No. 21-1088

IN THE SUPREME COURT OF TEXAS

FIRE PROTECTION SERVICE, INC.,
Appellant,

v.

SURVITEC SURVIVAL PRODUCTS, INC.,
Appellee.

Certified Question from the
United States Court of Appeals for the Fifth Circuit
No. 21-20145

REPLY BRIEF OF APPELLANT

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SUMMARY OF THE ARGUMENT

Survitec's brief has two main thrusts. First, it attempts to show that it properly brought a retroactivity challenge, rather than a contracts-clause challenge, to a law that prospectively altered the terms of an existing contract. But it is the contracts clause, as its name suggests, that limits the Legislature's power to alter contractual arrangements. FPS strategically chose *not* to challenge the Act under this clause. Survitec's efforts to justify this strategic error fail: none would support extending the retroactive-law clause to this case's circumstances even if they were justified by the decisions of this or the United States Supreme Court—which they are not. Because the retroactivity clause has no bearing in this situation, Survitec's constitutional challenge fails at the outset.

Second, in support of its mistakenly brough retroactivity challenge, Survitec argues that a gap between a law's enactment and its effective date cannot be a "grace period" that gives a party an opportunity to protect its rights under preexisting law. This Court has *twice* held to the contrary, and it has twice more ratified those holdings. Much of this Court's modern retroactivity jurisprudence is based on those decisions.

Survitec's invitation to return to a century-old rule that misread the Constitution's text, contradicted the Constitution's intent, and is inconsistent with the law's treatment of other publicly filed legal instruments, makes little sense.

FPS's other arguments fare no better. This Court should answer the certified question by holding that the Dealer Protection Act is not unconstitutionally retroactive as applied to the parties' contract.

ARGUMENT

I. The retroactive-law clause is not implicated by this case.

FPS offers a simple, intuitive, and textually and historically grounded dichotomy between the Texas Constitution's clauses prohibiting retroactive laws and laws impairing the obligation of contract: the contracts clause applies to laws altering contractual rights, while the retroactive-law clause applies to laws altering rights founded in positive law. This reflects the framers' intention, in inserting the retroactive-law clause, to create a civil-law analogue to the *ex post facto* law clause.

Survitec proposes, instead, a complicated and counterintuitive division: the contracts clause exclusively applies to "laws that weaken the ability [of a contract party to] enforce a counterparty's contractual obligations," while the retroactive law clause applies to:

> laws that restrict or eliminate common-law and statutory rights and liberties, even if they also exist within the context of an agreement or contract, as well as laws that impose new or increased legal duties and liabilities [on contracting parties], or laws that impair rights that, while contractual, are unconnected with any counterparty's performance obligations.

Survitec's Br. 29. Given that mouthful, it's no surprise that Survitec immediately adds that this Court should not worry itself with "perfectly and narrowly defin[ing] either clause." *Id.*

The only benefit of Survitec's confusing and half-hearted attempt at line-drawing is that it might help save Survitec from the error into which it led the district court. But it has no basis in the law, and this Court should reject it.

A. The contracts clause is the proper rubric for evaluating the Act's effect on Survitec's contractual right to at-will termination.

Survitec first argues that the contracts clause applies only to "fixed private rights of property," thus excluding its putative "right to have an at-will business association," which Survitec contends is a "liberty right[] rather than [a] property right[]." Survitec's Br. 14. Survitec's argument is based entirely on this quote:

> The contracts designed to be protected by the [federal Contract Clause] . . . are contracts by which . . . fixed private rights of property, are vested.

Butler v. Pennsylvania, 51 U.S. 402, 416 (1850) (alterations Survitec's). What Survitec elides in this quotation is critical. Here is the full quotation:

> The contracts designed to be protected by [the federal Contracts Clause] are contracts by which *perfect rights, certain definite, fixed private rights* of property, are vested.

Id. (emphasis in original).

In other words, *Butler* held that the contracts clause protects contracts in which "perfect rights" are vested; the phrase "certain definite, fixed private rights of property" is an attempt at defining "perfect rights." *Id.* A "perfect right" is an ancient term for a "right that is recognized by the law and is fully enforceable." *Right*, Black's Law Dictionary (11th ed. 2019).[1] Such rights are, of course, "a form of property." *United States Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977); *Lynch v. United States*, 292 U.S. 571, 579 (1934); *accord Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984). Thus, *Butler* holds little more than that the contracts clause protects vested contract rights. *See Hamilton v. Avery*, 20 Tex. 612, 623 (1857) (holding that "perfect rights" are "rights which are vested"); *cf.* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 696 (1960) ("[I]t has long been recognized that the

[1] By contrast, an "imperfect right" is a "right that is recognized by the law but is not enforceable," e.g., "time-barred claims." *Right*, Black's Law Dictionary (11th ed. 2019).

term 'vested right' is conclusory—a right is vested when it has been so far perfected that it cannot be taken away by statute.").[2]

Butler did not propose a distinction between "property" and "liberty" rights for contracts-clause purposes. The plaintiffs in *Butler* were state employees who argued that a statute reducing their statutorily set salary was an impairment of a contractual obligation. *See* 51 U.S. at 414–15. The Court held that a statute setting a public official's salary is not a contract at all and that the officials had no property rights at stake. *Id.* at 416–17. Subsequent cases thus interpret *Butler* as standing for the narrow proposition "that public office is not property." *Taylor v. Beckham*, 178 U.S. 548, 576 (1900). Neither *Butler* nor any other case holds that the contracts clause does not protect "liberty rights," whatever that might mean.[3]

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[2] Quoting this passage, this Court held in *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 145 (Tex. 2010), that the retroactive-law clause's applicability does not depend on whether the right is "vested." This Court has not addressed whether the same is true in the contracts-clause context, and it need not do so here.

[3] Survitec also cites *Corpus Christi People's Baptist Church, Inc. v. Nueces County Appraisal District*, 904 S.W.2d 621, 627 (Tex. 1995) (Enoch, J., dissenting), in support of its argument that the retroactive-law clause protects a greater scope of rights than the contracts clause. Survitec's Br. 14. In the first place, Survitec fails to note that it quotes that case's *dissent*. In any event, neither that dissent nor the Court's opinion—nor any other case—suggests that the contracts clause would not protect against the impairment of "liberty rights" that are provided by a contract.

In any event, the contract rights at stake in this case are "perfect" and vested. Indeed, Survitec successfully enforced them in the district court. Survitec argues otherwise by subtly side-stepping the actual rights at issue. In asserting that a "liberty right[]" is at stake rather than a property right, Survitec relies on the Act's alleged infringement on rights *independent of* the parties' contract, such as its freedom of contract and putative right to an at-will business relationship. *See* Survitec's Br. 9, 14, 23–24, 43. But Survitec does not dispute that the Legislature had the power to prospectively regulate its freedom of contract; thus, these freestanding rights are not at issue.[4]

What is at issue is the Act's impact on Survitec's *contractual* right to terminate the parties' contract at will. ROA.787. The constitutionality of that impact is a question for the contracts clause.[5]

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[4] Survitec cites 42 U.S.C. § 1981 for the proposition that it has a federal statutory right to "enforce a contractual termination right." Survitec's Br. 24. But that statute only prohibits racial discrimination in the enforcement of contract rights, and there is no such discrimination alleged here. The law is thus inapplicable. More important, if all that is at stake here are freestanding, non-contract rights, Survitec's retroactivity challenge fails because those rights were only altered prospectively—something that was unquestionably within the Legislature's power. *See infra* § II.A.

[5] Survitec cites three Texas cases that supposedly "found retroactivity violations with respect to both implied-in-law and express contract rights." Survitec's Br. 25. *Ex Parte Abell*, 613 S.W.2d 255, 258 (Tex. 1981), concerned whether a statute enacted after Abell was held in contempt purged him retroactively of that contempt; it had nothing to do with contracts. *Click v. Seale*, 519 S.W.2d 913, 920 (Tex. App.—Austin 1975,

B. Survitec's attempt to distinguish between rights and obligations does not help it.

Survitec next argues that the contracts clause protects only against statutes diminishing the ability of a party to enforce a counterparty's obligations, but that it does not protect against a law diminishing a party's contractual rights. Survitec's Br. 14–18. Even if Survitec were correct in its narrow conception of the contracts clause's scope, it would not follow that the retroactive-law clause applies to the diminution of contractual rights. Rather, because the retroactive-law clause does not apply to alterations of contractual rights, the effect of such a reading would be to make a diminution of contract rights not unconstitutional.

In any event, Survitec's reading of the contracts clause is dubious. Survitec argues that its right to terminate the parties' contract at will was a "freestanding option right not associated with any performance

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writ ref'd n.r.e.), held that a law diminishing a party's contractual rights violated the *contracts clause* (contrary to Survitec's theory that the contracts clause does not apply in that situation); the word "retroactive" does not appear. In *Chesapeake Operating, Inc. v. Denson*, 201 S.W.3d 369, 372 (Tex. App.—Amarillo 2006, pet. denied), an oil and gas lease dispute, the court brushed aside, in a brief and somewhat obscure passage, a suggestion that a subsequently passed statute bore on the contractual dispute. While the court used the word "retroactively" where a reference to the contracts clause might have been more accurate, it did not, as Survitec suggests, find any "retroactivity violation[]." In any event, FPS does not doubt that Texas courts have sometimes conflated the scopes of the retroactive-law and contracts clauses—hence the need for this Court's guidance.

obligation of FPS," for which reason its diminution is outside the contracts clause's protection. *Id.* at 16.

As Survitec acknowledges, the word "obligation" in the contracts clause "*does not* directly refer to obligations within a contract." *Id.* at 14 (emphasis added). Nevertheless, Survitec relies on *Langever v. Miller*, 76 S.W.2d 1025 (Tex. 1934), in an effort to show that "obligation" does, ultimately, refer only to "obligations within a contract." Survitec's Br. 15.

At issue in *Langever* was whether a statute canceling a deficiency judgment on a foreclosed mortgage violated the contracts clause. *See* 76 S.W.2d at 1029. To answer this question, this Court conducted a broad survey of caselaw to determine the meaning of "obligation" as used in that clause. *See id.* at 1030–35. This Court's survey identified "obligation" as having come from the civil law, where it referred to the law under which the parties enforce their contract. *See id.*

To narrowly read this as applying only to the laws "weakening" a party's "ability to enforce contractual obligations within the contract," Survitec's Br. 15, Survitec focuses on one of the many quotations this Court collected in its survey. *See Langever*, 76 S.W.2d at 1030 (quoting

Louisiana v. New Orleans, 102 S.W.2d 203, 206–07 (1880)).[6] Other quoted definitions are broader, and the unifying thread is that all define "obligation" to mean, in essence, a contract's legally binding effect.[7] *E.g.*, *id.* at 1031–33 ("the means, which at the time of its creation the law afforded for its enforcement" (quoting *Louisiana v. St. Martin's Parish*, 111 U.S. 716, 720 (1884))); *id.* ("the law which binds the parties to perform their agreement," including "those which affect its validity, construction, discharge, and enforcement" (quoting *Walker v. Whitehead*, 83 U.S. 314, 317 (1872)). And *Langever* also cited *Gunn v. Barry*, which expressly equated the destruction of rights with impairment of a contract's obligation. 82 U.S. 610, 615 (1872) ("If this is not impairing the obligation of a contract—if it is not destroying vested rights—what is?"); *accord Wright v. Straub*, 64 Tex. 64, 66 (1885) (citing *Gunn* and holding that, under the contracts clause, it is "beyond the power" of the State to destroy a "vested right" based in contract).

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[6] Given Survitec's insistence that only pre-1875 caselaw matters, it is worth noting that this case was decided after the Texas Constitution's adoption.

[7] This was the definition given by Samuel Johnson's contemporary dictionary. *Obligation*, A Dictionary of the English Language (1755) ("The binding power of any oath, vow, duty; contract."); *accord Obligation*, Webster's American Dictionary of the English Language (1828) ("The binding power of a vow, promise, oath or contract . . . .").

Langever neither holds nor implies that the obligation of a contract does not include "freestanding" rights given by the contract to one party. On the contrary, this Court held that the statute in question was unconstitutional precisely because it "abridge[d] *the rights* of the mortgagee." 76 S.W.2d at 1029 (emphasis added); *id.* ("The ideas of right and remedy are inseparable. Want of right and want of remedy are the same thing." (quoting *Edwards v. Kearzey*, 96 U.S. 595, 600 (1877)); *id.* at 1031 (holding that a law will not violate the contracts clause so long as "no substantial right secured by the contract is impaired" (quoting *Walker*, 83 U.S. at 317)); *id.* at 1032 (explaining that a remedy cannot "be so altered as to take away or impair any of the rights given by the contract as interpreted by existing law" (quoting 9 Tex. Jur. § 110)). And this Court has explicitly held that the contracts clause "fully protect[s]" "[r]ights based on contract." *Mellinger v. City of Houston*, 3 S.W. 249, 252 (Tex. 1887). This is, finally, consistent with James Madison's view that the contracts clause was a "constitutional bulwark in favor of personal security and *private rights*." The Federalist No. 44 (emphasis added).

Survitec cites no case, from any jurisdiction, adopting its proposed distinction between "freestanding" contractual rights, to which the

contracts clause does not apply, and rights "paired" with "performance obligations," to which the clause does apply. Survitec's Br. 16 (emphasis in original). Perhaps this is because the distinction is an illusion. The reality is that, before the Act, Survitec's right to terminate the contract *was* "paired" with an enforceable obligation on the part of FPS: FPS could not to complain of a no-cause termination, an obligation enforced by the district court's dismissal of FPS's lawsuit challenging that termination. Had the district court applied the Act, it would certainly have "weaken[ed] Survitec's ability to enforce [that] obligation" by making Survitec liable for FPS's termination. *Id.* at 17. Put differently, if a contract's "obligation" is its legally binding effect, a law that diminishes a party's "freestanding" contract right impairs the contract's obligation by lessening and altering[8] the contract's legally binding effect with respect to that right.[9]

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[8] Alexander Hamilton understood the word "impair" to be equivalent to "alter." *See* Benjamin F. Wright, Jr., The Contract Clause of the Constitution 22 (1938) (quoting Hamilton's opinion that the clause "must be equivalent to saying no State shall pass a law revoking, invalidating, or altering a contract").

[9] Survitec suggests that "an at-will relationship" is not a contract at all, but merely an "agreement." Survitec's Br. 16–17. However, the district court specifically found, as a matter of fact, that the parties entered into an oral contract, one term of which was that the parties could terminate the contract at will. ROA.784–85. Survitec did

Survitec thus fails to show that the retroactive-law clause applies in this situation.

C. Survitec's argument that the contracts clause does not apply to "laws that increase[] contractual obligations," even if true, would not establish that the retroactive-law clause applies.

Survitec argues that the contracts clause applies only to "laws that weaken the ability [of a contract party to] enforce a counterparty's contractual obligations," but does not apply to "laws that impose new or increased legal duties" on a contract party. Survitec's Br. 29; *id.* at 18–20. Again, even if Survitec were right, it would not mean that the retroactive-law clause applies in this situation; it would only meant that the contracts clause does not.

In any event, Survitec's position is once again dubious. Survitec advances the position championed by Justice Brennan's dissent in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). The Court answered that dissent by explaining that "in any bilateral contract the diminution of duties on one side effectively increases the duties on the other." *Id.* at 244 n.16. In other words, a law that "weakens the ability"

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not challenge that finding in the district court or the Fifth Circuit, and it is therefore binding in this proceeding.

of one party to enforce the other's obligations by definition also "impose[s] new or increased legal duties" on that party. Survitec's Br. 29. That was certainly the case here. By weakening Survitec's ability to enforce FPS's obligation to assent to a no-cause termination, the Act imposed new duties on Survitec.

It is thus unsurprising that neither this Court nor the United States Supreme Court has adopted Survitec's proposed rule, which appears based on an overreading of *Satterlee v. Matthewson*, 27 U.S. 380 (1829). There, Satterlee and Matthewson entered a contract that, at the time, was illegal under Pennsylvania law. *See id.* at 407–08. Subsequently, the Pennsylvania legislature enacted a statute authorizing such contracts. *See id.* at 408. The question presented was whether this statute was an unconstitutional impairment of contractual obligations. The Court acknowledged that the statute "create[d] a contract between parties where none had previously existed," but it held that there was no *impairment* because the statute gave the parties exactly what they had bargained for. *Id.* at 412–13. The Court made this explicit in *Gross v. U.S. Mortgage Co.*, which reached the same result and on which Survitec also relies. 108 U.S. 477, 488 (1883) (holding that the

law did not "impair[] the obligation of the contract" because it "enables the parties to enforce the contract which they intended to make"); *accord* *Ewell v. Daggs*, 108 U.S. 143, 151 (1883) ("The benefit which he has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur."). *Satterlee*, *Ewell*, and *Gross* thus stand for the narrow proposition that a law making an unenforceable contract enforceable does not violate the contracts clause.

These cases did not make the broader holding advocated by Survitec—that the contracts clause has no application to laws increasing a party's contractual obligations. Indeed, such a holding would seem inconsistent with numerous contemporary decisions. For instance, in *Sturges v. Crowninshield*, Chief Justice Marshall rejected the argument that the framers should have

> enumerate[d] particular subjects to which the principle they intended to establish should apply. The principle was the inviolability of contracts; this principle was to be protected *in whatsoever form it might be assailed*.

17 U.S. 122, 199–200 (1819) (emphasis added). Similarly, Justice Washington, who also delivered the Court's opinion in *Satterlee*, wrote in *Green v. Biddle* that a contract's obligation is impaired by

> [*a*]*ny deviation from its terms*, by postponing, or accelerating, the period of performance which it prescribes, *imposing conditions not expressed in the contract*, or dispensing with the performance of those which are . . . .

21 U.S. 1, 84 (1823) (emphasis added). And in *Sherman v. Smith*, 66 U.S. 587 (1861), which was decided after *Satterlee*, the Supreme Court upheld against a contracts-clause challenge a law that increased contractual obligations—without ever suggesting, as Survitec does, that the clause was totally inapplicable. *See* Survitec's Br. 19 n.23 (attempting to explain away this decision). Thus, Survitec's reading of *Satterlee* does not appear to have ever been adopted by this Court or the United States Supreme Court. *See Spannaus*, 438 U.S. at 244 n.16 (calling Survitec's position "wholly contrary to the decisions of this Court").

Finally, Survitec cites *Funkhouser v. J.B. Preston Co.*, 290 U.S. 163 (1933), which it claims holds that even if the contracts clause applies to laws increasing contractual obligations, it still does not "reach laws that increase[] contractual remedies." Survitec's Br. 19–20. As with *Satterlee*, Survitec overreads *Funkhouser*. In that case, the trial court awarded interest on a breach-of-contract judgment based on a statute enacted after the contract was executed. *See* 290 U.S. at 165–66. The Court upheld the award against a contracts-clause challenge, observing that

the contract was silent with respect to interest but required the breaching party to make the prevailing party whole. *Id.* at 166–67. The Court held that "what would constitute full compensation, was a matter of procedure within the range of due process in the enforcement of the contract." *Id.* at 167. The contracts clause was not violated because the Legislature merely altered the remedy for "enforc[ing] the obligations assumed by the parties." *Id.* at 168.

Funkhouser has no relevance here. It did not hold that alterations to remedies cannot violate the contracts clause, much less did it hold that the contracts clause *is not concerned with* such alterations. All *Funkhouser* held was that the clause was not violated in that particular instance because the law left the parties' rights and obligations fully intact.[10] The case gives no support to Survitec's argument that the

[10] *Brooks v. Northglen Association*, 141 S.W.3d 158 (Tex. 2004), which Survitec also cites (at 19), is much the same. The question there was whether a statute authorizing a homeowner's association to collect late fees for deed-required assessments violated the contracts clause where the statute was enacted after the deeds' execution. *See* 141 S.W.3d at 169. This Court held that the statute did not "substantially impair" the parties' contract because it had no effect on the parties' contractual rights and obligations. *Id.* at 170. Rather, as in *Funkhouser*, the statute merely provided a remedy for enforcing the rights the association had under the contract. Notably, this Court did not hold, as Survitec would have it, that the contracts clause did not apply at all.

retroactive-law clause applies to a law prospectively altering parties' rights under a preexisting contract.

D. A dealership contract is not a marriage contract.

Survitec finally analogizes to marital relationships, suggesting that the Act "required" the parties "to get 'married,'" and that because marital contracts are not within the contracts clause's scope, neither is the Act. Survitec's Br. 27–28. This argument goes nowhere.

Survitec is right that marital contracts are given special treatment under the contracts clause—a position first advocated by Chief Justice Marshall. *See Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 629 (1819) ("[The contracts clause] never has been understood to restrict the general right of the legislature to legislate on the subject of divorces."). *Maynard v. Hill*, 125 U.S. 190, 210–211 (1888), on which Survitec relies, justified this position by holding that a marriage contract is not really a contract at all. The rights and privileges of marriage are a creature of positive law, not contract; the contract is merely the means by which the parties enter into the legally defined relationship. *Id.*

For good reason, this principle has not been extended beyond its unique context, and Survitec's efforts to expand it here fail. *See Sherrer*

v. Sherrer, 334 U.S. 343, 360, 68 S. Ct. 1097 (1948) (Frankfurter, J., dissenting) ("As a contract, the marriage contract is unique in the law. To assimilate it to an ordinary private contract can only mislead."). There can be no serious dispute that, before the Act, the parties' rights were defined by their contract. As a result of the Act, the parties' rights and obligations under that contract would be altered if they chose to continue their commercial relationship. It proves too much to say that the contracts clause does not apply in this context because it is "statutory duties and liabilities" that would be enforced under the Act. Survitec's Br. 28. The contracts clause applies to legislation, and thus it is "statutory duties and liabilities" that are generally sought to be evaded in contracts-clause cases. This case is no different: the Act altered the parties' contractual rights, so the contracts-clause would have been the proper rubric for deciding whether Act offends the constitution.

* * *

Survitec's arguments are focused on diminishing the scope of the contracts clause. But even if the Court were to reach these arguments and agree with Survitec, it would not help Survitec because Survitec cannot show that the retroactive-law clause would reach the lacunae it

tries to create. These holdings, in other words, would just provide additional reasons the contracts-clause challenge Survitec did not bring would have failed.

As this Court long ago held, the retroactive-law clause was intended "to give protection . . . against the arbitrary exercise of some power *not forbidden by the other clauses of*" Article I, section 16. *Mellinger*, 3 S.W. at 252 (emphasis added). The power to modify preexisting contractual relationships is restricted by the contracts clause, and it is therefore not restricted by the retroactive-law clause.[11] A contrary reading, which would render the contracts clause superfluous, should be rejected.

This Court should therefore reject Survitec's retroactive challenge.

[11] Of course, applicability does not equal unconstitutionality. As this Court explained in *Robinson*, "[a]lthough the Contract Clause appears to literally proscribe 'any' impairment, the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula." 335 S.W.3d at 138 n.62 (quoting *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 21 (1977)) (internal quotation marks and alterations omitted); *id.* at 147 (explaining that while "rights tend to declare themselves absolute," unconstitutionality can only be determined by balancing the prohibition against "limits set to property by other public interests" (quoting *Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (Holmes, J.))).

II. Even if the retroactive-law clause applied, it was not violated.[12]

A. The Act applies only prospectively.

To understand why the Act's application was not retroactive, it is easiest to put the parties' contract aside for a moment—especially since Survitec now claims there was none. Imagine that FPS and Survitec were operating on a non-contractual, at-will basis and the Legislature enacted a statute that prospectively imposed conditions on a supplier's ability to terminate a dealer with whom it does business. Such a statute could not be described as retroactive because it would prohibit nothing but a post-enactment termination of a dealer, one made with full knowledge of the governing law.

The same is true of the Act. Survitec's alleged liability in the district court is based on its termination of FPS *six years after* the Act took effect,

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[12] While Survitec did not bring a contracts-clause challenge, FPS believes that, had Survitec done so, FPS would have prevailed prevail for many of the same reasons articulated *infra* § II.B. Before *Robinson*, this Court applied to contracts-clause challenges the same test as does the United States Supreme Court. *E.g.*, *Brooks*, 141 S.W.3d at 170. *Contra* Survitec's Br. 31–33 & n.43. What impact *Robinson* might have on that test's contours is not before this Court, *see supra* note 2, but because the Act would satisfy *Robinson*, it would also likely satisfy whatever test this Court would adopt for the contracts clause.

when it was well aware of the Act's prohibitions.[13] Survitec thus had "an opportunity to know what the law is and to conform [its] conduct accordingly." *Robinson*, 335 S.W.3d at 139 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265–66 (1994)).

Indeed, the Supreme Court held in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 311 (1994), that a law that limited contract parties' right to terminate was "entirely effective" with respect to terminations "occurring after its effective date"—without apparent regard to when the contract arose. Survitec argues that *Rivers*'s use of the phrase "entirely effective" actually meant something much narrower. But it is difficult to imagine that the Court would have repeatedly used such broad language if it believed that the law was retroactive when applied to future events under a preexisting contract. Rather, the decision, and subsequent cases, suggest strongly that the Court measured retroactivity solely by whether

[13] Survitec thus asserts that the Act attached new legal consequences "to Survitec's agreement to an at-will supplier/dealer relationship." Survitec's Br. 35. This argument gives lie to Survitec's new assertions that this case is about non-contract rights, and it demonstrates that Survitec is ultimately complaining about an alteration of the parties' contractual relationship. The retroactive-law clause was not violated because while the Act altered the parties' contractual relationship, Survitec was *aware of* those alterations years *before* it violated the Act and incurred liability.

the law was enacted before the party took the action to which the law added liability. Applying that rule here, there is no retroactivity.[14]

Survitec's argument also ignores the unique nature of a continuing contract without a fixed expiration date.[15] Survitec disparages the Fifth Circuit's and Maryland Court of Appeals' holdings that such contracts can be conceived of as a series of renewals as "outlier[s]." Survitec's Br. 39. That's not true when it comes to state legislatures, at least *twenty* of which—Texas's among them—have enacted statutes applying new laws to such statutes even when other contracts are exempted. *See* FPS's Br. 36 n.13. These statutes cannot but be seen as legislative judgments about the nature of that sort of contract—statutory recognition, in state after state, that parties to continuing contracts without expiration dates have no expectancy interest protected by the contracts or retroactive-law clauses.

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[14] Survitec also asserts, without further explanation, that *Rivers*'s conception of retroactivity differs from that adopted by this Court in *Robinson*. On the contrary, this Court in *Robinson* adopted *Landgraf*'s definition of retroactivity, and *Rivers* was a companion case to *Landgraf*. *See Robinson*, 335 S.W.3d at 136–39. Its holding cannot be so easily dismissed.

[15] Survitec now suggests that the parties' contract was not a continuing contract. But Survitec did not raise this argument in its Rule 52(c) motion or in the Fifth Circuit, and it runs counter to the district court's findings. ROA.784–85.

Because of the nature of their contract, Survitec and FPS had no expectations that they would even have a contract the next day, much less an expectation that they would have a contract governed by particular terms. FPS's Br. 49–50. Consequently, for retroactivity purposes, they were in much the same position as parties who had no contract at all: their rights were subject to the Legislature's broad power to regulate their rights prospectively.

It is for this reason that Survitec is wrong when it asserts that the Act "singled out agreements with no dealer performance obligations" for "harsher treatment than other pre- or post-Act agreements." Survitec's Br. 47. Rather, the Legislature exempted from the Act's operation preexisting contracts in which the parties had legitimate expectations of a continuing contractual relationship—either because their contracts were fixed-term or because they had limited the circumstances under which their contracts could be terminated. It appropriately decided, however, that contracts in which the parties had no legitimate

expectation of continuity could incorporate new terms without offending the constitution.[16]

This was necessary to ensure that commercial actors could not exempt themselves from the Legislature's police power. Survitec dismisses, as having arisen in a case with distinguishable facts, Justice Holmes's famous statement that "[o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them." *Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 357 (1908). But Justice Holmes was articulating a broad and important principle: that the contracts clause (or, here, the retroactive-law clause) should not be interpreted to let commercial actors perpetually exempt themselves from legislative power, especially when doing so would not impair their reasonable expectations. The use of open-ended, terminable-at-will, continuing contracts (which by definition contemplate a series of independent transactions) to evade, for as long as

[16] Survitec's new argument that the parties had an agreement rather than a contract supports FPS's position. Survitec cites no case holding that a law that alters the terms of a terminable-at-will *non-contract* agreement with respect to *future* conduct offends the retroactive-law clause. And the expectations in such circumstances would be even less significant than they would be with respect to an open-ended, terminable-at-will contract.

the parties wish, a legitimate exercise of State power is precisely what Justice Holmes warned against.

The parties had no future expectations in their terminable-at-will continuing contract. The Act is therefore not retroactive at all, and there is no constitutional defect.

B. If the Act applied retroactively, it did so consistent with *Robinson*.

1. The Act provides a grace period.[17]

Twice, this Court has upheld laws against retroactivity challenges because the Legislature provided a "grace period" in the form of a delay between the law's passage and the law's effective date. *Union Carbide Corp. v. Synatzske*, 438 S.W.3d 39, 49 (Tex. 2014); *City of Tyler v. Likes*, 962 S.W.2d 489, 502 (Tex. 1997). In other decisions, this Court has repeatedly characterized these holdings as standing for the precise proposition FPS advances. *See* FPS's Br. 47–48. Survitec contends,

[17] Survitec says that by "mak[ing] a grace-period argument," FPS admits that the Act is retroactive. There is no logic behind this "gotcha" assertion. As FPS shows above, the retroactive-law clause is inapplicable and the law is not retroactive for several additional reasons. FPS's grace-period argument is thus an alternative to an alternative. Moreover, grace periods can defeat not only retroactivity claims, but contracts-clause challenges as well. *See, e.g.*, *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 247 (1978); *El Paso v. Simmons*, 379 U.S. 497, 515 (1965). Thus, FPS would still have raised the grace period argument had Survitec brought a contracts-clause challenge below.

however, that this Court should now "overrule" these decisions, which have been at the center of this Court's modern retroactivity jurisprudence. Survitec's Br. 59. But *Synatzske* and *Likes* were correctly decided and should be applied here.

Survitec proposes a return to a rule that originated in *Missouri, Kansas, & Texas Railway Co. of Texas v. State*, 100 S.W. 766 (Tex. 1907). In that case, this Court held that a law does not operate as notice until it takes effect. *Id.* at 768. The Court based its reasoning on Article 3, § 39 of the Texas Constitution, which provides:

> No law passed by the Legislature, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless the Legislature shall, by a vote of two-thirds of all the members elected to each House, otherwise direct . . . .

Tex. Const. art. III, § 39. The Court held that this provision would be violated if it were to hold that the law "has at least the effect and force of notice" before its effective date. *Missouri*, 100 S.W. at 768 (quoting *Price v. Hopkin*, 13 Mich. 319, 326 (1865)).

Missouri's reasoning was faulty and inconsistent with § 39's intent. As this Court had earlier observed, § 39 was designed to give notice of new laws *before* they take effect:

> The object of the constitutional convention in prescribing a period of time within which no law enacted by the legislature should be operative was to give notice to the people of its passage, that they might obey it when it should become effective, and also to enable them to adjust their affairs to the change made, if any.

Halbert v. San Saba Springs Land & Live-Stock Ass'n, 34 S.W. 639, 639 (Tex. 1896); *accord* Tex. Const. art. III, § 39, interp. comm. (explaining that § 39 was "designed to permit of public notification of the legislation, to apprise fairly the public of its passage and its terms"). And permitting enacted but not-yet-effective statutes to act as notice, as § 39 intended, in no way violates that provision's text. By prohibiting laws from "tak[ing] effect or go[ing] into force until ninety days after the adjournment," the framers intended to delay the new law's "[l]egal efficacy," i.e., to delay it serving *as law*. *Force and effect*, Black's Law Dictionary; *accord Halbert*, 34 S.W. at 639 (interpreting § 39 to prohibit laws from becoming "operative" before ninety days after the Legislature's adjournment). This reading is consistent with the common meaning of "effective," which, with respect to statutes, refers to whether it is "in operation at a given time." *Effective*, Black's Law Dictionary; *id.* ("A statute . . . is often said to be effective beginning (and perhaps ending) at a designated time.").

It was thus appropriate for this Court not to apply *Missouri*'s rule in *Likes* and *Synatzske*. This should not be regarded as a sloppy oversight, as Survitec suggests. Survitec cites, as this Court's most recent decision applying *Missouri*'s rule, *Texas Water Rights Commission v. Wright*, 464 S.W.2d 642 (Tex. 1971). Survitec's Br. 52. But *Wright* was discussed in both *Likes* and *Synatzske*, as well as in *Robinson* and *Tenet Hospitals*—in other words, in *every modern case* in which this Court has discussed the principle of grace periods. *See Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 708 (Tex. 2014) (citing both *Wright* and *Likes* as cases holding that a grace period can defeat a retroactivity challenge); *Robinson*, 335 S.W.3d at 141 (same); *Likes*, 962 S.W.2d at 502 (citing *Wright* in favor of its grace period holding); *see also Synatzske*, 438 S.W.3d at 55; *Likes*, 962 S.W.2d at 506 (Spector, J., dissenting) (citing *Wright* and attempting to distinguish its "grace period" holding). It is implausible to suggest that, through all those opinions, this Court did act intentionally in breaking with *Missouri*.

Finally, *Likes*'s and *Syantzske*'s holdings make more sense in the modern context than does *Missouri*'s. *Price*, on which *Missouri* relied, acknowledged that the constitutional provision there at issue was

intended to give citizens "time and opportunity to learn" of the new law, which gave some support to the position that a statute should operate as notice upon passage. 13 Mich. at 326. But the court held that the entire ninety-day period was necessary to provide that knowledge because "notice of legislation is and must be given by publication in some form," and the court worried about the possibility of treating laws as providing notice "before they had been published in the statute book, and generally distributed." *Id.* at 326.

In 1865, as in 1900—and even in 1970, when *Wright* was decided—this reasoning had a practical basis. Newly enacted statutes were not broadly available before they were published in statute books. The reality today is much different. Enacted statutes are *immediately* available, for free, on the internet.[18] Indeed, they are generally much more accessible than deeds and other public records that provide notice as of their filing. *E.g.*, *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981) ("A person is charged with constructive notice of the actual knowledge that could have been acquired by examining public records.").

[18] *See Texas Legislature Online*, https://capitol.texas.gov.

It is logical to treat statutes the same way the law treats other publicly filed legal instruments: as providing notice as of the time they are filed. *Likes* and *Synatzske* properly recognized this, and they remain good law.[19]

2. The Act's grace period permitted Survitec to fully protect its rights.

The right that Survitec had under the parties' contract, but lost after the Act's enactment, was a right to terminate the parties' contract without cause. ROA.787. Survitec indisputably could have exercised this right during the grace period between the Act's passage and effective date and thus "completely preserved all [its] rights as they existed before the law went into effect." Survitec's Br. 51.

Survitec does not deny that this is true. Instead, it—like the district court—muddies the nature of the right at stake. Survitec asserts that the

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[19] Numerous state and federal courts in other jurisdictions have likewise held that a law provides notice as of the date of its enactment. *E.g.*, *In re Caro Prods., Inc.*, 746 F.2d 349, 351 (6th Cir. 1984) (holding that party had notice based on enacted but not yet effective law); *In re Ashe*, 712 F.2d 864, 868 (3d Cir. 1983) (same); *In re Groves*, 707 F.2d 451, 452–53 (10th Cir. 1983) (statute's enactment gave party "notice of the future effect of the Act"); *In re Webber*, 674 F.2d 796, 804 (9th Cir. 1982) (same); *DiBiase v. Commissioner of Ins.*, 704 N.E.2d 1188, 1189–90 (Mass. 1999) (same); *Shelter Mut. Ins. Co. v. Haney*, 824 S.W.2d 949, 953 (Mo. Ct. App. 1992) (same), *abrogated in part on other grounds*, *American Standard Ins. Co. v. Hargrave*, 34 S.W.3d 88 (Mo. 2000); *Ayres v. Cook*, 46 N.E.2d 629, 635 (Ohio Ct. App. 1941) (same), *aff'd*, 43 N.E.2d 287 (Ohio 1942).

grace period was insufficient because it would not have allowed Survitec to preserve its alleged right to "*continu*[*e*] an at-will relationship" with FPS. Survitec's Br. 50 (emphasis added). But Survitec had no such right: it is inherent in the nature of an at-will relationship that there can be no reasonable expectation that such a relationship will endure for days, to say nothing of years or indefinitely. FPS's Br. 49–50. Thus the only right Survitec had was a right to terminate the contract, and it had the power to exercise it unilaterally before the Act became effective.

In any event, Survitec is wrong that, during the grace period, it could not have preserved an at-will relationship with FPS that would have lasted beyond the grace period. Had the parties entered into a fixed-term, terminable-at-will contract before the Act took effect, the Act would not have applied to that contract. Act of May 25, 2021, 82d Leg., R.S., § 4, 2011 Tex. Sess. Law Serv. ch. 1039 (providing that a fixed-term contract "entered into before the effective date of this Act . . . is governed by the law as it existed on the date the agreement was entered into").[20] To be

[20] While the Act prohibits contracting around its terms, Tex. Bus. & Com. Code § 57.003, that provision would not have been in effect during the grace period and so would not have governed the parties' actions or contract. Survitec is thus incorrect to assert that it would have had to renegotiate other dealer contracts to comply with the not-yet-effective Act. *See* Survitec's Br. 50.

sure, FPS would have had to agree to this arrangement, but it cannot be taken as a given that FPS would not have done so: given the importance of Survitec's products to FPS's business and a choice between a fixed-term, terminable-at-will contract and termination, it might well have acquiesced.

Survitec could have exercised its right to terminate before the Act took effect, or it could have attempted to negotiate a different contractual arrangement with FPS. It did neither, instead letting the Act take effect and then operating under its terms for six additional years. Applying the Act in these circumstances is not unconstitutionally retroactive.

C. The Legislature made sufficient findings in support of applying the Act retroactively.

There is no question that here—unlike in *Robinson*, the only modern case in which this Court struck down a law as unconstitutionally retroactive—the Legislature made specific findings that the Act was "necessary" to protect vital state interests, namely "the general economy of this state, the public interest, and the public welfare." Act of May 25, 2011, 82d Leg., R.S., § 1. It is also indisputable that here, unlike in *Robinson*, the Legislature did not pass the Act to protect one company "and no one else," 335 S.W.3d at 149—the chief harm the retroactive-law

clause protects against, *id.* at 151 (citing *Landgraf*, 511 U.S. at 267 n.20); Hochman, 73 Harv. L. Rev. at 693. Indeed, Survitec nowhere denies that the Act applies to innumerable businesses across a broad range of industries.

Yet Survitec insists the Act cannot survive scrutiny under *Robinson*. Survitec's explicit reasoning is that the Legislature was insufficiently detailed in its findings. But Survitec cannot point to any decision from this Court requiring the Legislature to defend its findings with any particular level of specificity, nor can it point to a case permitting courts to ignore allegedly "conclusory" findings. The reason is simple: prescribing complicated standards for how the Legislatures passes bills is the job of the Constitution or the Legislature, not the courts. The courts' role is to accept the Legislature's findings and determine whether they meet constitutional muster.

As Survitec acknowledges, Survitec's Br. 65 n.79, the legislative record in this case is similar to or far stronger than in some past cases rejecting retroactivity challenges. The law applied retroactively in *Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d 618, 634 (Tex. 1996), was found justified by findings no more

specific or detailed than those here, *see* Act of May 30, 1993, 73d Leg., R.S., ch. 626, § 1.01, 1993 Tex. Gen. Laws 2350 (finding that the aquifer was "vital to the general economy and welfare of this state"). And the law in *In re A.V.*, 113 S.W.3d 355 (Tex. 2003), was passed without any legislative findings at all, *see* Act of May 31, 1997, 75th Leg., R.S., 1997 Tex. Sess. Law Serv. ch. 1022 (S.B. 359). This Court thus relied on a general statement of legislative purpose found in a different chapter of the Family Code passed at a different time. *See A.V.*, 113 S.W.3d at 361 (citing Tex. Fam. Code § 153.001(a)(2)).

Survitec suggests these decisions should be ignored because they predate *Robinson*. But *Robinson* held that both of these decisions had been correctly decided generally and as to this element in particular. 335 S.W.3d at 145 ("The Legislature found the water-permitting scheme established in the Edwards Aquifer Act to be necessary to discharge its constitutional duty to conserve groundwater, and the necessity of providing for the welfare of children of incarcerated convicts is too obvious to require justification." (footnote omitted)); *accord Synatzske*, 438 S.W.3d at 58. If the findings in *Barshop* sufficed—and this Court has at least three times held they did—so did the findings here.

Survitec positively cites this passage upholding the law in *Tenet Hospitals*:

> The Legislature conducted hearings and gathered evidence of the increasing costs of malpractice insurance resulting from claims that endured indeterminately. As a result, the Legislature expressly found that a spike in healthcare liability claims was causing a malpractice insurance crisis that adversely affected the provision of healthcare in Texas.

445 S.W.3d at 707–08. The circumstances here are much the same. As Survitec concedes, Survitec's Br. 65–66 & n.81, "[t]he Legislature conducted hearings"—across multiple sessions—"and gathered evidence" regarding the need for legislation that would bring Texas's law regarding manufacturer-dealer relationships up to date and make it consistent with the law in other states. *Tenet Hosps.*, 445 S.W.3d at 707–08; Hearing on H.B. 3096 Before the House Comm. on Bus. & Indus., 80th Leg. R.S. (Apr. 17, 2007) (hereinafter, "H.B. 3096 Hearing").[21]

As Survitec also concedes, Survitec's Br. 66 n.81, this included evidence of the very consumer benefit that Survitec elsewhere suggests was necessary but missing, *id.* at 61–62. In 2007, the Legislature heard testimony on a prior version of the Act, which, the sponsor explained, had

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[21] *Available at* https://tlchouse.granicus.com/MediaPlayer.php?view_id=24&clip_id=2643 (at 3:23–4:08).

already been negotiated for four years among relevant stakeholders. H.B. 3096 Hearing at 3:24 (statement of Rep. Darby). A proponent of that bill testified that legislation was necessary to ensure that local dealers would be able to provide their communities with the unique products needed for local industry. *Id.* at 3:35–3:40 (statement of Jeb Henderson). Major manufacturers, who have the power to kill dealers by removing their business, engaged in practices that harmed both dealers and smaller manufacturers, and thus harmed consumers. *See id.* at 3:41–3:43. This sentiment was echoed even by the witnesses who testified *against* the earlier bill. *E.g.*, *id.* at 3:47–49 (statement of Clyde Jones).

When the Legislature enacted the Act in 2011, it was entitled to take into account this and other information it had discovered over the prior *eight years* of work and negotiation. And it was "[a]s a result" of these efforts that the Legislature passed a compromise statute that not a single witness opposed, and it "expressly found" that doing so was "necessary" to protect the State's "general economy," among other important state interests. *See Tenet Hosps.*, 445 S.W.3d at 707–08; The Dealer Protection Act: Hearing on H.B. 3079 Before the House Comm. on Lic. & Admin. Procs. (April 19, 2011) (statement of Rep. Darby) (calling

the bill a "carefully crafted compromise among dealers and manufacturers creating uniformity in the sector of business").[22]

The Act thus looks nothing like the law in *Robinson*. The Legislature was deliberate and careful, made clear findings of public benefit, and acted with respect to players in numerous industries—just as *Robinson* demands. Survitec's refusal to acknowledge this reality reveals its true problem with the Legislature's findings: not that they lack detail, but that—in Survitec's opinion—they were *wrong*. Survitec claims that the Act's purpose was to "reward certain business interests at the expense of others." Survitec's Br. 62. Even if Survitec's characterization were accurate—and it is not—it would not mean that the legislation is unconstitutional.

In both *Synatzske* and *Tenet Hospitals*, this Court upheld laws that had the immediate effect of "reward[ing] certain business interests" at (in detractors' opinions) the expense of those companies' consumers and employees. Survitec's Br. 62; *see* FPS's Br. 59–60. Yet the laws were upheld precisely because, through that direct effect, the laws provided (in

[22] *Available at* https://tlchouse.granicus.com/MediaPlayer.php?view_id=26&clip_id=4038 (at 0:1:22–0:2:02).

the Legislature's opinion) a statewide public benefit. The same is true here. By making adjustments to the relationship between dealers and manufacturers, the Legislature intended to broadly bolster the State's economy. If the district court were correct in elevating the Act's detractors' opinions about its first-order effects over the Legislature's findings regarding its second-order effect, then this Court could have just as easily rejected the Legislature's findings in *Synatzske* and *Tenet Hospitals*. *Contra Robinson*, 335 S.W.3d at 146 ("[T]he necessity and appropriateness of legislation are generally not matters the judiciary is able to assess.").

Instead, this Court deferred to the Legislature's judgment in those cases, and it should do so again here.

PRAYER

FPS prays that this Court answer the certified question by holding that the Dealer Protection Act is not unconstitutionally retroactive as applied to the parties' contract.

Respectfully submitted,

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