

No. 05-0243

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IN THE  
SUPREME COURT OF TEXAS

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WOLFGANG HIRCZY DE MINO, PH.D., INDIVIDUALLY AND  
ON BEHALF OF OTHERS SIMILARLY SITUATED,  
Petitioner,

V.

THE UNIVERSITY OF HOUSTON,  
Respondent.

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On Appeal from the Third Court of Appeals  
(No. 03-03-00311-CV) and the  
98<sup>th</sup> District Court of Travis County, Texas  
(No. GN204624)

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PETITIONER S BRIEF ON THE MERITS

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July 18, 2005

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ORAL ARGUMENT REQUESTED

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## STATEMENT OF THE CASE

***Nature of the Case:*** The underlying case is a simple breach-of-contract suit against a state university. Plaintiff relied on statutory "sue and be sued" language as a waiver of immunity to suit and pleaded in the alternative that the University had waived immunity by its conduct. Unlike other sovereign immunity cases before this Court, the contract is between a state entity and an employee, and thus outside the scope of the administrative process set up by the Texas Legislature to resolve certain contract claims against the state. Tex. Gov't Code §2260.

***Trial Court and Judge:*** The Honorable Margaret A. Cooper, sitting for the 98<sup>th</sup> Judicial District Court, Travis County, Texas.

***Proceeding in the Trial Court:*** Petitioner pleaded both bases for waiver of immunity in his unamended original petition. The University filed a plea to the jurisdiction asserting that immunity was not waived by Section 111.33 of the Texas Education Code because the Legislature had amended it in 1985 and withdrawn its consent. Petitioner then asserted a declaratory judgment claim on behalf of all faculty with employment contracts at the University of Houston in a supplemental petition, and asked the Court to construe Section 111.33 and declare the 1985 amendment unconstitutional. The district court granted the University's plea to the jurisdiction and dismissed the live pleadings with prejudice without

addressing the class certification issue, and without explaining the reasons for its decision.

***Parties in the Court of Appeals:*** Appellant: Wolfgang Hirczy de Mino, Ph.D.

Appellee: The University of Houston.

***Court of Appeals:*** Court of Appeals for the Third Judicial District of Texas.

***Proceedings in the Court of Appeals:*** The Third Court of Appeals affirmed the trial court's plea to the jurisdiction in favor of the University, but modified the judgment to reflect a dismissal without prejudice.

The panel opinion, authored by Chief Justice W. Kenneth Law, and joined by Justices B. A. Smith and Patterson, also held that the Plaintiff's breach of contract claim did not definitively accrue until a waiver by legislative resolution was obtained, and thus in effect suspended the statute of limitations that would otherwise start running from the date the employment contract was terminated in 2001. Although that holding appears to modify the law regarding limitations, Respondents did not cross-petition for review of this issue.

Petitioner filed motions for panel rehearing and rehearing *en banc* in the Third Court of Appeals, both of which were overruled on February 10, 2005

without opinion. The panel s opinion was designated for publication, according to the Court s web site, but has not yet been released.

***Citation:*** *Hirczy de Mino v. The Univ. of Houston*, No. 03-03-0311-CV, 2004 Tex.App. LEXIS 9045, \_\_ S.W.3d \_\_ (Tex.App. Austin 2004, pet. filed)(Appendix 1).

***Proceedings in the Supreme Court:*** Petitioner timely filed a petition for review in this Court requesting review of the sovereign immunity issues, and reserved additional claims for full briefing, if any. Respondent waived its right to respond unless requested to do so by the Court. The Court requested a response and briefing on the merits on June 17, 2005.

## STATEMENT OF JURISDICTION

The courts of appeals are divided on the proper construction of sue and be sued and on whether *Missouri Pac. R.R. Co. v. Brownsville Navigation Dist.*, 453 S.W.2d 812 (Tex. 1970) (*MoPac*) controls. Accordingly, this Court has conflicts jurisdiction. Tex. Gov't Code § 22.001(a)(2).

Sovereign immunity issues are frequently litigated around the state and twenty or more cases involving such issues are currently pending before this Court. Several courts of appeals have stated in their opinions that they are awaiting guidance from this Court on the issue of waiver based on conduct other than forming a contract and filing suit. Accordingly, this Court has jurisdiction because an important issue for the jurisprudence and the people of Texas has been brought before it with frequency for an authoritative resolution. Tex. Gov't Code §22.001(a)(6).

Unlike most or all other sovereign immunity cases in which review by this Court has been sought, the case at bar also presents the claim that the lower court's immunity holding in construing a sue-and-be-sued provision denies individuals who contract with the state the equal protection of the law. Accordingly, this Court also has jurisdiction because a question of constitutional validity is before it. Tex. Gov't Code § 22.001(a)(3)(6). Its determination is not necessarily subject to U.S.

Supreme Court review because it can be resolved on independent state constitutional grounds.

### **ISSUES PRESENTED**

#### **Issue #1:**

Section 111.33 of the Texas Education Code, Which Contains Sue and Be Sued Language, Waives the University's Immunity to Suit (But Not to Liability).

#### **Issue #2:**

The Court of Appeals Construction of Section 111.33 As Not Waiving Immunity to Suit Is Unconstitutional.

#### **Issue #3:**

The Declaratory Judgments Act Provides a Proper Jurisdictional Basis to Construe Statutory Sovereign Immunity Waivers, and to Determine the Constitutionality of Legislative Enactments. The Members of the Class Affected by the Declaration Should Have Been Afforded Notice and an Opportunity to Participate in this Litigation.

#### **Issue #4:**

Equitable Estoppel Should Bar Government Agencies from Invoking Immunity Where They Failed to Disclose Their Intent to Rely on Immunity Upon Entering a Contract with a Private Individual.

#### **Issue #5:**

The Court of Appeals Sovereign Immunity Rulings Deny State University Employees the Equal Protection of the Laws and Are Thus Invalid under the Texas and Federal Constitutions.

## STATEMENT OF FACTS

The Court of Appeals stated the relevant facts and procedural background correctly in part: Petitioner Wolfgang Hirczy de Miño ( De Mino ), a political science lecturer, first filed suit in Harris County District Court in November 2001, alleging that the University of Houston ( the University ) had breached his employment contract for the 2001-2002 academic year by canceling his teaching assignment at the beginning of the Fall 2001 semester.<sup>1</sup>

De Mino also asserted a claim under 42 U.S.C. §1983 against Dean W. Andrew Achenbaum for terminating him without notice, and without giving him a reason, in violation of due process. The Defendants removed the suit to federal court. At a preliminary injunction hearing on January 11, 2002 U.S. District Court Judge David Hittner ordered De Mino reinstated for the Spring 2002 semester upon agreement by the parties. The court later dismissed De Mino s suit, finding that the University was immune to breach of contract suits under the Eleventh Amendment, and that the Dean, in his official capacity, was likewise immune to claims for retroactive relief. The Court also awarded costs to the Defendants.

On November 21, 2003, the Fifth Circuit vacated the award of costs in favor

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<sup>1</sup> The Third Court of Appeals erroneously accepted the Defendant s averment that the issue was non-reappointment rather than breach of the last of a series of academic-year contracts. The contract sued upon was attached to the original petition and clearly shows that it was for two semesters. (CR 009-010).

of the Defendants, finding that De Mino was the prevailing party because he had obtained an enforceable reinstatement order for the Spring 2002 semester. The Fifth Circuit dismissed the claims for equitable relief as moot, however, on the ground that De Mino had only sought injunctive relief and the contract under which he had sued had since expired by its own terms. *De Mino v. Achenbaum*, 81 Fed.Appx. 819 (5<sup>th</sup> Cir. 2003).

While the federal action was on appeal, De Mino filed a second breach of contract suit in the 98<sup>th</sup> District Court in Travis County, seeking to recover money damages for the value of the other half of his academic-year contract (the Fall 2001 semester). (CR 002). De Mino relied on the Section 111.33 of Texas Education Code as a statutory immunity waiver and pleaded waiver-by-conduct in the alternative. (CR 003, 006). De Mino also expressly pleaded that he wished to amend his Original Petition to assert other claims should his breach of contract claim flounder on sovereign immunity grounds. (CR 007). When Defendant moved for dismissal on sovereign immunity grounds, De Mino added a declaratory judgment claim on behalf of himself and all others with employment contracts at the University asking the trial court to construe Tex. Educ. Code § 111.33 and to adjudicate its constitutionality, should it find that it did not waive the University's immunity to suit. (CR 011, 021).

After a number of hearing settings and cancellations, the Austin Court granted Defendant s plea and dismissed De Mino s claims with prejudice over De Mino s written objections. (CR 067, 063, 073).

The Third Court of Appeals affirmed, following the First Court of Appeals intervening decision in *Freedman v. Univ. of Houston*, 110 S.W.2d 504 (Tex.App. Houston [1<sup>st</sup> Dist.] 2003, no pet), another breach-of-contract suit by a professor and former administrator against the University, but agreed with De Mino that the dismissal should not entail claim preclusion or *res judicata*.

The *Freedman* Court had construed sue and be sued as implicating capacity, and held that Section 111.33 did not waive the University s immunity.<sup>2</sup> The Third Court of Appeal did not adopt the capacity argument, but followed *Freedman* in holding that the 1985 amendment had withdrawn the consent to sue previously given by the sue and be sued language in the opening sentence of Section 111.33. The Third Court overruled De Mino s contention that this construction would be unconstitutional. It did not address the opportunity-to-amend claim, and rejected waiver-by-conduct for lack of guidance from this Court.

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<sup>2</sup> Also see A. Craig Carter, Is Sue & Be Sued Language a Clear & Unambiguous Waiver of Immunity?, 35 ST. MARY S L. J. 275 (2004).

Because the district court had not reached the merits, however, and had instead dismissed De Mino s claims for lack of subject-matter jurisdiction, the Third Court changed the dismissal to one without prejudice to refiling. It also held that De Mino s cause of action would not accrue (for limitations purposes) unless and until he had obtained a legislative resolution waiving immunity to sue on his claim. *Freedman*, by contrast, suggests that the statute of limitations would expire unless the professor obtained a resolution, and refiled his suit, within the four years fixed by statute. Both courts held that abatement, pending grant of legislative waiver by resolution, was improper, and that the suits against UH were subject to immediate dismissal.

### **SUMMARY OF THE ARGUMENT**

This Court should decide whether or not the sovereign immunity to suit is waived in contracts between state agencies and employees, and if it is not whether the unilateral denial of the right to enforce contracts conflicts with the Texas and U.S. constitutions.

On behalf of himself and others in his shoes, Petitioner urges the Court to establish clear legal precedent for what is assumed and taken for granted already: that employment contracts at state institutions of higher education in Texas are enforceable the same way they are enforceable elsewhere.

Even a clear decision affirming the lower courts, however, would have some benefit and would reduce the number of cases clogging the court system due to the unsettled nature of immunity jurisprudence. A definitive statement of the law, announced by the state's highest court would put lawyers in a position to provide better legal advice to their clients, would promote expeditious resolution of claims, and would stem the tide of appeals involving the same legal issues.

Assuming this Court's decision is well-publicized, it would also put would-be faculty members on notice about the risks of sovereign immunity, and would allow them to take it into account when deciding whether to accept employment offers from state universities.<sup>3</sup>

## **ARGUMENT AND AUTHORITIES**

### **I. SECTION 111.33 OF THE TEXAS EDUCATION CODE WAIVES THE UNIVERSITY'S IMMUNITY TO SUIT.**

#### **A. Authority to sue and be sued means what it says.**

Although the lawyers for the City of Houston in other cases before this Court have tried hard to convince the Court otherwise (to the point of incurring some verbal whip-lashing from their opponents for disingenuous argument), this

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<sup>3</sup> Unlike the commercial contractors in other sovereign immunity cases before this Court, academics, especially those from other states, cannot be assumed to know that seemingly binding employment contracts at public universities are currently unenforceable in this state. Petitioner did not know either, although he had lived in Texas for more than a decade, and had even written law review articles on other legal topics.

Court should reaffirm the position it took in *Missouri Pac. R.R. Co. v. Brownsville Navigation Dist.*, 453 S.W.2d 812, 813-14 (Tex. 1970). When a statute or city charter says that an entity has the power to sue and be sued, it may indeed sue if it so chooses, and may in turn be sued, if aggrieved parties choose to do so. The same common-sense construction should be applied to the statutory provision at issue here. Section 111.33 of the Education Code unambiguously states:

The board has the power to sue and be sued in the name of the University of Houston. Venue shall be in either Harris County or Travis County.

Acts 1971, 62<sup>nd</sup> Leg., p. 3272, ch. 1024, art. 1, § 1, eff. Sept. 1, 1971. Amended by Acts 1985, 69<sup>th</sup> Leg., ch. 378, § 1, eff. Aug. 26, 1985.

The literal reading of "sue and be sued" is not even contested in the case at bar because the Respondents rested their principal argument on the alleged repeal of the statutory waiver by subsequent amendment, thus conceding that immunity had been waived by "sue and be sued" in the first paragraph of § 111.33 prior to passage of the amendment. *Also see Fazekas v. University of Houston*, 565 S.W.2d 299 (Tex.Civ.App.-Houston [1<sup>st</sup> Dist.] 1978, writ ref'd n.r.e.), 440 U.S. 952; 99 S.Ct. 1487 59 L.Ed 2d 765; 1979.

**B. The 1985 legislative amendment does not withdraw general consent to suit against the University.**

The University argued below that the 1985 Amendment repealed and

rendered ineffective the right ... to be sued provision at the beginning of the Section 111.33 and thus reinstated common law sovereign immunity. The Amendment added the following sentence:

Nothing in this section shall be construed as granting legislative consent for suits against the board, the University of Houston system, or its component institutions and entities except as authorized by law.

Acts 1985, 69<sup>th</sup> Leg., ch. 378, § 1, eff. Aug. 26, 1985.

To read this amendment as a repeal of sue and be sued, however, would contravene well-established rules of statutory construction. Had the Legislature intended to repeal the statutory authority for suits against the University, it could have - and would have - deleted the word and be sued from the power to sue and be sued clause. Instead of deleting these words, however, the Legislature in 1985 opted to add an additional sentence.

It must be presumed that the addition had substantive import, for it is a well-established rule of statutory construction that every word, sentence, clause and phrase should be given effect. *University of Tex. v. Joki*, 735 S.W.2d 505, 508 (Tex.App. Austin 1987, writ denied)(citing *Ex parte Pruitt*, 551 S.W.2d 706, 709 (Tex. 1977)). Construction of a statute which would make a provision a useless appendage is not favored. *Carson v. Hudson*, 398 S.W.2d 321, 323 (Tex.Civ.App. Austin 1996, no writ). The interpretation urged by the University

would do exactly that. It would render both provisions needless surplusage for two reasons. First, the two provisions would be contradictory and would cancel each other out. When construing a statute, however, one provision should not be given meaning out of harmony or inconsistent with other provisions. The statute must be considered as a whole rather than its isolated provisions. *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 493, 44 Tex. Sup. Ct. J. 675 (Tex. 2001). Proper construction requires the court to presume that the entire statute is intended to be effective. *See* Tex. Gov t Code. §311.021 (2).

Second, a statutory provision stating that UH has *not* waived immunity would be redundant, for in the absence of a legislative waiver the University would enjoy sovereign immunity under to the common law.

**C. The statutory language in §111.33 is unambiguous and does not necessitate investigations into legislative history for interpretation.**

The University also argued in effect that the statement except as authorized by law should be read as except as authorized by *statutory* law. Again, such a reading is at odds with well-settled rules of statutory construction.

If the Legislature wanted to restrict the scope of permissible suits to statutory causes of action, it would have said so. It did not. Instead it used the term law without restriction or qualification. Law certainly encompasses the full

panoply of statutory law, constitutional law, and common law. The terms authorized and authority analogously are not limited to the acts of a legislature. Indeed every brief filed in this and in other appellate courts must contain an index of *authorities*, which lists the decisional law, statutes, constitutions and other relevant forms of law relied upon in appellate advocacy.

If the language of the statute is unambiguous, then the court must seek the legislative intent as found in the plain and common meaning of the words and terms used. *Sorokolit v. Rhodes*, 889 S.W.2d 239, 241 (Tex. 1994); *Monsanto Co. v. Cornerstones Mun. Util. Dist.*, 865 S.W.2d 937, 939 (Tex. 1993). Common words should be interpreted as they are commonly used. *Elgin Bank v. Travis County*, 906 S.W.2d 120, 121 (Tex.App. Austin 1995, writ denied).

Since the language of the statute is express and unambiguous, no resort to legislative history in aid of statutory construction is called for. In any event, it is difficult to divine the motives of the members of the majority of Texas House and Senate who approved the bill. Statements made in the course of proceedings may not accurately reflect the intent of the majority, nor do they reveal the reason why the Governor may have signed the bill.

**D. Section 111.33 waives immunity to suit, but requires pleading of established causes of action based on common law or on statutory law in compliance with statutory prerequisites.**

The proper reading of the phrase "except as authorized by law" is as a clarification that Section 111.33 in itself does not authorize suits against the University, but that any such suit must allege a cause of action valid under Texas law. For example one could not sue the University for a temporary injunction, relying *only* on Section 111.33, without having a valid statutory or common law cause of action and a probable right to relief.

Stated differently, Section 111.33 in itself does not create a cause of action. Just like the Tort Claims Act itself creates no claims or causes of action but only waives immunity from suit and liability for those that already exist.<sup>4</sup> See *City of Tyler v. Likes*, 962 S.W.2d 489, 494 (Tex. 1997); *City of Denton v. Van Page*, 701 S.W.2d 831, 834 (Tex. 1986); *In re Sabine Valley Center*, 986 S.W.2d 612 (Tex. 1999).

Nor is it a vehicle for the assertion of novel claims not based on a recognized cause of action. It merely opens the courthouse door for suits against the University of Houston that would otherwise be barred under sovereign immunity irrespective of merit.

The phrase "except as authorized by law" makes it clear that litigants must

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<sup>4</sup> Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter. Tex. Civ. Prac. & Rem. Code §101.0925(a).

satisfy the requirements of statutes and decisional law. Some statutory causes of action, for example, have jurisdictional prerequisites, which Section 111.33 does not suspend.

Contrary to the University's claims, the interpretation of the 1985 amendment urged by the Petitioner would not render it meaningless. The amendment serves a valid purpose: It limits the general right to sue the University of Houston and thus the statutory waiver of immunity to suit to established causes of action under Texas law, and makes it plain that it does not create an independent source of authority to sue the university where no action is otherwise authorized by statute or at common law. Section 111.33 does not deprive defendants of the affirmative defense of immunity to *liability*, where applicable. Nor does it relieve plaintiffs from the duty to comply with statutory schemes, such as exhaustion of remedies requirements, before filing suit.

## **II. THE COURT OF APPEALS CONSTRUCTION OF §111.33 AS NOT WAIVING IMMUNITY IS UNCONSTITUTIONAL**

### **A. The lower courts' construction inflicts impermissible constitutional injury.**

On October 14, 2004 the Third Court of Appeals rendered its decision in this case and thereby altered the case law to the effect of depriving employees of the University of Houston of the right to enforce their employment contracts in

Travis County.<sup>5</sup>

In 2003 the same class of individuals had lost the right to do so in Harris County, when the First Court of Appeals set new precedent in *Freedman v. Univ. of Houston*, 110 S.W.2d 504, 507-08 (Tex.App. Houston [1<sup>st</sup> Dist.] 2003, no pet.)(holding professor s suit barred by sovereign immunity), and in doing so repudiated previous precedent to the contrary. *Fazekas v. Univ. of Houston*, 565 S.W.2d 299, 302 (Tex.App. Houston [1<sup>st</sup> Dist.] 1978, writ ref d n.r.e.)(holding that professor may sue under §111.33). Petitioner will argue here that these rulings do not pass muster on multiple independent constitutional grounds, for the reasons set forth below.

**B. Assuming the 1985 amendment is correctly construed as withdrawing consent to suit on valid causes of action, the lower courts holding is invalid because it impermissibly impairs contractual property rights and deprives individuals of due process, due course of law, and just compensation.**

The Fourteenth Amendment s due process guarantee applies to public employees who have a property interest in the terms or conditions of their employment. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972). In Texas, property rights are considered sacred and fundamental.

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<sup>5</sup> Tex. Educ. Code §111.33 restricts venue for suits against the University of Houston to two counties: Harris County and Travis County.

*State v. Texas City*, 295 S.W.2d 697, 704 (Tex.Civ.App.-Galveston 1956), *aff d*, 157 Tex. 450, 303 S.W.2d 780 (Tex. 1957). In the case at bar, the protected property interest arises from written employment contracts with a state university.

It is well-settled that a state entity waives immunity to liability by contracting with a private individual. *General Services Commission v. Little-Tex Insulation*, 39 S.W.3d 591, 594 (Tex. 2001). In this case there is no dispute that the sue and be sued language of Section 111.33, standing alone, gives a Plaintiff the right to seek vindication of his or her rights in state court.<sup>6</sup> *Also see Delaney v. University of Houston*, 792 S.W.2d 733 (Tex.App-Houston [14<sup>th</sup> Dist.] 1990, *reversed on other grounds*)(While not creating liability, §111.33 grants permission for UH to be sued).

To the extent that the reviewing court now holds that the 1985 Amendment abrogates that right, and forecloses such relief, it deprives De Mino, and all others in his position, of a vested property right without any process other than the stroke of a pen (or its modern-day equivalent), i.e. by fiat.

If the 1985 amendment is indeed correctly interpreted as effectuating the denial of the rights individuals have pursuant to their contracts with the University

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<sup>6</sup> The University stated in the court below: When §111.33 was passed with the sue and be sued language, the bar of sovereign immunity was legislatively removed. *See Appellee's Brief*, p. 15.

of Houston in conjunction with the right ... to be sued provision in § 111.33, then it is rendered unconstitutional on its face. This is so because the construction of this Amendment in such a fashion by the appellate courts, on October 14, 2004 in the Third Judicial District, and on May 22, 2003 in the First and Fourteenth, impaired the affected parties contractual rights in violation of Article I, §16 of the Texas Constitution, deprived them of the right to seek redress in court in violation of Articles I, §13 and §27, deprived them of their contractual property rights in denigration of the due course of law provisions of Article I, §19 as well as the federal Due Process Clause, and further violated Article I, §17 of the Texas Constitution because there was no adequate compensation.

The lower court erred by making its ruling retroactive to the date of enactment in 1985, thus finding no violation on the premise that the Legislature had acted before the contracts of current faculty members were formed. It was the appellate court, however, rather than the Legislature, that caused the constitutional deprivation when it changed controlling precedent on the statutory construction issue. While the federal constitution only proscribes *ex post facto* laws of a criminal nature, the state constitution's corresponding provision also bars retroactive application of laws impinging on vested rights in the civil law context. Tex. Const. art I § 16. *Merchants Fast Motor Lines, Inc. v. Railroad Commission*, 573

S.W.2d 502 (Tex. 1978).

Even if responsibility is solely attributed to the Legislature, however, the result of the analysis remains the same. This is so because the Open Courts Provision prohibits the abrogation of a well-established causes of action. It is undisputed that the faculty had the right to sue the University for common-law breach of contract under Section 111.33 as construed in *Fazekas*. The Legislature could not have taken it away without running afoul of Article I § 13, which states that [a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

*Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 355-357 (Tex. 1990); *Earle v. Ratliff*, 998S.W.2d 882, 889 (Tex. 1999).

In holding that the University was immune, the Third Court effected a retroactive deprivation of the right to sue on a recognized common-law cause of action for breach of contract against the University, and a deprivation of vested property rights in contracts that thus became unenforceable, in violation of multiple provisions of the Texas Bill of Rights. Accordingly, the Third Court's judgment should be reversed.

### **III. STATUTORY CONSTRUCTION ISSUES ARE PROPERLY LITIGATED UNDER THE DECLARATORY JUDGMENTS ACT.**

The Declaratory Judgments Act (DJA) authorizes Texas courts of record to declare the rights of a person interested in a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract or franchise. Tex. Civ. Prac. & Rem. Code §§ 37.004(a). Declaratory judgment actions are appropriate means to determine questions of construction or validity. A court may also construe a constitutional provision under the Act. *See Chenault v. Phillips*, 914 S.W.2d 140, 141, 39 Tex. Sup. Ct. J. 204 (Tex. 1996). The Act waives sovereign immunity when used to declare rights under a statute or ordinance. *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994).

When the state is a necessary party because a state law is challenged, sovereign immunity is expressly waived, because if the State were not joined, the declaration would have no practical effect. *See City of La Porte v. Barfield*, 898 S.W.2d 288, 297 (Tex. 1995). The DJA potentially waives sovereign immunity when a party seeks the ancillary relief of an injunction with a declaration. *Leeper*, at 446.



The University contends that De Mino cannot maintain a declaratory judgment claim because he is (mis)using the DJA to vindicate his contractual rights, and the lower court agreed.

This reasoning, however, is unpersuasive because De Mino pleads the declaratory judgment claim as a separate cause of action, and does so as a representative of all others similarly situated. Like any other faculty member with a written contract at the University of Houston De Mino would be entitled to bring such a declaratory judgment action even if he had no contract dispute with the University. Declaratory judgment to construe a contract is authorized even *before* a breach occurs and any harm is suffered. It is an action separate and distinct from a suit for damages occasioned by a breach. *See* Civ. Prac. & Rem. Code §37.004(b). But the issue here is not even construction of the terms of a contract, or its validity, but construction of a statute affecting the contract.

The jurisdictional bar against suit for damages, assuming it can be validly asserted, simply does not apply when the relief sought is declaratory in nature. A money judgment (except for attorneys fees) cannot be obtained through a declaratory judgment action. Nor can the State be compelled to perform a contract via the DJA.

The public treasury, which the sovereign immunity doctrine is purportedly

meant to protect, stands to suffer no harm as a result of the Court determining whether Section 111.33 waives immunity to suit, and whether as a consequence would-be faculty members should think twice about accepting employment contracts at the University of Houston.

**C. Declaratory judgment can serve a variety of useful purposes.**

Nor is the ultimate goal of securing a money judgment against the State necessarily an element of a declaratory judgment claim involving a contract or alleged contract between an individual and a state entity. Other valid purpose could be served as well.

For example, in suing a competitor for tortious interference with a contract between the aggrieved party and the state, Company A would have to establish the existence of such a contract as an element of its cause of action against Company B. *See Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 210 (Tex. 1996). The question of whether the contract subject to interference was in effect might be an appropriate subject matter for declaratory relief when it comes up in a separate lawsuit.

Another example would be a wrongful termination suit under 42 U.S.C. §1983 alleging an unconstitutional deprivation of a vested property interest arising from an alleged employment contract with the state. If the existence or validity of

the contract is disputed, a determination thereof would be essential to the adjudication of the due process claim. For, without a vested property interest, there can be no actionable due process violation. *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972), *McCartney v May*, 50 S.W.3d 599, 608 (Tex.App.-Amarillo 2001, no pet.).

Declaratory judgment on claims of constitutional violations in the context of an employment dispute may be particularly valuable for a plaintiff because the vindication thereby achieved may restore his professional reputation and employability following a termination that marred his employment record and may have made it difficult to find another position in the same industry.<sup>8</sup> It can also be valuable for the Defendants, if they prevail and an adverse employment action by them is shown to have been fully justified, such as in the case of dereliction of duty or misconduct. When a dispute is resolved on immunity grounds, by contrast, the question of who was right and who did wrong, is never even reached.

The mere fact that a plaintiff would (also) like to collect damages should not prevent her from invoking the Declaratory Judgments Act for the purpose for

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<sup>8</sup> See *Tex. A & M Univ. v. Lawson*, 87 S.W.3d 518 (Tex. 2002)(second lawsuit over employment references following settlement of original wrongful termination suit).

which it was enacted. A plaintiff's other or ultimate objectives are irrelevant. It is not argued that the Act be used as a vehicle to compel specific performance or payment of damages. The suggestion that the plaintiff here is improperly disguising the true nature of his claims by recasting them as claims for declaratory relief is unavailing. After all, he set forth his various claims for relief expressly in his pleadings, and pleaded some of them in the alternative, as authorized by the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 47, 48. Not only do the rules allow for pleading of multiple claims and different legal theories, they even permit pleading of inconsistent claims.<sup>9</sup> *Regency Advantage L.P. v. Bingo Idea-Watauga, Inc.*, 936 S.W.2d 275, 278 (Tex. 1996). There is thus no just cause for charges of circumvention or subterfuge.

**D. Class certification hearing for DJA claim was required.**

The Third Court's opinion states that the underlying suit was not filed as a class action. Indeed this is true of the Original Petition. However, when the University answered and filed a plea to the jurisdiction contending that Section 111.33 did not waive its immunity, and thus put the enforceability of all employment contracts at the University of Houston in question, De Mino filed a

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<sup>9</sup> *See* *Labrado v. County of El Paso*, 132 S.W.3d 581 (Tex.App. Waco 2004, no pet.) (claims for equitable relief not barred by immunity merely because claims for damages are also present).

supplemental petition on behalf others situated like himself, asking the trial court to construe Section 111.33 and to decide whether the 1985 amendment could pass the test of constitutionality.(CR 021).

An amended or supplemental pleading relates back to the filing date of the suit. *Lovato v. Austin Nursing Ctr., Inc.*, 113 S.W.3d 45 (Tex.App. Austin 2003, pet. filed). Thus, what was originally a breach-of-contract by a single plaintiff became a proposed class action upon filing of the subsequent pleading. By dismissing the supplemental petition without conducting a class certification hearing, and without notice to the class members, as required by Tex. R.Civ. P. 42, the trial court committed reversible error, to the detriment of the University s employees. Contrary to the intent of Rule 42, the class members were left unaware that a suit affecting their interests was pending in Austin. Nor did they have a chance to make an appearance through competent counsel of their choice.

Because the class members were denied the opportunity to assert their interest in the construction of a statutory provision affecting the enforceability of their contracts, their rights under Rule 42, and under the due process and due course of law clauses, were violated. Accordingly, the Third Court s judgment should be vacated on this alternative ground, and the matter remanded to the trial court.

**IV. THE UNIVERSITY S NON-DISCLOSURE POLICY IS UNCONSCIONABLE AND SHOULD BE HELD TO WAIVE ITS RIGHT TO INVOKE SOVEREIGN IMMUNITY, IF ANY.**

**A. Faculty sign employment contracts in good faith, believing they are enforceable.**

The University of Houston is an institution of national statute and recruits faculty from all over the country. Indeed the hiring of new tenure-track and tenured faculty requires a national search. Prospective faculty member, when offered contracts, in good faith rely on the belief that contracts are legally binding on both parties and enforceable in court if not performed. That is the law with respect to contracts generally. It is also the law with respect state universities in most states. In retaining sovereign immunity to suit, Texas is an anomaly and most people, including current faculty at University of Houston, are unaware of it.

Most importantly, they sign contracts that fail to disclose that the University routinely invokes sovereign immunity in contract disputes and thus prevents an adjudication on the merits. De Mino signed such a contract, which is attached to his Original Petition and incorporated by reference (CR 009-010). It states that payment for specified courses is contingent on sufficient enrolment, but it is silent on sovereign immunity.

The University simply leaves faculty in the dark about the law of sovereign immunity and its policy of defeating breach-of-contract suits on jurisdictional

grounds in the event of a dispute. Faculty rely on the terms of their contracts, perform their part of the bargain, and expect the University to do likewise, only to discover in case of a breach that they have no judicial remedy.

The conduct of the University in inducing faculty to assume contractual obligations but failing to disclose that it does not intend to be bound by the terms of the agreements would otherwise be actionable in tort. *Formosa Plastics Corp. USA v. Presidio Engineers and Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998)(fraudulent inducement). The Court should not condone and endorse this systematic practice of offering employees contracts that bind the employee but not the University, and fail to disclose this critical information to them. Faculty should have the right to know that employment contracts at the University of Houston are unenforceable, and take that into account in weighing whether or not to accept an offer.

**B. Nondisclosure is unfair and in need of equitable judicial redress.**

To remedy this problem, this Court should judicially establish the doctrine that a state agency waives its right to invoke sovereign immunity, assuming it possesses such immunity, where it has failed to inform individuals at the time the contract was formed that it reserves the right to resolve subsequent contract

disputes by invoking sovereign immunity.<sup>10</sup>

Petitioner urges this Court to so hold because non-disclosure of the lack of enforceability of employment contracts at state universities on account of sovereign immunity is fundamentally unfair. Nothing prevents the University from suing faculty members for breach of contract, should they so choose. *See, e.g., State of Texas v. Walker*, 142 F.3d 813 (5<sup>th</sup> Cir. 1998).

The City of Houston asserts a similarly unreasonable position in other cases before this Court, asserting sovereign immunity when sued, but suing itself when it so pleases, whether in federal court or elsewhere, relying on the very same sue and be sued authority that it claims its contractors cannot rely on as a waiver.

It is being argued in the contractor cases before the Supreme Court that upholding sovereign immunity would upset the valid expectations of commercial parties. This applies even more forcefully here, for two reasons: While companies doing business with cities can be assumed to be appraised of the risks (after all, many have the benefit of legal advice when they enter formal contracts), Professors, especially from out of state, are much less aware of the quirks of the sovereign immunity regime in Texas. Secondly, contractors can avail themselves of the administrative scheme set up by the Legislature to resolve certain contract

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<sup>10</sup> *See De Mino's Contract* at CR 009-010 (no mention of sovereign immunity).

claims. *General Serv. Comm'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591 (Tex. 2001). Professors can not, because state employees are expressly excluded from its purview. *See* Tex. Gov't Code §2260.001(2)(B).

Given the absence of the remedy the Legislature made available to commercial contractors, the case for judicial recognition of waiver-by-conduct under the scenario presented here is all the more compelling. For the same reason, the Court's previous holding in *IT-Davy*, and its underlying rationale for not establishing a waiver-exception, is inapplicable here and should not be followed. *Texas Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849 (Tex. 2002).

**C. The case at bar put the waiver-by-conduct in issue and preserved it for appeal.**

Because Petitioner had expressly pleaded waiver-by-conduct, Defendant was on notice of this alternative theory. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 897 (Tex. 2000). The University did not file special exceptions to challenge Petitioner's pleading of the waiver theory and the underlying facts. Had the University done so, and the trial court sustained the exceptions, Petitioner would have been entitled to amend his pleadings, rather than facing dismissal of his suit. *See Friesenhahn v. Ryan*, 960 S.W.2d 656, 658-59 (Tex. 1998). Without special exceptions, a petition is liberally construed in favor of the pleader. *Roark v. Allen*, 633 S.W.2d 804, 809 (Tex. 1982). This standard also applies when

jurisdiction is challenged. *Continental Coffee Prods. Co. v. Cazarez.*, 937 S.W.2d 444, 449 (Tex. 1996).

The Third Court of Appeals, however, declined to entertain waiver-by-conduct, opting instead to await guidance from this Court. Given the large number of immunity cases before the Court, and the recurring pleas for guidance from the inferior courts, the time seems ripe for this Court to weigh in on the waiver debate, and to settle it one way or the other.<sup>11</sup>

**V. THE THIRD COURT OF APPEALS SOVEREIGN IMMUNITY RULING DENIES FACULTY MEMBERS THE EQUAL PROTECTION OF THE LAW.**

The equal protection clause requires that those who are similarly situated be treated equally. *See Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). To pass constitutional muster, *de jure* discrimination in favor of one over the other must be justified in terms of a compelling state interest or at least a rational basis, depending on what right or interest is affected by the discriminatory classification.

In the controversy at bar the state and the individual are both contracting parties, and thus similarly situated. Both have the capacity to sue. Both have the

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Petitioner refrains from citing the cases as the Court is well aware of them and of in which sue and be sued and waiver by conduct is being in which sue and be sued and waiver by conduct sufficiently.

capacity to contract. Both chose to contract, and did so with each other, agreeing on terms to their mutual satisfaction. Yet, according to the Third Court's holding, only one party to the very same contract can go to court and enforce it. Mutuality of obligations is suspended, because one party is free to ignore its terms without adverse consequences.

It is well settled that the sovereign acts in a different capacity when it contracts. Even defenders of sovereign immunity concede that when the State contracts, it waives immunity from liability. *Federal Sign v. Texas S. Univ.*, 951 S.W.2d 401, 408 (Tex. 1997). When the State chooses to sue, the courts are open to it. Nothing stands in the way. Yet when the private party to the same contract sues, insisting that the state adhere to the letter and spirit of its formal promises, the suit is dismissed irrespective of merits. The citizen never gets his or her day in court.

Access to the courts is a fundamental right. Even inmates enjoy it. *Bounds v. Smith*, 430 U.S. 817, 821 (1977); *Corpus v. Estelle*, 551 F.2d 68, 70 (5<sup>th</sup> Cir. 1977); *Thomas v. Brown*, 927 S.W.2d 122, 125 (Tex.App.-Houston [14<sup>th</sup> Dist.] 1996, writ denied). Access to the courts, and to judicial remedies, is also guaranteed by the state constitution. Tex. Const. art I, §13. *Texas Ass'n of Bus.*,

852 S.W.2d 852 S.W.2d 440, 448 (1993).

The proposition that one party to a contract should be allowed to breach the contract whenever it pleases, without incurring risks and consequences, while the other party is bound by it and yet has no judicial remedy to enforce it, is fundamentally unfair and violates the core principle of equality under the law. The common law did not countenance such inequity even where employment was at will and the constitution had yet to be written. To this day, at common law, absent a contract either party in an employment relationship may terminate it at will, for good reason or for no reason.

To the extent the defenders of sovereign immunity argue that the doctrine of immunity to suit is itself part and parcel of the common law, the argument fails because the equality guarantees enshrined in the Constitution supersede any common law construct or doctrine in conflict with it. The constitution is, after all, the fundamental law the land. Secondary law cannot contravene it.

When construing statutes, courts must do so in manner that renders them constitutional. Tex. Gov t Code §311.021(a); *Procter v. Andrews*, 972 S.W.2d 729, 735 (Tex. 1998). Nor should the Legislature be presumed to have intended an unconstitutional result. *Vinson v. Burgess*, 773 S.W.2d 263, 266 (Tex. 1989). The

categorical preference accorded one party in a contractual relationship under the established immunity doctrine is arbitrary and abusive, and manifestly lacks a rational basis. It allows for no exception and no weighing of the merits of competing contentions and claims. Indeed, it precludes the determination of contested facts and of the merits of claims, putting instead one party at the mercy of the other. It amounts to no more than the bland assertion: *I win because I am the King*. Such absolutism should have no place in a republic that derives its authority from the people and limits the exercise of the power it bestows on its public officials by a Constitution and a Bill of Rights that is inviolate.

In holding that the University, as one party to the contract in question, is immune to suits seeking enforcement of the terms of that contract, but could itself hold the other party to its terms under the sue element of the sue-and-be-sued clause, the lower courts rendered a decision contrary to the equal protection clause of the Fourteenth Amendment.

By its express terms, the Fourteenth Amendment is binding on the States and its courts. In addition, Texas has its own Bill of Rights, prominently placed at the very beginning of the state constitution. Its equality provisions have occasionally been interpreted as providing even more protection than their federal

counterparts. Tex. const., art 1, §3, §3a; *In re McLean*, 725 S.W.2d 696 (Tex. 1987)(establishing strict scrutiny and a compelling state interest test).

Either way, review of the lower courts immunity holding is subject to strict scrutiny because the deprivation it entails is of a right that is fundamental in nature. Judges are sworn to uphold both the U.S. and Texas constitution. They are thus bound by its commands and proscriptions when they adjudicate cases, construe statutes, and apply the common law in the performance of their duties.

Because the lower courts decisions upholding the University s immunity to suit cannot be reconciled with the equality guarantees of the federal and state constitutions, nor with the constitutional right of access to the courts, this Court should reverse the Third Court of Appeals and remand for a trial on the merits.

### **CONCLUSION AND REQUEST FOR RELIEF**

For any and all of the foregoing reasons Petitioner De Mino, in his own behalf and on behalf of all faculty members with contracts at the University of Houston System, respectfully requests that the Court reverse the lower courts opinion and judgment and remand this case for further proceedings.

Petitioner asks that the Court construe Section 111.33 of the Texas Education Code as conferring the right to sue the University of Houston for

common law breach of contract, declare the 1985 amendment unconstitutional if necessary, and reverse the trial court's dismissal order accordingly.

Petitioner asks that the Court exercise its power to modify the common law to bar the University of Houston and other state agencies from invoking sovereign immunity where they have failed to put contracting parties on notice that they may avoid the fair adjudication of disputes in court by filing pleas contesting jurisdiction on sovereign immunity grounds.

Finally, this Court should hold that individuals' right to access the courts to enforce contracts against the government is protected by the equality guarantees of the Fourteenth Amendment and the Texas Bill of Rights. Accordingly, the Court should overrule contrary statutory and decisional law, reverse the lower courts' holdings and judgment in the case at bar, and remand for further proceedings consistent with this Court's new precedent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 18, 2005 I served an accurate paper copy of the foregoing Petitioner s Brief of the Merits, and one electronic copy saved unto a 3 ½ in diskette in Portable Document (pdf) Format, upon opposing counsel at the address shown below by first class mail.

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