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Supreme Court of Texas.
The City of Houston
v.
Steve Williams, et al.
No. 09-0770.

October 13, 2010.

Appearances:

Reagan D. Pratt of The Pratt Law Firm, for petitioner.
Vincent L. Marable, III of Paul Webb, P.D., for cross-petitioner-respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in the final cause 09-0770, City of Houston v. Steve Williams, et al.

MARSHAL: May it please the Court, Mr. Pratt will present argument for petitioner today. Mr. Pratt has reserved eight minutes for rebuttal.

ORAL ARGUMENT OF REAGAN D. PRATT ON BEHALF OF THE PETITIONER

ATTORNEY REAGAN D. PRATT: May it please the Court. Section 271.152, of the local government code, provides a limited waiver of a city's immunity from suit on claims of breach of a written contract. These two aspects, the interpretation of that statute that I'd like to focus on today. The first is whether a city's standing ordinances qualify as a written contract subject to that waiver and second, if so, does a suit challenging the validity of the city's ordinances qualify as a claim for breach of that contract. This questions, both these questions start with the heavy presumption in favor of a city's immunity from suit. A home rule city like the city of Houston is presumed to have the constitutional power to make laws on behalf of its citizens, to interpret and apply those laws and to make the policy choices implicit in its appropriations decision without challenge through a suit for

money damages.

JUSTICE DAVID M. MEDINA: Okay. Why isn't this statute a contract. There was some discussion in briefs that it didn't contain the essential elements and terms, but it does contain a lot.

ATTORNEY REAGAN D. PRATT: The ordinances contain a lot about the terms that are governed for the city's directions to its personnel department as to what firefighters will be paid and how they will be paid. It's not a contract with any particular fire fighter. Nothing in the city's ordinances that says that a fire fighter has agreed to these ordinances and I think when we went to the Court of Appeals skipped the legislative intent analysis and came up with this unilateral contract analysis. It failed on just the basic common law analysis of a contract that ordinances don't have contractual intent. They're laws.

JUSTICE NATHAN L. HECHT: Why not? I mean what other intent is there here? It seemed like the only intent there could be in an ordinance like this, maybe not all ordinances, but in an ordinance like this is to tell your employees this is what we're going to pay you.

ATTORNEY REAGAN D. PRATT: No, I believe, Your Honor, it's the intent is to tell the human resources department. This is the policy of the city, this is how we're going to tell our administrative people this is how firefighters can be paid but it's not the concept of an agreement between the firefighters and the [inaudible]--

JUSTICE PHIL JOHNSON: Well how do the fire fighters know what they're going to get when they go to work for the city?

ATTORNEY REAGAN D. PRATT: We're not saying that there's not payment obligation by the city. Firefighters don't know what they pay them.

JUSTICE PHIL JOHNSON: How do they know what they're going to get? I mean they just hope that they're going to get a check at the end of the month? Or is there not some way that they ought to be able to rely on something, some obligation of the city.

ATTORNEY REAGAN D. PRATT: I'm not saying the city has no obligation to pay them and it hasn't put that in writing. The question--

JUSTICE PHIL JOHNSON: How do they know what it is?

ATTORNEY REAGAN D. PRATT: You can look at the ordinance. It sets forth the pay.

JUSTICE PHIL JOHNSON: So they came to work because the ordinance says they're going to get X.

ATTORNEY REAGAN D. PRATT: I actually assume that the human resources department told them what they're going to get and they are in turn guided by the ordinance.

JUSTICE PHIL JOHNSON: And resources-- But everybody knows or at least assumes what they're going to get is based upon the ordinance.

ATTORNEY REAGAN D. PRATT: Yes.

JUSTICE PHIL JOHNSON: Okay.

JUSTICE EVA M. GUZMAN: And ordinances are the way cities and municipalities conduct their affairs, correct? I mean they create the ordinance, create obligations because that is how they, generally speaking, conduct their affairs.

ATTORNEY REAGAN D. PRATT: How they generally speaking conducting affairs doesn't necessarily establish a contract. What we're stating--

JUSTICE EVA M. GUZMAN: It establishes an obligation, correct?

ATTORNEY REAGAN D. PRATT: Not necessarily.

JUSTICE EVA M. GUZMAN: It can, it may.

ATTORNEY REAGAN D. PRATT: Yes.

JUSTICE EVA M. GUZMAN: All right, if it may establish an obligation, is that, can that be a unilateral contract?

ATTORNEY REAGAN D. PRATT: If it is a, no, I would say no.

JUSTICE EVA M. GUZMAN: Ever?

ATTORNEY REAGAN D. PRATT: No because the, I would say that implicit in every standing ordinance as opposed to one that specifically approves an identified written contract, implicit in every standing ordinance is the city's discretion as to whether they are actually going to make an appropriation for that law and for any costs of that law and in this case, of course, we have a statute which explicitly, oh excuse me, an ordinance which explicitly says that. In this case, we have the ordinance, which enacted all the benefits at issue here at a clause which specifically said that any benefits under these ordinances are subject to future appropriation by the city and should not be construed to create any invested rights.

JUSTICE EVA M. GUZMAN: Well if the appropriation was there, then would this ordinance become a unilateral contract, if you will, if that's what it takes to make an ordinance a unilateral contract, an obligation. Is appropriations made later after the fact, is that what you're saying?

ATTORNEY REAGAN D. PRATT: It has to be an appropriation made after the fact and an intent to enter a contract for that particular benefit.

JUSTICE EVA M. GUZMAN: Can you enter a contract under any circumstances even if you just, I could sign a piece of paper and say that I have no intent of entering into a contract. Does that relieve me of my contractual obligations?

ATTORNEY REAGAN D. PRATT: Absolutely, that's what this Court held in Wyland when the employees came up and claimed a property right under the civil service rules of the city of Dallas and the Court said, no, it's not a contract because the manual specifically says this does not create any contractual rights. The Court said it does create legal rights because it's a law, but it's not a contractual agreement.

JUSTICE DAVID M. MEDINA: Why is there a distinction between the union's right to sue the city and not an individual, retired fire fighter to pursue litigation against the city? Was that negotiated away during some type of collective bargaining agreement?

ATTORNEY REAGAN D. PRATT: Between 2000 and 2005, there was not a collective bargaining agreement. So we're not saying the association would have a right to sue during that period. While there was a collective bargaining agreement in place, there are statutes that specifically waive the city's immunity from suit by the association. The meet and confer agreement was passed under the Chapter 143206 statute, which specifically says when the association and the city enter a meet-and-confer agreement, they may go to court and get a judicial de

termination of any dispute under that agreement, but the agreement says only either party agreed by an act of the other party may go to court. It says nothing about firefighters.

JUSTICE DAVID M. MEDINA: Okay. So what would be the remedy for a retired individual in this instance if they later determined that they were underpaid for whatever reason?

ATTORNEY REAGAN D. PRATT: Well a collective bargaining agreement was in place, it would be to go to the association and file a grievance and file the grievance procedure of the collective bargaining agreement.

JUSTICE DAVID M. MEDINA: In here, I think they didn't follow the administrative process, is that your position?

ATTORNEY REAGAN D. PRATT: Oh they've never filed a grievance under the collective bargaining agreements at all. They've claimed that even though they're suing for breach of the collective bargaining agreements, they're not actually bound by the remedial provisions of those agreements.

JUSTICE DALE WAINWRIGHT: In terms of setting the compensation for retired firefighters for the sick and vacation leave, the issues in this case, what is the relationship between the collective bargaining agreement defining that versus the ordinances.

ATTORNEY REAGAN D. PRATT: The collective bargaining agreement supersedes the ordinances by law. The law is allowing the city and the association to enter in the collective bargaining agreements say that if there's a conflicting provision in the collective bargaining agreement, that prevails over any contrary ordinance or statute.

JUSTICE DALE WAINWRIGHT: And the collective bargaining agreement sets this compensation for retired firefighters in detail?

ATTORNEY REAGAN D. PRATT: In the 2005 agreement, it specifically says termination pay shall continue in accordance with past practice-- which for the ordinances under which the city has been paying termination pay have been in place for over three decades.

JUSTICE NATHAN L. HECHT: You mentioned 961088. I'm not clear about your position on the no-vested rights, that language. Do you take the position that the city could retroactively change the fire fighters pay or is this just going forward?

ATTORNEY REAGAN D. PRATT: Well this particular statute only deals with the benefits, the sick leave and the termination pay benefits and certainly termination pay, yes, can be changed at any time.

JUSTICE NATHAN L. HECHT: Retroactively?

ATTORNEY REAGAN D. PRATT: It would. It--

JUSTICE NATHAN L. HECHT: You've already been there and you, can you retroactively changed what you've already earned? Does that provision say that?

ATTORNEY REAGAN D. PRATT: Yes and law of this Court going back many years says that that any time there's a provision and statute of ordinance providing termination benefits, the city can change that at any time. It doesn't create any vested rights, at least not prior to termination. So if you're about to retire tomorrow, the city can say today, well, we changed the rules, we're not going to offer termination pay anymore. And so, no, that and under the precedent of this Court, I don't think that even without that provision, there would be no vested rights created by that. And I think before even getting into the contract analysis of whether this could be con-

strued under common law standards as a contract, we should address whether the legislature ever intended for Chapter 271 to apply to claims based on standing civil service ordinances. There's nothing in the language of the statute that suggests that. It uses the term written contract. Common usage doesn't say that ordinances are written contracts. There's never been a case saying that civil service ordinances are standalone written contracts. There's the Overton case, which was cited years ago by the First Court of Appeals specifically held that the city of Houston Civil Service Ordinances are not written contracts. The legislature was presumed to know that when it drafted Section 271.152.

JUSTICE NATHAN L. HECHT: But it's hard to understand, I mean why would the city go to the trouble of passing an ordinance if it didn't mean to live with it? It seems like that's the whole point.

ATTORNEY REAGAN D. PRATT: The same reason employers put that provision in the employment manual saying that this does not create contractual rights so that the city maintains the right to interpret and apply its own ordinances and not be subject to suit by employees or a small portion of employees to say oh, no, no, I think your ordinances should be interpreted a different way. That's why they should or not draft a contractual intent, the city, the employer always maintains the discretion that his interpretation of his own rules and ordinances is the one that will prevail.

JUSTICE DAVID M. MEDINA: And the City takes the position that there's no intentional waiver of sovereign immunity right? Relying on the Tooke v. City of Mexia. You haven't waived?

ATTORNEY REAGAN D. PRATT: No, there's been no allegation that we've waived; the City by its actions have waived immunity. This is all about whether the written contract provision of 271.152 would apply to standing city ordinances.

JUSTICE DEBRA H. LEHRMANN: Do you think the fire fighters could have brought this suit an ultra vires action?

ATTORNEY REAGAN D. PRATT: No. I mean, the reason would be if it was declaratory action, which this Court has already held that these firefighters don't have standing to bring.

JUSTICE DEBRA H. LEHRMANN: Well under Heinrich?

ATTORNEY REAGAN D. PRATT: Excuse me?

JUSTICE DEBRA H. LEHRMANN: Under Heinrich?

ATTORNEY REAGAN D. PRATT: Under Williams, the prior decision to this case said it didn't direct, there was not an ultra vires issue. They didn't name, well actually they did, but they were dismissed, any individuals. The claim is not that the City has not been obeying its own ordinances. The claim here and that's another reason that we say that 271 doesn't apply because they're not suing, they're not claiming that the City failed to comply with its ordinances. They're claiming and complaining that the City did comply with its ordinances that have been on the books for decades and they are seeking to have those ordinances invalidated and have this Court impose, allow them to argue for a different deal that they never agreed to accept and the City never agreed to offer. I see I'm out of time.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The Court is ready to hear argument from the cross petitioners and respondents.

MARSHAL: May it please the Court, Mr. Marable will present argument for the respondent's cross petitioners.

ORAL ARGUMENT OF VINCENT L. MARABLE, III ON BEHALF OF THE RESPONDENT

ATTORNEY VINCENT L. MARABLE: May it please the Court, opposing counsel, I'd like to start out and I apologize, I don't know if the question came from Justice Medina or Justice Wainwright, but I think the question was what's the remedy here for these retired firefighters and I believe the answer that you received from counsel for the city of Houston was well you could sue under the collective bargaining agreement and I want to start there in trying to answer some of the questions that you asked. Mr. Blakeney and I represent 540 retired firefighters in this case. Only 99 retired when they retired were subject to the collective bargaining agreement. Everyone except for those 99 that were subject to the CBA, their claims accrued and arose at retirement because when they literally got their retirement check, they had money taken out of it or they weren't paid the amount. There were two things. They took back some money that they had paid them in overtime and they didn't pay them what they said they were owed for sick and vacation leave so that arises when they retired. The Court of Appeals has already held in this case in the first round when it that the grievance procedures were not available to any of these retired fire fighters because they were retired. They could only be used by active employees under the language in 143 and that issue was decided in the First Court of Appeals' decision, not the First Court being number one, I mean, before this case came up before and the City of Houston did not argue and did not challenge that finding when this case came up the first time, it was remanded back to permit us to assert claims under 271. Now, as to all of our folks that retired and were no subject to a CBA, their claims accrued before 2007 when the Section 180 of the local government code was passed, which specifically allowed for claims that arose under CBAs and meet-and-confers in Chapter 143 and Chapter 142. So the answer is to the question and I believe it may have been from you, Justice Wainwright, what is the remedy according to the city of Houston? Their argument is is that we have no remedy because we fall within that area and their position is that tough, that's the way that sovereign immunity. That's the position they've taken and one of the Amici says the same thing. It just says well that's the way sovereign immunity works. It's just tough. That's the way things happen. Now, there was--

JUSTICE DALE WAINWRIGHT: Okay. Let me jump in here, Mr. Marable. Local Government Code 180 excludes previously asserted claims from being raised under it, under that immunity waiver, correct? But for that, you could proceed under Chapter 180.

ATTORNEY VINCENT L. MARABLE: 180 would not apply because the claims did not arise, the claims arose before 2007. So I can't come under 280.

JUSTICE DALE WAINWRIGHT: 180?

ATTORNEY VINCENT L. MARABLE: 180, I apologize.

JUSTICE DALE WAINWRIGHT: Okay.

ATTORNEY VINCENT L. MARABLE: What happened on 180 is, if you read the legislative history, the city of Dallas has got a claim asserted against them based on a referendum or an ordinance or a city charter provision from 1980 that the city of Dallas says is a claim for over a billion dollars and that's come up to this Court several times in some of these cases from the city of Dallas and you've sent it back down for them to assert that claim under 271. When they passed 180, they specifically referenced that it will not apply to any prior claims and it actually discusses the actual claim under Dallas. So that's why it's made prospective only and it's why I can't rely upon that and that's why when I came up here the first time in *City of Houston v. Williams*, I asked that it be sent back down so that we could assert claims under 271 and that's the context. So they're claiming that because we fall within this period of time, we don't have any remedy. Now, please go ahead.

JUSTICE DALE WAINWRIGHT: Okay, now, your position is quite an excellent one. Firefighters who put their lives on the line to protect us deserve to be paid their termination pay. The role of this Court is to find out if we can recognize a claim where while sovereign immunity bars claims generally against governmental enti-

ties and your suit is against a governmental entity, the City of Houston.

ATTORNEY VINCENT L. MARABLE: Yes.

JUSTICE DALE WAINWRIGHT: Your argument is that Chapter 271 provides that remedy.

ATTORNEY VINCENT L. MARABLE: Yes.

JUSTICE DALE WAINWRIGHT: Amici have filed briefs and they say that Local Government Code 180.006 was an agreement among the municipalities to have a statute promulgated that provides a limited waiver of immunity so they can deal with some of these claims going forward. As you pointed out, not claims that arise prior to 2007, I think you said. And Amici say that Chapter 271 was not intended to include these types of claims, that the agreement through the legislature was for 180 to govern these waivers and the cities agreed to it under that limited scope. What's your response to that argument?

ATTORNEY VINCENT L. MARABLE: Well, the short answer is that the argument made and this is an argument that's made by the City of Dallas and Texas Municipal League. The legislative history that's actually attached to the City of Dallas' Amicus brief does not support the argument and that raises an issue of how you construe these two statutes and you address this argument that there was some kind of deal and that the legislature when they passed 180 never intended to include these kind of claims in Chapter 271. As a threshold issue, this Court indicated in *Entergy*, I think it went back to *El Chico v. Poole* as well as a 1969 case and said if the statutes are unambiguous, we don't really care what the legislative history is. We don't really care whether certain parts of the Bill didn't get passed and there's a corollary to that, which is that a subsequent session of the legislature normally is not going to be considered in determining what the intent was in earlier legislature. But let me get to the heart of your question about whether or not the legislature when they passed 271 intended to include ordinance base claims like we have in this case and I would just direct you to it's tab 1, to the Amicus brief filed by the City of Dallas and the legislative history they attach is interesting because it refers to the types of claims that are covered by 180 as contract base claims. It's probably in there 10 times where they're referring to the Chapter 143, Chapter 142 and the ordinance based wage type claims as contract base claims. I'll just read this part because the whole part of it contains these types of sayings. C.S.H.B. 1473 would resolve serious inconsistencies in state law, which guarantees certain negotiated benefits to peace officers, yet provides no means for enforcing them of the contracts it permits. And then it talks about employees that participated in civil service agreements or were subject to benefits guaranteed by state law would gain the right to sue municipalities to honor the terms of resulting employment contracts. That contract concept is all through this legislative analysis.

JUSTICE DALE WAINWRIGHT: So is the contract the ordinance or the collective bargaining agreement?

ATTORNEY VINCENT L. MARABLE: I think it's referring to, if you read in the context, it's talking about all of it. If you got a state statute which says you're going to get paid this. You've got an ordinance. You've got a meet-and-confer or CBA. The way it's talking about this is in the context of contract-based benefits. So my position is that there's nothing inconsistent with 180 and 271 and when they passed 271, there was not some intent by the legislature to exclude or to somehow take away claims that in this case if they satisfy the language of the statute because the closing comment on part of the legislative history it says is that the 79th legislature in 2005, that's talking about 271 enacted laws waiving sovereign immunity from local governments against, I think it should be for suits resulting from local contracts. C.S.H.B. 1473 would be an appropriate and limited extension of legislative waivers of immunity granted in previous sessions. They saw it as complementary. They didn't see it in such a way that it's something that was totally different from 271 and I think the correct answer to your question is it was passed so that there wouldn't be a fight. That it was covered by 271.

JUSTICE DALE WAINWRIGHT: I see. Let me change gears just a little bit.

ATTORNEY VINCENT L. MARABLE: Sure.

JUSTICE DALE WAINWRIGHT: Under the argument that an ordinance should be treated like a contract here, does that mean that any statute, federal or state, that references compensation should also be treated as a contract?

ATTORNEY VINCENT L. MARABLE: I think the answer to that is probably relates to an issue that or- a question that Justice Hecht had, and that is in the context of these types of ordinances, is there really any other type of intent other than to grant rights to employees and I think that's kind of where and I think part of the answer to your question is if it's compensation based promises made to employees that they can accept and perform by doing the work, then the answer is I think it gets treated as a unilateral contract under Vanegas.

JUSTICE EVA M. GUZMAN: What about the appropriation's argument in essentially a city not being able to contract without appropriate approvals from the council, etc.?

ATTORNEY VINCENT L. MARABLE: The answer to that question is the city of Houston doesn't appropriate for these types of payments. I think what they're talking about is certain obligations by constitution that a city is required to set aside certain reserves, but there's no evidence in this record that the city is "appropriating" in order to pay. These are everyday type wage claims and they don't know when an employee comes in if he's going to retire in 10 years, 12 years or 13 years down the line. When the guy retires, they just pay him. So I don't know of any place in this record where any issue was raised as to appropriation, but the bottom line is they've been paying retirement benefits forever. It's not a we didn't appropriate the money and haven't paid it and that relates to the question you asked, Justice Guzman, relates to an issue I think that Justice Hecht also asked about have they performed and can they retroactively change this? Under Vanegas, I don't think you can hold your hand up and say I'm going to pay you if you do all those things and then once you do those things then say well, I've now changed my mind because nothing vets. I think Vanegas and I think the Fifth Circuit case that I cited very clearly say that once you make that promise and it's performed, you get paid. But the argument that it didn't vest and they could make changes, they've never made changes to the statute. The statute sits here the same way it's always been and they, before these guys retired and said pay me my money, they never made any changes to say now we're going to do it differently.

JUSTICE DAVID M. MEDINA: Mr. Marable, you said the City always pays when the firefighters retire. Why haven't your 540 clients been paid?

ATTORNEY VINCENT L. MARABLE: They received a check and what this issue about is the following. The firefighters sends a letter to the city of Houston and says I'm going to retire. That then goes to the City's human resources department and they come in and they calculate what retirement is owed to them because over the years, they have been booking or using sick and vacation leave.

JUSTICE DAVID M. MEDINA: So you have a dispute with the way the calculations were made?

ATTORNEY VINCENT L. MARABLE: What the amount is, which I believe is part of the answer to your question, Justice Lehrmann, is why it's not an ultra vires case. We did a check and what happens is the check is for X amount and what we learn is after we're retired, they paid overtime to us for a period of time and then they decided they made a mistake so they just took those payments out of what was in our leave balance. If it's \$100, it's now light \$100 because they said you paid that wrong. Our position is you didn't pay it wrong. You were supposed to pay us at overtime and you properly paid us. You shouldn't have docked it. That's what we call a dock claim. For the accrued vacation and sick leave, we say that that those two items consist of or require that you give us four components. Just like if we had used sick or vacation leave while we were still active and before we had retired, we would have gotten our full pay. What the city of Houston does is it says we're only going to pay you two aspects of this and we're not going to pay you the other two. So you get less so we don't get as much as what we say we're entitled to.

JUSTICE DAVID M. MEDINA: And the City says that these ordinances are directives to the human resources department just like a manual would be in a corporation.

ATTORNEY VINCENT L. MARABLE: And what I would direct you to. This is tab A to my brief on the merits, but it's my response brief on the merits, but it's also attached to a bunch of the other documents in the record. It's the actual ordinances. It's 3448. Throughout this document, there is language which talks about all eligible employees shall be compensated for working overtime. All classified firefighters who are subject to provisions of 142 and 143 shall be entitled and so I believe that that was a question that Justice Johnson had is what do these things say if they're not to tell the firefighters what they're going to get paid? I think the argument that this is simply directed to human resources is simply insupportable. I mean this is what the firefighters are told they're going to get paid and when a lawsuit or a grievance or anything gets filed, they refer to this. It's the ordinance that says you're supposed to pay us this.

JUSTICE EVA M. GUZMAN: Under what circumstances can the City make some changes to the agreements to pay and when they do, are those retroactive? What defines how you address changes in budgets and that kind of thing? I mean some things may become not practical after awhile.

ATTORNEY VINCENT L. MARABLE: That's a good question and I'm going to give you as direct an answer as I can. Based on the language that they're relying upon. Let me back up a little bit. It's very clear based on cases that this Court has issued that certain aspects of payment to policemen and firefighters can be changed at any time and the one that I can think of that this Court has addressed was certain changes made by in the pension obligations and pension entitlements. That has to do with specific statutory provisions which gives the pension board the right to do that. Now, and I think this rolls over into Justice Hecht's question about retroactivity. Once I have worked and I have earned, can you then take away, have I vested and can you take that away. And, for example, my position would be is that if I've worked 15 years and at this point, I've actually vested, but I haven't retired, I don't believe you can rely upon that language to take away my retirement benefits, okay? And I'm talking about somebody who hasn't retired yet.

JUSTICE EVA M. GUZMAN: What was promised to you when you entered employment.

ATTORNEY VINCENT L. MARABLE: And which I've earned. In other words, as we've gone forward, I've got accrued sick and vacation leave if I started before 1985. I've been banking that for the entire time. So the question becomes I haven't retired yet, but the City then says six months before I retire, we're doing away with that or we're modifying it, all right? That's one potential scenario. I say they can't do it, but let's assume that they can. I've got the situation where I've earned it. It's booked. They paid me what they say I'm owed. They just haven't paid me the extra amount we say we're entitled to by statute and I'm now retired and they have never changed the statute. They've never changed their provisions and they've never actually made these changes that they say. So the reason I can't directly answer it is whatever they can do, they're now foreclosed from doing that because I'm retired and I don't think there's any principle or law which would say that they could do that at this point, but they still haven't done it. Justice Wainwright, I'm not sure I ever got around directly to answering your question about does this make all wage-based ordinances and statutes contracts? I think the issue is is that for wage-based type contracts for the municipal employees and the context of 271, if it falls within Vanegas and the Fifth Circuit case where it's actually an offer that's accepted and it's performed, then it's going to come within 271.

JUSTICE DALE WAINWRIGHT: Well, I know that's your argument under 271.

ATTORNEY VINCENT L. MARABLE: Right.

JUSTICE DALE WAINWRIGHT: And I know the state, for example, is not covered by Chapter 271, but if the state were to negotiate, for example, with a union for certain public services and they reach an agreement there's collective bargaining agreement, if that happened and those same terms of compensation were then included in

a statute, would that statute be a contract?

ATTORNEY VINCENT L. MARABLE: Yeah.

JUSTICE DALE WAINWRIGHT: If the federal government did it? It seems like by your rationale, they would have to be contracts.

ATTORNEY VINCENT L. MARABLE: They would, it would be a contract for goods or services within 271, but it's never going to arise in that context I think because that contract itself, the CBA, is going to satisfy any contract requirements. You're not going to need to rely upon the statute because you've got a CBA that's in place so I don't really think it'd really ever come up.

JUSTICE DALE WAINWRIGHT: Could the union sue on behalf of these firefighters for their benefits under the collective bargaining agreement? I know the City's argument is the individual fire fighters don't have standing, but could the union sue?

ATTORNEY VINCENT L. MARABLE: For the 99, the union could sue for the CBA, but keep in mind the CBA only applies to the 99 and I think there was some, we need to keep in mind and I know I'm over my time. I will get this through as quickly as I can. There is a distinction between the meet-and-confer agreements and the CBA. The meet-and-confer agreements, which was a question that Justice Medina had and counsel made an argument that said well the association could have filed under the meet-and-confer. The statute and the meet-and-confer agreement itself restricts the association to injunctive relief through declaratory judgments. They could not have filed a damages claim on behalf of my guys because the statute and the agreement don't permit it and there could have been on contractual or statutory agreements is filed individually because the Court of Appeals has already held those claims didn't accrue while they were actually employees. They accrued outside of that after they retired and the grievance procedure doesn't apply to them. I'm over my time by a lot and I apologize to the Court.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counsel.

REBUTTAL ARGUMENT OF REAGAN D. PRATT ON BEHALF OF PETITIONER

ATTORNEY REAGAN D. PRATT: This case does not present a case where the City fails to pay any fire fighter what it agreed to pay. The City has paid the firefighters exactly in accordance with the ordinance [inaudible] calculated and say that you cannot use paid benefit leave when you're excused from predesignated overtime hours. Moreover, the concept of sovereign immunity starts with the presumption that the sovereign does not wrong. It starts with the presumption that the city is going to do what its ordinances and laws require and the remedy if a city doesn't is you go to the legislature in every sovereign immunity case. You go to the legislature and says I've been done wrong. Give me permission to sue the city. These plaintiffs did that. In 2007, they went to the legislature and said, "Pass this new Chapter 180 waiver and make it retroactive so it applies to us" and the legislature explicitly said in the statute, "No, it's only going to apply prospectively." And even the language that was read to you speaks of Section Chapter 180 of being an extension of sovereign immunity, not overlapping or superfluous which would be entirely superfluous under their interpretation of Section 271.152.

JUSTICE EVA M. GUZMAN: You began your portion of this argument with the statement that they agreed to pay. What wasn't that agreement a contract? You have an agreement to pay and someone that agrees to do what you want. Why isn't that a contract?

ATTORNEY REAGAN D. PRATT: The question is not whether the employment relationship in general is contractual. We're not contesting that. The question is whether that establishes a written contract of the kind of written contract that the legislature intended to cover by Chapter 271 and we don't believe it does.

JUSTICE EVA M. GUZMAN: You said they agreed to pay and they agreed to pay an ordinance correct? The ordinance establishes their agreement to pay.

ATTORNEY REAGAN D. PRATT: The ordinance establishes the amounts the city has agreed to include in the termination pay, yes, but that is not an individual agreement with each fire fighter. That's what the City Council had said and said as a matter of law governing this city, this is what we're going to pay.

JUSTICE EVA M. GUZMAN: This is what we're going to pay people who agree to perform under these terms and conditions, correct?

ATTORNEY REAGAN D. PRATT: Yes.

JUSTICE EVA M. GUZMAN: But that agreement is not a contract.

ATTORNEY REAGAN D. PRATT: It's not and this suit is not for a breach of that contract. This is a suit to try to invalidate and challenge those contracts. It's a suit brought by a minority or retirees who say, "Well we've come up with an argument where we think maybe we can get some more from what the City ever said to anybody that it would pay."

JUSTICE EVA M. GUZMAN: Well they would lose their suit on the merits then if that's correct, right? But they get to sue on the contract, is that right? If you're correct, they lose on the merits?

ATTORNEY REAGAN D. PRATT: If I'm correct, they should lose on the merits. I believe they would lose on the merits. I think they will lose on the merits if this Court sends it back.

JUSTICE EVA M. GUZMAN: The question is do they have a contract today that they get into court on?

ATTORNEY REAGAN D. PRATT: No. That is the question and the answer is the legislature specifically refused to grant them a waiver of the city's sovereign immunity and if it hadn't passed Section 180, there would be no right. Now in the future, firefighters do have the right to sue for those because Chapter 180's waiver was passed, but that was not a superfluous act of the legislature.

JUSTICE DALE WAINWRIGHT: How many retired fire fighters from the city of Houston employment are there? How many retired firefighters are there total? Not just the ones in the suit. Not just the ones from this suit, but total.

ATTORNEY REAGAN D. PRATT: I've estimated, I've done the math in the past and estimated-- the math that I've done and I've figured out it is somewhere between 25 to 30% of the firefighters who would have been eligible for this suit joined. So that would be--

JUSTICE DALE WAINWRIGHT: 2000 or so.

ATTORNEY REAGAN D. PRATT: Right. On the collective bargaining agreement, I did want to clarify that for the 2005 collective bargaining agreement, we're not, the argument there is not that Chapter 271 bars those claims. The argument there is that the contract itself bars the individual firefighters from having any standing to bring the suit. It's been the plaintiffs have not challenged that as a general proposition under an agreement like the 2005 CBA that had a comprehensive grievance procedure, that there are two requirements for an individual fire fighter to have standing. First, they've got to pursue and exhaust the grievance procedure and then they still can't sue unless without the association bringing the suit unless they plead and prove the breach of the duty of fair representation. That's been established law for 45 years and it's been established law for 45 years specifically that it applies even to retirees suing to seek termination pay. That was the Republic Steel v. Maddox case of

the U.S. Supreme Court. Of course, this Court has long held that someone suing to enforce an agreement is going to be bound by the remedial provisions of that agreement and this agreement has a comprehensive grievance procedure that applies to any claim, dispute or complaint about the interpretation, application or anything else having to do with the agreement. So individual firefighters don't have standing to just skip the grievance procedure and on their own, they want to pursue a lawsuit in court.

JUSTICE EVA M. GUZMAN: There are only 99 here though that are subject to the CBA or is it more than that?

ATTORNEY REAGAN D. PRATT: In this case, it's only 99 that are subject to that CBA and there's about 30 who are subject to the 1997 meet-and-confer agreement. Another issue there, of course, is the fact that the association had the right to sue in that agreement and was given sovereign immunity was waived for the purpose of the association suing on that agreement long before Chapter 271. And that agreement, that statute must be as a waiver of immunity, it should be strictly construed to allow suit only by the association and/or the city on those claims. I would point out also that counsel referred to you to Tab A of his brief that has his ordinance 34 in there. That's not the ordinance that has any of the benefits at issue in this case. The ordinances that are at issue at this in case are over in Chapter 14 of the City's Code of Ordinances. So we're not even talking about a lawsuit based on what the firefighters themselves have called their written contract. We're talking about a lawsuit based on challenges to an entirely different section of the City's Codes of Ordinances and I don't think there's anything in Chapter 271 that could be even broadly construed to cover that kind of suit and, of course, in this case, the statute is supposed to be strictly construed to preserve immunity. If the Court has no further questions, I'll give you back a little of your time.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you very much, Counsel. The cause is submitted. That concludes the arguments for this morning and the Marshall will adjourn the Court.

MARSHAL: All rise.

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