IN THE SUPREME COURT OF TEXAS

NO. 05-0126

CITY OF ROCKWALL, TEXAS, PETITIONER,

v.

VESTER T. HUGHES, AS SOLE INDEPENDENT EXECUTOR OF THE ESTATE OF W. W. CARUTH, DECEASED, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued January 25, 2006

JUSTICE WILLETT, joined by JUSTICE HECHT, JUSTICE O'NEILL, and JUSTICE BRISTER, dissenting.

The Court espouses sound principles of statutory construction but unsoundly applies them. Basically, it takes literalism too literally. Read naturally, section 43.052(i) means this: landowners who request inclusion of their land in a city's annexation plan may arbitrate the city's failure to include it.

The City's position—arbitration is only available if the City *ignores* the petition, not if it *rejects* it—makes little sense. Studied in context, the arbitration-triggering phrase "fails to take action" in section 43.052(i) has a more substantively coherent meaning than "fails to take *any* action"; it necessarily means "fails to take *favorable* action." Landowners are seeking a specific

outcome: inclusion in the city's annexation plan. The statute grants arbitration if the property remains excluded, and exclusion persists just as surely through *adverse* action as through *inaction*.

The meaning of "fails to take action" is best revealed by how this phrase is used in another Chapter 43 arbitration provision. Applying today's wooden construction to that provision dictates an illogical result that lays bare the Court's misinterpretation. As discussed more fully below, the Court's literalist interpretation would deny residents of areas annexed by the City of Houston their statutory right to arbitrate the City's failure to provide municipal services to the annexed area if the City rejects the residents' petition to enforce the service plan. As the Court reads "fails to take action," Houstonians deprived of basic city services will have no private remedy.

Read as a whole, the statutory scheme—in both section 43.052(i) and in section 43.056(*l*)—is straightforward and cannot bear the narrow meaning the Court ascribes to it. The Court's unduly restrictive reading is foreclosed by statutory context, and because context matters, I respectfully dissent.

I. When Searching for Statutory Meaning, Words Matter–And So Does Context

The Court aptly describes, then misapplies, the pertinent ground rules for construing statutory language. Words and phrases must be read "in context and construed according to the rules of grammar and common usage."[1] The import of language, plain or not, must be drawn from the surrounding context, particularly when construing everyday words and phrases that are inordinately

[1] TEX. GOV'T CODE § 311.011(a).

context-sensitive.[2] Given the power of context to transform the meaning of language, courts should resist rulings anchored in hyper-technical readings of isolated words or phrases,[3] or forced readings that are exaggerated or, at the other extreme, constrained.[4]

This "context matters" maxim—a cardinal rule not only of statutory construction but "of language itself"[5]—is rooted in common sense,[6] Texas statutory law,[7] and caselaw from both this Court[8] and the United States Supreme Court.[9]

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[2] *Id*. Some familiar words, depending on how they are used, convey polar opposite meanings. For example, the word "sanction" may indicate approval ("I sanction eating that bowl of ice cream.") or disapproval ("My wife will sanction me for eating that bowl of ice cream."). *See* WEBSTER'S NEW WORLD DICTIONARY & THESAURUS 566 (Michael Agnes, ed., 2d ed. 2002). Its meaning—permission or prohibition—turns entirely on context.

[3] *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004) ("We must read the statute as a whole and not just isolated portions.").

[4] *Cities of Austin, Dallas, Ft. Worth, & Hereford v. Sw. Bell Tel. Co.*, 92 S.W.3d 434, 442 (Tex. 2002).

[5] *Deal v. United States*, 508 U.S. 129, 132 (1993).

[6] As noted above, some words are auto-antonyms that can mean diametrically opposite things depending on the context. The word "fast," for example, can mean "swift" or "firmly fastened." *See* WEBSTER'S, *supra* note 2, at 233. The word "cleave" can mean "to adhere" or "to divide." *See id.* at 112. In my view, the Court's decision today "cleaves" to a myopic approach that "cleaves" literal meaning from plain meaning.

[7] *See* TEX. GOV'T CODE § 311.011(a).

[8] For example, in *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006), our sole objective was to define the meaning of "sue and be sued"-type language. Rather than concluding that these simple and apparently unambiguous words have one, definitive meaning, we recognized that "the import of these phrases cannot be ascertained apart from the context in which they occur." *Id.* at 329; *see also, e.g.*, *City of Sunset Valley*, 146 S.W.3d at 642.

[9] In *Deal*, the Court identified numerous possible meanings of "conviction" in a bank robbery statute but reasoned that "of course susceptibility of all of these meanings does not render the word 'conviction,' whenever it is used, ambiguous; all but one of the meanings is ordinarily eliminated by context." 508 U.S. at 131-32.

The author of *Deal*, Justice Scalia, was determined to drive home this point, as he wrote a dissent two weeks later in *Smith v. United States*, 508 U.S. 223, 241-47 (1993), which centered on the meaning of "using a firearm" and where Justice Scalia again stressed the importance of giving words their fair meaning:

> To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks, "Do you use a cane?," he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane. Similarly, to speak of "using a firearm" is to speak of using it for its distinctive purpose, *i.e.*, as a weapon.

Accordingly, when interpreting the (h)(1) exemption for quick annexation of rural land and the arbitration remedy in subsection (i), we must consult the text and structure of surrounding and related provisions. Doing so yields a clear and forthright interpretation that confirms the statute's natural meaning while giving effect to every part of the statute.

Subsection (i) begins: "A municipality may not circumvent the [three-year plan] requirement[ ] by proposing to separately annex two or more areas described by Subsection (h)(1) if no reason exists under generally accepted municipal planning principles and practices for separately annexing the areas." This proscriptive language sets the context; lawmakers intended arbitration to curb the overzealous use of expedited, piecemeal annexations under subsection (h)(1) in order to evade the three-year planning requirement.

Ignoring this context, the Court adopts the City's view that "fails to take action" means "fails to take *any* action," in other words, when a city succumbs to bureaucratic inertia and does nothing. But if a city rejects a petition outright, the landowner has no further recourse.[10] This interpretation subverts the Legislature's effort to curb abusive annexation tactics.

The City complains that Hughes's interpretation requires arbitration of all requests, no matter how groundless, but the City's rigid interpretation enables it to deny all requests, no matter how

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Id. at 242.

The Court is equally attuned to context in civil cases. In *Textron Lycoming Reciprocating Engine Division v. UAW of America*, 523 U.S. 653 (1998) (construing "suits for violation of contracts"), the Union urged a narrow focus on the meaning of the preposition "for," but the Court refused to turn statutory interpretation into a brain teaser and instead insisted on a natural reading that examined each word in context, not under a microscope. *Id.* at 656-58 ("It is not the meaning of the word 'for' we are seeking here, but the meaning of '[s]uits for violation of contracts.'" (alteration in original)).

[10] While this opinion uses the term "landowner" for simplicity, section 43.052(i) makes clear that a petitioner may be either "a person residing or owning land in the area." *Id.*

meritorious. The Court's holding will effectively prescribe, not proscribe, the very circumvention that subsection (i), by its terms, was intended to cure.[11]

In context, the phrase "fails to take action" captures not only a city's inaction but also a city's overt denial of favorable action. The word "favorable" is implicit, honors the phrase's (and the overall statute's) common-sense meaning, and gives full effect to the statute's objective: giving landowners a specific and workable remedy against abuse of the (h)(1) exemption. In my view, the language cannot fairly be read any other way, and the Court's reading almost certainly undermines the Legislature's intent.

II. The Court's Strained Reading Invites Absurd Results

The Court acknowledges that any interpretation, literal or not, that produces absurd results should be discarded.[12] In my view, the Court's interpretation works multiple absurdities.

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[11] The record suggests that few cities enact three-year municipal annexation plans. In fact, amicus curiae The Texas Municipal League ("TML"), an association of more than 1,070 incorporated cities that advocates municipal interests, notes that many of its member "cities will have a one page plan stating that they do not intend to annex any area for which an annexation plan is required." *See* SCOTT N. HOUSTON, TEX. MUN. LEAGUE, MUNICIPAL ANNEXATION IN TEXAS: "IS IT REALLY THAT COMPLICATED?" 13 (2003, updated Nov. 2004), *available at* http://www.tml.org/legal_pdf/ANNEXATION111704.pdf. The City of Rockwall's annexation "plan" is a near carbon copy: "[t]he City does not intend to annex any territory that in order to be annexed, is required to be in an annexation plan." City of Rockwall, Tex., Ordinance 99-49 (Dec. 20, 1999). Hughes argues that such "plans" clash with a key objective underlying the Legislature's 1999 rewrite, that annexation decisions should be driven not by circumvention of the three-year planning process but by order, thoughtfulness, and predictability. Judging by the myriad amicus briefs filed by Texas cities, expedited annexations under (h)(1) are so common that (h)(1) is actually the rule. TML's brief admits as much, saying the (h)(1) exception "is routinely used by most home rule cities. Only a handful of cities annex under an annexation plan" at all.

[12] *See* __ S.W.3d. __.

A. The Undeniable Meaning of "Fails to Take Action" Elsewhere in Chapter 43 Undercuts the Court's Literalist Construction of Subsection (i)

Most disconcerting is that the Court's noncontextual analysis cannot be squared with other parts of Chapter 43, principally section 43.056, which centers on the City of Houston's contractual duty to provide must-have services to areas slated for annexation (*e.g.*, fire and police protection, EMS, road maintenance, solid waste collection, water and wastewater facilities).[13] The Legislature in subsection (*l*) authorizes Houston residents and landowners to request arbitration to force compliance with the City's service plan, and, strikingly, it uses the very same "fails to take action" phrase that appears in section 43.052(i). Subsection (*l*) provides:

> A person residing or owning land in an annexed area . . . may enforce a service plan by petitioning the municipality for a change in policy or procedures to ensure compliance with the service plan. If the municipality *fails to take action* with regard to the petition, the petitioner may request arbitration of the dispute . . . .[14]

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[13] The statute defines the service plan as a contract between the city and the annexed area. TEX. LOC. GOV'T CODE § 43.056(k) ("On approval by the governing body, the service plan is a contractual obligation . . . ."). This contract establishes the method that the city will follow in extending services to the newly annexed area. TEX. LOC. GOV'T CODE § 43.056(b).

[14] TEX. LOC. GOV'T CODE § 43.056(*l*) (emphasis added). Compare this statute with section 43.052(i): "If the municipality fails to take action on the petition, the petitioner may request arbitration of the dispute." It seems beyond serious dispute that "fails to take action *with regard to* the petition" in subsection (*l*) means exactly the same thing as "fails to take action *on* the petition" in subsection (i).

Under long-settled authority, "fails to take action" must mean the same thing here as it does in section 43.052(i).[15] The multiple parallels at work here—the same phrase enacted the same day in the same bill describing the same proceeding—could not present a more "classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning."[16]

I venture this prediction: if today's case centered not on subsection (i) but on subsection (*l*) and a Houston resident's request to arbitrate the City's alleged breach of a service plan, the Court would read "fails to take action" exactly as I read it in subsection (i). Studied consistently and contextually, the meaning is self-evident: someone in an annexed area can request arbitration to enforce the service plan if the city grants no relief on the petition.

Applying today's construction of "fails to take action," however, if the City of Houston denied a service-plan enforcement petition, arbitration would be unavailable. This reading runs head-long into subsection (*l*)'s two-step process for enforcing City of Houston service plans: (1) a petition urging the City to comply, then (2) arbitration if the petition produces no compliance. The notion that arbitration is possible only if the City refuses to move a bureaucratic muscle is conceptually untenable. The paramount goal of service-plan enforcement is illusory if the City of

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[15] *See Comm'r of Internal Revenue v. Lundy*, 516 U.S. 235, 249-50 (1996), *superseded by statute*, Taxpayer Relief Act of 1997, Pub. L. No. 105-34, sec. 1282(a), 111 Stat. 1037 (codified as amended at 26 U.S.C. § 6512); *see also Dallas County Cmty. Coll. Dist. v. Bolton*, 185 S.W.3d 868, 873 (Tex. 2005) ("We must interpret a statute according to its terms, giving meaning to the language consistent with other provisions in the statute."); Paddock *v. Siemoneit*, 218 S.W.2d 428, 435 (Tex. 1949) (observing that the same words must be given the same meaning unless context dictates otherwise).

[16] *Lundy*, 516 U.S. at 250 (internal quotation marks omitted) (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)); *see also Paddock*, 218 S.W.2d at 435.

Houston can foreclose a service-plan challenge simply by rejecting the petition outright. Such a result would render subsection (*l*) wholly impotent and allow the concerns that prompted its enactment to thrive unchecked.[17] The landowner is seeking to compel obedience to the service plan—a formal "contractual obligation"[18]—and vital city services will remain unprovided whether the City rejects the petition or ignores it; granting arbitration only if the City's response is dilatory, but not if it is direct, works an absurd result.

The very next sentence in subsection (*l*) removes any doubt that the Legislature intended "fails to take action" to mean "fails to take favorable action." It authorizes persons living outside of Houston to apply for a writ of mandamus to prod service-plan compliance from their respective cities.[19] It cannot possibly be the law that every Texan outside the Houston city limits can freely and immediately seek mandamus relief to enforce their cities' service plans while Houstonians deprived of basic services and whose enforcement petitions are rejected must hope exclusively for a State-led quo warranto action. Again, this result defeats the fundamental purpose (and contractual promise) of the service-plan statute, but it is necessitated by the Court's construction of section 43.052(i).

Chapter 43 is most coherent and consistent when "fails to take action" means the same thing in both provisions. The Court, however, cites "context" to reserve the right to interpret subsection (*l*) differently because "sections 43.052(i) and 43.056(l) not only differ in the types of disputes they

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[17] *See* HOUSTON, *supra* note 11, at 5-8 (describing the furor surrounding the City of Houston's annexation of suburban Kingwood in 1996, a controversy that fueled the Legislature's 1999 overhaul of Texas annexation law).

[18] *See supra* note 13.

[19] TEX. LOC. GOV'T CODE § 43.056(*l*) ("A person residing or owning land in an annexed area . . . may enforce a service plan by applying for a writ of mandamus . . . .").

address, but also in how arbitrations of those disputes are to be conducted."[20] That is true, but also irrelevant; the decisive "fails to take action" language is word-for-word identical and operates the same way—the triggering phrases are grammatical and structural twins—and there is no principled basis for distinguishing the indistinguishable.[21]

B. The City Says Arbitration Is Possible "Only Under the Narrowest of Circumstances"–Namely, When a City Volunteers

The City's view, at its core, is that a landowner entitled to *request* arbitration is never entitled to *receive* arbitration. Rather, subsection (i) is "an essentially consensual remedy of limited applicability," something vested in the City's absolute discretion.[22] I disagree that cities are only subjected to arbitration if they choose to be. Section 43.052(i), like the identically worded section 43.056(*l*), grants an actual remedy, not a "consensual" one and not merely a request for one.

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[20] __ S.W.3d __.

[21] Besides eviscerating the arbitration provision in section 43.056(*l*) regarding service-plan enforcement, the Court's holding also nullifies parts of section 43.056(i) above and beyond the arbitration provision itself. For example, subsection (i) features a cost-shifting penalty provision whereby arbitrators can sanction landowners if the petition was "groundless or requested in bad faith or for the purposes of harassment." It is inconceivable, however, that any right-minded city would ever submit to city-funded arbitration of *any* petition, much less a baseless one, if it knew that it could dodge arbitration just by denying the petition outright.

[22] At oral argument, the City insisted that a valid arbitration request alone cannot trigger arbitration or justify a court order compelling arbitration:

> COURT: So does 43.052 give a private landowner any right at any time under any circumstances to sue for an order compelling arbitration?
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> RESPONSE: No, it doesn't. . . .
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> COURT: So even when the city fails to act one way or the other, they sit on it for whatever reason, there is still no private right of action to compel arbitration?
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> RESPONSE: Well, that's correct. We take that position. . . .

The Court's "consensual remedy" holding endorses a path by which cities may circumvent the legislatively preferred three-year plan: "Just Say No"—deny everything and arbitrate nothing. Under this view, if a city (for reasons I cannot imagine) wanted to cede some of its planning authority, it would ignore the petition. But if a city wanted to retain unfettered control, it would deny the petition. Given how cities prize and safeguard their municipal annexation authority,[23] no rational city would ever renounce power by ignoring a petition when it could redouble power by denying it. If the Legislature intended only to authorize cities to volunteer for arbitration, then no statute was necessary as home-rule cities already possess "all the powers of the state not inconsistent with the Constitution, the general laws, or the city's charter."[24] A city that wants to arbitrate something does not need a statute granting it permission. Because "the legislature is never presumed to do a useless act,"[25] we must presume that it intended something more than voluntary arbitration.

More revealing, though, is the City's argument that all this sound and fury about arbitration and inclusion in the city's annexation plan signifies nothing because the fast-track nature of (h)(1) annexations will quickly moot the entire dispute. As the City noted at oral argument: "If the landowner asks to be included in a three-year plan, the city sits on it, that remedy or rather any consideration of whether it should be in a three-year plan is lost [once the area is annexed]."

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[23] Cities regard the broad, unilateral power to annex as a matter of municipal life and death: "According to many national authorities, this annexation power is the primary difference between the flourishing cities of Texas and the declining urban areas in other parts of the nation." *See* HOUSTON, *supra* note 11, at 10.

[24] *Proctor v. Andrews*, 972 S.W.2d 729, 733 (Tex. 1998) (observing that the Legislature may restrict the power of home-rule cities that derive their plenary power directly from the Constitution); *see also* TEX. CONST. Art. XI, § 5.

[25] *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 551 (Tex. 1981); *see also Travis County v. Pelzel & Assocs., Inc.*, 77 S.W.3d 246, 249-50 (Tex. 2002), *superseded by statute*, TEX. LOC. GOV'T CODE § 262.007; *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 485 (Tex. 1998).

The underlying facts illustrate the City's position that all landowner action under subsection (i) is ultimately futile:

- the Estate proposed to the City a high-density housing plan in the City's extraterritorial jurisdiction (ETJ)
- five days later the City directed its staff to begin expeditious (h)(1) annexation (goal: to bring the property within the City limits so it could impose *low*-density development restrictions)
- the Estate then petitioned for inclusion in the City's three-year plan (goal: to delay the (h)(1) annexation so it could vest the property's high-density development plan)

Under the City's position, heads the city wins and tails the landowner loses. The calendar is inexorable. Arbitration is forever a mirage because even if a landowner is theoretically entitled to arbitration, the City's annexation—the very annexation being challenged—zooms along the (h)(1) fast track, thus short-circuiting the dispute.

C. The City's "Pocket Veto" Analogy Is Facially off the Mark

The City says arbitration is possible in exactly one situation: "when a city refuses to consider or evaluate the request—exercising the proverbial 'pocket veto.'" The pocket-veto analogy is inapposite because a pocket veto, classically understood, quickly yields a definitive outcome: rejection.[26]

[26] A true pocket veto occurs when the President fails to sign a bill passed by Congress within ten days, if Congress is not in session at the end of those ten days. U.S. CONST. art. I, § 7, cl. 2; *see also The Pocket Veto Case*, 279 U.S. 655 (1929). Timing is the critical element. The President can only kill legislation with a pocket veto if Congress adjourns before the ten days expire; if Congress remains in session, and ten days elapse, then the bill automatically becomes law without the President's signature. U.S. CONST. art. I, § 7, cl. 2.

Accepting arguendo the City's pocket-veto characterization, the Legislature, unlike the United States Constitution, has failed to define the contours, and the Court avoids addressing these concerns,[27] most notably (1) how much time must elapse before the landowner may request arbitration? and (2) what form of "action" suffices to derail arbitration?[28]

Subsection (i) is open-ended and sets no decision-making deadline by which a city must respond to a landowner's petition. If a city sits idle, a landowner has no way of knowing whether the city has merely failed to open its mail or, alternatively, has in fact reviewed the petition but quietly decided not to grant it. What length of city inaction is sufficient before a landowner may seek arbitration? Meanwhile, as the landowner awaits a formal response, the city continues speedily annexing the targeted property under subsection (h)(1).

Moreover, the Court, while purporting to construe "fails to take action" literally, actually spurns its own literalist method. The Court says arbitration is unavailable because the City's categorical refusal amounts to "action." The word "action," however, encompasses a wide range of

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[27] __ S.W.3d __.

[28] The City argues that two other Texas statutes use the phrase "fails to take action" to mean "fails to take *any* action" and not overt rejection. *See* TEX. LOC. GOV'T CODE § 232.096 (authorizing commissioner's courts to approve or disapprove plat decisions of a land planning commission and providing that if the court "fails to take action" within thirty days, the commission's decision becomes final); TEX. OCC. CODE § 262.1025 (authorizing the State Board of Dental Examiners to review rules proposed by an advisory committee and providing that if the board fails to take action on the recommendation within ninety days, it must adopt the recommendation). These two statutes are facially different. In both, one governmental body is reviewing the prior decision or proposal of another governmental body; if the reviewing body "fails to take action" for a specified number of days, the prior decision is ratified by operation of law. The annexation statute, by contrast, lacks this critical "deeming" feature. The City's theory leaves the landowner in perpetual limbo since inaction is never treated as either approval or rejection of the landowner's petition, no matter how much time elapses. Meanwhile, the challenged annexation proceeds unabated. The reason the identical phrase "fails to take action" is interpreted differently in these other statutes is because the surrounding language is different in these other statutes. Again, context controls.

activities: reviewing a petition, conducting research, convening a hearing, deliberating, etc.[29] Why are these actions not "action"? The Court implicitly limits the word "action" to mean *dispositive* action—when a city formally denies a petition—but the Court cites nothing to explain why *nondispositive* action fails to qualify. By restricting "action" to a yes-or-no decision,[30] the Court has in fact abandoned literalism by reading the statute to mean "fails to take *final* action," a locution that, notably, lawmakers have used elsewhere in the Local Government Code regarding land use regulation, but not here.[31] The Court thus allows context to inform the meaning of "action," but it does so selectively, picking and choosing when it will permit context to guide its statutory analysis.

III. The Legislature Enacted a Specific Alternative to Quo Warranto in Cases of Alleged Abuse of Subsection (h)(1)

The Court says landowners are no worse off given the possibility of State-initiated quo warranto intervention. The Court reasons that annexation law is largely procedural and that our 1991 decision in *Alexander Oil Co. v. City of Sequin* declared quo warranto the exclusive mechanism to challenge improperly conducted annexations.[32] The Court's analysis is unconvincing.

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[29] According to BLACK'S LAW DICTIONARY, "action" means "[t]he process of doing something; conduct or behavior." BLACK'S LAW DICTIONARY 31 (8th ed. 2004).

[30] *See, e.g.*, __ S.W.3d __ ("[T]he city failed to take action on it one way or the other . . . .").

[31] The Legislature, for example, says if a county planning commission "fails to take *final* action" on a completed plat application within sixty days, the applicant may seek mandamus relief "to compel the planning commission to approve or disapprove the plat." TEX. LOC. GOV'T CODE § 232.096(g) (emphasis added).

[32] 825 S.W.2d 434, 436-37 (Tex. 1991).

The Legislature is presumed to understand extant law when it enacts legislation,[33] and if it intended that quo warranto remain a landowner's sole remedy against post-1999 annexation abuses, it would not have enacted a statute that explicitly grants a private arbitration right.[34] This Court recently held that the "truest manifestation" of what lawmakers intended is what lawmakers enacted—the text they actually voted on—and the intent to supersede *Alexander Oil* is found in a statute that does exactly that.[35]

We decided *Alexander Oil* in 1991 largely on the basis that the Legislature had not yet given private individuals a way to challenge annexations. Eight years later, the Legislature did so, granting landowners a defined arbitration right.[36] The Legislature, we must presume, understood the role of quo warranto in challenging annexation proceedings when it provided for arbitration in subsection (i), but the Legislature's comprehensive overhaul makes no mention of quo warranto, much less retains the exclusivity of such relief. The City insists the Legislature's failure to unequivocally declare that it was superseding *Alexander Oil* indicates it never intended to do so. We have never required such declarations, and *Alexander Oil* overtly disclaims the necessity for any such declaration: quo warranto, we said in that case, is the way to attack annexation irregularities *unless*

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[33] *In re Pirelli Tire, L.L.C.*, __ S.W.3d __ (Tex. 2007).

[34] Again, "the legislature is never presumed to do a useless act." *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 551 (Tex. 1981).

[35] *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651-52 (Tex. 2006).

[36] Act of May 31, 1999, 76th Leg., R.S., ch. 1167, § 4, sec. 43.052(i), 1999 Tex. Gen. Laws 4074, 4076-77.

the Legislature has "acted to expressly provide a private action."[37] The Legislature did precisely that post-*Alexander Oil*.[38]

This 1999 legislative exception to the general quo warranto rule provides a simple yet substantive remedy that is complete unto itself: the landowner petitions for inclusion in the three-year plan, and if the land is not added, the landowner may seek arbitration. Subsection (i) never states or suggests that quo warranto remains part of the legal landscape or that quo warranto must precede arbitration as an intermediate step.

Finally, the City's reliance on three courts of appeals' decisions construing section 43.052 as strictly procedural, and thus subject only to quo warranto challenge, is misplaced.[39] While those courts held that quo warranto is the sole means to attack a city's alleged violation of 43.052, none of those decisions considered the (h)(1) exemption or interpreted subsection (i), focusing instead on other portions of section 43.052.

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[37] *Alexander Oil*, 825 S.W.2d at 437.

[38] The Court posits the specter of multiple "individual arbitration proceedings" as another basis for its pro-quo-warranto holding. __ S.W.3d. __. To be sure, the City and various amici predict calamitous and "drastic implications" if we interpret the statute to provide a private arbitration right. I concede that landowner-invoked arbitration may well saddle cities with real and nonincidental costs. I also understand the City's fear that developers will (1) target areas within the ETJ for dense, out-of-character projects that clash with the city's overall vision for the area and (2) use arbitration under subsection (i) as a delaying tactic or as negotiating leverage. These arguments, however, are rooted in policy and prudential concerns, which are quintessential legislative judgments, not judicial ones. Burdensome or not, the costs and hassles attending arbitration were, I would conclude, presumed acceptable by the Legislature, and in any event, avoidable if cities scrupulously complied with the statute's three-year annexation plan requirement in lieu of successive fast-track annexations under (h)(1).

[39] The City cites *Werthmann v. City of Fort Worth*, 121 S.W.3d 803, 807 (Tex. App.—Fort Worth 2003, no pet.); *City of Balch Springs v. Lucas*, 101 S.W.3d 116, 122 (Tex. App.—Dallas 2002, no pet.); *City of San Antonio v. Hardee*, 70 S.W.3d 207, 212 (Tex. App.—San Antonio 2001, no pet.).

The remedy for abuse of the sparsely-populated-area exemption is arbitration, which subsection (i) clearly authorizes.

IV. Conclusion

The statute in this case speaks for itself. The Court mutes the statute, however, by fixating on four words divorced from the surrounding statutory framework. I agree judges must adhere to the language that lawmakers voted on, but statutes operate as a whole and must be read as a whole, not as a hodgepodge of isolated fragments. The Court's noncontextual reading is incompatible with related provisions (including one *identical* provision) in the same statute. Literalism can sometimes border on trivialism and should not be confused with textualism, which considers both statutory text and statutory *con*text to ascribe meaning. Today's decision is literalism gone bad.

Hughes is statutorily entitled to arbitration, and because the Court "fails to take action" to enforce that remedy, I respectfully dissent.

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Don R. Willett
Justice

Opinion delivered: January 25, 2008