No. 14-20-00358-CV

In the Court of Appeals for the Fourteenth Judicial District Houston, Texas

STATE OF TEXAS,

Intervenor-Appellant,

v.

TEXAS DEMOCRATIC PARTY, ET AL.,

Appellees.

On Appeal from the
201st Judicial District Court, Travis County

APPELLANT'S BRIEF FOR THE STATE OF TEXAS

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy First Assistant
Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

KYLE D. HAWKINS
Solicitor General

MATTHEW H. FREDERICK
Deputy Solicitor General

LANORA C. PETTIT
Assistant Solicitor General
State Bar No. 24115221
lanora.pettit@oag.texas.gov

Counsel for Intervenor-Appellant

ORAL ARGUMENT REQUESTED

Identity of Parties and Counsel

Intervenor-Appellant:
State of Texas, by and through its Attorney General

Appellate and Trial Counsel for Intervenor-Appellant:
Ken Paxton
Jeffrey C. Mateer
Ryan L. Bangert
Kyle D. Hawkins
Matthew H. Frederick
Lanora C. Pettit (lead counsel)
Anna Marie Mackin
Michael R. Abrams
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
lanora.pettit@oag.texas.gov

Appellees:
Texas Democratic Party
Gilberto Hinojosa, in his capacity as Chairman of the Texas Democratic Party
Joseph Daniel Cascino
Shanda Marie Sansing
Plaintiffs

Zachary Price
League of Women Voters of Texas
League of Women Voters of Austin-Area
MOVE Texas Action Fund
Workers Defense Action Fund
Plaintiff-Intervenors

Appellate and Trial Counsel for Appellees:
Chad W. Dunn
Brazil & Dunn LLP
4407 Bee Caves Road, Suite 111
Austin, Texas 78746

chad@brazilanddunn.com

K. Scott Brazil
Brazil & Dunn LLP
13231 Champion Forest Drive, Suite 406
Houston, Texas 77069
scott@brazilanddunn.com

Dicky Grigg
Law Office of Dicky Grigg, P.C.
4407 Bee Caves Road, Suite 111
Austin, Texas 78746
dicky@grigg-law.com

Martin Golando
The Law Office of Martin Gollando, PLLC
N. Saint Mary's, Suite 700
San Antonio, Texas 78205
martin.golando@gmail.com

Attorneys for Plaintiffs

Joaquin Gonzalez
Mimi Marziani
Rebecca Harrison Stevens
Texas Civil Rights Project
1405 Montopolis Dr.
Austin, Texas 78741
joaquin@texascivilrightsproject.org

Edgar Saldivar
Thomas Buser-Clancy
Andre Segura
ACLU Foundation of Texas Inc.
P.O. Box 8306
Houston, Texas 77288
esaldivar@aclutx.org

Sophia Lin Lakin
Dale E. Ho
American Civil Liberties Union
125 Broad Street, 18th Flr
slakin@aclu.org

Defendant
Dana Debeauvoir

Counsel for Defendant
Sherine Thomas
Leslie Dippel
Counsel for Travis County

TABLE OF CONTENTS

Index of Authorities

Page(s)

Cases

Statutes and Rules

Other Authorities

Statement of the Case

Nature of the Case: Plaintiffs sued the Travis County Clerk and Secretary of State seeking a declaration interpreting section 82.002 of the Election Code. CR.11. Plaintiffs asserted that, due to the coronavirus outbreak, all Texas voters have a sickness or physical condition that disables them from voting at the polls during the 2020 election cycle. *E.g.* CR.10, 28-29. They sought declaratory and injunctive relief compelling the Travis County Clerk to perform her duties consistent with their interpretation of the statute. CR.11, 44.

Course of Proceedings: After Plaintiffs non-suited the Secretary, CR.14-15, the State intervened by and through its Attorney General to ensure consistent application of its laws within Travis County, and it filed a plea to the jurisdiction, CR.16-24. An additional individual and four interest groups intervened, CR.27-47, and the trial court held a temporary injunction hearing, 1RR.1-12. Travis County did not oppose the entry of a temporary injunction, 2RR.137; only the State did, *e.g.,* 2RR.151-59. Following the hearing, Plaintiffs and Plaintiff-Intervenors asserted that the injunction should apply to the State in an unspecified geographic area. *Cf.* CR.946-49.

Trial Court: 201st Judicial District Court, Travis County
The Honorable Tim Sulak

Trial Court Disposition: The trial court denied the State's plea to the jurisdiction and granted a temporary injunction pending trial. CR.958. That order purports to bind not only Travis County, but also the State and broad swaths of State actors from enforcing the Election Code in an unspecified geographic area. CR.961.

Statement Regarding Oral Argument

This case involves important issues of first impression, implicating not only the meaning of the Texas Election Code but also the separation of powers. For over a century, Texas law has sought to ensure fair elections by requiring most voters to appear at the polls unless they fall within a limited number of legislatively created exceptions. Plaintiffs have sought,[1] and the trial court has ordered, a system of universal mail-in ballots based on unsupported assumptions about a novel virus and a faulty reading of a statute that has allowed the ill and infirm to vote by mail since 1935. The State respectfully suggests that oral argument will significantly aid the Court in resolving the numerous complex issues presented by this case.

[1] Plaintiffs and Plaintiff-Intervenors include three individual voters ("Individual Plaintiffs"), the Texas Democratic Party ("TDP") Chairman, the TDP, and four interest groups (with the TDP, "Organizational Plaintiffs"), who have been litigating this case in tandem. Unless context clearly indicates otherwise, this brief will use the term "Plaintiffs" to refer to all Plaintiffs, whether original Plaintiffs or Plaintiff-Intervenors.

Issues Presented

1. Whether Plaintiffs have standing to pursue redress for an injury shared equally by all voters in the State of Texas.
2. Whether a trial court has jurisdiction to (a) hear claims based on speculative allegations of possible future harm, and (b) issue an advisory opinion regarding the meaning of Texas's Election Code.
3. Whether Plaintiffs have pleaded a violation of the Election Code such that (a) allows them to overcome sovereign immunity, or (b) entitles Plaintiffs to a temporary injunction.
4. Whether the State's intervention to defend the uniformity of state law within Travis County gave the trial court authority to enjoin the State and various state actors from enforcing state law, including outside Travis County.

Introduction

On its face, this case turns on what appears to be a straightforward question of statutory interpretation: When the Legislature allowed a registered voter to vote by mail if he "has a sickness or physical condition that prevents the voter from appearing at the polling place on election day," did it extend that exception to all Texans who worry that voting in person may injure the public health? Tex. Elec. Code § 82.002(a). Behind this apparent simplicity, however, lie questions of the "most fundamental significance under our constitutional structure": How are citizens to exercise the franchise, and who should decide how elections are to be run in the State of Texas? *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citation omitted).

Claiming a "desparate[] need" to know "what the existing law provides so that they can determine their conduct during the primary runoff period and the General Elections," CR.8, Plaintiffs ask the judiciary to declare that "any eligible voter, regardless of age and physical condition" may vote by mail to "hinder the known or unknown spread of a virus or disease," CR.11. At the preliminary injunction hearing, the Travis County Clerk—the nominal defendant—echoed Plaintiffs' request for "a description of the law's requirements." 2RR.164 (Chad Dunn for Plaintiffs); 2RR.137 (Leslie Dippel for Defendant). The State intervened by and through its Attorney General because this joint request did not fall within the prescribed role of the judiciary. Moreover, the requested "description" bears no resemblance to the actual language adopted and maintained by the Legislature for nearly a century—regardless of which political party was in power.

The district court used the State's intervention to justify an order that is remarkable in its overreach. The court enjoined (among other things) state actors from "issuing guidance or otherwise taking actions during all elections affected by the COVID-19 pandemic that would prohibit individuals from submitting ballots based on the disability category of eligibility." CR.96. The order is entirely untethered to the language passed by the Legislature. It is unbounded in time or location. It eschews the deference due to the political branches in this type of crisis. And it cannot be allowed to stand.

Statement of Facts

I. Voting by Mail in Texas

To prevent fraud and abuse, Texas law has long required most voters to cast their ballots in person either on Election Day, Tex. Elec. Code ch. 64, or during an early voting period prescribed by the Legislature, *id.* § 82.005.The Texas Legislature has allowed voters to vote by mail in only four circumstances, if he: (1) anticipates being absent from his county of residence on election day; (2) has a disability that prevents him from appearing at the polling place; (3) is 65 or older; or (4) is confined in jail. *Id.* § 82.001-.004. Only the second exception is at issue in this appeal.

Plaintiffs have acknowledged that neither they nor the voters they seek to represent would meet the Legislature's strict guidelines for voting by mail were it not for the prevalence of the novel coronavirus commonly known as "COVID-19." *E.g.*, 3RR.53-54; 3RR.57; 3RR.62. Plaintiffs maintain that they—or unspecified members—want to vote by mail "to reduce the demand on in-person voting" and because

"public health makes it dangerous for individuals to vote in person." 2RR.38; *see also, e.g.*, 2RR.87.

But even if some believe it should have, the Texas Legislature has not defined "disability" by reference to the need to protect public health. Disability is instead defined for the purposes of the Election Code to apply if the "*voter* has a sickness or physical condition that prevents the *voter* from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the *voter's* health." Tex. Elec. Code § 82.002(a) (emphases added). The disability need not be permanent to meet this definition so long as the *voter* is suffering from the disability on election day. For example, the Legislature has included "[e]xpected or likely confinement in childbirth" as a "disability" for this purpose since 1981. *Id.* § 82.002(b); Act of May 26, 1981, 67th Leg., R.S., ch. 301, § 1, 1981 Tex. Gen. Laws. 854, 854. The rule allowing sick or disabled voters to vote by mail has itself existed since 1935. Act of Oct. 30, 1935, 44th Leg., 2nd C.S., p. 1700, ch. 437, § 1, 1935 Tex. Gen. Laws 1700, 1700.[2]

Under current law, the early-voting clerk is responsible for conducting early voting and must "review each application for a ballot to be voted by mail." Tex. Elec. Code § 86.001(a). For most state- and county-wide elections, the county clerk or

[2] Section 82.002 took its current form during the 1985 recodification of the Election Code. Act of May 13, 1985, 69th Leg., ch. 211, 1985 Tex. Gen. Laws 802. Though the phrasing of the section was modified somewhat, no substantive changes were intended. *Cf.* Bill Analysis, Tex. S.B. 616, R.S., 69th Leg. (1985) (omitting any reference to absentee balloting from list of substantive amendments during recodification).

election administrator is the early-voting clerk,[3] and "[t]he city secretary is the early voting clerk for an election ordered by an authority of a city." *Id.* § 83.005. Each early-voting clerk is responsible for determining whether an application to vote by mail complies with all requirements, providing notice and cure instructions to any voter who submits a noncompliant application, and "provid[ing] an official ballot envelope and carrier envelope with each ballot provided to a voter" who properly completes an application. *Id.* §§ 86.001(a), .002(a), .008, .009. After a voter marks his mail-in ballot, he must return it to the early-voting clerk in the official carrier envelope. *Id.* § 86.006(a). These provisions, though administered by local officials, apply uniformly throughout Texas. *Id.* § 31.003.

II. The 2020 Election and COVID-19

The record reflects that these procedures were used for the March 3, 2020 primary election without major incident[4]—even though COVID-19 had already arrived in Texas.[5] Because some races did not yield a conclusive result, however, a runoff was scheduled.[6] In the ordinary course, that runoff would have been held on May 26,

---

[3] Tex. Elec. Code § 83.002; *see also Election Duties*, Texas Secretary of State, https://www.sos.state.tx.us/elections/voter/county.shtml (last visited May 6, 2020).

[4] Plaintiffs offered into evidence reports of unusually long lines, but that evidence attributes the issue to "record turnout," rather than any mishandling by election officials. 3RR.273-78.

[5] *DSHS Announces First Case of COVID-19 in Texas*, Texas Department of State Health Services (Mar. 4, 2020), https://www.dshs.texas.gov/news/releases/2020/20200304.aspx.

[6] *See, e.g.*, Tex. Elec. Code §§ 172.003, .004(a).

2020. A special election to replace the Senator in District 14 was also scheduled to be held on May 10. The course of these elections—like most aspects of Texans' public and private lives—was interrupted by the spread of COVID-19.

On March 13, 2020, Governor Greg Abbott exercised his authority under the Texas Disaster Act of 1975, Tex. Gov't Code § 418.001, *et seq.*, and declared a state of disaster in all of Texas's 254 counties. 3RR.15-16; 3RR.233-35; *see also Salmon v. Lamb*, 616 S.W.2d 296, 298 (Tex. App.—Houston [1st Dist.] 1981, no writ) (discussing Governor's emergency powers in election context). At the time, little was known about the virus. There were 30 confirmed cases of COVID-19 in Texas and approximately 50 individuals awaiting test results, 3RR.15-16, but one estimate suggested that the disease had an overall mortality rate of about 2.3%, 3RR.233. In total, early estimates cited by Plaintiffs suggested that between 100,000 and 240,000 Americans could die from COVID-19. CR.32-33. To avoid such an outcome, state and local governments adopted "various measures . . . to 'flatten the curve,'" and those measures formed the basis of this lawsuit. CR.7; *see also, e.g.*, CR.33-34.

As Plaintiffs' epidemiologist candidly admitted, however, "models are only as good as the assumptions put into them." 3RR.89. And early estimates of the severity of COVID-19 proved inaccurate. As they have been revised down, government policies have evolved accordingly.

These policies show that Plaintiffs' suit is premature at best. On April 17, 2020, Governor Abbott announced the formation of a Strike Force to Open Texas, Executive Order No. GA-16, 45 Tex. Reg. 2760 (2020), as well as the reopening of certain

non-essential business, subject to an ongoing obligation to maintain appropriate social distancing, Executive Order No. GA-17, 45 Tex. Reg. 276 (2020). On April 27, the Governor announced a phased reopening of non-essential business, starting on May 1. Executive Order No. GA-18 (Apr. 27, 2020).[7]

The Governor has taken these actions fully cognizant that the Legislature has made him "responsible for meeting . . . the dangers to the state and people presented by disasters," and "with the expert advice of medical professionals and business leaders." *Id.* (quoting Tex. Gov't Code § 418.011). Further, the Governor has expressly provided that, while restrictions are being lifted in many parts of the State, more stringent restrictions may remain in counties where he determines there exists a public-health need "in consultation with medical professionals . . . based on factors such as an increase in the transmission of COVID-19." *Id.* To date, the Governor has not made that determination for Travis County, and the County is on schedule to fully reopen well in advance of the next election.

Throughout the worst of the COVID-19 pandemic and beyond, state officials have monitored the situation closely and adopted appropriate measures to protect the safety, uniformity, and integrity of elections. These actions include:

- Postponing the May 2, 2020 special election for Senate District 14 to July 14 because holding the election as scheduled "would prevent, hinder, or delay necessary action in coping with the declared disaster by placing the

[7] This order was entered after the hearing. Executive Orders are, however, the type of document that is subject to judicial notice. Tex R. Evid. 201(b)(2). This Court "has the power," and, at times, the obligation, "to take judicial notice for the first time on appeal." *Office of Pub. Util. Counsel v. PUC*, 878 S.W.2d 598, 600 (Tex. 1994) (per curiam) (collecting cases).

public's health at risk and threatening to worsen the ongoing public health crisis," 3RR.375;

- Allowing political subdivisions to postpone elections scheduled for May 2, 2020 to November 3, 2020, Office of the Governor of Texas, *Proclamation* (Mar. 18, 2020), https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2020/proc03182020.pdf;
- Postponing the May 26, 2020 primary runoff to July 14, 2020, 3RR.22-24; and
- Allowing the Fort Worth Crime Control and Prevention District to postpone a special election scheduled for May 2, 2020 to July 14, 2020, Office of the Governor of Texas, *Proclamation* (Apr. 2, 2020), https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2020/proc04022020.pdf.

The Secretary of State has also provided guidance regarding how to address elections during the COVID-19 pandemic. On March 18, 2020, the Secretary provided guidance on postponing elections scheduled for May 20, 2020.[8] On April 2, the Secretary further emphasized that local election officials should exercise their authority to postpone elections scheduled in May pursuant to the Governor's March 18, 2020 advisory. CR.113-15; 3RR.366-74. The Secretary also provided guidance about how to conduct elections safely, incorporating guidelines from the Center for Disease Control, 3RR.369-70; 3RR.177-79 (providing recommended cleaning practices), and tracking other guidelines used internationally.[9] Plaintiffs have provided no evidence—or even allegations—why the procedures recommended by the CDC and adopted by the Secretary could not or would not be safely employed.

---

[8] Texas Secretary of State, *Election Advisory No. 2020-12* (March 18, 2020), https://www.sos.state.tx.us/elections/laws/advisory2020-12.shtml.

[9] *E.g.*, Catherine Kim, *I Voted in Korea. This is What Democracy Can Look Like in a Pandemic*, Vox, (Apr. 17, 2020, 7:30 AM EDT) https://www.vox.com/

III. This Lawsuit

A. On March 20, 2020, Plaintiffs filed their Original Petition and Application for Temporary Injunction and Declaratory Judgment, asserting jurisdiction under the Uniform Declaratory Judgment Act ("UDJA," Tex. Civ. Prac. & Rem. Code ch. 37) and Texas Election Code section 273.081, CR.5-6. Without limiting their request to COVID-19, the TDP, its Chair, and two individual voters sought a declaration that Election Code section 82.002 "allows any eligible voter regardless of age and physical condition" to vote by mail "if they believe they should practice social distancing in order to hinder" the spread of an unspecified "virus or disease." CR.11. Plaintiffs also sought to enjoin the Travis County Clerk from refusing to count votes "in an upcoming election"—without limitations as to time—from any voters "who believe that they should practice social distancing in order to hinder" such a "virus or disease." CR.11.[10]

---

world/2020/4/17/21221786/coronavirus-south-korea-election-voting-covid-19-pandemic-democracy; Staffan Darnolf, et al., *Indelible Ink in Elections: Mitigating Risks of COVID-19 Transmission While Maintaining Effectiveness*, International Foundation for Electoral Systems (Apr. 15, 2020), https://www.ifes.org/news/indelible-ink-elections-mitigating-risks-covid-19-transmission-while-maintaining-effectiveness.

[10] The leadership of TDP's national affiliate has also stated that the pandemic is seen as "an opportunity to revamp our electoral system" by permanently increasing access to mail-in ballots. Tessa Berenson, *Eric Holder: Here's How the Coronavirus Should Change U.S. Elections—For Good*, Time (Apr. 14, 2020), https://time.com/5820622/elections-coronavirus-eric-holder/.

On March 27, Texas timely intervened in this case to preserve its paramount interest in the consistent application of its election laws as adopted by the Legislature. CR.16-26.

Plaintiff-Intervenors filed their Petition in Intervention on April 1. Like the original Plaintiffs, they claim to "need . . . legal clarity" regarding the scope of section 82.002. CR.43. And, like the original Plaintiffs, Plaintiff-Intervenors seek a declaration that "the definition of 'disability'" in the Election Code "currently encompasses all registered voters" because "all individuals have a physical condition that prevents them from appearing at a polling place on election day without a likelihood of injuring the voter's health." CR.44. They also ask the court to enjoin "Defendants from interpreting or applying section 82.002 . . . in a way that prevents registered voters from voting by mail in light of the pandemic." CR.44.

On April 7, 2020, the State as Intervenor filed a timely plea to the jurisdiction, asserting that Plaintiffs: (1) lack standing; (2) seek an advisory opinion on an issue not yet ripe; and (3) fail to overcome sovereign immunity because their complaint asks the courts to interpret the Election Code, not enjoin any ongoing violation thereof. CR.80-112. On April 13, the State filed an opposition to the temporary injunction, explaining that Plaintiffs were not entitled to such extraordinary relief for many of the same reasons. CR.637-48. Although Travis County filed a general denial of the Original Petition, the State's Plea in Intervention, and Plaintiff-Intervenors' Petition in Intervention, it did not oppose the temporary injunction in any way. *See* CR.212-16.

B. The trial court held an evidentiary hearing on April 15, 2020. 1RR.1-12. During that hearing, Plaintiffs' counsel acknowledged that this suit is an effort "to reduce the demand on in-person voting" and a "matter of public health"—not an effort to protect any particular voter based on that voter's condition. 2RR.38. Further, Plaintiffs disclaimed any suggestion from their complaint that this case involves any issues of federal or constitutional law, 3RR.37, that the named defendant had taken any action in violation of state law, or even that the defendant planned to violate state law, *see* 2RR.44 (complaining only that they "have received no meaningful guidance"). Indeed, Plaintiffs acknowledged repeatedly that this suit was born out of a need for a "description of the law's requirements." 2RR.167; *see also, e.g.*, 2RR.43, 55. Those sentiments were echoed by counsel for the nominal defendant, the Travis County Clerk. 2RR.137-38 ("Without a court opinion on the definition of disability . . . it would result in county clerks interpreting 82.002 differently resulting in inconsistency."); 2RR.142 ("[A]ll of this is based upon a need to reduce the demand on in-person voting for the voters and the election workers[].").

To establish a generalized risk to the public health, Plaintiffs asked the court to consider affidavits from themselves, 3RR.51-54; Dr. Catherine Troisi, an epidemiologist, 3RR.86-106; Dr. Mitchell Carroll, a primary-care physician who has treated two COVID-19 patients, 2RR.115; 3RR.25-27; 2RR.115; a TDP official, 3RR.28-33; and a lawyer who has made a career of testifying in cases under the federal Voting Rights Act, 3RR.34-50.

The trial court did not rule from the bench on April 15. The court indicated that it was inclined to deny the State's plea to the jurisdiction and to issue an injunction.

2RR.185. The form of that injunction was still to be determined. 2RR.183, 192. Plaintiffs proposed an injunction that purported to enjoin the State from enforcing section 82.002 without express limitation to Travis County.[11] The State objected to the injunction as overbroad and unsupported. CR.937-41. Travis County again made no objection to the form of the injunction.

C. On April 17—the very day the Governor began to reopen Texas for ordinary business—the trial court enjoined Travis County from refusing to provide, accept, or tabulate "any mail ballots received from voters who apply to vote by mail based on the disability category . . . as a result of the COVID-19 pandemic." CR.960. The court further purported to enjoin the State and state actors "from issuing guidance or otherwise taking actions . . . that would prohibit individuals from submitting mail ballots based on the disability category." CR.961. The court expressly denied the State's plea to the jurisdiction. CR.958.

That afternoon, the State filed a notice of appeal, which automatically stayed any further proceedings in the trial court, Tex. Civ. Prac. & Rem. Code §§ 51.014(a)(8), (b); and superseded the temporary injunction, *id.* § 6.001; RR 963-65; *Tex. Educ. Agency v. Hous. ISD*, 03-20-00025-CV, 2020 WL 1966314, at *1 (Tex. App.—Austin Apr. 24, 2020, no pet. h.).

[11] The original form of the proposed order is not in the record, but it has been submitted as Exhibit A to the State's concurrently filed Response to Appellees' Plaintiffs' and Intervenor Plaintiffs' Verified Motion for Emergency Relief.

Summary of the Argument

The trial court erred when it rejected the State's plea to the jurisdiction and granted an overbroad temporary injunction that is based on an unsupported interpretation of the Election Code. Individual Plaintiffs lack standing to sue because they seek to vindicate a generalized grievance that is shared (if it exists) by all voters, not a particularized injury in fact. Organizational Plaintiffs' standing is inexorably tied to the standing of their members and fails for the same reasons.

Even if Plaintiffs could establish standing to sue, their claims are not justiciable. Plaintiffs have sought relief in connection with elections that will not occur until (at the earliest) July. Though the nominal defendant does not object to the requested relief, the request is premised on hypothetical facts and contingencies that will not come to pass in the manner contemplated by the complaint and may never come to pass at all. This was true at the time of the hearing, and it has been underscored by the subsequent relaxation of the public-health measures that formed the basis of Plaintiffs' complaint.

Moreover, Plaintiffs failed to show jurisdiction or a cause of action against the named defendant because they have not shown an actual violation of the Election Code. Instead, Plaintiffs—and, to a lesser extent, Travis County—have sought judicial ruminations about how they should interpret the Election Code. Such a request for legal advice neither falls within the jurisdiction of Texas courts nor shows an entitlement to the extraordinary remedy of a temporary injunction.

And Plaintiffs certainly did not show an entitlement to relief that extends to the State (or anyone else outside Travis County). Contrary to Plaintiffs' assertions to

the trial court, the State did not become a full defendant when it intervened. Instead, it exercised its statutory right—and the Attorney General's statutory obligation—to represent the State's interest in the consistency of state law within the bounds of Travis County. That did not give the trial court authority or grounds to extend relief to anyone other than the defendant whose conduct was supposedly at issue.

Standard of Review

This Court reviews a trial court's ruling on a plea to the jurisdiction de novo. *Grossman v. Wolfe*, 578 S.W.3d 250, 255 (Tex. App.—Austin 2019, pet. denied). In applying this standard of review, "courts 'construe the pleadings in the plaintiff's favor, but [will] consider relevant evidence offered by the parties,'" *Farmers Tex. Cty. Mut. Ins. Co. v. Beasley*, No. 18-0469, 2020 WL 1492412, at *2 (Tex. Mar. 27, 2020) (collecting cases), and matters subject to judicial notice, *Bridgeport ISD v. Williams*, 447 S.W.3d 911, 916 & n.5 (Tex. App. 2014—Austin, no pet.) (citing *Freedom Commc'ns, Inc. v. Coronado*, 372 S.W.3d 621, 623-24 (Tex. 2012) (per curiam)). Though the focus of the inquiry is whether the court had jurisdiction at the time a complaint was filed, courts also consider later developments to the extent they impact their continued jurisdiction. *Perry v. Del Rio*, 66 S.W.3d 239, 251 (Tex. 2001).

This Court reviews a trial court's temporary injunction for an abuse of discretion. *E.g.*, *Henry v. Cox*, 520 S.W.3d 28, 33 (Tex. 2017). Nevertheless, "to the extent the district court's ruling rests on questions of law, whether in the context of an abuse of discretion analysis or otherwise," this Court reviews that ruling de novo. *Tex. Ass'n of Bus. v. City of Austin*, 565 S.W.3d 425, 438 (Tex. App—Austin 2018, pet. filed). "[I]f the relevant evidence is undisputed or fails to raise a fact question

on the jurisdictional issue, the trial court rules as a matter of law," and that ruling is reviewed de novo. *Chambers-Liberty Ctys. Navigation Dist. v. State*, 575 S.W.339, 345 (Tex. 2019) (quoting *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004)).

Regardless of the merits, a temporary injunction in a case where a plaintiff has not established jurisdiction is necessarily improper because "[a] plea to the jurisdiction challenges the trial court's authority to determine the subject matter of a specific cause of action." *Rea v. State*, 297 S.W.3d 379, 383 (Tex. App.—Austin 2009, no pet.) (citing *Bland ISD v. Blue*, 34 S.W.3d 547, 553-54 (Tex. 2000)).

ARGUMENT

I. Plaintiffs Lack Standing.

The trial court lacked jurisdiction because Plaintiffs lack standing to pursue a generalized grievance shared by the entire electorate. Standing is "a component of subject matter jurisdiction," *Tex. Ass'n of Bus.*, 852 S.W.2d at 445-46, and "a constitutional prerequisite to filing suit," *S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307 (Tex. 2007). To have standing, Plaintiffs must demonstrate that they have (1) an injury in fact that (2) is traceable to the defendant, and (3) likely to be redressed by a favorable decision. *See Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001). "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by

itself to meet [these] requirements." *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013).[12]

Both the Texas Supreme Court and the U.S. Supreme Court have cautioned that courts must carefully police jurisdictional limitations such as standing because they "identif[y] those suits appropriate for judicial resolution." *Brown*, 53 S.W.3d at 305. This case undoubtedly presents an important question. And there is a "natural urge to proceed directly to the merits of important dispute and to 'settle' it for the sake of convenience and efficiency." *Hollingsworth*, 570 U.S. at 704-05. But "[i]f courts were empowered to ignore the usual limits on their jurisdiction . . . when matters of public concern are at stake, then we would no longer have a judiciary with limited power to decide genuine cases and controversies," but a "judiciary with unbridled power to decide any question it deems important to the public." *Morath v. Lewis*, No. 18-0555, 2020 WL 1898537, at *3 (Tex. Apr. 17, 2020) (per curiam). Here, because neither Individual Plaintiffs nor Organizational Plaintiffs had (or have) standing, the case should be dismissed.

A. Individual voters lack standing.

Individual Plaintiffs lack standing for multiple reasons. First and foremost, even in voting cases, the Supreme Court has required plaintiffs allege a concrete harm that is unique from the general public. Here, Individual Plaintiffs seek to vindicate a generalized grievance that (if it exists) is shared by the entire electorate. Moreover, that

[12] To the extent not contradicted by state law, Texas courts "look to the more extensive jurisprudential experience of the federal courts on the subject [of justiciability] for any guidance it may yield." *Tex. Ass'n of Bus.*, 852 S.W.2d at 444.

grievance is hypothetical and contingent on a risk of contagion that depends not only on yet-to-be-taken steps by government officials but also on Individual Plaintiffs' own behavior. Such purported injuries do not create a justiciable controversy.

1. Plaintiffs allege only a generalized fear of contagion, which is common to the entire voting public.

Individual Plaintiffs' claim is based on a risk of contagion that is shared by every voter in the State. Such a theory violates the first rule of standing: that the plaintiff "must be personally aggrieved" by an alleged wrongful act in order to seek a remedy through the courts. *Daimler Chrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008) (citing *Nootsie, Ltd. v. Williamson Cty. Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996)). The Constitution places such controversies in the hands of "other branches of government [that] may more appropriately decide abstract questions of wide public significance." *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 7 (Tex. 2011) (citation and quotation marks omitted); *see also, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

The same rule applies in voting cases, where the Supreme Court has been careful to "require[] a plaintiff to allege some injury distinct from that sustained by the public at large." *Andrade*, 345 S.W.3d at 8 (quoting *Brown*, 53 S.W.3d at 302). This rule preserves the Legislature's primacy in ordering elections by ensuring that "'there is a real need to exercise the power of judicial review in a particular case,'" and that courts fashion remedies 'no broader than required by the precise facts to which the court's ruling would be applied.'" *Id.* at 7 (quoting *Lance v. Coffman*, 549 U.S. 437, 441 (2007)). Voters who seek change to current policy, but who lack such a unique

harm are, of course, "free to engage through the Legislative and Executive Branches," *Baron v. Tex. Historical Comm'n*, 411 S.W.3d 161, 176 (Tex. App—Austin 2013, no pet.).[13]

Andrade, which involved multiple theories of harm arising from the use of an electronic voting system in Travis County, illustrates the outer limits of voter standing. 345 S.W.3d at 4. The Court held that Travis County voters had standing to assert an equal-protection claim based on a theory that their votes were "less probable" to be "counted than will the votes of residents of other Texas counties." *Id.* at 10. It reasoned that such a harm was distinct to Travis County voters as compared to other members of the electorate. *Id.*; *see also id.* at 8-9 (collecting cases based on vote dilution or undercounting).[14] By contrast, *Andrade* explains, status as a voter was insufficient to allow them to complain about aspects of the system that could compromise the right to a secret ballot. *Id.* at 15. The concern that plaintiffs felt that such problems *could* arise was a "generalized grievance shared in substantially equal measure by all or a large class of citizens." *Id.* (citing *Daimler Chrysler Corp.*, 252 S.W.3d at 304-05). Moreover, because those problems had not manifested in Travis

[13] For this reason, Plaintiffs' reliance in the trial court on actions of other States in response to COVID-19 was misplaced. The actions cited were taken by those States' Executive and Legislative branches of government. 3RR.186-231. What policymakers could—or even should—do is not at issue in this case. Efforts in other States to force such a change through the courts have been rejected either for lack of jurisdiction or on the merits. *E.g.*, *City of Green Bay v. Bostelmann*, No. 20-C-479, 2020 WL 1492975, at *3 (E.D. Wis. Mar. 27, 2010).

[14] The Court ultimately concluded that these claims failed on the merits. *Andrade*, 345 S.W.3d at 13-14.

County elections, plaintiffs' grievance was hypothetical. *Id.* As such, this subjective concern did not rise to the level of a justiciable injury. *Id.*

Earlier this year, the Third Court came to a similar conclusion when it examined a voter's claim that a municipality had diluted his vote by effectively amending the city charter without voter consent. *Kilgore v. City of Lakeway*, No. 03-18-00598, 2020 WL 913051, at *1 (Tex. App.—Austin Feb. 26, 2020, no pet.) (mem. op.). The court dismissed the voter's claim and reiterated that "[n]o Texas Court has ever recognized that a plaintiff's status as a voter, without more, confers standing to challenge the lawfulness of government acts." *Id.* at *5; *see also Brown*, 53 S.W.3d at 303 (describing acceptable class of voter-status suits as "narrow"); *id.* at 305 (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). The court further emphasized that a plaintiff's subjective desire for "a different system" of elections "does not change the fact that he is raising only a generalized grievance about [the statute] and has not suffered a concrete particularized harm." *Kilgore,* 2020 WL 913051, at *5 (citing *Hotze v. White*, No. 01-08-00016-CV, 2010 WL 1493115, at *6-7 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (mem. op.)).

Here, just as in *Andrade* and *Kilgore*, Plaintiffs have not shown that their desire to vote by mail injures them in a way that is distinct from the general voting public. In analyzing standing, it is crucial to identify the specific harm at issue because "[t]he line between a generalized grievance and a particularized harm is difficult to draw, and *it varies with the claims made*." *Fin. Comm'n of Tex. v. Norwood*, 418 S.W.3d 533, 580 (Tex. 2014) (quoting *Andrade*, 345 S.W.3d at 8) (alterations added by *Norwood*). In this case, the alleged harm is not any potential loss of the right to vote, but the

inability to vote by mail. The U.S. Supreme Court has repeatedly recognized that though the right to vote is fundamental to democracy, "[i]t does not follow . . . that the right to vote in any manner and the right to associate . . . through the ballot are absolute." *Burdick*, 504 U.S. at 433. In particular, the U.S. Supreme Court has squarely distinguished between the constitutional right to vote and the license to vote by mail, which is granted (if at all) by legislation. *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807-08 (1969).

Plaintiffs' claim of a right to vote by mail is not particularized to them. Indeed, by their own terms Plaintiffs seek a remedy on behalf of every Texas voter. The gravamen of this extraordinary claim is that all Texans are disabled by fear of COVID-19. For example, Plaintiff-Intervenors offered the testimony of Zachary Price who averred "that during this ongoing COVID-19 outbreak [he], *along with everyone else*, ha[s] a physical condition that prevents [him] from appearing at the polling place on Election Day without a likelihood of injuring [his] health." 3RR.57 (emphasis added). Price did not state on what basis he was testifying about the fears of "everyone else."

In any event, complaints by an individual about fears he shares with "everyone else," are the definition of generalized grievances that will not support standing for two reasons. *First*, as the Third Court has recognized, "subjective interests, or concern, however admirable, are not in themselves considered to rise to the level of a justiciable interest that can support standing in court." *Baron*, 411 S.W.3d at 176. Nor is it enough in a pre-enforcement context for the plaintiff to assert "a generalized fear of being prosecuted." *City of El Paso v. Tom Brown Ministries*, 505 S.W.3d

124, 147 (Tex. App.—El Paso 2016, no pet.) (citing *Okpalobi v. Foster*, 244 F.3d 405, 426-27 (5th Cir. 2001) (en banc)). *Second*, even if a subjective fear suffices to support standing for the person holding the fear, it is not a particularized injury when the fear is shared alike by all Texans. "[T]he proper inquiry" is "whether the plaintiffs sue solely as citizens"—or voters—"who insist that the government follow the law." *Fin. Comm'n of Tex.*, 418 S.W.3d at 580.

To the extent that Plaintiffs have identified *anyone* with an interest that is potentially unique, it is to allege that certain groups with unique risk factors may be unable to go to the polls even if—as has now happened—the stay-at-home orders are lifted. CR.7-8. But Individual Plaintiffs have neither alleged nor shown that *they* belong to those groups. Therefore, as *Andrade* explained, this alleged injury "[n]ot only . . . fall[s] within the generalized grievance category, but it violates the prudential standing requirement that a plaintiff . . . cannot rest his claim to relief on the legal rights or interests of third parties." 345 S.W.3d at 15-16 & n.25 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

In any event, significant overlap exists between voters with an increased risk for COVID-19 and those who are already eligible to vote by mail because they are at least 65 years old or have other illnesses or disabilities. Tex. Elec. Code §§ 82.002-.003. And Plaintiffs cannot assert these harms because they are not "personally aggrieved." *Daimler Chrysler*, 252 S.W.3d at 304.

2. Plaintiffs' alleged harms are neither traceable to the named defendant's actions nor redressable by this Court.

Even if Plaintiffs' generalized allegations of harm otherwise stated an injury, that injury is not traceable to any action by the named defendant for at least two reasons.

First, the Travis County Clerk demonstrated at the hearing that she does not actually disagree with Plaintiffs and that she has taken no action to deprive them of their alleged rights. *See* 2RR.139-42. Indeed, the general agreement between Plaintiffs and the Travis County Clerk suggests that this case should have been dismissed under the general rule against collusive litigation. *Tex. & P. Ry. Co. v. Gay*, 26 S.W. 599, 613 (1894) (defining "collusive litigation" as that where "seemingly adverse parties" seek to "have some legal question decided which is not involved in a real controversy between them"); *see also, e.g.*, *Block Distrib. Co. v. Rutledge*, 488 S.W.2d 479, 480 (Tex. App.—San Antonio 1972, no writ) (reiterating that courts lack jurisdiction to hear collusive suits). So any harm that Plaintiffs theoretically may face is not caused by the Travis County Clerk.

The State has opposed Plaintiffs' interpretation of the law, but it is not a defendant subject to the jurisdiction of the trial court for the reasons discussed below (at 47-49). Moreover, even if the State were a defendant, enjoining the State would not remedy Individual Plaintiffs' alleged harm because the named defendant—the Travis County Clerk—is the only person empowered to process ballots for registered voters in Travis County. Tex. Elec. Code § 86.001(a). And a claim against the State

will not save Plaintiffs' claim against Travis County because standing is claim-specific. *See, e.g.*, *Thiel v. Oakes*, 535 S.W.2d 1, 2 (Tex. App.—Houston [14th Dist.] 1976, no writ).

Second, any injury to Individual Plaintiffs is subject to multiple contingencies, many of which are not within the control of Travis County (or the State). For example, whether a particular voter will be able to vote in July will depend on (among other things) the prevalence of the virus in that voter's area, whether the voter has already had the virus, what precautions are taken to protect voters at the voter's local polling places, and whether the particular voter chooses to use other means of voting safely. When standing depends on a chain of contingencies, any link that is either speculative or caused by someone other than the defendant will cause the entire chain to break. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410-11 (2013). Here, leaving aside all of the unknowables that are not within the control of the named defendant or the State, the Election Code already provides for late voting if a voter develops "a sickness or physical condition described by [section] 82.002 . . . after the day before the last day" to apply to vote by mail. Tex. Elec. Code § 102.001(a). That is, if any Individual Plaintiff contracts COVID-19 and is unable to vote in person as a result, that voter can apply to vote a late ballot under Election Code chapter 102. Thus, any hypothetical disenfranchisement would result from Individual Plaintiff's choice, *not* the behavior of the defendant or the State.

B. Organizational Plaintiffs lack standing.

Organizational Plaintiffs also lack standing for two reasons. *First*, their members (if any) lack standing to sue in their own behalf. *Second*, Texas law does not recognize

organizational standing separate from the standing of the organization's members. And, even if it did, Organizational Plaintiffs have not alleged, let alone shown, that they must take actions different from their ordinary activities.

1. Organizational Plaintiffs lack standing in a representative capacity.

Organizational Plaintiffs lack standing because their members, like Individual Plaintiffs, can assert at most a generalized grievance shared by the entire voting public. Texas courts generally follow federal standing jurisprudence with respect to associational standing—that is, the standing of an organization to sue on behalf of its members. *See Tex. Ass'n of Bus.*, 852 S. W. 2d at 444. Under that test, an association must show—among other things—that "its members would otherwise have standing to sue in their own right." *Hunt v. Wash. State Apple Adver. Comm'n.*, 432 U.S. 333, 343 (1977).

Organizational Plaintiffs have failed to "identify members who have the requisite harm" for an injury-in fact. *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). Indeed, Plaintiffs did not identify any members in their pleadings. Certain Organizational Plaintiffs submitted declarations in support of their preliminary injunction that identify an individual voter who claims to be a member of the organization. 3RR.69-70. Such conclusory statements are, however, insufficient to demonstrate the individual's membership for the purposes of establishing the organization's standing as representative of that member. *E.g.*, *Ass'n for Retarded Citizens of Dall. v. Dall. Cty. Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994); *Tex. Indigenous Council v. Simpkins*, No. 5:11-cv-315, 2014 WL 252024, at *3 (W.D. Tex. Jan. 22, 2014). Even if it were, the record reflects that

those individuals are similarly situated to Individual Plaintiffs and therefore lack standing for the reasons discussed extensively above. *E.g.*, 3RR.69-70. Because Organizational Plaintiffs provide no specific evidence of a specific member with interests distinct from those of the general populace, their claims must be dismissed. *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016); *NAACP v. City of Kyle*, 626 F.3d 233, 237 (5th Cir. 2010). That the TDP and its Chairman are parties does not change this analysis. *Ga. Republican Party v. SEC*, 888 F.3d 1198, 1203 (11th Cir. 2018); *Colvin v. Ellis Cty. Republican Exec. Comm.*, 719 S.W.2d 265, 266-67 (Tex. App.—Waco 1986, no writ).

2. Texas courts do not recognize standing based on harm to an organization itself.

To the extent that the trial court found that Organizational Plaintiffs had standing *separate* from their members, CR.958, that is an error of law. Because Plaintiffs' claims sound in state law, state law governs the standing analysis. *Perry*, 66 S.W.3d at 249-50. And Texas courts do not recognize organizational standing separate from representative standing.

Even in federal court organizational standing is limited. The U.S. Supreme Court has allowed an organization to sue for its own injuries (as opposed to those of its members) on only one occasion: In *Havens Realty Corporation v. Coleman*, 455 U.S. 363 (1982), the Court allowed an entity that provided housing consulting and referral services to bring claims for damage to the organization under the Fair Housing Act. This is a controversial ruling, which has not been broadly applied even in federal courts. *See* Ryan Baasch, *Reorganizing Organizational Standing*, 103 Va. L.

Rev. Online 18, 21-24 (2017). And the Third Court has held that *Havens* applies only in the Fair Housing Act context, and that organizations do *not* have standing based on their "advocacy expenditure[s]" under Texas law. *Tex. Dep't of Family & Protective Servs. v. Grassroots Leadership, Inc.*, No. 03-18-00261-CV, 2018 WL 6187433, at *5 (Tex. App.—Austin Nov. 28, 2018, no pet.) (mem. op.), *reconsideration en banc denied*, No. 03-18-00261-CV, 2019 WL 6608700 (Tex. App.—Austin Dec. 5, 2019). Instead, this Court has repeatedly equated an organization's interests with those of its members for standing purposes. *E.g.*, *Tex. Dep't of Ins. v. Tex. Ass'n of Health Plans*, No. 03-19-00185-CV, 2020 WL 1057769, at *2 (Tex. App.—Austin Mar. 5, 2020, no pet. h.).

Finally, to the extent that Texas law permits an organization to sue on its own behalf, the trial court did not make the necessary factual findings to allow Organizational Plaintiffs to do so. Even under *Havens*, "[n]ot every diversion of resources to counteract the defendants' conduct . . . establishes an injury in fact." *City of Kyle*, 626 F.3d at 238 (citing *ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 305 (5th Cir. 2000)). Instead, an organization must show a "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—that constitutes far more than simply a setback to the organization's abstract social interest." *Havens*, 455 U.S. at 379. Here, Organizational Plaintiffs effectively admit the defendant's conduct impacts only whether they will educate people to vote by mail or in person. *E.g.*, 3RR.77. Such shifts do not establish standing because they do not significantly "differ from the [organization's] routine . . . activities." *City of Kyle*, 626 F.3d at 238. For example, Organizational Plaintiffs have not

pointed to any "specific projects" they have "had to put on hold or otherwise curtail in order to respond" to Travis County's conduct. *Id.*

Because Plaintiff Organizations have not identified any individual member who would have standing to maintain this case, they lack standing to pursue their policy goal of expanding access to mail-in ballots through courts, and they must seek redress through the ordinary political process.

II. Plaintiffs Seek an Impermissible Advisory Opinion Regarding Claims that Are Not Yet Ripe.

Plaintiffs' requests are also not remediable through this action because Texas law does not afford its courts "the power to counsel a legal conclusion on a hypothetical or contingent set of facts." *Waco ISD v. Gibson*, 22 S.W.3d 849, 853 (Tex. 2000) (citing *Patterson v. Planned Parenthood of Hous. & S.E. Tex., Inc.*, 971 S.W.2d 439, 444 (Tex. 1998)). This restriction takes two forms: a ripeness requirement and a bar against advisory opinions. While its ruling is somewhat ambiguous, the trial court appears to have found the case to be ripe because of (a) "government imposed social distancing" that it speculated was likely "to continue through the elections this year," or (b) a "public health risk" that would continue even if that social distancing were "eas[ed]." CR.959-60.

But the "government imposed social distancing" requirements that the court anticipated continuing through November, CR.959, began to be reduced within hours of the temporary injunction. Executive Order Nos. GA-16 and GA-17. Such actions further demonstrate the rapid development of the science of COVID-19 pre-

vention and government responses to this disease. As a result, any claim that a particular individual will be disabled from attending the polls in July (or November) was not ripe at the time of suit and remains unripe today. The trial court exceeded its jurisdiction when it "eschew[ed] the ripeness doctrine" in the name of expediency and thereby "creat[ed] an impermissible advisory opinion." *Patterson*, 971 S.W.2d at 442.

A. Plaintiffs' claims are unripe because they are based on contingencies that have not yet come to pass.

As an initial matter, claims that any individual or group will be unable to vote months from now are not yet ripe in light of the rapidly evolving situation. Ripeness is "'peculiarly a question of timing.'" *Perry*, 66 S.W.3d at 250 (quoting *Blanchette v. Conn. Gen. Ins. Corp. ("Regional Rail Reorganization Act Cases")*, 419 U.S. 102, 140 (1974)). A claim ripens upon the existence of "'a real and substantial controversy involving genuine conflict of tangible interests and not merely a theoretical dispute.'" *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995) (quoting *Bexar-Medina-Atascosa Ctys. Water Control & Improvement Dist. No. 1 v. Medina Lake Prot. Ass'n*, 640 S.W.2d 778, 779-80 (Tex. App—San Antonio 1982, writ ref'd n.r.e.)). "A case is not ripe when the determination of whether a plaintiff has a concrete injury can be made only 'on contingent or hypothetical facts, or events that have not yet come to pass.'" *In re DePinho*, 505 S.W.3d 621, 624 (Tex. 2016) (orig. proceeding) (per curiam) (alteration omitted) (collecting cases); *see also Patterson*, 971 S.W.2d at 442 (quoting 13A Charles A. Wright, et al., Federal Practice and Procedure § 3532 (2d ed. 1984)).

Plaintiffs' claims rely on two contingent chains of events. *First*, they have made no attempt to demonstrate that the Executive—which has rapidly addressed and continue to address the spread of COVID—will not take sufficient precautions to enable safe in-person voting. *Second*, whether any particular individual satisfies section 82.002's definition of disability on account of COVID-19 necessarily changes over time because the Election Code is time-specific. Plaintiffs do not assert, and the trial court did not find, that any particular Individual Plaintiff (or member of Organizational Plaintiffs) will be disabled on election day because he is currently experiencing symptoms of COVID-19. Nor could they. COVID-19 has a limited incubation period, and Plaintiffs' evidence demonstrates that someone who is sick now likely will not be at risk on Election Day. 3RR.68-70. Instead, their focus is on the risk of transmission and government measures to manage that risk.

For the purposes of its plea to the jurisdiction, the State did not dispute that legal impediments to a particular individual's ability to vote in person that derive from an illness—for example, a quarantine order—may bear on whether an individual meets the definition of "disability." *See* Tex. Att'y Gen. Op. No. KP-0149 (2017). But those impediments have fundamentally changed even while this appeal has been pending, further underscoring that the dispute was not ripe at the time of filing. As of the time of this filing, Texas is projected to be fully open by July. Indeed, the Supreme Court has concluded the Texas bar exam—which routinely draws a crowd

larger than any polling place—can be safely administered within days of the scheduled election.[15]

Nor are these developments surprising. Plaintiffs' own evidence demonstrates that medical science's understanding of COVID-19 is evolving—as is our understanding of what protective measures are necessary. For example, Plaintiffs submit statements by the CDC that "COVID-19 is a new disease and we are still learning about how it spreads." 3RR.119. Their own epidemiologist acknowledged that scientists are still studying factors that may impact the dangerousness of COVID-19 in July—for example, the effectiveness of masks in containing the spread of disease and seasonality. 2RR.91, 97-98.

Assuming a healthy person's risk of contracting a sickness is itself a disability (and it is not), this evidence does not establish a ripe dispute that voters' risk of contracting COVID-19 is any higher at the polls than other activities in which they are engaged. For example, the only Individual Plaintiff (or member of an Organizational Plaintiff) that spoke to the question acknowledged that he periodically goes to the grocery store. 3RR.53-54. Plaintiffs' epidemiologist, Dr. Troisi, admits that the same risk factors that exist at polling places exist in other locations such as grocery stores and gas stations. 2RR.94-95. Moreover, she acknowledged that she did nothing to educate herself about what steps can be and have been taken by election officials to keep voters safe. 2RR.90. And she did not attempt to explain why a voter's risk at the polls would be higher than any other activity in which voters will likely engage

[15] Thirteenth Emergency Order Regarding the COVID-19 State of Disaster, No. 20-9060 (Tex. Apr. 29, 2020).

now that the stay-at-home orders are beginning to relax. Instead, she relies on anecdotal observations that she made in unrelated contexts—such as individuals walking for exercise in her neighborhood—to conclude that it would be "very hard" to maintain appropriate distancing at a poll. 2RR.89. Such speculation does not establish that voters will be unsafe if local election officials follow the guidelines established by the Secretary of State and CDC.

Though Plaintiffs offered the testimony of three other experts, they do not fill this gap in proof.[16] *First*, they offered Dr. Carroll, a primary-care physician, to explain what protective equipment his office uses when (but only when) a patient is suspected to have COVID-19. 2RR.120. Because he is an internist, not an epidemiologist, Dr. Carroll deferred to Dr. Troisi on the spread of the disease and any public-health measures that should be taken. 2RR.115-116; 2RR.118. *Second*, a TDP official testified about questions he had received regarding the definition of "disability" but acknowledged that he was not offering an opinion on what conduct might put voters' health at risk. 2RR.68. *Third*, Plaintiffs offered a declaration from a lawyer who has been described as "expert in election analyses concerning racially polarized voting," *O'Cana v. Salinas*, No. 13-18-00563-CV, 2019 WL 1414021, at *9 (Tex. App.—Corpus Christi-Edinburg Mar. 29, 2019, pet. denied) (mem. op.), but who has no apparent expertise in elections taking place during a pandemic. 3RR.34-50. Because there

[16] Plaintiffs initially proposed to offer the declarations of two additional experts. CR.418-66, 468-534. However, the State objected to the court's consideration of these declarations absent the opportunity to cross-examine the declarants, and the declarations were ultimately not admitted at the hearing. *Cf.* 1RR.5-6.

is "nothing in [these witnesses'] background that would indicate an expertise" in public-health measures that are required to protect voters during a pandemic, they do not satisfy Plaintiffs' burden of proof. *O'Cana*, 2019 WL 1414021, at *9 ("[A] claim will not stand or fall on the mere *ipse dixit* of a credentialed witness.") (citing *City of San Antonio v. Pollock*, 284 S.W.3d 809, 818 (Tex. 2009)). This is particularly true in light of the multiple steps that the Governor and other state officials have taken to protect voters' health. *Supra* at 5-7.

Equally unavailing are Plaintiffs' other closely related theories of harm, namely that they need to prepare for upcoming elections and fear they may be prosecuted if they encourage individuals to vote by mail who are not entitled to do so. The Third Court has repeatedly held that the "mere possibility" that someone "might apply [a] challenged rule . . . at some point in the future is not sufficient to raise a justiciable controversy." *VanderWerff v. Tex. Bd. of Chiropractic Examiners*, No. 03-12-00711-CV, 2014 WL 7466814, at *2 (Tex. App.—Austin Dec. 18, 2014, no pet.) (mem. op.). Whether any state or local executive officer "will bring an enforcement action . . . depends on many factual contingencies that have not yet come to pass and are not before the Court." *Trinity Settlement Servs. v. Tex. State Sec. Bd.*, 417 S.W.3d 494, 506 (Tex. App.—Austin 2013, pet. denied). Because these alleged injuries remain contingent on facts not yet known, Plaintiffs claims are not yet ripe.

B. Plaintiffs seek an advisory opinion because they assume contingencies that may never occur.

Plaintiffs also seek an impermissible advisory opinion. The separation of powers enshrined in the Texas and U.S. Constitution "prohibit[s] courts from issuing advisory opinions because such is the function of the executive rather than the judicial department." *Tex. Ass'n of Bus.*, 852 S.W.3d at 444 (citing *Fireman's Ins. Co. of Newark v. Burch*, 442 S.W.2d 331, 333 (Tex. 1968)); *Morrow v. Corbin*, 62 S.W2d 641, 644 (Tex. 1933); *see also, e.g.*, *Steele Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) (collecting cases). Under Texas law, the hallmark of an advisory opinion is that plaintiffs "have posed a problem which is hypothetical, 'iffy' and contingent." *Fireman's Ins. Co.*, 442 S.W.2d at 334. As with ripeness, a case is impermissibly contingent if the relevant facts are still evolving, *Waco ISD*, 22 S.W.3d at 853, but the question is less strictly about timing than about whether the court advising what the law could be on a hypothetical set of facts. *Patterson*, 971 S.W.2d at 444; *see also Fin. Comm'n of Tex.*, 418 S.W.3d at 592 (Johnson, J., concurring in part).

As discussed above, Plaintiffs claimed that they brought suit because (at the time) "[p]ublic health experts and government agencies and officials at all levels" were "imposing social distancing measures" that interfered with a voter's ability to vote in person. CR.33-34. It was predictable that those measures would change before July. They have, in fact, changed. And they will almost certainly change again between now and election day. While we can all "well appreciate that the parties would prefer a definite answer" as to what measures will be necessary to protect voters later this year "rather than to take an educated guess," that does not relieve

Plaintiffs of their obligations to ensure that these "questions are presented in a justiciable form." *Fireman's Ins. Co.*, 442 S.W.2d at 333. Because this case "involves uncertain or contingent events that [will not occur] as anticipated" by the complaint "and may not occur at all," it seeks an advisory opinion that is outside the jurisdiction of this Court. *Bridgeport ISD*, 447 S.W. 3d at 917; *Calif. Prod., Inc. v. Puretex Lemon Juice, Inc.*, 334 S.W.2d 780, 781 (Tex. 1960) ("The Uniform Declaratory Judgments Act does not license litigants to fish in judicial ponds for legal advice.").

III. Because Plaintiffs Have Not Pleaded a Violation of the Election Code, They Have Established Neither Jurisdiction Nor Entitlement to a Temporary Injunction.

Assuming that Plaintiffs could establish a justiciable dispute, they have not pleaded—let alone proven—any violation of the Election Code. Without such a violation, they can establish neither a waiver of sovereign immunity nor an entitlement to a temporary injunction.[17]

A. Plaintiffs have pointed to no violation of the Election Code.

As discussed above, though the Constitution protects a fundamental right to vote, that right does not encompass a right to vote by mail. *McDonald*, 394 U.S. at 807; *see also, e.g.*, *Ray v. Texas*, No. 2:06-cv-385, 2008 WL 8441630, at *6 (E.D. Tex. Oct. 31, 2006), *vacated on other grounds sub. nom. Ray v. Abbott*, 261 Fed. App'x 716 (5th Cir. 2008); *accord Fuentes v. Howard*, 423 S.W.2d 420, 523 (Tex. App.—El Paso 1967, writ dism'd). As there is no constitutional right to vote by mail, it is available

[17] Because the trial court's temporary injunction applies both to Travis County and the State, this appeal implicates both governmental and sovereign immunity. This brief will refer to both as sovereign immunity for simplicity.

only on the terms the Legislature provides. *McDonald*, 394 U.S. at 807. In Texas, those terms have long been "deemed mandatory in nature" and to "permit no application of the substantial compliance rule." *Kelly v. Scott*, 733 S.W.2d 312, 313-14 (Tex. App.—El Paso 1987, no writ) (citing *Branaum v. Patrick*, 643 S.W.2d 745 (Tex. App.—San Antonio 1982, no writ)).

The interpretation adopted by the trial court ignores this longstanding rule of construction, which was deliberately chosen by the Legislature to address "many of the abuses now prevailing in absentee voting." *McGee v. Grissom*, 360 S.W.2d 893, 894 (Tex. App.—Fort Worth 1962, no writ.) (per curiam) (discussing Act of May 12, 1959, 56th Leg.,R.S., ch. 483, § 6, 1959 Tex. Gen. Laws 1055, 1060)); *see also* Commission on Federal Election Reform, *Building Confidence in U.S. Elections* § 5.2 (2005) (discussing ongoing problems with absentee ballots). In interpreting a statute, the Court is to give effect to the Legislature's intent by looking to the statute's plain language. *Leland v. Brandal*, 257 S.W.3d 204, 206 (Tex. 2008). Courts presume that the Legislature included each word in the statute for a purpose and that words not included were purposefully omitted. *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008). Moreover, courts presume that the Legislature understood—and followed—the rules of English grammar. Tex. Gov't Code § 311.011; *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 140 (2012) (describing presumption as "unshakeable").

Properly construed, section 82.002 does not permit an otherwise healthy individual to vote by mail merely because going to poll carries a risk to the public health that even Plaintiffs' expert "cannot quantify." *See* 2RR.117. Instead, it permits a

qualified voter to vote by mail "if the voter has a sickness of physical condition that prevents the voter" from voting in person "without a likelihood of . . . injuring the voter's health." Tex. Elec. Code § 82.002(a). The clause that does the primary work of the sentence is "voter has a sickness or physical condition." Sidney Greenbaum, The Oxford English Grammar § 6.3 (1996). The remainder of the sentence beginning with the word "that" is a dependent clause defining sickness and condition. *Id.* § 5.6; *Spradlin v. Jim Walker Homes, Inc.*, 34 S.W.3d 578, 580-81 (Tex. 2000). This dependent clause does not become relevant unless and until the Court determines that Plaintiffs (or the voters Organizational Plaintiffs purport to represent) satisfy the clause that they have a "sickness or physical condition." Greenbaum, *supra*, at §§ 6.5, 6.9.

An otherwise healthy person does not have a "sickness or physical condition" within the meaning of section 82.002 merely because he subjectively fears contracting COVID-19. Because the Election Code does not define these operative terms, courts consult common usage. *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018). The common understanding of "sickness" is the "state of being ill" or having "a particular type of illness or disease." New Oxford Am. Dictionary 1623 (3d ed. 2010). A person ill with COVID-19 would certainly qualify as having a sickness. However, a fear of contracting a sickness does not fall within the terms selected by the Legislature—namely, that a voter "has a sickness." Tex. Elec. Code § 82.002.

Nor does a fear of contracting COVID-19 qualify as a "physical condition." The common understanding of the term "physical" is "of or relating to the body as opposed to the mind." New Oxford Am. Dictionary 1321. "Condition" is defined as "an illness or other medical problem." *Id.* at 362. Combining the two words, a "physical condition" is an illness or medical problem relating to the body. For example, the Legislature first allowed individuals with a physical disability to vote by mail in 1935 during the height of the polio epidemic. Act of Oct. 30, 1935, 44th Leg., 2nd C.S., ch. 437, § 1, 1935 Tex. Gen. Laws 1700. Some of the people who contracted this highly virulent disease required long-term treatment in iron lungs even after they no long suffered active infections.[18] Such individuals would have a physical condition that prevents them from voting in person.

By contrast, to the extent that a fear of contracting COVID-19, without more, could be described as a "condition," it is a mental or emotional condition, not a physical condition as required by the Election Code. The distinction between sickness and condition is significant: The Legislature used no modifier for "sickness," allowing a qualified voter with mental illness to vote by mail.[19] By contrast, it limited the term "condition" to "physical condition." The Legislature is presumed to have

[18] *E.g.*, JoNel Aleccia, *60 Years in an iron lung: U.S polio survivor worries about new global threat*, NBC News, Nov. 30, 2013, http://www.nbcnews.com/healthmain/60-years-iron-lung-us-polio-survivor-worries-about-new-2D11641456 (describing experience of someone who contracted polio in 1953).

[19] *See* Tex. Att'y Gen. Op. No. KP-0149 (2017) (concluding that behavioral abnormality sufficient to result in civil commitment qualifies as a sickness).

"intended to differentiate between the meaning of construction" when it uses different words or phrases. *Guarantee Mut. Life Ins. Co. v. Harrison*, 358 S.W.2d 404, 407 (Tex. App.—Austin 1962, writ ref'd n.r.e.). The Legislature undoubtedly could have allowed more widespread voting by mail, but it did not and was not required to do so. *See McDonald*, 394 U.S. at 810-11.

Plaintiffs' argument to the contrary—that because COVID-19 poses a risk to the public health, all voters are disabled—is without foundation. To begin with, it ignores that the relevant term requires a "likelihood" of injury to a particular "voter's health." Tex. Elec. Code § 82.002(a). The terms "likely" and "likelihood" have "different shades of meaning," but, in legal contexts, they "[m]ost often . . . indicate[] a degree of probability greater than five on a scale of one to ten." Bryan A. Garner, Modern Legal Usage 530 (2d ed. 1995); *accord* New Oxford Am. Dictionary 1012. Plaintiffs have made no effort to prove that COVID-19 makes it more likely than not that any particular voter will become ill by voting in person.

But even if some lesser degree of likelihood sufficed, Plaintiffs' reading inverts the terms of section 82.002. This can be seen on the face of the complaint, which asks for a declaration that *all* Texas voters are disabled "regardless of age and physical condition." CR.11. And it is confirmed by looking to the ordinary rules of grammar: "without a likelihood . . . of injuring the voter's health" is an adverbial clause twice subordinated to the requirement that a voter has a "sickness or physical condition." Greenbaum, *supra*, at § 6.11, Figure 6.4.4. To elevate this clause to the prominence ascribed by Plaintiffs would be to rewrite the sentence and to violate the rule that a court is to take "statutes as [it] find[s] them and construe them so that no

part is surplusage, but so that each word has meaning." *Shinogle v. Whitlock*, No. 18-0703, 2020 WL 855237, at *3 (Tex. Feb. 21, 2020) (per curiam) (quotation marks omitted). Courts "presume that the Legislature is bound to know the consequence s of its actions.'" *Cadena Commercial USA Corp. v. TABC*, 518 S.W.3d 318, 338 (Tex. 2017). The "court may not judicially amend a statute" by adding or deleting words simply because it seems ill-advised under the circumstances. *Id.* at 337.

B. Without a violation of the Election Code, Plaintiffs cannot overcome sovereign immunity.

Because Plaintiffs have not pointed to a violation of the Election Code, they cannot overcome sovereign immunity. Private parties may not sue a unit of the State absent the State's consent. *Dall. Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003). And it is Plaintiffs' burden to "affirmatively demonstrate the court's jurisdiction by alleging a valid waiver of immunity." *Id.* A waiver may only be "effected by clear and unambiguous language." Tex. Gov't Code § 311.034; *TxDOT v. City of Sunset Valley*, 146 S.W.3d 637, 641 (Tex. 2004). Any ambiguity weighs against a waiver—particularly in the election context. *Thiel*, 535 S.W.2d at 2 ("Elections are political matters, and the courts may take jurisdiction . . . only if the law has specifically granted such authority."). Plaintiffs have invoked Election Code section 273.081, Civil Practice and Remedies Code section 37.003, and the *ultra vires* and constitutional-violations doctrines. The trial court did not specify upon what supposed waiver of immunity it relied, but none is a valid ground for jurisdiction.[20]

[20] Plaintiff-Intervenors also cited Texas Civil Practice & Remedies Code § 65.011. CR.50. To the extent that was intended to invoke a waiver of immunity, it is without

1. By its express terms, Election Code section 273.081 only provides a remedy for violations of the Election Code.

Election Code section 273.081 does not expressly allow private parties to sue either the State or a county, stating only that "[a] person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code is entitled to appropriate injunctive relief." This is insufficient to waive sovereign immunity in this case for three reasons.

First, section 273.081 is a remedy provision, not a waiver. The Legislature typically uses certain phrases "to confirm its intent to waive immunity from suit." *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003). A statute may expressly "provide[] that a state entity may be sued or that 'sovereign immunity to suit is waived.'" *Id.* None of those "magic words" are present in section 273.081. Only on "rare occasions" has the Texas Supreme Court found that a statute waives sovereign immunity "absent 'magic words,' such as the State's 'sovereign immunity to suit and liability is waived.'" *Id.*

To determine whether a statute creates one of those rare immunity waivers that does not use the usual "magic words," a court considers: (1) "whether the statutory provisions, even if not a model of clarity, waive immunity without doubt"; (2) "ambiguity as to waiver is resolved in favor of retaining immunity"; (3) "immunity is waived if the Legislature requires that the [governmental] entity be joined in a law-

---

basis. *Cf. City of Dallas v. England*, 846 S.W.2d 957, 960 (Tex. App.—Austin 1993, writ dism'd w.o.j.) (affirming sovereign immunity in a section-65.011 case).

suit"; (4) "whether the Legislature provided an objective limitation on the governmental entity's potential liability"; and (5) "whether the statutory provisions would serve any purpose absent a waiver of immunity." *Harris Cty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 844 (Tex. 2009) (citing *Taylor*, 106 S.W.3d at 697-98, 700). Section 273.081 does not exhibit any of these characteristics. It speaks neither to immunity (factors 1 and 2), nor to the role or potential liability of a government entity in a law suit (factors 3 and 4). And, section 273.081 serves a purpose without waiving immunity: It creates a private cause of action where one previously did not exist. *City of El Paso*, 505 S.W.3d at 139; *cf. Brown v. De La Cruz*, 156 S.W.3d 560, 567 (Tex. 2004) (stating that "causes of action may be implied only when a legislative intent to do so appears in the statute as written").

Second, for the reasons discussed above, Plaintiffs' request is based on a fundamental misunderstanding of what the Election Code requires. As a result, even if section 273.081 did waive immunity for violations of the Election Code, Plaintiffs' claims would fall outside its ambit.

Third, assuming that Plaintiffs could overcome these problems, Plaintiffs have not identified any violation of the Election Code. To the contrary, both in their complaint and at the hearing, Plaintiffs made clear that they wanted an injunction "so that *they* do not risk violating the law." CR.38. That is, "[they]'re asking this Court to clarify" the law, not accusing someone of violating it. 2RR.38. As discussed in more detail below, there is no general waiver of immunity to seek clarification of the law.

2. The UDJA does not fill the gap and allow a plaintiff to seek a declaration of what a statute means.

Pointing to *Holt v. Texas Department of Insurance*, No. 03-17-00758-CV, 2018 WL 6695725 (Tex. App.—Austin Dec. 20, 2018, pet. denied), Plaintiffs have also asserted that the UDJA creates jurisdiction "to have a court determine, quote 'any question of construction or validity under,'. . . [a] statute." 2RR.167. Plaintiffs misunderstand how the UDJA and sovereign immunity interact.

Texas law could not be clearer that the UDJA is "not a general waiver of sovereign immunity." *Tex. Parks & Wildlife Dep't v. Sawyer Tr.*, 354 S.W.3d 384, 388 (Tex. 2011); *see also, e.g.*, *Town of Shady Shores v. Swanson*, No. 18-0413, 2019 WL 6794327, at *6 (Tex. Dec. 13, 2019). Thus, sovereign immunity "will bar an otherwise proper [U]DJA claim that has the effect of establishing a right to relief" on behalf of a private individual or entity "against the state for which the Legislature has not waived sovereign immunity." *Sawyer Tr.*, 354 S.W.3d at 388.

Holt, in which plaintiffs challenged the constitutionality of a rule regarding temporary income benefits, does not hold otherwise. 2018 WL 6695725, at *1. Courts have held that the UDJA waives immunity for challenges to the constitutionality of a statute, which may require some amount of construction. *TxDOT v. Sefzik*, 355 S.W.3d 618, 622 (Tex. 2011); *McClane Co. v. Tex. Alcoholic Beverage Comm'n*, 514 S.W.3d 871, 875 (Tex. App.—Austin 2017, pet. denied). But Plaintiffs disclaimed any challenge to the constitutionality of section 82.002. 2RR.37.

Because this action is one that seeks only a "description of the law's requirements," 2RR.164, the UDJA does not waive immunity. It is well-established that the

"UDJA does *not* waive . . . immunity when the plaintiff seeks a declaration of his or her rights under a statute or other law." *Sefzik*, 355 S.W.3d at 621. Because Plaintiffs seek no more than a clarification of what they maintain is an ambiguous statute, there has been no waiver, and the case should have been dismissed. *Trinity Settlement Servs.*, 417 S.W.3d at 505; *McClane*, 514 S.W.3d at 876 ("Precedent from the Texas Supreme Court and from this Court compels us to conclude that the UDJA does not waive sovereign immunity for 'bare statutory construction' claims.").

3. There is no jurisdiction under the *ultra vires* and constitutional-violation doctrines.

This analysis does not change merely because Plaintiffs invoke the common-law doctrine that there is no immunity for *ultra vires* conduct or constitutional violations. This is true for three separate reasons.

First, Plaintiffs cannot rely on the constitutional-violation doctrine because they expressly disclaimed any constitutional claims in this case. The constitutional-violation doctrine waives immunity only to the extent a plaintiff has "plead[ed] a facially valid constitutional claim." *Garcia v. Kubosh*, 377 S.W.3d 89, 96 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (collecting cases). The Original Petition made conclusory allegations that section 82.002 was unconstitutional. CR.8. But Plaintiffs subsequently disclaimed any intent to pursue such a theory in this action, 2RR.37, so they cannot invoke a waiver of sovereign immunity based on purported constitutional violations.

Second, Plaintiffs' cannot assert an *ultra vires* claim due to the redundant-remedies doctrine. Under this doctrine, a court will not entertain an *ultra vires* claim

brought under the UDJA when "the Legislature created a statutory waiver of sovereign immunity that permits the parties to raise their claims through some other avenue." *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 79 (Tex. 2015) (citing *Aaron Rents, Inc. v. Travis Cent. Appraisal Dist.,* 212 S.W.3d 665, 669 (Tex.App.–Austin 2006, no pet.) (en banc) ("When a statute provides an avenue for attacking an agency order, a declaratory judgment action will not lie to provide redundant remedies."); *see also Alamo Express, Inc. v. Union City Transfer*, 309 S.W.2d 815, 827 (1958). Here, if Plaintiffs had pleaded actual illegal action, they would have been allowed to proceed under Texas Election Code section 273.081 against the individual responsible, and the *ultra vires* claim would have been redundant. Because they have not, the *ultra vires* doctrine is inapplicable. *Cf. City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009) ("Stated another way, [*ultra vires*] suits do not seek to alter government policy but rather to enforce existing policy.").

Third, these common-law doctrines could support relief only against the Travis County Clerk. *Ultra vires* suits "do not attempt to exert control over the state—they attempt to reassert the control of the state." *Id.* As a result, such claims will lie not against the State, but rather against the official alleged to be violating state or federal law. *E.g.*, *Sefzik*, 355 S.W.3d at 621. The only named individual *supported* the requested relief at the hearing—and therefore cannot be said to have acted *ultra vires against* Plaintiffs (if she has acted at all).[21] As a result, the *ultra vires* doctrine cannot support the requested relief.

[21] Whether the *State* could sue the Travis County Clerk for a violation of State law is a separate question not before the Court.

C. Without a violation of the Election Code, Plaintiffs cannot establish the elements of a temporary injunction.

For similar reasons, because Plaintiffs have not shown that the named defendant has violated the Election Code, they failed to meet their burden to merit a temporary injunction. To obtain such extraordinary relief, the applicant must plead and prove: (1) a cause of action against the defendant, (2) a probable right to the relief sought, and (3) a probable, imminent, and irreparable injury. *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993) (per curiam). For the reasons discussed extensively above, Plaintiffs can plead no cause of action under the Election Code because their reading of the statute is incorrect. Moreover, Plaintiffs' asserted injuries are inherently speculative. Their own medical expert acknowledged that he "cannot quantify" how dangerous the pandemic will be to the public—let alone to any individual—in July. 2RR.117. Their epidemiologist did not bother to contact Travis County election officials to educate herself about what precautions they intended to take to protect voters—let alone analyze whether those measures would be effective. 3RR.90. Without some form of analysis, such "[f]ear or apprehension of possible injury is insufficient to support a finding of imminent injury." *DPS v. Salazar*, 304 S.W.3d 896, 908 (Tex. App.—Austin 2009, no pet.) (citing *Frey v. DeCordova Bend Estates Owners Ass'n*, 647 S.W.3d 246, 248 (Tex. 1983)). It is certainly not sufficient to overcome the State's paramount interest in bringing "order, rather than chaos, [to] the democratic process" by requiring uniform election laws. *Storer v. Brown*, 415 U.S. 724, 730 (1974).

IV. The Temporary Injunction Is Impermissibly Overbroad.

Even if Plaintiffs established an entitlement to enjoin Travis County, the trial court's decision to extend that injunction to the State and a wide swath of state actors was impermissible. A temporary injunction is an extraordinary remedy and never issues as a matter of right. *Walling*, 863 S.W.2d at 57. To obtain a temporary injunction, Plaintiffs "'must plead *and prove* three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim." *Tex. Ass'n of Bus.*, 565 S.W.3d at 437 (emphasis added) (quoting *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002)); *see also, e.g.*, *Walling*, 863 S.W.2d at 57. "If [this] burden is not discharged as to any one element," a plaintiff "is not entitled to extraordinary relief." *Dall. Anesthesiology Assocs., P.A. v. Tex. Anesthesia Grp., P.A.*, 190 S.W.3d 891, 898 (Tex. App.—Dallas 2006, no pet.). The trial court also balances the equities, "including a consideration of the important factor of the public interest." *Methodist Hosps. of Dall. v. Tex. Indus. Accident Bd.*, 798 S.W.2d 651, 660 (Tex. App—Austin 1990, writ dism'd w.o.j.).

Most importantly, a trial court abuses its discretion "when the evidence does not reasonably support the conclusion that the applicant has a probable right of recovery." *State v. Sw. Bell Tel. Co.*, 526 S.W.2d 526, 528 (Tex. 1975). In this instance, Plaintiffs face an elevated burden of proof because rather than seeking to maintain the status quo, they ask the judiciary to "extend the option to vote by mail to all registered voters." CR.49. Moreover, the trial court ordered that the State post the

availability of voting by mail on "the appropriate agency website." CR.961. An injunction that requires such affirmative action is considered a "mandatory" injunction. Black's Law Dictionary 904 (10th ed. 2014). "[T]he issuance of a preliminary mandatory injunction is proper only" if the plaintiff demonstrates through competent evidence that such "a mandatory order is necessary to prevent irreparable injury or extreme hardship." *Iranian Muslim Org. v. City of San Antonio*, 615 S.W.2d 202, 208 (Tex. 1981) (emphasis added).

The injunction fails to satisfy Texas Rule of Civil Procedure 683, exceeds the jurisdiction of the court, and is lacking in any evidentiary basis.

A. The temporary injunction does not satisfy Rule 683.

As an initial matter, the temporary injunction is unclear about what it purports to enjoin. Texas Rule of Civil Procedure 683 requires (among other things) that an injunction "set forth the reasons for its issuance" and to be "specific in terms," including by "describ[ing] in reasonable detail . . . the act or acts sought to be restrained." Moreover, it is binding only on parties to the action and "those persons in active concert or participation with them." Tex. R. Civ. P. 684. "The requirements of 683 are mandatory and must be strictly followed" or "the injunction order is subject to being declared void and dissolved." *InterFirst Bank San Felipe, N.A. v. Pay Constr. Co.*, 715 S.W.3d 640, 641 (Tex. 1986) (per curiam) (collecting cases).

The injunction is ambiguous as to what extent it is meant to apply outside of Travis County. Plaintiffs have asserted elsewhere that the injunction is binding in all parts of the State. *See, e.g.*, Mot. for Prelim. Inj. At 10, *Texas Democratic Party v. Abbott*, 5:20-CV-00438-FB (W.D. Tex.), ECF No. 10. The State (as an entity) does not,

however, enforce early-voting rules either inside or outside Travis County. *See* Tex. Elec. Code § 86.001(a). Instead, first-line responsibility remains where it has always been: on county officials.

There are 254 counties in Texas, 253 of which are not parties to this action and thus are not bound by this injunction. Tex. R. Civ. P. 683. If the County Clerk of Kleberg County, which has had fewer than a dozen cases of coronavirus as of May 8, asks the Secretary of State if the court's opinion applies in Kleberg County, can she answer "no"?[22] If an individual tells voters in Mitchell County, which has reported only one confirmed case, that they are nonetheless disabled by fear of coronavirus, can local prosecutors enforce the criminal sanctions passed by the Legislature? If not, on what basis? The order does not say. For that reason, to the extent that Plaintiffs' out-of-court assertions are correct and the injunction applies outside Travis County, it is impermissibly overbroad. *E.g.*, *Tex. Health & Human Servs. Comm'n v. Advocates for Patient Access*, 399 S.W.3d 615, 625-29 (Tex. App.—Austin 2013, no pet.).

B. The State's intervention did not give the trial court jurisdiction or grounds to extend any relief beyond Travis County.

The only ground Plaintiffs have ever asserted for such a broad order is that the State's intervention made the State a party for all purposes. CR.330. The trial court did not expressly adopt that view, reciting only that the State had intervened to protect its interest in the uniform application of state law. CR.958. The State's intervention to preserve the uniform application of state law did *not* provide grounds to

[22] All county-specific counts are derived from *Texas Coronavirus Map and Case Count*, N.Y. Times (updated May 8, 2020, 8:27 A.M.E.T.).

enjoin the State at all—let alone all officials, at all levels of government, statewide—for two reasons.

1. As an initial matter, Texas law establishes that a party's intervention does not make it a party for all purposes. Texas courts instead recognize an "expansive" intervention doctrine. *State v. Naylor*, 466 S.W.3d 783, 788 (Tex. 2015). Under Texas law, any individual may intervene if he "could have brought the same action, *or any part thereof*, in his own name, or if the action had been brought against him, he would be able to defeat recovery, *or some part thereof*." *Guaranty Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990) (emphasis added). A party may even intervene to challenge the jurisdiction of the court. *Good Shepherd Med. Ctr., Inc. v. State*, 306 S.W.3d 825 (Tex. App—Austin 2010, no pet.) (addressing standing challenge brought by an intervenor).[23] As a result, an intervenor may be aligned with neither the plaintiff nor the defendant, but opposed to both. *In re Motor Co.*, 442 S.W.3d 265, 274 (Tex. 2014); Kim J. Askew, 1 Tex. Prac. Guide Civil Pretrial §§ 10:62-63 (2019).

The trial court should have defined the scope of Texas's intervention by the interests asserted in its plea in intervention. *Corpus Christi People's Baptist Church v. Nueces Cty. Appraisal Dist.*, 904 S.W.2d 621 (Tex. 1995). This is true for all parties, but it is particularly important when the Attorney General appears on behalf of the State as intervenor to protect the integrity of and ensure compliance with state law.

---

[23] *See also, e.g.*, *Interest of R.M.*, No. 05-18-01127-cv, 2019 WL 2266388, at *6-7 (Tex. App.—Dallas May 24, 2019, pet. denied); *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 681 (Tex. App.—Dallas 2010, orig. proceeding).

Cf. City of Houston v. Savely, 708 S.W.2d 879, 889 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.) ("The State of Texas, as intervenor, was limited to the scope of relief sought by it in its petition.").

In this instance, the State intervened at a time when Plaintiffs' claims were indisputably limited to Travis County but ambiguous as to whether they challenged the constitutionality of section 82.002. CR.8. As its plea made clear, the State limited its intervention to preserving the uniformity of state election law within Travis County and, to the extent Plaintiffs *were* bringing a constitutional challenge, defending the law. CR.16-23. Texas's decision to protect its right as a sovereign to enforce its own law did not make it a defendant or "confer authority on the trial court to determine rights it is otherwise precluded from determining." *Van Dyke v. Littlemill Ltd.*, 579 S.W.3d 639, 649 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (citing *Alexander Dubose Jefferson & Townsend LLP v. Chevron-Phillips Chem. Co.*, 540 SW.3d 577, 585 (Tex. 2018)).

2. Even if the State did become a party in the sense that it was bound to the trial court's judgment that section 82.002 requires Travis County to accept mail-in ballots from healthy individuals who fear COVID-19, that would not allow the trial court to enjoin the State. "Immunity from liability and immunity from suit are two distinct principles. Immunity from liability protects the state from judgment even if the Legislature has expressly consented to the suit." *TxDOT v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). In other words, even assuming that a claim against the State "may be brought" under any of the theories that Plaintiffs have advanced, a trial court's "remedy may implicate immunity." *Heinrich*, 284 S.W.3d at 373. An injunction that

may properly run against a state or county *officer*, nonetheless cannot run against the State unless the Legislature has permitted it. *Id.* at 374 ("Parsing categories of permissible relief in cases implicating immunity inevitably involves compromise.") (citing Douglas Laycock, Modern Remedies 482 (3d ed. 2002)); *see also City of Galveston v. State*, 217 S.W.3d 466, 473 (Tex. 2007) ("Legislation rather than logic governs immunity, just as Holmes said experience rather than logic governs the common law.").

In this instance, Texas Election Code section 273.081 and the *ultra vires* doctrine allow a court to enjoin officials from violating the Election Code, but it does not waive immunity against the State. Assuming that authorizing a remedy could waive immunity, it could run only against the Travis County Clerk, who is responsible for processing the ballot applications of the only individuals Plaintiffs have identified as potentially harmed. *Supra* at 3-4, 21-22. Texas intervened to the extent necessary to defend the uniformity and constitutionality of state law. And the Legislature has allowed the State to do so *without* waiving immunity. *See* Tex. Gov't Code § 402.010(d).

Preserving the State's ability to intervene without subjecting it to a statewide injunction is vital to the proper function of our legal system. "As a sovereign entity, the State has an intrinsic right to enact, interpret, and enforce its own laws." *Naylor*, 466 S.W.3d at 790. At times, that right can be implicated in cases where neither party has an interest to fully litigate the State's position. *Id.* at 789. Under those circumstances, the State *must* intervene to protect its sovereign interest *before* the question is decided or lose the right to litigate it on appeal. *Id.* A party is not required to choose

between protecting its vested rights and subjecting itself to litigation that would not be otherwise permissible. *Van Dyke*, 579 S.W.3d at 648. Because the trial court could not otherwise have issued its statewide temporary injunction against the State, it could not do so because the State intervened to protect its right to enforce its own law within the bounds of Travis County.

C. Plaintiffs offered no evidence to support relief beyond Travis County.

Finally, to the extent that the injunction applies outside Travis County, it is unsupported by competent evidence. This Court typically will not reweigh evidence in support of a temporary injunction, but a party that completely fails to meet its burden of proof is not entitled to such extraordinary relief as a matter of law. *Dallas Anesthesiology, Assocs. P.A.*, 190 S.W.3d at 898. Here, to show that all voters are disabled by a fear of contagion, Plaintiffs relied on the testimony of an epidemiologist and a primary-care physician who admitted under cross examination that their analyses were limited to Travis County. 2RR.90, 117. Plaintiffs do not purport to offer any evidence that the dangers are similar in places with lower population density—for example, Zavala County, which only had one confirmed COVID-19 case as of May 1. To the contrary, Plaintiffs' expert acknowledged that the level of risk varies across the State. 2RR.100; 3RR.89. Taking these acknowledgements together, there is no evidence supporting an injunction outside the geographic area specifically opined on by Plaintiffs' experts.

Prayer

The Court should vacate the temporary injunction and dismiss the case for lack of jurisdiction. In the alternative, the Court should vacate the temporary injunction and remand with instructions that its scope be limited to Travis County.

Respectfully submitted.

Ken Paxton
Attorney General of Texas

Jeffrey C. Mateer
First Assistant Attorney General

Ryan L. Bangert
Deputy First Assistant
Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Kyle D. Hawkins
Solicitor General

Matthew H. Frederick
Deputy Solicitor General

/s/ Lanora C. Pettit
Lanora C. Pettit
Assistant Solicitor General
State Bar No. 24115221
lanora.pettit@oag.texas.gov

Counsel for Intervenor-Appellant

Certificate of Service

On May 11, 2020, this document was served electronically on Chad Dunn, lead counsel for Plaintiffs, via chad@brazillanddunn.com, and on Joaquin Gonzalez, lead counsel for Plaintiff-Intervenors, via Joaquin@texascivilrightsproject.org.

/s/ Lanora C. Pettit
Lanora C. Pettit

Certificate of Compliance

Microsoft Word reports that this brief contains 14,165 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

/s/ Lanora C. Pettit
Lanora C. Pettit