

NO. 17-0423

In the Supreme Court of Texas

Hays Street Restoration Group,
Petitioner,

v.

City of San Antonio,
Respondent.

Amicus Curiae Brief
on behalf of
The Texas Municipal League, Texas Coalition of
Cities for Utility Issues and 164 Texas Cities
In Support of the City of San Antonio

James F. Parker, III
State Bar No. 24027591
jparker@lglawfirm.com

Lauren E. Sprouse
State Bar No. 24079380
lsprouse@lglawfirm.com

Lloyd Gosselink
Rochelle & Townsend, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701
Telephone: (512) 322-5800
Telecopier: (512) 472-0532

TABLE OF CONTENTS

TABLE OF CONTENTSii

INDEX OF AUTHORITIES iii

RULE 11 DISCLOSURES..... v

ISSUE PRESENTED 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

A. Governmental immunity protects from unforeseen expenses that could hamper the performance of governmental functions..... 2

B. Governmental immunity renders political subdivisions immune from suit unless immunity is waived by the Legislature..... 4

C. The Legislature did not waive immunity to a suit for specific performance..... 5

D. The Legislature has waived immunity to a suit for specific performance in one narrow circumstance, reflecting the Legislature’s intention that specific performance not be available otherwise. 9

E. The Legislature’s decision not to waive immunity to suits for specific performance is consistent with the public policy of protecting public funds. 11

F. The Court should respect the Legislature’s role as the sole entity that can waive immunity to contract claims for specific performance. 14

CONCLUSION 15

CERTIFICATE OF SERVICE..... 17

CERTIFICATE OF COMPLIANCE..... 18

INDEX OF AUTHORITIES

Cases

<i>Alabama v. North Carolina</i> , 560 U.S. 330 (2010).....	2
<i>City of El Paso v. Heinrich</i> , 284 S.W.3d 366 (Tex. 2009).....	4
<i>City of New Braunfels v. Carowest Land, Ltd.</i> , --- S.W.3d ---, 2017 WL 2857142 (Tex. App.—Austin June 29, 2017, pet. denied)	6
<i>City of San Antonio v. Lower Colo. River Auth.</i> , 369 S.W.3d 231 (Tex. App.—Austin 2011, no pet.)	7, 8
<i>Engelman Irrigation Dist. v. Shields Bros., Inc.</i> , 514 S.W.3d 746 (Tex. 2017)	3
<i>Fed. Sign v. Tex. S. Univ.</i> , 951 S.W.2d 401 (Tex. 1997)	4, 15
<i>Greater Hous. P’ship v. Paxton</i> , 468 S.W.3d 51 (Tex. 2015).....	10
<i>Hall v. McRaven</i> , 508 S.W.3d 232 (Tex. 2017).....	3
<i>Hosner v. DeYoung</i> , 1 Tex. 764 (1847)	2, 5
<i>In re Estate of Nash</i> , 220 S.W.3d 914 (Tex. 2007)	10
<i>Lubbock Cty. Water Control & Improv. Dist. v. Church & Akin, L.L.C.</i> , 442 S.W.3d 297 (Tex. 2014).....	12
<i>Mission Consol. Indep. Sch. Dist. v. Garcia</i> , 253 S.W.3d 653 (Tex. 2008)	10
<i>Nazari v. State</i> , --- S.W.3d ---, 2018 WL 3077659 (Tex. June 22, 2018)	3
<i>Tex. Dep’t of Transp. v. Sefzik</i> , 355 S.W.3d 618 (Tex. 2011)	3
<i>Tex. Nat. Res. Conserv. Comm’n v. IT-Davy</i> , 74 S.W.3d 849 (Tex. 2002)	4, 15
<i>Tooke v. City of Mexia</i> , 197 S.W.3d 325 (Tex. 2006) .	2, 3, 4, 5, 6, 7, 12, 13

<i>West Travis Cty. Pub. Util. Agency v. Travis Cty. Mun. Util. Dist. No. 12</i> , 537 S.W.3d 549 (Tex. App.—Austin 2017, pet. filed).....	2
<i>Wichita Falls State Hosp. v. Taylor</i> , 106 S.W.3d 692 (Tex. 2003)	6
<i>Zachry Constr. Corp. v. Port of Houston Auth.</i> , 449 S.W.3d 98 (Tex. 2014)	5, 6, 7, 8

Constituion and Statutes

Act of May 22, 2013, 83rd Leg., R.S., ch. 1138, 2013 Tex. Gen. Laws 2756	14
Tex. Gov’t Code § 311.034	15
Tex. Local Gov’t Code §§ 271.151–.159.....	1
Tex. Local Gov’t Code § 271.151(2)(B)	9, 11, 14
Tex. Local Gov’t Code § 271.153(a)(1), (3), (4), (b)(1), (c).....	5, 7, 9, 11, 12

RULE 11 DISCLOSURES

Pursuant to Texas Rule of Appellate Procedure 11, the Amici disclose the following information:

Entities on whose behalf this Brief is tendered:

Texas Municipal League, Texas Coalition of Cities for Utility Issues, and its member cities: City of Addison, City of Allen, City of Arlington, City of Big Spring, City of Bowie, City of Breckenridge, City of Brownwood, City of Buffalo, City of Canyon, City of Carrollton, City of Cedar Hill, City of Cleburne, City of Conroe, City of Crockett, City of Cottonwood Shores, City of Denison, City of Dallas, City of Denton, City of Dickinson, City of Electra, City of Euless, City of Flower Mound, City of Fort Worth, City of Frisco, City of Fulshear, City of Grand Prairie, City of Grapevine, City of Highland Village, City of Houston, City of Irving, City of La Grange, City of Lancaster, City of Lewisville, City of Los Fresnos, City of Mansfield, City of McAllen, City of Mesquite, City of Newark, City of Plano, City of Refugio, City of Richardson, City of River Oaks, City of Rosenberg, City of San Saba, City of Seminole, City of Snyder, City of Spearman, City of Stephenville, City of Sweeny, City of Taylor Lake Village, City of Thompsons, City of Tyler, City of Waxahachie, City of Webster, and City of Westlake, **and separately** the Cities of Allen, Alvarado, Andrews, Anna, Archer City, Arlington, Azle, Bedford, Bellmead, Belton, Benbrook, Beverly Hills, Big Spring, Breckenridge, Bridgeport, Brownwood, Buffalo, Burkburnett, Burleson, Caddo Mills, Cameron, Canton, Carrollton, Cedar Hill, Celina, Centerville, Cleburne, Coahoma, Colleyville, Collinsville, Colorado City, Comanche,

Commerce, Coppell, Copperas Cove, Corinth, Crowley, Dallas, Dalworthington Gardens, DeLeon, De Soto, Denison, Duncanville, Early, Eastland, Ennis, Euless, Everman, Farmers Branch, Fate, Forest Hill, Forney, Fort Worth, Frisco, Frost, Gainesville, Garland, Glenn Heights, Grand Prairie, Granger, Grapevine, Haltom City, Harker Heights, Haslet, Heath, Henrietta, Hewitt, Honey Grove, Houston, Howe, Hudson Oaks, Hurst, Hutto, Iowa Park, Irving, Jolly, Josephine, Justin, Kaufman, Keene, Keller, Kennedale, Kerens, Killeen, Krum, Lake Worth, Lamesa, Lancaster, Lewisville, Lindale, Little River Academy, Malakoff, Mansfield, McKinney, Mesquite, Midland, Midlothian, Murchison, Murphy, New Chapel Hill, North Richland Hills, Northlake, Oak Leaf, Oak Point, Odessa, O'Donnell, Ovilla, Palestine, Paris, Plano, Pottsboro, Ranger, Red Oak, Rhome, Richardson, Richland, Richland Hills, River Oaks, Roanoke, Robinson, Rockwall, Rowlett, Sachse, Saginaw, Sansom Park, Seagoville, Sherman, Snyder, Southlake, Springtown, Stephenville, Sulphur Springs, Sweetwater, Temple, Terrell, The Colony, Tyler, University Park, Venus, Waco, Watauga, Waxahachie, Westworth Village, White Settlement, Wichita Falls, Willow Park, Woodway, and Wylie, the Towns of Addison, Argyle, Cross Roads, Edgecliff Village, Fairview, Flower Mound, Highland Park, Lakeside, Little Elm, Northlake, Pantego, Prosper, Sunnyvale, Trophy Club, and Westover Hills, and the Village of Rosser.

*Source of
fees paid for
preparing
this Brief:*

Each Amicus is paying a share of the fees incurred in the preparation of this Brief. No party or party's counsel authored any part of this brief or paid any costs associated with its preparation, and no person other than the amici curiae contributed money to fund the preparation and submission of this Brief.

ISSUE PRESENTED

The limited waiver of immunity in Texas Local Government Contract Claims Act (the “Act”), Tex. Local Gov’t Code §§ 271.151–.159, does not waive immunity to suits seeking specific performance, except in suits arising from large-volume conveyances of reclaimed water for industrial purposes.

SUMMARY OF THE ARGUMENT

The Court should affirm the decision of the Court of Appeals that the Act does not waive immunity to suits seeking specific performance, except in suits arising from large-volume conveyances of reclaimed water for industrial purposes.

Governmental immunity serves to protect the public from the costs and consequences of improvident actions of their local governments. If a desirable public policy outcome is to allow courts to compel performance in the event of a breach, the Legislature can do so by waiving governmental immunity. In fact, the Legislature has done so with respect to one type of contract: conveyances of large volumes of reclaimed water sold for industrial purposes. But with respect to all other contracts, the Legislature has pointedly refused to waive immunity to

suits for specific performance. Without such a waiver, the Court should conclude that Petitioner’s suit for specific performance is barred.

ARGUMENT

In addition to the court of appeals in this case, at least one other Texas court of appeals has held that the Act does not waive immunity for specific performance. *See West Travis Cty. Pub. Util. Agency v. Travis Cty. Mun. Util. Dist. No. 12*, 537 S.W.3d 549, 558 (Tex. App.—Austin 2017, pet. filed). This Court should follow that decision and reasoning.

A. Governmental immunity protects from unforeseen expenses that could hamper the performance of governmental functions.

At the outset of statehood, the Court recognized the ancient common-law rule that “no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent.” *Hosner v. DeYoung*, 1 Tex. 764, 769 (1847). Not merely a feature of sovereignty, immunity is “*the* primeval sovereign right.” *Alabama v. North Carolina*, 560 U.S. 330, 341 (2010) (emphasis added).

Recognizing that public funds are often administered by local government entities, immunity has been extended to those local governmental entities under the doctrine of governmental immunity. *See Tooke v. City of Mexia*, 197 S.W.3d 325, 331–32, 345 (Tex. 2006). As with

sovereign immunity, a primary purpose of governmental immunity “is pragmatic: to shield the public from the costs and consequences of improvident actions of their governments.” *Tooke*, 197 S.W.3d at 332.

But “[w]hile the doctrine of sovereign immunity originated to protect the public fisc from unforeseen expenditures that could hamper governmental functions, it has been used to shield the state from lawsuits seeking other forms of relief.” *Tex. Dep’t of Transp. v. Sefzik*, 355 S.W.3d 618, 621 (Tex. 2011) (internal citations omitted). That bar on suits seeking non-monetary relief reflects the other key justification for immunity: respect for the separation of powers.

“Sovereign immunity from suit implicates a court’s subject-matter jurisdiction because it recognizes the court’s limited authority over the sovereign creating them.” *Nazari v. State*, --- S.W.3d ---, 2018 WL 3077659, at *3 (Tex. June 22, 2018) (quoting *Hall v. McRaven*, 508 S.W.3d 232, 238 (Tex. 2017) and *Engelman Irrigation Dist. v. Shields Bros., Inc.*, 514 S.W.3d 746, 755 (Tex. 2017)) (internal citations and quotation marks omitted). The sovereign—acting through the Legislature—must be free to act in the public interest.

Among the actions taken (or not taken) in the public interest is the performance of contracts. Suits seeking “to enforce performance under a contract . . . attempt to control state action.” *Tex. Nat. Res. Conserv. Comm’n v. IT-Davy*, 74 S.W.3d 849, 855–56 (Tex. 2002). Such authority to control state action lies with the Legislature, not with the judiciary.¹ *See id.* Accordingly, suits “seeking to establish a contract’s validity, to enforce performance under a contract, or to impose contractual liabilities . . . cannot be maintained without legislative permission.” *Id.* at 856.

B. Governmental immunity renders political subdivisions immune from suit unless immunity is waived by the Legislature.

The only entity that can waive governmental immunity on behalf of the sovereign is the Legislature. *See Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997). Immunity is “waived only by clear and unambiguous language” of the Legislature. *Tooke v. City of Mexia*, 197

¹ Courts can, of course, compel local governmental entities to adhere to the public policy that they have already enacted through an *ultra vires* suit. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). But that public policy is reflected in the statutes that the state passes, not the contracts into which it enters. *See id.* (“[S]uits to require state officials to comply *with statutory or constitutional provisions* are not prohibited by sovereign immunity, even if a declaration to that effect compels the payment of money.” (emphasis added)). Thus, “where statutory or constitutional provisions create an entitlement to payment, suits seeking to require state officers to comply with the law are not barred by immunity merely because they compel the state to make those payments.” *Id.* at 371. But the same does not hold true for suits requiring the state to comply with the provisions of a contract—that requires a clear and unequivocal legislative waiver of immunity. *See IT-Davy*, 74 S.W.3d at 856.

S.W.3d 325, 328–29 (Tex. 2006). But even when the Legislature does so, “immunity is waived only in the manner indicated by that consent.” *Id.* at 331 (quoting *Hosner*, 1 Tex. at 769).

The Act provides a clear and unequivocal waiver of governmental immunity. *See id.* at 344–35. However, the Act only “waives immunity for contract claims that meet certain conditions: the existence of a specific type of contract, a demand for certain kinds of damages, a state forum, etc.” *Zachry Constr. Corp. v. Port of Houston Auth.*, 449 S.W.3d 98, 109 (Tex. 2014). Contract claims that do not meet those requirements remain outside the court’s subject-matter jurisdiction on the basis of (unwaived) governmental immunity. *See id.*

C. The Legislature did not waive immunity to a suit for specific performance.

Among the Act’s requirements to which a breach-of-contract suit must adhere is the requirement that the claim seek a limited category of damages. *See Zachry*, 449 S.W.3d at 109. Immunity is only waived for recovery of “the balance due and owed by the local governmental entity,” “the amount owned for change orders,” “reasonable and necessary attorney’s fees,” and “interest as allowed by law.” Tex. Local Gov’t Code § 271.153(a).

This “Court has made clear that the types of relief expressly made available by statute operate as the boundaries for a statute’s waiver of immunity.” *City of New Braunfels v. Carowest Land, Ltd.*, --- S.W.3d ---, 2017 WL 2857142, at *5 (Tex. App.—Austin June 29, 2017, pet. denied) (explaining *Zachry Constr. Corp. v. Port of Hous. Auth.*, 449 S.W.3d 98, 109–10 (Tex. 2014)). By identifying some remedies in the Act’s waiver of immunity, the Legislature made an affirmative decision *not* to waive immunity for other unnamed remedies, such as specific performance.

Petitioner misreads the Act, and misunderstands the nature of governmental immunity. Petitioner’s briefing argues that Section 271.153 is simply a limitation on monetary damages. (Pet’r’s Br. at 31–32; Reply Br. at 15–18.) It is not. “[W]hen construing a statute that purportedly waives sovereign immunity, [this Court] generally resolve[s] ambiguities by retaining immunity.” *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003). The same principle requires that ambiguity as to the scope of a waiver of immunity should be construed narrowly. Remedies that are not authorized by Section 271.153 are outside the Act’s limited waiver of immunity. *See Zachry*, 449 S.W.3d at 110; *Tooke*, 197 S.W.3d at 346.

Petitioner draws a distinction without a difference between its case and the claims at issue in *Tooke*. The *Tooke* Court concluded that because the recovery sought—i.e., consequential damages—was not authorized by the Act, the city’s immunity was not waived. *Tooke*, 197 S.W.3d at 346. Petitioner claims that *Tooke* does not apply because Petitioner seeks an equitable remedy—i.e., specific performance—rather than damages recoverable at law, as were at issue in *Tooke*. (Reply Br. at 16–18.)

Petitioner, however, does not explain why this distinction makes a difference. Viewed in the context of governmental immunity as a whole, it is clear that it does not. In both *Tooke* and the present case, the plaintiff sought a remedy that is not authorized by the Act. The consequential damages at issue in *Tooke* are expressly excluded by the Act. See Tex. Local Gov’t Code § 271.153(b)(1). But to fall within the Act’s waiver of immunity, the damages sought must be specifically permitted, not merely excluded. See *Zachry*, 449 S.W.3d at 109–110.

The Court made that point clear in *Zachry*, when it rejected the Austin Court of Appeals’ decision in *City of San Antonio v. Lower Colorado River Authority*, 369 S.W.3d 231 (Tex. App.—Austin 2011, no pet.). In *LCRA*, the Court of Appeals concluded that Section 271.153

contained mere “limitations on liability.” *City of San Antonio*, 369 S.W.3d at 238. But the *Zachry* Court expressly rejected that conclusion and held that Section 271.153 “further define[s] to what extent immunity has been waived.” *Zachry*, 449 S.W.3d at 110. In other words, Section 271.153 identifies all of the remedies for which the Act waives immunity. Governmental entities remain immune to suits seeking remedies not identified in Section 271.153, as well as suits for remedies expressly disclaimed (i.e., consequential damages).

Nothing in the language or context of *Zachry* indicates that its reasoning applies only to monetary damages. The holding of *Zachry* is clear: “The Act waives immunity for contract claims that . . . demand certain kinds of damages.” *Id.* at 109. Conversely stated, the Act does not waive immunity for contract claims that demand recovery or remedy outside those “certain kinds of damages.” *See id.* The “certain kinds of damages” enumerated in Section 271.153 delineate the scope of the remedy for which immunity is waived.

In order to waive immunity, the Legislature must do so in clear and unambiguous language. For example, the Legislature clearly and unambiguously waived immunity for the recovery of “the balance due and

owed.” Tex. Local Gov’t Code § 271.153(a)(1) . However, the Legislature ***did not*** clearly and unambiguously waive immunity for specific performance, except in the single instance of contracts for the sale of large volumes of reclaimed water for industrial use. *See* Tex. Local Gov’t Code § 271.153(c).

If the Legislature wanted also to waive immunity for specific performance with respect to ***all*** contracts subject to the Act, it could have done so. As reflected in Section 271.153(c), the Legislature knows the words to use.

D. The Legislature has waived immunity to a suit for specific performance in one narrow circumstance, reflecting the Legislature’s intention that specific performance not be available otherwise.

In subsection (c) of Section 271.153, the Legislature clearly and unambiguously waived immunity for “specific performance . . . in an adjudication brought against a local governmental entity for breach of a” “written contract . . . regarding the sale or delivery of not less than 1,000 acre-feet of reclaimed water by a local governmental entity intended for industrial use.” Tex. Local Gov’t Code §§ 271.151(2)(B), 271.153(c). This is a very narrow and specific circumstance. If Petitioner is correct, and specific performance *is* an available remedy in all contract cases under

the Act and not only in the small class of contract cases involving large volumes of reclaimed water for industrial use, then subsection (c) is surplusage.

Generally, the Court should “avoid treating statutory language as surplusage.” *Greater Hous. P’ship v. Paxton*, 468 S.W.3d 51, 66 (Tex. 2015). Indeed, “there may be times when redundancies are precisely what the Legislature intended,” whether to create a point of emphasis or to reduce confusion. *Id.* (quoting *In re Estate of Nash*, 220 S.W.3d 914, 917–18 (Tex. 2007)). But this situation—involving a statutory waiver of immunity—is not one of those times.

Waivers of governmental immunity are to be construed narrowly. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 (Tex. 2008). There is no reason the Legislature would have added superfluous language waiving immunity for the remedy of specific performance on certain reclaimed-water contracts if immunity was *already waived* with respect to that remedy for all contracts subject to the Act. Petitioner does not identify any reason why such surplusage would be needed, and it is impossible to imagine a plausible one.

The only reasonable explanation is that subsection (c) is not surplusage.

The Legislature knows how to waive immunity for specific performance. It did so for suits involving conveyances of large volumes of reclaimed water for industrial purposes, *and only such suits*. See Tex. Local Gov't Code § 271.153(c). It opted *not* to do so for suits involving any other contract subject to the Act. See Tex. Local Gov't Code § 271.153(a). The Court should respect the Legislature's policy decision, for which there is ample justification.

E. The Legislature's decision not to waive immunity to suits for specific performance is consistent with the public policy of protecting public funds.

As reflected by the narrow scope of Section 271.153(c), the Legislature has made a conscious decision not to waive immunity for specific performance on most contract claims under the Act. In part, that decision reflects the fact that specific performance would not be an appropriate remedy in most cases brought under the Act.

With the exception of certain reclaimed-water contracts, the Act only waives immunity on contracts “for providing goods or services to the local governmental entity.” Tex. Local Gov't Code § 271.151(2).

“Construing section 271.152’s waiver of immunity with section 271.153(a)’s limitation on damages to which the waiver applies, the waiver will typically apply only to contracts in which the governmental entity agrees to pay the claimant for the goods or services that the claimant agrees to provide to the governmental entity.” *Lubbock Cty. Water Control & Improv. Dist. v. Church & Akin, L.L.C.*, 442 S.W.3d 297, 304 (Tex. 2014). In such a case, specific performance is not an appropriate remedy. Recovery of the “balance due and owed,” along with interest and attorney’s fees, will suffice to compensate the plaintiff for the governmental entity’s breach. *Cf.* Tex. Local Gov’t Code § 271.153(a).

Inferring a waiver as to specific performance would eliminate the Legislature’s decision to waive immunity only for the “balance due and owed,” and would encourage litigation. For example, in a case in which a breach would inflict significant lost profits for which immunity is not waived, *see Tooke v. City of Mexia*, 197 S.W.3d 325, 346 (Tex. 2006), the plaintiff would be encouraged at an early stage to sue for specific performance in hopes of securing compliance with the contract and avoiding those (unrecoverable) consequential damages of lost profits.

Such an outcome would be contrary to the Legislature’s goal in passing the Act, and contrary to the purposes of governmental immunity. It would compel governmental entities to perform contracts for which performance may be impossible within the strictures of sound public fiscal policy. And with no limits on the scope of the specific performance that could be ordered, governmental entities could be saddled with impossibly high-cost contracts for an indefinite period, possibly resulting in insolvency.

One of the purposes of governmental immunity is to shield “the public from the costs and consequences of improvident actions of their governments.” *Id.* at 332. Compelling governmental entities to specifically perform on improvidently-executed contracts runs contrary to a fundamental purpose of governmental immunity. In the absence of a clear and unambiguous waiver of immunity for specific performance, the Court should avoid inferring such a waiver.

F. The Court should respect the Legislature’s role as the sole entity that can waive immunity to contract claims for specific performance.

Should the equities in this particular case favor allowing Petitioner to seek specific performance, Petitioner has an avenue to obtaining such an outcome: the Legislature.

In respect to one specific type of contract, that avenue has been successfully traveled. In 2013, the Legislature amended the Act to waive immunity to a suit for breach of certain large reclaimed-water conveyances. *See* Act of May 22, 2013, 83rd Leg., R.S., ch. 1138, 2013 Tex. Gen. Laws 2756, 2757 (codified at Tex. Local Gov’t Code § 271.151(2)(B)). These reclaimed-water contracts are critical to the hydraulic fracking process, and the Legislature determined as a matter of policy that the state’s economic interest in ensuring such contracts are performed outweighed the possible risks to the public fisc associated with waiving immunity.

Such is the Legislature’s role.

As the Court has observed, “the Legislature is better suited than the courts to weigh the conflicting public policies associated with waiving immunity and exposing the government to increased liability, the burden

of which the general public must ultimately bear.” *Tex. Nat. Res. Conserv. Comm’n v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002) (citing *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 414 (Tex. 1997) (Hecht, J., concurring)). For its part, the Legislature has expressed its desire to maintain control over immunity “[i]n order to preserve [its] interest in managing state fiscal matters through the appropriations process” Tex. Gov’t Code § 311.034. Concern for separation of powers, which underpins the Court’s “heavy presumption in favor of immunity,” should therefore prompt the Court not to infer a waiver of immunity to claims for specific performance, which the Act does not clearly and unambiguously include.

CONCLUSION

Governmental immunity serves to delineate the line between the policy-making function of the political branches from the adjudicatory function of the courts. As part of its policy-making function, the Legislature has the sole authority to waive governmental immunity. And unless the Legislature authorizes a remedy against a local governmental entity through a clear and unambiguous waiver of immunity, a court has no jurisdiction to award that remedy.

With respect to specific performance, the Legislature has authorized courts to award the remedy only in breach-of-contract cases involving the conveyance of large volumes of reclaimed water for industrial purposes. But the Legislature has pointedly *not* authorized that remedy in other breach-of-contract cases against local governmental entities. The Court should respect the Legislature's policy decision, and conclude that the Local Government Contract Claims Act does not waive immunity for the remedy of specific performance, except as specifically set forth in Section 271.153(c) of the Texas Local Government Code.

Respectfully submitted,

/s/ James F. Parker, III

James F. Parker, III
State Bar No. 24027591
jparker@lglawfirm.com

Lauren E. Sprouse
State Bar No. 24079380
lsprouse@lglawfirm.com

Lloyd Gosselink
Rochelle & Townsend, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701
Telephone: (512) 322-5800
Telecopier: (512) 472-0532

ATTORNEYS FOR AMICI CURIAE

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the following instrument on counsel of record by the Court's electronic case filing system and electronic mail on this the 30th of August, 2018:

Amy Kastely
amykastely@fastem.com
233 Lotus Avenue
San Antonio, Texas 78210

COUNSEL FOR PETITIONER

Deborah Lynne Klein
deborah.klein@sanantonio.gov
Office of the City Attorney Litigation Division
Frost Bank Tower
100 West Houston Street
San Antonio, Texas 78205

Dan Pozza
danpozza@pozzandwhyte.com
Pozza & Whyte, PLLC
239 E. Commerce Street
San Antonio, Texas 78205

COUNSEL FOR RESPONDENT

/s/ James F. Parker, III

James F. Parker, III

CERTIFICATE OF COMPLIANCE

I, James F. Parker, III, attorney for Amici Curiae, certify that this document was generated by a computer using Microsoft Word 2016, which indicates that the word count of this document is 3,082 per Tex. R. App. P. 9.4(i).

/s/ James F. Parker, III

James F. Parker, III