No. 15-11035

In the United States Court of Appeals for the Fifth Circuit

REPUBLIC WASTE SERVICES OF TEXAS, LIMITED,
Plaintiff-Appellant,

v.

TEXAS DISPOSAL SYSTEMS, INCORPORATED,
Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Texas, San Angelo Division

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

No. 15-11035 *Republic Waste Services of Texas, Ltd. v. Texas Disposal Systems, Inc.*

The undersigned counsel of record certifies that the following persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Appellant Republic Waste Services of Texas, Ltd. submits that this matter is appropriate for oral argument. The stakes are high because the district court held that the Texas Legislature has divested home-rule cities of the power to enter into exclusive contracts for management of construction waste. The Court may find it particularly helpful to engage the parties in a face-to-face discussion of the statutory language upon which the district court based its holding.

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JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1332 because the amount in controversy exceeds $75,000 and there is complete diversity between the parties. *See* ROA.9–10, 20. Specifically, plaintiff-appellant Republic Waste Services of Texas, Ltd. ("Republic") is a citizen of Delaware and Arizona, while defendant-appellee Texas Disposal Systems, Inc. ("TDS") is a citizen of Texas. *See* 28 U.S.C. § 1332(c)(1); *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195–96 (1990).

The district court entered a final judgment that disposed of all parties' claims on September 22, 2015. ROA.416. Republic filed a timely notice of appeal on October 21, 2015. ROA.418–20. This Court has jurisdiction of the appeal under 28 U.S.C. § 1291.

ISSUE PRESENTED

Whether a home-rule city in Texas can enter into an exclusive contract for management of construction waste.

STATEMENT OF THE CASE[1]

Solid Waste in the City of San Angelo

The City of San Angelo ("the City") is a home-rule city in Texas. ROA.72. For the City, and indeed for all municipalities, "[t]he problem of garbage disposal and waste disposal is of paramount importance." *City of Breckenridge v. Cozart*, 478 S.W.2d 162, 164–65 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.). A city must have the ability to provide solid waste management services, lest its inhabitants be overtaken by mountains of trash and armies of rats. *See, e.g.*, Allan R. Gold, *Garbage Collectors Threaten a Strike in New York*, N.Y. TIMES,

[1] The factual allegations in Republic's complaint must be taken as true on appeal because the district court granted a motion to dismiss. *See Machete Prods., L.L.C. v. Page*, 809 F.3d 281, 287 (5th Cir. 2015). As the district court noted, moreover, "[t]he parties conceded at the hearing that the facts are not in dispute and the central issue . . . is a matter of law." ROA.410; *see also* ROA.429.

Nov. 28, 1990; Samuel G. Freedman, *Mountains of Trash Being Cut to Hills*, N.Y. TIMES, Dec. 19, 1981. Little wonder, then, that "enforcement of a comprehensive garbage collection plan . . . is clearly within the police power granted to all municipalities." *Grothues v. City of Helotes*, 928 S.W.2d 725, 729 (Tex. App.—San Antonio 1996, no writ).

The City has for many years provided solid waste management services for its inhabitants by entering into exclusive contracts with a single company to deliver service at fair and reasonable rates, in a manner that is efficient, reliable, and environmentally sound. ROA.23–24 (citing the San Angelo Code of Ordinances). By entering into one exclusive contract for solid waste management, rather than dealing with multiple companies, a city secures greater accountability with respect to the service standards for which it has bargained. *See, e.g.*, Lauren Ahkiam, *Cleaning Up Waste and Recycling Management and Securing the Benefits: A Blueprint for Cities* 5, 36 (July 2015), *available at* http://www.laane.org/wp-content/uploads/2015/07/CleaningUpWaste-Report-Compressed.pdf. In this regard, the City follows best practices from around the country. *See id.* at 4. Using a single contractor also improves air quality, reduces wear and tear on city streets, and

decreases traffic congestion, because it avoids the inefficiency of multiple truck fleets covering crisscrossing routes. *See id.* at 5, 28, 42. In addition, a city that offers an exclusive contract can collect a franchise fee from the contractor that may be used to fund education, system administration, or recycling efforts. *See id.* at 5, 26, 34–35.

When a prior version of the City's exclusive contract was nearing its expiration date, the City issued a request for proposals for a new exclusive and comprehensive contract. ROA.11, 24. Republic and TDS participated in the City's competitive bidding process, each of them vying for the exclusive right to collect, transport, haul, and dispose of residential and commercial garbage. ROA.10–11. Republic's proposal was chosen as the winner. ROA.11, 24. The City Council authorized negotiation of an exclusive contract with Republic, finding that such a contract "is in [the] City's best interest and shall result in significant economic benefits, additional revenues and better services for residential and commercial solid waste customers." ROA.24–25.

Pursuant to an ordinance, Republic and the City entered into a Special Exclusive Contract for Solid Waste Collection and Disposal Services, effective for a decade beginning August 1, 2014. ROA.23–91.

This detailed agreement, hereinafter the "Exclusive Contract," requires Republic "to collect, transport, haul, handle, store and dispose of residential and commercial garbage, trash and debris generated or accumulated within the City Limits," while "maintain[ing] the highest industry standard of service," operating a "safe and sanitary" fleet of modern trucks, and "keep[ing] the entire City in clean and sanitary condition." ROA.27–29, 34. As its name suggests, the Exclusive Contract gives Republic "the exclusive right" to collect *all* solid waste, including "temporary Construction & Demolition Waste." ROA.27; *see also* ROA.63 (defining "Construction and Demolition Waste"). Republic is "responsible for enforcing th[is] exclusivity." ROA.27.

TDS is no stranger to exclusive contracts: Not only did it bid on the exclusive contract with the City that it now violates, but it has also entered into exclusive contracts with other Texas municipalities.[2] Having lost to Republic in the City's bidding process, TDS has no authority to provide solid waste management services within the City. ROA.12. Indeed, TDS's permit from the City provides that TDS cannot

[2] *E.g.*, http://tx-cuero.civicplus.com/AgendaCenter/ViewFile/Item/725?fileID=742; http://www.sunsetvalley.org/vertical/sites/%7B8963FD9D-CEFE-410A-A38B-1611D53E7AA1%7D/uploads/%7B4DE6E9C9-342C-4765-AE3D-81EE3FA856DE%7D.PDF.

operate in "conflict with the City's contract with [Republic] and the exclusive rights granted by that contract to [Republic]." ROA.386–88.

The Dispute Between Republic and TDS

Despite the fact that the Exclusive Contract gives Republic the exclusive right to collect all "temporary construction debris" in the City, TDS began collecting and hauling construction and demolition waste from within the City shortly after the Exclusive Contract was signed. ROA.12, 30. TDS's trucks now haul thousands of pounds of solid waste from construction projects in the City on a daily basis. ROA.13. TDS also continues to solicit customers for whom Republic holds the exclusive right of service. ROA.13.

As a result of TDS's behavior, Republic does not receive the benefit of its bargain with the City. Republic built its bid for the Exclusive Contract around the notion of exclusivity, agreeing to meet the City's high standards in exchange for the right to serve all of the City's inhabitants. *See* ROA.443. By providing a rival service to some of those inhabitants, TDS collects fees to which it is not entitled and dashes Republic's legitimate expectation of exclusivity.

In an effort to protect its rights under the Exclusive Contract, Republic sent TDS a cease-and-desist letter. ROA.12. TDS responded by admitting that its conduct was covered by the Exclusive Contract, but claiming that the Exclusive Contract is unenforceable with respect to temporary solid waste management services for construction projects as a result of section 364.034(h) of the Texas Health and Safety Code, which was enacted in 2007 by the Texas Legislature. ROA.12, 93–94. TDS's general counsel vowed not to honor the Exclusive Contract and openly invited litigation: "Since there is no controlling case law on the matter, I believe this dispute is ripe for the courts to settle." ROA.93–94. True to its word, TDS has continued to serve construction projects within the City. ROA.13.

Proceedings in the District Court

Republic commenced this diversity suit against TDS in the U.S. District Court for the Northern District of Texas, bringing a state-law cause of action for tortious interference with an existing contract. ROA.8–17. Republic sought declaratory relief as to the validity of its Exclusive Contract with the City, an injunction against TDS's continued servicing of construction projects, and money damages. ROA.15–16; *cf.*

28 U.S.C. § 2201(a); TEX. CIV. PRAC. & REM. CODE § 37.004(a); *Tex. Beef Cattle Co. v. Green*, 921 S.W.2d 203, 210 (Tex. 1996); *Stoner v. Thompson*, 578 S.W.2d 679, 684 (Tex. 1979).

TDS filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that section 364.034(h) prohibited the City's entry into any exclusive contract for the collection of construction waste. ROA.126–31. Republic, in turn, filed a motion for partial summary judgment pursuant to Rule 56(a). ROA.155–66. As Republic explained, answering the legal question about the City's exclusive-contracting authority resolves all but the remedies for the tortious-interference claim, because TDS acknowledged its interference with Republic's Exclusive Contract. ROA.159–60.

The case proceeded relatively quickly through the district court, Judge Cummings presiding. ROA.3–6 (noting entry of final judgment less than a year after filing of complaint). In a seven-page order handed down the week after a hearing, the district court granted TDS's motion to dismiss and denied Republic's motion for partial summary judgment. ROA.409–15. The district court held that section 364.034(h) abrogated

the City's preexisting authority to enter into an exclusive contract for the disposal of construction waste. *See* ROA.411–15.

SUMMARY OF ARGUMENT

The Home Rule Amendment to the Texas Constitution confers broad police power upon home-rule cities, pursuant to which they can provide for the management of solid waste within their borders. A home-rule city thus has inherent authority to enter into an exclusive contract concerning all types of solid waste, as reflected in an unbroken line of Texas cases. Although the Texas Legislature can take away that power, courts cannot assume that it has done so unless it acts with unmistakable clarity.

Section 364.034(h) of the Texas Health and Safety Code does not come close to satisfying this clear-statement rule. Unlike a neighboring subsection, section 364.034(h) does not expressly prohibit municipalities from entering into exclusive contracts for the management of construction waste—it simply declares the entire section inapplicable to waste-haulers who serve construction projects. And any negative implication from section 364.034(h)'s exclusion of construction waste does not clearly deprive home-rule cities of their power to enter into

exclusive contracts, because that power does not depend on statutory authorization. To the extent section 364.034(h) limits local authority, it applies only to counties, general-law cities, and other entities that lack home-rule authority and thus are dependent on section 364.034. This is particularly true in light of the Texas Legislature's explicit disclaimer of any intent to limit home-rule authority when it enacted section 364.034's predecessor statute in 1971.

Chapter 363 of the Texas Health and Safety Code offers a belt-and-suspenders grant of power. Under chapter 363, home-rule cities, general-law cities, and other entities can enter into exclusive contracts for management of all solid waste, with no exceptions. Chapter 363's existence confirms that the Texas Legislature has not limited home-rule authority with unmistakable clarity.

The City acted well within its power as a home-rule municipality when it entered into the Exclusive Contract with Republic. As such, the Exclusive Contract is valid and enforceable as a matter of Texas law. TDS must be held to account for its tortious interference with Republic's exclusive right to manage solid waste, including construction waste, within the City. The dismissal of Republic's tortious-interference claim

should be reversed, and the cause should be remanded to the district court for a determination of the appropriate remedies.

ARGUMENT

Texas law recognizes a cause of action for tortious interference with an existing contract. *See Holloway v. Skinner*, 898 S.W.2d 793, 794–95 (Tex. 1995) (Cornyn, J.). The tortious-interference claim has long been used, as Republic employs it here, to enforce a contractual grant of exclusivity. *See, e.g.*, *Tugwell v. Eagle Pass Ferry Co.*, 9 S.W. 120, 124 (Tex. 1888); *Moore v. Cox*, 215 S.W.2d 666, 667 (Tex. Civ. App.—Fort Worth 1948, no writ); *Lindsley v. Dall. Consol. St. Ry.*, 200 S.W. 207, 208 (Tex. Civ. App.—Dallas 1917, no writ). "To recover for tortious interference with an existing contract, a plaintiff must prove: (1) the existence of a contract subject to interference; (2) a willful and intentional act of interference; (3) the act was a proximate cause of the plaintiff's damages; and (4) actual damage or loss." *Tex. Beef Cattle Co. v. Green*, 921 S.W.2d 203, 210 (Tex. 1996).

Most of these elements are not in doubt on appeal. TDS admitted in writing that the Exclusive Contract "purports to grant Republic the exclusive right to collect construction and demolition waste" within the

City, even as it expressed the intention to continue impinging on that right. ROA.93–94. As a result, TDS's sole argument supporting its motion to dismiss was that the Exclusive Contract is invalid under section 364.034(h) of the Texas Health and Safety Code. *See* ROA.126–31. If TDS is right on that point, then the tortious-interference claim fails as a matter of law.[3] But if TDS is wrong—and it is—then the bargain reflected in the Exclusive Contract must be given effect in accordance with Texas law. *See Gotham Ins. Co. v. Warren E & P, Inc.*, 455 S.W.3d 558, 564 (Tex. 2014) ("[W]e bear in mind the strong public policy to preserve freedom of contract . . . [and] will enforce the parties' bargain unless it contravenes some positive statute.").

The district court accepted TDS's theory that section 364.034(h) "does not allow exclusive contracts between municipalities and waste service providers . . . when such services are for temporary construction waste disposal." ROA.411–12. This Court's de novo review will reveal that the district court erred in resolving this question of law when it granted TDS's motion to dismiss and denied Republic's motion for partial summary judgment. *See, e.g.*, *Kemp v. G.D. Searle & Co.*, 103

[3] *See Juliette Fowler Homes, Inc. v. Welch Assocs., Inc.*, 793 S.W.2d 660, 664 (Tex. 1990) ("The first element requires the existence of a valid contract.").

F.3d 405, 407 (5th Cir. 1997) ("Questions of statutory interpretation are questions of law and thus reviewed de novo."); *Del-Ray Battery Co. v. Douglas Battery Co.*, 635 F.3d 725, 728 (5th Cir. 2011) ("We . . . review de novo a district court's grant of a motion to dismiss for failure to state a claim under Rule 12(b)(6)."); *Robinson v. Orient Marine Co.*, 505 F.3d 364, 365 (5th Cir. 2007) ("We review a district court's grant or denial of summary judgment de novo, applying the same standard as the district court."). As shown below, this Court should reverse and remand because the City had the power to enter into the Exclusive Contract with Republic for management of *all* solid waste.

I. THE POLICE POWER OF A HOME-RULE CITY AUTHORIZES ITS ENTRY INTO AN EXCLUSIVE CONTRACT FOR SOLID WASTE MANAGEMENT

The opinion below reflects a basic misapprehension of the nature and sources of municipal power in the State of Texas. Fixating on the vague language of section 364.034(h), the district court proceeded as though the City needed the Texas Legislature's explicit permission to enter into the Exclusive Contract. That analysis gets it exactly backwards for a home-rule municipality like the City.

A. The Home Rule Amendment Confers Police Power

The City derives its authority directly from the Home Rule Amendment to the Texas Constitution. *See* TEX. CONST. art. XI, § 5; SAN ANGELO, TEX., CITY CHARTER. As this Court has noted, "home-rule municipalities chartered under the Texas Constitution . . . enjoy a considerable degree of self-governance." *City of Abilene v. EPA*, 325 F.3d 657, 664 (5th Cir. 2003). "Home-rule cities have the full power of self-government and look to the Legislature, not for grants of power, but only for limitations on their powers." *S. Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676, 678 (Tex. 2013); *see also Forwood v. City of Taylor*, 214 S.W.2d 282, 286 (Tex. 1948) (holding that the Home Rule Amendment gave cities "full authority to do anything the legislature could theretofore have authorized them to do"); *Bizios v. Town of Lakewood Village*, 453 S.W.3d 598, 605 (Tex. App.—Fort Worth 2014, pet. granted) (holding that a "general-law municipality," unlike a home-rule city, "can exercise only those powers that the legislature confers").

"It was the purpose of the people to bestow upon the cities coming under the Home Rule Amendment full power of local self-government." *City of Houston v. City of Magnolia Park*, 276 S.W. 685, 689 (Tex. 1925)

(internal quotation marks omitted); *see also* TEX. LOC. GOV'T CODE § 51.072(a) ("The municipality has full power of local self-government."). Home-rule cities are thus endowed with broad police power. *See, e.g.*, *City of Bellaire v. Lamkin*, 317 S.W.2d 43, 45 (Tex. 1958); *Brewer v. State*, 24 S.W.2d 409, 410–11 (Tex. Crim. App. 1930); *Tex. River Barges v. City of San Antonio*, 21 S.W.3d 347, 355 (Tex. App.—San Antonio 2000, pet. denied); *see also* TEX. LOC. GOV'T CODE § 54.004 ("A home-rule municipality may enforce ordinances necessary to protect health, life, and property and to preserve the good government, order, and security of the municipality and its inhabitants."). Conferring such authority through the Home Rule Amendment relieved the Texas Legislature of having to solve city-level problems, a task for which it is ill-equipped. *See Le Gois v. State*, 190 S.W. 724, 725 (Tex. Crim. App. 1916).

B. Police Power Enables Exclusive Contracting

It is settled that a city's "police power may be exerted in the interest of the public health, safety, morals, convenience, and general welfare of the inhabitants of a city." *Lombardo v. City of Dallas*, 73 S.W.2d 475, 479 (Tex. 1934). And the police power of a Texas city has long been held to encompass management of garbage and other waste.

See, e.g., *Ex parte London*, 163 S.W. 968, 970 (Tex. Crim. App. 1913); *Ex parte Savage*, 141 S.W. 244, 250 (Tex. Crim. App. 1911); *Grothues v. City of Helotes*, 928 S.W.2d 725, 729 & n.6 (Tex. App.—San Antonio 1996, no writ); *Browning-Ferris, Inc. v. City of Leon Valley*, 590 S.W.2d 729, 732 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.); *City of Breckenridge v. Cozart*, 478 S.W.2d 162, 164–65 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.); *City of Breckenridge v. McMullen*, 258 S.W. 1099, 1101 (Tex. Civ. App.—Fort Worth 1923, no writ).

It is also widely accepted that "an *exclusive* contract for the removal of [waste] constitutes a proper exercise of the police power." 7 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 24:251 (3d ed. 2005) (emphasis added). Texas courts have agreed with that conclusion. *See, e.g.*, *Kemp Hotel Operating Co. v. City of Wichita Falls*, 170 S.W.2d 217, 219 (Tex. 1943); *Browning-Ferris*, 590 S.W.2d at 731–34; *McMullen*, 258 S.W. at 1102. So have federal courts. *See, e.g.*, *Gardner v. Michigan*, 199 U.S. 325, 331–33 (1905); *Cal. Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306, 317–25 (1905); *Gardner v. City of Dallas*, 81 F.2d 425, 426 (5th Cir. 1936). As a leading case explained, an exclusive contract protects a city from a scenario in which "there

would be continual moving nuisances at all times . . . , breaking up the streets by their weight, and poisoning the air with their effluvia," because it lets city officials "employ men over whom they have entire control by night and by day . . . , and who will be able, from habit, to do this work in the best possible way and time." *McMullen*, 258 S.W. at 1102 (quoting *In re Vandine*, 23 Mass. (6 Pick.) 187, 192 (Mass. 1828)).

After canvassing this consistent line of precedent, the Attorney General of Texas has likewise declared: "It is within the police power of a city to adopt ordinances governing the removal of garbage. A city may grant an exclusive franchise and contract to a private company to collect, haul, and dispose of all solid waste material within the city." Tex. Att'y Gen. Op. No. DM-401, 1996 WL 454801, at *1 (1996) (citations omitted). The Attorney General has specifically opined that such an exclusive contract can include temporary construction debris, stating that "[a] home-rule municipality may adopt an ordinance requiring residential construction contractors to use the franchisee selected by the city . . . to collect and haul customary debris from a construction site." Tex. Att'y Gen. Op. No. JC-0035, 1999 WL 270049, at *3 (1999). As the Attorney General has explained, "[m]unicipalities'

authority to enact and enforce waste-collection health and safety ordinances predates" section 364.034, whose statutory predecessor was not enacted until 1971. Tex. Att'y Gen. LO-97-037, 1997 WL 196046, at *3 n.6 (1997).

The City acted pursuant to its broad police power when it entered into the Exclusive Contract and thus gave Republic the exclusive right to collect solid waste, including construction waste, through use of the City's streets, alleys, and public ways. ROA.23–24, 27. The Exclusive Contract is therefore valid and enforceable as a matter of Texas law, unless home-rule cities have somehow been stripped of their longstanding authority.

II. SECTION 364.034(h) DOES NOT TAKE AWAY A HOME-RULE CITY'S POWER TO ENTER INTO AN EXCLUSIVE CONTRACT FOR MANAGEMENT OF CONSTRUCTION WASTE

The district court erred in holding that section 364.034(h) "take[s] away the City's inherent authority to grant exclusive franchise or contact [sic] rights in the specific instance of contracts to provide temporary solid waste disposal services to a construction project." ROA.415 (internal quotation marks omitted). Texas law is far more

protective of home-rule cities' power than that misreading of section 364.034(h) would suggest.

A. The Texas Legislature Must Act With Unmistakable Clarity To Limit Home-Rule Power

Because "[h]ome-rule cities . . . derive their powers from the Texas Constitution," *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002) (per curiam), the Texas Supreme Court has imposed a clear-statement rule to preserve the proper balance of state and municipal authority. "[T]he Legislature may provide limits on the power of home-rule cities, but only if the limitation appears with 'unmistakable clarity.'" *Quick v. City of Austin*, 7 S.W.3d 109, 122 (Tex. 1998) (Abbott, J.) (quoting *LCRA v. City of San Marcos*, 523 S.W.2d 641, 645 (Tex. 1975) (quoting *City of Sweetwater v. Geron*, 380 S.W.2d 550, 552 (Tex. 1964))); *accord City of Houston v. Bates*, 406 S.W.3d 539, 546 (Tex. 2013); *S. Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676, 678 (Tex. 2013); *Proctor v. Andrews*, 972 S.W.2d 729, 733 (Tex. 1998). Mere entry into a field by the Texas Legislature will not crowd out home-rule cities' efforts by negative implication. *See City of Richardson v. Responsible Dog Owners*, 794 S.W.2d 17, 19 (Tex. 1990); *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982). Similarly, "a general law

and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached." *City of Beaumont v. Fall*, 291 S.W. 202, 206 (Tex. 1927).

Contrary to the district court's decision, section 364.034(h) does not satisfy Texas's clear-statement rule for limiting the power of a home-rule city. *See* ROA.415 (finding that section 364.034(h)'s "plain wording" evinces a "clear intent" to limit home-rule authority). The pertinent subsection, found in a chapter targeted at counties rather than cities, reads in its entirety as follows:

> This section [364.034] does not apply to a private entity that contracts to provide temporary solid waste disposal services to a construction project.

TEX. HEALTH & SAFETY CODE § 364.034(h) (codifying H.B. 1251, § 1, 80th Leg., R.S. (2007)).

TDS convinced the district court that this single sentence, enacted by the Texas Legislature in 2007, swept away more than a century of home-rule authority over garbage collection. Specifically, TDS argued that the City could not enter into the Exclusive Contract because authority over solid waste is conferred upon cities in section 364.034(a), but is later retracted in section 364.034(h) as to construction waste in

particular. *See* ROA.127, 292–94, 435–36; *cf.* TEX. HEALTH & SAFETY CODE § 364.034(a)(1)–(2) ("A public agency or a county may . . . offer solid waste disposal service to persons in its territory [and] require the use of the service by those persons . . . ."); *id.* § 364.034(h) ("This section does not apply to a private entity that contracts to provide temporary solid waste disposal services to a construction project.").

B. Section 364.034(h) Lacks The Unmistakable Clarity Of Its Neighboring Subsection

TDS reads too much into section 364.034(h) because it reads too little of the surrounding statute. *See Tex. Workers' Comp. Ins. Fund v. Del Indus., Inc.*, 35 S.W.3d 591, 593 (Tex. 2000) (Abbott, J.) ("[W]e presume that the Legislature intended the entire statute to be effective . . . [and] do not view disputed portions of a statute in isolation."); *In re OAG*, 456 S.W.3d 153, 155 (Tex. 2015) (orig. proceeding) (per curiam) ("When construing statutes . . . , one cannot divorce text from context."). Section 364.034(h) does not use language of prohibition. Instead, it merely declares that "[t]his section does not apply." This language stands in stark contrast to a neighboring subsection that was enacted in the very same 2007 bill:

> Notwithstanding the other provisions of this section, a political subdivision, including a county or *a municipality, may not restrict the right of an entity to contract* with a licensed waste hauler for the collection and removal of domestic septage or of grease trap waste, grit trap waste, lint trap waste, or sand trap waste.

TEX. HEALTH & SAFETY CODE § 364.034(f) (emphasis added).

Section 364.034(f) shows that the Texas Legislature knew how to limit municipal authority with unmistakable clarity. Yet it chose *not* to use similar language in section 364.034(h) for construction waste. As the Texas Supreme Court has held, in another case involving the power of home-rule cities, it must be "presume[d] that this omission has a purpose." *Quick*, 7 S.W.3d at 122–23 (holding that a statute did not limit a home-rule city with "unmistakable clarity" because, unlike neighboring provisions, it did not specifically provide that a municipal water-pollution ordinance was ineffective pending TCEQ review).

C. Negative Implications From Section 364.034 Do Not Limit Home-Rule Power With Unmistakable Clarity

Because there is no language of prohibition concerning a city's authority to manage waste in section 364.034(h), TDS is forced to rely on the *expressio unius est exclusio alterius* canon—"the expression of some connotes the exclusion of others." *Teltech Sys., Inc. v. Bryant*, 702

F.3d 232, 238 (5th Cir. 2012); *cf. Hernandez-Rodriguez v. Pasquarell*, 118 F.3d 1034, 1046 (5th Cir. 1997) (Garwood, J.) (noting that this canon works "by negative implication"); *Mid-Century Ins. Co. v. Kidd*, 997 S.W.2d 265, 274 (Tex. 1999) (noting that the canon "is simply an aid to determine legislative intent, not an absolute rule"). TDS argues that if section 364.034(a) confers an exclusive-contracting authority that does not extend to construction waste, then home-rule cities must not have any authority to enter into exclusive contracts concerning construction waste. *See* ROA.127, 435–36. Otherwise, contends TDS, section 364.034(h) would be "render[ed] nugatory." *See* ROA.292–93.

TDS's negative-implication argument fails because it assumes, incorrectly, that section 364.034(a) does nothing more than confer authority upon home-rule cities. In fact, the statute empowers counties, general-law cities, regional planning commissions, and other entities that lack home-rule authority to enter into exclusive contracts. *See* TEX. HEALTH & SAFETY CODE § 364.034(a)(1)–(2) ("A public agency or a county may . . . offer solid waste disposal service to persons in its territory [and] require the use of the service by those persons . . . ."); *id.* § 364.003(3) (" 'Public agency' means a district, municipality, regional

planning commission . . . , or other political subdivision . . . .”). Even if home-rule cities exercise exclusive-contracting authority that arises outside of section 364.034(a)’s explicit grant, section 364.034(h)’s narrowing language is not nugatory because it still applies to general-law cities and other entities that rely upon the Texas Legislature, rather than the Texas Constitution, for their authority. *Cf. In re Cont’l Cas. Co.*, 29 F.3d 292, 294 (7th Cir. 1994) (Easterbrook, J.) (“[T]he omission of other items from a list may reflect no more than a belief that other options are provided for elsewhere.”).

Not surprisingly, Texas courts have rejected similar attempts to satisfy the “unmistakable clarity” standard by negative implication. In *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 807–08 (Tex. 1984), the Texas Supreme Court held that a statute enabling acquisition of park land via specified methods did “not ‘unmistakably’ limit the power of a home rule city to require neighborhood park land dedication in connection with subdivision regulation,” because the statute “also applie[d] to counties and general law cities, and thus serve[d] as a grant of specific powers to these non-home rule entities.” In *Geron*, 380 S.W.2d at 552–53, the Texas Supreme Court held that a

statute specifying the "disciplinary reasons" for removing firemen and policemen did not unmistakably limit a home-rule city's power to impose "maximum age limits" for those municipal employees. And in *Grothues v. City of Helotes*, 928 S.W.2d 725, 728–29 (Tex. App.—San Antonio 1996, no writ), a Texas court declined to "follow the maxim *expressio unius est exclusio alterius*" with respect to section 364.034, holding that a subsection empowering a general-law city to suspend garbage collection for nonpayment did not preclude the city's use of its police power to impose a fine for nonpayment.

D. The Texas Legislature Expressly Disclaimed Any Intent To Limit Home-Rule Power In 1971

TDS's negative-implication argument is further undermined by a pronouncement from the Texas Legislature when it enacted section 364.034's predecessor statute. Section 364.034 is part of the County Solid Waste Control Act. *See* TEX. HEALTH & SAFETY CODE § 364.001. When the County Solid Waste Control Act was passed in 1971, the Texas Legislature declared that it did not intend to strip any local government of its preexisting authority over solid waste:

> [T]he powers granted under this Act shall be in addition to and not in derogation of any and all existing powers of any county or public agency. . . . [T]his Act shall not be deemed

> to repeal, expressly or by implication, any power or right granted to any county or to any public agency; and any county or public agency having powers under existing law similar to or in the nature of those granted hereunder may continue to operate and act in the exercise of such powers or may operate and act under the powers granted herein or both.

Act of May 29, 1971, ch. 516, § 22, 62d Leg., R.S., 1971 Tex. Gen. Laws 1757. This explicit disclaimer makes it unmistakably clear that the Texas Legislature did *not* intend to limit the police power of home-rule cities by providing them with an additional source of authority in section 364.034.

Whatever effect section 364.034(h) may have on counties or general-law cities, its weak language does not come close to limiting, with unmistakable clarity, the longstanding authority of home-rule cities to enter into exclusive contracts for solid waste management. The Exclusive Contract was therefore well within the police power conferred upon the City by the Home Rule Amendment, such that the bargain it reflects should be given effect. In refusing to honor the Exclusive Contract, the district court misread the statute, misunderstood Texas law, and upset the expectations around which Republic and the City structured their conduct and their contract.

III. CHAPTER 363 ONLY CONFIRMS THAT A HOME-RULE CITY HAS THE POWER TO ENTER INTO AN EXCLUSIVE CONTRACT FOR MANAGEMENT OF CONSTRUCTION WASTE

As a consequence of the Home Rule Amendment, the City needed no help from the Texas Legislature to enter into the Exclusive Contract. *See S. Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676, 678 (Tex. 2013). But even if the City looked to the statute books for a grant of authority, the more natural source would be chapter 363 of the Texas Health and Safety Code, known as the Comprehensive Municipal Solid Waste Management, Resource Recovery, and Conservation Act, rather than section 364.034 as the district court believed. *See* TEX. HEALTH & SAFETY CODE § 363.001.

A. Chapter 363 Further Empowers Municipalities

Section 363.116(a) provides that "[a] public agency may enter into contracts to enable it to furnish or receive solid waste management services on the terms considered appropriate by the public agency's governing body." *See also* TEX. HEALTH & SAFETY CODE § 363.004(14) (defining "public agency" to include "municipality"). Section 363.117(4) goes on to specify that, "[u]nder a solid waste management service contract, a public agency may . . . contract with a person . . . for the

operation of *all* or any part of a solid waste management system." (Emphasis added.) And section 363.119(e) provides that "[a] public agency may establish, charge, and collect fees . . . for services or facilities provided under or in connection with a contract," to be "charged to and collected from the residents of the public agency." There is no carve-out in chapter 363 for construction waste.

The City's Exclusive Contract with Republic falls within chapter 363's broad grant of authority, unnecessary though it may be in light of the Home Rule Amendment. In the district court, TDS argued that chapter 363 cannot be read to confer exclusive-contracting authority because "[t]he word 'exclusive' does not appear anywhere in [c]hapter 363." ROA.288. But the word "exclusive" does not appear anywhere in chapter 364, either, so TDS's observation is self-defeating. While chapter 363 does not use the exact same language as section 364.034(a), the authority it confers is just as broad.

B. Chapter 363 And Section 364.034(h) Are Not In Irreconcilable Conflict

According to the district court, however, there is an "irreconcilable conflict" between chapter 363 and section 364.034(h). ROA.413 & n.1 (citing TEX. GOV'T CODE §§ 311.025–.026). To resolve this supposed

conflict, the district court held that section 364.034(h), the more specific and more recent provision, must trump chapter 363. ROA.413. In this way, the district court maintained its focus on section 364.034(h), to the exclusion of all other sources of municipal authority.

This piece of statutory interpretation is unsound as a matter of Texas law because it makes no real effort to reconcile chapter 363 and section 364.034(h). *See* TEX. GOV'T CODE § 311.026(a) ("If a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both."); *Fortinberry v. State*, 283 S.W. 146, 148 (Tex. Comm'n App. 1926, judgm't adopted) ("Where two statutes seem to be repugnant, a construction will be sought to harmonize them and leave both in concurrent operation . . . ."). Juxtaposition of chapter 363 and section 364.034(h) does not reveal anything resembling the truly irreconcilable conflicts that have been identified by Texas courts. *See, e.g.*, *Saunders v. State*, 49 S.W.3d 536, 539 (Tex. App.—Eastland 2001, pet. ref'd) (finding irreconcilable conflict where one statute provided that "[n]o person shall be permitted to be with a jury while it is deliberating," while another provided that

an interpreter for the deaf "may accompany the juror during all proceedings and deliberations").

Any conflict between chapter 363 and section 364.034(h) is easily reconciled by reading them as applicable to municipalities and counties, respectively. The text of section 364.034 lends itself to such a reading, insofar as subsections (b) through (d) explicitly require involvement of a "county"—not a "public agency" or a "municipality"—to collect fees. What good is a municipality's power to "charge fees for the service" under section 364.034(a)(3), if it cannot actually *collect* the fees? The statutes' respective titles further support this harmonious reading. *Compare* TEX. HEALTH & SAFETY CODE § 363.001 ("This chapter may be cited as the Comprehensive *Municipal* Solid Waste Management, Resource Recovery, and Conservation Act." (emphasis added)), *with* TEX. HEALTH & SAFETY CODE § 364.001 ("This chapter may be cited as the *County* Solid Waste Control Act." (emphasis added)). *See also* TEX. GOV'T CODE § 311.023(7) ("In construing a statute . . . a court may consider among other matters the . . . title (caption) . . . ."). And to treat section 364.034 as though it governs municipal authority would be to

reduce chapter 363 to "a useless act," which Texas law forbids. *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 551 (Tex. 1981).

Instead of pitting the two statutes against each other, the pair should be harmonized by reading chapter 363 to empower general-law cities, and section 364.034 to empower counties. As for home-rule cities, this distribution is of little consequence because the Texas Constitution already provides the requisite authority. Although the City did not need chapter 363 to enter into the Exclusive Contract, the statute confirms that such a power has not been stripped away with unmistakable clarity. If anything, the Texas Legislature has taken a belt-and-suspenders approach to ensuring that home-rule cities have the power to manage solid waste.

CONCLUSION

This Court should reverse the district court's judgment of dismissal, direct the district court to grant Republic's motion for partial summary judgment, and remand the cause for further proceedings to determine the wording of the injunction and the amount of damages to be awarded. *See* 28 U.S.C. § 2106; *United States v. De Witt*, 265 F.2d 393, 400 (5th Cir. 1959). In the alternative—but only if the Court is

inclined to affirm—the Court should certify the state-law question to the Texas Supreme Court, which ought to have an opportunity to reject the district court's disruption of the balance of state and municipal authority. *See* TEX. CONST. art. V, § 3-c(a); TEX. R. APP. P. 58.1.

Respectfully submitted.

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that, on February 29, 2016, the foregoing brief was served, via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov/, upon the following registered CM/ECF users:

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