CAUSE NO. D-1-GN-23-003523

HARRIS COUNTY, TEXAS ***Plaintiff,*** **v.** **THE STATE OF TEXAS; OFFICE OF THE ATTORNEY GENERAL OF TEXAS; ANGELA COLMENERO, in her Official Capacity as Interim Attorney General of Texas; OFFICE OF THE TEXAS SECRETARY OF STATE; and JANE NELSON, in her Official Capacity as Texas Secretary of State,** ***Defendants.*** **CLIFFORD TATUM,** ***Intervenor,*** **THE ATTORNEY GENERAL OF TEXAS AND THE STATE OF TEXAS** ***Intervenors*.**	**§** **§** **§** **§** **§** **§** **§** **§** **§** **§** **§** **§**	**IN THE DISTRICT COURT OF** **TRAVIS COUNTY, TEXAS** **345TH JUDICIAL DISIRICT**

PLAINTIFF'S RESPONSE TO DEFENDANTS' PLEA TO THE JURISDICTION

Defendants fundamentally misstate the nature of Harris County's standing and the substance of its claims. Defendants' Plea to the Jurisdiction should be denied because Harris County has pled that it will be injured by Defendants' likely response if Harris County's elections administrator's office administers and conducts the November 2023 election after September 1, 2023. Harris County has shown both pecuniary and constitutional harm traceable to the likely actions of Defendants. Moreover, Harris County's harm will be redressed if the Court declares SB1750 unconstitutional because the County will not need to abolish its elections administrator's

office. This is bread and butter standing, and Harris County's claims against Defendants may proceed.

Defendants' arguments on immunity are likewise unavailing. As detailed in Harris County's Amended Brief in Support of Temporary Injunctive Relief, Defendants ignore decades of case law holding that closed population brackets cannot withstand constitutional scrutiny under Article III, Section 56.

For these reasons, Harris County respectfully requests that the Court deny Defendants' Plea to the Jurisdiction.

I. Harris County has standing.

A. SB 1750 will cause Harris County a cognizable legal injury.

To have standing, Harris County must have an injury that is "both concrete and particularized and actual or imminent, not conjectural or hypothetical." *Data Foundry, Inc. v. City of Austin*, 620 S.W.3d 692, (Tex. 2021). "An injury is 'particularized' for standing purposes if it 'affects the plaintiff in a personal and individual way.'" *Id.* (quoting *Spokeo, Inc. v. Robins,* 578 U.S. 330, 339 (2016)) (internal brackets omitted). An injury is "concrete" if it "actually exist[s]"—that is, if it is "'real,' and not 'abstract.'" *Spokeo,* 578 U.S. at 340.

Harris County's injuries easily meet this standard.

1. SB1750 directly injures Harris County in obvious and incontrovertible ways.

First, as Defendants admit (PTJ at 12), Harris County had claimed pecuniary harm from costs associated with compliance with SB1750. Defendants admit that this can constitute an injury in fact, but claim that because Harris County "does not intend to comply" with SB1750 it cannot actually be harmed. This of course misrepresents Harris County's statement. Harris County will not comply with this law *if it can get a temporary injunction preventing enforcement actions by*

Defendants. Moreover, even if Harris County did not comply with SB1750, it would still face pecuniary harm if its officers may be sued by the Attorney General's Office for civil penalties, among many other suits that may follow.

Second, Harris County has a statutory right to administer its elections using an election administrator. SB1750 would strip Harris County of that power. The loss of that authority is certainly particularized—by design, SB1750 affects Harris County alone. And the loss of power also "actually exists" and is not "abstract": Harris County will be stripped of a meaningful and specific right of local self-governance that it has today. Tellingly, the State makes no effort to dispute the existence of concreteness or particularization, and the Court's analysis should stop there.

Instead, the State makes a breathtaking argument: that a political subdivision like Harris County simply cannot sue the State for restricting its powers. PTJ at 11-12. The State can cite no authority for its rule, resorting instead to inapposite federal cases.[1]

This is because Texas Supreme Court precedent flatly rejects the State's rule. In *Neeley*, the Court explained that it had never "establish[ed] a broad rule that a governmental entity cannot sue to declare a statute unconstitutional." *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 772 (Tex. 2005). Instead, the Court held that political subdivisions may sue the State to declare a law unconstitutional when the subdivision "is charged with implementing a

[1] The State cites a decades-old federal decision for the proposition that "one governmental actor typically does not have a justiciable injury based on a *generalized* claim that another actor's exercise of its own authority on behalf of the same government altered the distribution of power." PTJ 11 (emphasis added). The case the State cites announces no such broad rule. Instead, it held that a congressman lacked standing because he asserted a generalized, not particularized, injury: an allegedly invalid executive order generally impinged upon congressional power, and thus upon the congressman's; the congressman did not allege the loss of any specific statutory or constitutional right or authority. *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1381-82 (D.C. Cir. 1984). Harris County's injury, by contrast, is particularized.

statute it believes violates the Texas Constitution." *Id.* (quoting *Nootsie, Ltd. v. Williamson Cnty. Appraisal Dist.*, 925 S.W.2d 659, 662 (Tex. 1996)).

Likewise, in *Nootsie*, the Court specifically rejected the idea that the political subdivision's standing depended on the challenged law "violat[ing] constitutional rights belonging to the [subdivision]." 925 S.W.2d at 662.[2] Instead, the harm suffered by the district in implementing an unconstitutional law *itself* "provide[d] the district with a sufficient stake in th[e] controversy to assure the presence of an actual controversy." *Id.*[3]

Harris County alleges an identical injury. SB1750 requires Harris County to implement SB1750 by terminating the EA's employment and shifting his duties, employees, and budget to the county clerk and tax assessor-collector. But Harris County believes that the law requiring it to perform these tasks is unconstitutional.

Under *Neeley* and *Nootsie*, that is a sufficient injury for standing purposes.

2. Harris County will also be injured by SB1750's enforcement by the State Officer Defendants.

In *Abbott v. Harris County*, the Supreme Court held that a "credible threat" that the Attorney General would "bring enforcement actions against the County" gave the County "standing to pursue its claims against the Attorney General." No. 22-0124, 2023 WL 4278763, at *6 (Tex. Jun. 30, 2023). Here, there is a similarly credible threat: the Attorney General has previously threatened enforcement actions aimed at abolishing the Harris County EA position. The

[2] *Nootsie* thus rejects the State's contention—again based upon a decades-old federal case—that a political subdivision may sue the government of which it is a part only if the larger government "'totally deprives the complainant of a right' granted by the Constitution." PTJ 11 (quoting *Chiles v. Thornburgh*, 865 F.2d 1197, 1206 (11th Cir. 1989)) (brackets omitted).

[3] The State asserts that because counties sometimes act as the State's agents, "it makes little sense to allow [a] county to sue the State because it disagrees with the choices the State makes about what powers the County may or may not exercise." PTJ 12. But in *Neeley*, the State's use of the school districts as its agents was part of why the districts *had standing* to sue the State.

State's coy demurrals do not diminish the likelihood that, if Harris County violated SB1750, the Attorney General would pursue similar actions with even greater vigor; tellingly, the State does not come close to denying this obvious reality, and the Court will consider evidence showing as much. As in *Abbott*, the Attorney General's enforcement threats give Harris County standing.

The Election Code also requires the Secretary of State to enforce SB1750 against Harris County in a variety of ways that will cause it harm. This is because numerous provisions of the Elections Code require the Secretary of State to interact with the proper county officials—which, after SB1750, the Harris County EA would not be. *See* Plaintiff's Br. in Support of Temporary Injunction at 27-29.

This argument also shows the fallacy in the State's assertion that Harris County's injury allegations "assume[] an enforcement action." PTJ 13. Because the duties the Elections Code imposes on the Secretary of State speak in terms of county elections officers, she will enforce SB1750 simply by performing her normal statutory duties after SB1750 takes effect.

3. Harris County would also be injured by complying with SB1750.

As the State concedes, Harris County alleges that SB1750 will harm its ability to effectively administer the November 2023 election, because the officers the law requires to run that imminent election have had no involvement in preparations. The State again does not dispute that this is a cognizable harm under *Neeley*, 176 S.W.3d 746, 772 (Tex. 2005)

The State instead asks this Court to ignore these allegations because "Harris County advertises that it 'does not intend to comply' with the statute," making "any alleged injury from complying with SB1750 . . . wholly irrelevant." PTJ 12. The State makes far too much of Harris County's statement. Harris County is not intending to ignore the law—that is why it filed this suit seeking a declaration that SB1750 was unconstitutional. And Harris County sought its injunction

because both compliance and noncompliance carry unacceptable risks in the absence of relief from this Court. The State can cite no precedent permitting this Court to ignore Harris County's injuries simply because Harris County forthrightly stated that it filed this lawsuit in an attempt to avoid compliance with an unconstitutional law.

B. Harris County's injuries are traceable to Defendants.

Traceability exists where a "plaintiff's alleged injury … fairly can be traced to the challenged action of the defendant." *Heckman v. Williamson County*, 369 S.W.3d 137, 155 (Tex. 2012). Here, because the Attorney General and Secretary of State are authorized to enforce SB1750 and have accused the County of violating state law by creating the EA position, and because the Attorney General has threatened enforcement action, the County's injury is traceable to both Defendants.

1. Harris County may sue the Attorney General and Secretary of State under the UDJA.[4]

The State erroneously contends that the Attorney General and Secretary of State "are the wrong defendants" and that the County should instead have sued "the Office of the Attorney General" and "the Office of the Secretary of State." PTJ at 14. To dispel any argument on this issue, the County has amended its petition to assert claims against the "Office of" the Attorney General and the "Office of" the Secretary of State. However, the State's argument is incorrect and the Attorney General and Secretary of State are proper defendants in a UDJA suit challenging a statute's constitutionality.

[4] The State raises this argument in the course of its standing argument, PTJ 14, but the jurisdictional defect it asserts is actually one of immunity, not standing.

The State says that Harris County "confused *ultra vires* suits with declaratory judgment actions." PTJ 14. The State's apparent contention is that an *ultra vires* claim is the sole means of waiving a state official's sovereign immunity, while the UDJA does not. The State's position derives from a passage in *City of El Paso v. Heinrich* explaining that the UDJA's immunity waiver "requires that the relevant governmental entities be made parties." 284 S.W.3d 366, 373 (Tex. 2009).

Implicit in the State's argument is that a constitutional officer like the Attorney General or Secretary of State cannot be the "relevant governmental entit[y]." But the State cannot cite a single case adopting this nonsensical rule. Worse for the State, the Supreme Court recently suggested that the State's rule is wrong. Immediately after noting that UDJA claims "challenging the validity of a statute may be brought against the relevant governmental entity," the Supreme Court noted that its "case law is replete" with constitutional challenges to statutes "brought against proper defendants *like the Governor and the Secretary of State*." *Abbott v. Mexican Am. Legislative Caucus, Texas House of Representatives*, 647 S.W.3d 681, 698 (Tex. 2022) (emphasis added).

Here, the relevant statutory provisions are enforced by the Attorney General and the Secretary State as officers, not by the "Offices of" those officers. In that circumstance, the officials themselves are the proper defendants for a UDJA claim.[5] *See 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."). And in any event, Defendants do not seriously claim that those offices would act contrary to the direction of their appointed or elected officers.

[5] To be sure, in some cases there may be a meaningful difference between an agency (e.g., the Health and Human Services Commission) and the officials who govern that agency (e.g., the Executive Commissioner). Those differences do not apply here.

2. The County's injury is fairly traceable to the Secretary of State.

If SB1750 is allowed to go into effect, the County will suffer injury fairly traceable to the Secretary of State. As Harris County explains above, a variety of statutes will require the Secretary of State to treat the Harris County EA as defunct and not a proper election officer for the County.

Unsurprisingly, the State does not address the many other provisions specifically charging the Secretary of State with electoral duties that currently involve the Harris County EA but, after SB1750, would exclude the Harris County EA. *See* Am. Pet. 15. The State's traceability arguments thus fail with respect to the Secretary of State.[6] Instead, it argues that the County's injuries are not traceable to other statutory provisions—the Secretary of State's general authority to maintain uniformity in the election laws, PTJ at 15, 17-18, or her specific authority to remove an elections administrator under certain conditions, *id*. at 16-17. The State also contends that, even if SB1750 were invalid, the law would not permit the Secretary of State to invalidate Harris County's election results. *Id*. at 18-19. None of the State's arguments pertain to other sections like Section 19.002, which could cost the County financial harm. That statute provides the "enforcement connection" required for traceability. *See MALC*, 647 S.W.3d at 698.

3. The County's injury is fairly traceable to the Attorney General.

The requisite "enforcement connection" is also present with respect to the Attorney General.

The State relies heavily on the fact that SB1750 does not explicitly authorize the Attorney General to enforce it. PTJ at 19. But such explicit language is not necessary. For instance, the Supreme Court recently held that Harris County had standing to sue the Attorney General

[6] Instead, the State argues at length that neither SB1933 nor the Secretary of State's general authority over elections establish traceability. PTJ 15-19. But Harris County's traceability arguments do not depend on these statutes.

regarding the Governor's executive order forbidding local governments from enacting mask mandates; it made no mention of whether the executive order at issue, or the statute authorizing the executive order, explicitly provided the Attorney General with enforcement authority. *Abbott v. Harris Cnty.*, No. 22-0124, 2023 WL 4278763, at *5 (Tex. June 30, 2023). Indeed, neither statute provides such explicit authority.[7]

In *Abbott v. Harris County*, standing was satisfied because the Attorney General had threatened enforcement action under his broader law-enforcement authority. *Id*. Similarly, here, the Attorney General already threatened to sue Harris County for creating the EA position, calling it "*ultra vires* actions" that were "both unlawful and null and void." Attorney General's Letter to Harris County Attorney Vince Ryan at 1 (Nov. 25, 2020).[8] After SB1750, the filing of an *ultra vires* suit to eliminate the Harris County EA has only grown more likely.

As for the State's contention that the Attorney General's threats can be ignored because they predate SB1750, PTJ 20, the State cites no authority requiring that enforcement threats be so specific. Harris County has alleged that SB1750 was a longstanding, politically motivated attack on the Harris County EA, in which the Attorney General participated. The Attorney General moreover threatened enforcement on the precise issue here—Harris County's ability to utilize an Elections Administrator.

Traceability is therefore satisfied as to the Attorney General.[9]

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[7] The State cites both *MALC* and the United States Supreme Court's decision in *Whole Woman's Health v. Jackson*. PTJ at 19. Both cases held that the requisite enforcement connection was absent, but neither case held that a statute must *explicitly* grant enforcement authority to establish traceability. *See MALC*, 647 S.W.3d at 698; *Whole Woman's Health*, 142 S. Ct 522, 534-35 (2021).

[8] https://s3.documentcloud.org/documents/20418715/states-letter-to-harris-county.pdf.

[9] Harris County acknowledges that, under *MALC*, its injuries are not traceable to the State itself. However, Harris County reserves the right to argue on appeal that *MALC* was wrongly decided insofar that it held that an injury directly

II. SB1750 is facially unconstitutional. Defendants therefore lack immunity from suit.

Harris County's brief in support of its application for a temporary injunction lays out in detail the reasons why SB1750 is unconstitutional. The most glaringly local of its provisions, Section 3, is a closed bracket forcing Harris County—and only ever Harris County—to abolish its elections administrator's office. Harris County refers the court to that brief, and will respond to some of the additional arguments raised by Defendants in their plea to the jurisdiction.

A. Harris County agrees that a reasonable basis test applies when analyzing laws that violate Article III, Section 56. But Defendants fundamentally misapply the reasonable basis test.

Harris County incorporates the arguments in its Amended Brief in Support of Temporary Injunctive Relief ("TI Brief"). As discussed in the TI Brief, pp. 15-26, Section 3 of SB1750 is a closed population bracket, and therefore fails the reasonable basis test applied by Texas courts for over a century. It bears repeating that counsel for Harris County has yet to find one case upholding a closed population bracket. Not surprisingly, counsel for Defendants appear to have also failed in this endeavor.

Defendants spend the bulk of their Plea to the Jurisdiction citing cases involving open population brackets, and making general allusions to their claimed reasonable basis for SB1750 as a whole. While Harris County acknowledges that case law applying Article III, Section 56 to open population brackets are more favorable to Defendants, Harris County reserves its right to challenge the basis for Section 2 because there is simply no reason why an elections administrator cannot run elections in a county above 3.5 million. In fact, SB1750 preserves the right of counties with

caused by a statute is not traceable to the State itself "in the absence of an 'enforcement connection' between the challenged provisions and the State itself." *MALC*, 647 S.W.3d at 696-97. Harris County does not seek an injunction against the State itself, and the State's dismissal would therefore have no effect on Harris County's injunction claims.

existing elections administrators to continue using that structure once they reach 3.5 million (except for Harris County, of course).

Given the early stage in the proceedings, and the lack of factual record to support Defendants' plea as regards Section 2 of SB1750, Harris County respectfully requests that the Court refrain from ruling on Defendants' plea as regards Section 2. Waiting to rule on Defendants' arguments as to Section 2 will not subject Defendants to any litigation it would not otherwise have faced. Plaintiffs do not seek temporary relief or discovery related to Section 2 specifically. Defendants' plea must fail as regards Section 3 (and Section 4, which only applies if Section 3 applies), and Section 3 forms the basis of Plaintiff's pending temporary injunction application.

B. Statewide interest

Defendants misstate the law when they claim that "a larger statewide interest is a sufficient, but not necessary, condition of constitutionality." Defs.' PTJ at 27. As the Texas Supreme Court made clear in *Maple Run Utility District*, "our later cases have clarified that the ultimate question under Article III, Section 56 is whether there is a reasonable basis for the Legislature's classification. ***The significance of the subject matter and the number of persons affected by the legislation are merely factors***, albeit important ones, in determining reasonableness." *Maple Run at Austin Mun. Util. Dist. v. Monaghan*, 931 S.W.2d 941, 945 (Tex. 1996) (emphasis added)(internal citations omitted).

And in any event, SB 1750's closed bracket shows precisely why Defendants' reliance on a purported statewide interest falls flat. Far from supporting Defendants' claim of immunity, Defendants' argument that Harris County's "outsized impact on statewide elections" due to its current population gives the legislature a "reasonable basis [to treat] Harris County differently in the State" in fact shows precisely why SB1750 violates Article III, Section 56. After all, if any

county that grows above 3.5 million has an outsized impact on statewide elections, it should also become part of the class of counties that must abolish their elections administrators. Tellingly, Defendants identify no case where a court upheld a closed population bracket—let alone one where the court upheld a closed population bracket because that classification furthered a larger statewide interest. That makes sense, because any classification furthering a larger statewide interest would be wholly irrational if it did not allow other entrants into the class.

C. Legislative History

Defendants argue that legislative history is irrelevant and that this court should ignore statements made by SB1750's Senate and House sponsors proudly proclaiming that the law targets Harris County's elections administrator. Defs.' PTJ at 32-34. While Harris County agrees that legislative history generally does not trump the plain text of a statute and other canons of statutory construction, legislative history can be particularly instructive in cases involving Article III, Section 56. That is because the purpose of Article III, Section 56 is precisely to avoid a single legislator using the legislative process to "engag[e] in the reprehensible practice of trading votes for the advancement of personal rather than public interests." *Id*. (internal citations omitted); *see also Kelly v. State,* 724 S.W.2d 42, 47 (Tex. Crim. App. 1987) ("The intent of Art. III, Section 56, of the Constitution … was 'to combat corruption, personal privileges, and meddling in local affairs—or, conversely, to prevent a group from dashing to the Capitol to get something their local government would not give them.'") (quoting George D. Braden, *The Constitution of the State of Texas: An Annotated and Comparative Analysis* 273 (1977)).

In fact, the case Defendants claim rejected an "identical argument to the one Harris County puts forth here" explicitly states that courts can consider legislative history in these types of cases. Defs.' PTJ at 33 (citing *Juliff Gardens, L.L.C. v. Tex. Comm. on Env. Quality*, 131 S.W.3d 271,

284-85 (Tex.App.—Austin 2004, no writ). In *Juliff*, the court started its analysis by noting that "[i]n determining whether a statute is a local or special law, it is appropriate to examine the statute's legislative history." *Juliff Gardens*, 131 S.W.3d at 282 n.7. The court went on to reject the consideration of a colloquy between two Senators discussing the bill, noting that "[s]pecific events have led to numerous statutes that were enacted as laws of general applicability." *Id.* at 283.

But *Juliff* did not deal with a closed population bracket, and could therefore find that there was a reasonable basis for a law of general applicability that applied to an open bracket. As the court went on to note, "[t]he mere fact that Juliff's proposed landfill, and the subsequent community opposition to the landfill, may have spurred Senator Brown to sponsor the amendment that became section 361.122 does not render this section a prohibited local or special law." *Id.* However, *Juliff* said nothing about considering legislative history when evaluating a closed population, and reaffirmed that legislative history may be considered in analyzing Article III, Section 56 claims. *See also Bexar Metro. Water Dist. v. City of San Antonio*, 228 S.W.3d 887, 895 (Tex. App.—Austin 2007, no pet.) (considering legislative testimony in a challenge to a law under a different section of the Texas Constitution); *FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000) (noting that courts may consider legislative history in a facial challenge to a statute's constitutionality).

In any event, because Section 3 of SB1750 is constitutionally invalid on its face as a closed population bracket, the legislative history is simply further evidence of that law's intent.

D. Repeal

Finally, Defendants argue that SB1750 "repeals" a previous law and is therefore a permissible local law. However, this rule only applies if a "complete repeal of a statute, unlike this case's purported partial repeal of an otherwise generally applicable statute, to remove its

application as to only one municipality." *City of Tyler v. Liberty Utilities (Tall Timbers Sewer) Corp.*, 571 S.W.3d 336, 345 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (citing *Central Wharf & Warehouse Co. v. City of Corpus Christi*, 57 S.W. 892). Citing the same authority Defendants rely on, the court in *City of Tyler* noted that "[t]he affirmative legislative act of excepting one locality from the effect of a generally applicable law is precisely what the general prohibition against enacting local laws is designed to prevent, and characterizing the statute as a partial repeal does not change its fundamental character as a prohibited local law." *Id.*

Courts have frequently invalidated laws that purport to exempt one locality from a prior statutory authorization, like SB1750 does. *See Anderson v. Wood*, 152 S.W.2d 1084, 1087 (Tex. 1941) (holding unconstitutional a law that exempted Tarrant County, through a population bracket, from a general law setting a cap on the number of traffic officers a county could hire); *Bexar County v. Tynan*, 128 Tex. 223, 228 (Comm'n App. 1936) (holding unconstitutional a law that, through a population bracket, reduced compensation for county officers in only Bexar County, despite a law that set a compensation schedule for counties throughout the state based on population); *Hall v. Bell Cnty.*, 138 S.W. 178, 183 (Tex. App.—Austin 1911), aff'd, 105 Tex. 558 (1913) (holding unconstitutional a law that exempted only Bell County from an existing law that created the office of county auditor). Accordingly, the Court should ignore Defendants' argument.

III. Conclusion

For the foregoing reasons, Defendants' plea to the jurisdiction should be denied.

August 7, 2023

Respectfully submitted,

/s/ Jonathan Fombonne

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2023, a true and correct copy of the foregoing document was served via the Court's electronic filing system to all counsel of record.

*/s/Neal A. Sarkar*_____
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