Cause No: D-1-GN-23-003523

HARRIS COUNTY, TEXAS,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
	§	
v.	§	
	§	
THE STATE OF TEXAS,	§	TRAVIS COUNTY, TEXAS
ANGELA COLMENERO, IN HER OFFICIAL	§	
CAPACITY AS PROVISIONAL ATTORNEY	§	
GENERAL, JANE NELSON, IN HER OFFICIAL	§	
CAPACITY AS TEXAS SECRETARY OF STATE,	§	
Defendants.	§	345TH JUDICIAL DISTRICT

DEFENDANTS' PLEA TO THE JURISDICTION

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TO THE HONORABLE JUDGE OF SAID COURT:

Defendants the State of Texas, Angela Colmenero in her Official Capacity as Provisional Attorney General, and Jane Nelson in her Official Capacity as Texas Secretary of State file their Plea to the Jurisdiction in response to Plaintiff's Verified Amended Petition and Application for Temporary Injunction and Permanent Injunction.

Introduction

Harris County openly states that it will refuse to comply with a law duly passed in the Legislature last session. In so refusing, it has created a crisis for itself. On one hand, it claims irreparable injury from the operation of a law slated to take effect on September 1, 2023, but on the other, it renders that same injury hypothetical because it refuses to comply with the law that would allegedly injure it. Yet, Harris County asks this Court to save it from itself and declare that law unconstitutional.

Harris County has sued the wrong parties, failed to establish an injury, and failed to show that the injury is fairly traceable to the named Defendants. Furthermore, it has not pleaded facts sufficient to overcome immunity because it has not pleaded a viable claim that the challenged statute is facially invalid. This Court should dismiss the suit for lack of jurisdiction.

Facts

In the last legislative session, the Texas Legislature passed SB 1750, which eliminated the ability for counties of 3.5 million or more to create an administrative position whose officers only duty is to run elections:

> The Commissioners Court *of a county with a population of 3.5 million or less*, by written order may create the position of a county elections administrator for the county.
>
> …

> On September 1, 2023, all powers and duties of the county elections administrator of a county with a population of more than 3.5 million under this subchapter are transferred to the county tax-assessor collector and county clerk.

SB 1750, amending TEX. ELEC. CODE § 31.031(a); 31.050, eff. Sept. 1, 2023 (emphasis added). It appears that only Harris County will have a population of 3.5 million or more on September 1, 2023, and it is one of several counties that has an elections administrator.[1] Other large counties like Bexar, Collin, Tarrant, and Dallas also have elections administrators, although Travis County does not. Senate Research Center, Committee Report, C.S.S.B. 1750 (Apr. 6, 2023).

The Legislature would have been aware that the history of the position of Elections Administrator in Harris County has been short and troubled. Harris County created the Elections Administrator position in 2020 pursuant to the authority of the County Commissioners Court, and the first elections administrator ever in Harris County took office after the November 2020 elections. *See* TEX. ELEC. CODE § 31.031-.049. During the 2022 election cycle, the role of the new elections administrator was publicly controversial in Harris County, leading to the abrupt resignation of Harris County's first Elections Administrator, Isabel Longoria, following the primary.[2] Although there is far from universal agreement regarding the precise cause of the problem, the Legislature would have been aware that the 2022 election cycle over which Ms. Longoria presided was called "one of the worst-run elections in recent memory."[3]

[1] Texas Secretary of State, *County Voter Registration Officials*, County Voter Registration Officials (state.tx.us) (last visited July 31, 2023).

[2] *See Harris County Official to Resign after Problems with Primary*, NBCDFW (Mar. 8, 2022), https://www.nbcdfw.com/news/local/texas-news/harris-county-official-to-resign-after-problems-with-primary/2909960/ (quoting Longoria as saying "Ultimately, the buck stops with me. I didn't meet my own standards.").

[3] Michael Hardy, *Why Can't the Biggest County in Texas Run an Election*, TEX. MONTHLY (Mar. 10, 2022), *at* https://www.texasmonthly.com/news-politics/harris-county-elections-2022/; *see also, e.g.*, Amy Gardner, *A Texas county didn't count 10,000 ballots. Now the parties are at war over who's to blame*, THE WASHINGTON POST

The Legislature would have been further aware that, as has been widely reported, problems during the March 2022 primary included polling locations being closed when they should have been open, the website identifying polling locations being down, running out of paper for the ballot machines, having the wrong size paper, allowing people to vote in the wrong precinct's races by giving them the wrong ballot, malfunctioning voting machines which could (among other things) damage or blur the ballots as they were printed and scanned, and providing mail-in ballots to the wrong voters.[4] And these issues could be more than inconvenient: having letter-size rather than legal-size paper to print the ballots means that about 15-20 races are left off the bottom of the ballot, thus invalidating those votes.[5] One election judge reported--through a witness to Congress in written testimony—that at least 70 ballots were cast before he realized that he had been given the wrong sized paper.[6]

The Legislature would also have known that some critics of the 2022 primary laid at least some of the problems directly at the Elections Administrator's door. For example, according to later testimony, election judges were reassigned by the Elections Administrator without warning, such that multiple judges were showing up for the same polling location, or judges were told they were not needed when positions elsewhere were vacant. The situation was so bad that both

(Mar. 11, 2022), https://www.washingtonpost.com/politics/2022/03/11/harris-county-primary-uncounted-votes-lawsuit/.

[4] *Id.*; *see also* Testimony of Cindy Siegel, Harris County Republican Party Chair, (Mar. 7, 2022), *at* https://www.congress.gov/117/meeting/house/114504/witnesses/HHRG-117-HA08-Wstate-SiegelC-20220317.pdf ("Siegel Testimony"); Alexa Ura, *Harris County's Election Missteps Fuel GOP Lawsuit and calls for investigation*, Texas Tribune (Nov. 15, 2022), https://www.texastribune.org/2022/11/15/harris-county-election-complaints/ (reporting investigation by Harris County Attorney Kim Ogg).

[5] Siegel Testimony, *supra* n. 3, at 4.

[6] *Id.* at 4.

Republican and Democrat election judges stepped up in a bipartisan effort to staff vacant polling locations, even when they were helping the other party.[7]

The Legislature would have been aware of further concerns around the administration of the March 2022 primary election. On the weekend before the election, the elections administrator is supposed to distribute supplies to the election judges for the polling location at Supply Weekend. Part of the process is documenting the chain of custody to verify that the ballots were always under proper control from the time they leave the elections administrator until they are returned. None of this happened, either at pick up or at drop-off on election night.[8]

Harris County is required by law to complete the vote tally within 24 hours after the polls close on election day, but they took until Thursday morning to report the results—31 hours after the polls closed—and a petition had to be filed in court for a judge to extend the time.[9] It took so long to report the votes that Harris County was the last in the State, in contrast with 13.5 hours to count the primary votes in 2020 and 9.5 hours in 2018—before Harris County had an elections administrator.[10] And then, after taking until Thursday to report the results, on Saturday, the elections administrator announced that 10,081 mail-in ballots were not actually counted.[11]

The Legislature would have been aware of the local concerns over the election administration during the March 2022 primary. The Elections Administrator resigned, telling the Commissioners Court that "I did not meet my own standard, nor the standard set by the

[7] Siegel Testimony, *supra* n.3, at 10.
[8] *Id.* at 10.
[9] *Id.* at 4.
[10] Hardy, *supra* note 1; Siegel testimony, *supra* note 3, at 5.
[11] Hardy, *supra* note 1; Siegel testimony, *supra* note 3, at 5.

Commissioners Court."[12] Indeed, the election administration was so obviously incompetent that County Judge Lina Hidalgo, called the issues "unforced errors."[13] The Harris County Democratic Party chair also expressed concerns, calling for a post-election review to instill confidence in the process.[14] The Republican county commissioners expressed willingness to return the job back to the Democrat county clerk, Teneshia Hudspeth, who had extensive experience running elections.[15] Senator Paul Bettencourt said the same thing, calling on the Harris County Commissioners Court to "decide to return the office to the elected Democrat office holders that it was taken from."[16] But, despite these bipartisan concerns, the County Commissioners Court made clear that they were going to keep the position.[17] The Legislature would have understood that voters were losing trust in the integrity of Harris County elections because they could not trust that the ballots they had cast were counted correctly. And without the chain of custody, they could not trust that every ballot counted was properly cast.

Nevertheless, after the primary election disaster, the Harris County Commissioners Court appointed a new elections administrator, Clifford Tatum, to run the 2022 general election. Again, there were problems with ballot paper shortages—and without paper to print the ballots, voters cannot vote. Allegations were made that thousands of voters had to be turned away, not only

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[12] Caroline Love, *Harris County Republicans Sue the Elections Administrator*, HOUSTON PUBLIC MEDIA (Mar. 8, 2022) *at* Harris County Republicans sue the elections administrator over her 2022 primary election management – Houston Public Media.

[13] Hardy, *supra* note 1.

[14] Caroline Love, *Harris County Republicans Sue the Elections Administrator*, HOUSTON PUBLIC MEDIA (Mar. 8, 2022) *at* Harris County Republicans sue the elections administrator over her 2022 primary election management – Houston Public Media.

[15] *Id.*

[16] *Id.*

[17] Mario Diaz, *It Is a Very Difficult Job*, CLICK2HOUSTON, (Mar. 4, 2022), *at* 'It is a very difficult job': Support and criticism continue amid fallout from Harris County primary election issues (click2houston.com).

because of the paper, but also because of issues with the machines that closed polling locations.[18] Two weeks after the fact, "officials struggle[d] to defend the county's election from a barrage of criticism and litigation," the county still couldn't "describe how pervasive the problems were at its 782 polling places and whether any were severe enough to prevent people from voting."[19] Ultimately, fourteen candidates filed election contests to challenge the results as a result of the problems on Election Day.[20]

The *New York Times* reported after the general election that "Democrats have not raised public challenges, but have privately complained that the repeated issues in the election process in Houston were not being adequately addressed . . . ."[21] Ultimately, a post-election report by the elections administrator's office recommended several needed changes, including simplifying voting-day setup, upgrading software, and improving tracking for problems at polling places.[22]

The Legislature would also have known that Harris County represents about 16% of the total population of Texas.[23] By contrast, Dallas County accounts for 9%,[24] Tarrant County

[18] Natalia Contreras, *Almost Two Months After Election Day, Harris County Still Doesn't Know if Polling Site Problems Kept People From Voting*, TEXAS TRIBUNE (Dec. 30, 2022), *at* Harris County's review of voting problems on Election Day "inconclusive" | The Texas Tribune.

[19] Natalia Contreras, *Here's why we still don't know what went wrong in Harris County on Election Day*, The Texas Tribune (Nov. 18, 2022), https://www.texastribune.org/2022/11/18/harris-county-voting-problems/.

[20] J. David Goodman, *After Election Problems in Houston, Republicans Seek to Overturn Results*, NYT (Jan. 6, 2023) *at* After Election Problems in Houston, Republicans Seek to Overturn Results - The New York Times (nytimes.com).

[21] *Id.*

[22] *Id.*

[23] According to the July 2021 Census, Harris County's population was 4,728,030 out of 30,079,522 in the State of Texas. U.S. Census Bureau, *Quick Facts, Harris County, Texas*, www.census.gov, U.S. Census Bureau QuickFacts: Harris County, Texas.

[24] *See id.* (population of Dallas County was 2,600,840).

accounts for 7%,[25] Bexar County accounts for 8%,[26] and Collin County accounts for 4%.[27] Harris County is nearly twice as big as the next largest county with an elections administrator.

This move neither affected the partisan makeup of election officials (as SB 1750 transferred control to Democrat elected officials) nor caused a sea change in how elections are run (because it transferred control back to the offices that had historically administered elections prior to 2022). Nevertheless, the County challenged the law as unconstitutional.

Legal Background

Defendants challenge this Court's subject-matter jurisdiction to hear the case on the grounds of standing and sovereign immunity.

Harris County lacks standing to sue the Secretary of State, the Attorney General, and the State of Texas. A plaintiff must show (1) an injury in fact that is concrete and particularized, actual or imminent, not conjectural or hypothetical; (2) the injury has to be "fairly traceable" to the challenged action of the defendant, not the result of the independent act of third parties not before the court, and (3) it must be "likely, not speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also Heckman v. Williamson County*, 369 S.W.3d 137, 155 (Tex. 2012); *Good Shepherd Med. Ctr. v. State*, 306 S.W.3d 825 (Tex. App.—Austin 2010, no writ). Standing is a constitutional prerequisite to suit under both federal and Texas law, therefore, courts "look to the more extensive jurisprudential experience of the federal courts on this subject for any guidance it may yield." *Texas Ass'n of Business v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993).

[25] *See id.* (population of Tarrant County was 2,154,595).
[26] *See id.* (population of Bexar County was 2,059,530).
[27] *See id.* (population of Collin County was 1,066,465).

Harris County has alleged only a speculative, hypothetical injury that is not fairly traceable to the actions of any of the named defendants, and that speculative injury is therefore not redressable by the injunctive relief they seek. In the absence of either (1) an injury that is "concrete and particularized, actual or imminent, not hypothetical"; or (2) an injury that is "fairly traceable to the defendant's conduct," "not the injury that results from the independent action of some third party not before the court," this Court must dismiss the suit for lack of jurisdiction. *Heckman v. Williamson County*, 369 S.W.3d 137, 155 (Tex. 2012).

Harris County has alleged three basic injuries: (1) the hypothetical injury from a disrupted election *if the county followed the statute* (which they have openly announced they will not do); (2) that the Secretary of State would somehow enforce SB 1750 against the County; and (3) that the AG would somehow enforce SB 1750 against the County. None of these injuries are actual or imminent. "Although imminence is a concededly elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). The injury must be "certainly impending" and "allegations of possible future injury are not sufficient." *Id.* at 409.

In this case, the legislation has not even taken effect yet. And even when it does, Harris County has not properly pleaded what authority the Secretary of State and the Attorney General may have to enforce SB1750, or that any type of enforcement is imminent. Harris County has pointed this Court to no statute allowing the Secretary or the Attorney General to enforce SB 1750, nor pleaded how enforcement is imminent. Thus, Harris County cannot manufacture standing by declaring that County officials will violate the law and that the Defendants will then injure them.

Harris County has not pleaded any facts showing that the Secretary of State or the Attorney General have threatened enforcement, so the County has not shown imminent injury. And again, Harris County has declared that it does not intend to follow the statute, so it will not suffer any hypothetical injury from having its election disrupted.

The State of Texas has immunity from suit, and none of Harris County's alleged injuries are fairly traceable to it, either. The "State is not automatically a proper defendant in a suit challenging the constitutionality of a statute merely because the Legislature enacted it." *Abbott v. MALC*, 647 S.W.3d 681, 697 (Tex. 2022). The "State itself has no enforcement authority with respect to election laws." *Id.* at 698. "Declaratory-judgment claims challenging the validity of a statute may be brought against the relevant governmental entity." *Id.* at 698. And for that reason, none of Harris County's alleged injuries are fairly traceable to the State itself. *Id.* at 698.

The Secretary and the Attorney General also retain sovereign immunity from suit because Harris County's constitutional claim is facially invalid. Harris County claims that SB 1750 is unconstitutional under Article III, section 56 of the Texas Constitution, specifically under the following provisions:

> The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing:
>
> (a)(2) regulating the affairs of counties . . .
>
> (a)(12) for the opening and conducting of elections, or fixing or changing the places of voting;
>
> (a)(14) creating offices, or prescribing the powers and duties of officers, in counties . . .
>
> (a)(30) relieving or discharging any person or set of persons from the performance of any public duty or service imposed by general law.
>
> . . .

> (b) In addition to those laws described by Subsection (a) of this section, in all other cases where a general law can be made applicable, no local or special law shall be enacted.

TEX. CONST. Art. III, § 56 (a)-(b). The Texas Supreme Court has long recognized that the intent of this constitutional provision is to prevent legislatures from "granting special privileges," and "trading votes for the advancement of personal rather than public interests." *Maple Run at Austin Mun. Util. Dist. v. Monaghan*, 931 S.W.2d 941, 945 (Tex. 1996). The fact that the law applies only to Harris County at present (but could eventually apply to other counties in the future) does not render it unconstitutional: "A law is *not* a prohibited local law merely because it applies only in a limited geographical area. . . . *The primary and ultimate test of whether a law is general or special is whether there is a reasonable basis for the classification* made by the law, and whether the law operates equally on all within the class." *Id.* (emphasis added).

Here, Harris County has made no argument that a reasonable basis for the classification does not, nor could not exist. For that reason, sovereign immunity is not waived as to the Secretary and the Attorney General. "Although the UDJA waives immunity for declaratory-judgment claims challenging the validity of statutes, we have held that immunity from suit is not waived if the constitutional claims are facially invalid." *MALC*, 647 S.W.3d at 698. That in itself is a jurisdictional question. *Id.* at 699. "As in every Texas case involving sovereign immunity, this jurisdictional inquiry touches on the merits because . . . courts lack jurisdiction to proceed if the claim appears 'facially invalid.'" *Id.* at 699.

Argument

Harris County has failed to plead facts either sufficient to establish standing or to waive sovereign immunity. It has both named the wrong parties and failed to show an injury fairly

traceable to the defendants that would be redressable by a favorable decision. And its challenge to the constitutionality of the statute is facially invalid.

I. Harris County has failed to plead facts sufficient to allege standing.

A. Harris County has failed to plead an actual, concrete, imminent injury sufficient to establish standing.

Harris County's real gripe in this action is that the Legislature has removed a power it previously had to have its elections run by an appointed Elections Administrator rather than an elected official such as the County Clerk. Harris County does not claim the diminution of that power as an injury, however, because one governmental actor typically does not have a justiciable injury based on a generalized claim that another actor's exercise of its own authority on behalf of the same government altered the distribution of power. *See United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1381-82 (D.C. Cir. 1984) (collecting cases). The one exception is where the challenged action "totally deprive[s] the [complainant] of [a] right" granted by the Constitution—typically, the right of an individual legislator to vote on proposed legislation. *Chiles v. Thornburgh*, 865 F.2 1197, 1206 (11th Cir. 1989) (discussing *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1984); *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974)). Harris County does not claim that S.B. 1750 destroyed a right guaranteed by the Constitution to counties because it cannot. It is well established that as "a subordinate and derivative branch of state government," *Avery v. Midland County*, 406 S.W.2d 422, 426 (Tex. 1966), *vacated on other grounds*, 390 U.S. 474 (1968); *see* TEX. CONST. art. IX, § 1; TEX. CONST. art. XI, § 1, the County "possess[es] only such powers and privileges" as the State confers upon it. *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 430 (Tex. 2016); *e.g.*, *Guynes v. Galveston County*, 861 S.W.2d 861, 863 (Tex. 1993); *Quincy*

Lee Co. v. Lodal & Bain Engineers, Inc., 602 S.W.2d 262, 264 (Tex. 1980). The Legislature gave Harris County the right to appoint an elections administrator, and it could take it away.

Indeed, for similar reasons, it is dubious that counties can ever sue the State on a claim like the one presented here. "Texas counties are legal subdivisions of the State, subordinate and derivative branches of state government that represent no sovereignty distinct from the state and possess only such powers and privileges as have been expressly or impliedly conferred upon them." *State v. Hollins*, 620 S.W.3d 400, 403-04 (Tex. 2020). As a result, it is well established that "the state may use, and frequently does use, a county as its agent in the discharge of the State's functions and duties." *Childress County v. State*, 92 S.W.2d 1011, 1015 (Tex. 1936). Because counties are subordinate components of the sovereign, it makes little sense to allow the county to sue the State because it disagrees with the choices the State makes about what powers the County may or may not exercise.

Instead of claiming a right to appoint an elections administrator in perpetuity, Harris County pleaded that it will be injured because compliance with SB 1750 will be difficult due to disruptions from "massive transfers of employees and resources from the EA's office to the Harris County Clerk and Harris County Tax Assessor-Collector" and increased costs to the County. Plaintiff's Application at 13-14. While compliance costs could potentially constitute an injury-in-fact, Harris County advertises that it "does not intend to comply" with the statute. *Id.* at 14, 18. Therefore, any alleged hypothetical injury from complying with SB 1750 is wholly irrelevant.

Harris County also asserts that if it fails to comply with SB 1750, it will "jeopardize not only the results of those elections, but the validity of voter lists, polling locations, thousands of financial transactions, and contracts with other entities . . . . Without court intervention, the public's

selection of their elected representatives . . . will be risked in Harris County." Plaintiff's Application at 14. But this alleged injury assumes an enforcement action, and specifically one in which the remedy would be the invalidation of votes. Harris County has pointed this Court to no statute that would allow either the Secretary of State or the Attorney General to enforce SB 1750 against it, let alone in such a draconian manner. SB 1750 itself has no such enforcement provision, and election law typically goes to great lengths to *avoid* a circumstance where changes to election rules could result in the invalidation of votes. *See, e.g., Allen v. Milligan*, 143 S. Ct. 1487, 1517 (2023) (holding that Alabama's redistricting maps violate the federal Voting Rights Act *without* invalidating the 2022 election). Therefore, Harris County has failed to plead an actual or imminent injury fairly traceable to the named defendants, and this Court should dismiss its claims for lack of jurisdiction.

B. Harris County has failed to demonstrate that the alleged injury is "fairly traceable" to any of the named defendants; thus, the injury is also not redressable by the requested relief.

Even if Harris County had an actual, imminent injury due to potential enforcement of SB 1750 against it, Harris County has not shown a connection between that injury and any of the named defendants. Therefore, it has failed to establish standing.

1. The State of Texas is the wrong defendant.

Under Texas law, the "State is not automatically a proper defendant challenging the constitutionality of a statute merely because the Legislature enacted it." *MALC*, 647 S.W.3d at 697. Harris County has not shown—nor can it show—that its alleged injury is "fairly traceable" to the State of Texas because "the State itself does not enforce election laws." *Id.* at 696. Because the "State itself has no enforcement authority with respect to election laws . . . [Harris County has] failed to meet the traceability element of standing" as to the State itself." *Id.* at 698.

2. Provisional Attorney General Colmenero and Secretary Nelson are the wrong defendants.

Although the State is not a proper party, it is possible to challenge the validity of a statute by suing the entity that enforces it: "Declaratory-Judgment claims challenging the validity of a statute may be brought against the relevant governmental entity." *Id.* at 698. But, Harris County did not name governmental entities. Rather, it confused *ultra vires* suits with declaratory judgment actions by naming the AG and Secretary of State in their official capacities, and not the Office of the Attorney General or the Office of the Secretary of State.

In an *ultra vires* suit, "because the rule that ultra vires suits are not suits against the State within the rule of immunity of the State from suit derives from the premise that the acts of officials which are not lawfully authorized are not acts of the State, it follows that these suits cannot be brought against the state, which retains immunity, but must be brought against the state actors in their official capacity. This is true even though the suit is, for all practical purposes, against the state." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009) (cleaned up); *Patel v. Texas Dep't of Licensing and Reg.*, 469 S.W.3d 69, 77 (Tex. 2015) ("because the Threaders challenge the validity of the cosmetology statutes and regulations, rather than complaining that officials illegally acted or failed to act, the ultra vires exception does not apply. The Department and the Commission are not immune from the Threaders' suit.")

Harris County brought a declaratory judgment action, not an ultra vires suit. "For claims challenging the validity of ordinances or statutes, however, the Declaratory Judgment Act requires that the relevant governmental entities be made parties, and thereby waives immunity." *Id.* at 373 n.6. Thus, Harris County should have sued the Office of the Attorney General and the Office of the Secretary of State as entities, not the state officials themselves.

3. Even if Harris County had sued the Secretary of State's office correctly, Harris County lacks standing to sue the Secretary of State.

Even if she could be a proper defendant in a UDJA action, the Secretary of State is not a proper defendant here because the Secretary of State does not generally enforce the entire election code. Harris County must show how the Secretary would enforce SB1750 against the County. Because it has not done so, it lacks standing to sue the Secretary.

The Texas Supreme Court and the Fifth Circuit agree that for traceability purposes, a plaintiff must demonstrate an enforcement connection between the official sued and the challenged statutory provision. Enforcement is directly related to traceability. *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019). Although enforcement authority is often discussed in the context of sovereign immunity, "it may be the case that an officials' connection to enforcement is satisfied when standing has been established." *Id.* at 1002.

In any case, "the official must have the requisite enforcement connection of the particular statutory provision that is the subject of the litigation." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020). When an officials' connection to enforcement is *not* established, "the plaintiff [has] failed to allege sufficient facts to satisfy the traceability element of standing." *MALC*, 647 S.W.3d at 697.

Here, Harris County has failed to establish that enforcement connection: "The Secretary's general duties fail to make him the enforcer of specific election code provisions. More is needed—namely, a showing of the Secretary's connection to the enforcement of the particular statutory provision that is the subject of the litigation." *Lewis v. Scott*, 28 F.4th 659, 664 (5th Cir. 2022) (cleaned up). "That is especially true here because the Election Code delineates between the

authority of the Secretary of State and local officials." *Id.* at 664; *Richardson v. Flores*, 28 F.4th 649, 654 (5th Cir. 2022).

Harris County cannot ask this Court to enjoin the Secretary of State's alleged ability to enforce SB 1750. *See* Plaintiff's Application at 18. On its face, SB 1750 has no enforcement provision, but merely retracts the ability of certain counties to create an elections administrator.

Instead, Harris County points to SB 1933, which provides that the Secretary may terminate an elections administrator under certain circumstances. Plaintiff's Application at 8, 13, 18. But, Harris County misunderstands that statute and has not shown how it establishes traceability. SB 1933 does not empower the Secretary of State to remove the elections administrator at the moment SB 1750 takes effect.

SB 1933 only allows the Secretary of State to remove an elections administrator after a lengthy process of notice and oversight that must be initiated by a third-party complaint. Because SB 1933 cannot even begin to operate without the actions of third parties not before the Court, there is no traceability. *Heckman*, 369 S.W.3d at 154.

First, Texas Election Code § 31.017 (as amended by SB 1933) allows the Secretary of State to require administrative oversight over a county elections administrator only if (1) there is a complaint filed by someone who participated in the election; (2) the secretary gives notice to the election official; and (3) after an investigation, the secretary "has good cause to believe that a recurring pattern of problems with election administration or voter registration exists within the county . . . ." *Id.* If the Secretary decides to implement administrative oversight after the investigation, the Secretary can do that without removing the election official.

Second, after the administrative oversight period, Texas Election Code §31.037 (as amended by SB 1933) only allows for the Secretary to remove the elections administrator "*if the recurring pattern of problems with election administration or voter registration is not rectified . . . .*" *Id.* (emphasis added). If the Secretary is not satisfied with the corrections, the oversight process lasts at least until "December 31 of the even-numbered year following the first anniversary of the date the complaint was received . . . ." TEX. ELEC. CODE § 31.037(f)(1).[28] Thus, the soonest a Secretary of State could possibly remove an election official under this act (assuming the Secretary received an actionable complaint to start the process during this upcoming election) would be December 31, 2024. TEX. ELEC. CODE § 31.050(f)(1).

Because none of the procedures of SB 1933 that could result in the removal of an elections administrator will occur remotely close in time to the operation of SB 1750, Harris County has not shown traceability of its purported future injury to the Secretary of State. "Traceability is particularly difficult to show where the proffered chain of causation turns on the government's speculative future decisions regarding whether and to what extent it will bring enforcement actions in hypothetical cases." *A.R. Eng'g & Testing, Inc. v. Scott*, ___ F.4th ___ (5th Cir. July 10, 2023) (citing *Clapper v. Amnesty Int'l*, 568 U.S. 398, 412-14 (2013)).

Next, to the extent that Harris County has pleaded that the Secretary's broad, general authority to oversee elections is sufficient to establish standing, that is incorrect. The Fifth Circuit has specifically rejected that proposition, stating that "our precedent has clarified that the

[28] The Secretary also has the option, after the oversight process has failed, to file a petition in the district court in the county where the administrator resides in accordance with Local Government Code § 87.015. TEX. ELEC. CODE § 31.021(a) (as amended by SB 1933).

Secretary's general duties under the Texas Election Code fail to make the Secretary the enforcer of specific election code provisions." *Richardson v. Flores*, 28 F.4th 649, 654 (5th Cir. 2022); *see also* TEX. ELEC. CODE § 31.001-.005; *Bullock v. Calvert*, 480 S.W.2d 367, 372 (Tex. 1972) (legislature did not write a "blank check" to the Secretary of State to enforce election laws).

Because Harris County has pleaded no mechanism by which the Secretary would enforce SB1750, Harris County has no standing to sue the Secretary. In order to have standing to sue, there must be an actual or threatened injury that is "fairly traceable" to the defendant, and it must be "likely, not merely speculative, that the injury will be redressed by a favorable decision." *Good Shepherd Med. Ctr. v. State*, 306 S.W.3d 825 (Tex. App.—Austin 2010, no writ) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Those requirements are not met here because the Secretary could not remove the Elections Administrator before the November 2023 elections in the first place under SB 1933.

Nor could the Secretary refuse to recognize the votes from Harris County merely on the grounds that the election was administered by the wrong official. The Texas Supreme Court settled this question back in 1887. A candidate alleged certain irregularities in the election rules, one of which was that "the managers of the election were not properly appointed and qualified." *Fowler v. State*, 68 Tex. 30, 34 (1887). The Court set forth a rule that "when it is shown that the irregularities of the officers have in no manner changed the result of the election, or its fair and honest character, the acknowledged rule is to count the returns or ballots, . . . in the same way as if the directory provisions of the statute had been rigorously pursued." *Id.* at 36. The rationale behind this rule is that "[e]lectors must not be deprived of their votes on account of . . . any misconduct on the part of its presiding officers, if these have not affected the true result of the

election." *Id.* at 35. Thus, regardless of who administers the Harris County election in November, no voter risks being disenfranchised so long as their votes otherwise appropriately comply with state law.

For all these reasons, the Secretary of State should be dismissed from this suit for lack of jurisdiction.

4. Harris County has not pleaded standing as to the Attorney General.

Although Harris County has asked this Court to enjoin the Attorney General from enforcing SB 1750, it has pointed this court to no provision that would allow the Attorney General's office to do so, nor has it pleaded facts to establish a credible threat of enforcement. Plaintiff's Application at 19.

Again, as with the Secretary of State, Harris County must demonstrate that its alleged injury is fairly traceable to the Attorney General. In order to demonstrate traceability, Harris County must at least plead facts sufficient to point this Court to the Attorney General's enforcement authority over SB 1750. *Whole Woman's Health v. Jackson*, 142 S. Ct 522, 534-35 (2021); *see also MALC*, 647 S.W.3d at 697-98. It has not done so. The County has merely alleged that the Attorney General and the Secretary of State "will be the lead agents enforcing SB 1750." Plaintiffs Application at 18. But this Court should dismiss this suit against the Attorney General because "plaintiff failed to allege sufficient facts to satisfy the traceability element of standing." *Abbott v. MALC*, 647 S.W.3d 681, 687 (Tex. 2022).

The Texas Supreme Court requires that a county plead facts establishing standing to sue the Attorney General. *Abbott v. Harris County*, ____ S.W.3d ____, 2023 WL 4278763, at *6 (Tex. June 23, 2023). "A plaintiff seeking an injunction against a defendant's enforcement of a governmental enactment may establish injury-in-fact by demonstrating a credible threat of

prosecution thereunder." *Id.* at *5. In *Abbott*, the Court considered Harris County's standing to sue the Attorney General, and it found standing because the Attorney General had sent a letter to Harris County officials threatening legal action in response to their violations of the executive order at issue in that case. *Id.* at *6. Here, Harris County has pleaded no facts regarding the AG's intent to enforce SB 1750. Harris County's attempt to rely on past actions before SB 1750 existed to predict future actions regarding a new law is hypothetical, speculative, and cannot substitute for an actual threat of enforcement. Therefore, it has not established standing. Again, "[t]raceability is particularly difficult to show where the proffered chain of causation turns on the government's speculative future decisions regarding whether and to what extent it will bring enforcement actions in hypothetical cases." *A.R. Eng'g & Testing, Inc. v. Scott*, ___ F.4th ____ (5th Cir. July 10, 2023) (citing *Clapper v. Amnesty Int'l*, 568 U.S. 398, 412-14 (2013)).

II. Immunity is not waived because Harris County has pleaded a facially invalid constitutional claim.

Harris County has pleaded a constitutional claim under Article III, Section 56 of the Texas Constitution. "Although the UDJA generally waives immunity for declaratory-judgment claims challenging the validity of statutes, we have held that 'immunity from suit is not waived if the constitutional claims are facially invalid.'" *Abbott v. MALC*, 647 S.W.3d 681, 698 (Tex. 2022) (quoting *Klumb v. Houston Municipal Employees Pension System*, 458 S.W.3d 1, 13 (Tex. 2015)). "We also emphasize, however, that our analysis of these constitutional provisions arises as part of our consideration of *jurisdiction*." (emphasis in original). *Id.* at 699. "As in every Texas case involving sovereign immunity, this jurisdictional inquiry touches the merits because, as noted, courts lack jurisdiction to proceed if the claim appears 'facially invalid.'" *Id.*

Here, Harris County's argument that SB 1750 is unconstitutional is not facially viable. The injunction application focuses entirely on whether the law is applicable only to Harris County, but that is the wrong test. *See* Plaintiff's Application at 14-17. The test is not whether a law is only applicable to a single county, but whether there could have been any possible reasonable basis for the classification. Harris County has not even made the argument—much less alleged facts to demonstrate—that no reasonable basis could have existed for the classification.

Indeed, many reasonable bases exist for treating Harris County differently for election administration purposes. Harris County is the largest county in Texas with a larger population than 26 states. Its sheer size warrants special consideration, as does its outsized impact on statewide elections. Further, after the Harris County Commissioners Court changed the election administration system for the 2022 election cycle, new problems emerged in Harris County that made national news, created local controversy, and led to numerous election contests. Solving Harris County-specific issues could also provide a reasonable basis. But Harris County has not even addressed any of the reasonable bases that could exist – much less demonstrated that none of them could exist. Therefore, the constitutional claim is facially invalid, immunity is not waived, and this Court "lacks jurisdiction to proceed." *MALC*, 647 S.W.2d at 699.

A. SB 1750 has a reasonable basis for treating Harris County differently; therefore, it is a general law and outside the purview of Article III, section 56.

Since 1899, the Texas Supreme Court has consistently stated that when a legislature has a reasonable basis for drawing a classification—even when that classification only affects a single county—the law is considered a general law, and therefore not prohibited by Article III, section 56. This principle was first stated in *Clark v. Finley*, in which the Court "adopt[ed] the rule that, in

order to make an act a general law, the classification adopted should be reasonable . . . . *Clark v. Finley*, 54 S.W. 343, 346 (Tex. 1899).

Over the last century, Texas courts have consistently evaluated Article III, section 56 claims based on the reasonable basis for the classification—even when a statute targets a single county or territory, the constitutional determination still rises and falls based on the reasonable basis test.[29] "*The 'primary and ultimate test' of whether a law is an impermissible special or local law is whether the legislature has a reasonable basis for the classification used*." *Robinson v. Hill*, 507 S.W.2d 521, 525 (Tex. 1974) (emphasis added) (quoting *Smith v. Davis*, 426 S.W.2d 827, 830 (Tex. 1968)). More recently, the Texas Supreme Court reaffirmed that "Legislation does not violate Article III, Section 56, however, as long as there is a reasonable basis for its classifications." *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, 952 S.W.2d 454, 465 (Tex. 1997).

[29] Even cases declaring statutes unconstitutional under Article III, section 56 have done so not only because a single county, territory, or small group was targeted, but also because there was no reasonable basis. *See, e.g.*, *Anderson v. Wood*, 152 S.W.2d 1084,1087 (Tex. 1941)(finding unconstitutional a limit on hiring of traffic officers targeting only Tarrant County when counties of both smaller and larger populations faced no such restrictions); *Miller v. El Paso County*, 136 Tex. 370, 374 (Tex. 1941) (finding unconstitutional a statute authorizing the El Paso Commissioners Court to levy a 5% tax for county development where other counties of similar size were not authorized); *Bexar County*, 97 S.W.2d at 470-71 (finding no reasonable basis to reduce Bexar County officials' pay below the level of counties with similar population); *City of Fort Worth v. Bobbitt*, 36 S.W.2d 470, 471-72 (Tex. 1931)(noting that the need for a "fair basis" to support the classification); *Smith v. State*, 49 S.W.2d 739, 743-44 (Tex. Crim. App. 1932)(holding a jury rule targeting McClennan County unconstitutional because the population classification was not reasonably related to the rule); *Southwest County Water Dist. v. City of Austin*, 64 S.W.3d 25, 31-32 (Tex. App.—Austin 2000, no writ) (noting the need for a reasonable basis, but declining to find a reasonable basis in a broader statewide interest); *City of Austin v. City of Cedar Park*, 953 S.W.3d 424, 432-435 (Tex. App.—Austin 1997, no writ)(finding unconstitutional a statute with a single-county population bracket that annexed extraterritorial land from Austin to Cedar Park because there was no reasonable basis).

1. A statute has a reasonable basis if any set of facts could exist that would justify the classification.

Reasonable basis is a low bar: "If there could exist a state of facts justifying the classification or restriction complained of, we will assume that it existed." *Scurlock Permian Corp. v. Brazos County*, 869 S.W.2d 468, 485 (Tex. App.—Houston [1st Dist.] 1993, reh'g denied)(citing *Inman v. R.R. Comm'n*, 478 S.W.2d 124, 126 (Tex. App.—Austin 1972, writ ref'd n.r.e.)); *see also Smith v. Davis*, 426 S.W.2d 827, 831 (Tex. 1968) ("It is to be presumed that the Legislature has not acted unreasonable or arbitrarily; and a mere difference of opinion . . . . is not a sufficient basis for striking down legislation as arbitrary or unreasonable.").

One reasonable basis that could exist is Harris County's sheer size. As the *New York Times* reported, the size of Harris County created reasons why elections could be extra challenging: "The county's size has been a challenge, covering an area nearly the size of Delaware with 2.5 million registered voters and over 700 polling places."[30]

As of the 2020 census, Harris County is the third most populous county in the nation,[31] and it has a larger population than 26 states.[32] Over a 17-year period, Harris County's population has grown more than twice as fast as the nation's population.[33] And it keeps growing -- Harris County added 45,000 residents in 2022, the second-most growth of any county in the United

[30] J. David Goodman, *After Election Problems in Houston, Republicans Seek to Overturn Results*, NYT (Jan. 6, 2023) *at* After Election Problems in Houston, Republicans Seek to Overturn Results - The New York Times (nytimes.com).
[31] United States Census Bureau, *2020 Population and Houston State Data*, www.census.gov (Aug. 12, 2021).
[32] Harris County, *Population Report—February 2018*, budget.harriscountytx.gov (Feb. 2018).
[33] *Id.*

States.[34] Harris County's sheer size and growth alone is a reasonable basis for the legislature to treat it individually on any number of issues, not just elections.

Another reasonable basis could be that the legislature observed that only Harris County had significant problems with its Elections Administrator. None of the other counties with an elections administrator made national news for how badly run their elections were. Harris County never had an elections administrator before the 2022 election cycle, and once the system changed, both Republicans and Democrats thought the administration was generally worse and needed correction. It would be reasonable for the legislature to make a change to the elections administrator in the one county that was experiencing difficulties while leaving the other counties' elections administrators alone.

In order to state a viable claim that fits within the UDJA's waiver of immunity, Harris County needed to plead facts that could defeat *all possible reasonable explanations* for the classification in order for its Article III, Section 56 claim to be facially valid. It has not; therefore, the Defendants are immune from suit.

2. Whether the law targets a single county is the beginning, not the end, of the analysis.

Harris County focuses on the fact that SB 1750 applies only to Harris County at the present time, then deduces that the law must therefore be unconstitutional under Article III, section 56. Plaintiff's Br. at 15-16. But this argument relies on an outdated precedent and ignores the main point of *Maple Run at Austin Municipal Utility District v. Monaghan*, 931 S.W.2d 941 (Tex. 1996).

[34] Kinder Institute for Urban Research, *Harris County Bounces Back in a Big Way in 2022 Population Estimate*, kinder.rice.edu (Mar. 23, 2023).

Harris County relies on *City of Fort Worth v. Bobbitt*, a 1931 Texas Supreme Court case with strong language that targeting a county is unconstitutional. *See* 36 S.W.2d 470 (Tex. 1931). But, assuming Harris County's reading of *Bobbitt* is correct, *Bobbit* would be an outlier: in the great weight of precedent, courts have viewed a statute's classification of one as merely the beginning of the Article III, section 56 analysis, not the end of it. Even Texas Supreme Court cases of the same vintage as *Bobbitt* from the 1930s and 1940s relied on reasonable basis analysis to find that laws targeting a single county were unconstitutional—it was not the targeting alone that dictated the outcome.[35] And, *Bobbitt* itself notes that a "fair basis" should support the classification. *Bobbitt*, 36 S.W.2d at 471-72.

Resolving any doubt that a statute that targets a specific area can be constitutional, the Texas Supreme Court has previously upheld a population classification that singled out Harris County in a one-time pension fund transfer. *Harris County Hospital District v. Pension Board of the City of Houston,* 449 S.W.2d 33, 39 (Tex. 1969). The Court noted specifically that the "*City argues that no city other than Houston can ever be affected by the provisions of the Section . . . . No authority is cited in support of the position that this fact renders the Act a local or special law, and we doubt that any will be found.*" *Id.* at 38.

[35] Cases declaring statutes unconstitutional under Article III, section 56 have done so not only because a single county, territory, or small group was targeted, but also because there was no reasonable basis for doing so. *See, e.g.*, *Anderson v. Wood*, 152 S.W.2d 1084, 1087 (Tex. 1941)(finding unconstitutional a limit on hiring of traffic officers targeting only Tarrant County when counties of both smaller and larger populations faced no such restrictions); *Miller v. El Paso County*, 136 Tex. 370, 374 (Tex. 1941) (finding unconstitutional a statute authorizing the El Paso Commissioners Court to levy a 5% tax for county development where other counties of similar size were not authorized); *Bexar County*, 97 S.W.2d at 470-71 (finding no reasonable basis to reduce Bexar County officials' pay below the level of counties with similar population); *City of Fort Worth v. Bobbitt*, 36 S.W.2d 470, 471-72 (Tex. 1931)(noting that the need for a "fair basis" to support the classification); *Smith v. State*, 49 S.W.2d 739, 743-44 (Tex. Crim. App. 1932)(holding a jury rule targeting McClennan County unconstitutional because the population classification was not reasonably related to the rule).

The Texas Supreme Court in *Maple Run* went to great lengths to harmonize the mostly consistent, but sometimes inconsistent, precedent on Article III, section 56. In the years since *City of Fort Worth v. Bobbitt,* Texas courts have said explicitly what even *Bobbitt* did implicitly—that when a law targets a single county, Article III, section 56 comes into question, but that is not the end of the analysis. *Maple Run*, in fact, recognizes that the reasoning underlying *Bobbitt* and other early cases finding certain laws unconstitutional was not the targeting itself, but the lack of a reasonable basis for the classification. *See Maple Run*, 931 S.W.2d at 946. The Court says—exactly counter to the language Plaintiffs cite from *Bobbitt*—that *"A law is not a prohibited local law merely because it applies only in a limited geographical area." Maple Run*, 931 S.W.2d at 945 (emphasis added).

The Austin Court of Appeals articulated this same understanding of the precedent over a decade before the *Maple Run* decision. In *Public Utility Commission v. Southwest Water Services, Inc.*, the court gave a detailed analysis of several cases targeting single counties or districts, some of which were constitutional and some of which were not. The Court then explained that the outcome was determined not by the targeting itself, but by the presence or absence of a reasonable basis for the classification. 636 S.W.2d 262, 264-66 (Tex. App.—Austin 1982, reh'g denied). Ultimately, the court concluded: *"These cases preclude . . . a rule that declaring a statutory class, which by its terms is closed to future members, to be a per se violation of the constitutional prohibition against local and special laws." Id.* at 266.

Thus, whether the law targets a single county or creates a "closed class" is not dispositive—the reasonable basis is.

3. Courts have held that laws targeting specific areas were constitutional when the classification was related to a larger statewide interest.

Although the potential reasonable bases for a legislative classification are many, the Texas Supreme Court has specifically recognized a specific subset: a targeted classification that furthers a larger statewide interest. As the Court observed in *Maple Run:* "Where the operation or enforcement of a statute is confined to a restricted area, the question of whether it deals with a matter of general rather than purely local interest is an important consideration in determining its constitutionality." 931 S.W.2d 941, 947 (Tex. 1996) (quoting *County of Cameron v. Wilson*, 326 S.W.2d 162, 165 (Tex. 1959)).[36]

To be clear, a larger statewide interest is a sufficient, but not necessary, condition of constitutionality: "The significance of the subject matter and the number of persons affected by the legislation are merely factors, albeit important ones, in determining reasonableness." *Maple Run*, 931 S.W.3d at 947.[37]

That said, Harris County's elections have a broad statewide impact. The County is larger than 26 states, and—with unquestionably the largest population in Texas—it has an outsized impact on statewide elections. It has a major impact on elections for seats whose district lines may encompass both parts of Harris County as well as neighboring counties. And, as the third-most populous county in the nation, Harris County is so significant that when problems with its elections administration arise, they become national news stories. The legislature has a reasonable basis in

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[36] *See also Lower Colorado River Authority v. McCraw*, 83 S.W.2d 629, 636 (Tex. 1935) ("[A] statute is not local or special, within the meaning of [Article III, section 56], even though its enforcement is confined to a restricted area, if persons or things throughout the state are affected thereby, or if it operates upon a subject that the people at large are interested in.").

[37] In *Maple Run* itself, the Court rejected environmental conservation as a larger state interest when the purpose of the statute was not environmental conservation but allowing a municipal district to dissolve and leave its debts to Austin taxpayers. 931 S.W.2d at 948.

treating Harris County differently than any other county in the State because its elections impact larger statewide interests than any other county in the State.

The legislature often targets a single locality for the greater public good. For example, in *County of Cameron v. Wilson*, the Texas Supreme Court found that a classification for park development that essentially targeted Padre Island was reasonable because the need for park infrastructure on an undeveloped island was different from that of mainland parks. 326 S.W.2d 162, 165-66 (Tex. 1959). Then, the Court made a sweeping endorsement of the need for targeted classifications in the service of a wider state interest:

> Because of the breadth and territorial extent of the State, its varied climatic and economic interests, and the attendant problems of transportation, regulation, and general needs incident to a growing and active population, *we have been and will again be faced with the need and demand for legislation which affects all the people of the State generally, yet which, in its direct operation, will apply to one locality* or to a comparatively small number of counties. Such legislation is not only common, but is generally for the public good, or at least has been so declared by the legislative branch of government. *The scope of such legislation should not be restricted by expanding the nullifying effect of Article 3, s 56 of the Constitution.*

Id. at 167 (emphasis added).

Again, in *Smith v. Davis*, the Texas Supreme Court upheld a population classification that effectively gave two specific counties the ability to levy extra taxes to support teaching hospitals—the only two counties in the State with teaching hospitals. The Court reasoned that "the operation of teaching hospitals for state-supported medical schools . . . affects people throughout the State. . . . People throughout the State have a vital interest in medical education." 426 S.W.2d. 827, 831-32 (Tex. 1968). The broader State interest in medical education was a reasonable basis for the two-county classification.

One court-approved form of promoting the larger public interest is in solving local jurisdictional/territorial disputes when a matter of high State importance is at stake. The *Maple Run* Court spoke favorably of the legitimate basis for upholding a statute that only affected the Dallas/Fort Worth International Airport. 931 S.W.2d at 948. Although Dallas and Fort Worth created a board to jointly administer the airport plans, eventually, the nearby cities of Irving, Euless, and Grapevine objected to its continued expansion, and a territorial war over zoning ordinances ensued. *City of Irving v. Dallas/Ft. Worth Int'l Airport Bd.*, 894 S.W.2d 456, 449-60 (Tex. App.—Fort Worth 1995, no writ). The legislature stepped in to grant "constituent public agencies of a joint board" who are "home rule municipalities whose populations exceed 400,000" the exclusive power to administer municipal airports regardless of whether all or part of the airport was located within another municipality, and it overruled any other municipality's ability to enforce zoning ordinances in the airport territory. *Id.* at 460. Because the law clearly targeted Dallas and Fort Worth, the cities challenged its constitutionality, reasoning that there was no reasonable basis to treat D/FW differently than other airports, such as those in Houston. *Id.* at 465-66.

The Court upheld the statute on statewide public interest grounds:

> There is no doubt about the significance of D/FW airport, not only statewide but also nationally and internationally. If ever a statute could be found not local or special even though its enforcement or operation is confined to a restricted area, because persons or things throughout the State are affected thereby or if it operates upon a subject in which people at large are interested, [this law] is such a measure.

Id. at 467 (internal citations omitted). The court also rejected the Cities' argument that the legislative attempt to fix a local problem rendered the statute unconstitutional—it recognized that "there clearly is a local problem with the host cities," but "the Legislature's attempt to alleviate this problem does not place [the law] into the realm of an unconstitutional local or special

measure." *Id.* Thus, a law targeting not only a local area but also a local problem can still have a reasonable basis that makes it a constitutional general law.

Here, the Legislature also saw that "there clearly is a local problem" with administering elections in the largest county in the State and the third-largest county in the country. In the one year that Harris County had an appointed elections administrator instead of elected officials from either party running the election, Harris County had "one of the worst-run elections in recent memory."[38] Because of the challenges and controversies surrounding the 2022 elections run under the elections administrator system, the Legislature had a reasonable basis for restoring the system back to the local elected officials who had a history of running less controversial and challenge-ridden elections. Like the D/FW situation, the local problem was simply too important to leave unresolved, and the legislature stepped in. And the Texas Supreme Court spoke approvingly of this statewide interest as a reasonable basis. *Maple Run*, 931 S.W.2d at 948.

By any measure, SB 1750 has a reasonable basis. Considering that a statute has a strong presumption in favor of reasonableness and constitutionality, and "*it must clearly appear that there is no reasonable basis for the classification adopted by the Legislature*" in order to invalidate it, Harris County has pleaded no set of facts that could possibly overcome this presumption. *See Cameron County*, 326 S.W.3d at 167. As such, Harris County has pleaded a constitutional claim that is facially invalid, and immunity is not waived.

4. In addition, SB 1750 could apply to other counties in the future.

The Texas Supreme Court has consistently held that when a law targets a single locality, the reasonable basis for the law is the touchstone of its constitutionality, not the fact of a restricted

[38] Hardy, *supra* note 4.

application. That said, an alternative basis for upholding a law that targets a single locality is the possibility that it could apply to other counties in the future: a law that "may have applied to only one county in the state at the time of its passage . . . did not alone make it a special or local law, . . . [because it could] apply to other counties in the future." *Bexar County v. Tynan*, 97 S.W.2d 467, 469 (Tex. 1936); *accord City of Fort Worth v. Bobbitt*, 36 S.W.2d 470, 471-72 (Tex. 1931); *Suburban Utility Corp. v. State*, 553 S.W.2d 396, 399 (Tex. App.—Houston 1977, reh'g denied).

SB 1750 could encompass another county in the future. Harris County admits this fact: "For example, if Travis County—which currently has a population of 1.3 million and does not have an elections administrator—reaches 3.5 million residents at some point in the future, Section 2 would preclude Travis County from 'creat[ing]' a county elections administrator position." Plaintiff's Application at 7. Given the substantial growth in Texas over the last few years, it is likely that SB 1750's application would extend over time.

Even if it were unlikely that the population classification will ever encompass another county, the Texas Supreme Court has held that any doubt must be resolved in favor of the validity of the statute. *Bexar County*, 97 S.W.2d at 470. And, indeed, it would be the Legislature's prerogative to determine that counties above a certain size should have a different scheme for elections administration because larger counties have different administrative needs than smaller counties.

Harris County believes that SB 1750 can never apply to any other county because counties with elections administrators today that exceed the 3.5 million population mark in the future will not have to abolish their elections administrator. Plaintiff's Application at 8. But even if that is true, and it is not clear that it is, the statute states that counties with a population of 3.5 million or

less may create a county administrator. As Texas grows, other counties that currently have no elections administrator and later exceed the 3.5-million-person threshold will then be unable to create the position of county elections administrator. Such a scenario may happen in the future, and so the statute may be read as a general law on that basis as well.

Finally, if the statute *can* be read as constitutional, it *must* be:

> When we evaluate the constitutionality of a statute, we start with the presumption that statutes enacted by the Legislature comply with both the United States and Texas Constitutions. In line with this presumption, if a statute is susceptible to two interpretations—one constitutional and the other unconstitutional—then the constitutional interpretation will prevail.

EBS Solutions, Inc. v. Hegar, 601 S.W.3d 744, 754 (Tex. 2020) (cleaned up). "The party asserting that the statute is unconstitutional bears a high burden to show unconstitutionality." *Id.* at 754. Harris County has not met its burden to plead facts demonstrating unconstitutionality, and immunity is not waived.

B. SB 1750's legislative history is irrelevant, as the Texas Supreme Court does not consider it.

To avoid the clear import of the statute's text when read in the light of well-established caselaw, Harris County relies heavily on legislative history, Twitter, and press releases to support its contention that the law unconstitutionally targeted Harris County. And even though the linchpin of the court's analysis is whether the legislation has a reasonable basis—not whether a county was targeted—Harris County's brief offers no argument against the reasonable basis, relying instead on the defunct closed-bracket analysis. Plaintiff's Br. at 15-17.

Harris County's reliance on Sen. Paul Bettencourt's press releases and Twitter posts, as well as an interchange with Rep. Briscoe Cain, is misplaced. The Texas Supreme Court has rejected this approach as a means of statutory interpretation, and rightly so. Sen. Bettencourt's

statements reflect only his own intent, but the text of the statute reflects the collective intent of all 181 members of the State legislature: "Statements made during the legislative process by individual legislators or even a unanimous legislative chamber are not evidence of the collective intent of the majorities of both legislative chambers that enacted a statute." *Molinet v. Kimbrell*, 356 S.W.3d 407, 414-15 (Tex. 2011). Moreover, the legislators are not the "cat's paw" of the bill sponsors: "Under our form of government, legislators have a duty to exercise their judgment and to represent their constituents. It is insulting to suggest that they are mere dupes or tools." *Brnovich v. Democratic Nat'l Cmte.*, 141 S. Ct. 2321, 2350 (2021).

The statements of legislators are simply not relevant to statutory interpretation, especially in an Article III, section 26 claim:[39]

> [W]hen interpreting a statute, *the text is the alpha and the omega of the interpretive process*. While we have often stated that our objective in statutory interpretation is to give effect to the Legislature's intent, we have also acknowledged that the Legislature expresses its intent by the words it enacts and declares to be the law.

Bosque Disposal Systems, LLC v. Parker Cnty. Appraisal Dist., 555 S.W.3d 92 94 (Tex. 2018) (cleaned up).

And, even if legislative history were relevant, the Austin Court of Appeals has already rejected Harris County's reasoning that a law must be unconstitutional if the legislative history demonstrates that it is targeting a specific issue. In an identical argument to the one Harris County puts forth here, the plaintiff in *Juliff Gardens v. Tex. Comm. on Environmental Quality* argued that a colloquy between Senators in the legislative history that made clear that the purpose of the bill

[39] In *Bexar County v. Tynan*, the Texas Supreme Court even expressly declined to examine the legislative history, as it did not "deem it necessary." 97 S.W.2d at 471.

was to stop Juliff's landfill from getting a permit. 131 S.W.3d 271, 284-85 (Tex. App.—Austin 2004, no writ). The Court emphatically emphasized that

> the mere fact that issues in [the Senators'] district . . . were precipitating causes of [the law] does not render it a local or special law. . . . When reviewing a statute to determine whether it is an unconstitutional local or special law, *we review the reasonableness of the statute's classifications, . . . not the precipitating forces that led to its enactment. Specific events have led to numerous statutes that were enacted as laws of general applicability.*

Id. at 283. The Court held that the law had a reasonable basis in treating this particular landfill differently than others due to the special needs of larger populations in coastal areas and upheld its constitutionality. *Id.* at 284-85.

This Court should likewise ignore Harris County's walk through the legislative history because the legislature had a reasonable basis for the classifications in SB 1750. The "precipitating forces" are irrelevant to its constitutionality. *See Brnovich*, 141 S. Ct. at 2349 (noting that the "cat's paw" theory does not translate to legislators). Because they are irrelevant to constitutionality, any statements made by legislators are irrelevant to whether Harris County has pleaded facts that state a valid constitutional claim, and irrelevant to whether immunity has been waived. Harris County has still failed to plead facts that overcome immunity.

III. SB 1750 repeals a previous authorization, and as such, is valid regardless of Article III, section 56.

Even if Harris County had successfully pleaded facts that demonstrated that SB 1750 lacked any reasonable basis, it would still be valid regardless of Article III, section 56, because it operates to repeal a previous law. Texas courts have repeatedly construed Article III, section 56 as inapplicable to the repeal of the legislature's own statutes or grants of authority.

SB 1750 repeals a previous grant of authority because it removes the power from counties with populations of 3.5 million or more to create the position of elections administrator. As far

back as 1900, courts have exempted such repeals from the "local law" prohibition. For example, in *Central Wharf & Warehouse Co. v. City of Corpus Christi*, the appellate court upheld the legislature's right to repeal a statute with the effect of repealing a city's charter, even in the face of a provision virtually identical to Article III, section 56. 57 S.W. 982 (Tex. App.—Galveston 1900, writ ref'd). The court observed that the constitutional provision "certainly did not mean to take away from the legislature its inherent power of repealing any law theretofore passed by it, and we must hold that said repealing act is a valid law." *Id.* at 983.

Similarly, the El Paso Court of Appeals upheld a law disincorporating a city's charter in the face of an Article III, section 56 challenge. Although the legislative action clearly targeted a single city, the court also held that a repeal was always within the legislature's power, regardless of Article III, section 56. It held that Article III, section 56 "does not expressly prohibit [the legislature] from repealing a statute of incorporation. In fact [the court] find[s] nothing in the entire provision which could be read as either expressly or impliedly limiting this inherent power of the legislature." *Diaz v. State*, 68 S.W.3d 680, 685 (Tex. App.—El Paso 2000, no writ).

Therefore, because SB 1750 acts as a repeal, it is not subject to Article III, section 56 at all, and there is no set of facts that Harris County could plead to demonstrate its invalidity.

IV. Provisional Attorney General Colmenero and Secretary Nelson are the wrong defendants.

Although the State is not a proper party, it is possible to challenge the validity of a statute by suing the entity that enforces it: "Declaratory-Judgment claims challenging the validity of a statute may be brought against the relevant governmental entity." *Id.* at 698. But, Harris County did not name governmental entities. Rather, it confused *ultra vires* suits with declaratory judgment actions

by naming the AG and Secretary of State in their official capacities, and not the Office of the Attorney General or the Office of the Secretary of State.

In an *ultra vires* suit, "because the rule that ultra vires suits are not suits against the State within the rule of immunity of the State from suit derives from the premise that the acts of officials which are not lawfully authorized are not acts of the State, it follows that these suits cannot be brought against the state, which retains immunity, but must be brought against the state actors in their official capacity. This is true even though the suit is, for all practical purposes, against the state." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009) (cleaned up); *Patel v. Texas Dep't of Licensing and Reg.*, 469 S.W.3d 69, 77 (Tex. 2015) ("because the Threaders challenge the validity of the cosmetology statutes and regulations, rather than complaining that officials illegally acted or failed to act, the ultra vires exception does not apply. The Department and the Commission are not immune from the Threaders' suit.")

Harris County brought a declaratory judgment action, not an ultra vires suit. "For claims challenging the validity of ordinances or statutes, however, the Declaratory Judgment Act requires that the relevant governmental entities be made parties, and thereby waives immunity." *Id.* at 373 n.6. Thus, Harris County should have sued the Office of the Attorney General and the Office of the Secretary of State as entities, not the state officials themselves.

V. Conclusion

The court should grant the plea to the jurisdiction and dismiss this case.

VI. Prayer

For the foregoing reasons, the Attorney General respectfully requests that this Court:

1. Dismiss the State of Texas for lack of jurisdiction.
2. Dismiss Angela Colmenero and Jane Nelson for lack of jurisdiction.

3. Dismiss Harris County's entire suit for lack of standing.

4. Find that sovereign immunity has not been waived.

5. Deny the temporary injunction because the court lacks jurisdiction to issue such relief.

6. Grant any other relief, in law or in equity, to which Defendants may be entitled.

Dated: August 3, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document, has been served on August 3, 2023, on the following attorney-in-charge, by e-service and/or e-mail:

/s/ Susanna Dokupil
SUSANNA DOKUPIL

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Filing Description: DEFENDANTS' PLEA TO THE JURISDICTION
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