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

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Nature of the Case:	Appellee Survitec, a manufacturer of life rafts, terminated its dealer agreement with Appellant FPS, which sold and serviced Survitec rafts for marine customers. FPS responded that Survitec's termination of their supplier-dealer relationship violated Texas's Fair Practices of Equipment Manufacturers, Distributors, Wholesalers, and Dealers Act, Tex. Bus. & Com. Code §§ 57.001–.402. ROA.125–28. FPS sued Survitec in state court for damages resulting from the wrongful termination in violation of the Act. ROA.125–28. Survitec removed the case to federal court.
Trial Court:	Hon. Nancy F. Atlas, United States District Court for the Southern District of Texas
Trial Court's Disposition:	FPS elected a bench trial. ROA.56, 98. On the second morning of trial, the court abated the proceedings to consider Survitec's motion for judgment under Federal Rule of Civil Procedure 52(c). ROA.774, 1287. The district court granted Survitec's motion, concluding that applying the Act to the parties' agreement would violate the Texas Constitution's prohibition on retroactive laws. ROA.777.
Court of Appeals:	United States Court of Appeals for the Fifth Circuit. Panel consisting of Elrod, Oldham, and Wilson, JJ.
Court of Appeals' Disposition	The Fifth Circuit certified to this Court a question regarding the constitutionality of the Act's application to the parties' contract. 18 F.4th 802, 805 (5th Cir. 2021).

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this certified question pursuant to Article V, Section 3-c(a), of the Texas Constitution and Rule of Appellate Procedure 58.1.

QUESTION CERTIFIED

The Fifth Circuit certified the following question:

> Does the application of the Texas [Fair Practices of Equipment Manufacturers, Distributors, Wholesalers, and Dealers Act, Tex. Bus. & Com. Code §§ 57.001–.402,] to the parties' agreement violate the retroactivity clause in article I, section 16 of the Texas Constitution?

Fire Protection Servs., Inc. v. Survitec Survival Prods., Inc., 18 F.4th 802, 805 (5th Cir. 2021).

STATEMENT OF FACTS

Appellee Survitec manufactures marine safety equipment, including life rafts. ROA.143, 697, 777. Survitec's life rafts are used on sea-going vessels across a wide range of industries, including cruise lines, off-shore oil-and-gas drilling and production, military-sealift commands, maritime shipping, and merchant marine, commercial fishing, and construction. ROA.91–92, 156, 181 n.4, 182, 197–98, 674, 1016–17, 1209–11, 1269. Survitec is one of only two primary manufacturers of life rafts in the Western Hemisphere. ROA.157, 987, 1029–30.

Appellant FPS, a family business founded in 1952, is headquartered in Houston with additional locations in Corpus Christi and New Orleans. ROA.615, 673, 980. In the late 1990s, FPS and Survitec orally agreed that FPS would serve as an authorized dealer and servicer of Survitec life rafts, selling Survitec's life rafts and providing marine customers associated service, parts, and accessories. ROA.301–02, 669, 672–73, 697, 777, 1022–23.

Life rafts cost $5,000 to $10,000 each, ROA.988, 1030, 1171, and vessels are often under an legal obligation to have multiple life rafts on board, ROA.988, 1030, 1171. Each must be serviced and recertified

annually and replaced after approximately ten years. ROA.988. Survitec-certified technicians must do any certification work and repairs on Survitec life rafts using Survitec-made parts. ROA.1025, 1031–32, 1081–82.

I. The Legislature enacts the Texas Dealer Protection Act.

In 2011, the Legislature enacted the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers, and Dealers Act (the "Dealer Protection Act"). Tex. Bus. & Com. Code §§ 57.001–.402. The Act governs the relationship between suppliers and dealers of certain "equipment" as defined by the statute, including life rafts. *See id.* § 57.002.[1] It applies to oral dealer agreements like the one between Survitec and FPS. *Id.* § 57.002(4). And while the Legislature generally provided that the Act would not apply to contracts predating the Act's effective date, the Act applies to a "continuing contract" that "has no expiration date" even if it was entered into before the Act took effect. Act of May 25, 2011, 82nd Leg., R.S., ch. 1039, § 4(a), 2011 Tex. Sess. Law Serv. ch. 1039.

[1] In the district court and the Fifth Circuit, Survitec argued that life rafts are not "equipment" as defined by the Act. ROA.192, 714–15. The district court did not resolve this argument, ROA.782, and the Fifth Circuit did not certify a question regarding it to this Court.

The Dealer Protection Act prohibits a supplier from terminating a dealer agreement without "good cause." Tex. Bus. & Com. Code § 57.153; *see id.* § 57.154 (defining "good cause"). When a supplier terminates a supplier-dealer agreement, the supplier must provide the dealer at least 180 days' written notice, which must state the good cause for the termination. *Id.* § 57.155(a). The dealer then has 60 days to cure any claimed deficiency. *Id.* § 57.155(a). This is effectively a "warning" period that gives dealers a chance to preserve the commercial relationship by fixing any problems.

If a supplier defies the Act's requirements, the dealer may sue for damages, including lost profits, attorney's fees, and costs. *Id.* § 57.401(a). In this way, the Dealer Protection Act permits a supplier to terminate an agreement if the supplier satisfies the statutory steps and the dealer does not rectify identified good-cause deficiencies. The statute thus imposes consequences—damages, interest, costs, and fees—on dealers who fail to comply with the Act's prerequisites for termination.

The statute also requires a terminating supplier to repurchase unsold inventory from the dealer. *Id.* § 57.353. A supplier who refuses to repurchase inventory is liable for 110% of the repurchase price, freight

charges the dealer paid, interest, attorney's fees, and costs. *See id.* § 57.355(a).

II. Survitec terminates the contract in violation of the Act.

Though the parties entered into their agreement in the late 1990s, the agreement was a continuing contract with no expiration date to which the Act expressly applied. ROA.785. Nevertheless, in August 2017—six years after the Act took effect—Survitec terminated the agreement effective December 27, 2017. ROA.670, 1025–26, 1295–1307. Survitec thus gave far less than the statutorily required notice, and it cited no reason, much less good cause, for the termination, which was not precipitated by any dispute between the parties. ROA.1026, 1028, 1298, 1302, 1306.

Like most dealers, FPS had purchased a large inventory of Survitec products during the parties' relationship, including life rafts, parts for repair and replacement, and original manufacturer "certificates" that show life rafts and service work meet manufacturer specifications. ROA.694, 1080–81, 1033–35.[2] But when Survitec terminated FPS, FPS's

[2] FPS had to buy Survitec certificates for licensing and regulatory purposes to show compliance with governing guidelines. ROA.1032–35.

good-faith investment in the parties' relationship suddenly became worthless. Survitec equipment can be used only on Survitec life rafts, and Survitec life rafts and can be sold and serviced only by licensed Survitec dealers. ROA.1030–31. Life rafts and their parts are not interchangeable among brands, so FPS's $200,000 inventory of Survitec equipment suddenly had no value to FPS. *E.g.*, ROA.1030–31.

Unsurprisingly, then, Survitec initially recognized its obligation to repurchase the equipment FPS bought while the contract was in place. ROA.1298. But Survitec never followed through, compounding FPS's harm from the sudden severance of the parties' long relationship.

After several months of Survitec's silence about the promised repurchase, FPS consolidated, organized, and inventoried its Survitec equipment. ROA.1032, 1037–38. FPS sent Survitec that inventory in May 2018. ROA.1315, 1037–38. Although Survitec told FPS that it was working on a resolution, nothing materialized. *See, e.g.*, ROA.1044, 1317–18, 1323–27.

More than a year after the termination, on December 20, 2018, Survitec sent FPS a "return authorization" for the equipment—the industry practice for accepting equipment returns. ROA.1038–40, 1044,

1046, 1323. But the return authorization had several problems. It left out two of the three categories of items to be returned—the life rafts and certificates. ROA.1048, 1050, 1323. Its list of parts had errors and omissions and improperly stated that numerous items were worth nothing. ROA.1039–42, 1361–1402. And the authorization expired in just eight days, meaning the items had to be delivered over the Christmas holiday, by December 28, 2018. ROA.1046, 1049–50, 1323, 1336–46. Survitec's return authorization also indicated that FPS would receive only a Survitec credit—not monetary reimbursement—"compensation" that would be worthless in light of FPS's termination. ROA.1047–48.

FPS alerted Survitec to the numerous discrepancies in communications spanning December 2018 through February 2019. ROA.1048–49, 1322–27, 1347–58. FPS reconciled its inventory to Survitec's error-ridden data and shared this information with Survitec. ROA.1042, 1048. Survitec did not reply to FPS's questions about these problems, either to dispute the corrected data, transmit a new return authorization, or discuss next steps. ROA.1042–44. FPS and Survitec then had frequent communications to "get this issue settled," and FPS

offered multiple times to drop off the equipment once the discrepancies were resolved. ROA.1050, 1347–48, 1058.

In late February 2019, FPS invited Survitec to inspect the inventory "so we could get the matter clarified and rectified." ROA.1051. Survitec noted internally that "FPS has been as patient as they can be." ROA.569, 629, 1418. But despite agreeing to send a representative to facilitate resolution, Survitec took no affirmative steps in that regard. ROA.1051, 1356. FPS continued multiple follow-ups to no avail over the next month. ROA.1056, 1413–15.

After over a year and a half on the receiving end of broken promises and recalcitrance, and still holding all the Survitec equipment in Houston, FPS sent Survitec a letter demanding payment for amounts due under Texas's Dealer Protection Act. ROA.1056–57, 1403, 1405–06. The next day, the Survitec representative handling the matter reported internally that FPS "has been more than patient . . . [a]t least 5–6 months patient" and explained that resolution could be quick—requiring only a site visit, straightening out the equipment list, and completing the buyback. ROA.2012–13.

Survitec then visited the FPS Houston location—some 20 months after giving notice of termination and telling FPS it would repurchase the inventory—and reviewed the consolidated Survitec equipment with unrestricted access. ROA.1414. At the site visit, Survitec informed FPS that everything "looked in order"; expressed no concerns about item counts, age, condition, or origin; and said Survitec would send FPS payment by week's end. ROA.1061–63, 1070, 1414. Payment never arrived. ROA.1064, 1413–14.

That same month, Survitec informed FPS it would not accept the life rafts for repurchase because their authorized life had expired—*after* Survitec terminated the dealer agreement and dragged its feet in repurchasing them. ROA.1058–60, 1407–08. The next month, Survitec communicated it could offer only a reduced percentage of the cost of inventory it was willing to selectively repurchase. ROA.1073–75, 2009–10. FPS later learned that Survitec had been internally discussing accepting only some inventory for repurchase and treating it as overstock or depreciating the price on buyback. ROA.1360–1402, 1052, 1069, 1314–16, 2011–13.

After more futile communication efforts, FPS sent a second demand letter, noting Survitec's site visit and lack of resolution and seeking payment by May 10, 2019. ROA.1064–65, 2006–07.

III. FPS sues Survitec for violating the Dealer Protection Act.

FPS sued in Harris County district court in May 2019, asserting that Survitec violated the Dealer Protection Act by terminating the dealer agreement without good cause or sufficient notice and by failing to repurchase FPS's inventory of Survitec equipment. ROA.21–25, 670–71, 695. Survitec removed the case to federal court, denied that it wrongfully terminated FPS as a dealer, and asserted that the parties were operating under a longstanding supplier-dealer agreement that was terminable at will. ROA.12, 120–21, 670.

At trial, FPS presented the termination's history and Survitec's twenty-one months of evading repurchase. FPS's expert explained the damages that Survitec's severance caused FPS. ROA.1139–1225. Losing the ability to sell Survitec life rafts had a devastating financial impact on FPS. Because of the company-specific design of vessels' life raft mountings, the fact that cost-intensive life rafts last about ten years, the requirement that parts and accessories for a life raft must be supplied by

the same brand manufacturer, and the annual mandated OEM recertification requirements, FPS customers could not simply change life raft brands or buy new life rafts manufactured by a different company. ROA.156–57, 163, 988, 1030–31, 1171. Survitec's termination of the dealer agreement caused FPS lost profits of $1,182,451. ROA.694, 1140, 1166. FPS's future lost profits through the end of 2022 were an additional $852,072. ROA.694, 1168.

FPS also presented the cost specifics of the three categories of Survitec inventory. At the time of termination, FPS possessed approximately $155,000 in Survitec parts and $33,050 worth of Survitec life rafts. ROA.694, 1080–81. FPS also had Survitec manufacturer "certificates" totaling at least $33,000. ROA.1033–35, 1080. These items should have been repurchased by Survitec, and FPS was thus entitled to 110% of their cost, attorney's fees, and interest. *See* Tex. Bus. & Com. Code § 57.355(a).

After FPS rested its case in chief and before Survitec began its defense, the district court heard Survitec's motion for judgment pursuant to Rule of Civil Procedure 52(c) motion. ROA.1229–61, 1265–88. Survitec argued that because the Dealer Protection Act had been enacted in 2011,

after Survitec and FPS first entered into an oral contract, the Act's application would violate the Texas Constitution's prohibition on retroactive laws. *See* Tex. Const. art. I, § 16; ROA.784. Survitec *did not* argue that the Act violated the Texas Constitution's prohibition on laws impairing contractual obligations. *See* ROA.786 ("Survitec's Rule 52(c) Motion is based on the 'retroactive law' provision of the *Texas* constitution . . . ."); ROA.792 n.5 ("Survitec asserts *only* a 'retroactive law' argument in support of its Rule 52(c) Motion based on a violation of the Texas Constitution." (emphasis added)); ROA.1242, 1248.

The district court held that the Act's application was unconstitutionally retroactive. The court noted that the parties' oral agreement predated the Dealer Protection Act's effective date and was a single continuing contract terminable at will. ROA.784–85. The court held that the statute's application to the agreement would be retroactive and its enforcement here would violate the Texas Constitution. ROA.782–92. Accordingly, the court granted Survitec's Rule 52(c) motion. ROA.793.

IV. FPS appeals.

FPS appealed to the Fifth Circuit. FPS argued that the Act did not operate retroactively at all, but that if it did it did so consistent with the Texas Constitution. FPS also moved to certify the question of the Act's constitutionality to this Court—relief Survitec did not oppose.

The Fifth Circuit agreed to certify. The Fifth Circuit explained that in the years since this Court's seminal decision in *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126 (Tex. 2010), this Court "ha[d] not come across a case like this one," and the Circuit would therefore be "*Erie*-guessing our way into uncharted waters." *Fire Protection Serv., Inc. v. Survitec Survival Prods., Inc.*, 18 F.4th 802, 805 (5th Cir. 2021). The Court also noted that it had previously "certified a remarkably similar question a few years ago, which the Court graciously accepted, but the parties settled before the Court could answer it." *Id.* (citing *Associated Mach. Tool Techs. v. Doosan Infracore Am., Inc.*, 745 F. App'x 535, 539 (5th Cir. 2018)); *see also Associated Mach. Tool Techs. v. Doosan Infracore Am., Inc.*, No. 18-0763 (Tex. May 10, 2019) (dismissing certified question by agreement).

SUMMARY OF THE ARGUMENT

Survitec terminated the parties' at-will contract *six years* after the Dealer Protection Act went into effect. The question certified to this Court is whether the district court correctly held that application of the Dealer Protection Act to that act of termination violates the Texas Constitution's prohibition on retroactive laws.

The Act's application is not unconstitutionally retroactive for several reasons. First, the retroactive-law clause is not implicated at all. The Texas Constitution's separate clauses prohibiting laws impairing contractual obligations, *ex post facto* laws, and retroactive laws each protect against distinct categories of legislative action. The contracts clause protects rights founded in contract, while the *ex post facto* and retroactive law clauses protect rights founded in positive law in the criminal and civil contexts, respectively. Here, the right in question arises from contract, so the retroactive-law clause is inapplicable. Survitec's alternative reading would render the Texas Constitution's prohibition on laws impairing contractual obligations superfluous. Survitec's retroactivity challenge must therefore fail.

But even if the retroactive-law clause applied, the Act's application to the parties' contract would be constitutional. In the first place, the Act's application would not be retroactive in the sense prohibited by the Constitution: consistent with *Robinson*,[3] the Act added consequences only to actions taken after the Act's enactment and with knowledge of its requirements—namely, the termination. Moreover, as the Legislature explicitly recognized, an open-ended, at-will contract can incorporate new, statutorily supplied terms without disrupting the parties' expectations—because the parties have no future expectations with respect to such a contract. Survitec and FPS chose anew each day to continue their relationship, which either could have left at any time for any reason before the Act took effect. Thus, like an at-will employee who accepts changed terms by continuing voluntarily to work after receiving notice of the change, Survitec accepted the changes wrought by the Act by choosing to continue the parties' relationship after the Act took effect.

Further, the Legislature provided Survitec with a grace period during which it could have exercised its right to terminate FPS without

[3] *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126 (Tex. 2010).

cause—and thus preserve its pre-Act rights. As in *Likes*[4] and *Union Carbide*,[5] there was a significant delay between the Act's enactment and effective date. The Act's enactment thus put Survitec on notice of its need to leave or alter the contractual arrangement before the Act took effect lest it be bound by the Act's terms. Survitec instead opted to continue the parties' relationship *for six years*. Under this Court's precedent, the Act therefore constitutionally applied to Survitec's post-enactment actions.

Finally, the Act is constitutional because it serves a compelling public interest. In assessing this factor of *Robinson*'s test, a court must rely on the Legislature's findings. Here, the Legislature found that the Act would benefit the state's general economy—one of the most compelling of public interests. But the district court ignored that finding and reached its own contrary conclusion that the law served a narrow interest. That was erroneous, as was the court's attempt to equate the Dealer Protection Act to the law struck down in. The law in *Robinson* not only lacked *any* findings in support, but the legislative record there showed it was meant to benefit one specific company. The Dealer

[4] *City of Tyler v. Likes*, 962 S.W.2d 489 (Tex. 1997).

[5] *Union Carbide Corp. v. Synatzske*, 438 S.W.3d 39 (Tex. 2014).

Protection Act, by contrast, affects countless entities in an array of critical industries across the Texas economy. That the law benefited some entities and inconvenienced others is unremarkable—the same is true of every law this Court has upheld against a retroactive-law challenge.

The retroactive-law clause does not prohibit the Dealer Protection Act's application to the parties' contract.

ARGUMENT

I. The Dealer Protection Act is not retroactive as applied to the parties' continuing contract.

A. The different prohibitions in Article I, Section 16 each protect against a distinct harm.

Article I, Section 16 of the Texas Constitution has four separate prohibitions,[6] and "the application of each prohibition must be measured by the object to be obtained" by the specific clause's inclusion. *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 137 (Tex. 2010). To understand why Survitec's constitutional challenge fails, it is necessary to first understand why the Texas Constitution's drafters included the retroactive-law clause on which Survitec's challenge is premised.

Unlike the Texas Constitution, "[t]he United States Constitution does not expressly prohibit retroactive laws." *Id.* Yet an "anti-retroactivity principle" has been identified based on the United States Constitution's prohibition of certain classes of legislation that impair preexisting rights or punish already completed conduct. For instance, Congress and the states are prohibited from enacting a "bill of attainder"

[6] "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made."

or "ex post facto law." U.S. Const. art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 1. The bill-of-attainder clauses prohibit the federal and state legislatures from "singling out disfavored persons and meting out summary punishment for past conduct." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994). The ex-post-facto-law clause "flatly prohibits retroactive application of penal legislation." *Id.*; *see Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798) (holding that ex-post-facto-law clause applies only to penal statutes). Like the Texas Constitution, the United States Constitution forbids the states (but not Congress) from passing a "Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1.

The United States Constitution does not prohibit Congress from enacting retroactive laws or laws impairing contractual obligations. In that absence, the Supreme Court has recognized a presumption that Congress intends its laws to operate prospectively and to not impair contractual obligations unless Congress clearly states otherwise. *See Landgraf*, 511 U.S. at 286; *see also In re Twenty Per Cent. Cases*, 87 U.S. 179, 187 (1873) ("Courts of justice agree that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of actions, or with vested rights, unless the intention

that it shall so operate is expressly declared or is to be necessarily implied.").

The drafters of the Constitution of the Republic of Texas—and of every subsequent Texas Constitution—diverged from the federal model by including an express prohibition on retroactive laws. Tex. Const. art. I, § 16; *see Robinson*, 335 S.W.3d at 138 n.63. This was likely a reaction to *Calder*. As the leading treatise on the Texas Constitution explains, *Calder*'s "restriction of the scope of ex post facto laws to retroactive criminal laws may have prompted" the drafters of the Texas constitution, who had "a general suspicion regarding all retroactive laws," "to re-establish the broader sweep, which the [ex-post-facto-law] prohibition had in the minds of some people." 1 George D. Braden, *et al.*, The Constitution of the State of Texas: An Annotated and Comparative Analysis 58 (1977).[7]

Beginning in its earliest cases and continuing through *Robinson*, this Court has recognized that the retroactive-law clause must have been

[7] *See also* Alison L. LaCroix, *Temporal Imperialism*, 158 U. Pa. L. Rev. 1329, 1339 n.31 (2010) (noting that the "neatness of the doctrinal rule that emerged from *Calder* obscures the fact that precedents existed in colonial and early national law for treating civil as well as criminal cases as susceptible to ex post facto objections").

included to prohibit some class of legislative action not already prohibited by Section 16's more specific prohibitions. In *De Cordova v. City of Galveston*, for example, Chief Justice Hemphill observed:

> *Ex post facto* laws and such as impair the obligation of contracts are retrospective; but there may be retrospective laws which are not necessarily *ex post facto*, or which do not impair the obligation of contracts; *and by the use of the term "retrospective" cases were doubtless intended to be included not within the purview of the two former classes of laws*.

4 Tex. 470, 474 (1849) (emphasis added). The Court upheld the challenged law—a statute of limitations—based on the limited scope of the Constitution's retroactive-law clause. *Id.* at 481–82.

This Court made the same point in *Mellinger v. City of Houston*, 3 S.W. 249, 252 (Tex. 1887), holding that "it cannot be presumed that separate and distinct provisions were intended to have the same and no other effect than one of them has." Thus, it could not

> be presumed that in adopting a constitution which contained a declaration "that no retroactive law shall be made," that it was intended to protect thereby only such rights as were protected by other declarations of the constitution which forbade the making of *ex post facto* laws, laws impairing the obligation of contract, or laws which would deprive a citizen of life. liberty, property, privileges, or immunities otherwise than by due course of the law of the land.

Id. Instead, the Constitution's drafters "intended" the retroactive-law clause "to give protection to every citizen against the arbitrary exercise of some power *not forbidden by the other clauses of the constitution referred to*." *Id.* (emphasis added); *accord Cardenas v. State*, 683 S.W.2d 128, 131 (Tex. App.—San Antonio 1984, no writ) (explaining that the retroactive-law clause "seeks to safeguard rights not guaranteed by other constitutional provisions such as the impairment of the obligation of contracts").

Robinson confirmed this understanding of Section 16, holding that the retroactive-law clause is tied to its objective—an objective distinct from that of the prohibitions against *ex post facto* laws and laws impairing contractual obligations. 335 S.W.3d at 137–39. In other words, the retroactive-law clause must prohibit something different than what Section 16's other, specific clauses already forbid.

B. The Dealer Protection Act's application to the parties' contract is not "retroactive" within the meaning of the Constitution.

FPS and Survitec had an open-ended contract that, before enactment of the Dealer Protection Act, either party could terminate at will. The Act altered that contractual relationship by imposing on

Survitec an obligation to terminate only for good cause. But the termination—the incident that gave rise to this suit—occurred *after* the Act took effect. The threshold question is thus whether a statute that alters a *contractual* right by adding legal consequences to an act that occurs *after* the statute's enactment is properly analyzed under the retroactive-law clause or the contractual-impairment clause. The contractual-impairment clause provides the proper rubric, for which reason the district court should have rejected Survitec's retroactivity challenge.

1. The retroactive-law clause applies to rights arising from positive law, not contract.

Just as every bill of attainder and *ex post facto* law is in some sense retroactive, so is every law that impairs a contractual obligation: the law necessarily operates on a preexisting contract, and every such operation can be described as "retroactive" in effect. *See Landgraf*, 511 U.S. at 266; *Robinson*, 335 S.W.3d at 139 ("Most statutes operate to change existing conditions . . . ." (internal quotation marks omitted)). Yet this Court's precedent teaches that each of Section 16's clauses must protect against a specific and distinct harm; the retroactive-law clause's broad language cannot be read to swallow Section 16's more specific clauses.

The most straightforward distinction that can be drawn between the contracts and retroactive-law clauses is between rights that arise from contract and those that arise from positive law. That the retroactive-law clause protects only against impairment of rights founded in positive law can be seen in this Court's earliest cases. In *Mellinger*, this Court held that "[r]ights based on contract are as fully protected by [the Texas Constitution], as they are by" the U.S. Constitution. 3 S.W. at 252; *accord id.* (observing that the U.S. Constitution "does not prohibit the passage of laws retroactive in their character, even though such law may divest antecedent vested rights of property, unless such rights [are] founded on contract").

The *Mellinger* Court then observed that the retroactive-law must protect against the exercise of some power "not forbidden by" these other clauses that "might be lawfully exercised but for this prohibition." *Id.* In articulating the scope of this additional prohibition, the Court held that it places "a further restriction on the power of the legislature" by "protect[ing] every right, although not strictly a right to property, which may accrue *under existing laws* prior to passage of any, which, if permitted a retroactive effect, would take away the right." *Id.* at 253

(emphasis added). The Court then clarified that the rights to which it referred were those that are "creatures of municipal law, written or unwritten." *Id.* By "municipal law," *Mellinger* meant "[t]he internal law of a country, as opposed to international law," *Municipal Law*, Black's Law Dictionary (11th ed. 2019)—in other words, United States and Texas statutory and common law.

The retroactive-law clause is thus concerned with protecting against interference with rights based in prior *law*, not rights based in contract. Protection of the latter set of rights is the purpose of the Constitution's contracts clause. Accordingly, the Dealer Protection Act's application to the contract is outside the scope of, and cannot be unconstitutional under, the retroactive-law clause.

2. When Survitec terminated the parties' contract, it knew the consequences of that action.

As the *Landgraf* Court observed, "deciding when a statute operates 'retroactively' is not always a simple or mechanical task." 511 U.S. at 268. This is because the word's "literal meaning" is so broad that it could apply to—and thus prohibit—"all laws." *De Cordova*, 4 Tex. at 475–76; *accord Robinson*, 335 S.W.3d at 138. *Landgraf* held that a law is not retroactive in the prohibited sense "merely because it . . . upsets expectations based

in prior law." 511 U.S. at 269. Rather, the question is whether "the new provision attaches new legal consequences to *events completed* before its enactment." *Id.* at 270 (emphasis added). In *Robinson*, this Court added its own gloss to *Landgraf*'s retroactivity test. Observing "'that individuals should have an opportunity to know what the law is and to conform their conduct accordingly,'" this Court pithily held that "the rules should not change *after the game has been played*." 335 S.W.3d at 139 (quoting *Landgraf*, 511 U.S. at 265–66) (emphasis added).

What is prohibited, in other words, is legislative sandbagging—punishing a party for actions it took before a statute was enacted based upon a legal regime of which the party could not have been aware. The clause thus operates as a civil-law counterpart to the *ex post facto* law clause, filling the lacuna *Calder* controversially opened. *See Calder*, 3 U.S. (3 Dall.) at 390 (opinion of Chase, J.) (holding that ex-post-facto-law clause prohibits a legislature from passing a law "*after a fact done* by" a party "which shall have relation to such fact, and shall punish him for having done it" (emphasis added)).

The concern that animated the retroactive-law clause is not present here. While it is true, as the district court found, that the Act attached a

new "legal consequence[]" to termination without cause, the "events" to which those consequences attached—the contract's termination—occurred *six years after* the Act's enactment. Survitec had "an opportunity to know what the law" was—it had constructive knowledge of the Act's requirements[8]—and could have "conform[ed its] conduct accordingly." *Robinson*, 335 S.W.3d at 139 (quoting *Landgraf*, 511 U.S. at 265–66).

That the Dealer Protection Act's application to this case is not "retroactive" according to *Landgraf*'s (and thus *Robinson*'s) definition is best illustrated by *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994), a companion case to *Landgraf*. A federal statute gives all persons a right to "make and enforce contracts" free of race-based discrimination. 42 U.S.C. § 1981. In *Patterson v. McLean Credit Union*, the Supreme Court held that § 1981 "does not apply to conduct which occurs after the formation of a contract," such as a race-based contractual termination. 491 U.S. 164, 171 (1989). As part of the Civil Rights Act of 1991, Congress amended § 1981 to clarify that the phrase "make and enforce contracts" includes "the making, performance, modification, and termination of

[8] *Greater Hous. Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 n.3 (Tex. 1990) ("[A]ll persons are presumed to know the law.").

contracts"—effectively overruling *Patterson*. Pub. L. 102-166, § 101, 105 Stat. 1071 (1991) ("§ 101").

Rivers considered whether § 101 applied to an allegedly race-based termination that preceded its enactment. Applying *Landgraf*'s retroactivity test, the Court held that it did not. 511 U.S. at 304. But the Court's concern was not that § 101 altered contractual obligations, though it certainly did that: like the Dealer Protection Act, § 101 altered contractual rights by adding a new restriction on parties' ability to terminate contracts. Instead, the retroactivity problem, according to the Court, would arise from "apply[ing]" § 101's "new definition to *past acts*," i.e., to "cases *arising* before its enactment." *Id.* at 308 (emphasis added); *accord id.* at 311 (finding no indication that Congress intended § 101 "to govern *past conduct*" (emphasis added)); *id.* at 313 (holding that § 101 "would be 'retroactive' if applied to *cases arising* before" its enactment (emphasis added)). By contrast, the Court held that § 101 was "entirely effective" as "applie[d] only to *conduct occurring after* its effective date"—without apparent regard to whether the underlying contract was entered into before or after § 101's enactment. *Id.* at 311 (emphasis added).

The Supreme Court's repeated focus on when "conduct" occurred or a case "arose," rather than on when the contract at issue was formed, emphasizes that a statute is not "retroactive" if it (1) alters a contractual obligation but (2) attaches new legal consequences only to acts that occur, and thus cases that arise, after that change becomes effective.[9] This is, indeed, how *Rivers* was subsequently applied. For instance, in *Andrews v. Lakeshore Rehabilitation Hospital*, the Eleventh Circuit allowed a § 1981 discriminatory-termination claim to proceed where the termination occurred after § 101's enactment, even though the contract had been formed in 1980 and had, therefore, been altered by § 101. 140 F.3d 1405, 1412–13 (11th Cir. 1998).

Survitec's argument that the Act is unconstitutionally retroactive because it "attached new legal consequences to the parties' decision to enter the agreement," Survitec C.A. Br. 10 (internal quotation marks and brackets omitted), cannot be squared with *Rivers*. Section 101, like the

[9] A cause of action does not accrue, and thus a case does not "arise," until the plaintiff suffers an injury. *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996). A § 1981 discriminatory-termination claim does not "arise" until the plaintiff is terminated. *Delaware State Coll. v. Ricks*, 449 U.S. 250, 256–57 (1980); *Smith v. University of Md. Balt.*, 770 F.App'x 50, 50 (4th Cir. 2019) (per curiam); *Singh v. Wells*, 445 F.App'x 373, 376 (2d Cir. 2011).

Dealer Protection Act, restricted the grounds on which a party could terminate a contract; it thus "attached new legal consequences to the parties' decision to enter the agreement" to the same extent that the Dealer Protection Act did here. Yet the Court held that § 101 was not retroactive, and was instead "entirely effective," when applied to conduct that "occurr[ed] after its effective date." 511 U.S. at 311.[10]

The Dealer Protection Act operated prospectively with respect to Survitec's termination, even though it also altered the parties' contract from the Act's effective date. This alteration, however, is not a subject for the retroactive-law clause, but of the contracts clause—which was not a basis for Survitec's constitutional challenge.

[10] This is also consistent with how Texas law uses "retroactive" in the employment context. For example, where parties have an agreement to arbitrate, an amendment to the arbitration agreement is "retroactive" only to the extent it applies to matters that occurred before the amendment; it is prospective as to post-amendment events, even though it changes the parties' contractual obligations. *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 205–08 (5th Cir. 2012) (citing *Weekley Homes, L.P. v. Rao*, 336 S.W.3d 413, 417–19 (Tex. App.—Dallas 2011, pet. denied)); *In re Halliburton Co.*, 80 S.W.3d 566, 569–70 (Tex. 2002) (concluding that employment agreement incorporated new arbitration agreement, which provided that it would not apply to disputes of which the employer had notice at the time of the amendment).

3. Survitec's reading would render the contracts clause superfluous.

Were this Court to accept Survitec's reading of the retroactive-law clause, it would write the contracts clause out of the Constitution. It is plain that the contracts clause is the proper rubric for examining a claim, like Survitec's, that a new law impaired a party's rights under a prior contract. Indeed, there is no question, that the Act altered the parties' preexisting contractual arrangements. The contracts clause "fully protect[s]" such contract-based rights, *Mellinger*, 3 S.W. at 252, and Survitec could have attacked the Act on contracts-clause grounds, *Sveen v. Melin*, 138 S.Ct. 1815, 1822 (2018) (holding that a statute is subject to a contracts-clause challenge if it "substantially impair[s] pre-existing contractual arrangements"). Survitec made a considered, strategic choice *not* to bring such a challenge and to rely, instead, on the retroactive-law clause alone. ROA.786, 792 n.5, 1242, 1248.[11]

Survitec must thus insist that the retroactive-law clause independently prohibits altering parties' rights under a preexisting contract, even if the change applies only to acts the parties take after the

[11] Had Survitec brought a contracts-clause challenge, FPS believes it would have been rejected. But that question is not before this Court.

new law takes effect. But if this is true, then the contracts-law clause accomplishes nothing not already achieved by the retroactive-law clause.

To avoid this obvious conclusion, Survitec argues that the *only* "subject of the state contract clause" is a law affecting "a pre-existing contractual obligation," as opposed to "a pre-existing contractual right." Survitec C.A. Br. 16. *Mellinger* holds flatly to the contrary. 3 S.W. at 252 (holding that "[*r*]*ights* based on contract" are "fully protected" by the contracts clause (emphasis added)). Indeed, the distinction Survitec draws is illusory. *Spannaus*, on which Survitec's argument largely relies, explains that because "in any bilateral contract the diminution of duties on one side effectively increases the duties on the other," altering an obligation also alters a corresponding right. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 n.16 (1978).

Survitec's attempt to locate its flawed dichotomy in an "early view" of the "federal Contract Clause" fares no better. Survitec C.A. Br. 18. As Survitec's own authority shows, the "early view" it touts appeared in essentially one case from the 1820s. *See Spannaus*, 438 U.S. at 244 n.16 (citing *Satterlee v. Matthewson*, 27 U.S. 380 (1829)); *id.* at 258 (Brennan, J., dissenting) (same). This view, if it ever held sway, had been

repudiated well before the 1876 Texas Constitution. *Spannaus*, 438 U.S. at 244 n.16 (citing, e.g., *Sherman v. Smith*, 66 U.S. 587 (1861)). Thus, cases contemporaneous to the contracts clause's ratification expressly equate contractual rights and obligations. *E.g.*, *Gunn v. Barry*, 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?"); *Ochiltree v. Iowa R.R. Contracting Co.*, 88 U.S. 249, 253 (1874) (holding that statute did not violate federal contracts clause where it "did not deprive the plaintiff of any of the rights secured to him when the contract was made").

If, as Survitec suggests, the contracts clause inherited a fixed meaning upon the Constitution's 1876 adoption, Survitec C.A. Br. 18 & n.27, the meaning that became fixed acknowledged the correspondence between rights and obligations. This correspondence is unmistakable in this Court's decisions interpreting Texas's contracts clause. *Langever v. Miller*, 76 S.W.2d 1025, 1031 (Tex. 1934) (holding that a law will not violate the contracts clause so long as "no substantial right secured by the contract is impaired"); *Giles v. Stanton*, 26 S.W. 615, 618 (Tex. 1894) (observing that if a law "diminish[es] the duty or … impair[s] the right, it necessarily bears on the obligation of the contract in favor of one party

to the injury of the other" (internal quotation marks omitted)); *Mellinger*, 3 S.W. at 252.

Survitec finally suggests that even if the retroactive-law clause swallows the contracts clause, that is appropriate because the two clauses are governed by different legal standards and because governmental actions may offend multiple constitutional provisions. Survitec's C.A. Br. 20. While Survitec's latter point may be true in some circumstances, it does not follow that the Texas Constitution's drafters intended the retroactive-law clause to protect against the same governmental actions prohibited by the contracts clause.

The Legislature's intent was exactly the opposite: it inserted the unique retroactive-law clause to protect "against the arbitrary exercise of some power *not forbidden by the other clauses*" in Article 16, including the contracts clause. 3 S.W. at 252 (emphasis added). The superfluity Survitec would create is all the worse if, as it insists, the two clauses are governed by wildly divergent standards, in which case the clause governed by the more deferential standard would be largely pointless.[12]

[12] In the district court, Survitec explained its decision to pursue only a retroactive-law challenge based on its belief that the contracts-clause analysis was more deferential to legislative action. ROA.1242, 1248. In the Fifth Circuit, Survitec reversed course and argued that the contracts-clause analysis was more stringent

If Survitec's claims implicate any clause of Article 16, it is the prohibition on laws impairing contractual obligations. The retroactive-law clause—the only clause relied on by Survitec and the district court—is not implicated. This Court should therefore hold that the Dealer Protection Act's application to the parties' contract is not unconstitutionally retroactive.

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

Even if the retroactive-law clause were applicable, the Dealer Protection Act's application could not have run afoul of that provision. First, the Act's application was not retroactive because open-ended, terminable-at-will contracts like the parties' can incorporate new terms—like those supplied by the Act. And were that not true, the Act would still satisfy *Robinson*'s test for constitutionally retroactive legislation.

(making Survitec's choice to rely on the retroactive-law clause confusing). Survitec C.A. Br. 20. The reality is this Court has not addressed the standard that governs contracts-clause challenges in many years, and certainly not since *Robinson*. The question is not presented in this case.

A. The parties' at-will contract incorporated the Dealer Protection Act's provisions.

In enacting the Act, the Legislature carefully addressed its effect on contracts signed before its passage:

> (a) Chapter 57, Business & Commerce Code, as added by this Act, applies to:
>
> (1) a dealer agreement entered into or renewed on or after the effective date of this Act; and
>
> (2) *a dealer agreement that was entered into before the effective date of this Act, has no expiration date, and is a continuing contract.*
>
> (b) A dealer agreement entered into before the effective date of this Act, other than a dealer agreement described by Subsection (a)(2) of this section, is governed by the law as it existed on the date the agreement was entered into, and the former law is continued in effect for that purpose.

Act of May 25, 2011, ch. 1039, § 4(a)(1) (emphasis added). Thus, the Act would apply to new contracts, and the prior law would apply to most contracts entered into before the Act's effective date. But the Legislature concluded that applying the Act to one class of preexisting contracts—"continuing contracts" that "ha[ve] no expiration date"—would suffer no constitutional infirmity.

Given the Legislature's solicitude to the constitutional issues that might arise in applying the Act to other pre-existing contracts, this must

be understood as a legislative judgment about the unique legal status of continuing contracts that have no expiration dates. Notably, twenty states have used similar constructions in defining the application of new statutes to existing contracts.[13]

The district court found that, in the late 1990s, the parties entered into a "continuing contract" that was "terminable at will" and had no expiration date. ROA.785. A "continuing contract" requires performance on a continuing basis, e.g., commission payments. *See Spin Dr. Golf, Inc. v. Paymentech, L.P.*, 296 S.W.3d 354, 362–63 (Tex. App.—Dallas 2009, pet. denied) (collecting cases describing continuing contracts). They are "terminable at will." *Clear Lake City Water Auth. v. Clear Lake Utils. Co.*, 549 S.W.2d 385, 391 (Tex. 1977) (Reavley, J.). Generally speaking, the significance of continuing contracts under Texas law is that they provide exceptions to the rule that the statute of limitations on suing for breach

[13] *See* Ark. Code §§ 4-56-103(d), 4-72-301(7), 4-72-302(a); Cal. Bus. & Prof. Code § 22927; Fla. Stat. §§ 686.603(3), 686.701(4)(a)(1); Ga. Code §§ 13-4-43(e), 13-8-25, 13-8-45; 815 Ill. Comp. Stat. § 715/11; Kan. Stat. § 16-1002(b); Ky. Rev. Stat. §§ 365.840, 371.170; Minn. Stat. § 325E.067; Miss. Code §§ 75-77-17, 87-9-1(4); Mo. Stat. § 407.885; N.C. Gen. Stat. § 119-65; N.D. Cent. Code § 51-07-01(5); Ohio Rev. Code § 1353.05; 15 Okla. Stat. § 250.1; 68 Okla. Stat. § 500.64(D); S.C. Code § 32-13-110(E); S.D. Codified Laws. §§ 37-5-6, 37-5-8; Tenn. Code §§ 47-25-1312, 47-25-1912, 47-50-115(e); Wash. Rev. Code § 19.98.010; W. Va. Code § 47-17-1(d); Wyo. Stat. § 40-20-110(a); 2002 N.C. Laws 2002-108, § 18(a) (S.B. 1407).

of contract runs from the time of the initial breach; if the contract is continuing, the statute runs anew from the time of each breach. *Spin Dr.*, 296 S.W.3d at 362.

Fixed-term or terminable-for-cause contracts differ substantially from continuing contracts with respect to the nature of their terms. The former comprise a single term, which exists from the time of execution until termination by expiration or cause. The latter, by contrast, consists of a series of terms defined by the "continuing" or "successive" performance the contract requires. *Clear Lake*, 549 S.W.2d at 390. Professor Williston describes them in the employment context:

> [A] construction must first be put on the agreement, and it must be determined whether in the particular jurisdiction the law regards the employment as by the week, the month, the year, or any other specified period, or merely at will.

31 Williston on Contracts § 79:25 (4th ed. 2021). In other words, key to interpreting a continuous contract is determining its period.

In *Northshore Cycles, Inc. v. Yamaha Motor Corp.*, the Fifth Circuit suggested that the period of an open-ended, terminable-at-will dealer contract is determined by the amount of notice the terminating party must give. 919 F.2d 1041 (5th Cir. 1990) (per curiam). *Northshore* concerned a federal contracts-clause challenge to a Louisiana dealer law.

Noting that the parties' contract had not been before the district court, *Northshore* rejected its holding that the law was "ipso facto" unconstitutional as applied to "each and every motorcycle dealer contract entered into before" the law's effective date. *Id.* at 1043. The Court explained how contracts of this sort may constitutionally incorporate new laws:

> [A]n open ended dealer agreement which empowers either party to terminate without cause merely by furnishing, say, thirty (30) days' notice to the other party, might be construed as a month-to-month agreement which automatically reconducts itself each month until such notice is furnished by one of the parties. Such an arrangement, too, might be held ineligible for the constitutional shield against the inventory repurchase obligation of the statute because, conceptually, the agreement could be deemed to confect a new contract each month.

Id.[14]

The district court dismissed *Northshore*'s relevance because the FPS-Survitec contract did not "contain[] a specific notice of termination provision," but was rather terminable at will *without* notice. ROA.784–85. But that distinction actually emphasizes why the parties' contract

[14] This Court did not apply this analysis to the *Northshore* parties' contract, which, while open-ended, was not terminable at will; thus the contract was not susceptible to an interpretation as a contract renewing monthly. *Northshore*, 919 F.2d at 1042.

was capable of incorporating new terms. In Texas, most employment contracts are open-ended and terminable by either party at will without notice. *See, e.g.*, *Federal Exp. Corp. v. Dutschmann*, 846 S.W.2d 282, 283 (Tex. 1993). Though such a contract technically begins when the relationship starts, the contract can evolve: an employer "may change the terms of" the contract merely by giving notice of the change and showing that the employee accepted it. *Halliburton*, 80 S.W.3d at 568; *cf. Montgomery Cnty. Hosp. Dist. v. Brown*, 965 S.W.2d 501, 503 (Tex. 1998) (deeming at-will employment contracts of indefinite duration "performable within one year"). Acceptance of the change is secured when "the employee continues working with knowledge of the changes." *Halliburton*, 80 S.W.3d at 568 (internal quotations omitted); *see also Iberia Credit Bureau, Inc. v. Cingular Wireless LCC*, 379 F.3d 159, 173–74 (5th Cir. 2004) (holding, under Louisiana law, that where a contract allows terms to be altered with notice, performance after that notice creates a new relationship "governed by the new terms. The customer then accepts the new terms by continuing[.]"); *accord Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1374 (11th Cir. 2005). An employee who does not agree with the change can leave the relationship.

Applying these principles to open-ended, at-will dealer contracts is consistent with public policy. Texas law "disfavors perpetual contracts." *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 842 (Tex. 2010); *accord Trient Partners I Ltd. v. Blockbuster Ent. Corp.*, 83 F.3d 704, 708 (5th Cir. 1996). And the law has always disfavored the use of contracts to evade legitimate state regulation. *See Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 357 (1908) (Holmes, J.) ("One 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."); *accord National Carloading Corp. v. Phoenix-El Paso Express*, 176 S.W.2d 564, 569 (Tex. 1943). As the Legislature recognized in the Dealer Protection Act, these principles are threatened if parties can use loose, open-ended, at-will contracts to perpetually exempt themselves from the State's police power.

The only other state supreme court to address this question adopted this very reasoning. In *John Deere Construction & Forestry Co. v. Reliable Tractor, Inc.*, 957 A.2d 595, 597 (Md. 2008), the Maryland Court of Appeals considered whether a Maryland dealer law impaired a terminable-at-will contract arising before the law's passage. Concluding

that the statute permissibly applied to the contract going forward, the court adopted *Northshore*'s analysis:

> the contracts, by their terms, could be terminated by either party at any time without good cause, merely by providing 120 days['] notice. It is logical, then, that neither party could reasonably expect the contracts to continue for more than 120 days from any given date. Once the statute was enacted, the parties were on constructive notice of its existence. By continuing to perform their obligations under the contracts without providing notice of termination, the parties effectively renewed their contracts consistent with the applicable law in effect at the time.

Id. at 600 (citations omitted). The court thus concluded that under Maryland law, the contract was in effect "a succession of renewable contracts lasting 120 days." *Id.* at 601. When the contracts renewed after the law's passage with the parties' constructive knowledge of the change, the amended terms were incorporated into the renewed contract. *Id.*[15]

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[15] *John Deere* was a certified question from the Middle District of Georgia. Consistent with the Maryland court's opinion, the district court held that the federal contracts clause was not implicated because, "[u]nder Maryland law, the dealer agreements were a succession of renewable contracts." *Reliable Tractor, Inc. v. John Deere Constr. & Forestry Co.*, 641 F.Supp.2d 1325, 1333 (M.D. Ga. 2009), *rev'd*, 376 F.App'x 938 (11th Cir. 2010) (per curiam). However, the Eleventh Circuit reversed, holding that, as a matter of federal common law, the contract was not a succession of renewals but a single contract beginning at the original agreement's execution. 376 F.App'x at 941-42.

While the *existence* of a contract for federal contracts-clause purposes is a matter of federal common law, *see General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992), the Eleventh Circuit cited no authority permitting a federal court to wholesale ignore

Although some federal courts of appeals have reached a contrary conclusion, most have done so in non-precedential opinions that, even when interpreting state constitutional provisions, do not account for the state-law status of at-will dealer contracts.[16] The Maryland court's decision, rather than these federal cases, better comports with Texas law.

Here, the parties had an open-ended, at-will contractual relationship. When it enacted the Dealer Protection Act, the Legislature gave the parties explicit notice that it was "chang[ing] the terms of" their contract. The inherent flexibility and uncertainty in the parties' contractual relationship permitted their contract to incorporate the Legislature's new terms. But rather than exit the relationship, as each had a right and opportunity to do, FPS and Survitec continued to perform, incorporating within their agreement a new law that governed their obligations and rights. That continued performance accepted the

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state law in defining a contract's nature. In any event, federal common law is irrelevant here because this appeal presents questions of Texas law.

[16] *E.g.*, *Bull Int'l, Inc. v. MTD Consumer Grp., Inc.*, 654 F.App'x 80, 84 (3d Cir. 2016) (Ohio constitution); *Reliable Tractor*, 376 F.App'x at 941 (federal constitution); *Jack Tyler Eng'g Co. v. SPX Corp.*, 294 F.App'x 176, 180 (6th Cir. 2008) (Tennessee constitution); *Cloverdale Equip. Co. v. Manitowoc Eng'g Co.*, 149 F.3d 1182, 1998 WL 385906, at *4-5 (6th Cir. 1998) (unpublished) (state and federal constitutions).

Legislature's alteration of their relationship, effectively creating a new agreement governed by the amended statutory terms.

From that point on, the Act operated prospectively, for which reason the district court's conclusion of illicit retroactivity must be reversed.

B. Application of the Dealer Protection Act to the parties' contract satisfies *Robinson*'s test.

Following *Landgraf*, this Court has identified "two fundamental objectives" served by the prohibition on retroactive laws: first, "it protects the people's reasonable, settled expectations" by giving them "'an opportunity to know what the law is and to conform their conduct accordingly'"; and second, it "protects against abuses of legislative power," especially the Legislature's ability to "'use retroactive legislation as a means of retribution against unpopular groups or individuals'" or benefiting powerful interests. *Robinson*, 335 S.W.3d at 139 (quoting *Landgraf*, 511 U.S. at 265–66).

In analyzing whether a statute is unconstitutionally retroactive, a court must consider three factors "in light of the prohibition's dual objectives": (1) "the nature of the prior right impaired by the statute"; (2) "the extent of the impairment"; and (3) "the nature and strength of the

public interest served by the statute as evidenced by the Legislature's factual findings." *Id.* at 145.

Here, application of those factors confirms that the Dealer Protection Act is constitutional as applied to the parties' contract.

1. The Nature of the Prior Right

The primary right altered by the Act was Survitec's right to "terminate the oral agreement with FPS, or decide to 'walk away,' without showing 'good cause.'" ROA.786. FPS agrees that this right existed prior to the Dealer Protection Act taking effect.

The district court also found that Survitec had a prior right not to repurchase the inventory FPS had purchased upon FPS's termination. *See* ROA.786–87. But Survitec's own termination letter declared that it would repurchase FPS's remaining inventory, and its representative acknowledged in testimony and internal communications that doing so was the company's standard practice. ROA.1298; *accord* ROA.1036, 1409 (email from Survitec representative stating that its "typical procedure" when terminating a dealer is to "buy back" inventory), ROA.2040-41 (testimony from Survitec representative that "Survitec's practice," "when Survitec terminated its [dealer]," was "to buy back any and [sic] unused

inventory"); ROA.1073 (noting that Survitec had repurchased inventory from other terminated dealers), ROA.1315.

2. The Extent of the Impairment

The retroactive-law clause protects parties' "reasonable, settled expectations." *Robinson*, 335 S.W.3d at 139. The Dealer Protection Act did not upset Survitec's reasonable expectations with respect to either of the rights the district court identified.

Survitec's "right" not to repurchase inventory. The district court did not address whether this putative right would be substantially impaired by application of the provisions of the Dealer Protection Act requiring buyback after termination, *see* ROA.786–87, much less did it find a substantial impairment.

The district court could not have done so because Survitec had no reasonable expectation that it could terminate FPS without repurchasing its inventory: Survitec's termination letter promised to buy that inventory back, its representative testified that repurchasing a terminated dealer's goods was its standard practice, and internal emails show that it knew it had an obligation to buy back FPS's inventory.

The Act's provisions regarding buyback are thus *consistent with* Survitec's expectations, which the Act supplements with a statutory duty and remedy. As *Robinson* explained, retroactive application of a statute that "merely affect[s] remedies or procedure, or that otherwise ha[s] little impact on prior rights, [is] usually not unconstitutionally retroactive." 335 S.W.3d at 146. Because application of the buyback provisions mirrors Survitec's own "settled expectations," the district court erred by holding that application of those provisions was unconstitutionally retroactive. At a minimum, this Court should find the Act's application constitutional with respect to those claims.

Survitec's right to terminate FPS without cause. The district court found that Survitec had a right to terminate FPS without cause. But that right was not substantially impaired for a very simple reason: Survitec could have exercised—and thus preserved—that right before the Act's effective date. The district court avoided this conclusion only by subtly changing the nature of the right at stake.

In assessing whether a statute impairs a party's rights, this Court looks at whether it allows for a grace period in which an affected entity can take action to avoid the new law's application. In *Union Carbide*

Corp. v. Synatzske, 438 S.W.3d 39, 49 (Tex. 2014), for instance, this Court considered a retroactivity challenge to a statute that eliminated the claims of asbestosis sufferers who could not show a physical impairment. Rejecting that challenge, this Court focused on the delay between the statute's passage and effective date, which this Court characterized as a "grace period" that allowed the asbestosis sufferer to file a suit "under the law as it previously existed." *Id.* at 58; *accord Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 708 (Tex. 2014) ("[W]e have long recognized that the impairment of such a right may be lessened when a statute affords a plaintiff a grace period to bring her claim . . . ."); *City of Tyler v. Likes*, 962 S.W.2d 489, 502 (Tex. 1997) (rejecting retroactivity challenge where plaintiff had two months to sue before statute's effective date); *see also Union Carbide*, 438 S.W.3d at 59 (characterizing *Likes* as having held "that a statute was not unconstitutionally retroactive when the plaintiff had two months to sue *before it became effective*"); *Robinson*, 335 S.W.3d at 141 (explaining that, in *Likes*, "it was important that" the plaintiff

"had ample opportunity after the change in the law to protect [her] interests").[17]

A grace period gives a party time to escape or prepare for the effect of the new law. In that sense, it negates the reliance element on which retroactivity claims are based, because parties cannot have "reasonable expectations that the" old law will govern when the statute "forewarned them that [it] would not." *Union Carbide*, 438 S.W.3d at 60.

The Dealer Protection Act incorporated a grace period. Rather than make the law immediately effective, the Legislature afforded 75 days between its enactment and its effective date. Act of May 25, 2011, ch. 1039, § 4(a)(1). That period is equal to the periods this Court found sufficient in *Union Carbide* and *Likes*.[18] *See also Maryland Shall Issue,*

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[17] In the Fifth Circuit, Survitec suggested that the grace periods in *Likes* and *Union Carbide* were not critical to those cases' holdings. *See* Survitec's C.A. Br. 33, 37. The cases' square holdings, not to mention this Court's repeated characterization of those holdings, foreclose that argument. *See* FPS C.A. Reply 11–12 & nn.3–4. Survitec also asked the Fifth Circuit to ignore *Likes* and *Union Carbide* and follow, instead, an old rule holding that an enacted but not yet effective statute did not provide notice of its contents. *Id.* at 37 (citing *Missouri, Kan. & Tex. Ry. Co. v. State*, 100 S.W. 766, 767–68 (Tex. 1907)). This ancient rule, which is ill suited to the modern era, was correctly abrogated by *Likes* and *Union Carbide*.

[18] *See Union Carbide*, 438 S.W.3d at 43 (noting that new law did not apply "during the more than two months between [the decedent's] death and" the law's effective date); *Likes*, 962 S.W.2d at 502 (holding that period of "more than two months from the time the change [to the law] was made" gave the plaintiff "a reasonable time to preserve her rights"); *Robinson*, 335 S.W.3d at 141 (explaining that, in *Likes*, "it was

Inc. v. Hogan, 963 F.3d 356, 367 (4th Cir. 2020) (rejecting retroactivity challenge because the challengers "had fair notice of the change in law," which was "passed six months before it first went into effect"); *John Deere*, 957 A.2d at 601 (holding that the dealer could have terminated the parties' contract within the time of the notice period after the statute's enactment).

Application of this principle is particularly appropriate here because parties can have no reasonable expectation that a terminable-at-will contract will continue for any length of time. *See Conner v. Lavaca Hosp. Dist.*, 267 F.3d 426, 439 (5th Cir. 2001) (holding that an at-will employee has no legal "expectation of continued employment"). Survitec had constitutionally sufficient notice of the change in law and, thus, a right and opportunity to terminate the contract before that change could be incorporated into the contract's terms.[19] Had Survitec exercised that right, it would have lost nothing because—before the Act became

important that" plaintiff "had ample opportunity after the change in the law to protect [her] interests").

[19] Survitec could also have negotiated a fixed-term or terminable-for-cause contract with FPS or another dealer before the Act took effect, in which case the Act would not have applied until the contract was terminated by its terms or expired. *See* Act of May 25, 2011, ch. 1039, § 4(b).

effective—Survitec lacked, as a matter of law, a reasonable expectation that the contract would survive the statute's grace period. Survitec chose to continue the contract after the law's effective date, and it thus became bound by the statute. *See, e.g.*, *Fort Wayne Patrolmen's Benevolent Ass'n v. City of Fort Wayne*, 625 F.Supp. 722, 730 (N.D. Ind. 1986) (finding no impairment of at-will employment contract because plaintiffs "do not have any great expectation of employment").

The district court here rejected this argument by altering the nature of the applicable right. Rather than assess the impairment of Survitec's right to terminate without cause—a right Survitec unquestionably could have exercised before the statute became effective[20]—the district court held that the Act impaired Survitec's "interest and rights in the voluntary and inherently flexible dealer agreement it had with FPS." ROA.789. In other words, the district court found that the Act's application impaired Survitec's right to an *ongoing* relationship with FPS governed by pre-Act terms. *See id.* (holding that Act impaired "Survitec's settled expectation that it would be able to

[20] The district court acknowledged that "Survitec could have terminated the dealer agreement with FPS after the Act was enacted in June 2011 and before it became effective on September 1, 2011." ROA.789.

choose to terminate the agreement when it decided to do so" (emphasis added)).

But Survitec had no such right. On the contrary, it had no reasonable expectation of an ongoing relationship with FPS. Prior to the Act taking effect, either party—not only Survitec—could have terminated the contract at any time, for any reason or no reason. Survitec thus did not have the exclusive right to "*choose*" when to terminate, much less did it have a right to an ongoing relationship governed by the pre-Act contract's "voluntary and inherently flexible" terms. Survitec merely had a right to terminate at will, which it unquestionably could have exercised. Instead, it chose to continue in the face of an altered legal landscape.

Critically, a grace period need only give a party an opportunity to *exercise* a right grounded in the prior law before it is extinguished; it need not permit a wholesale *exemption* from the new legal regime, preserving the status quo indefinitely, as the district court implicitly held. In *Tenet Hospitals*, *Union Carbide*, and *Likes*, this Court found sufficient grace periods that *did not* indefinitely preserve the plaintiffs' rights to sue, but rather gave them a limited opportunity to exercise that right before it was extinguished. *Tenet Hosps.*, 445 S.W.3d at 708–09; *Union Carbide*,

438 S.W.3d at 58–59; *Likes*, 962 S.W.2d at 502; *accord De Cordova*, 4 Tex. at 481–82 (rejecting retroactivity-clause challenge to enactment of statute of limitations, when none had been in effect, even though it did not preserve the plaintiff's unlimited right to sue).[21]

Survitec had an opportunity to exercise the right in question, which was to terminate FPS without cause. It opted not to do so. The right was thus extinguished when the Act became effective. As this Court has explained, a grace period provides a warning: a party cannot have had "reasonable expectations that" the old law will govern when the statute "forewarned [it] that [it] would not." *Union Carbide*, 438 S.W.3d at 60. Like the plaintiffs in *Likes*, *Union Carbide*, and *Tenet*, Survitec was on notice to exercise its right to terminate without cause, or else its relationship with FPS would be governed by a good-cause termination

[21] *Simmons*, a federal contracts-clause case, is similar. There, Texas sold land through contracts requiring annual payments. *See City of El Paso v. Simmons*, 379 U.S. 497, 498 (1965). If a buyer failed to make payments, Texas could forfeit the land without judicial proceedings, but the buyer could reinstate its rights at any time by paying the full past-due amount. *See id.* at 498-99. Decades later, Texas passed a statute imposing a five-year statute of repose on the right of reinstatement, which it also limited to the last buyer. *See id.* at 499. The Court held that the constitution was not violated by ending this permanent right of reinstatement because the statute of repose gave "defaulting purchasers with a bona fide interest in their lands a reasonable time to reinstate." *Id.* at 515. In other words, the grace period provided ample time for contracting parties to *exercise* their right of reinstatement before they lost it; it did not allow them to hold onto the right forever.

standard going forward. Survitec made its choice. Its subsequent regret is not the same as substantial impairment.

Finally, Survitec knew that its obligations with respect to termination of a dealer agreement might change for an additional reason. "Thirty-five states have statutes protecting dealers in farm implements and similar heavy equipment." 3 W. Michael Garner, Franchise & Distribution Law & Practice § 16:5 (2020-21); *see also id.* § 16:6. There was no reason to assume that Texas would forever be immune to this majority trend. *See Energy Rsrvs. Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983) ("In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past."); *Liberty Mut. Ins. Co. v. Texas Dep't of Ins.*, 187 S.W.3d 808, 825–26 (Tex. App.—Austin 2006, pet. denied) (concluding that the heavy regulation of insurance industry "weighs against a finding of substantial impairment"). Indeed, Texas has regulated many industrial and heavy-equipment dealerships since at least 1991. *See* Tex. Bus. & Com. Code ch. 55 (repealed 2011); Tex. Bus. & Com. Code ch. 19 (repealed 2009). And the Dealer Protection Act was enacted to "conform Texas law[] with th[at] of other states." House

Comm. on Licensing & Admin. Procs., Bill Analysis, C.S.H.B. 3079, 82nd Leg., R.S. (2011); Senate Research Center, Bill Analysis, H.B. 3079, 82nd Leg., R.S. (2011).

3. The Public Interest

A reviewing court must examine "the nature and strength of the public interest served by the statute as evidenced *by the Legislature's factual findings*." *Robinson*, 335 S.W.3d at 145 (emphasis added). A public interest must be "compelling" in order to "overcome the heavy presumption against retroactive laws." *Id.* at 146.

In *Robinson*, the law failed this test because "[t]he Legislature *made no findings* to justify" the statute, and "[e]ven the statement by its principal House sponsor fail[ed] to show how the legislation serves a substantial public interest." *Id.* at 149 (emphasis added). Worse, the "legislative record" made it "fairly clear" that the statute "was enacted to help only [one specific company] and no one else." *Id.* The Legislature's own record thus showed that it had engaged in precisely the conduct the retroactive-law clause was designed to preclude: permitting a single "powerful" company to "obtain special and improper legislative benefits." *Id.* at 139 (quoting *Landgraf*, 511 U.S. at 267 n.20); *accord Landgraf*, 511

U.S. at 267 n.20 (noting that "a retroactive statute 'may be passed with an exact knowledge of who will benefit from it'" (quoting Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 693 (1960))).

The Dealer Protection Act does not suffer from these defects. It affords protection to Texas equipment dealers—who typically invest enormous sums in establishing their dealerships and promoting the manufacturer's brand. *See Clear Lake*, 549 S.W.2d at 391 (explaining that distributorship agreements "contemplate the expenditure of substantial sums of money or other investments"). Those dealers are vulnerable to abuses by manufacturers and suppliers. As chapter 57's senate sponsor presciently observed, "dealers have no negotiating power to prevent suppliers from inserting contract language that gives the suppliers the legal right to take actions that harm a dealer's business." S.J. of Tex., 82nd Leg., R.S. 3559 (May 25, 2011); *see also Robinson*, 335 S.W.3d at 132, 149 (discussing the sponsor's statement of intent). By requiring good cause, the Legislature's intent was to prevent manufacturers from pulling the rug out:

> [D]ealer agreements represent "take it or leave it" propositions for dealers with little or no chance for dealers to

> negotiate with suppliers. The result is that dealers often sign contracts based on business expectations even if the dealer agreement permits the supplier to make future changes that impact the business['s] expectation[s]. The purpose of this law is to protect dealers from changes imposed by a supplier if the changes are substantial and negatively impact the dealer's business.

S.J. of Tex., 82nd Leg., R.S. 3559.

Contrary to the statute in *Robinson*, the Legislature here made specific findings that the Act would benefit "the general economy of this state":

> The legislature finds that the retail distribution, sales, and rental of . . . industrial . . . equipment through the use of independent dealers operating under contract with the equipment suppliers vitally affect the general economy of this state, the public interest, and the public welfare. Therefore, the legislature determines that state regulation of the business relationship between the independent dealers and equipment suppliers . . . is necessary and that any act taken in violation of this Act would violate the public policy of this state.

Act of May 25, 2011, ch. 1039, § 1.[22] These finding were based on the Legislature's work across several sessions, reflecting a "carefully crafted compromise among dealers and manufacturers creating uniformity in the

[22] *Cf.* Tex. Occ. Code § 2301.001 (finding that the "distribution and sale of motor vehicles in this state vitally affects the general economy of the state and the public interest and welfare of its citizens").

sector of business." Statement of Rep. Darby before House Lic. & Admin. Procs. Committee (April 19, 2011) (at 1:25–2:02).

The Legislature thus determined that protecting independent dealers from unfair practices by suppliers would benefit not just the dealers, but the broader Texas economy, and that this protection was therefore in the public interest. And unlike in *Robinson*, there is no indication that the Act was enacted to benefit a single company or even a narrow class of them. On the contrary, it applies to dealers and manufacturers in a broad range of industries across the Texas economy. Tex. Bus. & Com. Code § 57.002(7).

Other courts have recognized the interests protected by the Act as legitimate and compelling. For instance, in *Deere & Co. v. State*, 130 A.3d 1197, 1203 (N.H. 2015), industrial and agricultural equipment manufactures pressed a contracts-clause challenge to a New Hampshire dealer law. Rejecting their arguments, the court held that by "protect[ing] equipment dealers and consumers from perceived abusive and oppressive acts by manufacturers," the law "unquestionably [served]

a significant and legitimate public purpose." *Id.* at 1209;[23] *accord Colton Crane Co. v. Terex Cranes Wilmington, Inc.*, No. CV 08-8525 PSG (PJWx), 2010 WL 11519316, at *2 (C.D. Cal. June 2, 2010) (rejecting, on similar grounds, state and federal contract-clause challenge to California's version of Act); *Farmers Union Oil Co., of Rolla, N.D. v. Allied Prods. Corp.*, 162 B.R. 834, 841 (D.N.D. 1993) (same with respect to North Dakota statute).

Yet the district court paid no heed to the Legislature's findings, denouncing them as "general" and "unsupported." ROA.791. The court displaced the Legislature's findings with its own: that the public interest was "only slight" because the Act "protects only dealers and no other members of the public." *Id.* In making that finding, the district court

[23] *Deere & Co.* relied heavily on *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, 102 n.7 (1978), which described laws like the Dealer Protection Act as serving the purpose of "the promotion of fair dealing and the protection of small business[es]." There, the Court recognized that California "was empowered to subordinate the franchise rights of automobile manufacturers to the conflicting rights of their franchisees where necessary to prevent unfair or oppressive trade practices." *Id.* at 107; *accord Farmers Union Oil Co., of Rolla, N.D. v. Allied Prods. Corp.*, 162 B.R. 834, 841 (D.N.D. 1993) ("The state's strong interest in protecting distributors, coupled with the conclusion that courts will defer to legislative judgment to determine the appropriateness of the action taken to remedy the societal harm, lends itself to the conclusion that [the statute] does not violate the contract clause of the United States Constitution." (citations omitted)); *Hall GMC, Inc. v. Crane Carrier Co.*, 332 N.W.2d 54, 61 (N.D. 1983) (similar).

committed two critical errors. First, because "the necessity and appropriateness of legislation are generally not matters the judiciary is able to assess," *Robinson* instructed courts to examine whether the Legislature's findings stated a compelling justification, not to make its own findings. 335 S.W.3d at 146; *see also Deere & Co.*, 130 A.3d at 1211 ("[I]t is not our role to second-guess this legislative determination."); *cf. Perry v. Perez*, 565 U.S. 388, 396 (2012) (per curiam) (holding that lower court erred by "substitut[ing] its own concept of 'the collective public good' for the Texas Legislature's determination of which policies serve 'the interests of the citizens of Texas'"). Second, the district court's implicit conclusion that a law that benefits only a class of persons cannot serve the public interest conflicts with substantial precedent.

Like *Robinson*, *Union Carbide* concerned a retroactive statute that eliminated the claims of asbestosis sufferers who could not show an "asbestos-related impairment." 438 S.W.3d at 57. The Legislature justified the statute as being necessary to mitigate the asbestos-litigation crisis. But the statute plainly harmed the interests of some asbestosis sufferers while substantially benefiting potential asbestos defendants. *See id.* This Court nevertheless found that the law served the general

public interest because the Legislature had made findings that, by protecting that narrow class of companies, the law would benefit the public more broadly. *Id.* This Court did not second-guess that finding. It contrasted the Legislature's findings to "the situation in *Robinson*," observing that "th[e] record contain[ed] no evidence that the legislative purpose underlying [the statute] was to benefit any particular entity." *Id.* at 58; *accord id.* at 57 ("The *only* public benefit achieved by the statute [in *Robinson*] was the reduction of Crown Cork & Seal's liability . . . ." (emphasis added)).

Tenet Hospitals likewise illustrates the dangers of permitting courts to second-guess legislative findings. There, this Court considered whether a statute of repose was unconstitutionally retroactive where it eliminated a minor's pre-existing malpractice claim. *See* 445 S.W.3d at 707. Just as Survitec and the district court question the Legislature's motives in passing the Act, critics of the tort-reform bill at issue in *Tenet Hospitals* accused the Legislature of serving special corporate interests at the expense of injured parties. *E.g.*, Adam Feit, *Tort Reform, One State at a Time: Recent Developments in Class Actions and Complex Litigation in New York, Illinois, Texas, and Florida*, 41 Loy. L.A. L. Rev. 899, 899,

938 (2008) (describing "tort reform movement" as promoting "corporate and insurance interests," and calling Texas's 2003 law "tremendously advantageous to a corporate litigant"). Yet this Court deferred to the Legislature's articulation of public policy, accepting the economic benefits of liability reform that "the Legislature expressly found." *Tenet Hosps.*, 445 S.W.3d at 707.

The district court's reasoning threatens this judicial deference to a coordinate branch of government. Nearly every law declares winners and losers; it is inherent in governing. But a perceived public interest, advanced by representatives of Texas voters, is often served by such statutes. Weighing legislation's costs and benefits and determining its cumulative impact on the public interest is why the Legislature exists. The district court was ill-equipped to explain why the Dealer Protection Act was improper special-interest legislation while the tort-reform statutes in *Tenet Hospital* and *Union Carbide*—which arguably benefited a narrower class of interests—were valid exercises of legislative power, and the district court made no effort to do so. *See also In re A.V.*, 113 S.W.3d 355, 356 (Tex. 2003) (finding that retroactive statute served public interest although it affected only a small number of Texans and

directly harmed incarcerated parents (and potentially their children) by eliminating their parental rights); *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 624, 633–34 (Tex. 1996) (concluding that retroactive law served public interest even though it deprived certain landowners of rights to groundwater and had no effect on millions of Texans outside Edwards Aquifer region).

The Legislature passed a broadly applicable statute that is "primarily prospective," *Robinson*, 335 S.W.3d at 144, and affects numerous critical sectors of the Texas economy. The Legislature found that adjusting the relationship between suppliers and dealers across these industries would benefit the State's economy and thus the public interest. The district court was obliged to accept that determination. And because this Court has held broad economic benefits can justify even retroactive legislation, *Union Carbide*, 438 S.W.3d at 58, the district court should have rejected Survitec's constitutional challenge.

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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