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Supreme Court of Texas.
Houston Municipal Employees Pension System, Petitioner,
v.
Craig E. Ferrell, Jr., et al., Respondent.
No. 05-0587.

January 23, 2007

Appearances:
Thomas R. Phillips (argued), Baker Botts LLP, Austin, TX, for petitioner.
Lloyd E. Kelley (argued), Lloyd E. Kelley & Associates, Houston, TX, for respondent.

Before:

Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Scott A. Brister

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JUSTICE: Be seated please. The Court is ready to hear argument in 05-0587 Houston Municipal Employees Pension System versus Craig Ferrell.

COURT MARSHALL: May it please the Court, Mr. Phillips will present argument for the petitioner. Petitioner reserves five minutes for rebuttal.

ORAL ARGUMENT OF THOMAS R. PHILLIPS ON BEHALF OF THE PETITIONER

MR PHILLIPS: May it please this Honorable Court. This case is about the jurisdiction of a Texas Court to review benefit determinations by the Houston Municipal Employees Pension System. The particular issue for review here is whether pensioned members can, after claiming to and exhausted all their administrative remedies, bring a declaratory judgment action to determine or redetermine the correctness of those remedies and their rights even though the statute that creates this board, gives the board itself full and complete authority to determine both the facts and the law and that statute provides no right of judicial review. Because the trial court had no jurisdictions over this case, this Court should reverse the judgment of the Court of Appeals and render judgment dismissing plaintiff's claims for lack of jurisdiction. There's a preliminary issue that we feel

needs to be addressed first and that is the non-suit of the lead plaintiff, Craig Ferrell. Ferrell took this non-suit without prejudice after we had filed our petition for review and on the day that his response, as requested by the Court, was due. Several older cases, namely, *City of Pasadena versus City of Houston* [*City of Pasadena v. State ex rel. City of Houston*, 442 S.W.2d 325 (Tex. 1969)] would suggest that this Court should proceed with the case because it's a matter of public inpour. But the decision last year in *UTMB versus State of Blackmon* [*University of Texas Medical Branch at Galveston v. Estate of Blackmon*, 195 S.W.3d 98, 100 (Tex.2006)], would appear to give fair ultimate absolute right to take the non-suit because he took the non-suit before he had presented all his evidence and rested his case in chief. If Ferrell is out of the suit then the question becomes, what happens to this Court of Appeals opinion. There's very old fashion for this situation because most people don't walk away when they're winning. They walk away when they're losing or they walk away because they have made a settlement with the other side. In *Houston Cable TV versus Inwood West Civic Association*, [*Houston Cable TV, Inc. v. Inwood W. Civic Ass'n*, 860 S.W.2d 72, 73 (Tex.1993)] this Court held that when parties settled their case that was a matter of public interest, they could not make a part of the deal, part of their settlement that the Court would vacate a lower court opinion. And that's a sound rule. But here, the public policy is on the other side. Public interest would be compromised by leaving this opinion on the books rather than deleting it from the books where a party has been denied its right to seek to appeal from an adverse judgment. In federal courts, where mootness occurs to the unilateral action of a party could prevail in a lower court. The current practice is to reverse or vacate the judgment below and remand with directions to dismiss. That's *Arizonans for Official English versus Arizona* [*Arizonans for Official English v. Arizona*, 520 U.S. 43, 71-72, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997)]; and also *US Banncorp Mortgage*. There was no federal case specifically addresses what happens to the opinion. One can infer that it too must be vacated once the judgment is vacated and that will, in the words of the *Munsingwear* [*United States v. Munsingwear*, 340 U.S. 36 (1950)] case prevent a judgment unreviewable because of mootness from spawning any legal consequences.

JUSTICE: I guess I-- I'm maybe missing something but that we have 29 other plaintiff. Why doesn't the case survive with them?

MR. PHILLIPS: The case does survive as to them if the Court has jurisdiction over their case. But if the court doesn't have jurisdiction, it would be fundamentally unfair for this plaintiff to have the benefit of this case when he's still an employee of the City and he has dismissed without prejudice. He could re-file this case later and claim that the suit as to the 29 was still on the books and could be, if not at all the case, at least it's precedential value to him in reasserting this claim.

JUSTICE: And is the problem with the remaining 28 or 29 exhaustion?

MR. PHILLIPS: I believe it's exhaustion because if you look at tab (1) about the Oral Submission book. From the first supplemental petition where these 29 plaintiffs added themselves to the lawsuit after HMEPS have already filed it's motion to dismiss for lack of jurisdiction. Up to their brief on the merits they have repeatedly claim to have exhausted all their administrative remedies. If you have exhausted your administrative remedies, then your judicial relief if any, is on appeal of the Administrative Order. And if we treat this as

an appeal of the Administrative Order, it's absolutely clear from this statute that there is no right to an appeal short of a constitutional challenge which has not been made here. The challenge here is at best a different reading of the statute. And I say, to me, that's a stretch when you look at the statute.

JUSTICE: But, but the arg-- as I've heard-- as I read your argument it was, if you don't exhaust-- if you haven't exhausted administrative remedies then you need to-- and you can't go to Court then and if you have, then you need to appeal which you can't. So basically, what do you exhaust or what do you don't exhaust if you can go to Court.

MR. PHILLIPS: Well, that's correct and the reason that I stand here to say that, is the statute. If you look at tab 2 article 6243N of the Revised Civil Statute, it says that, "The pension board shall manage the pension fund and it, and it may-- look at number 2-- interpret and construe this Act in any summary plan descriptions for benefit procedures. Then number 3, is the most important one to me, the pension board may correct any defect, supply any omission and reconcile any inconsistency that appears in this Act in a manner and to the extent that the board considers expedient to administer the Act.

JUSTICE: That's kind of odd, isn't it? Where the legislative delegation to agency or sub-division to rewrite a statute if it deems it should.

MR. PHILLIPS: It's -

JUSTICE: I know that challenge is -

MR. PHILLIPS: - suppose that it is ...

JUSTICE: - raised here but it's odd.

MR. PHILLIPS: Language like this really doesn't exist outside a few a handful of pension statute in the State and even when we get down to the number one, which is the determination of any fact by the board and the board's determination of-- interpretation of the Act are final and binding on any interested party. Final and binding without then a subsequent provision for judicial review appears only in a couple of pension acts in the State and in arbitration matters. In matters where an agency is supposed to go to arbitration, they use this type of language and it takes it out of the Court's system. And when you take X two, three and four and Y together. First, if the, if the administrative remedies are exhausted, there's no right to an appeal and that's a pretty standard-- that have been the pretty standard administrative law forever and secondly, we don't believe there's any jurisdiction under the Declaratory Judgment Act for several reasons.

JUSTICE: Before we get too faraway from the non-suit, let me ask you one another question about that. Do you-- what effect do you think trap 29.5 has on the non-suit? It says an appeal from an interlocutory orders, while that's pending, the trial court retain jurisdiction of case. But the Court must not make an order that interferes with or impairs the jurisdiction of the appellate court or affect [inaudible] any relief sought. Does that have an effect on the non-suit here? Now the Court didn't make it; trial court didn't make it order as I understand it. There was just a non-suit filed by a party. But the spirit seems to be that the trial court shouldn't impair the jurisdiction of appellant court while an appeal is pending.

MR. PHILLIPS: Well, the, the trial judge did sign a non-suit order. I don't think-- in light of UTMB and Blackmon, I believe you have to honor this non-suit but one of our note in our initial brief but, but ...

JUSTICE: This is interloc-- appeal of an interlocutory order -

MR. PHILLIPS: It is.

JUSTICE: - and the non-suit interferes with or impairs the jurisdiction of appellate court as to that plaintiff.

MR. PHILLIPS: Well, the plaintiff-- plaintiff Ferrell took the non-suit in the County Court at Law and in this Court as well and at the Court of Appeals, the big non-suit for that matter. So obviously, I'm not telling the Court that it-- I don't see from [inaudible] standpoint why Rule 162 of the trial court rule has to apply here if the Court wanted to keep the Ferrell part of the suit. But it looks-- if-- you had a case like Summer and Blackmon where this-- roughly similar situation somewhat different. They was a-- a party had won then the Court of Appeals vacated it's opinion and before it went the other way, the parties who previously won now had no opinion on the books to the non-suit and the courts, of course have still [inaudible] the Court of Appeals. This Court said that under Rule 162 she had an absolute right to take that non-suit.

JUSTICE: Perhaps the easy answer is that a non-suit filed in this Court dismisses his appeal here or his petition here.

MR. PHILLIPS: That may be and then he goes to the trial court but since without prejudice and he's still an employee of the City assigned to the Police Department-- Legal Department. He could bring these complaints up again, theoretically.

JUSTICE: But it's not clear to me in the abstract apart from the language of Section 3 that you referred to. When you can get a Declaratory Judgment because the agency is not doing something it should be doing following the statute and when we will keep it.

MR. PHILLIPS: Well, I believe the-- it's-- I'm struggling for the case and I don't quite remember except to Judge Barron wrote in 1983, and I'll get it to you. I'm, ah not around here. But the, the trial court has jurisdiction over the declaratory judgment if there is an allegation that agency has exceeded it's authority and in that case the PUCT-- the City of Sherman. [City of Sherman v. Public Utility Commission of Texas, 643 S.W.2d 681 (Tex. 1983)]. The PUCT said: well, we're regulating Sherman's electric-- electrical business and they are in the water business too, so let's just regulate, thank. And this Court held that-- the trial court had the authority in the Declaratory Judgment Act to say that the agency was outside the scope of it's authority given Sections x and y, this agency was not outside the scope of it's authority in deciding whether or not he could combine two pensions or in deciding whether more credit for three to four months in the Police Academy should go. That's well within it's authority. The Declaratory Judgment Act, this Court has repeatedly said, is not an independent ground of jurisdiction. It merely confers the right of a party to proceed where the court already has jurisdiction. And in this case when you compare this statute that give all the power to the board to make this legal determinations, we don't think the Declaratory Judgment Act general language that we might construe a statute gives it jurisdiction. If you-- if you think of it that it does that the-- the trial court has jurisdiction but all they can do is rule one way since the statute says, "The board has that power." Then that's really in the nature of it's exclusive jurisdiction and we try to stay away from exclusive jurisdiction because at least the Court of Appeals said exclusive jurisdiction always presupposes their-- their judicial review later. In no extent that has to be the case either and in Williams 3, Justice Cas didn't think that. So when I think of this, it's an exclusive jurisdiction case. Declaratory Judgment Act says you can construe a statute, but you also have to look at whether or not the

statutory scheme has put that question solely in an administrative agency. Here, on this language it seemed that it has-- and since that -

JUSTICE: But you think, but you do think though-- if the language were less deferential to the board and require that we in certain times or we act in certain ways, that would that be the proper subject to the Declaratory Judgment Act.

MR. PHILLIPS: If this Act said you shall get a pension when you do this and when you do that, and this many years of service can do this and the board shall apply this Act. Then clear, yes there can-- is a right under, I think since [inaudible] there is no doubt that there will be a right under the Act to go and get a declaration if that's what that statute means. And that's why we're not-- we're actually not contesting sovereign immunity at least on the sovereign immunity part of the 29 remaining plaintiffs who sought Declaratory Judgment. We still think that-- we think when you read the two Acts together, which incidentally were passed in the same year as they have done as amicus brief points out. When you read the Declaratory Judgment Act and the HMEPS Act together, we don't believe that it confers jurisdiction on a trial court to issue a Declaratory Judgment. If it does have jurisdiction then the trial court has to defer as a matter of subject and a matter of jurisdiction to the HMEPS's board because the statute give so much authority to the board.

JUSTICE: I thought that, you know, complaint here is that they won't-- they won't say.

MR. PHILLIPS: Well, the first time some of these gets so you know, it's obviously a very clean argument that the first time the board ever heard about this 29 was when they filed the first supplement petition and Mr. Ferrell's counsel filed. But, but, but it's not in the record either way. But the case has essentially went up in the Court this whole time and certainly a court would have a jurisdiction to direct an agency to act or not act. But it's-- the agency is in the middle of uncomfortable position and I will go outside the record to tell you all I know about it. But well, when a litigant is in the Court the whole time saying you know, we've exhausted our administrative remedies. So it's hard for the board to keep the proceeding though and ...

JUSTICE: If HMEPS were to declare all the legal department employees in service between 2000 and 2005 were-- are illigible for credit, for credited service, would there be any way to attack that [inaudible]

MR. PHILLIPS: Or they could be a const ...

JUSTICE: - Or the board has complete power to veto.

MR. PHILLIPS: I think that a lawyer might take that case on constitutional grounds.

JUSTICE: Vested property interest, substantive due process or ...

MR. PHILLIPS: There is more vested property int-- well, actually there is not in Houston. And there-- as of the 2003 Constitutional Amendments some pension systems, members and beneficiaries have a vested property interest. And I'm pleased to report that the judicial pension system have vested property interest.

JUSTICE: Any other questions?

JUSTICE: Counsel, one last question. How, how do we say that the Court has jurisdiction over constitutional questions and over questions whether or not they've acted or if they simply refused to act. They have jurisdiction, picking and choosing when we have jurisdiction?

MR. PHILLIPS: Well, it might be and even though ...

JUSTICE: Can we go choose? Can we do that?

MR. PHILLIPS: Yes. You're not-- you're not doing anything. It had

been done. JUSTICE: Or under law, has it been well established for all out of times in it. MR. PHILLIPS: An Administrative order and under a statute that is not provided either directly the implication for judicial review can only be appealed if there is a vested property right or another constitution violation might need protection. JUSTICE: on appeal. I think Declaratory Judgment Act on that-- MR. PHILLIPS: on the Declaratory Judgment Act, you can't interpret a statute. But I think if you read this two statutes together there is no jurisdiction for a trial court to interpret this statute because [inaudible]. First there's no jurisdiction -

JUSTICE: To appeal.

MR. PHILLIPS: No, I'm now back into the trial court. Let's say you never go to the administrative agency. You just say, "We think we do better in the agency if we have a judicial declaration of what the statute means. I think if you go to a trial court on the face of this statute and the trial court looks at the statute, they would say the Declaratory Judgment Act doesn't extend to this. There's nothing to read, the HMEPS board reads what the statute means. In fact they can even rewrite the statute. You can also look at that as a question of something that can do exclusive jurisdiction. We do have jurisdiction but we can't exercise in the course that you just [inaudible] since jurisdiction is a subject matter. Or third you can look at it a sovereign immunity question under Strayhorn versus McLane [McLane Co., Inc. v. Strayhorn, 148 S.W.3d 644] since it's purely a discretionary act to the public official or board. Sovereign immunity precludes a trial court from declaring what they should do.

JUSTICE: Further question.

ORAL ARGUMENT OF LLOYD E. KELLEY ON BEHALF OF THE RESPONDENT

MR. KELLEY: May it please the Court. Mr. Kelley will represent argument for respondents. MR. KELLY: I want to tell you Joke when the Chief Justice earlier because [inaudible] make some arguments and did-- I just thinking, but the UT Med. Branch at Galveston case, to me, wipes out almost all of the pretty things that had been done in this case. What's left is the 29, the cases are still alive but it's 29 but you'll notice the replied brief has waived any argument about sovereign immunity as to those-- if you go back to their brief one of the questions that one of the Justices asked. If you look on page 5, it was pled that all administrative relief had been exotic-- exhausted as to 29 and HMEPS except that, that's on page 5 in the brief. They accepted their, they amended their Summary judgment motion to include that which was accepted. So that fact has to be accepted as given, given the current status. So they only ...

JUSTICE: So your saying, you can stipulate exhaustion. That's, that's pretty much what happened here.

MR. KELLEY: We're saying that's their defense to come into Court to say there is this procedure and you didn't follow it. In this case we're saying there is no such procedure. We'd ask for the procedure, you'd never told what such procedure was. In fact, in March the record is clear that in March of 2003, request was made for the 29. Now as far as Ferrell, it goes back numerous years but the record is clear on March 2003, request was made, July 16, 2003 another request was made on Ferrell and on October the ninth and this is in the appendix A to

respondents first Court brief. Mr. Longleather wrote a letter on October the 9th of 2003 and said, "HMEPS will provide a response to all those plaintiff at the same time. In the mean time, we are still reviewing the claims." And as at today, no response. and so you go 2003, 2004, 2005, 2006, no identification of any procedure that, that they have and no response as to this claims. So and no indication that their board have considered it. This is something the executive director has decided and verbally informed Mr. Ferrell years ago, but nothing has ever been said one way of the other.

JUSTICE: Sounds, sounds to me like both sides are saying that the Court can proceed as if, what this 29-- exhaustion all, all have been exhausted remedy, is that correct?

MR. KELLEY: Yes, Judge, that's -- that should not be an issue because that's their defense and they haven't alleged that any procedure that we haven't followed.

JUSTICE: Sorry.

MR. KELLEY: Yes.

JUSTICE: Is it also true that none of the 29 had made the claim for benefits that would depend upon the answer to the question about their Police Academy Staff?

MR. KELLEY: Yes, Judge, and there is no vested property right here. They've alleged that since they don't get a pension until you retired don't even vest. Then there's no due process claim have ever been brought. So there's no Constitutional claim. So let-- it the circuit argue what, what I would like to highlight to the Court -

JUSTICE: Let me ask you a question that 29 plaintiff police officers seek credit for time at the Academy or credit for time even beyond their time if they get?

MR. KELLEY: It's credit for time that they are not being given and one of the Justices is having an example what they don't count two years. And at this point in time, you know they are not giving credit. That was undisputed. The facts of this cases is not been told had gone out. But, but we're definitely saying, we know for a fact that none of them are giving credit for that for this currently.

JUSTICE: That mean the Academy? ...

MR. KELLEY: Not so that the police -

JUSTICE HECHT: I think time is up.

MR. KELLEY: - some may had been dispatchers or jailer surveying jailers and then move over . The Ferrell case is even clearer, he moved around. He moved from, from the Police Department to becoming the legal officer for the Police Department and just shifted his status. But he you know, same office, same job and so there were time periods they counted it and actually signed off on it and said, "Here, your-- you get this time and then later on they came and just changed it arbitrary, said you don't get that time. Then-- and the-- so the fight was how are you interpreting this statute on counting time and what did you define in employees and that's what we're trying to seek is understanding of the pensions statute, purely statutory interpretation and having. Did I answer your question.

JUSTICE: If it sounds like all the 29 plaintiff seek at least credit for time at the academy -

MR. KELLEY: Yes, they did.

JUSTICE: - and maybe additional time that some or all of them seek for other service.

MR. KELLEY: Yes, Judge as soon as the discovery was conducted on, on the records to see how did-- they had their time prepared. We know from our side from the record that they have in their homes. That they

are not getting their time counted. But, but we have to do. That's the factual dispute. If there would be one. We know, I don't think the statute is at dispute right now that they are not counting the time but I, I would like to point out that on page 28 of their brief, they say, that, "it's okay for the fund to use to Declaratory Judgment Act and sue the City' and, and the City say, "You didn't make the right contributions for the farm" and they talk about-- that's the proper use of the Declaratory Judgment Act. But it's not proper for an employee to ask for interpretation of the same statute. And so

JUSTICE: I'm not clear about what interpretation you're asking of the statute.

MR. KELLEY: The statute starts to define "employee" years of credit service and those are laid out, you know, briefing and laid out, you know, better than not to give you an opinions but, Judge Jennings, but when you start looking at the statute, starts of defining years of credited service and we would like to know how they can take that definition of what employee is. If you take-- just-- employee means, an individual who holds a classified position which is a subject to this article. So that's under the Police Pension. If you go on to City and it says "You're employee the moment you start." So how you get to a point where you can't be classified until you take the oath and you are beyond the Academy period. You have already passed it close and you are beyond that period and you are over here to the point where your definitely in the Police Pension System and that time is this great time when your clearly a City of Houston employee, you started and that and that statute defines you as a city employee. How did they come up with, with the statute passed at the same time that would leave of blank. When the statute passed -

JUSTICE: I can answer, I can answer that question is that because 6243 Section 2(x)(4) and (y) says the board may determine all questions whether legal or factual leading to availability members service or benefits etc. They gives of the board include authority -

MR. KELLEY: But, but -

JUSTICE: - based on the statute says.

MR. KELLEY: - based upon an interpreted statute and it also says, one of the Justices pointed out that the boards can interpret a statute which means, if you give them this unlimited power they can rewrite a statute however they want. What to say that they can't cut up two years before that. What to say that your first two years as a Police Officer, you don't get that count either 'cause we don't see that. So they-- so yes, it does say that a statute about the pension. They can determine a statute. But this says in the Declaratory Judgment Act that the, the function of the Judge is, is to interpret statute. If you bring it to us that's and that's the use that the use of the fire fighters fund case, City of Houston in 2006, on page 28 and they say, "That's an appropriate use of the Declaratory Judgment Act." Well, in neither case, you see in the city, they had to go to Declaratory Judgment Act because not with pension fund nor the City statute allowed them to suit the City over contributions. So, you know, I can use the statute but I, but I can't have the statute used against me for the same purpose which mean to interpret the law. And so yes, it does say they are the-- that says, they can't interpret a statute. If that was correct and they didn't need the Declaratory Judgment Act because they could have used the page to say we order the City to pay us because we made this interpretation. I guess at some point they began to affect their own board. Because one of the cases they cited talks about mandamus and said, "You know, the Court doesn't even have the power

mandamus over. So, so if you give them this idea of a circular, We will interpret the law. You have to back to legislature get a law pass to say what we did is wrong. But before we get that, we still interpret the law. They've cut the judiciary out of the circle altogether as far as Declaratory Judgment as far as mandamus, there is ...

JUSTICE: But they can do that. The Legislature can do that surely.

MR. KELLEY: I, I don't. I don't think, Judge.

JUSTICE: They can't write a State, they can't write a statute that says. "You run it and you can't go to Court and contested.

MR. KELLEY: I don't, I don't think so. I don't see how you can do that. Saying, explain this ...

JUSTICE: Was it's unconstitutional or why not.

MR. KELLEY: I don't think you can do it. The same is not a vested property right. We don't give a ...

JUSTICE: Both Marbury versus Madison, right?

MR. KELLEY: Yeah. But ...

JUSTICE: Or we've said that they can write statute and said no appeal."

MR. KELLEY: Yes. But their can -

JUSTICE: They can ...

MR. KELLEY: - doesn't, it doesn't eliminate. It-- I think the ability of a person to appeal a decision such as whether or not my exam was graded correctly. One of the case that my, my, my promotional exam was graded correctly. I think that's different. That, that's the administration of this-- of the program. I think they have broad discretion to administer pension. I think the Police Department has broad discretion to administer examinations. What, what.

JUSTICE: Clearly we said, going back a long way that the legislature can say that they can set up agencies that can make decisions from which there is no appeal. And that if there is no appeal then you can't go to Court under those cases. Unless there is vested property right or constitutional right.

MR. KELLEY: Or somebody wants to interpret the statute, the law. They did, they note the legislature has never said okay well, we are going to put the judiciary out of the loop on interpreting the law." They never done that and I believe that would then invade. Maybe there is a Constitution remedy that would have invade your rights to determine what the law is beginning with Marbury versus Madison. And so the court of appeal [inaudible] recently said, "The president was wrong for issuing mandate to us-- to tell us how to interpret a particular case on that mandamus case.

JUSTICE: By saying, you can determine all questions legal or factual. Tell them within your discretion and that something else cut off the judiciary.

MR. KELLEY: No and that's what Jennings's rights in this opinion. He says, "That is to give a broad grants of what their-- the administer to Court

JUSTICE: But that presume exhaustion. We presume exhaustion was required.

MR. KELLEY: What he, he presume that they had not set up any procedure to administrative review this decision and that the Court had not given them this exhaustion because-- exclusivity. Sorry, because they did not set up this scheme like a-- that word, how it's called. for example. But like a-- when you, when you discipline they have this entire review board -

JUSTICE: Civil Service.

MR. KELLEY: - yes. [inaudible]. officer but they set up a whole

scheme. That's an appeal from that. They can denied that, an appeal from that. But they can't say as to the laws that we passed, we won't let you interpret those laws. We won't let you. We will get some other branch of Government that right to review the law and interpret the law and make decision about what the law is. That would take the function away from you and I think that's where the separation of powers come in. That's not what's before you today. But I think the appeal is different than your ability to interpret the law. I don't think the legislature had the authority to take your job and give it to somebody else.

JUSTICE: But the statute says and why that the determination of any fact, the pension boards interpretation of this Act. The statute are final and binding on any interested party and the city.

MR. KELLEY: Yes, Sir.

JUSTICE: Give us another reasonable interpretation of that language other than the pension boards determination is the end of the dispute.

MR. KELLEY: It is in the end of dispute.

JUSTICE: In other words, give us another reasonable interpretation of final and binding.

MR. KELLEY: Let me. I am going to cite Mr. Jennings's opinion and the ideal was that language never exempted out the Declaratory Judgment Act. It never went to the point of saying would exclude the Courts now from this. It is-- in [inaudible], this is a narrow interpretation so that this is the function of the Board. This is what they're supposed to do, to give. It gives in that list of things broad things they may do such as to interpret a statute, vis-a-vis someone else -

JUSTICE: Okay. So

MR. KELLEY: - but not to.

JUSTICE: It sounds like you are saying, "Yes, why cuts out the Court to use your language. However, your saying, the Declaratory Judgment Act supercedes. Why?

MR. KELLEY: And the separation of power argument is somebody ...

JUSTICE: But you have brought a constitutional claim here.

MR. KELLEY: But they haven't argued that, that, that ...

JUSTICE: You'd, you'd not have brought--. There's no constitutional claim pending with force, right?

MR. KELLEY: That's true. But -

JUSTICE: So then, so then we're left with interpreting the statutes. So it's fair to say, I try to interpret what you said. Tell me if it's accurate, that why does cut the Court's out of the dispute when the pension boards has made a determination in this case. However, you believe the Declaratory Judgment Act use your right to receive not withstanding Section Y.

MR. KELLEY: Yes, Judge.

JUSTICE: Okay.

MR. KELLEY: But, but I think now but I'm thinking about what your talking about. Let's look at this way. If they're saying they have no ability to interpret the statute, you have no ability to interpret a statute.

JUSTICE: Right.

MR. KELLEY: You can't even look at that statute. So going back to the argument whether this Court has jurisdiction. I say you don't have their jurisdiction. I mean, there's no conflict, there's no other case. So it's a circular. I, I don't-- I, I find that Mr. Jennings's opinion is well reasoned in to that-- when you look at the language it was only meant to say, "This is what this board may do, may interpret a

statute." And you can't appeal this. You take them, take that as a direct appeal over to a Court. It did not cut out the Declaratory Judgment Act when going back to a charge just was. What it didn't cut that out. In, if that that in place and said, "This is the -

JUSTICE: Okay.

MR. KELLEY: - route you take."

JUSTICE: So we say the Declaratory Judgment jurisdiction.

Declaratory Judgment proceeds, the Court declares, here's what this means: And that's against the boards determination which prevails because this Statutory scheme puts [inaudible] into the law and the board.

MR. KELLEY: But -

JUSTICE: So havn't you undermined the...

MR. KELLEY: - you, you can't. But, but thus-- the board determines for the agency or the group what that means. They'll make that but there's no direct appeal to that. But it did eliminate the Declaratory Judgment appeal that saying, "This is what the statute means and this must be some evidence, let's open for the judiciary.

JUSTICE: I hear what you are saying. But, but let say that evidence is evitable and the case proceeds through the Court and I get's up here and we say, "This is what statute means and that's contrary to what the board says the statute means. Well, the statute itself that's-- that decision on the board.

MR. KELLEY: But, but I think the Supreme-- the functions like the separation powers, the function that the judiciary interpret the law tramps a -

JUSTICE: But the -

MR. KELLEY: - executive right to interpret the law.

JUSTICE: - but in this keeps getting back because of constitution question, would that be only if it shown that the, the pension board decision is arbitrary or capricious or the vest, vested right.

MR. KELLEY: Let's a pre-- suppose that this Court going to rule that they have some-- that the legislature has-- this is really executive. Legislature granted executive the right to determine what the statutes are. Then, that's what the way that was to be analyzed when the Court has to step in and say, "Wait a minute, you've cut us out of the game." and that's a separation of power-- are you-- which you can then advance on your own. I mean, it's only if you advance that argument that we cut the judiciary out completely that you get to the separation of powers problem if-- because what your saying is the legislature has cut us out. We're going to agree with that and, and you can't do that. What the legislature cannot do is hand to the executive the power to determine what the law is.

JUSTICE: But, but that all maybe that the board gets to decide this issue. Right? I'm guess you should.

MR. KELLEY: Yes, we ...

JUSTICE: So your argument comes down to-- the trial court has jurisdiction over this Declaratory Judgment Action, even though of course this is not your position, even though the trial court's decision maybe the board gets-- the statute gives the board the authority to decide all these issues and your just [inaudible]. But it's not a jurisdiction issue, and you at least least you get in the Court [inaudible].

MR. KELLEY: Yes, Judge. I think at some point in time, those issues of, of would errase and then get to brief, decide the all of the separation of powers. Some like that. But that's not wha we're here on today. We're here on this idea of the 29 plaintiffs. Remember they

weighed on this other arguments, exhaustion, sovereign immunity. We're down to only one thing, where was it-- that they are arguing, no longer at page 6, no longer makes a sovereign respect to the claims that other than Ferrell. So we're down to just-- was the right-- did you have to come straight from the board over to us by appeal. That's what they are arguing now, according to latest briefing. And so the answer to that is no because the Declaratory Judgment Act says, "You would have to exhaust the remedies." We're there but there no remedies there and this Court can see to that point. So, so we're still allowed to be in Court, given the current--

JUSTICE: Let me ask you if I've, if I join the club and the club rule says the annual dues are going to be whatever the board says to this and if you want be a member of this club, that's what your got to pay. Then if they raise the dues not sue them, the Court would toss that out, course you would agree to the deal tha they were going to set the dues and that was that. The Court's not going to get involved. That's just a club. And not what the statute says, "If you want to work for this agency, we're going to give you a pension but the pension whatever this board decides is binding on all the interested parties. How has this any different from us, get involve than a dues at the Country Club.

MR. KELLEY: Well, in some point in time even the dues to the Country Club, argument get into the Court on the Declaratory Judgment as to our rights not to overrule the board as to raising up the dues but what was the-- in this case, I guess just to some appear contact, interpretation of 50 pages, contract between the parties and there were some other language in there that you thought, set a grant on the -

JUSTICE: [inaudible] raise ten perent a year.

MR. KELLEY: Yeah, but, but the grandfather clause because my ancestor was there at the beginning in 1902. So ...

JUSTICE: What I'm asking about in this estoppel thing, if this is not in the statute and I am going to work at this agency and I know our Dean and law to know that they can do whatever they want to as far as attention, how do I then file suit on it?

MR. KELLEY: But again, I don't think that there's any possible bring-- anybody bring a suit against the pension board because they have altered the benefits. That is the benefits went up or down. It's whether or not they can kick you out because now they're saying they're not going to count your ten years because for whatever reason of the-- we don't count you because you are a member of other union. For whatever reason they have not determined what an "employee" means somebody who belong to the union. Let's put that way, we say "woah" to tell the Court. You can't use that definition 'cause the legislature gave us a definition of an employee and it doesn't include an exception that if your a member of the opposing union, you get kicked out. So we will have this somebody arbitrate that dispute. In, in your case and in my case, we can't go to pension board and say Ferrell or anybody else should get higher pension benefits. We're just saying, "You're not using the correct definition of employee. You're not using the correct definition credit at service." and we-- we cannot tell you to raise pension benefits or lower because that's not an interpretation of statute. That is, this one going back to the discretion versus administerial act. Was administerial act which to which to handle discretion. Obeying a law is administerial act for which you have no discretion. You must do it and the Court's have powers, injunctive power. They have Declaratory Judgment power and they have mandamus able power. In this case, we plead for injunctive relief and the first one,

Declaratory Judgment power. One of the things that we didn't do. I guess, the only question, if you came down to a fight, the court will issue a mandamus or the injunctive will go up to the board to interpret it according to the laws. So that's the power that the Court would have later to enforce it's interpretation of the law but going back to your dispute the dispute you described is something that you can't get to and I, and I'm not saying you get to there on my set of facts either. I'm saying that-- but if in that, if in that charter, or whatever we're going to fight over it. If grandfather-- my grandfather and that's an interpretation of that charter, then yes we go back to Court and the Court would interpret the contract like it would in the other fact. I'm at-- my time is up soon.

JUSTICE: Okay.

MR. KELLEY: Thank you, Justices.

JUSTICE: Thank you.

REBUTTAL ARGUMENT OF THOMAS R. PHILLIPS ON BEHALF OF PETITIONER

MR. PHILLIPS: If the parties stipulate that administrative agreement has been exhausted, then there's no right to Declaratory Judgment Act because your remedy from an final Administrative Appeal and from the final an administrative order is an appeal. I label it whether there's an appeal ...

JUSTICE: But, but what is the answer to an argument there's no right for them to win the Declaratory Judgment Action but they still have a right to break of Declaratory Judgment Action to find out that their claims no good.

MR. PHILLIPS: Well, you can look at it three ways. One, if you harmless this two statute passed in the same year, we just say that the legislature didn't mean to say. In one hand, the board makes all the decisions second you can go to court but you know actually, you can get by that and say "Yes you have-- perhaps you have a Declaratory Judgment right, then you've got some notion and it's subject matter jurisdiction of looking to what powers the legislature has reserved for an initial determination by the agency. And let me just call that exclusive jurisdiction. I don't believe you have, to have an-- the-- that exclusive jurisdiction all over it's-- it always kind of lose to define that. But here-- at the time that, that Justice Jennings Indrock wrote this opinon. The leading, the most recent exclusive jurisdiction cases were entertained, and [inaudible] and begnin and in those statutes purier] and the Motor Vehicle Commission Board, you had an express statement that there was exclusive original jurisdiction and the Court's said that may be ease. Justice Jenning said, "Therefore, we're going to look at the statute and see there has words in exclusive jurisdiction and it, it does. Well, since he wrote that opinion while Thomas versus Laung has come out. And that on the, the sheriffs-- the board-- and that's an even more-- it's a shorter statute for it's by far, it's a less for stuff and the Court held you don't have to use the words exclusive jurisdiction just look at what the legislature intended and there was exclusive jurisdiction in that case. So if that's was issue of exclusive jurisdiction it seems to me pretty clear the HMEPS's statute is that and that subject matter jurisdiction. So the Court face with the Declaratory Judgment should say, "We have now-- we've got this [inaudible] the exclusive jurisdiction is within the board and then

once the board makes it call that we're back to where we were. That can only be an appeal if there's a constitutional violations on vested property right. The third way you can look at it is sovereign immunity. That subject matter jurisdiction too. So it can't be waived and if you could look at it the legislature gives this much discretion to a governmental body then they have the sovereign immunity that-- that sovereign immunity exercise in them and the leading case on that is Strayhon versus McLane. I'm not sure when you really analyze it through, it works. But the-- it's a, it's a recent case 2004 in the Austin Court of Appeals but I'm pretty sure some, some notion of exclusive jurisdiction works. And as I say if that we stipulated exhaustion, I think it's-- this become a very easy case. Our brief becomes very complete. You just look at the-- there's been an constitutional violation this and it would.

JJUSTICE: And does nobody see a problem of stipulating exhaustion? I mean, if the purpose of exhaustion is to allow the, the that entity with exclusive jurisdiction make initial call. Does it seem me the parties could by pass that process by the same way to stipulate, we did it.

MR. PHILLIPS: That why I've spent over half an hour among other things. I don't, I don't know if you can. I haven't known exactly how to respond though of this but if it is. If we do see there's, there's exhaustion, the case is easy. If we don't understand it so -- you get same twice it's over.

JUSTICE: But if it, if your agency doesn't have an exhaustion procedure.

MR. PHILLIPS: Well, they did and let me just say you can go on the HMEPS stop or and see it. That much have if you can take judicial notice. I can go outside -

JUSTICE: But if ...

MR. PHILLIPS: - the record and tell you those rules have been mailed every member. It's been on the web since April of 2002. It's spells out to anybody who tell where [inaudible].

JUSTICE: But all purpose of exhaustion is for the board to say, "You know, we've looked at this. What you guys do or don't have credit". There's no question the board has looked at this and said, "You guys don't have credit. Well, not with respect to the-- to this, this 29.

MR. PHILLIPS: [inaudible]-- I mean if we're talking facts there maybe a question because we, we don't know about this March letter that, that we heard reference to that. The first notice we have about the 29 was their petition, the first supplemental petition of July 16th, 2003. And so I think there is a risk of-- there is a serious question.

JUSTICE: Be further questions. Next we call the defense put the argument -

MR. PHILLIPS: With the RJ.

JUSTICE: - for this morning. The Marshall will be [inaudible].

JUSTICE: All right. Oyez, Oyez, Oyez. The Honorable of District Court of Texas now stand adjourned.

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