

NO. 05-0126

IN THE SUPREME COURT OF TEXAS

THE CITY OF ROCKWALL, TEXAS
Petitioner

v.

VESTER T. HUGHES, AS SOLE INDEPENDENT EXECUTOR OF
THE
ESTATE OF W.W. CARUTH, DECEASED
Respondent

AMICUS CURIAE BRIEF ON THE MERITS
OF BRIAN D. SHANNON
IN SUPPORT OF RESPONDENT HUGHES

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**AMICUS CURIAE BRIEF ON THE MERITS
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IN SUPPORT OF RESPONDENT HUGHES**

TO THE HONORABLE SUPREME COURT OF TEXAS:

I, Brian Shannon, as amicus curiae, respectfully submit this brief on the merits in support of the Respondent Vester T. Hughes, as Sole Independent Executor of the Estate Of W.W. Caruth, deceased (“Hughes”), and in opposition to the petition for review filed by the City of Rockwall (“Rockwall”). Because the Court of Appeals correctly interpreted the arbitration provision set forth in Section 43.052(i) of the Texas Local Government Code, the petition should be denied.

INTEREST OF AMICUS CURIAE

I serve as the Associate Dean for Academic Affairs and am a law professor at the Texas Tech University School of Law. Although I do not have a specific “dog in the hunt” vis-à-vis this particular dispute, I do have a keen interest in the Texas law of alternative dispute resolution (“ADR”) and arbitration. I have taught ADR courses at Texas Tech on numerous occasions and taught the course as a visiting professor at the University of North Carolina School of Law. I served for several years on the former State Bar of Texas ADR Committee (now a section), and more recently served a three-year term as a Council member of the State Bar ADR Section. I am also a long-time member of the Lubbock Dispute Resolution Center Advisory Board. I am a co-author of the forthcoming 2005 edition of RAU, SHERMAN & SHANNON’S TEXAS ADR & ARBITRATION, and I collaborated with Professor Alan Rau and Dean Ed Sherman on two earlier editions of the book. My publications also include the article, *Confidentiality of Texas Mediations: Ruminations on Some Thorny Problems*, 32 TEX. TECH L. REV. 77, which was the winner of the Texas Bar Foundation’s 2002 Outstanding Law Journal Award. In 2004 I was bestowed the Justice Frank Evans award by the State Bar ADR Section. Finally, I have served as an arbitrator in a number of cases, and I have attended an array of arbitrator training courses. I

am hopeful that my experience can be of service in providing assistance to the Court in the pending matter.

I have no financial interest in the outcome of this litigation. I have not been, nor will I be paid any fees in connection with the preparation of this brief. I have prepared the brief on a pro bono basis. The Texas Tech University School of Law and my Charles “Tex” Thornton professorship account will absorb the costs for printing, postage, and a student research assistant. By way of further disclosure, I was formerly employed by Mr. Hughes’ law firms. I was a law student clerk for Hughes & Hill during the summer of 1981 and the summer and fall of 1982. I was later an associate with the Hughes & Luce law firm’s Austin office from 1986-88. I have not, however, been affiliated with the firm since my resignation to join the Texas Tech Law School faculty in 1988, although I have maintained a number of friendships.

In addition, appellate counsel for Rockwall – Judge Bob Shannon – is my uncle. After deciding to submit an amicus brief in this matter, I obtained copies of all of the prior briefing in this matter. At that time I discovered that Judge Shannon and his law firm began representing Rockwall after the Court of Appeals rendered its opinion. I disclosed the familial connection to Hughes and Hughes’ counsel, and I informed Judge Shannon that I would be

submitting an amicus brief in support of Hughes. The Judge (“Uncle Bob”) and I did not discuss the merits of the case, but I suspect that once this litigation is finally resolved, we might have an interesting, albeit friendly conversation at our next family gathering regarding our disagreement over the merits of the case.

STATEMENT OF FACTS

I adopt the statement of facts contained in Hughes' brief on the merits.

SUMMARY OF ARGUMENT

This case involves an uncomplicated interpretation of a 1999 legislative enactment. As part of a major overhaul of the state's municipal annexation laws, the 76th Texas Legislature enacted Section 43.052(i), Texas Local Government Code, which grants specific authorization to private persons to arbitrate certain annexation disputes. The general framework of the revamped annexation statutes requires cities to engage in three-year annexation planning. There is an exception, however, for land that is sparsely developed. A city is forbidden, nonetheless, from circumventing the three-year process by proposing to annex two or more of these less dense areas absent some recognized reason under generally accepted planning principles. Being cognizant, however, that a city might nevertheless attempt to bypass the three-year planning requirements by separately annexing multiple areas, the legislature authorized affected residents or landowners to petition the city for inclusion in that municipality's annexation plan. Moreover, the 76th Legislature provided specific authorization to these persons to seek arbitration of their dispute with the municipality if the city failed to act on a petition for inclusion.

Rockwall has attempted to distract the Court from focusing on this statutory grant of an arbitration right by identifying a line of cases that discuss *quo warranto* proceedings as the usual method for challenging annexation abuses. Those cases, however, recognize that a *quo warranto* action is required *unless the legislature has authorized a private right of action*. The 1999 legislation has provided such an authorization to affected residents and landowners.

Rockwall has also urged this Court to, in effect, ignore much of the text and context of Section 43.052(i), the statute that authorizes arbitration of these annexation disputes. Rockwall contends that once a city *acts* to deny a resident's or landowner's petition for inclusion in the annexation plan, it cannot be viewed as having *failed to act* on that petition. In effect, Rockwall would like this Court to declare that the legislature only authorized arbitration as a remedy in a case in which a city has done absolutely nothing with a resident's or landowner's petition. Such an interpretation is unduly narrow, unreasonable, and incorrect, and this Court should reject it.

Rockwall's proffered interpretation of Section 43.052(i) ignores the remaining text of the statute. For example, Section 43.052(i) incorporates by reference three other sections of the 1999 legislation now codified in Section 43.0564 of the Texas Local Government Code. These provisions set forth

procedural requirements for arbitrator selection and the arbitration hearing that when examined – both individually and cumulatively – demonstrate that the 76th Legislature intended Section 43.052(i) to authorize arbitration of *substantive* annexation disputes. The remaining text of Section 43.052(i) also negates Rockwall’s strained and illogical view of the statute. Moreover, this 1999 legislation is also consistent with an ongoing trend by the Texas Legislature to employ and authorize arbitration and other alternative dispute resolution mechanisms to resolve substantive disputes. The legislature is presumed not to have intended a meaningless, hollow act, and the passage of Section 43.052(i) was without doubt intended to authorize arbitration of actual disputes of substantive annexation matters. The Court of Appeals correctly construed the statute.

Although Rockwall and other cities do not like Section 43.052(i), their complaints should be raised at the Texas Legislature, not with this Court.

ARGUMENT

I. Introduction and Legislative Framework

This is a straightforward case involving statutory interpretation. During the 1999 legislative session, the legislature enacted Senate Bill 89, which was a major overhaul of the state’s municipal annexation laws. Act of

May 30, 1999, 76th Leg., R.S., ch. 1167, 1999 Tex. Gen. Laws 4074-90 (“S.B. 89”). A portion of that lengthy bill included the enactment of a revamped Section 43.052 of the Texas Local Government Code, which requires municipalities to develop three-year annexation plans. Subsection 43.052(h), however, provides for several exceptions to the three-year annexation plan requirement. TEX. LOCAL GOV’T CODE ANN. § 43.052(h) (Vernon Supp. 2004-05). Of relevance to this dispute is the exception set forth in Subsection (h)(1), which provides that Section 43.052’s three-year planning requirement “does not apply to an area proposed for annexation if ... the area contains fewer than 100 separate tracts of land on which one or more residential dwellings are located on each tract.” *Id.* § 43.052(h)(1).

A municipality, however, is not permitted to employ the (h)(1) exception to eviscerate the general requirement to engage in three-year annexation planning. The legislature recognized that prospect and, accordingly, enacted a limitation on the overzealous use of the (h)(1) exception. The first sentence of Section 43.052(i) states: “A municipality may not circumvent the requirements of this section [requiring three-year planning] by proposing to separately annex two or more areas described by Subsection (h)(1) if no reason exists under generally accepted municipal planning principles and practices for separately annexing the areas.” *Id.* §

43.052(i). In turn, the remaining portion of Section 43.052(i) – the language at issue in this appeal – delineates the mechanism and intended procedure for remedying potential abuses of the generally required annexation planning process:

If a municipality proposes to separately annex areas in violation of this section, a person residing or owning land in the area may petition the municipality to include the area in the municipality's annexation plan. If the municipality fails to take action on the petition, the petitioner may request arbitration of the dispute. The petitioner must request the appointment of an arbitrator in writing to the municipality. Sections 43.0564(b), (c), and (e) apply to the appointment of an arbitrator and the conduct of an arbitration proceeding under this subsection. Except as provided by this subsection, the municipality shall pay the cost of arbitration. If the arbitrator finds that the petitioner's request for arbitration was groundless or requested in bad faith or the purposes of harassment, the arbitrator shall require the petitioner to pay the costs of arbitration.

Id. Hence, in situations in which a municipality has opted to bypass the planning process by separately annexing areas through improper use of the (h)(1) exception, the legislature has granted – per Section 43.052(i) – specific authorization to affected residents or landowners in the impacted areas to petition for inclusion in the annexation plan. In turn, if the municipality fails to take action on such a petition, the statute grants the adversely affected resident or landowner the authority to seek arbitration of the dispute.

II. Rockwall Has Attempted to Obfuscate the Need to Focus on the Statutory Text through Misplaced Reliance on *Quo Warranto* Cases

By relying on an array of *quo warranto* cases, Rockwall attempts to obfuscate the plain intent of the legislature to authorize adversely impacted residents or landowners the right to seek arbitration of this type of annexation dispute. Although the usual method for challenging the validity of a city's annexation action is through a *quo warranto* proceeding brought by the state, that is not the case when the legislature has granted specific authority to private persons to raise challenges. *See City of Wichita Falls v. Pearce*, 33 S.W.3d 415, 417 (Tex. App.—Fort Worth 2000, no pet.) (“Absent specific legislative authorization, the only proper method for attacking the validity of a city's annexation of territory is through a *quo warranto* proceeding, unless the annexation is wholly void”); *Alexander Oil Co. v. Seguin*, 825 S.W.2d 434, 437 (Tex. 1991) (stating the general rule and observing that the legislature had “not acted to expressly provide a private action” regarding the disputed annexation in issue).

Rockwall appears to have largely ignored Justice Frankfurter's three cardinal principles of statutory construction that he taught to his law students: “(1) Read the statute; (2) read the statute; (3) read the statute!” Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in

BENCHMARKS 196, 202 (1967) (quoting Justice Frankfurter). Through the enactment of Section 43.052(i), the legislature has specifically provided authorization to adversely impacted residents and landowners to seek arbitration to resolve certain annexation disputes. The key focus of this appeal should be on the *intent* and *meaning* of this legislative authorization for the arbitration of disputes. The critical statutory language being construed is as follows:

If a municipality proposes to separately annex areas in violation of this section, a person residing or owning land in the area may petition the municipality to include the area in the municipality's annexation plan. If the municipality fails to take action on the petition, the petitioner may request arbitration of the dispute.

TEX. LOCAL GOV'T CODE ANN. § 43.052(i) (Vernon Supp. 2004-05).

III. What Disputes did the Legislature Intend to be Arbitrated under Section 43.052(i)?

What disputes have been authorized to be arbitrated under the authority of this statute? What must occur as a prerequisite to this right to arbitration? Rockwall posits that a right to arbitration arises only when a city fails “to consider or evaluate” the landowner’s request – a type of “pocket veto.” (Rockwall Brief on Merits at 24). In turn, Rockwall asserts that because it did take an action to deny the petition, then it did not “fail to take action.” The Court of Appeals rejected this contention and determined that

the legislature intended that an adversely affected landowner could request arbitration of the dispute if the municipality failed “to take action on the petition to include the area in the annexation plan.” *Hughes v. City of Rockwall*, 153 S.W.3d 709, 713-14 (Tex. App.—Dallas 2005, pet. filed).

IV. The Legislature is Presumed to Have Intended a Just and Reasonable Result

As stated in the Code Construction Act, the legislature “is presumed” to intend “a just and reasonable result” in the enacting of a statute. TEX. GOV’T CODE ANN. § 311.021(3) (Vernon 2005). *See also Del Indus., Inc. v. Texas Worker’s Comp. Ins. Fund*, 973 S.W.2d 743, 747 (Tex. App.—Austin 1998) (“A court ... will not construe a statute in a manner that will lead to a foolish or absurd result when another alternative is available”), *aff’d*, 35 S.W. 3d 591 (Tex. 2000). Rockwall’s literalist interpretation is unreasonable, and the Court should reject it.¹

Indeed, Rockwall’s position brings to mind a commentary from Lewis Carroll’s *Through the Looking Glass*: “‘When *I* use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean – neither more nor less.’” Lewis Carroll, *ALICE’S ADVENTURES IN*

¹ One could well envision a municipality taking this literalist interpretation even further. Suppose, for example, that upon receipt of a landowner’s Section 43.052(i) petition in the city clerk’s office, a city staffer forwards the petition to the city attorney. Thereafter, the city decides to take no further action whatsoever on the petition based on advice by the city attorney. Could the city then argue that because it had taken an *action* through the review of the petition by its counsel, it had accordingly *not* “fail[ed] to take action on the petition”?

WONDERLAND AND THROUGH THE LOOKING GLASS 237 (Puffin 1997) (emphasis in original). In contrast, the courts are not to view statutes in so narrow a manner as to eviscerate their intended meaning. Subsection 43.052(i) must be viewed in its entirety given the presumption that “the entire statute is intended to be effective.” TEX. GOV’T CODE ANN. § 311.021(2) (Vernon 2005). Moreover, it is presumed that a “reasonable result is intended,” and not an unreasonable one. *Id.* § 311.021(3). In construing a statute, a court’s primary objective should be “to determine and give effect to the Legislature’s intent.” *National Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000).

Rockwall’s contention that the statute authorizes arbitration only in situations in which there is some type of bureaucratic inertia through a city’s utter failure to take up, consider, and respond to a landowner’s petition for inclusion in an annexation plan is an unduly narrow, unreasonable, and incorrect construction of the statute. The statute permits the arbitration of a *dispute* between the landowner and the city. Surely, the legislature did not intend this form of binding alternative dispute resolution to apply only as a check against a city’s refusal to read or answer the mail. The more reasonable construction is that the legislature intended to authorize arbitration of *substantive* disputes regarding whether the resident’s or

landowner's property should be included in the annexation plan or whether reasons exist "under generally accepted municipal planning principles and practices for separately annexing the areas." TEX. LOCAL GOV'T CODE ANN. § 43.052(i) (Vernon Supp. 2004-05). One would ordinarily expect an arbitrator to be tasked with a greater degree of responsibility in adjudicating a dispute than simply making a rudimentary factual finding as to whether a city has given a "thumbs up" or "thumbs down" to a petition. The courts are not to construe a statute in an "absurd" manner "if the provision is subject to another, more reasonable construction or interpretation." *C&H Nationwide v. Thompson*, 903 S.W.2d 315, 322 n.5 (Tex. 1994).

A. Rockwall's Unduly Restrictive Interpretation of Section 43.052(i) Does Not Withstand a Close Scrutiny of the Entire Act

The remaining structure and language of Section 43.052(i) further negates Rockwall's unduly narrow construction. The statute provides that after the petitioner has requested arbitration, "Sections 43.0564(b), (c), and (e) apply to the appointment of an arbitrator and the conduct of an arbitration proceeding under this subsection." *Id.* Although Rockwall only notes these sections in passing (Rockwall Brief on Merits at 16, 20), a careful review of these cross-referenced subsections is helpful to understanding the intent of

the legislature as to the types of disputes envisioned as being arbitrable under Section 43.052(i).

Subsection 43.0564(b) relates to the appointment of an arbitrator. Under that subsection, the statute sets forth a process for selecting an arbitrator “[i]f the parties cannot agree on the appointment of an arbitrator before the 11th business day after the date arbitration is requested” TEX. LOCAL GOV’T CODE ANN. § 43.0564(b) (Vernon Supp. 2004-05). The Code Construction Act directs a court in construing a statute to, *inter alia*, consider “the consequences of a particular construction.” TEX. GOV’T CODE ANN. § 311.023(5) (Vernon 2005). If, as Rockwall urges, Section 43.052(i) allows arbitration only if the municipality has utterly failed to act, presumably once a landowner or resident invokes arbitration, the city could simply reply with a denial of inclusion in the annexation plan – thereby negating the need for arbitration of this narrow perfunctory question. But, if that were the case, it would be illogical for the legislature to have provided for a process of identifying an arbitrator to commence some *eleven business days* after the request for arbitration. This amount of time to allow for a detailed arbitrator selection process would in all likelihood not be necessary *unless* the parties were negotiating over the selection of an arbitrator who would be tasked with deciding an actual substantive dispute.

Moreover, Section 43.0564(b) also precludes a person from serving as an arbitrator who is “a resident of a county in which any part of the municipality or any part of the district proposed for annexation is located.” TEX. LOCAL GOV’T CODE ANN. § 43.0564(b) (Vernon Supp. 2004-05). This language serves as a check on potential bias on the part of the arbitrator. If, however, as Rockwall argues, the arbitrator is constrained only to decide whether a city has made a decision on a petition, why would a nonresident be needed? Instead, this concern for potential bias can only reasonably be construed as reflecting a concern that an arbitrator who is a resident of an affected area might be insufficiently neutral vis-à-vis the nature of the proposed municipal development – a substantive annexation issue.

Similarly, the text of Section 43.0564(c), another subsection incorporated by reference in Section 43.052(i), is inherently inconsistent with the position that Rockwall has advanced. Subsection (c) requires an arbitrator to “set a hearing to be held not later than the 10th day after the date the arbitrator is appointed” and to provide written notice of the hearing date to the parties. *Id.* § 43.0564(c). As with the consideration of Subsection (b) above, if the position Rockwall advances is correct, would a hearing date ever need to be set? After receipt of a petition, a city could simply decline a landowner’s request for inclusion in an arbitration plan, and the city could

no longer be viewed as having “failed to act.” Surely, the legislature intended that a hearing be set to consider, evaluate, and adjudicate substantive matters.²

Additionally, Section 43.0564(e), the final subsection incorporated by reference in Section 43.052(i), further negates Rockwall’s strained interpretation of the statute. Subsection (e) provides the following:

(e) The arbitrator may:

- (1) receive in evidence any documentary evidence or other information the arbitrator considers relevant;
- (2) administer oaths; and
- (3) issue subpoenas to require:
 - (A) the attendance and testimony of witnesses; and
 - (B) the production of books, records, and other evidence relevant to an issue presented to the arbitrator for determination.

Id. § 43.0564(e).

If, as Rockwall asserts, the sole “dispute” for which Section 43.052(i) authorizes arbitration is whether the city has acted to consider a resident’s or landowner’s petition for inclusion in an annexation plan or not, why would the legislature have incorporated by reference this delineation of procedural provisions? Would witnesses need to be subpoenaed? Would the arbitrator

² I have served as an arbitrator many times, primarily arbitrating under the commercial arbitration rules of the American Arbitration Association. Typically, preliminary matters can be resolved through pre-hearing telephone conferences. The actual arbitration hearing is reserved for the taking of evidence and consideration of argument – not deciding an issue as simple as whether one party has replied to a letter or not. See Rule R-20, *Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes)*, American Arbitration Association (Sept 15, 2005), available at <<http://www.adr.org/sp.asp?id=22440>>.

need the production of books, records, and other evidence? It would seem that a matter as simple as Rockwall’s “dispute” could be resolved by a brief, one-question inquiry by the arbitrator: “Have you, Municipality ‘X,’ provided a response to the landowner’s petition for inclusion in the annexation plan?” There would be no need for the subpoenaing of witnesses or the production of books, records, or other evidence to answer such a straightforward question.

Moreover, Subsection (e)(3)(B) permits the production of books, records, or other evidence that will be “*relevant to an issue presented to the arbitrator for determination.*” *Id.* § 43.0564(e)(3)(B) (emphasis added). Accordingly, in addition to Section 43.052(i)’s expectation of arbitration of a “dispute,” this incorporated section contemplates the arbitration of one or more “issues” that are to be presented to the arbitrator for determination. Given the overall context, the legislature was without doubt intending the use of binding arbitration for resolution of disputed substantive issues relating to annexation matters – not whether a city is willing to answer the mail. *See* TEX. GOV’T CODE ANN. § 311.011(a) (Vernon 2005) (a statute’s “[w]ords and phrases shall be read in context ...”).

In addition to the foregoing sections incorporated by reference from Section 43.0564, a close examination of the final sentence of Section

43.052(i) further negates the meaning proffered by Rockwall. That sentence sets forth a sanction for groundless or bad faith arbitration demands and provides, “If the arbitrator finds that the petitioner’s request for arbitration was groundless or requested in bad faith or for the purposes of harassment, the arbitrator shall require the petitioner to pay the costs of arbitration.” *Id.* § 43.052(i). If, as Rockwall contends, the only issue arbitrable under Section 43.052(i) is whether a city has failed to take an action to respond to a petition, the above-quoted cost-shifting provision would appear to be largely meaningless. Under Rockwall’s construction a groundless or bad faith petition would presumably only arise if the municipality had indeed responded to a petition, but the landowner or resident nonetheless sought arbitration of the so-called “dispute” of whether the city had made a decision or not. This is without doubt a strained interpretation. Instead, a more reasonable construction of Section 43.052(i)’s provision authorizing cost-shifting is that it represents the legislature’s check on groundless or spurious petitions relating to substantive annexation issues. A court should not “interpret statutory language so rigidly ‘that the almost certain intent of the Legislature is disregarded.’” *Finley v. Steenkamp*, 19 S.W.3d 533, 542 (Tex. App.—Fort Worth 2000, no pet.) (quoting *City of LaPorte v. Barfield*, 898 S.W.2d 288, 292 (Tex. 1995)).

B. The Legislature was Intentional in Authorizing Arbitration

That the legislature was intentional in authorizing arbitration of substantive annexation disputes through Section 43.052(i) should come as no surprise. An examination of the entirety of S.B. 89 reveals that the legislature authorized arbitration for an array of different types of annexation disputes as part of this lengthy bill. *See* S.B. 89, 76th Leg., R.S., ch. 1167, § 7, 1999 Tex. Gen. Laws 4074, 4082 (enacting Section 43.056(l), Texas Local Government Code, authorizing arbitration relating to petitions for changes in policy or procedures to ensure compliance with municipal service plans in populous municipalities “[i]f the municipality fails to take action with regard to the petition”); *id.* § 8, at 4084 (enacting Section 43.0564(a), Texas Local Government Code, authorizing arbitration of disputes relating to the provision of services either as part of an annexation or in lieu of annexation); *id.* § 12, at 4088 (enacting Section 43.0752, Texas Local Government Code, authorizing the arbitration of disputes regarding disagreements over the terms of strategic partnership agreements between municipalities and certain special districts); and *id.* § 4, at 4076-77 (enacting Section 43.052(i), Texas Local Government Code, which is the subject of

this appeal). In sum, the legislature made choices to permit arbitration for several differing types of substantive annexation disputes.

Senator Madla was the Senate author of S.B. 89, and Rep. Bosse was a House sponsor. Each served as the respective Senate and House Chairs of the Conference Committee on the bill. *See* Summary of Bill History, Tex. S.B. 89, 76th Legislature, R.S. (1999), *available at* <<http://www.capitol.state.tx.us/cgi-bin/db2www/tlo/billhist/billhist.d2w/report?LEG=76&SESS=R&CHAMBER=S&BILLTYPE=B&BILLSUFFIX=00089>>. Interestingly, during that same 1999 legislative session, these two legislators were key figures with regard to S.B. 262, another annexation bill. *See* Act of May 21, 1999, 76th Leg., R.S., ch. 544, § 1, 1999 Tex. Gen. Laws 3040-41 (“S.B. 262”). Senator Madla was a co-author and Representative Bosse was the House sponsor. *See* Summary of Bill History, Tex. S.B. 262, 76th Leg., R.S. (1999), *available at* <<http://www.capitol.state.tx.us/cgi-bin/db2www/tlo/billhist/billhist.d2w/report?LEG=76&SESS=R&CHAMBER=S&BILLTYPE=B&BILLSUFFIX=00262>>. This enactment added Section 43.0715(c) to the Texas Local Government Code. Subsection (c) authorizes *nonbinding* arbitration of certain annexation disputes relating to development costs. *See* TEX. LOCAL GOV’T CODE ANN. § 43.0715(c) (Vernon Supp. 2004-05). Although this

latter provision is generally unrelated to the types of disputes contemplated by Section 43.052(i) and S.B. 89, it nonetheless reflects that 1999's 76th Legislature and the sponsors of these different pieces of legislation were very cognizant of the availability of alternative remedies such as binding or nonbinding arbitration and were willing to use them to resolve substantive annexation disputes.

The legislature's employment in 1999 of an arbitral forum for resolving Section 43.052(i) annexation disputes is also consistent with the ongoing general trend of the Texas Legislature to require the use of ADR or arbitration as dispute resolution mechanisms. Indeed, as part of the 1987 Texas Alternative Dispute Resolution Procedures Act, the legislature decreed, "It is the policy of this state to encourage the peaceable resolution of disputes" TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (Vernon 2005). Although that chapter primarily relates to non-binding ADR procedures such as mediation, it also addresses both nonbinding and binding arbitration. *See id.* § 154.027. Since that enactment in 1987, our state has seen the passage of a plethora of statutes authorizing and encouraging the use of ADR or arbitration. Indeed, up to and including 1999 when S.B. 89 was enacted, the legislature authorized arbitration to resolve disputes in areas of the law that appear to represent far greater changes from former law

than the mere authorization for individual residents and landowners to arbitrate a narrow class of annexation disputes. By way of example, consider the following: (1) TEX. FAM. CODE ANN. § 6.601 (Vernon 1998) (enacted in 1997) (authorizing binding arbitration of divorce actions); (2) TEX. HEALTH & SAFETY CODE ANN. §§ 242.251-269 (Vernon 2001) (first enacted in 1995; amended in 1997 and 1999) (authorizing binding arbitration of certain nursing home disputes including cases involving the proposed assessment of statutory civil monetary penalties); and (3) TEX. BUS. & COMM. CODE ANN. § 20.08 (Vernon 2002) (enacted in 1997) (authorizing arbitration of disputes between consumers and consumer credit reporting agencies). Accordingly, the 76th Legislature's decision in S.B. 89 to grant an arbitration right to adversely impacted residents or landowners to seek resolution of disputes over a municipality's failure to include an area in that city's annexation plan appears to have been *intentional* and *not inconsistent* with an ongoing trend to turn to the use of ADR or arbitration.

V. Rockwall Wants This Court to be a Super-Legislature and Rewrite a Statute that the Cities Do Not Like

That Rockwall and the other Texas cities which have filed amicus briefs in this matter are unhappy with the Court of Appeals decision is readily apparent. Their displeasure is misdirected, however, given that the

Court of Appeals was merely interpreting Section 43.052(i) in a reasonable, common sense manner. If Rockwall and other cities (as well as the Texas Municipal League) have a continuing concern about the legislature's choice to permit arbitration as a dispute resolution mechanism for certain annexation disputes, their proper recourse is to seek a legislative solution. Instead, they are asking this Court to act as a "super-legislature" to re-write a statute that they find burdensome. This is not the role of the judicial branch, and this Court should decline the invitation.

CONCLUSION AND PRAYER

For the reasons set forth above, the Court of Appeals correctly determined that the legislature intended Section 43.052(i) of the Texas Local Government Code to allow individual residents and landowners to pursue arbitration to challenge an unauthorized annexation of territory by a municipality under Section 43.052(h)(1) of the Texas Local Government Code once the municipality has denied a request for inclusion in the municipality's three-year annexation plan. Accordingly, as amicus curiae, I urge the Court to deny Rockwall's petition for review. Alternatively, should this Court grant the petition, I submit that the Court should affirm the Court

of Appeals' decision, and render judgment ordering Rockwall to arbitrate the merits of Hughes' annexation dispute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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