

IN THE SUPREME COURT  
STATE OF GEORGIA

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Case No. S25C0476

On Petition for a Writ of Certiorari to the  
Court of Appeals of Georgia, No. A24A0802

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CITY OF MILTON, GEORGIA

*Petitioner,*

v.

JOHN CHANG, ET AL.

*Respondents.*

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**MULTI-CITY *AMICUS CURIAE* BRIEF IN SUPPORT OF  
PETITIONER CITY OF MILTON, GEORGIA**

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## **I. STATEMENT OF INTEREST OF AMICUS CURIAE**

The Multi-City group constitutes a diverse cross-section of Georgia's cities from a population, location, demographic, financial, and infrastructure perspective. This diversity of interest is warranted and unprecedented. It is no accident that cities as varied as Alpharetta, Tybee Island, Statesboro, LaGrange, St. Marys, and Sandy Springs have joined this amicus, with a total participation by thirty-two (32) Georgia cities. Each city is rightfully concerned as to the legal and financial implications of Chang v. City of Milton, 906 S.E.2d 785 (Ga. App. 2024). While the populations, financials, and roadway miles of each represented city vary, all share a profound interest in correcting what is believed to be an alarming aberration in Georgia law. The stakes, legally, financially, and practically, of Chang are profound. The Multi-City group shares a common objective; that is, to have the Supreme Court grant the City of Milton's petition for certiorari and overturn Chang.

## **II. INTRODUCTION**

COME NOW the cities of Alpharetta, Acworth, Brooklet, College Park, Columbus, Cumming, Dawsonville, Dunwoody, East Point, Fayetteville, Hapeville, Kingsland, St. Marys, LaGrange, Locust Grove, McDonough, Newnan, Peachtree Corners, Rome, Sandy Springs, Douglasville, Statesboro, Stone Mountain, Suwanee, Tybee Island, Union City, Woodstock, Cedartown,

Dahlonega, Flowery Branch, Brunswick, and Lilburn by and through collective counsel, and hereby tender the following amicus brief in support of the City of Milton, Georgia showing that the decision of the Georgia Court of Appeals, Chang v. City of Milton should be taken up by the Supreme Court and reversed.

Smith v. City of Roswell, 361 Ga. App. 853 (2021) and Chang v. City of Milton cannot be reconciled. The former articulated what has for decades been the law in Georgia, the latter turns that law on its head replacing it with a doctrine portending financial calamity for Georgia's cities. The former sets forth a balanced rule demonstrating an appreciation for the multifaceted role a right of way serves in the delivery of city transportation and utility services; the latter creates an unattainable standard that will force municipalities to proactively remove all fixed objects from shoulders and medians irrespective of their function.

Smith is well-reasoned law consistent with the time-honored rule that “[a] city has the duty to use ordinary care to keep city streets and sidewalks in a reasonably safe condition for use by persons in the *ordinary methods of travel*. City of Marietta v. Godwin, 106 Ga. App. 113, 117 (1962) (emphasis supplied); City of Barnesville v. Sappington, 58 Ga. App. 27, 28 (1938). Chang obviates the *ordinary travel* qualifier, replacing it with a rule imposing strict liability when a driver loses control, crosses the fog line, and collides with an

object well outside the motoring lanes of travel. While tragic, there was nothing ordinary about operation of the motor vehicle in Chang. If, as contemplated in Chang<sup>1</sup>, the full expanse of a road's shoulder and beyond must be prepared to accept an out-of-control vehicle without obstruction, then Georgia's use of right of way *must* markedly change. Traditional uses of a right of way as contemplated by municipal franchise fees (O.C.G.A. § 36-34-2(7A) / O.C.G.A. § 36-76-6), utilities in the right of way (O.C.G.A. § 46-5-1), and locally issued encroachment permits (See, O.C.G.A. § 36-30-10) must end. Chang imposes a strict liability standard wherein a fixed object on the shoulder with no history of complaints becomes a defect merely because a vehicle leaves the paved road and strikes it. Under Chang, the metamorphosis from fixed object to defect is automatic, with occurrence of the accident being all that is required to prove the deficiency. That has never been the law. Chang should be revisited and reversed.

### III. ARGUMENT AND CITATION OF AUTHORITY

#### A. The pre-Chang rule was that a roadway defect must be within or directly impact the motoring lanes of travel

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<sup>1</sup> Chang noting as important that the “*shoulder was used to give drivers a place to maneuver if they needed to pull off the road or to perform an evasive maneuver, and that the presence of the planter on the shoulder was a hazard for vehicles leaving the travel lanes.*” Chang, 906 S.E.2d at 791.



Chang endeavors to reconcile its holding with prior road defect precedent but comes up notably short. Chang commences its tour of precedent citing City Council of Augusta v. Tharpe, 113 Ga. 152 (1901) (Strand of sharpened wire running parallel between sidewalk and street injured pedestrian while crossing the street). But Tharpe is consistent with pre-Chang precedent. The object constituting the defect must either be within the lanes of travel or located in such proximity that the lanes of travel themselves are unduly dangerous when used in the ordinary course. In Tharpe the strand of sharp-edged wire was affixed such that merely crossing the street caused a person to strike it. Walking across the street, in 1901, was an ordinary use of the sidewalk and road.

In the other defect cases cited in Chang a similar commonality exists. The defect must be a condition causing the motoring lanes of travel to be unreasonably dangerous when used in the ordinary course. Stated differently, the city owes a duty to keep its roads free from defects for those members of the public using those roads *as they are intended to be used*. This ordinary usage theme is pervasive in historic road defect jurisprudence:

- Kicklighter v. Savannah Transit Authority, 167 Ga. 528 (1983) – fact question as to whether existence of utility pole six inches beyond curb constituted negligence, when person in a bus *within* the lanes of travel

(with an arm outside a window) had their arm wedged between the bus window and utility pole.

- Mayor & Aldermen of City of Savannah v. Herrera, 343 Ga. App. 424, 427 (2017) – fact question as to whether a tree in the right of way was a defect when evidence showed that the tree obstructed view of a motorist making left turn at an intersection leading to a broadside collision.
- Dewaters v. City of Atlanta, 169 Ga. App. 413 (2017) – affirmed the denial of summary judgment where a storm water grate located in the lanes of travel was configured such that a bicycle tire wedged in it causing injury.
- Barnum v. Martin, 135 Ga. App. 712, 716-717 (1975) (overturned on other grounds) – not error to deny city’s motion for directed verdict where road contained a super-elevation on sharp curve with an inadequate curb and no warning signs.
- City of Milledgeville v. Holloway, 32 Ga. App. 734 (1924) – impassable obstruction positioned within city street requiring abrupt turning maneuver to avoid causing driver to veer from traveling lanes was sufficient to overcome demurrer in roadway defect case.

In each of the above, the defect was either physically within the motoring lanes of travel (Dewaters, Barnum, Holloway) or outside the motoring lanes

of travel but caused travel *within the motoring lanes* to be unduly hazardous (Kicklighter and Herrera).

This well-reasoned precedent was followed in Smith v. Roswell, *supra*. Chang acknowledges Smith and endeavors to distinguish it. The effort is unavailing.

In Smith, the alleged defect was mailboxes located outside the motoring lanes of travel but within the right of way. Smith, relying on well-established precedent (much of it summarized above), noted a distinction between the lanes of travel (i.e., the road) and the right of way. (Smith, 361 Ga. App. at 858 – Plaintiffs’ expert said the “illegal mailboxes encroached on the right of way,” but, noted the court, “the mailboxes were indisputably not in or on the road.”). This distinction between the lanes where vehicles travel and the shoulder is critical but mainly overlooked in Chang. The planter in Chang was within the right of way but not the road. Chang’s vehicle left the road prior to the collision. Nothing about the planter’s existence rendered the motoring lanes of travel dangerous nor was the road being used in an ‘ordinary’ mode of travel at the time of the accident.

Chang endeavors to distinguish Smith but cannot. The Chang court stated that “the analysis in Smith did not address whether an object *in the road* constituted a defect such that the City had a ministerial duty to remove it.” Chang, 906 S.E.2d at 792 (emphasis in original). Respectfully, Smith

addressed that issue head on. The Smith court conducted an overview of roadway defect jurisprudence and distilled its findings to the following: “appellants fail to point to any case law, and we have not found any, to support their claim that cities have a ministerial duty to keep an area next to a road safe from defects when the defects do not impede travel on the road.” Smith, 361 Ga. App. at 859. The *road*, as referenced in Smith’s conclusion, refers to that area constituting the lanes of travel as opposed to the shoulder or utility corridors.

To emphasize the point, Smith appropriately cited City of Vidalia v. Brown, 237 Ga. App. 831 (1999) (physical precedent only), where a pedestrian was injured while stepping into a hole on a city road shoulder. Brown describes in exacting detail the nuanced attributes of a typical city right of way. The Brown right of way was 50’, with a 19’ 4” paved roadway, followed by a 5’ 4” shoulder on both sides and, adjacent to the shoulder, an exterior 10’ strip for drainage and utilities. Brown, 237 Ga. App. at 831-832. Evidence showed that the 5’ 4” shoulder was commonly used as a sidewalk; the 10’ utility strip where the hole existed was not intended for pedestrian activity. Brown, 237 Ga. App. at 833-834 (“no evidence that the area where the hole was located was...accepted by the City as a sidewalk” and “the area was not intended for use by the public as a sidewalk”). Within that 10’ utility strip was the 3’ x 1 1/2’ hole causing injury.

In affirming summary judgment, the Brown court articulated the standard that *should* have controlled Chang:

[W]here a plaintiff alleges that the defective condition which caused injury was located on a part of the city's street and sidewalk system, there must be some evidence that the defect was located in an area accepted by the city, either expressly or by implication, for use as a street or sidewalk, before the city can be charged with liability for negligently failing to maintain the area in a reasonably safe condition. Kesot v. City of Dalton, 94 Ga. App. 194, 198, 94 S.E.2d 90 (1956). [...] For example, the **public is not generally expected to use areas on the margins of a sidewalk occupied by obstructions such as telephone poles, water-plugs, and trees.**

Brown, 237 Ga. App. at 833 (emphasis supplied). And that is the point. The planter, in Chang, was not located in the street and did not make the street more dangerous when used for ordinary travel. The shoulder is not the street and, prior to Chang, there had never been a requirement that the shoulder be obstruction free. Shoulders, medians, gores, and other non-traveling portions of right way are, in fact, generally not obstruction free. (See, Section B). The court in Chang lost its way by not adhering to authorities like Smith, Brown, Dewaters, Barnum, Holloway Kicklighter and Herrera. The Chang opinion constitutes a marked deviation from decades of Georgia jurisprudence and should be revisited. The Multi-City group respectfully requests the Supreme Court grant certiorari and correct it.

**B. Right of way beyond the motoring lanes of travel contain all manner of fixed objects. Under Chang all such objects will be defects upon occurrence of a single accident.**

Municipal right of way serves both transportation, public welfare, and utility purposes. City-owned rights of way are replete with legally permitted fixed objects, such as fire hydrants, utility poles, signs, towers, pipes, mains, grade separation structures, storm water infrastructure, raised curbs, medians, drainage ditches, guardrails, neighborhood monument signs, and small cell equipment. See, O.C.G.A. § 32-4-92(10) (“A municipality may grant permits and establish reasonable regulations for the installation, construction, maintenance, renewal, removal, and relocation of pipes, mains, conduits, cables, wires, poles, towers, traffic and other signals, and other equipment, facilities, or appliances of any utility in, on, along, over, or under any part of its municipal street system and of a county road system lying within its municipal limits...”). Authorities acknowledging such fixed structures in city right of way are pervasive:

- Utility poles (Georgia Power Co. v. Zimmerman, 133 Ga. App. 786 (1975), see also, O.C.G.A. § 32-1-3 (30);
- Storm water infrastructure (City of Gainesville v. Waldrip, 345 Ga. 478 (2018);
- Small cell wireless infrastructure (such as poles, antennas, and telecommunication demarcation boxes) (O.C.G.A. § 36-66C-5(a));

- Drainage ditches (O.C.G.A. § 32-1-3 (24)(N));
- Signs and traffic control devices (Id., at (J)); and,
- Grade separation structures (Id., at (12)).

These uses are established by law, practice, policy, and permit. All are fixed structures along the shoulder or interior medians. Under Chang, however, a fixed object on the shoulder, having *never* been the subject of a prior crash or complaint will be declared a liability-imposing defect upon the occurrence of a single collision. As such, since all cities in Georgia are now one vehicular accident away from a solvency-implicating adverse judgment, all Georgia cities must now remove fixed objects from city shoulders and medians. This would include all manner of utilities, permitted encroachments, and public safety improvements. The Chang opinion made no distinction between planters, fire hydrants, monument signs, and utility poles. As such, Georgia cities can likewise make no such distinctions.

In light of Chang, the admonition in O.C.G.A. § 32-4-92(10) that “...it shall be the duty of the municipality to ensure that the normal operation of the utility does not interfere with the use of any portion of the municipal street system” has new meaning. A fixed utility located in the right of way is now, due to its mere presence, an *interference* with the municipal street system that *must* be removed. Before cities throughout Georgia commence

the removal of fixed structures within the right of way, the Multi-City group asks that the Georgia Supreme Court review Chang and reverse it.

**C. A fixed object on the shoulder is not synonymous with a defect.**

In addition to moving the goal posts as to a city's traditional duty to keep the lanes of travel free from defects, Chang also changed the law regarding *how* a defect is defined. While “defect” is not assigned a precise meaning in O.C.G.A. § 32-4-93, Chang's unprecedented defect definition would encompass a fixed structure in the shoulder that had been there for decades, that (ii) never caused or contributed to an accident, (iii) had never been the subject of a complaint, and (iv) does not affect or interfere with the motoring lanes of travel.

This definition, extraordinary in breadth, easily ensnares every subdivision monument, hydrant, utility pole, storm water structure, and tree that has existed harmlessly on the shoulder for decades. Chang's defect definition offers no quarter to tragic but freak collisions with the most benign object on the shoulder or median. No evidence need be shown that the object creates an actual hazard or potential hazard to those in the motoring lanes. Compare, Kicklighter, supra, at 531 (some evidence of defect existed because pole had “sustained scrape marks” from passing vehicles). Rather, under



Chang, the defect becomes self-evident *because* of the accident. Defect has never had such an absolutist meaning.

The word defect has a common meaning. Merriam's Websters, 11<sup>th</sup> Edition defines defect as "an imperfection that impairs worth or utility." While elementary, this definition tracks case law on roadway defects. In Tucker v. City of Thomasville, 367 Ga. App. 700 (2023), the defect is an imperfection; that is, a pothole in the road. In Kicklighter, supra, it's the utility pole positioned in such proximity to the lanes of travel that an arm dangling outside a bus window is wedged. In Herrera, supra, a roadside tree is a defect – but only because the tree impairs the lanes of travel by obstructing sight lines. In Dewaters, supra, it's a storm water grate with bars running parallel to the curb that ensnares a cyclist's tire causing an accident. In Barnum, supra, the defect is the street's design, with the super-elevation in a curve literally launching drivers off the road. In Holloway, supra, the defect is an *impassable obstruction* in the middle of the street. Each of these defects falls into one of two categories. Either the defect is an obvious flaw in the street (i.e., a pothole or impassable obstruction) or an object that, while not a per se flaw (i.e., like a tree or pole), transforms into a defect due to the pernicious effect it has on the lanes of travel.

Chang does something different. Chang assigns the defect monicker to a fixed object that is neither a per se flaw nor an object creating a hazardous

impact on the lanes of travel. The planter, here, has simply existed safely on the shoulder for decades. No different than the thousands of monuments, signs, hydrants, poles, small cell structures, and storm water facilities doing the same. If the planter, here, is a liability-imposing defect, so are those other benign structures. If Chang is good law, then prior cases holding that the defect must impact the “physical condition of the street” must be overruled.

The reference to “defects” in the Code section **refers to the physical condition of the street itself**; it includes defects brought about by the forces of nature and by persons and which render the street unsafe and includes objects adjacent to and suspended over the street.

McKinley v. City of Cartersville, 232 Ga. App. 659, 660 (1998) (emphasis supplied). City of Alpharetta v. Hamby, 352 Ga. App. 511 (2019) held the same. (no roadway defect where retaining wall causing injury was not part of the physical road on which the general public traveled).

The Multi-City group believes that Chang’s marked deviation from time-honored roadway defect jurisprudence is not good law and not good for Georgia. We ask that it be reviewed and reversed.

#### IV. CONCLUSION

The Multi-City group respectfully requests that this Court take up Chang and reverse it. Chang has upended the law regarding the expected

condition of city right of way and has opened the door for devastating municipal liability.

Respectfully submitted this \_\_\_\_ day of \_\_\_\_\_, 2024.

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## **CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the within and foregoing  
MULTI-CITY AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER  
CITY OF MILTON, GEORGIA upon all parties to this matter by depositing a  
copy of same in the United States Mail, proper postage prepaid, addressed to  
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