No. 23-0767

In the Supreme Court of Texas

SHANA ELLIOTT AND LAWRENCE KALKE,
Petitioners,

v.

CITY OF COLLEGE STATION, TEXAS; KARL MOONEY, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF COLLEGE STATION; AND BRYAN WOODS, IN HIS OFFICIAL CAPACITY AS THE CITY MANAGER OF THE CITY OF COLLEGE STATION,
Respondents.

From the Court of Appeals Sixth Appellate District of Texas at Texarkana, Case No. 06-22-00078-CV

BRIEF OF THE GOLDWATER INSTITUTE AS *AMICUS CURIAE IN SUPPORT OF THE PETITION FOR REVIEW*

Dated: August 21, 2024

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The Goldwater Institute ("Goldwater") is a nonpartisan public-policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, Goldwater files amicus briefs when its, or its clients', objectives are directly implicated.

Goldwater has devoted substantial resources to curtail government overreach and protect property owners' right and ability to use their own property. Goldwater uses state law to protect property owners' rights by ensuring that governments cannot take land directly or deprive an owner of the rights to rent, improve, sell, or otherwise use their property. Goldwater has appeared frequently as counsel for parties or amicus curiae in cases involving property rights and limited government. *See, e.g.*, *Borgelt v. Austin Firefighters Ass'n*, No. 22-1149, 2024 WL 3210046 (Tex. June 28, 2024); *Neptune Swimming Found. v. City of Scottsdale*, 542 P.3d 241 (2024); *Yim v. City of Seattle*, 451 P.3d 694 (2019).

Goldwater believes its litigation experience and public-policy expertise will aid this Court in considering the petition.

SUMMARY OF ARGUMENT

"Fortunately, [] for the people, the function of the judiciary in deciding constitutional questions is not one which it is at liberty to decline." *Morton v. Gordan and Alley*, Dallam 396, 397 (Tex. 1841). Indeed, the "final authority to determine adherence to the Constitution resides with the Judiciary. Thus, the Legislature has the sole right to decide *how* to meet the standards set by the people . . . and the Judiciary has the final authority to determine *whether* they have been met." *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 777 (Tex. 2005) (emphasis in original).

In this case, the Sixth Court of Appeals bypassed its job to interpret and uphold the Texas Constitution, choosing instead to apply case law interpreting the Guarantee Clause of the *United States* Constitution (U.S. Const. art. IV, § 4) to determine that claims brought under the Republican Form of Government Clause of the *Texas* Constitution (Tex. Const. art. I, § 2) are political questions. In doing so, the lower court failed to first examine whether Texas's Republican Form of Government Clause does, in fact, extend broader rights to Texas citizens than the Federal Guarantee Clause. The lower court did not grapple with (1) the textual language of Texas's Republican Form of Government Clause; (2) how it differs from the Federal Guarantee Clause; (3) the history of the Texas Constitution; (4) preexisting state law;

(5) differences in structure between the two constitutions; or (6) whether the matters in this case present a particular state interest or local concern. As the Washington Supreme Court found, state courts should consider these factors before borrowing from *federal* jurisprudence when interpreting a *state* constitutional provision. *See State v. Gunwall*, 720 P.2d 808, 812–13 (Wash. 1986) (collectively, "the *Gunwall* Factors").

Put simply, if this Court does not reverse the lower court, Texas precedent will be that a provision of the Texas Constitution, and indeed even a provision of the Texas Bill of Rights, can be deemed a nonjusticiable political question based on case law interpreting the Federal Constitution, despite the fact that the two constitutional provisions are worded differently, were adopted at different times, and address different concerns—and all without the court's first examining the text and meaning of the Texas Constitution to discern whether it was intended to extend broader rights to Texas citizens. That cannot be the law.

ARGUMENT

Setting aside other error, this amicus focuses on the lower court's error in relying on precedent interpreting the Federal Guarantee Clause to conclude that there is (1) a textually demonstrable constitutional commitment of the republican-form-of-government issue to the legislature and (2) no judicially discoverable and manageable standard for resolving the parties' underlying dispute, thus rendering it a political question. *See Elliott v. City of Coll. Station*, 674 S.W.3d 653, 670–75 (Tex. App.—Texarkana 2023, pet. pending) (relying on *Baker v. Carr*, 369 U.S. 186, 217 (1962)). The lower court's reliance on case law interpreting the *Federal* Guarantee Clause was in error because the lower court failed to grapple with the text of the *Texas* Republican Form Government Clause to discern whether the Texas Constitution extends broader rights to Texas citizens than the Federal Guarantee Clause.

The Court should take this opportunity to clarify that Texas courts cannot by *ipse dixit* apply precedent that interprets the United States Constitution to disputes regarding the interpretation and meaning of the Texas Constitution. Rather, while such precedent might be persuasive (or not), just as any other foreign-jurisdiction precedent might be, the Texas Constitution takes primacy. And that means that before such precedent can be applied, Texas courts must first examine neutral factors to determine whether the Texas

Constitution extends broader rights than the United States Constitution. The Washington Supreme Court offered an exceptionally helpful test for making that determination in *Gunwall*, *supra*; *see also State v. Hunt*, 450 A.2d 952, 962–69 (N.J. 1982) (Handler, J., concurring) (offering a similar test); *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991) (same). Anything less is inconsistent with the Judiciary's job to ensure the standards set by the citizens of Texas in their Constitution have been met. *See Neeley*, 176 S.W.3d at 777.

I. The Sixth Court of Appeals relied on inapplicable precedent, rather than the Texas Constitution and related jurisprudence.

The lower court relied on precedent finding claims brought under the Federal Guarantee Clause are "nonjusticiable under the political question doctrine." *See Elliott*, 674 S.W.3d at 670–72 (citing *Texas v. United States*, 106 F.3d 661, 666 (5th Cir. 1997); *New York v. United States*, 505 U.S. 144, 182–86 (1992); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912)). And the lower court acknowledged that key Texas precedent it relied upon in finding this dispute involved a nonjusticiable political question, *Bonner v. Belsterling*, 138 S.W. 571 (Tex. 1911), involved this Court's interpretation of the *Federal* Guarantee Clause—not Texas's Republican Form of Government

Clause. *Elliott*, 674 S.W.3d at 670–72 ("*Bonner* was decided on the Guarantee Clause, on which Appellants do not rely."). The lower court explained:

> On the first *Baker* factor, *Bonner* held that "the Legislature may confer upon any municipal government any power it may see fit to give." *Bonner* further held that questions such as "recall, the initiative, and the referendum" are "for the Legislature in the creation of municipal governments." Going further, *Bonner* stated, "It is not for the courts to decide that question." On the second *Baker* factor, *Bonner* quoted Thomas Jefferson for the proposition that the definition of a "republican form of government" "is of very vague application in every language[,]" but that to an extent a definition can be formed, "governments are more or less republican as they have more or less of the element of popular election and control in their composition."

Id. (citations omitted). And ultimately, the lower court concluded that there is "'a lack of judicially discoverable and manageable standards' as to the issue because, as stated in *Bonner*, what constitutes a republican form of government is, by necessity, indefinite," and thus "the *Baker* factors indicate that a political question exists." *Id.* at 675.

The lower court's reliance on *Bonner* and Federal Guarantee Clause jurisprudence is error.

A. *The lower court failed to consider the distinctions of the Texas Republican Form of Government Clause.*

The lower court compared the Texas Republican Form of Government Clause with the Federal Guarantee Clause in a single sentence: "The United States Constitution contains a guarantee clause similar to that of the Texas

Constitution." *Id.* at 670. But "similar" is not the word. The 1787 Federal Constitution says:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. Const. art. IV § 4. And the 1876 Texas Constitution says:

> All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.

Tex. Const. art. I § 2. The purported "similarity" consists of five words, out of a total of 69, and while the former is plainly a federalism guarantee—designed to extend the federal government's protection over the states—the state Constitution cannot logically *be* a federalism provision.[1] Far from "similar," the differences in these clauses are simply overwhelming.

[1] The Federal Clause was written to promise states protection against internal uprisings such as the Shays Rebellion. Timothy Sandefur, *A Private Little Bush v. Gore, or, How Nevada Violated the Republican Guarantee and Got Away with It*, 9 Tex. Rev. L. & Pol. 105, 122 (2004). The state provision—drafted in the wake of the Civil War—was designed with the much-broader purpose of setting forth the most fundamental principles that legitimize and guide the state government. Arvel (Rod) Ponton III, *Sources of Liberty in the Texas Bill of Rights*, 20 St. Mary's L.J. 93, 100–04 (1988).

Nevertheless, the lower court failed to wrestle with, or even mention, the differences between the two provisions, instead choosing by *ipse dixit* to adopt federal political-question jurisprudence interpreting the Federal Guarantee Clause. *Id.* The court did not consider the text, context, or structure of the Texas clause but, rather, assumed that the rights and protections afforded thereunder are identical to those of the Federal Guarantee Clause. But as explained below, they are not.

II. The *Gunwall* factors lead to the correct conclusion in this case: an independent analysis of the Texas Constitution.

"As a state court, sitting in Texas, [this Court's] expertise is in Texas law, [the] judges are Texas citizens and members of the Texas bar, and our concerns are Texas concerns. If [this court] simply appl[ies] federal law in all cases, why have a Texas Constitution, and why have a Texas Supreme Court?" *Davenport v. Garcia*, 834 S.W.2d 4, 19 (Tex. 1992). Numerous state courts, including those in Texas, have found that provisions of their state constitutions afford broader protections than the Federal Constitution. *See, e.g.*, *id.*; *Gunwall*, 720 P.2d at 815–18; *State v. Ingram*, 914 N.W.2d 794, 797–98, 820–21 (Iowa 2018); *see also* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535, 548–49 (1986) (collecting state court cases addressing state constitutional interpretation).

The United States Supreme Court has also recognized the "sovereign right [of each state] to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980). As one state supreme court justice put it: "state constitutions are freedom documents." Clint Bolick, *Principles of State Constitutional Interpretation*, 53 Ariz. St. L.J. 771, 773 (2021). This means that simply parroting federal precedent, without engaging in an examination of the unique protections provided by the distinct language of the Texas Constitution, robs Texans of their sovereign right to adopt protections for individual liberty more expansive than those found in the United States Constitution.

A. *The* Gunwall *factors.*

The Washington Supreme Court has devised a multifactor test—a set of "nonexclusive neutral criteria"—to consider in deciding whether to resolve a case on independent state constitutional grounds or to rely on federal jurisprudence. *See Gunwall*, 720 P.2d at 812–13. And several other states have adopted some version of this test. *See State v. Harmon*, 113 S.W.3d 75, 78–79 (Ark. 2003); *Gannon v. State*, 704 A.2d 272, 276 (Del. 1998); *Fertig v.*

State, 146 P.3d 492, 497 (Wyo. 2006) (modified version of the test).[2]

The *Gunwall* factors are "(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern." 720 P.2d at 810–11. These criteria should act as a road map for this Court in outlining its own jurisprudence identifying when the Texas Constitution should be interpreted independently from precedent interpreting the Federal Constitution.

The constitutional issue presented in *Gunwall* was "[w]hen is it appropriate . . . to resort to independent state constitutional grounds to decide a case, rather than deferring to comparable provisions of the United States Constitution . . . ?" *Id.* The *Gunwall* court recognized that Washington's Constitution extended broader protections to citizens than the Federal Constitution. *Id.* Thus, to provide guidance to counsel and lower courts, the court articulated criteria it will consider as to whether "in a given situation, the construction of the constitution of the State [] should be considered as extending broader rights to its citizens than does the United States Constitution," to "insure that if this court does use independent state

[2] Other courts have created their own different, but similar, tests. *See State v. Jewett*, 500 A.2d 233, 237–38 (Vt. 1985); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 421 (Conn. 2008).

constitutional grounds . . . our decision will be made for well founded legal reasons." *Id.* at 813.[3]

Texas courts need an equally well-defined standard. The *Gunwall* factors would not limit a Texas court's ability to look to federal constitutional interpretations, case law, or precedent—just as they can look at the precedent of any other foreign jurisdiction. *Butterfield v. State*, 992 S.W.2d 448, 453 (Tex. Crim. App. 1999) (Johnson, J., concurring). But the *Gunwall* test would guide Texas courts on *when* they may rely upon precedent interpreting the Federal Constitution as opposed to engaging in an independent interpretation of the Texas Constitution.

Here, the lower court engaged in no such analysis at all. It simply parroted interpretations of the Federal Constitution to find the Republican Form of Government provision of the Texas Bill of Rights (Tex. Const. art. I) sits outside judicial review. However, when the *Gunwall* factors are applied, such reliance was clear error.

[3] Actually, the *Gunwall* test suffers from one flaw, in that it implies that state courts should consider federal constitutional issues first, and state constitutional issues only secondarily. In fact, state courts should do the opposite for two reasons: first, state courts are primarily responsible for their own constitutions, and citizens expect them to enforce state constitutional guarantees first. Second, since state constitutions can provide greater protection than the Federal Constitution, resolving a case on state constitutional grounds can often satisfy the rule whereby courts try to avoid addressing constitutional issues when possible, *Pena v. State*, 191 S.W.3d 133, 136 (Tex. Crim. App. 2006)—whereas the reverse is not true.

B. *The* Gunwall *factors dictate an independent state-constitution analysis.*

As to the **first and second** *Gunwall* factors, the Washington Supreme Court explained: "the text of the state constitution may provide cogent grounds for a decision different from that which would be arrived at under the Federal Constitution. It may be more explicit or it may have no precise federal counterpart at all." *Gunwall*, 720 P.2d at 812. And differences in the text may weigh in favor of the court's relying on the state constitution. *Id.* "Even where parallel provisions of the two constitutions do not have meaningful differences, other relevant provisions of the state constitution may require that the state constitution be interpreted differently." *Id.*

Here, the text of the two clauses is almost *entirely* different. Moreover, the language of the Texas Clause is specific: "The faith of the people of *Texas* stands pledged." *Id.* (emphasis added). This provision clearly defines the political power derived from the people of Texas—and the political power reserved to the people of Texas. Unlike the federal provision, the Texas provision carves out power retained by the people with the language "subject to this limitation only." *See* Tex. Const. art I, § 2.

As to the **third and fifth** *Gunwall* factors, the constitutional history and the structural differences between the two provisions weigh in favor of finding that the Texas Clause was intended to provide broader protections to Texans.

"State constitutional and common law history . . . may reflect an intention to confer greater protection from the state government than the Federal Constitution affords from the federal government. The history of the adoption . . . may reveal an intention that will support reading the provision [of the state constitution] independently." *Gunwall*, 720 P.2d at 812.

Furthermore, the Federal Constitution "is a grant of enumerated powers to the federal government," whereas the state constitution "serves to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives. Hence the explicit affirmation of fundamental rights in [the] state constitution may be seen as a guarantee of those rights rather than as a restriction on them." *Id.*; *accord, Lyle v. State*, 80 Tex. Crim. 606, 614 (1917).

Though sections of the current Texas Constitution are modeled on the Federal Constitution, its drafters made a conscious decision to (1) use almost entirely different wording, (2) include the Republican Form of Government provision within the Texas Bill of Rights, and (3) place the Bill of Rights at the very beginning of the Texas Constitution. Though the Federal Constitution predates the Texas Constitution, the Texas Republican Form of Government Clause was adopted *before* federal courts held Federal Guarantee Clause claims to be nonjusticiable in 1912. *See generally Pac. States Tel. &*

Tel. Co., 223 U.S. at 133 (finding claims under the Guarantee Clause to be nonjusticiable).[4] Texas courts cannot change the original meaning of the Texas Constitution whenever federal courts pivot on the meaning of the Federal Constitution. "The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it." *Travelers' Ins. Co. v. Marshall*, 76 S.W.2d 1007, 1011–12 (Tex. 1934). Or, as the Mississippi Supreme Court put it, "[t]he words of our [State] Constitution are not balloons to be blown up or deflated every time, and precisely in accord with the interpretation the U.S. Supreme Court, following some tortuous trail, is constrained to place upon similar words in the U.S. Constitution." *Penick v. State*, 440 So. 2d 547, 552 (Miss. 1983).

The Texas Bill of Rights includes an additional limitation on the government as to the enumerated rights. *See* Tex. Const. art. I, § 29. Section 29 of Article 1 states, "[E]verything in this 'Bill of Rights' is excepted out of the general powers of government, and shall forever remain inviolate,

[4] There is a persistent myth that the Supreme Court held Federal Guarantee Clause cases to be *per se* unenforceable political questions in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). In fact, that is not true, and in the years following *Luther*, the Supreme Court resolved several Guarantee Clause cases without ever suggesting it was nonjusticiable. *See, e.g.*, *Minor v. Happersett*, 88 U.S. 162, 165 (1874); *Forsyth v. City of Hammond*, 166 U.S. 506, 520 (1897); *see also* Sandefur, *supra*, at 127–37 (detailing history of the Clause's interpretation).

and all laws contrary thereto . . . shall be void." Tex. Const. art. I, § 29. This unique provision means that, contrary to the Federal Guarantee Clause, the Texas Guarantee Clause is a limit on state government that was intended to shield Texans' most important rights, like the right of representation.

The **fourth** *Gunwall* factor is that "previously established bodies of state law, including statutory law, may also bear on the granting of distinctive state constitutional rights. State law may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims. Preexisting law can thus help to define the scope of a constitutional right later established." *Gunwall*, 720 P.2d at 812. The statute creating extraterritorial jurisdiction, first passed in 1963, obviously does not predate the Texas Constitution. The right to a republican form of government has long been held to mean the right to a government that is "responsive to concerns of its citizens"—and was so understood well before extraterritorial jurisdiction. *See* Municipal Annexation Act of Apr. 29, 1963, 58th Leg., R.S., ch. 160, 1963 Tex. Gen. Laws 447; Tex. Loc. Gov't Code Ann. § 42.001 (effective Sept. 1, 1987).

And finally, as to the **sixth** *Gunwall* factor—matters of state or local concern—if the subject matter is local in character, and there does not appear to be a need for national uniformity, the matter "may be more appropriately

addressed by resorting to the state constitution." *Gunwall*, 720 P.2d at 813. Here, the issue at the root of this case is one of local concern—municipalities extending regulation, ordinances, and fines on surrounding property owners. There simply is no need for federal uniformity as to municipal ordinances and jurisdiction in Texas, and thus this factor again weighs in favor of reading the Texas Republican Form of Government provision independent of the Federal Guarantee Clause.

All of this is common sense. The theory behind relying on federal jurisprudence when interpreting a state constitution or statute is that where the wording is the same, and where one was explicitly based on the other, interpretation of the language should probably also be the same. *See, e.g.*, *City of Austin v. Travis Cnty. Landfill Co.*, 73 S.W.3d 234, 238 (Tex. 2002). But by the same logic, there can be no justification for relying on *another sovereign*'s interpretation of *different* language in a constitution written in a *different century*, and for *different purposes*—and where the federal interpretation in question *postdates* the adoption of the state clause by 35 years.

Simply put, Article 1, Section 2 of the Texas Bill of Rights presents a novel issue of Texas constitutional interpretation. This provision enumerates liberties and spells out limitations on governmental power. Considering the

distinct language, structure, and local nature of the constitutional question presented, the lower court committed error in applying Federal Guarantee Clause precedent to determine that Petitioners' claims under Article 1, Section 2 of the Texas Constitution are a nonjusticiable political question.

PRAYER

This Court should grant the petition for review and reverse the lower court's ruling to establish that, when faced with interpretation of the Texas Constitution, a Texas court cannot *ipse dixit* apply precedent interpreting the United States Constitution without first determining whether the Texas Constitution intended to extend broader or distinct rights to Texas citizens.

Respectfully submitted on this 21st day of August 2024,

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I hereby certify that a true and correct copy of the foregoing Amicus brief was served on August 21, 2024, on all counsel of record via the Texas e-filing system.

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