No. 13-0961-CV

IN THE SUPREME COURT OF TEXAS

OCCIDENTAL CHEMICAL CORPORATION,

Petitioner,

v.

JASON JENKINS,

Respondent.

On Petition for Review from the First Court of Appeals,
at Houston, Texas

BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE AMERICAN CHEMISTRY COUNCIL

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IDENTITY OF AMICI CURIAE AND COUNSEL

This brief is submitted on behalf of the following *amici curiae*, who are represented before this Court through their undersigned counsel of record.

Amici Curiae: **The Chamber of Commerce of the United States of America, The National Association of Manufacturers, and The American Chemistry Council**

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INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America, the National Association of Manufacturers, and the American Chemistry Council respectfully submit this brief as amici curiae in support of Petitioners.

The Chamber of Commerce of the United States of America (the "U.S. Chamber") is the world's largest federation of businesses and associations. It has 300,000 direct members and represents the interests of more than three million businesses and professional organizations of every size, in every economic sector, and in every geographic region of the country – including Texas, where many of the U.S. Chamber's members are headquartered or otherwise conduct business.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. Its mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The American Chemistry Council ("ACC") represents leading companies engaged in the business of chemistry, which in Texas alone generates payrolls of $7.3 billion and directly provides over 73,000 jobs. Council members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. It is one of the nation's largest exporters, accounting for more than ten cents of every dollar in U.S. exports.

Pursuant to Texas Rule of Appellate Procedure 11(c), all fees incurred for preparing this amicus brief are being paid by the U.S. Chamber, NAM, and ACC.

SUMMARY OF ARGUMENT

The court of appeals' decision fundamentally misapplies Texas law and exposes property owners to virtually unlimited litigation related to improvements to real property long after that property has been sold to new owners. This Court should reaffirm the legal principle reflected in section 352 of the Restatement (Second) of Torts, which provides that (with limited exceptions) a seller of real property is not subject to liability for personal injury subsequently suffered as a result of any dangerous condition that may have existed at the time the new owner took possession of the property. The Court should also grant the petition for review and reverse the court of appeals' holding that Texas' 10-year statutes of repose for persons who design or construct improvements to real property do not apply to property owners who use their own licensed engineers to design those improvements, or who use third-party contractors to construct those improvements.

ARGUMENT

This case presents important issues concerning the consequences of owning, improving, and selling real property. If the decision of the court of appeals is left undisturbed, Texas property owners face an unprecedented expansion of litigation risk for "negligence" if a personal injury occurs even in the distant future, long after the owner has relinquished control of the property by selling it. The implications of that "perpetual liability" holding would inflict serious

consequences to Texas businesses and other property owners, both to those who are already in the state and those who are considering a move here.

The court of appeals flouted the settled law of Texas (and the rest of the country) that a former property owner owes no duty to a person who is subsequently injured by an allegedly dangerous condition on the property. That rule makes good sense from a policy standpoint, as the former owner has relinquished control over the property, has no ability to ameliorate any dangerous condition on the property, and cannot manage how people interact with the property. Furthermore, without a continuing ownership interest in the property, it will be difficult or impossible to manage the risk of continuing liability by way of insurance coverage. Thus, the court of appeals' holding would eliminate the economic certainty of having the risk from a condition of real property reside with its owner, and would instead turn many premises liability cases into a search for negligence up and down the chain of title.

The court of appeals' opinion is wrong on the law and wrong on the policy. The former owner of real property does not owe a duty to persons who may subsequently be injured by any allegedly dangerous condition upon it. And even if such a duty existed at law, liability in this case would still be barred by Texas' 10-year statute of repose for those who design or construct improvements to real property. Allowing the court of appeals' opinion to stand would place tens of

millions of residential and commercial property owners at risk of perpetual, uninsurable liability. This Court should reject that result.

1. The Court of Appeals' "Dual-Capacity" Theory Lacks Any Legal Foundation.

In reversing the trial court's take-nothing judgment, the court of appeals held that property owners like Defendant Occidental Chemical Corp. remain potentially liable for years after that property has been sold to new owners. In so holding, the court created a fiction that Occidental, as a prior landowner that designed and executed improvements to its property, acted in a "dual-capacity" with respect to the events that gave rise to Plaintiff Jason Jenkins' injury, (1) as the former premises owner and (2) as the designer of the acid addition system that caused Jenkins' injury. *See Jenkins v. Occidental Chem. Corp.*, 415 S.W.3d 14, 29 (Tex. App.–Houston [1st Dist.] 2013). According to the court of appeals, Occidental's liability hinged solely on its role as designer of the acid addition system, and not its status as a former property owner. *Id.* Jenkins now advances this same argument, insisting that Occidental's liability stems exclusively from "the *other* hat it wore – that of negligent designer." *See* Respondent's Brief on the Merits ("Resp. Br.") at 28.

This "two-hat" fiction is incompatible with the well settled legal principle that a former owner is not liable in tort for injuries that subsequently occur as a result of an allegedly defective condition on the property, including claims for

negligent design. Even if, as Jenkins alleges here, Occidental negligently designed a dangerous condition that caused his injury, the company's ability to ameliorate or even eliminate that condition ceased when it sold the facility to Jenkins' employer, eight years before he was injured. Because a former owner can no longer control the property or the people who come upon it, Texas law should continue to recognize that the former owner cannot be liable for personal injuries suffered as a result of a dangerous condition on the property.

A. Section 352 of the Restatement Broadly Precludes Tort Liability for Former Landowners, Including Liability Based on Negligent Design.

The court of appeals' segmentation of a former property owners' duties cannot persist in the face of the plain language of the Restatement (Second) of Torts. This Court should formally endorse the rule expressed in section 352 of the Restatement, which Texas appellate courts have relied upon for many years. *See First Fin. Dev. Corp. v. Hughston*, 797 S.W.2d 286, 291 (Tex. App.–Corpus Christi 1990, writ denied); *Beall v. Lo-Vaca Gathering Co.*, 532 S.W.2d 362, 365 (Tex. App.–Corpus Christi 1975, writ ref'd n.r.e.); *see also Roberts v. Friendswood Dev. Co.*, 886 S.W.2d 363 (Tex. App.–Houston [1st Dist.] 1994, writ denied) (adopting the rule expressed in *First Financial*). Section 352 of the Restatement directly addresses the very topic before the Court here: the residual liability of a vendor of real property.

Section 352 – entitled "Dangerous Conditions Existing at Time Vendor Transfers Possession" – categorically preempts a vendor's liability with respect to its former property:

> Except as stated in § 353, a vendor of land is not subject to liability for physical harm caused to his vendee or others while upon the land after the vendee has taken possession by *any dangerous condition*, whether natural or artificial, which existed at the time that the vendee took possession.

RESTATEMENT (SECOND) OF TORTS § 352 (1965) (emphasis added). The phrase "any dangerous condition" broadly extends to all potential claims against the vendor relating to the condition of the land. As the very first clause of this provisions makes clear ("Except as stated in § 353 . . ."), only one exception to the categorical rule exists.[1]

The Restatement further affirms the broad preclusive effect of section 352 with respect to former property owners because it bars liability for a defective condition "whether *natural or artificial*." *Id.* (emphasis added) The plain meaning of such an "artificial" dangerous condition would necessarily include conditions designed by the vendor. Thus, section 352 specifically precludes liability based on negligent design, and Jenkins' cornerstone "dual-capacity" theory has no basis here.

[1] The narrow exception set forth in section 353 plays no role in the analysis here because it applies only to undisclosed dangerous conditions known to the vendor.

This broad preclusion of liability makes sense given that section 352 is based in the "ancient doctrine of caveat emptor." RESTATEMENT (SECOND) OF TORTS § 352, cmt a. Thus, with respect to transfers of land, the vendee is required "to make his own inspection of the premises, and the vendor is not responsible to him for the defective condition, existing at the time of transfer." *Id.* The comment makes it clear that this doctrine extends to third parties, even stating that the vendor is even *less liable* "to any third person who may come upon the land, even though such entry is in the right of the vendee." *Id*. When an owner sells the property to a new owner, the risk of liability for dangerous conditions located on the property is shifted to the new owner, and a person injured by such a condition must look exclusively to that new owner for redress.

B. Case Law Affirms Section 352's Broad Preclusion of Negligent Design Claims Against Former Landowners.

The court of appeals' "dual-capacity" theory is also contrary to case law both in Texas and across the country. Until this case, Texas appellate courts have broadly precluded liability for former landowners even when those landowners designed or constructed improvements to their former property. *See First Fin.*, 797 S.W.2d at 291 (precluding liability against former landowner as a matter of law because section 352 "bars liability for *all dangerous conditions* [including] design defects, per se negligence, or any other theory of negligence") (emphasis added);

Beall, 532 S.W.2d at 364-66 (rejecting former landowner's liability under § 352).[2] Many courts beyond Texas have also routinely rejected the court of appeals' "dual-capacity" theory based on a similar reading of section 352. *See, e.g.*, *Preston v. Goldman*, 720 P.2d 476, 481, 487 (Cal. 1986); *Papp v. Rocky Mountain Oil & Minerals, Inc.*, 769 P.2d 1249, 1256-57 (Mont. 1989); *Gresik v. PA Partners, LP*, 33 A.3d 594, 599-600 (Pa. 2011); *see also* Petitioner's Brief on the Merits at Tab I (listing national cases that have adopted the Restatement or similar rule).

Given the overwhelming weight of authority both inside and outside of Texas, it would be a mistake for this Court to allow the court of appeals' opinion to stand. Individuals and businesses in this state should be free to sell their property without the perpetual threat of a lawsuit for a personal injury that occurs long after they have relinquished the property to new owners. It is the current property owners, not those in the chain of title, who have a duty to make their property safe for their invitees. *See, e.g.*, *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 767 (Tex. 2010). Imposing an ongoing duty for a past owner of real property to keep it safe for invitees makes no sense because that past owner no longer has the ability to satisfy such a duty.

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[2] Jenkins insists that neither case controls here because "the former owners [in those cases] had not designed the equipment to be affixed to the real estate." Resp. Br. at 37. But this is simply not true. As the court in *First Financial* explained, "[w]e find *Lo-Vaca* factually similar to this case because there *the transferor constructed the dangerous condition on the property prior to the conveyance*." *First Fin.*, 797 S.W.2d at 290 (emphasis added).

C. Jenkins' and the Court of Appeals' Out-of-State Authorities Do Not Support Application of the "Dual-Capacity" Theory Here.

The court of appeals cited three out-of-state cases in support of its holding, and Jenkins continues to assert them as the primary basis for the "dual-capacity" theory of this case. Not only are these three cases dwarfed by the overwhelming body of contrary authority, they are either wholly inapplicable or readily distinguishable. In proper context, they actually serve to further buttress the core principles established by section 352.

In *Stone v. United Engineering, a Division of Wean, Inc.*, 475 S.E.2d 439 (W.Va. 1996), the West Virginia Supreme Court rejected on procedural grounds the jury instruction proposed by a former factory owner that had designed equipment and then sold the factory to a new owner two years before an accident involving that same equipment. The opinion noted section 352's broad preclusive effect. *Id.* at 451. The court explained that only two exceptions to 352's "rather hard-line rule of nonliability" exist: (1) the exception established by section 353 of the Restatement, which provides that a vendor who conceals a condition that poses an unreasonable risk to persons on the land may be subject to post-transfer liability; and (2) a narrow exception "where the vendee of real property had knowledge of the dangerous condition at the time of the conveyance but sufficient time has not elapsed at the time of an accident to allow the vendee to remedy the defect." *Id.* at 451-52. But because the defendant had not requested a jury

instruction that included the second exception, the court *declined to decide whether to adopt section 352 at all*, and therefore affirmed judgment in favor of the injured worker. *Id.* at 452-53.

Thus, *Stone* does not support any application of a "dual capacity" exception to section 352. The court of appeals' misplaced reliance on *Stone* is further confirmed by the West Virginia Supreme Court's subsequent confirmation of the principle underlying section 352. *See Conley v. Stollings*, 679 S.E.2d 594, 599 (W.Va. 2009) (holding that a prior landowner was not liable for constructing an artificial condition that subsequently harmed a third-party after the property had been transferred to a new owner). That development effectively neuters any ongoing persuasive force Jenkins could hope to extract from *Stone*. Moreover, neither of the exceptions identified in *Stone* would affect the outcome in this case because Jenkins does not claim that Occidental either concealed a dangerous condition or that the vendee (Equistar Chemicals, L.P.) lacked sufficient time to remedy any alleged design defect.

The court of appeals and Jenkins also cite to *Carroll v. Dairy Farmers of Am., Inc.*, 2005 WL 405719 (Ohio Ct. App. 2005). *Carroll* addressed a default judgment against a former plant owner that had allegedly modified equipment before selling the plant to a new owner. *Id.* at *1-2. But in *Carroll*, the defendant had sought and obtained summary judgment based on the claim that there was no

evidence showing it had been involved with the design, installation, or modification of the equipment at issue. *Id.* at *3. The court of appeals disagreed, holding that the summary judgment record supported the plaintiff's claim that the former owner had modified the equipment that caused her injury. *Carroll* includes no mention or analysis of the rule embodied in section 352 because the former property owner failed to raise it as an issue.

Finally, the court of appeals and Jenkins both rely on *Dorman v. Swift & Co.*, 782 P.2d 704 (Ariz. 1989). That case is readily distinguishable. In *Dorman*, the court held that section 352 would not preempt a negligent design claim against a former owner where the negligently designed product "is wholly unrelated to the use or enjoyment of the land." *Id.* at 707. The court, however, recognized the preclusive effect of section 352 in nearly identical cases involving, for example, the design and installation of an artificial pond, basement stairs and even the negligent installation of a gas heater. Recognizing the tenuous line it had drawn, the court noted that "no court has explained the applicability of § 352 as we do here." *Id*. at 708 fn. 3. Thus, *Dorman* is both distinguishable and an outlier. And because the distinction between an improvement that is "related to the use or enjoyment of land" and one that is "unrelated to the use or enjoyment of land" is

meaningless – as shown by later decisions of other Arizona courts[3] – the case provides poor support for the "dual-capacity" theory in the present case.

The "[o]ther out-of-state authorities" Jenkins recites in his merits brief also fail to support application of the "dual-capacity" theory. (*See* Resp. Br. at 31-33.) Several of Jenkins' cases permitted recovery against former landowners based on the narrow exceptions to section 352 discussed above:

- *Thompson v. Higginbotham*, 187 S.W.3d 3, 7 (Mo. Ct. App. 2006) (former owners who designed and built a collapsed balcony could be liable under the exception to section 352 because builders may have had reason to know of defective state of the property and did not inform new owners);

- *Learson v. Bussey*, 691 So.2d 1301, 1303 (La. Ct. App. 1997) (former owner who painted over defective wooden stairs could be liable under the exception to section 352 because he had reason to know of defective state of the property and did not inform the new owners);

- *Matthews v. Tobias*, 688 N.Y.S.2d 677, 678 (N.Y. App. Div. 1999) (dismissing claim against former owner because the "narrow exception" to Section 352—which permits former landowners to be held liable if the new owner has not had a reasonable time to discover the condition—did not apply).

Because Jenkins has not offered any evidence that Equistar did not have sufficient time to remedy any purported design defect or that Occidental concealed a defect

[3] *See, e.g., Andrews v. Casagrande*, 804 P.2d 800, 803 (Ariz. Ct. App. 1990) (applying section 352 to preclude liability against former owner and rejecting argument made based on the distinction in *Dorman*); *Menendez v. Paddock Pool Construct.*, 836 P.2d 968, 978 (Ariz. Ct. App. 1991) (same).

from Equistar upon sale of the property, these cases do nothing to aid Jenkins' case.

Jenkins also cherry picks out-of-context language from a few cases that did not even involve the former landowner's design or construction of an improvement to the later-sold property:

- *Smith v. Andre*, 843 N.Y.S.2d 209, 211 (N.Y. App. Div. 2007) (slip-and-fall case with no allegations or evidence concerning the design or construction related to the previously transferred property);
- *Haynes v. Estate of Goldman*, 2007 WL 2500231, *15 (N.Y. Sup. Ct. 2007) (wrongful death case relating to failure to maintain a faulty elevator and lacking any allegations or evidence related to the design or construction of the elevator);
- *Coyne v. Talleyrand Partners, L.P.*, 802 N.Y.S.2d 513, 515-16 (N.Y. App. Div. 2005) (slip-and-fall case with no allegations or evidence related to the design or construction by the former owner of any aspect of the previously transferred property).

Jenkins cites to three New York cases that each involve a *premises liability claim* based on "the creation of a dangerous condition" through the former landowner's destruction or removal of various improvements that would otherwise have ensured the safety of third-parties:

- *Scheffield v. Vestal Pkwy. Plaza, LLC*, 958 N.Y.S.2d 232, 234 (N.Y. App. Div. 2013) (lawsuit against former landowner for removing pavement from portion of road);
- *Merrick v. Murphy*, 371 N.Y.S.2d 97, 100 (N.Y. Sup. Ct. 1975) (lawsuit against former landowner for demolition of retaining wall);

- *Marrero v. Marsico*, 639 N.YS.2d 183, 184 (N.Y. App. Div. 1996) (negligent digging and filling of a trench).

Jenkins insists throughout his briefing that his claim against Occidental is based only on the "negligent design of industrial equipment," and not the premises liability-type claims at issue in these cases.[4] Therefore, none of these cases support his argument, which is based entirely on the notion that negligent design claims can persist against the former landowner. Jenkins' reliance on these cases only reconfirms the conclusion that, at its core, his claim is nothing more than a repackaged premises liability claim.

Finally, Jenkins' remaining cases do not even address the principle reflected in section 352, instead focusing on matters such as other states' unique statutes of repose:

- *CITGO Petroleum Corp. v. McDermott Int'l, Inc.*, 858 N.E.2d 563, 569 (Ill. App. Ct. 2006) (applying Illinois' statute of repose to bar claim for negligent installation);
- *Stephens v. St. Regis Pulp & Paper Co.*, 863 F. Supp. 341, 345-46 (S.D. Miss. 1994) (applying Mississippi statute of repose to claim against former factory owner who had constructed improvement to property prior to selling it);
- *Magee v. Blue Ridge Prof'l Bldg. Co., Inc.*, 821 S.W.2d 839, 842-43 (Mo. 1991) (addressing constitutionality of the Missouri statute of limitations).

[4] Indeed, Jenkins argues in his response brief that Occidental wrongly attempts to "shoehorn the negligent design of industrial equipment into the premises liability categories," but this is precisely what Jenkins has done here in relying on these cases. *See* Resp. Br. at 24.

2. The Court of Appeals' Opinion Would Also Negate the Legislature's Policy Decision to Enact 10-Year Statutes of Repose for Those Who Design or Construct Improvements to Real Property.

A proper application of the principle embodied in section 352 of the Restatement likely brings an end to this case. But the court of appeals' opinion also rests on another holding that this Court should closely scrutinize if the issue is reached. It is well within the purview of the legislative branch to establish statutes of repose to prevent tort liability from accruing indefinitely into the future, long after a defendant's allegedly tortious conduct occurred. As applicable here, the Texas Legislature has enacted two such statutes that served as the basis for the trial court's take-nothing judgment, but which the court of appeals failed to apply as written. Because of those statutes' importance to the individuals and businesses who design or construct improvements to their real property, the *amici curiae* here support Occidental's request that the Court restore the plain meaning of those statutes.

The purpose of a statute of repose is to end liability after a legislatively determined period of time, so that potential defendants can proceed with certainty that they will not be held liable for actions or decisions that occurred long ago, before memories have faded and evidence has been lost. In this instance, the Legislature has enacted sections 16.008 and 16.009 of the Texas Civil Practice & Remedies Code, both of which provide protections to certain types of parties

engaged in the act of construction. As this Court has explained, "[s]ection 16.008 protects registered or licensed architects or engineers, while 16.009 protects a person who constructs or repairs, and section 16.008 protects those inspecting improvements to real property or equipment attached to real property, while 16.009 only protects those who construct or repair improvements to real property." *Sonnier v. Chisholm-Ryder Co., Inc.*, 909 S.W.2d 475, 479 (Tex. 1995).

A. The Court of Appeals' Opinion Misconstrues § 16.008.

Section 16.008 imposes a 10-year repose period for personal injury claims when they are brought against:

> a registered or licensed architect, engineer, interior designer, or landscape architect in this state, who designs, plans, or inspects the construction of an improvement to real property or equipment attached to real property, not later than 10 years after the substantial completion of the improvement or the beginning of operation of the equipment in an action arising out of a defective or unsafe condition of the real property, the improvement, or the equipment.

Tex. Civ. Prac. & Rem. Code § 16.008(a). The court of appeals erred in applying that statute when it held that it did not apply when an improvement to real property was designed *under the supervision of a licensed engineer who was employed by Occidental*. *See Jenkins*, 415 S.W.3 at 20-22. Instead, the court held that because Occidental "is not a registered or licensed engineering firm . . . it therefore cannot argue that the entity itself was a 'registered or licensed . . . engineer . . .who design[ed]' the acid addition system" at issue in the case. *Id.* n.6. In so holding,

the court of appeals essentially eliminated the statute of repose for corporations and other business entities that design improvements to their property by acting through their own in-house engineers.

It is a fundamental precept of law that a corporation can only act through its employees or other agents. *See, e.g., GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 618 (Tex. 1999). Thus, when Occidental's licensed engineer employee supervised the design of Occidental's acid addition system, she was standing in the shoes of Occidental itself. Construing section 16.008 to extend statute of repose protection only to the licensed engineer employee and not to the company that employed and directed her would be a departure from ordinary principles of corporate law. If allowed to stand, the court of appeals' unduly constrained reading of section 16.008 would expose property owners to liability when they used their own licensed engineers to design improvements to the realty, while neither the engineer nor the property owner would be subject to liability if the owner contracts the work out to a third party engineer – precisely the type of absurd result that should be avoided when interpreting a statute. *See, e.g., Jaster v. Comet II Const., Inc.* 438 S.W.3d 556, 562 (Tex. 2014).

B. The Court of Appeals' Opinion Also Misconstrues § 16.009.

Section 16.009 also imposes a 10-year statute of repose, this time for personal injury claims that are being brought against "a person who constructs or

repairs an improvement to real property not later than 10 years after the substantial completion of the improvement in an action arising out of a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement." Tex. Civ. Prac. & Rem. Code § 16.009(a). In rejecting the applicability of that provision, the court of appeals again relied on an improperly narrow reading that thwarts, rather than promotes, the purpose of the statute.

By the plain text of the statute, section 16.009 applies to "a person who constructs or repairs an improvement to real property." *Id.* The statute does not define what level of responsibility the property owner must assume for a project before it "constructs or repairs" the improvement, but the court of appeals expressly held that the owner must have performed "the role equivalent to that of a general contractor" before section 16.009 will apply. *See Jenkins*, 415 S.W.3d at 25. Nothing in the statute provides any basis for that elevated standard, and this Court has never explained what level of involvement a property owner[5] must have in constructing or repairing an improvement to real property before it qualifies for protection under section 16.009. Yet it would once again be an absurd result if the

[5] Jenkins cites *Sonnier* for the proposition that a party must physically affix equipment to the property before it can be said to have constructed the improvement. *See* Resp. Br. at 45-46. But *Sonnier* involved the question of whether a third-party manufacturer had constructed an improvement to real property by manufacturing a product (a tomato chopper) that a customer purchased and affixed to its own property. *See Sonnier*, 909 S.W.2d at 477, 481-82. *Sonnier* did not address whether *the property owner* "constructs or repairs an improvement to real property" by designing a tomato chopper, building some of its components, and hiring a contractor to have it installed on the property.

person who physically constructed and affixed the improvement to the realty was afforded the protection of section 16.009, while the property owner that caused it to be affixed there in the first place was again subject to perpetual liability for its defective or unsafe condition. Accordingly, *amici* ask this Court to clarify that section 16.009 protects both those who construct an improvement and the property owners who hired them to install it.

CONCLUSION

The court of appeals' decision and rationale undermines the fundamental expectations of property owners throughout Texas and threatens to saddle them with perpetual tort liability long after they have sold their property to new owners. Accordingly, Amici Curiae respectfully request that the Court grant Occidental's petition for review, reverse the judgment of the court of appeals, and issue an opinion vindicating Occidental's position in this case.

Dated: February 13, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copies of the foregoing instrument have been provided on this 13th day of February, 2015 to all counsel of record through an authorized electronic service provider.

/s/ Richard A. Smith
Richard A. Smith

CERTIFICATE OF COMPLIANCE

This amicus brief complies with the type-volume limitations of Rule 9.4 because it contains 4,470 words, excluding the parts of the brief exempted by Rule 9.4(i)(1). In making this certification, the undersigned has relied on the word-count function in Microsoft Word, which was used to compose this brief.

/s/ Richard A. Smith
Richard A. Smith

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