ORAL ARGUMENT — 11/3/99
98-1138
FT. WORTH ISD V. CITY OF FT. WORTH

OXFORD: I would like to begin with three primary reasons why this court can, and we respectfully submit, should reverse the summary judgment entered below. The first reason is that judicial precedent clearly establishes that the City does not enjoy any sort of immunity on the facts of this case. Second, the concerns that this court discussed in the *Fidelity Signs* opinions and the various opinions in that case strongly favor the independent school district's position here. Third, the record flatly contradicts and at a minimum raises a fact issue with respect to the CA's central finding that there was no contract here.

I would like to begin on this last point. We've cited much evidence to this effect, which is in the ordinances and resolutions themselves. I think one of the strongest pieces of evidence that there was in fact an agreement exists in the record at page 714, which is a memo from Wade Atkins, the City Attorney of the city of Ft. Worth itself in 1986, which said as follows - it described the 1936 litigation in an opinion and then says, "Following that CA's decision, the City, the ISD and Bell settled the suit. It is hornbook law that a settlement and a settlement agreement is indeed a contract. The settlement agreement was accomplished through the following actions: a) the city council adopted ordinances 1933 and 1935; b) the board of education, that's us, adopted a resolution on Dec. 31, 1936; and c) the board of directors of S.W. Bell adopted resolutions accepting both the city ordinance and the board of education resolution. That statement by the Ft. Worth city attorney in 1986, looking back on the facts of this case, is exactly the position that we, the ISD, have maintained about what that contract was (it was a settlement agreement), and what evidence that contract.

O'NEILL: What exactly was settled? What dispute was there in the earlier case between the ISD and the city that was specifically settled? Was there cross-action? Were there claims going back and forth?

OXFORD: There was not a cross-action between the ISD and the city of Ft. Worth. In that litigation, we were sitting at different tables. We were sitting with the City of Ft. Worth. What happened was, and I believe it was 1927, both the city of Ft. Worth and the ISD issued assessments on an easement, what we claimed was an easement, that SW Bell had to operate within the City limits of Ft. Worth. Bell didn't like that. Bell immediately brought a suit for an injunction and indeed received an injunction from the federal DC preventing...

O'NEILL: No, I understand the history. But you agree there was no pending dispute between the school district and the city to be settled, there was just a dispute with S.W. Bell?

OXFORD: That's right. But the school district's consent to that settlement was absolutely a condition to the city's receiving its consideration under that settlement.

O'NEILL: And is there summary judgment proof to that effect?

OXFORD: Yes there is. For example, at page 575 of the record, there's a 1959 memo from the city attorney at that time.

O'NEILL: Well that's after the fact, right?

OXFORD: Yes. He says, We (the city), could not make the settlement with the telephone company unless it was agreeable to the school district. That's looking back on it.

O'NEILL: Now why is that?

OXFORD: The way I look at it is, it's like a multi - where you have several plaintiffs in a lawsuit and sometimes the defendants is just not going to settle with one of them. This was a very important situation with S.W. Bell. The school district as well as the city were making a claim that as far as I know had never been made before. That is, that the right of S.W. Bell to operate in the alleys and byways of the city was _____, through taxable, assessable property right. S.W. Bell does not like that contention and had S.W.

Bell just settled with the city and left the school district out there, at the time the school district had the perfect right to levy those taxes.

Another issue in this case is the fact that the assessor/collector for us at the time was the city. But we had the right to make that claim. Had Bell just settled with the city, we would still be making that claim.

O'NEILL: But we have to infer that?

OXFORD: You don't have to infer that.

O'NEILL: Is there anything that we can point to that says what you just said?

OXFORD: Yes, it's in the 5th circuit's opinion, for example, and it's in the briefs as well as the city charter...

O'NEILL: I know the allegations part. Is there anything to indicate that the ISD's claims were all settled and other than the ordinances themselves, the resolution _____, that their piece was a part of this settlement other than the inference drawn on the ordinances?

OXFORD: The piece from the school district was a part of the settlement, yes. It specifically says in our resolution for example, which is a part of the settlement on page 1...

O'NEILL: But my question was separate and apart from the ordinances and the resolutions?

OXFORD: No, the agreement itself says, it's subject to. It does say in the resolution that this settlement is subject to our approval, the school district's approval.

ENOCH: That's the school district's resolution?

OXFORD: Yes.

ENOCH: It seems to me your great difficulty here is you have a series of documents none of which refers to any other series of documents that would enable a court to determine that these were all part of a common contract. What do you have that ties the city ordinance of 1935 and 1933 to S.W. Bell's acceptance of a Ft. Worth school board's resolution that ties those ordinances to S.W. Bell's agreement?

OXFORD: With all due respect, we do have something, we have quite a few pieces of evidence in the record that I think is really undisputable. That 1935 ordinance itself says, Whereas, in the settlement (it refers to the settlement, the settlement, not a multiparty settlement) of the controversy existing between S.W. Bell telephone, the city, and Ft. Worth ISD. It is provided in ordinance 1933, that Bell shall pay to the City 2%. And whereas it is necessary (this is still the city talking in its ordinance #1935) to make a proper apportionment of said taxes. Said taxes being the ordinance 1933 payments pursuant to the settlement referenced in 1935. Therefore, and they talk about the gross receipts taxes in section 1, being hereby are accepted and the commissioner of accounts is directed and ordered to make that apportionment.

HECHT: Nineteen thirty-three does not refer to payment of taxes?

OXFORD: I think your honor is right. There are certainly a lot of talk in there about taxes. The specific operative provision of 1933 is that it is in lieu of taxes.

HECHT: But it's a fee or a charge?

OXFORD: It is a fee or a charge...

HECHT: Are there three things here: the charge for the use of the city's property; a ad valorem tax by the city on that use interest (call it an easement); and the school district's ad valorem tax on that use interest?

OXFORD: There is at least those three things involved. 1933 mentions all form of charges and taxes.

HECHT: So what did 1933 pay for?

OXFORD: All. In lieu of all of those.

HECHT: That's S.W. Bell's position as well.

OXFORD: Certainly.

HECHT: If it did pay for all of them in lieu of other taxes why isn't that an equal and uniform problem?

OXFORD: Under the constitution of 1876 - first of all those underlying taxes were disputed. It's in lieu of any allegation we could make that there were such taxes to be paid. S.W. Bell disputed bitterly at the time and to this very day, as it referenced by footnote 1 of its brief, that there was any such tax that it ever owed. So we are really settling a tax dispute as the settlement agreement. It is in lieu of taxes. S.W. Bell will never say owed those taxes.

HECHT: So your argument is, that these are taxes in lieu of taxes?

OXFORD: No, my argument is that these are payments in lieu of taxes. These are settlement payments.

HECHT: Payments for the ad valorem tax assessment would be an assessment?

OXFORD: In lieu of that assessment. In the place of any assessment you think you could make without a (I'm speaking from S.W. Bell's point of view), but it's their opinion and it was the dispute at the time in 1936, it's in lieu of taxes including the dispute we have that we don't owe them at all. The Allen Gamble letter that was sent back in 1936 makes that very point. Leading up to the settlement agreement, he's the rep. of Bell and says, It seems we need to settle this whole thing and the way to do it is to agree to this instead of that.

HECHT: The old city of Austin case says, If you forgive somebody their taxes for some kind of settlement like that, you've got a problem with art. 8, §1a, Equal and Uniform?

OXFORD: Can I dispute your statement? The old City of Austin case does not say anything about a settlement and it was not a settlement. What happened was, there was a bill reduction and they said, because you get a bill reduction, we don't have to - exempt us from the payment of those taxes. That was under the 1870 constitution and as the notes to §55 of the 1876 constitution, which is our constitution today, say, Forgiveness of taxes was a real problem. So provision 55 of the 1876 constitution was adopted and as this court held in the *Fratita(?)* case, if there is consideration given for a commutation of a dispute, including taxes (Section 55 included taxes; although it doesn't mention it on its face it's clear from the notes that section 55 came about because of forgiveness of taxes, and the law consistently since the adoption of section 55 in the 1876 constitution is) that if there is consideration given...

HECHT: Does it matter how big?

OXFORD: I'm not sure.

HECHT: If it's $10, because they really did want to exempt Bell from paying any taxes?

OXFORD: I don't think it matters under that law. Now the case in *Fratita(?)* talks about consideration in terms of an uncertainty, and that's what we have here. There was no certainty in the future when this "in lieu of ordinance" was entered, whether what Bell was going to pay under the gross receipts ordinance was greater or was it going to be less than what they would pay if they were found to owe an ad valorem tax on that easement.

HECHT: Assuming the payment has to be something like what the taxes would be to pass muster under art. 8, §1a, is that a fact question here or can we tell that from this record?

OXFORD: I'm going to make that assumption, which I think I just disputed. Under your assumption, that is a fact question. Here the evidence from Mr. Gamble's letter is that this was some attempt to be some kind of reasonable or proximation, that if indeed the gross receipts went up, then the easement was more valuable. And if indeed, Bell wanted to make any money out there, then what's the worth of that easement and our gross receipts will go down and your payments will go down as taxes would have otherwise.

HECHT: Is it your position also that the settlement could comprehend the evaluation on the basis of value requirement of §1b of art. 8? In other words, ordinarily property has to be assessed at its value. Can that controversy be settled as you claim it was in 1933?

OXFORD: Yes it can. I think it's important. It was important then and it's important now for a taxing entity such as the City of Ft. Worth to be able to settle a tax dispute. And so, yes, I think any kind of disputed tax, which this certainly was, can be settled. I think we mentioned in our brief that there are many policies that favor our position here, presumptions in the law, and one of them is a strong presumption in favor of settlements. This was a settlement and it enjoys a strong presumption. And I think it should encompass what the court is saying there.

HECHT: Why didn't the change to the appraisal district process in 1982 end the agreements as a practical matter?

OXFORD: Because the agreement was terminable at will and nobody exercised their will to terminate it then. If indeed, which we do not concede, the 1982 changed from being the City of Ft. Worth is the tax assessor/collector to the appraisal district being the tax assessor/collector constituted some reason for one of them to say, All bets are off. They could have said it then. But they didn't.

OWEN: Do I take from what you just said you're not making claims for anything after 1992. You agree that once the 1933 was repealed all bets are off as you put it?

OXFORD: Not exactly. I think for the purposes of everything we've said so far, the answer is, yes. There is another claim in the case under the letter from the city manager at the time, David Ivory, that we're making the claim that the city bound itself to do something after 1992.

OWEN: Do you agree that on the state of this record ordinance 1935 was not effectively appealed in 1992 as well?

OXFORD: I don't. It may not matter, but I think 1935 was repealed. Ordinance 11163 does not reference ordinance 1935, and I don't think it's fair to say it was repealed by implication. Indeed, had the city gone through with what David Ivory committed to in his letter, I think the parties would have used ordinance 1935 as the vehicle to take care of the ISD.

GONZALES: Do you agree that the city had any authority to repeal the other ordinances?

OXFORD: Yes, the city had the authority to repeal the ordinance.

GONZALES: So what are you asking for? Are you asking that this new ordinance be amended? What is the school district asking for?

OXFORD: On our claims here we're asking for damages based on failure to live up to the letter agreement.

GONZALES: Can the school district levy taxes?

OXFORD: Yes. The school district still has the power to levy taxes, but the Tarrant Count Appraisal District does that now. It does the assessing and collecting.

ENOCH: If the court determines that there is no agreement here or not, then Ft. Worth ISD could go out and tax - I mean there's nothing to stop you from taxing Bell on the property that you insist is taxable?

OXFORD: That's true except S.W. Bell's insistence that they can't do it. And we would be in a whole another lawsuit on that.

ENOCH: Which was the one that happened in 1936, you would ultimately have to finish that one?

OXFORD: That's right. We would have to tear up the settlement agreement, which we respectfully submit should not be done, and start a new lawsuit and maybe settle out someday.

GONZALES: Is S.W. Bell taking the position that all

of its payments it's making under this new ordinance satisfies its obligations under the previous two ordinances, ie. to the school district and to the city?

OXFORD: I don't believe they are taking that position. Vis a vis S.W. Bell and the city they will certainly take that position because ordinance 11163, the new ordinance contains a release on behalf of the city. We, the school district, did not give any such release.

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RESPONDENT

KELLY: This case, as I think the court has rightly noted, is about the manner in which the school district assesses ad valorem taxes against S.W. Bell. It was in 1936. It is today. The thing the court must understand is that the city never owed the school district any money. It only stepped in to this role as a result of a settlement.

HECHT: Why did you pay it money?

KELLY: In 1936, the city was the assessor/collector for the school district. There is no dispute on that.

HECHT: The city didn't have any individual obligation?

KELLY: The city had no obligation. The record is made up of 5 documents. That is the summary judgment record as far as the contract they claim the city entered into in 1936. So all the inferences they ask you to make have to come from those documents. And the city's problem all along was there was no consideration for any obligation on the city's part to take on a responsibility to the school district to pay ad valorem taxes. That was S.W. Bell's deal. The city had to act as assessor/collector in 1936 by statute. In 1945, the city and the school district were emancipated. At that point, the school district had the right to appoint any assessor/collector it wanted. I would ask you to go to the record and see if they have put any summary judgment evidence in the record, but the school district appointed the city as assessor/collector in 1945 and I think you will find the evidence is not there.

GONZALES: After 1945 was the school district still receiving monies from payments made by Bell?

KELLY: The city paid under ordinance 1995 until it was terminated, the monies that it was being paid from S.W. Bell to the school district. There is no claim that it did not pay the amount due under that ordinance. It was paid.

GONZALES: These were monies that belonged to the school district?

KELLY: That's position is irrelevant. It was paid. Whether or not we take the position now it was illegal. And I think it clearly was illegal according to the state constitution at the time it was made. The problem is we made it. We haven't gone back in the state court case, we didn't seek a claim against the school district to pay up back for those monies. I think arguably, we could. I don't think that's a very popular position to seek money from a school district. So we didn't do that.

HECHT: Well it's a little disingenuous to argue, We did this for 55 years, we took the people's money, we gave it to somebody we shouldn't have, and now we want it back?

KELLY: I agree with you. It seems a tough position to take. The problem is, the only way I can make sense of it is, that this is a city. It's a bureaucracy. It changes over time. And this payment got entrained in its system and no one ever checked on it until 1992 when the city was renegotiating with Bell. And then it said, Oops, why are we paying this money? The point of the matter is, the City was not getting a portion of the money it should have been getting for all these years.

HECHT: There's three pieces, right? The charge for the use; the tax on the use by the city; and the tax on the use by the school district?

KELLY: That's in 1933. The city has a number of ways it can assess S.W. Bell. The school district has one, and it still has it today.

HECHT: What did 1933 pay?

KELLY: At least all of those. I think Mr. Oxford's correct on that. It cites it in the ordinance, a number of things it pays for: the police power, the regulation power, the franchise fee, and the ad valorem taxes that were due to the school district.

HECHT: You're saying that under 1993, S.W. Bell paid the city ad valorem taxes owed to the school district?

KELLY: I don't think there's any other way that you can look at the document and say that there is not some payment being - that's what the payment is being made to the school district for. That clearly is what was said in those ordinances.

HECHT: All three parties take the same view of 1933 that S.W. Bell was paying for its use of the property and taxes to both entities on the value of that use?

KELLY: I disagree with that point. I'm talking about 1935. 1933, those monies all come to the city. And that's what Justice Holman in the CA's opinion found was the problem with the illegality, is that all those monies were paid was public money to the city.

HECHT: Well what are they paid for is my question?

KELLY: The point is, we have to look at the source documents.

HECHT: I'm asking you what was paid under 1933?

KELLY: All it talks about is fees to the city. It doesn't speak anything about the school district's right to assess ad valorem taxes...

HECHT: So your view is that taxes were not paid under 1933?

KELLY: Under that document, no. I think the city was paying them under 1935 because they believed they had to pay those an ad valorem tax. Again, that goes back to the inference. You can make these inferences but you have to make an implied agreement - a three way agreement - to do all these things.

ENOCH: Does 1935 refer to 1933?

KELLY: No.

ENOCH: 1933 doesn't refer to 1935?

KELLY: No, it does not. The only two documents is the city side. And again, that's why I'm stressing the city is caught in the middle of this thing. The only two documents of the city side...

ENOCH: Only because it wants to be.

KELLY: It would love to get out of this situation, I promise you. For the longest time in the TC, we thought there was a settlement agreement out there somewhere that we could read and see what the three parties agreed to. That's the way their pleading was drafted. Thy drafted their state court pleading: Breach of ordinance. We thought there was some settlement agreement out there. There wasn't. And all along as you can see in the CA's opinion, he believed they were citing ordinance 1935 as the contract. Well they've modified that argument somewhat. I cite that in my brief. It's the five documents they say now make up the contract, the settlement agreement.

O'NEILL: Were they in fact not executed to settle that earlier lawsuit?

KELLY: I think that's the inference you have to make. And I think you could make that inference from those documents because they do speak as to settlement in the preamble of those ordinances.

O'NEILL: Those five documents were a settlement _____?

KELLY: I think there was a settlement. I don't dispute there was a settlement in 1936. There's no doubt. There are settlement language in those ordinances. The problem I have is when you imply this

contractual agreement, what you do is you imply various terms into it consideration between the school district and the city, and then by implication you end up waiving sovereign immunity by implication. I don't think that's what this court has ever said it should do. And I go back to *Fidelity Sign* where it said, the waiver of sovereign immunity must be by clear and unambiguous language.

O'NEILL: You agree there was a settlement and you agree that these five pieces of information, these two ordinances and the resolutions is evidence it's a settlement, or there could be a question as whether they would evidence a settlement?

KELLY: I think again, they stated in the preamble. It says there was a settlement of a controversy in some of these documents.

GONZALES: Was your opposing counsel correct in saying that there are opinions or letters from city attorneys confirming that these documents all constitute the settlement of the litigation?

KELLY: Those are letters from the city attorney in 1982. There is no record evidence from 1936 saying there was a settlement controversy. But I don't want to be disingenuous like Justice Hecht said and say there wasn't some settlement. Clearly there was some settlement at that time. I'm just saying the result of that settlement is not what they say - a contractual obligation on the part of the city to pay funds to the school district in perpetuity.

ENOCH: You were the agent for the school district in collecting taxes?

KELLY: For a short period of time, which is not in controversy in the case.

ENOCH: But they had the option of picking another agent after that?

KELLY: Yes.

ENOCH: While the city was the agent for collecting taxes, the city, the school district and Bell entered into an agreement on how to handle those tax payments?

KELLY: I think you have to infer those terms. And again, that is an inference I think everyone is asking you to make.

ENOCH: You don't have to infer the terms. What you say is you can't infer that there was an agreement. But the terms are all spelled out. You've got an ordinance 1933 that says, in lieu of taxes you are going to collect this fee. And in 1935 it says, you're going to share a proportionate amount to the school district of what that's going to be and this was all in conjunction with a settlement. And your argument is that there was no consideration to the city. But the city was the agent. So the agent was the collecting agent for the school district at the time. So all the terms are there are they not?

KELLY: That's the point of saying in 1945 they were emancipated. If you take that position and you infer and you infer and you infer down to that agreement...

ENOCH: But the agreements already finished. The fact that some event occurs later on effecting some responsibility of the various parties, they've already agreed that they will comply with this.

KELLY: Well they haven't agreed to the school district. They've agreed under an ordinance, which is an ordinance is a unilateral document that says, that we will apportion these funds. It doesn't say that we have to do this forever. We'll do it. And we did it until 1992 when we repealed it. There is no dispute that we have an ordinance and that we fulfilled until 1992 when we terminated it.

OWEN: Notwithstanding the 1945 emancipation as you call it, the City did in fact act as the school district's agent until 1992?

KELLY: My point is, there is no summary judgment evidence on that point. It's not clear in the record whether we did or didn't. It is clear in 1982 when TAD was created by statute, that they became the

collection agent for the school district. So there's a period between 1945 and 1992. But there's no evidence who was the assessor/collector for the school district. They cite one piece of evidence in the brief and it's some testimony from the city attorney, Wade Atkins, who was the city attorney as of 1982 and testified in the case. But if you go back and look at his testimony, he wasn't designated as the corporate representative. His testimony is I believe inadmissible because it's speculation and he says, I don't know, and launches into a guess that they were. He wasn't sure. They didn't seek any source documents showing that the city was appointed as the assessor/collector. So we don't know for that period of time. And clearly when we repealed the ordinance in 1992, there's no further obligation on the part of the city to continue these payments. And I frankly think they've waived that point for appeal.

I don't think there is any question that we terminated in 1992, we paid until 1992. Right or wrong, we believe wrongly, we believe it was improper under the state constitution to make those payments, but we did and we continued doing it and we terminated the responsibilities.

HECHT: That's because your view is that the payments that S.W. Bell made to the city under ordinance 1933 were solely for the use of the city's property and not for taxes, or not?

KELLY: Again, I have to look at the summary judgment evidence. I think again, we are inferring things. If we look at the summary judgment, which is the ordinances, they state what it's for. That's all I can look at. And that's what it says. I think their position is, they were ad valorem taxes, and that's what this whole dispute I believe is about.

HECHT: I'm just trying to get your position. I know what their's is. It's for all three. If S.W. Bell it's for all three, what is the city's position?

KELLY: The city's position is that we have to go to the summary judgment evidence and it says in there for franchise fees, regulatory powers of the city. It's just for fees paid to the city.

HECHT: It's just for the use of the property?

KELLY: Right. But there is a whole other dispute which we don't really have a fight in as far as evaluation and those issues on a constitutional basis.

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GONZALES: Once S.W. Bell makes these payments under this 1992 ordinance, is it your position you've satisfied your obligations to the school district?

DAVIS: Absolutely. That is correct. We believe that these payments made through the city to the school district are indeed ad valorem taxes and they've always been ad valorem taxes, and must be ad valorem taxes. Because the only claim that was brought into the litigation in 1936 by the Ft. Worth ISD was a claim for ad valorem taxes. Therefore, we think it's inescapable that is the substance of the payment and that is the reason we are so firm in our conviction that it is an unconstitutional arrangement because the parties have violated art. 8, §1 of the Texas Constitution in making that arrangement.

HECHT: But Bell proposed it?

DAVIS: Absolutely. We accept full responsibility for our role in that connection.

PHILLIPS: Is this all the responsibility but none of the blame?

DAVIS: I'm not sure where the blame or the responsibility goes in the broad sense. But certainly S.W. Bell initiated this unconstitutional arrangement. The parties all knew, and this may be a very important point for me to stress, all of the parties knew this was an unconstitutional arrangement in 1933. We know that to be true by looking at the language of the CA that decided the underlying legal question. And the CA for the 5th circuit said the following things: The parties should value these easement rights "only as property without special reference to the money that is made in the business of the company," and "not on any strained(?) or _____ basis."

HECHT: But can't you settle the dispute - you could have gone back in 1936 and taxed it on some kind of market value if you could ever figure out what it was?

DAVIS: Yes.

HECHT: Why can't you settle it based on gross receipts or some other kind of formula?

DAVIS: The reason you can't settle it in our view is because the constitution of the State of Texas prohibits it. It says specifically that the ad valorem taxes must be equal, must be uniform, and must be based upon the fair market value of the underlying property. This income tax arrangement, which is 2% of the gross receipts derived from S.W. Bell for the rendition of telephone service within the city limits, is in the nature of an income tax having no awareness or sensitivity to the fair market value of the underlying property. There is no concern for that constitutional required element.

BAKER: Is that because you can't determine what the fair market value is to judge the tax?

DAVIS: I think certainly it is possible to ascertain the fair market value of these easement rights. And indeed today S.W. Bell does determine the fair market value of those easement rights and pays to every school district in the State of Texas where it is present, the appropriate ad valorem tax based upon that fair market value including the Ft. Worth ISD. Annually for decades S.W. Bell independently of this contract has been preparing and filing an annual tax report to each school district, including Ft. Worth ISD.

BAKER: Also paying funds along with the report?

DAVIS: Absolutely. And it includes the fair market value of those easement rights and indeed the tax appraiser for Ft. Worth, the Ft. Worth/Tarrant County appraisal district so determined. There's an interesting point here, and I think you will find it very important. It is to me. The president of the school board doubted S.W. Bell's assertion that these taxes were already being paid independently of this old contractual arrangement. So he wrote a letter to the director of the Tarrant CAD in 1933 requesting his judgment about that issue. And a formal letter reply was sent by that executive director of the appraisal district and here is what he said: "Based on the information available at this time, I believe the current valuation methods used represent all of the utility value this would include any benefit from the right to operate in, over or under public rights-of-way or easements."

HECHT: Why would S.W. Bell pay double taxes for decades?

DAVIS: That is precisely the point. The plaintiff in this case, the petitioner here, is seeking to double-dip. It collects this tax..

HECHT: Under your position, you paid it for years?

DAVIS: Absolutely.

HECHT: Well why you do that?

DAVIS: Frankly because of the system used in making the determination of value. There was a unitary method of valuation used that takes into account all of the property of the district, indeed in all of the district's and a return is filed, which incorporates all values including rights-of-way values throughout the state. S.W. Bell adopted a uniform statewide method. It treats Ft. Worth ISD just like it does the Dallas ISD and every other school district.

HECHT: In the other localities do you also pay for the use of the city's property besides taxes? Is there a franchise use?

DAVIS: This is one of the novel things about this case. There is to my knowledge no arrangement anywhere in the state of Texas, and S.W. Bell serves about 560 cities, aside from this one involving Ft. Worth ISD where the city shares its revenues with a school district. This is unique, one of a kind, and that probably explains why the city finally decided to correct this problem. The point I'm making is, these taxes are already paid once. Indeed they have been paid

for decades twice.

OWEN: If they are ad valorem taxes as you argue and there was an agreement to apportion them between the city and Ft. Worth, why isn't the portion that the city's been paying the ISD ad valorem taxes?

DAVIS: My view is, that the payment by the city to the school district must be of ad valorem taxes because the school district has no claim to street rentals or reimbursement of fees or permit fees or anything else. The city has those claims. The school district has no claim except for ad valorem.

OWEN: How do you square your position with the express language of the ordinance 1933?

DAVIS: You will have to look in my view at the underlying substance of what occurred and we know what issues were pending in the CA for the 5th circuit, because the opinion articulates what that was. We saw, we see the letter from S.W. Bell proposing a resolution of that dispute. The attorney, Mr. Gamble, wrote a letter saying they wanted to resolve that dispute. And following that, we see the emanation of these ordinance arrangements. We think it is unmistakable that these are in substance ad valorem taxes and that the Texas constitution forecloses this income tax substitution for an ad valorem tax which complies with art. 8, §1.

ENOCH: When the city changed its ordinance in 1992, did it lower the franchise fees of S.W. Bell?

DAVIS: No, it did not.

ENOCH: So regardless of the outcome of this case, it produces no financial difference to S.W. Bell?

DAVIS: No. In fact, the reality is S.W. Bell collects all of these fees, that is the municipal fee from subscribers. It is only the ad valorem tax that it actually pays. And in this case, S.W. Bell has voluntarily paid the ad valorem tax twice for decades.

ENOCH: Whether there's a double dipping in here or not is of no concern to S.W. Bell?

DAVIS: Except, I think it reflects on the inequity of the claim of Ft. Worth ISD. The suggestion was left hanging in the air that somehow these contentious people at S.W. Bell weren't paying the taxes they owed, and hence, we can't buy school books for children. What I'm trying to say is, S.W. Bell not only has paid its ad valorem tax, it paid it twice for decades.

GONZALES: I don't understand why S.W. Bell is going to continue to pay them at the same level if you're overpaying the taxes. If I were a shareholder, I'm not sure I would be happy with that decision.

DAVIS: What S.W. Bell does for the Ft. Worth ISD today and last year, and the year before that is it prepares an annual rendition of its property, it applies the appropriate tax rate, it pays the tax to the Ft. Worth ISD as it does every other school district entirely apart from this old contract, which we believe to be unconstitutional. So, we fully comply with Texas law as we understand it today. It is only this contentious effort to collect it twice that brings us here to dispute the appropriateness of that second payment.

HECHT: What are the payments for under ordinance 11163?

DAVIS: Our view is that the city has a right to be reimbursed for the costs of administering S.W. Bell's presence in the streets, allies and rights-of-way of that city. Obviously they have to oversee the fact that we're in the streets, we're making cuts in the streets, we're patching those streets properly. To supervise S.W. Bell's presence in the city streets, allies and rights-of-way, that's what that money is for in our view.

HECHT: Not for taxes?

DAVIS: No, it is not for taxes.

HECHT: So the city could tax you? You have a dispute about whether the city could tax you. But if they say that this is a real interest, if that's a real property right, the city could tax it?

DAVIS: That's their view. Yes.

HECHT: In which event the money that you're paying under 11163 would not satisfy that obligation?

DAVIS: I think it's correct to say that the payments we make under 11163 are in satisfaction of all of the various claims of the city, not the school district. And that embraces ad valorem taxes and permit fees and a variety of other kinds of fees.

HECHT: But if it does how is it any different from ordinance 1933?

DAVIS: I guess the difference is it does not include any intended payment of ad valorem tax liability to Ft. Worth ISD.

HECHT: But it doesn't include taxes to the city?

DAVIS: Yes.

HECHT: And your argument earlier was, you can't base that on gross receipts. And this ordinance just says, $5.3 million or something. It just has a dollar. Why doesn't ordinance 11163 share the same constitutional problems as 1933?

DAVIS: It might be argued that it does. We would respectfully suggest that it does not. Because the amount only in our view matches the responsibilities S.W. Bell has to satisfy the expenses to reimburse the city for the expense of administering our presence in the streets, allies and rights-of-way. This has not been clear because there has not been a single document throughout this period of time. And the arrangement today is not the same that existed in 1993. There are different contractual arrangements S.W. Bell has had with the city of Ft. Worth.

OWEN: You were saying awhile ago that you have paid ad valorem taxes to Ft. Worth ISD and it's been double dipping. Did the ad valorem taxes that you have paid to the school district, do they include a value for the easements off city property or not?

DAVIS: Yes, absolutely. In fact, that was the recital I was reading from the letter of the director of the Tarrant APD. It was his determination...

OWEN: I thought you took the position that these were not taxable items?

DAVIS: We would like to hold that view. The regrettable reality is we lost a unanimous decision in the CA for the 5th circuit. We did not take any further effort, file a petition in the US SC. It's kind of hard to say that that unanimous decision is to be ignored. Of course we are complying with that decision of law every year when we file our ad valorem tax reports with the various school districts throughout the state of Texas. So we respect that decision even though we might urge in the future that it was erroneous. But the realities are there. The court has made a decision. We have to respect those decisions and do in our daily function at S.W. Bell.

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REBUTTAL

ENOCH: Mr. Oxford, you have made the comment that the CA was incorrect in its footnote that the Ft. Worth ISD was apparently receiving some ad valorem tax from S.W. Bell. Is that what you were commenting about?

OXFORD: Yes. What we are saying there is that there is only incompetent summary judgment evidence of this hearsay letter that he put in. There is other summary judgment evidence that Bell is not paying ad valorem taxes...

ENOCH: It seems to me that the school district would know that. Either the school district could say, We didn't deposit that check in our bank account.

OXFORD: We know about that. The issue is a very complex issue of what that check represents. Does it represent a payment on these easements that we are talking about or not? But coming back to Justice Owen's point. It's irrelevant here whether they are paying those ad valorem taxes or not. What happened back in 1936 was what we contended and they contested was a responsibility to pay ad valorem taxes on that easement was replaced by a contract. It was settled.

OWEN: What are your categories of claims pre 1992? What are you claiming? What is it you want?

OXFORD: We are suing S.W. Bell for under-payments under ordinance 1933. We are suing the city because starting in 1966 they got secret payments under ordinance 1933 that they did not share with us under ordinance 1935. So we have different claims against each one of them for pre-1992.

What happened in 1936 was this tax obligation was replaced with a contractual obligation. Bell was not paying ad valorem taxes. They were paying in lieu of ad valorem taxes to them, to the city, and to us.

Now if somewhere down the line, which we contest, they all of a sudden started writing a check that magically started covering this easement, they should have known it. And at that point they have every right under a contract terminable at-will to say, Wait a minute all bets are off. Circumstances had changed and we're going to terminate our contractual obligation to pay you. Because the underlying principles of that contract had changed. They have every right to do that and they did not do that. And the reason they didn't do that is because they were receiving substantial benefits under the 5 part, the 3-sided contract. They were receiving the right to operate and make millions and millions of dollars from the citizens of Ft. Worth by providing telephone service and avoid disputes with us and with the city. Neither did the City of Ft. Worth choose to terminate even though as Mr. Kelly says, there was some change in tax collection agent, that doesn't matter. That's the underlying issue. If they said, Wait a minute, all bets are off, we don't have a responsibility to do this anymore under the law. They could have terminated the arrangements which was terminable at-will. But they didn't choose to do so. Why? Because S.W. Bell said, the city got $63 million under this arrangement. They weren't about to terminate this arrangement. They were all receiving the benefits they wanted under a contract that was terminable at-will. And when it was terminated at-will do we have claims to them(?)? Yes, we absolutely do. That's what this lawsuit is about.

OWEN: After 1982 when the board started assessing taxes, what do you call payments under 1933? Were they a tax? Were they a charge?

OXFORD: The same as I always call them, and that is a contractual obligation that was substituted in lieu of the tax , in lieu of the supervisory responsibility as would all manner of taxes and charges, that's the only charge they had to pay for the use of that easement.

GONZALES: But once they started paying the taxes separately, then what do you have?

OXFORD: I have a contractual right for them to do exactly what they've already been doing. They were not paying me taxes. They were paying me a contractual settlement sum.

GONZALES: In lieu of taxes?

OXFORD: In lieu of taxes. And if they think I was double dipping after that, they should have terminated the arrangement. But they were not paying me ad valorem taxes. We bitterly dispute that claim, because the agreement itself says, It's in lieu of.

OWEN: Then why was 1933 written solely in terms of payments to the city for use of the city's property and charges to the city, reimbursements to the city? There is no mention of the school district. Why was it structured it that way?

OXFORD: That was the typical ordinance that they've used all over the state. But ordinance 1935 and our resolution made clear that the school district was to share. Remember this was a three-sided contract that has all kinds of portions to it.

OWEN: Then why should it run into trouble under the constitution because the city is sharing its general revenues with you?

OXFORD: Absolutely not. Those funds that were shared with us did not come from the city of Ft. Worth on their own citizens. Those funds came from S.W. Bell. Why? Because they had a contractual obligation to pay one of the two plaintiffs on the condition that

that plaintiff shared on a specified necessary basis according to the contract itself with the other plaintiff in that case. Those funds were not and nowhere do they say those funds were the general funds of the city of Ft. Worth. Absolutely not. They were contractually ours and they were obligated to pay them to us.