

No. 09-0420

**In the
Supreme Court of Texas**

ESPERANZA ANDRADE, IN HER OFFICIAL CAPACITY AS
SECRETARY OF STATE FOR THE STATE OF TEXAS,
Petitioner,

v.

NAACP OF AUSTIN, NELSON LINDER, SONIA SANTANA AND DAVID VAN OS,
Respondent.

On Petition for Review from the
Third Court of Appeals at Austin, Texas

REPLY BRIEF ON THE MERITS

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Plaintiffs do not directly address the Secretary's opening brief, which explained that (1) plaintiffs lack standing because they assert no particularized injury apart from their status as voters and participants in the political process; (2) plaintiffs' statutory claims are barred by immunity because the facts alleged in their petition do not describe a violation of the Election Code as a matter of law; and (3) the bulk of plaintiffs' constitutional claims are non-justiciable under longstanding precedent. Plaintiffs point to nothing in their affidavits that supports the existence of a particularized injury. And they do not defend the text of their live

petition—a curious procedural move in an appeal that hinges on the sufficiency of that petition.

Instead, the crux of plaintiffs’ merits brief is that they have demonstrated an injury sufficient, *per se*, to establish standing and invoke a waiver of immunity because the facts that they allege would violate their legal theories, which are counter-textual and ignore this Court’s precedent. Indeed, plaintiffs’ best argument that the text of the Election Code supports their position is to argue that the provisions setting out the procedure for performing recounts somehow violates the Code’s requirement that recounts be available. They make no attempt to argue that their lawsuit is justiciable under *Wood* and *Barry*. And their procedural arguments boil down to an assertion that, in resolving a plea to the jurisdiction, the courts are required to defer to the legal theories in a plaintiff’s petition—an approach the Court has consistently rejected. The Court should grant the petition and reverse.

ARGUMENT

I. BOTH THE SUBSTANTIVE AND PROCEDURAL ISSUES IN THIS CASE ARE IMPORTANT TO THE JURISPRUDENCE OF THE STATE, AND PLAINTIFFS MAKE NO ATTEMPT TO ARGUE OTHERWISE.

The court of appeals’s conclusion that the Secretary can be sued for certifying an electronic balloting system without a contemporaneous paper record is incorrect because the Election Code’s plain text authorized the Secretary’s actions. *See* Pet. Merits Br. at 29-35. Courts have jurisdiction over suits against state officials *only if* the actions alleged in a plaintiff’s petition describe an act that would, assuming the alleged facts are all true, violate

a statute or the constitution as a matter of law. *Compare, e.g., Short v. W.T. Carter & Bro.*, 133 Tex. 202, 217-19, 126 S.W.2d 953, 962-63 (1938) (holding that Land Commissioner could defeat jurisdiction by establishing that relevant statutes authorized his actions) *with Tex. Highway Comm'n v. Tex. Ass'n of Steel Imps., Inc.*, 372 S.W.2d 525, 530 (Tex. 1963) (holding that there was jurisdiction over suit against state officials because they had acted without statutory authority). It is only when a plaintiff makes a legally-valid assertion that a defendant official has acted *ultra vires* that the courts should affirm the denial of a plea to the jurisdiction. *E.g., Cobb v. Harrington*, 144 Tex. 360, 366, 190 S.W.2d 709, 712 (1945) (applying common-law cause of action against state officials because Comptroller's actions had been ruled illegal in previous litigation).¹

The court-of-appeals majority attempted to skirt the issue by claiming it was not required to apply the analysis of cases like *Cobb*, *Short*, and *Steel Importers* because it could not delve into the merits of plaintiffs' lawsuit (a position predicated a overreading of the discussion of minimum amount in controversy in *Bland Independent School District v. Blue*, 34 S.W.3d 547 (Tex. 2000)). But its conclusion that there was jurisdiction to review the Secretary's actions could be interpreted to bind the trial court on remand. The Court should grant the petition to prevent a remand in which the trial court might feel bound to apply a counter-textual reading of the Election Code or to ignore the Court's decisions in *Wood* and

1. Even the Third Court of Appeals has correctly applied the Court's precedent in at least one recent case. *Combs v. City of Webster*, No. 03-08-00291-CV, 2009 WL 3151345, at *5-*6 (Tex. App.—Austin 2009, no pet. h.) (correctly distinguishing between discretionary and *ultra vires* acts).

Barry. Leaving the court of appeals’s judgment in place would (1) inject uncertainty into the substantive law governing electronic balloting systems and (2) allow the court of appeals to put its thumb on the scale of the legal issues to be resolved on remand.

Substance aside, however, the Court should grant the petition because the court of appeals’s unprecedented procedural theory—which is contrary to nearly a century of this Court’s precedent—creates a roadmap for sidestepping the constitutional standing and sovereign immunity requirements for bringing suit under the Uniform Declaratory Judgments Act. *See* Pet. Merits Br. at 45-46. Plaintiffs embrace the court of appeals’s reasoning—even where it conflicts with this Court’s precedent—and suggest that court-of-appeals precedent binds this Court in this matter. *See* Resp. Merits Br. at 21-23.

The lynchpin of plaintiffs’ argument is *Texas Department of Insurance v. Reconveyance Services, Inc.*, 240 S.W.3d 418 (Tex. App.—Austin 2007, pet. filed), a court-of-appeals decision that is currently before the Court following merits briefing, No. 07-0786. The novel procedural theory advanced by the Third Court of Appeals in this case and *Reconveyance* proves far too much. It is a tautology: a plaintiff has standing to seek construction of a statute merely because he has alleged that he wants to know what the statute means. Under the theory, a plaintiff could establish standing to bring suit under the UDJA merely by invoking the UDJA’s statutory-construction provisions. *Compare Andrade v. NAACP of Austin*, 287 S.W.3d 240, 251 (Tex. App.—Austin 2009, pet. filed) (holding that

if a suit is brought under the UDJA, it is justiciable); *with Reconveyance*, 240 S.W.3d at 433-34 (holding that if a claim is justiciable, suit is available under the UDJA).

That is not the law. And it should not be the law. Immunity from suit prevents suits to control state action when, by rendering judgment, a court would substitute its own notion of policy for that of elected- and appointed- decision makers. *E.g.*, *Griffin*, 161 Tex. at 424-25, 341 S.W.2d at 153 (finding jurisdiction over suit to enjoin construction of highway overpass without first obtaining property rights because, under construction of relevant statute, defendant official lacked authority to institute the construction). If the UDJA *both* created a cause of action to sue state officials generally for statutory construction *and* relieved plaintiffs of any obligation to demonstrate a concrete, particularized injury, plaintiffs would effectively bear *no* pleading burden in suits against the State. That rule is irreconcilable with the propositions that (1) suit is not allowed to control state action; (2) suits against state officials are suits against the State, *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007); and (3) suits for judicial review of agency actions are barred by immunity from suit as a background matter, *Gen Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 599 (Tex. 2001). It cannot even be squared with the UDJA's plain text—a source of law the court of appeals declined to consider and plaintiffs do not seriously attempt to invoke. *See infra*, Part II.A.2. The Court should grant the petition.

II. PLAINTIFFS' AFFIDAVITS AND PLEADINGS DO NOT ESTABLISH STANDING, AN EXCEPTION TO IMMUNITY, OR A BASIS FOR REMAND.

A. Wallach's Affidavit Cannot Establish Jurisdiction Over Plaintiffs' Lawsuit.

The court of appeals erroneously relied on the affidavit of plaintiffs' expert, Wallach, to establish jurisdiction over claims not included in plaintiffs' pleadings. Pet. Merits Br. at 15-16 & n.9. Now, plaintiffs place even greater reliance on the Wallach affidavit than did the court of appeals. That reliance is misplaced.

1. Wallach's Assertions Regarding Texas Law Are both (1) Incompetent and (2) Irrelevant to Standing and Immunity Analysis.

Plaintiffs argue that Wallach's affidavit establishes jurisdiction because it was proffered in the context of a jurisdictional fact dispute. Resp. Merits Br. at 34-37. That is simply wrong. This appeal presents no issue of jurisdictional fact. The Secretary's argument assumes that all of the allegations in plaintiffs' live petition are true. Even assuming all plaintiffs' assertions are true, (1) plaintiffs' allegations regarding the recount and audit requirements of the Election Code do not describe a violation of law because the eSlate meets the Election Code's requirements as a matter of law, and (2) the factual allegations in plaintiffs' petition invoke constitutional provisions that this Court has already ruled to be non-justiciable. The Secretary is not required to adduce summary judgment evidence to prevail on these pure legal issues, even at the plea-to-the-jurisdiction stage.

Plaintiffs cite Wallach’s affidavit for three legal propositions: that (1) a “recount” under Texas law requires a hand count of already-printed paper ballots, *see* Resp. Merits Br. at 3, 7-8, (discussing 3.CR.557, ¶12); (2) an “audit” of the system’s operation requires a paper record, *id.* at 14 (discussing 3.CR.552-61); and (3) the Texas Constitution mandates stricter standards for voting systems than this Court has previously recognized, *see id.* at 1-2 (alleging that the “purity of the ballot box” clause is justiciable in contravention of *Wood*); *see also* 3.CR.558-59, ¶14 (asserting as a matter of law that Texas Constitution art. VI, §4’s requirement of numbered ballots requires *more* than numbered ballots)). None of these assertions is a factual allegation.

And all three assertions are wrong. The first two presuppose that Wallach’s counter-textual reading of the Election Code represents an accurate statement of Texas law. *See* Pet. Merits Br. at 29-35. And the third is (1) constitutionally problematic because Wallach presumes that the justiciable provisions of §4 have already been extended to encompass plaintiffs’ lawsuit, *see* 3.CR.557-58, ¶13, and (2) procedurally problematic because it ignores the respective roles of the appellate courts and assumes that this Court’s decision in *Wood* can be completely ignored for jurisdictional purposes.²

2. Substantive analysis aside, the assertions in Wallach’s affidavit are incompetent to establish any issue of fact, jurisdictional or otherwise. Evidence at the plea stage is analogous to summary-judgment evidence. *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-27 (Tex. 2004). Under that standard, evidence made on information and belief is incompetent to raise a fact issue. *See Purcell v. Bellinger*, 940 S.W.2d 599, 602 (Tex. 1997) (per curiam) (recitation of factual conclusions is incompetent summary-judgment evidence); *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984) (statements made on information and belief are not competent summary-judgment evidence). Likewise, an expert’s opinion on legal matters is incompetent. *McIntyre v. Ramirez*, 109 S.W.3d 741, 749 (Tex. 2003). Each of the statements contained in Wallach’s affidavit is not a statement of fact, but rather a conclusion as to whether

2. Plaintiffs' failure to allege any particularized injury based on the use of the eSlate system in Travis County precludes standing.

Plaintiffs continue to argue that they need only allege that they are voters and participants in the electoral process to demonstrate standing.³ *See* Resp. Merits Br. at 16 (citing to the court of appeals's opinion to establish standing, not to plaintiffs' own affidavits). As Justice Waldrop pointed out, plaintiffs have at most alleged that the relief they seek would prevent hypothetical future injury, rather than curing existing or imminent injury. *See Andrade*, 287 S.W.3d at 254-55 (Waldrop, J., dissenting).⁴ Plaintiffs point to nothing else in the affidavits that would support standing. *See* Pet. Merits Br. at 14-15.

Plaintiffs embrace this defect in their lawsuit, arguing that it is a desirable outcome for plaintiffs to bring suit without meeting the threshold constitutional requirements for doing so. Resp. Merits Br. at 16. According to plaintiffs' erroneous view of the law, (1) voters

the facts alleged constitute a violation of law. *See* 3.CR.556, ¶11 (providing Wallach's own definition of the term audit because he has been given copies of the relevant statutes); 3.CR.557, ¶12 (same for "audit"); 558-59, ¶14 (stating that Wallach "understands" that a "modern interpretation" of ¶4 would support plaintiffs' lawsuit, while implicitly recognizing that an 1893 case (presumably *Barry*) would not allow that claim). Thus, they would be incompetent fact evidence even if this case presented a question of jurisdictional fact.

3. Plaintiffs continue to discuss the NAACP's associational standing as though it were based on statements regarding injuries to NAACP members. *See* Resp. Merits Br. at 5 & n.1. To be clear, those assertions were struck by the trial court as hearsay, and plaintiffs have never challenged that ruling. 3.CR.573; *see* Pet. Merits Br. at 14 n.6.

4. In addition to Wallach's assertions, plaintiffs also provide a list of what they claim are malfunctions of similar voting systems in Texas elections in other counties. Resp. Merits Br. at 3-4. However, these specific malfunctions are not specifically alleged in plaintiffs' live petition, *see* 1.CR.8, ¶28 (alleging "countless reports of malfunctions and security issues . . . with paperless computerized voting systems") and, apart from a Wallach's description of a different lawsuit, 1.CR.221, ¶16, do not appear in any of the evidence before the trial court. While these defects would be irrelevant to the standing analysis in any case, they are not part of the record and are incompetent either to establish jurisdiction or to support remand.

automatically have standing to bring suit regarding the elections process; Resp. Merits Br. at 16; (2) the UDJA creates an exception to the constitutional requirement of standing, *id.* at 22-23; and (3) Wallach’s affidavit establishes standing by demonstrating as a matter of fact that the lack of a paper record of each ballot violates either the Election Code or the Constitution, *id.* at 39. All three assertions fail as a matter of law.

First, plaintiffs argue that there is automatically standing in any suit regarding the elections process because the courts act “zealously” to protect voting rights. Resp. Merits Br. at 13-14 & n.3.⁵ But voters do not automatically have standing to challenge the voting process, absent a separate, particularized injury to their voting rights. *E.g.*, *Stewart v. Blackwell*, 444 F.3d 843, 854 (6th Cir. 2006), *vacated as moot*, 473 F.3d 692 (6th Cir. 2007) (analyzing plaintiffs’ affidavits to determine standing to bring similar lawsuit); *see also* Pet. Merits Br. at 25-26.

Plaintiffs erroneously argue that voters have standing in lawsuits about the electoral process until their vote has been “given full effect.” Resp. Merits Br. at 13, 19 (discussing *Brown v. Todd*, 53 S.W.3d 297, 305-06 (Tex. 2001), and *Blum v. Lanier*, 997 S.W.2d 259, 262 (Tex. 1999)). This is a drastic overreading of *Brown* and *Blum*. Those cases state that

5. Sprinkled through plaintiffs’ merits brief is the argument that plaintiffs have standing because the injury is “imminent.” *See* Resp. Merits Br. at 22-24 & n.5 (collecting cases that turn on the imminence of harm). But imminence is merely a way to address a concrete, particularized injury that has not yet occurred. *E.g.*, *Bryant v. Yellen*, 447 U.S. 352, 366-67 (1980). It cannot transform a generalized injury into a particularized one. *See* Pet. Merits Br. at 25-26 (discussing *Stewart’s* application of *Bryant*). And, as the Secretary explained in her opening brief, cases such as *Texas Department of Public Safety v. Moore*, 985 S.W. 2d 149 (Tex. App.—Austin 1998, no pet.), ignore the text of the UDJA and stretch that statute so far that they undermine its constitutionality, *see* Pet. Merits Br. at 21 n.13 & 46 n.28 (asking the Court to disapprove *Moore* and similar court of appeals decisions).

the special standing rule for *municipal special elections*, for the *petitioners who initiate the election*, ends when the *petitioners'* interest has been given full effect—not that voters in *all* elections have standing until their votes are given full effect. *See* Pet. Merits Br. at 22-23 & n.14.

The Secretary is aware of no Texas or federal determination that plaintiffs need not demonstrate a particularized injury to bring a lawsuit regarding the election process, and plaintiffs cite none. Texas courts address such lawsuits have been brought in *quo warranto* proceedings following a disputed election or in mandamus suits against officials prior to elections. *E.g.*, *Wood v. State ex rel. Lee*, 133 Tex. 110, 112-13, 126 S.W.2d 4, 5 (1939); TEX.ELEC.CODE §273.061. The procedural requirements of those two legal remedies ensure that standing exists. And the relevant federal cases⁶ consistently require a showing of particularized injury in addition to plaintiffs' status as voters. *E.g.*, *Stewart*, 444 F.3d at 854; *see also* Pet. Merits Br. at 24-26 (explaining why the federal precedents on which plaintiffs and the court of appeals rely are inapposite).

6. Like the special municipal election rule, federal law recognizes that voting apportionment cases can be brought by voters based on their status as voters because, under the legal theory in apportionment cases, it is impossible to hold an election without hurting a plaintiff's rights. *See* Pet. Merits Br. at 25-26 n.1. Not so in this case, because it is entirely possible to hold an election in Travis County without imposing an injury. Plaintiffs allege only that certain security measures would make it easier to cure a hypothetical miscounted election—they do not allege that all elections in Travis County will necessarily be miscounted or otherwise statutorily or constitutionally defective absent a contemporaneous paper record, only that such elections will be marked by a decrease in voter confidence triggered by the absence of a contemporaneous printed record. Neither the Election Code nor Article VI requires that confidence under the Court's precedent. *See infra*, Part II.C.

Second, relying on a court of appeals decision, plaintiffs argue that the UDJA creates a more relaxed standard for standing than the constitution requires. Resp. Merits Br. at 22-23 (citing *Ainsworth v. Oil City Brass Works*, 271 S.W.2d 754, 760-61 (Tex. Civ. App.—Beaumont 1954, no writ)). Plaintiffs ignore this Court’s refusal of the writ in *Garwood Irrigation Co. v. Lundquist*, 252 S.W.2d 759, 760 (Tex. Civ. App.—Galveston 1952, writ ref’d), which made clear that UDJA claims must comply with the Constitution’s standing requirements.⁷ That holding makes sense, of course, because a statute cannot impose a lower procedural burden than the constitution requires.

Plaintiffs rationalize their argument that the UDJA lowers the standing bar by arguing that the statute contemplates resolution of future disputes. *See* Resp. Merits Br. at 22-23 (discussing liberal construction language of §37.002, but failing to address Secretary’s arguments regarding text of UDJA). But the UDJA contains *no* text suggesting that it affords relief from *future* injuries. For most claims, the UDJA merely says that “a person interested” under a written instrument can seek a declaration. *Id.* For contract claims, it provides a remedy “either before or after there has been a breach.” *Id.* §37.004(b). But §37.004(b) does not contemplate resolution of future injuries, even in contract suits. Breach is merely an

7. At the same time, Lundquist’s statement that there need not be a cause of action apart from the UDJA was made in the context of a suit between private parties. *See* 252 S.W.2d at 760-61. It is better understood as holding that, in private lawsuits, a request for declaratory relief cannot be barred because plaintiffs have not made out the elements of a common-law cause of action. Cases like *Moore* have overread this statement. Governmental defendants cannot be subjected to suit except for limited causes of action, defined by their elements. If the UDJA does not confer jurisdiction or create a cause of action—and it does not—it cannot create a waiver of immunity by setting out the parameters of a cause of action for which immunity is waived. *See* Pet. Merits Br. at 46 & n.28.

element of the common-law cause of action on a contract. *E.g.*, *W. Union Tel. Co. v. Edmondson*, 91 Tex. 206, 208-09, 42 S.W.549, 550 (1897). Parties to a contract can have a concrete, particularized dispute about the contract without first breaching it. Such a dispute exists in the present, not the future. As the Secretary explained in her opening brief, Pet. Merits Br. at 21 & n.13, the Third Court’s precedent suggesting that there is no particularized injury for declaratory-judgment claims undermines that statute’s constitutionality, ignores its text, and provides an additional reason to grant this petition.

Third, having failed to indicate any assertion in the plaintiffs’ affidavits that would support standing, plaintiffs turn to Wallach’s expert affidavit and additional extra-record allegations of voting malfunction in other counties to support their assertions of particularized injury. Resp. Merits Br. at 3-4; 14-15 (asserting that it is a fact that the eSlate system does not meet the Election Code’s recount and audit requirements). But Wallach does not purport to have personal knowledge of any injury to these plaintiffs, nor does he perform any statistical analysis indicating the existence of a particularized injury. Plaintiffs’ position is in sharp contrast to a case like *Stewart*, in which plaintiffs used statistical analysis of previous elections to show that the plaintiffs as a group had suffered specific, concrete injuries whenever the voting system in quest was used, and asserted that the same system would be used imminently. 444 F.3d at 854. Plaintiffs’ disconnected anecdotes do not allege such a particular, imminent injury to voters in Travis County—it could well be that Travis

County's system of running elections and training polling personnel will avoid the problems that have arisen elsewhere.

Finally, in addition to their reliance on Wallach's views of what Texas law requires, plaintiffs maintain that there is standing to support their equal protection claim based on the assertion that recounts will be performed differently in counties where electronic ballots without paper records are used from those that keep a paper record. Resp. Merits Br. at 20 (arguing that the different recount methods that apply to voters). But plaintiffs' affidavits do not assert this difference as an injury in fact, nor do they explain how it is particularized or imminent. Nor do they seek relief consistent with an equal-protection claim: plaintiffs want the eSlate declared insufficient to meet the Election Code's requirements, not the Election Code declared unconstitutional because it requires that votes collected using different systems be recounted differently. *See* 1.CR.14-15 (¶¶ A, B, & C). And even if the difference in recount methods were sufficient to demonstrate an injury, it could not confer jurisdiction in this case because the Secretary took no action to distinguish between Travis County voters and voters in other counties. As the Secretary explained in her opening brief, it was Travis County that selected eSlate without contemporaneous paper ballot from the list of certified systems. Pet. Merits Br. at 38-39.

B. The Election Code's Plain Language Forecloses Plaintiffs' Statutory Claims.

Seeking to prevent the Court from applying the Election Code as written, or apply its own Article VI precedent, Plaintiffs suggest that it is improper to look past the legal

allegations contained in their live petition to determine what Texas law actually is. *See* Resp. Merits Br. at 31-32 (incorrectly arguing that *Cobb* allows suit against state officials whenever a plaintiff seeks a declaration of rights). The reason for this move is clear—the only statutory argument plaintiffs can muster is that §213.016 of the Election Code (which governs recount procedures) somehow violates §214.048 of the same code (which mandates that recounts be possible). The argument that the Election Code violates itself is simply wrong. *See* TEX. GOV'T CODE §311.021(2). And plaintiffs do not even try to reconcile their lawsuit with the cases interpreting Article VI.

Unable to muster a substantive argument, plaintiffs now argue that courts cannot reject facially incorrect legal arguments raised by plaintiffs at the jurisdictional stage. Contrary to plaintiffs' assertions, such an inquiry does not improperly delve into the merits of a lawsuit. Rather—as in all immunity analysis—the jurisdictional inquiry requires analysis of the relevant law to determine whether the alleged facts, taken as true, fall within the category of claims for which immunity from suit is waived. *E.g., Short*, 133 Tex. at 217-19, 126 S.W.2d at 962-63.

- 1. *Cobb* and *Heinrich*—and the eighty years of precedent on which they rely—require the courts to test a plaintiff's petition to see if it states a valid *ultra vires* claim before exercising jurisdiction.**

Plaintiffs assert that *Heinrich* and *Cobb* stand for the proposition that immunity from suit does not in effect apply to claims against state officials, who under their theory could be sued whenever a plaintiff alleged an illegal act. Resp. Merits Br. at 31.

Not so. *Heinrich* and *Cobb* distinguish between suits against state officials and suits against state entities by recognizing that the exercise of jurisdiction is appropriate only when the lawsuit seeks to enjoin the official from acting *ultra vires*. If the facts alleged in a plaintiffs' petition describe a decision that is within the defendant official's discretion, then the suit is in substance a suit to control state action because the resulting judgment will necessarily direct the defendant in making what ought to be a discretionary choice.⁸ *E.g.*, *Short*, 133 Tex. at 217-18, 126 S.W.2d at 962-63.

Cobb's discussion of *Short* confirms the Secretary's understanding of both *Cobb* and *Heinrich*. "[T]he purpose" of the lawsuit in *Short* "was to control the Land Commissioner when acting within the scope of authority lawfully conferred upon him." *Cobb*, 144 Tex. at 366, 190 S.W.2d at 712. *Short* involved a claim that the Commissioner of the General Land Office had violated limits on his statutory authority by executing certain mineral leases to private lessees. 133 Tex. at 209-216, 126 S.W.3d at 955. The Court construed a number of statutes to determine whether the allegations described an act outside the Commissioner's authority, *e.g.*, *Short*, 133 Tex. at 221, 126 S.W.2d at 957-61, concluded that the

8. The court-of-appeals cases on which plaintiffs rely for this proposition provide no good reason for abandoning procedure set out in *Short*. The cases cited in the text, *see* Resp. Merits Br. at 26-27, are both irrelevant and counter to plaintiffs' argument. *Courtney v. University of Texas System*, 806 S.W.2d 277, 284-85 (Tex. App.—Fort Worth 1991, writ denied), concluded that suit could be brought under 42 U.S.C. §1983, not that suit was available under the UDJA. The court of appeals expressly refused Courtney's invitation to overrule the *ultra vires* doctrine, which it held barred his Texas-law claims. *Id.* at 287 (discussing point of error nine). *Laborers' International Union of North America v. Blackwell* is similarly irrelevant because it addresses only justiciability, not immunity. 482 S.W.2d 327 (Tex. Civ. App.—Amarillo 1972, no writ). Moreover, *Laborers' International* undermines plaintiffs' standing argument. *See id.* at 329 (reasoning that plaintiffs must have constitutional standing to prosecute a UDJA claim).

Commissioner’s authority extended to the acts alleged, *id.* at 961-62, and then held that dismissal on immunity grounds was the appropriate remedy, *id.* at 965 (concluding that “the plea to the jurisdiction . . . should have been sustained”).⁹ Thus, by citing *Short, Cobb* adopts the longstanding rule that (1) a court must construe the relevant statutes and constitutional provisions to determine whether a plaintiff has stated a valid *ultra vires* claim and (2) if he has not, the suit must be dismissed. To that end, the *Cobb* court found jurisdiction because the Comptroller’s interpretation of the statute in question had *already* been ruled *ultra vires* in previous decisions—there was no need to exercise jurisdiction to determine the validity of the Comptroller’s actions *Id.* 144 Tex at 365, 190 S.W.2d at 712 (applying the substantive holding of *Anderson, Clayton, & Co. v. State of Tex.*, 122 Tex. 530, 544, 62 S.W.2d 107 (1936)). *Cobb*’s application of *Anderson, Clayton* cannot be read as allowing the trial court, on remand, to determine whether the defendant official had violated the law.

9. The other decisions cited in *Cobb* likewise support the Secretary. *Herring v. Houston National Exchange Bank* held that suits on contract against state officials are barred by sovereign immunity because they seek to control the State’s actions as a contracting party, 113 Tex. 264, 268-270, 253 S.W. 813, 814-15 (Tex. 1923). In reaching this conclusion, the Court analyzed the pertinent provisions of the appropriations act to confirm that there was no basis for believing that the defendant officials had a ministerial obligation to dispense the funds in question. *Id.* 113 Tex. at 270, 253 S.W. at 815 (construing the language of the general appropriations act for that biennium). *Ford Motor Co. v. Department of Treasury of State of Indiana*, 323 U.S. 459 (1945), *overruled on other grounds*, *Lapides v. Bd. of Regents of Univ. Sys. Of Georgia*, 535 U.S. 613 (2002), set the outer limits of the federal *Ex Parte Young* doctrine—which states that suits against state officials are available only when the allegations, if true, would demonstrate a violation of federal law by a state official, 209 U.S. 123 (1908)—by holding that such suits could not result in the payment of money damages. Under *Ex parte Young*, a state official is considered distinct from the State to the extent that the plaintiff’s lawsuit seeks prospective injunctive relief so long as the claim is brought under the federal Constitution. But the United States Supreme Court has long cautioned that courts should not so broadly interpret *Young* so as to be a basis for federal court jurisdiction in every case where a state official is sued for equitable relief in his individual capacity. See *Idaho v. Cœur d’Alène Tribe of Idaho*, 521 U.S. 261, 270 (1997) (Kennedy, J.) (plurality op.) (collecting cases).

Plaintiffs' description of the *Cobb* rule unwittingly confirms the Secretary's position. They describe the *Cobb* rule as being "that an action to determine or protect a private party's rights against a state official who has acted without legal authority does not implicate sovereign immunity." Resp. Merits Br. at 31 (citing *Cobb*, 144 Tex. 713-14, 284 S.W.3d at 368). Thus, by plaintiffs' own description, if the alleged acts would not violate the law even if true, there is no jurisdiction to sue the defendant official.

At the same time, plaintiffs read *Cobb* for the proposition that lawsuits against state officials are never barred by immunity from suit. See Resp. Merits Br. at 30-34; see *Andrade*, 287 S.W.3d at 251-52; see also *City of Webster*, 2009 WL 3151345, at *12 (Patterson, J., dissenting). *Cobb*'s progeny rejects that reading. *Cobb* reserved the issue whether the UDJA creates jurisdiction. 144 Tex. At 369-370, 190 S.W.2d at 714. Ultimately, the Court held that the UDJA does not create jurisdiction. *E.g.*, *State v. Morales*, 869 S.W.2d 941, 947 (Tex. 1994) (holding that a plaintiff's request for declaratory relief cannot, by itself, "confer jurisdiction on the court, nor can it change the basic character of a suit"). As in federal law, the UDJA is "merely a procedural device for deciding cases already within a court's jurisdiction." *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993); see also *Chenault v. Phillips*, 914 S.W.2d 140, 141 (Tex. 1996) (per curiam) (holding that UDJA is not a grant of jurisdiction).

Nor are plaintiffs correct to suggest that the statement *Federal Sign v. Texas Southern University*, 951 S.W.2d 401, 404 (Tex. 1997), that the UDJA can be used to obtain

declarations of rights generally survives *Heinrich*. See Resp. Merits Br. at 25-27. *City of El Paso v. Heinrich* forecloses the broad reading of *Federal Sign* by holding that at least some suits for the declaration of rights under a statute are barred by sovereign immunity. See *Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009) (concluding that “suits to require state officials to comply with statutory or constitutional provisions are not prohibited by sovereign immunity,” rather than holding that the UDJA allows requests for declarations of rights, as a general matter). Nor would *Federal Sign* support plaintiffs had it not been limited by *Heinrich*. All of the cases cited in *Federal Sign* applied the *Short/Cobb* analysis and allowed suit to proceed only to the extent the plaintiffs’ allegations described an *ultra vires* act as a matter of law.¹⁰ See *Fed. Sign*, 951 S.W.2d at 404 (citing *Cobb*; *Dir. of Dep’t of Agric. & Env’t v. Printing Industries Ass’n of Tex.*, 600 S.W.2d 264, 265-66 (Tex. 1980) (dismissing plaintiffs’ claim for want of jurisdiction because alleged acts would not, if true, violate Texas Constitution); *Tex. Highway Comm’n v. Tex. Ass’n of Steel Imps., Inc.*, 372 S.W.2d 525, 530 (Tex. 1963) (holding that, because challenged action violated statute as a matter of law, “[i]t

10. Most of the cases cited in plaintiffs’ footnote 6 offer little support to plaintiffs’ arguments because they are merely court of appeals decisions. See Resp. Merits Br. at 26 n.6. This Court’s opinions consistently apply the *Short/Cobb/Heinrich* analysis. E.g., *W.D. Haden Co. v. Dodgen*, 158 Tex. at 78, 308 S.W.2d at 840 (expressly recognizing that immunity bars suits to control state action). At any rate, many of the decisions on which plaintiffs rely state or apply the test correctly. E.g., *Humana Ins. Co. v. Tex. Health Ins. Risk Pool*, 257 S.W.3d 402, 408-09 (Tex. App.—Corpus Christi 2008, no pet.) (concluding that immunity barred claim against Insurance Risk Pool in part because pool had acted within its statutory authority as a matter of law); *City of Round Rock v. Whiteaker*, 241 S.W.3d 609, 629-630 (Tex. App.—Austin 2007, pet. denied) (recognizing that there is jurisdiction over *ultra vires* claim only if it describes a violation of law). The others are incorrect and should be disapproved. E.g., *Bell v. City of Grand Prairie*, 221 S.W.3d 317, 325 (Tex. App.—Dallas 2007, no pet). The Fifth Circuit case, *TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999), is irrelevant because it address Eleventh Amendment immunity, not sovereign immunity in Texas court.

was wholly nugatory and hence the present proceeding cannot be classed as a suit against the state”).¹¹

Nor does *Heinrich* change the background rule applied in cases like *Short, Cobb, Printing Industries Association*, and *Steel Importers*. *Heinrich* certainly does not suggest that there was jurisdiction merely because Mrs. Heinrich sought injunctive relief—rather, the Court concluded that a jurisdictional fact issue existed as to what the defendant officials’ legal obligations, in fact, were. *Heinrich*, 284 S.W.3d at 376-77. If those obligations had been set out in a statute, rather than in a board resolution the substance of which was disputed, it would have been appropriate to dismiss Mrs. Heinrich’s claims for want of jurisdiction.

2. The *Short/Cobb/Heinrich* analysis is consistent with the policy behind allowing jurisdictional challenges to suits against state officials announced in the Court’s recent decisions.

The Secretary’s approach is also consistent with the underlying purpose of resolving immunity at the jurisdictional stage. The State should not be required to litigate invalid lawsuits. *See Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007). An *ultra vires* claim is allowed only under the fiction that the defendant official has acted outside of his authority and, therefore, is not acting on the State’s behalf. The determination whether the official is entitled to assert the State’s sovereign immunity *is* the jurisdictional

11. *See also Steel Imps.*, 372 S.W.2d at 531 (Griffin, J., dissenting) (“I would hold that the Highway Commission had the power and authority to pass Minute Order 48644, and that this is a suit against the state. I would, therefore, dismiss this cause.”).

question—if the alleged acts fall within the defendant official’s discretion, the case must be dismissed. *Compare State v. Epperson*, 121 Tex. 80, 86, 42 S.W.2d 228, 231 (1931) (finding jurisdiction because defendant official acted illegally), *with Printing Industries Ass’n*, 600 S.W.2d at 267 (dismissing lawsuit because alleged actions would never, as a matter of law, violate Texas Constitution); *see also Heinrich*, 284 S.W.3d at 372 (citing *Epperson*’s discussion of the *ultra vires* test with approval, while overruling *Epperson*’s rule for damages). Allowing a lawsuit to proceed without resolving that predicate issue would allow it to proceed without the establishment of a necessary element of jurisdiction. And it would render state officials amenable to suit regarding their discretionary acts in addition to any potential *ultra vires* claim.¹²

C. The Bulk of Plaintiffs’ Constitutional Claims Are Barred by *Wood* and *Barry*.

Permitting plaintiffs’ constitutional claims to proceed as pleaded would not only be substantive error, it would upend the appellate process and disturb this Court’s role in interpreting the Texas Constitution.¹³ In *Wood* and *State ex rel. Barry v. Connor*, 86 Tex.

12. Plaintiffs’ assertion that performing such analysis violates *Bland Independent School District v. Blue*, 34 S.W.3d 547 (Tex. 2000), *see* Resp. Merits Br. at 34-38, ignores *Blue*’s reasoning. *Blue* addressed the amount-in-controversy analysis, rather than immunity, and therefore did not address plaintiffs’ legal theory. Pet. Merits Br. at 37 n.24. Outside the amount-in-controversy context, the Court has consistently tested plaintiffs’ legal theories at the jurisdictional stage. *E.g.*, *State v. Lueck*, 290 S.W.3d 876, 881 (Tex. 2009).

13. Plaintiffs’ equal protection claim—which is based on the impact of a policy that treats different counties differently based on the choices of county officials—cannot be a valid equal protection claim against the Secretary because it is based on a decision the Secretary did not make. *See* Pet. Merits Br. at 37-40 (discussing, *e.g.*, *Tex. Dep’t of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 646 (Tex. 2004)). Plaintiffs offer no response.

133, 23 S.W.1103 (1893), the Court set out the parameters for litigating Article VI, §4. Suit is available under the section only if the ballot is not secret or the ballots are not numbered. 133 Tex. at 119, 126 S.W.2d at 9. Plaintiffs do not seek to invoke *Wood* and *Barry*, and they make no attempt to argue that their arguments are justiciable. *See* Pet. Merits Br. at 41-42 (analyzing plaintiffs’ petition). Similarly, like the non-justiciable provisions of §4, §2(c) requires the adoption of legislation to prevent fraud but does not establish a judicial mechanism for measuring the adequacy of that fraud prevention or to impose fraud-prevention mechanisms through judicial action. Under the same theory, whether the fraud-prevention mechanisms are adequate is non-justiciable. *Cf. Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 781-82 (Tex. 2005) (discussing the limits on judicial authority to impose particular policy outcomes). Thus, a proper §2(c) claim would allege that the Legislature had provided no anti-fraud measures at all. Plaintiffs do not allege—because they cannot—that the Election Code itself violates §2(c). *See* Pet. Merits Br. at 42-43 (pointing out the Code’s fraud-prevention mechanisms).

A claim under the constitution is barred by immunity if the alleged facts—or the uncontroverted evidence of jurisdictional fact—do not as a matter of law invoke the constitutional claim relied upon.¹⁴ *E.g., Printing Indus. Ass’n*, 600 S.W.2d at 265 (deciding

14. Footnote six of *Heinrich* does not create jurisdiction over these claims. 284 S.W.3d at 373 n.6. Footnote six does not stand for the proposition that the UDJA waives immunity from suit for constitutional claims, generally. Rather, it merely states that “immunity” is waived if a government entity is required to be joined to a UDJA claim. *Heinrich*, 284 S.W.3d at 373 n.6 (discussing TEX. CIV. PRAC. & REM. CODE §37.006(b)). Section 37.006(b) does not require joinder of the Attorney General, the State, or any state entity in proceedings involving constitutional challenges to statutes. Rather, it merely requires that the Attorney

that claim fell outside of constitutional provision invoked); *City of Webster*, 2009 WL 3151345, at *3-*5 (dismissing lawsuit because plaintiffs did not validly allege the existence of a vested property right). In this case, the bulk of plaintiffs’ constitutional claims are barred because they fall outside the scope of the Court’s interpretation of the provisions of Article VI on which plaintiffs rely. *See* Pet. Merits Br. at 42-44.

III. EVEN IF §238.071 OF THE ELECTION CODE WAIVED IMMUNITY FROM SUIT, PLAINTIFFS ARGUMENTS RELYING ON §238.071 COULD AT MOST RESULT IN REMAND, NOT RENDITION.

Plaintiffs assert §238.071 of the Election Code as an alternative basis for jurisdiction, on the ground that their petition should be liberally construed to include a cause of action they chose not to plead. Resp. Merits Br. at 13, 27-29. They are simply wrong.

General be served with a copy of the relevant pleadings and entitles him to be heard. TEX. CIV. PRAC. & REM. CODE §37.006(b); *see Lone Starr Multi Theatres, Inc. v. Tex.*, 922 S.W.2d 295, 298 (Tex. App.—Austin 1996, no writ) (notice requirement does not make the Attorney General a proper defendant in such suits). Accordingly, in contrast to the *Heinrich* Court’s statements about its effect on a municipality’s *governmental* immunity, section 37.006(b) could not properly be viewed as waiving the State’s or a state entity’s *sovereign* immunity in suits involving constitutional challenges to statutes. *See* TEX. GOV’T CODE § 311.034 (explaining that “a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language”); *accord Tooke v. City of Mexia*, 197 S.W.3d 325, 328-29 (Tex. 2006); *cf.* TEX. GOV’T CODE §2001.038 (waiving state agencies’ sovereign immunity by expressly requiring them to be made parties to actions for declaratory relief regarding the validity of agency rules).

Nor does §37.006(a) waive the State’s immunity from suit. Section 37.006(a) requires joinder of “persons.” TEX. CIV. PRAC. & REM. CODE §37.006(a). The UDJA excludes the State from its definition of the term “person.” *Id.* §37.001. Thus, §37.006(a)’s requirement that all interested persons be joined to certain lawsuits does not, on its face, include the State or her officials. And the Legislature has amended the Code Construction Act to provide that a statute indicating that a “person” must be a party to a lawsuit “does not” constitute a waiver of the State’s immunity unless there is no other reasonable reading of the statute. TEX. GOV’T CODE §311.034. Here, there is another reasonable reading: while other parties must be joined in a UDJA action, the State may—at the Attorney General’s discretion—become involved in suits related to the constitutionality of a statute under §37.006(b).

The existence of a potential cause of action based on facts alleged in a plaintiff's petition but not raised in that petition is a basis for remand or repleading, not for denying the plea and exercising jurisdiction based on a faulty petition. *E.g.*, *County of Cameron v. Brown*, 80 S.W.3d 549, 558-59 (Tex. 2002). The rule is that the allegations in a plaintiff's petition are taken as true, *not* that the courts will take all steps to preserve jurisdiction over a defective petition. *E.g.*, *Tex Ass'n of Bus.*, 852 S.W.2d at 446. Under plaintiffs' rule, it would be impossible ever to dismiss a case on the pleadings for jurisdictional defects, even though it has long been the law that the plaintiff bears the burden of establishing jurisdiction from the moment he files his pleadings. *Id.*

And §238.071 is not a valid basis for remand in this case because it does not waive the Secretary's immunity from suit when she acts within her official capacity. Section 238.071 (1) is at best ambiguous as to whether the Secretary can be made a defendant; and (2) does not, by its plain language, expand the *ultra vires* cause of action as plaintiffs contend.

By contrast to factual allegations in a petition, statutory provisions implicating immunity are strictly construed in favor of immunity and any ambiguity is resolved in favor of the State. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003); TEX GOV'T CODE §311.034. In a 1986 amendment, §238.071 was amended to remove any mention of state officials and now states only that a person who is harmed by a violation of the code is "entitled to appropriate injunctive relief." TEX. ELEC. CODE §273.081; *see* Act

of Feb. 14, 1930, 41st Leg., 4th C.S., ch.4 1930 TEX. GEN. LAWS 4, 5, *repealed by* Act of May 13, 1985, 69th Leg., R.S., ch. 211, §9(a)(5), 1985 TEX. GEN. LAWS 802, 1076 (current version at TEX. ELEC. CODE §273.081)(superseded statute provided injunctive relief against government officials).¹⁵ The current language of §273.081 is therefore ambiguous, at best, as to whether the Secretary can be a defendant in such a suit. Because it is ambiguous, §273.081 cannot be read as a waiver of the Secretary’s immunity from suit as a matter of law. *Taylor*, 106 S.W.3d at 697. And the Legislature’s decision to remove the Secretary as a potential defendant in such suits suggests that §273.081 is intended to remove—not create—a waiver of immunity.

Nor does the current language §273.081 purport to incorporate or expand the scope of the *ultra vires* exception to immunity from suit. Nothing in §273.081 mentions suits against state officials. Nor does §273.081 suggest that there is jurisdiction over claims for injunctive relief describing an act that, on its face, does not violate the Elections Code. Rather, it states that:

A person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring.

Id. The availability of injunctive relief is predicated on the existence of a “violation or threatened violation” of the code. If the facts alleged in a petition do not describe a

15. Under the current statute, the proper procedure for requiring performance of any duty imposed by law in connection with elections is a writ of mandamus filed against a state official in a court of appeals. TEX. ELEC. CODE §§273.061, .063. Immunity from suit does not bar mandamus.

“violation” of the Code as a matter of law, §273.081 is not be invoked. The section does not attempt to expand the *ultra vires* cause of action so broadly that it allows suit against state officials for acts that are not, as a matter of law, violations of law. Unless the factual allegations in the petition describe a violation of law, as a matter of law, there is no jurisdiction.

PRAYER

For these reasons, the Court should grant the petition and either render judgment dismissing plaintiffs’ claims in their entirety or, in the alternative, render judgment dismissing the bulk of plaintiffs’ claims and remanding only the claims tied to the factual allegation that neither the Secretary nor the public has access to the coding software for Travis County’s electronic ballot system.

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I certify that on February 3, 2010, a true and correct copy of this Reply Brief on the Merits was served by certified U.S. mail, return receipt requested, on all appellate counsel of record in this proceeding as listed below:

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