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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

FIRST LIBERTY

February 10, 2021

Mr. Blake A. Hawthorne, Clerk
Supreme Court of Texas
201 W. 14th Street
Austin, Texas 78701

E-filed

Re: *Von Dohlen, et al. v. City of San Antonio*
No. 20-0725

Dear Mr. Hawthorne:

Texas Values and Texas Pastor Council, by and through counsel, submit this letter brief as amici curiae in support of Petitioners in the above matter.[1] Amici urge the Court to grant the petition for review.

I. Interest of Amici Curiae

Amicus Curiae Texas Values is a nonprofit organization that seeks to preserve and advance a culture where religious liberty flourishes, families prosper, and every human life is valued. Texas Values promotes its core values of faith, family, and freedom primarily through policy research, public education, and grassroots mobilization. Texas Values believes the principle of religious liberty established in the First Amendment of the United States Constitution and the Texas Constitution is critical to a flourishing, tolerant society. Texas Values also believes that the State of Texas must sometimes expressly and robustly protect religious liberty by statute to eliminate doubt and to stop reckless efforts by some government officials to deny Texans their religious freedom.

Texas Values has been, and continues to be, involved in some of the most important court cases and policy debates in Texas on the issue of religious freedom. It played a role in the passage of laws like the Merry Christmas Law in 2013, Tex. Educ. Code § 29.920, the Pastor Protection Law

[1] No fee has been or will be paid for the preparation of this brief.

in 2015, Tex. Fam. Code §§ 2.601-.602, and the Freedom to Serve Children Law in 2017, Tex. Hum. Res. Code §§ 45.001-.010. Texas Values was also involved in the passage of the law at issue in this case, which has been referred to as the "Save Chick-fil-A" religious freedom law, or the First Amendment Defense Act, in 2019. Tex. Gov't Code §§ 2400.001-.005.

Amicus Curiae Texas Pastor Council is an inter-ethnic, inter-denominational network of pastors dedicated to bringing a united biblical voice and influence to social, moral, cultural, and policy issues, including the free exercise of religion. Texas Pastor Council was birthed in 2007 as the flagship Houston Area Pastor Council (founded in 2003) and expanded to serve and organize pastors in cities across the State.

Because the petition raises questions about jurisdiction under the First Amendment Defense Act, Texas Values and Texas Pastor Council have an interest in supporting Petitioners' claims.

II. Argument

A. The court of appeals' decision neuters a statute the Legislature intended to provide additional strong protections for First Amendment activity.

To ensure a robust protection of religious liberty and other First Amendment rights in Texas, the Legislature passed the First Amendment Defense Act with an express and unequivocal waiver of sovereign and governmental immunity. The Act "seeks to prohibit a governmental entity from taking any adverse action against any person based wholly or partly on the person's membership in, affiliation with, or contribution, donation, or other support provided to a qualifying religious organization and to provide for relief if that prohibition is violated." Senate Comm. on State Affairs, Bill Analysis, Tex. S.B. 1978, 86th Leg., R.S. (2019). The Legislature was so committed to ensuring the Act had teeth that it waived sovereign and governmental immunity, even if that waiver impacted the State's fisc. *See* Fiscal Note, Tex. S.B. 1978, 86th Leg., R.S. (2019).

In an era of cancel culture, where some segments of society seek to punish those who have religious convictions outside the progressive mainstream, the First Amendment Defense Act is critical to protecting

tolerance and liberty. Cancel culture's threat to associational rights are widespread. As just one example, last year over 150 writers and scholars signed an open letter against cancel culture.[2] In response, a group of people tried to cancel the signatories for opposing cancellation.[3] These types of situations betray the values of open inquiry and free association that we cherish in Texas. Thus, it is especially concerning to see government actions that perpetuate these phenomena.

In response to the threat of government actions that infringe First Amendment freedoms—and, in particular, the very municipal participation in cancel culture that forms the background of Petitioners' suit—the Act protects the ability of Texans to associate freely with religious groups without fear of governmental punishment, a value deeply embedded in the fabric of our nation. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). Indeed, the Act became law at just the right moment in Texas history, as the City of San Antonio voted to bar Chick-fil-A, an iconic American fast food restaurant chain, from an airport concessionaire contract because Chick-fil-A donated to the Salvation Army and Fellowship of Christian Athletes. Pet. 5–7. The San Antonio City Council cancelled Chick-fil-A because of its First Amendment activity. Others will be next if the Court does not correct the court of appeals' erroneous decision to ignore the Legislature's express waiver of sovereign and governmental immunity.

B. The plain language of the statute clearly and unambiguously waives sovereign and governmental immunity.

The court of appeals' decision neuters the impact of the First Amendment Defense Act by ignoring the express waiver of sovereign and governmental immunity and imposing a judicially created immunity to bar Petitioners from entering the courthouse. The lower court's ruling is not only contrary to the plain text of the Act, but also the purpose of the Act—to caution governmental bodies in Texas not to discriminate against people

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[2] *A Letter on Justice and Open Debate*, Harper's Magazine, July 7, 2020, https://harpers.org/a-letter-on-justice-and-open-debate/.

[3] Jesse Singal, *The reaction to the Harper's letter on cancel culture proves why it was necessary*, Reason, July 8, 2020, https://reason.com/2020/07/08/the-reaction-to-the-harpers-letter-on-cancel-culture-proves-why-it-was-necessary/.

based on their association with a religious group and to provide a remedy for the victims of such discrimination.

It is well-settled that when reading a statute, the "fundamental goal . . . is to ascertain and give effect to the Legislature's intent." *Cadena Comercial USA Corp. v. Tex. Alcoholic Bev. Comm'n*, 518 S.W.3d 318, 325 (Tex. 2017). The first, and often determinative, indication of the Legislature's intent is "the plain meaning of a statute's words," unless the Legislature provides a different meaning for those words by definition, or if "the plain meaning of the words leads to absurd or nonsensical results." *Id.* "If the statute is clear and unambiguous, [courts] must apply its words according to their common meaning in a way that gives effect to every word, clause, and sentence." *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631-32 (Tex. 2008). Critically, this means courts must "presume the Legislature chose[] a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen." *Cadena Comercial*, 518 S.W.3d at 325-26. Only if the plain meaning is unclear do courts resort to other tools of statutory interpretation.

The standard for determining if the Legislature has waived sovereign and governmental immunity mirrors that used to ascertain the Legislature's intent when reading a statute. Generally, "a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language." Tex. Gov't Code § 311.034. Thus, if the waiver is clear and unambiguous by the plain meaning of the statute's words, then there is a waiver of immunity.

The Legislature chose its words carefully and precisely when it decided to waive both sovereign and governmental immunity to ensure a robust protection of religious liberty in the Act. Section 2400.004 provides: "A person who alleges a violation of Section 2400.002 may sue the governmental entity for the relief provided under Section 2400.003. Sovereign or governmental immunity, as applicable, is waived and abolished to the extent of liability for that relief." Tex. Gov't Code § 2400.004.

A person alleges a violation of section 2400.002 by pleading that a "governmental entity" has taken an "adverse action against [him] based wholly or partly on the person's membership in, affiliation with, or contribution, donation, or other support provided to a religious

organization." *Id.* § 2400.002. For alleging one or more of those violations of law, the statute makes available as remedies injunctive and declaratory relief and costs and attorney's fees. *Id.* § 2400.003.

Thus, by the plain terms of the statute, when a person alleges an adverse action taken against him by the government based on his affiliation with a religious organization, for example, and prays for declaratory and injunctive relief, sovereign and governmental immunity is waived. Little more needs to be said. The waiver is clear, unmistakable, and plainly written into the statute.

The court of appeals, however, held that the City of San Antonio was entitled to immunity because petitioners sought to invalidate a city contract. Pet. App. 6. But to reach that conclusion, the court of appeals did not apply the clear and unambiguous words in the statute. Instead, it relied on precedent where the underlying claim did not waive sovereign or governmental immunity. *See Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 858-59 (Tex. 2002) (finding no express waiver of sovereign immunity in Texas Water Code); *City of Austin v. Util. Assocs.*, 517 S.W.3d 300, 314-15 (Tex. App.—Austin 2017, pet. denied) (holding statute that governs purchasing and contracting authority of municipalities waived immunity for one of plaintiff's claims, but did not for others); *Tex. Logos, L.P. v. Tex. Dep't of Transp.*, 241 S.W.3d 105, 114 (Tex. App.—Austin 2007, no pet.) (finding no statutory waiver of immunity). By doing so, the court failed to appreciate that the statute categorically waives immunity for suits arising under section 2400.004, and the waiver contains no exceptions for such suits based on their "purpose" or "effect." In other words, the court of appeals ignored the will of the Legislature, as expressed by the plain language of the statute, to categorically waive the government's immunity for claims like Petitioners'.

The Legislature waived sovereign and governmental immunity for claims brought under the First Amendment Defense Act against municipalities like the City of San Antonio. The court of appeals' contrary holding ignores the Legislature's intent as established by the plain language of the statute. The Court should grant review to correct this error and ensure the Act continues to provide a robust protection of religious liberty and free association.

III. Conclusion

The Court should grant the petition for review.

Respectfully submitted.

/s/ David J. Hacker

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