

**In the First Court of Appeals  
Houston, Texas**

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HENRY P. PORRETTO, JR. AND ROSEMARIE PORRETTO,

*Appellants,*

v.

JERRY PATTERSON, COMMISSIONER OF THE TEXAS GENERAL LAND OFFICE;  
TEXAS GENERAL LAND OFFICE; LOU MULLER, EXECUTIVE DIRECTOR OF THE  
PARK BOARD OF TRUSTEES OF THE CITY OF GALVESTON, TEXAS; AND THE  
PARK BOARD OF TRUSTEES OF THE CITY OF GALVESTON, TEXAS,

*Appellees.*

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Appeal from the 212th Judicial District Court  
Galveston County, Texas

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**BRIEF FOR APPELLANTS**

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<sup>1</sup> Pursuant to TEX. R. APP. P. 7.2(a), Commissioner Patterson is automatically substituted for his predecessor, David Dewhurst, as a party to this appeal.

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TO THE HONORABLE FIRST COURT OF APPEALS:

**STATEMENT OF THE CASE**

<i>Nature of the case</i>	Family who owns beachfront property in Galveston sued Texas General Land Office, Galveston Park Board, and their officials for taking or damaging property, trespass to try title, slander of title, breach of settlement agreement, and declaratory relief. CR 223-26 (Tab A).
<i>Trial court</i>	212th Judicial District Court, Galveston County Hon. Susan Criss
<i>Trial court's disposition</i>	Granted defendants' pleas to the jurisdiction based on sovereign immunity from suit. CR 214-15, 286 (Tab D).

**ISSUES PRESENTED**

1. Did the district court err in holding that, contrary to *Steele v. City of Houston*, 603 S.W.2d 786, 791 (Tex. 1980), government defendants who take or damage private property are immune from a suit for compensation under article I, section 17 of the Texas Constitution?
2. Did the district court err in holding that, contrary to *State v. Lain*, 349 S.W.2d 579, 581-82 (Tex. 1961), government officials can immunize themselves from a trespass to try title suit merely by asserting a claim of title or possession on the government's behalf?
3. Did the district court err in holding that, contrary to *Texas A&M University – Kingsville v. Lawson*, 87 S.W.3d 518, 521 (Tex. 2002), the General Land Office and its Commissioner are immune from suit for breaching a settlement agreement even though they were not immune from suit on one or more of the settled claims?
4. Did the district court err in holding that, contrary to *Missouri Pacific Railroad v. Brownsville Navigation District*, 453 S.W.2d 812, 813 (Tex. 1970), the Park Board and its Executive Director are immune even though section 306.041 of the Local Government Code provides that the Board may “be sued”?

## STATEMENT REGARDING ORAL ARGUMENT

The district court's orders granting immunity to Defendants are erroneous because they are contrary to four Texas Supreme Court decisions. Appellants submit that oral argument would help the Court craft an opinion that explains simply and clearly why these decisions apply so that future courts will not make the same errors.

Moreover, the fundamental issue in this case is whether courts have the power to consider claims by Texas citizens that their constitutionally-guaranteed private property rights have been unlawfully invaded by public officials. This issue is an important one worthy of the Court's full consideration. By refusing to consider such claims, the district court has made the constitutional rights of property owners a hollow promise and upset the settled expectations of investors. Its decision will have far-reaching negative consequences if allowed to stand.

## STATEMENT OF FACTS

The Porretto family has owned beachfront property in Galveston since the 1950s. Beginning in the mid 1990s, officials of the Texas General Land Office (“GLO”) and the Galveston Park Board disregarded the Porrettos’ ownership rights, encumbered their property with leases, clouded their title, and interfered with their attempts to sell the property. Tab A, at 221-22. After the Porrettos’ intensive efforts to settle the officials’ claims to the property failed, the Porrettos filed this suit in 2002. CR 2, 97; Tab A, at 222. Yet the GLO and Park Board continued to block any resolution of the uncertainty they had created regarding the Porrettos’ title, filing pleas to the jurisdiction asserting immunity from suit. The district court granted the pleas, leaving ownership of the property in limbo and depriving the Porrettos of any remedy for the wrongful invasion of their private property by public officials. As explained below, supreme court precedent compels reversal of the district court’s decision.

### *The Porretto family and their property*

The Porrettos’ petition alleges the following facts, which must be accepted as true and construed in their favor.<sup>2</sup> Plaintiffs Henry P. Porretto, Jr. and Rosemarie Porretto own the 27 acres of real property at issue (“the property”). Tab A, at 217. The property consists of several tracts of land located at the eastern end of Galveston Island, south of Seawall Boulevard, between 6th and 27th Streets. *Id.* at 217-18; CR 97. The largest

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<sup>2</sup> *City of Houston v. Northwood Mun. Util. Dist. No. 1*, 73 S.W.3d 304, 308 (Tex. App. – Houston [1st Dist.] 2001, pet. denied); *Kerr v. Tex. Dep’t of Transp.*, 45 S.W.3d 248, 250 (Tex. App. – Houston [1st Dist.] 2001, no pet.).

tracts, shown in black on the survey at Tab B, are between 6th and 10th Streets in an area known locally as Porretto Beach. Tab A, at 218.

Mr. Porretto's parents bought portions of the property beginning in the late 1950s. Tab A, at 220. In the 1960s, the Porretto family began earning income from the property by offering rental concessions such as umbrellas, chairs, floats, and boats to patrons of Porretto Beach, as well as parking for those patrons. *Id.* During the entire time the family has owned the property, they have paid property taxes, carried liability insurance, repaired and maintained all fixtures and improvements, and cleaned and maintained the land without assistance from the government. *Id.* The Porretto family also built a \$50,000 ramp for public and emergency vehicle access to Porretto Beach at their own expense. *Id.* Plaintiffs purchased the tracts owned by Mr. Porretto's parents in 1974. *Id.*

***Defendants violate the Porrettos' property rights***

Defendants are the GLO and its Commissioner, currently Jerry Patterson, as well as the Galveston Park Board of Trustees and its Executive Director, Lou Muller. In the early 1990s, Defendants refused to recognize the Porrettos' ownership and began acting in disregard of the Porrettos' rights to the property. Tab A, at 221. Specifically, in 1994, the GLO Commissioner executed two long-term leases to the City of Galveston that encumber portions of the Porrettos' property and cloud their title. *Id.* One leased the area adjacent to and along the south side of the seawall from 10th Street to 103rd Street to the City for a beach replenishment project; the other leased the area adjacent to and along the south side of the seawall from 10th Street to 61st Street to the City for a public

recreation area. *Id.*; CR 231-35, 264-67. These leases do not mention the Porrettos. Instead, they recite (without support) that the area south of the seawall is owned by the State and by Galveston County. CR 231-32, 264.

Under section 26-54 of the its Municipal Code, the City placed the leased area under the management and control of the Park Board. CR 272. In November 1999, the Park Board subleased a portion of the area south of the seawall between 10th and 69th Streets to Paul Roure and Virginia Nagra for the purpose of providing concessions on the beach. Tab A, at 222; CR 272-78. This sublease also encumbers parts of the Porrettos' property, clouds their title, and interferes with their ability to operate their own concessions business on the property. Tab A, at 222; CR 97.

Finally, Defendants' assertions that they own and control the property and that the Porrettos lack title have interfered with the Porrettos' attempts to sell the property. Tab A, at 220, 223-24. After many years of running their family-owned concessions business, the Porrettos decided to sell the property to provide a retirement income for themselves and lasting benefits for their children. *Id.* at 220. Yet Defendants' claims clouded the Porrettos' title and prevented several attempted sales. *Id.* at 222. For example, in June 2001, the Porrettos signed a contract with Southbrook Investments to sell the property. Southbrook later canceled the contract, however, citing the cloud that Defendants had placed on the Porrettos' title. *Id.*

***The Porrettos file suit and Defendants assert immunity***

For several years, the Porrettos attempted to settle Defendants' claims to the property. These attempts produced conflicting responses from various officials, but Defendants never formally recognized the Porrettos' ownership and did not exclude their property from the leases. Tab A, at 222. Eventually, the Porrettos turned to the courts to resolve the ownership dispute. Their original petition alleged five causes of action: constitutional and statutory claims for taking or damaging the property without compensation; trespass to try title; slander of title; and a declaratory judgment. CR 9-11.

The Porrettos did not anticipate any difficulty in obtaining a ruling on the merits, as a Galveston district court had rejected the GLO's immunity defense to a similar suit filed by a neighboring landowner. *Ruiz v. Park Bd. of Trustees*, No. 00 CV 0417 (56th Dist. Ct.) (CR 211). Seeking a different result in this case, however, all Defendants filed pleas to the jurisdiction asserting immunity from suit. CR 63-64, 72-80.

***The GLO and Patterson sign and then breach a settlement agreement***

While the district court considered the pleas, the GLO and Commissioner Patterson participated in mediation with the Porrettos and the parties signed a settlement agreement. *See* Tab C. Under phase one of the settlement, the Porrettos agreed to provide the GLO with a survey and a title commitment showing their clear title to the waterfront lots south of the seawall between 6th and 10th Streets. "To assist the Porrettos in obtaining a title commitment," the GLO agreed to provide a letter on request confirming that the State claimed no interest in those lots above the mean higher high tide

line. *Id.* at 281. The settlement contained no other conditions precedent to the GLO's duty to provide the letter. Under phase two, after the GLO received the title commitment, the parties would negotiate in good faith a lease authorizing the Porrettos (or their eventual buyer) to build above the State-owned submerged land abutting their waterfront lots. *Id.* at 282-83.

The Porrettos provided a survey and title commitment, but the GLO and Patterson breached the settlement agreement by failing to provide the promised disclaimer letter. Tab A, at 225-26; *see* CR 159-70 (title commitment). Accordingly, the Porrettos added a cause of action for breach of contract to their petition and filed a motion to compel the GLO to produce the letter. Tab A, at 225-26; CR 133-39. At a hearing on the motion, the GLO argued that the court could not compel it to comply with the settlement because it was immune from suit for breach of contract. 1 RR 8-10. The district judge expressed skepticism, wondering how any case involving an assertion of government immunity could ever be resolved by mediation if the settlement would be unenforceable. *Id.* at 16. She also criticized the GLO for promising to negotiate a lease in good faith even though it never allowed over-water development and did not intend to let the Porrettos put structures on their property to access such a development. *Id.* at 20-21.

***The district court grants Defendants' pleas to the jurisdiction***

Nevertheless, on March 23, 2005, the district court signed an order granting the plea to the jurisdiction filed by the GLO and Commissioner Patterson, dismissing the Porrettos' claims against them with prejudice. Tab D, at 214. On April 28, the court

signed an order granting the plea to the jurisdiction filed by the Park Board and Executive Director Muller and entering a take-nothing judgment on the Porrettos' claims against them. Tab D, at 286. The Porrettos filed a motion for new trial, which the court denied. CR 287-90, 296. On July 1, however, the court did modify its orders to dismiss the Porrettos' claims without prejudice. CR 296. This appeal followed.

### SUMMARY OF THE ARGUMENT

In the district court, Defendants argued that a public official's bare assertion of title to private property – even if unsupported by evidence and contrary to the petition – will bar the property owner from suing the government for a taking or the official for trespass to try title. CR 113. In other words, Defendants' position is that absent a rare act of the Legislature,<sup>3</sup> landowners have no recourse to the courts when state or local officials wrongfully claim ownership of their property or invade their property rights on the government's behalf.

That cannot be the correct rule. As the supreme court long ago recognized, “[i]f the present suit could not be maintained without legislative consent, officials of the State would never have to condemn land legally. They could simply appropriate it, and the landowner would be entitled to no compensation unless the Legislature granted him permission to sue.” *Griffin v. Hawn*, 341 S.W.2d 151, 153 (Tex. 1960).

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<sup>3</sup> See TEX. H.R. COMM. ON CIVIL PRACTICES, INTERIM REPORT TO THE 75TH LEG. 9 (1996) (noting that although the Legislature freely granted permission to sue the state before 1987, it passed only 11 of 173 resolutions granting such permission from 1989 to 1995), available at <http://tinyurl.com/aoy8x>.

Fortunately, four supreme court decisions hold that Defendants are not entitled to claim immunity from the Porrettos' suit. First, under *Steele v. City of Houston*, 603 S.W.2d 786, 791 (Tex. 1980), the Porrettos may sue Defendants for taking or damaging their property without compensation in violation of article I, section 17 of the Texas Constitution. The Porrettos have alleged all the required elements of a takings claim, including a vested right: fee simple title to the real property at issue. Defendants' disagreement with this allegation of title does not deprive the Porrettos of standing to sue for a taking.

Second, *State v. Lain*, 349 S.W.2d 579, 581-82 (Tex. 1961), holds that the Porrettos may sue the officials who claim their property – Commissioner Patterson and Executive Director Muller – for trespass to try title. *Lain* applies to disputes over title as well as possession, and it required the district court to hear evidence regarding the Porrettos' title before deciding the officials' pleas to the jurisdiction.

Third, *Texas A&M University – Kingsville v. Lawson*, 87 S.W.3d 518, 521 (Tex. 2002), allows the Porrettos to sue the GLO and Patterson for breach of the settlement agreement. Because these Defendants are exposed to suit on the takings and trespass to try title claims, they cannot claim immunity from suit for breaching their agreement to settle those claims.

Finally, under *Missouri Pacific Railroad v. Brownsville Navigation District*, 453 S.W.2d 812, 813 (Tex. 1970), the Porrettos may pursue all of their claims against the Park Board and Muller because the Legislature has waived their immunity. Section

306.041(a) of the Local Government Code says that Park Boards may “be sued,” and *Missouri Pacific* holds that this language gives general legislative consent to suit.

For these reasons, the district court erred in granting Defendants’ pleas to the jurisdiction. This Court should reverse.

#### STANDARD OF REVIEW

“Sovereign immunity from suit defeats a trial court’s subject matter jurisdiction and thus is properly asserted in a plea to the jurisdiction.” *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225-26 (Tex. 2004). Whether the Porrettos have alleged facts that demonstrate subject matter jurisdiction is a question of law. *Id.* at 226. Accordingly, this Court reviews the district court’s orders granting Defendants’ pleas to the jurisdiction *de novo*. *City of Houston v. Boyle*, 148 S.W.3d 171, 176 (Tex. App. – Houston [1st Dist.] 2004, no pet.).

“In asserting a plea to the jurisdiction, a party contends that an incurable jurisdictional defect precludes the court’s hearing the case on the merits, even if all allegations in the pleadings are true.” *Id.* Thus, the court does not look to the merits of the plaintiff’s case in conducting its review, but considers only the plaintiff’s pleadings and any evidence submitted by the parties that is pertinent to the jurisdictional inquiry. *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002); *Tex. Natural Res. Conserv. Comm’n v. White*, 46 S.W.3d 864, 868 (Tex. 2001). It “construe[s] the pleadings liberally in favor of conferring jurisdiction” and looks to the pleader’s intent.

*Boyle*, 148 S.W.3d at 176; *see also Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993).

“Dismissing a cause of action for lack of subject-matter jurisdiction is proper only when it is impossible for the facts alleged in plaintiff’s petition to confer jurisdiction on the trial court.” *Scott v. Prairie View A&M Univ.*, 7 S.W.3d 717, 718 (Tex. App. – Houston [1st Dist.] 1999, pet. denied). Therefore, unless the pleadings affirmatively negate the existence of jurisdiction, a plea to the jurisdiction may not be granted without allowing the plaintiff an opportunity to amend. *Miranda*, 133 S.W.3d at 226-27.

## ARGUMENT

### **I. The District Court Erred In Dismissing The Porrettos’ Constitutional Takings Claim.**

One of the Porrettos’ claims is that Defendants unlawfully seized ownership and control of their property without compensation by executing leases that include portions of the property. Tab A, at 221-22, 224-25; CR 264, 272. Defendants’ alleged actions violate article I, section 17 of the Texas Constitution, which guarantees that “[n]o person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made.”<sup>4</sup> As explained below, the supreme court has held that this constitutional provision waives governmental immunity from a takings claim. Defendants cannot circumvent that waiver and deprive the Porrettos of standing simply by contesting ownership of the property.

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<sup>4</sup> This type of takings violation is called an inverse condemnation. “Inverse condemnation occurs when (1) a property owner seeks (2) compensation for (3) property taken for public use (4) without process or a proper condemnation proceeding.” *Boyle*, 148 S.W.3d at 178.

**A. The Constitution waives governmental immunity from takings claims.**

“[B]y authorizing compensation for the taking, damaging or destruction of property, [article I, section 17] waives a governmental entity’s immunity from suit and immunity from liability.” *State v. Biggar*, 848 S.W.2d 291, 295 (Tex. App. – Austin 1993), *aff’d*, 873 S.W.2d 11 (Tex. 1994);<sup>5</sup> *see Gen. Servs. Comm’n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001); *Boyle*, 148 S.W.3d at 177. This rule that “[t]he Constitution itself . . . is a waiver of governmental immunity for the taking, damaging or destruction of property for public use” has been settled law since the supreme court’s decision in *Steele v. City of Houston*, 603 S.W.2d 786, 791 (Tex. 1980). Accordingly, landowners need not obtain legislative permission to bring a takings claim. “Were it otherwise, article I, section 17 could be nullified at the whim of the [L]egislature.” *Biggar*, 848 S.W.2d at 295.

For a plaintiff to defeat a plea to the jurisdiction and establish the district court’s jurisdiction over a takings claim, it is necessary only to plead – not prove – the elements of the claim. *Kerr v. Tex. Dep’t of Transp.*, 45 S.W.3d 248, 251 n.3 (Tex. App. – Houston [1st Dist.] 2001, no pet.). Those elements are that “(1) the State intentionally performed certain acts, (2) that resulted in a ‘taking’ of property, (3) for public use.” *Gen. Servs. Comm’n*, 39 S.W.3d at 598. Even allegations that “may be subject to special exceptions” and that do not “describe the property,” nor state how “the landowners claim

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<sup>5</sup> *See also id.* (“[G]overnmental immunity offers no shield against a claim for inverse condemnation brought pursuant to article I, section 17 of the Texas Constitution.”).

title,” nor include “the effective dates of their acquisitions” are still “minimally sufficient for purposes of satisfying the pleading requirements.” *State v. Riemer*, 94 S.W.3d 103, 109 (Tex. App. – Amarillo 2002, no pet.).

The Porrettos’ petition far exceeds these minimal requirements for pleading a taking. It alleges that the Porrettos “were, and are, the owners in fee simple of several parcels of real property” (Tab A, at 217),<sup>6</sup> exhaustively describes the location of many parcels (*id.* at 218-19), and explains the source of the Porrettos’ title and the effective dates of their acquisitions (*id.* at 220). It also alleges that (1) Defendants executed leases encumbering portions of the Porrettos’ property and refused to remove that property from the leases (*id.* at 221-22); (2) “Defendants’ actions constitute an unlawful taking of private real property without adequate compensation to the Porrettos” (*id.* at 225); and (3) at least one of the leases was for “public recreational use” (*id.* at 221). Nothing more is required to plead a takings claim and establish a waiver of Defendants’ immunity.

**B. The Porrettos have standing to bring a takings claim.**

Defendants argued below, however, that the constitutional waiver of immunity extends only to a taking of a “vested property right.” CR 115. According to Defendants, the Porrettos do not have a vested right because “there is a dispute between the State and the Porrettos regarding title to some of the real property at issue.” CR 115-16. This argument fails because it misunderstands the concept of a vested right.

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<sup>6</sup> Although proof supporting the Porrettos’ claim of ownership is not required at this stage of the case, the record includes a commitment from Stewart Title to insure the Porrettos’ fee simple ownership of the property. CR 161.

To establish standing and meet the second element of a takings claim, this Court has held that a plaintiff must allege facts showing that the government’s acts resulted in the taking of a “vested” property right. *City of Houston v. Northwood Mun. Util. Dist. No. 1*, 73 S.W.3d 304, 309 (Tex. App. – Houston [1st Dist.] 2001, pet. denied). Whether a property right is “vested” turns not on the indisputability or correctness of the plaintiff’s claim to the property, as Defendants incorrectly suggest, but on the nature or type of property interest claimed. *State v. Operating Contractors ABS Emissions, Inc.*, 985 S.W.2d 646, 651 (Tex. App. – Austin 1999, pet. denied).

The cases on which Defendants rely hold that certain types of *non*-real property interests are not “vested” property rights protected by the Texas Constitution, but merely expectations that existing law will remain unchanged.<sup>7</sup> As *Northwood* recognizes, the type of property protected by article I, section 17 “has generally been found to be a ‘real property’ interest such as fee simple title, a leasehold, or an easement.” 73 S.W.3d at 310; *see also Operating Contractors*, 985 S.W.2d at 651 (“[A] governmental taking of *real property* requires ‘just compensation’ ”). That is precisely the type of property interest that the Porrettos allege they possess: “the Porrettos . . . [are] the owners in fee simple of several parcels of real property.” Tab A, at 217. Accordingly, they have adequately alleged a vested property right and are entitled to sue Defendants for taking that right without compensation. The Galveston district court reached the same

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<sup>7</sup> *See, e.g., Northwood*, 73 S.W.3d at 311 (expectancy of collecting future ad valorem taxes); *Operating Contractors*, 985 S.W.2d at 651-53 (contractual interest in continuation of emissions testing program).

conclusion in *Ruiz*: it found that the Porrettos' neighbor had a vested property right and thus rejected the GLO's immunity defense to his takings claim. CR 211.

The Porrettos do not lose standing to sue for a taking of their vested property right simply because Defendants disagree with the above-quoted allegation of fee simple title. As this Court held in *Northwood*, standing is determined based on "the facts recited in [the] petition." 73 S.W.3d at 309.<sup>8</sup> "[P]laintiffs are [not] required to put on their case simply to establish jurisdiction." *Bland I.S.D. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). Thus, even when the government and the plaintiff dispute who owns the property at issue, Texas courts will reject an immunity defense and allow a takings claim to proceed so long as the plaintiff has alleged that it has title. *See Riemer*, 94 S.W.3d at 105, 108-09; *Kenedy Mem'l Found. v. Mauro*, 921 S.W.3d 278, 280, 282 (Tex. App. – Corpus Christi 1995, writ denied). Because the Porrettos have alleged their fee simple ownership and the other elements of a takings claim, the district court erred in holding that Defendants were immune from suit on that claim.

In an effort to bolster their assertion of immunity, Defendants argued below that federal courts do not permit takings suits when the federal government and the plaintiff assert competing claims to the property. CR 12 n.5. To the contrary, federal courts "will take jurisdiction of a title dispute under a taking theory when the government is in possession asserting itself to be the owner." *DSI Corp. v. United States*, 655 F.2d 1072,

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<sup>8</sup> *See also Kerr*, 45 S.W.3d at 251 n.3 ("For purposes of establishing the trial court's jurisdiction [over a takings claim], it is necessary only to plead facts showing the elements of the cause of action. Proof of those facts is required to recover under a plaintiff's cause of action.")

1074 (Ct. Cl. 1981) (emphasis added); *see also Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 887-89 (Fed. Cir. 1983). Of course, the government can avoid a takings claim by filing its own lawsuit and “assert[ing] its ultimate right to ownership of an interest in property through the same legal channels that any other individual would employ.” *Klump v. United States*, 50 Fed. Cl. 268, 271 (2001), *aff’d per curiam*, 30 Fed. Appx. 958 (Fed. Cir. 2002) (unpublished). In this case, however, Defendants most certainly have not “voluntarily submitt[ed] . . . [their] claim[s] to the scrutiny of the court and . . . agree[d] to abide by the outcome of the trial.” *DSI Corp.*, 655 F.2d at 1075. Instead, they have strenuously insisted that their claims are immune from judicial scrutiny, and there is “no evidence whatever that [Defendants] ever did, or ever intended to, institute judicial action or in any manner to submit to judicial determination” their claims to the Porrettos’ property. *Yuba Goldfields*, 723 F.2d at 889. Accordingly, this Court should follow *DSI Corp.* as well as the Texas precedents above and hold that the district court has jurisdiction over the Porrettos’ takings claim against all Defendants.

## **II. The District Court Erred In Dismissing The Porrettos’ Trespass To Try Title Claim Against Patterson and Muller.**

The Porrettos also pleaded a cause of action for trespass to try title, alleging that Defendants have unlawfully claimed title to their property and have unlawfully interfered with their possession by leasing portions of the property. Tab A, at 223, 226. As the supreme court held in *State v. Lain*, 349 S.W.2d 579, 581-82 (Tex. 1961), immunity does not prevent the Porrettos from pursuing this cause of action against Commissioner Patterson and Executive Director Muller, the officials who claim the property on behalf

of the GLO and Park Board. Contrary to Patterson’s argument, the rule of *Lain* applies not only to official claims of possession, but also to claims of title.

**A. Officials who incorrectly claim title to or possession of private property on the government’s behalf are not immune from suit.**

In *Lain*, state officials appropriated the plaintiffs’ submerged land to construct a ferry channel and landing, contending that the land was subject to a public easement. 349 S.W.2d at 582. The plaintiffs sued both the State and the officials in trespass to try title. *Id.* at 580. The State successfully asserted sovereign immunity, but the supreme court concluded that such immunity did not bar the plaintiffs from prosecuting their trespass cause of action against the officials. *Id.* at 580-81. Writing for the court, Chief Justice Calvert held that “a plea of sovereign immunity by officials of the sovereign will not be sustained in a suit by the owner of land having the right of possession when the sovereign has neither title nor right of possession.” *Id.* at 581 (citing this Court’s decision in *Imperial Sugar Co. v. Cabell*, 179 S.W. 83, 88-89 (Tex. Civ. App. – Galveston 1915, no writ)).

The rationale for this rule, *Lain* explained, is that

[o]ne who takes possession of another’s land without legal right is no less a trespasser because he is a state official or employee[.] . . . [T]he owner should not be required to obtain legislative consent to institute a suit to oust him simply because he asserts a good faith but overzealous claim that title or right of possession is in the state and that he is acting for and on behalf of the state.

*Id.* More specifically, legislative consent is not required because “[t]he acts of officials which are not lawfully authorized are not acts of the State, and an action against the

officials by one whose rights have been invaded or violated by such acts, for the determination or protection of his rights, is not a suit against the State within the rule of immunity of the State from suit.” *Griffin v. Hawn*, 341 S.W.2d 151, 153 (Tex. 1960) (quoting *Cobb v. Harrington*, 190 S.W.2d 709, 712 (Tex. 1945)); see *Tex. Natural Res. Conserv. Comm’n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002).<sup>9</sup> Put simply, because claims against individual officials who act unlawfully do not attempt to subject the State to liability, they do not implicate sovereign immunity.

In light of these principles, the *Lain* court prescribed the following procedure for deciding the officials’ pleas to the jurisdiction:

[W]hen officials of the state are . . . the only remaining defendants, and they file a plea to the jurisdiction based on sovereign immunity, it is the duty of the court to *hear evidence* on the issue of title and right of possession and to *delay action* on the plea until the evidence is in. If the plaintiff fails to establish his title and right of possession, a take nothing judgment should be entered against him as in other trespass to try title cases. If the evidence establishes superior title and right of possession in the sovereign, the officials are rightfully in possession of the sovereign’s land as agents of the sovereign and their plea to the jurisdiction based on sovereign immunity should be sustained. If, on the other hand, the evidence establishes superior title and right of possession in the plaintiff, possession by officials of the sovereign is wrongful and the plaintiff is entitled to relief. In that event the plea to the jurisdiction based on sovereign immunity should be overruled and appropriate relief should be awarded against those in possession.

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<sup>9</sup> See also *Imperial Sugar*, 179 S.W. at 89 (“Of what avail are written Constitutions . . . if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend, and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the state? The doctrine is not to be tolerated.” (quoting *Poindexter v. Greenhow*, 114 U.S. 270, 291 (1885))).

*Lain*, 349 S.W.2d at 582 (emphasis added); see *State v. Noser*, 422 S.W.2d 594 (Tex. Civ. App. – Corpus Christi 1967, writ ref’d n.r.e.) (applying *Lain*). The supreme court recently approved a similar procedure for deciding factual disputes that implicate both jurisdiction and the merits of the plaintiff’s cause of action. *Miranda*, 133 S.W.3d at 227-28.

Here, the Porrettos allege that they hold title to the property and have the right to possession, and that Defendants’ claims of title and leasehold possession are “unlawful[]” and “void.” Tab A, at 223. Under *Lain*, therefore, the district court was obligated to take evidence on title and possession before acting on the pleas filed by Patterson and Muller. The court erred by dismissing the Porrettos’ trespass claims against them without following this procedure.

**B. *Lain* includes disputes over title as well as possession.**

Before the district court, Patterson attempted to avoid this conclusion by arguing that *Lain* should be limited to its facts. As discussed above, the officials in *Lain* asserted that a public easement gave them possession and control over private property. This case is different, Patterson contended, because “the GLO asserts *title* to the disputed property and does so on behalf of the State of Texas.” CR 113 (emphasis added). Yet Patterson has offered no support for this flimsy distinction, which the supreme court’s opinion in *Lain* squarely contradicts. Under *Lain*, “the mere assertion by pleading that the defendants claim title *or* right of possession as officials of the state and on behalf of the state . . . will not bar prosecution of the suit.” 349 S.W.2d at 581 (emphasis added); see

*also id.* (holding legislative consent not required simply because official asserts “that title or right of possession is in the state” (emphasis added)); *id.* (holding plea of immunity will be denied “when the sovereign has neither title *nor* right of possession” (emphasis added)); *id.* at 582 (discussing capacity in which “those wrongfully claiming title or the right of possession are sued” (emphasis added)).

This Court’s decision in *Imperial Sugar* and the other supporting cases cited in *Lain* (at 581-82), all of which involved title disputes, confirm that that the rule of *Lain* applies when state officials assert title. See *United States v. Lee*, 106 U.S. 196, 198-99 (1882); *Stanley v. Schwalby*, 19 S.W. 264, 264-65 (Tex. 1892), *rev’d on other grounds*, 147 U.S. 508 (1893); *Whatley v. Patten*, 31 S.W. 60 (Tex. Civ. App. 1895, writ ref’d); *Imperial Sugar*, 179 S.W. at 84, 86. Moreover, post-*Lain* decisions of this Court and other courts of appeals recognize that *Lain*’s holdings apply to title disputes. See, e.g., *Bell v. State Dep’t of Highways & Pub. Transp.*, 945 S.W.2d 292, 293-95 & n.1 (Tex. App. – Houston [1st Dist.] 1997, writ denied) (*Lain* held that “individual state officials . . . could be sued for *title to land*” (emphasis added)); *Kenedy Mem’l Found.*, 921 S.W.2d at 281-82; *Noser*, 422 S.W.2d at 597 (dispute over title as well as easement). Finally, *Lain*’s rationale – that claims against individual officials who act unlawfully do not implicate sovereign immunity – encompasses not only unlawful assertions of possession but also unlawful assertions of title.

In an attempt to salvage his proposed distinction between possession and title, Patterson relied below on *State v. Riemer*, 94 S.W.3d 103 (Tex. App. – Amarillo 2002, no

pet.). *Riemer* has no application to the Porrettos' trespass to try title claims in this case, however. The private landowner in *Riemer* did not sue for trespass to try title, and the boundary dispute between him and the State primarily concerned mineral leases. *Id.* at 105-06. The *Riemer* court attempted to distinguish *Lain* on the ground that while the landowner in *Lain* had alleged a description or survey of the property and based his title on a chain of conveyances, the landowner in *Riemer* had not alleged a description and based his title solely on accretion. *Id.* at 106, 110. Because this case is not simply a boundary dispute and the Porrettos' petition provides an exhaustive description of the property as well as information about the conveyances leading to their ownership,<sup>10</sup> *Lain* applies here. Yet even if *Riemer* could be read to support Patterson's proposed distinction, it is not binding and should be rejected as contrary to this Court's decision in *Imperial Sugar* and the other cases cited above. Accordingly, *Lain* compels reversal of the district court's orders dismissing the Porrettos' trespass to try title claims against Patterson and Muller.

### **III. The District Court Erred In Dismissing The Porrettos' Claim That The GLO And Patterson Breached The Settlement Agreement.**

The Porrettos' next cause of action is for breach of contract. They allege that the GLO and Patterson breached the parties' settlement agreement by (among other things) refusing to provide a letter disclaiming any state interest in the Porrettos' waterfront lots above the mean higher high tide line. Tab A, at 225-26; Tab C, at 281. The settlement

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<sup>10</sup> Tab A, at 218-20. The record also contains a survey of the Porrettos' property, which is reproduced at Tab B.

agreement covered all of the Porrettos' underlying claims, including their takings and trespass to try title claims. Tab C, at 283. Because the GLO and Patterson are not immune from suit on those claims for the reasons explained above, they are likewise not immune from suit for breaching their agreement to settle the claims.

“[I]f a governmental entity agrees to settle a lawsuit from which it is not immune, it cannot claim immunity from suit for breach of the settlement agreement.” *Livecchi v. City of Grand Prairie*, 109 S.W.3d 920, 922 (Tex. App. – Dallas 2003, pet. dismiss’d); see also *City of Roman Forest v. Stockman*, 141 S.W.3d 805, 813 (Tex. App. – Beaumont 2004, no pet.). The supreme court adopted this sensible doctrine in *Texas A&M University – Kingsville v. Lawson*, 87 S.W.3d 518, 521 (Tex. 2002) (plurality op.). *Lawson* acknowledged that governmental entities generally do not waive immunity from suit merely by entering into a contract or accepting some of its benefits. *Id.* at 520-21. An exception to this rule applies, however, when a governmental entity contracts to settle claims on which a plaintiff is “entitled to sue” it. *Id.* at 521. Thus, “when a governmental entity is exposed to suit because of a waiver of immunity, it cannot nullify that waiver by settling the claim with an agreement on which it cannot be sued.” *Id.*

Below, the GLO and Patterson embraced *Lawson*, arguing that the exception did not apply here because the Porrettos were not entitled to sue for trespass to try title under *Lain*. CR 212-13. As explained in Part II above, however, the Porrettos are entitled to sue Patterson for trespass to try title. Moreover, they are entitled to sue both the GLO and Patterson for taking part of their property without compensation. See Part I, *supra*.

Under *Lawson*, therefore, the GLO and Patterson are not immune from suit for breaching their agreement to settle those claims. For this additional reason, the district court erred in granting their pleas to the jurisdiction. This Court should reverse.

#### **IV. The District Court Erred In Dismissing The Porrettos' Claims Against The Park Board And Muller Because The Legislature Waived Their Immunity.**

Finally, the Porrettos pleaded several causes of action against the Park Board and Muller, including not only takings and trespass to try title, but also slander of title and a request for declaratory relief. Tab A, at 223-26. Parts I and II of this brief explain why the Porrettos can sue the Park Board and Muller for a taking and sue Muller for trespass to try title. Yet there is an additional, independent reason why neither the Park Board nor Muller is immune from suit on any of the Porrettos' claims: the Legislature has waived their governmental immunity.

Section 306.041(a) of the Local Government Code provides that a Park Board “may sue and be sued in its own name.” In *Missouri Pacific Railroad v. Brownsville Navigation District*, 453 S.W.2d 812, 813 (Tex. 1970), the supreme court held that a similar statute allowing navigation districts to sue and be sued “is quite plain and gives general [legislative] consent for [a] District to be sued in the courts of Texas in the same manner as other defendants.” *See also FDIC v. Meyer*, 510 U.S. 471, 475, 480 (1994) (reaching same conclusion under similar federal statute). Accordingly, the court rejected the district’s claim of immunity and reversed the order granting its plea to the jurisdiction. *Mo. Pac.*, 453 S.W.2d at 814.

Some courts of appeals have recently cast doubt on *Missouri Pacific*, and the supreme court is currently reviewing the matter. In 2004, however, this Court issued a thorough opinion concluding that “*Missouri Pacific* remains the law of this state.” *United Water Servs., Inc. v. City of Houston*, 137 S.W.3d 747, 755 (Tex. App. – Houston [1st Dist.] 2004, pet. filed). In this case, therefore, the Court should follow *Missouri Pacific* and reject the pleas for immunity by the Park Board and Muller in their entirety.

### CONCLUSION AND PRAYER

For these reasons, appellants Henry P. Porretto, Jr. and Rosemarie Porretto respectfully request that this Court reverse in part the district court’s orders granting appellees’ pleas to the jurisdiction and remand the following causes of action to that court for further proceedings: (1) all of appellants’ causes of action against the Park Board and Muller; (2) their takings and breach of contract actions against the GLO and Patterson; and (3) their trespass to try title action against Patterson.

Alternatively, if the Court holds that appellants’ petition does not contain sufficient facts to affirmatively demonstrate the district court’s jurisdiction over all of these causes of action but does not affirmatively demonstrate incurable defects in jurisdiction, appellants request a remand and an opportunity to amend. *See Miranda*, 133 S.W.3d at 226-27; *see also* p. 9, *supra*. Appellants also request all other relief to which they may show themselves justly entitled.

Respectfully submitted,

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January 23, 2006

**CERTIFICATE OF SERVICE**

As required by TEX. R. APP. P. 6.3 and 9.5, I certify that on January 23, 2006, I served a true and correct copy of the foregoing Brief for Appellants by certified U.S. mail, return receipt requested, on all other parties as follows:

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