CAUSE NO. 19-0694
IN THE SUPREME COURT OF TEXAS

IN RE C.C.,

Relator.

Original Proceeding Arising Out of
the 16th Judicial District Court of Denton County, Texas
Cause No. 16-07061-16 - Hon. Sherry Shipman, Presiding Judge
And the Second District Court of Appeals (No. 02-19-00244-CV)

REAL PARTY IN INTEREST'S POST-SUBMISSION SUPPLEMENTAL BRIEF ON THE MERITS

Respectfully submitted:

LINDA RISINGER
Texas Bar No. 14854700
linda@ldrisingerlaw.com
Law Office of Linda Risinger
2691 Dallas Parkway, Suite 300
Frisco, Texas 75034
Tel:(972) 377-0096
Fax:(214) 271-0055

MICHELLE MAY O'NEIL
Texas Bar No. 13260900
michelle@owlawyers.com
MICHAEL D. WYSOCKI
Texas Bar No. 24042257
michael@owlawyers.com
KARRI BERTRAND
Texas Bar No. 24084826
karri@owlawyers.com
O'Neil Wysocki, P.C.
5323 Spring Valley Rd., Ste. 150
Dallas, Texas 75254
Tel:(972) 852-8000
Fax:(214) 306-7830

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Additional Responsive Issue: The best interest of the child standard, initially established in *Holley v. Adams*, equalizes the rights of the child compared to the rights of a parent by providing a non-exhaustive list of factors for the trial court to consider.

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TO THE HONORABLE JUSTICES OF SAID COURT:

NOW COMES J.D. who submits this his *Real Party in Interest's Post-Submission Supplemental Brief on the Merits*, and in support would show as follows:

Summary of Additional Argument

During oral argument, Father for the first time argued that mandamus should alter the best interest analysis under Texas law. This supplemental post-submission brief is presented to elaborate on the existing law related to this new position asserted by Father.

It is well-established that a child benefits from the same constitutional liberty interests as an adult. The best interest standard has also been found to be of constitutional dimensions. A child has a liberty interest in his or her own best interest, including in his or her free association with those parent-like figures in his or her life. So, a parent's rights are not the sole liberty interests at play. This Court discussed the balance of the child's liberty interests versus the parent's liberty interests as well as other relevant factors in determining the best interest of the child in the leading opinion of *Holley v. Adams*. Interpreting the *Holley* case together with the *V.L.K.* case, this Court has clearly defined the best interest standard as being an equal balance of several competing constitutional rights – those of the child, those of the parent, as well as those of the state acting *in parens patriae*. Because this issue has been

decided and needs no further clarification in Texas jurisprudence, no clear abuse of discretion has occurred, and mandamus should be denied.

Argument

<u>Additional Responsive Issue:</u> The best interest of the child standard, initially established in *Holley v. Adams*, equalizes the rights of the child compared to the rights of a parent by providing a non-exhaustive list of factors for the trial court to consider.

1. Further briefing is necessary because Father raised new, unbriefed issues during his oral argument.

During oral argument, Father raised a request for relief which was previously unbriefed, wherein he argued that this Court should alter the best interest of the child standard detailed by this Court in 1976 to provide "that the first prong of a court's best interest inquiry must be the fit parent presumption [and] if a parent is fit, the inquiry is over, the court cannot substitute its opinion for that of a fit parent." Holly Draper, Oral Argument for Relator, Supreme Court of Texas (April 22, 2020). In response, Stepfather referenced generally the competition between the child's constitutional rights compared to the parent's rights which are weighed as part of the best interest inquiry.

These two propositions intertwine and neither has been fully explored in the briefing. Therefore, Stepfather submits this post-submission brief to expound on the interrelation of the best interest of

the child standard detailed in *Holley v. Adams* and to discuss how the rights of the child compared to the rights of the parent lead to the equal weight given to each of the *Holley* factors. *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976).

2. Under the Constitution, a child is a "person" with liberty interests that must be balanced in the best interest equation.

Father seeks to have this Court look only to the liberty rights of a parent without any regard for the rights of the child, the state acting *in parens patriae*, or the Stepfather. By omission, Father seems to posit that only a parent has constitutional-level liberty interests at stake to be considered.

a. Federal law recognizes the child's Constitutional rights.

"Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Id.* As such, children are entitled to substantive due process, privacy, and protection of their liberty, the same as are adults. *See In re Gault*, 387 U.S. 1, 87 S.Ct. 1428 (1967).

Specifically, a child has a liberty interest in competent parental care in furtherance and protection of the child's best interests. *See* *Santosky v. Kramer*, 455 U.S. 745, 760, 102 S. Ct. 1388, 1398 (1982) (acknowledging that the child has rights and interests independent of the parent or the state in a parental termination suit). Justice Stevens in his dissent in *Troxel* recognized that, separate from the parent's interests and the state's *parens patriae* interest, the child has his or her "complementary interest in preserving relationships that serve [his or] her welfare and protection." *Troxel v. Granville*, 530 U.S. 57, 88, 120 S. Ct. 2054, 2072 (2000) (Stevens, J., dissenting), citing *Santosky*, 455 U.S. at 760, 102 S.Ct. at 1388.

Justice Stevens' dissent went on to discuss the child's liberty interests in preserving parent-like bonds:

> "While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, … it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, *so, too, do children have these interests*, and so, too, must their interests be *balanced in the equation*."

Troxel, 530 U.S. at 88, 120 S. Ct. at 2072 (2000) (Stevens, J., dissenting) (emphasis added).

Justice O'Connor in the *Troxel* plurality acknowledged that the traditional nuclear family does not define most family structures today, so the law should not make presumptions that root in the traditional family structure. *Troxel*, 530 U.S. at 64, 120 S.Ct. at 2059. Justice O'Connor noted:

> "Because grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of the children therein by protecting the relationships those children form with third parties.... [C]hildren should have the opportunity to benefit from relationships with statutorily specified persons."

Id.[1]

Likewise, Justice Kennedy envisioned protecting the child's right to a relationship (intimate associational right under the First Amendment) with parent-like figures:

> "Some pre-existing relationships, then, serve to identify persons who have a strong attachment to the child with the concomitant motivation to act in a responsible way to ensure the child's welfare.... [T]hose relationships can be so enduring that in certain

[1] Justice Thomas' concurring opinion points out that the plurality decision by Justice O'Connor did not use a strict scrutiny analysis. This is significant because it acknowledges that other interests must also be balanced. "The plurality's rejection of the strict scrutiny standard of review is also important because it demonstrates that the Court will permit other interests to be balanced against the interests of the legal parent, possibly including the child's interest." Kyle C. Velte, Towards Constitutional Recognition of the Lesbian-Parented Family, 26 N.Y.U. Rev. L. & Soc. Change 245, 287-88 (2001). Finding a liberty interest in children to maintain a relationship with parent-like individuals would thus protect children against the unwarranted loss of psychological and emotional ties to their established families. *Id.*

> circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological harm to the child."

Id. at 99, 2078 (Kennedy, J., dissenting). Justice Kennedy worried that presuming every family should be viewed through the traditional nuclear family structure would also presume that parents have always been the primary caregivers and third parties who seek visitation have zero legitimate claim to a relationship with the child. *Id.* at 98, 2077. He advocated that the best interest standard should be used to balance all of these competing rights. *Id.* at 99, 2078.

Justice Brennan in *Roberts v. U.S. Jaycees* discussed the important emotional attachment of family relationships from a First Amendment intimate associational standpoint:

> "Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty."

Roberts v. U.S. Jaycees, 468 U.S. 609, 619–20, 104 S. Ct. 3244, 3250–51 (1984).

Just as the mere existence of a biological link does not merit constitutional protection as a parent, similarly the absence of a biological link should not bar protection of the child's parent-like family members either. *See* *Lehr v. Robinson*, 463 U.S. 248, 261, 103 S.Ct. 2985, 2994 (1983); *Michael H. v. Gerald D.*, 491 U.S. 110, 128, 109 S.Ct. 2333, 2345 (1989).

b. Texas has long recognized the independent constitutional interests and rights of the child in custody litigation.

In 1963, this Court in *Herrera* recognized the right of the child "to be surrounded by such influences as will best promote its physical, mental, and moral development is an inherent right, of which, when once acquired, it cannot be lawfully deprived." *Herrera v. Herrera*, 409 S.W.2d 395, 398 (Tex. 1966).

This is not a new or modern concept in our jurisprudence. In 1894, this Court found the best interest of the child standard to be the proper balance of the competing rights of the child, parent, and state:

> "The one most vitally interested, however, in its custody, during the formative period of its character, is the one whose present and future happiness and tendencies towards good or evil will be most affected by its early environments, and its physical, mental, and moral training,—the child itself. The right of the parent or the state to surround the child with proper influences is of a governmental

> nature, while the right of the child to be surrounded by such influences as will best promote its physical, mental, and moral development is an inherent right, of which, when once acquired, it cannot be lawfully deprived."

Legate v. Legate, 87 Tex. 248, 252, 28 S.W. 281, 282 (1894).

Holley further defined the constitutional dimensions of "…the right of the child to the benefit of the home and environment which will probably best promote its interest and the right of the parent to surround the child with proper influences." *Holley v. Adams*, 544 S.W.2d 367, 370 (Tex. 1976).[2]

Additionally, the Texas Constitution provides certain affirmative rights greater than those provided under the federal constitution. Section 19 guarantees due process, stating that "[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." Tex. Const. art I, §19. Section 27 addresses freedom of assembly, ensuring that Texas citizens "shall have the right, in a peaceable manner,

[2] The *Holley* Court went so far as to apply strict scrutiny to the balance of the child's constitutional rights versus the parent or other party. *Holley v. Adams*, 544 S.W.2d at 370. However, *Holley* was a termination of parental rights case, which may have elevated the scrutiny applied, which might not equate to a custody determination. *Id.* The United States Supreme Court did not apply strict scrutiny in evaluating the visitation issues in *Troxel*, as noted by Justice Thomas' concurring opinion. *Troxel*, 530 U.S. at 80, 120 S.Ct. at 2068 (Thomas, J., concurring).

to assemble together for their common good; and apply to those invested with the power of government for redress of grievances or other purposes." Tex. Const. art. I, §27. If a child has a nebulous liberty interest in his or her care and custody, such right would apply not only under the United States Constitution but also under the Texas Constitution. The cases do not define the specific derivation of the child's liberty interest, but it is safe to assume it falls in both realms.

3. When the rights of the child are out of alignment with the rights of the parent, trial courts are called upon to resolve the conflict, using the best interest of the child standard.

"The best interest of the child [standard] is the backbone of American family law" when deciding issues related to the child. *See* *Yavapai-Apache Tribe v. Meija*, 906 S.W.2d 152, 168 (Tex. App. – Houston [14th Dist.] 1995, orig. proceeding). The best interest of the child standard has been recognized nationally as the procedural standard to balance the competing rights of the parent, child and the state.[3] *See*

[3] The best interest of the child standard developed as other standards fell by the wayside. The best interest standard repudiated earlier paternal custody presumptions based on property law and maternal custody presumptions based on gender stereotypes. See Wendy Anton Fitzgerald, Maturity, Difference, and Mystery: Children's Perspectives and the Law, 36 Ariz. L. Rev. 11, 53 (1994).

Troxel v. Granville, 530 U.S. at 91, 120 S. Ct. at 2073 (Stevens, J., dissenting).

The best interest of the child standard provides guidelines for trial judges in making discretionary decisions in child-related cases, focusing the inquiry on the certain child-centered factors and reminding the judge and parties that factors not centered around the child are of lesser importance. The standard provides the trial courts with the discretion to appoint amicus attorneys to advocate for the child's best interest, attorneys or guardians ad litem to represent the child's interest in the suit, to order custody evaluations, psychological examinations, counseling for the parties or child, including to order release of private medical and mental health information, all in the search of the child's best interest. See Wendy Anton Fitzgerald, Maturity, Difference, and Mystery: Children's Perspectives and the Law, 36 Ariz. L. Rev. 11, 71 (1994).

"The best interest of the child standard equates to a substantial governmental interest for purposes of the Equal Protection Clause." *Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S. Ct. 1879, 1882 (1984).

Texas jurisprudence provides the existing framework for the best interest standard. "The best interest of the child shall always be the *primary* consideration of the court in determining issues of conservatorship and possession of and access to the child." Tex. Fam. Code §153.002 (emphasis added). The public policy of this state places importance upon frequent access with parents, safety and stability of the child's environment, and parents sharing in the rights and duties pertinent to the child. Tex. Fam. Code §153.001. "The desires, acts and claims of the respective parents are secondary considerations and material only as they bear upon the question of the best interest of the child." *Bukovich v. Bukovich*, 399 S.W.2d 528, 529 (Tex. 1966); *see also Haymond v. Haymond*, 74 Tex. 414, 421, 12 S.W. 90, 93 (1889). The courts remind litigants that the "affections and feelings of parents are *secondary* to the best interest of the child." *In re Rodriguez*, 940 S.W.2d 265 (Tex. App. – San Antonio 1997, writ denied) (emphasis added).

a. The leading case of *Holley v. Adams* defined the best interest of the child standard in Texas jurisprudence.

This Court in *Holley v. Adams* acknowledged the competing rights of the child versus the parent when it defined the best interest standard

that predominates Texas family law jurisprudence. *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976).

> "An extended number of factors have been considered by the courts in ascertaining the best interest of the child. Included among these are the following:
>
> (A) the desires of the child;
>
> (B) the emotional and physical needs of the child now and in the future;
>
> (C) the emotional and physical danger to the child now and in the future;
>
> (D) the parental abilities of the individuals seeking custody;
>
> (E) the programs available to assist these individuals to promote the best interest of the child;
>
> (F) the plans for the child by these individuals or by the agency seeking custody;
>
> (G) the stability of the home or proposed placement;
>
> (H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and
>
> (I) any excuse for the acts or omissions of the parent. This listing is by no means exhaustive but does indicate a number of considerations which either have been or would appear to be pertinent."

Holley, 544 S.W.2d at 371-72, *citing* *Herrera v. Herrera*, 409 S.W.2d 395 (Tex. 1966); *Mumma v. Aguirre*, 364 S.W.2d 220 (Tex. 1963); *Porter v. Porter*, 371 S.W.2d 607 (Tex. Civ. App. – Eastland 1963, writ ref'd n.r.e.); *Heard v. Bauman*, 443 S.W.2d 715 (Tex. 1969). The *Holley* factors, as

they have been termed, contain a nonexhaustive list of factors that the trial court must weigh in making a best interest decision. *Id.*

By citing to *Herrera* for the first three items in the *Holley* list, the Court underscored the liberty interest of the child to be both considered and balanced. *Holley*, 544 S.W.2d at 371; *see also Herrera*, 409 S.W.2d at 398.

Likewise, by citing to *Mumma*, the Court acknowledges the need to balance "conflicting considerations" in determining the best interest of the child. *Mumma*, 364 S.W.2d at 223. Specifically, the *Mumma* court pointed to the ability of the trial judge to exercise discretion in making custody decisions because, "[h]e has an opportunity to observe and evaluate the personalities of the contending claimants, to weigh the credibility of their testimony, to assess the physical, mental, moral and emotional needs of the child, and to adjudge from personal observation which of the claimants can best meet the needs of the child." *Mumma*, 364 S.W.2d at 223. When balancing the "righteousness of claims to custody of children" the Court made clear that the paramount concern is with the best interest of the child. *Mumma*, 364 S.W.2d at 221, citing *Rice v. Rice*, 21 Tex. 58, 67 (1858). The *Mumma* court asserted that there are

rules to measure the best interest of the child, such as stability of the child in his or her home and surroundings. *Id.*

The Texas appellate courts have, over time, added to the list of best interest factors stemming from particular cases.

Important to this case, the preferences of the parent are one factor to be considered in the best interest analysis in a modification suit. "Although this presumption [that the child's best interest is to be raised by its natural parents] should be considered by the trial judge in weighing the evidence, it cannot be controlling in the face of a final judgment to the contrary, and, whatever effect such a presumption may have in an original custody action, it cannot control a suit to change custody." *Taylor v. Meek*, 154 Tex. 305, 310, 276 S.W.2d 787, 790 (1955); *see also In re V.L.K.*, 24 S.W.3d 338, 342 (Tex. 2000).

Summarily, some of the cases that have expounded upon the best interest factors to be considered in certain situations include:

- Factors to consider in appointing the parties joint managing conservators. *In re Bertram*, 981 S.W.2d 820, 825-26 (Tex. App. – Texarkana 1998, no writ).

- Factors to consider in the context of modification of conservatorship. *In re C.A.M.M.*, 243 S.W.3d 211, 221 (Tex. App. – Houston [14th Dist.] 2007, pet. denied); Tex. Fam. Code §153.134(a).

- Factors to consider in the relocation context. *Lenz v. Lenz*, 79 S.W.3d 10, 17-19 (Tex. 2002); *Bates v. Tesar*, 81 S.W.3d 411, 430 (Tex. App. – El Paso 2002, no pet.).

- Factors for termination of parental rights cases. *In re E.R.W.*, 528 S.W.3d 251 (Tex. App. – Houston [14th Dist.] 2017, no pet.); *In re R.S.-T.*, 522 S.W.3d 92 (Tex. App. – San Antonio 2017, no pet.); *In re T.N.*, 180 S.W.3d 376 (Tex. App. – Amarillo 2005, no pet.); *In re D.S.*, 176 S.W.3d 873 (Tex. App. – Fort Worth 2005, no pet.); *In re S.N.*, 272 S.W.3d 45 (Tex. App. – Waco 2008, no pet.); *In re K.O.*, 488 S.W.3d 829 (Tex. App. – Texarkana 2016, pet. denied); *Penn v. Abell*, 173 S.W.2d 483 (Tex. Civ. App. – El Paso 1943, no writ).

- Factors to consider in parental notification cases. *In re Doe 2*, 19 S.W.3d 278, 282 (Tex. 2000).

The best interest standard has been found to be constitutional by several intermediate appellate courts. The Eastland Court of Appeals held the "'best interest of the child' standard does not violate the due process clause or the equal protection clause of the 14th Amendment to the Constitution of the United States and that it does not violate Article 1, Section 19, Texas Constitution of 1876 (1955)." *In re H.D.O.*, 580 S.W.2d 421, 424 (Tex. Civ. App. – Eastland 1979, no writ). The Fort Worth and Austin Courts of Appeals have similarly held. *Crahan v. N.R.*, 581 S.W.2d 272 (Tex. Civ. App. – Fort Worth 1979, writ dism'd.); *Van Wart v. Van Wart*, 501 S.W.2d 359 (Tex. Civ. App. – Austin 1973, no writ).

b. There is no hierarchy of constitutional rights; therefore, a parent's constitutional rights are not superior to the constitutional rights of a child.

The United States Supreme Court has historically rejected a hierarchy of constitutional rights. For example, the Court refused to prioritize First Amendment rights over Sixth Amendment rights. *See* *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561, 96 S.Ct. 2791, 2803-04 (1976). There, the Court was deeply concerned that the petitioners wanted the Court to declare the right of a criminal defendant subordinate to their First Amendment right to publish in all circumstances. The Court noted in response, "[t]he authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other." *Id.*

Justice Souter commented on the conflict between competing rights and interests, as quoted by Laurence Tribe:

> "'The Constitution is a pantheon of values, and a lot of hard cases are hard because the Constitution gives no simple rule of decision for the cases in which one of the values is truly at odds with another,' retired Justice David H. Souter said in a 2010 Harvard commencement speech. 'We want order and security, and we want liberty. And we want not only liberty but equality as well.' (Not to mention privacy, transparency, accountability and efficiency.)"

Laurence H. Tribe, Op Ed: Supreme Court's Ultimate Test: When Rights Collide, *Los Angeles Times*, June 24, 2014 (viewed at https://www.latimes.com/opinion/op-ed/la-oe-tribe-supreme-court-20140625-story.html May 11, 2020). Tribe goes on to state, "Such clashes of values force the justices to exercise judgment: to balance compelling and conflicting values, to forge law by matching shared principles and traditions with ever-changing circumstances and needs." *Id.*

This Court in *Holley* aligned with this principle by making the Holley factors a non-exhaustive series of equally weighted factors, not a hierarchy. *See Holley*, 544 S.W.2d at 371-72. Nowhere in Texas jurisprudence has a court found that certain factors were to be weighed more heavily than other factors, for that would serve to prioritize the rights of certain parties over the rights of others or the child. In fact, each party and each child has interests that should be equally weighted.

Conclusion

This Court has provided the boundaries of the best interest analysis, directing that the child's liberty interests must be weighed and considered as well as the other competing factors. To that point, the first criteria that this Court listed in the list of best interest factors is the

desires of the child to the outcome of the suit. Father seeks to have this Court reorder the best interest factors to require a first hurdle of parental fitness before getting to the remaining discretionary factors. If this Court were to do so, it would be prioritizing the parental liberty interests above the liberty interests of the child, which is inconsistent with constitutional principles.

This Court has already provided an answer to this question. In *Holley*, this Court clearly stated that the child's rights are to be equally balanced in the best interest standard. *Holley v. Adams*, 544 S.W.2d at 371-72. Likewise, in *V.L.K.*, this Court clearly state that the parent's rights are to be equally balanced in the standard. *In re V.L.K.*, 24 S.W.3d 338, 343 (Tex. 2000). This case presents no clear abuse of discretion sufficient to warrant mandamus relief.

Prayer for Relief

WHEREFORE, PREMISES CONSIDERED, Stepfather prays this Court deny the petition for writ of mandamus.

Respectfully submitted,

/s/ Michelle May O'Neil
MICHELLE MAY O'NEIL
Texas Bar No. 13260900
michelle@owlawyers.com
MICHAEL D. WYSOCKI
Texas Bar No. 24042257
michael@owlawyers.com
KARRI BERTRAND
Texas Bar No. 24084826
karri@owlawyers.com
O'Neil Wysocki, P.C.
5323 Spring Valley Rd., Ste. 150
Dallas, Texas 75254
Tel:(972) 852-8000
Fax:(214) 306-7830

CERTIFICATE OF COMPLIANCE

I certify that this document brief/petition was prepared with Microsoft Word 2010, and that, according to that program's word-count function, the sections covered by TRAP 9.4(i)(1) contain 4,056 words.

/s/ Michelle May O'Neil
MICHELLE MAY O'NEIL
Texas Bar No. 13260900
michelle@owlawyers.com
MICHAEL D. WYSOCKI
Texas Bar No. 24042257
michael@owlawyers.com
KARRI BERTRAND
Texas Bar No. 24084826
karri@owlawyers.com
O'Neil Wysocki, P.C.
5323 Spring Valley Rd., Ste. 150
Dallas, Texas 75254
Tel:(972) 852-8000
Fax:(214) 306-7830

Certificate of Service

The undersigned hereby certifies that, pursuant to rule 9.2 of the Texas Rules of Appellate Procedure, a true and correct copy of the foregoing document was served on the following counsel in the manner listed on May 15, 2020:

RESPONDENT:

The Honorable Sherry Shipman — Via E-Mail
16th District Court of Denton County, Texas
1450 E. McKinney St.
Denton, Texas 76209

RELATOR'S COUNSEL:

Holly J. Draper — Via E- Mail
State Bar No. 24046300
Brandi L. Crozier
The Draper Law Firm, P.C.
State Bar No. 24087362
6401 W. Eldorado Pkwy., Suite 80
McKinney, Texas 75070
hdraper@draperfirm.com

Brad LaMorgese — Via E- Mail
State Bar No. 00796918
Orsinger, Nelson, Downing & Anderson, LLP
5950 Sherry Lane, Suite 800
Dallas, Texas 75225

/s/ Michelle May O'Neil
MICHELLE MAY O'NEIL
Attorney for Real Party in Interest