FILED
19-1123
6/18/2020 9:14 AM
tex-43842490
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 19-1123

In the Supreme Court of Texas

IN RE TEXAS PENSION REVIEW BOARD AND STEPHANIE LEIBE, IN HER OFFICIAL CAPACITY AS CHAIR OF THE TEXAS PENSION REVIEW BOARD,

Relators.

On Petition for a Writ of Mandamus
to the 353rd Judicial District Court, Travis County

BRIEF ON THE MERITS FOR RELATORS

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy First Assistant
Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

KYLE D. HAWKINS
Solicitor General

BILL DAVIS
Deputy Solicitor General

RANCE CRAFT
Assistant Solicitor General
State Bar No. 24035655
Rance.Craft@oag.texas.gov

CYNTHIA A. MORALES
Assistant Attorney General

Counsel for Relators

Identity of Parties and Counsel

Relators:
Texas Pension Review Board
Stephanie Leibe, in her official capacity as Chair of the Texas Pension Review Board

Counsel for Relators:
Ken Paxton
Jeffrey C. Mateer
Ryan L. Bangert
Kyle D. Hawkins
Darren L. McCarty
Bill Davis
Rance Craft (lead counsel)
Joshua R. Godbey
Cynthia A. Morales
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Rance.Craft@oag.texas.gov

Respondent:
The Honorable Amy Clark Meachum
353rd Judicial District Court, Travis County

Real Party in Interest:
Dallas Police Retired Officers Association

Counsel for Real Party in Interest:
George W. Vie III (lead counsel)
David M. Feldman
Shannon R. Almes
Feldman & Feldman, P.C.
3355 West Alabama Street, Suite 1220
Houston, Texas 77098
george.vie@feldman.law

Table of Contents

Index of Authorities

Page(s)

Cases:

Constitutional Provisions, Statutes, and Rules:

Miscellaneous:

Record References

"MR.*p*" refers to the mandamus record (filed December 20, 2019). "SMR.*p*" refers to the supplemental mandamus record (filed January 10, 2020). For both, "*p*" refers to the page number of the .pdf document on file with the Court.

Statement of the Case

Nature of the Underlying Proceeding:	The Dallas Police Retired Officers Association sued the Texas Pension Review Board and its Chair for a declaratory judgment that certain 2017 amendments to the statutes governing pension funds for Dallas police officers and fire fighters are unconstitutional. MR.5–14. The Board and Chair filed a plea to the jurisdiction, asserting that the Association had not pleaded facts establishing subject-matter jurisdiction over its claims. MR.16–37. In response, the Association asked the trial court to allow it to depose a representative of the Board and to obtain production of documents before responding to the plea. MR.39–54.
Trial Court:	353rd Judicial District Court, Travis County The Honorable Amy Clark Meachum (the respondent in the court of appeals and this Court)
Disposition in the Trial Court:	The trial court granted the Association's request to conduct discovery before responding to the plea. MR.92.
Parties in the Court of Appeals:	As relators, the Board and Chair filed a petition for a writ of mandamus seeking relief from the trial court's discovery order on November 12, 2019. The Association was the real party in interest.
Disposition in the Court of Appeals:	The court of appeals denied mandamus relief. *In re Tex. Pension Review Bd.*, No. 03-19-00821-CV, 2019 WL 6042278, at *1 (Tex. App.—Austin Nov. 14, 2019, orig. proceeding) (mem. op.) (Baker, J., joined by Goodwin and Kelly, JJ.); MR.102.

Statement of Jurisdiction

The Court has jurisdiction to issue a writ of mandamus to the trial court under Texas Constitution article V, section 3(a) and Texas Government Code section 22.002(a). A petition seeking the same relief was previously presented to the court of appeals, which denied relief. MR.102; *see* Tex. R. App. P. 52.3(e).

Issue Presented

Whether a trial court abuses its discretion by allowing a plaintiff to obtain discovery in connection with a plea to the jurisdiction when the plea challenges the sufficiency of the pleadings, not the existence of jurisdictional facts.

To the Honorable Supreme Court of Texas:

Sixteen years ago, this Court prescribed the procedures by which a defendant could use a plea to the jurisdiction to challenge the trial court's subject-matter jurisdiction over a plaintiff's claims. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–29 (Tex. 2004). Since then, the Court has refined and clarified those procedures in numerous cases. But two basic principles that *Miranda* established remain unchanged today.

First, the defendant gets to choose how to contest jurisdiction: it may challenge the sufficiency of the plaintiff's pleadings, the existence of jurisdictional facts, or both. And second, the defendant's choice determines what materials the trial court reviews in resolving the plea. In a challenge to the pleadings, the court construes the plaintiff's factual allegations in light of the applicable law. In a challenge to the existence of jurisdictional facts, the court also considers evidence submitted by the parties.

Having those different options for contesting jurisdiction is important to defendants. A pleadings challenge can be resolved early, before the costs of prolonged litigation accumulate. At the same time, the plaintiff might thwart such a challenge simply by amending the petition. A challenge to the existence of jurisdictional facts is harder for the plaintiff to overcome; he usually will have to produce some evidence in response. But there is a concomitant risk for the defendant as well: it may face the burden of jurisdictional discovery. All these considerations will inform the defendant's strategic choice when it believes jurisdiction may be lacking.

In this case, the trial court denied the Texas Pension Review Board that choice. The Dallas Police Retired Officers Association sued the Board for a declaratory judgment that recent statutory changes to the pension system for Dallas police officers are unconstitutional. Whatever the merits of that claim, the Board is the wrong defendant. As a matter of law, it has no authority to enforce or implement the statutes at issue—the local system trustees do that. In the Board's view, that made this case an ideal candidate for a jurisdictional challenge to the sufficiency of the pleadings. But after the Board filed its plea, the Association asked for discovery that it purportedly needed to respond to the Board's pleadings-based challenge. The trial court granted that discovery request and deferred ruling on the plea. As a result, the Board finds itself in a dispute over jurisdictional facts that it never sought, that imposes improper discovery obligations, and that is unnecessary to resolve its plea to the jurisdiction.

The trial court accepted the Association's incorrect view that courts have broad discretion to order discovery and consider evidence for *any* plea to the jurisdiction on a case-by-case basis. That approach ignores the distinction between different types of pleas that the Court carefully drew in *Miranda* and the different analyses required for each. Because the trial court had no discretion to depart from *Miranda*'s framework, and because the Board will suffer the consequences of that error before there is an appealable order, mandamus should issue.

Statement of Facts

I. Legal Background

A. The Dallas Police and Fire Pension System

The Texas Constitution authorizes the Legislature to establish systems for providing retirement, disability, and death benefits to public employees. Tex. Const. art. XVI, § 67(a)(1). Pursuant to this authority, the Legislature may create local retirement systems for cities and counties. *Id.* § 67(c).

One such system is the Dallas Police and Fire Pension System ("Dallas System"). Tex. Rev. Civ. Stat. art. 6243a-1. The Dallas System provides benefits to Dallas police officers, firefighters, and their qualified beneficiaries under the terms of the statutory pension plan. *Id.*

The Dallas System's board of trustees administers the system, invests the pension fund's assets, and directs payments from the fund according to the plan's terms. *Id.* § 3.01(a), (*l*), (m). The trustees have "full discretion and authority" to construe, interpret, and carry out the pension plan. *Id.* § 3.01(j-4). Their decisions are "final and binding on all affected parties." *Id.*

B. The Texas Pension Review Board

The Texas Pension Review Board is a state agency that monitors, studies, and advises public retirement systems. Tex. Gov't Code §§ 801.101, 801.202.[1] The Board is composed of seven members appointed by the Governor. *Id.* § 801.103.

[1] The agency's official name is the "State Pension Review Board." Tex. Gov't Code § 801.101. It is known informally as the "Texas Pension Review Board." The

The Board's powers and duties are set forth primarily in subchapter C of chapter 801 of the Government Code. *Id.* §§ 801.201–.211. Its general duties are to:

> (1) conduct a continuing review of public retirement systems, compiling and comparing information about benefits, creditable service, financing, and administration of systems;
>
> (2) conduct intensive studies of potential or existing problems that threaten the actuarial soundness of or inhibit an equitable distribution of benefits in one or more public retirement systems;
>
> (3) provide information and technical assistance on pension planning to public retirement systems on request; and
>
> (4) recommend policies, practices, and legislation to public retirement systems and appropriate governmental entities.

Id. § 801.202.

Within the sphere of those general duties, the Legislature has assigned specific tasks to the Board. For example, public retirement systems periodically must prepare various reports about their finances, activities, and benefits.[2] The systems must provide copies of those reports to the Board.[3] In turn, the Board must publicize data from many of those reports. *Id.* § 801.209(a). The Board also may ask state-financed systems to prepare reports about how proposed legislation would affect them. *Id.*

---

informal name appears in the caption in the underlying suit, so this brief will use that name as well.

[2] Tex. Gov't Code §§ 802.101, 802.103–.106, 802.108–.109, 802.1012, 802.1014, 802.2015–.2016, 802.202(d), 802.305.

[3] Tex. Gov't Code §§ 802.101(c), 802.103(b), 802.104, 802.105(b), 802.106(h), 802.108(a), 802.109(g), 802.1012(j)(2), 802.1014(b–1), 802.2015(g), 802.2016(g), 802.202(d)(3)–(4), 802.305(b).

§ 802.305. The Board uses information from all these reports to prepare its own reports for the Legislature and Governor. *Id.* §§ 801.203(a), 802.305(e)–(g).

In carrying out these review and reporting functions, the Board may inspect the books, records, and accounts of public retirement systems. *Id.* § 801.204. It may also subpoena those materials as well as witness testimony. *Id.* § 801.205. If a system fails to timely provide required reports or information, the Board may add it to a list of noncompliant systems on its website and inform relevant state or local officials about the noncompliance. *Id.* § 801.209(b)–(c). The Board may also seek mandamus relief to enforce certain reporting requirements. *Id.* § 802.003(d).

The Board performs other tasks in its role of advising public retirement systems. The Board must "develop and administer an educational training program for trustees and system administrators." *Id.* § 801.211(a); *see also id.* § 801.208 (authorizing the Board to "develop and conduct training sessions and other educational activities"). And the Board develops model ethical standards and conflict-of-interest policies that systems may adopt. *Id.* § 801.210.

C. HB 3158 and the *Degan* litigation

1. In 2017, the Legislature extensively amended the statutes governing the Dallas System. Act of May 25, 2017, 85th Leg., R.S., ch. 318, 2017 Tex. Gen. Laws 639 ("HB 3158"). Among the amendments were changes to retirement-eligibility age, employee and city contributions to the system, and methods for calculating some benefit payments. Tex. Rev. Civ. Stat. art. 6243a-1, §§ 4.02, 4.03, 6.02, 6.14.

HB 3158 also imposed new duties on the Board respecting actions by the trustees of the Dallas System.

HB 3158 mandated that, before July 2024, the Board must select an independent actuary that the Dallas System trustees will hire to perform an actuarial analysis. *Id.* § 2.025(a). That analysis must determine whether the system meets the Board's pension-funding guidelines and recommend changes to system benefits and contributions. *Id.* The trustees then must adopt by rule a plan that complies with statutory funding requirements and accounts for the actuary's recommendations. *Id.* § 2.025(b). The trustees must provide the actuary's analysis and a summary of the adopted rules to the Board, which in turn must report on those matters to the Legislature. *Id.* § 2.025(b–1), (c).

The system trustees may propose other rules under HB 3158 that would trigger a limited review by the Board. The trustees may adopt rules to amortize the system's unfunded liability within a certain period or to increase benefits or reduce retirement age in a way that will not extend that amortization period beyond a certain length. *Id.* §§ 3.01(j–1)(2), (3); 6.022. If the trustees propose such rules, the Board must review them in advance and confirm that they comply with the amortization periods prescribed by statute. *Id.* § 3.01(j–2)(1), (j–6), (j–7); 6.022.

Additionally, when the system trustees provide documents and other information to the public about the system's health and performance, the Board must review that information to ensure its validity. *Id.* § 3.01(j–9). The trustees and City must certify to the Board that any information they provide "is accurate and based on realistic assumptions." *Id.* § 3.01(j–10). The trustees also must adopt a code of ethics and file it with the Board. *Id.* § 3.01(r)(2).

Finally, HB 3158 assigned the Board a limited temporary duty to verify that the system trustees did not allow distributions from accounts in the Dallas System's Deferred Retirement Option Plan ("DROP"), except in certain circumstances, before the HB 3158 amendments became effective on September 1, 2017. Act of May 25, 2017, 85th Leg., R.S., ch. 318, § 3.02(b)–(d), 2017 Tex. Gen. Laws 639, 712–13. If the trustees had violated that prohibition, the amendments would not have gone into effect. *Id.* § 3.02(d).[4]

2. One change made by HB 3158 has already spawned litigation, which has reached this Court. Benefits that have accrued under DROP now must be distributed as an annuity rather than a lump sum (absent a qualifying hardship). *See* Tex. Rev. Civ. Stat. art. 6243a-1, § 6.14. In response, some retirees sued the system's board of trustees in federal court, alleging that this change deprived them of property rights in violation of the Takings and Due Process Clauses of the United States Constitution and impaired their retirement benefits in violation of article XVI, section 66 of the Texas Constitution. *Degan v. Bd. of Trs. of the Dall. Police & Fire Pension Sys.*, No. 3:17-CV-01596-N, 2018 WL 4026373, at *2, *9 (N.D. Tex. Mar. 14, 2018). The district court dismissed the suit. *Id.* at *11. On appeal, the Fifth Circuit certified two questions to this Court: (1) whether the method of distributing DROP funds was

[4] Apart from the Dallas System, HB 3158 authorizes the City to establish an alternative benefit plan for future hires. Tex. Gov't Code § 810.002. For that alternative plan, the Board's role is to collect all required reports and to confirm that the Dallas System will continue to comply with funding and amortization requirements after the alternative plan is implemented. *Id.* § 810.002(e), (f)(2).

protected by article XVI, section 66, and (2) whether the change in method violated that section. *Degan v. Bd. of Trs. of the Dall. Police & Fire Pension Sys.*, 766 F. App'x 16 (5th Cir. 2019) (per curiam). This Court answered "no" to both questions. *Degan v. Bd. of Trs. of the Dall. Police & Fire Pension Sys.*, 594 S.W.3d 309 (Tex. 2020). The Fifth Circuit then affirmed the order dismissing the suit. *Degan v. Bd. of Trs. of the Dall. Police & Fire Pension Sys.*, 956 F.3d 813 (5th Cir. 2020).

II. Procedural History

A. The underlying trial-court proceedings

1. The Dallas Police Retired Officers Association is "a voluntary-membership association of retired Dallas police officers and fire fighter affiliate members" who draw pension benefits from the Dallas System. MR.6, 7–8. The Association advocates for the retirement benefits and other interests of its members and their beneficiaries. MR.6.

In February 2019, the Association brought this suit under the Uniform Declaratory Judgments Act ("UDJA"), Tex. Civ. Prac. & Rem. Code ch. 37. MR.5–14. It sought declarations that sections 6.12 and 6.13 of the statutes governing the Dallas System, as amended by HB 3158, are unconstitutional. MR.11. Section 6.12 concerns annual increases to retirement, disability, and death benefits. Tex. Rev. Civ. Stat. art. 6243a-1, § 6.12. Section 6.13 concerns supplemental payments to certain benefit recipients aged 55 or older. *Id.* § 6.13. The Association asserted that HB 3158 "effective[ly] abolish[ed]" those increases and supplements. MR.5, 9–11. That was unlawful, the Association claimed, because it impaired vested benefits in violation of article

XVI, section 66 of the Texas Constitution—the same constitutional provision at issue in the *Degan* litigation discussed above. MR.11–13.

Unlike the *Degan* plaintiffs, however, the Association did not sue the Dallas System trustees. Instead, it sued the Board and its Chair (collectively, "the Board").[5] MR.6–7. The Board answered the suit but reserved its right to file a plea to the jurisdiction. MR.39.

2. Before the Board filed its plea, the Association noticed the Board's deposition. MR.49–54. The notice asked the Board to designate a representative to testify on ten matters:

> 1. The Board's recommendations, policies, and procedures, and their implementation, to oversee Texas public retirement systems, both state and local, regarding their compliance with state law.
>
> 2. The Board's recommendations, policies, and procedures, and their implementation, to ensure public retirement system benefits are equitable.
>
> 3. The Board's recommendations, policies, and procedures, and their implementation, to ensure public retirement system are properly managed.
>
> 4. Any analysis by the Board of HB 3158 during and after the 85th Legislature.
>
> 5. The Board's recommendations, policies, and procedures, to implement HB 3158.

[5] At the time, the Chair was Josh McGee. MR.7. He was succeeded by the current Chair, Stephanie Leibe, in April 2019. MR.16. Because the Association sued the Chair in the Chair's official capacity only, Leibe has been substituted as the defendant. MR.16.

6. The Board's recommendations, policies, and procedures, to oversee implementation of HB 3158.

7. Any complaints received by the Board related to HB 3158.

8. The Board's policies and procedures related to complaints it receives arising from public retirement systems, both state and local.

9. The Board's policies and procedures, and their implementation, to provide technical assistance, training, and information to public retirement system trustees.

10. The Board's policies and procedures, and their implementation, concerning appeals to the State Office of Administrative Hearings from a decision of a public retirement system's trustees relating to eligibility for or amount of benefits payable by the system.

MR.53. The notice also requested that the Board produce ten categories of documents at the deposition:

1. All documents in the Board's possession regarding HB 3158.

2. All documents reflecting the Board's analysis of article XVI, section 66 of the Texas Constitution.

3. All communications between the Board and any Texas pension system, state or local, related to HB 3158.

4. All communications related to the Board's analysis of HB 3158.

5. All communications related to the Board's analysis of article XVI, section 66 of the Texas Constitution.

6. All documents related to the Dallas System's implementation of HB 3158.

7. All communications between the Board and the Dallas System related to the implementation of HB 3158.

8. The Board's complaint policy and procedures.

9. Any training materials provided by the Board to any Texas pension system related to HB 3158 or article XVI, section 66 of the Texas Constitution.

10. Any recommendations or comments given by the Board to the Legislature regarding HB 3158.

MR.54.

The Board timely moved for a protective order. MR.40. It then filed its original plea to the jurisdiction. MR.40. At the hearing on the motion for protective order, the trial court directed that the plea be set for hearing solely to consider whether the Association needed to conduct discovery in connection with the plea. MR.40, 92.

3. After the protective-order hearing, the Board filed an amended plea to the jurisdiction—the live plea in this case. MR.16–37. The Board urged that the Association had "fail[ed] to affirmatively plead facts" that demonstrated subject-matter jurisdiction over its claims. MR.18. Specifically, the Board argued, the Association had not pleaded facts that established (1) a waiver of the Board's sovereign immunity for these claims, (2) the Association's standing to bring its claims against the Board, (3) a justiciable controversy between the Association and the Board, or (4) that the relief sought against the Board would redress the Association's injury. MR.18, 29–36.

The Board explained that the Association's allegations were jurisdictionally deficient because, under Texas law, the Board has no authority to implement or enforce the two statutory provisions the Association had challenged. MR.19, 32–33, 35–36. Rather, the Dallas System trustees implement and enforce those provisions. MR.19, 32–35. Indeed, the Board observed, the Association's alleged injury was that its

members were not receiving pension increases and supplements from the Dallas System because the *System* is calculating payments according to the amended versions of sections 6.12 and 6.13. MR.32. To that point, the Board noted that it has no authority under Texas law to mandate that the system trustees implement or enforce those sections, or refrain from doing so, in any particular way. MR.19, 33, 35.

In response, the Association asked the trial court to order the Board to comply with its pending discovery request before ruling on the amended plea. MR.39–54. The Association argued that the Board's assertions about its authority and duties presented disputed questions of *fact* that it was entitled to test through discovery. MR.40–45. The Association also contended that the standing and justiciability grounds of the amended plea warranted factual development. MR.44–47.

The Board replied that the Association's insistence on discovery was misplaced because its plea challenged the sufficiency of the petition's allegations, not the existence of jurisdictional facts. MR.56–59. Accordingly, the Board explained, the court's task was to assess whether those allegations, in light of applicable law, established subject-matter jurisdiction—a task for which discovery is unnecessary. MR.58–59. And regardless, the Board added, the requested discovery was not relevant to the jurisdictional issues raised by its plea. MR.59–61.

4. In October 2019, the trial court granted the Association's discovery request in full and ordered that the Association depose the Board's representative within thirty days. MR.92. The court did not rule on the Board's amended plea to the jurisdiction. MR.92.

B. Mandamus proceedings

The Board sought mandamus relief from the trial court's discovery order and a temporary stay of the order in the Third Court of Appeals. *In re Tex. Pension Review Bd.*, No. 03-19-00821-CV, 2019 WL 6042278, at *1 (Tex. App.—Austin Nov. 14, 2019, orig. proceeding) (mem. op.) (MR.102). Two days later, that court denied relief. *Id.*

The Board then filed this mandamus proceeding in this Court and again sought a temporary stay. The Court stayed the trial court's discovery order and any other discovery in the underlying case pending further order from the Court. Order, *In re Tex. Pension Review Bd.*, No. 19-1123 (Tex. Jan. 21, 2020).[6]

SUMMARY OF THE ARGUMENT

I. The Association brought this UDJA suit seeking declarations that two statutory provisions governing the Dallas System, as amended in 2017 by HB 3158, are unconstitutional. As the plaintiff, the Association bore the initial burden to plead factual allegations in its petition that established the trial court's subject-matter jurisdiction over its claims. That burden included pleading facts that demonstrated the Association's standing as well as a waiver of the Board's sovereign immunity from suit.

[6] During the mandamus proceedings, the Association has twice amended its deposition notice to change the scheduled date of the deposition. MR.95–100; SMR.4–9. The second amendment limited the scope of six deposition topics and eight document requests to the period from January 1, 2014, to the present. SMR.8–9.

The Board filed a plea to the jurisdiction challenging only the sufficiency of the Association's pleadings. The Board urged that the Association's pleadings failed to establish the traceability and redressability elements of standing because, as a matter of law, the Board plays no role in enforcing or implementing the challenged statutes. Similarly, the Board argued that the UDJA did not waive its immunity from suit for the Association's claims because the Board was not the relevant governmental entity that could enforce any declarations about the challenged statutes.

The trial court should have decided the Board's plea by construing the Association's pleadings in light of applicable law and determining whether they established subject-matter jurisdiction. Instead, the court deferred ruling on the plea and ordered the Board to submit to the Association's request to depose a Board representative and produce documents.

The trial court's discovery order was an abuse of discretion for several reasons. The court departed from this Court's framework for resolving different types of pleas to the jurisdiction. Because the Board had challenged only the sufficiency of the Association's pleadings, the Association did not need any evidence to counter the Board's plea. Nor could the Association override the Board's choice to limit the jurisdictional inquiry to the pleadings. Therefore, discovery was neither necessary nor appropriate.

By deferring a ruling on the Board's plea to allow improper discovery, the trial court also violated this Court's directive to resolve jurisdictional disputes at the earliest opportunity. Similarly, the court frustrated the purpose of the Board's

immunity from suit by refusing to rule on that immunity at the pleadings stage and subjecting the Board to the expense and burden of discovery.

II. The Association's various defenses of the trial court's discovery order are unavailing.

The Association wrongly suggests that courts have discretion to order discovery and consider evidence in connection with *any* plea to the jurisdiction. That argument ignores the difference between jurisdictional challenges to the sufficiency of the pleadings and challenges to jurisdictional facts. This Court has made clear that trial courts are to consider evidence only in the latter scenario.

The Association also mischaracterizes the Board's plea as presenting "factual assertions" that must be countered with evidence. The Board's lack of authority to enforce the challenged statutes is a matter of law, not fact. And the Board supported that point only by reference to relevant statutes, not evidence.

Finally, the Association cannot justify the trial court's decision by pointing to the limits on the discovery that was ordered. *No* discovery could be relevant to a plea to the jurisdiction that challenges only the sufficiency of the pleadings, as the Board's did. Accordingly, the trial court had no discretion to defer ruling on the Board's plea so that the Association could conduct discovery.

Standard of Review

This Court may issue a writ of mandamus to a trial court when the trial court clearly abused its discretion and an appeal is not an adequate remedy for the relator. *In re Garza*, 544 S.W.3d 836, 840 (Tex. 2018) (per curiam) (orig. proceeding).

A trial court abuses its discretion when it "acts without reference to guiding rules or principles or in an arbitrary or unreasonable manner." *Id.* In that regard, a trial court "has no 'discretion' in determining what the law is or applying the law to the facts." *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). Accordingly, "a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion" that may be remedied by mandamus. *Id.*

Whether an appeal is an adequate remedy "depends heavily on the circumstances presented." *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136, 137 (Tex. 2004) (orig. proceeding). When a trial court improperly compels discovery, raising that error in an appeal from a later order or judgment is generally considered inadequate. *E.g.*, *In re Weekley Homes, L.P.*, 295 S.W.3d 309, 322 (Tex. 2009) (orig. proceeding); *In re CSX Corp.*, 124 S.W.3d 149, 153 (Tex. 2003) (per curiam) (orig. proceeding); *In re Am. Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998) (per curiam) (orig. proceeding); *Walker*, 827 S.W.2d at 843.

ARGUMENT

I. The Trial Court Abused Its Discretion by Ordering Discovery Before Ruling on the Board's Amended Plea to the Jurisdiction.

In its amended plea to the jurisdiction, the Board urged that the Association's pleadings did not establish the trial court's subject-matter jurisdiction over the claims asserted. MR. 16–37. The trial court should have resolved the plea by construing the allegations in the Association's petition and applying the relevant law. Instead, the court deferred its ruling and subjected the Board to discovery, ostensibly so that the Association could try to develop evidence to counter the Board's

pleadings-based challenge to jurisdiction. MR.92. As explained below, that decision departed from this Court's settled precedent on classifying and adjudicating pleas to the jurisdiction. Mandamus should issue to correct that abuse of discretion.

A. The plaintiff has the initial burden to plead facts establishing the trial court's subject-matter jurisdiction over its claims.

1. "Subject-matter jurisdiction" refers to a court's power to hear a particular type of claim. *TV Azteca v. Ruiz*, 490 S.W.3d 29, 36 (Tex. 2016). Without it, a court lacks authority to decide a case. *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 484 (Tex. 2018).

Two aspects of subject-matter jurisdiction are relevant here: standing and sovereign immunity from suit.

a. Standing is a "prerequisite" to subject-matter jurisdiction. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 502 (Tex. 2010). Accordingly, if a plaintiff lacks standing to assert a claim, the court has no subject-matter jurisdiction over that claim. *Heckman v. Williamson County*, 369 S.W.3d 137, 150 (Tex. 2012).

Under Texas law, standing requires both "a concrete injury to the plaintiff" and "a real controversy between the parties that will be resolved by the court." *Id.* at 154. Those requirements parallel the three elements of standing under federal law: (1) an injury in fact that is (2) fairly traceable to the defendant's challenged conduct and (3) likely to be redressed by the plaintiff's requested relief. *Id.* at 154–55 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

b. Sovereign immunity from suit "implicates" a court's subject-matter jurisdiction over a claim against the State. *Rosenberg Dev. Corp. v. Imperial Performing*

Arts, Inc., 571 S.W.3d 738, 746 (Tex. 2019). By "implicates," the Court means that immunity from suit does not equate to a lack of subject-matter jurisdiction for all purposes. *Engelman Irr. Dist. v. Shields Bros., Inc.*, 514 S.W.3d 746, 751 (Tex. 2017). But when the State validly asserts that immunity from suit applies to a pending claim, that immunity deprives the court of subject-matter jurisdiction over the claim. *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012).

The immunity-from-suit bar to subject-matter jurisdiction may be lifted in three ways. The most common way is when the Legislature waives immunity through a statute or an express resolution. *Nazari v. State*, 561 S.W.3d 495, 500 (Tex. 2018). Also, the people may waive immunity through a provision in the Texas Constitution. *City of Dallas v. VSC, LLC*, 347 S.W.3d 231, 236 (Tex. 2011) (referring to article I, section 17 of the Texas Constitution as an immunity waiver for takings claims). Finally, the State may relinquish its immunity from suit, at least in part, by making affirmative claims for some kinds of monetary relief. *Nazari*, 561 S.W.3d at 507.

2. Establishing subject-matter jurisdiction is the plaintiff's responsibility. The plaintiff has the initial burden to allege facts in the petition that affirmatively demonstrate the trial court's subject-matter jurisdiction over the claims asserted. *Andrade v. Venable*, 372 S.W.3d 134, 138 (Tex. 2012) (per curiam); *Univ. of Tex. at Austin v. Hayes*, 327 S.W.3d 113, 116 (Tex. 2010) (per curiam). That burden includes the standing and immunity aspects of subject-matter jurisdiction discussed above. *Meyers*, 548 S.W.3d at 485–86 (standing); *Dall. Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003) (immunity).

For standing, the plaintiff must allege facts in the petition that establish each element of standing—injury, traceability, and redressability. *Heckman*, 369 S.W.3d at 154–55. And the plaintiff must meet that burden for each claim in the petition. *Id.* at 153.

When immunity from suit applies, the plaintiff must allege a valid waiver of that immunity. *Whitley*, 104 S.W.3d at 542. The plaintiff cannot discharge that burden merely by referring to a statute or constitutional provision that waives immunity. *TDCJ v. Miller*, 51 S.W.3d 583, 586–87 (Tex. 2001). Rather, the plaintiff must allege facts that state a claim that falls within the waiver. *Mission Consol. ISD v. Garcia*, 372 S.W.3d 629, 636–37 (Tex. 2012); *State v. Lueck*, 290 S.W.3d 876, 884 (Tex. 2009). And, as with standing, the plaintiff must do that for each particular claim asserted. *State v. Sledge*, 36 S.W.3d 152, 156 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); *see also TxDOT v. Sefzik*, 355 S.W.3d 618, 620 (Tex. 2011) (per curiam) (noting that state agencies "are immune from suits under the UDJA unless the Legislature has waived immunity for the particular claims at issue").

B. The defendant may dispute subject-matter jurisdiction by challenging the sufficiency of the pleadings or the existence of jurisdictional facts.

The defendant may contend that the plaintiff has not met its initial burden to establish subject-matter jurisdiction, as to standing or immunity, by filing a plea to the jurisdiction. *Farmers Tex. Cty. Mut. Ins. Co. v. Beasley*, 598 S.W.3d 237, 241 (Tex. 2020) (standing); *City of Houston v. Hous. Mun. Employees Pension Sys.*, 549 S.W.3d 566, 575 (Tex. 2018) (immunity). The plea may dispute subject-matter jurisdiction

by challenging the sufficiency of the plaintiff's pleadings, the existence of jurisdictional facts, or both. *TDCJ v. Rangel*, 595 S.W.3d 198, 205 (Tex. 2020); *Alamo Heights ISD v. Clark*, 544 S.W.3d 755, 770 (Tex. 2018).[7]

1. A plea to the jurisdiction that challenges the sufficiency of the pleadings "argues that the plaintiff has not alleged facts that, if proven true, constitute a valid claim over which there is jurisdiction." *City of Magnolia 4A Econ. Dev. Corp. v. Smedley*, 533 S.W.3d 297, 301 (Tex. 2017) (per curiam). To resolve this sort of plea, a trial court must determine whether the plaintiff has alleged facts that affirmatively demonstrate the court's subject-matter jurisdiction over the claim. *Miranda*, 133 S.W.3d at 226. That determination is a question of law. *Id.*

In making that determination, the trial court liberally construes the factual allegations in favor of the plaintiff and looks to the plaintiff's intent. *Id.* The court also considers relevant law to ascertain whether those allegations actually satisfy jurisdictional requirements. *See Chambers-Liberty Ctys. Navigation Dist. v. State*, 575 S.W.3d 339, 354–55 (Tex. 2019) (noting that the Court was required to "answer questions

---

[7] A similar dichotomy between challenges to pleading sufficiency and challenges to jurisdictional facts exists in federal law, where courts generally distinguish "facial attacks" on jurisdiction from "factual attacks." *E.g.*, *Davis v. Wells Fargo*, 824 F.3d 333, 346 (3d Cir. 2016); *Silha v. ACT, Inc.*, 807 F.3d 169, 173–74 (7th Cir. 2015); *Branson Label, Inc. v. City of Branson*, 793 F.3d 910, 914–15 (8th Cir 2015); *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1148 n.4 (10th Cir. 2015); *Cartwright v. Garner*, 751 F.3d 752, 759–60 (6th Cir. 2014); *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009); *McElmurray v. Consol. Gov't of Augusta–Richmond Cty.*, 501 F.3d 1244, 1251 (11th Cir. 2007); *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004); *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. May 1981).

of law" in assessing the adequacy of the plaintiff's allegations "at the jurisdictional stage"); *Lueck*, 290 S.W.3d at 881–82 (explaining that a court must consider the elements of a Whistleblower Act claim to determine whether the plaintiff "actually allege[d] a violation of the Act" necessary to trigger the Act's immunity waiver).

The trial court can dispose of a plea to the jurisdiction that challenges the sufficiency of the pleadings in one of three ways. First, if the plaintiff has met its pleading burden, naturally the plea should be denied. *Kubosh v. Harris County*, 416 S.W.3d 483, 486 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (citing *Miranda*, 133 S.W.3d at 226–27). Second, "[i]f the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction," the court should afford the plaintiff the opportunity to amend the petition to cure the pleading deficiency. *Miranda*, 133 S.W.3d at 226–27. And third, "[i]f the pleadings affirmatively negate the existence of jurisdiction," the court should grant the plea without affording the plaintiff an opportunity to amend. *Id.* at 227.

2. A plea to the jurisdiction that challenges the existence of jurisdictional facts argues that the "evidence" fails to establish jurisdiction or negates jurisdiction, *City of Magnolia*, 533 S.W.3d at 301, or that there is "no evidence" of an essential jurisdictional element, *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 551–52 (Tex. 2019). To resolve this type of plea, the trial court generally follows the procedures for traditional and no-evidence motions for summary judgment. *Id.*; *Miranda*, 133 S.W.3d at 227–28. Indeed, either of those motions may serve as the vehicle to assert

what is substantively a plea to the jurisdiction challenging the existence of jurisdictional facts. *Town of Shady Shores*, 590 S.W.3d at 550–51.

In deciding such a plea, the trial court first confirms that further factual development is not needed. *Id.* at 552 (noting that "no-evidence motions are permissible only '[a]fter adequate time for discovery'" (quoting Tex. R. Civ. P. 166a(i))); *Miranda*, 133 S.W.3d at 227 (explaining that "the trial court exercises its discretion in deciding whether the jurisdictional determination should be made at a preliminary hearing or await a fuller development of the case"). The court then reviews all the relevant evidence in the light most favorable to the plaintiff. *Town of Shady Shores*, 590 S.W.3d at 552; *Miranda*, 133 S.W.3d at 227–28.

The next step turns on whether the plea mirrors a traditional or no-evidence motion for summary judgment.

a. In a traditional-type plea, there are three possible outcomes. If the evidence is undisputed or fails to raise a fact question, the trial court rules on the plea to the jurisdiction as a matter of law. *Miranda*, 133 S.W.3d at 228. If the evidence creates a fact issue that does *not* implicate the merits, the court makes the fact findings necessary to resolve the jurisdictional issue. *See id.* at 226 ("'[W]hether a district court has subject matter jurisdiction is a question for the court, not a jury, to decide, even if the determination requires making factual findings, unless the jurisdictional issue is inextricably bound to the merits of the case.'" (quoting *Cameron v. Children's Hosp. Med. Ctr.*, 131 F.3d 1167, 1170 (6th Cir. 1997)). But if the evidence creates a fact question that also implicates the merits, the court must deny the plea. *Id.* at 227–28.

b. A no-evidence plea is a binary proposition. If the plaintiff's evidence fails to raise a fact question on the challenged jurisdictional element, the trial court must grant the plea. *Town of Shady Shores*, 590 S.W.3d at 551–52. But if that evidence raises a fact question, the court must deny the plea. *Id.*

3. A plea to the jurisdiction that challenges both the sufficiency of the pleadings and the existence of jurisdictional facts combines the arguments discussed above. *See Alamo Heights ISD*, 544 S.W.3d at 770. The plaintiff must respond to both. *See Akorede v. Tex. Workforce Comm'n*, No. 14-18-00827-CV, 2020 WL 1778194, at *2, *3 (Tex. App.—Houston [14th Dist.] Apr. 7, 2020, no pet.) (mem. op.) (noting that, because the plaintiff defended her pleadings but failed to submit evidence, she did not raise a fact question that would preclude granting the plea). The court applies the standards governing each respective type of challenge, ensuring that the pleadings are sufficient before reviewing the evidence. *E.g.*, *Amador v. City of Irving*, No. 05-19-00278-CV, 2020 WL 1316921, at *4, *6 (Tex. App.—Dallas Mar. 20, 2020, no pet.) (mem. op.).

C. The Board's amended plea to the jurisdiction challenged only the sufficiency of the Association's pleadings.

The Board's amended plea to the jurisdiction fell exclusively into the first category discussed above—it challenged only the sufficiency of the Association's pleadings. MR.16–37. That targeted approach was clear from explicit statements in the plea and the reply, the form of the plea, and the nature of the plea's arguments.

1. In the amended plea's introduction, the Board summarized the basis of the plea as the Association's failure to plead essential jurisdictional facts:

> [The Association's] petition *fails to affirmatively plead facts* that demonstrate this Court's subject matter jurisdiction over the declaratory judgment claims asserted against the State Pension Review Board and its Chair because of a lack of a waiver of sovereign immunity, a lack of standing, the lack of a justiciable controversy, and a lack of redressability.

MR.18 (emphasis added). Each of the next five sentences began by stating that the Association "pleads no facts," "does not plead any facts," or "has pled no facts" to establish necessary elements of standing and a waiver of immunity from suit. MR.18–19. In the argument section, the headings likewise declared that the specific jurisdictional defect challenged by the Board was that the Association had "failed to plead facts affirmatively demonstrating" subject-matter jurisdiction. MR.29, 31, 34.

The Board's reply expressly confirmed that the amended plea challenged only the sufficiency of the pleadings. MR.56–62. In response to the Association's request to conduct discovery "related to that plea," MR.47, the Board protested that no discovery was proper because its plea was only "a challenge to the sufficiency of [the Association's] petition," MR.56 (emphasis omitted). The Board distinguished that sort of pleading challenge from a plea "challenging jurisdictional facts" and affirmed that its plea fell squarely into the former class. MR.57. Given the nature of the plea, the Board explained, the "jurisdictional issue" before the trial court was "whether [the Association's] petition pleads sufficient facts" establishing jurisdiction. MR.61 (emphasis omitted).

2. The form of the Board's amended plea provided further proof that it challenged only pleading sufficiency. As explained above, a plea to the jurisdiction that challenges jurisdictional facts does so either by submitting evidence on the

jurisdictional issue or by asserting that no evidence supports a jurisdictional element. *Town of Shady Shores*, 590 S.W.3d at 551–52; *City of Magnolia*, 533 S.W.3d at 301; *see supra* Part I.B.2. The Board's plea did neither.

The Board did not submit any evidence with its amended plea. *See* MR.16–37. Nor did the plea even refer to evidence. *See* MR.16–37. The plea cited only the Association's petition and legal authorities relevant to the jurisdictional issues. MR.16–37. The phrase "no evidence" was also absent. *See* MR.16–37. Indeed, the word "evidence" appeared only in a discussion explaining the difference between a plea that challenges pleading sufficiency, such as the Board's, and a plea that challenges the existence of jurisdictional facts, in which the parties may submit evidence. MR.25.

3. Finally, the substantive arguments in the amended plea challenged only the sufficiency of the Association's pleadings.

The Board argued that the Association's pleadings failed to establish two conditions of the UDJA's limited waiver of immunity from suit. The Board explained that, while the UDJA waives immunity for a claim seeking to declare a statute unconstitutional, that waiver applies only to the relevant governmental entity that enforces or implements the challenged statute. MR.26–28 (citing, *inter alia*, *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (Tex. 2009)). Relatedly, the Board added, the UDJA also requires a justiciable controversy between the parties. MR.29 (citing *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995)). So, while the Association had pleaded that revised sections 6.12 and 6.13 of the Dallas System statutes were unconstitutional, MR.11–13, those allegations still fell short because, as a matter of law, the Board lacks authority to enforce or implement those sections and there

was thus no justiciable controversy between the Association and the Board. MR.33–35 (citing Tex. Rev. Civ. Stat. art. 6243a-1; Tex. Gov't Code §§ 801.001-.211, 802.001-.305).

For essentially the same reasons, the Board also argued that the Association's pleadings failed to satisfy the traceability and redressability elements of standing. While the Association had pleaded that its members were injured by the effects of revised sections 6.12 and 6.13 on their benefits, MR.9–11, the Board explained that those alleged injuries could not be traceable to the Board's conduct because, again, the Board has no authority under Texas law to enforce or implement those sections, MR.31–32. And that same lack of authority meant that a declaratory judgment against the Board could not redress the members' alleged injuries. MR.32–33.

D. The trial court abused its discretion by compelling the Board to submit to discovery before ruling on its jurisdictional challenge to the Association's pleadings.

Because the Board's amended plea to the jurisdiction challenged only the sufficiency of the Association's pleadings, the trial court had three options for disposing of it under this Court's precedent. As discussed above, those options were: (1) deny the plea on the ground that the Association had met its burden to allege facts that affirmatively demonstrated subject-matter jurisdiction; (2) deny the plea on the ground that, although the Association had not met its pleading burden, that deficiency could be cured by affording the Association leave to amend the petition; or (3) grant the plea on the ground that the Association had not met its pleading burden and the deficiency was incurable. *Miranda*, 133 S.W.3d at 226–27; *see supra* Part I.B.1.

The trial court did none of those things. It neither denied nor granted the plea. MR.92. Instead, it ordered the Board to submit to the Association's discovery request to depose a Board representative and to obtain documents from the Board. MR.49–54, 92. That was an abuse of discretion.

1. To begin, the trial court departed from the Court's framework for resolving pleas to the jurisdiction set forth in *Miranda*.

In *Miranda*, the Court sharply distinguished a plea that "challenges the pleadings," like the Board's, from a plea that "challenges the existence of jurisdictional facts." 133 S.W.3d at 226–27. When a plea challenges the pleadings, *Miranda* instructs courts to "construe the pleadings." *Id.* at 226. Only "*if* a plea to the jurisdiction challenges the existence of jurisdictional facts" does the court "consider relevant evidence" and "exercise[] its discretion in deciding whether the jurisdictional determination should be made at a preliminary hearing or await a fuller development of the case." *Id.* at 227 (emphasis added).

By ordering discovery to develop evidence and deferring a ruling on the Board's plea, the trial court erroneously took this Court's instructions for resolving pleas that challenge jurisdictional facts and applied them to a plea that challenges the pleadings. The court had no discretion to commit that legal error. *Walker*, 827 S.W.2d at 840.

2. The distinction drawn in *Miranda* further shows that only the party *challenging* jurisdiction may open the door to an evidentiary inquiry; the party *responding* to the jurisdictional plea may not do so. Here, the Board did not open that door.

If the plea to the jurisdiction challenges only the pleadings, the plaintiff may respond by (1) amending its pleadings to address the defects asserted in the plea or

(2) defending the sufficiency of its pleadings until a court determines that the plea is meritorious. *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 839–40 (Tex. 2007). And in the latter scenario, the plaintiff still may amend its pleadings if the defects can be cured. *Id.*; *see also Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993) (noting that "a litigant has a right to amend to attempt to cure pleading defects if jurisdictional facts are not alleged"). But the Court has never given the plaintiff the option to unilaterally convert a pleadings challenge into an evidentiary one by requesting discovery or introducing evidence. Indeed, that sort of turnabout would defeat the purpose of a pleadings challenge based on immunity from suit, which allows an immune defendant to extricate itself from the burdens of litigation without being forced to undertake those burdens unnecessarily. *See infra* Part I.D.4.

Only when the defendant initially relies on evidence (or an assertion of no evidence) to challenge the existence of jurisdictional facts may the plaintiff counter with its own jurisdictional evidence. *Mission Consol. ISD*, 372 S.W.3d at 637 (noting that, while a plaintiff "must plead the elements of her statutory cause of action" to invoke the immunity waiver in the Texas Commission on Human Rights Act, "she will *only* be required to submit evidence *if* the defendant presents evidence negating one of those basic facts" (emphases added)); *see also Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 391 (Tex. 2016) ("Once [the defendant] asserts *and supports with evidence* that the trial court lacks jurisdiction, we require [the plaintiff] to show only that there is a disputed material fact regarding the jurisdictional issue." (emphasis added)). After all, if the defendant is *not* challenging the existence of jurisdictional facts, the plaintiff's well-pleaded allegations are taken as *true*—a presumption that

obviates the need for any evidence. *Rangel*, 595 S.W.3d at 205; *Westbrook v. Penley*, 231 S.W.3d 389, 405 (Tex. 2007).

For that reason, it is only "when an *evidence-based* jurisdiction challenge is asserted" that "[s]ome tailored or limited discovery may be appropriate." *In re Hoa Hao Buddhist Congregational Church Tex. Chapter*, No. 01-14-00059-CV, 2014 WL 7335188, at *5 (Tex. App.—Houston [1st Dist.] Dec. 23, 2014, orig. proceeding) (mem. op.) (emphasis added) (citing *Miranda*, 133 S.W.3d at 227). Consistent with that rule, Texas courts of appeals have routinely affirmed trial-court orders that refused requests for discovery to respond to *pleadings-based* jurisdictional challenges. *E.g.*, *Zumwalt v. City of San Antonio*, No. 03-11-00301-CV, 2012 WL 1810962, at *8 (Tex. App.—Austin May 17, 2012, no pet.) (mem. op.) (finding no abuse of discretion in denying discovery before the plea hearing where the plea "did not include or rely on evidence; rather, it was based solely on the statutory language and the allegations in [the plaintiff's] pleadings"); *Brooks v. Chevron USA Inc*, No. 13-05-00029-CV, 2006 WL 1431227, at *5 (Tex. App.—Corpus Christi May 25, 2006, pet. denied) (mem. op.) (finding no abuse of discretion in denying discovery where the plea challenged the plaintiff's standing "based on the pleadings"); *Hammons v. City of Krugerville*, No. 2-04-353-CV, 2005 WL 2838602, at *3 (Tex. App.—Fort Worth Oct. 27, 2005, pet. denied) (rejecting the plaintiff's argument that "*Miranda* entitled him to at least 'reasonable opportunity for targeted discovery'" where "the City's

plea to the jurisdiction did not challenge the existence of jurisdictional facts" (quoting *Miranda*, 133 S.W.3d at 233)).[8]

Because the Board's amended plea to the jurisdiction challenged only the sufficiency of the Association's pleadings, *see supra* Part I.C., it did not enable an evidentiary inquiry into any jurisdictional facts. Accordingly, the Association's discovery request was neither necessary nor appropriate to resolution of the plea. The trial court abused its discretion by ordering that discovery to proceed. *See City of Galveston v. Gray*, 93 S.W.3d 587, 591–92 (Tex. App.—Houston [14th Dist.] 2002, orig. proceeding) (holding that the trial court abused its discretion in refusing to rule on pleas to the jurisdiction and ordering discovery, in part because the assumption that the well-pleaded facts in the petition are true leaves "no factual disputes in need of a resolution before the trial court rules on the pleas to the jurisdiction"); *see also In re Hays Cty. Sheriff's Dep't*, No. 03-12-00343-CV, 2012 WL 6554815, at *4 (Tex. App.—Austin Dec. 12, 2012, orig. proceeding) (Pemberton, J., concurring) (explaining that when a "plea challenges only the sufficiency of [the] pleadings," that posture "serves to sharply limit any discretion possessed by the district court to defer its ruling on the [the] plea to allow for additional discovery").

3. The trial court also violated this Court's directive to "determine *at its earliest opportunity* whether it has the constitutional or statutory authority to decide the

[8] *See also McElmurray*, 501 F.3d at 1250–51 (holding that the district court did not err in dismissing a case for lack of subject-matter jurisdiction without permitting discovery where the jurisdictional challenge was a "facial attack" on the complaint and, therefore, "[d]iscovery was not necessary").

case before allowing the litigation to proceed." *Miranda*, 133 S.W.3d at 226 (emphasis added); *see also id.* at 227 (noting that the jurisdiction determination "must be made as soon as practicable").

Because the Board's amended plea to the jurisdiction challenged only the sufficiency of the Association's pleadings, the trial court had an opportunity to assess its subject-matter jurisdiction before any discovery occurred. *See id.* But the court bypassed that opportunity by deferring a decision on the Board's plea and ordering discovery. MR.92. In doing so, it may have impermissibly compelled a party to submit to discovery in a case in which it has no authority. *See City of Anson v. Harper*, 216 S.W.3d 384, 390 (Tex. App.—Eastland 2006, no pet.) ("If the trial court does not have jurisdiction to enter a judgment, it does not have jurisdiction to allow plaintiffs to conduct discovery."); *accord In re Astrotech Corp.*, No. 03-13-00624-CV, 2014 WL 711018, at *2 (Tex. App.—Austin Feb. 14, 2014, orig. proceeding) (mem. op.). That sort of untenable result is the very thing that *Miranda*'s directive about resolving subject-matter jurisdiction at the "earliest opportunity" is designed to avoid. *See Miranda*, 133 S.W.3d at 226. The trial court abused its discretion by contravening that mandate.

4. Finally, the trial court's erroneous application of *Miranda* was especially harmful because the Board's amended plea to the jurisdiction was based in part on sovereign immunity from suit. MR.30–31, 34–36.[9]

[9] Because the Chair was sued in her official capacity and the Association did not allege an *ultra vires* claim, the Chair enjoys the same immunity from suit as the Board. *Franka v. Velasquez*, 332 S.W.3d 367, 382–83 (Tex. 2011).

One purpose of immunity from suit is to "shield[] governments from the costs of any litigation." *City of Houston v. Williams*, 216 S.W.3d 827, 829 (Tex. 2007) (per curiam); *see also Rusk State Hosp.*, 392 S.W.3d at 108 (Lehrmann, J., concurring in part) (observing that "immunity from suit protects the government from the expense involved in defending lawsuits"). That purpose is defeated when a trial court forgoes a ripe opportunity to rule on immunity from suit and subjects a governmental defendant to discovery. *See Gray*, 93 S.W.3d at 591 (agreeing that "a governmental unit's entitlement to be free from suit is effectively lost if the trial court erroneously assumes jurisdiction and subjects the governmental unit to pre-trial discovery and the costs incident to litigation"); *see also Texas v. Caremark, Inc.*, 584 F.3d 655, 658 (5th Cir. 2009) (noting that "the very object and purpose of sovereign immunity is to protect the state from the coercive process of judicial tribunals at the instance of private parties," and "the value of sovereign immunity is for the most part lost as litigation proceeds past motion practice" (citation and internal quotation marks omitted)).

Here, the trial court deprived the Board of the protection of its immunity from suit by deferring a ruling on its immunity-based plea to the jurisdiction, which challenged only the Association's pleadings, and subjecting it to discovery. For this additional reason, the court's order was an abuse of discretion. *See In re Lamar Univ.*, No. 09-18-00241-CV, 2018 WL 3911062, at *3 (Tex. App.—Beaumont, Aug. 16, 2018, orig. proceeding) (per curiam) (mem. op.) ("A trial court abuses its discretion when it subjects a governmental unit to pre-trial discovery and the costs incident to litigation without ruling on a plea to the jurisdiction."); *Gray*, 93 S.W.3d at 592

(holding that the trial court abused its discretion by refusing to rule on immunity-based pleas to the jurisdiction and granting a continuance to allow discovery).

II. The Association's Defenses of the Trial Court's Discovery Order Are Unavailing.

In its response to the mandamus petition, the Association suggests that trial courts generally have discretion to decide whether to permit discovery in response to *any* plea to the jurisdiction. Resp. 4–7. And it urges that the trial court properly exercised that discretion here to afford the Association discovery to respond to "disputed factual assertions" in the Board's amended plea to the jurisdiction. *Id.* at 8. That discovery should proceed, the Association concludes, because it is appropriately limited in scope. *Id.* at 10–12. The Association is wrong on all counts.

A. The Association erroneously conflates the different types of pleas to the jurisdiction.

The Association never acknowledges the difference between pleas to the jurisdiction that challenge the sufficiency of the pleadings and those that challenge the existence of jurisdictional facts. Instead, it lumps all jurisdictional pleas together and claims that they are all subject to the general (and unhelpful) rule that "some pleas to the jurisdiction need discovery; some do not; and some may need limited discovery." Resp. 6. Sorting those out, according to the Association, is simply "a matter of discretion," subject only to the basic principle that discovery must be "relevant." Resp. 6–7. That is incorrect.

1. As explained above, this Court has already done the work of selecting which pleas to the jurisdiction require discovery and which do not. *See supra* Parts I.B, D.

When a plea to the jurisdiction challenges only the sufficiency of the pleadings, the trial court construes the petition's allegations in light of the applicable law and determines whether they affirmatively establish subject-matter jurisdiction or can be amended to do so. *Miranda*, 133 S.W.3d at 226–27. That task requires no evidence and, thus, no discovery. It is only when a plea challenges the existence of jurisdictional facts that the plaintiff must respond with evidence. *Town of Shady Shores*, 590 S.W.3d at 551–52; *Miranda*, 133 S.W.3d at 227–28. In *that* scenario, limited discovery that allows the plaintiff to develop that evidence may be necessary. *Hoa Hao Buddhist Congregational Church*, 2014 WL 7335188, at *5 (citing *Miranda*, 133 S.W.3d at 227).

2. The authorities cited by the Association do not suggest otherwise. The Association quotes *Miranda* for the proposition that "a trial court may consider 'relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised.'" Resp. 5 (quoting *Miranda*, 133 S.W.3d at 227). That quotation omits the first part of the sentence: "*However, if a plea to the jurisdiction challenges the existence of jurisdictional facts*, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, as the trial court is required to do." *Miranda*, 133 S.W.3d at 227 (emphasis added). The word "[h]owever" signaled that the Court was distinguishing pleas that challenge the sufficiency of the pleadings, which it discussed in the previous paragraph. *Id.* at 226–27. And the full sentence makes plain that courts consider relevant evidence only "if" the plea "challenges the existence of jurisdictional facts." *Id.* at 227.

The Association also cites the Court's earlier decision in *Bland Independent School District v. Blue*, 34 S.W.3d 547 (Tex. 2000), in arguing that "a trial court

deciding a plea to the jurisdiction need not look solely to the pleadings but *may* consider evidence." Resp. 6. But the Association ignores that in *Bland ISD* the plea had attached evidence challenging the petition's factual allegations relevant to standing. 34 S.W.3d at 550, 555. It was in that context that this Court held that a court deciding a plea to the jurisdiction "may consider evidence." *Id.* at 555. Indeed, the Court placed that holding in context in *Miranda*, citing it to explain that a court considers evidence "if a plea to the jurisdiction challenges the existence of jurisdictional facts." *Miranda*, 133 S.W.3d at 227 (citing *Bland ISD*, 34 S.W.3d at 555).

For similar reasons, the Association misplaces reliance (at 8) on the Beaumont Court of Appeals' generalization that "[a] trial court has discretion to permit the parties to conduct limited discovery on jurisdictional issues." *Lamar Univ.*, 2018 WL 3911062, at *3 (citing *In re CMM Constr. Co.*, No. 09-05-096-CV, 2005 WL 913438, at *2 (Tex. App.—Beaumont Apr. 21, 2005, orig. proceeding) (per curiam) (mem. op.)). Although that particular statement did not distinguish pleas to the jurisdiction that challenge the pleadings from those that challenge jurisdictional facts, the court's authority for that statement was *Miranda*, which did. *CMM Constr.*, 2005 WL 913438, at *2 (citing *Miranda*, 133 S.W.3d at 227–28). Again, under *Miranda*, a plaintiff needs evidence only if the plea challenges jurisdictional facts. 133 S.W.3d at 227.

Finally, the Association gets nowhere by invoking the general rule that parties may obtain discovery "'relevant to the subject matter of the pending action.'" Resp. 7 (quoting Tex. R. Civ. P. 192.3). *No* discovery could be relevant to a plea to the jurisdiction that challenges only the sufficiency of the pleadings. The trial court

resolves such a plea by construing the factual allegations in the pleadings in light of the applicable law. *City of Magnolia*, 533 S.W.3d at 301; *Miranda*, 133 S.W.3d at 226–27. Accordingly, "[t]he existence of any additional facts not alleged in the pleadings, such as might conceivably be uncovered through the discovery contemplated by the district court's order, is not, strictly speaking, necessary or material to the jurisdictional issue presented here." *Hays Cty. Sheriff's Dep't*, 2012 WL 6554815, at *4 (Pemberton, J., concurring); *see also supra* Part I.D.2.[10]

B. The Association does not need discovery to address purported "factual assertions" in the Board's plea.

Not only does the Association overlook the distinction between different types of pleas to the jurisdiction, but its entire argument for seeking discovery rests on the false premise that the Board's plea is based on "facts." In the Association's view, the Board "factually asserted" in its plea that it lacks authority to enforce or implement the two statutes challenged in this suit or to mandate that the Dallas System enforce or implement those statutes in a particular way (or not at all). Resp. 5–6. The Association claims that it is entitled to "test" those "factual assertions" and

[10] In this sense, a plea to the jurisdiction that challenges only the sufficiency of the pleadings is analogous to a motion to dismiss under Texas Rule of Civil Procedure 91a. Because resolution of those motions is also confined to the pleadings, Tex. R. Civ. P. 91a.6, they are decided "before the parties engage in costly discovery." *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 656 (Tex. 2020); *see also Gonzales v. Dall. Cty. Appraisal Dist.*, No. 05-13-01658-CV, 2015 WL 3866530, at *5 (Tex. App.—Dallas June 23, 2015, no pet.) (mem. op.) (rejecting the argument that "the trial court should not have granted the [Rule 91a] motion to dismiss until Gonzales had the opportunity to conduct discovery").

"confirm" the Board's "representations" before responding to the plea. *Id.* at 6, 7. To that end, the Association explains that it "sought limited discovery, focused on the essential and disputed factual allegations" in the plea. *Id.* at 8. The Association is wrong.

The "assertions," "representations," and "allegations" that the Association refers to are matters of law, not fact. "[S]tatutorily created agencies" have "only the authority that the Legislature confers upon them by statute." *Tex. Coast Utils. Coal. v. R.R. Comm'n*, 423 S.W.3d 355, 367 (Tex. 2014); *see also City of Sherman v. PUC*, 643 S.W.2d 681, 686 (Tex. 1983) ("Agencies may only exercise those powers granted by statute, together with those necessarily implied from the statutory authority conferred or duties imposed."). As statutory matters, the existence and scope of a state agency's authority present questions of law. *See Employees Ret. Sys. of Tex. v. Duenez*, 288 S.W.3d 905, 908–09 (Tex. 2009) (holding that whether an agency has exclusive jurisdiction is a question of law); *Bayou Pipeline Corp. v. R.R. Comm'n*, 568 S.W.2d 122, 123 (Tex. 1978) (holding that whether an agency had authority to fix transportation rates is a question of law); *see also State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 246 (Tex. 1994) (construing a statute to determine the extent of an agency's authority). The Association cannot transform these questions of law into questions of fact simply by labeling them as such.

Moreover, the Board's statements about its authority in its plea were not "factual" assertions or allegations. The Board explained the scope of its authority, including its authority related to the HB 3158 amendments, entirely by reference to chapters 801 and 802 of the Texas Government Code and the statutory provisions

governing the Dallas System—just as it has done in this brief. MR.20–23. The Association is free to dispute the Board's reading of those statutes in response to the plea, but that sort of argument requires no discovery. *See Employees Ret. Sys. of Tex. v. Putnam*, 294 S.W.3d 309, 323 (Tex. App.—Austin 2009, no pet.) (op. on reh'g) (holding that the trial court properly denied a request for jurisdictional discovery where "the sole jurisdictional issue" was "purely a question of law").

The Association's proffered example of supposedly relevant discovery proves this point. In its plea, the Board explained that its general duties include "'recommend[ing] policies, practices, and legislation to public retirement systems and appropriate governmental entities.'" MR.21 (quoting Tex. Gov't Code § 801.202). In the Association's view, the Board's reliance on that statutory language opened the door to a deposition on the Board's "analysis" of HB 3158 and the Board's "recommendations, policies, and procedures to implement HB 3158" and "to oversee implementation of HB 3158." Resp. 7. But that discovery would be irrelevant to the jurisdictional issue raised here: because the Board can only "recommend" policies and practices to retirement systems, as a matter of law it has no authority to enforce or implement HB 3158, which means it is the wrong defendant in a suit seeking to declare parts of HB 3158 unconstitutional. *Meyers*, 548 S.W.3d at 487 (explaining that standing turns in part on whether the plaintiff has shown that the defendant has authority to respond to the requested relief); *Sanchez v. Saghian*, No. 01-07-00951-CV, 2009 WL 3248266, at *6 (Tex. App.—Houston [1st Dist.] Oct. 8, 2009, no pet.) (mem. op.) ("[A] party with authority to enforce a particular statute must be named in a suit to declare the statute unconstitutional.").

C. The extent of the discovery sought is not the point.

The Association misses the mark when it emphasizes the limited scope of its discovery request. Resp. 10–12 (noting that it seeks a "single three-hour deposition" and revised the time frame for certain deposition topics and document requests to the period on or after January 1, 2014). There is no de minimis exception at play here. In *Miranda*, the Court drew a clear line between pleas to the jurisdiction that challenge only the sufficiency of the pleadings, which do not involve the consideration of evidence, and pleas that challenge jurisdictional facts, which do require consideration of evidence. 133 S.W.3d at 226–28. By ordering *any* discovery before ruling on the Board's pleadings-based jurisdictional challenge, the trial court crossed that line.

Likewise, being subjected to any amount of discovery deprives the Board of the protection of its immunity from suit. *See Lamar Univ.*, 2018 WL 3911062, at *3; *Gray*, 93 S.W.3d at 591–92; *see also supra* Part I.D.4. The Association contends that *Lamar University* and *Gray* are inapposite because, in those cases, the trial courts refused to rule on pleas to the jurisdiction and allowed *merits-related* discovery. Resp. 8–9. But the principle is the same. Whether a trial court defers ruling on a plea to the jurisdiction to allow merits-related discovery or, as here, purportedly "jurisdictional" discovery that is irrelevant to the issues raised in the plea, the court improperly frustrates the purpose of immunity from suit.

Prayer

The Court should grant the petition and issue a writ of mandamus directing the trial court to withdraw its order of October 16, 2019, granting the Association's request to conduct discovery before responding to the Board's plea to the jurisdiction.

Respectfully submitted.

Ken Paxton
Attorney General of Texas

Jeffrey C. Mateer
First Assistant Attorney General

Ryan L. Bangert
Deputy First Assistant
Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Kyle D. Hawkins
Solicitor General

Bill Davis
Deputy Solicitor General

/s/ Rance Craft
Rance Craft
Assistant Solicitor General
State Bar No. 24035655
Rance.Craft@oag.texas.gov

Cynthia A. Morales
Assistant Attorney General

Counsel for Relators

Certificate of Service

On June 18, 2020, this document was served electronically on George W. Vie III, lead counsel for real party in interest Dallas Police Retired Officers Association, via george.vie@feldman.law.

/s/ Rance Craft
Rance Craft

Certificate of Compliance

Microsoft Word reports that this document contains 10,701 words, excluding the portions of the document exempted by Rule 9.4(i)(1).

/s/ Rance Craft
Rance Craft

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below:

Cecilia Hertel on behalf of Rance Craft
Bar No. 24035655
cecilia.hertel@oag.texas.gov
Envelope ID: 43842490
Status as of 06/18/2020 12:51:07 PM -05:00

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Shannon Almes	24094957	Shannon.smittick@feldman.law	6/18/2020 9:14:14 AM	SENT
David M. Feldman	6886700	david.feldman@feldman.law	6/18/2020 9:14:14 AM	SENT
George William Vie	20579310	george.vie@feldman.law	6/18/2020 9:14:14 AM	SENT
Rance Craft		rance.craft@oag.texas.gov	6/18/2020 9:14:14 AM	SENT
Cecilia Hertel		cecilia.hertel@oag.texas.gov	6/18/2020 9:14:14 AM	SENT

Associated Case Party: State Pension Review Board

Name	BarNumber	Email	TimestampSubmitted	Status
Cynthia Morales		cynthia.morales@oag.texas.gov	6/18/2020 9:14:14 AM	SENT

Associated Case Party: Dallas Police Retired Officers Association

Name	BarNumber	Email	TimestampSubmitted	Status
George WilliamVie III		george.vie@feldman.law	6/18/2020 9:14:14 AM	SENT