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United States Court of Appeals
for the Fifth Circuit

No. 22-50828

PHILIP C. JAMES; JOHN BALLANTYNE; WILLIAM NOE,

Plaintiffs–Appellees,

versus

GLENN ALLEN HEGAR, JR., *in his individual and official capacities as Texas Comptroller of Public Accounts, and his official and custodial capacities as Chairman of the Texas Treasury Safekeeping Trust Company and administrator of* TEXAS UNCLAIMED PROPERTY FUNDS; JOANI BISHOP, *in her individual and official capacities as Director of Unclaimed Property Reporting and Compliance, Texas Comptroller of Public Accounts*,

Defendants–Appellants.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:22-CV-51

(Filed Nov. 16, 2023)

Before KING, WILLETT, and DOUGLAS, *Circuit Judges*.

KING, *Circuit Judge*:

Plaintiffs are three Texas residents whose assets escheated to the State under Texas's Unclaimed

Property Act. Plaintiffs brought a class action lawsuit against the Texas Comptroller and a director in the Comptroller's office, alleging that the State is abusing the Unclaimed Property Act to seize purportedly abandoned property without providing proper notice. The district court dismissed most of Plaintiffs' claims. However, applying the *Ex parte Young* exception to state sovereign immunity, the district court permitted Plaintiffs to seek prospective relief, including an injunction ordering state officials to comply with the Constitution's Takings and Due Process Clauses. In this interlocutory appeal, Defendants contend that Plaintiffs cannot invoke *Ex parte Young* because they lack standing to seek prospective relief and have not alleged an ongoing violation of federal law. We agree with Defendants and REVERSE the district court's denial of Eleventh Amendment sovereign immunity, and we REMAND with instructions to dismiss Plaintiffs' remaining claims for prospective relief without prejudice.

I.

This case arises from alleged systemic and ongoing violations of Plaintiffs' constitutional rights by the State of Texas through its administration of the Texas Unclaimed Property Act ("UPA"), Tex. Prop. Code § 71.001 *et seq.* The UPA requires holders of presumptively abandoned property to report and deliver that property to the State Comptroller, along with last-known information about the property owner. *Id.* §§ 74.101, 74.301. "[P]roperty is presumed abandoned

if, for longer than three years: (1) the location of the owner of the property is unknown to the holder of the property; and (2) according to the knowledge and records of the holder of the property, a claim to the property has not been asserted or an act of ownership of the property has not been exercised." *Id.* § 72.101(a).

The holder of the property is generally required to give notice to the owner at least 60 days before the property is delivered to the Comptroller. *Id.* § 74.1011(a). One year after the holder files a statutorily mandated report, the Comptroller "may use one or more methods as necessary to provide the most efficient and effective notice to each reported owner." *See id.* § 74.201.

When the Comptroller receives property in the form of unclaimed money, the Comptroller deposits the funds – as well as any income derived from investment of the unclaimed money – to the credit of the State's general revenue fund, where it is "subject . . . to appropriation by the legislature." *Id.* §§ 74.601(b), 74.603.

The Comptroller maintains a website that lists the names and last known addresses of owners whose property has been transferred to the Comptroller under the UPA. An owner whose property has been transferred to the State can file an administrative claim to recover the property with the Comptroller's office. *Id.* § 74.501; *Clark v. Strayhorn*, 184 S.W.3d 906, 910– 11 (Tex. App. – Austin 2006, pet. denied). If the Comptroller determines that an owner's claim is valid, the Comptroller's office returns any unsold property or

pays the claimant from the general revenue fund. Tex. Prop. Code §§ 74.501, 74.602. This payment does not include any interest that the claimant's funds generated before he or she filed a claim for recovery. *Id.* § 74.304(d); *Clark*, 184 S.W.3d at 913.

II.

Plaintiffs-Appellees Philip C. James, William Noe, and John Ballantyne (collectively, "Plaintiffs") are three Texas residents who allege that their assets improperly escheated to the State under the UPA. Plaintiff James alleges that Charles Schwab & Co. closed his retirement account and transferred $305,203.56 from the account to the State as unclaimed property. James never received notice from the Comptroller's office, which denied having any record of the retirement funds purportedly transferred to its possession. He further claims that $188 of his funds were improperly seized by the Comptroller without notice, his knowledge, or consent.

Plaintiff Noe alleges that an amount of $468.72 was transferred from his accounts receivable credit balance with Reed Elsevier to the Comptroller. Noe claims that, other than the posting of his property on the Comptroller's website, he received no notice of this transfer. Plaintiff Ballantyne alleges that his accounts with multiple holders, including IBC Bank, Chase Bank, Wells Fargo, and E-Trade, all improperly escheated to the State. He claims that the Comptroller

failed to identify both the property type and the holders of his seized property.

Plaintiffs filed a class action complaint in federal district court on January 21, 2022. They named as defendants Glenn Allen Hegar Jr., the Texas Comptroller of Public Accounts, and Joani Bishop, the Comptroller's Director of Unclaimed Property Reporting and Compliance (collectively, "Defendants"). The complaint alleges that Defendants "misused" the UPA "to take private property from people and businesses without meeting the basic threshold requirements for escheatment because they ha[d] not 'abandoned' or 'lost' their property and they [were] not 'unknown.' " Defendants allegedly utilized the UPA to convert private property into revenue for the State, which they achieved by unlawfully coercing financial institutions, businesses, and nonprofits to surrender Plaintiffs' and class members' property to the Comptroller. The complaint proposed a class defined as "[a]ll persons or entities whose property was escheated to the State of Texas between 2014 and the present without adequate notice."

Based on the foregoing allegations, Plaintiffs asserted claims against Defendants in their individual and official capacities under 42 U.S.C. § 1983. Specifically, Plaintiffs sought a declaration that Defendants: (1) failed to provide notice and satisfy due process requirements under the UPA, the Texas Constitution, and the U.S. Constitution; (2) allowed and colluded with third parties to retain property that belonged to Texas citizens; (3) seized, sold, and destroyed contents of bank safety deposit boxes without adequate notice;

(4) failed to enforce the requirement that corporations comply with the UPA; and (5) acted *ultra vires* in failing to provide notice and satisfy due process. Plaintiffs additionally sought an accounting, attorneys' fees, the creation of a common fund, and injunctive relief in the form of ordering Defendants to: (a) comply with and properly administer the UPA; and (b) return Plaintiffs' property.

On April 14, 2022, Defendants filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. In response to the claims against Defendants in their official capacities, Defendants invoked state sovereign immunity under the Eleventh Amendment. Defendants further claimed that Plaintiffs had failed to identify specific actions taken by either of the individual Defendants that would subject them to liability.

In an order dated September 6, 2022, the district court dismissed most of Plaintiffs' claims. Addressing Defendants' jurisdictional arguments, the district court determined that the State had not consented to being sued in federal court, and it dismissed Plaintiffs' requests for declaratory and injunctive relief under state law and the Texas Constitution for lack of subject matter jurisdiction. The district court also dismissed "Plaintiffs' claims against Defendants in their official and individual capacity to the extent those claims seek funds from the general revenue fund." Turning to Plaintiffs' individual-capacity § 1983 claims, the district court found that Plaintiffs failed to allege individual causation regarding each Defendant.

The district court noted that the only way for Plaintiffs' official- capacity claims to overcome sovereign immunity was through the *Ex parte Young* exception, which permits federal courts to enjoin state officials in their official capacities from violating federal law. *See Hutto v. Finney*, 437 U.S. 678, 690 (1978) (citing *Ex parte Young*, 209 U.S. 123 (1908)). The district court determined that the following two requests for relief could survive under *Ex parte Young*: (1) "prospective injunctive relief in the form of ordering [Defendants] to comply with the Takings and Due Process Clauses of the Constitution"; and (2) a "declaration that Defendants violated the U.S. Constitution's requirements for due process of law and against takings." The district court accordingly granted in part and denied in part Defendants' motion to dismiss, solely permitting Plaintiffs to proceed with their requests for declaratory and injunctive relief under *Ex parte Young*. Defendants filed a notice of interlocutory appeal seeking review of the denial of Eleventh Amendment sovereign immunity.[1]

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[1] On interlocutory appeal, we solely address the district court's denial of Eleventh Amendment sovereign immunity concerning Plaintiffs' requests for: (1) an injunction ordering Defendants to comply with the U.S. Constitution; and (2) a declaratory judgment that Defendants violated the U.S. Constitution. We do not address the district court's dismissal of any of Plaintiffs' claims.

III.

We first address our jurisdiction to review Defendants' interlocutory appeal. Orders denying Eleventh Amendment sovereign immunity are reviewable on interlocutory appeal under the "collateral order doctrine." *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 (1993). Defendants on appeal argue that Plaintiffs "have not alleged an ongoing violation of federal law," which is a necessary component of the *Ex parte Young* exception to Eleventh Amendment sovereign immunity. *See Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 471 (5th Cir. 2020).

In arguing that Plaintiffs failed to allege an ongoing violation, Defendants repeatedly cite legal standards governing Article III standing for prospective relief, specifically the well-established principle that "to meet the Article III standing requirement when a plaintiff is seeking injunctive or declaratory relief, a plaintiff must allege facts from which it appears there is a substantial likelihood that he will suffer injury in the future." *Bauer v. Texas*, 341 F.3d 352, 358 (5th Cir. 2003). Thus, although the primary issue on interlocutory appeal is the district court's denial of Eleventh Amendment sovereign immunity under *Ex parte Young*, Defendants' briefing also raises the closely related issue of Plaintiffs' standing to seek prospective relief.

Standing is a component of subject matter jurisdiction, *Ortiz v. Am. Airlines, Inc.*, 5 F.4th 622, 627 (5th

Cir. 2021), and where "we have interlocutory appellate jurisdiction to review a district court's denial of Eleventh Amendment immunity, we may first determine whether there is federal subject matter jurisdiction over the underlying case," *Hosp. House, Inc. v. Gilbert*, 298 F.3d 424, 429 (5th Cir. 2002). Because "our Article III standing analysis and *Ex parte Young* analysis 'significant[ly] overlap,'" *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019) (quoting *Air Evac EMS, Inc. v. Tex., Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 520 (5th Cir. 2017)), we have in prior cases considered standing on interlocutory appeals of a district court's denial of Eleventh Amendment sovereign immunity, *see id.* at 1103 n.3; *see also*, *e.g.*, *Walker v. Livingston*, 381 F. App'x 477, 479 (5th Cir. 2010); *Williams v. Davis*, No. 22-30181, 2023 WL 119452, at *4–6 (5th Cir. Jan. 6, 2023).

Plaintiffs allege that they were subjected to constitutional violations, they allege that such violations are ongoing or may reoccur, and they seek prospective relief. Whether Plaintiffs have alleged ongoing constitutional violations is a central question of both the Article III standing analysis and the *Ex parte Young* analysis in this case. And, as discussed below, the most relevant authorities on "ongoing violations" as related to takings claims address this issue in the context of Article III standing. Because these authorities inform our analysis of "ongoing violations" in the context of *Ex parte Young*, we address standing before turning to an *Ex parte Young* analysis.

IV.

This court may address the jurisdictional requirement of standing for the first time on appeal. *Pub. Citizen, Inc. v. Bomer*, 274 F.3d 212, 217 (5th Cir. 2001). "Constitutional standing has three elements: (1) an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent; (2) a causal connection between the injury and the conduct complained of; and (3) the likelihood that a favorable decision will redress the injury." *Croft v. Governor of Tex.*, 562 F.3d 735, 745 (5th Cir. 2009) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

Although Plaintiffs in this case purport to act on behalf of a class, they must still demonstrate that they personally have standing. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 n.6 (2016). Litigants must demonstrate standing with respect to each type of relief they seek. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 (2021). To request prospective injunctive or declaratory relief, a litigant must demonstrate "continuing harm or a real and immediate threat of repeated injury in the future." *Soc'y of Separationists, Inc. v. Herman*, 959 F.2d 1283, 1285 (5th Cir. 1992). The threat of future injury must be "*certainly* impending"; mere allegations of possible future injury will not suffice. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Lujan*, 504 U.S. at 565 n.2).

The Supreme Court's holding in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), illustrates the principle that allegations of past harm cannot establish

standing for a request for prospective relief. In *Lyons*, the plaintiff sought damages, an injunction, and declaratory relief following an incident in which police officers seized him and applied a chokehold. *Id.* at 97–98. The *Lyons* Court held that while the plaintiff had alleged a past harm resulting from being subjected to a chokehold, he was unable to seek prospective relief absent a showing that he was likely to suffer a future injury from the use of chokeholds by police officers. *Id.* at 105. The plaintiff's allegation of past harm ultimately did "nothing to establish a real and immediate threat that he would again be stopped" and subjected to that method of restraint. *Id.*

This court has already applied the *Lyons* principle to an allegation of an unconstitutional taking under Texas's UPA. In *Arnett v. Strayhorn*, 515 F. Supp. 2d 690, 693 (W.D. Tex. 2006), *aff'd sub nom. Arnett v. Combs*, 508 F.3d 1134 (5th Cir. 2007), a plaintiff brought a facial challenge to the UPA, claiming that the State's retaining of revenue generated from unclaimed property violates the Takings Clause of the Fifth Amendment. In addition to seeking the return of revenue held by the State, the plaintiff also sought a declaratory judgment decreeing the UPA unconstitutional and an injunction prohibiting the State from retaining any such revenue generated by unclaimed property in the future. *Id.* The district court determined that the plaintiff lacked standing to assert a claim for prospective relief because he "[did] not, nor [did] the Court reasonably believe he [could], contend he [would] be likely to have property subject to the

Texas Unclaimed Property Law in the future." *Id.* at 697–98. In *Arnett v. Combs*, 508 F.3d 1134, 1134 (5th Cir. 2007), this court affirmed *Arnett v. Strayhorn* for the reasons stated by the district court.

Like the plaintiff in the *Arnett* line of cases, Plaintiffs here have only alleged that they were injured by past takings; they allege no facts indicating that another taking of their property is imminent or certainly impending. Plaintiffs reference their fear of another unconstitutional taking, requiring them to "routinely inspect the contents of their safe deposit boxes, check on the presence of funds in their retirement accounts, and search the website administered by Defendants to see if they have taken any more of their property." But even if Plaintiffs take actions and incur costs out of fear of a future injury, these activities do not suffice to establish standing. *See Clapper*, 568 U.S. at 416 (rejecting the theory that plaintiffs can "manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending").

Plaintiffs point to no authority supporting their assertion that an unconstitutional taking is an "ongoing violation" for the purpose of seeking prospective relief when the government has failed to return a claimant's property. In fact, the *Arnett* line of cases reaches the opposite conclusion – that a prior taking is a past harm insufficient to confer standing for prospective relief, even when it is alleged that the government has unlawfully retained assets that rightfully belong to the plaintiff. *See Arnett*, 515 F. Supp. 2d at 697–98.

Here, the district court permitted Plaintiffs to proceed with their request for prospective relief to prevent the State from violating the Constitution in the future. But if Plaintiffs allege no impending future injury, this prospective relief in no way redresses Plaintiffs' alleged injuries. We therefore find that Plaintiffs' allegations of past unconstitutional takings are insufficient to confer standing for prospective relief under the principle enounced in *Lyons*.

V.

We now turn to *Ex parte Young*. "In most cases, Eleventh Amendment sovereign immunity bars private suits against nonconsenting states in federal court." *Paxton*, 943 F.3d at 997. Sovereign immunity applies to suits against state officials or agencies that are effectively suits against a state. *Id.* For the *Ex parte Young* exception to Eleventh Amendment sovereign immunity to apply, three criteria must be satisfied: (1) A plaintiff must name individual state officials as defendants in their official capacities; (2) the plaintiff must allege an ongoing violation of federal law; and (3) the relief sought must be prospective, rather than retroactive. *Green Valley*, 969 F.3d at 471.

Our standing analysis makes clear that Plaintiffs have not demonstrated that they "seek prospective relief to redress ongoing conduct." *See Freedom From Religion Found. v. Abbott*, 955 F.3d 417, 424 (5th Cir. 2020). Just as Plaintiffs' allegations of past harm are insufficient to confer standing to seek prospective

relief, these allegations are also insufficient to show an ongoing violation of federal law and invoke the *Ex parte Young* exception to Eleventh Amendment sovereign immunity. *See Spec's Fam. Partners, Ltd. v. Nettles*, 972 F.3d 671, 681 (5th Cir. 2020) (finding that an allegation of wrongful past behavior does not establish a claim that falls within the *Ex parte Young* exception).

We are not persuaded by Plaintiffs' arguments that they have successfully pleaded ongoing constitutional violations to invoke *Ex parte Young*. Plaintiffs point out that their complaint alleges that Defendants "continue to violate" the Constitution by providing inadequate notice and performing unlawful takings. But the complaint contains insufficient facts to support Plaintiffs' claim that Defendants continue to perform unlawful takings with inadequate notice, and factual allegations contained in a complaint "must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiffs' nonspecific references to Defendants continuing to engage in unlawful conduct are too vague and unsupported by factual allegations to demonstrate an ongoing violation under *Ex parte Young*. *See Williams*, 2023 WL 119452, at *6.

Plaintiffs also claim that their lawsuit is a facial challenge to the UPA, which would permit an inference of ongoing violations because there is no evidence in the record to suggest that the State will halt enforcement of the UPA. Plaintiffs' complaint, however, does not allege that the UPA is facially unconstitutional. The crux of Plaintiffs' complaint is that the State of

Texas has "misused" and is "skirting the requirements of" the UPA. For instance, the complaint alleges that "Defendants failed . . . to provide . . . Constitutional *and statutorily* required notices before taking personal property," and that "our State and Federal Constitutions *and the State's UPA laws* do not permit the seizure and sale of private property, for public use, without adequate notice and Due Process of Law." (emphases added). The complaint repeatedly asserts that Defendants' allegedly unconstitutional takings also violate the UPA; absent from the complaint is clear indication that Defendants commit unconstitutional takings even when they fully comply with the UPA's statutory process to the letter.

Plaintiffs' claim that their lawsuit is a facial challenge to the UPA is further undermined by the language of their requests for prospective relief. Plaintiffs seek a declaration that Defendants violated the Constitution *and* the UPA; there is no request to declare the UPA facially unconstitutional.[2] Plaintiffs' request for injunctive relief specifically asks that the court "compel[ ] Defendants to immediately cease all unlawful conduct . . . and to *properly administer the UPA*." (emphasis added). Plaintiffs' contention that their lawsuit is a facial challenge to the UPA is contradicted by their complaint's admission that the State's unlawful conduct will be cured if the State "properly administer[s] the UPA." A plain reading of the complaint thus

[2] In fact, Plaintiffs' response to Defendants' motion to dismiss plainly states that "Plaintiffs here do not seek a declaration that the UPA is unconstitutional."

indicates that Plaintiffs are alleging that Defendants' *abuse* of their powers granted by the UPA – not the UPA itself – is unconstitutional.[3] Plaintiffs allege insufficient facts to indicate that these alleged abuses are ongoing.

* * *

Plaintiffs have failed to allege facts indicating that Texas's alleged abuse of the UPA is ongoing or will continue in the future. As there is no ongoing violation of federal law sufficiently pleaded in the complaint, Plaintiffs have failed to satisfy the *Ex parte Young* requirements, and their claims for prospective relief are barred by sovereign immunity.

VI.

Plaintiffs have failed to demonstrate that they have standing to seek prospective relief, and they have not met their burden to proceed with their constitutional claims under the *Ex parte Young* exception to

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[3] We note that even if the complaint unequivocally challenged the constitutionality of the UPA or sufficiently pleaded that Defendants' unconstitutional conduct is generally ongoing, Plaintiffs' failure to show that they themselves are likely to suffer a future injury would still prevent them from being able to establish standing to seek prospective relief. *See Spokeo*, 578 U.S. at 338 n.6 (noting that plaintiffs purporting to represent a class must show that they personally have standing); *Arnett*, 515 F. Supp. 2d at 697–98 (deciding that the plaintiff lacked standing to seek prospective relief because he was unable to show that he himself was likely to have property taken under the UPA in the future).

Eleventh Amendment sovereign immunity. Accordingly, we REVERSE the district court's denial of Eleventh Amendment sovereign immunity, and we REMAND with instructions to dismiss Plaintiffs' remaining claims for prospective relief without prejudice.[4]

[4] Because we find that the State is entitled to sovereign immunity on the claims before us on interlocutory appeal, we need not and do not address Defendants' alternative argument that Plaintiffs' takings claims are not ripe. We also need not and do not address Defendants' argument that Plaintiffs' requests for prospective relief impermissibly seek monetary damages. The district court dismissed Plaintiffs' request for an injunction ordering the State to return their assets, and that decision is not before this court on interlocutory appeal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

PHILIP C JAMES, JOHN BALLANTYNE, and WILLIAM NOE,	§	No. 5:22-CV-51-DAE
Plaintiffs,	§	
vs.	§	
GLENN ALLEN HEGAR JR., in his individual and official capacities as Texas Comptroller of Public Accounts, and his official and custodial capacities as Chairman of the Texas Treasury Safekeeping Trust Company and Administrator of Texas Unclaimed Property Funds; and JOANI BISHOP, in her individual and official capacities as Director of Unclaimed Property Reporting and Compliance, Texas Comptroller of Public Accounts;	§	
Defendants.	§	

ORDER (1) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS, (2) OVERRULING AS MOOT OBJECTIONS TO MAGISTRATE JUDGE BEMPORAD'S ORDER ON MOTION TO STAY, AND (3) DENYING AS MOOT OPPOSED MOTION FOR PROTECTIVE ORDER

(Filed Sep. 6, 2022)

Before the Court is Defendants Glenn Hegar Jr. and Joani Bishop's Motion to Dismiss. (Dkt. # 20.)

Plaintiffs filed a response (Dkt. # 29), and Defendants filed a reply (Dkt. # 30).

Defendants also filed a Motion to Stay Discovery (Dkt. # 21), which was referred to U.S. Magistrate Judge Bemporad. Judge Bemporad granted in part and denied in part the Motion (Dkt. # 28), and Defendants filed objections to the order (Dkt. # 31). Defendants next filed An Opposed Motion for Protective Order (Dkt. # 35), which essentially restates the objections to Judge Bemporad's Order.

The Court finds these matters suitable for disposition without a hearing. After careful consideration of the memorandum filed in support of and against the motions, the Court – for the reasons that follow – **GRANTS IN PART AND DENIES IN PART** the Motion to Dismiss (Dkt. # 20), **OVERRULES AS MOOT** the objections to Judge Bemporad's Order (Dkt. # 31), and **DENIES AS MOOT** the Motion for Protective Order (Dkt. # 35).

BACKGROUND

This case arises from alleged systemic and ongoing violations of Plaintiffs' fundamental due process rights as a result of the way the State of Texas administers the Texas Unclaimed Property Act ("UPA"). (Dkt. # 1.) Plaintiffs Philip James, William Noe, and John Ballantyne, individually and on behalf of all persons similarly situated bring suit under 42 U.S.C. § 1983 for declaratory relief, preliminary and permanent injunctive relief, an accounting, and relief based on the

unconstitutional and unlawful conduct of Defendants Glenn Hegar and Joani Bishop in their individual and official capacities. (Id. at 2.) Plaintiffs' claims arise from Defendants' alleged use of the UPA "to take private property from people and businesses without meeting the basic threshold requirements for escheatment" and "have perpetrated their misuse of the UPA without the requisite notice and due process." (Id.)

Under the UPA, when a holder of property cannot locate its owner and the property is presumed abandoned, the holder must report and deliver that property to the Comptroller along with the last-known information available for the owner. Tex. Prop. Code §§ 74.101, 74.301, 74.501. For property to be presumed abandoned, the location of the owner of the property must be unknown to the holder of the property and a claim to the property must not have been asserted or an act of ownership of the property must not have been exercised according to the knowledge and records of the holder. Id. § 72.101.

Upon receiving unclaimed property,

> [t]he comptroller shall deposit to the credit of the general revenue fund:
>
> > (1) all funds, including marketable securities, delivered to the comptroller under this chapter or any other statute requiring the delivery of unclaimed property to the comptroller; [and]
> >
> > . . .

> (4) any income derived from investments of the unclaimed money.

Id. § 74.601(b).

A person whose property has been transferred to the state can file an administrative claim for the property with the Comptroller's office, but until that claim is made and approved by the Comptroller, the property in the general revenue fund is subject to appropriation by the legislature. Id. §§ 74.501, 74.603. The Comptroller has a website that lists the name and last known address of all owners whose property has been transferred to the Comptroller under the UPA and instructs owners how to claim said property. See *Texas Unclaimed Property*, A DIVISION OF THE TEXAS COMPTROLLER, https://claimittexas.org/. According to the UPA, the comptroller is permitted to use one or more methods as necessary to inform each reported owner of unclaimed property, and the notice must be provided either in the county of the property owner's last address or "in the county in which the holder has its principal place of business or its registered office for service in this state, if the property owner's last address is unknown." Tex. Prop. Code § 74.201. The holder of property is also required to give notice at least 60 days before the property is delivered to the comptroller. Id. § 74.1011. However, the comptroller is not required to give notice prior to receiving the property from the holders and is only required to give notice in the calendar year immediately following the year in which the report required by section 74.101 is filed. See id. § 74.201.

Plaintiffs allege that the Comptroller's Office has been misusing the UPA to meet budget shortfalls in Texas. (Dkt. # 1 at 8.) They allege that Defendants are "skirting the requirements of the UPA to seize private property" and unlawfully coercing holders to transfer property so that they can convert it to revenue of the state. (Id. at 11.) In this vein, Plaintiffs assert that none of the property that is the subject of this action was abandoned property. (Id.) They allege that the holders are choosing to treat their property as abandoned even though they have the property owners' identities in their records, or the accounts have had activity in the previous three years. (Id. at 12.) They further assert that the holders are not providing adequate notice before transferring property to the state and that the Comptroller knows all of this and accepts the property anyways. (Id.) Notably, Plaintiffs have not asserted any claims against the holders of their property as far as the Court is aware.

Specifically, Plaintiff James alleges that Charles Schwab improperly transferred $305,203.56 from his retirement fund to the Comptroller's office as unclaimed property. (Id.) He further alleges that $188 of his funds were separately improperly transferred to the Comptroller's office as unclaimed property. (Id.) James asserts that the Comptroller's office did not give him adequate notice of the transfer of his funds and did not require his financial institution give him adequate notice before transferring the funds as unclaimed property. (Id.) James alleges that when he contacted the Comptroller's office about the funds, it

informed him that it had no record of the retirement funds supposedly transferred to its office. (Id.)

Second, Plaintiff Noe alleges that Reed Elsevier Inc. & Affiliates improperly transferred $468.72 of his funds to the Comptroller's office as unclaimed property. (Id.) Noe does acknowledge that he did receive notice of this transfer on the Comptroller's website but that it was legally inadequate notice. (Id.) Third, Plaintiff Ballantyne alleges that a financial institution improperly transferred $100 to the Comptroller's office as unclaimed property. (Id.) Ballantyne similarly acknowledges that the Comptroller's website listed the property but that this notice was inadequate and violated his due process rights. (Id.)

Based on the foregoing, Plaintiffs assert claims against Defendants in their official and individual capacities under 42 U.S.C. § 1983 seeking declaratory relief, preliminary and permanent injunctive relief, an accounting, and other relief. (Dkt. # 1.) Specifically, Plaintiffs seek a declaration that Defendants (1) failed to provide notice and satisfy due process requirements under Texas law, the Texas Constitution, and the United States Constitution; (2) allowed and colluded with third parties to retain property that belonged to Texas citizens; (3) seized, sold, and destroyed contents of bank safety deposit boxes without adequate notice; (4) failed to enforce the requirement that corporations comply with the Texas Property Code; and (5) acted ultra vires in regard to the first requested declaration ("Count 1"). (Id.)

Plaintiffs further allege violations under § 1983 of the (1) Due Process Clause of the Constitution and the Due Course of Law Clause of the Texas Constitution ("Count 2") and the (2) Takings Clause of the Fifth Amendment ("Count 3"). Additionally, Plaintiffs seek (1) an accounting ("Count 3"), (2) attorneys' fees and the creation of a common fund ("Count 4"), and (3) injunctive relief in the form of ordering Defendants to comply with and properly administer the law (the UPA) and return Plaintiffs' property ("Count 5"). (Id.) Lastly, Plaintiffs assert a claim for breach of fiduciary duty ("Count 6"). (Id.)

Under Count 2, Plaintiffs seek the return of the value of their property, which is currently held in the Texas General Revenue Fund. (Id.) Under Count 3, Plaintiffs again seek damages and compensation for their property. (Id.) In the alternative, they seek damages from Defendants in their individual capacities. (Id.)

LEGAL STANDARD

I. Motion to Dismiss

A. Rule 12(b)(1)

A motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure challenges a federal court's subject matter jurisdiction. See Fed. R. Civ. P. 12(b)(1). Under Rule 12(b)(1), a claim is properly dismissed for lack of subject matter jurisdiction when a court lacks statutory or constitutional authority to adjudicate the claim. Home Builders Assoc. of Miss., Inc.

v. City of Madison, 143 F.3d 1006, 1010 (5th Cir. 1998). In considering a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, "a court may evaluate (1) the complaint alone, (2) the complaint supplemented by undisputed facts evidenced in the record, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." Den Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420, 424 (5th Cir. 2001) (citation omitted).

B. Rule 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." In analyzing a motion to dismiss for failure to state a claim, the court "accept[s] 'all well pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" United States ex rel. Vavra v. Kellogg Brown & Root, Inc., 727 F.3d 343, 346 (5th Cir. 2013) (quoting In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007)).

To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). However, a court reviewing a complaint is not "bound to

accept as true a legal conclusion couched as a factual allegation." Id.

II. Objections to Magistrate Judge's Non -dispositive Order

Federal Rule of Civil Procedure 72(a) provides that non-dispositive pretrial matters may be decided by a magistrate judge. Fed. R. Civ. P. 72(a). However, a magistrate judge's ruling on a non-dispositive matter is subject to reconsideration by the district judge if a party serves and files objections to the order within 14 days. Id. Upon a party's timely objection, the district judge may modify or set aside any part of the magistrate judge's order which is "found to be clearly erroneous or contrary to law." Id.; see also 28 U.S.C. § 636(b)(1)(A).

DISCUSSION

I. Motion to Dismiss

Defendants move to dismiss Plaintiffs' claims based on a lack of jurisdiction due to sovereign immunity and the failure to state a claim. (Dkt. # 20.) Courts must first address challenges to subject matter jurisdiction before addressing the validity of a claim. Moran v. Kingdom of Saudi Arabia, 27 F.3d 169, 172 (5th Cir. 1994). The Court will address whether Plaintiffs failed to state a claim for any remaining claims under 12(b)(6) after the 12(b)(1) analysis.

A. Rule 12(b)(1)

Defendants argue that Plaintiffs' claims against Defendants in both their official and individual capacities are barred by the Eleventh Amendment, so the Court does not have subject matter jurisdiction. (Dkt. # 20 at 6–10.) In this vein, Defendants assert that the Ex parte Young exception does not apply to permit suit. (Id. at 8.) Defendants further argue that Texas state law bars Plaintiffs' state law claims. (Id. at 10.)

Generally, the Eleventh Amendment confers upon a state immunity from suits brought in federal court by its own citizens. U.S. Const. amend. XI; Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984). The Supreme Court has held that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." Pennhurst, 465 U.S. at 100 (quoting Emps. of Dep't of Pub. Health & Welfare, Missouri v. Dep't of Pub. Health & Welfare, Missouri, 411 U.S. 279, 280 (1973)). And the state is immune "regardless of the nature of the relief sought." Id. at 100–01.

However, in suits brought against state employees, "[t]he distinction between individual- and official-capacity suits is paramount." Lewis v. Clarke, 137 S. Ct. 1285, 1291 (2017). Therefore, courts "must look to whether the sovereign is the real party in interest to determine whether the Eleventh Amendment confers immunity." Id. at 1290. "In making this assessment, courts may not simply rely on the characterization of the parties in the complaint, but

rather must determine in the first instance whether the remedy sought is truly against the sovereign." Id. "[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office," and "[a]s such, it is no different from a suit against the State itself." Will v. Michigan Dep't of Stat e Police, 491 U.S. 58, 71 (1989) (internal citations omitted) (citing Brandon v. Holt, 469 U.S. 464, 471 (1985); Kentucky v. Graham, 473 U.S. 159, 165–166 (1985)). "And, as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief." Pennhurst, 465 U.S. 89 at 101–02 (citing Cory v. White, 457 U.S. 85, 91 (1982)).

However, there exists the Ex parte Young exception to the general rule: "a suit challenging the constitutionality of a state official's action is not one against the State." Id. at 102. Because "an unconstitutional enactment is 'void,'" it "does not 'impart to [the officer] any immunity from responsibility to the supreme authority of the United States.'" Id. (quoting Ex parte Young, 209 U.S. 123 at 160 (1908)). "To ensure the enforcement of federal law, however, the Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law." Frew ex rel. Frew v. Hawkins, 540 U.S. 431, 437 (2004) (citing Ex parte Young, 209 U.S. 123 (1908)). The Young exception "allows courts to order prospective relief, as well as measures ancillary to appropriate prospective relief." Id. (internal citations omitted)

(citing Edelman v. Jordan, 415 U.S. 651 (1974); Milliken v. Bradley, 433 U.S. 267 (1977); Green v. Mansour, 474 U.S. 64, 71–73 (1985)). Federal courts are not permitted to award retrospective relief or the equivalent if the State is immune. Id. (citing Edelman, 415 U.S. at 668).

Moreover, when a suit is brought against state officials in their individual capacities, "a question arises as to whether that suit is a suit against the State itself." Pennhurst, 465 U.S. at 101. "The Eleventh Amendment bars a suit against state officials when 'the state is the real, substantial party in interest.'" Id. (citing Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945))). "Thus, '[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.'" Pennhurst, 465 U.S. at 101 (quoting Hawaii v. Gordon, 373 U.S. 57, 58 (1963) (per curiam)).

Defendants assert that Plaintiffs' claims against Defendants in their official capacities are barred by the Eleventh Amendment and should be dismissed for lack of subject matter jurisdiction. (Dkt. # 20 at 6–10.) First, the Court finds that any claims brought against Defendants in their official capacities under § 1983[1] are dismissed with prejudice because state officials in their official capacities are not "persons" subject to

[1] It is somewhat ambiguous what claims Plaintiffs assert against Defendants in their various capacities, but for the sake of completeness, the Court will dismiss these claims if they have in fact been asserted.

claims under the statute. See Will, 491 U.S. at 68–71. Plaintiffs argue that the state waived its immunity for the remaining claims against Defendants in their official capacities. (Dkt. # 29.) Plaintiffs further argue that the Young exception applies. (Id.)

a. Waiver

All claims against Defendants in their official capacities depend on whether the state waived its immunity as Plaintiffs argue. (Dkt. # 29.) Defendant argues that it has not waived its immunity because there is no clear express waiver that specifically indicates the state intended to subject itself to suit in federal court. (Dkt. # 30 (citing Atascadero State Hospital v. Scanlon, 473 U.S. 234, 241 (1985); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984))).

"A sovereign's immunity may be waived, and the [Supreme] Court consistently has held that a State may consent to suit against it in federal court." Pennhurst, 465 U.S. at 99 (citing Clark v. Barnard, 108 U.S. 436, 447 (1883)). However, the state's consent must be "unequivocally expressed." Id. (citing Edelman v. Jordan, 415 U.S. 651, 673 (1974)). And "although Congress has power with respect to the rights protected by the Fourteenth Amendment to abrogate the Eleventh Amendment immunity, we have required an unequivocal expression of congressional intent to "overturn the constitutionally guaranteed immunity of the several States." Id. (citing Fitzpatrick v. Bitker, 427 U.S. 445 (1976); Quern v. Jordan, 440 U.S. 332, 342

(1979)) (internal citations omitted). Further, "[a] State's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued." Id.

Moreover, as the Supreme Court expounded:

> the Court consistently has held that a State's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts. See, e.g., Florida Department of Health v. Florida Nursing Home Assn., 450 U.S. 147, 150 (1981) (per curiam). "[I]t is not consonant with our dual system for the federal courts . . . to read the consent to embrace federal as well as state courts. . . . [A] clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found." Great Northern Life Insurance Co. v. Read, 322 U.S. 47, 54 (1944).

Pennhurst, 465 U.S. at 100 n.9.

Plaintiffs argue that the state has waived sovereign immunity under Tex. Prop. Code Ann. § 74.304(d) regarding claims for damages to unclaimed property in its possession. (Dkt. # 29 (citing Combs v. B.A.R.D. Indus. Inc., 299 S.W.3d 463, 469 (Tex. App. – Austin 2009)).Tex. Prop. Code Ann. § 74.304 provides:

> The comptroller is not, in the absence of negligence or mishandling of the property, liable to the person who claims the property for damages incurred while the property or the proceeds from the sale of the property are in

> the comptroller's possession. But in any event the liability of the state is limited to the extent of the property delivered under this chapter and remaining in the possession of the comptroller at the time a suit is filed.

Tex. Prop. Code Ann. § 74.304(d). Plaintiffs assert that they have met each of the requirements to bring suit according to the statute because (1) the Comptroller allegedly mishandled Plaintiffs' property by taking custody of property that is not 'unclaimed' or 'abandoned'" and failed to provide adequate notice of taking the property and (2) the allegedly mishandled property is in the state's possession. (Dkt. # 29 at 4–5.) Plaintiffs do not, however, provide any authority for why this state statute waives the state's immunity besides a citation to Pennhurst to support the fact that a state *can* waive its immunity, which Defendants do not disagree with. (Id.)

The Court cannot conclude that the statute "unequivocally expressed" Texas's consent to being sued in *federal* court for claims covered under the statute. And as stated above, "a State's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts." Pennhurst, 465 U.S. at 100 n.9. Therefore, because Texas has not waived its sovereign immunity as to the asserted claims, the only way for Plaintiffs' claims against Defendants in their official capacities to survive is if they fall under the Young exception.

b. The Young Exception

"[A]lthough prohibited from giving orders directly to a State, federal courts c[an] enjoin state officials in their official capacities." Hutto v. Finney, 437 U.S. 678, 690 (1978) (citing Ex parte Young, 209 U.S. 123). The Young framework is as follows:

> For Young to apply, three criteria must be satisfied: (1) A "plaintiff must name individual state officials as defendants in their official capacities," Raj v. La. State Univ., 714 F.3d 322, 328 (5th Cir. 2013); (2) the plaintiff must "allege[] an ongoing violation of federal law," Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 645 (2002); and (3) the relief sought must be "properly characterized as prospective," id. To determine whether the exception applies, we conduct a simple, "straightforward inquiry," Air Evac EMS, Inc. v. Tex. Dep't of Ins., 851 F.3d 507, 517 (5th Cir. 2017), and we do not consider the merits of the underlying claims.

Green Valley Special Util. Dist. v. City of Schertz, 969 F.3d 460, 471 (5th Cir. 2020).

Plaintiffs have named Defendants in their official capacities in the complaint, so the first requirement is met. (Dkt. # 1.) Plaintiffs allege violations of the Takings and Due Process Clauses of the U.S. Constitution, so the second requirement is likely also met. (Id.) Plaintiffs seek myriad forms of relief throughout the complaint. (Id.) They seek declaratory relief and injunctive relief, which can undoubtedly qualify as

prospective relief depending on what specifically they request be declared or enjoined. (Id.) Defendants in their official capacities do not have sovereign immunity against Plaintiffs' claims for constitutional violations of the Takings and Due Process Clauses in the United States Constitution.[2] The declaratory and injunctive relief relating to Texas state law and the Texas Constitution are addressed below.

However, Plaintiffs also seek repayment of the funds they claim were wrongfully taken from them and deposited in the Texas General Revenue Fund and damages. (Id.) Courts in this district and the Fifth Circuit have determined that money claimed under the UPA is not held in a separate trust for owners but rather "the Texas statute directs the Comptroller to deposit unclaimed property in the State's general revenue fund." Arnett v. Strayhorn, 515 F. Supp. 2d 690, 696 (W.D. Tex. 2006), aff'd sub nom. Arnett v. Combs, 508 F.3d 1134 (5th Cir. 2007); Clark v. Strayhorn, 184 S.W.3d 906, 912 (Tex. App. – Austin 2006, writ denied) (holding that the Texas UPA does not provide for unclaimed property to be held in a custodial trust). The statute provides that "[t]he comptroller shall deposit to the credit of the general revenue fund: (1) all funds, including marketable securities, delivered to the comptroller under this chapter or any other

[2] Plaintiffs assert that because they seek compensation for "private property that was unlawfully taken, liquidated, and converted to public use in violation of the Takings Clause," the state is not immune. (Dkt. # 29 at 3) (citing Combs, 299 S.W.3d at 470)). Finding that this claim is not barred by the Eleventh Amendment, the Court does not need to address this argument.

statute requiring the delivery of unclaimed property to the comptroller." Tex. Prop. Code Ann. § 74.601(b).

Plaintiffs argue that the analysis in Arnett does not apply here because in Arnett, the parties were seeking interest that had accrued on funds claimed through the UPA and not the return of the actual funds taken from the owners under the statute. (Dkt. # 29.) However, this Court finds no such distinction made in the opinion and finds the analysis of the UPA's holding of property to be equally applicable in a case such as this where Plaintiffs seek the return of funds taken under the UPA and thereafter deposited in the general revenue fund as required by Texas statute. Plaintiffs further rely on Ninth Circuit authority, which relies on a California state statute that provides for property claimed under California's analogue to the Texas UPA to be held in a custodial trust. (Dkt. # 29 (citing Suever v. Connell, 439 F.3d 1142, 1143 (9th Cir. 2006)). The California statute is distinguishable because property is held in a custodial trust, and therefore, the Ninth Circuit authority is not relevant here.

Plaintiffs further argue that the Texas Legislature could not have intended for the unclaimed property taken under the UPA to belong to the State. However, the Court must also reject this argument because the plain meaning of the statute indicates that the Legislature did intend for funds taken through the UPA to become part of the State's General Revenue Fund. The plain language of the statute clearly requires it. See Tex. Prop. Code §§ 74.601(b). And because there is no custodial trust scheme for unclaimed property under

the Texas UPA, see Clark, 184 S.W.3d at 912, depositing unclaimed funds that the comptroller receives from holders into the General Revenue Fund makes perfect sense within the statutory scheme of the UPA.

Lastly, the Court finds that all Plaintiffs' requests for declaratory or injunctive relief claims under state law and the Texas constitution must be dismissed for lack of subject matter jurisdiction.[3] In contrast to claims to vindicate federal rights, the Young exception is inapplicable to claims against state officials for the alleged violation of state law. Pennhurst, 465 U.S. at 106 ("A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. . . . [I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."). Plaintiffs assert that the claims are ultra vires claims and thus should not be barred by the Eleventh Amendment. However, the ultra vires exception for state law claims under the Eleventh Amendment is a "very narrow exception." Id. at 114.

Moreover, "a state officer may be said to act ultra vires only when he acts 'without any authority whatever.'" Id. at 101–02 n.11. The Texas Property Code undoubtedly vests the Comptroller with a great deal of authority and discretion in administering the UPA.

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[3] As a result, the Court need not address Defendants' argument that state law confers immunity or Plaintiffs' argument that the Supremacy Clause prohibits that.

One of Plaintiffs' complaints with Defendants is that they failed to provide notice as required by the UPA. Plaintiffs state that Defendants were required to mail direct notice to property owners. (Dkt. # 1 at 14.) However, none of the cited sections require such a thing, and the section that does mention mailing notice states that "notice may be mailed," which is undoubtedly a discretionary act under the UPA. See Tex. Prop. Code § 74.203(a).

Plaintiffs further assert that Defendants improperly commingled funds held in the Unclaimed Property Fund with funds held in the General Revenue Fund. (Dkt. # 1 at 15.) However, the UPA explicitly requires funds received under the UPA to be deposited in the General Revenue Fund. Tex. Prop. Code § 74.601(b). Plaintiffs generally allege that Defendants collude with companies "in violation of the law" to improperly receive and retain property that rightfully belongs to Texas citizens. (Dkt. # 1 at 15.) Plaintiffs cite no law that this violates and further fail to provide any factual allegations to support this claim.

Further, the UPA states "[t]he comptroller may adopt rules necessary to carry out this title." Tex. Prop. Code Ann. § 74.701. Throughout the enforcement subchapter that Plaintiffs cite as authority, the statute gives the comptroller and other state officials authority to do things but imposes few requirements to actually do so. See, e.g., id. § 74.702 ("For purposes of the application and enforcement of this title, the comptroller, the attorney general, or an authorized agent of either, *may* at any reasonable time and place, examine

the books and records of any person to determine whether the person has complied with this title."); id. § 74.703 ("The comptroller and the attorney general *may* employ, in the office of either official, additional personnel necessary to enforce this title."); id. § 74.711 ("To enforce this title, the comptroller *may* . . . ").

Plaintiffs only allegation that Defendants failed to comply with the UPA's notice requirement that involves *required* notice as opposed to *authorized* notice is that the website Defendants maintain does not constitute notice being provided "in the county of the property owner's last known address." See id. § 74.201. However, this section also provides that "the comptroller may use one or more methods as necessary to provide the most efficient and effective notice to each reported owner." Id. The website notice is available in every Texas county, which fulfills this requirement, and the Comptroller has the authority to determine what is the most efficient and effective way to accomplish that notice, rendering it a discretionary act for which the comptroller has authority to determine. Additionally, Plaintiffs cite sections of the UPA to support their contention that Defendants were required to police the holders in a particular way or ensure notice was affected in a certain way, but the sections have either been repealed or require no such thing. (See Dkt. # 1 at 17.)

It thus cannot be said that Defendants acted "without any authority whatever" regarding the administration of the aspects of the UPA at issue. To the extent Plaintiffs seek a court order for Plaintiffs to

comply with Texas law or the Texas Constitution, those claims are dismissed for lack of subject matter jurisdiction. While individual capacity claims can be barred by the Eleventh Amendment if they are claims that are transparently an attempt at an end run around the Eleventh Amendment where the state is the substantial party in interest. See Stramaski v. Lawley, 44 F.4th 318 (5th Cir. 2022). Accordingly, Defendants are not entitled to sovereign immunity as to Plaintiffs' individual capacity claims under § 1983 to the extent that the claims seek money damages against Defendants *individually* and not from the state treasury.

In summary, the Court dismisses Plaintiffs' claims against Defendants in their official and individual capacity to the extent those claims seek funds from the general revenue fund. Further, those claims seeking declaratory or injunctive relief based on alleged violations of state law or the state constitution are also dismissed for lack of subject matter jurisdiction. The remaining claims of those discussed in this section include (1) for violations of the Takings and Due Process Clauses of the Constitution against defendants in their official capacities to the extent that they seek permissible injunctive and declaratory relief and (2) for § 1983 claims against Defendants in their individual capacities for violations of the Takings and Due Process Clauses of the Constitution.

B. Rule 12(b)(6)

Defendants further assert that Plaintiffs fail to state a claim for any claim, and therefore, all claims against them must be dismissed. (Dkt. # 20 at 11.)

1. § 1983 Claims

"Section 1983 provides a claim against anyone who 'under color of any statute, ordinance, regulation, custom, or usage, of any State' violates another's constitutional rights." Whitley v. Hanna, 726 F.3d 631, 638 (5th Cir. 2013) (quoting 42 U.S.C. § 1983). "To state a section 1983 claim, 'a plaintiff must (1) allege a violation of a right secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law.'" James v. Tex. Collin Cnty., 535 F.3d 365, 373 (5th Cir. 2008) (quoting Moore v. Willis Indep. Sch. Dist., 233 F.3d 871, 874 (5th Cir. 2000)).

To plead a § 1983 claim, "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009). To hold a government official individually liable under § 1983 for violating constitutional rights, a plaintiff also must plead causation as to each defendant. Sims v. City of Madisonville, 894 F.3d 632, 639 (5th Cir. 2018); see also Jones v. Hosemann, 812 F.App'x 235, 239 (5th Cir. 2020). Additionally, "[t]he doctrine of qualified immunity protects government officials from civil damages liability when their actions could reasonably

have been believed to be legal." Morgan v. Swanson, 659 F.3d 359, 370 (5th Cir. 2011) (en banc).

"[S]ince § 1983 applies to individuals, we must be keenly aware of what § 1983 requires before plaintiffs can seek relief from individuals – namely individual causation." Jones v. Hosemann, 812 F. App'x 235, 238 (5th Cir. 2020) (unpublished opinion) (citing Sims v. City of Madisonville, 894 F.3d 632, 640–41 (5th Cir. 2018) (per curiam)). Accordingly, Defendants assert that Plaintiffs failed to plead individual causation as to each Defendant. (Dkt. # 20.) Plaintiffs respond that they did plead individual causation. (Dkt. # 29.) They provide that the complaint states that "Defendants have 'unlawfully taken control of and liquidated' Plaintiffs' property," "that Defendant Hegar is the 'custodian and administrator' of the Unclaimed Property Fund and that he is 'responsible for securing property and funds maintained in the State of Texas and for properly enforcing the UPA,'" and that "Defendant Bishop is 'responsible for carrying out many of the actions set forth in this Complaint, which include ensuring compliance with providing proper notice to abandoned property owners.'" (Dkt. # 29 (citing Dkt. # 1 at ¶¶ 10, 11, 12, 66)).

Defendants assert that pleading Defendants' official titles and supervisory nature of those titles does not satisfy Rule 12(b)(6) (Dkt. # 30). Defendants explain: "If the requirement to plead individual causation could be satisfied simply by reciting Defendants' job titles and general duties, the claim would effectively be against Defendants in their official capacities

and therefore not a proper § 1983 claim at all." (Dkt. # 30 (citing Will, 491 U.S. at 71)). The Court agrees. It is not sufficient to state that one's constitutional right was violated based on how the UPA was administered and attribute causation based on whose general responsibility it is to administer the UPA. This would allow § 1983 claims for vicarious liability, which are not permitted under any circumstances. See Iqbal, 556 U.S. at 676.

Thus, Plaintiffs have failed to plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." See Iqbal, 556 U.S. at 678. Therefore, the Court must dismiss Plaintiffs' § 1983 claims against Defendants in their individual capacities because they have failed to plead individual causation. As a result, the Court will not address Defendants' remaining arguments for dismissal of the § 1983 claims.

2. Injunctive Relief

Defendants move to dismiss the claim for injunctive relief because Plaintiffs are requesting the Court to "order a state constitutional officer to comply with state laws regarding a state program which he has the authority to administer." (Dkt. # 20 at 17.) For the reasons stated above in the discussion regarding the Eleventh Amendment, the Court lacks subject matter jurisdiction to order state officials to comply with state law or the Texas constitution. See Pennhurst, 465 U.S. at 106. Therefore, the claim for state law related

injunctive relief against Defendants in their official capacities is dismissed.

Defendants further assert that the remaining injunctive relief requested – that Defendants "immediately cease all unlawful conduct" – is impermissibly vague. (Dkt. # 20 at 17.) Plaintiffs assert that this Court is perfectly within its rights to order state officials to comply with the United States Constitution. (Dkt. # 29 at 17.) The Court agrees with that proposition. However, for the reasons discussed above, it is not clear that Plaintiffs have requested the Court to order Defendants to comply with federal law rather than state law.

Plaintiffs assert that they "specifically allege the relief they seek with particularity." (Id. (citing Dkt. # 1 at 30)). The count for injunctive relief specifically requests the Court to order "Defendants to comply with the law . . . and to return Plaintiffs' property" and to compel "Defendants to immediately cease all unlawful conduct as described herein and properly administer the UPA." (Dkt. # 1 at 27.) On page 30 of the complaint, Plaintiffs request an injunction restraining Defendants from: "[f]ailing to provide notice and due process pursuant to, and in the form required by, the provisions of Texas Property Code § 74.001, et seq. of the UPA;" "[f]ailing to pay interest in accordance with the UPA and applicable law;" "[i]mproperly commingling private funds escheated to the State held in the Unclaimed Property Fund with public funds held in the General Revenue Fund of the State of Texas;" "[a]llowing any known company or financial institution to

retain property and funds that are subject to escheat or transfer pursuant to the UPA;" "[s]hredding, altering, or destroying any documents necessary to determine the identity of any owner of property held by the Texas Comptroller according to the UPA;" "[d]estroying or altering original testamentary instruments (e.g., wills and trusts), insurance policies, and personal correspondence escheated or transferred to the Texas Comptroller's custody;" "[a]ccepting any escheated property from any holder without verification that the holder properly fulfilled its obligations under the UPA;" and "[p]rohibiting future unlawful and/or improper transactions, as alleged in this Complaint and to promulgate public rule- making." (Id. at 30.)

Indeed, the only requests that can be interpreted as requests to order Defendants to comply with the United States Constitution or federal law are for Defendants to cease all unlawful conduct and comply with the law. (See id. at 27, 30.) Plaintiffs did plausibly allege constitutional violations for notice and due process violations of the United States Constitution against Defendants in their official capacities, which allows for prospective injunctive relief. Therefore, the Court will not dismiss Plaintiffs' requests for prospective injunctive relief in the form of ordering the officials to comply with the Takings and Due Process Clauses of the Constitution. However, an injunction ordering the state to return funds from the general revenue fund is a request for money damages that is barred by the Eleventh Amendment and is dismissed.

Further, as stated above, the state law related injunctive relief is denied on Eleventh Amendment grounds.

3. Declaratory Relief

Defendants argue that Plaintiffs have also failed to state a claim for declaratory relief. (Dkt. # 20 at 17.) Their argument is essentially identical to that for the injunctive relief – that Plaintiffs are asking the Court to order state officials to comply with state law. Plaintiffs again seek declarations that Defendants violated the UPA, Texas Constitution, and U.S. Constitution. (Dkt. # 1 at 22–23.) Due to sovereign immunity, the Court dismisses the requests for declaration that Defendants have violated state law. However, the requests for declaration that Defendants violated the U.S. Constitution's requirements for due process of law and against takings are not dismissed for the reasons discussed in the injunctive relief section.

4. Breach of Fiduciary Duty

Defendants argue that Plaintiffs fail to state a claim for breach of fiduciary duty. (Dkt. # 20 at 18.) Plaintiffs allege that Defendants breached their fiduciary duty by failing to properly safeguard Plaintiffs' property. (Dkt. # 1.) They allege that Defendants violated their fiduciary duty "to not engage in self- dealing, to deal fairly and honestly, to act with good faith and loyalty, to act with strict integrity and full disclosure, and to act with candor." (Id.) To state a claim under Texas law, a plaintiff must plead the following:

"(1) the existence of a fiduciary duty, (2) breach of the duty, (3) causation, and (4) damages." First United Pentecostal Church of Beaumont v. Parker, 514 S.W.3d 214, 220 (Tex. 2017) (citing ERI Consulting Eng'rs, Inc. v. Swinnea, 318 S.W.3d 867, 873 (Tex. 2010)).

"It is well settled that 'not every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship.'" Meyer v. Cathey, 167 S.W.3d 327, 330 (Tex. 2005) (quoting Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 176–177 (Tex. 1997)). Accordingly, Defendants argue that there is no fiduciary relationship between them and Plaintiffs. (Dkt. # 20.) Plaintiffs respond that there is a fiduciary relationship because the statute mentions property claimed under the UPA must be safeguarded. (Dkt. # 29.) But it does not seem entirely certain that there is a fiduciary relationship here especially in light of the fact that the UPA does not create a custodial trust system of escheatment.

However, the Court finds a different defect in Plaintiffs' pleading of this claim in terms of the alleged breach of duty. What Plaintiffs have alleged does not constitute "enough facts to state a claim to relief that is plausible on its face." The claim is no more than a legal conclusion couched as a factual accusation. Therefore, the claim for breach of fiduciary duty is dismissed.

5. Accounting

Defendants argue that any claim for an accounting should be denied for failure to state a claim. (Dkt. # 20 at 19.) They argue that Plaintiffs do not identify any statute or legal authority that could entitle them to an accounting. They further recognize that "[w]hile an equitable accounting is an equitable remedy under Texas law when the facts and accounts presented are so complex that adequate relief may not be obtained at law, it is not an independent cause of action." (Id. (citing Terra Partners v. AG Acceptance Corp., No. 2:15-CV-236-J, 2016 WL 4989937, at *3 (N.D. Tex. Sept. 16, 2016)). The complaint does not demonstrate that the facts and accounts are so complex that Plaintiffs would be unable to get adequate relief. Therefore, the claim for an accounting is dismissed as a matter of law.

6. Attorneys' Fees and Common Fund

Defendants argue that the claims for attorneys' fees and creation of a common fund must be dismissed because they are for a remedy, not a separate cause of action. (Dkt. # 20.) Plaintiffs failed to address attorneys' fees or the creation of a common fund anywhere in their response. (See Dkts. # 29, 30 at 9.) In the complaint to support the request for attorneys' fees and creation of a common fund, Plaintiffs cite to 42 U.S.C. § 1988, which allows a court to award attorneys' fess in a § 1983 action. (Dkt. # 1.) The Court agrees with Defendants. There is no independent cause of action for attorneys' fees or the creation of a common fund, so

these claims fail as a matter of law. See e.g., Villegas v. Galloway, No. 10-20821, 2012 WL 45417, at *3 (5th Cir. Jan. 9, 2012); Wildy v. Wells Fargo Bank, N.A., No. 3:12-CV-01831-BF, 2013 WL 246860, at *6 (N.D. Tex. Jan. 21, 2013). Further, because the Court dismissed the § 1983 claims against Defendants, Plaintiffs have not pled a cause of action for which this remedy is available.

II. Objections to Magistrate Judge's Nondispositive Order

Defendants object to U.S. Magistrate Judge Bemporad's Order Granting in Part and Denying in Part Defendants' Motion to Stay. (Dkt. # 31.) As the motion to stay was to apply while the motion to dismiss was pending before this Court, the Court overrules Defendants' objections as moot.

III. Motion for Protective Order

Defendants move for entry of a protective order. (Dkt. # 35.) The motion for protective order is similarly applicable only to the time the motion to dismiss was pending before this Court. Therefore, it is also denied as moot.

CONCLUSION

For the reasons stated, the Court **GRANTS IN PART AND DENIES IN PART** Defendants' Motion to Dismiss. (Dkt. # 20.) The Court further

OVERRULES AS MOOT Defendants' objections to Judge Bemporad's Order (Dkt. # 31) and **DENIES AS MOOT** Defendants' Motion for Protective Order (Dkt. # 35). Plaintiffs' state statutory and state constitutional claims are dismissed without prejudice.

The parties are **ORDERED** to submit joint scheduling recommendations to the Court within **FOURTEEN (14) DAYS** of this Order.

IT IS SO ORDERED.

DATED: San Antonio, Texas, September 6, 2022.

/s/ David Alan Ezra
David Alan Ezra
Senior United States District Judge

United States Court of Appeals
for the Fifth Circuit

No. 22-50828

PHILIP C. JAMES; JOHN BALLANTYNE; WILLIAM NOE,

Plaintiffs–Appellees,

versus

GLENN ALLEN HEGAR, JR., *in his individual and official capacities as Texas Comptroller of Public Accounts, and his official and custodial capacities as Chairman of the Texas Treasury Safekeeping Trust Company and administrator of* TEXAS UNCLAIMED PROPERTY FUNDS; JOANI BISHOP, *in her individual and official capacities as Director of Unclaimed Property Reporting and Compliance, Texas Comptroller of Public Accounts*,

Defendants–Appellants.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:22-CV-51

ON PETITION FOR REHEARING EN BANC

(Filed Dec. 12, 2023)

Before KING, WILLETT, and DOUGLAS, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en bane as a petition for panel rehearing (5TH CIR. R . 35 I.0.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en bane (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en bane is DENIED.

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* Judge Jerry E. Smith, did not participate in the consideration of the rehearing en banc.

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

December 12, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 22-50828 James v. Hegar
USDC No. 5:22-CV-51

Enclosed is an order entered in this case.

See FRAP and Local Rules 41 for stay of the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

By: /s/ Renee McDonough
Renee S. McDonough, Deputy Clerk
504-310-7673

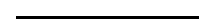
Ms. Sara Baumgardner
Ms. Alyssa Nicole Bixby-Lawson
Mr. David Bodenheimer
Ms. Kathryn Cherry
Mr. Sean R. Cooper
Mr. Laura Fellows
Mr. Jonathan C. Greiner
Mr. Richard M. Paul III
Mr. Christopher Ross

Texas Property Code § 72.101:

PERSONAL PROPERTY PRESUMED ABANDONED. (a) Except as provided by this section and Sections 72.1015, 72.1016, 72.1017, 72.102, and 72.104, personal property is presumed abandoned if, for longer than three years:

(1) the location of the owner of the property is unknown to the holder of the property; and

(2) according to the knowledge and records of the holder of the property, a claim to the property has not been asserted or an act of ownership of the property has not been exercised.



Texas Property Code § 74.201:

REQUIRED NOTICE. (a) Except as provided by Section 74.202, the comptroller may use one or more methods as necessary to provide the most efficient and effective notice to each reported owner in the calendar year immediately following the year in which the report required by Section 74.101 is filed. The notice must be provided:

(1) In the county of the property owner's last known address; or

(2) In the county in which the holder has its principal place of business or its registered office for service in this state, if the property owner's last address is unknown.

(b) The notice must state that the reported property is presumed abandoned and subject to this chapter and must contain:

(1) the name and city of last known address of the reported owner;

(2) a statement that, by inquiry, any person possessing a legal or beneficial interest in the reported property may obtain information concerning the amount and description of the property; and

(3) a statement that the person may present proof of the claim and establish the person's right to receive the property

(e) Deleted by Acts 1997, 75th Leg., ch. 1037, Sec 21, eff. Sept. 1, 1997

(d) The comptroller may offer for sale space for suitable advertisements in a notice published under this section.

Texas Property Code § 74.202:

NOTICE FOR ITEM WITH VALUE OF LESS THAN $100. In the notice required by Section 74.201, the comptroller is not required to publish information regarding an item having a value that is less than $100 unless the comptroller determines that publication of that information is in the public interest.

Texas Property Code § 74.203:

AUTHORIZED NOTICE. (a) During the calendar year immediately following the year in which the report required by Section 74.101 is filed, notice may be mailed to each person who has been reported with a Texas address and appears to be entitled to the reported property.

(b) the notice under Subsection (a) must conform to the requirements for notice under Section 74.201(b).

Texas Property Code § 74.301:

DELIVERY OF PROPERTY TO COMPTROLLER. (a) Except as provided by Subsection (c), each holder who on March 1 holds property to which this chapter applies shall deliver the property to the comptroller on or before the following July 1 accompanied by the report required to be filed under Section 74.101.

(b) If the property subject to delivery under Subsection (a) is stock or some other intangible ownership interest in a business association for which there is no evidence of ownership, the holder shall issue a duplicate certificate or other evidence of ownership to the comptroller at the time delivery is required under this section.

(c) If the property subject to delivery under Subsection (a) is the contents of a safe deposit box, the comptroller may instruct a holder to deliver the

property on a specified date before July 1 of the following year.

Texas Property Code § 74.304:

RESPONSIBILITY AFTER DELIVERY. (a) If reported property is delivered to the comptroller, the state shall assume custody of the property and responsibility for its safekeeping.

(b) A holder who delivers property to the comptroller in good faith is relieved of all liability to the extent of the value of the property delivered for any claim then existing, that may arise after delivery to the comptroller, or that may be made with respect to the property.

(c) If the holder delivers property to the comptroller in good faith and, after delivery, a person claims the property from the holder or another state claims the property under its laws relating to escheat or unclaimed property, the attorney general shall, on written notice of the claim, defend the holder against the claim, and the holder shall be indemnified from the unclaimed money received under this chapter or any other statute requiring delivery of unclaimed property to the comptroller against any liability on the claim.

(d) The comptroller is not, in the absence of negligence or mishandling of the property, liable to the person who claims the property for damages incurred while the property or the proceeds from the sale of the

property are in the comptroller's possession. But in any event the liability of the state is limited to the extent of the property delivered under this chapter and remaining in the possession of the comptroller at the time a suit is filed.

(e) For the purposes of this section, payment or delivery is made in good faith if:

(1) payment or delivery was made in a reasonable attempt to comply with this chapter;

(2) the holder delivering the property was not a fiduciary then in breach of trust with respect to the property and had a reasonable basis for believing based on the facts then known to the holder that the property was abandoned or inactive for purposes of this chapter; and

(3) there is no showing that the records under which the delivery was made did not meet reasonable commercial standards of practice in the industry.

(f) On delivery of a duplicate certificate or other evidence of ownership to the comptroller under Subsection (b) of Section 74.301, the holder and any transfer agent, registrar, or other person acting for or on behalf of a holder in executing or delivering the duplicate certificate are relieved of all liability of every kind in accordance with this section to any person, including any person acquiring the original certificate or the duplicate of the certificate issued to the comptroller, for any losses or damages resulting to any person by the

issuance and delivery to the comptroller of the duplicate certificate.

Texas Property Code § 74.601:

UNCLAIMED MONEY. (a) The comptroller shall maintain a record that documents unclaimed money received under this chapter or any other statute requiring the delivery of unclaimed property to the comptroller.

(b) The comptroller shall deposit to the credit of the general revenue fund:

(1) all funds, including marketable securities, delivered to the comptroller under this chapter or any other statute requiring the delivery of unclaimed property to the comptroller;

(2) all proceeds from the sale of any property, including marketable securities, under this chapter;

(3) all funds that have escheated to the state under Chapter 71, except that funds relating to escheated real property shall be deposited according to Section 71.202; and

(4) any income derived from investments of the unclaimed money.

(c) The comptroller shall keep a separate record and accounting for delivered unclaimed property, other than money, before its sale.

(d) Except as provided by Subsection (e), the comptroller shall from time to time invest the amount of unclaimed money in investments approved by law for the investment of state funds.

(e) The comptroller may use the proceeds from the sale of securities delivered under this chapter to buy, exchange, invest, or reinvest in marketable securities. When making or selling the investments, the comptroller shall exercise the judgment and care of a prudent person.

(f) The comptroller shall keep a separate record and accounting for securities delivered, sold, purchased, or exchanged and the proceeds and earnings from the securities.

(g) If an owner does not assert a claim for unclaimed money and the owner is reported to be the state or a state agency, the comptroller may deposit the unclaimed money to the credit of the general revenue fund. The comptroller may establish procedures and adopt rules as necessary to implement this subsection.

Texas Property Code § 74.602:

USE OF MONEY. Except as provided by Section 381.004, Local Government Code, and Section 74.604 the comptroller shall use the unclaimed money received under this chapter or any other statute requiring the delivery of unclaimed property to the comptroller to pay the claims of persons of states

establishing ownership of property in the possession of the comptroller under this chapter or under any other unclaimed property or escheat statute.

Texas Property Code § 74.603:

AUDIT; APPROPRIATION. The unclaimed money received under this chapter or any other statute requiring the delivery of unclaimed property to the comptroller is subject to audit by the State Auditor and to appropriation by the legislature for enforcing and administering this title.

Texas Property Code § 74.702:

EXAMINATION OF RECORDS. (a) For purposes of the applications and enforcement of this title, the comptroller, the attorney general, or an authorized agent of either, may at any reasonable time and place, examine the books and records of any person to determine whether the person has complied with this title.

(b) The comptroller, the attorney general, or any agent of either may not make public any information obtained by an examination made under this section and may not disclose that information except in the course of a judicial proceeding, authorized by this chapter, in which the state is a party or pursuant to an agreement with another state allowing joint audits or

the exchange of information obtained under this section.

(c) Subsection (a) applies to any books, records, papers, information, or other objects determined by the comptroller or attorney general to be necessary to conduct a complete examination under this title.

Texas Local Government Code § 381.004:

COMMUNITY AND ECONOMIC DEVELOPMENT PROGRAMS. (a) In this section:

(1) "Another entity" includes the federal government, the State of Texas, a municipality, school or other special district, finance corporation, institution of higher education, charitable or nonprofit organization, foundation, board, council, commission, or any other person.

(2) "Minority" includes blacks, Hispanics, Asian Americans, American Indians, and Alaska natives.

(3) "Minority business" means a business concern, more than 50 percent of which is owned and controlled in management and daily operations by members of one or more minorities.

(4) "Women-owned business" means a business concern, more than 50 percent of which is owned and controlled in management and daily operations by one or more women.

(b) To stimulate business and commercial activity in a county, the commissioners court of the county may develop and administer a program:

(1) for state or local economic development;

(2) for small or disadvantaged business development;

(3) to stimulate, encourage, and develop business location and commercial activity in the county;

(4) to promote or advertise the county and its vicinity or conduct a solicitation program to attract conventions, visitors, and businesses;

(5) to improve the extent to which women and minority businesses are awarded county contracts;

(6) to support comprehensive literacy programs for the benefit of county residents; or

(7) for the encouragement, promotion, improvement, and application of the arts.

(c) The commissioners court may:

(1) contract with another entity for the administration of the program;

(2) authorize the program to be administered on the basis of county commissioner precincts;

(3) use county employees or funds for the program; and

(4) accept contributions, gifts, or other resources to develop and administer the program.

(d) A program established under this section may be designed to reasonably increase participation by minority and women-owned businesses in public contract awards by the county by establishing a contract percentage goal for those businesses.

(e) The legislature may appropriate unclaimed money the comptroller receives under Chapter 74, Property Code, for a county to use in carrying out a program established under this section. To receive money for that purpose for any fiscal year, the county must request the money for that fiscal year. The amount a county may receive under this subsection for a fiscal year may not exceed an amount equal to the value of the capital credits the comptroller receives from an electric cooperative corporation on behalf of the corporation's members in the county requesting the money less an amount sufficient to pay anticipated expenses and claims. The comptroller shall transfer money in response to a request after deducting the amount the comptroller determines to be sufficient to pay anticipated expenses and claims.

(f) The commissioners court of a county may support a children's advocacy center that provides services to abused children.

(g) The commissioners court may develop and administer a program authorized by Subsection (b) for entering into a tax abatement agreement with an owner or lessee of a property interest subject to ad

valorem taxation. The execution, duration, and other terms of the agreement are governed, to the extent practicable, by the provisions of Sections 312.204, 312.205, and 312.211, Tax Code, as if the commissioners court were a governing body of a municipality.

(h) The commissioners court may develop and administer a program authorized by Subsection (b) for making loans and grants of public money and providing personnel and services of the county.