No. 24-0447

In the Supreme Court of Texas

THE STATE OF TEXAS AND KYLE MADSEN
IN HIS OFFICIAL CAPACITY AS DIRECTOR OF RIGHT OF WAY,
Petitioners,

v.

JRJ PUSOK HOLDINGS, LLC,
Respondent.

On Petition for Review
from the Fourteenth Court of Appeals, Houston

REPLY BRIEF FOR PETITIONERS

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Introduction

Pusok's arguments contradict basic principles of sovereign immunity and waiver. Sovereign immunity is presumed anytime a plaintiff files suit to control state action. Yet Pusok asks the Court to carve repurchase claims out of the sovereign-immunity bar and allow suits to force the State to sell land, potentially at a loss, that the State lawfully acquired with taxpayer funds. The State properly declined to offer the land to Pusok under the repurchase statutes, but even if the State were mistaken, sovereign immunity still protects the State from being haled into Court absent legislative permission.

Pusok fares no better when attempting to identify a clear and unambiguous waiver of immunity. A significant portion of Pusok's waiver argument rests on the theory that, if the Legislature tells the government to do something, it necessarily waives sovereign immunity if the government does not. But sovereign immunity protects the public from having to pay for the government's improvident or even unlawful actions. It is for the Legislature to decide when and under what circumstances taxpayer funds should be spent defending state action in court. And here, there is no language indicating that the Legislature waived sovereign immunity for repurchase claims.

Regardless, Pusok's claim does not fall within any potential waiver. Pusok filed suit in the wrong court, the property Pusok seeks to repurchase was not acquired "through eminent domain," and the repurchase statutes do not require the State to section off small pieces of lawfully acquired property for repurchase. Because two

courts of appeals have now gotten the waiver issue wrong, the Court should grant the petition and reverse in part the Fourteenth Court's judgment.

ARGUMENT

I. Sovereign Immunity Bars Repurchase Claims, and the Legislature Has Not Waived It.

Responding to the State's first argument—that the Legislature did not waive sovereign immunity for repurchase claims—Pusok urges the Court to conclude that sovereign immunity does not extend to repurchase claims, so no waiver is required. Resp. Br. 24-29. The Court should decline Pusok's invitation to adjust the boundaries of sovereign immunity. Pusok offers no compelling reason to hold that repurchase claims should be treated differently from other lawsuits in which sovereign immunity bars private plaintiffs from attempting to control state action.

Because sovereign immunity covers repurchase claims, Pusok must identify "clear and unambiguous language" waiving that immunity before Pusok's suit can move forward. Tex. Gov't Code § 311.034. Yet Pusok buries its textual argument in the middle of a free-floating purpose-based analysis, arguing that the Legislature would not have enacted the repurchase statutes without waiving immunity for landowners to enforce them. Resp. Br. 29-39. But that is a misunderstanding of the doctrine of sovereign immunity, which recognizes the Legislature's authority to decide when allegedly improvident government actions should result in lawsuits against government entities. *See Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117, 122 (Tex. 2015). Because there is no textual, contextual, or historical reason to conclude

that Legislature intended to waive the State's immunity from suit, Pusok's repurchase claim must be dismissed.

A. Sovereign immunity prohibits repurchase claims absent a waiver.

Rather than identify a waiver of immunity, Pusok initially asks the Court (at 24-29) to conclude that sovereign immunity does not extend to repurchase claims. Raising this issue for the first time on appeal, Pusok argues that repurchase claims do not threaten the public fisc or create separation-of-powers concerns, so the Court should carve these claims out of the normal bar of immunity. Neither the Fifth nor Fourteenth Court questioned whether sovereign immunity existed when they were considering repurchase claims but presumed it did. *See JRJ Pusok Holdings, LLC v. State* (*JRJ Pusok I*), 693 S.W.3d 679, 683-86 (Tex. App.—Houston [14th Dist.] 2023, pet. pending); *State v. LBJ/Brookhaven Invs., LP*, 650 S.W.3d 922, 931-32 (Tex. App.—Dallas 2022, pet. denied). This Court should not reach a different conclusion.

1. As this Court has long held, "[w]here 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." *Griffin v. Hawn*, 341 S.W.2d 151, 152 (Tex. 1960); *see also Hosner v. DeYoung*, 1 Tex. 764, 769 (1847) ("[N]o state can be sued in her own courts without her consent, and then only in the manner indicated by that consent."). Thus, "[s]overeign immunity generally bars lawsuits against the State absent legislative consent to be sued." *Hidalgo Cnty. Water Improvement Dist. No. 3 v. Hidalgo Cnty. Irrigation Dist. No. 1*, 669 S.W.3d 178, 182 (Tex. 2023). Indeed, there is a "heavy presumption in favor of immunity." *City of Galveston v. State*, 217 S.W.3d 466, 469 (Tex. 2007).

While the Court has provided a variety of reasons for the doctrine, it has identified a "pragmatic" one that is relevant to Pusok's argument: "to shield the public from the costs and consequences of improvident actions of their governments." *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006). In other words, sovereign immunity does not just protect the government from suit when it follows the law but also when it doesn't. Unless the Legislature chooses to waive immunity, the "burden of shouldering" the consequences of wrongful government actions falls on the injured individuals. *Brown & Gay Eng'g*, 461 S.W.3d at 121-22 (quoting *Bacon v. Tex. Hist. Comm'n,* 411 S.W.3d 161, 172 (Tex. App.—Austin 2013, no pet.)). And that immunity holds "however improvident, harsh, unjust, or infuriatingly boneheaded these acts may seem." *Bacon*, 411 S.W.3d at 172 (internal quotation marks and citation omitted) (quoted in *Brown & Gay Eng'g*, 461 S.W.3d at 122).

Cases in which the Court has concluded that immunity does not exist are cases that do not seek to control state action or impose consequences for allegedly improvident government acts. For example, in *City of Conroe v. San Jacinto River Authority*, the Court concluded that immunity did not apply to a suit under the Expedited Declaratory Judgment Act regarding the validity of public securities because (1) the action was *in rem*, (2) it did not concern allegedly improvident government acts, and (3) it posed little risk to the public treasury because the Cities had the choice to participate. 602 S.W.3d 444, 458 (Tex. 2020). And in *Hidalgo County Water Improvement District No. 3*, the Court concluded that sovereign immunity did not bar eminent-domain proceedings that were also *in rem*, did not concern improvident government actions, and had little impact on the public fisc. 669 S.W.3d at 186. The same

cannot be said for claims under the repurchase statutes, which are not *in rem*, concern allegedly improvident government actions, and may well impact the public fisc. Accordingly, sovereign immunity presumptively bars Pusok's suit.

2. Pusok, however, seeks to change this status quo, asserting that the Court retains the authority to decide whether sovereign immunity "should be modified or abrogated under particular circumstances." *Id.* at 183. But Pusok offers no persuasive reason for the Court to eliminate immunity in this new context.

First, Pusok argues (at 25) that sovereign immunity does not apply because Pusok is not seeking damages but only the recovery of property for which Pusok will pay some amount of money. That is a distinction without a difference. Sovereign immunity applies to any suit that seeks to control state action. *Griffin*, 341 S.W.2d at 152. As the Court has explained, "[w]hile the doctrine of sovereign immunity originated to protect the public fisc from unforeseen expenditures that could hamper governmental functions, it has been used to shield the state from lawsuits seeking other forms of relief." *TxDOT v. Sefzik*, 355 S.W.3d 618, 621 (Tex. 2011) (internal citations omitted). Further, sovereign immunity does not protect the State only from damages, but also from the expenses incurred in defending against lawsuits in the first place. *See Brown & Gay Eng'g*, 461 S.W.3d at 121 (describing purpose of immunity to prevent shifting tax resources to "defending lawsuits and paying judgments").

Thus, suits seeking declaratory or injunctive relief are frequently barred by sovereign immunity, even if no damages are sought. *E.g.*, *Abbott v. Mexican Am. Legis. Caucus, Tex. House of Reps.*, 647 S.W.3d 681, 703 (Tex. 2022) (declaratory relief barred). Trespass-to-try-title claims remain barred because they attempt to control

government action and impose costs for allegedly improvident government acts. *Hidalgo Cnty. Water Improvement Dist. No. 3*, 669 S.W.3d at 187-88. And in *Hays Street Bridge Restoration Group v. City of San Antonio*, the Court held that immunity bars suit for specific performance of contracts absent a legislative waiver, even when the plaintiff does not seek damages. 570 S.W.3d 697, 704 (Tex. 2019).

Further, even apart from the cost of defending such lawsuits, a repurchase claim may still damage the public fisc. The State could be forced to sell, at a loss, land that it lawfully acquired. *See* Tex. Prop. Code § 21.103(b) (requiring resale at the price paid at the time of the taking). And, of course, there is no guarantee that a repurchase plaintiff would seek only to repurchase property; circumstances could arise, such as the State's sale of the land to a third party, that might prompt the landowner to seek damages instead. It is, therefore, for the Legislature to decide whether to expose the State to that type of liability.

Second, Pusok asserts (at 26-28) that repurchase lawsuits do not implicate separation-of-powers concerns because the Legislature provided for repurchase in the first place. But the separation-of-powers concern here is permitting a lawsuit against the State when the Legislature has chosen not to waive the State's immunity—a decision that this Court has repeatedly held is solely within the Legislature's control. *Campbellton Rd., Ltd. v. City of San Antonio ex rel. San Antonio Water Sys.*, 688 S.W.3d 105, 114 (Tex. 2024); *City of Dallas v. Albert*, 354 S.W.3d 368, 373 (Tex. 2011). Pusok's theory would reverse the usual sovereign-immunity presumption anytime a plaintiff alleges that the government violated a statutory obligation.

Pusok's argument on this point is very similar to a waiver argument, and this Court has recognized that there is often little difference between finding a waiver of immunity and declaring immunity does not exist. *City of Galveston*, 217 S.W.3d at 471. But "[d]ue to the risk that the latter could become a ruse for avoiding the Legislature, courts should be very hesitant to declare immunity nonexistent in any particular case." *Id.* Acceptance of Pusok's argument would call into question whether sovereign immunity exists with respect to a multitude of statutes that regulate government conduct. The Court should be "very hesitant" to do so.

Third, citing *Reata Construction Corp. v. City of Dallas*, 197 S.W.3d 371, 377 (Tex. 2006), Pusok asserts (at 28-29) that, by filing (and then dismissing) condemnation proceedings, the State has opened itself up to subsequent lawsuits regarding repurchasing the property because repurchase claims are "germane to, connected with, and properly defensive to" the dismissed condemnation suit. This is not a *Reata* situation. The State has not filed suit for monetary damages, and Pusok has not asserted a defensive counterclaim that would offset those damages. *Id.* at 377. It is a separate action for new relief.

Pusok makes a similar argument regarding cases in which the Court has found immunity for attorneys' fees waived when the State files or joins a suit. *See Kinnear v. Tex. Comm'n on Human Rights ex rel. Hale*, 14 S.W.3d 299, 300 (Tex. 2000); *State ex rel. Best v. Harper*, 562 S.W.3d 1, 19 (Tex. 2018). But the State has not voluntarily filed or joined this lawsuit. So accepting Pusok's theory would require the Court to extend its rationale to conclude that by filing and then dismissing eminent-domain

proceedings, the State no longer has immunity for subsequent repurchase lawsuits. The Court should not stretch its precedent to include this new situation.

Pusok has failed to demonstrate that the typical rule—that sovereign immunity applies to suits that seek to control government action—should not apply to repurchase claims. Accordingly, the Court must determine whether a waiver of sovereign immunity exists.

B. The Legislature did not explicitly waive immunity for repurchase claims.

Any waiver of sovereign immunity must be in clear and unambiguous language. Tex. Gov't Code § 311.034. And although statutory interpretation always begins with the text, Pusok's argument does not. Instead, Pusok relies on context and history to suggest that the Legislature must have intended immunity to be waived for repurchase claims. But this Court's analysis "does not turn on speculation as to whether the Legislature envisioned a particular result but rather depends on what the statute's text 'clearly says.'" *Bexar Appraisal Dist. v. Johnson*, 691 S.W.3d 844, 848 (Tex. 2024) (quoting *Miles v. Tex. Cent. R.R. & Infrastructure*, 647 S.W.3d 613, 633 (Tex. 2022) (Young, J., concurring)). Pusok cannot make up for the textual silence in this case with arguments about legislative purpose.

1. Text

Pusok does not begin with the text of the relevant statutes, perhaps because the only courts to address the text have recognized that there are no "magic words" of "clear waiver" in chapter 21 of the Property Code. *JRJ Pusok I*, 693 S.W.3d at 683 (quoting *LBJ/Brookhaven*, 650 S.W.3d at 931). The only potential textual waivers of

sovereign immunity any court has identified are sections 21.003 and 21.101(c)—neither of which mentions immunity. Instead, as the State explained in its opening brief (at 12-14), these statutes concern subject-matter jurisdiction and ensure that district courts may consider all issues properly before them.

With respect to section 21.003, Pusok does not deny that it concerns subject-matter jurisdiction but suggests that it also waives immunity. Resp. Br. 38. Pusok provides no textual analysis to support that theory, instead falling back on its contextual argument that section 21.003 is in the same chapter of the Property Code as the repurchase statutes. And the Third Court's decision in *City of Killeen v. Oncor Electric Delivery Co.*, 709 S.W.3d 746 (Tex. App.—Austin 2025, no pet. h.), should not change the Court's mind. There, the City conceded (wrongly, in the State's view) that section 21.003 waived immunity in some cases and then argued that its case did not fall within the scope of the waiver. *Id.* at 758. The Third Court likewise treated section 21.003 as a waiver and merely asked in what circumstances it applied. *Id.* at 760.

Pusok offers nothing more with respect to section 21.101(c), which has the additional weakness of failing to mention governmental entities at all. Instead, Pusok just states that nothing prohibits section 21.101(c) from both granting jurisdiction and waiving immunity. And while such a statute could exist, the immunity waiver would still need to be in clear and unambiguous language—language that is absent from section 21.101(c).

2. Context

The failure to begin with text infects the rest of Pusok's analysis. Rather than discuss the context of the relevant statutes—sections 21.003 and 21.101(c)—in order to better understand their meaning, Pusok focuses on the context of the repurchase statutes generally and attempts to draw conclusions from their location in the Property Code. Resp. Br. 31-34.

Pusok argues that, because the repurchase statutes are within Texas Property Code chapter 21 ("Eminent Domain"), they are limits on the State's authority to condemn property that must be enforceable. But repurchase claims are separate from eminent-domain proceedings, even if they are statutory neighbors. And the State does not require a waiver of immunity before filing eminent-domain proceedings. Pusok does not cite any precedent holding that the mere proximity of a statutory scheme (which requires a waiver of immunity) to another statutory scheme (which does not require a waiver of immunity) somehow means immunity has been waived for the first. The State may be obligated to follow both schemes, but that is a separate question from whether the Legislature has waived sovereign immunity if the State fails to do so.

3. History

The State's statutory-history analysis demonstrated that section 21.003 is not a waiver of sovereign immunity because it originally did not include any governmental entities. Act of Mar. 16, 1889, 21st Leg., R.S., ch. 22, § 1, 1889 Tex. Gen. Laws 18, 18. Instead, it allows specific property claims to be brought in a single suit within one

court, as this Court has recognized. *See City of Houston v. Adams*, 279 S.W.2d 308, 312 (Tex. 1955); *Tex. Pipe Line Co. v. Hunt*, 228 S.W.2d 151, 154 (Tex. 1950).

Pusok's historical analysis does not contradict this assessment, as it merely cites the enactment of the repurchase acts and *legislative* history—the kind of history that is "generally useless to courts." *Brown v. City of Houston*, 660 S.W.3d 749, 755 (Tex. 2023). Statutory history concerns how the law has changed over time—the portions amended and repealed. *Id.* It "does not concern collateral or speculative questions such as the policy goals that motivated individual legislators." *Id.* Pusok notes (at 34-36) that (1) the repurchase statutes were enacted, (2) the right-of-way exemption was removed, and (3) section 21.101(c) was enacted. The State does not question any of these facts. But they do not show that the Legislature intended to waive immunity for claims under the repurchase statutes. They demonstrate only that the Legislature intended for condemnors to re-sell land in certain circumstances and that district courts would have subject-matter jurisdiction over repurchase issues.

Pusok also attempts to derive meaning from several pieces of legislative history—a Bill Analysis and Fiscal Note. Resp. Br. 35-46 (citing House Comm. on Land & Res. Mgmt., Bill Analysis, Tex. S.B. 18, 82d Leg., R.S. (2011); Fiscal Note, Tex. S.B. 18, 82d Leg., R.S. (2011)). Although the Court does not typically consider such documents, even if it did, neither reflects an unambiguous legislative intent to waive immunity. They reflect only the desire, expressed in the text of the repurchase statutes themselves, that condemnors re-sell their property in certain circumstances. Accordingly, Pusok has failed to demonstrate that the repurchase statutes, or any

statute in chapter 21, waives the State's sovereign immunity for Pusok's repurchase claim.

C. The repurchase statutes do not implicitly waive immunity.

1. As explained in the State's opening brief (at 20-23), an implicit waiver of sovereign immunity can be found if the text of a statute would make no sense without a waiver. This is not a purpose-based analysis, in which the Court decides whether the purposes of the statute would best be served by inferring a waiver. Rather, it focuses on the text and whether the text still has meaning without a waiver. *See Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1, 6 (Tex. 2000) ("[W]e must look at whether a statute makes any sense if immunity is not waived."). Thus, the Court looks to whether there is a "sensible construction" of the statute absent a waiver, *id.* at 7, or whether there is "no purpose" for the statute without a waiver, *City of LaPorte v. Barfield*, 898 S.W.2d 288, 296 (Tex. 1995). Here, the repurchase statutes serve several purposes even without a waiver.[1]

First, the repurchase statutes direct government action. It is, thus, not the State's position, as Pusok asserts (at 41), that the repurchase statutes do not apply to governmental entities. They do. Further, the Court presumes compliance with the law, *Dohlen v. City of San Antonio*, 643 S.W.3d 387, 396 (Tex. 2022), and has made clear that statutory commands are not to be disregarded, *In re Stetson*

[1] Pusok does not appear to argue that sections 21.003 and 21.101(c) serve no purpose absent a waiver. They clearly do, as they grant subject-matter jurisdiction to district courts.

Renewables Holdings, LLC, 658 S.W.3d 292, 295 (Tex. 2022) (orig. proceeding). But that does not mean the Legislature has waived immunity to enforce any and all statutes.

Pusok rejects as "absurd" the idea that a statute can have meaning absent judicial enforcement. Resp. Br. 43. But, as explained above, immunity protects improvident government actions, so not all violations of law will result in a lawsuit. The Legislature can both direct government action by statute and also conclude that the violation of the statute should not result in the expenditure of taxpayer funds to defend the State in court or to pay damages. *See supra* pp. 3-8.

The Court's private-right-of-action cases are an example of the rule that not every right has a judicial remedy. *Tex. Med. Res., LLP v. Molina Healthcare of Tex., Inc.*, 659 S.W.3d 424, 430-36 (Tex. 2023). In those cases, the Court has rejected a rule of "necessary implication" that allows courts to "imply a private cause of action to effectuate the statutory purposes" whenever "a legislative enforcement scheme fails to adequately protect intended beneficiaries." *Brown v. De La Cruz*, 156 S.W.3d 560, 567 (Tex. 2004). Instead, the Court has held that "causes of action may be implied only when a legislative intent to do so appears in the statute as written." *Id.* By analogy, the Court should not find an implied waiver of immunity merely because it believes the repurchase statutes should do more to protect landowner rights. It must ground any such finding in the text of the statutes as enacted by the Legislature.

Second, to the extent some form of judicial enforcement is necessary, the repurchase statutes permit (1) suit against private condemnors, and (2) *ultra vires* actions against government officials. The Court has previously found that a statute has

meaning, even when it can be enforced only against private facilities. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 700 (Tex. 2003). And the Court has determined that the *ultra vires* remedy is a meaningful one when sovereign immunity would bar a direct lawsuit. *Hidalgo Cnty. Water Improvement Dist. No. 3*, 669 S.W.3d at 188 (discussing trespass-to-try-title claims).

Contrary to Pusok's claim (at 39 n.9), the State has not been inconsistent on the *ultra vires* point. Simply labeling conduct "*ultra vires*" is not sufficient to establish an *ultra vires* claim; Pusok must show that Madsen acted without authority. *TxDOT v. Sunset Transp., Inc.*, 357 S.W.3d 691, 702 (Tex. App.—Austin 2011, no pet.). In the courts below, the State argued that Pusok's *ultra vires* claim was flawed for a variety of reasons, and the Fourteenth Court agreed there was no *ultra vires* conduct. *JRJ Pusok I*, 693 S.W.3d at 688. Pusok could have asked the Court to review the Fourteenth Court's judgment but did not. So whether Pusok properly brought an *ultra vires* claim is not before the Court. *See First Bank v. Brumitt*, 519 S.W.3d 95, 112 (Tex. 2017); Tex. R. App. P. 53.1 ("A party who seeks to alter the court of appeals' judgment must file a petition for review."). And Pusok's inability to establish an *ultra vires* claim on these facts does not render the repurchase statutes meaningless.

2. In addition to asking whether the text makes any sense absent a waiver of sovereign immunity, the Court has previously considered five factors to determine whether an implicit waiver exists. *See Hillman v. Nueces County*, 579 S.W.3d 354, 360 (Tex. 2019).

The parties simply disagree about the effect of their competing statutory interpretations on the first two factors—whether the statutes "waive immunity without

doubt" and whether the statutes are ambiguous such that they should be interpreted to retain immunity. *Id.* As demonstrated in the State's briefing, sections 21.003 and 21.101(c), along with all of the repurchase statutes, do not waive immunity without a doubt or even create an ambiguity on that point. The Court should reject Pusok's invitation (at 47) to substitute a purpose—"to fill an unjust gap" in the law—for an explicit waiver of immunity.

Pusok misconstrues the third factor—whether the State must be made a party. *Hillman*, 579 S.W.3d at 360. Pusok reasons (at 48) that it must sue the State in order to recover; therefore, the State must be made a party. But the question is whether "the Legislature requires that the [governmental] entity be joined in a lawsuit." *Id.* Pusok's self-fulfilling interpretation—"I want to sue the State, so the State must be made a party"—would eviscerate immunity. Because the repurchase statutes are silent on the joinder of the State, this factor does not favor Pusok.

Regarding the fourth factor, Pusok asserts (at 48) that there is an "objective limitation" on the State's potential liability, specifically, selling the land for the price originally paid. *See id.* But just because that is the relief Pusok seeks does not mean that is the relief all parties would seek. If, for example, the State had already sold the land to an innocent third party, the original landowner might seek damages for the value or potential value of the land. The repurchase statutes place no damages cap on any such claim.

And as for the fifth factor—whether the statutes serve any purpose without a waiver, *id.*—Pusok falls back on the Fifth Court's erroneous reasoning that "[i]t would make little sense to give landowners the right to repurchase property

previously taken by eminent domain yet deny them the ability to exercise that right." Resp. Br. 48 (quoting *LBJ/Brookhaven*, 650 S.W.3d at 932). As explained above, the repurchase statutes serve a purpose—directing governmental action, allowing suit against private condemnors, and permitting properly brought *ultra vires* claims. To hold otherwise would be to deny the Legislature the ability to direct government action without also retaining sovereign immunity should the government act improvidently. There has been no waiver of immunity—explicit or implicit—and Pusok's repurchase claim should be dismissed.

II. Pusok's Claim Does Not Fall Within the Scope of Any Waiver.

Although the State believes the Court need not reach this question, if it concludes that the Legislature has waived immunity for claims under the repurchase statutes, it must then determine whether Pusok's claim falls within that waiver. *TDCJ v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001). It does not for three reasons: (1) it was brought in the wrong court, (2) the property was not acquired "through eminent domain," and (3) the statutes do not apply to repurchasing only a piece of the property.

A. Pusok filed suit in the wrong court.

With respect to the State's argument that the purported waiver of immunity is limited to district courts, Pusok makes the same error the Fourteenth Court did: asserting that the specific references to "district court" in sections 21.003 and 21.101(c) reflect only permission to sue in district court, not a requirement that suit be brought there. Resp. Br. 49-50; *JRJ Pusok Holdings, LLC v. State* (*JRJ Pusok II*),

693 S.W.3d 860, 861 (Tex. App.—Houston [14th Dist.] 2024, pet. pending). But the rule is that the State cannot be sued without its consent "and then only in the manner indicated by that consent." *Hosner*, 1 Tex. at 769. If sections 21.003 and 21.101(c) are waivers of immunity, they also delineate the scope of that waiver. And because each refers only to "district court," district courts are the only courts in which immunity has been waived. Because Pusok filed in a county court at law, CR.8, its lawsuit falls outside the scope of any waiver.

Pusok misplaces reliance on Texas Government Code section 25.1032(d)(6), which gives Harris County courts at law jurisdiction over suits "for the recovery of real property." Resp. Br. 50. As explained in the State's opening brief (at 26), that statute concerns subject-matter jurisdiction. It does not waive the State's immunity for all cases concerning the recovery of real property in Harris County. If it were otherwise, the hundreds of statutes specifying the jurisdiction of county courts at law found in Texas Government Code chapter 25 would create gaping holes in the State's immunity, depending on the county in which suit was brought. No court has ever suggested this is the case.

Accordingly, although the State does not believe sections 21.003 and 21.101(c) are waivers of immunity, to the extent they are, Pusok must comply with them, including their limits on where suit may be brought. Because Pusok did not, the State's immunity remains intact.

B. The State did not acquire Pusok's property "through eminent domain."

The repurchase statutes apply only to property that has been acquired "through eminent domain." Tex. Prop. Code § 21.101(a); *see also* Tex. Const. art. III, § 52j (allowing repurchase of property acquired "through eminent domain" in certain circumstances). Instead, the State and the Pusoks reached an agreement to sell the property, CR.151-55, and the State dismissed its eminent-domain proceedings, CR.73-75. The repurchase statutes therefore do not apply.

1. In arguing that the settlement was still an acquisition through eminent domain, Pusok first suggests (at 52-53) that anytime the State obtains property in exchange for money, the acquisition is by eminent domain. The Legislature disagrees, frequently listing purchase and eminent domain as separate methods of acquiring property. *E.g.*, Tex. Gov't Code § 2166.503(a); Tex. Loc. Gov't Code § 331.001(b); Tex. Transp. Code §§ 203.051(a), 341.005(a), 391.033(a). The Legislature has also referred to property acquired "by eminent domain or the threat of eminent domain." Tex. Transp. Code §§ 451.155(c), 452.155(c). Thus, the mere acquisition of property, even if backed up by the threat of eminent domain, is not sufficient to make the acquisition one "through eminent domain" as that phrase has been used by the Legislature.

Pusok's precedent is not to the contrary. In *City of San Antonio v. Grandjean*, the property was taken through formal condemnation proceedings. 41 S.W. 477, 478 (Tex. 1897). The Court also recognized that the State can simply take property without formal proceedings but is obligated by the Constitution to provide payment, *id.*

at 479, which is not what happened here.[2] The issue in *City of Carrollton v. Singer* was whether the settlement of a threatened eminent-domain proceeding was the kind of settlement for which immunity was waived in the event of a breach under this Court's precedent. 232 S.W.3d 790, 796-98 (Tex. App.—Fort Worth 2007, pet. denied) (discussing *Tex. A&M Univ.–Kingsville v. Lawson*, 87 S.W.3d 518 (Tex. 2002)). It did not address statutory language referring to acquiring property "through eminent domain." And *Weingarten Realty Investors v. Albertson's, Inc.* concerned a lease provision regarding property that was "taken"—not a statute regarding eminent domain. 66 F. Supp. 2d 825, 835 (S.D. Tex. 1999), *aff'd*, 234 F.3d 28 (5th Cir. 2000). There is, therefore, no universally accepted definition that requires a different interpretation of "through eminent domain" than the one indicated by the textual analysis described above.

2. Pusok next emphasizes (at 53-56) all of the steps the State took to initiate eminent-domain proceedings, claiming these operate as a concession that the property was acquired through eminent domain. The State has never denied that it intended to take the property through eminent domain (if necessary), prepared to do so, and filed a condemnation petition. But the State did not complete—or go "through" with—the eminent-domain proceedings. Just the opposite: It settled with the Pusoks for the explicit purpose of "avoid[ing] ED proceedings." CR.152.

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[2] For clarity, the property would have been acquired through eminent domain if the State had simply taken the property by way of its eminent-domain authority and waited for Pusok to file an inverse-condemnation claim.

Alamo Heights ISD v. Jones, 705 S.W.3d 317 (Tex. App.—El Paso 2024, no pet.), on which Pusok relies, does not alter this conclusion. Because the acquisition there was through a third-party purchaser, the Eighth Court correctly concluded that the eminent-domain statutes, specifically the requirement to pay relocation costs, did not apply. *Id.* at 343. The Eighth Court explained that a condemnor will often comply with the statutory prerequisites to a condemnation suit (as the State did here), but then the parties will reach a voluntary agreement to purchase. *Id.* at 339. In other words, a condemnor may take preliminary steps to condemn property but still come to a voluntary agreement that does not require compliance with the remaining condemnation procedures. As a result, not all acquisitions of property by the State are by eminent domain, even if the State starts down that path.

3. Pusok next asks the Court (at 57) to draw the line between voluntary and involuntary acquisitions. But the repurchase statutes say nothing about the intent of the landowner. And it would be an odd rule indeed that would attach different rights to the same purchase of property depending on the landowner's level of enthusiasm for the sale. Rather than base a decision on eminent domain on the subjective state of the landowner, the Court should adopt an objective measure—whether the land was acquired via judgment in an eminent-domain proceeding or settlement to avoid an eminent-domain proceeding.

4. Finally, Pusok invokes the rule that, in condemnation proceedings, statutes are construed in favor of landowners. Resp. Br. 60 (citing, *inter alia*, *State v. Bristol Hotel Asset Co.*, 65 S.W.3d 638, 647 (Tex. 2001) (Baker, J., dissenting); *John v. State*,

826 S.W.2d 138, 140 (Tex. 1992) (per curiam)). But this is not a condemnation proceeding.

As this Court has explained, "in a condemnation action, the landowner is given a single opportunity to recover damages for the taking of his property by the state for the public benefit." *John*, 826 S.W.2d at 140. It is "[a]s a result" of this specific circumstance that the condemnation procedures are to be "liberally construed for the benefit of the landowner." *Id.* But this is not a condemnation proceeding in which the State is forcing a landowner to unwillingly part with his property. This is a *sui generis* right created by the Legislature in which a former landowner that was fully compensated for its property is attempting to force the State to unwillingly part with the State's property.

Rather than favoring Pusok, the Court should employ the rule that strictly construes statutes against waivers of immunity. *See Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 513 (Tex. 2012). Here, the statutory language unambiguously precludes Pusok from demonstrating an entitlement to repurchase. But if there is any doubt about that, it should be resolved in favor of retaining the State's sovereign immunity.

C. The State is not obligated to offer pieces of the property for repurchase.

Finally, Pusok errs in claiming that there is no "authority or support" for the State's argument that the repurchase statutes apply only to repurchasing *all* of the property acquired. Resp. Br. 62. To the contrary, the State's argument is based on the text of the repurchase statutes themselves, which repeatedly refer to "the"

property, not "a portion of" or "a piece of" the property. *See* Tex. Prop. Code §§ 21.101(a)(1)-(3) ("the property"), .102 (same), .1021(a) (same), .103(a)-(b) (same). Further, Pusok's piecemeal theory makes little sense when repurchase is sought because "no actual progress is made" developing the property for public use. *Id.* § 21.101(a)(2). The Legislature identified evidence of "actual progress," such as obtaining materials and hiring a contractor, which suggests that the property is treated as a whole when determining whether progress has been made. *Id.* § 21.101(b). Also, the repurchase price is "the price paid to the owner by the entity at the time the entity acquired the property through eminent domain." *Id.* § 21.103(b). The Legislature provided no guidance regarding how to calculate that amount when only a piece of the property is at issue.

In contrast to the plain text of the repurchase statutes, Pusok offers statements in the statutes' legislative history and speculates about bad-faith takings. Resp. Br. 62. But, as explained above, reliance on legislative history is disfavored. *See Brown*, 660 S.W.3d at 755. Nor is it even clear what that history suggests regarding this issue. And Pusok's fear that condemnors will deliberately take more land than is necessary is better addressed by the Legislature, the body best positioned to determine when and under what circumstances a condemnor's failure to use all of the property acquired should result in a requirement to re-sell it.

Prayer

The Court should grant the petition, reverse in part the Fourteenth Court's judgment, and render judgment dismissing the repurchase claim for lack of jurisdiction.

Respectfully submitted.

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