

February 26, 2024

Via E-FilingBen Geslison
TEL: 7132291241
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ben.geslison@bakerbotts.comBlake A. Hawthorne, Clerk of the Court
Supreme Court of Texas
PO Box 12248
Austin, TX 78711Re: Case No. 22-0974, *J-W Power Co. v. Sterling Cnty Appraisal Dist.*;
Case No. 22-0975, *J-W Power Co. v. Irion Cnty. Appraisal Dist.*

Dear Mr. Hawthorne:

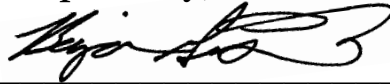
Amici Curiae Texas Taxpayers and Research Association and Archrock, Inc. offer this letter in response to questions posed at oral argument by Justices Busby and Boyd, who asked astutely what options the Court has to address *amici*'s "important" issue, given the Justices' concern with possible waiver. *Amici* take no position on whether J-W Power waived the issue, but submit that the Court can address *amici*'s point satisfactorily without disturbing its waiver precedent or creating a new class of "non-waivable" issues.

Justice Boyd's mention of otherwise case-dispositive affirmative defenses, which parties can nonetheless waive, suggests that it may be useful to clarify a nuance in *amici*'s position. Justice Boyd rightly pointed out that a party's failure to plead affirmative defenses results in a waiver of the party's right to invoke or to benefit from provisions of the law. *Amici* urge, however, that the issue here is less of waiver in that sense than a matter of judicial admission. *Amici*'s contention that an appellant cannot waive an important point of law is thus better stated as: a party cannot, by concession, admission, or waiver, affect what the law actually *is* or *says*. See, e.g., *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001) (recognizing that parties cannot stipulate to a legal question).

Amici do not ask the Court to recognize a new category of non-waivable issue—merely to recognize that "[q]uestions of law cannot be de-

cided by judicial admission.” *Rayner v. Claxton*, 659 S.W.3d 223, 245 (Tex. App.—El Paso 2022, no pet.). It would not therefore disrupt this Court’s waiver precedent to conclude that J-W Power cannot have “concede[d] this point on appeal,” as the court of appeals believed, Op. 5, and to hold that ARB orders are not the type of agency judgments that satisfy *Igal* and *Utah Construction* such that their orders must be given preclusive effect on a later court action brought under a different statute.

Respectfully,



Benjamin A. Geslison
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and Research Association and Archrock, Inc.*

CERTIFICATE OF SERVICE

On February 26, 2024, a true and correct copy of the foregoing letter was served on counsel of record by the Court's electronic filing system as follows:

Petitioner

Respondent

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/s/ Benjamin A. Geslison

Benjamin A. Geslison

CERTIFICATE OF COMPLIANCE

As required by Texas Rule of Appellate Procedure 9.4, I certify that, according to the word count of the computer program used to prepare this letter, the letter contains 325 words.

/s/ Benjamin A. Geslison

Benjamin A. Geslison

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Envelope ID: 84921500
Filing Code Description: Amicus Brief
Filing Description: Post-Submission Letter of Amici Curiae
Status as of 2/27/2024 7:48 AM CST

Associated Case Party: J-W Power Company

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