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August 19, 2020

Honorable Ken Paxton  
Attorney General of Texas  
Attn: Opinion Committee  
P.O. Box 12548  
Austin, Texas 78711-2548

***RE: Request for Opinion Regarding the Scope of the Authority of a Criminal District Attorney in and for the State of Texas to Prosecute Federal Officials Who Knowingly Violate Texas Election Laws in an Attempt to Disenfranchise Texas Voters***

Dear Attorney General Paxton:

This is to request that the Attorney General of Texas issue an Attorney General opinion pursuant to Section 402.042-.043 of the Texas Government Code.

**QUESTION PRESENTED**

- 1) Does the criminal jurisdiction of a Criminal District Attorney for the State of Texas extend to protecting the integrity of the November 3, 2020 general election by prosecuting those federal officials who might reside in another jurisdiction but would knowingly violate criminal provisions of the Texas Elections Code resulting in the disenfranchisement of Texas Voters, many of whom are age 65 or older and disproportionately rely on mail ballots as a means of effectuating their constitutionally protected right to vote?
- 2) If a federal official is indicted by a Bexar County grand jury and refuses to make an appearance after having been served with the indictment, may that federal official be convicted by a duly empaneled petit jury in absentia?

## **BACKGROUND OF REQUEST**

“Secure elections are the cornerstone of a thriving republic.”<sup>1</sup> The Texas Election Code provides a legal framework to ensure that neither private actors nor government officials infringe on Texans’ right to choose their leaders in secure, accessible, fair elections. The Election Code accomplishes this objective in part by establishing more than 100 criminal offenses that make it a crime for any person—whether a private citizen or a high-ranking government official—to “attempt to subvert or manipulate the electoral process by illegal means.”<sup>2</sup>

The election taking place this November includes general elections for several local, statewide, and federal offices, including that of President of the United States: historically among the highest-turnout elections that state and county officials have the responsibility of administering. At the same time, the ongoing COVID-19 pandemic presents historic challenges to state and local elections officials. Among these challenges is the reality that unprecedented numbers of eligible Texas voters will likely exercise their right to vote by mail in accordance with Chapter 86 of the Election Code.<sup>3</sup>

I have recently become aware of troubling reports of reductions in resources and equipment within the United States Postal Service (USPS) that threaten to disrupt the timely delivery of vote-by-mail applications and ballots.<sup>4</sup> These reductions include the unexplained removal of mail sorting machines<sup>5</sup> and mailboxes;<sup>6</sup> an abrupt departure from the historical practice of processing balloting mail as First Class to ensure prompt delivery;<sup>7</sup> and reductions in staffing and retail hours that have the effect of slowing down mail processing.

Some reports indicate that these changes are part of a deliberate attempt to influence the outcome of specific races<sup>8</sup> by disrupting voting by mail in certain jurisdictions—including

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1 Ken Paxton, Attorney General of Texas, Election Integrity, <https://www.texasattorneygeneral.gov/initiatives/election-integrity>.

2 *Id.*

3 John Engel, ‘I’m worried’: Texas election officials prepare for record-breaking mail-in voting, KXAN AUSTIN, Aug. 13, 2020, available at <https://www.kxan.com/news/texas-politics/im-worried-texas-election-officials-prepare-for-record-breaking-mail-in-voting/>; Tessa Weinberg, *Ahead of November, Texas Democrats to send record number of mail-in ballot applications*, FORT WORTH STAR-TELEGRAM, Aug. 10, 2020, available at <https://www.star-telegram.com/news/politics-government/election/article244810572.html>.

4 Luke Broadwater, et al. *Postal Crisis Ripples Across Nation as Election Looms*, N.Y. TIMES, Aug. 15, 2020, available at <https://www.nytimes.com/2020/08/15/us/post-office-vote-by-mail.html>.

5 Bryan Slodysko Tegna and Amy Beth Hanson, *Mail Sorting machines across the country being removed, multiple reports say*, KENS 5 SAN ANTONIO, Aug. 14, 2020, available at <https://www.kens5.com/article/news/nation-world/mail-sorting-machines-removed/507-8c96ed32-3b5a-45ac-9d03-e6cd3f971739>.

6 Paul P. Murphy, *USPS removes mail collection boxes and reduces post office hours as critics accuse Trump administration of voter suppression*, CNN, Aug. 14, 2020, available at <https://www.cnn.com/2020/08/14/politics/usps-removes-letter-collection-boxes-reduces-post-office-operating-hours/index.html>.

7 Letter from United States Senators to Postmaster General Louis DeJoy, Aug. 12, 2020, available at <https://assets.documentcloud.org/documents/7035823/Letter-to-Postmaster-General.pdf>.

8 Deb Riechmann and Anthony Izaguirre, *Trump admits he’s blocking postal cash to stop mail-in votes*, ASSOCIATED PRESS, Aug. 13, 2020, available at <https://apnews.com/14a2ceda724623604cc8d8e5ab9890ed>.

jurisdictions within Texas and Bexar County. For example, USPS recently informed state elections officials in Texas and other states that mail processing delays caused by the measures described above could result in some voters being disenfranchised—even if they request a ballot by the deadline set in state law and return it promptly.<sup>9</sup>

### **ARGUMENT AND AUTHORITIES**

Elected criminal district attorneys are authorized under the laws of the State of Texas to prosecute any criminal acts occurring within their jurisdiction. *Saldano v. State*, 70 S.W.3d 873, 876 (Tex. Crim. App. 2002) (en banc); Tex. Att’y Gen. Op. JC-0539 (2002). Within Bexar County, federal officials have allegedly ordered the removal and/or destruction of several components of federal mail system, including physical collection devices and mail sorting machines, in an apparent attempt to deny or delay the ballots for voters in Bexar County.<sup>10</sup> If in fact federal officials have acted intentionally to deny Bexar County voters their constitutionally protected rights, such actions would amount to criminal violations of the Texas Election Code. Responsibility for investigating and prosecuting criminal violations of the Election Code is shared concurrently by the Attorney General’s Office and Texas’s district and county attorneys. Tex. Elec. Code §§ 273.001, 273.002.

The Texas Election Code specifically prohibits conduct intended to interfere with the integrity of voting by mail. *See generally* Tex. Elec. Code §§ 84.003, 84.004, 84.0041, 84.007(b-1), 86.0051, 86.006, 86.010, 86.0105, 87.041(g). Together with the general prohibition against efforts to “influence the independent exercise of the vote of another . . . during the voting process[.]” Tex. Elec. Code § 276.013(a)(1), the Election Code is clear that attempts to manipulate the voting process to favor one party or one candidate are a crime—regardless of whether targeted at in-person or mail-in voting, and regardless of whether carried out by a private citizen, a government official, or by a candidate himself.

Further, there is no general immunity for violations of state laws for federal officials. Rather, federal officials may assert a defense of official immunity—a defense that only applies when the acts at issue were authorized by federal law and the official “in doing that act, . . . did no more than what was necessary and proper for him to do[.]” which requires that he “must subjectively believe that his actions were appropriate to carry out his federal duties, and that [his] belief [is] objectively reasonable.” *State v. Kleinert*, 855 F.3d 305, 314 (5th Cir. 2017) (quoting *Cunningham v. Neagle*, 135 U.S. 1, 75 (1890)); *see also generally* *Mesa v. California*, 489 U.S. 121, 133 (1989) (discussing prosecution of postal office employees for violations of state law and removal to federal court under 42 U.S.C. § 1442(a)(1)). Federal law does not task federal officials with violating the Texas Election Code, and an official who acts with the criminal intent necessary to establish a violation of the Texas Election Code does not act with a subjective, or an objectively reasonable, belief that their acts are necessary to perform duties under federal law.

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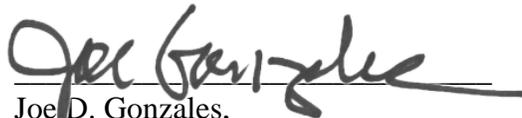
<sup>9</sup> Cassandra Pollock, *USPS warns Texas that some mail-in ballots may be delayed in November*, TEXAS TRIBUNE, Aug. 14, 2020, available at <https://www.texastribune.org/2020/08/14/texas-mail-in-ballots-usps/>.

<sup>10</sup> Brian Chasnoff, *San Antonio Postal Service sorting machines ‘thrown in the trash’*, SAN ANTONIO EXPRESS-NEWS, Aug. 17, 2020, available at <https://www.expressnews.com/news/local/politics/article/San-Antonio-Postal-Service-sorting-machines-15490051.php>.

If, as some reports indicate, that disenfranchisement is part of a deliberate and knowing effort to influence the outcome of the coming November general election, it is my opinion that such actions amount to a crime—one that is within our shared jurisdiction to investigate and prosecute. I trust that you share my view that it is not only illegal, but unacceptable that eligible Texas voters who seek to exercise their right to vote by mail, and who comply with the state law requirements to do so, may nonetheless be disenfranchised.

Because violations of the Texas Election Code are criminal and could result in the disenfranchisement of hundreds - if not thousands - of Texas voters within the lawful jurisdiction of my Office, I am seeking an opinion from the Attorney General as the highest law enforcement officer in this state. Accordingly, I will await your decision on the merits of this critical matter in order to help define the scope of my authority to prosecute those who would attempt to unlawfully deny one of our most sacred rights.

Thank you for your opinion on this critical matter.

  
Joe D. Gonzales,  
Criminal District Attorney  
Bexar County, Texas