No. 16-0549

In the Supreme Court of Texas

DR. BEHZAD NAZARI, D.D.S., ET AL.,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent,

v.

XEROX CORPORATION ET AL.,
Respondents.

On Petition for Review from the
Third Court of Appeals, Austin, Texas
(Cause No. 03-15-00252-CV)

STATE'S RESPONSE TO PETITION FOR REVIEW

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"CR.*p*" cites the clerk's record.

"Op.*p*" cites the court of appeals' June 17, 2016 slip opinion.

"TMFPA" cites chapter 36 of the Texas Human Resources Code.

Statement of Jurisdiction

Jurisdiction does not exist under Texas Government Code § 22.001(a)(2) and 22.225(c). *Cf.* Pet. viii. Defendants cite no decision of another court of appeals or of this Court holding that the State lacks sovereign immunity from monetary claims when it brings a Texas Medicaid Fraud Prevention Act enforcement action.

Moreover, even assuming jurisdiction to review the sovereign-immunity question, jurisdiction does not exist to review whether the "third-party claims can proceed." Pet. 16 (prayer for relief).[1] As the court of appeals explained, the dismissal of defendants' third-party claims against Xerox was not based on sovereign immunity and, therefore, is not appealable in this interlocutory posture. Op.22-23. Defendants do not challenge that appealability holding, much less assert that it conflicts with any decision of another court of appeals or this Court. *See* Pet. 1-16. Defendants' statement of jurisdiction does not even address jurisdiction to hear an appeal from the dismissal of their third-party claims. Pet. viii (addressing only defendants' counterclaims). No such jurisdiction exists, and defendants have forfeited any argument to the contrary.

[1] In a separate case (this Court's No. 16-0671), Xerox has sought this Court's exercise of its mandamus jurisdiction to review the separate question whether chapter 33 of the Civil Practice and Remedies Code applies in TMFPA actions.

Issue Presented

Whether the Third Court correctly affirmed the dismissal of defendants' three counterclaims as barred by the State's sovereign immunity.

To the Honorable Supreme Court of Texas:

Statement of Facts

The court of appeals correctly stated the nature of the case.

A. Medicaid overview

Services for which an orthodontic provider seeks payment from the Texas Medicaid program must be "prior authorized." *See* 25 Tex. Admin. Code § 33.71(a); *2003 Texas Medicaid Provider Procedures Manual* § 18.20.1, at 18-44 ("*Provider Manual*") (version effective at start of relevant period). Prior authorization requires providers to furnish Medicaid with materials and information showing a qualifying medical condition and other prerequisites to coverage. *Id.* §§ 18.20.1, 18.20.7, at 18-44, 18-49 to 18-50.

Healthcare providers who enroll in Texas Medicaid accept a duty to honestly represent patients' conditions, abide by all Medicaid policies, and submit complete and accurate claims information. *Provider Manual* §§ 2.1.1, 2.2.7, 2.3, at 2-2, 2-7, 2-11. With accurate information submitted, the request for prior authorization can then be approved or denied. *Id.* Here, that function was assigned to a company contracted by Texas Medicaid for claims administration ("Xerox"). CR.45-46.

B. Trial court proceedings

Defendants ("the dental groups") are six dental groups and affiliated individuals. CR.117-19 (State's petition). Seeking to receive funds from Texas Medicaid, the dental groups enrolled as Medicaid providers and agreed to abide by Medicaid regulations and the Texas Medicaid provider manual. CR.117-19.

This civil enforcement action under the Texas Medicaid Fraud Prevention Act ("TMFPA") alleges that all of the dental groups misrepresented patients' dental conditions to receive prior authorization and payment for services. CR.120-27. Additionally, certain dental groups are accused of other violations of the Act, including (1) making claims for services and products never provided or more costly than those provided; (2) soliciting kickbacks for referral of patients to third parties; and (3) falsifying the credentials of persons who performed claimed work. CR.120-27.

Defendants filed a general denial. CR.30. They also filed three "counterclaims," asserting that the State had waived sovereign immunity by filing this enforcement action. CR.30. The "counterclaims" allege:

(1) Conspiracy by the State "to allow Xerox to violate its various contractual duties" by "rubber stamp[ing]" or doing "no legitimate review" of prior authorizations. CR.31. Defendants' apparent causation theory is that the alleged rubber-stamping caused defendants to succeed in—and to continue—submitting false prior-authorization requests, which in turn exposed defendants to the injury of enforcement proceedings. CR.31 (alleging injury from the State's "recouping money from providers" through enforcement proceedings).

(2) Breach of Xerox's claims-administration contract with the State. CR.32. Defendants' theory is again that the State "created" defendants' liability in this action because it did not detect the misrepresentations from the outset. CR.32 (alleging that the State is liable to defendants in the amount of the State's own claims against defendants in this action).

(3) Conversion by the State in instituting, based on the unlawful acts alleged here, administrative holds on Medicaid payments to the dental groups. CR.32-33. Defendants' theory is that the payment holds infringe a supposed unconditional right to payment that arose from the fraudulently obtained prior authorizations. CR.32-33. *But see Personal Care Prods., Inc v. Hawkins*, 635 F.3d 155 (5th Cir. 2011) (no property right in Medicaid payments under investigation).

As remedies, defendants seek over a million dollars from the State. CR.33.

Additionally, defendants filed a third-party petition against Xerox alleging several causes of action and seeking complete satisfaction by Xerox of defendants' liability to the State in this action. CR.33-40.

The State filed a plea to the jurisdiction asserting its sovereign immunity from counterclaims. CR.46-50. The State also moved to dismiss defendants' claims against third-party Xerox because the TMFPA does not allow a defendant to reduce or eliminate its liability by claiming against a third party. CR.55; *see* CR.91-108. The trial court dismissed the counterclaims as barred by sovereign immunity, CR.384, and dismissed the third-party claims based on the court's "prior rulings interpreting the TMFPA" as precluding such claims, CR.382.

C. Court of appeals proceedings

Defendants appealed from both rulings. CR.385-86. The Third Court affirmed the dismissal of the counterclaims as barred by sovereign immunity. Op.8-21. The Third Court then dismissed for want of appellate jurisdiction defendants' interlocutory appeal from the dismissal of their third-party claims, because those claims were dismissed on non-jurisdictional grounds (making interlocutory appeal unavailable) and defendants did not request mandamus review. Op.23-26.

Summary of the Argument

I. Defendants cite no authority holding that the State steps outside its sovereign immunity from monetary claims by bringing a TMFPA enforcement action. Defendants focus on certain language in *Reata* that they prefer, namely, its use of the label "damages." But this Court insists that its opinions be read as a whole. The Third Court correctly did so and held *Reata* inapplicable.

Reata discussed common-law tort claims that (1) any party could bring, (2) did not arise from a statute in which the Legislature carefully crafted a waiver of sovereign immunity, and (3) presented no policy debate deemed significant about immunity and thus no occasion for judicial deference to legislative judgment. On all three fronts, this case is the opposite of *Reata*. First, TMFPA enforcement actions are brought only by the State. Second, the TMFPA expresses the Legislature's view on sovereign immunity, waiving it only in limited circumstances not present here. Third, ample reason for judicial deference exists here, and the Court has repeatedly emphasized its deference to the Legislature's views on the delicate policy issues involved in defining the appropriate scope of sovereign immunity.

II. This appeal is a poor vehicle to review whether *Reata* extends to TMFPA enforcement actions because sovereign immunity exists either way. *Reata*'s limited abrogation of sovereign immunity is only for claims germane to, connected with, and properly defensive to the suit. The "counterclaims" here fail that test. Defendants' pleadings of conspiracy and breach are not claims at all but, rather, defensive pleas of estoppel. The State in its sovereign capacity is not subject to an estoppel defense, and defendants cannot use artful pleading to bypass that rule.

The "counterclaims" also are not germane, connected, or properly defensive because they do not involve the same operative facts as the State's claims. Nothing in the State's claims turns on whether the State should have detected unlawful acts and denied prior-authorization requests, much less the existence of eventual administrative payment holds. Those matters, which defendants wish to place in dispute, are wholly separate.

ARGUMENT

I. The State Does Not Leave Its Sphere of Sovereign Immunity in Bringing a TMFPA Enforcement Action.

A. Defendants' "waiver" theory is meritless.

Defendants argue that the State "waives immunity from suit" when it files a TMFPA action. Pet. 3. That is wrong. A waiver exists only when the State enacts "a statute or resolution [that] contain[s] a clear and unambiguous expression of the Legislature's waiver of immunity." *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2003). Defendants point to no such provision. And the authority they primarily cite, *Reata Construction Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006), is not a waiver case. *Reata* expressly distinguished waiver from judicial interpretation of the scope of sovereign immunity as an initial matter. *Id.* at 375. The State adheres here to that usage of the term "waiver."[2]

[2] The State also uses "sovereign immunity" to include governmental immunity.

No statutory or constitutional provision waives sovereign immunity and allows defendants' claims against the State. The only TMFPA provision addressing sovereign immunity creates a limited, specific waiver that does not apply here. In the TMFPA subchapter authorizing private parties to initiate *qui tam* actions in the State's name, the Legislature provided that the State's choice to proceed with a *qui tam* action makes it subject to the preexisting statute authorizing attorney's fees for a frivolous claim by a state agency. TMFPA § 36.112 (citing Tex. Civ. Prac. & Rem. Code ch. 105). This case is not a *qui tam* action, nor do defendants assert a chapter 105 claim. That single type of recovery in a *qui tam* action is the only monetary claim against the State authorized by the Legislature in a TMFPA action. *See id.* § 36.116 ("Except as provided by Section 36.112, this subchapter does not waive sovereign immunity.").

B. No common-law exception to sovereign immunity applies.

The Third Court also correctly rejected defendants' theory that the State's initiation of any type of action "for monetary relief" takes the State outside the sphere of its sovereign immunity. Pet. 3. That theory would have serious consequences, and this Court has never gone that far. Defendants' reliance on *Reata* is misplaced because that case did not involve a government exercising its police power under a statutory regime specifically addressing sovereign immunity but, rather, a government acting in its private capacity by suing in tort for property damage to a water pipeline.

1. Sovereign immunity is a common-law doctrine that is "an established principle of jurisprudence," *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857), and

was specifically emphasized by the framers of the Constitution, *Taylor*, 106 S.W.3d at 694-95.

This Court "ha[s] not absolutely foreclosed the possibility that the judiciary may abrogate immunity by modifying the common law" but has been careful when asked to do so. *Taylor*, 106 S.W.3d at 696; *see Reata*, 197 S.W.3d at 375 ("We have generally deferred to the Legislature to waive immunity."). That care is based on two reinforcing principles. First, "the people's will is expressed in the Constitution and laws of the State," and courts are reluctant to second-guess it. *Taylor*, 106 S.W.3d at 695. Second, as compared to the judicial branch, "the Legislature is better suited to balance the conflicting policy issues" presented by abrogating sovereign immunity. *Id.*

2. This Court has long recognized that, when the government sues in its sovereign capacity to recover funds, counterclaims against it remain barred by sovereign immunity. In *Bates v. Republic*, 2 Tex. 616 (1847), the State sued a district court clerk (Bates) for failing to turn over money paid to him but to which the State was entitled. Bates answered by asserting that the State was indebted to him for a greater amount of money and that, once the State "brings a party into court, the same rules obtain as between individuals." *Id.* at 617.

This Court rejected that argument. *Id.* at 618. It explained that Bates' allegation "is in the nature of a cross-action" and "therefore cannot be instituted or set up against the government without its consent." *Id.* Rather than address the narrow question whether Bates' counterclaim was topically related to the State's claim, the Court enforced the broader principle that the State's suit to recover public funds does not place it outside its sovereign function and thus its sovereign immunity. *Id.*

Were the rule otherwise, inconsistencies would result between different ways in which the State exercises its sovereign police powers. For example, criminal defendants cannot raise counterclaims, as if to offset criminal fines by establishing a competing liability (e.g., liability for invasion of privacy in the search yielding inculpating evidence). Any such claim must proceed under another regime, like the Tort Claims Act. But the illegitimate rule urged here would mean that, if the State elects to punish the same conduct through a civil instead of criminal proceeding, defendants could avoid the Tort Claims Act's limits and bring damages counterclaims. No decision of this Court approves that result.

3. None of defendants' cited cases (Pet. 5-15) support their theory of sovereign immunity.

a. Defendants focus on the term "damages" in *Reata* but ignore *Reata*'s complete reasoning. The Third Court correctly followed this Court's precedents in rejecting such a selective reading. *E.g.*, *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 406 (Tex. 1997) (reversing a misreading of this Court's decision: "Although one may read parts of *Fristoe* to support the conflicting views, *Fristoe* taken as a whole says nothing about whether the State waives or retains its sovereign immunity [in a given context]."). This case is nothing like *Reata*, for three reasons.

i. First, *Reata* did not involve a government exercising its police powers to enforce a public-welfare statute. Instead, the government there was acting as any ordinary litigant could, in its private capacity, seeking damages against a contractor for the common-law tort of negligence. 197 S.W.3d at 373. This Court's reasoning rested on the idea of parity with private parties: when the government seeks damages like

an ordinary litigant, it "must participate in the litigation process as an ordinary litigant." *Id.* at 377.

But parity reasoning does not apply when there is no parity. In a TMFPA action, the State acts in its sovereign capacity, bringing a suit that only the State can bring. *See Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 599 (Tex. 2001) (same distinction in contract context: "Texas courts have long recognized that the State wears two hats: the State as a party to the contract and the State as sovereign"); *cf.* Pet. 15. The TMFPA is a public-welfare statute, and a TMFPA enforcement action must be brought by the State, through either a state official or a *qui tam* relator authorized to proceed on the State's behalf, subject to the State's control. TMFPA §§ 36.051, 36.101-.113.

The fact that a private party must step into the State's shoes to sue shows that this is not an ordinary civil action. Rather, the TMFPA has its origins in criminal law, Op.19 n.9, and provides the State with ways to punish and deter Medicaid-program violations. In such an action, the State acts differently than private parties suing in tort. Op.17-18 (collecting cases); *see, e.g.*, *Gabelli v. SEC*, 133 S. Ct. 1216, 1223 (2013) ("In a civil penalty action, the Government is not only a different kind of plaintiff, it seeks a different kind of relief.").

In response to this point, defendants assert that (1) one TMFPA civil remedy can be labeled "damages" and (2) *Reata* used the word "damages" to describe the city's suit there. Pet. 7. But asking in isolation if one label from *Reata* can be applied elsewhere ignores *Reata*'s complete reasoning. And such a selective approach is particularly inappropriate for the term "damages," which is notoriously malleable. *See*

Wal-Mart Stores, Inc. v. Forte, 497 S.W.3d 460, 471 (Tex. 2016) (Boyd, J., dissenting) (agreeing with the majority, *id.* at 465, that because "the term 'damages' is so broad and used in so many different contexts, dictionary definitions are 'of little help'").

Yet, even if the question were simply whether the label "damages" applies (not whether *Reata*'s reasoning applies), the answer would be no. *Cf.* Pet. 8-9. Subsection (a)(1) of TMFPA § 36.052 makes each person who commits a defined "unlawful act" liable for the amount of any benefit or payment provided by Medicaid as a direct or indirect result of the act. Importantly, that is not the same as the State's *loss* or *damages* from the unlawful act. *Cf.* Pet. 9 n.7 (citing definition of "damages" as awards repaying "actual loss"). For example, if a dental service warranting a $100 reimbursement was falsely claimed as a service warranting a $300 reimbursement, the State's overpayment would be $200. But the subsection (a)(1) remedy would be $300: the full amount of the payment made as the result of the unlawful claim. As the Third Court noted, "the [TMFPA] provision authorizing those penalties . . . does not limit the recovery to any type of overpayment; rather, the provision authorizes the full recovery of the payment." Op.16.[3]

Of course, the subsection (a)(1) recovery might offset a loss in some instances. For example, $300 in the example above is more than the $200 overpayment. But

[3] The same is true of the amount defined in Human Resources Code § 32.039(c)(1), which governs administrative proceedings and, contrary to defendants' suggestion, is not an alternative section under which the State brings a claim to court. *Cf.* Pet. 12. Defendants also allude (Pet. 13 n.11) to the federal False Claims Act's allowance for "the amount of damages which the Government sustains," 31 U.S.C. § 3729(a), but that is simply different statutory text than the TMFPA provision here.

"not all compensatory recovery can be considered damages." *Forte*, 497 S.W.3d at 465. Subsection (a)(1) does not measure the State's loss and is not "damages."

As another example, consider the TMFPA unlawful act of soliciting or receiving kickbacks for referral of Medicaid patients. TMFPA § 36.002(13); Tex. Hum. Res. Code § 32.039(b)(1-b). The subsection (a)(1) recovery is the amount of any Medicaid payment resulting from that unlawful act—even if the provider treating the referred patient honestly billed Medicaid for covered services. TMFPA § 36.052(a)(1). As this example again illustrates, subsection (a)(1) does not measure pecuniary loss to the Medicaid program. Rather, it gauges the magnitude of a prohibited act.

Finally, even assuming (incorrectly) that the subsection (a)(1) recovery is compensatory damages,[4] the subsection (a)(3) and (a)(4) recoveries are not compensatory damages because they are expressly above and beyond any subsection (a)(1) recovery. Op.16; *cf.* Pet. 10 (wrongly implying that "the relief sought" is under only subsection (a)(1)). Hence, any counterclaims possibly allowed here could not offset the entire TMFPA recovery sought. But dwelling on such complications is unnecessary because *Reata* does not concern a police-power action like this one.

ii. *Reata* also differs from this case because it involved a common-law claim. In contrast, the TMFPA is a statute that speaks to sovereign immunity and in which the Legislature found it appropriate to waive sovereign immunity only in one narrow

[4] The Act does not state that "damages" is an element of every TMFPA suit. *Cf.* Pet. 10 (misinterpreting TMFPA § 36.1021). The only context in which the TMFPA speaks of "damages" is private suits seeking damages for retaliation against the plaintiff's initiation of a *qui tam* action. Op.16-17 n.8 (discussing § 36.1021). That is not the type of suit here.

way: for certain litigation expenses when the State continues with a frivolous *qui tam* action. TMFPA § 36.112.[5] Thus, implicit in defendants' position is the argument that courts are better situated than the Texas Legislature to define the extent of sovereign immunity in TMFPA actions. But that argument flips on its head this Court's established order of deference. *Reata*, 197 S.W.3d at 375 ("the Legislature is better suited to address the conflicting policy issues involved").

iii. Lastly, *Reata* abrogated sovereign immunity despite deference principles because the Court perceived no room for policy debate about "hampering . . . governmental functions" or "the fiscal planning of the governmental entity." *Id.* at 376-77, 375. But the issues on which *Reata* perceived no policy debate in the private-tort context raise serious concerns in the TMFPA context.

Police-power actions implicate public safety and vital state programs. A conduct-based exception to immunity would "force the State to expend its resources to litigate" the immunity issue "before enjoying sovereign immunity's protections—and this would defeat many of the doctrine's underlying policies." *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 857 (Tex. 2002). That impairment affects the public interest in compliance with a host of important state programs, from child-support collection to restitution recovery under the DTPA to Medicaid-fraud enforcement. These types of actions arise in a more complicated environment than one-off tort actions. The money they recover is often pursuant to a systematic

[5] *Kinnear v. Tex. Comm'n on Human Rights*, 14 S.W.3d 299, 300 (Tex. 2000) (per curiam), which defendants cite (Pet. 6), is likewise distinguishable as another instance of statutory authorization of prevailing-party litigation expenses.

effort of collection. When the State's exposure to possible claims against it is capped, not by a statutory regime crafted for such claims (such as the Tort Claims Act), but only by the extent of the government's ongoing collection efforts in its sovereign capacity, the resulting unpredictability seriously affects state budgeting and hampers important state operations.

Those important concerns were not present in *Reata* but are present here. *See* Op.18-19. As this Court has repeatedly held, the Legislature's knowledge about fiscal appropriations and state programs gives it the best vantage point to balance the interest in orderly enforcement proceedings and the effect of using those enforcement proceedings, as opposed to other processes, to address interests and claims asserted by defendants. *Taylor*, 106 S.W.3d at 695; *City of Galveston v. State*, 217 S.W.3d 466, 473 (Tex. 2007) ("Judges cannot simply abrogate immunity every time they believe the Legislature's failure to do so 'defies logic.'"). Nothing in *Reata* negates those principles. The decision below faithfully follows them.

b. Defendants rely (Pet. 5, 6, 14) on *Anderson, Clayton & Co. v. State ex rel. Allred*, 62 S.W.2d 107 (Tex. Comm'n App. 1933, judgm't adopted). But *Anderson* is consistent with the decision below; it looks to the nature of the claim to determine sovereign immunity.

Anderson dealt with a counterclaim seeking fundamentally different relief than sought here: an injunction against state officers who were enforcing an allegedly invalid law governing trucking permits. *Id.* at 107, 110. *Anderson* held that sovereign immunity does not apply to a claim "to enjoin the enforcement of an invalid law." *Id.* at 110; *accord City of El Paso v. Heinrich*, 284 S.W.3d 366, 368-69 (Tex. 2009). In

other words, the state officers did not have sovereign immunity from that injunctive claim, regardless of how it was asserted.

Instead, the question was about the *venue* in which the injunctive claim could be brought. 62 S.W.2d at 109 (question presented: "Did the District Court of Nueces County acquire jurisdiction over the defendants named in the cross bill of cross petitioners?"). *Anderson* holds that a court's jurisdiction over specific state officers, as opposed to the State, exists when the State brings an enforcement suit in that court and then answers an injunctive counterclaim naming the officers. *Id.* at 110. But the issue here is not jurisdiction over state officers. The counterclaims are not for injunctive relief; they are for damages. *Anderson* does not address that situation.

c. Defendants also wrongly claim "more than 100 years" (Pet. 6) of support for their position by citing two 1898 cases merely holding that the State's rights on a claim are determined by the same law that applies to other litigants. *Fristoe v. Blum*, 45 S.W. 998, 999 (Tex. 1898) (same contract law); *State v. Zanco's Heirs*, 44 S.W. 527, 529 (Tex. Civ. App. 1898, writ denied) (same rights to new trial); *accord Sec. Trust Co. v. Lipscomb Cty.*, 180 S.W.2d 151, 159 (Tex. 1944) (same res judicata limits); *Wortham v. Walker*, 128 S.W.2d 1138, 1145-46 (Tex. 1939) (same res judicata limits).

Those holdings do not decide sovereign immunity and do not support defendants' position. How rights are determined when immunity is not in the picture is a relatively "unremarkable" issue that "has nothing to do with immunity from suit." *Fed. Sign*, 951 S.W.2d at 406-07 ("To state what happens *if* the State consents to be sued says nothing about whether the State consents to be sued.").

d. Defendants wrongly argue that the nature or "posture" of the State's action is "irrelevant" and that "[n]o case" has turned on it. Pet. 14. But that does matter, and cases applying *Reata* comport with the Third Court's analysis: they allow a counterclaim when the governmental entity asserts claims sounding in private law, but not when it exercises its police powers. *Compare, e.g.*, *City of Dallas v. Albert*, 354 S.W.3d 368, 375 (Tex. 2011) (allowing under *Reata* claims against a government that asserted breach of contract), *City of Conroe v. TP Prop. LLC*, 480 S.W.3d 545, 564 (Tex. App.—Beaumont 2015, no pet.) (applying *Reata* to a governmental claim with a contractual nature: "the City will have to show, among other things, that it is no longer bound by the HOT Agreement"), *and City of McKinney v. Hank's Rest. Group*, 412 S.W.3d 102, 119 (Tex. App.—Dallas 2013, no pet.) (involving declaratory-judgment statute open to all litigants), *with Waller Cty. v. Simmons*, No. 01-07-00180-CV, 2007 WL 3038420, at *3 (Tex. App.—Houston [1st Dist.] Oct. 18, 2007, no pet.) (mem. op.) (*Reata* inapplicable to "suit to recover delinquent taxes" although monetary relief sought).

II. This Case Is a Poor Vehicle to Review Defendants' Argument.

In all events, this case is a poor vehicle to review defendants' argument that *Reata* extends to TMFPA actions because the counterclaims fail either way. *Reata* creates only a limited exception for "claims germane to, connected with and properly defensive to" the government's claim. 197 S.W.3d at 377. This test first requires that the defendant asserts "claims." *Id.* Then, the operative facts must be the same for the government's claim and the defendant's claim. *See, e.g.*, *Albert*, 354 S.W.3d at

375 (counterclaim of underpayment meets "germane" and "connected" requirements because it "would at least inferentially rebut" a claim of overpayment).

Those tests foreclose the putative counterclaims here. Defendants' allegations of conspiracy and breach are not preexisting claims at all; rather, they are attempts to raise a defensive plea of estoppel. The test for whether an answer sets up a counterclaim or merely a defensive plea is "whether the defendant could have maintained a suit to enforce the claim before suit was brought by the plaintiff." *Flukinger v. Straughan*, 795 S.W.2d 779, 787 (Tex. App.—Houston [14th Dist.] 1990, writ denied). Here, the alleged conspiracy and breach would *benefit* defendants absent this enforcement action, by failing to detect false statements and thus permitting ongoing payments to defendants. That is why defendants seek "damages" in the amount of their own liability to the State in this action.

Defendants' idea is that the State cannot prevail here because it should be blamed for not catching false representations leading to prior authorizations. That is a defense of estoppel, not a claim. And "the State in its sovereign capacity, unlike ordinary litigants, is not subject to the defenses of limitations, laches, or estoppel." *State v. Durham*, 860 S.W.2d 63, 67 (Tex. 1993). Defendants cannot use artful pleading to bypass this rule.

All three "counterclaims" also fail *Reata*'s requirement of being germane, connected, and properly defensive. Defendants' allegations may involve the same government and general Medicaid framework. But they involve different aspects of defendants' interaction with that framework than are put into dispute by this action. It is no element of the State's TMFPA case whether defendants' unlawful acts were

detected by the State, should have been, or supported administrative payment holds (which have now been resolved, in any event). The State need only prove that defendants knowingly made prohibited statements to the Medicaid program or committed other unlawful acts. *See* CR.120-27. Defendants' allegations do not "at least inferentially rebut" the State's claims. *Albert*, 354 S.W.3d at 375. For that reason as well, *Reata* does not allow them. Neither would the federal False Claims Act. *Compare* Pet. 13 (so suggesting), *with* Op.20 n.10, *and United States v. Campbell*, No. 08-cv-1951, 2011 WL 43013, at *11 (D.N.J. Jan. 4, 2011).

PRAYER

The Court should deny the petition for review.

Respectfully submitted.

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