

No. 21-0307

In the Supreme Court of Texas

City of League City, Texas,

Petitioner,

v.

Jimmy Chargas, Inc.,

Respondent.

On Petition for Review from the
Fourteenth Court of Appeals at Houston, Texas
No. 14-19-00776-CV

**BRIEF OF *AMICI CURIAE*
TEXAS RESTAURANT ASSOCIATION AND
RESTAURANT LAW CENTER IN SUPPORT OF
RESPONDENT**

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INTERESTS OF *AMICI CURIAE*

The Texas Restaurant Association and the Restaurant Law Center appear as *Amici Curiae* in support of Respondent’s request that the Court affirm the Fourteenth Court of Appeals’ decision¹ affirming the denial of the City’s plea to the jurisdiction asserting immunity from suit. *See* TEX. R. APP. P. 11.

As of 2020, the restaurant and foodservice industry was the country’s second largest private-sector employer—approximately 10% of the workforce here in Texas and across the nation works in the industry.² The industry currently employs 1.3 million Texans in more than 50,000 locations statewide and nearly 16 million Americans who work in over one million restaurants and other foodservice outlets across the country.

Established in 1937, the Texas Restaurant Association is a 501(c)(6) nonprofit that represents and advocates on behalf of Texas’s approximately \$70 billion food-service industry. The Texas Restaurant Association’s members comprise stakeholders at all stages and levels of the industry, from

¹ *See City of League City v. Jimmy Changas Inc.*, 619 S.W.3d 819 (Tex. App.—Houston [14th Dist.] 2021, pet. granted) (herein, *League City*).

² *See infra* Argument, Section I(A) (discussing economic data concerning the restaurant industry).

small-town family restaurants to multinational franchise operations employing tens of thousands of Texans—and every iteration in between.

As an independent restaurant, Jimmy Changas is characteristic of many Texas Restaurant Association members:³ Nine out of 10 Texas restaurants have fewer than 50 employees, and seven in 10 are single-unit operations. Well over half are minority owned. Having protected and advanced the interests of Texas’s restaurant industry and workforce for 85 years, the Texas Restaurant Association is uniquely positioned to offer the Court industry-wide perspective on how significant legal rulings will impact those businesses’ constituents and the local Texas communities in which they are often incentivized to invest and operate.

The Restaurant Law Center is a 501(c)(6) nonprofit membership organization affiliated with the National Restaurant Association, the world’s

³ Like many of the Texas Restaurant Association’s members, Jimmy Changas is a privately owned, home-grown Texas restaurant group that, according to its website, currently has four locations in smaller communities outside Houston—Pearland, Katy, League City, and Pasadena. *See* <https://www.jimmychangas.com/locations/> (last visited Sept. 26, 2022). The League City location was Jimmy Changas’s second location when the parties entered into the Chapter 380 agreement with the City about a decade ago. *See* 2nd Jimmy Changas Restaurant Breaks Ground in League City, FSR INDUS. NEWS (APRIL 25, 2012), <https://www.fsrmagazine.com/2nd-jimmy-changas-restaurant-breaks-ground-league-city> (last visited Sept. 26, 2022). These publicly-available details contextualize the potential impact of the City’s proposed categorical rule on thousands of small-to-medium-sized Texas businesses like Jimmy Changas.

largest foodservice trade association. State restaurant associations affiliated with National Restaurant Association—including the Texas Restaurant Association and its members—are automatically enrolled as members of the Restaurant Law Center. The Restaurant Law Center is the only independent public policy organization created specifically to represent the interests of the American foodservice industry in the judicial system. Through *amicus* participation, the Restaurant Law Center regularly provides courts with the industry’s perspective on legal issues that significantly impact its members and the health of their industry.

The fee for preparing this Brief of *Amici Curiae* will be paid by *the Restaurant Law Center*.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal raises two issues of significant concern to *Amici Curiae* and their members: (1) are cities always entitled to immunity from suit when they enter into agreements authorized by Chapter 380⁴ that promise financial incentives to induce private businesses (here, a restaurant) to move into the area, invest in new operations and improvements, and generate business and taxes for the local community, TEX. CIV. PRAC. & REM. CODE § 101.0215(a), and (2) if immunity exists, whether immunity from suit is waived under the Texas Tort Claims Act (“TTCA”), TEX. LOC. GOV’T CODE §§ 271.151–.152.

Amici file this brief to address certain proposals raised by Petitioner that, if adopted by this Court, would have significant negative consequences for the restaurant industry and similar specialty retail businesses throughout the State. Specifically, Petitioner proposes a categorical rule that a city’s participation in a Chapter 380 incentive agreement always qualifies as a governmental function triggering immunity from suit. *Amici* oppose

⁴ See TEX. LOCAL GOV’T CODE §§ 380.001–.004 (Miscellaneous Provisions Relating to Municipal Planning and Development) (“Chapter 380”). The agreement between the City and Jimmy Changas is entitled “Chapter 380 Economic Development Incentives Grant Agreement” (CR390–401), and is referenced herein as the “Chapter 380 Agreement.” The term “Chapter 380 incentive agreements” in this brief refers generally to contracts between municipalities and third parties as authorized by Chapter 380.

Petitioner's proposed categorical rule because it asks this Court to revise § 101.0215(a) to include language that the Legislature has not adopted, and because it ignores the substantial benefits that both the restaurant industry and Chapter 380 incentive agreements provide to municipalities.

Amici have an interest in encouraging their constituent members to participate in Chapter 380 incentive agreements, which benefit both municipalities and the restaurant industry by facilitating private investment and fostering local economic growth. But Chapter 380 incentive agreements would be too risky for many industry participants if, as the City proposes, municipalities can unilaterally revoke economic incentives after they have induced private investment that might not otherwise have been feasible.

The Court should not abrogate the Legislature's evident choice *not* to expressly categorize Chapter 380 incentive agreements as governmental functions, even though it clearly could have done so if it considered Chapter 380 contracts to be equivalent to agreements authorized by Chapters 373 and 374 of the Local Government Code. TEX. CONST. art. XI, § 13(a); TEX. CIV. PRAC. & REM. CODE § 101.0215(a)(34).

If the Court is inclined to adopt a new judicial rule that Chapter 380 incentive agreements *always* effectuate a municipality's governmental function, *Amici* urge that the Court provide clear guidance with respect to

whether immunity from suit is waived. *Amici* propose that when a city enters a Chapter 380 incentive agreement that induces a private business to make specific investments in the local community, and the promised incentives are funded out of the revenue to the city that the new business generates, immunity from suit is waived.

ARGUMENT

I. TEXAS MUNICIPALITIES ROUTINELY EXERCISE THEIR DISCRETIONARY AUTHORITY UNDER CHAPTER 380 TO INDUCE RESTAURANTS TO INVEST IN LOCAL ECONOMIES.

A. Restaurants provide direct and substantial benefits to the local communities in which they decide to invest.

The Texas restaurant industry accounts for more than \$70 billion dollars in annual sales revenue.⁵ Though the industry is collectively the second-largest private employer in the state—employing over 1.3 million Texans (10% of the workforce) across 50,000 locations—it comprises primarily smaller businesses.⁶ Nine out of 10 locations have fewer than 50

⁵ Texas Restaurant Association & Foundation Announce 2023 Board of Officers & Directors, TEXAS RESTAURANT ASSOCIATION, <https://www.txrestaurant.org/pub/pub/tagged-content/news/2022/texas-restaurant-association-foundation-announce-2023-board-officers-directors.aspx> (last accessed Sep. 30, 2022).

⁶ See Texas Restaurant Industry at a Glance (2019), NATIONAL RESTAURANT ASSOC. | TEXAS RESTAURANT ASSOCIATION, at 1 <https://www.txrestaurant.org/common/Uploaded%20files/TRA/PDF/Advocacy/TRA-2020-Stats-At-A-Glance.pdf> (last accessed Sep. 27, 2022), [*hereinafter* Restaurant Industry at a Glance].

employees, and 7 in 10 locations are single-unit operations.⁷ And in Texas, 59% of restaurants are minority-owned.⁸

Restaurants like Jimmy Chingas are crucial to the health and growth of local economies.⁹ “[R]estaurants anchor neighborhoods and provide innumerable direct and indirect benefits to the communities they serve,” including vital employment opportunities for local residents and substantial tax revenue for local governments that in turn helps “fund countless local programs, police and fire departments, and a host of other local amenities that are critical to improving the quality of life for residents in every community.”¹⁰ Local restaurant sales also drive even greater direct economic benefit in the communities where they operate in terms of consumer

⁷ Restaurant Industry Overview.

⁸ Restaurant Owner Demographics, NATIONAL RESTAURANT ASSOC. (Mar. 2022), <https://restaurant.org/getmedia/ad96e3a8-4fb1-492d-a5ae-ob3dd53a61ef/nra-data-brief-restaurant-owner-demographics-march-2022.pdf> (last visited Sep. 27, 2022) [*hereinafter* Restaurant Owner Demographics].

⁹ *See generally* Independent Restaurants Are a Nexus of Small Business; *see also, e.g.*, John Nova Lomax, How a New Generation Is Reviving Small-Town Texas, TEX. TRIB. (Aug. 2018) [*hereinafter* Reviving Small-Town Texas] (describing how the arrival of new restaurants in towns such as Lockhart, Brenham, and Alpine are contributing to a “rural renaissance”).

¹⁰ Independent Restaurants Are a Nexus of Small Business, at 6, 14–15.

spending—each dollar spent in restaurants generates an additional \$2 in spending elsewhere.¹¹

Restaurants also feed the local community. Dining out may be viewed as a luxury to some, but the provision of food is one of the most basic needs for a society. Restaurants account for 51% of the food dollar in Texas.¹² The COVID-19 pandemic especially highlighted the importance of restaurants to the public. In March 2020, food shortages and peoples' unwillingness or inability to visit grocery stores led some residents to rely heavily on restaurant takeout and delivery services.¹³ Even more, many restaurants served their local communities by providing food to people in need during that difficult time.¹⁴

¹¹ Texas Restaurant Industry Overview, TEXAS RESTAURANT ASSOCIATION, <https://www.txrestaurant.org/common/Uploaded%20files/TRA/PDF/Advocacy/2022%20Advocacy%20Fact%20Sheets/TRA-Restaurant-Industry-Overview.pdf> (last accessed Sep. 27, 2022) [*hereinafter* Restaurant Industry Overview].

¹² Restaurant Owner Demographics.

¹³ See Ordering in: Kabir Ahuja et al., The rapid evolution of food delivery, MCKINSEY & Co., <https://www.mckinsey.com/industries/technology-media-and-telecommunications/our-insights/ordering-in-the-rapid-evolution-of-food-delivery> (last visited Sep. 27, 2022).

¹⁴ See, e.g., Hayden Walker, Tso Chinese Delivery Expands Free Takeout Meals Program, AUSTIN FOOD MAG. (Apr. 3, 2020), <https://austinfoodmagazine.com/tso-chinese-delivery-free-meals-program/> (last visited Sep. 27, 2022); Hayden Walker, Hopdoddy Burger Bar Launches Pay It Forward Campaign, AUSTIN FOOD MAG. (Mar. 25, 2020),

While the Texas restaurant industry always generates benefits for state tax coffers, a successful restaurant in Austin, for example, provides no direct benefits to League City. Seeking the tax revenue and other economic benefits that restaurants bring to local economies, cities like Petitioner therefore often “adopt economic development programs that centrally feature independent restaurants.”¹⁵

B. Despite their vital role in local economies, restaurants face notorious financial risks that often inhibit expansion to new localities absent economic incentives.

Historically, competing in the restaurant industry has never been an easy task. Estimates of restaurant failure rates vary drastically, but they are estimated to be somewhere between 15–30% in the first year, and 35% in the first three years.¹⁶

<https://austinfoodmagazine.com/hopdoddy-pay-it-forward/> (last visited Sep. 27, 2022).

¹⁵ Independent Restaurants Are a Nexus of Small Business, at 13.

¹⁶ See, e.g., Adam Ozimek, No, Most Restaurants Don’t Fail in the First Year, *FORBES* (Jan. 29, 2017), <https://www.forbes.com/sites/modeledbehavior/2017/01/29/no-most-restaurants-dont-fail-in-the-first-year/?sh=21dcfeb34fcc> (last visited Sep. 27, 2022) (reporting that 17% of restaurants fail in first year); Joseph Wilder, Strategies for Improving Small Restaurant Success Rates Beyond Three Years, *WALDEN DISSERTATIONS AND DOCTORAL STUDIES* at 1 (2021) (only 64.9% of restaurants that opened in 2014 remained in business beyond three years); H.G. Parsa et al., Why Restaurants Fail, *CORNELL HOTEL & RESTAURANT ADMIN. QUARTERLY*, vol. 46 no. 3, 304, 305 (Aug. 2005) (estimating 30% of restaurants fail in first year); cf. What is the failure rate for US restaurants?, *FOODINDUSTRY.COM* (Jul. 2021),

Independent restaurants in particular face financial stressors including high cost of goods sold, debt, and notoriously slim profit margins.¹⁷ Food, labor, and occupancy costs account for approximately 70% of revenue even in normal economic times.¹⁸ After other expenses, such as utilities, supplies, administration, and repairs, the average pre-tax profit margin for a restaurant is roughly 5%.¹⁹

Current economic trends including inflation and unfavorable labor markets magnify these challenges. Sixty-two percent of Texas restaurant operators say their business conditions are worse now than they were three months ago, and more than half say that it will be more than a year—if ever—

<https://www.foodindustry.com/articles/what-is-the-failure-rate-for-us-restaurants/> (last visited Sep. 27, 2022) (citing failure estimates from 17% to 60% in first year).

¹⁷ H.G. Parsa et al., *Why Restaurants Fail*, CORNELL HOTEL & RESTAURANT ADMIN. QUARTERLY, vol. 46 no. 3, 304, 307 (Aug. 2005); *see also* Rafi Mohammed, *How Restaurants Can Survive Right Now*, HARVARD BUS. REV. (March 26, 2020) <https://hbr.org/2020/03/how-restaurants-can-survive-right-now> (last visited Sep. 25, 2022) (noting that restaurant “industry profits are notoriously thin” at approximately 5% and that many restaurants “are struggling due to the pandemic” and “won’t survive”).

¹⁸ Restaurant Industry Overview.

¹⁹ Bottom line impact of rising costs for restaurants, NATIONAL RESTAURANT ASSOC. (Aug. 24, 2022), <https://restaurant.org/research-and-media/research/economists-notebook/analysis-commentary/bottom-line-impact-of-rising-costs-for-restaurants/> (last visited Sep. 27, 2022).

before business conditions return to normal.²⁰ For example, average wholesale food prices were up 13.2% in August 2022 as compared to August 2021.²¹ Meanwhile, several major commodities were well above this average, including eggs (up 139.6%), butter (75.8%), and milk (23.6%),²² which only further narrows restaurants' especially slim profit margins.

With these economic challenges, investors and aspiring restaurateurs must carefully weigh the risks involved with opening a new location, particularly in a new city. Part of that risk assessment for a restaurant is whether there are economic incentives to establish a new operation in a particular location.

Such incentives are frequently a key factor in deciding whether to invest in new operations, and they are offered by many local governments seeking to recruit new business to their community. As providers of employment, tax revenue, food, and culture, restaurants are sought after by

²⁰ Restaurant Business Conditions Survey: Key Findings – August 2022, NATIONAL RESTAURANT ASSOCIATION, at 2, <https://www.txrestaurant.org/pub/pub/tagged-content/news/2022/texas-restaurant-association-foundation-announce-2023-board-officers-directors.aspx> (last visited Sep. 30, 2022).

²¹ Food Costs, NATIONAL RESTAURANT ASSOC., <https://restaurant.org/research-and-media/research/economists-notebook/economic-indicators/food-costs/> (last visited Sep. 27, 2022).

²² *Id.*

local governments seeking to develop local economies and communities.²³ To further that goal, municipalities often offer economic incentives to induce potential restaurants to invest in their community, such as grants to directly reimburse various costs, sales tax rebates, and fast-track permitting.²⁴ These economic incentive agreements help investors overcome steep barriers to entry by reducing the amount of investment required and bolstering the anticipated profit margin in a restaurant's early years. As in this case, these agreements are written contracts that well-assure a careful investor of the incentivizing promises on which he or she relies. Given notoriously slim

²³ Independent Restaurants Are a Nexus of Small Business, at 6, 14–15.

²⁴ *See, e.g.*, Bailey Lewis, Keller approves economic incentive agreement to build 3 restaurants in Center State development, COMMUNITY IMPACT (May 5, 2022), <https://communityimpact.com/dallas-fort-worth/keller-roanoke-northeast-fort-worth/business/2022/05/03/keller-approves-economic-incentive-agreement-to-build-3-restaurants-in-center-stage-development/> (last visited Sep. 27, 2022) (reporting City of Keller's new Chapter 380 economic incentive contract with hospitality group building three new restaurants); Leander creates incentive program for 'destination' style restaurants, CITY OF LEANDER TEXAS (Apr. 13, 2022), <https://www.leandertx.gov/communications/page/leander-creates-incentive-program-%E2%80%98destination%E2%80%99-style-restaurants> (last visited Sep. 27, 2022) (creating program to "fill a gap in Leander's local economy while also bringing customers from other communities to Leander"); Restaurant Incentive Program, MISSOURI CITY TEXAS, <https://www.missouricitytx.gov/1114/21196/Restaurant-Incentive-Program> (last visited Sep. 27, 2022) (establishing restaurant incentive program to "contribute to the City Council's overall vision of creating a great place to live by revitalizing along the Corridor").

profit margins, the investor must be able to trust that the contract will be honored—or, at minimum, that he or she will have some recourse if it is breached—because not receiving the relied-upon incentives would often risk outright failure.

The Chapter 380 Agreement here is thus not unusual²⁵—many Texas cities actively promote Chapter 380 incentive programs that are funded out of anticipated revenue to induce new restaurants to join and contribute to their local communities.²⁶ Municipalities openly recruit out-of-town restaurants that can make a substantial and long-term investment in the

²⁵ See, e.g., Economic Development Incentive Agreement dated September 21, 2021 between the City of Murphy and Yard Dawgs TX LLC (restaurant developer), expressly authorized by Chapter 380, <https://assets.comptroller.texas.gov/open-data/ch380/0000546-Murphy.pdf> (last accessed Sept. 27, 2022).

²⁶ See, e.g., “Retail Incentive Programs: Specialty Retail & Restaurant,” CITY OF CARROLLTON, <https://www.cityofcarrollton.com/departments/departments-a-f/community-development/grants-incentives-neighborhood-improvement-in-action-impact/mycarrollton/retail-incentive-programs> (accessed Sept. 27, 2022) [*hereinafter* Carrollton Chapter 380 Restaurant Incentive Program]; see also Chapter 380 Recovery Lease Incentive Program, City of Austin—Economic Development Dep’t, <https://www.austintexas.gov/edims/document.cfm?id=349296>; Restaurant Incentive Program, City of Kyle, <https://kyleed.com/choose-kyle/incentives/resturant-incentive-program>; Restaurant Incentive Program, Missouri City, <https://www.missouricitytx.gov/1114/21196/Restaurant-Incentive-Program>.

community by, *e.g.*, enhancing the local tax base, attracting out-of-town customers, contributing to the local community’s need for quality restaurants and entertainment venues to “help differentiate [the city] from other communities,” and commit to maintain operations in the city for a minimum term of five, ten, or even fifteen years before being able to collect the promised incentives.²⁷

To secure these benefits for the local community, cities offer potential recruits specific financial incentives such as reimbursements of improvement costs, permit and fee rebates, rent assistance, and significant tax rebates based on the revenue generated by the restaurant. As the City of Carrollton describes their program: “It is the policy of the City of Carrollton to customize the provisions of economic development incentives on a case-by-case basis to result in a ‘Win/Win’ agreement for the applicant and for the City of Carrollton taxpayers.”²⁸

As addressed next, if this Court adopts the rule proposed by Petitioner, these Chapter 380 incentive agreements will not be a “win/win”—they will induce private investment based on a promise that some of that investment

²⁷ See, *e.g.*, Carrollton Chapter 380 Restaurant Incentive Program.

²⁸ See Carrollton Chapter 380 Restaurant Incentive Program, *Summary of Incentives*.

will return to the business. Petitioner asks this Court to adopt a categorical rule that would allow municipalities to walk away from those promises after they are contractually agreed and relied upon by Texas businesses.

II. THE COURT SHOULD NOT ADOPT A RULE THAT MUNICIPALITIES ARE CATEGORICALLY IMMUNE FROM SUIT FOR BREACHES OF CHAPTER 380 INCENTIVE AGREEMENTS.

The City asks this Court to adopt a broad, categorical rule that Chapter 380 incentive agreements *always* constitute a governmental function under § 101.0215(a)(34), even though statute does not mention Chapter 380. (*See* City BOM at 7–10.)

Amici oppose the City’s proposed categorical rule because it would negatively impact their member businesses—including those that are already parties to similar agreements—by inviting cities to breach agreements that have induced a private business to make a specific investment in a local community. Whether Chapter 380 incentive agreements should be included among § 101.0215(a)’s enumerated governmental functions is a question for the Legislature, and this Court should not judicially revise the TTCA to immunize the City from its contractual obligations.

A. The City’s proposed categorical rule that all Chapter 380 incentive agreements are governmental functions would judicially rewrite § 101.0215(a) where the Legislature has not done so.

Whether to include Chapter 380 incentive agreements among § 101.0215(a)’s enumerated governmental functions is a question for the Legislature. TEX. CONST. art. XI, § 13 (“Notwithstanding any other provision of this constitution, the legislature may by law define for all purposes those functions of a municipality that are to be considered governmental and those that are proprietary, including reclassifying a function’s classification assigned under prior statute or common law.”). As fully addressed by Respondent, § 101.0215(a) does not specify whether Chapter 380 incentive agreements reflect governmental or proprietary functions, and § 101.0215(a)(34)’s reference to community development agreements under Chapters 373 and 374 does not support a categorical rule as to Chapter 380 incentive agreements. (*See* Changas BOM at 12–20.)

Amici address this issue to respond to Petitioner’s misguided argument that the Legislature’s 2021 addition of § 380.004²⁹ to Chapter 380 somehow reflects Legislative intent that Chapter 380 incentive agreements are included in § 101.0215(a)(34), (City BOM at 14; *see also* City Reply at 8.) In

²⁹ See Acts 2021, 87th Leg., ch. 208 (H.B. 2404), § 2, eff. Sept. 1, 2021.

Amici's view, if the 2021 amendment to Chapter 380 is at all relevant, it is only because it confirms the Legislature could have addressed whether Chapter 380 incentive agreements are, categorically, governmental or proprietary in nature as they did for Chapter 373 and 374—but it did not. *See* TEX. CONST. art. XI, § 13.

Chapter 380 was originally enacted in 1989, and subsequently amended in 1991, 1995, 1999, 2001, 2005, and 2009. The Legislature has had ample opportunity to amend § 101.0215(a)(34) since it was added to the TTCA in 1997 to include Chapter 380 incentive agreements, but it has not done so—even though it enacted other amendments to § 101.0215(a) in 1999, 2001, and 2013. The Legislature also has not added Chapter 380 agreements to the TTCA's list of enumerated governmental functions even though the Fort Worth Court of Appeals held in 2018 that a Chapter 380 incentive agreement was not covered by § 101.0215(a)(34) because it was not referenced. *City of Westworth Village v. City of White Settlement*, 558 S.W.3d 232, 243–44 (Tex. App.—Fort Worth 2018, pet denied).

On this issue, the TML Amici claim “[t]here is no legislative pronouncement ... that a local community program that attacks the effects of poverty is more worthy of immunity protection than ... another that creates jobs.” (TML Amicus at 16–17.) But by amending § 101.0215(a) to expressly

include agreements under Chapters 373 and 374 as governmental functions but omitting Chapter 380 incentive agreements, the Legislature *did* make a statement—agreements under Chapter 380 do not categorically qualify as a municipality’s exercise of a governmental function.

In essence, Petitioner proposes adding words to § 101.0215(a)(35) that the Legislature could have, but did not. Doing so would run afoul of the rule that courts “may not judicially amend a statute by adding words that are not contained in the language of the statute. Instead, it must apply the statute as written.” *Odyssey 2020 Acad., Inc. v. Galveston Cent. Appraisal Dist.*, 624 S.W.3d 535, 543 (Tex. 2021) (quoting *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 508 (Tex. 2015)); *see also Miles v. Texas Cent. R.R. & Infrastructure, Inc.*, 647 S.W.3d 613, 624 (Tex. 2022) (“Of course, we may not rewrite statutes to broaden their applicability beyond what the plain language encompasses.”).

The Court should therefore decline to construe § 101.0215(a)(34) to include Chapter 380 incentive agreements where the Legislature has not chosen to do so.

B. Under this Court’s current precedent, many Chapter 380 incentive agreements are proprietary and not entitled to governmental immunity.

Unlike the City and the TML Amici, neither Respondent nor *Amici* here propose a categorical rule that Chapter 380 incentive agreements are always proprietary—that is a question for the Legislature. *Amici* agree with Respondent, however, that the Chapter 380 Agreement here qualifies as proprietary under this Court’s decision in *Wasson II*,³⁰ and is thus not entitled to immunity. (Changas BOM at 20–28.) *Amici* address this issue because the question of whether a Chapter 380 incentive agreement provides a direct benefit or “service” to a municipality is of great significance to *Amici*’s members, who frequently rely on these agreements when deciding whether they can afford to invest in a new venture in a new locality. Clarity on this issue would thus be helpful to the thousands of businesses and millions of restaurant workers represented by *Amici*’s membership.

The City argues at length that the Chapter 380 Agreement confers a benefit primarily on the State, not the City. (See City BOM at 7–8, 11–15.) The City’s argument not only disregards the plain text of Chapter 380, it ignores the direct and substantial benefit restaurants like Jimmy Changas

³⁰ See *Wasson Interests, Ltd. v. City of Jacksonville*, 559 S.W.3d 142 (Tex. 2018) (“*Wasson II*”).

bring to local communities when they establish operations in new cities. *See supra*, Section I. As the *amicus* brief filed by the Texas Municipal League and Texas City Attorneys Association in support of the City’s petition for review notes: “All municipal functions are carried out locally, not statewide; and therefore, courts can always assume that the direct benefit is greater locally.” (TML Amicus at 3.)

By enacting Chapter 380, the Legislature expressly recognized that it authorizes municipalities to promote “state *or* local economic development and to stimulate business and commercial activity in the municipality.” TEX. LOC. GOV’T CODE § 380.001(a) (emphasis added). “Or” is a disjunctive and identifies two alternative grounds or purposes for entering an agreement under Chapter 380: state *or* local purposes. *See id.*; *City of Dallas v. TCI West End, Inc.*, 463 S.W.3d 53, 58 (Tex. 2015) (citing *City of Lorena v. BMTP Holdings, L.P.*, 409 S.W.3d 634, 642 (Tex. 2013) (“[Texas Local Government Code Section 54.017’s] use of ‘or,’ a disjunctive, identifies two alternative bases for recovering civil penalties.”)).

Allowing municipalities to fund projects that are either state- or local-focused permits them to craft a range of projects that address their needs and to freely negotiate binding contracts with private parties. A municipality may pursue a large development project serving the interest of the general

public—such as supplementing state funding to restore a historic landmark as a cultural landmark with parking, educational facilities, restrooms, a park, and a hike-and-bike trail, *see Hays St. Bridge Restoration Grp. v. City of San Antonio*, 570 S.W.3d 697, 700 (Tex. 2019), with entities that agree to the state-focused project with knowledge of the increased risk associated with contracting with an entity protected by governmental immunity.

But a municipality may also choose to pursue a smaller-scale project that enjoys only local incentives and expressly benefits the local community, such as a shopping center,³¹ with an entity that reasonably relies on the municipality's agreement to a local scope—and thus a lack of governmental immunity due to the proprietary nature of the project. Investors unable to assume the risk of having no recourse against a sovereign entity may then rely on the assurance of incentives and bonds that would make the investment possible.

This Court has previously recognized that at least some funding or incentivizing agreements that are not under Chapters 373 or 374 may arise from a governmental function, but it has never endorsed a categorical rule

³¹ *See Town Park Ctr., LLC v. City of Sealy*, 639 S.W.3d 170, 186–89 (Tex. App.—Houston [1st Dist.] 2021, no pet.) (finding waiver of immunity in connection with Chapter 380 agreement to develop and construct shopping center according to a City-approved development plan).

that *all* agreements involving Chapter 380 or economic development do. *Hays St. Bridge Restoration Grp. v. City of San Antonio*, 570 S.W.3d 697, 705 n. 46 (Tex. 2019) (rejecting argument that § 101.0215(a)(34)’s reference to Chapters 373 and 374 *excluded* agreement that covered governmental functions elsewhere specifically enumerated in § 101.0215(a)).

In *Hays Street Bridge*, for example, this Court employed a fact-specific analysis of the *Wasson II* factors³² to hold that a particular agreement reflected a governmental function: The project was to restore an “important and cultural engineering landmark” for general public enjoyment and education. *Id.* at 706 (emphasis added by Court). The project was funded in large part—80%—by the Texas Department of Transportation. *Id.* And because it involved funding bridge construction and maintenance and community development or urban renewal activities, it was sufficiently related to governmental functions. *Id.*

For this reason, *City of Westworth Vill. v. City of White Settlement* is consistent with *Hays Street*, and the court of appeals did not err in relying on it. *See* 558 S.W.3d at 243–244. In *Westworth Village*, a Chapter 380 incentive agreement provided for regular payments from the city to a private

³² For a discussion of the *Wasson II* factors, see Chagas’s Brief on the Merits at 10–11.

entity calculated from the city's tax collections to "promote economic development." *Id.* at 237. Applying the *Wasson II* analysis, the court held the city had acted in its proprietary capacity because (1) entering the contract was discretionary, not mandated; (2) the agreement's purpose was to promote *local* economic development through the city's sales-tax-funded grant; (3) no evidence suggested the city was acting on the State's behalf; and (4) though the agreement "'touched' on taxation and planning . . . the agreement's primary purpose was to foster local economic development to the benefit of the cities' inhabitants rather than to the general public of the state." *Id.* at 244–251.

This fact-specific analysis affords municipalities the flexibility to pursue a smaller project that will primarily impact local residents and that will be viable for smaller business owners' participation. Here, for example, the City and Jimmy Chngas structured a deal by which Chngas would "contribute to the economic development *of the City* by generating employment and other economic benefits *to the City*." (CR789 (emphasis added).) Though the parties contemplated that the restaurant would help establish the area as a "regional destination," the impact of the regional destination would be to "promote *local economic development* and to

stimulate business and commercial activity *in the City.*” (CR790 (emphasis added).)

Finally, Exhibit B to the Chapter 380 Agreement states the anticipated economic impact of the establishment, which again focuses on local impact: property taxes to the City of League City, Clear Creek ISD, and City of League City Sales Tax make up the bulk of the expected revenues. (CR400–01.) This focus on local benefits, rather than regional or state benefits, demonstrates the parties’ intent that this project not be entered for the general public but rather for the City’s own interests.

C. The City’s proposed categorical rule limits the ability of municipalities and aspiring restaurateurs from freely contracting.

The impact of the City’s proposed rule would be that in every municipality-offered incentive program to promote local development, the municipality would be immune from suit. Contrary to the text of the TTCA and the Local Government Code, such a holding would grant license to induce private entities to invest through specific promises of incentives (such as defined amounts of tax credits or reimbursed fees) without any intention of following through with the promises. A business owner in this situation would have no recourse against the municipality.

While some businesses may be able to weather this risk, it would be prohibitively risky for many restaurants. As discussed *supra* in Section I, restaurants face ever-tightening margins and rising costs, making their ability to withstand a reneged deal impossible. Owners or operators may invest hundreds of thousands of dollars to open a new location, relying on specific, bargained-for financial incentives to offset part of the cost and then be forced out of business when the municipality backs out of the deal. Knowing that they will have no recourse if the municipality breaches the contract, many owners and operators will choose not to invest at all.

Amici recognize this risk is often present in state economic development programs, but many smaller businesses are unable to participate in those large-scale projects. By contrast, local municipalities have flexibility under Chapter 380 to pursue local development, increase local revenue and sales tax, and contract with even small business owners who are only able to do business with entities that they will be able to sue if an agreement is breached.

Importantly, the issue here is not whether the City breached the Incentive Agreement or whether any failure to comply is excused—that question would be resolved in litigation on the merits. The only question is whether a party that contracts with a municipality for defined tax incentives

that are funded by the contract itself may seek a remedy through the judicial system. Engaging in a case-by-case analysis, as did this Court in *Hays Street*, empowers the parties to make this choice and remain confident that their contracts will be enforced based on their agreement as expressed in the contract.

III. IF IMMUNITY APPLIES, THE COURT SHOULD HOLD IT IS WAIVED WHEN A CITY INDUCES A PRIVATE BUSINESS TO MAKE SPECIFIC INVESTMENTS IN THE LOCAL ECONOMY WITH PROMISES OF FUTURE FINANCIAL INCENTIVES FUNDED BY THE PROJECT.

Amici agree with Respondent that, whether under TTCA or the *Wasson II* factors, the City's discretionary decision to enter into the Chapter 380 Agreement here is a proprietary function to which immunity does not apply. But if the Court concludes the Chapter 380 Agreement is a governmental function for which the City is entitled to immunity, then it should provide clear guidance to Texas businesses regarding when these contracts can be enforced because immunity is waived. In doing so, the Court should take into account Texas's strong public policy favoring freedom of contract and the importance of honoring contract rights.

Amici propose that the Court should adopt a rule that a city waives immunity from suit when it enters a Chapter 380 incentive agreement that induces a private business to make specific investments in the local economy

with promises of future financial incentives that are to be funded by the project that is the subject of the agreement.

A. The Court should factor in Texas’s strong public policy favoring the enforcement of contract rights.

“Texas’s strong public policy favoring freedom of contract is firmly embedded in our jurisprudence.” *Chalker Energy Partners III, LLC v. Le Norman Operating LLC*, 595 S.W.3d 668, 673 (Tex. 2020) (quoting *Phila. Indem. Ins. Co. v. White*, 490 S.W.3d 468, 471 (Tex. 2016)). Therefore, “[a]bsent compelling reasons, courts must respect and enforce the terms of a contract the parties have freely and voluntarily entered,” and “[a]s a rule, parties have the right to contract as they see fit as long as their agreement does not violate the law or public policy.” *Shields Ltd. P’ship v. Bradberry*, 526 S.W.3d 471, 481 (Tex. 2017) (citations omitted). In other words, contract enforcement is the “indispensable partner” to the freedom of contract. *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 664 (Tex. 2008) (citation omitted).

Consistent with the strong public policy favoring the enforcement of contract rights, the Legislature enacted Texas Local Government Code § 271.152³³ to authorize the “enforcement of contracts against local

³³ “A local government entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to

governmental entities by waiving their immunity from suit.” *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 327 (Tex. 2006). “[T]he statute’s legislative history indicates that, by enacting section 271.152, the Legislature intended to loosen the immunity bar so ‘that *all* local governmental entities that have been given or are given the statutory authority to enter into contracts shall not be immune from suits arising from those contracts.’” *Id.* at 327 (quoting HOUSE COMM. ON CIVIL PRACTICES, BILL ANALYSIS, Tex. H.B. 2039, 79th Leg., R.S. (2005) (emphasis added in opinion)); *see also Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 838 (Tex. 2010).

The Court should take this strong public policy into account if it reaches the question of whether the City has waived immunity from suit.

this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter.” TEX. LOC. GOV’T CODE § 271.152. A “contract subject to this subchapter” is defined as “a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity.” TEX. LOC. GOV’T CODE § 271.151(2)(A).

B. If the Court reaches the waiver issue, it should hold that Chapter 380 incentive agreements that are funded by the private investments they induce waive immunity from suit.

Chapter 271's waiver of immunity applies broadly to any contract for "services," which this Court has held is expansive "enough to encompass a wide array of activities' and "includes generally any act performed for the benefit of another." *Byrdson Servs., LLC v. South East Tex. Reg'l Planning Comm'n*, 516 S.W.3d 483, 485 (Tex. 2016) (quoting *Kirby Lake Dev.*, 320 S.W.3d at 839). While the waiver does not apply to contracts that "provide[] only an 'indirect, attenuated' benefit to the local government," the benefit need not be the "contract's 'primary purpose.'" *San Antonio River Auth. v. Austin Bridge & Rd., L.P.*, 601 S.W.3d 616, 629–630 (Tex. 2020) (quoting *Kirby Lake*, 320 S.W.3d at 839 & *Byrdson*, 516 S.W.3d at 486).

Here, the Chapter 380 Agreement meets the broad definition of services provided to the municipality. (*See* Changas BOM at 31–33.) Jimmy Changas contracted to develop a parcel of land (tailored to the City's specifications), operate a restaurant, and create a certain number of new full-time jobs to "contribute to the economic development of the City by generating employment and other economic benefits to the City." (CR709.) The City acknowledges that it received a benefit of a 2% sales tax on Changas's gross sales. (City BOM at 12.) That benefit is a direct, non-

attenuated benefit to the City, even if the state will also receive tax revenues as a result of the economic development.

The TML *Amici* argue that the Chapter 380 Agreement “is not a government program that pays its own way” and that community development projects generally “advance public welfare at public expense.” (TML *Amicus* at 4, 14.) But these policy arguments are belied by the parties’ own contract, which provides that future incentive payments will be funded by the project itself. Like many economic incentive agreements, the Chapter 380 Agreement pays Jimmy Changas out of the direct economic benefit accruing to the City in the form of a scaled percentage rebate of “Sales Tax Revenues” defined as “the amount of “sales taxes collected by *the City*” from restaurant operations. (CR392 § 2 (emphasis added, defining “Sales Tax Revenues” in terms of taxes paid to Petitioner); *see also* CR394 § 6 (“Chapter 380 Payments – Sales Tax Calculus”).) In other words, the City induced Jimmy Changas to make a substantial investment in the local community with a promise of financial incentives that would come directly from the project itself—not public funds that the City already has available for other purposes.

The specifics of the Chapter 380 Agreement here are important to the thousands of Texas businesses *Amici* represent because there is a material

distinction between promoting local economic development through grants, and *inducing* a specific business to make a substantial private investment with a written contract. Under Chapter 380, the City had the option of simply offering incentives out of public funds in order to draw Jimmy Changas to the local community. TEX. LOC. GOV'T CODE § 380.001(a). But such a grant could not be assured to fund itself, as Chapter 380 incentive agreements usually do. Where a municipality enters into a Chapter 380 incentive agreement that promises financial incentives only *after* a private business invests in the community, and that investment funds the incentives to be given, the agreement funds itself and does not deplete the City's public funds.

The TML Amici also argue that, if cities do not have immunity on Chapter 380 incentive agreements, they “will opt not to engage in such activities.” (TML Amicus at 23.) In response, *Amici* pose this question: If cities do not want their contractual promises to be enforceable like other contracts, why are they entering into Chapter 380 incentive agreements in the first place? If cities make promises of future financial support to induce a business to establish a new venture in the local community without the intent to make good on those promises, then perhaps cities should not be entering into contracts with Texas businesses in the first place.

While perhaps true that cities will be less inclined to enter into Chapter 380 incentive agreements if they cannot claim blanket immunity, the same can be said of private businesses if the Court adopts a categorical rule that Chapter 380 incentive agreements are always subject to immunity. Many small businesses that would otherwise have been able to justify a new venture will opt to not participate in community development projects at all if a city's contractual promise of future performance is a meaningless exercise—and that harms local economies that would otherwise benefit from the investment. Without the ability to enforce a city's contractual obligations, Chapter 380 incentive agreements are nothing more than false promises of future performance intended to induce reliance without any legal remedy. This this Court should not endorse.

PRAYER

Amici urge the Court to reject the City's invitation to adopt a new rule that would characterize all Chapter 380 contracts as governmental functions where the Legislature has not chosen to do so itself. It is important that the Court clarify and restrict the circumstances under which a city can claim immunity from suit when it forsakes promises of future financial support that induce a private business to invest in a specific private development. Whether the City's choice to breach its promises to Changas were excusable

is not before the Court. But if the Court adopts the City's proposed rule, municipalities will be incentivized to induce investment by private business with specific promises that they know they can dishonor without consequence.

Respectfully submitted,

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Nicole Leonard Cordoba

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I hereby certify that on September 30, 2022, a true and correct copy of the foregoing document was served to all counsel of record through the Court's CM/ECF system.

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