No. DC-20-07112

DAVID DANIELS, JODIE CAMPBELL, and KEILIE McCULLAR, on behalf of themselves and a class of medically-vulnerable persons,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
v.	§	DALLAS COUNTY, T E X A S
DALLAS COUNTY SHERIFF MARIAN BROWN, in her official capacity,	§	
Defendant.	§	298TH JUDICIAL DISTRICT

PLAINTIFFS' BRIEF ON THE COURT'S
JURISDICTION TO ENJOIN DEFENDANT'S *ULTRA VIRES* CONDUCT

"The Constitution is not suspended when the government declares a state of disaster."

In re Abbott, No. 20-0291, 2020 WL 1943226, at *1 (Tex. Apr. 23, 2020).

Plaintiffs David Daniels, Jodie Campbell, and Keilie McCullar submit this brief in opposition to the plea, by Defendant Dallas County Sheriff Marian Brown in her official capacity, challenging this Court's jurisdiction to enjoin ongoing conduct that Plaintiffs allege is contrary to the Bill of Rights in the Texas Constitution, violates mandatory obligations specified in the Texas Health and Safety, Local Government, and Administrative Codes, and ignores duties of care under Texas common law on the ground that sovereign immunity shields her from injunctive relief that will protect the lives and health of medically-vulnerable people and will require her to perform ministerial duties in response to the spreading outbreak of COVID-19, the worst pandemic in more than a century, in the Dallas County Jail. [*]

[*] Because the Plea is being briefed and heard on an accelerated schedule in light of the urgent need for emergency relief on behalf of Plaintiffs and other medically-vulnerable persons in the Jail, Plaintiffs reserve their right to amend and supplement the arguments in this brief as may be appropriate.

Reasons for Opposition to Sheriff Brown's Plea to the Jurisdiction

On pages 28 and 29 of their Verified Petition, Plaintiffs affirmatively allege three separate grounds for rejecting the Sheriff's plea to the jurisdiction:

- **Injunction against Texas Bill of Rights violations.** Because the Sheriff "has no power to commit acts contrary to the guarantees found in the Texas Bill of Rights", sovereign immunity "does not prohibit a suit—like this one—for equitable relief under the Texas Constitution."[1]
- **Injunction against *ultra vires* failure to perform ministerial duties mandated by statute.** Because Texas statutory law imposes ministerial duties on the Sheriff (a) to maintain the Dallas County Jail "in a clean and sanitary condition in accordance with standards of sanitation and health", to (b) "abate a public health nuisance existing in or on a place [she] possesses", and (c) follow "medical instructions of designated physicians" and perform maintenance to "ensure . . . a sanitary facility", the *ultra vires* exception to immunity authorizes injunctive relief to compel performance of the Sheriff's ministerial duties.[2]
- **Injunction against causing injury by use or condition of inherently dangerous property.** Because the harm to Plaintiffs and members of the Class result from the

[1] Plaintiffs' Verified Petition for Emergency Relief Against Unlawful Endangerment of Medically-Vulnerable Persons Detained in Dallas County Jail ("Verified Petition") ¶ 100 (citing *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148 (Tex. 1997*); City of Elsa v. M.A.L.*, 226 S.W.3d 390, 391 (Tex. 2007) (per curiam)).

[2] Verified Petition ¶ 101 (citing *City of Houston v. Houston Municipal Employees Pension System*, 549 S.W.3d 566, 576 (Tex. 2018) and quoting Tex. Local Gov. Code § 351.010(4) and Tex. Health & Safety Code § 341.012(a)). The duties in (c) exist under sections 273.3 and 279.3 of the Texas Administrative Code. Although the Verified Petition does not specifically invoke provisions of the Texas Administrative Code, those provisions provide further support for waiver of sovereign immunity. Plaintiffs will, if necessary, amend or supplement the Verified Petition to clarify that sections 273.3, 275.4, and 279.3 of the Texas Administrative Code also negate the Sheriff's Plea.

inherently dangerous "condition" of the Dallas County Jail and the "use" of property that is inherently dangerous, the Texas Tort Claims Act waives any immunity defense.[3]

As Plaintiffs show in the balance of this brief, each independent ground negates the Sheriff's Plea, and the Court should reject the Plea in all respects.

Moreover, the Sheriff's challenge to this Court's jurisdiction—after previously and successfully arguing to the federal court that it "should abstain from entertaining Plaintiffs' claims"[4] (in favor of state-court jurisdiction)—is a Kafkaesque effort to shield her constitutional and statutory violations from review. Defense counsel argued to Judge Brown in the federal case that "the Eleventh Amendment prohibits a federal court from ordering state governments to follow their own policies" and "the state court judiciary system is the place to balance all of this."[5] Judge Brown then concluded that federalism justified "abstention".[6] Now that Plaintiffs have brought a state-court case, the Sheriff argues that this Court also lacks jurisdiction. But the Sheriff is not above the law, and her insistence otherwise is powerful evidence that she will continue to violate Plaintiffs' constitutional and statutory rights unless this Court asserts its jurisdiction and addresses Plaintiffs' claims on their merits.

Plaintiffs in any event have a right to conduct discovery bearing on waiver of sovereign immunity and to plead additional facts to further demonstrate waiver. The Sheriff's request for dismissal of the case with prejudice should be denied.

---

[3] Verified Petition ¶ 102 (quoting Tex. Civ. Prac. & Rem. Code § 101.021(2)).
[4] *Sanchez v. Dallas County Sheriff Marian Brown*, No. 3:20-cv-00832-E (N.D. Tex.), Brief in Support of Defendants' Amended Motion to Dismiss at 9-10 (Dkt. 54).
[5] Verified Petition, Exhibit D at 812:19-21, 838:22-25 (transcript of Apr. 24, 2020).
[6] *Sanchez*, Memorandum Opinion and Order 38 (Dkt. 99).

ARGUMENT

Standard for Ruling on Plea

The Plea asserts only that Plaintiffs have not affirmatively alleged grounds for waiver of sovereign immunity. In evaluating the Plea, the Court must therefore "construe the pleadings liberally in favor of the plaintiffs and look to the pleaders' intent."[7] Even if the pleadings "do not contain sufficient facts to affirmatively demonstrate" waiver "but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiffs should be afforded the opportunity to amend."[8]

Summary of Argument

Texas law does not provide sovereign immunity in suits for purely injunctive relief when government officials violate the Bill of Rights of the Texas Constitution and the laws of the state. To the contrary, binding precedent from the Texas Supreme Court establishes that sovereign immunity is waived and that this Court wields the authority to enjoin and restrain the unconstitutional and extra-statutory actions taken by the Sheriff in this case. Waiver of sovereign immunity is supported by three independent grounds in the Verified Petition, each of which firmly allows for injunctive relief to be ordered against the Sheriff.[9]

---

[7] *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004) (citing *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993)).

[8] *Id.* at 446-47 (citing *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002)). Because the Sheriff has not challenged Plaintiffs' jurisdictional allegations, Plaintiffs need not adduce evidence to support jurisdiction. *See id.* at 227–28. There are, of course, more than 1,100 pages of evidence attached to the Verified Petition and much more referenced in the 35 pages of text and footnotes. If the Sheriff does challenge Plaintiffs' allegations, any fact question regarding jurisdiction issue would have to be resolved by the fact finder at trial on the merits, not on a plea to the jurisdiction. *Id.* at 227–28; *see also infra* Section V (discussing need for discovery).

[9] The Sheriff mistakenly claims that Plaintiffs have not asserted any valid cause of action that can form the basis of injunctive relief and that Plaintiffs must meet the elements required under the Texas Uniform Declaratory Judgment Act ("UDJA"). Plea at 5. That is not so. The Texas Constitution, Texas statutory law, and Texas Tort Claims Act all empower this Court to exercise jurisdiction and issue injunctive relief. Although the UDJA does waive sovereign immunity for some kinds of cases, there is nothing in the statute that requires Plaintiffs to seek relief under it and certainly nothing that limits the waivers for *ultra vires* acts and for conduct within the Texas Tort Claims Act.

First, it is blackletter law that Plaintiffs may bring suits for injunctive relief against government officials to enjoin violations of the Bill of Rights of the Texas Constitution. Under Texas law, "an action to protect a private party's rights against a state official who has acted without legal or statutory authority is not a suit that sovereign immunity bars."[10] Accordingly, "suits to require state officials to comply with statutory or constitutional provisions are not prohibited by sovereign immunity".[11]

Second, sovereign immunity does not protect a county official's *ultra vires* actions, including the failure to perform ministerial acts mandated by Texas statutes.[12] In this case, the Sheriff has failed to perform at least two ministerial acts under the Texas Local Government Code and the Texas Health and Safety Code. The former provides that a "county jail must be . . . maintained in a clean and sanitary condition in accordance with standards of sanitation and health."[13] The latter mandates that a "person"—which includes an "individual" or "government"[14]—"shall abate a public health nuisance existing in or on a place the person possesses as soon as the person knows that the nuisance exists."[15] A "public health nuisance" includes "an object, place, or condition that is a possible and probable medium of disease transmission to or between humans."[16] Because Plaintiffs seek to enjoin the Sheriff to perform her mandatory statutory duties under these (and other)[17] statutory provisions, sovereign immunity does not apply to Plaintiffs' claims.

---

[10] *Federal Sign v. Texas State Univ.* 951 S.W.2d 401, 404 (Tex. 1997). "In other words," the Court continued, we distinguish suits to determine a party's rights against the State from suits *seeking damages*. A party can maintain a suit to determine its rights without legislative permission." *Id.* (emphasis added).
[11] *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009).
[12] *City of Houston v. Houston Municipal Employees Pension System*, 549 S.W.3d 566, 576 (Tex. 2018).
[13] Tex. Local Gov. Code § 351.010(4).
[14] Tex. Health & Safety Code § 341.001(5).
[15] *Id.* § 341.012(a).
[16] *Id.* § 341.011(12).
[17] *See supra* n.2 and accompanying text.

Third, the Texas Tort Claims Act further waives sovereign immunity since Plaintiffs' claims for injunctive relief arise from the "condition or use of tangible personal or real property" at the Dallas County Jail.[18] Texas courts often exercise jurisdiction in cases like this one where the inherently dangerous use or condition of government-owned property causes people harm, and sovereign immunity does not bar such claims.[19]

Here, there is no doubt that this Court has jurisdiction to enforce provisions of the Bill of Rights of the Texas Constitution and to require the Sheriff to follow her ministerial duties as defined by Texas statutes. Sovereign immunity does not shield government officials from simply being required to perform duties expressly mandated by the law.

I. The Court has jurisdiction to enjoin the Sheriff to perform mandatory duties under the Texas Bill of Rights.

It has long been established that plaintiffs may bring actions for injunctive relief pursuant to the Texas Constitution and Bill of Rights. As the Texas Supreme Court has explained, "the State of Texas has no power to commit acts contrary to the guarantees found in the Texas Bill of Rights."[20] Indeed, "any provision of the Bill of Rights is self-executing to the extent that anything done in violation of it is void."[21] "Thus, suits for equitable remedies for violation of constitutional rights are not prohibited."[22] In other words, "governmental entities may be sued for injunctive

[18] Tex. Civ. Prac. & Rem. Code § 101.021(2).
[19] *See, e.g.*, *Overton Memorial Hospital v. McGuire*, 518 S.W.2d 528, 529 (Tex. 1975) (holding that the Texas Tort Claims Act waived governmental immunity when the "condition" or "use" of a public hospital caused plaintiff harm); *Ordonez v. El Paso County*, 224 S.W.3d 240, 244 (Tex. App.—El Paso 2005, no pet.) (recognizing that a plaintiff could sue a government entity when the "condition" or "use" of a juvenile detention facility causes them harm); *Johnson v. Johnson Cty.*, 251 S.W.3d 107, 110 (Tex. App.—Waco 2008, pet. denied) (same).
[20] *City of Beaumont v. Bouillion*, 896 S.W.2d at 148.
[21] *Id*. at 148-49 (citing *Hemphill v. Watson*, 60 Tex. 679, 681 (1884)).
[22] *Id*. at 149.

relief under the Texas Constitution."[23] Sovereign immunity thus does not prohibit a suit—like this one—for equitable relief under the Texas Constitution.[24]

The Sheriff criticizes Plaintiffs for relying on a "sole case" in the Verified Petition that she claims does not support the waiver of sovereign immunity,[25] but this is incorrect. First, the case that Plaintiffs cite—*City of Elsa v. M.A.L.*—is binding precedent from the Texas Supreme Court that is still good law.[26] Moreover, this case's holding that "suits for injunctive relief may be maintained against governmental entities to remedy violations of the Texas Constitution" has been repeatedly reiterated by the Texas Supreme Court, both before and after *City of Elsa* was decided.[27]

The Sheriff attempts to distinguish this precedent by claiming that waiver of sovereign immunity applies exclusively to suits that "seek to declare a statute unconstitutional", but that is plainly not true.[28] The passage that the Sheriff quotes from *Patel v. Tex. Department of Licensing & Regulation* is actually the criticism of a government defendant's argument for "departing from" the Texas Supreme Court's consistent "rule" that "sovereign immunity does not prohibit suits brought to require state officials to comply with statutory or constitutional provisions."[29] The case in which the passage appears involved a challenge to "the constitutionality of the cosmetology statutes and regulations on which the officials based their actions." That is why the Court made the statement the Sheriff only partially—and misleadingly—quotes on page 2 of the Plea, omitting the crucial qualifying language in italics: "*The State acknowledges this Court's decisions to the effect that* sovereign immunity is inapplicable when a suit challenges the constitutionality of a

[23] *City of Elsa v. M.A.L.*, 226 S.W.3d at 391.
[24] *Id.*
[25] *See* Plea at 2.
[26] 226 S.W.3d at 392.
[27] *See, e.g., City of Beaumont v. Bouillion*, 896 S.W.2d at 148; *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 11 (Tex. 2011).
[28] *See* Plea at 2-3 (quoting *Patel v. Tex. Dep't of Licensing & Reg.*, 469 S.W.3d 69, 76-77 (Tex. 2015)).
[29] *Patel v. Tex. Dep't of Licensing & Reg.*, 469 S.W.3d at 77 (discussing *City of El Paso v. Heinrich*, 226 S.W.3d at 392).

statute and seeks only equitable relief."[30] The Court was not saying waiver applies *only* if the suit concerns an unconstitutional law instead of unconstitutional conduct. It was instead holding that in suits for injunctive relief to remedy unconstitutional conduct by officials in their official capacity, sovereign immunity is unavailable as a defense.[31]

II. The Court has jurisdiction to enjoin the Sheriff to perform mandatory duties under the Texas Health and Safety Code, Local Government Code, and Administrative Code.

Sovereign immunity does not protect a county official's failure to perform a ministerial act that Texas statutory law mandates.[32] "Even if a governmental entity's immunity has not been waived by the Legislature, a claim may be brought against a governmental official if the official engages in *ultra vires* conduct."[33]

"Plaintiffs in *ultra vires* suits must 'allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act.'"[34] "'Ministerial acts' are those 'where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.'"[35] "Use of the word 'shall' in a statute evidences the mandatory nature of a duty imposed."[36] So does the word "must".[37]

In this case, the Sheriff has failed to perform at least two ministerial acts mandated by the Texas Local Government Code and the Texas Health and Safety Code. The Local Government

---

[30] *Id.* at 75-76 (citing *City of Elsa v. M.A.L.*, 226 S.W.3d at 392; *City of Beaumont v. Bouillion*, 896 S.W.2d at 149).
[31] *See, e.g., El Paso Indep. Sch. Dist. v. McIntyre*, 584 S.W.3d 185, 199 & n.7 (Tex. App.—El Paso 2018, no pet.) (stressing distinction in *Patel* between *permissible* actions against officials for engaging in unconstitutional conduct and *impermissible* ones against governmental entities themselves).
[32] *City of Houston v. Houston Municipal Employees Pension System*, 549 S.W.3d 566, 576 (Tex. 2018).
[33] *Id.* (citing *Hall v. McRaven*, 508 S.W.3d 232, 238 (Tex. 2017)).
[34] *Id.* (quoting *City of El Paso v. Heinrich*, 284 S.W.3d at 372).
[35] *Id.* (quoting *Southwestern Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 587 (Tex. 2015)).
[36] *Id.* at 582.
[37] *PermiaCare v. L.R.H.* No. 08-19-0144-CV, 2020 WL 502486, at *6 (Tex. App.—El Paso Jan. 31, 2020, no pet. hist.) (citing *City of Houston*, 549 S.W.3d at 588; *In re Robinson*, 175 S.W.3d 824, 831 (Tex. App.—Houston [1st Dist.] 2005, no pet.)).

Code provides in relevant part that a "county jail *must be* . . . maintained in a clean and sanitary condition in accordance with standards of sanitation and health."[38] Section 341.012(a) of the Texas Health and Safety Code requires that a government "*shall* abate a public health nuisance existing in or on a place the [government] possesses as soon as the [government] knows that the nuisance exists."[39] A "public health nuisance" consists of "an object, place, or condition that is a possible and probable medium of disease transmission to or between humans."[40] Because, as demonstrated in the balance of this Section II, Plaintiffs seek to enjoin the Sheriff to perform her mandatory statutory duties under these statutory provisions, sovereign immunity does not apply to Plaintiffs' claims.[41]

A. As the statutory "keeper of the county jail", and the official who must exercise "supervision and control over the jail" under the Local Government Code, the Sheriff "*shall*" keep, supervise, and control the Jail in such a way as to "maintain[] it in a *clean and sanitary condition* in accordance with *standards of sanitation and health*".

Although the Sheriff tries to sidestep her duty under the Local Government Code for "sanitation and health"[42] in the Jail and to shift it to Dallas County commissioners,[43] nothing in

[38] Tex. Local Gov. Code § 351.010(4) (emphasis added).
[39] Tex. Health & Safety Code § 341.012(a) (emphasis added).
[40] *Id.* § 341.011(12).
[41] The Texas Commission on Jail Standards ("TCJS") also mandates ministerial duties that the Sheriff must perform at the Jail. These include the following, all of which implicate the claims in the Verified Petition:

- "All *medical instructions* of designated physicians *shall be followed*", Tex. Admin. Code § 273.3 (emphasis added);
- "Preventive maintenance, to include necessary repairs, shall be conducted to ensure a safe, secure, and *sanitary* facility", *id.* § 279.3 (emphasis added);
- "No less than 1 jailer per 48 inmates or increment thereof on each floor for direct inmate supervision", *id.* § 275.4.

Although the Verified Petition does not specifically call out these mandatory requirements, Plaintiffs reserve the right to amend or supplement their pleadings to allege violations of the TCJS mandates.
[42] Tex. Local Gov. Code § 341.012(a)
[43] *See* Plea at 12.

the Code supports her attempt to abdicate responsibility. The Code itself designates the Sheriff the "keeper of the county jail" and provides that she must exercise "supervision and control over the jail" at all times.[44] That makes her, not the commissioners, the responsible person.

The one court to address a similar argument rejected it. Citing the predecessor statute to section 351.041(b), the court held that the sheriff of Brazos County "would still be liable" for keeping a detained person in "deplorable conditions" even if he "had no actual knowledge of the conditions of the cell" in light of his statutory duty to exercise "supervision and control". [45] The "deplorable conditions" now present in the Dallas County Jail should be treated likewise.

Nor does the 1941 ruling the Sheriff cites on page 12 of her Plea absolve the keeper of the jail from responsibility. That case concerned authority to hire and fire county employees under a different statute, which explicitly assigned duties to the commissioners court rather than the sheriff.[46] It is firmly established under Texas law, moreover, that the Sheriff has "ultimate authority over and responsibility for the county jail"[47] and is the proper defendant in a case to enjoin violations committed inside the Jail.[48]

B. Plaintiffs have a right to sue the Sheriff in her official capacity to enjoin her to perform the mandatory statutory duty that she "*shall abate*" the "*public health nuisance*" at the Dallas County Jail.

The nuisance statute that imposes a mandatory duty on the Sheriff provides that "[a] person shall abate a public health nuisance existing in or on a place the person possesses as soon as the

---

[44] *Id.* §§ 351.041(a) & (b).
[45] *Campise v. Hamilton*, 382 F. Supp. 172, 176-77 & n.5 (S.D. Tex. 1974).
[46] *Anderson v. Wood*, 137 Tex. 201, 152 S.W.2d 1084 (1941).
[47] Tex. Local Gov. Code § 351.041.
[48] *Williams v. Lara*, 52 S.W.3d 171, 176 (Tex. 2001) (citing section 351.041). The Sheriff cites a non-binding letter opinion of the Texas Attorney General from 1996 without elaboration. Plea at 12 n.3. The same Texas Attorney General stated 4 years earlier that a commissioners court has to provide only "adequate funding and broad operational guidelines" for a county jail but "that the sheriff bears responsibility for the actual operation of the jail." Tex. Atty. Gen. Op. No. DM-111, 1992 WL 25174, at *1. The opinion also confirmed that a "county sheriff has a duty to keep safely persons committed to the sheriff's custody. *Id.* at *2 n.4 (citing *Alberti v. Sheriff of Harris County*, 406 F. Supp. 649, 669 (S.D. Tex. 1975)).

person knows that the nuisance exists."[49] The Sheriff does not deny that, as the keeper of the Dallas County Jail and the person who must exercise "supervision and control over the jail" at all times,[50] she "possesses" the Jail for purposes of the statute. She thus concedes that she lacks immunity from a suit to compel her to perform the ministerial duty of abating the public health nuisance consisting of the Jail as a "probable medium of disease transmission to or between humans."[51]

The Sheriff's attempt to invoke the enforcement regime for a *different* subchapter of the Health and Safety Code does her no good. The provision she cites—section 341.048(c)—applies only to "this subchapter", which concerns "Drinking Water" and does not begin until section 341.031, well after the nuisance provision in section 341.012(a). Nor does the nuisance provision purport to limit who may enforce it, imposing a mandatory duty for action by the "possessor" of the place constituting the nuisance without any prompting whatever.

The Sheriff's argument that "no statute provides a private right of action" also misses the mark. The only right of action Plaintiffs assert in this case is the right to seek equitable relief for the Sheriff's *ultra vires* conduct in allowing the Dallas County Jail to become a "probable medium of disease transmission to or between humans." There can be no doubt that Plaintiffs have a right to do just that.

C. The Sheriff has no discretion about whether to comply with the Texas Bill of Rights, to maintain the Jail "in a clean and sanitary condition in accordance with standards of sanitation and health", to "abate" the "public health nuisance" existing in the Jail, to follow "medical instructions of designated physicians", and to perform "preventative maintenance" that will "ensure" a "sanitary facility".

[49] Tex. Health & Safety Code § 341.012(a).
[50] *Id.* §§ 351.041(a) & (b).
[51] *Id.* § 341.011(12).

The Sheriff's claim that she has discretion "regarding jail operations" misconceives the *ultra vires* exception to immunity.[52] So does her assertion that "Plaintiffs' real complaint is that Sheriff Brown is not running the jail as they wish she would."[53] What matters for *ultra vires* purposes is not whether the Sheriff has discretion in *how* she performs the mandatory duties explicitly imposed by the Texas Bill of Rights and Texas statutory law but *whether* she must perform them.

The Texas Supreme Court's decision two years ago in *City of Houston v. Houston Municipal Employees Pension System* illustrates the principle. In that case, the Houston Municipal Employees Pension System alleged that the City of Houston violated its statutory "obligation to make contributions to the pension fund."[54] The City asserted that "the Pension System's *ultra vires* claims are barred because they do not seek to enforce ministerial duties, but rather, the claims are as to discretionary matters."[55] It also contended that "the allocation and appropriation of funds are necessarily discretionary matters and therefore *ultra vires* and mandamus claims are barred because it has discretion to determine *how* to secure or structure funding for the pension payments."[56] Although the statutory duty provided only that the City "shall make contributions" to the Pension System, the Court held that the statute "creates mandatory duties and defines them with sufficient clarity to support the Pension System's *ultra vires*" claim.[57] The question, the Court emphasized, was not "*how* the payments must be made, but, rather, *whether* the payments must be made."[58]

---

[52] Plea at 14.
[53] *Id.*
[54] *City of Houston,* 549 S.W.3d at 570.
[55] *Id.* at 581.
[56] *Id.*
[57] *Id.* at 582.
[58] *Id.* (emphasis in original).

The same reasoning applies in this case. Plaintiffs have identified specific duties that "shall" be performed by the Sheriff. As in *City of Houston*, the issue is not *how* the Sheriff will perform those duties but *whether* she will do so. Although the Verified Petition highlights the Sheriff's failure to enforce social distancing in the Jail, that serves to highlight the Sheriff's failure to perform her mandatory duties and emphasize that the "fundamental principles that underlie the Bill of Rights in the Texas Constitution and Texas statutory" law "forbid the Sheriff to continue to detain Plaintiffs and the members of the Class under conditions that gravely endanger their safety, their health, and their very lives."[59]

A recent case involving the use of space in a state prison further supports application of the *ultra vires* rule here. The plaintiff in that case, Bryan Suhre, was an inmate in the Ramsey 1 Unit. He sued the Executive Director of the Texas Department of Criminal Justice, Bryan Collier, for failing to comply with his mandatory obligation under the Texas Administrative Code to provide inmates with a "day room" for "inmate day time activities".[60] Like the Sheriff here, the Executive Director in *Collier v. Suhre* elided the question of whether he had the duty to make day rooms available and instead asserted "that the inmates are not subject to overcrowding and that they may use the common areas."[61] The court of appeals affirmed the denial of Collier's plea to the jurisdiction, ruling that the statutory provisions "impose a purely ministerial duty to provide day rooms and Collier, as TDCJ Executive Director, has no discretion in determining whether to provide them."[62]

III. The Texas Tort Claims Act waives immunity for injury and death threatened by the pestilential and inherently dangerous "condition" of "property" the Sheriff uses to

[59] Verified Petition 32 (Conclusion and Prayer).
[60] *Collier v. Suhre*, No. 01-19-00444-CV, 2020 WL 1879649, at *5 (Tex. App.—Houston [1st Dist.] Apr. 16, 2020, no pet. hist.) (citing Tex. Admin. Code §§ 259.430 & 261.330).
[61] *Id.*
[62] *Id.*

detain medically-vulnerable persons and for her "use" of the inherently dangerous "property" to do so.

The Texas Tort Claims Act provides a third basis for waiver of sovereign immunity in this case. Plaintiffs seek injunctive relief because "a condition or use of tangible personal or real property" by the Sheriff threatens to cause them personal injury and death.[63] The "condition or use" of Jail property threatens injury and death to medically-vulnerable persons by exposing them to inherently dangerous disease-causing elements of the novel coronavirus and COVID-19. These highly infectious elements are analogous to other conditions that would manifestly make use or condition of the same Jail property inherently dangerous—such as a conflagration, contamination with poisonous substances, and extreme heat in summer and extreme cold in winter. The disease-promoting condition of tangible personal or real property in the Jail and the use of tangible personal or real property in "ordinary" ways that expose detainees to those disease-causing elements easily satisfy the "use or condition" requirement of the Texas Tort Claims Act.[64]

***Condition* of property.** As the Texas Supreme Court has interpreted it, section 101.021(2) of the Texas Tort Claims Act waives immunity if a condition of property "(1) poses a hazard in the intended and ordinary use of the property and (2) actually causes an injury or death."[65] An "inherently dangerous condition" of property exists "if the condition poses a hazard when the property is put to its intended and ordinary use".[66] In this case, the Verified Petition alleges that the "*condition*" of pods and tanks in the Jail is such that those areas are inherently dangerous when

[63] Tex. Civ. Prac. & Rem. Code § 101.021(2).
[64] Although the Sheriff argues that section 101.056 of the Texas Tort Claims Act would deem her failure to perform mandatory obligations "discretionary" and therefore exempt from waiver under section 101.021(2), Plea at 10, the argument has no force for essentially the same reasons her argument that she has "discretion" about performing mandatory obligations has none, *see supra* Section II.
[65] *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 98 (Tex. 2012).
[66] *Id.* at 99.

put to their intended and ordinary use of housing up to 64 detained persons in close proximity to one another.

***Use* of property.** The Sheriff's "*use*" of property that is "inherently unsafe" also waives immunity under section 101.021(2).[67] "'Use' under the TTCA means 'to put or bring into action or service; to employ or apply to a given purpose.'"[68] Employing the pods and tanks to confine crowds of medically-vulnerable people who cannot socially distance and thus exposing them to a high risk of infection is an "inherently unsafe" "use" of real property.

The Sheriff attempts to portray Plaintiffs' claims as principally involving the "non-use" of property in the Jail.[69] This portrayal is inaccurate since Plaintiffs squarely allege that the "condition" and "use" of the Jail is proximately causing them harm. Unlike the injuries in the case cited by the Sheriff, where the plaintiff committed suicide after not being provided psychotropic drugs,[70] Plaintiffs' injuries in this case are not being caused solely by the non-use of tangible property. To the contrary, Plaintiffs are suffering imminent and irreparable harm from the Sheriff's inherently dangerous use, and the inherently dangerous condition, of the Jail itself—including the use of pods, tanks, and other shared spaces in ways that make social distancing impracticable and the spread of COVID-19 highly probable as well as the unsanitary, unhealthy, and inherently dangerous condition of the tanks, pods, and other shared spaces. Moreover, the case that the Sheriff cites concerning the "non-use" of property did not involve claims for injunctive relief, since the plaintiff was only seeking damages.[71] In suits for injunctive relief where rights are being violated, the trial court has "latitude in fashioning the details of appropriate relief."[72]

---

[67] *Tex. Dep't Crim. Just. v. Campos*, 384 S.W.3d 810, 815 (Tex. 2012).
[68] *Id.* (quoting *San Antonio Hosp. v. Cowan*, 128 S.W.3d 244, 246 (Tex. 2004)).
[69] Plea at 8-9.
[70] *Kassen v. Hatley*, 887 S.W.2d 4, 14 (Tex. 1994) (finding that "the non-use of available drugs during emergency medical treatment is not a use of tangible personal property that triggers waiver of sovereign immunity").
[71] *Id.* at 12.
[72] *Operation Rescue-Nat'l v. Planned Parenthood of Houston & Se. Texas, Inc.*, 975 S.W.2d 546, 560 (Tex. 1998).

Nor is it an answer to say, as the Sheriff does, that the danger of death and serious illness from the inherently dangerous condition of pods and tanks and the inherent danger of using pods and tanks to house medically-vulnerable persons is "too attenuated to constitute a waiver of immunity under the TTCA."[73] The case the Sheriff relies on involved a single instance of one inmate's sharing a cell with another inmate who had been exposed to tuberculosis. The first inmate's surviving spouse alleged that the exposure caused her husband's death from "pulmonary problems" more than two years later.[74] The widow did not allege that the cell was in an inherently dangerous condition or that its use posed an inherent danger to her husband. The court of appeals ruled that "any effect that the room's walls and Sykes's bed had on Sykes's alleged exposure to tuberculosis is too attenuated to constitute a waiver of immunity under the TTCA."[75]

The *Sykes* case applied the rule that property "does not cause injury if it does no more than furnish the condition that makes the injury possible",[76] and many other cases not cited by the Sheriff establish that governmental immunity can be waived when a "condition" or "use" of the property itself causes the plaintiff's harm.[77] The "condition" or "use" of the jail property in this case plays a critical role in the threatened injuries and death of medically-vulnerable persons during the COVID-19 pandemic, since the very condition and use of this property cause and proliferate the rapid spread of the virus. As the Sheriff is now well aware, this novel coronavirus spreads easily through interpersonal contact and common surfaces, and the layout, maintenance, and

[73] *Sykes v. Harris. County*, 89 S.W.3d 661, 667 (Tex. App.—Houston [1st Dist.] 2002), *aff'd in part and modified in part on other grounds*, 136 S.W.3d 635 (Tex. 2004).
[74] *Id.* at 664.
[75] *Id.* at 667.
[76] *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998).
[77] *See, e.g., Overton Memorial Hospital v. McGuire*, 518 S.W.2d 528, 529 (Tex. 1975) (holding that the Texas Tort Claims Act waived governmental immunity when "condition" or "use" of hospital bed without guard rails caused plaintiff's injury); *Ordonez v. El Paso County*, 224 S.W.3d 240, 244 (Tex. App.—El Paso 2005, no pet.) (recognizing that a plaintiff could sue a government entity when the "condition" or "use" of a juvenile detention facility causes them harm); *Johnson v. Johnson Cty.*, 251 S.W.3d 107, 110 (Tex. App.—Waco 2008, pet. denied) (same).

cleanliness of the Jail may immediately and proximately cause Plaintiffs harm. COVID-19 is a potential death sentence for medically-vulnerable persons who contract it, and the medical consensus is that persons must stay at least 6 feet apart to prevent transmission. The condition and use of the pods and tanks in the Jail to crowd people together create inherent danger, and injury and death are the direct and probable results. None of this is "attenuated," let alone "too attenuated", as it was in *Sykes*. At a minimum, there is a fact question, to be resolved after discovery by the trier of fact at trial.[78]

IV. The Verified Petition states actionable claims for equitable relief under the Texas Bill of Rights.

Asserting that "Plaintiffs' direct constitutional claims fail", the Sheriff rehashes her misguided argument that the Texas doctrine of sovereign immunity bars suits for equitable relief under the Texas Constitution. Plaintiffs respectfully refers the Court to their response to that line of argument in section I. above.

The Sheriff next contends that Plaintiffs' "constitutional claims fail as a matter of law", but that argument fares no better.[79] Citing very little case law, this argument falls far short of establishing that Plaintiffs do not state valid claims for relief when the pleadings are liberally construed in Plaintiffs' favor.[80] The thrust of the Sheriff's argument is that the Texas Bill of Rights provides no more relief than the Bill of Rights of the United States Constitution and that Plaintiffs' constitutional claims assert nothing more than a lack of "compliance with guidelines".[81]

Both arguments are incorrect.

---

[78] *E.g., Village of Tiki Island v. Premier Tierra Holdings Inc.*, 555 S.W.3d 738, 744 (Tex. App.—Houston [14th Dist.] 2018) ("If the evidence creates a fact question regarding jurisdiction, then the trial court must deny the plea, and the fact issue will be resolved by the fact finder.") (citing *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227-28 (Tex. 20004)).

[79] Plea at 16-17.

[80] *See Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004) ("We construe the pleadings liberally in favor of the plaintiffs and look to the pleaders' intent.").

[81] Plea at 16-17.

In the first place, the "due course of the law" standard in the Texas Bill of Rights does "for the most part, align with the protections found in the Fourteenth Amendment," but it also protects "individual rights that the United States Supreme Court determined were not protected by the federal Constitution."[82] Section 19, Article I of the Texas Constitution therefore confers broader rights than the Fourteenth Amendment to the United States Constitution, and this Court should look to Texas case law to define the rights to which Plaintiffs are entitled. Since the Defendant does not cite a single Texas case—and indeed, only cites one federal case—the Sheriff does not show as a matter of law that Plaintiffs have failed to state valid claims for relief pursuant to the Texas Bill of Rights.

The single case that the Sheriff cites, *Bell v. Wolfish*, does not bar Plaintiffs' claims. Although the prison conditions in *Bell*, which included a complaint about the double-stacking of beds, without the concern of transmitting a dangerous infectious disease, were found not to violate the plaintiffs' due process rights, the Court clearly held that conditions inside jail and detention facilities must comply with the Constitution and are subject to judicial review.[83] Since *Bell* was decided, courts have not shied away from adjudicating constitutional cases concerning jails and prisons,[84] and courts have repeatedly exercised their jurisdiction to examine constitutional claims concerning detention facilities since the start of this pandemic.[85] The Sheriff's assertion that Plaintiffs' claims are barred from the outset is not correct..

---

[82] *Patel*, 469 S.W.3d at 87.

[83] *Bell v. Wolfish*, 441 U.S. 520, 562 (1979) ("The deplorable conditions and Draconian restrictions of some of our Nation's prisons are too well known to require recounting here, and the federal courts rightly have condemned these sordid aspects of our prison systems.").

[84] *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 830 (1994).

[85] *See, e.g., Wilson v. Williams*, No. 20-3447, 2020 U.S. App. LEXIS 14049 (6th Cir. May 4, 2020) (declining to stay a district court decision granting injunctive relief to medically-vulnerable individuals at risk of irreparable harm from COVID-19 in federal prison); *Rodriguez Alcantara v. Archambeault*, No. 20CV0756 DMS (AHG), 2020 WL 2315777, at *2 (S.D. Cal. May 1, 2020); *Malam v. Adducci*, No. 20-10829, 2020 WL 1672662, at *1 (E.D. Mich. Apr. 5, 2020), *as amended* (Apr. 6, 2020); *Kevin M. A. v. Decker*, No. CV 20-4593 (KM), 2020 WL 2092791, at *6 (D.N.J.

Second, the Sheriff misinterprets the Verified Petition as complaining only of non-compliance with "guidelines." Plaintiffs allege much more. The Verified Petition specifies, among other things, that:

- The Sheriff has permitted the Jail "to become what the Texas Health and Safety Code declares a "public health nuisance"—a "place . . . that is a possible and probable medium of disease transmission to or between humans." Verified Petition 2.
- By May 19, 2020, the number of confirmed sick detainees had soared to 333—a number that plainly understates the actual extent of COVID-19 cases due to the Sheriff's failure to conduct anything close to adequate testing in the Jail. *Id.* 2-3.
- Even with significant under-testing, the Dallas County Jail is the third-highest source of COVID-19 cases in all of Dallas County, behind general community spread and long-term care facilities. *Id.* 3.
- The rate of COVID-19 infection in Dallas County is the highest of all large Texas counties and rising rapidly. *Id.*
- Despite the discovery of an active COVID-19 case in the Jail and the high probability that the individual had exposed others in the Jail, including detained persons and staff alike, the Sheriff did not promptly adopt or implement the CDC Interim Guidance.
- Nor did the Sheriff provide the CDC Interim Guidance to DSOs or other Jail staff or provide them with training about COVID-19.
- She has even failed to update the Jail's policy—already a decade old—for handling infectious diseases within the Jail.

May 1, 2020); *People ex rel. Stoughton v. Brann*, No. 451078/2020, 2020 WL 1679209, at *3 (N.Y. Sup. Ct. Apr. 6, 2020).

- On March 25, 2020, an infectious disease doctor who has worked at the Jail since 2012, Ank Nijhawan, M.D., MPH, MSCS, sent the Sheriff a letter stating that "social distancing is nearly impossible in a jail setting" due to crowding "in relatively small spaces with up to 60 people at a time" and urging the Sheriff to reduce crowing in the Jail, particularly for medically-vulnerable persons.
- COVID-19 is highly infectious and exceptionally dangerous to medically-vulnerable persons.
- The CDC Interim Guidance makes social distancing a "cornerstone" of and "indispensable" to any strategy to prevent spread of COVID-19.
- A "feasible" way to implement social distancing is by reducing density in pods and tanks at the Jail.
- The Sheriff has adopted the CDC Interim Guidance as official "policy" at the Jail.
- Conditions in the Jail are worsening, and the spread of COVID-19 is increasing.

These and other specific allegations go far beyond bare assertions that the Sheriff has not complied with "guidelines". They give rise to a strong inference that the Sheriff has acted with deliberate indifference to the health and lives of medically-vulnerable persons in her custody.[86]

V. The Court must allow Plaintiffs an opportunity to amend after discovery relating to the Sheriff's claim of immunity.

Because the allegations in the Verified Petition do not "affirmatively negate" jurisdiction, Plaintiffs should have "a reasonable opportunity to conduct discovery directed to the issue and amend the pleadings" before the Court rules on the plea to the jurisdiction.[87] Since this case has

[86] Although it is unnecessary because the Sheriff does not contest Plaintiffs' allegations, they are fully supported by the evidence attached to and referenced in the Verified Petition.
[87] *Tex. Dept. Crim. Just. v. Campos*, 384 S.W.3d 810, 815 (Tex. 2012) (per curiam).

been on file less than a week, discovery is necessary before Plaintiffs may be required to plead further.

CONCLUSION AND PRAYER

The Sheriff's failure to take basic steps including enforcement of social distancing to mitigate the extreme danger that the COVID-19 pandemic poses to medically-vulnerable people currently detained in the Dallas County Jail, or who will be detained there in the future, violates fundamental principles that underlie the Bill of Rights in the Texas Constitution and Texas statutory and common law. Those principles forbid the Sheriff to continue to detain Plaintiffs and the members of the Class under conditions that gravely endanger their safety, their health, and their very lives. Because the Sheriff has refused to remedy those conditions by taking steps necessary to make social distancing practicable, the Court should grant Plaintiffs and the Class all appropriate relief, including certification of this case as a class action, issuance of a temporary restraining order and temporary and permanent injunctions, and costs of court.

DATE: May 25, 2020

Respectfully submitted,

_____

AMERICAN CIVIL LIBERTIES FOUNDATION
Andrea Woods*
Brandon Buskey*
125 Broad Street, 18th Floor
New York, NY 10004
212-549-2528
awoods@aclu.org

Henderson Hill*
201 W. Main St., Suite 402
Durham, NC 27701
919-682-9563
hhill@aclu.org

_____

ACLU FOUNDATION OF TEXAS
Brian Klosterboer
Texas Bar No. 24107833
Adriana Piñon
Texas Bar No. 24089768
Andre Segura
Texas Bar No. 24107112
5225 Katy Fwy., Suite 350
Houston, Texas 77007
Tel: 713-942-8146
Fax: 346-998-1577

_____

CIVIL RIGHTS CORPS
Katherine Hubbard*
Elizabeth Rossi*

/s/ Barry Barnett

SUSMAN GODFREY L.L.P.
Barry Barnett
Texas Bar No. 01778700
8115 Preston Road, Suite 575
Dallas, Texas 75225
866-754-1900
bbarnett@susmangodfrey.com

Michael Gervais*
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
310-789-3100
mgervais@susmangodfrey.com

1601 Connecticut Ave NW,
Suite 800
Washington, D.C. 20009
202-894-6126
katherine@civilrightscorps.org
elizabeth@civilrightscorps.org

NEXT GENERATION ACTION NETWORK
Kim T. Cole
Texas Bar No. 24071024
1808 South Good Latimer Expressway
Dallas, Texas 75226
214-704-6400
agrinter@thengan.com
kcole@thengan.com

ATTORNEYS FOR PLAINTIFFS

**pro hac vice pending*

CERTIFICATE OF SERVICE

I certify that on May 25, 2020 my office served a copy of Plaintiffs' Brief on the Court's Jurisdiction to Enjoin *Ultra Vires* Conduct on the following counsel of record for Defendant Dallas County Sheriff Marian Brown by email and through the e-filing service of the Dallas County District Courts:

Katharine D. David
State Bar No. 24045749
Benjamin R. Stephens
State Bar No. 24098472
Nick Stepp
State Bar No. 24077701
Jeff Nobles
State Bar No. 15053050
HUSCH BLACKWELL LLP
600 Travis Street, Suite 2350
Houston, Texas 77002
kate.david@huschblackwell.com
ben.stephens@huschblackwell.com
nick.stepp@huschblackwell.com
jeff.nobles@huschblackwell.com

/s/ *Barry Barnett*