

No. 02-1031

**In the
Supreme Court of Texas**

REATA CONSTRUCTION CORP.,
Petitioner,

v.

CITY OF DALLAS,
Respondent.

On Petition for Review from the
Fifth Court of Appeals, Dallas, Texas

***AMICUS CURIAE BRIEF OF THE STATE OF TEXAS
IN SUPPORT OF MOTION FOR REHEARING***

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***AMICUS CURIAE BRIEF OF THE STATE OF TEXAS
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TO THE HONORABLE SUPREME COURT OF TEXAS:

This petition should be reheard for three reasons: (1) the decision does not reconcile its finding of waiver with the Texas Tort Claims Act, thereby calling into question those laws that govern resolution of claims against the State; (2) the decision contravenes this Court's precedents which have, since 1847, recognized that the State does not waive its sovereign immunity from suit against claims for affirmative relief even when the State initiates the lawsuit; and (3) the decision will cause gamesmanship by litigants, unfairness to the public, and interference with the State's obligation to enforce the laws and public contracts.

STATEMENT OF INTEREST OF *AMICUS CURIAE*¹

The State of Texas has an interest in the rehearing of this decision because—if it remains Texas law and if it is applied to *sovereign* immunity²—it would have enormous practical implications for the State and its agencies. Under those circumstances, even when the State sets out to enforce the law, it arguably would be subjected to counterclaims from which it is otherwise immune.

In addition to those very practical concerns, *Reata* concerns the State because it calls into question the continuing efficacy not only of the Texas Tort Claims Act (which is overlooked in the decision) but also of Chapter 2260 of the Government Code, the Whistleblower Act, and other statutes designed to regulate when the State waives immunity from suit. If the approach taken in the *per curiam*—imposing an equitable waiver contrary to the legislative command embodied in a statute governing immunity—is emulated by the courts of appeals, it could well undermine other statutes and throw substantial areas of law into disarray.

SUMMARY OF THE ARGUMENT

The Court should grant rehearing so that Texas law is not needlessly unsettled by the April 2, 2004 *per curiam* opinion, which dramatically changes Texas’s immunity law without reconciling the relevant statutes or this Court’s controlling precedents. The *Reata* decision,

1. No fee has been paid or will be paid to the State of Texas for preparing this brief.

2. This Court has recognized a distinction between “governmental immunity” and “sovereign immunity.” *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003). This brief proceeds on the assumption that this Court or some lower courts will apply the principle announced in the *Reata* opinion to both kinds of immunity.

on its merits, creates far too broad a waiver of immunity to be squared with Texas law. But regardless of how the Court ultimately resolves that question on rehearing, the opinion should be withdrawn because it fails to consider the implications of the rule it announces on three levels.

First, the opinion does not analyze the Tort Claims Act, which controls governmental immunity from suit against tort claims such as those asserted by Reata. By failing to perform that analysis, the decision runs afoul of how this Court has analyzed Chapter 2260 of the Government Code and other statutory schemes governing waivers of sovereign immunity.

Second, the opinion marks a dramatic departure from Texas law that, if undertaken at all, should have been explained in a full opinion of the Court after argument from all affected parties. It has long been the law of Texas that the State does not waive its sovereign immunity from suit even when it brings suit. Indeed, immediately following statehood, this Court explicitly held that the State retained its immunity from suit as against counterclaims that were asserted in offset. *Borden v. Houston*, 2 Tex. 594, 611-12 (1847) (App.1) (holding that, when the State brought suit, sovereign immunity still acted to bar counterclaims); *Bates v. Republic*, 2 Tex. 616, 618 (1847) (App. 2) (same). Those cases have never been overruled by this or any other court. And the decision in *Anderson, Clayton & Co. v. Allred*, 62 S.W.2d 107 (Tex. 1933), is not only consistent with that rule, it reaffirms it. *Anderson, Clayton* limits counterclaims that may be asserted against the State to “matters properly defensive,” *id.* at 110—a phrase that, because Texas procedural law sharply distinguishes between “defensive” matters and claims for affirmative relief, acts to preclude counterclaims for

affirmative relief from being asserted against the State. By now allowing such counterclaims to evade immunity, the *Reata* decision departs from over 150 years of Texas law.

Third, the *Reata* opinion could have wide-ranging consequences, some of which could well be avoided with a more developed explanation from the Court of this new rule. The *Reata* rule—because it does not reach immunity from liability—will, especially in tort cases such as this one, lead only to undue delay, needless subjection of governmental entities to trial expenses, and nuisance settlements. It will encourage gamesmanship by those holding claims against the State as they now have an incentive to bait the government into filing suit. By contrast, the established rule permits parties sued by the State to bring only “properly defensive” counterclaims and still allows courts to fairly evaluate the government’s claim while preserving the important policies underpinning sovereign immunity. Moreover, if a broad waiver of immunity is applied to the State, it may threaten the State’s ability to enforce regulations, pursue restitution or subrogation claims, and enforce contracts paid for with public funds. The Court’s opinion—which deviates from prior case law—ultimately elevates a “gotcha” rule of procedure over the important sovereign interests that have always been central to Texas immunity law.

ARGUMENT

I. THE COURT SHOULD HAVE ANALYZED WHETHER THE TORT CLAIMS ACT FORECLOSES A WAIVER OF IMMUNITY FROM SUIT IN THIS CASE.

The Court’s decision omits a key step, and that omission both undermines the Court’s conclusion in this case and needlessly calls into question other Texas statutes. The decision

failed to address how the tort claims at issue fit into the jurisdictional scheme of the Texas Tort Claims Act.

That is critical because the Court has squarely held that a governmental unit “is immune from both suit and liability for [a tort] injury *unless* the Texas Tort Claims Act waives that immunity.” *Tex. Nat. Res. Comm’n v. White*, 46 S.W.3d 864, 868 (Tex. 2001) (emphasis added). The Court should have explicitly addressed whether a purported “waiver by conduct” could fit within the comprehensive statutory regime of the Tort Claims Act. The absence of that analysis in the opinion runs afoul of repeated admonishments from this Court that any waiver of immunity for tort claims must be tied to the terms of the Act.³ Indeed, in another opinion issued on the same day as *Reata*, the Court reiterated that, “The Tort Claims Act creates a unique statutory scheme in which the two immunities are co-extensive: ‘Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter.’ Thus, the Department is immune from suit *unless the Tort Claims Act expressly waives immunity.*” *Tex. Dep’t of Parks & Wildlife v. Miranda*, 47 TEX. SUP. CT. J. 386, 389, 2004 WL 726901, at *4 (Tex. Apr. 2, 2004) (emphasis added; internal citation omitted). That clearly remains the law, but the *Reata* opinion failed to perform the necessary analysis.

This omission cuts to the heart of the relationship between the Legislature and the courts. “Under our form of government, the state derives its authority from ‘the people.’ In

3. *E.g.*, *Tex. Dep’t of Crim. Justice v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001); *Tex. Dep’t of Transp. v. Jones*, 8 S.W.3d 636, 639 (Tex. 1999) (per curiam) (“[T]he court of appeals erred in affirming the denial of the Department’s plea without first determining whether Jones’ pleadings state a claim under the Texas Tort Claims Act”); *Kerrville State Hosp. v. Clark*, 923 S.W.2d 582, 584 (Tex. 1996) (“The Act did not abolish sovereign immunity, and we must look to the terms of the Act to determine the scope of its waiver.”)

Texas, the people’s will is expressed in the Constitution and laws of the State. Consequently, to waive immunity, consent to suit must ordinarily be found in a constitutional provision or legislative enactment.” *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003) (citations omitted); TEX. CONST. art. I, §2. That democratic rationale does not just explain the persistence of sovereign immunity, it also explains why courts should not be the ones to change that background rule. “[T]he Legislature is better suited to balance the conflicting policy issues associated with waiving immunity.” *Taylor*, 106 S.W.3d at 695; *see also Tex. Nat. Res. Conserv. Comm’n v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002); *Duhart v. State*, 610 S.W.2d 740, 741 (Tex. 1980); *Lowe v. Tex. Tech Univ.*, 540 S.W.2d 297, 298 (Tex. 1976).

The *Reata* opinion undermines these bedrock principles by silently allowing a purported waiver by conduct to trump the statutory scheme of the Texas Tort Claims Act. Before *Reata*, when the Legislature had enacted a comprehensive scheme to regulate immunity, the Court had consistently refused to recognize waivers by conduct outside of that scheme. *E.g.*, *General Serv. Comm’n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 597 (Tex. 2001) (rejecting “the notion that judicially-imposed, waiver-by-conduct doctrine can exist in the face of the administrative procedure that Chapter 2260 establishes”). The *Reata per curiam* opinion could thus be read to fundamentally alter the relationship of the courts to the Legislature.⁴ The Court should grant rehearing to reject that change.

4. Although it has sometimes been suggested that the Court might have the power to abrogate the background law of immunity, that is contrary to the approach that was taken by this Court in the very term where it acknowledged the existence of sovereign immunity. *See Borden v. Houston*, 2 Tex. 594, 611-12 (1847) (looking only to the statute for any possible waiver and holding that “however clear the right may be,

II. THE *REATA* OPINION MARKS A FUNDAMENTAL DEPARTURE FROM ESTABLISHED TEXAS LAW THAT IS UNWARRANTED AND INAPPROPRIATE FOR A *PER CURIAM*.

The Court should grant rehearing because the opinion cannot be reconciled with this Court’s long-standing precedents that squarely hold that the State retains sovereign immunity from suit even when it initiates suit. *See* Part II.A., *infra*. That principle has been part of this Court’s jurisprudence since 1847, and was not altered by the *Anderson, Clayton* decision, which reaffirmed that only properly defensive matters could be raised against the State. *See* Part II.B, *infra*. For a contrary proposition, the *Reata* opinion mistakenly looks to *State v. Martin*, a court of appeals decision from 1961. *Reata Constr. Corp. v. City of Dallas*, 47 TEX. SUP. CT. J. 408, 409, 2004 WL 726906, at *3 (Apr. 2, 2004) (*per curiam*) (citing *State v. Martin*, 347 S.W.2d 809, 814 (Tex. Civ. App.—Austin 1961, writ ref’d n.r.e.)). But the *Martin* language should be afforded no weight because it merely parrots a prior error made by that same court of appeals, an error that demonstrably has no foundation in Texas law. *See* Part II.C.1, *infra*. And this Court’s *Kinnear* decision—a very brief *per curiam* deciding a statutory attorney’s fee question, not a common-law waiver—cannot reasonably be read to have silently overruled long-standing immunity precedents that it did not even mention. *See* Part II.C.2, *infra*.

and with whatever force of reason, equity and justice it may address itself to the moral sense of right, it can be enforced against the government only by its consent, and in the manner it may prescribe”). Indeed, during that same term, the Court did not discuss sovereign immunity as being court-created, but rather as “a well established principle” that “is applicable in all governments . . .” *Bates v. Republic*, 2 Tex. 616, 618 (1847). Sovereign immunity has its roots in the democratic form of our government and the structure of its separation of powers. *E.g.*, *Taylor*, 106 S.W.3d at 695-96; *IT-Davy*, 74 S.W.3d at 853-54 (Hecht, J., concurring). It is too deeply embedded in the fabric of that structure to be judicially excised on policy grounds.

A. Under the Consistent Law of Texas Since 1847, the State by Filing Suit Does Not Waive Its Immunity from Suit Against Claims Seeking Affirmative Relief.

The principle that the State does not waive its immunity from suit when it initiates a lawsuit is as old as the State of Texas itself. The *Reata* opinion cannot be reconciled with this long-standing precedent. Nor can it be reconciled with the equally long-standing rule that immunity for counterclaims is to be assessed on a claim-by-claim basis to better reflect the policy choices about immunity made by the Legislature.

In its December 1847 term, this Court acknowledged the existence of sovereign immunity from suit in the well-known case of *Hosner v. DeYoung*, holding that the State is immune from suit except to the extent, and only to the extent, that it consents to be sued. *Hosner v. DeYoung*, 1 Tex. 764, 769-70 (1847). In two other cases that same term, the Court applied that principle to the core question at issue here: whether the State waived its immunity from suit as against counterclaims when it brought the underlying lawsuit. *Borden v. Houston*, 2 Tex. 594 (1847) (App. 1); *Bates v. Republic*, 2 Tex. 616 (1847) (App. 2). In both cases, this Court held that the State did not waive its immunity from suit against such counterclaims. *Borden*, 2 Tex. at 611-12 (not allowing cross-claims, even in offset); *Bates*, 2 Tex. at 618 (same). Those cases have never been overruled.

The *Reata* opinion directly contradicts those long-standing precedents. While *Reata* emphasized the form of the pleading by which the plaintiff's claim was asserted by or against the State, 47 TEX. SUP. CT. J. at 409-10, in *Borden* this Court rejected any immunity rule turning on such "mere forms" as inconsistent with the sovereignty underpinning immunity:

The government . . . can be sued only with its own consent, and in the manner and for the causes which it may by law prescribe. But it would be of no avail to the government that it cannot be coerced by a direct suit, if the same thing may be done indirectly in another manner. Coercion in either mode is incompatible with sovereignty. *Whether it be directly by suit, or indirectly by set-off, which is in the nature of a cross-action, is immaterial. There is no difference in principle, the only difference is in mere forms*; and the principle and policy which forbid a direct suit against the government would be as effectually violated and defeated by according to the defendants the right here claimed.

Borden, 2 Tex. at 611 (emphasis added). That the *Reata* opinion turns on the label given to a party or to a pleading reverts to the kind of formalism that this Court had already moved beyond in the early days of statehood.

This Court's precedents also reject the argument that sovereign immunity against a cross-claim turns on whether the State brought the underlying suit. In *Bates v. Republic*, this Court held that, whether asserted by direct action or cross-action, those claims were still barred by immunity:

A set-off, though not denominated a suit, is in the nature of a cross action, and substituted therefor for the purpose of effectuating justice without an accumulation of actions. *It is, then, but another name for an action, and therefore cannot be set up against the government without its consent. The high purposes of public policy to be subserved by the exemption of government from suits at the instance of private individuals would be thwarted to a great extent if claims against the government were, without its consent, permitted to absorb the public funds collected for its use and support. . . .* For it is a well established principle that courts have no authority to enforce claims against the government, in whatever form of action they may be urged, unless the institution of such action, or the recognition of such claim, has been expressly sanctioned by law.

Bates, 2 Tex. at 618 (emphasis added). The label applied to the cross-claims in *Reata*, just as in *Bates*, is “but another name for an action.” *Id.* Permitting such cross-claims without sovereign consent is precisely what this Court rejected in *Bates*.⁵

This Court got it right—twice—in its 1847 term. The State’s immunity does not turn on whether the State appears as plaintiff, as plaintiff-intervenor, or as defendant. Sovereign immunity from suit is not about whether the court has jurisdiction over the *person* of the State, but rather has always been about whether courts have jurisdiction over the *subject matter* of the claim against the State. *E.g.*, *Borden*, 2 Tex. at 611 (holding that the State waives immunity only “for the causes” to which it consents); *Bates*, 2 Tex. at 618 (discussing whether a particular “claim” has been “recognized” as within the competence of the courts); *see Tex. Dep’t of Transp. v. Jones*, 8 S.W.3d 636, 637 (Tex. 1999) (per curiam).

And until its opinion in this case, the Court had continued to analyze immunity in terms of the subject-matter of the claims asserted against the government, not the mere presence of the government before the court. Thus, when a plaintiff brought a constitutional claim against the State for which there was no immunity from suit, this Court did not hold that the presence of the State for one claim allowed the plaintiff to bring all of its other claims against the State, too. *See Little-Tex*, 39 S.W.3d at 598. The First Court of Appeals correctly applied this claim-by-claim analysis to the context of counterclaims, holding that each counterclaim against the State must be separately analyzed to determine whether

5. This rule has continued to be noted in treatises. *E.g.*, 67 TEX. JUR 3D., State of Texas §108 (2003) (“Where the state has not authorized an action to be brought against it, however, a defendant in a suit commenced by the state may not indirectly institute suit against it by setting up a counterclaim or cross action constituting an independent cause of action.”).

immunity has been waived. *State v. Sledge*, 36 S.W.3d 152, 156 (Tex. App.—Houston [1st Dist.] 2000, pet. denied). The *Reata* opinion represents a sharp departure from this well-established claim-by-claim reasoning.

Other decisions of this Court have also applied the principle that affirmative counterclaims may not be brought absent an independent waiver.⁶ In *State v. Snyder*, 18 S.W. 106 (Tex. 1886), the Court rejected an attempt by a defendant to interpose equitable claims for monetary relief when the State initiated suit. The *Snyder* Court concluded that “[t]he facts through which the right to have the money repaid”—in other words, the particular conduct of the State—“cannot affect the question of the power of the court, nor of the propriety or impropriety of the exercise [of jurisdiction].” 18 S.W. at 701. The Court noted that the choice of whether to allow such counterclaims was for the Legislature: “if [they have] not, no rule of equity can override the will of the legislature It is not for courts to place terms, upon compliance with which only will they hear a cause directed by the legislature to be brought on behalf of the state” 18 S.W. at 699.

This core principle—that it is for the Legislature, not the courts, to declare a waiver—was reiterated in the unanimous opinion of this Court just last year in *Wichita Falls State Hospital v. Taylor*, 106 S.W.3d 692 (Tex. 2003). The Court noted that sovereign immunity from suit predated the *Hosner* case, citing the Federalist Papers and a United States Supreme Court decision contemporaneous with *Hosner*. 106 S.W.3d at 694-95 (citing THE

6. This rule was treated as a given. *E.g.*, *Dean v. State*, 54 Tex. 313, 1881 WL 9685, at *1 (1881) (“It is an admitted principle that no action can be maintained by an individual against the government, either directly or indirectly, by way of set-off, unless by the sanction of express law to that effect.”); *Chevallier’s Adm’r v. State*, 10 Tex. 315, 1853 WL 4344, at *1 (1853) (same).

FEDERALIST No. 81 (Hamilton) and *Beers v. Arkansas*, 61 U.S. 527 (1857)). “[S]overeign immunity ‘is an established principle of jurisprudence in all civilized nations.’” *Id.* at 695 (quoting *Beers*, 61 U.S. at 529). The Court further noted that States had, to a degree, chosen to waive some of that immunity, but “[i]nvariably . . . they have retained a significant measure of immunity to protect the public treasury.” *Id.* The Court then turned to the question of where such consent could be found, concluding that, because “the people’s will is expressed in the Constitution and laws of the State,” the proper places to look were those sources of law. *Id.* The Court should not, without explanation, set aside those restraints in favor of judicial abrogation just one year later.⁷

B. *Anderson, Clayton Held That the Defendant Can Assert Its Defenses to the State’s Claim, Not That Immunity Is Waived Against Counterclaims for Affirmative Relief.*

Anderson, Clayton & Co. v. Allred, 62 S.W.2d 107 (Tex. 1933) does not retreat from the principle that the State retains its sovereign immunity when it brings suit, but rather reaffirms it. The *Reata* opinion assumes that *Anderson, Clayton & Co.* means that the State waived its immunity as to counterclaims for affirmative relief. *See Reata*, 47 TEX. SUP. CT. J. at 409. But a careful reading demonstrates that the opposite is true. Under *Anderson, Clayton*, the State does not waive immunity as against any claims for *affirmative* relief but, instead, only against “matters properly *defensive*.” 62 S.W.2d at 110 (emphasis added).

7. Although the *Taylor* court indicated that “we have not absolutely foreclosed the possibility that the judiciary may abrogate immunity by modifying the common law,” *Taylor*, 106 S.W.3d at 696, to say it has not been “absolutely foreclosed” is certainly to acknowledge that such an abrogation had not yet occurred. The Court’s *Reata* opinion, as a *per curiam* that does not even explicitly address this tension, is not the proper vehicle for so substantial a change in the background law of immunity.

1. *Anderson, Clayton* dealt with a fundamentally different counterclaim—one seeking to enjoin enforcement of an invalid law—as to which the State had no immunity from suit regardless of whether it was plaintiff or defendant.

Anderson, Clayton did not decide any sweeping principle of sovereign immunity because it had no occasion to reach that question. It dealt instead with a counterclaim seeking fundamentally different relief against the State—relief that did not implicate sovereign immunity at all because the injunction in question could have been sought against the State regardless. Accordingly, the Texas Commission of Appeals focused its analysis on venue, namely, whether the district court of Nueces County could hear these cross-claims against state officers or whether they must instead be heard in another county.

The broader question of sovereign immunity from suit was not in play in *Anderson, Clayton* because of the subject matter of the counterclaim. The Attorney General brought an enforcement action to enjoin the defendants from “operating . . . trucks over the highways of Texas for transporting property for compensation or hire without obtaining permits from the State Railroad Commission.” *Id.* at 107. *Anderson, Clayton* defended by arguing that the state law was invalid, seeking a restraining order against certain members of the Railroad Commission “from further arresting, prosecuting, and threatening to arrest” their drivers for violation of that invalid law. *Id.* Thus, the particular counterclaim was to enjoin the enforcement of an invalid law—about which the Commission noted, “the state’s immunity from suit does not extend to a suit against state officers to enjoin the enforcement of an invalid law to the injury of the legal rights of a citizen.” *Id.* at 110. As the State never had

immunity from that particular counterclaim, the Commission had no occasion to address whether immunity from suit would have been waived because the State initiated the action.

For that reason alone, it is a mistake to read *Anderson, Clayton* as setting new law in regard to the *subject-matter* of counterclaims that may be brought against the State. The question before the Commission was actually about the *venue* in which a defensive counterclaim could be brought. That distinction was reflected in the way that the certified question was framed to the Commission—“Did the District Court of *Nueces County* acquire jurisdiction over the defendants named in the cross bill of cross petitioners?” *Id.* at 109 (emphasis added). In other words, it was not *which* claims could be brought, but rather *where* those claims could be brought. It is no surprise, then, that the operative part of the Commission’s analysis addressed not immunity principles, but venue principles. It concluded that the venue statute, as “one of personal privilege,” could be waived by the State filing suit. 62 S.W.2d at 110. The Court’s adoption of the Commission’s opinion should be considered in that light, as it adopted “the opinion . . . *answering the certified questions,*” *id.* at 113 (emphasis added)—which did not address the question of waiver or immunity from suit.⁸ Given the fundamentally different nature of the counterclaim, it is a mistake to read *Anderson, Clayton* as deciding a whole class of immunity cases so different from its facts.

8. The Court’s later citation to *Anderson, Clayton* in the *Humble Oil* case does not change this result. In *Humble Oil*, the Court held that a tax defendant could not assert a set-off against the State. *State v. Humble Oil & Refining Co.*, 169 S.W.2d 707, 710 (Tex. 1943). To reach that result, the Court examined two separate tax-related statutes and determined that they had not changed the background rule of law that no offset was available. *Id.* at 707, 710. The Court did not indicate that *Anderson, Clayton* had changed that rule, either, noting that it only “applied in a proper case.” *Id.* at 709-10. Because the *Humble Oil* Court held that public policy opposed setoffs at least in tax cases, the Court had no occasion to reexamine its earlier cases prohibiting such setoffs in general.

2. The “properly defensive” test does not authorize counterclaims that seek affirmative relief against the State.

The “properly defensive” language used in *Anderson, Clayton* has also been misconstrued. *See Reata*, 47 TEX. SUP. CT. J. at 409 (quoting *Anderson, Clayton*, 62 S.W.2d at 110). That language is not an invitation for defendants to assert *affirmative* claims for relief against the State. To the contrary, the Commission states very clearly that the defendant can “plead and prove all matters *properly defensive*.” *Anderson, Clayton*, 62 S.W.2d at 110 (emphasis added). To further emphasize that limitation, the Commission described it as “the right to make *any defense* by answer or cross-complaint germane to the matter in controversy,” *id.* (emphasis added)—*i.e.*, to make the truly substantive defenses, regardless of the form of pleading. The Commission’s twice-stated limitation to only “defensive” counterclaims should not be overlooked. By reading out that critical limitation, the *Reata* opinion turns *Anderson, Clayton* on its head.

This distinction between “defensive” and “affirmative” matters is important to Texas law and to a Texas practitioner of the time would have clearly excluded affirmative monetary claims such as those asserted in *Reata*.⁹ For example, the question of whether a counterclaim not asserted in a prior action was barred by preclusion turned on this very distinction. Counterclaims seeking affirmative relief would not be barred because they were not

9. The *Anderson, Clayton & Co.* case was decided in 1933—before the adoption of the Texas Rules of Civil Procedure in 1941. It cannot, therefore, be assumed that the term “defensive” encompassed a modern notion of compulsory counterclaims that was, at the time, entirely absent from Texas law. *Cf.* TEX. R. CIV. P. 97(a) (adopted 1941); FED. R. CIV. P. 13(a) (adopted 1938).

“defensive” in nature.¹⁰ The distinction between “affirmative” and “defensive” counterclaims thus had—and continues to have—real consequences under Texas law.¹¹

The *Anderson, Clayton* court repeated that distinction in explaining which counterclaims could be expected to be asserted against the sovereign. By including “all matters properly defensive,” it indicated that the district court could hear *defenses* to the State’s claim but excluded claims for *affirmative* relief. It is that careful limitation that the *Reata* opinion abolishes entirely, opening the door to claims for affirmative relief that had always been barred.

10. As a contemporary treatise explained the state of the law: “It is clear from what has heretofore been said that *the rule which requires a defendant to set up all matters of defense* which are necessarily involved in the claim or demand presented by the plaintiff’s petition *does not apply to setoffs and counterclaims.*” *Sumner v. Volunteer State Life Ins. Co.*, 100 S.W.2d 1079, 1082-83 (Tex. Civ. App.—Eastland 1937, no writ) (emphasis added; omission in opinion) (quoting 26 TEX. JUR. Judgments §434, at 171 (1933)); *see also Mercer v. Bonner Loan & Invest. Co.*, 73 S.W.2d 988, 989 (Tex. Civ. App.—Fort Worth 1934, no writ) (distinguishing “affirmative” from “defensive” counterclaims).

11. This “defensive” distinction still lives in the background of Texas’s law of res judicata, complementing but remaining distinct from the requirement of the Rules of Civil Procedure that certain counterclaims be compulsory. *E.g.*, *Jones v. Strauss*, 800 S.W.2d 842, 844 (Tex. 1990) (per curiam) (Texas’s law of res judicata also bars relitigation of “defensive matters that could have been set up by affirmative defense.”) Other areas of Texas law also make a similar distinction. To determine whether counterclaims can survive the plaintiff’s voluntary non-suit, Texas law has looked to whether the counterclaims were “defensive matters” or whether they instead “contained [a] prayer for affirmative relief.” *Thomason v. Sherrill*, 10 S.W.2d 687, 687 (Tex. 1928) (per curiam); *see also Newman Oil Co. v. Alkek*, 657 S.W.2d 915, 919-20 (Tex. App.—Corpus Christi 1983, no writ) (affirming dismissal of entire case where “[t]he allegations contained in defendants’ counterclaims were purely defensive and did not constitute a claim for affirmative relief”). The question of whether a particular “defense” can be asserted despite its own statute of limitations also distinguishes “defensive” counterclaims: “if the subject-matter of the defense be *of an inextricably defensive nature*, which, if given effect, *will operate merely as a negation of the plaintiff’s asserted right to recover*, or in abatement, either wholly or partially, of the amount claimed, the statute of limitation does not apply.” *Morriss-Buick Co. v. Davis*, 91 S.W.2d 313, 314 (Tex. 1936) (emphasis added) (distinguishing those “defense[s]” that “constitute[] an independent cause of action which does not go to the foundation of the plaintiff’s demand”).

C. The Other Cases Cited by the *Per Curiam* Do Not Justify Its Dramatic Departure from Texas Law.

Nor does the other authority relied upon by the opinion support the sea change it makes in Texas law.¹² It looks to language used in *State v. Martin*, but that language, as shown below, is actually a repeated misstatement of Texas law originating in an earlier error by that court of appeals. It also cites *Kinnear*, but that case is most reasonably read as a *Leeper*-type case about statutory waiver of attorney's fee immunity, not as a silent disavowal of 150 years of Texas's consistent sovereign-immunity law.

1. *State v. Martin* does not support *Reata*'s change in Texas law because the particular language quoted in *Reata* is based on an error.

The *Reata* court's announced rule—that there is a waiver allowing a broad range of counterclaims against the government—is ultimately based on a mistake made by a court of appeals. The few Texas cases holding that the State can be subjected to counterclaims seeking *affirmative* relief build on the foundation of the Austin court's first mention of that possibility in its 1941 decision in *Commonwealth of Massachusetts v. Davis*, 160 S.W.2d 543 (Tex. Civ. App.—Austin 1941), *rev'd in part*, 168 S.W.2d 216 (Tex. 1942) (stating that any

12. It should be noted that the compulsory counterclaim rule in the Texas Rules of Civil Procedure cannot constitute a waiver of sovereign immunity from suit as against counterclaims. First, immunity from suit is a question of subject-matter jurisdiction, *see Jones*, 8 S.W.3d at 637, and the rules themselves indicate that they do not “extend or limit the jurisdiction of the courts of the State of Texas,” TEX. R. CIV. P. 816. Second, to the extent a rule purported to do so, it might exceed the bounds of the rules enabling legislation. TEX. CIV. PRAC. & REM. CODE §22.004(a). And third, Rule 97(a) in particular cannot be construed as a “clear and unambiguous” waiver of sovereign immunity, *Taylor*, 106 S.W.3d at 696, because it carves out counterclaims as to which the court does not have subject-matter jurisdiction, *see* TEX. R. CIV. P. 97(a), and can thus be read to exempt counterclaims from which the State is immune from suit.

discussion of immunity was unnecessary to the decision).¹³ But the foundation of that proposition is unsound because the *Davis* case is demonstrably incorrect.

Davis is the first occurrence in Texas law of the assertion that the State somehow waives its immunity as to counterclaims seeking “affirmative judgment” when it files suit. 160 S.W.2d at 547. The *Davis* court merely mentioned this principle in dicta—it did not need to resolve the Texas-law question because it was instead dealing with the sister-State immunity that would be applicable when Massachusetts sued in Texas courts.¹⁴ That passing mention occurred in the context of a broad statement about the law of other States, followed by an assertion that this Court had already adopted a certain view:

Some courts hold that the state, by submitting to the jurisdiction of the judicial tribunals, waives any right to plead its immunity, at least to the extent of its own claim; while others hold that the defendant may have an affirmative judgment for any amount in excess of the state’s claim where the defendant’s claim is incident to, connected with, arises out of, or is germane to the suit or controversy. See *State v. Arkansas Brick & Mfg. Co.*, 98 Ark. 125, 135 S.W. 843 [(Ark. 1911)]; 25 R.C.L. §47 [, at] 411, and cases cited therein. Our Supreme Court adopted the latter rule in the *Anderson, Clayton & Co.* case.

Id. at 547.

13. *Martin* cites *Davis* for this proposition, *Martin*, 347 S.W.2d at 814. In turn, *Martin* has been cited for this proposition by cases such as *State v. Fidelity and Deposit Co. of Maryland*, for which a petition for review has been filed with this Court. 127 S.W.3d 339, 344 (Tex. App.—Austin 2004, pet. filed).

14. When the Texas Supreme Court reviewed and reversed in part the court of appeals’s decision in *Davis*, it noted both that the issue implicated was “sister State” immunity and, moreover, that it was unnecessary to decide even that issue: “We omit, as unnecessary, any discussion as to whether a sovereign State, such as the Commonwealth of Massachusetts, may be held liable in damages in a sister State for the wrongful suing out of a writ of garnishment.” *Commonwealth v. Davis*, 168 S.W.2d 216, 221 (Tex. 1943).

A sufficient reason to disregard the *Davis* case is that it so plainly misreads *Anderson, Clayton*, which used very careful language about “matters properly defensive” and nowhere suggested that affirmative claims could be brought. 62 S.W.2d at 110; *see* Part II.B, *supra*.

An added reason is that even the authorities that *Davis* cites from other States suggest that affirmative claims should be barred in the sovereign’s own courts. *Davis* cites two authorities: 25 RULING CASE LAW §47, at 411 (1919) (App. 3) and *State v. Arkansas Brick & Mfg. Co.*, 135 S.W. 843 (Ark. 1911). The treatise cited by the *Davis* court—and cited by *Anderson, Clayton* before it—actually says that “the well settled general rule [is] that, if the state has not given up its prerogative of non-liability to be sued, a defendant *cannot* set up a set-off in satisfaction of the demand asserted in a suit brought by the state.” 25 RULING CASE LAW §47, at 411 (1919) (emphasis added). The treatise goes on to suggest that “some states” do allow such a claim to act as a set-off, *id.*—which Texas did not, *see Borden*, 2 Tex. at 611-12; *Bates*, 2 Tex. at 618. “[B]ut *few courts* have gone to the extent of holding that the defendant may have an affirmative judgment for any amount in excess of the state’s claim.” 25 RULING CASE LAW §47, at 411 (1919) (emphasis added). Such a position was thus far from the mainstream; indeed, the treatise does not cite a single state where such affirmative relief was allowed. And the *Arkansas Brick* case cited by the *Davis* court is not such an example. To the contrary, it stands for the proposition that a counterclaim cannot result in an “affirmative judgment.” 135 S.W. at 844 (holding that, although Arkansas allows claims in set-off, a defendant still “cannot by a cross-action have an affirmative judgment against the state for any excess he may be entitled to over and above the state’s claim; but this is the

extent of his disadvantage from having dealt with the sovereign”). These authorities underscore that the *Davis* court’s assertion that Texas law permitted “affirmative judgment” was unfounded.

That erroneous statement in *Davis* was repeated in the 1961 court of appeals case *State v. Martin*, 347 S.W.2d 809 (Tex. Civ. App.—Austin 1961, writ ref’d n.r.e.). This error was, from there, repeated in the April 2, 2004 decision in *Reata*. When the *Reata* opinion quotes *Martin* (and thereby *Davis*) for the pivotal proposition that “by filing a suit for damages, a governmental entity waives immunity from suit for any claim that is ‘incident to, connected with, arises out of, or is germane to the suit or controversy brought by the State,’” 47 TEX. SUP. CT. J. at 409, this Court repeats an error that has no foundation in—and is contrary to—Texas law.

2. *Kinnear* Did Not Effect a Change in Texas’s Background Law of Sovereign Immunity But Instead Addressed a Statutory Waiver.

Reata also relies on *Kinnear v. Texas Commission on Human Rights*, 14 S.W.3d 299 (Tex. 2000) (per curiam), for the proposition that “when a governmental entity files suit against a party, that entity waives, at a minimum, immunity from suit for counterclaims filed as a consequence of that suit.” 47 TEX. SUP. CT. J. at 409.

But *Kinnear* should not be read so broadly. It does not purport to state any such general rule, nor does it cite to a single authority that could support such an expansion of Texas law. Rather, *Kinnear* dealt with a statutory attorney’s fee provision. It held that the state agency did not have immunity from suit under that statutory attorney’s fee provision because the State initiated suit under that statute and “*Kinnear* claimed attorney’s fees *as a*

consequence of that suit.” *Id.* at 300 (emphasis added). The attorney’s fees were not a competing claim held by Kinnear before the litigation. They were incurred as a *consequence* of the suit under the statutory scheme, not within any preexisting dispute between the parties.

Thus, the most reasonable reading of *Kinnear* should be as a *Leeper*-type case that involves an implied statutory waiver instead of a common-law waiver. *Cf. Taylor*, 106 S.W.3d at 697-98 (holding that “if the Legislature requires that the State be joined in a lawsuit to which immunity would otherwise attach, the Legislature has intentionally waived the State’s sovereign immunity” (citing *Tex. Educ. Ass’n v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994))). *Kinnear* should not be extended from the special context of statutory attorney’s-fee-shifting provisions to the general context of *all* counterclaims.¹⁵

As it was only a very brief *per curiam* opinion, *Kinnear* cannot reasonably be read as marking a sea change in Texas’s sovereign immunity law—or, as the *Reata* opinion suggests, as “resolv[ing]” “any ambiguity . . . whether immunity from suit is waived by the State’s invoking a court’s jurisdiction.”¹⁶ 47 TEX. SUP. CT. J. at 409. The *Kinnear* Court did not

15. Nor can the mention of this possibility in the concurring opinion in *IT-Davy* be seen as marking any change in Texas law. *IT-Davy*, 73 S.W.3d at 861 (Hecht, J., concurring) (“[I]t has long been held that the State can waive immunity by filing suit.”). The statement was not joined by a majority of the Court and by its own terms did not purport to change Texas law. It was instead classic dicta, unnecessary to the resolution of the question before the Court and thus not the focus of the briefing and argument so as to afford the Court an opportunity to fully consider the issue. As demonstrated in this brief, the two cases relied upon by the concurrence each stand for a much more limited proposition that does not support a broad waiver. *Id.* at 861n.3; see Part II.B (*Anderson, Clayton*), *supra*, and Part II.C.2 (*Kinnear*). Moreover, a broad reading of the statement cannot be reconciled with Texas’s long-standing rule that the State is not amenable to suit for counterclaims that seek affirmative relief. See Part I, *supra*.

16. The Court’s contention that *Kinnear* “resolved” an ambiguity about the common-law, 47 TEX. SUP. CT. J. at 409, cannot be correct. Even if *Kinnear* could be read as addressing the common-law at all—which, given its context, is not a fair reading—then *Kinnear* itself would have two plausible readings, providing yet another prudential reason not to interpret it as silently overruling 150 years of precedent. *Cf. Taylor*, 106 S.W.2d at 697 (requiring—for statutory waivers—that any ambiguity be read in favor of

cite, analyze, or disavow a single Texas precedent regarding sovereign immunity from suit. It would ask too much of a single conclusory statement in an *per curiam* opinion dealing with an attorney’s fee statute to say that it implicitly overturned 150 years of sovereign immunity law—including a very clear statement in *Anderson, Clayton* limiting the scope of any waiver to “defensive” counterclaims. Instead, this Court should give *Kinnear* its natural reading as being about its limited statutory context rather than a common-law context that was simply not before the Court.

III. REATA WILL LEAD TO UNFAIR RESULTS AND COULD IMPEDE THE ABILITY OF THE STATE TO ENFORCE THE LAW.

A. Reata Will Lead to Delay and Unnecessary Litigation Expenses for Both Sides in Tort Cases.

The *Reata* decision notes that it only affects the government’s immunity from suit and that any immunity from liability is still retained. 47 TEX. SUP. CT. J. at 409. As this Court reiterated in another opinion on the same day as it issued the *Reata* decision, under the Tort Claims Act, immunity from suit and immunity from liability are co-extensive. *Miranda*, 47 TEX. SUP. CT. J. at 389. Thus, the party with a tort counterclaim against the government can hardly be said to be better off after *Reata* than before. Their claim will—after more time and additional litigation costs—be equally barred by immunity from liability as it would have been by immunity from suit. In the tort context, *Reata* simply delays the inevitable.

Worse, as going to trial imposes costs on all parties, this will presumably lead to nuisance settlements for claims that otherwise would have been dismissed on immunity-

preserving immunity).

from-suit grounds. It is hard to justify a waiver as “equitable” when its result is simply to allow some, but not all, claimants to collect nuisance settlements from the public fisc. Imposing such litigation expenses and the cost of nuisance settlements on governmental entities subverts the will of the Legislature in enacting the Tort Claims Act and similar statutes. Indeed, the Legislature has elected to prevent such distortions of the system by creating an interlocutory appellate procedure for just such immunity-from-suit arguments. *See* TEX. GOV’T CODE §51.014(a)(8) (providing for interlocutory appeals for pleas to the jurisdiction). The legislative approach avoids—in a tort case such as this—the unnecessary costs of extended pre-trial practice and a trial for claims that would eventually be decided on immunity-from-liability grounds regardless.

B. The Rule of *Anderson, Clayton*—Allowing Defenses But Not Affirmative Counterclaims—Strikes the Correct Balance.

The best approach is to preserve the State’s immunity from suit as against counterclaims for affirmative relief, as exemplified by *Anderson, Clayton*. That rule preserves a defendant’s ability to raise defenses and fully litigate the merits of the State’s claim. Defendants are thus no worse off, and the courts are empowered to fairly decide the merits of the action. All that defendants can claim to have “lost” is something they never had: the “right” to bring a claim that is otherwise barred by sovereign immunity from suit.¹⁷

17. The law recognizes other situations in which the two sides of a lawsuit have a differing ability to assert claims. For example, when a corporate entity has lost its privileges is sued as a defendant, although it cannot assert its own counterclaims, it is still allowed to “merely defend[]” by asserting “defensive matters” such as limitations to defeat the plaintiff’s relief. *Mello v. A.M.F. Inc.*, 7 S.W.3d 329, 331 (Tex. App.—Beaumont 1999, pet. denied).

By contrast, the *Reata* rule advantages a particular private claimant at the expense of the public. It also undermines the Legislature’s control over which *classes* of claims can be asserted against the State because the scope of *Reata*’s waiver may well only be limited by the creativity of counsel.

The rule that only defenses can be raised strikes the right balance. It comports with the principle that normal procedural rules generally apply when the State brings a claim. *See State v. Zanco’s Heirs*, 44 S.W. 527, 529 (Tex. Civ. App. 1898, writ denied) (finding State held to same requirements when seeking a new trial). It also acknowledges that whether or not the State should follow court rules is a different kind of inquiry than whether the State is subject to suit at all.¹⁸ As this Court noted in *Federal Sign*, that the State “‘must have its rights determined by the same principles applicable to other litigants’” is an “unremarkable proposition.” *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 406-07 (Tex. 1997). That principle “has nothing to do with immunity from suit. To state what happens *if* the State consents to be sued says nothing about whether the State consents to be sued.” *Id.* at 407.

As confirmed by this discussion in *Federal Sign*, sovereign immunity is, in the words of *Anderson, Clayton*, one of the “exemptions inherent in sovereignty.” *Anderson, Clayton*, 62 S.W.2d at 537-38. Preserving the Legislature’s ability to control the public fisc—and

18. Federal law also places the United States in an advantaged position as a litigant in federal courts because of its responsibilities as sovereign. *See generally* 14 WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE §3652 (3d ed. 2004) (listing examples including broader subject-matter jurisdiction, statutes of limitation, limits on laches or estoppel as defenses against the sovereign, longer time periods under the rules, the absence of a requirement that it tender before bringing certain suits in equity, certain advantages in discovery, limitations on costs, and extra time to perfect appeal).

thereby to adapt to changing circumstances and democratic tides—should not be trumped by matters of mere procedure or efficiency.

C. The Rule in *Reata* Will Lead to Gamesmanship In the Courts and Will Reward Those Who Harm the State.

The *Reata* opinion elevates form over substance in a way that will encourage gamesmanship. Because its waiver turns on the nature of the State’s pleading—rather than the substance of the claim being asserted against the State—it will encourage every party dealing with the State to engage in a high-stakes game of chicken. If a plaintiff can—through its repeated bad conduct—prod the State into filing suit, then it can assert a whole realm of counterclaims that would otherwise be barred. The law should not create such incentives for those who deal with the State as sovereign representing the public.

And if *Reata* is extended to apply when the governmental entity is haled to court, rather than choosing to go to court,¹⁹ it will provide a roadmap for the nearly complete evisceration of sovereign immunity’s protections.²⁰ Because of Texas Rule of Civil Procedure 97(a), when a governmental entity is sued, it may be forced to choose between asserting its range of counterclaims (and thereby waiving immunity) or forfeiting them. A

19. This issue was briefed by the State in its amicus brief in response to the Court’s request for supplemental briefing in *Goerlitz v. City of Midland*, No. 03-0185. See Supplemental Brief of Amicus Curiae the State of Texas in Support of the City of Midland, Texas (May 5, 2004).

20. Under the broadest possible reading of *Reata*, even a request by the State as defendant for attorney’s fees under the Uniform Declaratory Judgment Act, see TEX. CIV. PRAC. & REM. CODE §37.009, might constitute a waiver of immunity that allowed the plaintiff to assert its full range of affirmative claims. This is because some courts might characterize the State’s request for fees as the State seeking affirmative relief. See *J.C. Hadsell & Co. v. Allstate Ins. Co.*, 516 S.W.2d 211, 213-14 (Tex. Civ. App.—Texarkana 1974, writ dismissed).

private plaintiff may choose to bring a single claim as to which the State does not have immunity from suit so as to force the State's hand.

Consider the claims brought by DalMac Construction Co. that were addressed in *Little-Tex*. DalMac brought a takings claim in addition to its breach of contract claims—which remains a common tactic, even if those takings claims are meritless because they are contract claims in disguise. *Little-Tex*, 39 S.W.3d at 598-99. But had *Reata* been the law, the State would have been in a very difficult position, being forced to choose between raising any counterclaims it might have held arising out of the same transaction or losing them forever. And if the State was thereby compelled to assert such a counterclaim, DalMac would then argue that the State had waived its immunity from suit against the very contract claims that this Court found held barred by immunity, eviscerating its protections and circumventing the legislative design of Chapter 2260.

By similar tactics, a tort plaintiff could also circumvent the Tort Claims Act. *Reata* itself provides a map. *Reata* brought a third-party action against the City of Dallas and thereby enticed it to assert its counterclaims. At that point, the Court allowed *Reata*'s earlier-asserted tort claims to proceed, even though the Court did not analyze whether they complied with the Tort Claims Act. *See Reata*, 2004 WL 726906, at *1.

D. *Reata* May Interfere With the State's Ability to Enforce the Law.

Reata presumes an equivalency between the sovereign as a litigant and any other private litigant. The decision does not explicitly limit its scope to exclude suits brought by the State as sovereign, but the State often goes to court to enforce public laws or to vindicate

rights held by its citizens. If *Reata* is applied to the State, it could be read by lower courts to penalize the State for filing such actions by exposing the public treasury to counterclaims.

A rote application of *Reata* by lower courts could lead to mischief in enforcement actions. Take the example of *Anderson, Clayton* itself. The Court allowed the defendant to interpose a counterclaim seeking to stop the enforcement of an unconstitutional regulation, but indicated that the counterclaims were limited to those “properly defensive.” 62 S.W.2d at 110. But if *Reata* had been the law when *Anderson, Courier* was decided, the State’s ability to fully and fairly enforce the trucking regulation would have been tempered by being exposed to monetary counterclaims from which it would otherwise have been immune from suit. Similar risks might impede restitution actions under the DTPA or child-support laws. In these contexts, the *Reata* rule would empower those accused of violating state law by giving them leverage against the State and a tool to impede the enforcement action itself by cross-litigation that should instead be resolved (or barred) through Chapter 2260, the Tort Claims Act, or another statute.

IV. IF THIS COURT OVERRULES ITS LONG-STANDING PRECEDENT AND DECIDES TO NOW ALLOW SOME COUNTERCLAIMS AGAINST THE STATE, IT SHOULD FOLLOW THE FEDERAL MODEL AND LIMIT THEM TO CLAIMS IN RECOUPMENT.

If this Court elects to overrule Texas’s long-standing bar on affirmative counterclaims against the State, it should draw the line where federal courts do—at recoupment. Although the federal government is immune from suit except to the extent that a statute waives that immunity, *e.g.*, *United States v. Sherwood*, 312 U.S. 584, 587 (1941), federal case law recognizes a limited waiver of immunity, when the federal government institutes suit, for

those counterclaims made in recoupment.²¹ Under those cases, “In order to constitute a claim in recoupment (1) the claim must arise from the same transaction or occurrence as the plaintiff’s suit; (2) the claim must seek relief of the same kind or nature; and (3) the claim must seek an amount not in excess of the plaintiff’s claim.” *FDIC v. Hulsey*, 22 F.3d 1472, 1487 (10th Cir. 1994) (citing *Frederick v. United States*, 386 F.2d 481, 488 (5th Cir. 1967)).

Each of those three elements—as well as the requirement that it be the government that institutes suit—acts as a critical limitation. First, the subject-matter of the counterclaims is strictly limited to those that arise from the same transaction as the government’s claim.²² That restriction balances the need for the court to assess both sides of the controversy with the government’s prerogative against suit without consent. *E.g.*, *Miller v. Tony and Susan Alamo Found.*, 134 F.3d 910, 916-17 (8th Cir. 1998); *United States v. Lockheed L-188*

21. There is some reason to think that the United States Supreme Court might be even more restrictive in construing such a waiver than have been the courts of appeals because, in part, certain courts of appeals rely on the scope of Federal Rule 13 to support this waiver. *E.g.*, *Frederick v. United States*, 386 F.2d 481, 488 (5th Cir. 1967). But the Supreme Court held in *Sherwood* that the Rules of Civil Procedure could not themselves waive immunity because to do so would “enlarge . . . the jurisdiction of the federal courts” in contravention of the Rules Enabling Act. 312 U.S. at 589. Indeed, Rule 13(d) disclaims the ability of the Federal Rules to so expand the jurisdiction of the courts beyond other waivers of immunity in statute. FED. R. CIV. P. 13(d).

22. Given that balance, the breadth of the term “transaction” in a sovereign immunity context should not be as broad as that employed in the context of *res judicata*. Drawing the term “transaction” narrowly—as is done in bankruptcy practice—respects the interests of third parties. *E.g.*, *In re Malinowski*, 156 F.3d 131, 133 (2d Cir. 1998); *In re Univ. Med. Ctr.*, 973 F.2d 1065, 1081 (3d Cir. 1992) (observing that “the open-ended standard, endorsed in the context of discerning compulsory counterclaims, is inadequate for determining whether two claims arise from the same transaction for the purpose of equitable recoupment in bankruptcy”); *Lee v. Schweiker*, 739 F.2d 870, 875 (3d Cir. 1984) (holding that the counterclaim must be so closely related that it “is essentially a defense”). Similar concerns of equity and limited funds are implicated when the question is which citizens have priority to receive credit for their claims against the public fisc. By contrast, if “transaction” were construed broadly, those who are sued by the State would possess a comparative advantage over other citizens. *Cf. Nolan County v. Simpson*, 11 S.W. 1098, 1099 (Tex. 1889) (refusing to allow offset against county because it would advantage the defendant over other claimants who would have to follow the county’s normal presentment process).

Aircraft, 656 F.2d 390, 395 n.11 (9th Cir. 1979) (“Because this action is in rem against the aircraft, IAL cannot assert that, in bringing suit, the government waived immunity to claims by IAL”). Second, the counterclaim cannot seek relief of a different nature than sought by the government—such as monetary relief against an injunctive claim—a limit that is especially important because of the sovereign’s responsibility to enforce the law and to pursue claims on behalf of its citizens. *E.g.*, *United States v. Timmons*, 672 F.2d 1373, 1378, 1379-80 (11th Cir. 1982) (rejecting counterclaims that sought affirmative relief when the government had brought an ejectment action); *FSLIC v. Quinn*, 419 F.2d 1014, 1017-18 (7th Cir. 1969) (rejecting counterclaim that sought accounting against the government because the government had sought only money). Third, the claim cannot result in an affirmative monetary judgment but is instead limited to being an offset. *E.g.*, *Frederick*, 386 F.2d at 487-88. Thus, a counterclaim can only act in a defensive way to reduce the government’s recovery; it cannot result in an award from the public treasury to the claimant.

Moreover, the federal recoupment cases presuppose that the government was the party that actually instituted the suit rather than being joined as a defendant.²³ Indeed, the leading

23. The federal authorities regarding Eleventh Amendment immunity may mislead on the effect of the sovereign bringing suit because Eleventh Amendment immunity is different in kind from sovereign immunity. *Lapides v. Bd. of Regents of Univ. of Ga.*, 122 S.Ct. 1640, 1646 (2002) (explaining the difference between general immunity cases in which the “sovereign . . . seek[s] the protection of its own courts” and cases under the Eleventh Amendment that involve state sovereignty “vis-à-vis” federal sovereignty). When the federal government appears as a plaintiff in federal court, it is entitled to sovereign immunity from counterclaims insofar as there is no statutory waiver. *See, e.g., United States v. Ringgold*, 33 U.S. 150, 163,64 (1834) (discussing federal presentment statute, Act of March 3, 1797, §4, 1 Stat. 512, 515 (codified at 28 U.S.C. §2406)). The situation of a State bringing suit in its own courts is analogous to the federal courts bringing suit in federal court. It is unlike the situation of a State choosing to bring suit in federal, rather than state, court because when a State chooses to bring a claim in, or remove a claim to, federal court, it is choosing between two alternative fora. *See Lapides*, 122 S.Ct. at 1644.

case even builds its reasoning on the requirement in Federal Rule of Civil Procedure 13(a) that the private party assert its claims—which presumes the government was the plaintiff or third-party plaintiff. *Frederick*, 386 F.2d at 487-88 (analyzing the interaction of the various parts of Rule 13); *see also* FED. R. CIV. P. 12(b), 13(a), 14(a). That limitation also accords with the idea that it must be the government’s choice to waive the immunity. If the government chooses to file suit, then it can be said to have made some choice. By contrast, if the government is haled into court as a defendant, its mere compliance with rules (such as the compulsory counterclaim rule) can hardly be said to reflect a choice to waive sovereign immunity.

PRAYER

For these reasons, the State requests that the Court grant rehearing and either deny the petition for review, dismiss the petition as improvidently granted, set the cause for argument, or issue a new opinion clarifying that immunity from suit is not waived by filing suit.

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I certify that I caused to be served a true and correct copy of this amicus brief by certified mail, return receipt requested, on May 12, 2004, to:

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