NO. 12-0838

IN THE SUPREME COURT OF TEXAS

PHILLIP BOERJAN, MESTENA OPERATING, LLC, FORMERLY KNOWN AS MESTENA OPERATING, LTD., MESTENA INC., AND MESTENA URANIUM, LLC,
Appellants

V.

J. JESUS RODRIGUEZ, AND M. CARMEN NEGRETE, INDIVIDUALLY AND AS CO-REPRESENTATIVES OF THE ESTATES OF NICOLAS LANDEROSANGUIANO, ANGELINA RODRIGUEZ-NEGRETE, AND CLAUDIA LAURA LANDEROS RODRIGUEZ, AND AS NEXT FRIENDS OF A.L.R., A MINOR,
Appellees

On Appeal from the Fourth Court of Appeals, San Antonio, Texas
Cause No. 04-11-00336-CV

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLEES

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

Marisa Bono
State Bar No. 24052874
mbono@maldef.org
David Hinojosa
State Bar No. 24010689
dhinojosa@maldef.org
110 Broadway, Suite 300
San Antonio, TX 78205
Tel: (210) 224-5476 / Fax: (210) 224-5382

AMICUS CURIAE in support of Appellees

IDENTITY AND INTEREST OF THE AMICUS

This brief is respectfully submitted in support of Appellees on behalf of the Mexican American Legal Defense and Educational Fund ("MALDEF" or "Amicus"). Amicus urges the Court to uphold the decision of the Court of Appeals, which reversed the trial court's improper granting of summary judgment based on the "unlawful acts" doctrine. The trial court's decision to allow a person's immigration status to bar his recovery in tort implicates the public good. Denying undocumented persons access to the tort system will overburden the civil court system by requiring state and county courts to discover and determine a person's immigration state when such a defense is raised, will leave undocumented immigrants without civil remedies, and will encourage vigilantism and lawlessness directed against the Latino community.

Amicus is a nonpartisan, nonprofit organization that promotes social change through advocacy, communications, community education, and litigation in the areas of education, employment, immigrant rights, and political access. In state and federal court, including the United States Supreme Court, Amicus has had significant victories in the area of immigrants' rights. Amicus's Southwest Regional office, located in San Antonio, Texas, provides a unique perspective on the legal, social, and political implications of restricting the immigrant community's access to Texas courts. Amicus has an interest in the justice system's

ability to protect all people in the United States, regardless of ethnicity or immigration status.

Appellees consent to the filing of this brief. No counsel for Appellees wrote any part of this brief. Amicus did not receive any fee or monetary contribution for preparing this brief.

TABLE OF CONTENTS

IDENTITY AND INTEREST OF THE AMICUS ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

STATEMENT OF ISSUES xi

SUMMARY OF ARGUMENT.....1

ARGUMENT.....2

I. DECEDENTS WERE NOT ENGAGED IN AN UNLAWFUL ACT AT THE TIME OF THE ACCIDENT.....2

II. THE TEXAS AND UNITED STATES CONSTITUTIONS GUARANTEE DUE PROCESS TO ALL PERSONS, INCLUDING THOSE WITHOUT AUTHORIZED IMMIGRATION STATUS.....6

A. The Texas Constitution mandates that all persons must have equal access to justice.....6

B. The United States Constitution guarantees due process to all persons, including those without authorized immigration status.....8

C. The right to due process requires equal access to justice.....9

III. OVERTURNING THE APPELLATE DECISION WOULD HARM THE PUBLIC INTEREST BY FORCING STATE COURTS TO MAKE IMMIGRATION DETERMINATIONS.....10

A. Texas courts have consistently rejected claims of immigration status as a barrier to recovery in tort cases.....11

B. State courts lack legal authority to make immigration status determinations. 12

C. State court immigration status determinations would create judicial inefficiency and unintended legal complications. 14

D. State courts lack the resources required to accurately ascertain immigration status. 16

IV. OVERTURNING THE APPELLATE DECISION HARMS THE PUBLIC INTEREST BY INVITING VIGILANTISM AGAINST LATINOS. 18

PRAYER 20

CERTIFICATE OF SERVICE 22

CERTIFICATE OF COMPLIANCE 23

TABLE OF AUTHORITIES

CASES

Aransas Cnty. v. Coleman-Fulton Pasture Co.,
108 Tex. 216 (Tex. 1917) 7

Arizona v. United States,
132 S.Ct. 2492 (2012).....2

Arredondo v. Dugger,
347 S.W.3d 757 (Tex. App.—Dallas 2011, pet. granted) 5

Carcamo-Lopez v. Does 1 through 20,
865 F. Supp. 2d 736 (W.D. Tex. 2011) 11

Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization,
847 F.2d 1307 (9th Cir. 1987) 16

Barcelo v. Elliot,
923 S.W.2d 575 (Tex. 1996) 19

City of Houston v. Clear Creek Basin Auth.,
589 S.W.2d 671 (Tex. 1979) 5

Commercial Standard Fire & Marine Co. v. Galindo,
484 S.W.2d 635 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.).....9, 11

DeCanas v. Bica,
424 U.S. 351 (1976), *superseded by statute* 12

Drax v. Reno,
338 F.3d 98 (2d Cir. 2003) 16

Fuentes v. Alecio,
CIV.A. C-06-425, 2006 WL 3813780 (S.D. Tex. Dec. 26, 2006) 4

Grocers Supply, Inc. v. Cabello,
390 S.W.3d 707 (Tex. App.—Dallas 2012, no pet.) 11

INS v. Lopez-Mendoza,
468 U.S. 1032 (1984) 2, 3, 4

LeCroy v. Hanlon,
713 S.W.2d 335 (Tex. 1986) 7

Martinez v. Fox Valley Bus Lines, Inc.,
17 F. Supp. 576 (N.D. Ill. 1936).....9

Mathews v. Diaz,
426 U.S. 67 (1976).....12

Montgomery v. Kennedy,
669 S.W.2d 309 (Tex. 1984) 6, 15

Morales v. Barnett,
2 CA-CV 2007-0118, 2008 WL 4638133 (Ariz. Ct. App. Feb. 25, 2008) ..18

Nijjar v. Holder,
689 F.3d 1077 (9th Cir. 2012) 13

Plyler v. Doe,
457 U.S. 202 (1982).....8, 12

Republic Waste Servs., Ltd. v. Martinez,
335 S.W.3d 401 (Tex. App.—Houston [1st Dist.] 2011, no pet.).....11

Rico v. Flores,
405 F. Supp. 2d 746 (S.D. Tex. 2005).....4

Rico v. Flores,
481 F.3d 234 (5th Cir. 2007) 3, 4, 5, 20

Shaughnessy v. United States ex rel. Mezei,
345 U.S. 206 (1953).....8

State v. Shumake,
199 S.W.3d 279 (Tex. 2006) 6

Takahashi v. Fish and Game Comm'n,
334 U.S. 410 (1948).....9

Tex. Utils. Elec. Co. v. Timmons,
947 S.W.2d 191 (Tex. 1997) 6

Tyson Foods, Inc. v. Guzman,
116 S.W.3d 233 (Tex. App.—Tyler 2003, no pet.).....10

United States v. Lucio,
428 F.3d 519 (5th Cir. 2005) 12

United States v. Cavillo-Rojas,
No. 10-4033, 2013 WL 563885 (4th Cir. 2013).....4

United States v. Cores,
356 U.S. 405 (1958).....2, 4

United States v. Rincon-Jimenez,
595 F.2d 1192 (9th Cir. 1979) 3

United States v. Witkovich,
353 U.S. 194 (1957).....8

Vicente v. Barnett,
415 F. App'x 767 (9th Cir. 2011) 19

Wal-Mart Stores, Inc. v. Cordova,
856 S.W.2d 768 (Tex. App.—El Paso 1993, writ denied).....10

Yick Wo v. Hopkins,
118 U.S. 356 (1886).....8

Zadvydas v. Davis,
533 U.S. 678 (2001).....8

STATUTES

6 C.F.R. § 5.41-45.....15

8 U.S.C. § 1101(a)(15)(T).....13, 17

8 U.S.C. § 1101(a)(27)(J) 13

8 U.S.C. § 1103 12

8 U.S.C. § 1153(a) 14

8 U.S.C. § 1154.....14

8 U.S.C. § 1158(b)(1)(A).....13

8 U.S.C. § 1158(b)(B)(i-iii) 17

8 U.S.C. § 1182(a)(2)(C)(ii) 15

8 U.S.C. § 1182(a)(6)(C)(i).....17

8 U.S.C. § 1184 (d)(2)(C) 17

8 U.S.C. § 1186a 14

8 U.S.C. § 1186b.....14

8 U.S.C. § 1229a 14

8 U.S.C. § 1229a(a)(1).....12

8 U.S.C. § 1229a(a)(3).....12

8 U.S.C. § 1325.....4, 5, 6, 17

8 U.S.C. § 1325(a)(1).....3, 5

8 U.S.C. § 1325(a)(2).....3, 5

8 U.S.C. § 1361.....15

18 U.S.C. § 922(g)(5)(A).....12

42 U.S.C. § 1981 9

Tex. Civ. Prac. & Rem. Code § 93.001(a)(1) 5

Tex. R. Civ. P. 166a(c) 5

Tex. Const. art. I, § 13 6

U.S. Const. amend. XIV, § 1 8

U.S. Const. art I, § 8, cl. 4, 18 12

U.S. Const. art. 3, § 1 13

OTHER

Andrea Aguilar, Comment, *Civilian Border Patrols: The Right to Safely Cross the Borders vs. The Right to Protect Private Property*, 11 Scholar 371 (2009) 18

Laurel Almada, *$15 Million Settlement Reached in Lawsuit*, Laredo Morning Times, Aug. 25, 2004 18

Matt Rivers, *Is Rancher Liable in Hudspeth County Shooting?*, KTSM News Channel 9–El Paso (May 14, 2011), http://www.ktsm.com/news/is-rancher-liable-in-hudspeth-county-shooting 20

Ray Ybarra, Note, *Thinking and Acting Beyond Borders: An Evaluation of Diverse Strategies to Challenge Vigilante Violence Along the U.S.-Mexico Border*, 3 Stan. J. C.R. & C.L. 377 (2007) 18

Sara A. Martinez, Comment, *Declaring Open Season: The Outbreak of Violence Against Undocumented Immigrants by Vigilante Ranchers in South Texas*, 7 Scholar 95 (2004) 18

U.S. Dep't. of Homeland Sec., OIG-10-12, *Age Determination Practices for Unaccompanied Alien Children in ICE Custody* (2009) 16

STATEMENT OF ISSUES

1. Whether the appellate court correctly concluded that the common law "unlawful acts" doctrine has no basis in law when Decedents were not committing a criminal act at the time of the accident at issue.

TO THE HONORABLE SUPREME COURT OF TEXAS:

The Court of Appeals appropriately reversed the trial court's granting of summary judgment based on the "unlawful acts" doctrine. Accordingly, Amicus respectfully urges the Court to uphold the appellate decision and remand the case to the district court for trial.

SUMMARY OF ARGUMENT

It was impossible for Appellants to meet their burden of proof at summary judgment, because Decedents were not engaged in an illegal act at the time of the accident that led to their deaths. The Court need not reach the question of whether the higher standards of Section 93.001 of the Texas Civil Practice and Remedies Code supplant the "unlawful acts" doctrine in this case. Appellants presented no evidence that Decedents were engaged in *any* unlawful act at the time of the accident, much less one that was the proximate cause of their injury so as to meet the required elements of the doctrine.

Further, Appellants urge a result that would violate well-established due process principles. The United States and Texas Constitutions guarantee persons without authorized immigration status due process of law, including the right of access to courts. Making authorized immigration status a prerequisite to avoid dismissal under the "unlawful acts" doctrine would violate these principles.

Finally, as a matter of policy, if the appellate court decision is overturned, such a ruling would signal to potential tortfeasors that they may take reckless action against, injure, or even kill, undocumented immigrants without civil repercussions. Such a policy is a matter of great public concern, especially in light of recent increased vigilante activity against Latinos, both immigrants and non-immigrants, in border areas. Furthermore, such a decision would unnecessarily involve state courts in complex and costly determinations of whether a person is present in the United States with authorization from the federal government. State district and county courts are unauthorized, under-resourced, and ill-suited to make such determinations. Accordingly, Amicus urges the Court to affirm the appellate court decision.

ARGUMENT

I. DECEDENTS WERE NOT ENGAGED IN AN UNLAWFUL ACT AT THE TIME OF THE ACCIDENT.

If the Court accepts Appellants' argument that unlawful entry and evasion of inspection are continuous criminal violations, it would turn decades of federal court case precedent on its head. It is well-established that unlawful presence in the United States is not, by itself, an ongoing crime for the purpose of tort claims (or for any purpose). *See, e.g., Arizona v. United States*, 132 S.Ct. 2492, 2505 (2012); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984)*; United States v.*

Cores, 356 U.S. 405, 408 n.6 (1958); *United States v. Rincon-Jimenez*, 595 F.2d 1192, 1193-94 (9th Cir. 1979). At the time of Decedents' injuries, which in a wrongful death suit is the time of death, Decedents were not engaged in the criminal violations alleged by Appellants. Thus, Appellants' defense must fail as a matter of law.

Appellants argue that at the time of the accident, Decedents were violating 8 U.S.C. §§ 1325(a)(1) and (2), which create federal crimes for entering the country without inspection and/or evading immigration officer inspection.[1] *See* Pet. for Rev. at 7. First-time offenses constitute misdemeanors, and subsequent offenses constitute felonies. *See Lopez-Mendoza*, 468 U.S. at 1057 n.4 (White, J., dissenting). Federal courts have repeatedly held that these violations may occur only at the point of unlawful entry, and that a violation is not continuous and ongoing. *See, e.g.*, *Rico v. Flores*, 481 F.3d 234, 243 (5th Cir. 2007) (finding that the crime of illegal entry under § 1325 was completed once decedents passed the border patrol checkpoint); *Rincon-Jimenez*, 595 F.2d at 1193-94 ("[T]he offense described by § 1325(2) is consummated at the time an alien gains entry through an unlawful point and does not submit to these examinations."); *id.* (declining "to

[1] These provisions state that "[a]ny alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers . . . shall, for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both." 8 U.S.C. §§ 1325(a)(1)-(2) (2012).

make the offense described in § 1325(2) one that continues as long as the alien remains in this country"); *see also United States v. Cavillo-Rojas*, No. 10-4033, 2013 WL 563885, at *9 (4th Cir. Feb. 15, 2013) (finding that a § 1325(a) offense is completed at the time of the illegal entry, and the statute of limitations begins running at that point).[2]

Even if Decedents did enter unlawfully or evade immigration officers, these alleged unlawful acts would have been completed once they passed an unlawful point of entry. *See Rico*, 481 F.3d at 243 (5th Cir. 2007). In their summary judgment motion, Appellants did not allege that the scene of the accident occurred at an illegal point of entry made by Decedents, nor that Appellees' employee was an immigration officer. And as noted by the Court of Appeals, Defendants did not present any summary judgment evidence to demonstrate the same.[3]

---

[2] Although the United States Supreme Court has never construed § 1325, it has noted in dictum that circuit court interpretations of the statute as a non-continuing offense are correct. *See Lopez-Mendoza*, 468 U.S. at 1056-57 (White, J., dissenting) (citing *United States v. Cores*, 356 U.S. 405 (1958) and Ninth Circuit precedent that construed a § 1325 violation as taking place at the time of entry, and that the statute does not describe a continuing offense).

[3] Appellants cite *Rico v. Flores*, 405 F. Supp. 2d 746 (S.D. Tex. 2005) and *Fuentes v. Alecio*, CIV.A. C-06-425, 2006 WL 3813780 (S.D. Tex. Dec. 26, 2006) to argue that unlawful immigration status constitutes a continuous violation of 8 U.S.C. § 1325. The unlawful acts at issue in *Rico*, however, were the decedents' engagement in an unlawful contract and the conspiracy to commit a crime – in fact, 8 U.S.C. § 1325 is not even cited in the opinion. *See Rico*, 405 F. Supp. 2d at 746-71, *rev'd*, 481 F.3d at 243 (5th Cir. 2007). The Fifth Circuit reversed the lower court, holding that plaintiffs were not barred by a § 1325 violation because plaintiffs had already completed unlawful entry. *See Rico*, 481 F.3d at 243 (5th Cir. 2007). Appellants' citation to *Fuentes v. Alecio* is inapposite. In *Fuentes*, the plaintiff admitted he "employed the services" of the defendant to "successfully help [the decedent] on his journey to the United States." *Fuentes*, 2006 WL 3813780, at *3. Here, Defendants have presented no

On the face of the statute, any potential violation of 8 U.S.C. §§ 1325(a)(1) or (2) would have been completed long before Appellants' employee ever engaged Decedents in the high speed chase that led to their deaths. As such, Decedents could not, as a matter of law, have been committing the alleged unlawful acts at the time the cause of action arose.[4]

Thus, the only offense that Decedents could have been committing conceivably at the time of the accident was trespass, as Appellants allude in their Petition for Review.[5] *See* Pet. for Rev. at 9-11; *Rico*, 481 F.3d at 243 (holding that since the decedents' illegal entry was completed after passing through Border Patrol checkpoint, it was "likely that the only offense that the decedents were committing past the . . . checkpoint was trespass"). However, the unlawful acts rule does not apply to cases where the unlawful act in question is trespass. *See id.* Moreover, Texas courts have established that a landowner owes a duty to a

---

evidence that the Decedents were attempting illegal entry. Second, *Fuentes* is neither controlling on this court nor representative of courts' view on § 1325. *See supra* note 2.

[4] Moreover, if Section 93.001 of the Texas Civil Practice and Remedies Code now governs wrongful death cases, as Appellees argue, Appellants still would have failed to meet their summary judgment burden. Section 93.001 creates an affirmative defense where the movant proves that the nonmovant was convicted of a felony that was the sole cause of the alleged damages. *See* Tex. Civ. Prac. & Rem. Code § 93.001(a)(1); *Arredondo v. Dugger*, 347 S.W.3d 757, 767 (Tex. App.—Dallas 2011, pet. granted). Defendants waived this defense because they failed to raise Section 93.001 as a defense in the lower courts, and did not allege that Decedents were convicted felons. *See* Def. Mot. for Traditional Summ. J. at 3; Tex. R. Civ. P. 166a(c); *see also City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979) (party's failure to expressly present to trial court issue of treatment plant violations precluded party from urging issue on appeal).

[5] Again, Appellants did not raise this violation in their summary judgment briefing and it is therefore waived. *See* Tex. R. Civ. P. 166a(c); *Clear Creek Basin Auth.*, 589 S.W.2d at 678.

trespasser "to refrain from injuring the trespasser willfully, wantonly, or through gross negligence," which, at the very least, raises an issue of disputed material fact, rendering summary judgment inappropriate in this case. *State v. Shumake*, 199 S.W.3d 279, 285 (Tex. 2006); *see also Tex. Utils. Elec. Co. v. Timmons*, 947 S.W.2d 191, 193 (Tex. 1997).

Appellants' burden is to plead and prove conclusively all elements of its affirmative defense as a matter of law. *See Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex. 1984). Because any purported violation of 8 U.S.C. § 1325, by definition, was completed well before Decedents' deaths, Appellant did not, and could not, meet its burden that the unlawful acts doctrine exculpates them from liability in this case.

II. THE TEXAS AND UNITED STATES CONSTITUTIONS GUARANTEE DUE PROCESS TO ALL PERSONS, INCLUDING THOSE WITHOUT AUTHORIZED IMMIGRATION STATUS.

A finding that Decedents were engaged in an unlawful act simply by being present in the country without lawful status contravenes well-established protections guaranteed to Decedents by the Texas and U.S. Constitutions, namely, access to the courts and the right to due process.

A. The Texas Constitution mandates that all persons must have equal access to justice.

The Texas Constitution guarantees every person the right to access courts to vindicate rights and obtain remedies for injuries. *See* Tex. Const. art. I, § 13 ("All

courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."). The open courts provision contemplates that all persons must have access to courts unimpeded by unreasonable barriers. *See LeCroy v. Hanlon*, 713 S.W.2d 335, 339-42 (Tex. 1986) (striking down court filing fee increase as unconstitutional under the open courts provision). The *LeCroy* Court went on to hold that

> [t]he provision's wording indicates the high value the drafters and ratifiers placed on the right of access to the courts. First, the language is mandatory: "*shall* be open" and "*shall* have remedy by due course of law." Further, it is all-inclusive: "*all* courts" are to be open; "for *every* person"; for *all* interests, "lands" (real property), "goods" (personal property), "person" (body and mind), and "reputation" (good name); *at all times*, since there is no emergency exception.

Id. at 339. This all-inclusive language creates a "substantial state constitutional right." *See id.* at 341. There is no language in this constitutional provision that explicitly or implicitly seeks to deny persons access to courts on the basis of their immigration status. *See Aransas Cnty. v. Coleman-Fulton Pasture Co.*, 108 Tex. 216, 219-20, 191 S.W. 553, 554-55 (1917) ("The spirit, purpose and scope of the particular provision are all to be consulted in the effort to determine with certainty the meaning of its terms."). Appellants' attempt to invoke a defense that ultimately denies persons access to courts on the basis of their immigration status thwarts the will of the people and should not stand.

B. The United States Constitution guarantees due process to all persons, including those without authorized immigration status.

Further, the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Immigrants without authorized status have "long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (citing *Shaughnessy v. United States* ex rel. *Mezei*, 345 U.S. 206, 212 (1953)); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The fourteenth amendment to the constitution is not confined to the protection of citizens . . . . These provisions are universal in their application.").

The Fifth and Fourteenth Amendments protect unauthorized aliens from deprivation of rights by the states and federal government. *See Plyler*, 457 U.S. at 210, 213. All immigrants within U.S. borders, even immigrants with outstanding orders of removal against them, have constitutional rights. *See Zadvydas v. Davis*, 533 U.S. 678, 693-94 (2001); *United States v. Witkovich*, 353 U.S. 194, 198 (1957). Because constitutional protections apply to all people, regardless of their immigration status, here, Decedents' immigration status should play no role in denying them the right to due process guaranteed under the Fifth and Fourteenth Amendments.

C. The right to due process requires equal access to justice.

The Fourteenth Amendment to the United States Constitution and the statutes enforcing it protect the rights of all persons – including persons without authorized status – to sue and recover for damages in tort with the full benefit of all available tort remedies and proceedings. As the Texas Court of Appeals has noted, 42 U.S.C. § 1981 provides that "'[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .'" *Commercial Standard Fire & Marine Co. v. Galindo*, 484 S.W.2d 635, 637 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.). "[T]his provision has been held to apply to both aliens and illegal aliens." *Id.* (citing *Martinez v. Fox Valley Bus Lines, Inc.*, 17 F. Supp. 576 (N.D. Ill. 1936) and *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410 (1948)).

Given these underlying federal constitutional guarantees, as well as Texas state constitutional protections, Texas state courts have repeatedly rejected arguments that undocumented persons cannot recover for personal injury on the basis of their immigration status. *See, e.g., Commercial Standard Fire & Marine Co.*, 484 S.W.2d at 637 ("[A] person residing in this State whose entry may be contrary to the immigration laws is not barred, by that reason alone from receiving

workmen's compensation benefits."); *Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233, 244 (Tex. App.—Tyler 2003, no pet.) (citation omitted); *Wal-Mart Stores, Inc. v. Cordova*, 856 S.W.2d 768, 770 n.1 (Tex. App.—El Paso 1993, writ denied) ("The current state of Texas law does not require citizenship or the possession of immigration work authorization permits as a prerequisite to recovering damages for loss of earning capacity . . . .").

Contrary to these precedents and their fundamental guarantee of due process, Appellants contend that Decedents' alleged entry and continued presence in the United States in violation of immigration laws precludes recovery for tortious injury. Following the trial court's reasoning, authorized presence would be a prerequisite to avoiding dismissal under the trial court's application of the "unlawful acts" doctrine. Such a holding would deny Decedents and others the right to sue and enjoy the due process of law solely (and impermissibly) on their status as undocumented immigrants.

III. OVERTURNING THE APPELLATE DECISION WOULD HARM THE PUBLIC INTEREST BY FORCING STATE COURTS TO MAKE IMMIGRATION DETERMINATIONS.

A decision denying tort recovery to unauthorized immigrants would place a new, unmanageable obligation on state courts to adjudicate immigration status because state courts are neither authorized nor equipped to make such determinations. A decision barring tort recovery to unauthorized immigrants

would also incentivize defendants to raise immigration status challenges in all tort cases, unleashing a flood of costly and potentially frivolous claims on courts.

A. Texas courts have consistently rejected claims of immigration status as a barrier to recovery in tort cases.

Historically, Texas courts have refused to consider a party's immigration status as a defense in tort suits and have often excluded evidence of immigration status as entirely irrelevant. *See, e.g.*, *Carcamo-Lopez v. Does 1 through 20*, 865 F. Supp. 2d 736, 766 (W.D. Tex. 2011) (finding an unauthorized immigrant's claim not barred by unlawful acts doctrine because immigration status was irrelevant to harms suffered after arrival); *Grocers Supply, Inc. v. Cabello*, 390 S.W.3d 707, 724 (Tex. App.—Dallas 2012, no pet.) ("Texas law does not require citizenship or the possession of immigration work authorization permits as a prerequisite to recovering tort damages."); *Republic Waste Servs., Ltd. v. Martinez*, 335 S.W.3d 401, 411 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (finding evidence of immigration status was properly excluded and allowing unauthorized immigrant to recover in wrongful death suit); *Commercial Standard Fire & Marine Co.*, 484 S.W.2d at 637 ("An illegal alien is not barred from prosecuting his action for personal injuries."). The well-established rule of Texas courts, confirmed by the Court of Appeal's decision in the present case, is that authorized immigration status is unnecessary for tort recovery.

Thus, Amicus urges the Court to uphold the Texas courts' long-standing view that immigration status does not bar tort recovery, rather than depart from precedent unnecessarily.

B. State courts lack legal authority to make immigration status determinations.

Federal law does not authorize state court judges to adjudicate immigration status.[6] *See* 8 U.S.C. § 1229a(a)(1) (2012) ("An immigration judge shall conduct proceedings for deciding inadmissibility or deportability of an alien."); 8 U.S.C. § 1229a(a)(3) ("[A] proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States . . . ."). The U.S. Supreme Court makes it clear that the "[p]ower to regulate immigration is unquestionably exclusively a federal power," *DeCanas v. Bica*, 424 U.S. 351, 354 (1976), *superseded by statute*, and that "[c]lassifications of aliens" is a "power 'committed to the political branches of the Federal Government.'" *Plyler*, 457 U.S. at 225 (1982) (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)). Congress delegates the power to administer and enforce immigration law to the executive branch. *See* 8 U.S.C. § 1103 (2012); U.S. Const. art I, § 8, cl. 4, 18. Courts have long recognized that the highly political nature of immigration law and policy "has counseled the Judicial Branch to avoid intrusion into this field."

[6] Federal laws do grant limited, defined court powers to federal courts to make immigration findings. *See, e.g.*, *United States v. Lucio*, 428 F.3d 519, 520 (5th Cir.) (finding that defendant was not "lawfully present" for the purposes of 18 U.S.C. § 922(g)(5)(A), prohibiting possession of fire arms while unlawfully present in the United States).

See Plyler, 457 at 225. A decision requiring state courts to ascertain whether a plaintiff's immigration status is lawful would require courts to usurp executive power and operate outside their proper judicial role. *See* U.S. Const. art. 3, §1.

Even if state courts had the authority to determine immigration status, certain immigration status determinations require additional supportive findings that state courts are unauthorized to make. For example, a plaintiff might fall under a category of lawful immigration protection, such as asylum, that only a particular executive officer may grant under federal immigration law. *See* 8 U.S.C. § 1158(b)(1)(A) (2012) (vesting power to grant asylum in the Secretary of Homeland Security and the Attorney General); *see also Nijjar v. Holder*, 689 F.3d 1077, 1082 (9th Cir. 2012) (finding that Congress expressly provided that the Secretary of Homeland Security or the Attorney General may grant asylum, and only the Attorney General may terminate asylum).

Similarly, state courts have no power to afford special protections to unauthorized immigrants who are trafficking victims, which the Secretary of Homeland Security and Attorney General jointly determine. *See* 8 U.S.C. § 1101(a)(15)(T) (2012). For juvenile victims of abuse, abandonment, and neglect, a juvenile court must declare that it is in the child's best interest to remain in the United States, and the Secretary of Homeland Security must consent to granting special immigrant juvenile status. 8 U.S.C. § 1101(a)(27)(J) (2012). Accordingly,

a decision requiring courts to make immigration determinations would force state courts into an impossible situation in which they must step outside their statutory authority in order to rule on a defense invoked on the basis of a plaintiff's immigration status.

C. State court immigration status determinations would create judicial inefficiency and unintended legal complications.

State court immigration status adjudications in tort are judicially unmanageable because they would generate numerous legal complications. First, a state court adjudication regarding immigration status could duplicate or even contradict an immigration court's determination. *See* 8 U.S.C. § 1229a (stating that an immigration court hearing "shall be the sole and exclusive procedure for determining" admissibility and deportability of aliens). If an immigration court later found a particular plaintiff was lawfully present, in contravention of the state court's determination in the same case, that party might re-file or appeal in state court. State courts would face a flood of pleas in tort cases from newly-determined lawfully present immigrant plaintiffs, as well as a morass of res judicata and preemption issues, all of which would drain judicial resources.[7]

[7] A state court's ruling might also generate legal consequences for third parties not involved in the lawsuit at issue. Numerous spouses, children, and other immediate relatives have immigration status by virtue of a spouse, parent or relative with authorized presence. *See, e.g.*, 8 U.S.C. § 1153(a), 1154, 1186a, 1186b (2012). A state court's determination that a plaintiff's immigration status is unlawful in contravention of an immigration court determination could interfere with the dependent relative's status. *See, e.g.*, 8 U.S.C. § 1186b (2012) (loss of alien entrepreneur status "shall terminate the permanent resident status of the alien and the alien

Second, a decision allowing state courts to ascertain immigration status also raises questions about the scope and nature of burden of proof requirements. Whereas in immigration matters, the immigrant seeking status bears the burden of providing proper documentation, *see* 8 U.S.C. § 1361, a defendant in tort raising an affirmative defense bears the burden of proof for each element of his defense. *See Montgomery*, 669 S.W.2d at 310-11. No current tort doctrine establishes how a defendant would prove a plaintiff's immigration status within the limits of discovery.[8] More importantly, a court would face enormous difficulties in setting a judicially manageable standard for whether a party met the burden of proof in ambiguous, complex immigration status cases.

Finally, a decision barring unauthorized immigrant plaintiffs would likely invite frivolous claims. Casting doubt on the immigration status of plaintiffs would be a useful tool in order to forestall adverse judgments and drain plaintiffs' litigation resources. Since the affirmative defense found in the unlawful acts

---

spouse and alien child" (internal parenthesis omitted)); 8 U.S.C. § 1182(a)(2)(C)(ii) (2012) (human trafficking by an alien makes any alien "spouse, son, or daughter" inadmissible if they "obtained any financial or other benefit from the illicit activity of that alien"). Defendants could use prior adverse rulings on the immigration status of a person to call into question the dependent immigration status of that person's relatives and, in turn, bar recovery for the person's relatives in separate law suits.

[8] For example, if a defendant subpoenas Immigration and Customs Enforcement documents regarding a plaintiff, the Department of Homeland Security (DHS) may object to the subpoena or prolong the process. *See* 6 C.F.R. § 5.41¬–45 ("No [DHS employee] shall, in response to a demand or request, including in connection with any litigation, produce any document or any material acquired as part of the performance of that employee's duties or by virtue of that employee's official status, unless authorized to do so by the Office of the General Counsel . . . .").

doctrine could equally apply in any tort suit, state courts could face a flood of potentially frivolous claims, decreasing judicial efficiency by forcing state courts to expend resources to handle these claims.

D. State courts lack the resources required to accurately ascertain immigration status.

State courts are not only unauthorized to make accurate immigration status determinations, they are also ill-equipped. Immigration laws are extraordinarily complex. *See Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) ("Immigration laws have been termed 'second only to the Internal Revenue Code in complexity.'") (citation omitted). The Second Circuit noted that the "labyrinthine character of modern immigration law—a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion" can "spawn[] years of litigation" and consume judicial resources. *Drax v. Reno*, 338 F.3d 98, 99-100 (2d Cir. 2003). State courts lack financial and other resources that are available to immigration agencies and courts to handle this complexity. For example, state courts do not have the equipment and technology needed to ascertain reliably the age of unauthorized immigrants, such as skeletal radiographs. *See* U.S. Dep't. of Homeland Sec., OIG-10-12, *Age Determination Practices for Unaccompanied Alien Children in ICE Custody* (2009), *available at* http://www.oig.dhs.gov/assets/Mgmt/OIG_10-12_Nov09.pdf. Every court obligated to make an age determination in its immigration status analysis would

have to partner with an executive agency or independently obtain resources to perform costly analysis. Other complex factual matters that are crucial to determining one's immigration status include: the authenticity and veracity of travel and other immigration documents, *see* 8 U.S.C. § 1182 (a)(6)(C)(i); political persecution in a person's home country, *see* 8 U.S.C. § 1158 (b)(B)(i-iii); circumstances of entry into the country, *see* 8 U.S.C. § 1325; and victimhood of certain crimes, such as domestic abuse, *see* 8 U.S.C. 1184 (d)(2)(C), or trafficking, *see* 8 U.S.C. § 1101(a)(15)(T) (2012). Such factual matters influence eligibility for forms of relief, but accurate resolution of factual distinctions are costly and would impose an impractical burden on state courts, again raising serious questions of judicial economy and resource allocation.

A decision barring unauthorized immigrants recovery in tort greatly harms the public good by requiring state courts to perform immigration determinations well outside their capacity, authority, and expertise. Forcing state courts to incur the unnecessary costs of responding to unmeritorious challenges to immigration status likewise harms the public good by promoting judicial waste and inefficiency. Amicus urges the Court to uphold the lower court's determination that immigration status is not relevant to the plaintiff's recovery in tort.

IV. OVERTURNING THE APPELLATE DECISION HARMS THE PUBLIC INTEREST BY INVITING VIGILANTISM AGAINST LATINOS.

A decision to allow a person's immigration status to bar his recovery in tort implicates the public good because it invites vigilantism towards Latinos, both immigrants and U.S. citizens, in border areas.

In recent years, there has been an outbreak of violence and vigilante activity against Latinos in borders areas, motivated primarily by anti-immigrant and nativist sentiment. *See, e.g.*, Sara A. Martinez, Comment, *Declaring Open Season: The Outbreak of Violence Against Undocumented Immigrants by Vigilante Ranchers in South Texas*, 7 Scholar 95, 100–08 (2004); Ray Ybarra, Note, *Thinking and Acting Beyond Borders: An Evaluation of Diverse Strategies to Challenge Vigilante Violence Along the U.S.-Mexico Border*, 3 Stan. J. C.R. & C.L. 377, 378–82 (2007); Andrea Aguilar, Comment, *Civilian Border Patrols: The Right to Safely Cross the Borders vs. The Right to Protect Private Property*, 11 Scholar 371, 374–76 (2009). Civil lawsuits serve to deter vigilantes who attack Latino immigrants and U.S. citizens alike in border areas. *See, e.g.*, Laurel Almada, *$15 Million Settlement Reached in Lawsuit*, Laredo Morning Times, Aug. 25, 2004 (settlement reached regarding group of immigrants killed in attack in South Texas); *Morales v. Barnett*, 2 CA-CV 2007-0118, 2008 WL 4638133 (Ariz. Ct. App. Feb. 25, 2008) (upholding jury verdict against border vigilante who

assaulted and falsely imprisoned group of U.S. citizens, no criminal charges brought); *Vicente v. Barnett*, 415 F. App'x 767, 769 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 109 (2011) (upholding federal jury verdict against border vigilante who assaulted and detained group of immigrants, no criminal charges brought). When local prosecutors opt against bringing criminal charges, civil lawsuits are often the only recourse for victims of vigilantism, both for obtaining justice and for deterring similar conduct in the community.

Defendants assert that "had the decedents not entered, remained, and sought transportation in the United States illegally, the decedents would not have died." Def. Mot. for Traditional Summ. J. at 11. If, as Appellants argue, unlawful entry or evading immigration officers could constitute the "sole cause" of death or injury as a matter of law, such a holding would immunize tortfeasors from civil liability for any and all deaths or injuries perpetrated against persons who entered unlawfully.[9] Allowing parties to sue irrespective of their immigration status provides accountability and an incentive for parties to use more care in their dealings with others and creates safer environments not only for the concerned parties but the communities that they live in. *Cf. Barcelo v. Elliot*, 923 S.W.2d 575, 580 (Tex. 1996) (Cornyn, J., dissenting) ("Allowing beneficiaries to sue

[9] In fact, if Appellants are successful with their argument, it could very well mean that *any* injury perpetrated against any person unlawfully present (including injuries resulting from first degree murder, rape, and aggravated assault, for example) also would not have occurred had the victim not been present in the United States, and thus, such perpetrators would be immunized from civil liability.

would provide accountability and thus an incentive for lawyers to use greater care in estate planning."). This calculus does not change with Decedents' immigration status.

A blanket immunization of tortfeasors from liability will encourage vigilantism and criminal activity directed at both undocumented immigrants, as well as persons believed to be undocumented based on their race or ethnic origin. *See, e.g.*, Matt Rivers, *Is Rancher Liable in Hudspeth County Shooting?*, KTSM News Channel 9–El Paso (May 14, 2011), http://www.ktsm.com/news/is-rancher-liable-in-hudspeth-county-shooting (victim of ranch shooting in West Texas border area states "[w]hat he did was wrong and the only reason he shot is because he saw that we were Hispanic."). To the extent that the district court held the unlawful acts doctrine is a defense based upon Decedents' alleged undocumented status, the district court is signaling that the lives of decedents – and by extension, all undocumented persons – are worth less than the lives of other people. Certainly, such a decision cannot stand in our State's highest court.

PRAYER

In its one-hundred-year history, the unlawful acts rule has never before defeated a wrongful death claim. *See Rico*, 481 F.3d at 241. Instead of providing an explanation as to why such a drastic departure from established tort principles in Texas is warranted, Appellants present Decedents' immigration status as a red

herring, and urge the Court to disregard well-established statutory construction and constitutional principles. Amicus respectfully requests that the Court consider its arguments and uphold the appellate court decision.

Dated: July 9, 2013

Respectfully Submitted,

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

By: _____/S/Marisa Bono_____
Marisa Bono

Marisa Bono
State Bar No. 24052874
mbono@maldef.org
David Hinojosa
State Bar No. 24010689
dhinojosa@maldef.org
110 Broadway, Suite 300
San Antonio, TX 78205
Tel: (210)224-5476
Fax: (210)224-5382

AMICUS CURIAE in support of Appellees

Certificate of Service

The undersigned counsel hereby certifies that she has sent via U.S. Mail a true and correct copy of the above and foregoing on the 9th day of July, 2013.

By: _____/S/Marisa Bono_____
Marisa Bono

Thomas C. Wright
R. Russell Hollenbeck
Bradley W. Snead
Wright and Close, LLP
Three Riverway, Suite 600
Houston, Texas 77056
713-572-4321
713-572-4320 Fax
wright@wrightbrownclose.com
hollenbeck@wrightclose.com
snead@wrightclose.com

Counsel for Defendants–Appellants Mestena Uranium, LLC and Philip Boerjan

Will W. Pierson
Jack C. Partridge
Royston, Rayzor, Vickery & Williams
Frost Bank Plaza
802 North Carancahua, Suite 1300
Corpus Christi, Texas 78470
(361) 884-8808
Fax (361) 884-7261
will.pierson@roystonlaw.com
jack.partridge@roystonlaw.com

Counsel for Defendants–Appellants Mestena Uranium, LLC and Philip Boerjan

John R. Griffith
Griffith & Garza, LLP
426 W. Caffery Avenue
Pharr, Texas 78577
(956) 971-9446
Fax (956) 971-9451
jrg@rgvfirm.com

Counsel for Defendants–Appellants Mestena Operating, LLC, formerly known as Mestena Operating, Ltd. and Mestena, Inc.

Carlos R. Soltero
McGinnis, Lochridge & Kilgore, L.L.P.
600 Congress Avenue, Suite 2100
Austin, Texas 78701
Tel: (512) 495-6000
Fax: (512) 495-6093
csoltero@mcginnislaw.com

Counsel for Appellees

René R. Barrientos
Attorney at Law
433 Devine Road
San Antonio, Texas 78212
Tel: (210) 733-3399
Fax: (210) 921-0430
rrbar453@yahoo.com

Counsel for Appellees

Baldemar F. Gutierrez
The Gutierrez Law Firm, Inc.
700 East Third Street
Alice, TX 78332
Tel: (361) 664-7377
Fax: (361) 664-7245
balde@gutierrezlawfirm.com

Counsel for Appellees

Manuel R. Flores
Law Offices of Christina Flores and
Manuel R. Flores
1308 San Agustin
Laredo, Texas 78040
Tel: 956.728.7474
Fax: 956.728.7406
Mrfloreslaw@sbcglobal.net

Counsel for Appellees

Certificate of Compliance

The undersigned counsel hereby certifies that the word count for this computer-generated brief is 6,000. I have relied on Microsoft Office Word 2007's word count feature for this word count.

By: _____/S/Marisa Bono_____
Marisa Bono