NO. 13-40317

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE ARANSAS PROJECT,
Plaintiff-Appellee,

V.

BRYAN SHAW, in his Official Capacity as Chairman of the Texas Commission on Environmental Quality, et al.,

Defendants-Appellants

On Appeal From the United States District Court
for the Southern District of Texas, Corpus Christi Division
Case No. 2:10-CV-75

BRIEF OF THE TEXAS PUBLIC POLICY FOUNDATION AS *AMICUS CURIAE* SUPPORTING DEFENDANTS-APPELLANTS SUPPORTING REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The parties' amended certificates of interested persons appear to be complete with the following addition: Texas Public Policy Foundation, by and through Mario Loyola. Texas Public Policy Foundation is a non-profit corporation organized under the laws of Texas and has no capital stock or other ownership.

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STATEMENT OF AMICUS CURIAE

The mission of the Texas Public Policy Foundation is to defend liberty, personal responsibility, free enterprise, and limited government in Texas and in the nation as a whole. Because these goals will be particularly undermined by a finding that the federal government may force the state of Texas to assist in the implementation of the Endangered Species Act against its will, in violation of the liberty that federalism secures for the people, the Texas Public Policy Foundation has an interest in this Court's determination.

The parties have consented to the filing of this brief. No counsel to any party authored the brief in any part, nor were any monies received from any party, or any counsel to any party, or any other person, for the specific preparation or submission of this brief.

ARGUMENT

Plaintiff-Appellee The Aransas Project ("TAP") has not alleged that TCEQ or any employee or agent of TCEQ did anything to "take" or "cause" a "take" of an endangered species under Section 9 of the Endangered Species Act, 16 U.S.C. § 1538 (hereinafter, "ESA § 9"), through any direct action. TAP's entire case depends on the proposition that by failing to impose or enforce state-law prohibitions on a federally prohibited activity, a state official violates federal law.

This proposition rests upon an erroneous proximate causation analysis that makes ESA § 9 unconstitutional as applied in this case, as an impermissible commandeering of state agencies by the federal government. The canon of constitutional avoidance requires this Court to avoid embracing such a reading of the ESA.

I. The District Court's Ruling Rests On a Reading of the Endangered Species Act that Would Make it Unconstitutional As Applied in This Case.

TAP does not allege that TCEQ is liable for a direct "take," a direct "cause" of a take, or a "solicitation" of a take under ESA § 9, nor does it argue that TCEQ has violated ESA § 9 under any theory of vicarious liability for the actions of any of their employees, agents, or associates. Instead, TAP argues that TCEQ has violated ESA § 9 indirectly, by issuing permits to draw water from the San Antonio and Guadalupe Rivers, thereby "authorizing" the water diversions that,

according to TAP, adversely impacted the salinity of San Antonio bay, causing a "take" of whooping cranes.

TAP's whole case thus rests on the proposition that "a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA." *See Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997). In support of its argument, TAP relies heavily on the First Circuit's decision in *Strahan*. That decision cannot survive proper scrutiny in light of the Supreme Court's Tenth Amendment jurisprudence, *see New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), and neither can the district court's decision below.

A. Under The District Court's Theory of Causation, ESA § 9 Violates the Principles of Federalism.

Citing *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687 (1995), the district court noted that "Section 9 prohibits indirect as well as deliberate 'takes' of endangered species. Ordinary requirements of proximate causation apply." Mem. Op. at 12. But the district court did not apply the "ordinary requirements of proximate causation." It ignored the element of foreseeability, which as *Babbitt* reaffirmed is perhaps the most essential element of proximate causation in the common law. *See* 515 U.S. at 700 n. 13. Moreover it applied the

causation analysis not to the alleged "take," but rather only to the diversion of water from the San Antonio and Guadalupe Rivers. Instead of conducting the foreseeability analysis required by the Supreme Court for indirect violations of ESA § 9, the district court filled in the blanks of the causal chain by simply copying its findings of facts *verbatim* from those proposed by TAP.

The district court's truncated causation analysis led to an impermissibly expansive result, extending liability far "outside the realm of causation, as it is understood in the common law," *Strahan*, 127 F.3d at 164, and into the realm of the "residuary and inviolable sovereignty" of the states, *Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528, 550 (1985) (quoting Federalist No. 39, at 245 (B. Wright ed. 1961) (J. Madison)).

At first blush it may not be obvious how even an erroneous analysis of ESA proximate causation could lead to a violation of the Supreme Court's Tenth Amendment jurisprudence. But the relation is quite simple. The district court's causation analysis led it to apply ESA § 9 in such a way that the provision ceased to be a law of general applicability with incidental impact on the states, and became instead a way of dragooning Texas into implementing federal policy as a mere deputy of the federal government. Unless overturned by this court, the district court's remedy will accomplish precisely what the Supreme Court has repeatedly

forbidden, namely federal commandeering of state agencies. *See, Printz*, 521 U.S. at 925-933.

It is crucial to distinguish at the outset between two kinds of cases that arise when the Supreme Court examines the application of federal law to the states. One category of cases concerns laws of general applicability that apply incidentally to the states. A second category of cases, closely related but profoundly different, concerns laws that seek to subvert state agencies into the implementation of federal programs.

As the Supreme Court said of the first category some 20 years ago, "Many of our recent cases interpreting the Tenth Amendment have concerned the authority of Congress to subject state governments to generally applicable laws. The Court's jurisprudence in this area has traveled an unsteady path." *New York*, 505 U.S. at 160. Where the issue was the incidental application to the states of a federal law of general applicability, the Court has labored to evaluate whether the federal law "excessively interfered with the functioning of state governments." *Printz* at 932.

In the second category of cases, however, the issue is the one presented squarely in *New York* and *Printz*, namely, under what circumstances can Congress use the states as implements of regulation; "that is, whether Congress may direct or

otherwise motivate the States to regulate in a particular field or a particular way." *New York* at 161.

In *New York*, the Court struck down federal legislation that forced States to "take title" to low-level radioactive waste or regulate its disposal according to Congress's instructions. "In this provision," wrote the majority, "Congress has crossed the line distinguishing encouragement from coercion." *Id.* at 175. Congress could not force states to choose between two alternatives neither of which Congress had the power to impose "as a free standing requirement." *Id.* Reasoned the Court, "A choice between two unconstitutionally coercive regulatory techniques is no choice at all." *Id.* at 176.

In *Printz*, the Court struck down a part of the Brady Act that required State police to conduct background checks on prospective gun purchasers. The Court ruled that because the federal government cannot compel State governments to regulate, neither can it compel State executive branch officials to perform any particular function. *Id.* at 935. The Court held that states must "remain independent and autonomous within their proper sphere of authority." *Id.* at 928. If a federal law offends "the structural framework of dual sovereignty," it is categorically unconstitutional. *Id.* at 935.

Writing for the majority, Justice Scalia wrote that a balancing test might be appropriate

> if we were evaluating whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments. But where, as here, it is whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a "balancing" analysis is inappropriate. It is the very *principle* of separate State sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect.

Id. at 932 (emphasis in original, citations omitted).

As enacted by Congress, ESA § 9 indisputably belongs in the first category of cases – laws of general applicability with incidental application to the states. It applies to every individual and every entity, public and private, subject to the jurisdiction of the United States. 16 U.S.C. § 1532(13). As written, it is therefore a law of general applicability with incidental application to the states.

Although, as *New York* reminds us, the Court has charted an unsteady path here, 505 U.S. at 160, it has generally evaluated such cases to determine whether the federal law excessively interferes with state functions. *Printz* at 932. But as applied by the district court below, ESA § 9 clearly works to use Texas as an implement of federal regulation, and therefore belongs in the second category. Because, under the district court's ruling, the ESA subverts Texas into

implementing federal policy against its will, it must be reversed under the Supreme Court's holdings in *New York* and *Printz*.

One case that applied ESA § 9 to a government entity only incidentally, as part of a law of general applicability, is *United States v. Glenn-Colusa Irrigation District*, 788 F. Supp. 1126 (1992), in which a local California water district was held to have violated ESA § 9 by pumping water from a local river for irrigation purposes during the river's peak winter salmon downstream migration. It was discovered that the water district's pumps were sucking salmon onto the fish screens with enough force to kill most of the salmon, decimating the local population. The district court properly found a "take" under ESA § 9, and would presumably have found the same "take" regardless whether the entity responsible for the pumping was public or private.

When a state is charged with a direct "take" under ESA § 9, courts must still ask whether the law interferes excessively with government functions. The same is true in cases of indirect "take," provided there is proximate cause; that is, provided, the take was a foreseeable result of the state action. The district court below rightly insists that the ESA treats governments and individuals equally – but that insight cuts both ways, and in this case it cuts against TAP.

As the Supreme Court noted in *New York*, the structure of dual sovereignty created by the Constitution creates federal and state governmental authorities that operate on *individuals*, directly and independently. 505 U.S. at 163-64. As compared to the Articles of Confederation, the Constitution represented a conscious decision to abandon a structure in which federal law acted upon states for one in which federal law acts directly and preeminently on individuals. *Id.* State sovereignty must remain sacrosanct; they must "remain independent and autonomous within their proper sphere of authority." 521 U.S. at 928.

Federal law can still apply to states incidentally, when states engage in activities that a private entity or individual could engage in, and to which their existence as states is incidental. But an entirely different situation arises when federal power seeks to act on individuals *through the agency* of the states. This is why courts should scrutinize with special care the application of ESA § 9 to state regulations in situations where only the conduct of those *subject to the regulation*, and not the state, can actually do the "take." In such situations, the ESA is not being used to regulate states incidentally, as part of a generally applicable law. Rather, it is being used to regulate states *as states*, in order to dragoon them into regulating state residents in accordance with federal preferences. Such applications of ESA § 9 are not to be scrutinized for excessive interference with government

functions. Rather they must be judged according to a much stricter standard, for "[i]t is the very principle of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect." *Printz*, 521 U.S. at 932.

The First Circuit Court of Appeals lost sight of that crucial distinction in deciding *Strahan*. The result, just three months after the Supreme Court handed down *Printz*, was an incoherent decision full of conceptual problems, absurd results, and undesirably public policy consequences, which this court would be well-advised to avoid embracing.

Strahan applied the ESA to a Massachusetts *law* which prohibited companies from fishing with gillnet and certain lobster gear without a license. Regulations by the licensing agency restricted the use of the licensed fishing equipment only in certain areas. 127 F.3d at 159. A conservationist sued the state agency under ESA § 9, alleging that its continued licensing of fishing equipment caused "harm" to the right whale. *See* 127 F.3d at 158.

Finding sufficient causal nexus between the ESA violation and the state's licensing regulation, the court noted that "fishing vessels cannot, legally, place gillnets and lobster gear in Massachusetts waters without permission from [the agency]." *Strahan v.* Coxe, 939 F. Supp. 963, 978 (D. Mass. 1996).

The First Circuit affirmed, apparently without thinking through the district court's tortured logic. The only reason that fishing vessels were prohibited from using gillnets and lobster gear without the appropriate license was because of the state law that created the license. To hold that Massachusetts had proximately caused a violation of ESA § 9 by "authorizing" fishing vessels to fish at certain times and in certain places with equipment that was otherwise prohibited under Massachusetts law was the same as to hold that Massachusetts had a positive obligation to enact the original prohibition.

That the ESA cannot require states to regulate according to Congress's instructions is not disputed, nor can it be. The Supreme Court has rarely been so clear and categorical: "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to regulate according to Congress' instructions." *New York*, 505 U.S. 162 (*quoting Coyle v. Smith*, 221 U.S. 559, 565 (1911)).

B. The Reasoning in *Strahan* is Indefensible.

In order to get around the Supreme Court's federalism principles, the First Circuit created a distinction that the district court below relied upon in fashioning the remedy: The distinction between requiring state regulation and prohibiting it. *Strahan* recognizes that the first is unconstitutional, but nonetheless imagines that

the latter is allowed. The problems in the court's reasoning abound. First, the distinction makes sense only if "absent a state-licensing scheme there would be no illegal takes from gillnet and lobster pot fishing", which is obviously absurd. *See* Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 Iowa L. Rev. 377, 429 (2005). Moreover, as the district court below points out, ESA's prohibition against "takes" governs both actions and failures to act. Memorandum Opinion and Verdict of the Court 12, March 11, 2013, ECF No. 354. And not surprisingly, in one of the cases principally relied upon by TAP, *Animal Welfare Institute v. Martin*, 588 F. Supp. 2d 70 (D. Me. 2008) (following *Strahan* as binding authority), the district court had enjoined state regulators to "immediately" promulgate regulations, by emergency order if necessary, to prevent further takes. *Id.* at 110.

Nor are those the only problems. Under *Strahan*, a state is better off not protecting endangered species at all, rather than protecting them less than perfectly. Equally troubling, the federal government can pass onto the states the consequences of *its* failure to regulate adequately, which creates perverse incentives for the federal government. That in turn, blurs crucial lines of accountability, thus violating one of the crucial imperatives of the Supreme Court's federalism decisions.

Under *Strahan*, a state that decides not to regulate anything at all cannot be liable for an ESA violation, even if the failure to regulate actually "causes" a mass-extinction event. But a state that effectively prohibits almost all violations of ESA § 9 will be held liable for those violations it doesn't prevent, if it authorizes someone to do something in the course of which he commits a "take." As the district court in *Strahan* calmly observed, "If Defendants cease exercising control over the use of gillnets and lobster gear in Massachusetts waters, then they will not be held liable, under Section 9, for any subsequent harm caused by such nets." 939 F. Supp. at 980. Never mind that many more takes of endangered species will occur as a result. The perverse incentive this creates for the states to avoid protecting endangered species altogether is obvious, and quite contrary to the ESA's stated policy of "encouraging the States . . . to develop and maintain conservation programs which meet national and international standards." 16 U.S.C. § 1531(5).

This inevitable result of *Strahan* simply cannot be right. From the point of view of proximate causation and foreseeability, there is absolutely no difference between a state's refusing to prohibit water diversions from a river, and a state's rolling back an existing prohibition. Neither can be a proximate cause of a violation of ESA § 9, because otherwise the ESA requires the states to regulate

according to federal instructions, and we know that that would be unconstitutional. The solution is not to create a false distinction, but to recognize that when the ESA is used to exert federal power on individuals *through state governments*, against their will, there is commandeering, whether the command is to regulate or to refrain from regulating.

Strahan creates an additional incentive for states to avoid regulating altogether: inadequate regulation opens the door to a functional federal take-over of their regulatory schemes, entirely outside the context of preemption. *See* J.B. Ruhl, *State and Local Government Vicarious Liability Under the ESA*, 16 Nat. Resources & Env't 70, 77 (2001) ("If a state regulatory program that involves permitting gives rise to vicarious liability as in *Strahan*, the state has an option that relieves it of the burden of adjusting its program so as to avoid ESA violations--don't regulate in the first place.")

Moreover, allowing states to be held liable for a take under an inadequate regulation theory creates perverse incentives for the federal government, too. If a "take" has occurred as a result of insufficient state regulation, then *a fortiori* federal regulation must also have been insufficient. Yet by holding the state liable under the ESA, *Strahan* effectively lets the federal government off the hook. *See* Valerie Brader, *Shell Games: Vicarious Liability of State and Local Governments*

for Insufficiently Protective Regulations under the ESA, 45 Nat. Resources J. 103, 120 (2005) ("What is notable about the vicarious liability cases is not just that they rely on government regulation 'causing' the injury in fact, but that, where state and local regulations are insufficient to protect species, the responsibility for any under-protection of the species is not placed on the federal government but is instead assigned to the state and local governments.")

In fact, *Strahan* positively encourages federal under enforcement, by allowing the federal government to pawn off enforcement responsibilities onto state and local governments:

> Instead of spending federal resources (pursuant to federal authority) promulgating politically unpopular regulations to protect endangered species, the federal government may issue non-binding guidance as in *Plymouth* or even expressly decline to enact a prohibition on the use of equipment as in *Strahan v. Coxe* and then use vicarious liability theories to force the local government to put their own patina on it. This creates a real difficulty for constituents trying to determine which governmental entity is responsible for the regulation.

Id. at 133; *see also*, *id.* at 131 ("vicarious liability is not limited in its use to cases in which no other deterrence is possible. Instead, it is used in place of direct liability for identifiable individuals actually committing takes when it is practically easier -- or politically easier -- to reach their behavior via state and local government liability.").

Strahan and its absurd consequences fly in the face of the Supreme Court's federalism decisions. The Court has repeatedly insisted that concerns for accountability lie at the heart of our constitutional system of federalism. As Justice Kennedy noted in his concurrence in *United States v. Lopez*, 514 U.S. 549 (1995), the Framers believed that federalism would protect liberty. But, as he pointed out, their hope

> requires for its realization two distinct and discernible lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States. If, as Madison expected, the Federal and State Governments are to control each other, and hold each other in check by competing for the affections of the people, those citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function.

Id. at 576-77 (Kennedy, J., concurring) (internal citations omitted). *Strahan* creates both the means and the incentive for the federal government to obscure this accountability.

Rejecting the reasoning of *Strahan* is required by the Supreme Court's more general pronouncements on theories of vicarious liability through inadequate regulation. *See e.g., American Manufacturers Mutual Ins. Co. v. Sullivan*, 526 U.S. 40 (1999) ("action taken by private entities with the mere approval or acquiescence of the State is not State action,"); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (holding the state liable for the illegal act of someone subject to its

regulation requires it to "put its own weight on the side of the proposed practice by *ordering* it.") (emphasis added).

The myriad of absurd and undesirable results that follow from the reasoning in *Strahan* counsel in favor of keeping to traditional common law concepts of causation and liability, as does basic fairness: "It is only if the state has a duty to regulate the taking of right whales that its failure to do so can be considered the cause of harm to the whales." James R. Rasband, *Priority, Probability, And Proximate Cause: Lessons From Tort Law About Imposing ESA Responsibility For Wildlife Harm On Water Users And Other Joint Habitat Modifiers*, 33 Envt. L. 595, 627 (2003). But "[i]f the state has no duty to regulate," and we know that it doesn't because the Supreme Court has told us so repeatedly, "it does not cause a take when it sets up a permitting system that restricts some but not all activities related to a protected species." *Id.*

C. *Strahan* Makes the State of Texas Responsible for Acts of God and Man.

The First Circuit's struggle with the driver's license analogy raised by the appellants in *Strahan* conclusively demonstrates the flaw in its reasoning. The court reasoned that the state issuance of a driver's license cannot be considered a proximate cause of any violation of federal law by the licensed driver because the driver is an intervening independent actor. On the other hand, reasoned the court,

the licensing of fishing equipment "does not involve the intervening independent actor [as] a necessary component" because "it is not possible for a licensed commercial fishing operation to use its gillnets or lobster pots in a manner permitted by the [state agency] without risk of violating the ESA by exacting a taking." 127 F.3d at 164.

The supposed distinction is ephemeral. It is not possible for a licensed driver to drive a car on Texas roads in a manner permitted by the state without risking a violation of the ESA by exacting a taking of one of the endangered species that routinely winds up as road-kill on Texas roadways. Despite the First Circuit's fervent denials, the driver's license analogy is exact, except for the fact that the causal link between state permits and "take" in the case at bar is far more attenuated than in the driver's license analogy.

State regulations simply cannot be considered a proximate cause of violations of federal law, any more than state refusals to enact federal law into their own statutes can be considered violations of federal law. In our federal system, the states and the federal government operate directly on individuals within their respective spheres of jurisdiction. A state-created right can only protect the holder from state law. It cannot be in conflict with federal law unless Congress has chosen

to preempt the field, and here nobody has suggested that Congress has or could preempt state regulation of water rights.

The error of concluding that states can proximately cause violations of the ESA through their regulations is especially apparent in the case at bar, because of the intervention of a major independent actor, namely nature itself. Unlike the situation in *Strahan*, in which the licensed activity (fishing with certain equipment) could constitute a direct "take" in violation of ESA § 9, it is uncontested that the diversion of water from the San Antonio and Guadalupe river would not constitute a "take" in the absence of extreme drought conditions.

Where injury to wildlife results from acts of nature, rather than human agency (let alone state regulation), establishing proximate cause becomes an exercise in fantasy. In *Pacific Shores California Water District v. U.S. Army Corps of Engineers*, 538 F.Supp.2d 242 (E.D. Cal. 2008), the district court ruled that injury to a listed species had stemmed from unusual rainfall into lakes that dangerously raised their water level and created a risk of area flooding, rather than subsequent protective action permitted by the Army Corps of Engineers to breach sand bars between the lakes and the Pacific Ocean in order to cause a controlled flood. The plaintiff had complained that the Corps of Engineers was waiting too long to cause the controlled flood, and sought an injunction to force the Corps to

breach the sand bars when the lake water reached a lesser depth. The district court refused to find that the Corps of Engineers had proximately caused the injury.

II. The Canon of Constitutional Avoidance Requires that This Court Reject TAP's Interpretation of the ESA.

TAP's reading of ESA § 9 thus raises a major constitutional issue under the Supreme Court's federalism doctrine. As a law of general applicability, *any* incidental application of ESA § 9 to the states requires courts to examine whether there has been excessive intrusion into state functions. *Printz*, 521 at 932.

But where, as in the case at bar, ESA § 9 has been applied in a way that targets state governments exclusively, and forces them to be implements of federal regulation, *see New York*, 505 at 161, courts must inquire whether the ESA leaves state "independent and autonomous within their proper sphere of authority." *Printz*, 521 at 928. That inquiry turns on whether state cooperation with the federal program is voluntary or obligatory. If state cooperation is obligatory, then the Supreme Court requires a finding of unconstitutionality. That is just where TAP's reading of ESA § 9 leads.

Federal courts have long hewed to a canon that, where a statute is susceptible of two interpretations, one of which could make the statute unconstitutional, courts must avoid that interpretation and embrace a reading that preserves its constitutionality. *Parker v. County of Los Angeles*, 338 U.S. 327, 333

(1949). This is a particularly clear-cut case for application of the canon of constitutional avoidance. The TAP's reading of ESA § 9 clearly departs from the natural reading of the text, which indicates a law of general applicability with incidental application to the states, and takes the law kicking and screaming into the realm of potentially violating state sovereignty through a tortured logic that has all kinds of undesirable public policy consequences.

It is not necessary for this court to agree with either interpretation of ESA § 9. If the court merely recognizes the constitutional issue, and *potential* unconstitutionality, engendered by the TAP's reading of the provision, then both the doctrine of constitutional avoidance, and due deference to the prerogatives of Congress, require this court to reject that reading. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001).

The district court's erroneous proximate causation analysis provides this court with ample room for deciding this case on non-constitutional grounds. "[N]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (*per curiam*).

CONCLUSION

For the foregoing reasons, this Court should reverse the ruling below and hold that TCEQ has not violated the Endangered Species Act.

Respectfully submitted,

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May 9, 2013

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance) contains 4,613 as determined by the word-counting feature of Microsoft Word 2000 in 14-point Times New Roman.

Signed: /s/ Mario Loyola
Mario Loyola
Texas Public Policy Foundation

May 9, 2013

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2013, I filed the foregoing Brief for Amicus Curiae by electronic filing. I also certify that, by agreement with corresponding counsel, I caused the brief to be served by electronic mail upon the following counsel:

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