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**NO. 17-0423**

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**IN THE SUPREME COURT OF TEXAS**
**AUSTIN, TEXAS**

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**HAYS STREET BRIDGE RESTORATION GROUP,**

**Petioner,**

**v.**

**CITY OF SAN ANTONIO,**

**Respondent.**

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# AMERICANS FOR PROSPERITY FOUNDATION, INC. AMICUS BRIEF

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## RULE 11 DISCLOSURES

This brief was prepared for and is filed on behalf of Americans for Prosperity Foundation, Inc. All fees related to the preparation and filing of this brief were provided or will be provided to the Morenoff Firm, PLLC by Americans for Prosperity Foundation, Inc.

*/s/ Daniel I. Morenoff*
Daniel I. Morenoff

## CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I hereby certify that this brief complies with the maximum length requirements established by TRAP 9.4(i)(2)(B). Specifically, I certify pursuant to TRAP 9.4(i)(3) that my word processer calculates this brief's word count to total 2,672.

*/s/ Daniel I. Morenoff*
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## Table of Contents

## Table of Authorities

**CASES**

### U.S. Supreme Court



### U.S. Courts of Appeal



### Supreme Court of Texas



### Texas Courts of Appeal

**CONSTITUTIONAL PROVISIONS**



**STATUTES**

Americans for Prosperity Foundation, Inc. ("Americans for Prosperity Foundation" or "AFPF") respectfully submits this brief as *Amicus Curiae* to urge the Court to reverse the decision of the 4th Court of Appeals.

## I. ISSUE PRESENTED

Facially, this case presents only one issue: whether, despite the legislature's on-point enactment, San Antonio (the "City" or the "Respondent") is immune from the suit brought by the Hay Street Bridge Restoration Group (the "Engaged Locals" or the "Petitioner") for the City's breach of its Memorandum of Understanding with the Engaged Locals (the "Contract"). However, because of the subject matter of the Contract and the kind of breach established by trial, the case also raises an additional issue: whether Texas law allows a municipality to do indirectly, through dishonesty, what the U.S. Constitution, Texas Constitution, and Texas Government Code plainly forbid it to do directly: take and redistribute property for private use without providing just compensation.

## II. STATEMENT OF THE CASE

AFPF need not fully restate the case for the Court: the parties have admirably done so for themselves. For the purposes of this *Amicus Curiae*, the only facts that matter are the order of the following events:

1. The Engaged Locals formed their organization;
2. The City prepared and had the Engaged Locals sign the Contract;

3. The Engaged Locals upheld their end of the Contract, raising money, lining up the support of the owners of both the bridge and the Cherry St. Land;[1]

4. The Engaged Locals, in compliance with the Contract, donated the money they'd raised to the City and caused the owners of the bridge and the Cherry St. Land to do the same;

5. The City passed an ordinance approving the sale of the Cherry St. Land to a preferred party for a private use incompatible with the Contract;

6. The City followed through on this alternative, incompatible sale of the Cherry St. Land to a preferred party for private development; and

7. The City declined to even allocate the proceeds from its sale of the Cherry St. Land to the project as required by the Contract, instead crediting the full sale price back to the preferred private "buyer."

## III. STATEMENT OF THE INTEREST OF AND EXPLANATION FOR THE NEED OF AFPF'S *AMICUS CURIAE*

AFPF is an organization, tax-exempt under Tax Code § 501(c)(3), which has been educating citizens for more than twenty (20) years to be advocates for freedom and to apply the principles of a free and open society in their daily lives. Accordingly, it is interested in this case, which presents as clear an example as AFPF

[1] "Cherry St. Land" is used as defined by the Petitioners in their Brief on the Merits.

has encountered of citizens organizing and advocating for those principles at the local level and encountering in response nothing but disingenuousness, disrespect, opacity, and the stiff-arm of a government focused only on benefitting a favored backer.

AFPF believes the Court needs this *Amicus* filing, for two reasons. First, due to scheduling limitations, the parties briefs have not addressed the impact of the Court's revisitation earlier this year of *Wasson Interests, Ltd. v. City of Jacksonville*.[2] Additionally, while the parties have understandably focused on the particulars of their exceptional case, they have not addressed the hash that the City's position would make of larger swaths of Texas public policy.

## IV. SUMMARY OF ARGUMENT

The City entered the Contract in its proprietary capacity: agreeing, as any number of private entities could have, to receive money and land (including the Cherry St. Land) and to use them to develop as agreed with the donors. The City is entitled to no governmental immunity for actions undertaken in its proprietary capacity.

However, both the legislature (through a clear enactment) and the City, through egregious conduct, waived any governmental immunity that might have

[2] 2018 Tex. LEXIS 514 (Tex 2018).

applied to the Contract. The legislature waived any governmental immunity for the kind of claim at issue in this case, and the City is simply wrong to contend that the relevant enactment makes such waivers remedy-by-remedy, rather than on the classification of the kind of claim at issue. Even if that were not the case, however, the City accepted hundreds of thousands of dollars of value under the Contract, before ignoring its obligations under the bargain and giving away the Cherry St. Land to a favorite for private use. This is exactly the kind of "extraordinary factual circumstances" the Court has recognized as generating an enforceable "waiver-by-conduct."

Finally, the Court cannot allow the City to prevail by asserting its purported governmental immunity from suit, because the City has used that assertion as a sword, to allow it to do indirectly, through breach, what it could not do directly: take private property from one owner and give it to a favored other for private development. The City would have the Court say that Texas law allows it to perform this banned act, without even the (usually inadequate) compensation it would have been compelled to provide if it had acted forthrightly through the exercise of its eminent domain powers. The Court should do no such thing and should, instead, clarify that localities cannot achieve the same illicit end through less transparent means.

# V. ARGUMENT

## A. PROPRIETARY NATURE OF CITY'S ACTION PRECLUDES FINDING OF GOVERNMENTAL IMMUNITY

As the Court properly recognized this summer:

> "Municipal corporations exercise their broad powers through two different roles; proprietary and governmental." The governmental/proprietary dichotomy recognizes that immunity protects a governmental unit from suits based on its performance of a governmental function but not a proprietary function. "Unlike governmental functions, for which municipal corporations have traditionally been afforded some degree of governmental immunity, proprietary functions have subjected municipal corporations to the same duties and liabilities as those incurred by private persons and corporations…"[3]

The Court further explained that proprietary functions "are those 'performed by a city, in its discretion, primarily for the benefit of those within the corporate limits of the municipality,' and 'not as an arm of the government.' These are usually activities 'that can be, and often are, provided by private persons.'"[4] The Court rightly concluded that such acts " 'do not implicate the state's immunity for the simple reason that they are not performed under the authority, or for the benefit, of the sovereign[,]'"[5] noting along the way both that: (a) acts "primarily benefitt[ing] the

[3] *Wasson Interests, Ltd.*, 2018 Tex. LEXIS at *4 (internal citations omitted).
[4] *Id.* at *6 (internal citations omitted).
[5] *Id.*

City's residents" (rather than Texans from elsewhere) "supports this conclusion[;]"[6] and (b) "not all activities 'associated' with a governmental function are 'governmental…' The fact that a city's proprietary action 'touches upon' a governmental function is insufficient to render the proprietary action governmental.' "[7]

The Court has made clear that this dichotomy applies to contracting decisions of municipalities.[8] This summer, it further specified that the determination of whether a government is entitled to immunity in a suit for breach of a municipal contract should focus on the capacity in which the locality *entered* the contract at issue, not when it breached it.[9, 10]

While the Court has "recognized" that "the distinction" between contracts entered in a governmental capacity and those entered pursuant to proprietary

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6 *Id.* at *18.
7 *Id.* at *19-*20.
8 *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 429 (Tex. 2016).
9 *Wasson Interests, Ltd.*, 2018 Tex. LEXIS at *12 - *13.
10 The Court's assertion that *all* municipal contracts should be assessed at their *entry* for execution in a governmental or proprietary role is actually dicta. The Court explained its conclusion by noting that "[w]e do not see how a city can act as a branch of the State when it breaches a contract it entered on its own behalf and in its proprietary capacity." But while the Court asserted that its conclusion would be the same in the reverse scenario, *Wassan* did not present it and the Court is not bound to the assertion by *stare decisis*. As this case presents the missing facts, the Court has reason, if necessary, to revisit and revise its dicta – even if the Court determines that the City entered the Contract in its governmental capacity, it cannot with a straight face conclude that it *breached* it through passage of the ordinance, transferring the Cherry St. Land to a preferred developer for private use, in that capacity.

functions "has not always been a clear one,"[11] there are contracts that clearly fall on one and only one side of the line – this case is one of them.

The City plainly entered the Contract and received the Cherry St. Land in an act of discretion; it has not contended otherwise. The City's partnering with the Engaged Locals to receive and develop the Cherry St. Land as agreed in the Contract is an act that private persons could have, and often do, perform. The City has not pretended that the Contract was understood or intended to inure primarily to Texans from outside San Antonio. It has, at best, suggested that the Cherry St. Land development "touched upon" the alleged governmental role of maintaining bridges; the Petitioner has explained why the condemned, historical bridge at issue should not qualify and AFPF merely highlights that, even were this not the case, it still would not make the Contract's provisions related to the Cherry St. Land sufficiently "closely related to or necessary for performance of [any] governmental activities designated by statute" to render the provisions at issue "governmental" contractual commitments of the City.[12]

Even analogically, the City's agreement to receive the Cherry St. Land through the Contract neatly aligns with Jacksonville's decision to lease land, which

[11] *Wasson Interests, Ltd.*, 489 S.W.3d at 438.
[12] *Wasson Interests, Ltd.*, 2018 Tex. LEXIS at *19- *20.

the Court held just months ago to have been proprietary in nature.[13]

## B. CLEAR WAIVER OF GOVERNMENTAL IMMUNITY FOR CLAIM AT ISSUE

To the extent that the Court determines that the City entered the Contract in a governmental capacity, it still would not be entitled to the protection of governmental immunity from suit, because such protection has been waived.

### 1. LEGISLATURE WAIVED GOVERNMENTAL IMMUNITY TO CLAIMS, NOT REMEDIES, AND CLEARLY WAIVED FOR BREACH OF CONTRACT

The Petitioner has already thoroughly explained that Texas Local Government Code Section 271.152 expressly "waives" for any "local governmental entity that is authorized … to enter into a contract" "sovereign immunity to suit for the purpose of adjudicating a claim for breach [of] the contract[.]" The plain language of the statute establishes that the legislature waived governmental immunity for *all* breach claims, not only for those breach claims seeking damages.

The Respondent's unavailing statutory construction arguments notwithstanding, the plain meaning of the following tort reform provision,[14] which continues to enact a damage cap, is just that: it does not alter the legislature's previous waiver of sovereign immunity for *all* breach of contract claims; it merely imposes limitations on the resulting awards a trial court may impose. The fact that

[13] *Id.* at *22.
[14] Texas Local Government Code Section 271.153.

the legislature chose (in Texas Local Government Code Section 271.153(c)) to emphasize in a belt-and-suspenders-style, 2011 amendment that specific performance is available in a one kind of contractual breach suit does not silently revoke from the blanket waiver enacted in Section 271.152 in 2005 all other breach claims seeking specific performance. Texas law has always disfavored silent repeals, especially silent repeals in derogation of the common law, so no law requires the Court to follow the Respondents down this rabbit hole.[15, 16]

### 2. WAIVER THROUGH EXTRAORDINARY FACTUAL CIRCUMSTANCES

AFPF separately emphasizes that the City, too, has arguably waived any right to assert governmental immunity in this case, through its actions. While the Court has been understandably reticent to acknowledge the possibility that a local government could waive immunity without legislative action, it *has* held that this occurs in "extraordinary factual circumstances."[17] Where localities have proposed a contract to private parties, contracted with them, accepted all the benefits of their

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[15] *Cash Am. Int'l, Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000) (restating accepted proposition that "a statute may be interpreted as abrogating a common-law principle only when its express terms or necessary implications clearly indicate the Legislature's intent to do so[.]").

[16] Portions of the Respondents' brief also suggest that the trial court was wrong to rule that the City breached the Contract by selling the Cherry St. Land. However, the Respondents did not cross-petition the Court in this case. Accordingly, these arguments appear to be utterly improper collateral attacks on the trial court's fact-finding. Since the Court cannot reach them in this case at this time, AFPF does not address them in this brief.

[17] *Tex. Southern Univ. v. State St. Bank & Trust Co.*, 212 S.W.3d 893, 907 (Tex. App. – Houston [1st Dist.] 2007, pet. denied).

contracts, and then refused to perform, the Court has made an exception and agreed that governmental immunity is unavailable.[18]

Our case exemplifies precisely why such a safeguard is necessary. The City, not the Engaged Locals, asked for the Contract. The City, not the Engaged Locals, drafted the Contract. Having convinced the Engaged Locals of its sincerity, the City accepted pursuant to the Contract the donation of a decade's worth of their collections, the bridge, and the Cherry St. Land, all in the name of facilitating the development the Engaged Locals had signed on for. But having received *all* the benefits available to it through the Contract, the City turned around and gave the Cherry St. Land away to an insider for nothing, before asserting governmental immunity and telling the Engaged Locals, effectively, to pound sand.

This treatment of an under-served, far-from-privileged community is appalling and the City's attempt to shield itself from their effort to enforce the Contract by draping itself in the Texas flag is an insult to the state that the Court should not countenance. The Engaged Locals are Texans with the right to expect their local governments to live up to their commitments, not serfs subsiding at sufferance of their masters who must bear what they must.

[18] *Id.* at 908.

### C. ALTERNATIVE UNTHINKABLE AFTER TEXAS'S POST-*KELO* CHANGES TO STATE CONSTITUTION AND LAW

Finally, AFPF highlights that this case presents a worse-than-expected realization of the hypothetical presciently warned of by Justice Lehrmann in her concurrence in *Harris County Flood Control District v. Kerr*.[19]

There, the Court addressed (and rejected) an effort by downstream home owners to recover the lost-value of their properties from what they styled an inverse-condemnation resulting from a failure to provide additional flood-control protections. Even while the plurality reiterated that "[t]his Court has repeatedly, recently, and unanimously recognized that strong judicial protection for individual property rights is essential to freedom itself[,]"[20] and recited the recent history of Texas's post-*Kelo* amendment of the state constitution to bar any taking for other than public use,[21] it admitted that "there is always tension between the compensation obligation of the Takings Clause and the necessary doctrine of sovereign immunity, also a doctrine of constitutional significance."[22] As the Court determined that there had been no "taking" (or even an action challengeable as having a reverse-condemnation effect), it did not need to resolve that tension in *Kerr*.

[19] 499 S.W.3d 793, 811 (Tex. 2016).
[20] *Id.* at 804.
[21] *Id.* at 799 (citing to the 2009 enactment of Tex. Const., Art. I, Sec. 17).
[22] *Id.* at 804.

However, in her concurrence, Justice Lehrmann addressed a peripheral issue raised by the language of Texas's post-*Kelo* 2009 constitutional amendment and the ensuing 2011 enactment of a parallel statutory protection:[23] whether the victim of an actual "taking" for barred, *private* purposes would be entitled to adequate compensation.[24] She concluded that:

> Declaring that a private-use taking is not compensable would create a perverse set of incentives for State actors by encouraging takings that do not serve a public use. In turn, a public shield against improper government action would be converted into a sword to enable that same improper action. Put simply, it makes no sense to say that a property owner is entitled to compensation if the government does the right thing but not if it does the wrong thing.[25]

This case presents Justice Lehrmann's hypothetical nightmare scenario on steroids. The City has done exactly what she feared and Texas has banned: acquired the Cherry St. Land from a private owner and transferred it to someone else for

[23] Texas Government Code Section 2206.011 (enacted in 2011).
[24] *Kerr*, 499 S.W.3d at 813.
[25] *Id*. at 813.

private use. Not only has the City done the forbidden thing, it has done it without providing the previous owners (or the Engaged Locals with whom they contracted to induce the donation of the Cherry St. Land) any compensation at all. And it did all of this not directly through a questionable, illicit taking, but by contracting for a use, accepting the benefit of the Contract, disregarding its burden, and passing an ordinance to transfer the Cherry St. Land to the City's preferred private user, for free.

The Court cannot allow the City to do indirectly, through a breach of contract, what Texas has forbidden it do directly. If the City could not take the Cherry St. Land, even *with* compensation, and give it to its preferred recipient for development, it simply cannot be that Texas law allows the City to accomplish the same end by hiding its intent, inducing the Engaged Locals' entry into and performance under the Contract, and then disregarding its terms.

It is long settled law that governmental immunity does not "extend[ ] to officials using [public] resources in violation of the law[.]"[26] However carefully

[26] *Houston Belt & Terminal Ry. v. City of Houston*, 487 S.W.3d 154, 154 (Tex. 2016) (citing earlier decisions).

structured, the City's actions violate clear, recently enacted, Texas law.[27] Governmental immunity cannot be allowed to shield the City from enforcement of the Contract under these circumstances without doing immeasurable harm to the public policy of the state.

## VI. CONCLUSION

The City cannot shield itself from suit over its breach of the Contract, because the City has no governmental immunity related to a Contract it entered (and breached) in the City's proprietary capacity. Even if it had any such immunity in the first instance, that immunity has been waived. And, even if the City had immunity in the first instance and it had not been waived, the Court should still deny it the use of governmental immunity, because that use is at war with clearly established public policy – governmental immunity cannot offer greater protection

[27] While the record does not seem to indicate that this was litigated below, the City's enactment of the ordinance to breach the Contract also clearly violates *Federal* law, specifically the U.S. Constitution's Contracts Clause. U.S. Const., Art. I, § 10 ("No State shall … pass any … Law impairing the Obligation of Contracts…."). As the Court of Appeals for the Fifth Circuit has instructed, for an enactment to be void under the Contracts Clause, a court must consider if: (a) it substantially impaired a contractual relationship; (b) it had a significant and legitimate public purpose; and (c) if a public purpose was present and adequate, whether the enactment was "reasonably necessary" to achieve it. *United Healthcare Ins. v. Davis*, 602 F.3d 618, 627 (5th Cir. 2010) (citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)). The trial court found that the City breached the Contract, meeting the first. The *only* purpose of the ordinance was to transfer the Cherry St. Land to a preferred developer for private development, assuring that the second cannot be met. Accordingly, the ordinance was void from its inception under yet another basis, again leaving the acts at issue in this case *ultra vires* and outside the protection of governmental immunity.

to a more-dishonest, but just as real violation of the Texas Constitution and Government Code, then it would for a straight-forward misuse of the eminent domain power.

## VII. PRAYER

For all the foregoing reasons, AFPF asks the Court to reverse the Court of Appeals and restore the trial court's judgment in this action.

Dated: September 7, 2018

Respectfully submitted,

*/s/ Daniel I. Morenoff*

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## CERTIFICATE OF SERVICE

I certify that, on September 7, 2018, a true and correct copy of the foregoing document was served by the Court's ECF system on counsel to both the Appellant and Appellees.

*/s/ Daniel I. Morenoff*
Daniel I. Morenoff