

No. 03-12-00555-CV

IN THE THIRD COURT OF APPEALS  
AUSTIN, TEXAS

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Texas Commission on Environmental Quality,  
*Appellant*

v.

Angela Bonser-Lain; Karin Ascot, as next friend on behalf of TVH and  
AVH, minor children; and Brigid Shea, as next friend on behalf of EBU,  
a minor child,  
*Appellees*

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AMICUS BRIEF BY THE HONORABLE LON BURNAM, ET AL.,  
IN SUPPORT OF APPELLEES

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**Table of Contents**

Table of Authorities..... ii

IDENTITY OF AMICI CURIAE..... 1

ARGUMENT..... 11

    I.  Texans Are Already Suffering Extreme Climate Change Impacts ..... 11

    II. The Texas Water Code Clearly Provides for Judicial Review ..... 16

    III. The Public Trust Doctrine is a Judicially Interpreted and Enforced  
        Doctrine Under the State Constitution and at Common Law ..... 19

CONCLUSION and PRAYER..... 23

## Table of Authorities

### Cases

<i>A.W. Gregg v. Delhi-Taylor Oil Corp.</i> , 344 S.W.2d 411 (Tex. 1961) .....	18
<i>Ariz. Ctr. for Law in the Pub. Interest v. Hassell</i> , 837 P.2d 158 (Ariz. Ct. App. 1991) .....	23, 24
<i>Bonser-Lain v. Tex. Comm’n on Env’tl. Quality</i> , No.D-1-GN-11-002194 (Dist.Ct. Tex., July 9, 2012).....	21
<i>Butler v. Brewer</i> , No. 1CA-CV-12-0347 (Ariz. Ct. App. 2013) .....	23, 24
<i>Dubai Petroleum Co. v. Kazi</i> , 12 S.W.3d 71 (Tex. 2001).....	17
<i>Geer v. Connecticut</i> , 161 U.S. 519 (1896) .....	21, 22
<i>Grounds v. Tolar Indep. Sch. Dist.</i> , 707 S.W.2d 889 (Tex. 1986) .....	17
<i>Hughes v. Oklahoma</i> , 441 U.S. 322 (1979).....	21
<i>Ill. Cent. R.R. v. Illinois</i> , 146 U.S. 387 (1892) .....	21
<i>Kootenai Env’tl. Alliance, Inc. v. Panhandle Yacht Club, Inc.</i> , 671 P.2d 1085 (Idaho 1983) .....	24
<i>Tex. Natural Resource Conservation Comm’n v. Sierra Club</i> , 70 S.W.3d 809 (Tex. 2002).....	17
<i>West v. Tex. Comm’n on Env’tl. Quality</i> , 260 S.W.3d 256 (Tex. App. 2008).....	17

### Statutes

TEX. WATER CODE § 5.012 .....	16
TEX. WATER CODE § 5.351 .....	16

### Other Authorities

Caesar Flavius Justinian, <i>The Institutes of Justinian</i> , Book II, Title I, Of The Different Kinds of Things (533) .....	22
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Charles L. Wilkinson, <i>The Public Trust Doctrine in Public Land Law</i> , 14 U.C. DAVIS L. REV. 269 (1980).....	22
Gerald Torres, <i>Who Owns the Sky?</i> , 18 PACE ENVTL. L. REV. 227 (2001). ...	4
Joseph L. Sax, <i>The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention</i> , 68 MICH. L. REV. 471 (1970).....	22
<b>Constitutional Provisions</b>	
TEX. CONST., Art. 2, Sec. 1 .....	18
TEX. CONST., Art. 5, Sec. 1 .....	18

## **IDENTITY OF AMICI CURIAE**

As required by Texas Rule of Appellate Procedure 11, the amici curiae make the following disclosures:

The Honorable Lon Burnam has served in the Texas House of Representatives, representing District 90 in Fort Worth since 1997. Rep. Burnam currently serves on the House Environmental Regulation and Homeland Security and Public Safety Committees. His legislative work focuses on consumer issues, anti-discrimination, fair taxation, energy, and the environment.

A longtime conservationist and advocate for the environment, Rep. Burnam received the "Millennium Conservation Award" from the Texas Committee on Natural Resources in 1999. He was the recipient of the 1997 "New Leadership for the Environment" Award from the Texas Chapter of the Sierra Club, which is given to an outstanding freshman legislator who displays leadership in protecting the environment. Also in 1997, Rep. Burnam was named "Best Public Official" by the Fort Worth Weekly. Rep. Burnam received the Texas Surfrider Foundation's 2003 "Keeper of the Coast" award.

In keeping with his tireless advocacy to protect this State's natural resources, Rep. Burnam supports the youths' efforts in this case and urges

this Court to uphold the trial court's ruling, which recognizes our State's Constitution requires the preservation and conservation of all natural resources, including the air and atmosphere.

Larry Soward is a former Commissioner of the Texas Commission on Environmental Quality, appointed by Governor Perry to the Commission in October 2003 and serving until his term expired on August 31, 2009. He has more than 32 years of experience leading state agencies, and served as the deputy land commissioner of the Texas General Land Office and Veterans' Land Board, the deputy commissioner of the Texas Department of Agriculture, and the deputy executive director of the Texas Public Utility Commission. In addition, Mr. Soward has been executive director of the Texas Water Commission, the predecessor to the TCEQ, the culmination of a 12-year tenure at that agency. During his time at the Water Commission, he was also its general counsel and chief hearings examiner. He was also appointed by the Governor to serve on the Texas Energy Planning Council in 2004.

Mr. Soward currently serves as an independent consultant, advising clients such as Air Alliance Houston, Environmental Defense Fund, and the Environmental Integrity Project on issues, strategies, and policies associated with Texas air permitting and enforcement and related matters. Because of

his extensive background and experience in matters related to environmental regulation, the issues presented in this case are of particular interest to Mr. Soward.

Professor Gerald Torres holds the Bryant Smith Chair at the University of Texas. He is an expert in environmental law, agricultural law, and in critical race theory. Before coming to Texas, Prof. Torres served as deputy assistant attorney general for the Environment and Natural Resources Division of the U.S. Department of Justice in Washington, D.C., and as counsel to then U.S. Attorney General Janet Reno.

Professor Torres is a past president of the Association of American Law Schools. He has served on the board of the Environmental Law Institute, the National Petroleum Council, and on EPA's National Environmental Justice Advisory Council. He currently is Board Chair of the Advancement Project, the nation's leading social and racial justice organization. He is also on the board of the Natural Resources Defense Council and is Vice-Chairman of the Board of Earth Day Network. He has been a visiting professor at Harvard, Stanford and Yale law schools.

Among Prof. Torres' numerous publications<sup>1</sup> is *Who Owns the Sky*,<sup>2</sup> which includes an early discussion of the application of the trust doctrine to the atmosphere.

The Texas League of Conservation Voters Educational Fund (TLCV—EF) was established in 1999 as a not-for-profit organization that educates Texans on and advocates for clean air, clean water, renewable energy, and the protection of parks, opens spaces, and wildlife habitat. TLCV—EF supports efforts, initiatives, and policies to improve the quality of air Texans breathe. The organization also works to empower the citizens of Texas to become civically engaged and have a voice in how the decisions on environmental policy that affect their lives are made. The issues raised in this appeal coincide with the objectives of the organization—namely, public participation in the environmental regulatory process to ensure protection of our natural resources, including air quality.

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<sup>1</sup> His book, *The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy* (Harvard University Press, 2002) with Harvard Law Professor Lani Guinier, was described by *Publisher's Weekly* as "one of the most provocative and challenging books on race produced in years." Additional articles by Prof. Torres include "Translation and Stories" (Harvard Law Review, 2002), "Taking and Giving: Police Power, Public Value, and Private Right" (Environmental Law, 1996), and "Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case" (Duke Law Journal, 1990). He has recently published articles on ground water in the Yale Law Journal (online) and on the Fisher case in the Vanderbilt Law Review (online).

<sup>2</sup> Gerald Torres, *Who Owns the Sky?*, 18 PACE ENVTL. L. REV. 227 (2001).



Sierra Club is a national nonprofit organization of approximately 600,000 members<sup>3</sup> dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club's concerns encompass the health and environmental consequences of climate change, including higher summer smog levels in urban areas, more severe droughts, more frequent and severe storms, record numbers of wildfires, record crop losses, loss of species diversity, and many other effects. The Club has successfully implemented several public interest campaigns in its efforts to combat climate change, such as the Beyond Coal Campaign. Appellees' advocacy for the regulation of greenhouse gases in this case is consistent with the goals of the Club.

Public Citizen is a national, nonprofit consumer advocacy organization founded in 1971 to represent consumer interests in Congress, the executive branch, and the courts. The organization has over 100,000 members. Public Citizen is divided into six divisions, one of which is the Critical Mass Energy Program. The energy program safeguards consumers,

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<sup>3</sup> The Lone Star Chapter of the Sierra Club has approximately 21,000 members in the state of Texas.

fighters against environmental degradation, and promotes clean energy alternatives.

Public Citizen's Texas office was established in 1984. The main focus of the Texas office has been and continues to be clean energy; the Texas office has worked on global warming issues since 1989. Consistent with its focus, the Public Citizen Texas office supports the trial court's decision, recognizing that protection of our air quality is required by the Texas Constitution.

Air Alliance began in 1988 as the Galveston Houston Association for Smog Prevention, then joined forces with Mothers for Clean Air in 2010 to form Air Alliance Houston. Air Alliance Houston (Alliance) is dedicated to reducing air pollution in the Houston region to protect public health and environmental integrity through research, education, and advocacy. The Alliance was founded in 2010 by a coalition of groups concerned with the air quality in the Houston region. The Alliance actively participates in developing legislation, community organizing, and outreach. Air Alliance Houston advocates for clean air so our State's and region's economy, quality of life, and children can thrive.

The Sustainable Energy and Economic Development (SEED) Coalition is an alliance of individuals, businesses, and organizations

advocating sustainable energy strategies for Texas, including the use of energy efficiency and renewable energy. SEED Coalition educates the public about the economic, environmental, and health benefits of a sustainable energy strategy. It tracks relevant policy-making and legislative processes and informs the public of opportunities to voice their opinions. SEED Coalition supports the trial court's ruling in this case regarding the public trust doctrine and its applicability to our air and atmosphere.

Environment Texas is a statewide, citizen-based environmental advocacy organization. Its core mission is to protect air, water, and open spaces in Texas. The organization researches the challenges confronting Texas' environment, educates the public about environmental issues, and advocates for sensible solutions. Among its successful campaigns is the Texas Clean Air Project. Through this project, Environment Texas successfully sued polluting entities for violating the Clean Air Act, forcing them to significantly reduce their pollution levels and pay several million dollars in fines. The efforts of the youths in this case are consistent with the objectives of Environment Texas, and thus, Environment Texas supports those efforts, as well as the trial court's ruling requiring protection and conservation of our air and atmosphere.

The Texas Drought Project was founded four years ago and is mainly funded by individual donations and donations made from foundations around the state. The Project brings together experts in farming, ranching, hydrology, civil engineering, climatology, and environmental science to present forums in key regions most affected by drought. The subject matter ranges from recognition of indicators of climate change, recommendations for modifications to policies governing water, methods of conservation, and solutions to the overall problem. Special attention is placed on lower-income indigenous and immigrant populations, which have fewer resources for adaptation. The Texas Drought Project espouses the view that all natural resources of this State, including our air and atmosphere, must be preserved and protected; accordingly, the Project supports the efforts the trial court's ruling in this case.

Texas Campaign for the Environment (TCE) is a nonprofit membership organization dedicated to informing and mobilizing Texans to protect their health, their communities, and the environment. Additional information about TCE and its achievements can be found at <http://www.texasenvironment.org>.

TCE has a demonstrated commitment to the enforcement of anti-pollution laws designed to stop or clean up air, water, and waste pollution.

For instance, TCE is the lead Texas environmental group working to promote sound electronic waste practices to clean up air and water pollution from electronic waste. TCE took a leading role in the effort to close the so-called “grandfather” loophole in the Texas Clean Air Act. TCE has also helped organize communities where coal plants were proposed to be sited. TCE has supported strengthening the ozone standards at the federal level. TCE has a history of working to improve the TCEQ’s enforcement of anti-pollution laws and response to citizens’ pollution concerns.

TCE supports the efforts of the Appellees in this case and in particular, supports the principle that the public trust doctrine and the Conservation Amendment require protection of our air quality.

Annemarie Manley is a thirteen-year-old Texan and founder of the non-profit organization Planet H.E.A.L. (Help the Earth And Lives). For as long as she can remember, she has wanted to show people in her community the impacts of climate change, and why it is detrimental to young people. She wants people to understand that climate change is a problem, and that we are causing this problem. Most importantly Annemarie and her organization want to show people that young people can make a huge difference in the climate change movement.

Planet H.E.A.L. is a non-profit environmental organization founded by Annemarie Manley and run by kids (with a little help from their parents), who strive to make a difference and spread awareness. Planet H.E.A.L. aims to reduce the level of carbon dioxide and methane in the atmosphere, help endangered species, and do anything that needs doing to improve our environment. Like the youths involved in this case, Planet H.E.A.L. members seek to improve our air quality and support efforts to implement regulations aimed at air quality protection.

Texas Black Bass Unlimited (T.B.B.U.) is a non-profit, membership organization founded in 1985, by a handful of conservation-minded freshwater fishermen. Since then, the organization has grown to become a statewide organization of fishermen and other conservation-minded individuals. T.B.B.U. advocates for the protection of the State's natural resources. T.B.B.U. supports the efforts of the youths in this case to protect our natural resources, and agrees with the trial court's ruling that our air and atmosphere are included among those natural resources that must be preserved and protected.

The law firm of Lowerre, Frederick, Perales, Allmon & Rockwell has offered its pro bono services to represent the amici curiae. No sources of funds are being provided for the cost of this brief.

## ARGUMENT

Amici Curiae submit this brief in support of the youth Appellees and ask this Court to uphold the legislature's express intent to give Texans the right of judicial review over decisions by the Texas Commission on Environmental Quality (TCEQ or Commission). Amici Curiae further implore the Court not to set aside a judicial decision that is well within the prerogative of the judiciary, whose job it is to interpret the law and render legal decisions. While the questions presented to the Court are jurisdictional in nature, this case's underlying dispute over whether the TCEQ can and should regulate greenhouse gas emissions is one that affects all Texans, as our state faces ongoing impacts from climate disruption. Judicial review of these types of critical questions is essential to maintain the separation of powers that democracy requires.

### **I. Texans Are Already Suffering Extreme Climate Change Impacts**

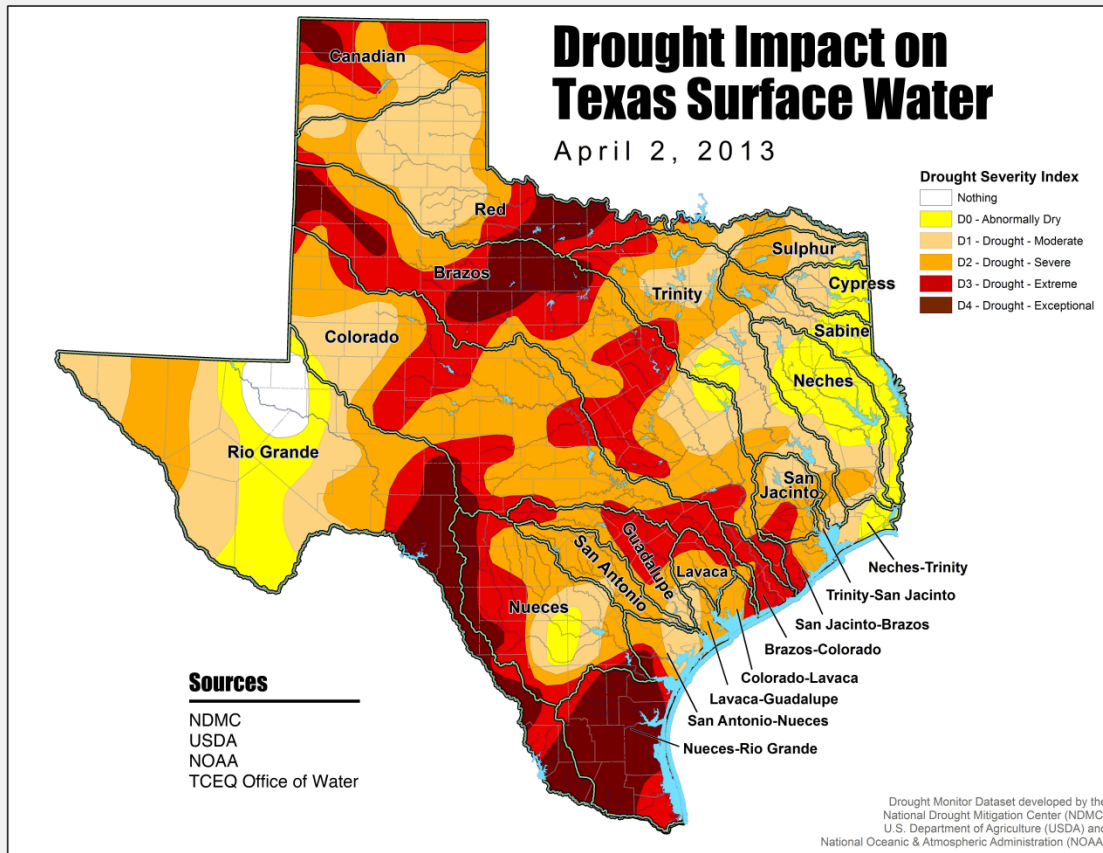
Texas is already experiencing the full gamut of early climate change impacts including drought, water shortages, agricultural losses, wildfires, sea-level rise, flooding, and severe storms. As temperatures continue to rise, these impacts are expected to worsen.

Of immediate urgency to our state is the water crisis. On March 22, 2013, Governor Perry issued another emergency disaster proclamation that “exceptional drought conditions pose a threat of imminent disaster in [183] counties in the State of Texas.” The proclamation states that “record high temperatures, preceded by significantly low rainfall, have resulted in declining reservoir and aquifer levels, threatening water supplies and delivery systems in many parts of the state,” that “prolonged dry conditions continue to increase the threat of wildfire across many portions of the state,” and “these drought conditions have reached historic levels and continue to pose an imminent threat to public health, property and the economy.” There are presently hundreds of public water systems throughout the state that have water usage restrictions in place in an effort to avoid shortages.<sup>4</sup>

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<sup>4</sup> <http://www.tceq.texas.gov/drinkingwater/trot/droughtw.html>





According to appellant TCEQ, more than two-dozen communities across Texas could run out of water in the next six months.<sup>5</sup> Climate disruption and further drought is expected to affect the already-dry western half of the state particularly hard. Indeed, “[t]he primary message of the 2012 State Water Plan is a simple one: In serious drought conditions, Texas does not and will not have enough water to meet the needs of its people, its businesses, and its agricultural enterprises.”<sup>6</sup>

<sup>5</sup> <http://www.nytimes.com/2013/04/07/sunday-review/getting-serious-about-a-texas-size-drought.html>

<sup>6</sup> <http://www.twdb.state.tx.us/waterplanning/swp/2012/index.asp>

Texas' climate in the coming decades will ultimately determine the weather, the probability of drought, and the availability of water in the state.<sup>7</sup> According to the 2012 State Water Plan for Texas, climate scientists project that Texas temperatures will continue increasing approximately 1°F for the 2000 to 2019 period, 2°F for the 2020 to 2039 period, and close to 4°F for the 2040 to 2059 period.<sup>8</sup> While temperatures and drought increase, the state's population is also expected to grow 82 percent in the next 50 years, which will increase water demand by an estimated 22 percent, at the same time water supplies are dwindling.<sup>9</sup>

As water supplies decrease as a result of climate disruption, farmers and ranchers will be forced to rely more on groundwater, to change their crop mix, or to plant less. In one scenario, it is estimated that Texas could realize a 20 percent decline in cropped acreage.<sup>10</sup> Indeed, Texas has just

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<sup>7</sup> [http://www.twdb.state.tx.us/publications/state\\_water\\_plan/2012/04.pdf](http://www.twdb.state.tx.us/publications/state_water_plan/2012/04.pdf), Chapter 4, p. 145

<sup>8</sup> [http://www.twdb.state.tx.us/publications/state\\_water\\_plan/2012/04.pdf](http://www.twdb.state.tx.us/publications/state_water_plan/2012/04.pdf), Chapter 4, p. 152.

<sup>9</sup> [http://www.twdb.state.tx.us/publications/state\\_water\\_plan/2012/00.pdf](http://www.twdb.state.tx.us/publications/state_water_plan/2012/00.pdf), Exec. Summary, p. 1, 3.

<sup>10</sup> [http://www.twdb.state.tx.us/publications/state\\_water\\_plan/2012/10.pdf](http://www.twdb.state.tx.us/publications/state_water_plan/2012/10.pdf), Chapter 10, p.231.

seen the single worst drought year in the history of the state, with 2011 agricultural losses alone amounting to \$7.6 billion.<sup>11</sup>

At the same time Texas is a top-ten global greenhouse gas emitter, “Texas is the worldwide leader in the combined frequency and variety of severe and high impact weather.”<sup>12</sup> With climate disruption and changing weather patterns, the chances of major hurricanes and extreme weather events striking the Texas coast will continue to increase over the next several decades.<sup>13</sup> Already, dangerous hurricanes threaten the Gulf Coast. Storms, combined with rising sea levels, and ground subsidence are causing significant problems for coastal towns.

As presented in Appellees’ petition for rulemaking, and not disputed by the TCEQ, the worldwide consensus and consensus of the U.S. government is that climate change is human caused by greenhouse gas emissions. Appellees provided abundant uncontested scientific support on the urgent need to reduce greenhouse gas emissions to curb climate disruption as well as evidence on the threats to Texas if action is not taken. AR 1, pgs. 3-24. Without urgent mitigation of greenhouse gas emissions,

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<sup>11</sup> <http://today.agrilife.org/2012/03/21/updated-2011-texas-agricultural-drought-losses-total-7-62-billion/>; <http://audioarchives.oc.usda.gov/radnewsdetail.asp?ID=17641>; [http://www.twdb.state.tx.us/publications/state\\_water\\_plan/2012/00.pdf](http://www.twdb.state.tx.us/publications/state_water_plan/2012/00.pdf), p.1.

<sup>12</sup> <http://texasclimate.org/Portals/6/Books/ImpactTX/Ch2Nielsen-Gammon.pdf>, p.13.

<sup>13</sup> *Id.* at p. 31.

climate disruption and the resulting consequences discussed above will only worsen in coming years and decades. All of these impacts will hit our youngest generation the hardest and leave a legacy of water insecurity, more significant natural disasters, wildfires, soaring temperatures, and more parched land where food cannot grow.

## **II. The Texas Water Code Clearly Provides for Judicial Review**

Given the significant threats climate disruption poses to the people and natural resources of Texas, a decision not to regulate greenhouse gas emissions by the governing agency charged with protecting state resources must be judicially reviewable. The legislature delegated to the TCEQ the responsibility for protecting the people and environment of this State. TEX. WATER CODE § 5.012. By enacting the Texas Water Code, the state legislature also provided for judicial review of decisions and other acts of the TCEQ. TEX. WATER CODE § 5.351. In providing for judicial review, the legislature ensured that the important work of protecting the natural resources and people of the State would not go unreviewed when agency action fell short.

The Texas Water Code is the enabling legislation for the TCEQ and as such, it “determines the proper procedures for obtaining judicial review of an agency decision.” *West v. Tex. Comm’n on Env’tl. Quality*, 260 S.W.3d

256, 260 (Tex. App. 2008) (quoting *Tex. Natural Resource Conservation Comm'n v. Sierra Club*, 70 S.W.3d 809, 811 (Tex. 2002) (citing *Grounds v. Tolar Indep. Sch. Dist.*, 707 S.W.2d 889, 891 (Tex. 1986), *overruled in part on other grounds*, *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2001))). Section 5.351 of the Texas Water Code states, “A person affected by a ruling, order, decision, or other act of the commission may file a petition to review, set aside, modify, or suspend the act of the commission.” This broad language of the Texas Water Code explicitly grants the public a right to judicial review of decisions and acts of the TCEQ, including the TCEQ’s rejection of petitions for rulemaking. Nothing in the statute would preclude judicial review here, and thus, contrary to the TCEQ’s assertions, there was no need for Appellees to look for an alternate basis for jurisdiction. They acted consistent with the statute and the legislature’s clear intent.

Furthermore, because the TCEQ’s decision included legal conclusions that wrongly interpreted the Texas Constitution and the state Public Trust Doctrine, and its obligation thereunder, its decision is judicially reviewable. To hold otherwise would run contrary to fundamental separation of powers principles and would foreclose access to justice by residents of Texas. *See* TEX. CONST., Art. 2, Sec. 1. The Texas Constitution vests the judicial

power of the State in the courts, including the district court, not in the TCEQ. TEX. CONST., Art. 5, Sec. 1. Consistent with the Constitution, the Texas Supreme Court has held that when reviewing administrative actions, the court may substitute its judgment for that of the agency on questions inherently judicial in nature. *See A.W. Gregg v. Delhi-Taylor Oil Corp.*, 344 S.W.2d 411, 415 (Tex. 1961). Thus, when legal questions are presented, the judiciary must decide them. *Id.*

Public policy considerations strengthen the argument for judicial review under section 5.351. Judicial review of agency actions acts as a check on one branch of government. Because the TCEQ is charged with protecting the essential natural resources of the state, from air to water, its authority and decision-making power should not go unchecked by the third branch of government. Indeed, the legislature has already made the public policy decision that TCEQ decisions and acts shall be reviewable in a court of law. The youth petitioners in this case are fully participating in the democratic process available to them to protect their state resources. They petitioned the TCEQ for reasonable rules on greenhouse gas emissions, and when their petition was rejected, in part for misinterpretation of the TCEQ's legal obligations, petitioners sought judicial review pursuant to the clear language of the Texas Water Code. Their right to access the courts should

not be denied, as was their administrative petition, leaving them without any recourse.

### **III. The Public Trust Doctrine is a Judicially Interpreted and Enforced Doctrine Under the State Constitution and at Common Law**

The TCEQ makes the untenable argument that its own conclusions of law interpreting the State Constitution and the Public Trust Doctrine should endure while the court's legal conclusions in rendering its decision should be voided. The TCEQ does not argue that the district court's legal conclusions were incorrect, only that the court had no authority to make them in the first instance. Quite the opposite is true. The court has every ability, indeed the duty, to interpret the law and correct an administrative agency's misstatement of the law when a case is brought before it by citizens seeking judicial relief from an unlawful agency decision. Here the court did just that. It reviewed the factual and legal bases for the agency's decision, deferring to the agency's factual reasoning, but correcting its misstatement of law.

Conversely, the TCEQ, as an administrative agency, does not have the ability to declare the law or limit its public trust obligation under the Constitution or at common law. In addition to the Water Code's express right of judicial review of decisions by the TCEQ, the TCEQ's actions are

also reviewable because it is the judiciary's exclusive role to review actions or inactions of a trustee that threatens public trust resources.

In denying Appellees' petition for rulemaking, the TCEQ exceeded its authority in limiting the Public Trust Doctrine in Texas to not include the air or atmosphere. In the context of reviewing the TCEQ's decision, the district court corrected the TCEQ's legal error by addressing the legal question of whether the TCEQ's decisions are constrained by the constitutional and public trust duty to protect public resources for future generations. In its ruling, the district court determined that "the public trust doctrine includes all natural resources of the State including the air and atmosphere." *Bonser-Lain v. Tex. Comm'n on Env'tl. Quality*, No.D-1-GN-11-002194, slip op. at \*1 (Dist.Ct. Tex., July 9, 2012).

The district court's decision interpreting the Texas Constitution and the Public Trust Doctrine is consistent with a hundred years or more of jurisprudence requiring government trustees to hold vital natural resources in trust for both present and future generations of their citizens. *See Geer v. Connecticut*, 161 U.S. 519, 534 (1896), *overruled on other grounds*, *Hughes v. Oklahoma*, 441 U.S. 322 (1979). Trust resources are deemed so vital to the well being of all people of the state that they must be protected by this long-standing constitutional and common law principle. *See Ill. Cent. R.R.*



*v. Illinois*, 146 U.S. 387, 455 (1892) (characterizing public trust assets as those natural resources that present “a subject of concern to the whole people of the state”); see Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Charles L. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 315 (1980). From its ancient roots, to modern law, the Public Trust Doctrine has applied to air. See Caesar Flavius Justinian, *The Institutes of Justinian*, Book II, Title I, Of The Different Kinds of Things (533) (“The things which are naturally everybody’s are: air, flowing water, the sea and the sea-shore.”); see also *Geer*, 161 U.S. at 534 (“There are few things which . . . must still unavoidably remain common. Such (among others) are the elements of light, *air* and water.”) (Emphasis added).

Determining whether the atmosphere should be considered a public trust resource and whether the State has an affirmative duty to protect and preserve the atmosphere are legal questions squarely within the jurisdiction of the court. Indeed, judicial review of legislative and executive actions under the Public Trust Doctrine is the bedrock of the separation of powers doctrine. The judiciary’s role is rooted in the “constitutional commitment to the checks and balances of a government of divided powers” and provides a

crucial and exclusive remedy for the public when the legislative or executive branches violate their duties as trustee of public trust resources. *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 837 P.2d 158, 168 (Ariz. Ct. App. 1991); *Butler v. Brewer*, No. 1CA-CV-12-0347, slip op. at \* 12 (Ariz. Ct. App. 2013) (attached hereto as Appendix A). The TCEQ does not have the authority to usurp this clear role of the judiciary. *See Butler*, at \*7 (it is up to the judiciary to determine the scope of the Public Trust Doctrine).

Further, whether the government is meeting its fiduciary obligation to protect public trust resources lies at the heart of public trust jurisprudence. *See Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1092 (Idaho 1983); *Ariz. Ctr. for Law in the Pub. Interest*, 837 P.2d at 169; *see also Butler v. Brewer*, No. 1CA-CV-12-0347, slip op. at \* 12 (Ariz. Ct. App. 2013). The district court's review of the TCEQ's decision involved both legal interpretation and review of the factual analysis underpinning the TCEQ's decision not to initiate rulemaking. A determination of the constitutional and public trust obligation of the agency was a prerequisite to reviewing the agency's decision. Because the TCEQ misconstrued the law, the district court acted well within its authority and consistent with the Public Trust Doctrine, in correcting the TCEQ's mistake.

**CONCLUSION and PRAYER**

Amici Curiae respectfully request that the Court affirm the decision of the district court finding that it had jurisdiction over Appellees' claims and deny the TCEQ's effort to have the district court's decision overturned without ever appealing the substance of the decision itself.

Respectfully submitted,

/s/ Marisa Perales

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**CERTIFICATE OF COMPLIANCE WITH TEX. R. APP. P. 9**

By my signature, below, I, Marisa Perales, certify that the preceding document contains 4,551 words, exclusive of the caption, table of contents, index of authorities, signature, proof of service, and this certificate of compliance.

/s/ Marisa Perales  
Marisa Perales

## CERTIFICATE OF SERVICE

By my signature below, I certify that on this 9th day of May, 2013 a copy of the foregoing document was served upon the parties identified below via electronic service and/or U.S. Postal Mail.

/s/ Marisa Perales  
Marisa Perales

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