FILED
17-0405
11/19/2018 5:20 PM
tex-29149689
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 17-0405

In the Supreme Court of Texas

LISA HENDERSON, IN HER OFFICIAL CAPACITY AS CITY SECRETARY,
Petitioner,

v.

ELIZABETH CARRUTH, MATTHEW TIETZ, JANIS NASSERI, JUDITH KENDLER, AND STEPHEN PALMA,
Respondents.

On Petition for Review
from the Fifth Court of Appeals, Dallas

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

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Statement of Interest of Amicus Curiae[1]

The court of appeals's judgment (1) misapplies the procedural law governing *ultra vires* claims and (2) in doing so ignores the Legislature's power to preempt city action. The State files this amicus brief to encourage the Court to continue its well-established procedural practices regarding pleas to the jurisdiction on *ultra vires* claims as well as to outline the scope of the Legislature's power to preempt cities from using decision-making procedures that violate state statutes to arrive at statutorily authorized comprehensive plans that play a role in state-wide regulation.

[1] No fee has been, or will be charged, for this filing.

To the Honorable Supreme Court of Texas:

The court of appeals's procedural error of refusing to consider the applicable statutes in construing the Plano City Secretary's actions allowed it to sidestep the substantive effect of a legislative enactment that places specific procedural requirements on cities in producing planning documents that are a necessary part of state-wide programs. The Court should grant rehearing and the petition, and render judgment dismissing plaintiffs' claims. It should do so not merely because the court of appeals's judgment is wrong, but because the proper application of the procedural and substantive principles in play in this case go to the heart of the constitutional distribution of authority between state and local government, and the separation of powers between the departments of state government mandated by the Texas Constitution. The Legislature has the power to impose procedural requirements on cities, and the courts should not be allowed to thwart the Legislature's intent by sidestepping their obligation to apply statutory law that preempts contrary provisions of a city charter or ordinance.

Argument

The court of appeals reasoned that it was bound to apply the Plano city charter to treat the city secretary's refusal to refer a petition to the city council because that duty was set out in the Charter and the City had cited no case expressly providing that comprehensive plan proceedings are not subject to referenda. *City of Plano v. Carruth*, No. 05-16-00573-CV, 2017 WL 711656, at *3 & n.7 (Tex. App.—Fort Worth 2017, reh'g of pet. denial filed). In doing so, it failed to apply *ultra vires* precedent. Had the court of appeals applied the correct procedure, it would have had

to determine whether section 213.003 of the Local Government Code, which prescribes the mechanism for adopting municipal comprehensive plans, preempts any contrary procedural provisions of a municipal charter.

The court of appeals should have construed the city charter provisions to determine whether a referendum could be held as part of the jurisdictional analysis of whether the case could be instituted in the first place. *See infra*, Part I. And in doing so, it should have held that section 213.003 of the Local Government Code preempts non-compliant procedural mechanisms for adopting and changing municipal comprehensive plans. *See infra*, Part II.

I. THE COURT OF APPEALS'S FAILURE TO CONSIDER THE RELEVANT STATUTES TO ESTABLISH SCOPE OF THE DEFENDANT OFFICIAL'S DISCRETION THREATENS TO UNDERMINE THE COURT'S DESIGN FOR AN *ULTRA VIRES* MECHANISM—WHICH IS DESIGNED TO PRESERVE THE DECISION-MAKING POWERS OF GOVERNMENTAL ENTITIES.

In declining to construe section 213.003 and its impact on the Plano city charter, the court of appeals remarked that no case had been presented to it in which the preemption of city-charter referendum processes related to comprehensive city plans was addressed. *City of Plano*, 2017 WL 711656, at *3 & n.7. But it is well established that in order to determine whether a defendant official has acted *ultra vires*, a court must interpret the relevant statutes and legal enactments. *E.g.*, *Klumb v. Houston Mun. Emp. Pension Sys.*, 458 S.W.3d 1, 1 n.2 (Tex. 2015) (jurisdictional question was "a matter of statutory construction, which is determined as a matter of law considering the statute's plain language"). Courts routinely construe statutes in resolving pleas to the jurisdiction filed in *ultra vires* cases. *E.g.*, *Traylor v. Diana D.*,

No. 03-15-00657-CV, 2016 WL 1639871, at *5 (Tex. App.—Austin 2016, pet. denied) (mem. op.) ("we construe the relevant statutory provisions, apply them to the pleaded and unnegated facts, and determine whether those facts constitute acts beyond the official's authority").

Plainly, it is possible for the legal relationship between section 213.003 and the Plano City Charter to be resolved by application of legal principles to the relevant statutes and city charter provisions. *E.g.*, *In re Williams*, 470 S.W.3d 819, 822 (Tex. 2015) (orig. proceeding) (per curiam) (statute preempted provisional provision of city charter); *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002) (orig. proceeding) (per curiam) ("We must determine whether the Election Code preempts the Charter's third-day filing deadline."). [2] The jurisdictional question in this case boils down to whether the Plano city charter's referendum provisions are preempted by 213.003's requirement of a different procedural mechanism for adopting and reviewing

[2] These mandamus precedents not only show that it is possible to construe charters and statutes together, they provide additional support for the proposition that it is appropriate to do so in an *ultra vires* case. While the parties have presented the issue to the Court as an *ultra vires* issue, the Court has recently specified that *ultra vires* and mandamus are two sides of the same coin, addressing the cessation of ongoing action and a failure to act, respectively. *City of Houston v. Houston Municipal Employees Pension Sys.*, 549 S.W.3d 566, 576-77 (Tex. 2018). There is no reason that the analysis of the city charter would be artificially divided from the relevant statutes under mandamus practice, as opposed to *ultra vires* practice. A substantive element of mandamus is a demonstrated abuse of discretion. *In re Essex Ins. Co.*, 450 S.W.3d 524, 526 (Tex. 2014) (orig. proceeding). If the referendum process does not apply to a particular subject-matter by operation of state law, that is a legal question necessary to the issuance of mandamus. *E.g.*, *In re Smith*, 333 S.W.3d 582, 584-85 (Tex. 2011) (orig. proceeding) (citing *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008), for proposition that statutory construction is performed de novo in mandamus proceeding against government official respondent). There is no procedural reason *not* to consider the impact of the Local Government Code on the Plano city charter's referendum requirements, no matter how you frame the lawsuit.

comprehensive plans. As in any *ultra vires* litigation, the fact that the action plaintiffs seek is actually foreclosed by law should end the legal inquiry. *E.g.*, *Hall v. McRaven*, 508 S.W.3d 232, 243 (Tex. 2017) (citing *Sw. Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 587 (Tex. 2015), for definition of ministerial duty).

But it is unclear how this would *ever* occur under the court of appeals's procedural reasoning, or at least how it could occur without major practical disruption. As the court of appeals's opinion concedes, the necessary result of allowing the referendum to proceed would be to force the city council to choose between revoking the comprehensive plan and allowing it to be suspended during the referendum process. *City of Plano*, 2017 WL 711656, at *7. If it is impossible to consider the impact of a statute on the city charter at this stage of the proceedings, then plaintiffs have a presumptive power to obtain at least a temporary suspension of Plano's comprehensive city plan—which will lead to the City's inability to use its long-term planning documents as state law intends. This is a practical example of why the Court's longstanding practice of resolving legal issues related to a defendant's statutory authority to act at the plea-to-the-jurisdiction stage is a sound practice.

A. Texas law recognizes a presumption against judicial review of executive-department determinations, which must be triggered by (1) a statutory grant of judicial authority, (2) a claim related to a vested property right, or (3) another constitutional interest. *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 599 (Tex. 2001). Thus, absent a grant of statutory authority to challenge a discretionary action, any legal challenge is barred. *In re Office of the Attorney General*,

456 S.W.3d 153, 157 (Tex. 2015) (orig. proceeding) (per curiam) ("The parties have not directed us to any authority expressly providing for the right to review the designation.").

The *ultra vires* cause of action is an exception to this general principle, allowing prospective relief against state officials to foreclose action in contravention of law. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009) (plaintiff must "allege" and "ultimately prove" act outside defendant official's authority); *id.* at 376 (relief must be prospective). The proper analysis is whether there is a limited grant of discretionary authority and whether the alleged actions are outside that grant. *McRaven*, 508 S.W.3d at 239-240. The claim is barred if the statute in question grants "absolute" authority on the matter. *Id.* at 241. But suit can likewise be barred if, in light of the statute's text, the acts listed in plaintiff's petition fall within the scope of a specific grant of statutory discretion. *Id.* at 242; *see, e.g.*, *LMV-AL Ventures, LLC v. Tex. Dep't of Aging & Disability Servs.*, 520 S.W.3d 113, 125 (Tex. App.—Austin 2017, pet. denied) (correctly applying *McRaven* and *Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 161 (Tex. 2016)).

The Court's procedural handling of these claims is tied to the distinction *Heinrich* draws between "pleading" and "ultimately proving a claim." Because any claim is tied to the plaintiff's legally correct framing of the potential abuse of discretion, it makes sense for the courts to determine the scope of that discretion at the plea stage. *E.g.*, *Hall v. McRaven*, 504 S.W.3d 414, 421 (Tex. App.—Austin 2016), *aff'd* 508 S.W.3d 232 (because immunity protects the separation of powers, but does not insulate all government actions from judicial review, relevant statutes

must be construed at jurisdictional stage to prevent improper lawsuit). The separate merits question is whether the alleged violation actually occurred. The plea-to-the-jurisdiction analysis does not—and should not—provide a mechanism for a court to perform balancing or equity determinations. But there is no need for it to do so in the *ultra vires* context, because an act outside of an official's discretion will necessarily be contrary to law without any need for judgment. And a determination that the defendant official acted within the zone of discretion will remove any need for a legal determination, because the courts do not have authority to interject their policy preferences for the discretionary actions of executive department officials in the exercise of their statutory and constitutional functions. Cutting off litigation at the jurisdictional stage prevents the courts from placing their thumb on the scale of choice between multiple legitimate discretionary decisions at a later date by merely excluding the alleged acts from the scope of the defendant's discretion.

There is no procedural reason for the court of appeals's decision not to apply all the relevant principles of statutory construction, or to ignore relevant sources of law that modify the question of discretion at issue in a given lawsuit. To the contrary, this Court routinely does so. *E.g.*, *Houston Belt*, 487 S.W.3d at 164 (construing municipal ordinance de novo in *ultra vires* suit). And it applies statutes to the internal operating procedures of other government entities, as when it construed the University of Texas Regents' Rules in light of the relevant statutes in *McRaven*, 504 S.W.3d at 421 ("Accordingly, to determine whether Hall has asserted a valid *ultra vires* claim that invokes the trial court's subject-matter jurisdiction, we must

construe the provisions of the Education Code and the Regents' Rules that define the scope of McRaven's delegated authority as Chancellor.").

The court of appeals's refusal to look beyond case law interpreting city charters was procedurally inconsistent with this Court's precedent.[3] The Court should grant the petition in order to consider whether a city secretary has to refer a petition to the city council on an issue where state law mandates a different decision-making process. And this issue deserves the Court's attention on rehearing, because the court of appeals's reasoning in effect renders the procedural provisions of section 213.003 meaningless. *See infra*, Part II.

B. From the point of view of a functioning constitutional democracy with constitutionally mandated separation of powers, *see* TEX. CONST. art. II, § 1, the Court's procedural framework for dealing with *ultra vires* claims—*i.e.*, by construing the relevant provisions at the outset to determine the scope of the defendant official's discretion—is a *good* system.

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[3] Footnote seven of the court of appeals's opinion appears to hang its judgment on the distinction between city charters and statutes. *City of Plano*, 2017 WL 711656, at *3 n.7. But any difference between statutes and city charters is immaterial; in this case, section 213.003 has to be construed to determine whether it preempts the charter, so the distinction makes no difference. At any rate, because city charters are in the nature of municipal ordinances issued by the city, *e.g.*, TEX. LOC. GOV'T CODE §§ 9.002, .003; *see also City of Fort Worth v. State ex rel. Ridglea Village*, 186 S.W.2d 323, 327 (Tex. Civ. App.—Fort Worth 1945, writ ref'd w.o.m.), there is an even stronger basis for construing them under the declaratory judgments act, which expressly provides for suits to construe municipal enactments, TEX. CIV. PRAC. & REM. CODE § 37.006(b) (when a proceeding "involves the validity of a municipal ordinance or franchise, the municipality must be made a party").

Ultra vires practice is an exception to immunity. The rule of immunity from suit is a rule about the identity of the defendant. If the defendant is a governmental entity, the courts lack subject-matter jurisdiction absent a legislative waiver or constitutional exception. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 (Tex. 2003) (citing *Hosner v. DeYoung*, 1 Tex. 764, 769, 1847 WL 3503 (1847) ("[N]o State can be sued in her own courts without her consent, and then only in the manner indicated by that consent.")). This principle has always barred both suits for monetary relief and suits "to control action of the state." *Griffin v. Hawn*, 341 S.W.2d 151, 152-53 (Tex. 1960) (citing, *e.g.*, *W.D. Haden Co. v. Dodgen*, 158 Tex. 74, 308 S.W.2d 838 (1958)). The breadth of this protection comports with the general purpose of the immunity doctrine in American law. *See Taylor*, 106 S.W.3d at 695 (citing THE FEDERALIST 81, at 487 (Hamilton) (Clinton Rossiter ed. 1961)).

The Court announced the underlying rationale for the immunity doctrine in three cases decided during its first session following statehood: *Hosner*, 1 Tex. at 769-770; *Borden v. Houston*, 2 Tex. 594, 611, 1847 WL 3612 (1847); and *Bates v. Republic*, 2 Tex. 616, 618, 1847 WL 3613 (1847). In each case, the Court made clear that the immunity principle was retained in Texas state law from the law of the Republic in order to maintain accountability and preserve the discretion of each branch of government. *Hosner*, 1 Tex. at 770 (immunity protects the Legislature's discretion to dispose of state property); *Borden*, 2 Tex. at 611 (immunity protects the government from private coercion); *Bates*, 2 Tex. at 618-19 (immunity prevents the judiciary from controlling executive branch determinations, particularly regarding spending).

Immunity protects the independent authority of governmental decision makers—in the Executive Department or in a municipality—by protecting their discretion to act. It thus makes sense that a legal determination of the scope of a defendant official's discretion be made at the outset of litigation. Discovery and litigation over an issue within a defendant's discretion is not only wasteful of both public and private resources, it is an affront to the separate decision making powers of the different portions of government. That an issue arises involving local government makes no difference: the predicate question to whether there should be litigation over governmental action should be whether that process is properly subject to judicial oversight. The interaction between statutory provisions and city charters is a necessary part of that analysis; there is no way to determine the scope of discretion and the limits of oversight without fully analyzing the scope of all relevant legal authorities bearing on the authority granted to the defendant official.

And, as the Court has recently confirmed, immunity is determined at the jurisdictional stage precisely because judicial intervention into government actions is often improper and can interfere with the functioning of government. *E.g.*, *Engelman Irrigation Dist. v Shields Bros., Inc.*, 514 S.W.3d 746, 752 (Tex. 2017) (articulating that immunity is treated as jurisdictional in the case in chief to avoid improper effects of ongoing litigation on governmental entities, but is not jurisdictional such that it voids already-final judgments on collateral attack). It is better to determine whether an *ultra vires* claim can proceed—based on *all* relevant sources of law—at the outset, rather than to subject the administration of government to the delays and interference caused by litigation and discovery. *See*,

e.g., *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 845 & n.2 (Tex. 2007) (explaining that "[s]ection 51.014(a)(8) was designed to reduce litigation expenses for all parties involved in suits against state entities" and noting that "[s]upporters of the provision believed 'incorrect rulings on [jurisdictional pleas] needlessly waste the time of the courts and can cost litigants hundreds of thousands of dollars as they defend cases which should have been dismissed' " (quoting House Comm. on Civ. Practices, Bill Analysis, Tex. S.B. 453, 75th Leg., R.S. (1997))).

C. Plaintiffs attempt to split the atom of statutory construction by arguing that preemption of city ordinances is always an affirmative defense, one that goes only to the substantive liability imposed by the lawsuit and not to the propriety of the proceeding in the first instance. *See* Carruth Resp. Merits Br. at 13-14. But preemption is not always an affirmative defense, and failing to consider the effect of the Local Government Code on a city ordinance simply ignores the Legislature's authority to preempt city ordinances and charters.

Preemption is treated as an affirmative defense when it does not address jurisdiction and determines only what legal standard will apply in a lawsuit. *E.g.*, *Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d 542, 546 (Tex. 1991) ("[W]here ERISA's preemptive effect would result only in a change of the applicable law, preemption is an affirmative defense.").[4] But the Court has counseled that, when

[4] For the proposition that preemption is always an affirmative defense, Carruth's brief cites an unsupported sentence from a dissent, without indicating that it was stated in dissent. Carruth Resp. Merits Br. at 13 & n.43 (citing *Stier v. Reading Bates Corp.*, 992 S.W.2d 423, 436 (Tex. 1999) (Baker, J., dissenting)).

preemption results in a change of forum or forecloses application of a state law entirely, it does not function as an affirmative defense. *Mills v. Warner Lambert Co.*, 157 S.W.3d 424, 427-28 (Tex. 2005) (holding that preemption is jurisdictional when it goes to the propriety of a forum).

Ultra vires analysis focuses on determining whether a counter-statutory act has been alleged. If the propriety of the defendant's actions in this case depends on the Plano city charter, it also necessarily depends on whether the provisions of the city charter are preempted by state law.

II. SECTION 213.003 OF THE LOCAL GOVERNMENT CODE PREEMPTS THE PLANO CITY CHARTER'S REFERENDUM PROCESS FOR COMPREHENSIVE PLAN ADOPTION.

The court of appeals's implication that the adoption of a comprehensive plan is somehow an optional activity, *see City of Plano*, 2017 WL 711656, at *1 (suggesting that a municipality "may adopt" a comprehensive plan), ignores that adoption of a comprehensive plan is required by state law. The court of appeals's judgment thus flouts the Court's procedural precedent and sidesteps the controlling power of legislative enactments. This approach is not only substantively wrong and practically unworkable, but it completely misunderstands the relationship of home rule cities to the Legislature in matters of state-wide regulation.

A. The Legislature has set adoption of a comprehensive plan as a condition for zoning of property within its boundaries. *See* TEX. LOC. GOV'T CODE § 211.004(a) ("Zoning regulations must be adopted in accordance with a comprehensive plan").

Plans are adopted or amended by ordinance following (1) a hearing and (2) review by the municipality's planning commission. *Id.* § 213.003.

A referendum under the Plano city charter to change or amend the comprehensive plan would be inconsistent with section 213.003, because it would allow the plan to be changed without a hearing or planning-commission input.

What does this mean for the State, and why did the Legislature both allow adoption of long-term planning and require that it be adopted in a certain manner? The requirement that zoning be carried out in compliance with a comprehensive plan stems from the Standard Zoning Enabling Act, a document designed to standardize the planning and zoning process across the country. Advisory Comm. on Zoning, U.S Dep't of Commerce, A Standard State Zoning Enabling Act (1926).[5] The Standard Act did not define the term "comprehensive plan," and only a few states, like Texas, have formalized the requirements for adopting a comprehensive plan in each municipality. *See* Edward J. Sullivan & Carrie Richter, *Out of the Chaos: Towards a National Sys. of Land-Use Procedures*, 34 Urb. Law. 449, 454-54 (Spring 2002). While the term is used as a common law test for zoning decisions in many states, *id.*, the requirement of such planning in Texas marks the Legislature's affirmative requirement that zoning be tied to such advance planning.

The planning requirement, then, is essential to the exercise of the zoning power in Texas. TEX. LOC. GOV'T CODE § 211.004 (a) ("Zoning regulations must be

[5] Available at https://www.gpo.gov/fdsys/pkg/GOVPUB-C13-18b3b6e632119b6d94779f558b9d3873/pdf/GOVPUB-C13-18b3b6e632119b6d94779f558b9d3873.pdf

adopted in accordance with a comprehensive plan . . . ."). It is also a limitation on the power of a municipality to exercise zoning favoritism. As the Court explained in *Thompson v. City of Palestine*, 510 S.W.2d 579, 582 (Tex. 1974), a primary purpose of the comprehensive plan requirement is to prevent so-called "spot zoning," where a favorable zoning entity grants special treatment to some property owners rather than others. A comprehensive plan creates a standardized system against which to measure such favoritism, which in turn promotes fairness in zoning and prevents local political leaders from exercising favoritism. *E.g.*, *City of Pharr v. Tippitt*, 616 S.W.2d 173, 176-77 (Tex. 1981).

The Legislature's interest in requiring a particular procedure for adopting such plans is clear: it is a mechanism for ensuring that landowners are entitled to the same procedural protections throughout the state. Indeed, by requiring that the plan be adopted at a public meeting, after review by the planning commission or department, TEX. LOC. GOV'T CODE § 213.003, the Legislature has mandated a particular mechanism by which property owners across the State can be involved in the adoption and amendment of these comprehensive plans. The requirement that the general plan be adopted in an open meeting is consistent with the idea that the adoption of a general comprehensive plan is necessary to establish fairness in zoning. If a city could, by amending its charter, make the process private, or use it to circumvent planning processes, then comprehensive plans could easily become a mechanism to favor particular landowners over others.

B. The parties have focused on the case law specifically addressing preemption of plans and zoning, *see* Henderson Petitioner's Merits Br. at 9 (citing *Glass v. Smith*,

244 S.W.2d 645, 649, 653 (Tex. 1951)). Under that standard, the Legislature's enactment of section 213.003's procedural requirements necessarily preempts the Plano city charter's procedural mechanisms for a referendum. Section 213.003 merely recognizes that a comprehensive land use plan requires significant expertise to implement and is the type of determination the Legislature has excluded from referendum, consistent with *Glass*.

But section 213.003 also preempts the referendum process for city comprehensive plans under the general principles by which the Texas Constitution provides for legislative enactments to preempt municipal regulation. While home rule cities look to the Legislature only for limitations on their power, such limitations need not be express, because no city enactment "shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." TEX. CONST. art. XI, § 5(a); *see BCCA Appeal Group, Inc. v. City of Houston*, 496 S.W.3d 1, 7-8 (Tex. 2016). City charter provisions and ordinances are "unenforceable" if inconsistent with a governing statute. *Id.* at 7 (citing *Dall. Merch.'s & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 490-91 (Tex. 1993)). The test is whether under any reasonable reading of the two provisions, both can be given effect. *Id.* (citing *City of Beaumont v. Fall*, 116 Tex. 314, 291 S.W. 202, 206 (1927)). The entry of the State into an area of regulation does not automatically preempt that field; local action is meant to be in harmony with state enactments. *City of Brookside Vill. v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982).

Preemption of municipal law can be express or implied. *Lower Colo. River Auth. v. City of San Marcos*, 523 S.W.2d 641, 645 (Tex. 1975). Preemption by implication

must be based on statutory text, which must in turn state with "unmistakable clarity" that the contrary municipal action is foreclosed. *BCCA*, 496 S.W.3d at 7-8 (citing *Dall. Merch.'s & Concessionare's Ass'n*, 852 S.W.2d at 491).

In authorizing the adoption of comprehensive city plans, the Legislature provided that any modification of the plan had to be achieved through a hearing with public input and a review by the city planning department, if one exists. TEX. LOC. GOV'T CODE § 213.003(a). This enactment both creates the possibility of enacting a comprehensive plan and states with the requisite 'unmistakable clarity' the means by which public and professional input will be given in adopting and changing the plans. The referendum process is manifestly at odds with the procedural requirement of section 213.003, because it does require a hearing and review by the planning department before action is taken on a comprehensive plan. The referendum procedure is, therefore, preempted in this context: the two procedures cannot both apply to comprehensive plans without the specific provisions of section 213.003 being rendered meaningless.

Home rule cities are subject to the preemptive power of the Legislature's enactments, regardless of whether those enactments are procedural or substantive. Its power to attach particular procedural requirements to a particular type of determination must be respected by the courts. After all, the Local Government Code by itself both authorizes (and for at least some purposes requires) local governments to adopt comprehensive plans. A city charter could not deprive a city of the authority to do what the Local Government Code commands. Likewise, a municipal charter should not be treated as providing an alternative procedural

mechanism when a specific procedure has been attached to a statutory grant of authority to municipalities made by the Legislature. City charters are not a mechanism for opting out of statutory requirements.

III. THE COURT SHOULD GRANT BOTH REHEARING AND THE PETITION.

This case is not merely about a political dispute in the City of Plano; it is about the Legislature's power to specify substantive and procedural requirements that preempt municipal ordinances and the procedural mechanisms for vindicating the Legislature's policy choices. In this case, the provision of specific procedural mechanisms for adopting comprehensive zoning plans was designed to balance the need for democratic involvement in the planning process with the requirement that plans be drawn by experts in such a way that they can be effectively used to implement future zoning decisions. Because the core function of comprehensive plans is to promote fairness in specific zoning provisions, the Legislature had ample reason to specify the process for adopting plans. The court of appeals's failure to consider the application of section 13.003 to the referendum proceedings was, in essence, a failure to follow the Legislature's express instructions. In granting this case, the Court can disabuse cities of the notion that their charters provide a mechanism for avoiding legislative oversight.

Moreover, a grant in this case would prevent conflict between city charters and legislative enactments from being sidestepped by a court of appeals reluctant to apply statutory law. By focusing narrowly on the lack of precedent requiring the construction of city charters, the court of appeals sidestepped ample substantive law and even two mandamus opinions from this court analyzing the issue of statutory preemption

of the procedural requirements of city charters. A court of appeals should not decline to apply the superior requirements of state law when necessary to resolve the question of a local government's immunity from suit.

Prayer

The Court should grant rehearing and the petition and render judgment dismissing plaintiffs' lawsuit.

Respectfully submitted.

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Certificate of Compliance

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