

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DIVISION OF TEXAS
SAN ANTONIO DIVISION

TEXAS DEMOCRATIC PARTY,
GILBERTO HINOJOSA, Chair of the Texas
Democratic Party, JOSEPH DANIEL
CASCINO, SHANDA MARIE SANSING,
and BRENDA LI GARCIA,
Plaintiffs,

and

LEAGUE OF UNITED LATIN AMERICAN
CITIZENS, and TEXAS LEAGUE OF
UNITED LATIN AMERICAN CITIZENS,
Plaintiff-Intervenors,

v.

GREG ABBOTT, Governor of Texas, RUTH
HUGHS, Texas Secretary of State, KEN
PAXTON, Texas Attorney General, DANA
DEBEAUVOIR, Travis County Clerk,
JACQUELYN F. CALLANEN, Bexar
County Elections Administrator,
Defendants.

Case No. 5:20-cv-00438

**COMPLAINT OF PLAINTIFF-INTERVENORS LEAGUE OF UNITED LATIN
AMERICAN CITIZENS AND TEXAS LEAGUE OF UNITED LATIN AMERICAN
CITIZENS**

Plaintiff-Intervenors League of United Latin American Citizens (“LULAC”) and Texas League of United Latin American Citizens (“Texas LULAC”), (together, “LULAC Plaintiffs”), by and through their undersigned attorneys, allege as follows:

INTRODUCTION

1. This case involves an illegal and unconstitutional attempt to prevent Texans from voting, in particular, minority and younger voters. Defendants have improperly sought to restrict access to absentee ballots in the midst of a pandemic, using an unduly narrow vote-by-mail policy coupled with threats of criminal prosecution, to force voters to choose between jeopardizing their

health by voting in person or not voting at all. This practice unduly burdens the right to vote, and that burden falls disproportionately on minority voters. At the same time, Defendants have made absentee ballots freely available to anyone age 65 or older, thus discriminating against younger voters. Because Defendants' actions violate the First, Fourteenth, and Twenty-Sixth Amendments of the United States Constitution and Section 2 of the Voting Rights Act, the LULAC Plaintiffs ask the Court to enjoin Defendants' illegal and unconstitutional activity, and ensure that *all* Texans are able to safely vote in this year's upcoming elections.

2. Approximately two months ago, the State of Texas confirmed its first case of the novel coronavirus, COVID-19. Since then, the deadly disease has spread to virtually every Texas community, transmitting itself through close contact with affected individuals, including many who displayed no symptoms of being sick. In response, the State and its local governments, echoing the federal government response, advised Texans to limit in-person contact and social interaction, and began implementing and encouraging other social distancing measures in order to slow the spread of the disease.¹

3. But even with such social distancing guidelines in place, to date, at least 37,860 Texans have been diagnosed with COVID-19, and at least 1,088 have died from it.² The numbers continue to increase daily, and with the "re-opening" of the State, the count of cases and deaths could accelerate even further.

4. For minority communities, particularly the Latino community, the impact of the disease has been especially devastating. A disproportionate share of Texas Latinos have contracted

¹ KXAN Staff, *In Texas, Gov. Abbott Issues Statewide Mandates In Response to COVID-19*, KXAN, Mar. 19, 2020, <https://www.kxan.com/news/coronavirus/live-gov-abbott-to-hold-press-conference-on-states-current-efforts-against-covid-19/>.

² *Texas Case Counts COVID-19 (Coronavirus Disease 2019)*, TEXAS DEP'T OF HEALTH AND HUMAN SERVICES, <https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83> (last updated May 10, 2020).

and died from COVID-19 as compared to their white counterparts. As just one example, in Travis County, Latino individuals constitute roughly 33 percent of the population but represent approximately 51 percent of all COVID-19 related hospitalizations.

5. Against this backdrop, Texas voters will cast their ballots in a primary runoff election on July 14, 2020, and the general presidential election on November 3, 2020. Under Defendants' unduly restrictive vote-by-mail policy, most will either have to do so in person—thereby risking exposure to COVID-19 through contact with voting equipment, election personnel, other voters, and observers—or not at all.

6. Defendants' restrictive vote-by-mail policy violates the Constitution.

7. In the midst of an ongoing public health crisis, the Constitution does not permit Defendants to force Texans to choose between their health and their exercise of the fundamental right to vote. But for *most* Texas citizens, including *most* of Texas' Latino citizens, that is precisely what Defendants are doing. Rather than permit all Texas citizens to safely vote by mail during the pandemic, Defendants are applying Texas law to permit only select groups—including *all* individuals over the age of 65—to vote by mail.

8. Defendants' unreasonable restrictions on who may safely vote by mail during a pandemic impose an undue burden on the LULAC Plaintiffs' members' voting and free speech rights in violation of the First, Fourteenth, and Twenty-Sixth Amendments to the United States Constitution. Moreover, because the negative effects of the overly-restrictive criteria are disproportionately felt by Texas' minority communities, they also violate Section 2 of the Voting Rights Act ("VRA").

9. Defendants need not apply the State's absentee voting eligibility criteria in such an unreasonably restrictive manner. Indeed, a Texas state court has already ruled that under Texas

law, COVID-19 constitutes an acceptable basis on which to request a mail-in ballot. But the State's Attorney General has demanded that county officials ignore the state court's order, and threatened them, voters, and third parties conducting protected First Amendment get-out-the-vote activity with prosecution if they follow the state court's ruling.

10. Specifically, on May 1, Attorney General Paxton issued an official opinion letter that states:

- “[F]ear of contracting COVID-19 unaccompanied by a qualifying sickness or physical condition does not constitute a disability under the Texas Election Code for purposes of receiving a ballot by mail.”
- “[P]ublic officials shall not advise voters who lack a qualifying sickness or physical condition to vote by mail in response to COVID-19.”
- “To the extent third parties advise voters to apply for a ballot by mail for reasons not authorized by the Election Code, including fear of contracting COVID-19 without an accompanying qualifying disability, such activity could subject those third parties to criminal sanctions imposed by Election Code section 84.0041.”³

11. And Defendants, as expressed in Attorney General Paxton's letter, have steadfastly refused to comply with the state court's ruling by arguing that it is stayed pending appeal and, in any event, cannot extend beyond the limited jurisdiction of Travis County:

A lawsuit recently filed in Travis County District Court does not change or suspend these requirements. In that case, the District Court ordered the Travis County Clerk to accept mail ballot applications from voters who claim disability based on the COVID-19 pandemic, and to tabulate mail ballots received from those voters. The Texas Attorney General immediately appealed that order. Accordingly, pursuant to Texas law, the District Court's order is stayed and has no effect during the appeal. Moreover, even if the order were effective, it would not apply to any county clerk or election official outside of Travis County. Those officials must continue to follow Texas law, as described in this letter, concerning eligibility for voting by mail ballot.⁴

³ Attorney General Ken Paxton, *Re: Ballot By Mail Based on Disability*, May 1, 2020, https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/Mail-in%20Ballot%20Guidance%20Letter_05012020.pdf

⁴ *Id.*

12. Instead, Defendants, in their official capacities as the chief executive, election, and law enforcement officials of the State, have adopted a cramped construction of state election law that will bar most Texans, and most Latinos, from absentee voting.

13. Defendants' restrictive vote-by-mail policy is having immediate practical effects. As a result of Attorney General Paxton's threats, at least some county election officials have indicated that they will not permit voters to rely on COVID-19 as a basis for receiving an absentee ballot.⁵ Voters, including LULAC Plaintiffs' members, fear criminal sanctions if they elect to vote by the only safe means available to them. And LULAC Plaintiffs, which imminently intend to engage in substantial voter engagement efforts—including encouraging voters to safely vote by mail—cannot undertake such protected speech activity without fear of prosecution. Attorney General Paxton's threats therefore chill protected speech and associational activity, harm voters, and unconstitutionally burden LULAC Plaintiffs' right to engage in core political speech and activity, in violation of the First and Fourteenth Amendments. The violation continues and compounds with each passing day that the State adheres to its restrictive policy and fails to rescind its threats.

14. Absent prompt relief from this Court, Defendants' restrictive policy will prohibit vote by mail for a majority of Texans and a majority of Latinos and extend the already potent chill of protected voter engagement activity. Voters are already submitting absentee ballot applications for the next election on July 14, 2020, and counties will begin disseminating absentee ballots in less than one week on May 15, 2020.

15. Defendants' restrictive mail-in voting policy violates LULAC Plaintiffs' First Amendment rights and LULAC Plaintiffs' members' right to vote. LULAC Plaintiffs respectfully

⁵ See, e.g., Brian Knox, *Voting With A Virus*, WISE COUNTY MESSENGER, May 6, 2020, <https://www.wcmessenger.com/articles/voting-with-a-virus/>.

request this Court declare Defendants' restrictive mail-in voting policy unconstitutional, declare that all Texans are entitled to vote by mail during the duration of this pandemic, enjoin Defendants and all those acting in concert with them from preventing voters from casting their ballots by mail-in ballot in the July 14 and November 3, 2020 elections, and from blocking any necessary steps to facilitate mail-in voting, and require Defendant Secretary Hughs to issue guidance to local election officials in compliance with this Court's order.

PARTIES

16. Plaintiff League of United Latin American Citizens ("LULAC") is the oldest and largest national Latino civil rights organization in the United States. LULAC is a non-profit membership organization with a presence in most of the fifty states, including Texas. It was founded with the mission of protecting the civil rights of Latinos, including voting rights. LULAC participates in civic engagement activity, such as voter registration, voter education, and voter turnout efforts, throughout the United States.

17. LULAC has been recognized and accepted as an organizational plaintiff protecting Latino rights in federal courts across the country, including the United States Supreme Court and the U.S. District Court for the Western District of Texas.

18. Plaintiff Texas LULAC is the Texas chapter of the League of United Latin American Citizens. Plaintiff Texas LULAC was founded in Texas in 1929. Texas LULAC has over 20,000 members in Texas. Texas LULAC's members include registered voters who desire to vote in upcoming Texas elections, and under the pandemic circumstances seek to do so by mail-in ballot.

19. Texas LULAC regularly engages in voter registration, voter education, and other activities and programs designed to increase voter turnout among its members and their

communities. These efforts are key to LULAC's mission of increasing civic participation of its members. Texas LULAC commits time, personnel, and resources to these efforts throughout Texas. In light of the coronavirus pandemic, Texas LULAC will be forced to divert resources away from existing priorities towards educating the Latino community about Defendants' restrictive vote-by-mail policy and helping its members and Latino generally determine if they are able to vote by mail under that policy. Moreover, Texas LULAC's ability to assist its members and Latinos throughout the state to request and cast mail-in ballots is significantly hampered by Defendants' restrictive vote-by-mail policy limiting access to mail-in ballots to a select few segments of Texas's voting population.

20. Absent federal court intervention, many of Texas LULAC's members will be unable to request and cast mail-in ballots. In an uncertain electoral environment where in-person voting will be either unavailable or unsafe, mail-in ballots are the only option for many Texas LULAC members and other Latinos throughout the state to exercise the franchise without jeopardizing their own health or the health of their families.

21. Defendant Greg Abbott is the Governor of Texas and, pursuant to Article IV, Section I of the Texas Constitution, is the chief executive officer of the State of Texas. He is sued in his official capacity.

22. Defendant Ken Paxton is the Attorney General of Texas, and is the chief law enforcement officer of the state. He is sued in his official capacity.

23. Defendant Ruth Hughs is the Texas Secretary of State, and pursuant to Tex. Election Code § 31.001, is the chief election officer of the state. She is sued in her official capacity.

24. Defendant Dana DeBeauvoir is the Travis County Clerk and Election Administrator. She is sued in her official capacity.

25. Defendant Jacquelyn F. Callanen is the Bexar County Elections Administrator. She is sued in her official capacity.

JURISDICTION AND VENUE

26. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343, 1357; 42 U.S.C. § 1983; and 52 U.S.C. § 10301.

27. LULAC Plaintiffs' action for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202 and Rules 57 and 65 of the Federal Rules of Civil Procedure.

28. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b) because Defendants' official places of business are within the District, Defendants reside in the District, and all Defendants reside in Texas.

29. The Court has personal jurisdiction over Defendant Governor Abbott, Defendant Attorney General Paxton, and Defendant Secretary of State Hughs. All are residents of the State of Texas and officials for the State of Texas, with official places of business within this District.

30. This Court has personal jurisdiction over Defendants DeBeauvoir and Callanen. Both are residents of Texas and are county officials in Travis and Bexar Counties, respectively, with official places of business within this District.

FACTUAL ALLEGATIONS

Background on the Effects of the COVID-19 Pandemic in Texas

31. The virus that causes COVID-19 is highly contagious and spreads through a variety of means, including respiratory droplets and direct contact between individuals. The disease can be spread by symptomatic and asymptomatic carriers, and once contracted, can have a range of effects on the diagnosed individual, from passing without any symptoms at all, to flu-like symptoms, to a severe immune system response that can cause fluid to build in the person's lungs

and lead to death. The disease poses a severe risk to all individuals, and youth or relative health do not guarantee immunity to or recovery from this disease, which can be brutal even for those who survive. It is particularly dangerous for those who are elderly, or regardless of age, are immunocompromised, or have other underlying conditions like chronic lung disease, diabetes, obesity, or moderate to severe asthma.⁶

32. COVID-19 has spread widely and quickly throughout the world, and has not spared the United States or Texas. On March 13, 2020, outbreak of the pandemic disease caused President Trump to declare a national state of emergency, and Governor Abbott to declare a state of disaster in Texas. Both declarations remain in place to this day, and there is no discernible end to the public health crisis caused by COVID-19 in sight. Rather, a second, potentially “more difficult” outbreak of the disease is expected later this year.⁷

33. In light of such unprecedented public health conditions, Defendants understand that social distancing measures, which encourage individuals to avoid close contact with others where possible, are critical to slowing the spread of COVID-19. On April 2, 2020, Governor Abbott—like most other governors across the United States—ordered all Texans to stay at home, unless exempted as essential workers, to slow the spread of the deadly disease. While that order has now expired, the Governor continues to echo the federal CDC by encouraging Texans to “remain committed to safe distancing practices that reduce the spread of COVID-19, and . . . protect[] the lives of our fellow Texans[.]”⁸ And public health officials, including Dr. Birx, the White House

⁶ Ctrs. For Disease Control and Prevention, *People Who Are at Higher Risk for Severe Illness*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>. (last visited May 7, 2020).

⁷ Lena H. Sun, *CDC Director Warns Second Wave of Coronavirus Is Likely to Be Even More Devastating*, WASH. POST, Apr. 21, 2020, <https://www.washingtonpost.com/health/2020/04/21/coronavirus-secondwave-cdcdirector/>.

⁸ Office of the Texas Governor, *Governor Abbott Announces Phase One To Open Texas, Establishes Statewide Minimum Standard Health Protocols*, Apr. 27, 2020, <https://gov.texas.gov/news/post/governor-abbott-announces-phase-one-to-open-texas-establishes-statewide-minimum-standard-health-protocols>.

coronavirus response coordinator, promise that “social distancing will be with us through the summer.”⁹

34. Even as the State now rushes to reopen its economy— which some public health experts caution may cause the number of COVID-19 cases to increase¹⁰—COVID-19 continues to have a dramatic impact on Texans’ health and safety. Since March 4, 2020, when the State’s first case of COVID-19 was confirmed, approximately 37,860 Texans have been diagnosed with the disease, and 1,088 have lost their lives.¹¹ Tragically, the number of cases and deaths continues to rise.

35. The disease has had a particularly devastating impact on the Texas Latino community, which represents a disproportionate share of COVID-19-related hospitalizations and deaths. In fact, while Latinos constitute 38.6% of Texas’s overall population, they represent 42.6 percent of the State’s COVID-19-related deaths. And in Travis County, Latinos constitute roughly 33 percent of the population but represent approximately 51 percent of all COVID-19 related hospitalizations. Critically, these official statistics may be underestimating rates of infection among the Latino community due to fear of reporting cases because of a lack of health insurance and fear of exposure to immigration authorities.

Absentee Voting in Texas

36. In light of the evident health risks posed by COVID-19, as well as the consensus that social distancing is the most effective method of preventing exposure, the disease is expected to significantly affect Texas’s upcoming elections on July 14 and November 3, 2020. In-person

⁹ Anya van Wagtenonk, *Deborah Birx Says “Social Distancing Will Be With Us Through the Summer,”* VOX, Apr. 26, 2020, <https://www.vox.com/2020/4/26/21237563/social-distancing-through-summer-birx-coronavirus>.

¹⁰ *See supra* n.2.

¹¹ *Texas Case Counts COVID-19 (Coronavirus Disease 2019)*, TEXAS DEP’T OF HEALTH AND HUMAN SERVICES, <https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83> (last updated May 10, 2020).

polling locations—at which voters must wait in crowded lines, and interact with other voters, poll workers, observers, and voting equipment—are particularly susceptible as hotspots for contagion, and put at risk the health of any voter who casts their ballot in person.

37. In jurisdictions that have proceeded with primarily in-person elections in the midst of this ongoing public health crisis, that risk has already manifested itself.¹² For example, in Wisconsin, which proceeded with its election on April 7, 2020, more than 50 people may have contracted COVID-19 *at their polling locations*.¹³ Thus, in Texas, where as recently as March, voters experienced large crowds and long wait times before casting their ballots, it can similarly be expected that some in-person voters and poll workers will contract COVID-19 at the polls during this year’s elections.

38. Recognizing the unnecessary risk that in-person voting imposes on voters and poll workers, many voters, including LULAC Plaintiffs’ members, are expected to request an absentee ballot, if eligible. Indeed, the CDC’s first recommendation for election officials in the midst of this pandemic is to “[e]ncourage mail-in methods of voting.”¹⁴ The vast majority of states have followed this guidance, and will permit no-excuse absentee voting in this year’s elections in light of the COVID-19 pandemic. Defendants will not.

39. Rather, Defendants refuse to heed the warnings of public health officials, and instead, continue to maintain one of the most restrictive lists of excuses in the country to qualify for mail-in voting. Defendants policy permits only four categories of persons to vote safely by mail: individuals who (1) will be away from their county on Election Day and during early

¹² See Scott Bauer, *52 People Who Took Part in Wisconsin's Primary Have Tested Positive for Coronavirus*, ASSOCIATED PRESS, Apr. 29, 2020, <https://apnews.com/6428674bc2668ebd2db3c482f7f703c1>.

¹³ *Id.*

¹⁴ Ctrs. for Disease Control and Prevention, *Recommendations for Election Polling Locations* (Mar. 27, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.

voting; (2) are sick or disabled; (3) are 65 years of age or older on Election Day; or (4) are confined in jail, but eligible to vote. Tex. Code §§ 82.001; 82.002; 82.003; 82.004. Unless Texas voters satisfy one of these enumerated excuses (“Eligibility Criteria”), they must vote in person in the upcoming elections, or not at all.

40. Defendants’ extreme approach to enforcing the Eligibility Criteria will require most Texas voters to risk their health and safety in order to exercise their fundamental right to vote. Defendants cannot guarantee that no Texan will contract COVID-19 as a result of in-person voting this Summer and Fall. Nor can Defendants guarantee that no Texan will contract COVID-19 as a result of their family member voting in person this year. Defendants further cannot guarantee that no Texan will be hospitalized or die as a result of contracting COVID-19 at an in-person polling location. And, for any Texan that does contract COVID-19 at a polling location, Defendants do not guarantee that they will cover the cost of any necessary medical care. As a result, for a voter that contracts COVID-19 in an effort to exercise their right to vote, the consequences could be devastating.

41. All voters will face substantial health risks by voting in person. But the consequences of voting in person will not be equally shared among Texas’ demographic populations. Most Texas voters that are eligible to vote by mail are white. Indeed, some estimates suggest that nearly two out of every three voters older than 65—*i.e.*, most of the absentee-eligible population in Texas—are white.¹⁵ And, of course, given the Eligibility Criteria, the vast majority of absentee voters are over 65. This means that the younger and minority voters, including many

¹⁵ Alexa Ura & Ryan Murphy, *Why Is Texas Voter Turnout So Low? Demographics Play a Big Role*, TEXAS TRIBUNE, Feb. 23, 2018, <https://www.texastribune.org/2018/02/23/texas-voter-turnout-electorate-explainer/>.

of LULAC Plaintiffs' members, are disproportionately harmed by Defendants' enforcement of the Eligibility Criteria. Nearly a third of Texas's Latino voters are between the ages of 18–29.¹⁶

42. For Latino voters, the consequences of having to vote in person are particularly stark. For example, a higher prevalence of multigenerational households in the Texas Latino community means that younger Latino voters who contract COVID-19 at the polls risk bringing the disease home to their vulnerable elderly family members. In addition, a higher prevalence of chronic conditions like hypertension and diabetes in the Latino community could lead to complications and increased risk of death from COVID-19 for Latino voters who contract COVID-19 at the polls—and for the family members they risk exposing to the disease thereafter.¹⁷ And, given the disproportionately high rate of Texas Latinos lacking health insurance—27% of Latinos compared to 12% of non-Hispanic whites¹⁸—the economic costs resulting from the contracting COVID-19 at a polling site could also be ruinous for Latino voters and their families, even if they survive the disease itself.

43. For Texas' Latino voters, the choice between voting in person while risking exposure to a deadly disease, and not voting at all, is not just an inconvenient one. It imposes an undue burden on voters' exercise of their fundamental right to vote.

44. And though Texas law expresses a preference for in-person voting, it has an established mail-in ballot system. That system is already open to *all* voters over the age of 65. Texas does not have any substantial interest in depriving its younger and minority voters of the

¹⁶ Stephanie Presch, *The Growing Latino Vote In Texas: Battleground of the Future*, UNIDOS US, 2016, <https://www.unidosus.org/issues/voting/articles/latino-vote-texas>.

¹⁷ Ctrs. For Disease Control and Prevention, <https://www.cdc.gov/diabetes/pdfs/data/statistics/national-diabetes-statistics-report.pdf>.

¹⁸ Matthew Buttgens, et al., *The Uninsured In Texas: Statewide and Local Area Views*, URBAN INSTITUTE, Dec. 2018, https://www.urban.org/sites/default/files/publication/99498/uninsured_in_texas_2.pdf.

ability to vote by mail during this health crisis when it extends that option liberally to older voters; nor does any interest in the integrity of the election *require* such a deprivation.

State Court Case

45. Given the pandemic conditions and their effects on election procedures, on March 27, 2020, a lawsuit was filed in Texas state court alleging that participating in social distancing to prevent the spread of COVID-19 is “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,” satisfying the requirements of Tex. Elec. Code § 82.002. The state court plaintiffs’ claims were purely based on state law, and did not present any federal constitutional claims or issues.

46. On April 17, 2020, Travis County District Court Judge Tim Sulak issued a written order granting a temporary injunction and enjoining Travis County and the State of Texas from rejecting mail-in ballots received from voters who voted by mail based on the disability category of eligibility as a result of the COVID-19 pandemic. The order also enjoined the State of Texas from issuing guidance or taking other actions during all elections affected by the COVID-19 pandemic that would prohibit eligible voters from submitting ballots based on the disability category, or from suggesting that those individuals be subject to penalties for doing so.

47. The state immediately appealed, and the Texas Attorney General’s office advised all county election officials that the state court’s ruling “does not change or suspend” the Eligibility Criteria. Instead, Attorney General Paxton asserted that because the State has appealed the ruling, the state’s court order “is stayed and has no effect during the appeal.” Attorney General Paxton

further stated that “even if the order were effective, it would not apply to any county clerk or election official outside of Travis County.”¹⁹

48. Yet even in Travis County, confusion abounds. The Travis County Clerk’s office states on their website that “[b]ased on the Travis County Trial Court’s recent order, mail-in-ballots are a legal alternative to in-person voting for many voters while COVID-19 is in general circulation. Anyone interested should review the Trial Court’s order and should *continue monitoring the situation*, because the Trial Court’s order has been appealed.”²⁰ Not only does statement not identify to which voters the state court’s order applies, it places the burden on voters and third parties conducting voter engagement activity to determine whether they should follow the state court’s ruling or, on penalty of criminal punishment, the Attorney General’s edict.

49. Pending appeal of the state court’s order, Defendants have chosen to enforce the Eligibility Criteria such that “an individual’s fear of contracting COVID-19 is not, by itself, sufficient . . . to receive a ballot by mail.” Moreover, Defendants have advised that “[t]o the extent third parties advise voters to apply for a ballot by mail for reasons not authorized by the Election Code, including fear of contracting COVID-19 without an accompanying qualifying disability, such activity could subject those third parties to criminal sanctions imposed by Election Code section 84.0041.”²¹

50. In light of the Defendants’ position, resolution of the state court litigation will not resolve the LULAC Plaintiffs’ constitutional and federal statutory claims here. LULAC Plaintiffs are currently suffering the harmful effects of Defendants’ actions. Unless they satisfy Defendants’

¹⁹ Attorney General Ken Paxton, *Re: Ballot By Mail Based on Disability*, May 1, 2020, https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/Mail-in%20Ballot%20Guidance%20Letter_05012020.pdf

²⁰ Travis County Clerk’s Office, *Ballot by Mail*, <https://countyclerk.traviscountytexas.gov/elections/ballot-by-mail.html> (last visited May 9, 2020) (emphasis added).

²¹ *See id.*

interpretation of the Eligibility Criteria, the LULAC Plaintiffs’ members may not apply to vote by mail. Moreover, the LULAC Plaintiffs themselves may not engage in voter engagement activity encouraging members to apply to vote by mail if they satisfy the state court’s interpretation of the Eligibility Criteria, without fear that they or their members will be prosecuted for doing so. This is the case even though some counties in Texas, including Dallas County, have passed resolutions encouraging voters to claim a “disability”—consistent with the state court’s order—in order to vote by mail.²²

51. The state court litigation is not expected to resolve questions around the interpretation of Texas state law with any deliberate speed. Briefing on the State’s appeal of the state trial court’s order will not be completed until June 15, 2020, meaning that the *soonest* the issue will be resolved is about two weeks prior to the July 3, 2020 closing of the absentee ballot window for the July 14, 2020 election, if no oral argument is held and an opinion is immediately issued by the appeals court. But absentee ballot applications are already being submitted for the next election on July 14, 2020, and absentee ballots will begin to be disseminated in less than one week, on May 15, 2020.

52. And if a further appeal is taken from the intermediate appellate court, enforcement of the state trial court’s order may be further delayed by the State. There is no guarantee of when further review might occur or on what timeline. In the meantime, Defendants’ actions will continue to deprive LULAC Plaintiffs of their constitutional rights.

²² Erin Anderson, *Dallas County Disregards Texas AG’s Vote-by-Mail Warning*, TEXAS SCORECARD, May 5, 2020, <https://texasscorecard.com/local/dallas-county-disregards-texas-ags-vote-by-mail-warning/>.

CAUSES OF ACTION

Count 1

Race and Language Minority Discrimination, Section 2 of the Voting Rights Act 52 U.S.C. § 10301

53. Plaintiff-Intervenors reallege and incorporate by reference the allegations in the preceding paragraphs as though fully set forth herein.

54. Texas's Latino voters are particularly susceptible to contracting and dying from COVID-19. Latino voters' increased susceptibility to the dangers of COVID-19 is directly tied to social and historical conditions stemming from discrimination.

55. As a result of their unique vulnerability to COVID-19 and as a result of their disproportionate exclusion from the age-based eligibility criteria, Texas Latinos will be disproportionately disenfranchised by Defendants' actions requiring them to either risk infection by voting in person or not vote at all unless they meet Defendants' narrowly defined Eligibility Criteria.

56. Texas's restrictions on mail-in ballots violate Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, because they result in the denial of the right to vote on account of race and language minority status, insofar as, under the totality of the circumstances, LULAC Plaintiffs and minority voters are denied an equal opportunity to participate effectively in the political process.

57. Texas's restrictions on mail-in ballots violate Section 2 because they deny and abridge the right to vote on account of race and language minority status.

Count 2
Violation of Fundamental Right to Vote
First and Fourteenth Amendments
42 U.S.C. § 1983

58. Plaintiff-Intervenors reallege and incorporate by reference the allegations in the preceding paragraphs as though fully set forth herein.

59. LULAC Plaintiffs' members and other Latinos in Texas have a fundamental right to vote under the First and Fourteenth Amendments to the United States Constitution. Where the operation of an election law is alleged to cause a deprivation of such a fundamental right, the court "must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interest put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

60. Texas already guarantees *some* of its citizens the right to vote by mail in any election in which they meet the State's narrow Eligibility Criteria. In the context of an ongoing global pandemic that has already claimed the lives of over one thousand Texans, Defendants' failure to extend the right to vote by mail to *all* citizens, unconstitutionally denies or abridges the fundamental right to vote of Texas' absentee ineligible voters, including many of LULAC Plaintiffs' members, in violation of the First and Fourteenth Amendments to the Constitution.

61. Making LULAC Plaintiffs and their members, including those who are at increased risk of complications from COVID-19, choose between voting in person, thereby risking their health and safety, or not voting at all because they do not meet the State's Eligibility Criteria for mail-in voting, violates LULAC Plaintiffs' right to vote under the First and Fourteenth Amendments to the Constitution.

62. In the midst of an ongoing public health crisis, there is no state interest in favor of enforcing Texas’ prohibition against mail-in voting without excuse that justifies the burden placed on LULAC Plaintiffs’ constitutional right to vote. Defendants may not deprive LULAC Plaintiffs of their fundamental right to vote—secured to them by the First and Fourteenth Amendments to the United States Constitution—by enforcing their unduly restrictive vote-by-mail policy, and by putting the onus on voters to determine when and where it applies.

63. The absentee ballot request deadline for the upcoming July 14, 2020 election is July 3, 2020. Absentee ballot applications are already being submitted and processed and will begin to be delivered on May 15, 2020. Plaintiffs and Texas voters need certainty as to whether they are eligible to request and cast mail-in ballots in the upcoming election.

Count 3
Denial of Speech and Association Rights
First and Fourteenth Amendments
42 U.S.C. § 1983

64. Plaintiff-Intervenors reallege and incorporate by reference the allegations in the preceding paragraphs as though fully set forth herein.

65. The First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, prohibits an abridgement of the freedom of speech.

66. On March 27, 2020, a Texas state court ruled that the definition of “disability” under the Eligibility Criteria encompasses a fear of contracting COVID-19 through in-person voting. Notwithstanding the Court’s ruling, Attorney General Paxton has advised county judges and election officials that the State does not intend to abide by the court’s ruling. Moreover, he has advised that any voter or third-party assisting a voter who requests to vote absentee for “fear of contracting COVID-19 without an accompanying qualifying disability,” could be subjected to

prosecution. Put differently, Attorney General Paxton has advised that a third-party may not encourage a voter to rely on the state court's ruling in requesting an absentee ballot.

67. Attorney General Paxton's threats of prosecution severely burden LULAC Plaintiffs and their members' core political speech and expressive conduct—namely encouraging voter participation and the use of mail-in ballots consistent with a state court's ruling.

68. The threats of prosecution are not narrowly-tailored to serve a compelling government interest, and in fact, only serve to sow confusion among voters about the scope of their rights.

69. Defendants' enforcement of the unreasonably restrictive Eligibility Criteria, under threat of prosecution, therefore unconstitutionally infringes on Texas LULAC's First Amendment right to free speech.

Count 4
Age Discrimination in Voting
Twenty-Sixth Amendment
42 U.S.C. § 1983

70. Plaintiffs reallege and incorporate by reference the allegations in the preceding paragraphs as though fully set forth herein.

71. Texas' Eligibility Criteria and Defendants' restrictive vote-by-mail policy abridges Texas voters' right to vote based on age. It discriminates on the basis of age by allowing all voters over the age of 65 to vote by mail while provided very narrow criteria for vote by mail for people under the age of 65.

72. In the context of the pandemic, this age discrimination is untethered from practical realities. A healthy 65-year-old will vote by mail without difficulty while an immunocompromised 25-year-old cannot even though the latter individual faces at least equal danger in casting an in-person ballot.

73. The abridgement of the right to vote based on age is unconstitutional as applied to LULAC Plaintiffs and its members during these pandemic circumstances.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that this Court:

A. Declare that Defendants' enforcement of the narrow vote-by mail eligibility policy in the context of the pandemic, to exclude Texas voters from casting mail-in ballots in the July and November 2020 elections unless they meet Defendants' interpretation of the Eligibility Criteria, is unconstitutional and violates the First, Fourteenth, and Twenty-Sixth Amendments;

B. Declare that Defendants' enforcement of their narrow vote-by mail eligibility policy in the context of the pandemic, to exclude Texas voters from casting mail-in ballots in the July and November 2020 elections unless they meet Defendants' interpretation of the Eligibility Criteria, violates Section 2 of the Voting Rights Act;

C. Preliminarily and permanently enjoin Defendants, their agents, employees, and any other persons acting in concert with them, from enforcing the Eligibility Criteria in an unconstitutional or unlawful manner, including enjoining Defendants from utilizing these Eligibility Criteria during this year's elections;

D. Preliminarily and permanently enjoin Defendants from excluding any eligible voter from casting a mail-in ballot in the July and November 2020 elections, whether or not the voter meets the Eligibility Criteria for the duration of the COVID-19 pandemic;

E. Preliminarily and permanently order Defendants to take additional reasonable steps necessary for facilitating mail-in voting in the context of a pandemic, including broadly publicizing the relief granted by this Court by all reasonable means, ensuring that county election

administrators abide by the relief granted by this Court, instructing and training election officials as to the relief granted by this Court;

F. Preliminarily and permanently enjoin Defendant Paxton from prosecuting any individual who requests a mail-in ballot without meeting the Eligibility Criteria;

G. Preliminarily and permanently enjoin Defendant Paxton from prosecuting any third-party which helps a voter request a mail-in ballot without meeting the Eligibility Criteria;

H. Award Plaintiffs their reasonable attorneys' fees and costs;

I. Order such other and further relief as may be just under the circumstances.

DATED: May 11, 2020

Respectfully submitted,

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**motions for admission pro hac vice
forthcoming*

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