

Texans for Lawsuit Reform



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June 10, 2024

Hon. Blake A. Hawthorne  
Clerk, Supreme Court of Texas  
P.O. Box 12248  
Austin, Texas 78711

RE: Case No. 24-0426, *In re Dallas County, Texas*

Mr. Hawthorne,

Texans for Lawsuit Reform, as amicus curiae, submits this brief for consideration by the Court in the above-referenced matter. I respectfully ask that you provide it to the Court in your customary manner.

TO THE HONORABLE SUPREME COURT OF TEXAS:

Whether the Fifteenth Court of Appeals was constitutionally created by the Texas Legislature is a matter of significant importance to the citizens of this state. This case presents the Court with the opportunity to resolve questions about the viability of the new court's orders and judgments. Texans for Lawsuit Reform (TLR), respectfully urges the Court to grant Dallas County's petition for review to address this issue of statewide importance.

#### **TLR's Interest in This Case**

TLR has a long-term, demonstrated interest in the organization and functioning of Texas's judicial system. The TLR Foundation has published multiple treatises on the judicial system in Texas, including one in 2020 on the structure and

operations of Texas’s intermediate appellate courts.<sup>1</sup> Additionally, TLR was the primary outside-the-Capitol advocate for creation of the Fifteenth Court of Appeals, as demonstrated by TLR providing the only live committee testimony in either chamber in favor of the bills to create the new court of appeals.<sup>2</sup> Its historic interest in Texas’s courts is the sole impetus for TLR submitting this brief. TLR has no direct or indirect financial interest in the outcome of this case. TLR paid all fees and costs associated with preparing and filing this brief.

### **The Court Should Declare the Constitutionality of the Fifteenth Court of Appeals**

The Fifteenth Court of Appeals will begin operating on September 1 of this year,<sup>3</sup> a mere 82 days from the filing date of this brief. While it may take weeks or months for the new court to render its first judgment, cases may be transferred to it and it may start issuing orders in pending cases immediately after beginning operations. And, for practical reasons, judges who will serve on the court must be appointed prior to September 1.

Whether the new court was constitutionally created was questioned during the legislative hearings<sup>4</sup> and is being questioned by attorneys in practice.<sup>5</sup> The efficacy of

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<sup>1</sup> See *Intermediate Appellate Courts in Texas: A System Needing Structural Repair*, TEXANS FOR LAWSUIT REFORM FOUND. (2020), [https://www.tlrfoundation.org/wp-content/uploads/2021/01/TLRfoundation\\_IAC\\_WebVersion\\_Final.pdf](https://www.tlrfoundation.org/wp-content/uploads/2021/01/TLRfoundation_IAC_WebVersion_Final.pdf). Other reports related to the Texas judicial system are available at TLRFoundation.com.

<sup>2</sup> See Tex. S. Comm. on Jurisprudence, Witness List, Tex. S.B. 1045, 88th Leg., R.S. (Mar. 22, 2023) <https://capitol.texas.gov/tlodocs/88R/witlistbill/html/SB01045S.htm> (Lee Parsley testifying for the bill on behalf of TLR); Tex. H. Comm. on Judiciary & Civil Jurisprudence, Witness List, Tex. H.B. 3166, 88th Leg., R.S. (Mar. 22, 2023), <https://capitol.texas.gov/tlodocs/88R/witlistmtg/html/C3302023032208001.htm> (Amy Befeld testifying on behalf of TLR in support of H.B. 3166, the House companion to S.B. 1045).

<sup>3</sup> See Tex. S.B. 1045, §§ 1.14, 1.15, 88th Leg., R.S. (2023).

<sup>4</sup> See Tex. S. Comm. on Jurisprudence, Hearing Testimony, Tex. S.B. 1045, 88th Leg., R.S. (Mar. 22, 2023), [https://tlcsenate.granicus.com/MediaPlayer.php?clip\\_id=17437](https://tlcsenate.granicus.com/MediaPlayer.php?clip_id=17437); Tex. H. Comm. on Judiciary & Civil Jurisprudence, Hearing Testimony, Tex. H.B. 3166, 88th Leg., R.S. (Mar. 22, 2023), [https://tlchouse.granicus.com/MediaPlayer.php?view\\_id=78&clip\\_id=24165](https://tlchouse.granicus.com/MediaPlayer.php?view_id=78&clip_id=24165).

<sup>5</sup> See, e.g., Mark C. Walker, *Texas’ New Business Courts and Court of Appeals*, DICKINSON WRIGHT (Aug. 2023), <https://www.dickinson-wright.com/news-alerts/texas-new-business-courts-and-court-of-appeals> (discussing the new court generally, including constitutional questions raised by opponents); *Welcome to Texas: Texas Governor Signs Law Creating Specialized Business*

orders and judgments the court renders while its constitutionality is in question will be disputed, creating uncertainty. An order or judgment is supposed to create certainty, not leave uncertainty.

The constitutional question will have to be resolved by this Court sooner or later. It is a pure question of law. No fact finding is required.<sup>6</sup> No lower court record will make any difference. And denial of the petition for review, as sought by the Office of the Attorney General, does no good because it is not a ruling on the merits. It simply leaves the issue alive for another day.

The issue has been adequately briefed by the parties. If this Court does not take *this* case, it will receive identical briefs in the next case, and the next, and the next, until it finally resolves the issue. Nothing will change over time, except the number of briefs this Court is required to review.

It is true that the Third Court of Appeals *might* rush to judgment in this case for the purpose of mooting this proceeding and divesting this Court of jurisdiction. It and other appellate courts *might* rush to judgment in a number of cases subject to transfer to the Fifteenth Court of Appeals. But the answer to that problem is not to have multiple parties in multiple cases file multiple original proceedings in this Court over the next 82 days and thereafter. The answer is for this Court to issue injunctions as necessary to protect its jurisdiction.<sup>7</sup>

Finally, we simply disagree that this Court does not have jurisdiction because the matter has been presented in the form of a request for an injunction rather than mandamus. Article V, section 1, of the Texas Constitution vests “judicial power” in

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*Courts*, SIDLEY AUSTIN LLP (June 12, 2023), <https://www.sidley.com/en/insights/newsupdates/2023/06/welcome-to-texas-texas-governor-signs-law-creating-specialized-business-courts> (summarizing opponents’ arguments regarding constitutional challenges); *Coale Points to Constitutional Risks in Proposed Texas “Business Court”*, LYNN PINKER HURST & SCHWEGMANN LLP (Apr. 24, 2023), <https://www.lynnllp.com/headlines/coale-points-to-constitutional-risks-in-proposed-texas-business-court> (arguing that the creation of the new court of appeals is unconstitutional).

<sup>6</sup> To the extent there are fact issues, this Court has “power, upon affidavit or otherwise as by the court may be determined, to ascertain such matters of fact as may be necessary to the proper exercise of its jurisdiction.” TEX. CONST. art. V, § 3(b).

<sup>7</sup> See TEX. CONST. art. V, § 3(a).

this Court and others. Section 3(a) provides that this Court “shall exercise the judicial power of this state, except where otherwise provided in this Constitution.” Judicial power surely includes the power to issue injunctions, and nothing in the Constitution divests injunctive power from the Court.

But even if this Court does not have injunctive power, the Legislature explicitly granted this Court jurisdiction to resolve this constitutional question, providing: “The Texas Supreme Court has exclusive and original jurisdiction over a challenge to the constitutionality of this Act or any part of this Act and may issue injunctive or declaratory relief in connection with the challenge.”<sup>8</sup> Form should not be elevated over substance. The Court has jurisdiction to resolve this constitutional issue, however it is presented.

### Conclusion

TLR respectfully urges the Court to resolve the constitutional issue about the creation of the Fifteenth Court of Appeals now, in this case, so that the new court may begin operating on September 1, 2024, free to issue orders and render judgments that carry the weight of a duly constituted and functioning court of this state.

Respectfully submitted,

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<sup>8</sup> See Tex. S.B. 1045, § 3.02, 88th Leg., R.S. (2023).

### Certificates of Compliance and Service

I certify that this brief contains 1375 words.

I certify that, on June 10, 2024, a true and correct copy of this brief was served via electronic service on all parties to this case.

*E. Lee Parsley* \_\_\_\_\_