

No. D-1-GN-20-001610

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

STATE OF TEXAS’S FIRST AMENDED RESPONSE TO PLAINTIFF-INTERVENORS’ APPLICATION FOR TEMPORARY INJUNCTION

Plaintiff-Intervenors’ Application for Temporary Injunction does not fix, and in fact highlights, the jurisdictional defects the State noted in its Plea to the Jurisdiction. This case arises in the middle of a rapidly evolving pandemic. The facts on the ground change by the day, if not by the hour. No one can predict with any certainty where things will stand a week from now, let alone this summer. Bedrock jurisdictional principles—standing and ripeness—therefore preclude Plaintiff-Intervenors’ claims from proceeding at this juncture. Because the Court lacks

jurisdiction to hear this case, it necessarily follows that Plaintiffs cannot obtain a temporary injunction.

### INCORPORATION OF STATE OF TEXAS'S PLEA TO THE JURISDICTION

The State extensively briefed the many hurdles barring Plaintiffs' claims in its Plea to the Jurisdiction. In short, Plaintiffs' claims (including the claims of Plaintiff-Intervenors) fail because Plaintiffs lack standing, *see* Plea at 8–19; Plaintiffs' claims are not ripe, *see id.* at 19–25; and because Plaintiffs have failed to identify any violations of the Election Code and thus any valid source of jurisdiction over their claims, *see id.* at 25–30.<sup>1</sup> For many of the same reasons, Plaintiffs cannot show a likelihood of success on the merits and thus cannot meet their burden of proof for a temporary injunction. To avoid duplication and simplify the filings for the Court to consider in advance of the hearing, the State incorporates those arguments by reference as if fully set forth herein.

Because this Court cannot issue relief when it lacks jurisdiction, the Court should deny Intervenor-Plaintiffs' Application for Temporary Injunction and grant the State's plea to the jurisdiction. *See Occidental Chem. Corp. v. ETC NGL Transp., LLC*, 425 S.W.3d 354, 359 n.3 (Tex. App.—Houston [1st Dist.] 2011, pet. dism'd) (“[I]n an appeal of a temporary injunction, we may always consider whether the injunction is void for lack of subject matter jurisdiction.”).

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<sup>1</sup> For the first time, Plaintiff-Intervenors assert Texas Civil Practice and Remedies Code § 65.011 as a source of jurisdiction. *See* P-Inter'v App. ¶ 2 (citing, *inter alia*, TEX. CIV. PRAC. & REM. CODE § 65.011, providing that a “writ of injunction may be granted if the applicant is entitled to the relief demanded and all or part of the relief requires the restraint of some act prejudicial to the applicant”). But a court “lacks jurisdiction to enjoin conjectural or speculative events under” § 65.011, rendering Plaintiff-Intervenors' reliance on § 65.011 unavailing for the same reasons discussed in the State's Plea to the Jurisdiction. *See Limon v. State*, 947 S.W.2d 620, 624 (Tex. App.—Austin 1997, no writ).

Plaintiff-Intervenors' Petition in Intervention and their subsequent Application for Temporary Injunction largely overlap, and thus, further briefing on the issues that Plaintiff-Intervenors raise in their Application for Temporary Injunction is mostly unnecessary. But the State would like to highlight several glaring flaws in Plaintiffs' Application that demonstrate why their claims cannot survive the State's Plea.

### STANDARD OF REVIEW

The purpose of a temporary injunction is to preserve the status quo of the litigation's subject matter pending trial on the merits. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). A temporary injunction is an extraordinary remedy and does not issue as a matter of right. *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993). To obtain a temporary injunction, the applicant 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. *Id.*; see also *Sun Oil Co. v. Whitaker*, 424 S.W.2d 216, 218 (Tex. 1968). The party seeking the injunction bears the burden of proving all three elements. *Cold Spring Granite Co. v. Karrasch*, 96 S.W.3d 514, 516-17 (Tex. App.—Austin 2002, no pet.). Injunctive relief is inappropriate if any of the three elements is absent. *Benefield v. State ex rel. Alvin Cmty. Health Endeavor*, 266 S.W.3d 25, 30 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

An injunction should not issue unless the plaintiff demonstrates a probable right to recovery; accordingly, 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 determining whether to issue a temporary injunction, the court also conducts “a balancing of the ‘equities’ and hardships, including a consideration of the important factor of the public interest.” *Methodist Hosps. of Dallas v. Tex. Indus. Accident Bd.*, 798 S.W.2d 651, 660 (Tex. App.—Austin 1990, writ dismissed w.o.j.).

Critically, Plaintiff-Intervenors’ request faces an even higher burden than most applications for temporary injunction because they do not seek to maintain the status quo. Instead, they ask the Court to disrupt the status quo and preemptively require Travis County to “extend the option to vote by mail to all registered voters” and to prevent the issuing of any guidance that conflicts with Plaintiff-Intervenors’ flawed interpretation of the Election Code. P-Inter’v App. at 2–3. Such a temporary mandatory injunction fundamentally *alters* the status quo and may only be granted when a plaintiff demonstrates by competent evidence that such an injunction is necessary to prevent irreparable injury. *See Iranian Muslim Org. v. City of San Antonio*, 615 S.W.2d 202, 208 (Tex. 1981).

#### ARGUMENT

Plaintiff-Intervenors’ Application for Temporary Injunction utterly fails to meet the demanding threshold for a mandatory injunction because all they can point to is their subjective, unprovable, and unripe allegations that the current COVID-19 pandemic—as it stands today—may cause them fear when appearing to vote in-person months from now in the July and November elections. *E.g.*, P-Inter’v App. ¶

4. For the reasons explained both below and in the State's Plea to the Jurisdiction, their conjectural assertions about the future developments of the pandemic bely the need for an immediate mandatory temporary injunction.

**1. Plaintiffs have not provided competent evidence of a probable right to recover or probable injury.**

As an initial matter, Plaintiff-Intervenors' Application does not attach any competent evidence demonstrating their entitlement to extraordinary relief. Plaintiff-Intervenors instead only attach boilerplate verifications from H. Drew Galloway, Executive Director of Intervenor MOVE Texas Action Fund; Emily Timm, Co-Executive Director of the Workers Defense Action Fund; Grace Chimene, President of the League of Women Voters of Texas; Joyce LeBombard, President of the League of Women Voters Austin-Area; and Individual Plaintiff Zachary Price. Each of these identical documents purports to verify the Application with respect to "the facts stated in Intervenor-Plaintiffs' Application for Temporary Injunction related to the COVID-19 pandemic" and to "voting in Texas." *E.g.*, Galloway Decl. ¶ 1; Timm Decl. ¶ 1; Chimene Decl. ¶ 1; LeBombard Decl. ¶ 1; Price Decl. ¶ 1. These verifications do not meet Plaintiff-Intervenors' burden of proof for two reasons.

*First*, they lack foundation and are not based upon personal knowledge, and for these reasons, Texas objects to each of these verifications. None of the declarants has identified credentials or expertise that qualify them to opine on the scientific or medical developments related to COVID-19. Similarly, the application of Texas's election laws is a legal question for the Court and involves subject matter about which these declarants lack competence to testify.

*Second*, even if Plaintiff-Intervenors could speak to these topics, the Supreme Court has long held that a sworn petition does not satisfy a party's burden of proof in seeking a preliminary injunction. *Millwright Local Union No. 2484 v. Rust Eng'g*, 433 S.W.2d 683, 686-87 (Tex. 1968); *see also, e.g., In re Tex. Nat'l Res. Comm'n*, 85 S.W.3d 201, 204 (Tex. 2002).

**2. Plaintiff-Intervenors' allegations are inherently speculative and hypothetical, and therefore unripe.**

Moreover, as the State noted in its Plea to the Jurisdiction, the Court lacks "the power to counsel a legal conclusion on a hypothetical or contingent set of facts." *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 853 (Tex. 2000) (citing *Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.*, 971 S.W.2d 419, 444 (1998) (recognizing that ripeness is a jurisdictional prerequisite to suit)). Plaintiff-Intervenors' allegations concerning the impact of COVID-19 on elections scheduled for July and November are necessarily "hypothetical or contingent." For example, Plaintiff-Intervenors allege that social distancing measures "are expected to be in place for the foreseeable future," P-Inter'v App. ¶ 15, but provide no evidence or even allegations of how those long social distancing measures will be in place, what those measures will entail, or the states, cities or counties where those measures will be implemented. *See also id.* ¶ 18 (contending only that "[s]ome level of social distancing is expected to be necessary for months to come").

The smattering of cherry-picked news sources Plaintiff-Intervenors offer similarly does not carry their burden of proof. Although Plaintiffs note that the Center for Disease Control and Prevention (CDC) has issued guidance to Americans

to socially distance until May 15, 2020, Plaintiffs do not assert that the CDC has already decided to expand that guidance through June or July, let alone into the Fall. Indeed, in recent days, leading doctors have seen a downward shift of the earlier death toll projections cited by Plaintiff-Intervenors and observe that, with appropriate precautions, normal life should be returning by this summer, including the possibility of vacation travel.<sup>2</sup> For example, as of April 10, 2020, the IHME predicts a total of 61,545 total deaths across the United States—substantially lower than the 240,000 Plaintiff-Intervenors alleged.<sup>3</sup>

That some individuals, such as Plaintiff-Intervenor Zachary Price, may desire to apply to vote by mail now to avoid uncertainty later does not create a cognizable injury or a ripe claim. Under Texas law, a voter may apply to vote by mail up to eleven days prior to an election. *See* TEX. ELEC. CODE § 84.004(c). Although it is understandable that Plaintiff-Intervenors “would prefer a definite answer” as to how the election will proceed,” that does not relieve them of their obligation to ensure that these “questions are presented in a justiciable form.” *Firemen’s Ins. Co. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1968). A subjective desire to apply to vote early, which Plaintiff-

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<sup>2</sup> *See* Optimism is Less Distant as Global Coronavirus Battle Rages On, N.Y. Times, *available at* <https://www.nytimes.com/2020/04/08/us/coronavirus-global-progress.html> (accessed Apr. 9, 2020); While Stressing Caution, Dr. Fauci Says Summer Travel ‘Can Be in the Cards’, Travel Market Report, *available at* <https://www.travelmarketreport.com/articles/While-Stressing-Caution-Dr-Fauci-Says-Summer-Travel-Can-Be-in-the-Cards> (accessed Apr. 9, 2020).

<sup>3</sup> *Compare* IHME, COVID-19: What’s New for April 10, 2020, <http://www.healthdata.org/covid/updates>, *with* P-Inter’v App. ¶ 14 & n.6 (citing Kiah Collier, Perla Trevizo and Vianna Davila, Despite coronavirus risks, some Texas religious groups are worshipping in person – with the governor’s blessing, The Texas Trib. (Apr. 2, 2020), <https://www.texastribune.org/2020/04/02/texas-churches-coronavirus-stay-open/>). Similarly, when Texas filed its Plea to the Jurisdiction on April 7, IHME was projecting peak infection rate in Texas to occur on May 5 with no further need for hospital resources by early July. It is now predicting peak infection on April 26, with no further need for hospital resources by June 30. IHME, COVID-19 Projections: Texas, <https://covid19.healthdata.org/projections> (accessed Apr. 13, 2020).

Intervenors concede is not required under Texas law, does not present a controversy “in a justiciable form.” *See id.* Any individuals in Texas who desire to vote by mail for the July 14 elections will be able to do so through May, June, and even the first part of July. Mr. Price does not have a ripe claim simply because he would like to submit his application at present.

Indeed, Plaintiff-Intervenors’ claims may never ripen. The science of COVID-19 treatment and prevention is rapidly developing, and policy decisions are evolving with it. Medical science’s understanding of what precautions are necessary and effective to contain the spread of the virus is evolving, too. As result, policymakers are continually monitoring how the situation affects any number of issues, including its impact on the election. Plaintiff-Intervenors identify no reason to infer that further accommodations will not be made if necessary to protect public safety.

For all of these reasons, and those that have already been briefed, Plaintiff-Intervenors’ claims are not ripe. Moreover, Plaintiff-Intervenors’ interpretation of “disability” under the Texas Election Code is flawed for the reasons explained in Texas’s Plea to the Jurisdiction. Tx. PTJ at 2-3, 21, 27-28. Because Plaintiff-Intervenors have not established a viable cause of action, a probable right to relief, or an irreparable injury or extreme harm, they have not met their burden of obtaining the “extraordinary remedy” of a temporary mandatory injunction. *Walling*, 863 S.W.2d at 57.



## CONCLUSION

Plaintiff-Intervenors' Application for Temporary Injunction should be denied, and this case should be dismissed for lack of jurisdiction.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on April 13, 2020, the foregoing instrument was served electronically through the electronic-filing manager in compliance with TRCP 21a to:

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