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Supreme Court of Texas.
City of Galveston, Petitioner,
v.
State of Texas, Respondent.
No. 04-0890.

February 16, 2006

Appearances:
Ramon G. Viada III, Abrams Scott & Bickley, L.L.P., Houston, TX,
for petitioner.
Rance L. Craft, Office of Attorney General, Austin, TX, for
respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett,
Justice Harriet O'Neill, Justice David M. Medina, Justice Paul W.
Green, Justice Nathan L. Hecht, Justice Dale Wainwright, Justice Phil
Johnson and Justice Scott A. Brister

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JUSTICE: The Court has three matters on the oral submission docket and the order of their appearance. They are docket No. 04-0890 City of Galveston versus State of Texas from Galveston County and the first Court of Appeal district, No. 04-0923 Patrick Richard Jackson versus David and Carolyn [inaudible] from Heiress County in the fourteenth Court of Appeal district and 05-0006 National Plan Administrators Inc. and CRS Marketing Agency versus National Health Insurance Company from the Travis county and the third Court of Appeal district. The Court has allotted twenty minutes per side in each of these matters and will take a brief recess between each argument. We expect to conclude the argument before noon. These proceedings are being recorded and length of the argument should be posted on the Court web site by the end of the day today. The Court is now ready to hear argument in 04-0890 City of Galveston versus State of Texas.

COURT MARSHALL: May it please the Court. Mr. Ramon Viada will present argument for the petitioner. Petitioner reserves five minutes rebuttal.

ORAL ARGUMENT OF RAMON G. VIADA III ON BEHALF OF THE PETITIONER

MR. VIADA: May it please the Court. This case arises on a, a

collision between two governmental functions. Both functions at the State highway construction and city's water works of the form prevented the people-- all the people of Texas as with governmental functions is. The loss must be borne by the people of Texas. The money in the State's treasury and the local treasury is equity and all the government's that any level. So the issue in this case very simply is which needs for the sovereign people of Texas concerning had public's laws is suggested. The says decision is, is the Legislature of Texas that speaks for the sovereign people in this regard or the people themselves do a constitutional amendment waiving sovereign immunity.

JUSTICE HECHT: Constitutional amendment. Well, take that away of immunity.

MR. VIADA: It takes, it takes that the Legislature act the people speaking through the popular branch government, your Honor, who are constitutional amendment such as Article I Section 17 which provides a, a waiver of sovereign immunity for taking without compensation by the State.

JUSTICE HECHT: And you don't think the State's immunity is from the common law.

MR. VIADA: I certainly understand that the common law is the original source publish the sovereign immunity that produced recognize that's for interrupt.

JUSTICE HECHT: And where the arbiters come from?

MR. VIADA: That's correct. The ...

JUSTICE HECHT: So do you think that we could abolish immunity although it doesn't exist? cer-- circumstances.

MR. VIADA: That, that certainly has been the approach has been taken by a number of jurisdictions throughout the country that, that base on the-- over those, those jurisdictions regard as being the foundation the, the, the, the theoretical foundation for the immunity that Courts can take upon itself to abolish immunity. There are number of States for example that say that, that, that sovereign immunity is a relic at past that it existed because the king could do the wrong and since we don't have a king anymore rura. And, and everyone acknowledges that the State can did, can be wrong that the, that the darkers in artifact as in should be done wide web. In this, this, this Court and, and in Taylor most recently recognized that the, that the, the theoretical foundation for sovereign immunity has moved to protect the public fisc. That immunity exist to protect public dollars. Public dollars of the blaybagous the people of Texas give life to the State government, we learn the people call the State government into existence to the constitution but the people actually the State government through expanding and it's the-- it's a Legislature for each government that, that it's best suited to make the, the fundamental allocation decisions concerning the level of government that we have as well as the types of government services they're provided.

MR. CRAFT: And in Taylor just three short years ago we recognize that it's not for close that the judiciary may abrogate immunity.

MR. VIADA: That -

MR. CRAFT: You, you acknowledge that.

MR. VIADA: - certainly, certainly, certainly the Court, the Court has made that statement in, in numerous of its opinions that the Court reserves under certain circumstances is not yet to found that, that the Court has the power to abolish immunity.

JUSTICE HECHT: It was a pure separation of powers argument depend on the Legislature having the constitutional authority exclusively to waive sovereignty.

MR. VIADA: I think that, that when you, when you look at, at the, at the course of, of the development of our jurisprudence in this area would you see his best. Very well in all courts regarded this much more this responsibility to, to waiver's immunity and fund corporation. This time is going on the, the decisions of this Court have recognize that the-- a, a legislative province under all but certain, under all but under all but certain circumstances for issue yet to come. On top of that we see in 1987 that the, the people of Texas adopted constitutional amendment which live to the, to the Legislature the power to define governmental functions that and, and in fact the Legislature pursue it to that constitutional power given to them by the people live them one works functions from the proctor category to the government category. That's important I think, very important in this case for this reason. That pronouncement the people curious with it inference of the number of values that the people particular within the constitution. One is that the people recognize that, that there is such thing as local governmental immunity and that the people want that governmental immunity. And the second thing is that the Legislature is always have the power to waive sovereignty. The people ratify that constitutional amendment for the purpose of giving the Legislature the power to expand local governmental immunity-- where previously had not existed. You see, can see two things going on: recognition by the people that there is local governmental immunity and a constitutional limit that empowers the Legislature. Now it was standing Court's provision on any other provision to constitution to move into a, a, an immunized category. Local governmental functions are previously regarded by the Courts to be acts on this kind of community. And so from this constitutional provision of an archy that there is a constitutional foundation in our State's constitution for local governmental immunity. And that the people have communicated through all branches of government through that constitutional amendment that they wanted the governmental immunity expand which the Legislature has done and that they wanted the Legislature to had a say in, in declaring of what source of governmental functions are or with in the doctrine of immunity. As the worry as the immunity at one point in our history was a [inaudible] entirely by the judicial branch. It has, since 1987 place and a total form at that time. Then a doctrine that the Legislature has had some a-- and, and expand. And although I pursue it to a directive from the sovereign people. One, one talk that I want to share with the Court very quickly before ... Another question comes from other late is that we have, in this case two, two aspects of the immunity doctrine that are before the Court. There is immunity from suit and immunity from liability. And in the trial court the city followed pleaded the jurisdiction in serving immunity from lia-- immunity from suit and also a motion for summary judgment as certain the defense of immunity from liability. You see in footnote No. 7 at the Court of Appeals Opinion that the issue was not raised. The issue of immunity from liability was not raised but in truth it was. It was raised at Trial Court level as an alternative grant for the court to relay. And the Court of Appeals briefing on-- in the preamble of the brief I, I ask the Court to affirm the, the decision of the Trial Court on, on the ground of immunity from suit. But also include alternatively to see request the court to affirm the judgment of the basis of the city's governmental immunity from liability. In the procedure of history the case I pointed out in the, in the appellees brief that the, that, that it had been two motions had been heard simultaneously and that the immunity from liability had been then presented as an opening prayer. In the issues presented the

argument was as that without-- that the city had immunity unless there is a waiver for immunity from suit or liability. So the immunity from suit and liability was the issues presented. And in some ray of argument you say that, that the statement is that there is an obligate significant questions posed by this case whether accidentally plead, legislation, authorization or oversight and in a case where this General rule of governmental immunity with otherwise it reacted in suit and liability where the claimant private party or even another local governmental entity.

JUSTICE HECHT: What case do you rely on from this Court that says cities have immunity from suit against the-- this to be the State of Texas?

MR. VIADA: There, there is no case that, that addresses this issue directly.

JUSTICE HECHT: And what, and, and other jurisdiction this, this has been addressed and adopted anytime?

MR. VIADA: There -

JUSTICE HECHT: Or they reach of law that you're entity.

MR. VIADA: - there, there are, there are two, there are two jurisdictions that had addressed this issue and I-- or-- the discuss extensively in a briefing and what is that I have the [inaudible].

JUSTICE O'NEILL: And may one of the made first projected preposition.

MR. VIADA: That's they, they have both rejected the position taken by the cities in those jurisdictions based on the, the development of the common law and those jurisdictions as well as the, the constitutional instruction.

JUSTICE O'NEILL: And didn't city they go pass them, address this issue? The, the Texas case city of they go pass versus Texas Workers' Compensation Commission?

MR. VIADA: The, that, that case is a, is, is, is, is a-- as we discuss and agree Texas position that, that the city has no immunity from the state regulation. And the regulation is imposed by a legislative act.

JUSTICE O'NEILL: But, but that's not what the Opinion was written on. The Opinion-- the reasoning of the Opinion was very much the reasoning of this Court of Appeals.

MR. VIADA: That -

JUSTICE O'NEILL: That, because it's derivative they can't be asserted against the sovereign.

MR. VIADA: - that's, that is the, that's, that's the reasoning the Court used or reserve resolve. As I, I would submit in, in a this is it would just disguise to sit but that the, that, the, that case would simply have been decided correctly. That on the, on the ground that the Legislature can waive the immunity of a, of a city and when-- when a-- when the Legislator by the re-- regulation a provides a statutory penalty of the, the city not to pay his work as a insurance compensational on time that the there is a waiver of immunity from suit or-- and liability that would ever attach to, to attach to, to

JUSTICE O'NEILL: That may never be an alternative basis for the Court held but there is not in fact what would held.

MR. VIADA: That, that is, that is correct, your Honor. And, and to the extent that, that, that is the basis of the Court's saluting I would first this Court tell or reject that and distinguish on the ground that I'm suggesting.

JUSTICE: Are you aware of any other cases around this day about? Perhaps, appellate [inaudible] case [inaudible] court but any other

instances where the state is sued in this county. Instances, quite like this?

MR. VIADA: Yeah.

JUSTICE: It's not, it's not like it's problem it's rampant around the state.

MR. VIADA: This is, this is a, a first of its kind cases a case first impression before this Court. I'm not aware that State of Texas is ever see this city before, before tort.

JUSTICE: As the City of Galveston [inaudible] issue with the state I mean, this is how a project -

MR. VIADA: Correct.

JUSTICE: - Who are made my concern with the-- obviously those kinds of things, tell me more about the product. It seems to me claim is back and fourth of immediately his back at Court to be restate, in his entities. As Galveston ever had problem with the Statements or get with then the work pad.

MR. VIADA: Your Honor, as I understated that, that there had been, there had been disputes between those parties as far as their contracts are concerned I'm not, I'm not pretty to the specific nature of those under the defendant's of undoing speech. What, what he did is the Legislature has provided that in certain circumstances like this that parties can allocate responsibilities and liabilities by contract. In every-- that's one way must the Legislator has step in a said to the extent that there is correction between governmental entities that they certainly can work these things out by means of contract rather than a court litigation.

JUSTICE: All right. Supposedly that's mostly what happen to arguments.

MR. VIADA: Yeah. I, I was, I was saying that, that would be, that would be, that would be avoid that this short things would, would work out in fact. One, one thing that, that, that we did in the Trial Court was to file it sense special exemptions that the assumption that the State might. So wait a minute were not planning in tour here for which there is unlimited liability we're, we're planning that there's a breach of contract. But rather than, than - ...

JUSTICE HECHT: Any of position would have been difficult?

MR. VIADA: Well, my position of that point would have been if there's a labor immunity suit and certainly by entering a contract the, the, fact the, the act of raising contract, district court has held the federal sign it is-- is a waive of immunity from liability. Then the question would be immunity from suit but I, I ...

JUSTICE HECHT: Can you attack the same position or a difficult? Can you attack the same position different one? That you can't be sued.

MR. VIADA: Well, there is, there is currently a statute on the books that the Legislator pass in this previous term that has waived from immunity from suit of cities for, suits on contract. In a solemnity waiver you keep because there's always certain types of damages that can be recovered and plus the provision for recovering attorney's fees in a breach of contract case will not be applicable. Here, the state assume on tort and also looking at which, which even if the thing do you recover the-- if this were [inaudible] between private individuals. So our, our position is-- this is, this is something that the Legislature should, should be involved in regulating-- this is-- that the Legislature came the yearly of the existence-- of what they-- the postcalpol the two went for, for, for this Court too much to open up a waiver immunity and, and then certainly ask the, the Legislature of the Court of Appeals did to, to fill up and as it says that I think,

calls into the existence the impossibility as suppose to send the opinion in this case that, that the next claim of this notion could be for \$250 million.

JUSTICE HECHT: Thank you. Thank you [inaudible].

JUSTICE: For the questions, the Court is ready to hear argument from [inaudible] [inaudible].

JUSTICE: May it please the Court Mr. Rance Craft. Is an argument to response.

ORAL ARGUMENT OF RANCE L. CRAFT ON BEHALF OF THE RESPONDENT

MR. CRAFT: May it please the Court. The proxy this case is the nature of the immunity that the serious asserting on the part of State suit. The city incorrectly argues that this immunity is a kind of power but the people have a firm double duplicated all governments of institute. The Texas' in federal cases tell us. That merely from sued is an inherent attribute of the state in federal government. The rises because those are the entities and which the people had vested it sovereign afford. That is political afford. A Texas common law extends the protection of the State's sovereign immunity in two cities because in performing government of functions they are deemed to be acting as agents of State. But it remains the States an immunity. And the State's immunity logically cannot bar a suit by the state itself.

JUSTICE HECHT: Why is that? I don't understand that. Why-- that things to be that, that sanction and logic Court of Appeals opinion but the Legislature gives powers to all kind school district, water districts, cities and, it could take those away but it just can't ignore them once it gives it to the, to the subdivision. That's the part I don't-- missing.

MR. CRAFT: But the Legislature has not given immunity to the cities or other court sub-function. That's a common law construct.

JUSTICE HECHT: So we give it to him.

MR. CRAFT: Yes. The back sit ...

JUSTICE HECHT: Even more reasons from. Not to taken away without the something I mean can't-- it seems to me that nobody disputes here that the State can take away what it's given or the Legislature can take away right to this Court room. But how can you just ignore?

MR. CRAFT: Because I would not carried horizon as the state is somehow defuse immunity to local governments and this an act of taking it back but the common law tell us is that it is extending the protection of the State's immunity in two cities because they are acting as agents of the State. So still it's not something that's been passed on. It's the State's immunity and, and the umbrella of it's extending to protect cities but it's-- it remains the State's immunity. And so to say that that can keep the State's itself from bringing suit is to say that one incident of the State's sovereignty can be used by one of it's covered with subdivisions to keep it from exercising another incident of its sovereignty which is to file suit in its own court.

JUSTICE HECHT: But that seems very logical to me that what the state here it comes to the people, whatever the authority is, is given you can take away by process but you can't just reload. That there has to be some way of lifting and to removed but you-- let me ask you now. We've said it doesn't work both wise. The city can't suit strike. What

about suing force of the cities or districts suing each other? But how do you think this affects that?

MR. CRAFT: In, in that case the, the principle is not advocated that one local governmental entity against another local governmental entity then you don't have the situation where State's immunity is being asserted for State itself and file of suit. So there we're not be invocated. Now in another voice on the "horizontal" situation let say you had one state agency suing another state agency like Texas versus the work force [inaudible]. Then this principle would be advocated in that the same situation where it, it the defendant agency were saying, "We're immune." That would be an intent to assert the State's immunity against the State itself. So that, that illogical construct also be advocated.

JUSTICE HECHT: So if he stay the same state they would not be immuned.

MR. CRAFT: Correct. But that logical principle not advocated in that local governments. In the end there's a, a policy rational rewind that in-- that is when the, when the State is filing suit there's a, there's a political check involved when got a state life official who is politically accountable to all Texans who is making a decision to bring this suit. Not just exist private suits nor does it exist when you got one local governmental entity suing another local governmental entity.

JUSTICE HECHT: But it would make any difference I take it. if that where the Attorney General represent the State or by outside counsel representing State agency.

MR. CRAFT: No. Did, did the despite the features that is State.

JUSTICE HECHT: But you don't have to check in the latter situation.

MR. CRAFT: Well, if we where outside counseling typically the way that words that the Attorney General supervise of an outside council. So there is court of checking and not circumstances. Now Chief Justice Jefferson you ask what is the case that supports the city position that they can assert immunity against the State as beyond admitted there is not one specifically presence that. In fact the sole basis for their theory of immunity is their misreading of this Court's decision can take. According to this city, Taylor holds that immunity is a kind of power people delegated to all governmental entities. But Taylor does not say anything like that. Taylor is only about the State's sovereign immunity from suit. Cities are only mentioned on a footnote to note to different waiver that we use when cities assert immunity. But it's talking about the nature of the State's sovereign immunity. And in discussing that it cites fabulous No. 81 which says that, "Sovereign immunity is an inherent attribute of the governments of the States." And it's only in the next part of the section-- next part of discussion over talking about waiver where the Court holds that not withstanding this inherent immunity from suit the people can always consent the suit. And what the city has done is conflated those two parts of discussion to say that immunity is this kind of power that the people delegate to all governmental entities. But that's not what the favor it says in New Texas case that in fact they suggest the opposite. In State versus Brandon for example which this Court adopted the reasoning of the way goes of a Court of Appeals. The Court said, "A city has no sovereignty that's owned. And no immun-- and likewise no immunity that's owned. It borrows it from the State." Now all member is men confirm this Texas law principles. As this Court did in Taylor all them cites Federals number 81 to explain that immunity from suit is an

inherent attribute of the governments in the States and the federal government. And all them further explain that this immunity does not inhere in political subdivisions. Now the city attempts to dismiss all them by making the blanket statement that the State is lying on eleventh amendment cases they're concerns the State's immunity from suit in federal court. Not so. All them is not eleventh amendment case. All them is not a suit about the State's immunity from suit in federal court. All them is a state court case and which was the State of main law suit and main State Court. So in all in this talking about State's sovereign immunity from suit. It's talking about State's sovereign immunity from suit in State Courts. So that discussion that we cite is germane to the issue before the Court which is the nature of the State's sovereign immunity.

MR. VIADA: Counsel address the Mr. Viada's argument that the public fisc issues are important that the whether it's the local taxpayer's money or the State flag the treasury's money that that's important that it really serves no useful purpose to just move the money around the different government entities because it's the people's money.

MR. CRAFT: I don't think this Court should be concerned about the shifting of public money from one local treasury to another in reaching decision in this case because there is a political answer for that. And beyond the fact the Attorney General is making a decision to bring the suit accountable to all Texans who legislate can always step in to the and restrict the State's ability by suit all over his not done so. And so in that sense, this case is really about what is the right starting point. And when the Court affirms or reverses the Legislature can come in and adjust the outcome it doesn't like what the Court does. So the Court should be concerned about getting the legal principles correct. And when I say what is the correct starting point, the city's starting point is that it is immuned from all suits and its governmental functions including suits by the State. The Legislature does not waive specifically that immunity for suits by the State. Therefore, the suit not receive. The State's starting point is that it is always had the authority as an instrument of its sovereignty to bring suit in its own courts to protect the public interest when the public rights had been invaded. The Legislature does not restrict it-- the State's ability to bring such a suit-- and therefore it can't receive. I want to offer you three reasons why the State starting point is the correct. First of all to accept the city's starting point, you have to accept this illogical idea that the State's immunity can bar suit by the State itself or you have to endorse their misreading of the Taylor case to say that this kind of delegated power. That's now what the common law says. Second, you do have a competing principle of sovereignty here and that is that the State is always unable to bring suit in its own courts to protect the public interest. And the Court of Appeals majority correctly recognize that in reading of the common law they gives rise to-- in this-- for immunity in a way that would hit the State from bringing that suit work a judicial abrogation of that sovereign right and was weary of doing so. And so we should not, we should not judicially abrogate that long standing right of the State we should let be back that to the Legislature. And finally, the city's starting point presumes that the Legislature has already destruct sort of balance that-- this-- because there's nothing in a tour claims act that waives immunity for a suit by the State the Legislature has decided that the State has no better position on a private citizen when it bring suit. But there are two very different considerations that play when a State

file a suit. One of those have are in talked about which is that when a State file a suit the Attorney General is making a decision to bring that suit and that is in control that is not present when a private citizen file a suit. He is accountable to no one but himself.

JUSTICE HECHT: In order to get principle derive which should agree that its important. We've held in Reata Construction versus City of Dallas which is already hear it but it cites two cases which preceded it that filing suit the State-- so much that waive to tell immunity. Why isn't it that by-- since the immunity is derived-- by choosing to file a suit the Attorney General, in effect, waive the city's immunity or the, the derived immunity of the other entity.

MR. CRAFT: Well, two responses for that, Justice Hecht. First of all as you know the State disagrees with the decision in Reata and give taken position on the industry is that the act of filing suit is not waive immunity from suit. Second, there are two distinct questions. When, when a State file a suit, it's, it's simply making a decision to, to bring in action to protect public interest. The city raise immunity as it defends to that suit. And whether that immunity exist in the first instance is a matter for the common law. And so the act of filing a suit doesn't operate of some sort implicit consent by the city to file a suit. That's, that's not at all what we are saying. So it's, it's not the Attorney General's making this decision. I'm going to waive Galveston's immunity. I'm going to waive this county's immunity.

JUSTICE HECHT: But it seems very close. You say its not but the thing is the Attorney General is making the decision to file a suit when he does then there's no immunity there. So it seems to be very hard to distinguished.

MR. CRAFT: But, but the, but the reason why is not because the Attorney General has reached out and, and affirm their waive abrogate the city's immunity. The reason is because of limitations that's inherent and the nature of the city's immunity as it's been described a common law. So the, the-- I-- and that's the way that the city and the unique in characterize this case of course is that it's some kind of waiver and they talk about it and sitting justices talk about that this allows the State to give plunderer local treasuries and raid city cocker but you know, and unless the people of Texas like in flighting as Attorney General left, that's not how does it works. It's-- the Attorney General is react to damage to the public interest filing the suit to protect that interest. When the city has immunity in the first instance is just to distinct issue so that they're not, they're not connected in that sense.

JUSTICE HECHT: But the-- maybe we'll agree that the effect probably the effect this is a ...

MR. CRAFT: I will say that the result is the same in a-- the city doesn't have immunity and that this gives into the Gillary decision where the Court was addressing a proposed modification for common law that the Court said we have the of a waiver. The in Gillary that was the effect of a waiver because it did have a decision, a long standing common law of precedent that is specifically on point. It's a navigation jurisprudence have immunity in all their functions from private suits. And so the Court is being ask to reverse that and that will be taking away an immunity that the-- that have been defendant establish and that the Legislature could not chosen the way or else here, we're asking the Court to look at its own precedents and recognize an inherent limitation on the way it is described the extension of State's sovereign immunity to cities. So it's-- we're asking the Court to do something that is consistent with the common

law. And, and, and to do so it is not an inherent Legislative task. It is a judicial task into construed your own precedent.

MR. VIADA: Could the State-- the Legislature abolish cities? It creates them.

MR. CRAFT: The, the Legislature has not created the City of Galveston because the City of Galveston is a home-rule city. And so the people of Galveston had adopted a city charter through the powers of government that there are four members of amendments. So that's the Legislature could not -

MR. VIADA: So this -

MR. CRAFT: - Why now?

MR. VIADA: - the Legislature could eliminate non-home-rule cities.

MR. CRAFT: Sure. General, general law of municipalities the Legislature could, could do that.

MR. VIADA: So then home-rule cities have a standing if he will that's more elevated than non-home-rule cities. As you've described it they can trace their source of authority directly to the constitution.

MR. CRAFT: That's correct.

MR. VIADA: So they're different and some important ways perhaps than non-home-rule cities.

MR. CRAFT: They are different but, but not in any way that is germane to the issue whether they have immunity from suit because this Court has never drawn any distinction between home-rule cities and general law municipalities in terms of what is the nature here, immunity from suit. It is described how that immunity exist in exactly the same way. It is an extension of the State's sovereign immunity that protects its cities.

MR. VIADA: Well, your argument is a listed part that tracing the agents concept that sovereignty derives from the king, that the king then establishes lords. The lord responsible for the king and the king can decide whether to take out the lords or not. That others can't decide whether to take out the lords or not. Only the king can, correct?

JUSTICE HECHT: I will not rest my heart. I did not ...

MR. VIADA: Principles.

MR. CRAFT: We, we agree with the city but -

MR. VIADA: It's analogous is it? -

MR. CRAFT: - the sovereignty ultimately counseling.

MR. VIADA: - it's analogous to kings and lords. That's what the concept-- where the concept derives.

MR. CRAFT: Well, the, the analogy that was brought over from England that is described in federal states is that because in our system of government the people who ultimately have sovereign authority had vested that sovereign authority in the State in federal governments. They-- because they have that supreme authority that's with the analogy to the king arises and that's why they are the intimate apparently have immunity from suit.

MR. VIADA: Of, of primary difficult ways since you are in comfortable with that. Political subdivisions derived their immunity from the State.

MR. CRAFT: Yes.

MR. VIADA: If the political subdivision has its authority directly from the constitution, how does that play into your argument that immunity is derivative

MR. CRAFT: Because immunity ...

MR. VIADA: Immunity is to explain that home-rule cities derived their authority directly from the constitution.

MR. CRAFT: So from the people ...

MR. VIADA: Explain through the constitution.

MR. CRAFT: But immunity is not a power that the people pass out to through the constitution to home-rule cities or to other governmental entities. Immunity is an attribute that arises because the State government and the federal governments have been vested by people with supreme political authority-- sovereign authority. Home-rule cities don't have sovereign authority. They are not sovereign because although they have the powers of government the Legislature can always amend and limit that power because they do not therefore amplify the position of the sovereign-- they do not have been an inherent attribute of immunity from suit.

MR. VIADA: Was immunity from liability and for the sealing for the Court of Appeals?

MR. CRAFT: We don't disagree with the city's description of that but the principle is the same because the immunity from suit and liability comes from the same source. It is the State's.

JUSTICE HECHT: Any further questions? Thank you counsel.

REBUTTAL ARGUMENT OF RAMON G. VIADA III ON BEHALF OF PETITIONER

MR. VIADA: I think there will be original. The sovereign in Texas is the, is the State to be extent of the State is sovereign. It, it is a derived sovereignty. Our constitution provides that and that is a Perry black leather law that, that, that sovereignty ultimately resides with the people. Now why is it the sovereign immunity exist? That's the Taylor addresses. It starts with a premise that it is the people who are in the sovereign, that the people have an interest in protecting public fisc and that, and that the Court then looks to the institution of State government two states for the people in terms of questions of body allocation of public resources like governmental funds. That's the reason was sovereign immunity exist. It can be waived completely by the people tomorrow or presumably by the Legislature tomorrow, mam. And what would be inherent in, in the State's immunity that the, that the people have the power through their-- through this institution to waive the immunity. In the Gillary case, the Supreme Court recognize the fact that, that the impact on local treasury send tort judgments is impact that that's the people whole. So that's one of Legislature has an interest in. That's one the Legislature is always had an interest in. When the-- when, when, when this case speak in terms of the governmental entities sharing the State's immunity, we are not talking about the constituent elements in State's government hear before this Court as the plaintiff. We're speaking about the State government. And so that all this case where is reference, reference to cities or agents of the State. What that really means is it cities are caring at about agencies of, of government for the benefit of the people and to that extent it shares that government sovereign immunity. It's the same immunity as this Court has always said. The Legislature has wave in, in lending the Court instruction at would construed to work person as some their statutes to may-- that the governmental entity if they-- it was statute applies for preach cost of action against the person that had in, in affect the raise sovereign immunity. The, the Legislature in that provision that clarify that may point that, that we, the Legislature, have an interest in protecting the sovereign city the, the

declination integrity the ability of, of, of government at all levels at the governmental functions.

JUSTICE HECHT: But all these could be taking care of and as soon we agree that immunity is inherent and inherent attribute of the people. And there-- then there is no right no immunity in the situation from in, in municipalities. Everything you've just said, says this can be placed in the Legislature hand in the next session and the Legislature can give the State-- the city's immunity from suits by the State.

MR. VIADA: I, I would say that's correct. I research all the implication about whether or not. The Legislature could give this-- give the city's immunity. And then in, in a case of Ohio for Jen who were the girlfriend by Pia eliminated the governmental immunity but struggle depend that the Legislature equipped that there after scan and it has a local governmental immunity act that, that put back in places said specially with the forehead and the moved through, through an act of the judiciary. The, the, the point is, is that, is that the, the, the rational for the immunity is directly related to the, the-- this Court's decision to look to the Legislature to, to take care with that system because it does involve allocations of resources decisions which are essentially legislative functions under separation of powers that there is no inherent immunity. There, there was a case that came down out in circuit kamarsh versus Texas in May of 2005 where, where the, the fifth circuit talked about the older decision may the point that under the structure of the United State's Constitution there is-- in the last of variation between the national structure of each State's immunity from suit or liability. I want to address-- I want to address the point that the Counsel that the all the decision of the nature of, of the federal government of ours that, that the State, in this context, be regarded as, as a, as inherent sovereign. That, the point, the point is, is that the, the Supreme Court of the United States is long held the bill it sovereign immunity Cleveland city state they waive it is pleasure and as a result the pattern of sovereign immunity maintain by the States. They [inaudible] considerately they made it. Are there any questions?

JUSTICE: Hearing is done. The case is submitted and the Court will now take a brief recess.

JUSTICE: All rise.

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