No. 19-1122

In the Supreme Court of Texas

KINDER MORGAN SACROC, LP, KINDER MORGAN CO_2 CO., LP, KINDER MORGAN PRODUCTION CO., L.P., and KINDER MORGAN PRODUCTION CO. LLC, *Petitioners*,

v.

SCURRY COUNTY, SNYDER INDEPENDENT SCHOOL DISTRICT, SCURRY COUNTY JUNIOR COLLEGE DISTRICT d/b/a WESTERN TEXAS COLLEGE, and SCURRY COUNTY HOSPITAL DISTRICT d/b/a COGDELL MEMORIAL HOSPITAL, *Respondents*.

PETITIONERS' REPLY BRIEF ON THE MERITS

On Petition for Review from the Court of Appeals for the Eleventh District of Texas, Eastland, No. 11-19-00097-CV

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INTRODUCTION

Texas courts lack subject-matter jurisdiction over this case because (1) the Taxing Units' engagement with their attorney, Mr. Lemon, is a contingent-fee, tax-ferret engagement that is void under Texas law; (2) the Taxing Units had no authority to pursue this administrative appeal (from an appraisal review board) through a void engagement; and therefore (3) this administrative appeal is void (was never perfected). The Taxing Units say that Kinder Morgan's jurisdictional challenge is a "fabricat[ed]" and "false argument" (Resp.Br.23, 29, 40) based on "[m]aterial [o]missions" (Resp.Br.19) and "Kinder Morgan's lack of candor with the Court as to material matters" (Resp.Br.18). But in a case nearly identical to this one, after fully examining both sides' evidence and contentions, the Pecos County court validated Kinder Morgan's jurisdictional argument in all respects, finding:

- "The engagement between the Taxing Unit and Mr. Lemon is a tax-ferret engagement";
- "The Taxing Unit did not have authority to enter into this engagement with Mr. Lemon, and that engagement is void";
- "Texas law does not authorize the Taxing Units to appeal the appraisal review board's decision through a void engagement"; and
- "This Court lacks subject-matter jurisdiction over this lawsuit."

App.-Ex. 8, Pecos County Trial Court's Findings of Fact and Conclusions of Law [hereinafter Pecos Findings of Fact and Conclusions of Law], ¶¶ 7, 11, 12, 16.

Kinder Morgan's jurisdictional argument is correct, and the Taxing Units' multifarious attacks on Kinder Morgan serve only to distract from the jurisprudentially important questions that Kinder Morgan asks this Court to resolve—*e.g.*, does Texas law permit taxing units to enter into contingent-fee, tax-ferret engagements? The Court should grant review to hold, as then-Attorney General John Cornyn concluded 20 years ago, that Texas law does not expressly or impliedly authorize such tax-ferret engagements.

With respect to the Texas Citizens Participation Act ("TCPA"), the threshold issue is whether a defendant's 60-day period to file a TCPA Motion to Dismiss begins to run where, as here, the plaintiff serves a cursory Original Petition that contains no factual allegations to implicate the defendant's TCPA-protected rights. This Court should grant review to hold that a defendant's 60-day time to file a TCPA Motion to Dismiss does not begin to run until the defendant receives notice that the plaintiff's legal action is based on, or in response to, the exercise of TCPA-protected rights. A defendant should not be required to guess at whether a claim implicates the TCPA.

ARGUMENT

I. Texas courts lack subject-matter jurisdiction because the Taxing Units' Original Petition is void and, therefore, the Taxing Units never perfected their appeal from the ARB's decision.

Public entities, like the Taxing Units, can do only what the Legislature or Constitution has authorized them to do; actions taken by a public entity without legislative authorization are void. Pet.Br.17-18. Thus, the Taxing Units' administrative appeal to the trial court is void (was not perfected), and the trial court had no jurisdiction, because, as Kinder Morgan contends, the Taxing Units prosecuted that appeal in an unauthorized manner—through a void tax-ferret engagement with their counsel, Mr. Lemon.

Instead of defending the legality of tax-ferret engagements, the Taxing Units contend that Mr. Lemon is not a tax ferret, and that Mr. Lemon's engagement is supported by express authority because he is merely attempting to collect a delinquent tax bill or to act as a tax accessor/collector—activities that are authorized under Texas law. As shown below, Mr. Lemon is a tax ferret, and no Texas law authorizes his engagement.

A. Mr. Lemon is a tax ferret.

The Taxing Units argue that Kinder Morgan's property has been on the tax rolls for years,[1] suggesting that Mr. Lemon is not a tax ferret because he is not

[1] The Taxing Units wrongly suggest Kinder Morgan concealed or omitted the fact that Kinder Morgan's properties have been on the tax rolls for a long time.

searching for omitted property. Resp.Br.30-31. This assertion contradicts the fundamental thesis of the Taxing Units' claims, repeated in each of their three petitions—that Kinder Morgan's property *has* been omitted from appraisal. CR9, 56, 12.

The Taxing Units undoubtedly repeat this allegation (that property was omitted, rather than simply undervalued) because the Tax Code and cases interpreting it explicitly limit taxing units to challenges directed at omitted property. *See In re ExxonMobil Corp.*, 153 S.W.3d 605, 613-14 (Tex. App.—Amarillo 2004, orig. proceeding). Under that authority, "omitted" property includes property that is undervalued due to taxpayer fraud. *Id.* Even if proving that Kinder Morgan's property was omitted from appraisal were not a necessary element of the Taxing Units' claim—and it plainly is necessary—asserting that already-appraised mineral property should be re-appraised because it was undervalued is a century-old tax ferret tactic. App.-Ex. 9, National Petroleum News, *Claim Tax Ferrets Use Unfair Methods; Harass Tulsa Oil Companies* (1922).

Here, the Taxing Units hired Mr. Lemon to pursue omitted property in exchange for a percentage of tax revenue. This makes him a tax ferret, as the Pecos

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Resp.Br.20. Kinder Morgan has explained that Mr. Lemon is following a classic tax ferret strategy whereby Mr. Lemon has made his own, private valuation of property already on the tax rolls, and then tried to convince taxing authorities to adopt those values. Pet.Br.1-3, 29, 31.

County court found. App.-Ex. 8, Pecos Findings of Fact and Conclusions of Law, ¶ 7. It does not matter that the Taxing Units previously retained another attorney before they retained Mr. Lemon. Resp.Br.19-20.

And Mr. Lemon's engagements with the Taxing Units raise the public policy concerns typical of a tax-ferret engagement. As the Taxing Units acknowledge, "[t]o continue providing effective public service, taxing units must receive the revenue allocated to them through the tax system." Resp.Br.39. Yet, if the Taxing Units are successful in their claim, then 40% of the public tax revenue will be diverted to private parties: 20% to Mr. Lemon, and another 20% to a private company called U.S. Consults. Resp. App.-Ex. 8.

Furthermore, Mr. Lemon's contingent-fee engagement purports to give him both (1) the statutory power of a state agency—able to sue taxpayers in the name of the government—and (2) the profit motive of a private citizen. It is this combination of state authority and private profit that has driven over a century of criticism from courts and commentators regarding tax-ferret engagements. And Mr. Lemon has validated those concerns by threatening public harassment of Kinder Morgan and then following through by, for example, sending a disparaging and misleading letter to approximately two dozen of Kinder Morgan's lenders. Pet.Br.31-32, 40.

The Taxing Units argue that Mr. Lemon's harassment of Kinder Morgan is justified because Kinder Morgan refused to answer discovery and thus engaged in

"Enron traditions of evidence concealment." Resp.Br.40-41, 54. But the Legislature has established protections against the very discovery that the Taxing Units improperly seek. Tex. Tax Code § 22.27(a) (rendition statements and related documents "are confidential and not open to public inspection"); Tex. Civ. Prac. & Rem. Code § 27.003(c) (TCPA motion stays discovery). Mr. Lemon's harassing tactics are not justified.

B. Mr. Lemon had no express or implied authority to represent the Taxing Units.

As explained by then-Attorney General Cornyn, taxing units do not have express or implied authority to enter into a contingent-fee, tax-ferret agreement in which a private entity is hired to pursue property that has escaped taxation in exchange for a percentage of the revenues generated by that engagement. Tex. Att'y Gen. Op. No. JC-0290, 2000 WL 1515207, at *4–5 (Oct. 10, 2000). Thus, here, the Taxing Units had no express or implied authority to enter into their engagement with Mr. Lemon. All actions taken by the Taxing Units through their engagement with Mr. Lemon—including the Taxing Units' purported appeal of the ARB's decision—are void.

1. No express authority: no Texas law expressly authorizes Mr. Lemon's engagements.

a. Section 6.30 of the Tax Code does not apply.

The Taxing Units wrongly argue that Section 6.30(c) authorizes them to engage Mr. Lemon to pursue omitted property. Resp.Br.36-38. Section 6.30(c)

provides that "a taxing unit may contract with any competent attorney to represent the unit to enforce the *collection of delinquent taxes*." (emphasis added). The total compensation "may not exceed 20 percent of the amount of delinquent tax, penalty, and interest collected." Tex. Tax Code § 6.30(c). Thus, Section 6.30 only grants taxing units the power to hire an attorney to assist with the collection of tax bills that have actually been sent to a taxpayer and gone unpaid. The "collection of delinquent taxes" is not the same as ferreting out property that was allegedly omitted or excluded from taxation.

This case does not, and cannot, involve the collection of delinquent taxes. Neither the Second Amended Petition nor Mr. Lemon's engagement contracts references an action to collect delinquent taxes. App.-Ex. 3, Letter from Brent Lemon Dated January 3, 2020, to Kinder Morgan Counsel, at 2-5, 7-8, 10-11, 13-14. The Second Amended Petition in this case also makes no reference to delinquent taxes; rather, it seeks recovery based on Sections 25.21 and 41.03(a)(2) of the Tax Code, which relate to omitted and excluded property, respectively. CR122. By contrast, Delinquent Tax Suits are addressed in a separate Chapter of the Tax Code—Subchapter C of Chapter 33. Section 33.41 of the Tax Code, titled "Suit to Collect Delinquent Tax," governs a taxing unit's suit to collect delinquent taxes.

Under Chapter 33, one prerequisite to a Suit to Collect Delinquent Tax is that "tax on [the] property becomes delinquent." Tex. Tax Code § 33.41(a). Taxes only

become "delinquent," as that term is defined, after a property owner has received, but failed to pay, a tax bill by a certain date. *Id.* § 31.02(a). Even when it is established that property was omitted from taxation in a particular year, taxes are not delinquent until "February 1 of the first year that will provide a period of at least 180 days after the date the tax bill is mailed." *Id.* § 31.04(a-1). In other words, if property is omitted from taxation in a given year, taxes on that property do not become "delinquent" until after the property is placed on the tax rolls and a tax bill for that property is issued and goes unpaid.

Thus, even if, as alleged in the Second Amended Petition, Kinder Morgan's property was omitted from taxation (and it was not), there would be no claim to enforce the collection of delinquent taxes until after (1) the property is placed onto the tax rolls at a higher value; (2) Kinder Morgan receives a tax bill in connection with the omitted property; and (3) Kinder Morgan fails to pay that tax bill by "February 1 of the first year that will provide a period of at least 180 days" after such a bill was sent to Kinder Morgan. *Id.* § 31.04(a-1). Accordingly, Section 6.30(c) gives the Taxing Unit authority to hire an attorney to pursue collection of an unpaid tax bill but does not authorize that attorney to pursue a theory that the property was omitted altogether from taxation.

In arguing for a definition of "delinquent taxes" that ignores both the common-sense meaning of that phrase and the statutory definition found in the Tax

Code, the Taxing Units cite cases from the 1930s holding that no-longer-existent civil articles authorized tax-ferret contracts even though those statutes referred only to "delinquent taxes." Those cases are no longer good law. As Attorney General Cornyn recognized, those 1930s-era cases do not inform the legality of a tax-ferret engagement under the modern Tax Code because "the law has been substantially amended since the tax ferret cases were decided." Tex. Att'y Gen. Op. No. JC-0290, 2000 WL 1515207, at *3 (citing *Grand Prairie Hosp. Dist. v. Dallas County App. Dist.*, 730 S.W.2d 849, 851 (Tex. App.—Dallas 1987, writ ref'd n.r.e.) (adoption of Tax Code repeals all inconsistent general, local, and special laws)).

In particular, the Taxing Units cite a 1938 case in which this Court concluded that former Article 7335a did not use the term "delinquent taxes" in a "technical sense." *White v. McGill*, 114 S.W.2d 860, 863 (Tex. 1938). But, as Attorney General Cornyn recognized, Article 7335a did not survive when the Tax Code was adopted by the Legislature in 1979. Tex. Att'y Gen. Op. No. JC-0290, 2000 WL 1515207, at *3. And, as noted above, the modern Tax Code provides that taxes do not become "delinquent" until after the property is placed on the tax rolls and a tax bill for that property is issued and goes unpaid.

b. Comptroller approval was required when Mr. Lemon's Scurry County contingent-fee engagement was executed.

Neither Mr. Lemon nor Scurry County obtained approval of Mr. Lemon's contingency-fee agreement with Scurry County as required by the Texas Government Code. Before 2019—and at the time the engagements were executed in 2018—Section 403.0305 of the Government Code required Scurry County to obtain Comptroller approval of contingent-fee contracts for legal services. *See* Tex. Gov't Code § 403.0305 (West 2007).

Specifically, Section 403.0305 provided that a "public agency . . . may not enter into a [contingent-fee contract for legal services] as provided by Subchapter C, Chapter 2254, without review and approval by the comptroller." *Id.* (emphasis added); *see also Int'l Paper Co. v. Harris Cnty.*, 445 S.W.3d 379, 382 n.4 (Tex. App.—Houston [1st Dist.] 2013, no pet.). The definition of "public agency" under Section 403.0305 includes counties. *Dallas County, Tex. v. MERSCORP, Inc.*, 2012 WL 6208385, at *8 n.5 (N.D. Tex. Dec. 13, 2012) (explaining statutory analysis by which "Texas counties are subject to the restrictions in Chapter 2254").

Accordingly, there is no merit to the Taxing Units' argument that Government Code Section 2254.101 is inapplicable. At the time Mr. Lemon's contingent-fee engagements were executed in 2018, Scurry County was required to obtain Comptroller approval. Tex. Gov't Code § 403.0305 (West 2007); App.-Ex. 3, Letter

from Brent Lemon Dated January 3, 2020, to Kinder Morgan Counsel. But Scurry County did not do so.

c. School districts do not have express authority to execute contingent-fee, tax-ferret agreements.

The Taxing Units erroneously contend that Section 11.1511(c)(3) of the Education Code expressly authorizes tax-ferret engagements by one of the four Taxing Units in this case, *i.e.*, Snyder Independent School District. Resp.Br.38. Although that provision does apply to the School District, it does not authorize the School District to enter into a tax-ferret engagement.

Section 11.1511(c)(3) of the Education Code authorizes a school district to hire a person to "assess" or "collect" taxes—a role typically fulfilled by a designated Assessor-Collector. But Mr. Lemon was not hired by Snyder ISD to be a Tax Assessor-Collector, and, in fact, Snyder ISD already employs a different person to perform that function. *See* App.-Ex. 3.[2]

Further, Mr. Lemon is not performing any functions that resemble "assessing" and "collecting" taxes on behalf of Snyder ISD. Under the Tax Code, a tax assessor-collector is tasked with calculating property tax rates and performing the ministerial duties of collecting taxes. *See* Pet.Br.26.

[2] The Tax Code allows other taxing units to require the county to "asses and collect" taxes. Tex. Tax Code §§ 6.22(c), 6.23. Scurry County's Tax Assessor-Collector already serves as the Assessor-Collector for Snyder ISD. *See* Pet.Br.26.

Lastly, the claim brought by Mr. Lemon (purportedly on behalf of the Taxing Units) has nothing to do with the assessment or collection of taxes. The Second Amended Petition asks the trial court to determine that Kinder Morgan's property was omitted from appraisal and to fix a value for Kinder Morgan's property. CR141. But under the Tax Code, an Assessor-Collector is not an appraiser. In Texas, "assessment refers only to the steps a taxing unit takes to determine the tax base and to adopt and impose a property tax. It does not include appraisal or collections." Charles E. Gilliland, et. al, *The Texas Property Tax System*, REAL ESTATE CENTER at 45 (July 2011), at https://assets.recenter.tamu.edu/Documents/Articles/1192.pdf.

Accordingly, Snyder ISD's engagement with Mr. Lemon to pursue Kinder Morgan's allegedly omitted property is not authorized under the Education Code or the Tax Code. Although a taxing unit could hire an attorney under Tax Code Section 6.30 to collect delinquent taxes, Section 6.30 is not applicable here. *Supra* p. 6-9.

2. No implied authority: Texas law does not impliedly authorize the Taxing Units to engage Mr. Lemon as a tax ferret.

Attorney General Cornyn concluded that no statute provides taxing units with the express authority to enter into a tax-ferret agreement, and that such authority "should not be implied." Tex. Att'y Gen. Op. No. JC-0290, 2000 WL 1515207, at *5. Attorney General Cornyn explained that such authority cannot be implied because the Legislature "closely regulate[s] contingent fee contracts involving

taxing units." *Id.* at *3. The Taxing Units cannot contend that authority to enter into a tax-ferret engagement can be implied under Texas law. Pet.Br.18-21, 28-34.

C. Mr. Lemon's engagement raises the very public policy concerns that make tax-ferret engagements problematic.

Mr. Lemon is a tax ferret because he is a private entity seeking to profit off raising a taxpayer's bill by proving property was omitted. Allowing such a tax-ferret arrangement would

(1) undermine the property tax system by ensuring that taxpayers are not treated equally (Pet.Br.28);

(2) conflict with ethical standards that divorce the personal profit motive of the appraiser from the appraisal and taxation process (*id.*); and

(3) violate the Tax Code's prohibition on tax appraisers hiring private firms on a contingency basis (Tex. Tax Code § 25.01(b)).

D. Kinder Morgan raises a jurisdictional challenge; Kinder Morgan has not asked this Court to resolve a Rule 12 Motion.

In their Brief, the Taxing Units detail the law governing a Motion to Show Authority under Rule 12 of the Texas Rules of Civil Procedure. Resp.Br.25-30. But Kinder Morgan's Brief to this Court does not mention Rule 12 or include any arguments concerning Rule 12. Instead, Kinder Morgan asserts a challenge to subject-matter jurisdiction. The Taxing Units' arguments concerning Rule 12 are misplaced.

Equally irrelevant is the Taxing Units' argument that Mr. Lemon is entitled to payment if his engagements are found void. Whether Mr. Lemon will be owed money by the Taxing Units under a quantum meruit claim is not at issue. *See* Resp.Br.26–27.

1. Kinder Morgan has not waived its jurisdictional challenge.

The Taxing Units say Rule 12 Motions and Motions to Disqualify can be waived or barred by laches (Resp.Br.27-28), but Kinder Morgan is not bringing a Rule 12 Motion or a Motion to Disqualify. Rather, Kinder Morgan is contending that courts lack subject-matter jurisdiction—a contention that cannot be waived because "a judgment will never be considered final if the court lacked subject-matter jurisdiction." *Id.*; *see Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993). The doctrine of laches, like the doctrine of waiver, cannot bar a challenge to subject-matter jurisdiction. *Phillips v. Dow Chem. Co.*, 186 S.W.3d 121, 129 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

Nor would laches be applicable here in any event. The party asserting laches must show a good-faith change in position—something the Taxing Units have not shown. *Caldwell v. Barnes*, 975 S.W.2d 535, 538 (Tex. 1998).

Even if waiver and laches were available as defenses to a jurisdictional challenge, the Taxing Units have not shown any unreasonable delay by Kinder Morgan, as would be required. *Id.* The Taxing Units argue that their contingent-fee

engagement letters with Mr. Lemon have long been in the public record. But, even if Kinder Morgan's constructive knowledge of the terms of the engagement were somehow relevant to the Court's jurisdiction, the Government Code expressly required that at least one of the Taxing Units, Scurry County, obtain approval from the Comptroller before entering into a contingent-fee agreement for legal services. *See supra* p. 10. It was not until late December 2019 that Kinder Morgan first learned that the Comptroller had not approved Mr. Lemon's engagement with Scurry County.

2. The supposedly "limited scope" of a Rule 12 motion is irrelevant to this appeal.

The Taxing Units say that a Rule 12 motion has a "limited scope" (Resp.Br.25-26), but again, Kinder Morgan has not filed a Rule 12 motion in this Court. Kinder Morgan has challenged subject-matter jurisdiction. In any event, a Rule 12 motion is proper to "question whether a party has the power or authority to hire an attorney." *Gulf Reg'l Educ. Television Affiliates v. Univ. of Houston*, 746 S.W.2d 803, 809 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

3. The Court may consider documents outside the record to establish subject-matter jurisdiction.

The Taxing Units argue that Kinder Morgan improperly relies on documents outside the record that relate to its jurisdictional argument. Resp.Br.18. The Court, however, may consider documents outside the record for the purpose of determining

its own jurisdiction. Tex. Gov't Code § 22.001(d); *see State ex rel. Best v. Harper*, 562 S.W.3d 1, 7 (Tex. 2018), *as corrected on denial of reh'g* (Dec. 21, 2018) (op. on mtn. for rehearing).

E. The Taxing Units' other irrelevant, inciteful accusations are wrong and do not establish jurisdiction.

The Taxing Units claim that Kinder Morgan "concealed" correspondence between Kinder Morgan and the Taxing Units' previous attorney (former federal judge Joe Kendall), but that correspondence is irrelevant to Kinder Morgan's jurisdictional challenge. For its jurisdictional challenge, Kinder Morgan contends that the Taxing Units did not perfect their administrative appeal because they purported to prosecute that appeal through a void engagement with *Mr. Lemon*. The Taxing Units' former attorney is not the one who purported to file this administrative appeal on behalf of the Taxing Units, so the Taxing Units' authority (or lack thereof) to engage their *former* attorney is irrelevant to Kinder Morgan's jurisdictional challenge.

The Taxing Units wrongly suggest that the *Montezuma* case, from Colorado, concluded that Kinder Morgan evaded or cheated on its taxes. *Kinder Morgan CO2, L.P. v. Montezuma County Bd. of Commissioners*, 399 P.3d 735, 738 n.2 (Colo. Ct. App. 2015). In that case, Kinder Morgan and the taxing authorities disagreed over the proper accounting method for determining Kinder Morgan's proceeds and disputed whether taxing authorities could adjust Kinder Morgan's taxes retroactively *in the*

absence of fraud. *Montezuma*, 399 P.3d at 738 n.2. The Colorado court found "no evidence that [Kinder Morgan's] annual statements [were] willfully false and misleading." *Id.*

And one Texas court has rejected a taxing unit's argument that Kinder Morgan engaged in taxpayer fraud. In Pecos County, a taxing unit argued that taxpayer fraud should invalidate Kinder Morgan's motion filed under Rule 12 of the Texas Rules of Civil Procedure. The Pecos County court rejected that argument with the following finding of fact: "[t]he Taxing Unit has failed to establish any fraud by Kinder Morgan [] as a basis to invalidate [Kinder Morgan's] Motion to Show Authority under Rule 12, Texas Rules of Civil Procedure." Pecos Findings of Fact and Conclusions of Law ¶ 3.

F. Whether Tax Code Section 6.30 authorizes a tax-ferret engagement is an important jurisdictional issue.

The Taxing Units argue that tax-ferret law has long been established, and the Court should not take this case to decide an established issue. Resp.Br.23. But this appeal raises whether Section 6.30 constitutes authorization for a tax-ferret engagement—a novel issue that has never been addressed by an appellate court. Section 6.30 remains one of a handful of statutes that empower political subdivisions to enter into contingent-fee agreements without the Attorney General approval normally required by the Legislature, and the Court should take this case to ensure

that the Taxing Units' novel and unsupported expansion of Section 6.30 does not gain a foothold in Texas jurisprudence.

Because Mr. Lemon did not have express or implied authority to represent the Taxing Units under an unauthorized tax-ferret engagement, the Taxing Units' appeal to the district court is void, not perfected, and jurisdictionally barred. The Court should render judgment dismissing this case for lack of subject-matter jurisdiction.

II. The Taxing Units' cursory Original Petition did not start the 60-day clock for Kinder Morgan to file a TCPA motion to dismiss.

A. In the ARB, the Taxing Units did not allege that Kinder Morgan made misrepresentations to the government.

According to the Taxing Units, Kinder Morgan should have known the Original Petition included a taxpayer fraud claim because, at the ARB hearing before the Original Petition was filed, (1) the word "fraud" was used many times, (2) counsel for Scurry CAD printed the definition of fraud, and (3) the Taxing Units cited cases involving taxpayer fraud. Resp.Br.3-4. Even though these assertions have no bearing on what is alleged in the Original Petition, the Taxing Units have stitched them together in a way that distorts what happened in the ARB.

Before the ARB, the Taxing Units alleged that Kinder Morgan's appraisals were reduced due to appraiser "errors" and did not directly accuse Kinder Morgan of any misrepresentations. CR432-39. The Taxing Units told the ARB that their challenge centered on allegations that an appraiser made mistakes in the appraisals.

CR831-32, 835-38. At the hearing, the parties discussed fraud, but only in the context of explaining case law that concludes property can be considered omitted if the property was undervalued due to taxpayer fraud. The Taxing Units never alleged, and did not cite any evidence, that Kinder Morgan made misrepresentations to evade taxes.

Scurry CAD's attorney, Kirk Swinney, observed at the ARB that "there ha[dn't] been any evidence" of fraud by Kinder Morgan. CR853-55, 921. The Taxing Units' presentation packet presented at the hearing states that property can be considered omitted if undervalued due to "certain reasons including misrepresentations," but never alleges that Kinder Morgan made any misrepresentations. CR937. The packet states that appraisals of Kinder Morgan's property were "faulty" without stating *why* those appraisals were faulty—*e.g.*, whether the appraisals were faulty due to appraiser error, taxpayer misrepresentations, or some other reason. CR937. The Taxing Units alleged that SCAD's appraiser had made errors in other appraisals that could explain the alleged undervaluation of Kinder Morgan assets, but the Taxing Units ultimately stated that they did not know "who did what wrong" here. CR839.

B. The Taxing Units' Original Petition did not plead any factual theory—much less one involving taxpayer fraud.

1. The Original Petition did not mention taxpayer fraud.

The Taxing Units describe the administrative proceedings in the ARB, but for the TCPA to apply, the cause of action asserted in court must be based on, or in response to, the exercise of TCPA-protected rights. Tex. Civ. Prac. & Rem. Code Ann. § 27.003(a). Accordingly, if the Taxing Units—having adduced no evidence of taxpayer fraud in the ARB—elected not to pursue a taxpayer-fraud claim in court, then the Taxing Units' claims would not implicate the TCPA.

Thus, it is critical that the Taxing Units' Original Petition, filed in court, failed to state any factual allegations involving fraudulent misrepresentations by Kinder Morgan. As the Court of Appeals recognized, "the only facts pleaded [in the Original Petition] were that [Kinder Morgan's] 'mineral interest real property' in Scurry County 'was erroneously and incorrectly omitted from appraisal for [2013-2018],' that [the Taxing Units] timely filed challenge petitions, that the [ARB] denied the petitions, and that [the Taxing Units] timely sought de novo review." *Kinder Morgan SACROC, LP v. Scurry County*, 589 S.W.3d 889, 894 (Tex. App.—Eastland 2019, pet. filed). Because the Original Petition did not mention the exercise of TCPA-protected rights, the TCPA did not apply.

2. The Original Petition did not identify the factual theory on which the Taxing Units were relying.

The Taxing Units say Kinder Morgan has admitted that fraud is a subset of the Taxing Units' statutory claim (Resp.Br.8, 15), but this argument misses the point. Multiple factual theories might plausibly have supported the Taxing Units' statutory claim, but only one such theory—a theory of taxpayer fraud—would have implicated Kinder Morgan's TCPA-protected rights. Because the Original Petition did not identify which factual theory the Taxing Units were asserting, the Original Petition did not give Kinder Morgan notice that the Taxing Units' claim was based on, or in response to, the exercise of TCPA-protected rights. Resp.Br.42, 45, 53; *Kinder Morgan*, 589 S.W.3d at 900.

3. The Original Petition's reference to an "erroneous" appraisal did not provide notice that the Taxing Units were relying on a factual theory of taxpayer fraud.

The Taxing Units argue that their allegation of an "erroneous" appraisal gave Kinder Morgan fair notice that the appraisal was erroneous because Kinder Morgan allegedly made misrepresentations to government officials in the appraisal process. Resp.Br.51. But the word "erroneous" does not tell Kinder Morgan why the appraisal was incorrect or give Kinder Morgan notice that the Taxing Units were alleging that Kinder Morgan made misrepresentations to the government—the factual theory that implicates Kinder Morgan's TCPA-protected rights.

The Taxing Units say an appraisal *can* be "erroneous" due to a taxpayer's misrepresentations, citing a case not referenced in the Original Petition. *Willacy County Appraisal Dist. v. Sebastian Cotton & Grain, Ltd.*, 555 S.W.3d 29, 50 (Tex. 2018). Resp.Br.51. But again, an appraisal can be erroneous for multiple reasons. The Original Petition did not tell Kinder Morgan why the appraisal was allegedly erroneous.

Indeed, when they filed their Original Petition, the Taxing Units themselves did not know why the appraisal was allegedly erroneous. In their First Amended Petition (filed after the Original Petition), the Taxing Units pleaded that they had not yet identified a "rational explanation" for the alleged property omission. CR59. If the Taxing Units could not explain why Kinder Morgan's property was allegedly omitted, how was Kinder Morgan to discern that the Taxing Units were relying on a factual theory of taxpayer fraud?

4. The Original Petition did not give notice that the Taxing Units' omitted-property claim was based on, or in response to, Kinder Morgan's communications.

The Taxing Units say Kinder Morgan knew the suit would implicate Kinder Morgan's communications with the government because that suit would implicate Kinder Morgan's property renditions. Resp.Br.43, 46, 54. But the Original Petition did not give Kinder Morgan notice that the suit was based on, or in response to, Kinder Morgan's communications. For all Kinder Morgan knew, its property

renditions would, at most, be a background detail in a suit that focused on an error by the appraiser or someone else. Kinder Morgan did not know the Taxing Units' claim was *directed at* Kinder Morgan's communications.

5. Kinder Morgan had no duty to consult files from years ago to determine what the Taxing Units were alleging in the Original Petition.

The Taxing Units say Kinder Morgan should have figured out that the Taxing Units were alleging taxpayer fraud by piecing together facts found outside the Original Petition, such as a six-year-old letter from Mr. Kendall. Resp.Br.11, 16, 48. But to provide fair notice, the petition itself must state "the facts upon which the pleader bases his claim." *Roark v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982). As the Taxing Units acknowledge, the test for notice pleading is whether an attorney of reasonable competence could ascertain basic issues in dispute "with the pleadings before him." Resp.Br.49, 53. Kinder Morgan was not required to consult six-year-old letters in its filing cabinets to determine what the Taxing Units were attempting to plead in the Original Petition. In any event, the six-year old letter is not part of the record and cannot be considered on this non-jurisdictional TCPA issue. *See Hogg v. Lynch, Chappell & Alsup, P.C.*, 480 S.W.3d 767, 774 (Tex. App—El Paso 2015, no pet.).

6. The Taxing Units' pleading-by-case-citation theory must fail.

The Taxing Units say their Original Petition cited cases involving taxpayer fraud (Resp.Br.6), but that petition also cited *Atascosa County v. Atascosa County Appraisal District*, 990 S.W.2d 255, 256–57 (Tex. 1999), a case involving property omitted due to appraiser error, not taxpayer fraud (the appraiser erroneously failed to revoke an invalid tax exemption). *Id.*

The Taxing Units do not deny that *Atascosa County* involved appraiser error, rather than taxpayer fraud. Instead, they say that a different case, *ExxonMobil*, "explained *Atascosa*'s significance to taxpayer fraud cases." Resp.Br.22-23, 50-51. But *ExxonMobil* cites *Atascosa* only for general propositions applicable to <u>any</u> claim for omitted property under Tax Code Section 25.21. *In re ExxonMobil Corp.*, 153 S.W.3d 605, 613 (Tex. App.—Amarillo 2004, orig. proc.). *ExxonMobil* does not suggest that *Atascosa* involved taxpayer fraud.

And even if the Taxing Units had exclusively cited cases involving taxpayer fraud, citations alone are insufficient to plead a claim for omission by taxpayer fraud. To state a claim, a petition must include, at minimum, "a short statement of the cause of action" (Tex. R. Civ. P. 47(a)), that "recite[s] the elements of a cause of action" (*In re Lipsky*, 460 S.W.3d 579, 590–91 (Tex. 2015)). Although this standard is not onerous, it requires more than citing cases that could be used to piece together one of several possible theories of recovery.

7. Kinder Morgan's statements at the 2019 hearing in a separate suit are irrelevant to determining whether the 2018 Original Petition pleaded a taxpayer fraud theory.

The Taxing Units point to Kinder Morgan's statements at a December 2, 2019 hearing in a separate case filed by the Taxing Units as reflecting Kinder Morgan's knowledge that the Taxing Units' statutory claim was based on a theory of taxpayer fraud. Resp.Br.8. But that hearing took place more than year after the Taxing Units filed their Second Amended Petition—the pleading in which the Taxing Units alleged, for the first time, that Kinder Morgan had made misrepresentations to the government in the appraisal process. CR122. By that point, Kinder Morgan knew that the Taxing Units were alleging taxpayer fraud because the Taxing Units had already pleaded taxpayer fraud in the Second Amended Petition.

In any event, that December 2, 2019 hearing related to another TCPA Motion filed by Kinder Morgan in a separate, subsequent lawsuit filed by the Taxing Units, in which the newly, amended TCPA applied. The transcript of that hearing is not in this appellate record and is well after the trial court's order in this proceeding. Thus, the transcript is irrelevant to the issue whether the Taxing Units' Original Petition gave Kinder Morgan fair notice that the Taxing Units were relying on a theory of taxpayer fraud.

8. The Taxing Units wrongly downplay the Second Amended Petition as merely "provid[ing] more details."

Because the Taxing Units' Original Petition did not articulate any factual theory, Kinder Morgan filed a Rule 91a Motion to Dismiss. That Motion stated that the Original Petition did not explain "whether it was [Kinder Morgan], the Scurry [CAD] or some unnamed third party that is responsible" for the alleged property undervaluation. CR49-50. Kinder Morgan's Rule 91a Motion also stated that the Original Petition made allegations so "sparse that [Kinder Morgan] do[es] not even know whether [it is] being accused of causing the exclusion." CR51.

In response, the Taxing Units filed a First, and then Second, Amended Petition. CR122. The Taxing Units argue that the Second Amended Petition merely "provided more details." Resp.Br.56. But the Court of Appeals noted that the Second Amended Petition "specifically pleaded for the first time that mineral interests of [Kinder Morgan] in Scurry County were omitted from the appraisal roll due to fraudulent misrepresentations." *Kinder Morgan*, 589 S.W.3d at 900. Kinder Morgan's 60-day deadline to file a TCPA Motion to Dismiss should have started when the Second Amended Petition was served—the first pleading that stated factual allegations implicating Kinder Morgan's TCPA-protected rights.

C. The text of the TCPA confirms that the Second Amended Petition was a new legal action that started Kinder Morgan's 60-day timeline.

Under the TCPA, the defendant's 60-day timeline to file a motion to dismiss begins to run when the plaintiff serves a "legal action [that] is based on or is in response to a party's exercise of the right of free speech, right to petition, or right of association." Tex. Civ. Prac. & Rem. Code § 27.003. The Taxing Units argue that (1) the Original Petition and the Second Amended Petition both asserted a claim for omitted property under the Tax Code; so (2) the Original Petition and Second Amended Petition both asserted the same "legal action"; and, therefore, (3) the Second Amended Petition did not start Kinder Morgan's 60-day timeline to file a motion to dismiss. Resp.Br.47. But the Second Amended Petition asserted a new legal action under the TCPA because the Second Amended Petition pleaded, for the first time, a factual theory that implicates Kinder Morgan's TCPA-protected rights.

The TCPA's broad definition of "legal action" includes a "cause of action." Tex. Civ. Prac. & Rem. Code § 27.001(6); *Harper*, 562 S.W.3d at 8 (recognizing the textual definition of "legal action" as "undeniably broad"). The term "cause of action" is not defined in the TCPA, but that term has a plain meaning: "cause of action" refers to the "fact or facts entitling one to institute and maintain an action." *Loaisigia v. Cerda*, 379 S.W.3d 248, 262 (Tex. 2012) (emphasis added); *accord* Black's Law Dictionary (11th ed. 2019) (defining "cause of action" to include "[a]

group of operative facts giving rise to one or more bases for suing") (emphasis added). Reading the statute as a whole, and giving plain meaning to the phrase "cause of action," the 60-day timeline for filing a motion to dismiss begins to run when a party receives notice of a *factual theory* that implicates TCPA-protected rights; mere notice pleading of a broadly worded claim is not enough.

The Taxing Units argue they needed only state that they were appealing from the ARB (Resp.Br.49), but such a barebones pleading certainly does not and cannot put Kinder Morgan on notice that the Taxing Units are asserting a claim based on, or in response to, the exercise of TCPA-protected rights.

D. The Taxing Units fail to harmonize the Court of Appeals' opinion with other courts of appeals' applications of the TCPA.

The Taxing Units cannot square the Court of Appeals' analysis with other courts of appeals' opinions. Resp.Br.56-57. Here, the Court of Appeals held that the TCPA's 60-day deadline for filing a motion to dismiss starts when the plaintiff gives the defendant fair notice of a claim—even if the petition does not include factual allegations implicating TCPA-protected rights. *Kinder Morgan*, 589 S.W.3d at 898.

By contrast, other courts of appeals hold that the TCPA's applicability depends on the factual allegations pleaded by the plaintiff. *Campone v. Kline*, 2018 WL 3652231, at *6 (Tex. App.—Austin Aug. 2, 2018, no pet.) (TCPA deadline reset when amended petition "added new factual allegations about [] alleged

defamation"); *Montelongo v. Abrea*, 2019 WL 5927742, at *4 (Tex. App.—San Antonio Nov. 13, 2019, pet. filed) (defendants must evaluate whether TCPA applies based on "factual allegations [] asserted against them"); *Jordan v. Hall*, 510 S.W.3d 194, 197 (Tex. App.—Houston [1st Dist.] 2016, no pet.) ("An amended petition asserting claims based upon new factual allegations may reset a TCPA deadline [regarding new] substance."). Contrary to the Taxing Units' arguments, there is considerable conflict among the courts of appeals as to whether and when an amended petition will start (or restart) a defendant's 60-day timeline to file a TCPA motion to dismiss.

E. The Taxing Units wrongly attack the Legislature's burden-shifting under the TCPA.

The Taxing Units say "the TCPA has been weaponized [] to force plaintiffs to essentially prove their cases with little to no evidence or adequate discovery." Resp.Br.58. But the TCPA's burden-shifting regime is unambiguous: the plaintiff must "establish[] by clear and specific evidence a prima facie case for each essential element of the claim." Tex. Civ. Prac. & Rem. Code §27.005(c); *In re Lipsky*, 460 S.W.3d at 587. Where, as here, the Legislature's words are clear, courts apply the statute's plain language. *Silguero v. CSL Plasma, Inc.*, 579 S.W.3d 53, 59 (Tex. 2019).

F. The Taxing Units wrongly deny that the Court of Appeals' opinion will cause gamesmanship.

The Taxing Units say there is no "rational basis" for thinking the Court of Appeals' opinion cause gamesmanship. Resp.Br.57-58. But if Texas law permits plaintiffs to evade the TCPA through procedural gamesmanship, it is only rational to anticipate plaintiffs will do so.

The Court of Appeals' opinion provides a roadmap of how to engage in gamesmanship—*i.e.*, how to evade the TCPA and still file a strategic lawsuit against public participation. Under that opinion, a plaintiff can circumvent the TCPA by (1) filing an original petition devoid of factual allegations that implicate TCPA-protected rights; and then (2) after expiration of the TCPA's 60-day deadline to file a motion to dismiss, filing an amended petition including such allegations.

G. Filing special exceptions would not prevent the gamesmanship.

The Taxing Units say a defendant can avoid gamesmanship by specially excepting when a petition is so lacking in detail that the defendant cannot determine whether the plaintiff's claim implicates TCPA-protected rights. Resp.Br.58-59. But even when a court sustains special exceptions and orders a plaintiff to replead, the TCPA's 60-day deadline to file a motion to dismiss may pass before the amended petition is filed. Pet.Br.48.

This case demonstrates why special exceptions will not prevent gamesmanship. In response to the Original Petition, Kinder Morgan filed a Rule 91a

Motion to Dismiss that specifically pointed out defects in the Original Petition, for example, that the Original Petition makes allegations so "sparse that [Kinder Morgan] do[es] not even know whether [it is] being accused of causing the exclusion of property." CR51. In response, the Taxing Units amended their petition but waited to allege taxpayer fraud until after the 60th day following service of the Original Petition. There is no reason to think the Taxing Units would have amended earlier if Kinder Morgan had combined its Rule 91a Motion with special exceptions.

III. Kinder Morgan established good cause to extend the TCPA's 60-day deadline.[3]

A court may extend the time to file a TCPA Motion to Dismiss on a showing of good cause. Tex. Civ. Prac. & Rem. Code § 27.003(b). Good cause is not defined in the TCPA, but in other contexts, "good cause is established by showing the failure involved was an accident or mistake, not intentional or the result of conscious indifference." *Kinder Morgan*, 589 S.W.3d at 901. Both the Eastland and Austin Courts have concluded that such a standard of good cause—*i.e.*, that a failure was due to accident or mistake rather than intentional wrongdoing or conscious indifference—is applicable in determining whether the TCPA's 60-day deadline should be extended. *Kinder Morgan*, 589 S.W.3d at 901; *Morin v. Law Office of*

[3] Kinder Morgan has already refuted (Pet.Br.55-57) the Taxing Units' argument that Kinder Morgan waived its request to extend the TCPA's 60-day deadline. (Resp.Br.59-60).

Kleinhans Gruber, PLLC, 2015 WL 4999045, at *3 (Tex. App.—Austin Aug. 21, 2015, no pet.) (mem. op.).

Rejecting this standard, the Taxing Units argue for a "strict" standard for good cause that requires a showing of "difficult or impossible circumstances." Resp.Br.60-61. In support, the Taxing Units cite cases discussing the good cause standard for excluding evidence not timely disclosed under Rule 193.6 of Civil Procedure (then TRCP 215(5)). *Id.* at 61; *see Alvarado v. Farah Mfg. Co., Inc.*, 830 S.W.2d 911, 914–15 (Tex. 1992). The purpose of that strict standard "is to require complete responses to discovery so as to promote responsible assessment of settlement and prevent trial by ambush." *Alvarado*, 830 S.W.2d at 914. A strict "good cause" standard may be useful for preventing discovery gamesmanship, but that standard is unnecessarily harsh in analyzing a request to extend the deadline for filing a TCPA motion to dismiss. Especially given the inconsistent appellate standards for when the TCPA's 60-day clock should begin to run (*supra*, p. 28-29), a strict "good cause" standard would unfairly penalize good faith accidents or mistakes.

Applying the correct legal standard, Kinder Morgan demonstrated good cause to extend the TCPA's deadline. This lawsuit is still in its earliest stages. Kinder Morgan's Rule 91a motion timely challenged the Taxing Units' cursory Original Petition, but the Taxing Units did not allege taxpayer fraud until their Second

Amended Petition filed after the 60th day following service of the Original Petition. Kinder Morgan's TCPA Motion was filed within four months after service of the Original Petition and about a month after the Second Amended Petition. *Cf. Sullo v. Kubosh*, 2019 WL 6120878, at *25 (Tex. App.—Houston [1st Dist.] Nov. 19, 2019, no pet.) (no good cause when TCPA motion filed nearly 5 years after service of a legal action). These facts demonstrate Kinder Morgan's reasonable diligence and constitute good cause to extend the TCPA's 60-day deadline.

The Taxing Units say Kinder Morgan presented no evidence of good cause, "feigned ignorance as to the case issue of taxpayer fraud [sic]", and made a "conscious decision to delay the filing of the TCPA motion to dismiss." Resp.Br.60-61. But the sequence of events outlined above and in Kinder Morgan's brief shows otherwise. Pet.Br.5-9, 54.

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I hereby certify that a true and correct copy of the foregoing has been electronically transmitted to the Clerk of the Court using the ECF System for electronic filing on this the 10th day of June, 2020. Based on the records currently on file, electronic notice of filing will be sent to all registered counsel of record:

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