IN THE SUPREME COURT OF TEXAS

NO. 07-0284

CITY OF DALLAS, PETITIONER,

v.

KENNETH E. ALBERT, ET AL., RESPONDENTS

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

JUSTICE WILLETT, dissenting.

Does Local Government Code Section 271.152 apply to waive the City's immunity? The Court wisely concludes the trial court should first tackle this potentially dispositive issue. If Section 271.152 applies, then that's that—the City has no immunity—making the balance of today's decision purely advisory, something the Court readily admits: "some of our discussion may not be necessary."[1] To clarify, the Court is unwilling to decide what is possibly controlling but willing to pre-decide what is purely contingent. If bad facts make bad law, then old cases make odd law. This litigation began in 1994, and I well understand the Court's desire to prod it along. But we should not leapfrog lower-court review by pre-answering a host of subsidiary questions that will never be asked if Section 271.152 indeed applies. Finding the Court's advisory opinion inadvisable, I respectfully dissent.

[1] The Court acknowledges that if Section 271.152 applies, "some of our discussion may not be necessary to resolution of the issues." *Ante* at __ n.5.

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The myriad governmental-immunity issues in this case provoke varied views. In their competing opinions, JUSTICE JOHNSON and JUSTICE HECHT debate a particularly vexing point: the existence (or not) of the City's immunity once it nonsuited its counterclaims. I think it unnecessary and improper for the Court to reach this and other satellite issues unless and until it determines that Section 271.152 is inapplicable—if it is. That "if" is mighty consequential, and mighty worthy of lower-court examination.

As the Court recognized earlier this year and reaffirms today, Section 271.152 effects a "clear and unambiguous" (and retroactive) waiver of governmental immunity in certain breach-of-contract suits.[2] Is this such a suit? If so, then the City lacks immunity.[3] What weight is then due the Court's lengthy discussion of various other issues, all interesting but all incidental (the effect of the counterclaim, the declaratory-judgment action, and the referendum)?[4] As my LSAT instructor used to (mis)state: "It's irrevelant."

Under article V, section 8 of the Texas Constitution, we decide concrete cases; we do not dispense contingent advice. The "judicial power does not embrace the giving of advisory

[2] *City of Houston v. Williams*, __ S.W.3d __, __ (Tex. 2011); *see also* TEX. LOC. GOV'T CODE § 271.152.

[3] TEX. LOC. GOV'T CODE § 271.152

[4] *See ante* § II A–B, D–E.

opinions,"[5] those that decide an academic[6] or "abstract question of law without binding the parties."[7] Prudent development of the State's jurisprudence requires that courts refrain from giving "advice . . . upon speculative, hypothetical, or contingent situations."[8] To be sure, this long-running case poses important issues of Texas immunity law, issues we may need to decide one day. But today is not that day.

As the Court notes, Section 271.152 was enacted while this case was already at the court of appeals, meaning the trial court never had an opportunity to consider its applicability. Likewise, the court of appeals did not discuss it, and neither party challenged that court's decision not to discuss it. Today this Court wisely declines to short-circuit lower-court review of whether Section 271.152 waives the City's immunity, a path we have consistently followed in analogous Chapter 271 cases.[9] My quibble lies in the Court's eagerness to undertake a full-dress analysis of various subissues, all of which evaporate if Section 271.152 applies. The Court has enough to keep itself busy without premature predecisions and consultative guidance that presupposes—if not predestines—a certain lower-court path.

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[5] *Fireman's Ins. Co. of Newark, N.J. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1968).

[6] *See City of West Univ. Place v. Martin*, 123 S.W.2d 638, 639 (Tex. 1939).

[7] *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993).

[8] *Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.*, 971 S.W.2d 439, 443 (Tex. 1998) (citing *Camarena v. Tex. Emp't Comm'n*, 754 S.W.2d 149, 151 (Tex. 1988)).

[9] *City of Houston v. Williams*, 216 S.W.3d 827, 829 (Tex. 2007); *City of Houston v. Clear Channel Outdoor, Inc.*, 197 S.W.3d 386, 386-87 (Tex. 2006); *McMahon Contracting, L.P. v. City of Carrollton*, 197 S.W.3d 387, 387 (Tex. 2006).

Again, because I find the Court's opinion advisory—and thus inadvisable—I respectfully dissent.

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Don R. Willett
Justice

OPINION DELIVERED: August 26, 2011