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# Liability of State Officials

**Benjamin Dower**  
**Deputy Division Chief**  
**General Litigation Division**

Views expressed are those of the presenters, do not constitute legal advice,  
and are not official opinions of the Office of the Texas Attorney General.



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## **When does the Office of the Attorney General provide representation?**

- The Attorney General is empowered to defend the State of Texas when a component of the State (*e.g.*, a state agency or state official) is named as a defendant in litigation.
- “Except as otherwise provided by the Constitution or general or special statutes, and only as consistent with Government Code, Sec. 402.0212 and Chapter 2254, Government Code, the Attorney General shall have the primary duty of representing the State in the trial of civil cases.” General Appropriations Act § 16.01(a)(1).
- The AG decides whether the representation is appropriate. TEX. GOV’T CODE § 402.0212(a).



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## When does the State provide indemnification?

- Generally, the State will indemnify and provide OAG representation to current or former State officials when:

damages are based on **an act or omission** by the person **in the course and scope** of the person's **office, employment, or contractual performance** for or **service on behalf of the [State]** **agency, institution, or department.**

TEX. CIV. PRAC. REM. CODE §§ 104.001-.002

- Indemnification or representation **may be denied** when the official acts with **willful or gross negligence, bad faith, conscious indifference or reckless disregard.**



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**There are numerous claims under both State and federal law that someone could bring against a state official.**

**Employment claims (*e.g.* a current or former employee sues for discrimination or retaliation)**

**Tort claims (*e.g.* someone is injured in a car accident or claims an injury such as defamation or fraud)**

**Civil rights or “ultra vires” claims (*e.g.* someone contends that the State has violated their rights)**



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## Individual versus Official Capacity

### Official in his or her **INDIVIDUAL** capacity

- This claim is against the person individually.
- Usually the claim seeks money damages and to hold the board member personally liable.

### Official in his or her **OFFICIAL** capacity

- This is another way of suing the office held by the person (the State itself).
- Usually the claim seeks to compel or prevent official actions taken in that official's role.



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## Official Capacity Claims

- Suing the office that the person occupies, often seeking injunctive relief.
- Claim is often *not* based on the conduct of the individual sued.
- The official can sometimes assert:  
Sovereign / Eleventh Amendment immunity





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## Sovereign / Eleventh Amendment Immunity



“That the king can do no wrong is a necessary and fundamental principle of the English constitution. . . .  
**[N]o action will lie against the sovereign (for who shall command the king?)”**

- Sir William Blackstone, Commentaries on the Laws of England in Four Books, vol. 2 [1753], Book III, Chapter XVII



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## Sovereign / Eleventh Amendment Immunity

**“[T]he States entered the federal system with their sovereignty intact.”** *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991).

**“[T]he States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today. . . .”** *Alden v. Maine*, 527 U.S. 706, 713 (1999).







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## Sovereign / Eleventh Amendment Immunity

### Who is entitled to it:

1. The **State** itself. *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997).
2. A **state agency or entity** deemed an “**alter ego**” or “**arm of the State.**” *Vogt v. Bd. of Comm’rs*, 294 F.3d 684, 688–89 (5th Cir. 2002).
  - The defendant must be “so closely connected to the State that the State itself is the ‘real, substantial party in interest.’” *Id.*
  - No bright-line test, but the Fifth Circuit uses six factors. *Id.* at 679.
3. A state official sued in their “**official capacity.**” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101–02 (1984).



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Sovereign / Eleventh Amendment Immunity

## How does the State lose its immunity?

Three mechanisms to authorize suits against the state, state agencies, and state officials:

- (1) consent to suit by the state;
- (2) valid abrogation by Congress; or
- (3) the state's amenity to suit under the *Ex Parte Young* or *ultra vires* doctrines.

*Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990); *Ex parte Young*, 209 U.S. 123 (1908); *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009).



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## Sovereign / Eleventh Amendment Immunity

### State's Consent to Suit:

- ▶ If the State is waiving its own immunity by “**consent[ing] to suit against it in federal court**,” such consent must be “**unequivocally expressed**.” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984).
- ▶ Similarly in state court, “**a statute that waives** the State’s immunity must do so **beyond doubt**.” *Sw. Bell Tel., L.P. v. Harris Cty. Toll Rd. Auth.*, 282 S.W.3d 59, 68 (Tex. 2009).
- ▶ **Receipt of federal funds** may also be **explicitly conditioned** on waiving Eleventh Amendment immunity. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985) (holding the Rehab. Act did not contain express intent to abrogate immunity), *superseded by statute as stated in Lane v. Peña*, 518 U.S. 187, 198 (1996) (noting that Congress subsequently added the express intent previously missing from the statute).



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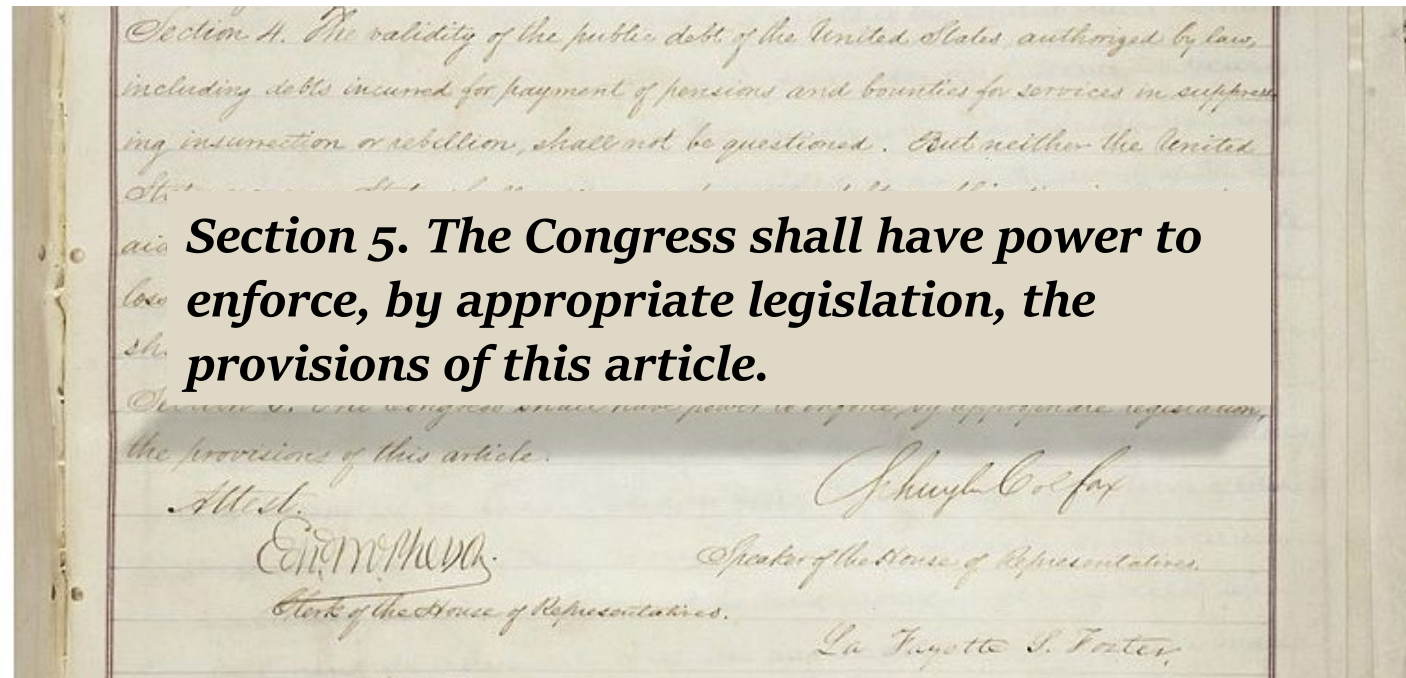
## Sovereign / Eleventh Amendment Immunity

### Congressional Abrogation:

For Congress to validly abrogate the State's Eleventh Amendment immunity:

- (1) the Congressional **intent** to abrogate must be **unequivocally expressed**; and
- (2) Congress must be acting pursuant to a **valid grant** of constitutional **authority**.

*Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000).







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Sovereign / Eleventh Amendment Immunity

### Congressional Abrogation (continued)

- Section 5 of the Fourteenth Amendment grants Congress authority to abrogate the States' immunity **when enacting legislation to enforce the Fourteenth Amendment.** *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 80–81 (2000).
- “Section 5 legislation reaching **beyond the scope of § 1’s** actual guarantees **must be an appropriate remedy for identified constitutional violations**, not ‘an attempt to substantively redefine the States' legal obligations.’” *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003) (quoting *Kimel*, 528 U.S. at 88).
- “There must be a **congruence and proportionality** between the injury to be prevented or remedied and the means adopted to that end.” *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997).



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## Sovereign / Eleventh Amendment Immunity

### Congressional Abrogation (continued):

- The Age Discrimination in Employment Act (“ADEA”) **does not** validly abrogate the States’ sovereign immunity. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 80–81, 91–92 (2000).
- **Title I** of the Americans with Disabilities Act (“ADA”) **does not** validly abrogate the States’ sovereign immunity. *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 (2001).
- **Title II of the ADA** validly abrogates the States’ sovereign immunity in **some situations**, but **not others**. See *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004); *United States v. Georgia*, 546 U.S. 151, 159 (2006).
- The Family Medical Leave Act (“FMLA”) **validly abrogates** the States’ sovereign immunity **when the leave** requested relates to a **family member**, but **not** when the leave requested relates to the **employee** him or herself. See *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 735 (2003); *Nelson v. Univ. of Texas at Dallas*, 535 F.3d 318, 321 (5th Cir. 2008).



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**Sovereign / Eleventh Amendment Immunity**

***Ex parte Young* doctrine:**

“In determining whether the *Ex parte Young* doctrine avoids an Eleventh Amendment bar to suit, a court need only conduct a ‘straightforward inquiry’ into whether the complaint alleges an **ongoing violation of federal law and seeks relief properly characterized as prospective.**” *Verizon Md., Inc. v. Public Serv. Com’n of Md.*, 535 U.S. 635, 645 (2002).

The *Ex parte Young* exception applies only to **official capacity** defendants, **not to agencies.** *Bryant v. Tex. Dep’t of Aging & Disability Servs.*, 781 F.3d 764, 769 (5th Cir. 2015).



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## Sovereign / Eleventh Amendment Immunity

### Ultra Vires doctrine:

- ▶ Sovereign immunity does not bar an ***ultra vires*** suit **seeking prospective injunctive relief** against a state official **in their official capacity**. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372–73 (Tex. 2009).
- ▶ “To fall within this *ultra vires* exception, a suit . . . must allege, and ultimately prove, that the officer **acted without legal authority** or **failed to perform a purely ministerial act.**” *Id.* at 372.





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# Individual Capacity Claims

- ▶ State official held *personally* liable
- ▶ Claim is based on the conduct of the individual
- ▶ The official can assert:
  - qualified immunity (to federal claims)
  - official immunity (to state claims)



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## Qualified Immunity (federal claims)

- Qualified immunity “shields government officials from liability when they are acting **within their discretionary authority** and their conduct does **not violate clearly established statutory or constitutional law** of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).
- “Put simply, qualified immunity **protects all but the plainly incompetent or those who knowingly violate the law.**” *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (internal quotation omitted).



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## Qualified Immunity (federal claims)

- A right is clearly established if the law **is clear in a particularized sense**, such that **a reasonable official would be put on notice** that her **conduct is unlawful** and violates the right in question. *Wernecke v. Garcia*, 591 F.3d 386, 392–93 (5th Cir. 2009).
- “[C]learly established law should not be defined at a high level of generality,” but must instead be “**particularized to the facts of the case.**” *White v. Pauly*, 137 S. Ct. 548, 552 (2017).
- “Otherwise, plaintiffs would be able to convert the rule of qualified immunity into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.” *Id.*



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## Official Immunity (state claims)

- “Government employees are entitled to official immunity from suit arising from the performance of their (1) **discretionary duties** in (2) **good faith** as long as they are (3) **acting within the scope of their authority.**” *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994).
- Official immunity is necessary for public servants “**to act in the public interest with confidence** and without the hesitation that could arise from having their judgment continually questioned by extended litigation.” *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 427 (Tex. 2004).





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## Official Immunity (state claims)

### Official immunity applies when:

- The claim arises from the employee's “**discretionary act**,” which means the act required personal deliberation, decision, or judgment;
- The act is performed in “**good faith**” if a reasonably prudent official under similar circumstances could have believed act was justified; and
- The act is **within the scope of the official's authority**, which means she is discharging the duties generally assigned to her; an employee's scope of authority extends to job duties to which the official has been assigned even if the official errs or acts unlawfully in completing the task.



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# Other Immunity Defenses

## ► Prosecutorial Immunity

- Applies to prosecutors and their assistance in the performance of prosecutorial functions
- Is not overcome by allegations that the prosecutor acted in bad faith

## ► Judicial Immunity

- Is only overcome when a judge performs non-judicial actions or when the actions are taken in a complete absence of all jurisdiction.
- Is not overcome when the judge is accused of acting corruptly or maliciously

## ► Legislative Immunity

- Attaches to all actions of local officials taken in the sphere of legitimate legislative activity

## ► These immunities are absolute and preclude suit and liability

- May be “quasi”—is generally based on the nature of the act at issue
- Bar all recovery and may cut off discovery (depositions, etc.)



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So you've been served with a lawsuit. . .

~~Step 1. Bemoan your fate.~~

~~Step 1. Panic.~~

**Step 1.** Promptly notify the appropriate person in your office (*e.g.* the immediate supervisor or Office of General Counsel).





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**Questions?**

**Benjamin Dower**  
**Deputy Chief**  
**General Litigation Division**  
[Benjamin.Dower@oag.texas.gov](mailto:Benjamin.Dower@oag.texas.gov)