No. _____

In The

Supreme Court of Texas

IN RE ALLCAT CLAIMS SERVICE, L.P. AND JOHN WEAKLY
Relators,

ORIGINAL PETITION

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ATTORNEYS FOR RELATORS,
ALLCAT CLAIMS SERVICE, L.P.
AND JOHN WEAKLY

IDENTITY OF PARTIES & COUNSEL

Relators:	Allcat Claims Service, L.P. John Weakly
Relators' Counsel:	James F. Martens Texas Bar No. 13050720 Michael B. Seay Texas Bar No. 24051318 Lacy L. Leonard State Bar No. 24040561 Amanda M. Traphagan Texas Bar No. 24066208 **MARTENS, SEAY, & TODD** 301 Congress Avenue, Suite 1950 Austin, Texas 78701 Tele: (512) 542-9898 Fax: (512) 542-9899
Respondents:	Susan Combs, Comptroller of Public Accounts of the State of Texas, and Greg Abbott, Attorney General of the State of Texas
Respondents' Counsel:	Office of the Attorney General of Texas Taxation Division P.O. Box 12548 Austin, Texas 78711

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STATEMENT OF THE CASE

This is an Original Petition brought by Relators Allcat Claims Service, L.P. ("Allcat") and John Weakly ("Mr. Weakly") (collectively "Relators") against Respondents Susan Combs, Comptroller of Public Accounts of the State of Texas, and Greg Abbott, Attorney General of the State of Texas (collectively "Respondents"). Relators seek declarations from this Court that (a) the revised franchise tax in Chapter 171 of the Texas Tax Code, which was enacted under House Bill 3 in 2006, violates the Texas Constitution because it imposes a tax on a natural person's share of partnership income without voter approval; and (b) the Comptroller's interpretation of the revised franchise tax violates the equal and uniform taxation clause of the Texas Constitution. Relators also seek injunctive relief against Respondents to prohibit them from enforcing, collecting, or assessing this unconstitutional tax. Finally, Relators seek an order from this Court that Relators may recover their costs and attorney's fees incurred in this declaratory judgment action.

STATEMENT OF JURISDICTION

Effective September 1, 2006, "[t]he supreme court has exclusive and original jurisdiction over a challenge to the constitutionality of this Act [House Bill 3, now Tex. Tax Code Ch. 171] or any part of this Act and may issue injunctive or declaratory relief in connection with the challenge. The supreme court shall rule on a challenge filed under this section on or before the 120th day after the date the challenge is filed." Act of May 2, 2006, 79th Leg., 3rd C.S., H.B. 3, § 24, § 27 (**Appx. 1**).

ISSUES PRESENTED

Issue 1: Whether the revised franchise tax violates the Texas Constitution because it is a general law enacted by the Legislature, without voter approval, that imposes a tax on a natural person's share of partnership income.

Issue 2: Whether the Comptroller's interpretation of the provision allowing deductions for the real estate industry, as applied to Allcat, violates the constitutional requirements of equal and uniform taxation by treating Allcat differently from other similarly-situated taxpayers.

Issue 3: Whether it is just and equitable for Relators to recover their costs and their reasonable and necessary attorney's fees incurred to pursue this declaratory judgment action.

STATEMENT OF FACTS

I. THE ENACTMENT OF HOUSE BILL 3 IN 2006 MADE SWEEPING REVISIONS TO TEXAS'S BUSINESS TAX SYSTEM.

In April-May 2006, in the Third Called Session of the 79th Texas Legislature, our Representatives hurriedly pushed House Bill 3 through the House and the Senate, forcing its swift enactment to comply with the deadlines set by this Court in *Neeley v. West Orange-Cove Consol. Independent School Dist.*, 176 S.W.3d 746 (Tex. 2005) (modifying injunctive deadline for State to cure constitutional defects in public school financing to be June 1, 2006).[1] Governor Perry called a special session to address this issue on April 17, 2006, and House Bill 3 was filed that day.[2] House Bill 3 was passed by the House on April 26, and then by the Senate on May 2, 2006.[3] There was no time for amendment between the House and the Senate's passage.[4] The Governor signed the Bill into law on May 19, 2006, with the various sections to take effect on June 1 or September 1, as designated within the Bill.[5]

House Bill 3 resulted in the codification of several additions and amendments to Chapter 171 of the Texas Tax Code. Unquestionably, the most drastic change effectuated by these amendments was the extension of the franchise tax to most types of business entities, including limited partnerships.[6]

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1 Summary of Bill Stages on HB 3, available at *http://www.legis.state.tx.us/billlookup/BillStages.aspx?Leg. Sess=793& Bill=HB3*; and Summary of Actions on HB 3, available at *http://www.legis.state.tx.us/billlookup/ Actions.aspx?LegSess=793&Bill=HB3.* (**Appx. 2**).

2 Press Release, Office of the Governor, Gov. Perry Announces Special Session of Legislature (April 17, 2006), available at *http://governor.state.tx.us/news/press-release/ 2465/.* (**Appx. 3**); *See also* **Appx. 2.**

3 **Appx. 2.**

4 *Id.*

5 *Id.*; *see also* **Appx. 1.**

6 Tex. Tax Code Ann. § 171.0002 (West 2009).

The revised franchise tax statute provides the following formula for calculating its tax base, commonly known as "taxable margin":[7] First, the entity calculates its federal gross income. To do this, the entity adds together the revenue amounts it reported on various lines of its federal income tax return. These amounts include gross receipts from a trade or business, dividends, interest, rents and royalties, capital gains, and other income.[8]

Next, the entity subtracts certain deductions from federal gross income to arrive at an amount the statute labels "total revenue."[9] These deductions include, among others, bad debts, sales commissions, the cost of securities sold, amounts paid to real property subcontractors, the cost of providing indigent care, and co-counsel payments to other attorneys.[10]

Finally, the entity subtracts from "total revenue" one of two additional categories of deductions:

> **Cost of Goods Sold.** This category includes not only the direct costs of acquiring and producing goods, but also other general costs, such as insurance, utilities, rent, administrative salaries, payroll and property taxes, and the like.[11]

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[7] Because this calculation results in the "taxable margin," the revised franchise tax is now commonly referred to as a "margin tax."

The statute also contains a separate method for calculating the Revised Franchise Tax known as the E-Z Calculation. However, the E-Z Calculation is not relevant to determining the constitutionality of the Revised Franchise Tax because H.B. 3928 provides that if a court finds that the other methods of calculating the Revised Franchise Tax are unconstitutional, it must invalidate the E-Z Calculation as well. Act of June 15, 2007, 80th Leg., R.S., H.B. 3928, § 39 (**Appx. 5**).

[8] Tex. Tax Code Ann. § 171.1011(c)(2)(A); **Appx. 4**.

[9] *Id.* § 171.1011(c)(2)(B) & (e)-(r); **Appx. 4**.

[10] *Id.*

[11] *Id.* § 171.1012(c)-(d), (f).

> **Compensation.** This category includes the total wages and benefits paid to officers, directors, owners, partners, and employees.[12] This includes payments to both production workers and administrative staff.[13]

If neither of these two additional categories of deductions exceeds thirty percent (30%) of the entity's total revenue, the entity is allowed a minimum deduction equal to 30% of its total revenue.[14] The tax rate assessed on the taxable margin derived from this calculation is, for most businesses (including Allcat), a rate of one-percent (1%); only retail and wholesale business entities pay a rate of one-half percent (0.5%).[15]

II. BACKGROUND OF RELATORS ALLCAT AND MR. WEAKLY.

Allcat is a Texas limited partnership headquartered in Boerne, Texas.[16] Some of Allcat's partners are natural persons.[17] Relator John Weakly is one such natural person.[18] Allcat provides insurance adjustment services to several national and regional insurance carriers that insure real property and improvements.[19] Allcat inspects real property to determine the cause of the damage and the need and costs of the required repairs.[20] Allcat is also available to negotiate the costs and methods of repair or replacement with the insured and the insured's contractor and in many cases, does so.[21] Allcat performs its services using independent adjusters.[22]

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12 *Id.* § 171.1013(b).
13 *Id.*
14 *Id.* § 171.101(a)(1)(A).
15 **Appx. 4**.
16 Affidavit of John Weakly, ¶ 4 (**Appx. 6**).
17 *Id.*, ¶ 5.
18 *Id.*
19 *Id.*, ¶ 6.
20 *Id.*, ¶ 7.
21 *Id.*, ¶ 7.
22 *Id.*, ¶ 8.

Allcat timely filed its 2008 and 2009 Texas Franchise Tax Reports ("the Reports") and timely paid the tax shown due on those reports.[23] Allcat also paid 2008 and 2009 franchise taxes under protest totaling $96,039.[24]

As a result of the imposition and payment of those Texas franchise taxes, Allcat's natural-person partners, such as Mr. Weakly, financially suffered in two ways: First, they indirectly incurred those taxes in proportion to their respective percentages of profit and loss interests in Allcat. Second, the values and liquidation rights of their investments in Allcat fell in direct proportion to their respective shares of the Texas franchise tax payments.

Allcat and Mr. Weakly have brought this Original Petition and declaratory judgment action to challenge the constitutionality of the revised franchise tax statutes as applied to partnerships and to Mr. Weakly. This Court should issue an order declaring that the revised franchise tax violates the Texas Constitution and find that Allcat owes no tax for the 2008 and 2009 franchise report periods. The Court should also permanently enjoin Respondents from enforcing, assessing, or collecting the revised franchise tax. The Court should further order the state to pay Allcat's costs and reasonable and necessary attorney's fees incurred in pursuing this claim under Texas Civil Practice and Remedies Code § 37.009.

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23 *Id.*, ¶ 28.
24 *Id.*, ¶ 29.

ARGUMENT

I. THE REVISED FRANCHISE TAX VIOLATES THE TEXAS CONSTITUTION BECAUSE IT TAXES A NATURAL PERSON'S SHARE OF PARTNERSHIP INCOME BUT A MAJORITY OF TEXAS VOTERS DID NOT APPROVE THE TAX.

A. The Bullock Amendment prohibits enactment of a general law imposing a tax on a natural person's income without approval from a majority of voters.

Article VIII, Section 24(a) of the Texas Constitution is known as the "Bullock Amendment." The 73rd Texas Legislature proposed the Bullock Amendment in 1993, and Texas voters overwhelmingly approved it on November 2, 1993 by a vote of 775,822 to 353,638.25 The Bullock Amendment states:

> A general law enacted by the legislature that imposes a tax on the net incomes of natural persons, including a person's share of partnership and unincorporated association income, must provide that the portion of the law imposing the tax not take effect until approved by a majority of the registered voters in a statewide referendum held on the question of imposing the tax.

Here, it is beyond dispute that the revised franchise tax is a general law enacted by the Legislature. It is also beyond dispute that the Comptroller has assessed and collected the revised franchise tax for at least four years. It is also beyond dispute that a majority of registered voters did not approve the revised franchise tax in a statewide referendum. Therefore, this Court must conclude that the revised franchise tax (as enacted by House Bill 3 in 2006 and codified in Tax Code Ch. 171) violates the Bullock Amendment if it is:

(1) an income tax; and

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[25] Legislative Reference Library of Texas, SJR 49, 73rd Regular Session, Election Details available at *http://www.lrl.state.tx.us/legis/billsearch/amendmentDetails.cfm?amendmentID=516&legSession=73-0&billTypedetail=SJR&billNumberDetail=49* (last visited Jun. 30, 2011) (reporting that the amendment was adopted by a vote of 775,822 to 343,638) (**Appx. 7**).

(2) imposed on a natural[26] person's share of partnership income.

For the reasons stated below, both of these requirements are satisfied by the revised franchise tax. Notably, this conclusion was affirmed by former Comptroller Carole Keeton Strayhorn, who publicly stated that the revised franchise tax is unconstitutional because it violates the Bullock Amendment.[27]

B. The revised franchise tax is an income tax.

The revised franchise tax is an income tax under Texas law. The revised franchise tax meets the only definition of "income tax" found in Texas statutes.[28] As defined in Section 141.001, art. II, § 4:

> "Income tax" means a tax imposed on or measured by net income including any tax imposed on or measured by an amount arrived at by deducting expenses from gross income, one or more forms of which are not specifically and directly related to particular transactions.

Texas Tax Code Chapter 141 contained this definition before and at the time the Legislature passed the Bullock Amendment in 1993. Chapter 141 contains this definition today. In fact, the revised franchise tax statute (Section 171.1014) expressly references Chapter 141.

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[26] The Bullock Amendment includes "a person's share of partnership and unincorporated association income" within "the net incomes of natural persons." It is reasonable to presume that this means a "natural" person's share of partnership income.

[27] *See* Letter from Carole Keeton Strayhorn to Rick Perry (May 15, 2006), *available at* http://www.window.state.tx.us/news/60515letter.html (stating that the revised franchise tax is "an unconstitutional income tax on partnerships and unincorporated associations) (**Appx. 8**); *see also* Letter from Carole Keeton Strayhorn to Rick Perry (May 2, 2006), *available at* http://www.window.state.tx.us/news/60502taxplan.pdf ("Taxing income from partnerships is strictly prohibited by the Texas Constitution, and I believe when this portion of HB 3 is challenged in court, the State will lose.") (**Appx. 9**); Letter from Carole Keeton Strayhorn to Greg Abbott (Apr. 21, 2006), *available at* http://www.window.state.tx.us/news/60421letter.html (stating that the revised franchise tax would "require a referendum under Article VIII, Sec. 24(a), precluding any adoption absent voter approval.") (**Appx. 10**).

[28] Tex. Tax Code Ann. § 141.001, art. II, § 4 (West 2009). *See also* Tex. Tax Code Ann. § 171.1014(a) (West 2009) (referencing Chapter 141 of the Texas Tax Code).

An income tax is, simply, a tax on net income. Succinctly stated, Chapter 141 defines net income as gross income less one or more deductions that are not specifically and directly related to particular transactions. A deduction is specifically and directly related to particular transactions when it can be traced to a particular transaction. An obvious example arises from the sale of a security. In that case, the transaction is the sale of the security. The seller computes its net income from the sale by subtracting the security's cost from the gross proceeds it received from the buyer. There, the cost of the security is a deduction that is specifically and directly related to the sale. In contrast, many other deductions are not specifically and directly related to particular transactions. They include deductions typically classified as general and administrative costs. Utility charges, salaries of administrative staff, and employee benefits are common examples.

Under Texas' net income definition, both revised franchise tax bases (COGS and Compensation), are properly classified as net income.[29] Both begin with the items of gross income reported on the federal return. Both methods provide for the subtraction from gross income of one or more deductions that are not specifically and directly related to particular transactions. For example, taxpayers may deduct the cost of insurance and utilities as component of cost of goods sold. Moreover, administrative staff salaries are deductible under both the cost of goods sold and compensation calculations.[30] These costs are not specifically and directly related to particular transactions. Thus, the revised franchise tax constitutes an income tax under both methods.

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29 *See* note 7, *supra*.

30 Tex. Tax Code Ann. §§ 171.1012(f), 171.1013(b) (West 2009).

The Texas statutory definition comports with the common definition of an income tax. Black's Law Dictionary defines an income tax as "[a] tax on an individual or entity's net income" and defines "net income" as "[t]otal income from all sources minus deductions, exemptions, and other tax reductions."[31] The Texas Tax Code definition of an income tax reflects this commonly-accepted definition.

U.S. Supreme Court precedent also supports characterizing the revised franchise tax as an income tax. The Supreme Court's decision in *U.S. Glue Co. v. Town of Oak Creek* defines a net income tax as one that taxes profitable businesses more than unprofitable ones.[32] The revised franchise tax meets this definition using either of the two alternative tax bases. The revised franchise tax imposes a greater amount of tax on profitable businesses than non-profitable ones because it allows entities to subtract numerous deductions from federal gross income, and it does not tax a partnership's gross income unless it exceeds the partnership's allowable deductions. Therefore, it meets *U.S. Glue Co.*'s definition of a net income tax.

Other prominent authorities have concluded that the revised franchise tax is an income tax. In addition to our former Comptroller,[33] several states have ruled that the revised franchise tax is an income tax.[34] Further, the Federal Accounting Standards

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31 BLACK'S LAW DICTIONARY 1497, 779 (8th ed. 2004) (**Appx. 11**).

32 247 U.S. 321, 329 (1918) (stating that a net income tax "does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large.").

33 **Appx. 10**.

34 *See, e.g.*, WI Tax Bulletin 156 (April 2008) (**Appx. 12**); KS DOR Opinion Letter No. O-2008-004 (Sept. 2, 2008) (**Appx. 13**), KS DOR Opinion Letter No. O-2009-005 (Mar. 24, 2009) (**Appx. 14**) ; MO DOR Letter Ruling LR 5309 (Dec. 12, 2008) (**Appx. 15**); SC Rev. Rul. 09-10 (Jul. 17, 2009) (**Appx. 16**); CA Technical Advice Memorandum 2011-03 (Apr. 13, 2011) (**Appx. 17**) .

Board, which sets national accounting standards, determined that the revised franchise tax is an income tax.[35]

The Legislature's unsupported statement in H.B. 3 (§ 27) that the revised franchise tax "is not an income tax" does not alter the revised franchise tax's character as an income tax. The United States Supreme Court has repeatedly held that a tax's nature and effect, not Legislative or statutory labeling, ultimately determines its character.[36] This is the law for an important reason; otherwise, it would be too easy for the Legislature to intentionally circumvent the constitutional requirements of the Bullock Amendment (*i.e.*, majority voter approval) simply by labeling a tax as a "non-income" tax. This Court should not permit the Legislature to so in this case. As demonstrated above, the revised franchise tax is an income tax in its nature and effect. Thus, Supreme Court precedent provides that our Legislature may not avoid the will of the people of Texas and the Texas Constitution merely by proclaiming that the revised franchise tax is something it is not.

C. The revised franchise tax taxes a natural person's share of partnership income.

Texas partnership law and rules of statutory construction show that Texas imposes the revised franchise tax on a natural person's share of partnership income. Under Texas partnership law, Texas indirectly imposes the revised franchise tax on each partner by allocating a share of a partnership's profits to each partner. The Texas Revised

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[35] Minutes of the August 2, 2006 Board Meeting on Potential FSP: Texas Franchise Tax, available at *http://www.fasb.org/jsp/FASB/Page/08-02-06_texas_franchise_tax.pdf.* (**Appx. 18**).

[36] *See, e.g., Dawson v. Kentucky Distilleries & Warehouse Co.*, 255 U.S. 288, 292 (1921) ("The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents. . ."); *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U.S. 217, 227 (1908) ("Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect.").

Partnership Act (enacted by the same Legislature that proposed the Bullock Amendment) provides that a partnership interest includes "the partner's share of profits and losses or similar items, and the right to receive distributions."[37] It also states that "[e]ach partner is entitled to be credited with an equal share of the partnership's profits and is chargeable with a share of the partnership's losses, whether capital or operating, in proportion to the partner's share of the profits."[38] Therefore, under Texas law, a portion of the partnership's income belongs to each individual partner.[39]

Imposing the revised franchise tax on the partnership's income therefore imposes the tax on each partner in proportion to each partner's respective interest in the partnership. As a result, the value of each partner's investment in the partnership falls in direct proportion to the partners' respective shares of the partnership's franchise tax payments. Effectively, each partner's share of both net income and partnership assets is reduced due to the assessment of the franchise tax.

John Weakly's circumstances illustrate this point. Mr. Weakly owns an approximate thirty percent (30%) interest in Allcat.[40] During 2008, Allcat paid franchise taxes to Texas totaling $27,241.[41] Allcat's federal partnership tax return reported this amount on Statement 2 of its 2008 Form 1065.[42] As a direct result of paying these

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37 Tex. Rev. Civ. Stat. Ann. Art. 6132b, § 1.01(13). The quoted language is identical to the current codified language included in Tex. Bus. Orgs. Code Ann. § 1.002(68) (West 2009).

38 Tex. Rev. Civ. Stat. Ann. Art. 6132b, § 4.01(b). *See also* Tex. Bus. Orgs. Code Ann. § 152.202(a) (West 2009).

39 Under the Texas Revised Partnership Act, the partnership agreement controls. The Act only governs the relationship between the partners and the partnership to the extent the agreement does not otherwise provide. *See* Tex. Rev. Civ. Stat. Ann. Art. 6132b, § 1.03(a).

40 **Appx. 6**, ¶ 3.

41 *Id.*, ¶ 10.

42 *Id.*, ¶ 15.

franchise taxes, Allcat's net income fell from $6,101,471 to $6,074,230—the amount Allcat reported on page one of its 2008 Form 1065.[43]

As a direct result of Allcat's payment of $27,241 in Texas franchise taxes, Mr. Weakly was burdened by his proportionate share of the franchise tax in the amount $8,091.[44] The value of Mr. Weakly's Allcat partnership interest fell by the same amount. So too did the amount Mr. Weakly would receive if Allcat were liquidated.

This Court should not construe the Bullock Amendment to reach only those instances where a natural person is *directly* taxed on his or her share of partnership income. Such a construction would blatantly violate Texas's rules of statutory construction under which courts must (a) presume the language of the Constitution was carefully selected[45] and (b) avoid construing constitutional provisions in a manner that renders them meaningless or inoperative.[46]

The phrase "imposed on a person's share of partnership income" would be rendered meaningless and inoperative if this Court were to construe the Bullock Amendment to apply only when the statute *directly* taxes a natural-person partner, like the federal tax scheme. This is true because the first phrase of the Bullock Amendment already does that: it prohibits "a tax on the net incomes of natural persons." Since the net incomes of natural persons already include a person's share of partnership income, the second phrase of the Bullock Amendment would be rendered meaningless and inoperative by such a construction.

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43 *Id.* ¶ 15-18.
44 *Id.* ¶ 23-24.
45 *Leander Indep. Sch. Dist. v. Cedar Park Water Supply Corp.*, 479 S.W.2d 908 (Tex. 1972).
46 *Hanson v. Jordan,* 198 S.W.2d 262, 263 (Tex. 1946).

In other words, if the Legislature had not included the second phrase, the Bullock Amendment would still prohibit a statute from directly taxing a natural person's income, including any income from a partnership. Thus, construing the Bullock Amendment to apply only to partnership income taxed at the partner level instead of the partnership level would not give effect and purpose to the phrase "a person's share of partnership . . . income."

Therefore, the revised franchise tax is imposed on a natural person's share of partnership income. Texas voters never approved the imposition of the revised franchise tax in a statewide referendum. Therefore, the revised franchise tax violates the Bullock Amendment, and this Court should declare it invalid.[47]

II. THE COMPTROLLER'S INTERPRETATION OF THE TEXAS TAX CODE, AS APPLIED TO ALLCAT, VIOLATES THE TEXAS CONSTITUTIONAL REQUIREMENT OF EQUAL AND UNIFORM TAXATION BY TREATING ALLCAT DIFFERENTLY FROM OTHER SIMILARLY-SITUATED TAXPAYERS.

The Comptroller's interpretation of Texas Tax Code §§ 171.1011(g)(3) and 171.1012, as applied to Allcat, violates the equal and uniform taxation clause of the Texas Constitution. The Texas Constitution, Article VIII, Section 1(a), provides that "[t]axation shall be equal and uniform." The Comptroller violates Article VIII by treating Allcat and its partners differently from a large class of similarly-situated taxpayers by assessing a greater amount of franchise tax on Allcat's claims-adjustment business in an arbitrary and discriminatory manner. For instance, the Comptroller's interpretation treats claims adjusters differently than general contractors, even though

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47 **Appx. 8, 9, & 10.**

both hire independent contractors to effect repairs to damaged real property. The Comptroller allows general contractors to pay significantly less tax than the claims adjusters, for the same business activity.

Both claims-adjusters and general contractors hire independent contractors to effect repairs to damaged real property. Allcat and other claims-adjusters employ independent contractors to inspect damaged real property to determine the type and cost of the necessary repairs.[48] General contractors inspect the work of independent contractors hired to repair damaged real property. Thus, both claims-adjusters and general contractors engage in the same business activity.

Despite this similarity, Comptroller policy allows general contractors to exclude payments to subcontractors from their revenue, while claims-adjusters like Allcat cannot.[49] This requires claims-adjusters to pay significantly higher taxes than general contractors for the same business activity.

The Comptroller's application of its interpretation of the tax code affects a large class of similarly-situated taxpayers. The Comptroller applies its interpretation of the tax code to all taxpayers who file franchise tax reports. A large number of claims-adjusters and general contractors filed franchise tax reports for the 2008 and 2009 privilege periods.[50] For privilege period 2008, 477 claims-adjusters filed franchise tax reports. In that same year, 21,246 general contractors filed franchise tax reports. For privilege period 2009, 485 claims-adjusters filed franchise tax reports, and 20,767 general

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48 **Appx. 6**, ¶ 7.

49 Comptroller Letter No. 201008001L, "Franchise Tax and the Construction Industry" (**Appx. 19**).

50 *See* **Appx. 20**, Texas Open Records Act Request Response.

contractors filed franchise tax reports. This data demonstrates that the Comptroller applied its interpretation of the tax code to a large class of both claims-adjusters and general contractors.[51]

Therefore, the Court should declare that the Comptroller violated Allcat's constitutional right to equal and uniform taxation and order the state to pay Allcat's costs and reasonable and necessary attorney's fees incurred in pursuing this claim under Texas Civil Practice and Remedies Code § 37.009. The Court should further permanently enjoin the State from its attempts to enforce, collect, and assess this unconstitutional tax.

III. ALLCAT IS ENTITLED TO RECOVER THE REASONABLE AND NECESSARY ATTORNEY'S FEES IT INCURRED PURSING THIS CLAIM.

Pursuant to its statutory and constitutional rights, Allcat seeks a declaration that the franchise tax is unconstitutional for the reasons stated above.[52] This requested statutory interpretation is above and beyond Allcat's request for a refund. It is just and equitable that the Court award Allcat the reasonable and necessary attorney fees incurred in pursuing this claim because the declarations Allcat seeks pursuant to Chapter 37 of the Texas Civil Practices and Remedies Code are not redundant to its request for a full refund of the franchise taxes paid in protest.[53]

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51 *Id.*

52 Tex. Civ. Prac. & Rem. Code Ann. § 37.003 (West 2009); TEX. CONST. art. III, § 13.

53 *See Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994); *R Commc'ns, Inc. v. Sharp*, 875 S.W.2d 314, 317-318 (Tex. 1994); *Rylander v. Bandag Licensing Corp.*, 18 S.W.3d 296, 305 (Tex. 2000); *Strayhorn v. Raytheon E-Systems, Inc.*, 101 S.W.3d 558, 572 (Tex. App.—Austin 2003, pet. denied); *Combs v. Texas Entm't Assoc.*, 287 S.W.3d 852, 865-66 (Tex. App.—Austin 2009, pet. granted.)

CONCLUSION

For the reasons set forth above, the revised franchise tax violates the Texas Constitution because Texas voters were never given the opportunity to approve it and it imposes a tax on natural persons' shares of partnership income. Some of Allcat's partners, including John Weakly, are natural persons. Imposing the revised franchise tax on Allcat unconstitutionally imposes it on the income of Allcat's natural person partners. Additionally, the Comptroller's interpretation of Texas Tax Code §§ 171.1011(g)(3) and 171.1012 violates the equal and uniform taxation clause of the Texas Constitution because it treats Allcat differently from a large class of similarly-situated taxpayers by assessing a greater amount of franchise tax on its claims adjustment business in an arbitrary and discriminatory manner.

PRAYER

Relators respectfully request that, within 120 days of the filing of this Original Petition, this Court issue an opinion (1) declaring that the revised franchise tax found in Chapter 171 of the Texas Tax Code violates the Texas Constitution; (2) declaring that the Comptroller's interpretation of Texas Tax Code §§ 171.1011(g)(3) and 171.1012 violates the equal and uniform taxation clause of the Texas Constitution; (3) permanently enjoining the Comptroller against enforcement, collection, or assessment of the revised franchise tax; (4) taxing all costs and reasonable and necessary attorney's fees as are equitable and just, reasonable and necessary, against Respondents under Texas Civil Practice and Remedies Code § 37.009; and (5) awarding Relators any such other and further relief to which they may be justly entitled at law or in equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Original Petition has been sent by hand delivery on July 29, 2011 to:

Susan Combs
Comptroller of Public Accounts of the State of Texas
Lyndon Baines Johnson State Office Building
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