

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
No. 07-06-00487-CV

**RESPONDENT'S RESPONSE TO PETITIONER'S
SUPPLEMENTAL BRIEF ON THE MERITS**

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SUPPLEMENTAL ISSUE PRESENTED

Does the Court's new immunity decision issued May 1, 2009, *City of El Paso v. Heinrich*, support the Court of Appeals' refusal to let the State avoid, on jurisdictional grounds, declaratory proceedings to determine the Sawyer Trust's constitutional and statutory rights?

SUPPLEMENTAL ANSWER

Absolutely yes.

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**RESPONDENT’S RESPONSE TO PETITIONER’S
SUPPLEMENTAL BRIEF ON THE MERITS**

TO THE HONORABLE SUPREME COURT OF TEXAS:

SUMMARY OF THE ARGUMENT

The State’s recent filing (“State’s 6/01/09 Supp. Br.”) merely confirms the Texas executive branch’s position—which it seems to assert more broadly and stridently with every passing year—that an agency’s actions and factual “determinations” should in nearly every situation be insulated from any judicial review. Throughout all its briefs in this appeal, including its most recent, the State supports this untenable result with paradoxical overreaching hypotheses that prove too much. If seen through any vaguely realistic lens, the executive branch wishes to operate with impunity, free from all judicial

interaction in nearly every circumstance. In sum, the Texas executive branch wants to keep the courthouse doors closed and locked at any cost, regardless of the source of rights being asserted or the type of remedy being sought.

This Court's unanimous opinion in *City of El Paso v. Heinrich*, No. 06-0778, 52 Tex. Sup. Ct. J. 689 (Tex. May 1, 2009) forecloses the State's vision of impenetrable immunity (and impunity) in multiple ways. Despite the State's wishful assertions, *Heinrich* supplies no reason to upset the Court of Appeals' decision but instead materially supports the holding below. For example, the reason the present case has not technically been pressed as an official-capacity *ultra vires* suit—even though the Trust's pleaded factual allegations qualify and the case might be properly so brought—is that being largely takings-based, there is no need. The State's briefing admits that suing the State itself without legislative consent is proper in a suit brought “under the Constitution”—i.e. in a suit to enforce constitutional rights.¹ *Heinrich* in no way alters this venerable and undisputed rule, which supports the Court of Appeals' holding in this case. *Infra* Section 1.

Moreover, *Heinrich* expressly rejects one of the State's indispensable linchpins: the State's ubiquitous assertion that the Uniform Declaratory Judgments Act as adopted in Texas can never, under any circumstance, have the effect of waiving the State's sovereign immunity from suit.² The *Heinrich* opinion identifies at least one example of such a waiver, thereby disproving this premise underlying the State's position on which

¹ *E.g.*, State's 12/15/08 Mot. for Reh'g at 12.

² *Heinrich*, 52 Tex. Sup. Ct. J. at 692-93 n.6 (citing 37.006(b) and explaining that by requiring that the State be made a party to certain suits, this subsection waives immunity).

the State has relied heavily throughout this appeal.³ Furthermore: the Trust strongly believes that in 2007, the 80th Texas Legislature added precisely such a waiver as to suits that seek real property boundary declarations, legislatively bringing boundary suits within the UDJA's scope and overruling the 2004 opinion holding that trespass to try title was an exclusive mechanism with which the UDJA could not permissibly overlap.⁴ This statutory change is an intervening development that renders one of the State's central arguments—that this action is a misnamed “trespass to try title” suit and therefore barred—positively wrong and obsolete. *Infra* Section 2.

For the reasons just outlined, the State's petition can and should simply be denied because this constitutionally and statutorily authorized case is already jurisdictionally sound. Since the suit may decide a real property boundary (at least with respect to the separable sand-and-gravel estate interest in the subject property), having the State itself as defendant is the simplest, wisest, and most logical course.

However: if the Court views the suit as being more appropriately brought as an official-capacity suit against a governmental actor and grants the petition for that reason, it should do no more than remand with instructions to modify the parties as the Court may direct. *Infra* Section 3.⁵ The State has described its assertions in this case as

³ Compare *Heinrich*, 52 Tex. Sup. Ct. J. at 692-93 n.6 with, e.g., State's 6/18/08 Br. on Merits at 31-32 (citing, *inter alia*, *W.D. Haden Co. v. Dodgen*, 158 Tex. 74, 308 S.W.2d 838, 839-40 (1958)) and State's 12/15/08 Mot. for Reh'g on Denial of Pet. at 12 (same).

⁴ See, e.g., House Research Org., Bill Analysis, Tex. H.B. 1787, 80th Leg., R.S. (explaining addition of new subsection to UDJA, Tex. Civ. Prac. & Rem. Code § 37.004(c), with the express intention of overruling *Martin v. Amerman*, 133 S.W.3d 262 (Tex. 2004)); Senate Research Ctr., Bill Analysis, Tex. H.B. 1787, 80th Leg., R.S. (2007) (same).

⁵ This is both efficient and correct under the usual rule that “[m]isjoinder of parties is not ground

“narrow,”⁶ and indeed they are: the State does not credibly deny that the Trust may bring some suit to have its constitutional and statutory rights determined by declaratory and other equitable relief; it asserts merely that by suing an agency itself rather than the agency’s director, the Trust has used the wrong vehicle, one that is afflicted by a formal flaw. This highly technical challenge is reminiscent of the ancient code-pleading system that Texas law abandoned decades ago. Even the State has described this aspect of its own appeal as “a meaningless exercise.”⁷ No sound logic requires or counsels the extreme remedy of dismissal, especially since the intervening *Heinrich* has newly clarified the “proper parties” aspect of such suits. *Id.*⁸

ARGUMENT

1. No extra waiver is needed to maintain this takings-based suit for declarations of constitutional rights, a rule that *Heinrich* reconfirms.

The State’s briefing openly agrees that if a suit is brought “under the Constitution”—i.e. is a suit to enforce constitutional rights—then the State itself is a proper defendant and there is no immunity from suit. State’s 12/15/08 Mot. for Reh’g at 12. This concession is wise. After all, “[i]t is well settled that no waiver of sovereign immunity is necessary before one may sue the State for the taking of a vested property right without due course of law.” *Tex. State Employees Union v. Tex. Workforce*

for dismissal of an action.” Tex. R. Civ. P. 41 (“Misjoinder and Non-joinder of Parties”). *Infra* Section 3. It is especially fair given the unanimous Court’s *Heinrich* comment that some prior statements have been “less than clear” when discussing proper parties in declaratory suits. *Heinrich*, 52 Tex. Sup. Ct. J. at 692 text accompanying n.6.

⁶ State’s 12/27/07 Pet. for Review at 12.

⁷ State’s 8/13/08 Reply at 16 n.8.

⁸ *Heinrich*, 52 Tex. Sup. Ct. J. at 693 (noting that an official-capacity suit “is, for all practical purposes,” a suit against the State itself).

Comm'n, 16 S.W.3d 61, 66 (Tex. App.—Austin 2000, no pet.). This Court’s unanimous *Heinrich* analysis expressly reaffirms this rule: “For example, a claimant who successfully proves a takings claim would be entitled to compensation, and the claim would not be barred by immunity even though the judgment would require the government to pay money for property previously taken.” *Heinrich*, 52 Tex. Sup. Ct. J. at 695 (emphasis added).

The *Heinrich* plaintiff did not allege a taking. *Id.* By contrast, the Trust in this case certainly does. Citing the takings provisions of the Constitutions of both Texas and the United States, the Trust’s live petition alleges that the State has unconstitutionally entered its property, has tried to limit or control the Trust’s use of its property, and has attempted to assert rights of ownership and control over the property involved. *See* Pl.’s 9/13/06 1st Am. Pet. at 3-4. The Trust also attached to its petition as Exhibit 1 an affidavit substantiating some of the material allegations made. Under the procedure that governs pleas to the jurisdiction, the Trust’s pleaded allegations and the evidence submitted in support of some of them must all be taken as true, and must be viewed in the light most favorable to the Trust. *Compare Heinrich*, 52 Tex. Sup. Ct. J. at 696-98 with *Texas Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-28 (2004) (explaining the ways in which the proper plea-to-the-jurisdiction standard “generally mirrors that of a summary judgment under Texas Rule of Civil Procedure 166a(c),” and must supply the nonmovant with protections comparable to those under that test).

As Texas opinions have traditionally observed, “suits to recover money or other property wrongfully taken or withheld by state officials from their rightful owners do not

implicate sovereign immunity because, in concept, the disputed property never belongs to the state.” *E.g.*, *City of Round Rock v. Whiteaker*, 241 S.W.3d 609, 634-35 (Tex. App.—Austin 2007, pet. denied, mot. for reh’g of denial of pet. filed) (emphasis added). Here, the State’s efforts to oppose the constitutional foundation of the Trust’s lawsuit have focused largely on paradoxical suggestions that would have the effect of locking landowners situated similarly to the Trust outside the courthouse doors in virtually every case. For example, though the State initially argued that shielding the State with jurisdictional immunity was fair as to navigability determinations because landowners could challenge those determinations with official-capacity *ultra vires* suits, in its very next brief it asserted just the opposite: that “[t]he trust cannot controvert the observations of the General Land Office surveyor without obtaining a legislative waiver of immunity.” *Compare* State’s 6/18/08 Br. on Merits at 13-14 (suggesting *ultra vires* suit as proper vehicle for challenge) *with* State’s 8/13/08 Reply Br. at 14-20 (emphasis added) (devoting an entire section to explanation of why the Trust cannot challenge the State’s navigability assertions through an *ultra vires* suit nor through any other mechanism short of obtaining a case-specific resolution from the Legislature granting permission to sue).

In sum, the State’s view is that the relevant executive agencies of Texas have the power to make unilateral “observations” about real property’s physical characteristics, to draw legal conclusions based on those characteristics, and from those conclusions to make unilateral ownership determinations, all without any realistic risk of having their determinations reviewed by anyone. In the State’s view, an aggrieved landowner has only one avenue of recourse: “private property owners must go to the Legislature for

relief”—in other words, they must seek and obtain an individualized resolution granting permission to sue through Chapter 107 of the Texas Civil Practice and Remedies Code. State’s 8/13/08 Reply Br. at 20. But as every year’s legislature seems to reconfirm, obtaining a Chapter 107 resolution granting permission to sue is, as a practical matter, all but impossible. Indeed, to the knowledge of the undersigned counsel, the Concurrent Resolution that authorized the *Brainard* lawsuit⁹ over twenty years ago was the last time landowners have succeeded in obtaining a resolution authorizing a land boundary suit, and the undersigned is aware of several specific and unsuccessful attempts.

The State’s other suggestion is that the Trust should simply do whatever it wants to do on its property and just wait and see if the State of Texas files a criminal complaint against it. This is no solution at all. It is offensive to suggest that in a civilized society, conscientious and well-intentioned private citizens should have no realistic alternative for protecting and confirming their vested property rights than to take action based on their own legal analysis and, in so doing, expose themselves to the possibility of having to defend themselves against a criminal charge. The mere fact that the State would resort to making such an outlandish suggestion shows that the State’s overreaching interpretation of Texas immunity law cannot possibly be right.

As one very recent post-*Heinrich* opinion has observed, and as the State’s own briefing in places admits, the State has no immunity against suits to enforce constitutional rights. *Compare Scott v. Alphonso Crutch Life Support Ctr.*, No. 03-06-00003-CV, 2009 WL 1896073, at *1-*5 (Tex. App.—Austin July 2, 2009, no pet. h.) (mem. op.)

⁹ See generally *Brainard v. State*, 12 S.W.3d 6 (Tex. 1999).

(explaining that under *Heinrich*, immunity does not bar declaratory claims founded on constitutional rights) *with* State’s 12/15/08 Mot. for Reh’g of Denial at 12 (agreeing that “declaratory relief is available directly against the government...if a plaintiff brings a suit...under the Constitution”). Such suits can and do validly seek and obtain declaratory, injunctive, or other prospective relief. *E.g.*, *Scott*, 2009 WL 1896073, at *2-*4. Such constitutionally-based relief is exactly what the Trust filed suit in this case to pursue. The trial court found its pursuit jurisdictionally sound, and the Court of Appeals agreed. After more than eighteen months’ worth of briefing in this Court, the State has shown no valid basis for disturbing that outcome, and it should not be disturbed.

The takings language in our Texas Constitution is broader than its federal counterpart: it protects citizens not just when property is taken but also when it is damaged or destroyed. When the State tells the Sawyer family members that they cannot sell sand and gravel from their own pasture without a permit from the State of Texas, value has been diminished. Destruction of value and use of Sawyer property has occurred, and immunity does not shield the State. Governmental immunity is waived under these circumstances, making irrelevant any analysis of the question of whether the State itself or one of its misguided employees should be the focus of the claim.

2. This is not a “trespass to try title” suit, and new UDJA language creates new statutory jurisdiction for this legislatively authorized “boundary line” suit.

One of the State’s linchpin assertions is that even though neither the Trust’s live petition nor the Court of Appeals’ opinion anywhere mentions nor even alludes to the

notion of a “trespass to try title” action under Chapter 22 of the Texas Property Code,¹⁰ this suit must be construed as one nonetheless. This idea is apparently very important to the State: its petition for review makes this assertion its very first sentence. State’s 12/27/07 Br. at 1 (“The court of appeals held that the Uniform Declaratory Judgments Act creates a waiver of immunity from suit for trespass-to-try-title claims”) Thereafter, the State’s briefs—up to and including its most recent, the 6/01/09 Supplemental Brief—have continually revisited, repeated, and indispensably relied on this assertion. *Compare id. with, e.g.,* State’s 6/01/09 Supp. Br. at 3-5 (framing as its heading the thesis statement that the Trust’s suit is incurably barred by sovereign immunity “because it is in substance a trespass-to-try-title claim” and then arguing that various implications flow from this assertion) (emphasis added).¹¹

In essence, the State’s clinging to “trespass to try title” and its insistence that the present suit must be placed under that heading accuse the Trust of artful pleading and, by extension, accuse the Court of Appeals of artful opinion writing too.¹² But the absence of “trespass to try title” from the Trust’s petition and Court of Appeals’ opinion is accurate, not “artful,” for at least two reasons. First, this dispute concerns ownership not of any stream bed itself but rather of the sand and gravel contained within that stream bed. The State does not assert that it owns the stream bed itself but instead concedes that the bed

¹⁰ Tex. Property Code § 22.001-.045.

¹¹ *See also, e.g.,* State’s 12/15/08 Mot. for Reh’g of Denial at 5 (“The State is immune from suit for attempts to try its title to real property.”) (emphasis added). The State’s briefing contains countless other examples of similar statements.

¹² *Cf., e.g., In re Int’l Profit Assocs., Inc.*, 274 S.W.3d 672, 677-78 (Tex. 2009) (explaining that claims must be treated according to their actual substance, and “artful pleading” set aside).

itself is owned by the Trust; the State expressly limits its ownership claim solely to asserting a separate-estate interest in the sand and gravel alone. *See* State’s 6/18/08 Br. on Merits at 2-5.¹³ As such, while technically this case certainly does involve a disputed interest in “real property” (the separable estate of the sand and gravel while in place¹⁴), it is “real property” in a narrower sense than boundary disputes typically involve. Thus, it is not automatically self-evident that “trespass to try title” could necessarily apply.

Second and more importantly, the State’s insistence that “trespass to title” must supply the jurisdictional model for this case is foreclosed by new subsection 37.004(c) of the UDJA. This subsection was added in 2007 by the 80th Legislature expressly for the purpose of foreclosing the State’s now-outdated argument that a property owner seeking to resolve a boundary line must proceed either through a “trespass to try title” suit or else not at all. *Compare* House Research Org., Bill Analysis, Tex. H.B. 1787, 80th Leg., R.S. and Senate Research Ctr., Bill Analysis, Tex. H.B. 1787, 80th Leg., R.S. (2007) *with, e.g.,* State’s 12/27/07 Pet. for Rev. at 1; State’s 6/01/09 Supp. Br. on Merits at 3-5. This

¹³ This divided condition of ownership results from the unusual structure of estates that was established in 1929 by the Small Bill. Tex. Rev. Civ. Stat. art. 5414a. The Small Bill provided that every navigable stream bed conveyed by a valid grant or patent issued more than ten years before the Act’s effective date would remain privately owned by the grantees, and expressly quitclaimed any interest the State might have asserted in them; provided, however, that this quitclaim reserved, among other interests, the sand and gravel within the privately owned bed as remaining property owned by the State. *Id.* It is undisputed here that the Trust owns the relevant bed under patents or grants that, being more than 100 years old, were confirmed and quitclaimed by the Small Bill in 1929. *Compare id. with, e.g.,* Pl.’s 4/15/08 Resp. to Pet. for Rev. at 1 (citing C.R. Vol. 1, p. 18) and Pl.’s 7/08/08 Br. on Merits at 2 (same); *see also* State’s 6/18/08 Br. on Merits at 2-5 (explaining State’s view that the bed at issue is “a Small Bill stream,” meaning that the bed itself is privately owned but that the sand and gravel contained therein are not).

¹⁴ Minerals in place, though held by an estate separate from the surface estate, are real property until physically removed from their natural location, at which time they become personal property. *E.g., Hager v. Stakes*, 116 Tex. 453, 294 S.W. 835, 842 (1927); *Kelvin Lumber & Supply Co. v. Copper State Mining Co.*, 232 S.W. 858, 860 (Tex. Civ. App.—El Paso 1921, writ dism’d w.o.j.).

important new subsection provides as follows:

Notwithstanding Section 22.001, Property Code [i.e. the trespass to try title statute], a person described by Subsection (a) [i.e. a person who asserts an interest under a deed or other writing, or whose rights, status, or other legal relations” may be affected by a statute or other writing] may obtain a determination under this chapter when the sole issue concerning title to real property is the determination of the proper boundary line between adjoining properties.

Tex. Civ. Prac. & Rem. Code § 37.004 (added by Act of May 21, 2007, 80th Leg. R.S., ch. 305, § 1, 2007 Tex. Gen. Laws 581, 581) (eff. June 15, 2007).

The legislative history plainly shows that this subsection was specifically intended to displace, with new legislation, this Court’s 2004 holding that “trespass to try title” was the exclusive mechanism for resolving boundary lines in Texas. *See* House Research Org., Bill Analysis, Tex. H.B. 1787, 80th Leg., R.S. (describing specific intent to overrule *Martin v. Amerman*, 133 S.W.3d 262, 264-68 (Tex. 2004)); *see also* Senate Research Ctr., Bill Analysis, Tex. H.B. 1787, 80th Leg., R.S. (2007) (same). That former exclusivity’s effect was to preempt the subject matter field, placing boundary location outside the universe of subject matters and controversies that may be properly resolved by the UDJA. *Martin*, 133 S.W.3d at 264-68. Under new section 37.004(c), today the exact opposite is true: boundary line location is one of the very few particular subject matters that today’s UDJA expressly enumerates as falling specifically within its scope. Tex. Civ. Prac. & Rem. Code § 37.004(c).

This legislative change is important for two intertwined reasons. First, this change either destroys or diminishes the relevance of most if not all of the immunity precedent on which the State’s core arguments rely, most or all of which involved “trespass-to-try-

title” suits.¹⁵ If this were not true, the State would have no cause to cling so desperately to a characterization of this suit that is at odds not only with the wording of the Trust’s live petition but also with the wording of the Court of Appeals’ opinion below (whose logic the State has misdescribed from this proceeding’s very first words). *See* State’s 12/27/07 Pet. for Rev. at 1 (1st sentence, quoted earlier above).

Second, new section 37.004(c) can easily and logically be construed as a legislative waiver of any sovereign immunity that has ever in the past impeded private titleholders’ efforts to litigate their boundary disputes against the State. Although the overruled *Martin v. Amerman* was itself a dispute between two private parties and did not involve a governmental party, *Martin* concerned its own analysis principally on two of the Court’s earlier opinions, each of which was a boundary dispute between a private titleholder and the State.¹⁶ The Legislature is presumed to have been aware of this fact when it undertook to overrule *Martin*. *Acker v. Texas Water Comm’n*, 790 S.W.2d 299, 301 (Tex. 1990) (“A statute is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it.”). By this same principle, the Legislature is also presumed to have been aware of the several Texas authorities, reviewed recently in *Heinrich*, indicating that the State itself could be a proper defendant in many UDJA suits. *Compare id. with Heinrich*, 52 Tex. Sup. Ct. J. at

¹⁵ For example, the most important opinion on which the State’s immunity arguments are based, *State v. Lain*, was specifically and explicitly a “trespass to try title” action in both its form and its substance. 162 Tex. 549, 349 S.W.2d 579, 550 (1961) (quoting Court of Appeals’ description of suit as an “action in trespass to try title”).

¹⁶ *Martin*, 133 S.W.2d at 267-68 (relying on *John G. & Marie Stella Kenedy Mem’l Found. v. Dewhurst*, 90 S.W.3d 268, 289 (Tex. 2002), and also concerning itself closely with *Brainard v. State*, 12 S.W.3d 6, 29 (Tex. 1999)).

692 (listing samples of opinions in which agency itself, and not just a government actor, was the defendant in declaratory suits). From this backdrop, it can strongly be argued that new section 37.004(c) was legislatively intended to waive the immunity traditionally asserted by the State in boundary cases.

Though it is too soon after the new section's enactment for a comprehensive body of intermediate opinions considering this question to have evolved, at least one opinion—rather ironically, an opinion that the State in this appeal previously supplied to this Court in a January 2009 letter¹⁷—tipped its hat strongly in that direction earlier this year. *See Veterans Land Bd. v. Lesley*, 281 S.W.3d 602, 627 (Tex. App.—Eastland 2009, pet. filed) (suggesting in midst of immunity analysis that if the dispute presented were a “boundary line” dispute, which it found that case was not, new 37.004(c) might defeat the State's assertion of immunity from suit). It also is true that one other recent opinion suggested the opposite conclusion, giving a very narrow interpretation to new section 37.004(c) and finding that on the particular facts presented, the new section was not factually relevant and therefore did not change the immunity analysis on those facts. *State v. BP Am. Prod. Co.*, ___ S.W.3d ___, No. 03-07-00685-CV, 2009 WL 1255812, at *9 n.23 & accompanying text (Tex. App.—Austin May 8, 2009, no pet. h.).

What is important about each of these two opinions, *Veterans Land Board* and *BP America*, is that each one discarded new section 37.004(c) not on the ground that the section did not constitute an immunity waiver but instead on the ground that the dispute

¹⁷ *See* State's 1/29/09 Letter from State's Counsel (Kristofer S. Monson) to the Honorable Supreme Court of Texas (enclosing copy of opinion referenced in principal text above).

at bar did not satisfy the section’s factual requirements: it was not a sole-issue “boundary line” determination as the new section’s text requires. *Veterans Land Bd.*, 281 S.W.3d at 627; *BP Am. Prod. Co.*, 2009 WL 1255812, at *9 n.23 & accompanying text. Meanwhile, multiple opinions illustrate that when arguing and justifying the basis of its claimed immunity against boundary lawsuits, the State very frequently has invoked *Martin v. Amerman* and its “exclusive method” holding as the core premise on which its argument has revolved. *See, e.g., Porretto v. Patterson*, 251 S.W.3d 701, 707-08 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing *Martin*, 133 S.W.3d at 264, and noting that “[i]t is this line [i.e. *Martin* and its predecessor opinions treating trespass-to-try-title as the exclusive method for resolving boundary disputes] which the government contends supports its plea to the jurisdiction”).

When viewed together with *Heinrich*, the opinions reviewed above, the text of new section 37.004(c) itself, and the connection between immunity analyses and the now-overruled *Martin v. Amerman* all point to one conclusion: that in this case, the Court of Appeals’ opinion should stand undisturbed. The Court of Appeals held that the river’s navigability—a question that with respect to the separable sand-and-gravel-estate will determine where the boundary line is, if any, between any State-owned sand and gravel and the adjoining privately deeded and privately owned earth—was not barred by immunity, and that this determination can properly proceed under the UDJA. In *Heinrich* this Court explicitly rejected the State’s oft-repeated premise that sections of the UDJA cannot be legislative waivers of immunity from suit. *Heinrich*, 52 Tex. Sup. Ct. J. at 692-93 n.6. Respectfully, the Trust suggests that new section 37.004(c) constitutes precisely

such a waiver, and that it therefore bolsters—together with *Heinrich*—the Court of Appeals’ holding that the State’s plea to the jurisdiction here was properly denied.

3. In the alternative, if the State’s petition is granted to any extent, proceedings should at most simply remand the suit with instructions to modify parties.

In its most recent filing, the State dwells on asserting that if this Court believes that different parties other than the State itself should have been sued, then dismissal with prejudice is the right result. The State admits, however, that dismissal is the exception and not the rule in immunity appeals, and that this extreme remedy should be used “only when the jurisdictional defect is incurable.” State’s 6/01/09 Supp. Br. at 5 (citing *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007)).

This case’s facts and allegations plainly show that if the Court believes for any reason that the suit as it now exists cannot properly proceed, any arguable defect can easily be cured. As already shown, the Trust’s existing petition pleads a classic pattern of unconstitutional takings-based conduct. *Supra* Section 1. Thus, it may properly proceed either as a classic takings claim against the State entity itself, as an *ultra vires*-style official-capacity suit against a government actor behaving unlawfully, or as both.

The State’s protestations to the contrary fail because they smack of the old “code pleading” mentality that fell into disfavor decades ago in Texas jurisprudence. They also violate the ordinary rule of pleading that “[m]isjoinder of parties is not ground for dismissal of an action.” Tex. R. Civ. P. 41 (“Misjoinder and Non-joinder of Parties”). If having the Executive Director of the Texas Parks and Wildlife Department named as an official-capacity defendant is the “be all and end all” of jurisdiction in this dispute, then

remanding the case for proper joinder to occur and for the issues to be further developed is the result that is prudent, efficient, and fair. Though this result would be correct and fair under any circumstances, it is especially so in light of the Court’s recent unanimous observation that when it comes to identifying the proper parties in a declaratory suit against the State, Texas jurisprudence has—until *Heinrich*—been decidedly “less than clear.” *Heinrich*, 52 Tex. Sup. Ct. J. at 692 text accompanying n.6.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Sawyer Trust respectfully prays that the State’s Petition for Review in this matter be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of Respondent's Response to Petitioner's Supplemental Brief on the Merits by U.S. Mail on July 10, 2009, on:

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