**No. 22-0008**

# In the Supreme Court of Texas

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

*v.*

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

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

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## Record References

MALC.CR refers to the clerk's record prepared in Trial Court Cause No. D-1-GN-21-006515. Gutierrez.CR refers to the clerk's record prepared in Trial Court Cause No. D-1-GN-21-006898. Cause Nos. D-1-GN-21-006515 and D-1-GN-21-006898 were consolidated shortly after filing. 1.RR and 2.RR refer to the reporter's records of December 15, 2021. 3.RR and 4.RR refer to the reporter's records of December 16, 2021.

## STATEMENT OF THE CASE

*Nature of the Case*: Plaintiffs seek declaratory relief stating that H.B. 1 and S.B. 4—which reapportioned the Texas House of Representatives and Texas Senate based on the 2020 decennial census—violate the Texas Constitution's requirement that reapportionment occur in the first regular session after the decennial census and the so-called county-line rule. MALC.CR.416; Gutierrez.CR.17-18. They also seek injunctive relief (a) forbidding the Governor and Secretary of State to order elections, oversee them, certify results, or otherwise implement H.B. 1; and (b) adopting a "legally appropriate alternative configuration" for the House districts in Cameron County. MALC.CR.416-17; Gutierrez.CR.17-18.

*Trial Court*: Special Three-Judge District Court for the 126th and 250th Judicial District Courts, Travis County
The Honorable Karin Crump, Ken Wise, and Emily Miskel

*Course of Proceedings and Disposition in the Trial Court*: In November 2021, two sets of plaintiffs sued Governor Greg Abbott, Secretary of State John Scott, and the State of Texas challenging the election maps that were enacted during the 87th Legislature's third called session following the U.S. Census Bureau's publication of the decennial census under sections 26 and 28 of Article III of the Texas Constitution. MALC.CR.4-14; Gutierrez.CR.3-18. Plaintiffs sought temporary injunctive relief. MALC.CR.43-53; Gutierrez.CR.20-38.

At the defendants' request, the Chief Justice convened a special three-judge district court, and the two cases were consolidated. MALC.CR.87-88; Gutierrez.CR.114. Thereafter, the defendants filed pleas to the jurisdiction, arguing that the plaintiffs lacked standing and that the petitions were barred by sovereign immunity. MALC.CR.134-58, 268-306.

On December 15 and 16, the three-judge district court held a combined hearing on the pleas to the jurisdiction and the motions for a temporary injunction. The court denied the motions for a temporary injunction and denied the pleas to the jurisdiction except "as to the Gutierrez Plaintiffs' claims for injunctive relief." MALC.CR.514-15.

## Statement of Jurisdiction

The Court has jurisdiction under Texas Government Code section 22A.006(a) to determine whether the trial court had jurisdiction. As described below, plaintiffs seek an advisory opinion because they concede that their lawsuit seeks only guidance regarding the constitutionality of the electoral maps enacted during the 87th Legislature's third called session. *Infra* at 17-18.

## Issues Presented

1. Whether plaintiffs seek an improper advisory opinion regarding the constitutionality of the electoral maps enacted during the 87th Legislature's third called session in order to guide the 88th Legislature's redistricting process during its regular session in 2023.
2. Whether plaintiffs lack standing to bring constitutional claims challenging the Legislature's reapportioned electoral maps for the Texas House of Representatives and Texas Senate where their petitions raise only generalized grievances, not concrete and particularized injuries fairly traceable to the conduct of the named defendants.
3. Whether sovereign immunity bars the suit because plaintiffs' allegations do not assert a viable claim that either the Office of the Governor or Office of the Secretary of State is attempting to enforce an unconstitutional statute.

**To the Honorable Supreme Court of Texas:**

The U.S. Census Bureau published the results of the decennial census in mid-September 2021—five-and-a-half months after the expiration of its statutory deadline to do so, and nearly four months after the close of the Texas Legislature's biennial regular session. Upon receiving the data, the 87th Legislature promptly reapportioned the districts for the State's electoral maps, including those for the Texas House of Representatives and Texas Senate, during its next session (the State's third called session in 2021). Several plaintiffs who had unsuccessfully opposed the redistricting bills quickly sued to achieve through litigation what they could not through legislation.

Specifically, two State Senators, one candidate for a seat in the Texas House of Representatives, and two legislative interest groups sued the Governor, the Secretary of State, and the State of Texas ("State Defendants") arguing that the House and Senate maps were constitutionally infirm in two respects. *First*, they asserted that Article III, section 28 of the Texas Constitution prohibits the Legislature from redistricting during a special session, and thus required the Legislature to wait until the 2023 regular session to begin that process—notwithstanding federal law that would prohibit such an outcome. And *second*, they asserted that Article III, section 26's county-line rule forbids the Legislature from dividing Cameron County into three House districts, two of which partly lay in other counties. In addition to declaratory relief, the plaintiffs sought injunctive relief that would halt the use of the maps for the rapidly approaching 2022 primary and general elections. They have since abandoned that request, suggesting instead that the Court should issue an

advisory opinion to guide the 88th Legislature regarding how to redistrict in the 2023 regular session.

But plaintiffs' bare-bones pleadings reveal that not one of them has standing to maintain these constitutional claims. Senator Eckhardt asserts her interest as a "voter" in the proper application of the Constitution, which is the quintessential generalized grievance that is insufficient to raise a justiciable controversy. Cortez points to his status as a declared candidate for a House district in Cameron County, but he fails to articulate how the Legislature redistricting during a special session or its reapportionment of the House districts in Cameron County inflicts a concrete, personalized injury on him in relation to his ability to run for office. And Senator Gutierrez complains that he will have to run for reelection before the expiration of his current term in the Senate. But this supposed "injury" occurs by operation of the Constitution itself, not as the result of any allegedly unconstitutional conduct by the State Defendants.

The two organizational plaintiffs—the Mexican American Legislative Caucus of the Texas House of Representatives ("MALC") and the Tejano Democrats—fare no better. Neither organization identifies an individual member who has suffered harm resulting from the alleged constitutional violations. And neither organization properly alleges how its claims are "germane" to its stated organizational purposes.

But even if these plaintiffs had standing, sovereign immunity would separately bar the plaintiffs' pursuit of these two constitutional claims. None of the plaintiffs can take advantage of the *ultra vires* exception to sovereign immunity. The State of Texas is not a proper defendant in an *ultra vires* action. And the petitions do not

allege that the Governor or Secretary of State took any ministerial act that fell outside the scope of their authority. To the contrary, the gravamen of the plaintiffs' petitions is that these government officials will enforce the allegedly unconstitutional election maps by exercising various statutory duties to carry out elections. Such a claim can be pursued only against a government agency charged with enforcing the allegedly unconstitutional law—agencies that plaintiffs did not name—in a suit relying on the Uniform Declaratory Judgments Act's sovereign-immunity waiver. That waiver applies only where a plaintiff presents a viable claim on the merits. But here, plaintiffs' interpretations of sections 26 and 28 of the Texas Constitution defy constitutional text, precedent, and common sense.

Because these plaintiffs have no proper basis upon which to invoke the jurisdiction of the state courts for purpose of seeking judicial rescission of validly enacted election maps, the Court should vacate or reverse the three-judge district court's order denying the State Defendants' pleas to the jurisdiction and render judgment dismissing plaintiffs' suit.

## Statement of Facts

### I. The 2021 Redistricting Process

Under federal law, the U.S. Census Bureau is obligated to release a "decennial census of [the] population," on the first day of April "every 10 years." 13 U.S.C. § 141(a); *see also* U.S. Const. art. I, § 2, cl. 3 (empowering Congress to carry out the census "in such Manner as they shall by Law direct"). Like other States, Texas uses this data to reapportion seats for its legislature, thereby ensuring its election districts

reflect changes in population as required both by state law, Tex. Const. art. III, § 28, and the one-person, one-vote principle announced by the U.S. Supreme Court, *see Reynolds v. Sims*, 377 U.S. 533 (1964).

Specifically, the Texas Constitution provides that "[t]he Legislature shall, at its first regular session after the publication of each United States decennial census, apportion the state into senatorial and representative districts, agreeable to the provisions of Sections 25 and 26 of" Article III of the Constitution. Tex. Const. art. III, § 28. Section 25 requires that "[t]he State shall be divided into Senatorial Districts of contiguous territory." *Id.* § 25. Section 26 requires that the House "shall be apportioned among the several counties" based "on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census, by the number of members of which the House is composed." *Id.* § 26. Where "one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties." *Id.*

But in 2021, due to "COVID-19-related delays," the U.S. Census Bureau missed its statutory deadline for releasing the census data on April 1. Press Release, United States Census Bureau, Census Bureau Statement on Redistricting Data Timeline (Feb. 12, 2021), https://www.census.gov/newsroom/press-releases/2021/statement-redistricting-data-timeline.html. The agency first "provided redistricting data as legacy format summary files for all states on August 12, 2021," and then committed "to providing the full redistricting data toolkit on Sept. 16,

2021." U.S. Census Bureau, Decennial Census P.L. 94-171 Redistricting Data (Sept. 16, 2021), https://www.census.gov/programs-surveys/decennial-census/about/rdo/summary-files.html.

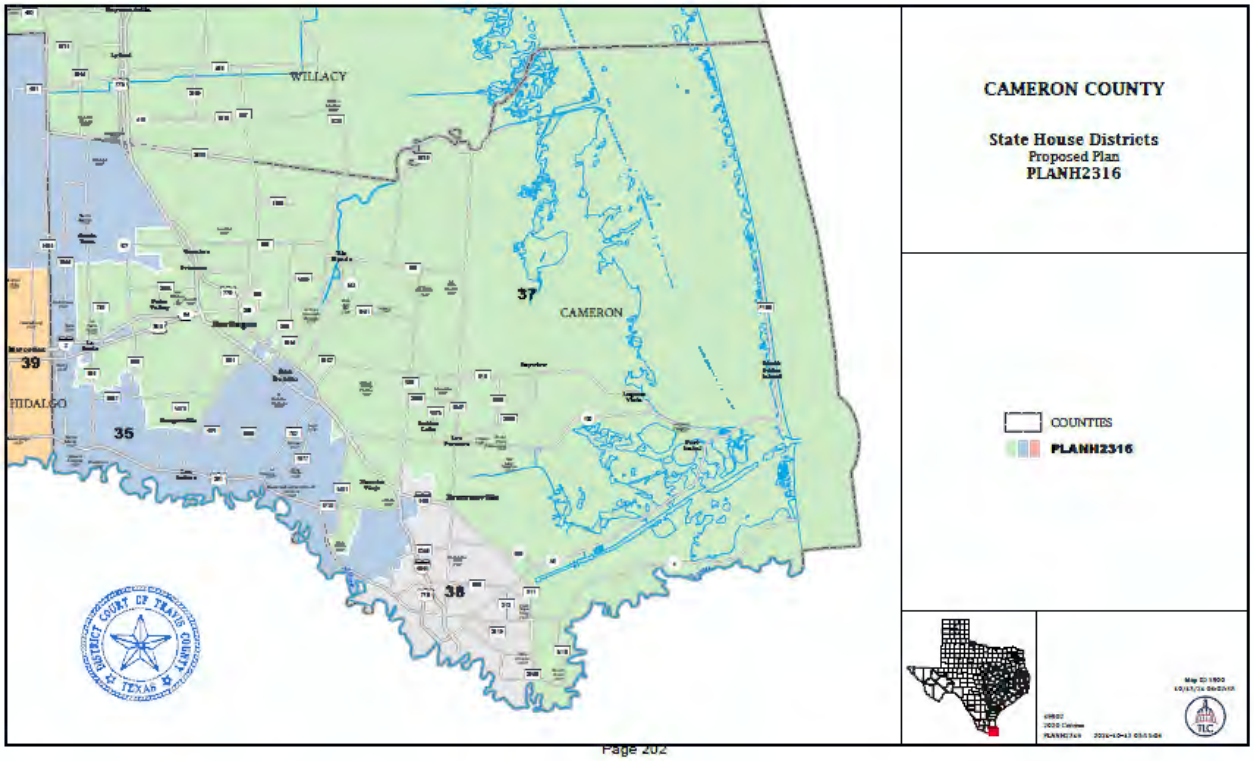
The delayed release of the census data meant that the Texas Legislature could not begin the redistricting process during its 87th regular session, which ran from January 12, 2021, to May 31, 2021. Tex. Legislative Council, Dates of Interest: 87th Legislature, https://tlc.texas.gov/docs/legref/Dates-of-Interest.pdf; *see also* Tex. Const. art. III, §§ 5(a), 24(b). In the light of Texas's significant change in population, it would have violated federal law for Texas to have continued to use the 2011 maps for the forthcoming 2022 elections. *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"). To avoid this outcome, on September 7, 2021, Governor Greg Abbott called a special session of the Legislature, to begin on September 20, that would tackle redistricting. Tex. Gov. Proclamation No. 41-3858, 87th Leg., 3d C.S. (2021).

During that special session, the Legislature redrew the district lines for the state House of Representatives and Senate in several counties throughout the State based on the newly received census data. *See, e.g.*, MALC.CR.159-222 (Plan H2316). On October 18, the Legislature passed H.B. 1—the bill that reapportioned the districts for the Texas House of Representatives—and it was signed into law by the Governor on October 25. MALC.CR.405. Likewise, on October 18 the Legislature passed

S.B. 4—the bill that reapportioned the districts for the Texas Senate—and the Governor signed it into law on October 25. Gutierrez.CR.4.

As relevant to plaintiffs' section 26 challenge to the House map, this reapportionment resulted in the adjustment of the three House districts lying within Cameron County. *Compare* 4.RR.10 (old map), *with* MALC.CR.202 (newly enacted map).[1] Under the previous maps, House Districts 37 and 38 were wholly contained within Cameron County and House District 35 was shared between Cameron and Hidalgo counties. 4.RR.10. Under the reapportioned maps, House District 38 remains wholly contained within Cameron County, MALC.CR.166, and House District 35 remains shared between Cameron County (36.3%) and Hidalgo counties (63.7%). MALC.CR.165, 202. But House District 37 is now shared between Cameron County (89.1%) and Willacy County (10.9%). MALC.CR.166. The following map depicts the current configuration of House districts that represent Cameron County:

[1] None of the plaintiffs alleges that the *Senate* map was drawn in an improper manner, only at an improper time.




MALC.CR.202.

## II. Procedural History

### A. MALC files a lawsuit and a motion for temporary injunction.

On November 3, 2021, MALC filed a petition against Governor Greg Abbott and Secretary of State John Scott alleging that H.B. 1 violated Article III, section 26 of the Texas Constitution. MALC.CR.4-15. MALC's theory was that by providing only one House district wholly contained within Cameron County and splitting the remaining surplus population among districts in two contiguous counties, the Legislature violated section 26's county-line rule. MALC.CR.7-12. As a remedy, MALC's petition sought declaratory relief stating that H.B. 1 violates section 26 and preliminary and permanent injunctive relief that would (a) enjoin the Governor and Secretary of State from "ordering elections, overseeing elections, certifying results, or

otherwise implementing H.B. 1" in any upcoming primary or general election for the House of Representatives; and (b) adopt a "legally appropriate alternative configuration" for the House districts in Cameron County. MALC.CR.14. Nineteen days later, on November 22, MALC filed an expedited motion for a temporary injunction asserting substantially similar arguments as those contained in its petition. MALC.CR.43-53.

### B. The Chief Justice convenes a special three-judge district court.

On November 16, Governor Abbott and Secretary Scott petitioned the Chief Justice under Texas Government Code section 22A.001 to convene a special three-judge district court to consider MALC's petition. MALC.CR.20-23. On November 18, the Chief Justice granted the Governor and Secretary's petition and appointed a three-judge district court. MALC.CR.87-88.

### C. The Gutierrez Plaintiffs file a lawsuit and a motion for temporary injunction, and they are consolidated before the three-judge court.

Four days after the three-judge panel was convened—and on the same day that MALC sought its expedited temporary injunction—Roland Gutierrez and Sarah Eckhardt, two State Senators, Ruben Cortez, a candidate for a House District 37, and the Tejano Democrats (collectively, the "Gutierrez Plaintiffs") filed a petition against the State of Texas. Guitierrez.CR.3-18. Like MALC, the Gutierrez Plaintiffs alleged that H.B. 1 violates Article III, section 26 of the Texas Constitution, but they added a claim that H.B. 1 and S.B. 4 violate Article III, section 28 of the Texas Constitution. Gutierrez.CR.6-16. The Gutierrez Plaintiffs sought a declaration that H.B. 1 and S.B. 4 were unconstitutional and injunctive relief forbidding the

implementation of those election maps. Gutierrez.CR.17-18. The next day, the Gutierrez Plaintiffs filed an application for a temporary injunction advancing identical arguments to those contained in their petition. Gutierrez.CR.20-38. On December 3, the Governor and Secretary moved the three-judge district court to consolidate the Gutierrez Plaintiffs' case with the MALC case that was already pending before the court. MALC.CR.95-99. The motion was granted later that day. Gutierrez.CR.114.

### D. The Governor, Secretary of State, and State of Texas file pleas to the jurisdiction and oppose the temporary injunctions.

On December 10, the Governor and Secretary of State filed a plea to the jurisdiction as to MALC's petition, MALC.CR.134-58, and the State of Texas filed a plea to the jurisdiction as to the Gutierrez Plaintiffs' petition, MALC.CR.268-306.[2] The Governor and the Secretary argued that MALC failed to establish associational standing to challenge H.B. 1's apportionment for Cameron County. MALC.CR.147-53. They also argued that MALC failed to overcome the Governor and Secretary's sovereign immunity because MALC's lawsuit was not a proper *ultra vires* action against state officers, because it was not a proper constitutional claim due to its not having been brought against state agencies, and because MALC had not pleaded a

[2] At the time, MALC had no claim against the State. On December 13, MALC filed an amended complaint that purported to add the State of Texas as a defendant and provided additional detail about MALC as an organization. MALC.CR.405-17. As it was otherwise materially identical to the original petition, the parties treated them as the same for the purposes of the State Defendants' plea. MALC never served the State of Texas. 2.RR.19.

viable claim on the merits. MALC.CR.144-46, 154-57. In its plea to the jurisdiction, the State argued that the Gutierrez Plaintiffs lacked standing and that their claims were barred by sovereign immunity for similar reasons. MALC.CR.280-306.

Three days later, on December 13, the Governor, Secretary of State, and the State of Texas filed oppositions to the two motions for a temporary injunction. MALC.CR.423-63, 467-95. In those oppositions, the State Defendants argued that MALC and the Gutierrez Plaintiffs failed to demonstrate a probable right to relief because they lack standing and because their claims are barred by sovereign immunity. MALC.CR.439-51, 477-89. The State Defendants also argued that MALC and the Gutierrez Plaintiffs did not demonstrate irreparable injury or that the balance of the equities favored enjoining the election maps given that primary elections were already underway. MALC.CR.451-60, 489-95.

### E. The three-judge district court holds a combined hearing and denies in part the pleas to the jurisdiction.

On December 15, the three-judge district court held a combined hearing on the temporary injunction motions filed by MALC and the Gutierrez Plaintiffs and on the State Defendants' pleas to the jurisdiction. At the hearing, the court first heard argument on the State Defendants' pleas to the jurisdiction, 2.RR.11:21-71:23, and then heard evidence regarding whether to issue one or more temporary injunctions. Over the course of two days, the court heard testimony from several witnesses, including Representative Alex Dominguez, the incumbent for House District 37, and Plaintiff Ruben Cortez. 2.RR.89-163.

On December 22, the three-judge court issued a written order denying the motions for a temporary injunction. MALC.CR.514-15. The court also denied the State Defendants' pleas to the jurisdiction except "as to the Gutierrez Plaintiffs' claims for injunctive relief," which it granted. MALC.CR.514-15.

The State Defendants filed a notice of appeal on December 27, MALC.CR.518-19, and then filed a statement of jurisdiction in this Court on January 6, 2022. On January 18, plaintiffs agreed that the Court had jurisdiction but withdrew their request "to disturb the current election cycle at this point in the litigation and in light of the Court's opinion in *In re Khanoyan*, __ S.W.3d__, No. 21-1111, 2022 WL 58537 (Tex. Jan. 6, 2022)." Resp. to Statement of Jurisdiction at 4 ("Response"). The plaintiffs further noted that the "parties agree that the Legislature has a duty under Article III, §28 of the Texas Constitution to apportion the Texas House and Senate in . . . the 2023 Regular Session." *Id.* Plaintiffs asked that the hearing be accelerated so that the "Legislature [may] be informed" if the current maps are unconstitutional "at the earliest practicable time." *Id.*

On January 21, this Court noted probable jurisdiction, set an expedited briefing schedule, and set argument for March 23.

## Summary of the Argument

This Court should vacate the three-judge district court's order denying the State Defendants' pleas to the jurisdiction because MALC and the Gutierrez Plaintiffs have conceded that there is no longer a live controversy between the parties. Alternatively, the court should reverse the court's order because MALC and the

Gutierrez Plaintiffs lack standing and cannot overcome the State Defendants' sovereign immunity.

**I.** MALC and the Gutierrez Plaintiffs have conceded that they seek only an advisory opinion regarding the constitutionality of the maps enacted by the 87th Legislature in its third called session. Response at 4. They have disclaimed any request that the Court invalidate H.B. 1 and S.B. 4 for the upcoming elections in 2022, but merely seek this Court's opinion about the constitutionality of those maps so that the Court's decision may guide the 88th Legislature when it undertakes redistricting during its regular session in 2023. Because such a request bears all the hallmarks of an advisory opinion, the state courts lack jurisdiction to hear it. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). This Court should therefore vacate the three-judge district court's order and render judgment dismissing plaintiffs' lawsuit. *Heckman v. Williamson County*, 369 S.W.3d 137, 162 (Tex. 2012) ("If a case is or becomes moot, the court must vacate any order or judgment previously issued and dismiss the case for want of jurisdiction.").

**II.** Plaintiffs also lack standing. The three individual plaintiffs—Senator Eckhardt, Ruben Cortez, and Senator Gutierrez—lack standing because their petition fails to allege a concrete, particularized injury fairly traceable to the conduct of the State Defendants. To establish standing, Senator Eckhart appears to rely solely upon her interest as a "voter" in proper application of the Constitution. But a voter's belief that a law is unconstitutional is not a cognizable injury; instead it is a generalized grievance. *Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001).

Cortez points to his status as a declared candidate for House District 37, but he fails to demonstrate how the Legislature's decision to redistrict during the special session or its apportionment of the House districts in Cameron County inflicts a personalized injury on him in relation to his ability to run for office. Even if that were not so, any injury would not be redressable. Cortez's only route around sovereign immunity is to rely on the *ultra vires* doctrine. But that doctrine allows for only prospective relief, *not* a retrospective declaration that past conduct was unlawful. *City of Houston v. Hous. Mun. Emps. Pension Sys.*, 549 S.W.3d 566, 576 (Tex. 2018). Because the parties agree that new maps will have to be drawn before the 2024 House election, Response at 4, and the plaintiffs have abandoned any request to prospectively change the apportionment in advance of the 2022 election, *id.*, there is no relief available to redress Cortez's alleged harm.

Senator Gutierrez claims he is injured by the Legislature's decision to reapportion the Senate districts because it will force him to run for reelection before the expiration of his current term in the Senate. But to the extent that is an injury at all, it is not traceable to the conduct of the State Defendants. After all, it is the Texas Constitution that requires Senators to stand for reelection any time districts are reapportioned, Tex. Const. art. III, § 3, and the U.S. Constitution's one-person, one-vote principle that requires reapportionment of electoral districts upon publication of the decennial census, *Evenwel*, 578 U.S. at 59.

The two organizational plaintiffs—MALC and the Tejano Democrats—also fail to allege that either organization can establish associational standing. MALC does not identify any individual member of its organization that has been harmed by the

Legislature's reapportionment of Cameron County. Though Representative Alex Dominguez testified at the hearing that H.B. 1 has drawn his residence outside of House District 37—where he is currently the incumbent—that cannot cure MALC's pleading deficiency because the Representative is not running for reelection to that seat. Instead, he is running for a vacant Senate seat and thus could not be injured by any errors in the boundaries of his present district. MALC.CR.254-65. Furthermore, the undisputed data rebuts MALC's theory that the Legislature diluted the votes of Cameron County. As Cameron County itself cannot vote, any dilution must be measured by whether its *residents* can elect their representative of choice. And the undisputed data shows that Cameron County voters remain in commanding control of two out of three districts lying within the county and would never have been in control of the third. MALC.CR.165-66.

MALC also cannot show that its effort to maintain the county-line-rule claim is "germane" to the stated purpose of its organization: "maintaining and expanding Latino representation across elected offices in Texas." MALC.CR.407. The apportionment of the House districts in Cameron County had nothing to do with race or ethnicity; in fact, each of the three House districts in that county has a sizeable Hispanic majority that is more than sufficient for the Hispanic population to elect the candidates of its choice. MALC.CR.193.

The Tejano Democrats make an even weaker attempt to demonstrate associational standing. The petition identifies no member of the Tejano Democrats that has been harmed by the State Defendants, much less attempts to articulate the nature of that harm. And the petition utterly fails to demonstrate how the Tejano Democrats'

effort to prevent implementation of H.B.1 or S.B.4 or to force the Legislature to reapportion the House districts in Cameron County is germane to its stated organizational purpose of educating voters about candidates for office.

**III.** Even if one or more of the plaintiffs could show a justiciable injury, the State Defendants' sovereign immunity poses an additional barrier to the claims of MALC and the Gutierrez Plaintiffs. Neither MALC nor the Gutierrez Plaintiffs can maintain this lawsuit as an *ultra vires* action. An *ultra vires* lawsuit cannot be brought against the State, thus eliminating any claim against Texas. And claims can be brought against the Governor or Secretary of State only if plaintiffs adequately alleged that those government officials acted "without legal authority" or failed to perform "ministerial dut[ies]." *Hall v. McRaven*, 508 S.W.3d 232, 238 (Tex. 2017). Plaintiffs' claims do not do so. At most they allege that the Governor and Secretary will indirectly enforce H.B. 1 and S.B. 4—which plaintiffs believe are unconstitutional—by exercising statutory duties associated with holding an election. But an *ultra vires* claim does not lie against a government official who acts consistently with an allegedly unconstitutional law. *Patel v. TDLR*, 469 S.W.3d 69, 76 (Tex. 2015). That is because an *ultra vires* suit cannot "seek to alter government policy," only "to enforce existing policy." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009).

Nor can this lawsuit be maintained via the sovereign immunity waiver in the Uniform Declaratory Judgments Act ("UDJA"). Although sovereign immunity may be waived for constitutional challenges, under this Court's precedent, that waiver is only effective for a claim against a state *agency*, not an individual officer. *Patel*, 469 S.W.3d at 76. As a result, under this Court's case law, an action that depends

upon the UDJA's waiver of sovereign immunity cannot stand against the Governor or the Secretary of State. Moreover, assuming that the State could constitute an agency for this purpose, the UDJA's waiver is not effectual for "facially invalid" constitutional claims such as those presented here. *Klumb v. Hous. Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015). Constitutional text, precedent, and logic demonstrate that nothing in Article III, section 28 of the Texas Constitution forbids the Legislature to redistrict during a special session. Similarly, the plain language of Article III, section 26 forecloses the argument that the Legislature was required to maximize the number of counties that are wholly contained in a single district.

## Standard of Review

A plea to the jurisdiction challenges the court's authority to determine the subject matter of the controversy. *Bland ISD v. Blue*, 34 S.W.3d 547, 553-54 (Tex. 2000). "Typically, the plea challenges whether the plaintiff has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the case." *Mission Consol. ISD v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012). But "[a] plea to the jurisdiction can also properly challenge the *existence* of those very jurisdictional facts," and in such a case the trial court can "consider evidence as necessary to resolve any dispute over those facts." *Id.* (emphasis original). This Court "review[s] de novo the trial court's disposition" of a plea to the jurisdiction, "consider[ing] the pleadings and factual assertions, as well as any evidence in the record that is relevant to the jurisdictional issue." *Klumb*, 458 S.W.3d at 8.

## ARGUMENT

### I. Jurisdiction Is Lacking Because Plaintiffs Concede They Are Seeking an Advisory Opinion.

Plaintiffs' Response to the Statement of Jurisdiction concedes that there is no longer a live controversy between the parties. Plaintiffs have withdrawn any request for relief in advance of the 2022 elections, and they admit that "[a]ll parties agree that the Legislature has a duty . . . to apportion the Texas House and Senate in the first *regular* session after the decennial census is published." Response at 4. They insist that "[i]f the 2021 statewide maps for the Texas House and Senate are constitutionally infirm, the Legislature must be informed of that fact at the earliest practicable time." *Id.* And they admit that the expedited resolution they seek before this Court is aimed at obtaining a ruling from this Court "before the 2023 legislative session" that will guide the 88th Legislature's redistricting process in the 2023 regular session. *Id.*

The State Defendants agree that this case presents important constitutional questions touching on one of the most fundamental aspects of our government: how those who govern us are to be selected. And there is a "natural urge to proceed directly to the merits of [an] important dispute and to 'settle' it for the sake of convenience and efficiency." *Hollingsworth v. Perry*, 570 U.S. 693, 704-05 (2013). But the ruling that plaintiffs now seek bears the "distinctive feature" of an advisory opinion: one that "decides an abstract question of law without binding the parties." *Tex. Ass'n of Bus.*, 852 S.W.2d at 444.

Because this Court has "construed our [Constitution's] separation of powers article to prohibit courts from issuing advisory opinions," *id.*, plaintiffs' concession that the Court should not act before the present election robs this lawsuit of any live controversy and dictates that this Court should vacate the three-judge district court's order denying the State Defendants' pleas to the jurisdiction and render judgment dismissing plaintiffs' suit, *cf. Heckman*, 369 S.W.3d at 162. "If courts were empowered to ignore the usual limits on their jurisdiction . . . when matters of public concern are at stake, then we would no longer have a judiciary with limited power to decide genuine cases and controversies," but a "judiciary with unbridled power to decide any question it deems important to the public." *Morath v. Lewis*, 601 S.W.3d 785, 789 (Tex. 2020) (per curiam). This is something the Court should not—indeed, cannot—do.

## II. The Plaintiffs Lack Standing.

Even if the Court were to overlook plaintiffs' concessions that there is no longer a live controversy between the parties, it should still reverse the three-judge district court's order. The petitions filed by MALC and the Gutierrez Plaintiffs falter at the outset because none of the plaintiffs—Senator Eckhardt, Ruben Cortez, Senator Gutierrez, MALC, or the Tejano Democrats—has standing sufficient to maintain this suit. This fatal flaw should have led the trial court to grant in full the State Defendants' plea to the jurisdiction. That flaw has only become more pronounced since the appeal was filed as plaintiffs have disclaimed any request for relief as to the only election for which the challenged maps will apply.

"Standing is implicit in the concept of subject-matter jurisdiction, and subject-matter jurisdiction is essential to the authority of a court to decide a case." *In re Abbott*, 601 S.W.3d 802, 807 (Tex. 2020) (per curiam) (orig. proceeding) (citing *Tex. Ass'n of Bus.*, 852 S.W.2d at 443). "For a plaintiff to have standing, a controversy must exist between the parties at every stage of the legal proceedings, including the appeal." *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001). "The Texas standing requirements parallel the federal test for Article III standing, which provides that '[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *In re Abbott*, 601 S.W.3d at 807 (quoting *Heckman*, 369 S.W.3d at 154). Thus, unless a contrary rule is dictated by state law, Texas courts "look to the more extensive jurisprudential experience of the federal courts on th[e] subject [of standing] for any guidance it may yield." *Tex. Ass'n of Bus.*, 852 S.W.2d at 444. Under these standards, the petitions come up short: neither the Gutierrez Plaintiffs nor MALC have properly alleged an injury in fact that is traceable to the conduct of the State Defendants and redressable by the courts through a claim for prospective relief.

### A. The three individual plaintiffs lack standing.

"Under Texas law, as under federal law, the standing injury begins with the plaintiff's alleged injury." *Heckman*, 369 S.W.3d at 155. "The plaintiff must be *personally* injured—he must plead facts demonstrating that he, himself (rather than a third party or the public at large), suffered the injury." *Id.* (emphasis original). Because standing is "not dispensed in gross," this Court must examine the type of harm that plaintiffs seek to vindicate in the petition. *Town of Chester v. Laroe Ests.*,

137 S. Ct. 1645, 1650-51 (2017). Moreover, "[a]s for the injury itself, it 'must be concrete and particularized, actual or imminent, not hypothetical.'" *Heckman*, 369 S.W.3d at 155 (quoting *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304-05 (Tex. 2008)). "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 n.1 (1992)). And the "concrete[ness]" requirement means that the injury must "actually exist"; it must be "'real' and not 'abstract.'" *Id.* (quoting Webster's Third International Dictionary 472 (1971)). Concrete harms include "traditional tangible harms, such as physical harms and monetary harms," and "[v]arious intangible harms" like "injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021).

"The second element of the standing test requires that the plaintiff's injury be 'fairly traceable' to the defendant's conduct." *Heckman*, 369 S.W.3d at 155. This means that the alleged injury must not "result[] from the independent action of some third party not before the court." *Id.* The final element of standing is redressability: the plaintiff must establish a 'substantial likelihood that the requested relief will remedy the alleged injury in fact.'" *Id.*

Thus, "[s]tanding consists of some interest peculiar to the person individually and not just as a member of the public." *Garcia v. City of Willis*, 593 S.W.3d 201, 207 (Tex. 2019). A plaintiff "raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly

benefits him than it does the public at large," does not plead a cognizable injury. *Lujan*, 504 U.S. at 573. Instead, this Court's "decisions have always required a plaintiff to allege some injury distinct from that sustained by the public at large." *Brown*, 53 S.W.3d at 302.

Applying these well-established principles, none of the three individual plaintiffs—Senator Eckhardt, Ruben Cortez, and Senator Gutierrez—has properly alleged standing with respect to either of the two claims at issue.

**1. Senator Eckhardt**

The petition does not identify a *single* particularized or concrete injury that Senator Eckhardt faces if the maps drawn by H.B. 1 or S.B. 4 are implemented. And tellingly, Senator Eckhardt did not even attempt to show otherwise in her briefing before the trial court. *See* Gutierrez.CR.116-31.

The closest that the petition comes is the allegation that Senator Eckhardt "will vote in future Texas elections, including the upcoming primary election in March." Gutierrez.CR.5. But a voter's belief that a course of action taken by the government is unconstitutional is precisely the type of "generalized grievance" that this Court has held is not cognizable as an injury sufficient to confer standing. *Brown*, 53 S.W.3d at 302. Indeed, "[n]o Texas court has ever recognized that a plaintiff's status as a voter, without more, confers standing to challenge the lawfulness of governmental acts." *Id.* To the contrary, this Court has stated that even in an election case, the separation of powers "required a plaintiff to allege some injury distinct from that sustained by the public at large." *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 8 (Tex. 2011) (Jefferson, C.J.) (citation and quotation marks omitted).

Even if this Court's precedent did not squarely foreclose Senator Eckhardt's claim of voter standing, the petition offers no explanation how *any* voter was harmed by the Legislature's effort to reapportion legislative districts as soon as the U.S. Census Bureau made the necessary data available—even if it was in a special session as opposed to during the regular session in 2023. *Cf.* Gutierrez.CR.11 (asserting claim that redistricting during the special session violated Article III, section 28 of the Texas Constitution).[3] And because Senator Eckhardt alleges that she is a "registered voter in . . . Texas House District 49," Gutierrez.CR.5, which lies in Travis County, she cannot "be personally aggrieved" in her capacity as a voter by changes to House Districts in *Cameron* County, as that would be an injury shared by all Texas voters, *DaimlerChrysler*, 252 S.W.3d at 304 (citing *Nootsie, Ltd. v. Williamson Cnty. Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996)); *see Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) ("a plaintiff who complains of gerrymandering, but who does not live in a gerrymandered district," asserts only a generalized grievance); *cf.* Gutierrez.CR.14-16 (asserting claim that H.B. 1's apportionment of Cameron County violates Article III, section 26 of the Texas Constitution). "The presence of a disagreement" between Senator Eckhardt and her colleagues in the Legislature

[3] For the avoidance of doubt, the State Defendants do not maintain that the Legislature may disregard its obligation to reapportion in the first regular session after the census data was published. Tex. Const. art. III, § 28. But jurisdictional limitations such as standing serve to "identif[y] those suits appropriate for judicial resolution." *Brown*, 53 S.W.3d at 305. And it may be that a suit under section 28 is not such a case or controversy. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019) (holding that not all complaints regarding redistricting are justiciable).

about the propriety of either is "insufficient by itself" to establish standing—however sharp and acrimonious it might be. *Hollingsworth*, 570 U.S. at 704.

**2. Candidate Cortez**

**a.** Ruben Cortez's attempt to demonstrate standing fares no better. Similar to Senator Eckhart, the petition alleges no facts that demonstrate a concrete, particularized injury to Cortez. To the extent Cortez seeks to rely on his allegation that "[h]e will vote in future Texas elections, including the upcoming primary election," Gutierrez.CR.5, that reliance fails for the same reason as Senator Eckhardt's: it is a "generalized grievance" that does not constitute a cognizable injury, *Brown*, 53 S.W.3d at 302; *supra* at 21-22.

The analysis does not change because, unlike Senator Eckhardt, Cortez resides in a Cameron County House District affected by H.B. 1. Gutierrez.CR.3. The petition's description of the injury stemming from the alleged violation of Article III, section 26 of the Constitution—"[d]ilut[ion]" of "the legislative representation of Cameron County," Gutierrez.CR.15-16—is an injury shared by *all* residents in Cameron County; it is therefore in no way particular to Cortez. *See Brown*, 53 S.W.3d at 302 (alleged injury was a generalized grievance because "it is shared by all living Houstonians who were among the 198,563 electors who actually voted against the proposed ordinance").

Nor does Cortez's status as a "declared candidate for HD 37"—which now lies in two counties instead of one—afford him the standing that Senator Eckhardt lacks. Gutierrez.CR.5. The petition contains not a single allegation identifying how H.B. 1 will adversely affect Cortez's ability to run for House District 37 in any discrete

way—or in any way at all. At the hearing before the trial court, Cortez's counsel speculated that Cortez may be injured by H.B. 1 "because it significantly alters his voter base," 2.RR.62:2-3, but that argument is not supported by any factual allegations in the petition or evidence in the record. Such vague assertions by counsel absent specific allegations or proof will not support jurisdiction "because courts must not decide hypothetical claims," *DaimlerChrysler*, 252 S.W.3d at 303-04, lest they run afoul of the bedrock rule that Texas courts may not offer advisory opinions, *Tex. Ass'n of Bus.*, 852 S.W.2d at 444.

Counsel did elicit vague testimony from Cortez at the temporary injunction hearing that, under H.B. 1, Cortez would "have to expend resources" to visit two counties instead of one by traveling there himself, sending staff, and sending mail. 2.RR.160:10-61:2. But a plaintiff typically cannot establish standing based on the expenditure of resources that he would have expended even absent the alleged constitutional harm. *Cf. NAACP v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010) ("Not every diversion of resources to counteract the defendants' conduct . . . establishes an injury in fact." (citing *La. ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 305 (5th Cir. 2000)). Because costs associated with staff and candidate time are costs that all candidates must incur—and because Cortez has not explained why the location of the county line increases those expenses—spending them in one location in a district (or county) instead of another is not a concrete, legally cognizable harm. *TransUnion*, 141 S. Ct. at 2204. Instead, choosing how to allocate resources is a mere incident to campaigning for elected office.

**b.** Moreover, because Cortez will have to expend staff resources to run his 2022 campaign and any 2024 campaign, it is not at all clear how the supposed injury from the expenditure of resources is traceable to changes in the location of the district line in H.D. 37. It is not sufficient to establish traceability "to complain simply that [the] Government is violating the law." *Allen v. Wright*, 468 U.S. 737, 755 (1984). Instead, any pocketbook injury must directly result from the actual or threatened enforcement of the law at issue. *California v. Texas*, 141 S. Ct. 2104, 2114 (2021). Moreover, while the plaintiff may ask the court to make inferences based on predictable behavior, the chain of causation cannot be tenuous or depend on the decisions of independent actors. *Dep't of Comm. v. New York*, 139 S. Ct. 2551, 2565-66 (2019). Here, whether an electoral map is drawn in a special or regular session is irrelevant to how much a campaign costs. And there is nothing to suggest that it is more expensive for Cortez to use direct mail to or canvas the support of the approximately 10% of the voters in H.D. 37 that are now located in neighboring Willacy County instead of Cameron County. *See* MALC.CR.166.

**c.** Nor would Cortez's purported injury be redressable by any order a court may subsequently issue in this case. To the contrary, plaintiffs have now acknowledged that (1) it would not be proper for the Court to issue an order impacting the 2022 election cycle, and (2) the "parties agree that the Legislature has a duty" to reassess the lines of H.D. 37 during its regular session in 2023. Response at 4. That is fatal to plaintiffs' claims because, as discussed below (at 37-53), they seek to avoid dismissal on the grounds of sovereign immunity based on the *ultra vires* doctrine and the UDJA. Such "claims work for 'only prospective, not retrospective relief.'"

*Garcia*, 593 S.W.3d at 207 (quoting *City of Dallas v. Albert*, 354 S.W.3d 368, 379 (Tex. 2011)). Put another way, having withdrawn any request for relief relating to the only election cycle to which this map will apply, Cortez "has no concrete or particularized stake in the validity or future application" of a soon-to-be-defunct map or in "a declaration that [state] officials acted ultra vires in the past." *Id.*; *accord Freedom from Religion Found. v. Abbott*, 955 F.3d 417, 425-26 (5th Cir. 2020) (invalidating a retrospective declaration issued under parallel doctrine established by *Ex parte Young*, 209 U.S. 123 (1908)). This is particularly problematic for Cortez, who seeks election to the House and would have had to stand for reelection—and thus expend resources campaigning—in 2024 regardless of whether the maps were redrawn. Tex. Const. art. III, § 4.

Finally, even if Cortez could establish standing for the county-line-rule claim, it would not supply a basis for him to demonstrate an injury with respect to the distinct claim under Article III, section 28 of the Constitution. Again, "[s]tanding is not dispensed in gross," so Cortez must establish "standing to bring *each* of his particular claims." *Heckman*, 396 S.W.3d at 153 (emphasis added). Cortez's status as a resident, voter, and declared candidate for a House seat in Cameron County does nothing to demonstrate that he has been injured by the Legislature redistricting during a special session rather than during the next regular session in 2023.

### 3. Senator Gutierrez

Senator Gutierrez likewise lacks standing to maintain either of the two claims at issue here. Because Senator Gutierrez "lives in San Antonio and is a registered voter in Texas Senate District 19 and Texas House District 119," Gutierrez.CR.3, he has

no basis upon which to claim an injury "peculiar to" him as a Bexar County resident, *Garcia*, 593 S.W.3d at 207, regarding the alleged county-line-rule violation in *Cameron* County.

Nor can Senator Gutierrez properly allege that he has been injured by the Legislature's redrawing of the Senate map in the special session of the Legislature as opposed to during the next regular session in 2023. The petition appears to suggest that he is injured by S.B. 4 because "[t]he new Senate map will force him to stand for election again in 2022, before his 4-year term expires." Gutierrez.CR.5. But this is not a cognizable injury at all—that is, a tangible harm or intangible one that bears a "close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts," *TransUnion*, 141 S. Ct. at 2204—much less one traceable to the named defendants. After all, it is the *Texas Constitution* that requires that "a new Senate shall be chosen after every apportionment." Tex. Const. art. III, § 3. And it is the process of redistricting itself that triggers an abbreviated term in office for some senators. *Id.*

Thus, regardless of who draws the maps—and whether it is done in a special session or a regular session or by a court—Senator Gutierrez will serve an abbreviated term in office by virtue of the Texas Constitution. The alleged injury of having to run for reelection before the expiration of his present Senate term is therefore not traceable to the challenged conduct—redistricting during the special session—but to operation of law. Nor is this supposed injury redressable by this Court, since redrawing the maps in the light of the new census data is required to ensure compliance

with the U.S. Constitution's one-person, one-vote principle. *See Reynolds*, 377 U.S. at 577-79. And he would *still* have to run for reelection.

* * *

In sum, none of the individual plaintiffs has standing. Most of their injuries are either hypothetical or shared by the general public. This Court has squarely held that the Constitution places the authority to "decide abstract questions of wide public significance" in the hands of "other branches of government." *Andrade*, 345 S.W.3d at 7 (citation and quotation marks omitted). But even if that were not the case, none of the alleged injuries are either traceable to the state actors named as defendants or redressable by any order this Court can issue.

### B. The two organizational plaintiffs cannot establish associational standing.

The two organizational plaintiffs lack standing for similar reasons. Both MALC and the Tejano Democrats purport to maintain claims against the State Defendants based upon injuries allegedly sustained by their members. MALC.CR.415; Gutierrez.CR.5. To do so on a theory of associational standing[4] requires an

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[4] Neither MALC nor the Tejano Democrats alleges that it is asserting "organizational standing." Unlike associational standing, "'organizational standing' does not depend on the standing of the organization's members" but instead that the organization "meets the same standing test that applies to individuals." *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017). This is a highly controversial doctrine, which has not been broadly applied even in federal courts, *see* Ryan Baasch, *Reorganizing Organizational Standing*, 103 Va. L. Rev. Online 18, 21-24 (2017), and has not been adopted in state courts to date, *DFPS v. Grassroots Leadership, Inc.*, No. 03-18-00261-CV, 2018 WL 6187433, at *5 (Tex. App.—Austin Nov. 28, 2018, pet. filed) (mem. op.), *reconsideration en banc denied*, No. 03-18-00261-CV, 2019 WL

association to show that: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires participation of individual members in the lawsuit." *Tex. Ass'n of Bus.*, 852 S.W.2d at 447 (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). Here, neither MALC nor the Tejano Democrats can establish that they have members who individually have standing to sue or that this lawsuit is germane to the organization's purpose.

**1. MALC**

MALC's sole claim is that that H.B. 1 violates Article III, section 26 of the Texas Constitution "by splitting Cameron County's surplus population into two different districts going two separate directions into two different counties." MALC.CR.414. MALC's theory of injury is one of vote dilution: that its members, "who are residents of Cameron County," will have their "representational power" "diluted" and its "members' ability to consistently win election, or, as voters in the region, to elect candidates from Cameron County, will be diminished by bringing new populations into the district." MALC.CR.415. MALC fails to establish any of the elements of associational standing necessary to maintain this claim.

**a.** As an initial matter, MALC's petition does nothing to identify which members of its association "have suffered the requisite harm." *Summers v. Earth Island*

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6608700 (Tex. App.—Austin Dec. 5, 2019). Because MALC and the Tejano Democrats did not assert such a theory in the trial court, the State Defendants do not address it here.

*Inst.*, 555 U.S. 488, 499 (2009). Instead, MALC vaguely alleges that its "membership is comprised of members of the Texas House of Representatives," including House members "who represent the areas challenged in this Petition" and who are "registered voters in Cameron County." MALC.CR.407. But the "requirement of naming the affected members has never been dispensed with" except "where *all* the members of the organization are affected by the challenged activity." *Summers*, 555 U.S. at 498-99. Here, there is no allegation that *all* the members of MALC have standing to assert an injury based on supposed vote dilution in Cameron County. Nor could there be such an allegation, since MALC's members hail "from all parts of the state." *Membership*, Mexican American Legislative Caucus, https://www.malc.org/membership/ (last accessed February 10, 2022).

Although he was not identified in the petition, MALC did offer the testimony of one of its members, Representative Alex Dominguez, during the temporary injunction hearing. But this testimony still fails to establish standing. Representative Dominguez does not appear to assert an injury based upon vote dilution,[5] but instead on the theory that the map enacted by H.B. 1 "draws [his] residence out of HD 37 making [him] no longer eligible to run for office to represent the district." MALC.CR.58. If Representative Dominguez were running for reelection in H.D. 37, that may have allowed MALC to meet at least this element of its burden. But he is not. Representative Dominguez is running for the *Senate* seat in Cameron County.

[5] If Representative Dominguez *had* asserted such a theory, it would be foreclosed for the reasons described below, *infra* at 31-33.

MALC.CR.254-65. The county-line rule does not apply to apportionment of the Texas Senate. *Compare* Tex. Const. art. III, § 25 (setting out the requirements of apportioning the Senate), *with id.* § 26 (House). And Representative Dominguez cannot credibly claim a concrete, non-speculative injury arising from his inability to run for a seat that he is not seeking. *Garcia*, 593 S.W.3d at 207; *Spokeo*, 578 U.S. at 339. Even if he could, any such injury would not be traceable to H.B. 1's reapportionment of the House districts in Cameron County because the Representative had been considering running for a different seat *before* H.B. 1 was enacted into law. 2.RR.118:13-121:17. Nor is the purported injury redressable by this Court, since the time to announce his candidacy for election in 2022 has lapsed, and there is no allegation or evidence that the Representative would seek reelection to H.D. 37—rather than to the Senate—in 2024, if it were redrawn in 2023 to include his residence.

**b.** Even if MALC's petition had identified a particular member of its association who is aggrieved by the implementation of H.B.1, the petition's theory that the alleged violation of Article III, section 26's county-line rule results in that member suffering a "vote dilution" injury is logically incoherent and contradicted by the record. According to MALC, the relevant injury is that "Cameron County's representational power . . . . will be diluted by splitting [the surplus population in] Cameron County unnecessarily into two districts extending into two different directions." MALC.CR.415. But counties do not vote. County residents do. Indeed, that is the very premise of the one-person, one-vote principle of *Reynolds*, 377 U.S. at 562 ("Legislators are elected by voters, not farms or cities or economic interests"). Thus, a vote-dilution claim—which usually arises under section 2 of the Voting

Rights Act, 52 U.S.C. § 10301—requires alleging not that a county is not fairly represented but that a particular voting practice "cause[s] an inequality in the opportunities of . . . *voters* to elect their preferred representatives." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2333 (2021) (emphasis added) (citation omitted). The class of voters affected by this electoral practice, moreover, must be (1) "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "politically cohesive"; and (3) "vot[e] sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.'" *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 425 (2006) (plurality op.) (cleaned up). Such a group may coincidentally fall within the boundaries of a county, but it will be by coincidence only. And the disconnect between vote dilution and the county-line rule is what caused this Court in the 1980s to adopt an interpretation of the county-line rule that significantly deviates from the actual text of section 26. *Infra* at 51-52.

When examined in terms of the actual voters, MALC's own allegations and undisputed evidence show that *voters* have not lost any ability to elect the candidate of their choice. Under H.B. 1, Cameron County voters will fully control two out of the three House districts that lie within the County. *See* MALC.CR.202 (map illustrating the three House districts in Cameron County). For example, House District 38 lies wholly within Cameron County, giving voters in that County complete control over that House District. MALC.CR.166. Similarly, Cameron County voters represent 89.1% of the voting age population in House District 37, giving them commanding control over that seat too. MALC.CR.166. In both of these districts, MALC can hardly claim that its Cameron County members are unable to "elect their preferred

representatives." *Brnovich*, 141 S. Ct. at 2333. And without any facts to establish vote dilution, MALC cannot demonstrate an injury sufficient to confer associational standing.

This analysis is not altered by the fact that the third district lying partly within Cameron County, House District 35, is *not* controlled by Cameron County voters but by Hidalgo County voters who make up 63.7% of the voting age population. MALC.CR.165. MALC itself concedes that Hidalgo County would maintain the supermajority of this district since Cameron County "cannot fit three whole districts because that would result in each district being underpopulated by 27.8%." MALC.CR.413. That is why the map proposed by some MALC members also provided Cameron County voters with control over only two of the three House districts. MALC.CR.227, 244.

**c.** Finally, even if MALC could establish that at least one of its members suffered a vote-dilution injury as a result of the adoption of H.B. 1, MALC has not properly alleged that "the interests it seeks to protect are germane to the organization's purpose." *Tex. Ass'n of Bus.*, 852 S.W.2d at 447. The petition describes MALC's mission as "maintaining and expanding Latino representation across elected offices in Texas." MALC.CR.407. Yet unlike other types of redistricting claims—such as those brought under the Voting Rights Act—MALC's county-line-rule claim does not seek to vindicate the interests of a particular race, ethnicity, or other protected class, *cf.* 52 U.S.C. § 10301(a) ("on account of race or color"), but instead purports to champion the interests of "MALC members who are residents of Cameron County" as a proxy for all Cameron County voters generally.

MALC.CR.415. But nowhere does MALC claim that it has a mission to expand the representation of Cameron County across elected offices in Texas. And even if promoting Cameron County's interests were part of MALC's mission, it does not "relate to the interest by which its members would 'have standing to sue in their own right'"—here, Representative Dominguez's residence in one predominantly Hispanic district as opposed to another. *Save Our Springs All., Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 886 (Tex. App.—Austin 2010, pet. denied) (quoting *Hays County v. Hays Cnty. Water Planning P'ship*, 106 S.W.3d 349, 357 (Tex. App.—Austin 2003, no pet.)).

Nor could MALC's county-line-rule claim be predicated on race or ethnicity. Under H.B. 1, every voter in Cameron County lives in a district with a sizeable Hispanic majority that is more than sufficient for the Hispanic population to elect the candidates of its choice. To wit: House District 35 has a Hispanic Citizen Voting Age Population ("HCVAP") of 93.7%, House District 37 has a HCVAP of 77.8%, and House District 38 has a HCVAP of 91.5%. MALC.CR.193. The claim raised in MALC's petition is therefore unrelated to the organization's stated mission of "maintaining and expanding Latino representation," MALC.CR.407, and the failure to meet the "germaneness" requirement is an independent basis for this Court to find a lack of associational standing. *Cf. Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n*, 616 S.W.3d 558, 567 n. 64 (Tex. 2021) (reaffirming three-part test).

**2. Tejano Democrats**

The allegations supporting the Tejano Democrats' claim to associational standing are even more sparse than those concerning MALC's claim. In fact, the petition

alleges nothing that would allow the Court to conclude that *any* of the associational standing elements are met here.

To start, the petition identifies no "members [who] would otherwise have standing to sue in their own right." *Tex. Ass'n of Bus.*, 852 S.W.2d at 447. This omission is fatal. "An organization lacks standing if it fails to adequately 'allege that there is a threat of injury to any individual member of the association' and thus 'fails to identify even one individual member with standing.'" *Funeral Consumers All., Inc. v. Serv. Corp. Int'l*, 695 F.3d 330, 344 (5th Cir. 2012) (cleaned up). While the petition alleges that the Tejano Democrats have "2,100 members," Gutierrez.CR.5, courts do not "accept[] the organization's self-description of the activities of its members" and assume that "there is a statistical probability that some of those members are threatened with concrete injury," *Summers*, 555 U.S. at 497. Instead, a plaintiff organization must "identify members who have suffered the requisite harm" for an injury in fact. *Id.* at 499. This "requirement of naming the affected members has never been dispensed with" except "where *all* the members of the organization are affected by the challenged activity." *Id.* at 498-99; *cf. City of Kyle*, 626 F.3d at 237 (finding a lack of associational standing where there was no "showing that a specific member" had been injured). Here, there is no allegation about how *any* member of the Tejano Democrats—much less *all* members—are affected by the Legislature redistricting during a special session or by H.B. 1's reapportionment of House district lines in Cameron County.

Even if the petition had identified a particular individual member of the organization suffering an injury, it still fails to properly allege that the members of the

Tejano Democrats "possess all of the indicia of membership" in an association: namely, that "[t]hey alone elect the members of the [governing board]; they alone may serve on the [governing board]; they alone finance its activities, including costs of this lawsuit, through assessments levied upon them." *Hunt*, 432 U.S. at 344-45; *Funeral Consumers Alliance*, 695 F.3d at 344 n.9. Indeed, there is not a single allegation about the nature of membership in this organization.

Finally, the petition fails to allege that "the interests [the Tejano Democrats] seek[] to protect are germane to the organization's purpose." *Hunt*, 432 U.S. at 343. The sole allegation concerning this organization is that it "expend[s] resources to educate voters about candidates for office and ha[s] a special focus on the needs of Mexican American voters and candidates." Gutierrez.CR.5. This generalized interest in voter education does not demonstrate a specific member with interests distinct from those of the general populace, sufficient to establish jurisdiction. *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016); *City of Kyle*, 626 F.3d at 237. Nor is it connected in any meaningful way to the two claims the Tejano Democrats seek to maintain here. The Tejano Democrats' attempt to invalidate the election maps because they were drawn in a special session has nothing to do with promoting voter education, which it can engage in regardless of when the Legislature redistricts. And the same is true of its claim that H.B. 1's reapportionment of House districts in Cameron County violates the county-line rule; the organization may continue to engage in voter education no matter the precise configuration of the House districts in Cameron County.

## III. Sovereign Immunity Bars the Claims Against the State Defendants.

Because none of the plaintiffs has standing to maintain a claim against the State Defendants, the Court need go no further. But should it do so, the State Defendants' sovereign immunity presents a separate, independent barrier to plaintiffs' claims. "Sovereign immunity implicates a trial court's jurisdiction, and, when it applies, precludes suit against a governmental entity." *Patel*, 469 S.W.3d at 75. A lawsuit alleging that a government official acted "ultra vires" presents a narrow exception to the sovereign-immunity doctrine. *Hall*, 508 S.W.3d at 238. So too does a claim that the State has waived its sovereign immunity in the UDJA. *Heinrich*, 284 S.W.3d at 373 n.6. Because plaintiffs' claims do not fall within the narrow scope of these exceptions, the trial court should have dismissed this suit.

### A. The *ultra vires* exception is inapplicable here.

"[A] suit against a government employee in his official capacity is a suit against his government employer with one exception: an action alleging that the employee acted *ultra vires*." *Franka v. Velasquez*, 332 S.W.3d 367, 382 (Tex. 2011). An *ultra vires* lawsuit will lie in one of two circumstances: where the government official (1) "acted without legal authority" or (2) "failed to perform a purely ministerial act." *Hall*, 508 S.W.3d at 238 (quoting *Heinrich*, 284 S.W.3d at 372). "An *ultra vires* claim based on actions taken 'without legal authority' has two fundamental components: (1) authority giving the official some (but not absolute) discretion to act and (2) conduct outside of that authority." *Id.* at 239 (citing *Hous. Belt & Terminal Ry. v. City of Houston*, 487 S.W.3d 154, 158 (Tex. 2016)). Under these standards, this lawsuit may not proceed as an *ultra vires* suit.

As an initial matter, neither MALC nor the Gutierrez Plaintiffs may maintain an *ultra vires* suit against the State of Texas. It is black-letter law that such "suits cannot be brought against the state, which retains immunity." *Heinrich*, 284 S.W.3d at 373. Indeed "governmental entities themselves [are] not proper parties to an *ultra vires* suit." *Hall*, 508 S.W.3d at 238-39. Instead, suit "must be brought against the state actors in their official capacity." *Heinrich*, 284 S.W.3d at 373.

But MALC's attempt to bring an *ultra vires* claim against the Governor and Secretary of State fares no better, since its petition does not allege that either official acted "without legal authority" or failed to perform a "ministerial act." *Hall*, 508 S.W.3d at 238. (The Gutierrez Plaintiffs sued only the State. Gutierrez.CR.3-18.)

Neither the Governor nor the Secretary of State is alleged to have acted "without legal authority," which they do only when they "act[] inconsistently with a constitutional statute." *Patel*, 469 S.W.3d at 76. This Court has squarely held that "acting consistently with an unconstitutional [statute]" does *not* establish that a government official acted "without legal authority." *Id.* Thus, where a plaintiff "did not plead that the [defendant] officials exceeded the authority granted to them," but instead "challenged the constitutionality of the [] statutes and regulations on which the officials based their actions," it is not an *ultra vires* suit. *Id.* That precisely describes MALC's lawsuit. MALC's petition does not allege that the Governor or Secretary of State are "acting inconsistently with a constitutional statute," *id.*, but instead complains that those officials will "implement or enforce H.B. 1," MALC.CR.415. Indeed, MALC brings this suit because it thinks "HB 1 on its face

violates Article III, § 26 of the Texas Constitution." MALC.CR.414. In other words, MALC alleges that the Governor and Secretary of State will "act[] consistently with an unconstitutional [statute]," which *Patel* held is not an *ultra vires* claim. *Patel*, 469 S.W.3d at 76.

MALC also does not—and cannot—allege that the Governor and Secretary of State have failed to perform a ministerial duty. "Ministerial acts" are those "where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Hall*, 508 S.W.3d at 238 (quoting *Sw. Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 587 (Tex. 2015)). Here, MALC's primary objection regarding the Governor would seem to be that he declined to veto H.B. 1 or S.B. 4. But this Court has recognized that the veto is an inherently discretionary function that "belong[s] constitutionally to the Governor" and is not subject to review by another branch of government. *In re Turner*, 627 S.W.3d 654, 660 (Tex. 2021) (per curiam).

To be sure, MALC alleges that the Governor can "order[] the elections for the Texas House of Representatives." MALC.CR.407; *see* Tex. Elec. Code § 300.3. And it vaguely contends that the Secretary of State "supervises elections and has constitutional and statutory duties associated with redistricting and apportionment, including advising election authorities on boundaries of districts, setting election deadlines for new districts, and enforcement of certain election rules and laws." MALC.CR.408. But there is no allegation that the Governor or Secretary of State has *shirked* any of these duties. If anything, MALC's petition seeks a judicial order forbidding the Governor and Secretary of State from carrying out one or more of

these statutory duties. Yet such an order would effectively require the Court to "seek to alter government policy," which is outside the scope of the *ultra vires* doctrine. *Heinrich*, 284 S.W.3d at 372. Because an *ultra vires* suit is an "attempt to reassert the control of the [S]tate," *id.*, it may not be used to prevent an official from implementing his "enabling law" because of a supposed misinterpretation of a "collateral law," *Hall*, 508 S.W.3d at 241-42.

At bottom, "the claim at issue here is not one involving a government officer's action or inaction" but instead "a challenge to statute." *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010). Thus, "this is not an *ultra vires* claim to which a government officer should have been made a party." *Id.*

### B. The UDJA does not waive the State Defendants' sovereign immunity for nonviable claims.

Finally, plaintiffs cannot avoid this conclusion by pointing to the UDJA's limited waiver of sovereign immunity for alleged violations of the Constitution. "Generally, sovereign immunity deprives a trial court of jurisdiction over a lawsuit in which a party has sued the State or a state agency unless the Legislature has consented to suit." *Tex. Parks & Wildlife Dep't v. Sawyer Tr.*, 354 S.W.3d 384, 388 (Tex. 2011). MALC and the Gutierrez Plaintiffs invoke the UDJA's sovereign-immunity waiver, Tex. Civ. Prac. & Rem. Code § 37.006(b), for the proposition that the State Defendants' sovereign immunity poses no barrier here, MALC.CR.408; Gutierrez.CR.6. But under this Court's case law, such a claim will not lie against the Governor or Secretary of State because they are not governmental entities. *Patel*, 469 S.W.3d at 79-77. Even as to the State, "[w]hile it is true that sovereign immunity does not bar

a suit to vindicate constitutional rights . . . immunity from suit is not waived if the constitutional claims are facially invalid." *Klumb*, 458 S.W.3d at 13 (citing *Heinrich*, 284 S.W.3d at 372 and *Andrade*, 345 S.W.3d at 11). That is the case here: because the two constitutional claims advanced by the Gutierrez Plaintiffs and MALC do not present viable claims, sovereign immunity bars them.

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

The Gutierrez Plaintiffs' first claim is that the House and Senate maps drawn by H.B. 1 and S.B. 4 are invalid because they were drawn during a special session of the Legislature, and Article III section 28 of the Constitution supposedly permits redistricting to occur only in a *regular* session of the Legislature. Gutierriez.CR.6-14. This argument cannot withstand scrutiny as it is foreclosed by text, standard canons of construction, precedent, and logic.

Article III, section 28 provides that "[t]he Legislature shall, at its first regular session after the publication of each United States decennial census, apportion the state into senatorial and representative districts." Tex. Const. art. III, § 28. Should the Legislature fail to do so, the responsibility of redistricting falls to the Legislative Redistricting Board of Texas." *Id.* But nothing in the language of section 28 *forbids* the Legislature to redistrict at a time other than during the first regular session following the release of the census. That alone is dispositive: "an act of a state legislature is legal when the Constitution contains no prohibition against it." *Shepherd v. San Jacinto Junior Coll. Dist.*, 363 S.W.2d 742, 743 (Tex. 1962). Accepting the Gutierrez Plaintiffs' interpretation of section 28 would require rewriting the

Constitution to insert the word "only," such that the Legislature could redistrict "[only] at its first regular session." Yet courts must be "[s]ticklers about not rewriting [legal texts] under the guise of interpreting them." *BankDirect Capital Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 86 (Tex. 2017). And this Court has already disapproved of this type of reasoning by rejecting an interpretation of section 28 that "would require interpolation of the word 'convened' into the constitutional provision." *Mauzy v. Legis. Redistricting Bd.*, 471 S.W.2d 570, 573 (Tex. 1971) (orig. proceeding).

Moreover, adopting the plaintiffs' view of the Texas Constitution could cause section 28 to violate the U.S. Constitution in certain applications. Although the federal courts are required "to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself," failure even to begin to redistrict until 2023 would have opened the State to malapportionment challenges under federal law. *Growe v. Emison*, 507 U.S. 25, 33 (1993). Indeed, one of the plaintiffs himself brought a federal claim on September 1, 2021, asserting that a federal court should redraw the maps and that his Senate District violated federal law because it was malapportioned in the light of the newly released census data. *Gutierrez v. Abbott*, No. 1:21-cv-769, ECF No. 1 (W.D. Tex. Sept. 1, 2021). Under standard canons of interpretation, this Court does not and should not unnecessarily adopt an interpretation of the state constitution that places it in contravention of the federal constitution. *Cf. Stockton v. Offenbach*, 336 S.W.3d 610, 619 (Tex. 2011) (applying principle in construing a statute).

In any event, this Court has already confirmed that the Gutierrez Plaintiffs' interpretation of section 28 is erroneous. As the Court stated over 30 years ago, although section 28 "explicitly requires the Legislature to reapportion legislative districts in the first regular session" after publication of the census, "neither that section nor any other constitutional provision prohibits the Legislature from acting in later special or regular sessions after the constitutional authority of the Legislative Redistricting Board has expired." *Terrazas v. Ramirez*, 829 S.W.2d 712, 726 (Tex. 1991) (orig. proceeding). Unsurprisingly, the Legislature has often engaged in redistricting more frequently than is required by Article III, section 28—in part because it is not uncommon for disappointed participants in the redistricting process to challenge the new electoral maps in the way that plaintiffs have done here. *See id.* (endorsing redistricting in special sessions); *Perry v. Del Rio*, 66 S.W.3d 239, 246 (Tex. 2001) ("congressional redistricting plans had been enacted in special sessions in 1971, 1981, and 1991"); *Terrazas v. Slagle*, 821 F. Supp. 1154, 1155-56 (W.D. Tex. 1992) (per curiam) (describing the Legislature's attempts at redistricting state House and Senate sets during a special session). Put simply, section 28 establishes a floor, not a ceiling, with respect to the frequency of redistricting.

The Gutierrez Plaintiffs' interpretation of section 28 is also illogical because it would undermine the very purpose of that constitutional provision, which is to spur the Legislature "to get on with the job of legislative redistricting" and prevent that task from being "neglected or purposely avoided." *Mauzy*, 471 S.W.2d at 573. Under the Gutierrez Plaintiffs' interpretation, however, the Legislature would be required to *put off* the process of redistricting if the census data is published after the

conclusion of the regular session. The upshot of this approach would be to require the State to maintain malapportioned maps in an election year—in violation of the one-person, one-vote principle, *Reynolds*, 377 U.S. at 577-79. While purpose can never trump text, canons of construction do require that the text not be twisted in a way that defeats its purpose. Antonin Scalia & Bryan Garner, Reading Law: *The Interpretation of Legal Texts* 63-65 (2012). Doing so would be particularly inappropriate here, where adopting plaintiffs' view would inevitably force the redistricting process into the courts for judicial resolution rather than keeping it in the Legislature where the drafters of the Constitution intended that politically charged process to occur.[6]

Plaintiffs have made at least five separate counterarguments, but none has merit. *First*, the Gutierrez Plaintiffs suggest that *Terrazas* authorizes the Legislature to redistrict only during a special session that occurs *after* the first regular session following the publication of the census. Gutierrez.CR.9. Emphasizing that the opinion specifically approved redistricting during "later" special sessions, *Terrazas*, 829 S.W.2d at 726, the Gutierrez Plaintiffs suggest that redistricting at an *earlier* special session that comes after the publication of the census but before the first regular session following that publication must be prohibited. Gutierrez.CR.9.

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[6] In the circumstances present here, the Legislative Redistricting Board would not have jurisdiction to begin the redistricting process. The Board's jurisdiction is triggered only when the Legislature "fail[s] to make such apportionment" at the "first regular session following the publication of a United States decennial census." Tex. Const. art. III, § 28. Because "the first regular session" after the publication of the census has not yet occurred, the Legislature could not have "fail[ed]" to redistrict during it and the Board's jurisdiction has not been triggered.

This reasoning falls prey to the logical fallacy of "denying the antecedent" or "the fallacy of the inverse." *NLRB v. Noel Canning*, 573 U.S. 513, 589, (2014) (Scalia, J., concurring in the judgment). Recognizing that the Legislature may redistrict in a special session that follows the first regular session after publication of the census—as the Court did in *Terrazas*—in no way establishes the very different proposition that the Legislature is forbidden to redistrict in a special session that falls between the publication of the census and the next regular session. *See Indem. Ins. Co. of N. Am. v. W & T Offshore, Inc.*, 756 F.3d 347, 355 n.5 (5th Cir. 2014) (explaining that "A → B" does not imply "Not A → Not B"). As this Court has put it, "the inverse of a statement is not always true." *DPS v. Caruana*, 363 S.W.3d 558, 561 (Tex. 2012).

*Second*, the Gutierrez Plaintiffs argue that *Mauzy* "commanded" a "schedule of apportionment" that requires redistricting to occur in the first regular session following the publication of the census and not any sooner. Gutierrez.CR.8-9. But *Mauzy* established no such thing. Instead, it concluded that the Legislature could begin the redistricting process even if the census data is published while a regular session is ongoing. *Mauzy*, 471 S.W.2d at 574. And far from deciding whether the Legislature could redistrict in a special session, the Court expressly did "not decide whether a special session of the Legislature could apportion if the power did not reside in the Board or if the Board's own scheme were declared invalid;" instead it reserved judgment on the question. *See id.* That question was subsequently resolved in *Terrazas*.

*Third*, the Gutierrez Plaintiffs point to a fifty-year-old Attorney General Opinion, which they assert concluded that the Legislature is not authorized to consider redistricting legislation in a special session after having failed to pass such legislation in a regular session. Gutierrez.CR.10 (citing Tex. Att'y Gen. Op. No. M-881 (1971)). But that opinion has nothing to do with whether the Legislature can redistrict in a special session *generally*, much less in a special session called before the first regular session after the census data is published. Instead, it was concerned with the circumstances under which section 28 shifts redistricting responsibility to the Legislative Redistricting Board. That is an entirely different subject that is not at issue here. *Supra* at 44 n. 6. Moreover, even if the opinion letter did stand for the proposition that the Gutierrez Plaintiffs urge, it would no longer be good law since it was issued decades before this Court held in *Terrazas* that the Legislature is authorized to redistrict in a special session.

*Fourth*, the Gutierrez Plaintiffs assert that section 28 provides an "implicit constraint" on the Legislature's power to redistrict at times other than during the first regular session after the publication of the census. Gutierrez.CR.10-11. To support this proposition, the Gutierrez Plaintiffs point to *Walker v. Baker*, 196 S.W.2d 324 (Tex. 1946) (orig. proceeding), which they argue establishes the principle that "[w]hen the Constitution provides a specific process for accomplishing an end, that process is exclusive." Gutierrez.CR.10. Again, to the extent *Walker* ever stood for that proposition, it too predates *Terrazas*'s express holding that section 28 does not limit the Legislature to redistricting *only* during the regular session. *Terrazas*, 829 S.W.2d at 726.

Regardless, the Gutierrez Plaintiffs misinterpret *Walker*. That case held that the Senate could not convene itself when out of session in order to decide whether to confirm the Governor's recess appointments. *Walker*, 196 S.W.2d at 328. The Court reasoned that the Constitution already prescribed a fixed time for the Senate to pass on such appointments—the first thirty days of a regular session. *Id.* at 327-28. In so concluding, the Court declined to apply the principle that all legislative power not expressly or impliedly forbidden by the federal or state constitutions is permitted. *Id.* at 328. It reasoned that this principle only applies only "to legislative power to be exercised by the Legislature, not to a non-legislative power to be exercised by the Senate" and "[c]onfirmation or rejection of the Governor's appointments is an executive function expressly delegated to the Senate." *Id.* This holding has no application here precisely because redistricting *is* a legislative power to be exercised by the Legislature, not a "non-legislative power." *See, e.g.*, Tex. Const. art. III, §§ 25, 26, 28.

*Fifth*, the Gutierrez Plaintiffs seek refuge in an argument that "absurdity will follow" if the State Defendants' interpretation of section 28 prevails. Gutierrez.CR.12-14. Their principal concern is that the Legislature could alter the House and Senate districts "each session," triggering elections of the whole Senate and thus frustrating the four-year terms established for that body. Gutierrez.CR.13. But such an "absurdity" is possible under any interpretation of section 28 that permits the Legislature to redistrict more than once per decade—a circumstance that the Gutierrez Plaintiffs concede (as they must) has been permissible since this Court decided *Terrazas* more than 30 years ago. Gutierrez.CR.8-9. No such calamity has

occurred, and the specter of its existence cannot justify deviating from the plain text of the Constitution—particularly as it would continue to loom even under the plaintiffs' view.

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

Similarly meritless is the claim, asserted by both MALC and the Gutierrez Plaintiffs, that the Texas Legislature violated Article III, section 26 of the Constitution—known as the county-line rule—when it enacted H.B. 1. MALC.CR.413-15; Gutierrez.CR.14-17. In their telling, the Legislature was obligated to give Cameron County "two wholly contained [House] districts and one partial district" rather than "one wholly contained [House] district and . . . two partial districts." MALC.CR.413; *see* Gutierrez.CR.15-16 (same). But this interpretation, predicated on the assumption that section 26 requires the Legislature to maximize the number of House districts wholly contained in a particular county, is erroneous.

Section 26 provides, in relevant part, that "when any one county has more than sufficient population to be entitled to one or more Representatives," the Legislature shall apportion "such Representatives or Representatives" to the county. Tex. Const. art. III, § 26. It is undisputed here that Cameron County has "sufficient" population to be entitled to one or more Representatives" and that H.B. 1 in fact apportioned one House District—H.D. 38—entirely to Cameron County. *See, e.g.*, Gutierrez.CR.16.

The dispute flows from the Legislature's choice to split the remaining "surplus" population outside of H.D. 38 into two other districts—H.D. 35 and H.D. 37—that lie only partly within Cameron County. MALC.CR.413-15;

Gutierriez.CR.14-17. In the view of MALC and the Gutierrez Plaintiffs, section 26 required the Legislature to allocate the "surplus" to one district wholly contained within Cameron County and one partial district—*not* two partial districts. *Id.* But this assertion finds no support in the constitutional text. Instead, section 26 provides that "any surplus of population may be joined in a Representative District with any other contiguous county or counties." Tex. Const. art. III, § 26.

The Legislature fully complied with this provision by joining some surplus population with Willacy County to form H.D. 37 and other surplus population with Hidalgo County to form H.D. 35. MALC.CR.202. After all, section 26 states that any surplus "may be joined in a Representative District with any other contiguous county or *counties*." Tex. Const. art. III, § 26 (emphasis added). Likewise, the argument of MALC and the Gutierrez Plaintiffs ignores that, while the Constitution *mandates* that a county with "sufficient population" receive "one or more Representatives," it vests the Legislature with discretion to manage "any surplus of population." This distinction is evident by juxtaposing the Constitution's command that a county with sufficient population "shall" be entitled to one or more Representatives and its instruction that any surplus population "may" be "joined in a Representative District with any other contiguous county or counties." *Id.* Texas law recognizes that the word "'[m]ay' creates discretionary authority or grants permission or a power," Tex. Gov't Code § 311.016(1), while "'[s]hall' imposes a duty," *id.* § 311.016(2). Thus, so long as each county of sufficient population is provided at least one wholly contained House district, section 26 permits the Legislature to allocate any surplus population to multiple districts in contiguous counties, should the need arise.

Against this plain-language interpretation of section 26, MALC and the Gutierrez Plaintiffs point to two cases from this Court that they claim foreclose the State Defendants' argument: *Smith v. Craddick*, 471 S.W.2d 375 (Tex. 1971), and *Clements v. Valles*, 620 S.W.2d 112 (Tex. 1981). MALC.CR.412-13; Gutierrez.CR.15-16. Both are factually distinguishable, so neither controls this case. Moreover, because their reasoning deviates from the plain text of section 26, they should not be extended beyond their facts.

In *Smith*, this Court found a violation of section 26's county-line rule where a redistricting map engaged in "wholesale cutting of county lines." 471 S.W.2d at 378. The map at issue in *Smith* "cut [] the boundaries of 33 counties," eighteen of which did not have a sufficient population to entitle them to their own district (and which were therefore ineligible to be cut under the plain language of section 26 because they did not have a surplus). *Id.* One county was not even provided the one wholly contained district that it was constitutionally entitled to, but it was instead carved up and combined with other adjoining counties. *Id.* The House map at issue in *Clements* suffered from similarly widespread violations of the section 26's county-line rule. The map at issue there "cut[] thirty-four counties," ten of which "ha[d] populations less than sufficient to form a separate representative district." *Clements*, 620 S.W.2d at 114.

No similarly wide-ranging violations of the county-line rule are alleged here. Indeed, the claims at issue here are limited only to Cameron County, which has complete control of one district and functionally complete control of a second. *Supra*

at 32. And unlike some of the counties at issue in *Smith* and *Clements*, Cameron County *did* have a "surplus" population that triggered the last clause of section 26.

In arguing otherwise, MALC homes in on *Clements*' criticism of the map at issue there on the ground that "three counties, Nueces, Denton, and Brazoria, which [were] entitled to one or more representatives, [were] cut so that their surplus populations [were] joined to two, rather than one adjoining district." MALC.CR.412-13 (quoting *Clements*, 620 S.W.2d at 114). But MALC plucks this statement out of context. It did not arise in isolation, but only in the context of the Court's broader analysis holding the map at issue unconstitutional because of the "wholesale cutting" of county lines that rendered the map "invalid in its entirety." *Clements*, 620 S.W.2d at 114-15. The Court did not hold the failure to assign these three counties a second wholly contained House district independently warranted relief or even constituted a separate violation of section 26.

The Court should decline MALC and the Gutierrez Plaintiffs' invitation to override the plain language of the constitutional text by extending a stray statement from *Clements* to usher in a new rule of constitutional law. *Smith* and *Clements* addressed a historical anomaly. The county-line rule, which had existed since the original Constitution of 1876,[7] required House districts to be "apportioned among the

[7] For a transcription of the original text, *see* Constitution of the State of Texas (1876), Art. III, § 26, Tarlton Law Library: Constitutions of Texas 1824-1876, https://tarlton.law.utexas.edu/c.php?g=813324&p=5803235 (last visited Feb. 10, 2022); *see also* Tex. Legislative Council, *Amendments to the Texas Constitution Since 1876* at 20 (June 2021), https://tinyurl.com/2p92befx (reflecting no relevant amendments).

several counties." Tex. Const. art. III, § 26. But nearly a century after section 26 was adopted, the Supreme Court applied the one-person, one-vote principle to state legislative maps, thus requiring "seats in both houses of a bicameral state legislature [to] be apportioned on a population basis." *Reynolds*, 377 U.S. at 568. In *Smith* and *Clements*, this Court tried to reconcile the seeming tension between the Texas Constitution's requirement that House districts be apportioned by county, and the federal one-person, one-vote principle's recognition that "[l]egislators represent people, not trees or acres." *Reynolds*, 377 U.S. at 562; *see Smith*, 471 S.W.2d at 376-77 (discussing *Reynolds*); *Clements*, 620 S.W.2d at 114 (applying *Smith*). To do so, this Court invalidated maps that did not make a good-faith attempt to comply with both the federal and state rules. *Smith*, 471 S.W.2d at 377-79; *Clements*, 620 S.W.2d at 114-15.

But to the extent that *Smith* and *Clements* can be read to require, as plaintiffs suggest, MALC.CR.411-14; Gutierrez.CR.14-16, that surplus population must *always* be assigned to a single district, they have superimposed a requirement that appears nowhere in the text of the Constitution. That is impermissible: courts do—and should—try to avoid that outcome by construing state law to avoid unnecessary conflict with the Constitution. *Stockton*, 336 S.W.3d at 618; Scalia & Garner, *supra* at 247-51. But even in the statutory context, this does not convey a license to rewrite the law as the Legislature passed it. *See BankDirect Capital Fin.*, 519 S.W.3d at 86-87. It cannot do so in the constitutional context where the document under examination represents the sovereign will of the people regarding how they are to be governed. To the extent that *Smith* and *Clements* purported to change those rules to a

system that no one ever adopted, they were wrong and should not be extended beyond their contexts.[8]

## Prayer

The Court should vacate or reverse the three-judge district court's order denying the State Defendants' pleas to the jurisdiction and render judgment dismissing plaintiffs' suit.

Respectfully submitted.


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[8] Although the State Defendants do not think it is necessary for the Court to overturn these decisions to rule in their favor, they expressly reserve the right to argue that the Court should do so.

## Certificate of Service

On February 10, 2022, this document was served on: (1) Wallace Jefferson, lead counsel for Ruben Cortez, Sarah Eckhardt, Roland Gutierrez, and the Tejano Democrats, via Wjefferson@adjtlaw.com; and (2) Sean McCaffity, lead counsel for the Mexican American Legislative Caucus, Texas House of Representatives, via Smccaffity@textrial.com.

/s/ Lanora C. Pettit
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## Certificate of Compliance

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/s/ Lanora C. Pettit
Lanora C. Pettit

**No. 22-0008**

# In the Supreme Court of Texas

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

*Appellants*,

*v.*

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

*Appellees.*

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

## APPENDIX

Tab

# Tab A: Order on Pleas to the Jurisdiction and Applications for Temporary Injunction

**NO. D-1-GN-21-006515**

| | | |
|---|---|---|
| **MEXICAN AMERICAN LEGISLATIVE CAUCUS,** | § | |
| | § | |
| ***Plaintiff,*** | § | **In the District Court** |
| | § | |
| **v.** | § | **of Travis County** |
| | § | |
| **GREG ABBOTT, in his official capacity as Governor of the State of Texas, and JOHN SCOTT, in his official capacity as Secretary of State of Texas, and THE STATE OF TEXAS** | § | **250th Judicial District** |
| | § | **[Lead Case]** |
| ***Defendants.*** | § | |

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| | | |
|---|---|---|
| **ROLAND GUTIERREZ, Texas State Senator for SD 19; SARAH ECKHARDT, Texas State Senator for SD 14; RUBEN CORTEZ JR.; and the TEJANO DEMOCRATS,** | § | **In the District Court** |
| | § | **of Travis County** |
| ***Plaintiffs,*** | § | **126th Judicial District** |
| | § | **[Consolidated Case]** |
| **v.** | § | |
| **THE STATE OF TEXAS,** | § | |
| ***Defendant.*** | § | |

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ORDER ON PLEAS TO THE JURISDICTION AND APPLICATIONS FOR TEMPORARY INJUNCTION

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On this day, the Three Judge District Court considered the Pleas to the Jurisdiction by Defendants Greg Abbott, in his official capacity as Governor of the State of Texas, and John Scott, in his official capacity as Secretary of State of Texas (collectively, "Defendants"), and Defendant

the State of Texas (the "State"), as well as Plaintiff Mexican American Legislative Caucus' ("MALC") Expedited Motion for Temporary Injunction, and Plaintiffs Roland Gutierrez, Sarah Eckhardt, Ruben Cortez Jr., and the Tejano Democrats' (collectively, the "Gutierrez Plaintiffs") Application for Temporary Injunction. The Court, having considered the pleas, the applications, and the supporting and opposing briefing, as well as the applicable law cited therein, evidence presented, arguments of counsel, and the pleadings on file in this case, is of the opinion:

1) Defendants' Plea to the Jurisdiction should be DENIED;
2) The State's Plea to the Jurisdiction should be GRANTED IN PART as to the Gutierrez Plaintiffs' claims for injunctive relief and DENIED IN PART as to the Gutierrez Plaintiffs' claims for declaratory relief; and
3) MALC's Expedited Motion for Temporary Injunction should be DENIED.

IT IS THEREFORE ORDERED that Defendants' Plea to the Jurisdiction is DENIED.

IT IS FURTHER ORDERED that the State's Plea to the Jurisdiction is GRANTED IN PART as to the Gutierrez Plaintiffs' claims for injunctive relief only and that such claims for injunctive relief against the State are DISMISSED. IT IS FURTHER ORDERED that the State's Plea to the Jurisdiction is DENIED IN PART as to the Gutierrez Plaintiffs' claims for declaratory relief.

IT IS FURTHER ORDERED that MALC's Expedited Motion for Temporary Injunction is DENIED.

The Court ORDERS a final trial in this matter to begin January 10, 2022 at 9:00 A.M. at a location to be determined by the Court.

SIGNED on the 22nd day of December, 2021.

The Honorable Karin Crump, Judge Presiding

The Honorable Ken Wise, Judge Presiding

/s/ Emily Miskel

The Honorable Emily Miskel, Judge Presiding

# Tab B: Tex. Const. art. III, § 26

Vernon's Ann.Texas Const. Art. 3, § 26

# § 26. Apportionment of members of House of Representatives

Currentness

Sec. 26. The members of the House of Representatives shall be apportioned among the several counties, according to the number of population in each, as nearly as may be, on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census, by the number of members of which the House is composed; provided, that whenever a single county has sufficient population to be entitled to a Representative, such county shall be formed into a separate Representative District, and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other; and when any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties.

**Editors' Notes**

**INTERPRETIVE COMMENTARY**

**2007 Main Volume**

As distinguished from the senate, representation in the house is apportioned among the counties according to the total population; the unit of representation used as a basis for the formulation of districts and the allotment of members being the number of inhabitants divided by the number of representatives. The basis of apportionment, then, is the population of the state divided by the membership of the house which is 150.

The constitutions of Texas have, from the beginning, apportioned representation in the house on inhabitants or population, although some of the earlier constitutions provided that free or slave Negroes and Indians not taxed were not to be counted in determining such apportionment.

Apportionment, as provided by Section 26, is designed to assure equality of representation among the population of the state, a fundamental principle of representative government.

This principle is carried out in provisions permitting a county having sufficient population to have more than one representative. At such time it is made a separate district. Moreover, if a county does not have the required population it must be joined to a contiguous county to form a representative district; and further, in cases where a county has a surplus of population, enough for one or more representatives, but not for another, it may be joined with a contiguous

  

county or counties in a legislative district and be permitted to elect a flotorial representative as a means of providing representation for the extra population.

Despite the fact that equality of representation is the rule, a constitutional amendment violating this principle was adopted in 1936. This amendment had the declared purpose of restricting representation from the larger cities. It did so by limiting to seven the number of representatives from any one county unless the population exceeds 700,000 in which event one additional representative is allowed for each 100,000.

This amendment shows the continuation of the old rivalry between rural and urban areas, and is a discrimination in favor of the former. As such, it aids in permitting the rural areas to maintain their supremacy in the House of Representatives.

Notes of Decisions (31)

Vernon's Ann. Texas Const. Art. 3, § 26, TX CONST Art. 3, § 26
Current through the end of the 2021 Regular and Called Sessions of the 87th Legislature.

# Tab C: Tex. Const. art. III, § 28

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Vernon's Texas Statutes and Codes Annotated
Constitution of the State of Texas 1876 (Refs & Annos)
Article III. Legislative Department

Vernon's Ann.Texas Const. Art. 3, § 28

# § 28. Time for apportionment; apportionment by Legislative Redistricting Board

Effective: November 26, 2001
Currentness

Sec. 28. The Legislature shall, at its first regular session after the publication of each United States decennial census, apportion the state into senatorial and representative districts, agreeable to the provisions of Sections 25 and 26 of this Article. In the event the Legislature shall at any such first regular session following the publication of a United States decennial census, fail to make such apportionment, same shall be done by the Legislative Redistricting Board of Texas, which is hereby created, and shall be composed of five (5) members, as follows: The Lieutenant Governor, the Speaker of the House of Representatives, the Attorney General, the Comptroller of Public Accounts and the Commissioner of the General Land Office, a majority of whom shall constitute a quorum. Said Board shall assemble in the City of Austin within ninety (90) days after the final adjournment of such regular session. The Board shall, within sixty (60) days after assembling, apportion the state into senatorial and representative districts, or into senatorial or representative districts, as the failure of action of such Legislature may make necessary. Such apportionment shall be in writing and signed by three (3) or more of the members of the Board duly acknowledged as the act and deed of such Board, and, when so executed and filed with the Secretary of State, shall have force and effect of law. Such apportionment shall become effective at the next succeeding statewide general election. The Supreme Court of Texas shall have jurisdiction to compel such Board to perform its duties in accordance with the provisions of this section by writ of mandamus or other extraordinary writs conformable to the usages of law. The Legislature shall provide necessary funds for clerical and technical aid and for other expenses incidental to the work of the Board, and the Lieutenant Governor and the Speaker of the House of Representatives shall be entitled to receive per diem and travel expense during the Board's session in the same manner and amount as they would receive while attending a special session of the Legislature.

**Credits**
Amended Nov. 2, 1948; Nov. 6, 2001, eff. Nov. 26, 2001.

**Editors' Notes**

**INTERPRETIVE COMMENTARY**

**2007 Main Volume**

In line with the principle of equality of representation of all voters of the state, it is required that the legislature, after the publication of each United States decennial census, reapportion its membership agreeably to the provisions of Article III, Sections 25, 26 and 26a.

  

It can readily be seen that if such reapportionment is not carried out, shifts in population will make certain portions of the state overrepresented and others underrepresented in the senate and the house, and a person's vote and political power will not have as much weight in one part of the state as in another.

Although the Constitution of 1876 made it obligatory upon the legislature to reapportion after each decennial census, as of 1948 there had been no reapportionment since 1921, and it would seem that there was no method to force the legislature to reapportion even though it violated a constitutional duty, for under the doctrine of separation of powers, the courts cannot interfere to compel the legislature to perform a legislative duty.

To remedy this situation, Section 28 was amended in 1948 so that periodic reapportioning could be assured. It was provided that should the legislature fail to reapportion at its first regular session after the publication of the decennial census, it must be done by the Legislative Redistricting Board of Texas.

This Board, an ex officio body, is composed of the Lieutenant Governor, the Speaker of the House of Representatives, the Attorney General, the Land Commissioner, and the State Comptroller. It is required to meet sixty days after the adjournment of the legislature which failed to reapportion, and by majority vote redistrict the state into senatorial and representative districts. When such apportionment is executed and filed with the Secretary of State, it has the force and effect of law.

In order to compel action by the Board so that it cannot escape performance of its duty, jurisdiction is given to the Supreme Court of Texas to force it to perform its duties in accordance with the provisions of this section.

Notes of Decisions (25)

Vernon's Ann. Texas Const. Art. 3, § 28, TX CONST Art. 3, § 28
Current through the end of the 2021 Regular and Called Sessions of the 87th Legislature.

**End of Document**

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Associated Case Party: John Scott

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