No. 15-0225

In The Supreme Court of Texas

DENBURY GREEN PIPELINE-TEXAS, LLC
Petitioner,

v.

TEXAS RICE LAND PARTNERS, LTD, ET AL.
Respondents.

On Petition for Review from the Court of Appeals for the Ninth District of Texas,
No. 09-14-00176-CV

BRIEF OF AMICUS CURIAE TEXAS LAND AND MINERAL OWNERS ASSOCIATION

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IDENTITY AND INTEREST OF AMICUS CURIAE TEXAS LAND AND MINERAL OWNERS ASSOCIATION

Texas Land and Mineral Owners Association ("TLMA") is a statewide advocacy association whose members are farmers, ranchers, and royalty owners. TLMA's charter is to support a business and legal environment that accommodates the continued exploration for and production of oil and natural gas and also protects the property rights of mineral owners. TLMA is paying the fees for preparation and submission of this brief.

INTRODUCTION

TLMA files this brief urging the Court to deny Denbury Green Pipeline-Texas, LLC's Petition for Review. This Court established a balanced test required of would-be common carriers in its 2012 *Texas Rice* opinion in order to prevent private carriers from gaming the eminent domain regime in Chapter 111 of the Texas Natural Resources Code (the "Denbury Test"). *Tex. Rice Land Partners v. Denbury Green Pipeline-Texas*, 363 S.W.3d 192, 202 (Tex. 2012) [hereinafter *Tex. Rice I*]. TLMA believes that the Court struck a proper balance between private property owners and a private entity seeking broad condemning authority. The Beaumont Court of Appeals effectively implemented this test, recognizing that evidence created and submitted years after the taking will not confer common carrier status as a matter of law. *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas*, 457 S.W.3d 115, 120 (Tex. App.—Beaumont 2015, pet. filed) [hereinafter *Tex. Rice II*].

SUMMARY OF THE ARGUMENT

The temporal aspect of the "reasonable probability" test, as implemented by the Beaumont Court in *Tex. Rice II*, is essential to the effective operation of the test. Without it, a pipeline operator can design and carry out the condemnation of private land for a private line, and then easily manufacture its common carrier "intentions" with new evidence created years after the taking. This could not have been the design of this Court when it proffered the Denbury Test, as the pipeline industry in their amicus briefs suggest. These same amici have also suggested, without any proof to substantiate their claims, that economic fallout will result if the Court upholds the *Tex. Rice II* decision. In fact, pipeline industry statistics point in the opposite direction and show that pipeline infrastructure, despite recent low prices for hydrocarbons of late, has maintained impressive growth since *Tex. Rice I* in 2012. Further, the Texas Railroad Commission's ("TRRC") new pipeline permit application, implemented after Tex. Rice I, recognizes the temporal aspect of the test by requiring evidence of common carrier intent as part of the application and thus *prior* to issuance. Denbury Green's after-the-taking evidence of common carrier status provided in its new summary judgment should not overcome Denbury Green's own before-the-taking admissions to establish common carrier status as a matter of law. A jury should be allowed to consider the evidence to determine Denbury Green's intent at the time it sought to condemn land for its pipeline. Such evidence is the most relevant and direct evidence towards a resolution of this Court's "reasonable probability" test.

ARGUMENT

I. The Temporal Aspect of the *Tex. Rice* Test Keeps Them Honest

Prior to this Court's opinion in *Tex. Rice I*, Denbury Green Pipeline-Texas, LLC ("Denbury Green") boasted publicly about its private ownership of the material to be transported through its pipeline, yet represented to the TRRC in its T-4 permit that it would act as a common carrier, transporting CO_2 belonging to others. 363 S.W.3d at 203. Subsequent to *Tex. Rice I*, Denbury Green presented newly fashioned evidence of its intent to act as a common carrier. *Tex. Rice II*, 457 S.W.3d at 120. The evidence presented by Denbury Green on remand did not exist at the time of *Tex. Rice I*, and more importantly, did not exist at the time the land was seized from Texas Rice Land Partners, Ltd. ("Texas Rice Land")—nor did it exist when the pipeline was constructed and put into operation. *Id.* Denbury Green's attempt to purify itself from its prior boasts with after-the-taking evidence should not confer common carrier status as a matter of law. As Tanya Tucker sang in her 1993 hit song, ". . . it's a little too late to do the right thing now." Not all challenges to common carrier status should result in a jury trial, but TLMA believes that Denbury Green's own before-the-taking statements touting private ownership and integration of the source CO_2, pipeline and end-use CO_2 operations raises a fact issue that should be resolved by a jury.

As noted by Enterprise Products Operating LLC, et al., amici curiae in support of Denbury Green ("Enterprise Amici"), this Court delivered an original August 26, 2011, opinion in *Tex. Rice I*. On page 13 therein, the common carrier test is as follows:

> We accordingly hold that to qualify as a common carrier of CO_2 under Chapter 111, a reasonable probability must exist, ***at or before the time common-carrier status is challenged***, that the pipeline will serve the public by transporting gas for customers who will either retain ownership of their gas or sell it to parties other than the carrier.

Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, No. 09-0901, at *13 (Tex. App.—Beaumont Aug. 26, 2011, *substituted by Tex. Rice II*, 363 S.W.3d 192 (emphasis added), *available at* http://www.search.txcourts.gov/Case.aspx?cn=09-0901&coa=cossup [hereinafter *Tex. Rice I Substituted*].

After considering a motion for rehearing, on March 2, 2012, the Texas Supreme Court substituted its opinion, and set forth the following common carrier test:

> We accordingly hold that for a person **intending to build a CO_2 pipeline to qualify as a common carrier under Section 111.002(6), a reasonable probability must exist** that the pipeline will at some point after construction serve the public by transporting gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier.

Tex. Rice I, 363 S.W.3d at 202 (emphasis added).

Enterprise Amici describes this change as "significant" and claims that this modification "changed the time at which a reasonable probability must exist to some point ***after*** construction." Enterprise Amici Brief at 8. TLMA believes this change is significant, but the effect of the change has been wholly misread by Enterprise Amici. The first test instructed the fact finder to determine the existence of a "reasonable probability . . . at or before the time common-carrier status is challenged." *Tex. Rice I Substituted*, No. 09-0901, at *13. Thus, a fact finder's inquiry could look to supporting facts before, during, and after the taking and construction, so long as it occurred before

"common-carrier status is challenged." *Id.* The temporal aspect of the original test was broader in nature. The new test narrows the temporal nature and requires the existence of a reasonable probability that the pipeline will serve the public "for a person **intending** to build a CO_2 pipeline." *Tex. Rice I*, 363 S.W.3d at 202 (emphasis added). As this Court recognized in *Tex. Rice I*, "[p]roceedings to condemn land are special in character, and the party attempting to establish its right to condemn must show strict compliance with the law authorizing private property to be taken for public use." *Tex. Rice I*, 363 S.W.3d at 198 n.14 (quoting *State v. Bristol Hotel Asset Co.*, 65 S.W.3d 638, 640 (Tex. 2001)). Thus, the reasonable probability requirement must exist prior to the construction, and likewise, prior to the taking. The Beaumont Court of Appeals' opinion correctly applied this temporal test. *Tex. Rice II*, 457 S.W.3d at 120 ("central to our inquiry is Denbury Green's intent at the time of its plan to construct the Green Line").

II. The Temporal Aspect of the *Tex. Rice* Test Prevents Gaming the System

This Court found that Denbury Green's original construction of Chapter 111's common carrier regime would lead to a "gaming of the permitting process to allow a private carrier to wield the power of eminent domain." *Tex. Rice I*, 363 S.W.3d at 201. Similarly, Denbury Green and Enterprise Amici's proposed elimination of the temporal aspect of the Denbury Test will result in further gamesmanship of the process. Under Denbury Green and Enterprise Amici's construction, a private carrier could seize property for private use, construct its pipeline and commence private

operations indefinitely, never having had any meaningful review from any government agency or landowner. The RRC has made it clear and, four years after *Tex. Rice I*, continues to make clear, that it "does not determine or confer common carrier status for pipelines." RAILROAD COMMISSION OF TEXAS, *Pipeline Eminent Domain and Condemnation*, http://www.rrc.state.tx.us/about-us/resource-center/faqs/pipeline-safety-faqs/faq-pipeline-eminent-domain-and-condemnation/ (last visited Feb. 5, 2016). Although the Public Utility Commission or Texas ("PUC") may vet the public nature of utility line construction in our State with an adversarial process that gives landowners an opportunity to voice their concerns, no such procedure exists for pipelines. *See* Chapter 37 of the Texas Utilities Code and 16 Tex. Admin. Code § 25.101 (statutes and rules governing utilities' requests to build transmission lines). Landowners often have limited resources to challenge multimillion dollar corporations from improper and unconstitutional takings. If a privately operated pipeline is afforded the option to find one potential third-party user of its pipeline, years after seizing the land and building the pipeline, if and only if common carrier status is challenged, then the gaming of the system will only continue. The temporal aspect of this Court's test, recognized in *Tex. Rice II*, is crucial to keep pipeline companies honest. If land is going to be seized by eminent domain, the 'common carrier' burden should be met at the time of the taking, not years after the fact.

III. The Sky Has Not Fallen Since *Tex. Rice I*

This Court's 2012 *Tex. Rice I* opinion focused a spotlight on a loophole in the pipeline condemnation process. While utility line condemnors are required to follow a thorough and adversarial administrative procedure with PUC in order to obtain required permits, pipeline companies have exercised condemning authority quite freely by "checking the box" on the TRRC's T-4 application. *Id.* In the aftermath of *Tex. Rice I*, the TRRC established new permitting procedures in March 2015, requiring sworn statements with facts supporting common carrier status. 16 Tex. Admin. Code § 3.70(b)(3) (Tex. R.R. Comm'n, Pipeline Permits Required). Prior to the changes, the Form T-4 consisted of a one-page document that only asked the following related to its purported common carrier status:

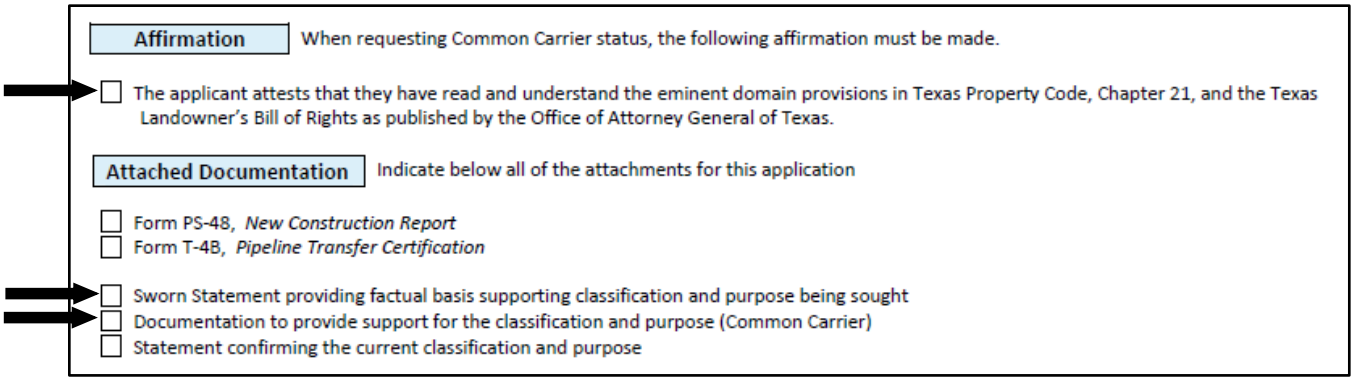
d) Pipeline classification:
If answer to (b) is other than natural gas, will the pipeline be operated as ____a common carrier or as ____a private line?
(Ch. 111, Texas Natural Resources Code)
If answer to (b) is natural gas, will the pipeline be operated as a _____gas utility or as a _____private line?
(Texas Utilities Code)
NOTE: A natural gas pipeline permit will not specify whether the pipeline is a gas utility or a private line. The Gas Services Division Gas Utility Audit Section will make that determination and notify the operator of its status.

e) Does pipeline use any public highway or road, railroad, public utility, or other common carrier right-of-way? ____Yes ____No

f) Will the pipeline carry only the gas and/or liquids produced by pipeline owner or operator? ____Yes ____No
If answer to (f) is "No", is the gas and/or liquids:
____Purchased from others. ____Owned by others, but transported for a fee. ____Both purchased and transported for others.

Source: http://www.rrc.state.tx.us/media/8016/t-4.pdf

Since March 2015, the TRRC not only requires applicants to classify themselves as common carriers or private lines, as they had all along, but also request the following:



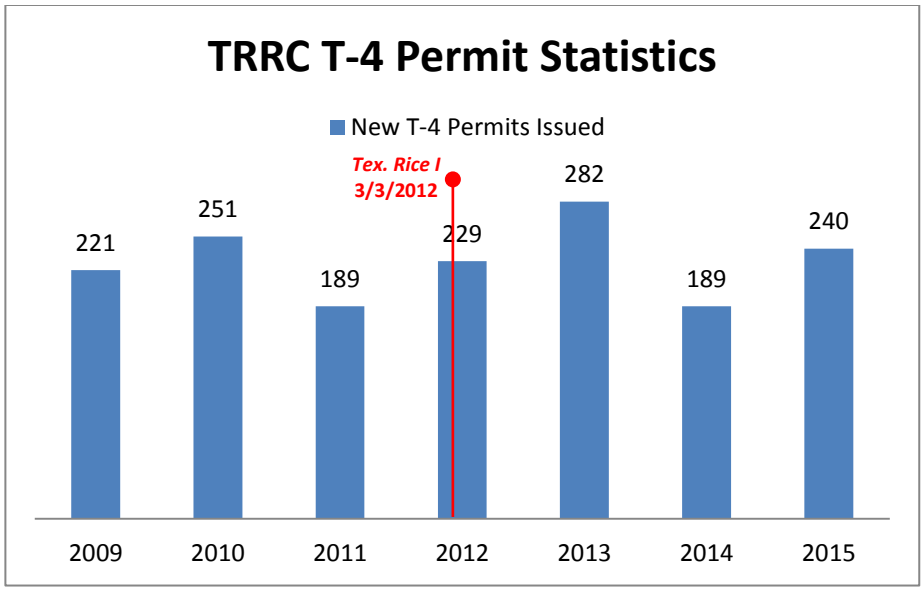
Source:http://www.rrc.state.tx.us/media/32312/2016-fillable-combo-t4-ps8000a-for-liquids.pdf

In light of *Tex. Rice I*, the TRRC now requires the applicant's: 1) **affirmation** of understanding as to Texas eminent domain law and the Landowner's Bill of Rights; 2) a **Sworn Statement** providing the factual basis supporting common carrier classification and purpose; and 3) **Documentation** to support common carrier classification and purpose. The new TRRC procedures mirror the temporal aspect of the Denbury Test recognized by the Beaumont Court in *Tex. Rice II*. Post *Tex. Rice I*, the TRRC now requires a Sworn Statement and Documentation to support common carrier status *prior* to issuance of the permit. The T-4 Form does not indicate that the applicant may provide the supporting information at a later date, after the permit is issued or after the taking. Instead, the supporting facts are a prerequisite to being granted a permit in the first place. Granting Denbury Green's Petition for Review and overturning the Beaumont Court's decision would undermine TRRC's efforts spent implementing the permitting changes spurred by the temporal aspect of the Denbury Test.

It should come as no surprise when a pipeline operator such as Energy Transfer Partners, L.P. ("Energy Transfer") complains in its amicus brief that landowners have

cited the 2012 *Tex. Rice I* case in pipeline disputes when condemning authority is in question. Energy Transfer Brief at 3. It is an important decision that brought balance to a system that had swung too far against private property rights.

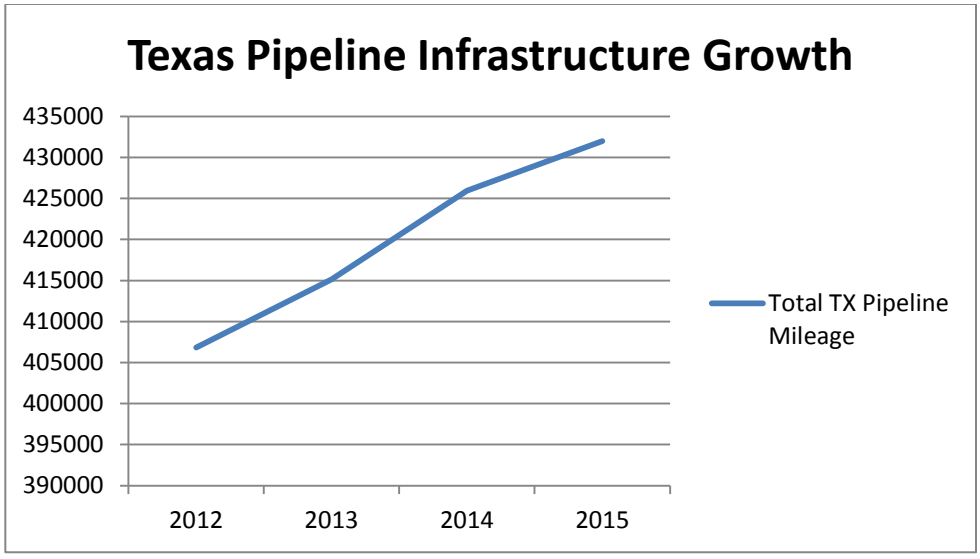
Nevertheless, since the *Tex. Rice I* decision in March of 2012, 896 T-4 permits have been issued by the TRRC. RAILROAD COMMISSION OF TEXAS, *Pipeline Safety Reports*, http://www.rrc.state.tx.us/pipeline-safety/reports/ (last visited Feb. 6, 2016). In 2015, 240 permits were issued, an increase by 27% from 2014, despite the TRRC's institution of its more thorough T-4 requirements in March, 2015. *Id.* The chart below shows the total yearly T-4 permits issued by the Texas Railroad Commission since 2009.



Source: http://www.rrc.texas.gov/pipeline-safety/reports/

Since 2012, Texas' pipeline network has grown by 25,150 miles, enough to crisscross the state over 30 times. RAILROAD COMMISSION OF TEXAS, *Texas Pipeline System Mileage*, http://www.rrc.state.tx.us/pipeline-safety/reports/texas-pipeline-system-mileage/ (last visited Feb. 6, 2016). This figure reflects net increase in total pipeline

mileage, less any mileage which may have been taken out of service. Thus, actual new pipeline construction may be even larger. The chart below shows total pipeline infrastructure growth since 2012.



Source: http://www.rrc.texas.gov/pipeline-safety/reports/texas-pipeline-system-mileage/

Each section of new pipeline construction crossing a separate tract of land requires a distinct two-party negotiation, possible condemnation threats and/or proceedings and ultimately, a negotiated or judicially-determined easement. Out of all 25,150 miles (or more) of new infrastructure, only two other pipeline projects have resulted in cases where eminent domain authority was challenged and reached the Texas appellate courts.

The Beaumont Court of Appeals has issued two opinions related to the Keystone pipeline project. In the first, the Beaumont Court held that the applicability of the Denbury Test for common carrier status was confined to CO_2 pipelines. *Rhinoceros Ventures Group, Inc. v. TransCanada Keystone Pipeline, L.P.*, 388 S.W.3d 405, 409 (Tex.

App.—Beaumont 2012, pet. denied). Therefore, the court did not apply the Denbury Test to the Keystone pipeline. *Id.* There was also no indication of any evidence that TransCanada's line "would be exclusively for private use," as was present in *Tex. Rice I*. *Id.*

In the second case involving the Keystone project, the Texarkana Court of Appeals upheld a summary judgment in favor of common carrier status. *Crawford Family Farm P'ship v. TransCanada Keystone Pipeline, L.P.*, 409 S.W.3d 908, 923 (Tex. App.—Texarkana 2013, pet. denied). As there was only evidence in the record as to TransCanada's common carrier intentions, and no evidence to the contrary, the court held that "[e]ven if [*Tex. Rice I*] should apply here, TransCanada contends, it has done all that is required under the reasonable probability test established in that case to show that it is a common carrier. We agree." *Id.* at 924.

In *Crosstex NGL Pipeline, L.P. v. Reins Road Farms-1, Ltd.*, 404 S.W.3d 754, 761 (Tex. App.—Beaumont 2013, pet. granted) (citing *Tex. Rice I*, 363 S.W.3d at 202 n.28), the Beaumont court upheld the jury decision that the Denbury Test was not met for a line transporting natural gas liquids, based on evidence that Crosstex, like Denbury Green, boasted in a press release that it had made commitments to its own affiliates to transport the pipeline's entire daily capacity. *Id.* at 761–62.

Crosstex only involved a portion of the 63-mile pipeline project, and the two Keystone cases involved only a portion of the 376 mile long Texas portion of the Keystone pipeline. Both projects consist of a total of 1.75% of the net total mileage of

pipelines built since 2012. Thus, despite concerns raised by industry amici in both *Tex. Rice I* and *Tex. Rice II*, Texas pipeline projects are highly unlikely to end up in an appellate court fight over common carrier status.

Despite a low price hydrocarbon environment, Texas's pipeline industry remains healthy and appears unaffected by the decision in *Tex. Rice I*. Still, pipeline industry amici have taken a sky-is-falling approach in *Tex. Rice II*, just as they did in 2012 with *Tex. Rice I*. In 2011, the Texas Oil and Gas Association claimed in its amicus brief in support of Denbury Green that "[t]he Court's creation of a new regulatory landscape under which a pipeline operator's status as a common carrier is subject to preliminary challenge by any landowner across whose property a proposed pipeline is to be built will have detrimental effects on the oil and gas industry . . . ." Texas Oil and Gas Association Amicus Brief at 2.[1] The same approach is visible today. To date, nine amicus briefs have been filed in support of Denbury Green's Petition for Review (the "Industry Amici").[2] "The result will discourage the construction in Texas of infrastructure necessary to transport oil." Enterprise Amici Brief at 13. "[T]he Beaumont Court of Appeals' *Texas Rice* opinion will unduly delay the construction of

[1] Texas Oil and Gas Association 2011 Amicus Brief is available at: http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=beb9825f-944b-4b2a-92dc-83cf0a775ebd&coa=cossup&DT=BRIEFS&MediaID=37aa7581-66a6-405e-ad28-a374e2b4798d.

[2] Amicus Curiae Brief filed on behalf of Texas Pipeline Association, June 8, 2015; Amicus Letter filed on behalf of Texas Civil Justice League, June 8, 2015; Amicus Letter filed on behalf of TransCanada Keystone Pipeline, LP, June 8, 2015; Amicus Curiae Letter filed on behalf of EnLink Midstream Operating, LP, June 17, 2015; Amicus Brief of Valero Refining – Texas, L.P., et al., June 23, 2015; Amicus Letter filed on behalf of Gas Processors Association, June 29, 2015; Amicus Brief of Plains Pipeline L.P., July 7, 2015; Amicus Brief on the Merits filed on behalf of Texas Oil & Gas Association, Sept. 12, 2015; and Amicus Curiae Letter filed on behalf of Energy Transfer Partners, LP, Sept. 30, 2015.

pipeline projects . . . or entirely frustrate the construction of such lines." Energy Transfer Brief at 5. "Immense reserves of oil and gas recently discovered in the Eagleford [sic] Shale and elsewhere across the state may go unproduced . . . ." Texas Civil Justice League Brief at 4–5. Despite these broad, sweeping predictions for the parade of horribles that will descend upon the Texas economy if *Tex. Rice II* is upheld, Industry Amici offer nothing in the way of actual statistics since 2012 to support their forecasts. Instead, pipeline applications increased after *Tex. Rice I* and thousands of additional miles of pipeline infrastructure has been installed across the State. The data show that instead of the sky falling, the sky appears to be the limit for Texas's pipeline industry.

CONCLUSION

This Court has already recognized that a private entity touting private ownership of transported materials could effectively game the system and gain eminent domain power. TLMA believes that a jury should be allowed to consider just such evidence, which exists in this case, so as to determine whether Denbury Green should be granted condemnation power or not. Industry Amici in support of Denbury Green ask the Court to strip Tex. Rice's right to a jury despite Denbury Green's own admission of intended private use. These amici, once again, assert that the sky will fall unless the Court finds that Denbury Green is a common carrier as a matter of law. Not every challenge to common carrier status has material fact issues that should go to a jury, but this case does.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I hereby certify that this brief contains 3,002 words, excluding the words not included in the word count pursuant to Texas Rule of Appellate Procedure 9.4(i)(1). This is a computer-generated document created in Microsoft Word, using 14-point typeface for all text. In making this certificate of compliance, I rely on the word count provided by the software used to prepare the document.

/s/ Ricardo E. Morales
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CERTIFICATE OF SERVICE

I hereby certify that on February 18th, 2016, a true and correct copy of the above and foregoing brief was properly forwarded to counsel of record for all other parties to this appeal in accordance with Rule 9.5 of the Texas Rules of Appellate Procedure, by electronic mail, as follows:

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