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.

AMICUS CURIAE BRIEF OF TEXAS MUNICIPAL LEAGUE

IN SUPPORT OF RESPONDENTS

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ATTORNEYS FOR AMICUS CURIAE
TEXAS MUNICIPAL LEAGUE

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Cases **Page(s)**

Statutes & Rules

Treatises and Other Authorities

AMICUS CURIAE BRIEF OF TEXAS MUNICIPAL LEAGUE

The Texas Municipal League ("TML") appears as *amicus curiae* under TEX. R. APP. P. 11 in support of Respondent City of College Station's response to the petition for review.

I. INTEREST OF *AMICUS CURIAE*.

TML is a non-profit association of over 1,100 incorporated cities that provides legislative, legal, and educational services to its members. Over 13,000 persons consisting of city mayors, council members, city managers, city attorneys, and department heads are member officials of TML by virtue of their respective cities' participation. The TML legal defense program was established to monitor major litigation that affects municipalities and to file amicus briefs on behalf of its members in cases of special significance to cities and city officials. This is such a case.

Municipal regulatory authority is generally confined within local borders. Unless the right to exercise a power outside its boundaries has been expressly delegated to a municipality, "the general rule is that the powers of a municipal corporation are limited by its boundaries and cannot

be exercised outside them."[1] Therefore, when a state delegates regulatory authority to a local government to regulate outside the local government's borders, the local entity functions as an arm of the state rather than as a locally-accountable democratic government.

Extraterritorial regulatory power has grown out of the twentieth-century trend toward metropolitanization – cities evolving from mostly small towns covering areas relatively small in both population and area, to sprawling metropolises characterized by large population nuclei surrounded by outlying, expanding communities that possess a high degree of economic and social integration with a city center.[2] As one commentator writes, "increasingly, as one of the efforts to cope with metropolitan problems, local governments are being given express grants of extraterritorial police powers."[3]

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[1] 2 E. McQuillin, THE LAW OF MUNICIPAL CORPORATIONS § 10.07 (3d ed. 1988); *see also* 2 M. Libonati & J. Martinez, LOCAL GOVERNMENT LAW 13.10 (1993).

[2] *See* R. Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 Stan. L. Rev. 1115, 1115-17 (1996).

[3] F. Sengstock, *Extraterritorial Powers in the Metropolitan Area, at 52-52* (Michigan Law School, 1962) (quoted in R. Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. Chi. L. Rev. 339, 386 & n.184 (1993)) [cited as Briffault, *Who Rules*].

"Extraterritoriality may reflect state policies designed to facilitate central city expansion and limit the formation of new municipalities on the urban fringe by strengthening the power of the core city over fringe development and reducing the incentive of fringe areas to incorporate in order to receive urban services."[4] "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions."[5] Texas justifies extraterritoriality as advancing the State's own interests of promoting and protecting the general health, safety and welfare of persons residing in and adjacent to municipalities. TEX. LOC. GOV'T CODE § 42.001. TML appears as *amicus curiae* in this case to support such grants of legislative authority, because the regulatory power so delegated allows for Texas cities to develop policies for managing their outward development in an orderly fashion.

II. INTRODUCTION AND SUMMARY OF ARGUMENT.

The case on petition for review, *Elliott v. City of College Station*, 674 S.W.3d 653 (Tex. App.—Texarkana 2023, pet. filed), raises several

[4] *See* Briffault, *Who Rules* [cited in note 3], at 385-386.

[5] *Sailors v. Board of Education*, 387 U.S. 105, 110-11 (1967).

important jurisdictional issues, only one of which TML will address in this Brief, because of its particular importance to Texas cities – whether the republican-form-of-government challenge to the City's extraterritorial regulations in this case raises a political question. Our position, in support of the City's and the court of appeals' well-reasoned opinion, is that the claim is a political question. The sovereign people of Texas, we will argue, which expresses its will through the Constitution or through the directly-elected Legislature, has wide discretion to organize the State's government into a wide array of agencies operating statewide or on a local level to address the governmental needs of the people. Although Article I, Section 2 of the Constitution pledges a "republican form of government," it does not prohibit the elected Legislature from delegating regulatory authority to other entities to carry out the state's objectives on a local level.

An essential premise of the plaintiffs' constitutional challenge in this case is the notion that under a "republican form of government," the people have a right to vote directly "for those who regulate them." Pet. Br., at p. 3 (citing various dictionaries). The hidden premise is that a government is non-republican if regulators are not directly elected by the voters. No claim is made here that the ultimate source of the City's extraterritorial

regulatory power is something other than popular sovereignty exercised through the Texas Legislature, whose members include representatives directly accountable to the plaintiffs themselves.[6] It is the Texas Legislature that delegated extraterritorial regulatory authority for the City to enact to the local regulations in question.[7] No challenge is made to the state statutes that authorize the City's extraterritorial regulations; and no claim is made that the ordinances themselves are arbitrary or capricious, such that the city regulations would be unconstitutional if imposed by Texas Legislature directly. In effect, the gravamen of the suit here calls into question the constitutionality of rule-making authority of any appointed regulators, including rule-making state agencies as well as local governments.

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[6] Based on residential addresses submitted in response to the City's plea (CR 42, 46), the Court can take judicial notice that Plaintiffs both reside in Texas House District 12 and Texas Senate District 5.

See https://www.house.texas.gov/members/find-your-representative/.

[7] *See* TEX. LOC. GOV'T CODE Chap. 42 (declaring purpose of, and defining extraterritorial jurisdiction); *see also id.*, at § 212.003 (authorizing municipal extension of rules governing plats and subdivisions of land to the city ETJ); § 216.003(a) (authorizing municipal sign regulation corporate limits or ETJ); § 217.042 (authorizing home-rule cities to define and prohibit nuisances in the city ETJ).

In Texas, as elsewhere, the practice of delegating extraterritorial regulatory power to local governments grew out of the twentieth-century trend of urban sprawl. Despite the fact that persons residing within a municipal ETJ lack the right of suffrage in city elections, the constitutionality of such arrangements was upheld in *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978), because states, having a legitimate interest in empowering local entities to regulate local problems, "may legitimately restrict the right to participate in its political processes to those who reside within [the local government's] borders." *Id.* at 68-69. "The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems." *Avery v. Midland County*, 390 U.S. 474, 485 (1967).

As we will show below, Section 2 of the Texas Bill of Rights pledges the same "republican form of government" as does the Guarantee Clause of Article IV, Section 4, of the United States Constitution. Scarcely two years before the ratification of the Texas Constitution, the United States Supreme Court held that the federal Guarantee Clause "necessarily implies a duty on the part of the States themselves to provide such a

government." *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175 (1874). This implied federal duty was written into the 1876 Texas Constitution as the people's pledge to preserve the essential tenets of Madisonian republicanism – popular sovereignty (as distinguished from authoritarianism), representative government, direct or indirect (as distinguished from pure democracy), and separated powers.

This Court has long held the republicanism guaranteed by the Constitution need not follow any specific template. A government can be more or less republican *in degree* to the extent representation is direct or indirect, but yet remain republican *in substance*. Legislatively-delegated extraterritorial municipal regulatory power is fully consistent with Madisonian republicanism, because the ultimate source of municipal power is the people of Texas as a whole, acting collectively through the representative branch of state government; and also because the local regulations are consistent with the doctrine of separate powers – subject to judicial review for rationality and other requirements guaranteed by the Constitution and state law.

In this case, we agree with both the City of College Station and the Texarkana court of appeals that the constitutional question raised by this

case is non-justiciable under one or more of the six tests recognized by *Baker v. Carr*, 369 U.S. 186 (1962), tests which this Court assumes to "serve equally well in defining the separation of powers in the state government under the Texas Constitution." *Am. K-9 Detection Servs., LLC v. Freeman*, 556 S.W.3d 246, 253 (Tex. 2018) (internal quotations omitted). This is because the constitutional guarantee of Madisonian republicanism presents a "vague and unmanageable [judicial] standard" where, as here, the claimant has challenged merely the degree of direct representation implicated by a legislative delegation of regulatory powers. *Elliott*, 674 S.W.3d at 665 (citing *Brown v. City of Galveston*, 97 Tex. 1, 75 S.W. 488, 495-96 (1903)).

In recent years, the U.S. Supreme Court has walked back from prior pronouncements to the effect that Guarantee Clause challenges are categorically political in nature. Extreme situations can be hypothesized in which the courts must step in to prevent a constitutional crisis, such as a constitutional amendment to set up a military dictatorship. The implied federal duty on the part of the states to preserve a republican form of government would trump even the will of the people of Texas to establish some other form of government, and the courts would be duty-bound to

declare invalid even a state constitutional amendment of that sort. But the challenge made in this case is a challenge to the degree of republicanism, calling into question only the degree of republicanism – that is, direct vs. indirect representation. In such cases, this Court should abstain as a matter of inter-branch comity and deference to the elected Legislature's institutional competence to organize and define the regulatory authority of local governments. Alternatively, if the merits of such cases were to be reached, the judgment should be affirmed on the ground that the constitutional claim is facially invalid and thus barred by the City's governmental immunity from suit.

III. ARGUMENT AND AUTHORITIES.

A. Extraterritorial Municipal Jurisdiction Advances Legitimate State Objectives.

Because extraterritoriality separates local government power from local representation, extraterritorial statutes have been the target of constitutional challenges. The lead case, *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978), involved a federal due process and equal protection challenge to Alabama statutes authorizing cities to impose

"police power" regulations within Tuscaloosa's three-mile ETJ. *Id.*, at 61-62.

Upholding the state enabling legislation, and thus the city ordinances enacted under it, the Court concluded that the Constitution did not require the State of Alabama to provide the non-resident plaintiffs with the right to vote in city elections as a precondition to regulating in the city's ETJ. Said the Court: "a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders." *Id.* at 68-69.

The right to vote protected under the Equal Protection Clause is only a "right to participate in elections on an equal basis with other citizens *in the jurisdiction*." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 34 n.74 (1973) (emphasis added, internal quotations omitted)).[8] Conversely, there is no fundamental right for persons outside of the jurisdiction to vote on an equal basis with city residents. Because many of the activities of any municipality spill over to affect non-residents, restricting the franchise to

[8] *See also id.*, at 35 n.78 ("[T]he right to vote, per se, is not a constitutionally protected right, ... [but we recognize a] protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State's population.").

residents of the municipality can be a reasonable exercise of legislative line-drawing:

> A city's decisions inescapably affect individuals living immediately outside its borders. The granting of building permits for high rise apartments, industrial plants, and the like on the city's fringe unavoidably contributes to problems of traffic congestion, school districting, and law enforcement immediately outside the city. A rate change in the city's sales or ad valorem tax could well have a significant impact on retailers and property values in areas bordering the city. The condemnation of real property on the city's edge for construction of a municipal garbage dump or waste treatment plant would have obvious implications for neighboring nonresidents. Indeed, the indirect extraterritorial effects of many purely internal municipal actions could conceivably have a heavier impact on surrounding environs than the direct regulation contemplated by Alabama's police jurisdiction statutes. Yet no one would suggest that nonresidents likely to be affected by this sort of municipal action have a constitutional right to participate in the political processes bringing it about.

Id. at 69

Having thus stripped the issue of its "voting rights attire," the *Holt* Court, per Justice Rhenquist, boiled the equal protection and due process issues down to rational basis review – due process satisfied so long as the Alabama enabling statute conferring extraterritorial force to the city

ordinances bore "some rational relationship" to a legitimate state purpose; and equal protection satisfied unless the statute's classification between resident municipal voters and non-voters of the ETJ "rest[ed] on grounds wholly irrelevant to the achievement of the State's objective" *Holt Civic Club*, 439 U.S. 70. Since a State's internal organization is and has always been a "'science of experiment,'" "a State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power." *Holt*, 439 U.S. at 71 (quoting *Anderson v. Dunn*, 6 Wheat. 204, 226 (1821)).[9] Local "governmental units are 'created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them," and [t]he number, nature and duration of the powers conferred upon municipal corporations *and the territory over which they shall be exercised* rests in the absolute discretion of the State." *Id.* (emphasis added) (quoting *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907)).[10]

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[9] *See also Berger v. N.C. State Conf. of the NAACP*, 597 U.S. 179, 192 (2022) (recognizing federal interest in states serving as "laboratories" of innovation in state and local governmental structures).

[10] *See also Sailors v. Board of Education*, 387 U.S. 105, 108 (1967) (upholding constitutional challenge to appointed school boards, finding "no constitutional reason why state or local officers of the nonlegislative character involved here

Applying the deferential rational-basis test, the Court upheld the Alabama enabling statutes:

> The Alabama Legislature could have decided that municipal corporations should have some measure of control over activities carried on just beyond their "city limit" signs, particularly since today's police jurisdiction may be tomorrow's annexation to the city proper. Nor need the city's interests have been the only concern of the legislature when it enacted the police jurisdiction statutes. Urbanization of any area brings with it a number of individuals who long both for the quiet of suburban or country living and for the career opportunities offered by the city's working environment. Unincorporated communities like Holt dot the rim of most major population centers in Alabama and elsewhere, and state legislatures have a legitimate interest in seeing that this substantial segment of the population does not go without basic municipal services such as police, fire, and health protection. Established cities are experienced in the delivery of such services, and the incremental cost of extending the city's responsibility in these areas to surrounding environs may be substantially less than the expense of establishing wholly new service organizations in each community.

Holt, 439 U.S. at 74.[11]

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may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election.").

[11] *Holt* does not rule out the possibility of a valid equal protection challenge where a city attempts to extend all burdens imposed on its own voting residents to non-voting outsiders – for example, ad valorem taxation, eminent domain, and

To be sure, *Holt* and its progeny do not specifically address whether municipal extraterritorial regulations are consistent with a "republican form of government." But an essential premise of these cases is that such regulations do not offend republican principles. A state legislature whose members are directly elected and directly accountable to the voters of the state as a whole can delegate regulatory authority to local governments without providing for elections in which all persons subject to local regulations have the right to participate in the local elections. *Cf. Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) (Cardozo, J.) (upholding against Guarantee Clause challenge state law authorizing state agency regulating milk prices, reasoning that "[h]ow power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."); *Largess v. Supreme Judicial Court*, 373 F.3d 219, 227 (1st Cir. 2004) ("The Guarantee clause does not

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zoning. *Id.*, at 72 n.8; *see also Quick v. City of Austin*, 7 S.W.3d 109, 127 (Tex. 1999) (Enoch, J., concurring) (writing separately to observe that "an extraterritorial-jurisdiction statute conferring broader powers than those at issue in *Holt* could run afoul of the 'one man, one vote' principle," but concurring in the result because an equal protection challenge had not been raised). The College Station ordinances in question do not subject the residents of the ETJ to taxation, eminent domain, or zoning, let alone the full scope of regulations imposed on the City's voting residents.

require a particular allocation of power within each state so long as a republican form of government is preserved."); *Kerpen v. Metro. Wash. Airports Auth.*, 907 F.3d 152, 162 (4th Cir. 2018) (Wilkinson, J.) (upholding against Guarantee Clause challenge an interstate compact to operate Dulles Airport).

B. The Texas Constitutional Pledge of a Republican Form of Government Parallels the Federal Guaranty Clause.

Article I, Section 2 of the Texas Bill of Rights provides as follows:

> All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, **subject to this limitation only**, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.

TEX. CONST. Art. I, § 2 (emphasis added).

Read in isolation, this provision presents a paradox. How can popular sovereignty, which implies the people's inherent power to alter, reform or even abolish their government in *any* manner they think expedient be limited by – or "subject to" – a pledge by the people of 1876 to preserve forever the form of government as republican? In other words, if the people

of Texas are truly sovereign, then why can they not choose pure democracy or even install a military dictator instead?

The text of the Constitution is always the starting point for interpreting its meaning, but other tools, such as the "temporal legal context," allows the Court to discern the original intent of those words. *See Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 86-87 (Tex. 2015); *see also City of Sherman v. Henry*, 928 S.W.2d 464, 472 (Tex. 1996) (the Texas Constitution is construed according to "the intent of the people who adopted it," "the history of the times out of which it grew," "'the understanding of other branches of government, the law in other jurisdictions, state and federal, constitutional and legal theory, and fundamental values including justice and social policy'") (quoting *Ex parte Tucci*, 859 S.W.2d 1, 18 n.3 (Tex. 1993)(Phillips, C.J., concurring)(quoting *Davenport v. Garcia*, 834 S.W.2d 4, 30 (Tex. 1992) (Hecht, J., concurring) (internal brackets omitted))).

The "temporal legal context" of the "subject to" clause of the Texas republicanism pledge is the key to understanding its meaning. The 1876 Texas Constitution marked the end of Radical Reconstruction. Two years before ratification of the 1876 Texas Constitution, the U.S. Supreme Court

had recognized that the federal Guarantee Clause "necessarily implies a duty on the part of the States themselves to provide [a republican form of] government." *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175 (1874).[12] Through Section 2 of the Texas Bill of Rights, the framers carried into Texas law, in express fashion, the same duty impliedly imposed by the federal Constitution on all of the states. Since the popular sovereignty of each of the states is necessarily "subject to" *federal* sovereign power, the federal Guarantee Clause being the supreme law, the apparent paradox of a sovereign people subordinated to a form of government is reconciled. State sovereignty is subordinate to federal sovereignty. As this Court put it a generation later, "*[e]xcept as limited by the Constitution of the United States* the people of Texas have the right to adopt any form of government which they may prefer." *Bonner v. Belsterling*, 104 Tex. 432, 437, 138 S.W. 571, 574 (1911) (emphasis added).

In short, the history and structure of Section 2 of the Texas Bill of Rights supports a parallel construction of the phrase "republican form of government" in both the federal and Texas charters. *Minor*'s implied duty

[12] Federal judges were not even given general jurisdiction over federal questions until 1875. *See* Judiciary Act of 1875, 18 Stat. 470, § 1.

on each of the states is the same as the express pledge by the people of Texas in Section 2 of the Bill of Rights. And as the national charter leaves undefined the precise contours of such a government, the Texas Constitution is equally standardless and uncertain. Indeed, this Court in *Bonner*, quoting Thomas Jefferson, recognized that as long as the government of the State *as a whole* remained one 'of the people' and accountable 'to the people' through representative democracy, it mattered not whether representation was achieved indirectly or directly – a government can be "more or less" republican to the extent representation was direct rather than indirect, and yet remain republican in substance:

> As to the meaning of the phrase: "Republican form of government," there is no better authority than Mr. Jefferson, who, in discussing the matter, said: "Indeed, it must be acknowledged that the term republic is of very vague application in every language. **Were I to assign to this term a precise and definite idea, I would say, purely and simply, it means a government by its citizens in mass, acting directly and not personally, according to rules established by the majority; and that every other government is *more or less republican in proportion as it has in its composition more or less of this ingredient of the direct action* of the citizens**." . . .

> "On this view of the import of the term republic, instead of saying, as has been said, that it may mean anything or nothing, we may say with truth and meaning, that governments are more or less republican as they have more or less of the element of popular election and control in their composition; and believing, as I do, that the mass of the citizens is the safest depository of their own rights and especially that the evils flowing from the duperies of the people are less injurious than those from the egotism of their agents, I am a friend to that composition of government which has in it the most of this ingredient."

Bonner, 104 Tex. at 437, 138 S.W. at 574 (italics and bold-face added for emphasis).[13]

We discern the broad outlines of republicanism, as discussed in the Federalist Papers, to embody to three basic principles, according to which a government can be "more or less republican" *in degree* but remain republican *in kind*:[14]

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[13] Thomas Jefferson's friend and often nemesis, John Adams, admitted decades after ratification that he "never understood" the Guarantee Clause, that "no man ever did or ever will," and adding that "the word [republican] is so loose and indefinite that successive predominant factions will put glosses and constructions upon it as different as light and darkness." William M. Wiecek, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION, at 72 (1972).

[14] *See also* R. Natelson, *A Republic, Not a Democracy—Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807, 814-15 (2002) (surveying historical sources to conclude that republican form of government, as used in the Guarantee Clause, had three core features: majority rule, the

First is popular sovereignty, as distinguished from monarchy or authoritarian rule. Madison referred to republican government as "government which derives all its powers **directly or indirectly** from the great body of the people." THE FEDERALIST No. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added); *see also Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 457 (1793) (opinion of Wilson, J.) (positing "short definition" of a republican form of government as "one constructed on this principle, that the Supreme Power resides in the body of the people"); *Duncan v. McCall*, 139 U.S. 449, 461 (1891) ("[T]he distinguishing feature" of a republican form of government "is the right of the people to choose their own officers for governmental administration, and pass their own laws.").

Section 2 of the Texas Bill of Rights specifically embraces popular sovereignty: "All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit." TEX. CONST. Art. I, § 2. The common understanding a republican form of government is one in which the "supreme power rests in all the

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absence of monarchy, and the rule of law).

citizens entitled to vote and is exercised by representatives elected, **directly or indirectly**, by them and responsible to them." WEBSTER'S NEW WORLD DICTIONARY 1207 (2d College ed. 1986) (emphasis added).

Second is the principle of representative government, as distinguished from pure democracy or tyranny of the majority. *See* THE FEDERALIST No. 10, at 81 (James Madison) (critiquing "pure democracy," and contrasting it with "[a] republic, by which I mean a government in which the scheme of representation takes place"); *see also In re Duncan*, 139 U.S. 449, 461 (1891) ("By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.").

Third is the separation of powers among coequal branches of government, as distinguished from centralized unitary power. *See* THE FEDERALIST No. 47, at 301 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands … may justly be pronounced the very definition of tyranny."); *see also Olney v. Arnold*, 3 U.S. (3 Dall.) 308, 314 (1796) ("But if any doubt shall exist upon the subject, the construction should be in favour of that general principle, in the policy of all well regulated, particularly of all republican, governments, which prohibits an heterogeneous union of the legislative and judicial departments."); *Van Sickle v. Shanahan*, 511 P.2d 223, 235 (Kan. 1973) ("An outstanding feature of the American constitutional system is the separation of the legislative, executive, and judicial powers of the government.").

In the present *Elliott* case, the plaintiffs contend that government cannot be "republican" in form unless direct representation exists at every level of legislative power. That has never been the law. As Madison taught: "If we resort for a criterion, to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers

directly or indirectly from the great body of the people." *See again*, THE FEDERALIST No. 39 (emphasis added). "It is **sufficient** for such a government, that the persons administering it be appointed, either **directly or indirectly**, by the people." *Id*. (emphasis original).

As originally drafted in 1787, the U.S. Constitution, which guarantees a republican form of government to the states, itself provided for a mix of direct and indirect representation. The two chambers of the national legislature were each elected in a different way. Members of the House of Representatives were and still are directly elected "by the People," U.S. CONST. art. I, § 2, cl. 1. However, the original Constitution provided that Senators were to be "chosen by the [State] Legislature." U.S. CONST. art. I, § 3, cl. 1. Direct election of U.S. Senators was only accomplished in 1912 with the ratification of the Seventeenth Amendment. Election of the U.S. President continues to be indirect. *See* Art. II, §1, cls. 2-3.

Indeed, the original understanding of republicanism does not call even for universal suffrage among citizens. Virtual representation of the majority of citizens was the norm. Women were citizens, yet it took the Nineteenth Amendment (1920) to extend the right of suffrage to women,

and the Twenty-sixth Amendment (1971) to extend that right to 18-year-olds. Yet in 1874, in *Minor*, the U.S. Supreme Court held that women, albeit citizens, had no federal constitutional right to vote pursuant to the Fourteenth Amendment's Privileges and Immunities Clause or the Guarantee Clause. *See Minor*, 88 U.S. at 171, stating:

> The guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.
>
> The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all the people participated to some extent, through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution.

Id. at 175-76.

As the Court in *Minor* noted, all but perhaps one of the states that had ratified the Constitution and had been admitted into the Union under

their respective state constitutions had extended suffrage rights only to men; yet all such states were regarded as "republican" in form:

> As has been seen, all the citizens of the States were not invested with the right of suffrage. In all, save perhaps New Jersey, this right was only bestowed upon men and not upon all of them. Under these circumstances it is certainly now too late to contend that a government is not republican, within the meaning of this guaranty in the Constitution, because women are not made voters.

Minor, 88 U.S. at 176.[15]

The point here is that nothing in Section 2 of the Texas Bill of Rights supports the plaintiffs' contention that a city's cannot regulate in its ETJ unless the voters in the ETJ participate in city elections. The 1876 Texas Constitution did not recognize universal suffrage either. *See* TEX. CONST. art. VI (1876) (later amended) (limiting the right of suffrage to male citizens, and further excluding the right of suffrage to all persons under the age of twenty-one, mental incompetents, felony convicts, and U.S.

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[15] *See also Evenwel v. Abbott*, 578 U.S. 54, 81 (2016) (Thomas, J., concurring) ("In guaranteeing to the States a "Republican Form of Government," Art. IV, §4, the Constitution did not resolve whether the ultimate basis of representation is the right of citizens to cast an equal ballot or the right of all inhabitants to have equal representation. The Constitution instead reserves these matters to the people.").

servicemen).[16] Virtual representation was part of Texas republicanism from the start, and to a much lesser extent that remains true today.

Indirect representation has been upheld as consistent with republicanism since at least 1903. *See Brown v. City of Galveston*, 97 Tex. 1, 75 S.W. 488, 492 (1903). Starting with the premise that the Texas Constitution authorizes the Legislature "to exercise all legislative power which is not forbidden expressly or by implication by the provisions of the Constitution" (*id.* at 492), the *Brown* Court held that because the Constitution does not prohibit the Legislature from organizing cities with appointed governing bodies, the Legislature was "left free to choose the form of government for cities and towns in contrast with the particular [constitutional] provisions for counties." *Brown*, 75 S.W. at 493; *see also id.*, at 495-96 ("it is within the power of the Legislature to determine what form of government will be most beneficial to the public and to the people of a particular community").[17]

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[16] *See* 1876 TEX. CONST. Art. V, §§ 1, 2.
See https://tarlton.law.utexas.edu/constitutions/texas-1876-en/article-6-suffrage.

[17] *Accord, Largess v. Supreme Jud. Ct. for State of Massachusetts*, 373 F.3d 219, 227 (1st Cir. 2004) (The text of the Guarantee Clause "does not require a particular allocation of power within each state so long as a republican form of government is preserved."); *Kerpen v. Metro. Washington Airports Auth.*, 907

In *Brown*, following the disastrous hurricane of 1900, the city of Galveston had been re-established under a statutory charter[18] providing for a governing body composed, in part, of a commissioners appointed by the Governor. By ordinance, the city commission, with appointed commissioners, imposed license fees on vehicles kept for hire. Persons subject to these fees sued the city to restrain the enforcement of the ordinances, contending that "people of Galveston had the 'inherent right' to select their own municipal officers, and that the Legislature had no power to authorize the Governor of the State to appoint municipal officers for that city." *Id.* at 494. Upholding the ordinances, this Court held that popular sovereignty guaranteed by Section 2 of the Bill of Rights refers not to local groupings within the State, but rather, to the people of Texas as a whole:

F.3d 152, 163 (4th Cir. 2018) (Guarantee Clause is not violated when "States . . . retain the ability to set their legislative agendas" and when "state government officials remain accountable to the local electorate") (quoting *New York v. United States*, 505 U.S. 144, 186 (1992)).

[18] *Brown* was decided before the Home Rule Amendment to the Texas Constitution in 1912, whereby the people of Texas authorized local communities of over 5000 persons to organize municipal governments under home rule charters.

> It will be observed that the declaration of the right of local self-government has reference to the people of the State and not to the people of any portion of it. The doctrine contended for would produce as many kinds of local government in a State as there might be different kinds of people in the municipalities. Again, in section 2, it is said that "all political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit." This is a true declaration of the principles of republican State governments; however, it does not mean that political power is inherent in a part of the people of a State, but in the body, who have the right to control by proper legislation the entire State and all of its parts.

Brown, 75 S.W. at 495.

More recently, this Court has recognized that "in a complex society like ours," the delegation of legislative power to local governments, administrative agencies, and even private entities may be "necessary and proper." *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000); *see also Texas Boll Weevil Eradication Found. v. Lewellen*, 952 S.W.2d 454, 467 (Tex. 1997) ("Texas courts have also generally upheld legislative delegations to state or municipal agencies."); *Housing Auth. of Dallas v. Higginbotham*, 135 Tex. 158, 143 S.W.2d 79, 87 (Tex. 1940) (providing categories of delegations to public entities, including delegations

to make rules to implement statutes, to find facts and ascertain conditions upon which an existing law may operate, to fix rates, and to determine the question of necessity of taking land for public use).[19]

C. Plaintiffs' "Republican Form of Government" Challenge Raises a Political Question.

Before *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court recognized that a challenge to state action based on the Guaranty Clause presented a non-justiciable political question.[20] In *Baker*, however, the Court also determined that a claim of discriminatory apportionment of state representatives *was* justiciable under the Equal Protection Clause.

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[19] In *Higginbotham*, for example, this Court upheld a statutory delegation of legislative eminent domain power to a municipal housing authority, governed by an locally-appointed board of directors. *See* TEX. LOCAL GOV'T CODE § 392.031 (providing for appointment of housing authority board). Although beyond the scope of this Brief, we further note the existence of state agencies with appointed boards that have been delegated broad regulatory authority, and . *See* TEX. UTIL. CODE § 12.051(a) (five-member Public Utility Commissioners all appointed by the Governor with the advice and consent of the Senate).

[20] *See, e.g., Luther v. Borden*, 48 U.S. (7 How.) 1, 12 L. Ed. 581 (1849) (often cited for the proposition that the federal Guarantee Clause implicates only nonjusticiable political questions); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 149 (1912) ("'It was long ago settled that the enforcement of this guarantee belonged to the political department.'") (quoting *Taylor v. Beckham*, 178 U.S. 548, 578-79 (1900) (both citing *Luther v. Borden*)). Other opinions of the Court, however, recognize that the Clause is not categorically non-justiciable. *Reynolds v. Sims*, 377 U.S. 533, 582 (1964) (The political question doctrine applies where the issue is "'political' in nature and where there is a clear absence of judicially manageable standards.").

To explain the difference in outcome, the Court reviewed its political question jurisprudence in several areas, declared the doctrine "essentially a function of the separation of powers," *id.* at 217, and articulated "six independent tests" for determining whether an issue was non-justiciable:

> (1) a textual commitment of the issue in the Constitution to another branch; or
>
> (2) a lack of judicially manageable standards for resolution; or
>
> (3) the impossibility of deciding the case without an initial policy determination of a kind clearly for nonjudicial discretion; or
>
> (4) the impossibility of a court's undertaking independent resolution without expressing a lack of respect due to coordinate branches of government; or
>
> (5) an unusual need for unquestioning adherence to a political decision already made; or
>
> (6) the potential for embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

As *Baker* explained, these six tests are disjunctive: a court should not dismiss a case for non-justiciability "[u]nless one of these formulations is inextricable from the case at bar." *Id.*

The *Baker* Court further explained that claims under the Guaranty Clause were generally non-justiciable under one or more of these tests. Under the second test – lack of judicially discoverable and manageable standards – the Court could not resolve guarantee claims because "the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government." *Id*., at 223. In contrast, the equal protection claim presented in *Baker* did raise justiciable issue of racially unequal treatment under the law did implicate a recognized fundamental right.

TML supports the dismissal of this case under each of the six *Baker* tests:

1. Textual Commitment to "the People." Section 2 of the Bill of Rights expressly reserves to "the people" "the inalienable right to alter, reform or abolish their government in such manner as they may think expedient," subject only to the implied federal constitutional duty imposed on the State to preserve a republican form of government. *See* TEX. CONST. ART. I, § 2; *Minor*, 88 U.S. (21 Wall.) at 175. As the *Elliott* court below correctly pointed out, this Court, in its *Brown* opinion, took a statewide view of popular sovereignty, holding that "Article I, Section 2, 'does not

mean that political power is inherent in a part of the people of a state, but in the body who have the right to control, by proper legislation, the entire state and all of its parts." *Elliott v. City of Coll. Station*, 674 S.W.3d at 662 (quoting *Brown*, 75 S.W. at 495). "In Texas, the people's will is expressed in the Constitution and laws of the State" – that is, by state statute. *See Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003) (linking concepts of sovereign immunity and popular sovereignty, and noting that the function of waiving the sovereign's immunity is properly left to the sovereign people themselves in the form of a constitutional amendment or to the political branch, the Legislature).

To be sure, Section 2 contains a "subject to" clause that limits even the power of the sovereign people to adopt a state government that is non-republican in form. But that limitation, we have shown, flows from the implied *federal* constitutional duty imposed on all of the states to preserve their republican form of their respective state governments. The "subject to" clause of Section 2 is not license for the judiciary to dictate a specific form of representative government the people have not themselves adopted through the Constitution or by legislative act. Section 2, we believe, does leave room for the judiciary to uphold the supremacy of

federal law, to which the State must always defer. But the federal Guarantee embraces the wide array of representative forms and serves only as a backstop against a revolutionary shift toward one extreme or the other – against the State authoritarianism on one hand or tyranny of the Majority on the other.

This case presents no threat to republicanism. In the case of cities exercising extraterritorial jurisdiction, the regulatory power at issue is delegated by the popularly-elected Legislature, to address uniquely local problems associated with metropolitanization. Since the source of that authority is ultimately accountable to the people of Texas as a whole, the form of government that enacted it is republican. *Elliott*, 674 S.W.3d at 671 (quoting *Brown*, 75 S.W. at 495-96 ("it is within the power of the Legislature to determine what form of government will be most beneficial to the public and to the people of a particular community."); *Bonner*, 138 S.W. at 574 ("the Legislature may confer upon any municipal government any power it may see fit to give.").

2. Lack of Judicially Manageable Standards. Relatedly, and in keeping with separation-of-powers concerns that undergird the political question doctrine, the court of appeals correctly concluded the form of

government challenge in this case presented a question of degree rather than kind; and thus, the line drawing sought by the plaintiffs in this case was more properly addressed to the Legislature. *See Elliott*, 674 S.W.3d at 671-72 (quoting *Bonner*, 138 S.W. at 574 ("governments are more or less republican as they have more or less of the element of popular election and control in their composition"). The guarantee of republicanism in the Texas and U.S. Constitutions is the same. "No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated." *Minor*, 88 U.S. at 175.

Institutionally, the judicial branch, under the guise of interpreting the phrase "republican form of government," is ill-suited to pick and choose from among the wide array of systems that Madison himself taught were republican in form. Thus, this Court should be loathe to ossify the range of choices available to the Legislature to delegate regulatory power to local governments to address local concerns.

To be sure, as the U.S. Supreme Court has noted, "not all" claims under the Guarantee Clause are non-justiciable, *see New York v. United States*, 505 U.S. 144, 184 (1992); and we would assume the same will hold true for the Texas republicanism pledge as well. These reciprocal

provisions should be construed to provide parallel guarantees, which are not offended by the delegated legislative powers at issue here. The Texas Legislature that delegated power to College Station to regulate in its ETJ remains directly accountable to the people of Texas. *New York*, 505 U.S. at 186 (Guarantee Clause is not violated when "States ... retain the ability to set their legislative agendas" and when "state government officials remain accountable to the local electorate").

3. Legislative/Non-Judicial Policy Determination. As the U.S. Supreme Court has noted, "[v]iable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions," *Sailors*, 387 U.S. at 110-111, and thus, "a State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power." *Holt Civic Club*, 439 U.S. at 71. Institutionally, the Legislature is better positioned to assess the need for subdividing legislative power than the judiciary, which is empowered only to decide cases or controversies on a limited record.

4. Judicial Comity for the Other Branches. *Baker* tests 4, 5, and 6 are essentially comity tests, akin to prudential standing

requirements and prudential abstention, all consistent with the standard of review applied in *Brown v. Galveston*:

> A court has no power to review the action of the legislative department of the government, but when called upon to administer a law enacted by it, must, in the discharge of its duty, determine whether that law is in conflict with the Constitution, which is superior to any enactment that the Legislature may make; but in the examination of such a question we must bear in mind, that, except in the particulars wherein it is restrained by the Constitution of the United States, the legislative department may exercise all legislative power which is not forbidden expressly or by implication by the provisions of the Constitution of the State of Texas. [citations omitted]. **If there be doubt as to the validity of the law it is due to the co-ordinate branch of the government that its action should be upheld and its decision accepted by the judicial department.**

97 Tex. at 22-23, 75 S.W. at 492 (emphasis added); *see also City of Corsicana v. Wren*, 159 Tex. 202, 317 S.W. 2d 516, 520 (1958), deferring to legislative classification of municipal airport as a governmental function for tort immunity purposes, noting that:

> The legislature is the repository of all Texas lawmaking power not otherwise assigned by the state or federal constitutions. Presumably its collective understanding of life and government is quite as broad as that of the courts, and certainly it has as much experience as they in evaluating the relative impact of a given municipal activity as between the general objects of

> government evidenced in the state or national sovereign and the narrower objects said to be peculiar to cities as limited groups of people.

Id., at 280, 317 S.W.2d at 520.

In a republican-form-of-government challenge to a statutory delegation of legislative power to a city, *Brown* thus commands the Court defer to the Legislature's policy choice unless that action is clearly at odds with the Constitution. This is not *de novo* review. Only if the Legislature installs a government that cannot even arguably qualify as "republican" in nature is there any room for the Court to nullify the action as having issued from an illegal form of government.

D. Immunity from Suit Bars Plaintiffs' "Republican Form of Government" Challenge on the Merits.

In the present case, the Texarkana court of appeals correctly read *Brown* and *Bonner* as holding that "Legislative authority over the form of city government" is "consistent with a constitutional 'republican form of government.'" *Elliott*, 674 S.W.3d at 657. The court struggled, however, to reconcile whether the case should be dismissed on the merits or as a political question. *Brown* and *Bonner* hint at, but do not explicitly declare the issue non-justiciable; and these century-old cases lack the benefit of

the recent body jurisprudence collected in *Baker v. Carr*, recognizing prudential abstention from the merits under the rubric of the political question doctrine. As the *Elliott* court below wrote:

> As a matter of judicial theory, one could debate whether *Brown* and *Bonner* found the issue of "republican form of government" at the city level to be a political question beyond the judiciary's reach, or on the other hand, those cases found the issue to have been within the judiciary's reach, but then made judicial pronouncements that Legislative authority over the form of city government, as exercised in those cases, was consistent with a constitutional "republican form of government."
>
> Either way, the Texas Supreme Court has spoken clearly that the matter is committed to the Legislature. The Legislature has relied on that word for more than a century, via numerous statutory grants, modifications, and withdrawals of ETJ authority to the cities. For us, on this case, that is the end of the matter.

Id.[21]

We agree that regardless of whether the constitutional issue raised by the *Elliott* plaintiffs presents a political or judicial question, the result

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[21] More recent federal decisions similarly note that the "question of whether a claim is justiciable is a 'difficult' one,'" and that "[w]here the merits of the claim itself are easily resolved," the courts can simply "bypass[ ] the justiciability question entirely" and dismiss the case on the merits. *See Kerpen v. Metro. Wash. Airports Auth.*, 907 F.3d 152, 163 (4th Cir. 2018) (Wilkinson, J.).

is the same. This is because the City's exercise of statutorily-delegated regulatory power is a power accountable to the people of Texas operating through their directly-elected Legislature. The City ordinances under review do not cause the State to "cease to have a republican form of government,"[22] or "abolish or destroy the republican form of government [of the State], or substitute another in its place."[23]

Section 2 of the Texas Bill of Rights guarantees the people of the State "the right to control by proper legislation the entire State and all of its parts," *Brown*, 75 S.W. at 495; Section 2 "does not mean that political power is inherent in a part of the people of a State." *Id*. The delegation of extraterritorial jurisdiction preserves all three fundamental characteristics of Madisonian republican government – popular sovereignty, representative government, and separated powers. The source of extraterritorial regulatory powers is the elected Legislature; and both the

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[22] *Hammond v. Clark*, 71 S.E. 479, 489 (Ga. 1911); *see also Opinion to the Governor*, 185 A.2d 111, 116 (R.I. 1962) (holding that there is no Guarantee Clause violation unless malapportionment of legislative districts "deprives the people completely of representative government and therefore of a republican form of government").

[23] *VanSickle*, 511 P.2d at 243; *see also Deer Park Indep. Sch. Dist. v. Harris County Appraisal Dist*., 132 F.3d 1095, 1099-1100 (5th Cir. 1998); *Kadderly v. City of Portland*, 74 P. 710, 719 (Or. 1903).

city ordinances adopted under that statutory authority, as well as any enforcement of those regulations by the cities, remain subject to judicial review.

Neither party in this case has framed the merits argument in terms of an immunity-based jurisdictional bar, but that is immaterial. "[A]n appellate court's review of a plea to the jurisdiction is not limited to the grounds set forth in the governmental unit's plea in the trial court." *See Tex. DOT v. Self*, No. 22-0585, 67 Tex. Sup. Ct. J. 759, 2024 WL 2226295, 2024 Tex. LEXIS 372, *10 (Tex. May 17, 2024) (citing *Dallas Metrocare Servs. v. Juarez*, 420 S.W.3d 39, 41 (Tex. 2013) ("[A]n appellate court must consider all of a defendant's immunity arguments, whether the governmental entity raised other jurisdictional arguments in the trial court or none at all."). Immunity from suit "can 'be raised for the first time on appeal by the parties or by the court,'[and] a court is *obliged* to ascertain that subject matter jurisdiction exists regardless of whether the parties have questioned it.'" *Self*, supra (quoting *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser*, 140 S.W.3d 351, 358-59 (Tex. 2004) (brackets and emphasis original in *Self*).

The plaintiffs' constitutional challenge in this case is brought under the Texas Declaratory Judgment Act (UDJA), TEX. CIV. PRAC. & REM. CODE Chap. 37. CR 7. While it is true that "the UDJA generally waives immunity for declaratory-judgment claims challenging the validity of statutes," this Court has "held that 'immunity from suit is not waived if the constitutional claims are facially invalid.'" *Abbott v. Mexican Am. Legis. Caucus*, 647 S.W.3d 681, 698 (Tex. 2022) (quoting *Klumb v. Houston Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015)). The claims in this case, even if sufficient to raise a judicial question, do not state a facially valid claim on the merits.

IV. CONCLUSION.

Amicus Texas Municipal League joins the City in urging the Court to deny the petition for review. But if review is granted and the Court goes past the City's first argument – that the dismissal should be affirmed for want of a ripe controversy – we write in support of the City's contention that the republican-form-of-government challenge in this case raises a non-justiciable political question, as the Texarkana court of appeals held. Moreover, since subject-matter jurisdiction is never waivable and can be raised *sua sponte*, we would further urge the Court to affirm the dismissal

of this suit on the separate jurisdictional ground of governmental immunity from suit, since immunity and the merits in this case are inextricably intertwined. That is, since Plaintiffs' constitutional challenge to the City's extraterritorial regulations is facially invalid, governmental immunity bars this suit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that all counsel of record have been served a copy of the foregoing Amicus Brief by electronic submission for filing and service through the Texas Online EFiling for Courts on July 31, 2024.

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CERTIFICATE OF COMPLIANCE

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