FILED
24-0325
5/1/2024 10:57 PM
tex-87289563
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 24-0325

In the Supreme Court of Texas

In re The State of Texas,
Relator.

On Petition for Writ of Mandamus
to the Fourteenth Court of Appeals, Houston

RELATOR'S REPLY IN SUPPORT OF ITS EMERGENCY MOTION FOR TEMPORARY RELIEF

To the Honorable Supreme Court of Texas:

Defendants' 61-page response to a motion for temporary relief pending resolution of a mandamus petition is remarkable. Longer than most briefs on the merits in this Court, the response does everything from asserting (at 34) that the State forfeited any argument that it diligently pursued the underlying action to accusing counsel (at 19) of sanctionable conduct for not providing the entire record on appeal.[1] What the response does *not* do is deny that if Uplift Harris is allowed to proceed, payments that the State maintains violate its Constitution will be made with no possibility to recover the funds. And though Defendants insist (at 31) that the *State*

[1] Because the Court has *not* yet requested merits briefing under Texas Rule of Appellate Procedure 52.8(b)(2), the State discusses the merits of its claims—as it did in its accompanying mandamus petition—only to the extent relevant to the requests before the Court under the standards the Court has articulated. Any omission is not intended as, and should not be read as, a concession.

should have moved to expedite its appeal to preserve the *County's* ability to make these unlawful payments, it cannot seriously argue that absent action from this Court, the short-term program is likely to be fully consummated before this Court has the opportunity to address its legality. None of the litany of reasons Defendants offer changes the fact that the relief the State seeks is the only way for this Court to preserve the status quo and the Court's own jurisdiction.

Argument

I. The State's Petition and Accompanying Motion Took the Appropriate Form.

By the State's count, Defendants have raised what seem to be five separate procedural objections to the request for temporary relief. None has merit.

A. The State recited the correct standard of review.

To start, Defendants complain (at 20) that the State improperly articulated the standard of review for ruling on motions for temporary relief. It is hard to see how, given that three members of this Court have recognized that it has "not previously articulated the standard a court of appeals asked to reinstate a temporary injunction using Rule 29.3 should apply." *See In re Abbott*, 645 S.W.3d 276, 288 (Tex. 2022) (Blacklock, J., concurring in part). Nor has it done so for Rule 52.10 motions. The closest it has come is the standard announced in *Republican Party of Texas v. Dietz*, 924 S.W.2d 932 (Tex. 1996). That is the standard upon which the State relied,

Mandamus Pet. 5, as it has done in numerous similar (and successful) motions for temporary relief over the last several years.[2]

Defendants nonetheless maintain (at 21) that the Court has sub silentio adopted a different standard under which Rule 52.10 relief can only be granted if the Court determines that (1) the movant has diligently pursued its rights, (2) the relief sought will maintain the status quo, and (3) the relief sought is necessary to preserve the Court's jurisdiction or the rights of the parties. No doubt, the Court has considered these factors in the past. *See, e.g.*, *In re State*, No. 21-0873, 2021 WL 4785741, at *1 (Tex. Oct. 14, 2021) (status quo); *In re LCS SP, LLC*, 640 S.W.3d 848, 855 & n.39 (Tex. 2022) (protect jurisdiction, preserve parties' rights, and seek timely relief). For good reason: "Relief sought under Rule 29.3 is analogous" to the common-law "writs of mandamus, prohibition, and injunction." *McNeely v. Watertight Endeavors, Inc.*, No. 03-18-00166-CV, 2018 WL 1576866, at *1 (Tex. App.—Austin 2018, no pet.) (citing *Lamar Builders, Inc. v. Guardian Sav. & Loan Ass'n*, 786 S.W.2d 789, 791 (Tex. App.—Houston [1st Dist.] 1990, no writ)). Factors like the ones Defendants name (among others) were undoubtedly relevant to such traditional equitable remedies.

---

[2] *See* Relator's Emergency Motion for Temporary Relief at 5, *In re Abbott*, No. 21-0720 (Tex. Aug. 23, 2021); Petition for Writ of Mandamus and for Writ of Injunction at 15, *In re State*, No. 20-0715 (Tex. Sept. 15, 2020); Relator's Emergency Motion for Temporary Relief at 2, *In re State*, No. 21-0873 (Tex. Oct. 8, 2021). This Court has granted many such motions, albeit without definitively articulating a standard of review. *See* Order at 1, *In re State*, No. 20-0715 (Tex. Sept. 15, 2020); *In re State*, 2021 WL 4785741, at *1.

Although the State agrees that it would be helpful to both the bench and bar for the Court to clarify the relevant standard, Defendants' recitation of their preference affords them nothing. Although the State's petition recited *Dietz* as the correct standard of review, its motion explained why all three of the elements identified by Defendants counsel in favor of providing the relief the State seeks. *See* Mot. 8 (status quo and protecting the Court's jurisdiction), 11 (timing of this suit), 13 (preserve the Relator's rights).

B. The State sought a proper form of relief.

The form of relief that the State sought was also proper. Indeed, the relief that the State seeks in this case is directly analogous to that which the Court ordered in advance of *State v. Hollins*. *See* Order at 1, *In re State*, No. 20-0715. The only difference is that rather than stopping Harris County from distributing mail-in ballots in a manner not authorized by the Election Code, *id.*, the State asks the Court to prohibit Harris County from distributing monetary payments that are prohibited by the Constitution, Mot. 3-7. Nevertheless, the County maintains that the form of relief is improper for what appear to be three separate reasons. None has merit.

First, Defendants assert (at 16) that the Court may grant relief only while it considers the mandamus petition, but the motion sought relief "pending appeal." This appears to be *at most* a typographical error, as the State's 52.10 motion and the mandamus petition request parallel relief. *See* Mot. 13; Pet. 17. The State apologizes for any confusion this could theoretically have caused, but it isn't a ground to deny relief. In addition to a general policy in favor of resolving cases on the merits rather than such technicalities, *see Morath v. Lampasas ISD*, No. 22-0169, 2024 WL 648671,

at *11 (Tex. Feb. 16, 2024), *reh'g denied* (Apr. 19, 2024), this Court has specifically recognized that an error in a "special prayer" will not preclude relief if "in response to the prayer for general relief [a party] may be awarded the relief to which the pleadings and evidence may entitle [it]," *Silberberg v. Pearson*, 12 S.W. 850, 851 (Tex. 1889) (citing *Trammell v. Watson*, 1860 WL 5814, at *5 (Tex. 1860)). The State included just such a general prayer (at 13) for "any other relief the Court deems appropriate."

Second, Defendants argue (at 16-17) that a writ of injunction may issue only following the disposition of the mandamus petition. To start, this argument does not affect the State's primary request for a stay under Rule 52.10. *See, e.g.*, *In re State*, 2021 WL 4785741, at *1.[3] It also gets the issue precisely backwards—as Defendants' own authority recognizes. Specifically, Defendants rely (at 16) on *Lane v. Ross*, 249 S.W.2d 591, 593 (Tex. 1952), which states that in "cases in which this court's jurisdiction to issue a writ of mandamus has attached[,] the court necessarily has the correlative authority to issue a writ of injunction to make the writ of mandamus effective," *id.* As this Court has long recognized, one way that a writ of injunction can make a mandamus "effective" is by protecting the Court's *jurisdiction*. *E.g.*, *In re*

[3] For similar reasons, Defendants' contention (at 16-17) that a writ of prohibition is improper is irrelevant. This Court has recognized for decades that the "incorrect identity of the writ sought is of no significance," *City of Dallas v. Dixon*, 365 S.W.2d 919, 922 (Tex. 1963) (orig. proceeding), *rev'd on other grounds sub nom. Donovan v. City of Dallas*, 377 U.S. 408 (1964). The State nevertheless included the request as a belt-and-suspenders alternative to avoid precisely the type of hyper-technical arguments that litter the County's response.

Geomet Recycling LLC, 578 S.W.3d 82, 90 (Tex. 2019); *Dean v. State*, 31 S.W. 185, 185 (Tex. 1895); *accord, e.g.*, *In re State*, No. 22-1044, 2022 WL 17101236, at *1 (Tex. Nov. 22, 2022), *mand. dism'd* (July 21, 2023). By definition, an order to protect the Court's jurisdiction must be entered before the Court exercises that jurisdiction by issuing a ruling on the merits.

Third, Defendants also complain (at 17) that the State did not request relief as to the County's agents. Again, this misunderstands ordinary rules of civil procedure. That is, the State has sought relief against the *Defendants*, who are violating their legal obligations. MR.384 n.26. By operation of law, an injunction—regardless of the court that enters it—is binding "upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Tex. R. Civ. P. 683; *see Huynh v. Blanchard*, 683 S.W.3d 30, 43 (Tex. App.—Tyler 2021, pet. granted); *cf. Geomet*, 578 S.W.3d at 90 (treating injunctions pending appeal as equivalent to ordinary injunctions except for jurisdictional purposes). Thus, whether the State's request for relief specifically mentions Defendants' agents is irrelevant: If this Court grants relief against Defendants (as it should), Defendants cannot avoid that relief by acting through agents.

Defendants' related complaint (at 37-38) that the State should have identified GiveDirectly as the party to be enjoined fails for similar reasons. No doubt the State must request relief against the parties that intend to make the payments. *See* Resp. 38. It did so: The State sued Harris County and Harris County Public Health (HCPH), which are the parties under the obligation not to violate the Constitution—

not GiveDirectly, HCPH's "third-party administrator." MR.114. As a matter of law, GiveDirectly would be nonetheless bound by an injunction against HCPH. Tex. R. Civ. P. 683. In response, Defendants point (at 39-40 n.32) to a provision in Harris County's contract with GiveDirectly explaining that the contract does not create a partnership, joint venture, or agency. Resp. 205. This blinks reality. However Defendants contracted to control liability, GiveDirectly can distribute Uplift Harris funds only because it is "in active concert or participation with" Defendants, Tex. R. Civ. P. 683—otherwise, it would not have access to the relevant funds.

To the extent further confirmation is needed, Defendant Ellis helpfully provided it during the pendency of this mandamus petition. Specifically, shortly before this Court issued its administrative stay, Commissioner Ellis tweeted that "[w]e have sent the first $500 payments to recipients." App A. And shortly after the Court's order issued, he tweeted, "[W]e were racing to get at least one payment out the door, but unfortunately we were not able to process them before the Supreme Court order came down." App. A. Those statements clearly show that Defendants directed GiveDirectly first to speed up the payments so that they would issue before the date Defendants had represented to the lower courts,[4] and then not to make a payment

[4] *See, e.g.*, MR.145 (Brandon Maddox, director of the Office and Planning and Innovation for real party in interest HCPH: "the first round" of "these checks [are] supposed to go out" on "April 24th"), 290 (Uplift Harris County Enrollment Form: "The first payment is scheduled for April 24"), 380 (Response to the State's Rule 29.3 motion: "[M]ore than 1,500 needy Harris County residents have been selected and enrolled in the program and are expecting the first round of assistance on April 24.").

after this Court issued its stay order. If GiveDirectly stopped payments upon notice of the Court's order without being instructed by the County to do so, then it is acting in concert or participation with the County.

C. The Court has the authority to grant the relief that the State seeks.

The Court has jurisdiction to issue an order preventing both the County and those acting in concert with it from altering the status quo pending resolution of the State's appeal. As this Court has recognized, it has authority to preserve the status quo and preserve the parties' rights during the pendency of an interlocutory appeal—notwithstanding other limitations that Rule 29.3 might impose. *In re Tex. Educ. Agency*, 619 S.W.3d 679, 68-90 (Tex. 2021). That is all that the current motion seeks to do. Defendants raise two arguments to the contrary. Neither has merit.

First, Defendants contend (at 33) that "this Court has never ordered a court of appeals to grant an injunction pending appeal under Rule 29.3." But Defendants' own authority shows the contrary. *See* Resp. 28 (discussing *In re State*, 2021 WL 4785741). *In re State* involved a claim by the State that a school district violated an executive order by imposing a vaccine mandate on school-district staff. Petition for Writ of Mandamus and for Writ of Injunction at vi, *In re State*, No. 21-0873 (Tex. Oct. 8, 2021). When the trial court denied a temporary injunction, the State sought an emergency temporary order under Rule 29.3 to prevent the school district from enforcing its vaccine mandate during the pendency of the State's appeal. *Id.* And when the court of appeals denied the State's motion for a temporary order, *id.*, the State requested that the Court "issue a temporary order prohibiting Defendants from enforcing their vaccination mandate pending resolution of the State's appeal,"

Relator's Emergency Motion for Temporary Relief at 6, *In re State*, No. 21-0873. The Court then "stay[ed] enforcement of the . . . School District's policy requiring that all its employees be vaccinated for COVID-19." *In re State*, 2021 WL 4785741, at *1. The Court "grant[ed] this relief on [its] own authority under Rule 52.10(b)." *Id.* And it further noted that its "exercise of authority under Rule 52.10 to preserve the status quo is not a comment on the decision of the district court to deny the State's request for a temporary injunction." *Id.*

The relief the State seeks here is no different. As in *In re* State, the State seeks to prevent a local governmental entity from violating state law while the State appeals the denial of a temporary injunction. *Compare* Relator's Emergency Motion for Temporary Relief at 6, *In re State*, No. 21-0873 (asking the Court to "issue a temporary order prohibiting Defendants from enforcing their vaccination mandate pending resolution of the State's appeal"), *with* Relator's Emergency Motion for Temporary Relief at 13, No. 24-0325*, In re State* (Tex. Apr. 22, 2024) (requesting that the Court "issue a temporary order prohibiting Defendants or their agents . . . from making payments under the Uplift Harris program during the pendency of the State's appeal"). Whether labeled a "stay" or an "injunction pending appeal," the State is seeking the same relief it sought and received in the vaccine case. *See Dixon*, 365 S.W.2d at 922.

Second, Defendants make much (at 37) of a pleading that the State filed in March 2022. But two months *after* that filing was made, this Court held that Rule 29.3 "may authorize a court of appeals to preserve the status quo and prevent irreparable harm to the parties during the pendency of the appeal, even if the temporary order has the

same practical effect as denying supersedeas of the trial court's injunction." *Abbott*, 645 S.W.3d at 282. A temporary order under Rule 29.3 that "preserves the status quo," "prevent[s] irreparable" harm, and has the same practical effect as denying supersedeas of a trial court's injunction is effectively a prohibitory injunction pending appeal—precisely what the State seeks here.

D. The State adequately raised the issue presented.

Equally off-base is Defendants' assertion (at 34) that the Court should deny the State's mandamus petition because the State does not affirmatively address "the lack of diligence ground" though it has previously argued that the Court should consider diligence in deciding whether to grant equitable relief. Again, this argument elevates form over substance because the State explained in its concurrently filed Rule 52.10 motion that it could not have sued Harris County in June 2023,as the timing of the Uplift Harris payments was unclear until March 18, 2024. Mot. 11-12; *infra* pp. 22-23. And Defendants can hardly be heard to complain that considering the two documents together would allow the State to evade the 4,500-word limit on mandamus petitions given the 61-page tome Defendants required to raise this objection.

In any event, as noted above (at 2-4), this Court has not previously articulated a comprehensive standard that a court of appeals should use in applying Rule 29.3. *See Abbott*, 645 S.W.3d at 288 (Blacklock, J., concurring in part). No doubt the County may argue about an alleged lack of diligence in its response—as the State did in the filing Defendants cite. But it does not follow that the State was required to raise it in its *petition*, which "must state concisely all issues or points presented for relief. The

statement of an issue or point *will be treated as covering every subsidiary question that is fairly included*." Tex. R. App. P. 52.3(f) (emphasis added). As this Court's prevailing standard requires, *Geomet*, 578 S.W.3d at 91, the State's mandamus petition presented the issue of "whether the court of appeals' refusal to grant Rule 29.3 relief was a clear abuse of discretion for which the State has no adequate remedy by appeal," Pet. ix. The issue of "diligence" in bringing this case is a "subsidiary question" as to whether the court of appeals clearly abused its discretion in denying Rule 29.3 relief. If the Court requests full merits briefing, then both parties may address that issue in more detail. *See* Tex. R. App. P. 52.8(b)(2).

E. The State did not submit a defective mandamus record.

In their final procedural objection, Defendants contend (at 17-20) that the Court should summarily deny the mandamus petition because of a putatively defective mandamus record. Rather than burden the Court with an 800-page appendix, as Defendants chose to do, Resp. 70-851, the State followed Rule 52.7, which requires a party seeking expedited relief to file what it considers *relevant* testimony, including any *relevant* exhibits offered in evidence. *In re CG Searcy, LLC*, No. 24-0170, 2024 WL 1333711, at *1 (Tex. Mar. 29, 2024) (per curiam). In short, "an exhibit that is not relevant or material to the *original proceeding* need not be included in the mandamus record." *Id.* (emphasis added). True, some of the materials contained in Defendants' appendix were discussed at the temporary-injunction hearing, and Defendants may argue that those materials are relevant to whether the State prevails on appeal. But that doesn't make them material to whether irrecoverable payments should be made during the pendency of that appeal. For example, the appendix

includes resumes of witnesses that are hardly relevant to whether an injunction is necessary to protect the Relator's rights. Resp. 381-409.

Even if all the omitted materials were *relevant*, the choice not to include them hardly made the mandamus record misleading. After all, the State included *all* transcript testimony, including those portions discussing the exhibits that Defendants deemed relevant in the trial court. MR.52-252. If Defendants believed the documents themselves were necessary, the correct response was to supplement the record as the Rules permit, Tex. R. App. P. 52.7(b), and as Harris County's 800-page appendix arguably did, *see* Resp. App. (appending the documents without formally supplementing the record). The omission of such materials thus is no ground to summarily deny the requested relief—particularly as they do not disprove the Relator's right to the relief sought.

II. The State Is Entitled to the Relief It Seeks.

When Defendants finally reach the merits, they do not contest that the State lacks an adequate remedy on appeal. *See* Resp. 43-61. What arguments Defendants *do* make fail to rebut the State's explanation that "[m]andamus relief is appropriate" because the court of appeals committed a "clear abuse of discretion," *Geomet*, 578 S.W.3d at 91, in denying interim relief when the State is likely to prevail on appeal and has no other way to preserve its rights in the meantime. Similar reasons demonstrate why interim relief is necessary pending resolution of the current mandamus petition.

A. The State is likely to prevail on the merits.

Harris County fails to rebut the State's argument that Uplift Harris violates the Texas Constitution's Gift Clauses and guarantees of equal protection. Uplift Harris violates the Gift Clauses because it is both gratuitous *and* does not pass the public-purpose test. *See Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 383-84 (Tex. 2002). It also violates the Constitution's equal-protection guarantee because it allots a public emolument in a way that has no rational connection to either the purpose for which the federal government provided the money (fighting COVID) or Harris County's self-defined class of potential beneficiaries.

1. Uplift Harris violates the Gift Clauses.

Uplift Harris is gratuitous and does not pass the public-purpose test. It therefore violates the Gift Clauses. In arguing to the contrary, Defendants attempt to distort the test and analogize to types of traditional welfare that are different in kind from the program at issue here.

a. To start, Uplift Harris is gratuitous in that Harris County receives no benefit from handing out excess money that it received from the federal government for a completely different purpose. Pet. 7. Defendants insist (at 47) that "Harris County receives return consideration" because "the recipients are part of" a "pilot commissioned by Harris County to aid future policy discussions." That is insufficient for at least two reasons. *First*, as the State's motion explains (at 4-5), the County receives "aid" for its "future policy discussions" from the results of a third-party survey—not from the actual program recipients. Resp. 47. "Seeing what happens" is

far from a "clear," *Tex. Mun. League*, 74 S.W.3d at 383, public benefit, *see also infra* p. 17 (discussing the "return benefit" element). *Second*, Defendants' claim (at 47) that funding recipients' "[p]articipation [in the survey] is consideration" is completely circular. Under that reasoning, any time a government wants to make a free handout, that handout is non-gratuitous if the recipient merely receives it. That result would vitiate the Gift Clauses.

Defendants further argue (at 51) that when the State calls Uplift Harris payments a gift, "the State misrepresents" Harris County's statement that Uplift Harris "funding qualifies as a tax exempt charitable gift under IRS rules." MR.277. This misses the point: The IRS's own website refers to a "gift" as a "transfer of property by one individual to another while receiving nothing, or less than full value, in return." *Gift tax*, Internal Revenue Service, https://www.irs.gov/businesses/small-businesses-self-employed/gift-tax (Jan. 22, 2024). Defendants present no authority for the notion that such a transfer is *not* a gift under the Gift Clauses. And both the Attorney General opinions that Defendants cite (at 51-52) for the notion that "counties can make charitable gifts" contemplated contracts supported by consideration. *See* Tex. Att'y Gen. Op. KP-0091, at *2-3 (2016); Tex. Att'y Gen. Op. JC-0439, at *1-8 (2001). Because fund recipients do not give consideration in exchange for program funds, those funds are an unconstitutional gift. *See Tex. Mun. League*, 74 S.W.3d at 383.

b. In addition to being gratuitous, Uplift Harris fails the three-part test that currently determines if a grant of public money "accomplishes a public purpose." *Id.* at 384. True, a legislative decision that a grant serves a public purpose receives

"great weight," *Davis v. City of Lubbock*, 326 S.W.2d 699, 704 (Tex. 1959), but the Court need not "respect[]" the County's determination that Uplift Harris serves a public purpose if the "classification as governmental (or nongovernmental)" is "arbitrary or clearly at variance with 'well established and well defined' law on the subject," *City of Corsicana v. Wren*, 317 S.W.2d 516, 520 (Tex. 1958). This is ultimately a judicial question, *Davis*, 327 S.W.2d at 704—notwithstanding Defendants' continual efforts (at 46-47, 51, 55) to characterize this case as a "policy disagreement."

Here, Uplift Harris is "at variance with 'well established . . . ' law on" the Gift Clauses. *Wren*, 317 S.W.3d at 520. *First*, Uplift Harris predominantly benefits private parties. *See Tex. Mun. League*, 74 S.W.3d at 384. The State agrees that public purposes can include "reducing poverty." Resp. 45. But as the State has explained, Mot. 6; Pet. 6-14, the Constitution provides certain specific ways of doing so consistent with the Gift Clauses, *see, e.g.*, Tex. Const art. III, § 51-a. Government may give to the needy if its gift fits within the boundaries of section 51-a and any like provisions—but Defendants nowhere respond to the State's discussion of section 51-a and its list of ways that government may provide for the needy. *See* Resp. 52-55 (responding instead to the State's separate arguments regarding article III, section 51).

Second, the record amply demonstrates that the County does not "retain" constitutionally adequate "public controls over the funds." *Tex. Mun. League*, 74 S.W.3d at 384. Defendants have asserted (at 45) that Uplift Harris's purposes are "reducing poverty, reducing unemployment, improving the incentive and ability to work, providing financial security, boosting self-employment, improving health and educational outcomes, and increasing economic opportunity." None of Uplift

Harris's alleged controls are specifically tailored, Tex. Att'y Gen. Op. No. MW-89, at *2 (1979), to "ensure" that the program accomplishes *any* of those purposes, *Tex. Mun. League*, 74 S.W.3d at 384. For example, Defendants' insistence (at 48) that private "spending itself creates the return benefit" to the County fails because nothing in the program "ensure[s]," *id.*, that "individuals who receive[] these funds spend the money within their local communities," MR.126. Similarly, Defendants argue (at 45) that Uplift Harris funding "improve[s] the incentive and ability to work," but the program does not tie eligibility for benefits to employment. To the contrary, Defendants have repeatedly touted that recipients can spend the funds however they choose. Mot. 5. That is the antithesis of control.

The closest Defendants come to identifying a control is their contention (at 48) that "public control of a public benefit is proved by enforcing eligibility criteria." But the Attorney General opinion that Defendants cite for this proposition has nothing to do with no-strings-attached welfare, instead discussing programs where the funds themselves could be spent only for specific purposes. *See* Tex. Att'y Gen. Op. JC-0244, at *6 (2000) (applicants for architectural-examination scholarships).[5]

Third, for many of the reasons already discussed, Harris County doesn't receive a benefit in return for the program funds. *See Tex. Mun. League*, 74 S.W.3d at 384; *supra* p. 16. Contrary to Defendants' assertions (at 49-50), the State has not insisted

[5] Should the Court request merits briefing, the State would be happy to explain why the many other putative controls that Defendants cite are similarly insufficient. But given the preliminary nature of the current motion, the State does not want to further burden the Court with a point-by-point rebuttal of Defendants' assertions.

that Harris County is absolutely "require[d]" to identify a statutory obligation to show a sufficient public benefit. It merely gave an example of how fulfilling such an obligation *could* provide such a benefit. It is telling, however, that the best Defendants can come up with is to point (at 50 n.36) to obligations that the Commissioners Court *could have* concluded Uplift Harris "alleviate[d]." True, the County may have "unfunded mandates" to provide for "indigent health care" and "costs of appointed attorneys for indigent criminal defendants," but Uplift Harris's eligibility criteria has nothing to do with those mandates, so the payments can do nothing to "alleviate them." *See* Resp. 50 n.36. And Uplift Harris does not cover the County's expenses—it dispenses $500 a month to individuals. Defendants have pointed to no other statutory mandates that this program might fulfill.

c. Perhaps recognizing that they cannot meet the Court's existing test, Defendants try (at 44 n.33) to rewrite *Texas Municipal League* by asserting that its test is disjunctive—that is, that a grant may pass Gift Clause muster if it *either* is non-gratuitous *or* serves a public purpose. Not so. This Court held that *Texas Municipal League*'s challenged statutes did not violate the Gift Clauses because the cities making the challenged payments "receive[d] consideration . . . *and* the [contested] provisions serve[d] a legitimate public purpose with a clear benefit." *Tex. Mun. League*, 74 S.W.3d at 386 (emphasis added). Although this Court's cases are not typically read like statutes, that holding "is unmistakably written in the conjunctive." *In re K.S.L.*, 538 S.W.3d 108, 110 (Tex. 2017); *see also, e.g.*, *Bayou Pipeline Corp. v. R.R. Comm'n*, 568 S.W.2d 122, 125 (Tex. 1978) ("While there may be circumstances

which call for such a construction, ordinarily the words 'and' and 'or' are not interchangeable.").

Constitutional history confirms that a grant of public funds will pass Gift Clause muster only if it *both* is not gratuitous *and* serves a public purpose. *See, e.g.*, *Hogan v. S. Methodist Univ.*, No. 23-0565, 2024 WL 1819826, at *2-6 (Tex. Apr. 26, 2024) (examining constitutional history). Article III, section 52(a) "started out as a flat prohibition on grants and loans by local governments." George D. Braden, The Constitution of the State of Texas: An Annotated and Comparative Analysis 257 (1977). The core of that provision, like the other Gift Clauses, thus prohibits gratuitous grants. *See id.*; *see also Bexar County v. Linden*, 220 S.W. 761, 762 (Tex. 1920). And Defendants cannot avoid the public-purpose requirement by attempting (at 44 n.33) to cabin it to a "constitutional provision" that the State "never cited below." *See* Tex. Const. art. XVI, § 6(a). "As with any legal text, both the text and context" of the state Constitution "can be important indicators of meaning." *Hogan*, 2024 WL 1819826, at *5. Here, constitutional context includes another "flat prohibition," Braden, *supra*, at 257—this one on any "appropriation for private or individual purposes" that the Constitution does not authorize, Tex. Const. art. XVI, § 6(a).

d. Comparisons to constitutionally authorized forms of welfare do not save Uplift Harris for the reasons the State has already explained. Mot. 6; Pet. 10-12. These principles apply to Harris County because the Constitution "covers both 'grants' and 'loans' as such, whether the government involved is the state or a local unit." Braden, *supra*, at 259; *see also e.g.*, *Fort Worth ISD v. City of Fort Worth*, 22 S.W.3d 831, 834-35 (Tex. 2000) (applying article III, section 51 to local-government

action); *Byrd v. City of Dallas*, 6 S.W.2d 738, 739-41 (Tex. [Comm'n Op.] 1928) (same). Defendants raise five arguments to the contrary. None has merit.

First, Defendants again assert (at 52) forfeiture, but a party "cannot waive the correct interpretation of the law simply by failing to invoke it." *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2101 n.2 (2015) (Thomas, J., concurring) (citing *EEOC v. FLRA*, 476 U.S. 19, 23 (1986) (per curiam)). Moreover, whether Uplift Harris falls within the textual exceptions to the Gift Clauses' prohibition is a "subsidiary question" that is "fairly included" in the State's argument that the Gift Clauses prohibit Uplift Harris. Tex. R. App. P. 52.3(f).

Second, Attorney General Opinion GM-2578 does not demonstrate that counties are exempt from the Gift Clauses' limitations on acceptable forms of welfare. *Contra* Resp. 53. There, the Attorney General noted that article III, section 51 bars "payment of State money to private persons other than those contemplated by" section 51's "several amendments." Tex. Att'y Gen. Op. No. GM-2578, at *3 (1940). He also noted that former article XVI, section 8 stated that counties could "provide, in such manner as may be prescribed by law, a Manual Labor Poor House and Farm, for taking care of, managing, employing[,] and supplying the wants of its indigent and poor inhabitants." *Id.* But, as the Attorney General then recognized, "[t]his express provision . . . , prescribing the manner in which the indigent of this State shall be cared for, precludes . . . resort to any other method short of a constitutional amendment." *Id.* If anything, this "express provision" proves the State's point, Mot. 6, that when the People of Texas want to provide an exception to section 51's general prohibition—applicable to both state and local-government action, Braden,

supra, at 259—they know how. They have provided no such exception that would apply to Uplift Harris.

Third, Defendants maintain (at 55) that *Texas Municipal League* does not apply to economic-development programs under article III, section 52-a. Although this Court does not seem to have been asked to address the issue, the better view is either that "government entities relying on [s]ection 52-a are still required" to serve a public purpose; section 52-a merely recognizes that economic development *is* a public purpose. *Corsicana Indus. Found., Inc. v. City of Corsicana*, 685 S.W.3d 171, 180 (Tex. App.—Waco 2024, pet. filed); *accord Ex parte City of Irving*, 343 S.W.3d 850, 855 (Tex. App.—Dallas 2011), *vacated and remanded by agreement*, No. 11-0634, 2011 WL 13419312 (Tex. Nov. 4, 2011). As a result, constitutionally sufficient controls are still required. *Corsicana Indus. Found.*, 685 S.W.3d at 180; *see also* Tex. Att'y Gen. Op. KP-0261, at *2 (2019). But they are entirely absent here because Uplift Harris has none in place to ensure that the funds actually serve to "improv[e] the economy" or "reduc[e] unemployment and underemployment." Resp. 56.

Fourth, Defendants misread *Linden* when they claim that "the chief purpose of counties is fulfilling the State's obligation to 'care of the poor.'" Resp. 53 (emphasis omitted) (quoting *Linden*, 220 S.W. at 762). In that case, the Court was simply distinguishing between cities, which are created for the "convenience of the locality," and counties, which "are essentially instrumentalities of the State," for the purpose of determining whether the State's bestowing funds on a county violated the Gift Clauses. *Linden*, 220 S.W. at 762 (quoting *Hamilton Cnty. Bd. of Cmm'rs v. Mighels*, 7 Ohio St. 109, 119 (1857)). Nowhere did the Court indicate that counties can make

gifts that the State may not. *See id.* Just the opposite: If the State may not make gratuitous gifts for private or individual purposes because no constitutional exception applies, a county, which is an arm of the State, may not, either. *See id.*; *Childress County v. State*, 92 S.W.2d 1011, 1015 (Tex. 1936).

Fifth, as a last-ditch effort, Defendants insist (at 54-55) that Uplift Harris falls within article III, section 51's public-calamity exception. *See* Tex. Const. art. III, § 51. But even the federal government has said that COVID is over for at least a year. *See, e.g.*, H.R.J. Res. 7, 118th Cong. (2023) (enacted) (joint resolution declaring the COVID national emergency over); *Biden ends COVID national emergency after Congress acts*, The Associated Press (Apr. 11, 2023), https://www.npr.org/2023/04/11/1169191865/biden-ends-covid-national-emergency. And, in any event, there is nothing about Uplift Harris designed to respond to COVID—which is, after all, part of what makes it both gratuitous in violation of the Constitution's Gift Clauses and irrational in violation of its equal-protection guarantees.

2. Uplift Harris violates the Texas Equal Protection Clause.

Although Defendants seem to concede that this Court has never been asked to review a program like this one, it is generally accepted that the state Equal Protection Clause's guarantee, Tex. Const. art. I, § 3, precludes classifications that are "arbitrary or unreasonable," requiring instead that there be "a real and substantial difference having a relation to the subject of the particular enactment," *Crawford Chevrolet, Inc. v. McLarty*, 519 S.W.2d 656, 661 (Tex. App.—Amarillo 1975, no writ); *see City of Brookside Village v. Comeau*, 633 S.W.2d 790, 795-96 (Tex. 1982). Uplift

Harris violates this guarantee of equal protection primarily because there is no rational connection between the source of the funds, the eligibility criteria, and the putative purpose of the program. *Contra* Resp. 57 (claiming that the State "implicitly urges this Court to abandon the rational basis test").

Defendants claim (at 59) that "[t]he classification at issue in Uplift Harris is poverty—not random selection" and that "[t]he principal criteri[on] for selection is income level." If Uplift Harris were to provide $500 to every individual who meets the income level the program has set, that might be true. But it doesn't. MR.265-66. It also requires those individuals to live in certain zip codes or participate in ACCESS Harris County. MR.265-66. Defendants have not defended this basis for allocating program benefits, *see* Resp. 57-61, with good reason: Poor individuals who live within the right zip code or participate in ACCESS Harris County are not rationally distinguished from poor individuals who do not. But even if they were, *still* not every one of the 55,000 eligible applicants receives the handout. MR.28, 271. The number is instead reduced to approximately 1,800—or 3.27% of the eligible class—by random selection. Such welfare by lottery is the oppose of what the Constitution guarantees.

3. The State acted diligently.

Nor can Defendants excuse their conduct by insisting (at 25) that the State waited too long to bring this case. They repeatedly insist (at 25-26) that the State could have sued in June 2023 when Harris County first approved the Uplift Harris program. But as the State explained in its motion, although the Uplift Harris program was announced in June 2023, it was not until March 18, 2024, that Harris County

actually announced the date on which its first payment would be made, and the State filed its lawsuit in early April. Mot. 12.

Nonetheless, Defendants contend that the State should have sued last June. Again, they are wrong. Under the ripeness doctrine, the Court considers "whether, at the time a lawsuit is filed, the facts are sufficiently developed so that an injury has occurred or is likely to occur, rather than being contingent or remote." *Waco ISD v. Gibson*, 22 S.W.3d 849, 851-52 (Tex. 2000). The analysis "focuses on whether the case involves uncertain or contingent future events that may not occur as anticipated or may not occur at all." *Id.* at 852. In June 2023, almost a year ago, the State's harm was "remote," "uncertain," "hypothetical," and "conjectural," rather than "direct and immediate." *Id.* The actual injury that harms the State in this case is the dispersal of payments that violate the Gift Clauses because "ultra vires conduct automatically results in harm to the sovereign as a matter of law." *State v. Hollins*, 620 S.W.3d 400, 410 (Tex. 2020). But until such payments were "imminent," *Gibson*, 22 S.W.3d at 851-52, the State had no injury. After all, as Defendant Ellis's conduct discussed above reflects, *supra* p. 7, Defendants' plans have remained in flux, meaning that sometimes their public representations are not reliable indicators of how Harris County will administer its public programs. But apart from that, the funds are subject to various conditions about which the federal government is *still* issuing guidance.[6] As a result, the program might have been materially altered or cancelled in its

---

[6] *See, e.g.*, *Coronavirus State and Local Fiscal Fund Recovery Funds Guidance on Recipient compliance and Reporting Responsibilities*, U.S. Dep't of Treasury (Mar. 28,

entirety until shortly before suit was commenced. This is far from the Attorney General "demand[ing] this Court do in 24 hours" what he "purportedly took months to do." *Contra* Resp. 25. Instead, the Attorney General waited to ensure that a lawsuit was necessary (and when) before burdening the Texas courts with a difficult constitutional question that might have never ripened.

B. Temporary relief from this Court is necessary under Rule 52.10.

1. Uplift Harris payments would alter the status quo.

Because that dispute has now ripened, the court of appeals abused its discretion in refusing the emergency relief that was necessary to preserve the status quo. The status quo is the "last, actual, peaceable, non-contested status which preceded the pending controversy." *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004). Here, that status is that the COVID funds received from the federal government remain in the hands of Harris County and its agents, not thousands of individual recipients who likely cannot or will not repay them should the payments be held unlawful. Mot. 8; Pet. 14.

In arguing to the contrary, Defendants insist (at 29) that the status quo includes the County's *preparation* to make the Uplift Harris payments. But it is the payment of unlawful gifts—not contracting, hiring personnel, selecting applications, or expending funds in preparation to make those payments—that violates the Gift Clauses. *Contra* Resp. Br. 29. Because the actual act of making payments is the ultra

---

2024), https://home.treasury.gov/system/files/136/SLFRF-Compliance-and-Reporting-Guidance.pdf.

vires conduct that harms the State as a matter of law, *Hollins,* 620 S.W.3d at 410, no dispute existed between the parties until such payments are made or imminently would be made.

Defendants' authority (at 26-31) is not to the contrary because it deals with a unique series of executive orders that collectively created a status quo. Defendants rely on two COVID-era orders of this Court, each of which dealt with executive orders issued by the Governor, replacing earlier executive orders he had issued. Order at 1, *In re Abbott*, No. 21-0720 (Tex. Aug. 26, 2021); *see also In re State*, 2021 WL 4785741 at *1. Each of those orders itself had the immediate effect of law upon issuance,[7] which is very different from a program that is designed to take effect in the future at some unspecified date. Moreover, the *sequence* of those orders led this Court to say that "the status quo, for many months, has been gubernatorial oversight of such decisions at both the state and local levels," Order at 1, *In re Abbott*, No. 21-0720; *see also In re State*, 2021 WL 4785741 at *1. Nothing in this Court's orders purported to change the ordinary meaning of status quo to include mere preparation for potential payments, the "details" of which would only "start" to emerge six months after the program was initially announced. Resp. 11. As a result, the status

---

[7] Governor of the State of Tex., Executive Order GA-35 ("I, Greg Abbott, Governor of Texas . . . do hereby order the following on a statewide basis effective immediately . . . ."); Governor of the State of Tex., Executive Order GA-36 (same); Governor of the State of Tex., Executive Order GA-38 (same); Governor of the State of Tex., Executive Order GA-39 (same). *Available at* https://gov.texas.gov/coronavirus-executive-orders.

quo *remains* that Harris County is in compliance with the Gift Clauses so long as the funds remain in Defendants' control.

2. Granting the State's motion protects the Court's jurisdiction and prevents irreparable harm to the State.

Finally, temporary relief would preserve this Court's jurisdiction, given that the funds being used to pay for Uplift Harris are likely to be expended before this Court has a chance to review any decision from the court of appeals. Mot. 9. Defendants counter (at 31-32) that granting the State's motion might *also* moot the underlying case and irreparably harm the County because the County must "commit" the relevant funds by the end of 2024 and may not "spend" them after September 30, 2026. If Defendants are concerned as to those deadlines, they can seek expedited review just as easily as the State. *Cf.* Resp. 31. If anything, Defendants' argument that the funds are use-it-or-lose-it belies their contention that the funds are not gratuitous. Their argument shows that the County thinks it needs to get rid of the money by September 30, 2026, and can do so only by giving the money away. And given that a motion to expedite of the type that Defendants contemplate is designed to protect a right the State maintains Defendants don't have, it would be hard to see how the State would have standing to make such a motion.

Say what Defendants may about whether the State diligently sought relief in filing the initial *complaint*, *but see supra* Part II.A.3, Defendants cannot seriously dispute that the State has acted with all possible haste once on appeal. After all, it sought relief in the court of appeals the day after it received an appealable order from the

trial court. MR.254, 346. And it sought relief from this Court within seven hours of receiving an adverse ruling from a divided court of appeals.

In any event, a simple motion to expedite the appeal below might prevent the *County's* putatively irreparable harm, which will not eventuate for at least seven months. Resp. 31. By contrast, it will do nothing to aid the State, which will be harmed the instant the County issues an illegal payment. *See Hollins*, 620 S.W.3d at 410. As Commissioner Ellis's tweets amply demonstrate, the only reason that such harm hasn't happened *already* is that the State sought relief from this Court with extraordinary diligence *and* this Court acted with extraordinary dispatch and issued a stay ahead of when the State requested.

Prayer

The Court has already granted an administrative stay pending resolution of the current motion. It should grant this motion and issue a temporary order prohibiting Defendants or their agents, MR.114, 139, from making payments under the Uplift Harris program during the pendency of the State's mandamus petition (which itself seeks relief pending the State's appeal), as well as grant any other relief the Court deems appropriate.

Respectfully submitted.

Ken Paxton
Attorney General of Texas

Brent Webster
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

/s/ Lanora C. Pettit
Lanora C. Pettit
Principal Deputy Solicitor General
State Bar No. 24115221
Lanora.Pettit@oag.texas.gov

Counsel for Relator

Certificate of Compliance

Microsoft Word reports that this document contains 7,517 words, excluding exempted text.

/s/ Lanora C. Pettit
Lanora C. Pettit

No. 24-0325

In the Supreme Court of Texas

In re STATE OF TEXAS,
Relator.

On Petition for Writ of Mandamus
to the Fourteenth Court of Appeals, Houston

RELATOR'S SUPPLEMENTAL APPENDIX

Tab

1. Commissioner Rodney Ellis Tweets, April 23, 2024 .... A

Tab A: Commissioner Rodney Ellis Tweets, April 23, 2024

Settings

Post

Rodney Ellis @RodneyEllis

NEW: We have sent out the first $500 payments to recipients of our Uplift Harris guaranteed income program. We will keep fighting to ensure we can continue making this life changing investment in the people of Harris County.

Last edited 11:13 AM · Apr 23, 2024 · **27K** Views

22 Reposts **21** Quotes **197** Likes **2** Bookmarks

2

Sign in with Google

Use your Google Account to sign in to twitter.com

No more passwords to remember. Signing in is fast, simple and secure.

Continue

Relevant people

Rodney Ellis @RodneyEllis Follow

Harris County Commissioner, Precinct One @hcpct1

Something went wrong. Try reloading.

Retry

Terms of Service Privacy Policy Cookie Policy Accessibility Ads info More ··· © 2024 X Corp.

Settings

Post

Rodney Ellis @RodneyEllis

We were racing to get at least one payment out the door, but unfortunately we were not able to process them before the Supreme Court order came down. We will continue to fight to get these 1900 families the support they need and deserve.

1:39 PM · Apr 23, 2024 · **2,023** Views

1 Repost **5** Quotes **14** Likes

Sign in with Google

Use your Google Account to sign in to twitter.com

No more passwords to remember. Signing in is fast, simple and secure.

Continue

Relevant people

Rodney Ellis @RodneyEllis Follow

Harris County Commissioner, Precinct One @hcpct1

Something went wrong. Try reloading.

Retry

Terms of Service Privacy Policy Cookie Policy Accessibility Ads info More ··· © 2024 X Corp.

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below:

Sylvia Rosales on behalf of Lanora Pettit
Bar No. 24115221
sylvia.rosales@oag.texas.gov
Envelope ID: 87289563
Filing Code Description: Reply to Motion
Filing Description: 240325_Relators Reply Emergency Mtn
Status as of 5/2/2024 7:50 AM CST

Associated Case Party: Office of the Attorney General

Name	BarNumber	Email	TimestampSubmitted	Status
Maria Williamson		maria.williamson@oag.texas.gov	5/1/2024 10:57:12 PM	SENT
Lanora Pettit		lanora.pettit@oag.texas.gov	5/1/2024 10:57:12 PM	SENT
Ben Mendelson		Ben.Mendelson@oag.texas.gov	5/1/2024 10:57:12 PM	SENT
Nancy Villarreal		nancy.villarreal@oag.texas.gov	5/1/2024 10:57:12 PM	SENT
Sara Baumgardner		sara.baumgardner@oag.texas.gov	5/1/2024 10:57:12 PM	SENT
Ben Prengler		Ben.Prengler@oag.texas.gov	5/1/2024 10:57:12 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Eleanor Matheson	24131490	Eleanor.matheson@harriscountytx.gov	5/1/2024 10:57:12 PM	SENT
Christian Menefee		Christian.Menefee@cao.hctx.net	5/1/2024 10:57:12 PM	SENT
Ryan Cooper	24123649	ryan.cooper@harriscountytx.gov	5/1/2024 10:57:12 PM	SENT
Jonathan Fombonne		jonathan.fombonne@cao.hctx.net	5/1/2024 10:57:12 PM	SENT
Tiffany Bingham		tiffany.bingham@harriscountytx.gov	5/1/2024 10:57:12 PM	SENT
Christopher Garza		Christopher.Garza@harriscountytx.gov	5/1/2024 10:57:12 PM	SENT
Andrea Mintzer		Andrea.Mintzer@harriscountytx.gov	5/1/2024 10:57:12 PM	SENT
Neal Sarkar		Neal.Sarkar@harriscountytx.gov	5/1/2024 10:57:12 PM	SENT
Grant Martinez		gmartinez@yettercoleman.com	5/1/2024 10:57:12 PM	SENT
Justin Tschoepe		jtschoepe@yettercoleman.com	5/1/2024 10:57:12 PM	SENT
Marisa Mata		mmata@yettercoleman.com	5/1/2024 10:57:12 PM	SENT
Jason LaFond		jlafond@yettercoleman.com	5/1/2024 10:57:12 PM	SENT