

CAUSE NO. D-1-GN-15-004455

TEXAS ETHICS COMMISSION,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
EMPOWER TEXANS, INC., et al.,	§	
	§	
Defendants.	§	345TH JUDICIAL DISTRICT

**TEXAS ETHICS COMMISSION’S SECOND AMENDED AND SUBSTITUTED  
PLEA TO THE JURISDICTION**

TO THE HONORABLE JUDGE OF THIS COURT:

Following the substitution of counsel for the Texas Ethics Commission (“the TEC” or “the Commission”) on October 25, 2016, the Commission, by and through its undersigned counsel, files this second amended and substituted plea to the jurisdiction<sup>1</sup> on the counterclaims of Empower Texans, Inc. (“Empower Texans”) and Michael Quinn Sullivan. Since the TEC filed its plea to the jurisdiction on the original counterclaims of Defendants, Defendants have amended those counterclaims.

By and through this plea, the TEC respectfully requests that the Court dismiss Counts 1 (also referred to in the amended counterclaims as “Count I”), paragraphs 75, 77, 78, 80, and 81 of Count 2, and Count 4<sup>2</sup> against the TEC because this Court lacks jurisdiction to hear any such claims. In support thereof, the TEC respectfully shows the Court as follows:

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<sup>1</sup>Through this filing, the Commission wholly replaces and supersedes in its entirety the Plea to the Jurisdiction filed on October 21, 2016 and its First Amended and Substituted Plea to the Jurisdiction filed on October 25, 2016.

<sup>2</sup>There is no Count 3 listed or set forth in the amended counterclaims filed on October 28, 2016.

**I.**  
**INTRODUCTION, PROCEDURAL BACKGROUND, AND RELEVANT FACTS**

In response to the receipt of two sworn complaints concerning alleged political activities of Empower Texans, the TEC issued investigatory subpoenas seeking documents from Empower Texans and its president Michael Quinn Sullivan (the “Subpoenas”).<sup>3</sup> Following a prolonged effort by the TEC to obtain compliance – including revising and narrowing the scope based on the respondents’ objections – Empower Texans and Sullivan indicated that they would not fully comply with the Subpoenas.

On October 5, 2015, the TEC filed this action seeking an order enforcing the Subpoenas pursuant to sections 571.137(c) and 2001.201(a) of the Texas Government Code and compelling Sullivan’s and Empower Texans’ full compliance. In response, Empower Texans and Sullivan filed a general denial of the TEC’s petition and raised counterclaims as follows: (1) a motion to quash the Subpoenas and for a protective order; (2) recovery of “damages,” costs, and fees for an alleged frivolous claim by a state agency under Texas Civil Practice and Remedies Code Chapter 105; (3) a declaratory judgment on issues ranging from a request for declarations on Empower Texans’ activities to requests for declarations on TEC procedures to requests for interpretation of statutes and an agency rule; and; (4) injunctive relief preventing the TEC’s enforcement of the Subpoenas.

On September 6, 2016, the TEC filed a notice of non-suit in this case, formally withdrawing its request that the Court enforce the Subpoenas and dismissing its action with prejudice as to refile. Further, at its meeting on October 13, 2016, the TEC voted to dismiss the sworn complaints against Empower Texans, thereby ending the related investigation. A true and correct copy of the Commission’s Order of Dismissal is attached as **Exhibit A**.

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<sup>3</sup>A more detailed description of the background facts of this case is set forth in TEC’s Original Petition to Enforce Administrative Subpoenas, filed with this Court on October 5, 2015.

On October 28, 2016, after the TEC had filed its plea to the jurisdiction with respect to Defendants' counterclaims, Defendants filed amended counterclaims, some of which are the same and some of which are newly raised.

## II. STANDARD OF REVIEW

A plea to the jurisdiction challenges the trial court's subject matter jurisdiction to hear the case before it. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). Subject matter jurisdiction is an essential element of the court's authority to hear a case; consequently, because jurisdiction is never presumed, the plaintiff bears the burden of alleging facts affirmatively demonstrating the court's jurisdiction before the case may proceed. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443-44, 446 (Tex. 1993). The existence of subject matter jurisdiction is a question of law to be determined by the Court. *State Dep't of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002).

A plea to the jurisdiction can challenge the pleadings on their face or the lack of sufficient jurisdictional facts in the pleading. *Texas Dep't. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-27 (Tex. 2004). In conducting a review of jurisdictional facts, the court must take as true all evidence favorable to the non-movant and must indulge every reasonable inference and resolve any doubts in the non-movant's favor. *Id.* at 228. Where the facts alleged, taken as true, do not affirmatively establish the trial court's jurisdiction, dismissal is appropriate. *Id.*

When assessing pleas to the jurisdiction, courts begin with analyzing the live pleadings but may also consider evidence submitted to negate the existence of jurisdiction. *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 150 (Tex. 2012). "We must grant the plea to the jurisdiction if the plaintiff's pleadings affirmatively negate the existence of jurisdiction. And we must grant

the plea if the defendant presents undisputed evidence that negates the existence of the court's jurisdiction.” *Id.* Importantly, subject matter jurisdiction cannot be presumed and cannot be waived. *Continental Coffee Prods. v. Cazarez*, 937 S.W.2d 444, 449 n.2 (Tex. 1996).

### III. ARGUMENTS AND AUTHORITIES

#### A. The TEC Is Not Subject to Chapter 105 of the Texas Practice and Remedies Code.

Count 1 (or “I”) asserts a claim under a statute that by its plain language is inapplicable to the TEC and, therefore, does not establish this Court’s jurisdiction to hear it. Texas Civil Practice and Remedies Code Chapter 105, Section 105.002 states that:

A party to a civil suit in a court of this state brought by or against a state agency in which the agency asserts a cause of action against the party, either originally or as a counterclaim or cross claim, is entitled to recover, in addition to all other costs allowed by law or rule, fees, expenses, and reasonable attorney’s fees incurred by the party in defending the agency’s action if:

- (1) the court finds that the action is frivolous, unreasonable, or without foundation; and
- (2) the action is dismissed or judgment is awarded to the party.

Section 105.001(3)(A) defines “state agency” as “a board, commission, department, office, or other agency that: (A) is in the *executive* branch of state government[.]” (emphasis added).

Despite Counterclaimants’ allegations to the contrary, for purposes of any attempt to bring a counterclaim—much less a counterclaim for “damages,” costs, or other fees – under TEX. CIV. PRAC. & REM. CODE § 105.001(3), the TEC does not fall within the statutory definition of “state agency.” The TEC was created pursuant to Article III of the Texas Constitution, which places it in, for the purposes of the statute invoked by Defendants in their counterclaim, the *legislative* branch of state government – and thus outside the application of Section 105. TEX. CONST. art. III, sec. 24a; TEX. GOV’T CODE § 571.021. Because Chapter 105 of the Civil Practice and Remedies Code authorizes claims under that statute only as to agencies in the

executive branch of government, the Legislature has not waived sovereign immunity as to claims made against the TEC under this statute, and the claim is not sustainable against the TEC and must be dismissed.

**B. Various Claims for Declaratory and Injunctive Relief Are Improperly Brought**

Paragraphs 75, 77, 78, 80, and 81 of Count 2 impermissibly seek claims for declaratory judgment under the Uniform Declaratory Judgments Act (“UDJA”) against a Texas government agency, the TEC, which is immune to such claims. “[S]overeign immunity bars UDJA actions against the state and its political subdivisions absent a legislative waiver.” *Texas Dept. of Transp. v. Sefzik*, 355 S.W. 3d 618, 620 (Tex. 2011). While the UDJA waives sovereign immunity in certain cases – such as a “claims seeking declarations regarding a statute’s validity” – no such similar waiver is provided by the UDJA for claims “merely seeking construction or enforcement of a statute.” *Texas State Board of Veterinary Med. Exam. v. Giggelman, DVM*, 2013 WL 4516092 at \*9 (Tex. App.—Austin, Aug. 22, 2013) (citing *Sefzik*, 355 S.W.3d at 621-22).

“Construction” and “enforcement,” however, is exactly what Paragraphs 75, 77, 78, 80, and 81 of Count 2 seek. Specifically, Counterclaimants seek declaratory judgments that (1) *if* Tex. Election Code § 251.001(12) has a certain meaning, it is unconstitutional facially and “as applied to Empower Texans”; (2) the TEC “does not have to ever decide a matter and may keep a respondent for ‘investigation’ for an unreasonable [sic] lengthy time”; (3) “the term ‘campaign expenditure’ as used in the Election Code is unconstitutional facially and *as applied to EMPOWER* because none of EMPOWER’s expenditures were made ‘in connection with’ a campaign”; (4) “the term ‘campaign contribution’ as used in the Election Code is both facially and *as applied to EMPOWER* unconstitutional because it is vague, overboard [sic] and

ambiguous”; and (5) “TEC is an executive branch agency as it relates to the statutory and rulemaking duties given by the Legislature,” “in the alternative” “TEC is a legislative branch agency and therefore prohibited from exercising any statutory authority as set out in TEX. GOV’T CODE § 571.061 and § 571.062,” and “all fees and fines assessed and collected by TEC were done without authority, and that final decisions by the TEC are void and without authority and effect and that the TEC must cease and desist all enforcement activities.”

Similarly, Defendants seeks injunctive relief “restraining the TEC from enforcement of the TEX. GOV’T CODE § 571.061 and § 571.062 and all orders and rules adopted pursuant thereto.”

Defendants cannot cite to “any provision of the UDJA that expressly waives immunity” for these claims, which must therefore be dismissed. *Sefzik*, 355 S.W. 3d at 620.

**C. Counterclaims Regarding the Investigation and Hearing Process With Respect to Empower Texans Are Moot and Not Justiciable.**

In addition, the declaratory judgment counterclaims set out in paragraphs 75, 77, 78, 80, and 81 of Count 2 seek declaratory judgments concerning the TEC’s investigation and formal hearing process as it relates to Empower Texans. Because the TEC has concluded the investigation of the complaints against Empower Texans and dismissed them, these counterclaims are moot and, therefore, do not establish this Court’s jurisdiction to hear them. As such, they should be dismissed.

“[I]f a justiciable controversy ceases while a case is on appeal, the case is moot and the appellate court lacks subject-matter jurisdiction to act on the merits.” *Tex. Quarter Horse Assn. v. Am. Legion Dep’t of Tex.*, No. 03-15-00118-CV, 2016 Tex. App. LEXIS 6034, at \*10 (Tex.App.—Austin, Jun. 8, 2016) (citing *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001)). An exception to this rule occurs when a defendant ceases the challenged conduct but does not

remove the risk that the claimant will once again require the court's intervention to halt or prohibit that same conduct in the future. *See, e.g., Matthews v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 418 (Tex. 2016) (school district that removed prohibition against signs referring to religious scriptures did not moot cheerleaders' claim that district's prohibition was unconstitutional). On the other hand, where the defendant's cessation of alleged wrongdoing "involves conduct that could not be easily undone, and thus foreclose[s] a reasonable chance of recurrence," dismissal on mootness grounds is appropriate. *Kountze ISD*, 484 S.W.3d at 418; *see also, Robinson v. Alief Indep. Sch. Dist.*, 298 S.W.3d 321, 326 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (defendant expunged plaintiff's personnel file and mooted plaintiff's request for the same injunctive relief); *Fowler v. Bryan Indep. Sch. Dist.*, No. 01-97-01001-CV, 1998 Tex. App. LEXIS 4036, 1998 WL 350488, at \*6-7 (Tex. App.—Houston [1st Dist.] July 2, 1998, no pet.) (defendant's adoption of sexual harassment policies and training mooted plaintiff's claim for the same relief). The courts' goal is to avoid dismissing an action for mootness only to have the complainant return in the future seeking the same relief. *Kountze ISD*, 484 S.W.3d at 418.

Here, the TEC's dismissal of the complaints underlying its investigation are clear and final actions that eliminate Counterclaimants' need to seek judicial intervention for any current or future protection regarding a formal hearing, which will obviously never occur with the dismissal of the complaints. The investigation at issue has concluded, and any and all counterclaims related to such are now moot.

**IV.  
PRAYER**

For the reasons stated above, the TEC respectfully requests that the Court grant this plea to the jurisdiction and dismiss Counterclaimants' Counts 1 (or "I"), paragraphs 75, 77, 78, 80, and 81 of Count 2, and Count 4 against the TEC, because this Court lacks jurisdiction to hear them.

WHEREFORE, PREMISES CONSIDERED, the Texas Ethics Commission respectfully requests that this plea to the jurisdiction be granted in all respects, and for such other and further relief to which the Court finds it entitled.

Unofficial copy Travis Co. District Clerk Velda L. Price



Respectfully submitted,

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**COUNSEL FOR TEXAS ETHICS  
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**CERTIFICATE OF SERVICE**

The foregoing was filed and served through the Court's e-filing system, as well as copied by email to the following counsel of record, on this 7<sup>th</sup> day of November, 2016:

**Via Email: joseph.nixon@akerman.com**

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Eric J.R. Nichols

Unofficial copy Travis Co. District Clerk Veva L. Price

# **EXHIBIT A**

**TEXAS ETHICS COMMISSION**

**IN THE MATTER OF**

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§

**BEFORE THE**

**EMPOWER TEXANS  
(DBA TEXANS FOR FISCAL  
RESPONSIBILITY),**

**TEXAS ETHICS COMMISSION**

**RESPONDENT**

**SC-3120485 AND SC-3120486**

**ORDER OF DISMISSAL**

The Texas Ethics Commission held a pre-hearing conference on October 13, 2016, to consider Commission Counsel's Motion to Dismiss for Insufficient Credible Evidence. The Commission voted to dismiss the complaints on the basis that there is insufficient credible evidence to prove the alleged violations occurred by the preponderance of the evidence.

The Texas Ethics Commission hereby dismisses sworn complaints SC-3120485 and SC-3120486. This order is not confidential.

FOR THE COMMISSION



Chase Untermeyer  
Chairman  
On behalf of the Texas Ethics Commission

Date: 13 October 2016

Unofficial copy Travis Co. District Clerk Velda L. Price