

EQUITABLE AND DECLARATORY REMEDIES FOR *ULTRA VIRES* ACTS

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Introduction

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.

United States v. Lee, 106 U.S. 196, 220 (1882)

While this is a nice sentiment, the question is how to put it into action. When state and local officials disobey Texas law, *sometimes* Texas courts can do *something* about it. This paper presents an overview and update on the legal and practical challenges of suing government actors in Texas state courts, with a particular focus on equitable and declaratory remedies for officials' *ultra vires* acts.

- I. Suing state officials for violations of state law through an *ultra vires* action filed in the district court.

Summary: Sovereign immunity does not bar *ultra vires* suits against government officials, which “check acts in excess of lawful authority or compel the performance of a clear legal duty.” *Phillips v. McNeill*, 635 S.W.3d 620, 628 (Tex. 2021). These suits typically involve claims for declaratory relief under the Texas UDJA and accompanying requests for injunctive relief—including permanent and temporary injunctions, plus TROs. To successfully plead an *ultra vires* claim and avoid sovereign immunity, the plaintiff must (1) allege an *ultra vires* act or failure, (2) sue the official in her official capacity, and (3) seek prospective relief other than the recovery of monetary damages. *Chambers-Liberty Ctys. Navigation Dist. v. State*, 575 S.W.3d 339, 348 (Tex. 2019).

1. Rationale for officer suits: Officials violating the law are no longer acting as the state, so they do not enjoy immunity.

In Texas courts, the “basis for the *ultra vires* rule is that a government official is not following the law, so that immunity is not implicated.” *City of El Paso v. Heinrich*, 284 S.W.3d 366, 374 (Tex. 2009). The same rationale is recognized in federal courts:

“If the act which the state [official] seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.

Ex parte Young, 28 S. Ct. 441, 454 (1908). “It is simply an illegal act upon the part of a state official.” *Id.*

Thus, as the Texas Supreme Court has explained, sovereign immunity is no bar because “‘*ultra vires* suits do not attempt to exert control over the state—they attempt to reassert the control of the state’ over one of its officials.” *Id.* (quoting *Heinrich*, 284 S.W.3d at 372). Such *ultra vires* claims “do not seek to alter government policy but rather to enforce existing policy,” so sovereign immunity is no obstacle to suit. *Id.*

2. *Ultra vires* suits challenge actions without legal authority or a failure to perform purely ministerial acts, not discretionary ones.

When pursuing *ultra vires* claims, make sure that the official’s action is contrary to the law or beyond her authority, and not a bad choice within her discretion. “‘Ultra vires claims depend on the scope of the state official’s authority,’ not the quality of the official’s decisions. Thus, it is not an ultra vires act for an official to make an erroneous decision within the authority granted.” *Honors Acad., Inc. v. Tex. Educ. Agency*, 555 S.W.3d 54, 68 (Tex. 2018) (quoting *Hall v. McRaven*, 508 S.W.3d 232, 234, 242 (Tex. 2017)).

Rather, to “fall within this *ultra vires* exception, a suit must not complain of a government officer’s exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act.” *Schroeder v. Escalera Ranch Owners’ Ass’n, Inc.*, 646 S.W.3d 329, 332 (Tex. 2022) (quotation marks omitted). “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.” *Id.* at 333. A “government officer with

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