NO. 13-22-00358-CV
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NO. 13-22-00360-CV

IN THE COURT OF APPEALS
FOR THE THIRTEENTH JUDICIAL DISTRICT
CORPUS CHRISTI & EDINBURG, TEXAS

NO. 13-22-00358-CV

SAVERGV, SIERRA CLUB, and
CARRIZO/COMECRUDO NATION OF TEXAS, INC.,
Appellants

v.

TEXAS GENERAL LAND OFFICE & DAWN BUCKINGHAM, IN HER OFFICIAL CAPACITY AS THE TEXAS LAND COMMISSIONER,
Appellees.

NO. 13-22-00359-CV

SAVERGV, SIERRA CLUB, and
CARRIZO/COMECRUDO NATION OF TEXAS, INC.,
Appellants

v.

CAMERON COUNTY,
Appellee.

NO. 13-22-00360-CV

SAVERGV, SIERRA CLUB, and
CARRIZO/COMECRUDO NATION OF TEXAS, INC.,
Appellants

v.

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS
ATTORNEY GENERAL OF TEXAS,
Appellee.

On Appeal from the 445th Judicial District Court
Cameron County, Texas
Cause No. 2021-DCL-05887

APPELLANTS' AMENDED REPLY BRIEF

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ORAL ARGUMENT REQUESTED

Table of Contents

Index of Authorities

Cases

Statutes & Constitution

Argument

I. Statutes that contravene the Bill of Rights are void, and the Court has jurisdiction to determine this.

Appellees' briefs all argue that the district court correctly granted the pleas to the jurisdiction because the court had no jurisdiction to determine the constitutionality of the amendments to the Open Beaches Act ("OBA") challenged by the Appellants. They maintain that Appellants' claims seek to *enforce* Section 33 of the Bill of Rights, and because the constitutional provision plainly states that it does not create a private right of enforcement, Appellants failed to invoke the district court's jurisdiction.

But in making this argument, Appellees have mischaracterized Appellants' claims. Appellants seek to challenge as unconstitutional certain amendments to the OBA. Courts possess the authority to redress this issue. *Hendee v. Dewhurst*, 228 S.W.3d 354, 373 (Tex. App.—Austin 2007, pet. denied) (citing *Morton v. Gordon, Dallam*, 396, 397–398 (Tex. 1841)).

When the government's actions run afoul of the Texas Constitution, it is the responsibility of the courts to say so. Indeed, it is *exclusively* the function of the judiciary to determine whether acts of other governmental departments are constitutional. *Terrell v. Middleton*, 187 S.W. 367, 70 (Tex. Civ. App.—San Antonio 1916), *writ ref'd*, 191 S.W. 1138 (Tex.1917); *Denison v. State*, 61 S.W.2d 1017, 1019 (Tex. Civ. App.—Austin), *writ ref'd*, 61 S.W.2d 1022 (1933).

A. Appellants need not demonstrate a private right of enforcement to challenge a statute as unconstitutional.

Appellees argue that the district court properly granted their pleas to the jurisdiction because Section 33 prohibits or bars private enforcement of the OBA.[1] But all three Appellees miss the mark with this argument.

Appellants did not present to the district court a suit for damages or a cause of action seeking to enforce the OBA or Section 33 of the Bill of Rights. Instead, Appellants presented the district court with an issue that courts are uniquely situated to address: whether the legislature's enactment of House Bill 2623 ("HB2623") exceeded its constitutional authority. Stated another way, Appellants' lawsuit questioned whether the statutory amendments to the OBA—*e.g.,* Section 61.132, "Closing of Beaches for Space Flight Activities"—contravene Section 33 of the Bill of Rights. The judiciary possesses the authority to consider the constitutionality of

[1] Each of the Appellees phrases their argument slightly differently and includes the argument under different subheadings of their briefs. The AG, for instance, maintains that Appellants lack standing because "[t]he plain language of Section 33 *bars* any private right of enforcement." *AG's Brief,* p.13 (emphasis added). The County argues that Appellants cannot demonstrate standing or a waiver of sovereign immunity because Section 33 "states that no private cause of action is created," and "[o]nly constitutional provisions that provide for a cause of action can be . . . susceptible to a waiver of immunity." *County's Brief,* pp. 19-20. The County, like the AG, also argues that "Section 33 prohibits private enforcement of the Open Beaches Act." *Id.* p.23. And the GLO argues that Appellants lack standing because there is no private right of enforcement under Section 33 to enforce access to beaches. *GLO's Brief*, pp.16-17. For clarity, Section 33(d) states: "This section does not create a private right of enforcement." Tex. Const. art. I, § 33. As explained above, each of Appellees' arguments fails.

the statutes. Neither a private cause of action nor a private right of enforcement is necessary to invoke a district court's jurisdiction to do so.

1. *The Bill of Rights is self-executing in that all laws in conflict with it are void.*

The *City of Beaumont v. Bouillion*, 896 S.W.2d 143 (Tex. 1995) case is particularly apt here. The case involved former Beaumont police department employees who sought damages from the City and its officials for alleged violations of their rights under the free speech and assembly clauses of the Texas Constitution. *Id.* at 145, 147 ("we must determine whether there is an implied private right of action for damages against governmental entities for violations of the Texas Constitution"). The supreme court ultimately held that "there is no implied cause of action for damages against governmental entities for violations of the free speech and free assembly clauses of the Texas Constitution." *Id.* at 144. The plaintiffs, therefore, could not pursue their claim for damages for violations of their constitutional rights.

Indeed, the supreme court explained that there can be no implied private right of action for damages against the State for violations of sections 8 and 27 of the Bill of Rights because "the text of the Texas Bill of Rights . . . explicitly announces the consequences of unconstitutional laws": any action taken and any statute enacted in violation of the Bill of Rights is *void*. *Bouillion,* 896 S.W.2d at 148. The "State has

no power to commit acts contrary to the guarantees found in the Bill of Rights," the court proclaimed. *Id.* Citing section 29 of the Bill of Rights, the court continued:

> [A]ny provision of the Bill of Rights is self-executing to the extent that anything done in violation of it is void. When a law conflicts with rights guaranteed by Article 1, the Constitution declares that such acts are void because the Bill of Rights is a limit on State power. The framers of the Texas Constitution articulated what they intended to be the means of remedying a constitutional violation. *The framers intended that a law contrary to a constitutional provision is void*. *There is a difference between voiding a law and seeking damages as a remedy for an act*. A law that is declared void has no legal effect. *Such a declaration is different from seeking compensation for damages, or compensation in money for a loss or injury*. Thus, *suits for equitable remedies for violation of constitutional rights are not prohibited*.

Id. at 148-49 (emphasis added) (internal citations omitted).

The *Bouillion* plaintiffs could not pursue a private cause of action for damages against the State for violations of the Bill of Rights, because their exclusive remedy for such constitutional violations is an equitable one, such as a judicial declaration that a law is contrary to a constitutional provision and is therefore void. *Id.; accord City of Elsa v. M.A.L.*, 226 S.W.3d 390, 392 (Tex. 2007).

Appellants, here, are not seeking damages or compensation by their lawsuit; they seek only equitable relief. This distinction is important, as the *Bouillion* court made clear.

2. *A private right of enforcement is necessary when a party seeks damages or compensation for a constitutional violation; Appellants seek only equitable relief here.*

A private right of enforcement or a private right of action must be found in the constitutional or statutory text when a party sues for damages or compensation based on a violation of the constitutional or statutory provision. *Frasier v. Yanes* discussed the elements of a "self-enacting" constitutional provision that would support a cause of action for compensatory damages. 9 S.W.3d 422, 425-26 (Tex. App.—1999, no pet.). The case involved three Travis County Sheriff's officers who were injured while performing their official duties. *Id.* at 424. They sued the Sheriff and the County, seeking a declaratory judgment that article III, section 52e of the Texas Constitution entitled them to receive their full salary during their period of recovery and enforcement of their claimed constitutional entitlement to that salary in the form of compensation. *Id.* at 424, 426. The defendants filed pleas to the jurisdiction, arguing that section 52e is not self-enacting and did not waive sovereign immunity. *Id.* at 424.

The court of appeals affirmed the trial court's denial of the pleas to the jurisdiction, explaining that section 52e of the Texas Constitution was a self-enacting provision that authorized *compensation* by the County to the officers and granted them a private cause of action to pursue their maximum pay according to the terms of the constitutional provision. *Id.* at 426. The court distinguished claims for damages based on general constitutional torts and noted that the *Yanes* plaintiffs sued to enforce "a specific constitutional entitlement to compensation. In this regard,

section 52e is analogous to the takings clause; it confers a narrow contextual right of compensation." *Id.* at 425.

Importantly, the Austin Court of Appeals in *Yanes* distinguished the supreme court's holding in *Bouillion*, to explain why the *Yanes* plaintiffs could proceed with their claim for *compensation* against governmental entities under section 52e of the constitution, while the plaintiffs in *Bouillion* could not claim damages against governmental entities arising from violations of sections 8 (right to free speech) and 27 (right to assemble) of the constitution. Section 52e provides a cause of action allowing plaintiffs to seek monetary compensation, explained the court, but no private cause of action for damages exists in sections 8 and 27 of the constitution. *Id.* ("The officers in our case do not seek damages for a general constitutional tort, as in *Bouillion*, but have sued to enforce a specific constitutional entitlement to compensation.").

Similarly, in *Steele v. City of Houston*, 603 S.W.2d 786 (Tex. 1980), a case cited by the *Yanes* court and by the County, the issue presented was whether the plaintiffs could recover *damages* from the City of Houston for the destruction of their homes and belongings by the police department. They alleged several legal theories, including that the City's actions constituted a taking without just compensation under the Texas Constitution. *Id.* at 788. The City moved for summary

judgment, arguing that the plaintiffs had failed to allege a cause of action, and the trial court granted the motion. *Id.*

The supreme court reversed, holding that the plaintiffs properly pleaded a cause of action under Section 17 of the Constitution (the takings provision). *Id.* at 791. According to the court, the "Constitution itself is the authorization for *compensation* for the destruction of property and is a waiver of governmental immunity for the taking, damaging or destruction of property for public use." *Id.* (emphasis added). Immunity is thus waived when a party seeks compensation for the destruction of property under section 17 of the Constitution.

Both of these cases stand for the proposition that a party may not sue the government for damages or compensation based on a violation of a constitutional provision, unless the constitutional provision itself authorizes a private cause of action for the monetary relief sought. But neither of these cases holds that a private right of enforcement or a private cause of action is necessary when challenging the constitutionality of a statute. They simply do not apply here, except to distinguish claims for monetary relief versus claims for equitable relief.

Here, Appellants did not present the district court with a private right of action seeking damages or compensation for constitutional violations. Nor do they seek to seize the State's enforcement authority under the OBA. *See* Tex. Nat. Res. Code § 61.013(a). Instead, Appellants sought an equitable remedy, a declaration that certain

provisions of the OBA—provisions enacted by the Texas Legislature in 2013 when it passed HB2623—are void because they are contrary to Section 33 of the Texas Bill of Rights. Relatedly, actions taken pursuant to the unconstitutional provisions of the OBA are also void. No private right of enforcement or private cause of action is necessary to invoke a court's jurisdiction to render this equitable form of relief and declare an unconstitutional statute void, as the supreme court in *Bouillion* made clear.

3. Appellees' attempt to distinguish Section 33 from other provisions of the Bill of Rights is unavailing and finds no support in the caselaw.

Appellees attempt to create a distinction between Section 33 and other provisions in the Bill of Rights, by pointing to subsection (d), which acknowledges that Section 33 "does not create a private right of enforcement." As the Attorney General ("AG") explains it, "Section 33 specifically forecloses suits that seeks [sic] to enforce the right on behalf of private parties." *AG's Brief,* p.17. Mischaracterizing Appellants' lawsuit as a "private enforcement of the right of access," *id.*, the AG attempts to distinguish *Bouillion, Patel v. Texas Dep't of Licensing and Regulation*, 469 S.W.3d 69 (Tex. 2015), and other similar cases by arguing that the constitutional provisions at issue in those cases did not include the same "limiting language" found in Section 33. *Id.*; *see also County's Brief*, p.20 (arguing that "[o]nly constitutional provisions that provide for a cause of action . . . can be susceptible to waiver of

immunity). But Appellees' attempts to create a distinction between this case and *Bouillion* and *Patel* are misplaced.

That Section 33 acknowledges that it "does not create a private right of enforcement" does not alter the fact that statutes that are contrary to the Bill of Rights, including Section 33, are void. And the judiciary is the entity with the power to declare such statutes void, when called upon to do so.

It is the nature of the remedy sought—an equitable remedy versus a claim for damages—that determines whether the district court has jurisdiction to grant the requested relief. *See City of Fort Worth v. Jacobs*, 382 S.W.3d 597, 598 (Tex. App.—Fort Worth 2012, pet. dism'd) (collecting cases). Although Section 33(d) states that it creates no private right of enforcement, it does not abrogate a party's right to seek equitable relief, such as a declaration that certain statutes contravene Section 33 of the constitution; nor does it abrogate the core function of the judiciary to interpret and apply the Constitution and declare all acts contrary to it void. *See Patel*, 469 S.W.3d at 123 (Willett, J., concurring).

Appellees' reading of Section 33(d) would allow the Legislature and Appellees to avoid judicial review of any statutes or actions that contravene Section 33 of the Bill of Rights. This would turn the Separation of Powers provision in the Texas Constitution on its head, allowing for no judicial check of the legislature's actions. *See id.* at 76. There is simply no caselaw that supports this proposition, and

the holdings in both *Bouillion* and *Patel* are to the contrary. Both acknowledge that suits for equitable remedies for violations of constitutional rights are *not* prohibited; no private right of action is necessary when challenging the constitutionality of a statute. Indeed, it is the courts' *duty* to declare all acts contrary to the Constitution void. Otherwise, "all the reservations of particular rights or privileges [in the Constitution] would amount to nothing." *Id.* at 123 (Willett, J., concurring) (internal quotation and citation omitted); *see also Denison,* 61 S.W.2d at 1019.[2]

4. Cases cited by Appellees addressing a private right of enforcement do not apply here because they did not involve constitutional challenges.

Appellees cite several cases in support of their argument that a private right of enforcement is necessary for Appellants to pursue their claims challenging the constitutionality of a statute. Relying, again, on Section 33(d), Appellees claim that because subsection (d) bars a private right of enforcement, Appellants cannot pursue the equitable relief they have requested. But the majority of cases they cite in support of this proposition are not relevant here, because they do not involve a constitutional challenge to a statute.

[2] The *Denison* court held: "But when [the government's] acts are called in question as being in contravention of the Constitution, it is the function and duty of the courts to decide that question. This power is . . . a discharge of the duties imposed upon the judiciary by the Constitution itself, under the general scheme of checks and balances upon which our constitutional system of government was conceived and founded." 61 S.W.2d at 1019.

All three Appellees cite *Texas Medicine Resources, LLP v. Molina Healthcare of Texas, Inc.*, 620 S.W.3d 458 (Tex. App.—Dallas 2021), *aff'd* 659 S.W.3d 424 (Tex. 2023), in support of their argument that a private cause of action must be clearly supported by statutory text. But this case involves physicians seeking to enforce Insurance Code provisions against a health maintenance organization (a private party) for inadequate payment for the physicians' services. *Id.* at 462. It is not analogous to Appellants' case, which presents a claim against governmental entities alleging that certain statutes are void because they violate the Bill of Rights.

Similarly, the AG and the GLO cite *Kessling v. Friendswood Indep. Sch. Dist*., 302 S.W.3d 373 (Tex. App.—Houston [14th Dist.] 2009, pet. denied), in support of their arguments that a private right of enforcement must exist in the statutory text to support a private cause of action. In *Kessling*, the plaintiff sued the school district, requesting a declaratory judgment and injunctive and mandamus relief requiring the district to adopt an account system that conforms to the Education Code. *Id.* at 377. The appellate court affirmed the trial court's dismissal of the plaintiff's Education Code claims for want of jurisdiction because the Education Code does not include any provision authorizing a private right of action for complaints concerning a school district's failure to follow required accounting practices. *Id.* at 386. This case, again, involves enforcement of specific statutes—statutes that do not provide a private cause of action. It is not analogous, here, because Appellants seek a judicial

declaration that certain statutes are unconstitutional and thus void; they do not seek to enforce any statutes.

Finally, the AG and the GLO cite *Witkowski v. Brian, Fooshee & Yonge Properties*, 181 S.W.3d 824 (Tex. App.—Austin 2005, no pet.), in support of their argument that a right of enforcement must be present in the statutory text to support a cause of action. In that case, plaintiffs (low income housing tenants) sued low-income housing property owners for damages, alleging violations of a federal statutory scheme (the Affordable Housing Disposition Program) and contractual breaches, which ultimately resulted in the tenants' eviction from their homes. *Id.* at 826-27. The trial court granted summary judgment in favor of the defendants, and the court of appeals affirmed. In reaching their decision, the court explained that the challenged statutes that formed the basis of the plaintiffs' lawsuit did not include a private right of enforcement that would support plaintiffs' claim for damages, and so, the trial court properly granted summary judgment in favor of the defendants. *Id.* at 831-32. This case is also distinguishable, because it involved a lawsuit for damages against private parties, based on the attempted enforcement of certain federal statutes. Appellants' lawsuit does not seek damages, it is not against a private party, and it does not seek to enforce any statute. *Witkowski* simply does not apply here.

In sum, Appellees have presented no relevant legal authority in support of their argument that the district court lacked jurisdiction to render the equitable relief requested by Appellants—namely, declaring void certain statutes that violate the Bill of Rights. For over a century, courts have recognized their authority to determine whether governmental acts violate the constitution and whether certain statutes are void for violating the Bill of Rights. *See, e.g., Denison,* 61 S.W.2d at 1019. No express private right of enforcement is necessary to render this form of equitable relief. In fact, Section 29 of the Bill of Rights expressly provides the authority to render the relief Appellants seek by their lawsuit.

B. The Declaratory Judgment Act is the proper vehicle for the relief Appellants seek here.

All three Appellees argue that Appellants' reliance on the Declaratory Judgment Act ("DJA") was improper for purposes of conferring jurisdiction. They maintain that because Appellants' constitutional claims are invalid, they could not rely on the DJA to confer jurisdiction and afford them the relief requested. Their arguments presume that Appellants' constitutional claims are invalid, because Section 33 does not provide a private right of enforcement.

As discussed above, it is well-settled that courts possess the jurisdiction to render the relief sought by Appellants—a declaration that certain statutes and government actions taken pursuant to those statutes are invalid because they violate the Bill of Rights. The DJA has historically been relied on when challenging the

constitutionality of a statute or other law. Tex. Civ. Prac. & Rem. Code §§ 37.004, 37.006; *see, e.g., City of Laredo v. Laredo Merchants Ass'n*, 550 S.W.3d 586 (Tex. 2018) (considering and resolving constitutional preemption challenge to city ordinance); *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994). Suits under the DJA are not limited to cases where the parties have a cause of action separate and apart from the DJA. *Bexar Metro. Water Dist. v. City of Bulverde*, 156 S.W.3d 79, 88-89 (Tex. App.—Austin 2004, pet. denied); *City of Waco v. Texas Natural Res. Conservation Comm'n*, 83 S.W.3d 169, 177 (Tex. App.—Austin 2002, pet. denied). A DJA action will lie within the jurisdiction of the court so long as the case presents a justiciable controversy capable of resolution by the declaration sought. *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 163–64 (Tex. 2004); *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995); *Texas Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 517–18 (Tex. 1995).

Appellants' case presents a ripe, justiciable controversy capable of resolution by the declaratory relief sought. As explained, below, in the discussion regarding Appellants' standing to pursue their claims, Appellants' rights to access the public beach have been restricted and will continue to be restricted, because of the unconstitutional legislation passed by the legislature and because of Appellees' actions pursuant to the unconstitutional legislation. Appellants have a direct stake in the outcome of the litigation. Their rights would be vindicated and their injuries

redressed by the relief requested. *See Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001). [

The AG's reliance on *El Paso County v. El Paso County Emergency Services District No. 1*, 622 S.W.3d 25 (Tex. App.—El Paso 2020, no pet.), is misplaced. The AG argues that the case is instructive because the court of appeals held that "the district court lacked subject matter jurisdiction over the [plaintiffs] Emergency Service Districts' equal protection, due process, and separation of powers challenges to an ordinance because plaintiffs had no vested interest protected by the U.S. or Texas Constitution." *AG's Brief,* pp.19-20. According to the AG, this case supports his argument that Appellants lack standing to raise their constitutional challenge "because Section 33 is not an enforceable right by the private parties." *Id.*, p.20.

The *El Paso County ESD* case was a case brought by emergency services districts, who took issue with the County's adopted budget and tax rates for the ESDs. The ESDs sued the County, raising a number of claims based generally on their complaint that the County exceeded its statutory authority to set budget and tax rates for ESDs under Subchapter K of the Health and Safety Code. They sought declaratory relief, including vague constitutional challenges, which the appellate court interpreted as equal protection, due process, and separation of powers claims. *El Paso Cty.*, 622 S.W.3d at 41.

Regarding the equal protection and due process claims, the appellate court held that the ESDs lacked standing to pursue those claims because "municipal corporations and other units of government are not vested with constitutional rights under the Texas or United States Constitutions." *Id.* Accordingly, they may not assert constitutional violations based on the Bill of Rights. *Id.*

The ESDs' other "constitutional" challenge alleged that Subchapter K of the Health and Safety Code unconstitutionally infringed on the ESDs' independent authority under the Texas Constitution, because Subchapter K allow the County to control the ESDs' budget and tax rates. *Id.* But, as the court noted, the ESDs failed to cite any provision of the Texas Constitution that the challenged statutes allegedly violate. *Id.* Nor did they cite to any authority explaining how the County's actions violate the Constitution. *Id.* The court nevertheless construed the ESDs' pleadings generously to allege that the challenged statutes unconstitutionally violate separation of powers. However, the court held that there were no competing branches of government implicated by the ESDs' claims: "Levying taxes is a legislative power, whether carried out by a commissioners court or an emergency services district," explained the court. *Id.*

Contrary to the AG's argument, the court's holding is wholly irrelevant to Appellants' claims. Appellants are not governmental units complaining about usurpation of their powers by another governmental branch. Rather, they are

individuals and organizations who, relying on the guarantees afforded them under the Bill of Rights, have requested the court declare certain statutes void because they violate the Bill of Rights. The AG's attempt to draw a useful comparison between the *El Paso County* case and the case presented here is simply unavailing.

II. Sovereign immunity is waived in cases, such as this one, where plaintiffs seek a declaration that certain statutes are void.

Appellees claim that Appellants have not alleged a valid waiver of immunity. Here, again, their arguments rely on a presumption that Appellants seek to enforce a constitutional provision, when no private right of enforcement exists. Appellants have discussed, above, why no private cause of action or private right of enforcement is necessary to pursue their claims.

Section 29 of the Bill of Rights specifies the relief warranted where, as here, a statute violates the Bill of Rights—the judiciary must declare the statute void. Sovereign immunity, a legislative doctrine, may not abrogate the right conferred by Section 29 of the Constitution. *Yanes*, 9 S.W.3d at 426 (citing *Jones v. Ross*, 173 S.W.2d 1022, 1024 (Tex. 1943)). "Sovereign immunity is inapplicable in a suit against a governmental entity that challenges the constitutionality of a statute and seeks only equitable relief." *Patel*, 469 S.W.3d at 76 (Tex. 2015) (citing *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (Tex. 2009)).

The DJA provides the procedural vehicle for affording such relief. In a declaratory judgment action challenging the constitutionality of a statute, the DJA

requires the relevant governmental entities be made parties, thereby waiving sovereign immunity. *Id.*; Tex. Civ. Prac. & Rem. Code § 37.006(b).

The cases cited by the County in support of its argument that sovereign immunity has not been waived here are inapposite, because they involved claims for damages, not the equitable relief sought by Appellants in this case. *Ware v. Miller*, 82 S.W.3d 795, 804 (Tex. App.—Amarillo 2002, pet. denied) (holding that court had jurisdiction to resolve declaratory judgment claims but sovereign immunity barred plaintiff's claim for damages); *Nueces County v. Ferguson*, 97 S.W.3d 205, 218 (Tex. App.–Corpus Christi 2002, no pet.) (distinguishing between suits in which declaration against State is sought and suits seeking money damages against State; suits seeking declarations are not considered suits for damages, and so sovereign immunity is waived). Indeed, the *Ferguson* court acknowledged that "the Texas Constitution permits a party to seek equitable relief for the violation of certain constitutional provisions, including article I, Section 19, even without legislative consent." *Ferguson*, 97 S.W.3d at 221. But Ferguson did not plead a violation of any constitutional provision; his was a claim for damages, not equitable relief. And so, there was no waiver of immunity. *Id.*

Similarly, *Texas Department of Transportation v. Sefzik,* 355 S.W.3d 618 (Tex. 2011)—a case cited by both the GLO and the AG—does not apply here, because as

the court noted, the plaintiff in that case did not challenge the validity of a statute. *Id.* at 622.

Next, the GLO argues that sovereign immunity bars Appellants' claims because they seek to challenge "actions" taken by a governmental unit under the authority of the challenged statute. But the supreme court in *Patel* held that where a party challenges a statute as unconstitutional *and* challenges the actions of a governmental entity or official based on the unconstitutional statute, sovereign immunity is waived. *Patel*, 469 S.W.3d at 76.

In short, Appellants' claims are the types of claims for which the supreme court has consistently held that sovereign immunity is inapplicable.

III. Appellants have standing to pursue their claims.

Appellees maintain that because Section 33 does not provide a private right of enforcement, Appellants had no standing to pursue their claims. As discussed above, however, no private right of enforcement is necessary for the relief sought by Appellants. Those arguments will not be repeated here. Appellants will address the various other standing arguments raised by Appellees, in turn, below.

A. Appellants include membership organizations and an organization that bears the indicia of membership.

The County argues that Appellants have not demonstrated standing to pursue their lawsuit because "Appellants are not membership organizations." *County's*

Brief, p.26. Regarding SaveRGV, in particular, the County argues that it is "a loose association of individuals, not a membership organization." *Id.*, p.27.

There is no dispute that Sierra Club and the Carrizo/Comecrudo Nation are membership organizations. As discussed in Appellants' Initial Brief, SaveRGV also bears the indicia of membership. *Appellants' Initial Brief,* pp.41-43. All three Appellants seek the same equitable forms of relief. Thus, so long as at least one of the Appellant organizations includes a member with standing to pursue the requested relief, that same relief will issue regardless of the standing of the other Appellants. *Patel,* 469 S.W.3d at 77-78. As discussed below, each of the Appellants possesses members who can demonstrate standing to pursue the equitable relief requested.

B. Appellant organizations include members who have standing in their own right to pursue the constitutional challenges alleged by their lawsuit.

"To challenge a statute, a plaintiff must [both] suffer some actual or threatened restriction under the statute" and "contend that the statute unconstitutionally restricts the plaintiff's rights." *Patel*, 469 S.W.3d at 77 (quoting *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 518 (Tex. 1995)). The GLO and the AG argue that Appellants have failed to demonstrate an injury-in-fact, traceable to the challenged action. But neither explains why the injuries alleged by Appellants are not cognizable injuries.

The County argues that Appellants must own private property along the public beach to bring a cause of action under the OBA. *County's Brief*, p.27. But Appellants' lawsuit is not a cause of action under the OBA. Rather, they seek to declare some of those statutes void, and there is no caselaw supporting the proposition that one must possess a property interest when alleging a constitutional challenge to a statute based on the Bill of Rights.

The County also argues that Appellants' injuries are "self-inflicted" based on their "own actions and choices" to avoid the beach, even when it is open. *Id.,* p.28. This contention is not supported by the record. As explained in Appellants' Initial Brief, each organization includes at least one member who has been turned away from Boca Chica Beach, when trying to access it for personally significant events. *Appellants' Initial Brief,* pp.44-45. They have all demonstrated an actual (and threatened) restriction caused by the challenged statutes—certainly more than an "identifiable trifle," which is all that is required. *United States v. Students Challenging Regul. Agency Procs.,* 412 U.S. 669, 689 n.14 (1973). And they have demonstrated that they have a direct stake in the outcome of the litigation.

Traceability requires only that the challenged action be a cause-in-fact of the injury, not the proximate or sole cause. *See Bennett v. Spear*, 520 U.S. 154, 168-69 (1997). Were there no unconstitutional legislation, allowing for the closure of Boca Chica Beach and the only access road to the Beach, Appellants' members would not

have been denied access to the Beach on the occasions they were turned away. The challenged statutes caused the restriction on Appellants' members' right to access the public beach.

The GLO argues that the legislature's and the County's conduct caused the alleged injuries here, not the GLO's conduct, and so, the GLO need not have been joined in Appellants' lawsuit. But the relevant inquiry is whether the challenged legislation caused the injury, and in this case, it did.

Further, the GLO is a necessary party here, as it is authorized to approve or deny requests for beach closures on certain specified dates. *See* Tex. Civ. Prac. & Rem. Code § 37.006 (all persons who have any interest that would be affected by the declaration must be made parties); Tex. Nat. Res. Code § 61.132(d), (f). The GLO also entered into a Memorandum of Agreement with the County, pursuant to the challenged legislation, to govern beach and access point closures for space flight activities. Tex. Nat. Res. Code § 61.132(f). And the GLO Commissioner is authorized to adopt rules, pursuant to the unconstitutional statutes, regarding beach closures for space flight activities. *Id.;* § 61.011(d)(11). The GLO's arguments on this issue are simply misplaced.[3]

C. Constitutional guarantees in the Bill of Rights are excepted from the general powers of government.

[3] For this same reason, Appellants properly sued the GLO commissioner in her official capacity, in addition to the GLO, and doing so was not impermissibly redundant. *See GLO's Brief,* p.19.

Both the County and the AG argue that Appellants have no standing because Section 33 "deliberately vests enforcement authority with the Legislature rather than private citizens and permits the Legislature to regulate the public's access to public beaches." *AG's Brief*, p.16; *see also County's Brief*, p.23 ("Section 33 prohibits private enforcement . . . and permits the legislature to regulate the access to public beaches"). But both Appellees misread Section 33, and their arguments fly in the face of over a century's worth of caselaw.

"The Texas Constitution derives its force from the people of Texas. This is the fundamental law under which the people of this state have consented to be governed." *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 394 (Tex. 1989). "[G]uarantees found in the Bill of Rights are excepted from the general powers of government." *Bouillion*, 896 S.W.2d at 148. Indeed, the Bill of Rights acts as "a powerful check on government power." *Patel,* 469 S.W.3d at 121 (Willett, J., concurring) (citation omitted).

Relevant to this case, the Bill of Rights guaranteed to the public "an unrestricted right to use and a right of ingress to and egress from a public beach." Tex. Const. art. I, § 33(b). The government—neither the Legislature, state agencies, nor the County—may not divest or abrogate this right. Under the Texas Constitution, government may only pursue constitutionally permissible ends. *Patel*, 469 S.W.3d at 122. And "the final authority to interpret and apply the Constitution belongs to the

Judiciary"; it is the judiciary that "checks" the government's action to ensure conformity with the Bill of Rights. *Id.* at 126 (Boyd, J., concurring).

Section 33 expressly dictates the limits of the legislature's authority regarding access to public beaches: "The legislature may enact laws to *protect the right of the public to access and use a public beach* and to protect the public beach easement from interference and encroachments." Tex. Const. art. I, § 33(c). This language makes clear the legislature may only enact laws that "protect"—as in, defend, guard, or keep safe—the public's right to access public beaches. But the legislature may not trammel the public's right to access public beaches, as guaranteed by the Bill of Rights. And if the legislature enacts a statute that infringes upon the public's guaranteed right of access to public beaches, it is the duty of the judiciary to declare it void. *Bouillion*, 896 S.W.3d at 149.

HB2623 does not "protect" the public's right to access and use a public beach. The plain language of Section 61.132 makes the intent of the statute clear: "*Closing of Beaches for Space Flight Activities*." "Space flight activities," in turn, is defined in the Texas Civil Practice and Remedies Code Chapter 100A, titled, "Limited Liability for Space Flight Activities":

> "Space flight activities" means activities and training in any phase of preparing for and undertaking space flight, including:
> (A) the *research, development, testing, or manufacture of a launch vehicle*, reentry vehicle, or spacecraft;

> (B) the preparation of a launch vehicle, reentry vehicle, payload, spacecraft, crew, or space flight participant for launch, space flight, and reentry;
> (C) the conduct of the launch;
> (D) conduct occurring between the launch and reentry;
> (E) the preparation of a launch vehicle, reentry vehicle, payload, spacecraft, crew, or space flight participant for reentry;
> (F) the conduct of reentry and descent;
> (G) the conduct of the landing; and
> (H) the conduct of postlanding recovery of a launch vehicle, reentry vehicle, payload, spacecraft, crew, or space flight participant.

Tex. Civ. Prac. & Rem. Code § 100A.001(3) (emphasis added); Tex. Nat. Res. Code § 61.001(4-a) (cross-referencing definition of "space flight activities" in Tex. Civ. Prac. & Rem. Code § 100A.001). The plain language of the relevant statutory provisions—authorizing the closure of public beaches for space flight activities, including activities such as, research, development, testing, or manufacture of a launch vehicle—makes clear that HB2623 does not protect, guard, or defend the public's guaranteed right to access public beaches; this is simply not the intent of the act.[4]

In sum, HB2623 violates Section 33 of the Bill of Rights, and any acts by the government pursuant to this statute—even if done under the pretext of enforcing

[4] To the extent there is any question about the intent of HB2623, various media outlets reported that SpaceX needed the legislature to pass HB2623—to allow the closure of public beaches—so that it could develop its commercial spaceport in Cameron County. *See, e.g.,* Houston Chronicle, May 24, 2013, at: https://www.houstonchronicle.com/news/houston-texas/houston/article/Legislative-Notebook-Closure-of-beach-for-4547681.php. Had the government already possessed the authority to close Boca Chica Beach, there would have been no need for this legislation.

Section 33—violate Appellants' guaranteed right to access public beaches. The judiciary is the entity with the authority to declare the legislation void, and that authority cannot be delegated to another branch of government. And Appellants, who have suffered an actual restriction of their rights traceable to the challenged statutes, have standing to seek a judicial declaration declaring the challenged statutes and actions taken pursuant to those statutes as void and unconstitutional.

IV. Appellants presented the trial court with a viable claim.

The AG next argues that Appellants have not presented a "viable" constitutional challenge by their lawsuit. For support, the AG recycles many of the same arguments regarding the "limiting language" of Section 33(d). And he, again, mischaracterizes Appellants' claims, thusly: "Section 33 provides an absolute, unrestricted right to access the beach without any regulation by the State." *AG's Brief,* p.27.

To be clear, Appellants' claim is that the legislative enactment that allows for beach closures for space flight activities violates Section 33 of the Bill of Rights, which, indeed, acknowledges the public's "unrestricted right" to use and access a public beach, Tex. Const. art. I, § 33(b). It is HB2623 that Appellants are challenging, not "any regulation by the State." And Appellants met their burden of presenting a viable claim.

As the supreme court in *Patel* explained, "claims against state officials—like all claims—must be properly pleaded in order to be maintained," but the claims need not "be viable on their merits to negate immunity." 469 S.W.3d at 77. Appellants satisfied this burden. They have plainly cited the constitutional provision that was violated by the legislature's enactment of HB2623, explained how the bill violates the constitutional provision, and described how the Appellant organizations' members have been aggrieved by the challenged statutes and by actions taken pursuant to those statutes.

According to the supreme court, "[o]ur guiding principle when interpreting the Texas Constitution is to give effect to the intent of the voters who adopted it." *Degan v. Bd. of Trs. of Dall. Police & Fire Pension Sys.*, 594 S.W.3d 309, 313 (Tex. 2020). In doing so, we "presume that the framers carefully chose the language," and "interpret their words accordingly." *Id.* (quoting *Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp*., 283 S.W.3d 838, 842 (Tex. 2009)).

At the time Section 33 was overwhelmingly adopted by voters, the Texas OBA had already been in effect for decades. The constitutional provision strengthened the Act and guaranteed the public the "right" to access public beaches, by restricting the legislature's authority to pass future statutory amendments that would impede the public's access to public beaches. Because HB2623 does just that—impedes the public's right to access public beaches—Appellants have invoked Section 33 of the

Bill of Rights to seek a declaration that HB2623 is void. They have presented a viable claim.

The AG argues that HB2623 is no different than other statutory provisions allowing counties to regulate access to public beaches, suggesting that if those other statutory provisions pass constitutional muster, so should HB2623. But none of the statutes cited in support of this argument allow a county to close a public beach or access point to the beach for space flight activities.[5] For instance, the AG cites Section 240.902 of the Local Government Code as an example of legislation that allows counties to close public beaches. That provision states: "The commissioners court of a county in which a public beach is located may by order close a part of the beach for a maximum of three days each year to allow a nonprofit organization to hold an event on the beach to which the public is invited and to which the organization charges no more than a nominal admission fee." Tex. Loc. Gov't Code § 240.902. This statute does not deny the public access to the beach; to the contrary, the statute expressly states that the public must be invited to the event, and that no more than a nominal admission fee may be collected.

Similarly, Section 61.015 of the OBA requires counties with public beaches in their jurisdiction to "adopt a plan for *preserving and enhancing access to and use*

[5] Even if any of the cited statutes allowed for beach closures, this would not render HB2623 constitutional. It would instead, arguably, provide a basis for challenging those other statutes as well.

of public beaches," but it does not authorize the closure of public beaches for certain commercial activities. Tex. Nat. Res. Code § 61.015(a) (emphasis added). The statutes allowing counties to protect dunes also do not authorize the closing of beaches, contrary to the AG's suggestion. *See id.* §§ 63.011, .057. Even the county's authority to regulate vehicular traffic on public beaches is derived from the Texas Constitution, indicating that counties would not have this authority absent a constitutional provision. Tex. Const. art. 9, § 1-A.

In short, Appellants have met their burden here, by presenting a viable constitutional challenge to HB2623. The AG's arguments to the contrary are without merit.

V. The AG's arguments regarding the merits of Appellants' claims are not relevant to review of a court's decision granting a plea to the jurisdiction.

The AG argues that the challenged statutes at issue in this appeal are rationally related[6] to the State's interests in protecting public safety, supporting the State's economy, and establishing Texas as a hub for space industry. *AG's Brief*, p.28. But the AG fails to explain how this argument leads to a conclusion that the trial court

[6] The AG provides no relevant legal authority to support its suggestion that "rational relationship" is the appropriate standard to use in this case. In any event, this argument addresses the merits of Appellants' claims, and the trial court may only reach the merits of the claims if it exercises subject-matter jurisdiction over the lawsuit.

lacked subject matter jurisdiction to determine the constitutionality of the challenged statutes.

To the contrary, the AG appears to be presenting arguments that reach the merits of Appellants' lawsuit. The trial court would have had to exercise its jurisdiction in order to reach the arguments that the AG urges. But this Court need not reach the merits, in order to determine whether the trial court had jurisdiction to render the relief sought by Appellants.

VI. The GLO's arguments regarding the validity of Appellants' rule challenge do not support the trial court's refusal to exercise subject matter jurisdiction.

Finally, the GLO argues that Appellants' claims challenging certain rules enacted by the GLO pursuant to its authority under HB2623 are barred because they seek a redundant remedy, and because jurisdiction rests exclusively in Travis County under the Administrative Procedure Act ("APA"). As to the redundant remedies argument, the *Patel* court made clear that a lawsuit seeking a declaration that certain statutes are unconstitutional, coupled with a claim challenging the validity of agency rules is not impermissible based on the redundant remedies doctrine. 469 S.W.3d at 80. That holding applies here.

Regarding Appellants' rule challenge under the APA, Appellants initially sought to invalidate certain agency rules adopted by the GLO pursuant to Section 2001.038 of the APA, Tex. Gov't Code § 2001.038, but they later advised the court

that they would amend their petition and drop this claim. C.R.519. That Appellants relied on the APA to challenge the GLO's rules is not an adequate basis for dismissal of Appellants' entire lawsuit for lack of jurisdiction. Appellants should be afforded an opportunity to amend their petition, as they committed to do.

Conclusion and Prayer

For the reasons described above, this Court should reverse the trial court's decision, granting Appellees' pleas to the jurisdiction and dismissing all of Appellants' claims, and remand this matter to the trial court for further proceedings.

Respectfully submitted,

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