FILED
21-1088
2/14/2022 3:41 PM
tex-61729301
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 21-1088

In The
Supreme Court of Texas

Fire Protection Service, Inc.,
Plaintiff - Appellant,

v.

Survitec Survival Products, Inc.,
Defendant - Appellee.

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

BRIEF OF APPELLEE SURVITEC SURVIVAL PRODUCTS, INC.

Peter A. McLauchlan
Texas Bar No. 13740900
Peter@McLauchlanLawGroup.com
THE MCLAUCHLAN LAW GROUP PLLC
950 Echo Lane, Suite 200
Houston, Texas 77024
(832) 966-7210 (tel/fax)

Jeremy Gaston
Texas Bar No. 24012685
jgaston@hcgllp.com
HAWASH CICACK & GASTON LLP
3401 Allen Parkway, Suite 200
Houston, Texas 77019
(713) 658-9015 (tel/fax)

Counsel for Appellee

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Constitutional Provisions, Session Laws, Statutes, and Rules

Legislative Materials

Other Materials

QUESTION CERTIFIED

Does the application of the Texas Dealers Act[1] to the parties' agreement violate the retroactivity clause in article I, section 16 of the Texas Constitution?

[1] Fair Practices of Equipment Manufacturers, Distributors, Wholesalers, and Dealers Act (herein, "Act"). TEX. BUS. & COM. CODE §§ 57.001-.402.

STATEMENT OF FACTS

Survitec Survival Products, Inc. ("Survitec") makes marine safety equipment, including life rafts. ROA.777. From the late 1990s onward, Survitec and Fire Protection Service, Inc. ("FPS") had an oral agreement allowing FPS to operate as an authorized dealer/servicer of Survitec rafts. ROA.777. The relationship was at-will and non-exclusive (*i.e.*, FPS could sell/service other raft brands). ROA.353-54, 778, 1156.

By letter dated August 15, 2017, Survitec terminated FPS's status as a Survitec dealer/servicer effective December 27, 2017. ROA.1298. In the letter, Survitec said it would make an offer to repurchase FPS's inventory of unused Survitec equipment and parts "following an evaluation of the goods." ROA.1298. The letter said the offer would apply to inventory "still in good condition and with proof of invoice." ROA.1298.

The letter did not claim termination was for cause, although it alleged finding deficiencies in FPS's servicing work during safety audits. ROA.1298. In addition, Survitec internally had discussed falling volumes of such work by FPS. ROA.2015. Meanwhile, FPS's revenues for *non*-Survitec brands were exceeding revenues for Survitec brands by a factor of five to one. ROA.1197.

In response to the letter, FPS did not invoke the Texas Dealers Act

("Act"),[2] either to halt the termination or to govern Survitec's proposed inventory buyback. Because the Act figures prominently in this matter, however, its particulars are worth highlighting:

The Act went into effect September 1, 2011.[3] With respect to supplier/dealer agreements within its scope, the Act provides that a supplier cannot terminate the agreement except for "good cause."[4]

For agreements like the one here (where FPS had no performance obligations, such as a requirement to sell a certain volume of products), the Act defines "cause" narrowly. A dealer like FPS would essentially have to commit a crime, move or go out of business, or fall into financial default to be terminated.[5]

For agreements *with* performance obligations, "cause" would also include instances where "the dealer fails to substantially comply with essential and reasonable requirements imposed on the dealer under the terms of the dealer agreement, provided that such requirements are not

---

[2] TEX. BUS. & COM. CODE § 57.001 *et seq*.

[3] 2011 Tex. Sess. Law Serv. Ch. 1039 § 5.

[4] Act § 57.153.

[5] Act § 57.154(a)(2)-(9) (limiting "good cause" to dealer cessation of business, insolvency, conviction of crime, relocation, change of ownership/control, and financial defaults).

different from requirements imposed on other similarly situated dealers either by their terms or by the manner in which they are enforced."[6] Even then, however, a supplier could not terminate a dealer for "supplier side" business reasons, such as a supplier's economic need to change business models or exit a geographic/product market.[7]

Even for permitted terminations, the Act imposes notice, opportunity-to-cure, and inventory-buyback duties,[8] and it enforces statutory violations with liabilities for a dealer's damages, including lost profits, as well as attorney fees, other costs, and interest.[9]

When passed, the Act was made retroactive to ongoing supplier/dealer agreements with no set expiration date (as here):

> "[The Act] applies to . . . a dealer agreement that was entered into before the effective date of this Act, has no expiration date, and is a continuing contract."[10]

By contrast, all other existing agreements (*e.g.*, agreements for a fixed or

---

[6] Act § 57.154(a)(1).

[7] The Act does this by limiting termination to causes listed in § 57.154(a), none embracing supplier-side issues

[8] Act §§ 57.155, 57.353

[9] Act §§ 57.354-.355, 57.401.

[10] 2011 Tex. Sess. Law Serv. Ch. 1039 § 4(a)(2).

renewing term) would be "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" through the remainder of their current term.[11]

Finally, the Act prohibited attempts to contract around it.[12]

As stated above, FPS did not invoke the Act in response to Survitec's termination notice. Rather, FPS engaged with Survitec in a lengthy back-and-forth regarding Survitec's offer to repurchase FPS's inventory. *See* FPS Br. 5-9.

During most of that time, the parties did not agree on when and where FPS's inventory would be evaluated, what would be bought back, or at what price. *Id.* According to FPS, these issues were Survitec's fault. *Id.*

The picture painted is inherently one-sided, however, as Judge Atlas dismissed FPS's buyback claim under the Act after FPS's case in chief (ROA.777), and so Survitec had no occasion to present a rebuttal case at trial. The picture also does not relate to the determinative issue: whether application of the Act to the parties' agreement violates the retroactive-law clause of the Texas Constitution. That said, the one-sided record is not

[11] *Id.* § 4(b); *see id.* § 4(a)(1).

[12] Act § 57.003 ("An attempted waiver of a provision of this chapter or of the application of this chapter is void").

completely one-sided:

First, contrary to the contention that Survitec's "promised" to repurchase FPS's inventory (FPS Br. 5), Survitec's letter conditioned any repurchase offer on an evaluation of the equipment. ROA.1298. FPS did not send Survitec an inventory of its Survitec parts until nine months after the letter, however, and never returned the goods to Survitec for evaluation. ROA.1315, 1037-38.

FPS justifies this on the grounds that when Survitec sent FPS a Return Merchandise Authorization for the goods (ROA.1044, 1336-46), it was untimely, expired quickly, offered only a credit, and was full of errors and omissions. FPS Br. 5-6. But even after FPS provided Survitec with corrected information, FPS declined to deliver its inventory to Survitec for evaluation, questioning whether it could trust Survitec to correctly "count the stuff." ROA.1127.

Whether FPS trusted Survitec to evaluate the inventory and, more generally, whether it disagreed with the length, terms, and process of Survitec's proposed buyback, Survitec had not agreed for FPS to choose the timing, terms, or procedure. And even under the Act, Survitec would have had no buyback payment obligation until *after* FPS returned the

inventory,[13] which never occurred.

Survitec's offer also conditioned buyback on proof FPS had actually purchased the inventory in question from Survitec (proof also needed to apply the Act)[14]—which FPS didn't provide until after suing Survitec.

To be clear, none of this is to suggest that, on this record, FPS would be found responsible for any material delays in the buyback process, just that the record is one-sided and the terms of both the Act and termination letter conditioned payment on events that hadn't occurred before FPS filed suit under the Act, which FPS did on May 17, 2019 (ROA.21), after demanding (on April 15, and May 7, 2019), that Survitec pay $158,134.25 for FPS's inventory. ROA.1405, 2006-07.

Months after filing suit, FPS provided Survitec with 585 pages of invoices dating back seven years. ROA.94, 100, 1420-2004. The next month, Survitec made a federal Rule 68 offer of judgment for $152,869.31, which FPS rejected (ROA.211, 672, 892-97), after claiming at a November 2019 hearing that Survitec further owed: (1) $30,000 for digital certificates

[13] Act § 57.354(a) (payment required "within 90 days after receipt by the supplier of property required to be repurchased").

[14] This is needed to see if equipment is too old for repurchase (Act § 57.358(a)(5)); subject to discount (*id.* § 57.353(a)(1), (3), (6)); or ineligible because bought elsewhere (*id.* § 57.358(a)(6)(B)).

it bought from Survitec; (2) a 10% statutory mark-up on everything for untimeliness; (3) two years of 18% interest; and (4) $18,000 in attorney fees. ROA.896, 898.

Including FPS's prior demand, these figures would total just over $306,000.[15] On February 10, 2020, Survitec made a second Rule 68 offer of judgment for $375,000, which FPS rejected. ROA.211, 289-94, 672.

At trial, FPS claimed that, in addition to the above items, Survitec also owed $33,050 for life rafts it couldn't sell and that Survitec's termination had caused FPS to suffer lost profits totaling over $2,000,000. ROA.694, 1080.

After FPS's case in chief, Survitec moved for judgment on partial findings, arguing that application of the Act to the parties' agreement would violate the retroactive-law clause of Article I § 16 of the Texas Constitution. ROA.715-31.[16] The district court agreed (ROA.792 & n.5) and entered judgment against FPS (ROA.794). On appeal, the Fifth Circuit certified the constitutional question to this Court, which this Court accepted.

---

[15] (($158,134.25 + $30,000) *x* 110% *x* 118% *x* 118%) + $18,000 = $306,152.94.

[16] Survitec also argued that its rafts weren't "Equipment" under the Act § 57.002(7). ROA.713-15.

SUMMARY OF ARGUMENT

Article I § 16 of the Texas Constitution prohibits retroactive laws. Under *Robinson*,[17] such laws presumptively are unconstitutional absent a compelling public interest that does not greatly upset settled expectations, a standard that considers the nature and degree of impairment of the right versus the strength of the public purpose as evidenced by the Legislature's factual findings.

Here, the Act retroactively eliminated Survitec's right to have an at-will relationship with FPS—a longstanding common-law and statutorily-protected right fundamental to the parties' relationship and incorporated in their agreement—while simultaneously imposing new statutory duties, including the duty to be bound in a potentially-perpetual supplier/dealer relationship enforced by new and substantial liabilities, including liability for a dealer's lost profits.

In particular, as applied to an at-will business relationship, the Act retroactively eliminated a supplier's ability to terminate the relationship based on any general dissatisfaction with a dealer's performance (or even dealer conflicts of interest, as where a dealer begins favoring other suppliers). Nor could a supplier terminate a dealer for any supplier-side

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

business reasons, such as a need to change business models or exit a geographic/product market.

FPS claims that Survitec's constitutional challenge can only be understood as a Texas contract clause challenge, but the issue here is not a weakening of Survitec's ability to enforce any contractual obligation of FPS, as might violate the Texas contract clause. Rather, the issues are (1) the elimination of an independent right that would have existed even absent any agreement of the parties combined with (2) the imposition of entirely new statutory duties and liabilities, and *both* are permitted subjects for retroactive-law challenges.

On the merits, Survitec's right to have an at-will relationship implicates longstanding liberty rights, including freedom *from* contract, and Survitec had no reason to expect that the parties' at-will relationship might be transformed overnight into one that not only was potentially permanent but also one-sided—FPS could still terminate without cause—or that such changes would be enforced by new and substantial statutory duties and liabilities.

FPS says Survitec never had any reasonable expectation that the parties' relationships would exist forever; after all, FPS could have terminated at any time. But the problem is not just a legislative

termination or prohibition of such relationships; it's their conversion into compelled and potentially-permanent relationships on a one-sided basis with substantial accompanying duties and liabilities and no escape valve for critical dealer-side issues (*e.g.*, dealer conflicts of interest) or any supplier-side issues (*e.g.*, a need to change business models or exit a market).

FPS has argued that the Act provided a grace period for Survitec to preserve its rights. But the gap between the Act's enactment date and its effective date was not a grace period:

First, unlike other cases finding a grace period mitigated retroactive harm, Survitec could not preserve its existing rights during that gap; at best, it could attempt to renegotiate all of its supplier/dealer agreements so as to include some dealer-side performance obligations, and even then, supplier-side termination grounds could not be included.

Second, under the Texas Constitution—as interpreted by this Court 115 years ago and applied by courts across the decades since—a law is of no force whatsoever, even for imparting notice of existence, until its effective date. Thus, the earliest date Survitec was on constructive notice of the Act was its effective date. Yet the Act immediately bound Survitec to FPS on that same date. Thus, there was no grace period.

Two decisions of this Court (from 1997 and 2014) did reference the time *before* a law went into effect in addressing retroactive-law challenges. The affected parties there, however, apparently did not appreciate the constructive-notice issue, and neither the majority or dissent in either case discussed it (nor did the Court purport to overrule decades of precedent). Because those were as-applied challenges, they should be limited to their facts, especially since the affected parties were already on constructive notice of time limits by virtue of existing statutes of limitations.

Of course, in any complex civil society, constructive notice is a necessary legal fiction such that "ignorance of the law" is no excuse. But extending that fiction backwards to things that aren't yet "the law" is an unnecessary departure from longstanding precedent, and this Court should reaffirm the constitutional rule.

Finally, although the Legislature made statements of purpose regarding the Act, those statements were inadequate to overcome *Robinson*'s "heavy" presumption against retroactive laws. In particular, the stated purpose was not a public purpose; it was a plan to benefit one private group at the expense of another. While this may be permissible for prospective laws, retroactive laws require more. The legislative statements also did not indicate how the Act might further any public

purpose, let alone how singling-out a limited number of suppliers for retroactive application of the law (while letting others continue under the prior law) was needed. Finally, the legislative statements were unsupported by factual findings sufficient to satisfy *Robinson*.

ARGUMENT

I. Survitec's challenge fits within the retroactive-law clause.

Ordinarily, a retroactive-law argument would begin with that clause. We discuss the Texas contract clause first, however, given FPS's threshold argument that Survitec's challenge is only cognizable under that clause.

A. The Texas contract clause reaches laws that weaken a party's ability to enforce a counterparty's contractual obligations, which isn't at issue here.

Article I § 16 of the Texas Constitution prohibits any "law impairing the obligation of contracts." This language was taken verbatim from Article I § 10 of the federal Constitution.

The federal clause was placed in the federal Constitution "for the very purpose of preventing the enactment of moratory laws," which are laws preventing or delaying creditors from foreclosing on mortgages after a borrower's default of a payment obligation. *Travelers' Ins. Co. v.*

Marshall, 76 S.W.2d 1007, 1017 (Tex. 1934).[18]

In *Travelers*', this Court held that the meaning of the Texas contract clause was fixed as of 1875-76 based on judicial decisions interpreting the federal clause:

> "[A]t the time the clause prohibiting the impairment of contracts was placed in the Texas Constitution in 1875-76, the language employed had a fixed and definite meaning in the jurisprudence of the country, the effect of which was that moratory legislation of almost every conceivable type was void. Since we adopted the [federal] contract clause without change, it must be held that we likewise adopted the fixed and definite interpretation which had been given it by the courts generally."

Id. at 1023.

Given this, FPS took the position in the district court that the Texas clause is limited to moratory laws. ROA.747 (arguing that the Act did not violate the Texas contract clause because "the Act is not a moratory law"). FPS also observed that this Court had not struck down any law under the Texas contract clause since the moratory law in *Travelers'*. ROA.745.

This Court need not decide whether the clause is that narrow, for even if it is broader, it has limits based on historical precedent:

---

[18] BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "moratorium" as "[a]n authorized postponement, usu. a lengthy one, in the deadline for paying a debt or performing an obligation.").

1. As of 1850, the federal clause was just understood to cover contracts concerning "fixed private rights of property." *Butler v. Com. of Pennsylvania*, 51 U.S. 402, 416 (1850) ("The contracts designed to be protected by the [federal Contract Clause] . . . are contracts by which . . . fixed private rights of property, are vested.").

Consistently, this Court distinguished the scope of the Texas contract clause (and other Article I § 16 protections) from the retroactive-law clause on the grounds that the retroactive-law clause protects "not ***only*** property rights" but other rights as well. *Corpus Christi People's Baptist Church, Inc. v. Nueces County Appraisal Dist.*, 904 S.W.2d 621, 627 (Tex. 1995) (emphasis added).

Unlike mortgages, the right to have an at-will business association concerns liberty rights rather than property rights, and the undersigned is unaware of any pre-1875 case striking down a legislative regulation of such liberty rights under the state or federal contract clauses.

2. Both the state and federal clauses use the word "obligation" (singular) rather than "obligations" (plural), and although subtle, the meaning of the singular term helps understand the narrow scope of the Texas contract clause. In particular, the "obligation" of a contract does not directly refer to obligations within a contract. Rather, it refers to the

positive law that enforces those obligations. Thus, an impairment of the "obligation" of contract literally means a weakening of the law's ability to enforce contractual obligations within the contract:

> "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced,—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend[s] to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened. . . . Any authorization of the postponement of payment, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition."

Langever v. Miller, 76 S.W.2d 1025, 1030 (Tex. 1934) (internal quotation marks omitted). To see how this reflects a limit on the clause's scope, it is important to distinguish between obligations and rights.

A right is something you can choose to do or not to do, while an obligation is a duty to perform.[19] FPS has suggested that contractual rights and obligations can be "equate[d]." FPS Br. 32. But "equated" is not the right word, as they are distinct concepts and are subject to different

[19] BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "right" as "[a] power, privilege, or immunity secured to a person by law" and "obligation" as "[a] legal or moral duty to do or not do something").

rules (*e.g.*, rights often are assignable even when obligations are not).[20]

To be sure, contractual rights and obligations often are paired, such that one side's performance obligation corresponds to the other side's right to enforce the obligation.

But not all rights are paired with corresponding performance obligations. Here, for example, Survitec had a right to terminate the parties' supplier/dealer relationship, and that right was a freestanding option right not associated with any performance obligation of FPS. Indeed, an agreement just to have an at-will business relationship inherently concerns *only* a right because such relationships do not create enforceable ongoing obligations.[21] In that sense, an at-will relationship is, strictly speaking, an example of "mutual assent" more appropriately called an "agreement" rather than a "contract":[22]

> T]he terms 'agreement' and 'contract' are not

---

[20] *See In re Martin*, 117 B.R. 243, 249 (Bankr. N.D. Tex. 1990) (in personal services contracts, rights typically are assignable while obligations are not); 1A QUINN'S UCC COMMENTARY & LAW DIGEST § 2-210[A][2] (assignability of rights versus obligations under UCC).

[21] *Hunn v. Dan Wilson Homes, Inc.*, 789 F.3d 573, 584 (5th Cir. 2015) (Texas law) ("contract for at-will employment, standing alone" is not "an 'otherwise enforceable agreement' because the promise of continued employment in an at-will contract is illusory—neither the employer or employee is bound in any way").

[22] *Martin v. Martin*, 326 S.W.3d 741, 746 (Tex. App.—Texarkana 2010, pet. denied) (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 1, 3 (1981)).

> synonymous; 'agreement' refers to a 'manifestation of mutual assent on the part of two or more persons,' whereas the term 'contract' refers to 'a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty."

Here, by eliminating Survitec's (but not FPS's) termination right, the Act did not weaken Survitec's ability to enforce any obligation of FPS; it just eliminated Survitec's freestanding option right. Moreover, as discussed further below, that right not only was freestanding but also it was *preexisting* in that it would have existed by default under common-law principles of business relationships, even absent any agreement *or* contract of the parties. *Infra* pp. 23-24 & n.30.

To be clear, our argument is ***not*** that the Texas contract clause just concerns obligations and not rights. Indeed, Survitec agrees that when one party's contractual performance obligation is paired with the other's side right to enforce that obligation, then a legislative weakening of the enforcement of the obligation (*i.e.*, an impairment of the "obligation" of contract) also weakens the corresponding right. *E.g.*, *Giles v. Stanton*, 26 S.W. 615, 618 (Tex. 1894) (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)).

But diminishing an obligation by impairing a corresponding right is

conceptually distinct from what happened here. What happened here was the legislative elimination of a right that (1) didn't correspond with a counterparty's performance obligation; and that (2) Survitec would have enjoyed by default *absent* any agreement or contract between the parties.

3. Before 1875, United States Supreme Court decisions had taken the position that the federal contract clause did not reach situations where contractual obligations were imposed, as by creating an enforceable contractual obligation where none previously existed:

> Should a statute declare, contrary to the general principles of law, that contracts founded upon an illegal or immoral consideration, whether in existence at the time of passing the statute, or which might hereafter be entered into, should nevertheless be valid and binding upon the parties; all would admit the retrospective character of such an enactment, and that the effect of it was to create a contract between parties where none had previously existed. But it surely cannot be contended, that to create a contract, and to destroy or impair one, mean the same thing."

Satterlee v. Matthewson, 27 U.S. 380, 412-13 (1829).

As late as 1883, the United States Supreme Court continued to rely on *Satterlee* as authority for permitting state laws to create enforceable contractual obligations where none presently existed. *See Ewell v. Daggs*, 108 U.S. 143, 151 (1883); *Gross v. United States Mortgage Co.*, 108 U.S.

477, 488-89 (1883) (both upholding laws that validated void or voidable contracts).[23]

Consistent with the idea that imposing new obligations is not a contract-clause issue, this Court held that law allowing the imposition of additional liability under a restrictive covenant (liability for late fees on untimely-paid assessments) was not within the Texas contract clause because the covenant did not prohibit such fees and the law authorizing them did not "withdraw or remove any contractual obligation." *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 170 (Tex. 2004).

To be sure, in the twentieth century, the United States Supreme Court broadened the scope of the ***federal*** clause to include laws that increased contractual obligations,[24] but even then, the Court did not view

---

[23] Before 1875, the Court rejected a federal Contract Clause challenge to a state constitutional provision that increased legal obligations by nullifying stipulated limitations of liability, finding that the stipulation was not part of a contract and, even if it were, it had reserved the Legislature's right to alter liabilities. *Sherman v. Smith*, 66 U.S. 587, 593 (1861). The Court could have held, in the further alternative, that increased liabilities weren't within the Contract Clause under *Satterlee*, but the Court didn't do so. However, this can't reasonably be read as a *sub silentio* overruling of *Satterlee* given the Court's rejection of the overall constitutional challenge and subsequent reliance on *Satterlee* cited above. In 1978, the Court stated that *Satterlee*'s view was ultimately repudiated, citing cases from 1916 and 1923. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 n. 16 (1978). The Court also cited *Sherman* but with a "*See also*" signal. *Id.*

[24] *See* Robert L. Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 512, 515 (1944). As Professor Hale explained, the Court began by "tacitly

the federal clause to reach laws that increased contractual remedies:

> "The statute in question concerns the remedy and does not disturb the obligations of the contract. . . . [W]hen the action of the Legislature is directed to the enforcement of the obligations assumed by the parties and to the giving of suitable relief for nonperformance, it cannot be said that the obligations of the contract have been impaired."

Funkhouser v. J.B. Preston Co., 290 U.S. 163, 167 (1933).

Apart from the Act not being a moratory law, each of the three limitations discussed above demonstrates why Survitec's challenge is not one under the Texas contract clause: (1) Survitec termination right was a liberty not property right; (2) the Act did not weaken Survitec's ability to enforce any obligation of FPS; and (3) the Act's imposition of new duties, liabilities, and remedies on Survitec did not "withdraw or remove any contractual obligation."

---

assum[ing] that strengthening and impairing an obligation are equally forbidden" although without striking down specific laws. *Id.* at 515 & n.15 (citing *Henley v. Myers*, 215 U.S. 373 (1910); *National Surety Co. v. Architectural Decorating Co.*, 226 U.S. 276 (1912); and *Stockholders of Peoples Banking Co. v. Sterling*, 300 U.S. 175 (1937)). By the middle of the *Lochner* era, the Court had invalidated laws that enlarged contractual obligations. Hale, *supra*, at 515 & nn.17-18 (citing *Georgia Ry. & Power Co. v. Decatur*, 262 U.S. 432 (1923); *Detroit United Ry. v. Michigan*, 242 U.S. 238 (1916)).

B. The Texas retroactive-law clause reaches laws that restrict positive-law rights and liberties or that increase positive-law duties and liabilities, both of which occurred here.

Article I § 16 of the Texas Constitution provides that "[n]o . . . retroactive law . . . shall be made." This clause has no direct federal analogue,[25] although this Court has cited the United States Supreme Court's historical discussion of concerns with legislative retroactivity when stating the twin risks the Texas clause protects against:

- the risk that the Legislature might "sweep away settled expectations suddenly and without individualized consideration"; and
- the risk that political pressures might tempt the Legislature to use retroactive legislation against "unpopular groups or individuals."

Robinson v. Crown Cork & Seal Co., Inc., 335 S.W.3d 126, 139 (Tex. 2010) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 266, 270 (1994)); *accord Robinson*, 335 S.W.3d at 145 ("[The retroactive-law clause] protects [the] settled expectation[] that rules are to govern the play and not simply the score, and [it] prevents the abuses of legislative power that arise when individuals or groups are singled out for special reward or punishment.").

[25] However, the Fourteenth Amendment's Due Process Clause does "protect[]the interests in fair notice and repose that may be compromised by retroactive legislation." *Landgraf v. USI Film Products*, 511 U.S. 244, 266, 270 (1994).

Non-retroactive laws presumptively are constitutional,[26] but retroactive laws are not. *Robinson*, 335 S.W.3d at 146 (Tex. 2010). Rather, there is a "heavy" presumption against retroactivity that can only be overcome by a "compelling public interest" that does not "greatly upset settled expectations." *Id.* As to that, courts must examine three factors:

1. The nature of the prior right impaired by the statute.

2. The extent of the impairment.

3. The nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings.

Id. at 139.[27]

As explained above, the Texas contract clause has narrow scope (whether limited to moratory laws or, if broader, laws weakening the enforcement of a counterparty's obligations). And the scope of other Article I § 16 prohibitions – ex post facto laws and bills of attainder – also are limited, applying to criminal laws[28] and other laws that punish.[29]

---

[26] *In re Doe 2*, 19 S.W.3d 278, 284 (Tex. 2000).

[27] The historical standard was whether a retroactive law impaired vested rights; *Robinson* decided this was "too much in the eye of the beholder to serve as a test." 335 S.W.3d at 143.

[28] *Rodriguez v. State*, 93 S.W.3d 60, 66 (Tex. Crim. App. 2002) (ex post facto laws).

[29] *Johnson v. Davis*, 178 S.W.3d 230, 240 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (bills of attainder).

Early on, however, this Court held that that the retroactive-law clause did not simply "protect . . . ***only*** such rights as were protected by other declarations of the constitution," but that it "protect[ed] ***every*** right . . . which may accrue under existing laws," where "right" was defined to include all instances where as a "consequence of the existence of given facts," the "written or unwritten" domestic "law declares that that one person is entitled . . . to resist the enforcement of a claim urged by another." *Mellinger v. City of Houston*, 3 S.W. 249, 252-53 (Tex. 1887).

Here, Survitec's right to terminate the parties' at-will business relationship was exactly that: a right that would have completely "resist[ed] the enforcement of [FPS's] claim."

FPS says (at 22-24) the retroactive-law clause only protects rights that arise from "positive law," which FPS defines to mean "United States and Texas statutory and common law." But historically, the right to engage in at-will business associations—at-will employment, at-will partnerships, at-will franchise/distributorships, other at-will agencies—was a longstanding common-law right.[30] (For some relationships, such

[30] *Montgomery County Hospital District v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998) ("[f]or well over a century" employment in Texas is at-will "absent a specific agreement to the contrary"); *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 545 (Tex. 1998) ("partners have no duty to remain partners"); *id.* at 544 (declining to

rights are now statutory.[31])

Accordingly, whether the parties here had expressly agreed to an at-will supplier/dealer relationship or not, Survitec would have had the right to terminate it at will absent any contrary agreement, as with any business association having no fixed or defined term.

And even if called a "contract" rather than "agreement," the right to enforce a contractual termination right is a positive-law right under federal statute[32] and, in turn, Texas law.[33]

Finally—and regardless of whether Survitec's termination right is

---

make exception to at-will nature of common-law partnerships); *Kennedy v. McMullen*, 39 S.W.2d 168, 174 (Tex. Civ. App.—Beaumont 1931, writ ref'd), *cited by Clear Lake City Water Auth. v. Clear Lake Utilities Co.*, 549 S.W.2d 385, 390-91 (Tex. 1977) ("contracts which contemplate continuing performance . . . and which are indefinite in duration can be terminated at the will of either party"); *id.* at 391 (noting exceptions for certain exclusive franchise/distribution agreements where "reasonable duration" term was implied); 3A ANDERSON U.C.C. § 2-326:49 (consignor/consignee relationships); *Gaede v. SK Investments, Inc.*, 38 S.W.3d 753, 757 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (agencies usually "at will" absent agreement on duration).

[31] TEX. BUS. ORG. CODE § 152.501(b)(1) (permitting at-will withdrawal, with notice, in general partnerships).

[32] 42 U.S.C. § 1981(a) ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . ."); *id.* § 1981(b) ("[T]he term 'make and enforce contracts' includes the . . . termination of contracts . . . .").

[33] *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 157 (1982) ("[A] fundamental principle in our system of complex national polity" mandates that "the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution").

called a common-law or statutory right, or a right based on mutual assent (an "agreement"), or just a contract right—there is no precedential basis to exclude rights from the retroactive-law clause simply because they may also fall within the scope of an agreement or contract.

Indeed, Texas courts have found retroactivity violations with respect to both implied-in-law and express contract rights. *See Ex parte Abell*, 613 S.W.2d 255, 260 (Tex. 1981) (construing retroactive-law clause and citing with approval *Click v. Seale*, 519 S.W.2d 913, 920 (Tex. App.—Austin 1975), which held that a law could not revoke a party's right to disclaim a contract, where that right was an implied-in-law contract term by statute); *Chesapeake Operating, Inc. v. Denson*, 201 S.W.3d 369, 372 (Tex. App.—Amarillo 2006, pet. denied) (statute could not retroactively alter contractual allocation of production tax between royalty owner and lessee of mineral lease (citing *Ex parte Abell*, 613 S.W.2d at 260)).

All that said, the most significant harm here was not simply an isolated elimination of Survitec's right to have an at-will relationship (as by, *e.g.*, a law that just terminated such relationships and prohibited new ones). It was the fact that the Act *also* compelled Survitec to remain in a supplier/dealer relationship on a potentially-permanent, yet one-sided, basis and by enforcing that compelled relationship with the imposition of

entirely new and substantial duties and liabilities.

In essence, the Act removed at-will supplier/dealer relationships from the realm of voluntary business associations and relocated them in a state-regulated regime with new duties and liabilities, a regime where private enforcement was under a statute, not the parties' agreement or contract. By imposing such positive-law duties and liabilities on preexisting relationships, the Act "attache[d] new legal consequences to events completed before its enactment" and thus was the very definition of a retroactive law.[34]

Fundamentally, what the Legislature did was create a statutory regime that, in relevant part, was analogous to one the United States Supreme Court explained as outside the federal Contract Clause. Specifically, that Court explained that marriage contracts weren't within the federal clause because once such a contract is entered, the parties are not free to exit it at-will; rather, they must look to positive law to provide grounds for dissolution. In other words, the institution of marriage takes what would otherwise be a private and voluntary agreement and moves it

[34] FPS Br. 25 (quoting *Landgraf,* 511 U.S. at 270); *see also Robinson*, 335 S.W.3d at 136-37, 138-39 (discussing *Landgraf*); *Cardenas v. State*, 683 S.W.2d 128, 131 (Tex. App.—San Antonio 1984, no writ) (law creating new "duties" with respect to "transactions or consideration already past" is retroactive).

into the realm of positive law:

> "[W]hile marriage is often termed . . . as a civil contract, . . . it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. . . .
>
> [T]he contracting parties . . . have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the state, statutory or common, which defines and prescribes those rights, duties, and obligations. ***They are of law, not of contract***. It was a contract that the relation should be established, but, being established, the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the will of the sovereign, as evidenced by law. They can neither be modified nor changed by any agreement of parties."

Maynard v. Hill, 125 U.S. 190, 210-11 (1888) (internal quotation marks omitted, emphasis added).

When FPS and Survitec entered their at-will supplier/dealer relationship, they weren't required to get "married" either in a limited sense (as by a fixed-term relationship terminable only for cause) let alone

any greater sense (such as a continuing relationship terminable only for cause). Rather, they were entirely within their rights to associate on a purely at-will basis, whether by express mutual assent or just by default.

And yet consider what happened over a decade later: The Legislature took a private and voluntary relationship that FPS itself describes as "loose," "open-ended," "indefinite," and "at-will,"[35] and moved it to a statutory regime with substantial new duties and liabilities that the parties couldn't contract around.

What's at issue is not the enforcement of contractual obligations; it's the enforcement of statutory duties and liabilities. Indeed, FPS did not even plead a breach of contract claim; it pleaded a statutory violation and sought to obtain statutory remedies. ROA.23-25, 126-129.[36] The legislative conversion of the parties' relationship from a voluntary business association to a compelled statutory regime is the fundamental reason this case fits in the retroactive-law clause rather than the Texas contract clause.

FPS has said "[t]he retroactive-law clause . . . protects a person from

---

[35] FPS Br. 40; FPS C.A. Reply Br. 10-11.

[36] As FPS says, "[t]he ***statute*** . . . imposes consequences—damages, interest, costs, and fees—on dealers who fail to comply with ***the Act's*** prerequisites for termination." FPS Br. 3 (emphasis added).

civil consequences based on changes wrought by a subsequent legal regime of which he could not have been aware." FPS C.A. Reply Br. 3. And that is what happened here.[37]

C. Any overlapping scope between the clauses would not render either superfluous.

FPS views the scope of the retroactive-law and contract clauses as mutually exclusive such that any other view would make one superfluous. As explained above, the clauses can be given largely—perhaps entirely—distinct scopes, with the contract clause reaching laws that weaken the ability enforce a counterparty's contractual obligations, and the retroactive-law clause covering laws that restrict or eliminate common-law and statutory rights and liberties, even if they also exist within the context of an agreement or contract, as well as laws that impose new or increased legal duties and liabilities, or laws that impair rights that, while contractual, are unconnected with any counterparty's performance obligations. That said, there is no need to perfectly and narrowly define either clause to make sure they are "mutually exclusive."

---

[37] By creating a new cause of action and lost-profits remedy, then imposing it on at-will relationships by removing their at-will status, what occurred was worse than reviving a cause of action that *had* existed. *Mellinger*, 3 S.W.at 255 (act that "revive[d] causes of action already barred . . . would be retrospective[] within the intent of the prohibition").

FPS's opposing view is based on the idea that "the application of each prohibition must be measured by the object to be obtained." FPS Br. 17 (quoting *Robinson*, 335 S.W.3d at 137).

In context, "object" means the harm to be avoided. The contract clause was directed against moratory laws or, if more broadly construed, laws that weaken the ability to enforce contractual obligations, while the retroactive-law clause was directed against laws that change the rules of the game midstream and laws that single out individuals or groups. These are all different objects, but that does not make the scope of the clauses mutually exclusive, for a given law can implicate more than one harm. Indeed, this Court has examined whether a law violated the contract and retroactive-law clause without suggesting it was a "one or the other" issue,[38] and other courts have held that a law violated both, including the very Act at issue here.[39]

FPS says "the retroactive-law clause protects 'against the arbitrary

---

[38] *See Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 634 (Tex. 1996).

[39] *Baytown Const. Co., Inc. v. City of Port Arthur, Tex.*, 792 S.W.2d 554, 560 (Tex. App.—Beaumont 1990, no writ) (ordinance and resolution constituted "retroactive law" and "law that impaired the obligations of a contract"); *Associated Mach. Tool Techs. v. Doosan Infracore Am., Inc.*, No. 4:15-CV-2755, 2015 WL 13660130 (S.D. Tex. Nov. 24, 2015) (finding Act violated both clauses).

exercise of some power *not forbidden by the other clauses*' in Article 16." FPS Br. 21 (quoting *Mellinger*, 3 S.W. at 252 (FPS emphasis)). But the fact that a constitutional protection reaches certain exercises of legislative power not reached by others doesn't entail it reaches nothing else.[40] Moreover, this quote must be read in context, which was the rejection of the idea that the retroactive-law clause covered *no more than* other constitutional protections, not an effort to define precise boundaries, let alone by uncrossable lines.[41]

FPS argues (at 30-33) that if strict boundaries aren't drawn, it would render the contract-clause superfluous. But regardless of any overlapping scope, neither clause would be superfluous because they have different legal standards. To see why this matters, it is necessary to explain a *structural* difference between the Texas contract clause and its federal analogue:

> "[A]lthough the contract clause in the Federal Constitution prohibits the impairment of contracts by state legislation, still a wide range of police control may be exercised by the states . . . even to

---

[40] *Mellinger*, 3 S.W. at 252 (stating only that legislative action violating the retroactive-law clause "might" not be prohibited by other clauses).

[41] *Mellinger*, 3 S.W. at 252 ("[I]t cannot be presumed that" the retroactive-law clause "was intended to protect . . . only such rights as were protected by other declarations of the constitution"; rather, the retroactive-law clause protects "every right . . . which may accrue under existing laws"); *supra* p. 23.

> the extent of impairing previously existing contracts. . . . It is quite obvious the same rule of interpretation cannot be applied to the contract clause in our [Texas] Constitution, for the reason that, unlike the Federal Constitution, the rights guaranteed by [the Texas] clause (section 16, art. 1) are by section 29 of the Bill of Rights 'excepted out of the general powers of government, *** and all laws contrary thereto, *** shall be void.' This is an express limitation on the police power which does not appear in the Federal Constitution . . . ."

Travelers', 76 S.W.2d at 1011. Thus, a legislative impairment of the obligation of a contract may not be excused by the breadth of the State's police power, even in times of emergency:

> "Since the impairment of the obligation of contracts is prohibited by section 16, article 1, of the Bill of Rights, without any specified exception in favor of legislative action to the contrary during industrial depressions or emergency periods, we are without power to write such an exception into the organic law."

Id.

This Court later confined *Travelers'* holding to laws that directly impair the obligation of contacts—and so laws having indirect impacts may still be upheld as valid exercises of police power[42]—but even with that limitation, *Travelers'* means a law could violate the Texas contract clause

[42] *Barshop*, 925 S.W.2d at 634-35.

even when passed for an important public purpose. By contrast, the retroactive-law clause standard *always* takes legislative purpose into account, and so the same law would not necessarily violate that clause (*i.e.*, if its purpose was sufficiently compelling to overcome the presumption against retroactivity).

Thus, even if the retroactive-law clause were applied to any rights within the scope of the Texas contract clause, the contract clause would not be superfluous since it could still reach laws not covered by the retroactive-law clause, as just explained.[43] And the converse – that a law violating the retroactive-law clause might not violate the Texas contract clause – is also true, as would be reflected by any retroactive law that didn't implicate contract rights.

---

[43] Similarly, a law that violates the Texas contract clause might not violate the federal one. *Sveen v. Melin*, 138 S. Ct. 1815, 1817 (2018) (determinative question for federal challenge is whether law was "drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose' " (internal quotation marks omitted)). FPS says (at 33-34 n.12) Survitec has taken inconsistent views regarding the difficulty of establishing a contract-clause versus retroactive-law-clause challenge, but FPS conflates Survitec's district court statements regarding the federal Contract Clause (which strongly defers to legislative purposes) with one of its appellate statements regarding the Texas contract clause (which doesn't give such deference for laws directly impairing the obligation of contracts).

II. Applying the Act to the parties' agreement was a retroactive application of law.

A. The Act eliminated positive-law rights and liberties and attached new legal duties and liabilities to conduct occurring before it took effect (i.e., the parties' decision to have an at-will business relationship).

The Legislature intended the Act to have retroactive effect and, most notably, singled out a limited category of supplier/dealer agreements for retroactive treatment. Specifically, the Legislature divided existing agreements into two groups: (1) those that were ongoing with no set expiration date; and (2) all others. The Legislature then exempted category (2) from retroactive application: they remained governed under pre-Act law until any renewal.[44]

FPS says (at 26) the Act's application to the parties' agreement was prospective because it just attached consequences to Survitec's post-Act termination of FPS in 2017. But the question isn't whether post-Act events triggered any aspect of the Act. Rather, as FPS acknowledges, the question is whether the Act "attache[d] new legal consequences to events completed before its enactment." FPS Br. 25-26 (emphasis omitted). And that is what happened here:

The relevant event was Survitec's assent to an at-will relationship

[44] *Supra* pp. 3-4.

with FPS, which occurred in the 1990s. ROA.777. In turn, the Act's imposition in 2011 of a one-sided duty for Survitec to maintain that relationship permanently (absent limited events), while imposing new and substantial statutory duties and liabilities, both directly *and* retroactively "attache[d] new legal consequences" to Survitec's agreement to an at-will supplier/dealer relationship. *See Bob Tatone Ford, Inc. v. Ford Motor Co.*, 197 F.3d 787, 792 (6th Cir. 1999) (rejecting argument that a similar law restricting supplier termination rights for preexisting agreements was "prospective": "[the supplier] acquired its rights under the contract when the parties executed the agreements and not when [the supplier] exercised those rights").[45]

FPS says the Act does not act retroactively because Survitec voluntarily accepted the Act's terms by "choosing to continue the parties' relationship after the Act took effect." FPS Br. 14. But Survitec didn't "choose" to continue the relationship after the Act became effective. It had no choice. The moment the Act went into effect on September 1, 2011, Survitec simultaneously had *no* ability to discontinue the parties'

[45] The Sixth and Third Circuits found supplier/dealer laws like the Act invalid under Ohio's retroactive-law clause. *Bob Tatone Ford*, 197 F.3d at 792; *Bull Int'l, Inc. v. MTD Consumer Grp., Inc.*, 654 Fed. Appx. 80, 84 (3d Cir. 2016).

relationship at will; rather, Survitec was immediately bound to FPS (no termination without cause, with cause narrowly defined), with new duties (*e.g.*, inventory buybacks) even for permitted terminations, and substantial potential liabilities (*e.g.*, lost profits) for unpermitted terminations.

FPS argues that under Texas law, amendments to certain agreements (specifically, arbitration agreements) aren't considered impermissibly retroactive in particular situations, even where they "change[] the parties' [prior] contractual obligations."[46] FPS Br. 29 n.10. FPS also compares the present situation to at-will employees who accept new work conditions by continuing to work after those conditions arise. FPS Br. 14. But in both situations, the affected party has notice of the change and their acceptance occurs by voluntary continued performance.[47] But what happened here was involuntary, like an at-will employee told

---

[46] FPS Br. 29.

[47] *In re Halliburton Co.*, 80 S.W.3d 566 (Tex. 2002) (arbitration agreement enforceable where accepted by performance). Neither *Halliburton* nor FPS's other cases discuss legislative retroactivity. *Weekley Homes, L.P. v. Rao*, 336 S.W.3d 413, 417-19 (Tex. App.—Dallas 2011, pet. denied); *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 209 (5th Cir. 2012). *Carey* did note the "unfairness of a situation where two parties enter into an agreement that ostensibly binds them both" but "one party can escape its obligations," *id.* at 205-08, as here, where the Legislature eliminated Survitec's termination right while leaving FPS's intact.

one morning they can't stop working except for cause.

To be sure, FPS argues (at 46-52) that there was a grace period between the Act's enactment and its effective date during which time Survitec could have avoided future changes by terminating the agreement. As explained below, the gap between those two dates does not count as a grace period for the retroactivity analysis. That said, the fact that FPS makes a grace-period argument proves the point: there would be no need for such argument if a law weren't retroactive to begin with.

B. Characterizing the parties' agreement as a continuing contract does not make the Act "prospective only" because Survitec could not terminate the agreement after the Act went into effect except for cause, with cause narrowly defined.

FPS says that application of the Act to the parties' agreement was not a retroactive application of law because that agreement was a "continuing contract,"[48] which FPS defines as an agreement that "consists of a series of terms defined by the 'continuing' or 'successive' performance the contract requires."[49] FPS Br. 37.

---

[48] FPS says (at 35) "the Legislature concluded that applying the Act to . . . 'continuing contracts' that 'ha[ve] no expiration date'[ ]would suffer no constitutional infirmity." But nothing in the legislative history reflects consideration of the issue, which is ultimately one for courts to decide.

[49] Courts use the term "continuing contract" in varied situations, including where performance is divided into parts and where ongoing performance is required, neither at issue here. *Dell Computer Corp. v. Rodriguez*, 390 F.3d 377,

Strictly speaking, the parties' agreement was not a "continuing contract" under that definition: it was at-will and there was no obligation to continue any performance, let alone for a particular term or series of terms, which distinguishes FPS's primary case (*John Deere*).[50]

There, a divided (4-3) Maryland court held that application of a supplier/dealer law to an agreement terminable on 120 days' notice did not constitute retroactive action. The court reasoned that "[t]he ongoing nature of the contracts, together with the 120 day notice provision, effectively created a series of 120 day contracts." *Id*. at 602. In turn, because John Deere had not sought to terminate the parties' contract within 120 days of the law's enactment, the parties had "effectively renewed" their contract after the law went into effect:

> "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 601.

The notion that continuing contracts should be viewed as a series of

391-92 & nn.37, 39 (5th Cir. 2004).

[50] *John Deere Const. & Forestry Co. v. Reliable Tractor, Inc.*, 957 A.2d 595, 601 (Md. 2008).

independent contracts is an outlier.[51] More fundamentally, however, the court's non-retroactivity finding was premised on the idea that the supplier could have terminated the agreement after the law went into effect—thereby avoiding the "effective[] renew[al]"[52]—but that wasn't the case here: once the Act went into effect, Survitec immediately was bound.

FPS also cites *Northshore Cycles, Inc. v. Yamaha Motor Co.*, 919 F.2d 1041, 1043 (5th Cir. 1990) (per curiam), which proposed the same kind of analysis and thus merits the same response: Survitec had no ability to take any steps after the Act went into effect to avoid its application. (In addition, the analysis in *Northshore Cycles* was dicta, and the Court found the law unconstitutional as applied. *Id.* at 1043-44.)

---

[51] According to the dissent, no prior court had held that "the continuation of an at-will contract beyond the notice for termination period is the equivalent of the parties 'making' a series of independent contracts." *Id.* at 602 (Harrell, J., dissenting) (collecting cases from Minnesota, Illinois, Indiana, Wisconsin, and South Carolina supporting idea that a material modification or express renewal is needed to incorporate a new statute into a contract). Even the federal court certifying the question avoided the majority's answer by re-interpreting the issue as one of federal law. *Reliable Tractor, Inc. v. John Deere Constr. & Forestry Co.*, 376 F. Appx. 938, 942 (11th Cir. 2010).

[52] 957 A.2d at 601 ("[I]f Deere had provided notice of termination within 120 days of the enactment of § 19-103, to apply that enactment to the contracts at issue would then constitute a retroactive application of the law."). The majority did not distinguish between enactment and effective dates, but that didn't matter because the law became effective 53 days after enactment, and so John Deere still had 67 days to terminate under the majority's view of the situation.

C. Whether the Act could be considered prospective in any sense as a matter of federal statutory construction does not answer the Texas constitutional question.

FPS cites *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994), which examined Congress's action in amending a federal law to prohibit employers from making race-based terminations. At issue was whether the amendment applied to pending cases.[53]

Under principle of federal statutory construction, the amendment would not apply to pending cases unless it was the kind of "narrow error-correcting statute[]" that "must be read to apply to pending cases 'because a contrary reading would render it ineffective.' " *Id.* at 311. Because the amendment was broad on multiple dimensions,[54] the Court found it would be "entirely effective, even if it applies only to conduct occurring after its effective date."

FPS reads "entirely effective" to mean that application of the amendment to cases involving employment agreements entered ***before*** the amendment would be a "prospective" application of law. But such a reading is both incorrect and inapplicable:

---

[53] *Id.* at 303 ("We granted certiorari . . . on the sole question whether [the amendment] applies to cases pending when it was enacted.").

[54] It was not limited to employment agreements, it increased liability, and it established new standards of conduct. *Id.* at 303-04.

1. In context, "entirely effective" did not mean "applicable in every conceivable case" because the Court was only assessing whether a prospective-only reading would render the amendment meaningless (a relevant concern for narrow, error-correcting amendments). *Id.* Thus, when the Court answered that question in the negative, it did not—and had no reason to—decide whether a "prospective-only" reading meant that the statute was applicable to every future case (*i.e.*, regardless of when the underlying employment agreement was entered). It just wasn't at issue.

2. The issue in *Rivers*—whether an amendment applied to pending cases or not—does not correspond to what counts as "retroactive" under the Texas clause. A Texas law in 2023 that eliminates legal rights secured in 2022 would be retroactive vis-à-vis those rights for purposes of the *Robinson* analysis whether cases involving those rights were pending cases filed in 2023 or future cases filed in 2024.

More generally, *Rivers* decided an issue of federal statutory construction against the backdrop of the federal Constitution, which places fewer limits on retroactive legislative action. Thus, even if *Rivers* had held that the amendment could apply to cases involving pre-existing employment agreements, the result would not mean the amendment wasn't retroactive in a relevant sense; it would just mean the federal

Constitution didn't prohibit it.[55]

III. Application of the Act to the parties' agreement violates the *Robinson* standard.

A. Nature of the rights at issue

The Act retroactively eliminated a longstanding, fundamental, and significant right while imposing new, substantial, and inescapable duties and liabilities.

1. The right to associate at will was longstanding.

As a matter of mutual agreement, Survitec's right to terminate the parties' supplier/dealer relationship at will had existed for more than a decade when the Act went into effect, while the underlying default common law right to have at-will business associations, such as at-will employment, dated back to the 1800s.[56]

2. The right was a fundamental liberty right: freedom from contract.

It's hard to imagine a right more fundamental to a business association that the basis on which it may be terminated, and such freedom "from" contract falls within the liberties protected by freedom "of"

---

[55] FPS cites *Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405 (11th Cir. 1998), involving the same law, but those defendants made no retroactivity arguments and, again, the federal Constitution imposes fewer retroactivity limits.

[56] *Supra* p. 23-24 & n. 30. The right also was "vested" in that it was not contingent on unmet conditions. Post-*Robinson*, that isn't determinative, but a right's non-contingent nature does reflect settled expectations.

contract. In particular, the "utmost liberty of contracting " is a policy this Court "reinforce[s] . . . virtually every Court Term," and it includes "enforc[ing] conditions precedent to contract formation." *Energy Transfer Partners, L.P. v. Enter. Products Partners, L.P.*, 593 S.W.3d 732, 738 (Tex. 2020) (internal quotation marks omitted).

There, this Court reaffirmed that Texas law permits parties to avoid forming partnerships by letting them agree in advance not to be partners absent certain events, even though they may otherwise be working together extensively for a common purpose and even though they may accepted related contractual obligations to each other. *Id. at* 734-36, 741.

By contrast, imagine if a law were passed that retroactively recharacterized such *non*-partnerships not merely as partnerships (which by default are just "at will") but as *binding* partnerships terminable only on limited bases. Such a law, like the one here, would thwart parties' prior ability to know the future legal consequence of their actions, thus violating fundamental protections of the retroactive-law clause:

> " 'Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. . . . In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of

their actions.' "

Robinson, 335 S.W.3d at 139 (quoting *Landgraf*, 511 U.S. at 265-266)).

3. The right was significant in terms of business and competitive risks.

Pre-Act, if Survitec wanted to change business models from sales to leasing, or to centralize servicing in one location, or to exit a particular market, or if it just had concerns about FPS's performance—*e.g.*, safety issues, low sales/service volume, too much focus on Survitec competitors (all reflected here)[57]—Survitec could move on without having to litigate and prove anything, knowing it would incur no liability, let alone the millions FPS seeks here. The right was thus significant from a business and competitive risk standpoint.

B. Degree of impairment

1. The extent of impairment was beyond total: the Act eliminated a right and imposed new and substantial duties, liabilities, and remedies.

Had the Act merely terminated existing at-will relationships and prohibited them going forward, that would have entirely eliminated Survitec's right to operate on an at-will basis. But the Act went further by compelling Survitec to remain bound to FPS on a potentially-permanent and one-sided basis while simultaneously imposing new and substantial

[57] *Supra* p. 1.

duties and liabilities:

(i) The Act entirely eliminated Survitec's ability to end the supplier/dealer relationship without cause, and the permitted causes were extremely limited.[58] The forced relationship was also one-sided because FPS could still terminate without cause and, in fact, demand buyback of its inventory even as the terminating party.[59]

(ii) The Act imposed new obligations (notice, opportunity-to-cure, and inventory-buyback, even for permitted terminations) and substantial liabilities (damages, including lost profits, attorney fees, and maximum interest) for statutory violations. Indeed, according to FPS, the Act made Survitec responsible for millions of dollars in alleged losses via liability rules that previously never existed.

By forcing Survitec but not FPS to remain in the relationship and imposing substantial new obligations and liabilities, the Act eliminated Survitec's ability to conduct business where, with whom, and how it wanted, while giving FPS a quasi-property right attaching to Survitec's ongoing business.[60] By analogy, imagine the Legislature passed a law

---

[58] *Supra* pp. 2-3.

[59] Act §§ 57.152, 57.353(a).

[60] *See Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972) (describing right of

changing all at-will jobs to lifetime employment, absent criminal conduct or voluntary resignation. Or if dating couples woke up to learn they'd been married by operation of law and "no fault" divorce was prohibited except as to one of them.

Or imagine a client and its attorney had agreed the attorney would represent the client on an at-will basis. Then a law went into effect providing that all at-will attorney/client relationships are now such that the attorney can fire the client for any or no reason but the client cannot fire the attorney except on a limited number of grounds. Further, those grounds exclude situations where the client decided it didn't need an attorney or no longer wanted this particular one, even if the reason was that the attorney started working for another party whose interests were at odds with the client's. The analogous happened here:

By operation of retroactive law, FPS was empowered to remain an authorized seller/servicer of Survitec products, even if sales of Survitec products were decreasing, even if Survitec had safety concerns, even if Survitec decided it didn't want to serve that product/geographic market,

---

discharge for cause only as quasi-property right).

and even if FPS was focusing more on products of other suppliers.[61] But FPS still could terminate without cause.

2. The Act singled out a limited set of supplier/dealer relationships.

The Legislature expressly stated an intent regarding the Act's retroactive application. Further, the Act's retroactive scope is narrower—and thus worse—than it might first appear. And that's because the Act singled out agreements with no dealer performance obligations, like this one, for harsher treatment than other pre- or post-Act agreements.

In particular, the Act transformed at-will agreements with no dealer performance obligations into permanent agreements where termination was permitted on extremely limited grounds (*e.g.*, the supplier committed a crime, moved or went out of business, or didn't pay for product). By contrast, the Act permitted other pre-Act agreements—and all new post-Act agreements—to have additional termination grounds (*i.e.*, based on dealer performance obligations).[62] Further, the Act permitted all other pre-Act agreements—such as agreements with set durations (*e.g.*, a 5-year

---

[61] FPS has suggested that the "potentially permanent" aspect of the Act isn't at issue because FPS didn't seek an injunction to make Survitec maintain the relationship (FPS C.A. Reply Br. 4), but FPS's choice of a new-and-retroactive lost-profits remedy rather than a new-and-retroactive injunction remedy just reflects the Act's broad choice of retroactive remedies.

[62] *Supra* pp. 2-3. The grounds were still limited and could not include supplier-side issues but could provide protections Survitec did not have.

agreement)—to continue in force under the old law until their term ended or was renewed.[63]

3. Survitec's expectations were reasonable given the longstanding nature of the right and absence of retroactive regulation.

FPS argues (at 49) that, given the at-will nature of the relationship, Survitec had no reasonable expectation of continuing the relationship. But Texas has permitted at-will business relationships since the late 1800s.[64]

FPS also cites (at 53) two repealed Texas laws regulating dealership agreements. As a threshold matter, those regulated farm, forestry, warehouse, and construction equipment, not marine life rafts; more fundamentally, they applied only to agreements entered on/after their effective dates[65] and they permitted suppliers to terminate the relationship if "the supplier determines that the dealer's area of responsibility or trade area lacks sufficient sales potential to reasonably

---

[63] *Supra* pp. 3-4.

[64] FPS says (at 50) at-will workers "do not have any great expectation of employment" (quoting *Fort Wayne Patrolmen's Benevolent Ass'n v. City of Fort Wayne*, 625 F. Supp. 722 (N.D. Ind. 1986)). But the law there "[did] not change those at will contracts." *Id*. at 730.

[65] 1991 Tex. Sess. Law Serv. ch. 199 § 3 (H.B. 1694) (TEX. BUS. & COM. CODE ch. 19); 1999 Tex. Sess. Law Serv. ch. 725 § 4 (H.B. 965) (Chapter 19 amendments). Chapter 19 was recodified without substantive change as Chapter 55. 2007 Tex. Sess. Law Serv. ch. 885 § 2.01 (H.B. 2278).

support continuation of the agreement."[66] Such laws thus confirm the reasonableness of the expectation that at-will relationships won't be prohibited retroactively, let alone such that a supplier could be forced to remain potentially forever in a relationship even if circumstances arose making it economically untenable.

FPS says "[a] person whose rights 'are subject to state restriction[] cannot remove them from the power of the state by making a contract about them.' " FPS Br. 40 (quoting *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908)). But the contract in *Hudson County* was illegal when made (*id.* at 353-54), and the case also just concerned the federal Contract Clause, which permits more police-power regulation.

More fundamentally, the fact that the Legislature may regulate marriage, employment, attorney-client relationships, and other business associations, does not mean it can retroactively impose those relationships on parties who took all required steps to avoid them.

4. The Act provided no grace period because constructive notice of a law begins on its effective date, not its enactment date.

FPS downplays the Act's impact because there was a 77-day gap

[66] TEX. BUS. & COMM. CODE §§ 19.26(e), 55.055 (both repealed).

between June 17, 2011 (when the Governor signed the legislation),[67] and September 1, 2011 (when the Act went into effect under the Texas Constitution). FPS contends that this gap was a grace period that permitted Survitec to preserve its rights and, in turn, inoculated the Act against constitutional challenge (FPS Br. 46-52), but this is incorrect.

(i) The gap was not a grace period because Survitec could not preserve its rights during the gap.

Even if FPS were amenable to continuing an at-will relationship after the Act, it would not have been possible because the Act expressly prohibited contracting around its terms. Act § 57.003.

In theory, Survitec could have terminated the parties' agreement during the gap and attempted to negotiate an agreement that, even if not "at will," at least had some dealer performance obligations. But apart from being subject to FPS's acceptance, that would have required Survitec to successfully renegotiate all other agreements with similar-situated dealers and impose the same terms. Act §§ 57.153, 57.154(a)(1). And even that uncertain workaround would at best be partial because it still would not permit Survitec to include any escape valve for supplier-side issues, such as changing business models or exiting a product or geographic

[67] Tex. H.J., 82nd Leg., 2011 R.S. No. 90 at 6919 (May 30, 2011).

market.

By contrast, in every case FPS cites where a grace period was found to alleviate retroactive impact, the affected party could have completely preserved all rights as they existed before the law went into effect.

(ii) The gap was not a grace period because the Act's enactment did not serve as constructive notice of its provisions; constructive notice arose only on its effective date.

FPS's grace-period argument depends on the idea that Survitec had constructive notice of the Act before its effective date. But that isn't correct as a matter of longstanding Texas constitutional law.

The maxim "ignorance of the law is no excuse" means everyone is on constructive notice of the law whether they know it or not. It's a necessary fiction, but stating it does not fully explain it; rather, it raises a follow-up question: What is "the" law? Is it the law in effect or does it also include legislation not yet in effect? Academics may debate this, but courts must draw a line.

Under Texas law, the line has been drawn at a law's effective date, not its date of enactment, and this is a Texas constitutional rule. Indeed, precedent from this Court dating back 115 years and decided under the Texas Constitution holds that a law not yet in effect has no power even for imparting notice of its existence. *See Missouri, K. & T. Ry. Co. of Tex. v.*

State, 100 S.W. 766, 767-68 (Tex. 1907).

There, this Court held that parties "were not required to take notice of [the law at issue] until it became operative" 90 days after its enactment because "[t]he words, 'or go into force,' used in our Constitution, emphasizes the idea that the law is without vitality until the 90 days shall expire." *Id.* (quoting TEX. CONST. art. III, § 39); *accord Wright v. Hardie* ("*Hardie*"), 32 S.W. 885, 886 (Tex. 1895) (measuring a grace period from the "time after the law goes into effect").

FPS calls this rule "ancient," FPS Br. 48 n.17, and the use of that label in a negative sense might be justified when a rule stated long ago has since been ignored. But the rule has been applied in state and federal cases from the 1930s, the 1950s, the 1970s, the 1990s, and the 2000s:

- "No Act of the Legislature is operative as notice until it becomes a law." *Popham v. Patterson*, 51 S.W.2d 680, 683 (Tex. 1932).

- "An Act of the Legislature does not operate as notice until it goes into effect as law." *Norton v. Kleberg County*, 231 S.W.2d 716, 718 (Tex. 1950); *see also Highland Park Indep. Sch. Dist. v. Loring*, 323 S.W.2d 469, 471 (Tex. Civ. App.—Dallas 1959, no writ) (law violated retroactive-law clause where it provided no post-effective-date grace period).

- *Tex. Water Rights Comm'n v. Wright* ("*Wright*"), 464 S.W.2d 642 (Tex. 1971) (finding grace period reasonable and measuring it from law's effective date); *see also Alvarado v. Gonzales*, 552 S.W.2d 539, 542-43 (Tex. Civ. App.—Corpus

Christi 1977, no writ) (finding grace period unreasonable and measuring it from law's effective date);

- *AT&T v. Rylander*, 2 S.W.3d 546, 554 (Tex. App.—Austin 1999) (finding grace period reasonable and measuring it from law's effective date).

- *Vaughn v. Fedders Corp.*, 239 Fed. Appx. 27 (5th Cir. 2007) (per curiam) ("[T]he date at which the new statute became law . . . is the date at which persons may be charged with constructive notice of its provisions."), *citing Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d 355, 360 & n.12 (5th Cir. 2005) (same).

And several cases FPS cites (both state and federal) from the 1960s, 1970s, 1980s, and 2010s all measured grace periods from a law's effective date:

- *City of El Paso v. Simmons*, 379 U.S. 497, 515 (1965) (where law eliminated reinstatement rights of landowners who defaulted on government loans, law provided five-year period to avoid such loss beginning after law went into effect);

- *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 247, 249 n.23 (1978) (striking down Minnesota law under federal Contract Clause where law made no "provision for gradual applicability or grace periods," and contrasting it with ERISA provisions that weren't operative for months after ERISA went into effect);

- *Texaco, Inc. v. Short*, 454 U.S. 516, 518-19, 520 n.7, 532 (1982) (statute provided that, after 20 years' non-use, severed minerals reverted back to surface owners but also provided that, for two years after law's effective date, mineral owners could preserve their interest by filing claims with government offices); and

- *Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 709 (Tex. 2014) ("Here, M.R. possessed a three-year grace period from the time the repose statute took effect until it extinguished her claim.").

Against the above, FPS contends (at 48 n.17) that this Court abrogated the constitutional rule in *Likes* (1997) and *Union Carbide* (2014). But neither discussed the rule, its history, its constitutional status, or the cases following it, nor did they purport to overrule any of them:

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

Here, a law effectively shortened a limitations period from twenty-four to seventeen months by creating a sovereign immunity defense. This Court held that, despite the seven-month reduction, "the Legislature . . . allowed [the plaintiff] a reasonable time to preserve her rights" stating that "she had seventeen months to file her lawsuit before the new law barred her claim, and she had more than two months from the time the change was made until the reclassification became effective." *Id.* at 503.

The Court did not say whether its holding depended on the seventeen-month period, the two-month gap, or both. One could argue that the holding just depended on the seventeen-month period because the legal standard quoted in *Likes* facially just required that a plaintiff receive *either* a "reasonable amount of time" to preserve her rights (a standard

directed at the absolute length of a limitations period) *or* a "fair opportunity" to do so (a standard directed at notice concerns),[68] and the Court's holding was stated solely in terms of the "reasonable amount of time" prong. *Id*. at 502 ("[T]he Legislature affected the remedy but allowed Likes a reasonable time to preserve her rights."). Consistently, in *Robinson*, this Court summarized the holding in *Likes* based just on the seventeen-month period.[69]

To be sure, elsewhere in *Robinson*, the Court mentioned *Likes* in the same sentence as two other cases upholding retroactive laws (*DeCordova*[70] and *Wright*), saying it was important in these three cases that the affected parties had time "after the change in the law to protect their interests."[71] But in both *DeCordova* (1849) and *Wright* (1977), that time included years after the law in question went into effect—consistent with the

---

[68] *Likes* cited *Wright*, 464 S.W.2d at 649, for the "reasonable amount of time or fair opportunity" standard. *Wright* used "fair opportunity" and "fair notice" interchangeably and, in deciding a constructive-notice issue, subtracted the period *before* the statute's effective date in deciding whether the post-effective-date period provided fair-notice/fair-opportunity. *Id*. at 649.

[69] *See Robinson*, 335 S.W.3d at 177-78 ("Because the statute [in *Likes*] became effective seventeen months after her action accrued, the Court held that the plaintiff had a reasonable time to preserve her rights, and thus the statute was not unconstitutional as applied.").

[70] *De Cordova v. City of Galveston*, 4 Tex. 470 (1849).

[71] *Robinson*, 335 S.W.3d at 141.

constitutional rule[72]—a substantive distinction the Court didn't note.

More generally, when *Likes* was decided in 1995, decades of precedent measured notice from a law's effective date based on a rule of constitutional law, and this Court did not mention the rule in *Likes*. Indeed, neither the majority nor dissent used the word "notice," and although both cited *Wright* for the "reasonable amount of time or fair opportunity" standard (*id.* at 502, 506), neither called out *Wright*'s use of a statute's effective date versus its enactment date in connection with the "fair opportunity" prong of the standard. *Likes* also did not mention, let alone analyze or disapprove any of the eight prior Texas decisions cited above, let alone purport to overrule a 90-year-old rule of Texas constitutional law as would be necessary since *Missouri* was a holding on what the Texas Constitution meant.

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

Here, a new law provided that asbestos-related personal injury suits filed after the law's effective date had to include a physician's report meeting certain requirements. *Id.* at 43. The plaintiffs (whose report did not meet those requirements) argued that the requirements were

[72] *Id.*

unconstitutionally retroactive. *Id.* at 46. The Court rejected this, reasoning that the plaintiffs never had any settled expectation they could file suit without such a report because they weren't even contemplating filing suit until *after* the law's effective date, a fact the Court stressed four times.[73]

In one place the Court said that Chapter 90 "forewarned" the plaintiffs that the procedural rules would change September 1, 2005 (*id.* at 60), which is a reference to the law's enactment date, and the Court also called the gap between the enactment and effective dates a "grace period" (*id.* at 58). But as in *Likes*, the majority did not mention, let alone discuss or analyze, let alone purport to overrule the longstanding and constitutional constructive-notice standard cited above, nor did the dissent raise the issue.

In addition, given the Court's view that the *Union Carbide* plaintiffs lacked any expectations before the law's effective date, the question whether they could have been imputed notice of the law any *earlier* was

---

[73] 438 S.W.3d at 59 ("[plaintiffs] have not demonstrated that they were contemplating such a suit before Chapter 90 became effective"); *id.* at 54 ("nothing in this record show[s] [plaintiffs] were contemplating a suit . . . before Chapter 90 had taken effect"); *id.* at 59 ("[plaintiffs] do not assert that they were contemplating a wrongful death suit before Chapter 90 became effective"); *id.* at 60 (there was "nothing in the record to demonstrate that [plaintiffs] were contemplating a suit before Chapter 90 became effective").

unnecessary to resolve in deciding their as-applied challenge.[74]

Indeed, the fact that both *Likes* and *Union Carbide* were as-applied challenges where the affected parties apparently did not recognize any constructive-notice issue even after the respective opinions issued[75] provides further reason to view their holdings narrowly. *Johnson v. State*, 562 S.W.3d 168, 175 (Tex. App.—Houston [14th Dist.] 2018, pet. ref'd) ("As the scope of such [an as-applied] challenge is necessarily narrow, we do not entertain hypothetical claims or consider the potential impact of the statute on anyone other than the challenger.").

Likes and *Union Carbide* might also be distinguished on the basis that before the laws in question went into effect, existing statutes of limitations had already put the affected parties on constructive notice that their time to act would be limited with respect to any potential claim they might have.

In a complex society, constructive notice of the law is a necessary

---

[74] FPS has argued that the grace period was necessary to the holding since the plaintiffs *objectively* should have contemplated suit in that period given what they knew. FPS C.A. Reply Br. 12 n.3. But this Court's reasoning repeatedly referenced plaintiffs' lack of *subjective* expectations regarding suit.

[75] In both cases, the affected parties sought rehearing but raised no such issue.

fiction. But extending that fiction by stretching the date of constructive notice backwards so it cover things that aren't "the law" is an unnecessarily harsh fiction, especially absent any express prior statement that a constitutional standard was being changed. The Court should confine *Likes* and *Union Carbide* to their facts and/or overrule them to the extent the Court finds them inconsistent with the longstanding constitutional rule and then reaffirm that standard.

C. The Legislature did not make the required findings to support retroactive legislation.

As indicated by one sponsor, the Act's goal was to strengthen dealers' negotiating power versus suppliers:

> "It is my intent that [the Act] will prohibit suppliers from 'substantially changing the competitive circumstances of the dealer agreement' without good cause. The reason this protection is needed is that 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. . . . 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 expectation."

Senator Deuell's Statement of Legislative Intent for HB 3079, Tex. S.J.,

82nd Leg., 2011 R.S. No. 67 (May 25, 2011).[76] The legislative history also included a statement of legislative findings concerning the economic importance of supplier/dealer relationships:

> "The legislature finds that the retail distribution, sales, and rental of . . . equipment [subject to the Act] 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 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."

2011 Tex. Sess. Law Serv. ch. 1039 § 1.

But neither the stated intent nor stated findings established a compelling public justification for retroactive application of the Act as needed to rebut the strong presumption against such effect:

1. The desire to retroactively level the playing field between private business interests is not the required "compelling" public interest.

For prospective litigation, special interest group politics is not uncommon. But it raises concerns with retroactive legislation, for even where legislative interference is "relatively small" or "the end seems to

[76] In non-exclusive at-will agreements, however (as here), a dealer can work with other suppliers and the supplier can't unilaterally impose new terms.

justify the means," "the constitutional prohibition against retroactive laws . . . prevents the abuses of legislative power that arise when individuals or groups are singled out for special reward or punishment." *Robinson*, 335 S.W.3d at 145; *Union Carbide*, 438 S.W.3d at 60 (describing unconstitutional law in *Robinson* as "special interest legislative action").

In connection with similar supplier/dealer legislation, one federal court agreed that "leveling the playing field between manufacturers and dealers," is not "a significant and legitimate public interest." *Equipment Manufacturers Institute v. Janklow*, 300 F.3d 842, 860-61 (8th Cir. 2002). *Janklow* was decided under the federal Contract Clause, but the public interest question would be similar in either context.

Against this, FPS states (at 57) that "[o]ther courts have recognized the interests protected by the Act as legitimate and compelling." But the leading case FPS cites—*Deere & Co. v. State*, 130 A.3d 1197 (N.H. 2015)—expressly distinguished itself from *Janklow* on the basis that the New Hampshire law in *Deere & Co.* "ha[d] a broader purpose than a simple reallocation of existing contractual rights" and "aspire[d] to protect consumers as well as dealers." *Id.* at 1210 (internal quotation marks

omitted).[77] Here, however, the Act altered private interests with no mention of consumers.[78]

FPS says (at 61) this Court has approved laws that "arguably benefited a narrower class" than the dealers here. But the problem is not how the Act benefited dealers; it's how the Act harmed suppliers and, more particularly, how it singled out suppliers having the ***least*** obligations for the ***greatest*** future restrictions, while permitting others to simply carry on under the old law. And certainly, when identifying "abuses of legislative power," *Robinson*, 335 S.W.3d at 139, 145, singling out a group for harm is, at minimum, more suspect than singling out one for reward.

Consistently, in two cases upholding retroactive legislation, the "compelling justification" was not a desire to reward certain business interests at the expense of others:

In one, the Court upheld the retroactive impairment of a landowner's right to extract unlimited ground water from an aquifer. *Barshop v.*

---

[77] FPS notes (at 58 n. 23) that *Deere & Co.* relied on *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U.S. 96, 103 (1978), but it involved prospective regulations.

[78] FPS cites *Colton Crane*, which similarly distinguished *Janklow* and, along with another, were decided under the more deferential federal standard. *Colton Crane Co., LLC v. Terex Cranes Wilmington, Inc.*, No. CV 08-8525, 2010 WL 11519316, at *2 (C.D. Cal. June 2, 2010); *Farmers Union Oil Co. v. Allied Products Corp.*, 162 B.R. 834, 840-41 (D.N.D. 1993).

Medina County Underground Water Conservation Dist., 925 S.W.2d 618, 623, 635 (Tex. 1996). The compelling public interest was located in the Texas Constitution, which directed the Legislature to enact statutes for the " 'preservation and conservation of all such natural resources of the State.' " *Id.* at 623 (quoting TEX. CONST. art. XVI § 59(a)).

In the second, the Court upheld a statute that let the State terminate parental rights of inmates, even those convicted before its enactment. *In re A.V.*, 113 S.W.3d 355, 361-62 (Tex. 2003). There, the Legislature was acting to "protect[] abused and neglected children." *Id.* at 361.

In both, the Legislature's exercise of power was directed at "safeguard[ing] the public safety and welfare," *Robinson*, 335 S.W.3d at 160, and a prospective-only reading would have been at public expense: Imagine a grandfather clause permitting unlimited water extraction by those who excessive use led to the law. Or a law that couldn't reach the parental rights of those whose ongoing incarceration, albeit from a past conviction, was presently resulting in child neglect and abuse.

2. The Legislative did not make specific factual findings regarding the Act's stated purpose or need for retroactive application.

FPS says (at 56) the Legislature made "specific findings" that the Act would benefit "the general economy of this state." But the Legislature made no specific findings; it just said regulation of supplier/dealer

relationships as "contemplated" by the Act was "necessary" because it "vitally" affected the economy and public interest/welfare. If such general statements equal factual findings sufficient to rebut the "heavy" presumption against retroactive legislation, nearly anything would do.

Moreover, the Legislature's statements gave no explanation as to how, or how much, the Act would benefit the economy rather than just dealers. And both the "how" and "how much" matter, as shown when this Court invalidated a law in the absence of adequate findings:

> "The Legislature made no findings to justify [the law]. Even the statement by its principal House sponsor fails to show ***how*** the legislation serves a substantial public interest. No doubt Texas will benefit from reducing the liability of an employer and investor in the State, but the ***extent of that benefit is unclear on this record***. And in any event, there is nothing to indicate that it rises to the level of the public interest involved in *Barshop* [the water rights case] and *A.V.* [the parental rights case.]"

335 S.W.3d at 149 (emphasis added).

FPS says "*Robinson* instructed courts to examine whether the Legislature's findings stated a compelling justification, not to make [their] own findings." FPS Br. 59. But the *Robinson* standard isn't whether the Legislature stated a compelling justification; it's whether the Legislature made factual findings that supported a compelling public interest.

Where the Legislature did so for another law, this Court upheld it. But the contrast between the two cases is clear. For the other law:

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

Tenet Hosps. Ltd. v. Rivera, 445 S.W.3d 698, 707-08 (Tex. 2014); *accord Union Carbide*, 438 S.W.3d at 57 (discussing "extensive" legislative findings).[79]

Nor is it surprising the legislative statements here were conclusory. In 2011, the Legislature received virtually no testimony before passing this Act. Indeed, the only apparent outside input was from the Act's lobbyist whose representative—speaking solely on behalf of certain dealers—said the Act was "not new legislation" and that "[a]ll we have done is amend[] existing Texas law for 30 years to better address the industry and business environment now and as it changes."[80]

---

[79] *In re A.V.* and *Barshop* discussed legislative statements and purposes rather than factual findings (but predated *Robinson*).

[80] Licensing & Administrative Procedures Committee Meeting (April 19, 2011) (00:02:17-00:02:47), *available at* https://house.texas.gov/video-audio/committee-broadcasts/82/.

FPS notes a sponsor of the Act said it was based on work across sessions and was a "carefully crafted compromise among dealers and manufacturers creating uniformity in the sector of business." FPS Br. 56-57. But a statement of a representative is not a statement of the Legislature, and the statement in question does not reflect any specific factual findings.[81]

Finally, and perhaps most fundamentally, there is absolutely nothing—statement, finding, anything—in the legislative record supplying a reason, let alone need, for *retroactive* application of the Act, let alone retroactive application that even FPS has characterized as "exceedingly narrow" (FPS C.A. Reply Br. 9). *See Robinson*, 335 S.W.3d at

---

[81] In 2007, a committee took testimony regarding an earlier version of the Act. *See* House Business & Industry Committee Meeting (April 17, 2007), *available at* https://house.texas.gov/video-audio/committee-broadcasts/80/.

A witness for dealers spoke in favor of the bill (03:25:50-03:43:15) and said it would help dealers offer consumers more products from small manufacturers (03:36:04-03:37:52), possibly by discouraging larger manufacturers from pushing dealers away from smaller manufacturers (03:41:33-03:42:35). But he also suggested the bill could cause small manufacturers to limit their number of dealers (03:37:53-03:39:49).

Three witnesses representing small manufacturers spoke against the bill (03:43:33-04:08:02), saying it would put them at a disadvantage vis-à-vis large manufacturers, thus hurting consumers (03:47:40-03:49:04), and that small manufacturers should be exempt because "this kind of legislation is designed to protect the local dealers from the big out-of-state tractor manufacturers" (04:07:43-04:08:00).

150 (examining "[o]ther states' perception of ***the public interest served by retroactive legislation***" when assessing whether compelling public purpose existed for retroactive law (emphasis added)).

Indeed, the fact that the Legislature permitted fixed-term agreements to continue in force under the old law[82]—regardless of how onerous their terms might be—and, relatedly, permitted such contracts to expire or be terminated on their own terms *after* the Act went in effect, defeats any idea that at-will agreements needed to be made potentially-permanent on a one-sided retroactive basis.[83]

For these reasons, the legislative history does not supply the required factual findings. *Robinson*, 335 S.W.3d at 149 (balancing test requires consideration of "the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings").

Because the Act eliminated Survitec's longstanding, fundamental, and significant right to not be bound in an involuntary business association while imposing new, substantial, and unavoidable duties and

---

[82] *Supra* p. 4.

[83] FPS has said many laws affecting the public interest impose negative consequences "on narrow subsets of persons," FPS C.A. Reply Br. 17, but not all do so *retroactively*, as is the problem here.

liabilities and because the Legislature made no specific factual findings—let alone ones supporting a compelling public purpose or justifying *retroactive* treatment—the Act's application to the parties' agreement was unconstitutional under *Robinson*.

CONCLUSION

For these reasons, Survitec requests that the Court answer the certified question by holding that the Act's application to the parties' agreement violates the retroactive-law clause of the Texas Constitution.

Respectfully submitted,

/s/ Jeremy Gaston
Jeremy Gaston
Texas Bar No. 24012685
jgaston@hcgllp.com
HAWASH CICACK & GASTON LLP
3401 Allen Parkway, Suite 200
Houston, Texas 77019
(713) 658-9015 (tel/fax)

Peter A. McLauchlan
Texas Bar No. 13740900
Peter@McLauchlanLawGroup.com
The McLauchlan Law Group PLLC
950 Echo Lane, Suite 200
Houston, Texas 77024
(832) 966-7210 (tel/fax)

Counsel for Appellee
Survitec Survival Products, Inc.

CERTIFICATE OF COMPLIANCE

This brief complies with the length limitations of Rule 9.4 because it contains 14,997 words, excluding exempted sections. TEX. R. APP. P. 9.4(i)(1), (2)(B).

/s/ Jeremy Gaston
Jeremy Gaston

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2022, a true and correct copy of the foregoing instrument was served on the following counsel of record for appellant by e-service:

Wallace B. Jefferson
wjefferson@adjtlaw.com
Melanie D. Plowman
mplowman@adjtlaw.com
Nicholas Bacarisse
Texas Bar No. 24073872
nbacarisse@adjtlaw.com
ALEXANDER DUBOSE & JEFFERSON LLP
515 Congress Avenue, Suite 2350
Austin, Texas 78701-3562

Scott Matney
smatney@fps-usa.com
Fire Protection Service, Inc.
8050 Harrisburg Blvd.
Houston, Texas 77012

/s/ Jeremy Gaston
Jeremy Gaston

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:

Jeremy Gaston
Bar No. 24012685
jgaston@hcgllp.com
Envelope ID: 61729301
Status as of 2/14/2022 3:47 PM CST

Associated Case Party: Survitec Survival Products, Incorporated

Name	BarNumber	Email	TimestampSubmitted	Status
Jeremy JGaston		jgaston@hcgllp.com	2/14/2022 3:41:48 PM	SENT
Peter AMcLauchlan		Peter@McLauchlanLawGroup.com	2/14/2022 3:41:48 PM	SENT

Associated Case Party: Fire Protection Service, Incorporated

Name	BarNumber	Email	TimestampSubmitted	Status
Wallace BJefferson		wjefferson@adjtlaw.com	2/14/2022 3:41:48 PM	SENT
Melanie DPlowman		mplowman@adjtlaw.com	2/14/2022 3:41:48 PM	SENT
Nicholas Bacarisse		nbacarisse@adjtlaw.com	2/14/2022 3:41:48 PM	SENT
Scott Matney		smatney@fps-usa.com	2/14/2022 3:41:48 PM	SENT