The Appellate Advocate

Appellate Section, State Bar of Texas

The 'Best Of' the Advanced Civil Appellate Course

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State Bar of Texas

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Editor's Note

The articles in this edition of the Appellate Advocate are republished from the Advanced Civil Appellate Course, which occurred in September, 2023, with the sole exception of the Texas Supreme Court Update wherein we opted to use the most recent version supplied by the Texas Supreme Court. We would like to extend our gratitude to TexasBarCLE and their staff, for all their hard work on the Advanced course, and for helping to make this edition possible. We would also like to thank the Supreme Court of Texas for their efforts to continuously provide updates on recent cases decided by the court. Most importantly, we want to thank the authors and speakers who contributed their time and efforts to the Advanced Civil Appellate CLE and this publication. Without your willingness to volunteer your time and expertise, none of this would be possible.

Publication Policies

The Appellate section is always looking for professional and timely legal articles that are important to appellate practitioners. If you are interested in submitting an article, please email TXAppellateSection@gmail.com for more information about our publishing guidelines, article submission process and publication timeline. The section reserves the right to decline publication of any article, for any reason, without explanation.

Authors who submit an article in which the author represents a party in a currently pending matter must include a footnote at the outset of the article disclosing their involvement in the case or matter. Publication of any article is not to be deemed an endorsement of the views expressed therein.

Disclaimer

The opinions expressed in The Appellate Advocate are those of the authors and not necessarily the opinions of the State Bar of Texas, its Board of Directors, or the Appellate Section council or its members. These articles should be used for educational purposes and to enhance your law practice. Nothing herein should be considered as legal advice. Statements of fact or law should be independently verified by the reader.

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Chair's Column

Kirsten M. Castañeda
Alexander Dubose & Jefferson LLP, Dallas

As I write this column, the current calendar year is drawing to a close and a new year is about to begin. At the top of my thoughts is one word: reëngagement.[1] I don't know about you, but it's been difficult for me to reëngage fully in the practice of law since the pandemic. Some of the obstacles have been logistical, some practical, and some just a feeling that I'd rather stay snug in a cozy, insulated space. But ultimately, I know that snug and cozy is simply an excuse not to take full advantage of all the opportunities this profession provides. In particular, full engagement—e.g., working at the office, attending appellate bar activities in person when possible, and connecting regularly with colleagues—invigorates me, pushes me to do my best for my clients, allows me to serve the system of justice, and supports me through an encouraging and collegial community of appellate lawyers like you!

If you, too, are looking for ways to reëngage fully in the practice of law in 2024, look no further than your State Bar Appellate Section. One place to begin is our online CLE video library provided by the Online CLE Committee FREE to Section members. A fireside chat with an Afghan Refugee Judge, practice-building presentations, updates for SCOTUS, SCOTX, and intermediate appellate courts, and a plethora of other interesting fare comprise the 6.5 hours of CLE credit and 1.25 hours of Ethics credit currently available. Check out the offerings, and watch those of interest to you, by visiting the section's Online Classroom.

Having found inspiration and new insights from these CLEs, you'll be energized to participate in the Section's Coffees with the Courts throughout the year. Our Bench/Bar Committee kicks off the 2024 series with the Second Court of Appeals on Wednesday, February 7, 2024, from 9:30 a.m. to 11:00 a.m. The in-person Coffee will take place in the reception area outside the Second Court of Appeals courtroom, located on the 9th Floor or the Tim Curry Justice Center, 401 W. Belknap Street, Fort Worth, Texas 76196. The Coffees provide opportunities for insightful and informative conversation with appellate justices and staff attorneys (though not about any matters pending before them!) and networking with fellow trial and appellate lawyers.

You'll have another opportunity for in-person professional development in April. Our CLE Committee is hard at work on the next Handling Your First (or Next) Appeal CLE, which will be presented live (and as a webcast) on Thursday, April 25, 2024, from 8:00 a.m. to 4:45 pm., at the Texas Law Center, 1414 Colorado Street, Austin, Texas 78701. This CLE will provide an invaluable roadmap, with excellent materials, to handle an appeal, with insights and internal operating knowledge you can't get from a rulebook.

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[1]Yes, I used the old-timey ë to indicate that the second e is pronounced separately from the first. Could've used a hyphen, but the holidays always put me in an old-timey, bookish mood.

The CLE also will provide guidance on emerging and cutting-edge issues, such as changes to our state appellate rules, developing case law, and the impact of technology (such as, you guessed it, artificial intelligence). Please check your inbox (and spam filter!) for registration and agenda information about this incredibly useful program.

In addition, stay tuned in early 2024 for more details about our Diversity Committee's Spring CLE program to be held at Texas Tech University School of Law in Lubbock, Texas. The CLE will educate current and future lawyers with appellate practice tips, emerging issues updates, a panel discussing Civility in the Appellate Courts with sitting and retired state and federal appellate court judges, and so much more. We look forward to providing an invigorating and educational experience for trial and appellate lawyers and law students in the Lubbock area.

Finally, please avail yourself of the excellent interviews with Texas court of appeals justices available on our website through the dedicated work of our Judiciary and Section History Committee. Over the past year, the video interviews have been viewed over 260 times – we'd love for viewership numbers to climb even higher! The Committee continues to add new interviews throughout the year. Check the site regularly for new opportunities to learn about and from our appellate justices. Watching a video or two on a day when things aren't going my way at the office always provides a reset, teaches me something I can put to immediate use to improve my appellate work, and reminds me why I love the work we do.

I am so grateful to our membership for the honor of leading the Section this year. Nevertheless, my work would be insufficient without the mighty efforts contributed by our Committee chairs and members. If you are interested in becoming a member of any of our Committees, please reach out directly to the pertinent Committee chair through our websites Committees Page or email me directly to let me know your interest. I look forward to sharing with all of you a new year full of reëngagement and many opportunities to grow as an appellate lawyer through our Section's programs, events, and offerings!

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APPELLATE JUDGMENTS AND THEIR EFFECTS: RENDITIONS, INSTRUCTION, BONDS, AND REMANDS

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EDUCATION

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M.A. in History & Politics (Political Science), Texas A&M University at Kingsville.
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B.A. with high honors (Government), The University of Texas; Phi Beta Kappa, Magna Cum Laude, Rhodes Scholarship Nominee.

PROFESSIONAL ACTIVITIES, LICENSES, AND AWARDS (abridged):

Vice Chair, Appellate Law Section of the State Bar of Texas (2022-2023)
Chair, Insurance Law Section of the State Bar of Texas (2019-2020)
Chair, Pattern Jury Charge Committee—Business, Consumer, & Insurance (2018--2022)
Editor in Chief, *The Journal of Texas Insurance Law* (2013-2016)
Member, American Law Institute (2013–present)
Executive Director and Dean, Texas Center for Legal Ethics and Professionalism (2007-2009).
Recipient: 2016 Texas Center for Legal Ethics Chief Justice Jack Pope Award presented to an appellate lawyer or judge who epitomizes the highest level of professionalism and integrity.
Recipient: 2005 Texas Bar Foundation Dan R. Price Award for excellence in legal writing, unwavering commitment to clients, and service to the profession.
Board Certified: Civil Trial Law and Personal Injury Trial Law, Texas Board of Legal Specialization.

PUBLISHED WORKS (abridged):

Six Constitutions over Texas, forthcoming from Texas A&M Univ. Press in 2024.
"Insurance Appraisal in Texas and its Place in Coverage Litigation," *St. Mary's Law Journal* 50, no. 1 (Spring 2019) 101-148 (with Brendan McBride and Matthew Pearson).
"Chief Justice Jack Pope of Texas," (book chapter) in *Common Law Judge: Selected Writings of Chief Justice Jack Pope of Texas* (Austin: Texas Sup.Ct. Hist. Soc., 2014) 322-354.
The Noble Lawyer (Austin: Texas Bar Books, 2011).
"Commentary on the Texas Disciplinary Rules of Professional Conduct Governing the Duties between Lawyer and Client," (with John F. Sutton, Jr.) in *Texas Lawyers' Professional Ethics*, 4th ed. (State Bar of Texas, 2007).
"Personhood and the Right to Privacy in Texas" *South Texas Law Review 48, no. 3* (Spring 2007): 575-611.
"Coverage for Ensuing Water Damage under Texas Property Insurance Policies." *South Texas Law Review* 46, no. 4 (Summer 2005): 1247-1281.

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APPELLATE JUDGMENTS AND THEIR EFFECTS: RENDITIONS, INSTRUCTIONS, BONDS, AND REMANDS

I. INTRODUCTION

This article deals with some of the least well understood and least frequently examined aspects of civil appellate practice, what happens *after* an appellate court decides a case: How are its rulings either followed by lower courts or otherwise carried out? What are the legal effects and limitations of its judgments? Of course, it is impossible to anticipate every quandary that might arise in such cases. However, while almost all lawyers understand how to read a court's written opinions, the judgments and mandates that accompany such opinions are, in their specifics, sometimes regarded as superfluous, but they are not. The scope of this paper is limited to the exercise of appellate jurisdiction in civil cases in Texas state courts and does not treat criminal cases or original proceedings or writs such as mandamus or habeas corpus.

II. THE BASIC ANATOMY OF APPELLATE DECISIONS

State court appellate decisions, whether of a Court of Appeals or The Supreme Court, follow the same basic structure: 1. An opinion; 2. A judgment; 3. A mandate. *See* T.R.A.P. 18, 43, 47, 51, 60, 63, 65. Both the courts of appeal and the Supreme Court are required to discharge the jurisprudential burden of rational explication by issuing opinions explaining and justifying their rulings. Courts of appeal are required by rule to issue opinions that are "as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal." There is no such stricture in connection with Supreme Court opinions, although the common law requires fidelity to the same principles. In the court of appeals, the actual decision of the court is reflected in its judgment, a written document that may only make one of the following decisions:

"(a) affirm the trial court's judgment in whole or in part; (b) modify the trial court's judgment and affirm it as modified; (c) reverse the trial court's judgment in whole or in part and render the judgment that the trial court should have rendered; (d) reverse the trial court's judgment and remand the case for further proceedings; (e) vacate the trial court's judgment and dismiss the case; or (f) dismiss the appeal." T.R.A.P. 43.2. The judgment is also required to either tax costs of the appeal in favor of the prevailing party or "otherwise as required by law or for good cause." T.R.A.P. 43.2. The Supreme Court's judgments must similarly tax costs of the appeal. T.R.A.P. 60.4. In practice, courts often tax costs of appeals against the party incurring same because in many appeals, no party wins every issue in the appeal.

T.R.A.P. 18 codifies the law concerning mandates that are issued from the Supreme Court or lower appellate courts. It is the clerk of the relevant court that issues the mandate. The clerk "must" do so within a certain period of time specified in Rule 18, and as such, this represents a ministerial act by the clerk. Although the mandate is sometimes described as an order of the court issuing it, it is issued by the clerk. *Texas Parks & Wildlife Dept. v. Dearing*, 240 S.W.3d 330, 347 (Tex. App.—Austin 2007, pet. denied). As such, it may also be characterized as a writ issued in enforcement of the court's judgment and opinion. In practice, the mandate quotes the disposition of the case from the appellate court's judgment and then instructs either the trial court or lower court of appeals (depending on the disposition of the case) to follow the judgment.

III. REVERSALS FOLLOWED BY REMANDS AND/OR RENDITIONS

Unless the appeal is dismissed, its disposition will be in the form of an affirmance, or a reversal and rendition, or a reversal and remand, or a combination of these. The rules specifically authorize appellate courts to affirm only that part of a lower court judgment that is legally valid and reverse only that portion that is rendered invalid by the existence of harmful reversible error. "If the error affects part of, but not all, the matter in controversy and that part is separable without unfairness to the parties, the judgment must be reversed and a new trial ordered only as to the part affected by the error. The court may not order a separate trial solely on unliquidated damages if liability is contested." T.R.A.P. 44.1, 61.2. If a lower court's judgment is in any way reversed as erroneous, then the appellate court must either render the judgment that should have been rendered or remand the case for a retrial or some other further proceedings.

A. Rendition

A rendition is the judgment of an appellate court that requires no further action by the lower courts other than enforcement of the appellate judgment, which substitutes for the erroneous judgment of the lower court. It is appropriate where the appellate court possesses a sufficient record to render the judgment it determines the lower court would have entered but for that lower court's harmful error. *Harris County v. Annab*, 547 S.W.3d 609, 616-17 (Tex. 2018).

B. Remand and Instructions

The Supreme Court possesses the power to remand a case for further proceedings even when a rendition would otherwise be proper. This is allowed "in the interests of justice." T.R.A.P. 60.3. One reason this occurs is when the Supreme Court decides a case under circumstances where the litigants did not have the benefit of some new expansion or contraction of the common law by the court in that or some other case decided during the pendency of the instant appeal. *Boyles v. Kerr*, 855 S.W.2d 593, 603 (Tex. 1993). Courts of appeals possesses similar power to remand cases when the "interests of justice require a remand for another trial." T.R.A.P. 43.3(b) Moreover, T.R.A.P. 43.6 more broadly allows them to "make any other appropriate order that the law and the nature of the case require..." *See*, e.g., *Luxeyard v. Klinex*, 643 S.W.3d 260, 265 (Tex. App.—Houston [14th Dist.] 2022); *Union Pac. R.R. v. Seber*, 477 S.W.3d 424, 432 (Tex. App.—Houston [14th Dist.] 2015, no pet.)

As the Supreme Court recently acknowledged in *Phillips v. Bramlett*, 407 S.W.3d 229 (Tex. 2013), "When the life cycle of a judgment extends beyond an initial appeal, courts often face unique or unsettled jurisdictional and procedural issues..." It is important to note that when an appellate court issues its judgment and mandate remanding a case for further proceedings the lower court only has the authority to take such actions as are authorized by the judgment and mandate. As the Supreme Court has stated,

> When an appellate court reverses a lower court's judgment and remands the case to the trial court, …the trial court is authorized to take all actions that are necessary to give full effect to the appellate court's judgment and mandate. See In re Columbia Med. Ctr. of Las Colinas, 306 S.W.3d 246, 248 (Tex.2010) (per curiam) (holding trial court erred on remand by failing to reduce punitive damages award to conform to this Court's reduction of actual damages, as dictated by statutory cap on punitive damages). But the trial court has no authority to take any action that is inconsistent with or beyond the scope of that which is necessary to give full effect to the appellate court's judgment and mandate. See, e.g., Hudson v. Wakefield, 711 S.W.2d 628, 630 (Tex.1986) ("When this court remands a case and limits a subsequent trial to a particular issue, the trial court is restricted to a determination of that particular issue."). *Phillips v. Bramlett* at 234.

When a trial court exceeds the authority thus given it and does not comply with the appellate court's instructions in conducting further proceedings, its judgment will be beyond its authority and erroneous. Thus, when a trial court conducts proceedings unnecessary to comply with the appellate judgment or revises its prior judgment in ways not specified by the appellate court, the trial court's "remand judgment" will be reversed in a subsequent appeal. *Phillips* at 234; *Wall v. Wall*, 186 S.W.2d 57, 58-9 (Tex. Comm. App. 1945, opinion adopted). When an appellate court remands for a new trial of all or a severable part of a case, the lower court will take such action as to that case or matter as was instructed by the appellate judgment, and such instructions and limitations must and will be enforced. *Dessomes v. Desommes*, 543 S.W.2d 165, 169 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.) The instructions in the mandate and judgment usually require that the lower court take some specific action "consistent with the court's opinion," but even without such an instruction, the lower courts should look for guidance not only to the mandate but to the opinion of the court. *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986); *Seale v. Click*, 556 S.W.2d 95, 96 (Tex. Civ. App.—Texarkana 1977, writ ref'd). When the case is remanded for other reasons than a new trial, the lower court must restrict itself to those actions necessary to follow the appellate judgment in deciding the issue or issues remanded for such determination. In some instances, this involves nothing more than a mathematical calculation. *See*, e.g., *Sky View at Las Palmas, LLC v. Mendez*, 555 S.W.3d 301, 116 (Tex. 2018).

As the Commission of Appeals mentioned in passing in *Wall*, these limitations on a court's authority on remand include the "law of the case" doctrine. This doctrine provides that legal determinations made by a court of last resort bind the parties and the lower courts in subsequent proceedings in the case where the issues are substantially the same as those determined on appeal. *Trevino v. Turcotte*, 564 S.W.2d 682, 685 (Tex. 1978).

C. Prejudgment and Post-judgment Interest

One of the "unique or unsettled…procedural issues" contemplated and dealt with by the Supreme Court in *Phillips v. Bramlett* is what to do about calculating pre-judgment and post-judgement interest on remand. In *Phillips*, Justice Boyd, writing for the unanimous court, explained that "[p]rejudgment and postjudgment interest compensate judgment creditors for their lost use of the money due to them as damages…Prejudgment interest performs this function for the time period from the date the damages are incurred through the date of judgment; postjudgment interest, from the date of judgment through the date the judgment is satisfied." *Phillips* at 238. In this connection, the Supreme Court has also held that a trial court abuses its discretion if it fails to award either prejudgment or postjudgment interest for a significant

period between the conduct complained of and payment of the judgment merely due to the procedural conundrums caused by lengthy or repetitive appeals. *Ventling v. Johnson*, 466 S.W.3d 143,155 (Tex. 2015) (holding that trial court lacked discretion to fail to award "any form of interest for fourteen years"). In other words, lengthy appeals should not be used as a method to delay resolution of a case so as to deprive a successful creditor of the use of her money in the form of either postjudgment or prejudgment interest.

Both *Phillips* and *Ventling* set out the same test for whether a revised judgment on remand relates back to the original date of judgment for purposes of postjudgment interest or interest is only to be calculated from the date the later amended judgment is signed:

> In Phillips, we held that when an appellate court remands a case to the trial court for entry of judgment consistent with the appellate court's opinion, and the trial court is not required to admit new or additional evidence to enter that judgment, ... the date the trial court entered the original judgment is the "date the judgment is rendered," and postjudgment interest begins to accrue ... as of that date. *Ventling v. Johnson*, 466 S.W.3d 143,149-50 (quoting *Phillips*, 407 S.W.3d at 239).

Ventling is the Supreme Court's latest pronouncement on the subject. In *Long v. Castle Texas Production Ltd. Partnership*, 426 S.W.3d 73, (Tex. 2014), which was decided between *Phillips* and *Ventling*, the court arrived at the same conclusion. In that case, the "trial court determined that evidence (necessary to determine when certain billings were received) was not in the record and that the record had to be reopened…[B]ecause the remand necessitated reopening the record for additional evidence, the Finance Code and our rules of procedure require that postjudgment interest accrue from the final judgment date rather than the original, erroneous judgment."

IV. SUPERSEDEAS BONDS

The requirements and amounts of supersedeas bonds are beyond the scope of this paper, which is confined to the way in which such bonds operate after an appellate rendition or remand. If the appellate court reverses the lower court judgment and renders a take-nothing judgment in favor of the defendant appellant, the appellate judgment will usually release the sureties on any supersedeas bond. On the other hand, if the appellate court affirms a superseded lower court judgment, it *must* include in its judgment a grant to the appellee of recovery on the bond. T.R.A.P. 43.5, which applies in courts of appeals, states:

> When a court of appeals affirms the trial court judgment, or modifies that judgment and renders judgment against the appellant, the court of appeals *mus*t render judgment against the sureties on the appellant's supersedeas bond, if any, for the performance of the judgment and for any costs taxed against the appellant. (emphasis added).

Similarly, T.R.A.P. 60.5 provides:

> When affirming, modifying, or rendering a judgment against the party who was the appellant in the court of appeals, the Supreme Court *must* render judgment against the sureties on that party's supersedeas bond, if any, for the performance of the judgment. If the Supreme Court taxes costs against the party who was the appellant in the court of appeals, the Court must render judgment for those costs against the sureties on that party's supersedeas bond, if any. (emphasis added).

If either appellate court fails to do so, a motion may be made at any time requesting that its judgment be modified to provide such relief. The mandatory nature of the appellate court's duty makes this a mere ministerial act that can occur even after the appellate court's plenary power has expired. *Whitmire v. Greenridge Place Apts*., 333 S.W.3d 255, 261 (Tex.App.—Houston [1st Dist.] 2010, pet. dism'd) Avoiding this inconvenience may explain why the Supreme Court has recently asked lower court clerks to include any supersedeas bonds in the clerk's record on appeal, whether or not they are designated for inclusion by any party. Rather than seeking relief in the appellate court, a successful appellee may alternatively file suit on the bond in the trial court. *Schnitzius v. Koons*, 813 S.W.2d 213 (Tex.App.—Dallas 1991, orig. proceeding).

When a judgment is affirmed in part and reversed and remanded in part, the bond is not subject to being released and is still valid. See, e.g., *Resolution Trust Corp. v. Chair King, Inc*., 827 S.W.2d 546, 548 (Tex.App.—Houston [14th Dist.] 1992, no writ). This is because a proper supersedeas bond must assure the judgment creditor of payment or performance of "an adverse judgment final on appeal," which will not have occurred until the judgment on remand becomes final after any further appeals. T.R.A.P. 24.1(d). See also *O'Connor's Texas Appeals*, Ch. 4-B, Section 10.5.

V. CONCLUSION

While these subjects may sometimes seem arcane or technical, these aspects of appellate procedure can be important in a appellate lawyer's developing an appropriate strategy.

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TEXAS SUPREME COURT LESSONS IN CONTRACT CONSTRUCTION

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BIOGRAPHY

Formerly a Justice on the Texas Court of Appeals, David Keltner has been lead counsel in over 300 appellate decisions. His legal writings have been cited, with approval, by Texas courts.

Mr. Keltner is recognized for his appellate accomplishments. He was honored by *Chambers USA* as a Star Individual in 2021 and 2022, and has received Band 1 ranking every year since 2007. Texas Lawyer recognized him as the Go-To Appellate Lawyer in Texas, and he has been chosen as one of the Top 10 Lawyers in Texas, by Thompson Reuters, for the last sixteen years, ranking No. 1 in 2009-2011 and 2021-2022. The Texas Bar Foundation honored him with the inaugural Gregory S. Coleman Outstanding Appellate Lawyer Award. In addition, he was named Best Lawyers® Appellate Lawyer of the Year for Dallas/Fort Worth in 2016 and 2018.

In 2018, Mr. Keltner received Tarrant County Bar Association's prestigious Blackstone Award, presented to a lawyer who has demonstrated excellence and courage in the practice of law. He is also the recipient of the Chief Justice Jack Pope Professionalism Award from the Texas Center for Legal Ethics and the Jim D. Bowmer Professionalism Award from the College of the State Bar of Texas. In addition, he is recognized on the national stage as a Fellow of the American Academy of Appellate Lawyers, one of only 320 in the country.

Mr. Keltner served as Chair of the Board of Directors of the State Bar of Texas. He was also Chair of the Litigation Section and Chair of the College of the State Bar of Texas. Additionally, he served as Chair of the Fellows of the Texas Bar Foundation.

The Texas Supreme Court appointed Mr. Keltner to a number of its committees. He served on the Texas Supreme Court Advisory Committee from 1993-2000 and was appointed Chair of the Texas Supreme Court Discovery Task Force. He was also a member of the Texas Supreme Court Advisory Committee for Professionalism that drafted the Texas Lawyer's Creed.

EXPERIENCE AND HIGHLIGHTS

- *In re Breviloba, LLC*, No. 21-0541, 2022 WL 2282598 (Tex. June 24, 2022) (orig. proceeding) (per curiam)
- *RKI Expl. & Prod., LLC v. Ameriflow Energy Servs., LLC*, No. 02-20-00384-CV, 2022 WL 2252895 (Tex. App.—Fort Worth June 23, 2022, no pet.) (mem. op.)
- *Hlavinka v. HSC Pipeline Partnership, LLC*, No. 20-0567, 2022 WL 1696443 (Tex. May 27, 2022)
- *Henry v. Smith*, 637 S.W.3d 226 (Tex. App.—Fort Worth 2021, pet. denied)
- *Tema Oil & Gas Co. v. ETC Field Servs., LLC*, No. 07-20-00029-CV, 2021 WL 2944598 (Tex. App.—Amarillo July 13,

2021, pet. denied)

- *In re American Airlines, Inc*., 634 S.W.3d 38 (Tex. 2021)
- *Ortiz v. American Airlines, Inc*., 5 F.4th 622 (5th Cir. 2021)
- *City of San Antonio, Texas v. Hotels.com, L.P*., 141 S. Ct. 1628 (2021)
- *HouseCanary, Inc. v. Title Source, Inc*., 622 S.W.3d 254 (Tex. 2021)
- *Concho Res., Inc. v. Ellison*, 627 S.W.3d 226 (Tex. 2021)
- *Sundown Energy LP v. HJSA No. 3, Ltd. P'ship*, 622 S.W.3d 884 (Tex. 2021)
- *Richter v. Carnival Corp*., 837 Fed. Appx. 260 (5th Cir. 2020)
- *Energy Transfer Partners, L.P. v. Enter. Prods. Partners, L.P*., 593 S.W.3d 732 (Tex. 2020
- *Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd*., 574 S.W.3d 882 (Tex. 2019)
- *Friedman & Feiger, LLP v. Massey,* Nos. 02-18-00401-CV, 02-18-00402-CV, 2019 WL 3269325 (Tex. App.—Fort Worth July 18, 2019, pet. denied) (mem. op.)
- *Estate of Klutts*, No. 02-18-00356-CV, 2019 WL 6904550 (Tex. App.—Fort Worth Dec. 19, 2019, no pet.) (mem. op.)
- *IAS Services Grp., L.L.C. v. Jim Buckley & Assocs*., 900 F.3d 640 (5th Cir. 2018)
- *In re Happy State Bank*, No. 02-17-00453-CV, 2018 WL 1918217 (Tex. App.—Fort Worth April 23, 2018, orig. proceeding) (mem. op.)
- *Reeves Cnty. Appraisal Dist. v. MidCon Compression, L.L.C.,* 563 S.W.3d 207 (Tex. 2018)
- *BNSF Ry. Co. v. Baca*, No. 02-17-00168-CV, 2018 WL 1528573 (Tex. App.—Fort Worth March 29, 2018, no pet.)(mem. op.)
- *Rainier Southlake DST v. Woodbury Strategic Partners Fund, LP*, No. 02-16-00263-CV, 2017 WL 6047725 (Tex. App.—Fort Worth Dec. 7, 2017, no pet.) (mem. op.)
- *City of San Antonio, Texas v. Hotels.com, L.P*., 876 F.3d 717 (5th Cir. 2017)
- *Permian Power Tong, Inc. v. Diamondback E&P, LLC,* No. 12-16-00092-CV, 2017 WL 2824311 (Tex. App.—Tyler June 30, 2017, pet. denied)
- *In re Paul*, No. 10-16-00359-CV, 2017 WL 1749805 (Tex. App.—Waco May 3, 2017, orig. proceeding)
- *BNSF Ry Co. v. Epple,* No. 07-15-00355-CV, 2016 WL 7010581 (Tex. App.—Amarillo Nov. 30, 2016, pet. denied)
- *Savering v. City of Mansfield*, 505 S. W.3d 33 (Tex. App.—Fort Worth 2016, pet. denied)
- *In re Paul*, No. 10-16-00004-CV, 2016 WL 2609599 (Tex. App.—Waco May 5, 2016, orig. proceeding)
- *In re Nat'l Lloyds Ins. Co*., No. 13-15-00521-CV, 2016 WL 552112 (Tex. App.—Corpus Christi Feb. 10, 2016, orig. proceeding [mand. denied])
- *BNSF Ry. Co v. Phillips*, 485 S.W.3d 908 (Tex. 2015)
- *Conglomerate Gas II, L.P. v Gibb*, No. 02-14-00119-CV, 2015 WL 6081919 (Tex. App.—Fort Worth Oct. 15, 2015, pet. denied
- *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, 776 F.3d 321 (5th Cir. 2015)
- *In re Hayward*, 480 S.W.3d 48 (Tex. App.—Fort Worth 2015, orig. proceeding>
- *Sinclair v. Estate of Ramirez*, No. 10-14-00157-CV, 2015 WL 3534156 (Tex. App.—Waco June 4, 2015, no pet.) (mem. op.)
- *Williams-White v. White*, No. 05-13-00414-CV, 2015 WL 1182879 (Tex. App.—Dallas March 16, 2015, no pet
- *Burnett Ranches, Ltd. v. U.S*., 753 F.3d 143 (5th Cir. 2014)
- *In re Siroosian*, 449 S.W.3d 920 (Tex. App.—Fort Worth 2015, orig. proceeding
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- Top 100 Dallas/Fort Worth Super Lawyers, Thomson Reuters, 2003-2022
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- Top Attorney, *Fort Worth Magazine*
    - Appellate, 2006-2022
- Top Attorney, *360 West* magazine
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- Best Lawyers®, Appellate Practice Lawyer of the Year, Dallas/Fort Worth, 2016, 2018
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- Best Lawyers®, Appellate Practice Lawyer of the Year, Dallas, 2011
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- Speaker, “Tell the Story: Persuasive Writing and Speaking,” UT Law CLE Conference on Criminal Appeals, 2021
- Author, "Fiduciary Duties: Navigating Contract and Common-Law Limits,” Corporate Counsel Review, Volume XL, 2021
- Speaker, “Account-Ability in Court: From Slavery to Scandal,” Texas State Historical Association Annual Meeting, 2021
- Speaker, "The Presumed Grant Theory and its Application to Texas Title Disputes," Texas Bar CLE Oil and Gas Disputes 2020 Houston, Texas, 2020
- Speaker, "The Court's Charge," UT Law CLE 29th Annual Conference on State and Federal Appeals Austin, 2019
- Speaker, "The Court's Charge," Corpus Christi Bar Association Advanced Civil Trial Law Seminar Corpus Christi, 2019
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- Speaker, "Bluff the Listener," UT Law CLE 28th Annual Conference on State and Federal Appeals Austin, 2018
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- Speaker, “Partnership Fiduciary Claims & Defenses,” Texas Bar CLE 12th Annual Fiduciary Litigation San Antonio, 2017
- Speaker, “Jury Charge Update,” Texas Bar CLE 31st Annual Advanced Civil Appellate Practice Course Austin, 2017
- Speaker, “Practical Admissibility Issues,” Texas Bar CLE Business Disputes Austin, 2017
- Speaker, "The Common Law is Not Dead," UT Law CLE 27th Annual Conference on State and Federal Appeals, 2017
- Speaker, "Winning Strategies for Petitioners and Respondents in the Texas Supreme Court," HBA Appellate Practice Section Luncheon, 2017
- Speaker, "Jury Charge Update," Corpus Christi Bar Association Advanced Civil Trial Law Seminar, 2017
- Speaker, "Findings of Fact & Conclusions of Law," Office of the Attorney General Course (2017)
- Speaker, "Jury Charges," Texas Bar CLE Advanced Civil Appellate Practice Course, 2016
- Author, "The Charge Conference From The Defendant's Perspective," State Bar Litigation Section Report, Volume 76, Fall, 2016
- Speaker, “Findings of Facts and Conclusions of Law,” Texas Bar CLE Advanced Civil Trial Course, 2016
- Speaker, “Findings of Facts and Conclusions of Law Update,” UT Law CLE 26th Annual Conference on State and Federal Appeals, 2016
- Speaker, "Jury Charge Update," Corpus Christi Bar Association Advanced Civil Trial Law Seminar, 2016

- Speaker, "Tactics for Appellees and Respondents," Texas Bar CLE Advanced Civil Appellate Practice Course, 2015
- Speaker, "Back Story of Sweatt v. Painter," Texas Supreme Court Practices Course, 2015
- Author, Texas Discovery, Thomson West, 2015
- Speaker, "Jury Charge Update," UT Law Annual Conference on State and Federal Appeals, 2015
- Speaker, "Jury Charges," Texas Bar CLE Advanced Civil Appellate Practice Course, 2014
- Speaker, "Sweatt v. Painter," Reenactment of Oral Argument, State Bar of Texas Annual Meeting, 2014
- Speaker, "Oral Argument: Organization and Preparation," UT Law CLE Conference on State and Federal Appeals, 2014
- Speaker, "Appellate Mediations," Houston Bar Association Annual Conference on ADR 2014
- Speaker, "Getting the Charge Right & Charge Error Preservation," Corpus Christi Bar Association Advanced Civil Trial Law Seminar, 2014
- Speaker, "Getting the Charge Right & Charge Error Preservation," UT Law CLE Conference on State and Federal Appeals, 2013;
- Speaker, "Getting the Charge Right & Charge Error Preservation," Texas Bar CLE 36th Advanced Civil Trial Course, 2013
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- Speaker, "Getting the Charge Right & Charge Error Preservation," 37th Annual Page Keeton Civil Litigation Conference of UT Austin, 2013
- Speaker, "Findings of Fact and Conclusions of Law," Houston Bar Association, 2013
- Speaker, "Respondent's Best Strategies in the Supreme Court," Texas Bar CLE Practice Before the Texas Supreme Court, 2013
- Speaker, "Defenses to Damages: Prerequisites to Damages," Texas Bar CLE 5th Annual Damages in Civil Litigation Course, 2013
- Speaker, "Getting the Charge Right," State Bar of Texas Webinar, 2013
- Speaker, "Harmless Error—Really?," Texas Bar CLE Advanced Civil Appellate Practice Course, 2012
- Speaker, "Continuing Developments in Jury Selection," Texas Bar CLE 35th Annual Advanced Civil Trial Course, 2012
- Speaker, "Preservation of Error," State Bar College Summer School, 2012
- Speaker, "Voir Dire Update – When to Challenge for Cause and How to Preserve Error," UT Law CLE Conference on State and Federal Appeals, 2012
- Speaker, "Attorney Client Work Product," Advanced Evidence and Discovery Course, 2012
- Speaker, "Preservation of Error," Texas Bar CLE Advanced Personal Injury Trial Course, 2012
- Speaker, "Findings of Fact and Conclusions of Law," Texas Bar CLE Handling Your First, 2012
- Speaker, "Findings of Fact and Conclusions of Law Update," Tarrant County Bar Association Bench Bar Conference XVIII, 2011
- Speaker, "Trying Cases to the Trial Court: Findings of Fact & Conclusions of Law Update," State Bar College 13th Annual Summer School, 2011
- Speaker, "Challenges for Cause in the Jury Selection Process: When a Person Can/Can't be Rehabilitated Judicial Perspective," Texas Bar CLE 34th Annual Advanced Civil Trial Course, 2011
- Speaker, "Pre-Trial Strategies: Personal Injury," State Bar College Spring Training, 2011
- Speaker, "Findings of Fact and Conclusions of Law: Do They Really Matter?," Texas Bar CLE Handling Your First Civil Appeal, 2011
- Speaker, "Findings of Fact and Conclusions of Law: Do They Really Matter?," TCBA Appellate Section Disposition Without a Jury, 2011
- Speaker, "Bench Trials: Findings of Fact and Conclusions of Law," Texas Bar CLE Advanced Civil Appellate Practice Course, 2011
- Speaker, "How to Convince the Supreme Court to Overturn Adverse Precedent," Texas Bar CLE Practice Before the Texas Supreme Court, 2011
- Speaker, "Findings of Fact and Conclusions of Law: Do They Really Matter?" 24th Annual Advanced Civil Appellate Practice Course, 2010
- Speaker, "Preservation of Error," BNSF Conference, 2010
- Speaker, "Post-Judgment Collections and Enforcement of Final Judgments in Texas," State Bar College Summer School, 2010
- Author, "The Future of Law Practice," State Bar College Spring Training, 2010
- Author, "Protecting the Record for Appeal: A Reference Guide in Texas Civil Cases," 17 St. Mary's L.J. 273, 1986

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TEXAS SUPREME COURT LESSONS IN CONTRACT CONSTRUCTION

I. INTRODUCTION.

The last five years produced an unusual number of Texas Supreme Court contract interpretation cases.

Some carry forward the court's allegiance to enforcing contracts as written. Several interpret oil and gas conveyances which describe the quantum of the transfer using double fractions. Those cases have resulted in a new rebuttable presumption that is yet untested.

What follows is a brief discussion of the Texas Supreme Court's recent contract interpretation decisions and search for guiding principles.[1] For an in-depth historical discussion, we highly recommend Richard R. Orsinger's 2013 paper. *See* Richard R. Orsinger, *170 Years of Texas Contract Law*, *in* State Bar of Tex., The History of Texas Supreme Court Jurisprudence, at Ch. 9, p. 60 (2013), on which we heavily rely.

II. CONSTRUCTION ZONE: IS THE TEXAS SUPREME COURT RE-PAVING THE ROADS OF OIL & GAS CONTRACT INTERPRETATION?

In academic and political colloquy, scholars, judges, politicians, and lawyers advocate for different standards of document interpretation. The differing standards are on full display in constitutional interpretation discussions. But those same standards are also at the core of contract interpretation, and recent Texas decisions prove the point. *See Van Dyke v. Navigator Grp.*, 668 S.W.3d 353 (Tex. 2023).

Historically, the most basic dispute was whether jurists should employ a subjective or objective view. The ***subjective view*** seeks to determine the meaning of a contract based on ***what the parties intended, which may differ from what they said***. On the other hand, the ***objective view*** of contract interpretation ***disregards the unexpressed intent of the contracting parties and instead looks to the language of the contract*** to determine what was agreed upon.

Texas has clearly adopted the ***objective view***, as discussed further in Part A below. For example, the Texas Supreme Court has consistently held that the goal is to ascertain the parties intentions "as expressed in the writing itself." *Nettye Engler Energy LP v. Blue Stone Nat. Res. II, LLC*, 639 S.W.3d 682, 689 (Tex. 2022); *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011).

Of course, adopting an originalist view requires looking outside the contract. While the text of the document remains the guiding light, that light must be viewed through the lens of time, with courts looking into what contract terms and concepts meant at the time the documents were executed. *See Van Dyke*, 668 S.W.3d at 359; *Hysaw v. Dawkins*, 483 S.W.3d 1, 9 (Tex. 2016).

And the methods used to determine the meaning at a particular time have been largely ignored. To date, the Court seems to rely on treatises and prior opinions—some not contemporaneous with the document being construed.

A. The Texas Supreme Court's historical approach to contract interpretation.

1. Texas adheres to the objective view.

There can be no doubt that Texas jurisprudence largely follows the objective view in construing contracts. In 1856, for example, the court expressed its objective view of deed interpretation as follows: "All the various rules of construction which have, from time to time, been adopted and acted upon, are designed for the purpose of arriving at, and carrying out, the intention of the contracting parties. Where that is manifest, all else must yield to, and be governed by it." *Swisher v. Grumbles*, 18 Tex. 164 (Tex. 1856) (Wheeler, J.).

Under *Swisher* and other cases, one could argue that an objective view was one that simply aimed to determine the "parties' intent" solely from the words used. But Judge Learned Hand characterized the objective view another way:

> A ***contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties***. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort. ***Of course, if it appear by other words, or acts, of the parties, that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their unexpressed intent***.

[1] The authors are the disappointed litigants in the *Van Dyke v. Navigator Grp.* and the *Boozer v. Fischer* disputes. But happily, we were on the prevailing side of *Energy Transfer Partners v. Enterprise Products Partners*, *Pathfinder v. Great Western Drilling*, and *Sundown Energy v. HJSA* disputes. The point is not "win a few—lose a few," but to disclose our pent-up bias.

Hotchkiss v. Nat'l City Bank of New York, 200 F. 287, 293 (D.C.N.Y. 1911) (Hand, J.), *aff'd*, 201 F. 664 (2d Cir. 1912), *aff'd*, 231 U.S. 50 (1913) (emphasis added). So Judge Hand would have agreed with *Swisher*'s emphasis on the words actually chosen by the parties being the drivers of contract interpretation.

2. Context can force a look outside the contract.

Yet when contract terms suggest that the parties attributed a particular meaning to certain words, should courts look to surrounding circumstances to construe those words? Justice Oliver Wendell Homes Jr. explained why the objective view should encourage such a look:

> A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

Towne v. Eisner, 245 U.S. 418, 425 (1918).

As Corbin put it, "[w]ords, in any language have no meaning whatever apart from the persons by whom they are used and apart from the context and the circumstances of their use." Arthur L. Corbin, *Sixty-Eight Years at Law*, 13 Kan. L. Rev. 183, 192 (1964).

Even when construing an unambiguous contract, Texas courts early on embraced this need to look beyond a contract's four corners. In *Watrous' Heirs v. McKie*, 54 Tex. 65 (1880), for example, the court recognized that:

> ***Surrounding circumstances*** may be looked to in order to arrive at the ***true meaning and intention of the parties as expressed in the words used***…. The duty of the courts in such cases is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words express, but what is the meaning of the words they have used.

Id. at 71 (emphasis added).

In examining the contract's written words, and even in looking to surrounding circumstances, the focus of the Texas Supreme Court's objective view has never been to ascertain the true intent of the parties. This comports with Justice Hand's admonition that even the testimony from twenty (20) bishops swearing to what the parties actually intended would be irrelevant to proper contract interpretation. *See Hotchkiss*, 200 F. at 293.

But where do courts go to determine what the contractual language was understood to mean at the time of the contract's execution?

Certainly not to the parties unexpressed intent. And certainly not to what an interested party thought the parties meant. In that search, the Texas Supreme Court recently relied on Law Review articles and other recent opinions. But would contemporaneous court decisions and statutes be a better source?

B. When considering the use of one-eighth in a double fraction—the Court resorted to outside sources that were not always contemporaneous to the contract being construed.

This section presents some of the Texas Supreme Court's recent contract interpretations of oil and gas conveyances. We begin with the Court's 2016 opinion in *Hysaw v. Dawkins*, 483 S.W.3d 1 (Tex. 2016) and conclude with the Court's 2023 opinion in *Van Dyke v. Navigator Group*, 668 S.W.3d 353 (Tex. 2023).

1. *Hysaw v. Dawkins*, 483 S.W.3d 1 (Tex. 2016).

(a) The *Hysaw* will.

The question was whether Ms. Hysaw's 1947 Will devised to each of her children a 1/3 fraction of royalty (*i.e.*, a floating royalty) or a 1/24 fixed royalty.

The will specifically bequeathed each of the testator's three children (Inez, Dorothy, and Howard) separate surface tracts of various sizes. *Id*. However, it bequeathed the minerals differently:

- The will employed a ***double fraction*** to devise each of the three children with a non-participating royalty interest of "'***an undivided one-third (1/3) of an undivided one-eighth (1/8) of all oil, gas or other minerals***….'" *Id.*
- Later, the will stated that each child "***shall receive one-third of one-eighth royalty***." *Id.*
- And the will concluded with a residuary clause that each child "shall receive one-third of the remainder of the unsold royalty." *Id.*

Thus, as to the mineral interests, the will used a double fraction in two provisions, but a single fraction in the other provision.

Family ties frayed and a dispute arose between the successors of the three children, who urged two alternative will interpretations:

- (1) the successors of Dorothy and Howard argued that the will devised a floating 1/3rd royalty equally among the three children, and
- (2) the successors of Inez essentially argued that the minerals passing under the will were devised as a fixed 1/24th royalty to each child (being 1/3 times a fixed 1/8 royalty), with the fee owner of the surface being entitled to any excess royalty. *Id.* at 6.

In other words, under the former argument, the three children were treated equally across all three tracts of land for purposes of oil and gas proceeds, while in the latter argument, the owner of the tract of land on which production was obtained stood to benefit if he/she could negotiate more than a 1/8th lease royalty.

(b) The Court acknowledged double fractions using 1/8th created interpretation problems.

The Court introduced its analysis by recognizing that "[t]he proper construction of instruments containing double-fraction language is a dilemma of increasing concern in the oil and gas industry, as uncertainty abounds, disputes proliferate, and courts have seemingly varied in their approaches to this complicated issue." *Id*. at 4. Such dilemma existed because "double-fraction language frequently generates disagreement about whether the interest conveyed or reserved is actually a fixed (fractional) royalty or floating (fraction of) royalty, especially when other language in the instrument appears to be contradictory or inconsistent." *Id*. at 11. Despite recognizing such disagreement, the Court construed the will by harmonizing its express terms to conclude that the will devised an equal floating 1/3rd royalty to each child. *See id*. at 14-16.

(c) The Estate Misconception Doctrine and the Legacy of the 1/8th "may" explain the use of 1/8th in a double fraction.

The *Hysaw* Petitioners argued that the estate misconception theory and/or the legacy of the 1/8 royalty explained the testator's use of a one-eighth in a double fraction, and argued the Court should construe the 1/3rd of 1/8th double fraction as, simply, 1/3rd.

As *Hysaw* defined it, the estate misconception doctrine "refers to a once-common misunderstanding (perpetuated by antiquated judicial authority) that a landowner retained only 1/8th of the minerals in place after executing a mineral lease instead of a fee simple determinable with the possibility of reverter in the entirety." *Id.* at 10. Therefore, a lessor might believe that after a lease he/she only owed 1/8th of the minerals.

The Court explained the Legacy of the 1/8th royalty as a theory that leases would always grant a 1/8th royalty because at one time a 1/8th royalty was "so pervasive that, for decades, courts took judicial notice of it as the standard and customary royalty." *Id.* at 9. The initial and primary support of the Legacy of the 1/8th theory was the 1957 opinion in *Garrett v. Dils Co.*, 299 S.W.2d 904, 909 (Tex. 1957) ("The Court takes judicial knowledge of the facts that the usual royalty provided in mineral leases is one-eighth. The parties assumed that the royalty under future leases would be one-eighth, as it was under the lease in existence when the deed was executed."). In that 5-4 opinion, the court analyzed the quantum of interest conveyed through a future rights provision that applied if the then-existing oil and gas lease was canceled or forfeited. *Id*. at 906. The parties agreed that if such cancelation or forfeit occurred, the grantee shall own "an undivided one-eighth of the lease interest in all future rentals…, he owning one-eighth of all oil, gas and other minerals in and under set lands, together with one-eighth interests in all future rentals." *Id*. To support the conclusion that this provision revealed an intent to convey one-eighth of the royalty under future leases, the Court took judicial notice "of the fact that the usual royalty provided in mineral leases is one-eighth." *Id*. at 905.

Over time, the majority's assumption proved to be untrue. The *Garrett* dissent warned of the danger and correctly noted that "the extent of the royalty payable under the prospective lease is accordingly a matter to be determined by a contract to be made in the future …." *Id*. at 910.

(d) *Hysaw* did not blindly apply the Estate Misconception Doctrine or the Legacy of the 1/8th.

Hysaw declined to hold that these two extra-contractual theories always applied. Instead, the Court held that the holistic review of the lease would determine whether the use of 1/8th meant 8/8ths or simply 1/8th.

- "The estate-misconception theory and the historical use of 1/8 as the standard royalty ***may*** inform the meaning of fractions stated in multiples of 1/8, but these considerations are not alone dispositive." *See Hysaw*, 483 S.W.3d at 13 (emphasis added).
- "The ***possibility*** that the parties were operating under the assumption that future royalties would remain 1/8 ***will not alter clear and unambiguous language*** that can otherwise be harmonized." *Id.* at 10 (emphasis added).
- Such clear and unambiguous language must prevail because, as the Court recognized, the supposed beliefs underlying the two theories are "***not inexorably so***" for all parties. *Id.* at 11 (emphasis added).

The Court held that the instrument's express language prevails over a party's *possible* intent because the mere possibility that a party may have intended a particular meaning does not drive contract construction. *See Luckel*, 819 S.W.2d at 463 ("Even if the court could discern the actual intent, it is not the actual intent of the parties that governs ….").

As Justice Hand put it, a mere possibility about the contracting party's intent—even if presented in the form of sworn testimony from twenty (20) bishops—is irrelevant to a court's contract construction under the objective view. *See Hotchkiss*, 200 F. at 293.

(e) The Court applied a holistic test, which looked at all the bequests together rather than separately.

Hysaw "reaffirmed" the Court's "commitment to a holistic approach aimed at ascertaining intent from all words and all parts of the conveying instrument." *Hysaw*, 483 S.W.3d at 13.

- The Court "eschew[ed] reliance on mechanical or bright-line rules as a substitute for an intent-focused inquiry rooted in the instrument's words." *Id.*
- The Court held "but double fractions in a mineral conveyance ***may or may not*** be evidence intent to fix the interest …. All the other language in the document must be considered to deduce intent." *Id*. at 14 (emphasis added).

2. *U.S. Shale Energy II, LLC v. Laborde Props., L.P.*, 551 S.W.3d 148 (Tex. 2018).

Laborde is another multiple fraction case. The question was whether the royalty interest reserved to the grantor in a 1951 deed was fixed (set at a specific percentage of production) or floating (dependent on the royalty granted in the oil and gas lease). The specific provision reserved "…an undivided one-half (1/2) interest of royalty …, the same being equal to one-sixteenth (1/16) of the production." *Id*. at 151.

The court determined that the royalty was floating instead of fixed and resulted in a one-half royalty interest in subsequent leases. The Court rationalized that the phrase "the same being equal to one-sixteenth…" was merely "incidental" language that applied the one-half grant to the then-current lease with a 1/8th royalty. *Id*. at 153-54.

In making this holding, the Supreme Court adopted or reaffirmed several contract interpretation principles:

- Recently in *Hysaw v. Dawkins*, we reaffirmed "our commitment to a holistic approach aimed at ascertaining intent from all words and parts" of the deed.
- We consider the words used in light of the "facts and circumstances surrounding the [instrument's] execution." *Sun Oil Co. v. Madley*, 626 S.W.2nd 726, 731 (Tex. 1981).
- Criticizing the dissent, the majority acknowledged the pervasive use of one-eighth royalty: "but this construction ignores the fact that the parties reserved one-half of the royalty with no language indicating the parties intended to limit the rate to the one-eighth that was commonly used at the time." *Laborde*, 551 S.W.3d at 155.

In other words, the Court acknowledged the pervasive use of the 1/8th royalty, but declined to give it any controlling precedent. *Id*. at 155.

3. *Piranha Partners v. Neuhoff*, 596 S.W.3d 740 (Tex. 2020).

The Court's 2020 *Piranha Partners* opinion affirmed the Court's objective view of contract construction, and specifically identified certain judicially created rules of construction that must be "cast off" to properly honor the objective view.

The Court was called to construe a written assignment of an overriding royalty interest to determine whether it conveyed the assignor's interest in production from a single identified well, production from any well drilled on the identified land, or production under the entire lease. *See id*. at 742. The parties advanced differing constructions, and both sides argued that their proposed constructions were supported by several "rules" historically used in construing oil and gas contracts. *See id*. at 746-752. The Court addressed most of those rules, employed an objective view to construe the assignment, and ultimately held that the assignment conveyed all production of all wells. *See id.* at 755.

(a) The Court employed the objective view.

The Court first made clear that its analysis would be guided by the objective view. "As with any deed or contract, our task is to determine and enforce the parties 'intent as expressed within the four corners of the written agreement." *Id.* at 743. In construing an unambiguous instrument, the Court would "look not for the parties' actual intent but for their intent as expressed in the written document." *Id.* at 744. And if there were any conflicts in the written document, consistent with the objective view, the Court would resolve any conflicts by harmonizing the contract's provisions, "rather than by applying arbitrary or mechanical default rules." *Id.* (citing *Wenske v. Ealy*, 521 S.W.3d 791, 792, 796 (Tex. 2017)).

(b) Arbitrary or mechanical rules of interpretation were rejected.

The Court then opined why some of those rules have been cast off when construing contracts. "[W]e have long rejected reliance on 'arbitrary' rules when construing unambiguous contractual language." *Id.* at 746. "And more recently, particularly in our decisions addressing mineral-interest conveyances, we have 'incrementally cast off rigid, mechanical rules' and 'warned against quick resort to . . . default or arbitrary rules' in favor of determining intent by 'conducting a careful and detailed examination of a deed in its entirety, rather than applying some default rule that appears nowhere in the deed's text.'" *Id.* (quoting *Wenske*, 521

S.W.3d at 792). Under this framework, the Court "cast off" the following "arbitrary, mechanical, default rules:"

- Rule requiring a royalty interest to "be carved proportionately from the two mineral ownerships." *See Wenske v. Ealy*, 521 S.W.3d 791, 795 (Tex. 2017).
- "Mechanical approach requiring rote multiplication of double fractions whenever they exist." *See Hysaw*, 483 S.W.3d at 4.
- Rule that certain clauses—granting, warranty or habendum clauses—have absolute priority over other clauses, upholding the abolition of the "repayment to the grant rule." *See Luckel v. White*, 819 S.W.2d 459, 462-63 (Tex. 1991).
- Rule favoring construction of a deed to convey the greatest estate permissible under its language. *See Piranha Partners*, 596 S.W.3d at 747-48 (relying on plain language analysis instead).
- Rule resolving any doubt as to construction of the deed against the grantors. *See id*. at 749 (noting this rule does not apply to an unambiguous contract).

This rejection of arbitrary, mechanical, default rules comports with an objective view of contract construction, in which the court is to "disregard[] the actual intent of the contracting parties and instead look[] to the language of the contract to determine what was agreed upon." Richard R. Orsinger, *170 Years of Texas Contract Law*, *in* State Bar of Tex., The History of Texas Supreme Court Jurisprudence, at Ch. 9, p. 61 (2013).

On the other hand, the Court explained why some "contract construction principles" are proper under the objective view. The Court reinforced its continued reliance on the following "well-settled contract-construction principles:"

- Rule requiring construction of language according to its "plain, ordinary, and generally accepted meaning" unless the instrument directs otherwise. *See URI*, 543 S.W.3d at 764.
- Rule requiring construction of words in the context in which they are used. *See id*.
- Rule requiring that courts avoid any construction that renders a provision meaningless. *See Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983).
- Rule requiring that courts consider and construe all of a contract's provisions together "so that the effect or meaning of one part on any other part may be determined." *Citizens Nat'l Bank in Abilene v. Tex. & P. Ry. Co.*, 150 S.W.2d 1003, 1006 (Tex. 1941).
- Rule requiring courts to "examine the entire lease and attempt to harmonize all its parts, even if different parts appear contradictory or inconsistent." *Endeavor*, 554 S.W.3d at 595 (citing *Anadarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550, 554 (Tex. 2002)).
- Rule allowing evidence of surrounding circumstances, which may "aid the understanding of an unambiguous contract's language," "inform the meaning" of the language actually used, and "provide context that elucidates the meaning of the words employed." *Piranha Partners*, 596 S.W.3d at 749; *Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 483 (Tex. 2019).

4. *Sundown Energy LP v. HJSA No. 3, Ltd. P'ship*, 622 S.W.3d 884, 889 (Tex. 2021).
This case is discussed in section IV.

5. *Van Dyke v. Navigator Group*, 668 S.W.3d 353 (Tex. 2023).

(a) The 1924 Deed.

In *Van Dyke*, the Court construed a 1924 deed that had only one provision regarding the mineral estate:

It is understood and agreed that ***one-half of one-eighth*** of all minerals and mineral rights in said land are reserved in grantors … and are not conveyed herein.

Unlike the will in *Hysaw*, which had conflicting bequests to Ms. Hysaw's children—there were no conflicting provisions. Indeed, the deed contained no other mention of the mineral estate.

The question was whether the reservation was of 1/2 or 1/16th of the minerals and mineral rights.

(b) Both parties relied on the *Hysaw* decision.

Petitioners took the position that the Estate Misconception Doctrine and the Legacy of the 1/8th were surrounding circumstances that must be considered in interpreting the deed. They argued that the use of 1/8th in a double fraction was conclusive that 1/8th meant 8/8ths.

Respondents, on the other hand, pointed out that unlike *Hysaw*, there were no conflicting deed provisions that justified the use of extrinsic evidence or consideration of surrounding circumstances. Respondents also pointed out that the Estate Misconception Theory could not apply because the misconception depended on the existence of a mineral lease, and at the time of the deed the land had never been leased.

(c) The source of the confusion of the use of 1/8th in a double fraction was disputed.

For their part, Petitioners merely relied on *Hysaw* and claimed the Court had determined that the use of 1/8th really meant 8/8th. Respondents argued that contemporaneous court holdings and statutes demonstrated that in 1924, the use of a 1/8th royalty was not universal. Before the 1924 Deed, the Texas

Supreme Court had held that there was no legal basis for the Estate Misconception Doctrine because mineral leases left the lessor with a possibility of reverter in the entire mineral estate instead of reducing the mineral estate to a simple 1/8th. *See Stephens Cty. v. Mid-Kansas Oil &Gas Co.*, 254 S.W. 290, 295 (Tex. 1923).

Additionally, in a 1931 Act, the Texas Legislature mandated that, in any conveyance of public school lands, the state must include a "reservation of one-sixteenth (1/16) of all minerals as a free royalty to the state."

Equally as important, legal commentators at the time recognized that royalty interests were not invariably one-eighth. J.W. Walker, "*The Nature of Property Interest Created by an Oil & Gas Lease in Texas*, 7 Tex. Law Review 1, 7-8 1928. Mr. Walker, of Jackson & Walker fame, cited several Texas opinions for his conclusion, including *Texas Co. v. Davis*, 113 Tex. 321 (1923) (1/10th for oil & gas) and *Munsey v. Marnett*, 113 Tex. 212 (1923) (gas at 1/10th and oil at 1/8th).

Indeed, before 1924, even non-mineral real property interests were routinely transferred by the use of double fractions. *Manwaring v. Terry*, 39 Tex. 67 (1873) (1/4th of 1/2 interest equals 1/8th); *Bowden v. Patterson*, 51 Tex. Civ. App. 173 (San Antonio 1908, no writ) (1/2 of 1/8th equals 1/16th); *Cetti v. Wilson*, 168 S.W. 996 (Tex. App.—Fort Worth 1914, writ ref'd) (1/2 of 1/4 interpreted as "in other words, 1/8th interest.").

Finally, cases interpreting contemporaneous deeds routinely multiplied multiple fractions including 1/8th to determine the quantum of a mineral estate conveyed. *See Harris v. Ritter*, 279 S.W.2d 845, 847-48 (Tex. 1955) ("1/2 of 1/8th of the oil, gas and other mineral royalty" could have but one meaning and that is 1/16th of the royalty on all oil & gas and other minerals that may be produced from said land); *Richardson v. Hart*, 185 S.W.2d 563 (Tex. 1945) (a conveyance of "1/16th of 1/8th interest in and to all the oil, gas and other minerals" resulted in a 1/128th conveyance).

(d) The holding: a new presumption.

A unanimous court stood by the *Hysaw* view of history, and engrafted the Estate Misconception Theory and the Legacy of the 1/8th into its construction of the double fraction. As the Court put it, "[h]appily we need not speculate as to why (1/8th was used in double fractions). *Hysaw* recently undertook the core analysis on which we rely today." *Van Dyke*, 668 S.W.3d at 362. The Court held:

- "When courts confront a double fraction involving 1/8 in an instrument, the logic of our analysis in *Hysaw* requires that we ***begin*** with a presumption that the mere use of such a double fraction was purposeful and 1/8 reflects the entire mineral estate and not just 1/8 of it." *Id*. at 364 (emphasis in original).
- The presumption "must come from the document itself." *Id*.
- The presumption is "readily and genuinely rebuttable." *Id*.
- Rebuttal "may be sufficiently clear that, as a matter of law, before the double fraction can only be held to require simple multiplication." *Id*. at 365.
- Rebuttal may create an ambiguity. *Id*.
- It is true that *Hysaw* and other cases dealt with internal deed/lease conflicts. *Id*.
- "But we never suggested a default rule that requires multiplication unless it can be proven that doing so would contravene some other provision of the text." *Id*.

III. FREEDOM TO CONTRACT: *ENERGY TRANSFER PARTNERS, L.P. V. ENTERS. PRODS. PARTNERS, L.P.*, 593 S.W.3D 732, 738-740 (TEX. 2020).

Texas imbues parties with expansive contractual freedom, particularly when the parties involved are sophisticated, well-counseled, and not subject to domination by the other side. The *Enterprise* case demonstrated that doctrine in dramatic fashion. *ETP*, 593 S.W.3d at 738-740.

A. The facts.

Enterprise and ETP agreed to explore the viability of a project to run a pipeline from Cushing, Oklahoma to the Gulf Coast refineries. They called the project "Wrangler." To that point-in-time, virtually all pipelines ran from south to north. But with a glut of oil in the middle of the country, a north to south line would be profitable—especially after the ban on crude oil exports was lifted.

In three written agreements, the parties expressed their intent that neither party would be bound to proceed with construction or operation until each company's board of directors approved and formal contracts were executed. Most importantly, the parties agreed that neither would have any legal obligation to the other until those definitive agreements were entered into. Because ETP and Enterprise were competitors in the pipeline business, this made sense.

The parties undertook the planning of the pipeline and testing the market's appetite for the pipeline. In doing so, the parties conducted an "open season" in which oil and gas producers were asked to make commitments of the daily number of barrels they would ship on the proposed pipeline. The parties generally agreed that the pipeline would only be viable if it received commitments of 250,000 barrels per day.

For better or worse, two open seasons attracted no takers. A third open season produced a single producer,

Chesapeake, who committed to ship 100,000 barrels a day. This was far short of the minimum traffic necessary to support the pipeline.

The next business day, Enterprise ended its relationship with ETP by letter. Days later, Enterprise made public filings announcing that the project would not go forward.

Enterprise became convinced that the project was not successful because it ignored the glut of Canadian oil. So days before terminating the ETP deal, Enterprise contacted Enbridge, a Canadian pipeline company. After the ETP project was terminated—Enbridge expressed an interest in another pipeline venture.

Enbridge and Enterprise eventually did reach an agreement and entered into an LLC, with both parties owning a 50% interest. Shortly after Enbridge and Enterprise reached an agreement, another pipeline became available. It was Seaway Pipeline, which was jointly owned by Enterprise and Conoco Phillips. Conoco Phillips had previously declined to reverse the flow to accommodate Enterprise's plan. But Conoco Phillips decided to get out of the refining business in that area and offered its 50% share of the pipeline for sale. Enbridge purchased that share and joined with Enterprise to reverse the flow and construct the Seaway Pipeline.

B. The lawsuit.

ETP brought suit claiming that despite the disclaimers in the parties' three preliminary agreements, Enterprise and ETP had formed a partnership to 'market and pursue' a pipeline through their conduct, and claimed Enterprise breached its statutory duty of loyalty by leaving ETP out of the new project. *ETP*, 593 S.W.3d at 736. ETP based its argument on Texas Business Organizations Code section 152.052, which authorizes a partnership by conduct upon the consideration of seven nonexclusive factors.

The Code allows the creation of a partnership even if the participants did not intend to be partners. Enterprise defended on the basis that the three preliminary agreements had all disclaimed a partnership and any legal duties owing by either party.

As damages, ETP sought one-half of Enterprise's 50% interest in the Seaway pipeline. The jury largely agreed and returned damages in the amount of $319,375,000. The jury was also asked to determine the value of the benefit Enterprise gained as the result of its misconduct. The jury determined that amount was close to $600,000,000 and the trial court, based on that finding, entered an additional disgorgement award of $150,000,000.

C. The court of appeals reversed and the Texas Supreme Court upheld the reversal.

The Dallas Court of Appeals reversed, holding that the three preliminary agreements had clearly expressed the parties' intention not to create binding obligations to one another prior to the execution of the definitive agreements. *Enter. Products Partners, L.P. v. Energy Transfer Partners, L.P.*, 529 S.W.3d 531, 545 (Tex. App.—Dallas 2017) *aff'd*, 593 S.W.3d 732 (Tex. 2020).

On petition for review, the dispute attracted over 16 amici briefs. Numerous briefs were filed by academics, who generally took the position that Chapter 152 of the Texas Business Organizations Code created a "catch-all" for business organizations that did not fit any place else in the code. Those briefs argued that the parties did not have authority to opt out of Chapter 152. The industry amici took the opposite view that parties could explore projects while agreeing not to take on obligations to one another.

The Supreme Court granted petition for review, and after full briefing and oral argument, upheld the court of appeals, making the following important rulings:

- The court recognized that it had enforced the public policy of freedom of contract in "virtually every court term." *Id*. at 738.
    - "Perhaps no principle of law is as deeply engrained in Texas jurisprudence as freedom of contract." *Id*. at 740.
- "We hold that the parties can contract for conditions precedent to preclude the unintentional formation of a partnership under Chapter 152, and that, as a matter of law, they did so here." *Id*.

IV. DEFINITIONS ARE ENFORCED AS WRITTEN.

A. Use of definitions by contract drafters is increasing.

Over the years, parties have learned that using definitions often provides precise meaning. As a result, commentators encourage the use of definitions. Kenneth A. Adams, *A Manual of Style for Contract Drafting* (ABA 5th ed. 2023).

No less an authority than the late Justice Scalia, when reflecting on definitions, noted, "it is very rare that a defined meaning can be replaced with another permissible meaning of the word on the basis of other textual indications; ***the definition is virtually conclusive***." Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 28 (2012) (emphasis added).

B. The Texas Supreme Court requires that contractually defined words be given their defined meaning.

1. *Sundown Energy LP v. HJSA No. 3, Ltd. P'ship*, 622 S.W.3d 884 (Tex. 2021) (per curiam).

Pardon the pun, but *Sundown* is currently the definitive case on use of definitions. There, the parties agreed that the phrase "Drilling Operations" would be given the defined meaning "*[w]henever used in this lease*." *Id*. at 886. The defined term included activities other than "spudding in" new wells and included "reworking" and "repairing" of existing wells.

A problem arose when the term "Drilling Operations" was used in a Continuous Drilling Operations provision, which provided that in the absence of certain continuous operations—portions of the lease would revert to the lessor. The Continuous Drilling Operations provision required that reassignment was required unless, within 120 days of completing one well, " Commencement of Drilling Operations on the next ensuing well" was undertaken.

HJSA argued the more specific requirement for Continuous Drilling Operations, which anticipated spudding new wells, controlled over the use of the defined term "Drilling Operations." The El Paso Court of Appeals agreed. But, the Texas Supreme Court reversed in a per curiam opinion, making these important rulings:

- "Words must be construed '*in the context in which they are used*,'" *Id*. at 888.
- "but courts '*cannot interpret a contract to ignore clearly defined terms*.'" *Id*.

The Court went on to hold that freedom of contract requires honoring the use of contractually defined terms. "The principle of freedom contract requires us to recognize that 'sophisticated parties have broad latitude in defining the terms of their business relationship' and courts are obliged to enforce the parties' bargain according to its terms. As we have said time and again, courts may not rewrite a contract under the guise of interpretation." *Id*. at 889.

2. *FPL Energy, LLC v. TXU Portfolio Mgmt. Co.*, 426 S.W.3d 59 (Tex. 2014).

The issue was whether contracts required TXU to provide adequate transmission capacity to FPL before the electricity reached a delivery point. The Court eventually determined the contracts imposed no such requirement. In doing so, the Court spoke to the roles of definition in contract interpretation, and made the following observations:

- "We cannot interpret a contract to ignore clearly defined terms." *Id*. at 64.
- The definition of "Net Energy" took precedent, and other parts of the contract did not alter that definition. *Id*.

3. *Frost Nat'l Bank v. L & F Distribs., Ltd.*, 165 S.W.3d 310 (Tex. 2005) (per curiam).

In this lease interpretation case, the bank financed and leased fourteen beer delivery trucks to a beer distributor. The lease gave the lessee the option to purchase the trucks at the ***expiration*** of the lease for 20% of the original purchased price.

The lessee transferred the lease to another distributor with the bank's approval. And the new distributor quickly attempted to ***terminate*** the lease and exercise the truck purchase option. The problem was that the option was exercised one year into the lease—thereby giving the lessee virtually new trucks at 20% of the actual purchase price.

The court of appeals held that the new lessee's exercise of the option was valid. The Texas Supreme Court reversed. While the case turned on the relative absurdity of the new distributor's position, the use of definitions played a part:

- The court of appeals' interpretation was incorrect because it required either substituting the definition of the term "Termination" for the term "Expiration," or altering the contractual definition of "Expiration." *Id*. at 313.
- The Court concluded that either substituting words or altering a definition is "[in]appropriate." *Id*.

V. RULE 11 AGREEMENTS AND STIPULATIONS.

A. *Pathfinder Oil & Gas, Inc. v. Great Western Drilling, Ltd.*, 574 S.W.3d 882 (Tex. 2019).

The parties entered into a written stipulation that was filed and approved by the trial court.

The suit centered on whether Great Western's letter offer was an enforceable contract once it was accepted by Pathfinder. Great Western took the position that although there was an initial acceptance of the letter agreement there had been no timely agreement to a Joint Operating Agreement ("JOA") mentioned by but attached to the offer letter. Pathfinder took the position that the JOA presented by Great Western departed from the language of the letter agreement and, therefore, was not a prerequisite to enforcement.

1. The stipulation.

The only issues submitted were:

(i) whether the letter agreement is an enforceable agreement;
(ii) whether Great Western **or** Pathfinder breached the letter agreement; and
(iii) Great Western's affirmative defenses, estopple, failure of consideration, statute of frauds, etc.

2. The parties also agreed to the remedies if Pathfinder was successful.
Specifically, the parties agreed:

(i) if the jury found the letter agreement is enforceable;
(ii) found that Great Western breached the letter agreement;
(iii) found against Great Western's defenses;
(iv) Pathfinder is entitled to a specific performance—requiring Great Western to convey an undivided 25% of the oil and gas leases and proceeds from operation; and
(v) in return for Pathfinder waiving its claim for money damages.

The jury returned a verdict for Pathfinder, finding that the agreement was enforceable, Great Western had breached the agreement, and deciding against Great Western on all of its affirmative defenses. The trial court entered a specific performance judgment for Pathfinder.

3. The court of appeal reverses.

At Great Western's urging, the court of appeals reversed and rendered, holding that Pathfinder had not sought a finding that Pathfinder was "ready, willing, and able" to fulfill its contract obligations—a finding generally required for specific performance. But Pathfinder pointed out that the stipulations did not require it to obtain that finding in order to justify a remedy of specific performance.

4. Texas Supreme Court holding.

- "Parties can … waive their right" to a finding on "an element of a claim." *Id.* at 887.
- Such a stipulation may be made in a Rule 11 Agreement or by written stipulation or made in open court. *Id*.
- "When parties stipulate that only certain questions will be tried, all others are thereby waived." *Id.*
- "Stipulations are binding on the parties, so the duty to enforce valid pretrial stipulations is purely ministerial." *Id.* at 887-88.

The Supreme Court held, "[b]y agreeing to limit the jury submissions to contract formation, breach, and specific affirmative defenses, Great Western waived the right to insist on any other fact findings that might otherwise have been required to entitle Pathfinder to specific performance." *Id.* at 893.

B. *Boozer v. Fischer*, No. 22-0050, 2023 WL 4278510 (Tex. June 30, *2023*).

At the time of this writing, a motion for rehearing is pending.

This case involved a settlement agreement dictated into the record as a Rule 11 Agreement. The dispute on appeal was whether the parties had created a valid escrow agreement when they directed Boozer's lawyer to act as an escrow agent for disputed funds placed in an escrow account controlled solely by the lawyer.

The underlying dispute grew out of a purchase and sales agreement wherein Boozer purchased Fischer's tax management business. The parties had agreed on a purchase price with additional compensation being paid for business that had been undertaken but not yet billed and collected. A dispute arose over the future payout obligation.

In open court, the parties dictated their settlement agreement into the record and agreed that the record would substitute as the actual settlement agreement.

As part of the settlement agreement, the parties agreed to appeal a disputed ruling. In the meantime, Boozer agreed the revenue attributed to the disputed issue would be collected and paid into a separate account that would be paid to the party who won the appeal.

Fischer's lawyer did not want Boozer or CTMI to have control of the funds. He insisted that an escrow account be created and held by either himself or Boozer's lawyer. Fischer's lawyer opted out of serving as the escrow agent because he did not want to be held responsible for the income taxes on the interest collected on the escrowed funds.

As a result, it was agreed that CTMI's lawyer, Holmes, would act as the escrow agent and create an account solely for those funds. Both parties agreed that CTMI would own the funds and pay any taxes, but not have possession or control. Instead, Holmes would be "on the hook" for the escrow funds.

Fischer was successful on the appeal. As a result, he was entitled to collect the funds out of escrow. Unbeknownst to any of the parties, however, Holmes had taken the escrowed funds and used them for his own account. Because Holmes controlled the account and received the bank statements, neither Boozer nor Fischer were aware of the theft.

The question presented was whether CTMI, who had already paid the disputed funds in to the account, or Fischer, who had insisted on Holmes as the escrow agent, bore the risk of loss.

1. The trial court.

The trial court considered and granted three motions for summary judgment over a period of time—holding (1) that there was a valid escrow agreement, (2) that CTMI had complied with the escrow agreement by paying all of the disputed funds into escrow, (3) that CTMI had discharged its obligations, and (4) the risk of loss fell on Fischer.

2. The court of appeals' opinion.

The Fort Worth Court of Appeals reversed and held that even though the parties used the term "escrow" and had agreed to the use of an "escrow account"—the fund created was not an escrow agreement. The court based its reasoning on a proposition that a party's lawyer cannot serve as an escrow agent for a dispute that involved his/her own client. The court's opinion relied on several court of appeals cases which suggested that an escrow agent must be a neutral third party. On the other hand, Boozer relied on the Restatement, the Texas Code of Professional Conduct, and out of state decisions—all of which held that a party's lawyer could serve as an escrow agent if both parties agreed.

3. The Supreme Court opinion.

The Supreme Court disapproved of every legal ruling made by the court of appeals, but nonetheless affirmed the judgment on a different theory. The Court made the following rulings:

- The Court defined the common-law elements of an escrow:
    - a deposit of property;
    - upon agreement by the parties;
    - with a third party who owes fiduciary obligations to both parties for purposes of the property held in escrow;
    - who will hold that property outside of the depositor's control; and
    - who will deliver that property to the party entitled to the funds upon the performance of a certain condition or the happening of a certain event. *Id*. at *6.
- The Rule 11 Agreement dictated into the record created a valid escrow.
    - The repeated use of the word "escrow" combined with the substantive characteristics of an escrow demonstrated that the agreement was an escrow arrangement. *Id*.
- A party's lawyer may serve as an escrow agent for both that party and an adverse party with the permission of both parties.
    - This is consistent with the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS section 44, cmt. h.
    - This is also consistent with the Texas Disciplinary Rules of Professional Conduct section 1.14(a) & cmt. 1, which anticipates an escrow arrangement. Tex. Disciplinary R. Prof'l Conduct 1.14(a) & cmt. 1.
- The fact that CTMI had ownership of the funds does not defeat an escrow, because escrow deals with control rather than ownership. *Id*. at *8-9.
- ***The important issue was risk of loss and the Court created a new presumption:***
    - ***Because the attorney representing CTMI's owners was the escrow holder and CTMI continued to own the funds—there is a presumption that CTMI bore the risk of loss.*** *Id*. at *13-14.
    - But the opinion recognizes that the parties can contract around this presumption by express agreement. *Id*.

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JUDGES AS HISTORIANS: *BRUEN*'S NEW RULES

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Texas Bar Foundation, Texas Bar College

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JUDGES AS HISTORIANS: *BRUEN*'S NEW RULES

By Chris Dove

In June 2022, *New York State Rifle & Pistol Association, Inc. v. Bruen*[1] made nationwide news, because it expanded the scope of the Second Amendment's protections for an individual's right to carry firearms, and seemed to provide ammunition[2] to anyone and everyone who wants to challenge gun laws. Since then, perceived blowback from *Bruen* has *also* made nationwide news.[3] In *hundreds* of cases adjudicated in the year since *Bruen* was released, litigants have challenged nearly every federal law restricting firearm possession, including those laws that were expressly identified as being presumptively lawful in *Bruen*'s predecessor, *District of Columbia v. Heller* (2008).[4] That means criminal defendants across the country have challenged laws prohibiting gun ownership by convicted felons or those subject to domestic violence restraining orders, laws requiring registration of firearms and the use of a serial number, and laws restricting the carrying of firearms in "sensitive places."[5] The Supreme Court has already granted certiorari in a notorious case that cannot help but provide further guidance (*see infra*), if only because additional data points will surely help the bench and bar understand how to apply *Bruen*.

Bruen guides all of this Second Amendment litigation, but it already has an outsized impact on *all* constitutional litigation. The majority opinion in *Bruen* (written by Justice Clarence Thomas) purports to create a new set of procedural rules for how litigants must argue history to the federal courts, and that methodology appears to apply to all sorts of historical argument about the meaning of constitutional texts. To be sure, the need for this methodology is most acute in Second Amendment litigation because of the test announced in *Bruen*. *Bruen* expressly rejects every sort of means-end testing for government regulation (even so-called "strict scrutiny") in Second Amendment cases, and instead declares that a restriction on a citizen's right to bear arms is only valid if the government can "affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[6] How can one know whether "historical tradition" allows a restriction? *Bruen* explains the methodology that courts must employ to weigh the evidence of historical practices.

But this paper and presentation *is not about gun rights*.

Okay, that's not true. It has to be about gun rights, to some extent, because there is simply no way to talk about *Bruen*'s methodology without talking about the history of firearms, firearm regulation, and constitutional understandings of firearm regulation. Some of *Bruen's* contours are obvious from the majority opinion, while other contours only become evident when one places *Bruen* in historical and jurisprudential context.

Instead, what I mean is that I don't intend to write yet another lengthy article about the merits of the individual-rights or collective-rights views of the Second Amendment, or to comment on the state of the current Supreme Court or American politics in general. I hope to set aside my own opinions of gun regulation, though they will no doubt creep in, because my research for this paper has led me to conclude more than ever that true neutrality in historical matters is a phantom.[7]

But I hope to move past those discussions of gun rights in particular, to discuss *Bruen* in its larger context of the challenges now facing litigants who must provide historical evidence of the "original" meaning of a constitutional text. I do not think that *Bruen*'s methodology is limited to guns or the Second Amendment. Why? Four reasons:

(1) The *Bruen* majority opinion expressly equates the Second Amendment with other constitutional rights, suggesting that its historical methodology will have implications for other parts of the Bill of Rights;
(2) As one example, since *Bruen* the Supreme Court recently created a similar "historical practice and understandings" test for Establishment Clause

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[1] 597 U.S. ___, 142 S. Ct. 2111 (2022).

[2] Sorry, I will try very hard to avoid gun puns, but I am sure that a few of them crept in.

[3] A Google news search in early August 2023 turned up hundreds of relevant results, featuring (among many others) Matt Valentine, *Clarence Thomas Created A Confusing New Rule That's Gutting Gun Laws*, POLITICO, July 28, 2023, *available at* https://www.politico.com/news/magazine/2023/07/28/bruen-supreme-court-rahimi-00108285; Scott Burris, *A Year On,* Bruen *Really Is As Bad As It Reads*, THE REGULATORY REVIEW, Aug. 2, 2023, available at https://www.theregreview.org/2023/08/02/burris-one-year-on-bruen-really-is-as-bad-as-it-reads/; and Robert Verbruggen, *A Year After* Bruen*,* NATIONAL REVIEW, July 13, 2023, available at https://www.nationalreview.com/magazine/2023/07/31/a-year-after-bruen/.

[4] 554 U.S. 570 (2008).

[5] *See id*. at 626-27. Some of these lawsuits are discussed in greater detail below.

[6] *Bruen*, 142 S. Ct. at 2127.

[7] *Cf.*, *e.g.*, PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION. Or consider the CALVIN & HOBBES strip where Calvin declares his intent to write a "revisionist autobiography." https://www.gocomics.com/calvinandhobbes/1993/07/19.

disputes,[8] and identified *Bruen* as an obvious methodology to apply in those cases;[9]

(3) *Bruen*'s methodology is already being used or expressly cited in other Supreme Court civil rights cases beyond the Second Amendment (discussed below); and

(4) I can discern no reason why *Bruen*'s methodology would be limited to the analysis of history only in the context of the Second Amendment, insofar as the methodology is really nothing more than a particular approach to originalism as applied to any text from 1791.[10]

Bruen's methodology, therefore, is a framework that *all* litigants must understand when they undertake to argue the meaning of a constitutional provision. Lawyers and judges need to understand how that methodology works—warts and all—to effectively present historical arguments where they are relevant to constitutional rights. This paper and presentation attempt to discern how litigants should use that framework.

This paper looks first to the text of *Bruen* itself (and its predecessor *Heller*), to see how the *Bruen* majority explains the methodology and how the dissent criticizes it. It next identifies some of the immediate consequences of the *Bruen* methodology—in particular, the way that it creates a bright-line procedural barrier to even *asserting* some of the substantive arguments that have been featured in Second Amendment advocacy, and that litigants (or their historian-experts) might be tempted to relitigate as a matter of historical truth. It then turns to two recent cases that made nationwide news through their struggles in applying *Bruen* to statutes regulating firearms, because those cases provide keen insight into how litigants have either applied the *Bruen* methodology successfully or failed to meet its standards. This paper then examines two recent Supreme Court cases that shine further light on how historical arguments might succeed or fail, and in particular highlights what this author believes to be an exemplary amicus brief from a historian that demonstrates the very best in *Bruen*-compliant advocacy.

Finally, after all of that analysis, this Court compiles the *Bruen* methodology into a bulleted list, and offers a series of practical suggestions for how advocates can use that methodology to their benefit. You could just jump to the end, but I don't recommend it. I suspect that my summary and recommendations will seem too bleak and fatalistic unless you have gone with me on a journey through *Bruen*'s text and its aftermath in the courts.

I. *BRUEN* CREATES A NEW HISTORICAL METHODOLOGY FOR CONSTITUTIONAL ARGUMENT.

These are the words of the Second Amendment, as they are written on the Joint Resolution of Congress adopting the Bill of Rights (on display in the National Archives Museum):

> A well regulated militia, being necessary to the security of a free State, the right of the People to keep and bear arms, shall not be infringed.[11]

Bruen construes the Second Amendment and uses historical evidence to interpret the meaning of each word. But to discuss *Bruen*, we must first discuss *District of Columbia v. Heller*,[12] because *Bruen* assumes an intimate familiarity with both the outcome of that case and the historical reasoning that supported *Heller*'s Second Amendment analysis.

A. Prologue: *Heller* held that the Second Amendment protects an individual's right to bear arms in self-defense.

Heller addressed a District of Columbia law that generally prohibited the possession of handguns by private citizens under nearly any circumstances.[13] Dick Heller was a government-employed security guard who lived in the District and wanted to keep a handgun at home for self-defense, but whose request to do so lawfully was rejected because of the statute.[14] Heller sued, and in a 5-4 decision written by Justice Scalia, the

[8] *Kennedy v. Bremerton School Dist.*, 597 U.S. ___, 142 S. Ct. 2407, 2428 (2022).

[9] In his *Kennedy* dissent, Justice Breyer predicted that this test will face the same difficulties as *Bruen*. *Id*. at 2450.

[10] As explained in greater detail below, *Bruen* creates a unique constitutional test but its framework is drawn more from the Court's commitment to a particular view of originalism and libertarianism than the specific issues arising from the interpretation of the Second Amendment. *But see infra* (discussing Judge Carlton Reeves's criticism of the Supreme Court's unwillingness to extend this libertarianism to other constitutional rights).

[11] https://www.archives.gov/founding-docs/bill-of-rights-transcript. The penmanship is excellent, making it the only aspect of the Second Amendment that is easily understood.

[12] 554 U.S. 570 (2008).

[13] *Id*. at 575. The law allowed the chief of police to issue one-year licenses to *carry* a handgun, but *Heller* notes that a separate law nevertheless prohibited the *possession* of all unregistered firearms, and then prohibited the registration of all handguns. *Id*.

[14] *Id*. at 575-76 & n.2. Heller was one of a group of plaintiffs carefully recruited for the purpose of challenging the law. *See* Adam Liptak, *Carefully Plotted Course Propels Gun Case To Top*, N.Y. TIMES, Dec. 3, 2007, available at https://www.nytimes.com/2007/12/03/us/03bar.html. Heller

Court held that the District's law violated the Second Amendment.[15]

Justice Scalia declared that the purpose of his opinion would be to divine the original understanding of the Second Amendment, which he explained meant that the Court would interpret the "voters'" understanding of the words, which includes any "idiomatic" meanings but not any "secret or technical" readings.[16] He began by drawing the reader's attention to the Second Amendment prefatory clause "A well regulated militia, being necessary to the security of a free State…," a drafting quirk that is unique in the Constitution but not completely unknown in state constitutions of the time.[17] Justice Scalia announced that he would treat the prefatory clause as though it were parol evidence—that is, he would not allow the prefatory clause to change, modify, expand, or contract the meaning of the operative clause that followed, though if an isolated analysis of the operative clause reveals an ambiguity, the prefatory clause might be relevant to resolve that ambiguity.[18] This is the very first step of *Heller*'s analysis, and to be perfectly candid this step is the whole ballgame. The prefatory clause's reference to a "well regulated militia" has historically been the reason why the Supreme Court and nearly all other courts reached a conclusion contrary to *Heller*. (For example, Justice Stevens's dissent in *Heller* interprets the entire Second Amendment as an organic whole, in contrast to Justice Scalia's approach of severing it into two sections and then reading each word separately.)

Justice Scalia then interprets the operative clause ("the right of the People to keep and bear arms, shall not be infringed") to protect an *individual*'s right to use a handgun for self-defense, without regard to whether that individual is serving in a militia.[19] The "right of the People" appears to refer to a right held by *all* the people, not just the militia, *Heller* holds.[20] To "keep and bear Arms" means weapons, and not merely those weapons used by the military.[21] Here, Justice Scalia specifically notes that "arms" means "all instruments that constitute bearable arms, even those that were not in existence at the time of the founding," in the same way that the First Amendment protects modern forms of communication and the Fourth Amendment applies to modern forms of search.[22] For this reason, the Second Amendment protects a citizen's right to bear modern firearms unknown at the time of the Founding.[23]

Justice Scalia then rejects the argument that to "bear arms" was understood to refer only to service in the military, arguing that this more-limited meaning was reserved for the phrase "to bear arms *against*."[24] And Justice Scalia rejects evidence drawn from the words of a conscientious objector provision that was proposed but rejected, admonishing that "[i]t is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process."[25] Justice Scalia then finds support for this overall reading of the operative clause in the practices of English common law, which resulted in a Parliamentary statute that forbade the King to ever disarm Protestants.[26] Likewise, Justice Scalia notes that Blackstone had endorsed "the right of having and using arms for self-preservation and defense."[27]

Justice Scalia then returns to the prefatory clause, and finds that it does not contradict his individual-rights reading of the operative clause.[28] He considers the militia to be more or less equivalent to "the People" because it simply meant "all able-bodied men."[29] This harmonizes with an individual-rights reading because, Justice Scalia argues, the primary concern of the Second Amendment was preventing the tyranny that would

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was the only one of these plaintiffs who passed the "standing" gauntlet, because he alone had gone through the futile process of trying to register a handgun that he had purchased outside the District, instead of trying to purchase a handgun in the District and being turned away. *Id*.

[15] *Id*. at 573, 636.

[16] *Id*. at 576-77.

[17] *Id*. at 577.

[18] *Id*. at 577-78 & n.4. Justice Scalia also adopts the principle that the prologue cannot be used to create ambiguity where none otherwise exists. *Id*. We all know that Texas adopted this same principle of textual interpretation, at least as it relates to the role of parol evidence in a contract, but it is hardly universal or self-evident that it should apply in this context. For example, California law allows courts to consider parol evidence to determine whether an ambiguity exists in the first place, because understanding *all* the surrounding circumstances is the only way a party could ever prove the existence of the "idiomatic" meaning that Justice Scalia allows. *See Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.* (1968) 69 Cal. 2d 33, 39. More importantly, it is far from certain that the interpretation of the Second Amendment should utterly depend on a canon of construction, especially when its prefatory clause is unique to the U.S. Constitution.

[19] *Id*. at 579-95.

[20] *Id*.

[21] *Id*. at 581-82.

[22] *Id*. at 582.

[23] *Id*.

[24] *Id*. at 584-87.

[25] *Id*. at 590 (emphasis in original). I highlight Justice Scalia's rule here, because we will see that Justice Thomas conspicuously violates that rule, both in *Bruen* and subsequent opinions—so perhaps Justice Scalia's admonition is not a bright-line rule after all. Advocates facing this rhetorical maneuver when arguing the *Bruen* framework can therefore cite case law on either side of the debate.

[26] *Id*. at 593.

[27] *Id*. at 594.

[28] *Id*. at 595-98.

[29] *Id*. at 596.

result from disarming the people.[30] That is to say, the majority rejected Justice Stevens's interpretation of those same sources as presenting a concern that the federal government might disarm *the state militias* in order to replace them with a standing federal army.[31]

Justice Scalia also examined a number of historical sources, including analogues in state constitutions,[32] and post-ratification enactments that might illustrate "the public understanding of a legal text in the period after its enactment or ratification."[33] He also addressed materials contemporary with the Civil War and its aftermath, *not in any way* because he concedes the importance of the Fourteenth Amendment as a "Second Founding"—he specifically points out that materials from this time period are *less* reliable because they were written 75 years after the Second Amendment was ratified—but because "those born and educated in the early 19th century faced a widespread effort to limit arms ownership by a large number of citizens; their understanding of the origins and continuing significance of the Amendment is instructive."[34]

Finally, Justice Scalia looked to Supreme Court precedent to see if *stare decisis* foreclosed his individual-rights reading of the Second Amendment, and concluded that it did not.[35] He points out that none of the state or U.S. Supreme Court cases directly and bluntly says that the Second Amendment only applies to those serving in a state militia.[36] To that end, he spends the most time addressing *United States v. Miller*,[37] a cryptic 1939 case that courts understood for several decades as limiting the Second Amendment's protections to militia service.[38] *Miller* held that a sawed-off shotgun was not eligible for Second Amendment protection because such weapons had no conceivable connection to service in a militia.[39] But *Miller* could not have held that Second Amendment protections only applied to militias, Justice Scalia reasoned, because *Miller* did not say anything about whether the *defendants themselves* served in a militia.[40] Justice Scalia also noted that while *Miller* may have discussed some of the same historical sources he addressed in his opinion, the government had only tersely briefed the issue for the Court.[41] Instead, *Miller* means that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[42]

Justice Scalia then took pains to identify those firearm restrictions that were presumptively *valid*, in light of the historical evidence.[43] Prohibitions on carrying concealed weapons were considered lawful in the 19th century, and moreover, "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[44] Additionally, historical evidence shows that the Second Amendment only applies to weapons "in common use at the time," and not "dangerous or unusual weapons."[45] This section was evidently meant to reassure those who would be alarmed (and probably Justice Kennedy as well), but one also cannot help noticing that these soothing words are dictum.

Moreover, in that same spirit of reassurance, Justice Scalia expressly rejected the argument that "the weapons most useful in military service—M-16 rifles and the like" must be protected by the Second Amendment.[46] He acknowledged the argument that such weapons must be protected because otherwise the people could not form a militia capable of opposing "modern day bombers and tanks."[47] "But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right."[48]

Finally applying these principles to the law at hand, the District of Columbia's handgun ban was unconstitutional because "[w]hatever the reason, handguns are the most popular weapon chosen by Americans for self-defense."[49] Justice Scalia then emphatically rejected Justice Breyer's dissenting argument that the Second Amendment should be subject to means-end testing that would consider the government's interest in the legislation.[50] "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon."[51]

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[30] *Id*. at 597-600, 603-05.
[31] *Id*.
[32] *Id*. at 601-03.
[33] *Id*. at 605-19.
[34] *Id*. at 614,
[35] *Id*. at 619-28.
[36] *Id*.
[37] 307 U.S. 174 (1939).
[38] 554 U.S. at 621-26.
[39] *Id*. at 622.
[40] *Id*.
[41] *Id*.
[42] *Id*. at 625.
[43] *Id*. at 626-27.
[44] *Id*. at 626-27.
[45] *Id*. at 627.
[46] *Id*.
[47] *Id*.
[48] *Id*. at 627-28.
[49] *Id*. at 629.
[50] *Id*. at 634-35.
[51] *Id*. at 634 (emphasis in original).

Justice Stevens wrote a lengthy and detailed dissent, in which he laid out the historical argument for why the Second Amendment protected the right to bear arms only in connection with service in a state militia.[52] His dissent is less relevant for our immediate purposes than the majority opinion. But in general, we can summarize his dissent this way: (1) *United States v. Miller* adopted the collective-rights interpretation of the Second Amendment after considering the same historical source material, and should not be disturbed; (2) the Second Amendment reflects the overarching design to give the federal government the power to regulate state militias (in the Militia Clauses) while denying the federal government the ability to completely disarm the militias in favor of a standing army (in the Second Amendment); (3) the Second Amendment should be read as a whole instead of reading it piecemeal; (4) historical sources fully support the collective-rights model, and particularly in portions of the text that Justice Scalia had not favored in his historical analysis; and (5) Justice Scalia's opinion was so broad that it "may well be just the first of an unknown number of dominoes to be knocked off the table"[53] and thus lead to an unreasonable restriction on the government's ability to address crime related to firearms.

Justice Breyer also wrote a lengthy dissent, in which he argued that the protections of the Second Amendment were not absolute and should be subjected to means-end testing.[54] Justice Breyer also pointed to some of the practical difficulties that would arise from implementing Justice Scalia's opinion, such as the fact that if the Second Amendment protects handguns because they are "popular," then its scope depends on the whims of customer buying habits, which in turn incentivizes Congress to prohibit all new weapons before they become "common."[55] He thought it particularly unclear why anyone would think that Americans living two hundred years ago on a frontier would have thought about the right to bear arms in the same way as modern Americans living in a modern urban area afflicted by crime.[56] And he found no rhyme or reason in the list of presumptively lawful regulations that Justice Scalia offered in his reassuring dictum.[57]

B. *Bruen* creates a new historical framework, because history alone limits the application of the Second Amendment's protection of an individual's right to possess and carry weapons.

An explosion of firearms litigation followed *Heller*, which ultimately led to the *Bruen* decision in 2022. The cast of characters on the Supreme Court had changed,[58] but the outcome was the same as in *Heller* fourteen years earlier.

Bruen arises from a challenge to so-called "may issue" laws. In 43 states, the state "shall issue" a license to carry a firearm to anyone who meets objective criteria that are not onerous (e.g. the applicant undergoes a background check to determine he is not a felon, and must complete a firearm safety class). "But in six States, including New York, the government further conditions issuance of a license to carry on a citizen's showing of some additional special need," which is to say that their regulations say that the government "may issue" a license under discretionary terms.[59] New York case law explains that a firearm license will only be made available if the applicant provides individualized evidence "of particular threats, attacks, or other extraordinary danger to personal safety," meaning that a general concern over a high crime rate would not satisfy the standard.[60] The decision to deny an application will only be reviewed under the "arbitrary and capricious" standard of review."[61] "May issue" laws might seem bizarre to modern Texans, but they were the most common form of firearm regulation throughout the 20th century.

The lawsuit was filed by a Second Amendment advocacy group, as well as two of its members who resided in upstate New York.[62] Those members were allowed to carry long guns for the purposes of hunting, but the state of New York denied their application to carry concealed handguns because they had no individualized reason to fear a particular threat.[63]

1. Justice Thomas's majority opinion explains how *Heller*'s historical analysis must be conducted.

The majority opinion was written by Justice Clarence Thomas. His opinion assumes *Heller* as a predicate—adopting it by reference, essentially—and

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[52] *Id*. at 636-80 (Stevens, J., dissenting).
[53] *Id*.
[54] *Id*. at 681-723 (Breyer, J., dissenting).
[55] *Id*. at 720-21.
[56] *Id*. at 715-17.
[57] *Id*. at 721.
[58] Subject to Judge Reeves's wise admonition not to be presumptuous about how judges will vote based on their politics (*see infra*), one can nevertheless observe with the benefit of hindsight that the overall tone of the Court on Second Amendment issues had not changed much by 2022. The swing vote for *Heller* (Kennedy) was replaced by a vote for *Bruen* (Kavanaugh), and one of the dissenting justices in *Heller* (Ginsburg) was replaced by a vote for *Bruen* (Barrett).
[59] *Bruen*, 142 S. Ct. at 2122. The other states were California, Hawaii, Maryland, Massachusetts, and New Jersey, joined by the District of Columbia. *Id*. at 2124.
[60] *Id*. at 2123 (quoting *In re Martinek*, 743 N.Y.S.2d 80, 81 (2002)).
[61] *Id*.
[62] *Id*. at 2125.
[63] *Id*.

then carries it forward by explaining how *Heller* should be applied in future disputes about historical tradition.

a. Justice Thomas rejects all forms of means-end testing, including the "strict scrutiny" standard, which leaves only a "historical analysis" test.

Justice Thomas begins by explaining that after *Heller*, the courts of appeal developed a two-step test for Second Amendment cases.[64] In the first step, the government could show that the regulated conduct fell outside the scope of the right to bear arms as it was originally understood, and if it did, then the regulation was lawful and the analysis ended.[65] In the second step, even if the right came within a historical understanding of the scope of the Second Amendment's protections, the government could still sustain its regulation by demonstrating that it satisfied the "strict scrutiny" test and was "narrowly tailored to achieve a compelling governmental interest."[66] *Bruen* holds that this is "one step too many," and wholly rejects any sort of means-end testing.[67] "Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[68]

The next section of *Bruen* adopts all of Justice Scalia's historical analysis from *Heller*, summarizing that analysis and building to the conclusion that "*Heller*'s methodology centered on constitutional text and history."[69] *Heller* had specifically rejected means-end testing, Justice Thomas reminds the reader, and it was inappropriate for the courts of appeals to revive it under a different label.[70]

Bruen also reminds the reader that this focus on history is not out of the ordinary for constitutional disputes. When the government restricts speech, it "generally must point to *historical* evidence about the scope of the First Amendment's protections."[71] The Sixth Amendment's Confrontation Clause "require[s] courts to consult history to determine the scope of that right."[72] And to determine the application of the Establishment Clause, courts "look to history for guidance."[73]

Justice Thomas concedes that "historical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it."[74] But analyzing history is "more legitimate, and more administrable" than making "'empirical judgments' about 'the costs and benefits of firearm restrictions.'"[75] In a footnote, Justice Thomas emphatically rejects Justice Breyer's dissenting concern that judges are ill-equipped to "resolve difficult historical questions."[76] The court's determination is ultimately a *legal* decision, not an academic exercise, and "[c]ourts are thus entitled to decide a case based on the historical record compiled by the parties."[77]

This is the first rule of *Bruen*'s methodology, stated here for the first time but developed later in greater detail and more blunt language. History is *evidence*, and courts will consider *only* the evidence (the history) submitted by the parties; courts will weigh that evidence according to legal standards, and are not compelled to do the work of historians.[78]

b. Justice Thomas then explains how to use analogy to prove "historical tradition."

In Section II-D of his majority opinion, Justice Thomas then explains the methodology that litigants should use to provide the historical evidence that the court will consider.[79]

Justice Thomas envisions that the easiest case would be a situation where "a general societal problem … has persisted since the 18th century," in which case the most compelling evidence would be the lack of a similar regulation at the Founding, the existence of regulations at the time of the Founding that used different means, or the Founders' rejection of an analogous regulation.[80] *Bruen* describes *Heller* as just such an easy case—insofar as *Heller* found no evidence of a complete ban on handgun ownership at the Founding.[81]

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[64] *Id*. at 2126.
[65] *Id*.
[66] *Id*.
[67] *Id*. at 2127.
[68] *Id*.
[69] *Id*. at 2127-28
[70] *Id*. at 2129.
[71] *Id*. at 2130 (citing *United States v. Stevens*, 559 U.S. 460, 468-71 (2010)) (emphasis in original).
[72] *Id*. (noting that *Giles v. California*, 554 U.S. 353, 358 (2008) allows "only those exceptions [to the Confrontation Clause] established at the time of the founding" (text presented as in *Bruen*))
[73] *Id*. (quoting *American Legion v. American Humanist Ass'n*, 588 U.S. ___, 139 S. Ct. 2067, 2087 (2019) (plurality opinion)). This point became even clearer when the Court decided *Kennedy v. Bremerton School Dist.*, 597 U.S. ___, 142 S. Ct. 2407, 2428 (2022) and a majority of the Court finally held it had abandoned the *Lemon* test at some point in the past. *See infra*.
[74] *Id*. at 2130 (quoting *McDonald v. Chicago*, 561 U.S. 742, 803-04 (2010) (Scalia, J., concurring)).
[75] *Id*. (quoting *McDonald*, 561 U.S. at 790-91 (plurality opinion)).
[76] *Id*. at 2130 n.6.
[77] *Id*.
[78] *See id*.
[79] *Id*. at 2131-34.
[80] *Id*.
[81] *Id*.

However, "other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach."[82] And the Constitution "can, and must, apply to circumstances beyond those the Founders specifically anticipated."[83] But Justice Thomas quickly squelches one obvious application of this principle. While the word "arms" must be construed as it was understood at the Founding, it nevertheless includes weapons unknown to the Founders, because *Heller* held that the word "arms" also "covers modern instruments that facilitate armed self-defense" in the same way that other constitutional rights apply to modern technology.[84]

The solution to the conundrum of changing times is "reasoning by analogy—a commonplace task for any lawyer or judge."[85] This requires determining whether the two regulations are "relevantly similar."[86] There are "two metrics" for this process: "how and why the regulations burden a law-abiding citizen's right to armed self-defense."[87] "To be clear, analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check."[88] On the one hand, courts must not "uphold every modern law that remotely resembles a historical analogue," but on the other hand, the test requires only a "historical *analogue*, not a historical *twin*."[89] As one example, while there were relatively few regulations declaring "sensitive places" where firearm carrying was altogether prohibited, "we are also aware of no disputes regarding the lawfulness of such prohibitions," so it can be assumed to be settled that the Second Amendment allowed those prohibitions.[90] However, the entire island of Manhattan cannot be declared a "sensitive place" under such a doctrine.[91]

c. What may and may not be considered for historical analysis.

Justice Thomas then proceeds to apply this "analogy" test to the case at hand, and begins by noting that no one disputes in the wake of *Heller* that the right to carry a handgun extends outside the home.[92] He then notes that the relevant question is the meaning of the text of the Second Amendment (ratified in 1791) and the Fourteenth Amendment (ratified in 1868).[93] Historical evidence must match these dates to be relevant.[94] Accordingly, Justice Thomas arranges the historical evidence into five groups based on age—(1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late-19th and early-20th centuries.[95]

He begins by discussing either end of the historical spectrum, explaining why *Bruen*'s methodology will diminish the value of history from before the Revolutionary War or after the Civil War:

Medieval to early modern England. Such evidence has diminished value because "the common law, of course, developed over time" and the practices of English law "cannot be indiscriminately attributed to the framers of our own Constitution."[96] "'It is better not to go too far back into antiquity for the best securities of our liberties,' unless evidence shows that medieval law survived to become our Founders' law."[97] Justice Thomas expects to see multiple sources confirming the consistent acceptance of such regulations, preferably "a long, unbroken line of common-law precedent stretching from Bracton to Blackstone."[98] This will be a problem for the government in *Bruen*, because its star piece of historical evidence is a English statute from 1328 that plainly restricted the public carry of firearms, and that was often referenced as the source of the common-law right to bear arms into the 1700s, but Justice Thomas considers that statute simply too old to provide useful evidence.[99]

Late-19th and early-20th centuries. All post-enactment evidence carries even *less* weight in *Bruen*'s framework than medieval texts. Such evidence may *only* be used to confirm the earlier meaning of the text, because "post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or

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[82] *Id*. at 2132.
[83] *Id*.
[84] *Id*.
[85] *Id*.
[86] *Id*. (quoting Cass Sunstein, ON ANALOGICAL REASONING, 106 HARV. L. REV. 741, 773 (1993)).
[87] *Id*.
[88] *Id*. at 2133.
[89] *Id*. (emphasis in original).
[90] *Id*. (citing David B. Kopel & Joseph Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 205, 229-236, 244-47 (2018) and Brief for Independent Institute as *Amicus Curiae*). *But see id*. at 2149 (finding that the respondents' argument failed because, *inter alia*, even though a law was still on the books, the respondents presented no evidence that the statute was enforced); *id*. at 2140 (finding that King James I's prohibition of handguns could be disregarded as historical evidence because a historian explained that "the question faded without explanation").
[91] *Id*. at 2134.
[92] *Id*. at 2134-35.
[93] *Id*. at 2136.
[94] *Id*.
[95] *Id*.
[96] *Id*.
[97] *Id*. (quoting *Funk v. United States*, 290 U.S. 371, 382 (1933)).
[98] *Id*.
[99] *See id*. at 2139.

alter that text."[100] Moreover, post-Civil War sources provide little insight because they came 75 years or more after the Second Amendment was ratified, and are therefore distant from the Founders' original understanding.[101] While the Fourteenth Amendment is technically the reason why the state of New York must comply with the Second Amendment, and America ratified the Fourteenth Amendment in 1868, *Bruen* asserts that the Fourteenth Amendment incorporated the existing, 1791-based understanding of the Second Amendment against the States.[102] While the Court acknowledges an academic debate about whether the 1868 understanding of rights should apply instead, *Bruen* sidesteps that point by holding there is no relevant difference between 1791 and 1868 as pertains to the right to publicly carry a handgun.[103] As discussed in greater detail below, this rule of disregarding post-1868 sources is significant because it dispenses with a century of cases and scholarly material that treated the Second Amendment as applying only to service in a militia.

d. Examining the historical evidence for regulating the public carry of firearms.

Justice Thomas's majority opinion then walks through the historical evidence regarding regulations affecting the public carry of firearms.

Medieval statutes like the 1328 Statute of Northampton plainly restricted the open carry of firearms, but are so old that they have little relevance to the 1791 understanding of the Second Amendment.[104] Moreover, the statute did not address handguns (which did not exist in England at the time), and likely addressed the wearing of armor and the carrying of military weapons like the "launcegay," a 10 to 12 foot lightweight lance.[105] However, the common people at the time commonly carried daggers or knives, and *Bruen* reasons that these smaller weapons are more analogous to modern handguns.[106] When handguns emerged they were indeed restricted (for being too unreliable) but such regulations faded over time and thus become irrelevant to the analysis.[107] The 1689 English Bill of Rights forbade the King to disarm Protestants, which was surely a "limited" protection, but nonetheless matured into an understanding that the individual had a right to keep and bear arms to defend one's self against violence.[108]

As for the Colonial era, the government pointed to restrictions on public carry in three states. But this immediately created a procedural problem under *Bruen*'s framework, because "we doubt that *three* colonial regulations could suffice to show a tradition of public-carry regulation."[109] Based on this observation, subsequent courts have not hesitated to reject a historical proposition simply because it was supported by too few sources.[110] At any rate, these sources failed to persuade the *Bruen* majority because "they merely codified the existing common-law offense of bearing arms to terrorize the people," meaning that they applied to "dangerous and unusual weapons" and not to weapons "in common use at the time."[111] A New Jersey statute did indeed forbid the carrying of short-barreled "pocket pistols," but had some different features and seems to have faded into disuse before 1791, so the majority disregarded it as well.[112]

Only after the Second Amendment was ratified, *Bruen* explains, "did public-carry restrictions proliferate."[113] But the Court found that each of these categories of restrictions were too dissimilar to New York's regime to serve as an analogy. Common-law offenses were limited to the concept of "affray" or terrifying the people, which does not speak to the use of firearms by law-abiding citizens.[114] Laws prohibiting the concealed carry of pistols were considered lawful, but only insofar as they did not also prohibit the *open* carry of pistols.[115] "Surety statutes" are another analogue to New York's "may issue" statute, insofar as they declared that the law could require a person who was likely to "breach the peace" to post a surety before he could publicly carry a firearm.[116] Such statutes are distinguishable because they required a prior reason to suspect a breach of the peace, and did not result in the total disarmament of the citizen—only the posting of a modest bond.[117] Moreover, while such surety statutes

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[100] *Id*. at 2137 (quoting Justice Kavanaugh's dissent in the D.C. Court of Appeals' *Heller* decision) (emphasis in original).

[101] *Id*.

[102] *Id*. *But see id*. at 2163 (Barrett, J., concurring) (declaring that the majority opinion does not actually decide this issue, while nevertheless declaring that postenactment history has limited relevance).

[103] *Id*. (citing AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998) and Kurt Lash, *Re-Speaking the Bill of Rights: A New Doctrine of Incorporation*, 97 INDIANA L.J. 1439 (2022)). For what it's worth, Justice Jackson has vigorously embraced the concept of the "Second Founding." *See infra*.

[104] *Id*. at 2139.

[105] *Id*. at 2140.

[106] *Id*.

[107] *Id*.

[108] *Id*. at 2141-42.

[109] *Id*. at 2142.

[110] *See infra* regarding *United States v. Rahimi.*

[111] *Bruen*, 142 S. Ct. at 2143-45.

[112] *Id*. at 2143-44.

[113] *Id*. at 2145.

[114] *Id*. at 2145-46.

[115] *Id*. at 2146-47.

[116] *Id*. at 2148-49.

[117] *Id*.

definitely existed, the government had not provided sufficient evidence that they were ever enforced.[118]

In a footnote, Justice Thomas clarifies yet another aspect of *Bruen*'s methodology—the absence of evidence that a statute was actually enforced means that the government failed to carry its burden of proof.[119] The absence of enforcement *cannot* be taken as evidence that there was nothing to enforce because citizens complied with the statute, which Justice Breyer argued in dissent.[120]

Bruen also found no evidence for restricting the carrying of firearms at the time of the adoption of the Fourteenth Amendment.[121] Justice Thomas criticizes the respondents for not addressing the "outpouring of discussion" of "how to secure constitutional rights for newly free slaves" after the Civil War, but shrugs this off because it is nevertheless a failure of the respondents to provide evidence: "Of course, we are not obliged to sift the historical materials for evidence to sustain New York's statute. That is respondents' burden."[122] However, Justice Thomas then goes on to passionately describe the way in which newly freed, formerly enslaved blacks in the South sought to arm themselves as protection against "the depredations visited on Southern blacks."[123]

Justice Thomas notes a historical issue of particular importance to this audience—that contrary to what we have seen in decades of Hollywood westerns, Texas passed a law in 1871 forbidding the carrying of pistols.[124] Indeed, in that same year the Texas Supreme Court held the law was constitutional because the Second Amendment protected only those weapons "as are useful and proper to an armed militia."[125] Four years later, the Texas Supreme Court "modified its analysis" and held that the Texas Constitution was not offended by a law requiring a person to have "reasonable grounds fearing an unlawful attack" in order to carry a pistol, and even then limiting such pistols to "such pistols at least as are not adapted to being carried concealed."[126] So Texas—of all places!—provides historical evidence that "may issue" statutes were considered constitutional. Likewise, West Virginia prohibited the public carry of pistols and the West Virginia Supreme Court held the Second Amendment did not apply to handguns at all.[127] But *Bruen* disregards Texas's and West Virginia's statutes and cases as "outliers."

Finally, post-ratification evidence carries little weight, Justice Thomas reminds us.[128] The Western Territories provide many examples of laws prohibiting the public carry of pistols—again contrary to Hollywood westerns—but "the bare existence of these localized restrictions cannot overcome the overwhelming evidence of an otherwise enduring American tradition permitting public carry."[129] Such statutes affected few people because these territories were sparsely populated, were rarely subject to judicial scrutiny, and sometimes did not survive that territory's passage into Statehood.[130] And though Kansas restricted public carry in its cities, there were too few people in those cities in the late 1800s to make those laws a meaningful analogue.[131] Evidence from the 20th century—such as the fact that the law in question has been in effect for more than 100 years—will be completely disregarded as irrelevant.[132]

Justice Thomas concluded his analysis by reiterating that overall, the evidence of lawful regulation of the open carry of handguns was limited to "a few late-in-time outliers."[133] And he reiterated that the Second Amendment would not allow the government to exercise prior restraint on the public carrying of firearms, any more than the First Amendment allows prior restraint of "unpopular speech or the free exercise of religion."[134]

2. <u>The concurring opinions emphasized the limits of *Bruen*.</u>

Three justices wrote concurrences in *Bruen*, and they deserve a very brief review.

Justice Alito wrote a concurrence for the sole evident purpose of demonstrating that he was offended by Justice Breyer's dissent.[135] Why did Justice Breyer quote so many statistics about the societal harms caused by firearms, when *Heller* makes them irrelevant?[136] (Spoiler: because Justice Breyer advocates means-end testing and would hold that New York's law satisfies strict scrutiny.) Justice Alito tells some rousing stories

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[118] *Id*. at 2149.

[119] *Id*. at 2149 n.25.

[120] *Id*. *Bruen* thus begins with the proposition that all modern Americans are presumed to be "law-abiding citizens" for whom carrying a deadly weapon is commonplace and of no great concern, and then carries that presumption backward into history—such that if the people enacted a statute forbidding themselves to carry pistols openly, one must presume that the government never enforced that law because we know that law-abiding citizens carry their pistols openly.

[121] *Id*. at 2150.

[122] *Id*.

[123] *Id*. at 2151.

[124] *Id*. at 2153.

[125] *Id*. (citing *English v. State*, 35 Tex. 473 (1871)).

[126] *Id*. (citing *State v. Duke*, 42 Tex. 455 (1875)).

[127] *Id*. (citing *State v. Workman*, 35 W. Va. 367 (1891)).

[128] *Id*. at 2154.

[129] *Id*.

[130] *Id*. at 2155.

[131] *Id*.

[132] *Id*. at 2154 n.28.

[133] *Id*. at 2156.

[134] *Id*. at 2156.

[135] *Id*. at 2157-61 (Alito, J., concurring).

[136] *Id*.

of people who have used firearms in self-defense, to counterbalance those gloomy statistics. And he concludes on a sour note: "The real thrust of today's dissent is that guns are bad and States and local jurisdictions should be free to restrict them essentially as they see fit."[137]

Justice Kavanaugh wrote a very brief concurrence to clarify two "limits of the Court's decision."[138] First, *Bruen* does not prevent States from imposing licensing requirements for carrying a handgun.[139] Second, *Bruen* is "neither a regulatory straightjacket nor a regulatory blank check."[140] Justice Kavanaugh reiterates the list of presumptively acceptable regulations first offered by Justice Scalia in *Heller*.

Justice Barrett's concurrence very briefly explains that *Bruen* leaves two issues unresolved: (1) "the manner and circumstances in which postratification practice may bear on the original meaning of the Constitution," because she can envision cases in which certain types of postratification evidence might be more persuasive than *Bruen*; and (2) the scholarly debate as to whether the Fourteenth Amendment embodied the People's view of individual rights in 1868, or the Founders' original view from 1791.[141] On this latter point, Justice Barrett makes clear she does not endorse "freewheeling reliance on historical practice from the mid-to-late 19th century."[142]

3. Justice Breyer's dissent identifies problems with *Bruen*'s conclusion and its new historical methodology.

Justice Breyer wrote a long and impassioned dissent (which Justices Sotomayor and Kagan joined), and we should examine it because its criticisms of *Bruen*'s methodology provide us with additional data points about how it can be applied.

Justice Breyer begins with a lengthy discussion of data showing that America has a serious gun-violence problem.[143] He explains that the purpose of this discussion is not merely "guns are bad," as Justice Alito alleged, but to show that the issue is complicated and should be handled by elected legislators instead of judges doing historical analysis.[144] Moreover, if handguns are "the most popular weapon chosen by Americans for self-defense in the home," as *Heller* declared, they are nevertheless "also the most popular weapon chosen by perpetrators of violent crimes."[145]

Justice Breyer then discusses New York's statute at length, arguing that the appellate record is insufficient to show that the "discretion" allowed by the statute is consistently applied to deny the right to carry a handgun.[146] And while "may issue" states are outnumbered by "shall issue" states, "may issue" was once the dominant form of firearm regulation and the states that continue to employ "may issue" have very large cities and more than 25% of the nation's population.[147]

Justice Breyer then argues that the Court should adopt the same means-end testing scheme that the courts of appeals uniformly adopted after *Heller*, arguing that the *Heller* majority implied that such balancing would be necessary.[148] While Justice Breyer made this argument in his *Heller* dissent, he does not believe the *Heller* majority rejected the approach, arguing instead that the majority had misunderstood him to be arguing that *no* scrutiny applied.[149] The *Heller* majority equated Second Amendment protections with First Amendment protections for protected speech, Justice Breyer explained, but First Amendment cases nevertheless engage in a form of means-end strict-scrutiny testing.[150] More relevant to our purposes, Justice Breyer then identifies a number of criticisms of the *Bruen* methodology, because it "is deeply impractical" and "raises a host of troubling questions."[151] Historical analysis lies outside the normal practice of judges, and courts lack the resources necessary to engage in the extensive historical analysis that *Bruen* mandates.[152] "Most importantly, will the Court's approach permit judges to reach the outcomes they prefer and then cloak those outcomes in the language of history?"[153] For example, in language that veers between the cautious and the bold, Justice Breyer announces that historians have rejected *Heller* as being egregiously wrongly decided.[154] The English common-law right to bear arms

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[137] *Id*. at 2160-61.
[138] *Id*. at 2161 (Kavanaugh, J., concurring).
[139] *Id*. at 2161.
[140] *Id*. at 2162.
[141] *Id*. at 2162-63 (Barrett, J., concurring).
[142] *Id*.
[143] *Id*. at 2164-67 (Breyer, J., dissenting).
[144] *Id*. at 2167-68.
[145] *Id*.
[146] *Id*. at 2169-73.
[147] *Id*. at 2172-73.
[148] *Id*. at 2175-76.
[149] *Id*. at 2176. For what it's worth, this author at first scoffed at Justice Breyer's argument, but on subsequent readings I concluded that Justice Breyer was not completely off base in making this argument. At any rate, I suspect (and it can only be mere suspicion) that Justice Breyer pressed the argument because he was trying to build a new coalition among the justices who were not on the Court in 2008 and who had not been in the room while the justices debated *Heller*.
[150] *Id*.; *compare Heller*, 554 U.S. at 635 ("We would not apply an 'interest-balancing approach' to the prohibition of a peaceful neo-Nazi march through Skokie").
[151] *Id*. at 2177.
[152] *Id*.
[153] *Id*.
[154] *Id*.

was limited to the needs of raising a militia; the words "bear Arms" do indeed *only* mean the use of arms in war, soldiering, and the like.[155] Scholars continue to publish explanations for why *Heller* "misread the text and history of the Second Amendment."[156] Justice Breyer denies that he wants to relitigate *Heller*, but he does want to "illustrate the difficulties that may befall lawyers and judges when they attempt to rely *solely* on history to interpret the Constitution."[157]

Bruen's methodology will also "pose a number of practical problems."[158] First, the lower courts will have difficulty applying *Bruen* because district courts typically have less resources and support from amici historians.[159] Second, *Bruen* provides "precious little guidance" except for meaningless truisms like "neither … a straightjacket nor a … blank check."[160] Some laws are "outliers" and three laws are insufficient, but how many will suffice?[161] What makes for a sufficient analogue?[162] Given the lack of clear guidance, "the numerous justifications that the Court gives for rejecting historical evidence give judges ample tools to pick their friends out of history's crowd."[163] Third, historical evidence is simply too sparse and unclear to provide meaningful guidance.[164] Fourth, founding-era regulations are "especially inadequate" for understanding "modern cases presenting modern problems."[165] The instruction to use "analogical reasoning" does not provide clear guidance, and will become increasingly strained as technology gets further and further away from the Founding era.[166]

Justice Breyer then concludes with his own review of the relevant historical evidence.[167] To summarize, Justice Breyer would give greater weight to historical statutes even where there is weak evidence that the statutes continued to be enforced,[168] finds little evidence that the intent-to-terrify was an additional element required to support firearm regulation (as opposed to an explanation for why the regulation was necessary[169]), and he would give much greater weight to those state regulations from the 19th century and the Western Territories,[170] arguing that the lack of evidence that a statute was enforced could mean the statute was *obeyed* and not *disregarded*.[171] Finally, Justice Breyer notes that by omitting evidence from the 20th century, the majority ignores the fact that the Court is striking down a law that stayed on the books uncontested for more than 100 years.[172]

II. SAYING THE QUIET PART OUT LOUD: WHAT *BRUEN*'S METHODOLOGY REQUIRES ADVOCATES TO IGNORE, NO MATTER HOW MUCH THEY MAY WANT TO ARGUE IT.

The *Bruen* majority holds that courts must look only to sources that were more or less contemporaneous with the adoption of the Bill of Rights in 1791—or, reluctantly and with diminished relevance, to the enactment of the Fourteenth Amendment in 1868. Regardless of one's view of the doctrine of originalism generally or the "Second Founding" in particular, there are two reasons why we should pause at this point and consider what information has been excluded by the test the Court declares in *Bruen*.

The test renders irrelevant an *immense* amount of historical material that might seem relevant to any application of the Second Amendment, and therefore, one of the most important practical restrictions on trying to persuade a court is to force yourself and any historians you recruit to resist the temptation to incorporate later material. Specifically, history from the later 19th century and 20th century would elucidate two important concepts that *Bruen* excludes from effective Second Amendment argument:

> First, firearms are *much* more effective and deadly today than at the Founding, or even in 1868; and
>
> Second, for a century, virtually *no one* invoked the Second Amendment as protecting an individual's right to own and carry firearms for self-defense, and that the shift in public opinion was the result of a concerted effort by a political lobby to change attitudes through historical research and legal scholarship.

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155 *Id*. at 2178.
156 *Id*.
157 *Id*. at 2179 (emphasis in original).
158 *Id*.
159 *Id*.
160 *Id*.
161 *Id*.
162 *Id*.
163 *Id*. at 2180.
164 *Id*.
165 *Id*.
166 *Id*. at 2181.
167 *Id*. at 2181-90.
168 *See id*. at 2183 (arguing that the Statute of Northampton continued to be referenced as guidance for the common-law limits on the right to bear arms).
169 *Id*. at 2185-86. That is, it is not that handguns were regulated *only* when special circumstances made them terrifying, but they were regulated because they were *already* terrifying in ordinary circumstances. *Id*.
170 *Id*. at 2187-88.
171 *Id*.
172 *Id*. at 2189.

A. Firearms became easier to fire, easier to reload, and much more accurate.

First, the "arms" that *Bruen* protects are *very* different than the "arms" that were commonly available in 1791 or 1868. This may seem obvious,[173] but it is worthwhile to sketch out the details of those differences to understand the magnitude of what *Bruen* forbids historians to talk about. The Revolutionary war featured firearms that were useful, but quite dissimilar to the AR-15.[174] And while the Civil War sparked a revolution in the development of firearms, the firearms available by the end of the war differ in many ways from the firearms that are in use in modern militaries, or even the firearms that can be purchased at firearm dealers across the country. The subject is complex and is far beyond the scope of this paper, but a few examples will suffice to make the point.

Rifles. You may have the impression that Colonial firearms were very different than modern weapons like the AR-15, and you would be correct. During the Colonial period, muskets were much more finicky and difficult to reload than modern rifles, used flintlock mechanisms to ignite the propellant, and were "quite inaccurate" by modern standards even if they were marvelous examples of engineering for their time and place.[175] Nevertheless, Revolutionary War troops used muskets effectively, both as a firearm at medium-range and as a long stick to which one could affix a bayonet. When this author fired a Revolutionary War musket at Boy Scout camp in the mid-1980s, he came away surprised that soldiers ever managed to hit *anything* at *any distance* with such a loud, smoky, and unwieldly weapon.[176]

Firearms became more recognizably modern after innovations in manufacturing in the mid-to-late 1800s, and especially after the Civil War—but even if one considered the state-of-the-art in 1868 (against the *Bruen* majority's command), they were still significantly different from the weapons one can buy today like the AR-15. The most common firearm used by United States infantry and marines during the Civil War was the Springfield Model 1861 rifled musket.[177] (Confederate infantrymen were often issued the Enfield Pattern 1853, which was similar.) The Model 1861 improved on prior muskets in many ways, especially by incorporating a rifled barrel for improved accuracy at long distances.[178] It also used percussion caps to ignite the gunpowder, which made the design more weatherproof than earlier flintlock muskets.[179] However, the soldier had to load the weapon through the muzzle after every shot, which was slow by the standards of modern automatic weapons but perhaps not *that* slow in absolute terms—after all, soldiers were trained to meet a goal of firing three aimed shots per minute during combat.[180] The projectile was large (a .58 caliber Minié ball[181]) but traveled at a much lower velocity than modern weapons. Modern rifles are breech-loading (reloaded from the *rear* of the barrel), a concept that preexisted the Civil War but which did not fully reach the market until later. Breech-loading rifles were eventually adopted in small numbers toward the end of the Civil War by certain divisions of United States troops, restrained by their scarcity. These rifles had evident benefits: the Henry rifle used by United States soldiers could hold sixteen rounds, and the soldier operated a lever to reload the weapon after each shot, which was an obvious improvement on having to muzzle-load a rifle after every shot. However, the Henry

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[173] Candidly, this section of the paper arose out of this author's embarrassment at making such a broad assertion in the first draft without citing any evidence—which then threatened to expand far beyond the limited point I was trying to make because it is so easy to go "down the rabbit hole" with historical subjects.

[174] Because the term "assault rifle" is political jargon tied to mere cosmetic features of some semi-automatic rifles, and because some persist in the mistaken belief that the "AR" in "AR-15" means "Assault Rifle," the term is rejected by Second Amendment advocates. They prefer the description "modern sporting rifle," which is just as much a product of political advocacy as "assault rifle." To bypass both forms of advocacy I will use the AR-15 as a generic stand-in for all modern semi-automatic rifles with removable magazines.

[175] *See, e.g.*, https://www.nps.gov/museum/exhibits/revwar/guco/gucoweapons.html; https://revolutionarywarjournal.com/muskets-rifles-of-the-american-revolution-difference-and-tactics/; https://www.youtube.com/watch?v=lXh4Qhmt3xA (popular firearms YouTuber Hickok45's video on U.S. military rifles). For a rigorous examination of muskets used by soldiers during the American Revolution, see George C. Neumann, *American Muskets of the Revolution*, AMERICAN RIFLEMAN, July 4, 2020, available at https://www.americanrifleman.org/content/american-muskets-of-the-revolution/.

[176] We need not dwell on the absolute nonsense of the run-and-gun musket marksmanship sometimes depicted in the movie *Last of the Mohicans* (1992), but if you can suspend disbelief, the movie is *wonderful*.

[177] *See* https://en.wikipedia.org/wiki/Springfield_Model_1861.

[178] *Id*. Smoothbore muskets were reliable only to 75 feet, even for the best marksmen, whereas an untrained marksman could use a rifled musket to hit a target 250 yards away and a trained marksman could hit a target 800 yards away. https://www.battlefields.org/learn/articles/small-arms-civil-war.

[179] https://en.wikipedia.org/wiki/Springfield_Model_1861.

[180] *Id*.

[181] A conical projectile (not a "ball" in the ordinary sense of the word) skirted with soft lead that would expand upon firing to engage the rifling of the musket's barrel, allowing for faster reloading and greater accuracy than previous musket balls. https://en.wikipedia.org/wiki/Mini%C3%A9_ball.

repeating rifle[182] and Winchester Model 1873 rifle of "Wild West" fame[183] made a larger impact in the 1870s and afterwards, *after* the Fourteenth Amendment was adopted. And while they are impressive and useful weapons, none carried the power, accuracy, or ease-of-reloading afforded by a modern AR-15.[184]

Pistols. Cavalrymen during the Civil War were quick to adopt breech-loading carbine rifles (shorter, less accurate weapons more suited to horseback) when they became available, and carried pistols as well. The pistols they carried, however, had significant differences from modern weapons. While they operated on the same principle as a modern revolver—a rotating cylinder with five or six chambers—each chamber had to be laboriously loaded from the front of the cylinder because what Hollywood calls "bullets" did not yet exist.[185] These pistols were accurate only to about 50 paces, though they saw widespread use nonetheless.[186] Rear-loading cartridge revolvers (what Hollywood uses in Westerns) pre-dated the Civil War but only proliferated after a key patent expired in 1869 and Horace Smith and Daniel B. Wesson lost their market exclusivity.[187] The most famous "Wild West" revolver, the Colt 1873 ("The Peacemaker") was introduced in 1873.[188] All of which is to say, nothing available in 1791 or 1868 had anything like the ease of use, accuracy, or reloading speed of a modern Glock handgun.

Machine Guns. The "machine gun"—a fully-automatic, auto-loading, rifled firearm—existed in experimental forms in the 1700s and into the 1800s. The "Gatling" gun was introduced in 1861, and was a large, mounted weapon capable of rapid fire through a hand-crank mechanism.[189] The Gatling gun saw relatively limited action in the Civil War, however, and these "machine guns" saw more significant improvements and implementation later in the 1800s and into World War I.[190] Fully automatic infantry rifles (like today's AK-47 or M-16) did not make their first appearance until the late 1800s, and innovation of such rifles was particularly spurred by German development during World War II.[191]

The point. The point of this review is to reiterate that the "arms" known in 1791 and 1868 are different than the "arms" available in the modern world. To the Founding generation, "arms" were muzzle-loading, flintlock muskets that were slow and inaccurate. To the Civil War generation that adopted the Fourteenth Amendment, most "arms" were still muzzle-loaded and slow, though citizens would have known that improvements to accuracy and speed were being implemented. But these Americans had *nothing* like the speed and accuracy available through the modern, semi-automatic pistols that can be purchased at any Wal-Mart, much less that of a semi-automatic modern sporting rifle like an AR-15 or its fully-automatic military-issue sibling, the M-16.

Bruen commands advocates, judges, and historians to *completely disregard* this fact. Justice Scalia's opinion in *Heller* says that it is "bordering on the frivolous" to assert that "only those arms in existence in the 18th century are protected by the Second Amendment," and then holds that the Second Amendment protects "all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."[192] The only permissible limit on "arms" is the historical restriction on the carrying of "dangerous and unusual weapons," which Justice Scalia concedes may mean that military weapons ("M-16 rifles and the like") may be restricted, even at the risk of leaving the militia unable to overcome "modern

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[182] https://en.wikipedia.org/wiki/Henry_rifle; *see also* https://www.youtube.com/watch?v=NbfXjqDzago (Hickok45's video demonstrating the Henry rifle). Confederate soldiers despised the speed increase made possible by the Henry rifle, describing it as "that damned Yankee rifle that they load on Sunday and shoot all week." https://www.nps.gov/fosm/learn/historyculture/1860-henry.htm

[183] https://www.youtube.com/watch?v=ZsN-daNaU3c.

[184] *Cf.* Max Benwell and Kari Paul, *What About the 30-50 Feral Hogs? Man's defense of assault weapons goes viral*, The Guardian, August 5, 2019, available at https://www.theguardian.com/us-news/2019/aug/05/feral-hogs-memes-twitter-30-50-running-into-my-yard-small-kids (noting that a viral defense of the AR-15 as being the only weapon capable of "killing 30-50 feral hogs in 3-5 minutes" actually had a significant basis in real-world rural America, where herds of feral hogs are a "huge problem" that could destroy an entire "crop field in a single night").

[185] https://www.battlefields.org/learn/articles/small-arms-civil-war; https://en.wikipedia.org/wiki/Bullet. To be precise, the "bullet" is the metal projectile and has existed since the 13th century, but the innovation of packaging the bullet with its propellant and primer in a "cartridge" came later. *Id*. Paper cartridges existed during the Civil War, as did some of the first metallic cartridges. https://en.wikipedia.org/wiki/Cartridge_(firearms). Metallic cartridges present an engineering challenge because they must be ejected from the barrel before the next cartridge can be loaded, whereas a paper cartridge combusts or is discharged from the muzzle when fired. *Id*.

[186] https://www.battlefields.org/learn/articles/small-arms-civil-war; *see also* https://www.youtube.com/watch?v=D3U4_3dkYnI (Hickok45's video on U.S. Military Handguns since 1776).

[187] https://en.wikipedia.org/wiki/Revolver.

[188] *Id*.

[189] https://en.wikipedia.org/wiki/Machine_gun; *see also, e.g.*, THE OUTLAW JOSEY WALES (Warner Bros. 1976) (depicting damnable Yankee troops using a hidden Gatling gun to slaughter a peaceful group of surrendering Confederate sympathizers, in what was sort of the JOHN WICK of a different era).

[190] *Id*.

[191] https://en.wikipedia.org/wiki/Automatic_rifle.

[192] *Heller*, 554 U.S. at 582.

bombers and tanks."[193] Justice Thomas's opinion in *Bruen* treats this idea as completely settled, and does not reopen the discussion.

But one can phrase the question quite differently than Justice Scalia did, so that it does not seem like such a straw man. For example, even if one concedes that the Second Amendment protects at least some modern "arms" as well as Colonial muskets, doesn't the government's right to regulate access to those "arms" increase as arms become more inexpensive and deadly than anything contemplated by the Framers? **No**, holds *Bruen*. There is no second part to *Bruen*'s test; if a regulation did not exist at the Founding, at least by reasonable analogy, then it cannot be imposed in the modern world. Justice Breyer dissents that changing technology requires greater regulatory flexibility, but to no avail.[194]

Instead, weapons must be considered compared to the maximum firepower available at the time. Take, for example, *Bruen*'s discussion of the weapons forbidden by the Statute of Northampton, a 1328 statute that became incorporated into the English common-law (and therefore, hypothetically, into the Second Amendment).[195] Justice Thomas asserts that the Statute primarily forbade the wearing of armor, or perhaps also the carrying of a "launcegay"—a "10- to 12-foot-long lightweight lance," and thus he concludes that this restriction on military armament was of little relevance to the question of what an ordinary citizen might carry.[196] Moreover, historical research shows that citizens commonly carried daggers or knives during this time period, so *Bruen* explains that the proper lesson to be taken from the Statute (if any) is that even if *military* weapons may be restricted (e.g. "launcegays"), personal defensive weapons should be permitted, and the modern weapon for personal defense is the handgun.[197]

Accordingly, while one may be tempted to argue that any small semi-automatic concealed-carry pistol bought at Wal-Mart (like a Glock 43) is *much* more deadly than a military-issued ten-foot-long pointed stick, that fact does not enter the *Bruen* analysis at any point.

B. Litigants and judges must disregard a hundred years of legislation and case law.

The second key point is that courts, advocates, and historians must ignore the fact that for the next *hundred years* after the Fourteenth Amendment, Americans presumed that the collective-rights view of the Second Amendment was correct. This is not to say that the individual-rights view somehow held sway *before* 1868—the state court decisions are few and cast only a dim light on the subject.[198] But it is much clearer that the evidence of nationwide practice after 1868 strongly favors the conclusion that Americans held a collective-rights view of the Second Amendment, if they even thought of the Second Amendment at all.

1. For a century, courts and legal texts considered the Second Amendment to be limited to militias.

The United States Supreme Court addressed the Second Amendment three times between the adoption of the Fourteenth Amendment and its 2008 *Heller* decision—in 1876, 1886, and 1939.[199] The *Heller* Court debates the significance of these holdings, eventually concluding that they were vague enough that *stare decisis* did not compel a collective-rights, militia-focused reading of the Second Amendment in 2008.[200] Nevertheless, it is surely safe to say that several generations of judges and lawyers understood those decisions as reading the Second Amendment in a very limited and militia-focused manner.[201] Any advocate

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[193] *Id*. at 627-28. *But see also* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L. REV. 637, 657 (1989) ("It is simply silly to respond that small arms are irrelevant against nuclear-armed states: Witness contemporary Northern Ireland and the territories occupied by Israel, where the sophisticated weaponry of Great Britain and Israel have proved almost totally beside the point.").

[194] *Bruen*, 142 S. Ct. at 2181 (Breyer, J., dissenting).

[195] *Id*. at 2139. *Bruen* explains that the ancient statute has minimal relevance because it was enacted "more than 20 years before the Black Death," and was therefore much too old to be reliable evidence of the Founders' understanding of the Second Amendment in 1791. *Id*.

[196] *Bruen*, 142 S. Ct. at 2140.

[197] *Id*.

[198] *See, e.g.*, *Heller*, 554 U.S. at 610-14 (majority discussing these cases); *id*. at 637-38 & n.2 (Stevens, J., dissenting) (deferring to *Miller*'s rejection of all historical arguments available in 1939). For example, what should one make of the Tennessee Supreme Court's assertion in 1840 that "A man in the pursuit of deer, elk, and buffaloes might carry his rifle every day for forty years, and yet it would never be said of him that he had borne arms; much less could it be said that a private citizen bears arms because he has a dirk or a pistol concealed under his clothes, or a spear in a cane"? *Aymette v. State*, 21 Tenn. 154; *compare Heller*, 554 U.S. at 613 (majority takes a narrow view of *Aymette* because, *inter alia*, it does not refer to a "militia," though it plainly implicates the general meaning of "bear arms").

[199] *United States v. Cruickshank*, 92 U.S. 542 (1876); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Miller*, 307 U.S. 174 (1939).

[200] *Heller*, 554 U.S. at 619-26 (discussing these cases).

[201] *Heller*, 554 U.S. at 638 & n.2 (Stevens, J., dissenting) (noting that "hundreds of judges have relied on the view of the Amendment we endorsed" in *Miller*, and noting that every circuit court opinion to address the issue before 2001 "understood *Miller* to hold that the Second Amendment does not protect the right to possess and use guns for purely private, civilian purposes"). *See also id*. at 621-25 (majority opinion fiercely rejecting this contention, and ultimately asserting that even if courts "erroneously" relied on *Miller* for decades, that

from 1868 to 2000 who wanted to argue that the Second Amendment protected an individual's right to carry a handgun for self-defense would be hard-pressed to state a colorable legal argument, except by presenting a reading of the text of the Second Amendment that had *zero* support in Supreme Court or circuit court case law, and *zero* support from published historical examinations of the right to bear arms. Legal scholarship reflected this same state of affairs. "From the time law review articles first began to be indexed in 1887 until 1960, all law review articles dealing with the Second Amendment endorsed the collective right model."[202]

Legislative practice *also* reflected the view that the Second Amendment had limited relevance to firearm regulation. Concerns about the Second Amendment were almost completely absent during the enactment of the National Firearms Act in 1934, which the National Rifle Association *supported* at the time.[203] A 1955 NRA internal memorandum acknowledged that the Second Amendment supported only a collective, and not an individual, right to bear arms.[204] Likewise, the NRA supported the Gun Control Act of 1968, which was enacted in the wake of the public assassinations of that era and growing exasperation with inner-city crime. Indeed, the Gun Control Act had the public support of none other than Charlton Heston, he of "pry this gun from my cold, dead hands" fame and a future five-term president of the NRA.[205]

During this period, the NRA took a supportive view of gun control policies for several apparent reasons: to match this public mood against violent crime, to refocus the public on positive views of the sporting use of firearms, and possibly to avoid the appearance of complicity in the tensions of the time. (Lee Harvey Oswald bought the weapon that killed President Kennedy from an ad in the NRA's *American Rifleman* magazine.[206]) Public sentiment was very different from today. For example, a 1959 Gallup poll reported that 60 percent of Americans believed that handguns should be prohibited (except for police and the like); that number was 23 percent in 2016.[207] To a certain extent, this reflected the public's concern about urban crime committed with the inexpensive, small-caliber handguns called "Saturday Night Specials" that the Gun Control Act prohibited.[208] The public did not necessarily associate handguns with weapons carried for self-defense by law-abiding citizens—as does the *Heller* majority—perhaps because the carrying of pistols was widely restricted through federal and state statutes and city ordinances.

"cannot nullify the reliance of millions of Americans (as our historical analysis has shown) upon the true meaning of the right to keep and bear arms"). Justice Scalia's assertion that millions of Americans "relied" on the individual-rights reading of the Second Amendment presumes that this view predominated among American citizens, but Justice Scalia's own methodology disregards the fact that there is scant evidence of any such reliance from 1868 to 1970, because he has referred back to evidence of the Founding generation's understanding of the Second Amendment, instead of the issue being discussed—how *United States v. Miller* was understood by courts and citizens. *See also Heller*, 554 U.S. at 676 n. 38 (Stevens, J., dissenting) (citing the lack of evidence that American citizens "relied" on "the existence of a constitutional right that, until 2001, had been rejected by every federal court to take up the question").

[202] Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHICAGO-KENT L. REV. 3, 4-5 (2000). What changed in 1960 was the publication of a student article arguing that the Second Amendment protected a "right to revolution" that the Southern states had used during "the War Between the States." Stuart R. Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381 (1960).

[203] *See, e.g.*, ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA (W.W. Norton & Co. 2013); Michael Waldman, *How the NRA Rewrote the Second Amendment*, Brennan Center for Justice, May 20, 2014, available at https://www.brennancenter.org/our-work/research-reports/how-nra-rewrote-second-amendment (adapting passages from his book THE SECOND AMENDMENT: A BIOGRAPHY). An NRA witness testified that he had not even considered whether the law would violate any constitutional provision. *Id*.

[204] Jennifer Tucker, *How the NRA Hijacked History*, WASHINGTON POST, Sept. 9, 2019, available at https://www.washingtonpost.com/outlook/2019/09/09/why-accurate-history-must-guide-coming-debate-about-guns-second-amendment/.

[205] *See* German Lopez, *How the NRA resurrected the Second Amendment*, VOX, May 4, 2018, *available at* https://www.vox.com/policy-and-politics/2017/10/12/16418524/nra-second-amendment-guns-violence; Tucker, WASHINGTON POST, Sept. 9, 2019.

[206] REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY ("The Warren Commission Report"), Sept. 24, 1964, at 119.

[207] *See* Lopez, VOX, May 4, 2018.

[208] *See, e.g.*, https://en.wikipedia.org/wiki/Saturday_night_special; Sam Wolter, *The Continuing Relevance of the Saturday Night Special*, Duke Center for Firearms Law, Aug. 21, 2021, available at https://firearmslaw.duke.edu/2021/08/the-continuing-relevance-of-the-saturday-night-special/. But times change, and the effects of laws become more evident. The potential racial injustices arising from the historical prohibition of the cheap handguns favored by inner-city African-Americans was raised by the group Black Guns Matter in their amicus brief supporting the petitioners in *Bruen*. *Id*. (available at https://www.supremecourt.gov/DocketPDF/20/20-843/184443/20210720184235122_Amici_Brief_of_Black_Guns_Matter_No._20-843.pdf)

2. Advocates led a concerted, deliberate effort to build historical support for the individual-rights model.

However, the enactment of the 1968 Gun Control Act raised serious concerns among those who advocated the use of firearms for individual self-defense, including some of the core membership of the NRA.[209] These concerns came to a head at the 1977 national NRA meeting in Cincinnati (the so-called "Cincinnati Revolt"), where control of the organization was seized by a group of members who advocated a fight for expanded legal rights for gun owners and opposed the leadership's intention to shift the organization's purpose to sportsmanship and hunting.[210] The newly refocused NRA undertook to build a groundswell of public support for an individual rights view of the Second Amendment, including by supporting historical research that would support such a view in the courts and in public opinion. Eventually the NRA offered money grants to scholars who worked to develop a historical justification for the individual-rights view.[211]

Legal scholarship reflected this new effort, though it came at first from "outsiders" to the academic elite. "From 1970 to 1989, twenty-five articles adhering to the collective right view were published (nothing unusual there), but so were twenty-seven articles endorsing the individual right model. However, at least sixteen of these articles—almost sixty percent—were written by lawyers who had been directly employed by or represented the NRA or other gun rights organizations, although they did not always so identify themselves in the author's footnote."[212] The key individual-right scholars of this era (Stephen P. Halbrook and Don B. Kates, Jr.) were former professors who had gone into private legal practice to represent gun rights organizations and firearm manufacturers, and who published a number of columns, articles, and books supporting their clients.[213]

One oft-cited landmark of this period of transition is Sanford Levinson's 1989 Yale Law Review comment, *The Embarrassing Second Amendment*.[214] The article is perhaps most valuable today as a compelling time capsule of the concerns of 1989, and less as a work of legal advocacy, because Professor Levinson more or less disavows any firm position on the interpretation of the Second Amendment. Instead, Levinson positioned himself as a liberal law professor advising other liberal thought-leaders to show more tolerance for the growing movement of Second Amendment advocates. Levinson begins by recognizing that the individual-rights view of the Second Amendment still had not been advocated by any "major" scholar or published in any "elite" law review in 1989,[215] and was essentially a view advocated only in citizens' letters to the editor and by gun-industry lawyers and the National Rifle Association's lobbyists.[216] But Levinson notes that support for an individual-right view of the Second Amendment still peeks through in the academic resources that had been published by the elites.[217] Moreover—to oversimplify Levinson's heroic efforts to have his cake and eat it too—Levinson seems to argue that the Second Amendment was so poorly written than it was in some ways fairly susceptible of the individual-rights view, which is what made it so "embarrassing" to elites like him that wished it were more plainly limited to collective service in a militia.[218] For example, Levinson explained why he was persuaded by the argument that the "people" referenced in the Second Amendment was *all* the "people," and not merely those white male landowners who could be called into service in a state militia at the time of the Founding.[219] As for policy arguments, Levinson portrays himself as swayed by the argument that handguns should be restricted because they "so clearly result[] in extraordinary social costs," but he also warned his liberal readers about "the good-faith belief of many Americans that they cannot rely on the Police for protection against a variety of criminals."[220] Though *The Embarrassing Second Amendment* tries to stay above the fray, Levinson soon embraced a new reputation as an iconoclastic liberal "elite" professor who favored the individual-rights view of the Second Amendment; he called himself "the perfect poster boy for the NRA. I'm a liberal Democrat

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[209] *See, e.g.*, OSHA GRAY DAVIDSON, UNDER FIRE: THE NRA AND THE BATTLE FOR GUN CONTROL 30-31 (Univ. of Iowa Press 1998 ed.).

[210] *Id*. at 35-36.

[211] *See* Bogus, 76 CHICAGO-KENT L. REV. at 14; Waldman, Brennan Center for Justice, May 20, 2014.

[212] Bogus, 76 CHICAGO-KENT L. REV. at 8.

[213] *Id*. at 8-9.

[214] 99 YALE L. REV. 637 (1989); *see* Bogus, 76 CHICAGO-KENT L. REV. at 12-14 (discussing the impact of this article).

[215] *Id*. at 639 n.13 ("One might well find this overt reference to 'elite' law reviews and 'major' writers objectionable, but it is foolish to believe that these distinctions do not exist within the academy or, more importantly, that we cannot learn about the sociology of academic discourse through taking them into account.").

[216] *Id*. at 641.

[217] For example, he notes that Professor Laurence Tribe's AMERICAN CONSTITUTIONAL LAW acknowledges the existence of references to individual self-protection in the debates surrounding congressional approval of the Second Amendment. *Id*. at 640 & n.20.

[218] *Id*. at 644.

[219] *Id*. at 647-48.

[220] *Id*. at 655-56.

and I haven't held a gun in my arms since I went to camp when I was 13."[221]

This growing movement toward an individual-rights view did not go unnoticed. This new movement received its most famous rebuke in 1991, when former Chief Justice Warren Burger addressed it during an interview on the PBS *MacNeil/Lehrer NewsHour*. He declared that the Second Amendment "has been the subject of one of the greatest pieces of fraud—I repeat the word fraud—on the American public by special-interest groups that I have ever seen in my lifetime."[222] Chief Justice Burger found the prefatory clause's use of the words "well-regulated militia" indicates that the government has the power to "regulate" the use of arms.[223] But Chief Justice Burger was no longer on the Supreme Court, and his view was just one more "elite" voice in a growing cacophony.[224]

Another key piece of scholarship arrived in 1994, when Professor Joyce Lee Malcolm published her book *To Keep and Bear Arms: The Origins of an Anglo-American Right*. Malcolm argued that an individual's right to use firearms was embodied in the 1689 English Bill of Rights—a point of view that Justice Scalia praised in his legal writings (with an amusing mistake[225]) and then cited in his majority opinion in *Heller*.[226] It is easy to see Professor Malcolm's book as filling in some of the gaps in academic scholarship noted by Professor Levinson.[227]

Other prominent scholars followed in Professor Malcolm's footsteps in the 1990s, developing views of the Second Amendment that may not have been wholly favorable to the NRA's position but that nevertheless embraced several elements of the individual-rights view—though some of those scholars beat a hasty retreat after the mass shooting at Columbine High School in 1999.[228] Justices Thomas and Scalia noted this developing scholarship and mused that the Court should perhaps reconsider its Second Amendment jurisprudence.[229] It is surely no coincidence that the individual-rights view mirrored these justices' emphasis on constitutional originalism during the 1980s and 1990s, insofar as originalism provides the necessary justification for disregarding the weight of case-law precedent in favor of the collective-right view.[230] Nevertheless, while the NRA supported scholarship supporting the individual-rights view, it was reluctant to press that view in court cases. As late as 1995, the NRA preferred to press other legal arguments over a straightforward Second Amendment challenge, possibly suspecting that historical support and public opinion had not yet reached a critical mass.[231]

This new scholarly movement bore its first major judicial fruit in 2001, when the Fifth Circuit published its decision in *United States v. Emerson*.[232] That lengthy opinion from Judge Will Garwood addressed the many historical Second Amendment arguments that had been developed through the scholarship of the past decade.[233] The court ultimately held that the Second Amendment protected an individual's right to possess a firearm independent of service in a militia, though the opinion also recognized that the right was subject to "limited, narrowly tailored specific exceptions or restrictions for particular cases."[234] For that reason, *Emerson* was a landmark decision and came to be cited in support of the

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[221] Joan Biskupic, *Guns: A Second (Amendment) Look*, WASHINGTON POST, May 10, 1995, at A20; *see also* Bogus, 76 CHICAGO-KENT L. REV. at 12-13.

[222] *Id*. (quoting Chief Justice Burger); *see also* https://www.youtube.com/watch?v=hKfQpGk7KKw (a recording of the interview itself, which places the answer in a broader context of modern commentary on how the Bill of Rights may not have achieved its intended goals). Justice Stevens likewise told the PBS NewsHour in 2014 that he would rewrite the Second Amendment to allow greater legislative control over gun regulations, which is more or less exactly what he advocated in his *Heller* dissent. https://www.youtube.com/watch?v=odmYxpyhVeY.

[223] *Id*.

[224] "Twenty-five years later, Burger's view seems as quaint as a powdered wig." Waldman, Brennan Center for Justice, May 20, 2014.

[225] In his text A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 136-37 n.13 (1997), Justice Scalia states that Professor Malcolm was "not a member of the Michigan Militia, but an Englishwoman," which is surely funny—but Professor Malcolm was actually American and taught at Bentley College in Massachusetts. Bogus, 76 CHICAGO-KENT L. REV. at 11.

[226] *Heller*, 554 U.S. at 592-93.

[227] Professor Malcolm has done very well for herself—she currently holds an endowed chair at George Mason Law School—but in 1994 she would not yet have passed Professor Levinson's test of being a "major" scholar writing in an "elite" law review. Nevertheless, with the lens of history it seems clear that her in-depth historical work provided the sort of substantial legal scholarship that Professor Levinson said was lacking.

[228] *See* Bogus, 76 CHICAGO-KENT L. REV. at 15-22 (discussing the emerging views of William Van Alstyne, Akhil Reed Amar, Leonard Levy, and Laurence H. Tribe).

[229] *Id*. at 23 n.104 (citing *Printz v. United States*, 521 U.S. 898, 939 n.2 (1997) (Thomas, J., concurring) and Scalia, A MATTER OF INTERPRETATION).

[230] *See* Tucker, WASHINGTON POST, Sept. 9, 2019.

[231] Biskupic, WASHINGTON POST, May 10, 1995 (citing NRA trial court challenges to the "Brady" handgun waiting period based on the Tenth Amendment, not the Second).

[232] 270 F.3d 203 (5th Cir. 2001).

[233] *Emerson* relies heavily on an appendix of historical material originally gathered in DAVID E. YOUNG, THE ORIGIN OF THE SECOND AMENDMENT (2nd ed. 1995) (Golden Oak Books).

[234] *Id*. at 261, 264-65.

individual-rights view of the Second Amendment. (However, other circuit courts rejected it until the D.C. Circuit Court decision that ultimately led to the Supreme Court's *Heller* decision in 2008.[235]) However, this wholesale adoption of the independent-right viewpoint came as cold comfort to Emerson himself. Emerson had purchased a handgun while subject to a family court injunction prohibiting him from violence against his soon-to-be ex-wife, which the court had entered with proper notice and an opportunity to respond.[236] 18 U.S.C. § 922(g)(8)(C)(ii) makes it unlawful to possess a firearm while subject to such an order (the injunction itself was silent on the subject), and the *Emerson* court concluded that the family court order was "minimally" sufficient to support the deprivation of Emerson's Second Amendment rights, so the application of Section 922(g)(8)(C)(ii) did not violate the Second Amendment in this particular case.[237] It is worth noting that after *Bruen*, the Fifth Circuit held that *Emerson* did not go far enough in its deference to the Second Amendment in cases involving domestic violence restraining orders.[238]

The final step in this progression was *Heller* itself, which this paper discusses above. Justice Scalia's majority opinion cites many historical texts and academic sources that had been developed in the 1990s, and Justice Scalia *certainly* does not lack confidence when presenting them. Justice Stevens succinctly presents the counter-arguments to each of the points that the majority makes, citing many of the same historical sources, but this view gathered the votes of only four justices even though it held sway for more than a century. Fourteen years later, *Bruen* treats the issue as completely settled in favor of the individual-rights interpretation, despite Justice Breyer's efforts in his *Bruen* dissent to protest that a vast majority of current historians reject *Heller* as wrong on the history and wrong on the law.[239]

I recount this post-1868 history because I want to make two points that are relevant to how advocates can prove history under *Bruen*'s test.

First, *Bruen* excludes consideration of all post-1868 history. That analytical step is critical to *Bruen*'s outcome, because post-1868 history overwhelmingly supports the collective-right view. One may conclude from this excluded history that *Heller* plays fast and loose with *stare decisis*, though perhaps one is less shocked by that conclusion in 2023 than one might have been in 2008.[240] But the point is that *Bruen* prevents

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[235] *See Heller*, 554 U.S. at 638 n.2 (Stevens, J., dissenting) (gathering cases).

[236] *Id*. at 210-11.

[237] Judge Parker stated in a special concurrence that he did not think it necessary or appropriate to address the Second Amendment issues if the court were going to uphold the application of the statute to Emerson anyway, but Judge Garwood argued that a full examination of the constitutionality of the statute was necessary to the decision of the case and had been part of the trial court's decision. *See id*. at 265 n.66.

[238] *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023), *cert. granted*, discussed *infra*.

[239] *Bruen*, 142 S. Ct. at 2177-81 (identifying academic disagreement with *Heller* as one reason why *Bruen*'s focus on history will create an unworkable and unfair scheme for evaluating Second Amendment challenges).

[240] Citation needed? Well, at the risk of belaboring a snarky aside, an enormous number of Supreme Court cases in the last five years have reversed settled case law authority, sometimes explicitly rejecting *stare decisis* concerns in doing so. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___, 142 S. Ct. 228 (2022) (overruling you know what); *Edwards v. Vannoy*, 593 U.S. ___, 141 S. Ct. 1547 (2021) (overruling *Teague v. Lane*, 489 U.S. 288 (1989)); *Ramos v. Louisiana*, 590 U.S. ___, 140 S. Ct. 1390 (2020) (overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972)); *Franchise Tax Bd. of Calif. v. Hyatt*, 587 U.S. ___, 139 S. Ct. 1485 (2019) (overruling *Nevada v. Hall*, 440 U.S. 410 (1979)); *Herrera v. Wyoming*, 587 U.S. ___, 139 S. Ct. 1686 (2019) (overruling *Ward v. Race Horse*, 163 U.S. 504 (1896)); *Knick v. Township of Scott*, 588 U.S. ___, 139 S. Ct. 2162 (2019) (overruling *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)); *Rucho v. Common Cause*, 588 U.S. ___, 139 S. Ct. 2484 (2019) (overruling *Davis v. Bandemer*, 478 U.S. 109 (1986)); *Janus v. AFSCME*, 585 U.S. ___, 138 S. Ct. 2448 (2018) (overruling *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)); *South Dakota v. Wayfair*, 585 U.S. ___, 138 S. Ct. 2080 (2018) (overruling *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)); *Trump v. Hawaii*, 585 U.S. ___, 138 S. Ct. 2392 (2018) (overruling *Korematsu v. United States*, 323 U.S. 214 (1944), thank God); *compare* the Congressional Research Service's list of all Supreme Court cases explicitly overruling prior cases, available at https://constitution.congress.gov/resources/decisions-overruled/. My list does not even include those recent opinions that read a famous and well-established precedent narrowly to avoid having to follow or overrule it. *See, e.g.*, *Egbert v. Boule*, 596 U.S. ___, 142 S. Ct. 1793 (2022) (taking aim at but inexplicably missing *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)); *Vega v. Tekoh*, 597 U.S. ___, 142 S. Ct. 2095 (2022) (reading *Miranda v. Arizona*, 384 U.S. 436 (1966) narrowly to avoid the otherwise obvious conclusion that a violation of the Fifth Amendment right described in *Miranda* is a "constitutional" violation, because that would give rise to a Section 1983 cause of action against an officer who fails to follow *Miranda*). And my list *also* does not include disputes about whether precedent survived a recent decision that did not expressly claim to overrule that precedent. *See, e.g.*, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141, 2219 (2023) (Justice Gorsuch's concurrence praises the Court for overruling *Grutter v. Bollinger*, 539 U.S. 306 (2003), even though the majority did not say that); *id*. at 2245 (Justice Sotomayor's dissent criticizes the Court for refusing to admit that it is overruling *Grutter*); *see also Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407, 2428 (2022) (declaring that *Lemon v. Kurtzman*, 403 U.S. 602 (1971), was no longer good

criticism of *Heller* along these lines. It will be very easy for a federal court to reject any argument based on the argument that *Heller* or *Bruen* was wrong in its historical conclusions, not because of the *merits* of the argument or of any work done by historians to develop this period of history, but for the *procedural* reason that all such considerations are foreclosed by *Bruen*'s insistence on pre-1868 history alone. This seems unfair, but it is the way the system works (for now), and it deserves to be plainly identified so that advocates can plan for it.

Second, this history teaches the importance of taking the long view and doing the hard work of developing the historical record to achieve a desired outcome. The NRA members who effectuated the "Cincinnati Revolt" in 1977 did not see immediate results for their efforts. Instead, it took three slow and expensive decades of historical work and advocacy to build a compelling argument in favor of the individual-rights interpretation of the Second Amendment. Your case may have a two or three year time horizon, but the legal issue you advocate may require two or three *decades* of historical research.

For this reason, advocates must remember that finding amicus support under the *Bruen* standard is not as simple as finding a supportive industry group to say "we agree." It requires *intense planning* from the very outset of the case, and perhaps even before the lawsuit arises. It requires finding ample historical scholarship into primary sources that will persuade the courts, and if that scholarship does not yet exist, it may require working with interest groups that will take a decades-long perspective on developing that evidence. Or, as one writer bluntly put it, while advocates may prefer to think that subtle legal doctrines sway courts, "The National Rifle Association's long crusade to bring its interpretation of the Constitution into the mainstream teaches a different lesson. Constitutional change is the product of public argument and political maneuvering."[241] That author later elaborates on two key lessons. "One lesson: patience. The fight for gun rights took decades. Another lesson, perhaps obvious: There is no substitute for political organizing."[242] And when you become an advocate in a case presenting a constitutional dispute implicating the historical record, all of this becomes *your* job. These political challenges become *your* burden of proof.

III. SUBSEQUENT APPLICATIONS OF THE TEST ILLUSTRATE THE DIFFICULTIES WITH *BRUEN*'S METHODOLOGY.

Since *Bruen*, many courts have struggled to apply its historical standards—far too many to discuss in any detail in this paper. However, two cases illustrate this struggle in ways that provide useful guidance. They are *Rahimi*, a decision of the Fifth Circuit on which the Supreme Court has already granted certiorari, and *Bullock*, a decision of the Southern District of Mississippi that presents an exceptionally insightful explanation of *Bruen*'s challenges. Both cases were covered in the national news media. And both present disturbing facts, difficult analysis of *Bruen*'s standards, and useful lessons for any litigant trying to prove history in a post-*Bruen* world.

A. *Rahimi*—A historical analysis of domestic violence restraining orders.

The first case is *United States v. Rahimi*,[243] a March 2023 decision of the Fifth Circuit written by Judge Cory T. Wilson and joined by Judges Edith Jones and James Ho. The very first words of *Rahimi* remind the reader that the question is *not* whether it is a "laudable policy goal" to prohibit firearm possession by the subject of a domestic violence restraining order—it is to determine whether that particular provision of the Gun Control Act of 1968 is constitutional.[244] "It is not," the majority holds.[245] The decision made national news, as the media quickly reported widespread alarm from those who feared the end of protections for victims of domestic violence, as well as anxiety that the United States Supreme Court should review the decision.[246] Indeed, the Court has granted certiorari.

The facts of *Rahimi* are upsetting, and the *Rahimi* court outlines them and then ignores the reality of Rahimi's actions in favor of an abstract discussion of general legal principles. Zackey Rahimi was being investigated for a series of five unlawful shootings in Arlington, Texas, including offenses involving drugs and the assault of his ex-girlfriend.[247] During this investigation, a police search of his home turned up a

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law, without really identifying which prior case had overruled it). TL;DR: It is objectively true to say that the Court recently reversed a *lot* of prior cases.

[241] Waldman, Brennan Center for Justice, May 20, 2014.

[242] *Id*.

[243] 61 F.4th 443 (5th Cir. 2023), *opinion on rehearing, cert. granted*.

[244] *Id*. at 448.

[245] *Id*.

[246] A small sampling from the first page of Google results includes: https://publichealth.jhu.edu/2023/opinion-the-fifth-circuits-rahimi-decision-protects-abusers-access-to-guns-the-supreme-court-must-act-to-protect-survivors-of-domestic-violence; https://www.everytown.org/united-states-v-rahimi-the-fifth-circuits-dangerous-and-extreme-decision/; https://www.tdcaa.com/journal/get-ready-for-the-fallout-from-u-s-v-rahimi-and-bruen/; https://www.usatoday.com/story/news/politics/2023/07/12/guns-supreme-court-second-amendment-rahimi/70383454007/.

[247] *Id*. For example, "On December 1, after selling narcotics to an individual, he fired multiple shots into that individual's residence" and "On January 7, Rahimi fired multiple shots

rifle and a pistol.[248] Rahimi was not present for the search because he was in jail for a separate firearm offense.[249] Rahimi admitted that he was subject to a domestic violence restraining order that prohibited him from a variety of threatening conduct against his ex-girlfriend.[250] Because of this order, 18 U.S.C. § 922(g)(8) prohibited him from "possess[ing] … any firearm or ammunition."[251] Rahimi moved to dismiss the indictment against him on the ground that the Second Amendment rendered the statute unconstitutional on its face, conceding that pre-*Bruen* Fifth Circuit authority rejected his argument but preserving it for a future appeal.[252]After *Bruen* was decided, the case was re-argued and the new *Rahimi* panel held that *Bruen* "render[ed] our prior precedent obsolete" and freed the panel from any obligation to follow that precedent under the rule of orderliness.[253]

The *Rahimi* court first wrestled with the question of whether *Heller*'s assertion that the Second Amendment only applies to "law-abiding, responsible citizens" was a qualifier that "constricts the Second Amendment's reach."[254] The court concluded that it did not, but instead merely embodied the Court's recognition that some groups have historically been disarmed without any presumptive constitutional concern—such as felons and the mentally ill.[255] Rahimi was not within this category; though he was *being investigated for* a variety of felonious conduct, he had not yet been *convicted* of a felony.[256] Moreover, the standard must be higher than merely "law-abiding" because the alternative would give the government too much power to strip citizens of their constitutional rights for spurious reasons, the *Rahimi* court reasoned.[257]

Looking to *Bruen*'s inquiry into the "how" and "why" of the statute, the *Rahimi* court then described the "how" of Section 922(g)(8): it prohibits the possession of weapons "after a civil proceeding" that either finds a "credible threat" to another person or imposes a blanket prohibition on the use, or threatened use, of physical force.[258] The "why" of the statute is found in its purpose to protect the person from "domestic gun abuse."[259]

The court then addressed the historical arguments at length, after explaining *Bruen*'s new procedures for historical analysis.[260] While many laws in English common law and colonial America restricted firearm ownership by those "considered to be dangerous," the *Rahimi* court found that these laws were too dissimilar to a domestic violence restraining order to be a useful *Bruen* analogue.[261] "The purpose of laws disarming 'disloyal' or 'unacceptable' groups was ostensibly the preservation of political and social order, not the protection of an identified person from the threat of 'domestic gun abuse' … posed by another individual."[262] That is, *Rahimi* viewed colonial laws as dissimilar because they targeted *groups* instead of individuals, even though those laws necessarily had the effect of disarming each of the individual members of those groups.

As for the English common-law offense of "going armed to terrify the King's subjects," which was reflected in a penal law in four American states, the court joined the *Bruen* majority in finding that these statutes fell short of reflecting "our Nation's historical tradition of firearm regulation."[263] Section 922(g)(8) does not apply only to those who were *criminally* adjudicated to be dangerous, but to those who were *civilly* adjudicated, through a process that lacks many of the safeguards of criminal law.[264] The court also expressed a concern that domestic violence restraining orders were sometimes issued against persons with no history of violence at all, so the existence of the order itself did not prove that "going armed" was an analogous

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into the air after his friend's credit card was declined at a Whataburger restaurant." *Id*. at 448-49. Because Rahimi had not yet been convicted of a felony at the time of the search, he would not yet have been in violation of statutes forbidding felons to possess firearms. Those laws are discussed *infra* with regard to *Bullock*.

[248] *Id*. at 449. According to Rahimi's own brief, it also turned up "large amounts of cash"—$20,000.

[249] Both parties' merits briefs admit this fact.

[250] *Id*. Candidly, it is not quite clear from the opinion or the parties' briefs whether Rahimi's violent 2019 assault on his ex-girlfriend involving a firearm was what prompted her to *obtain* the restraining order against Rahimi, or whether that assault was committed in *violation* of a previously issued restraining order.

[251] *Id*.

[252] *Id*. *United States v. McGinnis*, 956 F.3d 747 (5th Cir. 2020) was directly on point, and the government argued that *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001)—discussed above—was also on point. *Id*.

[253] *Id*. at 450-51.

[254] *Id*. at 451.

[255] *Id*. at 452.

[256] *Id*.

[257] *Id*. at 453 ("Could speeders be stripped of their right to keep and bear arms?").

[258] *Id*. at 455.

[259] *Id*.

[260] *Id*. at 456-60.

[261] *Id*. at 456-57.

[262] *Id*. at 457.

[263] *Id*. at 458 (citing and quoting *Bruen*, 142 S. Ct. at 2142 ("We doubt that *three* colonial regulations could suffice to show a tradition of public carry regulation")). Part of the concern is that one of the statutes did not have forfeiture as a penalty, while two other statutes were later amended to drop the penalty of forfeiture. *Id*.

[264] *Id*. at 458-59. Rahimi waived a hearing, and had no counsel to advise him of his rights. *Id*. On the other hand, Rahimi did not dispute that he had physically assaulted his girlfriend.

behavior.[265] Interestingly, the court again distinguished "going armed" laws because they addressed "curbing terroristic or riotous behavior" by *groups* of people, and were not necessarily directed to the behavior of a specific individual, even though they necessarily had the effect of disarming the individuals in that group.[266]

The court found that historical "surety laws" were "closer to being 'relevantly similar'" in *Bruen*'s terms, because they embodied a rule (described by Blackstone) that a person who had "just cause to fear" another could "demand surety of the peace against such person."[267] The court agreed that these surety laws matched the "why" of Section 922(g)(8), and even matched many of the "hows" of that statute, because they required only a civil proceeding.[268] However, the *Rahimi* court distinguished surety laws because they did not result in a blanket prohibition on the carrying of firearms, but only in a requirement that the subject of the order post a bond before carrying a firearm.[269]

The court concludes by once again praising Section 922(g)(8) as embodying "salutary policy goals meant to protect vulnerable people in our society."[270] However, because *Bruen* eliminated all forms of means-end balancing in favor of a strict historical analysis, the court held the statute is unconstitutional on its face.[271]

Judge Ho wrote a concurrence in which he sought to "explain how respect for the Second Amendment is entirely compatible with respect for our profound societal interest in protecting citizens from violent criminals."[272] In short, Judge Ho sees a profound difference between criminal proceedings and civil protective orders.[273] Criminal proceedings provide greater protection to the accused, whereas divorce courts have come to enter civil protective orders "to virtually all who apply … despite the absence of any real threat of danger."[274] Divorce courts also tend to enter mutual restraining orders as a matter of course, which creates the problem that the order prohibits the *abused* party from obtaining a firearm for self-defense.[275]

For our present purposes in evaluating how to present historical evidence under the *Bruen* standard, *Rahimi* presents two compelling lessons.

First, it does not appear that the parties' historical analysis added much to the historical arguments already evaluated in *Bruen*, which worked in Rahimi's favor. The *Rahimi* court addresses many of the very same colonial laws that were discussed in *Bruen*, and thus followed *Bruen*'s criticism of those same examples.[276] Are three or four state laws sufficient to show a nationwide practice? (No.) Are those same colonial laws sufficiently analogous to the modern law being challenged, given that *Bruen* does not require a "dead ringer"? (Apparently not.) The fact that *Rahimi* arose under a domestic violence restraining order did present a new and interesting point of comparison to the surety orders already considered in *Bruen*, but there does not appear to be any new historical evidence to consider. In fact, at one point the *Rahimi* court acknowledges that the government professed itself to be frustrated at the lack of colonial-era evidence for "domestic violence" prosecutions in the first place.[277] Advocates should take heed that they should try to find new material to work with, though that may be difficult for the foreseeable future because *Bruen* and *Heller* are quite thorough in addressing the material that has most often been discussed in existing scholarly texts on the Second Amendment.

Second, the government went into this case with very little "ammunition" in the form of historical evidence. *No* amici filed briefs in the Fifth Circuit. Perhaps there was no time. After all, the government had to present its historical case in a supplemental brief filed shortly after the Fifth Circuit called for additional briefing on rehearing to address the new *Bruen* opinion. As a result, the government's historical discussion was comparatively brief and relied more on historical discussions found in published case law and the materials already considered in *Bruen* and *Heller* than on extensive additional historical research. One can only wonder what the government could have presented if it had more time to gather supporting materials.

At any rate, the government had that opportunity after the *Rahimi* opinion was issued and took advantage of it. The United States petitioned the Supreme Court for certiorari, and this time its petition was supported by many supporting amicus briefs. The amici's common theme—sometimes repeated word-for-word under separate cover—is that *Rahimi*'s overly narrow view of

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[265] *Id*. at 459.

[266] *Id*.

[267] *Id*.

[268] *Id*. at 460. The court acknowledged that the parties had "spar[red] somewhat over the required granularity" of finding an appropriate historical analogue, since the government conceded that "crime statistics from the founding era are hard to come by." *Id*. at 460 n.10. Still, the court found the surety laws to be sufficiently analogous to the "why" of Section 922(g)(8).

[269] *Id*.

[270] *Id*. at 461.

[271] *Id*.

[272] *Id*. at 461-62 (Ho, J., concurring).

[273] *Id*. at 465.

[274] *Id*. at 466 (quoting *City of Seattle v. May*, 171 Wash. 2d 847, 256 P.3d 1161, 1166 n.1 (2011) (Sanders, J., dissenting) and citing David N. Heleniak, *The New Star Chamber: The New Jersey Family Court and the Prevention of Domestic Violence Act*, 57 RUTGERS L. REV. 1009, 1014 (2005)).

[275] *Id*.

[276] *See, e.g.*, *id*. at 459-60 & n.10.

[277] *Id*. at 460 n.10.

historical sources demonstrates that the Court must grant certiorari to explain how to apply the *Bruen* test. As of this writing, in the few months after *Rahimi* was decided there have not been any other circuit court decisions that address the issue.[278]

Despite the lack of other circuit court cases on point, the Court granted certiorari on June 30, 2023. The petition for certiorari was filed by the Solicitor General, while Rahimi once again will be represented by Matthew Wright, Rahimi's assistant federal public defender in Amarillo.[279] We should all follow the case closely to see how the Supreme Court chooses to apply *Bruen* to these facts, because its opinion cannot help but resolve a few of the issues that *Bruen* left open.

B. *Bullock*—a district judge's cry for help turned into an insightful application of *Bruen*.

The second case is *United States v. Bullock*,[280] a decision from Judge Carlton Reeves of the Southern District of Mississippi. *Bullock* is extraordinary because of Judge Reeves's insightful treatment of the issues created by *Bruen*—both in his savage criticisms of *Bruen*'s methodology and his willingness to follow *Bruen* to its logical (if unpleasant) conclusion by holding that laws prohibiting felons from possessing firearms could no longer be considered constitutional.

1. Judge Reeves expressed concern about *Bruen* in a procedural order.

Judge Reeves received publicity in the national legal press for a "scorching" procedural order[281] that he issued on October 27, 2022, as *Bruen* began impacting criminal firearms prosecutions. Faced with the post-*Bruen* argument that the federal statute prohibiting felons from possessing firearms (18 U.S.C. § 922(g)(1)[282]) violates the Second Amendment, Judge Reeves blasted *Bruen* as incoherent and disconnected from the reality of historical research, and asked the parties to provide guidance on how he should proceed.[283]

As explained in this extraordinary order, "In reviewing the briefing and authorities presented in this case, and after conducting its own research, this Court discovered a serious disconnect between the legal and historical communities."[284] "Simply put, '[t]he firearms history that appears in law journals and court briefs is not the firearms history familiar to many mainstream historians.'"[285] While *Heller* adopted an individual-rights view of the Second Amendment, which some call the "Standard Model," Judge Reeves wrote that "an overwhelming majority of historians remain unconvinced by the Standard Model's interpretation of the Second Amendment."[286] Judge Reeves block-quotes a scholar's acidic description of the state of Second Amendment legal history, which really must be read for one's self to appreciate the depth of its scorn, but it *begins* with the assertion that scholars favoring this "Standard Model" broke "virtually every norm of historical objectivity and methodology accepted within academia" and concludes with the assertion that those scholars "fail to adhere to even the most basic norms of historical objectivity and methodology."[287] Judge Reeves then quotes another legal commentary: "A common theme emerging from that literature is historians' frequent complaint that lawyers just can't seem to get it right."[288]

Judge Reeves went on to state that since *Bruen* the divide between lawyers and historians had only become worse, and that "[h]istorians have been unsparing in their criticism of the [*Bruen*] decision."[289] He quotes one historian who calls *Bruen* "an ideological fantasy," and quotes Jill Lepore—best-selling Harvard historian of

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[278] *But see United States v. Haas*, No. 22-5054, 2022 WL 15048667 (10th Cir. Oct. 27, 2022) (a pre-*Rahimi* decision rejecting a poorly briefed argument about the constitutionality of the statute and favorably citing *United States v. Kays*, No. CR-22-40-D, 2022 WL 3718519 (W.D. Okla. Aug. 29, 2022), which held Section 922(g)(8) was constitutional after *Bruen*).

[279] Setting aside the merits of the case, if that is even possible given Rahimi's rambunctious behavior, this author cannot help but cheer on Mr. Wright as the underdog—though one imagines he will be able to draw on the support of several organizations to balance the scales.

[280] No. 3:18-CR-165-CWR-FKB, 2023 WL 4232309 (S.D. Miss. June 28, 2023).

[281] 2022 WL 16649175 (S.D. Miss. Oct. 27, 2022). *See, e.g.*, Debra Cassens Weiss, *In 'scorching' opinion, federal judge considers appointing historian to help him in gun case*, ABA JOURNAL, Nov. 2, 2022, available at https://www.abajournal.com/news/article/in-scorching-opinion-federal-judge-considers-appointing-historian-to-help-him-in-gun-case; Ariane de Vogue, *Federal judge blasts the Supreme Court for its Second Amendment opinion*, CNN, Nov. 1, 2022, *available at* https://www.cnn.com/2022/11/01/politics/second-amendment-opinion-supreme-court-judge-carlton-reeves/index.html.

[282] "It shall be unlawful for any person—(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year … to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

[283] 2022 WL 1669175, at *1-2.

[284] *Id*. at 2.

[285] *Id*. (quoting A RIGHT TO BEAR ARMS? THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT 187 (Jennifer Tucker et al. eds., 2019)).

[286] *Id*. (citing A RIGHT TO BEAR ARMS at 168).

[287] *Id*. (citing A RIGHT TO BEAR ARMS at 168).

[288] *Id*. (quoting Jonathan D. Martin, *Historians at the Gate: Accommodating Expert Historical Testimony in Federal Courts*, 78 N.Y.U. L. REV. 1518, 1525 (2003)).

[289] *Id*.

American history[290]—who describes *Bruen* as "nothing but inconsistency and caprice."[291] Because Judge Reeves wanted to avoid such accusations of cherry-picking, he asked the parties to advise the court "whether it should appoint a historian to serve as a consulting expert in this matter."[292]

2. Judge Reeves did not appoint a historian, but instead, wrote a compelling analysis of the *Bruen* methodology.

Months passed, and then on June 28, 2023, Judge Reeves entered his final order granting Bullock's motion to dismiss the case.[293] You really should read his order for yourself; it is so thorough and well-written that I seriously considered submitting it in lieu of my own paper.[294] His order can be summarized into three overarching comments: (1) Judge Reeves develops and deepens his criticism of the Supreme Court majority as a bunch of hypocrites (without ever using that word *per se*); (2) Judge Reeves criticizes *Bruen* in particular as an indefensible methodology divorced from true historical methods; and then Judge Reeves (3) nevertheless held that *Bruen*'s methodology compels the conclusion that convicted felons have an individual right to bear arms, contrary to 99% of other federal courts to consider the question (before or since).

Judge Reeves begins by describing the playing field.[295] The facts of the case are simple. Jessie Bullock undeniably was convicted of a felony in his youth and therefore Section 922(g)(1) forbids him to possess a firearm, even though the magistrate judge thought it "downright silly" that anyone would ever think that Bullock was a danger to anyone in 2020.[296] Bullock contended that *Bruen* requires a change in the longstanding law finding Section 922(g)(1) constitutional, thus providing a defense against the government's demand that he serve up to ten years in prison.[297] The government responded by filing only a three-and-a-half-page document—Judge Reeves emphasizes the brevity of this response many times—in which the government urged Judge Reeves to "fall in line" with the many other district court cases that held the statute constitutional.[298] Yet neither *this* case nor any of those *other* cases provided any input from historians, Judge Reeves noted.[299]

This lack of input from historians troubled Judge Reeves deeply, especially considering that historians have overwhelmingly rejected *Heller* and *Bruen* as wrongly decided (as his prior order explained).[300] But both parties rejected Judge Reeves's invitation to appoint a historian.[301] Bullock's lawyers pointed out that *Bruen* makes the historical record part of the *government's* case, as Judge Reeves conceded was correct, whereas the government took the position that the issue was "so thoroughly established as to not require detailed exploration of the historical record."[302]

Judge Reeves noted that the parties' failure to provide input from historians has "define[d] the Supreme Court's own Second Amendment jurisprudence."[303] He chided Justice Scalia for writing a detailed opinion in *Heller* that seemed to defy Justice Scalia's own personal attacks on "sign-on, multiple-professor amicus briefs in a case" and the Court's unseemly habit of "picking and choosing those studies that support its position."[304] Judge Reeves also approvingly quoted the law review article in which Justice Scalia described at length the difficulty facing judges who try to "plumb the original understanding of an ancient text" and conceded that it was "a task sometimes better suited to the historian than the lawyer."[305] Judge Reeves also quotes Gordon Wood, surely the most eminent American historian of our

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[290] If you have not read her bestselling book THESE TRUTHS: A HISTORY OF THE UNITED STATES (2018), you are in for a treat. She writes for THE NEW YORKER and hosts a podcast, making her somewhat more visible than other historians toiling in the academic vineyard, and possibly also exposing her to greater criticism.

[291] 2022 WL 1669175, at *2 (quoting Saul Cornell, *Cherry-picked history and ideology-driven outcomes:* Bruen*'s originalist distortions*, SCOTUSBLOG (June 27, 2022) and Jill Lepore, *The Supreme Court's Selective Memory*, THE NEW YORKER (June 24, 2022)). Lepore criticizes the entire approach of originalism as cherry-picking the source material, and asserts that one of the key problems with *Bruen*'s methodology is that it will never give sufficient weight to the opinions of those people who were disenfranchised during the time periods allowed by *Bruen*, because their opinions are not likely to be preserved in a manner that can be used as evidence in court. *See id*.

[292] *Id*. at *3.

[293] 2023 WL 4232309.

[294] The CLE organizers would have been enlightened, but not amused.

[295] 2023 WL 4232309, at *1.

[296] *Id*. at *2-3. The government had not even tried to arrest Bullock for almost two years.

[297] *Id*. at *3-4.

[298] *Id*. at *4 (the words are Judge Reeves's description of the government's argument, not a quote from the government's briefs).

[299] *Id*. at *5.

[300] *Id*. at *4-5.

[301] *Id*. at *5.

[302] *Id*.

[303] *Id*. at *1-2.

[304] *Id*. at *1 (citing Memorandum from Associate Justice Antonin Scalia to Associate Justice John Paul Stevens, No. 95-1853, *Clinton v. Jones*, at 2 (April 4, 1997) and *Roper v. Simmons*, 543 U.S. 551, 617 (2005) (Scalia, J., dissenting)).

[305] *Id*. at *4 n.4 (quoting Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856-57, 861 (1989)).

era,[306] as saying that we "cannot base our constitutional jurisprudence on the historical reality of the founding."[307]

Judge Reeves then recounts the history of Second Amendment jurisprudence, in particular highlighting academic authorities that present *United States v. Miller* (1939) in a more positive light than Justice Scalia's dismissive treatment in *Heller*, and touching on historical milestones like Chief Justice Burger's 1991 description of the NRA's efforts as "fraud."[308] He then discusses *Heller* and its broad holdings at some length, as well as *McDonald v. City of Chicago, Illinois* (2010),[309] which expanded *Heller*'s holding to the states via incorporation in the Fourteenth Amendment and added an impassioned discussion of the need to arm black citizens against racist attacks during Reconstruction.[310] Judge Reeves then takes particular care to analyze a dissenting opinion written in 2019 by Justice Barrett when she was on the Seventh Circuit.[311] He noted that Justice Barrett emphasized that *Heller* would ask not whether the defendant was a felon, per se, but whether he was *dangerous*, because the historical record actually shows that public safety had always been the true concern driving laws allowing the disarmament of citizens in the American colonies.[312] She also found no categorical laws disarming felons, as opposed to laws disarming "rebels" or those who threatened violence.[313] Finally, Judge Reeves discusses *Bruen* at length, taking the occasional pot-shot at portions of the opinion in which the majority's sources do not seem to support the majority's analysis.[314]

Judge Reeves then turned to the "post-*Bruen* consensus" among courts considering the felon-in-possession statute, which he summarized as the proposition that the statute could be easily held constitutional because (1) *Heller* took pains to reiterate that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill" and (2) *Bruen* did not contradict that statement.[315] Indeed, the argument goes, concurring opinions by Justices Alito and Kavanaugh in *Bruen* reiterated this aspect of *Heller*, thereby guaranteeing that they would not cast votes to find felon-in-possession laws unconstitutional.[316]

Judge Reeves rejected this "consensus" for both procedural and substantive reasons. Both are insightful; both are troubling.

Procedurally, he noted that in Bullock's case, the United States had not tried to carry its *Bruen* burden of providing an expert report on the history of the Second Amendment.[317] Such reports are common in all kinds of litigation, yet the government offered no such evidence.[318] Likewise, the absence of historical analysis was not filled by any amicus briefs.[319] Judge Reeves expressed sympathy for the lack of amicus support and the plight of historians, who have no real-world motivation to file amicus briefs or participate in "what

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[306] Currently a professor at Brown University, Professor Wood's accolades include the Bancroft Prize, the Pulitzer Prize, and the National Humanities Medal. https://www.amacad.org/person/gordon-stewart-wood. He has a reputation for getting the history right, and for writing well, and those two don't always go together.

[307] *Id*. at *5 n.5 (quoting Gordon S. Wood, *The Supreme Court and the Uses of History*, 39 OHIO N.U. L. REV. 435, 446 (2013)). While this quotation is accurate and supports Judge Reeves's point, Gordon Wood's opinions on the subject are both more accommodating and more discomforting than Judge Reeves's opinion in *Bullock*. In the quoted article (which is a transcript of a talk that can also be viewed on YouTube), Wood distinguishes "law office history" as a "necessary fiction" because "[h]istory is much too complicated to be used effectively by judges and the courts." *Id*. at 443. But "we should not ever get this law-history mixed up with real history that historians write." *Id*. at 449. Wood also spoke about the specific issue at hand during the question-and-answer period of this talk, though Judge Reeves does not quote it. Wood opines that it is meaningless to ask what the Founders meant when they wrote the Second Amendment because "it's conventional wisdom for an Englishman to include a right to bear arms," and as a result, no one would have thought to ask whether the right was "just for the militia or is it just for the individual." *Id*. at 451. Wood explains that because James Madison believed that the federal government was already a government of limited powers, he eliminated all proposals for the Bill of Rights that would have been innovative or interesting (except, perhaps, the Establishment Clause's elimination of the Church of England's monopoly) and left only "the innocuous ones—the common law rights that everyone takes for granted." *Id*. at 452-53. For that reason, there is no point in asking what the Founders meant in the Bill of Rights—if anything, they *meant* to avoid any meaningful discussion of what their words meant. *See id*. This author finds Professor Wood's point of view so unnervingly recursive and unhelpful that he is tempted to retreat to "law-office history." And that was exactly Professor Wood's point.

[308] 2023 WL 4232309, at *6.

[309] 561 U.S. 742 (2010).

[310] 2023 WL 4232309, at *6-10.

[311] *Id*. at *10-12 (discussing *Kanter v. Barr*, 919 F.3d 437, 451-56 (7th Cir. 2019) (Barrett, J., dissenting)).

[312] *Id*.

[313] *Id*.

[314] *Id*. at *12-14 (quoting, e.g., William Baude and Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809, 810-11 (2019), which was cited in *Bruen*, as *also* saying "lawyers must often defer to historical expertise on the relevant questions").

[315] *Id*. at *14.

[316] *Id*.

[317] *Id*. at *15.

[318] *Id*.

[319] *Id*. at *16.

is ultimately an uncompensated labor scheme."[320] In an inverse of the usual system in which district courts receive evidence and the record is refined as it works its way up the appellate ladder, amici are few and far between in the district courts and circuit courts, because experts know that "all that matters is the Supreme Court's historical review, conducted de novo as a legal rather than a factual question, with dozens of amicus briefs never before seen by another court." But the practical effect was that Judge Reeves had nothing in the district court record on which to perform a *Bruen* analysis.

Substantively, Judge Reeves attacked the "consensus" thesis that *Heller* or *Bruen* had decided the constitutionality of felon-in-possession statutes.[321] The statement in *Heller* is non-binding dictum, and judges and scholars have noted that it conflicts with the Court's actual *analysis* in *Heller* and perhaps was only "compromise language designed to secure Justice Kennedy's vote."[322] Judge Reeves also agreed with a recent Third Circuit opinion[323] holding that *Bruen* effectively overruled *Heller*'s assurance that the Second Amendment extends only to "law-abiding responsible citizens" by creating a default rule that the Second Amendment applies to *all* citizens unless withdrawn by a law consistent with the Nation's historical tradition of firearm regulation.[324] (Recall that *Rahimi* reached a similar conclusion for somewhat different reasons.) And in an especially incisive footnote, Judge Reeves warned that it might not be so easy to "count the votes" of the Justices along simple political lines, because Justice Jackson "is a former public defender" who could easily conclude that felon-in-possession gun laws "disenfranchis[e] minorities and exacerbat[e] mass incarceration."[325] To that end, Judge Reeves recounted troubling data that African-Americans are charged with Section 922(g) offenses at a hugely disproportionate rate.[326] Additionally, he noted that Justice Barrett is the only justice to have already written on this specific subject, and she pointedly "declined to join Justice Alito and Justice Kavanaugh's attempts to reassure us [in *Bruen*] that felon-in-possession laws are constitutional."[327]

Judge Reeves then turned to the historical evidence, and pointed out that much of the evidence supporting the disarmament of felons was material that had already been considered and found wanting in *Bruen*.[328] Likewise, the fact that some felons could be executed for their crimes did not mean that disarmament was necessarily allowed as a lesser punishment; the historical record shows that sometimes felons were allowed to repurchase their arms after serving their terms of imprisonment.[329] As for law review articles, Judge Reeves also noted that even if one overlooked their methodological problems (such as their lack of peer review), the most commonly cited law review articles could be cherry-picked to support either side of the debate.[330]

Despairing of the entire approach of *Bruen*,[331] Judge Reeves turned to a historical analysis of what it meant to be a "felon" at the time of the Founding. He identified a number of questions that would have to be answered someday, such as what types of felonies would be sufficient to support disarmament, given that the understanding of "felony" was vague in 1791. He thought Justice Barrett's dissent was "fairly compelling" in its focus on "dangerousness" instead of "felony" status, but noted that courts would still need to know what level of "dangerousness" would suffice.[332] But he identified these questions for future resolution, finding no answer to them in the record.

Finally turning to the specifics of Bullock's case, Judge Reeves began by noting that the government previously argued (in some circuit court cases following *Heller*) that there was no evidence of a categorical prohibition of firearms by felons, and had now changed its position to the three-and-a-half page brief filed in his court.[333] That brief was insufficient because it relied on the same *Heller* dictum that he had rejected above, and lacks any serious discussion of American history.[334] The government later filed additional briefs in which it changed its position to argue that Bullock was actually quite dangerous, but Judge Reeves held this new line of attack was untimely and would not be considered.[335]

Judge Reeves concludes with a pair of breathtaking observations. First, he encourages the Supreme Court to apply *Bruen*'s thinking to other fundamental

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[320] *Id*. Judge Reeves noted that he had received many unsolicited CVs from professional historians, who "appear to charge affordable rates," and that the government itself hires "real historians" in some circumstances. *Id*. at *15 n.14 & 15.

[321] *Id*. at *17-18.

[322] *Id*. at *17 (quoting Carlton F.W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1372 (2009)).

[323] *Range v. Att'y Gen. United States of Am.*, 69 F.4th 96, 101 (3d Cir. 2023) (en banc).

[324] 2023 WL 4232309, at *21.

[325] *Id*. at *19 n.22.

[326] *Id*.

[327] *Id*. at *20 n.23.

[328] *Id*. at *21-23.

[329] *Id*. at *23.

[330] *Id*. at *23-24.

[331] *Id*. at *26 ("…maybe it is time to put an end to elevating 'historical tradition' over all other modes of legal analysis").

[332] *Id*. at *27-28

[333] *Id*. at *28-29.

[334] *Id*. at *30.

[335] *Id*. at *30-31.

constitutional rights—the right to a "speedy" trial is flagrantly ignored by current practice, the writ of habeas corpus is subject to onerous requirements, and litigants alleging deprivation of voting rights face a "heavy burden" to prove their case.[336] Just as with the Second Amendment, which *Heller* proclaimed was no longer a second-class right, the *federal government* should bear the burden to explain why it has deprived American citizens of these rights.[337] Second, he urges the Court to apply *Bruen*'s historical rigor to the very concept of originalism itself, because there is good reason to conclude that originalism is a historical *argument* lacking historical *evidence*.[338] "It is not clear that founding-era Americans collectively agreed that for time immemorial, their descendants would be bound by the founding generation's views on how the Constitution should be read."[339]

Judge Reeves concludes with these rousing words:

> Let's be clear about what this means for originalism. The next generation will have its own conceptions of liberty. It will interpret the principles of the Constitution, enduring as they are, differently than this generation has interpreted them. Change is unstoppable. And to the extent *Bruen* and decisions like it try to stop that change, they will not last long. The only question is how long the People will let them remain.[340]

Judge Reeves dismissed the charges against Bullock.[341] The government has appealed to the Fifth Circuit, where the United States will *surely* try to muster amicus support for its position. Or perhaps not, for all the reasons that Judge Reeves identified. At any rate, *Rahimi* will surely provide additional guidance when the Supreme Court decides it in the coming Term.

Bullock is valuable to anyone seeking an incisive (even withering) criticism of *Bruen*'s methodology and its conclusions—but remember that at the end of the day, Judge Reeves nevertheless applied *Bruen* as binding precedent. One cannot help wondering whether Judge Reeves rejected the "consensus" view on felon-in-possession laws because he read *Bruen* fairly, or because he read *Bruen* pessimistically.[342]

But *Bullock* has several practical lessons for litigants seeking to learn how to prove history after *Bruen*. These lessons include:

- History is *part of the government's burden of proof*. That means it is not something that can be filled in later through an amicus brief (though amici would not have been turned away), nor is it something that the court can address *sua sponte* by appointing a historian. It requires hard work and reliance on historical evidence and not merely citations to prior cases or to law review articles.
- It may be more difficult to obtain support from historians than one might think. Judge Reeves points out that the amicus brief system has bizarre motivations that dissuade historians from running to the lower courts to offer their points of view, and that it would make more sense for litigants to enlist historians like the testifying experts that they are.
- Address and engage with contrary views. With hindsight, it is shocking to think that the government did not anticipate and address an adverse opinion on the very same subject written by a current Supreme Court justice.
- Never, ever, *ever* tell a judge to "fall in line." Never assume that non-binding precedent will be sufficient to replace the historical analysis that is part of the burden of proof. Never file a three-and-a-half page brief on an issue of major constitutional importance, even if you are the federal government.
- Never assume that a judge's political history will determine the outcome of a decision. Judge Reeves has a long history of work with "liberal" organizations like the ACLU and was appointed by Barack Obama, but he nevertheless strictly followed *Bruen*, and he pointedly noted the ways in which felon-in-possession laws have been used to achieve unjust and racist results.

IV. SUBSEQUENT SUPREME COURT HAVE BEGUN TO SHOW THE HISTORICAL BATTLEFIELD OF THE FUTURE.

The Supreme Court's subsequent cases have also begun to suggest the way in which historical debates will take shape in the future. While the Court commonly debates history when considering constitutional issues, it is particularly worthwhile to consider how two cases from the 2022-2023 Term demonstrate *Bruen*'s potential impact for advocates and judges.

A. *Students for Fair Admissions*: The Race-Based College-Admissions Case

The Supreme Court's decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard*

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[336] *Id*. at *32-33.

[337] *Id*.

[338] *Id*. at *34, citing ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 82 (2022).

[339] *Id*.

[340] *Id*.

[341] *Id*.

[342] That is, I speculate that if one said "Surely *Bruen* wasn't that extreme," Judge Reeves might respond "yes, *Bruen* was that extreme, and don't call me Shirley."

College[343] made nationwide news, because the Court finally issued the holding that had previously been a distant threat in previous cases like *Grutter v. Bollinger*[344] and *Fisher v. University of Texas at Austin*[345]—that race may not be considered in college admissions because the Equal Protection Clause of the Fourteenth Amendment requires states to be "colorblind."[346]

1. Chief Justice Roberts's majority opinion relies on policy and case law.

Chief Justice Roberts's opinion for the Court does not engage in the sort of history that is contemplated in *Bruen*. It presents a detailed analysis of the Court's many rulings on race since the Founding, without engaging in very much discussion of the meaning of the Fourteenth Amendment as understood by those who ratified it.[347] Chief Justice Roberts emphasized the ways in which recent Supreme Court cases had warned that there must be an end-point to the use of racial preferences, and announced that the day had come for colleges to end the use of "race for race's sake."[348] In this sense, he sought to frame the decision as a fulfillment of those prior cases' warning about what must come in the future, instead of a reversal of their holdings.[349] And Chief Justice Roberts's argument arises from a rejection of *policy* concerns more than any historical analysis.[350]

Chief Justice Roberts's most incisive argument, in this author's opinion, is that the very concept of "race" as implemented by these universities is too vague and low-resolution to serve either as a legal distinction or an effective way of measuring "diversity." After all, at oral argument UNC could not answer what "race" a Middle Eastern student was, or defend its failure to distinguish *south* Asia from *east* Asia in its catch-all category for "Asians."[351] And shouldn't "diversity" account for the variety of cultures in Central and South America instead of using the catchall term "Hispanic"?[352]

2. Justice Thomas's opinion applies *Bruen* historical analysis.

More useful for our current purposes is the concurring opinion by Justice Thomas, and the rejoinders in dissent from Justices Sotomayor and Jackson. These opinions get down into the weeds of history.

Justice Thomas writes a lengthy opinion in defense of a thesis that he takes from Justice Harlan's famous dissent in *Plessy v. Ferguson*: "our Constitution is color-blind, and neither knows nor tolerates classes among citizens."[353] He recounts at some length the history of the adoption of the Fourteenth Amendment as a way to provide constitutional support for the 1866 Civil Rights Act, which some had criticized as exceeding the scope of authority granted by the Thirteenth Amendment.[354] Of course, this history can be taken to support a variety of views, depending on how one weights the goals of the 1866 Act. For Thomas, what mattered most was that the authors of the Fourteenth Amendment considered declaring those of "African descent" to be citizens, but chose instead to use the broader phrase "all persons born in the United States, and not subject to any foreign Power."[355] (But compare Justice Scalia's admonition in *Heller*, used to reject a similar argument: "It is always perilous to derive the meaning of an adopted provision

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[343] 143 S. Ct. 2141 (2023) (consolidated with *Students for Fair Admissions, Inc. v. University of North Carolina*).

[344] 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today").

[345] 579 U.S. 365, 388 (2016) ("The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary").

[346] 143 S. Ct. at 2145-46.

[347] *Id*. at 2159-66 (briefly discussing that evidence before moving on to a lengthy discussion of cases like *Plessy*, *Brown*, and *Bakke*).

[348] *Id*. at 2168-70.

[349] *See id*.

[350] *See, e.g.*, *id*. at 2173 ("In the years after *Bakke*, the Court repeatedly held that ameliorating societal discrimination does not constitute a compelling interest that justifies race-based state action"); *id*. at 2175 ("In [the dissent's] view, this Court is supposed to tell state actors when they have picked the right races to benefit").

[351] *Id*. at 2167-68. Likewise, Justice Gorsuch's concurrence stresses the incoherence of attempts to divide the modern world into racial categories, and the resulting inconsistency of legal decisions trying to apply those categories. *Id*. at 2209-11 (Gorsuch, J., concurring).

[352] *Id*. But this part of the analysis says nothing about the assertion that continued consideration of race is necessary to address the problem of persistent structural racism, which the majority rejects and the dissenting opinions adopt. And even if words like "white," "black," "Asian" and "Hispanic" are too clumsy to be the endpoint of a diversity analysis, it does not necessarily follow that the answer is to eliminate *all* consideration of race. True diversity requires some consideration of social and cultural factors, and perhaps a richer vocabulary. One can only hope that is what Chief Justice Roberts meant when he held that "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."

[353] *Id*. at 2176 (Thomas, J., concurring) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

[354] *Id*. at 2177-78.

[355] *Id*. at 2179-82.

from another provision deleted in the drafting process."[356]) Justice Thomas also emphasized the way in which some defended the 1875 Civil Rights Act in general, color-blind terms as opposed to the Black-specific, separate-but-equal rhetoric offered by others.[357]

Justice Thomas rejected contrary evidence supporting what he called the "anti-subordination" view, which is the view that "the Amendment forbids only laws that hurt, but not help, blacks."[358] He rejected the evidence of the Freedmen's Bureau—a government organization created in 1865 that plainly was not "color-blind" in practice—because the enacting legislation's reference to "freedmen" was technically a race-neutral category, insofar as there were African-Americans in America who had not been enslaved.[359] Justice Thomas categorized other race-targeted laws in existence in 1868 as doing a clumsy job of undoing the racially disparate impact of past discrimination; that is, because slavery was still so recent, "the statute's racial classifications may well have survived strict scrutiny."[360]

Most importantly for our purposes, Justice Thomas argued that one must not consider any laws enacted *after* the Fourteenth Amendment because of the holding in *Bruen*. Those laws include Jim Crow statutes and "a small number of laws that appear to target blacks for preferred treatment."[361] Only the text of the Fourteenth Amendment matters, and under *Bruen* no *post*-adoption authorities can possibly shed light on the original meaning of that text, no matter how soon thereafter they were enacted.[362] Justice Thomas then went on to discuss the Court's subsequent case law at length, placing great emphasis on the arguments and opinions in *Plessy* and *Brown*, even though they occurred after the Fourteenth Amendment was adopted.[363]

Justice Thomas concludes his concurrence with a bitter attack on Justice Jackson's dissent, which he describes as asserting that "the legacy of slavery and the nature of inherited wealth" necessarily "locks blacks into a seemingly perpetual lower caste."[364] He agrees with Justice Jackson that "our society is not, and never has been, colorblind."[365] But he believes that the Fourteenth Amendment nevertheless requires governments to behave in a colorblind manner.[366] The alternative would "empower privileged elites" to decide how to treat "castes and classifications they alone can divine."[367]

3. Justices Sotomayor and Jackson dissent and present their own historical argument.

Justices Sotomayor and Jackson wrote fierce dissents, in which neither author concedes an inch to the historical argument offered by Justice Thomas. Both authors follow the process that *Bruen* compels, more or less, and yet they arrive at a very different result than Justice Thomas.

Justice Sotomayor recounts the same history, but gives more space to the statutes enacted concurrently with the Fourteenth Amendment.[368] These programs were plainly targeted at Black citizens, not citizens without regard to their race.[369] In addition to the Freedmen's Bureau, these included the establishment of some of America's Historically Black Colleges and Universities ("HBCUs"), and these programs were defended in explicitly race-conscious terms.[370] Justice Sotomayor also discussed the case law that grew out of Reconstruction and its aftermath, again framing these decisions as "ensur[ing] racial equality of opportunity, not to impose a formalistic rule of race-blindness."[371] When Justice Sotomayor turns to Justice Thomas's concurrence, she is unsparing in her criticism of him for using bogus social science studies that "have major methodological flaws, are based on unreliable data, and do not meet the basic tenets of rigorous social science research," as a group of *amici* social scientists put it.[372] She also points out that Justice Thomas's "sentiment" against race-conscious admissions is contradicted by rigorous social science into the still-existing stigmas of race.[373] And she points out the lack of any evidence in the record or the social science to support many of Justice Thomas's allegations about college admissions practices.[374]

For her part, Justice Jackson offers a detailed history of the Fourteenth Amendment in which she emphasizes the evidence that it was adopted for the

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[356] *Heller*, 554 U.S. at 590.
[357] *Students for Fair Admissions*, 143 S. Ct. at 2183-85.
[358] *Id*. at 2185.
[359] *Id*. at 2185-86.
[360] *Id*. at 2186.
[361] *Id*. at 2187-88.
[362] *Id*.
[363] *Id*. at 2194-95. Justice Thomas would likely explain that he had changed the subject to the Court's precedent, which is always appropriate for discussion insofar as it touches on the principle of *stare decisis* instead of the original meaning of the constitutional text. But on a first reading, the dissonance created by this rhetorical shift is breathtaking.
[364] *Id*. at 2202-08.
[365] *Id*. at 2203.
[366] *Id*.
[367] *Id*. at 2204.
[368] *Id*. at 2228-30.
[369] *Id*.
[370] *Id*.
[371] *Id*. at 2231.
[372] *Id*. at 2256.
[373] *Id*. at 2257.
[374] *Id*.

specific reason of protecting Black Americans,[375] and discusses at length the Jim Crow laws and *de jure* injustices that Justice Thomas declared to be inadmissible under *Bruen*.[376] As for Justice Thomas's impassioned attack on her views, she responds in a footnote that "Justice THOMAS's prolonged attack … responds to a dissent I did not write in order to assail an admissions program that is not the one UNC crafted."[377] "Justice THOMAS ignites too many more straw men to list, or fully extinguish, here."[378] Her explanation of the historical record draws on historically defensible sources yet reaches a completely different conclusion, to some extent because she flatly refuses to yield to *Bruen*'s rule that post-adoption evidence must be disregarded.

4. Lessons from *SFFA*.

What lessons can we take from these impassioned disagreements? I suggest a few points:

- *Bruen* is not limited to Second Amendment cases. Justice Thomas cites *Bruen* as settled authority for why courts must disregard subsequent enactments to inform the meaning of the words of a prior constitutional text, and in so doing, bypasses authorities that would have contradicted his conclusion. In the single Term since *Bruen* was published, the Court has referred to *Bruen* in ways that suggest it will have an outsized impact,[379] and it is logically positioned to apply to other cases.[380]
- *Bruen*'s methodology has teeth. Justice Thomas uses *Bruen* to disregard an entire group of statutes that refute the "colorblind" thesis, because those statutes were enacted after the Fourteenth Amendment. Advocates must remember that this rule of *Bruen* is being applied mechanically and as a bright line.
- There is no single "lesson" to be drawn from history, and the same historical sources can lead judges to different conclusions. The justices cited the same historical events leading up to the adoption of the Fourteenth Amendment in order to support diametrically opposed conclusions. To a certain extent, this surely justifies Judge Reeves's (and historians') concerns about "cherry-picking" the historical record, and encourages advocates to do their best to tell a compelling story.
- Your authorities are not conclusive. Justice Sotomayor drew Justice Thomas's attention to the amicus brief from social scientists who demonstrated that his preferred authorities were methodologically unsound; nevertheless, he persisted in citing them.

B. *Haaland v. Brackeen*: An example of a successful *Bruen* brief.

Another excellent example of *Bruen*'s impact on historical argument can be found in *Haaland v. Brackeen*.[381] That case affirmed the Indian Child Welfare Act ("ICWA") against a variety of challenges, including the challenge that Congress lacked constitutional authority to enact it.[382] The concurring and dissenting opinions wage a pointed battle over the historical background and interpretation of the Constitution, in which a historian's amicus brief made a significant difference by taking up the *Bruen* burden.

Congress enacted the ICWA in 1978 in reaction to the United States government's practice over many decades of taking Indian children away from their families for the express purpose of deliberately destroying tribal identities.[383] All children who are "a member of an Indian tribe," or one who is "eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe," are protected by the ICWA. Among other protections, the ICWA imposes strict requirements on all proceedings involving child custody, and requires all courts to make rigorous efforts to place such children with an Indian caregiver before placing them with non-Indians.[384] Congress meant ICWA to overcome a horrific history, but it has also caused much heartache over the years because it necessarily overrides determinations by state family-

[375] *Id*. at 2264-65.
[376] *Id*. at 2265-68.
[377] *Id*. at 2277 n.103.
[378] *Id*.
[379] *See Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___, 142 S. Ct. 2228, 2323 & n.1 (2022) (Breyer, J., dissenting) (faulting the majority for discussing the history of abortion in ways that violate the rules of *Bruen*); *Smith v. United States*, 599 U.S. ___, 143 S. Ct. 1594, 1608 n.16 (2023) (Justice Alito notes that the evidence of postratification history did not present a *Bruen* problem because it was consistent with other evidence).
[380] The Supreme Court has adopted a "historical practice and understandings" test for the Establishment Clause, and abandoned the former *Lemon* test. *Kennedy v. Bremerton School Dist.*, 597 U.S. ___, 142 S. Ct. 2407, 2428 (2022) (citing *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 576 (2014)). Justice Breyer's dissent in *Kennedy* argues that this new historical test will present the same problems as *Bruen*. *Id*. at 2450.
[381] 143 S. Ct. 1609 (2023).
[382] *Id*. at 1623.
[383] *Id*. at 1642-46 (Gorsuch, J., concurring) ("Achieving those goals, officials reasoned, required the 'complete isolation of the Indian child from his savage antecedents'" (quoting the ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR (1886))).
[384] *Id*. at 1623-24.

law courts about what outcome would be in the best interest of a particular child.[385]

The disputes in *Haaland* involved three challenges to the ICWA by foster families that had already developed a bond with an Indian child placed in their care—(1) a White family that fostered a Navajo and Cherokee child, and whose petition for adoption was opposed by the tribes; (2) a White foster family who been chosen by the child's non-Indian mother, but whose petition for adoption was opposed by the child's Pueblo father; and (3) a White family who fostered a child after the Ojibwe represented that the child was not eligible for membership, but whose petition for adoption was then opposed when that tribe changed its position and enrolled the child as a member.[386] The prospective adoptive parents filed suit in federal court against the Department of the Interior and Bureau of Indian Affairs, among others.[387]

1. Justice Barrett's Majority Opinion.

In her opinion for the seven-justice majority, Justice Barrett addressed each of the arguments for why Congress lacked the power to enact the ICWA, and affirmed Congressional power in each instance—without ever quite explaining where that power came from.[388] Justice Barrett found that Congress's "power to legislate with respect to Indians is well established and broad,"[389] after explaining the overlapping powers conferred by the Indian Commerce Clause, the Treaty Clause, and the Constitution's inherent decision to place matters of military and foreign policy within the federal government's sphere.[390] She noted that the jurisprudence deferring to Congressional power to deal with Indian affairs "rarely ties a challenged statute to a specific source of constitutional authority," and that the power is "not absolute."[391] Addressing the specific arguments made by the petitioner families, she rejected the argument that family law was exclusively a matter of state law in all circumstances, and that the Indian Commerce Clause narrowly focused only on "commerce" in the sense of "commodities that can be traded."[392] Instead, Supreme Court precedent has long recognized that the Indian Commerce Clause encompasses "Indian affairs."[393] Justice Barrett scolded the petitioners for attacking the law piecemeal instead of presenting a coherent alternative vision for how to reconcile two centuries of precedent.[394] Tantalizingly, she left open the possibility that someone could someday make a valid argument that ICWA was not constitutional, but held that these particular petitioners failed to make that case.[395]

Finally, Justice Barrett rejected the petitioners' many arguments that ICWA violated the Tenth Amendment's protections against federal law "commandeering" the state courts, arguing that imposing preferences for Indian child placements impermissibly override state law.[396] The majority rejected those arguments, holding that the ICWA appears to apply equally to private and state actors (eliminating Tenth Amendment concerns), that the Supremacy Clause expressly authorizes federal law to preempt contrary state law, and that Congress can impose adjudicative tasks on state courts because the Constitution originally contemplated that state courts might be the primary actors enforcing federal law.[397]

2. Justice Gorsuch writes at length about history and the interpretation of the Indian Commerce Clause, repudiating Justice Thomas's historical criticisms.

For our present purposes, we will find the real value of *Haaland* in Justice Gorsuch's concurring opinion. Justice Gorsuch relies heavily on historical sources to tell the story of the ICWA, and to criticize the historical arguments offered in Justice Thomas's dissent. And while I am surely reading between the lines, I cannot help but surmise that one of Justice

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[385] Justice Scalia said in 2012 that a 1989 case involving the ICWA was the toughest decision he ever made. *See Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30 (1989); Adam Liptak, *Case Pits Adoptive Parents Against Tribal Rights*, N.Y. TIMES Dec. 24, 2012, *available at* https://www.nytimes.com/2012/12/25/us/american-indian-adoption-case-comes-to-supreme-court.html (quoting Justice Scalia's comments on the Charlie Rose Show). Both the majority and dissenting opinions in *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) are heart-wrenching, because it deals with the effects of the ICWA on a dispute between the biological parents of a child placed for adoption. Radiolab's episode about *Adoptive Couple* is one of the most compelling pieces of radio journalism ever produced, in my opinion. https://radiolab.org/podcast/295210-adoptive-couple-v-baby-girl.

[386] 143 S. Ct. at 1625-27.

[387] *Id*. at 1626.

[388] *Id*. at 1627.

[389] *Id*. at 1628.

[390] *Id*. at 1627-28.

[391] *Id*. at 1629.

[392] *Id*. at 1630.

[393] *Id*. at 1631.

[394] *Id*.

[395] *Id*. Justice Kavanaugh wrote a brief concurrence to explain his view that there would be a serious Equal Protection Clause issue in cases arising from state-court family proceedings, but these particular petitioners lacked standing to raise that issue because this was a federal suit against federal defendants. *Id*. at 1661-62.

[396] *Id*. at 1631-38.

[397] *Id*. This last point is particularly interesting to fans of federal courts issues. "Since Article III established only the Supreme Court and made inferior federal courts optional, Congress could have relied almost entirely on state courts to apply federal law." *Id*. at 1637.

Gorsuch's purposes is to "shore up" *Haaland* against the future constitutional attack that Justices Barrett and Kavanaugh expressly allow,[398] though Justice Gorsuch's passion for American Indian issues has long been evident and would provide ample motivation for his lengthy and thoughtful concurrence.[399]

Justice Gorsuch first lays out the historical context of the statute to explain why its intrusive requirements were necessary to remedy the United States government's express, *de jure* efforts to destroy Indian identity.[400] This portion of his opinion is deeply researched and cites many primary historical sources.[401] It covers much of the same ground as a thorough amicus brief filed by the American Historical Association and Organization of American Historians,[402] but Justice Gorsuch does not appear to have drawn his history from that source, which may be a lesson in and of itself.[403] One of the key differences between Justice Gorsuch's history and this amicus effort is that the amici rely heavily on recent published secondary histories with aggressively opinionated titles (e.g. "Meredith L. Alexander, *Harming Vulnerable Children: The Injustice of California's Kinship Foster Care Policy*, 7 HASTINGS RACE & POVERTY L.J. 381, 398 (2010)) whereas Justice Gorsuch strongly favors primary sources or secondary sources with a governmental or more neutral-sounding provenance (e.g. the ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR (1886)).

In the second part of his concurring opinion, Justice Gorsuch makes a detailed argument for why the Indian Commerce Clause authorized Congress to enact the ICWA—a much more specific argument than the generic argument offered in Justice Barrett's majority opinion.[404] He provides a broad background of "the Indian-law bargain struck in our Constitution," recognizing that "Indian tribes remain independent sovereigns with the exclusive power to manage their own internal affairs," and that as a corollary, "States have virtually no role to play when it comes to Indian affairs."[405] Indian tribes were sovereigns with whom the federal government made treaties, which resulted in a constitutional structure in which the federal government prevented States from encroaching on Tribal prerogatives.[406]

In this context, the Indian Commerce Clause must be understood as distinct from the Foreign Commerce Clause and the Interstate Commerce Clause.[407] Justice Gorsuch's analysis draws heavily from the work of historian Gregory Ablavsky of Stanford Law School.[408] "A survey of founding-era usage confirms that the term 'Commerce,' when describing relations with Indians, took on a broader meaning than simple economic exchange."[409] "Instead, the word was used as a 'term of art' … to encompass all manner of 'bilateral relations with the Tribes.'"[410] Gorsuch also makes a very detailed argument for why the term "Commerce" would mean something different in the Indian Commerce Clause than the other two clauses next to it.[411] The use of "commerce … *with*" in the foreign and Indian context and "commerce … *among*" in the interstate context suggests that Congress has a much more limited role in the latter.[412] Moreover, in the correspondence of the era and even in current usage, "Tribes" referred to collections of individuals instead of territorial units.[413] Finally, Justice Gorsuch draws on the Indian Commerce and Intercourse Act of 1790 as an example of contemporary understandings of Congressional power.[414]

This is where we can learn from an excellent example. The amicus brief filed by Professor Ablavsky, represented by Michelle T. Miano (an Indian law specialist in New Mexico), is a *stellar* example of a successful amicus brief applying the *Bruen* standard.[415]

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[398] Of course, his effort kicks as hard as it shoots, because his effort to strengthen the holding necessarily reveals the weakness inherent in the Justices' votes. Justice Gorsuch received only two other votes (Sotomayor and Jackson) for his history of the ICWA, and *no* other votes for his hyper-textualist defense of a broad reading of the Indian Commerce Clause.

[399] Justice Gorsuch has often written passionately on matters of Indian law. *See, e.g.*, *McGirt v. Oklahoma*, 591 U.S. ___, 140 S. Ct. 2452 (2020) (majority opinion by Justice Gorsuch holding that much of eastern Oklahoma is still Indian land subject to Indian governance—much to the alarm of the State of Oklahoma—because Congress never expressly disestablished its Indian reservations or defaulted on its treaties with those nations).

[400] *Id*. at 1641-47 (Gorsuch, J., concurring).

[401] *Id*.

[402] https://www.supremecourt.gov/DocketPDF/21/21-376/236505/20220826135000417_Nos_21-376_21-377_21-378_21-380_AmiciAmericanHistoricalAssoc_etal_.pdf

[403] 143 S. Ct. at 1641-47 (Gorsuch, J., concurring).

[404] *Id*. at 1647-60.

[405] *Id*. at 1647.

[406] *Id*. at 1651-52.

[407] *Id*. at 1654.

[408] *Id*. at 1651-60 (repeatedly citing Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L. J. 999, 1035-36 (2014) and Brief for Gregory Ablavsky as *Amicus Curiae*);

[409] *Id*. at 1654.

[410] *Id*.

[411] *Id*. at 1654-55.

[412] *Id*.

[413] *Id*. at 1655-56.

[414] *Id*. at 1656.

[415] Brief for Gregory Ablavsky as *Amicus Curiae*, available at https://www.supremecourt.gov/DocketPDF/21/21-376/234116/20220819171619170_21-376%20-377%20-378%20-380%20bsac%20Ablavsky%20Brief%20Final.pdf.

How do we know that the author(s) meant this analysis to address *Bruen*'s test? Because the brief cites *Bruen* right out of the gate, declaring its intent to aid the Court in "the understanding of constitutional text at the time of its adoption" as required by *Bruen*.[416] The brief states that Professor Ablavsky will guide the Court through an understanding of federal authority over Indian affairs using "concrete Founding-era evidence" instead of the Petitioners' effort to rely on "a handful of contested law review articles that rely on inaccurate evidence."[417] The amicus brief then lays out the very textual argument that Justice Gorsuch makes in his concurrence.[418] It draws its arguments from two sources—(1) primary source documents demonstrating contemporary understandings of the meaning of the words "commerce" and "Tribe," and (2) the work of historians who built their arguments on primary sources.[419] It also makes the same point about Congressional intent by relying on the Indian Commerce and Intercourse Act of 1790.[420] By presenting a hypertextual argument supported by primary source historical evidence, Professor Ablavsky may have achieved the Platonic ideal of the "Gorsuch brief."

Professor Ablavsky then demonstrates the error in what he calls the "revisionist argument" for state authority over the placement of Indian children.[421] He recounts the history of state challenges to Tribal authority, as well as the history of the failure of those court challenges.[422] And he dismantles the "handful of law review articles" cited by the petitioners.[423] He recognizes that "virtually the sole support" for the "revisionist argument" is "Justice Thomas's concurrence" in the 2013 case *Adoptive Couple v. Baby Girl*, "where the issue was unbriefed."[424] Justice Thomas relied almost solely on a single law review article by "former academic Robert Natelson," and to a lesser extent on an article by Saikrishna Prakash.[425] But every scholar to evaluate the issue since Natelson has rejected his conclusions, and Professor Ablavsky identifies specific primary-source errors that Natelson made in his work.[426]

3. Justice Thomas dissented, without seriously engaging with Justice Gorsuch's concurrence.

Justice Thomas wrote a dissent in which he made a historical argument for why Congress lacked constitutional authority to enact the ICWA, repeating much of his reasoning from his concurrence in *Adoptive Couple*.[427] But his argument takes no notice of Justice Gorsuch's detailed arguments, or of Professor Ablavsky's criticisms of the lack of source-material support for the positions taken by the petitioners.[428] Justice Thomas relies on the same concurrence and the same articles that Professor Ablavsky criticized without engaging with the subsequent criticism of those opinions; he offers generic dictionary definitions of "commerce"[429] and general canons of construction instead of engaging with the specific primary sources cited by Justice Gorsuch; and he (once again) relies on the significance of language that was considered but not adopted—a mode of interpretation that Justice Scalia sharply criticized in *Heller*.[430]

To be clear, Justice Thomas relies on a number of primary sources of his own, and he is not obliged to be persuaded by Professor Ablavsky or Justice Gorsuch.[431] But *Haaland* makes the reader wish that Justice Thomas had decided to engage with the counterarguments against his position, because it seems inexplicable that one would continue to rely on the same sources without comment after reading a pointed, scholarly explanation of those sources' defects.

4. Lessons from *Haaland*:

Ultimately, we can take some lessons from *Haaland*:

- Acknowledge the *Bruen* standard and engage with it immediately. Demonstrate that you know the hurdle and are prepared to surmount it.
- Primary source material is always best; second-best are collections of primary source material gathered by professional historians.
- Address the weaknesses of contrary historical arguments, by referring to specific methodological errors or primary sources, not by criticizing outcomes.

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[416] *Id*. at 2.
[417] *Id*. at 3-4.
[418] *Id.* at 7-8.
[419] *Id*. at 7-13.
[420] *Id*. at 14.
[421] *Id*. at 22-34.
[422] *Id*. at 22-26.
[423] *Id*. at 27-30.
[424] *Id*. at 30, citing *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 656 (2013).
[425] *Id*. at 31 & n.4, citing Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1087-90 (2003).
[426] *Id*. at 31-33.
[427] 143 S. Ct. at 1662 (Thomas, J., dissenting).
[428] *See id*. at 1666-73.
[429] I mean, he cites SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th rev. ed. 1773), but still.
[430] *Id*. at 1666 and 1670 (noting that the Founders rejected the term "Indian affairs"); *id*. at 1671-72 (discussing the interpretation of the constitutional text);
[431] *Id*. at 1666-73.

- Materials with emotionally charged or jingoistic titles likely will be disfavored, regardless of whether the analysis contained in those materials is reliable.

V. SUMMARIZING THE *BRUEN* METHODOLOGY AND STRATEGIES FOR ENGAGING WITH IT.

Having reviewed all of these sources, it makes sense to conclude by gathering all of these observations about *Bruen*'s methodology into a list, and then offering some suggestions for how to meet these challenges.

A. Summarizing *Bruen*'s methodology.

Government has the burdens of production and proof. The default rule is that the government may not infringe a potential Constitutional right, so the government carries the burden of proving historical precedent that such an infringement is within a nationwide tradition.

History consists *only* of the record evidence. To carry that burden, the government must provide record evidence that the judge can evaluate. The court has no obligation to do research of its own, or to consider evidence outside the record. (*Bruen* seems to contemplate reliance on *amicus* briefs, at least in practice, without addressing the fact that *amicus* briefs are not evidence.)

Normal expert rules apply. Courts must not defer to historians any more than they defer to other types of expert witnesses. Historical analogical reasoning is a *legal* process, not the writing of history, and the task lies within the capacity of the court system even though "historical analysis can be difficult." In fact, historians have lower status than other types of expert witnesses because *Bruen* strongly implies that courts should not appoint historians as expert witnesses, which is otherwise allowed by FED. R. EVID. 706.

Like all expert testimony, historical conclusions can be disregarded by the factfinder. Even if testimony from expert historians is uncontroverted, the court may disregard it and reach a different conclusion.

Analogues are like Goldilocks. Analogical reasoning is neither a "regulatory straightjacket nor a regulatory blank check." Courts must not go too far in one direction by upholding everything that "remotely resembles" a historical analogue, but also must not demand a "historical twin" for the law under consideration. These statements are meaningless, but you will be quoting them all the same.

Look to the "how" and "why." The sole guidance for applying the test of analogical reasoning is to ask whether the historical regulation is "relevantly similar" to the regulation at issue. Courts must ask "how and why the regulations burden a law-abiding citizen's right to armed self-defense."

Silence always means a law was not enforced. *Bruen* expressly holds that if government provides no historical evidence that a law was followed by actual prosecutions for violating that law, then the government failed to carry its burden of proving that the law reflected an accepted belief that the Constitution allowed such regulation. (Or maybe not—in another part of *Bruen* the majority accepts a lack of enforcement evidence as proof that a restriction on gun carrying was accepted. Depending on which side of the argument you are on, you can cite the *Bruen* majority to support your argument.)

Numerosity. There is a "numerosity" requirement for historical evidence, perhaps akin to class actions, if you think that analogy is "relevantly similar." Three examples of a statute is too few to show a nationwide practice. "Outliers" may be disregarded, based on their number per capita (i.e. too few states had such a law), or the size of the population subject to the regulation (i.e. it applied only in cities or states with too few people).

Not too old. Evidence cannot be too ancient; evidence from English common-law will not be considered relevant to the Founding era without rigorous evidence to show that the law remained in effect and was actually enforced all the way up to and including the Founding era in America.

Not too new. Evidence of practices in 1868 are only dimly relevant, because the Court declines to hold that the Fourteenth Amendment incorporated a new understanding of the scope of the Bill of Rights (though it may revisit that question in the future). Practices in 1868 are relevant only insofar as they reflect the understanding of

people educated in the early 19th century. Practices *after* 1868 are completely irrelevant and must be disregarded unless they support the preferred (i.e. libertarian) view of the constitutional right, at which point they are cumulative anyway.

Historians must begin from a counterfactual. Historians providing evidence of historical practices are limited by the Court's current interpretation in a sort of historical *stare decisis*. They should not proceed from the understanding that the Second Amendment protects only a collective right relevant to service in a militia, even though that is the overwhelmingly dominant view of actual practicing historians and supported by the best practices of the field, because the Court has already decided to favor a different view and the *Bruen* methodology always defaults to that rule.

The fact that weapons are more deadly than ever is irrelevant. Eschew all consideration of changes in weapon technology. Because medieval peasants carried knives but not launcegays, modern citizens may carry a Glock 43 but not a flamethrower.

However, current consumer preference will not be questioned. Whatever weapons are currently used by "law-abiding citizens" for self-defense are protected by the Second Amendment, apparently without regard to the question of whether there is any historical precedent for those preferences.

Disregard the evidence of proposed changes that were rejected. In *Heller*, Justice Scalia disregards such evidence because it is "always perilous," even though it is being offered as historical evidence of the meaning of the words therein, and not to prove the often-disputed concept of "legislative intent." Or, go ahead and rely on that evidence, because Justice Thomas does so on several occasions to support his argument.

Distinguish groups from individuals. Under *Rahimi*, laws that generally apply to a group of people, such as ancient laws disarming the King's disloyal subjects, are not relevantly similar to laws that restrict individuals for their personal actions.

B. Practical strategies for satisfying the *Bruen* burden.

With this summary in mind, how can litigants carry *Bruen*'s burden of proving historical analogues? The discussions above give us some suggestions:

Primary sources are everything. What matters in the *Bruen* framework is primary sources—specific examples of laws (and enforcement of those laws), not secondary evidence like historians' opinions about how to construe the primary evidence. Though history is a social science with its own methodology for construing primary evidence, the court alone will construe the primary evidence and make a legal determination.

Historians might be useful to fill the gaps. Having said that, historians can be useful for two purposes: (1) to identify primary sources and prove up their authenticity; and (2) their opinions *might* be useful to fill in gaps left by the primary sources. For example, a historian might be able to address the reasons why there are no records of whether a criminal law was enforced through prosecutions, or other evidence about why we suspect the public may have behaved in a certain manner.

Retain an expert historian. Because history is *evidence*, it is part of the burden of proof and should be treated as such. From the very beginning of the case think about retaining a historian as an expert to give the historical opinions that your argument will require. While we often think of historians filing amicus briefs to make their views known, amicus briefs are not evidence and the plain text of *Bruen* would support any court that decided to hold that evidence presented in an amicus brief can be disregarded as outside the record. Ideally, a historian could perform research to identify new primary sources, but at the very least a historian could help you identify those primary sources that are already known in the historical literature (and perhaps not yet addressed in legal precedent).

Solicit support early. Whether in the form of a retained expert witness or an amicus brief, you must develop the historical support for your position *early*. Do it at the district court level; do not rely on historians to rally to your cause at the Supreme Court stage—because as Judge Reeves noted, the system offers little motivation for historians to provide their

unpaid labor at the district or circuit court levels.

Like any expert witness, get ready to challenge methodology. To the extent that your opponent relies on secondary historical sources or the opinions of historians, that is expert evidence and is subject to methodological challenge. Judge Reeves's *Bullock* opinion demonstrates that methodological challenges have often fallen on deaf ears in the past, but it still remains a way to vigorously argue your case.

Law review articles are problematic, except insofar as they provide primary sources. We might be tempted to use law review articles as a substitute for "real" history, because they are easier to find on Westlaw and use language that may be more familiar to us. Nevertheless, Judge Reeves identifies two meaningful weaknesses in law review articles: (1) they are not peer-reviewed and are thus subject to methodological challenge; and (2) the overall body of scholarship tends to be so varied that they are subject to cherry-picking. If you must use law review articles, remember that courts appear to disfavor articles and journals with outright advocacy in their names, and favor the bland and neutral.

Find new sources, or present old sources in a new way. *Rahimi* demonstrates how it can be difficult to present a historical argument based on the same primary sources that have already been discussed in prior case law. Courts are likely to follow the same interpretation of those materials, even if the analogy being drawn is somewhat different. Creativity is key, even though "creativity" might not be celebrated as a pillar of the social sciences.

Discuss sources separately. Because there is a "numerosity" requirement, resist the urge to discuss a group of statutes collectively or to make a point by citing a single scholarly article that discusses those statutes in more detail. You must draw attention to the total number of primary sources that support your argument, to make it absolutely clear that you have more than three citations in support of your proposed nationwide practice.

Actually make an argument; never presume anything based on precedent. The United States government's colossal missteps in *Bullock* have many practical lessons. One must *actually make the historical argument, each and every time*, instead of relying on the analyses of other courts. While we might be tempted to think of history as being subject to stare decisis—and it is often treated that way (e.g. *Bruen* simply adopts *Heller* by reference)—history is also part of the evidence, the appellate record, and the burden of proof. Moreover, even though *Heller* and *Bruen* try to reassure the reader that various forms of firearm regulation are presumptively lawful, *Bruen*'s actual methodology strongly suggests a different outcome, as we saw in *Rahimi* and *Bullock*.

Put as many points as you can on the spectrum. Analogical reasoning tends to think in comparative terms—for example, Justice Thomas's reasoning that a knife was smaller than a launcegay, so a handgun must be permissible even if a machine gun is not. This motivates advocates to put as many data points on the analogical spectrum as possible, to "tilt" the analogy in your favor. In the same way that restaurants prominently feature a single, expensive item on their menu to make the rest of the prices seem more reasonable, use extreme outlying data points to make your argument seem more reasonable.

Keep your politics to yourself. Judge Reeves's lifetime appointment to a federal district court gives him a certain freedom to criticize the Supreme Court that you do not possess; and even so, Judge Reeves followed precedent. Understand that *Bruen* is flawed, and you will have a competitive advantage. But attacking *Bruen*'s methodology will get you nowhere. If you *must* vent your spleen, I recommend delivering a CLE presentation on the topic.

Start a movement. Finally, if there is not any historical evidence to support your argument, don't give up. Take the long view and find organizations that can help you develop that argument through the long and steady process of historical work. The two lessons from the history of gun rights advocacy are patience, and political organizing. And remember the old adage, "the best time to plant a tree is thirty years ago; the next best time is today."

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SUBSTANCE OVER FORM: DEVELOPMENTS IN SUMMARY JUDGMENT PRACTICE

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- District Court, W.D. Texas
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Mark Trachtenberg, who represents major companies in high-stakes appeals, is proud to be recognized by his peers as a top lawyer in his field. He was named as the 2023 Lawyer of the Year—Appellate Practice in Houston by The Best Lawyers in America directory. He was recognized as one of the top 100 lawyers in Texas and as one of the top appellate lawyers in the state by Texas Super Lawyers (Thomson Reuters). And he is ranked in Chambers USA, 2019-2022 (Chambers and Partners) for appellate law in Texas, which notes that he “is an excellent advocate” and is “super responsive, got up to speed with complex issues very quickly and did an excellent job of writing briefs that carried the day.”

Mark’s accomplishments for clients include:

- Obtaining reversal in the Texas Supreme Court of a $22 million tortious interference and trade secret misappropriation judgment
- Obtaining a summary judgment in a False Claims Act case in which the plaintiffs had sought billions in damages against a major oil company, and successfully defending the appeal of the take-nothing judgment in the Fifth Circuit
- Successfully defending a Fifth Circuit appeal of a $3.6 billion bankruptcy plan of reorganization
- Obtaining a reversal in the Texas Supreme Court of a $14 million products liability judgment
- Prevailing on a special appearance that shielded the firm’s Singaporean client from a potential $500 million judgment

A highlight of Mark’s career has been his work on behalf of Texas public schools, an opportunity that arose from a law review article he authored on the history of Texas’s school finance litigation while at Yale Law School. Mark played a lead role in a lawsuit that resulted in an infusion of more than $2 billion for public schools in Texas. He later served as lead counsel at trial and on appeal for a coalition of 88 school districts in a second lawsuit challenging the constitutionality of the state’s school finance system.

Mark is a member of the American Law Institute, recently served as the chair of the Houston Bar Association’s Appellate Practice Section, and is on the board of directors of the Texas Supreme Court Historical Society. Mark is also dedicated to his community, serving as the chair of the Southwest Region of the Anti-Defamation League and on the Education Policy Committee of the United Way of Greater Houston.

Mark writes and speaks prolifically on a variety of topics, with a recent focus on arbitration issues, brief writing, and Fifth Circuit and Texas Supreme Court trends. He is board certified in civil appellate law by the Texas Board of Legal Specialization.

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Recognized by Chambers USA in Texas for appellate litigation, 2018-2023, Kent Rutter is an accomplished appellate advocate with more than 25 years of experience. Clients turn to Kent for his trusted advice regarding the chances of reversal in a potential appeal. His analyses draw on his experience in the appellate courts and from coauthoring an award-winning empirical study of the factors that most frequently result in reversal in the Texas appellate courts.

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As a civil appellate specialist who is board certified by the Texas Board of Legal Specialization, Kent served as president of the Texas Association of Civil Trial and Appellate Specialists (TACTAS), an organization of board-certified attorneys, 2020-2021. He was the elected chair of the Appellate Section of the State Bar of Texas, an organization of more than 2,000 attorneys, 2019-2020. Kent also served as chair of the Appellate Practice Section of the Houston Bar Association, 2010-2011.

Kent is also active in the community at large. As a longtime member of the Alexis de Tocqueville Society of the United Way of Greater Houston, Kent has mentored young professionals with an interest in bettering their communities and supported a wide array of organizations that serve families in need.

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- Ranked in Chambers USA, Chambers and Partners, Litigation: Appellate, Texas, 2018-2023
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- Board Certified in Civil Appellate Law, Texas Board of Legal Specialization
- Selected for inclusion in Texas Super Lawyers, Thomson Reuters (2012-2020, 2022); Named to the list of Top 100 Houston Super Lawyers (2013-2015, 2020)

Professional and Community Activities

- Chair, Appellate Section of the State Bar of Texas (2019-2020)
- President, Texas Association of Civil Trial and Appellate Specialists (2019-2020)
- Chair, Appellate Practice Section of the Houston Bar Association (2010-2011)

- Member, Executive Committee of the Yale Law School Association, 2015-2017
- Member, American Law Institute (ALI)
- Board member, Houston Volunteer Lawyers, 2017-2018
- Board member, Texas Supreme Court Historical Society
- Board member, *The Houston Lawyer* editorial board, 2005-2011
- Fellow, Texas Bar Foundation
- Member, Education Council, United Way of Greater Houston
- Frequent speaker at State Bar and Houston Bar Association Continuing Legal Education programs, on a variety of topics, including arbitration-related litigation, the Texas Supreme Court, school finance litigation, and oil and gas law
- Chair, Anti-Defamation League, Southwest Region
- Special Assistant Disciplinary Counsel, Texas Commission for Lawyer Discipline

Awards and Recognition

- Recognized as a "Lawyer of the Year" – Appellate Practice – in Houston in *The Best Lawyers in America*, Woodward/White, Inc., 2023
- *Chambers USA*, Chambers and Partners, Litigation– Appellate Practice – in Houston: Appellate, Texas, 2019-2023
- Recognized in *The Best Lawyers in America*, Woodward/White, Inc., for Appellate and Commercial Litigation, 2016-2023
- Board Certified in Civil Appellate Law, Texas Board of Legal Specialization
- Recognized in 2022 for having been included in *Super Lawyers*, Thomson Reuters, top-attorney lists for 10 years or more
- Recognized as one of the top 100 lawyers in Texas by Texas Super Lawyers, Thomson Reuters, 2020-2022
- Recognized as one of the top 100 lawyers in Houston by *Texas Super Lawyers*, Thomson Reuters, 2016-2022
- Selected for inclusion in *Texas Super Lawyers*, Thomson Reuters, 2013-2022

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SUBSTANCE OVER FORM: DEVELOPMENTS IN SUMMARY JUDGMENT PRACTICE

I. INTRODUCTION

Summary judgments in Texas were once rare. But times have changed in Texas and elsewhere. "Every year the [federal] courts of appeals decide hundreds of cases in which they must determine whether … evidence provided by a plaintiff is just enough to survive a motion for summary judgment or not quite enough." *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1277 (2017) (Alito, J., concurring). Likewise, Texas intermediate appellate courts review hundreds of summary judgment appeals every year. *See* Kent Rutter & Natasha Breaux, *Reasons for Reversal in the Texas Courts of Appeals*, 57 Hous. L. Rev. 671 (2020) (counting 439 appeals from summary judgment grants during the 2018-19 term). Jurisprudential developments over the past four decades have contributed greatly to the substantial increase in summary judgment practice.

Most recently, the Texas Supreme Court has reinforced its directives that summary judgment rules and doctrines should be construed and applied liberally. That approach of elevating substance over form has been a feature of the court's decisions in recent years. "Whenever possible," the court has explained, "we reject form-over-substance requirements that favor procedural machinations over reaching the merits of a case." *Godoy v. Wells Fargo Bank, N.A.*, 575 S.W.3d 531, 536 (Tex. 2019) (quoting *Dudley Constr., Ltd. v.Act Pipe & Supply, Inc.*, 545 S.W.3d 532, 538 (Tex. 2018)).

This article provides an overview of recent developments. A complete guide to summary judgment practice in Texas, on which this article is based, was recently published in the South Texas Law Review. *See* Judge David Hittner, Lynne Liberato, Kent Rutter & Jeremy Dunbar, *Summary Judgments in Texas: State and Federal Practice*, 62 S. Tex. L. Rev. 99 (2023), https://www.stcl.edu/wp-content/uploads/2023/06/Summary-Judgments-in-Texas-Hittner-62.2.pdf.

II. RECENT DEVELOPMENTS

A. Sham Affidavits

The sham affidavit doctrine provides that "the nonmovant cannot defeat a motion for summary judgment by submitting an affidavit which directly contradicts, without explanation, his previous testimony." *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223, 228 (5th Cir. 1984). The doctrine has long been recognized in federal courts, but until relatively recently, state courts were split over whether to recognize the sham affidavit rule. *See id.*; *see also Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 84 (Tex. 2018). Eight Texas courts of appeals had recognized the rule; four had not. *Lujan*, 555 S.W.3d at 86 & n.1.

In *Lujan*, the Texas Supreme Court resolved the split by adopting the sham affidavit rule. The rule derives from Texas Rule of Civil Procedure 166a(c), which provides for summary judgment where there is "no genuine issue as to any material fact." *Id.* at 86. The court explained that the "key word is 'genuine,'" "which means 'authentic or real.'" *Id.* "A 'sham' is, by definition, 'not genuine.'" *Id.* (citing Webster's New Int'l Dictionary (3d ed. 1961)).

The *Lujan* court, though emphatic that the sham affidavit rule is part of Texas summary judgment practice, cautioned that the rule is "a flexible concept" rather than "a free-standing rule of procedure to be mechanistically applied in the same way to every case." *Id.* at 88. The rule "does not authorize trial courts to strike every affidavit that contradicts the affiant's prior sworn testimony." *Id.* at 85. For example, a contradition between an affidavit and witness testimony may be adequately explained by newly discovered evidence or the witness's confusion. *Id.* at 85–86. Nor does the rule authorize trial courts to "contravene the longstanding principle that the trial court is 'not to weigh the evidence or determine its credibility.'" *Id.* at 87 (quoting *Gulbenkian v. Penn*, 252 S.W.2d 929, 931 (Tex. 1952)).

The "flexible" nature of the sham affidavit rule has an important consequence in summary judgment appeals. Although summary judgments are subject to de novo review on appeal, the trial court's application of the sham affidavit rule—like other rulings excluding summary judgment evidence—is reviewed for an abuse of discretion. *Id.* at 90.

Lujan is noteworthy not only for its adoption of the sham affidavit rule, but also for its emphasis on substance over form. While the unanimous court grounded its decision in the text of Rule 166a, it further explained why the sham affidavit rule furthers the purpose of summary judgment practice. The court explained that "allowing manufactured affidavits to defeat summary judgment would thwart the very object of summary judgment, which 'is to separate real and genuine issues from those that are formal or pretended.'" *Id.* at 85 (quoting *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir. 1975)). "Rewarding a party who seeks to defeat summary judgment by 'contradicting his own prior testimony . . . would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.'" *Id.* (quoting *Perma Res. & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969)).

That approach was a sign of things to come. Since *Lujan*, the court has continued this trend of interpreting the summary judgment rules in light of their purpose and the realities of modern litigation.

B. Pleadings as Evidence; Limitations

The general rule in Texas has been that a party's pleadings—even if sworn or verified—are not permissible summary judgment evidence. *Laidlaw Waste Sys. (Dall.), Inc. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex. 1995). "Clearly a party cannot rely on its *own* pleaded allegations as evidence of facts to support its summary-judgment motion or to oppose its opponent's summary-judgment motion." *Regency Field Servs., LLC v. Swift Energy Operating, LLC*, 622 S.W.3d 807, 818–19 (Tex. 2021).

But pleadings can provide a basis for granting or denying summary judgment in other ways. The Texas Supreme Court has long recognized that because "pleadings 'outline the issues,'" courts "may grant summary judgment based on deficiencies in an *opposing party's* pleadings." *Id.* at 819 (quoting *Hidalgo v. Surety Savs. & Loan Ass'n*, 462 S.W.2d 540, 543 (Tex. 1971)). As the court explained in *Regency* and reaffirmed in *Weekley Homes, LLC v. Paniagua*, a defendant can "establish that it [is] entitled to summary judgment by treating the plaintiff's pleaded allegations about the timeline of certain events 'as truthful judicial admissions and rely on them to define the issues and determine whether the plaintiff's claims necessarily accrued beyond the limitations period.'" *Weekley Homes*, 646 S.W.3d at 828 (quoting *Regency*, 622 S.W.3d at 819–20).

The Texas Supreme Court recently explained that a summary judgment on limitations may be based on the pleadings. To obtain a traditional summary judgment on limitations—an affirmative defense—the defendant "must (1) conclusively prove when the cause of action accrued, and (2) negate the discovery rule, if it applies and has been pleaded or otherwise raised, by proving as a matter of law that there is no genuine issue of material fact about when the plaintiff discovered, or in the exercise of reasonable diligence should have discovered, the nature of its injury. *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999).

In *Regency*, the court addressed the first burden: how a party seeking summary judgment may prove when the claim against it accrued. 622 S.W.3d at 818–19. This requirement poses a dilemma: if the defendant denies that the plaintiff was injured at all, how can it prove when the claim accrued? In *Regency*, the movant "[did] not seriously contend that the *evidence* conclusively established that [the plaintiff] sustained any legal injury, much less that it did so at any particular time." *Id.* at 821. The movant explained that it "has no interest in or desire to prove that [the plaintiff] suffered any legal injury or has any valid claim whatsoever." *Id.* The plaintiff maintained that summary judgment could not be granted because it must be based on evidence. *Id.* at 818. The Texas Supreme Court disagreed, holding that "for summary judgment purposes, [the movant] could treat [the nonmovant's] pleaded allegations as truthful judicial admissions and rely on them to define the issues and determine whether [the] claims necessarily accrued beyond the limitations period." *Id.* at 819 (footnote omitted).

In *Draughon v. Johnson*, the supreme court addressed the second burden. It explained that although the defendant must negate the discovery rule or other tolling doctrine that the plaintiff would have the burden to prove at trial, it need not present evidence to do so. 631 S.W.3d 81, 92 (Tex. 2021). Instead, the defendant may file a hybrid motion for summary judgment. *Id.* at 96 (citing Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas: State and Federal Practice*, 60 S. Tex. L. Rev. 1, 154 (2019)). The traditional summary judgment would seek to conclusively establish with evidence that the plaintiff filed its suit after the expiration of the statute of limitations, while the no-evidence motion would challenge the discovery rule and require the plaintiff to present evidence raising a genuine issue of material fact. *Id.* (citing Hittner & Liberato, 60 S. Tex. L. Rev. at 154).

C. Preserving Error on Objections to Summary Judgment Evidence

The Texas Supreme Court has recently issued several decisions clarifying the prerequisites for preserving error regarding evidentiary objections.

In *Seim v. Allstate Texas Lloyds*, the court resolved a split among the courts of appeals as to whether a trial court "implicitly" rules on objections to summary judgment evidence when it rules on the summary judgment motion itself. 551 S.W.3d 161, 164 (Tex. 2018). Under the pre-1997 version of the Texas Rules of Appellate Procedure, the answer was clearly no: an explicit ruling was required. *Id.* But in 1997, the error-preservation rule, Rule 33.1, was amended to provide that a trial court may rule on an objection "either expressly or implicitly." *Id.* The Second Court of Appeals in Fort Worth held that a trial court "implicitly" rules on objections by ruling on the merits of the summary judgment motion, while the Fourth Court of Appeals in San Antonio and the Fourteenth Court of Appeals in Houston reached a contrary conclusion. *Id.* at 164–66.

The Texas Supreme Court agreed with the Fourth and Fourteenth Courts, quoting the Fourth Court as follows: "Rulings on a motion for summary judgment and objections to summary-judgment evidence are not alternatives; nor they are concommittants. Neither implies a ruling—or any particular ruling—on the other." *Id.* at 165 (quoting *Well Sols. v. Stafford*, 32 S.W.3d 313, 317 (Tex. App.—San Antonio 2000, no pet.) (alterations omitted)). In *Seim*, "even without the objections, the trial court could have granted summary judgment against the [plaintiffs] if it found that their evidence did not raise a genuine issue of material fact."

Id. at 166. The court asked: "if sustaining the objections was not necessary for the trial court to grant summary judgment, how can the summary-judgment ruling be an implication that the objections were sustained?" *Id.* The answer, the court concluded, is that the summary judgment ruling is not a ruling—implicit or otherwise—on the evidentiary objections. *Id.*

A related question confronted the court in *FieldTurf USA, Inc. v. Pleasant Grove Independent School District*: must a ruling on summary judgment evidence be in writing, or does an oral ruling on the record suffice preserve error? 642 S.W.3d 829, 830–31 (Tex. 2022). The court concluded that a written order is preferred, but not required: an "on-the-record, unequivocal oral ruling on an objection to summary judgment evidence qualifies as a ruling under Texas Rule of Appellate Procedure 33.1, regardless of whether it is reduced to writing." *Id.* at 838. The court recognized that "[b]ecause issues, grounds, and testimony in support of and in opposition to summary judgment may not be presented orally, a reporter's record of such a hearing is generally unnecessary for appellate purposes." *Id.* Therefore, "the best practice for a party objecting to summary judgment evidence is to secure a written order on the objection from the trial court." *Id.* at 838–39. But because an oral ruling may substitute for a written order, it appears increasingly prudent to request that summary judgment hearings be transcribed.

In *Browder v. Moore*, the court may have resolved another question involving the preservation of objections to summary judgment evidence: when a trial court sustains objections, must the proponent of the evidence object to the ruling? 659 S.W.3d 421, 423-34 (Tex. 2022). The Dallas and El Paso courts of appeals had required such an objection to preserve error. *See Brooks v. Sherry Lane Nat'l Bank*, 788 S.W.2d 874, 878 (Tex. App.—Dallas 1990, no pet.); *Cmty Initiatives, Inc. v. Chase Bank*, 153 S.W.3d 270, 281 (Tex. App.—El Paso 2004, no pet.). The Fort Worth court of appeals had not. *See Miller v. Great Lakes Mgmt. Serv., Inc.*, No. 02-16-00087-CV, 2017 WL 1018592, at *2 n.4 (Tex. App.—Fort Worth Mar. 16, 2017, no pet.). Although *Browder* did not involve summary judgment evidence, it appears to answer this question. *Browder* endorsed a "common sense approach to error preservation," explaining that "neither our procedural rules nor this Court's decisions require a party that has obtained an adverse ruling from the trial court to take the further step of objecting to that ruling to preserve it for appellate review." 659 S.W.3d at 423.

Note, however, that the Texas rules and case law do provide that error is preserved only if a party made "a timely request that makes clear—by words or context—the grounds for the request and by obtaining a ruling on that request, whether express or implicit." *Id.* (quoting *In re Commitment of Hill*, 334 S.W.3d 226, 229 (Tex. 2011) and citing Tex. R. App. P. 33.1). Thus, although an objection is not always required, if the proponent of the evidence has not articulated the basis for admission to the trial court at all, he still "might worry of the looming specter of waiver." Ryan Philip Pitts, *A Couple Developments in Preserving Evidentiary Errors in Summary Judgment Practice*, Hous. Bar. Ass'n App. Law. (July 20, 2022), https://appellatelawyerhba.org/acouple-developments-in-preserving-evidentiary-errors-in-summary-judgment-practice/. If the proponent of the evidence did not fully explain its position when opposing the objection before the ruling, it would be wise to do so by lodging its own objection after the ruling.

D. Video Evidence

Due to recent societal and technological advancements (for example, an increased prevalence of law enforcement body cameras, smartphone cameras, and security surveillance), video footage has become a more common form of summary judgment evidence—especially in cases involving qualified immunity or personal injury.

Federal and state courts have grown more receptive to the use of video footage in summary judgment proceedings in light of *Scott v. Harris*, 550 U.S. 372 (2007). In *Scott*, the U.S. Supreme Court held that when a nonmoving party's "version of events is so utterly discredited" by video evidence, "so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a summary judgment motion." *Id.* at 380. Rather, in such situations, the district court should review "the facts in the light depicted by the videotape." *Id.* at 381. Recently, for example, the Fifth Circuit relied on video evidence, including smartphone and security camera footage, in reviewing a summary judgment on qualified immunity. *Buehler v. Dear*, 27 F.4th 969, 983–85 (5th Cir. 2022).

A Texas state court of appeals invoked *Scott* in *Klassen v. Gaines County*, No. 11-19-00266-CV, 2021 WL 2964423 (Tex. App.—Eastland July 15, 2021, no pet.). There, the plaintiff alleged that two county sheriff's deputies used excessive force by throwing him on the ground and jumping on his back to handcuff him. 2021 WL 2964423, at *4. "In these types of cases," the court of appeals noted, "we are usually required to adopt the plaintiff's version of the facts." *Id.* Under *Scott*, however, "this general rule may change if the record contains video evidence capturing the events." *Id.* "When the record contains video evidence of the events and 'opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for ruling on a motion for summary judgment.'" *Id.* (quoting *Scott*, 550 U.S. at 380). The court of appeals therefore viewed the video evidence, concluding: "No reasonable person could, after viewing the video recording of the incident, find

that [the deputy] threw [the plaintiff] to the ground or jumped on [his] back to handcuff him." *Id.* The court affirmed the summary judgment because "we 'view the facts in the light depicted by the videotape.'" *Id.* (quoting *Scott*, 550 U.S. 381) (alteration omitted).

E. Late-Filed Responses

Rule 166a(c) provides that "[e]xcept on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response." Tex. R. Civ. P. 166a(c). Thus, the nonmovant must obtain leave of court to file a late response. *Id.* Where nothing in the record indicates that the trial court granted leave, it is presumed the trial court did not consider a late-filed response. *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996). A court granting leave "must affirmatively indicate in the record acceptance of the late filing." *Farmer v. Ben E. Keith Co.*, 919 S.W.2d 171, 176 (Tex. App.—Fort Worth 1996, no pet.).

In *B.C. v. Steak N Shake Operations, Inc.*, the Texas Supreme Court considered whether a judgment's boilerplate language that the court considered "'evidence and arguments of counsel,' without any limitation, is an 'affirmative indication' that the trial court considered [the nonmovant's] response and the evidence attached to it." 598 S.W.3d 256, 261 (Tex. 2020). According to the plaintiff, she attempted to electronically file her summary judgment response, including 461 pages of evidence, on the day it was due. *Id.* at 259. However, the filing was rejected because one of the exhibits was not formatted for optical character recognition. *Id.* She re-filed the following day but did not seek leave of court or move to continue the hearing. *Id.* The defendant objected to the untimeliness of the response, but there was no record that the trial court ruled on the objection. *Id.*

The plaintiff argued that the trial court's recital that it considered "evidence" was sufficient to demonstrate that it granted leave. She reasoned that the word "evidence," without limitation, demonstrated that the trial court considered "all the evidence." *Id.* at 260. She further reasoned that *all* the evidence was submitted late, so "had the trial court not considered [the late-filed] evidence, it would not have considered any evidence in opposition to the no-evidence motion." *Id.* The court agreed, holding that "a court's recital that it generally considered 'evidence'—especially when one party objected to the timeliness of all of the opposing party's evidence—overcomes the presumption that the court did not consider it." *Id.* at 261.

In reaching that conclusion, the court analogized to late-filed amended pleadings in advance of a summary judgment hearing. *Id.* Much as Rule 166a provides that a party must file a summary judgment response at least seven days before the hearing except with leave of court, Rule 63 provides that a party may not amend its pleadings within seven days of a summary judgment hearing without leave of court. *Id.* The court had previously held that "leave of court is presumed when a summary judgment states that all pleadings were considered, and when, as here, the record does not indicate that an amended pleading was not considered, and the opposing party does not show surprise." *Id.* (citing *Cont'l Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 276 (Tex. 1996)).

Steak N Shake is undoubtedly a victory of substance over form. For nonmovants, however, relying on this ruling should be considered first aid, not best practice. The prudent nonmovant should continue seeking an order specifically granting leave. For movants, the lesson of *Steak N Shake* is that it is essential to not only lodge an objection to the late-filed response, but also seek and obtain a ruling on the objection before or after the trial court's order. *See id.* at 262.

In addition to its holding about late-filed responses, *Steak N Shake* also provided another victory of substance over form. The court observed that "reviewing courts, when presented with combined motions for traditional and no evidence summary judgment, generally address the no-evidence point first." *Id.* at 260. The court clarified, however, that trial courts are not required to consider no-evidence motions before traditional motions. *Id.*

F. Continuances

Two recent cases—one state and one federal—illustrate the need to be specific when seeking a continuance of a summary judgment hearing.

In state court, two provisions in Rule 166a bear on continuances. Rule 166a(g) addresses all types of summary judgment continuances directly: "Should it appear from the affidavits of a party opposing the motion [for summary judgment] that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." Tex. R. Civ. P. 166a(g). Elsewhere, Rule 166a(i) addresses continuances indirectly. Even though there is no specific minimum amount of time that a case must be pending before a trial court can consider a no-evidence motion, Rule 166a(i) provides the basis for a continuance of a no-evidence summary judgment when it authorizes the granting of a no-evidence summary judgment only "[a]fter adequate time for discovery." Tex. R. Civ. P. 166a(i).

Nonmovants seeking additional time for discovery must state what specific depositions or discovery products are material and show why they are material. *Perrotta v. Farmers Ins. Exch.*, 47 S.W.3d 569, 576 (Tex. App.—Houston [1st Dist.] 2001, no pet.). The

need for specificity was demonstrated in a recent case in which the appellate court determined that the trial court did not abuse its discretion in denying a motion for continuance. *Pena v. Harp Holdings, Inc.*, No. 07-20-00131-CV, 2021 WL 4207000, at *26–30 (Tex. App.—Amarillo Sept. 16, 2021, no pet.) (mem op.). Although the nonmovant's affidavit "stated her need for additional depositions of 'crucial fact witnesses,'" the affidavit specifically identified only one witness and failed to explain how that witness's testimony would be material. *Id.*

In federal court, the Fifth Circuit has previously commented that "a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course." *Six Flags, Inc. v. Westchester Surplus Lines Ins. Co.*, 565 F.3d 948, 963 (5th Cir. 2009) (quoting *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1267 (5th Cir. 1991)). However, such relief is not automatic, and a party's failure to timely file or to articulate specific facts in support of its motion for continuance are grounds for denial. *See Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 257 (5th Cir. 2013) (affirming the district court's denial of a motion for continuance that was filed late and that failed to state specific facts in support); *Am. Fam. Life Assurance Co. v. Biles*, 714 F.3d 893–95 (5th Cir. 2013) (evaluating the sufficiency of the purported discovery—a deposition—to conclude that the district court's denial was not an abuse of discretion, given that the deposition would not have influenced the outcome of the case).

The plain language of Rule 56(d) requires specific reasons to support a motion for continuance. Fed. R. Civ. P. 56(d). For example, the Fifth Circuit has recently reversed a district court's order denying a Rule 56(d) motion when the plaintiff had articulated the precise discovery needed to controvert the allegations in the movant's supporting affidavit, including discovery of the documents referenced therein. *Bailey v. KS Mgmt. Servs., L.L.C.*, 35 F.4th 397, 401–02 (5th Cir. 2022). On the other hand, the Fifth Circuit has also recently affirmed the denial of a Rule 56(d) motion when the plaintiff had "simply asserted that 'no depositions have been held, nor have interrogatories, requests for admission, nor requests for documents been exchanged between the parties.'" *MDK Sociedad de Responsabilidad Limitada v. Proplant, Inc.*, 25 F.4th 360, 366–67 (5th Cir. 2022). It is therefore clear that the mere fact that discovery has not been conducted is insufficient. *Id.*

G. Mandamus and Interlocutory Appeals

Generally, an order denying a summary judgment motion is not appealable. *See Novak v. Stevens*, 596 S.W.2d 848, 849 (Tex. 1980). However, there are exceptions. When parties file cross-motions for summary judgment and one is granted, an appellate court may review both the grant and the denial. *Tex. Mun. Power Agency v. Pub. Util. Comm'n*, 253 S.W.3d 184, 192 (Tex. 2007). In addition, the Texas Legislature has created limited exceptions to the rule that denials of motions for summary judgment are not appealable. Tex. Civ. Prac. & Rem. Code § 51.014(a)(5), (a)(6), (a)(8), (a)(13). As of 2021, there is a new legislative exception: an interlocutory appeal may be taken from the denial of a motion for summary judgment filed in certain suits by contractors that construct or repair highways, roads, or streets for the Texas Department of Transportation. Tex. Civ. Prac. & Rem. Code § 51.014(a)(15).

Where there is no right to appeal the denial of summary judgment, there has traditionally been no right to mandamus relief, either. But in 2010, the supreme court cracked open the door to allow mandamus challenges to the denial of motions for summary judgment. *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 314 (Tex. 2010). The procedural background of the case was unusual: it had already been tried once in county court, resulting in a judgment that was reversed because the amount in controversy exceeded the county court's jurisdictional maximum, and the case was set to be tried again in district court, but the supreme court held that limitations barred the second trial. *Id.* at 304–05, 314. The supreme court noted that "mandamus is generally unavailable when a trial court denies summary judgment, no matter how meritorious the motion," *id.* at 314 (quoting *In re McAllen Med. Ctr.*, 275 S.W.3d 458, 465–66 (Tex. 2008)), but concluded that "the extraordinary circumstances here merit extraordinary relief." *Id.*

More than a decade passed before the court again granted mandamus relief from the denial of summary judgment in *In re Academy, Ltd.*, 625 S.W.3d 19 (Tex. 2021). *Academy* grew out of the Sutherland Springs church mass shooting. Victims sued the retailer that sold the perpetrator the semi-automatic rifle used in the murders. The court focused on the "no adequate remedy by appeal" requirement for mandamus relief: "Absent mandamus relief, [the retailer] will be obligated to continue defending itself against multiple suits barred by federal law. As in *United Services*, this case presents extraordinary circumstances that warrant such relief." *Id.* at 32, 36 (citing *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299 (Tex. 2010)).

The eleven-year gap between *United Services* and *Academy* should discourage practitioners from holding out much hope that a summary judgment denial will be corrected by mandamus. So should the paucity of decisions in which intermediate courts of appeals have granted mandamus relief from denials of summary judgment. *See In re Kingman Holdings, LLC*, No. 13-21-00217-CV, 2021 WL 4301810, at *5–6 (Tex. App.—Corpus Christi–Edinburg Sept. 22, 2021, orig. proceeding) (mem. op.); *In re Hoskins*, No. 13-18-00296-CV, 2018 WL 6815486, at *9 (Tex. App.—

Corpus Christi–Edinburg Dec. 27, 2018, orig. proceeding) (mem. op.); *In re S.T.*, 467 S.W.3d 720, 729–30 (Tex. App.—Fort Worth 2015, orig. proceeding).

A related question is whether mandamus relief is available when the trial court, rather than denying a summary judgment motion, fails to rule on it. The traditional understanding has been that "there is generally no procedure by which litigants can compel the trial court to rule on a pending motion for summary judgment." *C/S Sols., Inc. v. Energy Maint. Servs. Grp., LLC*, 274 S.W.3d 299, 30 8 (Tex. App.—Houston [1st Dist.] 2008, no pet.). One court explained that "even though the delay in ruling on the motion causes expense and inconvenience to the litigants, mandamus is not available to compel the trial judge to rule on the pending motion for summary judgment." *In re Am. Media Consol.*, 121 S.W.3d 70, 74 (Tex. App.—San Antonio 2003, no pet.).

But that is not a hard-and-fast rule either. Recently, the El Paso court of appeals granted mandamus relief to compel a trial court to rule on pending motions for summary judgment. *In re UpCurve Energy Partners, LLC*, 632 S.W.3d 254 (Tex. App.—El Paso 2021, orig. proceeding). And in another recent case, where the trial court failed to rule on motion to reconsider denial of summary judgment, the Corpus Christi court of appeals granted mandamus relief and directed that summary judgment be granted. *In re Kingman Holdings, LLC*, No. 13-21-00217-CV, 2021 WL 4301810 (Tex. App.—Corpus Christi Sept. 22, 2021, orig. proceeding).

H. Preservation of Error in Federal Court

In *Dupree v. Younger*, the U.S. Supreme Court decided an appellate preservation issue that had divided lower federal courts: whether raising and losing a purely legal issue at summary judgment preserves the issue for appeal, or whether the issue must be renewed on a post-trial motion. 143 S. Ct. 1382, 1389 (2023).

In the Fifth Circuit, the rule had been that "following a jury trial on the merits, this court has jurisdiction to hear an appeal of the district court's legal conclusions in denying summary judgment, but only if it is sufficiently preserved in a Rule 50 motion." *Feld Motor Sports, Inc. v. Traxxas, L.P.*, 861 F.3d 591, 596 (5th Cir. 2017). The U.S. Supreme Court overruled *Feld Motor Sports* in *Dupree*, holding that a Rule 50 motion is not required.

The Court in *Dupree* noted that it had answered a related question in *Ortiz v. Jordan*, 562 U.S. 180 (2011). There, the question was whether a summary judgment denial on sufficiency-of-the-evidence grounds suffices for preservation purposes. The answer is no, because factual challenges "depend on, well, the facts, which the parties develop and clarify as the case progresses from summary judgment to a jury verdict." 143 S. Ct. at 1388. "Thus, 'once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary judgment motion.'" *Id.* at 1388–89 (quoting *Ortiz*, 562 U.S. at 184) (alterations omitted). It follows that a party must raise a sufficiency-of-the-evidence claim in a post-trial motion to preserve it for appeal. *Id.* at 1389.

Different reasoning applies, the Court explained, when the summary judgment denial is based on "purely legal issues—that is, issues that can be resolved without reference to any disputed facts." *Id.* "Trials wholly supplant pretrial factual rulings, but they leave pretrial legal rulings undisturbed. The point of a trial, after all, is not to hash out the law." *Id.* "That difference explains why a summary-judgment motion is sufficient to preserve legal but not factual claims." *Id.*

The *Dupree* rule is in conflict with practice in Texas state courts, where a trial court's denial of a summary judgment on a purely legal issue does not preserve error, and where the unsuccessful movant must raise the issue anew at trial or via post-trial motion. *See, e.g.*, *United Parcel Serv., Inc. v. Cengis Tasdemiroglu*, 25 S.W.3d 914, 916-17 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *C&F International, Inc. v. Interoil Services, LLC*, 2020 WL 1617261, *4 (Tex. App.—Houston [14th Dist.] Apr. 2, 2020, no pet.) (mem. op.).

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A BIT OF THE OL' RAZZLE-DAZZLE: TIPS TO IMPROVE YOUR LEGAL WRITING

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JOHNSTON TOBEY BARUCH PC

In 2015, Chad Baruch wrote one of the most acclaimed legal briefs in American history while representing what the *New York Times* called "a glittering array of hip hop stars." The "Hip Hop Brief" received national media coverage, including articles in the *New Yorker*, *Billboard*, *Rolling Stone*, and newspapers across the country. One newspaper called it "the greatest amicus brief in Supreme Court history."

But that's hardly Chad's only high-profile appellate work. He also was involved in the case related to the hit movie *Bernie*—a representation that led to him being quoted in newspapers as far away as London, England. He successfully represented the Office of the Dallas County District Attorney in the appeal of contempt conviction against the elected DA, and then served as Special Prosecutor in the appeal of a criminal case involving fraud charges against a high-profile criminal defendant. And while representing the Dallas County Democratic Party, he recently obtained dismissal of a lawsuit filed by the GOP seeking to knock more than 120 candidates off the ballot.

Chad also handles a variety of family law appeals and civil appeals. He has served as lead counsel in civil or family appeals in the Supreme Court of Texas, the Texas appellate courts for Eastland, Texarkana, Tyler, Dallas, Houston, El Paso, Fort Worth, Waco, and Amarillo, and the United States Courts of Appeals for the Third, Fifth, Seventh, and Eighth Circuits. He has argued several cases before the Supreme Court of Texas, and is board certified in civil appellate law by the Texas Board of Legal Specialization.

Chad is an award-winning speaker on appellate advocacy and legal writing. Chad won the 2015 Gene Cavin Award, presented annually to one Texas attorney for lifetime contributions to continuing legal education. He also won the 2016 Dan Rugeley Price Memorial Award, presented annually to a Texas attorney who exemplifies service to the profession and excellence in legal writing. And he won the 2018 Patrick Wiseman Memorial Award, presented annually to an attorney who has made superior career contributions to the defense of constitutional rights and civil liberties in Texas. Chad has spoken on legal writing at the Texas College for Judicial Studies, the National Summit of Appellate Judges Education Institute, the Annual Conference of Texas Appellate Staff Attorneys, and a host of legal seminars in several states.

Chad also is a leader in the profession, having served on the State Bar Board of Directors, the Executive Committee of the State Bar, and as Chair of the Texas Bar College. In 2017, he was one of two nominated candidates for President-Elect of the State Bar of Texas. Chad has served as men's basketball coach at the University of Dallas and Paul Quinn College.

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LEGAL WRITING: LESSONS FROM THE BESTSELLER LIST

I. INTRODUCTION

"[T]he term 'legal writing' has become synonymous with poor writing: specifically, verbose and inflated prose that reads like – well, like it was written by a lawyer." Steven Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389, 1389 (1984). Legal writing suffers from "convoluted sentences, tortuous phrasing, and boring passages filled with passive verbs." *Id.* Despite recognition of this problem and concerted efforts by law schools to fight it, legal writing continues to deteriorate. *See* Lynne Agress, *Teaching Lawyers the Write Stuff*, LEGAL TIMES, Oct. 2, 1995, at 37.

No one who teaches at any level will be surprised by this deterioration in writing skills. Teachers bemoan it every day in high school, college, and law school faculty lounges. This paper presents a series of practical, easily implemented steps to improve legal writing.

A. Legal Writing is Important!

Many lawyers roll their eyes at discussions of legal writing, and use legal writing presentations during seminars as coffee breaks. They regard legal writing as a topic for law professors, judges, and all-around eggheads, one that has little application to their practices. They are wrong. As Irving Younger explained:

> So prevalent is bad legal writing that we get used to it, shrugging it off as a kind of unavoidable occupational disability, like a cowboy's bowlegs. This is an unfortunate state of affairs. Bad writing goes with bad thinking, and since bad thinking is the source of many of the ills that beset us, lawyers should acknowledge a professional obligation to wage war against bad writing. If the author who produced it is you, correct it. If another, condemn it.

Irving Younger, *Symptoms of Bad Writing*, SCRIBES J. OF LEGAL WRITING 121, 121 (2001-2002).

There are many reasons for a lawyer to write well. Good writing helps attorneys by:

- Enhancing their credibility with other lawyers. Many lawyers *are* good writers, and most of them recognize and respect quality legal writing when they see it. When opposing these lawyers, your ability to write well commands respect and affects their evaluation of the likelihood of success. At my former firm, we were writing snobs. When facing attorneys from small firms, we routinely made assumptions about them based upon their legal writing. Quality legal writing gains you respect that may prove useful in litigation.
- Preventing malpractice and grievances. Inferior legal research and writing skills can give rise to malpractice liability, client grievances, and court sanctions.
- Enhancing their credibility with clients. Some clients read what you produce in their cases with a Javert-like obsession for pointing out even the tiniest errors. A superior legal writing product works like a salve on these clients' tortured psyches.
- Enhancing their credibility with judges. Judges are the most frequent victims of bad legal writing. They cannot escape a daily barrage of poorly written motions and briefs. No surprise, then, that judges take special note of well-written pleadings. Once, during a sanctions hearing, a district court judge permitted me to argue on behalf of my client for less than one minute, telling me that his reading of my brief already made clear that I was "the only lawyer in the room who knows what he is talking about" (that was not true, but it kept my client from being sanctioned and pleased my mother very much).
- Helping them win cases. Legal writing is critical to appellate success. Even at the trial court level, better legal writing – particularly at the summary judgment stage – will produce better results for your clients. Like it or not, many cases are won or lost on the briefing.

The importance of legal writing increases as the odds of reaching trial diminish. In this era of ever-rarer trials and hearings, legal writing takes on added significance. As courts expand the types of matters they will decide based solely on briefing, legal writing becomes ever more critical. *See* Edward D. Re, *Increased Importance of Legal Writing in the Era of the "Vanishing Trial*, 21 TOURO L. REV. 665 (2005).

B. Know Your Audience – Judges Matter!

An important part of legal writing is to know your audience. Lawyers write most often for judges. With increasing frequency, judges are making public their frustration with much of the legal writing that comes before them and are asking attorneys to do better. As Supreme Court Justice Ruth Bader Ginsburg noted:

> "The cardinal rule: it should play to the audience . . . The best way to lose that audience is to write the brief long and cluttered . . . ."

> Ruth Bader Ginsburg, *Appellate Advocacy: Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 568 (1999).

Judges do not have unlimited time to read briefs:

> Briefs usually must compete with a number of other demands on the judge's time and attention. The telephone rings. The daily mail arrives with motions and petitions clamoring for immediate review. The electronic mail spits out an urgent message . . . . The clerk's office sends a fax with an emergency motion. The air courier arrives with an overnight delivery. The law clerks buzz you on the intercom because they have hit a snag in a case. So the deathless prose that you have been reading . . . must await another moment. Or another hour. Or another day.
>
> RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 24-25 (1996).

The simple truth is that judges – and particularly state court judges – rarely have extended periods of time to focus on your legal writing. Judges want briefs that are interesting but also are organized and clear – in other words, briefs that are easy to read.

It is not uncommon for a state court judge to hear motions in twenty or thirty cases in a single morning. Most mornings, several of those are summary judgment motions involving lengthy briefs. Sometimes a hearing involves complex legal issues that necessitate lengthy briefs. Even in those cases, however, attorneys can take a number of steps to assist a busy judge reviewing their briefs. This paper describes some of those steps.

C. For Further Instruction

Attorneys interested in more detailed instruction on legal writing should take Bryan Garner's seminars. He is an outstanding teacher of legal writing and anyone attending his seminars will come away a better writer (I even recommend his seminars to my high school students in preparation for the AP examination). Mr. Garner's books on legal writing are helpful in any significant writing project. His most helpful for attorneys is *The Winning Brief*.

D. Maintain Credibility

Your brief only has as much value as your reputation and credibility. Be careful, then, to maintain your credibility with opposing counsel and the court. Don't misstate or overstate the facts or law. Cite-check your citations. Address all significant arguments raised or likely to be raised by your opponent. When the other side is right, don't be afraid to say so if it will not matter to the end result.

E. Use the Right Tone

Shrill briefs are not persuasive. Adopt a reasonable and respectful tone regardless of how opposing counsel behaves. An angry or defiant tone usually is unproductive. On very rare occasions, humor may be effective in conveying frustration. In helping defend an attorney from a specious sanctions motion several years ago, I wanted to point out to the court that the other party was blaming my client for a whole host of things that were not even arguably his fault. The opening line of our response read: "Smith has accused Mr. X of everything but being the gunman on the grassy knoll." Upon receiving the response, opposing counsel called to tell me he enjoyed the line, so apparently it got our point across without offending anyone.

II. DRAFTING EFFECTIVE DOCUMENTS

A. Write in Something Resembling English

An important goal in drafting any document (presumably) is ensuring that the people who read it can understand it. Notwithstanding this rather obvious point, many contracts leave one with the unmistakable impression that the drafter's goal was to make certain that no one would ever comprehend the contract's terms.

Thought hardly difficult, drafting contracts in English requires a willingness to set aside entrenched writing habits and embrace the use of plain language. Here are some examples of traditional contract provision, and their plain English counterparts:

> *This Agreement constitutes the entire understanding between the parties with respect to the subject matter of this Agreement and supersedes any prior discussions, negotiations, agreements, and understandings between the Parties.*
>
> *This Agreement contains the entire agreement between the parties.*
>
> *The terms of this Agreement may not be varied or modified in any manner, except by a subsequent written agreement executed by all parties.*
>
> *The parties can amend this Agreement only by signing a written document.*

B. Prepare Documents in a Readable Typeface

To enhance readability, prepare documents in a serif typeface (serif refers to the lines or curves at the top and bottom of a letter) like Times New Roman or

Garamond. Avoid using Courier and Arial. Whatever typeface you choose, use at least 12-point font:

> A contract prepared in Garamond is readable.

> `A contract prepared in Courier is not.`

> Neither is Arial.

C. Use Plenty of White Space

Magazine editors know that the intelligent use of white space pleases the human eye and enhances readability. Use enough white space in your contracts that the reader's eye gets a break from the text. Place this white space strategically throughout the contract to prevent the reader from being overwhelmed by text.

D. Give Your Contract a Title

A contract entitled *Contract* or *Agreement* does not help the reader very much. On the other hand, a contract entitled *Contract for Alarm Services* or *Agreement to Provide Computer Consulting Services* may help the reader understand the contract's purpose.

E. Include a Table of Contents

For contracts more than a few pages long, provide a table of contents.

F. Give Each Section a Clear and Specific Title

Regardless of the length of your contract, provide section titles that clearly and specifically state the subject matter of each section. Meaningful section titles are easy to draft and make the contract more understandable. In other types of legal writing, a well drafted topic sentence fulfills this function. Think of your contract's section headings as a series of topic sentences, or alternatively as a roadmap through the contract. Here are some examples of good section headings:

> *How to Provide Notice*
> *The Law Governing This Agreement*
> *How to Amend this Agreement*
> *What We Can Do If You Default*

G. Provide an Introduction That Explains the Contract

In addition to a good title and descriptive section headings, provide an introductory statement that helps the reader understand the purpose of the contract.

> *This contract specifies the terms on which CenterCorp will provide alarm monitoring services to Smith's Widgets.*

H. The Strategic Use of Bullet Points

Bullet points are a remarkable tool both to enhance clarity and for persuasion. They are an excellent way to present any type of list, so long as the listed items have no rank order. To avoid adding more numbers to a contract, use bullet points when listing items that do not have a rank order.

I. Avoid Underlining and All-Capital Letters

The use of all capital letters is distracting and makes type very difficult to read. While lower case letters have distinctive shapes, most fonts do not include those individual characteristics for capital letters, meaning the capital letters have a uniform shape and appearance that renders them inherently difficult to read. Similarly, underlining – a holdover from the days of typewriters – fails to provide sufficient emphasis for critical contract terms and often looks unnatural. ***To add emphasis, use italics or boldface type.***

J. The Top Ten Things *Not* to Say in Contracts

Here are some other common words and phrases that should be excised from contracts:

1. Prior to.

Prior to is a longwinded way of saying before. Just say before. Prior to leads to other clunky phrasing (as in prior to commencement of the option period – instead of before the option period begins).

2. Shall.

Once upon a time, lawyers were taught that *shall* was a legal term of art imposing a mandatory duty. Whether that ever was true, it certainly isn't now. Lawyers routinely use *shall* to mean all sorts of different things, including *is* (*There shall be no right of appeal from the county court at law*) and *may* (*No floor supervisor shall investigate or resolve any complaint of harassment by a subordinate employee*). Where a contract calls for required action, use *must* instead of *shall*. It sounds more natural and leaves no doubt as to its mandatory effect.

3. Now, Therefore, in Consideration of the Foregoing and the Mutual Covenants and Promises Herein, the Receipt and Sufficiency of Which are Hereby Acknowledged.

This commonly used phrase causes a ordinary reader's eyes to glaze over, and adds nothing to the contract. A good contract specifies each party's consideration, making this clause redundant. If the contract fails to specify the consideration, this vague clause will not suffice to do so.

4. The Parties Agree.

Isn't the whole point of a contract that the parties agree to all the terms?

5. The Parties Expressly Agree.

By specifying certain terms that the parties "expressly agree" about, this language implies the parties do not expressly agree about all the other terms.

6. Unless Otherwise Agreed.

If this language refers to other potentially contradictory language in the contract, that other language should be specified. If it refers to contemplated amendments, it is unnecessary and probably confusing, so long as the contract specifies its amendment process.

7. Hereby.

This word never serves any legitimate function, and clutters otherwise sound legal writing.

8. Wherefore.

Let me introduce you to hereby's more annoying cousin.

9. Notwithstanding Anything in This Contract to the Contrary.

This provision serves only to confuse the reader. A well written contract should not have inconsistencies necessitating this language. If two provisions may be interpreted inconsistently and this cannot be avoided, the better practice is to explain the apparent inconsistency and how it should be resolved.

10. In Witness Hereof, the Parties Have Caused this Contract to be Executed by Their Duly Authorized Representatives.

This is another common phrase without any real meaning.

III. WRITING TO PERSUADE

A. Strong Introductions – Starting Well

Good writing includes a strong introduction. An introduction serves several purposes. First and foremost, it hooks the reader. An introduction piques the reader's interest and invites further reading. Mystery novelist Elmore Leonard is a master of the understated yet compelling introduction. Consider the opening paragraph from one of his recent novels:

> Late afternoon Chloe and Kelly were having cocktails at the Rattlesnake Club, the two seated on the far side of the dining room by themselves: Chloe talking, Kelly listening, Chloe trying to get Kelly to help her entertain Anthony Paradiso, an eighty-four-year-old guy who was paying her five thousand a week to be his girlfriend.
> ELMORE LEONARD, MR. PARADISE 1 (2004).

This introduction hooks the reader, who wants to know more about Chloe's sordid arrangement with her sugar daddy. There is an important lesson here for lawyers. Most lawyers who use introductions focus on *issues*. The Leonard approach focuses on *people*; issues would be set forth only in the context of their impact on people. All of us – even judges – are more likely to be interested in people facing problems than in abstract legal issues. An introduction that presents the primary players in a compelling light is particularly effective:

> Joseph Burke got it on Guadalcanal, at Bloody Ridge, five .25 slugs from a Jap light machine gun, stitched across him in a neatly punctuated line.
> ROBERT B. PARKER, DOUBLE PLAY 1 (2001).

Here is the introduction to a summary judgment brief filed on behalf of the American Civil Liberties Union in a First Amendment case involving the petition clause, in which we hoped to hook a rural Texas judge right away:

> On July 18, 1833, Stephen F. Austin arrived in Mexico City bearing a petition for reforms relating to grievances asserted by the residents of what is now Texas. For this audacity in petitioning his government, Austin spent more than a year in prison. Whoville City Council Member Cindy Simple apparently takes a similarly dim view of the petition right. While John Smith has not been imprisoned, he has - solely for exercising his constitutional right to petition his government - been haled into court and forced to defend this SLAPP (strategic lawsuit against public participation).
> Mr. Smith is entitled to summary judgment because the communications at issue sought redress of grievances from elected government officials and therefore are protected by the Petition Clauses of the United States and Texas Constitutions. Permitting this SLAPP to proceed would threaten fundamental constitutional liberties: "Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined."
> *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (Sup. Ct. 1992, *aff'd*, 616 N.Y.S.2d 98 (App. Div. 1994).

Sometimes, an introduction begins with a single line so interesting or compelling that it commands the reader's attention. Quintin Jardine, Scottish author of the Inspector Skinner series so popular in the United Kingdom, often begins his novels with single sentences so interesting the reader cannot help but continue:

> Panic was etched on the face of the clown on the unicycle.
> QUINTIN JARDINE, SKINNER'S FESTIVAL 1 (1994).

> As a city, Edinburgh is a two-faced bitch.
> QUINTIN JARDINE, SKINNER'S RULES 1 (1993).

> It was only a small scream.
> QUINTIN JARDINE, SKINNER'S TRAIL 1 (1994).

Here is an example of the eye-catching opening sentence from another of Spenser's cases:

> The office of the university president looked like the front parlor of a successful Victorian whorehouse.
>
> Bradford W. Forbes, the president . . . was telling me about the sensitive nature of a college president's job, and there was apparently a lot to say about it. I'd been there twenty minutes and my eyes were beginning to cross. I wondered if I should tell him his office looked like a whorehouse. I decided not to.
> ROBERT B. PARKER, THE GODWULF MANUSCRIPT5-6 (1973).

In a recent case involving an attorney who sold real property to our clients under a contract for deed but failed to follow the new property code provisions governing executory contracts, we began our clients' summary judgment motion with the following line:

> Stanley Jones is an attorney who refuses to follow the law.

Perhaps my all-time favorite introduction to a legal brief, cited by Bryan Garner, is this opening paragraph of the shareholders' brief in a complex takeover case:

> "NL Industries is owned by its shareholders. The board of directors works for them. The shareholders want to sell their stock to Harold Simmons. The board won't let them."
> BRYAN GARNER, THE WINNING BRIEF 99 (2004).

This introduction is wonderful. It focuses on people, explains their problem, and points the reader toward a conclusion.

A strong introduction to a legal motion or brief provides a glimpse of the most important legal issues in the case. These should be woven into your client's story. Good introductions frame the issues so their resolution is clear to the reader. This is done by framing the issues so the reader is compelled to reach the result you seek without being asked to do so.

Sometimes, an attorney must be creative in crafting an introduction. Several years ago, I represented a retired couple being sued on an account. The couple retired after selling a successful fabrication business to their son, who promptly ran it into bankruptcy. One of the son's unpaid creditors, who also did business with the company prior to the sale, sued the couple. This creditor sued the couple because the son was bankrupt and the parents had money. The parents were entitled to summary judgment and this would be fairly evident to any judge willing to read a five-page brief. The goals of our introduction were to persuade the judge to read the remainder of the brief – in other words, to get the judge's attention – and to make clear that the wrong people were being sued. In preparing the brief, I remembered a motion hearing during which the judge questioned me about a murder case in Dallas that I worked on for a brief time. The judge was fascinated by the case. The introduction to our brief joined the judge's interest in true crime with our desire to show the creditor's motive for suing our clients:

> The murder of Marilyn Reese Sheppard, found beaten to death in her home on July 4, 1954, was the most reported and sensational crime of the 1950's. During his closing argument en route to winning an acquittal at the retrial of Dr. Sam Sheppard, criminal defense attorney F. Lee Bailey described the myopic police investigation that resulted in the conviction and imprisonment of an innocent man:
>
> > In my closing argument, I compared the State of Ohio to a woman who was poking around in the gutter beneath a street light. When a passerby asked what she was doing, she said she was looking for a dollar bill she had dropped fifty feet away. "Then why aren't you looking over there? asked the passerby. "Because," she replied, "the light is better over here."

> ABC Services filed this breach of contract case to collect a commercial account. The services at issue were ordered and received by TinMan Fabricating, which failed to pay for them. Rather than suing TinMan –which is insolvent and bereft of assets – ABC sued Nick and Nora Nelson, a married couple whose business assets were sold to, and later reacquired through foreclosure from, the founders of TinMan. Instead of suing the company that ordered the services and is obliged to pay for them, ABC chose to sue the Nelsons – presumably because "the light is better over here" (meaning the Nelsons can satisfy a judgment).
>
> In a different era, ABC might have pursued the Nelsons under the de facto merger doctrine, enmeshing the court in a protracted and arduous analysis of the Nelsons' business relationship with TinMan. In 1979, however, the Texas Legislature precluded the types of claims alleged by ABC in this lawsuit when it amended the Business Corporation Act to preclude successor liability in the absence of express assumption. Because the Nelsons did not:
>
> - order or authorize anyone to order the services,
> - receive the services,
> - have any involvement in TinMan,
> - give any indication they would pay for the services, or
> - expressly assume any of TinMan's liabilities upon acquiring that company's assets,
>
> they are not liable for payment of the account. ABC must look for its money where it was lost, not where "the light is better."

The Nelsons are entitled to summary judgment.

This introduction worked better than we possibly could have imagined. Not only was it clear at the hearing that the judge read our entire brief, the judge actually referred to the better light analogy during argument! Opposing counsel began his argument by telling the judge that summary judgment was not appropriate "despite the excellent brief" we filed. The judge granted our clients' summary judgment motion.

Drafting an introduction is a good way to focus your briefing in a case. When there are several complex issues in a case, drafting the introduction first necessarily forces you to decide what facts and arguments really are important. Having to compress four pages of facts and ten or twenty pages of argument into four or five sentences usually shows you what matters!

Introductions are also effective in shorter motions. The next time you file a motion for continuance, consider replacing:

> Plaintiff John Smith files this Motion for Continuance, and would respectfully show as follows . . . .

with:

> John Smith seeks a continuance due to non-elective surgery he is scheduled to undergo on the day of trial.

By reading the first sentence of your motion, the court will know what you seek, and why.

B. Strong Conclusions – Finishing Well

A particularly puzzling aspect of legal writing is the tendency of some lawyers to write an outstanding motion or brief – complete with strong introduction, well-crafted paragraphs, and persuasive arguments – and then end it with a conclusion that says something like "Wherefore, premises considered, plaintiff prays that this motion be granted in its entirety." Talk about ending with a whimper! A strong conclusion is nearly as important as a strong introduction. It is your opportunity to provide a compelling summary of your argument and leave the reader thinking about your principal points. Stuart Woods did a great job ending his early novels. In ending a book about a middle-aged man recounting his youthful adventures with a married couple, and the tragic death of the wife, Annie, he concludes:

> The years have passed, and all this has remained fresh with me. I think of Mark often. I cannot bear to think of Annie.
>
> STUART WOODS, RUN BEFORE THE WIND 373 (1983).

This ending is perfect – poetic, appropriate, abrupt, and emotional without being sentimental. What is its focus? It does not refer to any of the thrilling events of the novel. Instead, it focuses solely on *people*. Again, *people* are compelling.

A conclusion should describe the specific relief you seek, tie it to the people you represent, set forth the most compelling reason it should be granted, and leave the reader thinking. Here is the conclusion from our summary judgment motion involving the parents being sued for their son's obligation:

> The Business Corporation Act precludes successor liability in the absence of express assumption. Because the Nelsons did not expressly assume any of TinMan's liabilities, and because they neither purchased nor received the services at issue, they are not obliged to pay for them or spend any more money defending this lawsuit. The Nelsons are entitled to summary judgment.

This conclusion is brief, but it sets forth the central argument, focuses on the people involved, and tells the court what relief is being sought.

C. Summarize Arguments and Issues

How important are summaries? Well, the Fifth Circuit and the Texas appellate courts require them. Summaries are helpful to appellate judges, and their usefulness probably is even greater to overworked and distracted trial court judges. A summary of the argument or issue should identify the relief requested, the legal principles at issue, and the specific arguments addressed in the brief. A good summary achieves the delicate balance between being thorough and reprinting your entire argument. A summary that states your arguments but does not provide any support for them has limited utility. A summary that essentially copies your entire argument serves little purpose. Useful summaries are short, yet set forth the critical arguments in support of your key points.

D. Use Tables for Lengthy Briefs

Tables of contents and authorities are useful tools for judges and should be provided in any motion or brief longer than ten pages. There is a reason these tables are required for appellate briefs – judges and their clerks use them.

E. Use Headers

Headers, particularly in the argument section of a brief, are powerful summaries and a useful roadmap of your position. The ideal header is a one sentence statement in the form of a positive assertion of the argument that follows it, rather than merely a signpost. This header is not very powerful: "The accident photographs." This header is better: "The accident photographs should be excluded because they are hearsay." Using headers throughout your motion or brief will make it more readable, understandable, and persuasive.

F. Literary References

Literary references are a potent persuasive tool and may be useful in calling to the reader's mind the theme of a literary work. For example, a judge's quotation of Shakespeare's *King Lear* ("How sharper than a serpent's tooth it is to have a thankless child") reveals his disdain for adult children who attempted to defraud their mother. *Mileski v. Locker*, 178 N.Y.S.2d 911 (N.Y. Sup. Ct. 1958).

Literary references may be useful in setting an overall theme for a legal brief. In seeking summary judgment on behalf of a SLAPP defendant in a case where the plaintiff's claims violated my client's First Amendment rights as well as any sense of decency, I cited on the cover page a line delivered by Wilford Brimley in the movie *Absence of Malice*: "It ain't legal and worse than that, by God it ain't right." It summed up my feelings about the case and, as it turned out, the judge's opinion as well. A terrific literary reference in any case involving an attempt to distort the meaning of a statute is Humpty Dumpty's classic statement about the meaning of words: "When I use a word, it means just what I choose it to mean . . . ." Could there be a better way to underscore a litigant's distortion of meaning?

Caution is the watchword when using literary references. Sad though it may be, don't assume that judges and lawyers will recognize even major literary references unless you provide a citation. Also, don't overuse literary references. It is easy to pass over the line from being clever and insightful to full-on Niles Crane insufferability.

G. Presenting the Issues

A good brief or motion immediately sets forth the critical issues in the case. In appellate cases, briefing rules often require immediate identification of the issues. Where no rule compels immediate identification of the critical issue, the good legal drafter nevertheless presents that issue through a well-crafted introduction. This simple paragraph introduces the issue in a motion to compel:

> Joe Nelson accuses the Smiths of carrying out a complex scheme to defraud him of more than $250,000.00. Mr. Nelson served interrogatories and document requests on the Smiths more than four months ago. The Smiths objected to every interrogatory and have yet to produce a single document. Mr. Nelson seeks to compel responses.

Good issues are hard to find. Generally, good issues:

- are presented at the outset of the motion or brief;
- are presented in short and readable sentences (rather than the old-style single sentence that begins with the word *whether* and continues until rigor mortis sets in);
- include facts sufficient for the reader to understand the issue and how it arose (in

other words, focus on the people rather than an abstract legal principle); and

- permit only one possible answer.

Here are examples of issues from appellate briefs that follow this format:

> The underlying lawsuits allege losses to three financial institutions by Smith's legal malpractice in failing to discover conflicts, implement procedures to assure compliance with ethical standards, train and educate lawyers working on financial institution matters in their ethical and professional duties, and assure that those lawyers were adequately supervised. Are these activities "professional services for others" within the meaning of the insuring agreement so that the insurance company has a duty to defend the underlying lawsuits against Smith?

> A jury convicted Abel Munoz of illegal entry after deportation. At sentencing, Mr. Munoz objected to the assessment of criminal history points for a prior conviction, claiming his guilty plea in that prior case was entered without benefit of counsel or a valid waiver of rights. The record of the prior case is silent as to representation or waiver. Despite the testimony by Mr. Munoz establishing lack of waiver or counsel, and the absence of any record or other evidence to contradict it, the district court assessed the points. Did the district court violate the sentencing guidelines?

Jane Doe sued ABC Corporation under Title VII. The district court granted ABC's summary judgment motion solely on the basis of after-acquired evidence. May a Title VII claim be adjudicated on the basis of after-acquired evidence?

These introductions to Supreme Court decisions present issues in the context of facts:

> Petitioner is a boy who was beaten and permanently injured by his father, with whom he lived. Respondents are social workers and other local officials who received complaints that petitioner was being abused by his father and had reason to believe that was the case, but nonetheless did not act to remove petitioner from his father's custody. Petitioner sues respondents claiming that their failure to act deprived him of his liberty in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. We hold that it did not. *DeShaney v. Winnebago County Soc. Servcs. Dep't*, 489 U.S. 189 (1989).

> After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the First Amendment. We hold that it is not. *Texas v. Johnson*, 491 U.S. 397 (1989).

IV. THE NUTS & BOLTS OF LEGAL WRITING

A. Relative Dating

Face it – dates are distracting, interrupting your prose with visual eyesores. Even worse, when someone goes to the trouble of inserting a date into a brief, most of us assume the date is relevant and slow down to try and absorb it. Judges are no different. As Fifth Circuit Judge Jacques Wiener Jr. observed:

> "When we judges see a date or a series of dates, or time of day, or day of the week, . . . most of us assume that such information presages something of importance and we start looking for it. But if such detailed information is purely surplus fact and unnecessary minutiae, you do nothing by including it other than to divert our attention or anticipation from what we really should be looking for. In essence, you will have created your own red herring." Jacques L. Wiener Jr., *Ruminations from the Bench: Brief Writing and Oral Advocacy in the Fifth Circuit*, 70 TUL. L. REV. 187, 192 (1995).

Most of the time, the date is irrelevant to any issue in the case and serves only as a serious distraction to the reader. Take, for example, this paragraph in a DTPA case:

> On February 6, 2006, the Millers purchased a house from the Smiths. On February 13, 2006, the Millers discovered a water stain on the wall of their bedroom closet. On February 16, 2006, Foundation Repair Company inspected the home and informed the Millers that it required significant foundation repairs. On March 12, 2006, the Millers paid Foundation Repair the sum of $8,500.00 to perform the necessary repairs.

All the dates are distracting; none of the dates is relevant. A better approach is:

> A week after purchasing a house from the Smiths, Robert and Ann Miller discovered a water stain on the wall of their bedroom closet. Three days later, Foundation Repair Company inspected the home and informed the Millers that it required significant foundation repairs. The following month, the Millers paid Foundation Repair the sum of $8,500.00 to perform the necessary repairs.

An even better approach is:

> After purchasing a house from the Smiths, Robert and Ann Miller discovered a water stain on the wall of their bedroom closet. Foundation Repair Company inspected the home and informed the Millers that it required significant foundation repairs. The Millers paid Foundation Repair the sum of $8,500.00 to perform the necessary repairs.

In most instances, chronology and relative dating are a better approach than actual dates. Of course, dates must be included when they are important, as in cases involving statutes of limitations or other legal issues dependent on actual dates. Even where actual dates are included, however, it is often best to frame them within the chronology. For example:

> The Texas Supreme Court rejected Ms. Smith's application for review on March 1, 2001, triggering the two-year statute of limitations. Ms. Smith filed this lawsuit two weeks prior to expiration of the limitations period, on February 16, 2003.

B. Spell Check (A Dangerous Tool!)

Spell check is a wonderful tool but is no substitute for thorough editing. The dangers of spell check are illustrated by a recent federal criminal pleading in which the government stated its intention to prosecute an alien for "Attempted Aggravated Sexual Assualt of a Chile." Jerry Buchmeyer, *Who Was That Masked Man?*, 69 TEX. BAR J. 491, 492 (2006) (and presumably giving whole new meaning to the term *hot sex*).

C. Don't Plagiarize

Legal writing culture is citation oriented, meaning it insists that sources of words and ideas be documented. In this environment, pagiarism is a very real issue. Plagiarism can have severe consequences, including a lawyer's loss of credibility and professional standing.

Most plagiarism in legal writing occurs when a lawyer uses the words, whether directly quoted or paraphrased, from a court decision or treatise. This is a tempting technique, since courts and legal scholars often set forth applicable principles clearly and concisely. The pride of a well written brief, however, will give way to humiliation if opposing counsel or the judge discovers that a source is quoted or paraphrased without attribution. In *Iowa Supreme Court Board of Professional Ethics v. Conduct & Lane*, 642 N.W.2d 296 (Iowa 2002), Lane copied almost twenty pages of published work into a brief and then requested an award of $16,000.00 in legal fees for preparing it. When a magistrate discovered that Lane had taken the pages verbatim from a treatise, the Iowa Supreme Court concluded that Lane plagiarized the brief and suspended him from the practice of law for six months.

When borrowing from form books, other briefs, or court decisions, it is appropriate to borrow language so long as it is tailored and applied to the specific case. Treatises and articles, however, should not be used without attribution.

Like other writers, attorneys must take care for ethical and practical reasons not to plagiarize.

D. "A Few Too Many Words"

Salieri said it best in *Amadeus*: "A few too many notes." Though probably an unfair criticism of Mozart, it remains an accurate assessment of most legal writing. Lawyers use too many words.

To improve your writing, review each draft with an eye toward cutting needless words. Be relentless in hacking unnecessary words from your writing. Shorten sentences. Simplify language. Cut, cut, cut. Spenser, Robert B. Parker's literate detective, speaks in simple yet descriptive sentences:

> It was a late May morning in Boston. I had coffee. I was sitting in my swivel chair, with my feet up, looking out my window at the Back Bay. The lights were on in my office. Outside, the temperature was 53. The sky was low and gray. There was no rain yet, but the air was swollen with it, and I know it would come.
> ROBERT B. PARKER, BACK STORY 1 (2003).

One source of clutter in legal writing is the overuse of certain customary phrases. If you find any of the following phrases in your writing, eliminate them:

- It is Smith's position that . . . .
- We respectfully suggest that . . . .
- It would be helpful to remember that . . . .
- It should be noted that . . . .
- It should not be forgotten that . . . .
- It is important to note that . . . .
- It is apparent that . . . .
- It would appear that . . . .

- It is interesting to note that . . . .
- It is beyond dispute . . . .
- It is clear that . . . .
- Be it remembered that . . . .

Some additional phrases used by lawyers, and more efficient alternatives, are:

• during the time that	while
• for the period of	for
• as to	about
• the question as to whether	whether
• until such time as	until
• the particular individual	[Name]
• despite the fact that	although
• because of the fact that	because
• in some instances	sometimes
• by means of	by
• for the purpose of	to
• in accordance with	under
• in favor of	for
• in order to	to
• in relation to	about
• in the event that	if
• prior to	before
• subsequent to	after
• pursuant to	under

See BRYAN GARNER, LEGAL WRITING IN PLAIN ENGLISH 35(2001); RICHARD WYDICK, PLAIN ENGLISH FOR LAWYERS 11(2d ed. 1985).

Another way to pare your writing is to avoid using *provided that*. In addition to cluttering your writing, the phrase usually signals failure to think through what you want to say. Rather than weaving the additional matter into your original statement, you just added the words *provided that* to the end of the sentence. Consider the following sentence:

> Any expert witness may testify, provided that the expert has been properly designated.

With better planning – or editing – it becomes:

> Any properly designated expert witness may testify.

E. Names, Not Party Designations

We know that people, rather than issues, are compelling. Why, then, would an attorney ever detract from the power of a brief by referring to the client as *plaintiff*, *defendant*, *petitioner*, or *respondent*? Novelists certainly don't do this. Consider the following passage from Spenser's case files:

> I drove the side of my right fist into his windpipe as hard as I could and brought my forearm around and hit Zachary along the jawline. He gasped. Then Hawk was behind Zachary and kicked him in the side of his back. He bent back, half turned, and Hawk hit him a rolling, lunging right hand on the jaw, and Zachary loosened his grip on me and his knees buckled and he fell forward on his face on the ground. I stepped out of the way as he fell.

ROBERT B. PARKER, THE JUDAS GOAT 192 (1978).

Now read the same passage written in the style of some lawyers:

> Petitioner drove the side of his right fist into respondent's windpipe as hard as petitioner could and brought his forearm around and hit respondent along the jawline. Respondent gasped. Then intervenor was behind respondent and kicked respondent in the side of respondent's back. Respondent bent back, half turned, and intervenor hit respondent a rolling, lunging right hand on the jaw, and respondent loosened his grip on petitioner and respondent's knees buckled and he fell forward on his face on the ground. Petitioner stepped out of the way as respondent fell.

Yuck. When the human element of the narrative is removed, it ceases to be compelling.

There are two significant exceptions to the rule against using party designations. First, use of party designations may be advisable where the opposing party is sympathetic in comparison to your client. For example, I used party designations in defending a recent child molestation case on behalf of a Dallas church. In that case, *plaintiff* seemed a lot better for my client than *Sally*. Second, party designations are helpful in cases involving multiple parties where confusion might otherwise result. Other than these situations, it is best to use names rather than designations.

F. To Cap or Not to Cap – Parties

Puzzling as it is, many attorneys engage in the maddening practice of capitalizing party designations like Plaintiff and Defendant. As noted in the preceding section, the better practice is to use the parties' names rather than their party designations. If you must use party designations, don't capitalize them. There is no compelling reason to do so, and it distracts those of us who know it. Among the authorities supporting this viewpoint are two of the leading guides to legal writing, and the Supreme Court:

> Briefly, plaintiff seeks to recover for personal injuries . . . .
> HENRY WEIHOFEN, LEGAL WRITING STYLE 238 (1980).

> On January 15, 1979, appellant filed a charge with the Equal Employment Opportunity Commission . . . .
> JOHN DERNBACH & RICHARD V. SINGLETON II, A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD 174 (1981).

> Louisiana infringed appellant's rights of free speech and free assembly by convicting him under this statute . . . .
> *Cox v. Louisiana*, 379 U.S. 536 (1965).

During my first year as an associate, our partners assigned me the task of researching whether party designations should be capitalized and preparing a summary of my research. While they found my citation of legal writing authorities persuasive, the decisive factor in their decision was my discovery that Justice Cardozo did not capitalize those designations. For our partners, Justice Cardozo's word decided the matter.

G. Mr./Ms. or Last Names

This is one where Mr. Garner and I part ways. He advises legal writers to use last names alone:

> Legal writers seem to fear that, when referring to parties, they're being impolite if they don't consistently use *Mr.*, *Ms.*, or some other courtesy title. Actually, though, they're simply creating a brisker, more matter-of-fact style. Journalists aren't being rude when they do this, and neither are you.

BRYAN GARNER, THE WINNING BRIEF 266 (2004).

While recognizing Mr. Garner's superior expertise on writing, I disagree with his assessment of courtesy. Journalists face space limitations necessitating their use of only last names (in his excellent argument in favor of the serial comma, Mr. Garner points out that space limitations affect journalistic style). Lawyers do not have the same concern. Lawyers do, however, work in a profession losing even the pretense of civility. The use of *Mr.* or *Ms.* restores a small bit of this civility to the legal profession.

In debating the issue, I am reminded of George Washington. The most towering figure in American history, and a man known throughout the world as a great gentleman, Washington refused during the Revolutionary War to accept letters from General Howe addressed to "Mr. George Washington" or "George Washington, Esq." because they did not contain his rank of general. One can only imagine his reaction to a letter addressed simply to "Washington."

Perhaps the Texan in me causes me to feel this way. This much I know: my grandfather, who came to Texas during the 1890's, would never have approved of referring to any person – and certainly never a woman – solely by last name. I am not sure that a different approach constitutes progress.

On the subject of names, please avoid the peculiar practice of many attorneys who feel the need to tell us that Smith is shorthand for Smith:

> Plaintiff John Smith ("Smith") petitions the court for relief . . . .

If the reader cannot figure out that Smith means Smith, good luck with the rest of your argument.

H. Avoid Be-Verbs

Verbs move the action. Consequently, good writers try to avoid using forms of *to be*, the so-called be-verbs, including is, am, was, were, will be, and have been. These verbs undermine the power of your writing and put readers to sleep.

Be-verbs destroy impact and sap strength from sentences. Infusing writing with stronger verbs improves language and increases the reader's interest. It also creates a more compelling story or argument. Simply put, verbs matter more to our writing than any other category of words. Using strong verbs amounts to injecting your writing with performance-enhancing words. Here is a sentence with the dreaded be-verb:

> *The petitioner will be granted certiorari by the Supreme Court.* Now, here is the same sentence without the be-verb: *The Supreme Court will grant certiorari in the case.*

The first sentence is sluggish compared to the second. The more effective sentence makes the subject (in this case, the Supreme Court) perform the action – *The Supreme Court will grant*.

Employing "be-verbs" is not entirely off limits. If a subject does not need to be identified, for example, it is not necessary to use action verbs. To increase your writing efficiency, however, limit "be-verbs" to about a quarter of your sentences.

I. State a Rule, Give an Example

Legal writing is the process of presenting rules and explaining their application. Stating a rule without providing an example of its application to facts leaves the job half-done. When presenting and applying a rule, most lawyers first present the rule and then apply it to the facts of their case. Many times, an

intermediate step – presenting an example of the rule in action –improves the argument. Consider an argument concerning assumption of risk in athletics:

> Students who participate in sports assume risks inherent to the activity. *Morgan v. State*, 685 N.E.2d 202, 207-08 (N.Y. 1977). Tommy Jones did not assume the risk of tripping over debris in the end zone because that debris is not inherent to football.

This argument improves when an example is inserted between the general rule and its application:

> Students who participate in sports assume risks inherent to the activity. *Morgan v. State*, 685 N.E.2d 202, 207-08 (N.Y. 1977). A student who is injured in an awkward fall while learning a jump roll in karate class has assumed an inherent risk, while a student who trips over a torn tennis court divider has not. Falling is inherent to karate jump rolls, while torn nets are not inherent to tennis. Tommy Jones did not assume the risk of tripping over debris left in the end zone of the football field because that debris – like the torn tennis net – is not inherent to the game.

Michelle G. Falkow, *Pride and Prejudice: Lessons Legal Writers Can Learn from Literature*, 21 TOURO L. REV. 349, 358 (2005).

In presenting a rule – particularly a complex rule – provide an example of the rule before applying it to your case.

J. Provide Determinative Facts

Provide the determinative facts when discussing important cases. Attorneys are so focused on the rules established by cases that they sometimes forget to describe the facts that led to those rules. Whether relying on a case or distinguishing it, providing the critical facts that led to the holding helps judges understand it. Provide those facts that related directly to the holding, with an eye toward providing only that level of detail necessary to secure a complete understanding of the holding.

K. Tell A Good Story, or Any Story

Much of the advice in this paper relates to storytelling. These techniques are designed to help the legal writer tell a better story. The statement of facts in a motion or brief should be a compelling story. The most compelling way to tell a story usually is in chronological order, by providing the facts in the order they happened.

There are rare exceptions when chronology is not the most persuasive way to tell a story. In a recent Supreme Court petition, my client argued that the Fifth Circuit resolved fact issues in affirming summary judgment for an employer in a discrimination case despite the Supreme Court's previous admonition in a similar case not to do so. To emphasize the critical fact issues in the case, we presented alternate versions of certain facts:

> Toycom "Eliminates" the RTV Lead Position
>
> Ms. Johnson's Version: Only two weeks after demoting Ms. Johnson, Toycom informed her it was eliminating the position of RTV Lead altogether and the company reduced the pay of both Ms. Johnson and Ms. Smith. The very next day, however, Ms. Smith received a pay raise from Toycom. Ms. Smith received another pay raise when she became the RTV Clerk/Trainer, a newly created position with the same duties as the previously "eliminated" RTV Lead position. Toycom managers could not agree about why the position was eliminated just weeks after the demotion of Ms. Johnson and promotion of Ms. Smith. Ms. Johnson remained a clerk until being terminated by Toycom on June 18, 2003. The demotion from RTV Lead to clerk substantially altered Ms. Johnson's job duties and authority, as well as her salary.
>
> Toycom's Version: Toycom made a business decision (based upon transfer of certain functions from the RTV Department to a different department) that it did not require any RTV Leads. Ms. Johnson and Ms. Smith were both demoted to clerk, with an attendant salary reduction. The day after her demotion, Ms. Smith was given a merit pay increase as a result of her regularly scheduled performance review. Between January of 2003 and mid-2004, Toycom did not have any RTV Leads.
>
> The Critical Fact Issue: The parties differ sharply over whether Toycom ever eliminated the RTV Lead position. Ms. Johnson believes that Toycom realized it could not demote her legally, hatched a plot to eliminate the position only in name, created an equivalent position to award to Ms. Smith, and then lied about what its scheme.

This type of narrative is compelling when you want to highlight fact disputes. Most of the time, however, a chronological narrative is the best way to tell a story.

L. Creating Strong Paragraphs

Once upon a time, most of us had a high school teacher who instructed us to use topic sentences. Good advice. The first sentence of an effective paragraph expresses the focus of that paragraph. In legal writing, the topic sentence provides the reader with a summary of the argument contained in that paragraph. It also assists overworked judges trying to skim a brief before a hearing. Strong topic sentences permit judges to read only the beginning portion of each paragraph and still grasp the issues.

Backward though it may seem, many lawyers to do the exact opposite of what I am counseling – they fall into the habit of placing topic sentences at the end of paragraphs. This is most common in paragraphs discussing court decisions. Here is an example of this writing mistake:

> In *Smith v. Jones*, 000 S.W.0d 0 (Tex. 0000), the Texas Supreme Court held that "evidence of a prior sexual molestation conviction may not be admitted to show that molestation in the present case took place." *Id.* at 00. The court went on, however, to state that such evidence "may be admitted for the purpose of establishing other facts, such as absence of mistake, motive, plan, or preparation." *Id.* Thus, evidence of Johnson's prior conviction is admissible to disprove his defense of mistake.

Aargh. The reader must complete the paragraph before discovering its principal point. Even worse, the case is cited without any immediate clue about its importance. A judge reading this paragraph could better analyze the import of the case if the topic sentence was at the beginning – rather than the end – of the paragraph (like Mr. Bonikowske taught me in the tenth grade!). Here is the same paragraph, rewritten to help the reader:

> Evidence of Johnson's prior conviction is admissible to disprove his defense of mistake. In *Smith v. Jones*, 000 S.W.0d 0 (Tex. 0000), the Texas Supreme Court held that "evidence of a prior sexual molestation conviction may not be admitted to show that molestation in the present case took place." *Id.* at 00. The court went on, however, to state that such evidence "may be admitted for the purpose of establishing other facts, such as absence of mistake, motive, plan, or preparation." *Id.* Thus, Johnson's prior conviction is admissible under *Smith*.

Now the reader understands the point of the paragraph and case citation upon reading the first sentence. Good topic sentences make your writing more readable and persuasive.

M. Creating Strong Sentences

Short sentences transform prose. Lengthy sentences are a common element of most poorly written motions and briefs. Your goal should be an average sentence length of fewer than twenty words. Remember to vary your sentence length. Some sentences should be longer, others shorter, but twenty words or less is a good average.

Uncomplicated sentences are particularly important to express complicated ideas. The more complex the idea, the shorter and simpler the sentences presenting it should be.

N. Eliminate Legalese

One sure way to undermine the power of your writing is to use legalese. All of us know this rule, and all of us break it (or stand mute while others do). We obligate our clients to *agree and covenant* not to do certain things, as though agreeing without covenanting somehow is not enough. We seek *any and all* documents, *bind and obligate* parties, demand that others *cease and desist*, help our clients *give, devise, and bequeath* their belongings, and declare contracts *null and void*. Sometimes these outdated terms of art are actually necessary, but only rarely. Most of the time, a single word will perform the work of these phrases. Similarly, is there really any reason to use words like *aforementioned*, *herein*, *hereinabove*, *inter alia*, *arguendo*, *hereinafter*, or *wherefore*? These are grand words on the Scrabble board and at the Renaissance Faire, but not in your motions and briefs.

O. Write in English

Latin is legalese's insufferable cousin. Avoid writing in any foreign language (except of course, when practicing law in the jurisdictions where they are spoken). The principal benefits of writing in English are (1) being understood and (2) avoiding sounding like a pretentious jackass. A side benefit is avoiding the "marvelous capacity of a Latin phrase to serve as a substitute for reasoning." Edmund M. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 229 (1922). Impress your friends at cocktail parties with your command of Latin. Write in English.

P. Active, Not Passive

Many lawyers use the passive voice without realizing the damage it does to their writing. With the passive voice, the subject of the clause does not perform the action of the verb. A classic example of a passive sentence is: *The deadline was missed by Mr. Jones.* The same sentence in active voice would read: *Mr. Jones missed the deadline.* The passive voice is weak and often ambiguous. Instead of saying that an actor acted, you say that an action was taken, meaning the reader might not realize who acted.

Lawyers who write strong, persuasive, and effective sentences avoid the passive voice. The passive voice adds unnecessary words, muddles writing, and undermines clarity.

Examples of passive phrases include:

- Is dismissed
- Are docketed
- Was vacated
- Were reversed
- Been filed
- Being affirmed
- Be sanctioned
- Am honored
- Got paid

The passive voice is acceptable in certain situations, such as when the actor cannot be identified or is unimportant. Use the passive voice when the active might alter what you want to say. On the whole, however, avoiding the passive voice saves words, promotes clarity, and animates your style. You will snatch and hold the reader's attention with clear, assertive sentences.

Q. Using However

You should not begin a sentence with however. You may, however, move it inside the sentence.

R. The Important Case of That v. Which

Confusion regarding the use of these words abounds. Much of the time when *which* is used, it should be *that* instead. The result of this confusion is misuse of both words, causing ambiguity. The best way to remember when to use these words is to understand that *that* is restrictive, while *which* is nonrestrictive. Remembering this simple rule will, at least most of the time, permit you to use *that* and *which* properly. The real mistake most writers make is to use *which* restrictively. So long as you remain vigilant in avoiding the restrictive *which*, you should be fine.

S. Not Sexist, But Not Awkward Either

Avoid sexist language. It offends some judges and lawyers and can be removed painlessly most of the time. The most effective way to remove sexist language is to reword your sentences to avoid it. Consider the following sentence: *The fiduciary duty an attorney owes to his client is one of the highest recognized by Texas law.* Some lawyers would rewrite the sentence to read as follows: *The fiduciary duty an attorney owes to his or her client is one of the highest recognized by Texas law.* How awkward! Rewrite the sentence to refer specifically to the litigants: *As the Wrays' attorney, Mr. Smith owed to them one of the highest fiduciary duties recognized by Texas law.* Alternatively, use an article instead of the pronoun: *An attorney's fiduciary duty to the client is one of the highest recognized by Texas law.*

You can rewrite most sentences easily to avoid sexist language. The sentence

> *Communications between a physician and his patient are protected from discovery*

becomes

> *Physician-patient communications are protected from discovery.*

While it may take some effort, rooting out sexist language is worth it.

T. Using the Dash – For Emphasis

Dashes highlight important phrases within your sentences. They are superior in this regard to commas and parentheses. Once you start using the dash this way, your use of commas will diminish and your use of parentheses will almost disappear. Dashes can be used both for interruptive phrases and for emphasis near the end of a sentence.

Here are some examples of dashes from actual briefs used this way:

- The Smiths paid the note – in full.
- The memorandum – which contained false information about Mayor Smith – was an attempt to obtain government action.
- Judge Benavides – in attempting to find some basis for Smith's decisions during voir dire – was being kind.

John Grisham, the best-selling legal writer of all time, uses the dash for interruptive phrases in his books:

> Rabbits, squirrels, skunks, possums, raccoons, a million birds, a frightening assortment of green and black snakes – all nonpoisonous I was reassured – and dozens of cats. But no dogs.

JOHN GRISHAM, THE LAST JUROR 28 (2004). Spenser also uses the dash both for emphasis and interruptive phrases:

> "It is a matter of the utmost delicacy, Mr. Spenser" – he was looking at himself in the glass again – " requiring restraint, sensitivity, circumspection, and a high degree of professionalism."
> ROBERT B. PARKER, THE GODWULF MANUSCRIPT 6 (1973).

> Her hair was loose and long. She wore a short-sleeved blouse, a skirt, no socks, and a pair of loafers. I looked at her arm – no tracks. One point for our side; she wasn't shooting. ROBERT B. PARKER, THE GODWULF MANUSCRIPT 54 (1973).

The most famous use of the dash for an interruptive phrase in American history – and perhaps the most compelling – is Abraham Lincoln's use in the Gettysburg Address:

> Now we are engaged in a great civil war, testing whether than nation – or any nation, so conceived and so dedicated – can long endure.

U. Quotation Marks

The misused quotation mark is inescapable in American society. My son and I pass a church sign each morning on the way to school that states:

ACADEMY NOW "ENROLLING"

Despite an entire year of trying, we have yet to figure out what it means. Our local driver's education school engages in the curious but common practice of using quotation marks to emphasize key words, along these lines:

> It is imperative that "any" student who wishes to take the driving test bring "all" forms of requested identification, and each student "must" pay the testing fee. There are "no" exceptions.

An entire page of this actually made my eyes hurt. The misused quotation mark is so common that there is an episode of *Friends* devoted in part to Joey's inability to understand how quotation marks are used!

Quotation marks should be used when you are quoting someone, when you are referring to a word (as in, *the Legislature's use in the statute of the word "the" denotes an intent to signal a particular class*), and when you are pointing out that a word or phrase is being misused (as in, *Smith's classification of a giraffe as a "farm animal" flies in the face of a century of caselaw, not to mention common sense*). Other than that, avoid the use of quotation marks. "Really."

V. Persuasion with a Bullet

Bullets are a remarkable persuasive tool. They are an excellent way to present any type of list, including the elements of a cause of action. The elements of a claim for breach of contract, for example, are:

- the existence of a valid and enforceable contract,
- breach, and
- proximate cause of
- actual damages.

Bullets are a great way to demonstrate the compnents of an argument:

> The Smiths take the startling position that they can sell their home to the Wrays and:
>
> - retain legal title to the property throughout the 20-year payment term,
> - have the Wrays pay all taxes and insurance on the property,
> - terminate the sales contract when the Wrays miss a single payment after faithfully making payments for 14 years, and
> - keep every penny paid by the Wrays for the previous 14 years, yet avoid the Texas statutes governing executory contracts by calling their contract a "rent-to-own" agreement.
>
> The contract is an executory contract subject to the provisions of the Texas Property Code.

Bullets highlight critical portions of your argument and make lengthy sequential statements more readable.

W. Confront Counter Arguments

Many lawyers make the critical mistake of avoiding counterarguments or relegating them to the very end of a brief. Good legal writers confront counterarguments directly and without hesitation. Sound argumentation requires not only the construction of your argument but also the refutation of opposing arguments.

The best way to overcome opposing arguments is to weave them into your argument. Begin your argument by joining the law and facts necessary to

support it, and then build to your principal conclusion. Then, enunciate the strongest possible counterargument and refute it. Repeat this process for each credible or likely counterargument. Finally, return to your principal argument and conclude it. In refuting counterarguments, devote as little time as possible to presenting the counterargument (you do not, after all, wish to highlight your opponent's arguments) and focus your efforts on refuting it. By this process, you will both support your argument and deal directly with the opposing arguments.

X. Serial Commas/Using Commas

Could there be a more important issue facing this nation than the ongoing dispute over the serial comma, known abroad as the Oxford comma (those British have a different word for everything!)? Some, Mr. Garner chief among them, are adamant about its use. Others, including Lynne Truss of *Eats Shoots and Leaves* fame, counsel flexibility.

Ms. Truss, incidentally, is the author of the greatest rule ever written about commas: *Don't use commas like a stupid person*. Well said and worth saying again in big scary letters:

DON'T USE COMMAS
LIKE A STUPID PERSON

The comma is the most overused, misunderstood mark in the English language. Please don't:

- Substitute a comma for the word *and* ("Agent, principal both responsible for defamation);
- Misplace a comma (the classic gun-toting panda who feels compelled to fire into the air because of a dictionary's misplaced comma – he believes a panda actually eats, shoots and leaves);
- Delete a necessary comma ("The captain crawled out of the boat's cabin before it sank and swam to shore");
- Use the gratuitous comma (The plaintiffs, were required to sign sworn statements waiving their DTPA rights);
- Overuse commas, placing them, at every turn, throughout your writing, leaving the reader to navigate, in frustration, what, otherwise, might be compelling prose;
- Use a comma to separate a party designation and name (Plaintiff, John Smith files this motion . . .).

Of course, some people can get away with breaking all the comma rules. In his farewell address before leaving Springfield after being elected president, Abraham Lincoln relied heavily on commas yet produced compelling prose still praised more than a century later:

> My friends – No one, not in my situation, can appreciate my feeling of sadness at this parting. To this place, and the kindness of these people, I owe every thing. Here I have lived a quarter of a century, and have passed from a young to an old man. Here my children have been born, and one is buried. I now leave, not knowing when, or whether ever, I may return, with a task before me greater than that which rested upon Washington. Without the assistance of the Divine Being, who ever attended him, I cannot succeed. With that assistance I cannot fail. Trusting in Him, who can go with me, and remain with you and be every where for good, let us confidently hope that all will yet be well. To His care commending you, as I hope in your prayers you will commend me, I bid you an affectionate farewell.

Y. To Split or Not to Split

As a first-year associate, I was summoned to our firm's conference room for a meeting with one of the partners. The partner laid before me a lengthy memorandum of my creation and turned to a portion he had highlighted in the middle of my glorious work. He asked me: "Are you aware of the firm's policy toward the split infinitive?" Concealing my astonishment that the firm had a policy on split infinitives, I confessed ignorance. The partner handed me a copy of Fowler's *Modern English Usage*, opened it to the section entitled *Split Infinitive*, and walked out of the room. This is what I learned (other than that our firm took legal writing a bit too seriously):

> The English-speaking world may be divided into (1) those who neither know nor care what a split infinitive is; (2) those who do not know, but care very much; (3) those who know and condemn; (4) those who know and approve; & (5) those who know and distinguish.

H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 558 (1944).

Upon completing the entry, I longed for the time only minutes earlier when I was among what Fowler termed those "happy folk, to be envied by most of the minority classes," who neither know nor care. Alas, from that moment forward, I would be haunted by misgivings and confusion about the dreaded split infinitive.

The preferred class of people – at least according to Fowler – is those who know and

distinguish. To summarize, split infinitives should be avoided unless the cure is worse than the disease. In other words, avoid the split infinitive unless doing so renders a sentence horrifically awkward, ambiguous, or patently artificial. Thus, we still avoid the classic *to mortally wound*, preferring instead *to wound mortally*. Captain Kirk and his crew do not undertake *to boldly go*, but instead *to go boldly*. On the other hand, we will probably prefer *our object is to further cement trade relations*, to *our object is further to cement trade relations* (making it unclear whether an additional object or additional cementing is the goal).

The problem is that many readers do not possess breeding sufficient to permit their appreciation of the nuance and beauty of the properly split infinitive, falling instead into the class of those who know and condemn in all cases. Even worse, those who know and condemn are on the constant lookout for the split infinitive, to point it out and thereby establish their intellectual superiority. At least of a few of these condemners are judges. My constant state of infinitive-paranoia therefore causes me to rephrase sentences at almost any cost to avoid split infinites. You will have to find your own way on this one.

Z. Numbers

Numbers greater than ten should be written as numbers (100), but only words should be used for one through ten. The most important exceptions to this rule are (1) when a passage contains numbers in both categories, in which case only numbers should be used, (2) references to discovery requests or other numbered items, (3) when referring to percentages, where only numbers should be used, and (4) when the number begins a sentence. Finally, don't engage in the puzzling practice of using words and numbers, as in ten (10). Few judges and lawyers will assume that by ten you mean 26.

AA. Referencing Filings

Most lawyers list the entire title of pleadings and discovery instruments when referring to them:

> After filing Plaintiff's Original Petition, plaintiff served Plaintiff's First Set of Interrogatories, Plaintiff's First Requests for Production, and Plaintiff's Requests for Disclosure. When defendant failed to respond, plaintiff filed Plaintiff's Motion to Compel Discovery and for Sanctions.

This is distracting because it requires the use of capital letters, confusing because it disrupts the narrative flow, and deflating because it interrupts your prose. To avoid these problems, describe a pleading rather than giving its title:

> After filing this lawsuit, Mr. Smith served requests for production and disclosure, as well as interrogatories, on Good Times. When Good Times did not respond, Mr. Smith sought to compel responses.

If the title must be used, it is best simplified:

> After filing his petition, Mr. Smith served interrogatories, document requests and disclosure requests on Good Times. When Good Times did not respond, Mr. Smith filed a motion to compel responses.

BB. Modifiers

Misplaced and dangling modifiers are not located properly in relation to the words they modify, leading to ambiguous sentences that sometimes do not mean what the writer intended them to mean. An example of a misplaced modifier would be: *The magazine sat on the bed that Jonathan had read.* Jonathan read the magazine, not the bed. This modifier is misplaced because it is not placed nearest the word it modifies. Another example: *The clerk posted the docket of cases for the lawyers heard that morning*. It should, of course, be: *The clerk posted the docket of cases heard that morning for the lawyers.* Dangling modifiers usually are –ing modifiers not logically connected to the principal part of the sentence: *Walking through the courthouse, the briefcase rubbed against my leg.* The briefcase was, in all likelihood, not walking through the courthouse. Instead, write: *The briefcase rubbed against my leg as I walked through the courthouse.*

Careful editing should resolve misplaced or dangling modifiers, which is important because they are to many readers the written equivalent of nails on a chalk board.

CC. Citing Cases – Joining Law & Fact

Case citations are more persuasive when joined with the facts of a particular case. Many lawyers insist on separating law and fact even though it undermines the power of their argument. Here is an example of legal writing undermined by its separation of law and fact:

> A party may protect from discovery the work of an expert witness employed purely for consultation. A party may not, however, continue to protect that consulting expert's work from discovery once it is reviewed by a testifying expert witness. TEX. R. CIV. P. 192.3(e) (West 2006).

> In this case, Smith's report as a consulting expert witness was later reviewed by Jones, an expert witness who will testify on behalf of Buy-Low at trial. As a result, Buy-Low must produce Smith's report.

These two paragraphs are combined, strengthened, and shortened by joining law and fact:

> Smith's report was not discoverable when Buy-Low was using him purely for consultation. Once Buy-Low showed Smith's report to Jones, however, it became discoverable because Jones is a testifying expert. TEX. R. CIV. P. 192.3(e) (West 2006).

While not always possible, joining law and fact in this manner often strengthens the argument and makes it easier for the judge to understand how a legal rule applies in a particular case.

DD. Instant Cases

Coffee is instant. Teenage gratification in American culture is instant. Cases are not instant. Enough said.

EE. Use Consistent Terms

Don't change the way you refer to people and things. Once it is a collision, don't make it an accident then an incident. Once it is an automobile, don't make it a car then a motor vehicle. Once it is Mr. Smith, don't make it Smith then Robert Smith. Be consistent.

FF. Use Transitions

Good writing contains transitions between paragraphs. Refer back to concepts in the previous paragraph to provide a bridge between your thoughts.

GG. Avoid Screaming Adjectives

Rarely will an over-the-top adjective enhance your argument. Consider the following sentence: *The school district's actions are outrageously insensitive and in blatant violation of the First Amendment.* Are regular violations of constitutional rights and normally insensitive actions not enough? These types of adjectives accomplish little other than to undermine your professional standing and credibility.

HH. Eliminate And/Or

Its inherent ambiguity and ugliness aside, the hatred many judges have for this phrase should be enough to persuade you to avoid it. Here is what the Wisconsin Supreme Court had to say about it (and this should convince you!):

> It is manifest that we are confronted with the task of first construing "and/or," that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of someone too lazy or too dull to express his precise meaning, or too dull to know what he did mean . . . .

Employers' Mut. Liab. Ins. Co. v. Tollefsen, 263 N.W. 376, 377 (Wis. 1935).

II. Avoid Repetition

Developing a consistent theme is one thing, but repeating the same sentence throughout a brief is quite another. Too many lawyers use the same sentence in the introduction, statement of the case, and facts sections, or the summary of the argument, argument, and conclusion. If you feel the need to say the same thing repeatedly, at least vary the language.

V. ETHICAL CONSIDERATIONS

A. Competence – Research

Texas attorneys are required to provide their clients with competent representation. TEX. DISCIPLINARY R. PROF. CONDUCT 1.01 cmt. 6 (2005), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005). In many – perhaps even most – cases, competent representation of the client requires adequate legal research.

An attorney is expected "to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques." *Smith v. Lewis*, 530 P.2d 589, 595 (Cal. 1975). As one court stated: "We recognize that it is unreasonable to expect every attorney . . . to construct arguments as if they were authored by Learned Hand, but a line must be drawn separating adequate from inadequate briefs . . . ." *Mortars v. Barr*, No. 01-2011, 2003 WL 115359, at *3-4 (Wis. App. Jan. 14, 2003).

The reporters are rife with cases in which attorneys failed to perform adequate research. *See, e.g., Fletcher v. State*, 858 F. Supp. 169 (M.D. Fla. 1994) (party cited one case that had been overruled and another that was reversed). Violation of this rule may constitute an ethical violation. *Baldayaque v. United States*, 338 F.3d 145 (2d Cir. 2003) (attorney who advised client that deadline to file his habeas petition had passed, even though client still had fourteen months to file, violated ethical rule mandating competent representation). It may also violate federal or state civil procedure rules. *See, e.g., Carlino v. Gloucester City High School*, No. 00-5262, 2002 WL

1877011, at *1 (3d Cir. 2002) ("flagrant failure to conduct any legal research" violated Rule 11(b) of the Federal Rules of Civil Procedure).

An important part of performing adequate legal research is insuring the cases you cite remain valid law. Several years ago, I represented an employment discrimination plaintiff in federal court. The head of employment litigation for one of the mammoth downtown firms represented the employer. The employer sought summary judgment. A young associate drafted the motion, and the supervising partner signed it. Our summary judgment response pointed out that the principal cases the employer relied upon had been overturned. The federal magistrate began the summary judgment hearing by giving a senior partner of one of the largest law firms in Dallas a stern lecture about cite-checking and supervising associates. There are a lot ways to be humiliated in the practice of law, but having your opponent point out that you are relying on invalid law has to be near the top of the list.

B. Competence – Writing Skill

Competent representation usually requires adequate writing skills. With increasing frequency, courts are recognizing this fact and punishing lawyers who fail to heed it. The Kentucky Supreme Court suspended an attorney from the practice of law for sixty days when he filed a brief that was "little more than fifteen unclear and ungrammatical sentences, slapped together as two pages of unedited text with an unintelligible message." *Kentucky Bar Ass'n v. Brown*, 14 S.W.3d 916 (Ky. 2000). Similarly, the Minnesota Supreme Court publicly reprimanded an attorney and ordered him to attend ten hours of legal writing education programming based on pleadings that were "rendered unintelligible by numerous spelling, grammatical, and typographical errors . . . sufficiently serious that they amounted to incompetent representation." *In re Hawkins*, 502 N.W.2d 770 (Minn. 1993). The Vermont Supreme Court also ordered an attorney to obtain instruction to improve his writing as a condition of maintaining his license to practice law. *In re Shepperson*, 674 A.2d 1273 (Vt. 1996).

Sometimes, the cruelest punishment for an attorney's bad writing is the judge's public wrath. Take, for example, Judge Samuel B. Kent of the United States District Court for the Southern District of Texas:

> This case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston . . . ."
>
> [A]ttorneys have obviously entered into a secret pact – complete with hats, handshakes and cryptic words – to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court will be so utterly charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed.

Bradshaw v. Unity Marine Corp., 147 F. Supp. 2d 668, 670 (S.D. Tex. 2001).

In another case, a federal bankruptcy judge entered an "Order Denying Motion for Incomprehensibility," citing by footnote a statement from the movie "Billy Madison," in which a competition judge responds to Billy Madison's answer to a question:

> Mr. Madison, what you've just said is one of the most insanely idiotic things I've ever heard. At no point in your rambling, incoherent response was there anything that could even be considered a rational thought. Everyone in this room is now dumber for having listened to it. I award you no points, and may God have mercy on your soul.

The judge concluded that "[d]eciphering motions like the one presented here wastes valuable chamber staff time and invites this sort of footnote." Jerry Buchmeyer, *Who Was That Masked Man?*, 69 TEX. BAR J. 491, 492 (2006). The Mississippi Supreme Court criticized an attorney for using "legalese instead of English" in an indictment that was "grammatically atrocious." The court used a literary reference when it paraphrased Shakespeare and stated:

> It cannot be gainsaid that all the perfumes of Arabia would not eviscerate the grammatical stench emanating from this indictment.

Henderson v. State, 445 So.2d 1364, 1367 (Miss. 1984).

The tenor of legal writing also can give rise to sanctions. An attorney who referred in a pleading to the presiding judge as a "lying incompetent ass-hole," and then wrote that the special judge who replaced that judge would be superior if only he "graduated from the eighth grade" was suspended from the practice of law for sixth months (mercifully, it would seem, for his clients). *Kentucky Bar Ass'n v. Waller*, 929 S.W.2d 181 (Ky. 1996). Similarly, an attorney who referred to opposing counsel as "Nazis" and a "redneck pecker-wood" was reprimanded and ordered to apologize. *See In re Wilkins*, 782 N.E.2d 985, 987 (Ind. 2003).

The moral of these cases is that lawyers need to insure that their writing is competent and – if they believe it may not be – should get help to improve it.

C. Disclosure of Adverse Authority

Attorneys must disclose to the court any authority in the controlling jurisdiction known to the attorney to be directly adverse to the position of the client and not disclosed by opposing counsel. TEX. DISCIPLINARY R. PROF. CONDUCT 3.03(a)(4) (2005). Legal authority is not limited to case law. It includes administrative rulings, codes, ordinances, regulations, rules, and statutes. *See, e.g., Dilallo v. Riding Safety, Inc.*, 687 So.2d 353, 355 (Fla. Dist. Ct. App. 1997).

D. Following Court Writing Rules

Following court rules becomes progressively more difficult with each passing year. In the federal system, local rules have proliferated to the point that one sometimes wonders why the federal rules even exist. I was admitted to practice in the Northern District of Texas just after a number of the new discovery rules were enacted. Judge Sanders told me, "Some of us follow all the rules, some of us follow some of the rules, and some of us follow none of the rules – so make sure you read each judge's rules!" Whew. Not to be outdone, many state court judges now have individual rules and standing orders concerning pretrial and trial practice in their courts.

Lawyers ignore court rules concerning writing at their peril. The Texas Supreme Court has dismissed appeals due to failure to follow briefing rules. *See, e.g., White Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture*, 811 S.W.2d 541 (Tex. 1991) (dismissing application for writ of error based upon improper type size and margins altered to comply with page limit). Attorneys who violate briefing rules may also be ordered to pay sanctions. *See, e.g., Laitram Corp. v. Cambridge Wire Cloth Co.*, 919 F.2d 1579, 1584 (Fed. Cir. 1990).

VI. THE LEGAL WRITING PROCESS

A. The Nike Rule: Just Write It!

As Eugene F. Ware noted: "All glory comes from daring to begin." The problem is how to begin. There is no shortage of advice, much of it contradictory, about the writing process. Some experts insist that the first step to any successful writing project is the old-fashioned outline. Some contend that you should write a rough draft before performing any research. Others counter that the more effective technique is to perform all the research, then prepare a rough draft. Still others advise lawyers to brainstorm and write down all their ideas before beginning the actual brief. There are probably as many effective ways to begin the writing process as there are writers. If a process works for you, use it. If it doesn't, find a new one. You can research, then outline, then write. You can brainstorm, then research, then write. Any combination of these tasks is acceptable so long as it works for you.

Writing ruts are a more persistent and universal problem. All writers get into ruts. There are things you can do to overcome these difficulties. Starting a brief in the middle is effective when you are having trouble beginning a project. Another useful tool is to change scenery. If you are having trouble writing in the office, try the neighborhood Starbucks or bookstore. A simple change of scenery may be enough to kick-start a project (and there is no better place for literary inspiration than the bookstore!).

B. Ruthless Editing

To call someone a great legal writer really is to say that person is a great legal editor. Great writing results from sustained and thorough editing.

The first and most important editor of your writing is you. Edit your work relentlessly and savagely, striking every unnecessary word. While editing your work, you should:

- have the Blue Book close at hand and pay careful attention to citation forms;
- proofread the final product – never assume that prior edits were made;
- let the finished product sit for a day or two, then come back to it for a final read.

Once you are relatively satisfied with your work, seek editing input from others. These others may be lawyers, but need not be – my mother is my best editor (of course, it helps that she actually was an editor!).

Committed editing means numerous drafts. Good writers write, rewrite, and rewrite again almost the point of being unable to stand looking at the work. One of the very best ways to edit your writing is to read it aloud. If it sounds unnatural, it probably needs to be rewritten. An even better editing method is to read your work aloud to someone else. Whatever your method, careful editing is a requirement for quality legal writing.

VII. SURVEY SAYS . . . .!

In 2009, the State Bar College asked me to resurvey Texas judges about their writing preferences. I performed a prior survey in 2007, limited to Dallas and Harris County judges. In 2009, I broadened the survey to include Dallas, Harris, Bexar, and Travis County civil judges (civil and family district courts, and county courts at law), and a small sampling of various rural district courts from around the state. The 2009 survey was more focused and probably better directed at judicial concerns, having been informed by

the 2007 survey results. As in 2007, the survey was anonymous to encourage honest responses.

A. What Judges Read

Perhaps not surprisingly, judges vary widely in what they read. An overwhelming majority of judges—right around 75 percent—read briefs relating to summary judgment and other dispositive motions in their entirety before the hearing. Surprisingly, at least to me, around eight percent of the judges indicated they almost never read the briefs even for dispositive motions. Just more than half of the judges indicate they usually read briefs supporting motions to compel, with just under half stating they generally read such briefs less than 50 percent of the time. Finally, the judges were divided fairly evenly in whether they read routine motions and briefs, such as those seeking a continuance. About 50 percent almost always read those motions and briefs, about 25 percent almost never read them, and the remaining 25 percent read them somewhere around half of the time.

The judges' responses indicate these percentages are subject to two caveats. First, judges in jurisdictions using a central docket almost never read anything because they have no idea what motions they will hear until just before the hearings take place. Second, in all categories, judges are more likely to read motions and briefs where a response is filed (and several judges indicated that in those situations, they often read the briefs in reverse order of filing).

Of critical importance for lawyers is the indication by around 50 percent of the judges that when they do "read" a brief, they usually skim it for what they believe to be important and read only the most important sections in their entirety. A few judges did, however, go out of their way to tell me that they read summary judgment affidavits very closely even when they only skim the briefs.

B. Judicial Preferences on "Hot Button" Issues

Judges overwhelmingly favor including an introduction in your brief. They also overwhelmingly appreciate lawyers who do not waste time by detailing the governing summary judgment standard (unless there is some disagreement or potential issue concerning it). Most judges also expressed a preference for gender-neutral language. Most judges seemed not to have a strong preference as to whether case citations belong in the body of the text or in footnotes, though those who did care preferred they be in the text.

C. Pet Peeves

Here are things responding judges took the time to write when asked to list "things that bother me:"

- Not bringing an order to the hearing
- Detailing irrelevant facts
- Sloppiness
- Dishonest statements in briefs
- Verbosity; length
- Citing cases that are not directly relevant
- Filing briefs at the last minute
- Failing to put major arguments at the beginning
- Taking extreme positions not supported by cases or evidence
- Wasting time telling me black-letter law every first-year law student already knows
- Too many exhibits
- Not providing a copy directly to the court—the clerk may not recognize the time constraints involved
- Citing something called "The Law" without actually citing a single statute or case to support it
- Lack of organization
- Failure to clearly state issue and requested relief
- Case citations that do not actually support the proposition for which they are cited
- Misrepresenting the holding of a case
- Not clearly identifying the type and grounds for summary judgment
- Vituperative language
- Failure to let the court know what kind of case it is at the outset
- Lack of citation to legal authorities
- Failure to provide the cases they want me to review
- Hyperbole
- Long or unclear titles for motions and briefs—one judge actually included a photocopy of one for me, entitled (and the names have been changed to protect both the innocent and the guilty) "Defendant City of Smithtown's Motion for Reconsideration of October 27, 2008 Partial Summary Judgment Order and for Partial Summary Judgment Limiting the City's Cumulative Potential Liability on All Claims by John Smith, Stacy Jones, Ronald Lee, Michael Plunkett, and Lucy Lopez to $500,000"); to make matters worse, as the judge pointed out, the title was printed in all-capital letters and was underlined, so it actually looked like this: DEFENDANT CITY OF SMITHTOWN'S MOTION FOR RECONSIDERATION OF OCTOBER 27, 2008 PARTIAL SUMMARY JUDGMENT ORDER AND FOR PARTIAL SUMMARY JUDGMENT LIMITING THE CITY'S CUMULATIVE POTENTIAL LIABILITY ON ALL CLAIMS BY JOHN SMITH, STACY JONES, RONALD LEE, MICHAEL PLUNKETT, AND LUCY LOPEZ TO $500,000.

D. Most Common Mistakes

The most common writing mistakes the surveyed judges see are:

- Poorly-drafted affidavits
- Wordiness
- *Ad hominem* arguments
- Inaccurate case citations (misrepresenting the holding)
- Assuming court is as familiar with case as advocates
- Using case law that has been overturned or otherwise called into question
- Grammar mistakes
- Citation errors
- Filing briefs too late
- Long analysis of irrelevant issues
- Failure to address the other side's issues
- Failure to provide a proposed order
- Emotional arguments

E. Annoyances

The things that most annoy the surveyed judges, in descending order of annoyance (from "infuriating" to "mildly annoying") are:

1. Derogatory remarks about opposing counsel or parties.
2. Wordiness/length.
3. Spelling and grammar mistakes.
4. Repeated use of words like "clearly" and"obviously" as a substitute for reasoning and citations.
5. Legalese.
6. Obvious errors in citation form.
7. String cites.

F. Wish List

Judges listed a great many things helpful to them (my favorite response by far was "having a briefing attorney"). The judges are almost unanimous in five preferences. First, they appreciate briefs that have an introduction at the very beginning explaining the case, issues, and argument. Second, they ask that counsel provide courtesy copies—at least in connection with dispositive or lengthy motions—of cases cited in briefs. Third, as they do in every survey and in response to almost every question, they ask that briefs be just that—brief! Some of the judges noted the growing importance of this preference in light of the move by their courts to electronic filings. Fourth, they appreciate when lawyers are specific and succinct in stating (at the beginning of the motion or brief) the requested relief in plain and simple language. Finally, they appreciate when lawyers plainly state the requested relief at the outset of the motion or brief, and provide a proposed order granting it.

One judge included a "wish list" item that I found particularly interesting: working with opposing counsel to narrow the issues and move the focus of the case to the actual dispute.

VIII. CONCLUSION

This paper is so brief a collection of ideas about writing that it really constitutes little more than a random collection of personal pet peeves. In applying these suggestions, remember that rules – at least many of them – were made to be broken. So, to paraphrase Richard Bach's reluctant messiah (RICHARD BACH, ILLUSIONS: THE ADVENTURES OF A RELUCTANT MESSIAH 136 (1977)):

Everything in this paper may be wrong.

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WHAT HATH THE 88th LEGISLATURE WROUGHT? AN OVERVIEW OF SELECTED BILLS THAT PASSED AND THOSE THAT DIDN'T (BUT YOU OUGHT TO KNOW ABOUT ANYWAY)

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EDUCATION

- University of Texas School of Law, J.D. (1991)
- Baylor University, B.A., Communications (1988)

PROFESSIONAL EXPERIENCE

- Shareholder, Adams, Lynch & Loftin, P.C., Grapevine, Texas (2006–present)
  Civil trial, transactional, administrative, and appellate practice: Areas of emphasis include commercial and residential real estate, commercial litigation, construction, corporate, employment, education, health care, and religious organizations.
- Shareholder, Suchocki, Bullard & Cummings, P.C., Fort Worth, Texas (1993–2005)
  Civil trial and appellate practice: Areas of emphasis included products liability, personal injury, construction accidents, premises liability, toxic torts, medical malpractice, insurance coverage, bad faith, contract disputes, and deceptive trade practices.
- Associate, Law Offices of Earl Luna, P.C., Dallas, Texas (1992–1993)
  Civil trial and administrative practice: Represented school districts in administrative, employment, and disciplinary proceedings; construction litigation; and ad valorem property tax collection.

PROFESSIONAL ACTIVITIES AND MEMBERSHIPS

- Board Certified—Civil Appellate Law—Texas Board of Legal Specialization (1998–present)
- AV/Preeminent Rating by Martindale-Hubbell
- State Bar of Texas Board of Directors, Medium Section Representative (2022-2025)
- Member, Appellate Section, State Bar of Texas
  Chair (2020–2021)
  Chair-Elect (2019–2020)
  Vice-Chair (2018–2019)
  Treasurer (2017–2018)
  Secretary (2016–2017)
  Council Member (2007–2010)
  Co-chair, Legislative Liaison Committee (2009–present)
  Co-chair, Bench-Bar Liaison Committee (2005–2009)
  Bench-Bar Project Subcommittee (2004)
  Annual Meeting Program Planning Committee (2003)
- Member, Litigation Section, State Bar of Texas
  Legislative Committee (2017, 2019, and 2021)
- Member, Legislative and Campaign Law Section, State Bar of Texas
- Member, Appellate Section, Tarrant County Bar Association
  Pro Bono Committee (2012–present)
  Planning and Programming Committee (2004–present)
  Chair (2003–2004)
  Secretary (2002–2003)

- Member, Tarrant County Bar Association
  Election Committee (2018–2020); Election Committee Chair (2019–2020); Blackstone Committee (2021–present)

- Life Fellow, Texas Bar Foundation and Tarrant County Bar Foundation

- Member, Texas Hospital Association Advance Directives Workgroup (2018–2019)

- State Bar of Texas, Court Administration Task Force (2007–2008)

- Member, State Bar of Texas Litigation Section Working Group for Senate Bill 1204 (2007)

- Adjunct Professor, Legal Writing and Analysis, Texas Wesleyan University (2005)

HONORS AND AWARDS

- Recipient, 2022 Franklin Jones, Jr. Outstanding CLE Article Award, presented by the Texas Bar College, for *Looking Over the 87th Lege: An Overview of Selected Bills that Passed and Those that Didn't (But You Ought to Know About Anyway).*

- Recipient, 2017 Certificate of Merit, presented by the current and past presidents of the State Bar of Texas for outstanding service to the legal profession during the 2016–2017 bar year.

- Tarrant County Top Appellate Lawyers, Fort Worth, Texas Magazine

- Texas Super Lawyer, Texas Monthly

ADMITTED TO PRACTICE

- State Bar of Texas (1991)
- All levels of trial and appellate courts of the State of Texas
- United States District Courts for the Northern, Western, Eastern and Southern Districts of Texas
- Fifth Circuit Court of Appeals, New Orleans, Louisiana
- United States Supreme Court

RECENT LAW RELATED PUBLICATIONS AND PRESENTATIONS

- Panelist, Houston Bar Association, Appellate Practice Section, "Attacks on the Independence of the Judiciary: What the Bench and Bar Can and Should Do About It", July 2023
- Course Director, State Bar of Texas – 35th Annual Advanced Civil Appellate Practice Course, Austin, Texas, September 2022
- Author/Panelist, State Bar of Texas – 34th Annual Advanced Civil Appellate Practice Course, Legislative Update with Rep. Jeff Leach, Chair, House Judiciary & Civil Jurisprudence Committee, December 2021
- Author/Panelist, State Bar of Texas – 44th Annual Advanced Civil Trial Course, Legislative Update with Rep. Rafael Anchía (Dallas) and Rep. Michael Schofield (Houston), August and November 2021
- Author/Panelist, State Bar of Texas – 13th Annual Business Disputes Course, Legislative Update with Sen. Bryan Hughes, Chair, Senate State Affairs Committee, September 2021
- Panelist, Texas Association of Civil Trial and Appellate Specialists, "Attacks on the Independence of the Judiciary: What the Bench and Bar Can and Should Do About It", October 2020
- Panelist, State Bar of Texas – 34th Annual Advanced Civil Appellate Practice Course, "Attacks on the Independence of the Judiciary: What the Bench and Bar Can and Should Do About It", September 2020

- Author/Panelist, State Bar of Texas – Damages in Civil Litigation, February 2020
- Author/Panelist, State Bar of Texas – 33rd Annual Advanced Civil Appellate Practice Course, "Looking Over the 86th Legislature: An Overview of Bills that Passed and Those that Didn't (But You Ought to Know About Anyway)", September 2019
- Author/Speaker, Midland County Bar Association, Legislative Update, September 2019
- Author/Speaker, Tarrant County Young Lawyers Association, August 2019
- Author/Speaker, Harris County Civil District Courts – Judicial Education Conference, August 2018 and August 2019
- Author/Speaker, Collin County Bar Association, Legislative Update, October 2019
- Author/Panelist, The University of Texas School of Law 29th Annual Conference on State and Federal Appeals, "Legislative Update," June 2019
- Author/Speaker, Dallas Bar Association, Appellate Section: Legislative Preview, February 2019
- Moderator, Tarrant County Bar Association and the Fort Worth Chapter of the Association of Legal Administrators Law Day Luncheon Panel Discussion: *Separation of Powers – Framework for Freedom*, May 2018
- Co-Columnist, The Appellate Advocate, State Bar of Texas Appellate Section Report: *Texas Courts of Appeals Update – Substantive* (2002–2017)
- Co-Columnist, Insight, Texas Association of School Administrators Professional Journal: *Legal Insights* (2008–2017)
- Author/Speaker, Harris County Civil District Courts – Judicial Education Conference, August 2017
- Author/Speaker, Dallas Bar Association, Clerk and Coordinator Seminar, August 2017
- Author/Speaker, Collin County Bar Association General Meeting: Legislative Update, July 2017
- Author/Speaker, Tarrant County Bar Association Brown Bag Seminar Series: Legislative Update for Litigators, June 2017
- Author/Speaker, Dallas Bar Association Appellate Law Section, Legislative Overview, April 2017
- Author, State Bar of Texas Litigation Section Newsletter, News for the Bar, "A Closer Look at the Lege: A Legislative Update," Spring 2017
- Author/Speaker, Plano Bar Association, Legislative Update, October 2015
- Author/Speaker, Harris County Civil District Courts – Judicial Education Conference, August 2015
- Author/Speaker, The University of Texas School of Law 25th Annual Conference on State and Federal Appeals, "Legislative Update," June 2015
- Author/Speaker, Tarrant County Bar Association Brown Bag Seminar Series: Questions about Appeals? Answers for Novices and Experts, "Issue Framing," March 2014

Denise Davis

Denise Davis is a native Texan with over 20 years of experience working with members of the Texas Legislature. In addition to lobbying, she has extensive experience in developing and implementing legislative strategy, providing procedural and parliamentary advice (House and Senate rules), and in drafting complex legislation, administrative rules, legal memoranda and briefs for clients in both the public and private sectors.

Before founding Davis Kaufman PLLC with Lisa Kaufman in 2012, Ms. Davis served for over two years as Chief of Staff to Speaker Joe R. Straus. As Chief of Staff, Ms. Davis gave strategic advice to the Speaker and House leadership and oversaw the legislative agenda and daily activities of the Speaker's Office.

Prior to her tenure as Chief of Staff, Ms. Davis served several sessions as House Parliamentarian and Special Counsel to the Texas House of Representatives, where she advised the Speaker and House members on ethics and on legal and parliamentary matters relating to the Texas House of Representatives including points of order, House Rules and precedent, and open records. Ms. Davis has extensive experience drafting complex floor amendments, litigation, and policies. She has lobbied extensively for several sessions before all of the House and Senate committees who have jurisdiction over public retirement and pension issues.

Her public service also includes work as General Counsel to Lt. Governor William "Bill" Ratliff, Director and Counsel to the Texas Judicial Council under then-Chief Justice Thomas R. Phillips, General Counsel to the Senate Jurisprudence Committee under Senator Rodney Ellis, Legislative Counsel for the Texas Legislative Council, and Assistant Public Information/Press Officer for Lt. Governor William P. Hobby.

In addition to her many years in public service, Ms. Davis has also worked in private practice, serving as Special Counsel to the corporate department of Baker Botts LLP, an international law firm, where she provided public policy law and governmental relations services to corporate clients in the energy, financial, and health care industries.

Ms. Davis received her Bachelor of Arts in Government from the University of Texas at Austin and her law degree from the University of Texas School of Law. While at the Law School, Ms. Davis served as Notes Editor for the American Journal of Criminal Law.

Ms. Davis has been consistently ranked as one of Texas' top lobbyists by Mike Hailey's "Capitol Inside," most recently ranked 28 in 2021's Texas Lobby Power Rankings; 29 in 2019; 30 in 2017; top 50 of its 2015 Texas Lobby Power Rankings; and #1 on the 2013 Rising Lobby Stars list. In 2020, the Black Business Journal honored her with the distinction as one of the Top 10 Central Texas Super Lawyers.

Ms. Davis currently services on the Executive Committee of the Greater Austin Chamber of Commerce (Chair State and Federal Legislative Affairs Committee), the Mission Capital Board of Directors (Chair), and KLRU-PBS Board of Directors (Chair of the Education Committee), and the Board of Directors of Social Venture Partners. She is also a member of Alpha Kappa Alpha Sorority, Incorporated and The Links, Incorporated.

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I. INTRODUCTION

The 88th Legislature ended its regular session on May 29, 2023. According to the Texas Legislative Reference Library, a total of 8,046 bills were introduced during the session.[1] 1,246 bills were passed and sent to Governor Abbott.[2] Of that total, 76 were vetoed.[3] The remainder were either be signed by the Governor or allowed to become law.[4]

This paper summarizes legislative proposals that could have a noticeable impact on the practice of civil trial and appellate law in Texas. For more detailed information about each bill and additional background information about the same, please visit Texas Legislature Online at http://www.capitol.state.tx.us and/or subscribe to Jerry Bullard's e-newsletter by following the directions at the end of this article.

II. LEGISLATION THAT PASSED

A. Arbitration

HB 1255 – Limitation Periods in Arbitration Proceedings [5]

- **Summary:** HB 1255, filed by Rep. John Smithee (R – Amarillo), amends Chapter 16 of the Civil Practice and Remedies Code (CPRC) by adding section 16.073, which provides that "a party may not assert a claim in an arbitration proceeding if the party could not bring suit for the claim in court due to the expiration of the applicable limitations period." However, under the proposed section 16.073, the party "may assert a claim in an arbitration proceeding after expiration of the applicable limitations period if: (1) the party brought suit for the claim in court before the expiration of the applicable limitations period; and (2) a court ordered the parties to arbitrate the claim."

- *Effective date:* May 24, 2023.

  [**Note:** In 2019, Rep. Smithee filed a similar bill (HB 1744), which was voted out of committee but died without receiving a vote on the House floor.]

- Bill Analysis: House Research Organization

- Fiscal Note: Legislative Budget Board

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[1] Legislative Reference Library of Texas, 88th Legislature Bill Statistics (July 28, 2023).
[2] Id.
[3] Id.
[4] As a general rule, the governor has ten (10) days upon receipt of a bill to sign it, veto it, or allow the bill to become law without a signature. However, if a bill is sent to the governor within ten (10) days of final adjournment, he has until twenty (20) days after adjournment to act on the bill. If the governor neither signs nor vetoes the bill within the allotted time, the bill becomes law. TEXAS CONST. ART. IV, § 14.
[5] Act of May 15, 2023, 88th Leg., R.S., H.B. 1255 (to be codified at TEX. CIV. PRAC. & REM. CODE ANN. §16.073).

- Status: On March 15, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony begins around the 31:35 mark. Witnesses who registered a position or testified in favor of, on, or against HB 1255 are listed here. On March 22, the bill was unanimously voted out of committee without any amendments. On April 19, the House unanimously voted to approve HB 1255. The bill was forwarded to the Senate, referred to State Affairs, and then was unanimously voted out of committee on May 4. The full Senate passed HB 1255, without amendments, on May 11.

B. Attorneys/Practice of Law

HB 5010 – Classification of a Grievance Filed with the State Bar of Texas [6]
(Companion: ***SB 2462*** [7]*)*

- **Summary:** HB 5010, filed by Rep. Mike Schofield (R – Katy), amends section 81.073 of the Government Code and requires the chief disciplinary counsel's office to classify a grievance as a "complaint" if the grievance is submitted by: (1) a family member of a ward in a guardianship proceeding that is the subject of the grievance; (2) a family member of a decedent in a probate matter that is the subject of the grievance; (3) a trustee of a trust or an executor of an estate if the matter that is the subject of the grievance relates to the trust or estate; (4) the judge, prosecuting attorney, defense attorney, court staff member, or juror in the legal matter that is the subject of the grievance; (5) a trustee in a bankruptcy that is the subject of the grievance; or (6) any other person who has a cognizable individual interest in or connection to the legal matter or facts alleged in the complaint. Otherwise, the grievance is classified as an "inquiry".

  HB 5010 also allows an attorney against whom a grievance is filed to appeal the classification of the grievance as a "complaint".

- *Effective date*: September 1, 2023.

  [**Note**: Sen. Bob Hall (R – Edgewood) filed the Senate companion.]

- Bill Analysis for HB 5010: Senate Research Center

- Fiscal Note for HB 5010: Legislative Budget Board

- Status of HB 5010: On April 5, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony on the bill begins around the 2:55:30 mark. Witnesses who registered a position or testified in favor of, on, or against HB 5010 are listed here: Witness List (page 13). On April 17, by a 5-3 vote, HB 5010 was voted out of committee without amendments. By a 93-49 vote, the House passed the bill, as amended, on May 3. HB 5010 was forwarded to the Senate and referred

[6] Act of May 26, 2023, 88th Leg., R.S., H.B. 5010 (to be codified as an amendment to TEX. GOV'T CODE ANN. §§81.073-.074).
[7] Tex. S.B. 2462, 88th Leg., R.S. (2023).

to State Affairs. On May 11, the committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony on the bill begins around the 32:00 mark. On May 15, HB 5010 was voted out of committee without amendments. On May 19, the full Senate passed the bill, as amended.

- Status of SB 2462: Referred to State Affairs on March 23, 2023.

C. Construction

HB 2022 – Residential Construction Liability [8] *(Companion:* ***SB 873*** [9]*)*

- **Summary:** HB 2022, filed by Rep. Jeff Leach (R – Allen), amends Chapter 27 of the Property Code and provides that:
  - A contractor is liable only to the extent a defective condition proximately causes actual physical damage to the residence, an actual failure or lack of capability of a building component to perform its intended function or purpose, or a verifiable danger to the safety of the occupants of the residence.
  - A contractor is not liable for damages caused by the failure of a person other than the contractor to timely notify the contractor of a construction defect.
  - A contractor is not liable for normal cracking or shrinkage cracking.
  - To maintain a breach of a warranty of habitability, a claimant must establish that a construction defect was latent on the date the residence was completed or title was conveyed to the original purchaser and the defect has rendered the residence uninhabitable for its intended use as a home.
  - A contractor must have up to three inspections during the 35-day right to cure period.
  - Recoverable damages will be limited only to economic damages as listed in the statute.
  - The court or arbitration tribunal may find that an offer of settlement by the contractor made after the applicable deadline is timely if the claimant failed to provide the contractor with evidence of the defect, or amended a claim to add a new alleged defect (or under circumstances beyond the contractor's control).
  - Statute of limitations applies to an arbitration proceeding as it does to a filing in court.
  - HB 2022 also repeals § 27.004(l), § 27.0042(b), and § 27.007(c).

[8] Act of May 23, 2023, 88th Leg., R.S., H.B. 2022 (to be codified as amendments to TEX. PROP. CODE ANN. §§27.001, 27.002-.004, 27.0042, 27.006-.009).
[9] Tex. S.B. 873, 88th Leg., R.S. (2023).

- *Effective date:* September 1, 2023.

  [**Note:** Sen. Phil King (R – Weatherford) filed the Senate companion bill (SB 873).]

- Fiscal Note for HB 2022: Legislative Budget Board

- Bill Analysis for HB 2022: House Research Organization

- Status of HB 2022: On March 15, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Witnesses who registered a position or testified on, for, or against HB 2022 are listed here. Testimony begins around the 3:09:13 mark. On March 27, by a 5-4 vote, HB 2022 (as amended) was voted out of committee. By a vote of 97-47, the House passed the bill on May 3. HB 2022 was forwarded to the Senate and referred to Business & Commerce. The committee conducted a hearing on May 9: Notice. Those who are interested can watch the proceedings here. Testimony on the bill begins around the 49:40 mark. Witnesses who registered a position or testified in favor of, on, or against HB 2022 are listed here: Witness List. The bill was subsequently voted out of committee without amendments. On May 17, the Senate passed HB 2022 without amendments.

- Status of SB 873: Referred to Business & Commerce on March 1, 2023.

HB 2024 – Statutes of Limitations and Repose for Certain Claims Arising out of Residential Construction [10] *(Companion:* ***SB 939*** [11]*)*

- **Summary:** HB 2024, as originally filed by Rep. Jeff Leach (R – Allen), would amend section 16.008 of the CPRC and require a person to bring a claim arising out of the design, planning, or inspection or a new residence, an alteration of or repair or addition to an existing residence, or an appurtenance to a residence against a registered or licensed architect, engineer, interior designer, or landscape architect no later than 8 years after the substantial completion of the improvement or the beginning of operation of the equipment in an action arising out of a defective or unsafe condition of the real property, the improvement, or the equipment.

  The version of the bill adopted by the House Judiciary & Civil Jurisprudence committee eliminated the above-described proposed amendment to CPRC section 16.008. However, the committee-approved version of HB 2024 would amend section 16.009 of the CPRC to establish a 10-year limitations period in a similar action against a person who constructs or repairs the improvement. It would also establish a 6-year limitations period if the defendant is a contractor who has provided a written warranty for the residence and provides that a written warranty must provide a minimum period of one year for workmanship and materials, two years for plumbing, electrical, and HVAC, and five years for major structural components.

[10] Act of May 21, 2023, 88th Leg., R.S., H.B. 2024 (to be codified as an amendment to TEX. CIV. PRAC. & REM. CODE ANN. §16.009).
[11] Tex. S.B. 939, 88th Leg., R.S. (2023).

- *Effective date:* June 9, 2023.

  [**Note:** Sen. Phil King (R – Weatherford) filed the Senate companion bill (SB 939).]

- Bill Analysis for HB 2024: House Research Organization

- Fiscal Note on HB 2024: Legislative Budget Board

- Status of HB 2024: On March 15, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Witnesses who registered a position or testified on, for, or against HB 2024 are listed here. Testimony begins around the 4:16:40 mark. On March 27, by an 8-1 vote, HB 2024 (as amended) was voted out of committee. By a 100-40 vote, the House passed the bill on April 21. The bill was forwarded to the Senate and, on May 4, Business & Commerce conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony begins around the 1:50:50 mark. On May 10, the committee voted the bill out of committee without amendments. On May 17, the Senate passed HB 2024 without amendments.

- Status of SB 939: Referred to Business & Commerce on March 3, 2023.

D. Deceptive Trade Practices and Consumer Protection

HB 18 – Protection of Minors from Harmful, Deceptive, or Unfair Trade Practices in Connection with the Use of Digital Services and Electronic Devices [12]

- **Summary:** HB 18 (also referred to as the Securing Children Online through Parental Empowerment (SCOPE) Act), filed by Rep. Shelby Slawson (R-Stephenville), adds Chapter 509 to the Business & Commerce Code and requires a digital services provider (DSP)—a person who owns or operates a website, app, program, or software that performs collection or processing functions with Internet connectivity—to exercise reasonable care prevent self-harm, suicide, eating disorders, and other similar behaviors; substance abuse and patterns of use that indicate addiction; bullying and harassment; sexual exploitation, including enticement, grooming, trafficking, abuse, and child pornography; advertisements for products or services that are unlawful for a minor, including illegal drugs, tobacco, gambling, pornography, and alcohol; and predatory, unfair, and deceptive marketing.

  The SCOPE Act exempts (1) a state agency or political subdivision, (2) a financial institution or data subject to Title V, Gramm-Leach-Bliley Act, (3) a covered entity or business associate governed by HIPAA and the Health Information Technology for Economic and Clinical Health Act; (4) a small business as defined by the SBA on 9/1/24, (5) an institution of higher education; (6) a DSP who processes or

[12] SECURING CHILDREN ONLINE THROUGH PARENTAL EMPOWERMENT ACT, 88th Leg., R.S., H.B. 18 (to be codified at TEX. BUS. & COM. CODE ANN. §509.001, et seq., and as an amendment to TEX. EDUC. CODE ANN. §§32.101, 32.104, and §32.1021).

maintains user data in connection with the employment, promotion, reassignment, or retention of the user as an employee or independent contractor, to the extent that the user's data is processed or maintained for that purpose; (7) an operator or provider regulated by Subchapter D, Chapter 32, Education Code (student data); or (8) a person subject to the Family Educational Rights and Privacy Act that operates a digital service.

The Act further exempts an Internet service provider or Internet service provider's affiliate if the provider or affiliate providing access or connection to a digital service does not exercise control of or is not responsible for the creation or provision of content that exposes a known minor to harm (a person is not a known minor after the minor's 18TH birthday).

Under the Act, a DSP may enter into a user agreement with a known minor only with the specific, informed, and unambiguous consent of the minor's parent or guardian granted without any financial incentive.

The Act prohibits a provider from collecting a minor's personal identifying information without specific parental consent except under limited circumstances and requires a provider, prior to obtaining consent, to give the parent or guardian the ability to permanently enable settings to enable the highest privacy setting offered, prevent the DSP from collecting any data associated with the minor not necessary to provide the service, prevent the DSP from processing, sharing, disclosing, or transferring the data, and prevent collection of geolocation data, prevent targeted advertising, and prevent the minor from making purchases or financial transactions.

A DSP will be required to provide a process for a known minor's parents to register as the minor's verified parent and requires the provider to give consenting parents tools to monitor and control the minor's use of the service; to permit parental access to data associated with the known minor; and to provide a method by which the parent or guardian may request corrections or deletions, which the DSP must do within 45 days. The provider is also required to disclose each advertiser on the service and whether and how it uses algorithms.

The DSP is also prohibited from limiting or terminating a minor's service because the minor or minor's parent withdraws consent.

A violation of the Act will also be a violation of the DTPA.

- *Effective date:* June 13, 2023
- Bill Analysis: Senate Research Center
- Fiscal Note: Legislative Budget Board
- Status: On March 20, the Youth Health & Safety (Select) committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony begins around the 48:25 mark. Witnesses who registered a position or testified in favor of, on, or against HB 18 are listed here. On April 11,

the bill was voted out of committee as amended. On April 26, the House voted to approve HB 18. The bill was forwarded to the Senate, referred to State Affairs, and then was unanimously voted out of committee on May 21. The full Senate passed HB 18, as amended, on May 23. The House and Senate subsequently agreed to the conference committee report and approved the bill on May 28.

E. Entertainment

SB 1639 – Prohibitions in Connection with Website Ticket Sales [13]

- **Summary**: SB 1639, filed by Sen. Judith Zaffirini (D – Laredo), adds Chapter 328 to the Business and Commerce Code and prohibits a person from selling, using, or causing to be used any method, technology, device, or software in the sale or resale of event tickets on a ticket issuer's or resale ticket agent's website that functions as a bypass in the ticket purchasing process, disguises the identity of the purchaser, permits the purchase of quantity of tickets that exceeds the maximum number of tickets that may be sold to one purchaser, or circumvents a security measure or other control in the ticket purchasing process.

  SB 1639 authorizes the attorney general to enforce by an action for injunctive relief, costs, attorney's fees, and investigative costs.

- *Effective date*: September 1, 2023

- Bill Analysis: Senate Research Center

- Fiscal Note: Legislative Budget Board

- Status: On April 4, the Senate Business & Commerce committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony begins around the 2:06:00 mark. Witnesses who registered a position or testified in favor of, on, or against SB 1639 are listed here. On April 20, the bill, as amended, was voted out of committee. On April 26, the Senate voted to approve SB 1639, as amended. The bill was forwarded to the House, referred to Business & Industry, and then was voted out of committee, without amendments, on May 5. The full House passed SB 1639, without amendments, on May 6.

[13] Act of May 9, 2023, 88th Leg., R.S., S.B. 1639 (to be codified at TEX. BUS. & COM. CODE ANN. §328.001, et seq.).

F. Healthcare Liability

SB 2171 – Qualification of Experts in Certain Healthcare Liability Claims [14]
*(Companion: **HB 1791*** [15]*)*

- **Summary:** SB 1791, filed by Sen. Carol Alvarado (D – Houston), amends the CPRC to provide that, in suits involving a health care liability claim against a chiropractor, a person may qualify as an expert witness on the issue of the causal relationship between an alleged departure from accepted standards of care and the injury, harm, or damages claimed if the person is a chiropractor or physician and is otherwise qualified to render opinions on that causal relationship under the Texas Rules of Evidence.

- *Effective date:* September 1, 2023

  [**Note:** Rep. Yvonne Davis (D – Dallas) filed the House companion bill (HB 1791). In 2021, Sen. Bryan Hughes (R – Mineola) filed a similar bill (SB 1106), which died in committee.]

- Bill Analysis of HB 1791: House Research Organization

- Fiscal Note for HB 1791: Legislative Budget Board

- Bill Analysis of SB 2171: House Research Organization

- Fiscal Note for SB 2171: Legislative Budget Board

- Status of HB 1791: On March 22, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony begins around the 5:32:20 mark. Witnesses who registered a position or testified for, on, or against the bill are listed here. On March 27, HB 1791 was unanimously voted out of committee without amendments.

- Status of SB 2171: On April 13, the State Affairs committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony begins around the 00:45 mark. Witnesses who registered a position or testified for, on, or against the bill are listed here. On April 18, by a 9-1 vote, SB 2171 was voted out of committee without amendments. By a 29-1 vote, the Senate passed the bill on April 24. SB 2171 was forwarded to the House and referred to Judiciary & Civil Jurisprudence, where it was promptly voted out of committee (without any amendments) on April 26. For those who are interested, you can watch the committee proceedings here. The committee considered and voted out the bill around the 9:10 mark. On May 4, the House unanimously passed SB 2171.

[14] Act of May 8, 2023, 88th Leg., R.S., S.B. 2171 (to be codified as amendments to TEX. CIV. PRAC. & REM. CODE ANN. §§74.351 and 74.403).
[15] Tex. H.B. 1791, 88th Leg., R.S. (2023).

HB 3058 – Provision of Medical Treatment to a Pregnant Woman by a Doctor or Health Care Provider [16]

- **Summary:** HB 3058, filed by Rep. Ann Johnson (D – Houston), adds section 74.552 to the CPRC to establish an affirmative defense to liability in an action against a physician or health care provider for a violation of § 170A.002 of the Health & Safety Code (prohibition of abortion), including an action to recover a civil penalty under § 170A.005, when the physician or health care provider exercises reasonable medical judgment in providing medical treatment to a pregnant woman in response to: (1) an ectopic pregnancy at any location; or (2) a previable premature rupture of membranes.

  The defense also extends to a pharmacist or pharmacy that dispenses a prescription drug or medication order written by a physician or provider pursuant to this section.

  HB 3058 also amends section 164.055 of the Occupations Code to prohibit the Texas Medical Board from taking disciplinary action against a physician who exercised reasonable judgment in providing medical treatment to a pregnant woman in the above circumstances. The bill also amends section 9.35 of the Penal Code to provide that a physician or health care provider is justified in exercising reasonable medical judgment in providing medical treatment to a pregnant woman as described above.

- *Effective date*: September 1, 2023

- Bill Analysis: Senate Research Center

- Fiscal Note: Legislative Budget Board

- Status: On April 26, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony begins around the 1:00:45 mark. Witnesses who registered a position or testified in favor of, on, or against HB 3058 are listed here. On May 3, the bill was voted out of committee without amendments. On May 12, the House voted to approve HB 3058. The bill was forwarded to the Senate, referred to State Affairs, and then was voted out of committee, as amended, on May 18. The full Senate passed HB 3058, as amended, on May 24. The House subsequently approved the Senate amendments.

[16] Act of May 29, 2023, 88th Leg., R.S., H.B. 3058 (to be codified at TEX. CIV. PRAC. & REM. CODE ANN. §74.551, et seq.).

G. Judiciary

SB 372 – Creating a Criminal Offense for the Unauthorized Disclosure of Judicial Opinions [17] *(Companion:* ***HB 1741*** [18]*)*

- **Summary:** SB 372, filed by Sen. Joan Huffman (R – Houston), amends the Government Code to make it a Class A misdemeanor for a person, other than a justice or judge, with access to non-public judicial work product to knowingly disclose the contents of any non-public judicial work product to a person who is not a justice, judge, court staff attorney, court clerk, law clerk, employee of an agency established under Chapter 71 (Judicial Council) or 72 (Office of Court Administration) of the Government Code, or other court staff routinely involved in crafting an opinion or decision for an adjudicatory proceeding. However, it will be a defense to prosecution if the disclosure was authorized either in writing by the justice or judge for whom the work product is prepared or under Texas Supreme Court rules.

- *Effective date:* September 1, 2023.

  [**Note:** Rep. Jeff Leach (R – Allen) filed the House companion bill (HB 1741).]

- Bill Analysis of SB 372: Senate Research Center

- Fiscal Note for SB 372: Legislative Budget Board

- Bill Analysis for HB 1741: House Research Organization

- Fiscal Note for HB 1741: Legislative Budget Board

- Status of SB 372: On March 2, State Affairs conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony begins around the 01:30 mark. Witnesses who registered a position or testified in favor of, on, or against SB 372 are listed here: Witness List. The bill (as amended) was unanimously voted out of committee. On March 8, the full Senate unanimously passed the bill.

  SB 372 was forwarded to the House and referred to Judiciary & Civil Jurisprudence. On April 26, SB 372 was voted out of committee without amendments. For those who are interested, you can watch the committee proceedings here. The committee considered and voted the bill out around the 15:10 mark. On May 19, the House passed SB 372 without amendments.

- Status of HB 1741: On March 15, Judiciary & Civil Jurisprudence conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony on HB 1741 begins around the 5:16:07 mark. Witnesses who registered a position or testified for, on, or against the bill are listed here. On March

[17] Act of May 22, 2023, 88th Leg., R.S., S.B. 372 (to be codified at TEX. GOV'T CODE ANN. §21.013).
[18] Tex. H.B. 1741, 88th Leg., R.S. (2023).

22, the bill was unanimously voted out of committee as amended (to match the Senate's version).

SB 1045 – Creation of the Fifteenth Court of Appeals [19] *(Companion:* ***HB 3166*** [20]*; Joint Resolution:* ***HJR 139*** [21]***)***

- **Summary:** SB 1045, filed by Sen. Joan Huffman (R – Houston), establishes the Fifteenth Court of Appeals, which will be a "district" composed of all Texas counties. The court will be based in Austin and composed of a chief justice and four justices; however, for the first three years after the court's creation, the court will consist of a chief justice and two justices. All justices will be elected in statewide races.

  Under SB 1045, the court will have exclusive immediate appellate jurisdiction over civil matters: (1) brought by or against the state or a board, commission, department or executive state agency, or by or against an officer or employee thereof arising out of the officer's or employee's official conduct; (2) in which a party to the proceeding challenges the constitutionality or validity of a state statute or rule and the attorney general is a party; and (3) any other matter as provided by law.

  The court's jurisdiction does not include: (1) a proceeding brought under the Family Code; (2) certain proceedings under the Code of Criminal Procedure; (3) a proceeding brought against a district or county attorney with criminal jurisdiction; (4) a proceeding relating to a mental health commitment; (5) a proceeding relating to civil asset forfeiture; (6) a condemnation proceeding; (7) a proceeding brought under Chapter 125 of the CPRC to enjoin a common nuisance; (8) an expunction proceeding under Chapter 55 of the Code of Criminal Procedure; (9) a 3-judge district court proceeding under Chapter 22A of the Government Code; (10) a proceeding under Chapter 411, Subchapter E-1 of the Government Code (orders of nondisclosure of criminal history record information); (11) unfair employment practices under Chapter 21 of the Labor Code; (12) a removal action under Chapter 87 of the Local Government Code; or (13) a proceeding under Chapter 841 of the Health and Safety Code (sexually violent predators).

  SB 1045 also provides that the Supreme Court may not transfer cases out of the Fifteenth Court of Appeals for docket equalization purposes or transfer cases to that court if it does not have exclusive jurisdiction.

- *Effective date:* September 1, 2023, but the court will be created on September 1, 2024. The changes in law made under SB 1045 apply to appeals perfected on or after September 1, 2024; however, once the court is created, all cases pending in other courts of appeal that were filed on or after September 1, 2023, and of which

[19] Act of May 22, 2023, 88th Leg., R.S., S.B. 1045 (to be codified as amendments to TEX. GOV'T CODE ANN. §§21.013, 22.201, 22.2151-.2152, 22.216, 22.220-.221, 22.229, 31.001, 73.001, 659.012, 2001.038, 2001.176; TEX. OCC. CODE ANN. §2301.751; TEX. CODE CRIM. PROC. §§4.01. 4.03, 44.25; TEX. UTIL. CODE ANN. §39.001).
[20] Tex. H.B. 3166, 88th Leg., R.S. (2023).
[21] Tex. H.J.R. 139, 88th Leg., R.S. (2023).

the Fifteenth Court of Appeals has exclusive intermediate appellate jurisdiction, will be transferred to the newly created court of appeals.

[**Note:** Rep. Andrew Murr (R – Kerrville) filed the House companion and the House joint resolution.]

- Bill Analysis for SB 1045: Senate Research Center
- Fiscal Note for SB 1045: Legislative Budget Board
- Fiscal Note for HB 3166: Legislative Budget Board
- Status of SB 1045: On March 22, the Jurisprudence committee conducted a public hearing on the bill: Notice. The committee considered a committee substitute that has yet to be posted for public viewing. Those who are interested in watching the proceedings can do so here. Testimony begins around the 02:45 mark. Witnesses who registered a position or testified on, for, or against the bill are listed here. The committee later voted SB 1045 out of committee, as amended, by a 3-2 vote. On March 30, by a 19-12 vote, the full Senate passed the bill without amendments.

  On April 4, SB 1045 was referred to the House Judiciary & Civil Jurisprudence committee. By a 5-4 vote, the bill (as amended) was voted out of committee on May 3. The bill was amended to state that the Texas Supreme Court will have original and exclusive jurisdiction to determine the constitutionality of the Fifteenth Court of Appeals. On May 19, the House passed SB 1045, as amended. The Senate approved the House amendments on May 21.

- Status of HB 3166: On March 22, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony begins around the 2:57:55 mark. Witnesses who registered a position or testified on, for, or against the bill are listed here. The bill was left pending.

SB 1603 – Relating to the Decision of a Court of Appeals Not to Accept Permissive Interlocutory Appeals [22] *(Companion:* ***HB 1561*** [23]*)*

- **Summary:** SB 1603, as originally filed by Sen. Bryan Hughes (R – Mineola), amends section 51.014 of the CPRC and requires a court of appeals to specify its reasons for finding that a permissive appeal is not warranted under 51.014(d) if the court does not accept the appeal. SB 1603 also provides that the Supreme Court may review a decision by a court of appeals not to accept a permissive appeal under an abuse of discretion standard. The House floor amendments did the following: (1) changed the Supreme Court's standard of review from an abuse of discretion to de novo, and (2) provides that the court of appeals could be directed to accept the appeal if the Supreme Court determined that the requisites for a permissive appeal have been satisfied.

[22] Act of May 12, 2023, 88th Leg., R.S., S.B. 1603 (to be codified as an amendment to TEX. CIV. PRAC. & REM. CODE ANN. §51.014).
[23] Tex. H.B. 1561, 88th Leg., R.S. (2023).

- *Effective date:* September 1, 2023. The change in law made by SB 1603 would apply only to an application for a permissive appeal filed on or after the effective date.

  [**Note:** Rep. John Smithee (R – Amarillo) filed the House companion bill.]

- Fiscal Note for HB 1561: Legislative Budget Board

- Bill Analysis for HB 1561: House Research Organization

- Fiscal Note for SB 1603: Legislative Budget Board

- Bill Analysis for SB 1603: Senate Research Center

- Status of SB 1603: On March 22, the Jurisprudence committee conducted a public hearing on the bill: Notice. Those who are interested in watching the proceedings can do so here. Testimony begins around the 1:08:40 mark. Witnesses who registered a position or testified on, for, or against the bill are listed here. The committee later unanimously voted SB 1603 out of committee without amendments. On April 12, the Senate unanimously passed SB 1603. The bill was referred to the House Judiciary & Civil Jurisprudence committee on April 14. On April 26, SB 1603 was unanimously voted out of committee. By a near-unanimous vote of 143-1, the House passed SB 1603 (as amended) on May 4. On May 11, the full Senate approved the House's changes.

- Status of HB 1561: On March 15, the Judiciary & Civil Jurisprudence committee conducted a hearing on HB 1561: Notice. Those who are interested can watch the proceedings here. Testimony on the bill begins around the 36:20 mark. Witnesses who registered a position or testified on, for, or against the bill are listed here. On March 22, HB 1561 was unanimously voted out of committee without amendments.

SB 2275 – Authority of Texas Supreme Court to Adopt Rules [24]

- **Summary**: SB 2275, filed by Sen. Bryan Hughes (R – Mineola), repeals section 22.004(c) of the Government Code, which states as follows:

  "So that the supreme court has full rulemaking power in civil actions, a rule adopted by the supreme court repeals all conflicting laws and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed. At the time the supreme court files a rule, the court shall file with the secretary of state a list of each article or section of general law or each part of an article or section of general law that is repealed or modified in any way. The list has the same weight and effect as a decision of the court."

- Bill Analysis: Senate Research Center

- Fiscal Note Legislative Budget Board

[24] Act of May 22, 2023, 88th Leg., R.S., S.B. 2275 (to be codified as an amendment to TEX. GOV'T CODE ANN. §22.004).

- Status: On April 3, the State Affairs committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings: here. Testimony on SB 2275 begins around the 3:21:10 mark. Witnesses who registered a position or testified for, on, or against the resolution are listed here (page 11). On April 6, by a 6-2 vote, the bill was voted out of committee without amendments. By a 21-10 vote, the full Senate passed SB 2275, without amendments, on April 19. The bill was forwarded to the House and referred to Judiciary & Civil Jurisprudence on April 28.

  On May 10, the committee will conduct a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony on SB 2275 begins around the 1:25 mark. Witnesses who registered a position or testified for, on, or against the bill are listed here. SB 2275 was later unanimously voted out of committee without amendments. On May 19, the House passed the bill without amendments.

  Governor Abbott ***vetoed*** SB 2275 on June 17, 2023.

HB 19 – Creation of a Specialty Trial Court (Business Court Judicial Divisions) [25] *(Companion:* ***SB 27*** [26]*)*

- **Summary:** HB 19, filed by Rep. Andrew Murr (R – Kerrville), creates a business trial court system in Texas. More specifically, HB 19 does the following:

  - Establishes a statewide business court with concurrent jurisdiction with a district court in three different categories of cases:

    Business governance disputes in which the amount in controversy exceeds $5 million and involve: (1) a derivative proceeding; (2) an action regarding the governance or internal affairs of the organization; (3) an action in which a claim under a state or federal securities or trade regulation law is asserted against an organization, a governing or controlling person or officer of an organization, or an underwriter of securities issued by the organization or its auditor; (4) an action by an organization or an owner or member thereof if the action is brought against an owner, managerial official, or controlling person and alleges an act or omission by that person in the person's official capacity; (5) an action alleging that an owner, managerial official, or controlling person breached a duty, including a duty of care, loyalty, or good faith; (6) an action seeking to hold an owner, member, or governing person liable for an obligation of the organization, other than on account of a written contract signed by the person to be held liable in a capacity other than as an owner or governing person; and (7) an action arising out of the Business Organizations Code. The amount in controversy requirement will ***not*** apply to actions in which a publicly traded company is a party.

[25] Act of May 29, 2023, 88th Leg., R.S., H.B. 19 (to be codified at TEX. GOV'T CODE ANN. §25A.001, et seq. and as an amendment to §837.001).
[26] Tex. S.B. 27, 88th Leg., R.S. (2023).

Commercial disputes in which the amount in controversy exceeds $10 million and involve: (1) an action arising out of a "qualified transaction" (as defined in the bill); (2) an action that arises out of a contract or commercial transaction in which the parties to the contract or transaction agreed to that the business court has jurisdiction over the action, except an action arising out of an insurance contract; and (3) an action that arises out of a violation of the Finance Code or Business & Commerce Code by an organization or an officer or governing person acting on behalf of an organization, other than a bank, credit union, or savings and loan association.

Actions seeking injunctive or declaratory relief so long as it involves a dispute falling within the scope of the jurisdictional grant for the business court; and

Any other claim related to a case or controversy within the court's jurisdiction that forms part of the same case or controversy. A claim within the business court's supplemental jurisdiction may only proceed upon agreement of all parties and the judge.

- Unless such claims fall within the court's supplemental jurisdiction, actions ***outside*** of the business court's jurisdiction are those brought by or against a governmental entity; those seeking to foreclose a lien on real or personal property; personal injury or death claims; claims under the DTPA, the Estates Code, the Family Code, the Insurance Code, Title 9 of the Property Code, and Texas's covenants not to compete statute; claims related to mechanics and materialman's liens; claims arising from the production or sale of farm products; claims related to consumer transactions; or claims related to duties and obligations under an insurance policy.

- Provides that claims within the jurisdiction of the business court may be directly filed there.

- Established a procedure for removing claims (or parts of claims) not within the jurisdiction of the business court to a county of proper venue in which the claim could have originally been filed.

- Provides a process for removing an action (or parts of actions) from a district or county court to the business court on motion of a party.

- Gives the proposed statewide 15th Court of Appeals exclusive jurisdiction over specified civil appeals.

- Requires a business court judge to be at least 35 years of age, a U.S citizens, a Texas resident for two years preceding appointment, a Texas licensed attorney with at least 10 years of experience in Texas in practicing complex business litigation or business transaction law, serving as a judge of a Texas civil court, or any combination of the above.

- Provides for the gubernatorial appointment of judges.

- Provides for two-year terms with the possibility of reappointment.

- Provides a salary equal to the sum of a district judge's salary and the maximum amount of county contributions and supplements allowed by law to be paid to a district judge.

- Bars a business court judge from private practice while in office.

- Provides for the appointment of visiting judges by the chief justice of the Supreme Court.

- Provides that a party has a right to a jury trial where required by the constitution in the county in which venue is proper under CPRC, section 15.002, if the case was removed to the business court, in the county in which the case was originally filed.

- Requires a jury trial in a case filed initially in business court to be held in any county of proper venue under CPRC section 15.002, as chosen by the plaintiff.

- Allows the parties to agree to hold a jury trial in another county.

- Requires the Texas Supreme Court to adopt rules relating to written opinions.

- Provides for the central administration of the business court in Travis County, with judges maintaining chambers in the county seat of their county of residence.

- Provides that the business court will be composed of geographic divisions that correspond to the state's eleven administrative judicial regions. Effective September 1, 2024, judges will be appointed to each business court division, with two judges in five of the divisions (Dallas, Austin, San Antonio, Fort Worth, and Houston). One judge will be appointed in each of the remaining six divisions if a legislative appropriation is made for that purpose. If not funded, the remaining six divisions will be abolished on September 1, 2026.

- Allows parties to appear by remote proceedings.

- Authorizes the business court to set filing fees.

- *Effective date:* September 1, 2023, but the court will be created September 1, 2024. The changes in the law under HB 19 apply to civil actions commenced on or after September 1, 2024.

  [**Note**: HB 19 is similar (but not identical) to versions of the 2015 chancery court bill (HB 1603) that was voted out of committee (but failed to pass in the House), as well as the 2017 chancery court bill (HB 2594) and the 2019 business courts bill (HB 4149) that were filed but never voted out of committee; and the 2021 business courts bill (HB 1875) that was voted out of committee (but failed to pass in the House).]

  [**Note**: Sen. Bryan Hughes (R – Mineola) filed the Senate companion.]

- Bill Analysis for HB 19: House Research Organization
- Fiscal Note for HB 19: Legislative Budget Board
- Bill Analysis for SB 27: Senate Research Center
- Fiscal Note for SB 27: Legislative Budget Board
- Status of HB 19: On March 22, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested in watching the HB 19 proceedings can do so here: Part 1 and Part 2. The testimony in all of Part 1 and the first three hours of Part 2 is about HB 19. Witnesses who registered a position or testified for, on, or against the bill are listed here. Written public comments about the bill can be reviewed here. On March 29, by a 5-4 vote, HB 19 (as amended) was voted out of committee. On May 2, by a vote of 90-51, the House passed HB 19 (as amended).

- HB 19 was forwarded to the Senate and referred to Jurisprudence. The committee conducted a hearing on the bill on May 8: Notice. Those who are interested can watch the proceedings here. Testimony on HB 19 begins around the 00:20 mark. HB 19, as amended, was subsequently voted out of committee. By a 24-6 vote, the Senate passed HB 19.

- Status of SB 27: On March 29, the Jurisprudence conducted a hearing on SB 27: Notice. Those who are interested can watch the proceedings: here. Testimony on SB 27 begins around the 13:55 mark. Witnesses who registered a position or testified for, on, or against the bill are listed here. The bill was left pending.

HB 367 – Powers and Duties of the State Commission on Judicial Conduct [27]

- **Summary**: HB 367, filed by Rep. Jacey Jetton (R – Sugar Land), amends the Government Code to authorize the State Commission on Judicial Conduct (SCJC) to accept complaints, conduct investigations, and take any other action authorized by statute or the Texas Constitution, with respect to a candidate for judicial office who is subject to the Judicial Campaign Fairness Act, in the same manner SCJC is authorized to take those actions with respect to a judge.

  In 2021, the 87th Legislature passed—and Texas voters subsequently approved—a constitutional amendment that provides the constitutional authority for the SCJC to enforce the Code of Judicial Conduct and administer discipline with respect to judicial candidates.

- *Effective date*: September 1, 2023.

- Bill Analysis: House Research Organization

- Fiscal Note Legislative Budget Board

[27] Act of May 27, 2023, 88th Leg., R.S., H.B. 367 (to be codified at TEX. GOV'T CODE ANN. §33.02105).

- Status: On March 15, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony on the bill begins around the 59:30 mark. Witnesses who registered a position or testified for, on, or against the bill are listed here. On March 22, HB 367 was unanimously voted out of committee without amendment. On April 12, the House unanimously passed HB 367. The bill was referred to the Senate committee on State Affairs on April 18. The committee conducted a hearing on HB 367 on May 8: Notice. Those who are interested can watch the proceedings here. Testimony about the bill begins around the 42:50 mark. On May 9, HB 367 was voted out of committee without amendments. The Senate passed the bill on May 15.

HB 841 – Gathering and Maintenance of Certain Judicial Statistics by the Texas Judicial Council [28]

- **Summary:** HB 841, filed by Rep. Claudia Ordaz (D – El Paso), requires the Texas Judicial Council to gather and maintain more detailed statistics about case-level information related to the amount and character of the business transacted by courts.

- *Effective date*: September 1, 2023.

  [**Note:** Rep. Ordaz filed a similar bill (HB 4335) in 2021. The bill was voted out of committee but failed to reach the House floor.]

- Fiscal Note: Legislative Budget Board

- Bill Analysis: House Research Organization

- Status: On March 8, Judiciary & Civil Jurisprudence conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Witnesses who registered a position or testified on, for, or against HB 841 are listed here. Testimony begins around the 49:20 mark. On March 15, HB 841 was unanimously voted out of committee without amendments. By a 135-13 vote, the House passed the bill on April 28. HB 841 was forwarded to the Senate and referred to Jurisprudence. On May 10, the committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Witnesses who registered a position or testified on, for, or against HB 841 are listed here. Testimony begins around the 37:00 mark. The bill was later unanimously voted out of committee without amendments. On May 17, the Senate passed HB 841 without amendments.

[28] Act of May 21, 2023, 88th Leg., R.S., H.B. 841 (to be codified as an amendment to TEX. GOV'T CODE ANN. §71.035).

HB 2384 – Court Administration/Knowledge, Efficiency, Training, and Transparency Requirements for Judicial Office Holders and Candidates [29]

- **Summary:** HB 2384, filed by Rep. Jeff Leach (R – Allen), amends applicable sections of the Election Code and Government Code to do the following:

  - Require a judicial candidate's ballot application to include the candidate's bar number, disclose any public sanction or censure or disciplinary sanctions in Texas or another state, state for the previous five-year period the nature of the candidate's practice, any legal specialization, the candidate's professional courtroom experience, and any final conviction for a Class A or B misdemeanor in the past 10 years. HB 2384 would further require candidates for appellate courts to describe appellate court briefs and oral arguments for the past five years.

  - Make public any sanction against a judicial candidate for making a false declaration on the ballot application.

  - Direct the Supreme Court to adopt rules on the judicial training a judge must complete within one year of election to the bench, including a minimum of 30 hours of instruction and that judges receive 16 hours of continuing education annually. The rules should also require the Judicial Conduct Commission to suspend a judge who does not complete the training.

  - Provide that a judge who is noncompliant with the education requirement for more than one year engages in "wilful or persistent conduct that is clearly inconsistent with the proper performance of a judge's duties" sufficient to subject the judge to removal from office under Art. V, § 1-a, Texas Constitution.

  - Direct the Office of Court Administration (OCA) to develop standards for identifying courts that need additional assistance to promote the efficient administration of justice.

  - Direct OCA to include disaggregated performance measures for each appellate, district, statutory county, probate court, and county court as part of its annual performance report.
  - Direct OCA to report the annual clearance rate for each trial court.

  - Direct local district grievance committees to sanction attorneys that make false declarations on a ballot application.

  - Direct the Supreme Court to adopt rules establishing a specialty certification for attorneys in judicial administration and that the Texas Board of Legal Specialization make it available to judges. Judge should also be permitted to receive additional compensation for those who hold a specialty certification in

[29] Act of May 21, 2023, 88th Leg., R.S., H.B. 2384 (to be codified at TEX. ELEC. CODE ANN. §141.0311; TEX. GOV'T CODE ANN. §§33.032, 39.001, et seq., and 72.024; and as amendments to §72.082-.083, 74.046, 81.075, and 82.101, et seq.).

judicial administration provided that the legislature makes an appropriation for that purpose.

- *Effective date*: September 1, 2023

- Bill Analysis: House Research Organization

- Fiscal Note: Legislative Budget Board

  Status: On March 29, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings: here. Testimony on HB 2384 begins around the 4:14:30 mark. Witnesses who registered a position or testified for, on, or against the bill are listed here (page 23). On April 3, HB 2384 was unanimously voted out of committee. By a 146-2 vote, the House passed the bill on April 18. HB 2384 was forwarded to the Senate committee on State Affairs. On May 4, the committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony on HB 2384 begins around the 3:15:00 mark. Witnesses who registered a position or testified for, on, or against the bill are listed here (page 3). On May 4, HB 2384 was unanimously voted out of committee. The Senate passed the bill on May 17.

HB 3474 – Omnibus Courts Bill [30] *(Companion:* ***SB 1462*** [31]*)*

- **Summary:** HB 3474, filed by Rep. Jeff Leach (R – Allen), does (among other things) the following:

  - Entitles an appellate justice engaged in the discharge of official duties in a county other than the justice's county of residence to reimbursement of traveling and other expenses.

  - Entitles appellate justices to receive from the state the actual and necessary postage, telegraph, and telephone expenses incurred in the discharge of official duties.

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[30] Act of May 29, 2023, 88th Leg., R.S., H.B. 3474 (to be codified at TEX. GOV'T CODE ANN. §§22.3015, 24.600201, 24.60031-.60034, 24.60038-.60043, 24.6009, 24.60095, 25.2491, 25.2703-.2704, 41.013, 45.315, 46.003, 54.2701, et seq., 54.2801, et seq., 54.6585, 54A.219, 54B.001, et seq., 62.115, and as amendments to §§24.392, 24.516-.517, 24.541, 24.553, 24.576, 24.591, 24.60030, 24.910-.913, 25.0005, 25.0023, 25.0062, 25.0171, 25.0173, 25.0331-.0332, 25.0592, 25.0732, 25.0932, 25.1031, 25.1331-.1332, 25.1572, 25.1721, 25.1723, 25.2223, 25.2293, 25.2391-.2392, 25.2607, 26.315, 51.3071, 51.403, 51.601, 52.041, 52.047, 52.055-.056, 52.058, 54.2001, 54.2502, 54.651, 54.656, 57.001-.002, 61.001, 61.0015, 61.003, 62.0111, 62.013, 62.0131-.0132, 62.014, 62.0145-.0146, 62.015-.017, 62.0175, 62.106-.109, 62.411-.412, 72.037, 79.012, 80.001-.002, 154.051, 154.101, 154.105, 154.112, 406.016, 602.002, 602.007and 659.012; codified as TEX. CIV. PRAC. & REM. CODE ANN. §§30.0035 and 51.018, and as amendments to §30.012; codified as amendments to TEX. CODE OF CRIM. PROC. ANN. ART. 2.09, 4.01, 11.07, 18.0215, 19A.052-.053, 19A.101, 42.15, 49.05, and 55.02; codified at TEX. EST. CODE ANN §33.105 and as amendments to TEX. EST. CODE ANN §33.101-.103, 152.001-.004, 152.051, , 1023.006-.007; codified as amendments to TEX. FAM. CODE ANN. §155.207, 201.005, 201.105, 201.113, 201.205, and 201.208; codified as amendments to TEX. HUM. RES. CODE ANN. §152.2264; and codified at TEX. PROP. CODE ANN. §92.0563.).

[31] Tex. S.B. 1462, 88th Leg., R.S. (2023).

- Creates at least 16 new district courts, including courts in Denton, Collin (2 courts—one civil, one family law), Bastrop, Brazos, Brewster, Culberson, El Paso, Harris, Hudspeth, Kaufman, Kendall, and Presidio counties.

- Adds district, criminal district, or county attorneys to the state base salary calculation for judges and justices.

- Converts Montgomery County Court at Law No. 2 to a statutory probate court and give it jurisdiction over eminent domain proceedings.

- Creates three new probate courts, including a second statutory probate court in Travis County for mental health matters.

- Creates new county courts at law in Bexar, Waller, and Wilson counties.

- Creates a second multicounty court at law for Bee, Live Oak, and McMullen counties.

- Creates criminal magistrate courts in Denton County and provides appointment parameters for courts in Bexar, Dallas, Denton, Harris, Tarrant, Travis, and other counties throughout Texas.

- Requires justices of the peace to report annually to the Ethics Commission the total amount of fees, commissions, and payments received during the year.

- Raises the jurisdictional limit for tenant judicial remedies sought in justice courts from $10,000 to $20,000 in cases under Tex. Prop. Code §92.056(3).

- Authorizes the Grayson County commissioners court to allow the district and statutory county court judges to appoint part-time or full-time criminal magistrates.

- Specifies the reasons for which an administrative region presiding judge may appoint a visiting associate judge.

- Exempts a county official or employee while transacting county business from paying fees for the issuance of transcripts if the county maintains court reporting equipment for the court.

- Provides for grand juror and petit juror service qualifications, procedures, and compensation.

- Addresses the appointment of official court reporters and interpreters.

- Addresses deposition, transcription, and interpretation services.

- Exempts a party from providing or paying for an interpreter unless another party contests a statement of inability to afford payment and the court orders the party to pay the costs.

- Addresses the transfer of cases and proceedings in probate, guardianship, and family matters.

- Adopts process in which an appealing party can create an appendix in lieu of a clerk's record.

- Requires trial and appellate courts to deliver through the electronic filing system all orders that a court enters in a case to all parties.

- Requires OCA to biennially conduct a district court workload analysis in the 30 most populous counties.

- *Effective date:* September 1, 2023.

  [**Note:** Sen. Bryan Hughes (R – Mineola) filed the Senate companion.]

- Bill Analysis of HB 3474: House Research Organization

- Fiscal Note for HB 3474: Legislative Budget Board

- Status of HB 3474: On April 5, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony on the bill begins around the 3:23:10 mark. Witnesses who registered a position or testified in favor of, on, or against HB 3474 are listed here: Witness List (page 8). The bill (as amended) was unanimously voted out of committee. On May 4, the House passed HB 3474 (as amended). The floor amendments included the following provisions: (1) a process in which an appealing party can create an appendix in lieu of a clerk's record (*compare* HB 2431); and (2) requires trial and appellate courts to deliver through the electronic filing system all orders that a court enters in a case to all parties (*compare* HB 525). HB 3474 was subsequently forward to the Senate and referred to Jurisprudence. On May 10, the committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony on the bill begins around the 31:20 mark. Witnesses who registered a position or testified in favor of, on, or against HB 3474 are listed here: Witness List. The bill, as amended, was subsequently voted out of committee. On May 21, the Senate passed HB 3474, as amended.

- Status of SB 1462: Referred to Jurisprudence on March 16, 2023.

HB 3929 – SCOTX Adoption of the Uniform Interstate Depositions and Discovery Act [32]

- **Summary:** HB 3929, filed by Rep. David Cook (R – Mansfield), **r**epeals CPRC §20.002 (testimony required by a foreign jurisdiction) and authorizes the Supreme Court to adopt the Uniform Interstate Depositions and Discovery Act (UIDDA) as rules of civil procedure.

[32] Act of May 26, 2023, 88th Leg., R.S., H.B. 3929 (repealing TEX. CIV. PRAC. & REM. CODE ANN. §20.002).

Also provides that, if the Supreme Court does not adopt the UIDDA before September 1, 2025, the current law remains in effect.

- *Effective date*: September 1, 2025
- Bill Analysis: Senate Research Center
- Fiscal Note: Legislative Budget Board
- Status: On April 5, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony begins around the 1:23:35 mark. Witnesses who registered a position or testified in favor of, on, or against HB 3929 are listed here. On April 10, the bill was voted out of committee without amendments. On May 5, the House voted to approve HB 3929 without amendments. The bill was forwarded to the Senate, referred to Jurisprudence, and then was voted out of committee, without amendments, on May 17. The full Senate passed HB 3929, without amendments, on May 21.

H. Oil & Gas

HB 450 – Bad Faith Washout of an Overriding Royalty Interest in an Oil & Gas Lease [33]

- **Summary:** HB 450, filed by Rep. Tom Craddick (R – Midland), amends the Property Code to create a cause of action for a bad faith of an overriding royalty interest in an oil and gas lease. "Washout" under HB 450 means the elimination or reduction of an overriding interest by the forfeiture or surrender and subsequent reacquisition of an oil and gas lease by the same lessee. The standard for "bad faith" is knowing or intentional conduct.

  The available remedies under HB 450 include actual damages, a constructive trust on the oil and gas lease or mineral estate acquired to accomplish the washout, and costs and attorney's fees. There will be a two-year statute of limitations running from the time the claimant obtained actual knowledge of the washout.

- *Effective date:* September 1, 2023
- Bill Analysis: Senate Research Center
- Fiscal Note: Legislative Budget Board
- Status: On March 8, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony begins around the 15:00 mark. Witnesses who registered a position or testified in favor of, on, or against HB 450 are listed here. On March 15, the bill was unanimously voted out of committee without any amendments. On

[33] Act of May 1, 2023, 88th Leg., R.S., H.B. 450 (to be codified at TEX. PROP. CODE ANN. §31.001, et seq.).

April 11, the House voted to approve HB 450. The bill was forwarded to the Senate, referred to Administration, and then was unanimously voted out of committee on April 28. The full Senate passed HB 450, without amendments, on April 27.

I. Preemption/Local Regulations

HB 2127 – Preemption and the Effect of Certain State or Federal Law on Certain Municipal and County Regulations [34]

- Summary: HB 2127, filed by Rep. Dustin Burrows (R – Lubbock), adds Chapter 102A to the CPRC and confers standing on any person, including a taxpayer, adversely affected by a municipal or county ordinance adopted and enforced by the city or county to sue the city, county, or local official for violating field pre-emption in the following codes: Agriculture, Finance, Insurance, Labor, Natural Resources, or Occupations. Under HB 2127, governmental immunity is waived and a person will be entitled to declaratory and injunctive relief and attorney's fees and costs. Venue is in any county of the state and may not be transferred without consent of the parties.

- *Effective date*: September 1, 2023

- Bill Analysis: House Research Organization

- Fiscal Note: Legislative Budget Board

- Status: On March 15, the State Affairs committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony begins around the 1:00:45 mark. Witnesses who registered a position or testified in favor of, on, or against HB 2127 are listed here (pp. 3-7). On April 14, the bill, as amended, was voted out of committee. On April 19, the House voted to approve HB 2127, as amended. The bill was forwarded to the Senate, referred to Business & Commerce, and then was voted out of committee, without amendments, on May 5. The full Senate passed HB 2127, as amended, on May 16. The House subsequently approved the Senate amendments.

[34] Act of May 23, 2023, 88th Leg., R.S., H.B. 2127 (to be codified at TEX. AG. CODE ANN. §1.004; TEX. BUS. & COM. CODE ANN. §1.109; TEX. CIV. PRAC. & REM. CODE ANN. §102A.001, et seq.; TEX. FIN. CODE ANN. §1.104; TEX. INS. CODE ANN. §30.005; TEX. LABOR CODE ANN. §1.005; TEX. LOC. GOV'T. CODE ANN. §51.002 and §229.901; TEX. NAT. RES. CODE ANN. §1.003; TEX. OCC. CODE ANN. §1.004; and TEX. PROP. CODE ANN. §1.004).

J. Restitution Payments for Criminal Conduct

HB 393 – Restitution Payments for the Support of a Child Whose Parent or Guardian is a Victim of Intoxication Manslaughter [35]

- **Summary:** HB 393, filed by Rep. Craig Goldman (R – Fort Worth) , amends Chapter 42 of the Texas Code of Criminal Procedure by adding Section 42.0375 (Mandatory Restitution for Child of Victim of Intoxication Manslaughter) to provide that:

  - The court shall order defendants convicted of intoxication manslaughter to make restitution payments to a minor child (up until age 18 or high school graduation) whose parent or guardian was killed as a result of drunk driving.

  - The court shall determine the amount of restitution payments based on a set of statutory criteria, including the following: (1) financial needs and resources of the child; (2) financial needs and resources of the surviving parent or guardian or other current guardian of the child or, if applicable, the financial resources of the state if the Department of Family and Protective Services has been appointed as temporary or permanent managing conservator of the child; (3) the standard of living to which the child is accustomed; (4) the physical and emotional condition of the child and the child 's educational needs; (5) the child's physical and legal custody arrangements; (6) the reasonable work-related child care expenses of the surviving parent or guardian or other current guardian, if applicable; and (7) the financial resources of the defendant.

  - The defendant is not required to pay restitution to an individual who is 19 years or older.

  - If the defendant is unable to pay due to incarceration, the defendant shall begin payments within one year of being released from jail in a payment plan that is agreed to by the court.

  - The amount of restitution paid under shall be deducted from any civil judgment against the defendant as provided by Article 42.037(f)(2) of the Code of Criminal Procedure.

  - A restitution order issued under the amended statute may be enforced by the attorney general, or by a person or a parent or guardian of the person named in the restitution order, in the same manner as a judgment in a civil action.

- *Effective date*: September 1, 2023

- Bill Analysis: Senate Research Center

- Fiscal Note: Legislative Budget Board

[35] Act of May 17, 2023, 88th Leg., R.S., H.B. 393 (to be codified at TEX. CODE OF CRIM. PROC. ANN. §42.0375).

- Status: On February 28, the Criminal Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony on the bill begins around the 1:53:20 mark. Witnesses who registered a position or testified in favor of, on, or against HB 393 are listed here: Witness List (page 5). On March 14, HB 393 was unanimously voted out of committee. The House unanimously passed the bill on April 11. HB 393 was forwarded to the Senate and referred to Criminal Justice. On May 9, the committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony on the bill begins around the 20:50 mark. Witnesses who registered a position or testified in favor of, on, or against HB 393 are listed here: Witness List (page 2). On May 11, HB 393 was voted out of committee without amendments. On May 15, the Senate unanimously passed the bill without amendments.

K. Rideshare Liability

HB 1745 – Civil Actions or Arbitration Proceedings Involving Transportation Network Companies [36]

- **Summary:** HB 1745, filed by Rep. Jeff Leach (R – Allen), adds Chapter 150E to the CPRC and prohibits a transportation network company (as defined in the Section 2402.001 of the Occupations Code) from being held vicariously liable for damages in a property damage or personal injury case if: (1) the claimant does not prove gross negligence by clear and convincing evidence; and (2) the company has fulfilled its driver-selection obligations under Chapter 2402 (Transportation Network Companies) of the Occupations Code.

  HB 1745 does affect liability arising out of the transportation network company's own negligence or gross negligence for an act or omission relating to the use of the company's digital network, including the failure to prevent a driver from logging on to the digital network if, at the time of the event giving rise to the cause of action, the company had actual knowledge that the driver was disqualified from logging on to the company's digital network for reasons described by Section 2402.107(b) of the Occupations Code that occurred after the most recent review of the driver's driving record or criminal background check required by the Occupations Code.

- *Effective date:* September 1, 2023. The changes in the law addressed in HB 1745 would apply only to causes of action that accrue on or after the effective date.

  [**Note:** Rep. Leach filed a similar bill (HB 2788) in 2021. The bill was voted out of committee, but did not reach the House floor.]

- Bill Analysis: House Research Organization

- Fiscal Note: Legislative Budget Board

[36] Act of May 17, 2023, 88th Leg., R.S., H.B. 1745 (to be codified at TEX. CIV. PRAC. & REM. CODE ANN. §150E.001, et seq.).

- Status: On March 22, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony about the bill begins around the 6:30:00 mark. Witnesses who registered a position or testified for, on, or against the bill are listed here (page 5). On May 2, by a vote of 110-35, the House passed HB 1745, as amended. The bill was referred to the Senate committee on State Affairs on May 4. The committee conducted a hearing on the bill on May 8: Notice. Those who are interested can watch the proceedings here. Testimony about HB 1745 begins around the 1:50 mark. On May 9, the bill was voted out of committee without amendments. The Senate passed HB 1745, without amendments, on May 15.

L. Texas Citizens Participation Act

HB 527 – Persons Considered to Exercise Certain Constitutional Rights for Purposes of a Motion to Dismiss under the TCPA [37]

- **Summary:** HB 527, filed by Rep. Gene Wu (D – Houston), amends section 27.010(a) of the CPRC and adds a new subsection (13) that expressly exempts "a legal malpractice claim brought by a client or former client" from the scope of the TCPA.

- *Effective date*: September 1, 2023. The changes in the law addressed in HB 527 apply to an action that commences on or after the effective date.

  [**Note:** Rep. Wu filed a similar bill (HB 4166) in 2021. The House unanimously passed HB 1466, but it died in the Senate.]

- Bill Analysis: House Research Organization

- Fiscal Note: Legislative Budget Board

- Status: On March 15, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony begins around the 42:10 mark. Witnesses who registered a position or testified for, against, or on the bill are listed here. On March 29, HB 527 (as amended) was unanimously voted out of committee. The House passed the bill (by a 121-27 vote) on April 26. HB 527 was referred to the Senate Committee on State Affairs. On May 11, the committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony begins around the 1:31:45 mark. On May 17, the bill, as amended, was voted out of committee. The Senate passed the bill on May 19.

[37] Act of May 29, 2023, 88th Leg., R.S., H.B. 527 (to be codified as an amendment to TEX. CIV. PRAC. & REM. CODE ANN. §27.010).

M. Resolutions Sent to the Secretary of State

HJR 107 – Proposing a Constitutional Amendment to Increase the Mandatory Retirement Age for Judges and Justices [38] *(Companion:* ***SJR 40*** [39]*)*

- **Summary:** HJR 107, filed by Rep. Four Price (R – Amarillo), seeks to amend Art. V, § 1-a(1) of the Texas Constitution and increase the mandatory retirement age for judges from 75 to 79.

  [**Note:** Sen. Juan "Chuy" Hinojosa (D – McAllen) filed the Senate companion resolution.]

- Bill Analysis for HJR 107: House Research Organization

- Fiscal Note for HJR 107: Legislative Budget Board

- Status of SJR 40: Referred to Jurisprudence on March 1, 2023.

- Status of HJR 107: On March 29, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings: here. Testimony on HJR 107 begins around the 1:26:00 mark. Witnesses who registered a position or testified for, on, or against the resolution are listed here (page 32). On April 5, the resolution was unanimously voted out of committee without amendments. By a 141-5 vote, the House passed HJR 107 on April 26. The resolution was forwarded to the Senate and referred to Jurisprudence on May 2. The committee conducted a hearing on the resolution on May 10: Notice. Those who are interested can watch the proceedings here. Testimony on HJR 107 begins around the 9:10 mark. Witnesses who registered a position or testified for, on, or against the resolution are listed here. HJR 107 was later unanimously voted out of committee without amendments. On May 15, the Senate passed HJR 107.

N. Suspension of Money Judgments

HB 4381 – Suspension of Money Judgments Pending Appeal in Civil Actions [40]

- **Summary:** HB 4381, filed by Rep. Mano DeYala (R – Houston), amends the CPRC to allow a judgment debtor with a net worth of less than $10 million to post alternative security pending appeal if posting the required amount of money as

[38] Act of May 16, 2023, 88th Leg., R.S., H.J.R. 107.
[39] Tex. S.J.R. 40, 88th Leg., R.S. (2023).
[40] Act of May 17, 2023, 88th Leg., R.S., HB 4381 (to be codified at TEX. CIV. PRAC. & REM. CODE ANN. §52.007).

security would require the judgment debtor to substantially liquidate real and personal property interests used in the debtor's normal course of business.

- HB 4381 also requires a reduction of the amount of security pending appeal if the appellate court reduces the amount of judgment.

- *Effective date*: September 1, 2023.

- Bill Analysis: Senate Research Center

- Fiscal Note: Legislative Budget Board

- Status: On April 5, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony begins around the 2:26:40 mark. Witnesses who registered a position or testified in favor of, on, or against HB 4381 are listed here: Witness List (page 11). On April 17, the bill was voted out of committee (6-2) as amended. On May 2, by a 130-15, the House passed HB 4381.

  The bill was forwarded to the Senate and referred to Finance on May 2. The committee conducted a hearing on the bill on May 8: Notice. Those who are interested can watch the proceedings here. Testimony on HB 4381 begins around the 5:15 mark. Witnesses who registered a position or testified for, on, or against the resolution are listed here. HB 4381 was later unanimously voted out of committee without amendments. On May 17, the Senate unanimously passed HB 4381.

O. Miscellaneous Bills

SB 17 – Prohibition of Diversity, Equity, and Inclusion Initiatives at Public Institutions of Higher Education [41]

- **Summary**: SB 17, filed by Sen. Brandon Creighton (R – Conroe) but had multiple primary authors, prohibits public universities from having a diversity, equity, and inclusion (DEI) office, division, or other unit established for the purpose of (1) influencing hiring or employment practices with respect to race, sex, color, or ethnicity, other than through the use of color-blind and sex-neutral hiring processes in accordance with any applicable state and federal antidiscrimination laws; (2) promoting differential treatment of or providing special benefits to individuals on the basis of race, color, or ethnicity; (3) promoting policies or procedures designed or implemented in reference to race, color, or ethnicity, other than policies or procedures approved in writing by the institution 's general counsel and the Texas Higher Education Coordinating Board for the sole purpose of ensuring compliance with any applicable court order or state or federal law; or (4) conducting trainings, programs, or activities designed or implemented in reference to race, color, ethnicity, gender identity, or sexual orientation, other than trainings, programs, or activities developed by an attorney and approved in writing by the institution 's

[41] Act of May 29, 2023, 88th Leg., R.S., S.B. 17 (to be codified at TEX. EDUC. CODE ANN. §51.3525).

general counsel and the Texas Higher Education Coordinating Board for the sole purpose of ensuring compliance with any applicable court order or state or federal law.

SB 17 also prohibits institutions from expending state funds before certifying compliance with the bill's provisions.

- *Effective date*: January 1, 2024
- Bill Analysis*: Senate Research Center*
- Fiscal Note: Legislative Budget Board
- Status: On April 6, the Senate Subcommittee on Higher Education conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony on the bill begins around the 0:01:20 mark. Witnesses who registered a position or testified in favor of, on, or against SB 17 are listed here: Witness List.

  On April 12, the full Committee on Education conducted another hearing on SB 17: Notice. Those who are interested can watch the proceedings here. Testimony on the bill begins around the 0:00:45 mark. Witnesses who registered a position or testified in favor of, on, or against SB 17 are listed here: Witness List. By an 8-2 vote, SB 17, as amended, was voted out of committee. The Senate passed SB 17, by a 19-12 vote, on April 19.

  SB 17 was forwarded to the House and referred to the Higher Education Committee. On May 8, the committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony on the bill begins around the 3:05:10 mark. Witnesses who registered a position or testified in favor of, on, or against SB 17 are listed here: Witness List. On May 12, by a 6-5 vote, SB 17 (as amended) was voted out of committee. On May 15, by an 83-62 vote, the House passed SB 17, as amended. On May 28, both chambers approved the conference committee report for SB 17.

SB 18 – Tenure and Employment of Faculty Members in Higher Education [42]

- **Summary**: SB 18, filed by Sen. Brandon Creighton (R – Conroe) but had multiple primary authors, prohibits the granting of tenure or any other type of permanent employment status for higher education faculty members or other employees who are under contract for employment or employed by institutions of higher education on or after September 1, 2023. However, SB 18 does authorize the board of regents of an institution of higher education establish "an alternate system of tiered employment status for faculty members provided that the system clearly defines

[42] Act of May 29, 2023, 88th Leg., R.S., S.B. 18 (to be codified at TEX. EDUC. CODE ANN. §51.9415 and as amendments to §§21.801(d), 51.943(c), 51.948(b), 51.9745(a), 51A.053(c), 61.057, 61.0902(b), 141.001(3), and 142.001(5)).

each position and requires each faculty member to undergo an annual performance evaluation."

- *Effective date*: September 1, 2023
- Bill Analysis: *Senate Research Center*
- Fiscal Note: Legislative Budget Board
- Status: On March 30, the Senate Subcommittee on Higher Education conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here (Part 1) and here (Part 2). Testimony on the bill in Part 1 begins around the 0:44:40 mark and continues into Part 2. Witnesses who registered a position or testified in favor of, on, or against SB 18 are listed here: Witness List. On April 12, by a 9-3 vote, SB 18, as amended, was voted out of committee. The Senate passed SB 18, by an 18-11 vote, on April 20.

  SB 18 was forwarded to the House and referred to the Higher Education Committee. On May 8, the committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony on the bill begins around the 00:55 mark. Witnesses who registered a position or testified in favor of, on, or against SB 18 are listed here: Witness List (page 7). On May 18, by a 6-5 vote, SB 18 (as amended) was voted out of committee. On May 23, by an 83-61 vote, the House passed SB 18, as amended. On May 27, both chambers approved the conference committee report for SB 18.

III. LEGISLATION THAT FAILED TO PASS

A. Administrative Law

HB 1947 – De Novo Review and Interpretation of State Laws and Agency Rules by Reviewing Court Judges [43]

- **Summary:** HB 1947, filed by Rep. Brian Harrison (R – Midlothian), would require a judge or administrative law judge (ALJ) to interpret a statute, rule, or other guidance issued by a state agency *de novo*, without deference to an agency's interpretation of the provision. HB 1947 would also require a judge or ALJ to resolve the question of an ambiguous provision of state law in favor of limiting state agency authority.
- Bill Analysis: House Research Organization
- Fiscal Note: Legislative Budget Board
- Status: On April 19, the House Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here: Testimony begins around the 1:28:30 mark. Witnesses who

[43] Tex. H.B. 1947, 88th Leg., R.S. (2023).

registered a position or testified in favor of, on, or against HB 1947 are listed here (page 1). On April 20, by a 5-4 vote, HB 1947 was voted out of committee without any amendments.

B. Attorneys/Practice of Law

SB 559 – Discrimination Against or Burdening Constitutional Rights of Law License Holder or Applicant [44] ***(Companion: HB 2846*** [45]***)***

- **Summary:** SB 559, filed by Sen. Bryan Hughes (R – Mineola), would amend the State Bar Act to prohibit rules or policies that: (1) limit an applicant's ability to obtain a license to practice law in Texas, or a bar member's ability to maintain or renew the license, based on a sincerely held religious belief; or (2) burden an applicant's or bar member's free exercise of religion, freedom of speech regarding a sincerely held religious belief; membership in any religious organization; or freedom of association. A person could seek injunctive relief for violating this prohibition. However, the prohibition would not apply to a State Bar rule or policy adopted or penalty imposed that results in a limitation or burden if the rule, policy, or penalty is: (1) essential to enforcing a compelling governmental purpose and narrowly tailored to accomplish that purpose; or (2) restricts wilful expressions of bias or prejudice in connection with an adjudicatory proceeding.

  SB 559 also provides that, in an administrative hearing or a judicial proceeding under the Texas Uniform Declaratory Judgments Act, a person may assert as a defense that a prohibited bar rule, policy, or penalty violates the State Bar Act. However, the person may not raise the violation as a defense to an allegation of sexual misconduct or the prosecution of an offense.

  [**Note:** The House companion was filed by Rep. Briscoe Cain (R – Deer Park). In 2021, Sen. Charles Perry (R – Lubbock) authored a similar bill (SB 247) that passed in the Senate, but died in the House after being voted out of committee. The House companion (HB 3940) was voted out of committee, but died without receiving a floor vote.]

- Bill Analysis for SB 559: Senate Research Center
- Fiscal Note for SB 559: Legislative Budget Board
- Bill Analysis for HB 2846: House Research Organization
- Fiscal Note for HB 2846: Legislative Budget Board
- Status of SB 559: On February 27, State Affairs conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony begins around the 02:05:25 mark. Witnesses who registered a position or testified in favor of, on, or against SB 559 are listed here: Witness List. The bill was voted

[44] Tex. S.B. 559, 88th Leg., R.S. (2023).
[45] Tex. H.B. 2846, 88th Leg., R.S. (2023).

out of committee (8-2) without amendments. On March 15, by a 21-9 vote, the full Senate passed SB 559.

The bill was forwarded to the House and, on April 3, was referred to Judiciary & Civil Jurisprudence. On May 3, by a 5-4 vote, SB 559 was voted out of committee without amendments. The bill died without receiving a full House vote.

- Status of HB 2846: On April 5, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony begins around the 3:50:15 mark. Witnesses who registered a position or testified in favor of, on, or against HB 2846 are listed here: Witness List (page 4). On April 17, the bill was voted out of committee (5-3) without amendments.

HB 1627 – Implicit Bias Training for Judges, Judicial Officers, Court Personnel, and Attorneys [46]

- **Summary:** HB 1627, filed by Rep. Ana Hernandez (D – Houston), would require judges, certain court personnel, and attorneys to receive training or continuing education on implicit bias regarding racial, ethnic, gender, religious, age, mental disability, and physical disability and sexual harassment issues, and on bias-reducing strategies to address the manner in which unintended biases and sexual harassment issues undermine confidence in the legal system. There would be different requirements for attorneys and the judiciary and other court-related personnel under the proposed law. Attorneys would be required to complete one hour of continuing education for each compliance period. Those employed within the judicial branch would be required to complete two hours of training every two years.

  [**Note**: In 2021, Rep. Hernandez filed a similar bill (HB 2714), but it died in committee.]

- Fiscal Note: Legislative Budget Board

- Status: On April 5, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony on the bill begins around the 1:03:55 mark. Witnesses who registered a position or testified in favor of, on, or against HB 1627 are listed here: Witness List (page 2). HB 1627 was left pending.

HB 5101 – Procedures for a Complaint Filed with the State Bar of Texas [47]
*(Companion: **SB 2461*** [48]*)*

- **Summary:** HB 5101, filed by Rep. Mike Schofield (R – Katy), would amend section 81.075 of the Government Code and authorize the Supreme Court, on its own

[46] Tex. H.B. 1627, 88th Leg., R.S. (2023).
[47] Tex. H.B. 5101, 88th Leg., R.S. (2023).
[48] Tex. S.B. 2461, 88th Leg., R.S. (2023).

motion or the motion of the respondent attorney, to order a stay and reconsider the findings of the chief disciplinary counsel, place the complaint on a dismissal docket, or affirm the finding of just cause. HB 5101 would also provide that (1) the filing of a motion to stay does not affect the filing deadline or other time prescribed for a trial or hearing, and (2) if the Supreme Court does not grant or deny a motion for stay on or before the 45th day of filing, the motion is considered denied.

[**Note**: Sen. Bob Hall (R – Edgewood) filed the Senate companion.]

- Bill Analysis for HB 5101: House Research Organization
- Fiscal Note for HB 5101: Legislative Budget Board
- Status of HB 5101: On April 5, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony on the bill begins around the 3:35:30 mark. Witnesses who registered a position or testified in favor of, on, or against HB 5101 are listed here: Witness List (page 13). On April 17, by a 5-3 vote, HB 5101 was voted out of committee without amendments.
- Status of SB 2461: Referred to State Affairs on March 23, 2023.

C. Attorney's Fees

HB 5253 – Recovery of Attorney's Fees for Statutory Causes of Action and Common Law Tort Claims [49]

- **Summary:** HB 5253, filed by Rep. Julie Johnson (D – Farmers Branch), would amend section 38.001 of the CPRC to allow for the recovery of attorney's fees if the claim is for a common law tort or a cause of action created by statute for which an award of actual damages is authorized.
- Status: Referred to Judiciary & Civil Jurisprudence on March 24, 2023.

D. Attorney General

HB 1610 – Defense of the State of Texas or a State Agency in Actions Challenging the Constitutionality of a Texas Statute [50]

- **Summary:** HB 1610, filed by Rep. Jeff Leach (R – Allen), would amend section 402.010 of the Government Code to provide that the attorney general may not settle or compromise any claim in an action against the state or a state agency if the settlement or compromise has the effect of holding that a state statute is unconstitutional. HB 1610 also provides that, if a state agency in the executive or legislative branch of state government is a defendant in an action in which a party

[49] Tex. H.B. 5253, 88th Leg., R.S. (2023).
[50] Tex. H.B. 1610, 88th Leg., R.S. (2023).

to the litigation files a petition, motion, or other pleading challenging the constitutionality of a state statute and the attorney general elects not to defend the agency, the attorney general shall pay or reimburse the reasonable expenses incurred by the agency in defending the action, including court costs, investigative costs, deposition expenses, witness fees, and attorney 's fees. However, this change in the law under HB 1610 would not apply to representation of the agency before the Supreme Court in violation of Section 22, Article IV, Texas Constitution.

- Fiscal Note: Legislative Budget Board

- Status: On April 12, State Affairs conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony on the bill begins around the 3:19:40 mark. Witnesses who registered a position or testified in favor of, on, or against HB 1610 are listed here: Witness List (page 32). The bill was left pending.

E. Civil Causes of Action Involving Injuries to Minors

HB 206 – Elimination of Limitations Periods for Personal Injury Cases Arising from Certain Offenses Against a Child [51] *(Companion:* ***SB 751*** [52]*)*

- **Summary**: HB 206, filed by Rep. Ann Johnson (D – Houston), would amend section 16.0046 of the CPRC and eliminate the limitations period (currently 30 years) for a personal injury suit arising from sexual offenses against a child.

  [**Note**: Sen. Pete Flores (R – Austin) filed the Senate companion (SB 751). Rep. Jeff Leach (R – Allen) has filed a similar, but not identical, bill (HB 3533).]

- Status of HB 206: Referred to Judiciary & Civil Jurisprudence on February 23, 2023.
- Status of HB 3533: Referred to Judiciary & Civil Jurisprudence on March 16, 2023.

- Status of SB 751: Referred to State Affairs on March 1, 2023.

HB 4601 – Personal Injury Suits Arising from Conduct that Violates Penal Code Provisions Concerning Sexual Offenses Against a Child [53]

- **Summary:** HB 4601, filed by Jeff Leach (R-Allen), would amend section 16.0045 of the CPRC to require a person to bring suit for personal injury against a non-perpetrator of a sexual offense against a child no later than 15 years after the cause of action accrues if the injury arises as a result of conduct that violates various Penal Code provisions and the person against whom the suit is filed had a safe environment program at the time the injury occurred. However, HB 4601

[51] Tex. H.B. 206, 88th Leg., R.S. (2023).
[52] Tex. S.B. 751, 88th Leg., R.S. (2023).
[53] Tex. H.B. 4601, 88th Leg., R.S. (2023).

would not create a private cause of action against a person "concerning a safe environment program."

Under HB 4601, the burden of proof to establish liability would be clear and convincing evidence for each element of the cause of action.

- Status: Referred to Judiciary & Civil Jurisprudence on March 22, 2023.

F. Damages

HB 955 – Relating to Affidavits Concerning Costs and Necessity of Services [54]

- **Summary:** HB 955, filed by Rep. Harold Dutton (D – Houston), would amend section 18.001 of the CPRC to exempt a medical bill or other itemized statement of a medical or health care service charging $50,000 or less from the requirements of 18.001. An affidavit would not be required to support a finding of fact that the amount charged was reasonable and necessary.

- Fiscal Note: Legislative Budget Board

- Status: On March 22, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony begins around the 4:44:00 mark. On April 5, the committee conducted another hearing on HB 955: Notice. Those who are interested can watch the proceedings here. Testimony on the bill begins around the 1:22:45 mark. Witnesses who registered a position or testified in favor of, on, or against HB 955 are listed here: Witness List (page 1). HB 955 was left pending.

G. Education/Civil Remedy

SB 393 – Public Schools, Grievance Process, and Civil Remedy [55]

- **Summary:** SB 393, filed by Sen. Bob Hall (R – Edgewood), would (among other things) create a cause of action for damages, costs, and attorney's fees by a parent against a school district if the district's grievance procedure fails to resolve an issue within thirty (30) days after the receipt of a parent's complaint.

- Status: Referred to Education on February 15, 2023.

[54] Tex. H.B. 955, 88th Leg., R.S. (2023).
[55] Tex. S.B. 393, 88th Leg., R.S. (2023).

H. Employment

HB 1999 – Unlawful Employment Practices Based on Sexual Harassment, Including Related Complaints and Civil Actions [56] *(Companion:* ***SB 1041*** [57]*)*

- **Summary:** HB 1999, filed by Julie Johnson (D – Farmers Branch), would add section 21.2545 to the Labor Code and authorize a person to bring a civil suit for damages arising from an unlawful employment practice based on sexual harassment, regardless of whether the person has filed a complaint or has received a right to sue letter. Under HB 1999, such actions would be subject to a two-year statute of limitations and make the actions subject to the punitive damage limitations in section 41.008 of the CPRC instead of the statutory limits in section 21.2585 of the Labor Code.

  [**Note**: Sen. Bryan Hughes (R – Mineola) filed the Senate companion bill.]

- Status of HB 1999: Referred to International Relations & Economic Development on March 8, 2023.

- Status of SB 1041: Referred to Natural Resources & Economic Development on March 3, 2023.

I. Healthcare Liability

HB 536 – Liability Limits in a Health Care Liability Claim [58]

- **Summary**: HB 536, filed by Rep. Gene Wu (D – Houston), would amend CRPC sections 74.301 and 74.302 and provide for an adjustment to the noneconomic damages caps based on the consumer price index (CPI). More specifically, the bill provides that, when there is an increase or decrease in the CPI, the liability limit prescribed by the noneconomic damage limitation sections will be increased or decreased, as applicable, by a sum equal to the amount of such limit multiplied by the percentage increase or decrease in the CPI that measures the average changes in prices of goods and services purchased by urban wage earners and clerical workers' families and single workers living alone (CPI-W: Seasonally Adjusted U.S. City Average--All Items), between September 1, 2003, and the time at which damages subject to such limits are awarded by final judgment or settlement.

  [**Note:** Similar bills have been filed in previous sessions. For example, bills filed in 2017 (HB 719), 2019 (HB 765), and 2021 (HB 501) all died in committee.]

- Status: Referred to Judiciary & Civil Jurisprudence on February 23, 2023.

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[56] Tex. H.B. 1999, 88th Leg., R.S. (2023).
[57] Tex. S.B. 1041, 88th Leg., R.S. (2023).
[58] Tex. H.B. 536, 88th Leg., R.S. (2023).

J. Insurance

HB 1320 – Recovery under Uninsured and Underinsured Motorist Insurance Coverage [59]

- **Summary:** HB 1320, filed by Rep. Charlie Geren (R – Fort Worth), would amend the Insurance Code to, among other things, expressly: (1) define, at least to some degree, what constitutes sufficient notice under the Insurance Code for uninsured/underinsured motorists (UIM) claims; (2) state that an insurer may not require, as a prerequisite to asserting a claim under UIM coverage, a judgment or other legal determination establishing the other motorist's liability or uninsured/underinsured status; (3) state that an insurer may not require, as a prerequisite to payment of UIM benefits, a judgment or other legal determination establishing the other motorist's liability or the extent of the insured's damages before benefits are paid; and (4) require an insurer to attempt, in good faith, to effectuate a prompt, fair, and equitable settlement of a claim once liability and damages have become reasonably clear. HB 1320 would also amend the Insurance Code to address when prejudgment interest begins to accrue on UIM claims and when a claim for attorney's fees is considered to be "presented" for UIM claim purposes.

  [**Note:** Rep. Geren filed similar bills in 2019 (HB 1739) and 2021 (HB 359). Both bills passed in the House, but died in the Senate.]

- Status: Referred to Insurance on March 3, 2023.

HB 3391 – Disclosure of Liability Insurers and Policyholders to Third Party Claimants [60]

- **Summary:** HB 3391, filed by Rep. Julie Johnson (D – Farmers Branch), would amend the Insurance Code and require an insurance carrier and a policyholder to disclose to a third party claimant certain information about the insurance coverage of the party against who a claim is being made. More specifically, HB 3391 would have required an insurance carrier to provide the claimant with a sworn statement of an officer or claims manager of the insurer that contained the following information for each policy known by the insurer that provides or may provide relevant coverage, including excess or umbrella coverage: (1) the name of the insurer; (2) the name of each insured; (3) the limits of liability coverage; (4) any policy or coverage defense the insurer reasonably believes is available to the insurer at the time the sworn statement is made; and (5) a copy of each policy under which the insurer provides coverage. An insurer that failed to comply with the request would be subject to an administrative penalty up to $500. An insured who received such a request had to: (a) disclose to the claimant the name of and type of coverage provided by each insurer that provides or may provide liability coverage for the claim; and (b) forward the claimant's request to each insurer included in the disclosure.

[59] Tex. H.B. 1320, 88th Leg., R.S. (2023).
[60] Tex. H.B. 3391, 88th Leg., R.S. (2023).

[**Note:** HB 3391 is identical to bills previously filed in 2019 and 2021, but died in committee.]

- Status: Referred to Insurance on March 15, 2023.

K. Judiciary

Although the judiciary bills listed below failed to pass, the text of some of the proposals were added to other bills that did pass and become law. All such bills are noted with a double asterisk (**).

SB 802 – Annual Base Salary of a District Judge [61] ***(Similar Bill: HB 2779*** [62]***)***

- **Summary:** SB 802, filed by Sen. Bryan Hughes (R – Mineola), would increase the annual base salary of a district judge from $140,000 to $172,494, which would also result in annual base salary increases for all appellate court judges and justices.

  [**Note:** Rep. Jeff Leach (R – Allen) has filed a similar (but not identical) bill, HB 2779. The original version of HB 2779 included the same pay increase as proposed by SB 802, but would delink legislative retirement from a district judge's salary].

- Bill Analysis for HB 2779: House Research Organization

- Fiscal Note for HB 2779: Legislative Budget Board

- Status of SB 802: Referred to Finance on March 1, 2023.

- Status of HB 2779: On March 29, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony on HB 2779 begins around the 2:20 mark. Witnesses who registered a position or testified for, on, or against the bill are listed here (page 24). On April 20, HB 2779 (as amended) was unanimously voted out of committee. On May 9, the House passed the bill (as amended). The bill was forwarded to the Senate and referred to the Senate Finance committee.

  On May 18, Senate Finance conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony on HB 2779 begins around the 32:10 mark. Witnesses who registered a position or testified for, on, or against the bill are listed here. The bill was subsequently voted out of committee as amended. The committee substitute removed the across-the-board pay raise language and created a third tier of compensation for judges who have served for more than 12 years.

[61] Tex. S.B. 802, 88th Leg., R.S. (2023).
[62] Tex. H.B. 2779, 88th Leg., R.S. (2023).

SB 900 – Reimbursement of Certain Expenses of Appellate Court Justices and Judges [63] **

- **Summary:** SB 900, filed by Sen. Bryan Hughes (R – Mineola), would amend the Government Code and permit an appellate justice or judge engaged in the discharge of official duties in a county other than the justice's or judge's county of residence to be reimbursed for traveling and other expenses. SB 900 would also permit appellate justices and judges to receive from the state the actual and necessary postage, telegraph, and telephone expenses incurred in the discharge of official duties.

- Status: Referred to Jurisprudence on March 1, 2023. Although SB 900 did not advance, the text of the bill was added to the omnibus courts bill discussed above (HB 3474). **

SB 930 – Prohibition of Per Curiam Opinions [64] *(Joint Resolution: **SJR 54*** [65]*)*

- **Summary:** SB 930, filed by Sen. Mayes Middleton (R – Galveston), would amend the Government Code to prohibit per curiam opinions on the basis that the authorship of court opinions is public information. Sen. Middleton has also filed SJR 54, which proposes a constitutional amendment that prohibits per curiam opinions.

- Bill Analysis for SB 930: Senate Research Center

- Fiscal Note for SB 930: Legislative Budget Board

- Bill Analysis for SJR 54: Senate Research Center

- Fiscal Note for SJR 54: Legislative Budget Board

- Status of SB 930: On March 9, State Affairs conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony begins around the 48:50 mark. No witnesses registered a position or testified in favor of, on, or against SB 930. On March 27, by an 8-1 vote, the bill was voted out of committee, as amended (to remove a reporting requirement). On April 13, by a 25-5 vote, the Senate passed SB 930 (as amended). SB 930 was forwarded to the House and referred to Judiciary & Civil Jurisprudence on April 24. On May 17, the committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony begins around the 16:10 mark. SB 930 was subsequently voted out of committee without amendments, but never received a full Senate vote. **

- Status of SJR 54: On March 9, State Affairs conducted a hearing on the resolution: Notice. Those who are interested can watch the proceedings here. Testimony

[63] Tex. S.B. 900, 88th Leg., R.S. (2023).
[64] Tex. S.B. 930, 88th Leg., R.S. (2023).
[65] Tex. S.J.R. 54, 88th Leg., R.S. (2023).

begins around the 1:11:00 mark. No witnesses registered a position or testified in favor of, on, or against SJR 54. On March 27, by an 8-1 vote, the resolution was voted out of committee.

SB 1092 – Jurisdiction of the Texas Supreme Court and Court of Criminal Appeals [66] ***(Companion: HB 4178*** [67]***)***

- **Summary:** SB 1092, filed by Sen. Tan Parker (R – Flower Mound), would amend the Government Code to grant the Texas Supreme Court jurisdiction to correct any error in a Court of Criminal Appeals (CCA) decision in which the CCA finds that a statute, rule, or procedure is unconstitutional. More specifically, SB 1092 provides that, on a petition of the attorney general or a district or county attorney, the Supreme Court would have original civil jurisdiction to issue writs of quo warranto and mandamus to correct any error in the court of criminal appeals' decision. The jurisdiction granted by SB 1092 would apply regardless of whether the CCA decision is (1) based on the state constitution, federal constitution, or both; (2) characterized as criminal or civil; or (3) characterized as final or non-final.

  Under SB 1092, a decision by the CCA that a statute, rule, or procedure violates the state or federal constitution would not be final and would not be effective until the later of: (1) the 60th day after the date of the decision; or (2) the denial or dismissal of a petition filed in the Supreme Court.

  [**Note:** Rep. Mike Schofield (R – Katy) filed the House companion.]

- Bill Analysis for SB 1092: Senate Research Center

- Fiscal Note for SB 1092: Legislative Budget Board

- Status of SB 1092: On March 23, State Affairs conducted a hearing on the bill: Notice. Those who are interested in watching the proceedings can do so here. Testimony on SB 1092 begins around the 17:45 mark. Witnesses who registered a position or testified on, for, or against the bill are listed here (page 27). On March 27, by a 7-2 vote, the bill was voted out of committee without amendments.

- Status of HB 4178: Referred to Judiciary & Civil Jurisprudence on March 21, 2023.

SB 1196 – Jurisdiction of the Texas Supreme Court and Court of Criminal Appeals [68] ***(Companion: HB 2930*** [69]***)***

- **Summary:** SB 1196, filed by Sen. Bryan Hughes (R – Mineola), would amend the Code of Criminal Procedure to provide that the Texas Supreme Court has

[66] Tex. S.B. 1092, 88th Leg., R.S. (2023).
[67] Tex. H.B. 4178, 88th Leg., R.S. (2023).
[68] Tex. S.B. 1196, 88th Leg., R.S. (2023).
[69] Tex. H.B. 2930, 88th Leg., R.S. (2023).

jurisdiction to resolve any conflicts between the Supreme Court and the CCA regarding the interpretation of a provision of the Texas Constitution on: (1) submission of a writ of certiorari to the Supreme Court by a party to any proceeding in any Texas court; or (2) certification of a question of law from any federal court.

[**Note:** Rep. David Spiller (R – Jacksboro) filed the House companion. Sen. Brandon Creighton (R – Conroe) filed a duplicate bill (SB 2392).]

- Fiscal Note for HB 2930: Legislative Budget Board
- Status of SB 1196: Referred to State Affairs on March 9, 2023.
- Status of HB 2930: On March 29, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings: here. Testimony on HB 2930 begins around the 4:00:45 mark. Witnesses who registered a position or testified for, on, or against the bill are listed here (page 26). The bill was left pending.

SB 2299 – Identification of Constitutional or Statutory Provisions Invalidated or Limited by a State Appellate Court [70]

- **Summary:** SB 229, filed by Sen. Judith Zaffirini (D – Laredo), would amend the Government Code to require an appellate court, including the Supreme Court and CCA, to report any decision to OCA if such a decision (1) concludes that a Texas constitutional provision or statute conflicts wholly or partly with federal law; (2) concludes that a Texas statute conflicts wholly or partly with the Texas Constitution; (3) uses the statutory construction aids identified in the Code Construction Act because a statute is either facially ambiguous, or ambiguous as applied to the facts of the case; or (4) concludes that two or more Texas statutes or two or more amendments to the same statute are irreconcilable. Such reports would have to be sent to OCA within 30 days of issuing the decision.

  Also under SB 2299, no later than September 1 of each year, OCA would be required to prepare and submit to the governor, the lieutenant governor, the speaker of the House, and the Legislature an electronic report describing information received by OCA for the period beginning July 1 of the previous year and ending June 30 of the year in which the report is issued. The report must provide the following in a searchable and sortable format: (1) for each appellate court decision reported, information specifying: the caption; case number; the court that issued the decision; and the current status of the case; (2) a citation to each constitutional provision or statute impacted by the decision to which the paragraph above applies with an indication of which subdivision applies; (3) for a Texas constitutional provision or statute to which the section above applies, identification of each federal law that the appellate court determines is in conflict with the constitutional provision or statute; (4) for a statute to which the subsection above applies, identification of each provision of the Texas Constitution that the appellate court determines is in conflict with the statute; and (5) for each constitutional

[70] Tex. S.B. 2299, 88th Leg., R.S. (2023).

provision or statute listed in the report that became law during the 40-year period before the date of the report, identification of the applicable legislative session; resolution or bill number; author; and sponsor.

SB 2299 would also require OCA to publish its reports on the OCA website.

- Status: Referred to State Affairs on March 22, 2023.

HB 437 – Annual Base Salaries of State Judges and Justices [71]

- **Summary:** HB 437, filed by Rep. Mike Schofield (R – Katy), would amend the Government Code to provide for a cost-of-living adjustment for judicial salaries based on changes in the Consumer Price Index. HB 437 would also abolish the Judicial Compensation Commission.

  Rep. Schofield also filed a similar bill (HB 438) that would accomplish the same result using a different formula.

  [**Note:** Rep. Schofield filed similar bills in 2021 (HB 1876 and HB 1880), but they died in committee.]

- Bill Analysis for HB 438: House Research Organization

- Fiscal Note for HB 438: Legislative Budget Board

- Status of HB 437: Referred to Judiciary & Civil Jurisprudence on February 23, 2023.

- Status of HB 438: On March 29, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings: here. Testimony on HB 438 begins around the 33:55 mark. Witnesses who registered a position or testified for, on, or against the bill are listed here (page 1). On April 3, HB 438 was unanimously voted out of committee without amendments. By a 134-10 vote, the House passed the bill on May 2. HB 438 was forwarded to the Senate and referred to Finance on May 4.

HB 525 – Delivery of Court Orders Through Electronic Filing System [72] **

- **Summary**: HB 525, filed by Rep. Cody Vasut (R – Angleton), would amend the Government Code to require a statutory county court, district court, or appellate court to deliver, via the electronic filing system, all court orders to all parties in each case in which the use of the electronic filing system is required or authorized.

- Bill Analysis: House Research Organization

[71] Tex. H.B. 437, 88th Leg., R.S. (2023).
[72] Tex. H.B. 525, 88th Leg., R.S. (2023).

- Fiscal Note: Legislative Budget Board

- Status: On April 5, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony on the bill begins around the 3:09:50 mark. Witnesses who registered a position or testified in favor of, on, or against HB 525 are listed here: Witness List (page 1). On April 17, the bill was unanimously voted out of committee without amendments. On May 6, by a vote of 132-2, the House passed HB 525, as amended on the floor. The floor amendment added the option of delivering the orders in person to each individual entitled to service. HB 525 was forwarded to the Senate and referred to Jurisprudence on May 9.

  Although HB 525 did not advance in the Senate, the text of the bill was added to the omnibus courts bill discussed above (HB 3474). **

HB 556 – Sealing of Documents Containing Trade Secrets [73]

- **Summary:** HB 556, filed by Rep. Cody Vasut (R – Angleton), would amend the Government Code to require the Texas Supreme Court to adopt rules allowing for documents alleged to contain trade secrets to be filed under seal. The rules must: (1) require the document to be accompanied by an affidavit that describes the document and the basis for claiming a trade secret privilege; (2) provide that the affidavit is open to public inspection; (3) allow any person to move to unseal the document; and (4) provide for the unsealing of the document or a portion of the document only on: (a) a sufficient showing by the moving party of a specific, serious, and substantial interest that clearly outweighs a presumption in favor of preserving the secrecy of trade secrets; or (b) a determination by the court that the document or the portion of the document does not contain a trade secret.

- Status: Referred to Judiciary & Civil Jurisprudence on February 23, 2023.

HB 2014 – Reimbursement for Jury Service [74] **

- **Summary:** HB 2014, filed by Rep. Jeff Leach (R – Allen), would amend section 61.001(a) of the Government Code to raise juror reimbursement from $6 to $20 for the first day and from $40 to $58 for each day thereafter.

- Bill Analysis: House Research Organization

- Fiscal Note: Legislative Budget Board

- Status: On March 15, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony begins around the 5:06:30 mark. Witnesses who registered a position or testified on, for, or against the bill are listed here. On March 22, HB

[73] Tex. H.B. 556, 88th Leg., R.S. (2023).
[74] Tex. H.B. 2014, 88th Leg., R.S. (2023).

2014 was voted out of committee without amendments. The House unanimously passed the bill on April 27. HB 2014 was forwarded to the Senate and referred to Jurisprudence on May 4.

Although HB 2014 did not advance in the Senate, the text of the bill was added to the omnibus courts bill discussed above (HB 3474). **

HB 2139 – Construction of Code, Laws, and Statutes [75]

- **Summary:** HB 2139, filed by Rep. Dustin Burrows (R – Lubbock), would amend Chapter 311 of the Texas Government (Code Construction Act) and require courts, when interpreting a statute, to enforce the statutory text as written and in accordance with the meaning that the words of the statute would have to "an ordinary speaker of the English language" (i.e., prohibits "intentionalism"). HB 2139 would also provide that "severability" applies down to every word, phrase, clause, or sentence in a statute.

  Further, HB 2139 attempts to limit judicial interpretations of the constitutionality of the statute to the parties in the specific case.

  HB 2139 would also make the same changes to Chapter 312 of the Government Code (construction of statutes) and prohibit courts from referring to legislative intent.

- Bill Analysis: House Research Organization

- Fiscal Note: Legislative Budget Board

- Status: On March 22, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony begins around the 5:00:25 mark. Witnesses who registered a position or who testified on, for, or against the bill are listed here. On April 5, by a vote of 7-1, HB 2139 (as amended) was voted out of committee.

HB 2383 – Court Deposition and Transcription Services [76]

- **Summary:** HB 2383, filed by Rep. Jeff Leach (R – Allen), would amend the Texas Government Code, to permit (1) the judges of two or more courts of record that are not located in the same judicial district to agree to jointly appoint an official court reporter to serve the courts; (2) the judges to appoint a certified shorthand reporter and permit the reporter to serve more than one court and serve remotely; (3) a deputy court reporter to serve remotely; and (4) a certified shorthand reporter to administer oaths to witnesses without being at the same location as the witnesses.

[75] Tex. H.B. 2139, 88th Leg., R.S. (2023).
[76] Tex. H.B. 2383, 88th Leg., R.S. (2023).

HB 2383 would also require an **uncertified** court reporter to engage in reporting to report an oral deposition only if the reporter delivers the required affidavit *before* the deposition begins (under current law, affidavit must be provided to those "present at" the deposition) and requires the reporter to file the affidavit with the court. The court reporter will be subject to civil penalty for any failure to comply.

HB 2383 also seeks to modify section 20.001 (b)-(d) of the CPRC to address those who may take depositions upon written questions of those who either reside outside the state of Texas or are members of (or civilians employed by) the armed forces.

- Fiscal Note: Legislative Budget Board

- Status: On March 29, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings: here. Testimony on HB 2383 begins around the 4:33:15 mark. Witnesses who registered a position or testified for, on, or against the bill are listed here (page 22). On April 3, HB 2383 (as amended) was unanimously voted out of committee.

HB 2431 – Preparation of Appellate Records in Civil Cases [77] **

- **Summary:** HB 2431, as originally filed by Rep. Julie Johnson (D – Farmers Branch), would amend the CPRC and Code of Criminal Procedure to permit appealing parties to file an appendix in lieu of a clerk's record. More specifically, under HB 2431, a party would be required to notify the court of appeals within ten (10) days of filing a notice of appeal that the party will file an appendix that replaces the clerk's record. The appealing party would then be required to file the appendix with its appellate brief. Except in an expedited proceeding or by court order, the brief and appendix would be due no later than the 30th day after the later of (1) the date notice of intent to use the appendix was provided, or (2) the date a reporter's record is filed with the court of appeals.

  However, the version of the bill adopted by the House Judiciary & Civil Jurisprudence committee applied only to civil cases, so the provisions dealing with criminal proceedings no longer apply. It would also require the appealing parties to notify both the trial court and the court of appeals during the allotted time frame.

  An appendix filed under HB 2431 must contain a file-stamped copy of each document required by Rule 34.5 of the Texas Rules of Appellate Procedure and any other item the party intends to reference in the party's brief. The appendix could not contain a document that has not been filed with the trial court except by agreement of the parties to the appeal.

  An appendix filed according to the process under HB 2431 would become part of the appellate record. The court clerk would not prepare or file a clerk's record or assess a fee for preparing a clerk's record if a party files an appendix.

[77] Tex. H.B. 2431, 88th Leg., R.S. (2023).

- Bill Analysis: House Research Organization

- Fiscal Note: Legislative Budget Board

- Status: On March 22, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony begins around the 6:12:30 mark. Witnesses who registered a position or testified on, for, or against the bill are listed here (page 10). On March 27, the bill (as amended) was unanimously voted out of committee.

  Although HB 2431 did not advance to the full House, the text of the bill was added to the omnibus courts bill discussed above (HB 3474).**

HB 3952 – Jurisdiction of Courts in Forcible Entry and Detainer and Forcible Detainer Cases [78]

- **Summary:** HB 3952, filed by Rep. Mike Schofield (R – Katy), would give statutory county courts concurrent jurisdiction with justice courts in forcible entry and detainer and forcible detainer suits.

- Bill Analysis: House Research Organization

- Fiscal Note: Legislative Budget Board

- Status: On March 29, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings: here. Testimony on HB 3952 begins around the 5:56:25 mark. Witnesses who registered a position or testified for, on, or against the bill are listed here (page 30). On April 5, by a 5-3 vote, the bill (as amended) was voted out of committee.

HJR 39 – Proposing a Constitutional Amendment to Repeal the Mandatory Retirement Age for Judges and Justices [79]

- **Summary:** HJR 39, filed by filed by Rep. Cody Vasut (R – Angleton), seeks to amend Art. V, § 1-a(1) of the Texas Constitution and repeal the mandatory retirement age for judges.

  [**Note:** Rep. Vasut filed a similar resolution (HJR 66) in 2021. The resolution was referred to committee, but was never scheduled for hearing.]

- Fiscal Note: Legislative Budget Board

- Status: On March 22, the Judiciary & Civil Jurisprudence committee conducted a hearing on the resolution: Notice. Those who are interested can watch the proceedings here. Testimony about the resolution begins around the 6:14:50 mark.

[78] Tex. H.B. 3952, 88th Leg., R.S. (2023).
[79] Tex. H.J.R. 39, 88th Leg., R.S. (2023).

Witnesses who registered a position or testified for, on, or against the bill are listed here (page 12). The resolution was left pending.

L. Nuisance

HB 1372 – Tort of Public Nuisance [80] ***(Similar Bill: SB 1034*** [81]***)***

- **Summary:** HB 1372, filed by Cody Harris (R – Palestine) and amended in committee, would add Chapter 100C to the CPRC and limit the cause of action for public nuisance. More specifically, HB 1372 would exclude the following claims, actions, or conditions from giving rise to a public nuisance cause of action: (1) an action or condition authorized, licensed, approved, or mandated by a statute, ordinance, regulation, permit, order, rule, or other measure issued, adopted, promulgated, or approved by the federal government, a federal agency, this state or an agency, or a political subdivision of this state; (2) an action or condition that occurs or exists in a context where a statutory cause of action or administrative enforcement mechanism already exists to address conduct that is injurious to the public; or (3) a product or the manufacturing, distribution, selling, labeling, or marketing of a product, regardless of whether the product is defective.

  [**Note:** Sen. Mayes Middleton (R – Galveston) has filed a similar bill (SB 1034).]

- Bill Analysis for HB 1372: House Research Organization

- Fiscal Note for HB 1372: Legislative Budget Board

- Bill Analysis for SB 1034: Senate Research Center

- Fiscal Note for SB 1034: Legislative Budget Board

- Status of HB 1372: On March 15, the Judiciary & Civil Jurisprudence committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony begins around the 1:01:19 mark. Witnesses who registered a position or testified for, on, or against the bill are listed here. On March 27, by a 5-4 vote, HB 1372 (as amended) was voted out of committee.

- Status of SB 1034: On April 13, the State Affairs committee conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here: Part 1 and Part 2. In Part 1, testimony on SB 1034 begins around the 15:30 mark. Part 2 begins with additional testimony on the bill. Witnesses who registered a position or testified for, on, or against the bill are listed here. SB 1034 was left pending.

[80] Tex. H.B. 1372, 88th Leg., R.S. (2023).
[81] Tex. S.B. 1034, 88th Leg., R.S. (2023).

M. Qualified Immunity

SB 575 – Creation of Cause of Action for Deprivation of Rights and Waiver of Immunity [82]

- **Summary:** SB 575, filed by Sen. Roland Gutierrez (D – San Antonio), would add Chapter 106A to the CPRC and create a cause of action by an injured person against a local government peace officer if the officer subjects or causes to be subjected, including a failure to intervene, the person to a deprivation of individual rights that create binding obligations on government actors. The peace officer would be liable to the injured party for legal or equitable relief as permitted by law.

  Under SB 575, a court would be authorized to award reasonable attorney fees and costs to a prevailing plaintiff. For purposes of injunctive relief, a plaintiff would be deemed to have prevailed if the plaintiff's suit was a substantial factor or significant catalyst in obtaining the results sought by the litigation. If a judgment is entered in favor of defendant, a court would have discretion to award reasonable costs and attorney fees to the defendant for defending any claims the court finds to be frivolous.

  SB 575 would require the local government employer to indemnify a peace officer for any liability incurred or any judgment or settlement entered against the peace officer; except that, if the peace officer's employer determines that the officer did not act upon a good faith and reasonable belief that the action was lawful, then the peace officer is personally liable and shall not be indemnified by the employer for five percent of the judgment or settlement or twenty-five thousand dollars, whichever is less.

  An employer would not be required to indemnify the peace officer if the officer was convicted of a criminal violation. Qualified immunity would not be a defense to liability.

- Status: Referred to State Affairs on February 17, 2023.

N. Texas Citizens Participation Act

SB 896 – Automatic Stay of Proceedings During Interlocutory Appeals of TCPA Motions to Dismiss [83] ***(Companion: HB 2781*** [84]***)***

- **Summary:** SB 896, filed by Sen. Bryan Hughes (R – Mineola), would amend section 51.014 of the CPRC to provide that the denial of a motion to dismiss under the TCPA is not subject to the automatic stay if the order denying the motion states that the motion was: (1) denied as not timely filed under section 27.003(b); (2) determined to be frivolous or solely intended to delay under section 27.009(b); or (3) denied because the action is exempt under section 27.010(a).

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[82] Tex. S.B. 575, 88th Leg., R.S. (2023).
[83] Tex. S.B. 896, 88th Leg., R.S. (2023).
[84] Tex. H.B. 2781, 88th Leg., R.S. (2023).

[**Note:** Rep. Jeff Leach (R – Allen) filed the House companion bill (HB 2781).]

- Bill Analysis for SB 896: Senate Research Center
- Fiscal Note for SB 896: Legislative Budget Board
- Status of SB 896: On March 9, State Affairs conducted a hearing on the bill: Notice. Those who are interested can watch the proceedings here. Testimony begins around the 1:25:50 mark. Witnesses who registered a position or testified for, against, or on the bill are listed here. The bill was subsequently unanimously voted out of committee. On March 21, the Senate unanimously passed SB 896 and forwarded it to the House. On April 10, the bill was referred to the House Judiciary & Civil Jurisprudence committee. The committee conducted a hearing on April 26: Notice. Those who are interested can watch the proceedings here (Part 1 – testimony begins around the 1:06:00 mark) and here (Part 2 – testimony begins around the 17:30 mark). On May 3, by a 6-3 vote, the committee voted SB 896 (as amended) out of committee.
- Status of HB 2781: Referred to Judiciary & Civil Jurisprudence on March 13, 2023.

O. Texas Deceptive Trade Practices Act

HB 515 – Relating to the Diagnosis, Maintenance, and Repair of Electronics-Enabled Heavy Equipment [85]

- **Summary:** HB 515, filed by Rep. Terry Meza (D – Irving), would add Chapter 121 to the Texas Business & Commerce Code and require an original manufacturer of electronics-enabled heavy equipment (including parts for the equipment) sold or used in Texas to make available on fair and reasonable terms to any independent repair provider or owner of such equipment: (1) documentation, replacement parts, and tools; and (2) documentation, replacement part, or tool necessary to disable and reset a lock when disabled in the course of diagnosis, maintenance, or repair of the equipment.

  HB 515 would also prohibit an agreement between an authorized repair provider and original equipment manufacturer that waives or otherwise limits the original manufacturer's obligation under the Chapter 121. Further, HB 515 would make it a violation of the new Chapter 121 a deceptive trade practice under the Texas Deceptive Trade Practices Act.
- Status: Referred to Business & Industry on February 23, 2023.

[85] Tex. H.B. 515, 88th Leg., R.S. (2023).

P. Texas Sovereignty Act

HB 384 – Texas Sovereignty Act [86] ***(Companion: SB 313*** [87]***)***

- **Summary:** HB 384, filed by Rep. Cecil Bell (R – Magnolia), would amend the Government Code and do the following:

  - Establish a 12-member Joint Legislative Committee in Constitutional Enforcement as a permanent joint committee of the Texas Legislature to review specified federal actions that challenge the state's sovereignty and that of the people for the purpose of determining if the federal action is unconstitutional. The bill would authorize the committee to review any applicable federal action to determine whether the action is an unconstitutional federal action and establish the factors the committee is required to consider when reviewing a federal action. The bill would require the committee, no later than the 180th day after the date the committee holds its first public hearing to review a specific federal action, to vote to determine whether the action is an unconstitutional federal action and authorize the committee to make such a determination by majority vote.

  - Require the Speaker of the House and the Lieutenant Governor to appoint the initial committee members no later than the 30th day following the bill's effective date and would require the Secretary of State, no later than the 30th day following the bill's effective date, to forward official copies of the bill to the President of the United States, the Speaker of the U.S. House of Representatives, the President of the U.S. Senate, and to all members of the Texas congressional delegation with the request that the bill be officially entered in the Congressional Record. The bill would require the Speaker and the Lieutenant Governor to forward official copies of the bill to the presiding officers of the legislatures of the several states no later than the 45th day following the bill's effective date.

  - Require the committee to report its determination that a federal action is an unconstitutional federal action to the Texas House of Representatives and to the Texas Senate during the current legislative session if the legislature is convened when the committee makes the determination, or the next regular or special legislative session if the legislature is not convened when the committee makes the determination. The bill would require each house of the legislature to vote on whether the federal action is an unconstitutional federal action and, if a majority of the members of each house determine that the federal action is an unconstitutional federal action, would require the determination to be sent to the Governor for approval or disapproval as provided by the Texas Constitution regarding the approval or disapproval of bills. The bill would establish that a federal action is declared by the state to be an unconstitutional federal action on the day the Governor approves the vote of the legislature making the determination or on the day the determination would become law if presented to the Governor as a bill and not objected to by the Governor. The bill would also require the Secretary of State to forward

[86] Tex. H.B. 384, 88th Leg., R.S. (2023).
[87] Tex. S.B. 313, 88th Leg., R.S. (2023).

official copies of the declaration to the President of the United States, the Speaker of the U.S. House of Representatives, the President of the U.S. Senate, and to all members of the Texas congressional delegation with the request that the declaration of unconstitutional federal action be entered in the Congressional Record.

- Establish that a federal action declared to be an unconstitutional federal action under the bill's provisions regarding such a legislative determination has no legal effect in Texas and prohibit such an action from being recognized by the state or a political subdivision of the state as having legal effect. The bill's provisions regarding the enforcement of the United States Constitution expressly do not prohibit a public officer who has taken an oath to defend the United States Constitution from interposing to stop acts of the federal government which, in the officer's best understanding and judgment, violate the United States Constitution.

- Authorize the Texas Attorney General to defend the state to prevent the implementation and enforcement of a federal action declared to be an unconstitutional federal action. The bill would authorize the Attorney General to prosecute a person who attempts to implement or enforce a federal action declared to be an unconstitutional federal action and to appear before a grand jury in connection with such an offense.

- Amend the CPRC to establish that any court in Texas has original jurisdiction of a proceeding seeking a declaratory judgment that a federal action effective in Texas is an unconstitutional federal action. The bill would entitle a person to declaratory relief if the court determines that a federal action is an unconstitutional federal action and would prohibit the court, in determining whether to grant declaratory relief to the person, from relying solely on the decisions of other courts interpreting the United States Constitution. The bill would also require the court to rely on the plain meaning of the text of the United States Constitution and any applicable constitutional doctrine as understood by the framers of the Constitution.

[**Note:** Sen. Bob Hall (R – Edgewood) filed the Senate companion (SB 313). Similar bills were filed in 2017, 2019, and 2021. In 2017, HB 2338 was voted out of committee, but it never reached the House floor. HB 1347 and HB 1215 were filed in 2019 and 2021 respectively. Both died in committee.]

- Status of SB 313: Referred to State Affairs on February 15, 2023.

- Status of HB 384: Referred to State Affairs on February 23, 2023.

Q. Texas Tort Claims Act

HB 1309 – Suits Against Certain Governmental Employees [88]

- **Summary:** HB 1309, filed by Rep. Harold Dutton (D – Houston), would amend section 101.106 of the CPRC to allow a plaintiff to sue a governmental employee for assault, battery, false imprisonment, or any other intentional tort, including a tort involving disciplinary action by school authorities.

- Status: Referred to Judiciary & Civil Jurisprudence on March 3, 2023.

IV. NOTE

As a service to interested members of the bench and bar, Jerry Bullard produces an e-newsletter that includes summarized information and links to relevant bills in order to keep recipients up to date on what is happening in Austin and how proposed legislation might affect the practice of civil trial and appellate lawyers and the judiciary. For those interested in receiving the e-newsletter, please contact Jerry Bullard at either of the following addresses: jdb@all-lawfirm.com or j.bullard1@verizon.net.

[88] Tex. H.B. 1309, 88th Leg., R.S. (2023).

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Appellate Section, State Bar of Texas
Volume 33 – No. 1, Winter, 2023

U.S. SUPREME COURT UPDATE

MAHOGANE REED, *Washington, D.C.*
U.S. Department of Justice

Mahogane D. Reed
Attorney, U.S. Department of Justice
Criminal Division, Appellate Section

Mahogane Reed is an attorney in the Appellate Section of the Department of Justice's Criminal Division, where she litigates criminal cases in federal circuit courts and the U.S. Supreme Court. She was previously the John Payton Appellate and Supreme Court Advocacy Fellow at the NAACP Legal Defense & Educational Fund, Inc., and an attorney at Susman Godfrey L.L.P. in Houston, Texas. Mahogane currently teaches an advanced legal writing course at Georgetown University Law Center.

Mahogane Reed previously served as a law clerk for Judge Carl E. Stewart on the U.S. Court of Appeals for the Fifth Circuit, and Judge Brian A. Jackson on the U.S. District Court for the Middle District of Louisiana. She received her J.D. and D.C.L., *magna cum laude*, from the Paul M. Hebert Law Center at Louisiana State University, where she was an Articles Editor for the *Louisiana Law Review* and a member of the Moot Court Board. She also received her undergraduate degree from L.S.U.

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U.S. SUPREME COURT UPDATE

This paper reviews six Supreme Court cases from the October 2022 Term of general interest to civil attorneys who practice in the U.S. Court of Appeals for the Fifth Circuit.

1. *HELIX ENERGY SOLUTIONS GRP. V. HEWITT*, NO. 21-984 (FEB. 22, 2023):

Respondent Michael Hewitt, an offshore oil rig worker who averaged 84 hours per week and earned $946 per day of work, sued his employer, Helix Energy Solutions Group, seeking overtime pay under the Fair Labor Standards Act of 1938, which guarantees overtime pay to covered employees who work more than 40 hours a week. Helix asserted that Hewitt was exempt from the FLSA because he qualified as "a bona fide executive"; Hewitt's designation as a bona fide executive, however, turned on whether he was paid a salary. Under the Department of Labor's regulations, an employee is paid on a "salary basis" when that employee receives "a predetermined and fixed salary that does not vary with the amount of time worked." The district court held that Hewitt was compensated on a salary basis and granted the company summary judgment. The Fifth Circuit reached the opposite conclusion and reversed. A 6-3 majority affirmed, holding that the regulatory definition of "salary basis" did not fit "a daily-rate worker" like Hewitt, "who by definition is paid for each day he works and no others."

2. *DUPREE V. YOUNGER*, NO. 22-210 (MAY 25, 2023):

In 2013, three prison guards severely beat Kevin Younger while he was in pre-trial detention at a state prison in Baltimore, Maryland. Younger was left with permanent injuries to his face, wrist, ribs, hand, and leg. The three prison guards who were directly responsible for the attack were convicted of assault. Younger also sued Neil Dupree, a lieutenant in the prison, alleging that he had ordered the attack. Dupree filed a motion for summary judgment, contending that Younger failed to exhaust his administrative remedies before filing his lawsuit. The district court denied Dupree's motion on the merits, holding that because the state prison system had conducted an internal investigation of the assault, Younger exhausted his administrative remedies. At trial, Dupree did not present evidence relating to his exhaustion defense, and the jury found Dupree liable and awarded Younger $700,000 in damages. Dupree did not file a post-trial motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b). Dupree appealed, arguing that the district court erred in rejecting his exhaustion argument. The court of appeals dismissed Dupree's appeal, relying on circuit precedent which held that a claim or defense that was rejected at summary judgment can only be raised on appeal if it was renewed in a post-trial motion, which Dupree had not done. The Supreme Court granted certiorari and, in a unanimous opinion, held for Dupree, concluding that Dupree was not required to file a post-trial motion under Rule 50 to preserve for appellate review the purely legal exhaustion question that the district court resolved at summary judgment. The Court explained that unlike factual findings, "a district court's purely legal conclusions at summary judgment are not 'supersede[d]' by later developments in the litigation." "The reviewing court does not benefit from having a district court reexamine a purely legal pretrial ruling after trial, because nothing at trial will have given the district court any reason to question its prior analysis."

3. *COINBASE V. BIELSKI*, NO. 22-105 (JUNE 23, 2023):

Abraham Bielski filed a putative class action on behalf of Coinbase users alleging that Coinbase failed to replace funds fraudulently taken from the users' account. Coinbase filed a motion to compel arbitration under its User Agreement, which provided for dispute resolution through binding arbitration. The district court denied the motion, and Coinbase filed an interlocutory appeal under the Federal Arbitration Act, 9 U.S.C. § 16(a), which authorizes an interlocutory appeal from the denial of a motion to compel arbitration. Coinbase also asked the district court to stay its proceedings pending resolution of the interlocutory appeal. The district court denied Coinbase's stay motion. The Ninth Circuit likewise declined to stay the district court's proceedings pending appeal. In a 5-4 decision, the Court held that a district court must stay its proceedings while an interlocutory appeal on the question of arbitrability is ongoing. Although Section 16(a) doesn't say whether district court proceedings must be stayed pending resolution of an interlocutory appeal, the majority concluded that Congress enacted the provision against the "clear background principle" that "an appeal, including an interlocutory appeal, divests the district court of its control over those aspects of the case involved in the appeal." That principle, the majority concluded, resolves this case.

4. *MALLORY V. NORFOLK SOUTHERN RAILWAY CO.*, NO. 21-1168 (JUNE 27, 2023):

Robert Mallory worked for Norfolk Southern as a freight-car mechanic for nearly 20 years, first in Ohio, then in Virginia. After he left the company, Mallory moved to Pennsylvania before returning to Virginia. Along the way he was diagnosed with cancer, which he attributed to his work at Norfolk Southern. Mallory sued his former employer under the Federal Employers' Liability Act in Pennsylvania state court, alleging that he was exposed to carcinogens in Ohio and Pennsylvania. Norfolk Southern is incorporated in

Virginia and maintains its headquarters there, but registered to business in the Commonwealth, thereby consenting to appear in the Commonwealth's courts on "any cause of action" against it. Even so, Norfolk Southern argued that a Pennsylvania court's exercise of personal jurisdiction over it would offend the Fourteenth Amendment's Due Process Clause. The Pennsylvania Supreme Court sided with Norfolk Southern, concluding that requiring an out-of-state business to consent to suit in exchange for status as a registered business violated the Due Process Clause. In a splintered opinion, the Supreme Court concluded that the Due Process Clause does not prohibit a state from requiring an out-of-state corporation to consent to personal jurisdiction to do business there. The majority held that this case was squarely controlled by the Court's 1917 decision in *Pennsylvania Fire Insurance Co. of Phildelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, in which the Court upheld a similar Missouri law. The Court held that its decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), did not undermine *Pennsylvania Fire*; "[t]he two precedents sit comfortably side by side." *International Shoe* did not rule out all other bases for personal jurisdiction, but instead "stake[d] out an additional road to jurisdiction over out-of-state corporations."

5. *GROFF V. DEJOY*, NO. 22-174 (JUNE 29, 2023):

Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e(j), bars employers from discriminating against workers for practicing their religion unless the employer can show that the worker's religious practice cannot "reasonably" be accommodated without "undue hardship." The question in this case was what constitutes an "undue hardship." Petitioner Gerald Groff, an evangelical Christian who believes that Sundays should be reserved for rest and worship, began working for the U.S. Postal Service in 2012, but he was disciplined after he refused to go to work on Sundays, and he resigned in 2019. Groff sued under Title VII, asserting that the Postal Service could have accommodated his Sunday Sabbath practice without undue hardship on the Postal Service's business. The district court granted summary judgment to the Postal Service. The Third Circuit affirmed based on the Supreme Court's decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), which it construed to mean "that requiring an employer 'to bear more than a de minimis cost' to provide a religious accommodation is an undue hardship." In a unanimous opinion, the Court rejected the "de minimis" test and held that Title VII requires an employer that denies a religious accommodation to show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its business.

6. *303 CREATIVE LLC, ET AL. V. ELENIS, ET AL.*, NO. 21-476 (JUNE 30, 2023):

Petitioner Lorie Smith wanted to expand her graphic design business, 303 Creative LLC, to include services for couples seeking wedding websites. But she was worried that under Colorado's Anti-Discrimination Act, she would be required to create websites celebrating marriages she does not endorse, including same-sex marriages. Smith filed a lawsuit seeking an injunction to prevent Colorado from enforcing CADA to compel her to create websites that go against her beliefs. The district court and the Tenth Circuit denied Smith's request for injunctive relief. In a 6-3 decision, the Supreme Court held that the First Amendment prohibits Colorado from forcing Smith to create expressive designs speaking messages with which she disagrees.

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SUPREME COURT OF TEXAS UPDATE
October 2022 through November 2023

HON. EVAN YOUNG, *Austin*
Justice, Supreme Court of Texas

Kelly Canavan, Staff Attorney

Martha Newton, Staff Attorney

Amy Starnes, Director of Public Affairs

Evan Young

Justice
Supreme Court of Texas

Justice Evan Young joined the Supreme Court of Texas in November 2021. Governor Greg Abbott appointed him to fill the seat vacated by Justice Eva Guzman.

Justice Young was an Air Force kid whose family settled in San Antonio when he was young. He graduated from Tom C. Clark High School and attended Duke University, where he was inducted into Phi Beta Kappa and graduated summa cum laude with a degree in History and minors in Japanese and Political Science. He won a British Marshall Scholarship and spent two years studying at Oxford University, where he earned a First Class Honours degree in Modern History in 2001. He graduated from Yale Law School in 2004.

After law school, he served as a law clerk first to Judge J. Harvie Wilkinson III on the U.S. Court of Appeals for the Fourth Circuit, and then to U.S. Supreme Court Justice Antonin Scalia. He then served as Counsel to the Attorney General at the U.S. Department of Justice. During his time at DOJ, he spent nearly a year in Iraq, where from 2007–2008 he was based at the U.S. Embassy in Baghdad and helped lead our government's Rule of Law mission. In that role, he worked with the Iraqi courts and prison system to enhance the Iraqi legal system's commitment to fair, prompt, and equal justice.

Following his federal service, Justice Young returned to Texas in 2009 and entered private practice. He focused on trial and appellate litigation and argued multiple cases in the U.S. Supreme Court, the Texas Supreme Court, and federal and state appellate and trial courts across the country. Justice Young has been an adjunct law professor at the University of Texas School of Law since 2015 and won the Professor of the Year Award from the student body in 2016. He is an elected member of the American Law Institute and has served as Chair of the State Bar of Texas Business Law Section, Chair of the National Center for Missing and Exploited Children's Texas Regional Office, and Trustee of the Texas Supreme Court Historical Society.

In 2015, the Texas Supreme Court appointed Justice Young to the Supreme Court Advisory Committee, which drafts the rules that govern proceedings in Texas courts. In 2017, Governor Abbott nominated him to serve as a member of the Texas Judicial Council, the policy-making body for the Texas judiciary. The Texas Senate confirmed his nomination, and Justice Young served as a member of the Judicial Council until his elevation to the bench.

Justice Young and his wife live in Austin with their active six-year-old daughter.

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I. SCOPE OF THIS PAPER

This paper surveys cases that the Supreme Court of Texas decided from October 1, 2022, through November 30, 2023. Petitions granted but not yet decided are also included.

The summaries do not constitute the Court's official descriptions or statements. Readers are encouraged to review the Court's official opinions for specifics regarding each case. The Court appreciates suggestions and corrections, which may be sent via email to amy.starnes@txcourts.gov.

II. DECIDED CASES

A. ARBITRATION

1. Arbitrability

a) *Alliance Auto Auction of Dall., Inc. v. Lone Star Cleburne Autoplex, Inc.*, 674 S.W.3d 929 (Tex. Sept. 1, 2023) (per curiam) [22-0191]

This case concerns the issue of incorporation of American Arbitration Association rules into their contract delegate the question of arbitrability to the arbitrator when the selection of AAA rules is contingent on another clause in the agreement.

Lone Star sued Alliance, alleging that Alliance conspired with two of Lone Star's employees to embezzle money from Lone Star. Alliance moved to stay the suit and compel arbitration, relying on arbitration clauses contained in authorization agreements between Lone Star and a third party. Alliance argues those agreements designate it as a third-party beneficiary who may invoke the arbitration clause against Lone Star. The arbitration agreement states that if the parties are unable to agree on an alternative dispute resolution firm, the arbitration will be conducted under AAA rules.

The trial court denied Alliance's motion to compel arbitration. The court of appeals affirmed, holding that the question of whether a case should be sent to arbitration is a gateway issue that courts must decide. After Alliance filed its petition for review in the Supreme Court, it issued its decision in *Totalenergies E&P USA, Inc., v. MP Gulf of Mexico, LLC*, ___ S.W.3d ___, 2023 WL 2939648 (Tex. April 14, 2023), which held that the general rule is that the incorporation of AAA rules constitutes a clear and unmistakable agreement that the arbitrator must decide whether the parties' disputes must be resolved through arbitration.

Lone Star argues that this case is distinguishable from *TotalEnergies* because (1) the parties here agreed to arbitrate under the AAA rules only if they are unable to agree on a different ADR firm; and (2) Alliance is not a party to the arbitration agreement but is instead a third-party beneficiary that may, or may not, elect to invoke the arbitration agreement. In a per curiam opinion, the Court remanded to the court of appeals to consider Lone Star's arguments, along with any other issues the parties raised that the court did not reach, in light of the Court's holdings in *TotalEnergies*.

b) *Lennar Homes of Tex. Land & Constr., Ltd. v. Whiteley*, 672 S.W.3d 367 (Tex. May 12, 2023) [21-0783]

The issue in this case is whether a subsequent purchaser of a home was required to arbitrate her claims against

the builder for alleged construction defects.

Cody Isaacson purchased a house from its builder, Lennar Homes. The applicable purchase-and-sale agreement and the home's warranty, which the purchase-and-sale agreement incorporated by reference, each included arbitration clauses. A similar arbitration provision incorporated by reference in the special warranty deed that Lennar recorded in the county records. Isaacson later sold the home to Kara Whiteley.

Shortly after purchasing the home, Whiteley sued Lennar for negligent construction and breach of the implied warranties of good workmanship and habitability. The trial court initially stayed the case for arbitration over Whiteley's objection. The arbitrator denied Whiteley all relief and awarded Lennar attorney's fees and costs on its counterclaim for breach of contract. Lennar and Whiteley then filed cross-motions to confirm and to vacate the award, disputing whether the subsequent purchaser was bound by the arbitration clauses. The trial court granted Whiteley's motion and vacated the award against Whiteley.

The court of appeals affirmed, holding that the doctrine of direct-benefits estoppel did not require Whiteley to arbitrate her common-law claims. The court of appeals also rejected Lennar's alternative arguments in support of arbitration, holding that (1) Whiteley did not impliedly assume the purchase-and-sale agreement when she purchased the home; (2) Whiteley was not a third-party beneficiary of the warranty, (3) the arbitration provision attached to the deed was not a covenant running with the land, and (4) Whiteley did not waive her objections to arbitration during the course of those proceedings.

The Supreme Court reversed the court of appeals' judgment. The Court held that a warranty which the law implies from the existence of a written contract is as much a part of the writing as the express terms of the contract. Moreover, although liability for Whiteley's claims arises in part from the general law, nonliability arises from the terms of any express warranties. Accordingly, Whiteley's claims were premised on the existence of the purchase-and-sale agreement and, as such, she was bound to arbitrate under the doctrine of direct-benefits estoppel. The Court therefore reversed the court of appeals' judgment, rendered judgment confirming the award against Whiteley, and remanded to the trial court for further proceedings.

c) *Taylor Morrison of Tex., Inc. v. Kohlmeyer*, 672 S.W.3d 422 (Tex. June 30, 2023) (per curiam) [21-0072]

The issue in this case is whether subsequent purchasers of a home are required to arbitrate their claims against the builder for alleged construction defects.

Shortly after purchasing their home, the Kohlmeyers sued the builder, Taylor Morrison, for negligent construction, violations of the Deceptive Trade Practices-Consumer Protection Act, and breach of the implied warranties of habitability and good workmanship. The Kohlmeyers allege that construction defects caused a serious mold problem in the home. Taylor

Morrison filed a motion to compel arbitration of the Kohlmeyers' claims, arguing that the Kohlmeyers are bound by the arbitration clause in the original purchase agreement under the doctrines of implied assumption and direct-benefits estoppel. The trial court denied the motion to compel, and the court of appeals affirmed, holding that direct-benefits estoppel does not require arbitration of the Kohlmeyers' common-law claims because they do not arise solely from the original purchase agreement.

In a per curiam opinion, the Supreme Court explained that the court of appeals' opinion conflicts with the Court's recent opinion in *Lennar Homes of Texas Land & Construction, Ltd. v. Whiteley*. For the reasons explained in that case, direct-benefits estoppel requires arbitration of all of the Kohlmeyers' claims. Accordingly, the Court reversed the court of appeals' judgment, rendered judgment ordering arbitration of the Kohlmeyers' claims, and remanded the case to the trial court for further proceedings.

d) *Totalenergies E&P USA, Inc., v. MP Gulf of Mexico, LLC*, 667 S.W.3d 694 (Tex. April 14, 2023) [21-0028]

This case answers the question of whether parties who incorporate the American Arbitration Association rules into their contract delegate the question of arbitrability to the arbitrator.

MP Gulf of Mexico and Total E&P owned an oil-and-gas processing system that serviced leases in the Gulf of Mexico. The parties signed two contracts to govern the system, the System Operating Agreement and the Cost Sharing Agreement. The dispute began when MP Gulf demanded that Total E&P pay certain costs incurred under the Cost Sharing Agreement. Total E&P refused and sued for a declaration construing that agreement. MP Gulf, however, initiated an arbitration proceeding before the AAA based on a provision in the System Operating Agreement stating that "any dispute or controversy aris[ing] between the Parties out of this Agreement . . . shall be submitted to arbitration . . . in accordance with the rules of the AAA." MP Gulf argued that this provision, which incorporated the AAA rules, required the AAA arbitrator to decide whether the parties agreed to submit their controversy to arbitration.

The trial court granted Total E&P's motion to stay the arbitration. The court of appeals reversed, holding that by agreeing to arbitrate before the AAA and in accordance with its rules, the parties delegated the arbitrability issue to the arbitrator.

The Court affirmed. Usually, courts determine the validity or scope of an arbitration agreement in a contract, but parties can agree to delegate those disputes to arbitrators. The Court agreed with the majority of other courts that, as a general rule, an agreement to arbitrate in accordance with the AAA or similar rules constitutes clear and unmistakable evidence that the parties agreed to delegate issues of arbitrability. And although parties can contractually limit their delegation of arbitrability to only certain claims, the Court concluded that the agreements did not do so here. The delegation provision incorporated the AAA rules, and nothing in that provision or in those

rules limited the scope of the delegation.

Justice Bland filed a concurring opinion. She agreed with the majority opinion but would also affirm on the ground that the parties agreed to arbitrate the underlying controversies in this case.

Justice Busby filed a dissenting opinion. He would hold that the language of the contracts indicates that the parties did not intend to empower an arbitrator to decide whether the contractual preconditions to arbitration have been met. The arbitration provision states that the power to decide what claims are arbitrable only belongs to arbitrators if the preconditions are met. And even if the AAA rules apply, the rules' delegation language is not exclusive and thus does not deprive courts of the power to address the scope issue. For either of those reasons, he would hold that the court of appeals erred by failing to address the issue of the scope of the arbitration clause.

2. Enforcement of Arbitration Agreement

a) *Hous. AN USA, LLC v. Shattenkirk*, 669 S.W.3d 392 (Tex. May 26, 2023) [22-0214]

The issue in this employment-discrimination case is whether an arbitration agreement is unconscionable, and thus unenforceable, on the ground that the allegedly excessive costs associated with arbitration would foreclose the employee from pursuing his statutory claims.

AutoNation USA Houston owns and operates a car dealership in Houston. AutoNation hired Walter Shattenkirk as its general manager but fired him approximately six months later. Shattenkirk sued AutoNation for discrimination and retaliation, alleging that he was terminated for reporting racist comments made by his supervisor. AutoNation moved to compel arbitration based on an agreement, which Shattenkirk allegedly signed during the hiring process, that requires the parties to arbitrate any claims arising from the employment relationship, including discrimination claims. The agreement does not discuss who would pay administrative fees, the arbitrator's compensation, or other expenses. The trial court denied the motion to compel, concluding that the agreement is unconscionable and unenforceable because the cost of arbitration would be so high that it would effectively preclude Shattenkirk from pursuing his claims. The court of appeals affirmed.

The Supreme Court reversed, holding that Shattenkirk failed to demonstrate the arbitration agreement's unconscionability. To show that the prohibitive cost of arbitrating renders an agreement to do so unconscionable, the party opposing arbitration must present more than evidence of the risk of incurring prohibitive costs; he must present specific evidence that he will actually be charged such costs. Here, Shattenkirk presented only conclusory evidence that the increased cost of arbitration compared to litigation would foreclose him from proceeding with the case. Further, given the agreement's silence on costs and the lack of other record evidence indicating how those costs would be allocated, any holding that they render the agreement unconscionable would be premature. Accordingly, the Court held that

Shattenkirk failed to meet his burden of proving the likelihood that he would incur prohibitive arbitration costs and thus failed to show that the agreement was unenforceable on that ground. The Court remanded the case to the court of appeals to address the parties' issues regarding whether Shattenkirk signed the agreement.

b) *Taylor Morrison of Tex., Inc. v. Ha*, 660 S.W.3d 529 (Tex. Jan. 27, 2023) (per curiam) [22-0331]

The issue in this case is whether a spouse and minor children may be compelled to arbitrate pursuant to the other spouse's arbitration agreement when the family sues for construction-defect claims concerning their family home.

Tony Ha signed a purchase agreement to buy a home from home-building company Taylor Morrison. The purchase agreement included an arbitration provision. Mr. Ha later sued Taylor Morrison, alleging that the home had developed significant mold problems and asserting claims based on construction defects and fraud. He was joined in the suit by his wife, Michelle Ha, and their three minor children. In their original petition, the Ha family collectively asserted a number of claims, including breach of contract. They later amended their petition, however, so that only Mr. Ha asserted the breach-of-contract claim. The trial court granted Taylor Woodrow and Taylor Morrison's motion to compel arbitration with respect to Mr. Ha, but it denied the motion as to Mrs. Ha and the children. The court of appeals affirmed.

The Supreme Court reversed. Under direct-benefits estoppel, litigants who sue based on a contract or who otherwise seek direct benefits from the contract subject themselves to its terms, including any arbitration provision. The Court held that direct-benefits estoppel applies in this case because Mrs. Ha and the children sought direct benefits from Mr. Ha's purchase agreement by living in the home. When a spouse and minor children live in a family home purchased by the other spouse, they have accepted direct benefits from the other spouse's purchase agreement such that they may be compelled to arbitrate under that agreement's arbitration provision when the family sues as an integrated unit for factually intertwined construction-defect claims.

c) *Taylor Morrison of Tex., Inc. v. Skufca*, 660 S.W.3d 525 (Tex. Jan. 27, 2023) (per curiam) [21-0296]

The issue in this case is whether children who sue with their parents for construction defects in their family home have joined their parents' contract claims—and therefore may be compelled to arbitrate under their parents' arbitration agreement—when the petition fails to distinguish between the parents' and children's causes of action.

Jack and Erin Skufca purchased a home from homebuilding company Taylor Morrison. The purchase agreement included an arbitration provision. The Skufcas allege that less than a year after moving in, the home developed significant mold problems that caused their children to be

continuously ill. They sued Taylor Morrison for construction defects and fraud. The Skufcas' petition included both Mr. and Mrs. Skufca as plaintiffs, as well as Mrs. Skufca as next friend of the couple's two minor children. The Skufcas' petition, however, did not distinguish between the parents and children in any of its causes of action, including the breach-of-contract claim.

Taylor Morrison moved to compel the Skufcas to arbitrate. The trial court denied the motion as it pertained to the children. Taylor Morrison appealed, arguing that direct-benefits estoppel—the principle that a litigant who sues based on a contract subjects himself to the contract's terms, including its arbitration provision—requires the children to arbitrate their claims. The court of appeals affirmed, holding that direct-benefits estoppel did not apply because, based on its reading of the petition, the children did not actually join the breach-of-contract claim.

The Supreme Court reversed. The Court held that, because the breach-of-contract claim simply referred to "Plaintiffs" and did not distinguish between the parents and the children, the children joined their parents' breach-of-contract claim. The children were thus subject to their parents' arbitration agreement through direct-benefits estoppel. Moreover, even if the children had asserted only tort and other noncontractual claims, they would still be compelled to arbitrate because they sought direct benefits from their parents' purchase agreement by living in the home and suing for factually intertwined construction-defect claims.

B. ATTORNEYS

1. Attorney–Client Privilege

a) *Univ. of Tex. Sys. v. Franklin Ctr. for Gov't & Pub. Integrity*, 675 S.W.3d 273 (Tex. June 30, 2023) [21-0534]

The issue in this case is whether documents underlying an external investigation into allegations of undue influence in a public university's admissions process are protected by the attorney–client privilege and are thus exempt from disclosure under the Texas Public Information Act.

The University of Texas System hired Kroll Associates to investigate allegations of improper admissions practices at UT Austin. After Kroll completed its investigation and released its final report, Franklin Center made a request under the Public Information Act for documents that were either provided to Kroll by the System or created by Kroll during its investigation. The System argued that all the documents sought were protected from disclosure by the attorney–client privilege because Kroll was serving as its "lawyer's representative" under Texas Rule of Evidence 503 in conducting the investigation.

After reviewing the disputed documents *in camera*, the trial court determined that they were privileged. The court of appeals reversed and ordered disclosure of all the documents. The court reasoned that Kroll did not qualify as a "lawyer's representative" because the final report did not contain legal advice, Kroll did not provide legal services to the System, and Kroll's investigation was not performed to advise the System regarding potential legal liabilities.

The Supreme Court reversed, holding that the attorney–client privilege attached to the disputed documents. The Court held that, to qualify as a "lawyer's representative" for purposes of the privilege, assisting in the rendition of professional legal services must be a significant purpose for which the representative was hired. Applying that standard, the Court concluded that Kroll acted as a lawyer's representative in conducting the investigation and that the disputed documents were intended to be kept confidential. The publication of the final report did not result in a complete waiver of the privilege as to all documents reviewed or prepared by Kroll. However, to the extent the report directly quoted from or otherwise disclosed "any significant part" of the disputed documents, publication of the report waived the System's attorney–client privilege with respect to those specific documents.

Justice Devine, joined by Justice Boyd, dissented. While agreeing with the Court's standard, the dissent would have held that the record did not sufficiently demonstrate that assisting UT's lawyers in the rendition of legal services was a significant purpose of Kroll's audit.

2. Escrow

a) *Boozer v. Fischer*, 674 S.W.3d 314 (Tex. June 30, 2023) [22-0050]

This case involves an escrow agreement among parties that were engaged in active litigation against each other, requiring the Supreme Court to address: (1) whether an attorney for one party may serve as an escrow holder despite the ongoing litigation and (2) which party bears the risk of loss when that attorney misappropriates escrowed funds.

Ray Fischer sold his tax-consulting business to CTMI, a company owned by Mark Boozer and Jerrod Raymond. That transaction generated litigation among the parties. They settled except for one severed claim pertaining to Fischer's entitlement to certain funds. The parties' settlement agreement had provided that, pending the ultimate resolution of the litigation regarding the severed claim, CTMI would deposit the funds at issue into an "escrow" account owned by CTMI but controlled by Wesley Holmes (Boozer and Raymond's attorney).

After Fischer prevailed on his claim, it came to light that Holmes had drained the account. CTMI sued, seeking a declaration that it had satisfied its obligations to Fischer under the settlement agreement by depositing the funds in the account. The trial court agreed, concluding that CTMI owed Fischer nothing further. The court of appeals reversed, holding that there was no escrow and CTMI therefore had not discharged its liability to Fischer.

The Supreme Court affirmed the court of appeals' judgment, but for different reasons. First, the Court held that the parties created an escrow. Second, however, the Court held that the parties' creation of an escrow did not shift the risk of loss in this case. Because the escrow holder was the attorney for CTMI's owners and CTMI agreed to retain title to the escrowed property, CTMI presumptively retained the risk of loss. Nothing in the parties' agreement rebutted that presumption, and CTMI therefore bore the

risk of the escrow's failure.

3. Fees

a) *Pecos Cnty. Appraisal Dist. v. Iraan-Sheffield Indep. Sch. Dist.*, 672 S.W.3d 401 (Tex. May 19, 2023) [22-0313]

The issue in this case is whether the district court properly dismissed a suit because a school district employed an attorney on a contingent-fee basis. Iraan-Sheffield ISD hired attorney D. Brent Lemon to pursue claims regarding the Pecos County Appraisal District's allegedly inaccurate valuation of Kinder Morgan's mineral interests. The school district is a taxing unit within the Appraisal District. The fee agreement with Lemon specified his compensation as 20 percent of amounts received by the school district that were related to claims Lemon pursued.

Under the Tax Code, Lemon brought a claim before the Appraisal District's Appraisal Review Board alleging erroneous appraisals of Kinder Morgan's properties. After the Review Board denied relief, Lemon brought an appeal in district court. Kinder Morgan filed a Texas Rule of Civil Procedure 12 motion to show authority, arguing that Lemon's contingent-fee agreement was not allowed under Texas law. The district court granted the motion and dismissed the suit with prejudice. The court of appeals reversed, reasoning that the fee agreement was permitted under Section 6.30(c) of the Tax Code.

The Supreme Court did not agree with the court of appeals' reasoning. The Court held the contingent-fee agreement was not permitted under Texas law. Political subdivisions possess only such powers as are expressly provided by statute or impliedly conferred by the Legislature. Implied powers are limited to powers essential and indispensable to the exercise of expressed powers. Section 6.30 does not expressly permit the agreement, because that section is limited to the collection of delinquent taxes. Taxes are not delinquent until they are imposed by the taxing unit, and here no taxes had been imposed on the higher valuations the school district sought. There was also no basis under Texas law for concluding that authority to make the contingent-fee agreement was impliedly conferred on school districts.

Even though the Court agreed with the district court that the contingent-fee agreement was not permitted, the Court concluded that the district court should not have dismissed the suit with prejudice. The Court concluded that Rule 12 was a proper vehicle for challenging the legality of the agreement, but the Court interpreted the rule as requiring the district court to give the school district a reasonable opportunity to adjust its arrangement with Lemon or hire another attorney. The Court therefore affirmed the court of appeals insofar as it reversed the dismissal of the suit, and the Court remanded the case to the district court for further proceedings.

C. CLASS ACTIONS

1. Class Certification

a) *Am. Campus Cmtys., Inc. v. Berry*, 667 S.W.3d 277 (Tex. April 21, 2023) [21-0874]

The issue in this case is whether a court may properly certify a class under Texas Rule of Civil Procedure 42 when the proposed class claim is

facially defective as a matter of law. Former tenants sued American Campus alleging that it had omitted required language from their leases. Section 92.056(g) of the Texas Property Code requires that leases contain bold or underlined language informing tenants of the remedies available when a landlord fails to repair or remedy conditions that materially affect the tenant's physical health or safety.

The class sought is not made up of individuals who alleged American Campus deficiently repaired their particular apartments. Rather, the class sought certification on a theory that the omission of the required lease language alone entitled each class member to recover statutory damages, penalties, and attorney's fees. The trial court denied American Campus's summary judgment motion and certified the class of tenants. The court of appeals affirmed the class certification.

The Court held that the class certification was improper because the tenant's claim had no basis in law, and, therefore, the rigorous analysis required by Rule 42 could not meaningfully be performed. The Court reversed the court of appeals' judgment and the district court's order certifying a class and remanded the case to the district court for further proceedings consistent with its opinion.

b) *Mosaic Baybrook One, L.P. v. Simien*, 674 S.W.3d 234 (Tex. Apr. 21, 2023) [19-0612, 21-0159]

This case concerns whether the trial court conducted a sufficiently rigorous analysis and correctly understood the governing law before certifying a class under Texas Rule of Civil Procedure 42. Paul Simien sued the owners and managers of his apartment complex, alleging that Mosaic had violated various Public Utility Commission rules that govern how landlords may bill tenants for water and wastewater service and was therefore liable under section 13.505 of the Water Code. The trial court granted partial summary judgment on liability in Simien's favor, rejecting Mosaic's arguments that Simien lacked standing and that subsequent amendments to section 13.505 had deprived the trial court of subject-matter jurisdiction. The trial court also granted Simien's motion to certify a class of current and former Mosaic tenants who were also subject to the challenged billing practices. Mosaic requested and received permission to file an interlocutory appeal of the trial court's order granting partial summary judgment.

Mosaic filed an application for permission to appeal the partial summary judgment, which the court of appeals denied, as well as an interlocutory appeal of the class certification order. The court of appeals (1) declined to reach the merits of the trial court's rulings on summary judgment as part of its review of the propriety of class certification and (2) rejected Mosaic's challenge to the trial court's compliance with Rule 42(c)(1)(D), concluding that the trial court's rulings on Mosaic's special exceptions and Simien's motion for summary judgment adequately addressed Mosaic's defenses.

Mosaic petitioned the Supreme Court for review in both cases. The Court granted the petitions and consolidated them for argument with *Mosaic*

Baybrook One, L.P. v. Cessor, ___ S.W.3d ___, 2022 WL 3027939 (Tex. Apr. 21, 2023) [21-0159]. The Court affirmed the trial court's partial summary judgment and affirmed the court of appeals' judgment affirming the trial court's order certifying a class. After rejecting Mosaic's challenges to standing and subject-matter jurisdiction, the Court held that Mosaic failed to raise an issue of fact regarding whether it had a right to charge Simien the disputed fees because Mosaic conceded that it had bundled a water-related service fee with other fees unrelated to water or wastewater service that were not authorized under his lease. The Court also rejected Mosaic's challenge to the trial court's failure to list the elements of Mosaic's limitations defense in its order certifying a class, holding that the trial court's temporal limitations on the class definition adequately accounted for the defense.

The dissent, authored by Justice Bland, would have reversed. In its view, the Water Code and its implementing rules require metered-water charges to be calculated and presented independently, not other charges. Because Simien's bills complied with this requirement, the dissent concluded that Simien failed to establish his sole claim of a Water Code violation as a matter of law.

c) *Mosaic Baybrook One, L.P. v. Cessor*, 668 S.W.3d 611 (Tex. Apr. 21, 2023) [21-0161]

This case concerns whether the trial court conducted a sufficiently rigorous analysis and correctly understood the governing law before certifying a class under Texas Rule of Civil Procedure 42. Tammy Cessor sued the owners and managers of her apartment complex, alleging that Mosaic had assessed fees for late payment of rent in violation of section 92.019 of the Texas Property Code. Cessor also filed a motion to certify a class of current and former Mosaic tenants who were also subject to the challenged late fees. Mosaic initially filed an answer that generally denied Cessor's claims. Mosaic later amended its answer three days prior to the hearing on class certification, raising several affirmative defenses for the first time and months after the deadline for amended pleadings had passed. The trial court granted Simien's motion to certify a class, and Mosaic filed an interlocutory appeal.

On appeal, Mosaic complained that the trial court did not conduct the requisite rigorous analysis under Rule 42, relying on the trial court's failure to definitively construe section 92.019 of the Property Code or address the affirmative defenses raised in Mosaic's late-filed answer. The court of appeals affirmed without addressing the parties' arguments about statutory construction, reasoning that courts should not decide the merits of a suit as a means of determining its maintainability as a class action. Mosaic petitioned the Supreme Court for review. The Court granted the petition and consolidated it for argument along with *Mosaic Baybrook One, L.P. v. Simien*, ___ S.W.3d ___, 2022 WL 3027992 (Tex. Apr. 21, 2023) [19-0612, 21-0159].

The Court rejected Mosiac's argument that the trial court had misconstrued or failed to construe section 92.019 but agreed with Mosaic that the trial court's failure to list the elements

of or otherwise address Mosaic's late-asserted answers constituted reversible error. Because Cessor did not object to the amended pleading, the trial court had no discretion under Texas Rule of Civil Procedure 63 to refuse to consider the defenses. The Court therefore reversed the court of appeals' judgment affirming the trial court's order certifying a class under Rule 42 and remanded the case to the trial court for further proceedings.

D. CONSTITUTIONAL LAW

1. Abortion

a) *Zimmerman v. City of Austin*, 658 S.W.3d 289 (Tex. Dec. 30, 2022) (per curiam) [21-0262]

The issue in this case is whether a statute that was never expressly repealed is enforceable after a case that held the statute to be unconstitutional was overruled.

The City of Austin approved a budget that included funding for entities that provide support to residents who seek abortions. Don Zimmerman sued the City, alleging that this budget allocation violated a Texas statute that prohibits furnishing the means for procuring an abortion. The trial court granted the City's plea to the jurisdiction, and the court of appeals affirmed. The court of appeals concluded that Zimmerman's claim could not proceed because of the United States Supreme Court's opinion in *Roe v. Wade*, 410 U.S. 113 (1973). Zimmerman petitioned the Texas Supreme Court for review, arguing that the statute was never repealed and therefore remained enforceable despite *Roe*.

After the Court requested and received briefs on the merits, the U.S. Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), which overruled *Roe*. The Texas Supreme Court vacated the lower courts' judgments and remanded this case to the trial court to address the effect of this change in the law, as well as any intervening factual developments.

2. Due Process

a) *B. Gregg Price, P.C. v. Series 1 – Virage Master LP*, 661 S.W.3d 419 (Tex. Feb. 17, 2023) (*per curiam*) [21-1104]

The issue in this case is whether due process entitles a defendant to an amended notice of hearing when a trial court cancels a hearing and subsequently reschedules it for the same date.

B. Gregg Price, P.C., a law firm, took out a loan from Series 1 – Virage Master LP. Virage alleged that B. Gregg Price personally guaranteed the loan and that his law firm failed to repay the loan. Virage sued Price and the firm and moved for summary judgment.

Virage served Price with the motion for summary judgment on March 12, 2020, and notified him of the hearing set for April 2. That same day, the trial court announced that in-person proceedings would be canceled in response to the emerging COVID-19 pandemic. Price's lawyer saw this announcement and assumed he would be notified of a new hearing date when the hearing was rescheduled. Rather than reschedule the oral hearing, the court changed the hearing method to submission and scheduled it for April 2. Price's lawyer first realized the change when

he contacted the court on April 1, and he immediately filed a response. On April 2, the trial court granted summary judgment for Virage without considering Price's late-filed response.

Price moved for a new trial, which the trial court denied. The court of appeals held that the original notice was sufficient to apprise Price of the rescheduled hearing date and affirmed the summary judgment for Virage. Price petitioned the Supreme Court for review.

The Court reversed, holding that Price did not receive adequate notice of the April 2 hearing as required by the United States and Texas Constitutions. Notice of a proceeding must be reasonably calculated, given the circumstances, to apprise the parties of the pending action and give them a meaningful opportunity to respond. When a previously scheduled hearing is canceled by the trial court, a new hearing requires new notice. Price did not receive proper notice as required by due process and is therefore entitled to a new trial.

3. Separation of Powers

a) *City of Houston v. Hous. Pro. Fire Fighters Ass'n, Local 341* and *Hous. Police Officers' Union v. Hous. Pro. Fire Fighters Ass'n, Local 341*, 664 S.W.3d 790 (Tex. Mar. 31, 2023) [21-0518, 21-0755]

The Court decided three issues in these consolidated cases: (1) whether a statute that requires the judiciary to set the compensation for firefighters after collective bargaining fails violates the constitutional separation of powers; (2) whether the statute waives governmental immunity; and (3) whether the statute preempts a local city charter provision that also governs firefighter pay.

The City of Houston's collective-bargaining agreement with its Fire Fighters Association expired, and the parties did not reach a new agreement. The Fire Fighters sued the City under The Fire and Police Employee Relations Act, alleging that the City failed to provide the terms of employment required by the Act, and asking the court to establish their terms of employment for one year as the Act provides. The City countered that the Legislature delegated the task of establishing firefighter pay to the judiciary in violation of the constitutional separation of powers and that the City's immunity was not waived under the Act because the firefighters failed to propose certain required terms during collective bargaining. The trial court rejected the City's constitutional and immunity challenges, and the court of appeals affirmed.

Meanwhile, the Fire Fighters successfully campaigned for a city charter amendment that would require their compensation to be in parity with city police officers. Upon its passage, the Police Officers' Union, joined by the City, sued for a declaratory judgment that the Act preempts the pay-parity amendment. The trial court held that the Act preempts the pay-parity amendment, but a divided court of appeals reversed.

The Supreme Court held that the Act does not unconstitutionally delegate legislative authority. The Act furnishes a judicial remedy that provides adequate and familiar comparators to

guide judicial discretion in setting terms of employment, like requiring compensation to be "substantially equal" to "comparable employment" in the private sector. The Supreme Court held that the Act's waiver of immunity was not contingent on the proposal of certain terms during collective bargaining because the statutory definition of the bargaining duty is limited to meeting at reasonable times and conferring in good faith. Finally, the Supreme Court held that the Act preempted the pay-parity amendment because the amendment attempted to supplant the Act's rule of decision for establishing firefighter compensation.

E. CONTRACTS

1. Damages

a) *MSW Corpus Christi Landfill, Ltd. v. Gulley-Hurst*, L.L.C., 664 S.W.3d 102 (Tex. Mar. 24, 2023) (per curiam) [21-1021]

This case concerns the correct calculation of damages when (1) a buyer breaches a real estate contract, (2) after the seller has fully performed, and (3) the property has appreciated in value since the underlying sale. Gulley Hurst, L.L.C. and MSW Corpus Christi Landfill, Ltd. entered into a mediated settlement agreement that required MSW to sell back a one-half interest in a landfill that it had previously purchased from Gully Hurst. The agreement also required Gulley Hurst to assume an outstanding loan in MSW's name. When Gulley Hurst failed to refinance the loan as promised, MSW sued Gulley Hurst for breach of contract. By the time of trial, the value of the landfill had significantly increased.

Following a trial, a jury awarded MSW two types of damages: (1) lost "benefit of the bargain" damages, which they were instructed to calculate based on the property's appreciation in value; and (2) lost "opportunity cost" damages, which they were instructed to calculate based on investments MSW could have made had Gulley Hurst performed as promised. Gulley Hurst filed a motion for judgment notwithstanding the verdict, challenging the trial court's instructions on calculating the two types of damages. The trial court granted the JNOV in part, issuing a final judgment that awarded MSW $372,484.70 in lost opportunity cost damages but reduced the jury's award for benefit of the bargain damages to $0.

Both parties appealed. After the court of appeals affirmed, the parties filed petitions for review, which the Court granted without hearing oral argument. Agreeing with Gulley Hurst that the underlying jury instructions were incorrect, the Court affirmed the trial court's final judgment with respect to the benefit of the bargain damages. The Court reversed the trial court's judgment and rendered a take-nothing judgment on the lost opportunity cost damages, holding that MSW failed to establish the foreseeability required to support such damages.

2. Interpretation

a) *U.S. Polyco, Inc., v. Tex. Cent. Bus. Lines Corp.*, ___ S.W.3d ___, 2023 WL 7238791 (Tex. Nov. 3, 2023) (per curiam) [22-0901]

The issue before the Court concerns whether a land-improvement contract's requirement of a further writing applies to certain improvements Polyco made so that Polyco had to obtain Texas Central's further written agreement.

Polyco sued Texas Central for breach of contract and moved for partial summary judgment on this issue. The trial court granted the motion, concluding that a further written agreement was not required. Texas Central appealed. The court of appeals held that there were multiple reasonable interpretations of the contract provision and that the in-writing provision was therefore insolubly ambiguous. The court of appeals reversed and ordered a new trial on the meaning of the contract provision.

The Supreme Court reversed and remanded to the court of appeals. The Court concluded that the multiple interpretations the court of appeals deemed reasonable are merely the parties' competing theories about the text's meaning. Looking to the structure and syntax of the provision, the Court concluded that the in-writing requirement only applies to the last antecedent. The Court remanded to the court of appeals to address Texas Central's other arguments in the first instance.

3. Releases and Reliance Disclaimers

a) *Austin Tr. Co. v. Houren*, 664 S.W.3d 35 (Tex. Mar. 24, 2023) [21-0355]

The issues in this case involve the scope and validity of liability releases in a family settlement agreement related to the administration of Bob Lanier's estate. Some of the parties to that agreement were the remainder beneficiaries of a marital trust, of which Bob had served as trustee and sole beneficiary. The trust was initially valued at $54 million, but at the time of Bob's death, only $5.5 million in assets remained. To facilitate the prompt distribution of the trust and estate assets, Jay Houren—the independent executor of Bob's estate—proposed a family settlement agreement to all interested parties, including the marital trust beneficiaries. Before signing the agreement, the parties obtained independent counsel and received various disclosures, including general accounting ledgers listing $37 million in payments made from the trust to Bob during his life.

After executing the agreement, the trust beneficiaries demanded that Houren repay that $37 million, which they claimed the trust had loaned to Bob. In response, Houren sued for a declaration that the alleged debt did not exist. The trust beneficiaries counterclaimed, alleging that the debt did exist or alternatively that Bob, as trustee, breached his fiduciary duty to the trust's remainder beneficiaries by making unauthorized distributions of principal to himself during his lifetime. According to the beneficiaries, the settlement agreement did not prohibit them

from pursuing their claims because (1) the releases did not extend to the debt claim and (2) they were not provided with the "full information" required by statute to release a trustee from liability. Houren filed a motion for summary judgment, arguing that the evidence conclusively negated the existence of a debt and that the agreement's broad release provisions barred both claims.

The trial court rendered summary judgment for Houren. The court of appeals affirmed, holding that the beneficiaries released all claims against the other parties to the agreement. The court further held that the releases were valid irrespective of any fiduciary duties owed by Houren or Bob.

The Supreme Court affirmed, holding that the trust beneficiaries released their debt and breach of fiduciary duty claims. The Court first concluded that the releases encompassed the debt claim, holding that the parties' release of liability for such debts superseded Houren's general obligation to pay all debts and claims of the estate. The Court also determined that Houren did not owe a fiduciary duty to the trust beneficiaries since they were not devised any probate assets. Although the Court assumed without deciding that the statutory "full information" requirement governing beneficiary releases of trustee liability cannot be waived, the Court held that Houren provided the trust beneficiaries with such information. Specifically, the Court held that the beneficiaries were sufficiently informed to understand the character of the act they were releasing and make an informed decision about whether to agree to the release.

F. CORPORATIONS

1. Stock Redemption

a) *Skeels v. Suder*, 671 S.W.3d 664 (Tex. June 23, 2023) [21-1014]

The central issue in this declaratory-judgment suit is whether a corporate resolution authorized a law firm to redeem a departing shareholder's shares on terms unilaterally set by the firm's founders.

As a shareholder in a law firm, David Skeels signed a corporate resolution generally authorizing the firm's founders "to take affirmative action on behalf of the Firm." After his relationship with the firm soured, the firm terminated his employment and proposed separation terms, including that Skeels relinquish his rights to his shares. When Skeels did not agree, the founders purported to redeem his shares at no cost. Skeels then sued the firm and two of its founders, and the firm counterclaimed. Both sides raised competing declaratory-judgment claims on whether the resolution authorized the founders' redemption actions. In a pretrial ruling, the trial court declared that it did, and the court of appeals affirmed.

The Supreme Court reversed. The Court held that the resolution, by modifying "affirmative action" with "on behalf of the Firm," authorized the founders to take action the firm could take, but it neither expanded the scope of the firm's authorized actions nor constituted an agreement that the founders may set redemption terms on Skeels's behalf. And because the firm was not authorized to set the redemption terms without Skeels's agreement, the Court held that the resolution did

not independently authorize the founders to unilaterally set those terms. Chief Justice Hecht dissented, concluding that Skeels agreed in the resolution that the firm could redeem his shares on his departure without payment.

G. DAMAGES

1. Settlement Credits

a) *Virlar v. Puente*, 664 S.W.3d 53 (Tex. Feb. 17, 2023) [20-0923]

The main issues in this medical malpractice case involve settlement credits under Chapter 33 of the Civil Practice and Remedies Code and periodic payments for future medical expenses under the Texas Medical Liability Act in Chapter 74 of the Code.

Jo Ann Puente suffered brain injuries due to complications of a prior surgery while in the hospital care of Dr. Jesus Virlar. Puente and members of her family sued Virlar; the physicians association that employed him, referred to as Gonzaba; and other health care providers. Several claims settled prior to trial, including the claims by Puente's minor daughter against some defendants for loss of consortium and services. Ultimately, the only claims tried were Puente's claims against the non-settling defendants, including Virlar and Gonzaba.

After a jury verdict of $14 million for Puente, the defendants moved for a settlement credit under Chapter 33, arguing that the $3.3 million Puente's daughter received in settlement should reduce the amount of Puente's award. The defendants also moved for periodic payments of the award under the Medical Liability Act. The trial court denied both motions.

A majority of the court of appeals, sitting en banc, largely affirmed. Without addressing the predicate question whether Chapter 33 requires a credit for the daughter's settlement, the court held that applying Chapter 33 here would violate the Open Courts provision of the Texas Constitution. The court further held that the defendants had not presented sufficient evidence for the trial court to grant periodic payments. The defendants petitioned for Supreme Court review.

The Court affirmed in part and reversed in part. The Court first reversed with respect to the court of appeals' Chapter 33 analysis. The Court held that the daughter is a "claimant" under Chapter 33 because her claims for loss of consortium and services are claims for injury to another person, Puente. Chapter 33 therefore requires that the daughter's settlement be credited against the judgment. The Court went on to hold that applying Chapter 33 here would not violate the Open Courts provision because the statute gives Puente a greater recovery than she would have obtained under the common law.

The Court also reversed with respect to the court of appeals' analysis of the Medical Liability Act. The Court held that the defendants had presented sufficient evidence of the statutory prerequisites and that the trial court was therefore required by the Act to order periodic payments for at least some of Puente's future damages. Finally, the Court affirmed with respect to some evidentiary challenges raised by the defendants.

2. Wrongful Death

a) *Gregory v. Chohan*, 670 S.W.3d 546 (Tex. June 16, 2023) [21-0017]

In this wrongful death case, the main issue is whether a noneconomic damages award of just over $15 million is supported by sufficient evidence.

Sarah Gregory—a truck driver for New Prime, Inc.—jackknifed her eighteen-wheeler, causing a multiple-fatality, multi-vehicle pileup. Among the deceased was Bhupinder Deol, whose estate and family brought suit. The case, which involved Deol and other decedents, was tried to a jury, which returned a nearly $39 million verdict. Deol's family's share was nearly $16.5 million, and the family's noneconomic damages accounted for just over $15 million. Concluding that the award neither shocked the conscience nor manifested passion or prejudice, the court of appeals affirmed.

In divided opinions, the Supreme Court of Texas reversed. Writing for a plurality, Justice Blacklock concluded that parties must provide both evidence of the existence of mental anguish and evidence to justify the amount awarded. The plurality would require parties defending a noneconomic damages award to demonstrate a rational connection between the evidence and the amount awarded. The "shock the conscience" standard of review is insufficient, and parties should not rely on unsubstantiated anchors or ratios between economic and noneconomic damages.

Justice Devine, joined by Justice Boyd, concurred in the judgment. His concurrence expressed concern that the plurality's "rational connection" requirement is an impossible standard to meet that infringes upon the jury's traditional role.

Justice Bland concurred in part. She agreed that improper argument affected the jury's verdict but considered that a sufficient basis for reversal in this case.

The case presented a secondary issue about whether ATG Transportation, another trucking company whose truck overturned during the accident, was wrongly excluded as a responsible third party. Both concurrences agreed with the plurality that ATG should have been joined as a responsible third party, and on that basis, the Court remanded for a new trial.

H. ELECTIONS

1. Injunctive Relief

a) *In re Morris*, 663 S.W.3d 589 (Tex. Mar. 17, 2023) [23-0111]

The issue in this case is whether a voter is entitled to pre-election relief to delay an election on a proposed city charter amendment, divide the proposed amendment into single subjects, and amend the wording of the ballot language describing the amendment.

Advocacy organizations drafted a proposed amendment to the San Antonio City Charter. The proposed amendment purports to, among other things, prohibit local enforcement of state laws related to marijuana possession, theft offenses, and abortion. The City Clerk certified that the proposed amendment met the requirements to appear on the ballot. The City Council ordered it placed on the ballot for the May election, but the abstention of three councilmembers caused the order

to take effect fewer than the required seventy-eight days before the election.

A prospective voter sought relief in an original proceeding in the Supreme Court. The voter argued that (1) the election was untimely ordered and should be reset for the November election, (2) the proposed amendment violates a state law requiring such amendments to contain only a single subject, and (3) the ballot language misleads voters as to which city officials would be barred from enforcing abortion laws.

The Court denied the petition for writ of mandamus, continuing the Court's jurisprudence of judicial noninterference with elections. The Court observed that the City Council had dual ministerial duties to order the election at least seventy-eight days ahead of the election date and to set the charter amendment on the earliest lawful uniform election date. The Court declined to supersede the City Council's decision, noting the absence of any particularized harm and the availability of post-election remedies for election irregularities. The Court declined to order the City Council to divide the proposed amendment into single subjects because the City Council lacks authority to redraft the citizen-initiated amendment, and the alleged violation of the single-subject rule may be determined in an election contest. Finally, the Court held that the voter lacked standing to challenge the ballot language before the election because she had not identified an injury distinct from that to the general public.

Justice Young issued a dissenting opinion, joined by Justice Devine and Justice Blacklock. The dissent would have granted partial relief to move the election to November. The dissent concluded that the seventy-eight-day deadline for ordering the election is express and unambiguous, and that the proper relief is to direct the City Council to hold the election at the correct time.

I. EMPLOYMENT LAW

1. Disability Discrimination

a) *Tex. Tech Univ. Health Scis. Ctr.–El Paso v. Niehay*, 671 S.W.3d 929 (Tex. June 30, 2023) [22-0179]

The issue in this case is whether morbid obesity qualifies as an "impairment" under the Texas Commission on Human Rights Act without evidence that it is caused by an underlying physiological disorder or condition.

Texas Tech dismissed Dr. Lindsey Niehay from its medical residency program, and Niehay sued for disability discrimination. claiming that Texas Tech dismissed her because it regarded her as being morbidly obese. Texas Tech filed a combined plea to the jurisdiction and motion for summary judgment, asserting that Niehay had not shown a disability as defined by the TCHRA. Specifically, Texas Tech argued that morbid obesity is not a disability without evidence that it is caused by an underlying physiological disorder. The trial court denied the plea and motion, and the court of appeals affirmed.

The Supreme Court reversed. The majority opinion, authored by Chief Justice Hecht, held that the plain language of the TCHRA's definition of disability as "a mental or physical impairment" requires an impairment to have an underlying a physiological

disorder or condition. It further held that weight is not a physiological disorder or condition—it is a physical characteristic. Niehay presented no evidence that her morbid obesity is caused by an underlying physiological disorder or that Texas Tech perceived it as such, so the Court ultimately held that Niehay has not shown a disability under the TCHRA.

Justice Blacklock filed a concurring opinion, joined by two other justices. He emphasized that the medical community's current understanding of morbid obesity is not a basis for interpreting fixed statutory language enacted in 1993 and that while Texas courts may look to federal law for assistance, federal authorities are not binding on Texas courts interpreting the TCHRA.

Justice Boyd filed a dissenting opinion, joined by one other justice. He would have held that morbid obesity qualifies as an impairment without evidence of an underlying physiological condition.

J. EVIDENCE

1. Exclusion for Untimely Disclosure

a) *Jackson v. Takara*, 675 S.W.3d 1 (Tex. Sept. 1, 2023) (per curiam) [22-0288]

The issue in this case is whether the trial court committed reversible error by allowing an untimely identified witness to testify.

Reuben Hitchcock fell while trimming a tree on Andrew Jackson's property and died. Hitchcock's sister, Kristen Takara, sued Jackson on the estate's behalf. Shortly before trial, Jackson identified Valerie McElwrath, a neighbor, as a person with knowledge of relevant facts. Takara moved to exclude McElwrath from testifying because the identification was untimely. Jackson's counsel represented to the trial court, without objection, that the parties had agreed to extend the discovery period and that Takara was not unfairly surprised or unfairly prejudiced because she knew McElwrath and mentioned McElwrath by name multiple times in her deposition. The trial court allowed McElwrath to testify. The jury found neither Jackson nor Hitchcock negligent, and the trial court rendered a take-nothing judgment.

A divided court of appeals reversed and remanded for a new trial. It held the trial court should have prohibited McElwrath from testifying because she was not timely identified, there was no discovery agreement that complied with Rule 11, and there was no evidence in the record that Takara was aware of McElwrath or her potential testimony.

The Supreme Court reversed and rendered judgment for Jackson. The Court held that the trial court did not abuse its discretion by allowing McElwrath to testify because the record included counsel's uncontested statements regarding the state of discovery and Takara's knowledge of McElwrath. The Court also held that the trial court's ruling, even if erroneous, would not constitute reversible error because the jury's failure to find negligence did not turn on McElwrath's testimony.

2. Expert Testimony

a) *Helena Chem. Co. v. Cox*, 664 S.W.3d 66 (Tex. March 3, 2023) [20-0881]

The issue in this case is whether expert testimony on causation was sufficiently reliable to survive the defendant's no-evidence summary-judgment motion. Plaintiffs are farmers who claimed their cotton crops were damaged by an aerial spraying of herbicide. The damage was allegedly caused by Helena Chemical Company's large-scale spraying of an herbicide called Sendero for a customer owning the Spade Ranch. Sendero contains two herbicides, clopyralid and aminopyralid and is used to kill mesquite trees. Sendero can damage other plants including cotton. Plaintiffs' cotton fields were located over hundreds of square miles and up to twenty-five miles from the Spade Ranch.

Plaintiffs sued Helena for negligence and trespass. They relied on experts to establish damages causation. Helena filed a motion to strike the expert testimony as unreliable and a no-evidence motion for summary judgment. The trial court granted the motions and dismissed the case. The court of appeals reversed in part, concluding the experts had provided a reliable scientific basis for their opinions. The Supreme Court concluded that the district court did not abuse its discretion in striking the expert testimony as unreliable. The Court therefore reinstated the summary judgment dismissing all claims.

The Court reasoned that expert testimony was required to prove that aerial drift from Helena's Spade Ranch application reduced the yield from plaintiffs' crops. If expert testimony is unreliable, it is no evidence. To be admissible, expert testimony must be grounded in the methods and procedures of science. The causation opinions proffered by the experts were not reliable and summary judgment was therefore warranted. Of the 111 fields owned by plaintiffs, only three positive lab tests for herbicide were obtained at identifiable locations. These tests only showed the presence of clopyralid. The experts failed to offer a scientifically reliable method for extrapolating the positive test results to all the other fields. The experts also failed to establish the dose of Sendero that landed on plaintiffs' fields or the dose required to cause a loss of crop yield. Further, the experts failed exclude other plausible causes for the crop damage, including other applications of herbicides and inclement weather. There was evidence of other applications of herbicides, and many plaintiffs filed insurance claims claiming their crop losses were the result of drought or other weather conditions.

3. Medical Expense Affidavits

a) *In re Chefs' Produce of Hous., Inc.*, 667 S.W.3d 297 (Tex. Apr. 21, 2023) (per curiam) [22-0286]

The issue in this mandamus proceeding is whether the trial court abused its discretion by striking Chefs' Produce's medical expense counteraffidavit and prohibiting the counteraffiant from testifying at trial.

Antonio Estrada was injured in a car accident with Mario Rangel, who was driving a box truck for his employer, Chefs' Produce. Estrada sued both Rangel and Chefs' Produce claiming that Rangel's negligence caused the wreck.

Estrada timely filed an affidavit under Section 18.001 of the Civil Practice and Remedies Code averring that he had incurred reasonable and

necessary medical expenses because of the accident. Chefs' Produce timely filed a counteraffidavit under Section 18.001(f) challenging Estrada's expenses. Chefs' Produce retained an anesthesiologist and pain management doctor as the counteraffiant.

Estrada moved to strike the counteraffidavit and testimony. The trial court granted the motion to strike and precluded the counteraffiant from testifying at trial. Chefs' Produce moved for reconsideration shortly after the Supreme Court issued its opinion in *In re Allstate Indemnity Insurance Co.*, 622 S.W.3d 870 (Tex. 2021), arguing that that opinion established that the trial court improperly struck the counteraffidavit. The trial court denied the motion for reconsideration. Chefs' Produce sought mandamus relief in the court of appeals, and a divided court denied relief.

The Supreme Court conditionally granted Chefs' Produce's petition for writ of mandamus and ordered the trial court to vacate its order striking the counteraffidavit and testimony. The Court held that the counteraffidavit satisfied all of Section 18.001(f)'s requirements and provided Estrada with reasonable notice of Chefs' Produce's basis for controverting the initial affidavit's claims. The Court further held that the mere inclusion of a causation opinion in an otherwise compliant Section 18.001(f) counteraffidavit is not a proper basis for striking it. Finally, the Court held that Chefs' Produce lacked an adequate appellate remedy because, given the procedural posture of the case, the trial court's improper order effectively foreclosed Chefs' Produce from presenting rebuttal testimony on the reasonableness and necessity of Estrada's medical expenses.

K. FAMILY LAW

1. Termination of Parental Rights

b) *In re J.N.*, 670 S.W.3d 614 (Tex. June 9, 2023) [22-0419]]

This case concerns a trial court's failure to interview a child under Section 153.009(a) of the Family Code. Under this section, upon application by certain parties, a trial court "shall" interview a child twelve and older to determine the child's wishes as to who will have the exclusive right to determine their primary residence. This statute applies only to nonjury trials or hearings. Therefore, a litigant must forgo her right to a jury trial to benefit from Section 153.009(a)'s interview provision.

In this divorce proceeding, Mother withdrew her jury demand and properly invoked the trial court's statutory obligation to interview her thirteen-year-old daughter regarding which parent she would prefer to have determine her primary residence. The trial court did not conduct the interview and ultimately granted the father the exclusive right to determine the primary residence of the couple's four children.

The court of appeals affirmed in a split decision. The panel agreed that the trial court erred in failing to conduct an in-chambers interview but disagreed about whether the error is subject to a harm analysis.

The Supreme Court held that the trial court erred in failing to conduct the interview because Section 153.009(a)'s interview requirement is

mandatory, and such an error is subject to a harm analysis. Here, the trial court's error was harmful. Consequently, the Court reversed the judgment in part and remanded for an interview under Section 153.009(a) and a new judgment regarding the child's primary residence.

c) *In re J.S.*, 670 S.W.3d 591 (Tex. June 16, 2023) [22-0420]

This case concerns the findings a trial court is required to make under Section 263.401(b) of the Family Code to extend the automatic dismissal deadline for a parental-rights-termination suit.

The suit to terminate the rights of J.S.'s parents was initially set for trial by remote appearance on the same day as the deadline for either commencing trial or dismissing the suit under Section 263.401(a). But J.S.'s attorney ad litem failed to appear, and both parents made last-minute requests for a jury trial. The trial court granted DFPS's motion to extend the dismissal deadline and rescheduled the trial to a later date. At DFPS's prompting, the court made an oral finding that the extension was in the best interest of the child. The court did not mention the second finding required by Section 263.401(b), that extraordinary circumstances necessitate the child's remaining in DFPS's conservatorship. Neither parent's counsel objected to the extension. The court later signed a written extension order that included both findings.

The parents' rights were eventually terminated after a jury trial, and Mother appealed. The court of appeals reversed, holding that the trial court's failure to make the extraordinary-circumstances finding when it granted the extension deprived the court of subject-matter jurisdiction. The court of appeals then vacated the trial court's judgment and dismissed the case.

The Supreme Court reversed. The Court held while Section 263.401(b) requires the best-interest and extraordinary-circumstances findings to be made expressly, these findings are mandatory rather than jurisdictional. As a result, a parent whose rights have been terminated generally must object before the initial automatic dismissal deadline passes in order to preserve the complaint for appellate review. Because Mother did not raise her complaint before the initial automatic dismissal deadline and did not oppose the extension, she had not preserved her complaint. Holding otherwise, the Court said, would penalize the trial court for doing its best to honor the parents' last-minute requests for a jury trial.

Justice Boyd concurred in judgment. He would have held that the findings are jurisdictional but can be made impliedly. Because the record in this case supports an implied finding of extraordinary circumstances, he joined the Court's judgment.

L. FEDERAL LAW

1. Regulatory Interpretation

a) *Wal-Mart Stores, Inc. v. Xerox State & Loc. Sols., Inc.*, 663 S.W.3d 569 (Tex. March 17, 2023) [20-0980]

The central issue in this tort and breach-of-contract case is whether a federal regulation, which authorizes

retailers to store electronic transactions when the cardholder verification system is unavailable and later forward them "at the retailer's own choice and liability," insulated a state agency contractor from liability for retailers' losses in connection with an outage of the contractor's verification system.

The federally funded, state-administered Supplemental Nutrition Assistance Program (SNAP) provides nutritional financial support for low-income individuals and families. Wal-Mart accepts SNAP benefits for qualifying food items, and Xerox contracts with state agencies to provide retailers like Wal-Mart with electronic verification of SNAP purchases. On a busy Saturday, Xerox's verification system went offline for around 10 hours due to a power failure while Xerox performed unannounced maintenance at its data center. During the outage, Wal-Mart continued to allow customers to make purchases but held the electronic transactions in abeyance for later submission and reimbursement, as authorized by the federal regulation. When Xerox's system came back online, and the stored transactions were forwarded, Wal-Mart was ultimately denied reimbursement for nearly 90,000 transactions worth around $4 million.

All parties agreed that the federal regulation precluded Wal-Mart from seeking reimbursement from SNAP beneficiaries or the government. But Wal-Mart sought to hold Xerox liable for its losses under tort theories and as a third-party beneficiary under Xerox's agreements with state agencies. Xerox moved for summary judgment, arguing that the federal regulation insulated it from liability for Wal-Mart's losses and submitting contractual excerpts disclaiming third-party beneficiaries from its contracts with state agencies. The trial court rendered a take-nothing judgment against Wal-Mart, and the court of appeals affirmed.

The Supreme Court, after examining the text, structure, history, and purpose of the federal regulation allowing retailers to store and forward transactions at their "own choice and liability," concluded that the regulation did not insulate Xerox, as the state contractor, from liability. Accordingly, the Court reversed the summary judgment on the tort claims and remanded those claims to the court of appeals to consider alternative grounds for affirmance. But the Court affirmed summary judgment on the breach-of-contract claim, holding that the relevant disclaimer provisions were sufficient to shift the burden to Wal-Mart to produce evidence of its third-party-beneficiary status and the contract provisions Wal-Mart identified in response failed to raise a fact issue on its status.

M. FEDERAL PREEMPTION

1. Railroads

a) *Horton v. Kan. City S. Ry. Co.*, ___ S.W.3d ___, 2023 WL 4278230 (Tex. June 30, 2023) [21-0769]

This case raises questions of federal preemption, evidentiary sufficiency, and charge error. Ladonna Sue Rigsby was killed when her truck collided with a train operated by Kansas City Southern Railroad Company while she was driving across a railroad crossing. Her children sued the Railroad

Company, alleging two theories of liability: (1) the Railroad Company failed to correct a raised hump at the midpoint of the crossing; and (2) it failed to maintain a yield sign at the crossing. Both theories were submitted to the jury in one liability question. The jury found both the Railroad Company and Rigsby negligent, and the trial court awarded the plaintiffs damages for the Railroad Company's negligence.

A divided court of appeals reversed. The majority concluded that the federal Interstate Commerce Commission Termination Act preempted the plaintiffs' humped-crossing theory and that the submission of both theories in a single liability question was harmful error. The court remanded for a new trial on the yield-sign theory alone.

Both sides petitioned for review. The Supreme Court granted the petitions and affirmed the court of appeals' judgment but for different reasons. The Court held that (1) federal law does not expressly or impliedly preempt the humped-crossing claim; and (2) no evidence supports the jury's finding that the absence of the yield sign proximately caused the accident. However, the Court agreed that a new trial is required because submitting both theories in a single broad-form question was harmful error.

Justice Busby filed a concurring opinion, urging the Supreme Court of the United States to reconsider *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941), and its progeny on the basis that implied obstacle preemption is inconsistent with the federal Constitution.

N. GOVERNMENTAL IMMUNITY

1. Arm of the State

a) *CPS Energy v. Elec. Reliability Council of Tex.* and *Elec. Reliability Council of Tex., Inc. v. Panda Power Generation Infrastructure Fund LLC*, 671 S.W.3d 605 (Tex. June 23, 2023) [22-0056, 22-0196]

The main issue in these cases is whether ERCOT is entitled to sovereign immunity.

In *CPS*, CPS sued ERCOT for breach of contract and other claims, alleging that ERCOT unlawfully short-paid CPS to offset losses suffered after Winter Storm Uri caused some wholesale market participants defaulted on their payment obligations to ERCOT. ERCOT filed a plea to the jurisdiction, asserting sovereign immunity and, alternatively, that the Public Utility Commission had exclusive jurisdiction. The trial court denied the plea, and the court of appeals reversed and dismissed the claims for lack of jurisdiction.

In *Panda*, Panda sued for fraud and other claims, claiming that ERCOT fraudulently projected a severe electricity shortfall when in fact there would ba an excess of supply and that Panda relied on ERCOT's reports when it decided to construct new power plants. ERCOT filed a plea to the jurisdiction asserting sovereign immunity and that the PUC had exclusive jurisdiction. The trial court granted the plea. Sitting en banc, the court of appeals reversed.

In an opinion by Chief Justice Hecht, the Supreme Court rendered

judgment for ERCOT in both cases. After concluding that ERCOT is a "governmental unit" entitled to an interlocutory appeal, the Court held that ERCOT is entitled to sovereign immunity. Specifically, the Court held that ERCOT is an "arm of the State" because, pursuant to the Utility Code, ERCOT operates under the direct control and oversight of the PUC, it performs the governmental function of utilities regulation, and it possesses the power to adopt and enforce rules. The Court further held that recognizing immunity satisfies the policies underlying immunity because it prevents the disruption of key governmental services, protects public funds, and respects separation of powers principles. The Court also held that the PUC has exclusive jurisdiction.

Justice Boyd and Justice Devine filed a jointly authored dissenting opinion, joined by two other justices. They agreed that ERCOT is a governmental unit and that the PUC has exclusive jurisdiction, but they would have held that ERCOT is not entitled to sovereign immunity.

2. Condemnation Claims

a) *Hidalgo Cnty. Water Improvement Dist. No. 3 v. Hidalgo Cnty. Irrigation Dist. No. 1*, 669 S.W.3d 178 (Tex. May 19, 2023) [21-0507]

The issue in this case is whether governmental immunity bars a condemnation suit brought by one political subdivision against another.

The Improvement District and the Irrigation District provide water and irrigation services in Hidalgo County. The Irrigation District operates an open irrigation outtake canal in McAllen through which most of Edinburg's drinking water flows. The Improvement District operates an underground irrigation pipeline along the right-of-way for Bicentennial Boulevard in McAllen. The Improvement District entered into an agreement with the City of McAllen to extend the irrigation pipeline in conjunction with the City's northward extension of Bicentennial Boulevard. The route of the proposed pipeline extension crosses the Irrigation District's canal.

The Improvement District offered to purchase an easement from the Irrigation District. After negotiations between them failed, the Improvement District filed a condemnation action. The trial court appointed special commissioners who awarded the Irrigation District $1,900 in damages. The Irrigation District objected to the commissioners' award, arguing that the Improvement District could not establish the "paramount public importance" of its proposed pipeline. Under the paramount-public-importance doctrine, a condemnation authority cannot condemn land that is already devoted to public use if doing so would effectively destroy the existing public use, unless that authority can show that the intended use is of "paramount public importance" and cannot be accomplished by any other means.

Before the trial court ruled on the objection, the Irrigation District filed a plea to the jurisdiction asserting that, as a governmental entity, it is immune from condemnation suits and that the Legislature has not waived that immunity. The trial court granted the plea and dismissed the suit. The

court of appeals affirmed.

The Supreme Court reversed, holding that sovereign immunity, and by extension governmental immunity, does not apply to the Improvement District's condemnation suit. The Court first reiterated the modern justifications for sovereign immunity and analyzed how the doctrine's modern justifications define its boundaries and inform whether it applies in the first instance. Next, the Court analyzed the historical development of condemnation proceedings in Texas with a particular focus on condemnations of public land. The Court noted that its jurisprudence has long resolved issues arising from the condemnation of land already dedicated to a public use through application of the paramount-public-importance doctrine without reference to immunity. Finally, the Court synthesized the modern justifications for sovereign immunity with the way its precedent has developed in both the sovereign-immunity and eminent-domain contexts to hold that the Irrigation District is not immune from the Improvement District's condemnation suit.

3. Contract Claims

a) *City of League City v. Jimmy Changas, Inc.*, 670 S.W.3d 494 (Tex. June 9, 2023) [21-0307]

This case involves the governmental/proprietary dichotomy in a breach-of-contract context. League City and Jimmy Changas entered into an agreement under Chapter 380 of the Texas Local Government Code, which permits cities to provide economic-development incentives to stimulate commercial activity. The City agreed to reimburse Jimmy Changas for certain fees and taxes if Jimmy Changas built a restaurant and created jobs in League City. After Jimmy Changas completed the project, League City refused to provide the promised reimbursements, and Jimmy Changas sued. The City filed a plea to the jurisdiction, arguing that contracts made under Chapter 380 were governmental functions and the City was therefore immune from suit. The trial court denied the City's plea, concluding that the City acted in its proprietary capacity, and the court of appeals affirmed.

The Supreme Court likewise affirmed. First, it held that Chapter 380 contracts are not similar to those expressly identified in the Tort Claims Act as being governmental. The Act includes only community-development activities under Chapter 373 and urban-renewal activities under Chapter 374 and does not suggest that local economic-development activities under Chapter 380 should be impliedly included.

It then held that the *Wasson* factors weigh in favor of determining that the City's acts were proprietary. The City's decision to contract with Jimmy Changas was discretionary, the contract primarily benefited City residents, the City acted on its own behalf (that is, it did not act as an agent of the State), and the City's acts were not sufficiently related to a governmental function so as to make them governmental as well.

Justice Young filed a concurring opinion. Although he agreed with the majority opinion, he suggested that the Court reconsider its reliance on the list of governmental functions in the Torts

Claims Act when deciding a contract case, and he questioned the usefulness of the *Wasson* factors in other cases.

Justice Blacklock filed a dissenting opinion, in which Justice Bland joined in part. He agreed with the concurrence that the *Wasson* factors do not aid the Court in answering the ultimate question of whether the City's acts were governmental or proprietary. The dissent would hold that a Chapter 380 tax-incentive grant program for local economic development is a governmental function because such contracts implement a government grant program operated for a diffuse public benefit.

b) *Pepper Lawson Horizon Int'l Grp., LLC v. Tex. S. Univ.*, 669 S.W.3d 205 (Tex. May 19, 2023) (per curiam) [21-0966]

The main issue on appeal is whether a construction contractor's claim against a university falls within a statutory waiver of governmental immunity that applies to a claim for breach of an express contract provision brought by a party to the written contract.

The university contracted with representatives of two construction companies who, as part of a joint venture, subsequently formed as Pepper Lawson to build student housing. Pepper Lawson completed the project more than six months after the contractual deadline. Invoking equitable adjustments and justified time extensions under contractual provisions, Pepper Lawson invoiced the university for an adjusted remaining balance due. The university refused to pay that amount, alleging that several contract provisions precluded the adjustments and time extensions. Pepper Lawson sued the university for breach of contract to recover the amount due and sought interest and attorney's fees under a statutory provision incorporated into the contract. The university asserted its immunity in a plea to the jurisdiction and alleged that the statutory waiver is inapplicable because Pepper Lawson failed to plead a claim covered by the provision. The trial court denied the university's plea, but on interlocutory appeal, the court of appeals reversed and rendered judgment dismissing the suit. For the first time, the university argued that Pepper Lawson lacked standing because the entity was subsequently formed after the contract and was not a party to the written contract.

The Supreme Court reversed the court of appeals' judgment and remanded the case to the trial court, holding that Pepper Lawson pleaded a cognizable breach-of-contract claim and sought categories of damages, including interest and attorney's fees, within the statutory waiver. Pepper Lawson was not required to prove its contract case to establish that the waiver applies. Finally, the Court did not reach the university's new standing argument to allow Pepper Lawson the opportunity to develop the record and amend its pleadings.

4. Texas Tort Claims Act

a) *Christ v. Tex. Dep't of Transp.*, 664 S.W.3d 82 (Tex. Feb. 10, 2023) [21-0728]

The issue in this case is whether the Tort Claims Act waives immunity for a premises-defect claim based on a commonly occurring condition.

Daniel Christ and his wife were riding their motorcycle through a construction zone when they collided head-on with a vehicle that crossed into their lane. The Texas Department of Transportation prepared the construction project's traffic control plan, which called for the placement of concrete barriers between the opposing lanes of traffic. The contractor instead placed yellow stripes and buttons, acting on TxDOT's purported oral approval. The Christs sued TxDOT, alleging negligence based on a premises defect.

TxDOT filed a plea to the jurisdiction and no-evidence motion for summary judgment. It argued the Tort Claims Act did not waive its sovereign immunity because the Christs failed to raise a fact issue on their premises-defect claim and because TxDOT's roadway-design decisions were discretionary. The trial court denied TxDOT's plea and motion, and TxDOT appealed. The court of appeals reversed, holding that TxDOT retained its immunity because it had discretion to orally modify the traffic control plan. The Christs petitioned the Supreme Court for review.

The Court affirmed on different grounds. The Court held that the Christs failed to raise a fact issue on whether a condition of the roadway was unreasonably dangerous. In the trial court, the Christs argued the construction zone was unreasonably dangerous solely due to the substitution of stripes and buttons for concrete barriers. The Christs presented no evidence that the use of stripes and buttons to separate travel lanes, a common condition on roadways, was measurably more likely to cause injury in this case. Nor did they present evidence of any complaints or reports of injuries from the use of stripes and buttons. Because the Christs did not raise a fact issue as to the existence of an unreasonably dangerous condition, an essential element of their premises-defect claim, they failed to establish a waiver of TxDOT's immunity under the Tort Claims Act.

b) *City of Austin v. Quinlan*, 669 S.W.3d 813 (Tex. Jun. 2, 2023) [22-0202]

The issue is whether the Texas Tort Claims Act waives the City of Austin's governmental immunity from a claim that it negligently maintained a permitted sidewalk café.

The City granted a restaurant a permit to use a portion of the sidewalk for a sidewalk café. The restaurant agreed to operate and maintain the sidewalk café's premises at its own expense. The City had the right to enter the sidewalk café premises to ensure the restaurant's compliance.

Quinlan was injured after exiting the restaurant when she fell from an elevated edge of the sidewalk to the street below. She sued the City, alleging, among other claims, that it negligently implemented a policy of ensuring that the restaurant complied with the maintenance agreement. The City filed a plea to the jurisdiction. The trial court denied the City's plea. A divided court of appeals affirmed with respect

to Quinlan's negligent-implementation claims.

The Supreme Court reversed, holding that Quinlan's claims are subject to the discretionary-function exception to the Texas Tort Claims Act. First, the Court noted that neither Quinlan nor the court of appeals identified any maintenance- or inspection-related act that the City was affirmatively required to perform under the maintenance agreement. Rather, the agreement granted the City permission to conduct inspections and order additional maintenance as it deemed fit. Second, the Court rejected Quinlan's argument that the City had a nondelegable statutory duty to protect the public from sidewalk cafés with dangerous conditions. Because the City had discretion, but not a legal obligation, to intervene, the City's decision not to do so was a discretionary decision for which it remained immune.

c) *City of Houston v. Green*, 672 S.W.3d 27 (Tex. June 30, 2023) (per curiam) [22-0295]

The issue in this case is whether a police officer is entitled to immunity under the Texas Tort Claims Act's emergency exception.

Houston police officer Samuel Omesa was responding to an emergency call when his vehicle collided with one driven by Crystal Green. Omesa testified that he had his emergency lights on and his siren activated intermittently. He claimed that he stopped and looked both ways at each intersection he crossed but that Green appeared suddenly from behind other vehicles and did not have her headlights on. Green disputed Omesa's testimony that he was driving at a reasonable speed and had his siren on.

Green sued the City of Houston. The City moved for summary judgment, asserting that the TTCA's emergency exception preserved the City's immunity. The trial court denied the motion, and the City appealed. The court of appeals affirmed, holding that Green raised a fact issue as to whether Omesa's conduct was reckless. The City petitioned the Supreme Court for review.

In a per curiam opinion, the Court reversed the court of appeals' judgment and rendered judgment dismissing Green's claims against the City. The Court held that the emergency exception applies—and that immunity is not waived—because Green failed to raise a fact issue as to whether Omesa acted with reckless disregard for the safety of others. Specifically, Green failed to introduce evidence that could support anything more than a momentary judgment lapse or failure to use due care, neither of which suffice to show reckless disregard for the safety of others.

d) *Fraley v. Tex. A&M Univ. Sys.*, 664 S.W.3d 91 (Tex. Mar. 24, 2023) [21-0784]

The issue in this case is whether the Texas Tort Claims Act waives immunity for a governmental unit's design of an intersection, including a ditch adjacent to the roadway.

Kristopher Fraley drove through an intersection and crashed into a ditch while driving at night on a property owned and controlled by Texas A&M University System. Fraley sued the University, alleging that the Act

waived the University's governmental immunity because the unlit, unbarricaded intersection where he crashed constituted an unreasonably dangerous condition or, alternatively, a special defect. The trial court denied the University's jurisdictional plea. The court of appeals reversed, holding that the complained-of condition was not a special defect and that the discretionary-function exception shielded the University from liability for the decision not to install safety features.

The Supreme Court affirmed. A governmental unit retains immunity for its discretionary design decisions, including the decision not to install safety features, if the decision results in an ordinary premises defect. If the complained-of condition is a special defect, however, the governmental unit owes a heightened duty, and the Act waives immunity correspondingly.

The Court held that Fraley's complaint about the intersection's lack of lights, barricades, and warning signs fell squarely within the discretionary-function exception for which the University retained immunity.

The Court also held that the complained-of condition was not a special defect. The Act describes special defects as being akin to obstructions or excavations on the road, and the Court has long analyzed special defects with reference to the risk posed to the ordinary user of the roadway. The Court held that the ditch adjacent to the roadway was not a special defect because it posed no danger to an ordinary user, who is expected to remain on the paved surface of the road.

e) *Gulf Coast Ctr. v. Curry*, 658 S.W.3d 281 (Tex. Dec. 30, 2022) [20-0856]

The issue in this case is whether the Texas Tort Claims Act's caps on the amount of a governmental unit's liability implicate the trial court's jurisdiction so the plaintiff has the burden to prove which cap applies.

Daniel Curry was struck by a bus driven by an employee of The Gulf Coast Center, a governmental unit that provides intellectual-disability services in Galveston and Brazoria Counties. Curry sued Gulf Coast under the Tort Claims Act, which caps the amount of a defendant's liability based on what type of governmental unit the defendant is. Following a jury trial, the trial court rendered judgment for Curry that included $216,000 in damages. Gulf Coast appealed, arguing that its liability should be capped at $100,000 because Curry failed to establish that a higher cap applies or, alternatively, the evidence conclusively established that Gulf Coast was subject to the $100,000 cap. The court of appeals affirmed. It concluded that the Tort Claims Act's damages caps are an affirmative defense and Gulf Coast had the burden either to obtain a jury finding or to present conclusive evidence at trial that the lower cap applied. Gulf Coast petitioned the Supreme Court for review.

The Supreme Court reversed. It held that the Tort Claims Act's damages caps are incorporated into the Act's waiver of immunity from suit, so a governmental unit retains its immunity from suit as to a claim that exceeds the applicable cap. The Court concluded that, as part of the plaintiff's burden to affirmatively demonstrate

the trial court's jurisdiction, the plaintiff has the burden to establish which cap applies. The Act's higher cap ($250,000) applies only to "the state government" or "a municipality," and the Court determined that Curry did not plead or prove that Gulf Coast was either. As a result, he failed to satisfy his burden that Gulf Coast waived its immunity from suit beyond the $100,000 cap. The Court independently held that the uncontroverted evidence established that Gulf Coast was a community center under Chapter 534 of the Health and Safety Code and therefore subject to the Tort Claims Act's $100,000 cap. The Court concluded that the trial court should have considered evidence presented after trial regarding the applicable damages cap.

f) *Rattray v. City of Brownsville*, 662 S.W.3d 860 (Tex. Mar. 10, 2023) [20-0975]

The primary issue in this case is whether a city's decision to close a stormwater gate during a rainstorm, which immediately preceded the flooding of a neighborhood, constitutes the "use or operation of . . . motor-driven equipment" under the Tort Claims Act.

Eleven homeowners in the City of Brownsville alleged that city officials closed a stormwater gate during a rainstorm and thereby caused a nearby resaca (a former channel of the Rio Grande River) to overflow and flood their homes. To recover for their property damage, they sued the City under section 101.021(1)(A) of the Tort Claims Act, which waives governmental immunity for any property damage that "arises from" the "use or operation of . . . motor-driven equipment."

The City filed a plea to the jurisdiction, challenging both the "use or operation" and "arises from" elements of the claim. The trial court denied the plea, but a divided court of appeals reversed. The "gravamen of the homeowners' complaint" concerned *non*use of the gate, the court of appeals observed, so the homeowners could not invoke the statutory waiver. The court of appeals further held that, even if the homeowners' allegations did concern the use of motor-driven equipment, the homeowners' property damage did not "arise from" the gate's closure because their homes would have flooded regardless of whether the gate was opened or closed.

The Supreme Court reversed. The Court held that because closing the gate put it to its intended purpose (blocking water), and because the gate's closure and the flooding of the homes all happened within the same episode of events, the homeowners had adequately pleaded enough facts to show use or operation of motor-driven equipment. As for the second issue, the Court held that the homeowners had produced enough evidence to create a fact issue on causation. In so holding, the Court clarified that plaintiffs can show that their property damage meets the "arises from" standard by meeting the familiar requirement of proximate cause.

5. Texas Whistleblower Act

a) *Tex. Health & Hum. Servs. Comm'n v. Pope*, 674 S.W.3d 273 (Tex. May 5, 2023) [20-0999]

The main issue in this case is whether two employees reported violations of law by their "employing governmental entity or another public employee" under the Texas Whistleblower Act when they reported violations of law by a private company that contracted with their employer.

Two employees of the Health and Human Services Commission, Dimitria Pope and Shannon Pickett, served as directors of a program that provides Medicaid beneficiaries with non-emergency transportation to and from medical providers. Federal and state law require that children who are Medicaid beneficiaries be accompanied by a parent or another authorized adult to receive transportation services and for the Commission to receive federal Medicaid reimbursement for providing the transportation. The employees reported to law enforcement that a private company the Commission contracted with to provide the transportation was transporting children without a parent or authorized adult.

After the employees were fired, they sued the Commission under the Whistleblower Act, alleging that they were terminated in retaliation for reporting violations of law by the Commission to law enforcement. The trial court denied the Commission's plea to the jurisdiction, and the court of appeals affirmed.

The Supreme Court reversed and rendered judgment for the Commission. The main issue before the Court was whether the employees' reports against the private contractor satisfied the Whistleblower Act's requirement that an employee report a violation of law by the "employing governmental entity or another public employee." The employees argued that their reports against the contractor were impliedly against the Commission too because of the structure of Medicaid's federal reimbursement scheme. The Court rejected that argument and held that the Act only protects express reports that unambiguously identify the employing governmental entity as the violator.

6. Ultra Vires Claims

a) *Hartzell v. S.O.* and *Trauth v. K.E.*, 672 S.W.3d 304 (Tex. Mar. 31, 2023) [20-0811, 20-0812]

These cases, consolidated for oral argument, address whether a public university has authority to revoke a former student's degree. In *Hartzell*, S.O. received a Ph.D. from UT Austin, which subsequently initiated disciplinary proceedings premised on allegations that S.O. engaged in scientific misconduct and academic dishonesty in connection with her doctoral research. In *Trauth*, K.E. received a Ph.D. from Texas State, which subsequently revoked K.E.'s degree after determining in an administrative proceeding that she engaged in academic misconduct in connection with her doctoral research. In both suits, the former students brought *ultra vires* claims against the respective university officials, asserting that they lack statutory authority to revoke previously conferred degrees. In *Trauth*, K.E. also alleged that she

was denied due process. The trial courts denied the universities' pleas to the jurisdiction with respect to the statutory-authority and due-process claims, and the courts of appeals affirmed.

The Supreme Court reversed as to the statutory-authority claims and dismissed those claims. The Court held that the statutory authority of the university systems' boards of regents is broad enough to encompass the authority to determine that a student did not meet the requisite conditions for earning a degree because of academic misconduct. The Court reasoned that whether the determination is made before or after a degree has been formally conferred is immaterial so long as the underlying conduct occurred during the student's tenure at the university, and due process is provided. The Court explained that courts in other states applying similarly worded grants of authority have uniformly determined that public universities have degree-revocation power.

However, the Court affirmed the denial of the jurisdictional plea as to K.E.'s due-process claim. The Court held that K.E. properly seeks prospective relief with respect to that claim and remanded the claim to the trial court for further proceedings.

Justice Boyd concurred in the judgment, opining that the only actions alleged to be *ultra vires* are scheduling a disciplinary hearing for S.O., noting on K.E.'s transcript that her degree was revoked, and requesting that K.E. return her diploma and no longer represent that she holds her degree. Justice Boyd concluded that the universities did not act *ultra vires* with regard to those specific actions.

Justice Blacklock, joined by Justice Devine, dissented, concluding that the governing statutes grant the universities neither express nor implied authority to revoke a previously conferred degree. The dissent would have held that revocation of a degree—an intangible asset—may result only from a judicial determination in a court of law.

b) *Tex. Educ. Agency v. Hous. Indep. Sch. Dist.*, 660 S.W.3d 108 (Tex. Jan. 13, 2023) [21-0194]

The issue in this case is whether a school district is entitled to prospective injunctive relief against the oversight actions of the Texas Education Agency Commissioner after the Legislature substantially amended the portions of the Education Code limiting the Commissioner's authority.

In 2016, the Commissioner appointed a conservator to Houston Independent School District to address repeated unacceptable academic accountability ratings received by a high school in the district. In 2019, a second high school received its fifth unacceptable rating in six years, and the Commissioner received a recommendation from a special accreditation investigation to appoint a board of managers to Houston ISD and lower the district's accreditation status.

Before the Commissioner could act, Houston ISD sought and received a temporary injunction barring the Commissioner from appointing a board of managers or taking any other action based on the results of the investigation. The Commissioner appealed and a divided court of appeals affirmed,

based on its interpretation of the then-existing Education Code. While the Commissioner's petition to this Court was pending, the 87th Legislature substantially amended the relevant provisions of the Education Code.

The Supreme Court reversed. The Court held that the temporary injunction must be supportable under the amended statutes because Houston ISD only has the right to seek prospective compliance with the law. The Court interpreted the amendments to eliminate the grounds the court of appeals relied on to affirm the temporary injunction. Because Houston ISD failed to show that the Commissioner's planned actions would violate the amended law, the Court vacated the temporary order and remanded the case for the parties to reconsider their arguments in light of intervening changes to the law and facts.

O. INSURANCE

1. Incorporation by Reference

a) *ExxonMobil Corp. v. Nat'l Union Fire Ins. Co.*, 672 S.W.3d 415 (Tex. Apr. 14, 2023) [21-0936]

At issue in this case is whether an umbrella insurance policy incorporates the payout limits of an underlying service agreement.

ExxonMobil entered into a service agreement with Savage Refinery Services, under which Savage was required to obtain liability insurance for its employees and to name Exxon as an additional insured. Savage obliged and obtained five different policies. National Union Fire Insurance Company underwrote two of them—a primary policy and an umbrella policy. After two Savage employees were severely injured during a workplace accident, Exxon settled with both for about $24 million, some of which National Union paid under its primary policy. National Union denied Exxon coverage under its umbrella policy, however, so Exxon sued for breach of contract. The trial court granted Exxon summary judgment, but the court of appeals reversed, holding that Exxon was limited to only primary coverage because the umbrella policy incorporated the primary policy's definition of "additional insured," which in turn was "informed by" the coverage limits spelled out in the service agreement.

The Supreme Court reversed. The Court began by noting the longstanding principles that insurance policies can incorporate extrinsic contracts, but only if they clearly do so, and that such extrinsic contracts will be referred to only to the extent required by the incorporation, but no further. Based on those principles, the Court concluded that National Union's umbrella policy incorporated the primary policy only for the purpose of identifying who was insured. The Court also rejected National Union's argument that Exxon was not entitled to coverage under the umbrella policy because that policy expressly disclaimed "broader coverage" than the primary policy. "Interpreting 'broader coverage' to refer to payout limits," the Court explained, "would give the umbrella policy a self-defeating meaning," and nothing in the policy's text required a "departure from the settled understanding that umbrella policies provide greater limits for *the risks already covered* by primary policies." The

Court accordingly reversed and remanded for further proceedings in light of Exxon's status as an insured under National Union's umbrella policy.

2. Private Right of Action

a) *Tex. Med. Res., LLP v. Molina Healthcare of Tex., Inc.*, 659 S.W.3d 424 (Tex. Jan. 13, 2023) [21-0291]

The Texas Insurance Code requires an insurer to pay for emergency care provided to its insureds by an out-of-network provider at the provider's "usual and customary rate." The main issue in this case and a companion case brought on certified question from the U.S. Court of Appeals for the Fifth Circuit, No. 22-0138, *United Healthcare Insurance Co. v. ACS Primary Care Physicians Southwest, P.A.*, is whether the Code authorizes a private damages action by a physician against an insurer for violating this statutory requirement.

Out-of-network emergency-care doctors sued Molina, alleging that the insurer failed to pay the doctors' usual-and-customary rates for treating thousands of Molina's insureds. They pleaded a cause of action directly under the Code's emergency-care provisions, a common-law quantum meruit claim, and a statutory claim for unfair settlement practices. The lower courts dismissed all of the doctors' claims, and the Supreme Court affirmed.

The Court first held that the Code does not authorize a private cause of action for a violation of the usual-and-customary rate payment requirement. The Court reasoned that a private a cause of action is not clearly implied in the text of the emergency-care provisions and noted that the Legislature has given the Department of Insurance broad authority to enforce those provisions. The Court also rejected the doctors' argument that recent statutory amendments that created a mandatory arbitration scheme for claims under the emergency-care provisions retroactively created a private cause of action for claims governed by the old, pre-arbitration law.

As to the doctors' other claims, the Court held that the doctors cannot satisfy the second element of a quantum meruit claim—that they undertook to treat Molina's insureds for the benefit of Molina—and also that the doctors' unfair-settlement-practices claim is not viable. Finally, the Court addressed the parties' and lower courts' characterizations of Molina's challenges to the doctors' claims as issues of the doctors' standing. The Court reiterated that statutory or common-law prerequisites to a plaintiff's filing suit or recovering on a claim are not issues of standing but of merits.

3. Rescission of Policy

a) *Am. Nat'l Ins. Co. v. Arce*, 672 S.W.3d 347 (Tex. Apr. 28, 2023) [21-0843]

The principal issue is whether proof of intent to deceive is required to rescind a life insurance policy during the contestability period based on a material misrepresentation in the insurance application.

Sergio Arce applied for life insurance from American National Insurance Company without disclosing certain health conditions. Thirteen days after the policy was issued, Arce died in an automobile accident.

American National refused to pay the beneficiary's claim because Arce had misrepresented his medical history.

In the beneficiary's suit for breach of contract and violations of the Texas Insurance Code, the insurer argued that the common-law scienter requirement is repugnant to Section 705.051 of the Insurance Code, which provides that a misrepresentation in a life insurance application "does not defeat recovery . . . unless the misrepresentation: (1) is of a material fact; and (2) affects the risks assumed." According to the insurer, Section 705.051 permits rescission of a policy if the two stated conditions are satisfied and, in doing so, renders the common-law intent-to-deceive requirement a dead letter. The trial court agreed and granted a take-nothing judgment for the insurer, but the court of appeals reversed, holding that the insurer could not rescind the policy without pleading and proving the misrepresentations were intentional.

The Supreme Court affirmed in part and reversed in part. On the main issue, the Court held that Section 705.051 does not abrogate the common law because the statute prescribes necessary, not exclusive or sufficient, conditions for denying recovery under a contestable life insurance policy. As written, Section 705.051 does not guarantee the insurer can "defeat recovery under the policy" if both conditions are satisfied; it only guarantees that recovery *cannot* be defeated if one or the other is not. The Court was not persuaded that this construction would render meaningless the express inclusion of an intent-to-deceive limitation in a different statutory provision applicable to incontestable life insurance policies. Finding no conflict with the statute, the Court also rejected the insurer's entreaty to repudiate the common-law rule as a product of "judicial drift" that adopts a minority view. However, the Court reversed and rendered judgment that the insurer did not forfeit its misrepresentation defense under a statutory notice provision that was inapplicable to Arce's life insurance policy as a matter of law.

In addition to joining the Court's opinion, Justice Young filed a concurring opinion elaborating on why principles of stare decisis require the Court to adhere to the common-law rule, which has coexisted with the statutory scheme for more than a century.

P. INTENTIONAL TORTS

1. Defamation

a) *Lilith Fund for Reprod. Equity v. Dickson* and *Dickson v. Afiya Ctr.*, 662 S.W.3d 355 (Tex. Feb. 24, 2023) [21-0978, 21-1039]

The issue in these consolidated cases is whether an advocate against legalized abortion defamed advocacy groups supporting legalized abortion when he called them "criminal organizations."

Mark Lee Dickson lobbied the city council in Waskom to pass an ordinance declaring abortion an act of murder. The ordinance identified The Lilith Fund for Reproductive Equity, the Afiya Center, and Texas Equal Access Fund as "criminal organizations" because they assist individuals in obtaining abortions. Dickson reproduced portions of the ordinance on his Facebook page and added his own commentary

that the groups are criminal organizations because they "exist to help pregnant Mothers murder their babies" and "murder innocent unborn children." The groups sued Dickson for defamation in Travis and Dallas counties. In both suits, Dickson filed motions to dismiss under the Texas Citizens Participation Act, which were denied. The Fifth Court of Appeals affirmed, concluding that Dickson's statements were not legally verifiable under the Texas Penal Code. The Seventh Court of Appeals reversed, holding that Dickson's statements were constitutionally protected statements of opinion. The Supreme Court granted review and consolidated the cases for oral argument.

The Supreme Court held that a reasonable reader would conclude that Dickson's statements were opinions that expressed disagreement with legal protections for abortion. Courts consider the entire context of an alleged defamatory statement from the perspective of a reasonable reader, who is knowledgeable of current events and sensitive to the manner of dissemination. A reasonable reader, apprised of the ongoing national debate surrounding abortion and informed by Dickson's exhortatory, first-person tone, would understand Dickson's speech to advance longstanding arguments about the morality and legality of abortion in the service of advocating that *Roe v. Wade* be overturned. Such opinions are constitutionally protected. An examination of the statements and their context shows no abuse of the constitutional right to freely speak. Dickson did not urge or threaten violence, nor did he misrepresent the underlying conduct in expressing his opinions about that conduct.

In a concurring opinion, Justice Devine wrote to emphasize that a prior declaration that the Texas abortion laws are unconstitutional did not remove them from the law books. Now that the declaration has been overruled, these prohibitions are enforceable.

Q. JURISDICTION

1. Appellate

a) *In re A.B.*, 676 S.W.3d 112 (Tex. Sept. 15, 2023) (per curiam) [22-0864]

The issue is whether an appellant can consolidate two separate appeals from a single judgment in one court of appeals by moving to consolidate in one court of appeals and voluntarily dismissing the appeal in another, when both courts of appeals have statutory jurisdiction to hear the case and no party objects.

In Gregg County, the trial court terminated Mother's and Father's parental rights in one trial court proceeding. Both the Sixth and Twelfth Courts of Appeals have jurisdiction to hear appeals from Gregg County. Father noticed his appeal to the Twelfth Court, and Mother to the Sixth Court. Father then amended his notice of appeal to reflect that he was appealing to the Sixth Court under the same case number as Mother. Father also moved to dismiss his appeal in the Twelfth Court, and the Twelfth Court granted his motion. After briefing was complete, the Sixth Court determined that it lacked jurisdiction over Father's appeal because the Twelfth Court had acquired dominant jurisdiction, and Father's amended notice of appeal did not

properly invoke the Sixth Court's jurisdiction.

The Supreme Court reversed, holding that Father's amended notice of appeal attempted compliance with the rule of judicial administration requiring consolidation of such cases. The Sixth Court acquired dominant jurisdiction when Father indicated his lack of intent to prosecute the appeal in the Twelfth Court.

2. Mandamus Jurisdiction

a) *In re Renshaw*, 672 S.W.3d 426 (Tex. July 14, 2023) (per curiam) [22-1076]

The central issue in this proceeding is whether a court of appeals must address a petitioner's request for mandamus relief when he expressly requests it as alternative relief.

Timothy Renshaw petitioned the trial court for release from his civil commitment, which the court denied without a hearing. Renshaw petitioned the court of appeals for writ of habeas corpus and, in the alternative, requested that the court "consider this a petition for a writ of mandamus." The court dismissed his habeas petition for want of original jurisdiction but did not address Renshaw's express request for mandamus relief.

Without hearing oral argument, the Supreme Court conditionally granted mandamus relief and directed the court of appeals to withdraw its previous opinion and to reconsider Renshaw's habeas corpus petition as a petition for writ of mandamus, as he requested.

3. Personal Jurisdiction

a) *LG Chem Am., Inc. v. Morgan*, 670 S.W.3d 341 (Tex. May 19, 2023) [21-0994]

The issue in this case is whether nonresident defendants' purposeful contacts with Texas are sufficiently related to a plaintiff's products-liability claims to support the exercise of specific personal jurisdiction.

Tommy Morgan alleged that he was injured when a lithium-ion battery he used to charge an e-cigarette exploded in his pocket. Morgan sued several defendants, including LG Chem, the South Korean manufacturer of the battery, and LG Chem America, its American distributor. LG Chem and LG Chem America each filed special appearances, which the trial court denied. The court of appeals affirmed.

LG Chem and LG Chem America petitioned for review. They argued that they only sold and distributed the battery that injured Morgan to industrial manufacturers, not individual consumers like Morgan, so their Texas contacts were insufficiently related to the plaintiff's claims to justify haling them into a Texas court.

The Supreme Court affirmed. The Court noted that the exercise of specific personal jurisdiction involves two components: first, the defendant must purposefully avail itself of the privilege of conducting activities in the forum state; and second, the plaintiff's claim must arise out of or relate to the defendant's contacts with the forum. The Court held that analyzing personal jurisdiction requires evaluation of a defendant's contacts with the forum—Texas—as a whole, not a particular market segment within Texas the

defendant may have targeted. LG Chem and LG Chem America did not dispute that they purposefully availed themselves of the privilege of doing business in Texas by selling and distributing into Texas the same product that allegedly injured Morgan. The Court therefore held that Morgan's products-liability claims were sufficiently related to the defendants' Texas contacts to satisfy due process and subject LG Chem and LG Chem America to specific personal jurisdiction in Texas.

4. Subject Matter Jurisdiction

a) *Ditech Servicing, LLC v. Perez*, 669 S.W.3d 188 (Tex. May 19, 2023) [21-1109]

At issue in this case is whether a county court at law, exercising jurisdiction pursuant to its independent, county-specific statute, is subject to the same jurisdictional limitations as if the court were exercising its concurrent constitutional county court jurisdiction.

Perez purchased property subject to a deed of trust held by Ditech's predecessor in interest. After Ditech initiated foreclosure proceedings, Perez filed suit in a Hidalgo County court at law. Perez asserted that Ditech waived its right to foreclose on the property, and Ditech counterclaimed for judicial foreclosure.

The county court at law rendered judgment for Perez. Ditech appealed, and the court of appeals reversed and remanded. On remand, Ditech moved for summary judgment on its judicial foreclosure counterclaim. In response, Perez argued that county courts at law lack subject-matter jurisdiction over actions requiring the resolution of issues of title to real property. The county court at law rejected Perez's jurisdictional challenge and granted Ditech's motion for summary judgment. Perez appealed, challenging only the county court at law's subject-matter jurisdiction. The court of appeals agreed with Perez, vacated the judgment, and dismissed the case for lack of subject-matter jurisdiction.

The Supreme Court reversed and rendered judgment for Ditech. Perez argued that the jurisdictional limitations on constitutional county courts—including the statutory provision depriving such courts of jurisdiction in a suit for the recovery of land—also apply to county courts at law. The Supreme Court explained that although county courts at law generally have concurrent jurisdiction with constitutional county courts, here the Hidalgo County court at law was exercising jurisdiction pursuant to its independent, county-specific statute, which granted the court jurisdiction in addition to its concurrent constitutional county court jurisdiction. Therefore, it was not subject to the same jurisdictional limitations as if the court were exercising its concurrent constitutional county court jurisdiction. Accordingly, the Supreme Court held that the Hidalgo County court at law had jurisdiction over Ditech's counterclaim.

R. JUVENILE JUSTICE

1. Mens Rea

a) *In re T.V.T.*, 675 S.W.3d 303 (Tex. Sept. 8, 2023) (per curiam) [22-0388]

This case concerns whether consent is relevant when a child under the age of fourteen is charged with aggravated sexual assault of another child under fourteen.

The State charged T.V.T. with aggravated sexual assault. At the time of the offense, T.V.T. was thirteen years old and the complainant was twelve. The trial court placed T.V.T. on probation and required that he receive sex-offender treatment. The court of appeals reversed and dismissed the case, holding that T.V.T. could not commit sexual assault because he lacked the legal capacity to consent to sex. Shortly thereafter, the Supreme Court held in *State v. R.R.S.*, 597 S.W.3d 835 (Tex. 2020), that juveniles under fourteen are capable of committing aggravated sexual assault.

In light of *R.R.S.*, the State moved for rehearing. The court of appeals denied the motion but issued a supplemental opinion, holding that consent, while not a defense, can still inform whether T.V.T. had the intent to commit aggravated sexual assault. The court also noted that when both the accused and complainant are close in age and under fourteen years old, it is difficult to distinguish between the victim and the offender.

The Supreme Court reversed. The Court first concluded that, even though T.V.T.'s probation had ended, the case was not moot because he still faced potential collateral consequences based on his adjudication as a sex offender. The Court then held that evidence of a victim's consent is not relevant to the accused's *mens rea*, reasoning that such a rule would circumvent the Legislature's exclusion of consent as a defense for engaging in the prohibited conduct with children under fourteen. The Court also found immaterial the fact that the T.V.T. and the victim were close in age, noting that the plain text of the statute covers conduct between children who are both under fourteen. The Court remanded the case to the court of appeals for consideration of T.V.T.'s constitutional arguments.

S. MEDICAL MALPRACTICE

1. Expert Reports

a) *Collin Creek Assisted Living Ctr., Inc. v. Faber*, 671 S.W.3d 879 (Tex. June 30, 2023) [21-0470]

This case examines what constitutes a "health care liability claim" under the Texas Medical Liability Act.

Christine Faber sued an assisted living facility for premises liability after her mother, a facility resident, died from injuries she sustained while being pushed on a rolling walker by a facility employee along the facility's sidewalk. A walker wheel caught in a crack, and Faber's mother fell. The facility filed a motion to dismiss on the grounds that Faber had not timely served an expert report as required by the TMLA. The trial court granted the motion, but the court of appeals, sitting en banc, reversed.

In an opinion by Justice Busby, the Supreme Court reversed the court of appeals' judgment, rendered judgment dismissing Faber's claim, and remanded the case to the trial court for

an award of attorney's fees. The Court explained that the court of appeals did not consider the entire record, which included allegations directed to employee conduct, the condition of the walker, and the decedent's status as a recipient of personal-care services. Applying the factors articulated in *Ross v. St. Luke's Episcopal Hospital*, the Court held that Faber's claim is a health care liability claim under the TMLA and that, therefore, an expert report was required.

Justice Young, joined by Justice Blacklock, concurred, suggesting that the *Ross* factors should be revisited.

Justice Boyd dissented, joined by Justice Lehrmann and Justice Devine. The dissent would have affirmed because the record lacks evidence that the facility provided the decedent with "health care" as defined in the Act.

T. MEDICAL LIABILITY

1. Health Care Liability Claims

a) *Uriegas v. Kenmar Residential HCS Servs., Inc.*, 675 S.W.3d 787 (Tex. Sept. 15, 2023) (per curiam) [22-0317]

The issue in this Chapter 74 case is whether two expert reports provide a fair summary of the experts' opinions regarding the standard of care and breach elements of a negligence claim against a residential care facility.

Brandon Uriegas, a nonverbal adult with intellectual and physical disabilities, resided at a residential care facility operated by Kenmar. Uriegas fell while showering and was treated for scalp lacerations. The next day, Uriegas fell in the bathroom again, allegedly while unsupervised, and did not receive an immediate medical evaluation. When Uriegas could not stand the following day, Kenmar staff took Uriegas to the hospital where he was diagnosed with a fractured hip and femur. Uriegas's guardian sued Kenmar and provided expert reports. Cumulatively, the reports state that after Uriegas fell the first time, Kenmar should have closely monitored Uriegas, especially while using the bathroom, and that Kenmar should have sought an immediate medical assessment of Uriegas after the second fall because Uriegas could not verbalize any pain or discomfort. The trial court denied Kenmar's motion to dismiss under Chapter 74 on the basis that the reports insufficiently described the applicable standard of care and breach of that standard. Agreeing with Kenmar, the court of appeals reversed.

The Supreme Court reversed the court of appeals, holding that the reports together provide a fair summary of the applicable standard of care and breach, namely, increased monitoring after a fall and medical assessments for nonverbal patients. That Kenmar disagrees about the appropriate standard of care is not a reason to reject the expert report at this stage of the case.

U. MUNICIPAL LAW

1. State Law Preemption

a) *Hotze v. Turner*, 672 S.W.3d 380 (Tex. Apr. 21, 2023) [21-1037]

The issue in this case is whether one proposed city charter amendment may impose a higher vote threshold for adoption on another proposed city charter amendment when both win a majority of votes at the same election.

A group of citizens submitted a proposed city charter amendment, Proposition 2, that would impose a strict voter-approval requirement before the City of Houston could increase tax revenues. The Houston City Council responded with its own proposed amendment, Proposition 1, that would require a more lenient voter-approval threshold; it also included a primacy clause that would require Proposition 1 to prevail over another majority-winning amendment "relating to limitations on increases in City revenues" if Proposition 1 passed with a higher number of votes. A majority of voters approved both propositions at the same election, but Proposition 1 earned more votes than Proposition 2.

The City declined to comply with Proposition 2, claiming that Proposition 1's primacy clause prevented its enforcement and, moreover, that the City Charter's reconciliation provision required such a result when two adopted amendments conflict. Bruce Hotze sued for enforcement, arguing that the primacy clause and the reconciliation provision violated a state law that provides for the adoption of a proposed charter amendment if it passes by a majority of votes. The trial court ruled that the primacy clause defeated Proposition 2. A divided court of appeals affirmed, holding that the state-law requirement that a majority-approved amendment must be adopted does not also require that the amendment be enforced.

The Supreme Court reversed, holding that the primacy clause improperly imposed a higher vote threshold than state law permits and that the City had no discretion to refuse to enforce a charter amendment after its approval and adoption. The Court observed, however, that state law does not address the unusual situation in which conflicting amendments pass simultaneously, and it remanded the case to the trial court to consider whether the City Charter's reconciliation provision governs the two amendments.

V. NEGLIGENCE

1. Duty

a) *Hous. Area Safety Council v. Mendez*, 671 S.W.3d 580 (Tex. June 23, 2023) [21-0496]

The issue in this case is whether third-party companies that collect and test employment-related drug-testing samples owe a duty of care to the employees being tested.

Mendez was required to submit to a random drug test as part of his employment. Houston Area Safety Council collected Mendez's samples, and Psychemedics tested them. Mendez's urine sample was negative, but his hair sample was positive for cocaine and cocaine metabolites. Although two subsequent hair tests came back negative, Mendez's employer refused to assign him to any jobsites.

Mendez sued the Safety Council and Psychemedics, alleging the companies negligently administered and analyzed the first hair sample, resulting in a false positive that cost him his job. Both companies filed motions for summary judgment. The trial court concluded that the companies did not owe Mendez a duty of care and granted summary judgment for the companies. The court of appeals reversed.

The Supreme Court reversed and rendered judgment for the companies. Chief Justice Hecht delivered the opinion of the Court, which held that third-party companies hired by an employer do not owe the employees they test a common-law duty of care. The Court concluded that the risk–utility factors set out in *Greater Houston Transportation Co. v. Phillips* weigh against imposing such a duty and that declining to recognize a duty is consistent with existing tort law.

Justice Young filed a concurring opinion joined by one other justice. They agreed with the majority but wrote separately to emphasize that the result could be reached without reliance on the risk–utility factors.

Justice Boyd filed a dissenting opinion joined by two other justices. They would have held that the risk–utility factors weigh in favor of imposing a duty on the third-party companies.

2. Res Ipsa Loquitur

a) *Schindler Elevator Corp. v. Ceasar*, 670 S.W.3d 577 (Tex. June 16, 2023) [22-0030]

The main issue in this case is whether the trial court abused its discretion by including in the jury charge an instruction on res ipsa loquitur.

Darren Ceasar alleges he was injured in a hotel elevator that ascended rapidly and then came to an abrupt stop at the wrong floor. He sued the hotel's elevator-maintenance company, Schindler, for personal injuries and presented two theories of negligence to the jury: (1) res ipsa loquitur and (2) the theory that Schindler negligently maintained the elevator's SDI board, which controls the elevator's position and velocity. The trial court submitted a jury instruction on res ipsa over Schindler's objection. The jury found for Ceasar, and the court of appeals affirmed.

The Supreme Court reversed and remanded for a new trial. The first evidentiary requirement for a res ipsa instruction is that the character of the accident is such that it would not ordinarily occur in the absence of negligence. The Court held that Ceasar presented no evidence to support this requirement because the testimony of Ceasar's elevator expert was conclusory and conflicting.

The Court further held that the court's submission of the res ipsa instruction was harmful because both of Ceasar's negligence theories were hotly contested, and the jury returned a 10–2 verdict. Finally, the Court rejected Schindler's challenges to a discovery-sanctions order, the court's exclusion of evidence, and the court's refusal to include a jury instruction on spoliation.

3. Vicarious Liability

a) *Cameron Int'l Corp. v. Martinez*, 662 S.W.3d 373 (Tex. Dec. 30, 2022) (per curiam) [21-0614]

The issue in this case is whether an oilfield worker traveling for personal necessities was acting in the course and scope of his employment such that the employer is vicariously liable for the worker's alleged negligence in connection with a car accident en route.

Cameron International Corporation hired John Mueller for a four-day job at a remote oil well worksite near

Orla, Texas. After Mueller's last contracted workday, his supervisor invited him to eat in Pecos. Mueller drove on his own to eat with his supervisor, fuel his truck, and restock his personal supply of food and water to bring back to the worksite, anticipating contracting for additional work. On his way back, Mueller was involved in a deadly accident. The accident survivors and their estates sued Mueller, Cameron, and others for negligence, and sought to hold Cameron liable under the doctrine of respondeat superior.

Cameron moved for summary judgment, arguing that it was not liable for worker travel that it did not control or direct. The trial court granted Cameron's motion, but the court of appeals reversed. The court of appeals held that a fact issue existed as to whether Mueller was on a special mission in the course and scope of his duties for Cameron at the time of the accident.

Cameron petitioned the Supreme Court for review, arguing that the court of appeals erred in interpreting the special mission doctrine too broadly by applying it to a personal errand. The Court agreed and reversed, reinstating the trial court's judgment in a per curiam opinion. The Court emphasized its recent statements that an employer cannot be held vicariously liable for accidents that occur while a worker conducts personal errands. The Court also declined to expand the scope of vicarious liability to match that of workers' compensation liability, and it reaffirmed past holdings that workers' compensation liability uses a distinct framework and attaches in broader situations than common law vicarious liability.

W. OIL AND GAS

1. Deed Construction

a) *Thomson v. Hoffman*, 674 S.W.3d 927 (Tex. Sept. 1, 2023) (per curiam) [21-0711]

At issue in this case is whether a 1956 deed reserved a fixed or floating royalty interest.

Peter and Marion Hoffman conveyed to Graves Peeler 1,070 acres of land in McMullen County, Texas, but reserved a royalty interest for Peter Hoffman. The deed expressly gave Peter "an undivided three thirty-second's (3/32's) interest (same being three-fourths (3/4's) of the usual one-eighth (1/8th) royalty) in and to all the oil, gas and other minerals." Other parts of the deed then referred to 3/32 without using the double-fraction description. Two interpleader actions were filed and consolidated in the trial court for a determination of the deed's meaning. The trial court concluded that the deed created a fixed 3/32 nonparticipating royalty interest, but the court of appeals reversed, holding that "the usual one-eighth (1/8th) royalty" language indicated an intent to reserve a floating interest.

The Hoffmans petitioned for review. After the parties filed briefs on the merits, the Supreme Court decided *Van Dyke v. Navigator Group*, 668 S.W.3d 353 (Tex. 2023), in which it held that an antiquated mineral instrument containing "1/8" within a double fraction raised a rebuttable presumption that 1/8 was used as a term of art to refer to the total mineral estate, not simply one-eighth of it. Because the court of appeals did not have the

benefit of *Van Dyke* and its rebuttable-presumption framework, the Supreme Court vacated the court of appeals' judgment and remanded for further proceedings in light of changes in the law.

b) *Van Dyke v. Navigator Grp.*, 668 S.W.3d 353 (Tex. Feb. 17, 2023) [21-0146]

This dispute concerns whether a 1924 deed reserving "one-half of one-eighth" of the mineral estate reserved a 1/2 interest or a 1/16 interest.

In 1924, the Mulkey parties conveyed their ranch and the underlying minerals to the White parties with a reservation of "one-half of one-eighth" of the mineral estate. For many decades, the parties' interactions with each other and in transactions with third parties reflected the understanding that both sides had a 1/2 interest. But in 2013, nearly 90 years after the deed, the White parties brought a trespass-to-try-title action asserting that the deed had reserved only a 1/16 interest. The Mulkey parties assert that they possess a 1/2 interest today for one of two reasons. Either the deed reserved that 1/2 interest all along, or else, even if it originally reserved only a 1/16 interest, the other 7/16 must be recognized by operation of the presumed-grant doctrine. The trial court granted the White parties' motion for partial summary judgment and declared that the deed unambiguously reserved a 1/16 interest. The court of appeals affirmed, holding that the deed unambiguously conveyed 15/16 of the mineral estate to the White parties and that the presumed-grant doctrine did not apply.

The Supreme Court reversed. First, the Court held that the text of the 1924 deed reserved the Mulkey parties a 1/2 interest in the mineral estate. Terms must be given the plain meaning that they bore at the time they were written. Thus, the reservation depends on whether the use of "1/8" in a double-fraction reflected an arithmetical meaning in 1924. The Court held that the double-fraction instead reflects a contemporary term of art, as the estate-misconception theory and the use of 1/8 as the standard royalty show. The Court thus applied a rebuttable presumption that instruments from this time used 1/8 within a double-fraction to refer to the entire mineral estate. Nothing in the text or structure of the deed in question rebuts that presumption, so the 1924 deed's reservation of "one-half of one-eighth" reserved 1/2 of the mineral estate.

In rare cases, the presumed-grant doctrine recognizes that the original instrument does not accurately reflect current ownership. The Court addressed that doctrine and held that the parties' extensive and unbroken history of recognizing and acting in reliance on a 1/2–1/2 split meant that the Mulkey parties had obtained the rest of a 1/2 interest at some point after 1924 even if the deed had reserved only a 1/16 interest.

The Court therefore reversed the judgment of the court of appeals and remanded to the trial court for further proceedings that will lead to a final judgment.

2. Force Majeure

a) *Point Energy Partners Permian LLC v. MRC Permian Co.*, 669 S.W.3d 796 (Tex. Apr. 21, 2023) [21-0461]

In this permissive interlocutory appeal, the central issue is whether a force majeure clause was properly invoked when the operation allegedly delayed by the force majeure had been untimely scheduled to begin after the lease deadline.

To suspend termination of its oil-and-gas lease at the end of the primary term, MRC had to commence drilling a new well by a certain date. But MRC mistakenly scheduled the drilling to begin three weeks after that deadline. MRC discovered its mistake after the deadline passed and invoked its lease's force majeure clause. The clause provided that "[w]hen Lessee's operations are delayed by an event of force majeure," the lease shall remain in force during the delay with ninety days to resume operations. In a notice to the lessors, MRC alleged that a month before the deadline, a wellbore instability on an unrelated lease set back its rig's schedule for drilling on other leases—including the untimely scheduled operation—by thirty hours. Point Energy responded that it had taken the lease from the lessors after the deadline had passed and challenged MRC's continued leasehold interests.

MRC sued Point Energy for tortious interference with its lease and declaratory relief that it properly invoked the force majeure clause. Point Energy counterclaimed for declaratory relief that MRC's lease terminated and that MRC's retained interests in production units for wells it had drilled during the primary term were limited in size to the smaller of two options described by the lease. On cross-motions for partial summary judgment, the trial court ordered that MRC's lease terminated, Point Energy did not establish the production-unit size as a matter of law, and MRC take nothing on its tortious-interference claims. The court of appeals reversed the declaratory judgment that the lease terminated, concluded that the question of the production-unit size was unripe for decision, reversed the take-nothing summary judgment on the tortious-interference claim, and remanded the case.

The Supreme Court held that, construed in context, "Lessee's operations are delayed by an event of force majeure" does not refer to the delay of a necessary drilling operation that had been scheduled to commence after the deadline for perpetuating the lease. Accordingly, the Court reversed the court of appeals' judgment on the force majeure and tortious-interference issues, rendered judgment that the force majeure clause did not save the lease as a matter of law, rendered a take-nothing judgment in part on MRC's tortious-interference claims to the extent they are predicated on the force majeure clause saving the lease, and remanded the case to the court of appeals to consider two issues preserved but not reached: the size of MRC's retained production units and whether the evidence raised a fact issue on MRC's tortious-interference claims regarding any leasehold interest in the retained production units.

3. Leases

a) *Apache Corp. v. Apollo Expl., LLC*, 670 S.W.3d 319 (Tex. Apr. 28, 2023) [21-0587]

This case primarily concerns whether the oil-and-gas lease at issue departed from the default common-law rule for computing time measured "from" a particular date.

In 2011, Apollo Exploration, Cogent Exploration, and SellmoCo (collectively, Sellers), along with Gunn Oil Company, entered into purchase-and-sale agreements with Apache. In the agreements, each Seller and Gunn conveyed to Apache 75% of their interests in 109 oil-and-gas leases, one of which was the Bivins Ranch lease at issue in this appeal, and entered into joint operating agreements making Apache the operator for these leases. There were two key features of the Bivins Ranch lease: (1) its primary term, which was to last three years "from" the lease's effective date of January 1, 2007, and (2) its continuous-drilling provision, through which the lease could be continued after the primary term expired by splitting the land into three equally sized blocks and drilling a certain amount each year. However, one of these blocks, the North Block, terminated after Apache did not fulfill that year's drilling requirement for that block.

The Sellers later alleged, among other things, that Apache breached the purchase agreements by not offering the North Block and other leases back to the Sellers. Apache argued that the North Block expired January 1, 2016, not (as the Sellers argue) December 31, 2015—a one-day difference with significant consequences for the amount of potential damages. The trial court agreed with Apache, excluded the Sellers' expert witness on damages, and granted Apache's summary-judgment motion challenging the Sellers' claims on the basis that the Sellers have no evidence of damages. The court of appeals, however, reversed on each of these issues.

The Supreme Court reversed. The Court held that the Bivins Ranch lease unambiguously imposed a January 1, 2010, expiration date for the primary term, which resulted in a January 1, 2016, expiration date for the North Block based on the text of the lease's continuous-drilling provision. The lease's primary term measured time "from" January 1, triggering the longstanding default common-law rule that years measured in this way end on the anniversary of that date (i.e., January 1 rather than December 31). Parties may measure time in any other way; and if they measure time "from" a date, they may freely depart from the default rule, but the text of the lease did not do so. The Court also addressed several other issues, holding that (1) the purchase agreements did not require Apache to offer Gunn's former interest—the remainder of which Apache had later also acquired, along with Gunn's purchase and sale rights—back to the Sellers, (2) the purchase agreements' back-in trigger—the point at which each Seller could "back in" for up to one-third of the interests it sold to Apache—should be calculated based on a 2:1 ratio of specified revenues versus specified expenses, and (3) the trial court correctly excluded the Sellers' expert witness on damages. The Court then remanded the case to the court of

appeals to determine whether the Sellers otherwise produced evidence sufficient to demonstrate damages and to address all remaining issues.

4. Release Provisions

a) *Finley Res., Inc. v. Headington Royalty, Inc.*, 672 S.W.3d 332 (Tex. May 12, 2023) [21-0509]

At issue was the scope of a release provision in an acreage-swap agreement between two oil-and-gas lessees. The parties disputed whether contract language releasing claims against a corporate entity's "predecessors" referred only to entity-related predecessors or more broadly encompassed an unnamed and unrelated entity as a "predecessor in title" under a different mineral lease for the same property.

Finley owned development rights for the Loving County Tract's shallow zones under the Arrington Lease. Headington owned the deep rights under the same lease. Petro secured the right to develop all depths on the property under a top lease (the WIRC Lease) that would become effective only when the Arrington Lease terminated. When questions arose about whether that event had occurred, Petro and Headington made separate demands to Finley for production information. Petro and Finley later settled the matter by entering an agreement in which (1) Finley assigned its Arrington Lease interests, if any, to Petro via a Quitclaim Assignment; (2) Finley certified there had been no production or well operations for at least eight months; and (3) Petro assumed all liabilities and obligations under the Arrington Lease and agreed to indemnify Finley for claims and damages arising from the same.

Contemporaneously, Headington negotiated with Petro to acquire the WIRC Lease in exchange for the deep rights in a different tract. Headington was informed about Finley's lease assignment, and not long after, Headington and Petro consummated an acreage-swap agreement that included mutual releases of liability limited to the Loving County Tract. The agreement did not name Finley or mention the Arrington Lease, and the releases expressly excluded, and assigned to Petro, liability for plugging and restoring Finley's wells. Petro, its affiliates, and their "predecessors" were otherwise released from all claims and liabilities "related in any way to the Loving County Tract." A few months later, Headington sued Finley, alleging it lost its mineral rights under the Arrington Lease due to nonproduction from Finley's wells and Finley's failure to provide well information warning Headington about the same. Finley and Petro (as an intervenor) asserted that Headington had released its claims against Finley as Petro's predecessor-in-title, predecessor-in-interest, and predecessor well operator.

The trial court rendered summary judgment for Finley and Petro that "predecessors" broadly includes a predecessor-in-title to the subject property interest. A divided court of appeals reversed, holding that "predecessors," as used in the release, unambiguously referred only to Petro's corporate predecessors.

The Supreme Court affirmed. The court first corrected the lower court's mischaracterization of releases

as effecting a "forfeiture," explaining that releases involve a voluntary relinquishment, while forfeiture connotes a penalty. The Court then cited the rule that categorical releases are construed "narrowly" and will only release an unnamed party described with such particularity that "a stranger could readily identify the released party." Even so, the outcome did not turn on a narrow construction or the absence of "descriptive particularity" but, rather, on the plain meaning of the contract language construed in context. Although "predecessors" has a potentially broad meaning, the grammatical and syntactic structure in which it was used limited the term to corporate predecessors. The Court also explored the limits on "surrounding circumstances" as an interpretive aid, noting that it was "not an invitation to backdoor parol evidence of subjective intent" and could not be used to impose a broader meaning than the text of the contract, construed as whole, allowed.

In a concurring opinion, Justice Boyd concluded that the meaning of "predecessors" was ambiguous and Finley's identity as a release party was therefore in doubt. Because precedent holds that a release is only effective as to unnamed parties described with sufficient particularity, the existence of an ambiguity made the release ineffective as to Finley.

5. Royalty Payments

a) *Devon Energy Prod. Co. v. Sheppard*, 668 S.W.3d 332 (Tex. Mar. 2023) [20-0904]

At issue in this mineral dispute is whether a bespoke royalty provision required the producers to include a third-party purchaser's postproduction costs in the royalty base before calculating the landowners' royalty.

In fairly standard language, the mineral leases provided for royalty payments based on gross sales proceeds, broadly defined as "all consideration" received from unaffiliated third-party sales. But in more unusual language, the leases mandated that, if "any reduction or charge for [postproduction] expenses or costs" has been "include[d]" in "any disposition, contract or sale" of production, those amounts "shall be *added to* the . . . gross proceeds." (Emphasis added.)

Unlike typical postproduction-cost disputes, the parties agreed that, under the leases, (1) the landowners' royalty is free of costs to the point of sale; and (2) the producers cannot directly or indirectly charge the royalty holders with a proportionate share of those expenses. But the landowners claimed the producers were also required to pay royalty on sums all agreed were neither the producers' incurred postproduction costs nor gross proceeds: the buyer's actual or anticipated costs to enhance the value of production after the point of sale.

After severing and abating breach-of-contract claims, the parties filed cross-motions for summary judgment on twenty-three stipulated issues, seeking a declaration as to whether the producers were required to add different categories of amounts to the royalty base under the "added to" "gross proceeds" clause. The trial court rendered judgment for producers. The court of appeals reversed and rendered in part and affirmed in part.

Only the producers appealed the

adverse judgment. Illustrative of the transactions at issue were contracts setting the sales price—and thus the gross sales proceeds—by using published index prices at market centers downstream from the point of sale and then subtracting $18 per barrel for the buyer's anticipated post-sale costs for "gathering and handling, including rail car transportation." The question was whether the producers were required, as the lower courts held, to add sums like the $18 adjustment to the royalty base.

The Supreme Court affirmed, holding the broad lease language unambiguously contemplates a royalty base that may exceed gross proceeds and requires the producers to pay royalties on the gross proceeds of the sale *plus* sums identified in the producers' sales contracts as accounting for actual or anticipated postproduction costs, even if such expenses are incurred only by the buyer after or downstream from the point of sale. The Court observed that the parties expressly deviated from the usual rule that landowners proportionally share the burden of postproduction costs by (1) providing for a "gross proceeds" royalty and (2) mandating that certain sums beyond consideration accruing to the producers be "added to" gross proceeds.

In dissent, Justice Blacklock argued that the mineral leases did not bargain for royalties to be paid on market-center prices, so the producers' sales contracts did not actually include a "reduction" or "charge" for postproduction costs. To the contrary, the sales contracts merely employed a formula for valuing the products at the point of initial sale. Although nothing would ever actually be "added to" "gross proceeds" under this construction of the lease, the dissent explained that the clause prevented "accounting gimmicks" to reduce gross proceeds for the initial sale and thereby reduce the royalty payment."

b) *Freeport-McMoRan Oil & Gas LLC v. 1776 Energy Partners, LLC*, 672 S.W.3d 391 (Tex. May 19, 2023) [22-0095]

The issue in this case is whether an operator of oil-and-gas wells was entitled to withhold production payments under the Texas Natural Resources Code's safe-harbor provisions.

Two energy-production companies, Ovintiv and 1776 Energy, entered into a series of agreements to jointly develop and produce minerals from oil-and-gas leases they owned in Karnes County. As the operator of the leases, Ovintiv was responsible for distributing production payments from these leases to 1776 Energy. A third party, Longview Energy, later sued 1776 Energy and obtained a judgment ordering 1776 Energy to transfer its interest in the Karnes County leases to Longview and imposing a constructive trust on those interests until the transfer occurred. Based on this judgment, Ovintiv suspended payments to 1776 Energy. 1776 Energy sued.

The court of appeals in the Longview suit reversed the judgment, and the Supreme Court affirmed. After that mandate issued, Ovintiv paid the withheld funds to 1776 Energy. 1776 Energy accepted the payments but pursued this suit to collect interest on the withheld payments. The trial court

granted summary judgment for Ovintiv, determining that the statutory safe-harbor provisions allowed it to withhold the funds without interest. The court of appeals reversed, holding that fact issues surrounding the safe-harbor provisions precluded summary judgment.

The Court reversed and held that the safe-harbor provisions applied as a matter of law for two reasons. First, the Natural Resources Code allows withholding payments without interest when a title dispute "would affect distribution of payments." The Court held that "would affect" means the title dispute was expected or likely to influence or alter the distribution of the payments. Here, the Longview lawsuit "would affect" the distribution of payments because it would require that payments be made either to Longview or to 1776 Energy.

Second, the Code allows a payor to withhold payments without interest when the payor has reasonable doubt that the payee has clear title to the proceeds. Here, Ovintiv had a reasonable doubt that 1776 Energy had clear title because the constructive trust established by the Longview suit clouded title. In fact, the very existence of the underlying dispute, so long as it was not frivolous, clouded title. Thus, the Court reversed the court of appeals and reinstated the trial court's final judgment dismissing 1776 Energy's claims.

X. PROBATE: WILLS, TRUSTS, ESTATES, AND GUARDIANSHIPS

1. Will Construction

a) *Jordan v. Parker*, 659 S.W.3d 680 (Tex. Dec. 30, 2022) [21-0205]

This case presents the issue of whether a conveyance of "all of my right, title and interest" in a ranch included the grantor's remainder interest in an estate that held an interest in the same ranch.

J. Loyd Parker Jr. left a life estate to his widow, Ruthie Parker, with a remainder in the estate to their two children. The estate included many real estate holdings, including a one-fourth interest in the Cottonwood Ranch. Loyd Jr.'s son, Loyd III, separately owned a one-eighth fee simple interest in the Cottonwood Ranch. During his mother's lifetime, Loyd III conveyed "all of my right, title and interest" in the Cottonwood Ranch to his daughters, Elise and Allison, in equal shares. Loyd III died and left his entire estate to his wife, Kathy.

After Loyd III's death, Elise claimed a right to a one-sixteenth interest in the Cottonwood Ranch from Loyd III's remainder interest that followed Ruthie's life estate. Kathy sued Elise to resolve this claim, and the trial court granted summary judgment to Elise. The court of appeals reversed. It held that Loyd III's deed, executed during his mother's lifetime, did not convey any remainder interest that followed her life estate. The court of appeals relied on the rule that a grantor may convey a future interest only by clear and express language demonstrating the intent to do so.

The Supreme Court affirmed. The Court held that, because Loyd Jr.'s will gave the life tenant expansive powers to sell or give away estate holdings, Loyd III had only an expectancy in any particular piece of estate property during Ruthie's life tenancy. The Court reaffirmed the longstanding rule that an expectancy or future interest may be conveyed only through language that clearly manifests the grantor's intent to convey it. Therefore, when Loyd III conveyed all his right, title, and interest in the Cottonwood Ranch through a deed that did not expressly refer to his expectancy, he conveyed only the fee simple interest he owned at the time.

Y. PROCEDURE—APPELLATE

1. Dismissal

a) *Alsobrook v. MTGLQ Invs., LP*, 656 S.W.3d 394 (Tex. Nov. 18, 2022) (per curiam) [22-0079]

This case concerns the proper procedure for dismissal when a case becomes moot prior to the filing of the appeal. Mortgagee MTGLQ Investors sought to foreclose on Courtney Alsobrook's property. Alsobrook filed suit and obtained a temporary injunction. After the injunction expired and Alsobrook did not move to extend it, the trial court granted summary judgment in MTGLQ's favor, and MTGLQ successfully foreclosed on the property.

Alsobrook appealed. MTGLQ moved to dismiss the appeal as moot because Alsobrook was no longer the owner of the property. The court of appeals granted the motion and dismissed the appeal. Alsobrook then sought review in the Supreme Court, arguing that the court of appeals should have also vacated the trial court's judgment.

In a per curiam opinion, the Supreme Court held that the court of appeals erred by failing to vacate the lower court's judgment. The Court reiterated its long-standing practice of setting aside all previous orders when a case becomes moot on appeal. The Court also held that, under Rule of Appellate Procedure 43.2(f), the court of appeals should have dismissed the "case," not the "appeal." The Court therefore modified the court of appeals' judgment to vacate the trial court's judgment. The Court dismissed the case and affirmed the court of appeals' judgment as modified.

b) *Durden v. Shahan,* 658 S.W.3d 300 (Tex. Dec. 30, 2022) (per curiam) [21-1003, 21-1017, 21-1018]

The issues in this case are (1) whether a county attorney has authority to initiate a Texas Open Meetings Act suit in the name of the State; and (2) whether the attorney made a bona fide attempt to invoke the court of appeals' jurisdiction with respect to sanctions imposed against the attorney personally.

County Attorney Todd Durden filed three lawsuits on behalf of the State of Texas that alleged violations of the Texas Open Meetings Act by Kinney County officials. The trial court concluded that Durden lacked authority to file the suits on the State's behalf. The court dismissed all three cases and sanctioned Durden personally by ordering him to pay the defendants' attorney's fees and costs. Durden filed a notice of appeal that stated that

Durden, in his official capacity, was appealing as to all issues and all parties affected by the order. The court of appeals affirmed, agreeing that Durden lacked authority and refusing to reach the merits of his sanctions complaint because he failed to file a notice of appeal in his individual capacity.

In a per curiam opinion, the Supreme Court affirmed the part of the court of appeals' judgment dismissing Durden's Texas Open Meetings Act suits because he lacked authority to bring them, but the Court reversed the part of the judgment that dismissed Durden's appeal of the sanctions imposed against him personally. The Court first held that while the Texas Constitution authorizes county attorneys to represent the State in some cases, that authority to represent the State does not include the authority to independently decide whether to institute a suit on the State's behalf. The Legislature must specifically provide that authority by statute. The Court rejected Durden's argument that TOMA's language authorizing any "interested person" to sue provides authority for a county attorney to bring a TOMA suit on the State's behalf. The Court then turned to the dismissal of Durden's sanctions appeal. After reiterating the rule that appeals should be decided on the merits rather than dismissed for procedural defect, the Court held that the court of appeals should have accepted Durden's appeal from the sanctions order or permitted him to amend the notices of appeal because Durden made a bona fide attempt to invoke the court's jurisdiction. The Court remanded the case to the court of appeals for further proceedings.

2. Judicial Appointments

a) *State v. Volkswagen Aktiengesellschaft* and *State v. Audi Aktiengesellschaft*, ___ S.W.3d ___, 2022 WL 17072342 (Tex. Nov. 18, 2022) (per curiam) [21-0130, 21-0133]

The issue addressed in this per curiam opinion is whether the Governor may appoint and commission substitute justices to participate in the Supreme Court's determination of a case in which the State of Texas is a party.

The State filed suits against several related entities, including two German companies (Volkswagen Aktiengesellschaft and Audi Aktiengesellschaft), for alleged violations of state environmental laws. The German entities filed special appearances challenging the court's exercise of personal jurisdiction over them, which the trial court denied. Divided courts of appeals reversed and dismissed the State's claims against the German entities. The State filed petitions for review. The Court granted the petitions and consolidated them for oral argument, which was held on February 22, 2022.

While the cases were pending, two of the Court's nine justices recused sua sponte. Relying on Government Code Section 22.005, the Chief Justice requested that the Governor commission two new justices to participate in the determination of these cases. The German entities objected to this procedure on various grounds. They argued that if the seven remaining justices cannot reach a five-justice majority, the Court should dismiss the petitions as improvidently granted.

The Court denied the German

entities' objections. The Court first held that the Governor's appointment of justices to participate in determining these cases would not allow the State to be the judge of its own cause. The Governor is not the party bringing the underlying lawsuit—the suit was brought by the Attorney General at the request of the Texas Commission on Environmental Quality. The Court concluded that party status cannot be imputed on the Governor and the mere fact that justices are appointed by the Governor is no basis for claiming they would be acting on the State's behalf. The Court next held that the Governor's appointments do not violate due process. Neither the Governor nor the appointed justices have the type of personal or pecuniary interest in the outcome of these cases that would create a serious, objective risk of actual bias. And adopting the German entities' theory would prohibit the appointment of any substitute justice, which could prevent the Court from resolving the case. Finally, the Court concluded that Texas's procedural rules and ethical canons do not require the automatic disqualification or recusal of any justice appointed by the Governor. The mere fact that the Governor selected the justices to participate in these cases would not create in reasonable minds a perception that these justices would be unable to carry out their responsibilities with integrity, impartiality, and competence.

Z. PROCEDURE—PRETRIAL

1. Compulsory Joinder

a) *In re Kappmeyer*, 668 S.W.3d 651 (Tex. May 12, 2023) [21-1063]

The principal issue in this case is whether individual property owners are required to join a subdivision's 700 other owners to secure a declaration against the homeowners association regarding enforcement of amended restrictive covenants. The Kappmeyers, who own property in the Key Allegro Island Estates subdivision, sued the Key Allegro Canal and Property Owners Association for a declaratory judgment that the amended restrictions, including their imposition of mandatory annual assessments, could not be enforced against the Kappmeyers because the amendments had not been approved by the required vote of the subdivision's owners; instead, the Association's board of directors had unilaterally executed the amended restrictions without a vote of the owners. The Association filed a motion to abate and compel joinder of the other owners. The trial court granted the motion and ordered the Kappmeyers to join and serve all 700 owners within ninety days on pain of dismissal. The court of appeals summarily denied mandamus relief.

The Supreme Court conditionally granted the Kappmeyers' petition for writ of mandamus and ordered the trial court to vacate its order. Rule 39(a)(2)(ii) of the Texas Rules of Civil Procedure requires joinder of a person who "claims an interest relating to the subject of the action" if disposition in the person's absence subjects any of the current parties "to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." The Court explained that, while the absent homeowners *could* claim an interest in enforcing the amended restrictions

against the Kappmeyers, no evidence indicates that any of them has *actually* claimed such an interest as required to compel their joinder. The fact that the declaration sought could affect the absent homeowners does not in itself satisfy Rule 39's joinder prerequisites. Thus, the trial court clearly abused its discretion in granting the Association's motion.

The Court further held that the Kappmeyers lack an adequate remedy by appeal, explaining that the underlying order, which requires them to bear the significant expense of joining and serving several hundred parties, puts them in danger of succumbing to the burden of litigation and abandoning the suit. Further, such orders all but ensure that this kind of litigation will never be pursued.

2. Discovery

a) *In re Auburn Creek L.P.*, 655 S.W.3d 837 (Tex. Dec. 2, 2022) (per curiam) [21-0886]

The issue in this mandamus proceeding is whether the trial court abused its discretion by denying the defendants' motion under Texas Rule of Civil Procedure 204.1 to conduct a medical examination of the plaintiffs.

Members of the Pau family sued their landlord Auburn Creek and related parties, alleging that they sustained traumatic brain injuries from being exposed to carbon monoxide in their apartment. The Paus sought more than $33 million in damages. Auburn Creek moved for an order under Rule 204.1 requiring the Paus to submit to neuropsychological testing by a clinical psychologist whom Auburn Creek had retained as a testifying expert. After the trial court denied the motion without prejudice, Auburn Creek filed a motion to reconsider, which the trial court also denied. Both motions were filed more than thirty days before the end of the discovery period, as required by Rule 204.1. On the Paus' motion, and because Auburn Creek acknowledged that its expert could not form an opinion on the nature and extent of the Paus' injuries without examining the plaintiffs himself, the trial court issued an order striking the expert's testimony in part. The court of appeals denied Auburn Creek's mandamus petition.

The Supreme Court conditionally granted mandamus relief in a per curiam opinion. The Court first held that Auburn Creek's motions were timely. The Paus argued that the motion to reconsider was filed too late because the hearing was not held until a few days before the end of the discovery period, and it would not have been possible to conduct the examination before discovery closed. The Court disagreed because Auburn Creek's motions were timely under Rule 204.1, and the delay in having the motion to reconsider heard was outside of Auburn Creek's control.

Next, the Court held that Auburn Creek's motion satisfies Rule 204.1's good-cause requirement because Auburn Creek's motion met the three-part test established by Supreme Court precedent: (1) the examination is likely to lead to relevant evidence; (2) there is a nexus between the examination and the condition alleged; and (3) the information cannot be obtained by less intrusive means. After concluding that Auburn Creek lacked an adequate

remedy by appeal, the Court directed the trial court to withdraw its orders denying the motion to compel and partially striking Auburn Creek's expert and to sign an order requiring the Paus to submit to an examination by Auburn Creek's expert.

b) *In re Kuraray Am., Inc.*, 656 S.W.3d 137 (Tex. Dec. 9, 2022) (per curiam) [20-0268]

The issue in this case is whether the trial court abused its discretion by ordering a party to produce up to four months of cell-phone data from its employees.

Multiple workers at a chemical plant sued the plant operator, Kuraray America, Inc., for injuries resulting from a chemical release and fire. Shortly after the incident, Kuraray collected the company-issued cell phones of several employees and copied the data. The plaintiffs moved to compel discovery of all information collected from those phones. The plaintiffs did not allege that cell-phone use by any Kuraray employee contributed to the chemical release, but they argued at a hearing that Kuraray employees could have been distracted by their cell phones and presented evidence that Kuraray had a history of problems with cell-phone use by employees. The trial court ordered Kuraray to produce the cell-phone data of three employees for four months before the chemical release and of two supervisors for six weeks before the release. Kuraray moved for reconsideration, asserting that the cell-phone data demonstrated that none of the five employees was using a cell phone at a time when the employees could have been distracted from responding to plant conditions. The trial court denied reconsideration. Kuraray sought mandamus relief, which the court of appeals denied. Kuraray then petitioned the Supreme Court for a writ of mandamus.

The Court conditionally granted Kuraray's petition. The Court held that, to obtain production of cell-phone data, the party seeking the data must first allege or provide some evidence of cell-phone use by the person whose data is sought at a time when cell-phone use could have contributed to the underlying incident. Once this burden is satisfied, the trial court may order production of cell-phone data but only for the time period in which cell-phone use could have contributed to the incident. If this initial production indicates that cell-phone use could have contributed to the incident, then the trial court may consider whether additional discovery regarding cell-phone use may be relevant. Here, the Court concluded there was no showing that any employee's cell-phone use could have contributed to the chemical release, so the trial court abused its discretion by ordering production of cell-phone data for a six-week or four-month period.

c) *In re Liberty Cnty. Mut. Ins. Co.*, ___ S.W.3d ___, 2023 WL 7930099 (Tex. Nov. 17, 2023) (per curiam) [22-0321]

The issue in this case is whether the trial court abused its discretion by quashing a subpoena seeking medical records from a plaintiff's primary care physician in a case where the plaintiff's injuries are in dispute.

Following a car accident, Thalia Harris sued the other driver and

settled for that driver's policy limits. Harris then sued her insurer, Liberty County Mutual Insurance Company, for underinsured motorist benefits, alleging that her damages exceeded the settlement amount. Liberty sent two subpoenas to Harris's primary care physician seeking all documents, records, and films pertaining to the care, treatment, and examination of Harris for a fifteen-year period. Harris moved to quash both subpoenas as facially overbroad and for sanctions. In its written response, and again at the hearing, Liberty agreed to reduce the timeframe of the requests to ten years (five years before the accident and five years after). The trial court granted Harris's motion to quash and sanctioned Liberty's counsel. Liberty sought mandamus relief, which the court of appeals denied. Liberty then petitioned the Supreme Court for a writ of mandamus.

The Court conditionally granted Liberty's petition. The Court held that the trial court clearly abused its discretion because Liberty's requests sought relevant information and, as modified, were not so overbroad or disproportionate as to justify an order precluding all discovery from Harris's primary care physician. By suing Liberty for UIM benefits, Harris placed the existence, causation, and extent of her injuries from the car accident at issue. The record also showed that Harris was involved in multiple other car accidents both before and after the accident at issue, some of which involved similar injuries. The Court further held that mandamus relief was appropriate because the trial court's order denied Liberty a reasonable opportunity to develop a defense that goes to the heart of its case, and it would be difficult to determine on appeal whether the discovery's absence would affect the outcome at trial. Finally, the Court set aside the sanctions order because it was supported only by the erroneous order quashing Liberty's discovery requests.

d) *In re Sherwin-Williams Co.*, 668 S.W.3d 368 (Tex. May 5, 2023) (per curiam) [22-0559]

The issue in this mandamus proceeding is whether the trial court abused its discretion by denying the defendants' motion under Texas Rule of Civil Procedure 204.1 to conduct a medical examination of the plaintiff.

Marcos Acosta alleges that he was injured in a car accident caused by the negligence of Roberto Hernandez and that Hernandez's employer, the Sherwin-Williams Company, was vicariously liable. Acosta designated two physicians who had examined him to opine on his medical treatment and inability to return to work. Sherwin-Williams and Hernandez designated Dr. Anton Jorgensen to testify as their expert and moved to compel a medical examination of Acosta. After a hearing on the motion, Sherwin-Williams filed a supporting affidavit from Dr. Jorgensen stating the tests he would perform and why they were necessary to opine on Acosta's injuries. The trial court denied the motion, and the court of appeals denied mandamus relief.

The Supreme Court conditionally granted mandamus relief in a per curiam opinion. The Court first held that, because the order denying the motion stated that the trial court had considered all of the pleadings on file, Dr. Jorgensen's affidavit was properly

before and considered by the trial court.

The Court next held that the affidavit sufficiently established good cause under Rule 204.1. The Court reasoned that the affidavit showed that, without conducting his own exam, Dr. Jorgensen could not fully opine on Acosta's injuries and would be at a disadvantage in front of the jury. Thus, the Court held that the exam would be the least intrusive means of discovery available. After concluding that Sherwin-Williams and Hernandez lacked an adequate remedy by appeal, the Court directed the trial court to withdraw its order denying the motion to compel and enter an order requiring Acosta to submit to an examination.

3. Dismissal

a) *In re First Rsrv. Mgmt., L.P.*, 671 S.W.3d 653 (Tex. June 23, 2023) [22-0227]

The issue in this case is whether the trial court should have dismissed the plaintiffs' negligent-undertaking claim against a group of private-equity investors under Texas Rule of Civil Procedure 91a.

After explosions at a chemical plant caused widespread damage and injuries, thousands of lawsuits were filed and consolidated in an MDL court for pretrial proceedings. When it became clear that the original defendant, plant-owner TPC, was bankrupt, Plaintiffs sued TPC's private-equity investors, First Reserve, for negligent undertaking. Plaintiffs allege that First Reserve undertook to take charge of TPC's operations and was negligent by failing to provide resources for safety measures that could have prevented the explosions. The trial court denied the motion to dismiss, and the court of appeals denied mandamus relief.

The Supreme Court held that the trial court should have dismissed the claim for lacking a basis in law. The only factual allegation in the petition about how First Reserve controlled TPC's operations is that First Reserve, together with another investor group, appointed four members to the five-member board of managers that governed TPC. Plaintiffs failed to plead facts that would take First Reserve's conduct outside the norm of private-equity-investor behavior.

Despite its holding, the Court declined to grant relief because of procedural irregularities in the case caused by TPC's bankruptcy. Justice Boyd concurred in the Court's disposition but did not file a separate opinion.

b) *McLane Champions, LLC v. Hous. Baseball Partners LLC*, 671 S.W.3d 907 (Tex. June 30, 2023) [21-0641]

The issue in this case is whether the Texas Citizens Participation Act applies to a private business transaction between private parties that later generates public interest.

Houston Baseball Partners purchased the Houston Astros from McLane Champions in 2011. The deal included both the team and its interest in a planned regional sports network, in which Comcast also owned an interest. Partners alleges that the Astros' interest in the proposed network was the primary reason Partners acquired the team. But the network collapsed shortly after the purchase. Partners alleged that Champions and Comcast

had materially misrepresented the proposed network's financial prospects, causing Partners to pay substantially more for the Astros than the team was worth. Partners sued, and Champions moved to dismiss Partners' claims under the TCPA. The trial court denied the motion, and the court of appeals affirmed.

The Supreme Court affirmed, holding that the TCPA did not apply to Partners' claims because Partners' lawsuit was not based on or in response to Champions' exercise of either the right of free speech or the right of association. The communications underlying Partners' suit were not "made in connection with a matter of public concern" because they did not hold relevance to a public audience when they were made. Rather, the challenged communications were private business negotiations in an arms-length transaction subject to a nondisclosure agreement relevant only to the private business interests of the parties. And the "common interest" that individuals join together to express, promote, pursue, or defend when exercising that right under the TCPA must relate to a government proceeding or a matter of public concern. Because the interest that Champions joined with Comcast to promote was their mutual private business interests, the Court held that the TCPA did not apply.

Chief Justice Hecht, joined by Justice Blacklock, dissented. He would have held that Partners' suit implicated Champions' right to free speech under the TCPA and that Partners failed to make a prima facie case for its fraud-based claims.

Justice Blacklock dissented separately to further highlight that the basis for Partners' lawsuit is substantially undermined by the Astros' extraordinary competitive and financial success under Partners' ownership.

4. Finality of Judgments

a) *Patel v. Nations Renovations, LLC*, 661 S.W.3d 151 (Tex. Feb. 10, 2023) (per curiam) [21-0643]

The issue in this case is whether a judgment confirming a final arbitration award was final.

This case arose out of a construction-project dispute between Nations, Huntley, and a third party, in which all parties agreed to submit all claims to binding arbitration. The arbitrator issued a final arbitration award in Nations' favor. At Nations' request, the district court rendered a judgment confirming the arbitration award. The judgment stated that: "Nations have all writs and processes to aid in execution of this judgment[,] . . . that all relief not granted herein is denied[,] . . . [and] that this is a final judgment and appealable." However, after the arbitration award was issued, and then again after the judgment confirming the arbitration award was signed, Nations added additional defendants to the case, including relator Patel. Nations alleged that the new defendants are alter egos of Huntley and sought to hold them vicariously liable for the damages owed by Huntley.

Approximately a year and a half later, Nations moved the district court to modify the judgment to clarify that it was interlocutory, not final. Unsure of its jurisdiction and whether the judgment was final, the district court

granted Nations' motion to modify the judgment but sua sponte certified the question for interlocutory appeal. The court of appeals denied review.

Treating the defendants' petition for review as a petition for writ of mandamus, the Supreme Court held that the judgment confirming the arbitration award was clearly and unequivocally final. The Court reasoned that while no magic language is required to establish sufficient indicia of finality, the statements in the judgment here, taken together, render it final, even though none of the statements would alone be sufficient. The Court then clarified that a judgment cannot be final as to some parties but not others. Finally, the Court pointed out that Nations' motion to modify came far too late; if, when the judgment was entered, Nations was unsure as to its finality or thought that a final judgment had been entered erroneously, Nations should have sought clarification or appealed within the statutory time frame for doing so. Because the order granting the motion to modify the judgment confirming the arbitration award was void, the Court granted mandamus relief directing the trial court to withdraw it.

5. Personal Jurisdiction

a) *State v. Volkswagen Aktiengesellschaft and State v. Audi Aktiengesellschaft*, 669 S.W.3d 399 (Tex. May 5, 2023) [21-0130, 21-0133]

In this civil-enforcement action, German automobile manufacturers challenged specific personal jurisdiction in Texas on claims arising from their scheme to embed illegal emissions-beating technology during post-sale service at Texas dealerships. The appeal presented two issues: (1) whether the manufacturers purposefully availed themselves of the privilege of conducting activities in Texas by deploying defeat-device software to Texas vehicles through intermediaries and instrumentalities under their contractual control, and (2) whether purposeful availment is lacking because the manufacturers targeted vehicles nationwide.

After an affiliated, Virginia-based distributor independently sold more than half a million illegal vehicles nationwide, hardware failures prompted the German manufacturers to develop and deploy defeat-device software updates. Without disclosing the software's true purpose, the German manufacturers initiated voluntary recall and service campaigns, which enabled dealerships nationwide to install the software on manufacturer-targeted vehicles. Importer agreements between the German manufacturers and the U.S. distributor required the distributor and all local dealers to perform recall and service campaigns when, as, and how the manufacturers' directed. Although the German manufacturers deployed the software updates in Germany, the distribution system "automated" downstream delivery to the local dealerships, including those in Texas. When targeted vehicles were presented for service or recall work in Texas, the software was "transmit[ted]" to those vehicles via the manufacturers' proprietary diagnostic system. The dealers slated to receive the software updates, including those in Texas, were known to the

manufacturers.

The State of Texas sued the German manufacturers, the U.S. distributor, and other American entities, seeking civil penalties and injunctive relief under state environmental laws. The trial court denied the German manufacturers' special appearances, but on interlocutory appeal, a divided court of appeals reversed and dismissed the State's claims. The appeals court held that the manufacturers' post-sale tampering activities were directed toward the United States as a whole, not Texas specifically.

The Supreme Court, with two justices sitting by commission of the Texas Governor, reversed and remanded. After exploring the evidence in detail, the Court held that the German manufacturers could reasonably anticipate being haled into a Texas court because they knowingly and purposefully leveraged a distribution system under their contractual control to bring the tampering software to Texas. The Court explained that the outcome would be the same whether the German manufacturers' purposeful actions were characterized as direct contacts effectuated through instrumentalities or indirect contacts effected through intermediaries. The Court observed that (1) controlling the distribution scheme that brought a product to the forum state is a recognized "plus factor" under a stream-of-commerce purposeful-availment analysis; (2) actions taken through a "distributor-intermediary" or an agent acting as the defendant's "boots on the ground" "provides no haven from the jurisdiction of a Texas Court"; and (3) the dissent's conclusion that purposeful-availment was lacking misfocused on contacts related to initial vehicle sales in Texas and was contrary to the applicable standard of review.

The Court also held that the purposefulness of the forum contacts was not diminished by the pervasiveness of the tampering scheme because personal jurisdiction is a forum-specific inquiry. Accordingly, a defendant's contacts with other states—whether more, less, or exactly the same—do not affect the jurisdictional force of purposeful contacts with Texas.

Justice Huddle dissented, joined by Chief Justice Hecht and Justice Bland. The dissent would hold that the Texas-specific contacts of VW America and the local dealers cannot be imputed to the German manufacturers under an agency or other theory because there is insufficient evidence that the German manufacturers controlled the means and details of the recall process. The dissent would also hold there is no evidence the German manufacturers purposefully targeted Texas specifically as opposed to the United States as a whole.

6. Statute of Limitations

a) *Ferrer v. Almanza*, 667 S.W.3d 735 (Tex. Apr. 28, 2023) [21-0513]

The issue in this case is whether a statute that suspends the running of a statute of limitations during a defendant's "absence from this state" applies when a Texas resident is physically absent from Texas but otherwise subject to personal jurisdiction and amenable to service.

Sibel Ferrer sued Isabella Almanza for personal injuries but did not

file her claim until more than two years after the accident. Almanza moved for summary judgment on limitations. Ferrer responded that the running of limitations was suspended while Almanza was attending college outside Texas. Ferrer relied on Section 16.063 of the Civil Practice and Remedies Code, which suspends the running of a statute of limitations during a defendant's "absence from this state." The trial court granted summary judgment for Almanza, and the court of appeals affirmed. Ferrer petitioned for review, arguing that the statute required the limitations period to be suspended while Almanza was physically absent from Texas.

The Supreme Court affirmed. The Court held that a defendant's "absence from this state" under Section 16.063 does not depend on physical location but rather on whether the defendant is subject to personal jurisdiction and service. The Court applied the interpretation of "absence" it adopted in *Ashley v. Hawkins*, 293 S.W.3d 175 (Tex. 2009), in which the Court concluded that Section 16.063 does not apply to a defendant who permanently leaves Texas but remains subject to personal jurisdiction and is amenable to service under the Texas long-arm statute. The Court held here that Section 16.063 likewise does not apply to a Texas resident who is subject to personal jurisdiction and amenable to service during the limitations period. The Court rejected Ferrer's argument that *Ashley* is distinguishable, concluding that Section 16.063's text does not support applying it only to Texas residents. The Court also noted that its interpretation was bolstered by the Legislature's codification of Section 16.063, which deleted two phrases the Court previously had relied on to hold that the statute applied to physical absences from the state, and the fact that the Legislature had not amended the statute since *Ashley* was decided.

Justice Busby dissented. He would have held that the plain meaning of "absence" as used in Section 16.063 applies to the time a defendant is living out of state, and he argued that the Court's construction renders the statute a nullity.

7. Venue

a) *Fortenberry v. Great Divide Ins. Co.*, 664 S.W.3d 807 (Tex. Mar. 31, 2023) [21-1047]

This case addresses whether an injured plaintiff presented sufficient evidence to support the application of a statute that mandates venue in the county where he resided at the time of his injury.

After signing a three-year contract to play for the Dallas Cowboys, Alcus Fortenberry stayed in a Dallas County hotel room provided by the team while he trained and participated in preseason activities. Fortenberry was injured while training out of state, and the Cowboys terminated his contract. Great Divide Insurance Company, the Cowboys' insurer, denied Fortenberry's request for workers' compensation benefits. After exhausting the administrative process, Fortenberry sued Great Divide in Dallas County. Great Divide moved to transfer venue to Travis County, which the trial court denied. The trial court

rendered judgment for Fortenberry following a jury verdict, and Great Divide appealed.

Great Divide challenged the trial court's venue determination among other things. The court of appeals concluded that Fortenberry failed to present prima facie evidence that he resided in Dallas County at the time of his injury as required under the venue statute governing workers' compensation appeals. The court reversed and remanded for further venue proceedings. Fortenberry petitioned for review, which the Supreme Court granted.

The Supreme Court reversed. The Court reiterated that a trial court's venue determination must be upheld if there is any probative evidence in the record to support it and that appellate courts must consider the entire record, including the trial on the merits, when reviewing that determination. The Court recognized that Texas cases have taken a flexible view of what it means to reside in a county for venue purposes, particularly when a party is in the process of moving from one county to another. It therefore rejected the court of appeals' categorical prohibition against a hotel room serving as a person's residence for venue purposes.

The Court concluded there was sufficient evidence in the record to support the trial court's venue ruling. Fortenberry testified by affidavit that he lived in Dallas County at the time of his injury. He was working out and participating in team activities for nearly three months before his injury after signing a three-year contract with the team. And the parties stipulated during the administrative proceeding that Fortenberry resided within 75 miles of the Workers' Compensation Division's Dallas Field Office at the time of his injury. The Court therefore reversed the judgment of the court of appeals and remanded for that court to consider Great Divide's other, unaddressed issues.

AA. PROCEDURE—TRIAL AND POST-TRIAL

1. Batson Challenge

a) *United Rentals N. Am., Inc. v. Evans*, 668 S.W.3d 627 (Tex. May 12, 2023) [20-0737]

The issues in this case are (1) whether a new trial is required because of *Batson* violations during jury selection, (2) whether United Rentals owed a duty to the decedent, and (3) whether United Rentals is entitled to rendition of judgment on the plaintiffs' survival claim. Texas caselaw prohibits counsel from stating a racial preference in open court and exercising peremptory strikes in concert with that preference. The Texas common law establishes a duty to avoid negligently creating dangerous situations. To recover survival damages, there must be evidence, beyond mere speculation, that would allow a reasonable juror to find that suffering occurred.

United Rentals is an equipment-rental company. It mistakenly released a piece of equipment to a driver who was supposed to transport a smaller load. When the oversized load struck an overpass, a beam fell off the truck and landed on Clark Davis's pickup truck, crushing Davis to death. Davis's mother and son brought wrongful death claims; his mother also filed a survival claim on behalf of his estate. After a jury verdict for the plaintiffs, the district court rendered a

substantial money judgment, which the court of appeals affirmed. United Rentals petitioned the Supreme Court for review, and the Court granted the petition.

The Court held that a new trial is required under *Batson* because plaintiffs' counsel announced on the record that the plaintiffs had a racial preference in jury selection, and all of the plaintiffs' peremptory strikes were consistent with the stated preference. The Court also held that United Rentals owed a common law duty to Davis to avoid negligently creating dangerous road conditions. Finally, the Court held that United Rentals was entitled to rendition of judgment on the plaintiffs' survival claim. The plaintiffs sought only pain-and-suffering damages for this claim, and there was no evidence at trial that would allow a reasonable juror to find that suffering occurred. The Court reversed the court of appeals' judgment on the survival claim and rendered a take nothing judgment on that claim. The Court remanded the case to the district court for a new trial on the remaining claims.

2. New Trial Orders

a) *In re Rudolph Auto., LLC*, 674 S.W.3d 289 (Tex. June 16, 2023) [21-0135]

The issue in this case is whether the trial court abused its discretion in granting a new trial.

This case arose after a tragic accident: after several employees consumed beer on the premises of Rudolph Mazda, one departing employee hit Irma Vanessa Villegas, another employee, with his truck when she was walking in the parking lot. Villegas suffered serious injuries and was left permanently paralyzed on one side before passing away several years later. Villegas's daughter, Andrea Juarez, sued Rudolph and its employees for negligence, failure to train, and premises liability.

A pretrial order in limine prohibited testimony about Villegas's drinking habits aside from the day of the accident. At the end of the three-week jury trial, the final witness—an expert toxicologist—provided testimony that the court found to have violated the order. The judge gave a stern limiting instruction to the jury and the trial proceeded. The jury awarded Villegas and Juarez over $4 million in damages.

Juarez then filed a motion for new trial, which the district court granted. The court listed four reasons in its new-trial order: (1) the apportionment of responsibility to Rudolph was irreconcilable with the jury's failure to find Rudolph negligent; (2) the jury's awards in certain categories of non-economic damages were inadequate given the record's positive depiction of Villegas; (3) on the day of the jury verdict, this Court issued a decision in an unrelated case that might have affected the trial court's earlier rulings; and (4) the expert's improper testimony was incurable and caused the rendition of an improper verdict.

The court of appeals denied mandamus relief. The Supreme Court granted relief based on its precedents requiring clear, specific, and valid reasons to justify a new trial.

The Court reasoned that, individually or collectively, none of the articulated errors warranted a new trial: (1) the verdict could be harmonized as

a matter of law, so a new trial was unnecessary; (2) nothing in the new-trial order explained, based on the evidence, why the jury could not have rationally allocated damages as it did; (3) this Court's separate decision in a different case had no plausible effect on this verdict; and (4) the jury system depends on the presumption that jurors can and will follow instructions, as they each said they would do in this case regarding the curative instruction about expert testimony. To rebut this presumption, a new-trial order must show why this jury could not follow the instruction, but no such reason was given here.

Because no new trial was necessary, the Court conditionally granted mandamus relief and ordered the trial court to vacate the new-trial order, harmonize the verdict, and move to any remaining post-trial proceedings.

BB. REAL PROPERTY

1. Subrogation

a) *PNC Mortg. v. Howard*, 668 S.W.3d 644 (Tex. May 12, 2023) [21-0941]

The issue in this case is when a refinance lender's claim to foreclose on a lien acquired through equitable subrogation accrues.

John and Amy Howard refinanced their mortgage with a bank that later assigned its note and deed of trust to PNC. Then the Howards stopped paying. PNC accelerated the note in 2009 but did not assert a claim for foreclosure until 2015. PNC conceded in the trial court that the four-year statute of limitations had expired on a claim to foreclose on its own lien. But PNC asserted that it still could foreclose on the original lender's lien, which PNC's predecessor had acquired through equitable subrogation in the refinance transaction and assigned to PNC. The trial court rendered judgment for the Howards, and multiple appellate proceedings followed. Ultimately, the court of appeals concluded that PNC's claim to foreclose through equitable subrogation accrued in 2009 when PNC's claim to foreclose on its own lien accrued and that the equitable-subrogation claim was therefore time-barred. The court of appeals thus affirmed the trial court's judgment for the Howards.

The Supreme Court affirmed. The Court explained that what subrogation transfers to a refinance lender is the original lender's security interest, which gives the refinance lender an alternative lien if its own lien is later determined to be invalid. Subrogation thus provides a refinance lender with an alternative remedy, not an additional claim. Like the original lender, a refinance lender has only one foreclosure claim, which accrues when the note made in the refinance transaction is accelerated.

CC. STATUTE OF LIMITATIONS

1. Discovery Rule

a) *Marcus & Millichap Real Est. Inv. Servs. of Nev., Inc. v. Triex Tex. Holdings, LLC*, 659 S.W.3d 456 (Tex. Jan. 13, 2023) (per curiam) [21-0913]

The issue in this case is the proper application of the discovery rule to a breach of fiduciary duty claim. In 2008, Triex bought a gas station in Lubbock and leased it back to its existing operator, Taylor Petroleum. Triex

and the gas station's owner both retained Marcus & Millichap to represent them in the transaction. In 2012, Taylor Petroleum defaulted on the lease. A little over three years later, Triex sued Taylor Petroleum and related parties. After deposing Taylor Petroleum's corporate officers a year later, Triex suspected that Marcus & Millichap misrepresented the sale and lease transaction, and added the company to the suit. Triex asserted claims for fraud, breach of fiduciary duty, and conspiracy, which allegedly occurred during the 2008 transaction. These claims were subject to a four-year limitations period. Triex pleaded the discovery rule to save its otherwise time-barred claims.

The trial court granted Marcus & Millichap's motion for summary judgment on limitations grounds. The court of appeals reversed. It concluded that the evidence conclusively established that Triex knew it was injured when Taylor Petroleum defaulted, but, applying the discovery rule, it held that there was a fact issue as to whether Triex knew or should have known in 2012 that Marcus & Millichap caused its injury. In reaching this holding, the court of appeals concluded that because there was a fiduciary relationship between Triex and Marcus & Millichap, Triex had no duty to make a diligent inquiry into its possible claims.

In a per curiam opinion, the Supreme Court reversed. It concluded that the discovery rule applied to Triex's claims, but, as prior cases explain, a fiduciary relationship does not eliminate a plaintiff's duty of reasonable diligence. It also noted that the discovery rule does not delay accrual until the plaintiff knows the exact identity of the wrongdoer. Accordingly, the Court held that despite the fiduciary relationship, Triex was required to exercise reasonable diligence, and had it done so, it should have timely discovered the facts giving rise to its claims against Marcus & Millichap. The Court reinstated the trial court's summary judgment.

2. Tolling

a) *Levinson Alcoser Assocs., L.P. v. El Pistolón II, Ltd.*, 670 S.W.3d 622 (Tex. June 16, 2023) [21-0797]

The primary issue in this case is whether the running of limitations was equitably tolled during the appeal of the plaintiff's earlier, identical suit, which was ultimately dismissed after limitations expired.

In 2010, El Pistolón sued Levinson for professional negligence and breach of contract arising from Levinson's performance of architectural services. El Pistolón's petition included a certificate of merit as required by statute. Levinson moved to dismiss, challenging the certificate of merit. The trial court denied the motion, but the court of appeals and the Supreme Court held that the certificate failed to satisfy statutory requirements. The trial court dismissed El Pistolón's suit without prejudice in 2018.

El Pistolón immediately refiled with a new certificate of merit and pleaded that equitable tolling paused the running of limitations. Levinson moved for summary judgment on limitations. The trial court granted Levinson's motion, but the court of appeals reversed, holding that the running of

limitations was equitably tolled while the 2010 suit was on appeal. Levinson petitioned for review.

The Supreme Court reversed and reinstated the trial court's judgment. The Court noted that equitable tolling is sparingly applied and limited in scope. It concluded that the court of appeals improperly relied on a broad "legal impediment rule" to support equitable tolling because the Court's precedents have limited such a rule's application to (1) cases where an injunction prevents a claimant from bringing suit and (2) legal-malpractice claims. The Court also held that the dismissal of El Pistolón's 2010 suit was not based on a procedural defect that would support equitable tolling. The Court rejected El Pistolón's alternative arguments that summary judgment was improper because Levinson's motion inartfully recited the summary-judgment burden and failed to establish the precise accrual date.

DD. TAXES

1. Property Tax

a) *Duncan House Charitable Corp. v. Harris Cnty. Appraisal Dist.*, ___ S.W.3d ___, 2023 WL 5655872 (Tex. Sept. 1, 2023) (per curiam) [21-1117]

This case concerns the applicability of a charitable tax exemption.

Duncan House applied for a charitable tax exemption for the 2017 tax year covering its interest in an historic home, but its application was denied. Duncan House filed suit for judicial review. When its protest for a 2018 exemption was also denied, it amended its petition to also challenge the denial of the 2018 exemption. The trial court dismissed the 2018 claim for want of jurisdiction because Duncan House never applied for the 2018 exemption. The court of appeals affirmed, holding that a timely filing of an application for the exemption is a statutory prerequisite to receive the exemption.

The Supreme Court reversed, holding that Duncan House did not need to apply for 2018 if it was entitled to the 2017 exemption. That issue remains pending in the trial court. If the courts ultimately conclude that Duncan House did not qualify for the exemption in 2017, Duncan House's failure to timely apply for the 2018 exemption will preclude it from receiving the exemption for 2018. But if the courts ultimately allow the exemption for 2017, Duncan House will then be entitled to the exemption for all subsequent years, including 2018. The Court remanded to the trial court for further proceedings.

b) *In re Stetson Renewables Holdings, LLC*, 658 S.W.3d 292 (Tex. Dec. 30, 2022) (per curiam) [22-1119]

The issue in this case is whether applicants in a statutory tax-incentive program have a judicially enforceable right to compel the Comptroller to process their applications.

Chapter 313 of the Texas Tax Code establishes a tax program that allows school districts to offer property-tax incentives to businesses willing to make investments within the districts' boundaries. The Legislature gave the Comptroller a supervisory role over this program, part of which includes completing an economic-impact

evaluation and issuing certificates of approval (or a written explanation of a denial) to businesses that apply. Relators in this case are renewable-energy businesses that submitted Chapter 313 applications. The Comptroller informed them, however, that because of the high volume of applications submitted, the limited resources of his office, and Chapter 313's statutory deadline of December 31, 2022, he will not be able to process their applications.

In response, the businesses filed a petition for writ of mandamus and a motion for temporary relief against the Comptroller, asking the Court to order the Comptroller to review their Chapter 313 applications and to extend the statutory expiration date of the Chapter 313 program to accommodate the influx of applications. In support of these requests, the businesses argued that Chapter 313 imposed a mandatory, non-discretionary duty on the Comptroller to process their applications. They pointed out, for example, that Chapter 313 says the Comptroller "shall" complete applicants' economic-impact evaluations within ninety days.

The Supreme Court, however, denied the businesses' mandamus petition and motion for temporary relief. It held that the businesses did not have a judicially enforceable right to compel the Comptroller to process their applications. The Court agreed that, even though the Comptroller's duties might be mandatory and non-discretionary, nothing in the statute indicated that *the Court* was meant to enforce the deadline. Even in the absence of a judicially crafted remedy, the Court said, a statutory command remains a statutory command because the Legislature has many ways to correct the executive's failure to abide by a statutory deadline. The Court further reasoned that a judicial remedy could also intrude on the Legislature's prerogative to determine not only when a tax-incentive program must end but also how far it is worth pressing to achieve compliance with a statutory directive. For those reasons, the Court concluded that the businesses were not entitled to mandamus relief.

EE. TEXAS CITIZENS PARTICIPATION ACT

1. Interpretation and Application

a) *USA Lending Grp., Inc. v. Winstead PC*, 669 S.W.3d 195 (Tex. May 19, 2023) [21-0437]

This case presents the issue of whether a legal-malpractice plaintiff produced sufficient evidence to survive a motion to dismiss under the Texas Citizens Participation Act.

USA Lending Group retained Winstead PC to sue a former employee for breach of fiduciary duty. Though Winstead obtained a default judgment against the former employee declaring USA Lending the owner of certain assets the employee had misappropriated, Winstead failed to also seek and obtain monetary damages. USA Lending sued Winstead for malpractice, and Winstead filed a motion to dismiss under the Texas Citizens Participation Act. USA Lending disputed the applicability of the Act and argued that clear and specific evidence supported each essential element of its claims, precluding dismissal under the Act. The trial court denied Winstead's motion, but the court of appeals reversed

and ordered the case dismissed.

The Supreme Court reversed. Assuming but not deciding that the Act applies, the Court held that USA Lending put on sufficient evidence to avoid dismissal. Winstead challenged two elements of USA Lending's malpractice claim: causation and damages. As to causation, the Court concluded that evidence of USA Lending's out-of-pocket expenses to acquire and maintain the misappropriated assets sufficed to show some specific, demonstrable injury traceable to Winstead's conduct. As to damages, the Court considered USA Lending's testimony linking the assets to a competitor company operated by the former employee's wife, coupled with expert testimony about the laws of fraudulent transfer and community property in the relevant jurisdiction. The Court deemed this evidence sufficient to rationally support the inference that USA Lending could have collected on a judgment for monetary damages against the former employee, had one been entered. Because the Act bars dismissal of claims if clear and specific evidence supports each essential element, the Court remanded the case to the trial court for further proceedings.

FF. TEXAS DISASTER ACT

1. Executive Power

a) *Abbott v. Harris County*, 672 S.W.3d 1 (Tex. June 30, 2023) [22-0124]

The question presented in this case is whether the Governor has authority to issue executive orders that prohibit local governments from imposing mask-wearing requirements in response to the coronavirus pandemic.

In 2020 and 2021, Harris County officials issued a series of executive orders requiring masks in certain public settings. The Governor then issued executive order GA-38, which stated that no local government or official "may require any person to wear a face covering." Citing independent authority under the Disaster Act and the Health and Safety Code, Harris County obtained a temporary injunction against the enforcement of GA-38 and future orders. The court of appeals affirmed.

The Supreme Court reversed and dissolved the temporary injunction. It concluded that the County had standing to sue the Attorney General but no probable right to relief. The Court concluded that county judges, who are the Governor's designated agents, have no authority to issue contrary orders. And while the Court noted that the Governor's view of the Act created constitutional questions, it concluded that GA-38 fell within the Governor's authority to control the movement of persons and the occupancy of premises in a disaster area. In light of statutory provisions vesting the State with final authority over contagious disease response, the Court concluded that the Disaster Act at least authorizes the Governor to control local governments' disease control measures, whether or not it also allows him to impose mask-wearing requirements of his own. In light of its decision, the Court vacated and remanded similar cases that were consolidated for oral argument.

Justice Lehrmann concurred, noting her view that the Governor's authority to balance competing concerns when responding to a disaster comes

from the Disaster Act itself.

GG. TEXAS TIM COLE ACT

1. Governmental Immunity

a) *Brown v. City of Houston*, 660 S.W.3d 749 (Tex. Feb. 3, 2023) [22-0256]

At issue in this certified question is whether Tim Cole Act claimants may maintain a lawsuit after they have received compensation from the State.

Alfred Dewayne Brown was wrongfully imprisoned for capital murder. After his release, he applied for Tim Cole Act compensation, but the Comptroller denied his applications. Brown then sued the City of Houston, Harris County, and various city law-enforcement officials in federal court, alleging violations of his constitutional rights. While that suit was pending, and based on new information uncovered during that litigation, a state district court dismissed the charges against Brown on the ground that he was actually innocent. The Comptroller, however, denied Brown's renewed request for Tim Cole Act compensation. The Supreme Court granted Brown's petition for writ of mandamus and directed the Comptroller to compensate Brown.

The defendants in Brown's federal case then argued that his suit had to be dismissed under a provision in the Act that prohibits a person receiving compensation under the Act from "bring[ing] any action involving the same subject matter . . . against any governmental unit or an employee of any governmental unit." The district court agreed and granted the defendants' motion for summary judgment. Brown appealed, and the Fifth Circuit certified the following question to the Court: "Does Section 103.153(b) of the Tim Cole Act bar maintenance of a lawsuit involving the same subject matter against any governmental units or employees that was filed before the claimant received compensation under that statute?"

The Court answered the question *yes*. In so holding, the Court principally relied on the text and history of the Tim Cole Act, reasoning that the word "bring" in Section 103.153(b) entails not only filing suit but also maintaining one. The history of the Act, the Court explained, shows that the Legislature intended to funnel all claims for compensation through the administrative process, subject only to the potential for mandamus relief in the Supreme Court. The Court also observed that this understanding of the text is consistent with its precedent, which has broadly construed Section 103.153(b) to bar all claims once a claimant receives compensation. Finally, the Court noted, it would interpret the statute in a way that preserves immunity; the Legislature's willingness to waive sovereign immunity by providing compensation was conditioned on that compensation being the last word in the dispute about the wrongful imprisonment.

III. GRANTED CASES

A. ADMINISTRATIVE LAW

1. Judicial Review

a) *Tex. Health & Hum. Servs. Comm'n v. Estate of Burt*, 644 S.W.3d 888 (Tex. App.—Austin 2022), *pet. granted* (Mar. 10, 2023) [22-0437]

At issue in this case is whether

the Texas Health and Human Services Commission reasonably interpreted the Medicaid "home" exclusion as requiring applicants asserting the exclusion to have previously occupied the property.

The Burts purchased a home in Cleburne, Texas. After living there for thirty-six years, they sold the Cleburne home to their adult daughter and moved into a rental property. In early August 2017, the Burts moved to a skilled nursing facility. At that time, their bank account balance exceeded the eligibility threshold for Medicaid benefits. However, later that month, the Burts purchased a one-half interest in the Cleburne home, depleting their bank account balance to $2,000. The same day, the Burts deeded their newly acquired half-interest back to their daughter while reserving an enhanced life estate in the property.

The Burts then applied for Medicaid. HHSC denied their application, concluding that the Burts' resources exceeded the Medicaid resource limit. HHSC concluded that under the applicable regulation, the Burts' partial ownership interest in the Cleburne home could not be excluded from the resource calculation because they never resided in the home while having an ownership interest.

After exhausting their administrative remedies, the Burts sought judicial review. The trial court reversed, holding that HHSC unreasonably interpreted the home exemption to require prior occupancy. HHSC appealed, and the court of appeals affirmed.

In its petition for review, HHSC argues that its interpretation of the term "home" as requiring simultaneous ownership and occupancy was reasonable. The Supreme Court granted HHSC's petition for review.

2. Jurisdiction

a) *Lampasas Indep. Sch. Dist. v. Morath,* 644 S.W.3d 866 (Tex. App.—Austin 2022), *pet. granted* (June 2, 2023) [22-0169]

This case concerns whether the Commissioner of Education has jurisdiction to review a petition to detach territory from one school district and annex it to another.

Bellpas, Inc. is a land development company that owns property within the Lampasas Independent School District. In December 2015, Bellpas filed petitions for annexation and detachment under section 13.051 of the Texas Education Code with each school district to detach some of its property from Lampasas and attach it to the Copperas Cove Independent School District. Each petition also contained an attached set of field notes with metes-and-bounds descriptions of the affected territory. In January 2016, Bellpas amended its petitions to reduce the size of the territory to be annexed. Although the amended versions of the petitions contained identical metes-and-bounds descriptions of the affected territory, the body of the petitions listed different acreages for the affected territory. Copperas approved Bellpas's amended petition in May 2016, but Lampasas has yet to approve or disapprove of either the original or amended version of Bellpas's petition.

After the Board of Trustees for Lampasas denied a grievance Bellpas had filed concerning Lampasas's delay

in acting on its petition, Bellpas filed a petition for review with the Commissioner of Education. Two years later, the Commissioner approved Bellpas's petition for detachment and annexation over Lampasas's objections that (1) the Commissioner lacked jurisdiction to accept Bellpas's petition for review in the absence of a final decision from both school districts, and (2) the Commissioner lost jurisdiction by failing to conduct a hearing or issue his decision in compliance with statutory deadlines.

Lampasas then sought judicial review of the Commissioner's jurisdiction. The trial court summarily affirmed the Commissioner's decision. Lampasas appealed. The court of appeals vacated the trial court's judgment and dismissed the case, holding that the Commissioner lacked jurisdiction over Bellpas's petition because the Commissioner could not rely on a theory of constructive disapproval. The Commissioner filed a petition for review, as did Bellpas and Copperas Cove. The Supreme Court granted both petitions.

3. Public Utility Commission

a) *Luminant Energy Co. v. Pub. Util. Comm'n of Tex.*, 665 S.W.3d 166 (Tex. App.—Austin 2023), *pet. granted* (Sept. 29, 2023) [23-0231]

This case raises questions of administrative law and judicial authority. The first issue is whether the Public Utility Commission exceeded its statutory authority by twice directing the Electric Reliability Council of Texas to affix electricity prices at $9000/MWh. The second issue is whether the court of appeals had the power, two years later, to unwind transactions with final settlement prices based upon those expired directives.

During Winter Storm Uri, the electrical power grid—overseen by the Commission through ERCOT—failed to produce enough power to meet extreme consumer demands. This failure was partially due to an error in the Commission's electricity-pricing algorithm. When the algorithm functions properly, then as demand increases, prices should increase to signal to, and provide an incentive for, energy generators to produce more energy. But the algorithm did not account for load shedding—targeted blackouts to protect the grid's physical integrity—necessitated by the storm's historically unprecedented severity. In response, the Commission issued two directives to ERCOT to set the price at the maximum $9,000/MWh allowed under the Texas Administrative Code.

Luminant sought judicial review directly in the Third Court of Appeals, as authorized by statute, and several parties intervened on both sides. The court issued an opinion reversing the Commission's orders more than two years after the appeal was filed. After rejecting mootness and other jurisdictional challenges to the appeal, the court held that the Commission had exceeded its statutory power under the Public Utility Regulatory Act by setting an anti-competitive price of $9,000/MWh.

The Commission petitioned for review, arguing that the court of appeals lacked jurisdiction to grant Luminant's desired relief and that the Commission had acted within its statutory

authority. The Supreme Court granted the petition.

B. CLASS ACTIONS

1. Class Certification

a) *USAA Cas. Ins. Co. v. Letot*, ___ S.W.3d ___, 2022 WL 405820 (Tex. App.—Dallas 2022), *pet. granted* (Sept. 29, 2023) [22-0238]

The issue in this case is whether the trial court erred by certifying a proposed class action.

Sunny Letot's vehicle was rear-ended by a USAA-insured driver. USAA determined that the cost to repair Letot's vehicle exceeded its value and deemed her car a total loss. USAA therefore sent Letot a check for the car's value and filed a report with the Texas Department of Transportation identifying Letot's car as "salvage." Letot later rejected USAA's valuation and check. She sued USAA for conversion for sending TxDOT the report before she accepted payment. Letot then sought class certification.

The trial court certified a class for both injunctive relief and damages. The class consisted of all claimants for whom USAA filed a report within three days of attempting to pay a claim for a vehicle deemed a total loss. The court of appeals affirmed the certification order.

USAA petitioned for review. It argues that neither Letot nor the alleged class members have standing to sue. In the alternative, USAA argues that the class fails to satisfy the certification requirements. The Supreme Court granted USAA's petition.

C. CONSTITUTIONAL LAW

1. Abortion

a) *State v. Zurawski*, *argument granted on notation of probable jurisdiction over direct appeal* (Aug. 25, 2023) [23-0629]

This direct appeal arises from a temporary injunction enjoining the State from enforcing laws banning abortion in certain cases on the ground that the laws are unconstitutional.

Plaintiffs are women who experienced pregnancy complications and whose physicians declined to provide abortions, citing legal prohibitions on abortion and uncertainty about the medical-emergency exception for pregnancies that, in the exercise of reasonable medical judgment, place the mother at risk of death or serious risk of substantial impairment of a major bodily function. Plaintiffs also include physicians who are concerned that the abortion laws will be enforced against them. The plaintiffs sued the State, the Attorney General, and the Texas Medical Board and its executive director, seeking clarification of the medical-emergency exception. They further sought a declaration that aspects of the abortion laws are unconstitutional. The trial court denied the State parties' plea to the jurisdiction and entered a temporary injunction that reforms the statute to define particular medical conditions as within the medical-emergency exception, restrains the State parties from enforcing the abortion bans in those instances, and enjoins the State parties from enforcing Texas abortion laws against the plaintiffs in particular.

The State filed a direct appeal to

the Supreme Court. The State challenges the injunction on multiple grounds, contending that the plaintiffs lack standing, that the State has not waived its sovereign immunity, that the plaintiffs have not shown that the State acted to obstruct an abortion in their cases or otherwise demonstrated a probable right to relief, and that the plaintiffs have not shown a probable, imminent, irreparable injury.

2. Free Speech

a) *Stonewater Roofing, Ltd. v. Tex Dep't of Ins.*, 641 S.W.3d 794 (Tex. App.—Amarillo 2022), *pet. granted* (Sept. 1, 2023) [22-0427]

At issue in this case is whether the statutory licensing requirement and conflict-of-interest prohibition for public insurance adjusting are content-based restraints of free speech subject to heightened scrutiny under the First Amendment.

Stonewater, a Texas-based roofing company, offers commercial and residential customers services that include repairing and replacing roofing systems. Although Stonewater is not a licensed public insurance adjuster, its website promotes extensive experience in dealing with the insurance claims process. The assertions on Stonewater's website implicate two Insurance Code provisions. The first, Section 4102.051(a), provides that a person may not act or hold himself out as a public insurance adjuster unless he is licensed. The second, Section 4102.163(a), bars contractors from both acting as public insurance adjusters and marketing claim-adjustment capabilities for projects they undertake.

Stonewater sued the Texas Department of Insurance, seeking a declaration that the two provisions violate the First Amendment and are unconstitutionally vague. The Department filed a motion to dismiss, which the trial court granted. The court of appeals reversed and remanded, holding that Stonewater's pleadings demonstrated an adequate basis in law and fact as to both its constitutional claims.

In its petition for review, the Department argues that the challenged provisions do not violate Stonewater's free speech rights because they regulate professional conduct with only an incidental effect on speech. Additionally, the Department argues that Stonewater's conduct clearly violates the challenged laws, foreclosing the company's vagueness claim.

The Court granted the Department's petition for review.

3. Retroactivity

a) *Hogan v. S. Methodist Univ.*, 74 F.4th 371 (5th Cir. 2023), *certified question accepted* (July 28, 2023) [23-0565]

This certified question concerns the Texas Constitution's retroactivity clause.

Luke Hogan sued SMU for refusing to refund tuition and fees after the university switched to remote instruction during the COVID-19 pandemic. The district court dismissed Hogan's complaint on the ground that Texas's Pandemic Liability Protection Act retroactively bars Hogan's claim for monetary relief and is not unconstitutional. Deciding that this ruling raises a determinative-but-unsettled question of state constitutional law, the

Fifth Circuit certified the following question of law to the Court: "Does the application of the Pandemic Liability Protection Act to Hogan's breach-of-contract claim violate the retroactivity clause in article I, section 16 of the Texas Constitution?" The Court accepted the certified question.

D. CONTRACTS

1. Interpretation

a) *IDEXX Lab'ys, Inc. v. Bd. of Regents of Univ. of Tex. Sys.*, ___ S.W.3d ___, 2022 WL 3267881 (Tex. App.—Houston [14th Dist.] 2022), *pet. granted* (Sept. 29, 2023) [22-0844]

The issue in this case is whether a contract is ambiguous. IDEXX Laboratories, a private company, sold tests to detect heartworms in dogs. Seeking to expand its product line, IDEXX contracted with the Board of Regents of the University of Texas System to license the Board's patented technology relating to Lyme Disease. Royalties owed to the Board were set out under three subparts of the agreement. Subpart (ii) set a royalty of 1% (or 0.05% if other royalties were due) on products "[s]old to detect Lyme disease in combination with one other veterinary diagnostic test or service (for example, but not limited to, a canine heartworm diagnostic test or service)." Subpart (iii) set a royalty of 2.5% on products "[s]old as a product or service to detect Lyme disease in combination with one or more veterinary diagnostic products or services to detect tick-borne disease(s)." IDEXX sold products that tested for Lyme disease, heartworm (which is not tick-borne), and one or more additional tick-borne diseases.

IDEXX paid royalties to the Board under subpart (ii). The Board sued, claiming that royalties were due under the higher rate set out in subpart (iii). The trial court granted summary judgment in favor of the Board and rendered a final judgment awarding contract damages, interest, and attorney's fees. The trial court concluded that subpart (iii) unambiguously applied to the products at issue. The court of appeals reversed and remanded, concluding that the contract was ambiguous.

The Board filed a petition for review that contends the court of appeals erred and the trial court's decision was correct. The Supreme Court granted the petition for review.

E. DAMAGES

1. Settlement Credits

a) *Mulvey v. Bay, Ltd.*, ___ S.W.3d ___, 2021 WL 2942448 (Tex. App.—San Antonio 2021), *pet. granted* (Sept. 1, 2023) [22-0168]

The primary issue in this case is whether the defendant is entitled to a settlement credit under the one-satisfaction rule.

Bay sued Mulvey and one of Bay's former employees, alleging that the employee made unauthorized improvements to a ranch owned by Mulvey using Bay's materials and equipment. Bay also sued the employee in a separate lawsuit, alleging that he engaged in a pattern of similar acts for the benefit of himself, Mulvey, and others. Bay and the employee agreed to the entry of a $1.9 million judgment for Bay, and the employee agreed to make monthly payments to Bay in exchange

for Bay's agreement not to execute the judgment.

Bay then nonsuited the employee and went to trial against Mulvey for unjust enrichment. The jury found for Bay and awarded damages. Mulvey sought a settlement credit based on the other judgment and agreement. The trial court refused and rendered judgment consistent with the jury findings. The court of appeals reversed and held that Mulvey was entitled to a credit. It therefore rendered a take-nothing judgment without reaching the other issues raised by Mulvey.

Bay petitioned for review, arguing that Mulvey was not entitled to a credit because the other judgment had not been satisfied. The Supreme Court granted the petition.

F. EMPLOYMENT LAW

1. Employment Discrimination

a) *Thompson v. Scott & White Mem'l Hosp.*, 659 S.W.3d 83 (Tex. App.—El Paso 2022), *pet. granted* (June 2, 2023) [22-0558]

The main issue on appeal is whether the court of appeals erred in reversing the trial court's order granting summary judgment on Dawn Thompson's retaliation claim by failing to properly analyze causation.

Thompson was a licensed registered nurse who worked as an at-will employee at Baylor Scott & White McLane Children's Medical Center. Before her termination, Thompson received two reprimands for policy violations from BSW, for revealing health information subject to protection under HIPAA. The first reprimand included a warning that future violations "may result" in actions such as termination of employment, and the second incident included a written warning that a failure to meet expectations or other incidents "will result in separation from employment." Thompson sued BSW, claiming BSW discriminated against her and retaliated in violation of several Texas statutes for filing a report with the Texas Child Protective Services in compliance with the Texas Family Code. BSW moved for no-evidence and traditional summary judgment, arguing that Thompson was terminated based on her HIPAA violation. The trial court granted the motion.

The court of appeals reversed the trial court's judgment and remanded to the trial court for further proceedings. The court of appeals held that Thompson was allowed a rebuttable presumption of a causal connection between filing the CPS report and her termination and that BSW's evidence did not overcome that presumption.

BSW petitioned the Supreme Court for review, arguing that in reversing the trial court's order granting summary judgment, the court of appeals misapplied or ignored Supreme Court precedent. BSW argues that Thompson did not establish but-for causation because BSW would have terminated Thompson when it did, even if Thompson did not make the CPS report. When Thompson violated HIPAA, BSW contends it merely carried out its previously contemplated employment decision, which is no evidence of causation. The Court granted BSW's petition for review.

G. FAMILY LAW

1. Divorce Decrees

a) *Baker v. Bizzle*, ___ S.W.3d ___, 2022 WL 123216 (Tex. App.—Fort Worth 2022), *pet. granted* (Mar. 10, 2023) [22-0242]

The issue in this case is whether a trial court's oral rendition of divorce is effective when one spouse dies prior to the entry of a written final decree.

Eve Baker filed for divorce from Terry Bizzle. The court held a bench trial, and the judge declared on the record, "The parties are divorced." The judge later emailed the parties a proposed property division and requested that Eve's attorney prepare the decree.

Eve died several weeks later. Neither party had submitted a proposed divorce decree to the court. After receiving notice of Eve's death, the court held a hearing at which counsel for both parties presented arguments on whether the court retained subject-matter jurisdiction to enter a final divorce decree. Eve's attorney then submitted a proposed decree, which the judge signed with some handwritten additions.

Terry appealed, arguing that the oral pronouncement, standing alone or in combination with the email containing the proposed property division, did not constitute a full and final rendition of judgment. The court of appeals held that the oral pronouncement was not a final judgment because it did not divide the marital property, and the email did not reflect a present intent to render final judgment because it expressed uncertainty and invited further discussion. The court of appeals reversed and ordered the case dismissed the case for lack of subject-matter jurisdiction.

Counsel for Eve petitioned the Supreme Court for review, arguing that the oral pronouncement and the property-division email, when viewed together, constitute a complete, present rendition of judgment. The Supreme Court granted the petition.

2. Termination of Parental Rights

a) *In re R.J.G.*, ___ S.W.3d ___, 2022 WL 1158680 (Tex. App.—San Antonio 2022), *pet. granted* (June 23, 2023) [22-0451]

The primary issue in this case is whether substantial compliance is sufficient to avoid termination of parental rights under Section 161.001(b)(1)(O) of the Family Code.

DFPS removed Mother's three children and provided her with a service plan. Although she made progress toward completing the services, she failed to complete the required counseling, parenting classes, and substance abuse classes in exactly the manner prescribed by the plan. Specifically, she attempted to complete those services with different providers from those prescribed in the plan. She also continued to associate with Father, who was physically abusive, in contravention of her counselor's recommendations. The trial court terminated Mother's parental rights under Subsection (O).

The court of appeals affirmed. It held that substantial compliance with the service plan is insufficient to avoid termination under (O) and Mother did not prove an affirmative defense to termination under (O).

Mother petitioned the Supreme

Court for review. Mother argues that substantial compliance is sufficient to avoid termination under (O) and that she complied with her service plan, just not in the way that DFPS wanted. She also argues that she proved the affirmative defense to termination under (O) because she made a good faith effort to comply with the plan and any failure to comply was not her fault. The Court granted the petition for review.

b) *In re R.R.A.*, 654 S.W.3d 535 (Tex. App.—Houston [14th Dist.] 2022), *pet. granted* (June 2, 2023) [22-0978]

The issue in this case is whether evidence of a causal connection between a parent's drug use and any alleged endangerment of the child is required to terminate a parent's rights under Section 161.001(b)(1)(D) or (E) of the Texas Family Code.

The Department of Family and Protective Services sought to terminate Father's parental rights to his three children after it learned of allegations that Father and the children were homeless and that Father was using drugs. The children were removed from Father and initially placed with their grandmother but were removed a second time after she was hospitalized and could not care for the children. At the time of the second removal, Father threatened to kill himself if the children were removed again. Father tested positive for drugs several times after the children's removal and eventually refused to submit to required drug testing. The trial court terminated Father's parental rights, finding by clear and convincing evidence that Father had endangered the children under Section 161.001(b)(1)(D) and (E) of the Family Code and that he used a controlled substance in a manner that endangered the children under subsection (P).

Father appealed. A split panel of the court of appeals reversed. The majority relied on a recent Fourteenth Court en banc opinion, which held that evidence of a causal connection between drug use and endangerment is required to terminate a parent's rights under subsection (E). The majority concluded that no such evidence existed here. Nor did it find any other evidence against Father—including his homelessness and threat of self-harm—sufficient to support termination. Accordingly, it reversed and rendered judgment for Father.

The Supreme Court granted the Department's and the children's petition for review.

H. GOVERNMENTAL IMMUNITY

1. Contract Claims

a) *San Jacinto River Auth. v. City of Conroe*, ___ S.W.3d ___, 2022 WL 1177645 (Tex. App.—Beaumont 2022), *pet. granted* (Sept. 1, 2023) [22-0649]

The principal issue in this case is whether a contractual mediation requirement is a limitation on the waiver of sovereign immunity on contract claims under the Local Government Contract Claims Act.

The Cities of Conroe and Magnolia receive water from the San Jacinto River Authority. The contracts between the Authority and the Cities require mediation of certain claims. The

Authority and the Cities disagreed over the water rates the Authority charged the Cities. The Authority brought claims against the Cities for declaratory judgment and for non-payment under the contracts. The Cities filed pleas to the jurisdiction, alleging that mediation is required under the contracts and that the claims should therefore be dismissed. The trial court granted the Cities' pleas to the jurisdiction. The court of appeals affirmed.

The Authority filed a petition for review raising several issues. It argues that governmental immunity on its claims is waived under the Local Government Contract Claims Act and the terms of the contracts. The Act waives governmental immunity on certain contract claims for goods and services. The Authority argues that its contract claims are not subject to mediation under the terms of the contracts, and that even if the claims require mediation, that requirement is not a jurisdictional limitation on the scope of the Act's waiver of immunity. Conversely, the Cities argue that mediation is required because the Authority's claims include claims for "performance" defaults subject to mediation under the terms of the contracts, as opposed to "payment" defaults that are not subject to mediation. The Cities also argue that a mediation requirement is an "adjudication procedure" under the Act that limits the scope of the Act's waiver of immunity, and therefore the trial court properly granted the pleas to the jurisdiction.

The Court granted the petition for review.

2. Independent Contractors

a) *Tex. Dep't of Transp. v. Self*, ___ S.W.3d ___, 2022 WL 1259094 (Tex. App.—Fort Worth 2022), *pet. granted* (Sept. 1, 2023) [22-0585]

This case presents two questions involving the scope of the Texas Tort Claims Act's immunity waiver: (1) whether a governmental employee's control over a third-party contractor constitutes "operation or use" under the Act's waiver of immunity for property damage "aris[ing] from" the operation or use of motor-driven equipment, and (2) whether a subcontractor's workers who removed trees from private property adjacent to a public roadway were TxDOT "employees" under the statute.

In a negligence and inverse-condemnation suit alleging improper removal of trees outside of a right-of-way easement, the trial court denied TxDOT's plea to the jurisdiction. The court of appeals affirmed as to the negligence claim but dismissed the takings claim for want of jurisdiction.

The appeals court acknowledged a split of authority regarding waiver of immunity based on control over motor-driven equipment that was physically operated by someone other than a state employee. Without weighing in on the debate, the court held that (1) TxDOT did not exercise sufficient control over the tree-removal equipment to invoke the Act's immunity waiver under the more expansive line of cases; however, (2) evidence that TxDOT actually controlled the details of the tree-removal task created a fact issue about whether the workers were "employees" rather than independent

contractors. In dismissing the inverse-condemnation claim, the court found no evidence of "intent" as required to sustain the claim.

The Supreme Court granted the parties' cross-petitions for review.

3. Texas Commission on Human Rights Act

a) *Tex. Tech Univ. Health Scis. Ctr. v. Martinez*, ___ S.W.3d ___, 2022 WL 3449495 (Tex. App.—Amarillo 2022), *pet. granted* (Sept. 1, 2023) [22-0843]

The issue is whether certain university entities are immune from Martinez's age-discrimination suit under the Texas Commission on Human Rights Act.

In 2008, Martinez began working for the Texas Tech University Health Sciences Center as Senior Assistant to the then-President of the Center. Martinez was promoted to Chief of Staff the following year and continued serving in that position through Dr. Ted Mitchell's appointment as President of the Center in 2010, as well as his dual appointment as Chancellor of the Texas Tech University System in early 2019. Martinez's employment was formally terminated in June 2019, shortly after Mitchell had sent an e-mail to Martinez and others in May 2019, which discussed the Texas Tech University Board of Regents' expression of interest in "succession planning" following the results of an age-analysis of the President's executive council.

After receiving a Notice of Right to Sue from the Equal Opportunity Employment Commission, Martinez filed an action for employment discrimination under the TCHRA, naming the Center, the Board of Regents, Texas Tech University, and the Texas Tech University System as defendants. The university entities jointly filed a plea to the jurisdiction, arguing that the TCHRA's waiver of sovereign immunity was inapplicable because Martinez did not qualify as their indirect employee under Texas caselaw. The trial court denied the plea to the jurisdiction and the university entities filed an interlocutory appeal. The court of appeals affirmed the denial of the plea to the jurisdiction for all the university entities except Texas Tech University.

The remaining university entities filed a petition for review, which the Supreme Court granted.

4. Texas Tort Claims Act

a) *Cai v. Chen*, ___ S.W.3d ___, 2022 WL 2350049 (Tex. App.—Houston [14th Dist.] June 30, 2022), *pet. granted* (Sept. 1, 2023) [22-0667]

The issue is whether an employee's report of sexual harassment by a coworker and comments about the matter to another coworker fall within the employee's scope of employment for purposes of the Texas Tort Claims Act.

Chen and Cai both worked at the M.D. Anderson Research Center in Houston and were subject to the Center's policies and procedures for the filing and investigating of sexual-harassment claims. In October 2018, Cai reported to a supervisor, as well as the Center's Title IX coordinator, that Chen was sexually harassing and stalking her, which ultimately led to Chen's placement on investigative

leave and the commencement of criminal charges against him. Cai also discussed the matter with another coworker, repeating her allegations of stalking and harassment by Chen.

In November 2019, Chen sued Cai, alleging claims of slander, defamation, libel, malicious, criminal prosecution, and tortious interference with contract, among others. Chen moved to dismiss under Section 101.106(f) of the Tort Claims Act, which requires a court to dismiss a suit against a government employee based on conduct within the general scope of that employee's employment. Chen refused to amend his pleadings to substitute the governmental unit as the defendant, arguing that reporting or discussing sexual harassment was not within the general scope of Cai's employment. The trial court denied Cai's motion to dismiss.

The Court of Appeals affirmed in part and reversed and rendered judgment in part, dismissing Chen's malicious prosecution claim in its entirety and dismissing his remaining claims to the extent they are based on Cai's reports of sexual harassment or conduct relating to the subsequent investigation. One justice, dissenting in part, also would have dismissed any claims based on Cai's statements to the coworker.

Chen and Cai filed cross-petitions for review. The Supreme Court granted both petitions.

b) *City of Houston v. Sauls*, 654 S.W.3d 772 (Tex. App.—Houston [14th Dist.] 2022), *pet. granted* (Oct. 20, 2023) [22-1074]

The issue in this case is whether the Tort Claims Act waives the City of Houston's immunity in a negligence suit for damages caused by a Houston Police Department officer.

The officer—while responding to a 911 call for a potential suicide—was driving 62 mph in a 40-mph zone, when she hit a bicyclist entering the intersection. The collision resulted in the bicyclist's death.

In the negligence lawsuit that followed, the City filed a motion for summary judgment that sought dismissal on grounds of governmental immunity. The trial court denied the motion, and the court of appeals affirmed.

The City petitioned for review, arguing that it has not waived governmental immunity because (i) the doctrine of official immunity prevents the officer from being personally liable to the plaintiffs under Section 101.021(1), and (ii) the emergency exception in Section 101.055(2) applies. The Supreme Court granted the City's petition for review.

5. Texas Whistleblower Act

a) *City of Denton v. Grim*, ___ S.W.3d ___, 2022 WL 3714517 (Tex. App.—Dallas 2022), *pet. granted* (Sept. 1, 2023) [22-1023]

The issues in this case are whether two employees' report of misconduct by an unpaid city councilmember qualifies for protection under the Texas Whistleblower Act and whether there is sufficient evidence that the report caused the employees' termination.

Michael Grim and Jim Maynard worked for the City of Denton and were on the planning committee for a new

natural gas plant. A city councilmember who opposed the plant released allegedly confidential documents to a local newspaper. Grim and Maynard reported this disclosure to the city attorney. Following a change in the City's leadership, the new city manager began investigating the procurement process for the new plant. Grim and Maynard were ultimately terminated.

Grim and Maynard sued the City, alleging that their terminations were in retaliation for their report and therefore violated the Whistleblower Act. The jury agreed and awarded damages, and a divided court of appeals affirmed.

The City petitioned for review. It argues that the Whistleblower Act does not apply because the councilmember was not acting in her official capacity, so there is no report of a violation by "the employing governmental entity" as required by the Act. The City also argues that the evidence is legally insufficient to support a finding that the employees' report caused their terminations. The Supreme Court granted the City's petition.

6. Ultra Vires Claims

a) *Image API, LLC v. Young*, ___ S.W.3d ___, 2022 WL 839425 (Tex. App.—Amarillo 2022), *pet. granted* (Sept. 1, 2023) [22-0308]

At issue is whether Section 32.0705(d) of the Human Resources Code imposes a mandatory one-year time limit for the Health and Human Services Commission to conduct external audits of "Medicaid contractors."

Image API contracted with the Commission to provide document-processing services. The Commission later audited Image and demanded that Image repay over $400,000. Image sued, seeking a declaration that the audit was untimely and thus *ultra vires* because the audit was beyond the one-year time limit for external audits imposed by Section 32.0705(d). The Commission filed a plea to the jurisdiction and moved for summary judgment, arguing that Section 32.0705(d) either does not apply or is directory (and thus judicially unenforceable). The trial court denied the Commission's plea but granted its summary-judgment motion.

The court of appeals reversed in part, holding that Section 32.0705 applies to the Commission's audit because Image is a "Medicaid contractor" under that statute. The court of appeals also held that Section 32.0705(d) is merely a directory provision, not a mandatory one. Consequently, Section 32.0705(d) neither imposes a ministerial duty on the Commission to conduct audits within the one-year period nor prohibits an audit from being conducted beyond that period.

Image petitioned the Supreme Court for review, arguing that Section 32.0705(d) is mandatory. The Court granted Image's petition.

I. HEALTH AND SAFETY

1. Involuntary Commitment

a) *In re A.R.C.*, 657 S.W.3d 585 (Tex. App.—El Paso 2022), *pet. granted* (June 16, 2023) [22-0987]

At issue in this case is whether a second-year psychiatry resident qualifies as a "psychiatrist" under Section 574.009(a) of the Texas Health and Safety Code.

A second-year psychiatry resident recommended court-ordered mental-health services for a patient displaying psychotic symptoms. The resident subsequently filed an involuntary commitment application. Two "certificates of medical examination," completed by second-year psychiatry residents, supported the application.

Before the trial court's hearing on the application, the patient filed a motion to dismiss, arguing that Section 574.009(a) requires at least one of the certificates of medical examination to be completed by a psychiatrist, and neither of the second-year psychiatry residents qualified.

The trial court denied the patient's motion to dismiss and signed an order for temporary inpatient mental-health services. A divided court of appeals reversed, holding that a psychiatry resident is not a "psychiatrist" under the Code.

In its petition for review, the State argues that the term "psychiatrist" refers to any physician who has chosen to specialize in psychiatry. According to the State, dictionary definitions indicate the need for additional training in psychiatry and a specialized focus but do not require completion of a specific program or board certification. The State contends that, because psychiatry residents commit their professional attention to psychiatry, the second-year psychiatry residents fall squarely within the definition of a psychiatrist.

The Court granted the State's petition for review.

J. INSURANCE

1. Policies/Coverage

a) *In re Ill. Nat'l Ins. Co.*, ___ S.W.3d ___, 2022 WL 4553342 (Tex. App.—Houston [14th Dist.] 2022), *argument granted on pet. for writ of mandamus* (June 16, 2023) [22-0872]

The issues in this case are whether an insured's nonrecourse settlement with a third party may inform contract liability and damages against insurers after the insurers allegedly breached their duties to their insured and whether the no-direct-action rule precludes the third party from intervening in the insured's suit against its insurers.

Relator GAMCO sued relator Cobalt for securities fraud. The parties settled after Cobalt filed for bankruptcy. The parties agreed that GAMCO would pursue insurance coverage to satisfy the settlement amount but not Cobalt itself, and Cobalt agreed to cooperate with GAMCO's collection effort against Cobalt's insurers. The federal bankruptcy and district courts approved the settlement.

Cobalt sued its insurers for breach of contract. GAMCO intervened. The trial court entered summary-judgment orders ruling that: (1) the no-direct-action rule did not bar

GAMCO from suing Cobalt's insurers because the settlement reflected Cobalt's liability to GAMCO; (2) Cobalt suffered insured losses by paying defense costs and becoming liable for the settlement amount; (3) the settlement was reached in fully adversarial litigation so it is enforceable against the insurers; (4) the insurers abandoned Cobalt and therefore could not assert defenses to the settlement; and (5) comity precluded the insurers from challenging the settlement because the federal courts approved the agreement.

The insurers sought a writ of mandamus to reverse those rulings, and the court of appeals denied relief. In the Supreme Court, the insurers argue that the no-direct-action rule bars GAMCO's claims, the settlement is not enforceable against them because the liability amount was not established in an adversarial proceeding since Cobalt is not directly liable under the agreement with GAMCO, Cobalt did not suffer covered losses, and comity does not apply. The Court granted oral argument.

2. Texas Prompt Payment of Claims Act

a) *Rodriguez v. Safeco Ins. Co. of Ind.*, 73 F.4th 352 (5th Cir. 2023), *certified question accepted* (July 21, 2023) [23-0534]

This certified question asks whether an insurer's payment of the full appraisal award plus any possible statutory interest precludes recovery of attorney's fees.

Mario Rodriguez's home was damaged by a tornado in May 2019. Rodriguez sued Safeco for unfair settlement practices and delayed payment under the Texas Prompt Payment of Claims Act. After Safeco paid him an appraisal award and interest on the delayed payment as required by the Act, it moved for summary judgment on the grounds that its payment of the appraisal award plus interest foreclosed Rodriguez's claim for attorney fees.

Safeco reasoned that because the statute determines attorney fees awards based on the "amount to be awarded in the judgment, " and because there is no "amount to be awarded" in a judgment for his damage claim under the policy, Rodriguez is not entitled to attorney fees. Rodriguez countered that the legislature did not intend the amendments to eliminate attorney fees in the appraisal context. The federal district court granted summary judgment for Safeco.

The Fifth Circuit, noting that only one state appellate court has ruled on the effect of the 2017 amendments and that the federal courts that have addressed this issue are split, certified the following question of law to the Court: "In an action under Chapter 542A of the Texas Prompt Payment of Claims Act, does an insurer's payment of the full appraisal award plus any possible statutory interest preclude recovery of attorney's fees?" The Court accepted the certified question.

K. INTENTIONAL TORTS

1. Defamation

a) *Polk Cnty. Publ'g Co. v. Coleman*, 668 S.W.3d 385 (Tex. App.—Beaumont 2021), *pet. granted* (June 2, 2023) [22-0103]

This case presents primarily two issues: (1) whether a newspaper is entitled to a substantial-truth defense despite publishing an article that was not literally true and (2) whether a local prosecutor is a limited-purpose public figure.

Valarie Reddell, a newspaper editor and employee of Polk County Publishing Company, published an article about a newly hired assistant district attorney in the Polk County District Attorney's Office, respondent Tommy Coleman. The article spoke about Coleman's "soft landing" at the District Attorney's Office after his alleged assistance with the "prosecution" of Michael Morton, a man who was later exonerated of murder charges. The article stated that Coleman had mocked Morton's request to test certain evidence for DNA.

Coleman read the article and informed the newspaper that it was false, pointing out that he was never involved in Morton's "prosecution." The newspaper later ran a correction and stated that it had "mischaracterized" Coleman's involvement because he "was not involved in the initial trial or prosecution of Michael Morton in 1987."

Coleman then sued Reddell and Polk County Publishing Company for defamation. Reddell and the Publishing Company moved to dismiss Coleman's claims under the TCPA. The trial court denied the motion, and the court of appeals affirmed, holding that (1) Coleman was not a limited-purpose public figure because his work history and employment were not matters being publicly discussed at the time and (2) Coleman met his burden in showing that the article was false because the average reader would have understood from the article that Coleman was involved in Morton's initial prosecution, not the post-conviction habeas proceedings. Reddell and the Publishing Company petitioned for review, arguing that the article was "substantially true" and that Coleman failed to meet his TCPA burden as a limited-purpose public figure.

The Court granted the petition for review.

2. Fraud

a) *Weller v. Keyes*, ___ S.W.3d ___, 2022 WL 3638204 (Tex. App.—Austin 2022), *pet. granted* (Oct. 20, 2023) [22-1085]

At issue is whether Section 21.223 of the Business Organizations Code shields a corporate agent from being held personally liable for torts committed during the course and scope of employment or in the role of corporate agent.

David Weller, the president and sole member of IntegriTech Advisors, spent several months in employment negotiations with MonoCoque Diversified Interests LLC, which is wholly owned by Mary Alice Keyes and Sean Leo Nadeau. The parties exchanged emails detailing compensation terms, Weller's salary, IntegriTech's training supplement, and payments based on quarterly revenues. Weller declined

other employment opportunities and accepted MonoCoque's employment offer. After Weller's acceptance, MonoCoque refused to pay him the promised revenue payments for the first quarter. Weller quit.

Weller filed suit asserting various fraud claims against Keyes and Nadeau alleging that they were personally liable for their own fraudulent and tortious conduct notwithstanding that they were acting as agents of MonoCoque. Keyes and Nadeau filed a motion for partial summary judgment on all of Weller's claims against them in their individual capacities. The trial court granted the motion, but the court of appeals reversed.

Keyes and Nadeau petitioned the Supreme Court for review, arguing that Weller only relied on statements that Keyes and Nadeau made in their capacity as representatives of MonoCoque and that Section 21.223 shields corporate agents from personal liability for the corporation's contractual obligations. Weller responds that Section 21.223 only shields veil-piercing theories of liability and was never intended to preclude personal tort liability.

The Court granted the petition for review.

L. JURISDICTION

1. Injunctions

a) *Huynh v. Blanchard*, ___ S.W.3d ___, 2021 WL 3265549 (Tex. App.—Tyler 2021), *pet. granted* (March 10, 2023) [21-0676]

The issue in this case is whether a jury finding that the operation of chicken farms was a temporary nuisance precluded the trial court from issuing a permanent injunction.

Sanderson Farms along with local growers, the Huynhs, set up and operated chicken farms in East Texas. The farms were in close proximity to neighboring properties—in violation of law and Sanderson's own internal policies. Blanchard and other neighbors claimed that the size and proximity of the chicken farms to their homes created a nuisance.

The jury found that Sanderson and the growers had intentionally caused a nuisance. The jury also determined the nuisance was temporary. The trial court rendered a take-nothing judgment on damages for the neighbors and issued a permanent injunction against Sanderson and the growers. The injunction prevented Sanderson and the growers from buying, selling, delivering, receiving, shipping, transporting, hatching, raising, growing, feeding, handling, burying, or disposing of any chicken of any breed, type, size or age within five miles of where the farms were operated. The court of appeals affirmed the trial court's judgment.

The Supreme Court granted Sanderson and the growers' petition for review.

2. Service of Process

a) *Tex. State Univ. v. Tanner*, 644 S.W.3d 747 (Tex. App.—Austin 2022), *pet. granted* (Sept. 1, 2023) [22-0291]

At issue in this case is whether diligence in service of process is a "statutory prerequisite to suit" for claims brought under the Tort Claims Act. In 2014, Hannah Tanner sustained serious injuries after being thrown from a

golf cart while on the Texas State University golf course. In 2016, Tanner timely sued TSU, the Texas State University System, and Dakota Scott (a TSU employee who drove the golf cart) under the Tort Claims Act. Tanner served the System in 2016 but did not serve Scott until 2018. Scott moved for summary judgment on the grounds that Tanner did not exercise diligence as a matter of law because she had delayed serving Scott for two years. The district court denied Scott's motion and granted the System's plea to the jurisdiction. Finally, in 2020, Tanner served TSU.

TSU filed a plea to the jurisdiction, asserting that Tanner's claims were barred by the two-year statute of limitations because she had delayed serving TSU for over three and a half years. The district court agreed and granted TSU's plea. The court of appeals reversed, holding that diligence in service of process is not a statutory prerequisite to suit under Section 311.034 of the Government Code and is thus not jurisdictional.

TSU petitioned the Supreme Court for review, arguing that timely service is a jurisdictional prerequisite because a court does not obtain jurisdiction over a defendant until service is effectuated. The Supreme Court granted the petition.

3. Territorial Jurisdiction

a) *Sabatino v. Goldstein*, 649 S.W.3d 841 (Tex. App.—Houston [1st Dist.] 2022), *pet. granted* (June 16, 2023) [22-0678]

The primary issue in this case is whether a trial court must have territorial jurisdiction over an alleged offender's conduct to issue a protective order under the Texas Code of Criminal Procedure.

Rachel Goldstein and James Sabatino dated while they both lived in Massachusetts. Three years after they stopped dating, Goldstein obtained a protective order in Massachusetts prohibiting Sabatino from contacting her. After Goldstein moved to Texas, Sabatino filed several small-claims suits against Goldstein, and the notices were forwarded to her in Texas.

Goldstein applied for a protective order in Texas under the Code of Criminal Procedure. Following a hearing, the trial court found there were reasonable grounds to believe that Goldstein was a victim of stalking and harassment. It issued a lifetime protective order prohibiting Sabatino from various acts. The court of appeals reversed and vacated the order, holding that the trial court lacked territorial jurisdiction over Sabatino's alleged harassment because the conduct all occurred in Massachusetts.

Goldstein petitioned the Supreme Court for review, arguing that territorial jurisdiction is solely a criminal-law concept and does not apply to protective orders, which are civil matters. She contends the court of appeals erred in vacating the order because the trial court had both subject-matter jurisdiction and personal jurisdiction over Sabatino.

The Court granted Goldstein's petition for review.

M. MEDICAL LIABILITY

1. Damages

a) *Velasco v. Noe*, 645 S.W.3d 850 (Tex. App.—El Paso 2022), *pet. granted* (June 23, 2023) [22-0410]

The issue in this case is what damages, if any, are recoverable in a medical negligence action based on "wrongful pregnancy."

Velasco sought prenatal care for her third child from Dr. Noe. She paid $400 to Dr. Noe's clinic, which she alleges she paid to receive a sterilization procedure when Dr. Noe performed a C-section. Dr. Noe performed the C-section, but not a sterilization procedure. Velasco subsequently became pregnant with her fourth child and sued Dr. Noe for negligence, among other torts, alleging that he failed to notify her that he did not perform the sterilization procedure.

The trial court granted summary judgment for Dr. Noe on all of Velasco's claims. A divided court of appeals affirmed in part and reversed in part. The court reversed as to her medical negligence claim, concluding that Velasco produced enough evidence on each element to survive summary judgment. Additionally, it held that mental anguish and pain and suffering damages are recoverable in a wrongful pregnancy action upon a showing of negligence. The court affirmed summary judgment on all of Velasco's other claims.

Dr. Noe petitioned the Supreme Court for review. Dr. Noe argues that Texas law does not recognize wrongful pregnancy actions, and alternatively, if it does, any damages are limited to medical expenses associated with the failed or unperformed procedure. The Supreme Court granted the petition for review.

N. MUNICIPAL LAW

1. Authority

a) *Emps.' Ret. Fund v. City of Dallas*, 636 S.W.3d 692 (Tex. App.—Dallas 2021), *pet. granted* (Feb. 24, 2023) [22-0102]

The issues in this case are (1) whether requiring the board of a pension fund to approve amendments to the city code is an improper delegation of authority; and (2) whether an ordinance that changes one part of the city code constitutes an amendment to another part of the code.

The Dallas City Code houses the governing provisions of the City Employees' Retirement Fund. The Code provides that an ordinance amending those provisions must first be approved by the Retirement Fund's Board. Some members of the Board are elected by City employees. Without the Board's approval, the City passed an ordinance that imposes term limits on the Board's elected members. The Retirement Fund and the City each sought declaratory relief and filed cross-motions for summary judgment. The trial court granted the City's motion and rendered judgment in its favor.

The court of appeals reversed. It held that the ordinance amended the Retirement Fund's governing provisions because it fundamentally changed the qualifications to be an elected member of the Retirement Fund's Board. The court thus held that the portion of the ordinance that imposes term limits is invalid because the

City failed to obtain the Board's approval.

The City petitioned the Supreme Court for review, arguing (1) that requiring the City to obtain the Board's approval to amend part of the City Code is an improper delegation of authority; and (2) that the ordinance does not amend the Retirement Fund provisions. The Court granted the petition for review.

O. NEGLIGENCE

1. Duty

a) *HNMC, Inc. v. Chan*, 637 S.W.3d 919 (Tex. App.—Houston [14th Dist.] 2021), *pet. granted* (June 3, 2023) [22-0053]

The central question in this case is whether an employer is liable to an employee who was injured while crossing a public roadway that divided the employer's property.

Chan worked as a nurse for HNMC and was struck by a vehicle while walking across a roadway that divides HNMC's hospital from its parking lot and which is owned and operated by Harris County. The accident resulted in Chan's death, following which her estate sued the driver that struck her and HNMC, asserting claims for negligent property design and failure to warn. The jury found HNMC partially responsible, and the trial court signed a judgment that awarded damages against HNMC. The court of appeals affirmed, holding (1) that HNMC failed to preserve its argument that the Texas Workers' Compensation Act barred Chan's claims, and (2) that the hospital owed a duty of care to Chan because the risk of serious injury on the roadway was highly foreseeable.

HNMC petitioned for review. HNMC first argues that there is generally no common-law duty to property-owners adjacent to a public roadway for risks presented by the road. Second, HNMC argues that if the property design of the hospital is at fault, Chan is required to recover through the Texas Workers' Compensation Act, not through a common-law action. The Supreme Court granted HNMC's petition for review.

2. Unreasonably Dangerous Conditions

a) *Prado v. Lonestar Res., Inc.*, 647 S.W.3d 731 (Tex. App.—San Antonio 2021), *pet. granted* (Sept. 1, 2023) [22-0431]

This case raises questions of what counts as sufficient evidence of an unreasonably dangerous condition of a railroad crossing and what constitutes notice that such a condition exists.

Rolando Prado was struck and killed by a Union Pacific Railroad Company train after he failed to come to a full stop at the stop sign in front of the railroad tracks, which Union Pacific also owned. The crossing was located on a private road owned by Evan Alderson Ranches. Prado's heirs sued the ranch and Union Pacific for negligence, negligence per se, and gross negligence. Prado argued that the curve of the road, the tree line, and a fence obstructed the view of oncoming trains and so the defendants breached their duties to warn of extra-hazardous and unreasonably dangerous conditions. The trial court granted summary judgment in favor of the defendants. The

court of appeals reversed, holding that reasonable jurors could disagree as to whether the crossing was extra-hazardous or an unreasonably dangerous condition.

Both the ranch and Union Pacific filed petitions for review. The ranch argues there is no evidence that the crossing was unreasonably dangerous and, even if there is, there is no evidence that the ranch was aware of the condition. Union Pacific argues that there is not sufficient evidence that the crossing was extra-hazardous because Prado did not exercise reasonable care, and there is a lack of evidence to support the finding even if reasonable care is not required. The Supreme Court granted both petitions.

3. Willful and Wanton Negligence

a) *Marsillo v. Dunnick*, 654 S.W.3d 224 (Tex. App.—Austin 2022), *pet. granted* (June 23, 2023) [22-0835]

In this healthcare-liability claim arising from an emergency physician's treatment of a snakebite, the main issue is whether the plaintiff has produced some evidence of "willful and wanton negligence" by the physician, as required by statute.

When Dr. Kristy Marsillo treated Raynee Dunnick for a rattlesnake bite, she followed her hospital's guidelines detailing when to administer antivenom. Raynee received the antivenom three hours after arriving at the hospital. The Dunnicks sued, alleging that Dr. Marsillo should have administered the antivenom immediately and that her failure to do so is the proximate cause of Raynee's lasting pain and impairment. The trial court granted Dr. Marsillo's no-evidence motion for summary judgment, but the court of appeals reversed.

The Supreme Court granted Dr. Marsillo's petition for review. She argues that willful and wanton negligence is the same standard as gross negligence and that there is no evidence to satisfy it. She also argues that there is no evidence of proximate cause.

P. OIL AND GAS

1. Contract Interpretation

a) *Samson Expl., LLC v. Bordages*, 662 S.W.3d 501 (Tex. App.—Beaumont 2022), *pet. granted* (Sept. 1, 2023) [22-0215]

The central issue in this case is whether a contractual "late charge" on past-due royalties allows for compound rather than simple interest.

As landowners, the Bordages executed multiple oil-and-gas leases with Samson Exploration, LLC. The leases provide for an 18% late-charge penalty on past-due royalties to be calculated each month but do not expressly state whether the interest should be compound or simple. After fellow royalty owners with a similar late-charge provision sued Samson on various breach-of-lease theories, the Bordages joined suit, but their case was later severed into a separate cause. The trial court rendered judgment against Samson for just over $13 million in "late charges," with approximately $11 million of that number based on the interest being compounded monthly. The court of appeals affirmed.

Samson petitioned the Supreme Court for review, arguing that Texas

law and nationwide authority disfavors compound interest when it is not expressly provided for in a contract and that applying simple interest is supported by the leases' plain language and a utilitarian construction. The Bordages respond that stare decisis and the leases' plain language preclude Samson's construction and that collateral estoppel bars this issue because it was already resolved in the fellow royalty owners' case in favor of compounding.

The Court granted Samson's petition for review.

2. Pooling

a) *Ammonite Oil & Gas Corp. v. R.R. Comm'n of Tex.,* 672 S.W.3d 33 (Tex. App.—San Antonio 2021), *pet. granted* (June 2, 2023) [21-1035]

At issue in this case is whether one oil-and-gas company's forced-pooling offer to another, which included a 10% risk penalty, was unreasonably low under the Texas Mineral Interest Pooling Act.

EOG Resources drilled sixteen wells on a riverbed tract based on drilling permits it received from the Railroad Commission. EOG's wells surrounded a seven-mile portion of the riverbed leased by petitioner Ammonite Oil & Gas Corp. Concerned that its mineral interested would be essentially stranded, Ammonite sent a series of letters to EOG proposing the formation of sixteen voluntarily pooled units, including a 10% risk charge to cover the economic risks assumed in drilling the wells. EOG rejected the offer. Ammonite then sought to force-pool its riverbed tracts with EOG's wells.

The Railroad Commission rejected Ammonite's applications, finding that Ammonite's offers to EOG were not "fair or reasonable" as required by the Mineral Interest Pooling Act . Ammonite petitioned for judicial review in the trial court, which affirmed the Commission's order. The court of appeals did the same. Ammonite petitioned for review to the Supreme Court, arguing that nothing in the plain text of MIPA even requires that a risk penalty be included in a voluntary-pooling offer, so a low-risk penalty (or even the absence of one) cannot render an offer statutorily unreasonable. The Court granted the petition for review.

Q. PROCEDURE—APPELLATE

1. Interlocutory Appeal Jurisdiction

a) *Harley Channelview Props., LLC v. Harley Marine Gulf, LLC*, ___ S.W.3d ___, 2022 WL 17813798 (Tex. App.—Houston [1st Dist.] 2022), *pet. granted* (Sept. 29, 2023) [23-0078]

The issue in this case is whether an interlocutory order that grants partial summary judgment and orders a party to sell real property within thirty days is an appealable temporary injunction.

Harley Marine Gulf leases a maritime facility from Harley Channelview Properties. When Harley Marine signed the lease, it also obtained an option to purchase the property for $2.5 million at any time during the lease period or a renewal period. Eight years later, Harley Marine attempted to exercise its option, but Channelview refused to sell the property, claiming

that the option had expired. Harley Marine sued for breach of the option agreement and sought specific performance. It then moved for partial summary judgment.

The trial court granted the motion and ordered Channelview to sell the property to Harley Marine within thirty days. It is undisputed that the order is interlocutory because other claims in the suit remain unresolved. Channelview appealed, claiming that the trial court's order constitutes a temporary injunction and is therefore appealable under Civil Practice and Remedies Code Section 51.014(a)(4). The court of appeals dismissed the appeal for want of jurisdiction, holding that the trial court's order lacked indicia of a temporary injunction because the order granted permanent relief on the merits.

In its petition for review, Channelview argues that the trial court's order qualifies as a temporary injunction under Supreme Court precedent. To hold otherwise, it argues, deprives it of its right to appellate review prior to compliance. The Supreme Court granted review.

2. Finality of Judgments

a) *Sealy Emergency Room, L.L.C. v. Free Standing Emergency Room Managers of Am., L.L.C.*, 669 S.W.3d 488 (Tex. App.—Houston [1st Dist.] 2022), *pet. granted* (June 16, 2023) [22-0459]

This case examines whether a trial court can sever unresolved claims following a grant of partial summary judgment, thereby creating an appealable final judgment.

FERMA was hired to manage Sealy Emergency Room L.L.C. When a contract dispute arose, FERMA sued Sealy ER for breach of contract. Sealy ER countersued FERMA and three of its doctors. FERMA and the third-party doctors filed a traditional motion for partial summary judgment on Sealy ER's counterclaims and third-party claims.

The trial court granted the motion for partial summary judgment on Sealy ER's counterclaims and third-party claims. It severed the claims disposed of by the partial summary-judgment motion into a new action with a separate cause number, leaving FERMA's original claims against Sealy ER pending in the trial court in the original cause. Sealy ER appealed the trial court's judgment under the new cause number.

The court of appeals dismissed the appeal for lack of jurisdiction due to the pendency of FERMA's unresolved claims against Sealy ER in the trial court under the original cause number. The court of appeals noted that neither the partial summary judgment nor the severance order contained finality language or any other clear indication that the trial court intended the order to dispose of the entire case completely. Because claims between the parties arising from the same transaction remained pending in the trial court, the court of appeals concluded that the partial summary judgment order did not dispose of all claims and parties before the trial court.

Sealy ER petitioned the Supreme Court for review. Sealy ER argues that the severed lawsuit on appeal consisted only of Sealy ER's

counterclaims against FERMA and third-party claims against the third-party doctors. Because the partial summary judgment order fully disposed of those claims, Sealy ER argues that the partial summary judgment order disposed of all claims and parties before the trial court in the severed cause, and therefore the court of appeals should have concluded it had jurisdiction and decided the case on its merits. The Court granted the petition for review.

R. PROCEDURE—PRETRIAL

1. Discovery

a) *In re Barnes*, 655 S.W.3d 658 (Tex. App.—Dallas 2022), *argument granted on pet. for writ of mandamus* (Nov. 10, 2023) [22-1167]

The issue in this case is whether E.B.'s healthcare records are privileged from discovery when E.B. is seeking mental-anguish damages in a negligence and bystander-recovery suit.

Ten-year-old E.B. was injured, and her younger brother was killed, in an ATV rollover accident. E.B. and her parents sued the seller of the ATV, Richardson Motorsports, and other defendants. E.B.'s claims are for negligence and bystander recovery, for which she seeks mental-anguish and other damages. In her initial disclosures, E.B. designated a clinical psychologist and her pediatrician as fact witnesses and nonretained testifying experts. At one defendant's request, E.B. produced unredacted healthcare records from those providers without objection.

Two years later, Richardson subpoenaed E.B.'s psychologist and pediatrician for updated records related to their treatment of E.B. for psychological issues. E.B. filed motions to quash, arguing that the physician–patient privilege and the mental-health-information privilege shield the records from discovery. E.B. then stated at the oral hearing that she would withdraw her designation of the doctors as testifying witnesses, though she has never amended her discovery responses to do so. The trial court denied the motions and ordered that the records be produced.

A split panel of the court of appeals granted E.B.'s mandamus petition and directed the trial court to vacate its orders and to grant E.B.'s motions to quash. The majority held that the records are not discoverable under the privileges' patient–litigation exception, which applies when a party relies on the patient's mental or emotional condition as part of a claim or defense. The majority characterized E.B.'s bystander claim as involving a routine claim for mental-anguish damages, which courts have held does not trigger the exception. The court rejected Richardson's argument that the "shock" element of E.B.'s bystander claim triggers the exception.

In its petition for writ of mandamus to the Supreme Court, Richardson challenges the court of appeals' holding that the patient–litigation exception does not apply and argues that E.B. waived the privileges' application by designating her providers as testifying witnesses and producing some of their records. The Court set the petition for oral argument.

b) *In re Metro. Water Co.*, ___ S.W.3d ___, 2022 WL 3093200 (Tex. App.—Houston [14th Dist.] 2022), *argument granted on pet. for writ of mandamus* (March 10, 2023) [22-0656]

The issue in this case is whether the trial court abused its discretion when it ordered a sweeping forensic examination of electronic storage devices as a discovery sanction.

Metropolitan Water and Blue Water were involved in litigation over a series of contracts governing rights to develop, market, and sell groundwater. Discovery was sought and ordered during the pendency of this litigation. The trial court ordered Metropolitan Water to turn over certain electronic files to Blue Water. Metropolitan Water did not comply.

The trial court entered an order for forensic inspection of Metropolitan Water's electronic devices as a sanction for its discovery abuse. The order included an inspection of the personal cell phone of Mr. Carlson, the head of Metropolitan Water. Blue Water's own expert was ordered to perform the forensic inspection. The sanction order provided no up-front limitation such as search terms or a time frame to limit the expert's search to relevant information. There was also no opportunity for Metropolitan Water or Mr. Carlson to object that data from their personal devices was private and irrelevant before it was turned over to Blue Water. The court of appeals denied Metropolitan Water's mandamus petition.

The Supreme Court granted oral argument on Metropolitan Water's mandamus petition.

2. Responsible Third-Party Designation

a) *In re Intex Recreation Corp.*, ___ S.W.3d ___, 2023 WL 2258461 (Tex. App.—Corpus Christi 2023), *argument granted on pet. for writ of mandamus* (Sept. 29, 2023) [23-0210]

The issues in this case are whether the trial court erred by granting the plaintiffs' motion for partial summary judgment on the defendant's contributory-negligence defense and, if it did, whether mandamus is available to correct that error.

Intex manufactures ladders for above-ground swimming pools. The parents of a two-year-old child filed a products-liability suit against Intex after their child snuck out of their house in the middle of the night, climbed the ladder to their pool, fell in, and drowned. Intex's answer included an affirmative defense designating the parents as responsible third parties under Chapter 33 of the Civil Practices and Remedies Code because the parents had failed to remove the ladder from the pool and to lock the back door leading to the pool. The parents moved for partial summary judgment, arguing that the common-law doctrine of parental immunity precludes Intex's comparative-responsibility defense. The trial court granted the parents' motion. The court of appeals denied Intex's subsequent mandamus petition.

Intex then sought mandamus relief in the Supreme Court. Intex argues that the doctrine of parental immunity does not foreclose its affirmative defense of contributory negligence and that Supreme Court precedent

authorizes mandamus review of a trial court ruling denying the designation of a responsible third party. The Court set Intex's petition for oral argument.

3. Statute of Limitations

a) *Sanders v. Boeing Co.*, 68 F.4th 977 (5th Cir. 2023), *certified question accepted* (June 2, 2023) [23-0388]

This certified question concerns the interpretation of Section 16.064 of the Texas Civil Practice and Remedies Code, which tolls limitations where a prior action is dismissed "because of lack of jurisdiction" and refiled in a court of "proper jurisdiction" within sixty days after the date the dismissal "becomes final."

Lee Marvin Sanders and Matthew Sodrok sustained injuries in connection with their employment as flight attendants by United Airlines. The flight attendants sued the Boeing Company and other defendants in federal district court, which later dismissed their suit for failure to adequately plead diversity jurisdiction—despite the fact that the parties agree that the flight attendants could have invoked the district court's jurisdiction if they had included the proper allegations. The flight attendants filed this suit shortly after the Fifth Circuit affirmed, but the district court dismissed their claims as barred by the statute of limitations.

On appeal to the Fifth Circuit, the flight attendants argued that Section 16.064 of the Texas Civil Practice and Remedies Code tolled the applicable statute of limitations while they pursued their prior suit because that case was dismissed for lack of jurisdiction and they filed this suit less than sixty days after the Fifth Circuit affirmed the prior judgment and denied their petition for rehearing en banc.

The Fifth Circuit certified two questions to the Supreme Court: (1) Does Texas Civil Practice & Remedies Code Section 16.064 apply to this lawsuit where the flight attendants could have invoked the prior district court's subject-matter jurisdiction with proper pleadings?; and (2) Did the flight attendants file this lawsuit within sixty days of when the prior judgment became "final" for purposes of Section 16.064? The Supreme Court accepted these questions.

4. Summary Judgment

a) *Gill v. Hill*, 658 S.W.3d 618 (Tex. App.—El Paso 2022), *pet. granted* (Sept. 1, 2023) [22-0913]

The issue in this case concerns which party to a collateral attack on a judgment bears the summary-judgment burden to show whether the underlying judgment was obtained without regard for due process.

In 1999, several taxing entities sued to foreclose on hundreds of properties in Reeves County. The taxing entities attempted service on the defendant landowners by posting notice of the suit on the courthouse door. The successors in interest to some of the original landowners collaterally attacked the foreclosure judgment, alleging that the original landowners were not provided notice of the foreclosure. The subsequent buyers of the properties moved for summary judgment, asserting that the suit was barred by the Tax Code's one-year statute of limitations on suits

challenging tax foreclosure sales. The buyers attached the foreclosure judgment and resulting sheriff's deed to the summary-judgment motion; the landowners' successors attached no evidence to their response.

The trial court granted summary judgment. In a divided opinion, the court of appeals affirmed. It held that the buyers had established that the limitations period had run, which shifted the burden to the successors to produce some evidence of the due process violation. Because the successors provided no evidence in their response, they failed to meet their burden.

The successors filed a petition for review. They argue that the buyers bore the burden to show compliance with due process. Specifically, they argue that, to establish that the limitations period had run, the buyers were required to show that the sheriff's deed was valid. Additionally, the successors argue that the Tax Code's limitations period does not apply to a collateral attack on a judgment that is void for lack of due process under this Court's recent decision in *Mitchell v. Map Resources*, 649 S.W.3d 180 (Tex. 2022). The Court granted the petition for review.

b) *Malouf v. State ex rel. Ellis*, 656 S.W.3d 402 (Tex. App.—El Paso 2022) *pet. granted* (Nov. 10, 2023) [22-1046]

A primary issue in this case is whether the State can conclusively establish Medicaid fraud at summary judgment when scienter is an essential element of the claim.

Dr. Malouf is a dentist who owned a chain of dental offices and who was an approved Medicaid provider who provided dental and orthodontic services to Medicaid recipients. Over a three-year period, Malouf submitted forms falsely representing that he provided services to Medicaid recipients, although the dental services provided to the beneficiaries of those claims were actually performed by other dentists in Malouf's practice.

Two private citizens brought separate qui tam actions against Malouf for violations of the Texas Medicaid Fraud Prevention Act. The trial court consolidated the cases after the State intervened in both. The State's live petition at the time of summary judgment asserted that Malouf knowingly failed to identify the license type and Medicaid billing number of the treating dentist on more than 1,800 Medicaid claims. Both parties moved for summary judgment, the State on traditional grounds and Malouf on no-evidence grounds. The district court denied Malouf's motion, granted the State's, and awarded more than $16 million in civil penalties, attorney's fees for the State and the private citizens who originally brought qui tam actions, and other costs and sanctions against Malouf.

Malouf filed a petition for review, arguing that the State did not conclusively show that he failed to indicate the treating dentist's license type or that he acted knowingly. Specifically, Malouf contends that he did indicate the correct license type and that his testimony that he lacked personal knowledge of improper billing raised a genuine issue of material fact as to scienter. The Court granted the petition for review.

S. PROCEDURE—TRIAL AND POST-TRIAL

1. Collateral Attack

a) *City of San Antonio v. Campbellton Rd., Ltd.*, 647 S.W.3d 751 (Tex. App.—San Antonio 2022), *pet. granted* (Sept. 1, 2023) [22-0481]

The issue is whether the City of San Antonio Water System is entitled to governmental immunity from Campbellton's breach-of-contract suit.

Campbellton planned to develop two new subdivisions in southeast San Antonio. To ensure the subdivisions would have adequate sewage services, Campbellton entered into a contract with the Water System. Campbellton agreed to design, build, and ultimately convey various oversized wastewater facilities to the Water System. In exchange, the Water System agreed to reserve adequate wastewater capacity for Campbellton's proposed development and to provide Campbellton with credits for impact fees it would otherwise owe. When Campbellton requested to connect the new subdivisions to the sewage system, the Water System had already allocated its capacity to other customers, taking the position that the contract expired by its terms years earlier.

Campbellton sued the Water System for breach of contract. The Water System filed a plea to the jurisdiction, arguing that it is immune from Campbellton's suit. The trial court denied the plea. The court of appeals reversed, holding that the contract does not qualify as an agreement for the provision of services to the Water System and that the claims for breach of the agreement thus do not fall within the scope of Local Government Code Section 271.151, which waives governmental immunity with respect to written contracts stating the essential terms of an agreement to provide goods or services to a local government entity. Campbellton petitioned for review, arguing that Section 271.151 waives the Water System's immunity because Campbellton agreed under a written contract to provide the Water System with construction services that directly benefited the Water System.

The Supreme Court granted Campbellton's petition for review.

b) *Hensley v. St. Comm'n on Jud. Conduct*, ___ S.W.3d ___, 2022 WL 16640801 (Tex. App.—Austin 2022), *pet. granted* (June 23, 2023) [22-1145]

The issue is whether Hensley's suit against the State Commission on Judicial Conduct is a collateral attack on a public warning the Commission issued against her.

Hensley is a justice of the peace. For religious reasons, she only officiates weddings between heterosexual couples. The State Commission on Judicial Conduct initiated an investigation into Hensley's wedding practices. After a hearing, the Commission issued a public warning. Rather than appeal to a special court of review, Hensley filed this lawsuit asserting various claims under the Act.

The Commission and its members filed a plea to the jurisdiction, arguing that Hensley's suit is an impermissible collateral attack on the public warning because Hensley failed to appeal that warning to the special court

of review and that both the Commission and its members have sovereign immunity. The trial court granted the plea, and the court of appeals affirmed.

Hensley petitioned for review, arguing that neither preclusion principles nor sovereign immunity bar her suit. The Supreme Court granted Hensley's petition for review.

2. Jury Instructions and Questions

a) *Bruce v. Oscar Renda Contracting*, 657 S.W.3d 453 (Tex. App.—El Paso 2022), *pet. granted* (Oct. 20, 2023) [22-0889]

The issue in this case is whether the trial court erred in signing a judgment that disregarded the jury's award of exemplary damages due to language in the charge and a post-verdict jury poll indicating that the verdict was not unanimous.

As part of a flood-mitigation project undertaken by the City of El Paso, Renda Contracting was awarded a contract to install a pipeline. Nearby homeowners sued Renda Contracting, alleging that vibration and soil shifting from the construction caused damage to their homes. The jury answered "yes" to Question 7 of the jury charge, which instructed the jury that it could only find gross negligence if that finding was unanimous and if its finding of simple negligence in Question 1 was also unanimous. Question 8 asked what sum of money should be awarded for exemplary damages, but the instruction did not require the jury's answer to Question 8 to be unanimous. The jury awarded $825,000 in exemplary damages.

When the trial court polled the jury, ten jurors responded that the verdict was their individual verdict, and two responded that it was not. Renda Contracting objected to the award of exemplary damages because the verdict was not unanimous. The trial court signed a final judgment that disregarded the award of exemplary damages.

A split court of appeals reversed and remanded with instructions to enter a judgment on the jury's verdict. The majority reasoned that Renda Contracting had waived its challenge by failing to properly and timely object to the jury charge and that Renda Contracting had also failed to carry its burden to prove that the verdict on exemplary damages was not unanimous.

Renda Contracting filed a petition for review, raising several challenges to the court of appeals' opinion. The Supreme Court granted the petition.

T. PRODUCTS LIABILITY

1. Design Defects

a) *Am. Honda Motor Co. v. Milburn*, 668 S.W.3d 6 (Tex. App.—Dallas 2021), *pet. granted* (June 2, 2023) [21-1097]

The main issues on appeal are whether Honda defectively designed the seatbelt that caused Sarah Milburn's injuries and whether Texas Civil Practice and Remedies Code Section 82.008's rebuttable presumption of nonliability shields Honda from liability.

Honda designed a new ceiling-mounted detachable anchor seat belt system for the third-row middle seat of

the 2011 Honda Odyssey. In November 2015, an Uber driver picked up Milburn and her friends in a 2011 Honda Odyssey. Milburn sat in the third-row middle seat and used the ceiling-mounted seat belt to buckle herself in. An accident caused the van to overturn on its roof. Milburn hung upside down by the shoulder strap portion of her seat belt, causing quadriplegia paralysis.

Milburn sued and settled with all defendants but Honda. Milburn asserted claims against Honda for negligence in designing, manufacturing, and marketing the van's third-row middle seat belt system. Milburn alleged that the seat belt system was defective and dangerous and its intended method of use was counterintuitive. The jury found that Honda negligently designed the defective seat belt system. The jury also found that Honda was entitled to the Section 82.008(a) presumption of nonliability, but that Milburn rebutted it under Section 82.008(b).

The court of appeals affirmed, holding that Honda was entitled to the presumption of nonliability but that Milburn rebutted it and that the record contained evidence that the detachable anchor seat belt system was defectively designed, and a safer alternative exists.

Honda petitioned the Supreme Court for review, arguing that Milburn was required, but failed, to present sufficient expert testimony to rebut Section 82.008's presumption of nonliability on regulatory inadequacy grounds. Honda contends that a "regulatory expert" must explain why the federal standards are inadequate to protect the public from unreasonable risk.

The Court granted Honda's petition for review.

U. RES JUDICATA

1. Elements of Res Judicata

a) *Wilson v. Fleming*, 669 S.W.3d 450 (Tex. App.—Houston [14th Dist.] 2021), *pet. granted* (June 16, 2023) [22-0166]

The issue in this case is whether Texas law recognizes implied-agreement privity for collateral estoppel purposes based on an alleged implied agreement to be bound to a bellwether trial.

George Fleming and his law firm represented thousands of plaintiffs in securing a product-liability settlement. Fleming allegedly deducted costs from his clients' settlements without authorization, and approximately 4,000 plaintiffs sued for fiduciary and contractual breaches. The trial court adopted the parties' agreed trial plan, selected a subset of six bellwether plaintiffs, and severed those claims from the remaining case.

After Fleming prevailed at the bellwether plaintiffs' trial, he moved for summary judgment, contending that his trial win collaterally estopped the remaining plaintiffs from litigating the same issues. The trial court agreed and dismissed the remaining plaintiffs' claims with prejudice.

The court of appeals reversed, holding that Fleming failed to establish that the remaining plaintiffs were in privity with the bellwether plaintiffs such that they were bound by the verdict. The court of appeals rejected Fleming's argument that the plaintiffs

had conceded privity with the bellwether plaintiffs by invoking offensive collateral estoppel against Fleming in their pleading. It also rejected the argument that the bellwether plaintiffs' similar allegations and use of the same counsel established privity.

Fleming petitioned for review, arguing that the Supreme Court should adopt frameworks from other contexts that permit an implied agreement to establish privity for collateral estoppel purposes and that the evidence warrants finding such privity in this case. The Court granted review.

V. STATUTE OF LIMITATIONS

1. Lien on Real Property

b) *Moore v. Wells Fargo Bank*, ___ F.4th ___, 2023 WL 4401110 (5th Cir. 2023), *certified question accepted* (July 14, 2023) [23-0525]

These certified questions concern notice requirements for acceleration of loans under Section 16.038 of the Civil Practices and Remedies Code.

After the Moores failed to make payments on a loan secured by real property, the lenders sent them a notice of default in October 2015 and a notice of acceleration on February 2, 2016, which started the running of the four-year limitations period. Thereafter, the lenders sent several similar notices of acceleration from October 6, 2016 to March 5, 2019. Each notice included language expressly rescinding prior acceleration notices and each notice purported to re-accelerate the maturity date of the loan.

In August 2020, the Moores sued in state court for declaratory judgment that the limitations period had run on the lenders' ability to foreclose. The federal district court granted the lenders' motion for summary judgment, holding that the lenders had abandoned their February 2016 acceleration by sending multiple notices requesting less than the full balance of the loan and that they otherwise rescinded the acceleration under Section 16.038 of the Civil Practices and Remedies Code. The Moores argue that a lender can't rescind and re-accelerate simultaneously because Texas law requires notice before acceleration, not with.

Noting that Section 16.038 is silent as to whether any time must pass between a rescission and a re-acceleration, the Fifth Circuit certified the following questions of law to the Court: (1) May a lender simultaneously rescind a prior acceleration and re-accelerate a loan under Civil Practices and Remedies Code 16.038? and (2) If a lender cannot simultaneously rescind a prior acceleration and re-accelerate a loan, does such an attempt void only the re-acceleration, or both the re-acceleration and the rescission? The Court accepted the certified questions.

2. Tolling

a) *Thome v. Hampton*, ___ S.W.3d ___, 2022 WL 802562 (Tex. App.—Beaumont 2022), *pet. granted* (Mar. 10, 2023) [22-0435]

Under Chapter 74 of the Civil Practice and Remedies Code, notice of a healthcare claim must be accompanied by a medical-authorization form that meets statutory requirements, and notice that is "given as provided in this chapter" will toll limitations on the claim for 75 days. The issue in this

cases is whether a form that does not strictly comply with statutory requirements will toll limitations.

Hampton underwent hernia surgery in March 2014. Dr. Thome authorized Hampton's discharge from the hospital despite concerns of lethargy. The night after Hampton's release, she fell and suffered a concussion. On November 9, 2015, Hampton served Thome with a Chapter 74 notice of claim and authorization form. Hampton then sued on May 31, 2016.

Thome filed a motion for summary judgment arguing that the form's omissions prevented the tolling of limitations. After the motion was denied, and the jury returned a verdict for the plaintiff, Thome renewed his limitations argument in a motion for a judgment not withstanding the verdict. The trial court denied that motion too, but the Ninth Court of Appeals reversed and rendered judgment for Thome after concluding that the suit was barred by limitations. The Supreme Court granted Thome's petition.

W. TAXES

1. Property Tax

a) *Johnson v. Bexar Appraisal Dist.*, ___ WL ___, 2022 WL 1395332 (Tex. App.—San Antonio 2022), *pet. granted* (Sept. 29, 2023) [22-0485]

The issue is whether each spouse of a married couple may claim a separate "residence homestead" for tax-exemption purposes.

Yvondia Johnson and her husband, Gregory, are each 100% disabled U.S. Air Force veterans. The Bexar Appraisal District granted the couple a disabled veteran "residence homestead" tax exemption for their San Antonio residence. The Johnsons later separated, and Yvondia began living at a residence in Converse that the couple also owned.

Yvondia applied for her own exemption for the Converse residence, which the District denied. After exhausting her administrative remedies, Yvondia filed suit, but the trial court granted the District's motion for summary judgment. The court of appeals reversed and rendered judgment for Yvondia, reasoning that under the plain language of the statute, she satisfied the exemption's requirements.

The District petitioned the Supreme Court for review, arguing that a married couple cannot have two residence homesteads. The Court granted the District's petition.

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FIFTH CIRCUIT UPDATE

HON. DANA M. DOUGLAS, *New Orleans, LA*
U.S. Court of Appeals for the Fifth Circuit

SHONTEL STEWART, *Houston*
Incoming Associate at Smyser, Kaplan, & Veselka

Hon. Dana M. Douglas

Hon. Dana M. Douglas currently serves as United States Circuit Court Judge of the United States Court of Appeals for the Fifth Circuit. Judge Douglas is a graduate of Miami University (Ohio) and attended Loyola University College of Law in New Orleans. Upon graduation, she served as a law clerk in the United States District Court, Eastern District of Louisiana to the Honorable Senior Judge Ivan L.R. Lemelle. Prior to taking the bench, Judge Douglas practiced in the areas of energy, products liability, and intellectual property litigation in the state and federal courts of Louisiana and across a wide variety of industry sectors as shareholder (partner) Liskow & Lewis, PLC.

She was sworn in as a United States Magistrate Judge in the United States District Court, Eastern District of Louisiana on January 4, 2019, where she served until 2022.

Judge Douglas was nominated by President Joseph R. Biden on June 15, 2022. On December 13, 2022, Judge Douglas was confirmed by the Senate with bipartisan support to serve on the U.S. Fifth Circuit Court of Appeals. She received her commission on December 16, 2022.

Shontel Stewart

Shontel Stewart recently completed her clerkship with the Honorable Carl E. Stewart of the U.S. Court of Appeals for the Fifth Circuit. She also previously clerked for U.S. Magistrate Judge Hope T. Cannon of the Northern District of Florida and Justice Sarah H. Stewart of the Supreme Court of Alabama. In October 2023, she will start as a litigation associate at Smyser, Kaplan, and Veselka, LLP in Houston, Texas. Shontel brings a variety of courtroom and legal writing experience and strong analytical skills to advise clients and achieve successful results. Her time as a clerk has been a nonstop dive into complex legal matters including securities, class action, discovery, statutory interpretation, and civil rights, to name a few.

Shontel received her Juris Doctorate from the University of Alabama School of Law after earning a Bachelor of Arts in Economics and International Affairs at the University of Georgia (Go Dawgs!). As a first generation college graduate, she is active in the community and enjoys serving others. She is a member of Delta Sigma Theta Sorority, Inc., an alumni mentor for students at Alabama Law, and a local member of her American Inns of Court chapter. When she is not lawyering, she enjoys creative writing, traveling, collecting art, and spending time with her family and friends.

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FIFTH CIRCUIT UPDATE

Included in this update is an overview of some of the notable opinions of general interest in civil litigation from the U.S. Court of Appeals for the Fifth Circuit, issued since the last Advanced Course in September 2022.

I. COURT STATISTICS

Each year, the Fifth Circuit gathers statistics, including caseload trends, composition, and measures. Statistics from the 2022-2023 term, as compared to the previous term, show a few key differences. The Fifth Circuit received 320 less appeals on the docket. That is a 5.3% decrease, from 6060 to 5740 new appeals this term. Of the 2620 cases screened by the court, 807—31% of cases—were orally argued before a panel. The court ultimately issued 2786 opinions: 14.5% of them—a total 404 opinions—were published and 2382 were unpublished. In comparison, the number of published opinions decreased by 70 from the preceding term. Parties filed a total of 203 petitions for rehearing this term; of those petitions, 199 of them were denied. Additionally, 9 cases were granted en banc treatment. Finally, as is always the case, the court has experienced no shortage of variety in the types of appeals on review. Significant shifts in the subject matter of these appeals include a 9.5% increase in federal question matters, a 6.7% increase in diversity matters, a 27.5% decrease in civil matters, a 13.6% decrease in bankruptcy matters, a 20.7% increase in civil rights matters, a 32.3% increase in writs of mandamus, and a 21.9% increase in agency matters. Finally, the data also displays some notable consistencies. For example, the court reversed or vacated a decision of the district court at a rate of 7.4%, exactly equal to last term's rate.

II. STANDING

The Fifth Circuit recently issued several decisions on Article III standing, proving that even this well-established doctrine of law has a few gray areas. For instance, the Fifth Circuit highlighted an unresolved question involving standing in the class action context in *Angell v. GEICO Advantage Insurance Company*, 67 F.4th 727 (5th Cir. 2023). In that case, multiple vehicle owners sued several GEICO entities (collectively "GEICO"), alleging that GEICO breached its policy by failing to provide collision and comprehensive coverage for their vehicles that sustained complete or total loss. They also asserted that, under Texas law, the policy required GEICO to cover the actual cash value, which included the vehicle's sales tax, title fees, and registration fees.

GEICO argued that the plaintiffs lacked standing to represent their proposed class. It is well settled that, to demonstrate standing, a plaintiff must show (i) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). In the district court's order granting class certification, it addressed this argument, explaining that the plaintiffs met Article III's standing requirement because they alleged an "underpayment of [actual cash value] . . . traceable to GEICO'[s] alleged breach of contract." *Angell*, 67 F.4th at 732. GEICO appealed the order challenging both standing and class certification.

Interestingly, GEICO conceded on appeal that each plaintiff had standing to bring his or her own suit. It instead argued that the plaintiffs lacked standing because each of their injuries were different, such that they lacked standing to bring suit on behalf of unnamed plaintiffs that suffered a different injury. GEICO stressed that none of the named plaintiffs alleged that GEICO owed them title fees; some alleged they were only owed registration fees; and another named plaintiff was owed both registration fees and sales tax. The plaintiffs countered this argument by stating that they were only required to show that they individually had standing, and whether their individual claims aligned with those of the class was a question suited for the class certification analysis.

The court first recognized that the parties had highlighted an issue unsettled in this circuit, and that our sister circuits have taken two separate approaches when addressing whether standing must only be proven for named class members, or whether the court must also apply the standing analysis to the class definition. *See* § 2:6, *Standing to Litigate What? The Relationship Between the Class Representatives' Claims and Those of Absent Class Members*, 1 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 2:6 (6th ed.). Some courts evaluate individual standing requirements to the class representatives only. *See Fallick v. Nationwide Mutual Ins. Co.*, 162 F.3d 410, 423 (6th Cir. 1998). Other courts have evaluated both the class representative's standing and the class definition to ensure that the class only includes individuals that have suffered injuries under the class representative's theory. In other words, they ensure that the absent class members also possess Article III standing. *See e.g.*, *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) ("[N]o class may be certified that contains members lacking Article III standing."); *In re Asacol Antitrust Litig.*, 907 F.3d 42, 49 (1st Cir. 2018).

The Fifth Circuit declined to endorse either approach. As to the individual standing approach, the court determined that each named plaintiff had clearly shown that they suffered *some* injury. As to the more intensive approach, the court focused on the ways in which the claims that the plaintiffs brought were common. Although each plaintiff had a different policy,

the language at issue was standard in each contract. Indeed, GEICO's liability for any of the fees was dependent on an interpretation of the same language in the policies and how that language calculates the actual cash value. Contrary to GEICO's arguments, the court emphasized that the plaintiffs were not alleging "three separate injuries: a deprivation of sales tax, of title fees, and of registration fees." According to the court, GEICO's failure to remit the fees amounted to the same general harm—a breach of the policy.

This case is important given the frequency in which the Fifth Circuit has seen Article III standing, in the class action context, peek its head. In *Deepwater Horizon*, the court likewise declined to decide which standard was appropriate because the plaintiffs failed under both approaches. 785 F.3d 1003, 1018–20 (5th Cir. 2015). This court took a similar approach in *Chavez v. Plan Benefit Servs., Inc*., 2023 WL 5160393, _____ F.4th _____ (5th Cir. Aug. 11, 2023). The court also mentioned the uncertainty in this area of law in *Flecha v. Medicredit*, *Inc*., 946 F.3d 762, 768 (5th Cir. 2020), though this issue was not central to the case. Inevitably, other class action appeals will come down the pipeline that involve this standing issue. It is therefore likely the court may one day be forced to answer this question.

As stated, standing has been a prevalent topic this year. Along with the case addressed in this section, the Fifth Circuit has also assessed important standing issues in many other cases, including: *Braidwood Mgmt.*, *Inc. v. Equal Emp. Opportunity Comm'n*, 70 F.4th 914 (5th Cir. 2023); *In re Paxton*, 60 F.4th 252 (5th Cir. 2023); *Matter of Highland Cap. Mgmt.*, *L.P.*, 57 F.4th 494 (5th Cir. 2023); *Vaughan v. Lewisville Indep. Sch. Dist*., 62 F.4th 199 (5th Cir. 2023); *La. by & through Landry v. Biden*, 64 F.4th 674 (5th Cir. 2023); *Abdullah v. Paxton*, 65 F.4th 204 (5th Cir. 2023); *Denning v. Bond Pharmacy, Inc*., 50 F.4th 445 (5th Cir. 2022); *Earl v. Boeing Co*., 53 F.4th 897 (5th Cir. 2022); *Campaign Legal Ctr. v. Scott*, 49 F.4th 931 (5th Cir. 2022); *Tex. State LULAC v. Elfant*, 52 F.4th 248 (5th Cir. 2022).

III. AGENCY LAW

The Fifth Circuit broke new ground in a series of cases challenging the constitutionality of administrative proceedings. These cases will have profound implications on agencies, as they call into question their ability to continue adjudicating actions under their current enforcement mechanism. In *Jarkesy v. Securities and Exchange Commission*, a divided Fifth Circuit panel vacated a decision of the Securities and Exchange Commission ("SEC"), determining that the role of the administrative law judge ("ALJ") in adjudicating fraud claims for civil remedies was unconstitutional in multiple ways. 34 F.4th 446 (5th Cir. 2022).

This case derived from an SEC enforcement action brought against George Jarkesy and other co-parties. The SEC charged petitioners with securities fraud under the Securities Act, the Securities Exchange Act, and the Advisers Act and alleged that they made other misrepresentations. Petitioners also sued in the U.S. District Court for the District of Columbia attempting to enjoin the agency proceedings and arguing that the proceedings infringed on various constitutional rights. Their suit was unsuccessful.

As such, the SEC conducted in-house administrative proceedings and found petitioners committed securities fraud. On appeal to the Commission, the rejection of petitioners' constitutional challenges was affirmed. In response, petitioners filed for review in the Fifth Circuit. Amongst the several constitutional challenges petitioners argued on appeal, the Fifth Circuit agreed with petitioners that: "(1) [they] were deprived of their constitutional right to a jury trial; (2) Congress unconstitutionally delegated legislative power to the SEC by failing to provide it with an intelligible principle by which to exercise the delegated power; and (3) statutory removal restrictions on SEC ALJs violated Article II." *Jarkesy*, 34 F.4th at 451.

As to the right-to-jury-trial violation, the court reasoned that the administrative proceedings were akin to common law fraud claims for which petitioners would have a right to a jury trial. Although the Seventh Amendment is not implicated when a case involving "public rights" is adjudicated in an agency proceeding without a jury, the court explained that an action is not converted into a public right simply because it has a public purpose. The facts here arose from common law fraud. As to the nondelegation doctrine claim, the court held that this long-dormant doctrine prevented Congress from granting legislative authority to the SEC because it does not have an "intelligible principle" guiding it's enforcement of that authority, thereby providing it "unfettered discretion." *Id*. at 460.

Finally, the court held that "the statutory removal restrictions for SEC ALJs are unconstitutional" because removal of an ALJ is insulated from the President, and thus, the President lacks the control necessary to ensure that the laws are faithfully executed. *Id*. at 463. Judge W. Eugene Davis penned a dissent disagreeing with each of these holdings. *Id*. at 466. The bench and bar should expect further developments in this case, as the Supreme Court granted the Government's petition for certiorari in June 2023.

The Fifth Circuit is no stranger to the issue highlighted in this case. In fact, it recently reheard a similar case on the *en banc* court. *See Wages & White Lion Invs.*, *L.L.C. v. Food & Drug Admin*., 58 F.4th 233 (5th Cir. 2023). As matters in the administrative realm continue to ramp up in federal courts across the nation, the aforementioned cases, and several others in the Fifth Circuit, will have a practical impact on administrative review across various federal agencies.

IV. LABOR & EMPLOYMENT

A. Fair Labor Standards Act

This year, the Fifth Circuit has grappled with a variety of appeals arising from a test established in *Swales v. KLLM Transp. Servs., L.L.C.*, 985 F.3d 430 (5th Cir. 2021). The *Swales* court developed a uniform roadmap for district courts faced with collective actions under the Fair Labor Standards Act ("FLSA"). FLSA protects employees, but not independent contractors, by establishing a minimum hourly wage, maximum work hours, and overtime compensation for work beyond 40 hours per week. *Id.* at 434. The relevant section of the statute, § 216(b), allows employees to proceed collectively when they are "similarly situated." It also requires that these similarly situated employees opt-in via written consent. A district court's role is pivotal to the opt-in process because it has the discretionary task of providing notice where appropriate. *See Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989). FLSA, however, does not define the term "similarly situated." Indeed, before *Swales*, district courts applied a variety of tests to determine how rigorously it should probe potential opt-in members to identify if they were entitled to court-approved notice, particularly the test established in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987).

This year's docket has allowed the court to review the workings of the *Swales* test. For example, in *Loy v. Rehab Synergies, L.L.C.*, the court assessed *Swales* when it affirmed a district court's decision to allow employees to proceed as a collective action. 71 F.4th 329 (5th Cir. 2023). In *Loy*, 22 plaintiffs sought collective relief for the overtime work they completed "off the clock" to boost their productivity. *Id.* at 334. Their employer, Rehab Synergies, imposed a general productivity requirement which forced employees to record 54 minutes on the hour of billable work. *Id.* As a result, there were many "off the clock" necessary duties performed after the hours of operation leading to unpaid overtime. *Id.* The plaintiffs' case went to trial, and they prevailed after a jury made individual liability findings on each member of the collective. Rehab Synergies appealed, arguing that the district court abused its discretion by allowing the case to proceed as a collective action.

After setting the appropriate *Swales* framework, the panel applied several factors to determine if the district court abused its discretion in determining that the plaintiffs were "similarly situated." The court noted that, although the *Swales* court, rejected the *Lusardi* notice process, this rejection did not implicate the court's use of the helpful factors set out in *Lusardi* to guide the similarly situated analysis. Those factors included: "(1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to the defendant which appear to be individual to each plaintiff; and (3) fairness and procedural considerations." *Loy*, 71 F.4th at 336–37.

Rehab Synergies argued that (1) the district court misidentified the "central merits issue," and (2) that all three of the *Lusardi* factors showed the plaintiffs were not similarly situated, particularly because each employee had varying productivity requirements and because each employee testified and received individual findings. *Loy*, 71 F.4th at 337. These arguments failed. The court held that the district court appropriately considered the merits question because it addressed the legal requirement that Rehab Synergies have knowledge of the plaintiffs' overtime work.

It further determined that the plaintiffs "did not need to be subject to identical productivity requirements to be similarly situated"; it was enough that each plaintiff was subject to a productivity requirement that was at least 90% across all facilities. In addition, it was inapposite that the district court required individual testimony, as the Fifth Circuit previously approved of a similar practice in *Roussell v. Brinker International, Inc*., 441 F. App'x 222, 227 (5th Cir. 2011) (per curiam) (unpublished). After making these considerations under each factor, the court concluded that the plaintiffs were similarly situated, and "[t]he district court did not abuse its discretion in allowing the case to proceed as a collective action." *Loy*, 71 F.4th at 340.

B. Title VII

The en banc Fifth Circuit has eliminated the requirement of an "ultimate employment decision" for actionable Title VII claims. In *Hamilton v. Dallas County*, the Dallas County Sheriff's Department admitted to using a sex-based policy to determine which two days off each week officers can select. 2023 WL 5316716, _____ F.4th _____ (5th Cir. Aug. 18, 2023). Only men were permitted to select full weekends off. Nine female detention officers sued, but their complaint was dismissed because the discriminatory scheduling policy did not amount to an "ultimate employment decision" such as "hiring, granting leave, discharging, promoting, and compensating." Confronted with a situation in which a blatantly discriminatory policy would be upheld, the Fifth Circuit returned to the text of Title VII, noting it is not so limited, and embracing the language that makes it unlawful to discriminate against an employee "with respect to [her] terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Though the Fifth Circuit did not expressly adopt a minimum level of actionable harm at this juncture, it noted that Title VII does not permit liability for de minimis workplace trifles. "A plaintiff need only show that she was discriminated against, because of a protected characteristic, with respect to hiring, firing, compensation, or the 'terms, conditions, or privileges of employment' — just as the statute says."

V. INSURANCE

The Fifth Circuit had an opportunity to clarify a question regarding diversity jurisdiction in insurance disputes in *Allstate Fire & Casualty Insurance Company v. Allison Love*, *et al*. ("*Allstate*"), 71 F.4th 348 (5th Cir. 2023). It is well settled that the "party seeking to invoke federal diversity jurisdiction bears the burden of establishing both that the parties are diverse and that the amount in controversy exceeds $75,000." *Garcia v. Koch Oil Co. of Tex. Inc.*, 351 F.3d 636, 638 (5th Cir. 2003). The issue here was whether, "in an action seeking declaratory relief, the amount of the policy limit or the value of the underlying claims should be assessed in determining whether the amount in controversy exceeds $75,000." *Allstate*, 71 F.4th at 351.

In this case, the Loves sued Jonathan Perez in state court for damages from a car accident. When Perez failed to cooperate with Allstate, the state court barred Allstate's counsel from representing Perez and awarded the Loves $163,822. Allstate then filed suit in federal court, invoking diversity jurisdiction and requesting a judicial declaration that they had no duty to indemnify the Loves' damages award. The district court concluded that it had subject matter jurisdiction and, subsequently, found in favor of Allstate. The Loves appealed, arguing that the district court erred in holding "that the amount of the state court judgment, [$163,822], rather than the applicable policy limit" of $50,000, would determine the amount of controversy. The Fifth Circuit disagreed with this approach and clarified the controlling precedent on this issue. *See Hartford Ins. Grp. v. Lou-Con Inc*., 293 F.3d 908 (5th Cir. 2002) (per curiam).

In *Hartford*, the Fifth Circuit held that "in declaratory judgment cases that involve the applicability of an insurance policy to a particular occurrence, the jurisdictional amount in controversy is measured by the value of the underlying claim — not the face amount of the policy." *Id.* at 911. The *Allstate* court noted that district courts have consistently misconstrued this rule to mean that "the jurisdictional amount is governed by the lesser of the value of the claim under the policy or the value of the policy limit." *Allstate*, 71 F.4th at 353. Their interpretation is incorrect, the court explained, because the party invoking jurisdiction—here, Allstate—is sought a declaration specifically preventing exposure to the damages award of $163,822. This is a particular occurrence that accurately measured the value of the underlying claim. *See Hartford*, 293 F.3d at 911.

The court further noted that, unlike *Hartford*, the amount in controversy in this case exceeded the policy limit. It, therefore, expanded on the holding in *Hartford*. In doing so, it highlighted the *Stowers* doctrine, which may subject Allstate to liability for the entire amount of the judgment, even if it goes beyond the policy limit. *See Allstate*, 71 F.4th at 351. Because there was a legal possibility that Allstate would have to pay the full $163,822, it was proper for the district court to consider it the amount in controversy. After the guidance of this case, it is clear: "where the claim under the policy exceeds the value of the policy limit, courts considering declaratory judgments should ask whether there is a legal possibility that the insurer could be subject to liability in excess of the policy limit." *Id.* at 355.

VI. CERTIFICATION

A. Interpretation of the Texas Civil Practice & Remedies Code

The Fifth Circuit certified two questions to the Supreme Court of Texas in *Sanders v. Boeing Co*., which at the time of this writing is scheduled for oral argument in September of 2023. 68 F.4th 977 (5th Cir. 2023), certified question accepted (June 2, 2023). These questions involve the interpretation of the Texas Civil Practice & Remedies Code § 16.064, a statute that tolls the applicable statute of limitation when a prior petition has been dismissed for "lack of jurisdiction" and refiled in a court of "proper jurisdiction" within sixty days after the prior judgment "becomes final." TEX. CIV. PRAC. & REM. CODE § 16.064. The court recognized that various Texas appellate courts have interpreted this jurisdiction-saving statute differently causing conflict amongst state law on a prevalent issue—the statute has been cited "at least once every year since 1988." *Sanders*, 68 F.4th at 983.

In *Sanders*, flight attendants sued Boeing Company and other airline manufacturers, for injuries they sustained when a smoke detector improperly activated during a flight, bursting their ear drums, causing them to bleed and endure permanent hearing loss. After plaintiffs filed their case in federal court in Dallas, the airline manufacturers moved to dismiss the suit for failure to establish diversity jurisdiction. Although the plaintiffs chose the correct federal court, the district court identified several deficiencies in their pleadings, ordered that they amend their complaint, and told plaintiffs specifically how their complaint could be amended to sufficiently plead diversity jurisdiction. After plaintiffs failed to do so, the district court dismissed the lawsuit for lack of jurisdiction and for failure to comply with a court order.

The flight attendants appealed to the Fifth Circuit to no avail; so, they filed their complaint again—this time in state court. The airline manufacturers wasted no time removing the case to federal court and moving to dismiss the case, stating that the two-year statute of limitations had run. In response, plaintiffs invoked the jurisdiction-saving statute at issue. They argued that their lawsuit was properly tolled because it was dismissed for lack of jurisdiction and they filed the new action less than sixty days after the court affirmed the district court's judgment. The district court disagreed holding that the statute did not apply because it only applies when the plaintiff files the previous action in the "wrong court." Because the plaintiffs did not file in the

"wrong court," but rather, failed to plead sufficient facts demonstrating diversity jurisdiction, the district court dismissed the action. The plaintiffs appealed.

The first question that was central to the resolution of this appeal was whether the "statute requires that the prior lawsuit be filed in the 'wrong court.'" The Fifth Circuit's decision to certify this question to the Supreme Court of Texas recognized that the Fifth Circuit's unpublished decision answering this question in the affirmative, *Agenbroad v. McEntire*, 595 F. Appx. 383, 389 (5th Cir. 2014), contradicts the court's prior decision in *Griffen v. Big Spring ISD*, 706 F.2d 645, 651 (5th Cir. 1983). Additionally, the answer to this question is unsettled amongst Texas authoritative cases. *Compare Clary Corp. v. Smith*, 949 S.W.2d 452, 461 (Tex. App.—Fort Worth 1997, pet. denied) (adopting the "wrong court" requirement), *with Brown v. Fullenweider*, 135 S.W.3d 340, 345 (Tex. App.—Texarkana 2004, pet. denied) (rejecting the requirement).

The second question was whether the plaintiffs properly refiled their new action within sixty days when they did not file the instant lawsuit until *after* the court affirmed the district court's judgment in the first appeal. The airline manufacturers argued that the sixty days must be counted from the day that the district court issued its decision dismissing the case for lack of jurisdiction. The court emphasized that, to properly assess these issues, it needed to know when the judgment became final for purposes of Texas law. That question is also unsettled in the guiding caselaw, and thus appropriate for certification. Given the widespread application of this statute, and the implication it has on cases filed in various areas of law, uniformity in the court's decision will be much appreciated and anticipated amongst the bench and bar.

B. Interpretation of the Texas Prompt Payment of Claims Act

The Fifth Circuit also *sua sponte* certified an issue of first impression with potentially sweeping insurance implications: whether, in an action under Chapter 542A of the Texas Prompt Payment of Claims Act ("TPPCA"), an insurer's payment of the full appraisal award plus any possible statutory interest precluded recovery of attorney's fees. *See Rodriguez v. Safeco Ins. Co. of Indiana*, 2023 WL 4484240, _____ F.4th _____ (5th Cir. July 12, 2023), certified question accepted (July 21, 2023).

The TPPCA requires insurers to pay damages, such as interest and attorney's fees, if they delay payment of a claim for more than the applicable statutory period or 60 days. *See* TEX. INS. CODE. §§ 542.058(a), 060(a). In September 2017, the Texas Legislature amended the TPPCA. *See* TEX. INS. CODE § 542A. Codified as Chapter 542A, the amendments changed, among other things, the method for determining the amount of attorney's fees and interest that a court may award under the TPPCA in weather-related insurance disputes. *See* TEX. INS. CODE §§ 542A.001, .007. In *Barbara Techs. Corp. v. State Farm Lloyds*, 589 S.W.3d 806, 812–13 (Tex. 2019), the Supreme Court of Texas held that a payment of an appraisal award did not eliminate a policyholder's ability to collect TPPCA damages, however, the case was not subject to the amendments in Chapter 542A.

In light of the amendments, some federal courts have held that "[t]he plain language of Section 542A.007(a) makes clear that payment of the appraisal award extinguishes a plaintiff's right to attorney's fees under the TPPCA." *Morakabian v. Allstate Vehicle & Prop. Ins. Co.*, No. 4:21-CV-100-SDJ, 2023 WL 2712481, at *5 (E.D. Tex. Mar. 30, 2023). Others, however, have held that "[a]lthough it is true that the Texas legislature intended to place a limit on attorney's fees through § 542A.007, there is no indication that the Texas legislature intended to read attorney's fees out of statute for all practical purposes." G*onzalez v. Allstate Fire & Cas. Ins. Co.*, No. 2019 WL 13082120, at *6 (W.D. Tex. Dec. 2, 2019).

While two state appellate courts ruled on the issue, *see Kester v. State Farm Lloyds*, No. 02-22-00267-CV, 2023 WL 4359790, at *1 (Tex. App.—Fort Worth, July 6, 2023); *Rosales v. Allstate Vehicle & Prop. Ins. Co.*, No. 05-22-00676-CV, 2023 WL 3476376, at *1 (Tex. App.—Dallas, May 16, 2023), the Fifth Circuit made clear that "the final arbiters of state law should have a say on important questions regarding state insurance law." *Frymire Home Servs., Inc. v. Ohio Sec. Ins. Co.*, 12 F.4th 467, 472 (5th Cir. 2021). Thus, it determined that the Supreme Court of Texas was in the best position to answer the consequential question in this case. The outcome of which will be pivotal to how insurance claims are handled throughout the state.