FILED
21-1088
3/11/2022 7:00 PM
tex-62555237
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 21-1088

In the Supreme Court of Texas

FIRE PROTECTION SERVICE, INC.,
Appellant,

v.

SURVITEC SURVIVAL PRODUCTS, INC.
Appellee.

On Certified Question from
the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

JUDD E. STONE II
Solicitor General

BILL DAVIS
Deputy Solicitor General

NATALIE D. THOMPSON
Assistant Solicitor General
Natalie.Thompson@oag.texas.gov
State Bar No. 24088529

Counsel for the State of Texas

Identity of Parties, Amicus, and Counsel

The parties and their counsel are correctly identified in the parties' briefs. Amicus curiae the State of Texas is represented by the following counsel:

Ken Paxton
Brent Webster
Judd E. Stone II
Bill Davis
Natalie D. Thompson (lead counsel)
Office of the Attorney General
P.O. Box 12548 (MC059)
Austin, Texas 78711-2548
Natalie.Thompson@oag.texas.gov

Table of Contents

Index of Authorities

Page(s)

Cases:

Constitutional Provisions and Statutes:

Other Authorities:

Statement of Interest of Amicus Curiae

In the lawsuit underlying this certified question, a federal judge held that a duly enacted Texas statute violates the Texas Constitution. The State of Texas is deeply interested in defending its laws from constitutional challenges like the one made here. And the State and its officials are frequently parties to lawsuits raising such issues. The State therefore files this brief as amicus curiae in hopes of assisting the Court in its assessment of and answer to the Fifth Circuit's certified question.

No fee has been or will be paid for the preparation of this brief.

To the Honorable Supreme Court of Texas:

The Texas Constitution's retroactivity clause is not implicated unless a law "attaches new legal consequences to events completed before its enactment." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994). The legal consequences at issue here are attached to conduct that took place many years after the challenged law took effect. The retroactivity clause is not implicated, and the Court should answer the Fifth Circuit's question in the negative.

But if the retroactivity clause is implicated, the Court should avoid the constitutional issue. There is an alternative statutory ground for resolving the case, and it has been fully briefed by the parties. If the statute at issue does not apply to the parties' contract, the case can be resolved without reaching the constitutional question the Fifth Circuit asked. And the statute does not apply. Rather than needlessly subject a Texas statute to constitutional scrutiny, the Court should follow its usual rule: "[W]e only decide constitutional questions when we cannot resolve issues on nonconstitutional grounds." *Phillips v. McNeill*, 635 S.W.3d 620, 630 (Tex. 2021).

To be sure, in a certified-question case this Court generally confines itself to directly answering the question certified. And whether or not a statute would be applied retroactively to the claims in this case is not itself a question of constitutional dimension, so the Court can fairly answer the Fifth Circuit's question in the negative on that basis. That is why the State suggests the Court first consider that question. It is only if the answer to that threshold question is "yes" that the constitutional-avoidance rule comes into play. And if that is the case, the State urges the Court to

respond to the Fifth Circuit by reference to the statutory grounds for dismissal, even though that is not a direct answer to the question it certified.

Statement of Facts

I. Appellee Survitec Survival Products, Inc. manufactures "marine safety and survival life rafts and parts." ROA.708; *see* ROA.671. "Beginning in the late 1990s," Appellant Fire Protection Services, Inc. ("FPS") was "an authorized dealer and servicer of Survitec's life rafts pursuant to an oral agreement." *Fire Prot. Serv., Inc. v. Survitec Survival Prods., Inc.*, 519 F. Supp. 3d 414, 417 (S.D. Tex. 2021). As the parties' dealership agreement was initially formed, the federal district court found, "each could terminate the agreement without cause." *Id.*

II. In 2011, the Texas Legislature enacted the Fair Practices of Equipment Manufacturers, Distributors, Wholesalers, and Dealers Act (the "Dealers Act" or "Act"). *See* Act of May 25, 2011, 82d Leg., R.S., ch. 1039, § 2, 2011 Tex. Gen. Laws 2646, 2646–58 (codified at Tex. Bus. & Com. Code §§ 57.001–.402). In enacting the Dealers Act, the Legislature found "that the retail distribution, sales, and rental of agricultural, construction, industrial, mining, outdoor power, forestry, and lawn and garden 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." *Id.* § 1, 2011 Tex. Gen. Laws 2646. "Therefore, the legislature determines that state regulation of the business relationship between the independent dealers and equipment suppliers as contemplated in the [Act] is necessary and that any action taken in violation of this Act would violate the public policy of this state." *Id.* The new statute applied to

(1) agreements "entered into or renewed" after its effective date (September 1, 2011), and (2) agreements "entered into before the effective date of this Act" that "ha[ve] no expiration date" and are "continuing contract[s]." *Id.* § 4(a), 2011 Tex. Gen. Laws 2658. Other existing dealership agreements continued to be governed by preexisting law until renewed. *Id.* § 4(b), 2011 Tex. Gen. Laws 2658–59.

Effective on September 1, 2011, the Dealers Act imposed requirements on covered dealership agreements, including a limitation on manufacturers' termination of a dealership contract unless there is "good cause," Tex. Bus. & Com. Code § 57.153, .154, a requirement that the manufacturer provide 180 days' notice and a 60-day opportunity to cure before such termination may take effect, *id.* § 57.155(a), and an obligation that terminating manufacturers buy back unsold inventory from the dealer, *id.* § 57.353.

The Dealers Act applies to agreements for the sale of "equipment," which is itself a defined term. "Equipment" means:

> [M]achinery, equipment, or implements or attachments to the machinery, equipment, or implements used for, or in connection with, any of the following purposes:
>
> (i) lawn, garden, golf course, landscaping, or grounds maintenance;
>
> (ii) planting, cultivating, irrigating, harvesting, or producing agricultural or forestry products;
>
> (iii) raising, feeding, or tending to livestock, harvesting products from livestock, or any other activity in connection with those activities; or
>
> (iv) industrial, construction, maintenance, mining, or utility activities or applications[.]

Tex. Bus. & Com. Code § 57.002(7)(A). The term "equipment" "does not mean: (i) trailers or self-propelled vehicles designed primarily for the transportation of persons or property on a street or highway; or (ii) off-highway vehicles." *Id.* § 57.002(7)(B).

III. In August 2017, Survitec terminated FPS's dealership agreement, effective December 27, 2017. ROA.671–72. FPS filed this lawsuit alleging that Survitec's termination violated the Dealers Act by "terminating without good cause, failing to provide sufficient requisite notice of termination, and failing to repurchase unused/unsold equipment and inventory." ROA.670. Survitec removed the suit from Harris County district court to the United States District Court for the Southern District of Texas. ROA.12–56.

In federal district court, Survitec filed multiple dispositive motions contending that the Dealers Act does not apply to its agreement with FPS because the life rafts at issue are not "equipment" as defined by the statute. *See* ROA.64–67, ROA.142–53. The district court denied these motions, reasoning that the life rafts could be "equipment" under the "mining" purpose listed in section 57.002(7)(A)(iv). *Fire Prot. Serv., Inc. v. Survitec Survival Prods., Inc.*, No. 4:19-2162, 2020 WL 4689216, at *3 (S.D. Tex. July 10, 2020). "[U]nder Texas law," the court reasoned, "mining activities can be conducted offshore in deep waters requiring the use of a vessel. It seems beyond dispute that life rafts would be 'used in connection with' mining operations conducted offshore in deep water." *Id.*; *see also Fire Prot. Serv., Inc. v. Survitec Survival Prods., Inc.*, 2019 WL 3766567, at *2 (S.D. Tex. Aug. 9, 2019) (denying Survitec's motion to dismiss). Because the summary-judgment record

reflected that the life rafts could be used in connection with mining operations, the court denied Survitec's motion for summary judgment.

Just before trial, Survitec not only renewed its statutory argument, ROA.709–15, but also raised a new one: Applying the Dealers Act to the parties' agreement would violate the retroactivity clause of Texas Constitution article I, section 16, ROA.236–48, 715–31. "Application of the Act to the parties' agreement would . . . constitute the retroactive application of state law because the parties' agreement predated the effective date of the Act and continued past that date," Survitec argued. ROA.715. It further argued that "retroactively applying the Act to the parties' agreement violates Article I § 16 of the Texas Constitution because doing so wipes out Survitec's contractual right to an open-ended relationship with FPS terminable at any time for any reason, while giving Survitec no opportunity to preserve that right on an ongoing basis, yet allowing FPS to keep its prior termination rights." ROA.731.

The federal district court entered judgment for Survitec based on its new unconstitutional retroactivity argument. *Fire Prot. Serv.*, 519 F. Supp. 3d at 423. The court first concluded that applying the Dealers Act would be retroactive because the parties had entered their at-will agreement before the Act's effective date. *Id.* at 420. The court thus turned to the three factors from *Robinson v. Crown Cork and Seal*, 335 S.W.3d 126 (Tex. 2010), which this Court delineated for assessing the constitutionality of retroactive laws. *Id.* Applying the Dealers Act would violate the retroactivity clause under *Robinson*, the federal court reasoned, because "notwithstanding the Texas Legislature's general, unsupported comment regarding public interest, the relevant subsection of the Act prohibiting a supplier from

terminating a dealer agreement without good cause protects only dealers and no other members of the public." *Id.* at 423. So "[a]ny public interest that the Legislature found was served by the Act is only slight, and fails to outweigh the impairment of Survitec's settled expectations in its oral agreement with FPS." *Id.*

The court declined to address the statutory question. Because it was ruling for Survitec based on its constitutional argument, the court concluded it "need not address definitively the difficult question whether the life rafts are 'equipment' under the Act." *Id.* at 419 n.3.

On appeal in the Fifth Circuit, the parties briefed both issues. *See* No. 21-20145, Brief of Appellee 45–50 (Oct. 1, 2021) ("5th Cir. Br."), Reply Brief of Appellant 18–27 (Nov. 1, 2021) ("5th Cir. Reply"). At the same time, FPS sought certification of the constitutional question alone, and Survitec was unopposed to its motion. *See Fire Prot. Serv., Inc. v. Survitec Survival Prods., Inc.*, 18 F.4th 802, 803 (5th Cir. 2021). Agreeing that the unconstitutional retroactivity issue is a "determinative and novel question of Texas law," *id.*, the Fifth Circuit certified the following question to this Court:

> Does the application of the Texas Dealers Act to the parties' agreement violate the retroactivity clause in article I, section 16 of the Texas Constitution?

Id. at 805. Its opinion certifying the question does not mention the parties' dispute about whether the life rafts are "equipment" subject to the Dealers Act.

Summary of the Argument

The Fifth Circuit asks this Court if "the application of the Texas Dealers Act to the parties' agreement violate[s] the retroactivity clause in article I, section 16 of the Texas Constitution[.]" *Fire Protection Servs.*, 18 F.4th at 805. But FPS's lawsuit does not call for a retroactive application of the Dealers Act. The Court should clarify that in any unconstitutional retroactivity challenge, the fundamental threshold question is whether a challenged law attaches new legal consequences to conduct that occurred before it took effect. And in a suit where unconstitutional retroactivity is raised as a defense to the merits of a claim, the relevant legal consequences are the ones material to that claim. Here, the material conduct is Survitec's termination of the parties' dealership agreement, which occurred many years after the Dealers Act took effect. FPS's lawsuit does not call for a retroactive application of the statute. For that reason, the Court can answer the Fifth Circuit's question in the negative.

But if instead the Court concludes the Dealers Act is retroactive as applied, it would be confronted with a constitutional question: Is the Act, although retroactive as applied here, nevertheless constitutional? That question calls for a balancing of interests under *Robinson*. And ordinarily, this Court avoids addressing such constitutional questions unless it is unavoidable.

It is avoidable in this case. The Dealers Act does not apply to the parties' agreement because the life rafts at issue do not fall within the definition of "equipment" that triggers the Act. The parties have litigated this issue and briefed it in the federal courts. The State agrees with Survitec: The life rafts are not "equipment." That is so for two reasons. First, "equipment" must be used for one

of a number of "purposes," but lifesaving at sea is not one of them. Although life rafts may be used in a context relating to those purposes—such as "industrial" or "mining" purposes—they are not themselves used for those purposes. Second, a separate statute applies to dealership agreements involving vessels. That suggests the life rafts are not "equipment" covered by the Dealers Act. And because the Act does not apply, the Court should not subject it to constitutional scrutiny.

ARGUMENT

I. This Case Does Not Involve a Retroactive Application of the Dealers Act.

Applying the Dealers Act in this case does not implicate the retroactivity clause because this case does not call for a retroactive application of the statute. For that reason, the Court need not address the boundaries between the contracts clause and the retroactivity clause to answer the Fifth Circuit's question. It also need not determine how the *Robinson* factors apply to the Dealers Act.

A. The Texas Constitution's retroactivity clause is rooted in the ancient principle "'that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place.'" *Robinson*, 335 S.W.3d at 136 (quoting *Landgraf*, 511 U.S. at 266). The conduct at issue in FPS's lawsuit is Survitech's termination of the contract and failure to purchase unsold inventory back from FPS. *See* ROA.669–73. That all happened many years after the Dealers Act took effect.

When this Court has treated a statute as retroactive, it has done so because new *legal* consequences are attached to conduct that took place previously. *See Robinson*, 335 S.W.3d at 136 (quoting *Landgraf*, 511 U.S. at 265); *see also Union Carbide Corp.*

v. Synatzske, 438 S.W.3d 39, 60 (Tex. 2014). In *Robinson*, the new legal consequence was the extinguishment of the defendant's successor liability. 335 S.W.3d at 147–48. The statute in *Wright* was "retroactive in the sense that it authorize[d] the Water Rights Commission to take into consideration Conduct, or more specifically non-conduct, taking place prior to the statute's effective date" in setting permittees' water rights going forward. 464 S.W.2d at 648. The new legal consequence was the diminished water right. *See id.* Those who could previously retain their water rights even if they did not use them were held to forfeit those rights based on non-use that, at the time it occurred, had had no legal consequence at all. *See id.*

In *Robinson*, the Court recognized that the retroactivity clause's scope does not go so far as the broadest definition of the words "retroactive" or "retrospective." 335 S.W.3d at 139. But lower courts have taken its reference to these broad definitions as license to assess laws under the *Robinson* test even if they do not change the legal effect of conduct after that conduct takes place. *See, e.g.*, *Fire Prot. Serv.*, 519 F. Supp.3d at 420; *Brazos River Auth. v. City of Houston*, 628 S.W.3d 920, 928 (Tex. App.—Austin 2021, pet. filed). This Court should clarify that this is error.

A law does not become "retroactive" merely because it "operate[s] to change existing conditions" in some broad sense. *Tex. Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971). For example, a statute of limitations is not retroactive as applied to a suit enforcing a promissory note even if the note was made before the statute was enacted. *See Robinson*, 335 S.W.3d at 140 (discussing *De Cordova v. City of Galveston*, 4 Tex. 470, 480 (1849) (Hemphill, C.J.)). In 1849, this Court discussed the matter in terms of vested rights, *see De Cordova*, 4 Tex. 480, but its decision holds

up in modern terms; the creation of a statute of limitations does not change the legal consequences of making a promissory note, which is all that had happened before the challenged law was enacted. When the debtor made the note, he undertook an obligation to repay the debt; that obligation remained unchanged without regard to whether his creditor's remedy was subject to a statute of limitations. *See* III Joseph Story, *Commentaries on the Constitution* § 1381 (4th ed. 1873) ("Rights may, indeed, exist, without any present adequate correspondent remedies" to enforce them).

An amendment to the limitations period may change the legal consequences of a creditor's previous failure to sue within limitations, of course, and that is why this Court has held a new statute of limitations cannot revive claims that previously were barred. *See Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 4–5 (Tex. 1999). There, the relevant legal consequences attach to a failure to sue within limitations, not the primary conduct at issue in the lawsuit. But in this case Survitec raised unconstitutional retroactivity as a defense to the merits of a claim, so the relevant legal consequences are the ones material to that claim, not the legal consequences of the parties' litigation decisions. Put differently, Survitec's retroactivity argument is about its primary conduct, so it cannot establish retroactivity unless some new legal consequence was attached retroactively to past primary conduct.

B. Survitec recognizes that the fundamental question is whether the Dealers Act "attache[d] new legal consequences to events completed before its enactment." Appellee's Br. at 34 (alteration in original); *see Landgraf*, 511 U.S. at 269–70. But it contends that "the relevant event was Survitec's assent to an at-will relationship with FPS, which occurred in the 1990s." Appellee's Br. at 35. That is not so. FPS's

lawsuit does not depend on any allegation of wrongdoing in the 1990s—or at any other time before the Dealers Act took effect.

If Survitec had terminated the oral dealership agreement on, say, August 1, 2011, FPS could not have argued that termination violated the Dealers Act because the Act was not yet effective. If FPS sued on such a theory, *that* counterfactual lawsuit would involve a retroactive application of the Act. To sue under the Dealers Act, FPS would be arguing a termination that was lawful on August 1, 2011, "when [it] took place," *Robinson*, 335 S.W.3d at 136, was subsequently transformed into a statutory violation. *See* 16A C.J.S. Constitutional Law § 645 ("A retrospective or retroactive law is one that relates back to a previous transaction and gives it some different legal effect from that which it had under the law when it occurred."). In the same way, if FPS contended that the original agreement's failure to meet the Dealers Act's requirements made it unenforceable *ab initio* as a violation of public policy, *that* theory would call for a retroactive application of the Act. On that theory, a once-enforceable contract would have been transformed into an unenforceable one *nunc pro tunc*.

But these counterfactuals are just that: counterfactuals. Here, FPS does not dispute that the parties' oral agreement was enforceable on an at-will basis from "the late 1990s" to August 30, 2011. Appellant's Br. at 1. It claims that Survitec violated the Act only in 2017, many years after the Dealers Act took effect. ROA.670. There is nothing retroactive about that. The Court should say so in its answer to the Fifth Circuit's question. And because there is no retroactive application of the statute, the retroactivity clause of article I, section 16 is not implicated.

C. Survitec's attempts to cast FPS's claims as retroactive are unsuccessful. To be sure, the Dealers Act provided that "the former law is continued in effect for th[e] purpose" of applying to "[a] dealer agreement entered into before the effective date of this Act" that is not a continuing contract without an expiration date. Dealers Act § 4(b), 2011 Tex. Gen. Laws 2658–59. Providing a grandfather clause for some preexisting agreements does not obligate the Legislature to grandfather in every preexisting agreement. The Legislature can go further to protect settled expectations than the Constitution requires.

And the Legislature had another reason, aside from the retroactivity clause, for framing the Act as it did: The contracts clause prohibits it from enacting "any law impairing the obligation of contracts." Tex. Const. art. I, § 16. That clause might have been implicated if the Act applied to preexisting agreements with set terms. *See* III Story, *Commentaries* § 1385 ("[A]ny law which enlarges, abridges, or in any manner changes the intention of the parties resulting from the stipulations in the contract, necessarily impairs it.").

But an at-will continuing contract like the one here is characterized by the absence of any future obligation between the parties. If (prior to the Act) Survitec had stopped performing, it would have been perfectly within its rights, and FPS would have had no claim against it. That is why it makes sense to analogize continuing contracts to a series of shorter contracts entered anew with each instance of performance. *See Northshore Cycles, Inc. v. Yamaha Motor Corp.*, 919 F.2d 1041, 1043 (5th Cir. 1990) (per curiam); *see also John Deere Const. & Forestry Co. v. Reliable Tractor, Inc.*, 957 A.2d 595, 600 (Md. 2008). It is also why at-will employment

relationships can incorporate new conditions not part of the original employment agreement. *See In re Halliburton Co.*, 80 S.W.3d 566, 568 (Tex. 2002); FPS Br. at 37–43.

The thrust of Survitec's argument is that the Dealers Act trapped it in its agreement with FPS. *See* Survitec Br. at 27–29, 45–47. That ignores the nature of an at-will contract. Survitec could have walked away from its at-will agreement at any time until after the Dealers Act took effect. FPS is correct in saying that the parties' decision to continue performing after September 1, 2011, "incorporate[d] within their agreement [the] new law that governed their obligations and rights." FPS Br. at 42.

It blinks reality to say that Survitec had no way of knowing the law was about to change. *See* Appellee's Br. at 50–51. But in any event, it does not matter whether the rule from *Missouri, Kansas & Texas Railway Co. of Texas v. State*, 100 S.W. 766, 767 (Tex. 1907), remains good law or is implicated here. *See* Appellee's Br. 51–54, Appellant's Br. 48. Even if Survitec were correct that a an enacted-but-not-yet-effective statute does not provide constructive notice, Survitec continued to perform on and after September 1, 2011. After the law took effect on September 1, 2011, Survitec performed again (and again and again). Its preexisting at-will agreement did not obligate it to do so. So its subsequent performance—undertaken with at least constructive notice of the new law—incorporated the Dealers Act's requirements into the parties ongoing relationship. *See Halliburton*, 80 S.W.3d at 568. And FPS's argument does not depend on calling the passage of time between enactment and effectiveness a formal "grace period." *See id.* at 51–54. This Court has recognized

that a new statute is not required to provide a grace period. *See Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 632 (Tex. 1996).

The Dealer's Act is not retroactive as applied to FPS's claims against Survitec. That means the Court need not address whether it is constitutional under *Robinson*. On this basis, the Court should answer the Fifth Circuit's certified question in the negative.

II. Before Reaching a Texas Statute's Constitutionality Under the Retroactivity Clause, the Court Should Address Whether That Statute Applies in the First Place.

But if the Dealers Act is retroactive as applied here, this Court should consider whether the Dealers Act applies to the parties at all. In the underlying federal litigation, the parties have hotly disputed whether the life rafts at issue are "equipment" as defined by the Act; if they are not, the Act does not apply to the parties' agreement. *See supra* 4–6. The Court should address that statutory argument before subjecting the Dealers Act to *Robinson*'s analysis.

A. The parties have also briefed Survitec's alternative argument for affirmance: Whether the Act applies to the life rafts.

Survitec has argued throughout the federal litigation that the Act does not apply to the parties' relationship because the life rafts are not "equipment" as defined by the Act. If that is correct, a ruling on the constitutional question would be unnecessary.

Survitec argues that the life rafts are not "equipment" because they are not used for any of the "purposes" listed in Texas Business and Commerce Code section 57.002(7)(A). 5th Cir. Br. at 46–49. "The list of purposes does not include any

specific or typical marine activities . . . nor any general reference to 'marine activities.' And facially, the listed purposes . . . concern terrestrial activities, as do the items in the two exclusions." *Id.* at 47. Survitec focuses on the terms "industrial" and "mining," which seem the most likely to reach the life rafts. "As to 'industrial,' at least *some* narrowing construction is needed because that term could theoretically be applied to anything commercial," Survitec contends, and applying it that broadly "would render many other categories superfluous." *Id.* (citing Tex. Bus. & Com. Code § 57.002(7)(A)(iv)). And the plain meaning of "mining," Survitec argues, refers to "excavation," which connotes hard minerals, not "offshore oil wells." *Id.* at 47–48 (citing Merriam-Webster Dictionary). Reading "mining" to include life rafts on offshore oil rigs would violate the *noscitur a sociis* canon, Survitec contends, by giving "one word a meaning so broad that it is incommensurate with the statutory context." *Id.* at 48 (citing *Greater Hous. P'ship v. Paxton*, 468 S.W.3d 51, 61 (Tex. 2015)). Survitec next argues that "even if offshore drilling were 'mining,' life rafts are not used in connection with any mining purpose. They are crafts for emergency situations unconnected to such activities." *Id.* at 49.

FPS contends that "[a]ll aspects of [section 57.002's] definition embrace broad applicability." 5th Cir. Reply at 19. Focusing on the broad language in subsection (7)(A), FPS argues that "[t]he statute reaches an expansive range of commercial activity and applies to *any* item that is 'used for, or in connection with' those activities." *Id.* at 19–20. "[E]quipment" thus "includes every tool, machine, part or device used in any of the enumerated . . . contexts," FPS argues, going on to assert that "the Act's general applicability is supported by the existence of only limited and

specific carve-outs: trailers, motor vehicles, and off-road vehicles." *Id.* at 20 (quoting Tex. Bus. & Com. Code § 57.002(7)(B)). Finally, FPS contends, the statute "must be interpreted in light of its purpose of providing dealer protections." *Id.* As to the listed purposes, FPS argues that "the common understanding of 'industrial' includes maritime activities like commercial fishing, ship manufacturing and maintenance, and port repair and services," so the *noscitur a sociis* canon does not support "a 'terrestrial' limitation." *Id.* at 21. As to mining, FPS points to two cases that referred to offshore "mining," *id.* at 21–22, and two federal court decisions applying the [Dealers Act] to machine parts used in oil and gas drilling and production," *id.* at 22 n.10.

B. Life rafts are not "equipment" subject to the Dealers Act.

Survitec's reading is the stronger for two reasons.

1. First, even where life rafts are used *in the context of* "industrial, construction, . . . [or] mining activities," Tex. Bus. & Com. Code § 57.002(7)(A)(iv), they are not used *for the purpose of* "industrial, construction, . . . [or] mining activities," *id.*; *see id.* § 57.002(7)(A) ("[e]quipment" is "used for, or in connection with, any of the following purposes"). A life raft is not a tool used to construct a dam or remove oil from the earth. It saves people in an emergency. As Survitec puts it, "life rafts are not used in connection with any mining purpose. They are crafts for emergency situations unconnected to such activities. To construe the Act to include them would mean that *anything* useful on an offshore drilling rig or ship would be "Equipment" (*e.g.* beds, sinks, computers)." 5th Cir. Br. at 49–50. Indeed, the same life raft would be "equipment" if purchased for use on an oil rig but not if purchased for use on a

cruise ship. But the Dealers Act applies to the entire relationship between the manufacturer and dealer, not on a raft-by-raft basis. That suggests the life rafts are not "equipment."

There is also some force to Survitec's *noscitur a sociis* argument. It is appropriate to read the general terms in section 57.002(7)(A)(iv) in accordance with the more specific "purposes" listed in subsections (7)(A)(i) through (iii), so "industrial" should not be read so broadly as to swallow the rest. But artificially limiting the Act to "terrestrial" applications would be pushing *noscitur a sociis* too far. "[M]aintenance . . . activities" happen on ships. Tex. Bus. & Com. Code § 57.002(7)(A)(iv). So too could "landscaping" or "planting . . . agricultural or forestry products" happen aboard a ship—consider a chef's garden in planters on the deck of a cruise ship. *Id.* § 57.002(7)(A)(i), (ii). So it cannot be that the "purposes" listed in subsection (7)(A) categorically exclude anything that happens in a maritime context. If the purported equipment is used for (or "in connection with") a listed purpose, it is properly included in the scope of the Act. The better reason for excluding the life rafts is that they are used for lifesaving purposes, not "industrial" purposes (or any of the other purposes listed in section 57.002(7)(A)). Survitec rightly points out that *anything*, from beds to computers, would be equipment if it sufficed that the purported equipment is used on an oil rig.

2. There is yet another reason to conclude that life rafts are not covered by the Act: A separate statutory scheme governs dealership agreements for "[v]essels," which means "any watercraft, other than a seaplane on water, used or capable of being used for transportation on water." Tex. Parks & Wild. Code § 31.003(2); *see*

Tex. Occ. Code § 2352.001(9). Survitec and FPS fall within the respective definitions of "[m]anufacturer" and "[d]ealer," Tex. Occ. Code § 2352.001(3), (5), because the life rafts at issue are "vessels" as statutorily defined. Tex. Parks & Wild. Code § 31.003; *see* Tex. Occ. Code § 2352.001(9).

Chapter 2352 governs manufacturer-dealer agreements "for the purchase and sale of new boats or new boat motors." Tex. Occ. Code § 2352.001(1); *id.* § 2352.051 ("A manufacturer or distributor contracting with a dealer may not sell or offer for sale, and a dealer may not purchase or offer to purchase, a new boat or a new boat motor unless the manufacturer or distributor and the dealer enter into an agreement that complies with this chapter."). For purposes of chapter 2352, however, "boats" is a defined term that is narrower than "vessels." It means "a motorboat" or certain sailboats. *Id.* § 2352.001(2). A "[m]otorboat," in turn, is "any vessel propelled or designed to be propelled by machinery, whether or not the machinery is permanently or temporarily affixed or is the principal source of propulsion." Tex. Parks & Wild. Code § 31.003(3) (incorporated by Tex. Occ. Code § 2352.001(6)).

The State is informed by counsel for the parties that the life rafts at issue here are not motorized, so chapter 2352's requirements for dealership agreements do not apply. *See* Tex. Occ. Code §§ 2352.001(2), 2352.051. But this separate statutory scheme nevertheless says something about this case. The Legislature defined manufacturers and dealers under chapter 2352 more broadly than it defined the "agreements" that must meet its requirements. That presumably was on purpose. Chapter 2352 applies to agreements for the sale of "boats" as defined, but not to agreements for the sale of other vessels. Imposing requirements on some but not all

vessels indicates that the Legislature excluded some vessels deliberately. Subjecting them to similar (albeit not identical) requirements under a different statutory scheme would disregard the Legislature's choice.

All that is to say, chapter 2352 suggests that "manufacturers" and "dealers" of "vessels" should not also be treated as "manufacturers" and "dealers" of "equipment" under Business and Commerce Code section 57.002. Considering how the two statutory schemes would apply to a motorized lifeboat shows the problem. (Indeed, it appears from public sources that Survitec also manufactures motorized lifeboats, not just the non-motorized life rafts at issue here.) The manufacturer would have to comply with chapter 2352's limitations on termination of dealer agreements for "boats"; but if a vessel can be "equipment" whenever it is used in connection with "industrial, construction, maintenance, mining, or utility activities or applications," Tex. Bus. & Com. Code § 57.002(7)(A)(iv), the manufacturer would also have to comply with the Dealers Act under FPS's reading.

And the two statutory schemes, while similar, are not identical. For example, a "vessel" manufacturer can terminate a dealership agreement based only on a statutorily specified "default." Tex. Occ. Code §§ 2352.0523, .053. But an "equipment" manufacturer can terminate based on "good cause." Tex. Bus. & Com. Code §§ 57.153, .154. The manufacturer of motorized lifeboats would not know which provision applies. Moreover, the notice requirements and period for cure differ between the two statutes. An "equipment" supplier must provide written notice at least 180 days before termination of most agreements and provide 60 days for the dealer to cure. *Id.* § 57.155(a). But a "vessel" dealer is entitled to between 30

and 180 days to cure, depending on the type of "default" at issue. Tex. Occ. Code § 2352.0524. Applying both statutory schemes to the same dealership agreement would be unwieldy, if not impossible.

The existence of a separate statutory scheme applicable to manufacturers and dealers of "vessels" strongly supports concluding that the Act does not govern the parties' agreement here.

C. This Court should address the alternative statutory argument rather than issuing an unnecessary constitutional ruling.

"As a rule," this Court does not "decide constitutional questions" if it can resolve the case on any other ground. *In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003). The Court recently emphasized that "[t]his rule is not optional." *McNeill*, 635 S.W.3d at 630. After all, "statutes are not to be set aside lightly." *Robinson*, 335 S.W.3d at 146. It is a weighty thing for a court to say that a duly enacted statute, voted on by both houses of the Legislature and signed by the Governor, is in violation of Texas's Constitution. So "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). If the Court concludes that the Act is retroactive as applied to the parties' agreement—though it should not—the State urges the Court to follow this rule rather than adjudicate whether the Act's application is constitutional under *Robinson*.

In some past cases, this Court has assumed away issues not disputed by the parties in order to provide an answer to a certified question. *See Wal-Mart Stores,*

Inc. v. Forte, 497 S.W.3d 460, 464 (Tex. 2016); *Diamond Shamrock Ref. & Mktg. Co. v. Mendez*, 844 S.W.2d 198, 200 (Tex. 1992). But this time the question certified is constitutional. Two alternate statutory bases for an answer, as in *Wal-Mart Stores*, 497 S.W.3d at 463–64, are interchangeable in a way that a statutory ground and a constitutional ground are not. Statutory questions may be analyzed in any order without implicating the concerns that animate this Court's constitutional-avoidance rule. Here, if the Court concludes that the Dealers Act is retroactive as applied, the Court would then have to decide a constitutional issue despite a potentially dispositive statutory ground for reaching the same result.

Moreover, the statutory question here has been litigated and briefed by the parties. Unlike in cases where a potentially dispositive alternative issue has been raised by amici only, this Court has "the benefit of [the parties'] arguments" here. *Id.* at 464. The issue has been extensively litigated, *see supra* 4–6, 14–16, and the Court will hear oral argument and can consider supplemental briefing on the question if necessary.

The Fifth Circuit's central reason for certifying questions of state law in the first place is "considerations of comity." *Fire Prot. Serv.*, 18 F.4th at 805; *see also R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941) (explaining that federal courts should abstain from exercising jurisdiction to avoid "the friction of a premature constitutional adjudication"). That comity encompasses understanding that the Texas courts, like the Fifth Circuit itself, are reluctant to reach constitutional issues unless it is absolutely necessary to do so. And as usual, the Fifth

Circuit "disclaim[ed] any intention or desire that th[is] Court confine its reply to the precise form or scope of the question certified." *Fire Prot. Serv.*, 18 F.4th at 806.

The Court can answer the Fifth Circuit's question by explaining that the Texas statute does not apply, and therefore cannot violate the Texas Constitution as applied to the parties here. If the Court concludes the Dealers Act is retroactive as applied to the parties' agreement, *but see supra* Part I, it should address whether the life rafts at issue are "equipment" covered by the Dealers Act in the first place.

PRAYER

The Court should answer the Fifth Circuit's question in the negative, whether because the statute is not retroactive as applied here or because the statute does not apply to the parties' contract.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

JUDD E. STONE II
Solicitor General

BILL DAVIS
Deputy Solicitor General

/s/ Natalie D. Thompson
NATALIE D. THOMPSON
Assistant Solicitor General
State Bar No. 24088529
Natalie.Thompson@oag.texas.gov

Counsel for the State of Texas

Certificate of Service

On March 11, 2022, this document was served on Wallace B. Jefferson, lead counsel for appellant, via wjefferson@adjtlaw.com, and Jeremy Gaston, lead counsel for appellee, via jgaston@hcgllp.com.

/s/ Natalie D. Thompson
Natalie D. Thompson

Certificate of Compliance

Microsoft Word reports that this document contains 6,098 words, excluding exempted text.

/s/ Natalie D. Thompson
Natalie D. Thompson

Automated Certificate of eService

This automated certificate of service was created by the efiling system.
The filer served this document via email generated by the efiling system
on the date and to the persons listed below:

Hollis Duncan on behalf of Natalie Thompson
Bar No. 24088529
hollis.duncan@oag.texas.gov
Envelope ID: 62555237
Status as of 3/14/2022 7:59 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Mark Trachtenberg		mark.trachtenberg@haynesboone.com	3/11/2022 7:00:12 PM	SENT
Joshua Polster		joshua.polster@stblaw.com	3/11/2022 7:00:12 PM	SENT
Anthony C.Piccirillo		anthony.piccirillo@stblaw.com	3/11/2022 7:00:12 PM	SENT
Natalie Thompson	24088529	natalie.thompson@oag.texas.gov	3/11/2022 7:00:12 PM	SENT
Bill Davis	24028280	Bill.Davis@oag.texas.gov	3/11/2022 7:00:12 PM	SENT
Hollis Duncan		hollis.duncan@oag.texas.gov	3/11/2022 7:00:12 PM	SENT

Associated Case Party: Fire Protection Service, Incorporated

Name	BarNumber	Email	TimestampSubmitted	Status
Michelle Meuhlen		michelle.meuhlen@haynesboone.com	3/11/2022 7:00:12 PM	SENT
Wallace BJefferson		wjefferson@adjtlaw.com	3/11/2022 7:00:12 PM	SENT
Melanie DPlowman		mplowman@adjtlaw.com	3/11/2022 7:00:12 PM	SENT
Nicholas Bacarisse		nbacarisse@adjtlaw.com	3/11/2022 7:00:12 PM	SENT
Nicholas S.Goldin		ngoldin@stblaw.com	3/11/2022 7:00:12 PM	SENT
Scott Matney		smatney@fps-usa.com	3/11/2022 7:00:12 PM	SENT

Associated Case Party: Survitec Survival Products, Incorporated

Name	BarNumber	Email	TimestampSubmitted	Status
Jeremy JGaston		jgaston@hcgllp.com	3/11/2022 7:00:12 PM	SENT
Peter AMcLauchlan		Peter@McLauchlanLawGroup.com	3/11/2022 7:00:12 PM	SENT