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Supreme Court of Texas
Carroll G. Robinson, Bruce R. Hotze, and Jeffrey N. Daily, Petitioners,
v.
Bill White, Mayor; City of Houston; Houston City Council, et al.,
Respondents.
No. 08-0658
November 19, 2009

Oral Argument

Appearances:Andy Taylor, Andy Taylor & Associates, Houston, TX, for petitioners.

Scott J. Atlas, Weil, Gotshal & Manges LLP, Houston, TX, for respondents.

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 did not participate.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in 08-0658, Carroll Robinson and others vs. Mayor Bill White and others.

MARSHALL: May it please the Court, Mr. Taylor will present arguments for the petitioners. Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF ANDY TAYLOR ON BEHALF OF THE PETITIONER

ATTORNEY ANDY TAYLOR: Mr. Chief Justice, and may it please the Court, there are two issues that we would like to discuss this morning. As Petitioners the first is standing and the second is the propriety of the trial court's ruling on the merits, that these two city charter propositions are consistent, valid and binding on the City of Houston.

As to standing, my three clients are not alone, they represent over 242,000 folks in Houston that voted for the passage of Proposition 2. The purpose of Proposition 2 was to try to put a hold on runaway city spending. It has to do with trying to keep down budgets and require voter approval if they want to exceed certain limits that are defined in the Propo-sition. What happened is my three clients in particular were petition organizers and signers and campaigners, and actually got Proposition 2 on the ballot. Over 30,000 signatures were procured to get it on the ballot under the Code, and then that Proposition passed by a majority vote of over 50 percent. This --

JUSTICE DAVID M. MEDINA: Mr. Taylor, does there need to be a unique injury for you to be here today?

ATTORNEY ANDY TAYLOR: I think there is a unique injury --

JUSTICE DAVID M. MEDINA: What is that?

ATTORNEY ANDY TAYLOR: We have a right as petition organizers and also voters and campaigners to see that our vote is not nullified in a contemporaneous enforcement of the law once it's passed. Let me --

JUSTICE DAVID M. MEDINA: How is that any different from someone who merely votes for that proposition, that the fact that they invested time and money have a particular interest?

ATTORNEY ANDY TAYLOR: I think it heightens their interest. I think that these particular individuals, the Petitioners, have spent more time and money than the typical voter, but I wanted to make two points in regard to your question. The first is the Coleman case, United States Supreme Court 1939, which says that voting is enough to give you a justiciable interest and a distinct injury if your vote is nullified. And the Rains [Ph.] case, which was many years later, 1997, limits that holding, but the limitation doesn't hurt our case. Let me explain what's going on in the Coleman case. We had 20 Kansas senators who voted no when a federal constitutional amendment was being brought to each state's attention as to whether or not they were going to ratify a certain amendment. Because there were 40 Kansas senators we had a deadlock, a 20/20 vote was going to mean that the ratification didn't occur for the State of Kansas, but what happened was, just like in Texas, the Lieutenant Governor, who is a member of the Executive Branch not the Legislative Branch, he broke the tie. And so the State of Kansas was actually upholding the ratification. Well, the senators sued and the U.S. Supreme Court said in Coleman that they had, those senators who voted for no on the particular ratification question, they had a justiciable interest in making sure that their vote was not contempora-neously nullified. Now the Rains case, which limits it somewhat, doesn't affect our case because Rains in 1997, the U.S. Supreme Court in limiting Coleman just said, “Look, if you have just a handful of congressmen and they vote against a presidential line item veto, and they lost the popular vote in the Congress and the thing passes, they don't have a justiciable interest now to fight because their vote was given full force and effect. They lost the battle politically.” We won the battle politically. Now the second point I wanted to make is the Brown case, Brown v. Todd, this court's decision which I think is responsive to your question. In Brown v. Todd, I think the key distinction between that case and this case is that we were

talking about two independent separate acts by two separate branches of municipal government thirteen years apart.

JUSTICE HARRIET O'NEILL: But we were also talking about the difference between the result of an election and a challenge to the process, and I'm unclear a little bit as to what your challenge, you're basing your standing challenge on.

ATTORNEY ANDY TAYLOR: Yes. If you create the two buckets of process and results, I think that what that misses is that in the Brown v. Todd case, we were talking about trying to stop future results, not the result of the election that was contemporaneous with the election process, but future results. No less than four times did this court say in that case, “What we're saying is that just because you vote doesn't give you a permanent standing of cart blanche to complain about subsequent change.”

JUSTICE HARRIET O'NEILL: But let me just make clear, I understand your position. You are claiming standing as having a justiciable interest in the result of the election. You're not basing your argument on process.

ATTORNEY ANDY TAYLOR: I think that's right. If you have to pick and choose between those buckets, cate-gories, it I think fairly could be ruled, looked at as a result rather than process, but I don't think that that carries the day because the difference between Brown v. Todd on the one hand --

JUSTICE HARRIET O'NEILL: No, I understand your argument there, I didn't see an argument in your briefing that this was a challenge to process, and I wanted to make sure you're not raising that point, that somehow the poison pill provision was a process oriented sort of challenge. That's not where you're going?

ATTORNEY ANDY TAYLOR: That is exactly correct, Your Honor.

JUSTICE HARRIET O'NEILL: You're saying, “We've got standing to challenge the results of the election.”

ATTORNEY ANDY TAYLOR: Right. And it's only --

JUSTICE DAVID M. MEDINA: Go ahead.

ATTORNEY ANDY TAYLOR: It's only because it's contemporaneous. I wouldn't be making this argument if it happened 20 years later and the Mayor, by some sort of an executive order had changed the amendment that had been passed, that's a different problem. But here I think the way to articulate it is that if we have a justiciable interest in making sure that the process of the election properly puts the proposition before the voters, it also must be true that if it passes, that those individuals have a justiciable interest in making sure that the government respects the vote.

JUSTICE DAVID M. MEDINA: Let me ask you again, I think you said that any of these 242,000 voters would have standing because they voted for the proposition and it passes, is that correct?

ATTORNEY ANDY TAYLOR: We did make that argument.

JUSTICE DAVID M. MEDINA: What if one of those voters took a position that was different from yours? Would they have standing to come in here and contest that?

ATTORNEY ANDY TAYLOR: I think so, because I think the substantive position that you take on the merits of the propositions is different than whether somebody has standing or not. This Court has taught us in multiple opinions that when we're trying to decide if there is a justiciable interest in standing, we don't get too far into the merits of the underlying substantive question. So hypothetically, if somebody were to file suit and would meet the standing re-quirements, they would be free to take a different position on the merits of the two propositions than we might take.

JUSTICE DALE WAINWRIGHT: What do you make of the factual distinction in Blum and Glass, where the voters also signed the petition versus Brown, where the voters did not sign the petition? How significant is that to the decision in those cases?

ATTORNEY ANDY TAYLOR: I think that we don't need to win that argument to prevail here, but we do win that argument. In the Brown case in Footnote 2, this Court made clear that Mr. Hotze, a different Hotze than the Hotze in this case being argued this morning, had only alleged standing and justiciable interest as a voter, and in oral argument they went a little further and said, “A voter,” and he was a winner, but they never alleged that he was a petition signer and organizer, so we could distinguish Brown v. Todd by saying, “Well, he's just a voter, not a petition organizer. We're a petition organizer so we're stronger than Brown.” So we win that argument but I don't think that's dispositive because of what I said earlier in Brown v. Todd, that this Court in distinguishing the Coleman case said, “We're not talking about a contemporaneous nullification of a vote that somebody properly made, we're talking about two independent entities 13 years later, different branches of government.” So I think we win either way.

JUSTICE DALE WAINWRIGHT: Assume just for purposes of this argument that we disagree that all 240,000 voters individually would have standing. What's your fall-back argument?

ATTORNEY ANDY TAYLOR: Then we would argue that the fact that we were petition organizers and signers and funders and voters, that those four events taken together are enough to distinguish us from some other voter in the election.

CHIEF JUSTICE WALLACE B. JEFFERSON: Mr. Taylor, how many times since the proposition was passed and put into the Charter, has the City exceeded the spending limitations that are at issue here, that were the purpose of Proposition 2?

ATTORNEY ANDY TAYLOR: The record only answers one fiscal year in this case, and it does not appear that the first year after the passage of these two propositions that there was a busting of either cap. I'm informed, but I must tell you that it's not in the record, that there has been a busting of both caps since then, but I'm not in a position to tell you with evidence that that's true and that wasn't litigated

below because it's happened subsequent to the trial court's ruling in June of 2005.

JUSTICE PHIL JOHNSON: I didn't understand your answer. Did you say this record does show that the cap has been busted one time?

ATTORNEY ANDY TAYLOR: It does not. It shows the opposite, that the cap wasn't busted the first fiscal year following the --

CHIEF JUSTICE WALLACE B. JEFFERSON: 2006.

ATTORNEY ANDY TAYLOR: Right.

CHIEF JUSTICE WALLACE B. JEFFERSON: The City Controller certified that neither 1 or 2 would have been busted, and I thought there was testimony that, for the then foreseeable future, this case has been around for a while, that there wouldn't, there was no at least anticipated bust of the cap.

ATTORNEY ANDY TAYLOR: There was a statement, you're correct, Mr. Chief Justice, that there was an an-ticipated, but what I'm informed is that in fact they've busted both, but I'm not in a position to show you record because it happened subsequent to the trial court ruling. I would like in the remaining time that I have to segue to the substantive arguments. This --

JUSTICE HARRIET O'NEILL: Before you do that, tell me why your argument about the poison pill provision not being included within the quotation marks isn't a process question.

ATTORNEY ANDY TAYLOR: Okay. I actually think that that argument is a perfect segue to what I was about to say, because the -- first of all, it's obviously nothing to do with jurisdiction because now we're in the merits, but on the question of the poison pill --

JUSTICE HARRIET O'NEILL: Not necessarily, because if it's a process question, it might confer standing under Brown.

ATTORNEY ANDY TAYLOR: Sure.

JUSTICE HARRIET O'NEILL: So I was a little puzzled why the process piece wasn't argued a little more.

ATTORNEY ANDY TAYLOR: I understand. Well, the poison pill language, that one sentence which we contend violates the Texas Constitution, the local government Code 904 and 905, and even the own Charter provision of the City of Houston, purports to say that we're not going to go with the 50 percent rule, an up or down vote, all we're going to say is that if you have more than one proposition on this subject matter in the same election, the highest vote getter is going to prevail. So they're doing away with the 50 percent rule, which we argue is not legally appropriate and unconstitutional --

JUSTICE HARRIET O'NEILL: I thought your argument was that if that had been in the text of the ordinance it would have been okay, because then the voters would know that they were voting for that.

ATTORNEY ANDY TAYLOR: Well, I think if it were in the text and if the voters supported it, then there would be the legal issue of whether or not that could actually occur. I think there is a deeper problem with that, and that is that by initiative and referendum, even though the citizens are acting as a legislature for the municipal government, under the Texas Constitution and in your case law, you can't do something that violates state law or violates the state constitution, so --

JUSTICE HARRIET O'NEILL: Doesn't that undercut your, your statutory standing argument?

ATTORNEY ANDY TAYLOR: Don't think so. The statutory standing argument would only apply if this Court were to find under 9004 and 9005 that a majority vote caused this proposition to be effective and now that they've been put in the books, they actually have vitality. And once you reach that point, then you would talk about whether somebody has standing because of the provision that gives the voter standing, but all of that is substantive. I don't think you get to that argument when you're only looking at the initial question of justiciability, because that's getting into the merits. I want to get back, though, to your question about poison pill before I run out of time --

JUSTICE DALE WAINWRIGHT: One other point about standing. Why is there a standing provision only with regard with Prop 2 but it's not in there for Prop 1?

ATTORNEY ANDY TAYLOR: Prop 1 was authored by the Mayor and the City. Prop 2 was authored by the public, and the folks in putting together Prop 1 just decided not to have that provision in there for whatever reason. Something that I think is significant is what did the city do when it placed the propositions that passed in the City Charter? What they did is they took Proposition 1 and they put it in Article 3, which is the Taxation Section. They took Proposition 2 and they put it in Article 6B, which is the Budgeting Section. Now the City gets to make that decision. They put that preamble language in the election ordinance, that's not our choice. So by their action we're contending that they recognized the distinction that Prop 2 is for budgeting, and Prop 1 isn't. Prop 1 uses the word “levy,” and they're talking about “assess and collect tax.” There's three parts to that. You assess it by figuring out how much is owed for property taxes, for example, then you actually have to collect it. And then thirdly, you actually spend it --

JUSTICE HARRIET O'NEILL: Well, would we reach that argument if we determined there was standing, we wouldn't reach that, would we? Wouldn't we send that back to the court of appeals?

ATTORNEY ANDY TAYLOR: If there is no standing, you would in our estimation uphold what the court of appeals did, which means that it goes back to the trial court, and we have a chance to amend our pleadings.

JUSTICE: If there is standing.

JUSTICE HARRIET O'NEILL: No. No, what I'm saying is if we said there was standing, then the court of appeals didn't address the inconsistency argument.

ATTORNEY ANDY TAYLOR: That's exactly correct, but under Rule 53.4 this Court does have the authority if it wants to to actually reach those issues, and we would urge you to do so. This case has been pending for five years. We thoroughly vetted the substantive issues at the trial court level, the only reason why the court of appeals ruled against us was on standing. You can, we believe, not only rule that we have standing, but rule that the trial court's judgment was correct. But if you choose not to --

CHIEF JUSTICE WALLACE B. JEFFERSON: Can I ask you real quickly, when the voters walked into the ballot booth, what is it that they saw? The poison pill provision was not on the ballot itself when you're voting, is that right?

ATTORNEY ANDY TAYLOR: That's right.

CHIEF JUSTICE WALLACE B. JEFFERSON: The standing provision was not on the ballot.

ATTORNEY ANDY TAYLOR: That's right.

CHIEF JUSTICE WALLACE B. JEFFERSON: So you just had those two, the summaries that the court of appeals cited?

ATTORNEY ANDY TAYLOR: That's right.

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay.

ATTORNEY ANDY TAYLOR: The important thing, though, is when you look at the ordinance before the election and the canvassing ordinance after the election, it makes clear with quotation marks the text of the two propositions. The poison pill is not in there, the standing issue is. So that's an important distinction. If all you're looking at is the election ordinance, because it's not in the text, and counsel below in June of '05 admitted that that poison pill language is not part of the Charter Amendment, and remember the definition of proposition, it's in the Election Code Subdivision 15, proposition is what's on the ballot. So because that poison pill was neither in the proposition that was on the ballot, and because it wasn't in the Charter Amendment, if you look at the Charter right this second, it's not in there, they didn't put it in, then at most it's a municipal ordinance. They're saying by ordinance, we're not going to do an up or down 50 percent vote. We're going to say that the top vote getter prevails. The City doesn't have that authority.

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice Medina?

JUSTICE DAVID M. MEDINA: Well, just I guess when you get up here again on your rebuttal, just I've got a question, one of the briefs challenged this by saying this should have been a quo warranto proceedings. I'm interested in your response to that.

ATTORNEY ANDY TAYLOR: Mr. Chief Justice, should I respond now or should I wait?

CHIEF JUSTICE WALLACE B. JEFFERSON: If you can briefly respond --

ATTORNEY ANDY TAYLOR: I will briefly respond.

CHIEF JUSTICE WALLACE B. JEFFERSON: -- and then you can supplement when you come back.

ATTORNEY ANDY TAYLOR: Quo warranto started in England, it's where the king would say somebody is usurping his authority in trying to hold office to which he is not entitled. If you look at the Civil Practice and Remedies Code, all that talks about is eligibility of somebody who claims to hold office. It's personal against somebody claiming office, it has nothing to do with propositions. So the idea that the attorney general or the district attorney or the county attorney is the sole and exclusive person who can decide to challenge propositions on a city charter is not supported by either the Common Law or the Civil Practice and Remedies Code. I reserve five minutes.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you. The Court is now ready to hear argument from the Respondent.

MARSHALL: May it please the Court, Mr. Atlas will present argument for the Respondents.

ORAL ARGUMENT OF SCOTT J. ATLAS ON BEHALF OF THE RESPONDENT

ATTORNEY SCOTT J. ATLAS: Mr. Chief Justice, and may it please the Court. Let me first address several questions that were posed to petitioner and the responses that he provided. First he said that the Brown case applies to future results, but not to the results in this particular election. I interpret that to mean that if the, some future mayor had waited 13 years and then decided not to enforce Prop 2, that Brown would apply. So if the mayor waited six months before deciding that Prop 2 didn't apply, then Brown would be the applicable law. It's not clear to me what the theo-retical distinction is between waiting 13 years --

JUSTICE HARRIET O'NEILL: I didn't read his argument to be so much passage of time as it was if another act happens. You don't have standing to challenge another act.

ATTORNEY SCOTT J. ATLAS: Your Honor, in that case, we would have, we would have a situation where the mayor could issue an executive order announcing that the Prop 2 limitations weren't going to apply. I simply don't see the theoretical distinction between that and what happened here, and I see nothing in the case law to support that notion.

JUSTICE DALE WAINWRIGHT: What about the distinction in the facts between Glass and Blum and Brown in that, in the first two opinions? The voters also signed the petitions, not just voted.

ATTORNEY SCOTT J. ATLAS: In the Glass --

JUSTICE DALE WAINWRIGHT: According to the records. It may have happened in Brown, but it wasn't argued, as I understand it.

ATTORNEY SCOTT J. ATLAS: Your Honor, if I heard your question correctly, Glass and Blum both dealt with clear election process

issues, whether after petitions were submitted, the petition signers have the power to enforce, requiring that if all conditions were met that something actually be put on the ballot, and whether the ballot language was misleading. Those are clear process issues. That has nothing to do and is totally unrelated to what happened here, where you're talking about once the election process is over, how the results will be implemented, which is clearly --

CHIEF JUSTICE WALLACE B. JEFFERSON: Would it be correct to say from your position, to extend it as far as it goes, that if a city council is not happy with the referendum process, doesn't like the policy, then they can submit to the voters what is, what everyone is calling a poison pill to defeat overwhelming public sentiment to the contrary.

ATTORNEY SCOTT J. ATLAS: Your Honor, if I understood the question correctly, you're -- let me restate. You're asking whether counsel could include a poison pill in some proposition in order to counter another --

CHIEF JUSTICE WALLACE B. JEFFERSON: But the whole intent being that they are unhappy, the Council is unhappy with the referendum process, doesn't like that it went around the formal, you know, ordinance provision, went around the Council, and they don't like the policy. Are cities authorized, is there anything legally wrong with them pairing that referendum with another proposition that is contrary to it and thus defeats the voters' will, the public's will?

ATTORNEY SCOTT J. ATLAS: Your Honor, we maintain there is absolutely nothing wrong with that. There are three legal approaches to challenging something of this nature. First, if there is something wrong with the process, either misleading language or something else with the process, an election challenge is possible. Second, if there is a true abuse of the process, we believe it's likely that a quo warranto action could be brought. And third, Your Honor, if you're talking about a political judgment by Council and the elected officials of the City, making a political decision, trying to reconcile the differences between two statutes, then the answer is in the political process. In this case there is no indication that there was any kind of reaction in the public reflecting any kind of lack of confidence in the Mayor and Council. You had a popular Mayor and a Council that by and large was reelected and no indication that there was any reaction in the public adversely at all. Petitioners had the right, had they so chosen, nothing would have prevented them from trying to put their own poison pill provision on the ballot, either on this occasion or in the future.

JUSTICE HARRIET O'NEILL: But don't you think it would be important for the voter to know that one could trump the other? So for example, if I'm generally in favor of both, I might if I knew that that was going to nullify under the poison pill provision, I might as a voter want to know that.

ATTORNEY SCOTT J. ATLAS: Absolutely, Your Honor, and the voter here did know that. The newspapers trumpeted it all the time, repeatedly during the --

JUSTICE HARRIET O'NEILL: It wasn't in the language of the proposition, and then that's what I keep focusing on is that would seem to me to be a process challenge, and if it is a process challenge, the poison pill wasn't included in the proposition itself. It went to the voters. Can you bring a process challenge post-election, or does that have to be before the election?

ATTORNEY SCOTT J. ATLAS: You could bring a process challenge after the election, but it has to be timely filed, and it wasn't in this case first of all. Second of all, it is not the case that the poison pill language was not within the proposition. It is clearly in the proposition. The proposition, I have the language actually in a chart that is in Appendix -- let me see if I can find it quickly -- Appendix 9 attached to our brief where you can see it says, “The following is the proposition,” and the proposition includes quite a bit of language. What they are saying is not that it isn't part of the proposition, but that when you look at the first paragraph where it says “You amend the charter with the following two parts,” those are in quotes. And then the final part, number four, talks about how it will be applied. It is not unusual either in the City, in the State legislature or in other states or in other cities, for that matter, to put prospectivity language and other language concerning how something will be applied.

JUSTICE HARRIET O'NEILL: But again, my question is to the extent the argument is made that it should have been within the quotation marks, that just strikes me as a process challenge.

ATTORNEY SCOTT J. ATLAS: It does seem like the ultimate process challenge and one that perhaps could have been brought if at all in an election contest, but they missed the deadline on that, and so that's simply not -- in our view that is not before us. The second point that was made during the questioning of petitioner was the concession that all 240,000 some odd voters have standing to bring a claim if they react to the way that Prop 2 is enforced.

JUSTICE DON R. WILLETT: Mr. Atlas, can I ask you briefly about ripeness?

ATTORNEY SCOTT J. ATLAS: Well --

JUSTICE DON R. WILLETT: Ripeness, which I believe the City raised in the trial court. Does the record in fact show that, at least so far, the City has complied with the revenue caps in Prop 2?

ATTORNEY SCOTT J. ATLAS: Your Honor, the record does not show that the City has not complied. It shows that in the City Council minutes immediately after the vote in November of 2004, I think November 4th, 5th, 7th, something like that, that the Mayor at Council meeting said that he intended to attempt to comply with Prop 2, as long as it didn't lead to some sort of financial crisis. In fact, every year before now the budget has complied, the controller has certified it as such and the independent auditors have confirmed after the fact that the City's revenues did comply. That is not in the record, I will concede that, but the record certainly does not have any indication that there was a failure to comply with Prop 2.

JUSTICE DON R. WILLETT: Does the Court in your view need to wait until a citizen has suffered a concrete injury before, you know, caused by the City's nonrecognition of Prop 2 before we can wade into it?

ATTORNEY SCOTT J. ATLAS: Your Honor, I think there is a very strong argument that this case is premature.

JUSTICE DAVID M. MEDINA: You were going to address the standing of the 242,000 or some voters that have proved this. What was your response to that?

ATTORNEY SCOTT J. ATLAS: Your Honor, my response is that number one, that shows a potential parade of horribles by not requiring as the case law and standing law generally requires having an agreed party with an injury distinct from the rest of the public. And two, that even if you narrow it down to petition signers, they have no interest that is different from other voters, they may have a more intense one, but there is certainly nothing that distinguishes their interest from that of the other 240,000 voters. The notion that you could have literally dozens if not hundreds and thousands of lawsuits with differing claims is, with the potential to both flood the Courts and create chaos, it seems to me establishes the wisdom of following the traditional standing requirements that there be some particularized injury.

JUSTICE DALE WAINWRIGHT: Would any citizen who is not a member of the City Council or the Mayor or the City government, in your view have standing to challenge something they think is going wrong here?

ATTORNEY SCOTT J. ATLAS: In this case, Your Honor?

JUSTICE DALE WAINWRIGHT: Um-hm. And so the petition signers don't have standing, who also voted, and the voters don't, what citizen could raise a challenge to an action they believe was inappropriate by their government in a lawsuit like this?

ATTORNEY SCOTT J. ATLAS: Your Honor, I would maintain, first of all, that this is the, that there is no one who has, there is no taxpayer or citizen who has standing to challenge this issue, and that in fact that's precisely what the essence of the Taxpayer Standing Doctrine is all about.

JUSTICE NATHAN L. HECHT: Why isn't this taxpayer standing? This has to do with taxing and spending. Why wouldn't you, why isn't this almost a claim that if you spend this money other than as Prop 2 allows, you're spending it illegally so that's a taxpayer standing question.

ATTORNEY SCOTT J. ATLAS: Your Honor, first we have to ensure that Prop 2 is actually valid, and so we have a bit of a chicken and egg problem, but putting that aside for the moment, that is not the type of illegal expenditure that the taxpayer standing cases talk about. They talk about illegal expenditures. In this case we're talking about a collection of revenues.

JUSTICE NATHAN L. HECHT: Right. An expenditure could be in violation of Prop 2, I mean that's what we asked about earlier, had the caps been busted.

ATTORNEY SCOTT J. ATLAS: Your Honor, when the question was posed about whether the caps had been busted, in the context of Prop 2 that's not asking about whether there were illegal expenditures. Prop 2 prohibits the collection of excess revenues without refunding the overage to the taxpayers or at least putting it into a taxpayer fund. There is nothing in Prop 2 that prohibits anything concerning spending, it merely prohibits the collection of revenues beyond the cap limits. So --

JUSTICE NATHAN L. HECHT: But it requires, if it gets up to 10 million and it's supposed to be in this fund, supposed to be given back to the voters or the taxpayers, but it seems that that's awfully close to a Bland Independent School District type of, you shouldn't be spending this money on this, you should be giving it back to the voters under this process.

ATTORNEY SCOTT J. ATLAS: Yes, Your Honor, but the proposition in question doesn't prohibit expenditures. You can't identify which expenditure it is that is spent with the funds that are the revenues in excess of the cap. That's an entirely different issue in my view.

JUSTICE HARRIET O'NEILL: How does this compare --

JUSTICE DAVID M. MEDINA: I think you said that no one here has standing. Maybe I wrote that down wrong, but you said none of the 240,000 voters would have standing. Is that correct?

ATTORNEY SCOTT J. ATLAS: That is correct, Your Honor.

JUSTICE DAVID M. MEDINA: How would the process be challenged then?

ATTORNEY SCOTT J. ATLAS: The process would be challenged in one of several ways. First, if it was a process being challenged, an election contest could have been filed within the time limits. It wasn't. That's lost, but it wasn't that it wasn't -- it is not the case that it wasn't available for a time. If it is an abuse, an outright abuse that the attorney general or the other officers allowed to bring quo warranto --

JUSTICE DAVID M. MEDINA: Are those three [Inaudible] --

ATTORNEY SCOTT J. ATLAS: And finally, Your Honor, there is the political process. This is a situation where the proponents of Prop 2 are unhappy with the pronouncement by the Mayor and the City Attorney that Prop 2 is not valid. They are not attacking any excess collection of revenue in violation of Prop 2 because there is no evidence that there has been any. In fact, we maintain outside the record that there has been none to-date. And so they are merely unhappy with the pronouncement by the Mayor and the City Attorney that they don't believe Prop 2 has any effect, even though they intended to try to adhere to it as long as they could.

CHIEF JUSTICE WALLACE B. JEFFERSON: Is the Charter question, Charter Provision 9 on inconsistency, that's a merits versus standing?

ATTORNEY SCOTT J. ATLAS: Yes, Your Honor, that is correct, that is a merits issue.

CHIEF JUSTICE WALLACE B. JEFFERSON: But they disagree, were we to reach the merits, they disagree that these two propositions conflict. How in your view do they? What's your best argument to show that they are con-flicting?

ATTORNEY SCOTT J. ATLAS: The simplest argument to explain is this, about the inconsistency. Prop 1 gives Council full authority to assess and collect revenues without limitation, except the two limitations in Prop 1 on setting rates for ad valorem taxes and water and sewer rates. So they've got full authority outside that limited area to assess and collect revenues. Prop 2 imposes a limit on the collection of revenues beyond the cap, whether it relates to those two limited areas or not. That is a direct conflict. It has --

JUSTICE NATHAN L. HECHT: Is there any other -- that's the argument you make in brief -- is there any other inconsistency between the two?

ATTORNEY SCOTT J. ATLAS: Your Honor, the -- I've given in our brief a number of examples of how at the budget step, at the revenue collection step, and later in the process, you could easily demonstrate a conflict between the two, but they are all part and parcel of Council having full authority to collect and assess revenues. It was a conscious decision to include that language in there, and that is why after the fact, and even before the fact, it was announced to the public that there was a widespread widely held view that nobody contested at the time that the two propositions were fundamentally in conflict.

CHIEF JUSTICE WALLACE B. JEFFERSON: How could the petitioners replead to achieve standing? That's what the court of appeals said, that it was possible. What's your view on that?

ATTORNEY SCOTT J. ATLAS: Your Honor, in short I have no idea. I don't believe they can.

JUSTICE PHIL JOHNSON: Well, if it goes back for repleading, couldn't they plead that now the caps have been busted?

ATTORNEY SCOTT J. ATLAS: Your Honor, our position is that even if the revenue cap has been exceeded, that they have no standing to challenge that, that a quo warranto action or the political process were the ways to have challenged it.

JUSTICE PHIL JOHNSON: But they couldn't replead that at this -- they could replead that if there is a question about whether it has or has not, if we're --

ATTORNEY SCOTT J. ATLAS: Yes.

JUSTICE PHIL JOHNSON: -- talking ripeness here or I mean we have potential inconsistencies, but we don't really have any shown or anything. But if it does go back, as the court of appeals [Inaudible] , it seems like we might be able to address that --

ATTORNEY SCOTT J. ATLAS: Your Honor, it is our --

JUSTICE PHIL JOHNSON: -- without repleading.

ATTORNEY SCOTT J. ATLAS: Excuse me. It is our position, Your Honor, that even if the caps are eventually busted, that no voter, no taxpayer, no resident of Houston has the authority to challenged Prop 2 because they have no -- for the standard reasons that no, that no voter here, no petition signer here has a unique injury.

JUSTICE DON R. WILLETT: If we disagree and find for the Petitioners on standing, Mr. Taylor says that under Rule 53.4 we should go ahead and wade into the merits, but I guess you have a different view?

ATTORNEY SCOTT J. ATLAS: Your Honor, in our prayer we had asked if the Court ruled with petitioner on standing that it affirm on the merits. If the Court has any question about affirming on the merits, I had forgotten the discussion in the court of appeals below about how muddled the final judgment is. It is silent on relief, has no declaration about the rights of the parties. It simply says it incorporates the order granting summary judgment, where it says summary judgment granted. So you can't tell which of a number of alternative grounds were the basis for the trial court's rulings or what rights the Court is actually declaring. So I think there is a very strong argument that if the Court believes it's not a clear case for affirming for Petitioner on the merits -- I'm sorry, affirming for our side on the merits -- that it ought to be remanded so that the court below can try to sort through this issue.

JUSTICE NATHAN L. HECHT: Do you think the mandamus, proceeding, In re Robinson correctly decided standing?

ATTORNEY SCOTT J. ATLAS: I'm sorry, Your Honor.

JUSTICE NATHAN L. HECHT: Do you think the mandamus proceeding with the certification of the Secretary of State, In re Robinson, there was a standing issue in that case too --

ATTORNEY SCOTT J. ATLAS: Correct.

JUSTICE NATHAN L. HECHT: -- and the Court held that there was standing. Do you think that case was properly decided?

ATTORNEY SCOTT J. ATLAS: Well, Your Honor, since I argued against it in the court of appeals, I'd be hard pressed to say it was properly decided, but I am --

JUSTICE NATHAN L. HECHT: How [Inaudible]

ATTORNEY SCOTT J. ATLAS: -- prepared to live with it and even if it is correctly decided, it has no impact on this case as that opinion very clearly stated and as Mr. Taylor's brief in that case very clearly stated, they specifically carved out the issue that's in this case.

JUSTICE HARRIET O'NEILL: The argument has been made, and I think an affidavit or two have been offered saying that this is very similar to what was done in Colorado, that there is a -- Prop 2 relates to spending, Prop 1 relates to revenue generation, and this really is the same thing. Do you see it differently?

ATTORNEY SCOTT J. ATLAS: Your Honor, I see it quite differently. Whatever restrictions there were in Colorado on spending -- and I know very little about Colorado law, so I can't answer that question. Here, we're not talking about restrictions on spending, we're talking about restrictions on revenues. But this is a case in Texas, and they went far beyond what anything, anything that I'm aware of in any other state, because what they did here was to include enterprise funds within the restrictions. Now we think we may have solved that problem with a subsequent ballot election where we removed the enterprise funds from, from Prop 2, but that's been under attack as well and there has been no decision in the court of appeals on that issue. The reason that having enterprise funds in there are so dra-matically different is that enterprise funds, which it means things like the airport, water and sewer, convention center, those have covenants and other requirements that prohibit expenditures of funds that are in those enterprises from being used for any other purpose. So if, for example, there was a drought one summer and a huge uptick in water use, and as a result an increase in water revenues that busted the revenue cap in Prop 2, we couldn't take money from the water and sewer system to refund to the taxpayer, it would have to come from general revenues. And so if everything in a sort of perfect storm, if all of the reasons why the cap was busted came from these enterprise funds, the City would be terribly strapped by taking money from the general fund, two-thirds of which goes to police, fire and EMS.

JUSTICE HARRIET O'NEILL: But your response in terms of the Colorado initiative is that this is just a different, Prop 2 is different, it doesn't just restrict spending, which is apparently what they're arguing is, it really just relates to spending and that's why they're not inconsistent. You just think that that's against the plain language of the proposition.

ATTORNEY SCOTT J. ATLAS: That is against the plain language of the proposition. Obviously it has some dampening effect on spending if you're limited in collecting revenues, but that's not what Prop 2 says and that's not what it's supposed to be doing, and that's not what its sponsors, and even in some instances the experts in this case, it's not the way they describe what its objective was.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Mr. Atlas.

JUSTICE DON R. WILLETT: Mr. Taylor, why do we not need to wait until the City's nonrecognition of Prop 2 turns into actual cap busting?

REBUTTAL ARGUMENT OF ANDY TAYLOR ON BEHALF OF PETITIONER

ATTORNEY ANDY TAYLOR: I believe Coleman is the best answer. We have a justiciable interest in ensuring that our vote is not nullified in a contemporaneous setting. Second, let's think about the Court's precedent of Blum and Glass. Both cases are pre-election standing cases. In re Robinson, which was asked about of my opponent, takes that one step further. It goes beyond the November election and says that the result includes certification on the vote. So In re Robinson takes one step further this analysis. We believe the case before you this morning takes that analysis yet one more step. If we want to think about these buckets of process and result, I would say first off that

the Coleman case, if you had to put it in one of those buckets, it would be put it in the result bucket because the actual vote of the 20 Kansas senators was nullified by the Lieutenant Governor's illegal vote, as alleged in that case. I didn't fear my opponent ever try to distinguish Coleman. The second thing I want to make a point about on this results idea is the election contest concern. I would submit that there is nothing to contest under the facts of this case. We were not upset with what happened, we're not upset about the ballot language, we're not saying a single vote was invalid or a single vote was not properly counted. We're not alleging fraud, mistake, irregularity. None of the election-type challenges that one would make within 30 days of certification, they don't exist in this case. The other concern I have about trying to pigeon-hole this into an election contest, it's really legal “got ya,” because we have a 30-day time, and it's jurisdictional, to make our election challenge. All they have to do is wait until 31 days and say they're not going to enforce Proposition 2, and so therefore they say we can't be challenged. Now our system of government is that the citizens and the voters control the city government. The city government doesn't control the people, and they've turned that principal backwards, and they're saying that we have the inalienable right to ignore the express will of the people in passing Proposition 2. Think about a Senate confirmation hearing --

JUSTICE HARRIET O'NEILL: Well, why isn't the express will of the people in voting for Prop 1, [inaudible] language.

ATTORNEY ANDY TAYLOR: Not in there. So why --

JUSTICE HARRIET O'NEILL: But you're saying it's not within the quotes, and it not been within the quotes is a process question.

ATTORNEY ANDY TAYLOR: Well, we would never file an election challenge and say, “Golly, a potential illegal top vote getter portion of the proposition isn't in here and we want it in here.” We would never make that argument in an election challenge. What it is, Your Honor, is at most a municipal ordinance. They admitted at the trial court in the June 2nd, 2005 oral argument that that poison pill provision is not part of the Charter, so -- and it's not in the Charter.

CHIEF JUSTICE WALLACE B. JEFFERSON: But, but what do you do when there is a provision in the charter that says the city's leaders recognize at some point there may be two propositions that butt heads, and you cannot enforce both. One says full authority, one restricts it, you know, I mean just tremendously, and assume that that's this case. I know you disagree, but assume that's the case, then can't that Charter amendment tell, you know, the City leaders what to do in that circumstance, that the proposition that garners the most votes is going to be the one that's in force and the other one is not, even though it had a lot of votes, isn't that the proper?

ATTORNEY ANDY TAYLOR: We're not willing to concede that point. Intellectually I understand what you're saying is that if there are two propositions that validly got passed and they really do conflict with one another, not our fact pattern, a hypothetical, then what does the City government do? And the City Charter, which has been around since 1913, says you toss the one out that got the fewer majority votes, if it's inconsistent. So you're asking a hypo-thetical.

CHIEF JUSTICE WALLACE B. JEFFERSON: Correct.

ATTORNEY ANDY TAYLOR: We still in our briefing, and this morning would contend that the City government doesn't have that power. If there is an inconsistency between two things that are elected by the people, then that's going to have to be a judicial court challenge. The Courts, the third branch of government, are going to have to decide that issue. The municipality cannot decide that, even though it's a home rule city and they have certain rights vested from the Constitution, they can't take and do something that's not allowed under either the general law or the Constitution of the State of Texas. And I return, Mr. Chief Justice, to 9005 and the Texas Constitution, both of which say you've got to have an up or down vote and a majority is enough to get it on the books. I was about to mention a hypothetical about a confirmation hearing. Say that you're appointed by the President to be on the US Supreme Court, and you go before the Senate, and the rules are that they're supposed to do an up and down vote on you, whether or not it's a majority. You've got to have a majority of the senators. Well, let's say that there is somebody else that is up for the same or different seat on the Supreme Court, and the body just decides, you know, we're going to just put in whoever gets the higher number of the votes, even though both got more than 50 percent. Well, that doesn't work Constitutionally, and in this case by analogy it doesn't work on our State Constitution because what it says, you have an up or down vote. Fifty percent is enough to get each one of these propositions validly passed and adopted and therefore effective. And so they cannot by municipal ordinance ignore that up or down vote requirement of the Constitution and State Law, and say, you know, we're only going to do the one that got the most votes. They just don't have that authority at the municipal level. In some --

CHIEF JUSTICE WALLACE B. JEFFERSON: Summarize in two sentences. Let's see if you can do that.

ATTORNEY ANDY TAYLOR: We have standing, we shouldn't have to wait to do some sort of a taxpayer amendment, and the merits show that both propositions are consistent and should be upheld. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, counsel. The cause is submitted, and the Court will take a brief recess.

MARSHALL: All rise.

[End of proceedings.

Carroll G. Robinson, Bruce R. Hotze, and Jeffrey N. Daily, Petitioners, v. Bill White, Mayor; City of Houston; Houston City Council, et al., Respondents.
2009 WL 4823929 (Tex.) (Oral Argument)

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