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SUPREME COURT OF TEXAS
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NO. 23-0767

IN THE SUPREME COURT OF TEXAS

SHANA ELLIOTT AND LAWRENCE KALKE,
***Petitioners*,**

v.

CITY OF COLLEGE STATION, TEXAS; KARL MOONEY, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF COLLEGE STATION; AND BRYAN WOODS, IN HIS OFFICIAL CAPACITY AS THE CITY MANAGER OF THE CITY OF COLLEGE STATION,
Respondents.

On Petition for Review from the Sixth Court of Appeals
Texarkana, Texas
Case No. 06-22-00078-CV

RESPONSE TO PETITION FOR REVIEW

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"Op." refers to the Sixth Court of Appeals' opinion in this case: *Elliott v. City of Coll. Station*, 674 S.W.3d 653 (Tex. App.—Texarkana 2023, pet. filed)

"The City" and "College Station" refers to Respondent, the City of College Station, Texas

STATEMENT OF THE CASE

Nature of the Case. This is an appeal of an order, dismissing Petitioners' claims for lack of subject matter jurisdiction. CR55-56. Petitioners own property in Respondent City's extraterritorial jurisdiction and filed suit against the City, and its mayor and city manager, in their official capacities, challenging the authority of Texas cities to regulate outside of their corporate boundaries. Petitioners seek declaratory and injunctive relief under the theory that the statutes authorizing cities to exercise regulatory authority in their extraterritorial jurisdiction, and any ordinances exercising that authority, are unconstitutional as a violation of the "republican form of government" provision of the Texas Constitution. CR3-11. Respondents challenged jurisdiction for three separate reasons: 1) Petitioners lack standing; 2) their claims are not ripe; and 3) their claims present a non-justiciable political question. CR13-17; CR26-52; CR126-159.

Trial Court. 85th District Court of Brazos County, Texas; Hon. Kyle Hawthorne, presiding.

Disposition of Trial Court. On September 16, 2022, after a hearing on the City's plea to jurisdiction, the trial court granted the City's plea, and dismissed Petitioners' case with prejudice. CR55-56.

Parties on Appeal. Petitioners: Shana Elliott and Lawrence Kalke.

Respondents: City of College Station, Texas; Karl Mooney, in his official capacity as Mayor of the City of College Station; and Bryan Woods, in his

	official capacity as the City Manager of the City of College Station.
Court of Appeals.	Sixth Court of Appeals, Texarkana.
Justices.	Chief Justice Stevens and Justices Van Cleef and Rambin.
Citation.	*Elliott v. City of Coll. Station*, 674 S.W.3d 653 (Tex. App.—Texarkana 2023) (pet. filed).
Disposition on Appeal.	The Sixth Court of Appeals affirmed the trial court's order, granting the Respondents' plea to jurisdiction. Petitioners did not file motions for rehearing or for en banc reconsideration.

STATEMENT OF JURISDICTION

Contrary to Petitioners' contention, this Court lacks jurisdiction over this appeal because it does not present a question of law that is important to Texas jurisprudence. As discussed in this Response, the opinion of the court of appeals does not create a conflict between other Texas courts and was rightly decided. Moreover, this lawsuit is based on hypothetical injuries. Consequently, it is burdened by dispositive collateral issues of jurisdiction—standing and ripeness.

ISSUES PRESENTED

Respondents do not believe the Court should grant review. Nevertheless, if the Court determines that review is necessary, Respondents are dissatisfied with Petitioners' presentation of the issues. Contrary to Petitioners' contentions, the court of appeals upheld the trial court's dismissal for lack of jurisdiction and did not address the merits of Petitioners' argument that any Texas city's regulation in the extraterritorial jurisdiction violates the "republican form of government" clause of the Texas Constitution. Therefore, Petitioners' second issue requests a judicial determination from this Court that is not ripe for review.

Because there are three independent grounds for affirming dismissal for lack of jurisdiction, two of which were raised by Respondents in their Plea to Jurisdiction but were not reached by the court of appeals, Respondents present the following issues:

1. Whether Petitioners lack standing because their claims are based on hypothetical injuries.

2. Whether Petitioners' claims are unripe because, at the time Petitioners filed their lawsuit, their claims were based on uncertain, future events that had not occurred and will likely never occur to ripen their claims.

3. Whether the court of appeals was correct in ruling that Petitioners failed to meet their burden of establishing jurisdiction because Petitioners' claims present a non-justiciable political question.

STATEMENT OF FACTS

I. For a century, the Texas Legislature has authorized Texas municipalities to regulate activities in nearby areas outside their city limits.

One hundred years ago, the Texas Legislature enacted a law authorizing home-rule cities to "define all nuisances and prohibit the same within the city and outside the city limits for a distance of 5000 feet." Acts of 1913, 33rd Leg., R.S., ch. 147, § 1, 1919 Tex. Gen. Laws 307, 314 (originally codified Tex. Civ. Stats. Ann. art. 1175). In 1927, the Legislature expanded that regulatory power to authorize cities with populations of 25,000 or more to regulate the subdivision of property "within five miles of the[ir] corporate limits… ." Acts of 1927, 40th Leg., R.S., ch. 231, § 1, 1927 Tex. Gen. Laws 342.

In more recent years, the Legislature has codified the concept of municipal extraterritorial jurisdiction ("ETJ") in Chapter 42 of the Texas Local Government Code. Chapter 42 defines ETJ as "the unincorporated area that is contiguous to the corporate boundaries of the municipality." The geographical extent of a particular city's ETJ is contingent upon the number of inhabitants of the city. Tex. Loc. Gov't Code § 42.021(a). For example, a municipality with 100,000 or more

inhabitants, like the City of College Station, has an ETJ extending five miles out from its corporate boundaries. *Id.*

Section 42.001 of the Texas Local Government Code explains the purpose of ETJ. "The legislature declares it to be the policy of the state to designate certain areas as the extraterritorial jurisdiction of municipalities to promote and protect the general health, safety, and welfare of persons residing in and adjacent to municipalities." Tex. Loc. Gov't Code § 42.001.

Current statutes that authorize municipalities to regulate activities outside their corporate boundaries include, but are not limited to: a) Chapter 212 of the Texas Local Government Code, which authorizes the regulation of the subdivision of property and certain related matters in ETJ; b) Chapter 216 of the Texas Local Government Code, which authorizes the regulation of signs in ETJ; c) Chapter 217 of the Texas Local Government Code, which authorizes the regulation of certain nuisance activities occurring within one mile of a city's boundaries; and d) Chapter 713 of the Texas Health & Safety Code, which authorizes the regulation of cemeteries in ETJ.

II. Petitioners live in the City's extraterritorial jurisdiction, and they filed the underlying lawsuit, challenging the City's authority to regulate outside its city limits.

Petitioners own and reside on residential lots located within the City's ETJ. CR4-5. Although the Texas Legislature has exercised its legislative judgment and conferred authority on Texas cities to regulate certain activities in nearby areas outside their city limits, Petitioners sued the City, its mayor, and its city manager,[1] challenging the exercise of that authority as unconstitutional. CR8-10.

Specifically, Petitioners allege that three of the City's ordinances are unconstitutional under Article 1, Section 2 of the Texas Constitution, to the extent that the ordinances apply outside the City limits.[2] CR8-10. They argue that unless residents of the City's ETJ can vote in City elections, any City regulation of the ETJ is void as a violation of the republican form of government provision contained in the Texas Constitution. Thus, despite that Petitioners focus on specific

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[1] Petitioners sued the officials in their official capacities.

[2] Petitioners contend that they are only challenging two ordinances. *See* Petition for Review at 2. It is unclear which ordinance challenge they intend to abandon. However, Section 26-2 of the City's Code or Ordinances, which Petitioners challenged as unconstitutional in their pleadings, only applies within the city limits. CR121. By its plain language, it does not apply to Petitioners' properties in the ETJ.

ordinances for their challenge, their true challenge is of the actual concept of ETJ and any Texas city's authority to regulate property outside of its corporate boundaries.

III. Petitioners base their challenge on hypothetical future scenarios.

Petitioners allege that they may someday decide to: a) fire air guns or practice archery on their properties; b) make changes to their driveways; and c) put up signs on their lots criticizing the City. They further allege that if they ever take such actions, the City may construe the actions as violations of its ordinances and take enforcement action against them. CR4-5; CR8; CR43-47. Accordingly, it is uncontroverted that Petitioners base their challenge of the City's regulations on activities that Petitioners have not actually engaged in on their properties but only contemplate engaging in, and their belief that those activities will be subject to regulatory enforcement by the City if they engage in the activities at some unknown time in the future. CR43-47.

IV. The City has never enforced or threatened to enforce the challenged regulations against properties in the City's extraterritorial jurisdiction.

Petitioners challenge Section 26-2 of the City's Code of Ordinances, which they contend prevents them from practicing archery

or shooting air guns on their property. CR133-134. They also challenge Section 7.5 of the City's Unified Development Code, which they contend prohibits them from placing signs on their property expressing their political views, and Section 34-36 of the City's Code of Ordinances, which they contend would require them to get permits from the City if they ever decide to modify or add driveways on their property. CR119; CR156.

Petitioners do not assert that the City has actually enforced any of the challenged regulations against them or against others similarly situated. Petitioners also do not allege that the City has threatened to enforce the challenged regulations against them or even that the City agrees with their construction of how the regulations might apply to them. In fact, it is uncontroverted that the City does not enforce the challenged regulations against residential lots located in its ETJ, and there is no evidence that the City has ever had occasion to construe how the challenged regulations might apply to Petitioners' properties.[3] CR50-52.

[3] Petitioners may argue that Bryan Woods, the City Manager, gave his opinions on the meaning of various provisions of the challenged ordinances during his deposition and that some of Woods' deposition answers constitute

Furthermore, were the City to agree with Petitioners' contentions regarding the applicability of the challenged regulations to their property and seek to enforce them, the City's only option for enforcement would be to file a civil lawsuit for injunctive relief. CR136-137; CR159. No fines or criminal penalties apply to violations of the regulations challenged by Petitioners to the extent they apply outside the city limits. *Id.*; *see also* Tex. Loc. Gov't Code § 212.003.

V. Senate Bill 2038 went into effect on September 1, 2023, providing a mechanism for opting out of a city's extraterritorial jurisdiction.

On September 1, 2023, Senate Bill 2038 went into effect and amended Chapter 42 of the Texas Local Government Code by adding Subchapter D: Release of Area by Petition of Landowner or Resident from Extraterritorial Jurisdiction. Tex. Loc. Gov't Code §§ 42.101–

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the City's construction of the challenged ordinances. However, the City Manager's off-the-cuff answers to questions, about how isolated parts of the ordinances might be applied, hardly substitutes for an official construction of the meaning of the challenged ordinances. Further, Petitioners did not ask Woods whether the City had ever had occasion to construe the applicability of the regulations to the hypothetical situations Petitioners had raised in the lawsuit.

42.105. Subject to some exceptions, Subchapter D apparently provides a mechanism for residents in a city's ETJ to "opt out" of the ETJ.[4] *Id.*

By its terms, Subchapter D states that a property owner with property in a city's ETJ that desires the property be removed from that city's ETJ need only submit a valid petition to the city for release. Tex. Loc. Gov't Code § 42.105. Once a city is presented with a qualifying petition for release from the city's ETJ, Subchapter D states that the city must release the land from its ETJ, or the land will be released automatically by operation of law.[5] *Id.*

SUMMARY OF THE ARGUMENT

The claims in this case are based on hypothetical events that have yet to occur and will likely never occur. Petitioners allege nothing more than: a) there are City ordinances on the books that they construe as prohibiting certain actions that they might want to take in the future; and b) they fear that if they take those actions the City will construe the ordinances as Petitioners have and take enforcement action against them.

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[4] The exceptions do not apply to this case.

[5] Grand Prairie, Texas, and fourteen other cities, have filed an action, challenging the constitutionality of SB 2038: Cause No. D-1-GN-23-007785 in the 261st District of Travis County, Texas.

Pursuant to the uncontested facts: a) Petitioners have not taken any of the contemplated actions; b) the City has never construed how any of the challenged regulations would apply to Petitioners or others similarly situated; and c) to the extent the challenged regulations apply in the ETJ at all, the City can only enforce the challenged regulations by filing a suit for injunctive relief, which the City has not done or threatened to do. Ultimately, this is a manufactured lawsuit, intended for the purpose of challenging the concept of extraterritorial jurisdiction. It does not involve actual or imminent injuries or a present controversy. As courts only have the power to remedy actual or imminent harm, Petitioners have failed to meet their burden of establishing jurisdiction. Ultimately, the Court should decline to review an issue that the Court would have to decide in the context of an imaginary dispute.

Further, for at least one hundred years, the Texas Legislature has granted authority to Texas cities to regulate certain activities in nearby areas outside their corporate boundaries. Petitioners challenge the very construct of this authority as a violation of the "republican form of government" clause under Article 1, Section 2 of the Texas Constitution

because ETJ residents cannot vote for city officials who enforce regulations that may apply in the ETJ.

As the court of appeals correctly recognized, the question of whether a city's regulatory authority in the ETJ violates Article 1, Section 2, is a nonjusticiable political question when analyzing the factors this Court has applied from *Baker v. Carr*: 1) there is a constitutional commitment of the issue to the Texas Legislature; and 2) Petitioners failed to identify any possible "judicially discoverable and manageable standards" for resolving the issue by the courts. Additionally, in taking into consideration the declaratory and injunctive relief requested by Petitioners, the appellate court rightly determined that the possible consequences of such relief did not align with the alleged complaints of Petitioners and would necessarily undo regulations that the Legislature exercised legislative discretion to authorize a century ago.

Petitioners fail to recognize or acknowledge the full scope of their "no regulation without representation" argument. If that argument were correct, neither the State of Texas, nor any of its political subdivisions, could enforce their land use regulations against the local

property of non-residents, nor could they apply their laws to the local activities of non-residents.

Lastly, contrary to the Petitioners' assertions, the court of appeals' decision in this case does not conflict with the Texas decisions that Petitioners cite. To the extent any of the holdings or logic of the decisions are relevant to the application of the political question doctrine to the Petitioners' claims, the underlying rationale of those decisions is consistent with the application of the doctrine.

ARGUMENT

I. The Court should deny review because Petitioners have manufactured an imaginary controversy to challenge the concept of extraterritorial jurisdiction.

"Subject matter jurisdiction requires that the party bringing the suit have standing, that there be a live controversy between the parties, and that the case be justiciable." *The State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994). While the court of appeals did not resolve the case on the grounds of ripeness or standing, and, instead, ruled that Petitioners' challenge to the City's regulatory authority in the ETJ was barred as a non-justiciable political question, this Court may deny review on any jurisdictional ground. *See Waco Indep. Sch. Dist. v.*

Gibson, 22 S.W.3d 849, 851 (Tex. 2000) (holding claims were unripe despite court of appeals' failure to reach ripeness issue).

A. Petitioners lack standing because their purported injuries are undisputedly hypothetical.

Standing and ripeness are threshold issues that implicate subject matter jurisdiction, and neither can be waived. *Id*. "While standing focuses on the issue of *who* may bring an action, ripeness focuses on *when* that action may be brought." *Id*. (emphasis added).

"For standing, a plaintiff must be personally aggrieved; his alleged injury must be concrete and particularized, actual or imminent, not hypothetical." *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304-05 (Tex. 2008). The injury must be "traceable to the defendant's conduct" and redressable by a favorable decision. *Tex. Med. Res., LLP v. Molina Healthcare of Tex., Inc.*, 659 S.W.3d 424, 440 (Tex. 2023). When challenging the constitutionality of a statute, a plaintiff must: 1) suffer some actual or threatened restriction under the statute; and 2) contend that the statute unconstitutionally restricts the plaintiff's rights. *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 77 (Tex. 2015) (citing *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 517–18 (Tex. 1995)).

Petitioners allege only that certain City ordinances exist, and they believe that the regulations apply to hypothetical activities that Petitioners have not engaged in but contemplate engaging in, at some unknown time in the future, on their residential lots in the City's ETJ. CR4-5; CR8; CR43-47. It is uncontested that the City has never enforced or threatened to enforce any of the challenged ordinances against Petitioners, and even if the City had the occasion to enforce the challenged ordinances against Petitioners in the future in the manner they allege, the only action that the City could take to enforce the regulations is to initiate a civil lawsuit for injunctive relief. CR50-52; CR159; *see also* Tex. Loc. Gov't Code § 212.003(b)-(c). No such suit has been initiated or threatened.

Asking a court to decide the legality of a city's possible future enforcement of regulations based on hypothetical future events is a classic example of a request for a court to issue an advisory opinion. Rather than remedying actual or imminent harm, a judgment would address only a hypothetical injury. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). Therefore, the Court should deny review of this hypothetical controversy.

B. Petitioners' claims are based on uncertain and contingent future events.

Like standing, ripeness "emphasizes the need for a concrete injury for a justiciable claim to be presented." *Waco Indep. Sch. Dist.*, 22 S.W.3d at 851. "Under the ripeness doctrine, courts must consider 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." *Patel*, 469 S.W.3d at 78 (citation omitted) (emphasis in original). Courts do not have the "power to counsel a legal conclusion on a hypothetical or contingent set of facts." *Waco Indep. Sch. Dist.*, 22 S.W.3d at 853.

The focus in a ripeness analysis is "on whether a case involves uncertain or contingent future events that may not occur as anticipated or may not occur at all." *Id.* (holding challenge to school district policy of refusing to promote students based on testing was not ripe because no student had been retained or given notice of retention and thus alleged injury depended on hypothetical or contingent facts.). "The ripeness doctrine serves to avoid premature adjudication" to "prevent courts from entangling themselves in abstract disagreements." *Patterson v. Planned Parenthood of Houston & Se. Texas, Inc.*, 971

S.W.2d 439, 442-43 (Tex. 1998).

Petitioners have not met their burden of establishing the ripeness of their claims because they have not demonstrated that an enforcement action is imminent or sufficiently likely to occur. *Patel*, 469 S.W.3d at 78 (finding ripeness because, at time lawsuit was filed, plaintiffs had taken illegal actions and had been warned, subjecting them to real threat of enforcement proceedings, penalties and sanctions). The reality is that Petitioners have conjured up a hypothetical controversy by speculating about how the City might respond to certain actions that Petitioners say they are contemplating taking on their properties at some unknown time in the future. It is undisputed that they have not taken any such contemplated actions.

Furthermore, Petitioners complain that cities should not have the authority to regulate in the ETJ when ETJ residents "receive no city services" and do not have the right to vote for city officials. *See* Petition for Review at 2. Yet, the Legislature has apparently granted Petitioners the opportunity to remove their properties from the ETJ through the removal process in Subchapter D of Chapter 42 of the Texas Local Government Code, without City input. Unsurprisingly,

Petitioners have chosen to continue this imaginary controversy in furtherance of their challenge to the regulatory authority of cities, instead of submitting petitions for removal.

II. This case of imaginary injuries does not give rise to an important question for this Court to resolve.

> [Petitioners] admit that they have not taken any concrete steps towards the realization of their desires. Neither has applied for a driveway permit. Neither has turned so much as a spade of soil for a driveway. Neither has bought so much as a posterboard or a paintbrush for a sign.

Op. at 659. While the court of appeals' judgment did not turn on ripeness or standing, the court recognized that Petitioners' conduct reveals that the resolution of this dispute has no bearing on their use of their property.

Indeed, Petitioners have concocted hypothetical injuries with the mindset that they are the face of a crusade to take on the regulatory authority of Texas cities in ETJ. They argue that this case involves constitutional questions that are important to the jurisprudence of Texas. Even if this case involved questions of importance, such questions cannot be decided in the abstract or in the context of a made-up dispute.

A. Petitioners have not identified an actual conflict between the court of appeals' opinion and other Texas opinions.

In an effort to make their case appear worthy of review, Petitioners purport to identify three Texas cases in conflict with the court of appeals' opinion in this case. However, just as Petitioners' injuries are illusory, any conflict is illusory. None of the cases cited by Petitioners directly address the issue of whether the political question doctrine applies to challenges brought under the "republican form of government" provisions in the state or federal constitutions.

First, Petitioners cite *Bell v. Hill*, 74 S.W.2d 113, 120 (1934). In that opinion, this Court upheld the right of the Texas Democratic Party to exclude citizens from voting based on race, under the freedom of association provisions of the state and federal constitutions. *Id.* Article 1, Section 2 is mentioned only in *dicta*, stating that Article 1, Section 2 is "the only limitation on the right of the people to assemble together for their common good, in a peaceable manner, as guaranteed by Section 27 of the Bill of Rights." *Id.*

Second, Petitioners cite *Bonner v. Belsterling*, 138 S.W. 571, 574 (Tex. 1911). In that case, this Court considered whether a recall

election provision in a city charter violated the federal Guarantee Clause and determined that it was "a question for the people themselves ... or for the Legislature ... not for the courts to decide." *Id.* As the preceding quote demonstrates, while the political question doctrine was not mentioned by name, the Court's analysis was consistent with its application.

Third, Petitioners cite a court of appeals case, *Walling v. N. Cent. Tex. Mun. Water Auth.*, wherein the Eleventh Court of Appeals considered a challenge under Article 1, Section 2 of the Texas Constitution, and the federal Guarantee Clause, to an act of the Texas Legislature that created a regional water authority. 359 S.W.2d 546, 547 (Tex. Civ. App.—Eastland 1962, writ ref'd n.r.e.). One of the arguments made to the court was that the portion of the challenged act, which allowed the governing bodies of the included cities to elect the members of the authority's board of directors (instead of allowing the voters within the authority to elect them directly), was unconstitutional. *Id.*

The court of appeals rejected the argument, noting only that it "found nothing in the United States Constitution or in the State

Constitution which would authorize us to say that the citizens of the Authority are being deprived of a republican form of government." *Id*. at 549. There is nothing in the opinion to suggest that the parties raised the issue of whether the political question doctrine applied.

Thus, none of the cases cited by Petitioners conflict with the court of appeals' determination that Petitioners' facial challenge to City ordinances as a violation of the "republican form of government" provision in Article 1, Section 2 presents a non-justiciable political question. The issue was not addressed in *Bell* or *Walling*, and *Bonner* applies a decisional analysis that is consistent with an application of the political question doctrine for claims brought under Article 1, Section 2.

Justiciability requires a careful case-specific analysis, and this is the first time that a court has directly addressed the issue of whether the political question doctrine applies to a challenge brought under Article 1, Section 2. Petitioners fail in their attempt to identify a conflict that does not exist. Regardless, the merits of Petitioners' argument that the concept of ETJ is a violation of the "republican form of government" provision should never be reached for the additional

reasons that Petitioners lack standing and their claims are unripe.

B. The court of appeals correctly decided that Petitioners' challenge under the "republican form of government" provision of the Texas Constitution is barred by the political question doctrine.

Under the political question doctrine, courts abstain from answering questions that are committed to the other two branches of government. *Baker v. Carr*, 369 U.S. 186, 209 (1962); *Am. K-9 Detection Servs., LLC v. Freeman*, 556 S.W.3d 246, 249 (Tex. 2018). Indeed, this Court explained most recently in *Preston v. M1Support Servs., L.P.*, that "the Texas Constitution enshrines the separation of powers as a fundamental principle of limited government," and "state courts decline to exercise jurisdiction over questions committed to the executive and legislative branches." 642 S.W.3d 452, 458 (Tex. 2022).

In determining whether a question is committed to another branch, courts, including this Court, have considered the factors presented in the United States Supreme Court case *Baker v. Carr*: (1) whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department;" or (2) "a lack of judicially discoverable and manageable standards for resolving it." *Preston*, 642 S.W.3d at 458; *Am. K-9 Detection Servs., LLC*, 556

S.W.3d at 252-53 (quoting *Baker*, 369 U.S. at 217). As the appellate opinion correctly explained, while this Court has never explicitly adopted the *Baker* test, it has "assumed" that the factors, which "define nonjusticiable political questions for purposes of demarcating the separation of powers in the federal government ... serve equally well to define the separation of powers in the state government under the Texas Constitution." *Id.* Further, "each case requires a discriminating analysis of the particular question posed ... of its susceptibility to judicial handling in light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Id.* at 255 (citing *Baker*, 369 U.S. at 211–12).

The court of appeals appropriately applied the factors and the "discriminating analysis" from *Baker* that this Court adopted in *American K-9* and determined that, under the first *Baker* factor, Petitioners' challenge to ETJ "constitutes a textual commitment to the Legislature." Op. at 673. The court reasoned that, pursuant to *Brown*, it is up to the Texas Legislature, not the courts, to determine the type and extent of regulatory authority afforded to municipalities. *Brown v. City of Galveston*, 75 S.W. 488, 495-96 (Tex. 1903). Since *Brown*, the

Legislature made it the policy of the State to designate certain areas as ETJ to protect the "general health, safety, and welfare" of people living "adjacent to" cities. Op. at 673 (citing Tex. Loc. Gov't Code § 42.001).

Regarding the second *Baker* factor, the court of appeals correctly concluded that Petitioners failed to articulate any judicially discoverable and manageable standards for resolving the question of whether municipal regulation in ETJ violates Article 1, Section 2. Petitioners argue that municipal regulatory authority in the ETJ is unconstitutional because if there is to be an ETJ, property owners in the ETJ must have a vote in city elections. However, they have yet to "put into words a standard of 'republican form of government' by which to judge the Legislature's representation of citizens in the [ETJ]." Op. at 673.

Lastly, the court of appeals analyzed "the possible consequences of judicial action" in answering the question at hand. *Id*. Petitioners seek declaratory and injunctive relief, declaring the challenged ordinances unconstitutional and enjoining their application based on their contention that they do not have the right to vote in city elections. CR8-10. However, they do not allege that the City could expand voting to

ETJ without legislative authority, and their pleadings lack a request for voting altogether. Op. at 674.

Furthermore, if a court granted the relief Petitioners requested, and found that the ordinances were void as unconstitutional, they would necessarily be void from inception. As the court of appeals reasoned, it is particularly persuasive that the Texas Legislature has authorized Texas municipalities to regulate activities in nearby areas outside their city limits for a century. Op. at 674.

CONCLUSION AND PRAYER

While the appellate court did not focus on them, ripeness and standing are two independent jurisdictional grounds supporting the trial court's dismissal. Petitioners have not taken any action on their properties that would subject them to an enforcement action by the City under the challenged regulations, nor do they allege that the City has enforced the regulations against them or anyone else in the ETJ.

Moreover, the appellate court's opinion does not create a conflict with other Texas courts, and the appellate court correctly applied the political question doctrine to affirm the trial court's dismissal, as Petitioners failed to meet their burden of establishing the justiciability

of their claims. Furthermore, at best, the issue of justiciability is premature for review, as this particular case is burdened by dispositive collateral issues of jurisdiction—standing and ripeness.

For these reasons, and for the reasons described in this Response, Respondents respectfully request that the Court deny review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Response to Petition for Review has a word count of 4,440.

/s/ Allison S. Killian
Allison S. Killian

CERTIFICATE OF SERVICE

As required by Texas Rule of Appellate Procedure 6.3 and 9.5(b), (d), (e), I certify that I have served this document on all other parties to this appeal, through their respective counsel of record, on January 31, 2024, as follows:

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NO. 23-0767

IN THE SUPREME COURT OF TEXAS

SHANA ELLIOTT AND LAWRENCE KALKE,
***Petitioners*,**

v.

CITY OF COLLEGE STATION, TEXAS; KARL MOONEY, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF COLLEGE STATION; AND BRYAN WOODS, IN HIS OFFICIAL CAPACITY AS THE CITY MANAGER OF THE CITY OF COLLEGE STATION,
Respondents.

On Petition for Review from the Sixth Court of Appeals
Texarkana, Texas
Case No. 06-22-00078-CV

APPENDIX TO RESPONSE TO PETITION FOR REVIEW

APPENDIX TAB A

Tex. Local Gov't Code § 42.105

This document is current through the 2023 Regular Session; the 1st C.S.; the 2nd C.S.; the 3rd C.S. and the 4th C.S. of the 88th Legislature; and the November 7, 2023 general election results.

Texas Statutes & Codes Annotated by LexisNexis® > Local Government Code > Title 2 Organization of Municipal Government (Subts. A — E) > Subtitle C Municipal Boundaries and Annexation (Chs. 41 — 50) > Chapter 42 Extraterritorial Jurisdiction of Municipalities (Subchs. A — Z) > Subchapter D Release of Area by Petition of Landowner or Resident From Extraterritorial Jurisdiction (§§ 42.101 — 42.105)

Sec. 42.105. Results of Petition.

(a) A petition requesting removal under this subchapter shall be verified by the municipal secretary or other person responsible for verifying signatures.

(b) The municipality shall notify the residents and landowners of the area described by the petition of the results of the petition. The municipality may satisfy this requirement by notifying the person who filed the petition under Section 42.102.

(c) If a resident or landowner obtains the number of signatures on the petition required under Section 42.104 to release the area from the municipality's extraterritorial jurisdiction, the municipality shall immediately release the area from the municipality's extraterritorial jurisdiction.

(d) If a municipality fails to take action to release the area under Subsection (c) by the later of the 45th day after the date the municipality receives the petition or the next meeting of the municipality's governing body that occurs after the 30th day after the date the municipality receives the petition, the area is released by operation of law.

(e) Notwithstanding any other law, an area released from a municipality's extraterritorial jurisdiction under this section may not be included in the extraterritorial jurisdiction or the corporate boundaries of a municipality, unless the owner or owners of the area subsequently request that the area be included in the municipality's extraterritorial jurisdiction or corporate boundaries.

History

Acts 2023, 88th Leg., ch. 106 (S.B. 2038), § 1, effective September 1, 2023.

End of Document

APPENDIX TAB B

Tex. Local Gov't Code § 212.003

This document is current through the 2023 Regular Session; the 1st C.S.; the 2nd C.S.; the 3rd C.S. and the 4th C.S. of the 88th Legislature; and the November 7, 2023 general election results.

Texas Statutes & Codes Annotated by LexisNexis® > Local Government Code > Title 7 Regulation of Land Use, Structures, Businesses, and Related Activities (Subts. A — C) > Subtitle A Municipal Regulatory Authority (Chs. 211 — 230) > Chapter 212 Municipal Regulation of Subdivisions and Property Development (Subchs. A — Z) > Subchapter A Regulation of Subdivisions (§§ 212.001 — 212.018)

Sec. 212.003. Extension of Rules to Extraterritorial Jurisdiction.

(a) The governing body of a municipality by ordinance may extend to the extraterritorial jurisdiction of the municipality the application of municipal ordinances adopted under Section 212.002 and other municipal ordinances relating to access to public roads or the pumping, extraction, and use of groundwater by persons other than retail public utilities, as defined by *Section 13.002, Water Code*, for the purpose of preventing the use or contact with groundwater that presents an actual or potential threat to human health. However, unless otherwise authorized by state law, in its extraterritorial jurisdiction a municipality shall not regulate:

(1) the use of any building or property for business, industrial, residential, or other purposes;

(2) the bulk, height, or number of buildings constructed on a particular tract of land;

(3) the size of a building that can be constructed on a particular tract of land, including without limitation any restriction on the ratio of building floor space to the land square footage;

(4) the number of residential units that can be built per acre of land; or

(5) the size, type, or method of construction of a water or wastewater facility that can be constructed to serve a developed tract of land if:

(A) the facility meets the minimum standards established for water or wastewater facilities by state and federal regulatory entities; and

(B) the developed tract of land is:

(i) located in a county with a population of 2.8 million or more; and

(ii) served by:

(a) on-site septic systems constructed before September 1, 2001, that fail to provide adequate services; or

(b) on-site water wells constructed before September 1, 2001, that fail to provide an adequate supply of safe drinking water.

(b) A fine or criminal penalty prescribed by the ordinance does not apply to a violation in the extraterritorial jurisdiction.

(c) The municipality is entitled to appropriate injunctive relief in district court to enjoin a violation of municipal ordinances or codes applicable in the extraterritorial jurisdiction.

History

Enacted by *Acts 1987, 70th Leg., ch. 149 (S.B. 896), § 1*, effective September 1, 1987; am. *Acts 1989, 71st Leg., ch. 1 (S.B. 220), § 46(b)*, effective August 28, 1989; am. *Acts 1989, 71st Leg., ch. 822 (H.B. 1285), § 6*, effective September 1, 1989; am. *Acts 2001, 77th Leg., ch. 68 (H.B. 666), § 1*, effective September 1, 2001; am. *Acts 2003, 78th Leg., ch. 731 (H.B. 3152), § 3*, effective September 1, 2003.

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Associated Case Party: Shana Elliott

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