12/13/2021 7:04 PM
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Filed: 12/13/2021 7:04 PM

Cause No. 2021-75043

Ranya Khanoyan, Alan Vera, David Lugo, Tom S. Ramsey and R. Jack Cagle,	§	In the District Courts of
Plaintiffs,	§	
vs.	§	Harris County, Texas
Lina Hidalgo, in her official capacity as County Judge if Harris County, and Harris County, Texas,	§	
Defendants.	§	270th Judicial District

Plea to the Jurisdiction

To the Honorable Judge of Said Court:

Comes now Lina Hidalgo, in her official capacity as County Judge of Harris County, and Harris County, Texas, Defendants herein, who make and file this, their Plea to the Jurisdiction, and in support thereof would respectfully show unto the Honorable Court as follows:

I.
BACKGROUND

The Plaintiffs have sued, claiming the 2021 redistricting plan adopted by the Commissioners' Court violates their nonexistent right to remain in a precinct that votes in 2022, rather than be moved to a precinct that votes in 2024. To remedy this supposed violation, the Plaintiffs ask the Court to grant an injunction, and return to the prior plan, which they admit is unconstitutional, or alternatively impose a map drawn by Plaintiffs or the Court for the 2022 elections.

Plaintiffs' claims are meritless, and they are not entitled to the relief they seek. Regardless of the merits, however, the Court should dismiss this suit for want of jurisdiction. First, Plaintiffs lack standing to bring their claim. Four of the five plaintiffs have failed to allege any injury at all. The injury alleged by the remaining Plaintiff is not fairly traceable to Defendants and cannot possibly be remedied by the relief Plaintiffs request. Second, Plaintiffs' claim is moot because they waited too long to bring this action and there is no way for this Court, much less any appellate court, to order relief before the candidate filing period ends on December 13, 2021. Finally, Defendants are entitled to governmental immunity, and no exception applies that would allow this suit. For these reasons, Plaintiffs' claims should be dismissed for want of jurisdiction.

II.
STANDARD OF REVIEW

A. Pleas to the Jurisdiction Generally

A plea to the jurisdiction contests a trial court's subject matter jurisdiction. *Texas Dep't of Transp. v. Jones,* 8 S.W.3d 636, 638 (Tex. 1999); *Benefit Realty Corp. v. City of Carrollton,* 141 S.W.3d 346, 348 (Tex. App. — Dallas 2004, pet. denied). Subject matter jurisdiction refers to the kind of controversies a court has authority to hear, authority conferred by constitution, statutes, and the pleadings. *CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996) (orig. proceeding). Subject matter jurisdiction is essential to a court's ability to decide a case, it may never be presumed, and it is never waived. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993); *Berry v. Texas*

Democratic Party, 449 S.W.3d 633, 639 (Tex. App. — Austin 2014, no pet.). In filing a plea to the jurisdiction, a party contests the trial court's authority over the subject matter of the dispute, without regard to whether the claims asserted have merit. *Bland Indep. Sch. Dist. v. Blue,* 34 S.W.3d 547, 554 (Tex. 2000).

Whether a court has subject matter jurisdiction is a question of law. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *Texas Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002). Without subject matter jurisdiction, a court cannot render a valid judgment, *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 74-75 (Tex. 2000), and must dismiss the suit, *Buzbee v. Clear Channel Outdoor, LLC*, 616 S.W.3d 14, 21 (Tex. App. — Houston [14th Dist.] Nov. 17, 2020, no pet.); *Wije v. Burns*, 01-19-00024-CV, 2020 WL 5269414 at * 3 (Tex. App. — Houston [1st Dist.] Sept. 3, 2020, no pet.) (mem. op.).

B. Plea to the Jurisdiction for Want of Standing

Standing is a component of subject matter jurisdiction: for the Court to have subject matter jurisdiction, the Plaintiffs must prove they have standing. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 865 (Tex. 2010); *State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994). The claim that the Plaintiffs lack standing may properly be raised by means of a plea to the jurisdiction. *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 850 (Tex. 2000); *Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993).

Proof of standing requires that there be a real controversy between the parties. *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 849 (Tex. 2005). A real controversy exists when a litigant is "personally aggrieved" by something his opponent did or did not do, *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008); *Nootsie, Ltd. v. Williamson County Appraisal Bd.*, 925 S.W.2d 659, 661 (Tex. 1996), and therefore has a "personal stake" in the outcome of the dispute, *Inman*, 252 S.W.3d at 304 n. 20; *Elizondo v. Texas Nat. Res. Conservation Comm'n*, 974 S.W.2d 928, 932 (Tex. App. — Austin 1998, no pet.). Put another way, proof of standing requires a litigant to prove that he has some "justiciable interest" in the outcome of a lawsuit, *In re H.S.*, 550 S.W.3d 151, 155 (Tex. 2018); *Austin Nursing Ctr.*, 171 S.W.3d at 849; *Salazar v. HPA Tex. Sub 2016-1 LLC*, 01-19-00330-CV, 2019 WL 7702176 at * 4 (Tex. App. — Houston [1st Dist.] Dec. 29, 2020, no pet.) (mem. op.); *Hughs v. Dikeman*, 609 S.W.3d 602, 611 (Tex. App. — Houston [14th Dist.] 2020, no pet.), which can only occur when he has been personally injured by something his opponent did or did not do, *Heckman v. Williamson County*, 369 S.W. 3d 137, 154 (Tex. 2012); *Salazar* at * 4. Plainly, standing requires each of the Plaintiffs to have a dog in the fight.

III.
ARGUMENT

A. Plaintiffs Vera, Lugo, Ramsey, and Cagle Lack Standing

"Standing is specific to each individual plaintiff." *In re Greg Abbott*, No, 20-0291 at 5, (Tex. Apr. 23, 2020) (citing *Heckman v. Williamson County*, 369 S.W. 3d 137, 152

(Tex. 2012). As such, Courts "must analyze the standing of each individual plaintiff to bring each individual claim he or she alleges when that issue is before the court." *Heckman*, 369 S.W. 3d at 152 (Tex. 2012). "Thus, each party must establish that he has standing to bring each of the claims he himself alleges—meaning the court must assess standing plaintiff by plaintiff, claim by claim." *Id.* at 153. Courts "must dismiss a plaintiff who lacks standing." *Id.* This is particularly so in suits that implicate sovereign immunity. *City of Austin v. Utility Associates, Inc.*, 517 S.W. 3d 300, 316-17 (Tex. App. — Austin 2017, pet. denied) ("The contemporary concern of immunity doctrine, again, is ensuring judicial deference to legislative control over not only the judicial remedies that may be imposed against government, but also the extent to which government must incur costs of defending against the claims—costs that will tend to increase with the number of plaintiffs allowed in the fight,").

Here, only one of the Plaintiffs suffers from the harm alleged in the complaint. Plaintiffs complain that the 2021 Plan violates the right to vote of voters who are moved from a precinct that votes in 2022 to a precinct that votes in 2024. Only Plaintiff Khanoyan was moved from a precinct that votes in 2022 to a precinct that votes in 2024. Because the other four Plaintiffs have not alleged any injury whatsoever, they must be dismissed. *Heckman*, 369 S.W. 3d at 153.

B. Plaintiff Khanoyan Lacks Standing

To establish standing, Plaintiff Khanoyan must show that she has suffered a personal injury, which is "concrete and particularized, actual or imminent, not

hypothetical." *Heckman*, 369 S.W. 3d at 155. Further, she must show that her injury is "fairly traceable to the defendant[s'] conduct," and that the requested relief is "likely to redress the injury." *Id.* If a plaintiff sues for injunctive relief, but the injunction requested "could not possibly remedy his situation, [s]he lacks standing to bring that claim." *Id.*

Plaintiff Khanoyan lacks standing because her alleged injury is not fairly traceable to Defendants, and the injunctive relief she seeks cannot possibly remedy the alleged injury to her right to vote. First, Harris County (as opposed to Harris County Commissioners' Court) has no role in adopting or implementing the 2021 Plan. Second, although Defendant Hidalgo serves on the Commissioners Court, she had no independent power to adopt the 2021 Plan, nor does she have any independent power to adopt any remedial plan. As such, not only is Plaintiff Khanoyan's injury not traceable to the Defendants, injunctive relief against the Defendants cannot possibly redress her claim. Indeed, with the filing period now closed, Plaintiff offers no authority that the Defendants, or any other possible Defendant, could now adopt a different plan (or order elections for all four precincts) and implement the remedy for the 2022 elections.

Furthermore, even to the extent that an injunction could lie against Defendant Hidalgo in light of her authority to implement the 2021 Plan, enjoining implementation of the 2021 Plan will cause, rather than remedy, a constitutional violation. As Plaintiffs acknowledge, enjoining the 2021 Plan, without more, would re-instate the now unconstitutional Benchmark Plan. *See, e.g.*, Nov. 29 Hrg. Tr. 5:4-7 ("If you were to grant that relief, the effect of that would mean that the Benchmark Plan, the plan that was in

existence before the new plan was passed in late October, would become the current plan."); ."). But Plaintiff Khanoyan admits that the Benchmark Plan is unconstitutional under federal law. Original Pet. at 10. Thus, not only would the relief requested by Plaintiff Khanoyan violate her own rights, by keeping her in an overpopulated district in violation of the constitutional principle of one-person, one-vote, it also would violate the rights of millions of Harris County voters. *See id*. Because the relief requested by Plaintiff Khanoyan is itself unconstitutional, it cannot possibly remedy her injury.[1] As such, Plaintiff lacks standing to bring her claim.[2]

Finally, Plaintiff Khanoyan has not shown that her injury is actual or imminent. She alleges that the 2021 Plan denies her the right to remain in a precinct that votes for a commissioner in 2022. But, she has never voted before only recently becoming age eligible. She could not have an expectation to vote for certain election contests given this

[1] Furthermore, because she has not sued the appropriate party, Plaintiff Khanoyan is unable to ask the Court to order any relief that *might* remedy the alleged violation. For example, she does not ask the Court to order the Harris County Commissioners Court to adopt or implement a new plan, nor could she as the Commissioners Court is not a party to this suit. *See e.g.*, *id.* Nov. 29 Hrg. Tr. at 10:90-11 ("the Harris County Commissioner's Court, *if it so chose to do so*, could go back to the drawing board and could create a new plan if they -- *if they wanted to*.") (emphasis added).

[2] Plaintiffs' request that the Court impose a plan, utilizing Plaintiffs' proposal, or by crafting its own, is in direct contravention to the constitutional text, which delegates such power to the county commissioners court. Tex. Const. Art. 5, Sec. 18. *See also, Avery v. Midland County,* 406 S.W.2d 422, 429 (Tex. 1966) ("But neither this Court nor the district court has the power to redistrict [Harris] County into commissioners precincts. This is the responsibility of the commissioners court and is to be accomplished within the constitutional boundaries we have sought to delineate.") The other possible appropriate remedy to the alleged harm is to order all the commissioners up for election, but that remedy is knowingly disclaimed by the constitutional text. Plaintiffs cannot obtain relief

would be her first election. Also, it is unquestioned that the result Plaintiff complains of is the anticipated result of the interaction between the constitutional mandate to periodically redistrict to account for population changes and Texas's use of staggered terms. *See, e.g., Dollinger v. Jefferson County Commissioners Court*, 335 F. Supp. 340, 343-44 (E.D.Tex.1971) ("It is anticipated that from time to time realignment of commissioners precincts will become necessary as the county population shifts in order to comply with the one man, one vote rule . . . it does not follow as a matter of right that the voters transferred from one precinct to another precinct are entitled to vote at the next regular election unless they reside within the Commissioners' precincts in which such elections are being held."). Indeed, it is almost certainly true that some voters will change precincts, and thus electoral cycles, every time a unit of government with staggered terms is redistricted, and voters move from one district to another. As such, Plaintiffs do not allege, nor could they, that there is a per se bar on moving voters between precincts when the result is to change the schedule upon which the voter votes.

And, though Plaintiffs allege that it is possible to draw a map that balances population between the four districts without moving any voters to different election schedules,[3] nowhere in their complaint do they claim that it is *necessary* to do so.

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that complies with the state constitution, and therefore the court is without jurisdiction.

[3] Plaintiffs purport to have a demonstrative map that shows that population could be balanced between the four districts without moving any voters to different election schedules. Original Complaint at 20. They have not provided the map to Defendants or the Court, and have not pleaded that this map otherwise meets the lawful redistricting criteria set forth by the Harris County Commissioners Court. For example, Plaintiffs have

Plaintiffs also do not claim that there are no circumstances in which Harris County could draw a redistricting map that constitutionally moves Plaintiff Khanoyan from a precinct that votes in 2022 to one that votes in 2024. Put another way, Plaintiff Khanoyan has not pleaded or shown that should this case result in a new map that any new map would still have her in a precinct that is up for election in 2022. As such, the injury alleged by Plaintiff Khanoyan is entirely hypothetical.

C. Plaintiff Khanoyan's Claim is Moot

Finally, Plaintiff Khanoyan's claim is moot, and thus the Court lacks jurisdiction over this action. At issue is Plaintiff Khanoyan's purported right to vote in 2022. As such, Plaintiff Khanoyan's claim becomes moot once it is no longer possible for this Court to enter relief without "interfer[ing] with the orderly process of the election." *In re Jones, et al.*, 2018 WL 549531 at *3 (Tex. App.—Dallas Jan. 24, 2018); *see also id*. (finding with respect to election cases that "[o]nce the time to practically permit continuing judicial scrutiny (including any attendant appellate review) . . . has expired, the case has become moot.) Here, Plaintiffs' unexplained delay in filing suit has denied this Court and any appellate court "sufficient time to consider and decide the matter without interfering with

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not pleaded that their demonstrative map complies with the United States Constitution and the Voting Rights Act, or that, to the extent possible, the resulting precincts are comprised of whole voting tabulation districts and are geographically contiguous. *See id*. at 18-19. Nor do they plead it makes any effort to preserve or reunite communities of interest, other than the purported community of interest in voting in 2022. *Id.* Instead, Plaintiffs only assert that their demonstrative plan complies with the one-person, one-vote requirement, and does not move voters between precincts with different voting schedules. *Id.* at 19.

the election schedule." *Id.* at *4.

D. Defendants Are Immune From Suit

Sovereign immunity protects the government against lawsuits, unless sovereign immunity has been waived. *General Svcs. Comm'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 594 (Tex. 2001). Embedded in the concept of sovereign immunity are two distinct principles: (1) the government is sovereignly immune from suit; and (2) the government is sovereignly immune from liability for damages. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n. 3 (Tex. 2003); *Travis County v. Pelzel & Assoc*., 77 S.W.3d 246, 248 (Tex. 2002). Immunity from suit means just what it sounds like it means: a suit may not be brought against the state in the first instance. *Wichita Falls State Hosp*., 106 S.W.3d at 696; *Little Tex*, 39 S.W.3d at 594.

In order to bring a suit against the government, sovereign immunity must have been waived. Sovereign immunity may be waived either by statute (for example, the Texas Tort Claims Act) or by a grant of legislative permission to bring suit. *Wichita Falls State Hosp*., 106 S.W.3d at 694 n. 3; *Little Tex*, 39 S.W.3d at 594. In either case, the permission to sue the state must be clear and unequivocal; sovereign immunity may not be implicitly waived. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374-75 (Tex. 2006).

While sovereign immunity protects the State and its subsidiary units, governmental immunity protects other political subdivisions, including counties. *Travis*

Central Appraisal Dist. v. Norman, 342 S.W.3d 54, 57-58 (Tex. 2011); *Garcia v. Kubosh*, 377 S.W.3d 89, 95 (Tex. App. — Houston [1st Dist.] 2012, no pet.). This distinction is a technical one, and in practice is a distinction without a legal difference, so the Defendants will cite cases involving both sovereign and governmental immunity, without distinction.

Harris County is entitled to governmental immunity. *See id*. Similarly, because Plaintiffs have sued Defendant Hidalgo in her official capacity only, Defendant Hidalgo is entitled to the same immunity that would be enjoyed by the unit of government she serves: "[A]n employee sued in his official capacity has the same governmental immunity, derivatively, as his government employer." *Franka v. Velasquez*, 332 S.W.3d 367, 382-83 (Tex. 2011); *accord, Wije v. Burns*, 01-19-00024-CV, 2020 WL 5269414 at * 4 (Tex. App. — Houston [1st Dist.] Sept. 3, 2020, no pet.) (mem. op.); *Henry v. Sullivan*, 499 S.W.3d 545, 555 (Tex. App. — Houston [14th Dist.] 2017, no pet.).

1. Harris County Is Entitled to Governmental Immunity

Plaintiffs do not assert any claims against Harris County, but rather added Harris County to the suit only because it is a "necessary party," and therefore must be party to the suit if it is to be bound by the result. Original Petition, ¶ 5. This assertion is wrong for several reasons.

First, the issue is not whether Harris County is a "necessary party." Texas law, found in Rule of Civil Procedure 39, no longer speaks in terms of "necessary" or "indispensable" parties, and has not for decades. *Texas Oil & Gas Corp. v. Ostrom*, 638

S.W.2d 231, 233 (Tex. App. — Tyler 1982, writ ref'd n.r.e.). Instead, the focus is on whether (as a prudential matter) the court "ought" to proceed with the case with or without some party. *Griggs v. Latham*, 98 S.W.3d 382, 385 (Tex. App. — Corpus Christi 2003, pet. denied). Rule 39 is intended to bring all parties who are, as a practical if not as a legal matter, necessary to the case before the court, and to hear all their issues at the same time because the absence of the parties from the suit precludes their being bound by the result. *See, e.g., Commonwealth Mtg. Corp. v. Wadkins*, 709 S.W.2d 679, 680 (Tex. App. — Houston [14th Dist.] 1985, no writ) (interests of trustee could not be adjudicated in divorce where he was not a party to the proceeding); *Spruill v. Spruill*, 624 S.W.2d 964, 967 (Tex. App. — El Paso 1981, writ dis'd) (partner of husband and bank were not affected by judgment finding he had defrauded wife because they were not parties to the lawsuit); *see also Kodiak Resources, Inc. v. Smith*, 361 S.W.3d 246 (Tex. App. — Beaumont 2012, no pet.) (discussing history of Rule 39).

As the foregoing makes clear, this means the Plaintiffs must identify some basis for a waiver of the immunity Harris County enjoys from suit even if they claim not to be bringing a "direct" claim against the county. The problem that the Plaintiffs have is if they have any right to relief, that right lies against the entity that committed the act on which the lawsuit is based, the Harris County Commissioners Court. Indeed, Plaintiffs have not pleaded any facts showing that Harris County itself has any role in the actions they seek to enjoin—namely implementing the 2021 Plan—nor in crafting the relief they seek—the drawing and implementation of a new redistricting plan. Assuming that

immunity would be waived for the Plaintiff's suit under any theory, it is not waived as against Harris County, as distinct from the Commissions Court, which the Plaintiffs have not sued. *See, e.g., Luttrell v. El Paso County*, 555 S.W.3d 812, 833 (Tex. App. — El Paso 2018, no pet.) (appeal from jurisdictional dismissal affirmed in part because plaintiffs failed to name commissioners court in their lawsuit).

2. Plaintiffs Have Not Pleaded a Facially Valid Constitutional Claim

Nor would the suit seeking declaratory judgment be proper even if the Plaintiffs had sued the correct defendant. The Declaratory Judgment Act is not a "general waiver of sovereign immunity," *Texas Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 388 (Tex. 2011); *accord, Berry*, 449 S.W.3d at 643, and couching a suit in terms of declaratory relief does not allow the Court to grant that relief, if it could not have done so in the first instance, *Heinrich*, 284 S.W.3d at 371. To prove oneself entitled to seek a declaration that some act of the government violates the constitution, a plaintiff must plead facts showing a facially valid constitutional claim. *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 11 (Tex. 2011); *Garcia*, 377 S.W.3d at 96; *City of Houston v. Johnson*, 353 S.W.3d 499, 504 (Tex. App. — Houston [14th Dist.] 2011, no pet.). Doing this takes more than the mere allegation that one's constitutional rights have been invaded. *Director of Dep't of Agric. & Environment v. Printing Indus. Assoc. of Tex*., 600 S.W.2d 264, 265 (Tex. 1980) (rejecting lower court's conclusion that pleading was sufficient if it pleaded the existence of a claimed invasion of rights); *accord, Garcia*, 377 S.W.3d at 96. In the absence of such proof, the Court lacks jurisdiction, and the case should be dismissed.

Andrade, 345 S.W.3d at 11.

According to the Plaintiffs, the constitutional provision that has been violated in this case is Article 1, Section 3, which provides for "equal rights." They claim the Texas Supreme Court has held that this provision creates a state constitutional "right to vote." Original Petition, ¶ 22 (*citing State v. Hodges*, 92 S.W.3d 489 (Tex. 2002)). But Plaintiffs do not assert they have been denied the right to vote. Rather Plaintiffs assert they have been denied the right to remain within a precinct that votes on a particular schedule. And Plaintiffs do not—and cannot—identify any constitutional or statutory provision which grants them such a right.

Indeed, Plaintiffs concede, as they must, that in every redistricting decade, in order to balance the population in the districts for offices constitutionally scheduled for staggered elections, many citizens will vote in different elections cycles than they have in past decades. The constitutional drafters understood this circumstance and provided for immediate elections in such circumstances when they deemed it appropriate. For example, the 31 members of the Texas Senate all stand for election after redistricting. Tex. Const. Art. 3, Sec. 3 ("The Senators shall be chosen by the qualified voters for the term of four years; but a new Senate shall be chosen after every apportionment, and the Senators elected after each apportionment shall be divided by lot into two classes. The seats of the Senators of the first class shall be vacated at the expiration of the first two years, and those of the second class at the expiration of four years, so that one half of the Senators shall be chosen biennially thereafter.") The Framers could have included such a

provision applying to Commissioners Court and did not. The Court should not presume the Framers made a mistake especially given that they specifically provided for what should happen if an elected Commissioner was moved out of their district in a new redistricting plan. *See* Tex. Const. Art. 5, Sec. 18(d) ("When the boundaries of commissioners precincts are changed, each commissioner in office on the effective date of the change, or elected to a term of office beginning on or after the effective date of the change, shall serve in the precinct to which each was elected or appointed for the entire term to which each was elected or appointed, even though the change in boundaries places the person's residence outside the precinct for which he was elected or appointed.") Without constitutional text to support their claim, Plaintiffs request the judiciary provide the necessary constitutional amendment. The judiciary lacks such jurisdiction.

Even were there clear constitutional text creating the right Plaintiffs claim (indeed a plain textual reading disclaims it), the Court lacks jurisdiction over this suit. Texas does not have a statutory equivalent of 42 U.S.C. § 1983, giving the statutory right to sue for violations of the Texas constitution. Texas law is clear that such a suit may only be brought in cases where the constitutional right in question is "self-executing," sometimes referred to in older cases as "self-enacting." *Hendee v. Dewhurst*, 228 S.W.3d 354, 359 (Tex. App. — Austin 2007, pet. denied).

In addition to the requirement that the constitutional provision be self-executing, the right to bring a suit for the violation of a self-executing provision is limited to the

right to seek an injunction to prevent the self-executing provision from being violated. *De Leon v. City of El Paso*, 353 S.W.2d 285, 290-91 (Tex. App. — El Paso 2011, no pet.); *Ho v. University of Tex. at Arlington*, 984 S.W.2d 672, 683 (Tex. App. — Amarillo 1998, pet. denied) (*both citing City of Beaumont v. Bouillion*, 896 S.W.2d 143 (Tex. 1995)); *see also City of Elsa v. M.A.L.*, 226 S.W.3d 390, 392 (Tex. 2007) (recognizing rule).

The Plaintiffs pleading runs afoul of all aspects of these rules. First, declaratory relief is available only when a party challenges the validity of some statute or constitutional provision, not when it challenges the actions taken under the authority of said statute or provision, *Texas Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 622 (Tex. 2011); *El Paso Cnty. v. El Paso Cnty. Emergency Svcs. Dist. No. 1*, 622 S.W.3d 25, 39 (Tex. App. — El Paso 2020, no pet.), which is what the Plaintiffs do in this case. Put another way, the Plaintiffs do not challenge that redistricting is allowed, or even required, or that it cannot be done in a way that is constitutional. Rather, Plaintiffs only challenge the way it was done under the facts, a claim for which immunity has not been waived.

Alternatively, even if this were not the case, the claim is purportedly based on a provision of the Texas Constitution, which only allows Plaintiffs to state a viable constitutional claim (a necessary jurisdictional prerequisite to their suit) if the provision of the constitution they claim is self-executing. Plaintiffs have not pleaded that the right to remain in a precinct that votes on a particular schedule is self-executing, and thus have not pleaded facts showing a facially valid constitutional claim. Indeed, Plaintiffs could not have pleaded as such since there is no constitutional text creating the right they seek

to impose.

Finally, even if none of this were true, the Plaintiffs seek the wrong relief. While the authorities set forth above show a party who can prove a self-executing constitutional provision has been violated is entitled to injunctive relief to prevent its continued violation, the Plaintiffs have both abjured this remedy against Harris County (against which they "assert no direct claims," Original Petition, ¶ 5) and failed to seek injunctive relief against the correct entity. With respect to Defendant Hidalgo, the Plaintiffs seek an injunction, yet fail to explain why the constitutional provision on which they rely can be enforced against a single member of a commissioners court in a way that would even arguably entitle them to such relief. The way to avoid this obviously incorrect result is to find the Plaintiffs' claims have not been brought in a way that waives the immunity the Defendants enjoy, and should be dismissed.

3. *Ultra Vires* Exception to Governmental Immunity Does Not Apply to Plaintiffs' Claims.

In their pleading, the Plaintiffs specifically assert that the governmental immunity that would otherwise absolutely preclude this suit against the Defendants has been waived "under the 'ultra vires' exception ...," Original Petition, ¶ 8, and that their claims against Defendant Hidalgo are based on her alleged "ultra vires acts." Id., ¶ 4.

An *ultra vires* claim is one asserting that a government official either failed to perform a ministerial act or acted without legal authority. *Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 161 (Tex. 2016); *Southwestern Bell Tel., L.P. v.*

Emmett, 459 S.W.3d 578, 587 (Tex. 2015); *Hughs v. Dikeman*, 631 S.W.3d 362, 380 (Tex. App. — Houston [14th Dist.] 22020, no pet.). The relief sought in the *ultra vires* suit is to force the state official to comply with a statutory or constitutional provision. *Texas Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 633 (Tex. 2010). As such, the suit alleges that an officer of the government acted without legal authority, or failed to perform an act he was required to perform, and so it is not barred by sovereign immunity, because *ultra vires* suits "do not attempt to exert control over the state — they attempt to reassert the control of the state" by enforcing existing law. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009).

Plaintiffs' claim that Defendant Hidalgo committed an *ultra vires* act fails. Because the purpose of an *ultra vires* suit is to reestablish control over government actors who are not obeying the law, they must be brought against the actor in his official capacity. *Heinrich*, 284 S.W.3d at 372. However, this does not mean the suit may be brought against just anyone: it must be brought against the actual government official responsible for the allegedly *ultra vires* act, not against "a nominal, apex representative who has nothing to do with the allegedly ultra vires actions." *Hall v. McRaven*, 508 S.W.3d 232, 240 (Tex. 2017); *accord, Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 76 (Tex. 2015). Yet, that is just what the Plaintiffs have done here. Defendant Hidalgo has been sued, apparently because she is the County Judge of Harris County, and therefore the presiding officer of the county's commissioners court.

Here, the act complained of by the Plaintiffs is the adoption of a new redistricting

map by the Harris County Commissioners Court, and the ultimate relief they seek is the adoption of a new redistricting plan. While Defendant Hidalgo sits on the Commissioners Court, she is not the court herself. At most, she is one vote (out of the three needed) to pass a map, and she cannot adopt a new redistricting plan by herself. Nothing in the Plaintiffs' pleading explains why Defendant Hidalgo herself has done something that is allegedly *ultra vires*, or how their suit seeks to remedy some *ultra vires* act she allegedly committed. The Plaintiffs must do more than sue the person at the apex of the organizational chart, and assert that it may do so because someone else, individually or in tandem with others, acted in an allegedly *ultra vires* manner. Because it is the Plaintiffs' burden to prove this suit is not barred by immunity, and because they have failed to do so, the Court should dismiss the suit against Defendant Hidalgo

Finally, Defendant Hidalgo's implementation of the 2021 Plan is not *ultra vires*. Courts have repeatedly held that implementation of redistricting plans adopted to correct population imbalances, as was done here, is lawful, even when they result in delaying exercise of the franchise for some voters. *See, e.g.*, *Scott v. Lack*, 332 F. Supp. 220, 222 (1971) ("The order of the Commissioners' Court of Hardin County, Texas, dated August 24, 1970, realigning boundaries of Road Commissioners' Precincts is a lawful exercise of a governmental function, and is a reasonable and rational division of the County."); *Pate*, 337 F.Supp. at 96 (approving remedial plan submitted by Commissioners notwithstanding the fact that staggered terms gave rise to a delay in exercising the franchise for certain voters).

IV.
PRAYER FOR RELIEF

Wherefore, premises considered, the Defendants pray that their Plea to the Jurisdiction be GRANTED, and the claims brought against them be dismissed, for the reasons set forth herein.

In the alternative, the Defendants pray that, to the extent the Court does not grant their Plea to the Jurisdiction in whole, that it be GRANTED with respect to those Plaintiffs and claims for which the Court finds it lacks jurisdiction.

The Defendants pray for such other and further relief, general or special, in law or in equity, to which they may show themselves to be justly entitled.

Respectfully submitted,

/s/ Chad W. Dunn

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CERTIFICATE OF SERVICE

This is to certify that on this the 13th day of December, 2021, a true and correct copy of the above and foregoing instrument was forwarded to the following counsel of record in accordance with Rule 21 of the Texas Rules of Civil Procedure as indicated below:

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