

No. 24-0102

IN THE SUPREME COURT OF TEXAS

JP MORGAN CHASE BANK, N.A.,

Petitioner,

v.

CITY OF CORSICANA AND NAVARRO COUNTY,

Respondents.

**On Petition for Review
from the Tenth Court of Appeals**

***AMICI CURIAE* BRIEF OF
THE TEXAS MUNICIPAL LEAGUE AND THE TEXAS CITY ATTORNEYS
ASSOCIATION IN SUPPORT OF RESPONDENTS
CITY OF CORSICANA AND NAVARRO COUNTY'S
BRIEF ON THE MERITS**

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Interest of Amici Curiae

The Texas Municipal League (TML) is a non-profit association of over 1,170 incorporated cities. TML provides legislative, legal, and educational services to its members. The Texas City Attorneys Association (TCAA), an affiliate of TML, is an organization of over 600 attorneys who represent Texas cities and city officials in the performance of their duties. TML and TCAA advocate for the interests common to all Texas cities.

TML and TCAA respectfully submit this brief and urge the Court to: (1) refuse the petition for discretionary review; or (2) grant the petition for review and affirm the decision of the Tenth Court of Appeals. The issue in this case is significant to all cities because JPMorgan Chase Bank, N.A.'s (Chase) position is contrary to cities' well-settled understanding of the safeguards needed in economic development incentives under the Texas Constitution.

The author of this brief is a salaried employee of TML who has received no fee, other than ordinary salary paid by TML, for the preparation of this brief.

Summary of the Argument

The Texas Constitution prohibits gratuitous payments unless the donation meets certain criteria. Tex. Const. arts. III, § 52(a); XI § 3. The test

implemented in *Texas Municipal League Intergovernmental Risk Pool v. Texas Workers' Compensation Commission*, 74 S.W.3d 377 (Tex. 2002) and later clarified in *Borgelt v. Austin Firefighters Association, IAFF Local 975*, 692 S.W.3d 288, 301 (Tex. 2024) (the *TML-Borgelt* test) should apply to economic development incentives authorized under Article III, Section 52-a of the Texas Constitution in order to protect public funds and taxpayers. The constitutional prohibition against gratuitous donations in Section 52(a) (the Gift Clause) still applies to economic development incentives and this Court should clarify that the *TML-Borgelt* test applies to economic development agreements.

Argument

I. The Constitutional Provision Allowing Economic Development Incentives Is Subject to the Requirements in the TML-Borgelt Test.

An economic development agreement must contain provisions that meet the *TML-Borgelt* test developed by this Court. Any time a city or county provides money or a thing of value to a private entity, the agreement must contain safeguards to ensure the political subdivision receives return consideration. *See Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 383 (Tex. 2002). The *TML-Borgelt*

test is used to determine whether a payment is gratuitous. To avoid the constitutional prohibition on gratuitous payments to individuals, corporations, or associations, a city council must determine that: “(1) the expenditure is not gratuitous but instead brings a public benefit; (2) the predominant objective is to accomplish a legitimate public purpose, not to provide a benefit to a private party; *and* (3) the government retains control over the funds to ensure that the public purpose is in fact accomplished.” *Borgelt*, 692 S.W.3d at 301. Cities must still retain sufficient control over taxpayer dollars to ensure that the public purpose allowing the provision of public funds is carried out.

A. Unbridled Economic Development Incentives Are Precisely What the Gift Clause Seeks to Avoid.

Without safeguards to protect the use of public funds, businesses will treat economic development incentives like a free-for-all, which is exactly what the Gift Clause seeks to avoid. *See id.* at 299 (discussing the history of local governments using public funds for the construction of railroads, which resulted in corruption, and ultimately, the constitutional prohibitions on spending public dollars for private purposes). Unchecked incentives to railroads prompted the drafters of the Texas Constitution to include the original Gift Clause. *Id.* These incentives to railroads were supposed to spur

economic development for the local governments providing the incentives, but unfortunately, the railroads frequently did not perform their end of the deal, leaving local governments holding the empty bag after providing the money.

Almost a century later when the 70th Texas Legislature passed H.J.R. 5 to submit Section 52-a to the voters, the bill analysis specifically noted that economic development was a public purpose, notwithstanding the prohibition against providing public money or a thing of value to an individual, association, or corporation in Section 52(a). H.J.R. 5, House Research Organization Bill Analysis, 70th Leg., R.S., 1987 (available here: <https://lrl.texas.gov/scanned/hroBillAnalyses/70-0/HJR5.pdf>). Prior to the passage of Section 52-a, cities could not provide money for economic development incentives because those incentives were not considered a public purpose and doing so was expressly prohibited.

B. Economic Development Incentives Meet the Public Purpose Prong of the *TML-Borgelt* Test Under Section 52-a of the Constitution but Must Still Meet the Other Prongs of the Test.

While economic development now clearly meets the “public purpose” part of the *TML-Borgelt* test, these economic development incentives must

contain some basic guardrails to ensure the public purpose of economic development is carried out. *Tex. Mun. League*, 74 S.W.3d at 384.

Section 52-a merely obviates the need to determine whether the loan or grant for economic development serves a public purpose. Op. Tex. Att’y Gen. No. KP-0261 (2019) (finding that a county economic development incentive meets the “public purpose” requirement because Section 52-a provides that economic development is a public purpose but that the incentives must still meet the other two prongs of the *TML-Borgelt* test for compliance with the Gift Clause). It does not allow a business to take advantage of a local government in an economic development agreement without meeting the remaining safeguards in the *TML-Borgelt* test.

Safeguards protect public funds. The types of safeguards economic development incentives contain to ensure the public purpose is carried out are obligations like claw back provisions and performance metrics for the business, not merely a requirement for the business to provide information even when it isn’t performing or a compulsory obligation for the city to deposit funds into a bank account. The provisions must ensure that the increased economic development (e.g., increased jobs, increased sales tax

revenue, etc.) actually happen. These safeguards are well known and widely implemented in incentive agreements between governmental and private entities.

C. Chase's Position is Incompatible with the TML-Borgelt Test.

Chase's argument to address how it met the *TML-Borgelt* test essentially converts the three-prong test into a single inquiry: Did any public purpose result from the venture? If so, then the absence of safeguards to see that purpose carried out doesn't matter. *See, e.g., Pet.'s Reply Br. on the Merits*, p. 30 (arguing that the "Foundation did fulfill all its promises and achieve a public purpose" by building a facility, which it then did not continue to operate, to explain why the control-prong was satisfied).

In short, Chase suggests that the lack of meaningful controls, which local governments have understood to be the law in Texas for decades, is inconsequential so long as some public purpose results. "Sufficient controls" are how a governmental entity ensures performance and protects the public's investment. *Texas Municipal League*, 74 S.W.3d at 384. With no requirement for meaningful controls, the public is left simply to hope something comes from an "unconditional" agreement, with no ability to ensure that happens or

seek remedies when it does not. *See Borgelt*, 692 S.W.3d at 318 (Busby, J., concurring in part, dissenting in part) (“[T]he government must *require* that the funds serve a public purpose by actually implementing ‘adequate contractual or other controls’ to ‘*ensure* its realization.’”).

To protect public funds and taxpayers, the *TML-Borgelt* test must apply to economic development incentives under Section 52-a otherwise the Gift Clause and prior Texas jurisprudence is meaningless.

Prayer

Amici request that the Court refuse the petition for review, thus making the ruling of the Tenth Court of Appeals the law in the State of Texas. In the alternative, should this Court grant the petition, *amici* request the Court affirm the Tenth Court of Appeals’s decision and hold that the taxpayer protections of the *TML-Borgelt* test apply to economic development agreements made pursuant to Section 52-a, Article III, of the Texas Constitution.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Rule 9.4 of the Texas Rules of Appellate Procedure, I certify that this Brief of Amici Curiae contains 1,300 words and has been prepared in a conventional typeface of 14-point font in the text.

/s/ Amber McKeon-Mueller
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