No. 20-0725

In the Supreme Court of Texas

PATRICK VON DOHLEN, BRIAN GRECO, KEVIN JASON KHATTAR, MICHAEL KNUFFKE, AND DANIEL PETRI,
Petitioners,

v.

CITY OF SAN ANTONIO,
Respondent.

On Petition for Review from the Fourth Court of Appeals at San Antonio, Texas, No. 04-20-00071-CV

BRIEF FOR THE GOVERNOR OF TEXAS AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICUS CURIAE

In his capacity as chief executive officer of the State of Texas, Governor Greg Abbott files this brief to support enforcing the plain words of a bill he signed into law. *See* TEX. CONST. art. IV, §§ 1, 14. Senate Bill 1978 became law thanks in large part to the City of San Antonio's prior religious discrimination against Chick-fil-A, which stood as the poster child for why the bill was needed. The enacted text is clear that governmental immunity will not shield discrimination of this sort. TEX. GOV'T CODE § 2400.004. Petitioners sued, alleging more discriminatory acts by the City after the law's effective date, yet the court of appeals held that the City somehow enjoys governmental immunity. This Court should grant review to remind lower courts that they cannot thumb their noses at the Legislature and the Governor.*

ARGUMENT

I. AFTER THE CITY'S PRIOR DISCRIMINATION AGAINST CHICK-FIL-A, THE LEGISLATURE SWIFTLY WAIVED GOVERNMENTAL IMMUNITY TO PROTECT RELIGIOUS LIBERTY

Senate Bill 1978, an important religious-discrimination measure, was first filed in the 86th Legislature on March 7, 2019. Just two weeks later, the City of San Antonio's city council banned Chick-fil-A

* No fee was paid or will be paid for preparing this brief. *See* TEX. R. APP. P. 11(c).

from the San Antonio airport for making charitable donations to Christian organizations like the Salvation Army and the Fellowship of Christian Athletes. *See* Pet. 5–7.

The City's overt mistreatment of Chick-fil-A struck such a blow against religious liberty that Senate Bill 1978—commonly referred to as the "Save Chick-fil-A" bill—passed both chambers of the Legislature and was signed into law within a few short months. As Governor Abbott declared at a ceremonial signing, amidst supportive legislators holding Chick-fil-A cups, "no business should be discriminated against simply because its owners gave to a church, or to the Salvation Army, or to any other religious organizations." *See* Greg Abbott (@GregAbbott_TX), TWITTER (July 18, 2019, 7:32 PM), https://twitter.com/gregabbott_tx/status/1152013402102878208.

The plain text of Senate Bill 1978, codified as Chapter 2400 of the Texas Government Code, puts a stop to religious discrimination of the kind perpetrated by the City against Chick-fil-A. It prohibits all sorts of adverse action by the government on the basis of someone's supporting a religious organization. *See* TEX. GOV'T CODE § 2400.002. And to give that prohibition some teeth, the statute creates a private cause of action

for declaratory and injunctive relief, plus attorneys' fees. *See id.* §§ 2400.003, 2400.004.

Crucially, for purposes of this case, Senate Bill 1978 brushes aside any immunity that the government might otherwise invoke in court: "Sovereign or governmental immunity, as applicable, is waived and abolished to the extent of liability for [declaratory relief, injunctions, or attorneys' fees]." TEX. GOV'T CODE § 2400.004. This language easily satisfies the clear-statement rule that allows the Legislature to maintain its control over waivers of immunity. *See* TEX. GOV'T CODE § 311.034; *PHI, Inc. v. TJJD*, 593 S.W.3d 296, 302 (Tex. 2019). Indeed, waivers do not get much clearer than this one.

Petitioners sued the City under Senate Bill 1978 alleging, and seeking to prevent, further adverse action against Chick-fil-A at the airport they frequent. Claims against the government are often turned away on immunity grounds with a write-your-Legislature opinion. *See, e.g.*, *Klumb v. Hous. Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 12 & n.7 (Tex. 2015); *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 408 (Tex. 1997). But here the Legislature, using words plain as can be, already "waived and abolished" the City's governmental immunity—precisely because of

the City's past religious-discrimination scandal relating to Chick-fil-A. TEX. GOV'T CODE § 2400.004. The trial court therefore correctly refused the City's request to dismiss this case.

II. THE COURT OF APPEALS ALL BUT IGNORED THE LEGISLATURE'S WAIVER OF GOVERNMENTAL IMMUNITY IN DISMISSING THIS CASE ALLEGING FURTHER ADVERSE ACTIONS

Despite the clarity of Senate Bill 1978's waiver, the court of appeals held that governmental immunity still protects the City against petitioners' religious-discrimination claims, and rendered a judgment of dismissal for lack of jurisdiction. *See City of San Antonio v. Von Dohlen*, No. 04-20-00071-CV, 2020 WL 4808722, at *1 (Tex. App.—San Antonio Aug. 19, 2020). This puzzling refusal to give effect to Senate Bill 1978 deserves a swift reversal.

The opinion below cites this Court for the proposition that "governmental immunity will preclude the suit if its purpose or effect is to cancel or nullify a contract made for the benefit of the state." *Von Dohlen*, 2020 WL 4808722, at *2 (citing *W.D. Haden Co. v. Dodgen*, 308 S.W.2d 838, 841 (Tex. 1958)). That skips a crucial step, resting on an answer to the wrong question. This Court has indeed held that a suit against officials is really against the government itself, as far as

immunity goes, if the claims concern a government contract. *See W.D. Haden*, 308 S.W.2d at 841–42; *TNRCC v. IT-Davy*, 74 S.W.3d 849, 855–56 (Tex. 2002); *Herring v. Hous. Nat'l Exch. Bank*, 253 S.W. 813, 814 (Tex. 1923). But the Court then asks whether the Legislature has waived immunity: "[A] suit . . . seeking enforcement of contract rights is necessarily a suit against the State which cannot be maintained *without legislative permission*." *W.D. Haden*, 308 S.W.2d at 842 (emphasis added); *accord IT-Davy*, 74 S.W.3d at 855–56. That is the key question here, yet the opinion below barely addresses it.

The court of appeals therefore would have been right to observe that this is a suit against the government. That much is clear from the *City of San Antonio* caption, though, so the existence of a government contract hardly matters. The question then becomes: Has the Legislature waived governmental immunity for this suit against the City? Senate Bill 1978 provides a straightforward answer: "A person who alleges [prohibited adverse action] may sue the governmental entity for [declaratory relief, injunctions, and attorneys' fees]. . . . [G]overnmental immunity . . . is *waived and abolished* to the extent of

liability for that relief." TEX. GOV'T CODE § 2400.004 (emphasis added) (cross-referencing § 2400.002 and § 2400.003).

This clear statutory waiver contains no carveout for religious discrimination that happens to flow from an old contract. Nor does it treat government contracts as sacrosanct, contrary to the opinion below. *See Von Dohlen*, 2020 WL 4808722, at *3. Once Senate Bill 1978 took effect on September 1, 2019, the City could not take any further adverse action against Chick-fil-A for supporting religious organizations like the Salvation Army. TEX. GOV'T CODE § 2400.002. Petitioners alleged such action by the City, and governmental immunity should have been no bar to their seeking declaratory relief and an injunction to stop it.

III. THIS COURT SHOULD GIVE EFFECT TO THE LEGISLATURE'S WAIVER OF GOVERNMENTAL IMMUNITY

The City of San Antonio was created as a mere agent of the sovereign State of Texas. *See, e.g.*, *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 643 (Tex. 2004); *Payne v. Massey*, 196 S.W.2d 493, 495 (Tex. 1946); *Tex. Nat'l Guard Armory Bd. v. McCraw*, 126 S.W.2d 627, 631 (Tex. 1939); *Yett v. Cook*, 281 S.W. 837, 842 (Tex. 1926). Any governmental immunity the City enjoys is borrowed from the State: "The state's immunity is inherent in its sovereignty; cities,

on the other hand, derive their immunity from the state." *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 436 (Tex. 2016) (citations omitted). In response to the City's religious discrimination against Chick-fil-A, the Legislature has snatched back some of that borrowed immunity through Senate Bill 1978.

Review is warranted here to preserve this important legislative prerogative. "It is the responsibility of the judiciary to decide when our State and its political subdivisions have immunity and to define its boundaries, and the responsibility of the Legislature to determine whether to waive immunity and to what extent." *Nettles v. GTECH Corp.*, 606 S.W.3d 726, 731 (Tex. 2020). As this Court has explained, "the Legislature is better suited to address the conflicting policy issues involved" in a waiver of immunity. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006); *see also Hillman v. Nueces County*, 579 S.W.3d 354, 361 (Tex. 2019); *Nazari v. State*, 561 S.W.3d 495, 500 (Tex. 2018). That understandable reluctance to engage in policymaking is why "[t]his Court has long recognized that it is the Legislature's sole province to waive or abrogate sovereign immunity." *TNRCC v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002) (internal quotation

marks omitted); *see also Lowe v. Tex. Tech Univ.*, 540 S.W.2d 297, 298 (Tex. 1976).

With its defiance of Senate Bill 1978's immunity waiver, the court of appeals has seized this policymaking role for itself. But this Court has "said repeatedly that the Legislature is in the best position to waive or abrogate immunity, 'because this allows the Legislature to protect its policymaking function.' " *City of El Paso v. Heinrich*, 284 S.W.3d 366, 370 (Tex. 2009) (quoting *IT-Davy*, 74 S.W.3d at 854). The Court should say so again in this case by giving effect to Senate Bill 1978.

CONCLUSION

This Court should grant the petition for review and reverse the judgment of the court of appeals.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

As required by Texas Rule of Appellate Procedure 9.4(i)(3), undersigned counsel hereby certifies that this brief contains 1531 words, according to the word count of the computer program used to prepare the document.

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that, on February 2, 2021, a true and correct copy of the foregoing brief was served through the Court's electronic filing system on all counsel of record as follows:

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