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SUPREME COURT OF TEXAS
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No. 24-0102

In the
SUPREME COURT OF TEXAS

JPMorgan Chase Bank, N.A.

Petitioner,

v.

City of Corsicana and Navarro County,

Respondents.

On Review from the Court of Appeals
for the Tenth District of Texas

PETITIONER'S REPLY BRIEF ON THE MERITS

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* Consistent with Petitioner's Brief on the Merits, the underlying opinion from the court of appeals will be cited in this brief as "Op." with pinpoint citations to the page number(s) in the published opinion in the South Western Reporter.

Statutes and Constitutional Provisions

Other Authorities

INTRODUCTION

Twelve years after the fact, and with the benefit of 20/20 hindsight, City and County officials second-guessed the deal they struck in 2004. But the question for this Court is not whether the City and County made a "good" deal. Rather, the question is whether the deal they struck is unconstitutional.

The unequivocal answer to that question is "no." Article III, section 52-a, of the Texas Constitution, as well as chapters 380 and 381 of the Local Government Code, expressly authorize economic-development agreements like the ones here. And tellingly, neither the City's and County's 73-page brief, nor the opinion below, nor the trial court's declaratory judgment identifies a single constitutional provision that was supposedly violated. (*See* Br. at 1-73; Op. at 171-86; Supp.CR.18-21) None exists. Section 52-a controls, and it dictates that the Agreements here were constitutional and enforceable.

In an effort to create the illusion that a constitutional violation exists, the City and County try to perpetuate the fiction that the public purpose of the grant was for the "continuous operation" of a Gander Mountain store. But notwithstanding their transparent efforts to rewrite the Agreements years after the fact, the City and County are mistaken. And that mistake infects their entire *TML* "analysis," which

is completely unmoored from the public purpose actually stated in the Agreements—to facilitate the development of a retail center.

In other respects, the City and County, as well as amici the Texas Public Policy Foundation and Goldwater Institute, make factual assertions and arguments that are divorced from reality, untethered to the summary judgment record, and not supported by Texas law or the plain language of the Agreements, resolutions, constitutional provisions, and statutes at issue. For example:

- The City and County equate themselves to "prisoner[s]" who had "little choice but to offer a subsidy" to Gander Mountain and repeatedly suggest—without proof—that their payment obligations were somehow foisted upon them. (Br. at 32, 70; *see id.* at 13, 24, 41-42, 53) The record, however, shows the opposite: the City and County voluntarily offered a sales tax incentive package to—in their own words—"entice" Gander Mountain to construct a store in Corsicana. (Br. at 59; *see* 2.CR.325, 338, 339; 5.CR.878-89, 884-85, 910) And ultimately, at least eight City and County officials and attorneys signed off on a grant to the Foundation and "determined it is in the public interest to promote the economic development of the Gander Mountain Facility." (*See* 2.CR.325-27, 338, 339-48, 350-67; 5.CR.910, 924, 925)

- The City, County, and amici pretend that the construction of a new retail facility provides no economic benefit to the public. (*See* Br. at 51; Amicus Br. at 19-23) And amici analogize this grant to a city gifting a Ferrari to a prominent citizen or providing chicken salad to a governor. (*See* Amicus Br. at 20-23) But under these inapt examples, the recipient does not provide any consideration or benefit in return for the gift. And there is no conceivable circumstance under which such gifts promote economic development. In contrast, the grant here required the Foundation to, among other acts, build a new retail facility. (2.CR.326, 340, 351-53) That facility benefits the City and County by generating property taxes

> regardless of occupancy. (5.CR.882); *see* TEX. CONST. art. VIII, § 1(b) ("All real property . . . shall be taxed in proportion to its value."). And the record shows that the construction of the facility and the surrounding development it attracted provided (and continue to provide) additional economic benefits for the public. (4.CR.793, 822-23, 833-35; 5.CR.881-82)

If anything, the amici's appearance merely underscores the importance of this case to Texas jurisprudence.[1]

In the final analysis, the facts of this case are straightforward; the errors of the courts below are undeniable; and the consequences of denying review or affirming the lower courts' rulings are disastrous for business development in Texas. Further review and reversal of the judgment below is necessary to settle the law, uphold the continuing validity of economic-development agreements, and prevent governmental units from being able to evade their obligations so capriciously.

ARGUMENT

The courts below are the first courts in the history of Texas jurisprudence to void a section 52-a economic-development agreement by relying on the *TML* test adopted in an entirely different context—*i.e.*, to determine whether a statute satisfies

[1] Amici largely ignore the facts of *this* case. Instead, they devote much of their brief to discussing legislative debates about railroads in the 1800s and the Packery Channel project in Corpus Christi that began in the 1990s. (*See* Amicus Br. at 6-16) That discussion is ultimately irrelevant. This Court is not being asked to weigh in on any public policy debate regarding the wisdom of economic-development projects. Rather, the issue for the Court is whether such projects are constitutional.

section 52(a). And the courts then compounded that error by (1) allowing the City and County to retroactively and unilaterally rewrite their economic-development agreements, and (2) then misapplying the *TML* test to those fictitious agreements.

I. *TML* does not apply to section 52-a economic-development grants.

The City and County hyperbolically contend that (1) "the legal community" and "every existing legal authority" agree that *TML* applies to section 52-a economic-development grants, and (2) "the *TML* test has been entrenched for decades as the test governing economic-development transactions in Texas." (Br. at 23, 29, 41; *see id.* at 33) But notably, the City and County cite no court that has ever applied *TML* to a section 52-a economic-development grant.[2] Until the opinion below, no such case existed.

Instead, the City and County rely entirely on (1) so-called "legal thinkers" whose work has never been cited by any court, and (2) one initial (and conclusory) Attorney General opinion—Tex. Att'y Gen. Op. No. JM-1255 (1990)—that mentions "sufficient controls" without analysis, was subsequently parroted

[2] Contrary to the City's and County's erroneous suggestion, neither *Ex parte City of Irving*, 343 S.W.3d 850 (Tex. App.—Dallas 2011, orig. proceeding), nor *Borgelt v. Austin Firefighters Ass'n, IAFF Local 975*, 684 S.W.3d 829 (Tex. App.—Austin 2022), *aff'd in part and rev'd in part*, 692 S.W.3d 288 (Tex. 2024), addresses *TML*'s applicability to section 52-a grants. (*See* Br. at 41 n.16)

(without scrutiny) by other AG opinions, and decided twelve years before *TML*. (*See* Br. at 34-35)

But AG opinions are "not controlling." *Holmes v. Morales*, 924 S.W.2d 920, 924 (Tex. 1996).[3] And although the City and County found three practitioners who assume *TML* governs section 52-a grants, those private practitioners cite nothing to support their *ipse dixit* view. (*See* Br. at 35 & App'x tabs 1-3) This Court—not three practicing attorneys—should decide this important issue of first impression.

That is particularly true here because section 52-a's plain text explicitly authorizes grants of public money for economic development purposes "[*n*]*otwithstanding* any other provision of this constitution." TEX. CONST. art. III, § 52-a (emphasis added). Rather than address this plain text, the City and County offer a superficial response heavy on witticisms, but light on substance.

For example, they inexplicably contend that Chase's textual argument is "atextual" and "misunderstands the text of Section 52-a." (Br. at 23, 37) They then chide Chase for reading the Texas Constitution and "discover[ing]" a

[3] The City's and County's reliance on a handful of conclusory AG opinions is particularly misplaced. Three of the cited opinions—Tex. Att'y Gen. Op. Nos. JC-0439 (2001), GA-0033 (2003), and KP-0091 (2016)—have nothing to do with section 52-a or economic-development grants. And five of the cited AG opinions never mention *TML*. *See* Tex. Att'y Gen. Op. Nos. JM-1255 (1990), DM-185 (1992), LO-96035 (1996), JC-0439 (2001), GA-0033(2003).

"notwithstanding" clause "missed by decades of legal thinkers." (Br. at 37) Yet this Court has repeatedly recognized the legal basis for Chase's argument—*i.e.*, a provision containing a "notwithstanding" clause controls. *See In re Lee*, 411 S.W.3d 445, 454 (Tex. 2013) ("The use of the word 'notwithstanding' [in section 153.0071 of the Texas Family Code] indicates that the Legislature intended section 153.0071 to be controlling."); *Molinet v. Kimbrell*, 356 S.W.3d 407, 413-14 (Tex. 2011) (a "notwithstanding any other law" provision evidenced "clear legislative intent" to resolve any interpretation conflicts in favor of the "controlling" statute containing the provision). The City and County ignore this well-settled legal principle and these authorities.

Instead, the City and County raise a false issue when they suggest that Chase's reading of section 52-a would allow the government to award economic-development agreements "based on race or religion" in violation of other constitutional provisions. (Br. at 39) The City and County are mistaken.

The "notwithstanding" clause in section 52-a makes clear that section 52-a controls over "*otherwise-conflicting*" constitutional provisions like the Gift Clauses. *See Molinet*, 356 S.W.3d at 413 (emphasis added). It does not "nullify" or "render meaningless" other non-conflicting Texas constitutional provisions prohibiting racial or religious discrimination. *See IHR Sec., LLC v. Innovative Bus. Software, Inc.*,

441 S.W.3d 474, 479-80 (Tex. App.—El Paso 2014, no pet.) (a provision including a "notwithstanding" clause "take[s] precedence over any other conflicting term" and does not "nullify other provisions").[4]

In nonetheless arguing that *TML* applies to section 52-a economic development grants, the City and County also fail to acknowledge—let alone appreciate—the critical distinction between section 52-a and section 52(a). Like the other "Gift Clauses," section 52(a) generally *prohibits* payments of public money to individuals or corporations. TEX. CONST. art. III, § 52(a); *see id.* art. III, § 51; *id.* art. XI, § 3. In stark contrast, section 52-a expressly *authorizes* programs that grant public money for economic development. *See id.* art. III, § 52-a ("the legislature may provide for the creation of programs and the making of loans and grants of public money . . . for the public purpose of development and diversification of the economy of the state"). And section 52-a permits such programs "[n]otwithstanding any other provision of this constitution." *Id.*

Instead of focusing on section 52-a, the City, County, and amici provide an irrelevant history lesson regarding the "abuse[s]" that led to the 1876 enactment of

[4] Amici further confuses the issue when they argue that section 52-a does not "repeal" the Gift Clause. (Amicus Br. at 23-27) Contrary to amici's suggestion, Chase has never so argued. Rather, Chase is merely pointing out that the section 52(a) Gift Clause does not apply here in light of section 52-a's plain language.

section 52. (*See* Br. at 30-33; Amicus Br. at 4-11) They do not provide a similar discourse regarding the reasons for the 1987 enactment of section 52-a. Rather, they pay mere lip service to section 52-a by conflating it with other constitutional "Gift Clause" provisions that do not govern this case.

Further, the City and County concede that "economic development is a public purpose under the first prong of the *TML* test." (Br. at 39) But this just proves Chase's point: it makes no sense to apply the three-prong *TML* test to a section 52-a grant when the Texas Constitution and chapters 380 and 381 of the Local Government Code already affirm that the development here serves a public purpose and satisfies the first prong. (*See* Pet.'s Br. at 42-43)

Finally, the City and County are simply wrong when they insinuate that *In re State*, No. 24-0325, 2024 WL 2983176 (Tex. June 14, 2024), supports their contention that *TML* applies to section 52-a economic development grants. (*See* Br. at 39-40 & n.14) That case did not involve a conventional section 52-a grant.

Rather, it concerns the "Uplift Harris program" whereby Harris County intended to "provide no-strings-attached $500 monthly cash payments to 1,928 Harris County residents" chosen by lottery. *In re State*, 2024 WL 2983176, at *1. In granting the State's motion for temporary relief to stay those gratuitous payments, the Court concluded the State had "raised serious doubt about the constitutionality

of the Uplift Harris program"—specifically, whether the program "can satisfy the 'public control' requirement of this Court's Gift Clause precedent" under section 52(a). *Id.* at *3-4.

In so concluding, the Court never stated or implied that *TML* applies to a section 52-a grant. Nor was the Court "skeptical" of the position Chase advances here. (Br. at 39) Instead, the Court was "skeptical" of the County's *alternative* argument that the Uplift Harris program qualifies as "economic development" authorized by section 52-a and that "a program of unmonitored, 'no strings attached' cash payments to individuals serves 'the public purposes of development and diversification of the economy of the state' as envisioned by section 52-a." *In re State*, 2024 WL 2983176, at *4.

Further, far from undermining Chase's position, the Court remarked that "section 52-a removed doubt about the constitutionality of conventional economic-development grants, by which governments promote business growth." *Id.* By nullifying the economic-development agreements here years after the fact, the courts below reinjected that doubt.

This Court should grant review to determine if the *TML* test applies to section 52-a economic-development grants and hold that it does not and that such grants are constitutional and contractually enforceable.

II. Even if *TML* applies, the grant here easily satisfied it.

Contrary to the City's and County's assertion, Chase need not "do away with the *TML* test if it has any hope of prevailing." (Br. at 37) Even if *TML* applies to a section 52-a grant, it makes absolutely no difference in this case because the grant here easily satisfied that test. *See Borgelt v. Austin Firefighters Ass'n, IAFF Local 975*, 692 S.W.3d 288, 301 (Tex. 2024) (clarifying when a challenged expenditure satisfies section 52(a)'s Gift Clause and *TML*).

A court should "presume" that legislative bodies intend their acts to be constitutional and to "advance a public rather than a private interest." *Id.* The "burden" is thus on the party attacking the expenditure to "show that it is unconstitutional." *Id.* The City and County did not satisfy that burden—much less do so conclusively as required to be entitled to summary judgment.

The City and County acknowledge that, as a "*starting place*," *TML* requires that "the government articulate a public purpose." (Br. at 38, emphasis added) The *TML* test then asks "whether the transaction's predominant objective is to accomplish *that* public purpose" and "whether the government retains control over the funds to ensure *that* purpose is accomplished." (*Id.*, emphasis added) The courts below failed to faithfully apply that test.

Instead, at the City's and County's urging, the courts went astray by (1) disregarding the public purpose *actually* articulated by the government in entering the Agreements, and (2) then determining whether the transaction was structured to ensure that a *different* public purpose—as reformulated by the City, County, and courts years later—would be accomplished.

A. The courts below disregarded the public purpose *actually* articulated by the government in entering the Agreements.

Notwithstanding the revisionist history of the City, County, and courts below, the grant here was specifically "limited to the *construction* of real property." (3.CR.326, 340, emphasis added) And the City and County plainly articulated the purpose of the grant in the Agreements: to "facilitate the *development* of the Retail Center." (2.CR.325, 339; *see* 2.CR.338, 250-54) The City and County repeatedly concede as much in their brief:

- "[T]he '*purpose*' of the economic development agreement was to entice Gander Mountain to *build* a store in Corsicana." (Br. at 59, emphasis added)
- "The City and County devote tax dollars for the *construction* of a Gander Mountain Facility." (Br. at 10, emphasis added; *see id.* at 11)
- The incentives were "limited to the *construction* of real property." (Br. at 12 n.3, 59 n.28, emphasis added)
- The "purpose" of the Interlocal Agreement was to "*develop* a retail facility." (Br. at 14 n.4)

But in the face of those concessions and the plain contractual language, the court of appeals impermissibly rewrote that purpose and the Agreements by holding the public purpose of the grant was for the "*continued operation* of the Gander Mountain store." (Op. at 182, emphasis added) Nothing supports that holding.

Far from tying the grant to the "continued operation" of Gander Mountain, the Agreements and Lease provide the precise opposite. First, the City, County, and Foundation *mutually agreed* to delete a draft contractual clause under which the RCDAs would terminate upon "cessation of operations of Gander Mountain" in Corsicana. (*Compare* 2.CR.330 *with* 2.CR.327; *see* Pet.'s Br. at 23)

Despite their agreement, the City and County now try to portray themselves as victims by creating the false illusion that Chase, Gander Mountain, and the Foundation "insisted" on removing the continuous-operation clause in the Agreements. (Br. at 13, 24, 41-42, 53-54; *see id.* at 11 n.2 [defining "Petitioners"]) But there is no summary judgment evidence—and the City and County cite none—as to why that clause was changed, who asked it to be removed, or the negotiations surrounding that particular clause.

Moreover, Chase and Gander Mountain are not parties to the RCDAs. (*See* 2.CR.325-27, 339-42)[5] And the contracting parties agreed the contractual terms were "jointly drafted by the parties." (2.CR.356)

Second, and consistent with the RCDAs, the Lease unequivocally confirmed Gander Mountain was "not required to continuously operate the Premises" throughout the 20-year lease term. (2.CR.383) The City and County acknowledge this contractual language. (Br. at 15, 50, 53-54) But in the next breath, they attempt to disclaim knowledge of the Lease by asserting they "were not parties to" the Lease, did not "negotiat[e]" it, and supposedly were "unaware of its existence" until Gander Mountain's closure in 2015. (Br. at 16, 54 n.23; 2.CR.428, 436)

The City's and County's assertion is factually erroneous and legally irrelevant. Notwithstanding their claimed ignorance,[6] the Interlocal Agreement approved and signed by City and County officials in 2004 explicitly references the Lease at least six times (including in a handwritten addition) and is tied to its terms. (*See* 2.CR.350-60; *see also* 3.CR.356 ["This [Interlocal] Agreement shall remain in

[5] Chase was not even involved as a lender until refinancing the permanent construction loan in October 2005 (4.CR.652-722; 5.CR.880)—more than a year after the Agreements were negotiated and signed (*see* 2.CR.325-27, 339-42, 350-60).

[6] Even if this Court could disregard the contrary summary judgment evidence in favor of the nonmovants, the City, at best, merely showed that *one* city official was "unaware" of the Lease until 2015. (2.CR.428)

full force and effect until the latter to occur of (a) the expiration or termination of the Lease, or (b) the full and final payment of all principal and interest on the Loan."]; 5.CR.924-25) Moreover, section 1 of the Interlocal Agreement "incorporate[s]" the Lease and other recitals by reference. (2.CR.350-52)

Even if those officials never reviewed the Lease, the City and County were legally presumed to know the contents of the Lease "explicitly referenced" in the Interlocal Agreement. *Gray & Co. Realtors, Inc. v. Atl. Housing Found., Inc.*, 228 S.W.3d 431, 436 (Tex. App.—Dallas 2007, no pet.). That is particularly true where, as here, "reference to [the Lease] is necessary to determine some terms of the [Interlocal Agreement]." *LDF Constr., Inc. v. Tex. Friends of Chabad Lubavitch, Inc.*, 459 S.W.3d 720, 728 (Tex. App.—Houston [14th Dist.] 2015, no pet.).[7]

Third and finally, the notion that the purpose of the Agreements was to have a Gander Mountain store continuously operating for the duration of the grant is further belied by section 13 of the Interlocal Agreement. In that section, the City and County contemplated changing circumstances by granting Gander Mountain the

[7] The City and County similarly complain that the Foundation and Chase refinanced the loan "without [the City's and County's] knowledge" and "on terms they had no control over." (Br. at 51) Yet that is precisely what the City and County agreed to in the Interlocal Agreement: "the Foundation is also obligated to obtain a permanent loan . . . to refinance the Construction Loan on terms mutually acceptable to the Foundation and Gander Mountain." (2.CR.352) In so agreeing, the City and County tacitly consented to and approved the loan.

ability to assign the Interlocal Agreement (and its interest in the Lease) to a third party. (2.CR.355) This further shows that neither the Agreements nor the City's and County's economic-development objectives were tied to the continuous operation of a Gander Mountain store.

The City and County ignore these indisputable facts; they disregard the plain language of the Agreements and Lease; and they miss the point of Chase's freedom-of-contract argument. (*See* Br. at 66-70) Chase has never suggested that governments and private parties can freely contract around any applicable constitutional constraints. Rather, Chase is merely arguing that, in reviewing an agreement to determine its constitutional compliance, a court must review the agreement *as written*.

A court cannot ignore freedom-of-contract principles, "judicially writ[e] back into the contract" a clause the parties "specifically removed" during negotiations (Op. at 186 (dissent)), and alter the public purpose of the grant after the fact. Yet, that is precisely what the courts below did.

To allow courts to unabashedly (and retroactively) redraft economic development agreements will chill Texas's economic-development regime. (*See* Pet.'s Br. at 18-21) This is no "false alarm[]." (Br. at 28) Indeed, businesses and lenders will be reticent to enter into economic-development agreements with cities

and counties in Texas when—at those same governmental entities' urging—a court could rewrite those agreements years later. And, at the very least, "*all* local governments will have to pay more for a contract if *some* of them can renege." *City of League City v. Jimmy Changas, Inc.*, 670 S.W.3d 494, 514 n.11 (Tex. 2023) (Young, J., concurring) (emphasis in original).

B. The closure of Gander Mountain did not extinguish the public purpose of the grant.

When viewed under the proper lens based on the grant's *actual* public purpose—instead of the *reformulated* purpose concocted below—nothing supports the rulings of the courts below that the public purpose of the 2004 grant was "extinguished" and no longer "being served" when Gander Mountain closed its store in 2015. (Supp.CR.19; Op. at 183, 185; *see also* Br. at 71-72 & n.36 [arguing that the public purpose "ceased" upon that closure])

Far from ceasing, the actual public purpose—the development and construction of a new retail facility—was fully achieved in 2004. The Foundation—with the assistance of a $10 million loan required by the City and County (2.CR.351-52)—built a new retail facility. (5.CR.880, 980) That facility attracted other businesses to the 132-acre business park. (5.CR.881) And the City and County received additional property taxes, as well as permanent infrastructure, jobs, and

other economic benefits, from both the new retail facility and the surrounding development. (4.CR.793, 822-23, 833-35; 5.CR.881-82)

1. The City and County continue to benefit from the development.

Although not germane to the analysis, the City and County are also wrong when they contend that the public purpose and any economic benefit from the grant "ceased" in 2015 when Gander Mountain stopped operating. (Br. at 71-72 & n.36) Even though Gander Mountain closed its store after eleven years, the City and County *continue* to benefit economically from the development of that retail facility.

For example, they continue to collect property taxes from the Gander Mountain store. (5.CR.882) They also benefit from the sales taxes, property taxes, and jobs generated by the surrounding development the Gander Mountain store helped attract. (4.CR.793, 822-23, 833-35; 5.CR.881) And a new tenant (Fun Town RV) now occupies the former Gander Mountain store and further contributes to the region's economic development. (*See* Pet.'s Br. at 60 n.19)

Even if the economic benefits to the City and County have changed over time—and there is no summary judgment evidence they have—it makes no difference. Under *TML*, there need be "only sufficient—not equal—return consideration to render a political subdivision's paying public funds constitutional." *Borgelt*, 692 S.W.3d at 301. The City and County received sufficient return

consideration at the outset of the grant when the facility was constructed and opened in August 2004. (4.CR.880, 980) Indeed, they received *all* the consideration for which they bargained and continue to receive benefits today.

In the absence of an agreement providing otherwise, nothing in *TML* allows the City or County to unilaterally dictate after the fact that the grant generate some unspecified quantum of economic benefit on an annual basis. (*See* Br. at 61) Nor does it permit the government to nullify an economic-development agreement if it arbitrarily determines that the economic benefits are no longer satisfactory.

In a misguided attempt to justify their 2016 resolutions proclaiming that the "public purpose no longer exists" and was "extinguished" (2.CR.418-25), the City and County now take an extremely narrow view of "economic development" by erroneously assuming it requires the continuous operation of a particular retail store. (Br. at 53; *see* Br. at 18-20, 24-25, 59) But economic development can take many forms and have different objectives. For example, a city's goal may be to create jobs. It may wish to generate additional sales taxes. Or it may seek to increase its property tax base and spur additional property development.

In this case, the City and County were principally interested in the latter. They therefore proposed, negotiated, and signed agreements to achieve that public purpose and ensure it was fulfilled.

Under these circumstances, the courts below were not free to engage in revisionist history, alter the public purpose of the grant and contractual terms years after the fact, and retroactively void the Agreements based on the City's and County's unilateral (and self-interested) resolutions in 2016.

2. The City's and County's 2016 determination that the public purpose ceased is not entitled to deference.

The City and County are likewise mistaken when they argue that their 2016 "determination that the public purpose ceased is entitled to deference." (Br. at 71)

The City and County correctly determined that the Agreements served a public purpose when they signed them in 2004 because they "realize[d] the economic advantages for development of a retail center on the 132 acre business park." (2.CR.325, 338-39; 5.CR.910; *see* 2.CR.352) And they admit this initial determination is "entitled to deference." (Br. at 73); *see Davis v. City of Taylor*, 67 S.W.2d 1033, 1034 (Tex. 1934).

Yet, they also contend that their self-serving determination twelve years later in 2016 that the public purpose "ceased" somehow "carr[ies] the same weight" as their 2004 determination and is likewise "entitled to deference." (Br. at 73) But not surprisingly, the City and County cite no authority for this proposition. None exists and for good reason: affording equal levels of deference to inconsistent determinations renders the concept of deference meaningless.

Moreover, it is not the law. As this Court has long recognized, "[f]ixedness of responsibility is a necessity in government," and if government officers could "declare void and refuse to enforce and to comply with a contract that has been duly and officially approved" then "chaos in government would soon reign." *Charles Scribner's Sons v. Marrs*, 262 S.W. 722, 728 (Tex. 1924). For this reason, "once [a governmental entity] exercises its discretion to enter into a valid and enforceable contract, it no longer has unfettered 'legislative discretion' to decide what its obligations are and how it will perform those obligations." *Clear Lake City Water Auth. v. Kirby Lake Dev., Ltd.*, 123 S.W.3d 735, 751 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).[8]

Further, under Texas law, whether a particular expenditure of public funds serves a public purpose is an issue for the governmental body to resolve "in the first instance." Tex. Att'y Gen. Op. Nos. KP-0091 (2016), GA-0843 (2011), JC-0239 (2000), DM-317 (1995). Critically, such determination is "generally made *at the time the contract is entered into.*" Tex. Att'y Gen. Op. No. KP-0099 (2016) (emphasis added). It is therefore "unlikely that a court would consider conduct *subsequent* to

[8] Even the amici recognize the fundamental unfairness of the City's and County's actions here. (*See* Amicus Br. at 4 [recognizing the "intuitive appeal to the idea that it is unfair for [the Foundation] to not receive the payments it expected to get under the Agreement"]; *id.* at 28 [same]; *id.* at 30 ["it may seem unfair to deprive [the Foundation] of the payment it expected"])

the contract's execution" in "determining whether the contract itself violates article III, section 52(a)." *Id.* (emphasis added).

Thus, once the City and County determined in 2004 that the Agreements served a public purpose, were "in the public interest," and officially approved those Agreements (*see* 2.CR.325-27, 338, 339-42, 350-60; 5.CR.910, 924-25), they necessarily lost the ability to later change their minds about the purpose of those Agreements. The City's and County's argument to the contrary reflects a troublingly expansive view of governmental power and invites the "chaos" this Court aptly foresaw over a century ago. It also would permit a city or county to impair vested contractual rights with impunity depending on the way the political winds are blowing. (*See* Pet.'s Br. at 57-58) The Court should not endorse this troublingly expansive view of governmental power.

C. The Agreements contained controls sufficient to ensure the grant's actual public purpose was accomplished.

Rather than defend the indefensible—*i.e.*, the brazen rewriting of the Agreements—the City and County focus principally on *TML*'s sufficient-control prong to argue the Agreements lack adequate controls. (Br. at 42-61) But once again, that argument is based on the false premise that the public purpose of the grant was for the "continuous operation" of the Gander Mountain store.

If the courts below had faithfully applied the *TML* test to the grant's *actual* public purpose—the development and construction of a retail facility—they would have concluded that the Agreements contain controls sufficient to ensure that actual stated purpose was achieved.

In arguing otherwise, the City and County myopically (and repeatedly) focus on one contractual clause that their payment obligations were "absolute and unconditional." (Br. at 10, 12, 22, 50, 52, 54, 56, 61, 70; *see* 2.CR.325, 340) But as this Court recently reiterated, "[t]he Gift Clause does not supplant the basic contract-law principle" that a court should "not read contractual phrases in isolation." *Borgelt*, 692 S.W.3d at 302.

Notwithstanding the isolated clause the City and County emphasize, they did not have to "hope or predict" their grant would achieve a public purpose. (Br. at 43) Indeed, the Agreements contain numerous controls (and the transaction was structured) to "ensure" the grant's stated purpose—to facilitate the development and construction of a retail center—was "achieved." (*Id.*) For example, the Agreements required the Foundation to:

- obtain a $10 million construction loan;
- use the loan and grant "solely" for "the construction of real property" and to repay the construction debt;

- "complet[e] and open[]" a Gander Mountain store *before* the City and County were obligated to fund their grant; and
- provide regular written reports documenting its use of the loan and grant, as well as the status of construction.

(2.CR.325-26, 339-41, 350-54; *see* Pet.'s Br. at 61-66)

Most importantly, and contrary to the City's and County's false assertion that the Agreements "don't require Gander Mountain to open" (Br. at 50; *see also id.* at 10, 13, 52), the Agreements allowed the City and County to retain complete control over the funds *until* the stated public purpose of the grant—the development of a new retail facility (2.CR.325, 339)—was achieved. Specifically, section 7 of the Interlocal Agreement provides that the City's and County's payment obligation would commence "following the completion and opening of Gander Mountain." (2.CR.353)

As the court of appeals thus correctly recognized, "[i]f Gander Mountain had never opened, [the City and County] would not have been required to contribute to the sales tax fund at all." (Op. at 182; *see also* Op. at 186-87 (dissent) ["[T]he City and County maintained absolute control over the use of the funds by making sure they were used only for a single purpose, repayment of the debt incurred to build the building that draws the businesses which generate and pay the sales tax."])

Further, because the grant's stated public purpose already had been achieved when the grant payments commenced, other possible controls (*e.g.*, clawbacks, recapture provisions, performance indexes, or performance metrics) that may make sense or be present in other agreements requiring ongoing performance were wholly unnecessary here. (*See* Br. at 23, 35-36, 48-51)[9] In any event, this Court should decline the City's and County's invitation to transform other potential controls suggested in "CLE courses," "handbooks," and "guides" into inexorable constitutional mandates. (Br. at 23; *see id.* at 48-51; *see also* Pet.'s Br. at 65-66)

1. The controls satisfy *TML*.

Instead of focusing on the extensive controls in the Agreements, the City and County hyperbolically assert that "the Agreements contained *fewer* than no controls." (Br. at 51, emphasis in original) But as the City's and County's own authorities confirm, the controls here easily satisfy *TML*. *See* Tex. Att'y Gen. Op. No. KP-0091 (2016) ("a contractual agreement outlining requirements that the receiving entity must comply with in exchange for the funds may provide sufficient

[9] For example, the City and County confusingly rely on tax abatement agreements that "provide for recapturing property tax revenue lost . . . if the owner of the property fails to make the improvements or repairs as provided by the agreement." TEX. TAX CODE § 312.205(4); *see* Br. at 68-69. In this case, no such recapturing provision was necessary because the Agreements provided that the sales tax grant would not begin until the Foundation completed the improvements (*i.e.*, constructed a new retail facility). (2.CR.353)

control over the funds"); Tex. Att'y Gen. Op. No. KP-0435 (2023) (an agreement "provid[ing] for an 'annual accounting' of the funds" may be used to "satisfy" *TML*'s control prong); TEXAS MUNICIPAL LEAGUE ECONOMIC DEVELOPMENT HANDBOOK 148 (Amber McKeon-Mueller ed., 2022) (suggesting a city enter into a "binding contract" outlining what steps the business will take to justify public funding—*e.g.*, "construction or enhancement of the physical facilities").

Rather than address those authorities, the City and County argue that "the control prong requires mechanisms to compel [or] cancel" performance if the business "does not fulfill its promises." (Br. at 43, 48; *see id.* at 35, 49-50) But the Foundation did fulfill all its promises and achieve the public purpose of the grant. (*See* 2.CR.325-27, 339-42, 350-60) And as discussed above, the Foundation did so *before* the City and County were obligated to fund the grant.

In short, the controls (even if necessary) worked here. The City and County do not argue otherwise. Instead, they engage in a meaningless sufficient-controls analysis that is untethered to the grant's actual public purpose. Review and reversal are needed to prevent local governments from rewriting and nullifying their own agreements years after the fact.

2. The five examples the City and County use to illustrate the control test are inapposite.

The City and County highlight five examples—a seawall, candlelight tour, ambulance services, *Jimmy Changas*, and a museum—in a misguided effort to "illustrate the control test." (*See* Br. at 43-47, 55 n.24) Those five examples are inapposite and further illustrate the fallacy of their position.

Seawall. The City and County cite Tex. Att'y Gen. Op. No. GA-0528 (2007) as an exemplar of the controls necessary to satisfy *TML*. But that opinion had nothing to do with economic development. The city there wanted to fund a seawall on private property to "protect the City's territory and prevent soil erosion." *Id.*

The public purpose was thus based on future benefits that had not yet been achieved and that the "enduring seawall" would provide. Under those circumstances, the AG opined that to comply with section 52(a), "the City must first acquire a sufficient interest in the real property where the seawall will be built to prevent land owners from altering or removing it" and thereby "ensure that the public purpose is accomplished." *Id.*

Unlike a seawall needed for future protection, the public purpose here was "to facilitate the development of the Retail Center." (2.CR.327, 338, 339; 5.CR.910) The retail center was built and developed before the City and County were obligated to contribute a single dollar to the Foundation. (5.CR.880, 980; *see* 2.CR.353) There

was thus no need for the City and County to acquire an interest in the Retail Center to "ensure that the public purpose is accomplished." Tex. Att'y Gen. Op. No. GA-0528 (2007).

Candlelight tours. The City's and County's reliance on *Key v. Commissioners Court of Marion County*, 727 S.W.2d 667 (Tex. App.—Texarkana 1987, no writ)—another case that does not involve an economic-development program—is also misplaced. The county there gratuitously transferred control of a "Christmas Candlelight Tour" to a non-profit corporation without "consideration [being] exchanged." *Id.* at 668. A citizen filed suit to rescind the transfer based on article section 52(a). *Id.* The trial court granted summary judgment in the county's favor. *Id.*

The court of appeals reversed because the record "raise[d] an issue of material fact of whether the projects were things of value" and thus whether section 52(a) prohibited the transfer. *Id.* at 669; *see* TEX. CONST. art. III, § 52(a) ("the Legislature shall have no power to authorize any county [or] city . . . to grant public money or *thing of value* in aid of, or to any individual, association or corporation whatsoever.") (emphasis added).

The court also rejected the county's argument that "a 'public purpose' exception should be read into the cited constitutional articles." *Key*, 727 S.W.2d at 669. In so rejecting, the court distinguished the cases on which the county relied because those cases "involve[d] contractual agreements for services or property entered into by a governmental arm with private business." *Id.*

As the court observed, the parties in *Key* had "no such contractual obligation and no retention of formal control." *Id.* But the court further recognized that "[h]ad the [non-profit corporation] obligated itself contractually to perform a function beneficial to the public, this obligation might be deemed consideration, and where sufficient consideration exists, Article III, § 52(a) of the Texas Constitution would not be applicable to the transaction." *Id.*

Unlike *Key*, the City and County here entered into Agreements under which they received consideration—*i.e.*, the development of a new retail center. Further, the City and County controlled the project and ensured the public purpose was accomplished by requiring the Foundation to "obligate[] itself contractually to perform a function beneficial to the public." *Id.* This case thus involves the consideration and control missing in *Key* that is necessary to satisfy section 52(a).

Ambulance services. The City's and County's reliance on Tex. Att'y Gen. Op. No. KP-0435 (2023) fares no better. That opinion concerned whether a county's payment of tax revenue for *ongoing* "ambulance services" complied with section 52(a)—not whether an economic-development program complied with section 52-a. *See id.* The AG opined that a political subdivision's payment of funds to another political subdivision for ambulance services is not gratuitous and will not violate section 52(a) if it meets the three-part *TML* test. *Id.*

Importantly, the AG recognized that "[i]t is for the county commissioners court to determine in the first instance whether a proposed expenditure satisfies the three-part test." *Id.* (emphasis added). Here, by authorizing the Agreements, the City and County necessarily determined in the first instance that their proposed expenditures satisfied any applicable three-part test under section 52(a). (*See* 2.CR.325-27, 338, 339-42, 350-60; 5.CR.910, 924, 925)

The AG further observed that "[a] county may meet the second prong and retain public control over the funds by entering into an agreement that imposes upon a recipient of public funds the obligation to accomplish the public purpose." Tex. Att'y Gen. Op. No. KP-0435 (2023). As previously discussed, that is precisely what the City and County did here by entering into the Agreements to ensure the development of the retail center.

To be sure, the AG "note[d] that the county commissioners court has the ability to terminate the Agreements under the terms provided in the Agreements if it determines that a public purpose is no longer being achieved or that the County is not receiving service equivalent to its expenditures." *Id.* But he never stated that any such provision is necessary to satisfy section 52(a). *See id.* To the contrary, the AG opined that, among "other way[s]," an agreement "provid[ing] for an 'annual accounting' of the funds [may be used to] satisfy the second and third prongs of the [TML] test." *Id.*

In this case, the Agreements provide far more than an annual accounting of the funds. Among other obligations, they required the Foundation to provide the City and County with written reports "no less often than quarterly" documenting the use of the sales tax funds and construction loan. (2.CR.326, 340, 354) Even if applicable, that control is alone sufficient to satisfy the second and third prongs of the section 52(a) test under *TML*.[10]

[10] The City and County confuse the issues when they analogize their contractual right to obtain information from the Foundation to a request for information under the Public Information Act. (Br. at 56 n.25; *see* 2.CR.326, 340, 354) Under that statute, members of the public have a right to obtain certain information from the government. But they are not parties to the Agreements here and cannot use that information to enforce the City's and County' contractual rights by suing the Foundation if it fails to perform.

Further, for the reasons previously discussed, there was no need for the City and County to retain "the ability to terminate the Agreements" by contract. Simply put, and unlike ongoing ambulance services which the county had the ability to re-evaluate on an annual basis, the City and County already achieved the public purpose—*i.e.*, the development of the retail center—when they became obligated to contribute sales tax revenues to the Foundation "following the completion and opening of Gander Mountain." (*See* 2.CR.353; 5.CR.880, 980)

Jimmy Changas. The City's and County's next example—*City of League City v. Jimmy Changas, Inc.*, 670 S.W.3d 494 (Tex. 2023)—is also inapposite. While *Jimmy Changas* involved a chapter 380 economic-development agreement between a city and a restaurant, the primary issue there was whether the city was acting in a governmental or proprietary capacity when it entered that agreement. *Id.* at 498-506. In fact, the Court did not even cite *TML*, much less perform any analysis of whether the agreement there contained controls sufficient to satisfy *TML*. *See id.*[11]

[11] The City and County miss the point when they complain that, unlike the contract in *Jimmy Changas*, the Agreements here did not limit the source of payments to sales-tax revenues generated by Gander Mountain. (Br. at 51) Unlike that case, the public purpose of the grant here was to incentivize the development of a new retail facility as an anchor store that, in turn, would spur surrounding development. Consequently, the grant also included a small portion of the sales taxes generated by the other stores in the business park. (*See* 2.CR.325, 339, 352-53)

Museum operations. Finally, far from "hammer[ing] home" the City's and County's argument (Br. at 55 n.24), Tex. Att'y Gen. Op. No. JC-0582 (2002) confirms that the grant here contains sufficient controls and is constitutional.

As the City and County acknowledge, that opinion (which concerned section 52(a), not section 52-a) "considered whether county money could be spent to support the *operation* of a museum" leased to and run by a private party. (Br. at 45, 55 n.24, emphasis added) Critically, the public purpose there was "the *operation* of a museum" that already existed—not the *development* of a museum. Tex. Att'y Gen. Op. No. JC-0582 (2002) (emphasis added). Under that circumstance, the AG opined that "[t]he lease agreement would appear to place sufficient controls on the transaction to ensure that the public purpose—the *operation* of a museum—is carried out" because the lease "does require the Museum to *operate* the leased premises as a museum." *Id.* (emphasis added).

If anything, the opinion supports Chase. The public purpose here was for the *development* of a retail center—not the *operation* of a Gander Mountain store. And as extensively discussed, the Agreements place extensive controls on the transaction to ensure that public purpose was accomplished. *See id.* ("[a] contract that imposes on the nonprofit organization an obligation to perform a function that benefits the public may provide adequate control").

***

This case presents the Court with the ideal opportunity to decide a case involving section 52-a and a conventional economic-development agreement for the first time and preserve Texas's reputation as a business-friendly state. Because the court of appeals' decision unsettles the law and imperils economic-development agreements across the state, further review and reversal of the judgment below are both necessary and warranted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Relying on the word count function of the computer software used to prepare this document, the undersigned certifies that this Reply Brief on the Merits contains 7,406 words (excluding the sections excepted under TEX. R. APP. P. 9.4(i)(1)) and was typed in 14-point font with footnotes in 12-point font.

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