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No. 17-0862

IN THE SUPREME COURT OF TEXAS

ENERGY TRANSFER PARTNERS, L.P.,
AND ENERGY TRANSFER FUEL, L.P.,

Petitioners,

v.

ENTERPRISE PRODUCTS PARTNERS, L.P.,
AND ENTERPRISE PRODUCTS OPERATING, LLC,

Respondents.

On Petition for Review from the
Fifth Court of Appeals at Dallas, Texas
No. 05-14-01383-CV

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, AND THE TEXAS ASSOCIATION OF BUSINESS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents more than three million businesses and professional organizations of every size, in every sector, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch.

The American Fuel & Petrochemical Manufacturers ("AFPM") is a national trade association whose members comprise virtually all refining and petrochemical manufacturing capacity in the United States. AFPM represents sophisticated businesses that use a variety of business structures to supply consumers with products that are essential to our modern way of life. Among its other missions, AFPM engages in legal advocacy on issues important to its members.

The Texas Association of Business ("TAB") is the leading business organization in Texas. It is also the state's chamber of commerce. Representing companies from large multi-national corporations to small businesses in nearly every community of Texas, TAB works to improve the Texas business climate and to help make the state's economy the strongest in the world. For 97 years, TAB has fought for issues that impact business.

Amici take no position on the ultimate outcome of this dispute between sophisticated businesses. *Amici* write separately to emphasize the importance to the business community generally of the enforceability of unambiguous contractual terms. The ability to carefully craft, and conclusively enforce, unambiguous agreements delineating the scope of a preliminary effort to study a potential joint venture—and precluding the emergence of a co-owned business for profit until the respective parties are able to fully vet and execute a definitive agreement—is of vital importance to companies that operate within Texas or seek strategic alliances to explore opportunities with Texas businesses. Planning, structuring, and operating joint ventures is a large component of business activity in the modern era, but businesses cannot confidently embark on such endeavors if any joint effort—no matter how circumscribed by written agreement—could be turned into a general partnership by a jury's application of open-ended factors.

Amici therefore urge the Court to affirm that unfulfilled conditions precedent in a clear and unambiguous contract preclude a partnership from being formed as a matter of law. *Amici* leave to the parties whether, on the facts of this case, the contract was clear and unambiguous, whether any conditions precedent were waived through the parties' actions here, whether that issue was properly preserved, and any other factual disputes between the parties. In short, they write

solely to urge the Court to affirm the court of appeals' correct rule of law, and leave to the parties whether, and if so how, that rule applies here.

In accordance with Texas Rule of Appellate Procedure 11, *amici* certify that this brief is filed solely on their behalf, that the fee for preparation of the brief will be paid by the Chamber and AFPM, and that copies of this brief are being served on all parties to the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Freedom of contract is a bedrock principle of Texas law. It is manifest in numerous axiomatic doctrines: contractual provisions must be enforced according to their plain terms; when parties negotiate conditions precedent to be satisfied before other obligations arise, they are bound by those conditions; and only the parties decide whether, and when, they enter into co-ownership of a business. Enforcing clear terms negotiated at arms length between two sophisticated businesses provides the clarity that businesses need to order their own relationships and the certainty that their hard-bargained agreements will be effective.

Properly interpreted, the Texas Business Organizations Code ("TBOC") reinforces these principles, by enforcing conditions precedent to the creation of "an association of two or more persons to carry on a business for profit as owners," TBOC § 152.051(b), while providing a default-rule safety net for business co-owners who do not negotiate an agreement or who mis-label their intended co-

ownership as something other than a partnership. Under the TBOC, two persons who intend to carry on a business for profit as co-owners are partners, absent their election of a different structure via a filing entity. But the TBOC does not require formation of a partnership where two companies expressly agree that they will *not* enter into an association as co-owners of a business unless conditions precedent occur—and, even then, that any co-ownership will take the form of an LLC. Nothing in the text or structure of the TBOC forces parties who have expressly agreed otherwise to associate as co-owners of a for-profit business.

If it were otherwise, and vague indicia of intent interpreted by juries could supplant unambiguous contractual terms, the threat of inadvertent partnerships would chill vital business activity. Joint ventures are a large and growing driver of business expansion and serve critical business functions in terms of cost sharing, risk mitigation, and access to specialized markets, resources, and technology. They are essential to the oil and gas industry, and pervasive throughout the economy. Such joint ventures do not come into being with the stroke of a pen, but instead depend on extensive preliminary feasibility, vetting, and negotiation processes. Unless businesses can limit the scope of their initial obligations through mutually agreed contract terms, without fear that a general partnership could be imposed on them notwithstanding their clear agreements otherwise, potential joint ventures will not have the breathing room they need during these essential exploratory

phases. The workaround of forming an LLC for exploratory endeavors is impractical, costly, and no substitute for simple, straightforward enforcement of the parties' agreements according to their terms. Nor is it necessary to impair the freedom of contract to preserve the role of partnership law as a default regime protecting unsophisticated parties who enter into co-owned businesses without a comprehensive partnership agreement.

ARGUMENT

I. Where Businesses Expressly Agree Not To Co-Own A Business For Profit Unless Conditions Precedent Are Satisfied, Their Agreement Controls Under Fundamental Principles Of Contract And Partnership Law.

Well-established principles of contract law require courts to enforce mutually agreed, unambiguous contract terms as written. Those principles apply with equal force to agreements that contemplate a joint business venture, but expressly withhold its formation pending completion of specified conditions. Enforcing such contracts as written is fully consistent with the TBOC's partnership definition, which requires a willing association of co-owners of a for-profit business. Although two parties need not subjectively intend for their association to take the form of a partnership for it to be one, Texas law has long affirmed that they must at least intend to associate as co-owners to generate a partnership.

The non-exhaustive multi-factor approach adopted by the TBOC to ascertain intent when intent is otherwise unclear does *not* require the courts to disregard an

explicit agreement, much less to treat an unambiguous contract *not* to enter a joint venture absent satisfaction of conditions precedent, as merely one factor among many for a jury to consider. To read the TBOC otherwise—as nullifying the enforceability of any contract term expressly providing that the parties are refraining from entering a co-owner relationship until additional diligence is performed, approvals are obtained, or agreements are executed—would be a breathtaking departure from the norms of Texas contract law and partnership law alike. There is no indication in the statute's text or structure that the Texas Legislature intended to abrogate businesses' long-established ability to order their affairs through freely negotiated agreements.

A. Texas "strongly favors parties' freedom of contract." *Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 912 (Tex. 2007). This "allows parties to bargain for mutually agreeable terms and allocate risks as they see fit," *id.*, and "respect[s] the right of persons to define the terms of their business relationships, particularly sophisticated parties," *Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co.*, 235 S.W.3d 695, 702 (Tex. 2007) (citation omitted). Because "contract enforcement" is the "indispensable partner to the freedom of contract," *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 664 (Tex. 2008) (internal quotation marks omitted), an "unambiguous document will be enforced as written," *In re Davenport*, 522 S.W.3d 452, 457 (Tex. 2017); when a contract's

"terms are plain, definite, and unambiguous, … the court cannot vary these terms," *id.* at 457–58. Respect for the bedrock principle of freedom of contract also means that parties cannot be forced into contractual obligations to which they did *not* agree. *Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 635 (Tex. 2007) ("Contracts require mutual assent to be enforceable.").

This fundamental rule that contracts will be enforced as written applies equally to conditions precedent. A "condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation." *Centex Corp. v. Dalton*, 840 S.W.2d 952, 956 (Tex. 1992). If the condition precedent does not occur, the obligation does not arise. *See id.* For example, when a letter agreement specified that a business would pay a finder's fee to a consultant if a bank board approved the acquisition of particular assets, the Court enforced the condition precedent of board approval, holding that the obligation to pay did not arise until the board's approval (at which point the board also prohibited the company from making the payment, thereby rendering performance impossible and excusing the failure to pay). *Id.* at 955-56.

Consistent with these general principles, courts in Texas have long recognized that conditions precedent can forestall entry into a contractual relationship, including a contract to associate as co-owners of a business. *See, e.g.*, *Thompson v. Thompson*, 500 S.W.2d 203, 209 (Tex. Civ. App.—Dallas 1973, no

writ) ("It is, of course, the general rule that when an agreement provides a condition precedent to the formation of a partnership, it will not come into existence until the condition has been met."); *WTG Gas Processing, L.P. v. ConocoPhillips Co.*, 309 S.W.3d 635, 645 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (holding the parties formed no contract to sell assets to a certain bidder when "execution of a [Purchase and Sale Agreement] was clearly a condition precedent to contract formation" and no such agreement had been executed); *COC Servs., Ltd. v. CompUSA, Inc.*, 150 S.W.3d 654, 663 (Tex. App.—Dallas 2004, pet. denied) (holding parties had not entered into a binding franchise agreement when letter of intent provided that if further "agreements were not timely executed, the parties had no further obligation concerning the potential franchise arrangement" and further agreement was drafted but not executed).

Enforceability of conditions precedent serves a critical purpose for complex business ventures. Permitting sophisticated parties to specify how and when they are bound allows them to enter into preliminary agreements that bind them to specific obligations for the exploratory phases of a project, while postponing a binding final commitment on the ultimate endeavor—whether the project is to complete a sale, enter a more fulsome contract, or create a new jointly-managed business. Such contractual choices—if clear—have long been enforced under Texas law. *See John Wood Grp. USA, Inc. v. ICO, Inc.*, 26 S.W.3d 12, 18 (Tex.

App.—Houston [1st Dist.] 2000, pet. denied) (holding that where letter agreement provided that it was "not binding" except for certain enumerated paragraphs, the parties did not intend to be bound by the non-enumerated paragraphs); *see also Foreca, S.A. v. GRD Dev. Co., Inc.*, 758 S.W.2d 744, 745 (Tex. 1988) (noting that a provision contemplating preparation of a formal document can be "a condition precedent to the formation of a contract" but finding a fact issue as to whether specific ambiguous language established a condition precedent).

B. These fundamental principles of contract law do not vanish because the subject of the parties' agreement is a potential joint business venture, rather than an asset sale or anything else. To the contrary, partnerships, too, are formed by agreement of the partners. Under the common law, "a partnership or joint enterprise presupposes an agreement to that end." *Ingram v. Deere*, 288 S.W.3d 886, 893–94 (Tex. 2009) (internal quotation marks omitted); *see also Bohatch v. Butler & Binion*, 977 S.W.2d 543, 544 (Tex. 1998) ("Partnerships exist by agreement of the partners."). And absent such an agreement, a party cannot be bound to the acts taken in the purported partnership's name. *See First Nat'l Bank of Troup, Tex. v. Blades*, 93 F.2d 154, 155 (5th Cir. 1937) (finding that where power of attorney did not authorize an assignment of an oil and gas lease, the assignment was not authorized on the theory that the attorney-in-fact was in a partnership with the principal because "the agreement, which merely contemplated

a future partnership, conferred no authority at the time the assignment was executed”).

The governing statute alters the common law only insofar as it “does not require direct proof of the parties’ intent to form a partnership,” *Ingram*, 288 S.W.3d at 895 (citing predecessor to TBOC § 152.051(b)), nor demand “proof that the parties intended to form a partnership at the outset of their agreement,” *id.* at 899.[1] But it nowhere purports to abrogate established contract law principles. Nor does the statute’s provision of a non-exhaustive list of “[f]actors indicating that persons have created a partnership,” TBOC § 152.052(a), displace the fundamental requirement that the parties must agree to form a co-owned enterprise. Rather, the factors “serve as a proxy for the common law requirement of intent to form a partnership by identifying conduct that logically suggests a collaboration” of that kind. *Ingram*, 288 S.W.3d at 896.

The plain text of the statute confirms that a partnership does not exist unless the parties agree to form a co-owned, for-profit business. Section 152.051(b) defines a partnership as “an association of two or more persons to carry on a business for profit as owners.” TBOC § 152.051(b). Although the parties need not “intend to create a partnership” and may call the association by some “other

[1] In *Ingram*, the Court interpreted the Texas Revised Partnership Act (TRPA) but noted that “TRPA and the TBOC’s rules for determining partnership formation are substantially the same.” *Id.* at 894 n.4.

name," *id.* § 152.051(b)(1)-(2), by definition, it is not a partnership unless the threshold requirement is met: the parties voluntarily agree to associate for the specific purpose of carrying on a business for profit as owners. *See, e.g.*, *Loft v. Lapidus*, 936 F.2d 633, 637 (1st Cir. 1991) (citing materially identical provisions in Massachusetts and Rhode Island statutes to define a partnership as "a voluntary association to carry on a business for profit based on agreement between the partners"); *Chocknok v. State*, 696 P.2d 669, 675 (Alaska 1985) (holding "associational element" of materially identical definition "requires the existence of an agreement to combine the [parties'] property, money, effects, skill, and knowledge to carry out a business enterprise").

Section 152.052(a), in turn, provides a non-exhaustive list of factors that indicate whether the agreed-upon "business" is a partnership: right to receive "profits of the business"; "expression of an intent to be partners in the business"; "control of the business"; agreement to share "losses of the business" or "liability for claims … against the business"; and contributions "to the business." TBOC § 152.052(a)(1)-(5). These factors help inform whether a business that the parties have agreed to form or participate in is a partnership or some other arrangement (e.g., employer-contractor, *Ingram*, 288 S.W.3d at 903). The factors by their terms presuppose that "the business" exists; they do not and cannot will such a business

into existence when the parties have expressly agreed that they are *not* forming a business until further events take place.

Surrounding provisions reinforce this plain reading. The TBOC itself provides that "principles of law and equity … supplement this [partnership] chapter." TBOC § 152.003. Such principles, as the court of appeals held, include the doctrine of conditions precedent. *Enterprise Prods. Partners, L.P. v. Energy Transfer Partners*, *L.P.*, 529 S.W.3d 531, 538 (Tex. App.—Dallas 2017, pet. granted). The court of appeals therefore applied well-settled law on conditions precedent to hold that the unambiguous terms of the parties' agreement can preclude the formation of a partnership. *Id.* at 538–39.

The court of appeals also correctly noted that courts should be careful before concluding two parties implicitly intended to form a for-profit venture. *See id*. at 539. Parties exploring a potential joint venture often need to take steps to determine whether the venture would be viable and profitable before moving further with their relationship. Presuming that parties form a partnership merely by working together to test the viability of a potential venture would be inconsistent with the statutory element requiring a partnership to "carry on a business for profit." TBOC § 152.051(b). An enterprise that is incapable of generating revenue cannot generate profit, and the court of appeals was correct to carefully examine the evidence of whether the parties had decided that the preparatory work alone

could generate revenue or earn a profit. *See id.* at 539. This makes sense. Businesses enter into preliminary agreements to explore potential joint ventures not because they expect the exploration phase to generate revenue, but because they want to learn whether there could be a profitable business in the future. Before they have such information, however—and all mutually agreed conditions precedent are satisfied—businesses should be able to rely on their clear contractual agreements to avoid being thrust into half-baked, non-consensual partnerships.

C. Enforcing unambiguous contractual conditions precedent is not a departure from the law of "de facto" partnerships, which recognizes that the "terms used by the parties in referring to the arrangement do not control." *Ingram*, 288 S.W.3d at 898, 900.

There is no conflict between the court of appeals ruling and the doctrine that partnerships may be "inadvertent" in the sense that co-owners need not intend that their business take the *form* of a partnership. *See* TBOC § 152.051(b)(1)-(2). Rather, under both the common law rule and the TBOC, "[i]t is the intent to do the things that constitute a partnership that determines that the relationship exists between the parties, and if they intend to do a thing which in law constitutes a partnership, they are partners whether their expressed purpose was to create or avoid the relationship." *Howard Gault & Son, Inc. v. First Nat'l Bank of Hereford*, 541 S.W.2d 235, 237 (Tex. Civ. App.—Amarillo 1976, no writ). Therefore, when a

contract gives rise to a co-owned business, the parties are partners (unless they form an entity under a different statute, TBOC § 152.051(c)) even if their contract purports to disclaim that status. *See Coastal Plains Dev. Corp. v. Micrea, Inc.*, 572 S.W.2d 285, 287 (Tex. 1978) ("[W]hen the record demonstrates that the actual effect of the arrangement resulting from the agreement is to create a status different from that stated in the language of the contract, the parties' designation will not control."). So if parties effectively agree to form a partnership, labeling it otherwise will not work to undo the agreement's "actual effect." But where "the actual effect of the arrangement resulting from the agreement," *id.—i.e.*, the effect of the written terms of the contract—does *not* give rise to such a business, and expressly *precludes* any business from coming into being, then there is no association as co-owners, and therefore no partnership.

The question is therefore not whether courts may impose an "accidental partnership" based on an agreement to carry on a joint business, but whether courts may impose such a partnership based on an express agreement *not* to carry on any co-owned business. Bedrock principles of contract law establish that courts cannot do so, and the TBOC's partnership provisions do not purport to abrogate these basic contract law principles. Far from creating a "clear repugnance" between the statute and the common law, as would be required for the "disfavored" abrogation of such bedrock common law principles, *Wasson Interests, Ltd. v. City of*

Jacksonville, 489 S.W.3d 427, 437 (Tex. 2016), the TBOC expressly preserves the backdrop common law "unless otherwise provided," TBOC § 152.003.

Vindicating unambiguous conditions precedent in conformance with longstanding common law also leaves the multi-factor approach of section 152.052(a) fully operable. This Court explained in *Ingram* that "no single factor" listed in section 152.052(a) is "either necessary or sufficient to prove the existence of a partnership." 288 S.W.3d at 891. That means that the TBOC "does not … give the parties' intent or expression of intent any greater weight than the other factors." *Id.* at 899. But the "intent" factor listed in the TBOC requires "expression of an intent to be partners in the business." TBOC § 152.052(a) By its plain meaning, this factor refers only to what the purported partners have said about the form ("intent to be partners") of their business ("the business"), not the threshold question of whether they intended to create a business at all.

Unambiguously crafted conditions precedent to the formation of a joint business, however, go to the threshold issue of whether the parties intended to embark on a joint business at all. Where such conditions are present, there is no agreement to create a joint business in any form—partnership or otherwise—until they are fulfilled. Petitioners' argument (Br. 37-39) that enforcing conditions precedent impermissibly gives the intent factor controlling weight thus misses the mark because conditions precedent go to whether "the business" exists, not

whether the parties of an existing business "intend[ed] to be partners." Giving controlling weight to the unambiguously expressed absence of intent to enter into any business agreement is consistent with both fundamental principles of contract law and the plain terms of the TBOC's partnership-formation provisions.

Petitioners' interpretation of the TBOC, on the other hand, would upend the principle that sophisticated parties are free to order their business affairs and have their unambiguous contracts enforced as written. Although sometimes claiming to accept that the "TBOC allows parties to agree—by contract—not to conduct themselves as partners" (Petrs. Br. 20), Petitioners are clear that no such agreement could ever be conclusive. At best it would be evidence to be "weighed as part of the TBOC's totality test" (Petrs. Br. 44). But weighing an agreement under a totality-of-the-circumstances test—which necessarily means it might be tossed aside—is a far cry from enforcing it as written. And without enforcement—that "indispensable partner to the freedom of contract," *Fairfield Ins. Co.*, 246 S.W.3d at 664 (internal quotation marks omitted)—businesses will not be able to conclusively agree by contract not to conduct themselves as partners. A business could at most hope that a jury does not discard their carefully negotiated arrangements. The TBOC nowhere requires such an anomalous and stark result.

II. Enforcing Contractual Conditions Precedent To Business Formation Is Sound Public Policy.

Enforcing conditions precedent as written is not only long-established common law that is preserved under the TBOC, it is also good policy. Agreements that bind businesses for exploratory work, yet protect them from long-term partnership obligations, provide the breathing room necessary for businesses to engage in the preliminary activities that allow them to determine whether a joint venture is viable. Such exploratory activities are increasingly important to most business sectors, including the oil and gas industry. Enforcing such agreements encourages economic growth and entrepreneurship, yet will not leave either unsophisticated would-be partners or third parties dealing with apparent partnerships in the lurch. Any other ruling creates uncertainty, increases transaction costs, reduces the benefits of joint ventures, invites litigation, and ultimately would result in fewer beneficial joint ventures.

A. For Businesses to Engage in Joint Ventures—a Major Component of Business Activity in Many Industries—They Must Be Able to Delimit Their Obligations in the Preliminary Phases.

In the modern era, joint ventures are a major driver of economic growth and are critically important to businesses and the economy at large. Joint ventures can take many forms, ranging from "contractual alliances," where businesses "collaborate without creating a new company," to equity-based joint ventures, where businesses "contribute resources to create a new company"—the form

contemplated by the parties here if the conditions precedent had been satisfied. James Bamford, et al., *Launching a World-Class Joint Venture*, HARV. BUS. REV. (Feb. 2004), https://tinyurl.com/y444zsbx. Joint ventures serve many purposes, including "managing risk in uncertain markets, sharing the cost of large-scale capital investments, and injecting newfound entrepreneurial spirit into maturing businesses." *Id.* They also can be essential pathways for businesses to obtain access to proprietary technology or other specialized resources or expertise. *See* Ernst & Young, *Joint ventures for oil and gas megaprojects*, at 3 (2015), https://tinyurl.com/y4whqnr4.

Joint ventures have become critically important in capital-intensive industries like construction and oil and gas exploration. Arnaud Leroi & Philip Leung, Bain Capital, *Tapping the Unexpected Potential of Joint Ventures* (Feb. 8, 2017), https://tinyurl.com/yysy5c2k (noting joint ventures "have become a standard practice in ... construction" and "are commonly used for exploration and production" of oil and gas). Their importance to the oil and gas industry, in particular, cannot be overstated. One study of 365 oil and gas "megaprojects" showed that joint ventures are responsible for as much as 71% of spending on exploration and production activity. Ernst & Young, *supra*, at 1. And a 2015 survey of chief executives in the industry indicated that about half anticipated entering into "a new strategic alliance or joint venture" within a year.

PricewaterhouseCoopers, *18th Annual CEO Survey 2015 Industry Snapshot: Oil and Gas*, at 2 (2015), https://tinyurl.com/y5kl3hjg.

Beyond oil and gas, joint ventures represent a large and growing part of business activity across the economy. *See* Leroi & Leung, *supra* (reporting that the "value of joint ventures grew 20% annually from 1995 to 2015," "twice the rate of [merger & acquisition] deals"). More than a decade ago, the 100 largest joint ventures represented more than $350 billion in combined annual revenue, Bamford, *supra*, and that number is no doubt far higher now.

Done right, joint ventures can achieve higher returns on investment than other growth options. *See* Leroi & Leung, *supra* (reporting that joint ventures yield a 17% return on investment, compared with an industry average of 11%). They can also fail, however. Bamford, *supra* (reporting 53% success rate based on study of more than 2,000 alliance announcements). And the difference between success and failure is often the thoroughness of the venture's preliminary phases—resulting in either a decision that the venture is not worth pursuing or a carefully-vetted agreement. *See* Leroi & Leung, *supra* ("Winners conduct careful evaluations before jumping in."); Ernst & Young, *supra*, at 12 (For success, "organizations must focus on initially selecting the most suitable commercial structure and partner organization through carefully considering the technical aspects of a [joint venture's] setup prior to operations….").

To undertake these crucial evaluations, businesses must be able to enter agreements with one another that impose some binding obligations—for example, confidentiality, cost-sharing for feasibility studies, or exclusivity of negotiations—but do not go so far as to launch the very joint ventures whose viability they are studying, or (even worse) trigger a default business structure imposing obligations that they did not negotiate. *See, e.g.*, *WTG Gas Processing, L.P.*, 309 S.W.3d at 637 (parties signed confidentiality agreement during preliminary phase); *John Wood Grp. USA, Inc.*, 26 S.W.3d at 15 (letter agreement barred third-party negotiations and bound parties to confidentiality but expressly did not commit to ultimate transaction).

Sometimes, a joint venture's success depends upon whether parties can jointly achieve efficiencies, which may not be apparent based on the information or research of one party alone—instead requiring their collaborative exploratory efforts. Prospective joint venturers are often willing to undertake such efforts precisely *because* they can rely on the initial exploratory agreement to preclude any understanding that they have yet agreed to be partners. Needlessly channeling parties into unwanted partnerships increases the risk of exploratory phases and reduces the range of actions parties will be willing to take to determine the likelihood of success of a future business, for fear of being deemed a partnership in a business they are not even sure is worthwhile to create.

Markets require clear, enforceable legal rules governing parties' relationships. *See* EDWIN MANSFIELD, ECONOMICS 66 (5th ed. 1986) (explaining that a proper functioning price system requires that "government must see to it that contracts are enforced, that private ownership is protected, and that fraud is prevented"); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 29 (3d ed. 1986) (explaining the role of enforceable rights of property and contract). If parties can only know whether they are in a partnership (or not) after a jury's decision, uncertainty reigns. Greater uncertainty increases transaction costs, which makes it harder to optimally allocate resources. It also means that some value-enhancing explorations of the viability of a joint venture may not take place.

Parties bargain for preliminary agreements to reduce uncertainty. If sophisticated entities can no longer strike this bargain, it will reduce the anticipated rewards of a joint venture, which will reduce incentives to engage in joint ventures. *Cf.* Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 11 (1984). As Judge Easterbrook has commented, "[a] right that cannot be the subject of bargaining is worth less, just as eagle feathers that cannot be sold are worth less to their owners." *Id.*

Enforceable conditions precedent thus foster predictable results and lower transaction costs. Conditions precedent to the formation of a partnership convey a clear, unambiguous intent *not* to enter business together until the conditions are

met. Ignoring this intent can only disappoint parties' expectations and lead to unanticipated results, dissuading businesses from even trying to explore joint ventures in the first place.

If Petitioners' interpretation of the TBOC were adopted, it would be very difficult, if not impossible, for businesses to enter into these sorts of preliminary agreements—no matter how clear and unambiguous they are on the point that the parties are not (yet) becoming co-owners of any business—without risking a jury trial on the question of whether their preliminary activities nonetheless created a general partnership. Given that many potential joint ventures are likely to prove infeasible or fall through for some reason, perhaps leaving a potential ally disgruntled, that risk is too great for many businesses to bear. The inability to conclusively avoid such an outcome will stifle the critical diligence and feasibility studies that underlie successful joint ventures, and discourage businesses from exploring potentially viable joint ventures in Texas. Indeed, it would *undermine* the TBOC's built-in flexibility to invariably jettison, rather than accommodate, parties' *ex ante* agreements structuring their relationships and unravel the predictability and stability intended by preliminary agreements.

Moreover, allowing conditions precedent to be subverted by those actions specifically contemplated by parties as part of the exploration of a joint venture—actions taken only in reliance on the existence of conditions precedent that forestall

creation of a long-term venture unless satisfied—would upset settled expectations and invite litigation. Disappointed parties can try to resurrect failed exploratory projects and receive a ticket for litigation if any similar project came to fruition between their prospective co-venturer and another party. This would squander judicial resources on issues that, if the contract governs, are simply and decisively settled.

Furthermore, eviscerating the enforceability of conditions precedent to the formation of a partnership will make parties to failed joint ventures worse off. If any partnership rights a contracting party could otherwise accrue under the TBOC cannot be waived *ex ante*, they are made "worse off, by depriving them of the opportunity to obtain the benefits of the statutory entitlement by using it as a bargaining chip in the process of contracting." *See Cange v. Stotler & Co.*, 826 F.2d 581, 596 (7th Cir. 1987) (Easterbrook, J., concurring). Prospective joint venturers will likely occupy each side of the coin at different times; a party might lose out on a scuttled joint venture this time, but next time be able to participate in a joint venture made possible only after an earlier, similar project failed. Everyone loses if the ability for contracting parties to freely determine when and whether they have entered in a partnership perishes.

It is no answer to propose that businesses simply form a Delaware LLC for every exploration of a joint venture that they undertake. *See* Amicus Br. of Joseph

K. Leahy at 8-27 ("Leahy Brief"). Forming an LLC is costly, has tax implications, and requires agreement on a number of matters that businesses sensibly wish to postpone until they have the information needed to decide whether to proceed with the joint venture at all. *See* Amicus Br. of John C. Ale at 21-22 (describing filing and registration fees, income tax and franchise tax implications, and agreement requirements). What's worse, it's not clear that filing an LLC will alone do the trick; to avoid the creation of a general partnership, businesses must also deny that they intend to be partners and agree that any partnership that might have already been created will be wound up and the business continued by the LLC, or agree to convert the (non-existent) partnership into the LLC. *See* Leahy Br. 9 n.8. Requiring businesses to jump through these formalistic hoops simply to explore a potential joint venture is nonsensical. If businesses can disclaim the formation of a partnership by filing a form, paying a fee, and reciting magic terms ("winding down" or "conversion"), then they should be able to disclaim the formation of a partnership by simply agreeing, in clear and unambiguous terms, that they are not (yet) co-owners of a business and may not ever be co-owners of a business unless and until further conditions are satisfied.

B. Contravening Unambiguous, Negotiated Written Agreements Is Not Necessary to Protect Unsophisticated Partners or Third Parties.

The disruption of joint venture activity that would be caused by failure to enforce conditions precedent is not balanced by countervailing benefits in terms of

protecting third parties or unsophisticated would-be partners (although the parties here are Fortune 100 companies).[2] *Contra* Petitioners Br. 32; Leahy Br. 27-45. Rather, enforcing unambiguous conditions precedent to the creation of a joint business will leave the TBOC's default-rule backstop in place where it matters.

First, enforcing clear and unambiguous conditions precedent leaves the TBOC's default rules in place for unsophisticated parties who do not negotiate written agreements. The TBOC's primary function of "provid[ing] governing rules for co-owned businesses that did not create their own" (Leahy Br. 28 (capitalization omitted)), is entirely untouched by a rule providing that where parties *do* negotiate agreements governing their joint effort and precluding the creation of a co-owned business, such agreements will be enforced as written.

Second, nothing about enforcing a condition precedent to the creation of a joint venture allows unsophisticated parties to unwittingly find themselves participating in a co-owned business that lacks "any system of rules" (Leahy Br. 41) or any duty of loyalty (*contra* Leahy Br. 41-43). The rule adopted by the court of appeals merely confirms that parties can constrain the scope of their obligations to one another, and have those constraints enforced, when they expressly agree that they will *not* form a co-owned business for profit, and instead agree only to join

[2] *See* Energy Transfer, Fortune 500 (2019), https://tinyurl.com/y66xncyl (rank 59); Enterprise Products Partners, Fortune 500 (2019), https://tinyurl.com/y6zs7ne5 (rank 89).

together to explore the possibilities of doing so. The default rule, however, still holds. If parties do agree to form a co-owned business, then that business will be a partnership—with all attendant duties and shared liabilities—unless the parties elect a different form. Affirming the court of appeals, and enforcing conditions precedent to the creation of a joint business, would not change those basic principles of partnership law.

Third, the hypothetical of the unscrupulous partner who lies about an oral agreement (Leahy Br. 42) is a slender reed on which to negate scrupulous parties' ability to arrange their business affairs through freely negotiated agreements. Petitioners' *amicus* posits that a disgruntled business owner could falsely claim that she and her co-owners orally agreed not to be partners, leaving the other partners without the protection of TBOC-mandated fiduciary duties if a jury believed the lying partner. A lie about an oral agreement not to be partners is a far cry from an explicit written condition precedent that has unambiguously not been satisfied, and would not fit within the court of appeals' rule. And the opposite rule does not avoid the problem of lies; if clear and unambiguous agreements are not enforced, an unscrupulous counterparty to a failed preliminary effort could just as easily lie about an oral agreement to be partners as the other way around. In all events, the hypothetical possibility that a one-off false claim about an oral agreement might make it past a jury is no justification for declining across the

board to enforce unambiguous and express conditions precedent to business formation.

Finally, Petitioners assert (Br. 32) that their reading of the TBOC protects "the general public, which may act in reliance on those who conduct themselves as partners." But if a third party were somehow harmed by reliance on overt statements that indicated it was interacting with a partnership that did not exist, equitable doctrines would likely provide a remedy. *Cf. Cook v. Brundidge, Fountain, Elliott & Churchill*, 533 S.W.2d 751, 758 (Tex. 1976) ("[O]ne seeking to charge a principal through apparent authority of an agent must prove such conduct on the part of the principal as would lead a reasonable prudent person to suppose that the agent had the authority he purports to exercise. The extent of authority of a partner is determined essentially by the same principles….") (citation omitted). Speculation that a third party might suffer some (unexplained) harm from a non-partnership that is (wrongly) holding itself out as a partnership is no grounds for allowing a party that expressly disclaimed intent to create any business absent satisfaction of conditions precedent—that were never satisfied—to use inapposite partnership law to ask a jury to form a partnership that was never agreed to. Much less is it grounds to vitiate fundamental principles of freedom of contract.

CONCLUSION

This Court should adopt the court of appeals' interpretation of the TBOC that unfulfilled conditions precedent in a clear and unambiguous agreement preclude a partnership from being formed as a matter of law.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As verified by Microsoft Word 2016 software, the foregoing brief is in 14-point Times New Roman proportional font and contains 6,384 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(1), and thus complies with the type-volume limitation set forth in Tex. R. App. P. 9.4(i)(2).

The brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in in Times New Roman 14-point font using Microsoft Word 2016 software.

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September 27, 2019

CERTIFICATE OF SERVICE

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