No. 24-0102

IN THE SUPREME COURT OF TEXAS

JPMorgan Chase Bank, N.A.,

Petitioners,

v.

City of Corsicana and Navarro County,

Respondents.

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

BRIEF AMICI CURIAE OF TEXAS PUBLIC POLICY FOUNDATION AND GOLDWATER INSTITUTE IN SUPPORT OF RESPONDENTS

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Respondents
(Plaintiffs/Counter-Defendants in the trial court; Appellees in the court of appeals):
City of Corsicana ("City") and Navarro County ("County")

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

The Texas Public Policy Foundation is a nonprofit, nonpartisan research foundation dedicated to promoting and defending liberty, personal responsibility, and free enterprise throughout Texas and the nation. For decades, the Foundation has worked to advance these goals through research, policy advocacy, and impact litigation. In pursuit of its broad mission, the Foundation has long had an interest in protecting taxpayers against unconstitutional expenditures of public moneys, and particularly the protections specified in the Texas Constitution's "Gift Clause." To that end, the Foundation, along with amicus Goldwater Institute, represented taxpayers in *Borgelt v. Austin Firefighters Ass'n, IAFF Loc. 975*, 692 S.W.3d 288 (Tex. 2024), and appeared as amicus in *Zimmerman v. City of Austin*, 658 S.W.3d 289 (Tex. 2022).

The Goldwater Institute ("Goldwater") is a nonpartisan public-policy and research foundation headquartered in Arizona, which is devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, Goldwater files amicus briefs when its, or its clients', objectives are directly implicated. Goldwater has appeared as an

[1] This brief is filed in support of the Respondents. No fee was paid to amici for preparing this brief nor will they be paying any other entity or attorney for doing so.

amicus in this Court on several earlier occasions. In addition to representing taxpayers in *Borgelt,* Goldwater has appeared as amicus in this Court in cases such as *Elliott v. City of College Station,* No. 23-0767 (pending); *Landry's, Inc. v. Animal Legal Defense Fund*, 631 S.W.3d 40 (Tex. 2021); *Morath v. Texas Taxpayer & Student Fairness Coalition*, 490 S.W.3d 826 (Tex. 2016). Goldwater has also litigated Gift Clause cases in other states, including *Gilmore v. Gallego*, 552 P.3d 1084 (Ariz. 2024), and *Rozenblit v. Lyles*, 243 A.3d 1249 (N.J. 2021), and Goldwater scholars have published extensive research on the history and meaning of the Gift Clauses. *See, e.g.,* Timothy Sandefur, *The Origins of the Arizona Gift Clause*, 36 Regent U. L. Rev. 1 (2024); Timothy Sandefur, *The Arizona Gift Clause in the Twenty-First Century*, 16 Drexel L. Rev. 299 (2024).

Amici believe their litigation experience and public-policy expertise will aid this Court in considering the petition.

SUMMARY OF ARGUMENT

Most state constitutions have a "Gift Clause" which forbids the state from giving away public money to private ends. Texas actually has several: Article III sections 50, 52, and 52(a), and Article XVI Section 6(a). Unless otherwise specified, amici will refer to these collectively as the "Gift Clause." Such clauses were placed in the constitutions of nearly every state to prevent government subsidies of private businesses, which are typically wasteful exercises in favoritism and usually fail to

result in the economic advantages their promoters advertise—not by coincidence, but by economic law.

The public control requirement and other mandates of the Gift Clause help ensure that government expenditures actually accomplish public goods, and do not result in gratuitous payments under flimsy disguises such as mere legislative assertions of public benefit. And the public control requirement, and other requirements, *do* apply to Section 52-a expenditures. Petitioner's argument that Section 52-a implicitly repealed the Gift Clause with respect to such expenditures is not warranted by the text, and contradicts the rule that courts should harmonize constitutional provisions whenever possible. Section 52-a can easily be harmonized with the rules that expenditures of taxpayer money be accompanied by public controls to ensure that public purposes are achieved with the funds the government spends.

The Agreement at issue in this case lacked adequate controls from the outset. Contrary to Petitioner's effort to portray the decision below as having inserted this control requirement into the contract *post hoc*, the Court of Appeals correctly found that the lack of adequate controls infected the Agreement from the beginning. The fact that the Agreement required the Petitioner to build and open a store does not satisfy the public oversight requirement, because that requirement is only satisfied by provisions that ensure that a *public purpose* is *actually* accomplished—not by

provisions that merely specify how the money will be spent, which is what the Petitioner points to. Nor should this Court endorse the Petitioner's effort to portray the absence of public controls as somehow proving the existence of a public purpose.

While there may be intuitive appeal to the idea that it is unfair for Petitioner to not receive the payments it expected to get under the Agreement, it has long been the rule that parties contracting with the government bear the burden of ensuring that the government actually has the constitutional authority to make the deal in question, and the *least* equitable outcome would be to force taxpayers to continue paying the Petitioner in a manner that contradicts the Constitution and provides Petitioner with a purely private benefit.

ARGUMENT

I. The Gift Clause was written to prevent the government from aiding private enterprises.

Gift Clauses were first adopted in the early nineteenth century after a wave of disastrous state investments in private development projects such as railroads and canals, many of which failed, leaving taxpayers to shoulder the burden of immense debt. *See* Timothy Sandefur, *The Origins of the Arizona Gift Clause*, 36 Regent U. L. Rev. 1, 7-10 (2024). Then in the post-Civil War era, most states added new Gift Clauses or amended their existing ones to also forbid local governments from doing the same—again, as a result of financially disastrous efforts by local governments

to invest in infrastructure projects and other economic development schemes. *See id.* at 15–28.

Texas's Gift Clause forbids the state from giving or lending its credit[2] to a private entity, Tex. Const. art. III § 50, or granting public money to private entities, *id.* § 51, or appropriating money in an unauthorized way. *Id.* art. XVI § 6(a). It also forbids local governments from doing the same. *Id.* art. III § 52. These protections for taxpayers are crucial. Contrary to Petitioner's effort to portray government subsidies of private businesses as "a 'win-win' scenario," Petition for Review at 18, the reality is that government subsidies to private enterprise are routinely—indeed, *inherently*—economically inefficient, and are frequently granted for reasons of favoritism and political influence rather than merit.

The economic inefficiency of subsidies is not coincidental; it is a function of economic law. When a business seeks government funding, it typically does so because it has been unable to obtain funding from private investors. The reason it has been unable to do this is typically that private investors regard the project as unlikely to provide an adequate return on the investment—i.e., as too great a risk relative to the potential alternative uses of their capital. It therefore naturally follows that any business seeking a government subsidy—that is, seeking to obtain funding

[2] A loan of credit is typically an arrangement whereby government stands as surety for a private loan. *See* Timothy Sandefur, *The Arizona Gift Clause in the Twenty-First Century*, 16 Drexel L. Rev. 299, 345-49 (2024).

taken from citizens against their will—is inherently less likely to succeed, or less likely to produce a greater social benefit, than those businesses that *have* been able to obtain investment legitimately, by persuading *consenting* investors that the benefits exceed the risks. Also, government subsidies are allocated not by reference to market demand (if there were market demand, there would be no need for a subsidy), but by reference to *political* considerations—and that makes it almost inevitable that the beneficiaries of subsidies will be the most politically influential companies, or those with the best insider connections or lobbyists, rather than the most deserving or profit-generating businesses. Again, the latter can and do operate without subsidies.

The framers of Texas' Gift Clause knew this. They had witnessed, over the course of the nineteenth century, the economic and political havoc wrought by government subsidies to private companies, especially railroads. Quite often, after state or local governments invested taxpayer money in railroad construction, the railroad would fail to materialize, or would be so badly built that it would go out of business as soon as the subsidy dried up.

In the 1850s, for example, the state had authorized more than 40 railroad companies, but a decade later, found that only about 60 miles of track had been built. Earl F. Woodward, *Texas's Internal Improvement Crisis of 1856: Four Remedial Plans Considered*, 13 E. Tex. Hist. J. 13, 13 (1975). Subsidies to railroads "[have]

not brought the benefits contemplated," complained delegate W. Gordon Robertson at the 1875 Constitutional Convention. The legislature had funded railroad construction

> amounting to $6,000 to the mile. But in a short time this was found to be insufficient, and another demand was made for $6,000 to the mile of graded, not completed road, and one demand has been made after another until the people have been forced to the conclusion that they must be stopped, because they fail to give that protection to the country its friends claim for it…. Our lands are gone; our school funds are gone, and yet we are called upon to extend this thing…. With such a record in the past, what may we not expect if we leave the people unprotected in the future?

Debates in the Texas Constitutional Convention of 1875 at 131-32 (Seth Shepard McKay, ed., 1930). Delegate Nicholas Darnell agreed. "He did not believe that a single mile of railroad had ever been built by [subsidies]." *Id.* at 116. He pointed to examples such as the Texas & Pacific Railroad, which had become infamous as a government-funded failure. Founded in 1871, and subsidized with some 20 million acres of land, plus an infusion of $60 million in cash, the tracks had still not been completed by 1879, when Congressman Henry Blair denounced the idea of federal subsidies on the floor of Congress.

"I am opposed to this subsidy," he declared, "to this vast scheme of possible plunder and the certain risk of it, because private agencies are amply adequate to secure the end." *Speech of Henry W. Blair Against The Bill for Providing a Subsidy to the Texas and Pacific Railroad* 22 (Washington, D.C.,1879). Blair pointed out

that other railroads were already being completed without subsidies—proving that government funding was unnecessary—and that if "[t]he managers of the Texas and Pacific [find] it impossible to induce private capital to invest in their enterprise," then that was all the more reason why taxpayers should not be compelled to invest in it. *Id.* at 4. If there was market demand for other roads but not the Texas and Pacific, then it was wasteful and wrong to shovel public dollars into the Texas and Pacific's pockets.

Not only was the reluctance of private investors proof that the undertaking was unlikely to be profitable, but a subsidy raised basic questions of fairness: "[B]y whom does the public good require that the road should be constructed and controlled? ... If, then, the Government ought not to own the property which it is proposed to create, in what way can it be justified in assuming for a private party a liability to pay for the property or to loan its credit in that amount?" *Id.* at 5.

Similar considerations underlay Delegate Robertson's objection to subsidies at the 1875 convention. "I do not oppose railroads when built with their own means," he insisted, *Debates, supra* at 414, but under the previous constitution, the government had often extended cash subsidies to railroads, with disastrous consequences of running the state into immense debts. As one historian noted, "[t]he Twelfth Legislature exhibited such a degree of profligacy and open disregard of the state's economic condition that it is notorious." Edmund Thornton Miller, *A*

Financial History of Texas, Bulletin U. Tex. (July 1, 1916) at 164. Thus, the delegates at the 1875 convention struck a compromise, allowing subsidies only in the form of land-grants, while prohibiting other forms of aid to private businesses. *See* Seth Shepard McKay, *Making the Texas Constitution of 1876* at 111-14 (Ph.D. diss., U. Pa. 1924).

Similar experiences with "internal improvement" projects throughout the nineteenth century led many other states to adopt Gift Clauses into their constitutions. These reforms began in the wake of the Erie Canal, one of the (vanishingly few) internal improvement projects of the era that actually proved successful. When other states sought to imitate the Erie Canal experiment, they proved far less opportune. In the 1830s, in fact, government investment in privately operated canal and railroad projects were so extensive that some eight states were driven into bankruptcy. Clifford Theis, *The American Railroad Network during the Early 19th Century: Private versus Public Enterprise*, 22 Cato J. 229 (2002). By 1843, the states were some $250 million in debt due to unwise investments in private "internal improvement" corporations. Sandefur, *Origins, supra* at 9. That year, Rhode Island became the first state to constitutionally forbid such subsidies, quickly followed by New Jersey and New York. *Id.* at 9-10. By the beginning of the Civil War, most states had adopted bans on *state* funding of private companies. But in the years after the war—during the era that historian Vernon Parrington called "the

Great Barbecue," due to the lavishness of government aid to private companies, 3 Vernon Louis Parrington, *Main Currents in American Thought* 23 (1930), local governments also began subsidizing businesses, often by buying bonds or giving them land, but also through such indirect means as exempting them from taxes. *See* Sandefur, *Origins, supra* at 19–22, 32–35. Thus, in the 1870s, an era during which many states held constitutional conventions, new provisions were added forbidding local governments, as well as the state, from engaging in subsidies. Texans, "writhing under the exactions and extortions of the state government forced upon them," were among the many who insisted on a constitutional rule barring the government from giving public money to private recipients. *Terrell v. Middleton*, 187 S.W. 367, 371 (Tex. Civ. App.—San Antonio 1916), *writ denied*, 108 Tex. 14, 191 S.W. 1138 (1917).

There is nothing quaint or old-fashioned about this. The authors of these provisions were not economically benighted or ignorant of the arguments in favor of subsidies. The Gift Clause represents the hard-learned lessons of people who, like taxpayers in our own era, heard the promises of prosperity offered by advocates of government aid to private enterprise—pledges that government investment would generate wealth and development—and witnessed the failures of such projects. They also understood why the economic inefficiency of subsidies are virtually inherent, and sought to prevent future generations from making the same mistakes

that their own era had witnessed. They knew that people would claim that barring subsidies to private businesses would harm Texas's "reputation as a business-friendly state," Petition for Review at 13—such arguments were made in their own day—and they chose to adopt the Gift Clause anyway, because they knew the economic folly of subsidizing private ventures and placed a higher priority on making Texas a *taxpayer*- and *citizen*-friendly state.

II. How boondoggles work.

This history confirms that the authors of Texas's Constitution were quite aware that arguments for subsidies tend to take the same pattern: promoters of a project claim it will improve the local economy, if only "visionary" political leaders will have the "courage" to provide funding from tax coffers. The fact that the project has been unable to generate private funding is disregarded, and political leaders, usually hoping in good faith to see economic improvements, approve the provision of aid. Yet the aid goes to the politically well-connected, rather than to the most meritorious recipients, and because those recipients are only responsible to a vaguely defined "public" instead of to specific investors with power to vindicate their contractual rights, recipients of such aid face less of the discipline imposed by the private market.[3]

[3] In the terminology of economists, these recipients are "political entrepreneurs" instead of "market entrepreneurs." Wayne A. Leighton & Edward J.

Freed from having to satisfy particular investors who can exercise legal oversight, these recipients are inherently less likely to complete the project on time or under budget—in part because if they fail, they can seek further extensions of time and further government aid. (The Texas and Pacific Railroad, for example, received extension after extension on deadlines the government imposed as a condition of its subsidies.[4]) The bottom line is that in an environment of subsidies, firms that are disciplined enough not to need subsidies in the first place are essentially punished for their diligence, while firms that cannot obtain funding on the private market—precisely because they are too risky to attract investors voluntarily—are rewarded for sloth and wastefulness. Meanwhile, taxpayers are forced to shoulder economic risks that they would not *voluntarily* choose to undertake—indeed, it is precisely because they refuse to voluntarily invest, in light of such risks that the government *forces* them to do so via the subsidy.

Consider the Packery Channel in Corpus Christi. This project began in the 1990s with a $3 million federal subsidy on top of many state subsidies, in hopes of improving the local economy. It cost about $30 million to complete. *See 6*

Lopez, *Madmen, Intellectuals and Academic Scribblers: The Economic Engine of Political Change* 181-82 (2013). Political entrepreneurs differ from market entrepreneurs because they are not incentivized to maximize return on capital investment, and are not disciplined by contracting parties or the possibility that investors will choose to go elsewhere.

[4] Debates over these extensions consumed much of the time at the 1875 convention. *See Debates, supra* at 436-40; 442-45; 448-50.

Investigates: Packery Channel Has a History of Failures, KRIS 6 News (June 14, 2018).[5] But while it enabled boats to more easily access the Gulf, there's no evidence it has provided significant economic benefits, let alone $30 million worth. Voters were told it would generate $700 million in development and 4,500 new jobs. *See* Ross E. Milloy, *Padre Island Journal; Fighting Over Opening a Shortcut to the Gulf*, N.Y. Times (Jan. 20, 2001).[6] That never happened. An amusement park was built on the nearby island, but it proved unsuccessful; although locals were promised it would attract more than 600,000 visitors per year, *id.,* it went bankrupt after only three years and was demolished in 2021. Haley Williams, *"The Waterpark Was Never Successful": Waves Resort Demolished on Padre Island*, 3 News (July 22, 2021).[7] A nearby housing development called Tortuga Dunes never got off the ground, because the flood risk was too high.

In fact, the reason private holders of capital did not choose to invest in a channel there was because of the substantial risk of storm damage. As early as 1996, experts warned that the channel was at such a serious risk of damage that it was not worth the investment. "I predict," wrote coastal geologist Orrin H. Pilkey, "that

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[5] https://www.kristv.com/news/2018/06/14/6-investigates-packery-channel-has-a-history-of-failures/

[6] https://www.nytimes.com/2001/01/20/us/padre-island-journal-fighting-over-opening-a-shortcut-to-the-gulf.html.

[7] https://www.kiiitv.com/article/news/local/the-waterpark-was-never-successful-waves-resort-demolished-on-padre-island/503-c9f75a55-7802-4b52-8834-16abacacb028.

when (not if) the results of [alleged safety studies] prove to have been incorrect, the statement will be made that the problem was 'due to an unusual sequence of storms,' or perhaps it will be noted that 'there is no way we could have predicted that a storm of that magnitude could have come by.'" *Dredging Up a Texas-Sized Boondoggle,* Corpus Christi Caller-Times, June 6, 1996 at B1. *See also* Richard L. Watson, *Will Packery Channel be a Windfall for Attorneys?* Corpus Christi Lawyer Magazine (Spring, 1997).[8] His prediction proved correct.

The construction was so slipshod that it's unclear how it was even built to begin with, *see 6 Investigates, supra*. Then, in 2008, a storm significantly damaged the channel walls such that it needed $2 million worth of repairs. *Id.* The channel was again severely damaged by Hurricane Harvey in 2017, requiring $8 million worth of more repairs. *Id.* That failed to do the job, however, and in 2021, the federal government gave the city another $13.5 million. *See FEMA Awards up to $13.5 Million for Packery Channel Restoration*, City of Corpus Christi Newsroom (Sept. 16, 2021).[9] The channel finally reopened to much celebration on April Fool's Day 2024, with still more promises that it would someday improve the local economy enough to earn its keep. *See* Josh Maxwell, *After 2022 Start, the Packery*

[8] http://texascoastgeology.com/Packery/cclawyer.htm.

[9] https://news.cctexas.com/news/fema-awards-up-to-13-5-million-for-packery-channel-restoration.

Channel Restoration Project is Now Complete, 3 News (April 1, 2024).[10] Remarkably, promoters of the project are *still* touting the illusory figure of $700 million in economic improvements, *three decades* after the project was first subsidized by the government, even though there is no reason to believe it will work this time around. *See* Kirsten Crow, *What's in The Cards for Lake Padre Development? Here's What to Know*, Corpus Christi Caller-Times (May 14, 2024).[11] The Packery Channel is the Texas and Pacific Railroad of the modern age.

Sometimes the inefficiency of subsidies is concealed. For example, it's common for businesses that would *already* have done something for legitimate market reasons to take advantage of subsidies to add a few extra millions to their bottom line by obtaining economic development subsidies for doing what they would already have done. This has routinely proven to be the case with the state's "Chapter 313" incentive program for locating businesses in Texas. University of Texas Professor Nathan Jensen has found that most recipients of these subsidies—some 85 percent of them—were not persuaded to locate their operations in Texas due to the subsidies, but were naturally happy to take the money for doing what were they already doing. *See* Nathan M. Jensen, *Exit Options in Firm-Government*

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10 https://www.kiiitv.com/article/news/local/packery-channel-restoration-project-is-complete/503-96d6b6ae-6367-4be1-bcf3-0292afdbcca1.

11 https://www.caller.com/story/news/local/2024/05/14/lake-padre-development-on-north-padre-island-may-get-tax-boost/73683107007/.

Negotiations: An Evaluation of the Texas Chapter 313 Program, Univ. of Tex. Austin (2017).[12] Taxpayers have therefore been forced to literally throw money away—or, more precisely, to throw it into the hands of private businesses, enriching the politically well-connected at the expense of ordinary citizens.

III. Section 52-a can be reconciled with the Gift Clause—as long as government expenditures are for specific, measurable values and the government maintains adequate control over how money is spent.

A. Public control over expenditures must be genuine, not illusory.

While the Gift Clause forbids the government from simply giving money or other valuable advantages to a private recipient in order to subsidize its undertakings, it does not forbid the government from spending money in ways that benefit private enterprises. After all, the government must and should *buy* things—goods and services—from private businesses, and it can do so with broad public purposes in mind. The word "gift" itself reflects a distinction between gratuitous payments on one hand and legitimate exchanges on the other, and Texas courts have given force to this distinction by saying that the Clause, among other things, forbids "gratuitous payments" to private recipients, and that payments to private recipients must be in exchange for a public benefit. *Borgelt v. Austin Firefighters Ass'n, IAFF Loc. 975*, 692 S.W.3d 288, 300 (Tex. 2024).

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[12] https://www.natemjensen.com/wp-content/uploads/2017/02/Jensen-Chapter-313-Research-Paper.pdf.

But simply saying that the government "cannot make a 'no-strings-attached' payment" to a private recipient is not enough. *Id*. at 308. It would be simple for the government to conceal a gift by simply *asserting* that a payment is in exchange for some (vaguely defined) public benefit, when in fact no such benefit is obtained. Yet "[t]he Gift Clause must be obeyed in reality, not just in form." *Id*. at 310. Thus, as this Court observed in *Borgelt*, an expenditure must be accompanied by restrictions that "in no uncertain terms" ensure that the funds actually obtain a (genuine) public benefit. *Id*. If an agreement is drafted in such a way that it "fail[s] to fulfill its public purpose," or if the government "refuse[s] to 'retain' … controls" over the expenditure, the result "would be tantamount to permitting what the Gift Clause forbids." *Id.*

Thus the Clause requires courts to *objectively* weigh the exchange of values to ensure that there actually is "'sufficient—[if] not equal—return consideration'" received by the government for its money, meaning a truly proportionate exchange rather than the government's mere say-so. *Id*. at 301 (citation omitted).

Also, when the government makes a payment, it must include some provision for accountability, to ensure that the payment *actually does* go to the public purpose that warrants the payment. In other words, there must be "'public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment.'" *Id*. at 308 (citation omitted). To put it another way, the recipient must

"obligate[] itself contractually to perform a function beneficial to the public." *Key v. Comm'rs Ct. of Marion Cnty*., 727 S.W.2d 667, 669 (Tex. App.—Texarkana 1987). Without this public control requirement, the government could, again, conceal a gift by paying a private recipient for some service, and then having the recipient fail to provide the service and just keep the money as a gratuity, or use it for some non-public purpose.

Such public controls must be meaningful, of course, and not illusory, since illusory controls would amount to no controls at all. Consider, as an example of the latter, the Arizona case of *Schires v. Carlat*, 480 P.3d 639 (Ariz. 2021). There, a city gave a private company a $2.6 million subsidy in exchange for operating its business—something it would have done anyway. But it sought to conceal this unconstitutional subsidy by fashioning illusory "controls" which it dubbed "performance thresholds." *Id*. at 642 ¶ 3. These were simply measurements of whether the business was operating as it was planning to do anyway. For example, the business—which was a private college—was required to enroll students. The Arizona Supreme Court found this insufficient, likening it to a government payment to a hamburger restaurant in exchange for selling hamburgers. *Id.* at 645 ¶ 17. Such a thing would not be "oversight"—it would be a subsidy under a flimsy disguise.

B. The Agreement here lacked controls—and Petitioner is wrong to portray this as somehow beneficial.

In this case, the Petitioner claims there is adequate control because the agreement provided that it would receive the funds only if it used the subsidy to raise additional funding, and then built and operated the store. Petition for Review at 36. But this misconceives what the public control requirement is about. The requirement is not a mere *contractual* requirement to ensure that a promise is fulfilled—it is a *constitutional* requirement to ensure that "a function beneficial to the public" is actually accomplished. *Key*, 727 S.W.2d at 669. These are two entirely different things. The Gift Clause requires public control to ensure that a genuinely public benefit is truly accomplished, *not* merely to ensure that the recipient of the funds uses them.[13] If the latter were permitted, the Clause would not accomplish its purpose of preventing the "subsidiz[ation] [of] private enterprises such as railroad and canal building in the guise of 'public interest.'" *Kotterman v. Killian*, 972 P.2d 606, 621 ¶ 52 (Ariz. 1999) (citation omitted).

Petitioner, however, argues that because the Agreement required it to build a store, that was enough. Yet the Agreement was not a *construction* contract; it was an economic development contract. The City and County were not buying a building

[13] That was why *Key* used the word "continuing" when it said "some form of continuing public control is necessary to insure that the State agency receives … accomplishment of the public purpose." *Id*.

for public use—in which case the Agreement would indeed satisfy the Gift Clause (assuming the value of the building was proportionate to the expenditure). They were paying for an economic development. And because the Agreement contained no controls to ensure that the latter was accomplished, it fails the Gift Clause test regardless of the fact that it specified the former. The Court of Appeals put it well: the Petitioner's purported "controls" are actually nothing more than language specifying "[w]here the money comes from and where it goes." *Corsicana Indus. Found., Inc. v. City of Corsicana*, 685 S.W.3d 171, 184 (Tex. App.—Waco 2024). But this is not *public control*—and to "focus on the money trail" is to "lose sight of the public purposes." *Id.*

If Petitioner were correct that all the Constitution requires is for the contract to recite how the recipient will use public funds, a pure gratuity could escape judicial notice by simply specifying the exact nature of the gift. As Borgelt put it, if that were the rule, the result would be "too great a risk of evading public controls or of being subverted to private purposes." 692 S.W.3d at 310. For example, a city could buy a Ferrari for a prominent citizen, as long as it wrote into the agreement the exact model and color of the Ferrari in question and the date on which the purchase would be completed. That's essentially what Petitioner claims when it asserts that the contractual provisions requiring it to build and open a private, for-profit store constitutes adequate "control." While such specifications may indeed be enough to

satisfy the requirements of mundane *contract* law, it is not enough to satisfy the wider constitutional demands of the Gift Clause—which exists to ensure that *the public* obtains something in exchange for its money, *not* that the private recipient specify exactly what kind of private benefit it expects to realize with taxpayer dollars.

Remarkably, Petitioner argues backwards by portraying the *lack* of adequate control as proof of control. It does this by arguing that the Agreement contained no language requiring the *continuing operation* of the store, only its initial opening, and then saying that this proves the government was unfairly changing the Agreement *post hoc* by withholding payment when the store closed. *See* Petition for Review at 34. What this means in substance is that the very absence of adequate public controls—that is, the lack of language to ensure that the public purpose of economic development was served—is somehow proof that the Agreement meets constitutional muster. That is perverse logic. The purpose of the Agreement was defined as "to stimulate business and commercial activity in the county," to "facilitate growth and economic development," and "the promotion of economic development." Petitioner's Tab 9 at 350-53. Assuming these are constitutionally valid public purposes, the public control requirement mandates that the Agreement contain sufficient provisions to ensure that *these* goals—not the mere construction of a building—are actually accomplished. The Agreement lacks any such control

requirement. The Petitioner may be correct that the contract only required it to build a building, but even if that's all it was *contractually* required to do, it's not all the parties were *constitutionally* obligated to do. Under the Gift Clause, they were required to ensure that a public purpose was accomplished. Here, the purported purpose was economic development. The fact that the Agreement lacks safeguards to ensure that the goal was accomplished means it is constitutionally unenforceable, even if the Petitioner built a building.[14] This is an effort to portray the lack of adequate controls as a feature instead of a bug—and it is unpersuasive.

Again, imagine it were otherwise. It would be all too simple for a state or local government to give away public funds gratuitously by contracting for a good or service which it claims benefits the public—but then failing to ensure that the public is actually benefitted—and then escaping the constitutional mandate by pointing out that the good or service was nonetheless provided. If this were the law, *Middleton,* the famous "chicken salad case," would have come out differently. There, the government paid for a wide variety of private expenditures for the

[14] In fact, as the Respondents note in their Response brief, Petitioner actually insisted on *removing* a provision from the Agreement that would have required the store to remain in operation. Response to Petition at 22. Petitioner obtained this removal no doubt for private commercial reasons—reasons that were probably entirely legitimate from the perspective of a private market participant. Petitioner is thus not to be faulted for seeking its removal. But the very fact that it did this for private commercial reasons goes to show that the final Agreement accomplished a private commercial good, instead of a public benefit.

Governor, including "gas, ice, telephones, 'merchandise,' automobile repair to machine (the private property of the Governor), food for horses privately owned by him, chickens, vegetables, butter, eggs, gasoline, 'groceries,' bread, cakes, meat, 'horse shoeing,' 'invitation cards and envelopes' for private use, 'chicken salad,'" and other things. 187 S.W. at 368. The court found this unconstitutional, because these expenditures were "for private and individual purposes, and not for the public good." *Id.* at 372. By Petitioner's logic, though, this would be constitutional, as long as the purchase orders precisely specified *what* gas, *which* telephones, and what *flavor* of chicken salad was provided to the governor.

The public control requirement obligates the parties to do more than merely specify what the recipient will do in exchange for a subsidy. It requires sufficient government oversight to ensure that the *public good*—here, economic development—will actually be accomplished. Petitioner is therefore in error to claim that the public control requirement was satisfied because the contract only required the construction of a store. If that's all the contract required, then it was an unconstitutional gift, because the government cannot pay for the construction of a private store.

IV. Article III § 52-a does not override or repeal the "Gift Clause."

It is, of course, inherently problematic to label something as amorphous as "economic development" a "public purpose" under the Gift Clause, because

"economic development" is too abstract to be measured. Absent an objectively measurable public purpose, it becomes impossible to meaningfully enforce the Clause, or to ensure that the public obtains a benefit proportionate to the expenditure—that is, to ensure that the public receives "sufficient return consideration" for the public funds it spends. *Borgelt*, 692 S.W.3d at 302. Defining something as amorphous as "economic development" as a public purpose would dangerously undermine the effectiveness of the Gift Clause, because that phrase is as vague as "healthy society" or "appealing neighborhood" or "good things." Under that theory, the government can give gratuities by simply claiming that they make society better, without requiring measures of control to ensure the realization of an actual public purpose.

The Court of Appeals spoke too hastily when it claimed that Article III Section 52-a defines economic development as a public purpose. *See Corsicana Indus. Found.,* 685 S.W.3d at 180. In fact, it does not. It merely says that "the legislature may provide for the creation of programs and the making of loans and grants of public money … for the public purposes of development and diversification of the economy," etc. It does not purport to overrule the Gift Clause, and in fact it does not, contrary to Petitioner's argument. Section 52-a can easily coexist with the Gift Clause, as long as the government, in making loans and grants for purposes of development, diversification, and so forth, does so in a manner that obtains

objectively measurable, public benefits, and provides adequate oversight to ensure that public benefits are achieved. For example, it can fund infrastructure improvements or better police services to attract businesses to a neighborhood, or provide grants to educational institutions to offer scholarships for business students, or lend money to businesses that, in exchange for repayment, provide some type of measurable benefit to the public (as with a discount on admission fees for local residents).

What it cannot do is pay businesses to operate, in hopes that their operations will generally redound to the public benefit. Thus, the Court of Appeals was right to conclude that "government entities relying on Section 52-a are still required to show that public resources and powers are used for the direct accomplishment of a public purpose, transactions using such resources and powers contain sufficient controls to ensure the public purpose will be carried out, and the governmental entity receives a return benefit." *Id.* at 180.

Petitioner argues that Section 52-a repealed the Gift Clause by implication. It contends that the phrase "notwithstanding any other provision of this Constitution" makes Section 52-a expenditures exempt from the oversight requirement and other constitutional provisions. Petition at 27. But courts presume against implied repeals, *see, e.g., Diruzzo v. State*, 581 S.W.3d 788, 799–800 (Tex. Crim. App. 2019), including in cases that involve a "notwithstanding" clause. *See, e.g., HSP*

Gaming, L.P. v. City of Philadelphia, 954 A.2d 1156, 1177 (Pa. 2008) (no repeal despite "notwithstanding" language).[15] The same disfavor applies to repeal-by-implication arguments in the constitutional realm. *See, e.g., State ex rel. Lashly v. Becker*, 235 S.W. 1017, 1032 (Mo. 1921) ("the universally recognized rules of … constitutional construction [are] that all parts of a … constitution, including amendments, must be read together [and] … that the presumption is against repeal by implication.").

This Court is obliged to harmonize provisions of the constitution that seem to conflict, and adopt "'a construction which would render every word operative, rather than one which would make some words idle and nugatory.'" *Ex parte Hart*, 56 S.W. 341, 342 (Tex. Crim. App. 1900) (quoting Thomas Cooley, *Constitutional Limitations*). That is easy here. Section 52-a does authorize spending for economic development purposes—but only as long as the requirements of the Gift Clause are also obeyed.

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[15] The reason is that "a general repealing clause … does not declare what the inconsistency is, but … simply limits any implied repeal to only those acts that are inconsistent." *Id.* at 1176 (citation omitted). Thus a "notwithstanding" clause is often "an express *limitation* on the ability to find implied repeal." *Id.* (emphasis added, citation omitted). The two cases Petitioner cites to support its "notwithstanding" argument—*In re Lee*, 411 S.W.3d 445 (Tex. 2013), and *Molinet v. Kimbrell*, 356 S.W.3d 407 (Tex. 2011)—are not to the contrary, because in those cases, the provisions in question were truly irreconcilable. *See Lee*, 411 S.W.3d at 454 n.8; That is not the case here.

Petitioner suggests that the Gift Clause is irreconcilable with Section 52-a, because while the former "prohibits gratuitous payments of public moneys," the latter "specifically authorizes the creation of programs that grant public money for economic development." Petition at 28. But there are many ways the government can give grants of public money for economic development that do not constitute gratuities or loans of credit to private recipients. Had the voters intended to repeal the Gift Clause when they adopted Section 52-a, they could easily have done so. Their choice *not* to do so must be respected. This Court should decline Petitioner's invitation to abandon the obligation to harmonize constitutional provisions.

V. The government cannot be contractually bound to violate the Constitution.

Petitioner places great emphasis on its contractual rights, arguing, for example, that "excus[ing] the City and County from their 'unconditional' contractual payment obligations has serious consequences." Petition at 18. But it is hornbook law that the government cannot contract away its police power or make a contract that obligates it to violate the Constitution. *San Antonio River Auth. v. Shepperd*, 299 S.W.2d 920, 927 (Tex. 1957). Nor can one public body adopt a law that requires a future public body to persist in unconstitutionality.

Petitioner is certainly correct that "governmental entities [should be] required to honor their contractual promises without the ability to unilaterally rewrite [them] … years later." Reply in Support of Petition at 4. But the government has no

authority to write an unconstitutional contract, and when it does so, the people cannot be required to persist in unconstitutionality. To hold that they can, would undermine the people's sovereignty, and make it easy to evade the constitution by simply writing contracts mandating unconstitutional actions.[16]

Petitioner emphasizes the intuitive sense that it is unfair for the City and County now to contend that their prior Agreement was unconstitutional, and to withhold payments they promised to Petitioner. But although this may be intuitively appealing, it cannot override the constitutional mandate.

First, the government simply lacks power to make an unconstitutional agreement, and any unconstitutional act by the government is void *ab initio*, with no more legal force than a blank piece of paper. *Reyes v. State*, 753 S.W.2d 382, 383 (Tex. Crim. App. 1988). What this Court said of debt limits in *McNeill v. City of Waco*, 33 S.W. 322, 323 (Tex. 1895), is also true of the Gift Clause: the Constitution uses "no uncertain language" in "imperatively prohibit[ing]" the City and County

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[16] Petitioner, quoting the dissent below, argues that "court[s] cannot ignore freedom-of-contract principles, 'judicially writ[e] back into the contract' a clause the parties 'specifically removed' during negotiations, and alter the public purpose of the grant after the fact." Reply at 11. But this is a mischaracterization of the decision below. Far from "judicially writing" the contract, the Court of Appeals held that the constitution requires that certain things be included in any government contract, and that neither private parties nor the government has authority to "specifically remove" constitutionally mandatory provisions from a contract. Important as it is to hold contracting parties to their bargains, it is more important that all Texans be held to the Constitution.

from giving gifts of public funds; "[t]herefore, the attempt[] [to do so] for any conceivable purpose, and in any conceivable manner … is contrary to the express prohibition of the constitution, and void." For that reason, this Court has long held that parties contracting with the government bear the risk of their agreements being deemed invalid. *See, e.g., City of Bryan v. Page & Sims*, 51 Tex. 532, 536 (1879) (contracting parties are "bound to know of the limitations on the authority of these officials, and their services were rendered at their own hazard."). In fact, for more than a century it has been recognized that "*all* persons contracting with a municipal corporation must, *at their peril, inquire into the power* of the corporation or of its officers to make the contract; and a contract beyond the scope of the corporate power is void, although it be under the seal of the corporation." 1 John F. Dillon, *Commentaries on the Law of Municipal Corporations* § 447 at 441 (3rd ed. 1881) (emphasis in original). As the Colorado Supreme Court has said,

> a party dealing with a municipal corporation is bound to see to it that all mandatory provisions of the law are complied with, and if he neglects such precaution he becomes a mere volunteer, and must suffer the consequences…. [This] admittedly produce[s] "harsh" results, in the sense that parties who in good faith performed what they had supposed to be obligations under a valid contract [can be] denied recovery because of matters beyond their knowledge. Yet, individual inequities notwithstanding, these results [are] deemed justified on the basis of the protection of taxpayers against improper expenditures of tax moneys by public officials. The purpose is to protect the taxpayer against improvident use of tax revenue … to insure public disclosure of proposed spending, and to encourage prudence and thrift by those elected to direct expenditure of public funds.

Normandy Ests. Metro. Recreation Dist. v. Normandy Ests., Ltd., 553 P.2d 386, 389 (Colo. 1976) (cleaned up).[17]

Second, it is more equitable that the risk of constitutional invalidity fall on the contracting parties than on the innocent taxpayers who, if the Petitioner prevails here, will be forced to shoulder an expense that enriches Petitioner, in violation of the people's own instructions in their Constitution. As the Virginia Supreme Court has observed, to take the latter course would mean that "the provisions of the Constitution and the statute approved and enacted by the sovereign power of the Commonwealth for the benefit and protection of the taxpayers would be rendered nugatory, and a complete cover and shield would be provided for acts which are prohibited." *Am.-LaFrance & Foamite Indus. v. Arlington Cnty.*, 178 S.E. 783, 786 (Va. 1935). *See also Thomas v. City of Richmond*, 79 U.S. (12 Wall.) 349, 357 (1870) ("The protection of public corporations from such unauthorized acts of their officers and agents is a matter of public policy in which the whole community is concerned. And those who aid in such transactions must do so at their peril.").

Although it may seem unfair to deprive Petitioner of the payment it expected, Petitioner should not have expected (or demanded) an *unlawful* payment, and it is

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[17] The court went on to modify the harshness of this rule by saying that there can be circumstances where *quantum meruit* restitution is justified by the equities. Texas adopted the same rule in *Sluder v. City of San Antonio*, 2 S.W.2d 841, 844 (Tex. Comm'n App. 1928).

more unfair to compel the taxpayers to make unconstitutional expenditures. Petitioner is a sophisticated party, who was represented by counsel during the negotiation process, and who even took advantage of that process to remove public oversight from the Agreement. The taxpayers, by contrast, were represented by officials who agreed to an unconstitutional gift. The *least* equitable outcome would be to force them to continue making unconstitutional payments.

PRAYER

The decision of the Court of Appeals should be *affirmed.*

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the word-count limitations in Tex. R. App. P. 9.4(i)(2)(D) because it contains 7,518 words, excluding the parts exempted by Tex. R. App. P. 9.4(i)(1).

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing document has been served via electronic service to all counsel of record listed below on this 18th day of December, 2024.

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