

IN THE  
SUPREME COURT OF TEXAS  
AUSTIN, TEXAS

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NO. 07-0288

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CITY OF DALLAS, *Petitioner*

vs.

DAVID S. MARTIN, ET AL, *Respondents/Cross-Petitioners.*

*Consolidated with* No. 07-0289

CITY OF DALLAS, *Petitioner*

vs.

GEORGE G. PARKER, ET AL, *Respondents/Cross-Petitioners.*

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Appealed from the 382<sup>ND</sup> District Court of Rockwall County, Texas  
Petition from the Fifth Court of Appeals at Dallas

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BRIEF ON THE MERITS FOR RESPONDENTS/CROSS-PETITIONERS

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## STATEMENT OF THE CASE

*Nature of the Case:*

07-0288:

class action suit for declaratory relief, back pay and damages on behalf of members of the Dallas Police Department, based on breach of employment contract and violation of municipal referendum

07-289:

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 :*

382<sup>nd</sup> 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:*

City of Dallas

*Defendant/Appellant*

07-0288:

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.

07-0289:

George G. Parker  
Joe M. Gunn  
Stephen W. Toth  
Nathan L. Trammell

*Plaintiffs/Appellees*

Todd A. Stratman

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 Police Department.

*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 agree 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), as alleged by the City. 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 section 271.152 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).

## ISSUES PRESENTED

1. The court of appeals erred in holding that the City has sovereign immunity from claims for back pay made by its police officers and firefighters unless that defense has been waived by section 271.152 of the Local Government Code, because as a matter of law the City cannot be immune from a lawsuit seeking to enforce a voter-approved referendum reflecting the will of the people acting in their sovereign capacity as the legislative branch of government. The doctrines of sovereign and governmental immunity cannot be used by a municipality against itself.
2. The reasoning underlying *City of El Paso v. Heinrich* supports Respondents' contention that immunity does not apply to this case. However, this case is distinguishable from *Heinrich* because it does not involve an allegation of an *ultra vires* act by a city employee, but concerns the validity of the city council's pay resolutions that effectively thwart the sovereign will of the people as expressed in the referendum.
3. Alternatively, this Court should reconsider the distinction drawn in *City of El Paso v. Heinrich* between suits brought against the City and suits brought against a city official in their official capacity, because this is a meaningless distinction that has been expressly rejected by both state and federal courts, because it was mere dictum that had no impact on the result in *Heinrich*, and because the distinction could unfairly prejudice the rights of the police officers and fire fighters who brought these claims while being completely unnecessary to protect the due process rights of the City.
4. In the further alternative, this Court should remand this case in the interest of justice to allow the police officers and fire fighters to amend their pleadings to name city officials in their official capacities as defendants instead of the City itself.
5. The court of appeals erred in holding that the City could reinvest itself with immunity after having waived it, simply by dismissing its counterclaim.
6. The court of appeals' remand of the police officers' and firefighters' claims for declaratory relief is consistent with this Court's rulings 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 section 271.152 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.

## **TO THE HONORABLE SUPREME COURT OF TEXAS:**

Respondents/Cross-Petitioners David S. Martin, et al, respectfully submit this brief on the merits pursuant to TEX. R. APP. P. 55.3, 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 the *Martin* case consists of approximately 3,800 current and retired firefighters, as well as all future firefighters. (1310 CR 74). The class of police officers that are plaintiffs in the *Parker* case consists of approximately 3,800 current and retired officers, as well as all future officers. (1334 CR 77). The City contends that these consolidated cases 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.

Also, contrary to the City's assertion, plaintiffs do not merely contend that the City breached an *implied* contract term; they also contend that the City violated the referendum provision requiring that "[t]he current percentage pay differential between grades in the sworn ranks of the Dallas Police Force and the Fire Fighter and Rescue Force shall be maintained...." DALLAS, TEX. ORDINANCE 16084 §4(Jan. 22, 1979). There is nothing in the language of the referendum or the ordinance suggesting that this pay differential only had to be maintained for a limited period of time, yet the City, through subsequent pay resolutions

adopted by the city council, failed to maintain the required pay differential between grades. (1310 CR 78-79; 1134 CR 82). Alternatively, if the ordinance is not determined to be clear and unambiguous, the plaintiffs seek an interpretation of the ordinance and an order compelling the City's compliance.(1310 CR 78-79; 1134 CR 82).

### **SUMMARY OF ARGUMENT**

The doctrines of sovereign and governmental immunity do not apply to this case because the plaintiffs are seeking to enforce an ordinance adopted by voter referendum. This Court has held that voters enacting a law by referendum are acting as the legislative branch of municipal government, and are exercising a sovereign power reserved to the people. This Court has also held that the courts are compelled to prevent interference with that process. The Amarillo court of appeals has held that sovereign immunity cannot bar a suit to enforce the voters' right to act as a sovereign legislature because "the doctrine of sovereign immunity cannot be used by a municipality against itself." 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.

*City of El Paso v. Heinrich* does not control the disposition of this case. This case does not involve an *ultra vires* act by a city employee who refused to comply with the voter referendum. This case involves the enforcement of the referendum, and by implication, the validity of pay resolutions adopted by the city council that are inconsistent with the requirements of the referendum. The courts of appeals that have

considered the question have each held that a referendum can only be repealed or amended by a subsequent referendum. The sovereignty reserved to the people in the referendum process must be superior to the sovereignty exercised by the city council, or else the council could simply repeal any referendum with which it disagreed, rendering the “sovereign power” supposedly reserved to the people a nullity. In this respect, a law passed by referendum is like a constitution, and supersedes any inconsistent law passed by the city council, such as the pay resolutions. In this respect also, a suit to enforce a referendum cannot be barred or limited by immunity any more than a constitutional takings claim can. Where immunity does not apply, both retroactive and prospective damages may be claimed, or the sovereign will of the people would be infringed.

The legal rationales underlying *Heinrich* also support a conclusion that immunity does not apply to this case. *Heinrich* supports the plaintiffs’ contention that because the referendum requires that police and fire fighter contracts be performed in a certain way, leaving no room for discretion, a suit alleging a violation of the referendum is not barred by immunity, even though it necessarily involves a contract. *Heinrich* concluded that suits seeking to require a government body to comply with statutory or constitutional provisions are not barred by immunity, even if a declaration to that effect compels the payment of money. The City’s entire petition for review was premised on the contrary proposition.

*Heinrich* also justified the *ultra vires* exception to immunity by noting that “*ultra vires* suits do not attempt to exert control over the state--they attempt to reassert the

control of the state.” Likewise, immunity does not apply in this case because this suit seeks to reassert the control of the people acting as a sovereign legislature.

The court of appeals correctly held that sovereign immunity does not apply to a claim for declaratory relief seeking prospective relief, 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 also correctly decided to allow the trial court to consider whether immunity was waived by the Legislature’s enactment of section 271.152 of the Local Government Code, a decision compelled by a long line of cases from this Court, including *Williams* and *Clear Channel Outdoor*.

The court of appeals did err, however, 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

The Court has requested the parties to “brief the issues that remain in light of the Court’s decision in *The City of El Paso, et al v. Lilli M. Heinrich*.” The issues that take this case out of the purview of the *Heinrich* decision are those raised in the respondents’ cross-petition for review, which raise important questions of law on which the courts of appeals have disagreed. These issues were not addressed in the City’s brief.

**1. The court of appeals erred in holding that the City has sovereign immunity from claims for back pay made by its police officers and firefighters unless that defense has been waived by section 271.152 of the Local Government Code, because as a matter of law the City cannot be immune from a lawsuit seeking to enforce a voter-approved referendum reflecting the will of the people acting in their sovereign capacity as the legislative branch of government. The doctrines of sovereign and governmental immunity cannot be used by a municipality against itself.**

### **A. Sovereign immunity does not apply to lawsuits enforcing a voter referendum.**

The opinion of the court of appeals is premised on the notion that “sovereign immunity<sup>1</sup> 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). This concept is considered so axiomatic that this Court has said that “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.” *Wichita State Hospital v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003). The *Heinrich* case also proceeds from this premise. *City of El Paso v. Heinrich*, \_\_\_ S.W.3d \_\_\_, 2009 Tex.

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<sup>1</sup> The City and the lower courts have consistently referred to sovereign immunity, although technically a municipality must assert governmental immunity, rather than sovereign immunity. See *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003). The doctrines are functionally equivalent, however, and the analysis does not change.

LEXIS 253 at \*1 (Tex. 2009).

This case presents an important issue that goes to the very heart of this premise, *i.e.*, the nature of sovereignty itself and the proper role of the courts in enforcing that sovereignty. The doctrines of sovereign and governmental immunity cannot apply to the police officers' and firefighters' claims for back pay in this case because those claims are seeking 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 compliance with the results of a referendum. The only difference between these

two types of actions that has ever been recognized by this Court is a difference in who has standing to bring them. *Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001) (proposition sponsor has standing to sue to compel referendum but lacks standing to sue to enforce results). The common-law rules governing standing require “a real controversy between the parties, which . . . will be actually determined by the judicial declaration sought.” *Id.* at 305. Generally, to have standing, a plaintiff must demonstrate he “possesses an interest in a conflict distinct from that of the general public, such that the defendant's actions have caused the plaintiff some particular injury.” *Id.* at 302. There is no dispute that the police officers and fire fighters who brought these claims have standing to sue to enforce a referendum concerning their employment compensation.

It would be irreconcilably inconsistent to hold that sovereign immunity does not prevent a suit to compel a city to hold a voter-mandated referendum, but then to hold 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 reserved power of the people to act 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 doctrines of sovereign or governmental immunity – judicially created rules – to bar this case, it will have created a legal avenue for municipalities to thwart the ability of the people to act as

the legislative branch of municipal government.

Sovereign immunity and government immunity are common-law doctrines that initially developed without any legislative or constitutional enactment. See *Cohens v. Virginia*, 6 Wheat. 264, 19 U.S. 264, 293(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 immunity is a common-law doctrine, this Court has not foreclosed the possibility that the judiciary may modify or abrogate such immunity by modifying the common law. See *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 immunity exists in the first instance. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006).

Voter-approved referendums are a unique form of legislative sovereignty entitled to special protection by the courts. For example, a municipal legislature can certainly reconsider its prior ordinances and decide to repeal them by a new legislative act. But if a law is enacted by voter referendum over the opposition of the municipal legislature, can the legislature simply thwart the referendum by immediately acting to repeal it? It seems obvious that to permit a municipal legislature to do so would render meaningless the sovereign legislative power that this Court has held is “reserved to the people.” *Glass*, 150 Tex. at 636, 244 S.W.2d at 648-49. Those courts of appeals that have considered this question have held that an ordinance adopted by referendum can only be repealed or

amended by the voters in another referendum. *International Assn. of Firefighters v. Beaumont*, 763 S.W.2d 57, 58 (Tex. App. Beaumont 1988, writ denied); *City of Houston v. Gray*, 1999 Tex. App. LEXIS 4011 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1999, pet. denied)(not intended for publication).

And yet, this is exactly what the City of Dallas stands accused of doing in this case. The voters approved a law requiring that “the current percentage pay differential between grades in the sworn ranks of the Dallas Police Force and the Fire Fighter and Rescue Force shall be maintained.” (City’s Brief, Tab 4). The city council subsequently adopted a series of annual pay resolutions that did not maintain the required pay differential. (1310 CR 77-78; 1334 CR 80-81).

The holding of the court of appeals 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 legislative acts and that courts should prevent interference with those acts. The lower 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.

This Court has, on occasion, found waiver of sovereign immunity absent “magic words,” such as where a statute would be rendered meaningless unless immunity were waived. *Taylor*, 106 S.W.3d at 697, citing *Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1, 8 (Tex. 2000). However, a mere waiver of immunity is insufficient to protect the

sovereign right of the people to act by referendum. The sovereignty of the people and the sovereignty of their elected representatives cannot be given equal weight, or an elected legislature could simply repeal or amend the sovereign acts of the people, thereby nullifying the power supposedly reserved to them. The “reserved” power of the people to act as sovereign must be held superior to the sovereign acts of the elected legislature, in the same way that the Texas Constitution, also adopted by voters, supersedes mere legislative acts.

The only way to preserve the people’s superior right to act, and to “prevent interference by others with that process,” *Glass*, 150 Tex. at 644-45, 244 S.W.2d at 653-54, is to hold that the judicially-created defenses of sovereign and government immunity do not apply to lawsuits seeking to enforce voter-approved referendums. Such suits should be permitted to fully enforce the sovereign will of the people and seek both retroactive and prospective relief, and should not be governed by the limitations that remain even where immunity is waived or an exception to immunity is created. *Compare City of El Paso v. Heinrich*, \_\_\_ S.W.3d \_\_\_, 2009 Tex. LEXIS 253 at \*24 (*ultra vires* exception to immunity permits prospective relief only) and *Williams*, 216 S.W.3d at \_\_\_ (waiver of immunity for declaratory judgment action permits prospective relief only) with *Gen. Servs. Comm’n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001) (immunity does not shield the State from an action for retroactive compensation under the takings clause) and WRIGHT & MILLER, FED. PRAC. & PROC. §3524.3 (If state cannot invoke immunity, retroactive relief is allowed).

**2. The reasoning underlying *City of El Paso v. Heinrich* supports Respondents' contention that immunity does not apply to this case. However, this case is distinguishable from *Heinrich* because it does not involve an allegation of an *ultra vires* act by a city employee, but concerns the validity of the city council's pay resolutions that effectively thwart the sovereign will of the people as expressed in the referendum.**

**A. The rationales underlying *Heinrich* support Respondents' contention that immunity does not apply to the claims made in this suit.**

*Heinrich* involved a claim that a municipal pension fund improperly reduced the survivor's benefits paid to the widow of a deceased fire fighter, which at least facially resembles the claims in this case that police officers and fire fighters are not being paid the full compensation required to be paid to them. However, the focus of the *Heinrich* opinion is the application of sovereign immunity to suits alleging that a government official had acted without legal or statutory authority. This Court had previously held that an action to determine or protect a private party's rights against a state official who has acted without legal or statutory authority is not barred by immunity, *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997), and *Heinrich* confirmed that this "*ultra vires*" exception also applied to governmental immunity claims by a municipal pension plan. *City of El Paso v. Heinrich*, \_\_\_ S.W.3d \_\_\_, 2009 Tex. LEXIS 253 at \*10-11.

The legal rationales underlying *Heinrich* are instructive to the present case. For example, *Heinrich* reaffirms the rule that while suits for contract damages against the state are generally barred by immunity, where a statute or the constitution requires that government contracts be made or performed in a certain way, leaving no room for

discretion, a suit alleging a violation of that law is not barred, even though it necessarily involves a contract. *Heinrich*, \_\_\_ S.W.3d \_\_\_, 2009 Tex. LEXIS 253 at \*9, citing *State v. Epperson*, 42 S.W.2d 228, 231 (Tex. 1931). *Heinrich* concluded that suits seeking to require a government body to comply with statutory or constitutional provisions are not prohibited by sovereign immunity, even if a declaration to that effect compels the payment of money. *Heinrich*, \_\_\_ S.W.3d \_\_\_, 2009 Tex. LEXIS 253 at \*10. Under this rationale, the present case should not be barred by immunity. This case involves an ordinance adopted by referendum that required police officers and fire fighters' contracts to be performed in a certain way, leaving no room for discretion, and an allegation that the City has failed to comply with that referendum. The suit seeks to require the City to comply with the referendum.

*Heinrich* also justified the *ultra vires* exception to immunity by noting that “*ultra vires* suits do not attempt to exert control over the state--they attempt to reassert the control of the state.” *Heinrich*, \_\_\_ S.W.3d \_\_\_, 2009 Tex. LEXIS 253 at \*11. This rationale applies equally to this case, which is seeking to reassert the control of the people acting as a sovereign legislature. Such a claim should not be barred by immunity.

**B. *Heinrich* does not control the disposition of this case**

Although the reasoning in *Heinrich* supports a conclusion that the claims in this case should not be barred by immunity, this case is fundamentally distinguishable from *Heinrich* because it does not involve an allegation of *ultra vires* conduct by a city official. “To fall within this *ultra vires* exception, a suit must not complain of a government officer's

exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act.” *Heinrich*, \_\_\_ S.W.3d \_\_\_, 2009 Tex. LEXIS 253 at \*11.

There is no allegation in this case that any city official disregarded the ministerial requirements of the referendum without legal authority. Rather, this case involves a battle between two sovereigns: the people, whose referendum vote mandated that a specific percentage pay differential be maintained between grades in the sworn ranks of the Dallas Police Force and the Fire Fighter and Rescue Force, and the city council, whose subsequent pay resolutions failed to maintain that differential. No city official involved in the payment of compensation to the police and fire fighters acted without legal authority – they would have acted under the authority of the pay resolutions adopted by the city council.

By seeking to enforce the sovereign will of the people acting by referendum, this suit is implicitly challenging the validity of the pay resolutions adopted by the city council that are inconsistent with the referendum. The Declaratory Judgment Act requires the relevant governmental entity be made a party to claims challenging the validity of ordinances, and thereby waives immunity from such suits. TEX. CIV. PRAC. & REM. CODE §37.006(b); *Heinrich*, \_\_\_ S.W.3d \_\_\_, 2009 Tex. LEXIS 253 at \*13, n.6.

Consequently, none of the pleading requirements and remedy limitations that arise under the *ultra vires* exception to immunity apply to the present cases. The City is the proper defendant because the validity of its pay resolutions must be challenged in order to enforce the sovereign will of the people acting by referendum.

**3. Alternatively, this Court should reconsider the distinction drawn in *City of El Paso v. Heinrich* between suits brought against the City and suits brought against a city official in their official capacity, because this is a meaningless distinction that has been expressly rejected by both state and federal courts, because it was mere dictum that had no impact on the result in *Heinrich*, and because the distinction could unfairly prejudice the rights of the police officers and fire fighters who brought these claims while being completely unnecessary to protect the due process rights of the City.**

**4. In the further alternative, this Court should remand this case in the interest of justice to allow the police officers and fire fighters to amend their pleadings to name city officials in their official capacities as defendants instead of the City itself.**

The City alleges in its brief, without any significant analysis, that “these cases are exactly the same as *Heinrich*,” (City’s Brief, p. 12) and argues that they should be dismissed because the suits were brought against the City rather than against any city official acting in his or her official capacity. This Court stated in *Heinrich* that *ultra vires* suits cannot be brought against the state, which retains immunity, but must be brought against the state actors in their official capacity. *Heinrich*, \_\_\_ S.W.3d \_\_\_, 2009 Tex. LEXIS 253 at \*14.

This Court has repeatedly made clear that the determination of whether a suit is barred by immunity is not governed by how the suit is characterized, but by the relief it seeks. *See, e.g., IT-Davy*, 74 S.W.3d at 856 (It is well settled that plaintiffs cannot circumvent immunity from suit by characterizing a suit for money damages as a declaratory-judgment claim). This suit seeks to enforce a referendum requiring that the police and fire fighters’ contracts be performed in a certain way, leaving no room for discretion. Suits alleging a violation of the referendum are not barred, even though they necessarily involve contracts and the payment of money. *Heinrich*, \_\_\_ S.W.3d \_\_\_, 2009

Tex. LEXIS 253 at \*9-10. That the plaintiffs characterized their suits as a breach of contract in an effort to bring this case within the exception to immunity under section 271.152 of the Local Government Code does not alter this reality.

If, however, this Court were to conclude that this is an *ultra vires* case governed by *Heinrich*, it should reconsider *Heinrich's* requirement that suit be brought against a city official rather than against the City itself, for a number of reasons.

First, this requirement in *Heinrich* was mere *dictum* and was not necessary to the resolution of the case, because the claimant in *Heinrich* had sued both the government and the government officials.

Second, it is a meaningless distinction. As *Heinrich* itself observed, both Texas courts and federal courts have long considered it fundamental that a suit against a government official is merely another way of pleading an action against the entity for which the official is an agent. *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 844 (Tex. 2007), quoting *Kentucky v. Graham*, 473 U.S. 159, 165 (1985).

Third, enforcement of this meaningless distinction could have devastating substantive effects for the police officers and fire fighters who brought this suit. If the plaintiffs are limited to prospective relief, and this suit is dismissed because it names the City as defendant rather than naming some city official, years of prospective relief could be lost.

In the further alternative, should this Court conclude that this is an *ultra vires* case governed by *Heinrich*, and that suit must be brought against a city official rather than

against the City itself, then this Court should remand this case in the interest of justice to allow the plaintiffs to replead their case consistent with the facts and the requirements of *Heinrich*. This Court has broad discretion to remand in the interest of justice where it appears that a party may have proceeded under the wrong legal theory. TEX. R. APP. P. 43.3(b); see *Boyles v. Kerr*, 855 S.W.2d 593, 603 (Tex. 1993). Remand is particularly appropriate where the losing party may have presented his or her case in reliance on controlling precedent that was subsequently overruled. *Kerr*, 855 S.W.2d at 603. It is even more appropriate where this Court has subsequently given formal recognition to a cause of action which might be applicable to the facts of the case. *Id.*

*Heinrich* admits that this Court has “been less than clear regarding the permissible use of a declaratory remedy in this type of *ultra vires* suit.” *Heinrich*, \_\_\_ S.W.3d \_\_\_, 2009 Tex. LEXIS 253 at \*13. In addition, this Court has substantially changed the law with regard to the application of sovereign and governmental immunity to declaratory judgment actions since this appeal was filed six years ago in 2003. If this Court somehow concludes that this is an *ultra vires* suit, it would be in the interest of justice to allow the plaintiffs to replead their case consistent with the facts and the requirements of *Heinrich*.

**5. 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*, *supra*, 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 (1970); *Newport Ltd. v. Sears, Roebuck & Co.*, 941 F.2d 302 (5th Cir. 1991), *cert. denied*, 502 U.S. 1096 (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.

**6. The court of appeals' remand of the police officers' and firefighters' claims for declaratory relief is consistent with this Court's rulings 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 section 271.152 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 at 644, *citing Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994); *IT-Davy*, 74 S.W.3d at 859-60.

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 petition for review 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*, *supra*. 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 these cases include currently employed firefighters and police officers and all future firefighters and police officers, 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 section 271.152 of the Texas Local Government Code is also exactly what this Court required in *Williams* and in *Clear Channel Outdoor, Inc.*, 197 S.W.3d at 386-87; *Martin*, 214 S.W.3d at 643-44. There is no conflict upon which this Court has jurisdiction to grant the City’s petition.

### **C. The City’s argument against declaratory relief is inconsistent with *Heinrich***

The main argument asserted by the City against the court of appeals’ decision to remand the plaintiffs’ claim for declaratory relief is the assertion 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

contract liability for damages. (City's Petition, p. ix; City's Brief, p. xii).

This contention conflicts with the holding in *Heinrich*, which says that lawsuits seeking to require a government body to comply with a statutory provision are not barred by sovereign immunity, even if a declaration to that effect compels the payment of money. *Heinrich*, \_\_\_ S.W.3d \_\_\_, 2009 Tex. LEXIS 253 at \*9-10.

### **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 cross-petition, reverse the opinion and judgment of the court of appeals, hold that immunity does not apply to the claims in this case and remand this case to the trial court for trial on the merits. Alternatively, respondents/cross-petitioners pray that this Court remand this case in the interest of justice to permit the plaintiffs to replead this case consistent with the facts and the law. 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 20<sup>th</sup> day of July, 2009:

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