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ARTICLE

A SYNOPSIS OF TEXAS AND FEDERAL SOVEREIGN IMMUNITY PRINCIPLES: ARE RECENT SOVEREIGN IMMUNITY DECISIONS PROTECTING WRONGFUL GOVERNMENTAL CONDUCT?

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I. INTRODUCTION

The Texas Supreme Court recently rendered several decisions in cases involving governmental entities that reflect the court's inflexible application of the doctrine of sovereign immunity.[1] These

1. *See generally* Univ. of Houston v. Barth, 313 S.W.3d 817, 818 (Tex. 2010) (requiring the court of appeals to determine whether the plaintiff met "the [Texas] Whistleblower Act's jurisdictional requirements for suit against a governmental entity" despite a jury verdict finding liability against the University); Tex. Dep't. of Ins. v. Reconveyance Servs., Inc., 306 S.W.3d 256, 257–59 (Tex. 2010) (rendering judgment to dismiss for lack of subject-matter jurisdiction because the plaintiff substantively pleaded ultra vires claims against a governmental entity that retained its sovereign immunity); Galveston Indep. Sch. Dist. v. Jaco, 303 S.W.3d 699, 699–700 (Tex. 2010) (reversing for the lower court to determine if the school district's sovereign immunity barred the plaintiff's suit because he failed to adequately allege a violation of law under the Texas Whistleblower Act); Univ. of Tex. Sw. Med. Ctr. at Dallas v. Gentilello, 300 S.W.3d 753, 754 (Tex. 2009) (remanding for a determination of whether the plaintiff properly alleged "a good-faith report of a violation of law to an appropriate law-enforcement authority" to establish jurisdiction for a whistleblower suit under Texas law); Tex. Dep't of Health & Human Servs. v. Okoli, 295 S.W.3d 667, 667–68 (Tex. 2009) (confirming that the lower court must determine that the plaintiff "actually reported the alleged violation to an appropriate law enforcement authority," as required under the Texas Whistleblower Act, before it can deny "a plea to the jurisdiction based on immunity from suit"); Tex. Dep't of Transp. v. Garcia, 293 S.W.3d 195, 195–96 (Tex. 2009) (applying recent precedent to require "the court of appeals to determine whether [the plaintiff] has alleged a violation under the [Texas Whistleblower] Act" to establish subject-matter jurisdiction); State v. Lueck, 290 S.W.3d 876, 878–86 (Tex. 2009) (holding that the State's sovereign immunity is not waived and a case lacks subject-matter jurisdiction where the pleadings fail to allege facts that affirmatively demonstrate the plaintiff reported a violation of law to an appropriate law enforcement authority as required under the Texas Whistleblower Act); City of El Paso v. Heinrich, 284 S.W.3d 366, 369–77, 380 (Tex. 2009) (concluding that the plaintiff could only pursue claims for prospective declaratory and injunctive relief against

decisions raise a concern that the Texas Supreme Court may be insulating governmental employees from any demands for honest and ethical governmental conduct through its adherence to a rigid and even expansive application of sovereign immunity principles. Just as the U.S. Congress enacted the Sarbanes–Oxley Act to protect investors in public companies[2] by requiring the accuracy and reliability of corporate disclosures and holding officers and directors responsible for the financial affairs of their corporations,[3] there is a corresponding need for Texas courts to protect the public from governmental harm by reevaluating the sovereign immunity doctrine so that government officials may be held accountable for their misconduct. The current awareness of governmental officials—that courts will generally dismiss suits brought against them—lessens the likelihood of governmental transparency and accountability.

In *Harris County Hospital District v. Tomball Regional Hospital*,[4] the Texas Supreme Court noted that the sovereign immunity doctrine had been established in Texas since the mid-nineteenth century[5] and presumably thought this was a reason to continue to sustain it. The court could have considered that this venerable doctrine runs counter to a current need for moral responsibility on the part of government and its officials as well as a need to compensate victims for harmful governmental acts. In

state officials under a limited ultra vires exception to sovereign immunity, which requires proof that these government officers acted in their official capacities without legal or statutory authority in a nondiscretionary matter); Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp., 283 S.W.3d 838, 841–49 (Tex. 2009) (determining that sovereign immunity was retained against an action for the recovery of medical expenses where none of the constitutional and statutory provisions cited by the plaintiff clearly and unambiguously waived the hospital district's immunity from suit).

2. *See* Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of the U.S.C.) (providing the Act's purpose: "To protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws").

3. *See generally* 15 U.S.C. §§ 7241–7246, 7261–7266 (2006) (providing general requirements, as well as authority for the promulgation of rules and regulations, regarding corporate responsibility and enhanced financial disclosures).

4. Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp., 283 S.W.3d 838 (Tex. 2009).

5. *Id.* at 844 (citing Tooke v. City of Mexia, 197 S.W.3d 325, 331 (Tex. 2006)). In its second term, the Texas Supreme Court "acknowledged the common-law rule that 'no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent.'" *Tooke*, 197 S.W.3d at 331 (quoting Hosner v. DeYoung, 1 Tex. 764, 769 (1847)).

Tooke v. City of Mexia,[6] the Texas Supreme Court observed that immunity "shield[s] the public from the costs and consequences of improvident actions of their governments."[7] Yet, in *Tooke*, the court did not address the problem that immunity generally renders remediless those members of the public who find themselves victims of such improvident acts. In *City of El Paso v. Heinrich*,[8] the Texas Supreme Court reiterated that "[a] lack of immunity may hamper governmental functions by requiring tax resources to be used for defending lawsuits ... rather than using those resources for their intended purposes."[9] This position of the court overlooks the notion that one of the intended purposes of tax resources should be to protect the public against the harmful and improvident actions of not only private individuals and entities but also the government itself.

This Article analyzes the Texas Supreme Court's current application of the sovereign immunity doctrine to provide for a better understanding of sovereign immunity precepts and to clarify ways for avoiding the procedural hurdles they present. Part II critiques the recent Texas Supreme Court decisions that illustrate how far the court has come in preventing lawsuits against the State, its agencies, and its officials. Part III reviews the history of the sovereign immunity concept and pertinent federal case law to clearly delineate the Texas Supreme Court's strict interpretation of that doctrine. Part IV considers the role of stare decisis in perpetuating the judicially evolved sovereign immunity doctrine. Part V examines the protection of state sovereign immunity in federal courts under the Eleventh Amendment. Part VI interprets both federal and Texas decisions relating to the immunity afforded to governmental officials. Part VII addresses congressional abrogation of state sovereign immunity under the Eleventh Amendment. Part VIII discusses waiver of sovereign immunity as applied by federal courts and by the Texas Supreme Court. Finally, Part IX questions the justifications for maintaining the doctrine of sovereign immunity in modern times and summarizes the substantive and procedural basics of which a litigant should be aware.

6. Tooke v. City of Mexia, 197 S.W.3d 325 (Tex. 2006).

7. *Id.* at 332.

8. City of El Paso v. Heinrich, 284 S.W.3d 366 (Tex. 2009).

9. *Id.* at 372 (alterations in original) (quoting Reata Constr. Corp. v. City of Dallas, 197 S.W.3d 371, 375 (Tex. 2006)) (internal quotation marks omitted).

II. RECENT TEXAS SUPREME COURT SOVEREIGN IMMUNITY DECISIONS

A. *Sovereign Immunity in Texas*

Sovereign immunity in Texas embraces two principles: "immunity from suit and immunity from liability."[10] In considering immunity in Texas, courts look at "not only whether the State has consented to suit, but also whether the State has accepted liability."[11] The Texas Supreme Court has upheld that "[i]mmunity from suit prohibits suits against the State unless the State expressly consents to the suit."[12] "Thus, even if the State acknowledges liability on a claim, immunity from suit bars a remedy until the Legislature consents to suit."[13] If a plaintiff who sues the State of Texas

10. Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 224 (Tex. 2004); *see also* Mo. Pac. R.R. Co. v. Brownsville Navigation Dist., 453 S.W.2d 812, 813 (Tex. 1970) (distinguishing "immunity from suit without consent even though there is no dispute as to liability of the sovereign" from "immunity from liability even though consent to the suit has been granted"), *overruled on other grounds by Tooke*, 197 S.W.3d at 33 (overruling *Missouri Pacific* to the extent it incorrectly held that "sue and be sued" language in a statute always waives immunity from suit). Immunity from suit is a jurisdictional question whereas "[i]mmunity from liability is an affirmative defense." *Miranda*, 133 S.W.3d at 224.

11. Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692, 696 (Tex. 2003).

12. *Id.* Texas "has long recognized that sovereign immunity, unless waived, protects the State of Texas, its agencies, and its officials from lawsuits for damages, absent legislative consent to sue the State." Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 405 (Tex. 1997), *superseded by statute*, Act of May 30, 1999, 76th Leg., R.S., ch. 1352, § 9, 1999 Tex. Gen. Laws 4578, 4583–87, *as recognized in* Gen. Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591 (Tex. 2001); *see also* Dir. of Dep't of Agric. & Env't v. Printing Indus. Ass'n of Tex., 600 S.W.2d 264, 265 (Tex. 1980) (confirming that "a suit brought to control State actions or to subject the State to liability is not maintainable without legislative consent or statutory authorization"); Griffin v. Hawn, 161 Tex. 422, 341 S.W.2d 151, 152 (1960) ("Where the purpose of a proceeding against state officials is to control action of the State or subject it to liability, the suit is against the State and cannot be maintained without the consent of the Legislature."); Hosner v. DeYoung, 1 Tex. 764, 769 (1847) (establishing that the State cannot be sued without the State's consent "and then only in the manner indicated by that consent"). In *Texas Department of Parks & Wildlife v. Miranda*, 133 S.W.3d 217 (Tex. 2004), the Texas Supreme Court illustrated that a statute can waive immunity from suit, immunity from liability, or both. *See id.* at 224 (reasoning that the Texas Tort Claims Act "creates a unique statutory scheme in which the two immunities are co-extensive").

13. *Wichita Falls*, 106 S.W.3d at 696; *see also Miranda*, 133 S.W.3d at 224–25 ("[T]he Department is immune from suit unless the Tort Claims Act expressly waives immunity."). Conversely, the Texas Supreme Court has stated that, "even if the Legislature has authorized a claimant to sue, the State's immunity is retained until [the State] acknowledges liability." *Wichita Falls*, 106 S.W.3d at 696. The Texas Civil Practices & Remedies Code provides that "[a] resolution granting permission to sue [the State] does

does not establish the State's consent to be sued, "sovereign immunity from suit defeats a trial court's subject-matter jurisdiction."[14]

"The State may assert sovereign immunity from suit in a plea to the jurisdiction,"[15] which is a dilatory plea that not only seeks dismissal of a case for lack of subject-matter jurisdiction but also "defeat[s] a cause of action without regard to whether the claims asserted have merit."[16] When the State challenges the pleadings in a plea to the jurisdiction, the trial court must "determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the [case]."[17] On the other hand, "immunity from liability is an affirmative defense that cannot be raised by a plea to the jurisdiction."[18] "[W]hen the facts underlying the merits and subject-matter jurisdiction are intertwined, the State may assert sovereign immunity from suit by a plea to the jurisdiction, even when the trial court must consider evidence 'necessary to resolve the jurisdictional issues raised.'"[19]

In *Harris County Hospital District*, the Texas Supreme Court referred to a "heavy presumption in favor of [sovereign] immunity derive[d] . . . from principles related to separation of powers [and] from practical concerns."[20] The court ruled the hospital district

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not waive to any extent immunity from liability." TEX. CIV. PRAC. & REM. CODE ANN. § 107.002(b) (West 2011). In *Federal Sign*, the Texas Supreme Court commented that "[t]he State neither creates nor admits liability by granting permission to be sued." *Fed. Sign*, 951 S.W.2d. at 405 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 107.002; State v. Isbell, 127 Tex. 399, 94 S.W.2d 423, 425 (1936)). However, the Texas Supreme Court has explained that immunity from liability, unlike immunity from suit, "does not affect a court's jurisdiction to hear a case and cannot be raised in a plea to the jurisdiction." *Wichita Falls*, 106 S.W.3d at 696; *cf.* Tex. Dep't of Transp. v. Jones, 8 S.W.3d 636, 638–39 (Tex. 1999) (reaffirming the principle that immunity from suit, in contrast to immunity from liability, "defeats a trial court's subject matter jurisdiction and thus is properly asserted in a plea to the jurisdiction").

14. Tex. Natural Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849, 855 (Tex. 2002) (citing *Jones*, 8 S.W.3d at 638).

15. *Id.*

16. Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 554 (Tex. 2000). "[S]ubject-matter jurisdiction is essential to a court's power to decide a case." *Id.* at 553–54.

17. *Miranda*, 133 S.W.3d at 226; *see also Blue*, 34 S.W.3d at 554–55 (reasoning that a trial court is not limited to the pleadings but may hear evidence necessary to determine the jurisdictional issue).

18. State v. Lueck, 290 S.W.3d 876, 880 (Tex. 2009) (citing *Jones*, 8 S.W.3d at 638).

19. *Id.* (quoting *Blue*, 34 S.W.3d at 555).

20. Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp., 283 S.W.3d 838, 848 (Tex. 2009) (quoting Nueces Cnty. v. San Patricio Cnty., 246 S.W.3d 651, 653 (Tex. 2008)) (internal quotation marks omitted).

was immune from suit brought by a hospital authority that sought to recover the cost of medical care its hospital rendered to indigent patients.[21] Applying the rule that "[i]mmunity is waived only by clear and unambiguous language" from the legislature,[22] the court determined that none of the constitutional and statutory provisions asserted by the plaintiff showed an intent to waive the hospital district's immunity from suit.[23] The court further reasoned that, "[i]n a world with increasingly complex webs of governmental units, the Legislature is better suited to make the distinctions, exceptions, and limitations that different situations require."[24]

The Texas Supreme Court's opinion in *Harris County Hospital*, however, appears devoid of any deference to legislative distinctions and exceptions. For example, the court decided that language in the Texas Health & Safety Code, which provides that boards of hospital districts "may sue and be sued,"[25] does not waive the district's immunity from suit.[26] The court reasoned, "When an entity's organic statute provides that the entity may 'sue and be sued,' the phrase in and of itself does not mean that immunity to suit is waived."[27] The court also ruled that a section

21. *Id.* at 841.

22. *Id.* at 842–43 (citing TEX. GOV'T CODE ANN. § 311.034; Tooke v. City of Mexia, 197 S.W.3d 325, 328–29 (Tex. 2006)). The Texas Government Code provides: "In order to preserve the legislature's interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language." TEX. GOV'T CODE ANN. § 311.034 (West Supp. 2010).

23. *See Harris Cnty. Hosp.*, 283 S.W.3d at 843–48 (analyzing language cited in the Texas Constitution and various statutes to conclude that none of them, when read individually or together, clearly and unambiguously waived the hospital district's governmental immunity from suit).

24. *Id.* at 848 (quoting *Nueces Cnty.*, 246 S.W.3d at 653) (internal quotation marks omitted).

25. TEX. HEALTH & SAFETY CODE ANN. § 281.056(a) (West 2010).

26. *Harris Cnty. Hosp.*, 283 S.W.3d at 843. The court stated that it construes a statute "to determine and give effect to the Legislature's intent," looking at not only the statute as a whole, rather than as isolated parts, but also "the 'plain and common meaning of the statute's words.'" *Id.* at 842 (quoting State v. Gonzalez, 82 S.W.3d 322, 327 (Tex. 2002)). However, the court failed to mention that it also generally seeks to "give effect to legislative intent . . . expressed by the plain meaning of words used in the statute *unless* the context necessarily requires a different construction, a different construction is expressly provided by statute, or such an interpretation would lead to absurd or nonsensical results." City of Waco v. Kelley, 309 S.W.3d 536, 542 (Tex. 2010) (emphasis added).

27. *Harris Cnty. Hosp.*, 283 S.W.3d at 843 (citing *Tooke*, 197 S.W.3d at 337).

of the Texas Constitution, which requires a hospital district to "assume full responsibility for providing medical and hospital care to needy inhabitants of the county" and prohibits such county and cities therein from levying "any other tax for hospital purposes,"[28] does not waive immunity because "[t]he constitutional language as . . . adopted did not address waiver of a hospital district's immunity."[29] Indeed, among the guiding principles the court developed "to help analyze statutes for legislative consent to suit," the court enumerated that "ambiguity as to waiver is resolved in favor of retaining immunity."[30] Thus, the inherent problem appears to be that the Texas Supreme Court applies judge-made immunity rules to determine the manner in which the legislature can adequately waive immunity.[31]

In *City of El Paso v. Heinrich*, the Texas Supreme Court observed that the purpose of sovereign immunity is to "protect[] the State from lawsuits for money damages,"[32] but the court acknowledged that "an action to determine or protect a private party's rights against a state official who has acted without legal or statutory authority is not a suit against the State that sovereign immunity bars."[33] Assessing "the intersection of these two rules," the court concluded that, "while governmental immunity generally bars suits for retrospective monetary relief, it does not preclude *prospective injunctive remedies* in official-capacity suits against

28. TEX. CONST. art. IX, § 4.

29. *Harris Cnty. Hosp.*, 283 S.W.3d at 843–44. A question the court did not address is whether the Texas Constitution abrogated immunity in such circumstances so that waiver would not have been an issue. For further discussion regarding the abrogation of immunity, see *infra* Part VII. For further discussion of suits authorized by the federal and Texas constitutions, see *infra* Part VIII(C).

30. *Harris Cnty. Hosp.*, 283 S.W.3d at 844. In the end, the court declined to remand the case to permit the hospital authority to replead and seek equitable relief. *See* Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp., 283 S.W.3d 838, 849 (Tex. 2009) (dismissing the case because the suit remained one for money damages and the plaintiff did not request an opportunity to replead and seek injunctive relief).

31. *Cf., e.g.*, Lane v. Pena, 518 U.S. 187, 200–12 (1996) (Stevens, J., dissenting) (criticizing the majority's use of strict judge-made rules for determining statutory waivers of sovereign immunity that defeat the clear intent of Congress). For further discussion of the sovereign immunity doctrine's existence as an amalgam of judge-made rules, see *infra* Part II and notes 161, 315 and their accompanying text.

32. City of El Paso v. Heinrich, 284 S.W.3d 366, 368 (Tex. 2009).

33. *Id.* (quoting Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 405 (Tex. 1997), *superseded by statute*, Act of May 30, 1999, 76th Leg., R.S., ch. 1352, § 9, 1999 Tex. Gen. Laws 4578, 4583–87, *as recognized in* Gen. Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591 (Tex. 2001)) (internal quotation marks omitted).

government actors who violate statutory or constitutional provisions."[34] However, the court subsequently explained that, while the *Heinrich* decision held "a claim for prospective declaratory and injunctive relief against government actors in their official capacities but acting [ultra vires] is not barred by immunity even if the requested relief compels the governmental entity to make monetary payments," the rule of sovereign immunity still "bars suits against governmental entities for retrospective monetary relief."[35]

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34. *Id.* at 368–69 (emphasis added). This proposition presents a need to clarify two concerns. First, in *Wichita Falls State Hospital v. Taylor*, 106 S.W.3d 692 (Tex. 2003), the Texas Supreme Court noted:

> Courts often use the terms sovereign immunity and governmental immunity interchangeably. However, they involve two distinct concepts. Sovereign immunity refers to the State's immunity from suit and liability. In addition to protecting the State from liability, it also protects the various divisions of state government, including agencies, boards, hospitals, and universities. Governmental immunity, on the other hand, protects political subdivisions of the State, including counties, cities, and school districts.

Id. at 694 n.3 (citations omitted). Second, as the Texas Supreme Court long ago propounded in *W. D. Haden Co. v. Dodgen*, 158 Tex. 74, 308 S.W.2d 838 (1958), private parties may seek declaratory and injunctive relief against state officials who allegedly acted without legal or statutory authority because such cases do not constitute suits against the State. *Id.* at 840. That is, "suits to compel state officers to act within their official capacity do not attempt to subject the State to liability." Tex. Natural Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849, 855 (Tex. 2002). In contrast, declaratory judgment actions brought against state officials "to establish the validity of a contract of the state, or to enforce ... the performance of a contract of the state, or to require acts to be performed ... which would impose contractual liabilities upon the state," do constitute suits against the State. *Dodgen*, 308 S.W.3d at 840 (quoting Herring v. Houston Nat'l Exch. Bank, 113 Tex. 264, 253 S.W. 813, 814 (1923)). Contractual suits against state officials are suits against the State "because such suits attempt to control state action by imposing liability on the State." *IT-Davy*, 74 S.W.3d at 855–56. "Consequently, such suits cannot be maintained without legislative permission." *Id.* at 856. Moreover, as the court stressed in *Heinrich*, there is a "well settled" rule that "private parties cannot circumvent the State's sovereign immunity from suit by characterizing a suit for money damages ... as a declaratory-judgment claim." *Heinrich*, 284 S.W.3d at 371 (quoting *IT-Davy*, 74 S.W.3d at 856) (internal quotation marks omitted).

35. *Harris Cnty. Hosp.*, 283 S.W.3d at 849 n.6 (citing *Heinrich*, 284 S.W.3d at 369). The court ruled in *Heinrich* that, "where statutory or constitutional provisions create an entitlement to payment, suits seeking to require state officers to comply with the law are not barred by immunity merely because they compel the state to make those payments." *Heinrich*, 284 S.W.3d at 371. Yet, "[t]o fall within this [ultra vires] exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act." *Id.* at 372. In addition, the court confirmed that, "as a technical matter, the governmental entities themselves—as opposed to their officers in their official

The *Heinrich* decision left unanswered the question of how victims can be adequately compensated in an ultra vires suit when, as the court stated, "the remedy may implicate immunity."[36] The court referenced authority supporting that, "under federal immunity law, an [ultra vires] suit may be brought[,] but 'if the defendant is a state officer, sovereign immunity bars the recovery of damages from the state treasury in a private suit.'"[37] Thus, the law creates "a curious situation: the basis for the [ultra vires] rule is that a government official is not following the law, so that immunity is not implicated, but because the suit is, for all practical purposes, against the [S]tate, its remedies must be limited."[38] Accordingly, after examining important federal and Texas qualifications for an ultra vires action, the court settled on an imperfect compromise, entitling an ultra vires claimant to only prospective injunctive relief,[39] and mentioned only one exception for monetary compensation when such a claimant can successfully prove a takings claim.[40] Although the court "distinguish[ed] suits to determine a party's rights against the State" from suits "[a] party can maintain . . . to determine its rights without legislative permission,"[41] the court so narrowly defined the scope of permissible relief for ultra vires claims as to leave unclear how

capacity—remain immune from suit" on such claims. *Id.* at 372–73. Accordingly, such ultra vires suits "cannot be brought against the State, which retains immunity, but must be brought against the state actors in their official capacity." *Id.* at 373. For example, in *Texas Department of Insurance v. Reconveyance Services, Inc.*, 306 S.W.3d 256 (Tex. 2010), the plaintiff's pleadings substantively alleged ultra vires claims but, because the plaintiff "sued only the Texas Department of Insurance rather than Department officials acting in their official capacities," the Department retained its sovereign immunity, the case as pleaded failed to establish subject-matter jurisdiction, and the court rendered judgment dismissing the suit. *Id.* at 258–59.

36. *Heinrich*, 284 S.W.3d at 373.

37. City of El Paso v. Heinrich, 284 S.W.3d 366, 373–74 (Tex. 2009) (quoting 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3524.3 (3d ed. 2008)).

38. *Id.* at 374.

39. *See id.* at 374–76 (analyzing the federal approach in sovereign immunity cases to permit claims for prospective injunctive relief but to bar claims for retroactive relief).

40. *See id.* at 376 (explaining that retroactive compensation can be awarded for property previously taken because the government cannot invoke immunity under the takings clause).

41. *Id.* at 370 (quoting Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 404 (Tex. 1997), *superseded by statute*, Act of May 30, 1999, 76th Leg., R.S., ch. 1352, § 9, 1999 Tex. Gen. Laws 4578, 4583–87, *as recognized in* Gen. Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591 (Tex. 2001)).

victims harmed by state action can effectively obtain redress when immunity generally precludes them from receiving monetary damages from the State.

B. *Texas Whistleblower Act*

Recent Texas Supreme Court decisions construing the Texas Whistleblower Act[42] present a question of whether the court is discounting statutory language in the Act that purports to be a clear waiver by the Texas legislature of the state's sovereign immunity with respect to whistleblower claims.[43] These recent decisions appear to have the effect of protecting the government from its citizens rather than protecting its citizens from governmental wrongdoing.[44]

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42. TEX. GOV'T CODE ANN. §§ 554.001–.010 (West 2004).

43. *See id.* § 554.0035 (stating that "[s]overeign immunity is waived and abolished to the extent of liability for the relief allowed under this chapter for a violation of this chapter").

44. Despite legislative language in the Texas Whistleblower Act that seemingly waives sovereign immunity, the Texas Supreme Court has erected substantial jurisdictional sovereign immunity bars to whistleblower claims. *See* Univ. of Houston v. Barth, 313 S.W.3d 817, 818 (Tex. 2010) (ruling that the jurisdictional question of whether a whistleblower plaintiff made "good-faith reports of a violation of law to an appropriate law-enforcement authority . . . may be raised for the first time on appeal and may not be waived by the parties" (citing Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 445 (Tex. 1993))); Galveston Indep. Sch. Dist. v. Jaco, 303 S.W.3d 699, 700 (Tex. 2010) (reversing for the lower court to determine if the school district's sovereign immunity barred the plaintiff's suit because he failed to adequately allege a "good-faith report of a violation of law to an appropriate law-enforcement authority" as a jurisdictional requirement); Univ. of Tex. Sw. Med. Ctr. at Dallas v. Gentilello, 300 S.W.3d 753, 754 (Tex. 2009) (remanding for a determination of whether plaintiff properly alleged "a good-faith report of a violation of law to an appropriate law-enforcement authority" to establish jurisdiction for a whistleblower suit); Tex. Dep't of Health & Human Servs. v. Okoli, 295 S.W.3d 667, 668 (Tex. 2009) (confirming that the lower court must determine the plaintiff "actually reported the alleged violation to an appropriate law enforcement authority" as required under the Texas Whistleblower Act before it can deny "a plea to the jurisdiction based on immunity from suit"); Tex. Dep't of Transp. v. Garcia, 293 S.W.3d 195, 196 (Tex. 2009) (applying recent precedent to require "the court of appeals to determine whether [the plaintiff] has alleged a violation under the [Texas Whistleblower] Act" to establish subject-matter jurisdiction); State v. Lueck, 290 S.W.3d 876, 880, 884–85 (Tex. 2009) (holding that the State's sovereign immunity is not waived and a case lacks subject-matter jurisdiction where the pleadings fail to allege facts that affirmatively demonstrate the plaintiff reported a violation of law to an appropriate law enforcement authority as required under the Texas Whistleblower Act).

Overall, the Texas Supreme Court appears unconcerned that whistleblowers not only risk the loss of their jobs and reputations when they come forward with reports of governmental wrongdoing but also often provide the only means to bring official misconduct to light. *See, e.g.*, Univ. of Tex. Sw. Med. Ctr. at Dallas v. Gentilello, 260

In 1989, the U.S. Congress enacted the federal Whistleblower Protection Act to help eliminate wrongdoing within the federal government.[45] Among other provisions, the Act mandates that federal employees must not suffer adverse employment actions as a result of disclosing evidence of "a violation of any law, rule, or regulation, or . . . gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."[46] As the Court of Appeals for the Fifth Circuit recognized: "There is perhaps no subset of 'matters of public concern' more important than bringing official misconduct to light."[47]

S.W.3d 221, 224 (Tex. App.—Dallas 2008) (recounting how the plaintiff, a tenured professor of medicine, was stripped of faculty chair positions after internally reporting what he believed were violations of federal regulations), *rev'd*, 300 S.W.3d 753 (Tex. 2009); *see also* Tex. Dep't of Human Servs. v. Okoli, 263 S.W.3d 275, 277 (Tex. App.—Houston [1st Dist.] 2007) (describing how the plaintiff, a former state employee, had his employment terminated after reporting alleged illegal activity to two supervisors and a manager), *rev'd sub nom.* Tex. Dep't of Health & Human Servs. v. Okoli, 295 S.W.3d 667 (Tex. 2009); *cf.* Stefan Rutzel, *Snitching for the Common Good: In Search of a Response to the Legal Problems Posed by Environmental Whistleblowing*, 14 TEMP. ENVTL. L. & TECH. J. 1, 35–36 (1995) (discussing the conflict between society's interests in the reporting of environmental violations and an employee's interests "in maintaining his job and a friendly work environment," which "seemingly requires either refraining from whistleblowing or internal reporting to avoid" retaliation). If the Texas courts do not protect whistleblowers as intended under the Act, public employees will undoubtedly stop reporting illegal governmental conduct.

Another problem for whistleblower litigants is the burden of paying for their own attorneys while the State enjoys a substantial advantage of being represented by the Office of the Attorney General. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 104.001–.002, .004 (West 2011) (requiring the attorney general to defend state officials who are entitled to indemnification from the state for damages resulting from acts or omissions made within the course and scope of government employment). Although the public funds the Office of the Attorney General, its services are provided to governmental officials without charge. *See id.* § 104.007 ("Only funds appropriated from the General Revenue Fund to the attorney general may be used to conduct the defense . . . ."). Further, through the use of dilatory tactics and interlocutory appeals available to the government, but not private litigants, the State can delay proceedings against it for years. *See id.* § 51.014(a)(5) (providing for an interlocutory appeal of a denial of a summary judgment motion "based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state"); *id.* § 51.014(a)(8) (providing for an interlocutory appeal of a grant or denial of "a plea to the jurisdiction by a governmental unit"). As a result, only very wealthy private litigants will be able to pay the necessary attorney fees incurred in their attempts to challenge governmental misconduct.

45. *See* Whistleblower Protection Act of 1989, Pub. L. No. 101-12, § 2(b), 103 Stat. 16, 16 ("The purpose of this Act is to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government . . . .").

46. 5 U.S.C. § 2302(b)(8) (2006).

47. Davis v. Ector Cnty., 40 F.3d 777, 782 (5th Cir. 1994) (citing Thompson v. City of

In 1993, the Texas legislature enacted the Texas Whistleblower Act,[48] which prohibits a governmental entity from retaliating against "a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority."[49] In *Texas Department of Assistive & Rehabilitative Services v. Howard*,[50] the Third Court of Appeals stated the Texas Whistleblower Act "is designed to enhance openness in government and compel the State's compliance with law by protecting those who inform authorities of wrongdoing."[51] The court viewed "whistleblowing by a public employee as a courageous act of loyalty to a larger community"[52] and further stressed that, "[b]ecause the Act is remedial in nature," the Act "should be liberally construed to effect its purpose."[53] Nevertheless, in recent whistleblower cases, the Texas Supreme Court has reversed judgments of several Texas courts of appeals that, in liberally construing the Act, denied the State's plea to the jurisdiction.[54]

In *State v. Lueck*,[55] the Texas Supreme Court reversed the Third Court of Appeals, which had affirmed a district court's dismissal of the State's plea to the jurisdiction in a suit against the State under the Texas Whistleblower Act.[56] The court ruled as a matter of law that Lueck, a public employee, did not sufficiently allege a violation of the Act and dismissed his case for a lack of subject-matter jurisdiction.[57] Although Lueck had attached to his petition a copy of an e-mail report he sent to his supervisor warning of regulatory non-compliance by a state agency, the court reasoned that this e-mail did not report "a violation of law . . .

Starkville, 901 F.2d 456, 463 (5th Cir. 1990)).

48. Act of May 4, 1993, 73d Leg., R.S., ch. 268, § 1, 1993 Tex. Gen. Laws 583, 609–11 (codified as amended at TEX. GOV'T CODE ANN. §§ 554.001–.010 (West 2004)).

49. TEX. GOV'T CODE ANN. § 554.002(a) (West 2004).

50. Tex. Dep't of Assistive & Rehabilitative Servs. v. Howard, 182 S.W.3d 393 (Tex. App.—Austin 2005, pet. denied).

51. *Id.* at 399 (citing City of New Braunfels v. Allen, 132 S.W.3d 157, 161 (Tex. App.—Austin 2004, no pet.)).

52. *Id.* at 396. The Third Court of Appeals also commented that "[t]he State of Texas elevates public employees who report legal wrongdoing to a protected status as a matter of fundamental policy." *Id.*

53. *Id.* at 399 (citing *Allen*, 132 S.W.3d at 161).

54. *See* cases cited *supra* note 44.

55. State v. Lueck, 290 S.W.3d 876 (Tex. 2009).

56. *Id.* at 878–80.

57. *Id.* at 886.

within the meaning of the Whistleblower Act."[58] In addition, the court determined that an agency supervisor "is not an appropriate law enforcement authority to whom such a report should be made."[59] For these two reasons, the court held that "Lueck's allegation affirmatively negate[d] the court's subject-matter jurisdiction over the cause."[60]

As a result, despite legislative language to the contrary,[61] the Texas Supreme Court established a significant jurisdictional hurdle for avoiding an immunity bar in whistleblower cases.[62] The court referred to the general principle that "clear and unambiguous language" is necessary to waive sovereign immunity.[63] It then ruled that, for a waiver of immunity from suit, the language in section 554.0035 of the Act requires a plaintiff to "actually allege a

58. *Id.* at 885.

59. *Id.*

60. *Lueck*, 290 S.W.3d at 878.

61. *See* TEX. GOV'T CODE ANN. § 554.0035 (West 2004) (providing that "[a] public employee who alleges a violation of this chapter may sue the employing state or local governmental entity for the relief provided by this chapter" and "[s]overeign immunity is waived and abolished to the extent of liability for the relief allowed under this chapter for a violation of this chapter").

62. *See generally Lueck*, 290 S.W.3d at 878–86 (holding that the State's sovereign immunity is not waived and a case lacks subject-matter jurisdiction where the pleadings fail to allege facts that affirmatively demonstrate the plaintiff reported a violation of law to an appropriate law enforcement authority as required under the Texas Whistleblower Act). In an analysis difficult to follow, the Texas Supreme Court reaffirmed "that the first sentence of [section 554.0035] waives sovereign immunity from suit," yet reasoned the waiver of immunity in the second sentence "simply limits judgments against the State to 'the extent of liability for the relief allowed under [the Act] for a violation of [the Act].'" *Id.* at 882 (quoting TEX. GOV'T CODE ANN. § 554.0035). The court determined the "second sentence not only waives immunity from liability, but also confines the scope of the State's consent to suit that was established in the first sentence," and concluded that, "like the [Texas] Tort Claims Act, the Whistleblower Act imposes a limited waiver of immunity that allows consideration of the section 554.002(a) elements, to the extent necessary in determining whether the claim falls within the jurisdictional confines of section 554.0035." *Id.*; *cf.* Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 224–28 (Tex. 2004) (applying similar statutory language in the Texas Tort Claims Act to require allegations and evidence of jurisdictional facts that bring the case within a limited scope of conduct for which immunity is expressly waived under the Act). Thus, the court held that a whistleblower plaintiff "must actually allege a violation of the Act for there to be a waiver from suit" and "that the elements of section 554.002(a) can be considered as jurisdictional facts, when it is necessary to resolve whether a plaintiff has alleged a violation under the Act." *Lueck*, 290 S.W.3d at 881. For further discussion of the Texas Tort Claims Act, see *infra* notes 362–70 and accompanying text.

63. *See* State v. Lueck, 290 S.W.3d 876, 880 (Tex. 2009) (quoting TEX. GOV'T CODE ANN. § 311.034) (noting that state agencies "are immune from suit and liability in Texas unless the Legislature expressly waives sovereign immunity").

violation of the Act" with facts supporting the elements of section 554.002(a),[64] which provides that a "governmental entity may not . . . take [any] adverse personnel action against[] a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority."[65] Lueck contended that "section 554.002(a) contains non-jurisdictional elements that speak to the underlying merits of the claim, and, therefore, [could not] be considered when determining jurisdiction."[66] However, the court explained that, because "section 554.0035 directs the [immunity] inquiry to section 554.002(a),"[67] holding those elements as jurisdictional facts was consistent with the principle that "[m]ere reference to the . . . Act does not establish the State's consent to be sued and thus is not enough to confer jurisdiction on the trial court."[68] In sum, the court announced that a public employee must be able to initially show that he reported a violation of law to an appropriate law enforcement authority to even file a whistleblower suit against the State, and, if the pleadings affirmatively negate the existence of those jurisdictional facts, the court must dismiss without an opportunity to amend.[69]

As previously mentioned in Part II(A), when addressing the question of sovereign immunity in Texas, courts look at "not only whether the State has consented to suit, but also whether the State has accepted liability."[70] According to the Texas Supreme Court,

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64. *Id.* at 881.

65. TEX. GOV'T CODE ANN. § 554.002(a) (West 2004).

66. *Lueck*, 290 S.W.3d at 881.

67. *Id.* at 882.

68. *Id.* at 881–82 (alterations in original) (quoting Tex. Dep't of Criminal Justice v. Miller, 51 S.W.3d 583, 587 (Tex. 2001)) (internal quotation marks omitted).

69. *See id.* at 884–86 (dismissing the case for lack of subject-matter jurisdiction because "Lueck's pleadings affirmatively demonstrate[d] that he did not allege a violation under the Whistleblower Act"); *see also* Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 227 (Tex. 2004) ("If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend.").

70. Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692, 696 (Tex. 2003). Under this two-immunity scheme, immunity from suit is a jurisdictional question of whether the State has expressly consented to suit, while immunity from liability asks whether the State has accepted liability even after it has consented to suit. *Id.* In *Lueck*, the state agency argued that the substantively identical language in the Texas Tort Claims Act was dispositive of the jurisdictional requirements for waiving immunity under the Texas Whistleblower Act. *Lueck*, 290 S.W.3d at 882; *see also Miranda*, 133 S.W.3d at 224 (opining that the Texas Tort Claims Act "creates a unique statutory scheme in which the two immunities are co-

to bring an action under the Texas Whistleblower Act, a plaintiff must allege not only status as a public employee and a violation of the Act but also a good-faith report of a violation of law to an appropriate law enforcement authority.[71] Thus, alleging facts to support these prerequisites is necessary to show the trial court that the legislature has in fact consented to the plaintiff's particular cause of action before the plaintiff can proceed to ultimately prove unlawful retaliation. Conversely, if any of these required allegations are insufficient to affirmatively demonstrate jurisdiction, the plaintiff's pleadings fail to show that the legislature has waived immunity from suit. The Texas Supreme Court dismissed the plaintiff's case in *Lueck* because the plaintiff did not allege the required jurisdictional facts—i.e., reporting "a violation of law" to "an appropriate law enforcement authority."[72] Yet, the court limited its holding to "not mean that [a whistleblower plaintiff] must prove his claim in order to satisfy the jurisdictional hurdle."[73]

The jurisdictional hurdle pronounced in *Lueck* raises a question of whether the Texas Supreme Court has circumvented the Texas legislature's clear intent to protect a whistleblower from retalia-

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extensive"). Although the Texas Supreme Court declined to permit the Texas Tort Claims Act to control the analysis, noting that it considers immunity statutes standing alone, it nevertheless implicitly determined that a co-extensive immunity scheme applies to a suit against the State under the Texas Whistleblower Act. *See Lueck*, 290 S.W.3d at 882–83 (holding "that the elements of section 554.002(a) can be considered to determine both jurisdiction and liability").

71. *See Lueck*, 290 S.W.3d at 881 (agreeing that the jurisdictional requirements of the Texas Whistleblower Act consist of being a public employee and alleging a violation of the Act, but adding that the latter requirement includes alleging the elements of section 554.002(a)); *see also* TEX. GOV'T CODE ANN. § 554.002(a) (West 2004) (applying the Texas Whistleblower Act to "a public employee who in good faith reports a violation of law . . . to an appropriate law enforcement authority").

72. *Lueck*, 290 S.W.3d at 885–86.

73. State v. Lueck, 290 S.W.3d 876, 884 (Tex. 2009). In *Miranda*, the Texas Supreme Court stated that, in a plea to the jurisdiction, courts must "consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised." *Miranda*, 133 S.W.3d at 227. The court further explained that, "[w]hen the consideration of a trial court's subject matter jurisdiction requires the examination of evidence, the trial court exercises its discretion in deciding whether the jurisdictional determination should be made at a preliminary hearing or await a fuller development of the case." *Id.* Accordingly, the court's ruling in *Lueck* should caution a plaintiff bringing suit under the Texas Whistleblower Act to carefully draft the petition, making certain it alleges sufficient facts to satisfy the jurisdictional challenge, and to request the trial court to defer ruling on the State's plea to the jurisdiction until the plaintiff can develop the case more fully.

tory actions of governmental officials in instances when a whistleblower reports illegal governmental actions. Moreover, the Texas Supreme Court's strict adherence to the doctrine of sovereign immunity presents a question of whether the court has effectively abandoned its reasoning in *Nueces County v. San Patricio County*,[74] which emphasized that "the Legislature is better suited to make the distinctions, exceptions, and limitations that different situations require."[75]

In *Texas Department of Transportation v. Garcia*,[76] the public-employee plaintiff contended a co-worker directed him to use property belonging to the Texas Department of Transportation (TxDOT) "to 'do private work' during state work hours."[77] The plaintiff claimed that "he refused to perform the requested acts and reported [the co-worker's] actions to 'enforcement authorities within the Texas Department of Transportation, but no action was taken.'"[78] The plaintiff also "alleged that on another occasion he saw another TxDOT employee 'drinking on the job and driving a company vehicle.'"[79] "[H]e also reported this incident, 'but again no action was taken.'"[80] The plaintiff finally resigned, "out of despair," and thereafter sued TxDOT under the Texas Whistleblower Act.[81] The Thirteenth Court of Appeals looked to the Act as the

74. Nueces Cnty. v. San Patricio Cnty., 246 S.W.3d 651 (Tex. 2008).

75. *Id.* at 653 (quoting City of Galveston v. State, 217 S.W.3d 466, 469 (Tex. 2007)). Moreover, it seems questionable whether the *Lueck* holding is consistent with *Hernandez v. Ebrom*, 289 S.W.3d 316 (Tex. 2009), in which the Texas Supreme Court acknowledged that it does not give effect to words in a statute if the "context necessarily requires a different construction." Hernandez v. Ebrom, 289 S.W.3d 316, 318 (Tex. 2009). An additional query is how the Texas Supreme Court will apply the *Lueck* approach in conjunction with the principle that pleadings must be construed liberally in favor of the plaintiff. *See Miranda*, 133 S.W.3d at 226 (citing Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 446 (Tex. 1993)) (stating that courts, in plea to the jurisdiction challenges, "construe the pleadings liberally in favor of the plaintiffs and look to the pleaders' intent").

76. Tex. Dep't of Transp. v. Garcia, 243 S.W.3d 759 (Tex. App.—Corpus Christi 2007), *rev'd*, 293 S.W.3d 195 (Tex. 2009).

77. *Id.* at 760.

78. *Id.*

79. *Id.* at 760–61.

80. *Id.* at 761.

81. *Garcia*, 243 S.W.3d at 761. The State's attorneys filed a plea to the jurisdiction, contending the plaintiff "failed to invoke the [Whistleblower] Act because the record [did] not reflect evidence" that the employee had alleged a violation of the law. *Id.* at 761–62. The State's attorneys also asserted that the plaintiff failed to plead and "show as a matter of law" that he reported to "an appropriate law enforcement authority." *Id.* at 762 (citing

source of jurisdictional requirements for the case.[82] The court determined that the Act "makes the only jurisdictional prerequisites to maintaining a suit the plaintiff's status [as a public employee] and the sufficiency of the whistleblower allegations," and ruled those prerequisites were met.[83] However, the Texas Supreme Court reversed the Thirteenth Court of Appeals, applying the holding in *Lueck* that "the elements of section 554.002(a) can be considered to determine both jurisdiction and liability."[84] Upon remand, the Thirteenth Court of Appeals held

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TEX. GOV'T CODE ANN. § 554.002(a)). The State's attorneys contended a public employee "must allege specific facts relating to the merits of his claim." *Id.* The court of appeals disagreed with the State's attorneys and affirmed the district court's denial of the State's plea to the jurisdiction. *Id.* at 760. The court of appeals adopted the reasoning in *Texas Board of Pardons & Paroles v. Feinblatt*, 82 S.W.3d 513 (Tex. App.—Austin 2002, pet. denied), that "an element of a plaintiff's cause of action does not affect the trial court's subject matter jurisdiction, rather, it affects the merits of the cause of action." Tex. Dep't of Transp. v. Garcia, 243 S.W.3d 759, 762–63 (Tex. App.—Corpus Christi 2007) (citing Tex. Bd. of Pardons & Paroles v. Feinblatt, 82 S.W.3d 513, 520 (Tex. App.—Austin 2002, pet. denied)), *rev'd*, 293 S.W.3d 195 (Tex. 2009).

82. *Garcia*, 243 S.W.3d at 763.

83. *Id.* Under the Texas Whistleblower Act, "[a] state or local governmental entity may not suspend or terminate employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority." TEX. GOV'T CODE ANN. § 554.002(a) (West 2004). The Act further provides:

> [A] report is made to an appropriate law enforcement authority if the authority is a part of a state or local governmental entity or of the federal government that the employee in good faith believes is authorized to: (1) regulate under or enforce the law alleged to be violated in the report; or (2) investigate or prosecute a violation of criminal law.

Id. § 554.002(b).

84. Tex. Dep't of Transp. v. Garcia, 293 S.W.3d 195, 196 (Tex. 2009) (quoting State v. Lueck, 290 S.W.3d 876, 883 (Tex. 2009)) (internal quotation marks omitted), *rev'g* 243 S.W.3d 759 (Tex. App.—Corpus Christi 2007). Similarly, in *University of Houston v. Barth*, 313 S.W.3d 817 (Tex. 2010), the Texas Supreme Court reversed and remanded a decision of the First Court of Appeals, ruling that the question—whether a professor's reports to state university officials of his dean's contracting and accounting irregularities were "good-faith reports of a violation of law to an appropriate law-enforcement authority"—was jurisdictional and could be raised for the first time on appeal. *Id.* at 818. At trial, the jury found that the university did retaliate against the plaintiff and awarded him damages. *Id.* On appeal, the university argued that "the verdict was not supported by legally sufficient evidence that Barth made a good-faith report of a violation of law to an appropriate law-enforcement authority." *Id.* The court of appeals held that the university "had waived its legal sufficiency challenge" to some elements of the professor's claims. *Id.* In reversing the court of appeals, the Texas Supreme Court ruled that the question of whether the professor had made "good-faith reports of a violation of law to an appropriate law-enforcement authority is a jurisdictional question . . . and may not be waived by the

that, under the reasoning in *Lueck*, the plaintiff's reports to TxDOT were not reports of violations of law to appropriate law enforcement authorities.[85]

In *University of Texas Southwestern Medical Center at Dallas v. Gentilello*,[86] a professor "sued the ... Medical Center ... under the Texas Whistleblower Act, alleging he was demoted and stripped of two faculty-chair positions for reporting violations of Medicare and Medicaid regulations to his supervisor."[87] "The Medical Center filed a plea to the jurisdiction, asserting that [the plaintiff's] claims were barred by governmental immunity because he failed to allege a violation under the Whistleblower Act."[88] "The trial court denied the plea to the jurisdiction" and the appellate court affirmed.[89] The Texas Supreme Court reversed and remanded, directing the lower court "to determine whether, under the analysis set forth in *Lueck*, [the plaintiff] has alleged a violation under the Act."[90] The court ruled that "whether the reporting of violations of Medicare and Medicaid regulations to a supervisor is a good-faith report of a violation of law to an appropriate law-enforcement authority is a jurisdictional question."[91] However, on remand, the Fifth Court of Appeals decided that a fact-finder could determine the plaintiff "had a good faith belief that he reported to an appropriate law enforcement authority."[92]

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parties." *Barth*, 313 S.W.3d at 818. The court then remanded the case to the court of appeals "to determine whether, under the analysis set forth in *Lueck*, Barth's claims [met] the Whistleblower Act's jurisdictional requirements for suit against a governmental entity and, thus, whether the trial court had jurisdiction over Barth's suit." *Id.*

85. Tex. Dep't of Transp. v. Garcia, No. 13-07-00004-CV, 2010 WL 2543899, at *1–2 (Tex. App.—Corpus Christi June 24, 2010, no pet.) (mem. op.). The Thirteenth Court decided TxDOT was not "an 'appropriate law enforcement authority' for purposes of reporting a 'violation of the law.'" *Id.* The court referred to *Texas Department of Transportation v. Needham*, 82 S.W.3d 314 (Tex. 2002), wherein the Texas Supreme Court held that an "employer's power to conduct internal investigations or disciplinary practices [does] not satisfy the 'appropriate law enforcement authority' standard under the Act." *Garcia*, 2010 WL 2543899, at *2 (citing *Needham*, 82 S.W.3d at 317). The Thirteenth Court noted that, in *Needham*, the Texas Supreme Court ruled "TxDOT is not considered an 'appropriate law enforcement authority.'" *Id.* (citing *Needham*, 82 S.W.3d at 320).

86. Univ. of Tex. Sw. Med. Ctr. at Dallas v. Gentilello, 300 S.W.3d 753 (Tex. 2009).

87. *Id.* at 754.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Gentilello*, 300 S.W.3d at 754.

92. Univ. of Tex. Sw. Med. Ctr. at Dallas v. Gentilello, 317 S.W.3d 865, 871 (Tex. App.—Dallas 2010, pet. filed).

In *Galveston Independent School District v. Jaco*,[93] the Texas Supreme Court again reversed similar lower court decisions, remanding the case with directions for the court of appeals to follow the approach in *Lueck*.[94] The supreme court held that, in deciding whether a school district's immunity under the Texas Whistleblower Act was waived, the trial court was required to determine whether an athletic director's reporting of a high school football player's violations of league rules and regulations to an interscholastic league was "a good-faith report of a violation of law to an appropriate law-enforcement authority."[95]

In *Texas Department of Transportation v. Needham*,[96] the Texas Supreme Court defined "good faith" to mean "(1) the employee believed the governmental entity was authorized to (a) regulate under or enforce the law alleged to be violated in the report, or (b) investigate or prosecute a violation of criminal law; and (2) the employee's belief was reasonable in light of the employee's training and experience."[97] In *Texas Department of Assistive and Rehabilitative Services v. Howard*, the Third Court of Appeals discussed the "first prong" of the good faith test as a consideration of an "employee's subjective belief: whether the employee honestly believed the conduct reported was a violation of law."[98] In contrast, the court noted that "[t]he second prong is objective because it measures the employee's belief against that of a reasonably prudent employee in similar circumstances."[99] The court further clarified that "[a] report of an alleged violation of law may be in good faith even though incorrect."[100]

The Third Court of Appeals appeared to follow Texas Supreme

93. Galveston Indep. Sch. Dist. v. Jaco, 303 S.W.3d 699 (Tex. 2010).

94. *Id.* at 699–700. Prior to the reversal, the court of appeals had held that elements of section 554.002 of the Whistleblower Act are not jurisdictional. Galveston Indep. Sch. Dist. v. Jaco, 278 S.W.3d 477, 482–83 (Tex. App.—Houston [14th Dist.] 2009), *rev'd*, 303 S.W.3d 699 (Tex. 2010).

95. *Jaco*, 303 S.W.3d at 699–700. The court remanded the case for a determination of whether the plaintiff properly alleged a violation of the Texas Whistleblower Act. *Id.* at 700.

96. Tex. Dep't of Transp. v. Needham, 82 S.W.3d 314 (Tex. 2002).

97. *Id.* at 321.

98. Tex. Dep't of Assistive & Rehabilitative Servs. v. Howard, 182 S.W.3d 393, 401 (Tex. App.—Austin 2005, no pet.).

99. *Id.*

100. *Id.*

Court precedent.[101] However, as previously mentioned, the Texas Supreme Court has also taken the position that, "when the facts underlying the merits and subject-matter jurisdiction are intertwined, the State may assert sovereign immunity from suit by a plea to the jurisdiction, even when the trial court must consider evidence 'necessary to resolve the jurisdictional issues raised.'"[102] Because the State can immediately file a plea to the jurisdiction and, if denied, subsequently file an interlocutory appeal before the plaintiff may have sufficient evidence, the result may often preclude any fair consideration whatsoever of the plaintiff's claim, much less his good faith. Consequently, under the analysis in *Lueck*, whistleblower plaintiffs potentially face a major problem with satisfying the elements of section 554.002(a) based solely on their pleadings.[103] Indeed, given the Texas Supreme Court's view of a limited waiver of sovereign immunity in the Texas Whistleblower Act, if a plaintiff cannot persuade a trial court to delay ruling on the plea to the jurisdiction until he has had an opportunity to discover the necessary evidence to prove his claim, the plaintiff may be required "to prove up his case before the court assume[s] jurisdiction."[104]

In *Texas Department of Human Services v. Okoli*,[105] the First Court of Appeals determined the Texas Whistleblower Act "makes the only jurisdictional prerequisites to maintaining a whistleblower suit the plaintiff's status as a public employee and the sufficiency of his whistleblower allegations."[106] The court

101. *See* Wichita Cnty. v. Hart, 917 S.W.2d 779, 784–85 (Tex. 1996) (adopting the two-prong definition of "good faith" to include objective and subjective elements).

102. State v. Lueck, 290 S.W.3d 876, 880 (Tex. 2009) (quoting Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 555 (Tex. 2000)).

103. *See id.* at 884 (requiring the plaintiff's pleadings to affirmatively prove the jurisdictional facts of Texas Government Code section 554.002(2) when the opposing party challenges the jurisdiction of the plea). In fact, a court may deny a plaintiff the chance to amend the pleading if the original plea effectively negates jurisdiction even with supporting evidence. *See id.* at 880 (dismissing the case for lack of subject-matter jurisdiction because the original plea affirmatively negated jurisdiction by stating specific assertions contrary to the required elements under the Texas Whistleblower Act).

104. *See id.* at 881, 884 (implying that a whistleblower plaintiff must present sufficient evidence, in addition to the allegations in the pleadings, to establish the court's subject-matter jurisdiction under the Texas Whistleblower Act).

105. Tex. Dep't. of Human Servs. v. Okoli, 263 S.W.3d 275 (Tex. App.—Houston [1st Dist.] 2007), *rev'd*, 295 S.W.3d 667 (Tex. 2009).

106. *Id.* at 282 (citing State v. Lueck, 212 S.W.3d 630, 636 (Tex. App.—Austin 2006), *rev'd*, 290 S.W.3d 876 (Tex. 2009)).

reasoned that questions of whether the plaintiff "actually reported to an appropriate law enforcement authority, or whether he had a good-faith belief that [the entity to which he reported] was such an authority, [were each] an element of his whistleblower claim and [could not] be a jurisdictional prerequisite to suit."[107] The Texas Supreme Court reversed, explaining that, under the reasoning in *Lueck*, the element of whether the plaintiff made "a good faith report of a violation of law to an appropriate law enforcement authority is a jurisdictional question."[108]

The plaintiff in *Okoli* had reported internal falsification of dates and documents to supervisors and a manager in the Texas Department of Human Services (TDHS).[109] On remand, the First Court of Appeals held that the plaintiff had made a report to "appropriate law enforcement authorities within TDHS."[110] The plaintiff had "argued that his report to TDHS was to an appropriate law enforcement authority because TDHS [was] the governmental entity authorized to regulate under and enforce the subject law."[111] The plaintiff further asserted "that he, in good faith, believed that . . . his supervisors were authorized to regulate under and enforce [the subject law] because his work rules required employees to make reports of fraudulent conduct to their supervisors."[112] In addition, he contended "that TDHS [was] authorized to 'refer and fund district attorney's special welfare fraud units for prosecution.'"[113] The First Court of Appeals noted "that the Whistleblower Act [was] designed to enhance openness in government and to compel the government's compliance with law by protecting those who inform authorities of wrongdoing," and that, "[b]ecause the Act is remedial in nature, [the court would] construe its provisions liberally."[114] Referring to the fact that the plaintiff "was instructed by TDHS to report the criminal

107. *Id.* (citing *Lueck*, 212 S.W.3d at 637–38).

108. Tex. Dep't. of Health & Human Servs. v. Okoli, 295 S.W.3d 667, 668 (Tex. 2009).

109. *Okoli*, 263 S.W.3d at 277.

110. Tex. Dep't. of Human Servs. v. Okoli, 317 S.W.3d 800, 809 (Tex. App.—Houston [1st Dist.] 2010, pet. filed).

111. *Id.* at 804.

112. *Id.*

113. *Id.*

114. *Id.* at 805 n.10 (citing City of Houston v. Levingston, 221 S.W.3d 204, 218 (Tex. App.—Houston [1st Dist.] 2006, no pet.); Tex. Dep't of Criminal Justice v. McElyea, 239 S.W.3d 842, 849 (Tex. App.—Austin 2007, pet. denied)).

conduct at issue in this case 'up his chain of command,'" the court reasoned the governmental entity and supervisors were appropriate law enforcement authorities authorized to investigate the alleged criminal conduct.[115] As an alternative basis for the plaintiff to move forward with the suit, the court also held that he "had a good faith belief . . . he was reporting the alleged criminal conduct to appropriate law enforcement authorities."[116] Thus, the court decided that, "under the plain language of the Whistleblower Act," the plaintiff was "entitled to the Act's protection for whistleblowing about the alleged unlawful conduct to those in his chain of command."[117]

The Fifth Court of Appeals has applied a similar approach. In *University of Texas Southwestern Medical Center at Dallas v. Gentilello*,[118] on remand, the Fifth Court of Appeals determined that "a fact issue exists on whether [the plaintiff] had a good faith belief that he reported to an appropriate law enforcement authority" when he reported violations of Medicare and Medicaid rules and regulations to the person at the Medical Center "who set the policies regarding the presence of attending physicians . . . and who had the power to internally investigate Medicare and Medicaid violations."[119] The Medical Center took the position that the plaintiff must specifically plead that the physician to whom he reported "had been delegated 'federal enforcement authority' by the Medicare and Medicaid statutes and regulations or that [the physician] had some sort of criminal jurisdiction."[120] "According to [the Medical Center], unless the employing agency is itself a law enforcement agency, a supervisor can never be an

115. *Okoli*, 317 S.W.3d at 808–09. The Uniform Law Commission states, within the Uniform Electronic Recordation of Custodial Interrogations Act, that: "'Law enforcement agency' means a governmental entity or *person authorized by a governmental entity* or by state law to enforce criminal laws or investigate suspected criminal activity. The term includes a *nongovernmental entity* that has been delegated the authority to enforce criminal laws or *investigate* suspected criminal activity." UNIF. ELEC. RECORDATION OF CUSTODIAL INTERROGATIONS ACT § 2(3) (2010) (emphasis added), *available at* http://www.law.upenn.edu/bll/archives/ulc/erci/2010final.pdf.

116. *Okoli*, 317 S.W.3d at 809–10.

117. *Id.* at 810.

118. Univ. of Tex. Sw. Med. Ctr. at Dallas v. Gentilello, 317 S.W.3d 865 (Tex. App.—Dallas 2010, pet. filed).

119. *Id.* at 867–71. After the plaintiff reported the violations, "he alleged he was demoted because of his good faith report." *Id.* at 868.

120. *Id.* at 867.

appropriate law enforcement authority as a matter of law."[121] The Fifth Court disagreed and ruled that "a plaintiff may reasonably believe a report to an appropriate law enforcement authority may be made internally."[122]

III. HISTORY OF THE SOVEREIGN IMMUNITY DOCTRINE

The long standing judicial doctrine of sovereign immunity, which prevents citizens from suing the government unless the government consents to such suits, is a "carryover from the days of the near-absolute power of the English kings" and is based on the philosophy that a sovereign cannot commit a legal wrong and should be immune from civil suit.[123] While the doctrine fell into some disfavor in the past,[124] many court decisions have continued to strictly apply the doctrine to further the judicial concept that citizens cannot bring suits against the government.[125]

Some jurists have commented that the doctrine of sovereign immunity evolved from the theory of absolute sovereignty, based "primarily on the structure of the feudal system and secondarily on a fiction that the King could do no wrong," and that the colonists

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121. *Id.* at 868.

122. *Gentilello*, 317 S.W.3d at 869. It remains uncertain whether the Texas Supreme Court will recognize a supervisor as an appropriate law enforcement authority when the supervisor is charged internally with investigating alleged governmental violations.

123. Humane Soc'y of the U.S. v. Clinton, 236 F.3d 1320, 1326 (Fed. Cir. 2001).

124. For example, in 1961, a dissenting state court justice declared that the only argument supporting the doctrine of governmental immunity was the notion that "age has lent weight to the unjust whim of long-dead Kings." Williams v. City of Detroit, 111 N.W.2d 1, 24 (Mich. 1961) (Edwards, J., dissenting), *superseded by statute*, Act of May 19, 1964, No. 170, 1964 Mich. Pub. Acts 221, *as recognized in* Odom v. Wayne Cnty., 760 N.W.2d 217, 221 (Mich. 2008). This justice postulated: "It is hard to say why the courts of America have adhered to this relic of absolutism so long a time after America overthrew monarchy itself!" *Id.*

125. *See, e.g.*, State v. Lueck, 290 S.W.3d 876, 878–86 (Tex. 2009) (holding that the State's sovereign immunity is not waived and the case lacks subject-matter jurisdiction where the pleadings fail to allege facts that affirmatively demonstrate jurisdictional facts that establish legislative consent to suit); *see also* City of El Paso v. Heinrich, 284 S.W.3d 366, 369–77, 380 (Tex. 2009) (concluding that, in the absence of the State's consent to suit, a plaintiff can only pursue claims for prospective declaratory and injunctive relief against state officials under a limited ultra vires exception to sovereign immunity, requiring proof that these government officers acted in their official capacities without legal or statutory authority in a nondiscretionary matter); Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp., 283 S.W.3d 838, 841–49 (Tex. 2009) (determining that sovereign immunity is retained where no constitutional or statutory provision clearly and unambiguously waives the State's immunity from suit).

rejected the fiction of the king's infallibility "when they declared their independence from the Crown."[126] U.S. Supreme Court Justice John Paul Stevens noted that the courts' "original reliance on the notion that a divinely ordained monarch 'can do no wrong' [has been] thoroughly discredited."[127] He further opined that the doctrine's "persistent threat to the impartial administration of justice has been repeatedly acknowledged and recognized."[128] Yet, the Supreme Court acknowledged that, while "the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified."[129] An interesting quirk of legal history is that, while the United Kingdom retains a vestigial monarchy, English courts have permitted actions against the government since the early 1900s.[130]

Despite its ancient lineage, the Supreme Court described the doctrine of sovereign immunity as a judge-made rule that "rests on

126. *See, e.g.*, Nevada v. Hall, 440 U.S. 410, 414–15 (1979) (discussing the origins of the sovereign immunity doctrine). In support of this proposition, the Supreme Court quoted the Declaration of Independence as follows:

> [T]hat whenever any form of government becomes destructive of these ends, it is the right of the People to alter or to abolish it, and to institute new government . . . and such is now the necessity which constrains them to alter their former systems of government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states.

Id. at 415 n.8 (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)). In *Langford v. United States*, 101 U.S. 341, 343 (1879), the Supreme Court stated: "We do not understand that[,] either in reference to the government of the United States, or of the several States, or of any of their officers, the English maxim [that the king can do no wrong] has an existence in this country." *Id.* at 343; *see also Williams*, 111 N.W.2d at 24 (Edwards, J., dissenting) (criticizing the adoption of the sovereign immunity doctrine).

127. United States v. Nordic Vill., Inc., 503 U.S. 30, 42 (1992) (Stevens, J., dissenting) (citing Nevada v. Hall, 440 U.S. 410, 415 (1979); Langford v. United States, 101 U.S. 341, 343 (1879)), *superseded by statute*, Bankruptcy Reform Act of 1994, Pub. L. 103-394, § 113, 108 Stat. 4106, 4117–18.

128. *Id.* at 43.

129. Alden v. Maine, 527 U.S. 706, 715–16 (1999).

130. *See generally* Smith v. Martin, [1911] 2 K.B. 775 (Eng.) (requiring the governmental agent to assume responsibility for the negligence of his employee); Shrimpton v. Hertfordshire CC, [1911-1913] All E.R. 359 (H.L.) (Eng.) (supporting the appeal of an individual's suit against the county council and noting that statutory authority to conduct an act necessarily conveys responsibility for the performance of the act); Ching v. Surrey CC, [1910] 1 K.B. 736 (Eng.) (noting that the responsibility of performance and any resulting negligence lies not upon the individual managers but rather on the governmental entity).

considerations of policy given legal sanction by [the] Court."[131] Further, while scholars and some courts have recognized the lack of justification for—and what some have termed inequities caused by—this judicially created doctrine, the doctrine has become a principle of American jurisprudence.[132]

Although the concept of sovereign immunity was initially adopted by the first courts in the United States, some early jurists disapproved of employing the doctrine. In 1882, the Supreme Court concluded that the doctrine clearly had no justification in our system of jurisprudence.[133] In pointing out that the principle of sovereign immunity "is derived from the laws and practices of our English ancestors," the Court traced the doctrine—that "the king of England was not suable in the courts of that country"—from the time of Edward the First.[134] Inquiring whether the king was suable "in his kingly character as other persons" prior to the establishment of the "petition of right," the Court noted that a king was apparently never suable as a matter of common right.[135] Beginning with the reign of Edward the First, however, one could sue the king in his own courts if the king gave consent in a petition of right.[136] Essentially, the petition of right gave a plaintiff the

131. Nat'l City Bank v. Republic of China, 348 U.S. 356, 359 (1955). Justice Frankfurter stated that the doctrine "has become such solely through adjudications of this Court." *Id.* at 358; *see also Nordic Vill.*, 503 U.S. at 42 (Stevens, J., dissenting) (noting that the notion of sovereign immunity was established by judges).

132. *See, e.g.*, Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955) (noting the contradiction between the Federal Tort Claims Act, which imposes governmental liability, and the long-standing jurisprudence of sovereign immunity). The Supreme Court has warned that, although courts must not squander the government's money by loose interpretation of statutes waiving sovereign immunity, courts must also refrain from acting "as a self-constituted guardian of the Treasury" by according immunity when legislation otherwise limits its application. *Id.* at 69. In *Alden v. Maine*, 527 U.S. 706 (1999), the Court stated that a "general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens." *Id.* at 750–51. The Court decided that, while a "judgment creditor of a State could have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc." *Id.* at 751. According to the Court, because "all cannot be satisfied in full, it is inevitable that difficult decisions . . . must be made." *Id.*

133. *See* United States v. Lee, 106 U.S. 196, 218 (1882) (reviewing various cases supporting and rejecting sovereign immunity and concluding that complete governmental immunity is indefensible given the rights accorded by the Constitution).

134. *Id.* at 205.

135. *Id.*

136. *Id.*

ability to bring suit against the monarch in the same manner that two private individuals could sue each other at that time.[137] Yet, with the advent of the petition of right, one could sue the king in any court only as permitted in the petition.[138]

The English remedy of the petition of right was never introduced into the United States. As the Supreme Court recognized in 1882, "there is in this country . . . no such thing as the petition of right, [just] as there is no such thing as a kingly head to the nation, or to any of the states which compose it."[139] The Court then discussed the reasons that would forbid one to sue the king in the king's own court and questioned how those reasons apply to the "political body corporate which we call the United States of America."[140] As the Court noted, "the absurdity of the king's sending a writ to himself to command the king to appear in the king's court" does not exist in our government because, in the United States, "process runs in the name of the president and may be served on the attorney general."[141] The Court further explained that "the dignity of the government is [not] degraded by its appearing as a defendant in the courts of its own creation, because it is constantly appearing as a party in such courts, and submitting its rights as against the citizens."[142] Another reason the Court considered in support of the doctrine of sovereign immunity, as it originated in England, was that

> it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject [the king] to repeated suits as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property.[143]

The Court countered this notion by observing that, because "we

137. *See id.* ("It is believed that this petition of right, as it has been practiced and observed in the administration of justice in England, has been as efficient in securing the rights of suitors against the crown in all cases appropriate to judicial proceedings, as that which the law affords in legal controversies between the subjects of the king among themselves.").

138. *Lee*, 106 U.S. at 205.

139. *Id.*

140. *Id.* at 206.

141. *Id.*

142. *Id.*

143. United States v. Lee, 106 U.S. 196, 206 (1882) (quoting Briggs v. A Light Boat, 93 Mass. (11 Allen) 157, 162–63 (1865)).

have no person in this government who exercises supreme executive power or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests."[144] Instead, the Court gave great weight to "the vast difference in the essential character of the two governments as regards the source and the depositaries of power" and, despite progress made to strip the crown of its powers, the public's undoubted reverence for the English monarchy to not subject it to the same legal demands as ordinary citizens.[145] In considering these differences, one might question, as the Court did, why the rights of the people of the United States—who are in fact the sovereign—should "give way to a sentiment of loyalty" to the government.[146]

The old form of bringing a claim against the English monarchy by petition of right "was so tedious and expensive that it fell into disuse."[147] Eventually, however, royal consent was granted "as a matter of course."[148] English statutes required the secretary of state to bring a petition for the monarch's consideration and, if the monarch refused to grant the fiat, the claimant was without a remedy.[149] Beginning in the mid-twentieth century, the United Kingdom authorized suits against the government in tort under the Crown Proceedings Act of 1947.[150] This Act permits claims against the Crown if the claims could be brought against any other defendant.[151] "Civil proceedings against the Crown [must] be instituted against the appropriate authori[z]ed Government

144. *Id.*

145. *Id.* at 208.

146. *See id.* at 208–09 ("Under our system the *people* . . . are the sovereign. Their rights . . . are not bound to give way to a sentiment of loyalty to the person of the monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right.").

147. *Id.* at 238 (Gray, J., dissenting).

148. *Lee*, 106 U.S. at 238 (Gray, J., dissenting) (citing E. Archipelago Co. v. The Queen, (1856) 118 Eng. Rep. 988 (Q.B.) 1009; 2 El. & Bl. 856, 914–15).

149. *Id.* (citing Irwin v. Grey, (1862) 176 Eng. Rep. 290 (C.P. Westminster) 291; 3 F. & F. 635, 637; Tobin v. The Queen, (1863) 143 Eng. Rep. 543 (CP Middlesex) 549–50, 14 C.B. N.S. 504, 521).

150. Crown Proceedings Act, 1947, 10 & 11 Geo. 6, c. 44, § 1.

151. *Id.* § 2.

department, or, if [no] . . . authori[z]ed Government department[] is appropriate or . . . [there is] reasonable doubt whether any . . . is appropriate, against the Attorney General."[152] "All documents required to be served on the Crown" must be served on the solicitor for the appropriate department or, "if there is no such solicitor," then upon the solicitor of the monarch's treasury.[153]

Although English courts have, for the most part, repudiated the doctrine of sovereign immunity, it continues as "part of the fabric of our law."[154] The Supreme Court long ago expressed concern that "public service would be hindered, and the public safety endangered, if the [government] could be subjected to suit at the instance of every citizen."[155] Justice Stevens later disagreed, however, stating in a dissenting opinion that "changes in our social fabric favor limitation rather than expansion of sovereign immunity."[156] He reasoned that the concept of sovereign immunity, which dictated that "citizens should be remediless in the face of its abuses[,] [was] more a relic of medieval thought than anything else."[157] He further remarked: "Whether this immunity is an absolute survival of the monarchial privilege, or is a manifestation merely of power, or rests on abstract logical grounds, it undoubtedly runs counter to modern democratic notions of the moral responsibility of the State."[158] Referring to an earlier dissenting opinion of Justice Frankfurter, Justice Stevens stated that "it is a wholesome sight to see 'the Crown' sued and answering for its torts."[159]

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152. *Id.* § 17(3).

153. *Id.* § 18.

154. *See* Nat'l City Bank v. Republic of China, 348 U.S. 356, 358–59 (1955) (comparing the sovereign immunity of foreign nations as solely recognized under adjudications of the Court with "the nonsuability of the United States . . .[which is also] derived from considerations of policy").

155. United States v. Lee, 106 U.S. 196, 247 (1882) (Gray, J., dissenting) (quoting The Siren, 74 U.S. (7 Wall.) 152, 154 (1868)).

156. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 164 n.48 (1984) (Stevens, J., dissenting).

157. *Id.*

158. *Id.* (quoting Great N. Life Ins. Co. v. Read, 322 U.S. 47, 59 (1944) (Frankfurter, J., dissenting)) (internal quotation marks omitted).

159. *Id.* (quoting *Read*, 322 U.S. at 59 (Frankfurter, J., dissenting)) (internal quotation marks omitted). Courts have not granted foreign governments immunity from suit in federal courts in the same manner as they have domestically provided immunity for the federal and state governments.

In 1812, in *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), Chief

IV. STARE DECISIS PRESERVES SOVEREIGN IMMUNITY

The continuing adherence of courts to the sovereign immunity doctrine is intertwined with and preserved by another long established doctrine: the principle of stare decisis. In 2009, the Supreme Court stated that stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[160] Based on this

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Justice Marshall discussed whether foreign sovereigns had a right to immunity in American courts. *Id.* at 147. Chief Justice Marshall explained that, "as a matter of comity, members of the international community had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases." Republic of Austria v. Altmann, 541 U.S. 677, 688 (2004). As a result, the U.S. Supreme Court had "consistently ... deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns." Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983). Until 1952, the State Department followed a policy of "request[ing] immunity in all actions against friendly foreign sovereigns." *Id.* However, in that year, the State Department concluded immunity should no longer be granted in certain types of cases. *Id.* at 487. "[F]oreign nations often placed diplomatic pressure on the State Department," and sometimes "political considerations led to suggestions of immunity in cases where immunity would not have [otherwise] been available." *Id.* "[R]esponsibility fell to the courts to determine whether sovereign immunity existed ...." *Id.* In *National City Bank v. Republic of China*, 348 U.S. 356 (1955), Justice Frankfurter stated that the limitation of immunity for foreign governments was unique because, "[u]nlike the special position accorded our States as party defendants by the Eleventh Amendment, the privileged position of a foreign state is not an explicit command of [our] Constitution." *Id.* at 358–59.

In 1976, Congress sought to remedy problems relating to immunity of foreign governments by enacting the Federal Sovereign Immunities Act. *See generally* Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94–583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1602–1611 (2006 & Supp. 2009)) (providing statutory provisions, with certain exceptions, to accord foreign states with immunity from suit in U.S. courts). Pursuant to the Foreign Sovereign Immunities Act, Congress itself has provided foreign states with some immunity from suit in federal courts. *See* 28 U.S.C. § 1604 (2006) (stating that foreign nations shall be immune from suits except as otherwise provided in §§ 1605–1607). Among other exceptions for foreign state immunity from suit, Congress has excepted the following: (1) "the foreign state has waived its immunity either explicitly or by implication"; (2) "the action is based upon a commercial activity carried on in the United States by the foreign state"; (3) in cases "in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States"; (4) cases "in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States"; and (5) where "money damages are sought against a foreign state for personal injury or death, or damage to or loss of property ... caused by the tortious act or omission of that foreign state [or one of its employees] while acting within the scope of his office or employment." *Id.* § 1605(a)(1)–(5).

160. Pearson v. Callahan, 129 S. Ct. 808, 816 (2009) (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)) (internal quotation marks omitted).

principle, the Supreme Court has treated the tenet—that citizens cannot sue their government—as part of the fabric of our jurisprudence since the Constitution was drafted and ratified and the first courts were instituted.[161]

Although the rule of stare decisis advances "consistency and uniformity of decision," the Supreme Court recognized early on that the doctrine is not inflexible.[162] Because the Supreme Court bears the ultimate responsibility for development of the law,[163] the Court has chosen on occasion to ignore the principle of stare decisis and to overrule or significantly modify its prior decisions.[164] Depending on the subject matter in a particular case,

161. *See, e.g.*, United States v. Lee, 106 U.S. 196, 205 (1882) (discussing the origins of the sovereign immunity doctrine as adopted in the United States). In 1999, a majority of the Supreme Court, in tracing the history of the sovereign immunity doctrine, asserted that "[w]hen the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts." Alden v. Maine, 527 U.S. 706, 715 (1999). Over two hundred years prior to the *Alden* decision, and just five years after the Constitution was adopted, the newly constituted Supreme Court reasoned that, at the time, the United States could not be sued. Chisholm v. Georgia, 2 U.S. (1 Dall.) 419, 425 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI, *as recognized in* Principality of Monaco v. Mississippi, 292 U.S. 313, 325 (1934). The Court sustained the right of a South Carolina citizen to bring a lawsuit against the State of Georgia. *Id.* at 458. In the Court's four separate opinions, the Justices generally reasoned that a state's immunity was qualified by the general provisions of Article III of the U.S. Constitution and, more specifically, by the provision in Article III, Section Two, which extended the federal judicial power to controversies between a state and citizens of another state. *Id.* at 454–58. Later, the adoption of the Eleventh Amendment eliminated the right of a citizen of one state to bring a suit in federal court against another state. *See Alden*, 527 U.S. at 713–14 (stating that "Eleventh Amendment immunity" refers explicitly to each state's sovereign immunity from suits brought by citizens of another state); *see also* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."). In 1890, the Supreme Court further held that a citizen may not sue the state of his or her residence in a federal court, even though the Eleventh Amendment does not explicitly apply to such suits. Hans v. Louisiana, 134 U.S. 1, 9–10, 15 (1890). Thus, the Supreme Court has sanctioned dual sovereign immunity since 1890 and stare decisis has sustained the doctrine.

162. Hertz v. Woodman, 218 U.S. 205, 212 (1910).

163. *See generally* Smith v. Allwright, 321 U.S. 649, 665–66 (1944) (discussing the Court's ability to reexamine its decisions and not be bound by stare decisis).

164. In *Arizona v. Gant*, 129 S. Ct. 1710, 1712–13 (2009), the Supreme Court overruled *New York v. Belton*, 453 U.S. 454 (1981), even though that case had been the law for twenty-eight years. In *Pearson v. Callahan*, 129 S. Ct. 808, 821–22 (2009), the Court softened the perceived hard-line laid out by *Saucier v. Katz*, 533 U.S. 194 (2001), and recognized the discretion of lower courts to decide whether or not to apply the precedent of *Saucier* in certain cases. In *Montejo v. Louisiana*, 129 S. Ct. 2079, 2080

a majority of the Court has occasionally disregarded stare decisis with respect to previous decisions they disapprove.[165] For many years, the Supreme Court acknowledged that it would not be constrained by stare decisis "when governing decisions are unworkable or are badly reasoned."[166] In *Pearson v. Callahan*,[167] the Court explained that "[r]evisiting precedent is particularly appropriate where ... a departure would not upset [settled] expectations."[168] The Court more recently rejected the two-prong

(2009), the Court overruled *Michigan v. Jackson*, 475 U.S. 625 (1986). In *Citizens United v. Federal Election Commission*, 130 S. Ct 876, 882 (2010), the Supreme Court overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and part of *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

165. *See, e.g.*, Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 680 (1999) (presenting Justice Scalia's discourse on the effect of stare decisis on decisions relating to sovereign immunity). Notwithstanding the principle of stare decisis, the majority of the Court in *College Savings Bank* overruled a decision rendered by a unanimous Court thirty-five years earlier. *See id.* (overruling Parden v. Terminal Ry. of the Ala. State Docks Dep't, 377 U.S. 184 (1964)). Justice Scalia referred to the *Parden* decision as "an elliptical opinion that stands at the nadir of our waiver (and, for that matter, sovereign-immunity) jurisprudence." *Id.* at 676. In *Parden*, the Supreme Court ruled that employees of a railroad owned and operated by the state of Alabama could bring an action against their employer under the Federal Employers' Liability Act. *Parden*, 377 U.S. at 185–92, *overruled by Coll. Sav. Bank*, 527 U.S. at 680. The Court decided that, despite the absence of any provision in that statute specifically referring to the states, the Act authorized suits against the states by virtue of the Act's general provision subjecting to suit "[e]very common carrier by railroad while engaging in commerce between any of the several States." *Id.* (quoting 45 U.S.C. § 51 (1958)) (internal quotation marks omitted). Twenty-three years later, in *Welch v. Texas Department of Highways & Public Transportation*, 483 U.S. 468 (1987), the Supreme Court overruled *Parden* "to the extent [it was] inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language." *Id.* at 478. Later, *College Savings Bank* expressly overruled "[w]hatever may remain of our decision in *Parden*." *Coll. Sav. Bank*, 527 U.S. at 680. The majority of the Court in *College Savings Bank* decided "that the constructive-waiver experiment of *Parden* was ill conceived, and [that there was] no merit in attempting to salvage any remnant of it." *Id.* The Court commented that "the very cornerstone of the *Parden* opinion was the notion that state sovereign immunity is not constitutionally grounded." *Id.* at 682. Justice Scalia, writing for a majority of the Court, referred to "the still-warm precedent of *Seminole Tribe* and to the 110-year-old decision ... that supports it," *id.* at 687 (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54, 66–68 (1996)), and the dissenting Justices view as having "adopted a decidedly perverse theory of [stare decisis]," *id.* at 689.

166. Payne v. Tennessee, 501 U.S. 808, 827 (1991); *see also Gant*, 129 S. Ct. at 1725 (Scalia, J., concurring) (citing *Payne*, 501 U.S. at 827) (noting there was "ample reason that the precedent was badly reasoned and produces erroneous (in this case unconstitutional) results" to justify abandoning prior precedent).

167. Pearson v. Callahan, 129 S. Ct. 808 (2009).

168. *Id.* at 816.

exception to stare decisis, which required precedent that was not well reasoned or that proved unworkable, and instead enumerated additional factors to consider before overruling a past decision.[169] Specifically, this approach focuses on four considerations: the reasoning behind the decision, the workability of the rule, the reliance interests at stake, and the precedent's antiquity.[170]

Although the doctrine of stare decisis treats prior court opinions as general law, it is questionable whether this treatment provides for judicial usurpation of the legislative power granted to Congress by Article I of the Constitution, which provides that Congress alone can make the laws.[171] In addition, if governing decisions can have less value in our system of jurisprudence and be overruled when they no longer meet the requirements for good law,[172] perhaps courts should revisit the reasoning, workability, reliance interests, and antiquity of the sovereign immunity doctrine in light of an increasing need for governmental accountability and transparency.

V. ELEVENTH AMENDMENT SOVEREIGN IMMUNITY

The Supreme Court's interpretation of the Eleventh Amend-

169. Montejo v. Louisiana, 129 S. Ct. 2079, 2088–89 (2009).

170. *Id.*

171. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."). Interestingly, in *College Savings Bank*, Justice Scalia stated that "[r]ecognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*." Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 683 (1999). In *Seminole Tribe*, the Supreme Court ruled that Congress lacks authority to abrogate the states' Eleventh Amendment immunity. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 68 (1996). In a dissenting opinion in *College Savings Bank*, Justice Breyer concluded the Supreme Court had made the "[sovereign immunity] doctrine immune from congressional Article I modification, ... [making] it more difficult for Congress to decentralize governmental decisionmaking and to provide individual citizens, or local communities, with a variety of enforcement powers." *Coll. Sav. Bank*, 527 U.S. at 705 (Breyer, J., dissenting). Justice Breyer opined that, by diminishing congressional flexibility, the Supreme Court made it "more difficult to satisfy modern federalism's more important liberty-protecting needs." *Id.* Justice Breyer concluded that the doctrine of sovereign immunity "is counterproductive." *Id.* In *Alden v. Maine*, the Court ruled "that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." Alden v. Maine, 527 U.S. 706, 712 (1999).

172. *See Montejo*, 129 S. Ct. at 2088–89 (enumerating the factors the court must consider before overruling a prior decision).

ment provides the authority for sovereign immunity for the states when they are sued in federal courts.[173] Article III of the Constitution, which authorizes the creation of the courts, extends federal judicial power to controversies "between a State and citizens of another State."[174] "Relying on this language, [the Supreme] Court in 1793 assumed original jurisdiction over a suit brought by a citizen of South Carolina against the State of Georgia."[175] The decision created great concern as to the reach of federal judicial power and immediately led to the proposal and enactment of the Eleventh Amendment in 1795, preventing a citizen of one state from bringing a suit in federal court against another state.[176] The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of *another* State, or by Citizens or Subjects of any Foreign State."[177] The Supreme Court postulated that "the principle of sovereign immunity" was incorporated into the Constitution through the Eleventh Amendment as "a constitutional limitation on the federal judicial power established in Art[icle] III."[178]

Although the Eleventh Amendment only bars actions by non-citizens against a state, in an 1890 decision the Supreme Court ruled "that, despite limited terms of the Eleventh Amendment, a federal court [also cannot] entertain a suit brought by a citizen against his own State."[179] "After reviewing the constitutional debates concerning the scope of Art[icle] III, the Court determined that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'"[180] Since

173. *See, e.g.*, *Seminole Tribe*, 517 U.S. at 72 ("[T]he Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.").

174. U.S. CONST. art. III, § 2. Article III authorizes the creation of law courts, equity courts, and admiralty courts, all of which sit to determine "cases" or "controversies." *Id.*

175. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 97 (1984) (citing Chisholm v. Georgia, 2 U.S. (1 Dall.) 419 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI, *as recognized in* Principality of Monaco v. Mississippi, 292 U.S. 313, 325 (1934)).

176. *See* Principality of Monaco v. Mississippi, 292 U.S. 313, 325 (1934) (discussing the adoption of the Eleventh Amendment after the Court's decision in *Chisholm*).

177. U.S. CONST. amend. XI (emphasis added).

178. *Halderman*, 465 U.S. at 98.

179. *Id.* (citing Hans v. Louisiana, 134 U.S. 1 (1890)).

180. *Id.* (quoting *Hans*, 134 U.S. at 15).

that opinion, the Supreme Court's "repeated decisions" have established, as "a fundamental rule of jurisprudence," the principle that "a State may not be sued without its consent."[181] The Court has ruled that "neither substantive federal law nor attempted congressional abrogation under Article I bars a State from raising a constitutional defense of sovereign immunity in federal court."[182] Moreover, according to the Supreme Court, the states "retain an analogous constitutional immunity from private suits in their own courts."[183] Thus, in taking the position that the Eleventh Amendment has incorporated into the Constitution a common law doctrine of sovereign immunity, the Supreme Court has determined that, while "the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."[184] The Court has referred to an idea of the "founding generation . . . [which is] that the several states of the Union" should not be summoned to answer as defendants "the complaints of private persons."[185]

Viewing the Eleventh Amendment as being consonant with principles of federalism, Justice Blackmun referred to sovereign immunity as "a guarantee that is implied as an essential component of federalism" and "sufficiently fundamental to our

181. *Id.* In *Alden v. Maine*, the Supreme Court noted that the principle of sovereign immunity was applicable to state governments as early as the ratification of the Constitution. Alden v. Maine, 527 U.S. 706, 715–16 (1999). The Court referred to Alexander Hamilton's assurance to the states in Federalist No. 81 when he stated:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual [without its consent]. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.

Id. at 716–17 (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)). The Court noted James Madison's statement at the ratification convention in Virginia: "It is not in the power of individuals to call any state into court." *Id.* at 717 (quoting 3 DEBATES ON THE FEDERAL CONSTITUTION 533 (J. Elliot 2d ed. 1854)) (internal quotation marks omitted). In *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 363 (2001), the Supreme Court noted that "the ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court." *Id.* at 363.

182. *Alden*, 527 U.S. at 748.

183. *Id.*

184. *Id.*

185. *Id.*

federal structure to have implicit constitutional dimension."[186] Accordingly, the Court has held that "a State may consent to suit against it in federal court" but insisted "that the State's consent be unequivocally expressed."[187] The Supreme Court has also ruled "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."[188]

In *Lapides v. Board of Regents of the University System of Georgia*,[189] the Court confirmed that a state can waive its Eleventh Amendment immunity by voluntarily appearing in federal court.[190] The Court stated:

> It would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the "Judicial power of the United States" extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the "Judicial power of the United States" extends to the case at hand.[191]

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186. Nevada v. Hall, 440 U.S. 410, 430–31 (1979) (Blackmun, J., dissenting); *cf.* Hutto v. Finney, 437 U.S. 678, 691 (1978) ("If a state agency refuses to adhere to a court order, a financial penalty may be the most effective means of insuring compliance. The principles of federalism that inform Eleventh Amendment doctrine surely do not require federal courts to enforce their decrees only by sending high state officials to jail. The less intrusive power to impose a fine is properly treated as ancillary to the federal court's power to impose injunctive relief." (footnote omitted)).

187. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984) (citing Edelman v. Jordan, 415 U.S. 651, 673 (1974)).

188. *Id.* at 99 n.9 (citing Fla. Dep't of Health v. Fla. Nursing Home Ass'n, 450 U.S. 147, 150 (1981)).

189. Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613 (2002).

190. *Id.* at 619.

191. *Id.* The Court reasoned:

> [A]n interpretation of the Eleventh Amendment that finds waiver in the litigation context rests upon the Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire, which might, after all, favor selective use of "immunity" to achieve litigation advantages.

Id. at 620 (citing Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 393 (1998) (Kennedy, J., concurring)). The State contended in *Lapides* that it had a benign motive for removing the case to federal court: to provide the state officials being sued personally with interlocutory appeal opportunities not available in state court. *Id.* at 621. However, the Court determined that "motives are difficult to evaluate [and that] jurisdictional rules should be clear." *Lapides*, 535 U.S. at 621. The Court decided that, if it adopted the State's Eleventh Amendment position, it "would permit States to achieve unfair tactical advantages, if not in this case, in others." *Id.* The Court noted that it had "consistently . . . found a waiver when a State's attorney general . . . has voluntarily invoked that court's

The Constitution was amended in 1868, adding the Fourteenth Amendment to protect certain civil rights of private parties.[192] Pursuant to Section Five of the Fourteenth Amendment, Congress can abrogate Eleventh Amendment immunity if it specifically does so in legislation enacted under the protection of the Fourteenth Amendment.[193] However, the Supreme Court has stated that, "[i]n light of history, practice, precedent, and the structure of the Constitution, . . . the States retain immunity from private suit in their own courts, [which is] an immunity beyond the congressional power to abrogate by Article I legislation."[194] In *Seminole Tribe of Florida v. Florida*,[195] the Court further ruled that Congress cannot abrogate the sovereign immunity of the states when acting pursuant to its plenary power to regulate commerce under Article

jurisdiction." *Id.* at 622. The Court ruled that "whether a particular set of state laws, rules, or activities amounts to a waiver of the State's Eleventh Amendment immunity is a question of federal law." *Id.* at 623. It then stated that "[a] rule of federal law that finds waiver through a state attorney general's invocation of federal-court jurisdiction avoids inconsistency and unfairness." *Id.* The Court commented that its "rule is a clear one easily applied by both federal courts and the States themselves." Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613, 623–24 (2002). That rule provides that "removal is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation of a matter . . . in a federal forum." *Id.* at 624.

192. *See generally* U.S. CONST. amend. XIV (establishing due process and equal protection as civil rights while granting citizenship to all persons born within the United States).

193. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985) (stating that Eleventh Amendment immunity may be abrogated by congressional legislation pursuant to the Fourteenth Amendment provided that the legislation is a clear expression of Congress's intent to vitiate sovereign immunity), *superseded by statute*, Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845, *as recognized in* Lane v. Pena, 518 U.S. 187, 198 (1996). The Supreme Court ruled that Congress may abrogate a state's sovereign immunity pursuant to Section Five of the Fourteenth Amendment only if done unequivocally and pursuant to a valid grant of constitutional authority. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000) (establishing that the application of a "simple but stringent test," requiring the federal statute to make Congress's "intention unmistakably clear in the language," allows courts to determine whether the "statute properly subjects States to suits by individuals" (quoting Dellmuth v. Muth, 491 U.S. 223, 228 (1989) (plurality opinion), *superseded by statute*, Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, sec. 101, § 604, 118 Stat. 2647, 2659) (internal quotation marks omitted)); *Halderman*, 465 U.S. at 99 (stating that the Court "require[s] an unequivocal expression of congressional intent" to dispel the immunity shield of the Eleventh Amendment).

194. Alden v. Maine, 527 U.S. 706, 754 (1999).

195. Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

I of the Constitution.[196] Yet, after the Supreme Court ruled against several attempts of Congress to abrogate immunity under the Eleventh Amendment for suits by recipients of federal financial assistance,[197] Congress enacted provisions explicitly abrogating Eleventh Amendment immunity in those instances.[198]

Although one might contend there is a legitimate argument that sovereign immunity and Eleventh Amendment principles "ru[n] counter to modern democratic notions of the [States'] moral responsibility,"[199] decisions of the Supreme Court have reflected an insistence that this "argument has not been adopted" by our courts.[200] Nonetheless, the Supreme Court has recognized that

196. *Id.* at 72–73.

197. *See Kimel*, 528 U.S. at 91 (holding that the Age Discrimination in Employment Act of 1967 did not serve as a valid exercise of Section Five of the Fourteenth Amendment); *Dellmuth*, 491 U.S. at 232 (affirming *Scanlon*'s holding that an unequivocal declaration by Congress is needed to abrogate sovereign immunity, which Congress failed to achieve in the textual language of the Education of the Handicapped Act); *Scanlon*, 473 U.S. at 247 (determining that "the Rehabilitation Act fell far short of expressing an unequivocal congressional intent to abrogate the States' Eleventh Amendment immunity" and therefore did not serve to vitiate this immunity).

198. *See* Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845 (codified at 42 U.S.C. § 2000d-7 (2006)) (abrogating sovereign immunity for violations of § 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, and any federal provisions prohibiting discrimination by recipients of federal financial assistance); *see also* Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 103, 104 Stat. 1103, 1106 (codified as amended at 20 U.S.C. § 1403 (2006)) (removing immunity for violations of provisions governing the education of individuals with disabilities). In the Copyright Remedy Clarification Act, Congress made the states and state officials liable for damages in copyright violation cases. *See* Pub. L. No. 101-553, § 2(a)(2), 104 Stat. 2749, 2749 (1990) (codified as amended at 17 U.S.C. § 511(a) (2006)) ("[A]ny officer or employee of a State or instrumentality of a State acting in his or her official capacity[] shall not be immune . . . from suit in Federal court by any person . . . for a violation of any of the exclusive rights of a copyright owner . . . ."). The Supreme Court has not ruled on whether Congress can abrogate Eleventh Amendment immunity in this context. However, the Court of Appeals for the Fifth Circuit decided that the Copyright Remedy Clarification Act does not abrogate a State's Eleventh Amendment immunity pursuant to a valid exercise of congressional power. *See* Rodriguez v. Tex. Comm'n on the Arts, 199 F.3d 279, 281 (5th Cir. 2000) (citing Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 635–48 (1999)) (holding § 511 unconstitutional following the Supreme Court's analysis in *Florida Prepaid* and *Seminole Tribe*).

199. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 114, 116 (1984) (alteration in original) (quoting Great N. Life Ins. Co. v. Read, 322 U.S. 47, 59 (1944) (Frankfurter, J., dissenting)) (internal quotation marks omitted).

200. *Id.* In *College Savings Bank*, a majority of Supreme Court Justices rejected Justice Breyer's suggestion that the Court limit state sovereign immunity to

"the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies within the limits of the Constitution" can collide with the need to bring suits against the government and its officials.[201] The Supreme Court has stated that "[t]he constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law."[202] However, the Court has decided "good faith of the States" provides "an important assurance" that states will follow the Constitution and federal laws; therefore, it was "unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States."[203] Members of the public clearly harmed by improvident governmental conduct might question that assurance.

VI. IMMUNITY FOR GOVERNMENTAL OFFICIALS

Courts have granted immunity to the sovereign's officials and have accordingly extended the sovereign immunity doctrine to protect those who carry out the sovereign's commands.[204] There should be concern that this expansion of the doctrine has created "a privileged class free from liability for wrongs inflicted or injuries threatened."[205]

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noncommercial state activities like Congress had done with respect to foreign sovereign immunity. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686 n.4 (1999). Justice Breyer referred to such a limitation as "the modern trend." *Id.* at 699 (Breyer, J., dissenting). However, a majority of the Court decided that "state sovereign immunity, unlike foreign sovereign immunity, is a *constitutional* doctrine that is meant to be both immutable by Congress and resistant to trends." *Id.* at 686 n.4 (majority opinion). The majority noted that "[t]he text of the Eleventh Amendment . . . [made] no distinction between commercial and noncommercial state activities." *Id.*

201. *Halderman*, 465 U.S. at 116 (quoting Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 (1949)).

202. Alden v. Maine, 527 U.S. 706, 753, 754–55 (1999). Recognizing that Congress relied on state courts to vindicate essential rights arising under the Constitution and federal laws, the Court previously noted: "With the growing awareness that this reliance had been misplaced, however, Congress recognized the need for original federal court jurisdiction as a means to provide at least indirect federal control over the unconstitutional actions of state officials." Butz v. Economou, 438 U.S. 478, 502 n.30 (1978) (quoting District of Columbia v. Carter, 409 U.S. 418, 428 (1973)).

203. *Alden*, 527 U.S. at 755.

204. *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 241–42 (1974) (acknowledging that sovereign officials may be granted immunity due to the public policy belief they should not be discouraged from making decisions).

205. *Halderman*, 465 U.S. at 133 (Stevens, J., dissenting) (quoting Hopkins v.

In applying the sovereign immunity doctrine, English courts "traditionally distinguished between the king and his agents, [based] on the theory that the king would never authorize unlawful conduct, and that therefore the unlawful acts of the king's officers ought not to be treated as acts of the sovereign."[206] The king's servants had been subject to liability for their unlawful acts since the fifteenth century.[207] Apparently, the rule of law—that the king's officers could be liable for committing wrongful acts—was used "to curb the king's authority."[208] As one English court stated, although process would not issue against the sovereign himself, it could issue against his officers.[209] "By the eighteenth century, this rule of law was unquestioned,"[210] and it was so well-settled in the nineteenth century that citation to authority was not needed.[211]

A. *Immunity for Governmental Officials Under Federal Law*

In 1883, the Supreme Court held that sovereign immunity is not a defense against a suit charging federal officials with unconstitutional conduct.[212] Later, however, the Supreme Court ruled that when a suit is brought against a state official but the State is the "real, substantial party in interest," sovereign immunity applies.[213] The Supreme Court further declared a suit

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Clemson Agric. Coll., 221 U.S. 636, 643 (1911)).

206. *Id.* at 142; *accord* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *244 (J. Andrews ed., Callaghan & Co. 4th ed. 1899) (1765) (stating that the king's officers could be liable for their unlawful acts but the king himself was immune).

207. *Halderman*, 465 U.S. at 142 (Stevens, J., dissenting) (citing III WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 388 (1908)).

208. *Id.*; *accord* VI WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 101 (2d ed. 1937) (photo. reprint 1966) (recounting that the king's commands or instructions could not protect his officers if they committed wrongs).

209. *Halderman*, 465 U.S. at 142 (Stevens, J., dissenting) (citing Sands v. Child, (1693) 83 Eng. Rep. 725 (K.B.) 726; 3 Lev. 361, 361–62).

210. *Id.* at 142–43 (citing X WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 650–52 (1938)).

211. *Id.* at 143 (citing Feather v. The Queen, (1865) 122 Eng. Rep. 1191 (Q.B.) 1205–06; 6 B. & S. 257, 291–97).

212. *See* United States v. Lee, 106 U.S. 196, 219–21 (1882) (declaring the judiciary has a right to enforce the provisions of the Constitution against officers of the executive).

213. Ford Motor Co. v. Dep't of Treasury of Ind., 323 U.S. 459, 464 (1945), *overruled on other grounds by* Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613 (2002); *accord* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 102–03 (1984) (acknowledging that, although precedent was inconsistent, the Eleventh Amendment principle is applicable when a suit against a state official is substantially against the State).

against state officials that is in fact a suit against the state is barred regardless of whether it seeks damages or injunctive relief.[214]

In *Ex parte Young*,[215] the Supreme Court decided that a suit challenging the constitutionality of a state official's action is not one against the state.[216] Further, if a state official acts contrary to laws of the state, the Court acknowledged the official should not have immunity because a sovereign could not and would not authorize its officers to violate its own laws.[217] Thus, a suit against a state official seeking redress for conduct not permitted by state law is a suit against the officer, not the sovereign.[218] "Similarly, when [a] state officer violates a state statute, the sovereign has . . . [not] erected [a] shield against liability."[219] The Court permitted an exception to Eleventh Amendment immunity so that a private party could bring suit against a state official in that officer's official capacity, but only for injunctive relief.[220]

In *Edelman v. Jordan*,[221] the Court held that a federal court cannot award retroactive monetary damages when private parties bring suit against state officers in their official capacity.[222] Thus, parties can only obtain injunctive relief against future conduct and generally cannot, through a suit against state officials in their official capacity, obtain monetary damages against the state.[223] Because the Eleventh Amendment precludes monetary damages against the state, and because a claim for monetary damages brought against state officers in their official capacity would

214. *See* Cory v. White, 457 U.S. 85, 91 (1982) (holding the type of relief sought does not affect the applicability of the Eleventh Amendment to state officials when the State is a substantial party).

215. *Ex parte* Young, 209 U.S. 123 (1908).

216. *Id.* at 159–60.

217. *Id.* at 160. The Court theorized that an unconstitutional enactment is void and does not impart immunity to a state official because the state cannot authorize the action; therefore, the officer is "stripped of his official or representative character and is subjected . . . to the consequences of his [official] conduct." *Id.*

218. *See id.* (explaining that the state has "no power to impart . . . any immunity" to the state official due to the state official's unconstitutional conduct).

219. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 158 (1984) (Stevens, J., dissenting) (emphasis omitted).

220. *See Young*, 201 U.S. at 163 (establishing an exception to the immunity principle for parties seeking injunctive relief).

221. Edelman v. Jordan, 415 U.S. 651 (1974).

222. *Id.* at 675–77.

223. *See id.* (explaining that the federal court has "remedial power . . . [that] is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award").

actually be a suit against the state, thus depriving the state of its sovereign immunity, the Supreme Court ruled that parties cannot sue state officers in their official capacity for monetary damages.[224] Therefore, parties seeking monetary damages must bring suit against state officers in their individual capacities.[225]

Bringing an action against a state official in that person's individual capacity does not implicate state sovereignty.[226] Thus, governmental officials can be liable in their individual capacities for their wrongful acts; however, they do have "qualified immunity" even in their individual capacities.[227] The Supreme Court has ruled that immunity of state officials depends upon the responsibilities of the office and the scope of the official's discretion.[228] The Court has also explained that, for executive

224. *See Halderman*, 465 U.S. at 102–03, 117 (echoing *Edelman*'s holding that a federal court cannot award monetary relief, and declaring that the Eleventh Amendment is violated when the relief sought "has an impact directly on the State itself").

225. *Cf.* Butz v. Economou, 438 U.S. 478, 504 (1978) (explaining that "a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain . . . monetary damages against the responsible federal official").

226. *See* Stoner v. Santa Clara Cnty. Office of Educ., 502 F.3d 1116, 1125 (9th Cir. 2007) (asserting that state officials in their individual capacities are not protected from suit by the Eleventh Amendment).

227. *See* Owen v. City of Independence, 445 U.S. 622, 638 n.18 (1980) (noting that previous decisions have allowed for qualified immunity for governmental officials in their individual capacities).

228. *See Butz*, 438 U.S. at 511 (deciding that certain executive branch officials were entitled to absolute immunity due to "the special nature of their responsibilities"). The Supreme Court not only determined that some officials should have absolute immunity but also held that federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope. *See id.* at 507 (proclaiming that federal officials will generally be accorded qualified immunity unless there are "exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business"). According to the Court, these officials are: judges, grand jurors, public prosecutors, federal hearing examiners, and administrative law judges. *See id.* at 511–13 (stating that judges are absolutely immune due to the "special nature of their responsibilities" and the other officials included in this category should be accorded similar protection because of their quasi-judicial nature); Gravel v. United States, 408 U.S. 606, 612 (1972) (recognizing "the judicially created immunity of executive officers from liability"). In *Forrester v. White*, 484 U.S. 219 (1988), the Court stated it is "the nature of the function performed, not the identity of the actor who perform[s] it, that inform[s] our immunity analysis." *Id.* at 229. Thus, as the Court pointed out in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), legislators have absolute immunity in their legislative functions as do judges in their judicial functions. *Id.* at 807. Some officials of the executive branch, such as the President, have this absolute immunity. *See id.* (recognizing that absolute immunity has been extended to the President, prosecutors, and certain officials of the executive branch

officials in general, qualified immunity represents the norm.[229] In *Scheuer v. Rhodes*,[230] the Court acknowledged high officials require greater protection but held that those with less complex discretionary responsibilities are subject only to a qualified immunity defense.[231]

Qualified immunity is an affirmative defense that must be pleaded by the defendant official.[232] The Supreme Court has established that this defense has both an objective and a subjective aspect.[233] The objective element involves a presumptive knowledge of and respect for "basic, unquestioned constitutional rights."[234] The subjective component refers to "permissible intentions."[235] In referring to both the objective and subjective elements, the Supreme Court stated that qualified immunity is defeated if an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury."[236]

The Supreme Court has held that a qualified immunity defense must be considered in proper sequence and that a ruling should be made early in the proceedings so that the cost and expenses of trial are avoided where the defense is dispositive.[237] As an initial

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exercising adjudicative functions (citing Nixon v. Fitzgerald, 457 U.S. 731, 750 (1982))). In *Forrester*, the Court recognized that judicial, prosecutorial, and other quasi-judicial functions may require absolute immunity in certain instances. *Id.* at 225–26.

229. *See Butz*, 438 U.S. at 508 (opining that qualified immunity is the general rule for both federal and state executive officials); Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) (acknowledging that state executive officials generally have qualified immunity for constitutional violations).

230. Scheuer v. Rhodes, 416 U.S. 232 (1974).

231. *See id.* at 247–48 (explaining that officers with more responsibility have a greater range of discretion, making qualified immunity applicable to their position).

232. *See* Gomez v. Toledo, 446 U.S. 635, 640 (1980) ("Since qualified immunity is a defense, the burden of pleading it rests with the defendant.").

233. *See* Wood v. Strickland, 420 U.S. 308, 321 (1975) (establishing that the qualified immunity defense has both an objective and subjective component).

234. *See id.* at 321–22 (stating that, to be entitled to qualified immunity, a school board member "must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges").

235. *See id.* (reasoning that qualified immunity for a school board member requires, in part, "permissible intentions").

236. *Id.* at 322.

237. *See* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (explaining that qualified

inquiry, the Court requires consideration of a threshold question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?"[238]

A victim of a federal official's unconstitutional conduct may have a special cause of action, called a *Bivens* action, that would preclude immunity related to that conduct.[239] In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[240] agents acting under color of federal authority made a warrantless entry of the petitioner's apartment, searched the apartment, and arrested him on narcotics charges, all without probable cause.[241] The Supreme Court reasoned that the victim had a cause of action under the Fourth Amendment and that he was "entitled to recover money damages for any injuries he . . . suffered as a result of the agents' violation of the Amendment."[242] The theory under a *Bivens* action is that federal officials lose their immunity shield when they are involved in constitutional torts.[243] Thus, a lawsuit brought against a federal official in a *Bivens* action must be brought against the official in the official's individual capacity, not in that person's official capacity.[244]

B. *Immunity for State Officials Under Texas Law*

"A private litigant in Texas is not required to obtain legislative permission to sue the State for a state official's violations of state

immunity may be "effectively lost if a case is erroneously permitted to go to trial").

238. Brosseau v. Haugen, 543 U.S. 194, 197 (2004); *accord* Siegert v. Gilley, 500 U.S. 226, 232 (1991) (stressing that, as an additional inquiry, the plaintiff needs to establish "a violation of a constitutional right").

239. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (pronouncing the existence of a cause of action, for damages resulting from a federal agent's unconstitutional conduct, that cannot be barred by immunity).

240. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

241. *Id.* at 389.

242. *Id.* at 397.

243. *See id.* (reasoning that sovereign immunity disappears when officials violate an amendment of the Constitution).

244. The Supreme Court has ruled that judgments against state officials in their individual capacities will not bind the state. *See* Alden v. Maine, 527 U.S. 706, 757 (1999) (emphasizing that a suit is allowed against state officials in their individual capacity for monetary damages as long as the relief sought is not from the state treasury but rather from the official himself).

law."[245] "A state official's illegal or unauthorized actions are not acts of the State."[246] The Texas Supreme Court has ruled that "an action to determine or protect a private party's rights against a state official who has acted without legal or statutory authority is not a suit against the State that sovereign immunity bars."[247] However, when governmental officials are sued in their official capacities, the court has opined "the remedy may implicate immunity"[248] because "private parties cannot circumvent the State's sovereign immunity from suit by characterizing a suit for money damages ... as a declaratory-judgment claim."[249] The court confirmed that sovereign immunity can prevent claims for retrospective relief against government actors in their official capacities.[250] Accordingly, if litigants seek monetary damages, they should bring suit against state officials in their individual capacities to avoid the jurisdictional immunity bar.[251]

Nevertheless, Texas governmental officials retain immunity if they performed discretionary governmental duties in "good faith" while "acting within the scope of their authority."[252] The official good faith immunity concept in Texas differs from the federal standard of qualified immunity. In *Crawford-El v. Britton*,[253] the

245. Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 404 (Tex. 1997) (citing Dir. of the Dep't of Agric. & Env't v. Printing Indus. Ass'n of Tex., 600 S.W.2d 264, 265–66 (Tex. 1980)), *superseded by statute*, Act of May 30, 1999, 76th Leg., R.S., ch. 1352, § 9, 1999 Tex. Gen. Laws 4578, 4583–87, *as recognized in* Gen. Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591 (Tex. 2001).

246. *Id.*

247. *Id.*; *cf.* Tex. Highway Comm'n v. Tex. Ass'n of Steel Imps., Inc., 372 S.W.2d 525, 529–31 (Tex. 1963) (concluding that a suit challenging a Texas Highway Commission's Minute Order was not against the state because the state agency was acting without statutory authority).

248. City of El Paso v. Heinrich, 284 S.W.3d 366, 373 (2009).

249. *Id.* at 371 (alteration in original) (quoting Tex. Natural Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849, 856 (Tex. 2002)) (internal quotation marks omitted).

250. *See id.* at 373–76 (explaining that, even though the ultra vires rule allows for suits against officials in their individual capacities, immunity may still be used to bar claims for retroactive monetary and declarative judgments).

251. *See* Tex. Dep't of Transp. v. Jones, 8 S.W.3d 636, 638–39 (1999) (affirming that immunity creates a subject-matter jurisdictional bar that may be asserted via a plea to the jurisdiction).

252. City of Lancaster v. Chambers, 883 S.W.2d 650, 653 (Tex. 1994). In *Telthorster v. Tennell*, 92 S.W.3d 457 (Tex. 2002), the Texas Supreme Court held that good faith immunity is an affirmative defense protecting public officials from individual liability and requires a defendant to conclusively establish all elements of the defense. *Id.* at 460–61.

253. Crawford-El v. Britton, 523 U.S. 574 (1998).

U.S. Supreme Court ruled the defense of qualified immunity cannot "be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated."[254] Thus, federal courts recognize a qualified immunity for public officials with discretionary authority so long "as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[255] In contrast, a state official in Texas can provide probative objective evidence to demonstrate the official's good faith to retain immunity.[256] Moreover, in *Telthorster v. Tennell*,[257] the Texas Supreme Court confirmed official good faith immunity is an affirmative defense that requires a governmental employee to conclusively establish each element of the defense.[258] These elements are: (1) the official was performing discretionary governmental acts when the official performed the acts in question, (2) the official acted in good faith, and (3) the official acts were done within the scope of the official's authority.[259]

VII. ABROGATION OF SOVEREIGN IMMUNITY

In some instances Congress has authority to statutorily abrogate state sovereign immunity in federal courts.[260] To do so, Congress must make its intent "unmistakably clear in the language of the statute."[261] The Supreme Court originally ruled that Congress could abrogate state immunity provided by the Eleventh

254. *Id.* at 588; *accord* Ballantyne v. Champion Builders, Inc., 144 S.W.3d 417, 427–28 (Tex. 2004) (rejecting a subjective standard for bad faith and embracing an objective standard that is similar to the federal qualified immunity test).

255. *Crawford-El*, 523 U.S. at 588 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982)).

256. *Ballantyne*, 144 S.W.3d at 427. The Texas Supreme Court acknowledged in *Ballantyne* that the federal standard of qualified immunity is different from the Texas official good faith immunity defense. *Id.* at 427 n.3.

257. Telthorster v. Tennell, 92 S.W.3d 457 (Tex. 2002).

258. *Id.* at 460–61.

259. *Id.* Whether an official acted in good faith would generally be a fact question that should preclude a state's motion for summary judgment. *Id.*

260. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (recognizing Congress's power to disregard state sovereign immunity under the Eleventh Amendment in certain circumstances), *superseded by statute*, Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845, *as recognized in* Lane v. Pena, 518 U.S. 187, 198 (1996).

261. *Id.*

Amendment under its Article I powers;[262] however, the Court later decided Congress lacks power under Article I to abrogate state immunity under the Eleventh Amendment.[263] Currently, Congress has the ability to abrogate Eleventh Amendment immunity through its power to enforce the Fourteenth Amendment.[264]

A. *Section Five of the Fourteenth Amendment*

Adopted in 1868, long after the Eleventh Amendment, the Fourteenth Amendment expanded federal power at the expense of state autonomy and "fundamentally altered the balance of state and federal power struck by the Constitution."[265] The Supreme Court commented that, although "state sovereign immunity does not yield to Congress' Article I powers, . . . Congress retains the authority to abrogate state sovereign immunity pursuant to the Fourteenth Amendment."[266] Section Five of the Fourteenth Amendment empowers Congress to enforce the substantive provisions of the Fourteenth Amendment through appropriate legislation.[267] More specifically, Section Five grants Congress the power to legislatively enforce the prohibitions in Section One of the Fourteenth Amendment.[268] Thus, "Section [Five] authorizes

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262. *See, e.g.*, Parden v. Terminal Ry. of Ala. State Docks Dep't, 377 U.S. 184, 192 (1964) (concluding that the Constitution grants Congress power to abrogate state immunity via the Commerce Clause), *overruled by* Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468 (1987); *see also* Pennsylvania v. Union Gas Co., 491 U.S. 1, 23 (1989) (holding that Congress has the power to abrogate Eleventh Amendment immunity under the Commerce Clause when it clearly expresses its intent to do so), *overruled by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72–73 (1996).

263. *See, e.g.*, *Seminole Tribe*, 517 U.S. at 72 (ruling that Congress is without constitutional authority to abrogate Eleventh Amendment immunity). *But see* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 379 (2006) (finding congressional authority to abrogate Eleventh Amendment immunity in the Bankruptcy Clause under Article I of the Constitution).

264. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (recognizing the congressional power to allow private suits against states for purposes of enforcing the Fourteenth Amendment); *see also Seminole Tribe*, 517 U.S. at 72 (acknowledging the congressional power established in *Fitzpatrick*).

265. *Seminole Tribe*, 517 U.S. at 59.

266. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 636–37 (1999).

267. U.S. CONST. amend. XIV, § 5; *see also* United States v. Georgia, 546 U.S. 151, 158 (2006) (stating that no one doubts the enforcement powers conferred by Section Five of the Fourteenth Amendment).

268. *See Seminole Tribe*, 517 U.S. at 59 (recognizing the relationship between

Sections One and Five of the Fourteenth Amendment as a fundamental alteration of the "balance of state and federal power"); *Ex parte* Virginia, 100 U.S. 339, 347–48 (1879) (determining that the states may not "disregard the limitations which the Federal Constitution has applied" through the Fourteenth Amendment). In addition to enforcement of the specific rights outlined in Section One, Congress's authority to abrogate state immunity has been expanded to cover those amendments that have been incorporated into the Fourteenth Amendment via the Privileges and Immunities Clause or the Due Process Clause. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (enforcing Fourth Amendment protection as guaranteed by the Fourteenth Amendment by applying the exclusionary rule to the States); Gitlow v. New York, 268 U.S. 652, 666 (1925) (identifying freedom of speech and freedom of press as fundamental liberties protected from state infringement by the Fourteenth Amendment). Thus, the states must meet certain procedural requirements before it can deprive a person of life, liberty, or property. *See* Duncan v. Louisiana, 391 U.S. 145, 164 (1968) (outlining the doctrine of "Selective Incorporation" and identifying the following incorporated rights: the right to trial by jury, the right against self-incrimination, "the right to counsel, the right to compulsory process for witnesses, the right to confront witnesses, the right to a speedy and public trial, and the right to be free from unreasonable searches and seizures"). Since *Ex parte Virginia*, 100 U.S. 339 (1879), the Court has ruled that Congress may enforce "the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity," even if they misuse their authority. Monroe v. Pape, 365 U.S. 167, 172 (1961) (citing Home Tel. & Tel. Co. v. City of L.A., 227 U.S. 278, 288 (1913)), *overruled on other grounds by* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658 (1978).

In *United States v. Georgia*, 546 U.S. 151 (2006), the Supreme Court ruled that Title II of the Americans with Disabilities Act (ADA) "validly abrogates state sovereign immunity" and "creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment." *Id.* at 159. However, the Supreme Court has also ruled, in a general context, that powers given Congress in the original Constitution cannot be used to abrogate Eleventh Amendment immunity. Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 364 (2001). *But see Katz*, 546 U.S. at 379 (recognizing congressional authority to abrogate Eleventh Amendment immunity under the Bankruptcy Clause of Article I of the Constitution).

In enforcing the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court has prohibited unjustified discrimination by enacting provisions such as Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, and national origin. 42 U.S.C. § 2000e (2006). Section Five of the Fourteenth Amendment would abrogate state immunity for a state's violation of Title VII. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 534 (1996) (holding that Virginia was in violation of the Constitution by discriminating against female students at its military institute). The Court has also read Section Five expansively to prohibit state actions wholly unrelated to discrimination. *See, e.g.*, Barry v. Barchi, 443 U.S. 55, 64 (1979) (stating that a New York law providing for suspension of a horse trainer, without limitation on the time in which it must provide a post-suspension hearing, violated the trainer's due process rights under the Fourteenth Amendment).

The Texas Commission on Human Rights Act prohibits an employer from discharging or in any other way discriminating against an employee because of the employee's "race, color, disability, religion, sex, national origin, or age." TEX. LAB. CODE ANN. § 21.051 (West 2006). The Act also prohibits employers from retaliating or discriminating against an employee who engages in certain protected activities under the Act. *See id.* § 21.055 (providing protection against retaliatory practices for an employee who: "(1) opposes a discriminatory practice; (2) makes or files a charge; (3) files a complaint; or (4) testifies,

Congress to create a cause of action through which [a] citizen may vindicate his Fourteenth Amendment rights."[269] This congressional enforcement power includes the power to abrogate state sovereign immunity by authorizing private suits for damages against the States.[270] Section Five is an important exception to the general rule that a suit against a governmental official is barred because it is a suit against the State. If an official's conduct violates the Fourteenth Amendment, Section Five permits an action for monetary damages against that official.[271]

The Fourteenth Amendment is a clear limitation on the

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assists, or participates in any manner in an investigation, proceeding, or hearing"). Because the "Legislature intended to correlate state law with federal law in employment discrimination cases" when enacting the Texas Commission on Human Rights Act, the courts look to federal law in interpreting provisions of the Act. M.D. Anderson Hosp. & Tumor Inst. v. Willrich, 28 S.W.3d 22, 24 (Tex. 2000). The Texas Supreme Court ruled in 2008 that the Act "clearly and unambiguously waives immunity." Mission Consol. Indep. Sch. Dist. v. Garcia, 253 S.W.3d 653, 660 (Tex. 2008). More recently, in *Waffle House, Inc. v. Williams*, 313 S.W.3d 796 (Tex. 2010), the supreme court ruled that, when an employee brings an action against an employer under the Commission on Human Rights Act, the Act preempts any common law claims. *Id.* at 811–13. In *Waffle House*, the plaintiff sued her employer for sexual harassment under the Act and also for common-law negligent supervision and retention. *Id.* at 800. The jury found for the plaintiff on both claims, and she elected to recover on the common law claim, which afforded a far greater monetary recovery. *Id.* However, the supreme court ruled the Act is the exclusive remedy for workplace sexual harassment. *Id.* The supreme court has also ruled that an employee claiming he was terminated in retaliation for complaining of age and race discrimination cannot bring a claim under the Whistleblower Act. *See* City of Waco v. Lopez, 259 S.W.3d 147, 149–50, 153–56 (Tex. 2008) (holding that the plaintiff was obligated to sue under the Commission on Human Rights Act because it provided a "specific and tailored anti-retaliation remedy"). In a recent decision, the First Court of Appeals cited the Texas Supreme Court's holding in *Mission Consolidated Independent School District v. Garcia* to rule against a state university. *See* Prairie View A&M Univ. v. Chatha, 317 S.W.3d 402, 409 (Tex. App.—Houston [1st Dist.] 2010, pet. filed) (reasoning that an ambiguity should not be interpreted in favor of immunity because the Texas Supreme Court held in *Mission* that the Texas Act unambiguously waives immunity). As the case is currently on appeal to the Texas Supreme Court, it will be interesting to learn whether current members of the supreme court will set aside its ruling in *Mission*.

269. *Georgia*, 546 U.S. at 158 (quoting Tennessee v. Lane, 541 U.S. 509, 559 (2004) (Scalia, J., dissenting)) (internal quotation marks omitted); *see also* City of Boerne v. Flores, 521 U.S. 507, 524 (1997) (identifying the "remedial and preventive nature of Congress' [Section Five] enforcement power").

270. *See Flores*, 521 U.S. at 524 (declaring that "the Fourteenth Amendment confers substantive rights against the States").

271. The U.S. Supreme Court held, in *Ex parte Virginia*, that Section Five of the Fourteenth Amendment granted Congress authority to enforce the substantive provisions of the Fourteenth Amendment by providing actions for money damages against the states. *See Virginia*, 100 U.S. at 347–48 (denying habeas corpus relief to a state judge imprisoned for violating the Fourteenth Amendment in his capacity as a state official).

authority of the states. "[T]he Fourteenth Amendment confers substantive rights against the States [that], like the provisions of the Bill of Rights, are self-executing."[272] Given the importance of the Eleventh Amendment's grant of sovereign immunity, however, the Supreme Court has cautioned that courts must not assume Congress intended to use its power to abrogate state immunity unless "evidence of congressional intent" to do so is "both unequivocal and textual."[273] The Court has maintained that Congress invokes Section Five when it has "identif[ied] conduct transgressing the Fourteenth Amendment's substantive provisions[] and . . . tailor[ed] its legislative scheme to remedying or preventing such conduct."[274] In *Board of Trustees of the University of Alabama v. Garrett*,[275] the Supreme Court noted that "Congress may abrogate the States' Eleventh Amendment immunity when it both unequivocally intends to do so and 'act[s] pursuant to a valid grant of constitutional authority.'"[276] The remedy imposed by Congress must be "congruent and proportional to the targeted violation."[277] Thus, the Supreme Court reasoned that, while Congress clearly expressed its intent to abrogate state sovereign immunity in the Patent Remedy Act, the Fourteenth

272. *Flores*, 521 U.S. at 524.

273. Dellmuth v. Muth, 491 U.S. 223, 230 (1989) (plurality opinion), *superseded by statute*, Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, sec. 101, § 604, 118 Stat. 2647, 2659.

274. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 639 (1999). The Court stated in *Flores* that Congress's broad power to abrogate state sovereign immunity under Section Five is not unlimited. *Flores*, 521 U.S. at 518–19; *see also* Tennessee v. Lane, 541 U.S. 509, 520 (2004) (opining that, although "Congress must have a wide berth in devising appropriate remedial and preventative measures for unconstitutional actions, those measures may not work a 'substantive change in the governing law'" (quoting *Flores*, 521 U.S. at 519)). In *Flores*, the Court set forth the test for distinguishing "between [permissible] remedial legislation and [unconstitutional] substantive redefinition" as "Section [Five] legislation being valid if it exhibits a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Lane*, 541 U.S. at 520 (quoting *Flores*, 521 U.S. at 520) (internal quotation marks omitted).

275. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

276. *Id.* at 363 (alteration in original) (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000)); *see also Flores*, 521 U.S. at 519 (limiting Congress's enforcement power to remedial and preventive measures rather than substantive measures).

277. *Garrett*, 531 U.S. at 374; *see also Kimel*, 528 U.S. at 91–92 (holding that Congress did "not validly abrogate the States' sovereign immunity" and that "the ADEA is not a valid exercise of Congress' power under [Section Five]" because of "the indiscriminate scope of the Act's substantive requirements").

Amendment's authorization for appropriate legislation to protect against deprivations of property without due process of law did not provide Congress with the authority to abrogate state sovereign immunity in that Act.[278] The Court held that a state's infringement of a patent violates the Fourteenth Amendment only where the state provides no remedy or inadequate remedies to injured patent owners.[279] However, in *Tennessee v. Lane*,[280] the Court ruled that Title II of the Americans with Disabilities Act constitutes a valid exercise of Congress's enforcement power under the Fourteenth Amendment when applied to "cases implicating the fundamental right of access to the courts."[281] Further, in *Boddie v. Connecticut*,[282] the Court noted that the Due Process Clause requires states to afford civil litigants a "meaningful opportunity to be heard" by removing obstacles to their full participation in judicial proceedings.[283]

B. *Suits Against State Officials Under 42 U.S.C. § 1983*

Most suits against state officials are brought pursuant to 42 U.S.C. § 1983, which provides that a "person who, under color of any [state] statute, ... regulation, [or] custom, ... depriv[es] [another] of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured."[284] Section 1983 makes a deprivation of constitutional rights actionable independent of state law.[285] State immunities are not

278. *Fla. Prepaid*, 527 U.S. at 635 (ruling that neither the Commerce Clause nor the Patent Clause provided Congress with authority to abrogate state sovereign immunity). The Court noted that the ruling in *Seminole Tribe* provided that Congress cannot use its Article I powers to abrogate state sovereign immunity. *Id.* In *Seminole Tribe*, the Supreme Court held that Congress's vast power to regulate interstate commerce nevertheless was subordinate to the protection of states from federal suits granted to them by the Eleventh Amendment. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72–73 (1996).

279. *Fla. Prepaid*, 527 U.S. at 647. The Court decided that the Patent Remedy Act's purposes "to provide a uniform remedy for patent infringement and to place States on the same footing as private parties" were proper Article I concerns but that *Seminole Tribe* eliminated Congress's power to enact such legislation. *Id.* at 647–48.

280. Tennessee v. Lane, 541 U.S. 509 (2004).

281. *Id.* at 533–34.

282. Boddie v. Connecticut, 401 U.S. 371 (1971).

283. *See id.* at 379 (holding that a state may not deny a citizen access to the courts without infringing on the "Due Process Clause of the Fourteenth Amendment").

284. 42 U.S.C. § 1983 (2006).

285. *See* Monroe v. Pape, 365 U.S. 167, 180 (1961) (concluding that Congress clearly intended § 1983 to provide "a federal right in federal courts because ... state laws might

applicable in these suits.[286] However, the Supreme Court later sustained sovereign immunity for the States, despite the language in § 1983, by ruling that "neither a State nor its officials acting in their official capacities are 'persons'" within the meaning of § 1983.[287] Thus, to obtain damages, a plaintiff must bring the lawsuit against a state official in the official's individual capacity rather than that person's official capacity.[288]

Section 1983 was originally enacted as the "Ku Klux Klan Act" of 1871.[289] This Act was "one of the means whereby Congress exercised the power vested in it by [Section Five] of the Fourteenth Amendment to enforce the provisions of that Amendment."[290] Section 1983 was enacted to provide "a federal right in federal courts because, by reason of prejudice, passion,

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not be enforced"), *overruled on other grounds by* Monell v. Dep't. of Soc. Servs. of N.Y., 436 U.S. 658 (1978).

286. In *Martinez v. California*, 444 U.S. 277 (1980), the Court ruled that "[c]onduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law." *Id.* at 284 n.8. The Court reasoned that "[a] construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise." *Id.*

287. Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989). The Court concluded that, "if a State is a 'person' within the meaning of § 1983, the section is to be read as saying that every person, including a State," falls within its purview. *Id.* at 64 (internal quotation marks omitted). The Court opined "that in common usage the term 'person' does not include the sovereign." *Id.* (quoting Wilson v. Omaha Tribe, 442 U.S. 653, 667 (1979)) (internal quotation marks omitted). However, the Court's statement appears to directly contradict the common usage of the term "person" as defined in the Uniform Statute and Construction Act. *See* UNIF. STATUTE & CONSTR. ACT § 3, 14 U.L.A. 483 (2005) (defining a "person" as "an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any legal or commercial entity"). The Court recognized that state officials are persons but ruled that, because "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," such a suit "is no different from a suit against the State itself." *Will*, 491 U.S. at 71. The Court did decide "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Id.* at 71 n.10 (quoting Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985)).

288. *See* Hafer v. Melo, 502 U.S. 21, 31 (1990) (holding "that state officials, sued in their individual capacities, are 'persons' within the meaning of § 1983").

289. Act of Apr. 20, 1871, ch. 122, 17 Stat. 13; *see also Monroe*, 365 U.S. at 170–82 (discussing the background of § 1983). In *Monroe*, the Court ruled that municipalities were not "persons" to whom § 1983 applied. *Monroe*, 365 U.S. at 187. However, the Court overruled this part of its decision in *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978), when it concluded that Congress intended to include municipalities as "persons" under § 1983. *Id.* at 690.

290. *Monroe*, 365 U.S. at 171.

neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of [their] rights ... guaranteed by the Fourteenth Amendment might be denied by the state agencies."[291] As the Supreme Court stated, an "[a]llegation of facts constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment satisfies" the requirements of § 1983.[292] The Court also noted that, in enacting § 1983, Congress intended "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position."[293]

The Eleventh Amendment does not bar Congress from authorizing suits in state courts to implement federal statutory rights.[294] The Supreme Court has ruled that suits under § 1983 may be brought in state courts.[295] Moreover, state courts must presumably hear § 1983 claims.[296]

In *Butz v. Economou*,[297] the Supreme Court compared immunity for federal officials to their state counterparts under § 1983.[298] The Supreme Court considered the government's position—that federal officials have a higher immunity than state officials—and began its comparison with the recognized premise that state officials have only qualified immunity.[299] The Court stated:

> We agree with the perception of these courts that, in the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement ... than is accorded state officials when sued for the identical violation under § 1983.[300]

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291. *Id.* at 180.

292. *Id.* at 171.

293. *Id.* at 172. In an action to enforce the provisions of 42 U.S.C. § 1983, a "court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (2006).

294. Maine v. Thiboutot, 448 U.S. 1, 10–11 (1980).

295. *Id.*

296. *Id.*; *see also* Martinez v. California, 444 U.S. 277, 283 n.7 (1980) (noting "that where the same type of claim, if arising under state law, would be enforced in the state courts, the state courts are generally not free to refuse enforcement of the federal claim").

297. Butz v. Economou, 438 U.S. 478 (1978).

298. *See id.* at 484–501 (discussing different immunity standards in actions against state officials under § 1983 and suits against federal officers under the Constitution).

299. *See id.* at 500–01 (explaining that there should not be a "higher degree of immunity from liability" between state and federal officials).

300. *Id.* at 500.

The Supreme Court pointed to the general rule, which it noted has long prevailed, "that a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers."[301] The Court explained that a governmental official will "not be excused from liability if he failed to observe obvious statutory or constitutional limitations on his powers or if his conduct was a manifestly erroneous application of [a] statute."[302]

The Supreme Court did acknowledge in *Butz* that judges and "heads of Executive Departments[,] when engaged in the discharge of duties imposed upon them by law," have absolute immunity.[303] But the Supreme Court also stated that an executive officer nonetheless would be vulnerable if the officer "took action 'manifestly or palpably' beyond his authority or ignored a clear limitation on his enforcement powers."[304] According to the Court: "Whatever level of protection from state interference is appropriate for federal officials executing their duties under federal law, it cannot be doubted that these officials, even when acting pursuant to congressional authorization, are subject to the restraints imposed by the Federal Constitution."[305] The Court then commented that "it would be incongruous to hold that [federal officers could] willfully or knowingly violate constitutional rights without fear of liability."[306]

The Court in *Butz* considered immunity of state officers under § 1983 and commented that, under the common law, high ranking state officials and police officers were never granted absolute and unqualified immunity.[307] Indeed, the Court declared:

> Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law: No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it.[308]

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301. *Id.* at 489.
302. *Butz*, 438 U.S. at 494.
303. *Id.* at 495.
304. *Id.* at 493 n.18.
305. *Id.* at 495.
306. *Id.*
307. Butz v. Economou, 438 U.S. 478, 496–97 (1978) (citing Scheuer v. Rhodes, 416 U.S. 232, 246 (1974)).
308. *Id.* at 506 (quoting United States v. Lee, 106 U.S. 196, 220 (1882)).

VIII. WAIVER OF SOVEREIGN IMMUNITY

As explained below, Congress as well as any state legislature can waive sovereign immunity for itself. The waiver principles under federal law and pursuant to Texas case law are essentially the same, although the Texas Supreme Court currently construes waiver language much more strictly in favor of retaining sovereign immunity.

A. *Federal Waiver Principles*

The Supreme Court has ruled consistently that only Congress can waive the United States' right to assert the doctrine of sovereign immunity and that a statute's text must contain an "unequivocally expressed" waiver of sovereign immunity.[309] Further, courts are to strictly construe any waiver of governmental sovereign immunity "in favor of the sovereign."[310] Thus, the Supreme Court has required courts to "construe ambiguities in favor of immunity."[311] Justice Stevens noted that "[t]he Court's stubborn insistence on 'clear statements' burdens the Congress with unnecessary reenactment of provisions that were already plain enough when read literally."[312]

The Supreme Court explained that "a State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation."[313] According to a plurality of the Court, Congress must refer specifically to state sovereign immunity and the Eleventh Amendment to make its intention clear.[314] Justice Stevens criticized this position of the Court by opining that, "[w]hen judge-made rules require Congress to use its valuable

309. *See, e.g.*, Lane v. Pena, 518 U.S. 187, 192 (1996) (citing United States v. Nordic Vill., Inc., 503 U.S. 30, 34 (1992)) (discussing the right of Congress to waive the United States' sovereign immunity through a clear statement of waiver).

310. *Id.* (citing United States v. Williams, 514 U.S. 527, 531 (1995)).

311. *Williams*, 514 U.S. at 531.

312. *Nordic Vill.*, 503 U.S. at 45 (Stevens, J., dissenting).

313. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 676 (1999) (citing Smith v. Reeves, 178 U.S. 436, 441–45 (1900)). The Court clarified that a state does not "consent to suit in federal court merely by stating its intention to 'sue and be sued.'" *Id.*

314. *See* Dellmuth v. Muth, 491 U.S. 223, 231 (1989) (plurality op.) (holding that reference to the Eleventh Amendment or the states' sovereign immunity is necessary to convey an intent to abrogate the sovereign authority of the states), *superseded by statute*, Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, sec. 101, § 604, 118 Stat. 2647, 2659.

time enacting and reenacting provisions whose original intent was clear to all but the most skeptical and hostile reader, those rules should be discarded."[315]

B. *Waiver Under Texas Law*

The Texas Supreme Court held that, to effectively waive sovereign immunity, "a statute or resolution must contain a clear and unambiguous expression" of the State's waiver.[316] Yet, the court stated it should "have little difficulty recognizing the Legislature's intent to waive immunity from suit when a statute provides that a state entity may be sued or that 'sovereign immunity to suit is waived.'"[317] A plaintiff must affirmatively demonstrate the court's subject-matter jurisdiction "by alleging a valid waiver of immunity."[318] In statutes with language stating that immunity from suit is waived to the extent of liability, the court has ruled that "immunity from suit and liability are co-extensive."[319] In such cases, the court must consider the "facts alleged by the plaintiff and, to the extent it is relevant to the jurisdictional issue, the evidence submitted by the parties."[320] The court has held that, if pleadings affirmatively negate the existence of jurisdiction, it will grant a plea to the jurisdiction without permitting a plaintiff the opportunity to amend.[321]

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315. *Lane*, 518 U.S. at 212 (Stevens, J., dissenting).

316. Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692, 696 (Tex. 2003) (noting that the Texas legislature ratified this approach in the Texas Government Code). The court quoted the following language in its opinion referencing how the legislature had addressed this issue: "In order to preserve the legislature's interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language." *Id.* (quoting TEX. GOV'T CODE § 311.034); *see also* Tex. Dep't of Transp. v. City of Sunset Valley, 146 S.W.3d 637, 641 (Tex. 2004) (reiterating that sovereign immunity cannot be waived without the Texas legislature providing an apparent and express intent to do so).

317. *Taylor*, 106 S.W.3d at 696–97 & nn.5–6.

318. *See* Dallas Area Rapid Transit v. Whitley, 104 S.W.3d 540, 542 (Tex. 2003) (noting that a plaintiff must plead a waiver of immunity because governmental immunity is superior to the court's subject-matter jurisdiction).

319. State v. Lueck, 290 S.W.3d 876, 880 (Tex. 2009); *see also* Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 224 (Tex. 2004) (stating that "[t]he Tort Claims Act creates a unique statutory scheme in which the two immunities are co-extensive").

320. *Whitley*, 104 S.W.3d at 542.

321. Cnty. of Cameron v. Brown, 80 S.W.3d 549, 555 (Tex. 2002). For further discussion of waiver of immunity in Texas, see *supra* Part II(A)–(B).

C. *Takings Clauses and Inverse Condemnation Suits*

The Fifth Amendment states: "[N]or shall private property be taken for public use, without just compensation."[322] Claims for just compensation are grounded in the Constitution itself.[323] Because the constitutional mandate is self-executing, sovereign immunity cannot defeat the "just compensation" requirement of the Fifth Amendment when a taking of property occurred for a public use.[324] In *Arnsberg v. United States*,[325] the Ninth Circuit noted the principle—that the United States cannot be sued without its consent—does not apply to suits directly authorized by the Fifth Amendment of the Constitution.[326] This exception governs suits to recover money damages for private property taken by the United States for a public purpose.[327] Moreover, because the Fifth Amendment explicitly grants a right to sue the government for redress, a litigant bringing a takings claim does not have to establish a specific waiver of sovereign immunity.[328]

The takings provision in the Texas Constitution states: "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made,

322. U.S. CONST. amend. V, § 1.

323. First English Evan. Luth. Church of Glendale v. Cnty. of L.A., 482 U.S. 304, 315 (1987).

324. *See, e.g.*, United States v. Clarke, 445 U.S. 253, 257 (1980) (emphasizing that, because the Constitution requires a landowner to be justly compensated for a governmental taking of land, he is entitled to bring suit against the governmental entity to ensure compensation).

325. Arnsberg v. United States, 757 F.2d 971 (9th Cir. 1984).

326. *See id.* at 980 n.7 (noting that the Fifth Amendment is an exception to sovereign immunity barring the United States from liability for direct violations of the Constitution).

327. *See, e.g.*, Duarte v. United States, 532 F.2d 850, 852 n.3 (2d Cir. 1976) (noting that claims against the government for a taking are not precluded from suit due to sovereign immunity because the language of the Fifth Amendment is self-executing and requires "just compensation").

328. *See id.* at 980 & n.7 (declining to extend the exception recognized under the Fifth Amendment to negate the waiver requirement for a claimant bringing a *Bivens* cause of action under the Fourth Amendment); *see also* T. O. F. C., Inc. v. United States, 683 F.2d 389, 393 (Ct. Cl. 1982) (holding that a claim citing the Fifth Amendment's Taking Clause will not raise a question as to the court's jurisdiction because the Fifth Amendment expressly waives sovereign immunity in takings cases). The United States Court of Federal Claims has jurisdiction over takings claims because the United States Code has promulgated the authority for that court to render judgment on any constitutionally based claim against the United States. 28 U.S.C. § 1491 (2006); *see also* United States v. Causby, 328 U.S. 256, 267 (1946) (clarifying that constitutionally based claims alleging a taking fall within the Court of Claims's jurisdiction).

unless by the consent of such person . . . ."[329] Sovereign immunity does not provide a shield from claims under this constitutional provision.[330] "The [Texas] Constitution itself . . . is a waiver of governmental immunity for the taking, damaging or destruction of property for public use."[331] Thus, the doctrine of sovereign immunity should not apply to a takings or inverse condemnation lawsuit in Texas.[332] "An inverse condemnation may occur when the state or its agency physically takes or invades property, or when it unreasonably interferes with the property owner's right to use and enjoy his property."[333] To defeat a plea to the jurisdiction in such a case, the property owner must plead facts sufficient to show the elements of an inverse condemnation cause of action.[334]

D. *Suits on Governmental Contracts*

1. Federal Law

For a time, governmental immunity fell into disfavor in the United States.[335] A "chilly feeling against sovereign immunity" was reflected in federal legislation as early as 1797, when Congress determined that, once the United States sues an individual, the individual could offset any amount due to him from the federal government.[336] However, this early trend to waive immunity of the federal government did not appear again until 1855 when Congress enacted legislation to establish the Court of Claims,

329. TEX. CONST. art. I, § 17.

330. *See* Steele v. City of Houston, 603 S.W.2d 786, 791 (Tex. 1980) (holding that governmental immunity will not protect the City of Houston from liability where the cause of action is founded under article I, section 17 of the Texas Constitution).

331. *Id.*

332. *See* Tex. Parks & Wildlife Dep't v. Callaway, 971 S.W.2d 145, 149 (Tex. App.—Austin 1998, no pet.) (citing *Steele*, 603 S.W.2d at 791) (recognizing that "an action for inverse condemnation is a limited exception to the doctrine of sovereign immunity").

333. *Id.* at 148. To have standing to sue for inverse condemnation, a party must have a vested property interest at the time of the taking. *Id.*; *see also* City of Keller v. Wilson, 168 S.W.3d 802, 808 & n.3 (Tex. 2005) (citing City of Dallas v. Jennings, 142 S.W.3d 310, 313–14 (Tex. 2004)) (declaring that, for a property owner to win damages for inverse condemnation, he must prove that a governmental entity intentionally damaged or took the owner's property for public use without paying adequate compensation or it was substantially certain such a taking would be the result of the entity's intentional act).

334. Kerr v. Tex. Dep't of Transp., 45 S.W.3d 248, 250–51 & n.3 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

335. Nat'l City Bank v. Republic of China, 348 U.S. 356, 359 (1955).

336. *Id.*

permitting citizens to sue the United States for debts of the federal government.[337] While there was no general provision governing claims against the United States for more than sixty years after adoption of the Constitution, the 1855 Act reflected a congressional decision that individuals and entities should be able to bring claims against the government based on acts of Congress, executive regulations, and express or implied contracts with the government.[338] Congress established the Court of Claims to hear and determine this defined class of claims brought against the government.[339]

Approximately thirty years later, in 1887, Congress enacted the Tucker Act, which not only waived immunity for suits arising out of express or implied contracts to which the federal government was a party but also extended the jurisdiction of the Court of Claims to constitutional claims and claims for damages "in cases not sounding in tort."[340] Today, similar provisions remain in force for the United States Court of Federal Claims.[341] Some courts have noted that there is no reason why the government should be treated differently from its citizens, particularly in its status as a creditor.[342] For a time, the course of court decisions reflected the

337. *See* Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 (repealed 1887) (stating the Court of Claims "shall hear and determine all claims founded upon any law of Congress, . . . any regulation of an executive department, or . . . any contract, express or implied, with the government of the United States").

338. *Id.*; *see also Nat'l City Bank*, 348 U.S. at 359–60 (discussing how the creation of the Court of Claims made it possible for the United States to be held accountable for its actions).

339. *Nat'l City Bank*, 348 U.S. at 359–60.

340. *See* Tucker Act, ch. 359, 24 Stat. 505 (1887) (repealed 1948) (providing the Court of Claims jurisdiction over "[a]ll claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages . . . in cases not sounding in tort, in respect of which claims the party would be entitled to redress . . . either in a court of law, equity, or admiralty if the United States were suable").

341. *See, e.g.*, 28 U.S.C. § 1491(a)(1) (2006) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."). If a plaintiff seeks damages of $10,000 or less, any federal district court has jurisdiction along with the United States Court of Federal Claims. *Id.* § 1346(a) (2006). If damages sought exceed that amount, the Court of Federal Claims has exclusive jurisdiction. *Id.*

342. *See* United States v. Whiting Pools, Inc., 462 U.S. 198, 209 (1983) (discussing how there is no reason to treat a government entity differently than a normal citizen

conflicting considerations that apply to the sovereign immunity doctrine, for in "varying degrees, at different times, the momentum of the historic doctrine [was] arrested or deflected by an unexpressed feeling that governmental immunity runs counter to prevailing notions of reason and justice."[343]

2. Texas Law

In contrast to federal immunity law, the Texas Supreme Court has ruled that the state maintains sovereign immunity even with respect to its contracts.[344] In 1997, the Texas Supreme Court held that, while the state may be liable on its contracts as if it were a private person, it only waives immunity from liability and not immunity from suit.[345] Thus, "a private citizen must have legislative consent to sue the State on a breach of contract claim."[346]

Although the Texas Supreme Court established that the act of contracting does not waive the state's immunity from suit, the court left open the possibility "the State may waive its immunity by *conduct* other than simply executing a contract so that it is not

concerning debt collection); *see also* United States v. Nordic Vill., Inc., 503 U.S. 30, 43–44 & n.13 (1992) (citing with approval the analysis in *Whiting Pools*), *superseded by statute*, Bankruptcy Reform Act of 1994, Pub. L. 103-394, § 113, 108 Stat. 4106, 4117–18.

343. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 709 (1949) (Frankfurter, J., dissenting).

344. *See* Fed. Sign v. Tex. S. Univ., 951 S.W.2d. 401, 412 (Tex. 1997) (holding that sovereign immunity applies to contracts between the state and individuals absent legislative consent to sue), *superseded by statute*, Act of May 30, 1999, 76th Leg., R.S., ch. 1352, § 9, 1999 Tex. Gen. Laws 4578, 4583–87, *as recognized in* Gen. Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591 (Tex. 2001).

345. *Id.* at 412. Four justices wrote a separate concurring opinion because they thought the parties and the public were owed an explanation. *Id.* at 412 (Hecht, J., concurring). Three justices dissented because they thought the opinion called "into question the enforceability of State contracts and [was] counter to the national trend recognizing that the State waives sovereign immunity when it enters contracts." *Id.* at 416 (Enoch, J., dissenting). These justices thought that the state university should honor its obligations just as it expected parties with which it contracted to honor their obligations. *Id.* at 418. The dissent opined that the majority held the "State can *be* liable for its breach of contract, but it cannot be *held* liable." *Fed. Sign*, 951 S.W.2d. at 420.

346. *Id.* at 408 (majority opinion). However, only six percent of the requests to sue were granted in a period of eight years. *Id.* at 413 (Hecht, J., concurring) (citing TEX. H. COMM. ON CIV. PRAC., INTERIM REPORT 75th Leg., at 9 (1996)). Texas now has a statute that provides for dispute resolution and negotiation of claims against the state for breach of contract. TEX. GOV'T CODE ANN. §§ 2260.001–.108 (West 2008). This provision applies to contracts with independent contractors but does not apply to contracts between the state and its employees. *Id.* § 2260.051.

always immune from suit when it contracts."[347] Further, in *Texas A & M University-Kingsville v. Lawson*,[348] in a 5-4 decision, the Texas Supreme Court adopted a waiver exception for immunity in a breach of contract case involving the enforcement of a settlement agreement.[349] Lawson had settled a suit against the university under the Texas Whistleblower Act but later sued the university for allegedly violating the terms of the settlement agreement.[350] The court reasoned that "a suit for breach of a settlement agreement is separate and apart from the suit on the settled claim, [thus] enforcement of a settlement of a liability for which immunity is waived should not be barred by immunity."[351]

In *Texas Southern University v. State Street Bank & Trust Co.*,[352] the First Court of Appeals recognized and identified a "waiver-by-conduct" exception to sovereign immunity.[353] The

347. *Fed. Sign*, 951 S.W.2d. at 408 n.1. In a concurring opinion, Justice Hecht stated that the court ruled "only that the mere execution of a contract for goods and services, without more, does not waive immunity from suit." *Id.* at 413 (Hecht, J., concurring). He commented that the defendant university terminated its agreement with Federal Sign before Federal Sign had delivered anything to the university. Fed. Sign v. Tex. S. Univ., 951 S.W.2d. 401, 412 (Tex. 1997) (Hecht, J., concurring), *superseded by statute*, Act of May 30, 1999, 76th Leg., R.S., ch. 1352, § 9, 1999 Tex. Gen. Laws 4578, 4583–87, *as recognized in* Gen. Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591 (Tex. 2001). Justice Hecht noted that the court did not address "whether the State is immune from suit on debt obligations, such as bonds." *Id.* at 412. He also questioned whether the state would be immune if Federal Sign had complied fully with the contract and the university then refused to pay the agreed price. *Id.* He commented that the court's decision in *Federal Sign* did not hold that "the State is always immune from suit for breach of contract absent legislative consent." *Id.* at 413.

348. Tex. A & M Univ.-Kingsville v. Lawson, 87 S.W.3d 518 (Tex. 2002).

349. *See id.* at 521 (discussing that, if the state waives immunity in a previous suit, it cannot assert immunity in a suit to enforce the settlement from the prior suit).

350. *Id.* at 519.

351. *Id.* However, the court did "reject the court of appeals' adoption of a broad waiver-by-conduct exception to sovereign immunity" as well as "the dissent's rigid view of immunity from suit for breach of contract." *Id.* at 522–23; *see also* Catalina Dev., Inc. v. Cnty. of El Paso, 121 S.W.3d 704, 705 (Tex. 2003) (establishing that the court evaluates the facts of each case to determine if a waiver-by-conduct exception to sovereign immunity exists).

352. Tex. S. Univ. v. State St. Bank & Trust Co., 212 S.W.3d 893 (Tex. App.—Houston [1st Dist] 2007, pet. denied).

353. *See id.* at 908 (discussing how Texas Southern University's conduct created a waiver-by-conduct exception by entering into a $13 million contract for equipment, allowing delivery, and then refusing to pay and claiming sovereign immunity). The court noted an additional fact in the case that governmental officials had lured the party to the contract "with false promises that the contract would be valid and enforceable, then disclaimed any obligation on the contract by taking the position that the contract was not valid after all." *Id.* In a more recent suit between a former coach and state university,

court ruled that "legislative control over waiving immunity from suit does not mean that the State can freely breach contracts with private parties or that the State can use sovereign immunity as a shield to avoid paying for benefits the State accepts under a contract."[354] Therefore, as the court held, sovereign immunity would not defeat the trial court's subject-matter jurisdiction over a claim of breach of contract when the state entity accepted substantial benefits under a contract.[355]

E. *Federal and Texas Tort Claims Acts*

In 1945, the immunity of the United States government as a territorial sovereign came under attack again when the sovereign immunity doctrine was increasingly "found to be in conflict with the growing subjection of governmental action to the moral judgment."[356] At that time, the Supreme Court observed that "prerogatives of the government yield to the needs of the citizen" if governments seek "to ameliorate inequalities as necessities will permit."[357] Following a few limited statutes waiving immunity, the Federal Tort Claims Act was enacted in 1946.[358] This Act waives the federal government's immunity from suit due to damage to or loss of property, or on account of personal injury or death caused by the negligent or wrongful act of any governmental employee while acting within the scope of the employee's office or employment.[359] The Act applies under circumstances where the United States would be liable to the claimant if it were a private person.[360] The Act does not, however, provide a waiver of

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however, the Seventh Court of Appeals in Amarillo held that the university did not waive immunity by its conduct related to the coach's breach of contract claim. *See generally* Leach v. Tex. Tech Univ., 2011 WL 183977, at *9–10 (Tex. App.—Amarillo, Jan. 20, 2011, pet. filed) (reversing the trial court's conclusion "that Texas Tech University waived its sovereign immunity from the breach of contract claim due to its conduct").

354. *Tex. S. Univ.*, 212 S.W.3d at 901.

355. *See id.* at 908 (holding that the facts were enough to constitute a waiver of sovereign immunity, giving the trial court subject-matter jurisdiction).

356. *See* Nat'l City Bank v. Republic of China, 348 U.S. 356, 359 (1955) (discussing how the doctrine of sovereign immunity has received increased scrutiny due to the moral implications of being immune from suit or liability for alleged wrongdoing).

357. United States v. Shaw, 309 U.S. 495, 501 (1940).

358. Federal Tort Claims Act, Pub. L. No. 79-601, Ch. 753, tit. IV, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.).

359. 28 U.S.C. §§ 1346(b), 2674 (2006).

360. *Id.*; *see also* FDIC v. Meyer, 510 U.S. 471, 477 (1994) (citing 28 U.S.C. § 1346(b) (1988)) (holding that a constitutional tort claim is not cognizable under the Act because

immunity for "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights" and other torts listed in 28 U.S.C. § 2680, such as claims arising out of combatant activities of the military.[361]

The Texas legislature also abolished sovereign immunity for some tortious governmental conduct pursuant to the Texas Tort Claims Act,[362] but only "to the extent of liability" created by the Act.[363] A person having a claim under the Act may sue a governmental unit for damages only for: (1) wrongful acts or omissions or "negligence of an employee acting within [the] scope of employment" when operating "a motor-driven vehicle or motor-driven equipment . . . [if] the employee would be personally liable to the claimant," and (2) "personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would" be liable to the claimant if it were a private person.[364]

In *Texas Department of Parks & Wildlife v. Miranda*,[365] the Texas Supreme Court ruled that the Texas Tort Claims Act provides "a limited waiver of sovereign immunity."[366] The court referred to two distinct principles of sovereign immunity: "immunity from suit and immunity from liability."[367] The court

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the section did not provide a cause of action for such a claim); United States v. Yellow Cab Co., 340 U.S. 543, 549 (1951) (recognizing that the government's obligation to pay claims for negligent or wrongful actions by its employees is not new and can be seen in the many relief acts passed). The Court also discussed how "sue-and-be-sued" language can constitute a waiver of sovereign immunity. *Meyer*, 510 U.S. at 483.

361. 28 U.S.C. § 2680(h) (2006). However, the exceptions to waiver do not apply to acts or omissions of federal investigation or law enforcement officers with respect to "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." *Id.*

362. Texas Tort Claims Act, 69th Leg., R.S., ch. 959, § 1, secs. 101.001–.109, 1985 Tex. Gen. Laws 3301 (codified as amended at TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001–.109 (West 2011)).

363. *Id.* § 101.025.

364. *Id.* § 101.021. These exceptions have been referred to as three areas: "use of publicly owned automobiles, premises defects, and injuries arising out of conditions or use of property." Tex. Dep't of Transp. v. Able, 35 S.W.3d 608, 611 (Tex. 2000). Section 101.058 of the Tort Claims Act further modifies a governmental unit's waiver of immunity from suit by imposing limitations of liability articulated in the recreational use statute. TEX. CIV. PRAC. & REM. CODE ANN. § 101.058 (West 2011).

365. Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217 (Tex. 2004).

366. *Id.* at 224.

367. *Id.*

decided that the "Tort Claims Act creates a unique statutory scheme in which the two immunities are co-extensive."[368]

If a claimant files suit against a governmental unit under the Texas Tort Claims Act, the claimant cannot also sue the governmental official regarding the *same* subject matter.[369] Further, if a suit is filed against a governmental official "based on conduct within the general scope of that employee's employment," and the suit could have been brought "against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only."[370]

IX. CONCLUSION

Courts in the United States consider themselves "self-constituted guardian[s] of the Treasury,"[371] and as such, they seek to protect the public fisc through a strict interpretation of the doctrine of sovereign immunity. However, Congress and the states could address the need to protect the public fisc by placing limits on the amount litigants can obtain in suits against the government. Further, governmental entities, like private entities, could obtain insurance to protect against the financial burden of civil suits brought by victims of improvident governmental conduct. Thus, it seems questionable whether protection of the public fisc is a legitimate reason to perpetuate the antiquated doctrine of sovereign immunity as well as whether a continuation of the doctrine in effect protects governmental wrongdoing at the expense of the public. Indeed, the Texas Supreme Court's current approach "to shield the public from the costs and consequences of

368. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.025(a)).

369. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(a) (West 2011). Thus, as between suits regarding the same subject matter, a plaintiff must elect to file suit against the employee individually or against the governmental unit. *See id.* § 101.106(b) (stating that a suit under the Texas Tort Claims Act "against any employee of a governmental unit constitutes an irrevocable election ... [that] bars any suit or recovery ... against the governmental unit"). If a suit is filed against both the governmental unit and any of its employees, the governmental unit can file a motion to dismiss the suit against the individual employees. *Id.* § 101.106(e).

370. *Id.* § 101.106(f). If the governmental employee then files a motion to dismiss the suit, the plaintiff must amend the pleadings to instead name the governmental unit as the defendant. *Id.*

371. *See, e.g.*, Indian Towing Co. v. United States, 350 U.S. 61, 69 (1955) (emphasizing that the Court should not, "as a self-constituted guardian of the Treasury[,] import immunity back into a statute designed to limit it").

improvident actions of their governments"[372] will likely have the counter effect of increasing governmental costs due to the concealment and protection of illegal governmental activity.

Courts also rationalize the need for sovereign immunity because "public service would be hindered, and the public safety endangered, if the [government] could be subjected to suit at the instance of every citizen."[373] Members of present society should question this rationale when there is a need to hold governmental officials accountable for their improvident acts. Societal demands for honest and ethical conduct on the part of governmental officials should mandate a reassessment of the doctrine of sovereign immunity. The position that governmental operations would be halted if citizens could sue the government may no longer justify retaining "a manifestation merely of power."[374] Governments and their officials, like all other entities and individuals, must be subject to the rule of law, must be bound to obey it, and must be accountable if they do not. To the extent the doctrine of sovereign immunity places governments and their officials above the law, the doctrine may indeed be "more a relic of medieval thought than anything else."[375]

As long as the doctrine of sovereign immunity remains "part of the fabric of our law,"[376] litigants must be aware of the procedural hurdles to address when they file lawsuits against the government and its officials. Generally, to prevent an assertion of sovereign immunity from defeating a trial court's subject-matter jurisdiction, a citizen suing the government must establish the sovereign's consent to suit. This consent can consist of a statutory waiver of sovereign immunity; however, courts require such waivers to be unequivocally clear and strictly construe them in favor of the sovereign.[377] It has been recognized that certain statutes waive

372. Tooke v. City of Mexia, 197 S.W.3d 325, 332 (Tex. 2006).

373. *See, e.g.*, United States v. Lee, 106 U.S. 196, 207 (1882) (quoting The Siren, 74 U.S. (7 Wall.) 152, 154 (1868)) (recounting the historical justifications for sovereign immunity).

374. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 164 n.48 (1984) (Stevens, J., dissenting) (quoting Great N. Life Ins. Co. v. Read, 322 U.S. 47, 59 (1944) (Frankfurter, J., dissenting)).

375. *Id.*

376. *See* Nat'l City Bank v. Republic of China, 348 U.S. 356, 358–59 (1955) (noting the similarity between the sovereign immunity of foreign nations and "the nonsuability of the United States . . .[both of which were] derived from considerations of policy").

377. *See supra* notes 309–10, 316 and accompanying text.

the federal government's immunity from suits involving express or implied contracts, constitutional claims, and claims founded on acts of Congress or regulations of executive departments.[378] Both the Federal and Texas Tort Claims Acts waive sovereign immunity for limited types of tortious acts or injuries.[379] Similarly, the Texas Whistleblower Act waives the state's immunity from suit if the plaintiff sufficiently pleads that a good faith report of a violation of law was made to an appropriate law enforcement authority.[380] To sue a state in federal court, the state's Eleventh Amendment immunity from suit can be either waived by the state's voluntary removal of the case[381] or abrogated by congressional legislation intended to enforce substantive provisions of the Fourteenth Amendment.[382]

For suits charging governmental officials with unconstitutional conduct, sovereign immunity will apply if the government is the "real, substantial party in interest."[383] Similarly, claims for monetary damages brought against state officials in their official capacities will be considered suits against the state.[384] Thus, parties are limited to obtaining injunctive relief against future conduct unless they sue governmental officials in their individual capacities. Under federal law, however, public officials sued in their individual capacities can still assert qualified immunity as an affirmative defense.[385] Qualified immunity can be defeated in several ways, including proof of an official's knowledge or intent with respect to actions that violate constitutional rights,[386] or by bringing a *Bivens* cause of action for damages resulting from a constitutional tort.[387] In contrast, Texas state officials sued in their individual capacities can assert immunity as an affirmative defense if they acted in good faith while performing discretionary governmental acts within the scope of their authority.[388]

378. *See supra* Part VIII(D)(1).
379. *See supra* Part VIII(E).
380. *See* discussion *supra* Part II(B).
381. *See supra* notes 189–91 and accompanying text.
382. *See* discussion *supra* Part VII(A).
383. *See supra* note 213 and accompanying text.
384. *See supra* notes 35, 222–24, 248–50, 287–88 and accompanying text.
385. *See supra* notes 227–35 and accompanying text.
386. *See supra* note 236 and accompanying text.
387. *See supra* notes 239–44 and accompanying text.
388. *See supra* notes 252–59 and accompanying text.

However, a § 1983 action brought against a state official in his individual capacity is actionable independent of state law if the state official deprived a plaintiff of his constitutional rights while acting under the color of state statute, regulation, or custom.[389]

389. *See supra* Part VII(B).