

No. 09-0770

IN THE SUPREME COURT OF TEXAS

THE CITY OF HOUSTON,
Petitioner,

vs.

STEVE WILLIAMS, et al.,
Respondents.

PETITIONER'S BRIEF IN REPLY

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PETITIONER’S REPLY

Petitioner, the City of Houston (the “City”), replies to the Response Brief on the Merits filed by Respondents (“Plaintiffs”).

I. RESPONSE TO “INTRODUCTION AND OVERVIEW”

Nothing in this case remotely concerns claims by the Plaintiffs “to be paid for work they performed for the City.”¹ The Plaintiffs were fully paid for every hour that they worked—including overtime pay when they worked overtime hours—and were fully paid all termination pay which they accrued. The City paid these amounts in accordance with clear and specific ordinances which had been in effect for decades, without challenge.

The issue in this case is whether the City is subject to suit when someone challenges the City’s own interpretation of its own ordinances, or (as here) claims that the non-substantive 1987 codification of the Civil Service Act somehow effected a substantive change in the law which gave a raise to the City’s fire fighters. The Plaintiffs had a clear means of obtaining a remedy for such claims: ask the Legislature for permission to sue. They did ask, and the Legislature refused. Accordingly, the ultimate question in this appeal is whether the Plaintiffs will be given a creative end-run around clear Legislative intent.

II. THE COURT HAS JURISDICTION OVER THIS APPEAL

The Court has “conflict” jurisdiction over this appeal based on the conflicting decisions which the City identified in its opening brief, whether those conflicts are

¹ Response Brief on the Merits, p. 2.

considered under the current standard for conflict jurisdiction or under the pre-2003 standard.

The correct standard, however, is the current standard set forth in Texas Government Code §§22.001(e) and 22.225(e). That standard, added by amendments effective since September 1, 2003, applies to an “action” filed on or after that effective date. Act of June 2, 2003, 78th Leg., R.S., ch. 204, §23.02(d). This case was not an “action” before that date, because the district court had no jurisdiction to hear the case before that date. This Court has already held that no arguable basis for jurisdiction over this case existed prior to 2005, when Local Government Code §§271.151-160 was passed. *City of Houston v. Williams*, 216 S.W.3d 827 (Tex. 2007).

That lack of jurisdiction meant that no “action” existed before 2005, because the filing of a petition in a court with no jurisdiction has no legal effect, and does not begin an “action.” As this Court explained long ago:

Nothing is better settled than that, in a suit which the court is inherently without the power to hear and determine, any judgment rendered and all proceedings had in its relation are mere nullities. Under this fundamental rule, with the court destitute of all authority to give to the suit any cognizance, it is difficult to conceive that the filing of the petition could have any legal effect. To constitute the proceeding ‘a suit’ or ‘action,’ in any legal sense, it is essential that it rest in a court, with the power to hear it. Without such a forum, it is not ‘a suit,’ since it lacks that which is as necessary to make it a suit as the petition itself.

United Production Corp. v Hughes, 152 S.W.2d 327 (Tex. 1941) (quoting *Pecos & N. T. Ry. Co. v. Rayzor*, 172 S.W. 1103 (Tex. 1915)). Accordingly, this Court’s appellate

jurisdiction is governed by the current rule that “one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.” Tex. Gov’t Code §§22.001 (e), 22.225(e).²

Moreover, the conflicts identified by the City would also satisfy the pre-2003 jurisdictional standard, because the identified opinions are “so similar that the decision in one is necessarily conclusive of the decision in the other.” *See Stephen F. Austin State Univ. v. Flynn*, 228 S.W.3d 653, 656 (Tex. 2007). For example, the *Overton* court addressed the same material question of law at issue here, presented on virtually identical facts. *See Overton v. City of Houston*, 564 S.W.2d 400 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref’d n.r.e.). The dispositive question of law in both cases was whether the City of Houston’s civil service ordinances, establishing pay scales and fringe benefits for classified civil servants, create “written contracts” with its civil servants. The *Overton* court held that the ordinances did not create “written contracts.” *Id.* at 403-04. The court of appeals here held that the ordinances did create “written contracts.” *City of Houston v. Williams*, 290 S.W.3d 260, 267 (Tex. App.—Houston [14th Dist.] 2009, pet. filed). The court explicitly rejected *Overton*, describing it as “not persuasive authority.”

² The City recognizes that this proposition may seem, at first blush, to conflict with footnotes in *Stephen F. Austin State Univ. v. Flynn*, 228 S.W.3d 653, 656 n.3 (Tex. 2007) and *Texas Department of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 223 n.3 (Tex. 2004). In those cases, the Court purported to apply the pre-2003 conflict standard in post-2003 decisions, although the Court ultimately concluded that the district court had no jurisdiction. In both cases, however, the Court found no jurisdiction based on the evidence presented, whereas the pre-2005 lack of jurisdiction in this case was established on the face of the Plaintiffs’ pleadings, as in *United Production*. Moreover, the footnotes in both *Miranda* and *Flynn* were *dicta*, because in each case the Court found a sufficient conflict under the pre-2003 standard for conflict jurisdiction. This means that the Court necessarily would have found a sufficient conflict to exercise its jurisdiction under the current, broader, standard. Therefore, the applicable standard was not material to the Court’s decision to exercise its appellate jurisdiction.

Id. at 268. That is a clear conflict on the same question of law actually involved and determined differently in different courts. *See* Tex. Gov't Code §22.001(a)(2) (providing jurisdiction when courts differ on “a question of law material to a decision of the case”).

This direct conflict does not disappear simply because *Overton* considered the question of law in the context of a statute of limitations defense, while here the question arises in the context of a statutory waiver of immunity. Conflicts jurisdiction has never required that the two cases be identical, either on the facts underlying the causes of action or on the procedural facts. *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 431 (Tex. 2000). Immaterial factual variations do not preclude a finding of jurisdictional conflict, and a conflict can arise on very different underlying facts if those facts are not important to the legal principle being announced. *Id.* (quoting *Coastal Corp. v. Garza*, 979 S.W.2d 318 (Tex.1998)).

Moreover, conflict jurisdiction does not limit the scope of conflicting propositions of law to the ultimate issues to be decided. For example, in *Texas Department of Parks & Wildlife v. Miranda* this Court considered whether the court of appeals' approach to a jurisdictional plea conflicted with this Court's prior decision in *Bland Independent School District v. Blue*, 34 S.W.3d 547 (Tex.2000). *Miranda*, 133 S.W.3d 217 (Tex. 2004). The ultimate question in *Bland* had been whether taxpayers had standing to sue their school district. 34 S.W.3d at 549. The ultimate question in *Miranda* concerned the waiver of immunity in the Tort Claims Act. 133 S.W.3d at 221. The *Miranda* court nonetheless found a jurisdictionally-sufficient conflict between the court of appeals' holding that evidence could be considered in only one particular circumstance on that

plea to the jurisdiction, and this Court's prior holding that evidence should be considered "when necessary to resolve jurisdictional issues." 133 S.W.3d at 223-24 (Tex. 2004) (noting that court of appeals had "misapplied" the Court's prior holding).

Similarly, the distinction between the context of *Overton* and the context of this case is not material to the conflict issue. The court below did not purport to distinguish *Overton* on the basis that it was a statute of limitations case; the court rejected *Overton* simply upon its conclusion that it was "not persuasive authority." The only potentially-relevant context-based distinctions in the cases would have been the standard of review. In limitations cases, courts were "liberal" in finding a written contract, while in a §271.152 case the courts should find a written contract only if it is "clear and unambiguous" that the legislature intended that result. The different standard of review is immaterial for conflict purposes, however, because the *Overton* court held that no contract existed under the liberal standard. Therefore, *Overton* necessarily dictated that no contract existed under a more strict standard, and hence was conclusive as to whether a contract existed for the purposes of the waiver of immunity in §271.152.

In short, if *Overton* had been decided by the same court as the present case, then the present case would have operated to overrule *Overton's* holding that the City's civil service ordinances do not form "contracts" with its civil servants. That circumstance establishes this Court's jurisdiction under any standard.

Conflict jurisdiction also exists for the same reason that it existed in *Miranda*: because the court of appeals incompletely stated and misapplied *Bland's* holding that courts must consider evidence when necessary to resolve the jurisdictional issues raised.

Miranda, 133 S.W.3d at 223-24 (citing *Bland*, 34 S.W.3d at 555). The court of appeals gave only one reason for refusing to consider whether the City’s ordinances applied to, and therefore created a “unilateral contract” with, those Plaintiffs covered by a collective bargaining agreement: it cited *Bland* for the proposition that the purpose of a plea to the jurisdiction is to defeat a cause of action “without regard to whether the claims asserted have merit.” 290 S.W.3d at 270 n.11. That holding directly conflicts with this Court’s holding in *Miranda* that, when the facts underlying the merits and subject matter jurisdiction are intertwined, plaintiffs must at least show that there is a disputed material fact regarding the jurisdictional issue before their cases will be allowed to proceed. 133 S.W.3d at 288; *see also City of Waco v. Kirwan*, 298 S.W.3d 618 (Tex. 2009). A fundamental jurisdictional requirement in this case is the existence of a written contract. The court of appeals reasoned that a sufficient “unilateral contract” was created by the “offer” made in the City’s ordinances. The court’s refusal to consider the evidence to determine whether such an offer even existed, for the Plaintiffs covered by a collective bargaining agreement, is a holding which cannot stand together with this Court’s holdings in *Miranda* and *Kirwan*.³

Of course, it only takes one conflict for the Court to have jurisdiction over all of the issues raised by the City. *See Brown v. Todd*, 53 S.W.3d 297, 301 (Tex. 2001)

³ The City’s Brief did not assert “importance” or “statutory construction” jurisdiction under Tex. Gov’t Code §§22.001(a)(3) & (6), as alleged by Plaintiffs. The City cited these subsections with a “*Cf.*” designation, to indicate that the conflicts presented by this case are of the type which this Court *should* resolve.

(discussing the extended jurisdiction doctrine).⁴ The City asks the Court to exercise that jurisdiction, for all of the reasons stated in its opening brief.

III. THE COURT STRICTLY CONSTRUES THE EXTENT OF IMMUNITY WAIVERS

The Plaintiffs offer no support for their suggestion that this Court overruled years of precedent *sub silentio*, and ignored the Code Construction Act, to call for a “broad” construction of §§271.151-.160, in *Ben Bolt-Palito Blanco Consol. Indep. School Dist. v. Texas Political Sub. Property/Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320 (Tex. 2006).⁵ The rule that a waiver of immunity must be clear and unambiguous as to both “the existence and the extent of the waiver”⁶ follows the principle that legislative grants of rights – such as the right to sue a political subdivision – “must be construed strictly in favor of the state ... and whatever is not unequivocally granted in clear and explicit terms is withheld. Any ambiguity or obscurity in the terms of the statute must operate in favor of the state.” *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 701 (Tex. 2003) (quoting *Magnolia Petroleum Co. v. Walker*, 83 S.W.2d 929, 934 (Tex. 1935)). This rule is also codified in the Code Construction Act, which provides that a statute should not be construed to waive immunity unless the waiver is “*effected* by clear and unambiguous language.” Tex. Gov’t Code §311.034 (emphasis supplied).

The Court reaffirmed this principle just three months after *Ben Bolt*, and emphasized that the rule is particularly applicable when the immunity of a home-rule city

⁴ The City concedes that this doctrine would also extend jurisdiction to the Plaintiffs’ Cross-Petition for Review. This is why the City’s response to the Cross-Petitioners’ jurisdictional statement only pointed out that the Cross-Petition showed no “independent” basis for conflict jurisdiction.

⁵ Response Brief on the Merits, p. 13.

⁶ *City of LaPorte v. Barfield*, 898 S.W.2d 288, 297 (Tex. 1995).

is at issue. *See City of Galveston v. State*, 217 S.W.3d 466 (Tex. 2007). In discussing the “heavy presumption in favor of immunity,” the Court observed:

This high standard is especially true for home-rule cities Such cities derive their powers from the Texas Constitution, not the Legislature.... Among those powers is, again, immunity from suit for governmental functions. The question thus is not whether any statute *grants* home-rule cities immunity from suit, but whether any statute *limits* their immunity from suit. Such limits exist only when a statute speaks with “unmistakable clarity.”

Id. at 469. The Court specifically identified Local Government Code §271.152 as one of the statutory waivers of immunity which “are not blanket waivers: they apply only to specified claims” *Id.* at 470. And the next year the Court again reiterated that “[w]e interpret statutory waivers of immunity narrowly” *Mission Consol. Indep. School Dist. v. Garcia*, 253 S.W.3d 653, 655 (Tex. 2008). Accordingly, there is no basis for any suggestion that this Court “broadly” or “liberally” applies the waiver of immunity provided by §271.152.

IV. THE CITY’S ORDINANCES ARE NOT “CONTRACTS”

A. The Legislature did not use the term “written contract” to mean “ordinance.”

None of the cases cited by the Plaintiffs support their proposition that “common usage” of the term “written contract” would encompass civil service ordinances, because none of the cases held that laws create written contracts. The Plaintiffs’ cases⁷ stand only for the proposition that laws governing contracts are “part of” or “incorporated into” subject contracts, and not that the laws themselves are “written contracts.” Except for the

⁷ *See* Response Brief on the Merits, p. 14 n.6.

limitations case cited by the Plaintiffs, none of their cases addressed whether laws would satisfy the writing requirement of another law requiring a “written contract.” And the Plaintiffs’ limitations case did not hold that laws alone could satisfy the former requirement of a “contract in writing.” Rather, the court found a “contract in writing” because the plaintiffs had a collective bargaining agreement, and the defendant city “[did] not deny the existence of written contracts of employment.” *Kierstead v. City of San Antonio*, 636 S.W.2d 522, 527 (Tex. App.—San Antonio 1982), *rev’d in part*, 643 S.W.2d 118 (Tex. 1982).

Moreover, the Plaintiffs’ logic would extend the scope of §271.152 far beyond laws concerning employment. Under the Plaintiffs’ reasoning, every ordinance, statute or regulation concerning contractual relationships could create a “written contract” subject to §271.152’s waiver of immunity. A claimant would only have to allege an agreement of some type with a local governmental entity, and point to a law which is “incorporated into” or “part of” that alleged agreement, in order to satisfy §271.152’s requirement of a “written contract.” Nothing in the waiver statute suggests, however, that the Legislature intended the statute to have such an unlimited scope.

The unlimited scope proposed by the Plaintiffs also belies their suggestion that the Legislature passed Local Government Code §180.006 in 2007 merely “to eliminate any future contention that sovereign immunity was not waived for ordinance[s] and statutes by Sections 271.151-.160.”⁸ The waiver of immunity in §180.006 applies only to claims for back pay and penalties provided by specified civil service statutes and ordinances

⁸ Response Brief on the Merits, p. 15.

concerning fire fighters and police officers. The Plaintiffs' interpretation of §271.152, on the other hand, would expand that statute's scope to encompass claims based on any alleged breach of any type of alleged contract which happens to be subject to written governmental regulations which are "incorporated into" the alleged contract. That interpretation would render §180.006 superfluous, and would render meaningless the limitations on §180.006's scope.

Another limitation on §180.006's scope was, of course, that it did not apply to claims asserted before its passage. The Legislature's refusal to make the statute retroactive, to encompass the Plaintiffs' claims, was not "inaction by the legislature" or a mere "rejection of proposed language." The Legislature took action, and enacted a statute with a clearly specified exclusion of the Plaintiffs' claims. That action demonstrated the Legislature's intent to reject the substance of the Plaintiffs' specific request for a retroactive waiver of immunity.

Accordingly, there is no basis for any assertion that the Legislature, in passing a waiver of immunity for suits on "written contracts," intended to waive immunity for claims based on the City's interpretation and application of its own civil service ordinances.

B. Documents which disavow contractual intent do not create "written contracts."

The Plaintiffs also fail to offer any meaningful response to the fact that the City's ordinances on the use of benefit leave are subject to the explicit denial of contractual intent found in Section 7 of Ordinance No. 96-1088. Instead, the Plaintiffs construct an

argument based entirely on the erroneous proposition that Section 7 “simply recognizes and acknowledges” the City’s right to “amend, repeal or otherwise pass modifying legislation.”⁹ That proposition requires the reader to wholly ignore three-quarters of the language of Section 7. While the first part of the first sentence of Section 7 does state that the benefit provisions “are subject to amendment or repeal at any time,” the remainder of that sentence states that the payment of benefits “is **subject to the appropriation or allocation of funds** for that purpose by the city council.” The next sentence states: “**No provision of this ordinance shall be construed to create a vested right of compensation** for sick leave benefits or, were applicable, for termination payments.”¹⁰

These additional provisions, ignored by the Plaintiffs, create at least two impediments to a finding that the City’s ordinances on benefit leave create a “unilateral contract,” even if ordinances are properly subject to such an analysis under Local Government Code §271.152. First, Section 7 provides that any “promise” of benefits is contingent on the city council first appropriating or allocating funds for that purpose. Without evidence that the city council appropriated or allocated funds for the termination pay and benefit hours which the Plaintiffs seek, the Plaintiffs cannot show that the required contingency ever occurred for the ordinance to be characterized as a “promise.”

Second, Section 7’s final sentence provides that in no event should the provisions of the benefits ordinance be “construed to create a vested right of compensation.” This

⁹ Response Brief on the Merits, p. 22.

¹⁰ Emphasis supplied. The full text of this and other relevant ordinances is set forth in Appendix D to Petitioner’s Brief.

phrase necessarily encompasses a directive that the ordinance not be “construed as a contract.” A contract is, by definition, an agreement conveying one or more rights.¹¹ If a writing specifies that it creates no vested rights, it is not a contract. *See Hughes v. Tex. Instruments, Inc.*, No. 05-99-02106-CV, 2000 WL 1708966, at *3-6 (Tex. App.—Dallas 2000, no pet.) (holding that extra-pay provisions in employer’s policies did not create contracts, where the provisions were contingent on further agreement and provided that “[t]his procedure is not intended to and does not confer legal rights or impose legal obligations.”); *S&A Marinas, Inc. v. Leonard Marine Corp.*, 875 S.W.2d 766, 770 (Tex. App.—Austin 1994, writ denied) (holding that LCRA board resolution, which had authorized negotiation of a contract, did not create “vested contractual rights”). Accordingly, Section 7’s disclaimer of the creation of vested rights, through any legal theory, necessarily encompasses a disclaimer that the ordinance created any vested contract rights. In light of such a disclaimer, the ordinance could not be a “written contract” subject to the waiver of immunity in §271.152. *Seals v. City of Dallas*, 249 S.W.3d 750, 757 (Tex. App.—Dallas 2008, no pet.).

Moreover, a disclaimer of contractual intent does not have to contain the magic word “contract” in order for the language to effectively deny contractual intent. When the plain language of a writing shows the writer’s lack of intent to be contractually bound, it is not a contract. *See Coastal Corp. v. Atlantic Richfield Co.*, 852 S.W.2d 714, 717 (Tex. App.—Corpus Christi 1993, no writ) (holding that statute of frauds was not satisfied by draft agreement which stated: “Nothing in this Agreement shall be binding

¹¹ *Black’s Law Dictionary* 322 (6th ed. 1990) (defining “contract”).

upon any of the parties until this Agreement is executed by all of the parties by their duly authorized officers.”); *see also Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 635 (Tex. 2007) (mutual assent, generally shown by delivery of a contract with the intent to bind, is a required element of contract formation).

Accordingly, there is no material distinction between the denial of “vested rights” in Ordinance No. 96-1088, and the denials of “contract rights” which this Court and others have repeatedly found sufficient to preclude any finding that a writing is a “contract.” In addition to the cases cited in the City’s opening brief,¹² these would include *Federal Express Corp. v. Dutschman*, 846 S.W.2d 282, 283 (Tex. 1993) (citing multiple cases).

This Court did not overrule all of those cases, as suggested by the Plaintiffs, or even discuss the element of contractual intent, in *Vanegas v. American Energy Serv.*, 302 S.W.3d 299 (Tex. 2009). In *Vanegas*, the Court assumed as true the plaintiffs’ allegation that their employer had made an unqualified oral promise to pay them a bonus if they stayed with the company until a sale or merger of the company. *Id.* at 300, 303. The opinion did not address an alleged “written contract” containing an express denial of contractual intent. Nor did the opinion address any of the cases holding that a document cannot create a “written contract” when it contains such an express denial of contractual intent. Nothing in the opinion contradicts the seemingly undeniable proposition that when a document says that it creates no rights, it is not a contract. And nothing in the opinion addressed whether standing ordinances are contractual promises.

¹² Petitioner’s Brief, pp. 19-21.

Similarly, in the *Paniagua* opinion cited by the Plaintiffs, the court considered an unqualified pay provision in the City of Galveston's Personnel Rules and Regulations. *Paniagua v. City of Galveston*, 995 F.2d 995 1310, 1314 (5th Cir. 1993). The court first observed that the question of whether that provision was contractual required a determination of whether the parties had that intent. It then upheld the trial court's affirmative finding of a contractual obligation as "not clearly erroneous," because the employee had received a copy of the Rules when he first began working for the city; because the Rules "themselves indicate that they are binding"; and because of **"the absence of any disclaimer in the Rules and Regulations—i.e., to the effect that they do not create a contract or affect legal relations"** *Id.* (emphasis supplied).

In stark contrast, the City's benefits ordinance plainly states that it is not binding, and that it does not create any vested rights. Moreover, the Rules and Regulations in *Paniagua* actually provided the pay benefit sought. The City's ordinances, in contrast, expressly contradict the Plaintiffs' claims that premium pay should be included in termination pay, and that they should have been allowed to use benefit leave when they did not work pre-scheduled overtime hours. Accordingly, the reasoning of *Paniagua* strongly suggests that the court would *not* have found contractual intent in the benefits ordinance at issue here. That is because basic contract law dictates that, without an unqualified promise to pay the amounts sought, there can be no "unilateral contract." *See Oldham v. Orix Financial Serv., Inc.*, No. 3:05-CV-2361-M, 2007 WL 530202, at *3 (N.D. Tex. 2007) (distinguishing *Paniagua*, where incentive compensation plan disclaimed contractual intent and provided that "no rights shall vest [until amounts are

determined by employer] and actually paid”); *Hughes*, 2000 WL 1708966, at *3-6 (distinguishing *Paniagua*, where extra-pay provisions denied the creation of legal rights).

This basic principle does not, as the Plaintiffs suggest, mean that the City could refuse to pay a fire fighter’s base wage without recourse. First, the Plaintiffs were given a Civil Service Commission remedy for any complaints about base wages. The Legislature refused, however, to give them a remedy for the extra benefits sought in this case. Second, the Plaintiffs do not allege that the City failed to pay them their base wages. The Plaintiffs do not even deny that the City paid them termination pay and overtime in full compliance with the relevant ordinances which have been in place for decades. Rather, they seek additional benefits by asking the courts to re-write the ordinances to remove selected words. This circumstance bears no resemblance to a claim for basic wages owed under a clear and unqualified promise.

Third, the issue in this appeal is governmental immunity from suit; i.e., the lack of recourse. If the Plaintiffs lack a means of enforcing their attempt to re-write the terms of their employment, it is because of the legal presumption that governmental entities cannot be sued without the consent of the Legislature. The Plaintiffs have obtained no such consent. Presumably, the Legislature would have been much more likely to grant consent if the Plaintiffs were complaining of a straight-forward refusal to pay clearly-promised wages.

Similarly, there is no merit to the Plaintiffs’ suggestion that the requirement of contractual intent would “jeopardize all pension plans, vacation leave,” etc. Pension plans and benefit leave policies commonly contain express denials of contractual intent,

precisely so that an employer may consistently administer its plan without the risk that employees will challenge the employer's own interpretations of its own plan. Moreover, if an employer intended for its benefit plan to create contractual obligations, it would not state in the plan that it creates no vested rights.

And again, the ultimate issue here is governmental immunity. No government-sponsored benefit plan is enforceable, regardless of its terms, except when enforcement is expressly permitted by the Legislature. The Plaintiffs obtained no such permission.

C. The lack of contractual intent is not a “new issue.”

There is no support or relevance to the Plaintiffs' assertion that the City did not raise, in the courts below, the lack of contractual intent in its ordinances. The Plaintiffs implicitly concede the weakness of this one-paragraph assertion,¹³ as they do not allege waiver.

Factually, the Plaintiffs' assertion that the City has previously claimed that ordinances were “oral” or “implied” contracts is ludicrous. On the record pages cited by the Plaintiffs for this proposition, the City was responding to, and plainly disagreeing with, the *Plaintiffs'* argument that ordinances are “implied” terms of their alleged “contracts.” The City has denied at every stage of this case that ordinances create any kind of contract.¹⁴ In the City's briefing to the appeals court, on the very pages cited by the Plaintiffs' for this proposition, the City's argument began: “Long-standing case law rejects the Plaintiffs' contention that civil service statutes and ordinances are themselves

¹³ Response Brief on the Merits, p. 19.

¹⁴ 3CR 000785-788; Brief of Appellant, pp. 16-22.

‘written contracts’ between a city and its employees.”¹⁵ In support of that proposition, the City cited (among many other things) the holding of *Seals*, 249 S.W.3d at 757, that a city’s written policies “are not considered contractual absent express language clearly indicating contractual intent.”¹⁶ And the City specifically argued the language of Ordinance No. 96-1088, Section 7, disclaiming the creation of any vested right.¹⁷

Nor did the court of appeals “recognize” any relevant concession by the City, when it noted that the City was not challenging the Court’s earlier holding that the City had contracted with its fire fighters when it employed them. Recognizing that an employment relationship is generally contractual in nature is a far cry from conceding that civil service ordinances are passed with contractual intent, or that employees have any kind of written contract as required by Local Government Code §271.152.

Finally, the Plaintiffs overlook the fact that they themselves never argued, in either the trial court or the court of appeals, that the City’s ordinances create “unilateral contracts.” They argued only the cases holding that laws become “part of” or “incorporated into” other written contracts¹⁸—an argument that could not succeed because the Plaintiffs had no “written contract” into which laws could be “incorporated.” The court of appeals’ opinion contained the first mention, in any proceeding in this case, of a “unilateral contract” theory. While the City’s initial briefs in the court of appeals had pointed out the lack of contractual intent, the City expanded on that point in its

¹⁵ Brief of Appellant, p. 16.

¹⁶ Brief of Appellant, p. 21.

¹⁷ Brief of Appellant, p. 22.

¹⁸ Brief of Appellees, pp. 20-22.

motion for rehearing filed in response to the court of appeals' new theory. Even if the City had not raised the point earlier, and even if the point were not subsumed in its larger point that ordinances are not contracts, the point would not have been waived because a complaint arising from the court of appeals' judgment itself may be raised for the first time in either a motion for rehearing in that court or in a petition for review in this Court. *See* Tex. R. App. P. 53.2(f); *Bunton v. Bentley*, 153 S.W.3d 50, 53 (Tex. 2004). Accordingly, there is no relevance or support for the Plaintiffs' suggestion that the City has not previously argued that its ordinances lack contractual intent.

V. A WAIVER OF IMMUNITY IS NOT ESTABLISHED BY WRITINGS WHICH CONTRADICT THE TERMS OF THE ALLEGED "CONTRACT"

The Plaintiffs further err in proposing that courts should wholly ignore both the terms of an alleged "written contract" and the nature of the alleged breach, when determining whether a claim qualifies for the waiver of immunity in §271.152, on the basis that such an inquiry delves into the "merits" of a claim. The plain language of the statute waives immunity only for claims for breach of a written contract stating all essential terms of the agreement. Accordingly, the existence of a qualifying written contract is a jurisdictional requirement. A writing which does not contain the essential terms of the alleged agreement does not qualify. A writing which contradicts the essential terms of the alleged agreement certainly falls outside the scope of the waiver.

Indeed, the Plaintiffs themselves assert that the Legislature, in passing §271.151-.160, intended to ensure that a local governmental entity "could only be held liable for

what it agreed to in a writing that it signed.”¹⁹ The City agrees with that conclusion. The necessary corollary of that conclusion is that the Legislature did not intend to allow suits against governmental entities based on claimed obligations which contradict the writings that the entity signed.

This Court has also agreed that a statute of frauds, like that contained in §§271.151-.160, cannot be satisfied by writings which contradict the claimed duties. In *Hall v. Hall*, the Court considered correspondence offered as writings sufficient to satisfy a statute of frauds. The Court held that: “If the respondent-plaintiff is to rely on the correspondence as a memorandum of the contract, he cannot at the same time discard the parts that are unfavorable to him” 308 S.W.2d 12, 17 (Tex. 1957). Courts have consistently followed this mandate. *See Coastal Corp.*, 852 S.W.2d at 717 (“When a party relies upon a memorandum of a contract [to satisfy a statute of frauds], it cannot disregard unfavorable provisions.”)

Accordingly, numerous courts of appeals have dismissed claims against governmental entities when the writings presented as the “written contract” in support of a §271.152 waiver would not support the “breach of contract” alleged by the plaintiff. For example, the Austin court of appeals reviewed the terms of a former teacher’s contract and determined that her claim did not qualify for §271.152’s waiver because the contract could not be construed to impose the duty upon the school district which she had alleged as the basis of her breach of contract claim. *McCandless v. Pasadena Indep. School Dist.*, No. 03-09-00249-CV, 2010 WL 1253581, *3 (Tex. App.—Austin 2010,

¹⁹ Response Brief on the Merits, p. 18.

n.p.h.). Similarly, the Fourteenth Court of Appeals held that one of a plaintiff's two claims could not qualify for §271.152's waiver where the plaintiff failed to demonstrate that any damages relating to that claim were the result of the defendant breaching any terms of the contract. *McKinney & Moore, Inc. v. City of Longview*, No. 14-08-00628-CV, 2009 WL 4577348, *5 (Tex. App.—Houston [14th Dist.] 2009, pet. filed). The court held that the plaintiff's other claim did qualify for the waiver, but only after examining the terms of the contract and determining that the plaintiff's claim was "firmly grounded in the contract." *Id.*

Even the Dallas court of appeals, which supplied two of the cases relied on by the Plaintiffs, has refused to find a waiver when the alleged written contract failed to specify terms matching the plaintiffs' claimed expectations. *Learner's Online, Inc. v. Dallas Indep. School Dist.*, ___S.W.3d ___, 2009 WL 2138974, *7-8 (Tex. App.—Dallas 2009, no. pet.). Noting that the claimed written agreement failed to specify the timing of expected performance and payment during course of a particular year, the court held that the plaintiff's request for installment payments after execution of the agreement demonstrated that the parties had not agreed on the "essential term" of when payment should be made. *Id.* The court based its holding on the fundamental proposition that a contract must define its essential terms with sufficient precision to enable the court to determine the obligations of the parties, and that the parties must agree to those terms, before a court may enforce the contract. *Id.*

Likewise, the City's ordinances plainly show that the City has never agreed to the essential terms alleged by the Plaintiffs. For over thirty years, the ordinances have

specified that premium pay is not part of a fire fighter’s “salary” for the purpose of calculating termination pay. For at least twenty-four years the ordinances have specified that paid benefit leave may not be used when a fire fighter does not work pre-scheduled overtime hours. The Plaintiffs cannot rely on the City’s ordinances as satisfying §§271.151-.160, while at the same time asking the Court to discard all of those terms unfavorable to them.

This conclusion is not directly addressed, much less persuasively rebuffed, by the cases from the First and Fifth Courts of Appeals cited by the Plaintiffs for their “ignore the contract terms” proposition. There was no dispute in those three cases that the governmental entity had entered a written contract with the plaintiff. *See City of Houston v. Southern Elec. Serv.*, 273 S.W.3d 739, 744 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); *Dallas Area Rapid Transit v. Monroe Shop Partners, Ltd.*, 293 S.W.3d 839, 840-41 (Tex. App.—Dallas 2009, pet. denied); *City of Mesquite v. PKG Contracting*, 263 S.W.3d 444, 447 (Tex. App.—Dallas 2008, pet. filed). All of the cases addressed assertions that the Plaintiffs could not prove damages allowed by §271.153. *See Southern Elec. Serv.*, 273 S.W.3d at 744; *Dallas Area Rapid Transit*, 293 S.W.3d at 841-42; *PKG Contracting*, 263 S.W.3d at 448. That is not an issue in this case, where the City has shown that its ordinances—the alleged “written contract”—directly contradict the duties alleged by the Plaintiffs. In none of the Plaintiffs’ cases were the claimants attempting to avoid the unambiguous term of the writings alleged as the “written contract” supporting their claims.

Moreover, the holdings of the Plaintiffs' cases appear to conflict with this Court's holding in *Tooke v. City of Mexia*, where the Court affirmed the dismissal of a contract claim, for lack of jurisdiction, because the claimed damages were not of the type allowed by §271.153. 197 S.W.3d 325, 346 (Tex. 2006). Accordingly, other courts of appeals have rejected the conclusions of *Southern Electric, Dallas Area Rapid Transit*, and *PKG Contracting*, and instead have held that no jurisdiction exists when a plaintiff is unable to raise a fact issue with regard to damages allowed by §271.153. See *Judson Indep. School Dist. v. ABC/Associated Benefit Consultants, Inc.*, 244 S.W.3d 617, 621 (Tex. App.—San Antonio 2008, no. pet.) (holding that plea to jurisdiction should have been sustained, where the terms of the alleged contract established that there could be no “balance due and owed” by the school district, as required by §271.153); *Kansas City Southern v. Port of Corpus Christi Auth.*, 305 S.W.3d 296, 306-08 (Tex. App.—Corpus Christi 2009, pet. denied) (holding that immunity was not waived by §271.152 where the alleged breach could not result in a “balance due and owed” within the damages recoverable under §271.153).

In sum, no court has ever held that a waiver of immunity under §271.152 can be established by writings which the plaintiff seeks to have declared unconstitutional and void, or which otherwise directly contradict the terms of the “agreement” alleged by the plaintiff. To the contrary, this Court and others have consistently held that a plaintiff cannot rely on writings alleged as a “written contract” to satisfy a statute of frauds, while asking the court to disregard unfavorable provisions of those writings. The same rule should certainly apply when plaintiffs are seeking to satisfy the statute of frauds

contained in §§271.151-.160, which is to be strictly construed in favor of maintaining the City's immunity from suit.

VI. ORDINANCES SUPERCEDED BY A COLLECTIVE BARGAINING AGREEMENT CANNOT ESTABLISH A "UNILATERAL CONTRACT"

The non-existence of an ordinance-based "written contract" is particularly clear for those Plaintiffs whose rights were governed by a collective bargaining agreement, rather than ordinances. Ordinances cannot establish a "unilateral contract," even under the court of appeals' theory, when those ordinances are no longer in effect. The fundamental requirement of a "unilateral contract" is a promise of a benefit upon a contingency, which is not withdrawn before the performance of that contingency. *Vanegas*, 302 S.W.3d at 302. If the promise is withdrawn before performance, no unilateral contract can be formed. Therefore, ordinances cannot form an "offer" which the Plaintiffs "accepted" if the ordinances were superseded by collective bargaining agreements prior to "performance" by the Plaintiffs, even under the most liberal interpretation of §271.152.

The Plaintiffs do not deny this proposition. Instead, the Plaintiffs' one-paragraph response baldly asserts the existence of a "dispute" over the "validity" of their "argument" that the collective bargaining agreements actually "reserve" their ordinance-based claims.²⁰ This is not a "merits-based" dispute, however, over the meaning of the alleged ordinance-based "contract." It is a dispute over the very existence of that "contract," and that existence is a jurisdictional requirement.

²⁰ Response Brief on the Merits, pp. 35-36.

Moreover, jurisdiction cannot be established by the bald assertion of a dispute. When a plea to the jurisdiction is supported by evidence (such as the text of the three collective bargaining agreements which supersede the City's ordinances), the plea should be granted when the plaintiff fails to present evidence creating a material issue concerning a required jurisdictional fact. *Miranda*, 133 S.W.3d at 227-28. A claimed dispute over the effect of an unambiguous contract does not create a fact issue, because the interpretation of an unambiguous contract presents a question of law. *Coker v. Coker*, 650 S.W.2d 391, 393-94 (Tex. 1983). A contract is not rendered ambiguous by the mere fact that the parties advance competing interpretations; i.e., a "dispute." *Id.* Accordingly, the court of appeals should have examined the terms of the collective bargaining agreements to determine whether they unambiguously superseded the City's ordinances on termination pay, for those Plaintiffs who terminated their employment while an agreement was in effect.

The 2005 collective bargaining agreement ("2005 CBA") plainly supersedes the City's ordinances on termination pay (at least as the Plaintiffs interpret those ordinances).²¹ The 2005 CBA states that the payment of termination pay "shall continue in accordance with past practice." Under the Plaintiffs' interpretation of the contract, this provision is meaningless. Indeed, the Plaintiffs would have the courts re-write this provision to provide that the payment of termination pay "shall continue in accordance with applicable statutes and ordinances." Coupled with the Plaintiffs' contention that the

²¹ The Plaintiffs do not contest, in their Response Brief, the City's argument that the 1995 and 1997 agreements superseded the Plaintiffs' alleged ordinance-based "contract" for termination pay.

City's past practice *differed* from that required by the applicable laws, the Plaintiffs' reading would directly contradict the plain language of the contract.

Even if the Court finds the 2005 CBA to be ambiguous on this point, moreover, jurisdiction is lacking because the resolution of that ambiguity is allowed only through the grievance/arbitration procedure of the agreement, and the plaintiffs lack standing to individually advocate their interpretation of the agreement.²² Accordingly, when the Plaintiffs allege a "dispute" over the preemptive effect of the 2005 CBA, they are necessarily describing a dispute over which the courts have no jurisdiction.

VII. CONCLUSION.

Accordingly, the City asks the Court to grant its petition for review, and dismiss the Plaintiffs' claims for lack of jurisdiction.

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See Response Brief of Cross-Respondent The City of Houston (filed May 24, 2010), at pp. 31-32.

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CERTIFICATE OF SERVICE

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