

**No. 24-0237**

IN THE SUPREME COURT OF TEXAS

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TEXAS GENERAL LAND OFFICE AND DAWN BUCKINGHAM, M.D.,  
IN HER OFFICIAL CAPACITY AS THE TEXAS LAND COMMISSIONER,  
*PETITIONERS.*

v.

SAVERGV, SIERRA CLUB, AND CARRIZO/COMECRUDO NATION OF TEXAS, INC.,  
*RESPONDENTS.*

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On Petition for Review from the Court of Appeals  
for the Thirteenth District of Texas at Corpus Christi/Edinburg

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**PETITION FOR REVIEW**

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OFFICIAL CAPACITY AS THE TEXAS LAND COMMISSIONER

## IDENTITY OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. 52.3(a), the following is a complete list of all parties and the names and address of all counsel:

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## **RECORD REFERENCES**

“CR” refers to the Clerk’s Record.

Petitioner General Land Office will be referred to as “GLO,” and Petitioner Dawn Buckingham, M.D. in Her Official Capacity as the Texas Land Commissioner will be referred to as “The Commissioner.” GLO and The Commissioner will be referred to collectively as “Petitioners” unless the context requires otherwise.

Respondents SaveRGV, Sierra Club, and Carrizo/Comecrudo Nation of Texas, Inc. will be referred to collectively as “Respondents” unless the context requires otherwise.

## STATEMENT OF THE CASE

Nature of the Case	SaveRGV sued the Texas General Land Office, George P. Bush, His Official Capacity as the Texas Land Commissioner, and Cameron County seeking a declaratory judgment regarding the constitutionality (facially and as applied) of certain statutes permitting the closing of beaches for space flight activities. (CR 6-29, 88-113) After her election as Texas Land Commissioner, Dawn Buckingham, M.D., substituted in place of George P. Bush. Pursuant to Texas Rule of Civil Procedure 60, the Attorney General of Texas intervened in this action as a party defendant. (CR 30-40) Sierra Club and Carrizo/Comecrudo Nation of Texas, Inc. intervened as party plaintiffs largely seeking the same relief as SaveRGV. (CR 134-144) All Defendants filed Pleas to the Jurisdiction. (CR 48-52, 59-83, 145-310, 479-518)
Trial Court	445 <sup>th</sup> Judicial District Court, Cameron County, Texas, Hon. Gloria M. Rincones, presiding (“Trial Court”)
Trial Court Disposition	The Trial Court signed Orders granting all Defendants’ pleas to the jurisdiction dismissing all the claims brought by SaveRGV, Sierra Club, and Carrizo/Comecrudo Nation of Texas, Inc. (CR 522-533)
Parties in Court of Appeals	<p>Appellants:</p> <ul style="list-style-type: none"> <li>• SaveRGV</li> <li>• Sierra Club</li> <li>• Carrizo/Comecrudo Nation of Texas, Inc.</li> </ul> <p>Appellees:</p> <ul style="list-style-type: none"> <li>• Texas General Land Office</li> <li>• Dawn Buckingham, M.D. in Her Official Capacity as the Texas Land Commissioner</li> <li>• Cameron County</li> <li>• Texas Attorney General</li> </ul>

Court of Appeals	Thirteenth District, Corpus Christi/Edinburg (“Court of Appeals”)
Court of Appeals’ Opinion	Memorandum opinion by Justice Silva, joined by Chief Justice Contreras and Justice Longoria. <i>SaveRGV, et al. v. Texas General Land Office, et al.</i> , Nos. 13-22-00358-CV, 13-22-00359-CV, 13-22-00360, 2024 WL 385656 (Tex. App.—Corpus Christi/Edinburg Feb. 1, 2024, no pet. h.) (mem. op.) (“Opinion”)
Court of Appeals Disposition	Reversed and remanded. The Court of Appeals concluded that Respondents SaveRGV, Sierra Club, and Carrizo/Comecrudo Nation of Texas, Inc. had standing to bring the underlying suit. The Court of Appeals also determined that the suit against the Commissioner was not prohibited because it is, in essence, an ultra vires lawsuit. Next, the Court of Appeals held that the UDJA waived sovereign immunity and that the redundant remedies doctrine does not bar Respondents’ claims.

## **STATEMENT OF JURISDICTION**

The Supreme Court has jurisdiction under Government Code section 22.001(a) because this appeal presents questions of law that are important to the jurisprudence of the state, and the Court of Appeals' judgment is not made final by statute. TEX. GOV'T CODE § 22.001(a).

## ISSUES PRESENTED

1. In *Abbott v. Mexican Am. Legis. Caucus, Tex. House of Representatives* (“MALC”), the Texas Supreme Court (“Supreme Court” or “this Court”) held that “[a]lthough the Uniform Declaratory Judgments Act (“UDJA”) generally waives immunity for declaratory judgment claims challenging the validity of statutes, ‘immunity from suit is not waived if the constitutional claims are facially invalid (i.e., facial-validity standard).’” 647 S.W.3d 681, 698 (Tex. 2022) (quoting *Klumb v. Hous. Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015)). This standard applies to both constitutional challenges to government action/conduct (as-applied constitutional challenges) and constitutional challenges to statutes themselves (facial constitutional challenges). *MALC*, 647 S.W.3d at 698. Despite this, the Court of Appeals determined that immunity is waived under the UDJA because Respondents are challenging the statutes themselves, not the action/conduct of Petitioners. This raises the following issues:
  - a. Did the Court of Appeals err in its immunity determination when it did not decide if Respondents’ constitutional claims are facially invalid based on its belief that the facial-validity standard does not apply to constitutional challenges to statutes themselves?
  - b. Is Respondent’s constitutional claim facially invalid since it is premised on the belief that under the Open Beaches Amendment (Tex. Const. art. I, § 33) any “statute curtailing beach access and use that infringes upon the public’s guaranteed right of access to public beaches” is “void”?
2. Did the Court of Appeals err when it determined that Respondents had standing to bring their claims against Petitioners even though there is no private right of enforcement under Article I, Section 33 of the Texas Constitution?
3. (unbriefed) Are Respondents’ claims under the UDJA and Section 2001.038 of the Texas Government Code otherwise barred by the doctrine of sovereign immunity?
4. (unbriefed) Did the Court of Appeals err when it held that Respondents had standing to bring their claims against Petitioners even though their

individual members would not otherwise have standing to sue because (a) they are unable to demonstrate an injury-in-fact to their members and (b) the alleged injury to their members cannot be fairly traced to the conduct of Petitioners?

5. (unbriefed) Did the Court of Appeals err when it held that Respondents' lawsuit was not barred by Article I, § 33 of the Texas Constitution because Respondents did not bring a private action to enforce their right to access the beach, but instead brought a declaratory judgment action seeking to have the statutes and rule declared void?
6. (unbriefed) Did the Court of Appeals err when it held that Respondents' claims under the UDJA and section 2001.038 of the Texas Government Code are not barred by the redundant remedies doctrine?
7. (unbriefed) Did the Court of Appeals err when it held that Respondents' official capacity claims against the Texas Land Commissioner are not prohibited despite the fact that the claims against the Texas Land Commissioner are redundant to those against the General Land Office?

## STATEMENT OF PROCEDURAL HISTORY

On or about October 11, 2021, Respondent SaveRGV sued Petitioners and Cameron County (“County”) under the Uniform Declaratory Judgments Act (“UDJA”). (CR 6-29) Pursuant to Texas Rule of Civil Procedure 60, Texas Attorney General Ken Paxton intervened in this action as a party defendant. (CR 30-40) SaveRGV then filed its First Amended Petition on April 26, 2022. (CR 88-115) On May 5, 2022, Respondents Sierra Club and Carrizo/Comecrudo Nation of Texas, Inc. filed their Petition in Intervention seeking identical relief. (CR 134-144) Respondents collectively requested a judgment from the trial court declaring the following:

- Section 61.132 of the Texas Natural Resources Code is unconstitutional on its face because it irreconcilably conflicts with Article I, Section 33 of the Texas Constitution.
- Sections 61.132 and 61.011(d)(11) of the Texas Natural Resources Code, as applied to Boca Chica Beach, are unconstitutional because they violate Article I, Section 33 of the Texas Constitution.
- Section 61.011(d)(11) of the Texas Natural Resources Code, allowing for closure of public beaches via promulgation of state agency rules, is unconstitutional on its face because it irreconcilably conflicts with Article I, Section 33 of the Texas Constitution.
- GLO’s amendment to its Rule 31 TAC § 15.32, certifying the County’s dune protection and beach access plan, is invalid because it violates Article I, Section 33 of the Texas Constitution.
- The Memorandum of Agreement between GLO and the County, adopted pursuant to House Bill 2623’s revisions to the Open Beaches

Act, is invalid because it violates Article I, Section 33 of the Texas Constitution.

- The Cameron County Commissioners Court's order, authorizing the Cameron County Judge to order the closure of Boca Chica Beach and/or State Highway 4 to allow for space flight activities, is invalid because it violates Article I, Section 33 of the Texas Constitution.

Petitioners (along with the County and the Attorney General) filed Pleas to the Jurisdiction (CR 497-518, 48-52, 145-310) and after a hearing on said pleas, the Trial Court granted the Pleas to the Jurisdiction. (CR 545-547, 551, 555-556) Respondents appealed these rulings to the Court of Appeals.

The Court of Appeals reversed the trial court's rulings and remanded the cases to the Trial Court. In so ruling, the Court of Appeals held, in part, as follows: (1) Respondents had standing because they suffered an injury-in-fact; (2) Respondents' injuries are directly traceable to the allegedly unconstitutional statutes and actions taken thereunder by the County and Petitioners; (3) despite the fact that the Open Beaches Amendment states that it "does not create a private right of enforcement," Respondents did not bring a private cause of action to enforce their right to access the beach, but instead brought a declaratory judgment action seeking to have the statutes and rule declared void; (4) Petitioners' and the County's sovereign immunity is waived under the UDJA and the Administrative Procedures Act, which

require the inclusion of the relevant governmental unit as a party. This petition for review ensued.

## STATEMENT OF FACTS

The sections that follow provide background information regarding (a) the right of public access to public beaches in Texas, (b) the Texas Open Beaches Act of 1959, (c) the 2009 Open Beaches Amendment to the Texas Constitution, and (d) House Bill 2623. They are almost a verbatim copy of the Statement of Facts section of the Attorney General’s Second Amended Brief of Appellee filed in the Court of Appeals on April 13, 2023, in 13-22-00360-CV.<sup>1</sup>

### **1. The right of public access to public beaches in Texas.**

In Texas, the public has a right to access and use of the *public* beach. TEX. CONST. ART. I, § 33 (b) (emphasis added). Not all beaches are considered public. All “wet beaches”—land from the mean low tide line to the relevant high tide line—are owned by the State of Texas and are held in the public trust. *Severance v. Patterson*, 370 S.W.3d 705, 708 (Tex. 2012); see also *Lorino v. Crawford Packing Co.*, 142 Tex. 51, 55 (1943) (“The soil covered by the bays, inlets, and arms of the Gulf of Mexico within tidewater limits belongs to the State and constitutes public property that is held in trust

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<sup>1</sup> References to “Appellants’ Br.,” “Appellee’s Br.,” and “Reply Br.” refer to “Appellants’ [SaveRGV, Sierra Club, and Carrizo//Comecrudo Nation of Texas, Inc.] Initial Brief,” the “Second Amended Brief of Appellee [the Texas Attorney General],” and “Appellants’ [SaveRGV, Sierra Club, and Carrizo//Comecrudo Nation of Texas, Inc.] Amended Reply Brief,” respectively.

for the use and benefit of all the people.”). The “dry beach” may be public or private land based on the past historic use. *Severance*, 370 S.W.3d at 708. The right of public access in Texas is essentially a “public easement.” *Id.* The “public easement” provides the public access to otherwise private land located between the mean high or mean higher high tide line and line of vegetation, the “dry beach,” in order to access the public “wet beach” *if* the easement was established historically. *Id.* (emphasis added).

**2. The Open Beaches Act of 1959 created no new rights of public access to public beaches.**

The Texas Open Beaches Act (“OBA”) was first enacted in 1959 as a reaction to the Texas Supreme Court’s decision declaring the “dry beach” private property. *Lutttes v. State* 159 Tex. 500, 537 (1958); *Severance*, 370 S.W.3d at 718. Unlike the wet beach held in the public trust by the State, the dry beach, landward of the mean high tide line, had not been declared part of the public trust. *Lutttes*, 159 Tex. at 537. This land could be privately owned unless it was shown the public had a history of prior public use. *Id.* Before *Lutttes* was decided, it was unclear whether both the wet and dry beach were owned by the State. *Severance*, 370 S.W.3d at 717. At the time, there was a concern private landowners would try to fence in their “dry

beach” and block the public from entering the private dry beach to access the public wet beach.<sup>2</sup>

In reaction to this concern, the OBA was enacted to ensure private landowners did not obstruct the public’s access to beaches where the public had *already* acquired a right of use or easement. The OBA did not create *new* rights. As the Texas Supreme Court explained in the most recent opinion outlining the property rights of private landowners:

The OBA does not alter *Luttles*. It enforces the public’s right to use the dry beach on private property where an easement exists and enforces public rights to use State-owned beaches. Therefore, the OBA, by its terms, does not create or diminish substantive property rights. The statute cannot truly be said to create any new rights.

*Severance*, 370 S.W.3d at 719.

Rather, than create new rights, the OBA vested authority in the County Commissioners Courts to regulate public beaches.<sup>3</sup> While the OBA provided “that the public, individually and collectively, shall have the free and unrestricted right of ingress and egress to and from the state-owned beaches,”<sup>4</sup> the right to access the public beach was “subject to the rules and

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<sup>2</sup> Jacqueline Reeves, *The Challenge of Legislating Coastal Boundaries: One Property Owner’s Attack on the Public Beach*, 53 S. TEX. L. REV. 345, 351 (2011).

<sup>3</sup> Act of July 16, 1959, 56<sup>th</sup> Leg., 2<sup>nd</sup> C.S., ch. 19, 1959 Tex. Gen. Laws 108.

<sup>4</sup> *Id.* at § 1 (currently codified as TEX. NAT. RES. CODE § 61.011).

regulations promulgated by the Commissioners Court.”<sup>5</sup> For example, the state and federal government retained the authority to build a seawall, barrier, or other structure to aid in navigation and safety of the shore.<sup>6</sup> The public was never delegated any authority to enforce public access, or to secure public access.

Today’s version of the OBA also delegates the Texas Land Commissioner the authority to regulate public access and to protect the public beach easement from encroachments and interferences. TEX. NAT. RES. CODE § 61.011 (c) (providing the commissioner “shall strictly and vigorously enforce the prohibition against encroachments on and interferences with the public beach easement.”). The public is not granted any enforcement authority under the OBA.

**3. The 2009 Open Beaches Amendment to the Texas Constitution does not disturb the Legislature’s authority to regulate beach access and use.**

In 2009, the Legislature incorporated Section 33 to Article I of the Texas Constitution, which outlines the public’s rights in accessing and using

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<sup>5</sup> *Id.* at § 8.

<sup>6</sup> *Id.* at § 1 (“[T]he provisions of this subchapter do not prevent any of the following governmental entities [an agency, department, institution, or instrumentality of the federal government, state, county, municipality, or subdivision of the state] from erecting or maintaining any groin, seawall, barrier, pass, channel, jetty, or other structure as an aid to navigation, protection of the shore, fishing, safety, or other lawful purpose authorized by the constitution or laws of this states or the United States.”).

public beaches. Section 33(b) provides:

The public, individually and collectively, has an unrestricted right to use and a right of ingress to and egress from a public beach. The right granted by this subsection is dedicated as a permanent easement in favor of the public.

TEX. CONST. ART. I, § 33(b).

Section 33 expressly provides that the Legislature retains the authority to “enact laws to protect the right of the public to access and use a public beach and to protect the public beach easement from interference and encroachments.” TEX. CONST. ART. I, § 33(a). Importantly, Section 33 also expressly disclaims any private right of enforcement. TEX. CONST. ART. I, § 33(d) .

**4. House Bill 2623 is a proper delegation of power by the Legislature consistent with the Land Commissioner’s duty to protect the public beach easement.**

The Legislature delegated to the Land Commissioner the duty to “strictly and vigorously enforce the prohibition against encroachments on and interferences with the public beach easement.” TEX. NAT. RES. CODE § 61.011(c). House Bill 2623 directly aligns with the Land Commissioner’s duty to protect the public and the public beach easement by promulgating rules governing the use and maintenance of public beaches. *See generally id.* § 61.011.

The specific amendments of House Bill 2623 to section 61.011 of the Texas Natural Resources Code provide the Land Commissioner the authority to promulgate rules for the closure of public beaches for space flight activities. See TEX. NAT. RES. CODE § 61.011(d)(11) (providing that the commissioner shall promulgate rules for the closure of beaches for space flight activities). The amendments to Section 61.132 provide the local County Commissioners Court the authority to temporarily close beaches for launch purposes to protect the health, safety, and welfare of the public. *Id.* § 61.132(c). Beach closures are limited and cannot be planned on Memorial Day, Labor Day, or the Fourth of July without prior approval by the Land Commissioner. *Id.* § 61.132(d). Closure must also comply with both the County's beach access plan and dune protection plan. *Id.* at § 61.132(e).

**5. House Bill 2623 does not permit temporary beach closure until the launch site is approved by the Federal Aviation Administration.**

House Bill 2623 provides that public beach access cannot be temporarily closed for space flight activities until the FAA license approval process is complete and a record of decision is issued and documented in the Federal Register. TEX. NAT. RES. CODE § 61.132(a). After years of notifying and reviewing comments from the public, on July 15, 2014, the FAA

issued a Record of Decision approving SpaceX's license application to establish Boca Chica as the Falcon 9 and Falcon Heavy vertical launch site. (CR 182-215) The FAA determined the temporary closures of the nearby publicly owned public parks, recreation areas, wildlife refuges, and significant historic sites for launch activities "would not substantially reduce the use or enjoyment" of the sites. (CR 191)

**6. House Bill 2623 is rationally related to preserving public safety, stimulating the economy through increased jobs and revenue, and promoting Texas as a hub for space activity.**

House Bill 2623 is plainly rational and does not violate the right to public beach access. House Bill 2623 was promulgated when Brownsville, Texas was under consideration as a potential private shuttle launch site by the FAA.<sup>7</sup> One of the many FAA licensing requirements of a private shuttle launch site includes providing a detailed Security Plan to ensure public safety during launch. (CR 209) House Bill 2623's stated purpose achieves this goal by providing "for the protection of the public health, safety, and welfare on dates when an FAA-approved launch is to take place."<sup>8</sup> The Brownsville launch site was anticipated to "provide a significant and direct economic impact on the surrounding communities by providing jobs and

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<sup>7</sup> Senate Comm. On Admin., Bill Analysis, Tex. H.B. 2623, 83 Leg., RS. at 2 (2013).

<sup>8</sup> Senate Comm. On Admin., Bill Analysis, Tex. H.B. 2623, 83 Leg., RS. at 1 (2013).

other economic opportunities.”<sup>9</sup> And, it was estimated to “directly create 600 new jobs paying at least \$55,000 per year and have an estimated economic impact of \$51 million per year.” Additionally, it was expected that the launch site provided an opportunity for Texas to continue to lead space exploration and inspire young Texans to pursue education in science, math, and engineering.<sup>10</sup> Ensuring public safety, economic stimulus, and promoting Texas as the leader in space exploration are all rational choices the Legislature considered and weighed when deciding to enact House Bill 2623.

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<sup>9</sup> Land and Resource Mgmt., Bill Analysis, Tex. H.B. 2623, 83 Leg., R.S. at 3 (2013).

<sup>10</sup> *Id.*; see also CR 258-294 (explaining the urgent need for national space exploration).

## SUMMARY OF ARGUMENT/REASONS TO GRANT REVIEW

This Court should grant review because (1) Petitioners' immunity from suit was not waived because Respondents' constitutional claims are facially invalid, and (2) Respondents lack standing because there is no private right of enforcement under Article I, Section 33 of the Texas Constitution.

1. Jurisdiction "is essential to the court's power to decide a case." *Klumb v. Hous. Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 8 (Tex. 2015) (quoting *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004)). "Because the assertion of sovereign immunity implicates the court's jurisdiction, immunity is properly raised in a plea to the jurisdiction." *Matzen v. McLane*, 659 S.W.3d 381, 387 (Tex. 2021). "Although the UDJA generally waives immunity for declaratory-judgment claims challenging the validity of statutes," the Texas Supreme Court has "held that 'immunity from suit is not waived if the constitutional claims are facially invalid.'" *Abbott v. Mexican Am. Legis. Caucus, Tex. House of Representatives ("MALC")*, 647 S.W.3d 681, 698 (Tex. 2022) (quoting *Klumb*, 458 S.W.3d at 13). Moreover, "when sovereign immunity is asserted, it is the plaintiff's burden to plead facts that affirmatively state a viable claim." *Matzen*, 659 S.W.3d at 394; see also, e.g., *Tex. Dep't of Transp. v. Ramirez*, 74 S.W.3d 864, 867 (Tex. 2002) (per curiam).

Although the Court of Appeals recited these principles, it refused to decide the viability of the claim that Respondents SaveRGV, Sierra Club, and Carrizo/Comecrudo Nation of Texas, Inc. brought because the Court of

Appeals believed the Texas Supreme Court’s facial-validity standard applies only to challenges to government *conduct*, not to constitutional challenges to *statutes*. *SaveRGV v. Tex. Gen. Land Off.*, No. 13-22-00358-CV, 2024 WL 385656, at \*7 (Tex. App.—Corpus Christi—Edinburg Feb. 1, 2024, no pet. h.) (“Op.”). That is incorrect. The Texas Supreme Court and other courts of appeals have repeatedly held that facially invalid challenges to statutes must be dismissed at the plea-to-the-jurisdiction stage. *See, e.g., MALC*, 647 S.W.3d at 698; *City of Houston v. Hous. Firefighters’ Relief & Ret. Fund (“HFRRF”)*, 667 S.W.3d 383, 395-96 (Tex. App.—Houston [1st Dist.] 2022, pet. denied). In refusing to do the same, the Court of Appeals failed to meet its “obligation to consider the ... assertion of immunity when the plea to the jurisdiction was filed.” *MALC*, 647 S.W.3d at 699 n.8 (alteration in original). This Court should grant review to rectify that error.

Upon review, this Court should reverse the Court of Appeal’s decision overturning the trial court’s dismissal of Respondents’ action, as that action is premised on the remarkable notion that under the Open Beaches Amendment, Tex. Const. art. I, § 33, *any* “statute that infringes upon the public’s guaranteed right of access to public beaches” is “void.” (Reply Br. at 30) That reading of article I, section 33 is both facially invalid and untenable. Although public entities do their best to keep beaches open to the public, they must also protect the public from natural events such as hurricanes and riptides, dangerous sand erosion, undrivable conditions, the spread of coronavirus, and other unavoidable hazards. In doing so, they

must sometimes limit beach access and use. Because Respondents' argument and the Court of Appeals' decision would leave the Legislature without the means to protect not just Texas citizens but the beaches to which Respondents demand access, it is not a viable construction of the Amendment, and challenges based on that construction must fail. As a result, Respondents have not met their burden to plead facts that can overcome sovereign immunity, and this Court should grant Petitioners' request for review and reverse the Court of Appeals' decision.

2. Standing is a constitutional prerequisite to filing suit, and a court does not have jurisdiction over a claim made by a plaintiff who does not have standing to assert it. *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 150 (Tex. 2012). In the trial court, Respondents argued that temporary Boca Chica Beach closures due to scheduled launches by Space Exploration Technologies Corp. ("SpaceX") violated the public's constitutional right to the access and use of public beaches guaranteed by Article I, Section 33 of the Texas Constitution. The trial court correctly dismissed Respondents' claims against Petitioners because it did not have subject-matter jurisdiction over their claims against GLO and the Commissioner, in part, because there is no private right of enforcement under Article I, Section 33 of the Texas Constitution. Accordingly, review should be granted, and the Court of Appeals' decision should be reversed.

## ARGUMENT

- I. This Court should grant review because courts have an obligation to assure themselves at the outset that constitutional challenges to statutes are facially valid and in this case Respondents' constitutional claims are not viable.**

This Court should grant review because courts have an obligation to assure themselves at the outset that constitutional challenges to statutes are facially valid, and Respondents' constitutional claims are not viable.

- A. Courts have an obligation to assure themselves at the outset that constitutional challenges are facially valid.**

Respondents sought a declaratory judgment that Texas Natural Resources Code sections 61.011(d)(11) and 61.132 and Title 31, Texas Administrative Code section 15.32(d) violate Texas's Open Beaches Amendment, Tex. Const. art. I, § 33. (Op. at \*1) Although the Petitioners filed a plea to the jurisdiction arguing that they were entitled to sovereign immunity, the Court of Appeals held that it need not address that claim at the plea-to-the-jurisdiction stage. (*Id.* at \*7) Although the court of appeals acknowledged the seminal case *Klumb v. Houston Municipal Employees Pension System*, it held that it was inapplicable because "*Klumb* did not involve a challenge to the constitutionality of a statute, but rather involved a challenge to" the pension system's "actions (its classification of employees) under the Texas Constitution equal protection clause." *Id.* (citing *Klumb*, 458

S.W.3d at 3, 13). But *Klumb* is only one of several cases concerning viability challenges, and several of them involve constitutional challenges to statutes. As a result, that ground does not justify the Court of Appeal’s decision not to address jurisdiction.

*Klumb*’s viability requirement for overcoming sovereign immunity *does* apply in constitutional challenges to statutes. For example, in *MALC*, the Texas Supreme Court held that the trial court erred in denying the State’s plea to the jurisdiction when the plaintiffs sought a declaratory judgment that two statutes reapportioning Texas’s legislative districts—H.B.1 and S.B.4—violated the county-line rule in article III, section 28 of the Texas Constitution. *MALC*, 647 S.W.3d at 686. The Court did so, in part, based on its conclusion that the plaintiffs’ “claim for declaratory relief that H.B.1 and S.B.4 violate Article III, Section 28 [wa]s facially invalid and thus barred by sovereign immunity.” *MALC*, 647 S.W.3d 703. And it unequivocally stated that “[t]he trial court had the obligation to consider the ... assertion of immunity when the plea to the jurisdiction was filed.” *MALC*, 647 S.W.3d 699 n.8 (quoting *In re Lazy W Dist. No. 1.*, 493 S.W.3d 538, 544 & n.44 (Tex. 2016) (orig. proceeding)).

The courts of appeals have followed suit. For example, in *City of South Padre Island v. Survive*, the plaintiffs challenged a city’s food-truck

ordinance, which they claimed violated “their ‘economic liberty rights under Article I, § 19 of the Texas Constitution.’” No. 13-20-00536-CV, 2022 WL 2069216, at \*4 (Tex. App.—Corpus Christi June 9, 2022, pet. denied) (mem. op.). The Thirteenth Court of Appeals concluded that the trial court erred in denying the city’s plea to the jurisdiction because the plaintiffs did not overcome the strong presumption that the ordinance was constitutional. *Survive*, 2022 WL 2069216 at \*7-9; see *Patel v. Tex. Dep’t of Licensing & Regulation*, 469 S.W.3d 69, 87 (Tex. 2015). And in *HFRRF*, the firefighters’ relief and retirement fund sought “a declaratory judgment that S.B. 2190 is unconstitutional,” and the Houston Court of Appeals affirmed that a “constitutional claim seeking equitable relief, alone, is [not] sufficient to waive the City’s governmental immunity” if the claim is invalid. 667 S.W.3d at 395-96. Because the Court of Appeals mistook precedent requiring it to examine the viability of Respondents’ claim even though they challenged statutes, this Court should grant review and reverse the Court of Appeals.

To be sure, “the jurisdictional inquiry may unavoidably implicate the underlying substantive merits of the case.” *Chambers-Liberty Cntys. Navigation Dist. v. State*, 575 S.W.3d 339, 345 (Tex. 2019) (orig. proceeding). But that occurs “in every Texas case involving sovereign immunity” because “courts lack jurisdiction to proceed if the claim appears

‘facially invalid.’” *MALC*, 647 S.W.3d at 699 (quoting *Klumb*, 548 S.W.3d at 13). The courts need “go no further than necessary to determine jurisdiction.” *Id.* But to the extent evidence is in the record, the courts “must move beyond the pleadings and consider evidence when necessary to resolve the jurisdictional issues” – “even if the evidence implicates both subject-matter jurisdiction and the merits of a claim.” *Alamo Heights ISD v. Clark*, 544 S.W.3d 755, 770-71 (Tex. 2018). Only if determining the viability of a claim would require deciding unresolved facts can the courts delay their assessment of jurisdiction until those facts are decided. See *City of Houston v. Downstream Env’t, L.L.C.*, 444 S.W.3d 24, 39 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). If instead “additional facts would be necessary to state a viable ultra vires claim or to state a viable claim falling within a waiver or exception to immunity, then the plaintiff has not affirmatively demonstrated the court’s jurisdiction,” and “a plea to the jurisdiction should be granted.” *Matzen*, 659 S.W.3d at 389. Where, as here, the Petitioners challenge Respondents’ interpretation of a statute, no further facts need be resolved, and this Court should grant review and resolve the dispute. *Miranda*, 133 S.W.3d at 226.

**B. This Court should grant review because Respondents' constitutional claims are not viable.**

As this case does not require resolving disputed facts, the Court of Appeals was under an obligation to assess the validity of Respondents' claims and uphold the trial court's decision to grant the Petitioners' plea to the jurisdiction. Respondents' claim relies on an absolutist theory that "if the legislature enacts a statute that infringes upon the public's guaranteed right of access to public beaches, it is the duty of the judiciary to declare it void." (Reply Br. at 30) According to Respondents, because H.B. 2623 amends the Open Beaches Act to authorize closing public beaches for space flight activities, it does not "protect, guard, or defend the public's guaranteed right to access public beaches." (Reply Br. at 31; Appellants' Br. at 14)

The Court of Appeals could have assessed such a legal position on a plea to the jurisdiction, and it should have held that Respondents' challenge is facially invalid because laws limiting access to the beach or its access points are not automatically unconstitutional. Both the plain text of section 33 of the Texas Constitution and the nature of the easement it protects demonstrate that the Legislature struck "a delicate balance between the pre-existing rights of individuals" – such as private-property owners – "and

the state’s need to abridge those rights to achieve important public policy objectives” – such as ensuring the public can enjoy Texas’s beaches. *Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 700 (Tex. 2014). The all-or-nothing rule Respondents suggest is untenable and internally inconsistent, endangering all the laws the Legislature employs to protect public safety on or near beaches. See TEX. GOV’T CODE § 311.023 (allowing consideration of the “consequences of a particular construction” of a statute).

**II. Review should be granted because Respondents lack standing as there is no private right of enforcement under Article I, Section 33 of the Texas Constitution.**

Standing is a “component of subject matter jurisdiction” and “a threshold requirement to maintaining a lawsuit.” *Farmers Tex. County Mut. Ins. Co. v. Beasley*, 598 S.W.3d 237, 240 (Tex. 2020); *Jefferson Cty. v. Jefferson Cty. Constables Ass’n*, 546 S.W.3d 661, 666 (Tex. 2018); *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 150 (Tex. 2012); *City of Houston v. Williams*, 353 S.W.3d 128, 145 (Tex. 2011). A court does not have jurisdiction over a claim made by a plaintiff who does not have standing to assert it. *Heckman*, 369 S.W.3d at 150; see, e.g., *State v. Naylor*, 466 S.W.3d 783, 791-92 (Tex. 2015).

Respondents lack standing, in part, because there is no private right of enforcement under Article I, Section 33 of the Texas Constitution. “In Texas,

the standing doctrine requires that there be (1) a real controversy between the parties that (2) will be actually determined by the judicial declaration sought.” *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 849 (Tex. 2005). “Implicit in these requirements is that litigants are properly situated to be entitled to [a] judicial determination.” *Id.* If no private right of enforcement exists under a particular statute, the plaintiff lacks standing. *See Kessling v. Friendswood Indep. Sch. Dist.*, 302 S.W.3d 373, 383 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (“Because Kessling has no right to require appellees to meet the dictates of the Education Code provisions either through the TPIA or the Education Code itself, she does not have a particularized injury from the appellees’ alleged failure to do so. In short, she has no standing to make these claims.”).

**A. No private right of enforcement exists to enforce access to beaches.**

“When a private cause of action is alleged to derive from a constitutional or statutory provision, our duty is to ascertain the drafters’ intent.” *Brown v. De La Cruz*, 156 S.W.3d 560, 563 (Tex. 2004). The Texas Constitution expressly states that the section granting the public access to use public beaches “does not create a private right of enforcement.” TEX. CONST. ART. I, § 33(d). “To interpret our Constitution, we give effect to its

plain language.” *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148 (Tex. 1995) (citing *Dawkins v. Meyer*, 825 S.W.2d 444, 448 (Tex. 1992)). Regardless, no such right can be implied. Courts in Texas apply “a ‘strict rule of construction’ to statutory enforcement schemes and imply causes of action only when the drafters’ intent is clearly expressed from the language as written.” *Witkowski v. Brian, Fooshee & Yonge Properties*, 181 S.W.3d 824, 831 (Tex. App.—Austin 2005, no pet.) (quoting *Brown v. Arturo De La Cruz*, 156 S.W.3d 560, 567 (Tex. 2004)). Even when the statute “fails to adequately protect intended beneficiaries,” the right of enforcement is not implied. *Witkowski*, 181 S.W.3d at 831. Here, no such implied right exists and is specifically disclaimed.

**B. Without a private right of enforcement, Respondents lack standing to bring a claim for violations of Article I, Section 33 of the Texas Constitution.**

Texas courts have confirmed that the correct course is to dismiss claims for lack of standing when no private right exists. In *Texas Medicine Resources, LLP v. Molina Healthcare of Texas, Inc.*, the Dallas Court of Appeals dismissed the claim of a physicians group to enforce a private right of action related to payment obligations in the Texas Insurance Code for lack of subject matter jurisdiction when it concluded no private right of action existed. 620 S.W.3d 458 (Tex. App.—Dallas 2021, pet. granted); see

*Kessling*, 302 S.W.3d at 387. Here, the Constitution expressly provides that “[t]his section does not create a private right of enforcement.” TEX. CONST. art. I, § 33(d). Accordingly, the Court of Appeals incorrectly concluded that Respondents had standing to bring a claim for violations of Article I, Section 33 of the Texas Constitution. Review should be granted to rectify this error.

#### **CONCLUSION AND PRAYER**

Petitioners Texas General Land Office and Dawn Buckingham, M.D. in Her Official Capacity as Texas Land Commissioner respectfully request that this Court grant review, and upon review, reverse the Court of Appeals’ decision overturning the Trial Court’s granting of Petitioners’ Plea to the Jurisdiction, thereby dismissing Respondents’ claims against them, including but not limited to, GLO’s amendment to its Rule 31 TAC § 15.32 and the Memorandum of Agreement between the GLO and Cameron County. Petitioners further request all other relief to which they may be justly entitled both at law and in equity.

Respectfully submitted,

*/s/ Oscar H. Lopez*

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## CERTIFICATE OF COMPLIANCE

This petition was prepared using Microsoft Word 2024 in Arial font. The font size in the text is 14-point. The font size in the footnotes is 12-point. This brief contains 4,435 words, not counting the sections excluded by TEX. R. APP. P. 9.4(i)(1).

*/s/ Oscar H. Lopez*

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## CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Petition for Writ of Mandamus was served in accordance with TEX. R. APP. P. 9.5 upon the Respondent and following counsel of record on this 28<sup>th</sup> day of May 2024:

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