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Supreme Court of Texas.

City of Dallas, Petitioner/Counter-Respondent,

v.

Kenneth E. Albert, et al., Respondents/Counter-Petitioners.

City of Dallas, Petitioner/Counter-Respondent,

v.

David R. Barber, et al., Respondents/Counter-Petitioners.

City of Dallas, Petitioner/Counter-Respondent,

v.

Anthony Arredondo, et al., Respondents/Counter-Petitioners.

City of Dallas, Petitioner/Counter-Respondent,

v.

Kevin Michael Willis, et al., Respondents/Counter-Petitioners.

Nos. 07-0284; 07-0288

December 17, 2009

Oral Argument

Appearances: Deborah G. Hankinson, Hankinson Levinger LLP, Dallas, TX,
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Respondents-Counter-Petitioners: Kenneth E. Albert, et al. in 07-0284.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice
Harriet O'Neill, Justice Dale Wainwright, Justice David M. Medina,
Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett,
Justice Eva Guzman.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear
argument in the consolidated City of Dallas cases, 07-0284 and 07-0288.

MARSHALL: May it please the Court, Ms. Hankinson will present argument for the Petitioner, the Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF DEBORAH G. HANKINSON ON BEHALF OF THE PETITIONER

ATTORNEY DEBORAH G. HANKINSON: May it please the Court, when this Court requested briefs on the merits in these cases, it asked the City and the Plaintiffs to brief the issues that remain in light of Heinrich. The City's briefs show that, with the exception of the statutory issue remanded by the court of appeals in accordance with this Court's remand orders in similarly postured cases, Heinrich controls the disposition of the remaining issues. The result is that governmental immunity bars the plaintiffs' declaratory judgment claims and against the City and plaintiffs cannot assert an ultra vires claim against the City and has no ultra vires claim against city officials.

These are the issues I would like to discuss with the Court during my allotted time. First with respect to the plaintiffs' declaratory judgment claims against the City of Dallas. Here is the posture of these cases. The City is the only defendant, the only claim remaining before this Court is one that is sought alternatively, a construction of City Ordinance 16084 and its effect on the plaintiffs' employment contracts with the City. There is no challenge to the validity of a city ordinance. Heinrich dictates the governmental immunity bars these claims for the following reasons.

JUSTICE HARRIET O'NEILL: Well, Heinrich didn't involve a challenge to the pension plan language itself; it was more application of the pension language to Heinrich. Right?

ATTORNEY DEBORAH G. HANKINSON: Correct.

JUSTICE HARRIET O'NEILL: And why is that different from here? All they're seeking is a declaration of what this ordinance means. They're not challenging the ordinance itself.

ATTORNEY DEBORAH G. HANKINSON: Your Honor, they are, that's correct, and the point is is that they are challenging the way the City has paid them under what they say is a contract that arose as a result of the ordinance. And under this Court's jurisprudence with respect to declaratory judgment actions, the Court must look at the sub-stance of the claims to determine whether a declaratory judgment action is proper.

JUSTICE HARRIET O'NEILL: But would you agree that it's the exact same situation as Heinrich in terms of the firefighters are seeking a determination of what the statute means. They're not challenging the validity of the statute.

ATTORNEY DEBORAH G. HANKINSON: I agree with that, they are not challenging the validity of that. The Court in its Heinrich analysis on the declaratory judgment aspects began with the well-established principle that under Texas law the Declaratory Judgment Act does not enlarge a trial court's jurisdiction and a litigant's request for declaratory relief does not change a suit's underlying nature. It is merely a procedural device. The second principle that the Court

recognized from well-established Texas law is that immunity applies to suits for both declaratory and injunctive relief, and this is because this Court has previously determined that both declaratory and injunctive relief can interfere with the government's exercise of its discretion.

CHIEF JUSTICE WALLACE B. JEFFERSON: Did we in *Heinrich* foreclose any kind of remedy for plaintiffs in this position? I mean let's say that the -- and there's a little bit of dispute about this, but the ordinance guarantees this sort of structure in pay for the life for these firefighters, and that's what the City, the residents wanted and that's what the ordinance adopted. And then the City simply won't comply with that. Let's just assume that that's the case. What remedy would they ever have if there's no suit against the City to enforce it and if you're saying there's no ultra vires claim?

ATTORNEY DEBORAH G. HANKINSON: Well, Your Honor, there is no ultra vires. In *Heinrich*, the Court held that there is no ultra vires claim against the government itself and against the City.

CHIEF JUSTICE WALLACE B. JEFFERSON: Right. But you're saying even in the future there's no ultra vires claim against any city officials.

ATTORNEY DEBORAH G. HANKINSON: There's no ultra vires claim -- first of all, the city officials aren't here, but there is no ultra vires claim against the city officials because the standard for that is whether they have acted without legal authority. The ordinance which flowed from the referendum is not anything that grants authority. The authority in which the police officers and firefighters are paid is by virtue of the state statute that gives to home rule cities the authority to make appropriations and then the city code and city regulations that deal with how those appropriations are to be made. The appropriation of money has always been discretionary in Texas. What we have here is a challenge to the way the City has appropriated money to pay.

JUSTICE NATHAN L. HECHT: But to explore this a little bit, if the ordinance were very, very clear and said, "This shall be the structure for pay," and whoever writes the checks at the City, I don't know, the city treasurer, there's got to be a person who does that, he just says, "Well, I think that's a bad policy, I'm not going to do it, I'm not going to write the checks." Would there be an action in that case?

ATTORNEY DEBORAH G. HANKINSON: There would be no action the City.

JUSTICE NATHAN L. HECHT: Right.

ATTORNEY DEBORAH G. HANKINSON: If in fact there was something that in the appropriations, the legal authority to make appropriations that curtailed the discretion of the City with respect to that, which is contrary to everything in Texas law about the appropriations process at the city, local and state levels, but presuming that that would be the case, then under *Heinrich* if there really was a situation in which he was acting outside his legal authority by not doing what he was supposed to, then under *Heinrich* the remedy would be prospective injunctive relief, and that's all.

JUSTICE NATHAN L. HECHT: And that would be the case whether he were doing it on his own or whether he had the acquiescence of the council too?

ATTORNEY DEBORAH G. HANKINSON: That's correct.

JUSTICE NATHAN L. HECHT: And maybe you would sue the council or other people, but if it were that clear then you could require it. So what's the difference between that and this?

ATTORNEY DEBORAH G. HANKINSON: The difference between that and this, Your Honor, is that this particular ordinance does not in any way address the authority of the City with respect to how appropriations are made. No legal authority flows from this. And as a result of that, it falls in the category of cases, the long line of cases that this Court has had in which the Court has said that it is not ultra vires for a public official to misinterpret the law, it is not ultra vires for a public official to make a mistake and do something wrong.

JUSTICE HARRIET O'NEILL: Well, let's take the differential out. Let's say the ordinance had just said, "There shall be a raise." Would your answer be the same?

ATTORNEY DEBORAH G. HANKINSON: It would be the same.

JUSTICE HARRIET O'NEILL: Because there's always going to be budgetary discretionary ability?

ATTORNEY DEBORAH G. HANKINSON: Yes, yes. Every governmental entity in Texas has the discretion and the control over appropriations, and there is a state statute with respect to cities that says that, and then you have all of the procedures within the code and the ordinances of the City of Dallas which say how that process is to be undertaken. So your remedy is going to always have to just be the prospective injunctive relief if it really is ultra vires. This is not ultra vires even if there were city officials here, but they are not here. The only thing that's before the Court is the declaratory judgment action.

JUSTICE HARRIET O'NEILL: But how is that different then from Heinrich, because wouldn't those same ap-propriative sort of issues come into play?

ATTORNEY DEBORAH G. HANKINSON: The Heinrich Statute is different. It specifically has in it the legal authority granted to the board to deal with the amounts to be paid. I mean it is the authorizing statute. And what it says in there, it provides the limitations on that, it says they can make adjustments, they just can't reduce. Now clearly that's described in the Court's opinion as being ministerial, a ministerial function in that regard, but the difference between the two schemes is that's the source of the legal authority which is why you can say it is outside the legal authority because no authority was given to reduce. That's different than this scheme, looking at the language of this ordinance now, as well as the other statutory scheme with respect to appropriations.

JUSTICE NATHAN L. HECHT: Now is the with respect to kind of the difference kinds of ordinances that we were talking about, what about the 15 percent in the ordinance?

ATTORNEY DEBORAH G. HANKINSON: It's the same thing, Your Honor.

JUSTICE NATHAN L. HECHT: So if this passed and the City said, "Well, we're just not going to give the 15 percent," there's nothing that can be done about that?

ATTORNEY DEBORAH G. HANKINSON: No, there is something that can be done, Your Honor, because there is in fact an administrative procedure, which we have briefed for the Court, in which that can be raised within the City.

JUSTICE NATHAN L. HECHT: All right, but ultimately if the treasurer said or the city council, "This passed, but we're not going to pay the 15 percent," they are immune from suit in that situation?

ATTORNEY DEBORAH G. HANKINSON: I think they are, Your Honor. I think they have to follow the other procedures that are in place. They are not without a remedy, and I think they have which is why we briefed that for the Court. They have to follow the other procedures that are in place. That's the whole point of immunity, is that the legislature gets to control what the remedies are what the limitations are.

CHIEF JUSTICE WALLACE B. JEFFERSON: Why didn't you waive immunity from suit by filing a counterclaim, and does jurisdiction come and go based on what sorts of pleadings you have filed?

ATTORNEY DEBORAH G. HANKINSON: It does not, Your Honor, and we did not waive jurisdiction with the counterclaim that was filed for several reasons, including going back to the very language of Riata. Riata sets up; the plaintiffs make procedural construct arguments and try to equate this to a lot of procedural mechanisms. I would suggest to the Court that that's not appropriate in a sovereign immunity case and certainly would be inconsistent with what the Court said in Riata. I think that the Court's jurisprudence on sovereign immunity is what addresses the question of what happens under these circumstances. First of all, there is not anything in Reata in which this Court said that by filing a counterclaim there was a waiver of immunity by conduct. It is not in the opinion, it would be incon-sistent with this Court's jurisprudence, which has consistently said that legislative enactment and legislative resolution are the way that immunity is waived. Second of all --

JUSTICE EVA GUZMAN: There's no legal effect for filing that counterclaim and basically becoming a party to that suit? It's of no legal consequences as it relates to immunity, is that right?

ATTORNEY DEBORAH G. HANKINSON: Well, at the time that it was filed -- first of all, there's a question about this counterclaim. The Reata construct with respect to claims made and the extent to which as the Court says, "the sphere" or the boundaries of immunity are altered as a result of it. Immunity does not go away. So if it really was a defensive counterclaim and an offset, then the sphere of immunity, according to the language of the opinion changed, it didn't go away and

there would be an offset with respect to the City's counterclaim. Now, that counterclaim was not defensive and it was not an offset, so it doesn't come within the language. But here's what the Court has said in the opinion which I think is important at page 377. The Court says that when the City of Dallas in that suit filed their claim, "It encompassed a decision to leave its sphere of immunity from suit for claims against it which are germane to, connected with, and properly defensive to the claims the City asserts." But then the Court said this, "The City continues to have immunity from affirmative damage claims against it for monetary relief exceeding amounts necessary to offset the City's claims." The immunity did not go away. It's still there outside the sphere. Then the Court went on to say, "Absent the legislature's waiver of the City's immunity from suit however, the trial court did not acquire jurisdiction over a claim for damages against the City in excess of damages sufficient to offset the City's recovery." Immunity did not go away. Immunity does not come and go and it didn't come and go there. If the counterclaim, while it was pending, did fall within the category that's specified in Reata, which we don't think it did, then for a while there was a sphere within which there was not immunity for offset purposes, and that's it. But the language of the opinion controls that. Now we are left with the circumstance in which there is nothing to offset. It's gone. And because the opinion says that immunity continued and that immunity exists outside the extent of the offset, if we're down to zero, then immunity cloaks the whole case again.

JUSTICE DALE WAINWRIGHT: It sounds like your argument is that a governmental entity can affect or de-terminate the contours of the sphere of immunity by its litigation actions?

ATTORNEY DEBORAH G. HANKINSON: I think that was the language that this Court used in its opinion.

JUSTICE DALE WAINWRIGHT: That's how you interpret Reata?

ATTORNEY DEBORAH G. HANKINSON: Yes, sir.

JUSTICE NATHAN L. HECHT: Let me ask you about House Bill 1473 in 2007 that waived immunity for these kinds of cases, not this case.

ATTORNEY DEBORAH G. HANKINSON: Right.

JUSTICE NATHAN L. HECHT: But doesn't that indicate legislative intent that the government should not be immune from these kinds of lawsuits?

ATTORNEY DEBORAH G. HANKINSON: No, Your Honor, what it -- I think that that statute, that's 311.034 -- it's 180.005 now?

JUSTICE NATHAN L. HECHT: 006, yes.

ATTORNEY DEBORAH G. HANKINSON: Okay, 006. No, Your Honor, this was a reaction -- this came after the Williams decision by this Court, and it does indicate, it is exactly what the legislature does when it decides to waive immunity. Sometimes it just says, "We waive," and other times it does like here and set parameters and limitations which it does. But what it reflects is that because there was no waiver of immunity for any of these kinds of claims before this was passed, what the Court did

in this particular provision in Section G was preserve the immunity that already existed for the City of Dallas with respect to the claims the plaintiffs are making here. So this evidence is the intent on the part of the legislature to leave the status quo, which means that these claims are subject to governmental immunity, and the legislature indicated its clear intent that there was to be no waiver of immunity with respect to these claims.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Ms. Hankinson. The Court is now ready to hear argument from the Respondents.

MARSHALL: May it please the Court, Mr. McGarry and Mr. Parsley will present argument for the Respondents. Mr. McGarry will open with the first eight minutes.

ORAL ARGUMENT OF CHARLES W. MCGARRY ON BEHALF OF THE RESPONDENT

ATTORNEY CHARLES W. MCGARRY: Thank you. May it please the Court, I will be addressing our contention that the Doctrine of Governmental Immunity cannot apply to a lawsuit that's seeking to enforce an ordinance enacted by voter referendum. Mr. Parsley will be addressing the remaining issues regarding the various waivers of immunity that might also apply to this case. The Dallas City Charter expressly provides for the adoption of ordinances by voter referendum and also expressly provides that any ordinance passed by a vote of the people cannot be repealed or amended except by another vote of the people. This case at its very core is a case seeking to enforce an ordinance passed by voter referendum, and also to invalidate subsequent pay resolutions adopted by the City Council to the extent that they are inconsistent with the requirements of that referendum.

JUSTICE EVA GUZMAN: Does that make it a suit for just money damages though ultimately?

ATTORNEY CHARLES W. MCGARRY: No, Your Honor, one distinction that we're going to be asking this Court to recognize, which the Court has already recognized in another case, is that not all claims for money are claims for money damages, that there's a difference between seeking indeterminate money damages under a common law theory of tort or contract, and seeking a sum of money that has been specifically ordered by the legislature. And in this case, the legislature that passed the policy regarding payment in this case is the citizen legislature, the electorate acting as the sovereign in this case. And I think that makes this case fall outside of any case that this Court has ever addressed before because we're dealing with a case in which the City is essentially asserting immunity against the sovereign.

CHIEF JUSTICE WALLACE B. JEFFERSON: How much money are we talking about here?

ATTORNEY CHARLES W. MCGARRY: Really, I know there has been media reports about a large sum of money. There is no allegation of a specific sum of money and there is no evidence in this case of a specific sum of money.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, roughly. I mean we're talking billions are in the briefs here. Is that right, at a least a billion?

ATTORNEY CHARLES W. MCGARRY: I would say it is a large sum of money, but honestly there is no evidence of it, so it would be purely speculation. And also, I would point out that obviously this is an interlocutory appeal, it does not address the merits of the case.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, let's assume it's a billion dollars that is at issue here, and the City would, if we were to rule in that way, would have to write a check for a billion dollars. What would happen if the City just doesn't have the money? What if there's a budgetary crisis, if you know there's a natural disaster and the City has to react to that? I mean, what--how are the current officials supposed to handle that sort of thing without some kind of discretion not to pay if public policy requires something different?

ATTORNEY CHARLES W. MCGARRY: Well, let me address that this way. Number one, the policy decision, and I'm getting kind of ahead of myself in my argument, but we're asking the Court to adopt a black letter rule which says that government immunity does simply not apply to a suit seeking payment from a city where the city's own legislature has ordered the payment. The policy decision as to whether and how to spend money has been made by the legislature because in this case, unique among other cases the Court has considered, the legislature is the electorate.

JUSTICE HARRIET O'NEILL: But there's nothing about appropriative authority in the ordinance. So are you saying that the ordinance usurped the City's appropriative authority to appropriate money?

ATTORNEY CHARLES W. MCGARRY: No. Well, it's not really usurp; it is the City's appropriative authority. The electorate in this case has the power to make that appropriation and it did. It made that policy decision that the City should be required to make these payment to its police officers and firefighters in a specific proportion. Now I would also point out that one of the public policies supporting a grant of immunity is the notion that one legislature for a government body should not be bound by the decisions of a prior legislature, but a referendum is unique in that it is the specific purpose of a referendum to bind subsequent legislatures. That's the specific requirement of the Charter, that the city council cannot just thereafter amend any ordinance that's been passed by a referendum. They don't have that power.

JUSTICE HARRIET O'NEILL: Your argument presumes that this ordinance is crystal clear in terms of the pay differentials, and I think you'd have to concede that it's really not crystal clear.

ATTORNEY CHARLES W. MCGARRY: Well, that's the merits of the case, and we're conceding that even if the Court says there's no immunity in this case, that the City might well have zero liability.

JUSTICE HARRIET O'NEILL: Well, let me just get back to my question. Presuming the ordinance is unclear in that regard, shouldn't we afford

a certain amount of discretion to the appropriative body as to what it requires?

ATTORNEY CHARLES W. MCGARRY: No, and I'll say this because what you're again assuming is that the council is the appropriative body and not the citizens. What you're dealing with here is a normal case of statutory construction. You have to find the intent of the legislature, but you have to keep in mind that the legislature whose intent you are required to enforce is the citizen legislature and not the city council. It's their intent that governs this case.

JUSTICE PAUL W. GREEN: What if you have a [inaudible]-- over here, Counsel.

ATTORNEY CHARLES W. MCGARRY: Excuse me.

JUSTICE PAUL W. GREEN: What if you have a school district that forecasts, the voters forecast that there is going to be this huge growth in school children, and so we've got to have a referendum for a billion dollar bond, and so the people vote that, they vote the bond.

ATTORNEY CHARLES W. MCGARRY: And they turn out to be wrong?

JUSTICE PAUL W. GREEN: They turn out to be wrong.

ATTORNEY CHARLES W. MCGARRY: It requires another referendum. The people have to admit their mistake.

JUSTICE PAUL W. GREEN: So in the absence of another referendum, they would be compelled in your opinion to build the schools that will be empty?

ATTORNEY CHARLES W. MCGARRY: That's the clear requirement of the law, the city charter says that in this case, it says that the city council does not have the power to amend or modify or repeal a law passed by the voters. They do not have that power. Now getting back on track and we've covered a couple of my points here, but the rule we're asking, there's four compelling reasons to adopt this black letter rule. Number one, it's consistent with all the policies that have ever been stated in support of immunity. Number two, cases involving legislative entitlement to payment do not properly fit in the framework of an ultra vires lawsuit. Number three, that to hold otherwise would construe legislation requiring the entitlement to payment to be ineffective. You would be reading the statute to be a nullity if you were to say that the City was free to disregard it.

JUSTICE NATHAN L. HECHT: But that's what immunity does.

ATTORNEY CHARLES W. MCGARRY: Yes, and we're saying here though that the electorate is the sovereign. The Court's faced with Catch 22. To apply immunity to this case to any degree, even as a bar of retroactive relief versus prospective relief, you're actually undermining the sovereign; you're not supporting the sovereign because in this case the people are the sovereign.

JUSTICE NATHAN L. HECHT: But I mean one of the enlightened reasons for immunity is to protect the government from improvident decisions, and

the populace is no more immune from improvident decisions than their elected representatives.

ATTORNEY CHARLES W. MCGARRY: Yes, but you have to understand too that ultimately it is the people who always pay for improvident decisions, and in this case they have no one to blame but themselves, they can't blame the city council, they can't vote them out, it wouldn't make any difference. The City has always had the option of calling another referendum.

JUSTICE DAVID M. MEDINA: Well, let's backtrack there. I want to go back to Justice Green's scenario. This might not be exactly on point with your situation, but you said we can't vote them out. Why wouldn't that be a remedy?

ATTORNEY CHARLES W. MCGARRY: Excuse me?

JUSTICE DAVID M. MEDINA: You said that they cannot vote them out. Why isn't that a remedy decision?

ATTORNEY CHARLES W. MCGARRY: Well, but it wouldn't provide a remedy.

JUSTICE DAVID M. MEDINA: If there's no money to build schools after a referendum was passed or in this situation no money to follow this legislation or this ordinance, why isn't the remedy to get someone else to follow it, vote the people out of office?

ATTORNEY CHARLES W. MCGARRY: Well, it would be simply to enforce the law. I mean that's what we're asking the Court to do in essence is, please, just enforce the law, and if that requires the City to pass a bond or to borrow money or to do whatever it has to do to pay what the law requires, that's simply all we're asking the Court to do is compel a specific performance of the referendum. That's all we're asking. We're not asking for indeterminate money damages, we're asking simply for what the law requires after the trial court and any reviewing courts determine exactly what it is that the law does require in this case.

JUSTICE DAVID M. MEDINA: And without consideration to the potential consequence?

ATTORNEY CHARLES W. MCGARRY: Excuse me?

JUSTICE DAVID M. MEDINA: And without consideration of the potential consequence?

ATTORNEY CHARLES W. MCGARRY: Yeah, because you're looking at the merits in this case, and again that's not before the Court. That's going to be another issue that will come up on a second round as to what did in fact the referendum require this proportion to be kept indefinitely. That's a separate issue.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions? Thank you, Counsel.

ATTORNEY CHARLES W. MCGARRY: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Mr. Parsley.

ATTORNEY E. LEE PARSLEY: Good morning. May it please the Court, I am, as Mr. McGarry said, going to address the waiver issues, but I'm going to take a brief aside from the waiver issues to talk about Heinrich just for a moment. This City has argued to you I believe that we could not possibly have an ultra vires claim here under any circumstances any way. The Court must I think in light of that argument look to the City's live pleading at the time that this appeal happened, which is the Albert Clerk's Record starting on page 69 and specifically page 84 and a few pages after that, where the City plainly pleads, plainly pleads that if their pay of these firefighters has not complied with the ordinance, then their resolutions paying the firefighters over the years are quote, "ultra vires, illegal and void." The City pleads that they have committed ultra vires acts. Now the question is how does Heinrich play in particularly if the City -- Heinrich says that you must sue officials for ultra vires acts because a City, a government cannot act ultra vires. Well, what happens if the government has admitted that it acted ultra vires, does Heinrich apply at all? But clearly we have a claim for ultra vires acts I believe under the City's own pleadings in this case. As to waiver, I would like to talk about that through the lens of history, if I may.

JUSTICE HARRIET O'NEILL: The problem, of course, with Heinrich and the ultra vires declaratory judgment construct is, you don't know whether jurisdiction exists until the case is over.

ATTORNEY E. LEE PARSLEY: That is a problem with Heinrich, and I think that if I talk about--if my conversation with you a bit on waiver I think may address that a bit also. Here's the way I think the Court needs to look at waiver and needs to look at immunity more broadly and affects Heinrich, and that is the context of history. The United States government is a sovereign government and it enjoys immunity from suit because of its sovereignty. The State of Texas is a sovereign government, except to the extent it's given it some sovereignty to the United States government under the Constitution. Sovereignty implicates immunity from suit because the concept is that by being sovereign, you don't have to answer to anyone for anything. That is sovereignty as Justice Jefferson has noted in one of his opinions quoted in the Federalist papers. Sovereignty means you don't answer to anyone. So the State doesn't have to answer to its citizens in court, the State doesn't even have to go to court, it just has to show up and say, "We're the state, we are sovereign, we are not required to answer to anyone," it's inherent in sovereignty. A municipality, as the United States Supreme Court said in *Alden vs. Maine* and this Court has recognized forever, is not sovereign in and of itself. It is not a sovereign government, it is partly private and it is partly public. Now this Court has extended immunity from suit to cities, and it has done so for prudential reasons, for practical reasons. It has said for practical reasons a city is like the state and ought to be able to control its own budget. But a city's immunity from suit under this Court's jurisprudence is prudential immunity from suit, practical immunity from suit, and if there's practical immunity from suit, there is practical waiver of immunity from suit. The question is because it's not sovereign immunity, you have said over and over it's governmental immunity and that's the key difference between the two. It's the difference between immunity that arises because of sovereignty and

immunity that has been granted by the common law for prudential reasons.

JUSTICE DALE WAINWRIGHT: And I take it you base your reasoning in this regard on the City of Galveston vs. State of Texas, where we said the City had immunity?

ATTORNEY E. LEE PARSLEY: The City of Galveston, as Justice Brister said in that case, immunity derives from the common law not through the state. That's exactly right, and you of course joined in Justice Willett's dissent on that and noting correctly, I believe Justice Willett did, that sovereignty gives rise to immunity from suit. So that's right, Galveston, if read that way, confirms exactly what I'm saying, the difference between sovereign immunity and governmental immunity is the difference between sovereignty and being partly public, partly private like a municipality, yes.

JUSTICE HARRIET O'NEILL: Well, if practicality is the touchstone, what could be more practical than trying to come up with a budget in the appropriation process?

ATTORNEY E. LEE PARSLEY: Nothing.

JUSTICE HARRIET O'NEILL: Isn't that quintessentially the immunity you're talking about?

ATTORNEY E. LEE PARSLEY: Absolutely, that's a very practical consideration, but also practically speaking is it means that you don't have to inextricably tie governmental immunity to subject matter jurisdiction, as sovereign immunity might be tied inextricably to subject matter jurisdiction. You don't have to, so subject matter jurisdiction is not the problem it is for government immunity that it is for sovereign immunity. And the second thing it tells you is that practical considerations ought to be considered in waiver. When the City comes to court on purpose, joins the case and litigates for nine years before telling a court, "By the way, you don't have control over me." That is we believe an example of practical waiver. It is accessing the state's court system for its own purposes until it's tired of accessing the state's court system for its own purposes, in which case it says, "You can't hold me any longer." It is accepting the benefits of the bargain potentially from these firefighters. They performed during the period of time that this ordinance was in place and they were supposed to be paid a certain amount of money. They have fully performed their obligations, and this Court has noted that performance may be a waiver by conduct. It is also a waiver by conduct as we know, just the filing of the counterclaim is a waiver by conduct. This Court has so held, this Court has held in the Anderson Clayton case that the state can waive immunity, not just a lower authority, but the state can waive immunity by litigating.

JUSTICE HARRIET O'NEILL: Even if that were the case, would Reata still apply to the extent that they would only be in the suit for a limited purpose?

ATTORNEY E. LEE PARSLEY: I think that the Court really needs to think about whether that is good public policy to say that immunity can be partly here and partly not, jurisdiction is partly here and partly not.

It's a little bit like being pregnant, either a court has jurisdiction or it doesn't, and that's what immunity from suit contemplates is jurisdiction. Either it has jurisdiction --

JUSTICE PHIL JOHNSON: Well, I thought you just got through saying that it's prudential in regard to govern-mental immunity and there's a difference between the City waiving and the State waiving?

ATTORNEY E. LEE PARSLEY: There is.

JUSTICE PHIL JOHNSON: We don't allow the City to waive, do we?

ATTORNEY E. LEE PARSLEY: I think the City can waive. I think for prudential reasons the City can waive. Whether the State can waive --

JUSTICE PHIL JOHNSON: In Reata we said it gets outside its sphere of immunity, so basically I think opposing counsel said we kind of altered the parameters of the immunity, but there's a problem with the City going out and in, I can see that. But why do we not do as opposing counsel said, and we just allow them a certain amount of nonimmunity when they go into it? It's prudential, you just got through saying it's prudential and it seems like that would be a very prudential decision.

ATTORNEY E. LEE PARSLEY: Well, it is. If it's a prudential decision you can do many things, but I still think that you must look at it through the lens of history. You must understand I think that sovereign immunity can be a, is a jurisdictional concept because the sovereign doesn't have to answer to anyone. But the City does have to answer to someone and the City --

JUSTICE PHIL JOHNSON: The City has governmental immunity, you're making the distinction?

ATTORNEY E. LEE PARSLEY: That's right. So they are there asserting their governmental immunity nine years after that the fact, having litigated a counterclaim for nine years. And that counterclaim, by the way, specifically it does exactly what they complain about allegedly that we do, which by the way is not true. We have a breach of contract action and a declaratory judgment action. They had a straight up breach of contract, I mean straight up declaratory judgment action by which they sought to recover damages. They say, "Declare that the ordinance doesn't apply, but if it does apply, then we've overpaid these firefighters in some circumstances and declare that we're entitled to recovery money on the Declaratory Judgment Act and attorney fees."

JUSTICE PAUL W. GREEN: Okay, so what I understand that you're saying then is if they had not done this for nine years, then you wouldn't be making this waiver argument and that there would be immunity?

ATTORNEY E. LEE PARSLEY: I'm saying that if they had appeared in Court when the suit started and said, "We assert our governmental immunity from suit," that I believe the Court would be correct to say, "Yes, you have im-munity from suit."

JUSTICE PAUL W. GREEN: Well, for practical reasons then, the prudential argument then, some officials within the city government made the decision to engage in this case --

ATTORNEY E. LEE PARSLEY: Yes.

JUSTICE PAUL W. GREEN: -- and you say that that, which could have enormous billion-dollar ramifications, and you say that that's prudentially is something that should be taken into account?

ATTORNEY E. LEE PARSLEY: That's correct. I'm saying it should be taken into account, and in a more specific answer to your question, the Charter, Chapter 7, Section 3 says, "The city attorney on his own initiative can appear in any litigation involving the City and can institute such legal action as may be necessary or desirable on behalf of the City." The City Attorney clearly had the right to do what he did.

JUSTICE PAUL W. GREEN: Well, but why would it be prudential to look at that decision that was made nine years previous and say, "Well, maybe that wasn't such a smart decision to make."

ATTORNEY E. LEE PARSLEY: Well --

JUSTICE PAUL W. GREEN: And we can't allow that prudentially to affect the City's immunity for such a large ramification?

ATTORNEY E. LEE PARSLEY: I think that is judging the substance of the case, which is not before you right now. The question I think that is before you right now is can a city waive its sovereign immunity and by its actions? I believe that's the question that's squarely before you.

JUSTICE HARRIET O'NEILL: Well, let me -- I mean in the city attorney's defense at the time the counterclaim was filed, immunity was waived under Tooke -- I mean before Tooke, pre-Tooke, sue and be sued.

ATTORNEY E. LEE PARSLEY: The most direct answer this Court could make today to this case would be to say that Tooke was wrongly decided and that cities have never enjoyed immunity from suit. I believe --

JUSTICE DALE WAINWRIGHT: What's your best argument, Counsel?

ATTORNEY E. LEE PARSLEY: That is the bottom line argument, that is historically cities -- and we have briefed it fully -- cities historically do not enjoy immunity from suit, but I'm willing to accept that this Court has given them immunity from suit to some extent. But I'm saying it's been done by a prudential doctrine and waiver is also a pru-dential doctrine, and if there's any case ever appropriate for finding waiver of immunity, if there's ever any case that's ever appropriate this is it. They litigated for nine years, they asserted counterclaims, they moved for summary judgment. They had a trial on their summary judgment, they lost. They appealed, they accessed the court system there in the appellate court system, if there's ever an instance where the Court ought to say, "All this activity amounts to a waiver of your immunity and you must litigate like anyone else," this is the case to say that.

JUSTICE EVA GUZMAN: It's a fact that we are dealing with nine years? What about if they had only been in this a year, does that make a

difference? I mean should we really look at the time that it takes given the process in the court system?

ATTORNEY E. LEE PARSLEY: You have to look at something. You have to look at the whole group of facts here, as I said.

JUSTICE EVA GUZMAN: So if they had only been in there a year, they wouldn't have waived immunity?

ATTORNEY E. LEE PARSLEY: I don't want to say one way or the other. You do have to look at the entire picture of facts. There's nine years of litigation in this case, there's accepting the benefits from the firefighters, there's filing a counterclaim and pursuing the counterclaim. One last --

JUSTICE DAVID M. MEDINA: Maybe we look at it the same way you do a jurisdiction issue. If someone comes into the Court and doesn't file a plea to the jurisdiction, access to the court and its resources maybe should be on the same level.

ATTORNEY E. LEE PARSLEY: And Justice Brister has argued exactly that, and I know he's no longer here, but he's argued that jurisdiction shouldn't be inextricably tied to jurisdiction. It has concepts that are like personal jurisdiction and waiver can apply to personal jurisdiction, as you've pointed out and as the U.S. Supreme Court pointed out in the Lapidus case, even a sovereign can waive its jurisdiction. Under the 11th Amendment the State of Texas can waive its jurisdiction by accessing the court.

JUSTICE DALE WAINWRIGHT: Counsel, I think it's useful to look at the history of immunity and the state's sovereignty and the federal government's sovereignty. Concurrent with that, this Court has been very hesitant to determine, announce waivers of immunity. The argument you're making and the arguments we've heard about the fairness or inequity of the prudential considerations, the voter referendum, the City officials following or not following the ordinance, raise all kinds of policy and policy-balancing considerations, the kinds of considerations that's hard to get into for this institution in a lawsuit versus a legislature getting into with hearings across the state and debate and being able to ask questions outside of the record, so to speak, which informs why we've been so hesitant to find waivers of immunity or recognize new waivers, and the standard is clear and unambiguous waiver by the legislature, language that waives it. Why isn't that a good answer in this case?

ATTORNEY E. LEE PARSLEY: Well, because the --

JUSTICE DALE WAINWRIGHT: And if we start down that road, waivers, finding waivers, where does it take us and where does it end?

ATTORNEY E. LEE PARSLEY: Your question presumes that the City did not make a policy decision when it joined the litigation. It did make policy decisions; it's made policy decisions all along. Your question presumes that the only policy decision is the one that's made at the legislative level when you make an appropriation or something like that, but it's possible to make decisions every day as a city council that are policy decisions, and the decisions this City Council made was

to participate in litigation, to not assert their immunity. They've made that decision, and there's nothing wrong with conceding that that too is a policy decision and that too is a decision that this Court should respect as a decision that the government has made as its legislature. And as Mr. McGarry said, there is a policy decision made by the voters in this case that makes this also a unique case and also a reason that this should be treated somewhat differently than the regular case.

JUSTICE DALE WAINWRIGHT: Does your argument lead to the conclusion that every subdivision of the state, every governmental entity can then waive immunity --

ATTORNEY E. LEE PARSLEY: I believe that the Court can --

JUSTICE DALE WAINWRIGHT: -- by taking appropriate actions, without a legislative enactment that's clear and unambiguous?

ATTORNEY E. LEE PARSLEY: I believe that the way the Court would have to handle that, cities are in their own area because the jurisprudence has developed for years that they are partly public and partly private, they're partly governmental and partly private. So cities are in one spot. A county, history tells us a county is a subdivision of the state and because it is, because a county is formed by the state for the purpose of governing its population, that a county enjoys different immunity rules than a city. Navigation districts, there are many, many districts, that I think that the appropriate thing to do is to look at the Fifth Circuit's decisions, which has a six-part test in the Fifth Circuit about determining whether something is an agency of the state. It includes the concept of whether sue and be sued; it includes the concept of whether they derive their own money from the people or whether they get it from the state. But the Fifth Circuit has a six-part test that I think is a good test potentially that this Court could look at to determine. But for purposes of our case only, our case only, the City, municipalities have always been regarded differently from the sovereign; they have both a private aspect and a public aspect. They are private like a regular corporation in the sense that a group of citizens come together and form a municipality. In that respect they are like General Electric and no one would ever think General Electric is immune from suit.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The Court will hear rebuttal.

REBUTTAL ARGUMENT OF DEBORAH G. HANKINSON ON BEHALF OF PETITIONER

ATTORNEY DEBORAH G. HANKINSON: First, no new law is necessary to deal with referendums. The City of Galveston opinion that the Court has been discussing with counsel certainly answers the arguments that both opposing counsel have raised. First, with respect to this idea of something prudential with respect to cities, as City of Galveston says, which is correct, that home rule cities, like in this case the City of Dallas, derive their powers from the Texas Constitution not the legislature. It is the power of the people that has given home rule cities its powers in the Constitution. It's no different; the Court has not treated governmental immunity and sovereign immunity differently with respect to cities for that reason, not since 1847 when

it first recognized immunity on the part of cities. Second of all, as a result of that, the argument that referendums should be different because it's the people speaking is exactly what was at issue in City of Galveston when the State of Texas tried to sue the City of Galveston. And as the Court said at page 473, "There are difficulties with the logic that cities cannot invoke immunity against the state because they derive their immunity from it. Both derive, meaning the city and the state, their authority from the people. If immunity cannot logically be invoked against one from whom it is derived, it is hard to see how the state has been invoking it against Texas citizens for more than a century." That bridge has already been crossed. Opposing counsel asked --

JUSTICE NATHAN L. HECHT: Of course the state is not immune from suit to enforce Constitutional rights, why isn't this, you can't ever change a referendum sort of a like a Constitutional right in the context of a city?

ATTORNEY DEBORAH G. HANKINSON: Well, nobody has changed the referendum. I mean I understand the referendum power and this Court has dealt with that before and has confirmed that principle, but no one has changed the referendum. There are remedies if they don't believe that the City is doing what it's supposed to do in the appropriations process vis-a-vis the remedy. On an individual basis there is the administrative grievance process for individual police officers and firefighters to complain about their pay. On another level, at the core of immunity law in Texas, go to the Texas legislature if there is a problem and get immunity so that you can file the appropriate claims. Here the Texas legislature said no. That's the answer. This Court has never said that anyone can waive immunity but the legislature by enactment or resolution. They said no here. So to say there's no remedy in the face of a referendum is not correct. There are remedies available both to individuals and both in a larger, at a larger level. This case on the declaratory judgment action that is before the Court is governed by Heinrich. There is no challenge to the validity of the ordinance, and second of all, this Court said in Heinrich that private parties cannot circumvent the state's sovereign immunity from suit by characterizing a suit for money damages as a declaratory judgment action. That is exactly what this dec action is, that is exactly what it is.

JUSTICE HARRIET O'NEILL: The court of appeals seemed to say that by the plain language of the Declaratory Judgments Act you can get a declaration, you just can't collect damages on it.

ATTORNEY DEBORAH G. HANKINSON: You cannot do that, and it based its decision on Leeper. Leeper is a 1994 case and there have been actions by the legislature since then which say that there is no immunity for the construction of a statute under the law. And if you look at Section 311.034 of the Government Code there is a provision that has been in there since 2005 which says, "In a statute the use of 'person,' as defined by Section 311.005 to include governmental entities, does not indicate legislative intent to waive sovereign immunity unless the context of the statute indicates no other reasonable construction." So there is no declaratory -- this Court was correct in Heinrich when it said, "Municipalities must be made parties if there's a challenge to the validity of an ordinance," and based on the Taylor decision said

that there was that waiver under the dec action. That is the only waiver that exists under the dec action, there is no such claim in this lawsuit against the City of Dallas before this Court.

JUSTICE DALE WAINWRIGHT: Address the City's pleadings, the City pleading reference to ultra vires actions.

ATTORNEY DEBORAH G. HANKINSON: I disagree that the pleading says that.

JUSTICE DALE WAINWRIGHT: That it says, that is uses the term "ultra vires"?

ATTORNEY DEBORAH G. HANKINSON: No, not that it says "ultra vires," but the way it has been interpreted to the Court. And I don't have the pleading in front of me. Second of all, it was part of that counterclaim which has been gone for quite a while. That's where it's in a pleading. But it was also said in an "if" language and in the context of the counterclaim, so I believe, my view is that's it's been taken out of context.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Ms. Hankinson. The cause is submitted -- and both causes are submitted and the Court will take a brief recess.

[End of proceedings.]

City of Dallas, Petitioner/Counter-Respondent, v. Kenneth E. Albert, et al., Respondents/Counter-Petitioners. City of Dallas, Petitioner/Counter-Respondent, v. David R. Barber, et al., Respondents/Counter-Petitioners. City of Dallas, Petitioner/Counter-Respondent, v. Anthony Arredondo, et al., Respondents/Counter-Petitioners. City of Dallas, Petitioner/Counter-Respondent, v. Kevin Michael Willis, et al.,
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