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December 4, 2009

VIA HAND DELIVERY

Mr. Blake A. Hawthorne, Clerk
Supreme Court of Texas
201 W. 14th Street, Room 104
Austin, Texas 78701

RE: *Texas Lottery Commission v. First State Bank of DeQueen*, No. 08-0523
(scheduled for oral argument on December 16, 2009)

Dear Mr. Hawthorne:

The State of Texas submits this letter because it has just determined that a recent decision of this Court appears to have significant jurisdictional implications for this case. See *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009). Accordingly, the State asks that this letter be circulated to the members of the Court.

* * *

Originally, the State of Texas filed a petition for review in this case, seeking reversal of the judgment below on the ground that the court of appeals erred in denying effect to a Texas consumer protection statute designed to protect lottery winners against predatory business practices.

But a recent decision of this Court (issued after the close of merits briefing in this case) appears to deprive Texas courts of jurisdiction to resolve this dispute—thereby necessitating vacatur of the judgment below and dismissal of the case for want of jurisdiction.

Plaintiffs in this case brought suit against a single defendant—the Texas Lottery Commission. They did not include any state official as a defendant. That omission appears to be devastating to the jurisdiction of Texas courts to hear this case, under this Court's recent ruling in *Heinrich*.

Letter to Blake A. Hawthorne, Clerk
December 4, 2009
Page 2

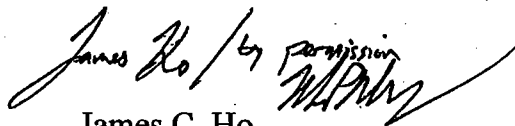
Heinrich made clear that, in cases such as this—where a plaintiff seeks declaratory and injunctive relief to prevent a state official from violating a state statute—the suit must be brought against a state official, and not against a governmental entity. *Id.* at 372-73.

The reason is this: “[T]he rule that *ultra vires* suits are not ‘suit[s] against the State within the rule of immunity of the State from suit’ derives from the premise that the ‘acts of officials which are not lawfully authorized are not acts of the State.’” *Id.* at 373 (quoting *Cobb v. Harrington*, 190 S.W.2d 709, 712 (1945)) (emphasis added). “[I]t follows that these suits cannot be brought against the *state*, which retains immunity, but must be brought against the *state actors* in their official capacity.” *Id.* (emphasis added). As a result, “the governmental entities themselves—as opposed to their officers in their official capacity—remain immune from suit.” *Id.* at 372-73.

The State of Texas is unaware of any basis for distinguishing this case from the reach of *Heinrich*. (Footnote 6 of *Heinrich* does not apply here, for at least two reasons. First, although Plaintiffs seek to deny effect to a duly enacted Texas statute, they do so as a matter of statutory interpretation, not constitutional invalidation. Second, this case involves a state entity, not a municipality, and under the express text of the Declaratory Judgment Act, it is only a “municipality” that “must be made a party” and therefore waives its immunity.)

Accordingly, the Court should vacate the judgment of the court of appeals and dismiss the case for want of jurisdiction.

Sincerely,

A handwritten signature in black ink that reads "James Ho" followed by a flourish. To the right of the signature, the word "permission" is written in a smaller, cursive script.

James C. Ho
Solicitor General

JCH/sl
Attachment

cc: Jeffrey S. Boyd (via Certified Mail, Return Receipt Requested)
Max R. Tarbox (via Certified Mail, Return Receipt Requested)