No. 03-21-00214-CV

In The Third Court Of Appeals
Austin, Texas

TERRY BURNS, M.D. AND STEPHEN M. RAPKIN,
Appellants

V.

THE CITY OF SAN ANTONIO, TEXAS, ACTING BY AND THROUGH THE CITY PUBLIC SERVICE BOARD OF SAN ANTONIO, TEXAS,
Appellee

FROM THE 353RD JUDICIAL DISTRICT COURT, TRAVIS COUNTY, TEXAS
CAUSE NO. D-1-GN-20-006848
HONORABLE TIM SULAK AND CATHERINE A. MAUZY, PRESIDING

APPELLEE'S BRIEF

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ORAL ARGUMENT CONDITIONALLY REQUESTED

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Statement of the Case and Defined Terms

Nature of the Case:

The underlying case is a class action and *in rem* proceeding under Chapter 1205 of the Texas Government Code, also known as the Expedited Declaratory Judgment Act (the "EDJA"). CR:6. The case was brought by the City of San Antonio, Texas (the "City") acting by and through the City Public Service Board of San Antonio, Texas (the "Board," which now conducts business under the name CPS Energy) to validate 20 ordinances (the "Ordinances") and 26 series of bonds and commercial paper notes totaling approximately $6.2 billion (the "Public Securities") used to finance the City's electric and gas utilities (the "Systems"). CR:4-7.

Trial Court Information and Course of Proceedings:

353rd Judicial District Court, Travis County, Texas

No "Interested Parties" as defined by the EDJA became named defendants either before or after the trial in which the Attorney General participated. *See* RR2:3. The Honorable Tim Sulak rendered judgment validating the Public Securities and the Ordinances. CR:232-41.

After Judge Sulak left the bench, the Appellants — circulators of a petition to amend the City Charter and thereby change the management and control of CPS Energy (the "Charter Petition") — filed a motion for new trial under Texas Rule of Civil Procedure 329, which permits named defendants served by publication to file a motion for new trial up to two years post-judgment. CR:247-56

The Honorable Catherine A. Mauzy denied the motion for new trial. CR:496. The Appellants then filed a notice of accelerated appeal. CR:498. The City filed a motion to dismiss the appeal for lack of jurisdiction and to expedite the appellate process pursuant to the EDJA.

Statement Regarding Oral Argument

The City requests oral argument but only if the Court decides to grant the Appellants' request for oral argument. As explained in the previously filed motion to dismiss this appeal, the Court lacks appellate jurisdiction. The only question on the merits, whether the trial court had subject-matter jurisdiction to render its judgment, is a straightforward issue of law. Absent provisions to expedite the normal submission process, oral argument will unnecessarily delay this super accelerated appeal under the EDJA.

Issues Restated

1. The EDJA allows the City to seek a declaratory judgment at any time concerning the legality and validity of its Public Securities and their authorizing Ordinances, which are contracts with the investors in the Public Securities. The EDJA states that a validating judgment "is a permanent injunction against the filing" of any proceeding contesting the Public Securities and their authorizing Ordinances. Did the trial court have subject-matter jurisdiction to render a judgment that tracked the injunction language of the EDJA and that did not address the Appellants' Charter Petition?

2. Due process requires notice appropriate to the type of case, which here is an *in rem* proceeding regarding the validity of Public Securities and their authorizing Ordinances. The EDJA provides the class of statutorily defined

"Interested Parties" with notice by newspaper publication because the interests in validating public securities and their authorizing ordinances are public in nature. The Appellants did not prove any life, liberty, or property interests in the declarations sought by the City or bestowed by the judgment. Was due process satisfied by publication notice?

3. The EDJA provides that the appeal of a validating judgment is accelerated, takes priority over any other matter (other than writs of habeas corpus), and must be decided with the least possible delay. Accelerated appeals must be perfected 20 days after judgment, regardless of whether a motion for new trial is filed. Does the Court have jurisdiction over this appeal when the notice of appeal was filed 150 days after judgment?

Summary of the Argument

The undisputed evidence from trial proved that the Charter Petition attempted to change the independent management and control of CPS Energy and thereby called the Public Securities and Ordinances into question, from the perspective of CPS Energy, its investors, and the capital market. The capital market looks closely at the independent management and control of a public utility when evaluating risk, and higher risk negatively impacts credit ratings and interest rates.

Prior to the filing of the EDJA proceeding, a major credit rating agency for the capital market cited the Charter Petition as an additive risk when issuing a

negative outlook for the City's credit rating. The undisputed evidence also proved that a credit downgrade would substantially impact the value of the City's outstanding debt and would further hinder the City's ability to market new debt at interest rates most beneficial and least costly to the customers and ratepayers of CPS Energy.

Faced with real market concerns over the City's credit rating, the City exercised the right expressly granted by the EDJA to seek a declaratory judgment at any time to confirm the legality, validity, and enforceability of its Public Securities and their authorizing Ordinances in an effort to appease such market concerns. Prior case law, including *Ex parte City of El Paso*, 563 S.W.3d 517 (Tex. App.—Austin 2018, pet. denied), also demonstrated that such relief was available even after bonds had issued to address any concerns about the Public Securities.

Because the validity of the Public Securities and authorizing Ordinances are public in nature, the EDJA provides notice to "Interested Parties," such as the City's residents and registered voters, by newspaper publication. The EDJA also requires service on the Attorney General. The City satisfied the required notice and provided more newspaper notice than was statutorily required.

The Appellants did not prove any life, liberty, or property interests in the EDJA action that would set them apart from other Interested Parties. Even their alleged "private" right to amend the City's charter is a right they admittedly share

with all other City residents. A public interest shared by all citizens only calls for the EDJA's publication notice. In other words, any status the Appellants had as proponents of the Charter Petition did not entitle them to more due process than those City residents who opposed the Charter Petition, or the hundreds if not thousands of bond and note holders with an interest in the outcome of the EDJA litigation for that matter.

As Interested Parties, the Appellants received all the due process that was required. To the extent that the Appellants had any interest in the Public Securities and authorizing Ordinances, that interest is only indirect and did not entitle them to service of process by mail or otherwise.

Contrary to the Appellants' contention, the trial court's judgment tracks the language of the EDJA and recent Supreme Court precedent; the judgment does not mention the Appellant's Charter Petition or enjoin the political process. As the Appellants concede, their Charter Petition was a potential risk to the City's credit rating because the terms of the Charter Petition were contrary to the terms of the Ordinances. Undisputed expert testimony proved that even a small change in the City's credit rating or investor uncertainty could cost substantial sums of money when the City anticipated entering the capital market in January 2021 following the December 2020 trial.

The Appellants accuse the City of obtaining an "advisory opinion" about the validity of their Charter Petition. But, as explained above, the Charter Petition inserted ***present*** uncertainty into the capital market that was addressed by the EDJA proceeding. The City's right to validate its Public Securities and authorizing Ordinances is separate and apart from any challenge the City might raise if the Charter Petition is ever filed with the City Clerk, if the City Clerk ever certifies the petition, if the City Council ever orders an election, and if the electorate ever approves the proposed city charter amendments. The Appellants themselves engage in rampant speculation and invite this Court to issue an advisory opinion by ruling on facts that have not yet come to pass. The judgment must be affirmed if the Court decides to exercise any applicable jurisdiction.

The appeal should be promptly dismissed because the Appellants, as Interested Parties, failed to avail themselves of the applicable window to appeal under the EDJA and Texas Rules of Appellate Procedure. That window was 20 days after the judgment was signed.

Further, a motion for new trial under Rule 329 is not generally available in an EDJA action and is specifically not available to Interested Parties like the Appellants, who did not prove a life, liberty, or property interest to which extraordinary, extra-statutory due process is owed. Even if Rule 329 applied, the Appellants' appeal was still untimely because their notice of appeal was filed more

than 20 days after the "new" date of judgment, that is, the date they filed their motion for new trial. The EDJA clearly provides that an appeal from a validating judgment is accelerated, and this appeal should be decided with the least possible delay.

Statement of Facts

The City objects to (1) each statement in the Appellants' Brief that is not supported by a record cite, (2) Appendix item "J" to the Appellants' Brief, which is not part of the appellate record, (3) the "supplemental record," which contains items from a different lawsuit involving the San Antonio Water System ("SAWS"), and (4) every reference in the Appellants' brief to SAWS, which is not a party in this case.

I. The City conferred control of its electric and gas utilities in the Board.

When the City purchased the Systems in 1942, it vested sole management and control of the Systems in the Board, rather than the City Council, as permitted by state law. RR2:14; TEX. GOV'T CODE § 1502.070(a)(2) (former article 1115 of Vernon's Annotated Civil Statutes). The City financed the purchase by issuing bonds, and the 1942 ordinance authorizing those bonds provided that the Board would maintain management and control of the Systems as long as any bonds remained outstanding. RR4:2393. The intent was to guarantee that good business practices, not city government, would guide the new company. CR:206-07.

II. The City issued Public Securities in reliance on the Board's management structure.

Since 1942, the City has issued, sold, and delivered Public Securities for the purpose of building, improving, extending, enlarging, and repairing the Systems, as well as refinancing previously issued obligations. RR2:14. The debt is secured by revenue of the Systems, and as such, no authorizing election is ever required as a prerequisite to issue this revenue debt. RR2:79.[1] Each Public Security was authorized by a City Ordinance as required by law. RR4:4-1759;[2] TEX. GOV'T CODE § 1201.005, § 1371.053.

The authorizing Ordinances are contracts with the respective investors during the lifetime of the respective Public Security:

> ***The provisions of this Ordinance shall constitute a contract*** between the City and the holder or holders … and, after the issuance of any of said bonds, no change, variation, or alteration of any kind in the provisions of this Ordinance may be made, unless as herein otherwise provided, until all of said bonds issued hereunder shall have been paid as to both principal and interest.

RR4:1674 § 28 (emphasis added).

[1] In contrast, certain city debt secured by ad valorem property tax requires an election. *Compare* TEX. GOV'T CODE § 1251.001 *with id.* §§ 1502.002, 1502.051 (authority for the Public Securities).

[2] To simplify subsequent record citations to specific provisions of the Ordinances, the City cites an exemplar Ordinance adopted on September 10, 2020. RR4:1625-97 (also found at CR:54-123).

Significantly, each Ordinance confirms and extends the management and control of the Systems in the Board (the "Governance Provisions"). RR4:1665 § 19. Among other things, the Governance Provisions:

(1) establish that Board membership consists of five Trustees, one of whom is the Mayor of the City and the remainder of whom are selected by the Board and confirmed by City Council;

(2) specify that the Board shall have absolute and complete authority and power with reference to the control, management, and operation of the Systems;

(3) provide that the Board enjoy terms of office and term limits conducive to developing institutional knowledge and expertise about the Systems that are inconsistent with the 2-year terms and term limits for City Councilmembers (the "Term Limit Provisions"); and

(4) covenant to maintain this governance and management structure until the Public Securities issued pursuant to the particular Ordinance are no longer outstanding.

RR4:1665-67.

As noted above, the primary method of naming members to the Board is "indirect" vis-à-vis the City Council because the initial selection is made by the Board and confirmed by the City Council. *See*, *e.g.*, CR:92. The City Council

reserved the right to change the method of selecting Board members from indirect selection to direct selection:

> [T]he City Council reserves unto itself the absolute right at any time upon passage of an ordinance approved by a majority vote of its members to change the method of selection of and appointment to the Board of Trustees to direct selection by the City Council, with such change of method to direct selection being at the sole option of the City Council without approval of any persons, party, holder of Parity Bonds, or the Board of Trustees.

RR4:1665 § 19. The City Council did not reserve the right to change the number of board positions, much less to enlarge the Board from five to eleven to match the number of City Council seats. *Id.* Nor did the City Council reserve the right to alter the independent nature of the Board or the term limits of the Board members. *Id.*

Each Ordinance also states specific contractual procedures and requires investor approvals to amend the Ordinance as long as the Public Securities issued thereunder remain outstanding (the "Amendment Provisions"). RR4:1668. The failure to follow the applicable Amendment Provision results in an impairment of contract:

> The City hereby reserves the right to amend ordinances authorizing the issuance of Parity Bonds subject to the following terms and conditions [thereafter set out in more detail]. An actual or constructive amendment of any term, provision, or covenant of this Ordinance that is not compliant with this amendment process specified in this Section 20 ***shall result in an impairment of the contract*** between the City and the Bondholders hereby evidenced.

RR4:1668 § 20 (emphasis added).

The Governance, Term Limit, and Amendment provisions described above were material inducements to the sale of the Public Securities and are binding on the City:

> The City has secured from the Board of Trustees a resolution acknowledging its duties, responsibilities, and obligations under this Ordinance and agreeing to fully comply with all its terms and provisions, including the ***administration and operation of the Systems*** and the disposition of revenues of the Systems, compliance with which ***represents a material inducement*** to a Bondholder's investment decision relative to any Bonds.

RR4:1671 § 24A (emphasis added).

III. The City availed itself of the Legislature's three-tiered system to protect public securities.

The Texas Legislature has enacted a three-tiered statutory framework that protects public securities and an issuer's creditworthiness. RR2:41. This framework enables political subdivisions to finance capital projects at lower costs relative to traditional methods of financing utilized by private enterprise. RR2:26-27.

A. The City submitted the Public Securities to the Attorney General for approval.

The first tier of protection is the Attorney General's approval process. *See* TEX. GOV'T CODE § 1202.003. The Attorney General decides the validity of proposed bonds "to protect the particular locality and its inhabitants against the imposition of unauthorized or illegal obligations" and to "give assurance" to

prospective investors. *City of Galveston v. Mann*, 143 S.W.2d 1028, 1035 (Tex. 1940). The Attorney General approved the validity of each of the Public Securities before they issued. RR4:1760-1829.

B. The City completed the steps to make the Public Securities incontestable.

The second tier of legislative protection consists of "incontestability statutes," which this Court considers constitutional. *Leonard v. Cornyn*, 47 S.W.3d 524, 527 (Tex. App.—Austin 1999, pet. denied). The statutes applicable here provide that once the Attorney General approves a public security, the City registers that public security with the Comptroller of Public Accounts, and the City issues the public security, the public security becomes "valid," "incontestable," and "binding." TEX. GOV'T CODE § 1202.006(a), § 1371.059. After the Attorney General approved the Public Securities, the City registered and issued them. RR4:1829-77.

C. The City sought relief under the EDJA.

The third and final tier of protection is the EDJA. *Hotze v. City of Houston*, 339 S.W.3d 809, 814 (Tex. App.—Austin 2011, no pet.) ("The Legislature enacted the EDJA to provide issuers of public securities … a method of quickly and efficiently adjudicating the validity of public securities and ***acts affecting those public securities***." (emphasis added)). The acts affecting public securities can occur 30 or 40 years after they issue. RR2:43-44. Such was the case here.

1. The Charter Petition caused uncertainty in the market.

Long after the majority of the Public Securities had issued, but while they remained outstanding and unpaid, the organizers of the Charter Petition attempted to change the management, control, and operation of the Systems by circulating a petition to amend the City's home-rule charter. CR:125-26; RR2:69; RR4:4. The Charter Petition implicated the Governance and Term Limit Provisions of the Ordinances by seeking to: (1) replace the five member Board with a board comprised of eleven City Councilmembers; (2) alter the terms and term limits for Trustees of the Board; (3) substitute the chief executive officer with a director to be selected by the newly comprised board; (4) proscribe the powers and duties of the director; and (5) establish an advisory commission. CR:125 ¶¶ 1-4.

The Charter Petition also sought to dictate the operational practices of the Board by mandating certain energy and rate related policies, such as the elimination of coal power by 2030 and fossil fuels by 2040. CR:125 ¶ 5. The Charter Petition implicated the Amendment Provisions by making the proposed amendments "effective immediately on adoption by the electorate" without any provision for notice to or consent of the investors, as is otherwise required as a condition precedent to the effectiveness of any Ordinance amendment. CR:125 ¶ 6.

Although the Charter Petition purported to "reaffirm" the City's outstanding debt obligations, the existence of the Charter Petition prompted a major credit rating

agency (Fitch Ratings, Inc.) to describe the Charter Petition as a potential "additive risk" when issuing a negative outlook for the City's credit rating. CR:125 ¶ 1, 260, 359-60. The Charter Petition efforts were opposed by other members of the community. CR:285.

The City was sensitive about its credit rating and the perception of CPS Energy because the City planned to issue additional debt for the Systems' operation. RR2:38-39, 61-64, 93. The uncertainty stood to substantially increase the City's cost of borrowing money and to diminish the value of outstanding Public Securities, thereby harming CPS Energy's reputation in the investment community. RR2:39-40, 44-45, 85-86. Before reentering the capital market, the City, acting by and through the Board, initiated an action under the EDJA to confirm the legality, validity, and enforceability of the Ordinances and the Public Securities. CR:4-26. The EDJA permits venue in Travis County. TEX. GOV'T CODE § 1205.022.

2. The City provided more notice than required by the EDJA.

The City provided the Attorney General with notice of the suit. CR:134; TEX. GOV'T CODE § 1205.042(b). The City also published notice twice in the *Austin American Statesman* and *San Antonio Express News*, two newspapers of general circulation located in Travis and Bexar Counties. RR4:2433-37; TEX. GOV'T CODE § 1205.043. The City published the same notice twice each in five local newspapers in smaller cities where customers of the Systems are located: the *Bandera Bulletin*,

the *Boerne Star*, the *Wilson County News*, the *Pleasanton Express*, and the *Hondo Anvil Herald*. RR4:2438-53.

These publications provided notice to the statutory class of Interested Parties, comprising all persons who reside in the City, own property within the City, are taxpayers of the City, or "have a claim, right, title, or interest in any property or money to be affected by the public security authorization or the issuance of the public securities." TEX. GOV'T CODE § 1205.023(2). The notices explained that in light of the Charter Petition, the City sought to generally validate "the legality of the Public Securities and the public securities authorizations related thereto," as well as to specifically validate the Governance, Term Limit, and Amendment Provisions. CR:137-38.

3. The trial court crafted a judgment that mirrors the EDJA.

The Attorney General appeared for trial, but no Interested Parties appeared. *See* RR1:2. At the start of the hearing, Judge Sulak questioned the City's lead attorney about the public rights involved and the precedents upholding the EDJA's notice by publication, topics addressed in the City's pretrial brief to the court. RR2:19-21; CR:217-18.

The trial court then heard fact and expert testimony from three witnesses and admitted more than 2,000 pages of evidence. RR1:3, 5; RR2:12; RR4. The City's bond counsel testified about the process of selling bonds, risk assessment in the

capital market, the role of the Attorney General in the sale of public securities, and the importance of the EDJA to address issues that arise after the sale of public securities. RR2:41-43, 46-50. Counsel explained that the City's credit rating impacted both past and future sales of public securities, particularly when investors and potential investors use clipping services to monitor media coverage about the issuers of public securities. RR2:39-40, 44.

An officer of CPS Energy testified about the various efforts to assure potential investors that the management of the Systems is sound, independent, and experienced. RR2:53-64; RR4:2454-79. She testified about the provisions of the authorizing Ordinances and her concern about ensuring that investors knew the City would comply with its contractual commitments, particularly when 50% of the budget for CPS Energy over the next five years would be funded by debt. RR2:61, 64-71.

An expert witness, with a background in providing financial advice to public utilities, testified about the impact of the Charter Petition on the City's credit ratings and explained how management and control of a utility can impact the credit rating of its debt. RR2:76-77, 84-90; RR4:2517. The key factor determining an interest rate is the credit rating: the higher the credit rating, the lower the interest rate, which directly benefits CPS Energy and its ratepayers. RR2:82. The expert also explained that the City intended to issue $420 million in debt in January 2021 and that a 1/10th

of 1% change in interest rate could result in additional costs of $325,673. RR2:92. Larger changes in interest rate would result in much higher costs. *Id.*

After the close of evidence, the trial court asked whether the City was seeking to enjoin "the petition effort." RR2:95. The City's counsel denied seeking any "direct action in terms of an injunction against the petition." RR2:96. Counsel acknowledged that any validation of the Public Securities and Ordinances "doesn't foreclose other matters in the future." *Id.*

After final argument, the trial court took a recess to review the proposed judgment. RR2:103. Following this recess, the trial court expressed concerns about narrowing the judgment and recommended specific revisions, including the removal of any reference to the Charter Petition. RR2:103-110. The trial court took a lunch recess so that the City's attorney could revise the judgment and confer with the Attorney General's office. RR2:110. The trial court approved the City's revisions after confirming with the Attorney General's office that it approved the revised judgment. RR2:110-111. Only then did the trial court sign the judgment. RR2:111.

The judgment declares, among other things, that the Public Securities and Ordinances are legal, valid, and incontestable; the Governance, Term Limit, and Amendment Provisions are likewise legal, valid, and enforceable; and any attempt to amend the Ordinances outside their terms is invalid and an impairment of the contracts between the City and the holders of its Public Securities. CR:239-40. The

judgment further states that it is binding on the City, the Attorney General, the Comptroller, and the Interested Parties. CR:240.

The judgment also contains a permanent injunction against future proceedings contesting the Public Securities and the Ordinances. CR:240. The judgment does not mention the Charter Petition and does not enjoin circulation of a Charter Petition or any subsequent election. *See id.*

IV. The Appellants filed a motion for new trial under Rule 329.

The trial court signed the judgment on December 7, 2020. CR:241. No accelerated appeal was filed 20 days thereafter. *See* TEX. GOV'T CODE § 1205.068(e); TEX. R. APP. P. 26.1(b). In January 2021, the media reported that the circulators of the Charter Petition had abandoned their efforts before filing it with the City Clerk. CR:284.

On February 23, 2021, the Appellants filed a motion for new trial under Rule 329 raising five arguments. CR:247-56. First, the Appellants claimed the trial court had no jurisdiction to enjoin the Charter Petition. CR:251-52. Second, they claimed the judgment was void because their due process rights were violated by the EDJA's notice by publication. CR:253. Third, they claimed there was no conflict between the Charter Petition and the Ordinances. CR:253-54. Fourth, they claimed the judgment was void as beyond the scope of the EDJA. CR:254. Finally, they claimed the judgment violated the reserved powers doctrine. CR:255. While the

motion appears to challenge the entire judgment, it actually focuses on two provisions: the permanent injunction and the impairment section. CR:248, 254.

The motion for new trial was supported by two affidavits. CR:257-59; TEX. R. CIV. P. 329(b). Appellant Terry Burns testified that he was a registered voter of the City, was an organizer of the Charter Petition, had attending meetings with employees of CPS Energy, and did not find out about the judgment until January 7, 2021:

> I have been a registered voter in the City of San Antonio since 2013. … I was one of the organizers of the drive to obtain 20,000 signatures for the City of San Antonio Charter Amendment for Public Control of CPS Energy to Achieve the City's Energy Goals. On or about January 7, 2021, I and the other organizers learned for the first time from a *San Antonio Express-News* news article, that the City of San Antonio, acting through CPS Energy, had secretly gone to court in Travis County to obtain an injunction against the Charter petition. … The leaders of CPS Energy were well aware of my identity and the identities of the other organizers and how to contact us. …

CR:257-58. Presumably, Burns signed the Charter Petition as one of its organizers, but he did not say that he did. *Id.* He did not testify that he stopped circulating the Charter Petition based on the existence of the judgment. *Id.*

Appellant Stephen Rapkin's affidavit was much shorter. He testified simply that he was a registered voter of the City, had signed the Charter Petition, and had gathered signatures for the Charter Petition:

> I have been a registered voter in the City of San Antonio since 2004. During October and November 2020, I was one of the persons who signed and obtained signatures of others to the Petition for the City of San Antonio Charter Amendment for Public Control of CPS Energy to Achieve the City's Energy Goals.

CR:259. Rapkin did not say whether he knew about the trial or when he learned about the judgment. *Id.* He did not testify that he stopped circulating the Charter Petition based on the existence of the judgment. *Id.* Local media reported that the judgment would not stop the collection of signatures. CR:481.

Because Judge Sulak had left office, Judge Mauzy conducted a nonevidentiary hearing on the Appellant's motion for new trial. *See generally* RR:3. She denied the motion on April 28, 2021. CR:496. On May 5, 2021, the Appellants filed a notice of appeal. CR:498.

Argument

The standard of review for an order denying a motion for new trial is an abuse of discretion. *Hitt v. Zarauskas*, 03-16-00076-CV, 2017 WL 1228893, *3 (Tex. App.—Austin Mar. 29, 2017, no pet.). However, a trial court has no discretion to analyze or apply the law incorrectly. *Id.* Because the Appellants' issues focus on matters of law, this Court's review is de novo. *See id.*

The scope of review does not include the two grounds for new trial that the Appellants abandoned on appeal: whether the judgment violated the reserved powers doctrine and whether there was any conflict between the Charter Petition and the

Ordinances. *Compare* CR:253, 255 *with* Appellants' Brief at 2. The abandonment was appropriate because neither issue is well founded. CR:287-89.

I. The judgment is not void.

The Appellants ask this Court to void the trial court's judgment in its entirety, but they have not offered the Court any rationale for doing so. Brief at 36. For example, they do not claim that the trial court lacked jurisdiction to render an EDJA judgment. Instead, the Appellants focus on only two provisions of the judgment, claiming that there is no subject-matter jurisdiction for the permanent injunction or for the provision invalidating attempts to amend the Ordinances outside their terms. Brief at 16, 18. If these provisions exceed the EDJA's authority (and they do not, as explained below), then this Court would invalidate those portions of the judgment, not the judgment as a whole. *See Kubena v. Hatch*, 193 S.W.2d 175, 177 (Tex. 1946) (holding "it is well settled in this state that a judgment may be void in part and valid in part"); *Kendziorski v. Saunders*, 191 S.W.3d 395, 410 (Tex. App.—Austin 2006, no pet.) (applying *Kubena* to reverse a judgment in part and affirm in part).

A. The EDJA authorized the trial court to validate the Public Securities and their authorizing Ordinances.

In the trial court, the Appellants argued that the "City's suit is outside the scope of the EDJA," but they complained about only two provisions of the judgment. CR:254-55. On appeal, this argument morphs into an argument that the EDJA cannot be used to protect the City's credit rating. Brief at 12, 25. Again, the Appellants

complain about only two provisions of the judgment. Brief at 11, 16. These arguments misconstrue the scope of the EDJA, the judgment, and Supreme Court authority.

The EDJA does not place any boundaries on how public securities might be challenged or why the issuer of public securities might need to validate the public securities and their associated contracts. *See generally* TEX. GOV'T CODE § 1205.021. Nor does the EDJA place any temporal boundaries on when the EDJA action may be brought. *Id.* § 1205.025.

The EDJA allows suit to be brought before or after the Attorney General approves the public securities. *Id.* § 1205.025(3). Suit may be brought before or after the public securities are authorized, issued, or delivered. *Id.* § 1205.025(2). Suit has been brought at these various times. *See, e.g.*, *Ex parte City of El Paso*, 563 S.W.3d at 520 (illustrating an EDJA action filed after bonds were sold); *Taxpayers for Sensible Priorities v. City of Dallas*, 79 S.W.3d 670, 673 (Tex. App.—Dallas 2002, pet. denied) (same); *Hotze*, 339 S.W.3d at 813 (illustrating an EDJA action filed after an ordinance was adopted).

The EDJA expressly empowers the trial court to render a declaratory judgment regarding "the legality and validity of the public securities" at issue. *Id.* § 1205.021(4). That is exactly what the judgment does when it declares: "The Public

Securities … are legal, valid, and incontestable." CR:239. The Appellants are not contesting this declaration.

The EDJA further empowers the trial court to render a declaratory judgment regarding "the legality and validity of each public security authorization relating to the public securities." *Id.* § 1205.021(2). The EDJA defines a "public security authorization" as "an action or proceeding by an issuer taken, made, or proposed to be taken or made ***in connection with or affecting*** a public security." *Id.* § 1205.001(3) (emphasis added).

The Supreme Court has held to obtain relief under the EDJA, a public securities authorization must have an ***authorizing*** connection with or effect on public securities. *City of Conroe v. San Jacinto River Auth.*, 602 S.W.3d 444, 452 (Tex. 2020). Once the authorizing connection is established, the trial court has jurisdiction to validate the provisions of the public securities authorization. *Id.* at 456, 458-59 (upholding validity declaration of an EDJA judgment).[3]

The Ordinances are the *sin qua non* to issue the Public Securities — the City Council's statutorily required prior authorization. *See* TEX. GOV'T CODE § 1201.005 (requiring a public security to be authorized by ordinance), § 1371.053 (same). There

[3] The scope of the EDJA "does not extend to declaring compliance with a contract's terms." *City of Conroe*, 602 S.W.3d at 455. The contract in *Conroe* is the one between an issuer of public securities and a third party, not the contract between the issuer and the owner or holder of the subject public security.

can be no greater authorizing connection, and the judgment's declarations — both those challenged and those unchallenged — all go directly to the validity of the Ordinances' terms. *See City of Conroe*, 602 S.W.3d at 452 (recognizing that the term "public securities authorization" has "long referred to the initial actions or approvals needed to ensure the proper issuance of public securities").

The judgment declares that the authorizing Ordinances "are legal, valid, and incontestable." CR:239. The judgment then declares that the Governance, Term Limit, and Amendment provisions of those Ordinances are likewise "legal, valid, [and] enforceable." CR:240. The Appellants do not contest these declarations.

The judgment then declares the contractual provisions are "binding on the City for the entire time period during which the debt obligations of the Public Securities remain outstanding." CR:240. This declaration repeats language from the Ordinances and is consistent with prior law. *Guadalupe-Blanco River Auth. v. Tuttle*, 171 S.W.2d 520, 521 (Tex. App.—San Antonio) (holding that the Board's management and control cannot be changed until the City's debt is fully paid), *writ ref'd*, 174 S.W.2d 589 (Tex. 1943). The Appellants do not contest this declaration.

The judgment declares that the "actual or constructive amendment of any term, provision, or covenant" of the Governance, Term Limit, and Amendment Provisions "outside the exclusive methods prescribed by the Ordinances themselves is invalid and shall result in an impairment of contract between the City and the

holders of the Public Securities." CR:240. The Appellants challenge this language as inappropriate under the EDJA, but this declaration is another way of saying the provisions are valid and binding pursuant to their terms. *See Determan v. City of Irving*, 609 S.W.2d 565, 569 (Tex. App.—Dallas 1980, no writ) (holding that the obligations between a city and its bondholders is protected by the contract clauses of the state and federal constitutions). It is uncontested that each Ordinance contains an Amendment provision making noncompliance "an impairment of contract." RR4:1668. The trial court did not exceed its EDJA authority by making this declaration.

The judgment further states that it is binding on the City, the Attorney General, the Comptroller of Public Accounts, and the Interested Parties. CR:240. The language is drawn directly from the EDJA, and the Appellants do not challenge it. *See* TEX. GOV'T CODE § 1205.151(b).

The Appellants, however, challenge the permanent injunction that is confined to and drawn directly from the EDJA, as the following table illustrates:

SECTION 1205.151(c)	FINAL JUDGMENT
The judgment is a permanent injunction against the filing by any person of any proceeding contesting the validity of: (1) the public securities, a public security authorization, or an expenditure of money relating to the public securities described in the petition; (2) each provision made for the payment of the public securities or of any interest on the public securities; and (3) any adjudicated matter and any matter that could have been raised in the action.	[T]his Final Judgment is a permanent injunction against the filing by any person of any proceeding contesting the validity of (a) the Public Securities or the Ordinances; (b) each provision made for the payment of the Public Securities or of any interest on the Public Securities; and (c) any adjudicated matter and any matter that could have been raised in this action.

CR:240; TEX. GOV'T CODE § 1205.151(c).

No court has invalidated this statutory language or found it contrary to the scope of the EDJA. If the judgment had omitted the statutory language, the effect of the judgment would still have been a permanent injunction according to the terms of Section 1205.151(c). The trial court could not have erred by tracking the statute.

To the extent that the Appellants are trying to raise ripeness as a component of subject-matter jurisdiction (Brief at 26-27), this new argument must fail. *See Patterson v. Planned Parenthood of Hous. & Se. Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998) (defining "ripeness" as a component of subject-matter jurisdiction that requires an injury or one that is likely to occur). Because the EDJA's timeframe to file suit is wide open, it is not necessary that the Appellants "attempt to stop a bond issue" or "challenge the authority of the City to issue bonds." *See* Brief at 24.

It is undisputed that the Board considered the financial soundness of CPS Energy and the management of the Systems to be vital factors when marketing new debt. RR2:55-57. Reputational damage could have a "profound impact on the total cost of borrowing." RR2:38-39. The City's expert testified that the Charter Petition was material to the negative outlook to the City's credit rating. RR2:84-86. It is undisputed that a credit rating downgrade would result in significant costs. RR2:39-40, 90-93. Plus, the Appellants conceded the Charter Petition was a potential "additive risk" to the credit rating. Brief at 9 (citing CR:360).

These real-world threats provided more than sufficient reason for the City to exercise its statutory rights under the EDJA. *See, e.g., Ex parte City of El Paso*, 563 S.W.3d at 520 (involving an issuer "concerned" about "possible" impacts on public securities that had already issued); *Empire Life Ins. Co. of Am. v. Moody*, 584 S.W.2d 855, 858 (Tex. 1979) (holding that a potential loss of a valuable asset represents a justiciable controversy); *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 468 (Tex. 1995) (holding a trial court can enter a declaratory judgment "so long as it will serve a useful purpose"). The judgment, in whole and in part, fits squarely within the purview of the EDJA.

B. The trial court did not enjoin any political process.

According to the Appellants, the "trial court's judgment violates the separation of powers doctrine and is void." Brief at 18; *see also id.* at 2, 28. The

separation of powers doctrine was never mentioned in the Appellants' motion for new trial, but the City understands this argument as a challenge to the trial court's subject-matter jurisdiction. *See Texas Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993) (describing separation of powers as a limit on subject-matter jurisdiction).

Indeed, the Appellants more plainly argue that the trial court lacked subject-matter jurisdiction because the judgment "enjoin[ed] citizens from filing" the Charter Petition. Brief at 10. In other words, the Appellants perceive the judgment as an improper "advisory opinion" that interferes with the political process. *Id.* at 11, 18, 28.

The judgment does not enjoin the Charter Petition or any political process, and there is no evidence that anyone stopped circulating the Charter Petition after the judgment was signed or was in any way prohibited from filing it. *See* CR:232-41. The judgment does not mention the Charter Petition because it did not need to do so to validate the City Council's prior and repeated actions in approving the authorizing Ordinances and their associated Public Securities.

The Appellants rely heavily on *City of Thompson*, 219 S.W.2d 57, 59 (Tex. 1949), to argue that the judgment is a prohibited "roundabout way of enjoining the election itself." *See, e.g.*, Brief at 15 & 18. In *Thompson*, the Supreme Court was asked to decide whether this Court had authority to enjoin the City of Austin from

spending money to hold a city council election. The Supreme Court was not asked to interpret any provision of the EDJA. Enjoining the expenditure of funds to conduct an election is in no way equivalent to holding that, as permitted by the EDJA, contractual provisions between the City and the owners and holders of its Public Securities are valid and enforceable.

The other cases the Appellants cite are equally unavailing. Brief at 18-20. In *City of Dallas v. Dallas Consolidated Electric Street Railway*, 148 S.W. 292 (Tex. 1912), the Supreme Court answered a certified question from the Dallas Court of Appeals: can the railway seek an injunction prohibiting the City of Dallas from canvassing the results of a rate election? The Supreme Court's answer was "no" because the canvass was an integral part of the election and a statutory ministerial act. This holding cannot be read to prohibit a judgment validating Public Securities and Ordinances when those documents are not themselves part of the electoral process.

In both *Coalson v. City Council of Victoria*, 610 S.W.2d 744 (Tex. 1980), and *Green v. City of Lubbock*, 627 S.W.2d 868 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.), voters who filed charter amendment petitions sought judicial relief when the respective city councils refused to order elections believing the proposed amendments violated state law. The courts held that the city councils could not interfere in the political process once it had begun. Again, nothing in either opinion

prohibits the City from seeking a judgment under the EDJA validating the terms of its Public Securities and Ordinances.

The Appellants ask, "did the judgment under the EDJA have no effect with respect to the Charter Petition"? Brief at 14. They then insist, based solely on their scant affidavit testimony, that the judgment "effectively" enjoins the filing of the Charter Petition. *Id.* at 16. The Appellants never testified, by affidavit or otherwise, that they felt enjoined by the judgment or that anyone who might have signed the petition felt enjoined. *See* CR:257-59. By asking their rhetorical question in appellate briefing, the Appellants invite this Court to speculate about what might happen one day if the petitioners obtain enough qualifying signatures on the Charter Petition, file the petition with the City Clerk, obtain an order calling an election from City Council, and then successfully convince the electorate to pass the measure.

The EDJA does not require the City to wait for these political actions to take place before adjudicating the validity of its contracts with investors. To suggest otherwise, as the Appellants do, threatens the entire legislative scheme of the EDJA. No part of the judgment is void for lack of subject-matter jurisdiction.

II. This Court has no appellate jurisdiction.

The trial court's judgment was signed on December 7, 2020, and as Interested Parties bound by the judgment, the Appellants were entitled to appeal. CR:241; *Alejos v. State*, 433 S.W.3d 112, 126 (Tex. App.—Austin 2014, no pet.).

An accelerated appeal was due to be perfected no later than January 22, 2021, which generously accounts for one motion to extend time and the mailbox rule. TEX. R. APP. P. 26.1(b), 10.5(b), 9.2(b); TEX. GOV'T CODE § 1205.068(e). A motion for new trial would not have extended the time to perfect the accelerated appeal. *In re K.A.F.*, 160 S.W.3d 923, 924 (Tex. 2005); *Rainbow Group, Ltd. v. Wagoner*, 219 S.W.3d 485, 493 (Tex. App.—Austin 2007, no pet.). The Appellants nonetheless filed a motion for new trial under Rule 329 on February 23, 2021. CR:247; TEX. R. CIV. P. 329. They filed their notice of appeal 72 days later on May 5, 2021. CR:498. The notice of appeal came too late to confer jurisdiction.

A. Rule 329 is not applicable to this EDJA action.

Rule 329 provides that named defendants may seek a new trial up to two years after judgment when such defendants are served by publication. TEX. R. CIV. P. 329. It is undisputed that the Appellants never filed an answer or intervened to become named defendants. TEX. GOV'T CODE § 1205.062. Had they done so, the Appellants would have been subject to the EDJA's requirements that they post a sufficient bond before appealing the judgment. *Id.* § 1205.104(a); CR:227-30 (the City's timely filed motion for security).[4]

[4] In light of the City's previously filed motion to expedite this appeal, the City is not yet requesting a security bond. *See Alejos*, 433 S.W.3d at 127 (illustrating that this Court remands cases to the trial court to rule on motions for security).

1. The plurality opinion in *Magnolia* is distinguishable.

The Appellants attempt to borrow the use of Rule 329 from *City of Magnolia v. Magnolia Bible Church*, 03-19-00631-CV, 2020 WL 7414730 (Tex. App.—Austin Dec. 18, 2020, no pet.). Brief at 12, 23-32. But *Magnolia* is a plurality opinion with a fundamentally different factual and procedural posture that has no relevance to this appeal.

In *Magnolia*, the City of Magnolia filed an EDJA action to validate a water rate ordinance applicable only to nonprofit ratepayers, knowing that several churches opposed the rate as violating their personal, religious freedom. *City of Magnolia*, 2020 WL 7414730 at *1. The city published notice as authorized by the EDJA and obtained a judgment, unbeknownst to the churches, which had sent a demand letter to the city during the pendency of the validation suit. *Id.* at *2. In this demand letter, the churches threatened litigation, claiming that the water rate was discriminatory, violated their rights under the Texas Religious Freedom Restoration Act, and violated their personal tax-exempt status. *Id.*

The churches filed a motion for new trial under Rule 329, alleging that notice by publication violated their due process rights under *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The *Mullane* court held that any "deprivation of ***life, liberty, or property*** by adjudication [must] be preceded by notice and the opportunity for hearing ***appropriate to the nature of the case***." *Id.* (emphasis

added). The trial court granted the churches' motion for new trial, and the city perfected an interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) (permitting an interlocutory appeal from an order that grants or denies a plea to the jurisdiction ***by a governmental unit***).

In his concurring opinion, the Chief Justice acknowledged that "notice by publication satisfies due process as to the parties bound by an EDJA judgment because the EDJA permits only *in rem* declarations." *City of Magnolia*, 2020 WL 7414730 at *3. He then opined that the judgment obtained by the City of Magnolia extinguished the churches' religious and property claims. *Id.* at *3-4. Thus, "[u]nder the ***particular and unique circumstances of this case***, notice by publication did not satisfy the Churches' right to due process." *Id.* at *4 (emphasis added).

The Chief Justice felt it unnecessary to address the relationship between the EDJA and Rule 329 because the failure of due process renders a judgment void and subject to challenge "at any time." *Id.* at *5. Nonetheless, the *Magnolia* judgment could only be directly challenged because this Court had appellate jurisdiction through the City of Magnolia's appeal, which was timely filed less than 20 days after the order that granted a new trial effectively denying the city's plea to the jurisdiction. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8); Appellant's Brief at Appendix I. As the Appellants have judicially admitted, the statutory basis for jurisdiction in *Magnolia* does not exist here. Brief at 35.

In a separate concurring opinion, Justice Triana would have allowed the churches to use Rule 329 to seek a new trial because she concluded the rule did not conflict with the EDJA's statement that an "order or judgment from which an appeal is not taken is final." *Id.* at *9; TEX. GOV'T CODE § 1205.068(c). She did not, however, directly address Justice Baker's dissent, where he concluded that Rule 329 conflicts with the legislative scheme of the EDJA. *Id.* at *11.

As a plurality opinion, *Magnolia* is not precedential. *See, e.g.*, *University of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175, 177 (Tex. 1994); *Randig v. State*, 03-19-00176-CR, 2021 WL 386427, *2 n.1 (Tex. App.—Austin Feb. 4, 2021, no pet.). Moreover, *Magnolia* is distinguishable for at least three reasons.

First, the churches in *Magnolia* were members of a unique and limited subset of ratepayers impacted by an allegedly discriminatory rate claimed to violate religious freedom and property rights. By contrast, any interest in CPS Energy's governance and methods of amending the Ordinances is generalized and possessed equally by all Interested Parties, entitling none to personal notice. *Magnolia* is also distinguishable because the City has not appealed and conferred jurisdiction on this Court. Finally, the *Magnolia* court allowed the trial court's discretionary decision to stand, while the Appellants here are asking the Court to reverse the trial court's decision.

2. Rule 329 conflicts with the EDJA's purpose to speedily resolve bond validation disputes.

The EDJA mandates that "[t]o the extent of a conflict or inconsistency between this chapter [the EDJA] and another law, this chapter controls." TEX. GOV'T CODE § 1205.002(a). To repeat Justice Baker's dissenting conclusion in *Magnolia*, "applying Rule 329 to rulings under the EDJA is inconsistent with the legislative scheme." *City of Magnolia*, 2020 WL 7414730 at *11.

In determining whether the rule is inconsistent with the statute, the courts are not confined "to isolated statutory words, phrases, or clauses, but [courts] instead examine the entire act." *Meritor Auto., Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 90 (Tex. 2001). Courts consider, among other things, the statute's objectives and the consequences of a particular statutory construction. TEX. GOV'T CODE § 311.023(1), (5).

The purpose of the EDJA is to provide a "speedy final resolution" in validating public securities. *Buckholts Indep. Sch. Dist. v. Glaser*, 632 S.W.2d 146, 150-51 (Tex. 1982); *Hatten v. City of Houston*, 373 S.W.2d 525, 534-35 (Tex. App.—Houston 1963, writ ref'd n.r.e.). The EDJA is "extraordinarily" expedited. *Cities of Conroe, Magnolia, & Splendora v. Paxton*, 559 S.W.3d 656, 664 (Tex. App.—Austin 2018), *reversed in part on other grounds by City of Conroe*, 602 S.W.3d at 444.

This legislative purpose is reflected throughout the EDJA's provisions. For example, the trial court must try the action and enter judgment "with the least possible delay." TEX. GOV'T CODE § 1205.065(a). No legislative continuance is allowed, and the trial court may enjoin or consolidate related proceedings. *Id.* § 1205.069, § 1205.061. The trial court may prevent delay by requiring a security bond from opposing parties who are subject to dismissal for noncompliance. *Id.* § 1205.101(a).

The same legislative purpose is reflected in the EDJA's provisions concerning this appeal, which is "accelerated" and "takes priority over any other matter, other than writs of habeas corpus." *Id.* § 1205.068(e). The appellate court is expressly instructed to "render its final order or judgment with the least possible delay." *Id.*

"The Legislature clearly intended for all requirements of the [EDJA] to be speedily conducted[.]" *Narmah v. Waller Indep. Sch. Dist.*, 257 S.W.3d 267, 273 (Tex. App.—Houston [1st Dist.] 2008, no pet.). For that reason, the First Court of Appeals rejected a party's effort to perfect a restricted appeal. *See* TEX. R. APP. P. 26.1(c) (permitting a party meeting certain conditions to bring a restricted appeal in a civil case within six months after the judgment is signed). "Given the vast difference in the time to perfect accelerated and restricted appeals, as well as the [EDJA's] overarching purposes," the court held that restricted appeals were not permissible under the EDJA. *Id.* at 273. To hold otherwise, the EDJA's purpose

"would be completely undermined," a detrimental consequence the court was entitled to consider. *Id.*; *see also* TEX. GOV'T CODE § 311.023(5).

Indeed, serial motions for a new trial under Rule 329, if granted, would allow a single family to delay bond validation for a decade. A single block of neighbors could combine to prevent validation for a century. If a six-month delay for a restricted appeal under Rule 26.1 is impermissible as a direct conflict with the EDJA's purpose, then a two-year delay for a motion for new trial under Rule 329 is likewise a direct conflict. Pursuant to the plain terms of the EDJA, the statute controls over the rule, and the trial court lost plenary power long before the Appellants filed their motion for new trial.

3. Rule 329 conflicts with provisions of the EDJA regarding proper parties and appeal.

Applying Rule 329 to the EDJA not only conflicts with its legislative scheme, but it also conflicts with specific provisions of the EDJA that were not conclusively decided by *Magnolia*. Rule 329 does not apply to every instance that notice is served "by publication;" instead, the rule expressly states, not once but twice, that it applies only to a "defendant." TEX. R. CIV. P. 329. The Appellants were not defendants. *See* CR:13.

In her concurring opinion in *Magnolia*, Justice Triana discounted this distinction, citing *In re E.R.*, 385 S.W.3d 552, 563 (Tex. 2012), for the proposition that Rule 329 can apply to "parties" despite Rule 329's reference to "defendants."

But *E.R.* referred only to a party who should receive service by citation. *City of Magnolia*, 2020 WL 7414730 at *9 n.5. Interested Parties under the EDJA receive only notice by publication. TEX. GOV'T CODE § 1205.43.

The EDJA did not permit the Appellants to become defendants using Rule 329. An Interested Party "may become a named party" — that is, a defendant — by "filing an answer at or before the time of trial" or "intervening, with leave of court, after the trial date." TEX. GOV'T CODE § 1205.062. Thereafter, an Interested Party must appeal. *Id.* § 1205.068(a). Thus, this Court recognizes only three procedural means to litigate under the EDJA: "filing an answer before the trial date, intervening prior to final judgment, *or* filing an appeal." *Alejos*, 433 S.W.3d at 126 (emphasis original).

The Appellants did none of these things, although they could have. Appellant Burns admitted to learning about the underlying judgment on January 7, 2021, and he clearly had time to file an accelerated appeal and "traditional" motion for new trial. *See* CR:257; TEX. R. APP. P. 28.1(b) (allowing an accelerated appeal to be filed 15 days after its original due date; the extended date was January 12, 2021); TEX. R. CIV. P. 329b(a) (permitting a "traditional" motion for new trial 30 days after judgment). This appeal is untimely.

B. Even if Rule 329 applies, the Court lacks jurisdiction.

1. The appeal is still untimely.

The Appellants filed their motion for new trial under Rule 329 on February 23, 2021. Should the rule apply, the date of judgment was reset from December 7, 2020 to February 23, 2021 by operation of law. *See* TEX. R. CIV. P. 329(d) (applying Rule 306a(7) to a Rule 329 motion filed more than 30 days after the date of judgment); TEX. R. CIV. P. 306(a)(7) (computing the appellate timetable "as if the judgment were signed on the date" the Rule 329 motion was filed).

Twenty days after the new date of judgment was March 15, 2021, and one extension thereafter was March 30, 2021. TEX. R. APP. P. 26.1(b), 28.1(b). No accelerated appeal was filed until May 5, 2021, which was too late. *See, e.g., S.P. Dorman Expl. Co., L.P. v. Mitchell Energy Co., L.P.*, 71 S.W.3d 469 (Tex. App.—Waco 2002, no pet.) (dismissing a non-accelerated appeal improperly perfected after the ruling on a Rule 329 motion rather than the new date of judgment).

The ruling on the motion for new trial is not itself appealable. *Miller v. Garcia*, 03-16-00551-CV, 2016 WL 5770696, *1 (Tex. App.—Austin Sept. 28, 2016, no pet.) (collecting cases); *see also State Office of Risk Mgmt. v. Berdan*, 335 S.W.3d 421, 428 (Tex. App.—Corpus Christi 2011, pet. denied) (holding that an order denying a motion for new trial "is not independently appealable so as to start a new

timetable for perfecting an appeal"). This appeal should be dismissed for want of jurisdiction.

2. Due process was fully satisfied.

Even if Rule 329 applied and even if the Appellants had timely perfected their appeal according to the rules, the Appellants cannot prevail on the merits. To establish a procedural due process claim, the Appellants must show that they have a life, liberty, or property interest that is entitled to procedural due process protection; and if so, they must demonstrate what process is due. *Mosley v. Tex. Health & Human Services Comm'n*, 593 S.W.3d 250, 264 (Tex. 2019); *Matzen v. McLane*, 604 S.W.3d 91, 113 (Tex. App.—Austin 2020, pet. filed [No. 20-0523]). The Appellants failed to satisfy this test because they have no life, liberty, or property interests entitled to more protection than the EDJA offers.

a. The EDJA's notice by publication is constitutional.

The City complied with the EDJA by publishing twice in Bexar and Travis Counties. RR4:2433-37; TEX. GOV'T CODE § 1205.043. The City also published notice twice each in five additional newspapers. RR4:2438-53. The Appellants conceded this notice was sufficient to validate the Public Securities. RR3:7.

"Due process requires the government to provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Jones v.*

Flowers, 547 U.S. 220, 226 (2006). Past experience demonstrates that notice by publication is reasonably calculated to reach Interested Parties in EDJA actions. *See, e.g.*, *Davis v. City of Robinson*, 919 S.W.2d 849, 850 (Tex. App.—Austin 1996, writ denied) (involving 57 challengers who intervened post publication and pretrial). Thus, this Court has unanimously held that notice by publication under the EDJA is appropriate because "no personal-liberty interest or interest in property is affected." *Leonard*, 47 S.W.3d at 527; *see also Cities of Conroe, Magnolia, & Splendora*, 559 S.W.3d at 664.

Other Texas courts have reached the same conclusion. *See, e.g., Jackson v. Waller Indep. Sch. Dist.*, CIV.A. H-07-3086, 2008 WL 818330, *9-10 (S.D. Tex. Mar. 24, 2008) (holding that notice by publication satisfies due process for residents, property owners, and taxpayers because bond validation involves public rights, not liberty or property rights), *clarified on other grounds*, 625 F. Supp. 2d 357 (S.D. Tex. 2008). Courts in other states have likewise upheld publication notice under their respective bond validation statutes particularly when, as here, the Attorney General participates in the process. *See, e.g., Salt Lake City Corp. v. Jordan River Restoration Network*, 299 P.3d 990, 1009 n.13 (Utah 2012); *Denham Springs Econ. Dev. Dist. v. All Taxpayers, Prop. Owners & Citizens of Denham Springs Econ. Dev. Dist.*, 945 So. 2d 665, 684 (La. 2006); *Thomas v. Ala. Mun. Elec. Auth.*, 795 So.2d 940, 949 (Fla. 2001).

This case has all the ingredients of a typical EDJA action where notice by publication is constitutionally sufficient. The City sought validation of legislative acts passed by the City Council in the form of the Ordinances and the validation of Public Securities authorized by those Ordinances. CR:23-24. The validating judgment impacts the Appellants only indirectly because it addresses matters of general, public interest. CR:234-41. No residents of San Antonio — including the Appellants — have life, liberty, or property interests in the method of amending the Ordinances.

b. **Registered voters are not entitled to more notice.**

In the trial court, the Appellants alleged they were entitled to service of process as registered voters of the City. CR:257-59. On appeal, they allege to be "affected by and bound by the judgment." Brief at 31. These allegations, however, are another way of saying they are members of the class that reside in the City and are statutorily defined as Interested Parties. TEX. GOV'T CODE § 1205.023(2)(A); TEX. ELEC. CODE § 11.003 (voters vote where they reside). Residents and, by extension, registered voters, are entitled only to notice by publication. TEX. GOV'T CODE § 1205.041(a)(1).

c. **Rights shared by all citizens are not entitled to more notice.**

The organizers of the Charter Petition did not submit it to the City Clerk because they were unable to obtain the requisite number of signatures. CR:284. Yet

the Appellants claim they should have received mailed notice of this EDJA action because they have a "private right" to submit the Charter Petition. CR:253; Brief at 23. A "private right" is not the same as a life, liberty, or property interest under *Mullane*.

Nonetheless, the Appellants' claim was disproven by their own motion for new trial, which judicially admitted that the right to petition belongs to "all citizens of San Antonio." CR:253. Their opening brief is likewise replete with broad references to the City's citizens. *See, e.g.,* Brief at 11, 17, 30, 21, 36. If the right belongs to all citizens, then it cannot require more due process than the EDJA provides.

The Appellants make a similar concession on appeal when they argue that "actual notice to ***any*** of the known organizers" would have been sufficient due process as to Appellant Burns. Brief at 22 (emphasis added). If notice to any organizer of the Charter Petition is sufficient, then Appellant Burns has not proven a unique life, liberty, or property interest.

The Appellants cite a number of cases for the proposition that they have "standing" as petition circulators to "vindicate their rights." Brief at 31-32. None of these cases involve Interested Parties who appear as respondents in an EDJA action, as opposed to plaintiffs or intervenors who traditionally must have standing to assert their claims. *See, e.g.*, *Blum v. Lanier*, 997 S.W.2d 259, 262 (Tex. 1999); *Brown v.*

Todd, 53 S.W.3d 297, 302 (Tex. 2001); *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984). Likewise, none of these cases involve petition circulators alleging that the EDJA requires personal notice. *Id.*

The proper question is not whether the Appellants had standing but whether they proved in the trial court that some life, liberty, or property interest sets them apart from all other Interested Parties. They did not.

d. ***Magnolia* does not create any rule for "known parties."**

Appellant Burns alleged that he deserved service of process because his attendance at various meetings made him "known" to CPS Energy. CR:258; Brief at 23. That simply is not enough. A resident's expression of approval or disapproval of a matter of general public interest — such as the governance of a public utility — cannot entitle that resident to more due process than other residents receive or that the EDJA requires.

The Appellants appear to contend that personal service was required for a broad, undefined "coalition of organizers" of the Charter Petition that includes: "the Sierra Club, Public Citizen Texas Organizing Project, Move Texas, Southwest Works Union, ***and others***." Brief at 4-5 (emphasis added); *see also id.* at 8. The Appellants fail to explain why personal service on this undefined group of "known proponents" is any more appropriate than personal service on opponents of the

Charter Petition, individual ratepayers, or individual bondholders (whose Public Securities are actually at issue). *See id.* at 1.

While the Appellants cite *Magnolia*, the plurality decision does not establish a rule concerning service to "known" persons. *See* Brief at 23. Chief Justice Rose's concurring opinion does ***not*** say that all "known parties" should receive service of process under the EDJA. Instead, the Chief Justice focused first on the "Churches' due-process claim" — that is, religious freedom — and then on whether the churches could be easily identified. *City of Magnolia*, 2020 WL 7414730 at *3. That analysis comports with U.S. Supreme Court precedent. *See, e.g., Schroeder v. City of New York*, 371 U.S. 208, 212-13 (1962) (explaining that due process is owed to persons whose "name and address are known or very easily ascertainable ***and*** whose legally protected interests are ***directly affected*** by the proceedings" (emphasis added)); *Denham Springs*, 945 So. 2d at 683 (affirming notice by publication in a bond validation suit; regardless of whether contesting parties were known or easily ascertainable, they had no constitutionally protected liberty or property interest).

Publication here was reasonably calculated to reach Interested Parties, a very large class including at least people who spoke for and those who spoke against the City's energy policies in the media and at CPS meetings, members of the public who participated in the petition process before that process was abandoned, and members of the public who opposed the petition. Given the large number of Public Securities

at issue, there were likely hundreds, if not thousands, of bond and note holders interested in the outcome of the litigation, in addition to potential investors. It would have been impossible to provide service of process to each one of those persons, and due process does not demand it.

The Appellants did not allege, much less prove, any unique right involving life, liberty, or property. To the extent they had any interest in the EDJA action as voters and community activists, they received all that due process demands through notice by publication. Rule 329 does not salvage the Appellants' untimely appeal, which should be dismissed as soon as possible for lack of jurisdiction.

C. The Court has no jurisdiction over an original collateral attack.

For the first time in their brief, the Appellants argue that Rule 329 confers "standing" on them to "collaterally" attack the judgment in this appeal. Brief at 31. A collateral attack is initiated as a new case under a different cause number. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 863 (Tex. 2010). This Court does not have original jurisdiction over such collateral attacks. TEX. GOV'T CODE § 22.220(a); *see also Newsom v. Ballinger Indep. Sch. Dist.*, 213 S.W.3d 375, 380 (Tex. App.—Austin 2006, no pet.) (observing that "a void judgment can be final for purposes of appeal").

Also for the first time in their brief, the Appellants contend their motion for new trial is "equivalent to a bill of review." Brief at 32-33 (citing opinions from

various courts of appeals: *Rimbow v. Rimbow*, 191 S.W.2d 89, 91 (Tex. App.—Galveston 1945, writ ref'd); *Stock v. Stock*, 702 S.W.3d 713, 714-15 (Tex. App.—San Antonio 1985, no writ); *Brown v. Breneman*, 385 S.W.2d 461, 463 (Tex. App.—Dallas 1964, no writ); *Velasco v. Ayala*, 312 S.W.3d 783, 792 (Tex. App.—Houston [1st Dist.] 2009, no pet.)). The Supreme Court, however, has held that "a motion for new trial under Rule 329 is ***not*** a true equitable bill of review." *Schwarz v. Smith*, 281, 329 S.W.2d 83, 84 (Tex. 1959) (emphasis added). Regardless, the Supreme Court has held that a bill of review cannot be used to challenge an EDJA judgment. *City of Lubbock v. Isom*, 615 S.W.2d 171, 172 (Tex. 1981) (discussing predecessor statute with substantially the same language as the modern version).

Building on their flawed bill of review analogy, the Appellants disavow their earlier concession that the appeal was accelerated to now contend this appeal is not accelerated but "standard." *Compare* Brief at 33 *with* CR:498. This contention is contrary to the EDJA. TEX. GOV'T CODE § 1205.068(e) (providing that an appeal from an EDJA judgment is an accelerated appeal). Regardless, the Appellants cannot claim their motion is a collateral attack and then bootstrap appellate jurisdiction where such jurisdiction does not exist.

Conclusion

Because the Court lacks jurisdiction over this untimely appeal, it should be dismissed as quickly as possible. Alternatively, the trial court's judgment should be

affirmed as quickly as possible. The judgment does not enjoin the Appellants' Charter Petition or any part of the political process. The judgment instead tracks the provisions of the EDJA.

Respectfully submitted,

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Certificates of Compliance and Conference

Pursuant to TEX. R. APP. P. 9.4(e), I certify that this motion complies with the type-face requirements. I further certify that this brief satisfies the type-volume requirements of TEX. R. APP. P. 9.4(i) because it contains 13,061 words in total, including tables, as calculated by the undersigned's word processing software.

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