

05-0321

**In the
Supreme Court of Texas**

TEXAS A&M UNIVERSITY SYSTEM,
TEXAS ENGINEERING EXPERIMENT STATION, AND DR. MARK MCLELLAN,
Petitioners,

v.

DR. SEFA KOSEOGLU,
Respondent.

On Petition for Review from the
Tenth Court of Appeals at Waco, Texas

PETITIONERS' BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Nature of the Case: Suit against state agencies and a government official for breach of contract

Trial Court: Honorable Steve Smith, Judge Presiding,
361st Judicial District Court of Brazos County, Texas

Trial Court Disposition: Denied the defendants' pleas to the jurisdiction

Parties in Court of Appeals: *Appellants:* Texas A&M University System
Texas Engineering Experiment Station
Dr. Mark McLellan

Appellee: Dr. Sefa Koseoglu

Court of Appeals: Tenth Court of Appeals at Waco, Texas

Court of Appeals Disposition: Justice Reyna wrote a majority opinion in which Justice Vance joined. Chief Justice Gray dissented. *Texas A&M University System v. Koseoglu*, 167 S.W.3d 374 (Tex. App.—Waco 2005, pet. filed).

As to the government official, the court of appeals dismissed his appeal for lack of appellate jurisdiction.

As to the government entities, the court of appeals reversed the denial of their plea to the jurisdiction on the ground that it was barred by sovereign immunity but nonetheless remanded the case.

STATEMENT OF JURISDICTION

The Court has jurisdiction over this interlocutory appeal because the justices of the court of appeals disagree on a question of law material to the decision and because the court of appeals held differently than have other courts of appeals. *See* TEX. GOV'T CODE §§ 22.001(a)(1) & 22.001(a)(2); *see also* TEX. GOV'T CODE §§ 22.225(c), 22.225(e).

ISSUES PRESENTED

1. The court of appeals held that the plaintiff's breach-of-contract claim was barred because it did not fit an exception to the State's sovereign immunity from suit. Although aware of the State's plea for four months, the plaintiff had not amended his petition nor had he suggested any viable way for the jurisdictional defect to be cured. Should the court of appeals have dismissed the claims rather than remanding for further trial-court proceedings?
2. A government official acting in his official capacity stands in the shoes of the State for sovereign-immunity purposes. The court of appeals refused to hear an interlocutory appeal filed by such a government official, reasoning that it lacked interlocutory appellate jurisdiction whenever the plaintiff styled its petition against an official rather than a governmental unit. Should the court of appeals have heard the official's appeal and ruled in his favor on the underlying immunity issues?

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Tenth Court of Appeals at Waco, Texas

PETITIONERS' BRIEF ON THE MERITS

TO THE HONORABLE SUPREME COURT OF TEXAS:

The courts of appeals are divided on two significant questions affecting the appellate review of pleas to the jurisdiction invoking sovereign immunity from suit: (1) whether a plaintiff can evade interlocutory review of the denial of a plea by styling the petition against an official rather than the governmental entity, and (2) whether a court of appeals must always remand even if a plaintiff has steadfastly refused to cure the jurisdictional defects in his pleadings, thus forcing all parties to expend added resources in the trial court and perhaps additional interlocutory appeals. The Court should grant the petition to resolve the split over these two questions.

STATEMENT OF FACTS

This is a breach-of-contract action against the State and one of its officials. 1.CR.2-10 (original petition). The alleged contract arises out of an employment dispute, and Koseoglu claims that sovereign immunity from suit has been waived because the contract contains a release of Koseoglu's yet-unspecified potential claims. 1.CR.3, ¶6.

A. The Original Employment Dispute

The Texas A&M University System (TAMU) contains a department known as the Texas Engineering Experiment Station (TEES). 1.CR.2, ¶4. One of the research institutes within TEES is the Institute of Food Sciences and Engineering. 1.CR.5, ¶13. Within that institute is a more focused research center known as the Food Protein Research and Development Center.¹ One of the researchers employed by the center was Sefa Koseoglu. 1.CR.5, ¶13.

Beginning in 1999, Koseoglu moonlighted for Worldnutra, L.L.C., a private business enterprise in which Koseoglu held an ownership interest. 1.CR.63. In Koseoglu's own description, "the services [Koseoglu] provide[s] for Worldnutra are in the same area as [his] academic expertise." 1.CR.64. He used that subject-matter expertise to enable Worldnutra to put on short courses and conferences, and he aided in the publication of relevant books and newsletters. 1.CR.63.

¹ Although not material to the issues in this interlocutory appeal, fuller explanations of the activities of TEES, the Institute of Food Science and Engineering, and the Food Protein Research and Development Center are available on their respective websites. See <http://tees.tamu.edu>; <http://ifse.tamu.edu>; <http://foodprotein.tamu.edu>.

In early 2002, Koseoglu requested TEES's consent to his continued outside employment with Worldnutra. The director of the institute in which Koseoglu was employed, Dr. Mark McLellan, denied the request on January 10, 2002. 1.CR.4, ¶10. McLellan gave two grounds—that involvement with Worldnutra would interfere with Koseoglu's regular work by diverting his attention to competing programs and that the outside employment also constituted a conflict of interest because Worldnutra offered workshops that competed with those of his employer. 1.CR.67 (Jan. 10, 2002 letter). Koseoglu protested that decision, filing internal appeals and writing correspondence to other TEES officials. *E.g.*, 1.CR.70.

On July 19, 2002, Koseoglu was given a written warning that he appeared to be in violation of TEES policy by continuing to do work for Worldnutra. 1.CR.80-81. On October 2, 2002, McLellan informed Koseoglu that his employment would be terminated at the end of November 2002. 1.CR.4, ¶11; 1.CR.88 (Oct. 2, 2002 memorandum).

B. The Alleged Settlement Agreement

After being notified of the upcoming termination, Koseoglu sought to negotiate with Texas A&M University's general counsel office. 1.CR.5, ¶12. On December 19, 2002, counsel for Koseoglu sent a letter outlining terms under which he would agree to resolve the dispute. 1.CR.5, ¶12. Under the terms outlined in the letter, Koseoglu would remain in his position until August 2003 and receive certain other financial and non-financial benefits. 1.CR.5-7, ¶¶13-15. The letter included a blank signature line, which was then signed by an attorney in the counsel's office at the Texas A&M University

System.² 1.CR.12-15 (Dec. 19, 2002 letter). On January 14, 2003, Koseoglu’s counsel sent a proposed draft of the final settlement agreement to TAMU’s counsel’s office. 1.CR.7, ¶16. The final settlement agreement was never signed. 1.CR.7, ¶16.

Counsel for Koseoglu later wrote to TAMU, contending that, by refusing to execute the January 14, 2003 settlement documents, the university was in breach of the earlier December 19, 2002 “agreement.” 1.CR.95-98. In the exchange of correspondence, his counsel raised the prospect of a due-process challenge.³ 1.CR.97; *see also* 1.CR.51-52.

C. This Breach-of-Contract Suit

On April 3, 2003, Koseoglu filed a petition in the Brazos County District Court, asserting a breach-of-contract claim against the Texas A&M University System, TEES, and McLellan. 1.CR.2-11. The petition sought contract damages arising from purported breaches of the December 19, 2002 letter. *See* 1.CR.8-10; *see also* 1.CR.12-15 (December 19, 2002 letter attached to the petition).

The defendants filed pleas to the jurisdiction on the ground that they had sovereign immunity from suit against this breach-of-contract claim. 1.CR.16-20 (TAMU and

² The parties disagree about whether this signature on the December 19, 2002 letter agreement was sufficiently authorized to constitute a binding settlement on behalf either of the governmental entities or of Dr. McLellan. *Compare* 1.CR.31-35 (affidavits supporting verified denials), *with*, 1.CR.5, ¶12 (“the parties reached a settlement which was memorialized in a letter agreement”). The Court need not reach that substantive dispute to resolve the sovereign-immunity-from-suit issues in this interlocutory appeal.

³ Koseoglu’s counsel suggested in this correspondence that a 1985 offer letter sent to Koseoglu had created a property interest because it described the position being offered as a “permanent” position. 1.CR.97.

TEES); 1.CR.24-30 (McLellan). Meanwhile, Koseoglu filed a motion for summary judgment, 1.CR.36-56, contending in part that sovereign immunity had been waived for the breach-of-contract action because it had been waived for an underlying action under 42 U.S.C. §1983. 1.CR.51-52 & n.3. Four months later, after a hearing, 2.RR.4, the district court denied the pleas to the jurisdiction. 3.CR.220.

TAMU, TEES, and McLellan filed an interlocutory appeal to the Tenth Court. 3.CR.236-37. The clerk of the court sent a letter to McLellan stating that he did not qualify to file such an appeal. Subsequently, the Tenth Court dismissed McLellan's interlocutory appeal for want of jurisdiction. *Koseoglu*, 167 S.W.3d at 379.

As to the remaining parties, the court of appeals reversed the district court's denial of the plea to the jurisdiction. *Koseoglu*, 167 S.W.3d at 379-80. The court concluded that there was no waiver-by-conduct exception and that Koseoglu's pleadings did not fit into the narrow exception suggested by the plurality in *Texas A&M University–Kingsville v. Lawson*, 87 S.W.3d 518 (Tex. 2002), because Koseoglu's hypothesized underlying §1983 claim was not one for which sovereign immunity had been waived. *Koseoglu*, 167 S.W.3d at 380. It thus held that Koseoglu's breach-of-contract claim was barred by sovereign immunity from suit. *Id.* But the court chose to remand, suggesting that it might be possible for Koseoglu to state some entirely different claim for which sovereign immunity might have been waived "with respect to the termination of the employer-employee relationship." *Id.* at 384. This petition for review followed.

SUMMARY OF THE ARGUMENT

The court of appeals made two key errors—each bearing on a split among Texas’s courts of appeals—fundamental to how appellate courts should handle the interlocutory review of pleas to the jurisdiction. The court of appeals’s first error—concluding that courts have no interlocutory appellate jurisdiction to review jurisdictional pleas filed by government employees acting in their official capacity—exacerbates a three-way conflict among the courts of appeals that warrants this Court’s intervention. Because a suit against a state entity’s employee in his official capacity is a suit against the entity itself—not the employee individually—Texas Civil Practice and Remedies Code §51.014(a)(8) authorizes interlocutory appellate review of an official’s jurisdictional plea based on the entity’s sovereign-immunity-from-suit. The court of appeals’s contrary holding elevates form over substance and opens a loophole in the interlocutory-appeal regime that plaintiffs might easily exploit by naming an official as a defendant.

The court of appeals’s second error—refusing to dismiss the breach-of-contract claim after correctly concluding that it was barred by sovereign immunity—represents a departure from this Court’s precedent and puts the Tenth Court of Appeals at odds with other courts of appeals. At the outset, the court of appeals should have held that Koseoglu had failed to avail himself of the “reasonable opportunity” he had to amend his pleadings during the four months in which the plea to the jurisdiction was pending. The court of appeals held, in essence, that it could not render a judgment of dismissal in such a situation—turning the first interlocutory appeal into a mere dress rehearsal. Judicial efficiency demands instead that courts be able to rely on the plaintiff to put his best foot

forward before the first interlocutory appeal. Alternatively, the court of appeals should have held that Koseoglu’s breach-of-contract claim was incurably defective since further factual pleading would not affect sovereign immunity from suit. Indeed, even the plurality in *Texas A&M University–Kingsville v. Lawson*, 87 S.W.3d 518 (Tex. 2002), suggests the need to find that the Legislature had waived immunity as to the underlying, allegedly settled claim. But Koseoglu did not articulate such a claim—before or after allegedly settling his case—and he should not now be given a remand to rewrite the history of his alleged settlement with TAMU by articulating one for the first time.

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE TWO IMPORTANT DISAGREEMENTS AMONG THE COURTS OF APPEALS.

A. The Court’s Intervention Is Needed To Resolve the Three-Way Split Over the Availability of Interlocutory Appeal for Pleas to the Jurisdiction in Suits Nominally Brought Against Government Officials.

The courts of appeals disagree over whether they have interlocutory appellate jurisdiction over a plea to the jurisdiction challenging claims nominally made against a government official rather than against the entity itself. Eight of the State’s courts of appeals have already weighed in on this question, providing three separate and irreconcilable answers: yes, no, and sometimes.

Four courts of appeals have answered “yes.” The First, Third, Seventh, and Thirteenth Courts of Appeals have held that §51.014 authorizes interlocutory review of the denial of jurisdictional pleas on claims against state employees sued in their official capacity because such suits are, in reality, suits against governmental units. *See De Miño*

v. Sheridan, No. 01-03-00794-CV, 2004 WL 1794558, at *2 (Tex. App.—Houston [1st Dist.] Aug. 12, 2004, no pet.); *Smith v. Lutz*, 149 S.W.3d 752, 756 n.3 (Tex. App.—Austin 2004, no pet.) (considering plea as to claims in official capacity); *Potter County Attorney’s Office v. Stars & Stripes Sweepstakes, L.L.C.*, 121 S.W.3d 460, 464-65 (Tex. App.—Amarillo 2003, no pet.); *Nueces County v. Ferguson*, 97 S.W.3d 205, 216 (Tex. App.—Corpus Christi 2002, no pet.).⁴

Three courts of appeals have answered “no.” The Second, Fifth, and Fourteenth Courts of Appeals have held that interlocutory review of pleas to the jurisdiction is not available when state employees are sued—even if sued in their official capacity—on the ground that they do not fit within the category of “governmental units” under §51.014(a)(8). See *Castleberry Indep. Sch. Dist. v. Doe*, 35 S.W.3d 777, 779-80 (Tex. App.—Fort Worth 2001, pet. dismissed w.o.j.); *Dallas County Cmty. Coll. Dist. v. Bolton*, 990 S.W.2d 465, 467 (Tex. App.—Dallas 1999, no pet.); *Univ. of Houston v. Elthon*, 9 S.W.3d 351, 354 (Tex. App.—Houston [14th Dist.] 1999, pet. dismissed w.o.j.).

Straddling that split, the Tenth Court of Appeals has most recently chosen to answer “sometimes.” It held that some officials are entitled to bring suit as a “governmental unit” under §51.014(a)(8) while some other officials—including McLellan—are not so entitled.⁵ See *Tex. A&M Univ. Sys. v. Koseoglu*, 167 S.W.3d 374,

⁴ See also *Ware v. Miller*, 82 S.W.3d 795, 800 (Tex. App.—Amarillo 2002, pet. denied).

⁵ In another case currently pending before this Court on petition for review, the Tenth Court of Appeals simply answered “no” in refusing to consider an official’s plea asserted by two employees. See *Tex. Parks & Wildlife Dep’t v. E.E. Lowrey Realty, Inc.*, 155 S.W.3d 456, 457-58 (Tex. App.—Waco 2004, pet. filed). In an even earlier case, the Tenth Court of Appeals had answered “yes” and had considered an official’s plea asserted by a sheriff. *Brazos County v.*

377-79 (Tex. App.—Waco 2005, pet. filed). The distinction drawn by the Tenth Court of Appeals is that some officials hold positions described in the Texas Constitution and thus become “governmental units.” *Id.* at 378. For this proposition, the *Koseoglu* court relies on a decision of the Third Court of Appeals that allowed certain high-ranking officials to pursue interlocutory appeals. *Id.* (citing *Perry v. Del Rio*, 53 S.W.3d 818, 820-23 (Tex. App.—Austin 2001), *dism’d on other grounds*, 66 S.W.3d 239 (Tex. 2001)). But more recent Third Court decisions confirm that even relatively low-level state officials may be the subject of interlocutory appeals under §51.014(a)(8) as to claims asserted against them in their official capacity. *E.g., Smith*, 149 S.W.3d at 756.

The question whether officials sued in their official capacities can bring an interlocutory appeal on sovereign-immunity grounds has now been faced by at least eight courts of appeals, and they have reached at least three irreconcilable answers. The resulting confusion affects a substantial part of the litigation docket against government officials. Indeed, each side of this split can count among its adherents the appellate courts for at least two major urban centers.⁶ The Court should hear this case to resolve that uncertainty.

Tullous, No. 10-04-00020-CV, 2004 WL 1574889, at *1 (Tex. App.—Waco July 7, 2004, no pet.) (mem. op.). Now, in *Koseoglu*, the Tenth Court of Appeals has attempted to reconcile its own prior decisions by expressly adopting the “sometimes” approach that it erroneously attributes to the Third Court of Appeals. 167 S.W.3d at 377-79 (asserting that *Lowrey* and *Tullous* can be reconciled, citing a decision from the Third Court).

⁶ Adding to the uncertainty, the two courts covering the Houston metropolitan area are on opposite sides of this question. *Compare De Miño*, 2004 WL 1794558, at *2 (allowing interlocutory appeal), *with, Elthon*, 9 S.W.3d at 354 (not allowing interlocutory appeal). Thus, litigants and trial courts remain unsure whether interlocutory review is available until an appeal is randomly assigned to either the First or Fourteenth Court of Appeals.

B. The Court Should Grant the Petition To Resolve a Split Among the Courts of Appeals Over When Courts of Appeals Should Dismiss—Not Remand—Claims That Fall Incurably Outside the Trial Court’s Subject-Matter Jurisdiction.

On a second issue, the Tenth Court of Appeals has staked out a new position in opposition to other courts of appeals and to this Court. Although the court of appeals correctly held that Koseoglu’s breach-of-contract claim did not fall within any applicable waiver of immunity from suit, *Koseoglu*, 167 S.W.3d at 380—an aspect of the judgment against which Koseoglu has not filed a cross-petition, TEX. R. APP. P. 53.1—the court nonetheless chose to remand the claim. *Koseoglu*, 167 S.W.3d at 383-84.

The court of appeals has taken the absolutist view that a remand is essentially always required when reversing the denial of a plea to the jurisdiction, even when (as here) a plaintiff has chosen not to amend its pleading to attempt to cure any defects:⁷

[W]e hold that a plaintiff may stand on his pleadings in the face of a plea to the jurisdiction unless and until a court determines that the plea is meritorious. If a court so determines, a plaintiff must then be provided “a reasonable opportunity to amend” his pleadings to attempt to cure the jurisdictional defects found, unless “[t]he pleaded facts and the evidence . . . demonstrate that it is impossible for [the plaintiff] to amend the pleadings to invoke jurisdiction.”

Id. at 383 (citations omitted). That holding garnered a dissent from Chief Justice Gray, who noted that the Tenth Court’s new approach was “encouraging the plaintiff to not

⁷ Although the *Koseoglu* majority purports to allow for dismissal if an amendment to cure is “impossible,” its resolution of this case demonstrates the opposite. The *Koseoglu* court held that the plaintiff did not fit into the one hypothetical loophole in sovereign immunity from suit against contract claims because there was no waiver for the purported underlying §1983 claim. 167 S.W.3d at 383. Yet, even though no embellishment of the petition’s *factual* allegations would bear on that result—and thus a cure is impossible for the plaintiff’s claims—the court still refused to dismiss. See Parts III.A.2 & III.C, *infra* (discussing this issue in more detail).

plead all the information and [to] never amend its pleadings until after it has suffered an adverse ruling.” *Id.* at 384 (Gray, C.J., concurring in part and dissenting in part). In his words, “What a waste of judicial resources, both trial and appellate. I would hold that if the plaintiff has had a reasonable opportunity to evaluate the plea to the jurisdiction and amend the petition to meet the complaints raised in that plea, but fails or refuses to amend, the plaintiff must suffer the consequences of its decision.” *Id.* at 384 (Gray, C.J., concurring in part and dissenting in part).

The Tenth Court of Appeals’s novel rule also puts it in direct conflict with the Third Court of Appeals, which took the opposite view in *O’Neal v. Texas Board of Chiropractic Examiners*, No. 03-03-00270-CV, 2004 WL 2027787 (Tex. App.—Austin Sept. 10, 2004, no pet.) (mem. op.). In that case, the Third Court of Appeals dismissed the plaintiff’s claims without a remand because he “had ample notice of the Board’s arguments, but he did not attempt to replead,” *id.* at *3. In *Koseoglu*, the Tenth Court of Appeals made express its “disagree[ment] with the conclusion stated” by the Third Court of Appeals. 167 S.W.3d at 383.

In addition, the very breadth of the *Koseoglu* majority’s rule places it—as the opinion acknowledges—at odds with decisions of the Third and Fourth Courts of Appeals, as well as certain statements made in a plurality opinion of this Court. *Id.* at 383. The Tenth Court of Appeals would almost always refuse to render a judgment of dismissal on the theory that the plaintiff always gets one more shot, *id.* at 383-84, a view that it acknowledges is opposed to certain decisions from the Third and Fourth Courts of Appeals. *Id.* at 383 (rejecting the approach of *Save Our Springs Alliance v. City of*

Austin, 149 S.W.3d 674, 686 (Tex. App.—Austin 2004, no pet.), and *Salas v. Wilson Mem'l Hosp. Dist.*, 139 S.W.3d 398, 405 (Tex. App.—San Antonio 2004, no pet.)). In addition, the Tenth Court of Appeals noted its disagreement with certain statements in a recent plurality opinion of this Court. *Koseoglu*, 167 S.W.3d at 383 (citing *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 231 (Tex. 2004) (plurality)). The Court should grant the petition to resolve this express disagreement between the Tenth Court of Appeals and other courts in this state.

II. THE COURT OF APPEALS SHOULD HAVE HEARD MCLELLAN'S INTERLOCUTORY APPEAL.

The Court should reverse the court of appeals's erroneous dismissal of McLellan's appeal and conclude that §51.014 permits interlocutory review of a plea asserting the sovereign immunity from suit held by a governmental entity, regardless of how the plaintiff happens to style his pleading.

A. When a Government Official Files a Plea to the Jurisdiction, He Is Asserting the Sovereign Immunity from Suit Held by the Governmental Entity.

The rule announced by the court of appeals elevates form over substance in two ways. It does not acknowledge that a suit against a government official in his official capacity is, in reality, a suit against the governmental entity. And it does not account for the principle that a plea to the jurisdiction is defined by the substance of the immunity asserted, not by the form of the pleading.

First, when an official files a plea to the jurisdiction, the official is invoking the sovereign immunity from suit held by the entity itself.⁸ It is fundamental that a suit against a government employee in his official capacity is merely “another way of pleading an action against the entity of which [the employee] is an agent.” *Kentucky v. Graham*, 473 U.S. 159, 165 (1985); *see also Tex. Dep’t of Pub. Safety. v. Petta*, 44 S.W.3d 575, 581 (Tex. 2001); *McLane Co. v. Strayhorn*, 148 S.W.3d 644, 649 (Tex. App.—Austin 2004, pet. denied) (“A suit against a state officer lawfully exercising her governmental functions is considered a suit against the State, and is barred by sovereign immunity absent legislative consent.”); *Liberty Mut. Ins. Co. v. Sharp*, 874 S.W.2d 736, 738 (Tex. App.—Austin 1994, writ denied) (“This court has previously held that a suit against a state officer in his official capacity is a suit against the state.”); *Alcorn v. Vaksman*, 877 S.W.2d 390, 403 (Tex. App.—Houston [1st Dist.] 1994, writ denied). A suit against a governmental employee in his official capacity “is *not* a suit against the official personally, for the real party in interest is the entity.” *Graham*, 473 U.S. at 166 (emphasis in original). Such a suit “actually seek[s] to impose liability against the governmental unit . . . rather than on the individual specifically named,” *Ferguson*, 97 S.W.3d at 213, and “is, in all respects other than name, . . . a suit against the entity,” *Graham*, 473 U.S. at 166; *see also Tex. Natural Res. Conservation Comm’n v. IT-Davy*,

⁸ This “sovereign immunity from suit” is a limitation on the subject-matter jurisdiction of the courts. *See Tex. Dep’t of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999) (per curiam). It differs from the defense of “official immunity,” which is available to shield an official sued in his *individual* capacity from personal liability. *City of Houston v. Kilburn*, 849 S.W.2d 810, 812 n.1 (Tex. 1993). Under Texas law, “official immunity” shields an official who is: (1) acting within the scope of his authority, (2) performing his discretionary duties, (3) in good faith. *See Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 425 (Tex. 2004).

74 S.W.3d 849, 855-56 (Tex. 2002) (“Declaratory judgment suits against state officials seeking to establish a contract’s validity, to enforce performance under a contract, or to impose contractual liabilities are suits against the State.”) (citing *Herring v. Houston Nat’l Exch. Bank*, 253 S.W. 813, 814 (Tex. 1923)). But the court of appeals did not treat the claims against McLellan as being, in substance, against the State.⁹

Second, when construing the phrase “plea to the jurisdiction” in §51.014(a)(8), this Court has emphasized the substance of the immunity argument rather than the form of the pleadings. “The reference to ‘plea to the jurisdiction’ is not to a particular procedural vehicle but rather to the substance of the issue raised.” *Dep’t of Criminal Justice v. Simons*, 140 S.W.3d 338, 349 (Tex. 2004). Yet, the court of appeals looked to the *form* of the pleadings rather than the substance of the immunity being asserted, which was sovereign immunity from suit held by the government entity.

By drawing an artificial distinction between pleas filed by government entities and pleas filed by government officials asserting the entities’ sovereign immunity from suit, the court of appeals has misinterpreted the statute in a formalistic way. In recognition that a government official’s assertion of a plea to the jurisdiction is just another “procedural vehicle” for the assertion of the entity’s underlying sovereign immunity from suit, *cf. Simons*, 140 S.W.3d at 349, this Court should hold that §51.014(a)(8) does vest interlocutory appellate jurisdiction over such pleas.

⁹ By contrast, at least four other courts of appeals have held that an official may pursue an interlocutory appeal in order to vindicate the entity’s sovereign immunity from suit. *See De Miño*, 2004 WL 1794558, at *2; *Smith*, 149 S.W.3d at 756 n.3; *Potter County Attorney’s Office*, 121 S.W.3d at 464-65; *Ferguson*, 97 S.W.3d at 216.

B. The Text of §51.014(a)(8)—Including Its Cross-Reference to the Definition of “Governmental Unit” in the Texas Tort Claims Act—Authorizes This Interlocutory Appeal.

The provision in question, Texas Civil Practice and Remedies Code §51.014(a)(8), provides how a “person” may appeal certain pleas to the jurisdiction:

(a) A person may appeal from an interlocutory order of a district court, county court at law, or county court that . . .

(8) grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001.

TEX. CIV. PRAC. & REM. CODE §51.014(a)(8).

The court of appeals erroneously concluded that §51.014(a)(8) did not allow this interlocutory appeal because, in its words, “McLellan is not a ‘governmental unit.’” *Koseoglu*, 167 S.W.3d at 379. Its reading is wrong on at least two counts. First, the term “governmental unit” is explicitly defined in terms of how that term is used under the Texas Tort Claims Act found in Chapter 101 of the Civil Practices and Remedies Code, and thus the Legislature was incorporating the well-settled rule that a suit against an official in his official capacity is deemed to be a suit against the “governmental unit.” *See* Part II.B.1, *infra*. Second, the court of appeals wrongly concluded that the term “governmental unit” limits the class of persons who can appeal. *See* Part II.B.2, *infra*. But reading the statute whole, the term “person” defines who can appeal—a plaintiff, for example, can appeal the grant of a plea under §51.014(a)(8)—and the term “governmental unit” merely describes the entity holding the sovereign immunity from suit that underpins the “plea to the jurisdiction.”

1. Section §51.014(a)(8)’s reference to the definition of “governmental unit” found in the Texas Tort Claims Act demonstrates that the Legislature was incorporating the well-settled rule that a suit against an official in his official capacity is a suit against the “governmental unit.”

When the Legislature drafted §51.014(a)(8), it chose to borrow the definition of “governmental unit” from the Texas Tort Claims Act by an explicit cross-reference. TEX. CIV. PRAC. & REM. CODE §51.014(a)(8) (“governmental unit as that term is defined in Section 101.001”); *see also id.* §101.001(3) (defining “governmental unit” for purposes of the Texas Tort Claims Act). Based on that explicit legislative choice, the Court should give the same meaning to the term “governmental unit” in this context that has long been true in the context of the Texas Tort Claims Act.

The Texas Tort Claims Act defines “governmental unit” as:

(A) this state and all the several agencies of government that collectively constitute the government of this state, including other agencies bearing different designations, and all departments, bureaus, boards, commissions, offices, agencies, councils, and courts; [and]

...

(D) any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution.

TEX. CIV. PRAC. & REM. CODE §101.001(3).

In turn, the defined term “governmental unit” is used in several critical provisions of the Texas Tort Claims Act governing the types of damages for which suit might be brought, TEX. CIV. PRAC. & REM. CODE §101.021 (“a governmental unit in the state is liable for”), the nature of the duty for an alleged premises defects, *id.* §101.022 (“the

governmental entity owes to the claimant only the duty that . . .”), and the Act’s limited waiver of immunity from suit, *id.* §101.025 (“[a] person having a claim under this chapter may sue a governmental unit for damages”).

And under the Texas Tort Claims Act—applying the very same definition of “governmental unit” referenced in §51.014(a)(8)—there is broad agreement in the courts that an official sued in his official capacity shares the same immunity from suit as the governmental entity.¹⁰ *E.g.*, *Harrison v. TDCJ-TDCJID*, No. 07-03-0239-CV, 2005 WL 1397415, at *2 (Tex. App.—Amarillo 2005, no pet.) (mem. op.) (applying this principle to find that an official sued in his official capacity is protected by sovereign immunity under the TTCA to the same extent as the government entity); *Madox v. Thomas*, No. 11-02-00042-CV, 2003 WL 21757477, at *2 (Tex. App.—Eastland July 31, 2003, no pet.) (mem. op.); *Tex. State Auditor’s Office v. Mora-Nichols*, No. 03-03-00113-CV, 2003 WL 22453830, at *4 (Tex. App. Oct. 30, 2003, no pet.) (mem. op.); *Klein & Assocs. Political Relations v. Port Arthur Indep. Sch. Dist.*, 92 S.W.3d 889, 896 (Tex. App.—Beaumont 2002, pet. denied); *Hohman*, 6 S.W.3d at 777-78; *Bates v. Dallas Indep. Sch. Dist.*, 952 S.W.2d 543, 551 (Tex. App.—Dallas 1997, writ denied); *Dear v. City of Irving*, 902 S.W.2d 731, 735 n.4 (Tex. App.—Austin 1995, writ denied). Courts thus apply the principle that—insofar as the official is sued in his official capacity—he is included

¹⁰ Although a published opinion from the First Court of Appeals in 1995 suggested the opposite, *see Harrison v. TDCJ-ID*, 915 S.W.2d 882, 888 (Tex. App.—Houston [1st Dist.] 1995, no pet.), that court has since correctly stated that “employees sued in their official capacities are shielded by sovereign immunity,” *Univ. of Tex. Med. Branch at Galveston v. Hohman*, 6 S.W.3d 767, 777 (Tex. App.—Houston [1st Dist. 1999, pet. dismissed w.o.j.).

within the blanket of the term “governmental unit.” And because the Legislature chose to explicitly link §51.014(a)(8) to the reach of “governmental unit” under the Texas Tort Claims Act, the Court should hold that the term has the same broad meaning for purposes of defining the reach of interlocutory appellate review of pleas to the jurisdiction.

2. In any event, the term “governmental unit” does not define the class of persons who can appeal under §51.014(a)(8) but instead merely describes the substance of the plea.

Moreover, even if the court of appeals were correct that somehow the term “governmental unit” did not include an official acting in his official capacity, its construction of §51.014(a)(8) would still be incorrect.

The court of appeals fundamentally misread the statute in concluding that the phrase “governmental unit” is the term in the statute that limits the class of persons who can bring appeals. That is not how the term functions in the operative sentence. The class who can bring an appeal is any “person,” not any “governmental unit.” TEX. CIV. PRAC. & REM. CODE §51.014(a) & 51.014(a)(8) (“A person may appeal from an interlocutory order . . . that: (8) grants or denies a plea to the jurisdiction by a governmental unit . . .”).

Thus, even an aggrieved *plaintiff* can bring an interlocutory appeal challenging the grant of a plea asserting sovereign immunity from suit. *E.g., De Miño*, 2004 WL 1794558, at *2 (plaintiff was appealing the grant of a plea by officials in their official capacity). Such a plaintiff is merely a “person” under the initial part of §51.014(a); they are not a “governmental unit” under subpart (a)(8). Instead, the term “by a government unit” describes the *substance* of the argument being asserted.

Indeed, because this Court has already construed the phrase “plea to the jurisdiction” to focus on the underlying substance of the sovereign immunity from suit being asserted, it makes the most sense to conclude that the modifying phrase “by a governmental unit” refers to the entity holding that immunity.¹¹ In §51.014(a)(8), the language “plea to the jurisdiction” refers to the substance of the sovereign-immunity-from-suit issue—“not to a particular procedural vehicle but to the substance of the issue raised.” *Simons*, 140 S.W.3d at 349. Considering that preference for substance over form in §51.014(a)(8), the modifying phrase “by a governmental unit” that immediately follows is most logically read describing which entity holds that substantive immunity. Read whole, the statute thus provides interlocutory appeal to any “person” aggrieved by the “grant[] or deni[al]” of a plea invoking the sovereign immunity from suit held “by a governmental unit.” That perfectly describes McLellan’s interlocutory appeal, and the court of appeals erred to hold otherwise.

C. Allowing Interlocutory Appeal In These Circumstances Is Consistent With the Purposes Behind §51.014(a)(8).

1. The court of appeals’s construction of §51.014(a)(8) contravenes the purpose demonstrated by its legislative history.

A further reason to reject the court of appeals’s reading is that it undermines the purposes that motivated the Legislature to enact §51.014(a)(8). The legislative history of §51.014(a)(8) underscores the Legislature’s concern with ensuring that sovereign immunity from suit could be decided through interlocutory appeal. For example, one

¹¹ Notably, the statute does *not* say that the plea must be filed by a governmental entity. The word “filed” does not appear within the phrase “plea to the jurisdiction by a governmental unit.” TEX. CIV. PRAC. & REM. CODE §51.014(a)(8).

representative speaking in favor of the bill in committee stated that the purpose of the provision was to allow “state agencies” to “find . . . out up front” whether or not a trial court could assert subject-matter jurisdiction over a dispute. *See* Hearings on Tex. S.B. 453 Before the House Civil Practice Comm., 75th Leg., R.S. (May 6, 1997) (testimony of Representative Pete Gallego) (Tape 1, Side 1, available from House Media Services Office). That concern is equally justified regardless of whether a plaintiff has chosen to style his petition against a government official.

By permitting interlocutory appeals of pleas to the jurisdiction, the statutory provision was designed to “save a lot of money for not only the State in terms of the litigation that the State is involved in,” but also for the claimants suing the State. *Id.* Section 51.014(a)(8) was aimed at reducing litigation expenses for all parties involved in suits against state entities by resolving the question of sovereign immunity prior to suit rather than after a full trial on the merits. *Id.*; *see also* HOUSE RESEARCH ORGANIZATION, BILL ANALYSIS, Tex. S.B. 453, 75th Leg., R.S. (1997) (noting that supporters of provision believed that “incorrect rulings on [pleas to the jurisdiction] needlessly waste the time of the courts and can cost litigants hundreds of thousands of dollars as they defend cases which should have been dismissed”). Those cost savings, too, apply equally regardless of whether the plaintiff has chosen to style his petition against a government official. But under the court of appeals’s reading, §51.014(a)(8) might actually exacerbate these problems rather than alleviating them.

2. The court of appeals’s suggestion that officials instead file a “summary judgment” in order to take advantage of §51.014(a)(5) is problematic.

The court of appeals notes its disagreement with the First Court of Appeals’s decision in *De Miño*, stating that “[t]he implication of *De Miño* that [our] narrow reading thwarts the legislative purpose of providing prompt review of interlocutory rulings on the immunity claims of government employees is simply incorrect.” *Koseoglu*, 167 S.W.3d at 378-79. The court of appeals suggests that §51.014(a)(5) provides another avenue: “a government employee need not wait until after the conclusion of the parties’ litigation to seek appellate review when a trial court denies the government employee’s claim of immunity, if the employee raises the claim by motion for summary judgment.” *Id.* at 379.

But in the court of appeals’s explanation lie the two critical distinctions that explain why an appeal under §51.014(a)(5) is an inadequate substitute to an appeal under §51.014(a)(8). In particular, appeal under §51.014(a)(5) is only available to review a ruling on a “motion for summary judgment” and it is only available if the ruling “denies” the motion.¹² TEX. CIV. PRAC. & REM. CODE §51.014(a)(5).

First, the court of appeals would make appellate jurisdiction over the invocation of sovereign immunity from suit turn on the same kind of technical distinctions about the forms of pleadings rejected in *Simons*. See *Simons*, 140 S.W.3d at 349. And this case

¹² That section authorizes appeal from a ruling that “denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state.” TEX. CIV. PRAC. & REM. CODE §51.014(a)(5).

demonstrates the mischief that might result. Here, the court of appeals held that it could consider the entity's plea on interlocutory appeal but not McLellan's. If McLellan follows the advice of now filing a "motion for summary judgment," and if that motion is denied, he would file what would be a *second* interlocutory appeal in this same case seeking substantively identical relief. That situation could be expected to be common, since the trial court's order on a "plea to the jurisdiction" and its order on a "motion for summary judgment" might not happen to fall close enough in time to be a part of the same notice of interlocutory appeal. *See* TEX. R. APP. P. 26.1(b) & 28.1 (notice of interlocutory appeal must be filed within 20 days of the particular order being challenged).

Second, the court of appeals's rule would only grant interlocutory appellate review if the official's claim of sovereign immunity is denied—a plaintiff would be unable to seek interlocutory appellate review to challenge the *grant* of such a "summary judgment" on the grounds of sovereign immunity from suit. The difficulties that this presents—both for a plaintiff and for the State—are apparent from an example.

Consider the common situation in which a plaintiff's petition names as defendants a governmental entity, a government official in his official capacity, and the same official in his individual capacity. In that situation, the two defendants representing the State—the governmental entity and the official sued in his official capacity—often file a plea to the jurisdiction asserting that the claims against them are barred by sovereign immunity from suit. Imagine that the trial court grants the plea as to both defendants, reserving the

question of the claims against the official in his *individual* capacity.¹³ Under the court of appeals’s misguided reading of §51.014(a)(8), the plaintiff would be without interlocutory recourse against the government official sued in his official capacity. Instead, the plaintiff would be able to challenge only *part* of the plea to the jurisdiction on interlocutory appeal, and the plaintiff would have to wait until after a merits trial (or other merits disposition) to seek appellate relief regarding the official-capacity claims. Government entities, too, are harmed by such a rule, as they must litigate the issue of their underlying sovereign immunity from suit in *two* separate appeals—the interlocutory appeal and the final appeal.

The court of appeals’s suggested approach—that the official sued in his official capacity should file a “motion for summary judgment” instead of a plea in order to take advantage of §51.014(a)(5)—does not even begin to solve these problems. At the outset, it is far from clear that trial courts will routinely decide “summary judgment” motions near the beginning of a case before the very type of costly and needless discovery that §51.014(a)(8) was designed to avoid for all parties. Moreover, if a trial court does not decide such a “summary judgment” motion at the same time as the government entity’s plea, it is likely to result in *multiple* interlocutory appeals—if the two rulings come more than 20 days apart, for example, the two identical sovereign-immunity arguments could

¹³ To note just one real-world example, this situation occurred in *Smith v. Lutz*, 149 S.W.3d 152 (Tex. App.—Austin 2004, no pet.). In that case, the trial court granted the plea as to both the government entity and its officials to the extent they were sued in their official capacity, and the court of appeals noted that any claims against the officials in their *individual* capacity were not a part of the interlocutory appeal. *Id.* at 756 & n.3.

not be pursued through the same appeal.¹⁴ And, worse from a plaintiff’s perspective, §51.014(a)(5) would only be available if the trial court *denies* the motion. Thus, a plaintiff may be left with no opportunity to seek interlocutory review of immunity determinations about official-capacity claims against an official until after final judgment.

C. The Court of Appeals’s Attempt at a Middle Ground—Its Suggestion That a Different Rule Might Apply to “Constitutional” Officers—Is Ill-Founded.

In an attempt to soften the impact of its erroneous holding, the court of appeals suggests that, in a future case, it might hold that a constitutional officer—one whose office is “derived from the Constitution,” *Koseoglu*, 167 S.W.3d at 378—is in fact a “governmental unit.” *Id.* at 378 (citing TEX. CIV. PRAC. & REM. CODE §101.001(3)(D)). That distinction is not grounded in the statutory text and would lead to less-than-sensible results, both in the context of interlocutory appeals and in the Texas Tort Claims Act.

The text of §101.001(3) does not support the court of appeals’s attempted distinction. The court of appeals suggests that an officer such a sheriff might fit into §101.001(3)(D) while the officer McLellan would not fit into §101.001(3)(A). *Koseoglu*, 167 S.W.3d at 377-78. But this textual distinction is illusory. Both §101.001(3)(A) and §101.001(3)(D) talk about governmental entities and offices—neither expressly mentions

¹⁴ Indeed, if the trial court were to rule on only one of the pending motions, the filing of the notice of interlocutory appeal would trigger an automatic stay that would prevent the trial court from even resolving the second motion until after the exhaustion of the first interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE §51.014(b) (This type of interlocutory appeal “stay[s] all other proceedings in the trial court pending the resolution of that appeal.”).

the individual human beings who might happen to hold office in an official capacity.¹⁵ Compare TEX. CIV. PRAC. & REM. CODE §101.001(3)(A) (“this state and all the several agencies of government . . . and all departments, boards, commissions, offices, agencies, councils, and courts”), with, *id.* §101.001(3)(D) (“institution, agency, or organ of government the status and authority of which are derived from the Texas Constitution or from laws passed by the legislature under the constitution.”). Thus, there is no reason to think that the description of an “institution, agency, or organ of government” in §101.001(3)(D) might include an individual such a sheriff while the description “all departments, boards, commissions, offices, agencies, councils, and courts” in §101.001(3)(A) would not also include the officials who inhabit the positions necessary to breathe life into those arms of the government.

Nor would such a distinction—even if one did even arguably exist in the text—be a sensible one when applied to interlocutory appeals under §51.014(a)(8). Even low-level government officials—when sued in their official capacity—are acting as the State. See Part II.A, *supra*. The State will incur equal litigation costs and inconvenience if it cannot appeal an interlocutory plea, regardless of whether the named official happens to also be listed in the Constitution. And in routine tort cases—which make up a substantial proportion of appeals under §51.014(a)(8)—it is especially likely that such low-level officials will be named.

¹⁵ The court of appeals’s focus on the concept of a constitutionally-created entity—as opposed to one authorized merely by statute—is also unfounded in the text of §101.001(3)(D), which treats the two as equivalents for purposes of defining a “governmental unit.”

Moreover, as an entirely unintended consequence, the court of appeals’s construction of the definition of “governmental unit” in §101.001(3)—as excluding all low-level government officials—could work a dramatic change in the operation of the Texas Tort Claims Act. As explained above, the phrase “governmental unit” is used in the Texas Tort Claims Act to define, among other things, the scope of the waiver of immunity for tort claims and the nature of the duty for premises defects. If the definition of “governmental unit” now excludes all *non-constitutional* officers, it would force plaintiffs to bring claims against only constitutional officers, distorting how tort suits are handled against the State.

D. As to the Claims Against McLellan, This Court Should Render a Judgment of Dismissal.

Because of its erroneous view of §51.014(a)(8), the court of appeals did not reach the merits of McLellan’s appeal of the denial of his plea to the jurisdiction. Nonetheless, this Court can render the judgment that the court of appeals should have rendered. *See* TEX. R. APP. P. 60.2(c). Rendition is especially appropriate here because the claims against McLellan in his official capacity are indistinguishable from the claims against the government entities. Thus, for the same reasons that the court of appeals should have rendered judgment, *see* Part III, *infra*, this Court should render a judgment of dismissal.

III. THE COURT OF APPEALS—AFTER CORRECTLY DETERMINING THAT KOSEOGLU’S BREACH-OF-CONTRACT CLAIM WAS BARRED BY IMMUNITY—SHOULD HAVE DISMISSED, NOT REMANDED.

The court of appeals reached the correct legal conclusion as to the sovereign-immunity question, holding that Koseoglu’s contract claim did not fit any waiver of

sovereign immunity from suit and, thus, the court reversed the trial court’s denial of the plea, *Koseoglu*, 167 S.W.3d at 380—an aspect of the court of appeals’s judgment that has not been challenged by petition for review. But the court of appeals entered an erroneous judgment in that it remanded to the trial court rather than rendering a judgment of dismissal.

A. The Court of Appeals Contravened This Court’s Guidance When It Concluded That It Was Required To Remand.

The court of appeals held—citing its reading of this Court’s precedents—that it was required to remand when reversing the denial of a plea to the jurisdiction, regardless of how many times the plaintiff had refused or failed to amend his petition. As the court of appeals stated its understanding of the law: “[W]e hold that a plaintiff may stand on his pleadings in the face of a plea to the jurisdiction unless and until a court determines that the plea is meritorious.” *Koseoglu*, 167 S.W.3d at 383. Under that rule, because a plaintiff could delay until *after* the first interlocutory appeal before even attempting to cure its pleadings, the first interlocutory appeal in each case may become a mere dress rehearsal for a future interlocutory appeal on the same sovereign-immunity question.

The court of appeals’s rule misconstrues controlling authority and would vitiate the purposes behind interlocutory appeal of pleas to the jurisdiction. Courts should be empowered to dismiss when a plaintiff has failed to take advantage of a reasonable opportunity to amend. *See* Part III.A.1, *infra*. And for a breach-of-contract claim, it should be irrelevant whether the plaintiff attempts to plead more “facts,” since sovereign immunity from suit for breach-of-contract claims does not turn on the type of nuanced

factual distinctions sometimes found in cases brought under the Texas Tort Claims Act. *See* Part III.A.2, *infra*.

1. A plaintiff need only be given a reasonable opportunity to cure.

The court of appeals held that it could not give any weight to Koseoglu's refusal to attempt to cure his petition during the four months before the trial court ruled on the plea to the jurisdiction. *Koseoglu*, 167 S.W.3d at 383. But this Court has said a plaintiff deserves a "reasonable opportunity" to attempt to cure, not an absolute right to sandbag its best arguments until after the first interlocutory appeal.

In *Harris County v. Sykes*, this Court held, "If a plaintiff has been provided a reasonable opportunity to amend after a governmental entity files its plea to the jurisdiction, and the plaintiff's amended pleading still does not allege facts that would constitute a waiver of immunity, then the trial court should dismiss the plaintiff's action." 136 S.W.3d 635, 639 (Tex. 2004). The Court did not say that a plaintiff had an absolute right to amend, but instead that it should be given a "*reasonable opportunity* to amend." *Id.* (emphasis added). By the same token, the Court did not indicate that a plaintiff's chance to amend must come after an appellate court ruling, but instead that the chance should come "after a governmental entity *files its plea*" and thus puts the plaintiff on notice of the alleged defects. *Id.* (emphasis added).

The court of appeals, however, cited *Sykes* for the opposite proposition, concluding that the Court actually meant that it was required to wait for the plaintiff to avail itself of the given opportunity before any court could take definitive action. *See Koseoglu*, 167 S.W.3d at 382 (citing *Sykes*, 136 S.W.3d at 639-40).

The court of appeals’s reading is inconsistent with the language of *Sykes* and, moreover, would be a recipe for mischief. If courts of appeals were required to remand in this situation, many suits against governmental entities would have to be appealed at least *twice* before final judgment—once to obtain a reversal and remand, and a second time after remand—thus turning the first interlocutory appeal into a mere dress rehearsal. That procedure would simply waste the time of litigants and courts, defeating the purposes that motivated the Legislature to create an avenue for the interlocutory appeal of jurisdictional pleas.

The court of appeals also places heavy reliance on certain language it draws from *County of Cameron v. Brown*, 80 S.W.3d 549 (Tex. 2002). But as the dissenting justice rightly notes, the cited portion of *County of Cameron* actually concerned a non-jurisdictional defect in the pleading, one that had been raised by special exceptions and urged as an alternate basis on which to support the trial court’s dismissal.¹⁶ *Koseoglu*, 167 S.W.3d at 384 (Gray, C.J., concurring in part and dissenting in part); *see also County of Cameron*, 80 S.W.3d at 559. Indeed, at one point the *Koseoglu* majority opinion alters the quotation it takes from *County of Cameron* to say that a plaintiff needs an “opportunity to amend after [a plea to the jurisdiction] ha[s] been sustained,” *Koseoglu*, 167 S.W.3d at 383 (alterations in original), but the unaltered language actually refers to special exceptions, not to a plea to the jurisdiction, *see County of Cameron*, 80 S.W.3d at 559 (“dismissal for failure to state a claim is appropriate only when the plaintiff has been

¹⁶ As *County of Cameron* was an appeal from a final judgment, not an interlocutory appeal, the parties were in a position to urge non-jurisdictional alternate grounds for affirmance.

‘given an opportunity to amend after *special exceptions* have been sustained.’”) (emphasis added; citation omitted). This interlocutory appeal about plea-to-the-jurisdiction practice is simply not controlled by *County of Cameron*.

In *Miranda*, although the trial court had denied the plea to the jurisdiction, a majority of this Court held that the plaintiff’s claims should be dismissed without remanding for further pleading. The court of appeals explains its disagreement with the result in *Miranda* by noting that only four Justices joined in Part III.C.1 of the *Miranda* opinion, which is the portion that discusses the rationale for dismissal rather than remand. *Koseoglu*, 167 S.W.3d at 382 n.12 (“the only portion of the opinion which mustered only a plurality”); *id.* at 383 (“this aspect of *Miranda* garnered only a plurality”); *see also Miranda*, 133 S.W.3d at 231 (plurality). But a majority of the *Miranda* Court joined in the judgment of dismissal, which is the aspect of *Miranda* at odds with the court of appeals’s judgment here.

The Court should reject the court of appeals’s holding that the first interlocutory appeal is merely an elaborate dress rehearsal in which the appellate court cannot yet reach the threshold jurisdictional question that led to the interlocutory appeal. Instead, the Court should hold that the filing of a jurisdictional plea puts the plaintiff on notice that he should attempt to correct the challenged aspects of his pleading. If he does not after a reasonable opportunity to do so, the trial court—and the court of appeals—should be able to rely on his pleading as representing his best effort to invoke the jurisdiction of the courts. *See Koseoglu*, 167 S.W.3d at 384 (Gray, C.J., concurring in part and dissenting in part).

2. The court of appeals’s standard makes especially little sense in a breach-of-contract case, where pleading more facts does not overcome sovereign immunity from suit.

Even if the court of appeals had properly read the Court’s cases concerning when remand is appropriate in tort cases—which it did not, *see* Part III.A.1, *supra*—it would still have erred in applying those principles to this breach-of-contract claim. That is because Texas law rejects the notion that merely pleading more facts can establish a waiver of sovereign immunity from suit for a breach-of-contract claim. Even in *Lawson*, the Court looked to the *legal* nature of the underlying claim, not to particular alleged conduct that might have been aided by pleading more facts. Thus, a remand here would serve no purpose.

This Court has consistently rejected arguments that the State can waive its immunity from suit against a breach-of-contract claim by conduct. *Catalina Dev. Co. v. County of El Paso*, 121 S.W.3d 704, 705-06 (Tex. 2003); *Travis County v. Pelzel & Assocs., Inc.*, 77 S.W.3d 246, 248 (Tex. 2002); *IT-Davy*, 74 S.W.3d at 860; *Gen. Servs. Comm’n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 594 (Tex. 2001); *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405, 408 (Tex. 1997). The courts of appeals—including the court of appeals in this case, *Koseoglu*, 167 S.W.3d at 379-80—have also followed this Court in recognizing that waiver-by-conduct arguments do not overcome the bar of immunity from suit.¹⁷

¹⁷ *See, e.g., S. Disposal, Inc. v. City of Blossom*, 165 S.W.3d 887, 892 (Tex. App.—Texarkana 2005, no pet.); *My-Tech, Inc. v. Univ. of N. Tex. Health Sci. Ctr. at Fort Worth*, 166 S.W.3d 880, 883-84 (Tex. App.—Dallas 2005, pet. filed) (mem. op.); *Breezy v. Anatomical Bd. of the State*, No. 14-03-01321-CV, 2005 WL 1923854, at *1 n.2 (Tex. App.—Houston [14 Dist.] Aug.

Unsurprisingly, when the Court has found that a plaintiff's allegations do not constitute a waiver by conduct, the Court has not hesitated to render judgment rather than remanding. *Catalina Dev. Co.*, 121 S.W.3d at 707 (affirming without remand); *Pelzel & Assocs.*, 77 S.W.3d at 252 (rendering judgment of dismissal); *IT-Davy*, 74 S.W.3d at 860 (rendering judgment of dismissal); *Little-Tex*, 39 S.W.3d at 600 (rendering judgment of dismissal); *Fed. Sign*, 951 S.W.2d at 412 (affirming a court of appeals judgment that ordered the district court to dismiss).

Similarly, in *Lawson*—which did not involve a waiver by conduct—the Court's plurality did not suggest that any aspect of the plaintiff's *factual* allegations would bear on immunity from suit. Instead, a plurality of the Court looked to the *legal nature* of the plaintiff's original claim, which had been pleaded in a prior lawsuit and then had survived a plea to the jurisdiction. *Lawson*, 87 S.W.3d 518 at 521-22 (plurality) (discussing whether the Legislature had waived immunity from suit for an underlying Whistleblower Act claim).

B. Koseoglu Had Ample Time To Amend His Pleading and Failed To Do So, and Thus Remand Was Unwarranted.

The court of appeals should have rendered a judgment of dismissal because Koseoglu already had ample opportunity to amend his pleadings. Indeed, after the

11, 2005, no pet.) (mem. op.); *Robinson v. Univ. of Tex. Med. Branch at Galveston*, 171 S.W.3d 365, 371 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *Smith*, 149 S.W.3d at 761; *Hirczy de Miño v. Univ. of Houston*, No. 03-03-00311-CV, 2004 WL 2296131, *3 (Tex. App.—Austin Oct. 14, 2004, pet. filed) (mem. op.); *Noah v. Univ. of Tex. Med. Branch at Galveston*, Nos. 01-03-00985-CV, 01-03-00986-CV, 2004 WL 1794642, at *7 (Tex. App.—Houston [1st Dist.] Aug. 12, 2004, pet. denied); *Univ. of Tex. Med. Branch at Galveston v. Harrison*, No. 14-02-01276-CV, 2003 WL 21803314, at *2 n.2 (Tex. App.—Houston [14th Dist.] Aug. 7, 2003, pet. denied) (mem. op.).

defendants raised the issue of sovereign immunity, 1.CR.16-18; 1.CR.24-25, and after Koseoglu acknowledged the issue in his motion for summary judgment, 1.CR.50-52, he still did not attempt to cure any pleading deficiency by amendment. Instead, he let the months pass until the court ruled on the defendants' plea.

As Chief Justice Gray explained in discussing why he dissented to this portion of the court of appeals's judgment:

There comes a point in litigation when choices have to be made. There are consequences of making choices. When faced with a plea to the jurisdiction, a party can choose to amend or stand. . . . The ruling we should make should encourage the plaintiff to give it the best shot. . . . This is especially true once a plea to the jurisdiction has been filed. Thereafter, by the passage of time, it is reasonable to conclude what is in the pleadings is all the plaintiff has to offer the trial court. . . . Dr. Koseoglu had known for several months prior to the hearing that the jurisdiction of the trial court was being attacked. He did nothing in response.

167 S.W.3d at 383-84. Koseoglu failed to exercise the reasonable opportunity that he had to improve his pleadings—futile though it may have been, *see* Part III.C, *infra*. For that reason, no remand is warranted to give him yet another opportunity to replead.

C. In Any Event, Koseoglu's Breach-of-Contract Claim Should Have Been Dismissed Because the Jurisdictional Defect Is Incurable.

As noted above, a sufficient reason for the court of appeals to have rendered judgment was Koseoglu's refusal to avail himself of the "reasonable opportunity" he had to cure during the four months that the plea was pending. *See* Part III.A, *supra*. An added reason for the court of appeals to have rendered judgment is that this is not a tort action but is instead a contract action, for which the Court does not remand for further factual pleading but instead renders a judgment of dismissal. *See* Part III.A.2, *supra*.

But, in any event, the jurisdictional defect in Koseoglu's breach-of-contract claim is incurable.

The court of appeals's decision is the first to attempt to identify what types of claims might meet the test proposed by a plurality of this Court in *Texas A&M–Kingsville v. Lawson*, 87 S.W.3d 518 (Tex. 2002).¹⁸ As such, it deserves special scrutiny by this Court. And because *Lawson* itself was only a plurality decision, the lower courts need guidance about whether and how to apply the unique result in *Lawson* to the very different circumstances present here.

1. This case warrants review to alleviate confusion resulting from the splintered decision in *Lawson*.

Lawson has proven vexing because it was a 4-1-4 decision in which no rationale commanded a majority of the Court. *Lawson* originally filed an action against his university employer asserting a variety of claims, including interference with business relations, a Whistleblower Act claim, and some claims for equitable relief for purported constitutional violations, including due process. *Lawson*, 87 S.W.3d at 519-20 (plurality). The university filed a plea to the jurisdiction, which the trial court sustained as to all claims except the Whistleblower Act claim and the constitutional claims for equitable relief. *Id.* at 520. The only claim for monetary relief to survive the plea was the Whistleblower Act claim. *Id.* at 521. The parties reached a settlement agreement. *Id.*

¹⁸ Although one case from the Dallas Court appears to apply *Lawson*, that decision turned on the preliminary consideration of whether the plaintiff's claims even alleged a breach of the settlement agreement. *Livecchi v. City of Grand Prairie*, 109 S.W.3d 920, 922-23 (Tex. App.—Dallas 2003, pet. dism'd).

at 520. Sometime later, Lawson claimed that the university had violated the settlement agreement, and he filed a second suit, this time for breach of contract. *Id.* The court of appeals held that the second suit could proceed because the university had waived immunity by its conduct. *Id.* (citing *Lawson v. Tex. A&M Univ.—Kingsville*, 28 S.W.3d 211, 214 (Tex. App.—Austin 2000)).

This Court affirmed the judgment of the court of appeals, but did so without a majority rationale. Four Justices rejected the court of appeals’s waiver-by-conduct theory but found in essence that Lawson’s claim for the breach of an agreement settling his Whistleblower Act claim was encompassed within the Legislature’s decision to waive immunity for Whistleblower Act claims. *Lawson*, 87 S.W.3d at 521-23 (plurality). Those four Justices therefore voted to affirm the court of appeals’s judgment. One Justice concurred in the judgment, but only on the ground that the State had no immunity from suit against any contract that it had entered. *Id.* at 523 (Enoch, J., concurring in the judgment). Four other Justices dissented, arguing that a settlement agreement should be evaluated by the same waiver principles that govern any contract and that, as the Legislature had not clearly and unambiguously waived immunity from suit, the university retained sovereign immunity from suit. *Id.* at 525-26 (Rodriguez, J., dissenting).

When this Court earlier confronted an equally split decision—a 4-1-4 decision in which a single Justice concurred in judgment only—it explained the “duty” to resolve the uncertainty over the immunity question at issue:

[B]ecause [the case in which the Court divided] was affirmed without a coherent majority rationale, it is our duty to endeavor to resolve issues as important as waiver of government immunity so as to provide a reasoning

that may offer guidance not only for the parties, but for future litigants, the bench, the bar, and the general public in shaping their conduct and decisions. While we may look to [the case in which the Court divided] for guidance, we are not bound by the result in that case and must consider anew the issue of governmental immunity

Univ. of Tex. Med. Branch at Galveston v. York, 871 S.W.2d 175, 176 (Tex. 1994) (citation omitted).

The need for further guidance from this Court is acute because, as this Court has held, when there is no majority rationale, a “plurality opinion is not authority for determination of other cases, either in this Court or lower courts.”¹⁹ *Id.*; *see also Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 627 (Tex. 1996) (holding that “plurality opinions are not binding precedent on this Court”); *City of Fort Worth v. Crockett*, 142 S.W.3d 550, 554 n.23 (Tex. App.—Fort Worth 2004, pet. denied). At most, “the judgment itself has very little precedential value and would control the result only in identical cases.” *York*, 871 S.W.2d at 176.

2. The differences between this case and *Lawson* highlight why *Lawson* should at most be limited to its facts.

The differences between this case and *Lawson* show why a waiver, such as was found in *Lawson*, would be wholly inappropriate and unworkable if stretched to fit the very different procedural posture here.

¹⁹ This rule is somewhat similar to the federal principle known as the “*Marks* rule.” When applying federal law, this Court has recognized the principle that splintered decisions of the United States Supreme Court are considered binding on lower courts in that “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.” *Worthy v. Collagen Corp.*, 967 S.W.2d 360, 368 (Tex. 1998) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)). But in circumstances such as *Lawson*—where the Justices concurring in judgment did not share an overlapping rationale—applying even the “*Marks* rule” would not yield a controlling holding.

In *Lawson*, there was no question about *which* claim was being settled; the parties were settling the claim that Lawson had litigated and then dismissed with prejudice. *See Lawson*, 87 S.W.3d at 519. Here, by contrast, Koseoglu never pleaded a claim and, thus, when Koseoglu sought to “settle” with TAMU, he could offer only a general release of claims that did not specify any particular claim as to which immunity might have been waived. 1.CR.12-15 (Dec. 19, 2002 letter). The court below was left in the unenviable position of trying to infer from Koseoglu’s after-the-fact briefing (and some earlier correspondence between the parties introduced into the record) what claims had even been contemplated by the parties. *Koseoglu*, 167 S.W.3d at 380. The courts and litigants would be better off with a crisp rule that the *Lawson*-type waiver can only be applicable to settlements of pending suits that have actually been filed, thus forcing the parties to identify with particularity the subject-matter involved.

Moreover, in *Lawson*, the question of immunity had *already been adjudicated* before the settlement. *Lawson*, 87 S.W.2d at 521 (the Whistleblower Act claim was the only monetary claim to survive the plea in the original lawsuit). By contrast, there was never an opportunity for a trial court (or appellate courts) to test whether the claims that Koseoglu might have asserted were barred by sovereign immunity. Consistent with *Lawson*, the courts should not merely presume that an underlying, settled claim fell within the scope of the Legislature’s waiver of immunity. Indeed, the policy justifications advanced by the *Lawson* plurality would break down if the scope of the waiver for settlement agreements was not closely tied to the Legislature’s own choice about what immunity to waive. *Cf. id.* at 522 (linking the scope of the waiver to the

Legislature's decision to waive immunity for Whistleblower Act claims); *id.* (speculating that the Legislature's role in appropriating funds would likely not be affected because its appropriations for a class of waived claims does not distinguish between judgments and settlements).

If anything, these difficulties suggest at a minimum limiting the result reached in *Lawson* to its unique circumstances, in which a prior court had already adjudicated a plea to the jurisdiction about a claim for which the Legislature had waived immunity. Attempting to stretch *Lawson* beyond its unique procedural situation would lead to lingering uncertainty about which settlement agreements might fit the waiver. By contrast, a bright-line rule that the exception might only apply if the claim being settled had already been adjudicated through a plea to the jurisdiction would afford certainty to all parties and, moreover, would preserve the critical role of the Legislature as the branch of government to which decisions about the scope of immunity have been entrusted. *Id.* at 522 (citing *IT-Davy*, 74 S.W.3d at 856; *Fed. Sign*, 951 S.W.2d at 413-14 (Hecht, J., concurring)).

3. In light of those differences, the court of appeals erred to remand this claim for repleading.

Koseoglu argues that he could have asserted a §1983 claim for which immunity has been waived. *Koseoglu*, 167 S.W.3d at 380. But the court of appeals correctly concluded that the State and its officials sued in their official capacity were immune from money damages sought in a §1983 claim, absent a waiver by the legislature of the state being sued. *Id.* at (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989)).

Texas has not waived that immunity. For that reason, the court of appeals correctly concluded that Koseoglu’s §1983 allegation was not one for which the Legislature had waived immunity from suit, and thus the trial court erred in denying the plea as to Koseoglu’s breach-of-contract claim. *Id.* That defect is incurable.

It was in refusing to render a judgment of dismissal that the court of appeals erred. The court of appeals instead invited Koseoglu to now think of a *new* claim—perhaps a claim he can, in hindsight, assert was within the scope of his 2002 letter agreement, or perhaps a wholly new claim unrelated to breach of contract. *Id.* at 383. The aim of *Lawson*, however, would be thwarted if a plaintiff could retrospectively come up with a new claim that he “was settling” all along through signing a contract that contained a general release. And it would eviscerate interlocutory appeals of jurisdictional pleas if a plaintiff could wait until after the appellate disposition of a plea—not to refine his *factual* allegations—but to concoct an entirely new claim to assert against the same defendants. *Cf.* Part III.A, *supra*. Remand was inappropriate because the defendants were immune from suit as to Koseoglu’s only pleaded claim—breach of contract.

PRAYER

For these reasons, Petitioners respectfully request that the petition be granted, the judgment of the court of appeals be reversed, and judgment be rendered dismissing the claims against Petitioners.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 7, 2005 a true and correct copy of Petitioners' Brief on the Merits was served by certified U.S. mail, return receipt requested, on all appellate counsel of record in this proceeding as listed below.

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