
**In the Court of Appeals
for the Ninth Judicial District
Beaumont, Texas**

SAN JACINTO RIVER AUTHORITY,
Appellant,

v.

CITY OF CONROE, TEXAS AND CITY OF MAGNOLIA, TEXAS,
Appellee.

On Appeal from the
284th Judicial District Court, Montgomery County (No. 19-09-12611)

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

Identity of Parties and Counsel	ii
Table of Contents	iii
Index of Authorities	iv
Statement of Interest of Amicus Curiae	1
Summary of Argument.....	2
Argument.....	4
I. The GRP Contracts state the essential terms to waive sovereign immunity.	4
A. The GRP Contracts’ price and volume terms are sufficiently definite because they contain a clear standard by which to determine the terms.	5
B. Longstanding contract principles support finding that the GRP Contracts contain the required essential terms.	8
II. The GRP Contracts are and should remain incontestable.....	10
A. Texas statutes and case law provide that the GRP Contracts are incontestable.	11
B. Abandoning incontestability will chill future investment in water development projects and increase costs on utility providers.	13
C. If Appellees’ ability to breach is upheld, TWDB and similarly-situated bond purchasers risk serious financial setbacks.	17
Prayer	20
Certificate of Compliance	22
Certificate of Service.....	23

INDEX OF AUTHORITIES

Cases

<i>Bendalin v. Delgado</i> , 406 S.W.2d 897 (Tex. 1966)	6, 9
<i>City of Conroe v. San Jacinto River Auth.</i> , 602 S.W.3d 444 (Tex. 2020).....	12
<i>City of Denton v. Rushing</i> , 570 S.W.3d 708 (Tex. 2019).....	4
<i>Clear Creek Indep. Sch. Dist. v. Cotton Commercial USA, Inc.</i> , 529 S.W.3d 569 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).....	6
<i>Dallas/Fort Worth Int'l Airport Bd. v. Vizant Techs., LLC</i> , 576 S.W.3d 362 (Tex. 2019).....	6
<i>Fischer v. CTMI, L.L.C.</i> , 479 S.W.3d 231 (Tex. 2016)	passim
<i>Fort Worth Indep. Sch. Dist. v. City of Fort Worth</i> , 22 S.W.3d 831 (Tex. 2000)	6
<i>Hydrocarbon Prod. Co. v. Valley Acres Water Dist.</i> , 204 F.2d 212 (5th Cir. 1953).....	15
<i>Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.</i> , 320 S.W.3d 829 (Tex. 2010)	5, 9
<i>T.O. Stanley Boot Co., Inc. v. Bank of El Paso</i> , 847 S.W.2d 218 (Tex. 1992).....	6

Statutes

TEX. GOV'T CODE § 1202.006	11
TEX. GOV'T CODE § 1371.059.....	2, 11, 13
TEX. LOC. GOV'T CODE § 271.151	4, 16

TEX. LOC. GOV'T CODE § 271.152passim

TEX. WATER CODE § 6.012..... 1

TEX. WATER CODE § 49.184 3, 12

Other Authorities

Act of 1937, 45th Leg., R.S., ch. 426, 1937 Tex. Gen. Laws 861, 861-69..... 16

Act of 1967, 60th Leg., R.S., ch. 547, § 1, 1967 Tex. Gen. Laws 1212, 1214..... 16

Tex. Const. art. XVI, § 59.....14, 15

STATEMENT OF INTEREST OF AMICUS CURIAE

The Texas Water Development Board (“TWDB”) is the agency of the state primarily responsible for water planning and for administering water financing. TWDB was created by the legislature in 1957 and is governed by the Texas Water Code.

Pursuant to Texas Water Code section 6.012, TWDB has general jurisdiction over the administration of the state’s various water assistance and financing programs (including those created by the Texas Constitution), the development and implementation of the state water plan, and the administration of the National Flood Insurance Program.

TWDB has provided billions of dollars to Texas communities to ensure Texans have clean water, effective wastewater treatment, and progressive stormwater solutions—including more than \$400 million to the San Jacinto River Authority (“SJRA”) for the Groundwater Reduction Plan (“GRP”) project before the Court. The loans for the GRP project are based on SJRA’s pledge of revenue received through the contracts at issue in this case (“GRP Contracts”).

A decision in this case will impact other loans made by TWDB that are also based on a pledge of contract revenues and will impact whether TWDB continues to rely on long-term contracts as the basis for loan repayments.

SUMMARY OF ARGUMENT

Amicus curiae TWDB makes two arguments in support of SJRA: (1) the GRP Contracts contain the essential terms necessary to waive sovereign immunity and permit SJRA's suit against the City of Conroe, Texas, and the City of Magnolia, Texas ("the Cities"); and (2) public policy, statute, and case law dictate that the GRP Contracts remain incontestable.

Section 271.152 of the Local Government Code, which is at the heart of the debate in this case, is the statutory waiver of sovereign immunity that permits SJRA's suit, as waivers of sovereign immunity are the legislature's to give. Section 271.152 requires that the GRP Contracts contain the "essential terms" to waive sovereign immunity. The Cities argue that without fixed pricing and volume terms, the GRP Contracts fail to contain the required essential terms to waive sovereign immunity. As SJRA, fellow amici curiae, and TWDB argue, the GRP Contracts meet the essential terms requirement to waive sovereign immunity even without these fixed terms and including fixed terms like these into multi-decades long contracts is both economically infeasible and contrary to industry practice.

TWDB also argues that the GRP Contracts are and should remain incontestable in Texas courts. Government Code section 1371.059(a) is unambiguous in its intent and language that the GRP Contracts, having been

approved by the Attorney General and registered by the Comptroller, are “incontestable in a court” and “valid, binding, and enforceable” according to their terms. Both this section and Water Code section 49.184(e) evidence the legislature’s clear intent to make the GRP Contracts and the public bonds they secure dependable sources of revenue to the state and investors. Abandoning this long-held policy will chill future investment in water development projects, increase costs to utility providers, and put bond purchasers in serious financial risk.

ARGUMENT

I. The GRP Contracts state the essential terms to waive sovereign immunity.

Section 271.152 provides that a local governmental entity that enters into a contract “subject to this subchapter” waives sovereign immunity to a breach of contract suit. TEX. LOC. GOV’T CODE § 271.152. To be “subject to this subchapter,” the contract must (1) be in writing, (2) state the agreement’s essential terms, (3) require the contractor to provide goods or services to the local governmental entity, and (4) be properly executed on the entity’s behalf. *Id.* § 271.151(2); see *City of Denton v. Rushing*, 570 S.W.3d 708, 710 (Tex. 2019). The second requirement, whether the GRP Contracts contain the “essential terms” to waive the Cities’ sovereign immunity, is in dispute here.

Although the GRP Contracts do not contain fixed price and volume terms, the contracts are not silent as to these terms. Instead, the GRP Contracts reference a specific formula or standard to determine the price and volume terms. The contracts provide a formula to determine the fee and set the SJRA rate order, which is determined using a statutory formula set by the Legislature, as the price in the formula. See Appellant Brief at 26-27, citing CR.396-98, 494-96. The parties also expressly agreed that the SJRA rate order “may be amended from time to time” by SJRA. *Id.* at 27, citing CR.398, 496 (§6.04). As to volume, the GRP Contracts

provide that the water volume must be within a range set by the GRP Administrator. Appellants Brief at 51. A contractual amendment established the minimum quantity and Section 4.09 of the contract establishes the detailed criteria used by the GRP Administrator to establish the maximum amount. *Id.* The actual volume of water used by the Cities ultimately is used to calculate the fee. *Id.*

The Cities contend there was no waiver of sovereign immunity because the GRP Contracts do not contain fixed price and volume terms, thus, failing to contain all essential terms as required by Section 271.152. The Cities' argument is without merit. Essential terms do not have to be fixed to waive sovereign immunity. The standard is whether a contract's essential terms are sufficiently definite to establish the parties' obligations. Here, they are, and, sovereign immunity has been waived.

A. The GRP Contracts' price and volume terms are sufficiently definite because they contain a clear standard by which to determine the terms.

An agreement's essential terms are those that parties would reasonably regard as "vitally important ingredient[s]" of their bargain. *Fischer v. CTMI L.L.C.*, 479 S.W.3d 231, 237 (Tex. 2016). If a contract's essential terms are clear enough to establish the obligations of the parties, the essential terms requirement in Section 271.152 is satisfied. *See Kirby Lake Dev., Ltd. V. Clear Lake City Water Auth.*, 320 S.W.3d 829, 838-839 (Tex. 2010). To meet this standard, "[a] contract must state its essential terms with 'a reasonable degree of certainty and definiteness,' sufficient

to confirm that both parties actually intended to be contractually bound and to enable a court to understand and enforce the parties' obligation and provide an appropriate remedy when breached." *Dallas/Fort Worth Int'l. Airport Bd. v. Vizant Techs., LLC*, 576 S.W.3d 362, 369 (Tex. 2019), quoting *Fischer*, 479 S.W.3d at 237; see also *Fort Worth Indep. Sch. Dist. V. City of Fort Worth*, 22 S.W.3d 831, 846 (Tex. 2000).

The sufficiently definite standard set forth in the Supreme Court's *Fischer* opinion is consistent with longstanding Texas Supreme Court opinions interpreting what is required for a contract to be enforceable, and is frequently cited by Texas courts for the standard used to determine whether a contract meets § 271.152's essential terms requirement. See e.g., *T.O. Stanley Boot Co., Inc. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992) ("In order to be legally binding, a contract must be sufficiently definite in its terms so that a court can understand what the promisor undertook."); *Bendalin v. Delgado*, 406 S.W.2d 897, 899 (Tex. 1966) ("to be enforceable, a contract must be sufficiently certain to enable the court to determine the legal obligations of the parties thereto."); *Vizant*, 576 S.W.3d 362 at 368-69; *Clear Creek Indep. Sch. Dist. v. Cotton Commercial USA, Inc.*, 529 S.W.3d 569, 580-83 (Tex. App.—Houston [14th Dist.] 2017, pet. denied). In *Fischer*, the Supreme Court addressed whether a contract was sufficiently definite when there was no fixed amount as to future payments. See *Fischer*, 479 S.W.3d at 240-42. The contract

provided that the future payments were to be determined by the completion percentages of projects pending in the future. *Id.* at 240-41. The Supreme Court noted that of course the parties could not specify the *amount* of the payments at the time of the contract because they could not know what projects would be incomplete and what completion percentages as to those projects would be in the future. *Id.* Nevertheless, the Supreme Court held that although the contract’s payment term was not fixed as to amount, it was still sufficiently definite because the contract provided a clear formula and description of what the missing input price into the formula would be. *Id.* at 241. The Supreme Court distinguished the contract at issue from contracts that were *silent* as to pricing terms: “this is not a case in which the parties failed to reach some understanding as to price or provide an adequate way in which it can be fixed,” but “[t]o the contrary, the agreement provided a clear formula or standard by which to determine the payments...” *Id.* (internal citations and quotations omitted). Thus, the formula and description of the input provided enough information to determine the obligations of the parties, and therefore, the term was sufficiently definite. *Id.*

The Supreme Court’s reasoning in *Fischer* applies here. The GRP Contracts are not silent as to price or volume. The parties agreed to a formula for the price and identified the rate orders as the input that was to be determined in the future—a rate

order that is set by statutory criteria provided by the legislature. *See* Appellant Brief at 26-27, citing CR. 396-97, 494-95. Similarly, although there is no fixed maximum water volume, the Conroe contract provides a standard based on specified criteria to determine the maximum volume amount, and the actual amount consumed by the Cities is what it is ultimately used to calculate the fee for water. Accordingly, the terms of the GRP Contracts are sufficiently definite to provide the parties and a court analyzing the contracts enough information to determine the basic obligations of the parties, including the price and volume terms, and provide an appropriate remedy if the contracts are breached. Therefore, the GRP Contracts meet the essential terms requirement of § 271.152, and sovereign immunity is waived.

B. Longstanding contract principles support finding that the GRP Contracts contain the required essential terms.

In analyzing whether a contract's terms are sufficiently definite, Texas courts rely upon guiding principles of contract interpretation. *See Fischer*, 479 S.W.3d at 238-40. These principles also support finding that the GRP Contract terms are sufficiently definite.

First, courts do not rewrite a parties' contract, but "construe the contract 'as a whole,' and 'evaluate the overall agreement to determine what purposes the parties had in mind at the time they signed' it." *Fischer*, 479 S.W.3d at 239, quoting *Kirby Lake*, 320 S.W.3d at 841.) Second, Texas law disfavors forfeitures; thus, courts "will

find terms to be sufficiently definite whenever the language is reasonably susceptible to that interpretation.” *Id.* (“When the actions of the parties ... show conclusively that they have intended to conclude a binding agreement, even though one or more terms are missing or are left to be agreed upon[,] ... courts endeavor, if possible, to attach a sufficiently definite meaning to the bargain.”) (internal citations and quotations omitted). Third, because contracts are to be construed to avoid forfeitures, courts “may imply terms that can reasonably be implied”. *Id.* (“Expressions that at first appear incomplete or uncertain are often readily made clear and plain by the aid of common usage and reasonable implications of fact.”), quoting *Bendalin v. Delgado*, 406 S.W.2d 897, 900 (Tex. 1966). Fourth, “a term that appears to be indefinite may be given precision by usage of trade or by course of dealing between the parties.” *Fischer*, 479 S.W.3d at 239 (internal citations and quotations omitted). **Lastly, partial performance under a contract removes uncertainty and establishes terms are sufficiently definite even when some terms are missing or left to be agreed upon.** *Id.* at 240.

These guiding principles further support the conclusion that the GRP Contracts are sufficiently definite to waive sovereign immunity. Here, the parties entered the GRP Contracts in 2010. The terms were sufficiently definite that the parties performed under the contracts for years until the increase to the rate order

for 2017 was announced. The Cities do not and cannot reasonably suggest that they didn't understand what the terms were in the contracts, as their course of dealing from 2010-2016 shows otherwise. Although the terms are clear in the contract, if the Court finds the terms "appear to be indefinite," the terms "may be given precision ... by course of dealing between the parties." *See Fischer*, 479 S.W.3d at 239. Here, the partial performance by the parties removes any uncertainty as to the terms and establishes that the terms are sufficiently definite to enable performance. Lastly, the Cities chose to enter long-term contracts with SJRA understanding that the price and quantity terms would be adjusted and were dependent on criteria specified in the contracts. This is a case where the Cities are merely unhappy with the terms of the contracts and are asking the Court to rewrite the terms of the contracts and forfeit the contracts. This is exactly what Texas law disfavors. Accordingly, TWDB requests that the court hold the parties to the terms that they bargained for and find that the terms are sufficiently definite to waive sovereign immunity.

II. The GRP Contracts are and should remain incontestable.

Significant risk can and will befall municipalities, river authorities, public bond investors, governmental investors, and Texas taxpayers if Appellees are permitted to breach their contracts securing bonds issued by the SJRA.

A. Texas statutes and case law provide that the GRP Contracts are incontestable.

State law unambiguously makes the SJRA contracts at issue incontestable in this—or any other—court.

The language of Government Code section 1371.059(a) is plain and unambiguous:

If proceedings to authorize an obligation or credit agreement are approved by the attorney general and registered by the comptroller, each obligation or credit agreement, as applicable, or a contract providing revenue or security included in or executed and delivered according to the authorizing proceedings is incontestable in a court or other forum and is valid, binding, and enforceable according to its terms.

TEX. GOV'T CODE § 1371.059(a).

No party disputes that the contracts challenged here were submitted with bonds issued under chapter 1371 of the Texas Government Code that were approved by the Attorney General and registered by the Comptroller. Thus, they are incontestable. *Id.* See also TEX. GOV'T CODE § 1202.006 (“A public security and any contract the proceeds of which are pledged to the payment of the public security are valid and incontestable in a court or other forum” . . . [after the public security is approved by the attorney general and registered by the comptroller and the public security is issued].).

Moreover, the legislature has also made incontestable any contracts whose proceeds are pledged to the payments of bonds issued by a water district or water authority (such as SJRA) when, as here, the contracts were submitted to the Attorney General with the bond records and were reviewed and approved by the Attorney General. TEX. WATER CODE § 49.184(e).

These statutory bars—prohibiting any party from contesting such approved contracts in court—reflect the legislature’s priority in insuring that such contracts will not be subject to court challenges and may be relied upon as dependable sources of revenue, particularly for bonds issued by an authority such as SJRA.

Finally, in addition to the plain and unambiguous language of the applicable statutes, the Texas Supreme Court has recognized the incontestability of these very GRP contracts, stating:

To comply with several requirements of the Texas Government and Water Codes, SJRA obtained the Attorney General’s approval of all the contracts and bonds, and it registered the bonds with the Comptroller. The contracts and bonds thus *became* “*incontestable*” and “valid, binding, and enforceable according to [their] terms.”

City of Conroe v. San Jacinto River Auth., 602 S.W.3d 444, 448–49 (Tex. 2020) (emphasis added) (citing TEX. GOV’T CODE § 1371.059(a)).

The TWDB does not argue for the incontestability of contracts that do not secure the debts of bonds issued by other issuers or do not otherwise fall within the

narrow constraints of section 1371.059. **But here, it cannot plausibly be disputed that the contracts at issue are incontestable.**

B. Abandoning incontestability will chill future investment in water development projects and increase costs on utility providers.

While the Cities contest the contract for the Groundwater Reduction Plan, similar contract structures are used across the state of Texas for a host of regional water projects. The decision in this case could therefore have substantial impact on numerous other water supply projects across the state. In fact, the TWDB is currently providing financial assistance to 13 regional projects that have pledged contract revenues for the repayment of their loans. These projects are vital to millions of Texans as they provide an affordable, reliable, and sustainable source of water that is critical for both current needs and further growth of the state.

Regional projects provide economies of scale to otherwise potentially cost-prohibitive projects such as reservoirs, treatment plants, and pipelines for the distribution of water. Not only do regional water projects make fiscal sense in terms of building infrastructure, they make sense for the economic sustainability and growth of the state. Water does not appear where people happen to settle, it needs to be pooled or moved and saved. These types of regional projects are the cornerstone to providing affordable infrastructure needed to sustain the economy and for the economy to grow. The Texas economy is not sustainable and will not

continue to grow if reliable, affordable, and long-term sources of water are not available. Growth can only occur where water is available and consistent and if Texas cannot meet that need, then Texas will be at a severe disadvantage.

Texas has experienced recent rapid population growth and that growth is only expected to continue in the future. A recent report prepared by the Texas State Demographer estimates Texas's population grew by eighteen percent between 2010 and 2020 to a total of 29,677,668 and further estimates that growth of an additional fifty-nine percent by 2050, bringing the total state population to an estimated 47,342,105. This growth will simply go elsewhere if the state is unable to provide reliable, sustainable, and affordable water.

The legislature is keenly aware of the benefits to the state when water infrastructure is regionalized. Water security is so important to the state that the Texas Constitution provides a mechanism by which entities such as SJRA are enabled to implement regional water projects. Texas Constitution Article XVI, § 59, passed by the legislature and approved by the voters in 1917, provides authority to establish Conservation and Reclamation Districts for “[t]he conservation and development of all of the natural resources of this State, and development of parks and recreational facilities, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for

irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semi-arid and other lands needing irrigation, the reclamation and drainage of its overflowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties.” Tex. Const. Art. XVI § 59.

One of the purposes of Article XVI § 59 is to ensure that water preservation and conservation is recognized as fundamental to the development of the state. The Fifth Circuit recognized the importance of water preservation and conservation to the State of Texas as a “matter vital to the public welfare”:

So proceeding in this case, we keep in mind the common knowledge that in large areas of the State of Texas the importance of conservation and proper use of water is a matter vital to the public welfare. This truth is recognized by the organic law of that State, as set forth in Article XVI, Section 59(a), Constitution of Texas...Subsection (b) thereof authorizes the creation of ‘such number of conservation and reclamation districts as may be determined to be essential to the accomplishment of the purposes of this amendment to the constitution which districts shall be governmental agencies and bodies politic and corporate with such powers of government and with the authority to exercise such rights, privileges and functions concerning the subject matter of this amendment as may be conferred by law.’

Hydrocarbon Prod. Co. v. Valley Acres Water Dist., 204 F.2d 212, 217 (5th Cir. 1953).

Regional water projects enable reliable, sustainable, and secure sources of water; to cut off the most reliable funding mechanism of regional contracts will severely impede the ability to finance the infrastructure needed and execute these regional projects. For a court to hold that utility contracts referencing rate orders passed by river authority boards or contracts that reference external pricing terms, rather than contracts including fixed and predetermined terms, are void for lack of essential terms would be “catastrophic to Texas cities and their constituents,” as Appellants contend. By determining that external rate orders are “essential terms” and their lack of inclusion is fatal to contract formation, the court would also expand the cities’ sovereign immunity to contract, since the contracts would not fall within the scope of Local Government Code Section 271.151. The natural conclusion to this would be that cities would be immune from suit if they breached such a contract, and utility providers such as the SJRA would have strong disincentives from contracting with those government entities. Also, utility contracts with local governments, like the GRP contracts, are by their nature, long-term, commonly spanning many decades. If utility providers were required to use fixed-price terms in their contracts, the contracts would invariably be negotiated for shorter terms, likely leading to the municipalities’ detriment by being more costly as well as increasing the administrative burden on the governmental entities of obtaining repeated approvals.

C. If Appellees' ability to breach is upheld, TWDB and similarly-situated bond purchasers risk serious financial setbacks.

As SJRA points out in its Brief, the revenue from the GRP Contracts is “the sole source for repaying those bonds, more than \$400 million of which are held by the Texas Water Development Board, essentially the citizens of Texas,” App. Brief at 54 (citations omitted), with a smaller portion of the bonds being held by other investors who may be less financially sophisticated than TWDB and almost certainly have less understanding of Texas water law. Critical to the function of water development projects and financing in the State of Texas is the certainty and financial faith that bond purchasers, like TWDB, have in the incontestability of GRP Contracts and the revenue generated from them. Granting Appellees a judicial reprieve from adhering to wholesale water supply contracts will create uncertainty in the government bond market space which will make financing large-scale infrastructure projects much more costly, if not wholly cost-prohibitive. General bond market principles indicate the larger the risk, the larger the yield. If regional project issued bonds are no longer the stable, low-risk investments that they historically have been, the yields required to attract investors could rise to unattainable levels and regional projects may no longer be feasible. Though other investors will also be affected, TWDB is the state agency charged with leading water development financing through the issuance of bonds and is uniquely situated to be

impacted by such a drastic and wholesale change to the nature of public finance in water development.

TWDB has, in fact, purchased the majority of SJRA's bonds in its role in funding water development projects across the state. The Legislature has empowered the TWDB to make loans to political subdivisions like SJRA for regional projects. The mechanism by which TWDB makes such loans is by purchasing the bonds of political subdivisions, such as those issued by SJRA. As this office argued previously to the 98th Judicial District Court of Travis County in a related matter, if the Court were to find the contracts void ab initio, and declaratory judgment operated to invalidate the remaining contracts of all similarly situated participants, SJRA's capacity to pay its obligations to TWDB would be reduced. SJRA's bonds are special obligations, limited to the Pledged Revenues. Because the fees comprising the Pledged Revenues are assessed pursuant to the contracts, voiding the contracts would impair the ongoing source of repayment to TWDB.

Without dependable revenue from contracts with municipalities and other users of the SJRA system, TWDB and other bond purchases will have higher investment risks. Higher investment risks for institutional and governmental investors, like TWDB, translate into lower likelihood of future investment and higher costs to river authorities who will not be able to raise sufficient capital to fund

the long-term projects necessary to meet growing water needs in the state of Texas. Large scale water projects cost millions and sometimes a billion dollars and to cut off the most reliable funding mechanism for regional projects will severely impede the ability to finance the necessary infrastructure. This appeal doesn't simply concern the repayment of loans made to one regional water project; it concerns the viability of the state's plan for meeting its long-term water needs.

PRAYER

For the reasons expressed in this brief, the Ninth Court of Appeals should reverse the decision of the Montgomery County District Court granting the Appellees' plea to the jurisdiction and remand the matter for trial.

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CERTIFICATE OF COMPLIANCE

I certify that this amicus brief complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4 and 9.2 because it contains 3,694 words, excluding any parts exempted by Texas Rule of Appellate Procedure 9.4.

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On April 30, 2021, in compliance with Tex. R. App. P. 9.5 and 9.2, served this Appellant's Brief on counsel of record for Appellees listed below by via EFile.Texas.gov.

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