

No. 07-0945

**In the
Supreme Court of Texas**

TEXAS PARKS AND WILDLIFE DEPARTMENT,
Petitioner,

v.

THE SAWYER TRUST,
Respondent.

On Petition for Review from the
Seventh Court of Appeals at Amarillo, Texas

PETITIONER'S REPLY BRIEF ON THE MERITS

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

JEFF L. ROSE
Deputy First Assistant Attorney
General

JAMES C. HO
Solicitor General

KRISTOFER S. MONSON
Assistant Solicitor General
State Bar No. 24037129

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 7711-2548
[Tel.] (512) 936-1820
[Fax] (512) 469-3180

COUNSEL FOR PETITIONER

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PETITIONER'S REPLY BRIEF ON THE MERITS

TO THE HONORABLE SUPREME COURT OF TEXAS:

The nature of this case changed when, by offering the letter containing observations made by the Chief Surveyor of the General Land Office, the Texas Department of Parks and Wildlife asserted the State's title to the sand and gravel in the stream in question. From that moment, this lawsuit became a suit to try the State's title to property, as opposed to a suit to prevent a State official from wrongly possessing property without asserting title. Suits to try title are barred by immunity.

Rather than attempt to controvert this longstanding principle, the Sawyer Trust argues that the law is unfair. The Trust's appeal to sympathy ignores the underlying constitutional

issue: the Legislature, not the courts, has the ultimate power to determine in what forum the State's property rights will be determined. Immunity from suit bars challenges to the State's title in order to preserve the Legislature's discretion to dispose of the State's property. This does not leave the Trust without a remedy. Although the Trust chose not to do so: it could have (1) sought a legislative waiver of immunity from suit under Chapter 107 of the Civil Practice and Remedies Code, or (2) commenced mining operations and raised its claim of title as a defense to an enforcement action brought by the Department.

ARGUMENT

I. THE TRUST'S ARGUMENT IS BASED ON A FUNDAMENTAL MISCONCEPTION OF THE IMMUNITY DOCTRINE: IMMUNITY FROM SUIT PREVENTS THE JUDICIARY FROM EXERCISING THE LEGISLATURE'S FUNCTIONS.

The Trust argues that, because the courts can take judicial notice of physical terrain—including facts that would support a determination that a stream is navigable—the determination of navigability is a fundamentally judicial issue. Resp. Merits Br. at 10-19. The Trust goes so far as to suggest that asserting sovereign immunity in a lawsuit involving property to which the State claims title constitutes the “encroachment” of executive-branch power into judicial power. Resp. Merits Br. at 7-8. The Trust's argument is wrong because it is based on a fundamentally incorrect concept of immunity.¹

1. The Trust's bare assertion that individual constitutional rights trump sovereign immunity, *see* Resp. Merits Br. at 5-6, is clearly wrong. The Court has consistently held that Article I, §17 is not a general cause of action for damages whenever government action affects property—sometimes the damaging or destruction of property is governed by tort, or contract, or the police power and there is no right to compensation. *E.g.*, *State v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007) (discussing *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598-99 (Tex. 2001)). And the remainder of Article I does not trump immunity. *E.g.*,

The underlying purpose of immunity is to protect the other branches of government from undue judicial interference—particularly in the expenditure of public funds and the custodianship of public property. That the courts decide issues related to title, or navigability, in lawsuits between private litigants does not transform the navigability determination into an exclusively judicial function. Rather, immunity protects the State from being a defendant in lawsuits without the Legislature’s permission.

A. The Fact that Courts Are Competent to Decide Navigability Questions When There is Jurisdiction Does Not Lead to the Conclusion that Courts Always Have Jurisdiction Over Navigability Determinations.

As the Department explained in its opening brief, a core function of immunity is to preserve the independence of the executive and legislative departments of government. Pet. Merits Br. at 20-22. The disposition of Texas’s property is reserved by the Constitution to the Legislature. *Gov’t Servs. Ins. Underwriters v. Jones*, 368 S.W.2d 560, 563 (Tex. 1963) (orig. proceeding). The Legislature has delegated responsibility for overseeing Texas’s property in navigable waterways to the Department of Parks and Wildlife (which regulates harvesting of gravel and animals from the streams, TEX. PARKS & WILD. CODE §1.011(d); *see also* TEX. NAT. RES. CODE §51.291) and the General Land Office (which, as custodian of property for the Permanent School Fund, regulates the underlying mineral interests, TEX. NAT. RES. CODE §11.041(a)(1)).

Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 411-12 (Tex. 1997) (concluding that the immunity doctrine does not implicate due-course-of-law concerns). Nor could it, given that immunity was a background principle of law when the framers adopted the provisions of the Texas Constitution. *See* Pet. Merits Br. at 21-23.

The Legislature has not chosen to provide a general waiver of immunity for plaintiffs to contest the State’s claim to title, although it has in the past permitted suit on a case-by-case basis. *E.g.*, *Brainard v. State*, 12 S.W.3d 6, 25 (Tex. 1999) (brought pursuant to specific legislative waiver of immunity). The Legislature has also provided a general cause of action for certain government actions that interact with private property rights. *E.g.*, TEX. NAT. RES. CODE §33.171 (allowing “littoral property owners”² to challenge decisions of School Land Board in court). But it has not manifested an intent that issues of State property ownership—which are reserved to the Legislature by the Constitution—be determined instead by the courts without legislative consent.

The Department and the General Land Office, charged with the statutory obligation to hold State property in trust for the people of Texas, can choose to exercise that obligation by bringing a lawsuit against a private individual. In such cases—as in *State v. Bradford*, 121 Tex. 515, 50 S.W.2d 1065 (1932), the primary case on which the Trust relies, *see* Resp. Merits Br. at 10, 19—the courts have authority to rule on any legal issue properly defensive to the claims asserted, including the issue of navigability. *E.g.*, *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 376-77 (Tex. 2006). But it does not follow that, simply because the courts can decide navigability issues *when they have jurisdiction*, that they necessarily have jurisdiction to determine *all* navigability claims. And for good reason. When the State

2. For the purpose of Chapter 33 of the Natural Resources Code, a “littoral owner” is the owner of public or private upland bordered by or contiguous to coastal public land not bordering the Gulf of Mexico. TEX. NAT. RES. CODE §33.004(12).

brings the lawsuit, it has exercised its discretion to put the matter of ownership at issue; the court's action in adjudicating the lawsuit therefore does not impose upon the authority of the political branches. But the same cannot be said of suits brought by private plaintiffs. It is therefore hardly surprising that there is no authority for the proposition that a plaintiff can bring a lawsuit against the State to determine the navigability of a particular stream—or challenge any other aspect of a Texas agency's claim to natural resources contained in a stream- or river-bed. *See* Pet. Merits Br. at 10-12.³

The same is true in federal law: the United States has immunity from suits seeking to challenge its title to property, except under the narrow circumstances in which Congress has provided a waiver of that immunity. *See Block v. N. Dakota ex. rel. Bd. of Univ. & School Lands*, 461 U.S. 273, 292-93 (1983) (remanding suit by North Dakota to establish navigability status of river to require North Dakota to demonstrate compliance with immunity waiver). The same rule applies in suits against the States: courts can decide the government's title to land only under circumstances of the government's choosing. *Idaho v. Cœur d'Alène Tribe of Idaho*, 521 U.S. 261, 272 (1997) (plurality op.); *id.* at 290-91 (O'Connor, J., concurring).

3. The Trust correctly points out that the Department's opening brief mislabeled several cases it discussed in its opening brief as "navigability cases" when not all of those cases involved navigability. Resp. Merits Br. at 14. A better characterization would have been "cases related to the State's property rights in streams and rivers." However, the Trust's criticism misses the point. *Not one* of the cases discussed in the Department's opening brief involved a lawsuit brought against the State by a private plaintiff to determine an issue related to the location or navigability of a stream or river. *See* Pet. Merits Br. at 10-12. There is no precedent for the Trust's argument that suits involving the placement and width of rivers can be brought in Texas courts without regard to the doctrine of sovereign immunity.

B. Absent a Valid Legislative Waiver of Immunity from Suit, Immunity Bars Any Suit In Which the Government is a Defendant or Public Property is at Stake.

The underlying rule of immunity from suit is that, if the State is a defendant, the lawsuit must be dismissed unless it falls within an exception to immunity. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 (Tex. 2003); *see* Pet. Merits Br. at 20-21. This means that lawsuits against the State can be brought only within the limited confines of particular causes of action.

In some circumstances, a plaintiff can bring suit against a governmental official based on the fiction that the official's actions are so far beyond the scope of his authority that he is not acting on the State's behalf. *E.g.*, *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855-56 (Tex. 2002). The ultimate analysis is whether the suit would result in a judgment that would either control state action or require the State to pay money damages. *E.g.*, *W.D. Haden Co. v. Dodgen*, 158 Tex. 74, 308 S.W.2d 838, 842 (1958). Thus, for example, whether a government official effects a taking on the government's behalf depends, in part, on whether the official acts pursuant to a contract or in a sovereign capacity—or what “hat” the State is wearing. *Holland*, 221 S.W.3d at 643 (discussing *Little-Tex*, 39 S.W.3d at 598-99). In other words, the immunity analysis depends on the substance—not the form—of the plaintiff's claims. *E.g.*, *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343-44 (Tex. 1998) (concluding that whether a claim falls within an exception to immunity depends on its “real substance”).

A necessary corollary to the rule that cases involving the substance of a contract cannot be brought against a State entity is that a plaintiff cannot bring an *ultra vires* suit against a State official alleging that the official acted without authorization in failing to abide by a contract's terms. *IT-Davy*, 74 S.W.3d at 855-56. If the State's possession of public funds is at issue, there is no need to determine whether the official's breach was supported by any particular authority—the end result of a judgment making the State responsible for voiding a contract would be the imposition of liability directly on the public. *Id.*

Likewise, in the real-property context, when a government official asserts the State's ownership of property, any lawsuit would necessarily result in a judgment touching the core of the State's property ownership. *See* Pet. Merits Br. at 14-15. If the courts were to dictate the scope of the State's property rights in the first instance, they would deprive the other branches of government of their respective rights to dispose of the State's property under the Legislature's will. The Court has already held that it is part of the constitutional design that the Legislature retain the aspects of sovereignty not granted the executive and the judiciary—including the right to dispose of the State's property. *Jones*, 368 S.W.2d at 563; *City of Galveston v. Menard*, 23 Tex. 349, 392, 1859 WL 6290, at *31 (1859).⁴ It is for

4. As the Department pointed out in its opening brief, the background power of the Legislature to dispose of State property is the basis for its delegation of authority to the General Land Office and the Department to hold and regulate the State's interest in navigable waterways. Pet. Merits Br. at 14-15. And it is by virtue of that ownership that the State regulates natural resources in navigable waters. *E.g.*, *Dodgen v. Depuglio*, 146 Tex. 538, 544-45, 209 S.W.2d 588, 593 (1948) (Legislature regulates fishing by virtue of public's property interest in fish); *Lorino v. Crawford Packing Co.*, 142 Tex. 51, 58, 175 S.W.2d 410, 414-15 (1943) (Legislature has power to grant property interests based on ownership).

that reason that trespass-to-try-title claims against the State are barred by sovereign immunity.

Nor is *State v. Lain*, 162 Tex. 549, 349 S.W.2d 579 (1961), to the contrary. As the Department explained in its opening brief, the State did not actually claim title to the property at issue in that case. *See* Pet. Merits Br. at 8-10. Accordingly, the suit against State officials to enjoin their use of property involved only the officials' assertion of control over property without any accompanying claim of title. *Lain*, 341 S.W.2d at 582-83.

There is language in *Lain* that, if read casually, suggests that suit can be brought against government officials to challenge their assertion of title. But that is not what the Court actually held in *Lain*, and it is inconsistent with the Court's subsequent precedent. Specifically, after *Lain*, the court has held that if a government official is acting within the scope of his authority, any suit against him is in substance a suit against the State.⁵ *E.g.*, *IT-*

5. *Lain* cites two Texas court of appeals decisions—unreviewed by this Court—that in turn relied on the United States Supreme Court's decision in *United States v. Lee*, 106 U.S. 196, 210 (1882). *See* *Whatley v. Patten*, 31 S.W. 60, 83 (Tex. Civ. App.—Galveston 1895, writ ref'd); *Imperial Sugar Co. v. Cabell*, 179 S.W. 83, 89 (Tex. Civ. App.—Galveston 1915, no writ). The underlying presumption in *Lee* was that a suit against an official is not a suit against the State and is not barred by sovereign immunity, and that is the proposition for which both *Patten* and *Cabell* cite that case. In deciding that immunity from suit applies to contract claims, the Court has subsequently limited *Cabell* and *Whatley*—and all cases based on *Lee*—to suits in which a State official is withholding property from a private individual without any valid claim of authority to do so. *W.D. Haden Co.*, 308 S.W.2d at 841.

But under current Texas law, a suit against a State official acting in his official capacity *is* a suit against the State. *E.g.*, *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 335, 844 (Tex. 2007) (“When a state official files a plea to the jurisdiction, the official is invoking the sovereign immunity from suit held by the government itself.”) (citing *Kentucky v. Graham*, 473 U.S. 159, 165 (1985)). And the United States Supreme Court has subsequently recognized that *Lee*'s holding that a suit against an official is not barred by sovereign immunity has been limited by subsequent decisions. *Cœur d'Alène*, 521 U.S. at 272 (plurality op.) (recognizing that *Lee*'s reasoning has been undermined by subsequent holdings); *id.* at 290-91 (O'Connor, J., concurring) (suggesting that suits against State officials are limited to suits attempting to prohibit possession of—rather than assert title to—property)). It is worth emphasizing that the core holding of *Cœur*

Davy, 74 S.W.3d at 855-56. The better understanding of *Lain*—and one that is consistent with the greater body of precedent on this issue—is that, if the remedy requested would impact the State’s assertion of title, and the defendant official is acting within his discretion by asserting title, then the suit is one against the State and is barred by immunity. Any other approach would elevate form over substance. The substantive question underlying the immunity doctrine in this case is whether the courts have the power to preclude the Legislature from determining whether a particular piece of property is the State’s. If a State official asserts the State’s title to such property, in the exercise of his discretion, then immunity bars the lawsuit and the plaintiff must go to the Legislature for permission to have the suit tried in court. *See infra*, Part II.D. This is the only proper mechanism to maintain the Legislature’s constitutional authority to dispose of State property as it sees fit.

II. THE JURISDICTIONAL QUESTION IN THIS CASE IS WHETHER THE DEFENDANT OFFICIAL HAD DISCRETION, NOT WHETHER THE STATE HAS PROPER TITLE TO THE SAND AND GRAVEL IN THE STREAMBED.

The Trust argues that the jurisdictional question in this case is whether the stream is in fact navigable. *See Resp. Merits Br.* at 10-12. This argument misconstrues the Department’s position. The Department argues, in the hypothetical, that if it were appropriate as a matter of law to bring suit against a Department official, the surveyor’s letter would constitute uncontroverted evidence that the defendant official had acted within his

d’Alène is that the Eleventh Amendment bars suits to try the State’s title to property in federal court. *Id.* at 289 (O’Connor, J., concurring). Thus, to the extent the *Lain dictum* is based on an outdated understanding of federal law (and one that is also inconsistent with modern Texas jurisprudence) the Court should not follow it.

discretion. Pet. Merits Br. at 16-17. Under the facts of this case, no suit can be brought because the remedy the Trust seeks is a judgment establishing title against the State. But, to be clear, if the Court even reaches the subsidiary issue of whether an official might have acted *ultra vires*, this evidence cannot be considered for the purpose of determining the correctness of the official's claim to property. It would be relevant only for the purpose of demonstrating that the official's actions were not *ultra vires*, and the Court would reach that issue only if it concluded that it could adjudicate navigability without questioning the State's title.

A. There is Not A General Grant of Jurisdiction to the Courts to Make Decisions Merely Because a Particular Issue is “Judicial” in Nature.

The Trust mistakenly relies on *Cobb v. Harrington*, 144 Tex. 360, 290 S.W.2d 709 (1945), and *Federal Sign v. Texas Southern University*, 951 S.W.2d 401 (Tex. 1997), for the proposition that, if a question is judicial in nature, the courts can resolve it regardless of the fact that the defendant is a State entity. Resp. Merits Br. at 10-12. This is ironic; the Trust relies on precisely the same precedents on which the Department relies—but fails to explain the Court's holdings in those cases and its holdings in subsequent cases.⁶ In this line of authority—governing the distinction between suits against State entities and suits against

6. Curiously, the Trust attempts to challenge the Department's (purported) reliance on *State v. Riemer*, 94 S.W.3d 103 (Tex. App.—Amarillo 2002, no pet.). Resp. Merits Br. at 13. This is odd, as the Department relied only on Supreme Court precedent in its opening brief and did not cite *Riemer*. Moreover, *Riemer* is both (1) correct and (2) correctly states the scope of the *ultra vires* cause of action. The fact that a plaintiff may seek relief against a state official acting outside his official authority, *see Riemer*, 94 S.W.3d at 111, does not lead to the conclusion that there is a general cause of action against state officials to challenge their assertion of the State's title to property. One does not affect the State's ultimate interests; the other plainly does.

State officials, and the substantive distinctions between those suits—the Court has held that (1) sovereign immunity bars UDJA claims for which there is no separate waiver of immunity; *W.D. Haden*, 308 S.W.2d at 839-840; (2) there is an exception to this immunity only when the declaratory judgment is based on a separate cause of action for which immunity is otherwise waived, *Cobb*, 190 S.W.2d at 712; (3) while a court can construe statutes and other legal issues to determine a plaintiff’s right to prevent a State official from acting outside the law, e.g., *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); and (4) actions taken within the defendant official’s authority are protected by immunity from suit, *id.* As the Department explained at length in its opening brief, any other result would permit the courts to second-guess the decisions of government agencies—and undermine the separation of powers—based on the mere formality of naming an official as the defendant rather than naming the State itself. *See* Pet. Merits Br. at 10-15.

B. The Court Need Not Address the Substance of the Trust’s Claims Because the Remedy the Trust Seeks is the Determination of Title.

As explained above, it would elevate form over substance to pretend that the Trust does not seek to challenge the State’s title in this proceeding. Indeed, the Trust would have the court believe that the trial court already adjudicated the issue of the State’s title in the proceedings below. *See* Resp. Merits Br. at 17-19. But any claim that would have the substantive effect of placing the State’s title to property in jeopardy is barred by sovereign immunity. *See supra*, Part I.B.

The easiest way to resolve this case is to recognize that when an agency, like the Department, that has statutory authority to assert the State's title to property does so, there cannot be an exception to immunity from suit. This is because the assertion of title is, without question, within the defendant agency's discretion.

The Department has statutory authorization to assert the State's title to the natural resources contained in the streambeds of navigable rivers. *See* TEX. PARKS & WILD. CODE §1.011(d); TEX. NAT. RES. CODE §51.291. And in this case, after a review of the property, the Department manifested its intent to assert title by introducing the letter explaining the basis for its assertion. CR.15. Any lawsuit challenging that assertion of title with evidence showing that the Trust has title to the property would involve the forbidden analysis evidence to determine which side has title. That kind of lawsuit is barred because the Trust cannot sue the State to determine title to property to which the State claims title without a legislative waiver of immunity.

Accordingly, the Court should render judgment dismissing the Trust's claims and need not address the scope of the availability of suit against State officials related to the Department's assertion of title on the State's behalf.

C. Alternatively, the Correctness of the Department's Assertion of the State's Title to the Sand and Gravel in the Streambed is Not at Issue—Only the Authority of Department Officials to Assert the State's Title to Property is In Play.

Alternatively, should the Court address the substance of a lawsuit that would be permissible related to the assertion of the State's title, it should recognize a substantive bar

to lawsuits that would put the State's title at issue. The Trust's argument that the issue of title can always be resolved at the jurisdictional phase of a suit related to the assertion of title assumes too much. It supposes that, because the scope of a State official's authority is involved in determining jurisdiction over *ultra vires* claims, every potential legal question related to that authority must be considered by the courts.⁷ Not so.

As the Department explained in its opening brief, the core limitation to the proposition that State officials can be sued to prevent illegal actions is that the courts can issue a judgment only that a particular act falls outside the defendant's discretion—the courts can never issue a judgment directing the defendant officer or entity in the exercise of its own discretionary functions. Pet. Merits Br. at 23-28 (collecting authority). Thus, while statutory construction is sometimes part of the jurisdictional analysis in an *ultra vires* claim, the jurisdictional inquiry necessarily does not extend to a full adjudication of the underlying legal issues. Cf. *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 783 (Tex. 2005) (recognizing limitations on courts' injunction powers under the Constitution). If the jurisdictional inquiry resolved each and every question that might be brought in the underlying lawsuit, there would be no purpose to the immunity doctrine.

7. To this end, the Trust cites the Corpus Christi court of appeals's decision in *Kenedy Memorial Foundation v. Mauro*, 921 S.W.2d 278, (Tex. App.—Corpus Christi 1995, writ denied). Resp. Merits Br. at 7. The Corpus Christi court's statements regarding jurisdiction are *dicta*, because, as this Court recognized in a subsequent stage of the appellate proceedings, the lawsuit was brought pursuant to a statutory waiver of immunity from suit. *Kenedy Mem'l Found. v. Dewhurst*, 90 S.W.3d 268, 289 & n.71 (Tex. 2002).

Contrary to the Trust’s unsupported assertions, the jurisdictional question in a title-based suit against a State official must be whether the official has authority to assert the State’s title, not whether the State’s underlying title is actually valid as a matter of law. *Cf. Poretto v. Patterson*, 251 S.W.3d 701 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (holding that landowners could bring suit because the government did not offer “a colorable *assertion* of ownership in the land” (emphasis added)). If the State makes a colorable claim to title, and the plaintiff sues to disturb that title, the lawsuit is in substance a suit to try the State’s title and is barred by immunity. *See supra*, Part II.B. Any other result would allow the courts to circumvent the Legislature’s constitutional role as the primary decision-maker regarding the disposition of the State’s property.

D. The Trust Cannot Controvert the Observations of the General Land Office Surveyor Without Obtaining a Legislative Waiver of Immunity.

The Trust hinges its argument that the courts should resolve its navigability claims on the incorrect premise that the jurisdictional question in this case is whether the stream is navigable. But navigability is irrelevant to jurisdiction. The Department has statutory authority to assert the State’s title to the natural resources found in the beds of navigable waters and streams and, moreover, is tasked with regulating the harvest of gravel from those streams.

1. The courts cannot decide the ultimate question of navigability without determining the underlying issue of title.

The Trust seeks to turn this case into a lawsuit to determine the State's title to the sand and gravel in the streambed based on an evidentiary proceeding that would challenge the State's assertion that the stream is navigable and, therefore, the State's property. In other words, the Trust seeks to try the State's title by slapping a different name on the cause of action. But the prohibition on courts determining the State's title to property in lawsuits brought by private plaintiffs is a matter of substance, not of form. Allowing the courts to decide questions of title and navigability—even in proceedings to determine jurisdiction over claims alleged against a State official—would vitiate the constitutional design by making the courts, not the legislature, has ultimate sovereign authority over the State's property rights. *See supra*, Part I.B.

2. Even if the State's assertion of title did not bar suit, the Trust's claims would be barred as a matter of law because they do not assert a valid *ultra vires* claim.

The Trust's lawsuit is barred because—as the Trust candidly admits—to consider the Trust's evidence would be to perform the prohibited act of determining the State's title to property in a judicial proceeding initiated by a private plaintiff. However, even if the general bar against determining title did not apply, the Trust's lawsuit would still fail because the

Trust cannot, either as a matter of law or based on the evidence on which it relies, establish the elements of an *ultra vires* claim against a State official.⁸

The Trust's claim is not a true *ultra vires* claim because—rather than assert that Department officials lack authority to assert the State's title to property because they have not acted pursuant to statute—the Trust merely asserts evidence that could be the basis to determine whether the Department was correct to assert title. That type of claim—which would result in the courts controlling state action—is barred by immunity. *See* Pet. Merits Br. at 20-23. If the Department has authority to claim property in this fashion, no Department official can be sued for doing so.

The Trust has not attempted to plead a proper *ultra vires* claim, the only claim under which it might establish an exception to immunity. Such a lawsuit would have to allege that a Department official acted without any colorable regard for the principles governing the State's title to property. If the official can cite no legal authority for the assertion of title or control over the property, his actions would be outside the scope of his discretion and, as a result, could be enjoined. The Trust's live petition forecloses this theory. It alleges that the stream is not navigable and, as a result, that the State lacks title to the sand and gravel in the stream. CR.19-22. But by statute streams that are thirty feet wide belong to the State, along with all their sand and gravel, TEX. NAT. RES. CODE §21.001, with the caveat that in some

8. As the Department pointed out in its opening brief, it addresses this issue with regard to a suit against an official because it would be a meaningless exercise to hinge the entirety of the jurisdictional analysis on the fact that the Trust named the wrong defendant. *See* Pet. Merits Br. at 14.

cases the Legislature has deeded the beds of streams to private property owners while retaining title to the natural resources contained and under the streams, TEX. REV. CIV. STAT. art. 5414a; *see* Pet. Merits Br. at 2-3. So long as Department officials have a good-faith reason to believe that a stream is thirty feet wide, jurisdiction depends only on whether the Department has asserted ownership, not whether the stream is actually thirty feet wide. Indeed, courts have long rejected the proposition that any particular type of measurement is needed to establish navigability. *E.g.*, *Hix v. Robertson*, 211 S.W.3d 423, 427 (Tex. App.—Waco 2006, pet. denied) (collecting authority). The Department should have similar latitude to rely on a letter filed by the Chief Surveyor of the General Land Office reporting his official observations related to navigability.

Ruling for the Department on this issue does not foreclose the possibility of a case being brought under materially different facts. A private plaintiff purporting to own property can sue a rogue official for falsely claiming property when that official can assert no legal basis for asserting title. Carving out a substantive exception to immunity on this ground preserves the Court’s expressed concern that public officials not be permitted to break the law, *see, e.g.*, *State v. Epperson*, 121 Tex. 80, 86-87, 42 S.W.2d 228, 231 (1931),⁹ while

9. *Epperson*, like the cases relied upon in *Lain*, relies on the outdated reasoning in *United States v. Lee*, 42 S.W.2d at 231, that suit is generally available against state officials. The Court has already limited this holding in *W.D. Haden Co.*, and it should disregard *Epperson* to the extent in conflicts with subsequent decisions holding that suits against State officials are suits against the State. *See supra*, Part I. But *Epperson* does raise the specter that a state official could, by violating the law, wrongly possess and withhold property from private citizens. The Department agrees that suit should be available to prevent an unsupported assertion of ownership by State officials when the officials can assert no legally-valid basis for the assertion. *See W.D. Haden Co.*, 308 S.W.2d at 841. The substantive distinction the Department draws between suits to challenge the details of the State’s assertion of title and suits to allege that State officials lack any authority

abrogating the superseded notion that suits against state officials are never suits against the state, *see supra*, Part I.B & n.5. This narrow cause of action should apply only if the defendant official asserts title or control over some property that he has no colorable authority to claim.

3. The Trust’s proffered evidence establishes that the Trust cannot reframe its petition to state a valid claim.

The Trust’s proffered evidence demonstrates that the Trust cannot amend its petition to properly allege the Department or its officials has acted contrary to law in asserting title to the sand and gravel in this case. The Department has relied on the observations of the Chief Surveyor of the General Land Office, who is trained to evaluate the navigability of waterways. The Trust has at most attempted to undermine the Department’s discretionary conclusion that, based on the available information, the State owns the property in question by proffering testimony that would allow a court to find the opposite.¹⁰ But the letter included in the record, CR.15, is enough to satisfy the basic question whether the Department had a basis to believe the stream is navigable and, as a result, that the State owns the natural resources contained in the stream. Because the Department has acted legally in asserting

to claim title on the State’s behalf, preserves the concerns expressed by the Commission of Appeals in *Epperson* while bringing Texas jurisprudence into harmony with modern immunity law and federal law governing suits to quiet title. *See supra*, Part I.B. & n.5.

10. To the extent that the Trust attempts to use this evidence to transform the trial court’s and court of appeals’s orders into a final decision on the merits, its argument is waived. TEX. R. APP. P. 53.1. Failure to file a petition for review waives any arguments that would result in a more favorable judgment for the movant. *Id.* Accordingly, to the extent that the Trust seeks to transform the interlocutory order on which it prevailed into a final judgment during appeal, its argument is foreclosed.

title—not because the Department is necessarily correct, or because the courts can or should adjudicate actual title—the Trust’s lawsuit cannot be redrawn based on the evidence the Trust has proffered.

4. Distinguishing between suits related to official discretion to assert title to property and those where an official breaks the law preserves the Legislature’s constitutional right to dispose of the State’s property as it sees fit.

This analysis—in which the State cannot be sued if a State official acting within his discretion asserts the State’s title to property—makes sense because it ultimately funnels to the Legislature all disagreements private plaintiffs might have about the State’s title to property. The Legislature can, as a result, determine on a case-by-case basis whether it will place the State’s title to property in hazard by allowing private parties to institute litigation against the State.

This arrangement makes particular sense with regard to claims related to streams and rivers. Streams and rivers move. The Legislature has not provided a budget sufficient for the State to constantly monitor the course and boundaries of navigable streams. If the State were required to submit to suit for every change in course of every waterway, it would be required to provide full surveys of each waterway in each lawsuit—a result that would be entirely contrary to the Legislature’s intent. The decision of how the State will dispose of its title to property will be taken from the centralized control of the Legislature and disbursed to the local courts to be resolved by a series of local juries in battles of expert witnesses. Such an approach would cost the State a great deal of money to litigate—and one of the core

purposes of providing interlocutory appeal for pleas to the jurisdiction based on immunity was to reduce the State's exposure to the costs of expert testimony related to barred legal questions. *Koseoglu*, 233 S.W.3d at 845 & n.2 (discussing legislative history of statute permitting interlocutory appeals).

If State agencies, with authority to do so, assert title to property, private property owners must go to the Legislature for relief. This makes sense because it is the Legislature, not the courts, that is charged with maintaining the State's property rights.

In this context, it bears mention that the State's retention of control over navigable waterways is deeply tied to its obligation to regulate navigation and to both preserve and utilize the State's natural resources on the public's behalf. Indeed, the Department and the General Land Office are trustees of natural resources that provide income to support education and parks services throughout the State. Given their obligation to act as a trustee holding public resources for the public good, it makes sense that it would be the Legislature that determines when title suits initiated by private plaintiffs should be resolved by the courts.

III. THE TRUST'S MISTAKEN ARGUMENTS UNDERSCORE THE IMPORTANCE OF THIS APPEAL TO THE JURISPRUDENCE OF THE STATE.

The Trust places great reliance on a passage in *Federal Sign* indicating that there is a general right to bring lawsuits to determine a plaintiff's rights. *See* Resp. Merits Br. at 11. The Department has already explained—at length—that the *dictum* on which the Trust relies cannot be so read without vitiating the holdings of the cases on which *Federal Sign* relied. *See* Pet. Merits Br. at 31-32 & n.16. The Trust's misreading of *Federal Sign* falls squarely

in the split among the courts of appeals that the Department believes the Court should resolve by granting this petition.

Courts of appeals are split as to the applicability of the UDJA as a vehicle for attacking governmental decisions outside the procedural mechanisms provided by the Legislature. Pet. Merits Br. at 34-36. In relying on the UDJA as a basis for jurisdiction, the courts of appeals are ignoring the substance of the immunity doctrine entirely. Relying on declaratory judgments as a separate basis for jurisdiction elevates form over substance. The touchstone of immunity is the preservation of the independent decision-making authority of the legislative and executive branches. The courts holding that the Uniform Declaratory Judgments Act creates a general license for the courts not only to second-guess, but also to pre-judge, decisions that are conferred by the Constitution on the other branches of government have introduced instability into the law. This goes to the heart of the uncertainty in Texas law regarding the distinction between suits against State entities and suits against State officials—and many of the court of appeals opinions are based on ancient cases holding that a suit against a State official automatically avoids the immunity bar—a proposition that both this Court and the United States Supreme Court have soundly rejected. *See supra*, Part I.B & n.5.

Litigants can no longer be certain of the outcome when they sue a State entity or official. The Court should grant the petition and decide the scope of the *ultra vires* exception to immunity from suit in this case by concluding that the *ultra vires* exception does not allow

a lawsuit that would determine the State’s title to property without a legislative waiver of immunity. In the alternative, it should hold the case and resolve it in a *per curiam* opinion based on one of the other pending petitions for review raising the same issue. *See* Pet. Br. at 35-37 (collecting cases).

IV. THE TRUST HAS NEVER PLEADED A VALID TAKINGS CLAIM AND, AS A MATTER OF LAW, IT CANNOT DO SO.

The Trust attempts to reframe this lawsuit as an Article I, §17 takings claim. Resp. Merits Br. at 1-5. To that end, the Trust avers that the Department argues “without specificity” that the Trust has failed to state a claim for Article I, §17 damages in its pleadings. But the Trust has not stated an Article I, §17 claim as a matter of law because it seeks possession of the property, not monetary damages.¹¹ Resp. Merits Br. at 2. There can be no Article I, §17 claim because, by definition, when the State asserts its own title to property, it has not “taken” anything.

The definition of a taking under Texas law is the government’s exercise of its superior right to use or damage private property for the public good. *E.g., McInnis v. Brown County Water Improvement Dist. No. 1*, 41 S.W.2d 741, 746 (Tex. Civ. App.—Austin 1931, writ ref’d); *see* Pet. Merits Br. at 18. The State has capacity to act, and bring suit to vindicate its property rights, like any other property owner. *Day Land & Cattle Co. v. State*, 68 Tex. 526, 534, 4 S.W. 865, 867-68 (1887) (“The state doubtless has the right, by suit, to protect any

11. As the Court has pointed out, it is unnecessary to cite the clerk’s record for the proposition that nothing in the record supports a particular proposition. *Cf. City of Arlington v. State Farm Lloyds*, 145 S.W.3d 165, 167-68 (Tex. 2004) (*per curiam*).

property right vested in it as fully as has any person”). Thus, not every action the State takes with regard to property constitutes a taking—a taking occurs only when the State acts inconsistently with private property rights with the purpose of transferring those rights to a public use.

By contrast, a claim in which a plaintiff attempts to recover immediate possession of land is not a takings claim, but rather a trespass to try title that is barred by immunity unless the State lacks any colorable basis for asserting title to the property. *E.g.*, *Lain*, 341 S.W.2d at 582-83; *cf.* *Cœur d’Alène*, 521 U.S. at 272 (plurality op.); *id.* at 290-91 (O’Connor, J., concurring). In sum, the courts can determine title when the State chooses to subject itself to jurisdiction through the initiation of a lawsuit or a legislative waiver of immunity, but the State’s management of its own property rights is otherwise outside the courts’ control.

V. THE TRUST IS NOT WITHOUT RECOURSE: IT CAN EITHER (1) SEEK LEGISLATIVE PERMISSION TO SUE OR (2) COMMENCE MINING OPERATIONS AND DEFEND AGAINST RESULTING ACTION BY THE DEPARTMENT.

Texas has a practical means of addressing navigability issues: if a property owner thinks that a stream might be navigable—and the gravel contained within it might therefore be regulated by the Department—the property owner should *ask*. *See* Pet. Merits Br. at 12-14. It does not require litigation for the Department to either assign an employee to inspect the stream or request that the GLO to send a surveyor to review the stream to determine whether the stream is navigable and, as a result, whether the State has title to the publicly-held resources found within it. The only difference between that informal approach and the

remedies sought in the current appeal is that the current lawsuit has required both the Trust and the Department to waste time and money. The end result—that the Department can assert title to property based on its investigation and conclusion—cannot change. *See supra*, Part II.B.

This does not leave the Trust without a remedy. As the Trust points out, in a suit to which immunity does not apply, the courts are competent to make boundary and navigability determinations. Plaintiffs, like the Trust, can apply to the Legislature to obtain an individual waiver of immunity to allow the courts to resolve particular questions of title. This process leaves it in the Legislature's hands to decide whether the State's assertion of title will be litigated at the public's expense and what limitations will be placed on the scope of the resulting lawsuit. An example of this approach is *Brainard v. State*, 12 S.W.3d 6 (Tex. 1999), in which a group of plaintiffs obtained legislative permission to bring suit regarding property adjacent to the Canadian River. The Legislature in that case decided that the plaintiffs' complaints merited the expense of subjecting itself to the judicial process—although it could just as easily have made a legislative decision not to permit the suit or chosen to grant the property in question to the claimants without judicial proceedings. Regardless of the approach the Legislature elects, though, the underlying purpose of any procedural framework for dealing with the State's title to property should be that the Legislature makes the ultimate decision.

Alternatively, the Trust could commence mining operations and wait for the Department to take action to stop the mining. In that case, because the State would have commenced proceedings, the Trust could contest the stream's navigability as an affirmative defense. *See Reata*, 197 S.W.3d at 376-77.

PRAYER

For these reasons, the Court should reverse the judgment of the court of appeals and render judgment dismissing the Trust's lawsuit.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

JEFF L. ROSE
Deputy First Assistant Attorney General

JAMES C. HO
Solicitor General

KRISTOFER S. MONSON
Assistant Solicitor General
State Bar No. 24037129

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 7711-2548
[Tel.] (512) 936-1820
[Fax] (512) 469-3180

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I certify that on August 13, 2008, a true and correct copy of this Reply Brief on the Merits was served by certified U.S. mail, return receipt requested, on all appellate counsel of record in this proceeding as listed below:

Jody Sheets
LAW OFFICE OF JODY SHEETS
5910 N. Central Expressway, Suite 275
Dallas, Texas 75206

COUNSEL FOR RESPONDENT

Kristofer S. Monson