IN THE

SUPREME COURT OF TEXAS

AUSTIN, TEXAS

NO. 07-0288

CITY OF DALLAS,

Petitioner,

vs.

DAVID S. MARTIN, ET AL,

Respondents-Cross-Petitioners.

Appealed from the 382ND District Court of Rockwall County, Texas
Petitioned from the Fifth Court of Appeals at Dallas

RESPONSE TO CITY'S PETITION FOR REVIEW AND CROSS-PETITION FOR REVIEW

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IDENTITY OF PARTIES AND COUNSEL

Parties to the Trial Court's Final Judgment:

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Individually and on behalf of a class of all other individuals who are currently, were formerly, or may in the future become employed in the sworn ranks of the Dallas Fire Department.

City of Dallas	*Defendant/Appellant*

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STATEMENT OF THE CASE

Nature of the Case:	class action suits for declaratory relief, back pay and damages on behalf of members of the Dallas Fire Department, based on breach of employment contract and violation of municipal referendum
Trial Court :	382nd District Court of Rockwall County, Texas, the Hon. Brett Hall, presiding
Trial Court Disposition:	City's plea to the jurisdiction denied
Parties in Court of Appeals:	
David S. Martin James A. Braddock Obie Cartmill Robert Dale Martin O.J. (Jay) Adair	*Plaintiffs/Appellees*

Individually and on behalf of a class of all other individuals who are currently, were formerly, or may in the future become employed in the sworn ranks of the Dallas Fire Department.

City of Dallas	*Defendant/Appellant*
Court of Appeals:	Fifth District Court of Appeals at Dallas
Panel and Author of Court of Appeals:	Hon. Joe Morris, Kerry FitzGerald, and Molly Francis. Published opinion authored by Justice Morris
Court of Appeals' Disposition:	Reversed and Remanded December 21, 2006 Rehearing denied February 22, 2007

STATEMENT OF JURISDICTION

Respondents/Cross-Petitioners agrees that this Court has conflicts jurisdiction over this interlocutory appeal under sections 22.001(a)(2) and 22.225(c) of the Texas Government Code. However, the conflict is not with *City of Houston v. Williams,* 216 S.W.3d 827 (Tex. 2007). In fact, the court of appeals opinion in this case has the same holding as *Williams*: In *Williams,* this Court remanded the case to the trial court to consider whether immunity was waived by the Legislature's enactment of sections 271.151-.160 of the Local Government Code, citing *City of Houston v. Clear Channel Outdoor, Inc.*, 197 S.W.3d 386 (Tex. 2006). The court of appeals in this case remanded the case to the trial court "to allow appellees the opportunity to argue that the legislature has waived the City's immunity from suit by these new statutory provisions," also citing *City of Houston v. Clear Channel Outdoor, Inc.*, *supra.* The entire issue raised by the City in its petition about the Declaratory Judgment Act is a red herring.

The true conflict created by the court of appeals' opinion is with *City of Canyon v. Fehr,* 121 S.W.3d 899 (Tex. App.-Amarillo 2003, no pet.), in which the court of appeals held that sovereign immunity cannot apply to a suit seeking to enforce the sovereign right of the people acting as the legislative branch of government in a voter referendum, because "the doctrine of sovereign immunity cannot be used by a municipality against itself." The lower court's opinion is also in conflict with the long line of cases exemplified by *Glass v. Smith*, 150 Tex. 632, 644, 244 S.W.2d 645, 653 (1951), which held that there should be no judicial interference with the legislative process, because the doctrine of sovereign immunity, a judicially-created rule, is being used in this case to thwart the voice of the people acting as the legislature.

A second conflict exists by reason of the court of appeals' holding in this case that the City could first waive immunity by filing a counterclaim, then reinvest itself with immunity by subsequently dismissing its counterclaim. This holding is inconsistent with the long-established rule that "where jurisdiction is once lawfully and properly acquired, no subsequent fact or event in the particular case serves to defeat the jurisdiction." Dallas Ind. School Dist. v. Porter, 709 S.W.2d 642, 643 (Tex. 1986); *Flynt v. Garcia*, 587 S.W.2d 109, 109-110 (Tex. 1979) (per curiam); *Haginas v. Malbis Memorial Foundation*, 163 Tex. 274, 278, 354 S.W.2d 368, 371 (1962); *Isbell v. Kenyon-Warner Dredging Co.*, 113 Tex. 528, 532, 261 S.W. 762, 763 (1924).

ISSUE PRESENTED IN RESPONSE TO CITY'S PETITION

This Court lacks conflicts jurisdiction to address the issue raised by the City in its petition, because the court of appeals' remand of the firefighters' claim for declaratory relief is consistent with this Court's ruling in *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 859-60 (Tex. 2002), and its decision to allow the trial court to consider whether immunity was waived by the Legislature's enactment of sections 271.151-.160 of the Local Government Code, is required by a long line of cases from this Court, including *City of Houston v. Williams,* 216 S.W.3d 827 (Tex. 2007) and *City of Houston v. Clear Channel Outdoor, Inc.*, 197 S.W.3d 386 (Tex. 2006). The City's argument also erroneously assumes that this statute does not apply as a matter of law, an issue this Court has repeatedly required the trial courts of Texas to determine in the first instance.

ISSUES PRESENTED IN CROSS-PETITION

1. The court of appeals erred in holding that the City is protected from the firefighters' claim for back pay by sovereign immunity unless that defense has been waived by the Legislature's enactment of sections 271.151-.160 of the Local Government Code, because sovereign immunity cannot apply as a matter of law to a case seeking to enforce the right of the people acting in its sovereign capacity as the legislative branch of government by referendum. The doctrine of sovereign immunity cannot be used by a municipality against itself.

2. The court of appeals erred in holding that the City could reinvest itself with immunity after having waived it, simply by dismissing its counterclaim.

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioners David S. Martin, et al, respectfully submit this response to petition for review pursuant to TEX. R. APP. P. 53.3 and cross-petition for review pursuant to TEX. R. APP. P. 53.1, 53.7(c), and in support thereof would respectfully show the court as follows:

STATEMENT OF FACTS

Respondents/Cross-Petitioners agree with the City's statement of the facts with the following exceptions and/or additions:.

The class of firefighters that are the plaintiffs in this case consists of approximately 3,800 current and retired firefighters, as well as all future firefighters. (1310 CR 74).

The City contends that this class action and its companion case, *City of Dallas v. Parker,* No. 07-0289, combined seek over $1 billion in damages in the form of back pay, benefits, and pre-judgment interest. There is nothing in the record to support this claim.

SUMMARY OF ARGUMENT

The sole issue raised by the City claims that the waiver of sovereign immunity contained in the Declaratory Judgment Act does not apply to the claim for declaratory relief in this case, because it is "for the sole purpose of imposing liability when sovereign immunity bars a suit for money damages based on the requested construction." This is both factually untrue and a misrepresentation of the holding of the court of appeals. The plaintiffs in this case include current and future firefighters, and they have properly sought a construction of the city ordinance and referendum in order to establish their

contractual rights going forward. The court of appeals clearly held that sovereign immunity did not apply to this proper claim for declaratory relief, and also held that this claim could not be used as a subterfuge for recovering damages. Consequently, the City is apparently attacking a ruling that does not exist, and this Court lacks conflicts jurisdiction over the City's petition because the opinion of the court of appeals directly follows the holdings of this Court in *City of Houston v. Williams,* 216 S.W.3d 827 (Tex. 2007), *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849 (Tex. 2002) and *City of Houston v. Clear Channel Outdoor, Inc.*, 197 S.W.3d 386 (Tex. 2006).

The court of appeals did err, however, in holding that sovereign immunity applies to this case at all. This case seeks to enforce the terms of a referendum passed by the voters of the City of Dallas. This Court has clearly held that when the voters enact a law by referendum, they are acting as the legislative branch of municipal government. In *City of Canyon v. Fehr,* 121 S.W.3d 899 (Tex. App.-Amarillo 2003, no pet.), the court of appeals held that sovereign immunity cannot bar a suit to enforce the voters' right to act in that capacity, because "the doctrine of sovereign immunity cannot be used by a municipality against itself." *Fehr,* 121 S.W.3d at 902. The application of sovereign immunity – a judicially created rule – to this case would amount to judicial interference with the legislative process by rendering the voter-approved referendum in this case an unenforceable nullity.

The court of appeals also erred in holding that the City, which had clearly waived sovereign immunity by filing a counterclaim for damages, could reinvest itself with

immunity and deprive the trial court of jurisdiction by subsequently dismissing its counterclaim. This holding is in conflict with the long-established rule that where jurisdiction is once lawfully and properly acquired, no subsequent fact or event in the particular case serves to defeat the jurisdiction." *Dallas Ind. School Dist. v. Porter*, 709 S.W.2d 642, 643 (Tex. 1986).

ARGUMENTS AND AUTHORITIES

ISSUE PRESENTED IN RESPONSE TO CITY'S PETITION

This Court lacks conflicts jurisdiction to address the issue raised by the City in its petition, because the court of appeals' remand of the firefighters' claim for declaratory relief is consistent with this Court's ruling in *City of Houston v. Williams,* 216 S.W.3d 827 (Tex. 2007) and *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 859-60 (Tex. 2002), and its decision to allow the trial court to consider whether immunity was waived by the Legislature's enactment of sections 271.151-.160 of the Local Government Code, is required by a long line of cases from this Court, including *Williams* and *City of Houston v. Clear Channel Outdoor, Inc.*, 197 S.W.3d 386 (Tex. 2006). The City's argument also erroneously assumes that this statute does not apply as a matter of law, an issue this Court has repeatedly required the trial courts of Texas to determine in the first instance.

A. The City is challenging a ruling the Court of Appeals did not make.

In the only issue presented by its petition, the City complains that the waiver of sovereign immunity contained in the Declaratory Judgments Act should not allow a suit to construe legislation, when the declaratory relief is "for the sole purpose of imposing liability when sovereign immunity bars a suit for money damages based on the requested construction." (City's Petition, p. ix). In making this contention, however, the City is clearly attacking a ruling that the Court of Appeals did not make.

The court of appeals' opinion correctly observes that the firefighters have sought

declaratory relief in this case. It goes on to hold that Governmental entities must be joined in suits to construe their legislative pronouncements, and that, accordingly, there is no governmental immunity in suits to construe legislation. *City of Dallas v. Martin*, 214 S.W.3d 638, 644 (Tex. App. – Dallas 2006, pet. filed), *citing Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994)*; Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 859-60 (Tex. 2002).

The lower court's opinion is careful to note that "[s]overeign immunity cannot be circumvented … by characterizing a suit for damages as a declaratory judgment action. [citation omitted]. Parties cannot frame a breach of contract cause of action as a declaratory judgment action to determine a contract's validity, enforce performance under a contract, or impose contractual liabilities against a governmental entity." *Martin*, 214 S.W.3d at 644, *citing IT-Davy*, 74 S.W.3d 849, 855-56. The Court of Appeals concluded that "the trial court was correct in denying the City's plea to the jurisdiction to the extent appellees' claims for a declaratory judgment are limited to declaring the rights, status, and legal relations of the parties under the ordinance." *Martin*, 214 S.W.3d at 644.

Thus, for the City to complain that the Court of Appeals has permitted a declaratory judgment action "for the sole purpose of imposing liability when sovereign immunity bars a suit for money damages" is factually inaccurate. The court of appeals made no such ruling, and the City has nothing about which to complain.

B. This Court lacks conflicts jurisdiction to address the City's petition.

The City's statement of jurisdiction attempts to invoke this Court's conflicts

jurisdiction over an interlocutory appeal by contending that the lower court's opinion is inconsistent with this Court's opinion in *City of Houston v. Williams,* 216 S.W.3d 827 (Tex. 2007). It is not.

Williams held that "private parties cannot circumvent the State's sovereign immunity from suit by characterizing a suit for money damages, such as a contract dispute, as a declaratory-judgment claim." *Williams,* 216 S.W.3d at 827, *citing IT-Davy*, 74 S.W.3d 849, 859-60. The court of appeals in this case made the same holding, citing the same authority. *Martin*, 214 S.W.3d at 644.

Williams found that the sole purpose of the declaratory judgment action in that case was to recover damages, because the plaintiffs were already retired and had no right to payments from the City in the future. *Williams,* 216 S.W.3d at 827. The plaintiffs in this case include currently employed firefighters and all future firefighters, who obviously *do* have a right to payments from the City in the future. The remand of the declaratory judgment action to establish those future rights is consistent with *Williams*.

The court of appeals' decision to remand this case to the trial court for a determination of whether the legislature has waived the City's immunity from suit by enacting sections 271.151-60 of the Texas Local Government Code is also exactly what this Court required in *Williams* and in *City of Houston v. Clear Channel Outdoor, Inc.*, 197 S.W.3d 386, 386-87 (Tex. 2006). *Martin*, 214 S.W.3d at 643-44. There is no conflict upon which this Court has jurisdiction to grant the City's petition.

ISSUES PRESENTED BY CROSS-PETITION

1. The court of appeals erred in holding that the City is protected from the firefighters' claim for back pay by sovereign immunity unless that defense has been waived by the Legislature's enactment of sections 271.151-.160 of the Local Government Code, because sovereign immunity cannot apply as a matter of law to a case seeking to enforce the right of the people acting in its sovereign capacity as the legislative branch of government by referendum. The doctrine of sovereign immunity cannot be used by a municipality against itself.

A. Sovereign immunity does not apply to a case based on voter referendum.

The court of appeals premises its entire opinion in this case on its holding that "sovereign immunity from suit protects the City, and the court lacks subject matter jurisdiction over these cases unless unambiguous consent to be sued has been granted." *City of Dallas v. Martin*, 214 S.W.3d 638, 642 (Tex. App. – Dallas 2006, pet. filed). It proceeds to hold that sovereign immunity does not apply to the firefighters' claim for purely declaratory relief, citing *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994), and remanding this case to the trial court for a determination of whether the legislature has waived the City's immunity from suit by enacting sections 271.151-60 of the Texas Local Government Code, citing *City of Houston v. Clear Channel Outdoor, Inc.*, 197 S.W.3d 386, 386-87 (Tex. 2006) and *McMahon Contracting, L.P. v. City of Carrollton*,197 S.W.3d 387, 387 (Tex. 2006). *Martin*, 214 S.W.3d at 643-44.

The lower court's entire analysis is based on an erroneous premise. The doctrine of sovereign immunity cannot apply to the firefighters' claim for back pay because the claim is one to enforce the will of the people acting by voter-approved referendum. The

initiative and referendum process affords direct participation by the people in lawmaking. It entails the exercise of a power reserved to the people. *Glass v. Smith*, 150 Tex. 632, 636, 244 S.W.2d 645, 648-49 (1951). It is not simply a right granted to them. *Id.* When the people exercise their rights and powers under the initiative and referendum provisions of a city charter, they become the legislative branch of the municipal government. *Glass,* 150 Tex. at 644, 244 S.W.2d at 653.

In *City of Canyon v. Fehr,* 121 S.W.3d 899 (Tex. App.-Amarillo 2003, no pet.), the court of appeals reasoned that if the voters in a referendum were acting as the legislative branch of the municipal government, then sovereign immunity could not bar a suit to enforce the voters' right to act in that capacity, because "the doctrine of sovereign immunity cannot be used by a municipality against itself." *Fehr,* 121 S.W.3d at 902.

This rationale applies with equal force to the present action. There is no material distinction between the suit in *Fehr* to compel a referendum and the suit in this case to compel the City to comply with the results of a referendum. It is simply inconsistent to say that sovereign immunity does not prevent a suit to compel a city to hold a referendum provisions of its City Charter, but that it applies to bar suit when the City disregards the results of the referendum. In both cases, the doctrine is being invoked against an act of the sovereign, *i.e.,* the people acting as the municipal legislature.

This Court has also held that "the same cogent and persuasive reasons which prompt judicial non-interference with the legislative process should compel the courts in proper cases to prevent interference by others with that process. *Glass,* 150 Tex. at 644-

45, 244 S.W.2d at 653-54. And yet, if the courts are allowed to apply the doctrine of sovereign immunity – a judicially created rule – to bar this case, it will be effectively thwarting the ability of the people to act as the legislative branch of municipal government.

The court of appeals, by holding that the doctrine of sovereign immunity applies to this case unless waived, is inconsistent with the holding in *Fehr* and with the rule in *Glass* that referendums are a legislative act and that courts should prevent interference with those acts. The lowers court's opinion in this case would allow the City to assert a plea of sovereign immunity in order to avoid compliance with the directive of its own voters acting as a sovereign legislature. The result is, as a practical matter, to transform the entire initiative and referendum process into a vain and useless proceeding.

As this Court is aware, sovereign immunity is a common-law doctrine that initially developed without any legislative or constitutional enactment. See *Cohens v. Virginia*, 6 Wheat. 264, 19 U.S. 264, 293, 5 L.Ed. 257 (1821) (recognizing the doctrine without citing statutory or constitutional authority); *Hosner v. De Young,* 1 Tex. 764, 769 (1846) (same); see also, *Texas A&M University-Kingsville v. Lawson,* 87 S.W.3d 518, 520 (Tex. 2002). Recognizing that sovereign immunity is a common-law doctrine, the Texas Supreme Court has not foreclosed the possibility that the judiciary may modify or abrogate such immunity by modifying the common law. See *Wichita State Hospital v. Taylor*, 106 S.W.3d at 695-96. Therefore, it remains the judiciary's responsibility to define the boundaries of the common-law doctrine and to determine under what

circumstances sovereign immunity exists in the first instance. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006)

2. The court of appeals erred in holding that the City could reinvest itself with immunity after having waived it, simply by dismissing its counterclaim.

A. Once jurisdiction is acquired, no subsequent event can defeat it.

Relying on this Court's opinion in *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006), the court of appeals held that the City's decision to file a counterclaim in this case "only waives immunity …to the extent the opposing party's claims could offset any recovery against it." *Martin*, 214 S.W.3d at 642-43, *citing Reata*, 197 S.W.3d at 378. Reasoning that the sole purpose of the waiver of immunity was to permit an offset, the lower court reasoned that "withdrawn counterclaims cannot form the basis of the trial court's jurisdiction over appellees' claims," *Martin*, 214 S.W.3d at 643, and held that the City's decision to dismiss its counterclaim served to reinvest it with immunity.

This holding is inconsistent with the long-established rule that "where jurisdiction is once lawfully and properly acquired, no subsequent fact or event in the particular case serves to defeat the jurisdiction." *Dallas Ind. School Dist. v. Porter*, 709 S.W.2d 642, 643 (Tex. 1986); *Flynt v. Garcia*, 587 S.W.2d 109, 109-110 (Tex. 1979) (per curiam); *Haginas v. Malbis Memorial Foundation*, 163 Tex. 274, 278, 354 S.W.2d 368, 371 (1962); *Isbell v. Kenyon-Warner Dredging Co.*, 113 Tex. 528, 532, 261 S.W. 762, 763

(1924). The court of appeals has effectively given the City the unilateral power to revoke a court's jurisdiction after it was properly acquired in this case.

A useful analogy can be made with the exercise of jurisdiction by the federal courts. Although federal courts generally have no jurisdiction to decide purely state law claims between non-diverse parties, a party's decision to plead a federal cause of action allows the court to exercise pendent, or supplemental jurisdiction over the state claims. And yet, if the federal cause of action is dismissed, this does not automatically revoke the court's jurisdiction. The court has the discretion to continue exercising jurisdiction over the state law claims, even though they are no longer pendent to anything, and even though the court would have lacked jurisdiction to entertain the claims had they originally been presented alone. *See Rosado v. Wyman*, 397 U.S. 397, 401, 25 L. Ed. 2d 442, 90 S. Ct. 1207 (1970); *Newport Ltd. v. Sears, Roebuck & Co.*, 941 F.2d 302 (5th Cir. 1991), cert. denied, 117 L. Ed. 2d 420, 112 S. Ct. 1175 (1992). Under no circumstance may a party unilaterally revoke a court's jurisdiction over pending claims, once the court had properly acquired jurisdiction over those claims.

PRAYER

For the reasons stated herein, respondents/cross-petitioners pray that this Court dismiss the City's petition for review for want of jurisdiction, or otherwise deny it, and grant their petition, reverse the opinion and judgment of the court of appeals and remand this case to the trial court for trial on the merits. Further, respondents/cross-petitioners pray for all costs of court and that this Honorable Court grant them any and all further

relief to which they may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing response was delivered to the following counsel of record by U.S. Mail, postage prepaid and properly addressed, on this 26th day of May, 2007:

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