NO. 2017-36216

HOUSTON FIREFIGHTERS' RELIEF AND RETIREMENT FUND,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
v.	§	HARRIS COUNTY, TEXAS
CITY OF HOUSTON, ET AL.,	§	
Defendants.	§	190TH JUDICIAL DISTRICT

CERTAIN DEFENDANTS' PLEA TO THE JURISDICTION

Defendants Sylvester Turner, Brenda Stardig, Jerry Davis, Ellen Cohen, Dwight Boykins, Dave Martin, Steve Le, Greg Travis, Karla Cisneros, Robert Gallegos, Mike Laster, Larry Green, Mike Knox, David Robinson, Michael Kubosh, Amanda Edwards, and Jack Christie (collectively "Defendants"), in their official capacity, file this Plea to the Jurisdiction seeking dismissal of all claims filed against them by Plaintiff Houston Firefighters' Relief and Retirement Fund ("HFRRF").

I. SUMMARY OF ARGUMENT

This Court should dismiss HFRRF's claims against Defendants for lack of subject matter jurisdiction because Defendants are immune from suit in this case.

HFRRF alleges that this Court has jurisdiction to hear its declaratory judgment claims pursuant to the Texas Declaratory Judgments Act (the "Declaratory Judgments Act") because HFRRF challenges the constitutionality of Texas Senate Bill 2190 ("SB 2190"). But Defendants' governmental immunity has not been waived for several reasons.

First, Defendants are immune from HFRRF's declaratory judgment claims because HFRRF has not met its burden to allege a valid waiver of immunity. And Texas law provides

that in order to allege a valid waiver of immunity, HFRRF must first meet its burden to establish a valid constitutional challenge to SB 2190. *See Gen. Servs. Com'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 599 (Tex. 2001) (dismissing inverse condemnation claim for want of jurisdiction because allegations did not state a takings claim); *see also Tex. Bay Cherry Hill, L.P. v. City of Fort Worth*, 257 S.W.3d 379, 395 (Tex. App.—Fort Worth 2008, no pet.) (when a plaintiff fails to allege facts that constitute a taking, dismissal for want of jurisdiction is appropriate) (citing *Gen. Servs. Com'n*, 39 S.W.3d at 600). For the reasons set forth in Certain Defendants' Response in Opposition to Plaintiff's Application for Temporary Injunction, Subject to Certain Defendants' Plea to the Jurisdiction, which is incorporated by reference as if fully set forth herein, HFRRF has not and cannot establish a valid constitutional challenge.

Second, the Declaratory Judgments Act "does not waive the state's sovereign immunity when the plaintiff seeks a declaration of his or her rights under a statute or other law." *Texas Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621 (Tex. 2011) (per curiam). To the extent HFRRF's claims for declaratory relief seek a declaration of HFRRF's rights under the predecessor statute to SB 2190, or an interpretation of that statute, Defendants are immune from those claims.

Third, the *ultra vires* exception to immunity does not apply to Defendants because their actions are in compliance with SB 2190—they have not taken any *ultra vires* (i.e. "unauthorized") action. *Sefzik*, 355 S.W.3d at 622 (*ultra vires* "claims may be brought against a state official for nondiscretionary acts unauthorized by law."). HFRRF cannot merely recast its constitutional challenge to SB 2190 into an *ultra vires* claim against City officials. *See Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 76-77 (Tex. 2015) (holding that the

ultra vires exception to sovereign immunity does not apply when a litigant challenges the validity of a statute with which the governmental official complied).

In addition, Defendants are also immune from HFRRF's *ultra vires* claims because those claims allege discretionary, and not ministerial acts. *See City of El Paso v. Heinrich,* 284 S.W.3d 366, 372-73 (Tex. 2009).

Finally, to the extent that HFRRF's Petition seeks retrospective relief, Defendants are immune from claims from such relief. *City of Dallas v. Albert*, 354 S.W.3d 368, 378-79 (Tex. 2011) (a party cannot obtain retrospective relief against a government entity or its officials, whether by a declaratory judgment action or an *ultra vires* claim, because such claims are barred by immunity).

For these reasons, this Court has no jurisdiction to determine HFRRF's claims against the City.

II. LEGAL STANDARD

A. This Court Must Dismiss Defendants Where, As Here, The Court Has No Subject-Matter Jurisdiction To Hear the Claims Against Defendants

It is well-established that where a trial court lacks subject matter jurisdiction to hear a plaintiff's claims, it must dismiss those claims. *Thomas v. Long*, 207 S.W.3d 334, 340 (Tex. 2006) ("the trial court lacks subject matter jurisdiction and must dismiss those claims without prejudice to refiling"); *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 150 (Tex. 2012) (same). "A plea to the jurisdiction seeks to dismiss a case for want of jurisdiction." *See City of Waco v. Kirwan*, 298 S.W.3d 618, 621 (Tex. 2009).

Governmental immunity from suit deprives a trial court of subject matter jurisdiction unless such immunity is waived. *See Mission Consol. Ind. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 & n.2 (Tex. 2008); *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006).

The party suing the governmental entity has the burden to both plead and prove consent to suit under a clear and unambiguous constitutional or statutory waiver of that immunity. *See Tex. Nat. Res. Cons. Comm'n v. IT-Davy*, 74 S.W.3d 849, 853-55 (Tex. 2002); *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999).

B. This Court Should Rule on Defendants' Plea To The Jurisdiction Before Considering HFRRF's Application For Temporary Injunction

As an initial matter, this Court should rule on Defendants' plea to the jurisdiction before it considers HFRRF's application for a temporary injunction. *City of Galveston v. Gray*, 93 S.W.3d 587 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

In *Gray*, the court held that the trial court abused its discretion in refusing to rule on the city's and the county's pleas to the jurisdiction and in granting Gray's motion for continuance. *Id.* at 591. The court found that a governmental unit's entitlement to be free from suit is effectively lost if the trial court erroneously assumes jurisdiction and subjects the governmental unit to pre-trial discovery and the costs incident to litigation; therefore, the trial court abused its discretion and there was no adequate remedy at law. *Id.* at 593 (granting a petition for writ of mandamus and ordering the trial court to rule on the pleas to the jurisdiction); *see also In re Greenwell*, 160 S.W.3d 286, 288 (Tex. App.—Texarkana 2005, orig. proceeding) (granting mandamus to require the trial judge to rule on a city's motion for partial summary judgment based on governmental immunity when the judge refused to rule on the motion until after trial).[1]

[1] *See also In re Kleven*, 100 S.W.3d 643, 644-45 (Tex. App.—Texarkana 2003, no pet.) (five and six-month delays on ruling on discovery motions was abuse of discretion); *In re Shredder Co., L.L.C.*, 225 S.W.3d 676, 679-80 (Tex. App.—El Paso 2006, no pet.) (eight-month delay on ruling on motion to compel arbitration after hearing was abuse of discretion); *Safety-Kleen Corp. v. Garcia*, 945 S.W.2d 268, 269 (Tex. App.—San Antonio 1997, no writ) (ten-month delay in setting hearing on motion to compel discovery was abuse of discretion); *O'Donniley v. Golden*, 860 S.W.2d 267, 269 (Tex. App.—Tyler 1993, no writ) (thirteen-month delay in ruling on motion for appointment was an abuse of discretion).

Here, if the Court considers HFRRF's application for temporary injunction before ruling on Defendants' plea to the jurisdiction, Defendants stand to lose much more than the city and the county did in *Gray*. In addition to being subject to discovery and the costs of litigation—which alone was enough to trigger a mandamus remedy in *Gray*—Defendants in this case are facing a temporary injunction which threatens to invalidate a duly enacted Texas law and forcibly alter the budget for the entire City of Houston. Accordingly, this Court should rule on the plea to the jurisdiction before considering HFRRF's application for temporary injunction.

III. ARGUMENT & AUTHORITIES

A. Defendants Are Entitled To Dismissal of HFRRF's Declaratory Judgment Claims For Want of Subject Matter Jurisdiction

1. Defendants are immune from HFRRF's declaratory judgment claims because HFRRF has not met its burden to establish a valid constitutional challenge to SB 2190

"When bringing suit against a governmental unit, the plaintiff bears the burden of establishing the court's subject matter jurisdiction by alleging a valid waiver of immunity." *Anheuser–Busch, LLC v. Harris Cty. Tax Assessor–Collecto*r, No. 01–15–00422–CV, 2016 WL 5920766, at *5 (Tex. App.–Houston [1st Dist.] Oct. 11, 2016, no pet. h.). Here, in order to allege a valid waiver of immunity, HFRRF must meet its burden to establish a valid constitutional challenge to SB 2190. *City of Dallas v. Turley*, 316 S.W.3d 762, 771-72 (Tex. App.—Dallas 2010, pet. denied) (holding that the trial court erred in denying the city's plea to the jurisdiction because plaintiffs did not establish a valid challenge to a city ordinance).[2]

[2] If a plea to the jurisdiction challenges the existence of jurisdictional facts, courts consider relevant evidence when necessary to resolve the jurisdictional issues raised, even where those facts implicate the merits of the case of action. *See Kirwan*, 298 S.W.3d at 622-24; *Garcia*, 253 S.W.3d at 657-58. Here, given the overlap between the validity of HFRRF's constitutional claims and the existence of a valid waiver of immunity, the Court should consider the constitutionality challenge to SB 2190.

Here, HFRRF has not alleged a valid waiver of immunity against Defendants because it has not met its burden to establish a valid constitutional challenge to SB 2190. The reasons for this are set forth in Certain Defendants' Response in Opposition to Plaintiff's Application for Temporary Injunction, Subject to Certain Defendants' Plea to the Jurisdiction, which Defendants incorporate fully herein.

2. The Defendants are immune from HFRRF's claims for declaratory relief to the extent HFRRF seeks a declaration of its rights under Article 6243e.2(1), or an interpretation of Article 6243e.2(1)

The Declaratory Judgments Act "does not waive the state's sovereign immunity when the plaintiff seeks a declaration of his or her rights under a statute or other law." *Sefzik*, 355 S.W.3d at 621. Similarly, the Declaratory Judgments Act also does not waive immunity for claims seeking an interpretation of an ordinance or statute. *See City of McKinney v. Hank's Rest. Group, L.P.*, 412 S.W.3d 102, 112-13 (Tex. App.—Dallas 2013, no pet.)(holding that the City of McKinney was immune from several of plaintiff's requests for declaratory relief because those requests all "involve[d] claims that City officials [we]re violating or misapplying the law in some respect."); *Becky, Ltd. v. City of Cedar Park*, 2017 WL 2224527, at *5-7 (Tex. App.—Austin, May 19, 2017, no pet. h.)(holding that the Declaratory Judgments Act did not waive the City of Cedar Park's governmental immunity because plaintiff was "seeking a declaration of rights and challenging the City's actions under the ordinances.").

Here, HFRRF seeks a declaration that the City must "allocate funding in accordance with the existing version of Article 6243e.2(1), including among other things, the [HFRRF] Board's adopted rate of return." *See* HFRRF's Brief in Support of Its Application for Temporary Injunction, at 2. To the extent that claim amounts to HFRRF seeking a declaration of its rights under Article 6243e.2(1), or an interpretation of Article 6243e.2(1), Defendants are immune from that claim.

B. Defendants Are Also Immune From HFRRF's *Ultra Vires* Claims Because Defendants Acted In Compliance With SB 2190 And HFRRF Cannot Recast Its Constitutional Challenge Into An *Ultra Vires* Claim.

HFRRF's *ultra vires* claims are improper for two reasons: (1) Defendants have not taken any *ultra vires* action; and (2) Defendants cannot merely recast its constitutional challenge to SB 2190 into an *ultra vires* claim against City officials.

An *ultra vires* claim against a public official has two fundamental components: "(1) authority giving the official some (but not absolute) discretion to act and (2) conduct outside of that authority." *Hall v. McRaven*, 508 S.W.3d 232, 239 (Tex. 2017). Put simply, in order for HFRRF to have a valid *ultra vires* claim, the Defendants must have taken some action "unauthorized" by current binding law. *See Sefzik*, 355 S.W.3d at 621. HFRRF cannot make that showing in this case. It is undisputed that SB 2190 is the law, and that it binds the Defendants. *See* Amended Petition ¶¶ 32, 38. And it is undisputed that HFRRF's claims are based on Defendants' acts that were done pursuant to the terms of SB 2190. *See* Amended Petition ¶ 40. Thus, because Defendants' acts are authorized by SB 2190, HFRRF's *ultra vires* claim is improper.

Because it cannot show that the Defendants committed an *ultra vires* act, HFRRF instead improperly attempts to recast its constitutional challenge to SB 2190 into an *ultra vires* claim against City officials. But that attempt fails. When a plaintiff does not assert an *ultra vires* claim, but instead seeks declaratory or injunctive relief to invalidate existing law, the proper defendant is the governmental entity that enacted the challenged law, not the official. *See Patel*, 469 S.W.3d at 76-77 (because suit sought to invalidate statute and regulations as unconstitutional, not to secure official's compliance with law, it was not *ultra vires* action and state government agency was properly named as party rather than official); *Texas Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 634 (Tex. 2010) (holding that

allegations against the lottery commissioner were not *ultra vires* allegations because the claim challenged a statute and was not one involving a government officer's action or inaction).

In *Patel*, several merchants practicing commercial eyebrow threading sued the Texas Department of Licensing and Regulation ("TDLR"), the Texas Commission of Licensing and Regulation (the "Commission"), and the Commission's members, claiming that Texas' licensing statutes and regulations violated the Texas Constitution. *Patel*, 469 S.W.3d at 73. The court observed that the Commission members were immune from suit, and that the *ultra vires* exception would not apply because the plaintiffs challenged the constitutionality of the statutes, rather than claiming the officials exceeded their authority:

> In this case, the Threaders did not plead that the Department and Commission officials exceeded the authority granted to them; rather, they challenged the constitutionality of the cosmetology statutes and regulations on which the officials based their actions.
>
> . . .
>
> **Accordingly, because the Threaders challenge the validity of the cosmetology statutes and regulations, rather than complaining that officials illegally acted or failed to act, the ultra vires exception does not apply.**

Id. at 76-77 (emphasis added).

Thus, under *Patel*, HFRRF's attempts to recast constitutional challenges to SB 2190 into an *ultra vires* claim against City officials is not permissible. And, this result makes sense. To hold otherwise would place a governmental official in a Hobson's choice: If the governmental official complies with a statute that a litigant claims is unconstitutional, the governmental official would be acting *ultra vires*; but if the governmental official refuses to comply with the statute, the official still is acting *ultra vires*.[3]

[3] One appeals court has held that a plaintiff could bring both a declaratory judgment claim against a governmental entity seeking to invalidate certain state statutes the entity did not enact, and an *ultra vires* claim that an employee of

C. Defendants Are Also Immune From HFRRF's *Ultra Vires* Claims Because Those Claims Do Not Allege Ministerial Acts

Defendants are also immune from *ultra vires* claims because HFRRF does not allege complaints about ministerial acts—but discretionary ones. Immunity does not bar *ultra vires* suits seeking to compel compliance with ministerial duties. *See Heinrich*, 284 S.W.3d at 372. But a duty is only ministerial where "the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion." *See Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991) (emphasis added). Similarly, to fall within the limited *ultra vires* exception to governmental immunity under Texas law, "a ***suit must not complain of a government officer's exercise of discretion***, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act." *See Heinrich*, 284 S.W.3d at 372 (emphasis added); *see also Kassen v. Hatley*, 887 S.W.2d 4, 9, 10 (Tex. 1994) (emphasis added) (citation omitted) (confirming that resource allocation is discretionary in explaining that "[a]t times, government doctors and ***nurses must decide how to allocate a scarce pool of state resources among possible recipients***. Because of these circumstances, the good faith performance of governmental responsibilities should not be subject to second-guessing in the courtroom.").[4]

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the governmental entity had acted *ultra vires* in enforcing the allegedly invalid statutes. *See Lone Star College Sys. v. Immigration Reform Coalition of Tex. (IRCOT)*, 418 S.W.3d 263 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). However, in *Patel*, which was decided two years after *IRCOT,* the Texas Supreme Court expressly repudiated the logic applied in *IRCOT*. *See Patel*, 469 S.W.3d at 76 (reasoning that permitting a plaintiff to both challenge the constitutionality of a statute, and assert an *ultra vires* claim against a government official complying with that statute, "would effectively immunize [the State] from suits claiming a statute is unconstitutional—an illogical extension of th[e] underlying premise" that "the State is not responsible for unlawful acts of officials.").

[4] Other court decisions regarding legislative immunity confirm that budgetary appropriation and allocation are discretionary matters. *See In re Perry*, 60 S.W.3d 857, 860 (Tex. 2001) (orig. proceeding) ("An action is legislative in nature when it reflects a discretionary, policymaking decision of general application, rather than an individualized decision based upon particular facts."); *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998) ("We need not determine whether the formally legislative character of petitioners' actions is alone sufficient to entitle petitioners to legislative immunity, because here the ordinance, in substance, bore all the hallmarks of traditional legislation. The ordinance

Here, HFRRF seeks to compel the City officials to undertake specific budgetary appropriation and allocation. Budgets are by their nature are highly discretionary and require the City officials to make judgments about prioritizing funding between many competing projects and interests. Thus, because HFRRF seeks to compel discretionary, and not ministerial, acts, Defendants are immune from HFRRF's mandamus and *ultra vires* claims under Texas law.

D. Defendants Are Immune From HFRRF's Claims For Retrospective Relief

To the extent that HFRRF's Petition seeks retrospective relief, the Defendants are immune from claims for such relief. A party cannot obtain retrospective relief against a government entity or its officials, whether by a declaratory judgment action or an *ultra vires* claim, because such claims are barred by immunity. *See Albert*, 354 S.W.3d at 378-79. It is well-settled that a party cannot circumvent governmental immunity by characterizing a suit for money damages as a claim for declaratory judgment. *Id*. (citing *City of Houston v. Williams,* 216 S.W.3d 827, 828-29 (Tex. 2007) (per curiam)). Such claims seeking retrospective monetary relief are barred by immunity where the injury alleged has already occurred leaving the claimant with only one plausible remedy—an award of money damages. *Id*. at 374. A successful claimant is entitled to only prospective relief "as measured from the date of injunction." *Id*. at 376 (citing *Edelman v. Jordan*, 415 U.S. 651, 669 (1974)).

Here, HFRRF requests "[r]etrospective relief in the form of a money judgment for any underpayment of monies owed by the City to the Fund for failing to act in act in accordance with Article 6243e.2(1) and Texas Constitution article XVI, section 67, from July 1, 2017 to the date of the Final Judgment[.]" *See* First Amended Petition, at 18. Claims for such retrospective relief

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reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents.").

are clearly barred by immunity. Accordingly, to the extent that HFRRF seeks this or any other retrospective relief, this Court should find that Defendants are immune from such a claim.

IV. CONCLUSION & PRAYER

Accordingly, for the foregoing reasons, Defendants respectfully request the Court to sustain this Plea to the Jurisdiction, enter an order dismissing all of HFRRF's claims against Defendants in this case for want of subject-matter jurisdiction, and grant any and all such other and further relief, whether at law or in equity, to which Defendants may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This pleading has been served upon all counsel of record in compliance with the Texas Rules of Civil Procedure on June 20, 2017:

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