IN THE
FIFTH DISTRICT COURT OF APPEALS
AT DALLAS

No. 05-18-01543-CV

GUSTAVO NOEL HINOJOSA, Appellant,

v.

STEVE PAUL LAFREDO, Appellee.

On Appeal from Trial Court Cause No. DF-15-16693
302nd Judicial District Court, Dallas County, Texas
The Honorable Tena Callahan, District Judge

BRIEF *AMICUS CURIAE* OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF APPELLANT

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INTEREST OF *AMICUS CURIAE*

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals and transgender ("LGBT") people and people living with HIV through impact litigation, education, and public policy work.

Lambda Legal participated as party counsel in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and as counsel for *amici curiae* in *United States v. Windsor*, 133 S. Ct. 2675 (2013) and *Pavan v. Smith*, 137 S. Ct. 2075 (2017), which together provide the most explicit, recent articulations of the interconnected and mutually reinforcing nature of the constitutional guarantees of liberty and equality that protect the rights of lesbian, bisexual, and gay people against discrimination and denial of the fundamental right to marry. Lambda Legal has been counsel in marriage equality cases since *Baehr v. Miike*, 910 P.2d 112 (Haw. 1996), and was involved as party counsel or *amicus* in nearly every major case addressing the rights of same-sex couples since then.

In 2014, Lambda Legal became lead appellate counsel in *Robicheaux v. Caldwell*, 791 F.3d 616 (5th Cir. 2015), the marriage equality case appealed from the Eastern District of Louisiana. *Robicheaux*, along with *DeLeon v. Abbott*, 791

F.3d 619 (5th Cir. 2015) (Texas marriage case), and a marriage case from Mississippi, were argued together before a Fifth Circuit panel and decided together by that panel immediately following the Supreme Court's *Obergefell* decision. Counsel for Lambda Legal worked closely thereafter with *DeLeon* party counsel to assist in assuring compliance with *Obergefell* and *DeLeon* by the Texas defendants and Texas Attorney General's Office. Lambda Legal has an interest in ensuring that the *Obergefell* and *DeLeon* decisions are faithfully implemented to benefit not only its members throughout Texas, but the lesbian, gay, and bisexual community as a whole.

Lambda Legal submits this brief to provide guidance to the Court solely on a question relevant to Issue 2 of the appeal: whether the trial court erred in providing the jury with an incorrect statement of law concerning retroactive application of the Supreme Court's decision in *Obergefell*, and the impact of that decision on Texas law concerning the requirements for establishing an informal marriage prior to 2015. Lambda Legal takes no position on Issue 1. Because the trial court's error almost certainly determined the outcome of the jury's deliberations and conclusion concerning whether such a marriage existed, *Amicus* submits this brief in support of remand for a new trial.

No counsel for a party authored this brief in whole or in part, and no person

other than *Amicus* or its counsel made a monetary contribution to this brief's preparation or submission. Counsel for Appellant has consented to the receipt of this brief. Appellee's counsel has not responded to *Amicus*' attempt to confer; therefore, this Court may presume Appellee does not consent to the receipt of this brief.

SUMMARY OF ARGUMENT

This case concerns whether Appellant Gustavo Noel Hinojosa ("Appellant") and Appellee Steve Paul Lafredo ("Appellee") established an informal marriage under Texas common law and are therefore entitled to a divorce. Appellant and Appellee enjoyed a 15-year committed same-sex relationship that ended a month prior to the Supreme Court's decision in *Obergefell*, which struck down all remaining bans on marriage for same-sex couples as unconstitutional and mandated equal treatment of same-sex and different-sex couples under state marriage laws. Under well-established precedent, when the Supreme Court declares a law facially unconstitutional, its decision applies retroactively. Accordingly, the jury in this case was required to examine the evidence of an informal marriage as though Texas's marriage bans never existed, and apply the same test the jury would apply if the couple were a different-sex couple. Unfortunately, the jury did not do so here because the lower court erred as a matter of law in its jury instructions.

The trial judge instructed the jury, "Prior to June 26, 2015, Texas did not legally recognize same-sex marriage," (Appellant's Brief, Appx. Tab B, p. 36), but failed to instruct that the Supreme Court's decision in *Obergefell* applies retroactively. Specifically, the court erred in failing to instruct that the jury should evaluate evidence of an informal marriage as though Texas's marriage bans had never existed. The jury understandably was confused, and specifically asked in writing, "If a same-sex couple met the requirements of informal marriage before June 26, 2015, does the *Obergefell* decision state whether the effective date of the informal marriage is the date of the Supreme Court decision or the date the conditions were met?" (Appellant's Brief, Appx. Tab B, p. 41). Instead of answering, the judge simply directed the jury back to the court's earlier inaccurate jury charge stating solely that marriages of same-sex couples were unrecognized prior to June 26, 2015, compounding the court's prior error. *Id.*

This Court should remand this case for a new trial because the trial court's jury instruction was an incorrect statement of the law that failed to notify the jury that Appellant and Appellee could enter into an informal marriage prior to *Obergefell*, and resulted in the rendition of an improper verdict.

ARGUMENT

I. *Obergefell* and *DeLeon* held unconstitutional Texas laws barring same-sex couples from marriage, including informal marriage.

In *Obergefell*, the Supreme Court declared unconstitutional all state laws that barred marriages between persons of the same sex. The Court specifically held that:

> [T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. . . . [t]he State laws challenged by the petitioners in these cases are held invalid **to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.**

Obergefell v. Hodges, 135 S. Ct. 2584, 2604-5 (2015) (emphasis added).

At the time of the *Obergefell* decision, Texas laws banning same-sex couples from marriage were located in Article 1, §32 of the Texas Constitution (marriage shall consist only of the union of one man and one woman and neither the state nor a political subdivision of this state may create or recognize any legal status identical or similar to marriage) and Texas Family Code §2.001 (a marriage license may not be issued to persons of the same sex), §2.401 (limiting informal marriage to a man and woman) and §6.204 (stating a marriage or civil union is void between two persons of the same sex in Texas). In *DeLeon v. Perry*, 975 F.Supp.2d 632 (W.D. Texas 2014, the district court enjoined these laws, finding that same-sex couples were likely to succeed in demonstrating that they were unconstitutional. After *Obergefell*, the Fifth Circuit affirmed, noting "*Obergefell* . . . is the law of the land and, consequently, the law of this circuit," and remanded for entry of final judgment

in favor of the plaintiffs. *See DeLeon v. Abbott*, 791 F.3d 619, 625 (5th Cir. 2015.

On remand, the lower court declared and ordered:

> **Any Texas law denying same-sex couples the right to marry**, including Article I, §32 of the Texas Constitution, **any related provisions in the Texas Family Code, and any other laws or regulations prohibiting a person from marrying another person of the same sex or recognizing same-sex marriage**, violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983 . . . .

Final Judgment, *DeLeon v. Abbott*, No. SA-13-CA-00982-OLG (W.D. Tex. Jul. 7, 2015, ECF No. 98 (emphasis added). The court permanently enjoined the State from enforcing Texas's laws excluding same-sex couples from marriage. Thus, as required by *Obergefell*, *DeLeon* expressly struck down the parts of the Texas Family Code that would deny same-sex couples the same right as different-sex couples to establish their marital relationship by evidence of an informal marriage. Any argument that informal marriages were not affected is directly contrary to the court's judgment in *DeLeon* and *Obergefell* itself.[1]

This conclusion is borne out by the Supreme Court's reaffirmance of

[1] While the U.S. Supreme Court's *Obergefell* holding is binding precedent on this Court under the Supremacy Clause, U.S. CONST. art. VI, Cl. 2, "decisions of the federal courts of appeals do not bind Texas courts, [but state courts] receive them 'with respectful consideration.'" *First Nat'l Collection Bureau, Inc. v. Walker*, 348 S.W.3d 329, 337 (Tex. App.—Dallas 2011, pet. denied (quoting *Hassan v. Greater Hous. Transp. Co.*, 237 S.W.3d 727, 731 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). Because *DeLeon* faithfully applied *Obergefell* without variance, there is no distinction in their application here.

Obergefell in *Pavan v. Smith*, 137 S. Ct. 2075 (2017). There the Court summarily reversed an Arkansas Supreme Court decision that had permitted Arkansas to treat same-sex spouses differently from different-sex spouses by omitting them from the birth certificates of children born during their marriage if the spouse was not the person who gave birth to the child. *Id*. at 2077, 2079. The Court reaffirmed that "a State may not 'exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.'" *Id.* at 2078.

Faithful application of *Obergefell* and *Pavan*, and respectful consideration of *DeLeon*, not only require allowing same-sex couples access to informal marriage laws, but also necessarily prohibit lower courts from instructing juries that they should decline to consider evidence that predates *Obergefell* to establish such marriages—a limitation that would not apply to different-sex couples. *Obergefell* expressly directed states to make marriage available to all couples—both those involving different-sex and same-sex couples—on the same terms. Permitting same-sex couples to establish an informal marriage, but limiting their evidence of agreement, cohabitation, and representation to activities and events that post-date the *Obergefell* decision would breathe new life into the very laws the courts struck down.

II. A Supreme Court determination that a law is facially unconstitutional applies retroactively.

Permitting same-sex couples to establish an informal marriage, but instructing the jury that they may not consider evidence that pre-dates *Obergefell*, violates the well-established rule of retroactive application for decisions that strike down a law as facially unconstitutional under the United States Constitution. In *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993, the Supreme Court set forth a clear rule regarding the retroactivity of its federal law holdings:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and **must be given full retroactive effect** in all cases still open on direct review and **as to all events, regardless of whether such events predate or postdate our announcement of the rule.** . . .

Id. at 97 (emphasis added) (citing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991) (White, J., concurring)), *accord Danforth v. Minnesota*, 552 U.S. 264, 271 (2008); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995).[2] Retroactivity of judicial decisions is inherent in the judicial power, following from

[2] In *Harper*, the Supreme Court rejected the analysis in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), as inapplicable to determining the reach of court decisions applying a rule of federal law. The rule in *Huson*, which under some circumstances had permitted prospective-only application of court decisions, is still followed by some state courts, including in Texas, when applying a rule of state law to the parties before them. Because *Obergefell* struck down marriage laws restricting same-sex couples as a violation of the federal Constitution, however, *Huson* analysis does not apply here, even though this particular dispute is being heard in a state district court.

the courts' role to "say what the law is . . . not what the law shall be." *Harper*, 509 U.S. at 107 (Scalia, J., concurring). "Fully retroactive decisionmaking," Justice Scalia explained, "was considered a principal distinction between the judicial and the legislative power."

The legal rule is well established that a facially unconstitutional law is simply void and must be treated as though it had never existed:

> [A]n unconstitutional statute, whether federal or state, though having the form and name of law, is in reality no law but is wholly void and ineffective for any purpose. Since unconstitutionality dates from the time of its enactment and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed and never existed; that is, it is void ab initio.

19 AM JUR. 2D, *Constitutional Law* Section §195 (footnotes omitted). "[W]hat a court does with regard to an unconstitutional law is simply to ignore it. It decides the case disregarding the unconstitutional law, because a law repugnant to the Constitution is **void, and is as no law**." *Reynoldsville Casket Co.*, 514 U.S. at 760 (Scalia, J., concurring) (internal citation and quotation marks omitted) (emphasis added). Thus, an unconstitutional measure is as inoperative as if it had never been

passed and never existed; that is, it is null from the beginning. *See Reyes v. State*, 753 S.W.2d 382, 383 (Tex. Crim. App. 1988).[3]

Under these principles, there is no question that marriages entered prior to *Obergefell* are entitled to retroactive recognition, with the full range of marital protections extended thereto. The Supreme Court itself had no problem holding that the couples who sought relief in *Pavan*, all of whom had married prior to *Obergefell*, were entitled to be treated equally under their state's vital records laws. *Pavan*, 137 S. Ct. at 2077-78. Other federal courts have also recognized as valid marriages entered prior to *Obergefell*. For example, the Eleventh Circuit held that a district court had not abused its discretion in disbursing the spousal share of wrongful death proceeds to an Alabama man whose husband died while Alabama still banned same-sex couples from marriage. *See Hard v. Attorney General*, 648 Fed. Appx. 853 (11th Cir. 2016); *see also, e.g., Birchfield v. Armstrong*, No. 4:15-CV-00615, 2017 WL 1319844, at *3 (N.D. Fla. Mar. 23, 2017) (ordering Florida to amend death certificates issued prior to *Obergefell* to recognize decedents' marriages to same-sex

[3] The origin of the doctrine that a statute held unconstitutional is considered void in its entirety and inoperative as if it had no existence dates back to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), in which Chief Justice Marshall wrote that "a law repugnant to the constitution is void." Subsequently, in *Norton v. Shelby County*, 118 U.S. 425 (1886), the U.S. Supreme Court stated that, "[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Id.* at 442.

spouses, noting "plaintiffs are entitled to appropriate injunctive relief correcting the state's prior, unremedied violation of the plaintiffs' constitutional rights"); *Williams v. Colvin*, No. 1:14-cv-08874, Order, ECF No. 36 (Oct. 26, 2015) (directing Commissioner of Social Security "to apply the SSA's rules and regulations and process the [spousal benefits] claim consistent with, and in light of, the Supreme Court's decision in *Obergefell*, and the Commissioner's own internal instructions, which both recognize the nature of plaintiff's marriage as valid as of the date it was celebrated"); Social Security Admin. (S.S.A.), Program Op. Manual Systems GN 00210.001 *et seq*. (June 12, 2017), available at https://secure.ssa.gov/apps10/poms.nsf/lnx/0200210001 (affirming recognition of same-sex couples' marriages for social security benefits eligibility regardless of whether entered prior to *Obergefell*).[4]

Texas acknowledges its obligation to apply *Obergefell* retroactively, and both

[4] This is consistent with retroactive application of prior landmark marriage decisions rectifying past discrimination. For example, in *Windsor*, 133 S. Ct. 2675, the Supreme Court struck down as unconstitutional a federal law denying recognition to marriages of same-sex couples. Federal courts uniformly applied *Windsor* retroactively to provide federal benefits to same-sex couples whose eligibility turned upon events prior to *Windsor*. *See, e.g., Schuett v. FedEx Corp*., 119 F.Supp.3d 1155 (N.D. Cal. 2016); *Cozen O'Connor P.C. v. Tobits*, 2013 WL 3878688 at *4 (E.D. Pa. July 29, 2013. Federal courts and agencies proceeded similarly after the Supreme Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967), which struck down bans on marriage for interracial couples. *See, e.g., Prudential Ins. Co. of America v. Lewis*, 306 F. Supp. 1177 (1969) (holding an interracial common law marriage could be valid when the spouse died prior to the decision in *Loving*); Soc. Security Ruling 67-56, Section 216(h)(1)(A), Marital Relationship, Applicability of State Anti-miscegenation Statute, available at https://tinyurl.com/ybgx9rr6.

Texas agencies and Texas state and federal courts have been doing so routinely, including with respect to recognition of informal marriages. For example, Texas agencies have implemented policies and procedures that recognize ceremonial and informal marriages of same-sex couples entered prior to June 26, 2015; the Texas Department of State Health Services has revised its policies for vital records to respect the marriages of same-sex couples entered prior to *Obergefell* on birth and death certificates. *De Leon v. Abbott,* No. 5:13-CV-982-OLG, Advisory to the Court, ECF No. 115 (Aug. 24, 2015).

A federal district court similarly has applied *Obergefell* retroactively under Texas's informal marriage laws to a surviving spouse's wrongful death claim. *Ranolls v. Dewling*, 223 F.Supp.3d 613, 622 (E.D. Tex. 2016). The court's analysis is instructive here where the same principles of retroactivity apply.

The Court reasoned:

> The [US Supreme Court] reinforced its preference for retroactivity in *Harper*, holding: "**this Court's application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision**." 509 U.S. at 89 (emphasis added). In reaching this conclusion, the Court stated that both "the common law and our own decisions" have "recognized a general rule of retrospective effect for the constitutional decisions of this Court" and noted that "[n]othing in the Constitution alters the fundamental rule of 'retrospective operation' that has governed '[j]udicial decisions ... for near a thousand years.'" *Id*. at 94

Id. at 621-22 (citations omitted). *See also Ford v. Freeman*, 2020 WL 521084 (N.D.

Tex. Jan. 16, 2020) (holding that same-sex couple had established a common law marriage based on their 24-year relationship, notwithstanding the death of one of the men in 2016).

Texas probate courts also have recognized informal marriages of same-sex couples retroactively. *See*, *e.g.* *In re Estate of Powell*, No. C-1-PB-14-001695; Travis County Probate Court No. 1, Feb. 17, 2015 (court recognized the common law marriage of two Texas women who had a marriage ceremony in 2008, and subsequently held themselves out as married), (described in media reports, Chuck Lindell, *Same Sex Common Law Marriage a Texas First*, AUSTIN-AMERICAN STATESMAN, Sept. 25, 2018, updated at 9:54 a.m., available at https://tinyurl.com/ycoteqbc); *In re Estate of Charlton M. Theus, Jr., Deceased*, No. 2017-PC-0021; Bexar County Probate Court No. 1, Mar. 27, 2017 (declaratory judgment in a probate case holding two men were informally married as of April 30, 2008); *In the Estate of Steven Scott McGilvra, Deceased,* No. PR-16-03063-2; Dallas County Probate Court No. 2, Nov. 6, 2017 (declaratory judgment in a probate case holding two men were informally married as of December 16, 2006).

Numerous other states that respect common law marriages also have applied *Obergefell* retroactively to respect the marriages of same-sex couples entered into prior to June 26, 2015, regardless of whether these couples could have satisfied the

requirements for such a marriage based solely on evidence after that date. *See*, *e.g.*, *In re: J.K.N.A.,* 454 P.3d 642 (Mont. 2019) (court applied *Obergefell* retroactively to find that a common-law marriage existed between the parties beginning in 2000); *In re Estate of Carter*, 159 A.3d 970, 976, 982 (Pa. Super. Ct. 2017) (recognizing common-law marriage between two men beginning in 1997). In doing so, some courts expressly have recognized the need to apply *Obergefell* retroactively. *See*, *e.g.*, *In re Marriage of Hogsett and Neale*, 2018 WL 6564880, (Colo. Ct. App. Dec. 13, 2018), at *1, *5 (even though no common law marriage demonstrated based on the evidence, "*Obergefell* applies retroactively in determining the existence of a common law marriage" and a party "may allege that a common law marriage existed pre-*Obergefell*."); *Gill v. Van Nostrand*, 206 A.3d 869, 875 (D.C. Ct. App. 2019) (holding that *Obergefell* requires retroactive recognition of same-sex couples' ability to enter into a common law marriage).

III. The trial court's error reinforced past discrimination and imposed the precise constitutional harms the Supreme Court condemned in *Obergefell.*

The retroactivity doctrine is particularly important in cases evaluating historical evidence to determine if an informal marriage exists today. A central characteristic that distinguishes informal marriage from formal marriage is the backward-looking, fact-driven nature of establishing the spousal relationship.

Unlike formal marriages, which mark a date certain by license and ceremony from which married life begins, informal or common law marriages examine the history the couple has created together and evaluates that evidence from the current vantage.

In Texas, an informal marriage may be proved by a preponderance of the evidence that: (1) the parties agreed to be married and, after the agreement; (2) they lived together in Texas [as spouses]; and (3) there represented to others that they were married. *See* TEX. FAM. CODE § 2.401(a)(2). To establish an agreement to be married, "the evidence must show the parties intended to have a present, immediate, and permanent marital relationship" and that they did in fact agree to be spouses. *See Eris v. Phares*, 39 S.W.3d 708, 714 (Tex. App.--Houston [1st Dist.] 2001, pet. denied).

It is important to recognize that informal marriage serves a particularly important role here, where states for decades wrongly denied same-sex couples the right to marry formally. History shows many couples nonetheless lived as married couples in spite of state-sponsored discrimination. Unlike their different-sex counterparts, for whom formal marriage was accessible, same-sex couples faced unique obstacles that only recently have been erased. For same-sex couples, informal marriage can serve a remedial role in correcting past injustice.

Although the evidence adduced in informal marriage cases involving same-

sex couples may reflect the presence of past Texas marriage laws in various ways, courts must ensure that the jury does not impose a facially unconstitutional legal prohibition on recognition of their relationships when evaluating that evidence. *See Reed v. Campbell*, 476 U.S. 852, 856 (1986) (even though operative facts may predate the recognition of the relied-upon constitutional principle, they must be reviewed under standards as we understand them today). Thus, the evidence adduced in a case concerning a same-sex couple's informal marriage may appear different from evidence presented in comparable proceedings involving different-sex couples. For example, because state law prohibited the parties from marrying, they may not have been able to describe themselves as married on federal tax forms, loan documents, or deeds, simply to avoid accusations of untruthfulness or worse, even while holding themselves out consistently as spouses elsewhere. The jury must evaluate the evidence in its entirety to establish whether the parties met the test *to the extent that they could with respect to matters under their control* given unconstitutional restrictions.

The court, however, erred by re-imposing the unconstitutional restrictions afresh, when it authorized the jury to find that the parties were not married simply because the parties met the requirements at a time when Texas law unconstitutionally banned them from marriage. Because the Texas marriage bans are void as if they

had never existed, courts must not resurrect them to obstruct a jury from evaluating or relying upon evidence of a couple's marriage before the bans were struck down. The Supreme Court has told us these laws never were valid.

The lower court's instructions deprived Appellant of equal protection, and impermissibly burdened fundamental liberty interests protecting intimate relationships, including Appellant's fundamental right to marry. *Obergefell*, 135 S. Ct. 2584; *see also Lawrence v. Texas*, 539 U.S. 558 (2003). The Supreme Court's decisions affirming the equal dignity of same-sex relationships make clear that government may not deny equal access to marriage, including legal benefits and protections associated with marriage, to same-sex couples. *See Obergefell*, 135 S. Ct. at 2601; *Windsor*, 570 U.S. at 772-74. Members of same-sex relationships must be given an equal opportunity to demonstrate the validity of their relationships, including through presentation of evidence of an informal marriage. It is solely because Appellant and Appellee were a same-sex couple that the court: 1) instructed the jury that their marriage was not recognized prior to June 26, 2015; and 2) referred the jury back to this instruction in answer to the jury's specific query about the impact of *Obergefell* on parties who satisfied the requirements for informal marriage prior to this date. If Appellant and Appellee comprised a different-sex couple, the jury would have received no such instructions restricting both the recognition of their

marriage, and evaluation of evidence, to events after June 26, 2015. Accordingly, the trial court's error violated both the equal protection and due process guarantees of the United States Constitution, imposing the same harm and stigma condemned in *Obergefell.*

CONCLUSION

The trial court erred in failing to instruct the jury that Appellant and Appellee could enter into an informal marriage prior to the United States' Supreme Court decision in *Obergefell*, June 26, 2015, warranting a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I certify that this brief complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(2)(B) because this brief contains 4209 words, excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

This brief complies with the typeface and type style requirements of Texas Rule of Appellate Procedure 9.4(e) because this brief has been prepared in a proportionally spaced, conventional typeface using Microsoft® Word Times New Roman 14-point font (12-point for footnotes).

Dated: May 5, 2020.

/s/ Shelly L. Skeen
Shelly L. Skeen

CERTIFICATE OF SERVICE

As required by Texas Rule of Appellate Procedure 9.5, I certify that I have served this document by electronic mail to counsel of record for all parties on May 5, 2020.

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