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May 5, 2022

Via E-filing

Blake A. Hawthorne, Clerk
The Supreme Court of Texas

Re: No. 22-0008, *Abbott v. Mexican American Legislative Caucus et al.*

Dear Mr. Hawthorne:

This letter responds to the Court's April 27 letter requesting supplemental briefing on two issues relating to Plaintiffs' standing. *First*, whether the State of Texas—as opposed to particular state officials or agencies—is a proper defendant to Plaintiffs' declaratory-judgment claims for traceability and redressability purposes. And *second*, if not, whether "that defect is curable."

As described below, the answer to the first question is "no." Because the answer to the first question involves a limit on the Uniform Declaratory Judgments Act's ("UDJA") sovereign-immunity waiver, which can only be expanded by the Legislature, the State Defendants understand the Court's second question about "cure" to be asking whether the Plaintiffs could proceed by identifying a different defendant. On that understanding, the answer is "yes," but they would need to file a new petition that addressed the State Defendants' many jurisdictional objections.

A. The State Is Not a Proper Defendant.

The State of Texas is not a proper defendant in a declaratory-judgment action under the UDJA. To the contrary, this Court has repeatedly stated that it is only the "relevant governmental entity" that is a proper defendant in a UDJA action "[f]or claims" such as this one "challenging the validity of . . . statutes." *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 76 (Tex. 2015) (quoting *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (Tex. 2009)). In such an action, this Court has held that "the Declaratory Judgment Act requires that the relevant governmental entities be made parties, and thereby waives immunity." *Id.* To be sure, the identity of the "relevant government entity" will depend upon the nature of the claims being

advanced in a particular lawsuit. But it is nonetheless the “governmental entit[y]” that “must be joined or notified.” *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994); *see also TxDOT v. Sefzik*, 355 S.W.3d 618, 622 n.3 (Tex. 2011) (per curiam) (“the UDJA expressly requires joinder of the *governmental unit*” (italics added)); *cf. Muskrat v. United States*, 219 U.S. 346, 361-62 (1911) (holding that a plaintiff could not sue the United States “in its sovereign capacity” when “the only judgment required is to settle the doubtful character of the legislation in question,” but observing that separate suits were proceeding against the Secretary of the Interior).

The State of Texas is not a “governmental entity” or “governmental unit” for purposes of the limited, implied sovereign-immunity waiver this Court has found in the UDJA—it is a sovereign entity, not a portion of the government. That is why this Court has “subsequently applied the holding of *Leeper*”—namely, “that ‘governmental entities’ are to be joined in suits to construe legislative pronouncements”—“to *different* governmental entities.” *Tex. Lottery Comm’n v. First State Bank of DeQueen*, 325 S.W.3d 628, 634 (Tex. 2010) (italics added). Those different governmental entities have included a municipality, *Heinrich*, 284 S.W.3d at 373 n.6, a state hospital, *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697-98 (Tex. 2003), and a state agency, *Tex. Nat. Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 859-60 (Tex. 2002), but not the State itself.

This understanding comports with how waivers of sovereign immunity are enacted by the Legislature. For example, any number of statutes waive sovereign or governmental immunity for specific types of claims against specific governmental entities. *E.g.*, Tex. Gov’t Code §§ 554.001(2), (5); *id.* § 554.0035; Tex. Loc. Gov’t Code §§ 271.151(3), 271.152. But when the Legislature intends to include the State as a “governmental unit” or “unit of state government,” it does so expressly. *See* Tex. Civ. Prac. & Rem. Code § 101.001(3)(A) (defining “governmental unit” to include the State); Tex. Gov’t Code § 2260.001(4) (defining “unit of state government” to include the State). It has not done so for purposes of the UDJA, *see* Tex. Civ. Prac. & Rem. Code §§ 37.001, 37.006, and that omission is presumed intentional.

The State Defendants’ view also comports with federal law on traceability and redressability, which this Court follows. *See Heckman v. Williamson County*, 369 S.W.3d 137, 155 (Tex. 2012). “Consistent with historical practice, a federal court exercising its equitable authority may enjoin named defendants from taking specified

unlawful actions. But under traditional equitable principles, no court may ‘lawfully enjoin the world at large,’ or purport to enjoin challenged ‘laws themselves.’” *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 535 (2021). Because the State can act only through its agents, a plaintiff lacks standing to challenge a provision that no state agent can enforce—even if, as a theoretical matter, the sovereign could redress the injury by repealing the law. *California v. Texas*, 141 S. Ct. 2104, 2115-2116 (2021).

And this interpretation comports with common sense: the State of Texas is a government of many parts, which serve different constituencies and may have different interests. Here, the individual Plaintiffs include government actors who are as much a part of the State as the individual defendants. A judgment declaring a plaintiff’s rights vis-a-vis the “State of Texas” provides no guidance regarding which state actor—such as an official or agency—is bound by the decree. A declaration here that “the State of Texas” violated Section 26 of the Constitution due to the configuration of Cameron County in H.B. 1—or that it violated Section 28 by redistricting in a special session—provides no clarity about who must act to bring the State into compliance. Must the Governor refuse to order an election under H.B. 1 or convene a Special Session to redraw the districts in Cameron County? Must the Legislature—including certain of the Plaintiffs themselves—vote in favor of particular maps? If so, which ones? Must the Secretary of State refuse to tabulate the results of any election held under these maps? If so, can he cabin that refusal to results from Cameron County? Or must some other state agency or official do something else entirely? Ultimately, a declaration of Plaintiffs’ rights as against the “State of Texas” would raise more questions than it would answer.

B. Plaintiffs Can Solve Their Traceability and Redressability Problems By Suing the Correct Governmental Entities.

As applied to one of Plaintiffs’ two claims, Plaintiffs could solve some of their standing problems through identifying a proper defendant. Indeed, the solution is just what this Court prescribed in *Patel*: Plaintiffs must sue the “relevant governmental entit[y].” 469 S.W.3d at 76. To the extent that Plaintiffs believe that the Governor and Secretary of State can redress their purported injuries on their section 26 claim, then *Patel* dictates that they must sue the Office of the Governor and the Office of the Secretary of State. Appellants’ Br. 40-41; Reply Br. 17-19. For the section 28 claim, there likely is no relevant entity because federal law required the Legislature to redistrict ahead of the 2022 election. *See Evenwel v. Abbott*, 578 U.S. 54, 59 (2016) (stating that “jurisdictions must design both congressional and

state-legislative districts with equal populations, and must regularly reapportion districts to prevent malapportionment”).

But filing a new lawsuit against the proper defendants would not salvage Plaintiffs’ claims here unless they can also solve the other problems the State Defendants have identified. None of the Plaintiffs has pleaded a cognizable, personalized injury-in-fact. Appellants’ Br. 18-36; Reply Br. 6-16. Furthermore, because they merely seek an advisory opinion regarding the constitutionality of good-for-one-election-only maps, the trial court lacks jurisdiction to enter the declaratory judgment they currently seek. Appellants’ Br. 17-18; Reply Br. 3-6. And even if they had properly pleaded claims against the State of Texas as a defendant, their two constitutional claims are not viable and thus cannot fit within the UDJA’s sovereign-immunity waiver. Appellants’ Br. 40-53; Reply Br. 19-27.

Respectfully submitted.

/s/ Lanora C. Pettit

Lanora C. Pettit
Principal Deputy Solicitor General

cc: all counsel of record (via e-mail)

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