NO. 18-0159

IN THE SUPREME COURT OF TEXAS

GTECH CORPORATION,

Petitioner,

V.

JAMES STEELE, et al.,

Respondents

RESPONDENTS JAMES STEELE, *ET AL.*'S RESPONSE TO PETITION FOR REVIEW

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August 20, 2018

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ISSUE PRESENTED

Did the court of appeals correctly analyze the evidence to determine that GTECH exercised discretion in creating and preparing the Fun 5's game?

STATEMENT OF FACTS

This case involves the Texas Lottery's Fun 5's instant ticket game and, on its merits, presents the issue of whether the Fun 5's instructions comported with the parameters for determining a winning ticket.

GTECH developed the Fun 5's game and proposed it for use in four other jurisdictions before bringing it to Texas. (CR 413-416). GTECH proposed the game for Texas pursuant to the "Contract for Instant Ticket Manufacturing and Services" (the "Contract") between GTECH and the Texas Lottery Commission. ("TLC"). (CR 279-290). The Contract stated GTECH was an independent contractor and disclaimed any employment, agency or any other relationship between TLC and GTECH. *GTECH Corp. v. Steele*, 549 S.W.3d 768, 795 (Tex. App.−Austin 2018, pet. filed). (CR 280). It also required GTECH to carry liability insurance and indemnify TLC for all claims arising from the works, goods or services provided by GTECH to TLC. *GTECH,* 549 S.W.3d at 795. (CR 174, 175).

In accordance with the Contract, GTECH provided TLC with draft artwork and prize structure for the games GTECH was proposing. (CR 283). As the court

of appeals recognized, GTECH had "wide discretion" and "broad creative leeway" in preparing and proposing games for TLC. *GTECH,* 549 S.W.3d at 799-800. This discretion included deciding which games to suggest for TLC and making recommendations for game design, play style, graphic design and artwork. *Id.* at 794. In preparing the Contract-required draft working papers, GTECH had the discretion to formulate detailed versions of the game's parameters and specifications as well as color proofs of the ticket image for TLC's approval. *Id.* at 795. (CR 284-85) (listing requirements for working papers).

GTECH proposed the Fun 5's game to TLC on March 13, 2013. (CR 275). After selecting the game, TLC requested working papers for Fun 5's from GTECH, and Penelope Whyte of GTECH prepared them. (CR 430-32, 445, 456, 481). As originally proposed by GTECH, the fifth game on the Fun 5's card was a tic-tac-toe game which contained the following instructions:

> Reveal three Dollar Bill (icon) symbols in any one row, column or diagonal line, win PRIZE in PRIZE box. Reveal a "5" symbol in the 5X BOX, win 5 times that PRIZE. (CR 616).

As worded, these instructions offer two alternative ways of winning: First, by uncovering a tic-tac-toe combination, and second, by revealing a "5" symbol in the 5X box. (CR 183-84). While these instructions offered two different ways of winning, the proposed game parameters made only one way possible. The parameters stated that "5s" in the 5X box would appear only on tickets with a

winning tic-tac-toe game, (CR 329), so that no player could win by uncovering the "5" symbol in the 5X box unless he had also won at tic-tac-toe.

As part of its review, TLC requested that GTECH modify the instructions but not in a way that clarified the fact that winning tic-tac-toe was a prerequisite to winning with the "5" symbol in the prize box. Instead, TLC requested that GTECH 1) change the Dollar Bill icon to a "5" symbol, 2) change the "5" symbol to a Money Bag symbol, and 3) remove the word "line" after the word diagonal in the game 5 instructions. (CR 176, 316-17, 325-26, 417). TLC later requested that GTECH change the game parameters so as to include the Money Bag symbol in the "5X" box on both winning an some non-winning tickets. (CR 331, 334, 418-19). TLC made this request because of concerns that the tickets, as originally proposed by GTECH, would be easy targets for micro-scratching. (CR 331, 419).

GTECH and TLC agreed that when TLC suggested changes, GTECH was obligated to review the proposed changes in the context of the entire game to ascertain whether the changes created other problems with the game or made the instructions unclear. (CR 424 [testimony from GTECH's Joseph Lapinski], 438-39 [testimony from GTECH's Penelope Whyte], 446-67 [testimony from TLC's Dale Bowersock], 466 [testimony from GTECH's Laura Thurston]). When TLC stated it wanted the moneybag symbol to appear on some non-winning tickets, GTECH reviewed the game again and determined that it did not need to

recommend changes to the instructions. (CR 433-36, 466-68). Thus, in its final form, the Fun 5's fifth game bore the following instruction:

> Reveal three "5" symbols in any one row, column or diagonal, win PRIZE in PRIZE box. Reveal a "Money Bag" (icon) symbol in the 5X Box, win 5 times that PRIZE. (CR 493).

TLC began selling the Fun 5's game on September 2, 2014. (CR 183). Almost immediately TLC began receiving complaints from purchasers. Internal TLC documents recognized that "the way the instructions read in the second sentence gives the impression that matching the "5" symbols is not necessary to win the bonus portion, that you only have to get the Money Bag symbol." (CR 183). Ms. Angelica Tagle of TLC reported that on September 4, 2014, she received 83 calls from Fun 5's players who felt that the wording was misleading. (CR 184). And on September 5 she noted that players were complaining that "this is misleading" and that "the other games have two ways to win and why would game 5 be any different." (*Id*.).

Plaintiffs are purchasers of Fun 5's tickets that revealed Money Bag symbols, but which were declared to be non-winners under the game's parameters. (CR 190). They filed this suit in late 2014, and the Intervenors, other purchasers, subsequently joined. (Second Supp. CR 10-20). The trial court denied GTECH's plea to the jurisdiction. The Third Court of Appeals affirmed the trial court's denial of the plea with respect to Plaintiffs' fraud claims and reversed the trial

court's denial of the plea with respect to Plaintiffs' claims for aiding and abetting fraud, tortious interference with existing contracts and conspiracy. *GTECH,* 549 S.W.3d at 804. GTECH now challenges the denial of its plea as it relates to Plaintiffs' fraud claims.

SUMMARY OF THE ARGUMENT

At the center of this dispute regarding derivative sovereign immunity is the question of whether Defendant GTECH exercised discretion in creating and preparing TLC's Fun 5's game. Using an analytical framework derived from this Court's recent *Brown & Gaye* decision, the court of appeals conducted a painstaking factual analysis of the contractual relationship and course of dealing between GTECH and TLC. Based on that analysis, the court determined that GTECH did have discretion with respect to its conduct challenged in Plaintiffs' fraud claim. And based on that determination, the court of appeals affirmed the denial of GTECH's plea to the jurisdiction as it related to that claim.

GTECH seeks review in this Court, attacking the court of appeals' analysis of the facts regarding discretion, contending that TLC's statutory authority requires immunity for GTECH and emphasizing a purported need to clarify the varying approaches courts of appeals have used to resolve immunity issues. But none of these arguments support the granting of GTECH's petition.

First, the court of appeals specifically detailed the record evidence

supporting the existence of GTECH's discretion. In doing so it pointed to provisions in the Contract and to the parties' practices in preparing lottery games. The court of appeals' analysis strictly adhered to the established standard of review for pleas to the jurisdiction, which requires the reviewing court to take as true the evidence supporting plaintiff's position and to indulge every inference and resolve every doubt in plaintiff's favor.

Second, GTECH ties its arguments relating to TLC's statutory authority to provisions of the Contract. (Pet. at 19). But since the court of appeals' factual analysis established that the Contract gave GTECH "wide discretion" and "broad creative leeway," the Contract cannot be viewed as a means for using TLC's statutory authority to immunize GTECH.

And finally, while courts of appeals have used varying approaches in resolving claims of derivative immunity, the court of appeals' decision in this case rests on its fact-based finding of discretion and its determination that GTECH's liability will not impose unforeseen expenditures on the public fisc. GTECH does not attack the public fisc finding. Nor does it point to any case that conflicts with the court of appeals' holding here that a contractor's exercise of discretion can preclude its claim of derivative sovereign immunity. Since the actual basis of the court of appeals' decision is not the subject of a conflict among the courts of appeals, this Court should deny GTECH's Petition for Review.

ARGUMENT

In *Brown & Gay Engineering v. Olivares,* 461 S.W.3d 117 (Tex. 2015), this Court rejected a highway contractor's bid for derivative immunity. It did so for two reasons. First, the Court recognized that the imposition of liability on the contractor would not saddle the government with unforeseen expenditures, and on that basis, concluded that extending immunity to the contractor would not comport with the legitimate purposes of immunity. *Brown & Gay,* 461 S.W.3d at 123-24. Second, it recognized that plaintiffs' claims arose from the contractor's discretionary decisions in building the highway. The Court thus concluded the contractor's actions were not the actions of the government and held that a defendant being sued for its own decisions could not derive immunity from the government entity with whom it was contracting. *Id*. at 124-127. *See also, id.* at 129-30. (Hecht, C.J., concurring) (characterizing the relevant inquiry as whether the defendant was acting *as* the government or *for* the government and noting that contractors acting *as* the government could derive immunity while contractors acting *for* the government could not).

The court of appeals in this case decided that a defendant could derive immunity either by showing that its liability would cause unforeseen expenditures from the public fisc or by showing that a defendant had no discretion with respect to its actions and was acting *as* the government. *GTECH,* 549 S.W.3d at 781-82.

The court then found that GTECH exercised no discretion with respect to Plaintiffs' claims that GTECH aided and abetted TLC's fraud, tortiously interfered with the TLC's contract and conspired with the TLC. However, the court found that Plaintiffs' fraud claims against GTECH did implicate GTECH's discretion and that GTECH therefore did not have immunity for those claims. *Id.* at 796-803.[1]

GTECH disagrees. It challenges the court of appeals' determination that GTECH exercised its discretion in 1) formulating the Fun 5's game, 2) choosing to submit it to TLC for use in Texas, and 3) determining that instructions for the game did not need to be changed after the game parameters were changed. GTECH also contends that TLC's statutory authority requires the extension of immunity and that the court of appeals' opinion conflicts with *University of Incarnate Word v. Redus*, 2018 WL 1176652 (Tex. App.–San Antonio March 7, 2018, pet. filed), a case which did not even involve a contractor seeking derivative immunity. Because the court of appeals' decision is correct and in accord with this Court's decision in *Brown & Gay*, this Court should deny GTECH's Petition for Review.

[1] The Court also determined that GTECH failed to show that Plaintiffs' fraud claims would impose unforeseen expenditures on the State, thus rejecting this alternative basis for immunity. *Id.* at 803-04.

I. THE COURT OF APPEALS CORRECTLY DETERMINED, BASED ON THE EVIDENCE, THAT GTECH EXERCISED DISCRETION.

A. The Record is Replete with Evidence of GTECH Discretion.

In affirming the trial court's finding of subject-matter jurisdiction, the court of appeals properly concluded the evidence showed Plaintiffs' fraud claims arose from GTECH's exercise of discretion in selecting and preparing the Fun 5's game for TLC. *GTECH,* 549 S.W.3d at 794-95, 798-803. In reaching this conclusion, the court of appeals employed the standard of review established in *Texas Parks & Wildlife Department v. Miranda,* 133 S.W.3d 217, 228 (Tex. 2004), taking Plaintiffs' evidence as true and resolving all inferences in Plaintiffs' favor. *GTECH,* 549 S.W.3d at 773-774 nn. 8-11. Viewed through this *Miranda* lens, the evidence showed GTECH exercised its discretion in initially proposing the game for use by TLC and by originating detailed draft working papers which mapped out the artwork, graphics, style of play and parameters for the game. (CR 275, 292-313, 424, 430-32, 445, 456, 481). And, after TLC requested changes to the game parameters, GTECH completed a second review of the game designed to ensure that TLC's proposed changes did not cause the game to be misleading or confusing. (CR 433-36, 466-68). Based on that review GTECH decided not to recommend further changes. (*Id.*). Both GTECH and TLC personnel testified they expected GTECH to conduct such a review and to advise TLC if additional modifications were needed. (CR 424, 438-39, 446-67, 466). After all, GTECH

had used this game in other jurisdictions and was considered the expert. (CR 438, 456). The record is replete with evidence showing GTECH's substantial discretion in choosing and formulating the Fun 5's game.

The court of appeals found GTECH's discretion comparable to the contractor's discretion in *Brown & Gay* who, like GTECH here, designed a product which had to be approved by the requisite government authority before it could be built or sold. *GTECH,* 549 S.W.3d at 799. GTECH takes issue with the comparison, contending that Brown & Gay was being sued for decisions regarding construction of the highway that were "its own" but that the decisions at issue here were not GTECH's own because TLC had ultimate control. (Pet. at 15). But that is not a correct reading of the facts. TLC had no role in GTECH's original design of the game or its decision to suggest the game to the TLC in the first place. (CR 283, 414, 284-85). *GTECH,* 549 S.W.3d at 799-800 (noting that "the contract contemplated that GTECH would have broad creative leeway in fashioning *for* TLC approval, as opposed to acting '*as* TLC' in effectuating agency decisions already made, the myriad details of 'Game Development Services'…"). Nor did TLC have any input in GTECH's decision that it would not recommend any changes to the game's instructions after receiving TLC's suggested parameter changes. These were simply acts of discretion, which caused the game to be misleading and for which GTECH is now being called to account.

B. GTECH's Discretion in Formulating Fun 5's is Material to its Claim of Sovereign Immunity.

The court of appeals recognized that GTECH's failure to recommend revisions to the game after TLC's parameter changes was relevant to GTECH's jurisdictional inquiry. But it held that GTECH's initial selection of Fun 5's was not material to GTECH's claim of sovereign immunity because the change in game parameters transformed Fun 5's into a different game. *GTECH,* 549 S.W.3d at 800. Respondents respectfully disagree with that analysis because GTECH's instructions were fraudulent even before the parameters were changed.

As originally proposed by GTECH, the instructions for the fifth game represented to players that they could win a prize in two alternative ways: *either* by getting a tic-tac-toe combination *or* by uncovering an appropriate icon in the 5X box. (CR 295). That was a misrepresentation. The original game parameters required a tic-tac-toe combination for a winning ticket regardless of whether the ticket had an appropriate icon in the 5X box. (CR 310). Thus, there was only one way to win a prize. And that way was to win at tic-tac-toe. If a winning ticket *also* revealed an appropriate icon in the 5X box, the amount in the prize box would be multiplied by five. GTECH's representation that there were two independent ways to win a prize was false. Under GTECH's original parameters, this falsehood would never be discovered. Every ticket that revealed an appropriate icon in the 5X box would have also revealed the winning tic-tac-toe combination. Players

who were led to believe they could win in one of two ways would never know they had been misled because they would never uncover an appropriate icon in the 5X box unless they had *also* won at tic-tac-toe.

The TLC's requested change in game parameters did not make GTECH's original instructions any more or any less fraudulent. Instead, the changes created a class of players who would know that they had been misled by the instructions. This class would consist of persons who had lost at tic-tac-toe but then uncovered an appropriate icon in the 5X box on their non-winning ticket. When they presented that ticket for payment they would be told that their ticket was not a winner despite the fact that they had revealed an appropriate icon in the 5X box. GTECH could have avoided this problem by recommending the correction of the misrepresentations on the ticket after receiving TLC's suggested change in parameters. GTECH's conscious decision not to do so helped create a class of plaintiffs, but it did not make the original instructions any more or less fraudulent than they were already. This case thus calls GTECH to account for its own conduct in formulating and suggesting the game in the first place and then in refusing to recommend changes to the game instructions after the parameter change.

C. The Court of Appeals Correctly Analyzed *KDF, Allen Keller* and *Strakos*.

GTECH also complains about the court of appeals' reliance on applicable case law. GTECH attempts to distinguish *K.D.F. v. Rex,* 878 S.W.2d 589, 597 (Tex. 1994) by claiming that the defendant there was an advisor and not subject to the state's control. (Pet. at 16). But, as shown above, GTECH was also an advisor, and its decision to advise or not advise was not subject to TLC's control.

GTECH also looks for support from *Allen Keller v. Foreman,* 343 S.W.3d 420, 426 (Tex. 2011) and *Strakos v. Gehring,* 360 S.W.2d 787, 803 (Tex. 1962). (Pet. at 16). But those cases do not support GTECH's argument. In *Allen Keller,* this Court absolved the contractor of liability, but it did so based on contract language which precluded contractor discretion.[2] In *Strakos*, this Court found that a contractor whose contract did not reference the contractor's responsibility to fix the danger which caused the plaintiff's injury nevertheless had a duty under the tort law to remedy that danger. *Strakos,* 360 S.W.2d at 803. The language cited by GTECH involved a hypothetical proposed by the court involving a "builder [who] merely follows plans and specifications which have been handed to him by the other party with the instruction that same be literally followed." *Id.* But as the

[2] *Allen Keller,* 343 S.W.3d at 425 ("Keller's contract with the County required absolute compliance with the contract specifications, and there is summary judgment evidence that any deviation from the specifications could have jeopardized federal funding for the project.")

court below correctly observed, "[t]he TLC-GTECH relationship…was not one 'where TLC set out specific parameters dictating the type of game it wants and the language, artwork and design to be selected for the game.'" *GTECH,* 549 S.W.3d at 800. Instead, the Contract granted GTECH "broad creative leeway" in fashioning the game for TLC approval. *Id.* And that "broad creative leeway" distinguishes this case from both *Allen Keller* and the hypothetical proposed in *Strakos.*

D. The Court of Appeals' Opinion Does Not Invite Artful Pleading.

GTECH's attempt to stir up fear regarding artful pleading is beside the point because the court of appeals' decision was based on evidence rather than mere pleadings. Indeed, the court specifically noted that parties were allowed to support their jurisdictional contentions with evidence and that both parties did so here. *GTECH,* 549 S.W.3d at 773. With respect to the discretion issue the court explained that "contractor immunity in a given case turns on the particular contracts and facts involved" *Id.* at 800. The court followed this statement with a detailed factual account of GTECH's exercise of discretion. *Id*. at 800-02. Thus, the court of appeals did not fashion a new "discretion to alert" doctrine that can be alleged in every case, but instead merely applied the law to the facts as developed in the extensive record below. GTECH's purported fear of a talismanic use of the so-called "discretion to alert doctrine" is merely a disguised invitation to misapply

the standard of review by ignoring the evidence showing the extent of GTECH's exercise of discretion. *See Miranda,* 133 S.W.3d at 228.

II. HOLDING GTECH ACCOUNTABLE FOR ITS EXERCISE OF DISCRETION DOES NOT IMPLICATE THE STATUTORY POWER OF THE TLC.

GTECH also argues that TLC's statutory power to control the lottery compels a finding that GTECH had no discretion. GTECH thus explicates the nature and extent of TLC's statutory power and then merely returns to cherry-picked provisions of the Contract to claim GTECH had no discretion. (Pet. at 19).

But as the court of appeals noted, the Contract does in fact confer discretion on GTECH. Specifically, the Contract designates GTECH as an independent contractor, (CR 280), a term "denoting TLC control only as to the end product of the work." *GTECH,* 549 S.W.3d at 798. GTECH wrongly states that the Contract leaves it no discretion over the form or content of lottery tickets, (Pet. at 19), but in fact the Contract expressly requires GTECH to provide draft artwork for those very tickets. (CR 283). How does GTECH create artwork for lottery tickets without using discretion? For games selected by TLC, GTECH provides draft working papers which include specifications for color versions of the ticket front and back, including ticket size and paper stock and UPC number. (CR 284). These GTECH-prepared papers are also required to provide further details, including descriptions of the style of play and myriad details regarding the price point, the percent of prize payout, the revenue and the odds of winning. (*Id.*). No doubt this is what the

court was referring to when it discussed GTECH's "wide discretion" and "broad creative leeway" in fashioning games for TLC's approval. *GTECH,* 549 S.W.3d at 799-800. Finally, the contract required GTECH to carry liability insurance and to indemnify TLC for liability arising from the acts or omissions of GTECH in connection with its development of lottery games for TLC. (CR 174, 175). These provisions are hardly consistent with the notion that the Contract contemplates GTECH's use of TLC's statutory power to immunize itself from legal process. Since the Contract leaves much to GTECH's discretion, and even contemplates GTECH's liability to third parties and to TLC, it does not support GTECH's argument that the Contract combined with TLC's statutory control entitles GTECH to immunity.

III. THE ALLEGED CONFLICT BETWEEN *GTECH* AND *REDUS* DOES NOT JUSTIFY GRANTING GTECH'S PETITION.

GTECH argues the Court should hear this case to resolve a conflict between *GTECH* and *University of Incarnate Word v. Redus*, 2018 WL 1176652 (Tex. App.–San Antonio March 7, 2018, pet. filed). GTECH characterizes the conflict as involving whether a defendant claiming derivative immunity has to establish both an unforeseen negative effect on the public fisc and that the defendant was acting *as* the government without discretion, or whether a showing of one of these elements is sufficient. But there is no conflict, and even if there were, it is not material to the outcome of this case.

There is no conflict because *Redus* was not a derivative immunity case. The *Redus* court was not deciding whether the defendant could derive immunity from a contract with a governmental entity. Instead, it was deciding whether the defendant was a "'governmental entity' that enjoys governmental immunity from suit under the doctrine of sovereign immunity." *Cf. Brown & Gay,* 461 S.W.3d 117, 124 (quoting *KDF* and noting that no sovereign is entitled to extend [sovereign immunity protection] *ad infinitum* through nothing more than private contracts); *GTECH,* 549 S.W.3d at 770 ("This appeal requires us to ascertain the nature and parameter of "derivative" sovereign immunity for government contractors…").

Further, even if there were a conflict, it is not one that affects a question of law material to this case. The conflict claimed by GTECH involves the question of whether a party claiming derivative immunity has to show BOTH unforeseen expenditures from the public fisc AND that it was acting *as* the government without discretion, or whether such a party can obtain derivative immunity by showing either one of these elements. (Pet. 11-13). Here, the court of appeals found that a showing of either element is sufficient. And then it found that GTECH satisfied the absence of discretion element for three of Plaintiffs' four causes of action but failed to satisfy either element as to Plaintiffs' fraud cause of action. *GTECH,* 549 S.W.3d at 770. If a conflict did exist between this case and *Redus*,

and the court found that the defendant must show both elements, the result in this case would still be an affirmance of the judgment, since, as detailed by the court of appeals, the evidence showed GTECH was exercising discretion and there was no improper effect on the public fisc, *id.* at 803-04. Thus, the suggested conflict is not material to this case.

Defendants also contend that the Court should use this case rather than *Nettles v. GTECH Corp.,* 2017 WL 3097627 (Tex. App.—Dallas July 21, 2017, pet. filed) to clarify sovereign immunity because this case involves more Plaintiffs. (Pet. at 20-21). But this argument ignores the fact that the court of appeals here correctly decided the discretion question while the court in *Nettles* did not.

In *Brown & Gay,* this Court made clear that "Sovereign Immunity Does Not Extend to Companies Exercising Independent Discretion." 461 S.W.3d at 124. In doing so it reaffirmed its reasoning from *KDF* that "private parties exercising independent discretion are not entitled to sovereign immunity," *id.,* and cited with approval federal case law recognizing that federal contractors who are allowed discretion to determine how a task should be accomplished and the manner of performing the task should not be given immunity. *Id.* at 125 n.9 citing *Bixby v. KBR Inc.,* 748 F. Supp. 1224, 1242 (D. Or. 2010).

In finding evidence of discretion here, the court of appeals correctly applied the standard of review, pointing to evidence showing GTECH's discretion in the

design of the game and the choice to submit it to the TLC, *GTECH,* 549 S.W.3d at 794-95, (CR 424, 438-39, 464, 466); TLC's reliance on GTECH as the expert with experience in the field, *Id.* at 800, (CR 438, 456); and GTECH's responsibility to review TLC changes and advise TLC of any concerns. *Id.* at 799-803, (CR 424, 438-39, 446, 466). And the court correctly noted that this facet of discretion was actually employed in this case when GTECH deliberately reviewed TLC's changes and decided not to recommend further changes. *Id.* at 802, (CR 433-36, 467-68). Since the trial court's implied finding of discretion defeated GTECH's claim of immunity and was supported by evidence, the court of appeals correctly affirmed the trial court's rejection of GTECH's plea to the jurisdiction. This case was correctly decided based on evidence in this record. And *Nettles,* which was decided on a different record, therefore should not compel review here. This Court should therefore deny GTECH's petition for review.

PRAYER

Plaintiffs request that the Court deny GTECH's Petition for Review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 9.4

This brief complies with the type-volume limitation of TEX. R. APP. P 9.4(i)(2)(B) because this brief contains 4,484 words, excluding the parts of the brief exempted by TEX. R. APP. P 9.4(i)(1).

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Dated: August 20, 2018

CERTIFICATE OF SERVICE

This is to certify that on the 20th day of August, 2018, a true and correct copy of the foregoing instrument was served in accordance with Rule 9.5, Texas Rules of Appellate Procedure to Petitioner's counsel of record, as follows:

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