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SUPREME COURT OF TEXAS
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Nos. 24-0237, 24-0407, 24-0457

In the Supreme Court of Texas

TEXAS GENERAL LAND OFFICE AND DAWN BUCKINGHAM, IN HER OFFICIAL CAPACITY AS THE TEXAS LAND COMMISSIONER,
Petitioners,

v.

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

CAMERON COUNTY,
Petitioner,

v.

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

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS,
Petitioner,

v.

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

On Petitions for Review
from the Thirteenth Court of Appeals, Corpus Christi–Edinburg

PETITIONERS' CONSOLIDATED REPLY BRIEF ON THE MERITS ON THE FACIAL-VALIDITY STANDARD AND THE CONSTITUTIONALITY OF H.B. 2623 (2013)

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Introduction

The Uniform Declaratory Judgments Act (UDJA) waives immunity from a suit challenging the constitutionality of a statute *only* if the claim is facially valid. In their opening brief, the Texas General Land Office, the Texas Land Commissioner, Cameron County, and the Attorney General of Texas (collectively, "the Government Parties") showed that the court of appeals refused to apply that rule. Rather than apply the rule, the court erroneously held that the facial-validity standard applies only to jurisdictional challenges to government "actions" and that addressing the claims' facial validity here would determine the "merits." That ruling, which conflicts with decisions from this Court and other courts of appeals, warrants this Court's review and correction.

In response, Plaintiffs do not dispute that the facial-validity standard applies here, but they implausibly argue that the court of appeals followed it. The court's opinion simply cannot be read that way.

Plaintiffs' remaining defenses of the opinion depend on misreading this Court's precedent or wrongly blaming the Government Parties' arguments for the court of appeals' faulty analysis. And although Plaintiffs ask the Court not to disturb the court of appeals' remand so that they can add claims challenging a new beach-closure law, that is not a valid reason to deny review and leave an incorrect decision on the books.

The Government Parties also showed in their opening brief that, in lieu of remanding this case for the court of appeals to apply the facial-validity standard, this Court should perform that task itself and render judgment dismissing this suit. Plaintiffs' challenge to H.B. 2623 rests on their allegations and arguments that Article I,

Section 33 of the Texas Constitution "guarantees" a right to access public beaches and renders "void" any statute that "infringes" that right no matter the purpose of the law. That interpretation conflicts with Section 33's text, context, and history. Properly construed, Section 33 does not prohibit a law like H.B. 2623 that temporarily limits beach access for public-safety reasons. Plaintiffs' claims are thus facially invalid as a matter of law.

Plaintiffs' response betrays the flaws in their extreme reading of Section 33. They never seriously grapple with the fact that Section 33 confines the right of beach access to an "easement," a property right with its own inherent limitations that leaves room for reasonable police-power regulations like H.B. 2623. They also wrongly read Section 33 to prohibit any law that impedes public beach access, a construction untethered from its text and background principles of constitutional law. And they incorrectly suggest that Section 33's origin in the Open Beaches Act somehow bolsters their reading of that section when, in fact, the Act refutes it. Because Plaintiffs fail to show that their challenge to H.B. 2623 is facially valid, they have not met their burden to establish a waiver of immunity under the UDJA.

ARGUMENT

I. The Court of Appeals Wrongly Held That the UDJA Waives Immunity for a Constitutional Challenge to a Statute Regardless of Whether the Claim Is Facially Valid.

"Although the 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.'" *Abbott v. Mex. Am. Legis. Caucus, Tex.*

House of Representatives (*MALC*), 647 S.W.3d 681, 698 (Tex. 2022) (quoting *Klumb v. Hous. Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015)). Determining whether a constitutional challenge to a statute is "facially invalid and thus barred by immunity" "hinges on [the] interpretation of the [constitutional] provisions at issue." *Id.* So, when making that determination, a court must undertake an "analysis of the[] constitutional provisions . . . as part of [its] consideration of *jurisdiction*," even though that "jurisdictional inquiry touches the merits." *Id.* at 699 (emphasis in original).

As the Government Parties showed in their opening brief (at 14-15), the court of appeals wrongly refused to follow this binding precedent. The court reasoned that this Court's dismissal of a facially invalid constitutional claim in *Klumb* was distinguishable because "*Klumb* did not involve a challenge to the constitutionality of a statute, but rather involved a challenge to [the defendant's] actions." *SaveRGV v. Tex. Gen. Land Off.*, Nos. 13-22-00358-CV, 13-22-00359-CV, 13-22-00360-CV, 2024 WL 385656, at *7 (Tex. App.—Corpus Christi–Edinburg Feb. 1, 2024, pet. pending). But that actions/statute distinction is immaterial because, as this Court explained in *MALC,* the *same* facial-validity standard applies to constitutional challenges to statutes. 647 S.W.3d at 698 (citing *Klumb*, 458 S.W.3d at 13).

In response, Plaintiffs concede (at 13) that *MALC* and *Klumb* apply here. But they insist (at 13) that the court of appeals "did not misapply those [cases'] holdings" and in fact "determined that Plaintiffs' claims were viable and facially valid." That contention cannot be squared with the court of appeals' opinion. And Plaintiffs' various attempts to explain away the court's deficient analysis all fail.

A. The court of appeals never determined that Plaintiffs' claims are facially valid.

Plaintiffs assert (at 14) that the court of appeals did not "refuse to examine whether Plaintiffs' claims were viable and valid." Indeed, they claim (at 8) that the court affirmatively "determined that Plaintiffs' pleadings presented viable, valid claims within the trial court's jurisdiction." *See also* Resp'ts Br. 13 (stating that the court "determined that Plaintiffs' claims were viable and facially valid").

Notably absent from those statements is any citation of the court of appeals' opinion. That is because the court never did what Plaintiffs say it did.

The court of appeals' immunity-waiver analysis consisted of three points: (1) "the UDJA . . . waives immunity for suits seeking to have a statute declared unconstitutional"; (2) Plaintiffs "are challenging the validity of a statute, which is expressly permitted by the UDJA and under long-standing precedent"; and (3) therefore, "immunity is waived." *SaveRGV*, 2024 WL 385656, at *6. That's it.

In response to the Attorney General's argument that, under *Klumb*, Plaintiffs' challenges also had to be facially valid to invoke the UDJA's immunity waiver, the court of appeals said *nothing* about those claims' validity or viability. *Id.* at *7. Instead, as discussed above, the court incorrectly distinguished *Klumb*. *Id.* The court also erroneously labeled the facial-validity argument a "merits" issue and refused to address it. *Id.* And the court stood by those errors even after the Attorney General filed a motion for rehearing pointing out that *MALC* required the court to apply *Klumb*'s facial-validity standard to a challenge to a statute *and* to do so notwithstanding the overlap with the merits. Appellee's Mot. for Reh'g 4-6.

So, contrary to Plaintiffs' assertion (at 13), the court of appeals did *not* "determine[] that Plaintiffs' claims were viable and facially valid."

B. The court of appeals' failure to consider the facial validity of Plaintiffs' claims was not a reasoned attempt to avoid the merits.

Plaintiffs nonetheless seize upon *MALC*'s statement that, in evaluating a claim's facial validity, a "reviewing court goes no further into the merits than necessary to determine jurisdiction." Resp'ts Br. 12 (citing *MALC*, 647 S.W.3d at 699). In Plaintiffs' view, that explains why the court of appeals "went no further" than it did: "the issues presented were not complicated"; Section 33 "is plainly written"; and a "deeper dive into the merits of the lawsuit" was therefore "unnecessary in this case." *Id.* at 12, 15; *accord id.* at 39. That is wrong for two reasons.

1. To begin, Plaintiffs misread *MALC*. The line they would draw between a permissible jurisdictional inquiry into a claim's validity and an impermissible merits inquiry finds no support in that decision.

In *MALC*, the Court held that determining whether a constitutional challenge is facially valid "hinges on [the] interpretation of the [constitutional] provisions at issue." 647 S.W.3d 698. In other words, the Court added, a court must perform an "analysis of the[] constitutional provisions . . . as part of [its] consideration of *jurisdiction*," even though that exercise "touches the merits." *Id.* at 699 (emphasis in original). The Court then thoroughly analyzed the two provisions at issue—examining their text and history, interpretative commentary, and relevant caselaw—and ultimately concluded that one claim was facially valid while the other was not. *Id.* at 699-703.

Contrary to Plaintiffs' implication (at 12), the Court never suggested that deep analysis was needed because the issues were "complicated" or the constitutional provisions were not "plainly written." Instead, the Court explained that it "address[ed] the merits" "only to the extent necessary to grant the opportunity to replead." *Id.* at 700 n.9. *That* is the line. But that line may reach far into merits issues because "the opportunity to replead" is available only if the jurisdictional defect "can be cured." *TxDOT v. Sefzik*, 355 S.W.3d 618, 623 (Tex. 2011) (per curiam). And to the extent a challenge to a statute rests on an incorrect reading of the constitutional provision it allegedly violates, no amount of repleading can cure that defect. That is what happened in *MALC*. After the Court analyzed Article III, Section 28 and concluded that the plaintiffs' reading of it was wrong, the Court held that their claim under that section was "facially invalid and barred by sovereign immunity," which "require[ed] its dismissal"—not a remand for repleading. 647 S.W.3d at 704.

In the court of appeals, the Attorney General made the same kind of argument presented in *MALC*. He explained that Plaintiffs "cannot" "plead a viable constitutional claim" in part because Section 33, correctly construed, does not support their claims. Appellee Br. 23-28. Under *MALC*, that was a proper jurisdictional argument, notwithstanding that it "touches the merits." 647 S.W.3d at 699.

2. In any event, the line that Plaintiffs would draw between a proper jurisdictional inquiry and the merits still does not explain the decision below. Again, the court of appeals did not even undertake the superficial assessment that Plaintiffs describe. It failed to consider the facial validity or viability of Plaintiffs' claims *at all*.

C. The arguments raised below do not explain or justify the court of appeals' departure from this Court's precedent.

Plaintiffs also claim (at 14-15) that the court of appeals' analysis "makes sense" in light of the arguments that the Attorney General made in that court. It does not.

First, Plaintiffs argue (at 15, 39) that because the Attorney General's facial-validity argument attacked Plaintiffs' pleadings, the court of appeals properly "focused" on those pleadings. But as discussed above, the court did not address facial validity or viability even with respect to Plaintiffs' pleaded allegations.

Second, Plaintiffs defend (at 15) the court of appeals' refusal to consider the Attorney General's argument that H.B. 2623 readily withstands rational-basis review. According to Plaintiffs (at 15), the court correctly declined to address that point because it went to "the merits" and "*Klumb* does not hold otherwise." That is wrong. Plaintiffs ignore the court's stated reason for not considering that argument: the court acknowledged that *Klumb* found a claim facially invalid because the challenged actions "had a rational basis," but it reasoned that *Klumb* does not apply to "a challenge to the constitutionality of a statute." *SaveRGV*, 2024 WL 385656, at *7. Again, *MALC* holds that *Klumb*'s facial-validity standard *does* apply to challenges to statutes. 647 S.W.3d at 698. And although *Klumb*'s rational-basis discussion surely overlapped with the merits, the Court held that it also meant the plaintiffs had "failed to plead a viable equal-protection claim" within the UDJA's immunity waiver. 458 S.W.3d at 13-14. Under *Klumb*, then, the fact that the Attorney General's rational-basis argument implicated the merits of Plaintiffs' claims was no reason for the court of appeals to avoid it in the immunity-waiver analysis.

D. The Government Parties' facial-validity argument does not mischaracterize Plaintiffs' pleadings.

Plaintiffs further contend (at 15-16) that the court of appeals "correctly disregarded" the Government Parties' facial-validity argument because it was purportedly "based on their own exaggerated mischaracterization of Plaintiffs' pleadings." Again, that is not what the court said. It disregarded the facial-validity argument because it believed—incorrectly—that a facial-validity analysis did not apply to challenges to statutes. *SaveRGV*, 2024 WL 385656, at *7.

Regardless, Plaintiffs are wrong about the Government Parties' facial-validity argument. Plaintiffs protest that they alleged only that "HB2623"—not any other law—"violate[s] the public's constitutional right to access public beaches." Resp'ts Br. 1. For that reason, they believe the Government Parties are "mischaracteriz[ing]" their pleadings in arguing that their reading of Section 33 would "prohibit[] any law that infringes in any way on the public's rights to access and use public beaches." *Id.* at 15 (quoting Pet'rs Br. 9-10). And they claim that once that mischaracterization is set aside, the Government Parties' facial-validity argument "collapse[s]." *Id.* at 16. Each part of that explanation fails.

First, Plaintiffs are conflating the scope of their claims with the scope of the constitutional theory on which those claims are based. Yes, Plaintiffs seek to invalidate only H.B. 2623 and not any other law. CR.106-10, 138-39. But they alleged that the *reason* H.B. 2623 is invalid is that Section 33 "*guarantees* the public an unrestricted right to use and access Texas public beaches," CR.107, 109-10, 139 (emphasis added), and limits the Legislature's power to "enact laws related to beach access"

to laws "*protecting*" that access," CR.107 (emphasis added). And in the court of appeals, they elaborated that Section 33 means 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*." COA Reply Br. 30 (emphases added). Those allegations and arguments construe Section 33 to have a broader sweep than one that would invalidate only H.B. 2623, even if Plaintiffs are not challenging any other law.

Second, those allegations and arguments confirm that the Government Parties' characterization of Plaintiffs' claims is accurate. Plaintiffs read Section 33 as a "guarantee"—a word that does not appear in the section—that the public can use and access public beaches, CR.109-10, as well as a prohibition on "a statute"—not just H.B. 2623—that "infringes" that guarantee, COA Reply Br. 30.

Third, the Government Parties' facial-validity argument is that Plaintiffs' challenge to H.B. 2623 is based on a misreading of Section 33's meaning. As the Government Parties showed in their opening brief (at 16-29), Plaintiffs' construction of that section clashes with its text and history as well as background constitutional principles. So, even if this Court ignored the implications of that construction for other laws, Plaintiffs would still be wrong about what Section 33 means, which renders their challenge to H.B. 2623 facially invalid. *Cf. MALC*, 647 S.W.3d at 701-03.

E. *Patel* does not support the court of appeals' decision.

Plaintiffs next argue (at 16) that the decision below finds support in *Patel v. Texas Department of Licensing and Regulation*, 469 S.W.3d 69, 77 (Tex 2015), which held that a constitutional claim was viable because it had no "basic pleading defects." That argument ignores the Court's post-*Patel* precedent.

Since *Patel*, this Court has explained that determining whether a constitutional claim is sufficiently viable to overcome immunity is a more searching inquiry than merely scanning the pleadings for basic defects. In *Matzen v. McLane*, for example, the Court examined the legal basis for the constitutional claims and, finding that they failed as a matter of law, concluded that they were not viable and thus jurisdictionally barred. 659 S.W.3d 381, 389-94, 395 (Tex. 2021). The Court in *Texas Southern University v. Villarreal* undertook a similar review, considering both the governing legal principles and the undisputed facts in holding that, as a matter of law, the plaintiff had not alleged a viable constitutional claim. 620 S.W.3d 899, 905-10 (Tex. 2021). And, again, in *MALC* the Court held that assessing the facial validity of the pleaded claims required an "analysis of the[] constitutional provisions" that the challenged statute allegedly violated. 647 S.W.3d at 699. The Government Parties' jurisdictional challenge fits comfortably within this precedent.

F. Potential challenges to a new law do not warrant denying review.

Finally, Plaintiffs ask this Court to deny review and let stand the court of appeals' remand to allow them "to add new parties and new claims" to challenge both a recently enacted law that authorizes the Texas Space Commission to temporarily close a beach for space-related industries and a related Commission order issued under that law. Resp'ts Br. 16-17 (citing Tex. Gov't Code § 482.107(a)(8)); Resp'ts Supp. Ltr. 4 (Oct. 3, 2025). The Court should decline the request for three reasons.

First, denying review would leave the court of appeals' erroneous opinion on the books. Again, that opinion fails to perform the facial-validity analysis required by this Court's precedent and, worse, it justifies that failure by wrongly cabining that

precedent to challenges to government "actions." *SaveRGV*, 2024 WL 385656, at *7. Those "error[s] of law" are "of such importance to the state's jurisprudence that [they] should be corrected." Tex. R. App. P. 56.1(a)(5). Moreover, as the Government Parties explained in their opening brief (at 13-14), the decision below conflicts with decisions from other courts of appeals. Resolving that conflict is more important than allowing Plaintiffs to bring new claims. *See* Tex. R. App. P. 56.1(a)(2).

Second, the recently enacted beach-closure law and Plaintiffs' threat to challenge it do not provide a valid reason to leave the court of appeals' judgment of remand undisturbed. "Generally, remand is a mechanism for parties, over whose claims the trial court may have jurisdiction, to plead facts tending to establish that jurisdiction, *not for parties, over whose claims the trial court does not have jurisdiction, to plead new claims*" to try to establish jurisdiction. *Clint ISD v. Marquez*, 487 S.W.3d 538, 559 (Tex. 2016) (emphasis added). Because the court of appeals refused to consider whether Plaintiffs' existing claims are facially valid, the trial court's jurisdiction over this case has not yet been established. If the trial court does not have jurisdiction, as the Government Parties contend, a remand to allow Plaintiffs to plead new claims would be improper. *Id.* Accordingly, the Court should either remand this case to the court of appeals to conduct the correct jurisdictional analysis or resolve the jurisdictional issues itself in the first instance. *See infra* p.12.

Third, Plaintiffs are wrong to argue (at 17-18) that it would be "efficient" to "allow this case to return to the trial court for the parties to address the merits," including the new law's constitutionality. The trial court "may not move to the merits if even one jurisdictional argument remains unresolved." *Rattray v. City of Brownsville*,

662 S.W.3d 860, 869 (Tex. 2023). And it would be more efficient to decide now whether the existing claims are facially valid. That resolution would yield an authoritative construction of Section 33 that can guide litigants and courts in any future challenge to the new law.

II. Plaintiffs' Claims Are Facially Invalid, So This Court Should Render Judgment Dismissing Them for Lack of Jurisdiction.

In their opening brief (at 15-16), the Government Parties explained that although this Court could remand this case for the court of appeals to perform the correct facial-validity analysis, it should resolve that issue itself. That approach would be appropriate because "[t]he parties have briefed and argued the issue here" and "address[ing] it rather than remanding to the court of appeals" will serve "the interest of judicial economy." *Pedernal Energy, LLC v. Bruington Eng'g, Ltd.*, 536 S.W.3d 487, 495 (Tex. 2017).

In response, Plaintiffs offer no argument for remanding the issue to the court of appeals. Instead, they contend (at 18) that neither this Court nor the court of appeals should construe Article I, Section 33 because that would "essentially" decide "the merits." Again, that is wrong. In a constitutional challenge to a statute under the UDJA, a court may construe the constitutional provision that the statute allegedly violates to determine whether the claim is facially valid and thereby triggers the UDJA's immunity waiver. *E.g.*, *MALC*, 647 S.W.3d at 701-03 (construing Article III, Section 28); *City of Houston v. Hous. Firefighters' Relief & Ret. Fund*, 667 S.W.3d 383, 396-401 (Tex. App.—Houston [1st Dist.] 2022, pet. denied) (construing Article XVI, Section 67).

A proper construction of Section 33 should result in dismissal of this suit. As the Government Parties showed in their opening brief (at 16-29), the text, context, and history of Section 33 demonstrate that it does not prohibit the Legislature from enacting laws that reasonably regulate beach access for public-safety reasons. It therefore does not invalidate H.B. 2623, which protects the public by authorizing the temporary closure of beaches during nearby rocket launches. Pet'rs Br. 29-30.

In response, Plaintiffs counter (at 19-38) that Section 33's text, context, and history all support their contrary reading. They do not. As discussed below, Plaintiffs' selective reading of those sources cannot overcome the simple fact that Section 33 grants the public only a limited "easement" right, which does not preclude public-safety measures like H.B. 2623. Nor do Plaintiffs coherently explain how their more expansive rendering of that right prohibits laws that protect the beachgoing public from the risks created by nearby rocket launches while allowing laws that protect the public from other hazards like hurricanes and oil spills.

A. Section 33's text does not support Plaintiffs' view of the public's beach-access rights.

Plaintiffs urge (at 22, 30) that Section 33's text "unambiguously reflects" that the section "reserve[s] for the public the guaranteed right to access" public beaches and "limit[s] the Legislature's power to enact laws that interfere with or impede" that right. They contend (at 23) that H.B. 2623 is "not reconcilable" with that text and "must be declared void." But the two provisions in Section 33 that Plaintiffs rely on do not support their absolutist view of the public's beach-access rights.

1. Section 33 grants an "easement," which is inherently limited.

Section 33 provides that "[t]he public, individually and collectively, has an unrestricted right to use and a right of ingress to and egress from a public beach" and that this right "is dedicated as a permanent easement in favor of the public." Tex. Const. art. I, § 33(b). Plaintiffs' textual "analysis" of this provision largely consists of reciting its language and then simply asserting that it "unambiguously reflects" a "guaranteed right to access" public beaches. Resp'ts Br. 22. All they say about the term "easement" is that the public, as the easement holder, "possesses the dominant estate," which in their view means "the state may not interfere with the public's right to use the public beach." *Id.* at 29. Plaintiffs are wrong.

a. As the Government Parties explained in their opening brief (at 20-22), an "easement" confers limited rights that stop short of Plaintiffs' imagined guarantee of no state interference. An easement carries only rights that are "reasonably necessary for enjoyment consistent with its intended use." *Coastal Indus. Water Auth. v. Celanese Corp. of Am.*, 592 S.W.2d 597, 601 (Tex. 1979). As a result, those rights "do not encompass rights foreign to the purpose for which the easement is granted." *State v. Brownlow*, 319 S.W.3d 649, 656 (Tex. 2010). Moreover, just as "all property is held subject to the valid exercise of the police power," *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 804 (Tex. 1984), "easement rights . . . are subject to reasonable regulation," *Dykes v. City of Houston*, 406 S.W.2d 176, 181 (Tex. 1966); *see also* 11 McQuillin Mun. Corp. § 30:142 (3d ed.) (updated June 2025) (noting a "public easement" in streets is "subject to the lawful exercise of the police power"). Indeed, three years *after* Section 33's adoption, this Court reaffirmed—in a case

about beach easements, no less—that "the State, as always, may validly address nuisances or otherwise exercise its police power to impose reasonable regulations on coastal property." *Severance v. Patterson*, 370 S.W.3d 705, 725 (Tex. 2012).

Section 33 thus leaves room for state laws regulating access to and use of public beaches in two respects. *First*, to the extent the public claims a right to visit a public beach that is not "reasonably necessary" to enjoy its easement, *Coastal Indus.*, 592 S.W.2d at 601, or indeed that is "foreign to the purpose" of its easement, *Brownlow*, 319 S.W.3d at 656, a law that prohibits or restricts that visit would not conflict with the easement dedicated by Section 33. *Second*, even when the public wants to visit a public beach consistent with its easement to access and use it, the State may "exercise its police power" to subject that visit to "reasonable regulations." *Severance*, 370 S.W.3d at 725; *accord Dykes*, 406 S.W.2d at 181.

b. The allowance for "reasonable" regulation of the public-beach easement also answers Plaintiffs' objection (at 18-20) to applying rational-basis review here. The Court has equated "reasonableness" with "rational basis" review. *See Save Our Springs All., Inc. v. TCEQ*, 713 S.W.3d 308, 320 (Tex. 2025); *see also Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012) (explaining that "rational basis review requires deference to reasonable underlying legislative judgments"). So, contrary to Plaintiffs' charge (at 19), the Government Parties are not grafting an inapt federal equal-protection standard onto Section 33. Rather, a rational-basis test accurately reflects this Court's holding that "easement" rights—which is what Section 33 provides—are "subject to reasonable regulation." *Dykes*, 406 S.W.2d at 181.

2. Section 33 does not prohibit laws that impede public-beach access.

Section 33 also provides that the Legislature "may 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(c). Plaintiffs read this provision to "limit[]" the Legislature's power to enact laws about public-beach access to "those that protect the public's right to public beach access." Resp'ts Br. 30. From that premise, they reason that "[l]aws that do not fulfill this function" of "protecting" public-beach access "are prohibited." *Id.* at 22-23. Plaintiffs are wrong again.

a. To begin, Section 33 does not contain any language of limitation or prohibition with respect to the Legislature. Providing that the Legislature "may" enact laws protecting public-beach access "creates discretionary authority or grants permission or a power" to adopt such laws. Tex. Gov't Code § 311.016(1); *see also Indus. Specialists, LLC v. Blanchard Ref'g Co. LLC*, 652 S.W.3d 11, 17 (Tex. 2022) (referring to the "fundamentally discretionary nature of the word 'may'"). But that says nothing about the Legislature's power to enact other beach-access laws. When our Constitution's framers limit legislative authority to enact laws, they say as much. *E.g.*, Tex. Const. art. I, § 6-a (providing that "[t]his state . . . may not enact [or] adopt . . . a statute . . . that prohibits or limits religious services"); *id.* art. I, § 8 (providing that "no law shall ever be passed curtailing the liberty of speech or of the press"); *id.* art. I, § 16 ("No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made."). Because courts must "presume that the framers carefully chose the language" in the Constitution and "interpret their words

accordingly," *Degan v. Bd. of Trs. of Dall. Police & Fire Pension Sys.*, 594 S.W.3d 309, 313 (Tex. 2020), Section 33's lack of any analogous language forbidding other beach-access laws signals that no such prohibition was intended.

Nor does Section 33 implicitly prohibit all beach-access laws other than those that protect that access. It is a "fundamental constitutional principle" that "the Legislature is vested with 'all legislative power—the power to make, alter and repeal laws—not expressly or impliedly forbidden by other provisions of the State and Federal Constitutions.'" *MALC*, 647 S.W.3d at 702 (quoting *Walker v. Baker*, 196 S.W.2d 324, 328 (Tex. 1946)). And to find that the Constitution implicitly forbids a law, the prohibition must be "at least 'clearly implied.'" *Id.* (quoting *Shepherd v. San Jacinto Junior Coll. Dist.*, 363 S.W.2d 742, 743 (Tex. 1962)). Section 33's provision that the Legislature "may" enact laws protecting public-beach access does not clearly imply that all other laws about public beaches are forbidden. As this Court explained nearly a century ago in *Mumme v. Marrs*, "the enumeration in the Constitution of what the Legislature may or shall do" is "not to be regarded as a limitation on the general power of the Legislature to pass laws on the subject." 40 S.W.2d 31, 33 (Tex. 1931); *see also MALC*, 647 S.W.3d at 702 (holding that Article III, Section 28's command to redistrict House and Senate seats following the decennial census did not "impliedly foreclose[] this power from being exercised at another time").

b. Plaintiffs have only one response to this line of authority. They believe that Section 33 *does* implicitly prohibit laws that do not protect beach access simply because Section 33 is in Article I of the Texas Constitution—the Bill of Rights. Resp'ts Br. 23, 30-32. In their view, placing it there means that (1) providing that the

Legislature "may" enact laws to protect beach access "was intended to restrict the authority of the government" to do otherwise; and (2) *Mumme* is inapposite because it addressed a provision in Article VII, not Article I. *Id.* Those arguments miss the mark.

First, Plaintiffs misplace reliance (at 23, 32) on decisions about Article I provisions that explicitly prohibit certain laws. *Hogan v. SMU*, 688 S.W.3d 852, 858 (Tex. 2024) (discussing Article I, Section 16's command that "[n]o . . . retroactive law . . . shall be made"); *Patel*, 469 S.W.3d at 121 (Willett, J., concurring) (addressing a challenge under Article I, Section 19's directive that "[n]o citizen of this State shall be deprived of . . . liberty [or] property . . . except by the due course of the law of the land"). By their plain terms, those provisions limit legislative power. Section 33's statement that the Legislature "may" enact certain laws does not.

Second, Plaintiffs likewise overread *City of Beaumont v. Bouillion*, 896 S.W.2d 143 (Tex. 1995). They correctly recite (at 23, 30, 31) *Bouillion*'s holdings that "guarantees found in the Bill of Rights are excepted from the general powers of government" and "the State has no power to commit acts contrary to the guarantees found in the Bill of Rights." 896 S.W.2d at 148. But those principles still require a "guarantee." As discussed above, Section 33's dedication of an "easement" to access and use public beaches does not guarantee that access and use under any circumstances, nor does its provision that the Legislature "may" enact laws to "protect" beach access prohibit other beach-access regulations.

Third, *Mumme* is not distinguishable. Again, *Mumme* holds that a constitutional provision stating that the Legislature "shall" or "may" do something does not

implicitly limit the Legislature's general power to pass other laws on the same subject. 40 S.W.2d at 33. Placing the same language in Article I does not imply such a limit. As this Court explained in *Bouillion*, what gives Article I special force is Section 29. 896 S.W.2d at 148-49. That section provides that "all laws contrary" to the Bill of Rights "shall be void." Tex. Const. art. I, § 29. The Legislature does not act "contrary" to a provision saying that it "shall" or "may" enact certain laws by passing additional laws on the same subject.

B. Section 33's context and history do not support Plaintiffs' view of the public's beach-access rights.

Plaintiffs urge (at 24-28) that the context and history of Section 33's adoption also show that it leaves no room for a law like H.B. 2623. Specifically, they claim (at 25, 27) that those two sources of meaning reflect an intent "to protect public beach access from interference by private interests" and "to strengthen" the Open Beaches Act. But the sources they cite do not support their absolutist view of the public's beach-access rights, either.

1. H.B. 2623 does not implicate the concerns over private interference with beach access that motivated Section 33's adoption.

Plaintiffs first argue (at 25-27) that because Section 33's framers intended to stop "private interests" from infringing public-beach access, they necessarily meant to preclude a law like H.B. 2623 that authorizes temporary beach closures during rocket launches by a private company. That argument fails for three reasons.

First, Plaintiffs misplace reliance (at 25) on a media comment by Representative Richard Raymond, author of the resolution that proposed Section 33. His concern

was that a private corporation could lobby the Legislature to "get a piece of" an island on the Texas coast, such as South Padre Island, so he wanted to amend the Constitution to put that prospect beyond the reach of ordinary legislation. Melissa Galvez, *A Constitutional Right to the Beach?: Prop 9*, Houston Public Media (Oct. 20, 2009). H.B. 2623 does not implicate that concern because it does not permit private acquisitions of public beaches. It authorizes officials only to "temporarily close a beach" on "a primary or backup launch date" to "protect the public health, safety, and welfare." Tex. Nat. Res. Code § 61.132(c).

Second, Section 33's legislative history reflects a narrower concern about private interference than Plaintiffs suggest. Supporters of the proposed amendment cited two threats to beach access from private interests: (1) "developers" that "build properties along the beach and restrict the public's right to access," and (2) property owners challenging "the removal of homes that are now located on public beaches as a result of coastal erosion and Hurricane Ike." H. Rsch. Org., Bill Analysis at 2, Tex. H.R.J. Res. 102, 81st Leg., R.S. (2009). In other words, the animating concern was privately owned buildings on or along the beach that shut out the public, and the amendment "would make clear the intent of Texas law to keep the beaches public." *Id.* H.B. 2623 does not implicate that concern, either. The beaches it temporarily affects remain public. The law just ensures that no one—public or private—will be in harm's way by visiting the beach during nearby rocket launches.

Third, Plaintiffs are conflating rocket launches on private land with the safety hazards on public land that may result from rocket launches. H.B. 2623 protects members of the public from exposure to hazards from rocket launches on nearby

private property; it does not authorize rocket launches. Nothing in the history of Section 33's adoption suggests that the People intended to prevent the Legislature from protecting the public from such hazards.

2. Section 33 did not expand the public's rights under the Open Beaches Act.

Plaintiffs further note (at 27) that Section 33 was "intended to enshrine" the Open Beaches Act in the Texas Constitution. In their view, that history bolsters their reading of Section 33 because the Act generally "emphasize[s]" both "the public's right to access public beaches" and "the prohibition of the government to restrict access." Resp'ts Br. 27. The Government Parties agree that Section 33 "constitutionalizes" the Open Beaches Act, but that does not help Plaintiffs here.

Plaintiffs' reliance on the Act omits important context. As they note (at 27-28, 32-33), the Act recognizes that "the public, individually and collectively, shall have the free and unrestricted right of ingress and egress to and from" public beaches and directs the Land Commissioner to "strictly and vigorously enforce the prohibition against encroachments on and interferences with the public beach easement." Tex. Nat. Res. Code § 61.011(a), (c). But the *same* statute makes clear that this right and prohibition remain subject to reasonable regulation. Specifically, it empowers the Commissioner to "promulgate rules" concerning "*reasonable exercises of the police power* by local governments with respect to public beaches." *Id.* § 61.011(d)(4) (emphasis added). And the Act assumes that such rules can be "consistent with the policies established in this section"—i.e., the very policies that Plaintiffs invoke. *Id.* § 61.011(d). Similarly, the Act's provisions for regulating mobile business

establishments on public beaches state that they do not "prevent[] any agency, department, political subdivision, or municipal corporation of this state from exercising its lawful authority under any law of this state *to regulate safety conditions* on any beach area subject to public use." *Id.* § 61.161 (emphasis added). So it is clear that the Open Beaches Act does not categorically prohibit regulations regarding safety conditions on a public beach.

All of these provisions were in the Act when Section 33 "add[ed]" the public's rights under the Act "to the Texas Constitution." S. Rsch. Ctr., Bill Analysis, Tex. H.R.J. Res. 102, 81st Leg., R.S. (2009). Contrary to Plaintiffs' suggestion, then, Section 33's origination in the Act does not support their unqualified view of the rights to access public beaches under that section. Those rights have always been subject to "reasonable exercises of the police power" and regulations of "safety conditions on any beach area subject to public use." Tex. Nat. Res. Code §§ 61.011(d)(4), .161.

C. Because Plaintiffs' challenges to H.B. 2623 depend on an incorrect construction of Section 33, they are facially invalid.

The text, context, and history just discussed refute Plaintiffs' theory that "a statute that infringes upon the public's guaranteed right of access to public beaches" is automatically "void." COA Reply Br. 30. For that reason alone, Plaintiffs' challenges to H.B. 2623 are facially invalid and therefore do not state claims within the UDJA's immunity waiver. *See MALC*, 647 S.W.3d at 701-03; *Hous. Firefighters*, 667 S.W.3d at 396-401.

Moreover, under the correct construction of Section 33, H.B. 2623 is constitutional. As the Government Parties showed in their opening brief (at 29), visiting a

public beach when it is potentially unsafe to do so because of nearby rocket launches falls outside the scope of the "easement" dedicated by Section 33. And as the Government Parties also showed (at 30), H.B. 2623 reasonably regulates that easement because authorizing temporary beach closures is rationally related to the State's legitimate interests in fostering the space-flight industry and protecting the public from the potential dangers of rocket launches.

Plaintiffs respond (at 32-38) that H.B. 2623 is nonetheless invalid because (1) any previous allowance for regulation of the public-beach easement did not extend to temporary closures, and (2) H.B. 2623 cannot be justified as a public-safety measure within the State's police power. They are wrong on both counts.

1. H.B. 2623 is consistent with the beach-access regulation allowed when Section 33 was adopted.

Plaintiffs concede that the Open Beaches Act allowed some regulation of public-beach access at the time Section 33 incorporated the Act's easement rights into the Constitution. *See* Resp'ts Br. 32-35. But they contend (at 32-33) that those regulations do not validate H.B. 2623 because "[n]one expressly allow[ed] for closure of the public beach" and the Act otherwise "prohibits persons from impeding the public's access to the protected public beach areas." That reasoning fails.

H.B. 2623 can be consistent with the 2009 version of the Act without having an exact analogue in it. As discussed above, the Act recognized then, as it does today, that government entities have concurrent authority to implement "reasonable exercises of the police power," Tex. Nat. Res. Code § 61.011(d)(4), and "to regulate safety conditions on any beach area," *id.* § 61.161. *See supra* pp.21-22. H.B. 2623 fits

within those broad reservations of regulatory authority, as it expressly permits temporary beach closures on launch dates "[t]o protect the public health, safety, and welfare." *Id.* § 61.132(c).

2. H.B. 2623 is a reasonable public-safety measure.

Because H.B. 2623 aims "[t]o protect the public health, safety, and welfare," *id.*, it "receive[s] 'a strong presumption of validity,'" *State v. Loe*, 692 S.W.3d 215, 229 (Tex. 2024) (quoting *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 473 (6th Cir. 2023)). Plaintiffs nonetheless argue (at 35-38) that H.B. 2623 does not qualify as a legitimate public-safety measure. But their three arguments fail to overcome the presumption that H.B. 2623 is valid.

First, Plaintiffs contend (at 36) that H.B. 2623 is not a proper exercise of the police power because it purportedly benefits only the private corporation that conducts the rocket launches at the expense of the general public. But they offer no support for that point beyond their unsubstantiated say-so. In fact, H.B. 2623 serves the public interest because "the development of such launch sites provides a significant and direct economic impact on the surrounding communities by providing jobs and other economic opportunities." S. Rsch. Ctr., Bill Analysis at 1, Tex. H.B. 2623, 83d Leg., R.S. (2013). And, of course, it also ensures the "safety" of the public "within a certain radius of a launch site." *Id.*

Second, Plaintiffs complain (at 36) that the public-safety rationale is a form of bootstrapping because H.B. 2623 itself "facilitate[s]" the rocket launches occurring near Boca Chica Beach. That argument is doubly flawed. For one thing, as discussed above, the Open Beaches Act already recognized local governments' regulatory

authority over public-beach safety *before* H.B. 2623. *See supra* p.22. Indeed, supporters of H.B. 2623 explained that "Cameron County could, under existing law, temporarily close beaches to ensure the public was not exposed to any potential hazards in the launch area" and H.B. 2623 would merely help "standardiz[e] this practice." H. Rsch. Org., Bill Analysis at 3, Tex. H.B. 2623, 83d Leg., R.S. (2013). For another, fostering Texas's economic development is also a legitimate "public welfare" objective. *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 634 (Tex. 1996). No authority says the Legislature cannot exercise its police power to achieve two public-welfare goals in the same legislation.

Third, Plaintiffs argue (at 36-38) that the existence of the Texas Disaster Act somehow proves that H.B. 2623 does not have a public-safety purpose. That argument is a non-sequitur and, at best, reflects a misunderstanding of the Government Parties' position. In their opening brief (at 1, 19), the Government Parties argued that Plaintiffs' absolutist reading of Section 33 was implausible in part because it would prevent the government from closing public beaches to protect Texans from hurricanes and oil spills. In response, Plaintiffs note that the Disaster Act would govern those situations, and they appear to concede that using that Act to close public beaches could be valid. *See* Resp'ts Br. 38 (explaining that "[d]eclaring HB2623 void" under Section 33 "would, thus, not limit the government's authority to continue to enforce the Disaster Act when the circumstances require it and to protect the health and safety of Texas residents in times of catastrophic events"). If so, then the parties agree that Section 33 *does* allow laws that authorize beach closures for public-safety reasons, and the only dispute is, as Plaintiffs put it (at 38), whether

"HB2623 is a proper exercise of police power." For the reasons discussed above and in the Government Parties' opening brief, it is.

PRAYER

The Court should grant the petitions for review, reverse the judgments of the court of appeals, and render judgment dismissing this case for lack of jurisdiction, or, at minimum, remand this case to the court of appeals for further proceedings.

Respectfully submitted.

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