Opinion issued August 30, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00710-CV

CITY OF HOUSTON, SYLVESTER TURNER, TANTRI EMO, CHRIS BROWN AND COUNCIL MEMBERS TARSHA JACKSON, DAVE MARTIN, MARY NAN HUFFMAN, KARLA CISNEROS, ROBERT GALLEGOS, MARTHA CASTEX-TATUM, MIKE KNOX, DAVID ROBINSON, MICHAEL KUBOSH, AMY PECK, ABBIE KAMIN, CAROLYN EVANS-SHABAZZ, TIFFANY THOMAS, EDWARD POLLARD, LETITIA PLUMMER, SALLIE ALCORN, AND THE STATE OF TEXAS, Appellants

V.

HOUSTON FIREFIGHTERS' RELIEF AND RETIREMENT FUND, Appellee

On Appeal from the 190th District Court
Harris County, Texas
Trial Court Case No. 2019-51405

O P I N I O N

Article XVI, Section 67(a) of the Texas Constitution authorizes the Texas Legislature "[to] enact general laws establishing systems and programs of retirement and related disability and death benefits for public employees and officers." TEX. CONST. art. XVI, § 67(a)(1). The financing of those benefits must "be based on sound actuarial principles." *Id.* Pursuant to Section 67(a), the Legislature enacted article 6243e.2(1) of the Revised Civil Statutes, which governs the operation of the Houston Firefighters' Relief and Retirement Fund—the system providing pension benefits to City of Houston firefighters. *See* TEX. REV. CIV. STAT. art. 6243e.2(1). The dispute in this case arises from the 2017 legislative amendments to article 6243e.2(1), which were part of Senate Bill 2190.[1] *See* Act of May 24, 2017, 85th Leg., R.S., ch. 320, 2017 Tex. Sess. Law. Serv. 738, 738–60 (effective July 1, 2017). The disputed amendments relate to the procedure for determining the City of Houston's contribution rate—the rate used to establish the amount of money the City must contribute to the Fund each year. *See id.* Among the amendments, the Legislature established four actuarial assumptions that must be employed by both the Fund's and the City's actuaries in determining the City's contribution rate. The amendments

[1] The amendments to article 6243e.2(1) were contained in Article 1 of S.B. 2190. Article 2 of S.B. 2190 contained the amendments to the statute governing Houston Police Officers' Pension System, and Article 3 contained amendments to the statute governing the Houston Municipal Employees Pension System. When we refer to S.B. 2190, we are referring only to Article 1, not to Articles 2 and 3.

also established a process for setting the contribution rate when the difference between the Fund's and the City's proposed contribution rates exceeds two percentage points. The process requires the parties to try to reconcile the difference and, if unsuccessful, sets the contribution rate as the average of the Fund's and City's proposed rates. *See id.*

The Fund sued the City of Houston and 19 of its City Officials,[2] asserting that S.B. 2190 was unconstitutional because, as applied to the Fund, the amendments relating to the contribution rate violated Article XVI, Section 67(f) of the Texas Constitution. Section 67(f) provides, in part, that the board of trustees for a pension system like the Fund "shall . . . select . . . an actuary and adopt sound actuarial assumptions to be used by the system or program." TEX. CONST. art. XVI, § 67(f)(3). The Fund asserted that this provision gave the Fund's Board of Trustees the

[2] In their official capacities, the Fund sued (a) Mayor Sylvester Turner, (b) Finance Department Director Tantri Emo, (c) City Controller Chris B. Brown, and (d) all 16 members of the Houston City Council (collectively, City Officials). The City Council members originally sued by the Fund in this case were Brenda Stardig, Jerry Davis, Ellen Cohen, Dwight Boykins, Dave Martin, Steve Le, Greg Travis, Karla Cisneros, Robert Gallegos, Mike Laster, Martha Castex-Tatum, Mike Knox, David Robinson, Michael Kubosh, Amanda Edwards, and Jack Christie. Later, the trial court signed an order substituting as defendants "[c]urrent City council members Amy Peck, Abbie Kamin, Carolyn Evans-Shabazz, Tiffany Thomas, Edward Pollard, Letitia Plummer, and Sallie Alcorn, each in their official capacities" for "former city council members Brenda Stardig, Ellen Cohen, Dwight Boykins, Steve Le, Mike Laster, Amanda Edwards, and Jack Christie." Since the trial court signed the order, Tarsha Jackson has replaced Jerry Davis and Mary Nan Huffman has replaced Greg Travis as City Council members. Jackson and Huffman are automatically substituted as appellants in the place of Davis and Travis. *See* TEX. R. APP. P. 7.2(a).

"exclusive authority" to adopt—that is, to choose—all the sound actuarial assumptions used by the Fund in preparing its proposed contribution rate.

The City and the City Officials (collectively, City Defendants) filed pleas to the jurisdiction, asserting that the trial court lacked subject-matter jurisdiction because the Fund had "failed to plead a viable and valid" as-applied constitutional claim, as required to waive their immunity from suit. They asserted that the plain and literal language of Section 67(f) does not give the Fund the "exclusive authority" to select the actuarial assumptions used to determine the contribution rate nor does it prohibit the Legislature from enacting laws relating to the oversight of the Fund. The City Defendants asserted that Section 67(a) not only gives the Legislature the authority to enact legislation like S.B. 2190, but it requires the Legislature to ensure that the financing of the Fund is "based on sound actuarial principles."

Each side also filed a motion for summary judgment regarding the constitutionality of S.B. 2190. In its final judgment, the trial court denied the City Defendants' pleas to the jurisdiction, granted the Fund's motion for summary judgment, and denied the City Defendants' summary-judgment motion. The trial court rendered a declaratory judgment in the Funds' favor, declaring that S.B. 2190 was unconstitutional as applied to the Fund "because it impermissibly infringe[d] on the Board's exclusive authority to select an actuary and determine sound actuarial

assumptions under Texas Constitution Article XVI, Section 67(f).” The trial court also granted the Fund’s requested mandamus and injunctive relief.

Because we hold that the Fund’s as-applied constitutional claim is facially invalid, the City Defendants’ immunity from suit was not waived, and the trial court lacked subject-matter jurisdiction over the City Defendants. Accordingly, we reverse the trial court’s judgment and render judgment granting the City Defendants’ jurisdictional pleas and dismissing the Fund’s claims against them.

Background

A. The 2017 Suit

The instant suit, filed in 2019, is not the first suit filed by the Fund against the City and its officials asserting that S.B. 2190 violated Article XVI, Section 67(f) of the Texas Constitution. Rather, this is the second suit in which the Fund claimed that S.B. 2190 was unconstitutional under Section 67(f). The Fund filed its first suit against the City and its officials challenging S.B. 2190’s constitutionality in May 2017 (the 2017 Suit), before S.B. 2190 became effective on July 1, 2017. The details of the 2017 Suit and the later appeal of the judgment in that case are reported in *Houston Firefighters’ Relief & Retirement Fund v. City of Houston*, 579 S.W.3d 792 (Tex. App.—Houston [14th Dist.] 2019, pet. denied) (*HFRRF I*).

In the 2017 Suit, the Fund asserted that S.B. 2190 was facially unconstitutional because it “impermissibly infringe[d]” on what it termed the

"exclusive authority" of the Fund's Board of Trustees under Article XVI, Section 67(f) of the Texas Constitution "to 'select . . . an actuary and adopt sound actuarial assumptions to be used by the system or program.'" *Id.* at 796 (quoting TEX. CONST. art. XVI, § 67(f)). To support its claims, the Fund made the following allegations in its 2017 pleading:

> (1) Article 6243e.2(1) of the Revised Statutes governs the Fund's and the City's rights, duties, and obligations to and for the Fund. The Board of Trustees of the Fund ("Board") manages and administers the Fund.
>
> (2) Article 6243e.2(1) [in its pre-amendment form] requires each member of the Fund to contribute a set percentage of the member's salary and requires the City to make contributions based on a "contribution rate certified by the [B]oard," which must be at least twice the amount contributed by Fund members and sufficient to ensure the long-term financial well-being of the Fund.
>
> (3) Article XVI, Section 67(a) of the Texas Constitution ("Section 67(a)") expressly authorizes the Texas Legislature to enact general laws establishing non-statewide pension systems for public employees and officers, such as article 6243e.2(1).
>
> (4) Section 67(f) "vests the Board with exclusive authority to 'administer the system or program of benefits,' 'hold the assets of the system or program for the exclusive purposes of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the system or program,' and 'select legal counsel and an actuary and **adopt sound actuarial assumptions to be used by the system or program**.'"
>
> (4) [sic] The version of article 6243e.2(1) in effect up until July 1, 2017 complied with this constitutional provision by leaving to the Board the exclusive authority to appoint an actuary and to determine the actuarial assumptions to be used by the Fund.

(5) In 2017, the Texas Legislature passed and the Governor signed S.B. 2190, which substantively changed article 6243e.2(1) in ways that violate Section 67(f).

(6) By fixing [that is, codifying] certain actuarial assumptions that must be used by the Fund's actuary, including an initial assumed rate of return of seven percent, S.B. 2190 violates Section 67(f).

(7) S.B. 2190 violates Section 67(f) by imposing a new "Risk Sharing Valuation Study" . . . procedure for use in setting the City's contribution rate to the Fund. Under this procedure, the City's contribution rate may be determined by using the average of the Fund's estimate of the City's contribution rate and the City's estimate of that contribution. The Fund asserts that this averaging violates Section 67(f).

(8) S.B. 2190 violates Section 67(f) by allowing the City to use actuarial assumptions different from the Fund actuary's assumptions if an independent actuary recommends the assumptions.

(9) On May 30, 2017, the Board adopted an actuarial valuation report prepared by the Fund's appointed actuaries. Under this report, the City's actuarial contribution rate is 48.5% which equals approximately $148,255,000 and anticipates a return on investment on the Fund's assets of 7.25%.

(10) On May 31, 2017, the City Council passed a budget which used S.B. 2190's assumed seven percent rate of return. According to the Fund, because S.B. 2190 is unconstitutional, the City's Budget is statutorily required to employ the 7.25% rate of return certified by the Board under article 6243e.2(1) without any amendment by S.B. 2190, and a City contribution rate of 48.5%.

(11) Nonetheless[,] the City Council passed the Budget allegedly allocating less than half of the amount that should be contributed under article 6243e.2(1) without any amendment by the allegedly unconstitutional S.B. 2190. The Fund claims that this action forced the Fund to file suit.

(12) Mayor Turner and the defendants who are City Council Members engaged in ultra vires and illegal acts or abuses of discretion in passing

> the budget that failed to allocate the amounts necessary to fund the City's lawful pension obligations, and these acts will irreparably injure the Fund. The act of passing and implementing the budget is causing and will cause irreparable injury to the Fund, the firefighters, and their surviving children and spouses.

Id. at 796–97 (footnotes omitted; bolded emphasis in *HFRRF I*).

In the 2017 Suit, the Fund sought injunctive and mandamus relief against the City Defendants as well as a declaration that "S.B. 2190 is unconstitutional because it impermissibly infringe[d] on the exclusive authority of the Board to 'select . . . an actuary' and determine 'sound actuarial assumptions' under Section 67(f)." *Id.* at 797. The Fund specified that three sections added by S.B. 2190 to article 6243e.2(1)—Sections 13B, 13C, and 13D—facially violated Section 67(f)'s requirement that the Fund's Board select an actuary and "adopt sound actuarial assumptions to be used by the system or program." *See id.* at 803–06. The Fund also asserted that "these three allegedly unconstitutional parts of S.B. 2190 cannot be severed from the remainder of S.B. 2190, and therefore all of S.B. 2190 fail[ed]." *Id.* at 806.

Section 13B—the first section challenged by the Fund—requires that, as soon as practicable after the end of a fiscal year, the Fund's actuary and the City's actuary must each prepare a proposed Risk Sharing Valuation Study (RSVS) based on the fiscal year that had just ended. *See* Act of May 24, 2017, 85th Leg., R.S., ch. 320, § 1.14, 2017 Tex. Sess. Law. Serv. 738, 752 (codified at TEX. REV. CIV. STAT. art.

6243e.2(1), § 13B(b)). The parties' RSVSs must be prepared "in accordance with" Section 13B and "consistent with actuarial standards of practice." TEX. REV. CIV. STAT. art. 6243e.2(1), § 13B(a). Each party's RSVS must estimate the City's contribution rate. *See id.* § 13B(a)(5). The municipal contribution rate is used to determine the amount of money that the City is required to contribute each year to the Fund by multiplying the rate by the pensionable payroll. *See id.* § 13A(a).

Section 13B also requires that both the Fund's and the City's respective actuary base the party's RSVS on specified "assumptions and methods that are consistent with actuarial standards of practice." *See id.* § 13B(a)(6). The provision lists four actuarial assumptions on which the City's and the Fund's actuaries must base the party's RSVS. These four assumptions are listed in Subsections 13B(a)(6)(H)–(K) (collectively, the "Required Assumptions"). *See id.* § 13B(a)(6)(H)–(K). For example, one of the Required Assumptions mandates that the assumed rate of return used by each party's actuary in preparing the respective RSVS may not exceed seven percent per year. *Id.* at § 13B(a)(6)(H). However, nothing in S.B. 2190 prevents either the Fund or the City from adopting sound actuarial assumptions in addition to the four Required Assumptions in preparing their respective RSVSs.

The second section of which the Fund complained—Section 13C—requires the Fund's and the City's actuary to each prepare and exchange an initial RSVS

"project[ing] the corridor midpoint for 31 fiscal years beginning with the fiscal year beginning July 1, 2017." *Id.* § 13C(a)(2). If the parties' estimated contribution rates for any fiscal year in the initial RSVSs were two or less percentage points apart, then the Fund's "estimated municipal contribution rate for that fiscal year" would apply. *See id.* § 13C(c)(1). But, if the difference in the estimated municipal contribution rates was greater than two percentage points, then the City's actuary and the Fund's actuary has 20 business days to reconcile the difference. *Id.* § 13C(c)(2). If the difference was reduced to less than or equal to two percentage points by the reconciliation process, then "the estimated municipal contribution rate recommended by the [F]und actuary for that fiscal year [would] be the estimated municipal contribution rate" for that fiscal year. *See id.* § 13C(c)(2)(A). If the reconciliation process did not reduce the difference to two percentage points or less, then an "arithmetic average of the estimated municipal contribution rate for each fiscal year in which the difference was greater than two percentage points" would be used. *See* § 13C(c)(2)(B). Section 13B provides for a similar reconciliation and averaging process for the RSVSs required to be prepared at the end of each fiscal year. *See* § 13B(f). In *HFRRF I*, the appellate court referred to this process for determining the applicable contribution rate, as found in both Sections 13B and 13C, as the "Required Averaging of Contribution Rates." 579 S.W.3d at 805.

The final section challenged by the Fund in the 2017 Suit—Section 13D—requires that, at least once every four years, the Fund must direct its actuary to conduct "an actuarial experience study" in accordance with actuarial standards of practice. *See* TEX. REV. CIV. STAT. art. 6243e.2(1), § 13D(a). The City's actuary shall present to the Fund and the Fund's actuary any different "assumptions or methods" it recommends. *See id.* § 13D(f). If no agreement can be reached on this report, then an independent actuary is selected under a statutory procedure to assess and resolve the differences. *See id.* § 13D(g)–(i). If the Board does not adopt an assumption or method recommended by the City's actuary to which the independent actuary agrees, Section 13D authorizes the City's actuary to use that recommended assumption or method in preparing a subsequent RSVS under Section 13B, until the next experience study is conducted. (Referred to in *HFRRF I* as the "Use of the Independent-Actuary Assumption"). *See HFRRF I*, 579 S.W.3d at 805–06 (citing TEX. REV. CIV. STAT. art. 6243e.2(1), § 13D(n)).

In response to the Fund's 2017 Suit, the City and the City Officials filed "pleas to the jurisdiction asking the trial court to dismiss all of the Fund's claims for lack of subject-matter jurisdiction" because their governmental immunity had not been waived. *Id.* at 798. On June 30, 2017—the day before S.B. 2190 became effective on July 1, 2017—the trial court signed orders sustaining the jurisdictional pleas and

dismissing the Fund's claims against the City and the City Officials for lack of subject-matter jurisdiction. *See id.* The Fund appealed.

On appeal, the Fund argued that the trial court erred when it granted the City's plea to the jurisdiction because the Fund had "properly pleaded" a claim for declaratory relief, seeking a declaration that S.B. 2190 was facially unconstitutional. *Id.* The Fund asserted "that Section 67(f) mandates that [its] Board adopt the sound actuarial assumptions to be used by the Fund's pension system." *Id.*at 806 (citing TEX. CONST. art XVI, § 67(f)). The Fund claimed that "S.B. 2190 facially violates this mandate in Article 67(f) in three ways: (1) by mandating the Required Assumptions [in Section 13B], (2) by the Required Averaging of Contribution Rates [in Sections 13B and 13C], and (3) through the Use of the Independent-Actuary Assumption [in Section 13D]." *Id.*

The *HFRRF I* court explained, "For a statute to facially violate a constitutional provision, the statute must by its terms always and in every instance operate unconstitutionally. *Id.* at 806. In asserting a facial challenge to a statute, the challenger must establish that no set of circumstances exists under which the statute is valid. *Id.*

The *HFRRF I* court determined that, even if it presumed without deciding that Section 67(f) provided the Fund's Board with "exclusive authority" to adopt sound actuarial assumptions, the Fund had not shown that S.B. 2190 always operated

unconstitutionally. *Id.* at 807. The court then explained why the three challenged sections of S.B. 2190—Sections 13B, 13C, and 13D—may not always operate unconstitutionally.

Regarding the Required Averaging of Contribution Rates as described in Sections 13B and 13C, the court explained that "article 6243e.2(1), as amended by S.B. 2190, does not always require that the estimated municipal contribution rate stated by the Fund's actuary be averaged with the estimated municipal contribution rate stated by the City's actuary." *Id.* Specifically, if the difference between the City's estimated contribution rate and the Fund's estimated contribution rate is less than or equal to two percentage points, the estimated contribution rate recommended by the Fund's actuary will be the estimated contribution rate used without any averaging. *Id.* (citing TEX. REV. CIV. STAT. art. 6243e.2(1), § 13B(f)). "Thus, the facial challenge to the Required Averaging of Contribution Rates fail[ed] as a matter of law because the statute does not always operate unconstitutionally." *Id.*

The *HFRRF I* court held that the facial challenge to the Required Assumptions in Section 13B likewise failed because "in some instances, the Board might adopt actuarial assumptions consistent with those mandated by S.B. 2190." *Id.* (citing TEX. REV. CIV. STAT. art. 6243e.2(1), § 13B(a)(6)(H)–(K)). Because in that instance the statute operated constitutionally, the Fund's facial challenge failed. *Id.*

Finally, the *HFRRF I* court explained that the Use of the Independent-Actuary Assumption, as described in added Section 13D, is not triggered if (1) the City's actuary and the Fund's actuary agree on all of the assumptions and methods for the experience study, or (2) the Board adopts the assumptions or methods recommended by the City's actuary to which the independent actuary agrees. *Id.* 807–08 (citing TEX. REV. CIV. STAT. art. 6243e.2(1), § 13D(g)–(n)). "Thus, the facial challenge to the Use of the Independent-Actuary Assumption fail[ed] as a matter of law because the statute does not always operate unconstitutionally." *Id.* at 808.

The court concluded, "Even under a liberal construction of the Fund's live pleading, the City's governmental immunity [was] not waived as to each of the constitutional challenges raised by the Fund on appeal because the Fund has not pleaded a viable or valid constitutional claim." *Id.*

The Fund had also asserted that the trial court erred in granting the City Officials' pleas to the jurisdiction because the Fund had alleged that the officials engaged in ultra vires conduct "by acting pursuant to an unconstitutional statute." *Id.* The court held that, because the Fund had not pleaded a viable claim that S.B. 2190 was facially unconstitutional, the Fund's ultra vires claims against the City Officials, which were premised on the facial challenge, also failed. *Id.* at 809. Given that the trial court had properly sustained the City Defendant's jurisdictional pleas,

the *HFRRF I* court affirmed the trial court's judgment dismissing the Fund's facial constitutional challenge. *Id.*

B. The Instant Suit

After the *HFRRF I* court affirmed the dismissal of the Fund's facial challenges to S.B. 2190, the Fund filed the instant suit in July 2019, two years after the amendments to article 6243e.2(1) contained in S.B. 2190 became effective. As in the 2017 Suit, here, the Fund challenges the constitutionality of S.B. 2190. Like before, the Fund asserted in its petition that Sections 13B, 13C, and 13D, added by S.B. 2190—pertaining to the Required Assumptions, the Required Averaging of Contribution Rates, and the Use of the Independent-Actuary Assumption—violate Article XVI, Section 67(f) of the Texas Constitution.

As it did in the 2017 Suit, the Fund's petition asserted that, pursuant to Section 67(f), the Fund's Board has "exclusive authority" to "select . . . an actuary and adopt sound actuarial assumptions to be used by the [pension] system." TEX. CONST. art. XVI, § 67(f)(3). The Fund specifically complained that the Required Assumptions in S.B. 2190 "violate[d] the Board's exclusive authority to adopt actuarial assumptions under Section 67(f) of the Texas Constitution." As in the 2017 Suit, the Fund requested declaratory relief, seeking a declaration that S.B. 2190 was unconstitutional because it "impermissibly infringe[d] on the Board's exclusive

authority 'to select an actuary' and to determine 'sound actuarial assumptions' under Section 67(f)."

Like before, the Fund also alleged that, by acting in accordance with article 6243e.2(1) as amended, the City Officials engaged in ultra vires conduct because they acted pursuant to an unconstitutional statute. The Fund requested a writ of mandamus compelling the City Defendants to allocate monies under the pre-2017 version of article 6243e.2(1) and sought a permanent injunction to enjoin the City Defendants "from acting in reliance on SB 2190."

Although there are many similarities between the 2017 Suit and this suit, the suits differ in one respect. While the 2017 suit asserted a facial challenge to the constitutionality of S.B. 2190, in this suit, the Fund claims that S.B. 2190 is unconstitutional as applied to the Fund. It asserts that, since S.B. 2190 became effective, article 6243e.2(1) has operated in violation of Section 67(f) as to the Fund. To support its as-applied challenge, the Fund alleged in its petition:

> 39. . . . S.B. 2190 has gone into effect and been applied to the Fund. And it is undisputed that the Board's assumptions differ from those applied under SB 2190.
>
> 40. As required by SB 2190, both the Fund and the City exchanged initial RSVSs in 2017 for the 2018 fiscal year. They were markedly different. The City's actuary "determined that the primary reason for the differences in the results of the two Proposed Initial Risk Sharing Valuation Studies was differences in the underlying assumptions." Because the difference in estimated contribution rate was greater than two percentage (it was greater than 10%) points, S.B. 2190 required the Fund and the City to attempt to reconcile the difference.

> 41. The Fund and the City were not able to reconcile the difference, so as required by SB 2190 they executed a joint addendum that reflects the arithmetic average of the estimated city contribution rates for each fiscal year in which the difference between the Fund's and the City's estimated contribution rate is greater than two percentage points—which was every year from 2018 through 2048. The difference in estimated contribution rates resulting from the different actuarial assumptions used was almost 10 percent (36.80% versus 26.98%) for all but one year. The average required by statute was, for each year from 2018 to 2048, different than the contribution rates that would have been estimated had the Fund's board been able to adopt and use the actuarial assumptions that it chose.
>
> . . . .
>
> 50. The City and City Officials are acting in accordance with SB 2190, which is an unconstitutional statute. These actions constitute ultra vires and illegal acts as well as an abuse of discretion and the failure to fulfill a ministerial duty [by providing funding to the Fund under the pre-amended version of article 6243e.2(1)].

The City Defendants filed a plea to the jurisdiction, claiming that the Fund "ha[d] not met and cannot meet its burden to allege a valid waiver of Defendants' governmental immunity." They asserted that "[g]overnmental immunity from suit is not waived when, as here, the Plaintiff has failed to plead a viable or valid constitutional claim." Subject to the jurisdictional plea, the City Defendants also filed a traditional motion for summary judgment on the ground that, as a matter of law, S.B. 2190 was not unconstitutional as applied to the Fund. They also sought summary judgment based on the affirmative defense of res judicata. The Fund (1) responded to the jurisdictional pleas and the City Defendants' motion for

summary judgment, (2) filed its own motion for summary judgment, and (3) incorporated its summary-judgment motion and summary-judgment response into its response to the City Defendants' jurisdictional plea.

The trial court ruled in favor of the Fund, rendering judgment that

- denied the City Defendants' pleas to the jurisdiction;
- granted the Fund's motion for summary judgment;
- denied the City Defendants' motion for summary judgment;
- granted "a Declaratory Judgment" to the Fund against the City Defendants, declaring "that SB 2190, Article 1 is unconstitutional as applied to the [Fund] because it impermissibly infringes on the Board's exclusive authority to select an actuary and determine sound actuarial assumptions under Texas Constitution Article XVI, Section 67(f)" and declaring "that the City of Houston and City of Houston officials must allocate funding in accordance with Texas Constitution article XVI, Section 67 and the prior, un-amended [a]rticle 6243e.2(l)";
- ordered "a Writ of Mandamus compelling the [City Defendants] to allocate funding in all City of Houston budgets in accordance with Texas Constitution Article XVI, Section 67 and the prior, un-amended [a]rticle 6243e.2(l)"; and
- ordered "a Permanent Injunction prohibiting the [City Defendants] from taking action under SB 2190 and requiring them to allocate funding in accordance with Texas Constitution article XVI, Section 67 and the prior, un-amended [a]rticle 6243e.2(l)."[3]

[3] The Fund also sued Ken Paxton in his official capacity as Attorney General for the State of Texas. Attorney General Paxton filed a plea to the jurisdiction and a motion to realign the State of Texas as an intervenor in the case. *See* TEX. GOV'T CODE § 402.010 (providing that notice of challenge to constitutionality of state statute must be served on attorney general, who may intervene in suit without waiving State's immunity). The trial court signed an order, several months before signing the judgment, granting the plea and the request to realign the State as an intervenor

The City Defendants now appeal. They raise seven issues challenging the trial court's judgment, including the denial of their jurisdictional pleas.

Pleas to the Jurisdiction

We necessarily begin with the jurisdictional issue. *See Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012) (noting that if court does not have jurisdiction, its opinion addressing any issues other than jurisdiction is advisory). In their third issue, the City Defendants contend that the trial court erred when it denied their pleas to the jurisdiction.

A. Standard of Review & Jurisdictional Principles

A plea to the jurisdiction is a procedural vehicle used to challenge the court's subject-matter jurisdiction over a claim. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 232 (Tex. 2004). Whether a court has subject-matter jurisdiction is a question of law, *id.* at 226, and we review de novo a trial court's ruling on a plea to the jurisdiction, *Suarez v. City of Tex. City*, 465 S.W.3d 623, 632 (Tex. 2015). In doing so, we exercise our own judgment and redetermine each legal issue, without giving deference to the lower court's decision. *Quick v. City of Austi*n, 7 S.W.3d 109, 116 (Tex. 1999).

---

in the case. *See id.* The trial court's judgment states that it denied "Intervenor's" plea to the jurisdiction. However, as it points out in its brief, the State of Texas never filed a plea to the jurisdiction in its role as intervenor. In any event, the trial court's judgment provides that it is "a final appealable Order that disposes of all claims between all parties," making clear that it is a final judgment.

When reviewing a trial court's ruling on a challenge to its jurisdiction, we consider the plaintiff's pleadings and factual assertions, as well as any evidence relevant to the jurisdictional issue. *See City of Elsa v. Gonzalez*, 325 S.W.3d 622, 625–26 (Tex. 2010); *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). We construe pleadings liberally in favor of the plaintiff, look to the pleader's intent, and determine if the pleader has alleged facts affirmatively demonstrating the court's jurisdiction. *City of Elsa*, 325 S.W.3d at 625; *Miranda*, 133 S.W.3d at 226. Allegations found in pleadings may affirmatively demonstrate or negate the court's jurisdiction. *City of Waco v. Kirwan*, 298 S.W.3d 618, 622 (Tex. 2009). "If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend." *Miranda*, 133 S.W.3d at 227.

Governmental immunity protects the State's political subdivisions, including its cities, against suits and legal liability. *See Hillman v. Nueces Cnty.*, 579 S.W.3d 354, 357 (Tex. 2019). A plaintiff bears the burden of pleading sufficient facts to demonstrate the trial court's jurisdiction over the claims asserted, and when a governmental entity challenges jurisdiction on immunity grounds, "the plaintiff must affirmatively demonstrate the court's jurisdiction by alleging a valid waiver of immunity." *Ryder Integrated Logistics, Inc. v. Fayette Cnty.*, 453 S.W.3d 922, 927 (Tex. 2015).

In its response to the City's jurisdiction plea, the Fund asserted that the City's governmental immunity was waived for two reasons. First, it pointed out that it had sued the City under the Uniform Declaratory Judgments Act (UDJA), seeking a declaration that S.B. 2190 was invalid because it was unconstitutional as applied. *See* TEX. CIV. PRAC. & REM. CODE § 37.004(a) (authorizing declaratory-judgment action to determine validity of statute). The Fund correctly asserted in its response that the UDJA provides a limited waiver of immunity for suits challenging the validity of a statute or ordinance. *See Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 622 (Tex. 2011); *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 633–34 (Tex. 2010); *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (Tex. 2009) ("For claims challenging the validity of ordinances or statutes . . . , the Declaratory Judgment Act requires that the relevant governmental entities be made parties, and thereby waives immunity."); *see also* TEX. CIV. PRAC. & REM. CODE § 37.006(b) ("In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party and is entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state must also be served with a copy of the proceeding and is entitled to be heard.").

Next, the Fund asserted that immunity from suit "is inapplicable in a suit against a governmental entity that challenges the constitutionality of a statute and

seeks only equitable relief." *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 76-77 (Tex. 2015). According to the Fund, because it challenged the constitutionality of S.B. 2190 seeking only equitable relief, the City's governmental immunity was also waived on this basis.

But neither a "request for a declaratory judgment that S.B. 2190 is unconstitutional" nor a constitutional claim seeking equitable relief, alone, is sufficient to waive the City's governmental immunity. *HFRRF I*, 579 S.W.3d at 801. Neither claim will waive governmental immunity if it is facially invalid. *See Abbott v. Mexican Am. Legis. Caucus, Tex. House of Representatives*, — S.W.3d —, No. 22-0008, 2022 WL 2283221, at *11 (Tex. June 24, 2022) ("Although the UDJA generally waives immunity for declaratory-judgment claims challenging the validity of statutes, we have held that immunity from suit is not waived if the constitutional claims are facially invalid." (internal quotation marks omitted)); *Klumb v. Hous. Mun. Employees Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015) ("While it is true that sovereign immunity does not bar a suit to vindicate constitutional rights, immunity from suit is not waived if the constitutional claims are facially invalid." (internal citation omitted)); *HFRRF I*, 579 S.W.3d at 801 ("The City's governmental immunity is waived only to the extent the Fund has pleaded a viable or valid constitutional claim."); *City of Hous. v. Downstream Env't, L.L.C.*, 444 S.W.3d 24, 38 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) ("The Texas Constitution

authorizes suits for equitable or injunctive relief for violations of the Texas Bill of Rights. But this limited waiver of immunity exists only to the extent the plaintiff has pleaded a viable constitutional claim." (internal citation omitted)). Thus, to determine whether the trial court properly denied the City's plea to the jurisdiction, we must determine if the Fund's as-applied constitutional claim was facially valid. *See Abbott*, 2022 WL 2283221, at *11; *Klumb*, 458 S.W.3d at 13; *HFRRF I*, 579 S.W.3d at 801.

B. The City's Jurisdictional Plea

A plaintiff asserting an as-applied constitutional challenge concedes that a statute is generally constitutional but contends that the statute is unconstitutional when applied to a particular person or set of facts. *HFRRF I*, 579 S.W.3d at 806 (citing *City of Corpus Christi v. Pub. Util. Comm'n of Tex.*, 51 S.W.3d 231, 240 (Tex. 2001)). In its petition, the Fund asserted that S.B. 2190 is unconstitutional as-applied because the legislation has "infringe[d]" on the purported "exclusive authority" of the Fund's Board to "determine" the sound actuarial assumptions that the Fund uses to calculate the City's contribution rate.

In its response to the City's jurisdictional plea, the Fund reasserted its contention that S.B. 2190 was unconstitutional because it violated the Board's "exclusive authority" under Section 67(f) to adopt—that is, choose for itself—all the actuarial assumptions that the Fund used to determine the City's contribution rate. It

claimed in both its petition and its response that, as applied, S.B. 2190 had infringed on that right. Specifically, the Fund alleged that, as applied, two aspects of S.B. 2190—the Required Assumptions and the Required Averaging of Contribution Rates process—had violated its constitutional right of "exclusive authority" to choose all the actuarial assumptions it used to prepare its RSVSs. It also claimed its "exclusive authority" had been violated because when it prepared its initial RSVS it had been required to use the four Required Assumptions—which the Fund claimed its Board would not have chosen to adopt had it not been for S.B. 2190. The Fund asserted that its Board's "exclusive authority" to choose all actuarial assumptions had been violated by applying the Required Averaging of Contribution Rates process, which the Fund claimed had operated to dilute and negate the actuarial assumptions its Board had adopted in addition to the Required Assumptions. Thus, key to the Fund's constitutional claim was its assertion that Section 67(f) vests its Board with the "exclusive authority" to select all the actuarial assumptions used to determine the City's contribution rates.

As relevant to the Fund's constitutional claims, Article XVI, Section 67, entitled "State and local retirement systems," provides:

> Sec. 67. (a) General Provisions. (1) The legislature may enact general laws establishing systems and programs of retirement and related disability and death benefits for public employees and officers. Financing of benefits must be based on sound actuarial principles. The assets of a system are held in trust for the benefit of members and may not be diverted.

. . . .

> (f) Retirement Systems Not Belonging to a Statewide System.[4] The board of trustees of a system or program that provides retirement and related disability and death benefits for public officers and employees and that does not participate in a statewide public retirement system shall:
>
> > (1) administer the system or program of benefits;
> >
> > (2) hold the assets of the system or program for the exclusive purposes of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the system or program; and
> >
> > (3) select legal counsel and an actuary and adopt sound actuarial assumptions to be used by the system or program.

TEX. CONST. art. XVI, § 67(a),(f).

In interpreting the Texas Constitution, Texas courts rely heavily on the literal text. *Eddington v. Dall. Police & Fire Pension Sys.*, 589 S.W.3d 799, 805 (Tex. 2019). Courts "may consider (1) the constitutional provision's history, (2) the conditions and spirit of the times in which the provision was adopted, (3) the prevailing sentiments of the people who framed and adopted the provision, and (4) the evils intended to be remedied," but "we must give effect to the provisions plain language." *HFRRF I*, 579 S.W.3d at 803 (citing *Eddington*, 589 S.W.3d at 805 (internal quotation marks omitted)); *see Bosque Disposal Sys., LLC v. Parker Cty.*

[4] It is not in dispute that the Fund does not belong to a statewide system.

Appraisal Dist., 555 S.W.3d 92, 94 (Tex. 2018) ("When interpreting our state Constitution, we rely heavily on its literal text, and our goal is to give effect to its plain language." (internal citation and quotation marks omitted)); *Arnold v. Leonard*, 273 S.W. 799, 802 (Tex. 1925) (stating that court's duty is to give effect to "the people's will," as expressed by plain meaning of Texas Constitution). We presume that the constitution's language was carefully selected, and we interpret its words as people generally understand them. *See Garofolo v. Ocwen Loan Servicing, L.L.C.*, 497 S.W.3d 474, 477 (Tex. 2016); *see also Armbrister v. Morales*, 943 S.W.2d 202, 205 (Tex. App.—Austin 1997, no pet.) ("In interpreting the constitution, we give words their natural, obvious, and ordinary meanings as they are understood by the citizens who adopted them.").

The Fund claims that its Board's "exclusive authority" to choose all the actuarial assumptions that the Fund uses to prepare its RSVSs derives from the language in Section 67(f)(3), which provides that the Board "*shall* . . . adopt sound actuarial assumptions to be used by the system or program."[5] *Id.* § 67(f)(3) (emphasis added). But the word "shall" does not, by itself, grant or imply "exclusive authority." Instead, "shall," as commonly understood, means "[h]as a duty to; more broadly, is required to." *Shall*, BLACK'S LAW DICTIONARY (11TH ED. 2019); *cf.* TEX. GOV'T

[5] In its petition, the Fund also alleged that S.B. 2190 was unconstitutional because it infringed on its authority to "select . . . an actuary," but the Fund did not allege that, when S.B. 2190 was applied, the Fund was not permitted to select its actuary.

CODE § 311.016(2) (providing that, when used in a statute, "shall" means "imposes a duty"). The commonly understood meaning of "shall" does not imply that the party with a duty to perform—who "shall" perform—does so exclusively or that the duty cannot be regulated.

In *Vinson v. Burgess*, the Supreme Court of Texas determined that the word "shall," when used in another provision of the Texas Constitution, did not grant "exclusive authority." 773 S.W.2d 263, 266–67 (Tex. 1989). There, Vinson asserted that a section of the Texas Property Tax Code governing property tax rates was unconstitutional because the Texas Constitution conferred exclusive authority on the Commissioners Court to set property-tax rates. *Id.* at 266. The constitutional provision in *Vinson* provided that "at the time the Commissioners Court meets to levy the annual tax rate for each county it *shall* levy whatever tax rate may be needed." *Id.* at 267 (quoting TEX. CONST. art. VIII, § 9 (emphasis added)).

The supreme court rejected Vinson's argument, holding that the word "shall" did not mean the Commissioners Court had "exclusive authority" to levy taxes. *Id.* at 269. The court held that the Legislature could also set property tax rates, as it had in the complained-of statutory provision. *See id.* Although it required action on behalf of the Commissioners Court, the constitutional provision did not preclude the Legislature from acting to pass laws setting tax rates. *See id.* Similarly, here, the use of the word "shall" in Section 67(f) does not preclude the Legislature from enacting

legislation requiring the Fund to use certain actuarial assumptions in preparing its RSVSs or requiring the averaging of the parties' proposed contribution rates under certain circumstances in order to set the City's contribution rate.[6] *See id.*

And just as important as what Section 67(f) says is what it does not say. Section 67(f) contains no express language of exclusivity. We find instructive our opinion in *Holbrook v. Guynes*, a case involving a statute and the absence of the word "exclusive" modifying the word "shall." 827 S.W.2d 487, 491–92 (Tex. App.—Houston [1st Dist.] 1992), *aff'd*, 861 S.W.2d 861, 864 (Tex. 1993).

In *Holbrook*, we rejected the appellant's argument that the Galveston District Attorney had the exclusive right to represent the county in civil matters based on a statutory provision providing that the Galveston District Attorney "*shall exclusively* represent the state" in all criminal matters while also providing that the district attorney "*shall* represent" Galveston County "in any court in which the county has pending business." *Id.* (emphasis added). We explained that we were able reach to our holding "[g]iven the absence of an 'exclusive' mandate in the part of the statute relevant to civil legal affairs." *Id.* at 493.

---

[6] We note that, although it generally complains of the unconstitutionality of the Use of the Independent-Actuary Assumption provision in S.B. 2190—Section 13D—the Fund does not allege that it has been subject to that provision; that is, the Fund did not plead allegations supporting its general contention that the provision is unconstitutional as applied to the Fund.

Similarly, Section 67(f) lacks an "exclusive" mandate. We agree that the Fund's Board has a duty to "adopt sound actuarial assumptions to be used by [the Fund]," but, because language of exclusivity is absent from Section 67(f), we do not interpret the provision to give the Fund's Board "exclusive authority" to choose all the actuarial assumptions that the Fund will use. *See id.*; *see also Degan v. Bd. of Trs. of Dall. Police & Fire Pension Sys.*, 594 S.W.3d 309, 313 (Tex. 2020) (recognizing that courts must "presume that the framers [of the Texas Constitution] carefully chose the language, and we interpret their words accordingly"); *cf. Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) ("We presume the Legislature included each word in the statute for a purpose and that words not included were purposefully omitted."); *Lee v. City of Hous.*, 807 S.W.2d 290, 294–95 (Tex. 1991) ("A court may not judicially amend a statute and add words that are not implicitly contained in the language of the statute.").

The Fund suggests that the framers' selection of the word "adopt" in Section 67(f)(3) (i.e., the Board "shall . . . adopt sound actuarial assumptions to be used by [the Fund]") implies that its Board had the exclusive authority to choose all the actuarial assumptions for the Fund's use in preparing its RSVSs. Citing dictionary definitions, the Fund asserts that "adopt" means "'[to] make one's own by selection or assent,' 'to choose for or take to oneself,' 'to take by choice into a relationship,' or 'to take up or start to use or follow (an idea, method, or course of action).'" Even

accepting the Fund's definition of "adopt," Section 67(f) does not imply that the Board had the exclusive authority to choose *all* actuarial assumptions to be used by Fund. Nor did S.B. 2190 prohibit the Fund from selecting sound actuarial assumptions in addition to the four Required Assumptions. The Fund's petition and its response to the City's jurisdictional plea indicated that its Board adopted actuarial assumptions in addition to the four Required Assumptions, resulting in the 10 percentage point difference between the contribution rate proposed by the Fund and the rate proposed by the City in its initial RSVS. Thus, as applied to the Fund, S.B. 2190 did not prevent the Board from adopting additional sound actuarial assumptions, and nothing in Section 67(f)'s language provides that the Board had the exclusive authority to choose, without limitation, all actuarial assumptions for the Fund's use.

The Fund also suggests that S.B. 2190 was unconstitutional as applied because it operated to diminish the effect of the actuarial assumptions adopted by the Board by requiring the parties to engage in the Required Averaging of Contribution Rates process when their proposed contribution rates in their RSVSs were more than two percentage points apart. But, when considering the meaning of Section 67(f), we are mindful that constitutional provisions and amendments that relate to the same subject matter must be construed together, and the provisions and amendments must

be considered in light of one another. *See Garofolo*, 497 S.W.3d at 477. Here, Section 67(f) must considered together with Section 67(a).

As mentioned, Section 67(a)(1) provides,

> The legislature may enact general laws establishing systems and programs of retirement and related disability and death benefits for public employees and officers. Financing of benefits must be based on sound actuarial principles. The assets of a system are held in trust for the benefit of members and may not be diverted.

TEX. CONST. art. XVI, § 67(a)(1). Section 67(a) "authorizes the Texas Legislature to enact general laws establishing pension systems for public employees and officers." *City of Hous. v. Houston Firefighters' Relief & Ret. Fund*, 502 S.W.3d 469, 472 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Pursuant to this authority, the Legislature enacted article 6243e.2(1), establishing the Fund in 1997.[7] *See id.* In tandem with granting the Legislature this authority, Section 67(a) also requires that the "[f]inancing of benefits must be based on sound actuarial principles." *See* TEX. CONST. art. XVI, § 67(a)(1). Thus, the plain language of Section 67(a) requires the Legislature to ensure that pension systems, like the Fund, operate using sound actuarial principles. *See id.*[8] It is pursuant to this requirement that the Legislature

---

[7] Under the constitutional grant of authority in Section 67(a), the predecessor version of article 6243e.2(1) was enacted in 1975, but that version was repealed and replaced in 1997 by the version of article 6243e.2(1) amended by SB 2190. *City of Hous. v. Houston Firefighters' Relief & Ret. Fund*, 502 S.W.3d 469, 472 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

[8] This reading is confirmed by the legislative history of Section 67(a) from 1975:

enacts legislation, like S.B. 2190, for the purpose of ensuring that pension systems operate "based on sound actuarial principles."[9] *See id.* While the Fund has a non-exclusive duty to adopt sound actuarial assumptions under Section 67(f), the Legislature must ensure that the funding of public retirement systems, like the Fund, is based on sound actuarial principles. And S.B. 2190 harmonizes the Fund's duties with the Legislature's responsibility to ensure that the Fund is financed based on sound actuarial principles.

Finally, in its petition, the Fund cited the legislative history of Section 67(f) as support for its assertion that the provision granted the Board "exclusive authority" to determine the actuarial assumptions for the Fund. *See* House Research

---

> Section 67 continues in effect the public retirement and benefit programs and systems already established under the Constitution and laws, authorizes the legislature to create other systems and programs, and requires funding and fiduciary standards necessary to maintain such systems and programs on a sound actuarial basis. *The sound actuarial requirement is intended to place a high level of fiscal and fiduciary responsibility on the legislative and administrative bodies concerned with the creation, funding, and management of public retirement systems of Texas and is an entirely new provision.*

Tex. Leg. Council, Analyses of Proposed Constitutional Amendments, Apr. 22, 1975 Election, at 3 (1975) (emphasis added).

[9] The legislative history of S.B. 2190 shows that its purpose was to address "serious funding shortfalls and rising costs" that "jeopardize[d] [the Fund's] long-term sustainability." Senate Research Center, Bill Analysis, Tex. S.B. 2190, 85th Leg. R.S. (Mar. 20, 2017).

Organization, Const'l Am. Analysis 44–45, 73rd Leg., R.S. (1993). The portion of the legislative history relied on by the Fund set out the reasons given by the proponents of Section 67(f) for why the provision should be ratified:

> [Section 67(f)] would stipulate that the boards of trustees, not the governmental entities, should have fiduciary responsibility for system assets. It would give the trustees the exclusive right to administer the system and assure that the local governmental entity cannot raid a pension fund when facing an economic crisis.
>
> Giving the boards of trustees explicit authority to choose their own legal counsel and the system's actuary would alleviate any possibility of a conflict of interest with the governmental entity. Some local governments have insisted on choosing a pension system's legal counsel and actuary, who have board authority in administering pension systems. Actuaries assess the actuarial soundness of systems and determine the rate of contributions needed to pay current and future benefits. System actuaries should have as their first priority the best interest of the members of the pension system, not the fiscal well[-] being of the governmental entity that employs them.
>
> . . . .
>
> The duties of pension trustees need to be specified in the Constitution so they cannot be easily changed by the Legislature in response to possible political pressure. Placing the authority in the Constitution would give it more standing than just having it in the statutes, which can be changed whenever the Legislature meets.

Id.

The legislative history indicates that the intent of Section 67(f)'s proponents was to ensure that pension funds were administered by boards of trustees, which owe fiduciary duties to the funds, rather than by local government entities, which do not owe a fiduciary duty to the pension funds and may be inclined to act in their own

self-interest, particularly with respect to funding. The proponents also intended for Section 67(f) to set out the trustees' duties, which were designed to safeguard the actuarial soundness of the pension funds for the benefit of the funds' members. Requiring the board of trustees to adopt sound actuarial assumptions aligns with this intent. But the legislative history does not state that the proponents intended a board's authority to adopt sound actuarial assumptions to be exclusive or unregulated.

We conclude that, even under a liberal construction of the Fund's pleadings, the City's governmental immunity is not waived because the Fund's as-applied constitutional claim is facially invalid. *See Abbott*, 2022 WL 2283221, at *11; *Klumb*, 458 S.W.3d at 13, *HFRRF I*, 579 S.W.3d at 808. Amendment of the Fund's petition would not cure the pleading. *HFRRF I*, 579 S.W.3d at 808. We hold that the trial court erred in denying the City's plea to the jurisdiction. *See id.*

C. City Officials' Jurisdictional Plea

We turn next to whether the trial court properly denied the City Officials' plea to the jurisdiction. The Fund claimed that the City Officials, in their official capacities, engaged in ultra vires conduct by acting without legal authority and by failing to fulfill a ministerial duty. "Ultra vires suits brought to require government officials to comply with statutory or constitutional provisions are not prohibited by governmental immunity." *Id.* (citing *Heinrich*, 284 S.W.3d at 372). "A plaintiff

asserting an ultra vires claim against a government official must not complain of the official's exercise of discretion, but must allege that the official acted without legal authority or failed to perform a purely ministerial act." *Id.* (citing *Heinrich*, 284 S.W.3d at 372).

In its petition, the Fund alleged that the City officials were implementing the City's budget and allocating money in the budget for the Fund pursuant to S.B. 2190. The Fund asserted that, because S.B. 2190 was unconstitutional, the City Officials were acting without legal authority in implementing the City's budget and in allocating money to the Fund. It also alleged that the City Officials were failing to carry out a ministerial duty regarding the allocation of funding. The Fund alleged that, because S.B. 2190 was unconstitutional, the City Officials had a ministerial duty to implement the City's budget and allocate money to the Fund under the pre-amendment version of article 6243e.2(1), but they had failed to perform that duty.

We have already concluded that the Fund's as-applied constitutional claim was facially invalid. Because the Fund's ultra vires claim was premised on its constitutional claim, we conclude that, even construing the Fund's petition liberally in its favor, the Fund has not pleaded a facially valid ultra vires claim. *See id.* at 809. Amendment would not cure the pleading. *See id.* We hold that the trial court erred in denying the City Officials' plea to the jurisdiction. *See id.*

We sustain the City Defendants' jurisdictional pleas.[10]

Conclusion

We reverse the trial court's judgment and render judgment granting the City Defendants' pleas to the jurisdiction and dismissing the Fund's claims against them.

Richard Hightower
Justice

Panel consists of Chief Justice Radack and Justices Landau and Hightower.

[10] Because of our disposition of issue three, we need not decide the City Defendant's remaining issues, including the City Defendants' issues challenging the trial court's summary-judgment rulings. *See* TEX. R. APP. P. 47.1. However, we note that, had we reached the summary-judgment issues, we would have ruled that the trial court erred in denying the City Defendants' motion for summary judgment and in granting that of the Fund. The facts in this case are undisputed, and the issue—whether S.B. 2190 is unconstitutional as applied—turns on construction of the Texas Constitution and S.B. 2190, which are questions of law. Given our analysis above, we would have held that, as applied to the Fund, S.B. 2190 did not violate Section 67(f).