No. 17-1010

In the Supreme Court of Texas

DAWN NETTLES,
Petitioner,

v.

GTECH CORPORATION,
Respondent.

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

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE

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TABLE OF CONTENTS

Page

Index of Authorities

Page(s)

Cases:

Constitutional Provisions and Statutes:

Other Authorities:

Statement of Interest of Amicus Curiae

The State's interests in this case are manifold. Plaintiff sued GTECH Corporation for implementing the discretionary decisions of state officials at the Texas Lottery Commission (TLC), a state agency that raises billions of dollars for the state treasury. And GTECH asks to share in the State's sovereign immunity. The State has interests in (1) the reach of its sovereign immunity, (2) limiting interference with its officials' exercises of discretion, (3) maintaining its ability and flexibility to contract with private entities to assist in the execution of government functions, and (4) preventing litigation that risks hampering its ability to raise revenue through the lottery.

No fee has been or will be paid for preparing this brief.

To the Honorable Supreme Court of Texas:

Sovereign immunity from suit begins with the State, but it does not end there. Rather, as the Court has explained, defendants beyond the State may derive immunity from their relationship with the State and for actions executing the sovereign's will. Applying this reasoning, the State's immunity may extend to private contractors facing suit for executing the sovereign's will.

The Court should hold that GTECH shares the State's sovereign immunity from plaintiff's fraud claim, which complains of GTECH's compliance with TLC's directives. Among other aims, sovereign immunity maintains separation between Texas's three branches of government by limiting judicial power to interfere with executive officials' exercises of legislatively delegated discretion. Thus, sovereign immunity bars suits that "attempt to control state action." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009) (emphasis omitted). Applying this well-established purpose of sovereign immunity, the Court should bar suits against government contractors if such suits similarly seek to exert control over the State. Plaintiff's fraud claim, although brought against GTECH, seeks to control the State by threatening GTECH with ruinous liability for following instructions issued by the State after significant consideration and deliberation. Government contractors like GTECH are often called upon to implement the sovereign's will as expressed through state agencies and officials. Allowing suits like plaintiff's would interfere with the executive's implementation of state law just as surely as suits directly against the State.

Five terms ago, in *Brown & Gay Engineering Inc. v. Olivares*, 461 S.W.3d 117 (Tex. 2015), the Court confirmed that government contractors may share the sovereign's

immunity so far as would serve the purposes of sovereign immunity. There, the contractor's relationship with a political subdivision did not entitle the contractor to the political subdivision's governmental immunity, because barring suit in that case did not serve the purposes of sovereign or governmental immunity. Unlike the political subdivision in *Brown & Gay*, however, TLC, as required by statute, maintains strict control over its contractors and closely managed the design and parameters of the lottery ticket at the center of plaintiff's suit. And unlike in *Brown & Gay*, plaintiff's suit directly implicates the public fisc because it risks hampering the State's ability to collect revenue through the lottery. Applying sovereign immunity here serves the doctrine's political, pecuniary, and pragmatic purposes.

Statement of the Facts

A. In 1991, the people of Texas amended their Constitution to permit the creation of a state lottery. Tex. Const. art. III, § 47(e). Texans expressly approved the State's contracting with private entities to "operate lotteries on behalf of the State." *Id.* TLC has contracted with GTECH for lottery operation services since shortly after TLC's creation. *See* Tex. Lottery Comm'n, *Texas Lottery Commission History*, https://perma.cc/59NR-LHQJ.

In implementing the 1991 constitutional amendment, the Legislature has made clear that TLC, although it may contract for services, is ultimately responsible for the lottery's operation. The Legislature instructed that, while TLC's "executive director may contract with or employ a person to perform a function, activity, or service in connection with the operation of the lottery," "[t]he commission and executive director . . . shall exercise strict control and close supervision over all lottery

games." Tex. Gov't Code § 466.014(a)-(b). The Legislature further instructed that "[t]he executive director shall prescribe the form of tickets." *Id.* § 466.251(a). TLC publishes the form of all lottery games in the Texas Register. *See, e.g.*, Tex. Lottery Comm'n, *Instant Game Number 1592 "Fun 5's"*, 39 Tex. Reg. 4799, 4799-4804 (June 11, 2014) (describing and setting forth the rules of the scratch ticket bought by plaintiff).

The request for proposals (RFP) and contracts relied on by the parties here reflect TLC's control over the lottery. TLC's operations contract with GTECH requires GTECH to obtain TLC approval before, among other things, subcontracting any part of the contract or changing management personnel working on TLC's account. CR.125-26. TLC requires "written notification of any significant organizational changes to the staffing for the Texas Lottery Account" and may order the removal of "any person employed by GTECH . . . from work relating to the Contract." CR.126. TLC has "the free and unrestricted right . . . to enter the premises of GTECH and any subcontractors . . . to examine their operations." CR.132. TLC also "assign[s] an investigator to monitor GTECH throughout the contract term," with whom GTECH must "maintain close contact and regular communication . . . regarding all matters under the Contract." CR.153.

The RFP for the scratch ticket plaintiff purchased, which is incorporated into the TLC-GTECH ticket manufacturing contract, continues this theme. It provides that TLC "shall make all final decisions regarding the selection . . . of instant ticket games." Tex. Lottery Comm'n, *Request for Proposals for Instant Ticket Manufacturing and Services* at 60 (Nov. 7, 2011) (RFP), https://perma.cc/BWT2-XFWR. And that

TLC "will not relinquish control over [the] Texas Lottery instant ticket game portfolio," but rather that the contractor "shall function under the supervision of" TLC and receive "the same scrutiny and oversight that would apply if all operations were performed by [TLC] employees." *Id.* at 4. Removing all doubt, the RFP declares that "[f]inal decisions regarding the direction or control of the Lottery are always the prerogative of the [TLC] in its sole discretion as an agency of the State of Texas." *Id.*

Finally, the specific contract governing scratch tickets also reflects TLC's control. Under the contract, TLC will request "draft artwork and prize structure" from GTECH and, within five working days, GTECH will provide the draft. Tex. Lottery Comm'n, *Contract for Instant Ticket Manufacturing and Services Between the Texas Lottery Commission and GTECH Printing Corporation* at 4-5 (Aug. 7, 2012), https://perma.cc/8NR8-NUMD.[1] TLC may then take whatever time it needs to evaluate the draft. If TLC approves the draft, GTECH must provide TLC with "draft working papers" within five working days of TLC's approval. *Id.* at 5. TLC may then take whatever time it needs to evaluate the draft working papers. After review, TLC provides GTECH "requested changes" and GTECH must return "final working papers" reflecting those changes to TLC within two business days. *Id.* TLC's director or his designee must approve any changes after this process. *Id.*

[1] Plaintiff references this contract but includes only a portion in the record. *See* CR.270-72. The full contract may also be found at pages 279-90 of the *Steele* Clerk's Record.

Nothing in the contract requires GTECH to second-guess TLC's final approval of the scratch tickets.

B. The scratch ticket plaintiff purchased was developed according to the contracts just described. GTECH provided draft working papers to TLC. *Nettles v. GTECH Corp.*, No. 05-15-01559-CV, 2017 WL 3097627, at *2 (Tex. App.—Dallas July 21, 2017, pet. granted). TLC staff reviewed these papers in minute detail and made changes as they believed appropriate. *Id.* GTECH made all requested changes, TLC's Executive Director approved the final design of the ticket, and TLC published the ticket's form in the Texas Register. *Id.* at *3; 39 Tex. Reg. at 4799-4804.

Plaintiff alleges that the instructions approved by TLC for one of the five games on the scratch ticket confused some consumers. *See* CR.433-35. The game resembled tic-tac-toe and included a "5X BOX" and a "PRIZE" box. 432. The instructions read: "Reveal three '5' symbols in any one row, column or diagonal, win PRIZE in PRIZE box. Reveal a Money Bag . . . symbol in the 5X BOX, win 5 times that PRIZE." CR.430.

The alleged confusion centered on the meaning of "that PRIZE." *See* CR.433-35. "That" functions as a demonstrative determiner providing information about a noun—"PRIZE." TLC and GTECH read the "that" in the "that PRIZE" as specifying the prize won in the tic-tac-toe part of the game, as described in the previous sentence of the instructions. *See* CR.306. This is because TLC and GTECH saw the "5X BOX" as a "multiplier," not another game or way to win. CR.306, 367. Some consumers, however, read "that PRIZE" as referring to the amount in the PRIZE box; in other words, they saw the "5X BOX" as an additional game within a game.

See CR.306. This latter possible interpretation became relevant only after TLC required GTECH to change the "5X BOX" parameters. GTECH at first proposed that a symbol would appear in the "5X BOX" only if a player had won the tic-tac-toe game. *See Nettles*, 2017 WL 3097627, at *2. For security reasons, TLC required that a symbol would appear in the "5X BOX" even on some tickets that were not winners. *Id.* at *2-3.

Plaintiff revealed a money-bag symbol in the "5X BOX" but did not win the tic-tac-toe game. She sued (as relevant here) GTECH for fraud. But plaintiff does not allege that she relied on the complained-of instructions when deciding to purchase the Fun 5's ticket. Plaintiff seeks benefit-of-the-bargain damages, CR.440, 442, measured by the difference between the value as represented and the value received, *Formosa Plastics Corp. USA v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41, 49 (Tex. 1998). But plaintiff does not allege that the true value of the ticket when purchased—i.e., the odds that any given ticket would win any given amount—differed from what was published on the ticket or in the Texas Register. *See* 39 Tex. Reg. 4804. Rather, plaintiff complains of the psychic disappointment caused by thinking a ticket was a winner and then discovering that it was not. *See* CR.438.

C. None dispute that TLC, the issuer of the scratch ticket and State authority on all matters lottery, is immune from suit. GTECH claims that it shares the State's sovereign immunity because it followed TLC's instructions as to the design of the scratch tickets. The Fifth Court agreed with GTECH; the Third Court did not. *See GTECH Corp. v. Steele*, 549 S.W.3d 768 (Tex. App.—Austin 2018, pet. granted); *Nettles*, 2017 WL 3097627.

Summary of the Argument

The Fifth Court reached the correct result. The Third Court did not. GTECH is immune from suit on plaintiff's fraud claim.

The political, pecuniary, and pragmatic purposes of sovereign immunity drive its application. Sovereign immunity is part and parcel of the Texas Constitution's separation of powers. Sovereign immunity bars suits that attempt to control the State and thus limits judicial interference in state officials' exercise of legislatively delegated discretion. *See* Part A.

If a lawsuit attacks the sovereign's will, as expressed through a state official's exercise of discretion, the lawsuit is barred by sovereign immunity, regardless of the defendant sued. A private contractor implements the sovereign's will if it follows State directives issued after substantial consideration and informs the State of any potentially dangerous aspects of a design unknown to the State but known or reasonably knowable to the contractor. *See* Part B.

Sovereign immunity bars plaintiff's fraud claim against GTECH. After close examination and consideration, TLC approved the final design and parameters of plaintiff's scratch ticket, GTECH followed TLC's directives, and plaintiff complains of the instructions on the face of the ticket, not some hidden danger. Along with trying to control the State, plaintiff's suit threatens the public fisc by hampering TLC's ability to raise revenue through the lottery. *See* Part C.

The Third Court refused to allow GTECH to benefit from the State's immunity because GTECH had discretion to warn TLC that TLC's final design and parame-

ters risked confusing consumers. The Court should reject the Third Court's discretion-to-warn rule. The Third Court's rule is untethered from sovereign immunity's purposes, conflicts with precedent, improperly defines sovereign immunity in terms of a tort duty, and misapplies that tort duty. *See* Part D.

ARGUMENT

The Court should affirm the Fifth Court, reverse the Third Court, and hold that GTECH shares the State's sovereign immunity from plaintiff's fraud claim.

A. Sovereign immunity protects exercises of official discretion from judicial interference.

The standard approach this Court takes in defining sovereign immunity's reach is to ask what serves the doctrine's purposes.[2] The "justifications for sovereign immunity are political, pecuniary, and pragmatic." *Rosenberg Dev. Corp. v. Imperial Performing Arts, Inc.*, 571 S.W.3d 738, 740 (Tex. 2019). Any of these purposes may suffice to compel immunity from suit.[3]

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[2] *See, e.g.*, *Hillman v. Nueces County*, 579 S.W.3d 354, 361-63 (Tex. 2019); *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 436 (Tex. 2016); *Brown & Gay*, 461 S.W.3d at 119; *Heinrich*, 284 S.W.3d at 372.

[3] *See, e.g.*, *Nazari v. State*, 561 S.W.3d 495, 508 (Tex. 2018) (holding that sovereign immunity barred suit that could hamper "collecting revenue"); *Hall v. McRaven*, 508 S.W.3d 232, 240-43 (Tex. 2017) (holding that sovereign immunity barred suit to compel access to government records); *Catalina Dev., Inc. v. County of El Paso*, 121 S.W.3d 704, 706 (Tex. 2003) (holding that sovereign immunity barred suits seeking to bind "governmental entities . . . [to] the policy decisions of their predecessors").

Sovereign immunity's "political" purpose is to maintain "the separateness of the branches of government," *id.* at 751, an "explicit" requirement in our Constitution designed to "curb[] judicial power as surely as it curbs legislative and executive power," *Henry v. Cox*, 520 S.W.3d 28, 38 (Tex. 2017) (quotation marks and citations omitted). Thus, "the necessary doctrine of sovereign immunity" is "also a doctrine of constitutional significance." *Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 804 (Tex. 2016); *see also Brown & Gay*, 461 S.W.3d at 121. It helps preserve "the political structure of [our] government and the allocation of responsibility among its Branches." *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 416 (Tex. 1997) (Hecht, J., concurring).

As the Court recognized over 150 years ago, allowing the judiciary to on its own control the executive "would render the judiciary not co-ordinate, but superior, to the executive department; contrary to the plain design of the constitution of the state." *Hous. Tap & Brazoria Ry. v. Randolph*, 24 Tex. 317, 338 (1859). "Who 'takes care, that the laws are faithfully executed,'" the Court asked, "the governor or the district judge?" *Id.* at 337. "Surely not the governor," the Court reasoned, "if he must obey the mandate of the court, in the performance of an official duty." *Id.*[4]

[4] These limits on the powers of each branch are reciprocal. "[T]he judicial department cannot be clothed with executive or legislative power," just as "the executive cannot exercise either judicial or legislative authority" and the "the legislative 'magistracy' cannot exercise the functions of either the Executive or the Judicial Departments." *Langever v. Miller*, 76 S.W.2d 1025, 1035 (Tex. 1934); *see also Engelman Irrigation Dist. v. Shield Bros.*, 514 S.W.3d 746, 754 (Tex. 2017) (warning that the Legislature making a jurisprudential shift in sovereign immunity retroactive "might well violate separation-of-powers principles by interfering with a function properly

Thus, two terms ago, the Court relied on sovereign immunity to bar claims that ask the judiciary to "interfere" with state officials' execution of state law. *Nazari v. State*, 561 S.W.3d 495, 509 (Tex. 2018). And just last term, the Court again made plain that sovereign immunity "restrains the courts from intruding into matters that are more properly reserved to the other branches of government." *Hughes v. Tom Green County*, 573 S.W.3d 212, 218 (Tex. 2019).

"[T]he separation-of-powers doctrine ensures that discretionary functions delegated to administrative agencies by the legislature are not usurped by the judicial branch." *Tex. Dep't of Transp. v. T. Brown Constructors, Inc.*, 947 S.W.2d 655, 659 (Tex. App.—Austin 1997, pet. denied) (citing *Davis v. City of Lubbock*, 326 S.W.2d 699, 714 (Tex. 1959)); *see also Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 468 (Tex. 1997) ("[T]his Court has been especially willing to strike down delegations of legislative authority to the judicial department."). The need to allow state officials to exercise discretion in the execution of state law without interference from the judiciary shapes the Court's *ultra vires* jurisprudence. *See, e.g.*, *Hall v. McRaven*, 508 S.W.3d 232, 238 (Tex. 2017); *Heinrich*, 284 S.W.3d at 372. In turn, the Court's *ultra vires* jurisprudence informs its view of derivative immunity. *See Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 436-37 (Tex. 2016) (relying on *ultra vires* jurisprudence to determine the scope of a city's "derivative . . . immunity" from suit).

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left to the judiciary"); *Rochelle v. Lane*, 148 S.W. 558, 560 (1912) ("The Comptroller is an executive officer and cannot exercise judicial power. The judgment, being a judicial act, cannot be reviewed by an executive officer.").

In applying the *ultra vires* doctrine, a court must determine whether to treat a suit against a state official as a suit against the State. *See Hall*, 508 S.W.3d at 238. Applying derivative immunity requires a similar inquiry. *See Wasson Interests*, 489 S.W.3d at 436-37. In both circumstances, a court asks whether the defendant is being sued for acting in a capacity that "derive[s] its authority[ ]from the state's sovereignty." *Id.* at 436. "Coercion is incompatible with sovereignty." *Nazari*, 561 S.W.3d at 510 (quoting *Borden v. Houston*, 2 Tex. 594, 611 (1847)) (alterations omitted). So sovereign immunity bars any suit, whoever the defendant, that asks a court "to exert control over the state." *Hall*, 508 S.W.3d at 238; *Heinrich*, 284 S.W.3d at 372.

B. Allowing suit against a government contractor for implementing a state agency's considered directives interferes with the exercise of official discretion.

Sovereign immunity bars suits that "attempt to control state action by imposing liability on the State." *Heinrich*, 284 S.W.3d at 372 (quotation marks and emphasis omitted). "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." *Borden*, 2 Tex. at 611; *accord Bates v. Republic of Texas*, 2 Tex. 616, 618 (1847) ("[T]he proposition that the government is above the reach of judicial authority by direct action, but within its control and coercive power by indirect suit, is a solecism and absurdity in its very terms."). When the State, through an agency or official, has vetted and approved a design, service, or plan; the contractor has followed the State's directions; and the contractor has disclosed any potentially dangerous aspects to the

State, that design, service, or plan is an act of the State. A suit against the contractor that attacks that design, service, or plan seeks to control the State and should be treated as a suit against the State for purposes of sovereign immunity.

1. "All sovereigns need flexibility to hire private agents to aid them in conducting their governmental functions." *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000). And now, more than ever before, the State uses private contractors to provide essential goods and services that the government itself lacks the organic capability to produce or perform. "The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and [one] cannot say that these functions become less important simply because they are exercised . . . by private contractors." *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 73 (2d Cir. 1998) (quotation marks omitted). If lawsuits may stymie or punish government contractors for carrying out the sovereign's will, as expressed through an exercise of a state official's delegated discretion, they will exert control over the State no less than a direct suit against the State. *See Wasson*, 489 S.W.3d 436-37 (explaining that "acts . . . performed under the authority or for the benefit of the state . . . share a common root with the state's sovereign immunity").

The need to apply the sovereign's immunity to private parties carrying out the sovereign's will is well established. *See*, *e.g.*, *Vanchieri v. N.J. Sports & Exposition Auth.*, 514 A.2d 1323, 1326 (N.J. 1986) ("[I]ndependent contractors . . ., under well-recognized principles, share to a limited extent the immunity of public entities with whom they contract."). At least since the founding of our State, "the common law

did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities." *Filarsky v. Delia*, 566 U.S. 377, 387 (2012). Later, the Supreme Court of the United States, applying federal common law, extended immunity to a "contractor . . . executing [the government's] will." *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940). And recently that court rejected the suggestion that courts should construe this immunity narrowly. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 673 & n.7 (2016). This Court endorsed a similar concept 25 years ago in *K.D.F. v. Rex*, which extended Kansas's sovereign immunity to a private entity carrying out that State's will but refused to do the same for a private entity that did not act at Kansas's direction. 878 S.W.2d 589, 597 (Tex. 1994)[5]; *see also Brown & Gay*, 461 S.W.3d at 124 (citing *K.D.F.*); *cf. Heinrich*, 284 S.W.3d at 373-77 (looking to federal immunity jurisprudence for guidance).

[5] The Court allowed K.D.F. to share Kansas's immunity despite the lack of a contractual relationship between K.D.F. and Kansas. As the head of KPERS—the relevant state agency—explained, K.D.F. was created and supervised by Commerce Bank & Trust, the private entity with which KPERS contracted. *See* Resp. to Relator's Mot. for Leave to File a Pet. for Writ of Mandamus, Appendix Tab C (Williams Dep. 101:4-18), *K.D.F. v. Rex*, No. D-4340 (Tex. Oct. 22, 1993) ("K.D.F. was in a contractual relationship with Commerce Bank & Trust, which . . . had a custodial relationship with KPERS. . . . K.D.F. was a vehicle [that] gave effect to Commerce Bank & Trust's ability to perform its custodial function as they had contracted with the retirement system. . . . [W]e did not have a contractual relationship with K.D.F. . . . . K.D.F. was a partnership, I believe, of bank officers.").

Plaintiff argues that "[i]f there is no danger to the public fisc from unforeseen expenditures, then there is no reason to extend immunity to a nongovernmental actor such as GTECH." Petitioner's BOM 5 (citing *Brown & Gay*, 461 S.W.3d at 129). But as the Fifth Court recognized, "[n]either the court in *Brown & Gay* nor our sister courts applying *Brown & Gay* limited their analysis to whether the extension of immunity would protect the public fisc from unforeseen expenditures." *Nettles*, 2017 WL 3097627, at *6; *accord Steele*, 549 S.W.3d at 787. The "justifications for sovereign immunity are" not just "pecuniary," but also "political . . . and pragmatic." *Rosenberg Dev. Corp.*, 571 S.W.3d at 740; *see Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621 (Tex. 2011) (per curiam); *Fed. Sign*, 951 S.W.2d at 416 (Hecht, J., concurring) (explaining that the justifications for sovereign immunity "are not simply pecuniary. They involve the political structure of government and the allocation of responsibility among its Branches for resolving disputes involving the State."). And each purpose may, on its own, justify immunity. *See Rosenberg Dev. Corp.*, 571 S.W.3d at 750-52; *see supra* p. 8 n.3.

Brown & Gay confirms that the sovereign-immunity inquiry looks beyond a suit's effect on the public fisc. The Court there did not stop its sovereign-immunity analysis after concluding that the suit did not threaten the public fisc. The Court then went on to consider whether the plaintiffs' claims "complain[ed] of harm caused by Brown & Gay's implementing the [government]'s specifications or following any specific government directions or orders." 461 S.W.3d at 126; *see also id.* at 127 ("The Olivareses' suit does not threaten allocated government funds *and* does not seek to hold Brown & Gay liable merely for following the government's directions.")

(emphasis added). As this analysis confirms, sovereign immunity bars any suit that attempts to control the State, regardless of the defendant. *See Heinrich*, 284 S.W.3d at 372; *see also Wasson*, 489 S.W.3d at 436-37.

2. In *Brown & Gay*, the Court correctly rejected "Brown & Gay's contention that it is entitled to share in the [government]'s sovereign immunity solely because the [government] was statutorily authorized to engage Brown & Gay's services and would have been immune had it performed those services itself." 461 S.W.3d at 127. But the Court stopped short of establishing a test to determine when a claim against a government contractor attacks an execution of the sovereign's will and is thus barred by the sovereign's immunity. *See id.* at 126 & n.11. The Court should fill that gap here with a test that turns on three questions: (1) Did a state official exercise substantial judgment or discretion through its use of a contractor to provide the goods or services at issue? (2) Did the contractor follow the State's directives? (3) Did the contractor inform the State (or was the State otherwise aware) of any aspect of a design that is potentially dangerous? Each question aims to ensure that only suits attacking the sovereign's will—i.e., that violate "the rationale that justifies [sovereign] immunity in the first place," *id.* at 127—are barred. If the answer to each of these questions is yes, then the contractor is immune from suits that arise directly from the contractor following the State's directives.

Asking whether a state official exercised substantial judgment or discretion through its use of a contractor to provide the goods or services at issue helps establish whether the act complained of was "authorized and directed by the Government,"

Yearsley, 309 U.S. at 20, and thus shares the "common root" of the State's immunity, *Wasson*, 489 S.W.3d at 436. As discussed in *Brown & Gay*, answering this first question requires examining the circumstances of the government's approval of the form of a good or service. *See* 461 S.W.3d at 124-27. These circumstances include the request for proposals; the contractor selection process; the contract; task orders issued to the contractor; and oversight, supervision, or review during implementation and performance. A court should review these circumstances to determine whether a state agency or official exercised substantial discretion or judgment during the contracting process.

The aim of the second question—did the contractor comply with the State's directions—is straightforward. If a contractor does not follow the sovereign's will, it should not share the sovereign's immunity. *Compare Campbell-Ewald Co.*, 136 S. Ct. at 673-74, *with Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 647-48 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 417 (2018).

The third question relates to the first. In keeping with the idea that the sovereign's immunity should be available to a contractor only when the sovereign has thoroughly vetted the design decisions, *see Brown & Gay*, 461 S.W.3d at 125-26, a contractor must inform the State of aspects of a design that may create a danger so that the State can balance the risks and benefits. Similarly, when a contractor fails to disclose potentially dangerous aspects of a design to the State, it is far less clear that a suit against the contractor arising from that danger would interfere with the performance of official functions.

C. GTECH shares the State's sovereign immunity because GTECH implemented the design TLC approved after close scrutiny.

Applying this approach, the State's immunity precludes plaintiff's suit against GTECH. According to statute, the RFP, and the contracts, TLC maintains a tight grip on lottery operations. *See supra* pp. 2-5. TLC closely supervised GTECH and closely reviewed the design of the Fun 5's ticket and requested any changes it thought appropriate. *See supra* p. 5. TLC then published the ticket's design and parameters in the same fashion as state regulations. *See* 39 Tex. Reg. at 4799-4804. There is no allegation or evidence suggesting that GTECH did not follow TLC's directions. And the aspect of the FUN 5's ticket about which plaintiff complains—its instructions—was on the face of the ticket and well known to TLC when TLC approved those instructions and directed GTECH to print tickets displaying those instructions. *See* CR.428, 430. Those features were decisions of TLC, reflect the sovereign's will, and thus spring from the "root [of] the state's sovereign immunity." *Wasson*, 489 S.W.3d 436-37.

Brown & Gay does not alter this conclusion. The facts here contrast sharply with those of *Brown & Gay* and demand a different outcome. There, "the details of the Tollway project, or the 'discretionary functions' as put by counsel, were delegated to Brown & Gay." 461 S.W.3d at 126 n.10. The government entity did not even have employees who could engage in a close review of Brown & Gay's design. *Id.* at 119 n.1. "Brown & Gay's decisions in designing the Tollway's safeguards [were] its own." *Id.* at 126. Here, state law requires TLC to "exercise strict control and close supervision over all lottery games." Tex. Gov't Code § 466.014(a). TLC's contracts

with GTECH provide for micromanagement by TLC, and TLC micromanaged the design and parameters of plaintiff's scratch ticket. *See supra*, pp. 2-5; *Nettles*, 2017 WL 3097627, at *2-3. And TLC engaged many TLC employees with expertise in different areas to review and suggest changes to the ticket's design and parameters. *See* CR.297, 325, 408, 466. TLC did not delegate its discretion to GTECH. The decision on the final design and parameters of the ticket—including its instructions—was an act of TLC, not GTECH. *See Brown & Gay*, 461 S.W.3d at 124-27.

To be clear, this would be a different case, with a different result, if plaintiff complained of GTECH's exercise of discretion in implementing TLC's directives, rather than GTECH's compliance with TLC's directives. For example, if GTECH retained discretion in manufacturing the approved ticket and had printed and cut the tickets in a way that caused their edges to be sharp and injure consumers, GTECH would have no immunity because it retained discretion to make that printing choice. GTECH would not be merely following TLC's instructions. Here, however, GTECH had no discretion to decline to print the instructions approved by TLC after close examination. That is why the instructions are an act of TLC, not GTECH.

As plaintiff's suit seeks to control the State, it is barred regardless of its effect on the public fisc. *See supra* pp. 11-15. But if the Court does look to sovereign immunity's public-fisc purpose, it will find even more support for barring plaintiff's suit. At the outset, however, the Court should make clear that the public-fisc aim of sovereign immunity is not limited "to guard[ing] against the 'unforeseen expenditures' associated with the government's defending lawsuits and paying judgments 'that could hamper government functions' by diverting funds from their allocated purposes."

Brown & Gay, 461 S.W.3d at 123. That language from *Brown & Gay* originated in dicta from *Sefzik*, a per curiam opinion that turned only on the plaintiff's naming the incorrect party. *See Sefzik*, 355 S.W.3d at 621-22. In other cases, before and since, the Court has described this purpose more broadly, "to shield the public from the costs and consequences of improvident actions of their governments." *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006); *accord Nazari*, 561 S.W.3d at 500; *see also Wasson* 489 S.W.3d at 436 (referring to this aim as sovereign "immunity's pragmatic purpose"). Fulfilling this purpose does not depend on a cost being unforeseen or associated with defending lawsuits and paying judgments.

The public-fisc purpose, properly conceived, bolsters GTECH's case for sharing the State's sovereign immunity. In *Nazari*, for example, the Court relied on the public-fisc purpose to bar claims that risked "[h]ampering [government] entities' collections" because those claims "injure[] the public fisc just as surely as allowing private citizens to sue [the State] directly for damages." 561 S.W.3d at 508. Similarly, here, the "objective" of the lottery is "produc[e] revenues for the state treasury." Tex. Gov't Code § 466.101(b). The lottery raised over $1.6 billion for Texas education and veterans in fiscal year 2019, and more than $24 billion since the its inception. Press Release, Tex. Lottery Comm'n, *Texas Lottery Smashes All-Time Sales Records With New $6.25 Billion Mark In FY 2019* (Sep. 17, 2019), https://perma.cc/6E6B-WLHN. Allowing suits against TLC contractors for following TLC directions will make it harder to find contractors that will agree to the strict control required by statute or make contracting much pricier. Either way, it risks "dramatically reduc[ing TLC's] ability to collect revenue." *Nazari*, 561 S.W.3d at

508. Here, "the terms of the contract, the relationship between the state agency and the contractor, and the direct implication of state funds . . . distinguish . . . the case at hand" from *Brown & Gay* and bar plaintiff's suit. *Brown & Gay*, 461 S.W.3d at 127.

D. The Court should reject the Third Court's erroneous "discretion to warn" rule.

The Third and Fifth Courts looked at the same facts but came to different conclusions about GTECH's immunity. The Third Court held that GTECH could not share the State's immunity because GTECH retained discretion under the contract—not to diverge from TLC's directives, but to warn TLC that TLC's approved instructions could confuse consumers. *Steele*, 549 S.W.3d at 796-803. This was error for at least four reasons.

First, requiring a contractor to contract away its ability to warn the State in order to share the State's immunity does not serve any of sovereign immunity's purposes. The fulcrum of immunity here is whether plaintiff's fraud claim against GTECH seeks to control the State. *See supra* pp. 11-15. That inquiry turns in part on whether a plaintiff's alleged injury stems from the directions given by the State or from a contractor's exercise of discretion in *implementing those directions*. *See Brown & Gay*, 461 S.W.3d at 125-26; *supra* pp. 18. GTECH had no discretion to decide whether or how to implement TLC's chosen ticket design and parameters. *See supra* pp. 2-5. Plaintiff's fraud claim seeks to control the State because it attacks GTECH's *compliance* with TLC's directives, issued after substantial and substantive consideration. *See supra* pp. 17-18.

The Third Court's decision went awry because the court looked beyond GTECH's discretion in its performance of TLC's directives to GTECH's discretion to second-guess those directives. In focusing as it did, the court lost sight of what matters: government control. GTECH's theoretical ability to second-guess TLC's directives does not alter the fact that the directives were TLC's and that GTECH was bound to follow them. TLC's control would be undermined only if GTECH did *not* follow TLC's directives or if GTECH knew of a dangerous aspect of the Fun5's ticket unknown to TLC. *See supra* pp. 15-16. GTECH followed the State's directives. And not only were the complained-of instructions not hidden, *see* CR.298-99, but plaintiff contends that TLC had actual knowledge before final approval of at least the possibility that the Fun 5's ticket's instructions could confuse some consumers. *See* CR.428.

Moreover, if the Third Court's rule is correct, "[t]he fear of damage suits might prompt [contractors] to wrap themselves in paper work as a means of insulating themselves from liability." Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 Vand. L. Rev. 1529, 1537 n.24 (1992).[6] But "[c]reating a paper trail itself delays government action and adds to the cost of" implementing the sovereign's will. *Id.* "The resulting bias towards inaction would be understandable, yet detrimental to effective

[6] *Cf. Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002) (citing Professor Krent's article); *Fed. Sign*, 951 S.W.2d at 414 (Tex. 1997) (Hecht, J., concurring) (same).

government." *Id.*[7] The rules of sovereign immunity should not hamper effective government. Doing so here would also risk "reduc[ing TLC's] ability to collect revenue." *Nazari*, 561 S.W.3d at 508.

Second, the Third Court's rule conflicts with precedent from this Court and the Supreme Court of the United States. In *K.D.F.*, for example, nothing suggested that the immune private entity was contractually barred from warning KPERS that refusing to release the property at issue may tortiously interfere with the loan recipient's contractual relations. *See* 878 S.W.2d at 591. In fact, there was no contract at all between K.D.F. and KPERS. *See supra* p. 13 n.5. And in *Yearsley*, nothing suggested that the immune construction firm lacked discretion to warn the United States that the dikes it was constructing may fail. Those cases could not have come out as they did under the Third Court's test. Indeed, it is hard to imagine a scenario in which a contract would forbid a contractor from saying something about a risk the contractor discovered after an agency had issued final directives.[8] So it is unlikely that any contractor, no matter how perfunctory its implementation of the State's instructions, would have immunity under the Third Court's test.

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[7] *Cf. Smith v. Rogers Grp., Inc.*, 72 S.W.3d 450, 456 (Ark. 2002) ("If the contractor was required, at its peril, to check and double check all plans given it and required to keep an engineering force for the purpose of interpreting these plans, and was not permitted to follow the orders of the engineering force of its superior, then the cost of public improvement would be so increased as to make them almost prohibitive.").

[8] True, a contractor could demand a clause forbidding it to warn the State about risks in an agency's final directives. But any state agency likely would not agree to require a contractor to turn a blind eye to risk created by the agency. And there is no persuasive reason to encourage such demands in the first place. At best, the Third Court's

Third, the Third Court's discretion-to-warn test arose from the court's reading of *tort* jurisprudence, not immunity precedent. *Steele*, 549 S.W.3d at 788-91, 799-803. According to the Third Court, derivative sovereign immunity "parallels . . . tort duties" that "the contractor owes to third parties," and because GTECH supposedly owed a tort duty to the plaintiffs in that case, GTECH could not be immune from suit. *Id.* at 788, 799-803. But when a plaintiff brings a tort claim, sovereign immunity presupposes a duty. The Court addressed this issue last term in *Hillman v. Nueces County*, in which a plaintiff argued that governmental immunity did not apply to a county because that county allegedly breached a tort duty owed to the plaintiff. 579 S.W.3d 354, 358 (Tex. 2019). Rejecting this argument, the Court explained that "common-law duties . . . apply to governmental entities as to anyone else, but immunity bars suits for breach of those duties." *Id.* at 359; *accord City of Tyler v. Likes*, 962 S.W.2d 489, 494 (Tex. 1997) (explaining that sovereign immunity is "a bar to a suit that *would otherwise exist*") (emphasis added). Thus, the limits of sovereign immunity cannot be defined by reference to the existence of tort duties. Because the cases the Third Court relied on "did not address governmental immunity or its waiver, [they do] not support" the Third Court's conclusion "that the trial court had jurisdiction over [plaintiffs'] claim." *Hillman*, 579 S.W.3d at 359.

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rule will proliferate these currently hypothetical head-in-the-sand clauses, and the State will be left without even the possibility of a prophylactic layer of review. At worst, the Third Court's rule will make contracting—and thus getting the State's work done—much harder.

Chief Justice Hecht's *Brown & Gay* concurrence, relied on by the Third Court, *see Steele*, 549 S.W.3d at 791, does not counsel otherwise. Chief Justice Hecht observed only that certain tort duties embody a similar principle as derivative sovereign immunity: A contractor is not independently responsible for harm caused by "act[ing] in strict compliance with the governmental entity's specifications." *Brown & Gay*, 461 S.W.3d at 130 n.6 (Hecht, C.J., concurring). Chief Justice Hecht did not suggest, contrary to *Hillman*, that contractors are entitled to immunity only if they would prevail on the merits of a plaintiff's claim.

Fourth, and finally, the Third Court's tort-based reasoning was wrong on its own terms. The Third Court relied on Texas's rejection of the accepted-work doctrine, "a privity-rooted concept that had relieved an independent contractor of any duty of care to the public with respect to dangerous conditions it creates on the sole basis that the work had been completed and accepted by the party hiring it." *Steele*, 549 S.W.3d at 788. But TLC did not just accept GTECH's work. TLC treated GTECH's drafts as a mere starting point; TLC closely examined the drafts, made changes it thought appropriate, and then directed GTECH to implement the design and parameters *chosen by TLC*. Thus, this case is in a distinct category—a contractor following a superior's directions. The Court has held that a contractor is not liable for a defect ordered by an experienced superior. *Allen Keller Co. v. Foreman*, 343 S.W.3d 420, 425-26 (Tex. 2011) (cited at *Brown & Gay*, 461 S.W.3d at 130 n.6 (Hecht, C.J., concurring). Notably, nothing in *Keller* suggested that the contractor lacked discretion under the contract to warn its superior of potential design defects. Tort-wise, *Keller* is just like this case.

Keller also establishes that GTECH had no extracontractual duty to warn TLC about language on the face of TLC lottery tickets—and thus no duty to third parties. In *Keller*, a third party sued a contracting construction company for failing to warn Gillespie County that a guardrail it installed on a county construction project was too short. The Court rejected the idea "that a contractor may owe a duty to warn a premises owner of a danger on the premises owner's own property." *Id.* at 426. Just as the County in *Keller* "was aware of conditions at the site," *id.*, TLC was aware of the scratch ticket's instructions and, according to plaintiff, even the possibility of confusion. Even if sovereign immunity did parallel tort duty, GTECH would still be immune from plaintiff's suit. *See, e.g.*, *Portis v. Folk Constr. Co., Inc.*, 694 F.2d 520, 525 (8th Cir. 1982) (holding that the defendant shared the government's immunity despite the defendant's theoretical ability to ask the government to change the government plans, because the government was aware of the danger).

Prayer

The Court should affirm the court of appeals' judgment.

Respectfully submitted.

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Certificate of Service

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Certificate of Compliance

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