No. 03-13-00753-CV

In the Court of Appeals
Third District of Texas — Austin

SUSAN COMBS, IN HER OFFICIAL CAPACITY AS TEXAS COMPTROLLER, AND GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS TEXAS ATTORNEY GENERAL

Appellants

v.

TEXAS SMALL TOBACCO COALITION AND GLOBAL TOBACCO, INC.

Appellees

BRIEF OF APPELLEES

Craig T. Enoch
Melissa A. Lorber
Shelby O'Brien
ENOCH KEVER PLLC
600 Congress Avenue, Suite 2800
Austin, Texas 78701
(512) 615-1200 / (512) 615-1198 fax

Attorneys for Appellees,
Texas Small Tobacco Coalition and Global Tobacco, Inc.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

RULES AND REGULATIONS

RESPONSIVE ISSUES PRESENTED

The tax imposed by House Bill 3536 on Small Tobacco manufacturers, while exempting their Big Tobacco competitors, is unconstitutional and was properly enjoined by the trial court. This Court should affirm the trial court's judgment because:

I.

The tax violates the Texas Constitution's Equal and Uniform Clause because it targets products of certain manufacturers while exempting identical products made by their competitors.

II.

The tax violates the Equal Protection Clause of the United States and Texas Constitutions because it imposes a tax on the products of certain manufacturers while exempting identical products of other similarly-situated manufacturers.

III.

The tax violates the United States Constitution's Due Process Clause and Texas Constitution's Due Course of Law provision because the tax bears no fiscal relation to protection, opportunities, and benefits given by the state.

IV.

Small Tobacco has standing to challenge the Act and properly brought suit under both the Tax Code and the Declaratory Judgment Act.

INTRODUCTION

The tax targeted by this lawsuit is imposed only on the products of small tobacco manufacturers, while expressly exempting the identical products of Big Tobacco manufacturers who entered into private settlement agreements with the State of Texas in the 1990s after being sued for their unlawful conduct. The tax—enacted this past legislative session in House Bill 3536 (the "Act")—was lobbied by Big Tobacco companies, who pushed for its enactment to eliminate the impact of the financial penalties that were assessed against them in those settlement agreements. The Texas Small Tobacco Coalition (the "Coalition") is a consortium composed primarily of small, independent tobacco manufacturers, including Global Tobacco, Inc. ("Global"), who are subject to the unconstitutional tax (collectively, "Small Tobacco"). Through the discriminatory tax, the members of the Coalition—competitors of Big Tobacco—have been coerced to raise prices, thus eliminating the competitive disadvantage the penalties against Big Tobacco were designed to impose.

Fortunately, forward-thinking Texas constitutional drafters anticipated that some big businesses may use their financial clout in

the legislative process to disadvantage smaller competitors through the exercise of the legislative power to tax. The Texas Constitution expressly prohibits such a discriminatory tax. And bedrock principles embedded in both the Texas and United States Constitutions declare such a tax a violation of citizens' constitutional rights. Because the discriminatory tax on the Coalition members' tobacco products violates the Texas and United States Constitutions, the trial court did not err in denying the State's plea to the jurisdiction, granting Small Tobacco's motion for summary judgment, and enjoining collection of the tax. Small Tobacco asks this Court to affirm the trial court's judgment.

PRELIMINARY STATEMENT

Rather than mounting a serious challenge to the constitutional infirmity of the tax, the State's[1] brief is replete with blatant, unsupported, inflammatory misrepresentations in an apparent attempt to distract the Court from the real issues in this case. Without citation or reference to the record, the State alleges that members of the Coalition—including Sandia Tobacco, Tantus Tobacco, and National Tobacco—sell

[1] The appellants in this case are Susan Combs, in her official capacity, and Greg Abbott, in his official capacity. The appellants are collectively referred to as the "State" in this brief.

flavored cigarettes and engage in other marketing practices designed to appeal to children.[2] The State then asserts that the Coalition's members are able to do so because they are not bound by the private settlement agreements entered into by Big Tobacco.[3] The State is unable to cite any support—from within the record or any external source—because its accusations are patently false.

As an initial matter, the settlement agreements do not prohibit Big Tobacco from selling flavored cigarettes. Instead, federal law prohibits ***all*** cigarette manufacturers from selling flavored cigarettes, as well as selling packs with more than 20 cigarettes or otherwise marketing tobacco products towards children. *See* Family Smoking Prevention and Tobacco Control Act, P. Law No. 111-31 (2009); 21 CFR Part 1140.[4] The marketing restrictions that are actually in the settlement agreements are also codified in federal law: Small Tobacco, like Big Tobacco, must comply with those restrictions.[5] *See id.*

---

[2] Appellants' Brief, pp. 2, 5-7.

[3] Appellants' Brief, pp. 2, 6.

[4] The provision of the federal law banning flavored cigarettes is specifically codified at 21 U.S.C. § 387g. In response to mandates in the federal statute, the Food and Drug Administration has adopted a rule banning the sale of cigarette package that contains more than twenty cigarettes. 21 CFR § 1140.16(b).

[5] Indeed, in the trial court, the State and Small Tobacco entered into a joint stipulation of facts that states "***[a]ll*** advertising of cigarette products is restricted by law." Clerk's Record ("CR") 1330 (emphasis added).

It is outrageous for the State to accuse the Coalition members of violating federal law, when none of the members have been accused of doing so, that issue has never been raised in this litigation, and the State does not offer a scintilla of evidence to support its far-fetched and intentionally incendiary claims.

Further, the State's attempt to make up issues out of whole cloth does not end with its unsupportable allegations. The State also repeatedly makes the unsupported statements that cigarettes sold by Small Tobacco cost at least $0.64 a pack less than those sold by Big Tobacco, and that under the settlement agreements Big Tobacco companies already contribute about $0.64 to the State treasury for each pack sold. Again, there is nothing in the record to support these statements.[6] *See* TEX. R. APP. P. 38.1(g). In fact, there is nothing in the record that supports the State's conclusion that cigarettes sold by Big Tobacco always cost more than cigarettes sold by Small Tobacco. And

---

[6] The State cites no authority for this first statement and cites only its own cross-motion for summary judgment as authority for the second statement. In its motion, the State cited a Minnesota Supreme Court case for the proposition that Big Tobacco pays the equivalent of $0.64 per pack under the master settlement agreement. CR 1304. But this statement is unsupported and untrue. First, the Minnesota case concerned a settlement agreement between Minnesota and Big Tobacco—not the master settlement agreement or the agreements between Texas and Big Tobacco. Thus, there is no basis for asserting that Big Tobacco pays $0.64 per pack into the *Texas* treasury. Further, the Minnesota court was referring to a stipulation entered into between the parties in that case—no stipulation was entered into here.

while the record shows each settling manufacturer pays a different amount to the State each year, there is nothing in the record that shows how much any Big Tobacco manufacturer has paid in any year.

It is unclear whether the State simply did not do its homework or is flagrantly attempting to mislead the Court. In any event, the Court should dismiss the State's unsupported, inflammatory statements and focus on the legitimate, constitutional issues that form the basis of Small Tobacco's suit.

STATEMENT OF FACTS

A. Big Tobacco has for generations participated in anti-competitive behavior aimed at maintaining its market stronghold.

The tobacco industry has historically been dominated by a few large companies. In 1900, 90 percent of cigarettes were manufactured by a single company—American Tobacco Company.[7] In 1907, American Tobacco Company was indicted under the Sherman Antitrust Act and, in 1911, the United States Supreme Court ordered the company to dissolve to ensure greater competition in the tobacco market.[8] In 1946, the Supreme Court

[7] CR 698-99; *see also U.S. v. American Tobacco Co.*, 221 U.S. 106, 157 (1911).

[8] CR 699; *see also American Tobacco*, 221 U.S. at 187.

again ruled against the large tobacco companies, concluding that the market continued to be monopolized by a handful of companies.[9]

Nonetheless, despite these attempts to ameliorate the monopolized market enjoyed by the big tobacco companies, the market today continues to be dominated by a few large companies. As of 1997, 97 percent of the cigarette market was claimed by only four companies (collectively, "Big Tobacco")—Phillip Morris Companies: 47.5 percent; RJR Nabisco Holdings (parent of R.J. Reynolds Tobacco): 25.4 percent; BAT Industries P.L.C. (parent of Brown & Williamson Tobacco): 16.1 percent; and the Loews Corporation (parent of Lorillard Tobacco): 7.9 percent.[10]

On March 28, 1996, Texas sued the Big Tobacco manufacturers and their trade entities for numerous violations of federal and state laws, including, once again, anti-competitive behavior. *State of Texas v. American Tobacco Co., et al.* was filed in the United States District Court for the Eastern District of Texas, Texarkana Division.[11] This lawsuit leveled serious

---

[9] *See American Tobacco Co. v. U.S.*, 328 U.S. 781, 814-15 (1946).

[10] CR 978 n.7.

[11] CR 978-79; Second Supplemental Clerk's Record ("2 CR") Exhibit ("Exh.") 10. Some of Small Tobacco's summary judgment exhibits filed in the trial court were not included in the clerk's record. As such, Small Tobacco has requested that the clerk prepare a second supplemental record to include those documents. Those exhibits are referred to as 2 CR Exh. 10, 2 CR Exh. 11, etc.

charges of wrongdoing against Big Tobacco. The allegations involved three general categories of claims:

(1) **Deceptive Advertising** – Big Tobacco distributed false and misleading information and health data designed to obscure the health risks of smoking;

(2) **Targeting Children** – Big Tobacco engaged in marketing campaigns aimed at children to promote early smoking habits and create successive generations of addicted customers; and

(3) **Antitrust** – Big Tobacco illegally manipulated the market to restrain and eliminate competition.[12]

The facts alleged in Texas' lengthy complaint were remarkable. The complaint, with exhibits, spanned nearly 600 pages and provided specific details about Big Tobacco's efforts to illegally manipulate the tobacco industry and promote their products through unconscionable tactics.[13] For example, Big Tobacco:

- targeted adolescent girls by creating products and marketing campaigns designed to prey on feelings of insecurity and inferiority in some young women;[14]
- took advantage of societal pressure to have a "thin" body type by presenting cigarettes as a suitable alternative to dieting;[15]

[12] CR 979, 684-91.

[13] CR 698-745.

[14] CR 733-34.

[15] CR 734.

- promoted a cartoon campaign that resulted in "Joe Camel" being as universally recognized by six year olds as "Mickey Mouse";[16]
- created anti-smoking materials geared towards children that were, in reality, designed to promote smoking;[17]
- fraudulently and deceptively advertised low levels of tar and nicotine in cigarettes;[18]
- represented that cigarettes had health benefits (*e.g.*, kept one clear-headed and offered protection against colds);[19]
- secretly bred high-nicotine tobacco plants while denying their existence to the FDA;[20] and
- created a "gentlemen's agreement" to suppress independent research on smoking and health.[21]

The State's characterization of the lawsuit as merely "seeking to recover billions of tax dollars [the State] had spent to treat tobacco related illnesses suffered by Texas citizens"[22] is defied by the expansive allegations in the lawsuit petition.

---

[16] CR 735-36.

[17] CR 736-37.

[18] CR 739-40.

[19] CR 752.

[20] CR 874-75.

[21] CR 724-25.

[22] Appellants' Brief, p. 3.

The Texas lawsuit was just one of many brought against Big Tobacco. Dozens of states filed similar fraud and market manipulation actions, collectively seeking billions of dollars in damages.[23]

B. Big Tobacco negotiated private agreements with the states.

Rather than proceed to trial in individual states, Big Tobacco negotiated private settlement agreements under which they agreed to make monetary payments and, in turn, the states granted immunity, released Big Tobacco from liability for tort claims, and agreed to incentives designed to protect Big Tobacco's market share.[24] Most states joined a master settlement agreement.[25] A few states, like Texas, negotiated for a separate agreement.[26]

In exchange for Texas's agreement not to pursue its claims of deceptive marketing, targeting children, and antitrust violations, Big Tobacco agreed to pay Texas billions of dollars through a multi-year payout structure.[27] The size of the agreed payment, alone, demonstrates that Big Tobacco understood its

---

[23] CR 623-25; 2 CR Exh. 15.

[24] CR 372-74, 1240-50; 2 CR Exh. 17.

[25] CR 1124-77.

[26] CR 358-96.

[27] Big Tobacco also agreed to pay an additional $2.3 billion to Texas counties and hospital districts that had intervened in the suit. CR 364-66.

culpability and the significant exposure to huge damages it faced for historical and well-documented misconduct.

C. The Texas Legislature imposed a discriminatory tax on Big Tobacco's small competitors.

House Bill 3536, signed into law on June 14, 2013, is an unprecedented tax. It amends the Texas Health and Safety Code to assess a "fee" (actually a tax under well-established Texas law)[28] on only cigarette products manufactured by small, independent manufacturers.[29] Through a labyrinth of terms to avoid taxing the cigarettes of any of the Big Tobacco manufacturers, the Act imposes a perpetual tax on cigarette tobacco products sold, used, consumed, or distributed in Texas—but only on those products manufactured by the targeted Small Tobacco competitors.[30] Distributors of cigarette products manufactured by Small Tobacco companies are required to file

---

[28] The Texas Supreme Court has declared that whether an assessment is a tax or a "fee" depends on the nature of the assessment, not on what the Legislature calls the assessment. *See*, *e.g., Lowenberg v. City of Dallas*, 261 S.W.3d 54, 57-58 (Tex. 2008); *Conlen Grain & Mercantile, Inc. v. Texas Grain Sorghum Producers Bd.*, 519 S.W.2d 620, 622-23 (Tex. 1975). When the primary purpose of an assessment is raising revenue, it is a tax. On the other hand, if the assessment's primary purpose is regulation, it is a fee and not a tax. *Lowenberg*, 261 S.W.3d at 57-58. The State does not appear to contest that the "fee" is a "tax" in this appeal.

[29] CR 341-54.

[30] *Id.*

monthly reports and remit taxes on those products.[31] The tax rate is 2.75 cents on each cigarette sold, used, consumed, or distributed in Texas. This amounts to 55 cents for each 20-cigarette pack.[32] The taxes collected are deposited in the State treasury to the credit of the general revenue fund.[33]

By design, the tax does not apply to all cigarettes. Under the Act, only cigarettes manufactured by Big Tobacco's small competitors (referred to in the Act as "non-settling manufacturers") are subject to the tax.[34] The Act defines these manufacturers as those that did not sign either the Comprehensive Settlement Agreement and Release in the Texas lawsuit (the "Texas settlement agreement") or a March 20, 1997 settlement agreement involving the Liggett Group (the "Liggett agreement").[35] Thus, Big Tobacco is expressly exempted from the tax.

In addition to exempting Big Tobacco, the Act extends a benefit to some manufacturers though a tax discount. A manufacturer that is able to establish that it is a Subsequent Participating Manufacturer as that term is defined in the multi-state master settlement agreement may reduce its tax

---

[31] CR 348.

[32] *Id.*

[33] CR 352.

[34] CR 347.

[35] CR 344-45.

liability by approximately 75 percent.[36] For Subsequent Participating Manufacturers, the Act imposes a drastically reduced tax of only 0.75 cents per cigarette (or 15 cents per pack).[37] The reduction is the result of monies paid to other states, not to Texas.[38]

Additionally, the Act does not provide Small Tobacco companies the benefits granted to Big Tobacco through the settlement agreements. As mentioned, the private agreement between the State and Big Tobacco granted immunity and relieved Big Tobacco of liability from claims. In contrast, though the taxes paid by the Small Tobacco competitors may be applied as a credit against any judgment or settlement on a claim for costs related to the use or exposure of their tobacco products to the public, the Act does not grant immunity or release the Small Tobacco competitors from liability.[39]

One of the stated purposes of the Act is to "ensure evenhanded treatment" of non-settling manufacturers and the Big Tobacco companies that

---

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] CR 352.

entered into the settlement agreements.[40] But the independent Small Tobacco manufacturers targeted by the Act were not sued by Texas, and none have ever been accused or adjudged to have engaged in the illegal corporate conduct—deceptive marketing, targeting children, and antitrust violations—that gave rise to the financial sums Big Tobacco agreed to pay under the Texas settlement agreement. By forcing Small Tobacco manufacturers to increase their prices, Big Tobacco's market share is not only protected, but Big Tobacco is effectively relieved of any economic sanctions for its unlawful conduct. The Legislature has essentially forced Small Tobacco to "settle" as Big Tobacco did, but without any accusation of wrongdoing or opportunity to defend itself.

D. Small Tobacco successfully sued to declare the tax unconstitutional and have its collection enjoined.

Shortly after the Act was enacted, Small Tobacco filed suit requesting the trial court to declare the Act unconstitutional as violating the Equal and Uniform, Equal Protection, and Due Course of Law Clauses of the Texas Constitution, and the Equal Protection and Due Process Clauses of the United States Constitution. Small Tobacco also asked the trial court to enjoin

---

[40] CR 342.

the tax's collection or enforcement. After the trial court heard the State's plea to the jurisdiction and the parties' competing summary judgment motions, the court denied the State's plea and granted Small Tobacco's summary judgment motion.[41] In the final judgment, the trial court declared the Act unconstitutional in its entirety and permanently enjoined the State from assessing, collecting, or enforcing the tax.[42] The State then filed this appeal.[43]

SUMMARY OF THE ARGUMENT

House Bill 3536 imposes a tax only on the products of small, independent tobacco manufacturers, while expressly exempting the same products manufactured by their Big Tobacco competitors. The only distinction between Small Tobacco and Big Tobacco is that the latter was sued by the State for wrongdoing and agreed to enter into private settlement agreements, while Small Tobacco was never sued for wrongdoing and does not owe settlement payments to the State. This tax violates the Texas Constitution's

---

[41] CR 1367-68.

[42] *Id.*

[43] During the State's appeal, members of the Coalition have continued paying the tax because the State automatically superseded the judgment. The members of the Coalition filed a motion for hardship exemption in the trial court under Texas Tax Code, Section 112.108 and Texas Rule of Appellate Procedure 24, which the trial court dismissed for want of jurisdiction. The Coalition then filed a motion for review of supersedeas order, which is pending in this Court.

Equal and Uniform Clause for two key reasons. First, the tax discriminates against Small Tobacco, even though the nature and operations of Small Tobacco's and Big Tobacco's businesses, and the products manufactured by both sets of businesses, are identical. Second, the policy reasons articulated by the Texas Legislature are not permissible goals to support tax legislation.

The tax also violates the Equal Protection Clauses of the United States and Texas Constitutions because it lacks a rational basis. The Act arbitrarily exempts from the tax cigarette products of manufacturers that are, in all other respects, identical to the cigarette products of the manufacturers that must pay the tax.

Additionally, the tax violates the United States Constitution's Due Process Clause and the Texas Constitution's Due Course of Law provision. The tax in essence imposes a penalty against Small Tobacco, but without Small Tobacco ever having been sued for any wrongdoing or afforded the opportunity to defend itself—an opportunity Big Tobacco was afforded before those companies opted to voluntarily settle with the State.

The trial court correctly declared the tax unconstitutional and permanently enjoined its collection or enforcement. This Court should affirm the judgment.

ARGUMENT

I.

The tax violates the Texas Constitution's Equal and Uniform Clause because it unfairly targets products of certain manufacturers while exempting identical products made by their competitors.

The drafters of the Texas Constitution enacted the Equal and Uniform Clause precisely because of concerns about discriminatory taxes like the one imposed by the Act. During the Constitutional Convention of 1875, there was considerable debate about exemptions from taxation that had been granted to powerful corporations—in that era, railroad corporations—at the expense of less powerful entities and persons, and the monopoly that could result from a tax scheme that favored a few entities. *See* DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875 296, 304-06 (Seth Shepard McKay ed., 1930); THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 565 (George D. Braden ed., 1977).

The end result of the debate was Article VIII, Section 1, of the Texas Constitution, which requires that: "Taxation shall be equal and uniform," and Article VIII, Section 2, which requires that: "All occupation taxes shall be equal and uniform upon the same class of subjects[.]" These provisions collectively are known as the Equal and Uniform Clause.

The tax imposed by the Act violates the Equal and Uniform Clause because it taxes identical products by identical manufacturers differently: the products of Small Tobacco manufacturers are subject to the tax while the products of their Big Tobacco competitors are not. The only distinction between Small Tobacco and Big Tobacco is that the latter voluntarily agreed to pay financial sums to the State under the private settlement agreements. But imposing an involuntary tax on companies who were never sued for wrongdoing and never agreed to enter into settlement agreements to resolve litigation with the State is not a permissible distinction for purposes of the Equal and Uniform Clause. The Court should affirm the trial court's judgment.

A. If the nature and operations of businesses are the same, the businesses may not be taxed differently under the Equal and Uniform Clause—even if the purpose behind the tax legislation is otherwise reasonable.

All tax laws enacted by the Texas Legislature are required to comply with the Equal and Uniform Clause. *See Dancetown, U.S.A., Inc. v. State*, 439 S.W.2d 333, 336 (Tex. 1969). Although the Legislature can establish classifications that differentiate among lines of business, every classification must have a reasonable basis in the nature and operations of the business

and must operate equally on subjects within the same line of business, between which there is no real difference to justify separate treatment. *See Hurt v. Cooper*, 110 S.W.2d 896, 901 (Tex. 1937); *Texas Co. v. Stephens*, 103 S.W. 481, 485 (Tex. 1907); *Bullock v. Pioneer Corp.*, 774 S.W.2d 302, 305 (Tex. App.—Austin 1989, writ denied).

In conducting an Equal and Uniform inquiry, courts first employ a test similar to the Equal Protection Clause's "rational basis" test, which permits a statute to survive constitutional challenge when a rational basis is articulated by the legislature or implied by the reviewing court.[44] *See In re Nestle USA, Inc.*, 387 S.W.3d 610, 622 (Tex. 2012). But while the Equal Protection analysis ends there, under the Equal and Uniform Clause, courts must ***additionally*** consider whether the ***nature and operations*** of the businesses are so different as to warrant unequal treatment. *See Am. Home Assurance v. Tex. Dep't of Ins.*, 907 S.W.2d 90, 97-98 (Tex. Civ. App.—Austin 1995, writ denied); *Calvert v. American Int'l Television, Inc.*, 491 S.W.2d 455, 458 (Tex. Civ. App.—Austin 1973, no writ); *Grayson v. Calvert*, 357 S.W.2d 160, 162 (Tex. Civ. App.—Austin 1962, writ ref'd n.r.e.). When the nature and operations of

---

[44] The Texas Supreme Court has stated that the rational basis test is one in which courts determine whether a statutory classification is "reasonable." *See Bell v. Low Income Women of Texas*, 95 S.W.3d 253, 265-66 (Tex. 2002).

businesses are the same, the Legislature's attempt to apply different classifications for taxing purposes must be rejected, even if the purpose of the tax is otherwise rational or reasonable. *See Nestle*, 387 S.W.3d at 622; *Am. Home Assurance*, 907 S.W.2d at 97-98.

Here, the State does not dispute that the nature and operations of Small Tobacco's and Big Tobacco's businesses, and the products manufactured by the businesses, are identical. Instead, the State incorrectly describes the Equal and Uniform Clause's "nature and operations of the business" test as "essentially the same" as the Equal Protection Clause's rational basis test.[45] To the State, the test is solely whether the purpose of the Act is "reasonable." But the Texas Supreme Court rejected this argument two years ago in *Nestle* when it held that the standard of review under the Equal and Uniform Clause is "more strict" than the rational basis test. 387 S.W.3d at 624. The Court made clear that, under the Equal and Uniform Clause, it is not enough that the tax is "reasonable" or "rational." *Id.* at 622. Instead, a tax "must attempt to group similar things and differentiate dissimilar things." *Id.* This Court should reject the State's effort to eliminate this essential second requirement of the Equal and Uniform test.

---

[45] Appellants' Brief, pp. 12-14, 18.

B. The classification imposed by the tax violates the Equal and Uniform Clause: it does not operate uniformly as to all competitors within the single classification of tobacco manufacturers.

The classification imposed by the tax violates the Equal and Uniform Clause. The Act arbitrarily and impermissibly segregates identical cigarette products into: (1) products manufactured by the Small Tobacco manufacturers (not parties to private agreements with Texas or the other states), which are taxed at 55 cents per pack; (2) products manufactured by Subsequent Participating Manufacturers (the later-joining parties to the multi-state agreement), which are taxed at a discount of only 15 cents per pack; and (3) products of manufacturers that are parties to private agreements with Texas, which are not taxed at all.

The tax does not operate uniformly as to all competitors within the single classification of tobacco manufacturers, even though the nature and operations of and the products manufactured by these businesses are identical. Specifically:

- The cigarettes or cigarette tobacco products sold, used, consumed, or distributed in Texas are identical, and the Act does not make any attempt to draw any legitimate distinction between the products. The Act generally defines "cigarette" as "a roll for smoking that is: made of tobacco or tobacco mixed with another ingredient and wrapped or covered with a material other than

tobacco; and [is] not a cigar."[46] Both Small Tobacco and Big Tobacco manufacture cigarettes that fall within this definition.

- The Act also does not make any attempt to draw any legitimate distinction between the manufacturers. The operations of the businesses are the same. "[C]ourts look to the main or principal occupation (as opposed to an incidental activity) being pursued by businesses when engaged in the activity at issue in deciding whether they can or cannot be separately classified for tax purposes."[47] It is unquestionable that the "main or principal occupations" of Small Tobacco and Big Tobacco are identical. Both have a principal occupation of manufacturing and selling cigarette products. *See Am. Home Assurance*, 907 S.W.2d at 97-98.

It is worth stressing that the ***only*** distinction between Small Tobacco and Big Tobacco is that Big Tobacco voluntarily entered private settlement agreements with the State to resolve allegations of its wrongdoing, whereas Small Tobacco did not because it did not commit and was never accused of the same legal infractions. There is no exception under the Equal and Uniform Clause that allows voluntary non-tax payments made under private agreements with the State to be the genesis of a discriminatory tax against business competitors who did not commit the same infractions, nor agree to make any settlement payments.

---

[46] CR 342.

[47] *See Fairmont Dallas Restaurants v. McBeath*, 618 S.W.2d 931, 935 (Tex. Civ. App.—Waco 1981, no writ); *Calvert v. American Int'l Television, Inc.*, 491 S.W.2d 455, 458 (Tex. Civ. App.—Austin 1973, no writ); *see also Pullman P. C. Co. v. State*, 64 Tex. 274, at *3-5 (1885).

Indeed, if private settlement agreements reached in the course of litigation were a permissible means of discriminating among identical businesses, it is difficult to imagine the purpose of the Equal and Uniform Clause. If the State sued Small Tobacco for the same legal infractions as Big Tobacco, and Small Tobacco was cleared of any wrongdoing, could the State nonetheless impose a tax on the Small Tobacco companies to recover amounts it would have recovered had it succeeded in the litigation? Or if the State sued one car manufacturer accused of making unsafe vehicles and recovered penalties, could the State then tax other car manufacturers who were never accused or proven to have committed the same infractions in an effort to recover the equivalent of those penalties from each manufacturer to increase State revenue? Surely the answer must be no. Yet this is precisely what the State is attempting through the tax imposed on Small Tobacco under the Act.

The State argues (without citation) that the amounts Big Tobacco must continue to pay under the Texas settlement agreement are not the result of wrongdoing, but instead are to offset the State's future healthcare costs. As an initial matter, this statement is inaccurate. Under the Texas settlement agreement, the continuing amounts paid by Big Tobacco are "allocated to the general revenue fund of the State of Texas to be used for such purposes as the

State of Texas may determine."[48] No provision of the settlement agreement states how much of the settlement payments are for past or future healthcare costs. Moreover, the State cannot dispute that Big Tobacco would not be required to pay ***any*** amounts under the settlement agreements had it not been sued by the State for wrongdoing and voluntarily chosen to settle rather than face the risk of greater financial penalties at trial. The Small Tobacco companies have not been accused of any wrongdoing and have not voluntarily agreed to enter into settlement agreements with the State. Thus, by imposing the tax, the Legislature has essentially forced Small Tobacco to "settle" like Big Tobacco, but without accusation or an opportunity to defend itself.

C. Even if the purpose of the tax is to protect public health and raise revenue, the tax is still in violation of the Equal and Uniform Clause.

The State's argument boils down to the claim that the tax is constitutional because it has two "reasonable" purposes: (1) to protect public health by forcing Small Tobacco to pay healthcare costs to the State and raise their prices to discourage underage smoking—what the State refers to as a "Pigovian" tax and (2) to raise revenue.[49] But this first policy reason is not

---

[48] CR 366.

[49] Appellants' Brief, pp. 10-11, 13-14.

permissible under Texas law. The second policy reason is unsupportable because taxing all tobacco manufacturers equally (as required by the Equal and Uniform Clause) would raise more revenue. And regardless of whether these policy goals are "reasonable," the tax still may not discriminate among businesses whose nature and operations are the same.

1. Forcing Small Tobacco to internalize healthcare costs and detering underage smoking are not legitimate policy goals to support tax legislation.

The Texas Supreme Court has expressly stated that "the Legislature may pursue goals through tax legislation, but ***only*** goals related to taxation." *Nestle*, 387 S.W.3d at 622 (emphasis added). Thus, the health reasons advocated by the State are not reasonable because they are not goals related to taxation. Perhaps that is why the words "Pigovian tax" have never appeared in any Texas case.

Moreover, Texas has never used taxation as a means of discouraging smoking or the use of tobacco products. To the contrary, the Texas Supreme Court has observed that "[t]he tax on gasoline, cigarettes and liquor are for revenue purposes only," *County of Harris v. Shepperd*, 291 S.W.2d 721, 724 (Tex. 1956), and that "[w]hile some other states have placed cigarettes in the category with liquor, racing and the like, Texas has not." *House of Tobacco,*

Inc. v. Calvert, 394 S.W.2d 654, 656 (Tex. 1965). As a result, the constitutionality of the tax on Small Tobacco must be examined solely as a revenue-generating enactment having no rationale other than the legitimate objective of raising money for the state. *R.R. Comm'n v. Channel Indus.* Gas Co., 775 S.W.2d 503, 509 (Tex. Civ. App.—Austin 1989, writ denied).

But regardless, even if a tax could be imposed in Texas for the purpose of discouraging behavior rather than generating revenue, it would still be subject to constitutional scrutiny for Equal and Uniform application. The tax on Small Tobacco would fail because it is, by design, not equal or uniform and taxes only the products of some tobacco manufacturers. *Nestle*, 387 S.W.3d at 622.

2. Even if a tax reasonably raises revenue for the State, the tax still must satisfy the Equal and Uniform Clause.

As this Court explained in *Channel Industries*, a tax statute is "rationally related to the legitimate end of raising money for the State" when it taxes all class members "according to the same formula" and "treats all members within the same class uniformly and equally." 775 S.W.2d at 509. Applying that analysis here, the tax on Small Tobacco must fail. It does not tax all manufacturers according to the same formula. Further, substantially

greater revenues could be raised for the State by taxing all tobacco manufacturers, and thus the tax is not reasonably related to the legitimate end of generating revenue. Under the Equal and Uniform Clause, the tax is prohibited.

D. Decisions upholding the constitutionality of other states' escrow statutes have no applicability to the Texas tax imposed on Small Tobacco.

The State spends significant portion of its brief contending that numerous states have enacted statutes similar to the Act and that all the statutes have been upheld by the courts in those states. With two exceptions, all of these statutes require non-settling manufacturers to place money in escrow accounts—they do not impose a tax.[50] And with the exception of a distinguishable Minnesota Supreme Court case discussed further below, the decisions cited by the State solely concern the constitutionality of these escrow statutes. Because there is no similarity between these escrow statutes and the Texas Act, these cases are irrelevant and should be disregarded by the Court.

---

[50] Minnesota and Mississippi have enacted statutes similar to the Act. MINN. STAT. § 297F.24; MISS. CODE ANN. § 27.70.1 *et seq.* The Minnesota tax was challenged and upheld by the Minnesota Supreme Court, as discussed further below. The portions of the Mississippi statute similar to the Act have not been challenged. *See Commonwealth Brands v. Morgan*, 110 So. 3d 752, 754, 760 (Miss. 2013) (invalidating the out-of-state sales provision of the statute as violating the Commerce Clause).

States participating in the Master Settlement Agreement have adopted "escrow" statutes requiring non-settling manufacturers to make annual deposits into escrow accounts. *See Grand River Enter. Six Nations v. Pryor*, 481 F.3d 60, 63 (2d Cir. 2007). And the State is correct that courts have upheld these escrow statutes. But it is inaccurate to describe these statutes as analogous to the Texas tax statute. First, non-settling manufacturers are only required to pay into these escrow accounts for 25 years. *See id.* The purpose of the escrow accounts is to create a pool of funds from which states can secure damage awards in the event of any successful cigarette-related claims. *See id.* And after 25 years, any funds remaining in the escrow accounts must be restored to the non-settling manufacturers. *See id.*

Further, not only does a non-settling manufacturer receive the funds back from the escrow accounts after 25 years (assuming it does not engage in wrongful acts that lead to a damages award), it actually earns interest on the funds it pays to the escrow fund. *See KT&G Corp. v. Attorney General of Okla.*, 535 F.3d 1114, 1122 (10th Cir. 2008). In other words, unlike the Texas tax imposed on Small Tobacco, the tobacco companies that put funds in escrow accounts actually make money from the account and hold those funds as assets, so long as they do not commit wrongdoing. Conversely, the Texas

Act requires Small Tobacco's members, who have never been accused or adjudged of committing wrongdoing, to pay in perpetuity a tax with no opportunity to earn the money back.

Regardless, the escrow statutes were evaluated under a rational basis test, not the stricter standard the Texas Supreme Court has required under the Equal and Uniform Clause. *Nestle*, 387 S.W.3d at 624. Thus, the escrow cases cited by the State are inapposite and provide no persuasive authority.

E. The Minnesota Supreme Court's decision upholding that state's tax under a different legal standard is not persuasive.

The State also cites as authority a Minnesota Supreme Court decision that upheld a tax applicable solely to small, independent tobacco manufacturers. *See Council of Indep. Tobacco Mfrs. of America v. State*, 713 N.W.2d 300, 311 (Minn. 2006). But not only is that case not controlling in Texas, it is also not persuasive.

The test for compliance under the Minnesota Constitution's Uniformity Clause is a "rational basis" test, not the more stringent standard that must be satisfied under the Texas Constitution's Equal and Uniform Clause. Indeed, the Texas Supreme Court has specifically listed those states with provisions

analogous to the Texas Equal and Uniform Clause—and Minnesota was not one of them. *Nestle*, 387 S.W.3d at 621.

The Minnesota Supreme Court held that the rational basis test requires examination of three elements:

> (1) the distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs;
>
> (2) the classification must be genuine or relevant to the purpose of the law, that is, there must be an evident connection between the distinctive needs peculiar to the class and prescribed remedy;
>
> (3) the purpose of the statute must be one the state can legitimately attempt to achieve.

Council of Indep. Tobacco Mfrs., 713 N.W.2d at 308-09. Thus, the Minnesota Constitution conveys to the Minnesota Legislature far greater leeway to establish the classifications it will tax than does the Texas Constitution convey to the Texas Legislature.

In any event, the reasoning in the Minnesota Supreme Court's decision is not compelling. As explained further below, the Texas tax not only fails the Equal and Uniform test, but also the Equal Protection Clause's rational basis test. And while the Minnesota Supreme Court identified public policy rationales that it concluded justified the application of a tax solely on certain

manufacturers, the court did not consider the effect of its ruling. *Council of Indep. Tobacco Mfrs.*, 713 N.W.2d at 309-10. Not only did the tax change the competitive environment to the Big Tobacco defendants' benefit, but it nullified their financial penalties. Thus, even the policy of health and safety relied on by that court was not served. Indeed, if health and safety were truly a concern, a tax would be imposed on ***all*** cigarette manufacturers rather than just a select few. And as discussed, only goals related to taxation are permissible in Texas. *See Nestle*, 387 S.W.3d at 622. Thus, the Court should find the Minnesota Supreme Court's decision unpersuasive.

F. Even if a discriminatory tax could be imposed to equalize payments made under private agreements, the Act still violates the Equal and Uniform Clause because the payments are not equal.

Finally, even if a discriminatory tax could be imposed to equalize payments made under private settlement agreements, the tax imposed on Small Tobacco still violates the Equal and Uniform requirement. Big Tobacco's payments are not related to any sum calculated on each cigarette or pack sold, nor are those payments equal to the amount taxed on the Small Tobacco competitors' cigarette products.

A review of the various settlement agreements shows that each agreement contains unique provisions and a particular scheme—none of which are based on a flat per-pack fee. For example, the Texas settlement agreement establishes a payment scheme that requires initial payments of differing amounts, followed by annual payments on a sliding scale depending on each settling manufacturer's respective national market share.[51] The Liggett agreement imposes an entirely different payment scheme.[52] And notably, the amount of the payments under these agreements are capped, regardless of any increase in Big Tobacco's market share.[53]

What is clear is that each settling manufacturer owes a different amount to the State each year, based on numerous factors and not a flat per-pack fee. The payments required under the settlement agreements bear no similarity to the 55-cents-per-pack tax imposed on Small Tobacco manufacturers.

Other glaring disparities include that Texas, under the private settlement agreement and in exchange for Big Tobacco's payments, granted Big Tobacco immunity and released it from liability, but the Act imposes the

---

[51] CR 368-71.

[52] 2 CR Exh. 17.

[53] CR 368-71, 1184-1240; 2 CR Exh. 17.

tax on the Small Tobacco competitors without granting them any immunity or release.[54] Moreover, the Act's different treatment for companies that entered into the Liggett agreement proves that the Legislature's justification that the tax "levels the playing field" is false.[55] The Act sets a different tax rate, through a discount, for a manufacturer that makes settlement payments to ***other states*** and pays nothing to Texas.[56] It cannot be legitimately argued that the Act imposes similar payment requirements to that imposed by either of the settlement agreements.

In conclusion, it is ironic that a private agreement with Big Tobacco, settling a lawsuit that included antitrust claims, is now used as a reason to impose a tax on Big Tobacco's small competitors in order to impose a financial burden that protects Big Tobacco's market share. Imposing a tax only on the products manufactured by the Small Tobacco competitors targeted by the Act violates the Texas Constitution's Equal and Uniform Clause. Thus, the Court should affirm the trial court's judgment.

---

[54] CR 372-74, 1240-50; 2 CR Exh. 17.

[55] CR 342.

[56] CR 347-48.

II.

The tax violates the Equal Protection Clause of the United States and Texas Constitutions because it imposes a tax on the products of certain manufacturers while exempting identical products of other similarly-situated manufacturers.

The Act also fails the "rational basis" test articulated in the United States and Texas Constitutions, and thus violates these Constitutions' Equal Protection Clauses. The United States Constitution's Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Similarly, the Texas Constitution's Equal Protection Clause states that "[a]ll free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." TEX. CONST. art. I, § 3. The Texas Supreme Court has explained that the both clauses employ the same standard of review. *See Bell v. Low Income Women of Texas*, 95 S.W.3d 253, 266 (Tex. 2002).

Under the Equal Protection Clause, states may not treat differently persons who are in all relevant respects alike. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Even if a law neither burdens a fundamental right nor targets a suspect class, the legislative classification still violates the Equal Protection

Clause if it bears no rational relation to some legitimate end. *Romer v. Evans*, 517 U.S. 620, 630 (1996).

With regard to taxation, a state may vary the rate of excise on various products and "is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value." *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 527 (1959). But the State must proceed on a rational basis and may not resort to a classification that is palpably arbitrary. *Id.* A classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Id.* Only "[i]f the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law." *Id.*

The Act violates the Equal Protection Clause by arbitrarily exempting from the tax cigarette products of manufacturers that are, in all other respects, identical to the cigarette products of the manufacturers that must pay the tax. The tax does not impose different taxes on different trades and professions, nor does it vary the rate of excise on different products. To the contrary, the Act discriminates between manufacturers of identical products. The Act creates three categories of manufacturers who make identical

cigarette products, requiring some to pay a 55-cent-per-pack tax, others to pay a reduced 15-cents-per-pack tax, and others to pay no tax. For the most onerous tax burden, the Act arbitrarily singles out manufacturers who were not sued for wrongdoing and were not parties to private agreements with Texas and other states. This classification is capricious and arbitrary.

In conclusion, because the tax violates the Equal Protection Clause, the Court should affirm the trial court's judgment.

III.

The tax violates the United States Constitution's Due Process Clause and Texas Constitution's Due Course of Law provision because the tax bears no fiscal relation to protection, opportunities, and benefits given by the state.

The Act additionally violates the United States Constitution's Due Process Clause and the Texas Constitution's Due Course of Law provision. The United States Constitution's Due Process Clause commands that no person may be "deprived of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1. Similarly, the Texas Constitution's Due Course of Law provision requires that "[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." TEX. CONST.

art. I, § 19. Texas courts "construe the due course clause in the same way as its federal counterpart." *Tex. Workers' Compensation Comm'n v. Patient Advocates of Texas*, 136 S.W.3d 643, 658 (Tex. 2004).

With regard to a state tax, the Due Process Clause "requires some definite link, some minimum connection, between a state, and the person, property, or transaction it seeks to tax." *Quill Corp. v. N. D.*, 504 U.S. 298, 312 (1992). The test is whether the taxing power exerted by a state bears fiscal relation to protection, opportunities, and benefits given by the state. *Wis. v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940); *Norfolk & W. Ry. Co. v. Mo. State Tax Comm'n*, 390 U.S. 317, 326 n.5 (1968).

Here, the tax on the Small Tobacco competitors bears no relation to the protection, opportunities, and benefits afforded those businesses by the State. It is simply an effort to improperly extract, through the State's taxing power, the same financial benefits from Small Tobacco competitors that were negotiated under private agreements with Big Tobacco—but without conveying any of the benefits to the Small Tobacco competitors that were granted by the State to Big Tobacco under those private contracts. As noted, the Texas settlement agreement granted immunity to and relieved Big

Tobacco of liability from claims, while the Act provides neither benefit to Small Tobacco.

The State is correct that courts have not before addressed a similar due process argument. But the Act imposes an unprecedented tax. The Act seeks to equalize the financial penalties assessed against Big Tobacco in settlement of those companies' deceptive marketing, targeting children, and antitrust violations by using the guise of a tax to assess the same financial penalties against their Small Tobacco competitors—thereby forcing the Small Tobacco companies to also "settle" with the State. But the Small Tobacco manufacturers have never been accused of any wrongdoing, never been sued by the State, and never been afforded the opportunity to defend themselves. The Act seeks to impose financial penalties on Small Tobacco companies with no process of law—and certainly not the required due process.

In conclusion, because the tax violates the United States Constitution's Due Process Clause and the Texas Constitution's Due Course of Law provision, the Court should affirm the trial court's judgment.

IV.

Small Tobacco has standing to challenge the Act and properly brought suit under both the Tax Code and the Declaratory Judgment Act.

The State argues that the trial court lacked jurisdiction in this lawsuit because Texas Tax Code, Chapter 112 provides the exclusive mechanism for challenging a tax, and associations of taxpayers are barred from bringing suit under Chapter 112. Both arguments lack any basis in the law.

A. The Texas Supreme Court and this Court have repeatedly held that Section 112.108 is unconstitutional; thus, the Coalition may bring a cause of action under the Declaratory Judgment Act.

Chapter 112 includes a provision prohibiting a court from issuing a declaratory judgment. *See* TEX. TAX CODE § 112.108. But this Court has on multiple occasions held this section unconstitutional and void as violating the Open Courts provisions of the Texas Constitution, including as recently as last year. *See, e.g.*, *Richmont Aviation, Inc. v. Combs*, No. 03-11-00486-CV, 2013 WL 5272834, at * 5-6 (Tex. App.—Austin Sept. 12, 2013, pet. filed); *FM Express Food Mart, Inc. v. Combs*, No. 03-12-0144-CV, 2013 WL 1149551, at *6 n.6 (Tex. App.—Austin Mar. 15, 2013, no pet.); *Rylander v. Bandag Licensing Corp.*, 18 S.W.3d 296, 303-04 (Tex. App.—Austin 2000, pet. denied). Thus, this Court may easily reject the State's first argument.

B. Small Tobacco has associational standing to bring this suit.

The State next argues that the Coalition, as an association, lacks standing to maintain a taxpayer suit under Chapter 112, and thus cannot invoke Chapter 112's waiver of immunity. The States cites no support for this assertion other than the language of the Chapter 112—which does not discuss associational standing. And this argument is likewise premised on the State's unsupported belief that Small Tobacco is confined to bringing suit under Chapter 112. Small Tobacco also brought suit under the Declaratory Judgment Act, and the State has not challenged its standing under that statute.

But even if the Coalition could only sue under Chapter 112, it still unquestionably possesses associational standing. The elements for associational standing are well-established: "An association has standing to sue on behalf of its members when '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 447 (Tex.

1993) (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). Small Tobacco meets each of these elements:

- First, Small Tobacco's members, including Global, have standing to sue in their own right. Small Tobacco's members are manufacturers, distributors, and retailers who are subject to the tax imposed by the Act, and thus have standing to challenge the tax.[57] *See* TEX. TAX CODE §§ 112.052, 112.101.[58]

- Second, the interests Small Tobacco seeks to protect are germane to its organizational purpose. Small Tobacco is a trade association whose members are the very taxpayers who are subject to the tax that is the basis of this suit. The purpose of the organization is to protect the constitutional rights of its members who are subject to the tax.[59]

- And third, Small Tobacco's pleadings demonstrate that the individual participation of its members is not required in this constitutional challenge. This case raises pure questions of law and the individual circumstances of aggrieved members are not at

---

[57] *See* CR 1327-28.

[58] In the trial court, the State argued that Small Tobacco's members who are cigarette manufacturers are not taxpayers. The crux of this argument was that it is ***distributors*** of the taxed tobacco products—and not the ***manufacturers***—who must remit the tax. But as the Act repeatedly states, it is the ***manufacturers' products*** that are taxed. *See, e.g.*, CR 345-46, 350-51. And the Act expressly provides that its intent is to impact ***manufacturers***, not distributors. *See* CR 341 (the purpose of the Act is to prevent non-settling manufacturers from offering cigarettes at prices below Big Tobacco manufacturers). Small Tobacco's manufacturer members are the persons most impacted by the Act's language and purpose and thus are taxpayers who may challenge the tax under Chapter 112. In any event, the Coalition is also comprised of distributors and retailers. *See Andrade v. NAACP of Austin*, 345 S.W.3d 1, 6 (Tex. 2011) ("only one plaintiff with standing is required").

[59] CR 948. At the trial court, the State argued that this stated purpose is too "amorphous" to support associational standing. But this argument lacks any validity under Texas precedent and should be rejected. See*, e.g.*, *Stop the Ordinance Please v. City of New Braunfels*, 306 S.W.3d 919, 931 (Tex. App.—Austin 2010, no pet.) (an association formed the purpose of defeating challenged ordinances has associational standing).

> issue. *See Tex. Ass'n of Bus.*, 852 S.W.2d at 448. Indeed, this case was decided on summary judgment, and the State does not contend that there are any fact issues.

Nothing in Chapter 112 abrogates the well-established common law rule of associational standing, nor does the chapter prohibit an association of taxpayers who are subject to the tax from suing under its provisions. Indeed, it would constitute an enormous waste of judicial resources for each individual taxpayer plaintiff to be compelled to bring separate suits under Chapter 112, each challenging the same tax for the same reasons.

C. Global Tobacco undisputedly has standing to bring this suit.

In any event, should the Court determine that the Coalition lacks associational standing, Global is a non-settling manufacturer who is also a plaintiff in this suit. The State does not dispute Global's standing.

In conclusion, for all of these reasons, the Court should affirm the trial court's judgment denying the State's plea to the jurisdiction.

PRAYER

Appellees Texas Small Tobacco Coalition and Global Tobacco, Inc. respectfully pray that this Court affirm the trial court's judgment. Appellees further pray that this Court grant all other relief to which they may justly be entitled.

Respectfully submitted,

By: s/ *Craig T. Enoch*
Craig T. Enoch
Texas Bar No. 00000026
cenoch@enochkever.com
Melissa A. Lorber
Texas Bar No. 24032969
mlorber@enochkever.com
Shelby O'Brien
Texas Bar No. 24037203
sobrien@enochkever.com
ENOCH KEVER PLLC
600 Congress Avenue, Suite 2800
Austin, Texas 78701
(512) 615-1200 telephone
(512) 615-1198 fax

ATTORNEYS FOR APPELLEES,
TEXAS SMALL TOBACCO COALITION
and GLOBAL TOBACCO, INC.

CERTIFICATE OF COMPLIANCE

Appellees certify that this Brief of Appellees (when excluding the caption, identity of parties and counsel, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, signature, proof of service, certificate of compliance, and appendix) contains 7,692 words.

/s/ Craig T. Enoch
Craig T. Enoch

CERTIFICATE OF SERVICE

The undersigned certifies that this Appellees' Brief has been served on the following counsel of record via electronic filing on March 24, 2014:

ERIKA M. KANE
ARTHUR C. D'ANDREA
Office of the Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 320-0067 Fax
erika.kane@texasattorneygeneral.com
arthur.dandrea@texasattorneygeneral.gov

/s/ Craig T. Enoch
Craig T. Enoch