CAUSE NO. 2024-13851

STATE OF TEXAS, *Plaintiff*, v. AMANDA McGEE, in her official Capacity as Board President and Trustee for Place 7, KIRK VAUGHN, in his official capacity as Board Vice President and Trustee for Place 4, RAY BURT, in his official capacity as Board Secretary and Trustee for Place 3, MATT DUTTON, in his official capacity as Trustee for Place 6, DEAN WARREN, in his official capacity as Trustee for Place 2, JARED DAGLEY, in his official capacity as Trustee for Place 1, JEREMY PHILLIPS, in his official capacity as Trustee for Place 5, BENNY SOILEAU, in his official capacity as Superintendent of Schools, Huffman Independent School District, *Defendants.*	§	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 269th JUDICIAL DISTRICT

DEFENDANTS' ORIGINAL ANSWER, PLEA TO THE JURISDICTION, AND RESPONSE TO PLAINTIFF'S APPLICATION FOR TEMPORARY INJUNCTION

Defendants Amanda McGee, in her official capacity as Board Secretary[1] and Trustee for Place 7; Kirk Vaughn, in his official capacity as Board President and Trustee for Place 4; Ray Burt, in his official capacity as Assistant Board Secretary and Trustee for Place 3; Matt Dutton, in his official capacity as Trustee for Place 6; Dean Warren, in his official capacity as Trustee for Place 2; Jared Dagley, in his official capacity as Board Vice President and Trustee for Place 1; Jeremy Phillips, in his official capacity as Trustee for Place 5 (collectively, the "Trustees"); and Benny Soileau, in his official capacity as the Superintendent of Schools of the Huffman Independent School District, file this Plea to the Jurisdiction, Original Answer to Plaintiff's Original Petition, and Response to Plaintiff's Application for Temporary Injunction, as follows:

[1]The State's petition misidentifies the current roles of several members of the Board of Trustees.

INTRODUCTION

The Attorney General filed this lawsuit as a politically-motivated publicity stunt to help turn out anti-public education voters in advance of the Republican primaries.[2] Having failed to pass his voucher agenda through traditional means, the Governor vowed to impose it "the hard way." In furtherance of that threat, the Attorney General seeks to use the power—and public funds—of the State to trample upon the rights of local officials who dare to support Texas public schools. This lawsuit offends the United States Constitution and Texas law.

BACKGROUND

The Huffman Independent School District serves approximately 3,600 public school students in northeast Harris County, Texas. As the Superintendent, Dr. Benny Soileau serves as the educational leader and chief executive officer of the District. TEX. EDUC. CODE § 11.201(a). Superintendent Soileau reports to the District's seven-member Board of Trustees: Jared Dagley (Place 1), Dean Warren (Place 2), Ray Burt (Place 3), Kirk Vaughn (Place 4), Jeremy Phillips (Place 5), Matt Dutton (Place 6), and Amanda McGee (Place 7). The Board of Trustees governs and oversees the management of the District's public schools. TEX. EDUC. CODE § 11.151(b).

Texas ranks 41st in the Nation in per-pupil funding for K-12 public schools.[3] The baseline funding for Texas public schools has not changed since 2019, despite double-digit inflation rates, and despite the State going in to the 88th Legislative Session with a $33 billion surplus. Why? Because Governor Abbott publicly declared that he would not sign a school funding bill if it did not have vouchers attached, and "offered a warning for House Republicans [who opposed vouchers]: They

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[2]The Attorney General issued a press release about this lawsuit before even filing it. *Compare Attorney General Ken Paxton Sues Huffman ISD and Aledo ISD for Illegal Electioneering*, OFFICE OF THE ATTORNEY GENERAL (March 1, 2024), *available at* https://shorturl.at/dexF2, *with* Pl.'s Orig Pet. (filed March 4, 2024). The Texas primary election took place on March 5, 2024.

[3]Hanson, Melanie, *U.S. Public Education Spending Statistics*, EDUCATIONDATA.ORG (Sept. 8, 2023), *available at* https://educationdata.org/public-education-spending-statistics#texas.

could choose 'the easy way'—getting a bill to his desk—or 'the hard way'—facing his wrath in the primaries."[4] In the end, 21 House Republicans crossed the aisle to stop the Governor from diverting public funds to private institutions. The Governor's wrath ensued, through an orchestrated and well-funded campaign of retaliation at the polls.[5]

Against this backdrop, the State alleges that on February 7, 2024—*i.e.*, approximately two weeks *before* polls opened for early voting—Superintendent Soileau attended a staff meeting in which he made several factual statements about the current state of public school funding, the House Republicans who helped defeat school vouchers, and the importance of voting in the upcoming primary elections. Pl.'s Orig. Pet., ¶¶ 24–25. Superintendent Soileau reportedly made these statements to a room full of people who could not vote for the House Republicans involved in blocking the Governor's voucher agenda, because none of them represent voters in Harris County. Regardless, someone in the audience recorded the Superintendent's statements and then circulated them on social media. *Id.* Neither Superintendent Soileau nor the Trustees published the statements online, on social media, or on any other public (or private) platform. *Id.*

Based on this single incident, the State claims that Huffman ISD's Superintendent—and its Trustees—used public funds for "electioneering" in violation of the Texas Education Code, and for "political advertising" in violation of the Texas Election Code. Pl.'s Orig. Pet., ¶¶ 28–41. The State further claims, without any factual support, that immediate injunctive relief is warranted because "Defendants will continue to act without legal authority . . . " *Id.* at ¶¶ 31, 35, 41. And, despite having

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[4]Patrick Svitek, *How Gov. Greg Abbott lost a yearlong fight to create school vouchers*, THE TEXAS TRIBUNE (Dec. 22, 2023), *available at* https://shorturl.at/vySTZ; *see also* Alexandra Samuels, *Greg Abbott Failed to Persuade Lawmakers on School Vouchers. Now He's Threatening Them*, TEXAS MONTHLY (Oct. 4, 2023), *available at* https://shorturl.at/byJKZ.

[5]*See, e.g.*, Patrick Svitek, *Texas Republicans who defied Gov. Abbott on school vouchers face mounting primary attacks*, THE TEXAS TRIBUNE (Jan. 31, 2024), *available at* https://www.texastribune.org/2024/01/31/texas-house-republican-primary-2024-vouchers/ ("Texas House Republicans who tanked Gov. Greg Abbott's school voucher agenda last year are facing a growing onslaught in their primaries as his long-promised revenge tour reaches its final month . . . It all marks the long-telegraphed fallout from last year's legislative sessions, when a group of House Republicans held firm against Abbott's crusade for letting parents use taxpayer dollars to take their kids out of public schools.").

ample time to prepare and disseminate a press release informing the public of this lawsuit, the State (through the Attorney General) represented to this Court that it was entitled to *ex parte* injunctive relief because "any time spent notifying the Defendants risks further irreparable injury." *Id.* at ¶ 46.

This politics-driven action falls far short of establishing that Superintendent Soileau or the Trustees violated Texas law. It also impermissibly invades protected speech. The State's claims have no merit and should be dismissed.

ORIGINAL ANSWER

A. GENERAL DENIAL

Pursuant to Texas Rule of Civil Procedure 92, Defendants generally deny each and every allegation contained in the State's petition.

B. AFFIRMATIVE DEFENSES

In asserting the following defenses, the Defendants do not admit that they have the burden of proving the allegations or denials contained therein, but instead assert that the State bears the burden of proving the facts relevant to many of the defenses and the burden of proving the inverse of the allegations contained in many of the defenses. Also, by asserting any defense, the Defendants do not admit any liability, but, to the contrary, specifically deny any and all allegations of liability in the State's lawsuit. Without admitting liability as to any of the State's causes of action, the Defendant assert the following defenses:

1. The State has failed to state a valid claim upon which relief may be granted.

2. The Court lacks subject-matter jurisdiction over this dispute because the State has not established a valid waiver of the Defendants' governmental immunity.

3. The State's claims are barred, in whole or in part, because the claims are moot.

4. The State's interpretation and application of section 11.169 of the Texas Education Code violates the First Amendment.

PLEA TO THE JURISDICTION

A. APPLICABLE LEGAL STANDARDS

A plea to the jurisdiction is a dilatory plea, the purpose of which is to defeat a cause of action without regard to the merits of the claim. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). Governmental immunity is a jurisdictional issue and is properly raised in a plea to the jurisdiction. *Meyers v. JDC/Firethorne Ltd.*, 548 S.W.3d 477, 484 (Tex. 2018); *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 639 (Tex. 1999). The plaintiff bears the burden of alleging facts affirmatively showing that the trial court has subject matter jurisdiction and must show that immunity has been waived. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). In deciding a plea to the jurisdiction, a court must not weigh the merits of the claim, but should consider only the plaintiff's pleadings and the evidence pertinent to the jurisdictional inquiry. *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002); *see also Bland Indep. Sch. Dist.*, 34 S.W.3d at 555.

Mootness is also a jurisdictional issue that may be raised in a plea to the jurisdiction. *Heckman v. Williamson County*, 369 S.W.3d 137, 161 (Tex. 2012) ("Just as the Texas Constitution bars our courts from deciding a case when the plaintiff lacks standing, similarly, a court cannot decide a case that has become moot during the pendency of the litigation . . . If a case is or becomes moot, the court must vacate any order or judgment previously issued and dismiss the case for want of jurisdiction.") (citations omitted); *State Bar v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994) (subject-matter jurisdiction requires that there be a live controversy between the parties).

B. THE STATE'S CLAIMS FAIL FOR LACK OF SUBJECT MATTER JURISDICTION

1. The State's claims are moot.

Courts lack subject matter jurisdiction to decide moot controversies. *State* ex rel. *Best v. Harper*, 562 S.W.3d 1, 6 (Tex. 2018); *see also Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000) (prohibition on advisory opinions deprives courts of jurisdiction over moot controversies). "A case

becomes moot when it appears that [o]ne seeks to obtain a judgment upon some pretended controversy when in reality none exists, or when he [s]eeks judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy." *Carrillo v. State*, 480 S.W.2d 612, 619–20 (Tex. 1972) (citations omitted). In other words, mootness occurs when there ceases to be a justiciable controversy between the parties or when the parties cease to have "a legally cognizable interest in the outcome." *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001). A case can become moot at any time, and courts have an obligation to take into account intervening events that may render a dispute moot. *Heckman v. Williamson Cnty.*, 368 S.W.3d 137, 162 (Tex. 2012). Notably, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974).

The State seeks prospective injunctive relief based solely on comments that Superintendent Soileau allegedly made on one single occasion relating to the Texas primary election, which took place on March 5, 2024—more than a month ago. The Court cannot grant retrospective relief for alleged *ultra vires* actions, *see City of El Paso v. Heinrich*, 284 S.W.3d 366, 374 (Tex. 2009), and the State does not allege any facts that would justify prospective injunctive relief beyond the conclusion of the primary election, particularly given that prior restraints on speech "bear a heavy presumption against their constitutionality." *Kinney v. Barnes*, 443 S.W.3d 87, 94 (Tex. 2014). Accordingly, the State's claims became moot when the polls closed at 7:00 p.m. on March 5, 2024, and the Court should dismiss the State's claims for lack of subject matter jurisdiction. *See, e.g., Cornyn v. City of Garland*, 994 S.W.2d 258, 267 (Tex. App.—Austin 1999, no pet.) (claims for injunctive relief based on prior alleged violation of Texas Open Meetings Act [TOMA] were moot, and claims relating to future potential violations would require impermissible advisory opinion); *Calhoun Port Authority v. Victoria Advocate Publ. Co.*, 2019 WL 1562003, *3 (Tex. App.—Corpus Christi Apr. 11, 2019, pet. denied) (dismissing claims for injunctive

relief based on prior alleged TOMA violations because "there is no live case or controversy [] which the trial court could remedy by taking action on the merits").

To the extent that the Attorney General argues that his case involves issues "capable of repetition, yet evading review," this "rare" exception to mootness does not apply because the State does not allege any facts demonstrating that "a reasonable expectation exists that the same complaining party will be subjected to the same action again." *Williams*, 52 S.W.3d at 184; *see also Burleson v. Collin Cnty. Comm. Coll. Dist.*, 2022 WL 17817965, *10 (Tex. App.—Dallas Dec. 20, 2022, no pet.) (exception to mootness applies in cases involving a continuing pattern or practice of alleged violations). But, even if the exception did apply, the Court still lacks subject-matter jurisdiction because the State's claims are barred by governmental immunity.

2. The State has not demonstrated a valid waiver of Defendants' immunity.

In a suit against a governmental entity or its officials, a plaintiff must affirmatively demonstrate the court's subject matter jurisdiction by alleging a valid waiver of immunity. *See DART v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003);*Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 637 (Tex. 1999). To fall within the *ultra vires* exception to governmental immunity, "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." *Heinrich*, 284 S.W.3d at 372. An *ultra vires* claim based on actions taken without legal authority has two fundamental components: (1) authority giving the public 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). A government officer with some discretion to interpret and apply a law may nonetheless act "without legal authority," and thus *ultra vires*, if he exceeds the bounds of his granted authority, or if his acts conflict with the law itself. *Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 158 (Tex. 2016).

With respect to the claims against the Trustees, the State does not identify any action taken by any Trustee that exceeded the authority provided to them under state law. Instead, the State merely concludes that the Trustees "allowed or approved" Superintendent Soileau to use the District's funds and resources "to electioneer for or against candidates." *See* Pl.'s Orig. Pet., ¶ 29. As an initial matter (and as explained in more detail below), the State cannot show that Superintendent Soileau engaged in improper electioneering or political advertising. But even if it could, the State does not allege that any of the Trustees actually knew about, much less ratified, Superintendent Soileau's alleged actions. In fact, the petition does not even allege that *any* individual Trustee took *any* direct action.

The State's blanket allegations are insufficient to overcome the Trustees' entitlement to governmental immunity. Indeed, to state a viable *ultra vires* claim, the State must identify exactly how the government official exceeded his or her authority when violating an identified state law. *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 76 (Tex. 2015) (citing *Heinrich*, 284 S.W.3d at 372). "Merely asserting legal conclusions or labeling a defendant's actions as 'ultra vires,' 'illegal,' or 'unconstitutional' does not suffice to plead an *ultra vires* claim—what matters is whether the facts alleged constitute actions beyond the governmental actor's statutory authority, properly construed." *Tex. Dep't of Transp. v. Sunset Transp., Inc.*, 357 S.W.3d 691, 702 (Tex. App.—Austin 2011, no pet.). Because the State failed to satisfy its burden, the Trustees' immunity remains intact.

Finally, all of the State's claims fail because the State has not alleged any facts demonstrating that it is "being harmed or is in danger of being harmed by a violation or threatened violation of [the Texas Election Code]," as required to obtain injunctive relief. TEX. ELEC. CODE § 273.081. As detailed above, the State's claims stem from comments that Superintendent Soileau allegedly made relating to the 2024 primary election. That election has passed, and the State has not alleged any facts suggesting a risk of future harm. Because the State cannot demonstrate an entitlement to injunctive relief "to prevent [a] violation from continuing or occurring, *see id.*, the Court lacks subject-matter

jurisdiction over this dispute, and the State's claims should be dismissed. *Calhoun Port Authority*, 2019 WL 1562003 at *4 ("The Advocate also requested an order 'prevent[ing] future violations" of TOMA. As noted, TOMA allows a member of the news media to sue to 'prevent' a 'violation or threatened violation' of TOMA. Arguably, this specific claim is not moot, technically speaking, because it only seeks prospective relief. However, again, the only actions which the Advocate alleges were violation of TOMA have already been effectively reversed, and it does not allege any 'threatened violation' of the statute. Accordingly, even assuming the request for an order preventing future TOMA violations is not moot, the trial court nevertheless lacks subject-matter jurisdiction over this particular request because the Advocate has not pleaded facts establishing a waiver of CPA's governmental immunity.").

The Defendants' plea to the jurisdiction should be granted.

RESPONSE TO APPLICATION FOR TEMPORARY INJUNCTION

Even assuming the Court has jurisdiction over this dispute, Superintendent Soileau's statements on February 7, 2024 did not constitute prohibited "electioneering" or "political advertising." But even if they did, the State has not shown an entitlement to injunctive relief. Additionally, the State has not alleged that the Trustees themselves engaged in any electioneering or political advertising, and the State's agency theory of liability fails as a matter of law. The Court should deny the State's request for a temporary injunction.

A. APPLICABLE LEGAL STANDARDS

"A temporary injunction is an extraordinary remedy and does not issue as a matter of right." *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993) (per curiam). "[T]he only question before the trial court is whether the applicant is entitled to preservation of the status quo of the subject matter of the suit pending trial on the merits." *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978); *see In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004) (defining status quo as the last, actual, peaceable, non-contested status that preceded the pending controversy).

Generally, to obtain injunctive relief, an applicant must plead and prove: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). However, where "an applicant relies upon a statutory source for injunctive relief, the statute's express language supersedes the common law injunctive relief elements such as imminent harm or irreparable injury and lack of an adequate remedy at law." *Grossman v. City of El Paso*, 642 S.W.3d 85, 108 (Tex. App.—El Paso 2021, pet. dism'd). Here, the State relies upon section 273.081 of the Texas Election Code, which 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." TEX. ELEC. CODE § 273.081.

Accordingly, to obtain injunctive relief in this case, the State must plead and prove: (1) a cause of action against each Defendant; (2) a probable right to the relief sought; and (3) current harm, or a danger of future harm, from a violation or threatened violation of the Texas Election Code.

B. THE STATE IS NOT ENTITLED TO INJUNCTIVE RELIEF

The State cannot satisfy any of the elements required for obtaining injunctive relief. The State's request for temporary injunctive relief should be denied.

1. The State has no valid cause of action.

As detailed above, the State alleges that the Defendants have acted *ultra vires* by using public funds for political advertising in violation of the Texas Election Code, and by using public funds to electioneer for or against a candidate, measure, or political party in violation of the Texas Education Code. As noted above, to fall within the *ultra vires* exception to the Defendants' governmental immunity, "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." *Heinrich*, 284 S.W.3d at 372. Even then, "the *ultra vires* rule is subject to important

qualifications." *Id.* at 373. Chief among them is the limitation of available remedies—*ultra vires* claimants are only entitled to prospective relief. *Id.* at 376. "If the relief is injunctive, then whether it is retrospective or prospective is measured from the date of the injunction." *City of Houston v. Houton Mun. Employees Penson Sys.*, 549 S.W.3d 566, 576 (Tex. 2018).

As detailed above, the State's claims are barred by governmental immunity. And even if the Court does have subject matter jurisdiction, the State's claims are premised on comments that solely related to the 2024 primary election, which already took place on March 5, 2024. The State does not allege any facts suggesting that it "is being harmed or is in danger of being harmed by a violation or threatened violation from continuing or occurring." TEX. ELEC. CODE § 273.081; *Calhoun Port Authority*, 2019 WL 1562003 at *4. Accordingly, the State has no claim against the Defendants, and its request for injunctive relief should be denied.

2. The State cannot show a probable right to relief.

To establish a probable right of recovery, the State must present at least some "evidence that, under the applicable rules of law, tends to support its cause of action." *Sands v. Estate of Buys*, 160 S.W.3d 684, 687 (Tex. App.—Fort Worth 2005, no pet.); *see also EMS USA, Inc. v. Shary*, 309 S.W.3d 653, 657 (Tex. App.—Houston [14th Dist.] 2010, no pet.); *Vaughn v. Intrepid Directional Drilling Specialists, Ltd.*, 288 S.W.3d 931, 936 (Tex. App.—Eastland 2009, no pet.). Absent a showing of likelihood of success on the merits, a temporary injunction may not issue. *In re Newton*, 146 S.W.3d 648, 652 (Tex. 2004).

The State cannot show a probable right to relief against the Trustees because it has not alleged any facts suggesting that any of them engaged in political advertising or electioneering. The State merely asserts that the "superintendent of a school district acts as the agent of the board of trustees," and then concludes that the Trustees "allowed [Superintendent] Soileau to distribute the communication referenced above." Pl.'s Orig. Pet., ¶ 29 (citing *Bowman v. Lumberton Indep. Sch. Dist.*,

801 S.W.2d 883, 888 (Tex. 1990)). *Bowman* itself rejects the State's theory of liability—just one sentence before the language quoted by the State: "[T]he acts of the agent of the board would not bind the board only if the acts were unauthorized." *Bowman*, 801 S.W.2d at 888. Stated more succinctly, unauthorized acts by an agent of the Board will *not* bind the Board. Accordingly, the State must do more than simply state that Superintendent Soileau is the Board's agent.

But here, the State expressly claims that Superintendent Soileau acted without legal authority, and at the same time it fails to allege any facts suggesting that any Trustee knew of, authorized, or participated in Superintendent Soileau's alleged statements. The absence of any factual allegations against the Trustees is fatal to the State's claims against them. After all, "[m]erely asserting legal conclusions or labeling a defendant's actions as 'ultra vires,' 'illegal,' or 'unconstitutional' does not suffice to plead an *ultra vires* claim—what matters is whether the facts alleged constitute actions beyond the governmental actor's statutory authority, properly construed." *Sunset Transp., Inc.*, 357 S.W.3d at 702; *see also Kilgore Indep. Sch. Dist. v. Axberg*, 535 S.W.3d 21, 31–32 (Tex. App.—Texarkana 2017, pet. denied) ("To maintain an *ultra vires* action against each of the named Trustees, [the plaintiff] must plead and ultimately prove that *each* of those seven people acted without legal authority or failed to perform a ministerial act.") (emphasis original).

Regardless, as demonstrated below, the State cannot prevail on the merits of its political advertising or electioneering claims.

a. Political Advertising Claims

"An officer or employee of a political subdivision may not **knowingly** spend or authorize the spending of public funds for political advertising." TEX. ELEC. CODE § 255.003(a) (emphasis added). "Political advertising" means "a communication supporting or opposing a candidate for nomination or election to a public office or office of a political party, a political party, a public officer, or a measure that:

(A) **in return for consideration**, is **published** in a **newspaper, magazine**, or **other periodical** or is **broadcast** by **radio** or **television**; or

(B) appears:

(i) in a **pamphlet, circular, flier, billboard**, or other **sign, bumper sticker**, or similar form of **written** communication; or

(ii) on an **Internet website**."

Id. at § 251.001(16) (emphasis added).

Courts must "construe a statute by giving effect to the plain meaning of its language unless the language is ambiguous . . . Where the statute is clear and unambiguous, the Legislature must be understood to mean what it expressed, and it is not for the courts [or the Attorney General] to add or subtract from such a statute." *Ex Parte Stafford*, 667 S.W.3d 517, 527 (Tex. App.—Dallas 2023, pet. granted) (citing *Coit v. State*, 808 S.W.2d 473, 475 (Tex. Crim. App. 1991)). Here, the unambiguous language of the political advertising statute demonstrates that the State cannot prevail.

The State does not allege any facts suggesting that Superintendent Soileau or the Trustees, in return of consideration, published political communications in a newspaper, magazine, or other periodical. The State does not allege any facts suggesting that Superintendent Soileau or the Trustees, in return for consideration, broadcast political communications via radio or television. The State does not allege any facts suggesting that Superintendent Soileau or the Trustees published or disseminated political communications in a pamphlet, circular, flier, billboard, sign, or bumper sticker, or on an Internet website. And, most notably, the State does not allege any facts suggesting that Superintendent Soileau or the Trustees directed anyone to circulate Superintendent Soileau's alleged statements on social media or any other online platform.

Accordingly, the State has not shown a probable right to relief on its claim that Superintendent Soileau and/or the Trustees *knowingly* used or authorized the use of public funds for political advertising, and the State's request for temporary injunctive relief should be denied.

b. Electioneering Claims

The Texas Education Code states that, "[n]otwithstanding any other law, the **board of trustees** of an independent school district may not use state or local funds or other resources of the district to electioneer for or against any candidate, measure, or political party." TEX. EDUC. CODE § 11.169 (emphasis added). The Texas Education Code does not define the term "electioneering," but the Texas Election Code twice defines it as "include[ing] the posting, use, or distribution of political signs or literature." TEX. ELEC. CODE §§ 61.003(b)(1), 85.036(f).

As noted above, the State does not allege that the Board of Trustees did anything, much less that it directed or authorized the use of public funds or other resources to post, use, or distribute political signs or literature. And, as also noted above, the State's conclusory attempt to establish agency liability fails as a matter of law, particularly given the State's position that Superintendent Soileau acted without legal authority, and the State's failure to allege any facts suggesting that the Board knew about, directed, or authorized Superintendent Soileau's statements. *See Bowman*, 801 S.W.2d at 888 (unauthorized acts by board's agent will not bind the board). The State's electioneering claims therefore fail as a matter of law.

Even assuming Superintendent Soileau's individual actions could give rise to an electioneering claim under section 11.169 (they cannot), the State's petition does not allege any facts suggesting that Superintendent Soileau posted, used, or distributed political signs or literature regarding any candidate, measure, or political party. At most, Superintendent Soileau orally communicated factual information regarding public school finance issues (which itself is not a "candidate, measure, or political party"),[6] and orally encouraged the support of public officials who support public education. He did not use,

[6]The term "measure" means "a question or proposal submitted in an election for an expression of the voters' will and includes the circulation and submission of a petition to determine whether a question or proposal is required to be submission in an election for an expression of the voters' will." TEX. ELEC. CODE § 251.001(19). Public school finance was not on the primary ballot.

display, or provide anyone with any political signs or literature. Furthermore, his alleged statements were made two weeks before early voting began, and were made to a group of people who are not eligible to vote for the House Republicans who helped defeat school vouchers during the last legislative session. And, the State does not allege that Superintendent Soileau used any public funds or other resources. The allegedly offending statements lasted mere seconds, and the staff meeting on February 7, 2024 would have taken place *regardless*.

The State's expansive (and statutorily unsupported) view of what constitutes "electioneering" has obvious First Amendment implications. *See, e.g., Garcetti v. Ceballos*, 547 U.S. 410 (2006) ('[P]ublic employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's rights, in certain circumstances, to speak as a citizen addressing matters of public concern.") (citing *Pickering v. Bd. of Educ.*, 319 U.S. 563, 68 (1968)); *Davis v. McKinney*, 18 F.3d 304, 312 (5th Cir. 2008) ("The inquiry whether the employee's speech is constitutionally protected involves three considerations. First it must be determined whether the employee's speech is pursuant to his or her official duties. If it is, then the speech is not protected by the First Amendment. Second, if the speech is not pursuant to official duties, then it must be determined whether the speech is on a matter of public concern. Third, if the speech is on a matter of public concern, the *Pickering* test must be applied to balance the employee's interest in expressing such a concern with the employer's interest in promoting the efficiency of the public services it performs through its employees.") (citations omitted).

For example, in *Ricci v. Cleveland Independent School District*, 2012 WL 2935200 (S.D. Tex. July 17, 2012), a school district terminated its payroll clerk after she encouraged another employee to vote for particular candidates in an upcoming school board election, reasoning that her actions amounted to electioneering in violation of state law and district policies. *Id.* at *1. When the school district moved to dismiss her subsequent lawsuit, the court determined that the payroll clerk had adequately

alleged that her speech was protected under the First Amendment because she spoke as a citizen on matters of public concern. *Id.* at *5–8. The court also found that "**the alleged facts at issue here do not clearly indicate that [the electioneering statutes] would necessarily have prohibited [the employee's] conduct**." *Id.* at *9 (citing TEX. ELEC. CODE §§ 61.003, 85.036) (emphasis added).

Here, the State does not allege that Superintendent Soileau's comments were made pursuant to his official job duties—in fact, the State alleges the opposite, *i.e.*, that Superintendent Soileau acted without legal authority when he briefly spoke about candidates who support public education. *See, e.g.*, *Ricci*, 2012 WL 2935200 at *6 ("Taken together, these facts indicate that Ricci was speaking as a citizen, rather than pursuant to her official duties as a payroll clerk, when she made comments to Rush related to the school board election. No facts suggest that Ricci's formal job duties, tied to her position as payroll clerk, would require Ricci to speak on matters such as the school board election. To the contrary, Defendants contend that Ricci was explicitly prohibited from speaking on such a topic . . . ."). And, there can be no question that elections in general, and funding for public education in particular, are "matters of public concern." *See, e.g.*, *Jordan v. Ector Cnty.*, 516 F.3d 290, 297 (5th Cir. 2008) ("We have reiterated . . . that a public employee's campaign activities address matters of public concern."); *Aucoin v. Haney*, 306 F.3d 268, 274 (5th Cir. 2002) ("There is no doubt that campaigning for a political candidate relates to a matter of public concern."); *Vojvodich v. Lopez*, 48 F.3d 879, 885 (5th Cir. 1995) (finding that "there can be no question that the claimed activity, associating with political organizations and campaigning for a political candidate, related to a matter of public concern"); *Click v. Copeland*, 970 F.2d 106, 112 (5th Cir. 1992) ("It is undisputed that ... running for elected office, addresse[s] matters of public concern.").

For these reasons, the State cannot show a likelihood of success on the merits of its claim that the Trustees (or Superintendent Soileau) used public funds to engage in "electioneering" in violation of the Texas Education Code.

3. The State has not shown any current or future harm.

As noted above, this entire lawsuit arises from statements made during a single staff meeting on February 7, 2024. And although the State concludes that "Defendants will continue to act without legal authority," it has not actually alleged any facts suggesting that Superintendent Soileau or the Trustees are likely to engage in any conduct prohibited by the Texas Education Code or the Texas Election Code—especially when Superintendent Soileau's alleged statements related to the importance of voting in the primaries, and the primary election took place on March 5, 2024 (*i.e.*, the day after the State filed this lawsuit). The First Court of Appeals affirmed the denial of a similarly speculative request for injunctive relief:

> We find evidence to support the trial judge's ruling that appellant's claim of harm is speculative. At the hearing, appellant was concerned about his rights "if" appellee withdrew money, hypothesizing about "if all of the sudden they decided to make the law retroactive and take funds out of the accounts." Appellant admitted that appellee had not even attempted or threatened to levy his account. For harm to be imminent and irreparable, the appellant must prove that appellee intends to or will withdraw money from the account. Appellant presented no evidence at all that suggests this future intent on the part of appellee, much less that it is imminent.

Morris v. Collins, 881 S.W.2d 138, 140 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (citations omitted).

Also, the State relies on section 273.081 of the Texas Election Code as its statutory basis for injunctive relief, but that statute requires evidence that "[a] person [] is being harmed or is in danger of being harmed by a violation or threatened violation of this code" to justify "appropriate injunctive relief to prevent the violation from continuing or occurring." There is no current harm because the primary election has already passed, and the State has not alleged any facts suggesting that Superintendent Soileau or the Trustees intend to engage in prohibited electioneering or political advertising in the future, such that the State "is in danger of being harmed by a violation or threatened violation." The State's request for temporary injunctive relief should be denied. *See Calhoun Port Authority*, 2019 WL 1562003 at *3–4 ("The Advocate also requested an order 'prevent[ing] future

violations" of TOMA. As noted, TOMA allows a member of the news media to sue to 'prevent' a 'violation or threatened violation' of TOMA . . . However, again, the only actions which the Advocate alleges were violation of TOMA have already been effectively reversed, and it does not allege any 'threatened violation' of the statute."); *see also, e.g., State v. Morales*, 869 S.W.2d 941, 946–47 (Tex. 1994) ("[A]n injunction will not issue unless it is shown that the . . . [defendant] will engage in the activity enjoined.").

CONCLUSION AND PRAYER FOR RELIEF

Defendants pray that the State takes nothing on its claims, that the claims against them be dismissed, and that they be awarded all such other and further relief to which they may be entitled, at law or in equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on April 15, 2024, a true and correct copy of this document has been served upon all parties in accordance with the Texas Rules of Civil Procedure via the Court's electronic filing service:

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