

No. 22-0008

IN THE SUPREME COURT
OF TEXAS

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

v.

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

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

APPELLEES' SUPPLEMENTAL BRIEF

Sean J. McCaffity
State Bar No. 24013122
Smccaffity@textrial.com
George 'Tex' Quesada
SOMMERMAN, MCCAFFITY, QUESADA
& GEISLER, LLP
3811 Turtle Creek Blvd., Suite 1400
Dallas, Texas 75219-4461

Wallace B. Jefferson
State Bar No. 00000019
wjjefferson@adjtlaw.com
Amy Warr
Nicholas B. Bacarisse
ALEXANDER DUBOSE & JEFFERSON LLP
515 Congress Avenue, Suite 2350
Austin, Texas 78701-3562
Telephone: (512) 482-9300
Facsimile: (512) 482-9303

Joaquin Gonzalez
TEXAS CIVIL RIGHTS PROJECT
1055 Sutton Drive
San Antonio, Texas 78228

**ATTORNEYS FOR MEXICAN
AMERICAN LEGISLATIVE CAUCUS,
TEXAS HOUSE OF REPRESENTATIVES**

Martin Golando
THE LAW OFFICE OF MARTIN GOLANDO,
PPLC
2326 W. Magnolia
San Antonio, Texas 78201

**ATTORNEYS FOR ROLAND GUTIERREZ,
SARAH ECKHARDT, RUBEN CORTEZ,
JR., AND TEJANO DEMOCRATS**

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF CONTENTS

Table of Contents	iii
Index of Authorities	iv
Argument.....	1
I. The State is a proper defendant.	2
A. Plaintiffs' injuries are traceable to the State.	3
B. Plaintiffs' injuries are redressable by a declaratory judgment directed to the State.	10
II. If Plaintiffs sued the wrong defendant, they should be allowed to replead.....	15
Prayer	17
Certificate of Service	18
Certificate of Compliance	19

RETRIEVED FROM DEMOCRACYDOCKET.COM

INDEX OF AUTHORITIES

	Page(s)
Cases	
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997).....	2
<i>City of El Paso v. Heinrich</i> , 284 S.W.3d 366 (Tex. 2009)	5, 6, 7, 15
<i>City of Laredo v. Laredo Merchants Ass’n</i> , 550 S.W.3d 586 (Tex. 2018)	5
<i>City of New Braunfels v. Stop The Ordinances Please</i> , No. 03-12-00528-CV, 2013 WL 692446 (Tex. App.—Austin Feb. 21, 2013, no pet.)	16
<i>Clayton v. Chertoff</i> , No. C-07-2781-CW, 2007 WL 2904049 (N.D. Cal. Oct. 1, 2007)	9
<i>Computerware, Inc. v. Knotts</i> , 626 F. Supp. 956 (E.D.N.C. 1986)	9
<i>Consumer Data Indus. Ass’n v. King</i> , 678 F.3d 898 (10th Cir. 2012)	3
<i>Data Foundry, Inc. v. City of Austin</i> , 620 S.W.3d 692 (Tex. 2021)	2, 3
<i>Ex parte Doan</i> , 369 S.W.3d 205 (Tex. Crim. App. 2012)	13
<i>Duke Power Co. v. Carolina Env’t Study Grp., Inc.</i> , 438 U.S. 59 (1978).....	2
<i>Federal Sign v. Texas S. Univ.</i> , 951 S.W.2d 401 (Tex. 1997)	6
<i>Hall v. McRaven</i> , 508 S.W.3d 232 (Tex. 2017)	7, 8

<i>Hassan v. City of New York</i> , 804 F.3d 277 (3d Cir. 2015)	2
<i>Heckman v. Williamson Cnty.</i> , 369 S.W.3d 137 (Tex. 2012)	3
<i>Howell v. Texas Workers' Comp. Comm'n</i> , 143 S.W.3d 416 (Tex. App.—Austin 2004, pets. denied).....	10
<i>Jude v. Commissioner of Soc. Sec.</i> , 908 F.3d 152 (6th Cir. 2018)	8
<i>Khodara Env't, Inc. v. Blakey</i> , 376 F.3d 187 (3d Cir. 2004)	2
<i>Massachusetts v. EPA</i> , 549 U.S. 497 (2007).....	3
<i>Moody v. Holman</i> , 887 F.3d 1281 (11th Cir. 2018)	3
<i>Nueces Cnty. v. San Patricio Cnty.</i> , 246 S.W.3d 651 (Tex. 2008)	13
<i>Nutt v. United States</i> , 121 Fed. Cl. 579 (2015)	8
<i>OCA-Greater Hous. v. Texas</i> , 867 F.3d 604 (5th Cir. 2017)	1, 4, 5, 9
<i>Patel v. Tex. Dep't of Licensing & Regul.</i> , 469 S.W.3d 69 (Tex. 2015).....	3, 5, 7, 8
<i>Rosenberg Dev. Corp. v. Imperial Performing Arts, Inc.</i> , 571 S.W.3d 738 (Tex. 2019)	13
<i>Sacramento Grazing Ass'n, Inc. v. United States</i> , 96 Fed. Cl. 175 (2010)	8
<i>San Antonio Bar Ass'n v. Guardian Abstract & Title Co.</i> , 291 S.W.2d 697 (Tex. 1956)	14

<i>Sanchez-Espinoza v. Reagan</i> , 770 F.2d 202 (D.C. Cir. 1985).....	10
<i>Shelton v. Kalbow</i> , 489 S.W.3d 32 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).....	14
<i>State v. Collins & Burford Drug Co.</i> , 128 S.W.2d 382 (Tex. Comm’n App. 1939, judgm’t adopted).....	10
<i>State v. Cook United, Inc.</i> , 469 S.W.2d 709 (Tex. 1971)	13
<i>State v. Naylor</i> , 466 S.W.3d 783 (Tex. 2015)	5
<i>Steffel v. Thompson</i> , 415 U.S. 452 (1974).....	10
<i>Sunshine Anthracite Coal Co. v. Adkins</i> , 310 U.S. 381 (1940).....	11
<i>Tex. Ass’n of Bus. v. Tex. Air Control Bd.</i> , 852 S.W.2d 440 (Tex. 1993)	3
<i>Tex. Dep’t of Parks & Wildlife v. Miranda</i> , 133 S.W.3d 217 (Tex. 2004)	16
<i>Texas Dep’t of State Health Servs. v. Balquinta</i> , 429 S.W.3d 726 (Tex. App.—Austin 2014, pet. dism’d).....	15
<i>Texas Education Agency v. Leeper</i> , 893 S.W.2d 432 (Tex. 1994)	4, 5
<i>Texas Lottery Comm’n v. First State Bank of DeQueen</i> , 325 S.W.3d 628 (Tex. 2010)	15
<i>Town of Shady Shores v. Swanson</i> , 590 S.W.3d 544 (Tex. 2019)	15
<i>Wasson Interests, Ltd. v. City of Jacksonville</i> , 489 S.W.3d 427 (Tex. 2016)	13

<i>Wichita Falls State Hosp. v. Taylor</i> , 106 S.W.3d 692 (Tex. 2003)	6
--	---

Statutes

5 U.S.C. § 703.....	9
28 U.S.C. § 1346(b)(1).....	8
28 U.S.C. § 2679(a)	8
TEX. CIV. PRAC. & REM. CODE § 37.003(b).....	10
TEX. CIV. PRAC. & REM. Code § 37.004(a).....	15
TEX. CIV. PRAC. & REM. Code § 37.006(b)	15
TEX. CIV. PRAC. & REM. CODE § 37.011.....	14
TEX. CIV. PRAC. & REM. CODE § 101.106.....	9
TEX. ELEC. CODE § 3.001	11
TEX. ELEC. CODE § 3.003.....	11
TEX. ELEC. CODE § 31.001(a).....	11
TEX. ELEC. CODE § 31.003.....	11, 13, 14
TEX. ELEC. CODE § 42.023.....	12
TEX. ELEC. CODE § 67.010(a)	11
TEX. ELEC. CODE § 67.012.....	11
TEX. ELEC. CODE § 67.013.....	11
TEX. ELEC. CODE § 67.016(b)	11
TEX. GOV'T CODE § 2001.176(b).....	9

Other Authorities

Advisory No. 2021-14, *Impact of Redistricting on Certain Deadlines and Procedures*,
<https://www.sos.texas.gov/elections/laws/advisory2021-14.shtml>
(Nov. 1, 2021).....12

C.J.S. *Judgments* § 112311

RESTATEMENT (SECOND) OF AGENCY § 38513

TEX. R. CIV. P. 683.....14

RETRIEVED FROM DEMOCRACYDOCKET.COM

ARGUMENT

This Court requested supplemental briefing on two questions:

1. Is the State of Texas a proper defendant to a claim seeking a declaratory judgment that H.B. 1 and S.B. 4 violate Article III, Section 28 of the Texas Constitution and that H.B. 1 violates Article III, Section 26 of the Texas Constitution? Stated another way, are any plaintiff's alleged injuries "traceable" to the "State's" conduct (as opposed to a particular official's or agency's conduct) and redressable by an order that may be directed against the "State" (as opposed to a particular official or agency), as required to establish that plaintiff's standing?
2. If the answer to the first question is no, is the defect curable; and if so, how?

The answer to the first question is "Yes." As the Fifth Circuit has held, "[t]he facial invalidity of a Texas election statute is, without question, fairly traceable to and redressable by *the State itself*." *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 613 (5th Cir. 2017) (emphasis added). The Fifth Circuit was correct, and its reasoning applies here, where Plaintiffs challenge the facial validity of the State's legislative district maps that will govern the State's future elections.

If this Court holds otherwise, the answer to the second question is also "Yes." If the State is not a proper party, the UDJA nevertheless waives the immunity of the entity that *is* the proper party, and Plaintiffs should be permitted to replead their suit against that entity.

I. The State is a proper defendant.

Traceability presents an exceptionally low hurdle for a plaintiff to clear. At *most*, the plaintiff need show that the challenged conduct is a but-for cause of its injury; the Supreme Court of the United States has suggested that the burden may even be lower than that. *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 74–78 (1978); *see also Khodara Env't, Inc. v. Blakey*, 376 F.3d 187, 195 (3d Cir. 2004) (Alito, J.) (“Article III standing demands a causal relationship, but neither the Supreme Court nor our Court has ever held that but-for causation is always needed.” (internal quotation marks omitted)).¹ Thus, traceability is satisfied even if the challenged action is one of multiple causes and even if it is not “the very last step in the chain of causation.” *Hassan v. City of New York*, 804 F.3d 277, 293 (3d Cir. 2015) (internal quotation marks omitted). The defendant’s actions need not be “the very last step in the chain of causation.” *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997) (Scalia, J.) (holding that injury was traceable to an opinion issued by one agency, even though any adverse action would be determined and enforced by a different agency, because the opinion determined the scope of the second agency’s discretion).

¹ This Court “ha[s] adopted the federal requirements for standing as set forth by the United States Supreme Court.” *Data Foundry, Inc. v. City of Austin*, 620 S.W.3d 692, 696 (Tex. 2021).

The redressability prong is also satisfied when “it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Data Foundry, Inc. v. City of Austin*, 620 S.W.3d 692, 696 (Tex. 2021). But this does not require “that the redress sought by a plaintiff be complete.” *Moody v. Holman*, 887 F.3d 1281, 1287 (11th Cir. 2018). Rather, “a plaintiff need show only that a favorable decision would redress ‘an injury,’ not ‘every injury.’” *Consumer Data Indus. Ass’n v. King*, 678 F.3d 898, 902 (10th Cir. 2012) (quoting *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982)); see *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007) (holding that redressability was satisfied where the risk of harm “would be reduced to some extent if petitioners received the relief they seek” (emphasis added)).

Last, the standing analysis is informed by two important tenets. First, standing “is determined at the time suit is filed.” *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 n.9 (Tex. 1993); see also *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 157 (Tex. 2012) (explaining that “subsequent events have no effect” on standing). And second, a case may proceed if *any* plaintiff has standing. *Patel v. Tex. Dep’t of Licensing & Regul.*, 469 S.W.3d 69, 77–78 (Tex. 2015) (citing *Heckman*, 369 S.W.3d at 152 n.64).

A. Plaintiffs’ injuries are traceable to the State.

H.B. 1 and S.B. 4 are but-for causes of Plaintiffs’ injuries. Plaintiffs’ injuries emanate from the districts that were created entirely and exclusively by those

statutes. The statutes will be enforced by the State through State officials, like the Governor, who must order, canvass, and certify elections under the unconstitutional maps; and the Secretary of State, who assists in the Governor's canvassing and, more broadly, ensures that elections under the unconstitutional maps are uniformly administered. *See infra* § I.B (explaining these officers' roles in more detail). The Fifth Circuit has thus held that an injury from "a Texas election statute is, without question, fairly traceable to and redressable by the State itself." *OCA-Greater Hous.*, 867 F.3d at 613. Indeed, an injury caused directly by a statute, or by a statute's enforcement by the State's agents, must be traceable to the State itself.

First, the statute exists only because of the State's sovereign authority. The enactment of a statute that governs citizens' behavior and rights is a quintessentially sovereign power—lawmaking. If any conduct can be ascribed to the State qua State, therefore, it is enactment of a law by the cumulative actions of dozens of State officials across the legislative and executive branches. There is no single official, or even an agency or department, that possesses sole responsibility for a law's enactment.

In *Texas Education Agency v. Leeper*, this Court held that a governmental entity is a proper defendant in a suit to invalidate that entity's legislative enactment:

The DJA expressly provides that persons may challenge ordinances or statutes, and that governmental entities must be joined or notified. Governmental entities joined as parties may be bound by a court's declaration on their ordinances or statutes. The Act thus contemplates

that governmental entities may be—indeed, must be—joined in suits to construe their legislative pronouncements.

893 S.W.2d 432, 446 (Tex. 1994). H.B. 1 and S.B. 4 are *the State's* “legislative pronouncements.” *Id.* Thus, just as a city is the proper defendant in a suit to invalidate a municipal ordinance, *e.g.*, *City of Laredo v. Laredo Merchants Ass’n*, 550 S.W.3d 586, 598 & n.79 (Tex. 2018), the State is a proper defendant in a suit to invalidate a statute. *OCA-Greater Hous.*, 867 F.3d at 613.

After all, it is the State (through the Attorney General) that is entitled to intervene in any suit calling into question a statute’s validity. *See State v. Naylor*, 466 S.W.3d 783, 788 & n.1 (Tex. 2015) (acknowledging “the State’s right to defend Texas law from constitutional challenge” and collecting cases permitting its intervention). It is difficult to understand how the State could have standing to intervene to defend a law were it not also the party responsible for injuries caused by its laws. *See Patel*, 469 S.W.3d at 76 (rejecting as “illogical” the State’s argument that it was “effectively immune[e]” from “suits claiming a statute is unconstitutional”).

Second, Plaintiffs’ injury is traceable to the State through its agents’ conduct. Because the UDJA waives the State’s immunity, the State is a proper defendant in a suit challenging the conduct of a state agency, official, or employee acting in their official capacity because any such party is either the State itself or the State’s agent. An injury caused by such an entity or individual is, thus, traceable to the State.

A state agency is merely a “division[] of state government,” *i.e.*, a division of the State itself. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003). And a suit against a state official, likewise, is “for all practical purposes, *against the state.*” *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009) (emphasis added). This is because a governmental entity, just like a corporation, can act only through its agents, officials, and employees. Because those persons exercise the State’s sovereign power and are subject to the State’s control, injuries they cause are also traceable to the State from which their authority devolves. In the ultra vires context, a plaintiff sues an official not because the official is the only person to whom the plaintiff’s injuries can be traced, but because the State is immune and cannot be sued directly. *Id.* Thus, a suit against the official is the only mechanism by which a plaintiff can secure a judgment *against the State. Id.* (citing *Brandon v. Holt*, 469 U.S. 464, 471–72 (1985)).

Indeed, this Court’s ultra vires cases hold that a challenge to the validity of a statute *must* be filed against a governmental entity rather than a governmental official. Ultra vires doctrine waives an official’s immunity on the theory that the official’s “illegal or unauthorized actions *are not acts of the State.*” *Federal Sign v. Texas S. Univ.*, 951 S.W.2d 401, 404 (Tex. 1997) (emphasis added). The suit thus “do[es] not attempt to exert control over the state” and “do[es] not seek to alter

government policy,” but rather “attempt[s] to reassert the control of the state” by “enforc[ing] existing policy.” *Heinrich*, 284 S.W.3d at 372.

By contrast, when a suit challenges *state policy itself*—by seeking to invalidate a statute—no ultra vires suit can be stated against an official because an official does not act ultra vires by *complying* with an invalid statute. *E.g.*, *Hall v. McRaven*, 508 S.W.3d 232, 240 (Tex. 2017) (holding that state official did not act ultra vires by carrying out his duty under an allegedly illegal rule, because he was “follow[ing] his governing authority”).² Instead, a suit challenging a statute’s validity *must* be filed against the State itself. *Heinrich*, 284 S.W.3d at 372–73 & n.6 (holding that “[f]or claims challenging the validity of ordinances or statutes, however, the [UDJA] *requires* that the relevant *governmental entities* be made parties, and thereby waives immunity” (emphasis added)); *accord Patel*, 469 S.W.3d at 75–76 (holding that “sovereign immunity is inapplicable when a suit challenges the constitutionality of a statute and seeks only equitable relief”); *id.* at 76–77

² The need to engage in “horizontal selection” among officials, “pinpointing which official has the duty to act,” arises from the limited nature of the ultra vires cause of action and immunity waiver, not from traceability concerns. *Hall v. McRaven*, 508 S.W.3d 232, 239 (Tex. 2017). That is, the plaintiff must find an official who had a ministerial duty to act or who violated his governing legal authority. *Patel v. Tex. Dep’t of Licensing & Regul.*, 469 S.W.3d 69, 76 (Tex. 2015) (holding that the plaintiff “must allege that a state official acted *without* legal authority or failed to perform a purely ministerial act” (emphasis added)). But the official whose immunity is waived is unlikely to be the only person or entity to whom the plaintiff’s injury is traceable. Thus, in *Hall*, the plaintiff’s injury was likely traceable not only to the university chancellor he unsuccessfully sued, but to the board of regents, the university system that board governed, and, ultimately, the State, which empowered those other entities and officials to act.

(holding that “state entities” “must be” parties to suits challenging “the constitutionality of a statute”).³

A comparison to the national government illustrates why the State itself is a proper party in this case. “[T]he *only* proper defendant in [a Federal Tort Claims Act suit] is the United States” itself. *Jude v. Commissioner of Soc. Sec.*, 908 F.3d 152, 157 n.4 (6th Cir. 2018); 28 U.S.C. §§ 1346(b)(1), 2679(a). This is true even if the plaintiff’s injury is caused by the lowest-ranking employee in the smallest agency of a minor department of the federal government. Yet no court appears to have even *suggested* that such an injury is not traceable to “the United States.” The contrary is true. *See, e.g., Nutt v. United States*, 121 Fed. Cl. 579, 581, 584 (2015) (holding that injury caused by the negligence of “a drunk Army employee” was “fairly traceable to” the United States); *Sacramento Grazing Ass’n, Inc. v. United States*, 96 Fed. Cl. 175, 188 (2010) (injury caused by ranger employed by the United States Forest Service was traceable to the United States).

Similarly, a plaintiff challenging administrative action under the federal Administrative Procedures Act has *the option* of suing “the United States, the agency

³ In other words, even if Plaintiffs are *also* injured by a state or local official’s *compliance with* H.B. 1 and S.B. 4, those officials are likely immune from suit. *See Hall*, 232 S.W.3d at 240; *Patel*, 469 S.W.3d at 76. Accordingly, if this Court were to hold that a plaintiff’s injuries from a statute are *only* traceable to the official who implements the statute, the effect of that holding would be to render meaningless the UDJA’s waiver of immunity for validity challenges. *See Patel*, 469 S.W.3d at 76 (rejecting as “illogical” the State’s argument that it was “effectively immune[e]” from “suits claiming a statute is unconstitutional”).

by its official title, or the appropriate officer.” 5 U.S.C. § 703. Again, there is no precedent suggesting that an APA plaintiff’s suit is not equally traceable to all three. *E.g.*, *Clayton v. Chertoff*, No. C-07-2781-CW, 2007 WL 2904049, at *2 (N.D. Cal. Oct. 1, 2007) (rejecting argument that agency secretary was “the only proper defendant,” and permitting suit to *also* go forward against *the United States* and various agencies and officials); *Computerware, Inc. v. Knotts*, 626 F. Supp. 956, 960 (E.D.N.C. 1986) (“When an instrumentality of the United States is the real defendant, the plaintiff should have *the option* of naming as defendant the United States, the agency . . . , appropriate officers, *or any combination of them.*” (internal quotation marks omitted; emphasis added)).

By the same token, every action by every State agency, official, employee, and agent is traceable, ultimately, to the State itself—in *addition to* those other individuals and entities. *See OCA-Greater Hous.*, 867 F.3d at 613 (holding that injury was traceable to and redressable by “the State itself *and* its Secretary of State” (emphasis added)); *cf.* TEX. CIV. PRAC. & REM. CODE § 101.106 (providing that a plaintiff suing under the Texas Tort Claims Act may elect between suing an employee and the “governmental unit,” which includes the State itself).⁴

⁴ There are reasons other than traceability why a plaintiff might sue an agency or official rather than the State. Most commonly, this is immunity, as in the ultra vires context. Similarly, the reason the *Patel* plaintiffs sued the agency is that they also brought a challenge to the validity of a rule that the agency adopted and were thus required to name the agency itself. TEX. GOV’T CODE § 2001.176(b). By contrast, the UDJA waives the immunity of the State itself.

B. Plaintiffs' injuries are redressable by a declaratory judgment directed to the State.

Plaintiffs' injuries would also be redressable by an order directed to the State itself. Their injuries emanate from the statute itself: the law is self-executing and creates the illegal legislative districts about which Plaintiffs complain. Those districts are creatures of the State, as they comprise the State's legislative branch of government. A declaration directed to the State declaring the statutes unconstitutional would invalidate these districts, rendering them nugatory for any official purpose, and thus redress Plaintiffs' injuries directly.

Second, a declaration against the State would bind the executive and legislative branch agencies, officials, and employees who implement the new maps and carry out elections under them. The purpose of a declaratory judgment is "to provide a milder alternative to the injunction remedy." *Steffel v. Thompson*, 415 U.S. 452, 467 (1974). The State must comply with a declaration as it would any other preclusive judgment. TEX. CIV. PRAC. & REM. CODE § 37.003(b); *Howell v. Texas Workers' Comp. Comm'n*, 143 S.W.3d 416, 433 (Tex. App.—Austin 2004, pets. denied); cf. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985) (Scalia, J.) ("[I]t must be presumed that federal officers will adhere to the law as declared by the court."). This necessarily includes compliance by the State's agencies, officers, and employees. *State v. Collins & Burford Drug Co.*, 128 S.W.2d 382, 384 (Tex. Comm'n App. 1939, judgment adopted) (calling it "obvious" that "an

agency of the State” would “be bound by a decree against the State”); *accord Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 403 (1940) (“Where a suit binds the United States, it binds its subordinate officials.”).⁵

Thus, the declaratory judgment would bind the Governor, who is responsible for ordering, canvassing, and certifying elections for state House and Senate. TEX. ELEC. CODE §§ 3.001, 3.003, 67.010(a), 67.016(b). He would therefore be obliged *not* to order, canvass, or certify an election under the unconstitutional maps. Likewise, the Secretary of State acts as “the chief election officer of the state.” *Id.* § 31.001(a). Like the Governor, the Secretary is involved in the canvassing of the elections at issue, *see id.* §§ 67.010(b), 67.012, 67.013, and could be obliged not to canvass an election under an invalid map. The Secretary must also “obtain and maintain uniformity in the application, operation, and interpretation of [the Election Code] and of the election laws outside th[e] code,” including through “written directives and instructions . . . to the appropriate state and local authorities having duties in the administration of” elections. *Id.* § 31.003. Following the passage of H.B. 1 and S.B. 4, the Secretary issued an advisory instructing local officials how to “effectuate [the] legislative redistricting plans,” including by instructing them to use

⁵ *See also* C.J.S. *Judgments* § 1123 (“In general, a governmental body and its officers, boards, commissions, agents, representatives, and employees are in privity and form but a single entity with respect to the rule of *res judicata*.”).

the new maps.⁶ If those statutes are invalidated, the Secretary would be obliged to issue an advisory ensuring that any local authorities involved in administering future elections do *not* use invalid maps. Keith Ingram, Director of the Elections Division of the Secretary of State, testified that he would immediately send instructions to local officials in the event the maps were invalidated. 2RR210–11.⁷

Finally, a declaration against the State would bind county officials involved in administering elections under the illegal maps. For example, any change in the maps obliges county officials to reevaluate precinct boundaries, and any resulting precinct changes must be approved by a vote of the county commissioners. TEX. ELEC. CODE § 42.023 (“If changes in county election precinct boundaries are necessary to give effect to a redistricting plan under Article III, Section 28, of the

⁶ Texas Secretary of State, Election Advisory No. 2021-14, *Impact of Redistricting on Certain Deadlines and Procedures*, <https://www.sos.texas.gov/elections/laws/advisory2021-14.shtml> (Nov. 1, 2021).

⁷ Mr. Ingram testified:

Q: Okay. And if this Court orders that the election should halt because there’s a constitutional defect with the redistricting maps that have been ordered, my question to you is certainly your guidance will not be you have to still do the elections on those original calendars. In fact, what you’ll do is, quote, make sure those local officials can be as successful as possible under the Court’s order, right?

A. If the Court orders a change, then we’ll follow that court’s order and we’ll alert the counties about the change.

Q. You issue –

A. I’ve instructed the counties to be flexible and to pay attention to our office for that very reason.

Texas Constitution, each commissioners court shall order the changes before October 1 of the year in which the redistricting is done.”); *accord* 3RR27–30 (testimony of Remi Garza, Elections Administrator for Cameron County).

Counties, and thus county officials, are “involuntary agents of the state’ without the power to serve the local interests of their residents.” *Nueces Cnty. v. San Patricio Cnty.*, 246 S.W.3d 651, 652 (Tex. 2008) (quoting *City of Galveston v. Posnainsky*, 62 Tex. 118, 128 (1884)). Instead, they exclusively perform “governmental functions *as the state’s agents*,” *Rosenberg Dev. Corp. v. Imperial Performing Arts, Inc.*, 571 S.W.3d 738, 746 (Tex. 2019) (emphasis added), and “as a branch of the state,” *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 430 (Tex. 2016) (emphasis added).

A judgment against the State would thus also run against the counties and county officials that administer elections “as a branch of the state.” *See* TEX. ELEC. CODE § 31.003 (requiring the Secretary of State to enforce uniformity in compliance with election laws); RESTATEMENT (SECOND) OF AGENCY § 385 (requiring an agent to obey its principal); *cf. State v. Cook United, Inc.*, 469 S.W.2d 709, 712 (Tex. 1971) (suggesting that a judgment against the State would bind “county and district attorneys throughout the State”); *Ex parte Doan*, 369 S.W.3d 205, 207–08 (Tex. Crim. App. 2012) (holding that judgment against one county’s district’s attorney

bound other county's district attorney where both shared an interest in the issue litigated).⁸

Relief against the State could redress injuries caused by counties and their officials in other ways, too. While the UDJA is designed to avoid the need for coercive relief, it authorizes a post-judgment injunction where necessary to ensure compliance. TEX. CIV. PRAC. & REM. CODE § 37.011; *Shelton v. Kalbow*, 489 S.W.3d 32, 48 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). An injunction may bind not only a party but its “officers, agents, servants, employees, and attorneys.” TEX. R. CIV. P. 683. Here, the counties and county officials, in administering elections, are acting as the State’s agents and would, therefore, be bound by any injunction against the State. *Cf. San Antonio Bar Ass’n v. Guardian Abstract & Title Co.*, 291 S.W.2d 697, 701 (Tex. 1956) (holding that while an injunction “might mention only the corporation,” it runs against the agents through whom the corporation acts). An injunction against the State, therefore, would also bind its county agents and their officers and employees.

⁸ Here, of course, the State and counties would be situated identically with respect to the validity of the maps. Defense of the constitutionality of state laws is committed foremost to the State itself, and the Election Code requires the counties to follow State instructions regarding the conduct of elections. TEX. ELEC. CODE § 31.003.

II. If Plaintiffs sued the wrong defendant, they should be allowed to replead.

To the extent this Court determines that Plaintiffs' injury was only traceable to and redressable by a governmental entity other than the State itself, that defect is curable.

The UDJA broadly waives sovereign and governmental immunity “for challenges to the validity of an ordinance or statute.” *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 552 (Tex. 2019). This waiver does not depend on the identity of the defendant against whom suit is filed. See TEX. CIV. PRAC. & REM. Code §§ 37.004(a), 37.006(b); see *Heinrich*, 284 S.W.3d at 373 n.6 (holding that the “the [UDJA] requires that the relevant governmental entities be made parties, and thereby waives immunity”). Accordingly, even if the State itself were not a proper defendant, and some department of the State—such as the Governor, the Secretary of State,⁹ or a county—were, Plaintiffs could sue that department under the UDJA and it would have no immunity. *E.g.*, *Texas Lottery Comm’n v. First State Bank of DeQueen*, 325 S.W.3d 628, 634–35 (Tex. 2010) (holding that UDJA waived agency’s immunity in suit to invalidate a statute); see *Texas Dep’t of State Health Servs. v. Balquinta*, 429 S.W.3d 726, 746 (Tex. App.—Austin 2014, pet. dismiss’d)

⁹ The Governor and the Secretary of State are not merely individuals but also governmental entities. Thus, the MALC Plaintiffs asserted proper UDJA claims against those defendants. See MALC Resp. Br. at 15–17.

(holding that the UDJA provides a waiver of immunity for “claims against the State or its agencies to challenge the ‘validity’ of a statute”).

Thus, if this Court determines that Plaintiffs were required to sue a state entity or a county, rather than the State, it should remand this cause to allow Plaintiffs to replead. *See Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226–27 (Tex. 2004) (holding that plaintiff had right to replead to establish jurisdiction); *City of New Braunfels v. Stop The Ordinances Please*, No. 03-12-00528-CV, 2013 WL 692446, at *12 (Tex. App.—Austin Feb. 21, 2013, no pet.) (remanding to allow plaintiff to replead to establish standing).

With respect to state officials, this Court’s ultra vires precedent forecloses the possibility that the only proper defendant in a challenge to a state statute is a state official, and there is no logical or precedential basis for holding that an injury traceable to such an official is not also traceable to the governmental entity in which the official serves. However, in the event that this Court adopts a new standing rule, Plaintiffs should, in the interest of justice, be allowed to replead.

PRAYER

Appellees respectfully request that the Court affirm the trial court's judgment. Alternatively, Appellees request a remand to allow an opportunity to replead and any additional relief to which they are entitled.

Respectfully submitted,

Sean J. McCaffity
State Bar No. 24013122
Smccaffity@textrial.com
George 'Tex' Quesada
State Bar No. 16427750
quesada@textrial.com
SOMMERMAN, MCCAFFITY, QUESADA
& GEISLER, LLP
3811 Turtle Creek Blvd., Suite 1400
Dallas, Texas 75219-4461

Joaquin Gonzalez
State Bar No. 24109935
jgonzalez@malc.org
TEXAS CIVIL RIGHTS PROJECT
1055 Sutton Drive
San Antonio, Texas 78228

**ATTORNEYS FOR MEXICAN
AMERICAN LEGISLATIVE CAUCUS,
TEXAS HOUSE OF REPRESENTATIVES**

/s/ Wallace B. Jefferson
Wallace B. Jefferson
State Bar No. 00000019
wjefferson@adjtlaw.com
Amy Warr
State Bar No. 00795708
awarr@adjtlaw.com
Nicholas B. Bacarisse
State Bar No. 24073872
nbacarisse@adjtlaw.com
ALEXANDER DUBOSE & JEFFERSON LLP
515 Congress Avenue, Suite 2350
Austin, Texas 78701-3562
Telephone: (512) 482-9300
Facsimile: (512) 482-9303

Martin Golando
State Bar No. 24059153
Martin.Golando@gmail.com
THE LAW OFFICE OF MARTIN GOLANDO,
PLLC
2326 W. Magnolia
San Antonio, Texas 78201

**ATTORNEYS FOR ROLAND GUTIERREZ,
SARAH ECKHARDT, RUBEN CORTEZ,
JR., AND TEJANO DEMOCRATS**

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2022, a true and correct copy of this brief was served via electronic service through eFile.TXCourts.gov on parties through counsel of record, listed below:

Judd E. Stone II (lead counsel)

Solicitor General

Judd.Stone@oag.texas.gov

Lanora C. Pettit

Principal Deputy Solicitor General

lanora.pettit@oag.texas.gov

Eric J. Hamilton

Assistant Solicitor General

eric.hamilton@oag.texas.gov

Christopher Dalan 'Chris' Hilton

Assistant Attorney General

christopher.hilton@oag.texas.gov

Eric Alan Hudson

Assistant Attorney General

Eric.Hudson@oa.texas.gov

Patrick K. Sweeten

Deputy Attorney General for Special
Litigation

Patrick.Sweeten@oag.texas.gov

William T. Thompson

Deputy Chief, Special Litigation Unit

will.thompson@oag.texas.gov

Office of the Attorney General

P.O. Box 12548 (MC 059)

Austin, Texas 78711-2548

/s/ Wallace B. Jefferson

Wallace B. Jefferson

CERTIFICATE OF COMPLIANCE

Based on a word count run in Microsoft Word, this brief contains 4,206 words, excluding the portions of the brief exempt from the word count under Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Wallace B. Jefferson
Wallace B. Jefferson

RETRIEVED FROM DEMOCRACYDOCKET.COM

Automated Certificate of eService

This automated certificate of service was created by the e filing system. The filer served this document via email generated by the e filing system on the date and to the persons listed below:

Stacey Jett on behalf of Wallace Jefferson
Bar No. 19
sjett@adjtlaw.com
Envelope ID: 64237978
Status as of 5/5/2022 3:59 PM CST

Associated Case Party: Ruben Cortez

Name	BarNumber	Email	TimestampSubmitted	Status
Wallace Jefferson	19	wjefferson@adjtlaw.com	5/5/2022 3:34:01 PM	SENT
Amy Warr	795708	awarr@adjtlaw.com	5/5/2022 3:34:01 PM	SENT
Martin Golando	24059153	martin.golando@gmail.com	5/5/2022 3:34:01 PM	SENT

Associated Case Party: The Tejano Democrats

Name	BarNumber	Email	TimestampSubmitted	Status
Wallace Jefferson	19	wjefferson@adjtlaw.com	5/5/2022 3:34:01 PM	SENT
Martin Golando	24059153	martin.golando@gmail.com	5/5/2022 3:34:01 PM	SENT
Amy Warr	795708	awarr@adjtlaw.com	5/5/2022 3:34:01 PM	SENT

Associated Case Party: Sarah Eckhardt

Name	BarNumber	Email	TimestampSubmitted	Status
Wallace Jefferson	19	wjefferson@adjtlaw.com	5/5/2022 3:34:01 PM	SENT
Amy Warr	795708	awarr@adjtlaw.com	5/5/2022 3:34:01 PM	SENT
Martin Golando	24059153	martin.golando@gmail.com	5/5/2022 3:34:01 PM	SENT

Associated Case Party: Roland Gutierrez

Name	BarNumber	Email	TimestampSubmitted	Status
Wallace Jefferson	19	wjefferson@adjtlaw.com	5/5/2022 3:34:01 PM	SENT
Amy Warr	795708	awarr@adjtlaw.com	5/5/2022 3:34:01 PM	SENT
Martin Golando	24059153	martin.golando@gmail.com	5/5/2022 3:34:01 PM	SENT
Stacey Jett		sjett@adjtlaw.com	5/5/2022 3:34:01 PM	SENT
Nicholas Bacarisse		nbacarisse@adjtlaw.com	5/5/2022 3:34:01 PM	SENT

Automated Certificate of eService

This automated certificate of service was created by the e filing system.
The filer served this document via email generated by the e filing system
on the date and to the persons listed below:

Stacey Jett on behalf of Wallace Jefferson
Bar No. 19
sjett@adjtlaw.com
Envelope ID: 64237978
Status as of 5/5/2022 3:59 PM CST

Associated Case Party: The State of Texas

Name	BarNumber	Email	TimestampSubmitted	Status
William Thompson	24088531	will.thompson@oag.texas.gov	5/5/2022 3:34:01 PM	SENT
Eric Hamilton	24127287	Eric.hamilton@oag.Texas.gov	5/5/2022 3:34:01 PM	SENT
Lanora Pettit	24115221	lanora.pettit@oag.texas.gov	5/5/2022 3:34:01 PM	SENT
Patrick Sweeten	798537	Patrick.Sweeten@oag.texas.gov	5/5/2022 3:34:01 PM	SENT
Judd Stone	24076720	judd.stone@oag.texas.gov	5/5/2022 3:34:01 PM	SENT
Jack DiSorbo		jack.disorbo@oag.texas.gov	5/5/2022 3:34:01 PM	SENT

Associated Case Party: Greg Abbott

Name	BarNumber	Email	TimestampSubmitted	Status
William Thompson	24088531	will.thompson@oag.texas.gov	5/5/2022 3:34:01 PM	SENT
Judd Stone	24076720	judd.stone@oag.texas.gov	5/5/2022 3:34:01 PM	SENT
Patrick Sweeten	798537	Patrick.Sweeten@oag.texas.gov	5/5/2022 3:34:01 PM	SENT
Lanora Pettit	24115221	lanora.pettit@oag.texas.gov	5/5/2022 3:34:01 PM	SENT
Jack DiSorbo		jack.disorbo@oag.texas.gov	5/5/2022 3:34:01 PM	SENT
Eric Hamilton	24127287	Eric.hamilton@oag.Texas.gov	5/5/2022 3:34:01 PM	SENT

Associated Case Party: John Scott

Name	BarNumber	Email	TimestampSubmitted	Status
William Thompson	24088531	will.thompson@oag.texas.gov	5/5/2022 3:34:01 PM	SENT
Lanora Pettit	24115221	lanora.pettit@oag.texas.gov	5/5/2022 3:34:01 PM	SENT
Patrick Sweeten	798537	Patrick.Sweeten@oag.texas.gov	5/5/2022 3:34:01 PM	SENT
Judd Stone	24076720	judd.stone@oag.texas.gov	5/5/2022 3:34:01 PM	SENT
Eric Hamilton	24127287	Eric.hamilton@oag.Texas.gov	5/5/2022 3:34:01 PM	SENT
Jack DiSorbo		jack.disorbo@oag.texas.gov	5/5/2022 3:34:01 PM	SENT

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below:

Stacey Jett on behalf of Wallace Jefferson
Bar No. 19
sjett@adjtlaw.com
Envelope ID: 64237978
Status as of 5/5/2022 3:59 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Maria Williamson		maria.williamson@oag.texas.gov	5/5/2022 3:34:01 PM	SENT
Anne LSchievelbein		anne.schievelbein@oag.texas.gov	5/5/2022 3:34:01 PM	SENT
William FCole		William.Cole@oag.texas.gov	5/5/2022 3:34:01 PM	SENT

Associated Case Party: Mexican American Legislative Caucus, Texas House of Representatives

Name	BarNumber	Email	TimestampSubmitted	Status
Sean Joseph McCaffity	24013122	smccaffity@textrial.com	5/5/2022 3:34:01 PM	SENT
George Quesada	16427750	quesada@textrial.com	5/5/2022 3:34:01 PM	SENT
Nicole Pioli		npoli@textrial.com	5/5/2022 3:34:01 PM	SENT

RETRIEVED FROM E-FILED DOCUMENTS