

**NO. 18-50846**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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CATHI CLEVEN, for herself and all others similarly situated;  
TARA CLEVEN, for herself and all others similarly situated;  
ARELI ARELLANO, for herself and all others similarly situated;  
JOE L MARTINEZ, for himself and all others similarly situated,

*Plaintiffs-Appellees,*

v.

MID-AMERICA APARTMENT COMMUNITIES, INCORPORATED;  
MID-AMERICA APARTMENTS, L.P.;  
CMS/COLONIAL MULTIFAMILY CANYON CREEK JV, LP,

*Defendants-Appellants.*

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Appeal from the United States District Court  
for the Western District of Texas  
Civil Action No. 1:16-cv-820  
The Honorable Robert Pitman

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**BRIEF OF AMICI CURIAE TEXAS HOUSERS, TEXAS  
TENANTS' UNION, AND AUSTIN TENANTS COUNCIL IN  
SUPPORT OF PLAINTIFF-APPELLEES AND AFFIRMANCE**

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned council of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

## **Defendants/Appellants**

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**CORPORATE DISCLOSURE STATEMENTS OF AMICI**

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A) and Fifth Circuit LAR 26.1.1, *Amici Curiae* Texas Housers, the Texas Tenants' Union, and Austin Tenants Council disclose that they are each a nonprofit corporation that has no parent and issues no stock.

*/s/ Adam R. Pirtle*

\_\_\_\_\_  
Adam R. Pirtle

**STATEMENT OF CONSENT TO FILE AMICUS BRIEF**

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *Amici* certify that all parties have consented to the filing of this brief.

*/s/ Adam R. Pirtle*

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Adam R. Pirtle

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## **STATEMENT OF INTEREST AND AUTHORITY TO FILE**

*Amici Curiae* respectfully submit this brief in support of the plaintiff-appellees. *Amici* are three non-profit community development and tenant advocacy groups working throughout Texas: Texas Housers, the Texas Tenants' Union ("TTU") and Austin Tenants Council ("ATC").

Founded in 1988, Texas Housers, also known as Texas Low Income Housing Information Service, is a 501(c)(3) nonprofit Texas corporation which supports low-income Texans' efforts to obtain decent and affordable housing in a quality neighborhood through research, education, and organizing. As part of this effort, Texas partners with low-income Texan tenants to support common-sense laws and policies which ensure equal bargaining power and fair dealing between tenants and landlords.

The Texas Tenants' Union (TTU) is a Dallas-based 501 (c) (3) nonprofit organization that empowers tenants through education and organizing to protect their rights, preserve their homes, improve their living conditions and enhance the quality of life in their communities. TTU conducts free weekly tenant education workshops serving 1,000 tenants each year, and it speaks with thousands more by phone and social media. Tenants contact TTU when they fall behind on the rent, owe late fees, or face eviction and homelessness.

Austin Tenants Council (ATC) is a 501(c)3 non-profit organization founded in 1973. ATC receives local, state and federal grants to serve more than 7,000 Central Texans annually, with a primary focus on increasing awareness of and compliance with landlord-tenant laws and mediating the disputes between low-income tenants and landlords. ATC engages in fair housing compliance testing and enforcement, landlord-tenant mediation services, and educational services designed to assist tenants in enforcing their right to safe, decent, fair and affordable housing.

The questions presented in Mid-America's appeal of the class certification order directly affect the interests of every low-income tenant in Texas. Their ability to join together as a class allows this vulnerable group to effectively challenge abuses impacting each tenant in an efficient and cost-effective manner. As tenant advocates, *Amici* have a strong interest in protecting tenants' right to join in a class. A ruling preventing certification of the class would deny tenants an important tool for contesting unlawful actions by landlords whose leases and policies impact thousands of Texans.

Through their work, *Amici* find that landlords continue to charge penal late fees, which result in unjustified evictions for too many tenants - especially those who are most vulnerable due to disability, old age, or low income. *Amici* are concerned by Appellants' erroneous interpretation of the statute at issue in this case, Section 92.019 of the Texas Property Code. The statute simply requires landlords to make a

reasonable estimate of damages when determining the amount of a late fee so it fairly compensate a landlord for losses. Divorcing the estimation requirement from the statute as Appellants suggest would contradict long-held principles of just compensation imposing arbitrary and often excessive and punitive fees on tenants, leading to increased housing instability in an already vulnerable population.

*Amici* respectfully request this Court to affirm the judgement of the lower court certifying the class.

Undersigned counsel, Adam Pirtle, is the Northwest Texas co-director and counsel for Texas Housers. He has been authorized to file this *Amicus* brief on behalf of Texas Housers, TTU, and the ATC. *Amici Curiae* hereby certify that no party's counsel authored this brief in whole or in part. Texas Housers paid the fees for the preparation of this brief, which TTU and ATC join.

## **SUMMARY OF THE ARGUMENT**

The district court correctly certified a class of Texas apartment tenants in this case regarding Section 92.019(a) of the Texas Property Code which prohibits landlords from charging a late fee unless it is a prospective, reasonable estimate of uncertain damages resulting from the late payment of rent. In its argument that the district court erred when concluding that plaintiffs satisfied the commonality requirement, Appellants urge this Court to improperly delve into the merits of this case and misinterpret the statute. This would do great harm to tenants throughout the Texas. *Amici* offer this brief to provide the proper interpretation of Section 92.019 to Texas tenants retain the strong protections the statute provides.

The purpose of Section 92.019 is to ensure that late fees contracted in the lease are just compensation for uncertain damages caused by the late payment of rent rather than an illegal penalty. To effectuate this goal, the statute penalizes landlords who do not base their contracted late fees on a prospective, reasonable estimate of those damages. The district court's common questions go to the heart of the statute's purpose to protect tenants from unscrupulous landlords who would treat late fees as an unwarranted profit center.

Appellants contend that "reasonable estimate" means that a late fee's reasonableness should be determined by an after-the-fact judgment, essentially reading the word "estimate" out of the statute. This misinterpretation of the statute is wrong for the following reasons.

First, it is blatantly contradicted by the statute's plain meaning. The Legislature's use of the word "estimate" and that word's common meaning implies the necessity of a pre-contract calculation. An estimate cannot be made of a known number. A number picked arbitrarily is not reasonable and not an estimate.

Second, it would divorce late fees from their required relationship to just compensation, invalidating the Legislature's intended purpose of reimbursing landlords for losses while also protecting vulnerable tenants from paying penal, unreasonable late fees.

Third, it is belied by the common law of liquidated damages which governed late fees before the statute was codified in 2007. Texas courts will traditionally refuse to enforce a liquidated damage clause if the damage is not based on a pre-contract, reasonable estimate of uncertain damages. If courts find by a fact-specific inquiry that the process of estimation was not reasonable, they will not enforce the damage clause.

Fourth, it would make bad public policy. If landlords are permitted to set late fees arbitrarily, it will likely lead to an increase in the amount charged. Low-income tenants already suffer sky-rocketing rental prices in urban centers throughout Texas. Subjecting them to increasing late fees will only increase housing instability for the most vulnerable Texans.

Fifth, it goes against common sense. The statute simply requires landlords to estimate their damages caused by late rent payment before contracting. Because landlords

know the costs associated with collecting late rent payments, they are in the best position to calculate their anticipated damages. Eliminating the pre-lease calculation would shift the burden of determining the reasonableness of a late fee onto tenants, forcing them to risk retaliation and eviction were they to dispute an unreasonable fee in court or otherwise.

Should this Court determine an inquiry is necessary, *Amici* ask this Court to affirm the district court's certification of the class based upon the correct interpretation of Section 92.019(a) of the Texas Property Code.

### **ARGUMENT**

Under Section 92.019(a) of the Texas Property Code<sup>1</sup>, “a landlord may not charge a tenant a late fee for failing to pay rent unless:

- (1) notice of the fee is in the written lease;
- (2) the fee is a reasonable estimate of uncertain damages to the landlord that are incapable of precise calculation and result from the late payment of rent; and
- (3) the rent has remained unpaid one full day after the date the rent was originally due.

By mandating late fees be a reasonable estimate of damages caused by the late payment of rent, the Legislature intended to ensure that the late fees contracted in a lease were just compensation for a landlord's damages rather than imposing an arbitrary and

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<sup>1</sup> All statutory references are to the Texas Property Code unless noted to the contrary.

impermissible penalty. Landlords who violate this statute must pay the tenant \$100, three times the amount of the late fee, and reasonable attorney’s fees. *Id.* A tenant’s right to enforce this statute may not be waived. *Id.* The class-certification dispute is centered on the proper interpretation of this statute. *Amici* submit this brief to support the district court’s proper interpretation of Section 92.019 and to bring to this Court’s attention the importance of this statute for protecting the interests and dignity of low-income tenants in Texas.

**I. The District Courts commonality analysis was correct and based on the proper interpretation of Section 92.019(a)**

The District Court found the class of tenants ‘satisfied the commonality requirement by raising at least one question common to the class: whether Defendant’s uniform, fixed late fee – which was applied automatically to all tenants in their properties – violates the Texas Property Code Requirement that any late fee “is a reasonable estimate of uncertain damages to the landlord that are incapable of precise calculation and result from the late payment of rent.”’ *Cleven v. Mid-America Apt. Communities, Inc.*, No. 1:16-cv-00820-RP at \*8-9 (W.D. Texas. Sept. 5, 2018).

This question concerns Section 92.019(a) of the Texas Property Code which requires landlords to estimate the prospective damages caused by the late payment of rent before setting a late fee. This reading is supported by the statute’s plain meaning, the common law regarding late fees and liquidated damages, and legislative intent. In creating Section 92.019, the Texas Legislature strengthened the common law regarding late fees

by authorizing civil penalties for landlords who treat late fees as a penalty rather than just compensation for damages caused by the late payment of rent.

Appellants base their argument on a flawed reading of Section 92.019(a). Despite plain language stating the contrary, Appellants contend that landlords are not required to make a reasonable estimate of their uncertain damages or “prospective analysis” before setting a late fee. See *Appellants Opening Brief*. at \*26. This interpretation is incorrect. It is flatly contradicted by the statute’s plain language, the common law it was meant to codify and bolster, and other basic principles of statutory interpretation.

**II. The plain meaning of Section 92.019(a) prohibits a landlord from charging a late fee unless it is a pre-lease, reasonable estimate of uncertain damages resulting from the late payment of rent**

The common questions in this case boil down to whether landlords are required to (1) conduct a reasonable estimate of their uncertain damages (2) before contracting for a late fee in the lease. Basic principles of statutory interpretation confirm that they are.

The meaning rule is well established in Texas. “If the statutory text is unambiguous, a court must adopt the interpretation supported by the statute’s plain language unless that interpretation would lead to absurd results.” *Texas Dept. of Protective and Regulatory Services v. Mega Child Care, Inc.*, 145 S.W.3d 170, 177 (Tex. 2004). To determine the plain meaning of a statute, Texas courts follow the following principles.

First, Texas courts “read statutes contextually to give effect to every word, clause, and sentence because every word or phrase is presumed to have been intentionally used

with a meaning and a purpose.” *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018) (internal citations omitted). “In enacting a statute, it is presumed that: ...the entire statute is intended to be effective.” TEX. GOV’T CODE ANN. § 311.021. Courts “give effect to all the words of a statute and [do] not treat any statutory language as surplusage[,] if possible.” *Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 581 (Tex. 2000).

Second, if a word used in a statute is undefined by the Legislature, the Texas Supreme Court will “construe the statute’s words according to their plain and common meaning unless a contrary intention is apparent from the context, or unless such a construction leads to absurd results.” *City of Rockwell v. Hughes*, 246 S.W.3d 621, 625-626 (Tex. 2008) (internal citations omitted). To determine the common, ordinary meaning of an undefined word, Texas courts “typically look first to [its] dictionary definitions.” *City of Richardson v. Oncor Elec. Delivery Co. LLC*, 535 S.W.3d 252, 261 (Tex. 2018).

Third, courts will also “apply the definition most consistent with the context of the [broader] statutory scheme.” *City of Richardson*. 535 S.W.3d at 261.

Based on these principles of statutory interpretation, Section 92.019(a) calls for a prospective estimate for the following reasons.

**A. Landlords must conduct a reasonable estimate of their uncertain damages**

To protect tenants from paying an arbitrary, penal late fee, Section 92.019(a) requires that a contracted late fee be the result of landlords’ reasonable estimate of their

uncertain damages. The Legislature’s use of the of the word “estimate” and that word’s plain meaning implies that the landlord must undertake a process of calculating damages.

**1. The Legislature intended to give effect to the word estimate**

Each word in Section 92.019(a) has meaning, including the word “estimate”. The Legislature chooses its words carefully and instills purpose within each one. In drafting this statute, the Legislature required a contracted late fee to be a reasonable estimate of uncertain damages. By including the word “estimate,” the Legislature obligated the landlord to undertake a process of calculation. Nor is “estimate” swallowed up by the word that comes before it in statute, the word “reasonable.” Had the Legislature intended for late fees to be deemed reasonable by an after-the-fact assessment or comparative market analysis, or slotted within a certain monetary range, it would have said so.

**2. “Estimate” means a tentative calculation or evaluation; an arbitrary number is not an estimate**

It is commonly understood that an estimate is the result of some sort of evaluation or calculation. This is supported by the word’s dictionary definition. The first definition of the noun form of “estimate” in the Merriam Webster dictionary is “the act of appraising or valuing: calculation.” *Estimate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/estimate> (last visited Mar. 11, 2019). In its analysis of the statute, the district court relied on this definition: “[a] tentative evaluation or rough calculation, as of worth, quantity, or size.” *Cleven v. Mid-Am. Apartment Communities, Inc.*, No.1-16-

CV-820-RP, 2019 WL 5733139, at \*4 (W.D. Tex. Sept. 18, 2018) (quoting *Estimate*, THE AMERICAN HERITAGE DICTIONARY 609 (5th ed. 2011)).

By using the word estimate as commonly defined and understood, the Legislature ensured that a contracted late fee would not be arbitrary and thus an impermissible penalty. Far from being an absurd result, the use of estimate mandates that a late fee be grounded in a reasoned calculation of damages thereby reflecting just compensation for a landlord's losses and effectuating the statute's purpose.

**B. Landlords must conduct the estimate *before* the lease is signed**

The fact that an estimate of late fees must be prospective is evident after examining the broader late fees statute. Section 92.019(a)(1) prohibits a landlord from charging a late fee unless notice of the fee is included in lease. If tenants must have notice of the late fee amount before signing the lease, then it follows that the landlord's estimate of uncertain damages must be prospective and conducted before contracting.

Further, Appellants' contention that a reasonable estimate is not prospective does not comport with the definition of estimate. Appellants argue that a "late fee's reasonableness under § 92.019 is determined not by the quality of a landlord's prospective estimation of its future damages, but instead by the degree to which the late fee ultimately approximates the landlord's actual damages." *Appellants Opening B* at \*30 (internal quotations omitted). Under Appellants' construction, a landlord could pick an arbitrary number as a late fee without any sort of calculation of damages. This misinterpretation

eliminates the word “estimate” from the statute ignoring the intent of the Legislature and contradicting the statute’s plain meaning and purpose. As discussed below, the Legislature required the landlord to estimate its damages before contracting so that late fees would be reasonable and reflective of just compensation *in the first place*. Appellants’ misconstruction creates an absurdity – by its very definition, an estimate is not based on an after-the-fact analysis of a known result. Under Section 92.019(a), the landlord’s reasonable estimate of damages must happen prospectively, before the lease is signed.

**III. To protect tenants from paying penal, excessive late fees, the Legislature codified and strengthened the common law of liquidated damages**

Further proof that a reasonable estimate must be prospective is shown by the intent of the legislature to both codify the common law of liquidated damages and fortify it with penalties for noncompliant landlords. Section 92.019 was enacted as part of a broad, omnibus bill to protect vulnerable tenants from the practices of abusive landlords.<sup>2</sup> The bill was the product of a compromise between tenant and landlord groups. As summarized by the Vice President of Government Affairs of the Texas Apartment Association, it was intended to “address in a number of key areas some of the true abuses we’ve seen with some rental property owners and, I think just as importantly, does it in a way that is balanced and fair and within good, reasonable business practices.” Public Hearing on H.B. 3101 Before the H. Comm. on Bus. & Indus., 80th Leg., R.S. (April 4, 2007) (testimony

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<sup>2</sup> Aside from addressing late fees, the bill placed restrictions on a landlord changing a tenant’s locks, standardized tenant parking requirements, and penalized landlords who failed to refund. The bill established penalties, required a landlord to give notice of these rights, and prevented these rights from being waived. See House Research Organization, Bill Analysis, Tex. H.B. 3101, 80th Leg., R.S. (2007).

of David Mintz on behalf of Tex. Apt. Ass'n)

([http://tlchouse.granicus.com/MediaPlayer.php?view\\_id=24&clip\\_id=2430](http://tlchouse.granicus.com/MediaPlayer.php?view_id=24&clip_id=2430)).

**A. Late fees not based on a reasonable estimate of damages are an unjust penalty**

To protect tenants from landlords who would charge unreasonable, arbitrary, and penal late fees, the Legislature ultimately codified and strengthened the existing common law treating late fees as liquidated damages by adding stiff penalties for landlords who violated the statute's directives. An early draft of the bill suggested that late fees be capped at a percentage of unpaid rent<sup>3</sup>, but the final bill chose instead to reinforce long-held principles regarding liquidated damages. As was understood by the Vice President of Government Affairs of the Texas Apartment Association, this codified the principle that, as a liquidated damage, a late fee must not be an unjust penalty but a reasonable estimate or forecast of damages caused by the late payment of rent: "I think what's important to keep in mind is that late fees in Texas have always been regarded as a liquidated damage, not a penalty. They are supposed to approximate the costs that are incurred by an owner in trying to collect late rent. All the language within this bill does is codify what courts have found to be a liquidated damages definition (sic)." See Public Hearing on H.B. 3101 Before the S. Comm. on Bus. & Commerce, 80th Leg., R.S. (May 17, 2007) (Testimony

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<sup>3</sup> See Public Hearing on H.B. 3101 Before the S. Comm. on Bus. & Commerce, 80th Leg., R.S. (May 17, 2007) (testimony of Robert Doggett on behalf of Tex. Low Income Housing Info. Serv.) ([http://tlcsenate.granicus.com/MediaPlayer.php?view\\_id=16&clip\\_id=3023](http://tlcsenate.granicus.com/MediaPlayer.php?view_id=16&clip_id=3023)) ("This bill started out at a hard cap – 10%, 5%. We negotiated down to the common-law. This bill codifies what is already the law.").

of David Mintz on behalf of Tex. Apt. Ass'n)  
([http://tlcsenate.granicus.com/MediaPlayer.php?view\\_id=16&clip\\_id=3023](http://tlcsenate.granicus.com/MediaPlayer.php?view_id=16&clip_id=3023)).

Thus, the Legislature intended to ground Section 92.019(a) in enduring principles of contract damages which abhor unjust penalties. “The basic principle underlying contract damages is compensation for losses sustained and no more; thus, [the Texas Supreme Court] will not enforce punitive contractual damages provisions.” *FPL Energy, LLC v. TXU Portfolio Mgmt. Co., L.P.*, 426 S.W.3d 59, 69 (Tex. 2014) (citing *Stewart v. Basey*, 150 Tex. 666, 245 S.W.2d 484, 486 (Tex. 1952)). The Texas Supreme Court will only enforce a liquidated damage clause if it passes a two-part test, which was later restated by Section 92.019(a): “In order to enforce a liquidated damage clause, the court must find: (1) that the harm caused by the breach is incapable or difficult of estimation, and (2) that the amount of liquidated damages called for is a *reasonable forecast* of just compensation.” *Phillips v. Phillips*, 820 S.W.2d 785, 788 (1991) (emphasis added). The Texas Supreme Court “evaluate[s] both prongs of this test from the perspective of the parties at the time of contracting.” *FPL Energy*, 426 S.W.3d at 69 (Tex. 2014).

**B. Texas courts invalidate liquidated damage clauses not based on prospective, reasonable estimate of uncertain damages**

The *Phillips* test is a restatement of the test first laid down by the Texas Supreme Court in *Stewart v. Basey*.<sup>4</sup> Explaining the importance of a liquidated damage

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<sup>4</sup> In stating the test for liquidated damages, *Stewart* says the following: “Restatement of Contracts, Sec. 339, accurately expresses the rule as follows: '(1) An agreement, made in advance of breach fixing the damages therefor, is not enforceable as a contract and does not affect the damages recoverable for the breach, unless[:] (a) the amount so fixed is a reasonable forecast of just compensation for the harm that

approximating just compensation, *Stewart* explains that courts will enforce liquidated damage provisions only if the parties estimate damages prospectively, before contracting:

“In those cases in which courts enforce stipulations of the parties as a measure of damages for the breach of covenants, the principle of just compensation is not abandoned and another principle substituted therefor. What courts really do in those cases is to ***permit the parties to estimate in advance the amount of damages***, provided they adhere to the principle of just compensation.” *Stewart v. Basey*, 150 Tex. 666, 245 S.W.2d 484, 486 (1952) (emphasis added).

Appellants argue that a late fee’s reasonableness should be determined only by the degree to which it ultimately approximates actual damages, and that Texas law does not require “a contracting party to analyze and estimate its potential damages before contracting.” See *Appellants’ Opening B.* at \*29. This is wrong. Courts will not enforce liquidated damages provision if they are arbitrary and not based on a reasonable estimate of anticipated harm. See *Garden Ridge, L.P. v. Advance Intern., Inc.*, 403 S.W.3d 432 ([14th Dist.] 2013, pet. denied) In *Garden Ridge*, a case involving a dispute over orders for eight-foot, waving Christmas snowmen, the court held that, in addition to not reflecting actual harm suffered by the defendant, a liquidated damage provision was “unreasonable in light of harm anticipated by Garden Ridge.” *Id.* at 441. In reaching that holding, the court made a fact specific inquiry into whether Garden Ridge had done an appropriate prospective analysis of its anticipated damages. It had not. Garden Ridge “did not perform any actual studies” nor could it “explain any specifics” of how it came up with the liquidated damages provision. *Id.* at 442. Since Garden Ridge failed the second prong of

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is caused by the breach, and (b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation.’ *Stewart v. Basey*, 150 Tex. 666, 245 S.W.2d 484, (1952).

the *Phillips* test for not making a reasonable estimate, its liquidated damages provision was an unenforceable penalty.

It is true that just compensation demands that Texas courts not enforce a seemingly reasonable liquidated damages provision if it ultimately has no rational relationship to the resulting actual damages. *FPL Energy*, 426 S.W.3d at 72.<sup>5</sup> In *FPL Energy*, a case involving the transfer of renewable energy credits between a power marketer and a power generator, the Texas Supreme court held an apparently reasonable liquidated damages provision unenforceable because of an “unbridgeable discrepancy” between the provision and actual damages. *Id.* In analyzing the liquidated damages provision, the Court evaluated the prongs of the *Phillips* test “*from the perspective of the parties at the time of contracting.*” *Id.* at 70. (emphasis added). In addressing the second prong of the *Phillips* test requiring a reasonable forecast, the court found the liquidated damages were reasonable on their face because they had anticipated possible market changes rather than being “an arbitrary number”. *Id.* at 71. Nonetheless, the Court did not enforce the provisions because they were rendered unreasonable because of actual damages. *Id.* at 71. The case does not mean that Texas courts do not require parties to make a reasonable

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<sup>5</sup> See also TEX. BUS. & COMM. CODE § 2.718(a): (a) “Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the *anticipated or actual harm caused* by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.” (emphasis added). The Texas Supreme Court’s interpretation in *FPL Energy* is consistent with principles of just compensation enshrined in the Uniform Commercial Code as codified in this section. Just compensation requires parties to make reasonable estimates of their uncertain damages to ensure that liquidated damages are not a penalty. However, if a good faith estimate of damages is extremely disproportionate to actual damages, just compensation may also require the provision to be voided.

estimate of their damages at the outset. In fact, it tells us the exact opposite. The Texas Supreme Court closely scrutinizes the estimate made by the parties contracting for liquidated damages. **If a party simply picks an arbitrary number rather than perform a reasonable estimate, the provision will be struck down as an impermissible penalty.**

The common law demands that parties make a reasonable estimate of their unexpected damages before setting a liquidated damage. Without the prospective evaluation, the liquidated damages provision is arbitrary and an unenforceable penalty. By fortifying the common law by adding penalties to the two-prong *Philips* test in 92.019(a), the Legislature intended to force landlords to base late fees on a pre-lease reasonable estimate of their damages to tie late fees to just compensation and protect tenants from being victimized.

#### **IV. Certifying this class will carry out the intent of the Legislature to protect vulnerable tenants**

Allowing tenants to join together in a class action gives tenants power in an unequal relationship with landlords. The landlord/tenant relationship is characterized by an imbalance of power between the individual tenant who depends on the landlord for a home, and landlord who has the power to take that home away. This is especially true for the most vulnerable tenants: those who have low incomes, are elderly, disabled, or otherwise unable to move to another living place easily. Because of this imbalance, tenants are susceptible to abuses from unscrupulous landlords and have limited abilities to challenge abusive policies.

In enacting Section 92.019, the Legislature recognized the weak position of tenants by including strict penalties for landlords who violated the statute and forced liable landlords to pay a victimized tenant's attorney's fees. Despite these protections, the statute does not protect the tenant from future retaliation in the form of elevated scrutiny, harassment, or targeting for eviction or non-renewal of lease. Certifying this class action is good public policy. It allows for multiple tenants to challenge systemic abuses of those landlords who control thousands of leases throughout Texas and often subject their tenants to the same unlawful policies. A favorable verdict would solve the problems of many in one efficient, and cost-effective stroke.

### **CONCLUSION**

Amici urge this Court to sustain the ruling of the trial court on all counts and approve the class for certification.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of **BRIEF OF AMICI CURIAE TEXAS HOUSERS, TEXAS TENANTS' UNION, AND AUSTIN TENANTS COUNCIL IN SUPPORT OF PLAINTIFFS-APPELLEES** was served on counsel of record by using the Court's CM/ECF system on the 18th day of March, 2019, addressed as follows:

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rules of Appellate Procedure 29(a)(4)(g) and 32(g)(1), I certify this brief complies with the type-volume limitations set forth in Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because this brief contains 4,350 words, exclusive of the corporate disclosure statement, table of contents, table of authorities, statement of interest, certificates of counsel, and other items exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type–style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in Microsoft Word in a proportionally spaced typeface using a plain, roman-style, 14-point font.

*/s/ Adam R. Pirtle*

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