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Supreme Court of Texas.  
Oncor Electric Delivery Co. LLC  
v.  
Dallas Area Rapid Transit and Fort Worth Transportation Authority.  
No. 11-0079.

January 11, 2012.

Appearances:

James C. Ho of Gibson, Dunn & Crutcher, LLP, for Petitioner.

Hiram Sasser of Liberty Institute, for Amicus Curiae.

Joycell Hollins of Dallas Area Rapid Transit, for Respondents.

Before:

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

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 11- 0079, Oncor Electric v. Dallas Area Rapid Transit.

MARSHAL: May it please the Court, Mr. Ho will present argument for the Petitioner and Mr. Sasser will present argument for the Amicus. Petitioner has reserved five minutes for rebuttal. Mr. Ho will open with the first ten minutes and will present the rebuttal.

ORAL ARGUMENT OF JAMES C. HO ON BEHALF OF THE PETITIONER

ATTORNEY JAMES C. HO: Mr. Chief Justice and may it please the Court, disagreement with the opinion below has been both vociferous and widespread, but is now irrelevant and unnecessary for this Court to resolve. That's because last summer, the Legislature accepted the court's invitation below to issue guidance that condemnation actions, such as this one, does not implicate governmental immunity. DART has two basic arguments in response to our contention that H.B. 971 applies to and provides a much easier way to resolve this case. First, DART says that, it would be impermissibly retroactive to apply 971 to this case. This is wrong on two levels. It is applying 971 to this case would not be retroactive at all, let alone impermissibly so because it is a new prospective relief statute as well as happening to be a new immunity waiver statute. First, courts routinely apply new prospective relief laws to pending cases and doing so is not retroactive as this Court just recently re-

mindful litigants unanimously in the Arancibia ruling. This is an eminent domain condemnation case. So we're not asking for damages or backward-looking relief of any kind. This case is just about the adjudication of future rights not past conduct. DART does not dispute any of this and for this reason alone applying 971 to this case would not be retroactive. So turning to their second backup argument, they submit that DART is the State for purposes of 971. This too is wrong on two levels. First, it's not true. DART is not the State. DART is a political subdivision of the State, as their briefs acknowledge and these are, of course, profoundly distinct concepts as the Legislature has repeatedly made clear and DART does not cite a single authority to the contrary. Moreover, the distinction between State and political subdivision is particularly relevant and poignant in the immunity context as this Court has repeatedly noted the state as the sovereign enjoys sovereign immunity, something that political subdivisions do not. Political subdivisions enjoy a very distinct different kind of immunity and of course, Legislature has seen fit in a variety of occasions to waive one form of immunity, but not the other. Second, DART's argument would render 971 meaningless. After all, 971 is targeting all public land except for State land. Under their view, all would become no public land, none, and this Court has repeatedly and unanimously reaffirmed that immunity is waived if the provision in question would otherwise be meaningless in the absence of a waiver.

JUSTICE NATHAN L. HECHT: It's not very specific. It's not very specific. We have said that, we'd look at it and what else could it mean, but it could have said, immunity is waived and it doesn't. What's your reaction to that? 971 does not say immunity is waived in just so many words.

ATTORNEY JAMES C. HO: That's true, they don't have the magic words that the Legislature could have used, but I think this Court has said, equally, emphatically and unanimously that it doesn't take magic words, words that would be tantamount to a waiver. Authorizing a cause of action, that would obviously be enough. That's what the Court I believe said, in Taylor and several other cases. If there are no further questions Your Honor, thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Ho. Thank you.

#### ORAL ARGUMENT OF HIRAM SASSER ON BEHALF OF THE AMICUS CURIAE

ATTORNEY HIRAM SASSER: May it please the Court, we agree with Oncor that the ruling below is wrong as a matter of law and that H.B. 971 easily resolves these issues, but we're here for a very different reason. We're here on behalf of the private property owners of Texas to make this one very simple point that the ruling below is not just legally wrong, it's very troubling as a matter of constitutional values and the opinion below cannot stand. One of the central mistakes of the controversial Kelo decision by the U.S. Supreme Court is that it failed to recognize the fundamental importance of straining the eminent domain power. Now, we would submit that the ruling below if left to stand is the Texas version of Kelo because it leads to a greater taking of private property by giving public land a very, very broad exemption. If anything, eminent domain should be applied first to public land and then only to private land when necessary. That should be the prevailing principle. Just over a few years ago, 81% of the people of Texas voted in response to the Kelo decision to strengthen Texas private property rights. The Kelo decision itself, involving as an antagonist a political subdivision, served as that catalyst for Texans to reign in the power of eminent domain in the face of some noted abuses. Now DART claims to be exempt from the very power they and other governmental entities hold over private property owners in Texas by invoking this doctrine of governmental immunity. Now the people of Texas enjoy broad property rights under the Texas Constitution that are self-executing as this Court found in Steele v. City of Houston. That is the Texas Constitution itself under Article 1, Section 17, waived judicially created and conferred governmental immunity. It's not only ironic that now a political subdivision is claiming governmental immunity to put itself in a superior position to that of private landholders. It's contrary to the property rights conferred on the citizens alone as they stand against political subdivisions, such as DART. It's the private property rights of citizens who deserve the protection the constitution provides, not DART. The opinion below should be reversed, after all DART's position turns this State's constitutional commitment to private property rights on its head.

JUSTICE NATHAN L. HECHT: On what do you take issue with the court of appeals on, that's it's an in rem ac-

tion or that it's not for money damages or what's the argument that immunity does not apply here?

ATTORNEY HIRAM SASSER: Well, your Honor, the court of appeals' decision before H.B. 971, the court of appeals ignored over 100 years of established law and practice in the State of allowing the condemnation of private property through eminent domain proceedings. The Texas Legislature has reenacted the same statute over and over again that if Legislature had a problem with these types of eminent domain proceedings, certainly they would have said, something to that effect. So based upon that longstanding precedent, the court of appeals should never have said that, governmental immunity protected public lands from eminent domain proceedings. If there are any further questions?

CHIEF JUSTICE WALLACE B. JEFFERSON: It appears not. Thank you, Counsel. The Court is ready to hear argument from the Respondents.

MARSHAL: May it please the Court, Ms. Hollins will present the argument for the Respondents.

#### ORAL ARGUMENT OF JOYCELL HOLLINS ON BEHALF OF THE RESPONDENT

ATTORNEY JOYCELL HOLLINS: May it please the Court, waivers of immunity are accomplished by clear and unambiguous language that the longstanding standard that this Court and the Texas Legislature has mandated. The court of appeals in this case is correct in its majority decision in determining that DART and The T's immunity had not been waived by clear and unambiguous language when it analyzed the statute giving Oncor eminent domain authority at the time that the court rendered its judgment in this case.

JUSTICE DALE WAINWRIGHT: Ms. Hollins in *Humble Pipe Line v. State* in 1928, the court of appeals opinion, however writ refused by this Court, we concluded that the grant of express statutory authority of condemnation carried with it the power to condemn public lands as well as private lands. Why should this case be different?

ATTORNEY JOYCELL HOLLINS: Your Honor, our position is that *Humble* did not actually analyze the statute as issue in this particular case. Immunity was not raised in the *Humble* case. The factors that this Court has outlined in guiding whether or not immunity is waived were not considered in the *Humble* case. And so since the Legislature has enacted Section 311.034 and this Court has mandated that language to waive immunity must be clear and unambiguous and if there's any ambiguity, the ambiguity is resolved by retaining immunity, we don't believe that the *Humble* case applies to this scenario because it was not the same statute analyzed. It was not an electric utility that was at issue in terms of its power to condemn.

JUSTICE DALE WAINWRIGHT: Do I take it then that your view is every statute authorizing condemnation authority has to state going forward, private as well as public lands, can be condemned? If it's otherwise clear and unequivocal about the authority and the waiver to proceed, does it have to be clear about public and private separately?

ATTORNEY JOYCELL HOLLINS: Your Honor, our position on that would be that the statute, a condemnation statute has to be strictly construed with the words that are used and in this particular situation, Section 181.04, Oncor's statute did not authorize it to condemn land owned by a governmental entity or by the State because it only said that, it had the power to condemn land of a person or a corporation. DART and The T are neither of those.

JUSTICE DEBRA H. LEHRMANN: What effect would House Bill 971 have on this case?

ATTORNEY JOYCELL HOLLINS: If 971 is applied as Oncor is advocating to the Court, it would be a retroactive application. In this scenario, in this case, the court of appeals rendered a judgment adjudicating the issue of immunity in this case. A condemnation suit, by its nature, is obviously a suit whose effect would be the

ability to take property rights, to take land, easements or whatever the case might be and DART and The T have vested rights in protecting their property, in determining how and whether to litigate any attack on that property or any type of forced sale of the property, that this would affect the resources that DART and The T or other governmental entities might use in determining how to protect itself from a tax on its property.

JUSTICE DON R. WILLETT: Do you concede that if 971, if the Court finds 971 does apply to this and other pending cases, do you concede that you necessarily lose?

ATTORNEY JOYCELL HOLLINS: If I understand your question correctly, I think you're asking whether if the case is remanded.

JUSTICE DON R. WILLETT: If this Court were to find that House Bill 971 applies to this case, this pending case, is there still a path to victory or are you up a creek?

ATTORNEY JOYCELL HOLLINS: Our position on that, Your Honor, is that 971 as it's written is still unclear and ambiguous.

JUSTICE DON R. WILLETT: You still say it doesn't clearly and unambiguously waive immunity.

ATTORNEY JOYCELL HOLLINS: Exactly because it has a clear intention to preserve immunity and it's not clear that the intention is to disturb the immunity that is afforded to the State, its agencies, political subdivisions and the like.

JUSTICE DAVID M. MEDINA: Now the amicus submitted by the utility company's Center Point Energy and those entities, state that there's no limitations on this bill, that it doesn't present, its effect is immediate and so it doesn't have any impact on whether or not a case is in the loop waiting for a decision or not and that we should apply it immediately. Have you read that brief? Do you have a response to that?

ATTORNEY JOYCELL HOLLINS: That the case is--

JUSTICE DAVID M. MEDINA: That the House Bill is written, it's effective immediately. There are no limitations to it.

ATTORNEY JOYCELL HOLLINS: Yes, Your Honor. The language of House Bill 971 does say that it's effective. It passed by the required majority and so it's been effective since June of 2011. This particular, our case has a judgment and we believe that because of that, the review of this particular case would be focused more on whether or not the court of appeals actually properly construed the statute as it existed at the time it rendered its judgment, not necessarily to apply a statute that doesn't have any expressed language that it should be applied retroactively. Going forward, it appears to us to be a prospective statute because the presumption hasn't been overcome by the language of the statute.

JUSTICE PHIL JOHNSON: Counsel, understanding your position, what exactly would the Legislature have meant in your view by the language that in 971, the rights extended to an electric corporation under Section 181.004 and this is the language I'm looking at, include all public land except land owned by the state. So how would, what does that language mean if we preclude land except that owned by the State from being condemned? What does the language mean if that, in fact, is what you believe it means?

ATTORNEY JOYCELL HOLLINS: The language is as I've said, Your Honor, we believe it's unclear what it means and that in itself means that the ambiguity there has to be resolved in favor of retaining the immunity that DART and The T--.

JUSTICE PHIL JOHNSON: So your interpretation would have to mean that the electric corporations under

181.004 could not then condemn public land even if it did not belong to the State because it seems. Do you have any other position that you would be taking on that because if the land is owned by someone other than the State, wouldn't the eminent domain proceeding have to go against the entity that owned the land?

ATTORNEY JOYCELL HOLLINS: Yes, Your Honor, there's--

JUSTICE PHIL JOHNSON: So if it did go against municipal land or something else other than owned by the State, would it be your position that even though this says that, land could be subject to eminent domain, it can't because of governmental immunity?

ATTORNEY JOYCELL HOLLINS: And that's the quandary. That's the unclear aspect of the language.

JUSTICE PHIL JOHNSON: But that would be your position.

ATTORNEY JOYCELL HOLLINS: Right. There's other land that's not owned by the State in the State of Texas that could be considered public, such as federal reserves and things of that nature. Texas is a broad state with lots of land, but it is not clear that the Legislature beyond doubt intended to waive immunity for governmental entities. It could have simply said, so.

JUSTICE DON R. WILLETT: Then what would be the point of the language? Why enact what they enacted if it's completely ineffective? Why give utilities the power to condemn public land if they could never condemn public land because the public land owner says, I don't think so I'm immune.

ATTORNEY JOYCELL HOLLINS: The unclear and ambiguous nature of the language still preserves immunity and that's our position.

JUSTICE DON R. WILLETT: Your point is lawmakers may have attempted to allow utilities the power to condemn public land, but they fumbled. They just didn't make it as express and clear as they should have.

ATTORNEY JOYCELL HOLLINS: I don't think that the language does live up to the standard that's been set by the Court or the Legislature in this particular situation.

JUSTICE DON R. WILLETT: Mr. Ho says that, DART and the Fort Worth Authority may be political subdivisions of the State, but you're not the State and what do you say in response?

ATTORNEY JOYCELL HOLLINS: We're not the State of Texas, for sure. In some scenarios, maybe we would be looked at in that way; however, sovereign immunity provides the same types of protection as governmental immunity. It flows from the state in every arm and political subdivision would have the same protection that the state would have sovereign immunity.

JUSTICE DON R. WILLETT: So looking at House Bill 971 when it says, except land owned by the state and again, assuming for the sake of argument that 971 applies, you would say that DART and the Fort Worth Authority are shoehorned within that language, except land owned by the state.

ATTORNEY JOYCELL HOLLINS: Yes, Your Honor.

JUSTICE EVA M. GUZMAN: With respect to whether immunity is waived in Wichita Falls v. Taylor that this Court set out four factors, if you will, to look at, to determine whether the Legislature clearly and unambiguously waived immunity when it didn't use magic words, can you comment on how those factors fit into your assertion that the Legislature did not waive immunity, specifically referencing Section 181.004 since Oncor has condemned land for many, many years under that?

ATTORNEY JOYCELL HOLLINS: In the court of appeals in reviewing Section 181.004 did use the Taylor standards or guidelines and it looked at whether the language itself, the plain language of the text was a clear and unambiguous waiver of immunity. In that statute, it is not clear and expressed that immunity is waived and they also looked at the fact that although it says, person and person is a term that's used to include governmental entities under the Code Construction Act, they specifically looked at the fact that that cannot be used to infer that the Legislature intended to waive immunity. So on that basis, it was not a clear and unambiguous waiver of immunity and then, secondly, when the magic words, so to speak, were not used, they still looked, and the Taylor guidelines still require that the intent to waive immunity must be beyond doubt. It must be found beyond doubt and in this scenario, Section 181.004 says that, electric utility in this case only has the authority to condemn land owned by a person or a corporation and DART and The T are persons or corporations and therefore, the language is not clear and unambiguous.

JUSTICE EVA M. GUZMAN: Well, I was focusing on Justice Murphy's dissent where she also went through the Taylor factors and argued that the power to condemn land under 181.004 would be rendered meaningless adopting. So can you comment on why such a position does not render it?

ATTORNEY JOYCELL HOLLINS: Yes, Your Honor, the statute would be not rendered meaningless by preserving immunity because Oncor and electric utilities would still have the power to condemn land. They would still have the power to erect their lines. They would still have the power to negotiate with private and public entities as they had for several years and in our case, we have had over 800 agreements with them to do this very thing and we have always been able to negotiate and come to an agreement. And so therefore, the ability to negotiate and to still have the power to condemn the statute is not meaningless just because immunity is preserved because the utilities still retain those powers.

JUSTICE EVA M. GUZMAN: I guess the argument was if governmental entities refused to participate, then that renders it meaningless.

ATTORNEY JOYCELL HOLLINS: If the governmental immunity says that, they cannot bring the suit for condemnation against us without consent, without a clear and unambiguous waiver of our immunity. So the case has never been that we have strictly just set out refused to negotiate with them and it's not in our brief, but we even have a under the Transportation Code Section 452.061, DART and The T are required to negotiate fair and reasonable nondiscriminatory rates and fares for the use of the regional transportation system. And I apologize that that's not in the brief and I'd be happy to do a post submission letter.

JUSTICE PHIL JOHNSON: This seems like this might be considered a little different than a rate or fare for use of the system. Would you have a response to the amicus' position that if DART or TRE simply says, whatever offer is made to us is unreasonable and we have governmental immunity, then how is Oncor going to get their line put other than going all the way around your property and condemning a great deal of private land so they can get that line done? Is there any other way that you, that they can do that?

ATTORNEY JOYCELL HOLLINS: I believe the proper mechanism for Oncor or our utility to use if DART or The T is not being fair in its negotiation would be a writ of mandamus to have the governmental official to do what it is legally bound to do and that is to negotiate a fair and reasonable price for the use of the system.

JUSTICE PHIL JOHNSON: And you classify this as a use of the system going across the line. They're not actually using this. They're using the land or the air above it or the land below it whatever they want to condemn. But so your, in your view that has to fall within a use of the system.

ATTORNEY JOYCELL HOLLINS: The authority would be made up of the land that it owns, the structures and so forth. So yes, an easement across our land or use of our land Section 451.061 would cover that, any use, any fare, any fee that we charge for use of our land would be covered under that section.

JUSTICE PHIL JOHNSON: What about municipal land? If the municipality just said, no, we're not going to give you an easement and we're not going to negotiate and you can't sue us. Go all the way around the city of Dallas, put that line all the way east over to the east side of Texas or wherever it is that you want to go. Would there be any option that they have other than doing that under the way that you read this statute?

ATTORNEY JOYCELL HOLLINS: Your Honor, I don't know specifically what statute the municipality might have to control how it negotiates for use of its property, but in erecting its lines, utility companies have always had to do that with the consent of the municipality and according to the briefs in this case, Oncor may have exercised condemnation of governmental entities, land, maybe five times since 1930 according to them. So it seems that because of the number of agreements that are always, that are generally made, these easements are usually made by agreement. That the idea that somehow now all of a sudden nobody will negotiate fairly, it seems strange because the ability to condemn hasn't been there from our perspective. And so that was never a motivating factor in how we negotiated over 800 times with them.

JUSTICE NATHAN L. HECHT: The parties have argued whether House Bill 971 would weigh the Respondents' immunity in this case. Do you think we should decide that issue or send it back to the trial court to decide?

ATTORNEY JOYCELL HOLLINS: I think in this scenario since the court of appeals has rendered a judgment, the focus of the appeal would be on whether or not they properly construed the statute as it existed at the time that they rendered the decision.

JUSTICE NATHAN L. HECHT: So we shouldn't address 971 at all?

ATTORNEY JOYCELL HOLLINS: I don't think it applies to this case.

JUSTICE EVA M. GUZMAN: But if it does, should we remand if it, hypothetically if it does or address it? And I understand that you say it doesn't, but if it does?

ATTORNEY JOYCELL HOLLINS: Should this Court --?

JUSTICE EVA M. GUZMAN: Send it back so that the lower courts have an opportunity to--

ATTORNEY JOYCELL HOLLINS: I don't think so Your Honor, because then you would still have the issue of whether it weighs immunity or not and if it doesn't weigh immunity, then that, so it seems like it would be a waste of judicial [inaudible].

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any other questions?

JUSTICE DALE WAINWRIGHT: If I may, Chief?

CHIEF JUSTICE WALLACE B. JEFFERSON: Yes.

JUSTICE DALE WAINWRIGHT: Just curious, why is Fort Worth Transportation Authority called, The T? I saw it in the briefs, but I don't know why.

ATTORNEY JOYCELL HOLLINS: I believe that's just the short term for it.

JUSTICE DALE WAINWRIGHT: The T?

ATTORNEY JOYCELL HOLLINS: The T.

JUSTICE DALE WAINWRIGHT: Okay.

CHIEF JUSTICE WALLACE B. JEFFERSON: Better than FWT, shorter. Thank you, Ms. Hollins.

ATTORNEY JOYCELL HOLLINS: Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court will hear a rebuttal.

REBUTTAL ARGUMENT OF JAMES C. HO ON BEHALF OF PETITIONER

ATTORNEY JAMES C. HO: First of all, briefly on the remand point, the Court has the option to do either On-cor would certainly welcome a ruling in our favor on 971 if the Court's interested in doing so.

JUSTICE DALE WAINWRIGHT: Counsel--

JUSTICE NATHAN L. HECHT: But if we're inclined to rule against you, you'd prefer to go back to trial court.

ATTORNEY JAMES C. HO: Absolutely, Your Honor.

JUSTICE DALE WAINWRIGHT: In *City of Galveston v. State*, this Court held, provided opinion, but still the Court held that a city could assert governmental immunity against the State in the suit for many damages. Is your position in this Court today intention the *City of Galveston v. State* or not?

ATTORNEY JAMES C. HO: I don't think either side relies on Galveston one way or the other. I suppose it could mildly support us.

JUSTICE DALE WAINWRIGHT: Which actually may or may not be important to our decision because we've got to get the law right. Any tension between the opinion and your position today?

ATTORNEY JAMES C. HO: I don't see any tension. I don't think DART see any tension. I suppose it could mildly support us just to the extent that it does exemplify the fact that there are different kinds of immunities that the different kinds of the entities transfer.

JUSTICE DALE WAINWRIGHT: Well, an argument might go that if a city can assert immunity against the state in a suit for money damages as in that case, that another type of governmental unit, not the state, could assert immunity in a condemnation action. That would be the logic that someone might argue. Do you see a tension with your position?

ATTORNEY JAMES C. HO: No, because I think the issue, I think everybody would agree that had the Legislature waived that case then it would be a nonzero opinion that, of course, the suit could proceed. The whole debate here is whether there's been a waiver. So I don't think anybody's, nobody's contested that you need a legislative waiver in this case. With respect to Justice Guzman's question about the Taylor factors how they apply to 971, we would submit that factor number one easily disposes it. It's the meaningless prong. I think the response on this whether or not it would be meaningless, I think that it essentially conceded that it would be, that our provision 971 would be meaningless. They sort of described as a quandary, I think this Court has explained in Taylor under that factor what do you do with that quandary. If it's meaningless, you find a waiver. With respect to Justice Wainwright on Humble Pipe, 971, of course, provides a simpler remedy, but just to address the Humble Pipe point, basically what we've heard is Humble Pipe dealt with a different statute. A different statute, but the exact same language and part of the same family of statutes. We have not heard once either from the court below or from DART why the exact same language should be construed differently just because it's codified in a different section. With respect to Justice Lehrmann on the discussion about retroactivity and Arancibia, we've heard essentially two responses today. One that Arancibia doesn't apply because in here, the judgment was ren-



dered, was actually rendered below. In other words, if I under the proposed rule correctly, if DART wins below, you can't review the case. If they lose below, you can move on the case. Separate and apart from the fact that that's a self-serving rule, I would think that the Court would be profoundly disturbed by the notion that the Court's not entitled to review a jurisdictional ruling by a lower court and certainly there's no authority for that proposition. They also mentioned that they had vested rights. This Court said, the exact opposite and took governmental entities do not have vested rights with respect to immunity. Lastly, there's a reference to the 800 agreements that the parties have been able to undertake in the past. That, of course, was under the century of law practice, understanding and precedent that there was eminent domain backing up those agreements. Under their view, that's true. Going forward, those 800 agreements will become 800 opportunities for extortion and that's just with respect to DART below, not accounting for all the other political subdivisions that will surely come out of the woodwork going forward. In summary, DART's position is legally flawed, but it's not just legally flawed. It's bad for private property rights as we've heard from Amici. It's also bad for Texas consumers. After all, DART's transportation system crisscrosses the Dallas area so DART petition, oh sorry, their position threatens to turn our energy transmission system into an obstacle course as Justice Johnson alluded to earlier. There's no reason for any of this as the Legislature has just recently reaffirmed. If there are no further questions. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Ho. The cause is submitted. That concludes arguments for this morning and the Marshal will adjourn the Court.

MARSHAL: All rise.

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