NO. 03-11-00113-CV

IN THE THIRD COURT OF APPEALS
AT AUSTIN, TEXAS

THOMAS SUEHS, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE TEXAS HEALTH & HUMAN SERVICES COMMISSION AND THE TEXAS HEALTH & HUMAN SERVICES COMMISSION,
Appellants,

v.

OCTAVIA GONZALEZ, ET AL.,
Appellees.

On Appeal from the
345th Judicial District Court, Travis County, Texas

BRIEF OF APPELLEES

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ORAL ARGUMENT CONDITIONALLY REQUESTED

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STATEMENT OF THE CASE

Nature of the Case:	Ultra-vires and declaratory-judgment action against state official to declare violation of state rules regarding administration of food-stamp program and to enjoin further violations.
Trial Court:	Hon. Lora Livingston, 261st District Court, Travis County.
Trial Court's Disposition:	Denied state official's plea to the jurisdiction based on sovereign immunity. 1CR 681.
Parties in the Court of Appeals:	*Appellant*: Thomas Suehs, in his official capacity as Commissioner of the Texas Health & Human Services Commission.[1]
	Appellees: Octavia Gonzalez, *et al*. (*see* Identity of Parties and Counsel)

ISSUES PRESENTED

1. Are certain deadlines and other requirements in the Texas regulations governing administration of the food-stamp program ministerial requirements that Texas courts have jurisdiction to enforce in an ultra vires action, or do agency officials have discretion to ignore them?

2. Do the U.S. Secretary of Agriculture and the federal courts have exclusive jurisdiction over the enforcement of these *state* rules?

3. Does the Eleventh Amendment, the Spending Clause, or the "federal right" doctrine deprive the state courts of jurisdiction to enforce state law that is similar to, or incorporates, federal standards?

4. Is adherence to state food-stamp regulations a nonjusticiable political question?

[1] Plaintiffs/Appellees also brought a due-course-of-law claim against the Commission under Article I, §19 of the Texas Constitution. But they are now withdrawing that claim, leaving the Commissioner, in his official capacity, as the sole defendant. Plaintiffs have also narrowed the claims against the Commissioner. *See infra*, at 6.

STATEMENT REGARDING ORAL ARGUMENT

This appeal involves a straightforward application of this Court's and the Texas Supreme Court's ultra-vires jurisprudence under *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009). Thus, Appellees do not believe that oral argument is necessary. But, if the Court grants oral argument, Appellees would like to participate.

STATEMENT OF FACTS

This appeal arises from a dispute about whether the Commissioner of the Texas Health and Human Services Commission is violating state law by failing to adhere to deadlines and requirements for processing food-stamp applications and providing benefits.

The Food-Stamp Program

The food stamp program (now known as the Supplemental Nutrition Assistance Program or SNAP) was established in 1964 to "safeguard the health and well-being of the Nation's population by raising levels of nutrition among low-income households" and "permit low-income households to obtain a more nutritious diet . . . by increasing food purchasing power for all eligible households who apply for participation." 7 U.S.C. §2011.

Approximately one million Texas families receive food stamps, and over half the recipients are children. 1 CR 86. To qualify, applicants must meet net income requirements: no more than $903 per month for an individual and $1,838 per month for a family of four. 1 CR 87. In 2009, Texas recipients spent $4.4 billion at Texas grocery stores. *Id.*

SNAP is a federal-state partnership. The federal government covers most of the costs (the entire cost of benefits and half the cost of administration) and imposes eligibility and administration requirements. 1 TEX ADMIN. CODE §372.5(b) The State develops and administers the program and directs benefits to eligible households. *Id.* §372.6(b).

To further the purpose of getting these essential benefits into the hands of the hungry, both federal and state law give households specific rights to apply, have their eligibility determined promptly, and receive benefits promptly. The process begins on the day that the applicant household files an application containing at least the applicant's name, address, and signature. 1 TEX. ADMIN. CODE §372.902(a), .903; 7 U.S.C. §2020(e)(2)(B)(iv). If approved, an applicant receives benefits for a specified certification period—commonly between three and twelve months. 7 C.F.R. §273.10(f). Then, the recipient must apply for recertification. 7 C.F.R. §273.14(a).

The State is obliged to comply with minimum federal food-stamp requirements as a condition of participating in the program and receiving federal funds. *See* 7 C.F.R. §276.1(a)(4). But States are given latitude in administering the program. States may, in most circumstances, impose additional requirements over and above what the federal government requires. *See, e.g.*, 1 TEX. ADMIN. CODE §372.956. Additionally, States may request waivers of federal mandates. 7 C.F.R. §272.3(c)

Federal food-stamp rules do not compel participating States to promulgate federal rules as state law, or even to issue rules at all. Nonetheless, the Texas Legislature charged the Health and Human Services Commission with "establish[ing] policies and

rules that will ensure the widest and most efficient distribution of the commodities and food stamps to those eligible to receive them." TEX. HUM. RES. CODE §33.002(c).

The Commission chose to carry out this mandate by:

- issuing rules incorporating federal regulations by reference, 1 TEX. ADMIN. CODE §372.3(e) (incorporating all federal regulations in 7 C.F.R. Parts 271-283); 1 TEX. ADMIN. CODE §372.1001(b) (incorporating 7 C.F.R. §273.10(g));
- imposing requirements over and above federal requirements, s*ee, e.g.*, *id*. §372.956(b) (mandating next-day deadline for providing benefits to applicant with emergency need as compared to seven days under the corresponding federal regulation, *see* 7 C.F.R. §274.2(b)); and
- promulgating rules in areas in which States are granted options or waivers. *See* 1 TEX. ADMIN. CODE §372.3(e).

The rules in the first category oblige the Commission, among other things, to make eligibility determinations and notify applicants of those decisions within legal deadlines; notify applicants in writing of the necessary verification documents and assist them with obtaining those documents; if benefits are denied, give notice of reasons for denial; and, if benefits are granted, provide them promptly and from the day of application. 1 TEX. ADMIN. CODE §§372.3(e), 372.1001(b)(1) (both incorporating federal standards).

The Parties

There are 50 individual and five organizational plaintiffs (collectively, "Gonzalez"). All of the individual plaintiffs have applied for food stamps and been stymied by a variety of barriers. In other contexts—such as dealing with an insurance company—such barriers would be nothing more than an annoyance. But food stamps are different. An unresponsive agency not following its own deadlines and procedures can become the difference between feeding yourself and your children—or not.

McKay Keithley is a retired 80-year-old gentleman who served in the Air Force from 1951 to 1954 and then worked for 30 years as a photographer. 1 CR 89. When his parents became ill, he returned to his home state of Indiana and started a construction company. *Id*. at 90. Several years ago, he moved to Texas to be closer to his brother. *Id*. He is now retired and lives on $856 per month from Social Security. *Id*.

Mr. Keithley applied for food stamps on December 10, 2009 and had his interview shortly thereafter. *Id*. Forty-three days later, he received a letter stating the obvious: there was a delay in processing his application, and he needed to send more documents. *Id*. Confused by the request, he called HHSC, which told him to disregard one of the requests. *Id*. at 90-91. HHSC also advised him that he would receive his benefits on the same day he provided the documents. *Id*. Mr. Keithley's brother hand-delivered the documents to the HHSC office the same day, but HHSC did not provide benefits to Mr. Keithley as promised. *Id*. Eleven days later (54 days after he applied), Mr. Keithley received a notice that his benefits had been denied because his income was too high and

he had not provided necessary information. *Id*. at 91-92. Knowing that was wrong on both counts, Mr. Keithley tried to call HHSC, but his calls were not returned. *Id*. at 92.

When Mr. Keithley appealed with the assistance of Legal Aid, HHSC offered to reopen his application if he provided the missing unidentified information. *Id*. at 93. The condition was that HHSC proposed to use the date that Mr. Keithley was provided the information as his application date, which would reduce the benefits owed to him if he were successful at the administrative appeal. *Id*. Although desperately in need of food stamps, Mr. Keithley refused HHSC's offer and still (166 days after the application) awaited, as of the time of the petition, a decision on his appeal. *Id*.

Liliana Lara cleans houses for a living and supports an eight-year-old daughter. 1 CR 93. She is seeking a divorce from her husband, who abused her and is currently incarcerated. *Id*. The economic downturn caused Ms. Lara to lose customers. 1 CR 94. Currently, she cleans only three houses per week and earns $840 per month, of which $570 goes for rent and utilities. *Id*. She applied for food stamps on March 18, 2009. *Id*. That day, she was given a letter stating that HHSC would call her for an interview the following day. *Id*. HHSC never called and never answered Ms. Lara's repeated phone calls. *Id*. Throughout her wait, which was one year long, Ms. Lara's phone number and address did not change. *Id*. She began to depend on handouts from customers and neighbors and fell behind on her rent and utilities. *Id*.

Texas RioGrande Legal Aid became involved in January 2010 and demanded that HHSC make a decision on Ms. Lara's application. *Id*. HHSC informed TRLA that it had denied Ms. Lara's application back in May 2009, but she never received any notice of

denial. *Id*. Her right to appeal started running when benefits were denied, so her right to an administrative hearing was in jeopardy. *Id*. at 94-95. She is still waiting for that hearing. *Id*. at 95.

In the meantime, she applied for benefits again. *Id*. Even though she had legal representation, HHSC still did not schedule an interview for her until 37 days had passed. *Id*. Another 22 days passed before HHSC informed her that she had been approved. *Id*. But, as of the time of the petition, she had still never received a single written notice regarding her eligibility for benefits, which would include the date the benefits expire. *Id*. She desperately hopes that she will not have to use an attorney again to continue her benefits. *Id*. Any delay in benefits would be especially difficult in the summer, when her daughter is not in school and thus does not receive free meals. *Id*. The other plaintiffs have had similar experiences with HHSC.

Gonzalez's petition alleges violations of §33.002(c) of the Human Resources Code (Count 1), regulations implying a duty to maintain an adequate phone system (part of Count 3), and Article I, §19 of the Texas Constitution (Count 7), but she now withdraws those complaints. Because the Article I, §19 claim is the only claim against the Commission, it is no longer a proper defendant. Gonzalez will formally amend her petition when the case returns to the trial court. She proceeds with the following claims against the Commissioner in his official capacity:

- Failure to make decisions on initial applications within 30-day deadline. 1 TEX. ADMIN. CODE §372.904(b); 1 TEX. ADMIN. CODE §§372.3(e), .1101(b) (both incorporating 7 C.F.R. 273.10(g)(1)).

- Failure to make timely decisions on recertifications. 1 TEX. ADMIN. CODE §372.3(e) (incorporating 7 C.F.R. §273.10(g)(2).

- Failure to provide required notice to applicants as follows:

    - Which documents must be submitted to verify and complete an application. 1 TEX. ADMIN. CODE §372.3(e) (incorporating 7 C.F.R. 273.2(c)(5)).

    - That a final decision has been made on the application (and whether the applicant is eligible, the type and amount of assistance, the date on which the assistance shall begin, and the manner in which payments shall be made). 1 TEX. ADMIN. CODE §§372.3(e), .1101(b) (both incorporating 7 C.F.R. 273.10(g)(1)).

    - That an application has been denied, the basis for the denial, and the right to an administrative "fair hearing." 1 TEX. ADMIN. CODE §§ 372.3(e), .1001(b) (both incorporating 7 C.F.R. §273.10(g)(1)(ii)).

    - That an application has been left pending and whether the applicant must take other action, 1 TEX. ADMIN. CODE §§372.3(e), .1001(b) (both incorporating 7 C.F.R. §273.10(g)(1)(iii)).

    - That the agency must assist an applicant with obtaining verification documents, 1 TEX. ADMIN. CODE §372.3(e) (incorporating 7 C.F.R. §273.2(c)(5)).

    - That benefits are provided from the date of the application (must be on application itself), 1 TEX. ADMIN. CODE §372.3(e) (incorporating 7 C.F.R. §273.2(b)(1)(vii)).

    - That an application is submitted upon providing a name, address, and signature (must be on application itself). 1 TEX. ADMIN. CODE §372.3(e) (incorporating 7 C.F.R. §273.2(b)(1)(v)).

    - Date on which benefits will end and that recipient must apply for recertification to continue benefits, 1 TEX. ADMIN. CODE §372.3(e) (incorporating 7 C.F.R. §273.14(b))

- Failure to assist applicant in obtaining verification documents. 1 TEX. ADMIN. CODE §372.3(e) (incorporating 7 C.F.R. §§273.2(f)(5)).

- Failure to provide benefits to eligible applicants within 30 days of application. 1 TEX. ADMIN. CODE §372.3(e) (incorporating 7 C.F.R. §§273.2(g), 274.2(b)).

- Failure to continue benefits to recertification applicants when application decision is delayed through agency's fault. 1 TEX. ADMIN. CODE §372.3(e) (incorporating 7 C.F.R. §§273.14(e)).

All of these counts are based on §372.3(e) of the Texas Administrative Code, which incorporates a large block of federal standards into the state rules.[2] Some complaints are also based on §372.1001(b), which incorporates the standards in 7 C.F.R. §273.10(g)).[3] And one complaint is also based in part on §372.904(b), which does not incorporate a federal rule.[4]

SUMMARY OF ARGUMENT

This is a proper ultra-vires suit under state law. Under *City of El Paso v. Heinrich*, state courts have jurisdiction to entertain suits (1) for prospective injunctive relief (2) that allege a state official's failure to comply with a ministerial (non-discretionary) duty. 284 S.W.3d 366 (Tex. 2009). This suit is for prospective injunctive relief only. And Commission rules set out ministerial duties (incorporated from federal standards) that the Commissioner must perform and deadlines that he must meet vis à vis applicants for food

[2] "To the extent that the regulations described in subsection (d) of this section impose federal mandates that apply to Texas, HHSC incorporates the regulations by reference for administration of SNAP in Texas." 1 TEX. ADMIN. CODE §372.3(e).

[3] "In SNAP, HHSC provides notice: (1) to SNAP applicant households as explained in 7 CFR. §273.10(g)(1) [and] (2) related to recertification as explained in 7 CFR §273.10(g)(2) . . ." 1 TEX. ADMIN. CODE §372.1001(b).

[4] "For a SNAP application . . . HHSC certifies or denies the application as soon as possible but not later than 30 days after the application file date . . ." 1 TEX. ADMIN. CODE §372.904(b).

stamps. These rules are clear and specific, leaving no room for discretion—the hallmarks of a ministerial duty. Thus, both prongs of an ultra-vires action are met, the suit is not barred by sovereign immunity, and the trial court correctly denied the plea to the jurisdiction.

The Commissioner does not directly challenge either prong. He does not contend that this suit is for retrospective relief or for damages. Neither does he challenge the ministerial nature of the rules. Rather, the Commissioner advances a laundry list of reasons why he is free to ignore state law.

First, he argues that the agency's rules are "directory" rather than "mandatory" because the rules list no specific consequences or penalty for noncompliance. But the Court's "directory" jurisprudence does not establish that compliance with such rules is optional. It holds only that noncompliance does not *invalidate* the rule. Were it otherwise, only statutes and rules with specific remedial provisions could be enforced through ultra-vires suits—a result at odds with *Heinrich* and unsupported by any authority.

Second, the fact that HHSC has a limited administrative review mechanism (if it even applies to Gonzalez's claims) does not preclude an ultra-vires suit. Rather, the two avenues coexist and are complementary, providing different forms of relief. The HHSC's hearing examiner can find that deadlines were missed but cannot grant prospective relief ordering the agency to meet deadlines in the future. That is the role of the courts under *Heinrich*—to ensure that state officials follow state law.

The remainder of the Commissioner's attacks on this suit focus on the agency's incorporation of federal standards into its rules. The Commissioner seems to believe that incorporation deprives the rules of any state-law character. That argument is not only unsupported but unnecessarily subordinates Texas with respect to the federal government. The Texas Legislature issued a statutory command to the Commission: "establish policies and rules that will ensure the widest and most efficient distribution of the commodities and food stamps to those eligible to receive them." TEX. HUM. RES. CODE §33.002(c). The agency apparently concluded that the federal standards would, at least in part, further the Legislature's goal, so it incorporated those rules by reference. Using a short cut does not deprive the rules of their state-law status or make them unenforceable. Such a rule would diminish Texas's sovereignty. And it would cast doubt on countless Texas statutes and rules that incorporate federal standards.

The concepts the Commissioner advances resemble preemption, but he does not advance that doctrine. Nor could he, because state law is preempted when it *conflicts* with federal law. Paradoxically, the Commissioner wishes to accomplish the same result, but in the opposite circumstance: when state law is *identical* to federal law. The Commissioner should not be able to indirectly accomplish preemption when that doctrine is not advanced and clearly inapplicable.

Once the state-law nature of Gonzalez's suit is recognized, the Commissioner's federal-law-based arguments are exposed as meritless. Whether federal law provides an enforceable "*federal* right" is irrelevant. Whether Congress conferred exclusive jurisdiction under *federal* law is irrelevant. And the primary rationale of the

Commissioner's political-question assertion—dedication of enforcement of *federal* law to a coordinate branch of U.S. government (the Department of Agriculture)—is irrelevant.

The Commissioner's remaining contentions similarly miss the mark. The Eleventh Amendment is inapplicable because it precludes only suits against the State—not against a state official acting in her official capacity. And the federal Constitution's Spending Clause is inapplicable because it is a vehicle for establishing the State's consent to suit. Gonzalez's suit does not require consent because—again—hers is an official-capacity suit, not a suit against the State.

Allowing this suit to go forward will not entangle state courts in overseeing the food-stamp program in Texas. Because an ultra-vires suit, by definition, enforces only ministerial requirements, the courts will not infringe on executive discretion or cross the line into prohibited policy-making. Put another way, Gonzalez's suit is proper because it "do[es] not seek to alter government policy but rather to enforce existing policy." *Heinrich*, 284 S.W.3d at 372.

ARGUMENT

I. Because Gonzalez seeks to compel the Commissioner to perform his ministerial duties, her ultra-vires suit is proper.

A. **Ultra-vires suits are permissible because they seek to enforce (not alter) state law.**

The Commission cannot be sued directly for failure to follow its own rules because, as a state agency, it enjoys sovereign immunity. But, in limited circumstances. state officials can be sued for failing to comply with state law. "Unlike a suit challenging a state official's discretionary acts, an action to determine or protect a private party's

rights against a state official who has acted *without* legal or statutory authority—*i.e.* has acted ultra vires—is not a suit against the State that is barred by sovereign immunity." *Combs v. City of Webster*, 311 S.W.3d 85, 94 (Tex. App.—Austin 2009, pet. denied) (citing *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 404 (Tex. 1997); *see also Heinrich*, 284 S.W.3d at 371. Sovereign immunity does not act as a bar to ultra vires suits, not because immunity has been waived, but because it does not apply at all. *See Heinrich*, 284 S.W.3d at 372.

The rationale for this exception is that "'ultra vires suits do not attempt to exert control over the state—they attempt to reassert the control of the state.'" *Id*.; *Univ. Interscholastic League v. Sw. Officials Ass'n, Inc.*, 319 S.W.3d 952, 964 (Tex. App.—Austin 2010, no pet.).

B. Gonzalez's suit is proper because it seeks to force the Commissioner to comply with ministerial duties.

"To fall within [the] 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." *Id*. "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); *Texas Racing Comm'n v. Marquez*, 03-09-00635-CV, 2011 WL 3659092, *4 (Tex. App.—Austin Aug. 19, 2011, no pet. h.) (mem. op.).

The rules that Gonzalez invokes set out the Commissioner's duty with great detail and precision. They give the Commissioner no discretion. For example:

- "State agencies **shall** provide applicants with . . . written notices [of eligibility, denial, or pending status] . . . no later than 30 days after the date of the initial application . . . ." 7 C.F.R. §273.10(g)(1), incorporated by 1 TEX. ADMIN. CODE §§372.3(e), .1001(b).

- "Each application form **shall** contain: . . . notification that benefits are provided from the date of application." 7 C.F.R. §273.2(b)(1)(vii), incorporated by 1 TEX. ADMIN. CODE §372.3(e).

- "The State agency **shall** provide each household at the time of application for certification and recertification with a notice that informs the household of the verification requirements the household must meet as part of the application process [and] at a minimum, the notice **shall** contain examples of the types of documents the household should provide and explain the period of time the documents should cover. 7 C.F.R. 273.2(c)(5), incorporated by 1 TEX. ADMIN. CODE §372.3(e).

- "If the application is to be held pending . . . the State agency **shall** provide the household with a written notice which informs the household that its application has not been completed and is being processed." 7 C.F.R. §273.10(g)(1)(iii), incorporated by 1 TEX. ADMIN. CODE §372.1001(b).

- "The State agency **shall** provide . . . households . . . [a notice of expiration of benefits] before the first day of the last month of the certification period, but not before the first day of the next-to-the-last month." 7 C.F.R. §273.14(b), incorporated by 1 TEX. ADMIN. CODE §372.3(e).

- "State agencies **shall** inform the household of the State agency's responsibility to assist the household in obtaining required verification [documents] . . ." 7 C.F.R. §273.2(c)(5), incorporated into state law by 1 TEX. ADMIN. CODE §372.3(e).

- "The State agency **must** assist the household in obtaining [the documents needed for] verification . . . ." 7 C.F.R. §273.2(f)(5), incorporated by 1 TEX. ADMIN. CODE §372.3(e).

- "The State agency **shall** provide eligible households that complete the initial application process an opportunity to participate . . . as soon as

possible, but no later than 30 calendar days following the date the application was filed . . ." 7 C.F.R. §273.2(g)(1), incorporated by 1 TEX. ADMIN. CODE §372.3(e).

- If the "recertification process cannot be completed within 30 days . . . because of State agency fault, the State agency **must** continue to process the case and provide a full month's allotment for the first month of the new certification period." 7 C.F.R. §273.14(e)(1), incorporated by 1 TEX. ADMIN. CODE §372.3(e).

According to the Code Construction Act, "'[s]hall' imposes a duty." TEX. GOV'T CODE §311.016(2). The Commission's rules are clear and specific. Their plain language gives no discretion. Therefore, they are ministerial. *See Anderson*, 806 S.W.2d at 793; *see also Texas Racing Comm'n v. Marquez*, 03-09-00635-CV, 2011 WL 3659092, *4 (Tex. App.—Austin Aug. 19, 2011, no pet. h.) (mem. op.) (holding that ultra vires action was proper against executive director of racing commission because she had violated ministerial duty to provide administrative hearing).

C. The Commissioner's argument that the rules are "directory" rather than "mandatory" does not relieve him of his obligation to comply or shield him from an ultra-vires suit.

The Commissioner contends that, because the rules do not establish penalties for noncompliance, they are "directory" rather than "mandatory." Comm'r Br. at 34-40. Of course, "ministerial" is the test—not "mandatory." *See Heinrich*, 284 S.W.3d at 372. So the Commissioner's argument immediately misses the mark.

Moreover, the mandatory/directory distinction has not been used to relieve government officials from legally-imposed duties. Rather, it serves to prevent private parties from taking advantage of procedural lapses to *invalidate* state statutes or rules or impede state agencies from enforcing them.

The Commissioner relies primarily on *Texas Mutual Insurance Company v. Vista Community Medical Center, LLP*, 275 S.W.3d 538 (Tex. App.—Austin 2008, pet. denied), and that case is a perfect example. Comm'r Br. at 37-38. In *Vista*, a hospital tried to avoid the application of a workers' compensation reimbursement rule because the Department of Insurance had not revised it every two years as required by statute. This Court rejected the hospital's claim that the rule was invalid. *Vista*, 275 S.W.3d at 553. Because the statute specified no penalty for non-compliance with the revision deadline, the Court held that the revision requirement was "directory." Thus, the fact that revisions had not been done did not prevent the Department from enforcing the rule against the hospital. *Id*. The Court did not hold or even suggest that the Department of Insurance was relieved of its statutory duty to update the rule—only that hospitals could not take advantage of that failure to avoid the rule's application. *See id*.

Thus, whether the rules Gonzalez invokes are mandatory or directory is irrelevant.[5] The standard for an ultra vires suit is whether the rules are *ministerial*. *Heinrich*, 284 S.W.3d at 372. Gonzalez has demonstrated that they are. The Commission's deadlines for acting on applications and sending out notices are clear and specific. Its requirements for the form of applications and the contents of notices are also clear and precise. The Commissioner does not challenge the ministerial nature of these

[5]And even if it were relevant, at least one of the rules Gonzalez seeks to enforce would be mandatory because it does provide a consequence for noncompliance. If the Commission cannot complete the recertification process for a current food-stamp recipient within 30 days because of the agency's fault, then it has to provide a month of benefits while it finishes the evaluation. 1 TEX. ADMIN. CODE §372.3(e) (incorporating 7 C.F.R. §273.14(e)(1)).

commands. Rather, he limits himself to questioning, in a footnote, whether the requirement to "assist" is sufficiently precise. Comm'r Br. at 39 n.16. He does not challenge the core requirements of the rules. Nor can he. Under the governing standard, they are ministerial and enforceable through an ultra-vires suit. *See Heinrich*, 284 S.W.3d at 372; *Anderson*, 806 S.W.2d at 793.

II. The presence of limited administrative review does not foreclose an ultra-vires suit.

The Commissioner suggests that Gonzalez's ultra-vires suit is prohibited because she could obtain relief through the Commissioner's administrative review process. Comm'r Br. at 16-17. That is incorrect for several reasons—most notably because there is no such limitation on ultra-vires claims, and the Commissioner cites none. Also, the agency's administrative process does not cover all of Gonzalez's claims, and it cannot grant prospective injunctive relief.

The Commission's rule provides: "SNAP households may appeal Texas Health and Human Services Commission (HHSC) *decisions* as provided by HHSC's fair hearing rules in Chapter 357 of this title (relating to Hearings)." 1 TEX. ADMIN. CODE §372.1002 (emphasis added). Gonzalez's claims do not complain of HHSC decisions (such as denial of benefits). The problem is just the opposite—a *failure* to make decisions on applications in timely fashion. In addition, HHSC has failed to provide assistance, information about required documentation and reasons for denials. It has failed to provide notice of grants, denials, and applications that remain pending within the required time frame. These are not "decisions."

Without a "decision," an applicant's complaint about SNAP administration cannot go to fair hearing. The fact that the fair hearing rule encompasses "a failure to act with reasonable promptness on a client's claim for benefits or services," *id*. §357.3(b)(1)(B), does not obviate the "decision" required by §372.1002. For a failure to act to be reviewable, the agency would have to have made a "decision" *not* to make a decision (such as deciding to leave an application pending and then failing to take further action).

This construction of the rules makes sense. Failures to rule are not appealable but, in the courts, are reviewable by mandamus—to compel a trial judge to perform her ministerial duty to rule on motions. *See*, *e.g.*, *Stoner v. Massey*, 586 S.W.2d 843, 846-47 (Tex. 1979); *Safety-Kleen Corp. v. Garcia*, 945 S.W.2d 268, 269 (Tex. App.—San Antonio 1997) (orig. proceeding) (collecting cases). That is precisely the goal of Gonzalez's suit—to compel the Commissoner to timely rule on food-stamp applications and perform other ministerial duties. Such relief is always available because it "reassert[s] the control of the state," and "enforce[s] existing policy." *Heinrich*, 284 S.W.3d at 372. Whatever limited administrative appeal is available, it adds to, but does not supplant, proper ultra-vires suits.

III. State law that is identical to, or incorporates, federal law does not lose its force and dignity as state law.

Gonzalez brought this suit to enforce state law. 1 CR 5. But the Commissioner argues that this it should be viewed as a suit under *federal* law; thus, federal-law constructs must apply. The Commissioner's rationale is that the state rules at issue incorporate, or are similar to, federal-law standards. *See* Comm'r Br. at 23-24. But

incorporating federal standards does not deprive the state rules of their state-law character.[6] Such a conclusion would federalize wide swaths of Texas law and diminish Texas's sovereignty.

A. Basic constitutional principles support the enforceability of laws enacted by sovereign States.

The Commissioner accords no weight to the fact that the federal regulations were enacted as state law. The Texas Legislature—not the federal government—directed the Commission to "establish policies and rules that will ensure the widest and most efficient distribution of the commodities and food stamps to those eligible to receive them." TEX. HUM. RES. CODE §33.002(c). That command goes beyond merely satisfying the minimum requirements of federal law. But the agency, in its rulemaking discretion, apparently concluded that the federal standards would, in many instances, further the Legislature's goal, so it incorporated those rules by reference. Using a short cut does not deprive the rules of their state-law status or make them unenforceable.

The Commissioner's contention ignores Texas's sovereignty. State and federal governments are independent sovereigns exercising concurrent authority over the people.

[6] It is true that where state law incorporates federal standards, state law is interpreted in congruity with those standards. For example, if federal courts had interpreted the term "assist" in 7 C.F.R. §273.2(f)(5), incorporated by Commission rule 372.3(e), then Texas courts should consider the federal interpretation in construing the state rule. *See, e.g., Tex. Parks & Wildlife Dept. v. Dearing*, 240 S.W.3d 330, 351-52 (Tex. App.—Austin 2007, pet. denied) (interpreting burden-of-proof requirement under Texas Commmission on Human Rights Act for disparate-impact claims consistently with federal requirement under Americans with Disabilities Act). But it is another thing entirely to foreclose ultra-vires suits because of incorporation of federal standards. In *Dearing*, for example, this Court continued to consider the case as brought under state law—the TCHRA—even though it was construing the statute consistent with federal law. *See id.*

Alden v. Maine, 527 U.S. 706, 714 (1999). "The States 'form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'" *Id*. (quoting THE FEDERALIST NO. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison)). "The States thus retain 'a residuary and inviolable sovereignty.'" *Id*. at 715 (quoting THE FEDERALIST NO. 39, at 245). "They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty." *Id*. These principles confirm that enacting requirements into state law is not a mere formality; rather, it is an expression of sovereignty.

B. State food-stamp law has its own force and dignity independent of federal rules.

The governing statute commands the Commission to "establish policies and rules that will ensure the widest and most efficient distribution of the commodities and food stamps to those eligible to receive them." TEX. HUM. RES. CODE §33.002(c). It did not have to enact this statute. It could have authorized the Commission to merely participate in the food-stamp program and accept the federal funds. The federal statutes do not force participating States to enact statutes or rules, and they do not require the States to "ensure the widest and most efficient distribution of . . . food stamps to those eligible to receive them." Therefore, the Legislature's command was original and uncompelled—and went beyond the federal requirements, as States are permitted to do. It had already bound the Commission to federal law by agreeing to participate in the program and accepting federal funds. Then, through §33.002(c), the Legislature separately bound the

Commission to whatever rules it promulgated. Denying those rules the customary dignity and force of state law would thwart the Legislature's will

C. Depriving state rules of their state-law status because they happen to incorporate federal standards would threaten enforcement of countless state rules.

Denying state rules their rightful status as state law could potentially eliminate the ability of citizens, businesses, cities, and state agencies to enforce, in state court, any statute or rule that incorporates federal standards. For example, rules regarding acid rain permitting, promulgated by the Texas Commission on Environmental Quality, incorporate federal standards expressed in 40 C.F.R. Part 72. 30 TEX. ADMIN. CODE §122.410(a). One of those incorporated regulations sets a deadline for issuing a Phase II permit that state agencies must meet. 40 C.F.R. §72.73(b)(i) ("A State . . . shall: (i) On or before December 31, 1997, issue an Acid Rain permit . . ."). Under the Commissioner's legal construct, if a business had properly applied for a permit, but the TCEQ did not grant it by that deadline, the business could *not* have brought an ultra-vires suit under state law to compel the head of the agency to comply with state law.

The business's sole option would have been to seek relief under federal law. A plaintiff could not guarantee that such a case would remain in state court. The end result of the Commissioner's argument could be that Texas residents, businesses, and government entities are effectively deprived of a state-court forum for obtaining redress.

This could have wide-ranging impact; countless state regulations incorporate federal standards. *See, e.g.*, 25 TEX. ADMIN. CODE §229.420 (food and drug regulations); 30 TEX. ADMIN. CODE §335.261 (management of hazardous waste); 25 TEX. ADMIN.

CODE §221.11 (poultry and meat inspection); 25 TEX. ADMIN. CODE §229.242 (licensing of wholesale distributors of non-prescription drugs); 43 TEX. ADMIN. CODE §741(railroad safety); 7 TEX. ADMIN. CODE §12.1 et seq. (banking regulation of lending limits); 1 TEX. ADMIN. CODE §385.321, et seq. (Medicaid eligibility for the elderly).

If mere incorporation were to federalize state law, then States would indeed be "relegated to the role of mere provinces or political corporations."*Alden*, 527 U.S. at 715. That would conflict with the Framers' constitutional design. *See id.* at 714-15.

D. The Commission acknowledged that it is bound by state law, including its own rules.

The Commission itself understood that it was separately bound by state and federal law. It specifies that the food-stamp program has both a federal and a state-law basis. 1 TEX. ADMIN. CODE §372.3(d)-(f). It notes that "[f]or SNAP, the *federal* law basis is: (1) 7 U.S.C. §2011 et seq.; and (2) the federal regulations in 7 C.F.R., Parts 271 through 283." *Id*. §372.3(d) (emphasis added). And, [f]or SNAP, the *state* law basis is: (1) the Texas Human Resources Code, Chapter 33, which authorizes HHSC to administer SNAP in Texas; and (2) the rules of this chapter, as well as other applicable HHSC rules." *Id*. §372.3(f) (emphasis added). The Commission then chose to incorporate federal regulations by reference into its own rules. *Id*. §372.3(e). Their character as state law—binding on the Commissioner—cannot be questioned.

IV. Allowing Gonzalez's suit to go forward will not place the state judiciary in control of the food-stamp program and will not impact the Secretary of Agriculture's authority under the federal statute.

The Commissioner predicts dire consequences if Texas courts entertain Gonzalez's ultra-vires suit, invoking the specter of judicial micromanagement of a state program. That is a false specter.

The nature of an ultra-vires suit makes it ill-suited to accomplish what the Commissioner fears. It is available to enforce only ministerial duties, and thus does not—by definition—infringe upon a state agency's policy-making discretion. *See Heinrich*, 284 S.W.3d at 372.

Likewise, state ultra-vires suits will not affect the authority of the Secretary of Agriculture to enforce the federal statute. The Secretary retains the full breadth of his remedial authority to withhold funds or ask the Attorney General to bring suits against States for noncompliance. And, the Secretary never had the authority to restrain States from imposing requirements on themselves through state law, which is exactly what the Commission did when it promulgated its rules.

The Commissioner's argument lacks merit.

V. Federal courts and agencies do not have exclusive jurisdiction over Texas food-stamp regulations.

The Commissioner further contends that a federal statute vests the Secretary of Agriculture with exclusive jurisdiction to enforce food-stamp violations. Comm'r Br. at 17 (citing 7 U.S.C. §2020(g)). That is both incorrect and ultimately irrelevant. It is

incorrect because the plain language of the federal statute does not confer exclusive jurisdiction. It is irrelevant because Gonzalez seeks to enforce state—not federal— law.

Even if the federal statute were relevant, it does not confer exclusive jurisdiction. It authorizes remedies (withholding of funds, suit by Attorney General for injunction) for a State's noncompliance with federal food-stamp law. 7 U.S.C. §2020(g). But it neither explicitly states nor even suggests exclusive jurisdiction. Although no magic words are required, Congress's intent to confer exclusive jurisdiction (as distinguished from primary jurisdiction, or lack of a private right of action) requires express statutory language to overcome the background rule that state and federal courts have concurrent jurisdiction over federal claims:

> So strong is the presumption of concurrency that it is defeated only in two narrowly defined circumstances: first, when Congress expressly ousts state courts of jurisdiction; and second, when a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts.

Haywood v. Drown, __ U.S. __, 129 S. Ct. 2108, 2114 (2009) (citations and quotations omitted); *see also* Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FED. PRAC. & PROC. JURIS. §3527 (3d ed. 2008) ("Unless Congress expressly makes federal court jurisdiction exclusive, federal and state courts have concurrent jurisdiction to try federal claims.").

The federal food-stamp statute that the Commissioner invokes does not even begin to meet this standard. *See* 7 U.S.C. §2020(g). It includes no express exclusive-jurisdiction language. It does not even use the word "jurisdiction" at all, except to provide for injunctive relief upon suit by the Attorney General in an "appropriate district

court of the United States having jurisdiction of the *geographic* area in which the State agency is located." Such language refers to venue—not subject-matter jurisdiction. *See United States ex rel. Thistlethwaite v. Dowty Woodville Polymer, Ltd.*, 110 F.3d 861, 865 (2nd Cir. 1997) (holding that the Clayton Act section providing that "any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business . . ." is "properly characterized as the Clayton Act's 'venue provision.'"). Also, §2020(g) has no language of exclusivity.

The Commissioner invokes *Texas* law on exclusive jurisdiction—specifically, the Texas Supreme Court's decisions in *Thomas v. Long*, 207 S.W.3d 334 (Tex. 2006); and *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220 (Tex. 2002). Comm'r Br. at 27. But he does not explain why Texas law should control the interpretation of a federal statute. *Thomas* and *Subaru* deal with the *Texas* Legislature's power to confer exclusive jurisdiction on *Texas* agencies pursuant to the *Texas* Constitution and statutes. *See* 207 S.W.3d at 340; 84 S.W.3d at 220.

Those cases do not discuss exclusive jurisdiction granted by federal statutes. And even if they did, Texas exclusive-jurisdiction law is similar to federal law. There must be a clear indication in the statute's language or structure that the legislature intended to grant exclusive jurisdiction to an agency. *See Thomas*, 207 S.W.3d at 340; *Subaru*, 84 S.W.3d at 221. Again, the language in §2020(g) speaks to venue—not jurisdiction. *See* 7 C.F.R. §2020(g). A statute that defines venue does not necessarily limit jurisdiction; something more is required. *See Wichita County v. Hart*, 917 S.W.2d 779, 782-83 (Tex.

1996) (holding that the Texas Whistleblower Act's venue provision is not jurisdictional); *Subaru*, 84 S.W.3d at 220 (citing *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75 (Tex. 2000) (holding that a Texas district court is presumed to have jurisdiction over all actions, including those based in statutes)). And, even if §2020(g) did speak to jurisdiction, it does not expressly or impliedly grant exclusivity to the federal agency or the federal courts.

But there is an even bigger flaw in the Commissioner's argument. Under *Thomas* and *Subaru*, exclusive jurisdiction means exclusive *original* jurisdiction, meaning that judicial review occurs *after* the agency is finished. In *Thomas*, the Texas Supreme Court specified that an agency charged with exclusive jurisdiction has "sole authority to make an *initial* determination in a dispute" and that the party seeking relief "must exhaust all administrative remedies before seeking judicial review of the decision." 207 S.W.3d at 340 (emphasis added); *see also Subaru*, 84 S.W.3d at 221.

But the Commissioner seems to argue that there would be *no* judicial review from the Secretary of Agriculture's decision. Comm'r Br. at 17, 28-29. In fact, under the USDA's authority as outlined by the Commissioner, no formal decision need ever be made. The Commissioner points to no contested-case or any other procedure that would trigger a decision by the Secretary that could be appealed. The Secretary could simply choose not to set in motion the federal statute's remedies, and that would be the final word.

That does not describe exclusive jurisdiction under Texas law—the law that the Commissioner invokes to support his position. *Id*. at 27. The Commissioner's vision of

complete, unreviewable agency power is directly contrary to both *Thomas* and *Subaru*. Also, it contradicts the goal of allowing ultra-vires suits—to vindicate state law, "reassert[ing] the control of the state" rather than allowing state officials to make their own rules. *See Heinrich*, 284 S.W.3d at 372. The Commissioner's theory, if applied to a state agency, would allow that agency to be the sole arbiter of its compliance with state law. The Commissioner's argument is meritless.

Regardless, the Commissioner's invocation of the federal food-stamp statute is irrelevant to this case because Gonzalez is not seeking relief under the federal statute. Rather, she has chosen to pursue only state-law claims. The Court can reject the Commissioner's exclusive-jurisdiction argument on that ground alone.

VI. Neither the Eleventh Amendment, nor the Constitution's Spending Clause, nor the "federal right" doctrine bars Gonzalez's state-law ultra-vires suit.

The Commissioner advances a grab bag of arguments to prevent Gonzalez from enforcing state law: the Eleventh Amendment, Comm'r Br. at 22-23; the federal Constitution's Spending Clause; Comm'r Br. at 24-26, and the "federal right" doctrine applicable to suits under 42 U.S.C. §1983, Comm'r Br. at 18-19. But those doctrines do not apply for two basic reasons: (1) Gonzalez has sued a state official—not the State, and (2) she has sued under state—not federal—law.

A. **The Eleventh Amendment does not bar this suit because sovereign immunity (of which the Eleventh Amendment is a part) does not apply to ultra-vires suits.**

The Commissioner invokes the Eleventh Amendment, but he does not explain how it applies to this case. It does not. Eleventh-Amendment immunity is a subset of state

sovereign immunity. *Alden*, 527 U.S. at 712-13. Under state law, sovereign immunity does not apply to ultra vires suits. *Heinrich*, 284 S.W.3d at 372. Therefore, *a fortiori*, Eleventh-Amendment immunity does not apply to state-law ultra-vires suits.

The Eleventh Amendment is best known as barring individuals from suing States for money damages in federal court. *See, e.g.*, *Atascadero St. Hosp. v. Scanlon*, 473 U.S. 234, 238 (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)). It also restricts retrospective injunctive and declaratory relief against the state. *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). But the Eleventh Amendment does not limit prospective declaratory and injunctive relief against a state official who is acting outside the law; such a claim can be pursued under 42 U.S.C. §1983. *Id*. at 677 (citing *Ex parte Young*, 209 U.S. 123, 159-60 (1908)). The claim must be brought against a state official in his official capacity—not against the State itself. *Pennhurst St. Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984).

Ultra-vires actions are Texas law's analog to *Ex parte Young*. *See Heinrich*, 284 S.W. 3d at 373-77 (discussing federal immunity law and adopting *Young* remedies for state ultra-vires suits). Like *Young* actions, state ultra-vires actions must also be brought against a state official in her official capacity, and they may seek only prospective declaratory and injunctive relief. *Heinrich*, 284 S.W.3d at 373, 376. Properly brought, they "are not prohibited by sovereign immunity." *Id*. at 372.

Alden made clear that Eleventh-Amendment immunity is but one part of the States' immunity from suit. Although the U.S. Supreme Court has "sometimes referred to the States' immunity from suit as 'Eleventh Amendment immunity,'" that phrase is

"something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden*, 527 U.S. at 713. "Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today." *Id.*

Thus, if state sovereign immunity does not apply in the first place to a certain type of suit, the Eleventh Amendment cannot override that status and grant immunity. Sovereign immunity does not apply to state-law ultra-vires suits. *Heinrich*, 284 S.W.3d at 372. Accordingly, the Eleventh Amendment likewise does not apply.

The Commissioner might very well agree with the preceding discussion. His invocation of the Eleventh Amendment has a different basis—his erroneous contention that this is a suit based on federal—not state—law. Because the Commissioner's federal-law premise is incorrect, his Eleventh-Amendment argument should be rejected. In short, state immunity law (*i.e.*, *Heinrich*) controls this state-law action.

B. The Spending Clause does not bar Gonzalez's suit because she is not suing the State itself and thus does not need to demonstrate a waiver of immunity.

The Commissioner also invokes the federal Constitution's Spending Clause (U.S. CONST. art. I, §8), but—again—he does not explain how it relates to immunity. Comm'r Br. at 24-26. Under the Spending Clause, the federal government may give the States federal funds in exchange for their compliance with stated conditions, which may include States' voluntary waiver of their immunity. In those instances, state immunity is waived

pursuant to the Spending Clause. *See Atascadero*, 473 U.S. at 240-41. The food-stamp program is a Spending-Clause program, and Texas, by accepting federal funds, has agreed to certain conditions, including compliance with minimum federal standards. *Alabama v. Lyng*, 811 F.2d 567, 568-89 (11th Cir. 1987), *cert. denied*, 484 U.S. 821 (1987).

Gonzalez does not contend that the State, by accepting federal funds, waived its immunity from suit. Gonzalez does not need to demonstrate waiver. Because her suit is a properly-pleaded ultra vires suit against a state official—not against the State—immunity does not apply at all. *Heinrich*, 284 S.W.3d at 372 (holding that ultra vires suits are "not prohibited by sovereign immunity"). Thus, the Commissioner's Spending-Clause argument is a red herring.

C. The presence or absence of a "federal right" in the federal food-stamp statute is irrelevant.

The Commissioner's argument that Gonzalez's suit is barred by immunity because of the lack of a "federal right" is entirely dependent on his erroneous premise that her suit is based on federal law. Comm'r Br. at 18-19. Because this premise is incorrect, *see supra*, Part III, this argument is irrelevant.

VII. Enforcement of Texas's food-stamp regulations is justiciable.

The Commissioner contends that the Court cannot entertain this suit because it is a political question. The Commissioner invokes two of the considerations set out in *Baker v. Carr*: that an issue is nonjusticiable if it has (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department" or (2) "a

lack of judicially discoverable and manageable standards for resolving it." Comm'r Br. at 20 (citing 369 U.S. 186, 217 (1962)).

Contrary to the Commissioner's contention, the Texas Supreme Court has not "borrow[ed] its political-question inquiry from federal law." *Id*. (citing *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 778 (Tex. 2005)). To the contrary, the Texas Supreme Court explicitly declined to answer whether the *Baker* standards would apply under Texas law. *Neeley*, 176 S.W.3d at 779.

The Texas Supreme Court also observed that true political questions are "a rarity." *Id*. "The United States Supreme Court has held only two issues to be nonjusticiable political questions: whether the military was properly trained, and whether the impeachment trial of a federal judge may be conducted before a Senate committee instead of the entire Senate." *Id*. (citations omitted). "This Court has never held an issue to be a nonjusticiable political question . . ." *Id*. at 780.

Moreover, the Commissioner does not address the specific Texas regulations Gonzalez invokes.[7] Rather, he appears to contend that the entire food-stamp regulatory scheme (state and federal) is nonjusticiable—a very far-reaching argument. *See* Comm'r Br. at 19-20. Despite needing to clear a high hurdle, the Commissioner makes his political-question argument in cursory fashion—devoting to it little more than one page

[7] The Commissioner mentions in passing only two specific requirements—that the phone system be "adequate" and that notices be "sufficiently clear." Gonzalez no longer seeks relief in connection with the adequacy of the Commission's phone system. And the rules about notices have specific requirements about what information must be included; in that context, that reasons for denial of a claim be "sufficiently clear" is an eminently workable standard, just like the "reasonableness" standard that Texas courts implement every day.

of his brief, and limiting his citations to two decisions that rejected the doctrine's applicability, yet failing to contrast those cases to the food-stamp scheme. *See id.* at 20 (citing *Neeley*, 176 S.W.3d at 778; *Baker*, 369 U.S. at 217).

The Commissioner does not even cite—much less discuss—this Court's recent political-question jurisprudence. In *Hendee v. Dewhurst*, this Court rejected the State's contention that the political-question doctrine barred a suit challenging the Legislature's school-financing bill on the ground that it caused the Legislature to exceed the aggregate biennial cap on the rate of growth of appropriations mandated by Article VIII, section 22(a) of the Texas Constitution. 228 S.W.3d 354, 373 (Tex. App.—Austin 2007, pet. denied). In *Hendee*, this Court surveyed Texas jurisprudence on political questions and concluded that Article VIII, section 22(a) was justiciable. *Id*. at 372-73.

In reaching its decision, this Court first noted that the Supreme Court in *Neeley* had held that even "nebulous" standards such as "adequacy," "efficiency," and "suitability" under article VII, section 1 of the Texas Constitution were sufficiently determinable and enforceable by courts. *Id*. Even though the Article VIII, section 22(a) standards were "admittedly not precise," they were justiciable. *Id*. (citing *Neeley*, 176 S.W.3d 776-77).

The Texas rules Gonzalez seeks to enforce here do not even begin to come close to that line. There is nothing "nebulous" about a 30-day deadline, the list of items that must be contained in notices, or the requirement to begin (or continue) benefits if the deadlines are missed or the notices not provided. Even more than precise, these

requirements are *ministerial*, leaving nothing to the Commissioner's discretion. *See Anderson*, 806 S.W.2d at 793.

This conclusion is confirmed by this Court's decision in *Texas Workers' Comp. Comm'n v. City of Bridge City*, 900 S.W.2d 411, 414–15 (Tex. App.—Austin 1995, writ denied). In *City of Bridge City*, this Court held the suitability provision of Article III, section 61 of the Texas Constitution was a political question. Article III, §51 provided (before its repeal) that "[t]he Legislature shall have the power to enact laws to enable cities, towns, and villages ... to provide Workmen's Compensation Insurance ... and the Legislature shall provide suitable laws for the administration of such insurance in the said municipalities and for payment of the costs, charges, and premiums on policies of insurance and the benefits to be paid thereunder." *Id*. (quoting TEX. CONST. art. III, §51). This Court held that provision was nonjusticiable: "[T]he question of what is a 'suitable' law is not within the power of a court to decide. By its very nature, it is a political question committed to the legislature because it calls for pure public policy decisions beyond a court's competence." *Id*. at 415

The rules Gonzalez seeks to enforce are light years more precise than the "suitability" provision held to be a nonjusticiable political question in *City of Bridge City*. The Court has only to order the Commissioner to comply. No policy decisions are required.

The Commissioner's brief fails to grapple with controlling Texas case law—or any case law at all. Rather, his argument repeats the same irrelevant mantra that suit is not permitted under the *federal* statute. *See, e.g.*, Comm'r Br. at 20 ("[C]ompliance with

federal law's requirements is in the hands of the Secretary of Health and Human Services.") Gonzalez agrees that whether Texas continues to receive federal funding is entirely between Texas and the Secretary of Agriculture. Gonzalez is not trying to deprive Texas of federal funding. She is seeking to ensure that the Commissioner obeys *Texas* law—his agency's own rules.

But even if federal law were relevant, this case would still not be a political question. In fact, the Commissioner did not even advance the argument in the prior federal-court suit, and with good reason. An argument that food-stamp cases are nonjusticiable would presumably have been ill-received by the federal courts, which entertain cases about food stamps and other programs with similar remedial schemes—such as Medicaid—on a regular basis.[8]

Finally, the Commissioner's justiciability argument is fatally in conflict with his recognition that the federal courts may entertain suits against the States brought by the Attorney General. *E.g.*, Comm'r Br. at 17. If the food-stamp program's requirements are nonjusticiable, then there can be no role for any courts, no matter who the plaintiff is.

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[8] *See, e.g., Equal Access for El Paso, Inc. v. Hawkins*, 590 F.3d 697 (5th Cir. 2007) (Medicaid); *Doe v. Kidd*, 501 F.3d 348 (4th Cir 2007) (Medicaid); *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006) (Medicaid); *S.D. v. Hood*, 391 F.3d 581 (5th Cir. 2004) (Medicaid); *Sabree v. Richman*, 367 F.3d 180 (3rd Cir. 2004) (Medicaid). *Bryson v. Shumway*, 308 F.3d 79 (1st Cir. 2002) (Medicaid); *Doe v. Chiles*, 136 F.3d 709 (11th Cir. 1998) (Medicaid); *Robertson v. Jackson*, 972 F.2d 529 (4th Cir. 1992) (food stamps); *Victorian v. Miller*, 813 F.2d 718 (5th Cir. 1987) (en banc) (food stamps); *Haskins v. Stanton*, 794 F.2d 1273 (7th Cir. 1986) (food stamps); *Williston v. Eggleston*, 379 F.Supp.2d 561 (S.D.N.Y. 2005) (food stamps); *Robidoux v. Kitchel*, 876 F.Supp. 575 (D. Vt. 1995) (food stamps); *Harley v. Lyng*, 653 F.Supp. 266 (E.D. Pa. 1987) (food stamps); *Hess v. Hughes*, 500 F.Supp. 1054 (D. Md. 1980) (food stamps).

The Commissioner's political-question argument doesn't even make it out of the starting gate. The Court should reject it.

PRAYER

Appellees respectfully request that this Court affirm the trial court's denial of the plea to the jurisdiction.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the Clerk of the Court using the electronic case filing system of the Court. I also certify that a true and correct copy of the foregoing was served by eservice or email on the following counsel of record on September 19, 2011:

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