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Supreme Court of Texas.
The City of El Paso, et al.
v.
Lilli M. Heinrich.
No. 06-0778.

November 13, 2007.

Appearances:

Eric G. Calhoun, Travis & Calhoun, PC, Dallas, TX, for petitioner,
Hadley Huchton, Office of the City Attorney, El Paso, TX, Kristopher S.
Monson, Amicus Curiae, Assistant Solicitor General, Office of the
Attorney General, Austin, TX, for petitioner.

Stewart W. Forbes, Forbes & Forbes, El Paso, TX, for respondent.

Before:

Chief Justice, Wallace B. Jefferson, Nathan L. Hecht, Dale
Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil
Johnson, and Don R. Willett, Supreme Court Justices.

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CHIEF JUSTICE JEFFERSON: Be seated. The Court is ready to hear
argument in 06-0778, City of El Paso, et al. versus Lilli M. Heinrich.

COURT MARSHALL: May it please the Court. Mr. Calhoun and Ms.
Huchton will present argument for the petitioners. Petitioners have
reserved five minutes for rebuttal. Mr. Calhoun will open with the
first fourteen minutes. Mr. Calhoun will present the rebuttal.

ORAL ARGUMENT OF ERIC G. CALHOUN ON BEHALF OF THE PETITIONER

MR. CALHOUN: May it please the Court. Eric Calhoun here on behalf
of El Paso Firemen & Policemen's Pension Fund, its Board of Trustees,
individual, individual trustees that have been sued in this case along
with the administrator of the Fund. I'm here with Richard Pradarits.
He's also on the brief with me. This appeal presents several overview
issues each of which has several subsidiary issues. I'll address those,
list that out first to address in order.

JUSTICE HECHT: Do your arguments are interest diverged in any way
from the City's?

MR. CALHOUN: No, your Honor. Not with respect to this appeal. The
first issue is whether or not a private party that, as agreed with the

determination by the Pension Fund concerning the amount of benefits that are due to that person under the governing by-laws and statutes for the Pension Funds, may file a suit for declaratory judgment and injunctive relief against the Fund and its trustees and individuals in order to seeking a declaration that the fund has violated those statutes, by-laws and couple that with an injunction to compel essentially the payment of both past benefits and future benefits for that person. The second question is, what standard should the court apply in looking at a plea to the jurisdiction? Should the court look at the pleadings in the conduct of the officials and analyze those that conduct in light of the governing law that governs the conduct? What those officials' obligations are in deciding the plea to jurisdiction? Respectfully, I think the court should do that and the past court did not. Third question here has to do whether the individuals are immune from a suit here that is attempting to control their exercise of their discretionary duties in this case whether they have immunity that's derivative of the governmental entities and official immunities. Where here-- as here, the real claims are to order the governmental entity itself, here the Pension Fund, to pay the monies at issue. With respect to that first question, the question I am subsequent to the El Paso Court's ruling at issue here. This Court decided the City of Houston versus Williams (216 S.W.3d 827 case, this-- early of this year which I think is instructive here. In that case, some fire fighters sued the city seeking a declaration and other relief that they were entitled to recover monies for some back pay, sick leave, overtime monies that were not paid to them when their employment was terminated. As this Court stated clearly in that case, absent, a clear unambiguous waiver of immunity by the legislature, the city's immune from that suit. So even though it was cast as a suit for declaratory relief and injunctive relief, it's really a suit for money damages, and that's really what we have here. As respondent concedes in their brief, what they're really seeking here by way of this declaration, combination of declaration and injunctive relief is an order from the trial court directing the Pension Fund, telling the Pension Fund that this is the way you are supposed to construe these provisions and they-- their construction of them requires a payment, a higher payment to respondent, and we're going to enjoin you from violating our construction of that provision. In essence ordering you to pay back benefits, allegedly due to Miss Heinrich and future benefits in the future allegedly due under their interpretations. Respectfully, those claims are, are subject of government immunity ...

JUSTICE HECHT: And you don't differentiate between future payments and the past payments?

MR. CALHOUN: Respectfully, your Honor, no. We believe that money is money, whether it's payable in the past or whether it's payable in the future. All of the principles that this Court has identified in support of governmental immunity, the policy factors that go into a government deciding when it's going to spend it the mo-- the money, when it's going to require a governmental entity to defend against the suit for money. All those-- the policy decisions, those are decisions that are properly made by the legislature whether it's future monies or past monies, and there's really no appropriate distinction there, between for purposes of governmental immunity from suit here, between future monies and past monies.

CHIEF JUSTICE JEFFERSON: If the governmental entity were legally obligated to pay money because of the judgment of a court?

MR. CALHOUN: Again, it would depend on how they got there. I would

believe that the judgment of the court against the governmental entity, we would assume they would have had gone through the jurisdictional analysis as to whether that governmental entity had immunity from suit in the first place. As, as this Court pointed out in Williams case, immunity doesn't spring forth at the time of judgment. Governmental immunity from suit is a question that's addressed at the pleading stage before the governmental entity is required to spend the funds to address and defend that case.

JUSTICE HECHT: What if she had been underpaid by mistake? If the Fund made a mistake, they, they wrote the wrong check. Could she sue then?

MR. CALHOUN: Absence a legislative waiver of immunity from suit. She could not prosecute a claim for money damages from the Fund.

JUSTICE HECHT: Well, the, the claimant re-- agrees that they owe her. This-- you know, that say, Well, we owe you two-thirds but they might be heading machine mistake just made it. But the decimal point they're on place or something.

MR. CALHOUN: In, in that ...

JUSTICE HECHT: So what, we owe you but it's too bad you can't sue us.

MR. CALHOUN: Well, in the, in the ins-- in that instance, the Fund would do a calculation, if agreed with her would pay her but from the standpoint of immunity from suit again, absent the legislative immunity, a waiver of immunity, I would say, no, as this Court has reiterated the, the door to the court house against the governmental entity is through the legislature. And, and that those the, the, the fairness and the public policy issues that are there would preclude a suit for money damages against the governmental entity.

CHIEF JUSTICE JEFFERSON: What if the, what if in that instance there's a constitutional claim, a takings claim for example? She's owed this, the law compels it and the city would hold, the Fund would hold it. Would it be outside of our, you know, typical legislative waiver issue if there is a constitutional claim wouldn't that be-- an avenue for suit?

MR. CALHOUN: If there were a, a, a valid constitutional takings claim, I think there's a different analysis potentially there. Here, however, there's no argument or no legitimate argument and again you got to look at the pleadings and the law applicable to the circumstances. No legitimate argument here that there's been any constitutional right that can be redressed by a lawsuit that's implicated in this case. In fact, it wasn't really even argued to the, to the Court of Appeals that way. So in fact, I believe it was the City of Dallas versus Trammell (129 Tex. 150) case many years ago that held that pension benefits are not a cons-- that are created by state statute and governed by state regulations and pension funds are not a constitutionally protective property right. And so that analysis doesn't really apply to the circumstances of this case in which we have a, a Fund that's operating within its discretionary duties in implementing the by-laws or applicable to this pensioner there at the time.

JUSTICE HECHT: Public retirement benefits are protected by the constitution. Has been any argument in the case how that impacts the issues?

MR. CALHOUN: There, there really hasn't your Honor, been that issue raised as an, as an avenue here. And, and that we did brief the issue that there was no private cause of action for the a constitutional violation here, and that was not a basis though for the

underlying decision.

JUSTICE HECHT: I mean, I was asking you several hypotheticals but supposed the by-laws that covered this said, as they do two-thirds, but the Pension Fund forgot, and they forgot to change the by-laws and-- but they were running out of money and they knew what's going to be a problem. So they said, Well, you know, yes. We forgot to change them but we don't have the money and we're just going to pay you one-third, and that's what we're going to pay. We admit that the law says this but we're just-- we're not going to do it. No cause of action there either?

MR. CALHOUN: Well, again, distinguishing as this Court has immunity from liability from immunity from suit, again the question of, of whether a governmental entity is liable is very distinct from whether they can be sued for it. And so here, with this admittedly state created governmental entity absent a legislative, clear and unambiguous [inaudible] waiver immunity from suit, there's not an avenue for a, a lawsuit for those money damages here.

JUSTICE HECHT: What do you think of the states position?

MR. CALHOUN: Well, I think that the-- for the most part the state's position is correct. They're-- they take the position as we do that you've got to, at the pleading stage, look at the conduct of the state actors in light of the applicable law to determine if there is a claim that has been properly plead that can proceed that is outside the scope of governmental immunity. And we agree that you've got to do that, they didn't do that here and then in fact, if you look at the, the conduct that's alleged here and the statutes they're acted within the scope with their authority, and so even if you don't-- it's not a money damages claim, it's a claim to control a state official's actions within the scope with their authority and therefore, barred by government immunity. And we also agree with the state's position that this is in essence of a claim from money damages, and therefore, it's barred whatever frame of, you know, what they call declaratory or injunctive relief. Where we disagree with the state, is that, there's some exception for what they would call a non-discretionary statutory obligation to pay that in those cases you imply a waiver within the statute. And again, they don't cite any authority for that position. I mean, they cite to IT-Davy (74 S.W.3d 849) but it doesn't say that in IT-Davy. Respectfully, this Court has made it very clear that absent a clear statutory waiver, a clear and unambiguous waiver consistent with the, the dictates of the Code Construction Act the government code that says, that the legislature has said those things have to be there. You can't imply a waiver just because of an obligation by a government entity or agency to do something.

CHIEF JUSTICE JEFFERSON: But you don't have to get to that argument because you say it was discretionary. Is that correct? Do I understand that right -

MR. CALHOUN: No, well ...

CHIEF JUSTICE JEFFERSON: - under the 1989 or 1980 by-laws?

MR. CALHOUN: Well, we don't get to that argument for several reasons. And one of them is that this, the conduct that's alleged here was well within the scope of their discretionary acts as, as the Board of Trustees here. By statute that's what they were supposed to do. In fact, I think the by-laws say that they can't spend any money without the vote of the trustees, you know. So they've got-- and they've got a lot of other folks that they've got to account to besides Miss Heinrich, so yes, we don't get to that issue. And then, so respectfully here there is governmental immunity independent of that. The third issue and again we've touched on the, the issue of whether or not what

the court has to do or should do in concerning the plea to jurisdiction which is evaluate the conduct of the government officers in light of the standards that are applicable to them. And respectfully here that's what should have been done. The-- you look at the governing by-laws and statutes, look at what the trustees did and you say they were acting within the scope with their authority and therefore, it's not a claim that is outside the scope of government immunity. There's immunity from suit for that claim and I believe that the Department of Agriculture versus Texas Printing Association (600 S.W.2d 264) case that's cited in the brief discusses some of that, and it's very clear. The third area has to do with the, the individuals' immunity, and here where the claims are really in essence to compel the Fund to take action and to pay money to the respondent. The claims are against the government entity even if you sue the individuals, and so it's properly suit against the entity not the individual, in which case the individuals have derivative immunity from suit.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel. And the Court will hear from petitioners, City of El Paso.

MS. HUCHTON: May it please the Court. Hadley Huchton for petitioner City of El Paso. Your Honor, your Honors, we agree with the statements made in the brief by the Fund, the petitioner that there's been no waiver of governmental immunity because respondent is seeking monetary damages. The City does not administer the Fund, it's administered by a board that we, I have the same position as the Fund that the principles of governmental immunity apply here and that City has not waived its governmental immunity. Looking at the petition, the respondent's petition itself shows that the respondent peti-- the respondent is seeking money benefits, money dama-- money damages, and that means sovereign immunity of the City has not been waived. This was a request for money judgment, money damages. Therefore, governmental immunity of the City has not been waived, and the City's plea to the jurisdiction should have been granted. I'm pleased to answer any questions.

CHIEF JUSTICE JEFFERSON: Any questions?

MS. HUCHTON: Thank you.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. The Court will now hear from Amicus Curiae, the State of Texas.

COURT MARSHALL: May it please the Court. Mr. Monson will present argument for the Amicus Curiae.

ORAL ARGUMENT OF KRISTOPHER S. MONSON ON BEHALF OF THE PETITIONER

MR. MONSON: May it please the Court. I' like to begin by addressing Justice Hecht and Chief Justice Jefferson's question about what's different between the state's position and the position of the petitioners. This case is not about an implied waiver of immunity. It's not about a waiver of immunity at all. It's about a long standing common law exception to immunity doctrine which requires you to find that state official or government official has acted so far outside the zone of their discretion that they're no longer acting in-- on behalf of the state. And that the lawsuit is therefore, not one against the state and is therefore not barred by immunity. Now, there's two analytical questions you can ask to, to figure out whether this has happened. Is there a statutory constitutional limitation on the

government official's discretion that lets you know that the suit isn't actually suit against the state? Or and this is the second prong, and this is what IT-Davy's about, would the court's judgment interfere in the discretion of the public body to allocate public money as it sees fit? And that's the heart of the difference between the state's position about the requirements of these Pension programs and the requirements in the suit against the legislature.

JUSTICE HECHT: But you say even if the act was ultra vires, if the end result is going to be spending money that's the end of it?

MR. MONSON: Not entirely. We think that they're situations in which either the legi-- the legislature can make the spending of money a non-discretionary obligation. For instance, if the legislature has already appropriated money to pay a certain claim and there comes into existence a legal obligation to pay that claim, then without doubt the comptroller could be mandamus'd or subject to an ultra vires suit to pay the money that the legislature has already allocated to that purpose. The, the bar on monetary damages is the interference with the, the legislature's discretion to allocate other monies in the budget as it sees fit.

JUSTICE HECHT: But here the-- I mean, the claimant is either right or she's wrong.

MR. MONSON: That's right.

JUSTICE HECHT: And if she's right, the board, because-- the by-laws and the law say she's right, then the Fund had planed on paying her.

MR. MONSON: And, and I think that that's the distinction between suing a municipal local entity that's been created by statute and suing the legislature. The legislature has the power to create an obligation for state government but not fund it. If the legislature creates an obligation for entities Pension Fund and there's a non-discretionary obligation to pay money and, and I would challenge the merits of your hypothetical. What's ...

JUSTICE HECHT: But if, but if the by-laws said she wins?

MR. MONSON: Yes.

JUSTICE HECHT: Just clearly. And the Funds already made that decision and it's in the budget, you know, some fraction is going to go to this claim, then you-- she can sue or not?

MR. MONSON: She can sue and she can get prospective relief requiring payment of the full amount owed to her under the by-laws in the future. I-- we don't see any difference between this and the DeMorrow(SP) case which involved the minimum wages for firefighters. If the legislature says you have to pay so many dollars an hour to a firefighter in your local government entity, you have to find enough money to pay that, that minimum wage to all the firefighters.

JUSTICE HECHT: And why not the back pay?

MR. MONSON: Not back pay because the decision to allocate money means that they've already, if the, for instance if the defendant in DeMorrow(SP) had already spent the money that should've have gone to firefighters' salary on something else, the court's interference would challenge all of those discretionary allocations of money. But the affirmative obligation confirmed by the court to pay the money in the future comes into existence at the time that the judgment has entered, and after that you could get an injunctive relief to enforce the already final judgment. And that's the Federal Rule on 1983 claims which we think is analogous to this kind of situation. But once again the ability for the courts to interfere in the discretion of a governmental defendant comes into existence only if the law creates a

non-discretionary obligation on which the courts can base jurisdiction. Otherwise the suits ...

JUSTICE HECHT: But the, but the question is, we're looking back now to 1985, and saying what was the obligation then -

MR. MONSON: Right.

JUSTICE HECHT: - and the Fund thought it was this and if we thought it was something else, wouldn't that be a non-discretionary obligation as of that time?

MR. MONSON: And it's our position that the jurisdictional analysis requires you to look at the by-laws and statutes and figure that out ' cause that's the only way you can know whether this is a suit against the errant official or a suit against the government entity itself, and that's how you figure out whether there is jurisdiction. If there are no further questions, I'll yeild the remainder of my time to the Court.

CHIEF JUSTICE JEFFERSON: Thank you very much, Counselor. The Court then is ready to hear argument from the respondent.

COURT MARSHALL: May it please the Court. Mr. Forbes will present argument for the respondent.

ORAL ARGUMENT OF STEWART W. FORBES ON BEHALF OF THE RESPONDENT

MR. FORBES: May it please the Court. 1985, that's when Chuck Heinrich died. Before that it's in 1983 when he was shot and the year before that, 1982 was when he was given the Police Officer of the Year Award by the Combined Law Enforcement Association of Texas. The point I am trying to make was the Board, the Pension Board decided it was such unusual set, set of circumstances for a police officer to be shot in the line of duty. We're going back to the 1980's that the violence that we have today is not such, then as it is now that the Board got together with the city attorney and decided it was appropriate to give this widow 100 percent of the pension. Then comes in the year 2003, the Board then decides, We're going to take this widow's money away from her ...

JUSTICE HECHT: And -

JUSTICE: And-- Go ahead.

JUSTICE HECHT: Okay. My confusion about that argument is that, if they could disobey the by-laws in 1985, why can't they do it now?

MR. FORBES: I'm not so sure that they did disobey the by-laws in that case.

JUSTICE HECHT: Well, they've said two-third-- and one-third. And you said that it was so unusual they have decided to have an exception but the Section 20 doesn't say, except if you're shot in the line of duty.

MR. FORBES: Well, the statute as brought forward by the petitioners say that the Bail Bond Board earns-- excuse me, not Bell Bond. That was my last case before I was here-- the Pension Board has a right to change it, so if that's correct, if that that statute allows them to do it as the petitioners have brought forward then they have the, the right to do it under these circumstances then it is legal. It was done by the city attorney, it was approved, everybody agreed. We haven't been able to go into the trial court and develop the reasons why, other than what I've just told you, or their thought process as to why it was legal and why it applied to the by-laws.

JUSTICE HECHT: But, but your argument is, they could've changed it

in her favor in 1985 but not change it back in 2002.

MR. FORBES: Exactly, because the statute says, you have to have vote by certain amount of the then paying members. They say you can only increase it, you can't decrease it. That's what the statute said, and my argument is, this is her property, this Board took it away. And the Court of Appeals said you have to look at the underlying nature of the suit.

JUSTICE BRISTER: But how does, how's that different from Federal Sign (951 S.W.2d 401)?

MR. FORBES: Pardon.

JUSTICE BRISTER: How it that different from Federal Sign? If Texas Southern Board approved buy this big sign, and we're going to pay them money, and we'd sign the contract, and everyone's approved and then they change their mind and we said you can't sue them.

MR. FORBES: Well, it's-- according to my pleadings in this case is that it's an illegal act of a board.

JUSTICE BRISTER: Well, why wasn't that illegal in Federal Sign? I mean, it wasn't illegal like they stole or they-- you just mean it's illegal like you don't like it, they've breached the contract which is what Federal Sign said, too.

MR. FORBES: No, I-- seriously this is, this is a illegal ...

JUSTICE BRISTER: What, what did, what did they, what, what cri-- that they didn't violate any criminal law when you say illegal you don't mean criminal?

MR. FORBES: Well, I'm not so sure. I mean, I, I don't ...

JUSTICE BRISTER: Which one?

MR. FORBES: Pardon me. What ...

JUSTICE BRISTER: Which one? You're telling me, Yes, yes. Oh, no, no. I'm insisting it's illegal, Okay. How?

MR. FORBES: Under the statute, that's marked ...

JUSTICE BRISTER: Pay them more.

MR. FORBES: No, no. They, they are-- the, the Board already made a determination that she was entitled to a hundred percent.

JUSTICE BRISTER: And the Federal Sign made a determination they would by this sign. How was what they did any less illegal than what you're saying occurred here?

MR. FORBES: I can't answer your question.

JUSTICE BRISTER: No, no question you want her to get paid.

MR. FORBES: That's up-- it's not ...

JUSTICE BRISTER: So, so why isn't a suit for money damages?

MR. FORBES: Well, you know pension boards, they don't give out food-- they don't give out vehicles. They just have dollars, and so when someone's entitled to a dollar, you're taking their money away from them. So it's just like if you would give out food or give out cars, what's the difference?

JUSTICE BRISTER: So you ...

MR. FORBES: We're not going to give you out your car anymore. It's personal property.

JUSTICE BRISTER: I know. The problem is we've said, you can't sue them for money damages. I mean, that's what the Williams case and a lots of others before it say that the, if you're-- what you wanting is a government entity to pay you, then you can't just bring suit. You got to go, ask the legislature first.

MR. FORBES: The old Epperson (42 S.W.2d 228) case, Epperson, the old Epperson case was a, a contract dispute where someone had earned money, and there was a suit against the, the taxing authority because they were there to collect taxes. And it was a suit for money, it was

earned income pursuant to a contract. It was a, it was a breach of contract and the court said, Well, it is money damages, yes. It is for-
- earned in the past and that's why they are entitled to collect it.

JUSTICE BRISTER: How does that survive Federal Sign? I mean, the deal was they started building the signs so they've earned it.

MR. FORBES: I think that when you take some property away from someone that they hardly have received it, it doesn't-- the Federal Sign doesn't even apply. I think that in this situation those funds 100 percent, one-third of the funds that were paid to Ms. Heinrich, it's her, her money, whether it's money, whether it's cars, whether it's food, regardless to how you characterized the personal property that was taken away from her, it's an equitable remedy and she's asking for that which belongs to her to be returned. And whether it's a constitution, or an illegal or an ultra vires act, these are things that belong to her.

JUSTICE BRISTER: How, and how was that different from everybody else with contract claim against the state?

MR. FORBES: Well, I have to look at all the other people that have contract case. I mean there are people that you have a contract case with the state so you can sue.

JUSTICE BRISTER: And you're saying because we've got a contract, then all the money she would be paid under that contract in the future are her funds as soon as the contracts sign?

MR. FORBES: I'm not so sure. I said there's a contract, I'm sure that what had happened is that her husband paid into a fund for sixteen years before he got shot and eventually died. And a board decided that she was entitled, she should be entitled 100 percent which I'm assuming is an illegal act. And now on down the road, years later, the another board decides that it's not. And our position is that, we should be able to litigate the issue whether or not it was a leg-- a legal act, and we claim that it is. And we also claim that their actions were illegal that they took it away from her without the right and that's the position ...

JUSTICE BRISTER: I understand. But this is, this is an old, old part of the law that in a free society that one legislature can't bind a future legislatures hands, one board can't bind the future board's hand, and one city counsel can't bind the future city counsel's hands, so the law in America has been for at least a hundred years. The whole idea behind that democratic principle is that a government as constituted one day that promises the citizens something. When they get voted out, they're not bound by one-- what the dead hand of the former legislature said. It sounds to me you're saying exactly that. You wanting us to ignore a whole lot of law and said this board is bound by the hand of the former board, and I need some specific authority before I go that far.

MR. FORBES: Well, I'm not necessarily, I don't necessarily agree with the characterization that's being put upon this set of circumstances. And I don't, and I'm try-- I'm trying to wrestle with you what you, what you're putting forward. And what I would say is this, it's a, it's a question of entitlement. This, this recipient of the pension benefit are entitled. It was illegally taken away from her. They did-- it's not a question of going in and contracting with someone else to build, to build this office building or, or starting anew. This is something that happen in the past, and, and I, I don't particularly agree that this is new legislation that's being made by a new city counsel. The problem is a new city counsel should honor contracts made in the past by prior city counsel, and I, I'm sure they could break

these contracts, but that gives rise to cause of actions for breach of contract. That isn't what we're here about. What I think we're here about is this, this, these funds were-- her funds legally they've been taken away.

JUSTICE BRISTER: Can I ...

JUSTICE JOHNSON: So you're-- just the declaratory judgment does not benefit any, you're-- you want a judgment declaring and a judgment that your client is entitled to money, is that correct? Is there any judge-- let me phrase that a little different way. Is there any judgment you're seeking whatsoever that does not include a judgment awarding your client money?

MR. FORBES: You know, I had, I'd like to disagree with you.

JUSTICE JOHNSON: No, I'm asking you if the ...

MR. FORBES: Well, I know. I'd like to say no, but the problem is what you receive from a pension? What can you receive other than an allotment every month in the form of money I don't see anything?

JUSTICE JOHNSON: For example, the declare, a declare-- declaration is not, you're not seeking any type of declaration that does not award you your client money.

MR. FORBES: Well, in the sense we are, and that would be, she the entitlement to 100 percent as opposed to sixty-six two-thirds -

JUSTICE JOHNSON: All right.

MR. FORBES: - would eventually compute into dollars.

JUSTICE JOHNSON: But eventu-- so how do you get to dollars?

MR. FORBES: Well, we have to get the, the judgment and then enjoin them from keeping it and that's an unjust enrichment.

JUSTICE JOHNSON: Okay. So you want the judgment and an injunction and you're saying judge-- affect net. The bottom line is, the declaratory judgment does not do you any good without the injunctive relief telling them to pay it. Is that first ...?

MR. FORBES: Injunct-- enjoining them from withholding it.

JUSTICE JOHNSON: All right. That's the future.

MR. FORBES: All right. Actually, and for, for percentages that they've held in the past, so they, they have been withholding since -

JUSTICE JOHNSON: Yeah. Right.

MR. FORBES: - 2003.

JUSTICE JOHNSON: Right.

MR. FORBES: So we have to have the declaratory judgment allowing us within the statute that the actions of the Board in 1985 were correct, and an injunction enjoining them from keeping what they took away from her in the past and in the future.

JUSTICE JOHNSON: Are you say-- are you interested in, in any ways that the declaratory judgment that does not include injunctive relief?

MR. FORBES: No.

JUSTICE WILLETT: So I'm a little confused so bear with me. Do, do, do you accept or reject the state's view that your case can be divided into two parts, prospective relief and retroactive relief?

MR. FORBES: Do you think the, the, the case can be divided into two, in two portions, prospective and retroactive?

JUSTICE WILLETT: Well, collecting on money past due separate and apart from moving forward directing the city to abide by the initial agreement.

MR. FORBES: Well, I think it has to, it has, it has to be like that. I think which brings up the whole, a whole host of questions which-- that -

JUSTICE WILLETT: Well, I mean -

MR. FORBES: Looking at me kind of ...

JUSTICE BRISTER: How do we? No, no. I understand. If we enjoin them and say, pay this amount in the future and they don't, then we're going to throw them all in jail.

MR. FORBES: If, if that's what you all want to do, I mean ...

JUSTICE BRISTER: Well, this, this is why we, this is why we avoid sovereign immunity because if we tell them to do something and they say, no, then precisely what is the court going to do?

MR. FORBES: Well, ...

JUSTICE BRISTER: They'd answer, Well, we'll foreclose on the capital building-

MR. FORBES: No.

JUSTICE BRISTER: - and slap a lien on the big pink building.

MR. FORBES: Then, what ...

JUSTICE BRISTER: And we're ...

MR. FORBES: You know, the other thing to do if that happens is of course, the plaintiff or Ms. Heinrich would go to the legislature and ask for further relief, but you see the problem I had ...

JUSTICE BRISTER: Which is what she could do now.

MR. FORBES: Of course, she could, I mean ...

JUSTICE BRISTER: Why, why do you need, need, a deck action before you go over and ask the legislature? I mean, I don't understand them to be saying, they can't sue us even if they get the legislature's permission. I understand them to be saying she has to get the legislature's permission first. So why don't you go get that?

MR. FORBES: Well, you know, I have a real problem with the, the old concept of English law is that you just can't send the sheriff out and pick up somebody's property without due process, without a warrant - I have a real problem with that, you know, this is not, you know, the King sending the Sheriff of Nottingham or so, whatever to go out and pick out people's property here or, to collect the money. In, in, in my-- you know, humble or not so humble opinion, that that's exactly what happened here. The, the Board has made a decision. There, there's, there's no argument. You either do what we say or, or that's it, and, and you can't sue us even if it's illegal, even if it's unconstitutional. And I just, I have a hard time with that. I have a hard time with that. And ...

JUSTICE HECHT: In Williams, we remanded the case like several others to consider changes in the Local Government Code that waived immunity for some claims against local governance. You're familiar with that?

MR. FORBES: Yes.

JUSTICE HECHT: Do you think you have a claim under those statutes?

MR. FORBES: I don't think the Local Government Code would apply to this situation. I just don't ...

JUSTICE HECHT: Why not?

MR. FORBES: Well, it, it's a, it just doesn't apply. I mean, this is, this is an equitable remedy for an illegal act. I don't think the government code goes to that.

JUSTICE HECHT: So those sections which are-- it's Sections 271, 151 to 160, those were the amendments about four or five years ago that waived immunity for some claims against local governance. You don't plan to sue under those statutes?

MR. FORBES: No, I don't.

JUSTICE HECHT: Sorry?

MR. FORBES: I don't.

JUSTICE HECHT: And the, the last, the amendment in the last session that's been discussed in the briefs, you're familiar with that?

MR. FORBES: Yes.
JUSTICE HECHT: How do you-- do you think it applies?
MR. FORBES: No, I don't. If anyone ...
JUSTICE HECHT: That was the House Bill 1473.
MR. FORBES: That's correct. Can I give you guys some time back?
CHIEF JUSTICE JEFFERSON: If no further questions, you surely may.
Thank you, Counsel. The Court will hear rebuttal.

REBUTTAL ARGUMENT OF ERIC G. CALHOUN ON BEHALF OF THE PETITIONER

MR. CALHOUN: Please the Court. First of all, I, I think that the respondent's argument, candid argument that conceding that he really, his only sole remedy here is money damages that really there is no basis here for a declaratory claim independently here of a order compelling the Fund essentially to pay either past or future monies. I think that falls squarely within governmental immunity under this Court's case law and therefore immunity from suit bars the ca-- the claim and it should be dismissed with prejudice. I think it should be dismissed with prejudice because there is no way to amend the petition which she had amended a couple of times already in effort to evade immunity in a way that could viably go forward in the absence of a legislative waiver of immunity from suit.

JUSTICE HECHT: I suppose you don't think the changes to the Local Government Code apply here either?

MR. CALHOUN: They don't, your Honor, and I can't say specifically that the, that the 1571 Section of Government Code applies to municipalities and schools and certain limited agencies which the Pension Fund is not included. So on the face of the statute, we're not subject to that limited waiver of immunity within that statute first of all. And, and that-- by the way that, that I think that section illustrates why it is appropriate that the legislature be the ones to waive immunity. That statute has limitations upon this-- the damages that can be recovered for a breach of contract that says for example, you can't recover lost profits. That's one of the limitations. It says you can only recover attorney's fees if they're spelled out in the contract and you covered attorney's fees. So one of the reasons why under our system that the court directs litigants to go to the legislature, is because it's within the legislature's province to define the scope of the remedies that are available to the litigant against the government entity and protection of the government's funds and here the Pension Fund's funds.

JUSTICE HECHT: And what's your view of House Bill 1473?

MR. CALHOUN: No, that wouldn't apply, apply here either, your Honor, to the circumstances of this case where the Pension Funds or its statutory obligations. To follow-up on where some of the courts have gone off track on in terms of awarding declaratory relief against governmental entities that as to future, as to future monies, I think that what has happened is they pulled a sentence out of the IT-Davy case. There's a sentence in there, in there that says, 'That because suits to compel state officers to act within their official capacity,' they don't, they don't subject the state to liability. And so they've gone on to say that well, we can, we can construe a statute in the future that would have the effect of causing someone to a government entity to pay money. Respectfully, the sentence if you put it in

context, it's in the context of the cases discussed in IT-Davy. It's in that period discussing Cobb versus Harrington (190 S.W.2d 709) and a case again where it was purely equitable declaration as to whether or not the petitioner had was a motor carrier. It didn't have anything to do with the paying of money, and so if you put that, that statement in context, it is referring specifically to those types of circumstances where someone is burdened by a statute and wants a declaration concerning its applicability or meaning to them. As opposed to a case like this where someone is seeking to use to compel a-- what their view of the state law in a way that requires the payment of money damages like this. So those, that vein of cases in that, and that sentence taken out of context do not support an injunctive or declaratory relief for the future.

CHIEF JUSTICE JEFFERSON: But, should the Court concern itself at all with the mischief that would happen if we say a body can promise to pay and that a, a plaintiff can rely on, on that promise to their detriment and then the government unit can take it away some years later. Do we, you know, we have said it's the legislatures province but we've also not completely given up on the idea that the court might intervene when necessary.

MR. CALHOUN: Well, I think that the structure that the Court has set up is working. The Court has stated that it is the legislature's job to define the circumstances in which the inherent governmental immunity from suit is waived. And the legislature has taken that into account and is, is acting on it and as the Court has pointed out with these two recent statutes has defined the specific circumstances under which that immunity from suit will be waived, and the scope of that waiver. And I think that system works-- is working and the Court is acting responsibly in the way that it's interpreting those duties.

CHIEF JUSTICE JEFFERSON: Further questions. Thank you, Counsel. This cause is submitted. That concludes argument for the day and the marshall will now adjourn the Court.

COURT MARSHALL: All rise. Oyez, oyez, oyez. The Honorable, the Supreme Court of Texas now stands adjourned.

2007 WL 5231246 (Tex.)