No. 22-0008

In the Supreme Court of Texas

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS; JOHN SCOTT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF TEXAS; THE STATE OF TEXAS,
Appellants,

v.

MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES; ROLAND GUTIERREZ; SARAH ECKHARDT; RUBEN CORTEZ, JR.; TEJANO DEMOCRATS,
Appellees.

On Direct Appeal
from the Special Three-Judge District Court for the 126th
and 250th Judicial District Courts, Travis County

REPLY BRIEF FOR APPELLANTS

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Last year, Texas faced a dilemma: the 2022 election was just months away, and Texas's election maps were noncompliant with federal law due to the U.S. Census Bureau's unprecedented delay in releasing 2020 census data. To remedy the situation, the Legislature reapportioned the State's electoral maps at the first opportunity—the State's third called session in 2021. Seeking partisan advantage, two state Senators, one candidate for the Texas House, and two interest groups now seek an order either requiring the State to use illegal maps or to redraw them entirely before the 2022 election.

Three jurisdictional obstacles block Plaintiffs' path. At the outset, this Court has already held that it would be judicial overreach to halt implementation of the current maps during the current election cycle. As a result, Plaintiffs ask this Court to issue an advisory opinion to guide the Legislature when it again redistricts (as it must, regardless of any court action) during the 2023 regular session. Yet it is well established that Texas courts lack jurisdiction to issue such precatory, non-binding decisions. Even if the Court were inclined to overlook that limit on its own power, Plaintiffs lack standing to maintain a claim that the Legislature violated Article III, section 28 of the Texas Constitution when it redistricted during a special session or Article III, section 26 when it apportioned the House districts in Cameron County. And sovereign immunity independently bars Plaintiffs' attempt to assert these nonviable claims against the Governor, Secretary of State, and the State of Texas.

Plaintiffs cannot clear those hurdles. *First*, Plaintiffs suggest they are not seeking an advisory opinion because the Legislature might not comply with its acknowledged

obligation to redistrict in 2023—so *maybe* the current maps could be used again. But government actors are presumed to comply with their legal obligations. Any argument that the Legislature may not do so is speculative.

Second, Plaintiffs fare no better in establishing standing. Senator Roland Gutierrez complains that he must seek re-election in 2022 when waiting until 2023 to reapportion would have secured his seat until 2024. Yet Senator Gutierrez has a traceability problem: federal law required reapportionment (by legislation or litigation) before the 2022 election. And it is *the Texas Constitution* that requires him to run for re-election after "every apportionment"—not any unlawful conduct by the State Defendants. Candidate Ruben Cortez argues that he has standing because H.D. 37 has a larger geographic area following reapportionment, which he now contends will increase his costs in campaigning for election to that House seat. But there is nothing in his petition or in the record to suggest that Cortez will face increased costs; at most, he asserts that he will need to reallocate funds that he would have already spent, which is not a cognizable injury.

MALC argues that it has associational standing because one of its members, Representative Alex Dominguez, no longer resides within H.D. 37 under the new House map, thus rendering him ineligible to run for reelection to that seat. But Representative Dominguez is seeking election to the Texas *Senate*. He is hardly injured by an inability to run for a seat he does not seek. And even if he were, vindicating such an injury is not germane to MALC's stated interest in "maintaining and expanding Latino representation," because the new map does nothing to impede

Latinos' ability to elect the candidate of their choice in H.D.37, which retains a supermajority of Latino voters.

Finally, Plaintiffs cannot overcome the State Defendants' sovereign immunity. The Governor and Secretary of State are not proper defendants in an action under the Uniform Declaratory Judgements Act ("UDJA"). And even if they were, the UDJA does not waive immunity for nonviable claims like the ones Plaintiffs advance.

ARGUMENT

I. Plaintiffs Seek an Advisory Opinion that Texas Courts Lack Jurisdiction To Issue.

Plaintiffs' briefs confirm that their lawsuit seeks an advisory opinion. They concede that their requests for injunctive relief to enjoin implementation of H.B. 1 and S.B. 4 for the 2022 election are foreclosed by *In re Khanoyan*, 637 S.W.3d 762 (Tex. 2022). Gutierrez Br. 4-6; MALC Br. 5-7. And all "parties agree that the Legislature has a constitutional responsibility to redistrict in" the next "regular session." MALC Br. 7. Because the current maps will be used only in the 2022 election, Plaintiffs ask this Court to "decide[] an abstract question of law" about the constitutionality of maps that must be revisited during the 2023 regular session. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). "Texas courts, like federal courts, have no jurisdiction to render such opinions." *Id.* Plaintiffs resist this conclusion in three ways, but none has merit.

First, the Gutierrez Plaintiffs maintain (at 5) that they are not seeking an advisory opinion because "[t]he trial court retains jurisdiction to declare the maps unconstitutional and then consider the propriety of permanent injunctive relief"—all

"before the 2022 general election." This argument blithely ignores that the only map Plaintiffs have identified that would satisfy both them and federal law alters the borders of 68 districts encompassing 78 counties as far west as El Paso and as far North as Tarrant and Kaufman. 4RR.435-65. Even in the "early stages" of the election cycle, this Court refused to require redrawing maps in a single county because it "could prevent the election from going forward on time and . . . insert a great deal of confusion into this election cycle." *Khanoyan*, 637 S.W.3d at 766. The Court instead adhered to the well-established principle of "declin[ing] to implement even 'seemingly innocuous' alterations to election laws on the eve of an election, let alone after one has begun." *Id.* at 765 (quoting *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring)). Plaintiffs' demand would disturb the maps in 30% of the counties in Texas *between* the primaries and the general election, raising the prospect of "disruption, delay, and confusion" that is orders of magnitude worse than that held intolerable in *Khanoyan*. *Id.* at 769.

Second, though MALC recognizes that *Khanoyan* precludes injunctive relief, it maintains (at 5-6) that the trial court could still enter a declaratory judgment that H.B. 1 and S.B. 4 are unconstitutional. But the UDJA is "merely a procedural device for deciding cases already within a court's jurisdiction rather than a legislative enlargement of a court's power, permitting the rendition of advisory opinions." *Tex. Bus. Ass'n*, 852 S.W.2d at 444. And MALC does not claim that any declaratory judgment could permissibly "affect th[e] election and the larger structure of our state's election machinery" for the 2022 election that is already "ongoing." *Khanoyan*, 637 S.W.3d at 764. Instead, MALC says (at 7) that a declaratory judgment would serve

the purpose of "guid[ing] the legislature in adopting new, constitutional boundaries [for Cameron County] during its next regular session." Such a precatory, non-binding pronouncement would be precisely the type of advisory opinion that Texas courts lack jurisdiction to issue. *Tex. Bus. Ass'n*, 852 S.W.2d at 444.

Third, Plaintiffs insist there is still a live controversy because it is "speculative" whether the Legislature will redistrict during the 2023 regular session—so *maybe* the current maps will be used in "future election[s]." Gutierrez Br. 6; MALC Br. 6-7. But it is a long-established principle of both state and federal law that "[t]he members of the legislature are sworn to support the constitution, and the courts will not presume they have intended to violate it." *Pickle v. Finley*, 44 S.W. 480, 487 (Tex. 1898); *see also, e.g.*, *Yarls v. Bunton*, 905 F.3d 905, 910-11 (5th Cir. 2018) (reiterating that "[g]overnment officials . . . in the exercise of their official duties are accorded a presumption of good faith"). Plaintiffs have offered nothing but speculation to overcome that presumption.

To show that the Legislature *may* not adopt new maps, MALC notes that the Legislative Redistricting Board ultimately drew the maps in the 2000, 1980, and 1970 cycles. MALC Br. 7 (citing Texas Legislative Council, *Redistricting History*, https://redistricting.capitol.texas.gov/history (last accessed Mar. 17, 2022)). Leaving aside that "predictions about the probable course of the legislative process are notoriously unreliable," *Perry v. Del Rio*, 66 S.W.3d 239, 255 (Tex. 2001), that highlights just how speculative MALC's position truly is: it shows that not one but *two* government bodies—the Legislature and the LRB—would have to shirk their constitutional obligations for these maps to apply in 2024. "[C]ourts should not

encourage parties to predict, much less prove the improbability of, [such] inaction on the important matter of redistricting." *Id.* If Plaintiffs wish to challenge hypothetical maps that will be used in a future election, they must wait until such a claim is ripe, which occurs "at the end of the regular session, but not before." *Id.*

II. Plaintiffs Lack Standing.

Even if the order Plaintiffs request could affect the administration of a future election cycle, Plaintiffs lack standing to seek it. Plaintiffs concede that Senator Eckhardt or the Tejano Democrats lack standing by failing to respond to the State Defendants' brief. Their attempt to demonstrate Senator Gutierrez, Candidate Cortez, or MALC's standing is without merit.

A. Senator Gutierrez lacks standing.

Senator Gutierrez, who lives in Bexar County, Gutierrez.CR.5, has no plausible injury from any alleged violation of Article III, section 26 as to Cameron County's House Districts. And any injury arising from the Legislature's alleged violation of Article III, section 28 of the Texas Legislature by redistricting during a special session, is not fairly traceable to or redressable by the named defendants. Appellants' Br. 26-28.

Senator Guiterrez insists (at 7) that he is injured because the 2021 reapportionment "forc[es] him to stand for re-election in 2022," instead of 2024, "which will require his time, emotional and professional exertions, as well as the significant expense associated with such a campaign." Assuming counsel's vague assertions about "emotional and professional exertions" demonstrate a cognizable injury, *but see*,

TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021), it is not "fairly traceable" to the Legislature's adoption of new electoral maps. Instead, it is attributable to the Texas Constitution's requirement that Senators must stand for re-election "after every apportionment." Tex. Const. art. III, § 3.

Senator Gutierrez responds (at 8) that had "the challenged maps . . . not been adopted," he "would not have to endure a 2022 campaign for reelection" because the Legislature would not have redistricted until 2023. But that argument depends upon the dubious proposition that Texas could have carried out the 2022 elections using malapportioned maps in violation of the federal Constitution's requirement to "design both congressional and state-legislative districts with equal populations," and "regularly reapportion districts to prevent malapportionment." *Evenwel v. Abbott*, 578 U.S. 54, 59 (2016). Senator Gutierrez *himself* sought to ensure that would not happen when he filed a lawsuit in September 2021 alleging that Texas's maps were malapportioned and asking a federal court to re-draw the maps for the upcoming 2022 election. *See Gutierrez v. Abbott*, No. 1:21-CV-00769 (W.D. Tex. Sept. 1, 2021), ECF 1.

Senator Gutierrez does not seem to dispute that a court-ordered reapportionment would ordinarily trigger his obligation to run in 2022—and thus the same injury he asserts establishes his standing. Senator Gutierrez nonetheless argues (at 9) that the federal court may have refused to re-draw Texas's maps even if the Legislature had not reapportioned them in 2021. If the court stayed its hand despite what Senator Gutierrez insisted (and the Texas Legislature agreed) was a violation of federal law, he reasons, there would be no reapportionment and, therefore, Article III, section

3's requirement that Senators stand for reelection after apportionment would not have been triggered. This convoluted "speculation about the decisions of independent actors" cannot supply Senator Gutierrez with standing because it depends upon a "tenuous" and counterfactual "chain of causation." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2565-66 (2019).

Nor does *Watkins v. Mabus*, 771 F. Supp. 789 (S.D. Miss. 1991) (per curiam) prove that a federal court would have permitted the 2022 election to proceed under malapportioned maps if the Legislature had not reapportioned the maps during the special session. In *Watkins*, the three-judge district court refused to re-draw malapportioned maps one month before a primary election and three months before the general election. *Id.* at 791. Given that tight timeframe and the "range of untenable options" presented to the court by the parties, it "conclude[d] that conducting elections under the existing plan is the lesser of the available evils." *Id.* at 807. No similar circumstances are present here precisely *because* the Legislature redrew the maps without need for intervention from the judiciary.

As a last-ditch effort, Senator Gutierrez hypothesizes (at 9-10) that the federal court *may* have re-drawn the maps to cure one-person-one-vote violations but specifically "limit[] new elections [of Senators] to only the affected districts." Because the scope of a federal injunction "must be determined with reference to the constitutional violations established," it is questionable whether a federal court *could* disregard an independent state law where not necessary to cure the maps malapportionment. *Brown v. Plata*, 563 U.S. 493, 531 (2011). And it is entirely speculative that it *would* have done so: the text of Article III, section 3 certainly does not suggest that a

piecemeal procedure would appropriate. And to the extent that such a haphazard approach was followed in *Thomas v. Bush*, No. 1:95-cv-00186-SS (W.D. Tex. Sept. 15, 1995), ECF 105, it would appear to violate Article III, section 3, which requires "a new Senate [to] be chosen after *every apportionment*" and makes no distinction between court-ordered maps and legislatively drawn ones. That a federal court might do so again is speculative and cannot supply Plaintiffs with standing. *Dep't of Com.*, 139 S. Ct. at 2565.

B. Candidate Cortez lacks standing to maintain the county-line claim.

Ruben Cortez, a candidate for H.D. 37, lacks standing to maintain the county-line claim,[1] since nothing in the petition or evidentiary record indicates that he has sustained a concrete, particularized injury fairly traceable to H.B. 1 that is redressable by the courts. Appellants' Br. 23-26. Cortez's argument for standing hinges on the theory that H.D. 37 now contains "a much larger geographic territory consisting of a greater portion of Cameron County" than some unspecified plan "and also a large adjacent county—Willacy," and that this will "plainly entail a significantly greater expenditure of Cortez's time and money" due to "frequent travel" to Willacy County. Gutierrez Br. 11-12. But under Cortez's theory, H.D. 37 should have included an even *bigger* portion of Cameron County, and nothing in the petition or the evidentiary record demonstrates how replacing some portion of Cameron County with Willacy County affects the cost of running a campaign. Indeed, Cortez

[1] Cortez does not argue that he has standing to bring a claim under Article III, section 28.

admitted that an order "enjoin[ing] the map and mov[ing] the primary date" would not "affect [his] candidacy in any way." 2.RR.161.

Cortez did testify that the fact that H.D. 37 now lies across two counties means that he will have to "travel," "send mail," and "send staff" to Willacy County. 2.RR.160. But intrastate mail costs the same regardless of its destination, and costs associated with staff and candidate time are expenses that all candidates for elected office must incur. *Cf. Zimmerman v. City of Austin*, 881 F.3d 378, 391 (5th Cir. 2018) (no injury-in-fact based upon conduct that is "a standard campaign practice"). Moreover, there is nothing in the record to suggest that the reapportioned district will cause Cortez to expend *more* resources—as opposed to reallocating existing ones. To the contrary, Cortez concedes that resources devoted to campaigning in Willacy County will merely be reallocated from those that would have been spent in parts of Cameron County that are no longer in H.D. 37 under the current plan, stating (at 12) that "money that should have been devoted exclusively to voters wholly within Cameron County" will now go to campaigning in Willacy County. This admission is fatal: a plaintiff cannot establish standing based on expending resources that would have already been spent absent the alleged constitutional harm. *See NAACP v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010) ("Not every diversion of resources to counteract the defendants' conduct . . . establishes an injury in fact.").

Cortez's attempt (at 12) to establish standing to assert the county-line claim "as a Cameron County resident and voter" also fails. He argues (at 12) that "[t]he new maps dilute [his] vote . . . compared to voters in other counties that have the correct number of House districts contained within their boundaries." But Cameron County

voters, without any help from other counties' voters, can easily elect the candidate of their choice in two out of three House districts that lie within the County—representing 100% of the citizen voting age population ("CVAP") in H.D. 38 and 89.1% of the CVAP in H.D. 37. Appellants' Br. 32.[2] As Plaintiffs concede that they cannot legally control the third, they cannot establish any vote-dilution injury.

Cortez also argues (at 12-13) that the Court should hold that he has standing because it permitted members of the Legislature to maintain a county-line claim in *Clements v. Valles*, 620 S.W.2d 112 (Tex. 1981), and *Smith v. Craddick*, 471 S.W.2d 375 (Tex. 1971). But neither case addressed any issue of standing. And where standing was "assumed by the parties, and was assumed without discussion by the Court," such "drive-by jurisdictional rulings . . . have no precedential effect." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). These cases, therefore, offer Cortez no basis upon which to establish standing.

C. MALC failed to establish associational standing.

To establish associational standing, MALC was required to demonstrate that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires participation of individual members in the lawsuit." *Tex. Ass'n of Bus.*, 852 S.W.2d at 447 (quoting *Hunt v.*

[2] Whether a *subset* of Cameron County voters can elect their candidate of choice is a different question that would only be addressed through a different claim—*e.g.*, a claim under section 2 of the Voting Rights Acts. But Plaintiffs have not brought such a claim.

Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977)). Nothing in MALC's petition or the evidence at the temporary-injunction hearing established that MALC has members with standing sufficient to maintain the county-line claim. Appellants' Br. 29-33. And MALC's pursuit of the county-line claim is not germane to the stated purposes of the organization. *Id.* at 33-34. MALC's brief does nothing to cure these faults.

1. To begin, MALC failed "to make specific allegations establishing that at least one identified member [of its organization] had suffered or would suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009); Appellants' Br. 29-31. MALC concedes (at 8) that it has not named any member of its organization so injured but says that it "clearly identified that the individual House Representatives representing Cameron County, who would have individual standing, are MALC members." It further argues (at 9) that "by virtue of identifying the districts that each of the affected MALC members represent, MALC has clearly identified which of its members 'suffered the requisite harm.'" MALC is required to "name *the individuals* who were harmed by the challenged" conduct. *Summers*, 555 U.S. at 498 (emphasis added). This "requirement of naming the affected members has never been dispensed with" except "where *all* members of the organization are affected by the challenged activity," *id.* at 498-99—a standard that MALC does not even try to meet.

MALC attempts to shore up its pleading deficiency by pointing (at 9-10) to Representative Dominguez, who it says "has already testified and presented evidence . . . that he is, indeed, directly injured as a result of HB 1." But MALC fails to grapple

with the State Defendants' argument that Representative Dominguez's testimony also fails to establish a legally cognizable injury. Appellants' Br. 30-31. Representative Dominguez's asserted injury is that H.B. 1 "draws [his] residence out of HD 37 making [him] no longer eligible to run for office to represent the district." MALC.CR.58. But Representative Dominguez is not running for reelection to the House of Representatives; he is running for election to the Senate. MALC.CR.254-65. The county-line rule does not apply to the apportionment of the Texas Senate, and Representative Dominguez cannot maintain a claim based upon an inability to run for a seat that he is not seeking. Appellants' Br. at 31.

Representative Eddie Lopez, III, the incumbent in H.D. 38 and MALC's only other member who resides in Cameron County, is not running for *any* office this cycle. 4.RR.570. Moreover, far from asserting an injury from combining Willacy and Cameron Counties in a single district, he expressly urged the House to adopt just such a plan on October 4, 2021. *Compare* 4.RR.691 (endorsing H2150), *with* 4.RR.427 (reflecting combined Willacy-Cameron district in H2150). MALC cannot rely on him to establish standing either.

2. Even if MALC had identified a member of its organization with standing, nothing in the record substantiates MALC's theory that the alleged county-line rule violation has caused MALC "members' ability to consistently win election, or, as voters in the region, to elect candidates from Cameron County, [to] be diminished by bringing new populations into the districts." MALC.CR.415; *see* Appellants' Br. 31-33. To the contrary, the undisputed evidence shows that Cameron County voters fully control two out of the three House districts lying within the county, and MALC

concedes there is no way for Cameron County to control all three consistent with the federal constitution. Appellants' Br. 32-33.

MALC responds (at 12) that this "numerical vote dilution analysis . . . is entirely inappropriate for determining whether an irreparable constitutional injury exists." But that is precisely how vote-dilution claims are litigated. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 438 (2006) (finding that Latinos were "two districts shy of proportional representation" because they controlled five of 32 congressional districts, "amount[ing] to roughly 16% of the total, while Latinos make up 22% of Texas citizen voting-age population"); *Johnson v. De Grandy*, 512 U.S. 997, 1014 (1994) (finding no vote dilution in part because "Hispanics constitute 50 percent of the voting-age population in Dade County and under SJR2-G would make up supermajorities in 9 of the 18 House districts"). As the Supreme Court has held, proportionality "is a relevant fact in the totality of circumstances to be analyzed" when assessing a vote-dilution claim. *De Grandy*, 512 U.S. at 1000.

MALC therefore retreats to an argument (at 10) that the State Defendants misconstrue the "true" nature of its injury, which it describes as Cameron County voters being deprived of their "constitutional right . . . to two undivided, whole state representatives." MALC Br. 11. But this argument assumes that (1) the county-line rule protects an individual right that (2) survives in its pre-one-person-one-vote form—propositions for which MALC conspicuously cites no authority. Moreover, it wrongly merges standing and the merits. "[S]tanding, and the concrete injury it requires, is quite distinct from the merits of a claim and the injury required to prove

it." *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 305 (Tex. 2008); *accord TransUnion*, 141 S. Ct. at 2205 ("[A]n injury in law is not an injury in fact.").

MALC further suggests (at 13) that abridgment of this purported right causes a concrete, particularized injury because a representative whose district lies in two counties will have his or her "attention" "diffuse[d]," and this may lead that representative to neglect the interests of constituents in a less-favored county. But this purported injury is "'conjectural or hypothetical' in that it depends on how legislators respond" to imagined conflicts that have not come to pass. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006). That is fatal because "courts must not decide hypothetical claims." *Inman*, 252 S.W.3d at 304.

3. Finally, MALC fails to establish that its pursuit of the county-line claim is "germane" to the organization's interests. Appellants' Br. 33-34. MALC's stated purpose is "maintaining and expanding Latino representation across elected offices in Texas." MALC.CR.407. But by MALC's own admission (at 12), the county-line claim aims to remedy the purported "representational dilution" injury shared by "Cameron [County] residents" without regard to race or ethnicity. Further, this "representational dilution" injury does not "relate to the interest by which its members would have standing to sue in their own right"—here, Representative Dominguez's residence in one predominantly Hispanic district as opposed to another. *Save Our Springs All., Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 886 (Tex. App.—Austin 2010, pet. denied).

MALC nevertheless insists (at 14) that the county-line claim seeks to address a "reduc[tion] [of] the percentage of Latino population in HD 3[8] and HD 37," that

allegedly "makes it less likely that the candidate of choice for the majority of Latino voters in those districts will be elected." This argument cannot be squared with the undisputed fact that Latinos retain *supermajorities* in every district at issue under H.B. 1: H.D. 35 has a Hispanic Citizen Voting Age Population ("HCVAP") of 93.7%, H.D. 37 has a HCVAP of 77.8%, and H.D. 38 has a HCVAP of 91.5%. MALC.CR.193. Accordingly, so long as Latinos in these districts are "politically cohesive"—as they must be to advance a vote-dilution claim, *Thornburg v. Gingles*, 478 U.S. 30, 48, 49 (1986)—H.B. 1 cannot render Latinos unable to "elect candidates of their choice" in H.D. 35, 37, or 38.

MALC also argues (at 15) that it has satisfied the "germaneness" requirement because its members "take a constitutional oath to uphold the Texas Constitution" and are "dedicated, in their capacity as members, to opposing unconstitutional legislation through all means necessary." But "an asserted right to have the Government act in accordance with law is not sufficient" to confer standing. *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 7 n.12 (Tex. 2011) (quoting *Allen v. Wright*, 468 U.S. 737, 754 (1984)). MALC members' status as legislators does not change that analysis. *See In re Hotze*, 627 S.W.3d 642, 648 (Tex. 2020) (rejecting legislative standing). Thus, this interest in compliance with the Constitution does not "relate to the interest by which [MALC's] members would 'have standing to sue in their own right'" and cannot provide a basis for satisfying the "germaneness" requirement. *Save Our Springs All.*, 304 S.W.3d at 886.

III. The UDJA does not waive the State Defendants' sovereign immunity for these nonviable claims.

Even if Plaintiffs could demonstrate standing, sovereign immunity separately bars their attempt to invalidate H.B. 1 and S.B. 4. Plaintiffs do not try to satisfy the *ultra vires* exception to sovereign immunity, nor could they. Appellants' Br. 37-40. Instead, Plaintiffs argue that they can fit within the UDJA's sovereign-immunity waiver, Tex. Civ. Prac. & Rem. Code § 37.006(b), because they have pleaded viable claims that H.B. 1 and S.B. violate the Texas Constitution. Gutierrez Br. 13-38; MALC Br. 15-23. But the Governor and Secretary of State are not proper defendants in a UDJA action like this one. Regardless, neither of Plaintiffs' claims is viable.

A. The Governor and Secretary of State are not proper defendants under the UDJA.

Plaintiffs' claims against the Governor and Secretary of State fail at the outset because Governor Abbott and Secretary Scott are not "governmental entities" against whom the UDJA's sovereign-immunity waiver applies. This Court held in *Patel v. TDLR*, 469 S.W.3d 69 (Tex. 2015), that "for claims challenging the validity of . . . statutes . . . the Declaratory Judgment Act requires that *the relevant governmental entities be made parties*, and thereby waives immunity." *Id.* at 76 (quoting *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 466 (Tex. 1994)) (emphasis added). The Court rejected the argument that a government official would be a proper defendant in an action challenging the constitutionality of a state statute because such a proposition would be at odds with the nature of the *ultra vires* exception to sovereign immunity, which is based on the premise "that the State is not responsible for unlawful acts of officials." *Id.* Accordingly, to challenge the constitutionality of H.B. 1 and

S.B. 4 via the UDJA's sovereign immunity-waiver, Plaintiffs were required to sue the Office of the Governor and the Office of the Secretary of State, not Governor Abbott and Secretary Scott.

MALC argues (at 16) that "suing the Texas Governor and Texas Secretary of State in their official capacity is the same as suing the government entities that are the Governor and Secretary of State." An entity, however, is "[a]n organization . . . that has a legal identity apart from its members." Black's Law Dictionary 673 (11th ed. 2019). Though a government official might be colloquially described as an institution, that does not make him an entity.

MALC further asserts (at 16) that because an official-capacity suit is effectively a suit against the office, there can be no distinction between a governmental official and his or her governmental entity "where the governmental entity at issue is an individual office." But the first proposition is true for *all* government officials sued in their official capacities. *E.g.*, *Heckman v. Williamson County*, 369 S.W.3d 137, 148 (Tex. 2012). Both that concept and the conclusion that MALC seeks to draw from it fail to account for *Patel*'s distinction between government officials who may be subject to suit under the *ultra vires* doctrine and governmental entities that may be subject to suit via the UDJA's sovereign-immunity waiver. *Patel*, 469 S.W.3d at 76-77. Because this lawsuit suit challenges the constitutionality of the H.B. 1 and S.B. 4 themselves, not any government official's failure to properly implement them, only the latter is at issue.

MALC's final argument (at 17) is that drawing a distinction between governmental officers and governmental entities would make little sense in this context

because it is the individual officer himself who "bear[s] the statutory responsibilities associated with ordering and conducting elections, not their office staff." This argument again overlooks the distinction between the allegation that an official "act[ed] inconsistently with a constitutional statute" (an *ultra vires* action) and the allegation that an official "act[ed] consistently with an unconstitutional one" (a UDJA action). *Patel*, 496 S.W.3d at 76. To use MALC's example (at 17), while it may be proper to sue the Governor himself for failure to "order . . . each general election for officers of the state government" as required by Texas Election Code § 3.003(a)(1), under *Patel* only the Office of the Governor could be a proper defendant in an action challenging the constitutionality of that statute. Plaintiffs cannot, however, state the same claims against the Office of the Governor or Office of the Secretary of State because they are not viable. *Klumb v. Hous. Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015).

B. Article III, section 28 does not forbid the Legislature to redistrict during a special session.

Plaintiffs' theory that Article III, section 28 of the Texas Constitution forbids the Legislature to redistrict during a special session defies text, precedent, and logic. section 28 provides that "[t]he Legislature shall, at its first regular session after the publication of each United States decennial census, apportion the state into senatorial and representative districts." Tex. Const. art III, § 28. That language does not forbid the Legislature from redistricting at a different time necessitated by the timing of census data. This Court's precedent confirms as much. *Terrazas v. Ramirez*, 829 S.W.2d 712, 726 (Tex. 1991) (orig. proceeding). And the Legislature has often

undertaken redistricting during a special session. Appellants' Br. 43 (collecting examples). Accepting the Gutierrez Plaintiffs' position would mean that the 87th Legislature was required to put off the process of redistricting and that the State must either hold an election with maps that violate federal law or funnel the redistricting process into the courts for judicial resolution. Appellants' Br. 43-44. Nothing in the Constitution or this Court's precedent compels such an illogical result. The Gutierrez Plaintiffs make five arguments in response; none has merit.

First, they argue (at 16) that the State Defendants' interpretation of section 28 reads out the word "regular," which modifies "session." But the State Defendants do not dispute that the Legislature is obliged to redistrict during the "first regular session" after the census—here the 2023 regular session. Unlike Congress, which has specific enumerated powers, "the enumeration in the Constitution of what the Legislature may or shall do" is generally not "regarded as a limitation on the general power of the Legislature to pass laws." *Mumme v. Marrs*, 40 S.W.2d 31, 33 (Tex. 1931). Instead, because Texas has the police power that the federal government lacks, "an act of a state legislature is legal when the Constitution contains no prohibition against it." *Shepherd v. San Jacinto Junior Coll. Dist.*, 363 S.W.2d 742, 743 (Tex. 1962). And nothing about a requirement to redistrict in a "regular session" precludes reapportionment at another time—particularly when required by federal law.

Second, the Gutierrez Plaintiffs assert (at 16-19) that this Court's decisions in *Terrazas* and *Mauzy v. Legislative Redistricting Board*, 471 S.W.2d 570 (Tex. 1971) (orig. proceeding), establish a "specific schedule for apportionment," which

prohibits the Legislature from undertaking redistricting any time before 2023. Not so. *Mauzy* held that the Legislature could begin the redistricting process even if the census data is published while a regular session is ongoing. 471 S.W.2d at 573. And *Terrazas* held that the Legislature could redistrict in regular or special sessions that take place after the first regular session following publication of the census. 829 S.W.2d at 726. Far from narrowing the Legislature's reapportionment authority, as the Gutierrez Plaintiffs' suggest, *Mauzy* and *Terrazas* confirm its breadth.

Third, the Gutierrez Plaintiffs argue (at 21-26) that this Court's decision in *Walker v. Baker*, 196 S.W.2d 324 (Tex. 1946) (orig. proceeding), establishes that the Legislature may not redistrict at any time between publication of the census and the first regular session following that publication. Invoking the "rule of implied exclusion," the Gutierrez Plaintiffs argue (at 23-25) that section 28's requirement that the Legislature redistrict during the "first regular session" after publication of the census impliedly prohibits it from redistricting before that first regular session.

The Gutierrez Plaintiffs misread *Walker*, which expressly confirmed that "all legislative power—the power to make, alter, and repeal laws—not expressly or impliedly forbidden by other provisions of the State and Federal Constitutions" is vested in the Legislature. 196 S.W.2d at 328. That principle, however, only "applies to legislative power to be exercised by the Legislature," *id.*, in part because the Texas Constitution contains an express separation-of-powers limitation, Tex. Const. art. II, § 1. *Walker* applied the principle of implied exclusion because the case involved "an *executive* function expressly delegated to the Senate." *Walker*, 196 S.W.2d at 328 (emphasis added). To contain that legislative exercise of an

executive function within its proper bounds, the Court held that the Senate could only pass on the Governor's recess appointments during the first thirty days of the regular session. *Id.* at 327-28.

Walker is inapplicable here because "redistricting is typically a legislative function," *Perry*, 67 S.W.3d at 93, not a "non-legislative power," *Walker*, 196 S.W.2d at 328. Thus, unlike in *Walker*, the principle that all legislative power not forbidden is permitted is fully applicable here. *Id.*; *see also Shepherd*, 363 S.W.2d at 743.

Fourth, the Gutierrez Plaintiffs contend (at 26-28) that "historical practice" forecloses the State Defendants' arguments since "the Legislature has *never* first reapportioned state legislative districts in a special session." But historical practice is of little interpretive value because—as Plaintiffs admit (at 1)—the federal government has never failed to timely deliver the census data since the adoption of section 28 in 1947. *See* Michael Macagnone, *Census Bureau defends delays in delivery before Senate panel*, ROLL CALL (Mar. 23, 2021), https://tinyurl.com/2m4njw9b (last accessed Mar. 17, 2022). It is therefore unremarkable that "2021 is the first time the Legislature has ever attempted to" redistrict in a special session taking place between publication of the census data and the first regular session following that publication. Gutierrez Br. 28. Past Legislatures had little cause to consider a question that never arose. That distinguishes this *sui generis* situation from *Walker*, where the Governor had made recess appointments for nearly a century before the Senate thought that it could convene itself in a special session to reject or confirm them. *Walker*, 196 S.W.2d at 327. And it distinguishes *Carrollton-Farmers Branch Independent School District v. Edgewood Independent School District*, 826 S.W.2d 489 (Tex.

1992), where the Legislature went eight decades before discovering a putative power to impose local ad valorem taxes without voter approval. *Id.* at 506.

Finally, the Gutierrez Plaintiffs double down (at 28-31) on their argument that the State Defendants' interpretation of section 28 would "lead to absurd results." Pointing to the Constitution's requirement that "[a] new Senate shall be chosen after every appointment," Tex. Const. art. III, § 3, Plaintiffs argue (at 30) that "the Legislature could perpetually frustrate the Constitution's text regarding [four-year] senatorial terms by minimally altering legislative districts," if the State Defendants' interpretation of section 28 were to prevail.

As an initial matter, nothing about the redistricting process "frustrate[s]" the Constitution's provisions regarding Senators' terms of office. The Constitution expressly qualifies Senators' four-year terms by providing that a new Senate will be chosen following reapportionment. Accordingly, any candidate for Senate knows there is the possibility that he may not serve a full four-year term. Regardless, there is no factual basis for the Gutierrez Plaintiffs' far-fetched concern that the Legislature will voluntarily engage in serial redistricting—which is always a resource-intensive, politically fraught, and litigation-prone process—just to cut short senatorial terms. Here, the timing of redistricting was necessitated by the confluence of two events entirely outside the Legislature—and the State Defendants'—control: (a) the Census Bureau's delivery of the census data well after the 87th Legislature's regular session had concluded; and (b) the need to comply with the federal one-person-one-vote standard for the 2022 elections that would occur before the 88th Legislature's regular session in 2023. Nothing about the Legislature's response in this unique

situation portends legislative abuse of the reapportionment prerogative, and the Court should not allow the Gutierrez Plaintiffs' hypothetical concerns to defeat text, precedent, and logic.

C. H.B. 1 does not violate Article III, section 26's county-line rule.

The claim that H.B. 1 violates Article III, section 26's county-line rule is similarly nonviable and thus cannot overcome the State Defendants' sovereign immunity. Appellants' Br. 48-53. Section 26 instructs that "when any one county has more than sufficient population to be entitled to one or more Representatives," the Legislature shall apportion "such Representative or Representatives" to the county. Tex. Const. art. III, § 26. Regarding "any surplus of population," section 26 provides that "it may be joined in a Representative District with any other contiguous county or counties." *Id.*

No one disputes that section 26 is designed to ensure "local representation." Gutierrez Br. 11. The question is how. Texas law has long recognized in a variety of contexts that "[t]he use of the singular number includes the plural, and the plural the singular." *Snow v. State*, 6 Tex. App. 284 (Tex. App. 1879); *see also, e.g.*, *Lewis & Baker v. Stewart*, 62 Tex. 352, 355 (1884). Section 26's deliberate use of both the singular and plural forms of multiple words, including both "Representative" and "County" implies an amount of discretion in pursuing the goal of local representation so long as small counties remain intact, populous counties get at least one dedicated representative, and excess population is assigned to contiguous districts. H.B. 1 does all of that. Cameron County has "sufficient population to be entitled to one or more Representatives," and H.D. 38 is assigned entirely to Cameron County.

Appellants' Br. 48. Similarly, H.B. 1 joins the surplus population in Cameron County in "a Representative District with . . . other . . . counties"—H.D. 37, which lies partly in Willacy County and H.D. 35, which lies partly in Hidalgo County. Appellants' Br. 48-49.

Plaintiffs assert several objections, all premised on the assumption that the surplus population in Cameron County must be allocated to one district wholly contained in Cameron County and one partial district, not two partial districts. None has merit. For example, MALC (at 22) and the Gutierrez (at 36) complain that State Defendants ignore that "a" is singular or read the phrase "a Representative District" out of the last line of section 26. Not so. Depending on context, "a" can be plural. *See Ex parte R.P.G.P.*, 623 S.W.3d 313, 324 (Tex. 2021). More fundamentally, because the question is how to address surplus population, the relevant word is "any," which is often plural, *id.*, and means "one or some indiscriminately." *Any*, Websters Third International Dictionary 97 (2002). And because H.B. 1 puts "some" surplus "in a Representative District" with Willacy County and "some" surplus "in a Representative District" with Hidalgo County, H.B. 1 is fully compliant with section 26. This interpretation is further supported by section 26's use of the word "may," which "creates discretionary authority or grants permission or a power." Tex. Gov't Code § 311.016(1). The word "may" therefore vests the Legislature with *discretion* to manage "any surplus" in a manner it sees fit. Appellants' Br. 49.

MALC also argues (at 20) that the State Defendants overlook "the relationship between the phrases 'entitled' and 'such' and ignore[] the apportionment

'according to the number of population in each' language at the beginning of" section 26. Not so. The State Defendants acknowledge that a county, like Cameron County, that "has more than sufficient population to be entitled to one or more representatives," must have a representative "apportioned to such county." Tex. Const. art. III, § 26. But nothing requires that the Legislature *maximize* the number of seats wholly contained in the county. Indeed, the "disjunctive ph[r]asing"—the word "or" in "representative or representatives"—indicates that compliance can be achieved through" either "alternative means," of providing one or more representatives. *Davis v. Morath*,624 S.W.3d 215, 225 (Tex. 2021). And as discussed, the remaining "surplus" can be "joined in a Representative District with any other contiguous county or counties." Tex. Const. art. III, § 26. Thus, putting each provision together, so long as each county of sufficient population is provided at least one wholly contained House district, section 26 permits the Legislature to allocate any surplus population to multiple districts in contiguous counties.[3]

Plaintiffs pair their textual objections with an invocation of *Smith* and *Clements*. But as the State Defendants have explained (at 50), those cases invalidated election maps that engaged in "wholesale cutting of county lines" in more than thirty counties. Several counties cut by the maps in *Smith* and *Clements* did not have sufficient population to be entitled to at least one whole district and were therefore ineligible to be cut under the plain language of section 26. *Id.* (citing *Smith*, 471 S.W.2d at 378

[3] Under Plaintiffs' reading, by contrast, a simple error whereby 99.9% of a district is within a county with the remainder in an adjoining county would invalidate the district. Plaintiffs cite no authority for such a proposition.

and *Clements*, 620 S.W.2d at 114). And in *Smith*, one county was not even provided the one wholly contained district that it was entitled to. *Id.* (citing *Smith*, 471 S.W.2d at 378). The widespread, systematic violations of the county-line rule at issue in *Smith* and *Clements* stand in stark contrast to what is alleged.

Plaintiffs respond that "no rule of law forgives a constitutional violation simply because its transgression is confined." Gutierrez Br. 36; *see* MALC Br. 22. But it is well understood that redistricting requires the Legislature to balance competing values and comply with multiple interlocking laws: a State "that zealously seeks to comply with any of those laws . . . may inadvertently subject itself to liability under another of those laws." J. Gerald Hebert, *The Realist's Guide to Redistricting* 1 (2d ed. 2010). Thus, while in the abstract equal protection requires strict equality, in practice, the law of redistricting recognizes the vital role of good faith compliance. *E.g.*, *Karcher v. Daggett*, 462 U.S. 725, 730-31 (1983). And the so-called "ten-percent rule," *Hebert*, *supra* at 9-13, allows deviations from the constitutional demand of one-person-one-vote so long as those deviations are—in Plaintiffs' terms—"confined." Nothing in *Smith* or *Clements* suggests that the test for failure to comply with the county-line rule is more stringent than that of the Equal Protection Clause. Plaintiffs are thus wrong to focus myopically on this Court's statements in *Clements* about Nueces County rather than reading the statements in context of the larger opinion. *Clements*, 620 S.W.2d at 114; *see* Gutierrez Br. 37; MALC Br. 21.

Prayer

This Court should reverse the district court's denial of the State Defendants' pleas to the jurisdiction.

Respectfully submitted.

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