

Procedure 194, including relevant documents.

CLAIMS FOR RELIEF

Petitioners seek injunctive and declaratory relief. This action is not governed by the expedited actions process in Tex. R. Civ. P. 169.

WAIVER OF SOVEREIGN IMMUNITY

Respondents do not have governmental immunity under their actions which are *ultra vires* acts. Tex. Local Gov't Code §174.008. The execution of the Executive Order cannot be considered as a valid act of the state due to its non-compliance with other state law and policies and is without legal authority. Tex. Govt Code *See Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 158 (Tex. 2016). Petitioners are essentially acting as a private attorney generals and seeking to control the improper actions of an agent of the governmental entity as the Executive Order is without legal authority. See *Cobb v. Harrington*, 144 Tex. 360, 190 S.W.2d 709, 712 (1945); also, *Tex. Parks & Wildlife Dep't v. Sawyer Tr.*, 354 S.W.3d 384, 386, 393 (Tex. 2011) (implying an *ultra vires* claim might succeed against the Parks and Wildlife Department for a mistaken application of the agency Code).

I. PARTIES

1. Petitioners are all current employees of the Harris County Sheriff's Office employed as a Deputy Sheriffs, Detention Officers, and or administrative employees who have accumulated and earned their various property rights in compensatory time and or vacation time and have earned accumulated sick leave benefits. Petitioner Madglean Branch is a current Detention Officer employed with Defendants.

2. Sheriff Ed Gonzalez is the elected Sheriff of the Harris County Sheriff's Office ("HCSO") in Harris County, Texas, and can be found at 1200 Baker Street, Houston, Texas 77002. He is the chief policymaker for the Harris County Sheriff's Office.

3. Harris County is an administrative body that governs, approves, and or oversees the Harris County Sheriff's Offices. Harris County may be served via County Judge Lina Hidalgo, at 1001 Preston Street, Houston, Texas 77002.

II. JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over the matter pursuant to Art. V, §8 of the Texas Constitution and Tex. Civ. Prac. & Rem. Code §65.001, et seq. and §§ 65.011 and 65.021 as the Petitioners will suffer and or are about to suffer deprivation of their property rights and rights to due process unless restrained.

5. This Court has also jurisdiction to grant writs of mandamus pursuant to writ power afforded by Texas Government Code §24.011 ("A judge of a district court may, either in termtime or vacation, grant writs of mandamus, injunction, sequestration, attachment, garnishment, certiorari, and supersedeas and all other writs necessary to the enforcement of the court's jurisdiction.")

6. Venue is proper pursuant to Tex. Civ. Prac. & Rem. Code §15.002 because all of the events giving rise to the claim occurred in Harris County, Texas, and all the claims relate to the business of the Harris County Sheriff's Office and or Harris County.

III. FACTS

7. On March 7, 2023, the HCSO issued Executive Order (03-2023) ("the Order") with the effective date of March 11, 2023. Attached as Exhibit "A." This order mandated that "all non-exempt personnel who have accrued, or are about to reach, 180 compensatory hours, will be required to utilize their Compensatory Time instead of: Sick Leave – *except as required by FMLA Form 0455B*; Family Sick Leave; or Vacation." Exhibit "A" Executive Order (03-2023) pg 2. This Order is the basis for this action.

8. Petitioners have exhausted all administrative remedies. The Sheriff's Civil Service

Commission was created pursuant to Subchapter B, Tex. Loc. Gov't Code §158.034. It is not authorized and it will not hear the nature of this matter as it pertains to economic benefits. *See* Rule 13.03 (2)

9. Consistent with Tex. Loc. Govt Code §160.005 *et seq.*, Respondents have adopted, published, and established a grievance procedure regarding certain issues arising during the course of employment.

10. Respondents have established rules and policies and have periodically amended such rules, policies, and regulations (“Policies”), including policies related to employee benefits and compensation packages, that are required to be in compliance with the Fair Labor Standards Act, 29 USC §201 *et seq.*

11. Petitioner Branch became ill on or about April 13, 2023, requiring her to seek medical treatment at the hospital emergency room. Petitioner Branch’s treating medical doctor provided her with a valid note to not return to work until April 17, 2023. Petitioner Branch notified her sergeant supervisor and also provided the medical doctor’s note through email communication on April 14, 2023.

12. At the time, Petitioner Branch was not on FMLA.

13. On April 14, 2023, the sergeant supervisor informed Petitioner Branch that she did not need to call in each day and he coded her as being out sick on the time records he keeps on employees under his supervision.

14. On April 18, 2023, after Petitioner Branch’s return to work, she requested her supervising Sergeant to provide a copy of her medical doctor’s note to the payroll department so that her sick leave would be properly supported and documented. The supervising sergeant responded on April 19, 2023, that he had already coded her time off as being sick leave and had submitted the

medical doctor's note to payroll. However, the sergeant also informed Petitioner Branch that because of the new "rules" payroll changed her time off as being use of her compensatory time.

15. Petitioner Branch did not request, authorize, consent, or desire to use her earned accrued compensatory while she was using her earned sick leave benefits. According to her supervising Sergeant, the payroll department has been instructed through the implementation of the new rules (Executive Order 03-2023) to change sick leave to compensatory when the employee has over 180 hours of accrued compensatory time.

16. Due to existing policies in place at HCSO, Petitioner Branch knew and believed that when she called in sick, she was subject to these policies which include providing a doctor's note to her supervisor— thereby giving to her immediate supervisor portions of her medical information— and being restricted from leaving her house during the time she is out sick.

17. Petitioner Branch has no remedy with Harris County to provide her any relief.

18. All Petitioners are supposed to earn wages at one and one-half their regular hourly rate in excess of forty (40) hours.

19. Petitioners are allowed to accumulate various economic benefits based upon hours worked as well as overtime hours worked but these benefits are not immediately paid but are accumulated as "compensatory time." *See* Harris County Policy Section 11 (2021). The Harris County Sheriff's Office must keep the monetary amount of the total employee compensatory time balance held apart from the regular funds of the HCSO budget. The funds held due to compensatory time balances may not be mixed with regular budget funds and these funds may not be spent except to meet the obligation of paying out employee compensatory time balances. Fund may be removed from this trust when or if compensatory time is used as a day off and funds can then be moved into the regular budget for the Sheriff to spend at his discretion.

According to the Texas Comptroller of Public accounts website, Respondents are required to report and maintain both current and non-current compensable leave accounting balances regarding their net funds available. Current compensable leave accounting balances are a reference to the available fund balances in the Respondent Sheriff's budget. Respondent Sheriff has to maintain a current fund balance regarding payment of earned compensatory time. This fund balance cannot be used as it must be maintained to ensure compensatory time is paid.

20. When an employee separates from HCSO, they are paid out the balances of certain earned time benefits. An employee is owed monetarily for any compensatory time or vacation time the employee did not use. An employee is not paid for any sick time they did not use. If an employee is forced to use their compensatory time instead of their sick time, then that employee would not be compensated for the sick time that they have been forced by HCSO to keep if they were to separate from employment.

21. The sick leave balances are non-current liabilities and are not required to be held in an available fund as with compensatory time funds. Compensatory time is a current liability and must be funded and is not transferable to other funds. Sick leave funds are non-current funds and can be shifted around in the budget.

22. The fund balance regarding compensatory funds is essentially treated as trust funds and must be maintained and accounted for by Respondents. Upon information and or belief, the reason for Respondents to require use of compensation funds is to reduce the amount of liabilities so that these funds can be used for other projects. *See* GASB 16; Statement of Cash Flows (SOCF) as a reflection of operating cash flows (available funds for payment of compensatory time).

23. Respondents, upon information and belief, desire to fund other projects and avoid

payments being owed to Petitioners.

24. Respondents are limited to exercising those powers that are specially conferred by statute or the state constitution. *Gynes v. Galveston Cty.*, 861 S.W. 2d 861, 863 (Tex. 1993). Commissioners' Court has the implied power to perform its duties. *City of San Antonio v. City of Boerne*, 111 S. E. 3d 22, 29 (Tex. 2003). Respondents' unilateral decision to change Petitioners' use of their earned economic benefits that is not restricted by having permission creates substantial doubt and must be resolved by the court. *See Foster v. City of Waco* 255 S.W. 1104 (Tex 1923). The changing of designation of sick leave usage is not authorized and places Petitioners in a precarious situation.

25. With Executive Order (03-2023) Respondents changed Petitioners use of their earned benefits.

26. Under HCSO policy, when an employee calls in sick, they would be ordered to comply with sick leave policy to include, staying confined to their home, bringing in a doctor's excuse for their absence, and, if they are authorized to work extra employment, then they are barred from working extra employment when on sick leave. When an employee utilizes compensatory Time leave, the employee must preschedule the leave with their supervisor and must get approval for that leave. While on leave, the employee is on their own time and cannot be ordered on how to use that time except during times of immediate emergency.

27. After the implementation of the Order, if an employee calls in sick, they are still ordered to comply with HCSO policy on sick leave and will mark their payroll sheets for the sick leave that they took; however, HCSO will change the sick leave designation to compensatory leave without the consent of the employee.

28. Petitioners are required to sign and approve their payroll sheets that have designated use

of their sick leave benefits. Executive Order (03-2023) appears to have the effect and impact of forcing Petitioners to falsify a government document as they did not request usage of compensatory time or holiday leave in lieu of their decision and or necessity to rely on and exercise their earned sick leave benefits.

29. Petitioners' overtime hours are not paid at the time of accumulating such hours but are provided "compensatory time" accrual of such overtime hours usually not to exceed 240 hours. Compensatory time are wages belonging to the Petitioners that can be used as paid time off when they desire but has to be approved by Respondents. Compensatory time can be controlled by the Respondents as such cannot be used by the employee without prior permission from Respondents.

30. Compensatory time that exceeds the accrual limits must be paid to the employee in the form of overtime payment or the employee may be directed to use such time by the employer to reduce the amount of compensatory time fund balance set aside in the Respondents budget to pay the employees.

31. Petitioners earn as an established economic employment benefit a property right accumulated at certain number of hours based upon hours worked identified as "vacation pay benefits" which accumulate each pay period and can be used only at the discretion of the employee if approved in advance or otherwise by the Respondents. Respondents are prohibited from forcing Petitioners to use their vacation pay unless such is necessary for extended leave under the Family Medical Leave Act ("FMLA").

32. Petitioners earn as an established employment economic benefit and property right accumulated at a certain number of hours based upon hours worked identified as "sick leave" that is allowed at primarily the discretion of the employee should that employee be ill or need to

care for an immediate family member. This benefit does not depend on or require the permission of the Respondents. This benefit belongs to the Petitioners and this benefit can be donated under certain circumstances within policies as well as at the discretion of Petitioners. (Harris County Policy 12)

33. Harris County Policies do not allow for substitution of benefits at the will and discretion of the employer. Respondents have established according to state law, uniform hours of work and are supposedly prohibited from working employees from unbudgeted overtime unless such is established as a particular type of emergency. *See* Govt. Code, §157.021 et seq.

34. According to Tex Gov't Code, §157.022 the Sheriff is supposed to declare a particular emergency prior to being able to utilize Respondent County funds for unscheduled overtime. The Respondents have refused to address and or disclose the overtime budget fund and or balances.

35. The established definition and or identification regarding various leave benefits are consistent throughout the State of Texas which includes, other than potential FMLA issues, the accumulation of employee leave benefits that are earned property rights of Petitioners. No other state or municipal agency in the State of Texas allows for the random substitution of benefits solely at the discretion of the employer or employer's supervisor. Harris County does not provide or allow its supervisors to establish policies that allow the control of employees earned benefits without the permission or agreement of the employee.

36. Respondents instituted the Executive Order (03-2023) and have been taking Petitioners earned benefits in lieu of their earned sick leave benefits without a hearing or opportunity to be heard. Based upon the nature of the Order, Petitioners are unable to grieve and or challenge the event as they are not notified until the next pay period of the change of status they have not agreed. *See* Fourteenth Amendment to U.S. Constitution. *See* Exhibit "A."

37. Petitioners are suffering irreparable harm believing they have available their earned compensatory time to attempt to plan for and or schedule time off when approved.

38. Removal of their earned property right without notice or opportunity to choose which benefit to use is a right granted by Respondent Harris County and still applies to all other Harris County employees other than Sheriff Office employees. *See* Exhibit “A.”

39. Petitioners are being deprived of earned benefits that have a far different character and more valuable than sick leave benefits as the Petitioners can request time off that is not conditioned upon being sick or limited to caring for a family member and may require the expense of going to a medical provider for a conformation.

40. Petitioners are being deprived of their sick leave benefits and treated differently than all other state, county, or municipal government employees. *See*. Tex. Gov’t Code §662.202

41. Petitioners have no administrative remedies available due to the nature of the Order issued and have no plain remedy at law. Petitioners will suffer irreparable harm as they will be precluded from attempting to use their earned benefits accrued from overtime work well beyond their normal hours. Tex. Gov’t Code §§ **659.015, 659.016, 659.022, 659.023, and 662.152.**

42. Compensatory time use does not require any valid reason and can be used for any reason other than the approval of the date to use which can be used in conjunction with vacation time. No reason needs to be provided. However, sick leave is restricted to being ill and limited but does not require prior approval.

43. No direct harm exists as the benefits are already earned and owed to Petitioners. The Principles of Equity are to govern proceedings in injunctions. Tex. R. Civ. P. Rule 693. There is no loss of pecuniary benefit to Respondents but a deprivation to Petitioners.

44. No valid sustainable reason exists to justify the taking of Petitioners’ earned economic benefits without due process and or ability to elect whether they desire to choose which benefit

to utilize impacting their earned economic property benefits.

IV. CAUSES OF ACTION

A. Declaratory Judgement

45. The Petitioners request this Court issue a writ to require the Respondents to revoke the adopted Executive Order (03-2023) (Exhibit “A”). In the alternative, the Petitioners seeks that this Court void the Executive Order and or hold such order in abeyance pending a full evidentiary hearing. To be entitled to relief by writ of mandamus, Petitioners must demonstrate that there is no adequate remedy at law. *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992). A writ of mandamus will be issued to compel a public official to perform a ministerial act. *Womack v. Berry*, 156 Tex. 44, 291 S.W.2d 677 (1956); *Turner v. Pruitt*, 161 Tex. 532, 342 S.W.2d 422 (1961).

46. An act is ministerial when the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991), citing *Depoyster v. Baker*, 89 Tex. 155, 34 S.W. 106 (1896); *Parrish v. Wright*, 293 S.W. 659 (Tex. Civ. App. 1927), writ refused (May 25, 1927); *Lampson v. S. Park Indep. Sch. Dist.*, 698 S.W.2d 407 (Tex. App. 1985), writ refused NRE (July 9, 1986), writ granted (Feb. 11, 1987), writ withdrawn (Feb. 11, 1987), judgment set aside, 742 S.W.2d 275 (Tex. 1987). Once an act is proven to be ministerial, relators are not required to prove that a public official’s action was arbitrary and unreasonable. *Id* at 793.

47. Writs of mandamus have also been used to correct clear abuse of discretion in matters that did require the exercise of discretion. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124 (Tex. 2004). *Womack v. Berry*, 156 Tex. 44, 291 S.W.2d 677 (1956). *Dykes v. City of Houston*, 406 S.W.2d 176 (Tex.1966). Failure to correctly analyze or apply the law will constitute an abuse of discretion that supports reversal by writ. *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992). *In re Johnson*, No. 01-19- 00496-CV, 2020 WL 4289975 (Tex. App. July 28, 2020).

48. Acting “without reference to guiding rules and principles” is unreasonable or arbitrary and is an abuse of discretion. *In re Colonial Pipeline Co.*, 968 S.W.2d 938 (Tex. 1998); See also *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223 (Tex.1991). The Petitioners lack any other remedy to challenge a decision by the Respondents by their unilateral execution and implementation of the Executive Order (03-2023) that forces Petitioners to essentially fabricate a government document. Petitioners did not request use of their earned compensatory benefits. The Respondents are free to pay them and or schedule time off but cannot force the exchange of compensatory time for sick leave without the permission of the Petitioners.

B. WRIT OF MANDAMUS: Tex. Local Gov’t Code §158.035 and Civil Service Rules

49. Petitioners seek a writ of mandamus because there is no other reasonable or expedient means to address the conduct of Respondents. The Sheriff’s Civil Service Commission and or the County grievance procedures lack authority to hear this matter. The Respondents have a ministerial duty to enforce the Constitution of the State of Texas as well as provide meaningful due process and equal protection to Petitioners. The powers of the Respondents are not permissive in that they require that they shall protect the earned economic property rights of the Petitioners as well as only adopt and enforce policies that do intentionally deprive Petitioners of their earned economic benefits (property rights) without due process. See Tex. Gov’t Code §662.202 regarding sick leave earned.

50. In addition, Petitioners are entitled to notice and an opportunity to be heard prior to any deprivation of their earned economic employment benefits. Respondents should be prohibited from requiring Petitioners from signing and approving timesheets that are false and do not contain any notation or indication that the affected employee requested a change in the use of a particular earned economic benefit.

51. In the alternative, however, if this Court finds that the duty was not ministerial and instead

required the exercise of discretion, then Petitioners assert the decision was unreasonable and arbitrary in light of the evidence presented and is an ultra vires act. Additionally, the Respondents believing that Petitioners' property rights earned by many hours of labor is such a character that such rights can be simply vacated with a simple Executive Order is apparently based on the advice of the County Attorney. Such Executive Order (03-2023) as approved by the County Attorney, justifies the fabrication of government documents so that it appears the Petitioners are agreeing with and or requesting use of compensatory time rather than their sick leave benefits. No other governmental agency has approved of such a forced use of employee earned economic benefits.

52. The actions of Respondents in this matter is ultra vires and not allowed under the law, rules, and or authority of Respondents or the laws of the State of Texas. *See* Tex. Gov't Code §§659.015, 659.016, 659.022, 659.023 regarding compensatory earned benefits.

C. WRIT OF MANDAMUS TO DECLARE EXECUTIVE ORDER INVALID:

53. Petitioners seek a writ of mandamus as to the Respondent Harris County apparent secret decision without a public meeting to change the countywide policy by use of an Executive Order (03-2023) that cannot pass constitutional muster. By doing so, the Respondents appear to have engaged in an impermissible closed meeting that should have been subject to the Texas Open Meetings Act (TOMA) pursuant to Tex. Govt. Code §551.001(3)(D). In this instance, the Sheriff was not allowed or authorized to change the general policies of Harris County without permission or authorization of the Commissioners unless approved by the Commissioners at an open meeting. No such meeting is known to have occurred regarding the change of Harris County Policy. *See* Tex. Local Gov't Code §157.021 *et seq* and § 174.021 *et seq*.

54. While the TOMA provides limited exception for certain personnel matters to be conducted in an 'executive' or closed meeting, that exception is inapplicable here as there was

no meeting scheduled or docketed on the agenda and such Executive Order is voidable and should be voided as it changes Harris County Policy in violation of the open meetings requirements to prevent government operating in secret. An action taken in violation of TOMA is voidable. Tex. Gov't. Code §551.141. The court has authority to reverse a violation of the TOMA.

V. ARGUMENT AND AUTHORITIES

A. APPLICATION FOR TEMPORARY RESTRAINING ORDER

55. “The purpose of a TRO is to preserve the status quo, which we have defined as the last, actual, peaceable, non-contested status which preceded the pending controversy.” *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004) (footnote and internal quotation marks omitted).

56. If the Court does not issue the requested temporary restraining order, the status quo will be irrevocably broken as the employees will be deprived of earned leave benefits without due process and or forced to use leave benefits they did not chose.

57. For similar reasons, the Petitioners are entitled to a temporary injunction. A temporary injunction’s purpose is to preserve the status quo of the litigation’s subject matter pending a trial on the merits. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). Petitioners must prove three elements to obtain a temporary injunction: (1) a cause of action against the Respondents; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Id.* Petitioners are not required to establish that they will prevail at trial to obtain a temporary injunction. *Id.* at 211. As indicated herein, the enforcement of an Executive Order (03-2023) is *ultra vires* in nature and in violation of Harris County policy, as well as the policies of other government agencies throughout the State of Texas. **See Tex. Gov’t Code §§659.015, 659.016, 659.022, 659.023 regarding compensatory earned benefits and Tex. Gov’t Code §662.202 regarding earned sick leave.**

58. Petitioners satisfy their standing by “showing that [they have] suffered an injury that is concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.” *Texas v. EEOC*, 933 F.3d 433, 446 (5th Cir. 2019). “If, in a suit challenging the legality of government action, the plaintiff is himself an object of the action [,] there is ordinarily little question that the action or inaction has caused him injury, and that a [favorable] judgment will redress it. Whether someone is in fact an object of a regulation is a flexible inquiry rooted in common sense.” *Id.* (Quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Contender Farms, L.L.P. v. U.S. Dep’t of Agric.*, 779 F.3d 258, 264–65 (5th Cir. 2015)). “An increased regulatory burden [also] typically satisfies” injury in fact. *Id.* The injury “need not measure more than an identifiable trifle.” *OCA-Greater Houston v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017). One party with standing is sufficient for the court to address the merits of changes in county policy. *See BST Holdings v. OSHA*, 17 F.4th 604, 610 n.6 (5th Cir. 2021).

59. Petitioners also have standing as their earned benefits are objects of the Executive Order (03-2023), which “is a flexible inquiry rooted in common sense.” *Contender Farms, L.L.P. v. U.S. Dep’t of Agric.*, 779 F.3d 258 at 265(5th Cir. 2015). Also, that the “practical impact” on family members of a regulated party, and the “interference as to their lives,” is sufficient for standing. *Id.* (quoting *Duarte ex rel. Duarte v. City of Lewisville*, 759 F.3d 514, 518 (5th Cir. 2014)).

B. APPLICATION FOR TEMPORARY RESTRAINING ORDER AND OR TEMPORARY INJUNCTION

60. The Petitioners seek a temporary restraining order and temporary injunction from the Court restraining Respondents or their employees from enforcing this referenced Executive Order (03-2023). An injunction is an equitable remedy and not a cause of action. *Brittingham v. Ayala*, 995 S.W.2d 199, 201 (Tex. App.—San Antonio 1999, pet. denied).

61. The Petitioners are entitled to injunctive relief if they show “(1) a cause of action against

the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.” *Butnaru* at 204.

62. A plaintiff “need not prove that [they] will ultimately prevail in the litigation; rather, the applicant must show [they have] a cause of action for which relief may be granted.” *Topheavy Studios, Inc. v. Doe*, 03-05-00022-CV, 2005 WL 1940159 (Tex. App. Aug. 11, 2005).

63. The Petitioners address the factors relevant to injunctive relief. Generally, Petitioners “must show: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that the injunction might cause to the Respondents; and (4) that the injunction will not disserve the public interest.” *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 288 (5th Cir. 2012). Here, each factor weighs in the Petitioners’ favor.

64. The Executive Order (03-2023) flies in the face of reason, denies due process, equal protection, and defies Harris County policies as well as being contrary to every known policy of governmental entities in the State of Texas. Harris County has not promulgated or approved the use of this Order nor would the County approve such policy as it conflicts with previously adopted policies regarding use of economic benefits earned by employees. Currently, the Order fails because it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law and or policies of Harris County or the State of Texas governmental agencies. Tex. Local Gov’t Code §157.021 *et seq* and § 174.021 *et seq*. See *Camp v. Shannon*, 348 S.W.2d 517, 519 (Tex. 1961); *Butnaru* at 211; *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 197 (Tex. App.—Fort Worth 2005, no pet.).

65. Generally governmental action is arbitrary and capricious if the governmental agency has relied on factors which it was not intended it to consider, is counter to other policies, is implausible and excluded other alternatives that should have been considered. No explanation

for the arbitrary action taken in the Executive Order is a rational response to facts or circumstances. Tex. Gov't Code §§659.015, 659.016, 659.022, 659.023; and §662.202. *See e.g. Luminant Generation Co. v. EPA*, 675 F.3d 917, 925 (5th Cir. 2012); *See also 10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 724 (5th Cir. 2013); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015).

66. The Executive Order (03-2023) is inconsistent with Harris County policy on the same subject and no factual justification supports the deprivation of earned property rights of the Petitioners that contradicts reason or rational thinking. *See Butnaru* at 204; *see also e.g. FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

67. The Executive Order (03-2023) disregarded the known dangers to Petitioners' property rights, as well as rights to due process and is contrary to existing Harris County policies. *See DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020); *Motor Vehicle Mffs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50-51 (1983). The Order represents a self-dealing interest by the Sheriff regarding various fund balances existing which this Order is designed to harm Petitioners and benefit the Sheriff. *See Health Discovery Corp. v. Williams*, 148 S.W.3d 167, (Tex. App.—Waco 2004, no pet.) (Interested directors had burden to establish fairness of transaction in temporary injunction proceeding).

68. As the Respondents are in a fiduciary capacity in protecting the earned economic benefits of Petitioners and other similar employees, the Order is essentially created in a self-dealing context, the "presumption of unfairness" attaches to the transactions of the Respondents as fiduciaries. Thus, shifting the burden to the Respondents to prove that Petitioners will not recover. *See Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 508-09 (Tex. 1980) (a profiting fiduciary has the burden of showing the fairness of the transactions).

69. The Executive Order cannot be adopted by the Sheriff as he acted without legal authority

and this order was essentially an *ultra vires* act that had not been approved by the County Commissioners of Harris County. Providing for sick leave usage is purely a ministerial act in this instance. The change of condition was not approved or consistent with the policies of Harris County. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009).

70. Both the Declaratory Judgment Act and the holding of the Texas Supreme Court in *City of El Paso v. Heinrich*, referenced *supra.*, provide Petitioners with a cause of action to seek declaration and injunctive relief against Respondents over the issuance and or enforcement of the Executive Order (03-2023). Tex. Gov't Code §§659.015, 659.016, 659.022, 659.023; and §662.202 and Tex. Local Gov't Code §157.021 *et seq* and § 174.021 *et seq*.

71. Petitioners will be able to prove the three elements to obtain a temporary injunction: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). Petitioners are likely to prevail and are entitled to relief requested because the Executive Order (03-2023) violates the polices and laws of the State of Texas.

1. Petitioners have stated a cause of action

72. Interference with earned property rights, violation of due process and equal protection, notwithstanding the illegality of the order not approved by Harris County.

2. Probable Right of Relief

73. This Petition details causes of action based on matters of law and supports the idea that Petitioners have a probable right of relief. Harris County has a fiduciary obligation not only to make policies, but to enforce them regarding Petitioners earned economic benefits.

74. The applicable language of the Executive Order (03-2023) simply denies Petitioners any due process or choice regarding deprivation of their earned property rights in their economic benefits. There is not an adequate remedy at law for a breach of fiduciary duty claim as is in this

instance. See *Minexa Arizona, Inc. v. Staubach*, 667 S.W.2d 563 (Tex. App.—Dallas 1984, no writ). The expending of funds essentially held in trust for Petitioners constitutes a misappropriation of trust funds set aside or needing to be made available for use by Petitioners.

75. Harris County, by conceding to allow the Sheriff to violate County Policy in such an inconsistent manner, indicates that the Respondents intentionally reached an agreement and or understanding in violation of the TOMA. This appears to be especially true in that the Executive Order (03-2023) makes no sense as it is contrary to all other state agency policies addressing the treatment of such economic benefits earned by employees such as Petitioners.

3. The probable, imminent, and irreparable injury in the interim

76. If the Court does not grant the injunctive relief sought, the detrimental consequences to the Petitioners are more than just probable and will result in imminent and irreparable injury and constitute a serious violation of due process and equal protection. The Sheriff's Executive Order (03-2023) was signed on and promulgated to the parties at the same time and, barring this Court's grant of injunctive relief, Petitioners will be forced to suffer the continued deprivation of their earned economic benefits as well as violate the law by subscribing to their time sheets that do not properly reflect the truth or their consent to exchange sick leave for use of compensatory time.

77. Accordingly, this Court should issue an injunction, at the very least, pending resolution of the request for writ of mandamus as to the enforcement of the Order. Additionally, the specific financial and operational harm to Petitioners will be significant and irreparable if the Respondents are allowed to deprive Petitioners of their earned benefits without their consent. "To show irreparable injury if threatened action is not enjoined, it is not necessary to demonstrate that harm is inevitable and irreparable." *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390, 1394 (5th Cir. 1986).

78. Instead, Petitioners need only to show that that they are “likely to suffer irreparable harm in the absence of preliminary relief” and “need only show [their injury] ‘cannot be undone through monetary remedies.’” *Texas v. United States*, 524 F. Supp. 3d 598, 662–63 (S.D. Tex. 2021). Petitioners being forced to sign inaccurate time sheets cannot be rectified by recouping and or recalculating economic benefits.

79. It would be chaotic and disruptive to attempt to correct leave balances without resolution of the mandamus issues. Harm to Petitioners is imminent and irreparable regarding their earned economic benefits that are being impacted by Respondents. For instance, the Fifth Circuit found that “compliance and monitoring costs” for those covered by a regulation constituted irreparable injury. *BST Holdings v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021) (“[C]omplying with a regulation later held invalid **almost always produces the irreparable harm of nonrecoverable compliance costs.**” (Quoting *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016) (Emphasis Added))).

80. The amount of time and resources needed to correct time sheets and leave balances would be excessive. Monetary damages are not sought by Petitioners and are most likely unavailable or in some instances inadequate and not a remedy available to Petitioners. *See Burgess v. FDIC*, 871 F.3d 297, 304 (5th Cir. 2017) (injury is irreparable if monetary damages are unavailable or inadequate).

81. Petitioners respectfully request the court grant a temporary restraining order and set a hearing for consideration of a temporary injunction.

82. Additionally, Petitioners seek permanent injunctive relief as follows:

1. Enjoining enforcement of the Sheriff’s Executive Order (03-2023) to take Petitioners earned economic sick leave benefits without due process or opportunity to be heard;
2. Enjoining enforcement of the Sheriff’s Executive Order (03-2023) to force Petitioners

to sign or approve the changing of their timesheets that will result in a fabrication of government records without their consent to the exchange of benefits.

An Injunction Will Not Harm Respondents or Disserve the Public Interest

83. “Any interest [the government] may claim in enforcing an unlawful” regulation “is illegitimate.” *BST Holdings*, 17 F.4th at 618. Because the Executive Order (03-2023) is simply an unlawful attempt to rewrite and or redefine Harris County (and or Texas policy) the plain text of the Executive Order (03-2023) is arbitrary and capricious. Respondents lack a valid or legitimate interest in the implementation of the Executive Order (3-2023) and would not suffer if it is enjoined as compliance with current and overriding policy is controlling.

84. By contrast, the public and its employees who serve the public interest are “**served when the law is followed.**” *Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 585 (5th Cir. 2013)(emphasis added); *see also League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). The balance of harms in this case is thus straightforward. Petitioners seek declaratory relief and an injunction to preserve the careful management of employee earned economic benefits in compliance with Harris County Policy (as well as State of Texas agency policies). Respondents appear to seek to perpetuate an abdication of their ministerial imposed statutory duties. Enjoining the Respondents would stop this illegal *ultra vires* action and compel the Respondents to simply follow the law, policies of Harris County, as well as the State of Texas. Such relief harms neither the government nor the public.

85. Denying relief will cause further erosion of public confidence and harm the Petitioners who sacrifice each day to ensure public safety and be forced to lose benefits while signing time documents that are not accurate.

D. BOND ISSUES

86. The court is required to set a bond amount when it grants a temporary restraining order

or temporary injunction. Tex. R. Civ. P. 684. However, Rule 684 states:

“Where the temporary restraining order or temporary injunction is against the State, a municipality, a State agency, or a subdivision of the State in its governmental capacity, and is such that the State, municipality, State agency, or subdivision of the State in its governmental capacity, has no pecuniary interest in the suit and no monetary damages can be shown, the bond shall be allowed in the sum fixed by the judge . . .”

87. The purpose of a bond is to provide protection to the enjoined party for any possible damage occurring as a result of the injunction. *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 203 (Tex. App.—Dallas 2005, no pet.); *Bayoud v. Bayoud*, 797 S.W.2d 304, 312 (Tex. App.—Dallas 1990, writ denied). Respondents cannot and will not suffer any pecuniary interest and will have no monetary damages. **A nominal bond of \$100.00 is appropriate.**

VI. PRAYER

For these reasons, the Petitioners respectfully request the Court grant the following relief:

A. A temporary restraining order barring the enforcement the Sheriff’s Executive Order taking away Petitioner’s right to utilize sick leave benefits and reinstate all compensatory leave taken without permission and order reinstatement of compensatory time and allow the deduction of sick leave balance at the discretion of the affected Petitioners;

B. A temporary injunction barring enforcement of the Sheriff’s Executive Order as written unless agreed to or approved by the Petitioners to want to voluntarily exchange compensatory time in lieu of sick leave benefits at the sole discretion of the Petitioners;

C. A permanent injunction barring enforcement of the Sheriff’s Executive Order (03-2023); and

D. Issuance of a writ directing the Respondents to revoke the unauthorized Executive Order.

E. Issuance of a writ voiding the Sheriff’s unauthorized Executive Order (03-2023) due to violation of TOMA as such was not approve by Respondent Harris County at an open meeting;

F. All other relief to which Petitioners are justly entitled, including payment of costs and attorney fees as authorized by TEX. CIV. PRAC. & REM. CODE § 37.009.

Dated: May 26, 2023.

Respectfully submitted,

/s/ David J. Batton

David J. Batton

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Attorney for Petitioners

NO. 2023-

MAGDLEAN BRANCH;
JOHN and JANE DOES
Petitioners

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IN THE DISTRICT COURT OF

v.

HARRIS COUNTY SHERIFF'S
OFFICE AND HARRIS COUNTY
Respondents

HARRIS COUNTY, TEXAS

— JUDICIAL DISTRICT

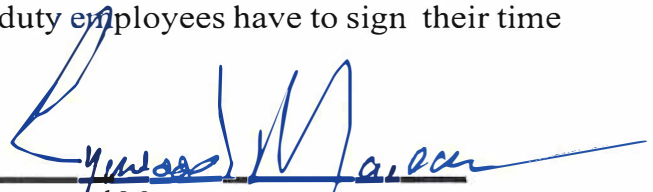
Declaration of Lynwood Moreau

1. My name is Lynwood Moreau. I am over eighteen years of age, am of sound mind, and am capable of making this declaration. I am a previous employee of the Harris County Sheriff's Office and now retired and aware current employees have an interest in their earned accrued sick leave benefits and their accrued compensatory time benefits.

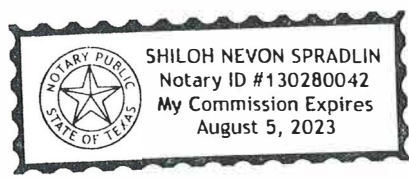
2. I have read the above Petition and Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction; I am able to verify that the facts stated therein are within my personal knowledge and are true and correct to the best of my belief and understanding.

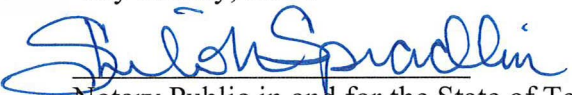
3. I have been made aware that active-duty employees have requested the use of their sick leave benefits which pursuant to new Executive Order (3-2023) have now been changed without their consent to reflect use of their accrued compensatory benefits without permission.

4. I am also familiar and aware that active-duty employees have to sign their time records as being correct.


Lynwood Moreau

Subscribed and Sworn To before me on this 24th day of May, 2023.




Notary Public in and for the State of Texas

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2023, a copy of this pleading was e-filed and served upon all parties of record via the Court's electronic filing system.

/s/ David J. Batton
David J. Batton