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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 23-0656

IN THE SUPREME COURT OF TEXAS

THE STATE OF TEXAS; OFFICE OF THE ATTORNEY GENERAL OF TEXAS; KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS; OFFICE OF THE TEXAS SECRETARY OF STATE; AND JANE NELSON, IN HER OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE,
Appellants,

v.

HARRIS COUNTY, TEXAS; AND CLIFFORD TATUM,
Appellees.

On Direct Appeal from the 345th Judicial District Court,
Travis County

HARRIS COUNTY'S BRIEF OF APPELLEE

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STATEMENT OF FACTS

This is an appeal from an order temporarily enjoining the State from enforcing S.B. 1750 against Harris County. Accordingly, this Court "review[s] the evidence in a light most favorable to" the trial court's injunction. *Kennedy v. Gulf Coast Cancer & Diagnostic Ctr. at Se., Inc.*, 326 S.W.3d 352, 357 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

I. For half a century, every Texas county has had a right to hire an elections administrator to run its elections.

In Texas, counties run elections. The State is correct that, by *default*, counties do so "through their elected county clerks and tax assessor-collectors." State's Br. 5. Yet this system is inherently inefficient, as it divides the intimately related roles of voter registration and election administration between those two officials. *See* Tex. Elec. Code §§ 12.001, 43.002, 67.007, 83.002; RR2:75–76, 77–78.

Perhaps for that reason, and to insulate elections administration from crippling partisanship, the Legislature has, since 1977, given each Texas county the option to consolidate voter-registration and election-administration functions in a professional, non-partisan elections

administrator. Tex. Elec. Code §§ 31.031, .035.[1] Once the position is created, the administrator is appointed by a committee of elected county officials (including the clerk and tax assessor-collector) and the heads of the local Democratic and Republican parties. *Id.* § 31.032.

The State demeans these professionals as "unaccountable bureaucrat[s]," even as it suggests that the Secretary of State—the State's chief elections officer, who may take over a county's election administration under certain circumstances[2]—is politically accountable because she is appointed by an elected official. State's Br. 5–6. Ad hominem aside, these officers are accountable to the same extent and in the same manner: the elected officials who select them "must answer to the voters for [their] choice." *Id.* at 5.[3] Indeed, an elections administrator is subject to *immediate* accountability to county officials, Tex. Elec. Code

[1] *See* Act of May 28, 1977, 65th Leg., R.S., ch. 609, § 3, sec. 56a, 1977 Tex. Gen. Laws 1497, 1499. An elections administrator may not run for or hold public office, nor may he contribute to electoral campaigns under his jurisdiction. Tex. Elec. Code § 31.035.

[2] *See* Tex. Elec. Code §§ 31.017, 31.020, 31.021.

[3] The State also makes much of the unremarkable fact that these non-partisan officials have limited tenure protections. State's Br. 6. What the State ignores is that a county may "at any time"—and irrespective of those protections—summarily "abolish the position of county elections administrator." Tex. Elec. Code § 31.048(a).

§ 31.037, while the clerk and tax assessor-collector are only subject to election every four years.

Today, more than half of Texas counties, including nine of its ten largest, rely on elections administrators to manage their elections. RR2:125.

II. Harris County's elected officials create the elections administrator position.

In 2020, Harris County followed the example of most other large counties and created the position of elections administrator. RR2:81. The State casts S.B. 1750 as a response to alleged problems with elections run by the administrator. But the State's efforts to abolish the position, and undo the will of Harris County voters, commenced immediately after the position's creation, before any election was administered under its aegis. *See id.*

The Secretary of State asserted that Harris County violated the Elections Code when creating the position, pointing to a minor clerical oversight. RR2:95–96. The Attorney General parroted that complaint, contending that the position was "null and void" and did "not exist." RR3:7. The Attorney General even threatened legal action if Harris County continued exercising its statutory rights. *Id.* Senator

Bettencourt, who would later draft S.B. 1750 and spearhead its passage, publicly called on Harris County to abolish the office and fire the administrator. RR3:PX2.

Because none of this saber-rattling worked, Senator Bettencourt brandished a blunt club—S.B. 1750. But as enacted, that bill impacts only one lonesome county in Texas—Harris County. And as Harris County shows below, S.B. 1750's most important provision can *never* apply to *any other* Texas county.

As S.B. 1750's text reveals, the Legislature intentionally singled out Harris County for discriminatory treatment. The sole reason for the bill's filing was to "eliminate the Harris County Elections Administrator." RR3:20. S.B. 1750's House sponsor spelled out the intent in even blunter terms: "my bill is filed . . . *only* [] for Harris County." RR3:25; *see also* RR3:24 (explaining why the "bill relates to Harris County *only*" (emphasis added)). He conceded that the bill was drafted to shield other large counties from the law's effect. RR3:25.[4]

[4] "Look, after they talked to all of the other counties, those large counties, they found that they didn't have the problems Harris County did. . . . And so for that reason, they decided to settle it only on the county that seems not to be able to get their act together."

III. Procedural History

Harris County sued the State, the Attorney General, the Secretary of State, the Office of the Attorney General, and the Office of the Secretary of State seeking a declaration that S.B. 1750 is unconstitutional and an injunction against its enforcement. CR405. Cliff Tatum, then the elections administrator, intervened and sued Harris County seeking declaratory relief and an injunction prohibiting Harris County from terminating his employment on the grounds of S.B. 1750's enactment. CR736. The State intervened in Tatum's suit and filed jurisdictional pleas asserting that Harris County lacked standing and that Tatum's suit was collusive. CR126, 438, 775.

The trial court held an evidentiary hearing. The State's brief focuses on perceived faults in the election administrator's running of prior elections. But while Harris County, like many jurisdictions, has faced challenges in administering elections, *see* RR2:118–19, the perfectly run election is an impossibility, RR2:134. Nevertheless, there was no evidence that the issues Harris County experienced during the two elections overseen by the administrator were different or unique in kind, severity, or frequency from those other counties have encountered.

If anything, the evidence established the opposite. *See* RR2:117, 120–21, 134–35.[5]

The trial court denied the State's jurisdictional pleas and granted both Harris County's and Tatum's requested preliminary injunctions. CR817. The trial court found that Harris County would likely succeed on its claim that S.B. 1750 was unconstitutional, and it found that, absent an injunction, Harris County would suffer "inefficiencies, disorganization, confusion, office instability, and increased costs," as well as "disrupt[ion to] an election that the Harris County EA has been planning for months." CR816–17, 819. The court further found that, absent injunctive relief, Harris County would

> be forced to hire additional permanent and temporary workers, as well as consultants, at great cost, to ensure it can meet its many obligations and to navigate the management structure to be used, the personnel to be retained, and the numerous decisions that need to be made in hopes of orderly administering Harris County, as well as this November's election.

CR820.

[5] Indeed, the evidence showed that one of the reasons Harris County moved to the elections-administrator model was that it had encountered more serious issues when relying on the county clerk and tax assessor-collector. RR2:132–33.

The trial court thus enjoined the Attorney General and Secretary of State from "[t]aking any actions to enforce SB 1750" or "[r]efusing to recognize the Harris County Elections Administrator's Office as a lawful elections office." CR821–22.

After some initial confusion,[6] the State perfected a direct appeal to this Court. Because the State asserted that its appeal superseded the injunctions, Harris County and Tatum sought temporary relief reinstating the trial court's injunctions. This Court denied the motions, noted probable jurisdiction, and set this case for argument.

Because the injunction was superseded, Harris County was compelled against its will to transfer the election administrator's employees and budget to the tax-assessor and clerk, and it fired Tatum. Tatum subsequently filed a motion to dismiss as moot the State's appeal from the injunction issued in his favor.

[6] The trial court signed four orders on August 14, 2023, and submitted them to the trial court clerk, who did not docket the orders until August 15. CR814-36; *see also* CR837–38. The first order to be docketed denied one of the State's jurisdictional pleas, CR814, and upon receiving it the State noticed an appeal to the Third Court, CR839, and attempted to use that appeal to prevent the clerk from docketing the already-signed injunction orders. *See* Tex. Civ. Prac. & Rem. Code §§ 51.014(a)(8), (b). Though it is irrelevant given the State's express waiver, Harris County notes its disagreement with the State's stance that the automatic stay prevents a trial court clerk from performing her ministerial duty to docket an order that had, before the stay, already been signed and submitted for filing. *See* State's Statement of Jurisdiction 2–3.

Harris County has not abolished the elections administrator *position*. *See* Tex. Elec. Code § 31.048.[7] And Harris County stands by the trial court's findings regarding the substantial monetary burdens and administrative disruptions caused by S.B. 1750. The County remains concerned about the harm the law will have on the November 2023 and future elections.

[7] Under the Elections Code, the creation of the position and the selection of an individual to occupy it are distinct. The *position* is created by written order of the commissioner's court, while its occupant is chosen by the county election administrator. Tex. Elec. Code §§ 31.031(a), .032(a). Likewise, the position may only be abolished by the commissioner's court's written order. *Id.* § 31.048(a). While S.B. 1750 includes a provision titled "Abolishment of Position and Transfer of Duties in Certain Counties," no operative language in the statute actually purports to abolish the position; it merely transfers the position's duties. *Id.* § 31.050. Thus, even if S.B. 1750 took effect on September 1, 2023, Harris County's election administrator *position* remains extant, even if it is unoccupied and currently disempowered.

SUMMARY OF THE ARGUMENT

The Texas Constitution strictly prohibits local laws that interfere with a county's election administration or the duties and functions of its officers. Tex. Const. art. III, § 56(a). And this Court has consistently struck down laws that target a single locality using a closed population bracket—that is, a bracket that applies to a locality meeting the classification criteria on the date the law takes effect but excluding localities that later come within it.

S.B. 1750 is such an unconstitutional law. It purports to disempower an elections official in Harris County, and then it will never apply again. Section 3 provides:

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

Tex. Elec. Code § 31.050 (emphasis added). The State's construction proves Harris County's case: the phrase "On September 1, 2023" is an adverbial phrase that modifies the verb "transfer" by "specif[ying] *when* that transfer is to occur." State's Br. 15 (emphasis added). In other words, any transfer of functions under Section 3 is to occur *on September 1, 2023*, limiting the section's application to counties meeting the population

criterion on that date. The State insists the provision would also apply to counties later meeting the population threshold, but it makes no effort to ground that position in its own construction of the provision's meaning. If Section 3 "specifies" that "transfer is to occur" on September 1, 2023, how can it also occur on some unspecific future date? The State has no answer.

The State's backup position—that what it concedes is a modifying phrase is actually a "reference to the effective date of the statute," State's Br. 15—fares no better. S.B. 1750 has an effective-date provision which was more than sufficient to serve the notice purpose to which the State refers. And if the Legislature had omitted "On September 1, 2023" from Section 3, the standalone effective-date clause would have given Section 3 precisely the effect that the State advocates. The only reason the Legislature would have added the modifying phrase to Section 3 was to *restrict* its effect in a manner the effective-date provision, standing alone, did not.

Section 3 therefore targets Harris County using a closed population bracket. This Court has consistently struck down such laws, which, by definition, do not "operate[] equally on all within the class." *Maple Run*

at Austin Mun. Util. Dist. v. Monaghan, 931 S.W.2d 941, 945 (Tex. 1996). Because S.B. 1750 fails at this most fundamental level, this Court therefore need not address the State's proffered justifications for the law—all of which fail on their merits in any event. Nor can this Court rewrite S.B. 1750 to apply more broadly than it was drafted—a reality confirmed by the very severance cases the State cites, as well as some it doesn't.

Finally, the State's last-ditch standing arguments fail. The Secretary of State has a mandatory legal duty to enforce S.B. 1750 against Harris County. The Secretary's representative's equivocal denials of that reality were properly disregarded by the trial court. As for the Attorney General, he has previously threatened legal action to abolish Harris County's elections administrator position, and he *voluntarily* intervened in Cliff Tatum's suit against Harris County specifically to enforce S.B. 1750. There is more than a credible threat that the Attorney General would pursue enforcement action against Harris County if it violated S.B. 1750. Harris County's are thus traceable to, and would be redressable by an injunction against, these officials.

This Court should affirm the trial court's injunction.

ARGUMENT

I. Section 3 of S.B. 1750 is an unconstitutional local law.

A. The State's proposed rational-basis review is incompatible with the constitutional text.

It has been almost thirty years since this Court applied the Texas Constitution's prohibition on local laws. *See* Tex. Const. art. III, § 56(a); *Maple Run at Austin Mun. Util. Dist. v. Monaghan*, 931 S.W.2d 941 (Tex. 1996). *Maple Run* established that the "[t]he primary and ultimate test of whether a law is general or special is whether there is a reasonable basis for the classification made by the law, and whether the law operates equally on all within the class." *Id.* at 945 (quoting *Rodriguez v. Gonzales*, 227 S.W.2d 791, 793 (1950)).

The State would eviscerate this simple test. According to the State, any legislative classification, no matter how narrow, is permissible if a rational basis can be conjured after the fact. State's Br. 21–22. The State's extreme position illustrates a conflict in this Court's precedent. Some cases have, indeed, applied a nearly boundless deference to legislative classifications. *E.g.*, *Smith v. Davis*, 426 S.W.2d 827, 830–32 (Tex. 1968) (upholding special ad valorem tax rules for statute applicable to just three counties, based on hypothetically reasonable justification).

Other cases have been more exacting, even when a clever lawyer could easily have imagined a rational pretense. *E.g.*, *Rodriguez*, 227 S.W.2d at 794 (striking down special ad valorem tax rules in counties bordering the Rio Grande); *see also Smith v. Decker*, 312 S.W.2d 632, 636 (Tex. 1958) (requiring "a *substantial* reason for the classification" (emphasis added)).

Given the erratic precedent, this Court should return to first principles—the constitutional text. *See Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000) ("Presuming that the language of the Texas Constitution is carefully selected . . . . [we] rely heavily on the plain language of the Constitution's literal text."). Section 56(a) speaks with admirable clarity: "The Legislature *shall not*, except as otherwise provided in this Constitution, pass *any* local or special law" on an enumerated list of subjects. Tex. Const. art. III, § 56(a) (emphasis added). Thus, § 56(a) not only uses prohibitory language ("shall not"), it emphasizes that prohibition by employing the expansive word "any."

As the State concedes, a § 56(a) claim "sounds in unequal treatment," as it "'secure[s] uniformity of law throughout the State as far as possible.'" State's Br. 19 (quoting *Miller v. El Paso County*, 150 S.W.2d 1000, 1001 (Tex. 1941)). In measuring § 56(a)'s prohibitory scope, it is

also therefore useful to examine the type of uniformity it compels. Relevant here, § 56(a) prohibits—broadly and repeatedly—the Legislature from controlling matters of local governance. Thus, it prohibits "any" local law:

- "regulating the affairs of counties, cities, towns, wards or school districts";
- "for the opening and conducting of elections, or fixing or changing the places of voting";
- "creating offices, or prescribing the powers and duties of officers, in counties, cities, towns, election or school districts"; or
- "relieving or discharging any person . . . from the performance of any public duty or service imposed by general law."

Tex. Const. art. III, §§ 56(a)(2), (12), (14), (30). The plain constitutional command, therefore, is that counties be treated uniformly concerning their conduct of elections and the creation and duties of their officers.

The Framers did not assign courts the power to create exceptions to § 56(a)'s prohibitions. Instead, they explicitly and narrowly defined the *sole exception* to § 56(a)'s applicability: the Legislature may enact a special or local law concerning the enumerated subjects only when the Constitution otherwise permits such action. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that, "when legislation appears on its face to be within a specific prohibition of the

Constitution," something more searching than rational-basis review may be appropriate); *accord District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008) (quoting *Carolene Products* and making the same point).

B. Section 3 will only ever apply to Harris County.

The State concedes that, today, "S.B. 1750 applies only to Harris County." State's Br. 14. But the State asserts that Section 3 of S.B. 1750—the provision purporting to shutter Harris County's elections administrator position—could apply to another county in the future. The State's arguments are incompatible with the statute's text and this Court's emphasis on plain language.

Section 3 of S.B. 1750 provides:

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

Tex. Elec. Code § 31.050 (emphasis added).

The parties' dispute centers on the effect of the introductory prepositional phrase "On September 1, 2023." As the State admits, this phrase is adverbial, modifying the verb "transfer." State's Br. 15. Thus, both parties agree that "the modifier 'on September 1, 2023,' specifies *when* that transfer is to occur." *Id.* (emphasis added).

The State refuses to reckon with the plain meaning of its own construction. According to the State, the transfer mandated by Section 3 occurs "*on* September 1, 2023." With respect to dates, "on" signifies a specific, singular day of occurrence.[8] *On*, Webster's Third New Int'l Dictionary 1574 (2002) ("a function word to indicate position with regard to place, direction, or time; esp. . . . occurrence during the course of a specified day"). Thus, when this Court set this case for argument "on Tuesday, November 28, 2023," it used the preposition "on" to specify the day oral argument would happen; the Court did not say that argument might be held at some unspecified later time.

Yet the latter is how the State interprets Section 3. Tellingly—and despite accusing Harris County of "faux textualism"[9] for taking the

[8] *E.g.*, Act of May 28, 1993, 73rd Leg., R.S., ch. 347, § 4.15, 1993 Tex. Gen. Laws 1479, 1526 ("On August 31, 1993, each county education district shall transfer its funds to its component school districts . . . ."); Act of May 27, 1953, 53rd Leg., R.S., ch. 315, art. 326k-26, § 8, 1953 Tex. Gen. Laws 784, 785–86 ("[O]n September 1, 1953, the Criminal District Attorney of Harris County shall transfer all civil matters to the County Attorney of Harris County . . . .").

[9] The warning against "faux textualism" amounts to an instruction to "follow ordinary meaning, not literal meaning." State's Br. 15 (quoting *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1491 (2021) (Kavanaugh, J., dissenting)). Here, of course, it is Harris County relying on the ordinary meaning of "on." The State, by contrast, does not offer any definition of the phrase "On September 1, 2023"—ordinary, literal, or otherwise—consistent with the result it asks this Court to reach.

State's own construction seriously—the State does not try to explain, using "the ordinary rules of English grammar," State's Br. 14–15, how a statute that specifies a date for a transfer *also* requires that transfer to occur on *unspecified* other dates. Indeed, the State does not provide—and Harris County cannot imagine—a single usage of "on" consistent with its interpretation.

The State also contends that the phrase "On September 1, 2023" is a "reference to the effective date of the statute." State's Br. 15. For several reasons, this argument fails. Like every properly drafted bill, S.B. 1750 stated its effective date in a distinct section. RR3:44 ("This Act takes effect September 1, 2023."); *see* Texas Legislative Council, Drafting Manual § 3.14(a) (2023) ("[E]ach bill should have a stated effective date."). That section accomplished the notice function to which the State refers when it mentions "grace period[s]" and the need to give affected persons time to plan for a change in the law. State's Br. 15, 17; *see Fire Prot. Serv., Inc. v. Survitec Survival Prods., Inc.*, 649 S.W.3d 197, 205 (Tex. 2022) (finding statute constitutional based on sufficient notice given by effective-date provision, where effective date was *not* referenced in substantive provision of bill). There was thus no need to "reference" this

effective date in the substantive text—which is why the State provides no other example of a statute that behaves this curious way.[10] *See* Drafting Manual § 3.14(b) ("A drafter must place effective date language and transition language in separate sections of a bill.").

Moreover, the supposed "reference" to the effective date *narrows* Section 3's scope more than the effective-date provision would have on its own. If the Legislature had intended for Section 3 to apply prospectively on every date on or after September 1, 2023, it could have accomplished that purpose by simply omitting the introductory phrase "On September 1, 2023" and letting S.B. 1750's separate effective-date provision operate organically. In that case, Section 3 would have applied after the effective date without temporal limitation, applying to Harris County and any other county that later crossed the population threshold.

Or, if the Legislature thought it necessary for Section 3 to "reference" the effective date and give Harris County redundant notice,

[10] The State similarly asserts that the supposed reference to the statute's effective date "is best understood to be a belt-and-suspenders approach, which ensures that Harris County cannot argue that it is exempt from S.B. 1750." State's Br. 17 (internal quotation marks and citation omitted). Needless to say, the State does not endeavor to explain how, were this putative reference omitted, Harris County could have "argue[d] that it is exempt." The argument is illogical on its face.

it could have used "*After* August 31, 2023" or "On *or after* September 1, 2023." *See* Drafting Manual § 7.29 & n.4 (suggesting this usage). The plain meaning of these constructions would have been to impose a temporal limitation on Section 3 that was coextensive with the bill's effective date.[11] Instead, by requiring that the transfer happen on a single, specified date, the Legislature deliberately restricted Section 3 to ensure it applies only to Harris County.

Finally, in an effort to defeat the surplusage problem its reading creates, the State notes that Section 2 bars counties bigger than 3.5 million from *creating* an elections administrator position, correctly noting that Section 2 says nothing "about what to do with a county that is *already* above 3.5 million people and *already* has an Elections Administrator." State's Br. 16. The State then says that "Section 3 closes that gap and brings Harris County within the class of counties with 3.5

[11] The State provides some alternative language the Legislative could have used to make Section 3 apply only to counties meeting the population threshold on September 1, 2023, asserting—without any basis—that its proffered language is "more natural." State's Br. 15. The existence of an alternative construction, even a "more natural" one, cannot bear on the meaning of the unambiguous language the Legislature chose. By contrast, the alternative constructions Harris County provides above are probative because—unlike the language the Legislature chose—they actually carry the meaning the State incorrectly ascribes to Section 3.

million residents that are not permitted to have an Elections Administrator." *Id.* That's certainly Section 3's effect—but it has nothing to do with the phrase "On September 1, 2023." Section 3 would unambiguously apply to Harris County with or without the modifying phrase. By adding "On September 1, 2023," the Legislature ensured that Section 3 applies *only* to Harris County.

Harris County's plain-language reading bears no hallmark of "absurdity." *Contra* State's Br. 17. As the bill's House co-sponsor stated, S.B. 1750's authors, after meeting with representatives of Texas's other large counties, intentionally drafted the bill to exclude those counties and make it "relate[] to Harris County only." RR3:24–25.[12] The Legislature's decision to grandfather any elections administrator created by another large county before it reached the 3.5 million population threshold was a

[12] Harris County is cognizant of the "controversial" nature of legislative history, and its construction of S.B. 1750 (unlike the State's) thus relies on plain meaning alone. *In re Facebook, Inc.*, 625 S.W.3d 80, 88 n.4 (Tex. 2021). However, Harris County cites this passage to push back on the State's unsupported and anti-textualist position that the Legislature cannot have intended S.B. 1750 to mean what it says. In fact, at least some legislators—including the author and House sponsor—had exactly that intent. Under those circumstances, resort to the anti-absurdity canon would, itself, be absurd.

deliberate choice—albeit one that plunges the statute into constitutional infirmity.[13]

The Legislature used only the preposition "On," which specifies a single date on which the "transfer" was to occur. That choice was intentional and its effect is clear.

C. Regardless of whether Section 3's bracket is open or closed, S.B. 1750 is unconstitutional.

1. Section 3 uses an unconstitutional closed bracket.

Texas courts have frequently distinguished between open brackets, which apply to any locality that subsequently comes within the statute's classification, and closed brackets, which are drafted to exclude localities later meeting at classification criteria. Section 3 employs a closed population bracket: it applies to Harris County and then never again.

Texas courts have consistently invalidated such laws. *E.g.*, *Hall v. Bell County*, 138 S.W. 178, 183 (Tex. App.—Austin 1911) (striking down law whose "sole object was to regulate the affairs of Bell County" by

[13] There is no merit to the State's contention that, under a plain-text reading, Harris County could "refus[e] to comply" and then "ignore S.B. 1750 in perpetuity." State's Br. 17. Consider a contract analogy: if a contract requires performance on a fixed date, the promisor does not insulate itself from a breach claim by refusing to perform that day and then claiming the obligation has vanished; instead, the promisee can go to court to force the promisor to deliver the overdue performance.

abolishing the position of county auditor in that county), *aff'd*, 153 S.W. 121 (Tex. 1913); *see City of Fort Worth v. Bobbitt*, 36 S.W.2d 470, 473 (Tex. [Comm'n Op.] 1931) ("[W]hen the law is so drawn that it applies only to one city, and can never apply to any but this one city in any possible event, the law is unconstitutional and void, because such law is not based on classification but on isolation."); *Suburban Util. Corp. v. State*, 553 S.W.2d 396, 399 (Tex. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.) ("The statute is unconstitutional . . . if at the time of its enactment, the classification by population is based entirely upon existing circumstances and the application of the statute is 'closed' to other local units in the future."). The State cites no case in which this Court upheld a closed bracket under § 56(a).[14]

[14] In the trial court, the State asserted that *Board of Managers of Harris County Hospital District v. Pension Board of the Pension System for the City of Houston*, 449 S.W.2d 33 (Tex. 1969), was such a case. As this Court pointed out, however, the bracket in that case was open. *Id.* at 38. And the law's provision permitting governmental subdivisions to request pension contribution transfers could be invoked by later-created subdivisions. *See id.* at 35, 38–39. Unsurprisingly, the State has abandoned its reliance on this case.

In this Court, the State instead cites *City of Irving*, which it asserts upheld a statute that "could apply only to the Dallas/Fort Worth Airport." State's Br. 24 (citing *City of Irving v. Dallas/Fort Worth Int'l Airport Bd.*, 894 S.W.2d 456, 467 (Tex. App.—Fort Worth 1995, writ denied)). In fact, the bracket in that case was open and could eventually come to apply to the Midland/Odessa International Airport, and it would have also applied to a proposed Austin/San Antonio airport. *See City of Irving*, 894 S.W.2d at 466.

Because Section 3's bracket is closed, it is unconstitutional. A "local law is one limited to a specific geographic region of the State." *Maple Run*, 931 S.W.2d at 945. Section 3's closed bracket confines its operation to Harris County. Therefore, the law is local. And § 56(a) strictly prohibits local laws that, like Section 3, regulate a county's affairs, its conduct of elections, or the creation and duties of its officers. Tex. Const. art. III, §§ 56(a)(2), (12), (14). The State has not argued that some other constitutional provision authorized a local law in these circumstances. *See id.* § 56(a) ("except as otherwise provided in this Constitution").

Maple Run's test confirms this straightforward textual analysis. Under *Maple Run*, a local law must satisfy two factors: first, "there [must be] a reasonable basis for the classification made by the law"; and second, "the law [must] operate[] equally on all within the class." 931 S.W.2d at 945 (quoting *Rodriguez*, 227 S.W.2d at 793). A closed population bracket flunks this second factor, because—by definition—it does not operate equally on all within the class. Indeed, the use of a closed bracket is proof that the stated classification is illegitimate and that it was used as a subterfuge to regulate a certain entity "without actually identifying it by name." *Maple Run*, 931 S.W.2d at 946.

Apart from its attempt to deny Section 3's plain meaning, the State does not argue that—if Section 3's bracket is closed—it complies with the second part of *Maple Run*'s test. The law is therefore unconstitutional, and there is no need to examine the Legislature's possible justifications.

2. Even if this Court adopted the State's interpretation of Section 3, S.B. 1750 would still be unconstitutional.

The State asserts that Harris County "do[es] not dispute" that S.B. 1750 "would be constitutional" if it used an open bracket. State's Br. 13; *id.* at 14, 19. This assertion is false.[15] Section 3's closed bracket makes its unconstitutionality obvious. But Harris County also challenged Section 2 of S.B. 1750, which uses a facially open bracket. *E.g.*, Harris County's Mot. 15 n.7; CR425, 501–02. Indeed, the State's brief illustrates why treating Section 3 as an open bracket barely alters the constitutional analysis in this case—and why the entirety of S.B. 1750 is unconstitutional.

[15] For this supposed concession, the State cites a portion of Harris County's emergency motion that simply notes the definition of open and closed brackets, Emergency Mot. 9, and a page of Harris County's live pleading explaining that Section 3's bracket is closed, CR424.

In *Miller*, this Court confronted a statute that was technically open, insofar as it used no language to temporally fix its classification (just as the State incorrectly interprets Section 3). 150 S.W.2d at 1002. When the law was enacted in 1935, the "Legislature was doubtless cognizant" that it applied only to El Paso County, to which it would exclusively apply at least until the 1940 census. *Id.* This Court therefore "presume[d]" that this exclusive scope "was intended by the Legislature." *Id.* And the Court noted that, after the 1940 census, "no other county met the population requirements . . . and as a consequence El Paso County is the only county that will be affected thereby until after 1950"—at least 15 years after enactment. *Id.*

Under these circumstances, this law "applicable only to a single county" was "[c]learly" a local law, and this Court struck it down as unconstitutional. *Id.*; *see also Smith v. Davis*, 426 S.W.2d at 832 (upholding constitutionality of law that neither relied on a closed bracket nor "appl[ied] to only one county at the time of its enactment, as in *Miller*").

Miller's suspicion of a technically open bracket that actually targets a single locality applies with special force here. As the State itself

observes, Texas's other large counties—"Bexar, Dallas, Collin, Tarrant, and Travis"— "are not expected to even cross the 3.5 million threshold" until, at least, the "*year 2060*." State's Br. 24 (emphasis added). The State uses numbers drawn from the State Demographer's reports, of which the Legislature was presumably aware. Therefore, when the Legislature enacted S.B. 1750, it knew *and intended* that the law would not affect any other county for at least *35 years*. *Miller*, 150 S.W.2d at 1002.

A classification that is effectively limited to a single member for several decades, as S.B. 1750 would be under the State's reading, is not "broad enough to include a substantial class." *Maple Run*, 931 S.W.2d at 945 (quoting *Miller*, 150 S.W.2d at 1001–02). Instead, such a classification reflects an attempt to "evade[] by a subterfuge" § 56(a)'s prohibition on local laws—reducing it to "an idle and a vain thing." *Bobbitt*, 36 S.W.2d at 472; *see also Anderson v. Wood*, 152 S.W.2d 1084, 1087 (Tex. 1941) (striking down law exempting, via a narrowly drawn but technically open population bracket, Tarrant County from a general law).

S.B. 1750 is therefore unconstitutional even under the State's reading.

3. The State's proffered justifications cannot overcome S.B. 1750's unconstitutionality.

This Court in *Bobbitt* anticipated a scenario not unlike this one. There, a statute deliberately targeted Fort Worth using, as a smoke-screen, a facially neutral population-bracket. This Court was not fooled: "We presume that no one would contend, if the name 'Fort Worth' had been inserted in the law in place of the stipulation with reference to population, that the act would be constitutional." 36 S.W.2d at 472.

Here, the State makes the very argument *Bobbitt* assumed to be beyond the pale. It suggests that if the Legislature had expressly made S.B. 1750 applicable to Harris County alone, the act would be constitutional. The State thus defends S.B. 1750 based exclusively on characteristics unique *to Harris County*, ignoring the population bracket the Legislature chose. The State's proffered justifications fail.

First, the State fails to actually address the propriety of S.B. 1750's classification. S.B. 1750's stated classification—which is what must satisfy the constitutional test—is not "disproportionately large counties," "the biggest county in Texas," "counties with problems administering their elections," or even "Harris County." The classification is "count[ies] with a population of 3.5 million or more." The State does not defend that

classification. Instead, it offers three rationales that have nothing to do with the population bracket, but which instead apply uniquely to Harris County. State's Br. 23–28. The State's unwillingness to defend the classification at issue should, alone, be fatal. *See Maple Run*, 931 S.W.2d at 945 (focusing on "the classification *made by the law*" (emphasis added)); *see* Smith Amicus Br. 9 (making similar point).

Second, the State's argument that the Legislature can properly isolate a single county for disparate treatment so long as the issue seems important cannot be squared with the constitutional text or this Court's precedent. It will always be true that larger counties have a greater effect on state elections than smaller ones. Yet the Constitution's drafters, surely aware of that reality, prohibited local laws regarding the "conducting of elections." Likewise, the framers surely knew that different counties—based on their unique circumstances, including population—would face different issues regarding their officers' accountability and effectiveness. Yet the framers flatly prohibited local laws "prescribing the powers and duties of [county] officers."

The State's rule, if adopted, would nullify these prohibitions. According to the State, if the Legislature reasonably believes a single

county faces unique issues (as every county does)—or even if some members of the public merely perceive that to be the case—the Legislature may surgically intervene in its local governance without regard to constitutional protections. State's Br. 23–27. This is precisely what § 56(a) forbids, which explains why *Maple Run* rejected the argument that its two-part test was inapplicable to laws affecting a "statewide interest." 931 S.W.2d at 947.

Finally, the State's proposed justifications collapse on their own merits. If "sheer size" were the criterion, State's Br. 23, the Legislature would not have excluded from S.B. 1750's effect counties that come to equal or exceed Harris County's size. The State also asserts that Harris County *might* remain proportionally larger than other Texas counties. State's Br. 24–25. But the Legislature did not use a classification based on proportionate size; it used a fixed population cutoff. The State's arguments are irrelevant to that classification.

The State suggests that the Legislature could have "believed reports" that Harris County's elections administrator "mismanaged the County's recent elections." State's Br. 25. Even if the Legislature received and believed such reports, there is no evidence suggesting—and no basis

for believing—that Harris County alone faced reports of election mismanagement, let alone that it resulted in problems more serious than those faced by other counties with elections administrators. Indeed, the evidence was to the contrary. RR2:134–35. It would be arbitrary to single out Harris County based on perceived election-management problems when similar problems also affect other counties. *See Miller*, 150 S.W.2d at 1001–02 (classifications must be broad enough to "*legitimately* distinguish[] such class from others with respect to the purpose sought to be accomplished," lest classifications become "a mere arbitrary device" to evade § 56(a)). Consequently, this supposed justification (which has nothing to do with the Legislature's classification) fails.

The State last suggests that the Legislature may have been "concerned about media reporting regarding Harris County's elections," and thus public confidence. States' Br. 27. The State's evidence simply established the existence of some unknown number of press reports about alleged problems during the 2022 election. RR2:120. There is no evidence, however, that such reports were unique to Harris County, let alone that the public might have been concerned about the integrity of Harris County's election but not that of other counties. This justification (which

again has nothing to do with the statutory classification) is therefore arbitrary.

D. The State's other arguments fail.

1. The State's severance argument would require this Court to judicially enact a statute the Legislature never passed and the Governor never signed.

The State offers a breathtaking cure for Section 3's unconstitutionally narrow scope: this Court should rewrite S.B. 1750 to apply in circumstances the Legislature never intended. But "severability is a question of legislative intent." *Texas Indus. Energy Consumers v. CenterPoint Energy Hous. Elec., LLC*, 324 S.W.3d 95, 103 (Tex. 2010). It therefore forbids a court from rewriting a statute to have an effect *opposite* the intent the Legislature expressed through its language. *See BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 18 (Tex. 2016) (observing that this Court has never "altered an ordinance's applicability" using severance principles).

The State argues that if the phrase "On September 1, 2023" makes Section 3 unconstitutional, this Court should simply cross it out—and thereby fundamentally alter the scope of S.B. 1750. State's Br. 18–19. The State misunderstands the law of severance.

To begin, the State misunderstands *what* may be severed. "In general, the *invalid portion* of an ordinance or statute should be severed from the rest of the enactment, which remains in effect without the severed portion." *Builder Recovery Servs., LLC v. Town of Westlake*, 650 S.W.3d 499, 507 (Tex. 2022) (emphasis added); *accord Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S.Ct. 2335, 2350 (2020) ("The Court presumes that an *unconstitutional provision* in a law is severable from the remainder of the law or statute." (emphasis added)).

Here, Section 3 contains just one provision: it transfers Harris County's election administrator's functions to the county clerk and tax assessor-collector on September 1, 2023. That single provision—the entirety of Section 3—is unconstitutional. There is no constitutional "remainder" to save. And the prepositional phrase "On September 1, 2023" is not unconstitutional standing alone. It is therefore not an "invalid portion" which is subject to severance. No precedent permits this Court to judicially amend a statute to remove the language that makes a standalone provision unconstitutional. Indeed, the State's lead case explains that the point of severability principles is to "*avoid*" the sort of

"judicial policymaking or *de facto* judicial legislati[ng]" in which the State implores this Court to engage. *Barr*, 140 S. Ct. at 2351 (emphasis added).

The State also mangles the broader federal rule for which it advocates (and which this Court has never adopted). The State touts the federal courts' "preference for extension rather than nullification." State's Br. 19 (quoting *Barr*, 140 S.Ct. at 2354). But it fails to describe what that looks like in practice. Consider *Sessions v. Morales-Santana*, 582 U.S. 47 (2017), on which the State relies. There, the United States Supreme Court noted that when faced with challenges to "discriminatory exceptions *denying benefits*"—like food stamps or military spousal benefits—"to discrete groups," it had severed *those discriminatory exceptions* rather than nullified the whole benefit regime. *Id.* at 74–75 (emphasis added). This resulted in the broadly available benefit being extended to the statutorily excluded group. *Id.*

In *Morales-Santana*, by contrast, the Court faced a challenge to a law giving a discrete group *better* treatment. *See id.* at 75. Rather than extend that benefit to the plaintiffs, who were outside the better-treated class, the Court struck down the statutory preference, essentially reducing the benefits of the better-treated group. *Id.* at 76. This case is

more like the denial of benefits cases. The Election Code gave every Texas county a statutory power, and then it was amended to except only Harris County. Under the State's own precedent, the fix is to strike down the unconstitutional exception to the general rule—exactly what Harris County requests.

As important, in *Barr*, *Morales-Santana*, and the benefits cases, the Court excised from a larger statute an unconstitutional exception—in its entirety. The State has not offered a single case doing what it asks of this Court: to *expand* an unconstitutional exception to a general rule by striking out statutory language that is not unconstitutional in itself—and thereby create a statute that the legislative body did not draft and the executive did not sign. *Barr*, the State's lead severability case, explains why such a result would be inappropriate: "[C]ourts are not well equipped to imaginatively reconstruct a prior Congress's hypothetical intent." 140 S. Ct. at 2350.

This warning is consistent with this Court's holding in *BCCA*. There, this Court held that a municipal ordinance criminalizing certain environmental ordinances was preempted by state law limiting when such acts could be prosecuted. 496 S.W.3d at 16. This Court rejected the

argument that, rather than strike down the ordinance, it should adopt a "limiting construction" saving the ordinance in circumstances in which prosecution would comply with state law. *Id.* at 18. This Court refused to "read[] language into the Ordinance that simply is not there." *Id.* Here, as in *BCCA*, this Court should refuse to "alter[]" or "reconstruct[]" Section 3's "applicability." *Id.* This Court must, instead, apply the constitutional rules to the language the Legislature chose.[16] *See Anderson*, 152 S.W.2d at 1088 (striking down law under § 56(a) and refusing to use severance principles to "giv[e] the act a broader scope than was intended by the Legislature").

This Court should decline the State's invitation to judicially amend S.B. 1750.[17]

[16] This Court's reticence to rely on legislative history to construe statutes arises, in part, from a reluctance to "attach[] authoritative weight to statements not subject to the constitutionally prescribed process of bicameralism and presentment." *Facebook*, 625 S.W.3d at 88 n.4 (internal quotation marks and citation omitted). Those same constitutional limitations on lawmaking would be much more gravely violated by judicially amending S.B. 1750 to apply outside the narrow limits chosen by the political branches.

[17] The State's assertion that "eliminating the phrase 'on September 1, 2023' would seem to have no appreciable impact on the rest of Section 3," State's Br. 20, depends entirely on its implausible reading of that phrase. But if the State's reading were right, there would be no need to resort to judicial rewriting.

2. Harris County proved irreparable harm.

The State argues that the trial court's injunction was erroneous because Harris County has "unclean hands" and because post-appeal facts show that it lacks an irreparable injury. Neither of these arguments has merit.

The State's "unclean hands" argument has no support in the record. The State's apparent argument is that Harris County unreasonably delayed in preparing to implement S.B. 1750 between when it was signed on June 18, 2023, and when it took effect on September 1, 2023. State's Br. 30.

The State cites no evidence—not a single citation to the record—showing that Harris County "ignore[d]" S.B. 1750 and failed to "ma[k]e any contingency plans" for its implementation. *Id.* In fact, even as it pursued this suit, Harris County was already taking concrete steps to implement S.B. 1750, including by hiring a consultant to assist it with the orderly transfer of functions and employees from the elections administrator's office to the clerk and tax assessor-collector. RR2:110 (Q: "[I]s the county taking steps to prepare for this transition?" A: "Yes.").

There is thus no basis for the State's assertion that Harris County's "harm was self-inflicted." State's Br. 30.

In any event, by the time the Governor signed S.B. 1750 in June 2023, it was *already* too late for the elections administrator's functions to be transitioned without causing Harris County harm. RR2:110–11. It takes much longer than two months to plan and conduct an election, especially when the officers suddenly responsible have not been preparing. No matter how hard Harris County tried to plan for the transition, there remains a serious risk Harris County will suffer monetary costs, decreased efficiencies, and the potential for disruption during the election.

The State's argument that "events during the pendency of this appeal" defeat Harris County's injunction claim fares no better. *Id.* As the State concedes, this dispute is not moot, and "facts that occur subsequent to an appealable order are [ordinarily] irrelevant." *Id.* at 30–31. That ought to be the end of the matter.

The State cites cases holding that injunctions are always subject to alteration. These cases stand for the proposition that "[a] *trial court* generally retains jurisdiction to review, open, vacate or modify" an

injunction. *City of San Antonio v. Singleton*, 858 S.W.2d 411, 412 (Tex. 1993) (emphasis added). Harris County certainly agrees that the State could ask the trial court to modify or terminate the injunction if the State believes new facts warrant that relief. But the State's cases do not recognize *an appellate court's* authority to modify an injunction based on post-appeal facts outside the record.[18]

And what thin facts they are. The State points only to the Harris County Clerk's press release, following this Court's refusal to grant Harris County emergency relief, noting that she had taken over as the County's chief election official. State's Br. 31–32. Nothing in this statement "suggests that the County's alleged difficulties in transitioning were overstated." State's Br. 32.

[18] *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1855), is not to the contrary, as in that case it was the Supreme Court, exercising its original jurisdiction, that initially ordered the bridge removed, and thus it retained continuing jurisdiction to revisit that order. As for *ePlus, Inc. v. Lawson Software, Inc.*, 789 F.3d 1349, 1354–55 (Fed. Cir. 2015), it recognizes that an appellate court may dissolve an injunction when a *legal* bar to the injunction arises during an appeal. The State does not argue that rule is applicable here.

II. The district court had subject-matter jurisdiction.

The State saves its arguments regarding subject-matter jurisdiction—a threshold matter—for the very end of its brief—a telling sign of how it views its own arguments.

Harris County sued the right parties *and* sued the parties the State now says it should have sued. There is also a credible threat that the Secretary of State and Attorney General will enforce S.B. 1750 against Harris County: the Secretary has a ministerial duty to enforce S.B. 1750, and the Attorney General has previously threatened suit to abolish the Harris County elections administrator and voluntarily intervened in Tatum's suit to accomplish the same result.

A. Neither the Attorney General nor the Secretary of State is immune from injunctive relief.

The entirety of the State's sovereign-immunity argument is a one-sentence assertion that a UDJA claim challenging a statute's validity "will not lie against the Attorney General or the Secretary of State because they are not governmental entities." State's Br. 35. There is no basis for the State's position.

The State's cursory argument seems to have roots in *Heinrich*'s holding that the UDJA authorizes, and waives immunity for, suits

against "governmental entities" challenging a statute's validity. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). The State's seeming position is that a constitutional officer sued in his or her official capacity cannot be a "governmental entity."

No case supports the State's stance. To the contrary, this Court strongly suggested the State's position was incorrect last year in *MALC*. Immediately after noting that UDJA claims "challenging the validity of a statute may be brought against the relevant governmental entity," this Court noted that the "case law is replete" with constitutional challenges to statutes "brought against proper defendants *like the Governor and the Secretary of State*." *Abbott v. MALC*, 647 S.W.3d 681, 698 (Tex. 2022) (emphasis added). The obvious inference is that those officers can be proper "governmental entity" defendants under the UDJA.

Here, the relevant statutory provisions are enforced by the Attorney General and Secretary State, as officers, not by the "Offices of" those officers. *See infra* § II.B. The officers themselves, in their official capacity, are therefore the proper "governmental entities" to sue under the UDJA. *MALC*, 647 S.W.3d at 697 n.7 ("The identity of the relevant

governmental entity for waiver purposes necessarily depends on the statute being challenged.").[19]

But even if they were not, the State acknowledges that Harris County also sued the Office of the Attorney General and Office of the Secretary of State, State's Br. 35, who the State conceded below were proper UDJA defendants, CR142, 164 ("Harris County should have sued the Office of the Attorney General and Office of the Secretary of State . . . ."). If this Court concludes that the trial court wrongly enjoined the officers rather than their offices, it should simply reform the injunction to run against the offices.[20]

B. Harris County's injuries are traceable to the Attorney General and Secretary of State.

The State asserts that to satisfy the traceability prong of standing, Harris County was required to prove that a defendant "*will*" take enforcement action against Harris County if it violates S.B. 1750. State's Br. 40. The State misstates the legal standard. Harris County must show

[19] To be sure, in some cases there may be meaningful differences, for UDJA purposes, between an agency (e.g., the Health and Human Services Commission) and the officials who govern the agency (e.g., the Executive Commissioner). But those differences are inapplicable here.

[20] Even if the injunction could not be affirmed as modified, Harris County's suit could continue against the proper defendants.

a "credible threat" of enforcement by one of the defendants. *Abbott v. Harris County*, 672 S.W.3d 1, 8 (Tex. 2023) ("A plaintiff seeking an injunction against a defendant's enforcement of a governmental enactment may establish injury-in-fact by demonstrating a 'credible threat of prosecution thereunder.'" (quoting *In re Abbott*, 601 S.W.3d 802, 812 (Tex. 2020))).

Harris County more than met its burden. It showed that the Secretary of State has a *mandatory legal duty* to enforce S.B. 1750. Additionally, there is a credible threat that both the Secretary and the Attorney General would use their discretionary enforcement powers against the County.

1. Harris County's injuries are traceable to the Secretary of State, who has a ministerial statutory duty to enforce S.B. 1750 against it.

The Elections Code requires the Secretary of State to work with counties' registrars and clerks. *See, e.g.*, Tex. Elec. Code §§ 15.083, 18.043, 20.065(c), 112.011(c), 141.068. Before S.B. 1750, the elections administrator legally performed these officers' functions, *id.* § 31.043, so the Secretary was statutorily required to work with Harris County's

elections administrator. The trial court's injunction required the Secretary to continue that coordination.

Under S.B. 1750, however—and absent injunctive relief—the Secretary would be statutorily *prohibited* from working with the elections administrator. Most fundamentally, the Elections Code governs the transmitting of votes from county election officers and their tabulation. *See* Tex. Elec. Code §§ 67.007, 68.034. Before S.B. 1750, the Secretary of State worked with the elections administrator on these issues, but—absent injunctive relief—the Secretary today must work only with the County Clerk. At the injunction hearing, the Secretary of State's elections director, Christina Adkins, thus testified that after S.B. 1750 took effect, the Secretary will "consider the Harris County Clerk the entity responsible for certain duties and functions under the Texas Election Code," including the obligation to "certify county election returns." RR2:148. More concerning, Ms. Adkins testified that after S.B. 1750 took effect, the elections administrator would "no longer be the legally-authorized person to submit election results" to the Secretary. RR2:184–85.

This is hardly the only example of the Secretary's *statutorily mandated* enforcement of S.B. 1750. For instance, the Secretary must pay Harris County for voters registered by its statutorily authorized registrar. Tex. Elec. Code § 19.002. Before S.B. 1750, that was the elections administrator; now it is the tax assessor-collector. Thus, if Harris County continued to use its elections administrator to register voters, the Elections Code would *prohibit* the Secretary from paying Harris County for those registrations. Tex. Elec. Code § 16.039. The Secretary's elections director, Ms. Adkins, agreed at the injunction hearing with this reading of the Elections Code:

> Q: [After S.B. 1750 takes effect], who will the Secretary of State's Office consider the voter registrar of Harris County?
>
> A: By law, it would be the tax assessor-collector.

RR2:150.

The State entirely ignores the legal mandates at issue here. It relies instead Ms. Adkins's testimony questioning whether the Secretary would follow the law and enforce S.B. 1750. But Ms. Adkins testimony does nothing to undermine Harris County's standing. For instance, the State relies on a statement that the Secretary would accept Harris County's returns even if they were submitted by the elections administrator in

violation of the Code. State's Br. 40–41. But on cross, Ms. Adkins walked this statement back, stating that there were "a number of [unspecified] factors we're going to look at" when determining whether to accept Harris County's returns. RR2:187. Indeed, Ms. Adkins closed her testimony with an utterly equivocal statement on the subject:

> Q: Okay. So your binding testimony on the Secretary of State's office is that you will accept results in conflict with the Texas Election Code.
>
> A: *Possibly*, yes.

RR2:188 (emphasis added).

Ms. Adkins's testimony regarding the Secretary's obligation to make payments to Harris County for voter registrations was similar. For instance, the State quotes Ms. Adkins as saying that the Secretary was "not going to stop providing funds . . . because of a transition that's happening locally." State's Br. 41 (quoting RR2:152). But this, like much of Ms. Adkins testimony, seemed to presume Harris County's compliance with S.B. 1750. But the actual inquiry is whether the State would enforce S.B. 1750 if Harris County *does not* comply. And on that point, Ms. Adkins was clear: she "can't commit" to the Secretary of State "tak[ing]

no action if [the elections administrator] continues to run elections despite being a legally defunct office." RR2:185.

For several reasons, the State's reliance on Ms. Adkins's testimony fails. First, in determining whether Harris County proved a "credible threat" of harm—not the certainty of harm—the trial court would have acted appropriately by looking to the statutory scheme *requiring* the Secretary to enforce S.B. 1750, disregarding Ms. Adkins's evasive testimony. After all, courts must presume that the government will follow the law. *See Abbott v. Anti-Defamation League*, 610 S.W.3d 911, 923 (Tex. 2020).

Second, given the statutory scheme, Ms. Adkins's admissions concerning it, her wishy-washy answers regarding enforcement, the Secretary's prior efforts to shut down Harris County's elections administrator, and Ms. Adkins's refusal to testify that the Secretary would not enforce S.B. 1750 against the County, the trial court would properly have found her testimony regarding enforcement—testimony stating that the Secretary would refuse to enforce the Elections Code—not credible. *See City of Keller v. Wilson*, 168 S.W.3d 802, 819–20 (Tex. 2005).

And third, there are other mandatory enforcement duties imposed by the Election Code on the Secretary that neither Ms. Adkins nor the State addresses. *See* Harris County's Mot. 24–25. For instance, after S.B. 1750—and absent injunctive relief—the elections administrator would not be entitled to the Secretary's assistance in training of election judges and clerks. Tex. Elec. Code § 32.115. And the Secretary would be *required* to take enforcement actions against the county clerk if the elections administrator continued to perform registration functions. *Id.* § 18.065(b).

The purpose of Harris County's suit is to maintain its right to use an elections administrator. Harris County could only succeed by winning an injunction requiring the Secretary of State to treat the elections administrator as a valid elections officer, something the Elections Code presently prohibits. Accordingly, Harris County's injuries are directly traceable to the Secretary of State, against whom an injunction would redress the County's injuries.

2. There is a "credible threat" that the Secretary of State and/or Attorney General will use their discretionary powers to enforce S.B. 1750 against Harris County.

Harris County's creation of an elections administrator position had been the subject of years of tension between Harris County and the State. Shortly after Harris County created the position, the Secretary of State asserted that the creation was illegal based on a technicality (the County Clerk had unintentionally failed to forward the order establishing the position to the Secretary of State). RR2:95–96. The Attorney General concurred, asserting that the "purported creation of the Office of Election Administrator and subsequent appointment of Ms. Longoria to the position [were] *ultra vires* actions and [were] both unlawful and null and void." RR3:7; RR3:8 ("In short, the Harris County Office of Election Administrator does not exist."). The Attorney General threatened to "pursue appropriate legal remedies" if Harris County did not comply with his demands. RR3:7–8.

When this effort failed, Senator Bettencourt—who had joined in the Secretary of State's and Attorney General's efforts, RR3:10—filed S.B. 1750 to terminate the position by statute. *See* RR3:13. And *after* Harris County filed this suit, the Attorney General personally tweeted about the

importance of S.B. 1750 and how Harris County had supposedly committed "blatant Election Code violations" during the 2022 election. RR3:408. Harris County was audited by the Secretary of State for its compliance with the Election Code following both the 2020 and 2022 elections. RR2:94–95. And both the Secretary of State and Attorney General refused to rule out enforcement actions against Harris County if it did not comply with S.B. 1750. RR2:31, 185. And, of course, the Attorney General *voluntarily intervened* in this suit to defend and enforce S.B. 1750. CR775–76.

The trial court thus appropriately found a credible threat of enforcement by the Attorney General and Secretary of State. *See, e.g.*, *303 Creative LLC v. Elenis*, 600 U.S. 570, 582–83 (2023) (noting that no one disputed the existence of a credible threat sufficient to permit a pre-enforcement challenge where the state had pursued similar enforcement actions in the past and "declined to disavow future enforcement proceedings" against the plaintiff in the future (internal brackets and quotation marks omitted)).

The State concedes that this Court has found threats of enforcement by the Attorney General sufficient to create a credible threat

of future enforcement. *Harris County*, 672 S.W.3d at 8. The State tries to distinguish *Harris County* on the ground that, when he threatened to sue to abolish the Harris County elections administrator, the Attorney General was not basing that threat on S.B. 1750. State's Br. 37–38.

The State cites no authority supporting its proposed rule. Nothing prohibited the trial court from considering the historical context in which S.B. 1750 was enacted, especially considering the defendants' refusals to forswear enforcement and the Attorney General's tweet about S.B. 1750 and Harris County's purported voting problems.[21] What the trial court properly recognized was that even if these officials had not yet attempted to enforce S.B. 1750, they *have* attempted to use their statutory enforcement powers to accomplish S.B. 1750's purpose: prohibiting Harris County from using an elections administrator. When all the evidence was taken into account, the defendants' prior attempts create,

[21] The defendants' prior efforts to abolish Harris County's elections administrator position make this case readily distinguishable from *City of Austin v. Paxton*, 943 F.3d 993 (5th Cir. 2019), which the State bills as "precisely" on point. State's Br. 38. In fact, *City of Austin* faulted the plaintiff for relying on prior enforcement actions that lacked "any overlapping facts with this case or [were] even remotely related to the" ordinance being attacked. 943 F.3d at 1001. Here, by contrast, there are strong factual links between the Attorney General's and Secretary State's prior actions and the credible threat of future enforcement.

at minimum, a "credible threat" of future enforcement actions with the same goal.

More important, the Attorney General *has* used his authority "with respect to *this* Act." State's Br. 39. Specifically, the State intervened in Tatum's suit against Harris County in order to defend S.B. 1750 and ensure it took effect. Put differently, the Attorney General and the State *have already* taken legal action to force a Harris County official to enforce S.B. 1750. It was thus hardly speculative for the trial court to conclude that the Attorney General would take similar actions if Harris County went so far as to violate S.B. 1750.

III. The State's accusation that Harris County colluded with Tatum is baseless.

Harris County's suit will succeed or fail on its own merits. Nevertheless, Harris County comments briefly upon the State's repeated claim that Harris County colluded with Tatum. The State cites no evidence supporting its very serious accusations, which are particularly inappropriate given its cursory engagement with the precedent concerning collusive suits. Relevant here, for instance, a suit is not collusive merely because "the plaintiff's claim is uncontested or

incontestable." *Pope v. United States*, 323 U.S. 1, 11 (1944).[22] Thus, the single fact the State cites—that both Tatum and Harris County think S.B. 1750 is unconstitutional—is evidence of nothing.

There is a simple answer to the State's assertion that there is no adversity between Tatum and Harris County. After this Court refused to stay S.B. 1750's effect pending this appeal, Tatum suffered the precise harm his suit against Harris County was meant to avoid: termination of his employment by Harris County. *See* CR753: Tatum's Mot. to Dismiss 4, 7–8.

PRAYER

Harris County prays that this Court affirm the trial court's injunction against the Secretary of State and Attorney General.

[22] By contrast, the *single* collusion case the State cites involved "a proceeding in which the plaintiff has had no active participation, over which he has exercised no control, and the expense of which he has not borne," and in which the plaintiff was "only nominally represented by counsel who was selected by appellee's counsel and whom he has never seen." *United States v. Johnson*, 319 U.S. 302, 305 (1943). Nothing remotely like those facts exist here.

Respectfully submitted,

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