

No. 12-0047

IN THE SUPREME COURT OF TEXAS

CARLA STRICKLAND,
Petitioner,

v.

KATHRYN AND JEREMY MEDLEN,
Respondents.

On Petition for Review from the
Second Court of Appeals at Fort Worth, Texas
No. 02-11-00105-CV

***AMICI CURIAE* BRIEF OF THE AMERICAN KENNEL CLUB,
CAT FANCIERS' ASSOCIATION, ANIMAL HEALTH INSTITUTE,
AMERICAN VETERINARY MEDICAL ASSOCIATION,
NATIONAL ANIMAL INTEREST ALLIANCE,
AMERICAN PET PRODUCTS ASSOCIATION, AND
PET INDUSTRY JOINT ADVISORY COUNCIL
IN SUPPORT OF PETITION FOR REVIEW**

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STATEMENT OF THE CASE

Amici adopt the Petitioner's statement of the case.

STATEMENT OF THE JURISDICTION

Amici adopt the Petitioner's statements of jurisdiction.

ISSUE PRESENTED

Should Texas courts create new, broad emotion-based damages that would be available in all types of litigation involving injuries to pets?

INTEREST OF AMICI CURIAE

Amici are the American Kennel Club, Cat Fanciers' Association, Animal Health Institute, American Veterinary Medical Association, National Animal Interest Alliance, American Pet Products Association, and Pet Industry Joint Advisory Council. These non-profit associations promote animal welfare and responsible animal ownership. *Amici* paid for the brief, and have a substantial interest in ensuring that Texas laws promote sound welfare and ownership policies for the state's pets. They believe that recognizing a new measure of emotion-based damages for the loss of a pet is contrary to this goal. *Amici* urge the Court to grant this Petition and reject the broad new damages rule created by the Second Court of Appeals, consistent with the vast majority of American courts. A statement of interest for each *amicus* is appended to the brief.

SUMMARY OF ARGUMENT

The Second Court of Appeal's ruling puts cherished Texas pets at significant risk, isolates Texas in American jurisprudence, and will lead to a new wave of pet litigation.

Amici pet owner and welfare groups submit this brief because of the major adverse impact that injecting broad, new emotion-based damages into all pet litigation will have on pets in this state. If the Court does not grant the Petition, the costs of every pet's health care, pet products and other pet services in Texas will go up to accommodate this new liability. People's ability to spend on their pets is limited, though, as demonstrated by tough choices pet owners have made in recent times. *See, e.g.,* Assoc. Press, *Even Pets Feeling Sting of Financial Struggles*, Fosters.com, Nov. 23, 2008 (owners are "putting the dogs to sleep" rather than treating them). Essential pet-related services, and

with it responsible pet ownership, will be out of reach of many Texas residents. To be clear, creating emotion-based liability in pet litigation is not the pro-pet position. *Amici* deeply cherish pets. Pets do not reap benefits from these awards, only owners do, and pets will be harmed if they do not receive needed care because of lawsuits.

Legally, there is no basis for creating emotion-based liability in pet litigation. *See* Victor E. Schwartz & Emily J. Laird, *Non-economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 33 *Pepp. L. Rev.* 227, 236 (2006). Courts in thirty-five states have rejected emotion-based liability in pet cases, including as a separate cause of action and as a measure of damages. As in Texas, courts throughout America carefully limit when a person may seek emotion-based damages. *See City of Tyler v. Likes*, 962 S.W.2d 489 (Tex. 1997). Injuries to pets, just as to human best friends and most cherished possessions, do not fit within the restrictive categories. The most recent courts to consider and deny such recoveries, including for intrinsic damages, are the Supreme Court of Vermont and mid-level appellate courts in California, Arizona, and Washington. *See Goodby v. Vetpharm, Inc.*, 974 A.2d 1269 (Vt. 2009)¹; *McMahon v. Craig*, 97 Cal. Rptr. 3d 555 (Cal. Ct. App. 2009); *Kaufman v. Langhofer*, 222 P.3d 272 (Ariz. Ct. App. 2009); *Sherman v. Kissinger*, 195 P.3d 539 (Wash. 2008).

These courts recognized that the current legal system promotes responsible ownership, deters abuse, and creates a financial environment for innovative, affordable, and quality pet care. New damages are not needed to honor the human-pet bond or to assure fair compensation. *See* Peter Lewis, *What's Fido Worth?*, *MSN Money*, Jan. 27,

¹ *See also Scheele v. Dustin*, 998 A.2d 697 (Vt. 2010) (involving intentional conduct).

2009 (veterinary malpractice cases settle for thousands of dollars – a ten-fold increase without new damages law); Maria Vogel-Short, *Tainted Pet Food Class Action Settles for \$24M, \$6M of it Lawyers' Fees*, 194 N.J.L.J. 347 (2008); Assoc. Press, *Family Gets \$56,400 in Dog's Death*, Seattle Times, May 31, 2006.

Finally, the case's importance cannot be understated. The Petition does not seek review for a novel legal issue with little application. If tens of thousands of dollars are at stake every time a pet is injured or killed, pet litigation will become a cottage industry. Litigation would arise when pets are injured in car accidents, police actions, veterinary visits, shelter incidents, protection of livestock, and pet-on-pet aggression, to name a few. *See* Steve Malanga, *Pet Plaintiffs*, Wall St. J., May 9, 2007 at A16 (“just about everyone would potentially bear more liability.”). Plaintiffs’ attempt to downplay this impact rings hollow. *See* Resp. Br. at viii. There is a reason this decision was broadcast on the NBC Nightly News and the litigation’s advocates have boasted the ruling “Could Change Everything.” *See* Susan Thixton, *This Could Change Everything*, truthaboutpetfood.com, Nov. 14, 2011. Plaintiffs admit the ruling “sounds alarming”; it actually is alarming.

Indeed, this case meets many traditional criteria for when a case is ripe for the Court’s review: it creates new, open-ended liability that lacks rational structure; it does so by refusing to follow the Court’s clear precedent; the end result stands in isolation nationally and creates a circuit split in Texas; and the new law sets forth the wrong public policies. *Amici* urge the Court to grant the defendant’s Petition and review this ruling.

ARGUMENT

I. THIS RULING PUTS THE SECOND DISTRICT OF TEXAS FAR OUTSIDE OF MAINSTREAM AMERICAN AND TEXAS JURISPRUDENCE AND CREATES A CIRCUIT SPLIT

A. Courts Throughout the Country Have Widely Rejected Similar Attempts At Emotion-Based Damages in Pet Injury and Death Cases

As detailed in the following 50-state survey, courts in thirty-five states where the issue has arisen, including the Court of Appeals in Austin, have broadly and consistently rejected damages based on the emotional relationship between an owner and a beloved pet – no matter how significant the owner’s emotional investment in a pet, legal theories asserted, or circumstances in which the harms arose. The rulings demonstrate the legal shortcomings of and public policy reasons against permitting any such recovery.

- **Alaska:** “[Plaintiff] may not recover damages for her dog’s sentimental value.” *Mitchell v. Heinrichs*, 27 P.3d 309, 314 (Alaska 2001).
- **Arizona:** “Expanding Arizona common law to allow a pet owner to recover emotional distress or loss of companionship damages would be inappropriate as it would offer broader compensation for the loss of a pet than is currently available in this state for the loss of a person.” *Kaufman*, 222 P.3d at 278-79.
- **California:** “Regardless of how foreseeable a pet owner’s emotional distress may be in losing a beloved animal, we discern no basis in policy or reason to impose a duty on a veterinarian to avoid causing emotional distress to the owner of the animal being treated.” *McMahon*, 97 Cal. Rptr. 3d at 564.
- **Connecticut:** Common law authority does not allow “noneconomic damages resulting from a defendant’s alleged negligent or intentional act resulting in the death of a pet.” *Myers v. City of Hartford*, 853 A.2d 621, 626 (Conn. App. Ct. 2004).
- **Delaware:** “Delaware law does not provide . . . for the pain and suffering of either dog or owner.” *Naples v. Miller*, 2009 WL 1163504, at *3 (Del. Super. Ct. Apr. 30, 2009), *aff’d*, 992 A.2d 1237 (Del. 2010).
- **Florida:** “[A]llowing recovery for these types of cases would place an unnecessary burden on the ever burgeoning caseload of courts in resolving serious tort claims for

individuals.” *Kennedy v. Byas*, 867 So. 2d 1195, 1198 (Fla. Dist. Ct. App. 2004); compare *Johnson v. Wander*, 592 So. 2d 1225, 1226 (Fla. Dist. Ct. App. 1992) (allowing “gross negligence and damage to property causing emotional distress.”).

- **Georgia:** Plaintiff “cannot recover for any of her emotional distress” from her pet’s death. *Holbrook v. Stansell*, 562 S.E.2d 731, 733 (Ga. Ct. App. 2002).
- **Idaho:** “We are not persuaded to depart from this general rule” of denying recovery for mental anguish in pet cases. *Gill v. Brown*, 695 P.2d 1276, 1278 (Idaho Ct. App. 1985).
- **Illinois:** “[Plaintiffs] are asking us . . . to permit recovery by a dog owner for the loss of companionship of a dog. We do not believe this is consistent with Illinois law.” *Jankoski v. Preiser Animal Hosp., Ltd.*, 510 N.E.2d 1084, 1087 (Ill. App. Ct. 1987).
- **Indiana:** “The loss of a pet dog is similarly only an economic loss.” *Lachenman v. Stice*, 838 N.E.2d 451, 461 (In. Ct. App. 2006).
- **Iowa:** “[S]entimental attachment of an owner to his or her dog has no place in the computation of damages for the dog’s death or injury.” *Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 691 (Iowa 1996).
- **Kansas:** Sentimental value is not recoverable. *Burgess v. Shampooch*, 131 P.3d 1248 (Kan. Ct. App. 2006).
- **Kentucky:** “[L]ove and affection . . . from the loss or destruction of personal property is not compensable.” *Ammon v. Welty*, 113 S.W.3d 185, 188 (Ky. Ct. App. 2003).
- **Louisiana:** “Personal or sentimental considerations cannot enter into . . . an award such as this.” *Kling v. U.S. Fire Ins. Co.*, 146 So. 2d 635, 642 (La. Ct. App. 1962).²
- **Massachusetts:** “It would be illogical, however, to accord the plaintiff greater rights than would be recognized in the case of a person who suffers emotional distress as a result of the tortiously caused death of a member of his immediate family.” *Krasnecky v. Meffen*, 777 N.E.2d 1286, 1287-90 (Mass. App. Ct. 2002).
- **Michigan:** No authority “permits this Court to take the drastic action proposed by plaintiff.” *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. Ct. App. 2000).

² In a contract case, a Louisiana Court of Appeal allowed emotion-based damages for harm to a cat against a boarding facility. Compare *Smith v. Univ. Animal Clinic, Inc.*, 30 So. 3d 1154 (La. Ct. App. 2010) with *Keller v. Case*, 757 So. 2d 920 (La. Ct. App. 2000) (applying traditional damages against a boarding facility over pet’s death).

- **Minnesota:** “We have found no law supporting” emotional distress or noneconomic damages. *Soucek v. Banham*, 503 N.W.2d 153, 164 (Minn. Ct. App. 1993).
- **Missouri:** Damages in pet cases “is the difference between fair market value” before and after the injury. *Wright v. Edison*, 619 S.W.2d 797, 802 (Mo. Ct. App. 1981).
- **Nebraska:** “This court has clearly held that animals are personal property and that emotional damages cannot be had for the negligent destruction of personal property.” *Fackler v. Genetzky*, 595 N.W.2d 884, 892 (Neb. 1999).
- **Nevada:** Plaintiff cannot sue for emotional distress “based on the death of an animal.” *Thomson v. Lied Animal Shelter*, 2009 WL 3303733, at *7 (D. Nev. Oct. 14, 2009); *see also* Nev. Rev. Stat. § 41.740 (barring noneconomic damages in pet litigation).
- **New Jersey:** “[T]here is no authority . . . for allowing plaintiffs to recover noneconomic damages resulting from defendants’ alleged negligence” in killing plaintiffs’ pet. *Harabes v. The Barkery*, 791 A.2d 1142, 1146 (N.J. Super. Ct. App. Div. 2001).
- **New Mexico:** “[D]amages for sentimental value are not recoverable” for death of a pet. *Wilcox v. Butt’s Drug Stores, Inc.*, 35 P.2d 978, 979 (N.M. 1934).
- **New York:** Pet owner “may not recover damages for loss of companionship.” *DeJoy v. Niagara Mohawk Power Corp.*, 786 N.Y.S.2d 873, 873 (N.Y. App. Div. 2004).
- **North Carolina:** “[T]he sentimental bond between a human and his or her pet companion can neither be quantified in monetary terms or compensated for under our current law.” *Shera v. N.C. State Univ. Veter. Teach’g Hosp.*, No. COA11-1102, *18 (N.C. Ct. App. Feb. 21, 2012).
- **Ohio:** “Without in any way discounting the bonds between humans and animals, we must continue to reject recovery for noneconomic damages for loss or injury to animals.” *Pacher v. Invisible Fence of Dayton*, 798 N.E.2d 1121, 1125-26 (Ohio Ct. App. 2003).
- **Oregon:** “The trial court did not err in denying plaintiffs’ claim for damages based on emotional distress.” *Lockett v. Hill*, 51 P.3d 5, 7-8 (Or. Ct. App. 2002).³
- **Pennsylvania:** There can be no recovery for “loss of companionship” due to a pet’s death. *Daughen v. Fox*, 539 A.2d 858, 864-65 (Pa. Super. Ct. 1988).
- **Rhode Island:** “[E]motional trauma” for pet injuries is not recoverable. *Rowbotham v. Maher*, 658 A.2d 912, 913 (R.I. 1995).

³ *Freedon v. Stride*, 525 P.2d 166 (Or. 1974) (allowing mental distress in conversion case).

- **South Carolina:** The “law does not support a cause of action for emotional distress for injury to one’s pet.” *Bales v. Judelsohn*, slip op., No. 011-268-05 (S.C. Ct. App. 2005).
- **Texas:** The Court of Appeals in Austin rejected expanding intrinsic value “to embrace the subjective value that a dog’s owner places on its companionship.” *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554, 565 (Tex. App.—Austin 2004, no pet.).
- **Vermont:** There is no “compelling reason why, as a matter of public policy, the law should offer broader compensation for the loss of a pet than would be available for the loss of a friend, relative, work animal, heirloom, or memento – all of which can be prized beyond measure, but for which this state’s law does not recognize recovery for sentimental loss.” *Goodby*, 974 A.2d at 1274.
- **Virginia:** Damages for pet injury is diminution in value “plus reasonable and necessary expenses.” *Kondaurov v. Kerdasha*, 629 S.E.2d 181, 186 (Va. 2006).
- **Washington:** “[I]t is well established that a pet owner has no right to emotional distress damages for loss of human-animal bond.” *Sherman*, 195 P.3d at 548.
- **West Virginia:** “[S]entimental value, mental suffering, and emotional distress are not recoverable” for pets. *Carbasha v. Musulin*, 618 S.E.2d 368, 371 (W. Va. 2005).
- **Wisconsin:** “We note that this rule of nonrecovery applies with equal force to . . . a best friend who is human as it does to a plaintiff whose best friend is a dog.” *Rabideau v. City of Racine*, 627 N.W.2d 795, 801 (Wis. 2001).

Among the remaining states, Hawaii briefly allowed emotion-based liability for harm to property, including pets, but that was legislatively overturned. *See Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1071 (Haw. 1981); Haw. Rev. Stat. § 663-8.9. In Maryland and Tennessee, statutes define damages for pets and would not allow emotion-based recovery in the situation at bar. *See* Maryland MD Code Cts. & Jud. Proc. § 11-10S (fair market value plus reasonable and necessary cost of care.); Tenn. Code Ann. § 44-17-403 (capping noneconomic damages in narrow set of cases, but exempting veterinarians and certain organizations, including shelters, acting on behalf of public or animal welfare). *Amici* are unaware of reported appellate cases in Alabama, Arkansas,

Colorado, the District of Columbia, Maine, Mississippi, Montana, New Hampshire, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming.⁴

Further, the draft Restatement of the Law, approved by the members of the American Law Institute, addresses and excludes emotion-based damages from pet cases:

While pet animals are often quite different from chattels in terms of emotional attachment, damages for emotional harm arising from negligence causing injury to a pet are also not permitted. Although there can be real and serious emotional disturbance in some cases of harm to pets (and chattels with sentimental value), lines, arbitrary at times, that limit recovery for emotional disturbance are necessary.

Am. L. Inst., Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm 64 (Prelim. Draft 5, Mar. 13, 2007).

B. Courts Have Specifically Rejected Adding Broad Emotional Damages Under a Pet’s Intrinsic Value, Value to the Owner and Actual Damages

The steadfast reaction against emotion-based liability in pet litigation includes the courts’ responses to the recent trend to recast the claims under vague-sounding measures of damages: intrinsic value, peculiar value and actual value to the owner. Clever animal rights lawyers started this trend in 2008, and plaintiffs are using the same strategy here.

This theory has been rejected in California, Washington, Alaska, Ohio and North Carolina. In California, a pet’s intrinsic or peculiar value must enhance its “economic value to the owner . . . not its sentimental or emotional value.” *McMahon*, 97 Cal. Rptr. 3d at 566 (“pedigree, reputation, age, health and ability to win” events). In Washington, value to the owner is “confined by the limitation on sentimental or fanciful value,” as “it

⁴ Legislation to authorize emotion-based damages in pet litigation has failed. In Colorado, once the sponsor understood the impact on pets, he withdrew his bill. See Julia C. Martinez, *Pet Bill Killed by House Sponsor; Move Outrages Senate Backer*, DENVER POST, Feb. 16, 2003, at B1.

is well established that a pet owner has no right to . . . damages for loss of human-animal bond.” *Sherman*, 195 P.3d at 548. The Supreme Court of Alaska and Courts of Appeal in Ohio and North Carolina have ruled the same. *See Mitchell*, 27 P.3d at 313-14 (owner “may not recover damages for her dog’s sentimental value as a component of actual value to her as the dog’s owner”); *Sokolovic v. Hamilton*, 960 N.E.2d 510 (Ohio Ct. App. 2011) (e.g., “time invested in specialized, rigorous training, which established that a similar dog was not available on the open market”); *Shera*, No. COA11-1102, *18-19 (applying “actual or intrinsic value. . . to compensate owners for the value of their emotional bond with their pet” would expand those damages beyond what is currently recognized).

Illinois has held this line too. There, as the Second Court of Appeals suggests is law in Texas, an item’s “value to the owner may include some element of sentimental value.” *See Jankoski*, 510 N.E. at 1807. The court refused to turn the limited exception into a broad loophole for emotion-based damages in pet cases, saying such recoveries must be “severely circumscribed.” *Id.* (plaintiffs “expressly disavow[ed this] limited recovery”).

C. Public Policy Concerns with Broad New Damages in Pet Cases

Courts have expressed a wide-range of concerns over introducing into pet litigation emotion-based damages that are severely limited elsewhere. *See Goodby*, 974 A.2d at 1273 (A pet’s “special characteristics as personal property” do not make it appropriate to create a common law wrongful death action for pets similar to “what the Wrongful Death Act does for the death of immediate relatives due to the fault of others.”).

Some courts have understood that there would be “no sensible or just stopping point” for the litigation. *Rabideau*, 627 N.W.2d at 802. It would be impossible “to cogently

identify the class of companion animals” – dogs, cats, hamsters, rabbits, parakeets, etc. – “because the human capacity to form an emotional bond extends to an enormous array of living creatures.” *Id.* Veracity of claims would be hard to prove, and, in many cases, “charging tortfeasors with financial burdens” for an owner’s emotional loss for a pet may be unfair. *Id.* Finally, given that two-thirds of Americans own 200 million pets, pet litigation would increase the “ever burgeoning caseloads of the court” and interfere with a court’s ability to adjudicate “serious tort claims for injuries to individuals.” *Johnson v. Douglas*, 723 N.Y.S.2d 627, 628 (N.Y. App. Div. 2001).

These courts, unlike the Second Court of Appeals, separated the love and affection between owners and pets from any need to create new, uncertain liability. *See Rabideau*, 627 N.W.2d at 798 (“To the extent this opinion uses the term ‘property’ in describing how humans value the dog they live with, it is done only as a means of applying established legal doctrine to the facts of this case.”); *Pacher*, 798 N.E.2d at 1125-26 (“[w]ithout in any way discounting the bonds between humans and animals, we must continue to reject recovery for noneconomic damages”); *Ammon*, 113 S.W.3d at 187-89 (bond “is undeniable,” but dog is “not a family member.”); *Strawser v. Wright*, 610 N.E. 2d 610, 612 (Ohio Ct. App. 1992) (“sympathiz[ing] with one who must endure the sense of loss which may accompany” a pet’s death, but “cannot ignore the law”).

Thus, the law of this land is clear. The emotional attachment between owner and pet is not compensable as a matter of law regardless of how it is packaged in litigation, *i.e.*, as a measure of damages, including intrinsic value, a cause of action for emotional

distress, loss of companionship or any other theory. The Court should grant the Petition to assure that Texas law follows traditional, widely accepted American jurisprudence.

II. ALLOWING EMOTION-BASED DAMAGES WILL JEOPARDIZE AFFORDABLE PET CARE AND BROADLY IMPACT PEOPLE NOT REPRESENTED BY PARTIES BEFORE THE COURT

Pet welfare and social policy weigh heavily against broad new emotion-based damages in pet litigation. There is a stark dichotomy between pet welfare and interests of the few owners who seek these damages – and the animal rights groups supporting them.⁵

A. Not Granting the Petition Will Adversely Impact Pet Welfare

The primary concern for pet welfare is that veterinary care will resemble human healthcare, where emotion-based damages increase costs and dictate care. People’s ability to spend on pet care is limited.⁶ Many families will avoid preventive care, not treat an ill pet, or be forced to euthanize a pet. *See* Assoc. Press, *Even Pets Feeling Sting of Financial Struggles*, Fosters.com, Nov. 23, 2008 (“we’re putting the dogs to sleep” over finances); Kim Campbell Thornton, *Pet Owners Skipping Vet Visits as Economy Sinks*, MSNBC.com (Nov. 12, 2008) (“pet owners [are] skimping on preventive care”). Households that “continue to purchase veterinary services are spending substantially more, but an increasing proportion of households are choosing not to spend any money

⁵ *See* Douglas Belkin, *Animal Rights Gains Foothold as Law Career*, Boston Globe, Mar. 6, 2005, at 6 (seeking sentimental damages in pet cases lays a foundation to “support a ruling that animals are not property but have rights of their own and thus legal standing”).

⁶ “[P]et owners have a limit — often a few hundred dollars or less — on how much they will spend on veterinary services. . . . [O]wners would pay \$688 for treatment for their pets if there is a 75% chance of recovery and only about \$356 if there is a 10% chance of recovery.” John P. Brown & Jon D. Silverman, *The Current and Future Market for Veterinarians and Veterinary Medical Services in the United States*, 215:2 J. Am. Veterinary Med. Ass’n 161, 167 (1999).

for veterinary services.” Christopher A. Wolf, et al., *An Examination of U.S. Consumer Pet-Related & Veterinary Serv. Expenditures, 1980-2005*, 233 J. Am. Veterinary Med. Ass’n 404, 410 (2008). A quarter of owners spend no money on veterinary care, twenty percent postpone wellness visits and forty-five percent postpone care for sick pets.⁷

Liability concerns also may cause some services, such as free clinics for spaying and neutering, to close. Shelters, rescues and other services may no longer afford to take in dogs and other pets if they and their staff, as in this case, face liability if an owner alleges a pet is wrongfully injured under their care. In addition, the risks and costs for other pet services, such as dog walking and boarding, will rise and become less available. Even friends may not take on the risk of watching a pet if they could be sued for emotion-based damages if the pet is injured under their care. Of equal concern is that, given the increase in costs of pet ownership, fewer people will obtain pets, leaving pets abandoned and in shelters to die. Also, less veterinary care increases public health risks, as controlling rabies and zoonotic disease is an important function of veterinary services.

B. Most of the People Who Will Be Adversely Affected by This Ruling Were Not Represented by the Parties Before the Court

The impact of the Second Court of Appeal’s ruling will also be felt outside of the pet care community. A pet owner would face liability if her pet attacked another animal. *See, e.g., Pickford v. Masion* 98 P.3d 1232, 1233-35 (Wash. Ct. App. 2004) (pet-on-pet injuries); *Rowbotham*, 658 A.2d at 912 (same). “[P]et-on-pet aggression is at least as

⁷ *See* AMERICAN VETERINARY MEDICAL ASSOCIATION, 2007 US PET OWNERSHIP & DEMOGRAPHICS SOURCEBOOK (2007); JOHN W. ALBERS & MICHAEL T. CAVANAUGH, 2010 AAHA STATE OF THE INDUS. REPORT; National Commission on Veterinary Economic Issues, *Survey of Veterinarians*, Quick Poll Jan. 2010.

common as attacks on humans, [and] big awards would sharply increase insurance company liabilities and force homeowners to choose more often between their insurance and their pets.” Malanga, *supra* at A16. Car insurance rates would also rise because of risks associated with pets running into roads and riding in cars. *See, e.g., Johnson*, 723 N.Y.S.2d at 628 (struck by car); *Kondaurov*, 629 S.E.2d at 181 (in car); *see also* Malanga, *supra*, at A16 (“Actuaries probably haven’t even contemplated what cases like that would do to our insurance premiums.”). Texas police could be subject to liability, even when taking appropriate action against a threatening dog. *See, e.g., Kautzman v. McDonald*, 621 N.W.2d 871, 876-77 (N.D. 2001) (dog shot to protect community); Laura Summers, *Suit Seeks \$125,000 in Officer's Killing of Dog*, Tulsa World, July 2, 2008 at A14 (officer: “I hated to shoot the dog, but had no choice”).

A majority of the public recognize these problems and oppose compensating owners for emotional loss in pet litigation. *See* Joseph Carroll, *Pet Owners Not Worried That Their Pets Will Get Sick From Pet Food: Most Don't Agree With Pain and Suffering Damages for Pets*, Gallup News Service, Apr. 3, 2007. The Court should grant the Petition to avoid the adverse consequences the underlying decision will have on pets, in diminished care, and Texas residents, by increasing their liability.

III. GRANTING THIS PETITION WILL RESTORE PROPER PROCEDURES FOR SIGNIFICANT EXPANSIONS OF COMMON LAW LIABILITY

The Court should grant the Petition to assure mid-level appellate courts in Texas will not depart from this Court’s specific precedent or create new, uncertain liability law.

First, this Court has already held that damages available in pet litigation is based on market valuation and other economic factors. See *Heiligman v. Rose*, 81 Tex 222, 16 S.W. 931 (Tex. 1891). The Second Court of Appeal's rationale was that *Brown vs. Frontier Theaters, Inc.* created a limited exception to allow sentimental damages for certain property, namely heirlooms, that have no market value, serve no function, and are one-of-a-kind items kept primarily for sentimental reasons. See 369 S.W.2d 299 (Tex. 1963). If the Second Court of Appeals believed *Brown* overturned *Heiligman*, it should have deferred to *Heiligman* and urge this Court to hear the case and rule accordingly.

If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

See *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989); *Owens Corning v. Carter*, 997 S.W.2d 560, 571 (Tex. 1999) (invoking *Rodriguez*).

Second, before a huge, new source of liability is created, the Court should determine whether pets fit within the narrow *Brown* exception. The primary value of a pet is not idle sentiment, but companionship. People engage with pets, take them for walks and play with them. Pets provide security and hunting services. A pet is also not an heirloom, like the items lost in *Brown* (e.g., wedding veil) that were kept to remind the plaintiff of someone or an event in the past. Rather, owners expect pets, which often have life spans of 10-15 years, to pass away during their lifetimes and often get other pets. While no two pets are alike, the emotional attachments a person establishes with each pet cannot be shoe-horned into keepsake-like sentimentality for litigation purposes.

The public policies implications are also entirely different. Rendering an award for heirlooms does not impact the medical community, owners of other heirlooms, or the care provided by other owners to protect their own heirlooms.

Third, the lack of any structure to these damages would lead to bizarre results. As just one example, a five-year old show dog with a market value of \$3,000 may retrieve that amount in litigation, but the owner's emotional attachment to the dog would be noncompensable because the dog had market value. By contrast, a twelve year old, sick dog with no market value could retrieve several times that amount because the owner could sue for unlimited emotion-based damages. Because of the complexity of creating such new broad liability, courts traditionally leave this task to legislatures. *See, e.g., Koester*, 624 N.W.2d at 211 (“[w]e refuse to create a remedy where there is no legal structure . . . plaintiff and others are free to urge the Legislature to” enact this change).

Finally, the Court should reject plaintiffs' attempt to mischaracterize this appeal as “an advisory opinion” made moot by the application of *Franka v. Velasquez*, 332 S.W.3d 367 (Tex. Jan. 11, 2011). If the Petition is moot, so was plaintiffs' appeal to the Second Court of Appeals, which was filed on March 22, 2011 – two months *after* this Court decided *Franka*. Given the significance and impact of the Second Court of Appeal's ruling, if this Court determines the Petition should not be granted for this reason, it should vacate the Second Court of Appeal's ruling on similar grounds.

PRAYER

For the foregoing reasons, *amici* request this Court to grant the Petition and reject the creation of new, broad measures of damages in pet injury litigation.

Respectfully submitted,

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APPENDIX: STATEMENTS OF INTEREST

Animal Health Institute (“AHI”) is a national trade association of manufacturers of animal health products, pharmaceuticals, vaccines and feed additives used in food production and medicines that keep pets healthy. A primary objective of AHI is to ensure a safe and effective supply of medicines that help pets live longer. AHI supports policies to protect and promote animal healthcare.

The American Kennel Club (“AKC”) is the largest registry of purebred dogs and leading not-for-profit organization devoted to the study, breeding, exhibiting, and advancement of dogs. Along with its more than 5,000 member and licensed clubs and affiliated organizations, the AKC advocates for the purebred dog as a family companion, advances canine health and well-being, works to protect the rights of all dog owners and promotes responsible dog ownership.

The American Pet Products Association (“APPA”) is the leading U.S. not-for-profit trade association for the pet products industry, representing nearly 1,000 pet product manufacturers, importers, manufacturers’ representatives and livestock suppliers. APPA’s mission is to develop and promote responsible pet ownership.

The American Veterinary Medical Association (“AVMA”), established in 1863, is the largest veterinary medical association in the world and the national voice for the veterinary profession. The Association has more than 82,000 members, representing approximately 85% of U.S. veterinarians. The issues presented in this case directly involve the veterinary profession.

The Cat Fanciers' Association ("CFA") is a non-profit organization founded in 1906 and has the largest registry of pedigreed cats in the world. CFA's mission is to preserve and promote the pedigreed breeds of cats and enhance the well-being of all cats. It is dedicated to the promotion of cat health, cat welfare and public education of responsible cat ownership.

The National Animal Interest Alliance (NAIA) is an association of business, agricultural, scientific, and recreational interests dedicated to promoting animal welfare and strengthening the bond between humans and animals. NAIA was founded in 1991 to provide education regarding responsible animal ownership and use, and to oppose animal rights extremism. Its members include pet owners, dog and cat clubs, obedience clubs and rescue groups as well as breeders, trainers, veterinarians, research scientists, farmers, fishermen, hunters and wildlife biologists.

The Pet Industry Joint Advisory Council ("PIJAC") is the largest trade association advocating on companion animal issues, representing thousands of manufacturers, distributors, breeders, and retailers. PIJAC advocates for healthy and safe pets, responsible trade in pets and pet products, and pro-pet policies.

