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September 21, 2020

Blake A. Hawthorne
Clerk of the Court
The Supreme Court of Texas
Supreme Court Building
201 W. 14th, Room 104
Austin, Texas 78701

Re: Cause No. 20-0393; James Frederick Miles v. Texas Central Railroad & Infrastructure, Inc. and Integrated Texas Logistics, Inc., on Petition for Review from the Court of Appeals, Thirteenth District of Texas, Corpus Christi-Edinburg, Texas, Case No. 13-19-00297-CV

**LETTER BRIEF OF AMICUS CURIAE TEXAS AND SOUTHWESTERN
CATTLE RAISERS ASSOCIATION**

Dear Mr. Hawthorne:

To the Honorable Justices of the Supreme Court of the State of Texas:

Amicus Curiae Texas and Southwestern Cattle Raisers Association submits this letter brief in support of Petitioner James Frederick Miles. We ask that copies of this letter be circulated to the chambers of the Justices of the Supreme Court as they consider the pending case. In accordance with Rule 11 of the Texas Rules of Appellate Procedure, I certify that copies of this Letter Brief of Amicus Curiae have been served on all parties.

I. STATEMENT OF INTEREST

The Texas and Southwestern Cattle Raisers Association (TSCRA) is a 143-year-old trade association and is the largest and oldest livestock organization based in Texas. TSCRA has more than 17,000 beef cattle operations, ranching families, and businesses as members. These members represent approximately 55,000

individuals directly involved in ranching and beef production who manage 4 million head of cattle on 76 million acres of range and pastureland primarily in Texas, Oklahoma, and throughout the Southwest.

The membership of TSCRA is comprised of agricultural operators, growers, and producers in the State of Texas who are concerned with the growing encroachment of eminent domain on landowners and the impacts to the agricultural economy in Texas, which has grown to more than \$21 billion annually. TSCRA is not a party to the case and will pay all attorneys' fees incurred in the preparation of this letter brief. TSCRA seeks to provide important context concerning the far-reaching implications of continued expansion of eminent domain in Texas and the need to protect private property rights in Texas and ensure a fair and complete process for landowners.

II. STATEMENT OF JURISDICTION, ISSUES PRESENTED AND STATEMENT OF FACTS

TSCRA adopts and incorporates by reference herein the Statement of Jurisdiction, Issues Presented, and Statement of Facts set forth in the Petition for Review.

III. SUMMARY OF ARGUMENT

Texas rural landowners and livestock producers have come under threat in recent years from the growing encroachment of oil and gas production and an ever-increasing and extensive system of pipelines, many of which are for export from the U.S. or serve only a single corporate interest. Exponential population growth throughout Texas has led to a near-constant expansion of infrastructure, including water lines, reservoirs, electric transmission lines, and roads. All of these projects cross the expansive rural Texas landscape, often permanently altering the land and limiting its use in the future.

Landowners who pour their life savings into beautiful land for retirement or farmers who have worked their land for generations are finding themselves at the mercy of private companies all in the name of "infrastructure." The projects, while seemingly important on a micro basis are all taking place over and across property

taken by force. The system is grossly unbalanced. These companies offer low, often below-market payments for easements, sometimes aggressively pursuing agreement from property owners. If the landowners refuse, the companies sue.

This case highlights once again the lack of sufficient process and government oversight of the eminent domain process in Texas. Landowners are left at the mercy of private corporations whose concerns are solely efficiency and cost and who often aggressively pursue these ends at the expense of fairness and due process to serve shareholders. Individual impacts to landowners are neither considered nor prioritized. The process too often is unbalanced for the sake of expediency. At present, the last protection landowners have is a constitutionally thorough day in court.

Too often overlooked are the societal contributions of the private land that is taken in these projects, the permanent damage caused to the land by the takings, and the impacts to the economy. Eminent domain must be viewed through the broader lens of increasing private development and infrastructure expansion and the near-constant encroachment of these activities on rural Texas land used and needed for agriculture. Texans can find new ways of traveling between Dallas and Houston, but they cannot find new land to grow crops or raise livestock once that land is taken and developed.

The protection of property is considered one of the central tenets of American democracy. Alexander Hamilton described “the security of property” as one of the primary functions of government. *See Kelo v. City of New London, Conn.*, 545 U.S. 469, 496 (2005) (O’Connor, J., dissenting). That principle thread has remained constant over time, but it has become frayed. The constitutional limitations of public use and just compensation together “ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government’s eminent domain power....” *Id.* Constitutional application of state laws, therefore, requires that takings of private property must receive the highest scrutiny. Expedience in the affairs of governmental function cannot supplant constitutional protections and limits. This Court is the ultimate gatekeeper for eminent domain in Texas to ensure a fair and complete process for landowners. This case provides an important opportunity for the Court to ensure that this process is not displaced by private development.

IV. ARGUMENT

A. Texas Land and Agriculture

The heart of Texas is its land. With over 172 million acres, Texas is one of the largest states in the country. Unique in its sweeping views and widely varied landscapes, Texas boasts striking deserts and canyons in the west, impressive piney-wood forests in the east, grasslands to the north and an expansive coastline along the south overlooking the Gulf of Mexico. Ninety-five percent of this vast landscape is privately owned. Tex. A&M Nat. Res. Institute, *Texas Land Trends: Status Update and Trends of Texas Working Lands 1997-2017* (“Texas Land Trends”), Dec. 2019, at 16, available at https://txlandtrends.org/media/qzpb1z2j/texas-land-trends_status-update-and-trends-of-tx-working-lands.pdf. Over eighty percent—more than 140 million acres—of Texas land is rural. Tex. Dept. of Agriculture, *Tex. Ag Stats*, available at <https://www.texasagriculture.gov/About/TexasAgStats.aspx>. Texas ranks first nationally with the largest number of farms and agricultural acreage. *Texas Land Trends*, at 16. But Texas is about more than its size and beauty.

Texas land is truly the lifeblood of this state. Contributing more than \$20 billion annually to the Texas economy, these rural lands play an important role in producing food and fiber, sustaining wildlife, supporting rural economies, and supplying clean air and water. *Id.* Yet, the landscape is changing. Increasing populations, urban sprawl, and growing development places significant pressure on working lands. Between 2010 and 2017, Texas added on average nearly 450,000 new residents each year. Texas State Library and Archives Commission, available at: <https://www.tsl.texas.gov/ref/abouttx/census.html>.

Land trends in recent years demonstrate a sharp increase in land-use conversion (e.g., farm to residential development), with a loss of over 2.2 million acres of working lands in Texas between 1997 and 2017, and 1.2 million of that loss occurring in the last five years. *Texas Land Trends*, at 14. The negative impacts to the economy and the environment from the growing loss of these working lands and open space are substantial. Working lands typically help retain water by letting rain percolate into the ground, recharging groundwater resources and aquifers. These benefits are reduced or eliminated as rural lands diminish and fragment. Land fragmentation also has negative impacts on agricultural sustainability and

profitability. With agriculture production contributing nearly \$20 billion annually to the Texas economy and the hunting and angling industry contributing another \$5.7 billion annually, the impacts of increasingly fragmented land to the Texas economy are potentially far-reaching.¹

B. High Speed Rail Impacts to Rural Land and the Need to Protect Private Property Rights

Land fragmentation is the greatest threat to rural, working and open space lands in Texas. While economic and residential development are one source of fragmentation, increasingly the greatest threat to these rural landscapes are privately-funded projects, like high speed rail and pipelines. When private development projects are allowed to sever working and open space lands, it reduces the land's ability to conserve water, produce food, and support wildlife. Clearing and removal of vegetation and forest cover for project routes can take decades or even centuries to recover. Even more than with pipelines, the land taken for high speed rail would be rendered unusable for any other purpose. These private development projects not only destroy the meaningful use and character of the land, but they do so without adequate due process.

Texas has long-protected the right of its citizens to hold and own private property. Chief among these protections is the requirement that private property may only be taken for a public use and with adequate compensation. U.S. CONST., amend. V; TEX. CONST., art. 1, § 17. The loss of the land and the economic benefit of its use in agriculture can never be fully recouped. Equally significant is the constitutional guarantee of due process of law, which covers all manner of actions from notice to a fair and impartial process. *See* U.S. CONST., amend. V; TEX. CONST., art. 1, § 19.

¹ *See* USDA Economic Research Service, *available at*: <https://data.ers.usda.gov/reports.aspx?ID=178440>; Americas Sportfishing Association, *available at*: <https://asafishing.org/state-reports/economic-impacts-of-recreational-fishing-texas/>; Joe L. Outlaw, David P. Anderson, Margaret L. Earle, and James W. Richardson, Economic Impact of the Texas Deer Breeding and Hunting Operations, April 2017, at 5, *available at*: <https://texasdeerassociation.com/wp-content/uploads/2017/06/Economic-Impact-Texas-Deer-Breeding-and-Hunting-Operations.pdf>.

In recent years, the Texas Supreme Court has reaffirmed the importance of private property rights and the constitutional protections sheltering those rights:

This Court has repeatedly, recently, and unanimously recognized that strong judicial protection for individual property rights is essential to “freedom itself.” ... Individual property rights are “a foundational liberty, not a contingent privilege.” They are, we affirm today, “fundamental, natural, inherent, inalienable, [and] not derived from the legislature,” and “preexist[] even constitutions.”

Harris County Flood Control District v. Kerr, 499 S.W.3d 793, 804 (Tex. 2016) (quoting Justice Willet) (internal citations omitted). This Court has consistently embraced the importance of balancing the need for development with strong protection of individual property rights. *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192, 204 (Tex. 2012) (reasoning “our Constitution and laws enshrine land ownership as a keystone right”).

With thousands of acres of land being taken every year in Texas, robust government oversight of the eminent domain process is not only needed but essential. For now, this oversight falls squarely at the feet of Texas courts. “The judiciary has a fundamental obligation to facilitate a landowner’s right to meaningfully contest the exercise of eminent domain under the facts and circumstances of the individual case.” *Hlavinka v. HSC Pipeline Partnership, LLC*, --S.W.3d--, 2020 WL 3393540, *8 (Tex.App.—Houston [1st Dist.] June 18, 2020, no pet. h.). The Court of Appeals in this case suggests a landowner’s ability to bring suit and defend itself in court *after* a taking is sufficient process. *Tex. Central Railroad & Infrastructure, Inc. v. Miles*, 2020 WL 2213962, *9, n. 3 (Tex.App.—Corpus Christi-Edinburg, May 7, 2020). The constitutional protections of private property, however, demand more.

Each day, Texas landowners face the taking of their land by companies whose primary focus is maximizing profits and minimizing costs and not complying with constitutional requirements or supplying a fair value for property taken. The system of taking private property for shareholder gain is far too efficient and all too often unchecked. Landowners are relegated to mere bystanders as they watch the permanent disruption of their pristine landscapes, destruction of century-old trees,

and damage to carefully nurtured soils and pastureland. The courts, therefore, are the landowner's last and best hope for ensuring the continued constitutional protection of private property rights when the next privately-funded project comes knocking at their door. *See Texas Rice*, 363 S.W.3d at 204. The Court of Appeals decision in this case fails to recognize or uphold these key constitutional protections of private property and highlights the important and essential role of the courts in upholding these requirements. *See id.*

C. The Taking of Texas Land Needs Oversight from a State Agency

Texas needs a better system. This case provides the Court an opportunity to further address the inequities of the eminent domain process in Texas. This Court's reasoning and analysis in the *Texas Rice* cases should apply with equal force in the high speed rail context—confirming the special scrutiny that must be applied to eminent domain procedures and to ensure constitutional protections of private property remain robust. *See* 363 S.W.3d at 205. The Court can ensure the ability of landowners to have a full evidentiary challenge to any taking of their property and damages if necessary. Landowners are entitled fully and meaningfully to participate and challenge the need and routing of the high speed rail project *before* their land is taken.

In the high speed rail context, there is no government oversight of the eminent domain process. No one but the private entity claiming eminent domain authority is watching to ensure that constitutional protections of due process and private property are respected.² An environmental assessment by a federal agency does not afford landowners the same ability to challenge direct impacts of a chosen route on their land or the basis for choosing one route over another. The Texas Legislature has yet to approve or grant authority for the high speed rail project. In fact, the Texas Legislature passed in 2017 a statute prohibiting any state funding for the “planning, facility construction or maintenance, security for, promotion of, or operation of,

² Even the Federal Railroad Administration acknowledged in its September 11, 2020 final rule on the Texas Central Railroad High Speed Rail Safety Standards that it defers to Texas state law on the issue of eminent domain. *See* Texas Central Railroad High Speed Rail Safety Standards, -- Fed. Reg.--, at 50 (49 C.F.R. Part 299), available at: <https://railroads.dot.gov/sites/fra.dot.gov/files/2020-09/2130-AC84%20TCRR%20final%20RPA%20clean.pdf>.

high-speed rail operated by a private entity.” Tex. Transp. Code § 199.003. Federal approval has been requested, but authority to construct or operate the project has yet to be approved.³

The Court of Appeals has by its decision ceded all authority on this project to a private corporation without specific authorization by the state. This itself is a constitutional issue that merits this Court’s attention as it requires a landowner to give up his property to a private group of investors who *hope* to have a railroad. Landowners should be able to trust that there is a state agency overseeing the routing and eminent domain process of the high speed rail project to ensure a robust and complete opportunity to challenge the taking of their land. And yet, this has not happened in Texas. Texas landowners remain at the mercy of a private corporation threatening to take their land without adequate state agency oversight of the eminent domain process. This Court has the opportunity to ensure the continued and important constitutional protection of private property rights, and TSCRA urges this Court to do so.

V. CONCLUSION

Rural land is the heart and soul of Texas and the lifeblood of the multi-billion dollar agricultural industry. Agriculture cannot function without the land, and when it is threatened by eminent domain wielded by a private corporation, the highest constitutional scrutiny and due process must be applied. The courts are the landowner’s only forum to ensure that these constitutional protections are upheld against private entities cloaked in the power of eminent domain. Each time a private entity is allowed to condemn private property without a robust, fair, and public process, the constitutional protections of private property are eroded. Where the Legislature has failed to define constitutional protections, the courts must fulfill this role. The Court of Appeals below failed to guard these protections. Loss of property

³ Further, Appellee has sought the jurisdiction of the federal Surface Transportation Board for the project. The Board recently ruled on Appellee’s request and claimed jurisdiction over the project but denied Appellee’s request for an exemption for filing an application. The Board made clear that before Appellee can *construct or operate* the high speed rail, it must file a full application. See Tab B to Response to Petition for Review. The Board cited the concern over adequate funding of the high speed rail project as the primary reason for requiring a full application—the same concern raised by Appellants in this appeal.

at the hands of a private enterprise raises questions of liberty of the highest magnitude. Courts should ensure that the routing and eminent domain process for projects like the high speed rail project is robust and protective. Constitutional gatekeeping mandates stricter scrutiny than the court applied here. TSCRA urges the Court to grant the Petition for Review in this case and take this important and essential opportunity to confirm the constitutional protections of private property and due process.

Respectfully submitted,

/s/ James D. Bradbury

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CERTIFICATE OF COMPLIANCE WITH TRAP 9.4(i)

This is to certify that the foregoing Letter Brief of Amici Curiae consists of 2,758 words, in accordance with the Texas Rule of Appellate Procedure 9.4(i)(2).

/s/ James D. Bradbury
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CERTIFICATE OF SERVICE

On this 21st day of September, 2020, a true and correct copy of the foregoing document was served on all parties of record indicated below in accordance with the Texas Rules of Appellate Procedure through electronic service by the electronic filing manager.

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