

## STATEMENT OF INTEREST AND FEE DISCLOSURE

Amicus Curiae the City of Pearland, Texas ("City") is a home rule municipality with a significant interest in the outcome of this case. The City has consistently used, and continues to use, the expedited procedures contained in ' 43.502(h)(1) to annex vacant, undeveloped or sparsely settled land located within its extraterritorial jurisdiction. Under the holding in *Hughes*, cities such as Pearland will be required to submit to arbitration, at the city's expense, with each and every owner of such land who petitions to be included in the city's three-year annexation plan and is denied. The *Hughes* ruling affords this right to any such petitioning landowner without even requiring the landowner to make a showing that the city proposed to act in violation of the statute.

1. Following enactment of the changes to the annexation laws in 1999, the City has continued to annex vacant and undeveloped land under the traditional procedures requiring notice, preparation of a service plan, and dual public hearings. The City has not annexed primarily vacant land under the three-year annexation plan procedures introduced by the amendments. Under the holding in *Hughes*, cities such as Pearland will either have to include such land in a three-year annexation plan upon request of landowners in the annexed area, or engage in costly arbitration with as many landowners as demand it.

2. The City is a fast-growing suburb located southeast of Houston that is surrounded by vacant but rapidly developing land that lies within its two-mile extraterritorial jurisdiction. Because such land ultimately becomes part of the City, the City has a vital interest in expeditiously annexing this land in advance of new development, in order to establish appropriate land use and development standards and in order to plan for adequate levels of public facilities and services. The ruling in *Hughes* significantly impairs the City's ability to assimilate vacant land in advance of development,

by allowing owners of vacant property to compel the City to arbitrate the decision of whether the land should be annexed under traditional expedited procedures.

Amicus Curiae submits this brief in support of Rockwall's Petition for Review in order to underscore the jeopardy faced by Texas cities that have utilized and continue to utilize § 43.052(h)(1) to annex vacant, undeveloped or sparsely settled land in their extraterritorial jurisdictions. Under the decision in *Hughes*, a multitude of cities now are faced with the prospect of having to engage in multiple arbitrations with multiple landowners and with potentially disparate results. This erroneous ruling will have a chilling effect on the exercise of municipal jurisdiction to the public's detriment, is not supported by the wording of the statute, undermines the central policy issues protected by the quo warranto doctrine and cannot be allowed to stand.

The source of the fee paid or to be paid for preparing this brief is the City of Pearland, Texas. Tex. R. App. P. 11(c).

### **STATEMENT OF FACTS**

Amicus Curiae hereby adopts the Statement of Facts contained in Rockwell's Petition for Review.

### **SUMMARY OF THE ARGUMENT**

Amicus Curiae, and scores of other cities, have utilized the expedited procedures in Texas Local Government Code § 43.052(h)(1) to annex vacant, undeveloped or sparsely populated land in their extraterritorial jurisdictions. It is a procedural statute that has been widely used to accomplish such annexations. The holdings of the Texas Courts of Appeals in *Hardee*, *Werthmann* and *Lucas* establish that § 43.052 is a procedural statute and that a private party had no standing to collaterally attack an annexation based on alleged failures to follow the statute's provisions. Those cases hold that a challenge based on an alleged failure to follow the provisions of § 43.052 can only be chal-

lenged via a quo warranto action. The Court of Appeals in this case, however, found that a private party can collaterally attack an annexation based on alleged procedural irregularities thereby ignoring the above-mentioned case law and undermining a central policy of the quo warranto doctrine.

The Court of Appeals also ignored the express wording of § 43.052(i) by finding that a landowner who petitions to be included in a three year annexation plan, and is denied by the city, is entitled to arbitration on that issue by simply alleging that the proposed annexation was in violation of the statute. If allowed to stand, the Court of Appeals opinion in *Hughes* effectively eliminates a city's ability to utilize the expedited provisions of § 43.052(h)(1) because any effected landowner will be entitled to arbitrate its claim to be included in a three-year plan at the city's expense. This Court should grant Rockwall's petition and reverse the Court of Appeals ruling to avoid its unjust effect on municipalities throughout this state.

## **ARGUMENT**

### **I. Nature and Impact of Court of Appeals' Decision**

Texas Local Government Code Chapter 43 provides for two separate and distinct procedural tracks for annexation: (i) one relating to populous areas; and (ii) one relating to vacant, undeveloped or sparsely settled land. Vacant, undeveloped or sparsely settled land may be annexed under expedited procedures. See Tex. Loc. Gov't. Code §§ 43.062 to 43.064. Those expedited procedures apply to any annexation involving fewer than 100 parcels, each of which contains one or more dwelling units. These procedures were enacted by the Legislature in SB 89 to establish a balance between promoting municipal growth while providing protection to the substantive rights of landowners.

The longstanding doctrine of quo warranto limits judicial intrusion into the legislative prerogative of cities to grow. Under that doctrine, private parties may directly attack municipal an-

nexation of their land only on grounds that the city exceeded its fundamental authority to annex under the Act. *Alexander Oil Co. v. City of Seguin*, 825 S.W.2d 434, 439 (Tex. 1991). Procedural challenges to annexation can only be maintained by the State of Texas in a quo warranto proceeding. *Alexander Oil Co.*, 825 S.W. 2d at 439. The purpose of the quo warranto doctrine in this context is to prevent judicial second-guessing of municipal annexation decisions and to avoid the potential for conflicting decisions regarding the same annexation by multiple property owners. Chapter 43 was enacted at a time when the quo warranto doctrine was firmly established in Texas law.

The Court of Appeals' decision in this case completely disrupts the balance created by the Legislature under SB 89 and further offends the supporting doctrine of quo warranto. According to the *Hughes* court, an owner of vacant land in a city's extraterritorial jurisdiction may derail the city's annexation proceedings simply by asking to be placed in a three-year annexation plan and thereafter demanding arbitration if the city denies the request. This is a radical departure from current annexation law that could not have been intended by the Legislature. Nor could the Legislature have intended that the quo warranto doctrine be abrogated without expressly so providing.

Cities in Texas have a vital interest in the expansion of their boundaries. A recent study commissioned by the Texas Municipal League has shown that the economic interest of cities and of the State as a whole is substantially advanced by the orderly growth of cities. The State's annexation laws play a vital role in assuring that such growth continues to occur. In order for cities to accommodate growth in a timely manner, it is essential that they be able to expeditiously annex vacant land before inefficient land use patterns become established. This is necessary both for the efficient delivery of public facilities and services and to assure that development within what it is to be the City's future borders is consonant with that which already exists within its limits.

For such reasons, the Texas Legislature has provided that cities may annex vacant or sparsely populated areas in advance of development under Tex. Loc. Gov't Code chapter 43, subchapter C-1, requiring public notice, preparation of a service plan and two public hearings. This familiar procedure has not changed substantially for more than two decades. Under normal circumstances, annexation under subch. C-1 can be completed within 90 to 120 days.

Quite different concerns apply to annexation of populous areas. By definition, land use patterns within such areas already have been established. Typically, a range of public facilities already serve such areas. Annexation of such territory may be important for the long-term fiscal integrity of municipalities, or for improvement of service levels within the area, but the urgency of annexation is considerably diminished. Not surprisingly, in 1999 the Texas Legislature lengthened the annexation process for areas that contain at least 100 parcels that are occupied by one or more dwelling units each. *See* Tex. Loc. Gov't Code sec. 43.052(h). Prior to annexation of such territory, municipalities must prepare a three-year annexation plan and negotiate with constituent home owners concerning the levels and timing of municipal services. This procedure is now codified as subchapter C of Chapter 43. (While this process makes sense for populous areas, it has virtually no utility for vacant areas, because there are few if any services in such areas to begin with.)

The Court of Appeals decision in the *Hughes* case completely undermines the legislative framework established in 1999 by SB 89, which allowed cities on the one hand to expeditiously annex undeveloped areas, while requiring a three-year planning period for annexation of populous areas. By allowing a property owner in a sparsely settled area to compel arbitration in the event the city fails to honor his or her request to include the land in the three-year annexation plan through a private action, the court has effectively rendered chapter C-1 annexations obsolete. Once the word

is out that annexation of vacant land can be forestalled by demanding arbitration, virtually every property owner in a proposed annexation area can be expected to demand his or her right to arbitrate, because under the arbitration provision of section 43.052(i) the city must pay for the arbitration unless the petition has been filed in bad faith.

The widespread impact of this erroneous ruling cannot be discounted. The procedures provided in Section 43.052(h)(l) are widely used by municipalities throughout this state. The court of appeals ruling in *Hughes* not only renders future usage of such procedures unworkable, but also lends uncertainty to the status of current annexations utilizing such procedures. In short, the opinion has completely undermined the system established by the Legislature and must be reversed.

## **II. The Court of Appeals Opinion is Contrary to Prior Case Law Construing Texas Local Government Code § 43.052**

Three Texas appellate courts have considered challenges raised under ' 43.052; unequivocally ruled that the provisions of that statute regarding inclusion within a three year annexation plan are procedural in character; found that the statute does not affect the city's essential powers to annex land within its extraterritorial jurisdiction; and held that alleged violations of the statute can only be challenged in a quo warranto proceeding. *Werthmann v. City of Fort Worth*, 121 S.W. 3d 803, 807 (Tex. App. - Fort Worth 2003, no pet.) ("We agree with the cases holding that the provisions of § 43.052 are procedural requirements for annexation rather than limitations on a municipality's inherent authority to annex land."); *City of Balch Springs v. Lucas*, 101 S.W. 3d 116, 122 (Tex. App. Dallas 2002, no pet.); *City of San Antonio v. Hardee*, 70 S.W. 3d at 212 (Tex. App. San Antonio 2001, no pet.).

The *Hardee* court granted defendant's plea to the jurisdiction and dismissed plaintiff's claims holding that the challenges asserted based on alleged § 43.052 violations could only be

brought by a quo warranto proceeding. The *Hardee* court made the following rulings: **(a)** "[t]he new § 43.052 does not limit the area or type of land a city may annex; rather it prescribes a three year planning process, presumably to give the public better notice of proposed city growth and services." 70 S.W. 3d at 212; **(b)** "Tex. Loc. Gov't Code Ann. § 43.052(b) - (c) is a procedural requirement for annexation rather than a limit on the City's authority to annex." *Id.*; and **(c)** challenges to an annexation based on those subsections can only be brought in a quo warranto proceeding.

The *Werthmann* court reached the same conclusion and made the following findings: **(a)** "Currently, under Texas law, municipalities have the exclusive right to annex within their extra-territorial jurisdictions. This bill revises the municipal annexation process, requiring cities to implement advance annexation planning procedures and providing for the timely provision of services to the annexed areas, among other revisions." *Id.* at 807, citing Senate Research Center, Bill Analysis, Tex. S.B. 89, 76th Leg., R.S. (1999); **(b)** the statute was procedural in nature; and **(c)** quo warranto was required to raise a challenge to annexation based on § 43.052.

The *Lucas* court held that: "We agree with that court's [*Hardee*] characterization of the provisions of section 43.052 as being procedural, rather than limitations on the City's inherent authority to annex... Appellees' complaints about the City's lack of compliance with section 43.052 address procedure. As such, even if the alleged improprieties were proven by appellees, the proposed annexation would be voidable, not void. Consequently, the exclusive remedy is a quo warranto proceeding brought by a representative of the State of Texas. We conclude, therefore, that the appellees lack standing to bring this private action. Further, we conclude that because the appellees lack standing, the trial court lacked jurisdiction." (emphasis added) *Id.* at 122.

The rulings in *Hardee*, *Lucas* and *Werthmann* establish that alleged failures to follow the provisions of § 43.052 constitute nothing more than an irregularity in annexation procedures which can only be challenged in a quo warranto proceeding. The court's attempt to distinguish its prior opinion is inconsistent with the court's express statement in the *Lucas* opinion. The *Hughes* decision ignores this precedent and should be reversed.

### **III. The Court of Appeals Opinion Frustrates the Principal Goals of the Quo Warranto Doctrine**

One of the primary purposes of the rule against collateral attack in annexation proceedings, is stated in *Alexander Oil Co.*, 825 S.W. 2d at 437 (citations omitted) as follows:

"Furthermore, quo warranto proceedings serve another purpose. By requiring that the State bring such a proceeding, we avoid the specter of numerous successive suits by private parties attacking the validity of annexations.... The judgments of suits brought by private parties are binding only on the parties thereto so conflicting results might be reached in subsequent suits by other individuals. These problems are avoided by requiring quo warranto proceedings because the judgment settles the validity of the annexation on behalf of all property holders in the affected area." (Internal citations omitted.)

See also *Werthmann*, 121 S.W. 3d at 807, citing *City of Wichita Falls v. Pearce*, 33 S.W.3d 415, 417 (Tex. App. -- Fort Worth 2000, no pet.).

The *Hughes* opinion summarily dismisses the concerns over multiple arbitration proceedings and, in fact, creates a blue print for multiple procedural challenges to annexations with multiple arbitration proceedings and potentially disparate results. This is the very result that the quo warranto doctrine aims to avoid. By placing the decision on whether to challenge an alleged procedural violation in the hands of the state (i.e. - the Attorney General or a District Attorney), quo warranto creates a gatekeeper system to weed out unwarranted claims. In the absence of specific authorization to cre-

ate a private right of action under § 43.052(i), which does not exist, the *Hughes* court erred in failing to affirm the grant of Rockwall's plea to the jurisdiction.

1. The likelihood of multiple arbitrations under section 43.052(i) is a virtual certainty. The “right to arbitrate” defined by the court of appeals in *Hughes* is a private right, not a collective right. There is nothing in the procedure that induces a property owner to choose an arbitrator selected by another property owner. This contrasts sharply with the arbitration provisions in sec. 43.0564, which apply to annexation of land under the three-year annexation plan. In the event that an impasse is reached in negotiating service levels, a city must arbitrate the service level with a committee of landowners appointed by the commissioners’ court of the county in which the land is located. The result of arbitration thus will not vary according to who the property owner is. Section 43.0564(g) also provides for judicial review of the arbitrator’s decision to assure that he or she has not exceeded the authority vested. The manner of judicial review of arbitrations under subsection (i) is not even specified in the statute.

2. The chaos that may be created by multiple arbitrations is considerable. The effect of a single arbitration on the overall annexation proposed depends on where the property is situated relative to municipal boundaries and to other properties in the territory to be annexed. If the property provides the adjacency with municipal boundaries required by the statute, then an arbitrator’s decision for such land will determine the procedure for all of the land to be annexed. If, for example, the arbitrator rules that the municipality should have included the contiguous parcel in a three-year annexation plan, but a different arbitrator determines that the city could annex a more remotely located parcel under expedited procedures, the first arbitrator’s decision will nullify the second decision.

#### **IV. The Court of Appeals Misinterprets and Misapplies the Statute**

Under § 43.052(i), a landowner who petitions for inclusion of his land in a three-year annexation plan is entitled to arbitration only if the city "fails to act" on the petition. The phrase "take action on the petition" allows the city either to grant or deny the relief requested in the petition. The *Hughes* opinion ignores this rule of statutory construction and substitutes the phrase "fails to approve the petition" for "fails to take action on the petition."

Under the *Hughes* decision, the power to annex undeveloped land provided for in § 43.052(h)(1) is fettered by the newly created right to arbitrate a dispute over the city's choice of annexation procedures. Cities will be faced with the potential of an arbitration proceeding for every parcel to be annexed. The city's choice to include the land in a three-year plan or arbitrate at its own expense is no choice at all. The *Hughes* holding will render meaningless the expedited procedure for annexation under subch. C-1 created by 1999 amendments.

Under Tex. Loc. Gov't. Code § 43.052(i), a landowner who petitions for inclusion in a three-year annexation plan must show that (1) the city proposes to annex two separate areas, each of which contains fewer than 100 parcels occupied by a dwelling unit, for the purpose of circumventing its statutory obligations and (2) the city has no reason ... under generally accepted municipal planning principles and practices for separately annexing the areas. (emphasis added)

In the *Hughes* case, the Plaintiff does not identify how Rockwall "proposes to annex land in violation of the statute". Under the *Hughes* opinion, the mere allegation of a landowner that some irregularity exists is apparently enough to scuffle an annexation proceeding under § 43.052(h)(i). Such an interpretation is in conflict with the express wording of in the statute and creates a right that is neither provided in the statute nor was intended by the Legislature.

**CONCLUSION**

For all these reasons, Amicus Curiae respectfully requests that the Court accept the City of Rockwall's Petition for Review in this matter.

Respectfully submitted,

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