APPENDICES

APPENDIX A

SUPREME COURT OF LOUISIANA

NO. 2019-0C-1503
NO. 2019-0C-1508

TEXAS BRINE CO., LLC AND
UNITED BRINE SERVICES CO., LLC

V.

RODD NAQUIN, IN HIS OFFICIAL CAPACITY
AS CLERK OF COURT FOR THE FIRST CIRCUIT
COURT OF APPEAL FOR THE STATE OF LOUISIANA

c/w

GARY N. SOLOMON, STEPHEN H. JONES, TERRY D.
JONES, AND HEALTH SCIENCE PARK, L.L.C.
CENTERPOINT ENERGY RESOURCES CORP., ET AL.

V.

RODD NAQUIN, IN HIS CAPACITY AS CLERK OF
COURT FOR THE FIRST CIRCUIT COURT OF APPEAL
FOR
THE STATE OF LOUISIANA

ON WRIT OF MANDAMUS TO THE COURT OF
APPEAL,
FIRST CIRCUIT

PER CURIAM*

* Retired Judge James Boddie Jr., appointed Justice ad hoc, sitting for Justice Marcus R. Clark. Chief Judge Susan M. Chehardy of the Court of Appeal, Fifth Circuit, appointed Justice ad hoc, sitting for Crain J., recused. Hughes, concurs in part, and dissents in part. Crichton, J., dissents and assigns reasons. Johnson, CJ, additionally concurs and assigns reasons Genovese, J, dissents and assigns reasons.

In these consolidated actions, we are called upon to decide whether a writ of mandamus should issue to the clerk of an appellate court for the purpose of directing the clerk to comply with certain rules for the random assignment of panels and cases in that court. For the reasons which follow, we deny the petitions for writ of mandamus.

FACTS AND PROCEDURAL HISTORY

On July 31, 2019, Gary N. Solomon, Stephen H. Jones, Terry D. Jones, and Health Science Park, LLC (collectively referred to hereinafter as the "Solomon plaintiffs") filed a petition for mandamus in the Court of Appeal, First Circuit (hereinafter referred to as the "First Circuit") against Rodd Naquin, in his capacity as the Clerk of Court for the First Circuit Court of Appeal for the State of Louisiana (hereinafter referred to as "clerk"). The petition sought an order directing the clerk "to follow the statutory mandate to randomly allot each appeal and each writ application to appeal and writ panels. . . ."

On August 9, 2019, Texas Brine Co., LLC and United Brine Services Co., LLC (collectively referred to hereinafter as "Texas Brine") filed a similar mandamus petition in the First Circuit against the clerk. As in the Solomon petition, Texas Brine's petition sought an order directing the clerk "to follow the statutory mandate to randomly allot each appeal and each writ application to appeal and writ panels. . . ."

The First Circuit issued en banc orders recusing the court from both actions. In incorporated reasons, the orders explained recusal of the entire court was mandated because each petition "when read as a whole, seeks to mandamus the court itself. . . ."

On September 20, 2019, we exercised our plenary supervisory jurisdiction under La. Const. Art. V, §5(A) to assume jurisdiction over both actions.[1] We further directed the First Circuit to "submit a per curiam to this court detailing the internal allotment procedures for appeals and applications for supervisory writs in that court."

On October 4, 2019, the First Circuit filed a per curiam pursuant to this court's order. The per curiam was signed by every member of the court of appeal, with Judge Crain concurring with reasons[2] and Judge McDonald concurring without reasons. The per curiam references the court of appeal's internal rules, and those rules referenced are attached to the per curiam.

In its three-page per curiam, the First Circuit explained its allotment procedures were changed in

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[1] This court had initially transferred the actions to the Court of Appeal, Fourth Circuit upon the recusal of the First Circuit. The September 20, 2019 order vacated this order, and directed the records be transferred directly to this court.

[2] Judge Crain stated:

> I agree the facts set forth in the per curium are accurate and our court is properly responding to the Supreme Court's directive. I write separately to emphasize the underpinning of the parties' arguments is the assumption that the legislative branch, as opposed to the judicial branch, has the constitutional authority to dictate the manner in which cases are assigned within the court. The assumption is not only arguably flawed, but also threatens the ability of our courts to independently perform their adjudicative functions. Furthermore, there has been no constitutional challenge asserted as to this court's allotment procedures.

2019 after the 2018 amendment to La. R.S. 13:319.[3] Prior to the 2019 change, the court used an allotment process, applicable to appeals only, which it explained as follows:

> Prior to legislative amendment in 2018, La. R.S. 13:319 provided that "[e]ach civil and criminal proceeding and each application for writs shall be randomly assigned by the clerk, subject to the direct supervision of the court." Thus, with regard to the random allotment of appeals, prior to the 2018 amendment and in compliance with the pre-amendment language of the statute, where an appeal arose from a judgment in a judicial district court proceeding from which a prior appeal had previously arisen, the subsequent appeal in that same district court case number (proceeding) was assigned to the same primary judge who had authored the prior appeal in that district court proceeding, sitting with that primary judge's current panel.
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> However, by Acts 2018, No. 658, the Legislature amended La. R.S. 13:319 to change the word "proceeding" to "appeal,"

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[3] La. R.S. 13:319, as amended by Acts 2018, No. 658, § 1, effective August 1, 2018, provides:

> Each civil and criminal **appeal** and each application for writs shall be randomly assigned by the clerk, subject to the direct supervision of the court. [emphasis added].

Prior to that time, the statute provided:

> Each civil and criminal **proceeding** and each application for writs shall be randomly assigned by the clerk, subject to the direct supervision of the court. [emphasis added].

> thus now providing that" [e]ach civil and criminal **appeal** and each application for writs shall be randomly assigned by the clerk, subject to the direct supervision of the court." Following this legislative amendment, the First Circuit reviewed and amended its Internal Rules effective July 10, 2019, as specifically codified into the Court's Internal Rules on August 9, 2019, to clarify that each appeal is randomly allotted, regardless of prior appeals in the First Circuit arising from the same district court proceeding bearing that district court case number. See Internal Rule 2.3d(1)(c). [emphasis in original].

Going forward, the First Circuit stated it adopted rules requiring a procedure for random allotment by the Clerk's office of both appeals (Internal Rule 2 .3(d)(1)(c)) and writ applications (Internal Rules 3.9(a)),[4] with consideration for recusals and emergencies.

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[4] Internal Rule 3.9(a)(1) further provides:

> 3.9a(1) Writ applications. Other than the below-described procedure for emergency or expedited writ applications, the Clerk's Office shall randomly allot writ applications in court of appeal docket number order, in groups of 4, from 2 pools.
>
> 3.9a(1)(a) Pool 1 shall consist of writ applications entered into the Court's case management system from the 1st day of the month, until the 15th day of the month plus all writ applications not previously allotted. Pool 2 shall consist of writ applications entered into the Court's case management system from the 16th day of the month, until the last day of the month plus all writ applications not previously allotted.

The First Circuit also explained its rules require random allotment after recusal of a member of a panel:

> Appeals are randomly allotted to a panel by the clerk's office, as described above, taking into account any standing recusal a judge may have. If a member of panel has a standing recusal applicable to a particular appeal, the matter is randomly allotted to one of the remaining panels. See Rule 2.3d(1)(c)(i). However, if more than one panel must be removed from the allotment process due to standing recusals, the clerk of court, utilizing two clerk's office staff members, randomly draws a special panel by removing the judges with the standing recusals from the selection process and then randomly drawing the special panel from the remaining judges. See Internal Rules 2.3d(1)(c)(ii).
>
> If a judge is later recused following the initial random allotment of an appeal or writ application, the judge is replaced by the assignment of another judge, by random allotment. The clerk of court utilizes two clerk's office staff members to randomly select the replacement judge. See Internal Rules 2.3d(1)(c)(i) and 3.9f(1).

Finally, the per curiam discusses allotments for emergency filings:

3.9a(1)(b) The clerk's office shall make note of the two people present for the allotment process. The clerk's office shall provide the list of writ applications and the allotments to Central Staff after each pool's allotment.

> The allotment process for writs is also by random allotment, as set forth in Rule 3.9. Writ applications designated for emergency or expedited consideration are allotted to the writ panel on duty as the nature of the emergency so requires. See Internal Rule 3.9a.

On October 21, 2019, we issued an order directing the First Circuit to submit a supplemental per curiam "discussing whether the court's allotment procedures incorporate any geographical considerations. . ."

Pursuant to that order, the First Circuit submitted a supplemental per curiam on October 29, 2019. The supplemental per curiam draws a distinction between random allotment of appeals/writ applications and the drawing of panels:

> The random allotment of appeals and writ applications to a particular panel is entirely independent of the process of composing appellate panels and writ duty panels. The First Circuit Court of Appeal's procedures for the **allotment of appeals and writs,** as detailed in this court's prior per curiam delivered to the Supreme Court on October 4, 2019, do not incorporate any geographical considerations, as such allotments are made by random assignment, in accordance with applicable statutes.
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> As to the **drawing of panels,** the composition of panels is reserved to the courts of appeal by Louisiana Constitution, Article V, Section 8(A). Thus, the constitutional provision requires only that the First Circuit sit in panels of at least three judges selected according to rules adopted by the Court, as the

> composition of such panels is specifically reserved to each court, notwithstanding any statutory enactment. The rules adopted by the First Circuit establish that the Court sits in at least six appeal cycles annually, with four regular panels of three judges each, throughout the court year. The Court's procedures for the composition of regular panels is random within the geographic divisions of the court, as more fully described in the following paragraph. The composition and terms of the Court's panels and the schedule of oral argument dates and writ conference dates are formulated and recommended by the Case Flow and Scheduling Committee, subject to approval of the Conference of the First Circuit. See Internal Rule 2.1a. [emphasis in original].

The supplemental per curiam then discusses the composition of the panels:

> By longstanding practice, and in accord with the constitutional authority specifically reserving such to each court of appeal, absent recusals, each regular panel of the First Circuit is comprised of one member randomly chosen through mechanical means from the four members of each of the Court's three election districts. The random composition of the initial three judge panels is adopted pursuant to a five-year plan of rotation of members among the panels. To further ensure random composition of the panels, panel members of particular panels do not sit as an intact panel in the following year. The four randomly drawn regular panels also sit on writ duty throughout the Court's six appeal

> cycles. Summer writ duty panels, which rotate duty on a two-week basis, are established by seniority, without regard to the allotment of any writ or appeal, to account for summer scheduling. Rotation of the composition of the panels occurs in August of each year.

Following receipt of the supplemental per curiam, we issued a special briefing order which consolidated both mandamus actions and scheduled them for oral argument.

DISCUSSION

Propriety of the Mandamus Petitions

Prior to discussing the merits of the mandamus petitions, we must first consider whether the mandamus remedy is procedurally appropriate under the facts presented.

Pursuant to La. Code Civ. P. art. 3863, "[a] writ of mandamus may be directed to a public officer to compel the performance of a ministerial duty required by law. . . ." We have explained mandamus "is an extraordinary remedy, to be applied where ordinary means fail to afford adequate relief." *Hoag v. State,* 2004-0857 p. 6 (La. 12/1/04), 889 So. 2d 1019, 1023. It is well settled "that the only circumstances under which courts may cause a writ of mandamus to issue is where the actions sought to be performed by the legislature are purely ministerial in nature." *Id.*

Mandamus is to be used only when there is a clear and specific legal right to be enforced or a duty that ought to be performed. It never issues in doubtful cases. *Bonvillian v. Dep't of Ins.,* 2004-0332, p. 3 (La. App. 1 Cir. 2/16/05), 906 So.2d 596, 599, *writ not considered,* 2005-0776 (La. 5/6/05), 901 So.2d 1081; *Wiginton v. Tangipahoa Parish Council,* 2000-1319, p.

4 (La. App. 1 Cir. 6/29/01), 790 So.2d 160, 163, *writ denied,* 2001-2541 (La. 12/07/01), 803 So.2d 971. In mandamus proceedings against a public officer involving the performance of an official duty, nothing can be inquired into but the question of duty on the face of the statute and the ministerial character of the duty he is charged to perform. *Plaisance v. Davis,* 2003-0767, p. 11 (La. App. 1 Cir.11/07/03), 868 So.2d 711, 718, *writ denied,* 2003-3362 (La. 2/13/04), 867 So.2d 699.

Although they differ in their specific allegations, both petitions for writ of mandamus generally seek to compel the clerk to comply with La. R.S. 13:319, which provides, "[e]ach civil and criminal appeal and each application for writs shall be randomly assigned by the clerk, subject to the direct supervision of the court," and La. Code Civ. P. art. 2164.1, which provides, "[t]he provisions of R.S. 13:319 shall be applicable to assignment of appellate panels."

In order for mandamus to apply, we must determine whether these provisions impose a ministerial duty on the clerk. A ministerial duty has been defined as "a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law." *Hoag,* 889 So.2d at 1024. An examination of these provisions indicate neither La. Code Civ. P. art. 2164.1 nor La. R.S. 13:319 prescribe any definite duties on the clerk for assignment of appeals or writ applications other than the provisions in La. R.S. 13:319 requiring such cases must be "randomly assigned." In this regard, the language of La. R.S. 13:319 stands in clear contrast to the provisions of La. Code Civ. P. art. 253.1, which sets forth explicit procedures for random assignment of cases in the

district courts.[5] In the absence of any specific or definite procedures for random assignment of cases in the appellate court, the statute gives the clerk discretion to select an appropriate method to randomly assign such matters. If a public officer is vested with any element of discretion, mandamus will not lie. *Hoag,* 889 So.2d at 1024. Therefore, on this ground alone, the petitions for writ of mandamus must fail.

Nonetheless, we recognize the true intent of petitioners is to determine whether the First Circuit's assignment procedure comports with generally accepted principles of random allotment. Although it was perhaps error for petitioners to urge this relief through writs of mandamus, our jurisprudence has long declined to place form over substance, and instead requires courts to look to the facts alleged to discover what, if any, relief is available to the parties. *See, e.g., Reynolds v. Brown,* 2011-0525, p. 6 (La. App. 5 Cir. 12/28/11), 84 So.3d 655, 659.

La. Const. art. V, § 5(A) grants this court "general supervisory jurisdiction over all other courts." It is well recognized the constitutional grant of

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[5] La. Code Civ. P. art. 253.1 provides:

> All pleadings filed shall be randomly assigned to a particular section or division of the court by either of the following methods:
>
> (1) By drawing indiscriminately from a pool containing designations of all sections or divisions of court in the particular jurisdiction in which the case is filed.
>
> (2) By use of a properly programmed electronic device or computer programmed to randomly assign cases to any one of the sections or divisions of court in the particular jurisdiction in which the case is filed.

supervisory authority to this court is plenary, unfettered by jurisdictional requirements, and exercisable at the complete discretion of the court. *Unwired Telecom Corp. v. Par. of Calcasieu,* 2003-0732, p. 8 (La. 1/19/05), 903 So.2d 392, 400 (on rehearing).

Accordingly, in the exercise of supervisory authority, we will entertain petitioners' arguments on the question of whether the rules of the First Circuit are consistent with the statutory and jurisprudential requirements for random assignment of cases.

Petition of Texas Brine

Texas Brine's petition alleges the First Circuit follows "an internal policy of allocating judges to appellate panels according to the geographic makeup of the First Circuit's election districts—allocating one judge from each district to each panel." According to Texas Brine, this policy "dramatically limits the number of unique panels that can hear writs, appeals, and contested motions before the First Circuit from 220 unique combinations to 64 unique combinations—a reduction of approximately 70.9%." It concludes this policy is an "affront to the requirement of randomness."

Although this policy has apparently not been formally codified by the First Circuit, its October 29, 2019 supplemental per curiam explains the First Circuit, by "longstanding practice," forms panels "comprised of one member randomly chosen through mechanical means from the four members of each of the Court's three election districts." The court sits in at least six appeal cycles annually, with four regular panels of three judges each, throughout the court year.

At the outset, it is important to recognize the policy challenged by Texas Brine relates to the selection of appellate panels, rather than the assignment of cases to those panels. This distinction is significant, because the selection of appellate panels is governed by La. Const. Art. V, § 8(A), which provides:

> Section 8(A) Circuits, Panels. The state shall be divided into at least four circuits, with one court of appeal in each. Each court shall sit in panels of at least three judges **selected according to rules adopted by the courts.** [emphasis added].

This provision expressly grants the courts of appeal the authority to adopt rules for the selection of panels. However, Texas Brine submits the Legislature recognized selection of panels must be done through random assignment through its enaction in 2018 of La. Code Civ. P. art. 2164, which states the random assignment provisions of R.S. 13:319 "shall be applicable to assignment of appellate panels."

The question of whether the legislature may impose limitations or restrictions on the rule-making authority granted to the courts of appeal under La. Const. Art. V, § 8(A) is not raised by these pleadings, and we therefore express no opinion on this issue. Rather, it suffices to say we have long recognized due process requires assignments be done on a random or rotating basis. *State v. Simpson,* 551 So.2d 1303, 1304 (La. 1989) (on rehearing). La. Code Civ. P. art. 2164.1 has the effect of recognizing and codifying this fundamental aspect of our law. Based on our review, we see nothing in the First Circuit's rules for selection of panels which runs counter to the principles of

random assignment from a statutory or due process standpoint.

As discussed earlier, La. R.S. 13:319 requires appeals and writ applications to be "randomly assigned," but does not provide any specific procedures or requirements for such random assignments. Similarly, neither the statutes nor jurisprudence mandate any specific methods for random selection of judges for appellate panels. In the absence of any specific rules or procedures for random assignments, a system which results in random assignments is not invalid simply because it is possible to conceive of a more random system.

In addressing here is *no random selection among the twelve members of* random allotment, our jurisprudence has never required an allotment system to be purely random. In *State v. Cooper,* 2010-2344, p. 13 (La. 11/16/10), 50 So.3d 115, 126, we explained:

> Our inquiry here is not to determine whether the district judges selected the "best" or "easiest" method of allotting criminal cases. Our focus here is only on whether the 2010 Plan which was adopted violates the law. We have established a framework in the uniform rules whereby district judges may tailor their case allotment plans in ways that will take into consideration the unique characteristics of their judicial district and the resources available to them. **In our goal of ensuring due process is provided to litigants, we have never required an allotment system which was purely random.** [emphasis added].

Our cases in this area have instead focused on whether assignments are subject to intentional

manipulation by either the courts or litigants. *See, e.g., State v. Sprint Communications Co.,* 1996-3094, p. 4 (La. 9/9/97), 699 So.2d 1058, 1062 (explaining interdivisional transfers of cases between judges after the cases were randomly assigned "would defeat the purpose of the statute and render it meaningless"); *Simpson,* 551 So.2d at 1304 (explaining criminal cases must be allotted for trial using a procedure "which does not vest the district attorney with power to choose the judge to whom a particular case is assigned."). However, we have declined to find the principles of random assignment are violated where there is a mere potential the assignments might be subject to manipulation. *State v. Nunez,* 2015-1473, 2015-1486, p. 13 (La. 1/27/16), 187 So.3d 964, 973 (explaining it would be "burdensome and untenable" to invalidate an assignment system for "merely being susceptible to manipulation").

While Texas Brine argues the use of a geographical component may result in panel assignments which are not equal from a purely mathematical standpoint, there is no indication these assignments are not random. As explained in the First Circuit's October 29, 2019 per curiam, each panel is created by randomly selecting one member through mechanical means from the four members of each of the court's three election districts. To further ensure random composition of the panels, panel members of particular panels do not sit as an intact panel in the following year.

As we explained in *Cooper,* it is not our role to determine whether a particular allotment system is the best or easiest method available, nor have we required the adoption of systems resulting in a purely random distribution of cases among judges. Without passing on the wisdom of the First Circuit's

assignment system, we find the system is reasonably designed to select judges for panels in a random fashion which does not permit intentional manipulation by either the judges or the litigants. Appeals and writ applications are then randomly assigned among these panels, further ensuring there is no pattern or predictability as to which judges hear specific cases. This procedure comports with statutory and jurisprudential requirements for random assignment.[6]

Accordingly, Texas Brine's petition for writ of mandamus is denied.

The Solomon Plaintiffs' Petition

The Solomon plaintiffs' mandamus petition is premised on the First Circuit's practice, used between 2006-2018, of assigning subsequent appeals or applications for writs to a panel which included a judge who sat on the original panel and may have taken the lead or authored the first opinion/ruling in the case. Specifically, the Solomon plaintiffs alleged:

> The First Circuit Clerk of Court presumably assigns the first appeal or writ application in a case to a sitting panel by random allotment. Upon information and belief, however, and from the history of [the Solomon plaintiffs'] dealings with this Court from 2006 through 2018 and supported by the summary chart attached to Exhibit A and the table provided above, each subsequent application for a writ

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[6] Texas Brine argues the First Circuit's system results in circumstances where a single judge might serve disproportionately on panels involving separate appeals from the same litigation, thereby creating the potential for "confirmation" bias on the part of that judge. However, any questions of bias are more properly raised through a motion to recuse.

> or appeal in that case is then assigned by the Clerk's office to a panel that includes a judge who sat on the original panel and who may have taken the lead or authored the first opinion/ruling in the case. That judge, and the panel to which he or she is yearly assigned, will receive all subsequent writs or appeals in the case. Regardless of any efficiency this practice may theoretically provide the Court, it is antagonistic to the very purpose of random allotment - to ensure that freedom from bias stays the norm, which can only be accomplished when true neutral and random assignment of cases is the rule. The conscious or unconscious mindset about a case with which a judge has history cannot help but color the lenses through which the judge views issues subsequently presented in the case. True random allotment will not guarantee that a particular judge will not be assigned to subsequent matters but it will certainly even the odds and provide a more level playing field for the parties.

The Solomon plaintiffs' petition for mandamus was filed on July 31, 2019. On August 9, 2019, the First Circuit amended its internal rules to clarify that each appeal is randomly allotted, regardless of any prior appeals arising from the same case. In its current version, the First Circuit's rule for allotment of appeals, Internal Rule 2.3d(1)(c), provides, in pertinent part:

> 2.3d(1)(c) Random allotment process. The clerk's office shall use two clerk's office staff members **for the random allotment of each civil and criminal appeal to a panel,** taking into account all standing recusals, and

> to thereafter designate a primary (or writing) judge. [emphasis added].

Similarly, the rule for allotment of writ applications, Internal Rule 3.9a, provides:

> 3.9a Allotment, After each writ application is given an appellate docket number, each writ application shall be randomly allotted to a panel in accordance with Louisiana Revised Statute 13:319. [emphasis added].

In *Cat's Meow v. City of New Orleans through Dept. of Finance,* 1998-0601, p. 8-9 (La. 10/20/98), 720 So.2d 1186, 1193-1194, we explained a dispute can become moot if the challenged provision is amended during the pendency of the suit:

> According to Louisiana jurisprudence, an issue is "moot" when a judgment or decree on that issue has been "deprived of practical significance" or "made abstract or purely academic." *Perschall v. State,* 96-0322 (La.7/1/97), 697 So.2d 240; *Louisiana Associated Gen. Contractors, Inc.,* 669 So.2d at 1193; *American Waste & Pollution Control Co.,* 627 So.2d at 162. A case is "moot" when a rendered judgment or decree can serve no useful purpose and give no practical relief or effect. *Robin,* 384 So.2d at 405. If the case is moot, then "'there is no subject matter on which the judgment of the court can operate.'" *St. Charles Parish Sch. Bd.,* 512 So.2d at 1171 (citing *Ex parte Baez, 177* U.S. 378, 20 S.Ct. 673, 44 L.Ed. 813 (1900)). That is, jurisdiction, once established, may abate if the case becomes moot.

* * *

> When the challenged article, statute, or ordinance has been amended or expired, mootness may result if the change corrects or cures the condition complained of or fully satisfies the claim. Further, if it is concluded that the new legislation was specifically intended to resolve the questions raised by the controversy, a court may find that the case or controversy is moot. In such a case, there is no longer an actual controversy for the court to address, and any judicial adjudication on the matter would be an impermissible advisory opinion. [emphasis added].

In the instant case, the changes to Internal Rules 2.3d(1)(c) and 3.9a resolve the questions over allotments raised by the Solomon plaintiffs. The Solomon plaintiffs acknowledge the existence of this rule change, but argue this court should nonetheless consider their petition because there is a possibility the First Circuit could change its rules again in the future.

In *State v. Rochon,* 2011-0009, p. 11 (La. 10/25/11), 75 So.3d 876, 884 (footnote omitted), we recognized an exception to the mootness doctrine for cases capable of repetition, yet evading review. We explained that "[u]nder this exception, a court may consider the merits of a case that would otherwise be deemed moot when the challenged action was in its duration too short to be fully appealed prior to its cessation or expiration and a reasonable expectation existed that the same complaining party would be subjected to a similar action." *Id.*

We do not believe this exception is applicable under the facts presented. While it is possible the court of appeal could change these rules in the future,

any opinion by this court at this time would be based on speculative facts and would be advisory in nature. By all indications, the First Circuit's amended rules were adopted for the purpose of bringing the court's rules into compliance with the 2018 legislation, and we have no reason to believe the court will not continue to adhere to the legislative requirements.[7]

Accordingly, we deny the Solomon plaintiffs' petition for writ of mandamus as moot.

DECREE

For the reasons assigned, the petitions for writ of mandamus are hereby denied.

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[7] Although there is no formal requirement that the courts of appeal publish their internal rules of assignments, we believe that such publication would be useful in ensuring full transparency and promoting confidence of attorneys and litigants who appear before those courts. Therefore, we strongly encourage all courts of appeal to codify and publish their internal assignment rules on their respective websites.

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FIRST CIRCUIT

Hughes, J., concurs in part and dissents in part.

I do not find any problem in the inclusion of a geographical factor in the initial allotment of cases by the First Circuit. However, given that four of the twelve judges of that court are unable to participate in matters involving the sink-hole cases, I would refer those cases to another circuit for resolution.

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GENOVESE, J., dissents in part and assigns the following reasons:

I dissent from this per curiam with respect to 2019-0C-1503, as it employs a metamorphosis in linguistics and lexicology by redefining the word "random." The issue in this case is what is the definition of the word "random" in the phrase random allotment as it pertains to the selection of members serving on an appellate court panel. Louisiana Constitution Article V, § 8(A), provides each court of

appeal "shall sit in panels of at least three judges selected according to rules adopted by the court." "Each civil and criminal appeal and each application for writs shall be randomly assigned by the clerk, subject to the direct supervision of the court." La.R.S. 13:319[1] "The provisions of R.S. 13:319 shall be applicable to assignment of appellate panels." La.Code Civ.P. art. 2164.1.[2]

Let us first look at the Merriam-Webster Dictionary, in service since 1828, which is one of America's most trusted dictionaries for English word definitions, meanings, and pronunciations. The Merriam-Webster Dictionary defines random as being "without definite aim, direction, rule, or method." Another source, Dictionary.com, defines the word random as "proceeding, made, or occurring without definite aim, reason, or pattern."

These definitions of random seem pretty clear to me, and not one of these definitions recite any restriction, qualification, or limitation in defining the word random. That is what makes random, random. And random is random, period. How much more clear can it be?

The legal issue in this case is whether the First Circuit Court of Appeal (1CCA) of this state employs constitutionally and legislatively mandated random allotment in its panel selection for review of lower court rulings coming before it. In my view, the answer

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[1] Prior to its amendment by La. Acts 2018, No. 658, § 1, effective August 1, 2018, La.R.S. 13:319 provided: "Each civil and criminal proceeding and each application for writs shall be randomly assigned by the clerk, subject to the direct supervision of the court."

[2] Louisiana Code of Civil Procedure Article 2164.1 was added by La. Acts 2018, No. 658, § 2.

is clearly no, it does not. The 1CCA has twelve judges and establishes its three-member panels by employing three geographical districts.[3] In other words, in comprising its panels of three members each, it randomly draws one panel member from each of the three geographical districts in order to make up its three-judge panel. I agree that there is random selection from each of the three geographical districts, but there is no random selection among the twelve members of the 1CAA, which I find violates the constitutional and legislative mandates of our law. For there to be a random selection of the members of the 1CCA, as is done in all other courts of appeal of this state, said random selection must be made from all twelve members of the court — not from three mystical, geographical districts.

What defeats random allotment in this case is the fact that the employment of these geographical districts in satisfaction of random allotment qualifies, limits, restricts, and confines random allotment to said geographical districts. Again, random allotment is random allotment. When you confine and/or restrict random allotment, it is no longer random allotment. To allow such a geographical allotment is to allow a definite aim, direction, rule, method, reason and

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[3] Though the 1CCA represents that its random selection is employed via these "election" districts, in truth and in fact, its random selection is via three mystical "geographical" districts. The 1CCA's alleged random selection does not employ election districts, as there are five election districts, yet it only draws from three geographical districts. Thus, these three geographical districts are not the equivalent of its five election districts. Furthermore, if these geographical districts were created for the purpose of promoting diversity, it restricts as opposed to promotes diversity, and certainly does not establish a true random allotment.

pattern of allotment, which is totally contrary to the very definition of the word random. Our law does not provide for a limited, restricted, or geographical random allotment; it requires random allotment, pure and unadulterated, not quasi-random allotment. Had the legislature allowed for such segmented, random allotment, it would have enacted legislation to do so.

Additionally, the 1CCA's alleged random allotment is skewed even more so when employing a five-judge panel (5JP). A 5JP comes into play when a three-judge panel (3JP) votes two to one to modify or reverse a lower court's judgment. When this occurs, two additional judges are added to the 3JP to make the 5JP. However, and inconsistent with the selection of the 3JP via geographical districts, these two additional judges are drawn in a real random allotment process from all of the remaining nine judges of the 1CCA, and not from the three geographical districts. I might also add that these 5JPs sit for an entire year and not just for a cycle. In my view, litigants having to appeal to the 1CCA are denied the equal protection and due process of litigants having to appeal in all other courts of appeal in this state.

Thus, I disagree with the majority decision in this matter and find the 1CCA's "geographical" allotment procedure to be constitutionally and legislatively impermissible, and I would mandate the 1CAA's allotment procedure to be in line with the other four courts of appeal of this state and implement a true and unrestricted random allotment of its panels.

SUPREME COURT OF LOUISIANA

NO. 2019-0C-1503
NO. 2019-0C-1508

TEXAS BRINE CO., LLC AND
UNITED BRINE SERVICES CO., LLC

V.

RODD NAQUIN, IN HIS OFFICIAL CAPACITY
AS CLERK OF COURT FOR THE FIRST CIRCUIT
COURT OF APPEAL FOR THE STATE OF LOUISIANA

c/w

GARY N. SOLOMON, STEPHEN H. JONES, TERRY D.
JONES, AND HEALTH SCIENCE PARK, L.L.C.
CENTERPOINT ENERGY RESOURCES CORP., ET AL.

V.

RODD NAQUIN, IN HIS CAPACITY AS CLERK OF
COURT FOR THE FIRST CIRCUIT COURT OF APPEAL
FOR
THE STATE OF LOUISIANA

ON WRIT OF MANDAMUS TO THE COURT OF
APPEAL, FIRST
CIRCUIT

CRICHTON, J., dissents and assigns reasons:

I dissent to the majority opinion as it relates to matter number 2019-0C01503, which addresses the petition for writ of mandamus filed by Texas Brine Co., LLC and United Brine Services Co., LLC (collectively herein, "Texas Brine"). As the majority notes, we exercised our plenary supervisory jurisdiction pursuant to La. Const. Art. V, §5(A) when assuming jurisdiction over this matter. This supervisory authority is "plenary, unfettered by

jurisdictional requirements, and exercisable at the complete discretion of the court." Albert Jr. Tate, Supervisory Powers of the Louisiana Courts of Appeal, 38 Tul. L. Rev. 429, 430 (1964). Nevertheless, we have self-imposed restrictions on this power, exceptions to which should be made only where extraordinary circumstances justify this Court's intervention. In my view, such extraordinary circumstances are present here and require this Court to issue a writ of mandamus ordering the Clerk of Court of the First Circuit Court of Appeal to assign panels in a manner that does not include geographical limitations based on election districts.

Preliminarily, I disagree with the majority that Texas Brine's petition for writ of mandamus must fail irrespective of the merits. Whether or not mandamus is an appropriate remedy for an action depends on whether the duty sought to be performed is ministerial or discretionary. *See* La. C.C. art. 3863 ("A writ of mandamus may be directed to a public officer to compel the performance of a ministerial duty required by law, or to a former officer or his heirs to compel the delivery of the papers and effects of the office to his successor."). "It is well settled that mandamus will lie to compel performance of prescribed duties that are purely ministerial and in which no element of discretion is left to the public officer." *Felix v. St. Paul Fire & Marine Ins. Co.,* 477 So. 2d 676, 682 (La. 1985). The duty must be "clear and specific." *Id.*

Louisiana Revised Statute 13:319 provides "[e]ach civil and criminal appeal and each application for writs shall be randomly assigned by the Clerk, subject to the direct supervision of the court," and this provision "*shall* be applicable to assignment of appellate panels." C.C.P. art. 2164.1. The relevant

inquiry in determining if mandamus is an appropriate remedy, then, is whether the Clerk's duty to randomly assign appellate panels to civil and criminal appeals and each application for writs is ministerial or discretionary.

The majority relies on this Court's prior decision in *Hoag v. State,* 04-0857 (La. 12/1/04), 889 So. 2d 1019, 1023, in finding *that* the duty of the Clerk in this matter is discretionary, rather than ministerial. The duty present in *Hoag,* however, is clearly distinguishable from the duty set forth in C.C.P. art. 2164.1. In *Hoag,* the relevant question was whether a court could order the legislature by writ of mandamus to appropriate funds to pay a judgment pursuant to La. R.S. 13:5109(B), which required that any judgment rendered against the state must be paid out of funds appropriated for that purpose by the legislature. *Id.* at 1023-1024. In finding that the act of appropriating funds is discretionary and not subject to a mandamus action, this Court held that "appropriating funds is, by its nature, discretionary and specifically granted to the legislature by the constitution" and "[t]his Court has consistently recognized the legislature's absolute control over the finances of the state, except as limited by the constitution." *Id.* at 1024 (internal citations omitted). Notably, La. R.S. 13:5109(B) did not impose a duty on the legislature but instead provided the manner in which judgment would be paid, *i.e.* at the legislature's discretion.

Unlike the provision at issue in *Hoag,* the mandate by the legislature to the clerks of court of each court of appeal to randomly allot cases is not by its nature a discretionary act. The language requiring assignment of panels to be random is "clear and specific" and leaves no discretion to the Clerk to

choose whether or not to assign panels at random. *See* La. C.C.P. art. 2164.1 ("The provisions of R.S. 13:319 *shall* be applicable to assignment of appellate panels."). Accordingly, I would find that Texas Brine's petition for writ of mandamus does not seek a remedy that this Court cannot afford in accordance with La. C.C. art. 3863.

As to the merits of Texas Brine's petition — *i.e.,* whether the First Circuit's panel assignments are random — I dissent from the majority's finding that the First Circuit's procedure is consistent with the statutory and jurisprudential requirements for random assignment of cases. In reaching this conclusion, I find it significant that the Clerk fails to provide any compelling reason for the geographical limitation on its ministerial duty under C.C.P. art. 2164.1. While we have recognized that the goal of insuring due process to litigants does not require an allotment system that is "purely random," *see State v. Cooper,* 10-2344 (La. 11/16/10), 50 So. 3d 115, in each of the cases on which the majority relies to condone the First Circuit's geographical limitations there was a concern for judicial efficiency or costs that necessitated the manner in which allotment was effected. *See, e.g., Cooper, supra* (finding that two-year geographical assignments of judges within a district court did not violate due process where it was necessary for judicial efficiency and costs); *State v. Sprint Communications Co.,* 96-3094, p. 3 (La. 9/9/97), 699 So. 2d 1058, 1062 ("The decision to disturb the equitable distribution of assignments should not be made lightly. Judges cannot decide to accept or reject cases unless a valid reason for recusation exists."); *State v. Nunez,* 15-1473, 15-1486, p. 13 (La. 1/27/16), 187 So. 3d 964, 973 (declining to adopt a "burdensome and untenable rule" that an allotment procedure

violates due process principles merely by being susceptible to manipulation).

Again, contrary to the jurisprudence on which the majority relies, the Clerk provides no compelling reason for the geographical limitation in its allotment procedure in the nature of judicial efficiency or otherwise. In fact, every other court of appeal in Louisiana operates without this limitation on random panel assignments. I therefore decline to expand the scope of our earlier decisions permitting limitations on random allotment, *see Cooper, supra,* absent proof that this deviation is required for judicial efficiency.

Accordingly, I find that the extraordinary circumstances in this matter necessitate the rare exercise of this Court's plenary authority pursuant to La. Cont. art. V, §5(A), and I am therefore duty-bound to dissent. I would issue a writ of mandamus to the Clerk of Court of the First Circuit Court of Appeal ordering its performance of the ministerial duties set forth in La. C.C.P. art. 2164.1 to randomly assign panels in this matter and in all future panel assignments of that court. However, I vote to deny Texas Brine's request to transfer the so-called "Sinkhole Cases" to another circuit court.

SUPREME COURT OF LOUISIANA

NO. 2019-0C-1503
NO. 2019-0C-1508

TEXAS BRINE CO., LLC AND
UNITED BRINE SERVICES CO., LLC

V.

RODD NAQUIN, IN HIS OFFICIAL CAPACITY
AS CLERK OF COURT FOR THE FIRST CIRCUIT
COURT OF APPEAL FOR THE STATE OF LOUISIANA

c/w

GARY N. SOLOMON, STEPHEN H. JONES, TERRY D. JONES, AND HEALTH SCIENCE PARK, L.L.C.
CENTERPOINT ENERGY RESOURCES CORP., ET AL.

V.

RODD NAQUIN, IN HIS CAPACITY AS CLERK OF COURT FOR THE FIRST CIRCUIT COURT OF APPEAL FOR
THE STATE OF LOUISIANA

ON WRIT OF MANDAMUS TO THE COURT OF APPEAL,
FIRST CIRCUIT

JOHNSON, C.J., additionally concurs and assigns reasons.

I agree with the Per Curiam and write separately simply to emphasize that a mandamus will not lie in this case because the clerk of court has discretion in selecting a method of random allotment. Given the element of discretion, a petition for mandamus is not procedurally appropriate.

APPENDIX B

SUPREME COURT OF LOUISIANA

ORDER

IT IS HEREBY ORDERED that this court's order of August 28, 2019 transferring the matters of "Texas Brine Co. LLC, et al. v. Rodd Naquin, in his Capacity as Clerk of Court for the First Circuit Court of Appeal for the State of Louisiana," 19-CW-1053 and (2) "Gary N. Solomon. et al. v. Rodd Naquin, in his Capacity as Clerk of Court for the First Circuit Court of Appeal for the State of Louisiana," 19-CW-1101 from the Court of Appeal, First Circuit to the Court of Appeal, Fourth Circuit be and hereby is recalled and vacated.

IT IS FURTHER ORDERED that in the exercise of our plenary supervisory jurisdiction under La. Const. Art. V, § 5(A), this court hereby assumes jurisdiction over these matter. *See Marrioneaux v. Hines,* 05-1191 (La. 5/12/05), 902 So. 2d 373; *Perschall v. State of Louisiana*, 96-0322 (La. 7/1/97), 697 So.2d 240. The Court of Appeal, Fourth Circuit is directed to transfer the record of these proceedings to this court.

IT IS FURTHER ORDERED that within fifteen days of the date of this order, the Court of Appeal, First Circuit, shall submit a per curiam to this court detailing the internal allotment procedures for appeals and applications for supervisory writs in that court. A copy of this per curiam shall also be provided to the parties.

IT IS FURTHER ORDERED that an appropriate briefing order will be issued to the parties at a future date.

NEW ORLEANS, LOUISIANA, this 20 day of September 2019

FOR THE COURT:

____

JUSTICE, SUPREME COURT OF LOUISIANA

APPENDIX C
STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

PER CURIAM

By order dated September 20, 2019, the Louisiana Supreme Court, in relation io the matters of Texas Brine Co., L.L.C. v. Rodd Naquin, 2019-OC-01503, and Gary N. Solomon v. Rodd Naquin, 2019-OC-01508, ordered this Court to submit, within fifteen days of its order, a per curiam to the Supreme Court, "detailing the internal allotment procedures for appeals and applications for supervisory writs" in First Circuit Court of Appeal. The allotment procedures of the Louisiana First Circuit Court of Appeal are detailed in the Internal Rules of Court, First Circuit, as more fully described below.[1]

I. Allotment process for each appeal and each writ application in the Court of Appeal, First Circuit

Each appeal and writ application is docketed (assigned a court of appeal case number) upon the lodging (filing) of the record in an appeal or the filing of a writ application with the Court of Appeal. The appeals and writ applications are docketed in the order in which they are filed with the Court of Appeal. See Internal Rules 2.3d(1) and 3.9d(1).

After each appeal is given a docket number, each appeal is randomly allotted pursuant to La. R.S. 13:319, after such time as the appellant's brief is filed,

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[1] The relevant portions of the First Circuit's Internal Rules are attached hereto as "Appendix A" and made a part hereof.

utilizing the processes set forth in First Circuit Internal Rule 2.3d(1)(c). After each writ application is given a docket number, each writ application is randomly allotted utilizing the processes set forth in First Circuit Internal Rule 3.9a. For the random allotment of both appeals and writ applications, the clerk of court utilizes two clerk's office staff members to randomly allot each appeal or each writ application to a panel and to thereafter randomly designate a primary (or writing) judge from the judges of that panel. See Internal Rules 2.3d(l)(c)(i) and 3.9a.

Prior to legislative amendment in 2018, La. R.S. 13:319 provided that "[e]ach civil and criminal **proceeding** and each application for writs shall be randomly assigned by the clerk, subject to the direct supervision of the court." (Emphasis added). Thus, with regard to the random allotment of appeals, prior to the 2018 amendment and in compliance with the pre-amendment language of the statute, where an appeal arose from a judgment in a judicial district court proceeding from which a prior appeal had previously arisen, the subsequent appeal in that same district court case number (proceeding) was assigned to the same primary judge who had authored the prior appeal in that district court proceeding, sitting with that primary judge's current panel.

However, by Acts 2018, No. 658, the Legislature amended La. R.S. 13:319 to change the word "proceeding" to "appeal," thus now providing that "[e]ach civil and criminal **appeal** and each application for writs shall be randomly assigned by the clerk, subject to the direct supervision of the court." (Emphasis added). Following this legislative amendment, the First Circuit reviewed and amended its Internal Rules effective July 10, 2019, as specifically codified into the Court's

Internal Rules on August 9, 2019, to clarify that each appeal is randomly allotted, regardless of prior appeals in the First Circuit arising from the same district court proceeding bearing that district court case number. See Internal Rule 2.3d(1)(c).

The Court's procedures for the random allotment of writ applications was also amended, as codified into its Internal Rules on August 6, 2019. However, unlike appeals, the random allotment of writ applications in the First Circuit Court of Appeal never followed the "subsequent appeal" allotment process. Thus, notwithstanding any representation to the contrary, any similarity in the panels to which writ applications are or were randomly allotted would be mere coincidence.

II. Recusals

Appeals are randomly allotted to a panel by the clerk's office, as described above, taking into account any standing recusal a judge may have. If a member of panel has a standing recusal applicable to a particular appeal, the matter is randomly allotted to one of the remaining panels. See Rule 2.3d(l)(c)(i). However, if more than one panel must be removed from the allotment process due to standing recusals, the clerk of court, utilizing two clerk's office staff members, randomly draws a special panel by removing the judges with the standing recusals from the selection process and then randomly drawing the special panel from the remaining judges. See Internal Rules 2.3d(l)(c)(ii).

If a judge is later recused following the initial random allotment of an appeal or writ application, the judge is replaced by the assignment of another judge, by random allotment. The clerk of court utilizes two clerk's office staff members to randomly

select the replacement judge. See Internal Rules 2.3d(l)(c)(i) and 3.9f(l).

III. Emergency writ applications

The allotment process for writs is also by random allotment, as set forth in Rule 3.9. Writ applications designated for emergency or expedited consideration are allotted to the writ panel on duty as the nature of the emergency so requires. See Internal Rule 3.9a.

Appendix A

2.3d **Docketing and allotment procedures.**

2.3d(1)(a) All appeals shall be docketed (assigned a case number) upon the lodging of the original trial record with the Clerk of the Court of Appeal. The appeals shall be docketed in the order in which they are filed under the same title used in the lower court.

2.3d(1)(b) After the appeal is given an appeal docket number, the appeal shall be randomly allotted to a panel in accordance with Louisiana Revised Statute 13:319 using the random allotment process of Rule 2.3d(1)(c) of the First Circuit Internal Rules.

2.3d(1)(c) **Allotment of appeals.**

2.3d(1)(c)(i) **Random allotment process**. The clerk's office shall use two clerk's office staff members for the random allotment of each civil and criminal appeal to a panel, taking into account all standing recusals, and to thereafter designate a primary (or writing) judge. The other judges serving as backup and third judges are determined by seniority. If a judge is later recused following the allotment of an appeal and assignment to a panel, the judge shall be replaced by the assignment of another judge, by random allotment, to the panel. The successor judge shall stand in the place and stead of the recused judge.

2.3d(1)(c)(ii) However, where more than one panel must be removed from the allotment process due to standing recusals, the Clerk of Court shall randomly assign a special panel by removing the judges with the standing recusals from the

selection process and then randomly drawing the special panel from the remaining judges.

2.3d(1)(d) **Designation of appeals**. Appeals with up to 1,000 pages of record and exhibits are considered "regular" appeals; appeals with 1,001 pages to 3,000 pages are "specials"; appeals with 3,001 to 10,000 pages are "super specials"; appeals with more than 10,000 pages are "mega specials."

2.3d(1)(e) **Staff assistance**. The primary judge and back-up judge on a civil mega special appeal have the option of requesting that a central staff civil attorney be assigned to the judge's staff.

2.3d(1)(f) **Credit for specials**. When a civil special, super special, or mega special appeal is assigned to a judge, that judge's caseload is reduced as follows: special--one fewer civil appeal; super special--two fewer civil appeals; mega special--3 fewer civil appeals.

2.3d(2) **Judges' responses to proposed docket**. The Clerk shall submit proposed dockets to the judges with a "respond by" date noted on the cover sheet, which shall be no sooner than seven days from the date noted on the cover sheet.

2.3d(3) **Clerk to furnish docket**. The Clerk shall furnish each judge a copy of the complete docket of cases scheduled for argument at least 30 days prior to argument date.

2.3d(4) **Dismissed appeals and writs**. If a motion to voluntarily dismiss an appeal or a writ already on a docket is filed not sooner than 30 days before the submission date and the motion is granted, the primary judge shall be randomly allotted an extra appeal when the next available docket is randomly allotted.

2.3d(5) **Continued appeals and writs**. If an appeal or writ is continued, it shall be docketed as an extra case for the primary judge on the docket to which it is continued, unless a substitution is made on the docket from which it was continued. To the extent possible, the panel shall schedule the matter to be heard within the same docket year.

2.3d(6) Recusals.

2.3d(6)(a) Each judge shall supply a standing recusal list, if applicable, with written reasons to support each standing recusal to the clerk's office.

2.3d(6)(b) During the docket approval process or after the docket has been approved, when a judge informs the clerk's office in writing of a recusal, the clerk's office shall note an order of recusal has occurred in the case and the date the recusal occurred. The judge shall forward written reasons for the recusal to the clerk's office no later than 15 days after the date the recusal occurred and, upon receipt, the clerk's office shall file the written reasons with the record.

2.3d(6)(c) If the judge who recuses from an appeal is the primary judge, that judge shall be randomly allotted an extra appeal when the next available docket is randomly allotted.

2.3d(7) **Certiorari grants**. Any cert. grant shall be assigned as an additional case to the primary judge and original panel on the writ and shall not be in lieu of a regular case.

2.3d(8) **Appeal stayed due to bankruptcy after panel assignment**. If an appeal is stayed due to bankruptcy after assignment to a panel, when the stay is lifted, the matter goes to the same panel assigned the appeal at the time of the stay. If

a judge of the panel is no longer a member of the court, the judge shall be replaced by the successor judge, who shall stand in the place and stead of the replaced judge.

3.9 Writs

3.9a **Allotment**. After each writ application is given an appellate docket number, each writ application shall be randomly allotted to a panel in accordance with Louisiana Revised Statute 13:319. The clerk's office shall use two clerk's office staff members for the random allotment of each writ applications to a panel, and to thereafter designate a primary judge. The other judges serving as back-up and third judge are determined by seniority. Criminal and civil writ applications are allotted separately. Writ applications designated for emergency or expedited consideration shall be allotted to the writ panel on duty as the nature of the emergency so requires.

3.9a(1) **Writ applications**. Other than the below-described procedure for emergency or expedited writ applications, the Clerk's Office shall randomly allot writ applications in court of appeal docket number order, in groups of 4, from 2 pools.

3.9a(1)(a) Pool 1 shall consist of writ applications entered into the Court's case management system from the 1st day of the month, until the 15th day of the month plus all writ applications not previously allotted. Pool 2 shall consist of writ applications entered into the Court's case management system from the 16th day of the month, until the last day of the month plus all writ applications not previously allotted.

3.9a(1)(b) The clerk's office shall make note of the two people present for the allotment process. The clerk's office shall provide the list of writ applications and the allotments to Central Staff after each pool's allotment.

3.9a(2) **Writ applications designated for emergency or expedited consideration**. The clerk's office will review writ applications to identify requests for expedited or emergency consideration. As prescribed by the Central Staff Director, all writs will be further screened for determination of whether emergency or expedited consideration is required.

3.9a(2)(a) The Clerk's Office will advise Central Staff of writ applications requesting expedited or emergency consideration and these writ applications will be considered in that manner unless the Clerk's Office is advised otherwise by the Court or Central Staff.

3.9a(2)(b) Central Staff will advise the Clerk's Office that a writ application will be handled in an emergency or expedited manner if Central Staff's screening determines such a need through review of the writ application, subsequent filings, or per the direction of the Court.

3.9b **Certiorari grants**. In the case where certiorari is granted on a criminal writ application, the primary judge decides whether he wishes to write the opinion or wishes to have central staff write the opinion. In either event, the primary judge receives no extra credit for it on a regular docket.

3.9c **Criminal writ application remand**. A similar situation exists when the Louisiana

Supreme Court remands a criminal writ application for a full opinion. In that case the primary judge is contacted and asked if he/she wants a full opinion. If so, the judge receives a writing credit for one of his/her criminal appeals; staff receives a credit for one of its appeals. If the judge does not want a staff opinion report, he/she receives a writing credit, for one of his/her non-criminal cases.

3.9d **Criminal writ dismissed**. The court no longer converts a criminal writ to an appeal. In such cases, the writ shall be processed by central staff and assigned to writ conference.

3.9e **Prose writs**. Prose writs are accepted as they are.

3.9f **Random allotment of writs and motions to non-duty judges**. The procedures described herein shall be used to randomly allot writs or motions to non-duty judges in the event that it is necessary to select non-duty judges to participate in the decision on a writ or motion. Such situations include, but are not limited to, the unavailability of a duty judge, recusal, and need for a five-judge panel. Civil and criminal matters shall have separate but identical procedures, pools, and records.

3.9f(1) **Placement in pool**. At the start of each writ duty cycle (i.e. 12:01 a.m. on the first Saturday of the duty cycle), all non-duty judges' names will be placed in a pool from which to select a judge when the need arises for a non-duty judge to participate in the decision on a writ or motion. Once a judge is selected, his or her name is not placed back into the pool until or unless all non-duty

judges have been selected or until a new duty cycle begins, whichever comes first.

3.9f(2) **Motions and writs with same or interrelated issues**. If more than one writ or motion present the same issue or arise from the same case and are interrelated to the extent that judicial efficiency dictates that they be assigned to the same judges as if formally consolidated, the matters may be assigned to the same non-duty judge according to the procedures set forth herein and, in that event, shall constitute only one selection for purposes of random allotment and selection credit.

3.9f(3) **Unavailability of selected non-duty judge**. If the non-duty judge selected cannot, for whatever reason (including, but not limited to, unavailability or recusal), participate in the decision on the writ or motion, his or her name shall be placed back in the pool and another non-duty judge selected. The selection of a non-duty judge should not delay the decision on a writ or motion. Therefore, if the non-duty judge selected is not immediately available upon the initial attempt at contact, in person or by telephone call to his or her office, and the writ or motion is of such a nature that some degree of expedited treatment is required, then staff has the option of returning that judge's name to the pool and selecting another non-duty judge, as described above.

3.9f(4) **Records**. Records shall be kept by staff, which shall include:

(a) Date of selection;
(b) Docket numbers;
(c) Judge selected;

(d) Name of person who performed the selection; and

(e) Return of a judge's name to the pool and reason therefor if a selected judge's name is placed back in the pool in accordance with Rule 3.9f(3).

3.9f(5) **Time of selection**. The separate criminal and civil pools shall be brought to writ conferences and necessary selections made as needed. However, in the event the judge selected at the writ conference cannot participate, the procedure described in Rule 3.9f(3) shall be applicable and followed after the writ conference. Internal Rules of Court, First Circuit Court of Appeal SECTION 3.1

3.9f(6) **Recusal order and written reasons**. In the event of a recusal, Central Staff shall forward notice of the order of recusal to the judge and to the clerk's office indicating the case number, the judge's name, and the date the recusal occurred. The judge shall forward written reasons for the recusal to the clerk's office (either directly or through Central Staff) no later than 15 days after the date the recusal occurred and, upon receipt, the clerk's office shall file the written reasons with the record.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

PER CURIAM

CRAIN, J., additionally responding.

I agree the facts set forth in the per curium are accurate and our court is properly responding to the Supreme Court's directive. I write separately to emphasize the underpinning of the parties' arguments is the assumption that the legislative branch, as opposed to the judicial branch, has the constitutional authority to dictate the manner in which cases are assigned within the court. The assumption is not only arguably flawed, but also threatens the ability of our courts to independently perform their adjudicative functions. Furthermore, there has been no constitutional challenge asserted as to this court's allotment procedures.

APPENDIX D

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

PER CURIAM

By orders dated October 21, 2019, in the matters of Texas Brine Co., L.L.C. v. Rodd Naquin, 2019-OC-01503, and Gary N. Solomon v. Rodd Naquin, 2019-OC-01508, the Louisiana Supreme Court ordered this Court to submit, within fifteen days of the date of its orders, a supplemental per curiam to the Supreme Court, "discussing whether the court's allotment procedures incorporate any geographical considerations" and directed that this Court should "attach copies of its internal rules, if any, which provide for such allotment." The First Circuit respectfully submits the following.

The random allotment of appeals and writ applications to a particular panel is entirely independent of the process of composing appellate panels and writ duty panels. The First Circuit Court of Appeal's procedures for the **allotment of appeals and writs,** as detailed in this Court's prior per curiam delivered to the Supreme Court on October 4, 2019, do not incorporate any geographical considerations, as such allotments are made by random assignment, in accordance with applicable statutes.

As to the **drawing of panels,** the composition of panels is reserved to the courts of appeal by Louisiana Constitution, Article V, Section 8(A). Thus, the constitutional provision requires only that the First Circuit sit in panels of at least three judges selected according to rules adopted by the Court, as the

composition of such panels is specifically reserved to each court, notwithstanding any statutory enactment. The rules adopted by the First Circuit establish that the Court sits in at least six appeal cycles annually, with four regular panels of three judges each, throughout the court year. The Court's procedures for the composition of regular panels is random within the geographic divisions of the court, as more fully described in the following paragraph. The composition and terms of the Court's panels and the schedule of oral argument dates and writ conference dates are formulated and recommended by the Case Flow and Scheduling Committee, subject to approval of the Conference of the First Circuit. See Internal Rule 2.1a.

By longstanding practice, and in accord with the constitutional authority specifically reserving such to each court of appeal, absent recusals, each regular panel of the First Circuit is comprised of one member randomly chosen through mechanical means from the four members of each of the Court's three election districts. The random composition of the initial three-judge panels is adopted pursuant to a five-year plan of rotation of members among the panels. To further ensure random composition of the panels, panel members of particular panels do not sit as an intact panel in the following year. The four randomly drawn regular panels also sit on writ duty throughout the Court's six appeal cycles. Summer writ duty panels, which rotate duty on a two-week basis, are established by seniority, without regard to the allotment of any writ or appeal, to account for summer scheduling. Rotation of the composition of the panels occurs in August of each year.

Issued this 29th day of October, 2019, at Baton Rouge, Louisiana.

Appendix A

2.1a **Three-judge panels.** In accordance with the provision of Louisiana Constitution, Article V, Section 8(A) that requires the Court to sit in panels of at least three judges selected according to rules adopted by the Court, the First Circuit, which consists of 12 judges, shall sit in at least 6 cycles with 4 regular panels of 3 judges each throughout the court year. Rotation of the panel composition occurs in August of each year. The composition and terms of these regular panels and of the summer duty panels and the schedule of hearing dates, exchange dates, decision dates and rehearing dates are formulated and recommended by the Case Flow and Scheduling Committee, subject to approval of the Conference of the First Circuit.

APPENDIX E

The Supreme Court of the State of Louisiana

TEXAS BRINE COMPANY LLC AND UNITED BRINE SERVICES COMPANY, LLC

No.2019-OC-01503

VS.

RODD NAQUIN IN HIS CAPACITY AS CLERK OF COURT FOR THE FIRST CIRCUIT COURT OF APPEAL FOR THE STATE OF LOUISIANA

— — — — — —

IN RE: Texas Brine Company, LLC - Applicant Plaintiff; United Brine Services Company, LLC - Applicant Defendant; Applying for Rehearing, Parish of Assumption, 23rd Judicial District Court Number(s) 34,202, Court of Appeal, First Circuit, Number(s) 2019CW1053;

— — — — — —

April 09, 2020

Application for rehearing denied.

JLW
BJJ
JHB
SMC

Hughes, J., would grant the application for rehearing.
Crichton, J., would grant the application for rehearing.
Genovese, J., would grant the application for rehearing.
Crain, J., recused.

Supreme Court of Louisiana
April 09, 2020

____
Clerk of Court
For the Court

APPENDIX F

COURT OF APPEAL, FIRST CIRCUIT
STATE OF LOUISIANA

DOCKET NO. ________________

TEXAS BRINE COMPANY, LLC and UNITED BRINE SERVICES COMPANY, LLC

VERSUS

RODD NAQUIN, IN HIS CAPACITY AS CLERK OF COURT FOR THE FIRST CIRCUIT COURT OF APPEAL FOR THE STATE OF LOUISIANA

PETITION FOR WRIT OF MANDAMUS AND REQUEST FOR STAY

Texas Brine Company, LLC and United Brine Services Company, LLC (collectively, "Texas Brine") petitions this Honorable Court to issue a writ of mandamus directed to Rodd Naquin, in his capacity as the Clerk of Court for the First Circuit Court of Appeal for the State of Louisiana ("Clerk of Court"), based in Baton Rouge, Louisiana, to follow the statutory mandate to randomly allot each appeal and each writ application to appeal and writ panels, and further seek a stay of proceedings in the Sinkhole Cases[1] until this Honorable Court can rule on this petition, on the following grounds:

[1] These Sinkhole Cases, filed in the 23rd Judicial District Court for the Parish of Assumption, include *LaBarre v. Occidental Chemical Co.; Marchand v. Texas Brine Co., L.L.C.; Florida Gas Transmission Co., L.L.C. v. Texas Brine Co., L.L.C.*; *Pontchartrain Natural Gas System v. Texas Brine Co., L.L.C.*;

1.

Plaintiff herein is Texas Brine, a Texas limited liability company, and its principal place of business is located in Houston, Texas. Texas Brine does business in the State of Louisiana.

2.

Defendant herein is Rodd Naquin, in his capacity as the Clerk of Court for the First Circuit Court of Appeal for the State of Louisiana, based in Baton Rouge, Louisiana, and who is a public officer for purposes of La. Code of Civ. Proc. Arts 2164.1, 3861, and 3863, and La. R.S. § 13:319.

3.

Jurisdiction is proper in the Louisiana First Circuit Court of Appeal, pursuant to Article V, § 2 and § 10 of the Louisiana Constitution of 1974, and La. Code Civ. Proc. Art. 191.

PROCEDURAL HISTORY AT THE TWENTY-THIRD JUDICIAL DISTRICT COURT

4.

Texas Brine has been involved in a seven-year battle in multiple lawsuits with multiple parties as a result of a sinkhole that appeared in Assumption Parish on August 3, 2012. Texas Brine is a party to the multiple cases currently pending before Louisiana state courts in the Twenty-Third Judicial District

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Crosstex Energy Services, L.P. v. Texas Brine Co., L.L.C.; *Assumption Parish Police Jury v. Texas Brine Co. LLC c/w Assumption Parish Sheriff Mike Waguespack v. Texas Brine Co., LLC c/w State of Louisiana v. Texas Brine Co., LLC.; Texas Brine Co., LLC v. Vulcan Materials Co.;* and *Occidental Chemical Corp. v. Arch Insurance Co.* (collectively the "Sinkhole Cases").

Court that comprise the Bayou Corne sinkhole litigation.

5.

Following a three-week trial, participated in by all parties, Judge Kliebert issued a judgment finding that Occidental Chemical Corporation was 40% at fault; Occidental Petroleum Corporation was 5% at fault; Oxy USA, Inc. was 5% at fault; Texas Brine was 25% at fault; United Brine Services Company, LLC was 10% at fault; and Legacy Vulcan, LLC was 15% at fault. Multiple appeals to the First Circuit have been taken from this liability judgment, and remain pending.

PROCEDURAL HISTORY AT THE FIRST CIRCUIT

6.

As of June 1, 2019, the Bayou Corne Sinkhole Cases have spawned 53 appellate panels for cases before the First Circuit. Additionally, as of that date, the judges of the First Circuit have issued 114 unilateral orders in the Sinkhole Cases. The First Circuit has not practiced the legislatively mandated random allotment of these appeals or motions arising out of the Bayou Corne Sinkhole Cases. Texas Brine discovered the First Circuit's failure through its investigation of procedural anomalies surrounding Judge McDonald's grossly disproportionate issuance of unilateral orders and disproportionate presence on Texas Brine's appellate panels.

7.

On February 26, 2019, Judge McDonald unilaterally denied three contested motions before the First Circuit related to the appeal of the liability trial. Since then, Texas Brine has determined that as of

June 1, 2019, Judge McDonald has signed almost 70 orders regarding these writ applications and appeals—far more than all other First Circuit Judges combined.

8.

Under Louisiana law, contested motions before the First Circuit must be decided by a three-judge panel and cannot be decided unilaterally by a single judge outside of a panel.[2] Any panel would need to be appointed by the First Circuit Clerk of Court on a **random** basis, and not according to the election of any particular judge.[3]

9.

Judge McDonald's February 26, 2019 improper unilateral denial of the three contested motions—which were filed by Texas Brine on February 1, 2019, and requested additional pages for Texas Brine's appeal of the Phase I liability ruling — prompted Texas Brine to review Judge McDonald's involvement in the Bayou Corne Sinkhole Cases.

10.

On review of Judge McDonald's conduct in the Bayou Corne Sinkhole Cases, Texas Brine discovered that as of June 1, 2019 Judge McDonald had signed a vastly disproportionate share of orders issued by the First Circuit in the Bayou Corne Sinkhole Cases—68 of 114, or about 58% of the orders issued—and served on 33 of 53 appellate panels. This overrepresentation is particularly striking in light of the fact that 12 judges sit on the First Circuit.

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[2] *See* LA. CONST. art. V, § 8(B); LA. UNIF. R. CT. APP. 1-5.
[3] *See* LA. CODE CIV. PROC. art. 2164.1 (referring to LSA-R.S. § 13:319).

11.

The odds of this distribution—including all appellate panels formed and unilateral orders signed by judges as of June 1, 2019—occurring in a system of true random allotment of writs, appeals and motions, as is required under Louisiana Code of Civil Procedure article 2164.1 and Louisiana Revised Statute §13:319, is more than ***140 million to 1*** **with respect to appellate panel membership and approximately *52.6 quindecillion* (a one with 48 zeroes) *to 1* with respect to the issuance of unilateral First Circuit orders.**[4] This distribution alone demonstrates that Mr. Naquin has not allocated motions or appeals arising out of the Bayou Corne Sinkhole Cases on a random basis.

12.

Texas Brine has filed numerous motions to recuse Judge McDonald in the Sinkhole Cases, noting Judge McDonald's disproportionately large role in the Bayou Corne Sinkhole Cases.

13.

In connection with its motions to recuse, on March 1, 2019, Texas Brine submitted a public records request to Rodd Naquin in his role as Clerk of Court for the First Circuit. Texas Brine's request sought information related to the First Circuit's internal rules for recusal of judges and for allocation of appeals, writs, and motions to judges and panels.

14.

On March 7, 2019, in response to Texas Brine's March 1, 2019 public records request, Mr. Naquin

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[4] *See* Exhibit 1, Affidavit of Robbie Beyl, Ph.D. (June 1, 2019).

produced copies of several rules from the First Circuit's Internal Rules of Court.[5]

15.

According to the First Circuit's Internal Rules of Court produced by Mr. Naquin, motions and orders, except as otherwise provided, shall be presented to "any available judge for consideration."[6] Motions filed after the docket has been approved shall be sent to the panel chief and shall be decided by majority vote of the panel and signed by the panel chief.[7]

16.

Thus, the First Circuit's own internal rules expressly reveal a policy ***absolutely incompatible*** with the First Circuit Clerk of Court's ministerial duty to ensure random allotment.

17.

On March 13, 2019, seven of the twelve judges on the First Circuit issued a one-sentence denial of Texas Brine's motions to recuse Judge McDonald. Judges Whipple, McClendon, Holdridge, and Chutz recused themselves, citing a need to "avoid the appearance of impropriety" even though they had not been accused of any wrong-doing whatsoever in Texas Brine's motions to the First Circuit.

18.

Texas Brine suspected that the First Circuit—in addition to whatever practices had allowed Judge McDonald to exercise his improbable level of control over the Bayou Corne Sinkhole Cases—follows an

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[5] *See* Exhibit 2, First Circuit Response to Mar. 1, 2019 Public Records Request.

[6] LA. APP. 1 CIR. INT'L R. 3.6a.

[7] *Id.* R. 3.6f.

internal policy of allocating judges to appellate panels according to the geographic makeup of the First Circuit's election districts—allocating one judge from each district to each panel. Such a policy dramatically limits the number of unique panels that can hear writs, appeals, and contested motions before the First Circuit from 220 unique combinations to 64 unique combinations—a reduction of approximately 70.9%.[8]

19.

On March 19, 2019, Texas Brine submitted two public records requests to Mr. Naquin in his capacity as Clerk of Court for the First Circuit. Texas Brine's request sought information related to, *inter alia*, any measures taken by the First Circuit to ensure that appellate panels contain judges elected from each of the three election districts that comprise the First Circuit.

20.

On March 26, 2019, the First Circuit responded to Texas Brine's March 19, 2019 public records requests. In its response to Texas Brine's inquiry regarding First Circuit efforts to ensure geographically diverse panels, the First Circuit claimed that "there are no records 'relating to any measures taken to ensure that appellate panels are comprised of judges from separate election districts.'"[9]

21.

Despite this response to the public records requests, affidavit testimony from Retired First Circuit Judge Edward J. Gaidry has confirmed that

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[8] *See* Exhibit 3, Affidavit of Robbie Beyl, Ph.D. (Mar. 26, 2019).

[9] *See* Exhibit 4, First Circuit Response to Mar. 19, 2019 Public Records Requests.

the First Circuit performs a less than random allotment of judges to panels and instead limits random allotment by using quotas to select judges from each of the three election districts on each panel.[10] This policy ensures by design that judges from the same district will never serve on the same panel in the ordinary course of First Circuit operations—an affront to the requirement of randomness. This situation alone demonstrates a failure on the part of Rodd Naquin to perform his ministerial duty to allocate cases on a truly random basis. Compounded with the role of Judge McDonald and the facially non-random allocation methods called for — yet mysteriously not followed — by the internal rules of the First Circuit, this procedure **forecloses any claim that the First Circuit allocates cases on a random basis.**

22.

The affidavit testimony from Retired First Circuit Judge Edward J. Gaidry states that the First Circuit practices an internal policy of selecting one judge from each of the three electoral districts within the First Circuit to form appellate panels.[11]

23.

Moreover, of the eighteen Sinkhole Cases appeals that were orally argued in the First Circuit on June 10-11, 2019, over Texas Brine's objections, Judge McDonald was assigned to panels for ***fifteen*** of them.

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[10] *See* Exhibit 5, March 25, 2019 Affidavit of Retired First Circuit Judge Edward J. Gaidry.
[11] *Id.*

24.

As indicated above, the defendant to this Petition has demonstrated an unwavering refusal to perform his ministerial duties in accordance with the express terms of the Louisiana Code of Civil Procedure, the Louisiana Revised Statutes, and even the First Circuit's own internal rules. The First Circuit judges have adopted written and unwritten internal rules of court which are **expressly incompatible with random allotment**, and Mr. Naquin has demonstrated a pattern of allocating a disproportionate number of cases to one particular Judge—Judge McDonald.

RANDOM ALLOTMENT IS REQUIRED

25.

Pursuant to Louisiana law, "***each*** civil . . . appeal and each application for writs ***shall*** be randomly assigned by the clerk, a public officer, subject to the direct supervision of the Court."[12] Random allotment is clearly a statutory, ministerial duty assigned to the clerks of the appellate courts, and to the courts themselves due to their specific roles as supervisors of this mandatory procedure. Appellate courts do not possess discretionary authority to allow clerks to do anything other than to allot randomly. Random allotment of cases on appeal and writ applications is not discretionary on the part of the appellate courts or their clerks.

26.

Because this Court's internal rules and practices (both written and unwritten) provide for a material

[12] LA. CODE CIV. PROC. art. 2164.1 (referring to La. R.S. § 13:319) (emphasis added).

variance from the Legislature's random allotment mandate related to the assignment of judges to panels and the allotment of appeals and applications for writs to these panels, they cannot stand, and the Defendant cannot enforce them.

27.

Conversely to this Court's rules and practices, affidavits of the Clerks of Court for the Louisiana Courts of Appeal for the Third, Fourth, and Fifth Circuits confirm that the practices of each of those courts are to randomly allot all cases to appeal and writ panels each time an appeal or application for writ is filed, regardless of the history of the case at their respective courts of appeal.[13] Two of the three have expressly attested that they do not incorporate geographic quotas.[14]

28.

When a litigant, such as Texas Brine in the Sinkhole Cases, is deprived of the random, neutral assignment of each appeal or review of its case, the litigant is deprived of its right to due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, §§ 2 and 22 of the Louisiana Constitution.

REMEDY: THE ISSUANCE OF A WRIT OF MANDAMUS AND STAY ORDER

29.

A writ of mandamus is a writ directed to a public officer "to compel the performance of a ministerial

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[13] *See* Exhibits 6, 7 and 8, Affidavits of Renee R. Simien, Justin L. Woods and Cheryl P. Landrieu.

[14] *See* Exhibits 6 (Simien) and 7 (Woods).

duty required by law" and can only be issued by a court on petition.[15]

30.

Upon the filing of a petition for writ of mandamus, "the Court ***shall*** order the issuance of an alternative writ directing the defendant to perform the act demanded or to show cause to the contrary."[16]

31.

A mandamus proceeding may be tried summarily.[17] The petition for writ of mandamus shall be assigned for hearing, in open court or in chambers, two to ten days after service of the alternative writ, but may be held earlier upon proper showing.[18]

32.

Louisiana positive law is abundantly clear: the clerk of court for each Louisiana Court of Appeal shall, without fail, allot each appeal and each application for a writ by a true random allotment process, regardless of the case history at the court.[19] This mandatory random allotment is a ministerial duty that must be performed by every appellate clerk of court. The appeal courts must also directly supervise their respective clerks of court to ensure that the mandatory random allotment process is followed.

33.

As indicated above,

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[15] LA. CODE CIV. PROC. arts. 3781, 3861, & 3863.
[16] *Id.* art. 3865 (emphasis added).
[17] *Id.* art. 3781.
[18] *Id.* arts. 3782 & 3784.
[19] *Id.* art. 2164.1 & La. R.S. § 13:319.

(1) the odds, given the statistical analysis of Robbie Beyl, Ph.D.;

(2) the written internal rules of the First Circuit;

(3) the Affidavit of Retired First Circuit Judge Edward J. Gaidry as to the First Circuit's actual unwritten practices; and

(4) common sense after reviewing the various assignments in the Sinkhole Cases,

make it highly improbable that random allotment of the applications for writs and/or appeals in the Sinkhole Cases has occurred as required by Louisiana law.

34.

An alternative writ of mandamus should immediately issue by Order from this Honorable Court to compel its Clerk of Court, Rodd Naquin, to randomly allot each and every appeal and application for a writ, in the Sinkhole Cases, to the various panels of the court, and after the Defendant has had the opportunity to show cause why he should not be so compelled, this Honorable Court should issue a judgment making the alternative writ peremptory.

35.

Texas Brine also requests that this Court enter a stay order that ensures that any currently pending or filed in the future writ applications and appeals in the Sinkhole Cases not be assigned to a panel, nor decided, until this Honorable Court has had the opportunity to hold a hearing on the subject Petition for Writ of Mandamus to decide whether the alternative writ should be made peremptory.

36.

Texas Brine further notes a similar Petition for Writ of Mandamus has been filed in this Court in the case *Solomon v. Naquin*, No. 2019-CW-1011[20] and this entire court has recently recused itself from that action and notified the Louisiana Supreme Court Clerk of Court regarding same.[21]

WHEREFORE, Petitioner Texas Brine prays that this Honorable Court order the issuance of an alternative writ directing Rodd Naquin, in his capacity as the Clerk of Court for the First Circuit Court of Appeal for the State of Louisiana, to comply with La. Code of Civ. Proc. art. 2164.1 and La. R.S. 13:319, and to randomly allot each and every civil appeal and application for writs to panels for consideration, regardless of the case's history at the Court, or to show cause to the contrary pursuant to La. Code of Civ. Proc. art. 3866.

Petitioner further prays that this Honorable Court issue a stay order to ensure that pending appeals and applications for supervisory writs to this Court are not assigned to a panel, nor decided, until this Honorable Court has had the opportunity to hold a hearing on the subject Petition for Writ of Mandamus.

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[20] *See* Exhibit 9, Petition for Writ of Mandamus.

[21] *See* Exhibit 10, Letter and Order dated August 8, 2019.

Respectfully submitted,

/s/ *James M. Garner*

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APPENDIX G

STATE OF LOUISIANA

SUPREME COURT

DOCKET NO. 2019-OC-1503

TEXAS BRINE COMPANY, LLC and UNITED BRINE SERVICES COMPANY, LLC

VERSUS

RODD NAQUIN, IN HIS CAPACITY AS CLERK OF COURT FOR THE FIRST CIRCUIT COURT OF APPEAL FOR THE STATE OF LOUISIANA

BRIEF OF RELATORS TEXAS BRINE COMPANY, LLC AND UNITED BRINE SERVICES COMPANY, LLC IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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MAY IT PLEASE THE COURT:

Relators Texas Brine Company, LLC and United Brine Services Company, LLC ("Texas Brine") seek (1) enforcement of Louisiana law for random assignment of civil appeals and civil appellate panels by the Louisiana First Circuit Court of Appeal, (2) protection of Texas Brine's constitutional rights, (3) promotion of public policy and trust in the judiciary, and (4) transfer of pending and future appeals and writ applications in the Sinkhole Cases[1] to another circuit. The Louisiana Legislature has codified the requirement of random assignment of civil appeals and civil appellate panels in every case.[2] That legislative will, as set forth in Revised Statutes §13:319 and Code of Civil Procedure article 2164.1, as confirmed by **unanimous vote** of both houses of the Louisiana legislature,[3] mandates that all appellate courts **must randomly assign all civil appeals**.[4] The First Circuit's assignment of civil appeals fails to adhere to these statutes. Its failure to randomly

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[1] The "Sinkhole Cases," filed in the 23rd Judicial District Court, include *LaBarre v. Occidental Chem. Co.*; *Marchand v. Tex. Brine Co., LLC*; *Fla. Gas Transmission Co., LLC v. Tex. Brine Co., LLC*; *Pontchartrain Nat. Gas Sys. v. Tex. Brine Co., LLC*; *Crosstex Energy Servs., L.P. v. Tex. Brine Co., LLC*; *Assumption Parish Police Jury v. Tex. Brine Co. LLC c/w Assumption Parish Sheriff Mike Waguespack v. Tex. Brine Co., LLC c/w State of Louisiana v. Tex. Brine Co., LLC*; *Tex. Brine Co., LLC v. Vulcan Materials Co.*; and *Occidental Chem. Corp. v. Arch Ins. Co.*

[2] *See* LA. REV. STAT. § 13:319 (as amended) and LA. CODE CIV. PROC. art. 2164.1, effective August 1, 2018.

[3] *See* Legislative History of Senate Bill 273, attached as Exhibit 11 to Texas Brine's August 21, 2019 Amended Petition for Writ of Mandamus. As to article 2164.1, no corresponding random requirement provision was enacted with respect to the Code of *Criminal* Procedure.

[4] LA. REV. STAT. 13:319; LA. CODE CIV. PROC. art. 2164.1.

assign civil appellate panels also violates Texas Brine's constitutional rights of due process and equal protection – as attested by one of the nation's preeminent constitutional law scholars, Erwin Chemerinsky, the Dean of the University of California, Berkeley School of Law.[5]

Four of the five circuit courts of appeal in Louisiana abide by the law and use a purely random method for assigning civil appeals and appellate panels.[6] The First Circuit is an ***admitted*** ***outlier***: it uses an **uncodified**, unwritten **geographic** quota to ensure that all three-judge appellate panels (including civil panels) contain exactly one judge from each of the three districts comprising the First Circuit – a practice that eliminates over 70% of possible panels.[7] That court's unwritten policy violates the law, violates Texas Brine's constitutional rights, undermines public policy and faith in the judiciary, and ignores the legislative mandate of random assignment in civil appeals.

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[5] *See* Exhibit A, Affidavit of Erwin Chemerinsky, Nov. 13, 2019, at ¶¶ 17-22. Professor Chemerinsky was determined to be the most cited constitutional law scholar in the country from 2013-2017 by a sizable margin. *See* https://leiterlawschool.typepad.com/leiter/2018/08/20-most-cited-constitutional-law-scholars-in-the-us-for-the-period-2013-2017.html (last viewed Nov. 12, 2019). Texas Brine is simultaneously moving for leave to file affidavits with this brief.
[6] *See* Affidavits of Renee Simien (Third Circuit Clerk of Court), Justin Woods (Fourth Circuit Clerk of Court) and Cheryl Landrieu (Fifth Circuit Clerk of Court), attached as Exhibits 6-8 to Texas Brine's 8/9/19 Petition for Writ of Mandamus; *see also* Affidavit of Lillian Evans Richie (Second Circuit Clerk of Court), attached as Exhibit B.
[7] *See* First Circuit *per curiam* dated October 29, 2019, at p. 2; *see also*, Appendix C, Robbie Beyl, Ph.D. affidavit, ¶5.

The First Circuit also admitted in its October 4, 2019 *per curiam* that it had *failed to enforce the law for a year* after the August 1, 2018 effective date by systematically assigning appeals to the same panels that had previously heard other appeals arising from the same district court case:

> However, by Acts 2018, no. 658, the Legislature amended La. R.S. 13:319 to change the word "proceeding" to "appeal," thus now providing that "[e]ach civil and criminal appeal and each application for writs shall be randomly assigned by the clerk, subject to the direct supervision of the court." Emphasis added). Following this legislative amendment, the First Circuit reviewed and amended its Internal Rules effective July 10, 2019, as specifically codified into the Court's Internal Rules on August 9, 2019 to clarify that each appeal is randomly allotted, regardless of prior appeals in the First Circuit arising from the same district court proceeding bearing that district court case number. See Internal Rule 2.3d(1)(c).

But there is more: each of the following factors demonstrates why the First Circuit's failure to abide by Louisiana law requiring the random assignment of civil appeals requires the transfer of all pending and future appeals and writ applications in the Sinkhole Cases to another circuit:

- Not only has the First Circuit ***admitted*** that it failed to adhere to Louisiana law requiring the random assignment of civil appeals for over a year, but it ***still ignores the random assignment requirement*** by imposing geographic quotas pursuing to an unwritten,

"longstanding practice" where "each regular panel of the First Circuit" consists of one member from "each of the Court's three election districts."[8]

- The First Circuit's purported partial compliance with the random assignment statutes is illusory. While the First Circuit claims that it changed its ***rules*** as of August 9, 2019 to assign each appeal anew, irrespective of prior appellate assignments arising from the same lower court case, empirical evidence proves that it **has not changed its *practices***.
  - Weeks after the First Circuit claimed to have changed its rules, that Court issued three dockets in *Pontchartrain* on August 27, 2019. These dockets are ***identical*** to those released in other *Pontchartrain* appeals on June 27, 2019. The odds against this breakdown being due to random chance exceed ***175,000 to 1***.[9]

- Four First Circuit judges – a full third of that Court – remain recused from all Sinkhole Cases, citing the "***appearance of impropriety***" in recusing themselves on March 13, 2019.[10] None of these judges have appeared on a single appellate panel since that date.

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[8] *See* First Circuit *per curiam* dated Oct. 29, 2019, at p. 2.

[9] *See* Exhibit C, Affidavit of Robbie Beyl, Ph.D, Nov. 15, 2019, at ¶¶ 19-20; Exhibit C-1, Chart.

[10] *See* Exhibit 4 to August 9, 2019 Petition for Mandamus (the "Petition"), March 13, 2019 recusal notices.

- The First Circuit remains ***institutionally adverse*** to Texas Brine: every First Circuit judge signed the two per curiams issued in opposition to its mandamus petition.[11]

- Even if this Court were to direct the First Circuit to randomly assign civil appeals and writ applications going forward, that would do nothing to alleviate the problems, unique to Texas Brine, created by dozens of rulings rendered by illegally constituted appellate panels. Future panels, even if constituted in perfect compliance with Louisiana law, may nonetheless be legally constrained under the "law of the circuit" doctrine to adhere to rulings rendered by invalidly assigned panels.[12]

This Court has the ultimate supervisory authority over inferior Louisiana courts and must compel the First Circuit's compliance with the law. This Court has previously invalidated court rules and practices that undermine public confidence and cause cases not to be "truly randomly assigned."[13] In *State v. Sprint*, this Court declared, "random assignment procedures promote fairness and impartiality and reduce the dangers of favoritism and bias."[14] This Court

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[11] *See* Oct. 4, 2019 per curiam; Oct. 29, 2019 *per curiam*.
[12] *Succession of Johnson*, 2016-1115 (La. App. 1 Cir. 2/17/2017), 2017 WL 658775.
[13] *State v. Spring Comm's Co., L.P.,* 96-3094 (La. 9/9/97), 699 So.2d 1058, 1063 (district court's practice of nonrandom transfers of actions from one division to another for purported reason of judicial economy and case management violated statute and local rule requiring random assignment of cases, and was thus improper, void and unenforceable).
[14] *Id*., 699 So.2d at 1063.

recognized the primacy of the legislative mandate to **end the practice of non-random assignment** in civil cases in district courts.[15] According to this Court, the Code of Civil Procedure article requiring district court cases to be "randomly assigned to a particular section or division of the court" was a "**clear and unambiguous** expression of the legislative mandate to end the practice of non-random assignment."[16] This Court further found the district court's failure to adhere to the statutory requirement of random assignment violated public policy.[17]

In its October 29, 2019 *per curiam*, the First Circuit asserted it had the right to enact rules governing the composition of appellate panels "***notwithstanding any statutory enactment***."[18] This remarkable assertion turns the separation of powers doctrine on its head. But courts' rulemaking powers are not unlimited. ***Rules that violate legislative enactments are unenforceable nullities***. The Louisiana Constitution grants the courts authority only to "establish procedural and administrative rules "***not in conflict with law***."[19] As a result, courts' limited rulemaking authority cannot

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[15] *Spring*, 699 So. 2d at 1062 ("Effective since August 15, 1995, this statute [LA. CODE CIV. PROC. art. 253.1] expresses the legislative mandate to end the practice of non-random assignment. The statute is clear and unambiguous."

[16] *Id*., at 1061-62 (emphasis added).

[17] *Id*. (case transfers due to "judicial economy and case management . . . violated La. Code Civ. P. art. 253.1, Local Rule 9 and ***public policy*** and therefore cannot stand.") (emphasis added). *See also State v. Cordero*, 08-1717 (La. 10/3/08), 993 So. 2d 203, 204-05 (internal court procedures violated requirements of state constitution).

[18] *See* October 29, 2019 *per curiam*, at p. 1 (emphasis added).

[19] LA. CONST. art. V § 5(A) (emphasis added).

circumvent legislative enactments.[20] Moreover, the First Circuit has also violated the law by not even writing down, let alone publishing, its internal geographic quota rule.[21]

This Court should not defer to the First Circuit's assertion that it now enforces the random assignment laws. Statistical analysis negates this contention. The August 27, 2019 *Pontchartrain* dockets disprove the First Circuit's contention that it ceased to reassign appeals to previously constituted panels within the same case earlier that month.[22] The judges on the three Sinkhole Case panels issued at that time are the identical judges on the panels identified two months earlier – the odds against this distribution being the result of random chance exceed ***175,000 to 1***.[23]

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[20] *See State v. Cordero*, 2008-1717 (La. 10/3/08), 993 So. 2d 203, 204-05 (internal procedures of Fifth Circuit violated requirements of state constitution requiring that majority of judges sitting in a case must concur to render judgment and required re-review by judges who had not participated in unconstitutional procedure); *Sprint*, 699 So. 2d at 1061-62; *see also* Exhibit E, Nov. 15, 2019 Affidavit of Herbert Larson, at ¶ 8.

[21] *See* LA. CODE CIV. PROC. art. 193 (appellate rules must be entered in court minutes and "shall be published"). Notably, the First Circuit invoked privilege in refusing to substantively respond to a public records request concerning the effective date of the internal rule cited in its October 29, 2019 *per curiam* or the circumstances of that rule's adoption. *See* Exhibit D and D-1, Response to Public Records Request, Nov. 13, 2019; Public Records Request, Nov. 5, 2019. Such stonewalling runs afoul of *Henderson v. Bigelow*, which applied the Public Records Act to the judiciary, including meeting minutes and rules regarding administrative matters. 07-1441 (La. App. 4 Cir. April 9, 2008), 982 So.2d 941, 943 (holding that "minutes of en banc meetings" constitute public records subject to disclosure). *Id*. at 945.

[22] *See* p. 2, *supra*.

[23] *See* Exhibit C, Beyl Affidavit, at ¶¶ 21-22.

As a Louisiana civil litigant and taxpayer, Texas Brine is entitled to enforcement of the laws requiring random assignment of civil appeals and writ applications. Unfortunately, this case's circumstances require more than merely a forward-looking promise to randomly assign civil appeals and writs. The civil appeals and writ applications in the Sinkhole Cases must be transferred to another Louisiana circuit. Why? Because Texas Brine has been openly adverse to the First Circuit for almost a year, seeking enforcement the laws requiring random assignment of civil appeals. Texas Brine has exposed the First Circuit's noncompliance with Louisiana law. Four judges immediately recused themselves from all Sinkhole Cases after Texas Brine challenged that Court's failure to randomly assign cases, citing the "appearance of impropriety."[24] These highly irregular circumstances require transfer to another circuit. What authority allows for that? In *Tolmas v. Parish of Jefferson*, in which there was ***no institutional violation of law***, and a questionable-at-best "appearance of impropriety," this Court transferred an appeal from one circuit to another circuit.[25] The gravity of the First Circuit's statutory and constitutional violations here dwarf those alleged in *Tolmas*. As in *Tolmas*, this Court should transfer the Sinkhole Cases to another circuit court for all pending and future appeals and writ applications.[26]

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[24] *See* Exhibit 4 to August 9, 2019 Petition, March 13, 2019 recusal notices. Since that date, the four judges who submitted recusal notices have not been placed on a single appellate panel in the Sinkhole Cases.

[25] 12-0555 (La. 4/27/12), 87 So. 3d 855 (appeal transferred to another circuit to avoid "appearance of impropriety").

[26] *See also Cordero*, 993 So.2d at 214 (while agreeing that the cases should be reconsidered "to avoid any appearance of impropriety" Judge Weimer states he "would either randomly

Further, the First Circuit cannot institutionally decide the Sinkhole Cases without reverting to the prior rulings of its illegally constituted panels. The First Circuit's "law of the circuit" doctrine may effectively perpetuate the rulings from illegally constituted panels. Political psychologist Claude "Pete" Rowland, Ph.D. opined that the First Circuit's rulings in the Sinkhole Cases reflect the influence of cognitive bias, confirmation bias, and groupthink — subconscious biases affecting the decisionmaking process.[27] He noted, "[b]ecause of the subconscious nature of these biases, it is overwhelmingly improbable that their effect can be disregarded or bypassed."[28] In other words, it is not enough for a particular First Circuit judge to deny that he or she is "biased." With decades of experience analyzing cognitive and confirmation bias, Dr. Rowland opined, "these biases have manifested in the First Circuit as a group through the history with the First Circuit as a whole and the public exposure of the First Circuit's violation of the Louisiana law requiring random assignment of appellate panels."[29] Thus, "the First Circuit as a whole cannot impartially decide the appeals and writ applications in the sinkhole cases going forward."[30]

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allot these cases to the other courts of appeal or appoint three *ad hoc* judges to consider these matters.") (Weimer, J., dissenting in part).

[27] *See* Exhibit F, Affidavit of Claude "Pete" Rowland, Ph.D., at ¶¶ 6-12.

[28] *Id*. at ¶13.

[29] *Id*. at ¶ 14.

[30] *Id*. at ¶ 15. This Court reached the same result in *State v. Cordero*, where it remanded the cases alleging that the Fifth Circuit's internal procedures violated the constitution to the Fifth Circuit to re-review, but limited the re-review to only five specific judges who were not previously involved in the cases.

This Honorable Court should grant Relators' Petition for Writ of Mandamus and order First Circuit Clerk of Court Rodd Naquin to enforce the law requiring random assignment of civil appeals. Also, this Court should transfer the Sinkhole Cases to another circuit to (1) ensure that the many legal issues in this "bet-the-company" litigation affecting Texas Brine's fate will not be decided by an institution – the First Circuit Court of Appeal – which Texas Brine has exposed as not following article 2164.1 and Revised Statutes §13:319, (2) minimize the effects of rulings issued by invalidly constituted panels in violation of law, and (3) ensure due process and equal protection, free from any possible confirmation bias, the appearance of impropriety, and eliminate any corresponding risk of running afoul of Judicial Canons 2A and 3B.[31] This Court has transferred appeals in other cases[32] and should do so under the unique circumstances here.

STATEMENT OF THE CASE

Texas Brine filed its Petition for Writ of Mandamus directed to First Circuit Clerk of Court Rodd Naquin after the First Circuit's failure to randomly assign civil appeals, as Louisiana law mandates, became apparent. The First Circuit

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That approach is impossible here: all twelve First Circuit judges have been involved in the Sinkhole Cases, and all twelve judges signed the two *per curiam* opinions submitted in opposition to Texas Brine's mandamus petition.

[31] *See* Canons of Jud. Conduct 2A, 3B.

[32] *See Tolmas*, 87 So.3d at 855 (on motion to recuse a single judge, the Court transferred the case to another circuit, "to be heard anew … to avoid even the appearance of impropriety"); *see also Cordero* (this Court remanded cases, allowing only judges in the Fifth Circuit who had no prior involvement to continue to decide them). 993 So. 2d at 206.

admitted that it did not alter its rules or practices to comply with Revised Statutes §13:319 and Code of Civil Procedure article 2164.1 after those laws became effective on August 1, 2018. Instead of randomly assigning civil appeals, the First Circuit followed its "longstanding" *unwritten* and *unpublished* practice of assigning judges to appellate panels based on geographic quotas.[33] The First Circuit has used geographic quotas to assign civil appellate panels for years[34], even as all *other* circuits engage in truly random assignment.[35]

First Circuit Chief Judge Whipple defended that Court's unwritten practice in hearings on the Louisiana Senate bill enacting these statutes.[36] Although the Legislature unanimously rejected non-random assignment, the First Circuit disregarded these laws after they became effective on August 1, 2018. When confronted with that issue, the First Circuit responded disingenuously to Texas Brine's public records request, claiming "no records" documented "any measures taken to ensure that appellate panels are comprised of judges from

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[33] *See* October 4, 2019 First Circuit and October 29, 2019 First Circuit Per Curiams; *see also* Affidavit of Rodd Naquin, attached as Appendix C to Reply Memorandum in support of Motion to Stay, September 25, 2019; *see* Affidavit of First Circuit Judge Edward Gaidry [Retired] (March 25, 2019), attached as Exhibit 5 to Petition.

[34] *See* Affidavit of Judge Gaidry [Retired], attached as Exhibit 5 to Texas Brine's Petition.

[35] *See* Affidavits of Renee Simien, Justin Woods and Cheryl Landrieu, attached as Exhibits 6, 7 and 8 to Texas Brine's August 9, 2019 Petition; Affidavit of Lillian Richie attached as Exhibit B.

[36] *See* Exhibit 17 to Texas Brine's September 2, 2019 Second Amended Petition, at pp. 43-58.

separate election districts."[37] The Clerk of Court's September 9, 2019, Affidavit confirming such practices[38] contradicted this contention, as did the October 29, 2019 *per curiam*.[39] Interestingly, the First Circuit changed its Internal Rules *after* the consolidated *Solomon* mandamus case was filed on July 31, 2019, as the Clerk's affidavit cites an updated version of its internal rules, noting they were "***revised August 2019***."[40]

The First Circuit's use of a geographic quota in assigning appeals does not yield random results.[41] The term "random" ordinarily connotes an equal probability of occurrence.[42] In this context, it would suggest a system for assigning judges to three-judge civil appeals in which each judge had an equal probability of appearing on any particular civil appellate panel, and that each First Circuit judge would expect to serve on a civil appellate panel with each of the other eleven judges an equal number of times. The use of an *unwritten* geographic quota

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[37] *See* March 25, 2019 Response to Public Records Request, attached as Exhibit 4 to Texas Brine's Petition, at ¶ 4.

[38] *See* Response to Public Records Act Request, previously attached as Appendix B to Reply Memorandum in support of Motion to Stay, September 25, 2019; see also Affidavit of Rodd Naquin, attached as Appendix C to Reply Memorandum in support of Motion to Stay.

[39] *See* October 29, 2019 First Circuit *per curiam*.

[40] *See* Rodd Naquin affidavit, attached to Opposition to Writ of Mandamus, Sept. 9, 2019.

[41] *See* March 26, 2019 Beyl Affidavit, attached as Exhibit 3 to Texas Brine's Petition.

[42] *See* MERRIAM-WEBSTER ELEVENTH NEW COLLEGIATE DICTIONARY (defining "random" as "without definite aim, direction, rule or method" and "being or relating to a set or to an element of a set each of whose elements has equal probability of occurrence") https://www.merriam-webster.com/dictionary/random.

dramatically limits the number of unique panels, from 220 unique combinations to 64 unique combinations, ***eliminating 70.9% of all possible combinations*** that can hear civil writ applications and appeals. Further, the First Circuit's use of geographic quotas effectively prevents two judges from the same election district from ever serving together on a three-judge panel, absent recusals.[43]

The First Circuit recently defended its use of its unwritten practice as an exercise of its rulemaking power under the 1974 Louisiana Constitution, "notwithstanding any statutory enactment."[44] While the 1974 Constitution recognizes courts' authority of appellate courts to select judges for appellate panels "according to rules adopted by the court," Louisiana courts' rulemaking authority is not boundless. "That authority has always been tempered with a separation of powers induced submission to a legislative enactment."[45] The Louisiana Constitution allows courts only to make rules "**not inconsistent with law**," *i.e.*, not in conflict with legislation.[46] Code of Civil Procedure article 193 provides that courts may "adopt rules for the conduct of judicial business... including those governing matters of practice and procedure which are ***not contrary*** **to the rules provided by law**"[47] and requires that rules "**shall be entered on the minutes of the court**" and "**shall**

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[43] *See* March 26, 2019 Beyl Affidavit, attached as Exhibit 3 to Texas Brine's August 9, 2019 Petition.

[44] *See* October 29, 2019 per curiam, at p. 1 (emphasis added).

[45] *See* WILLIAM E. CRAWFORD, 12 LA. CIV. L. TREATISE, *Tort Law* § 27:58, District court rules – Analysis and jurisprudence (November 2018) ("Crawford Treatise on Court Rules").

[46] *Id.*; LA. CONST. art V, § 5. (A) (emphasis added).

[47] LA. CODE CIV. PROC. art. 193 (emphasis added).

be published in the manner which the court considers most effective and practicable."[48]

The ***unwritten*** nature of the First Circuit's use of geographic quotas makes this practice even more unjust. A fundamental tenet of due process is notice. If a rule is "unwritten," there is no notice to the public. Such an unconstitutional practice deprives the public of the basic notice requirements required by both federal and state due process requirements.[49] Further, Louisiana's civil law system relies upon a comprehensive compilation of written rules and principles that are easily accessible to the public. The unwritten nature of this practice violates the spirit of the civilian tradition and undermines public trust in the judiciary.

This Court has general and plenary supervisory jurisdiction[50] over all courts to ensure compliance with the law.[51] It guards the constitutional rights of litigants to support the public perception of the judiciary. The constitutional rights of civil litigants are threatened if a case is allotted on a less-than-random basis. "Due process of law requires fundamental fairness, *i.e.*, a fair trial in a fair tribunal."[52] Random assignment promotes fundamental fairness. A deviation from random

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[48] *Id*. (emphasis added).

[49] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1976); *Hamilton v. Royal Intern. Pet. Corp.*, 2005-846.

[50] Albert Tate, Jr., *Supervisory Powers of the Louisiana Courts of Appeal*, 38 TUL. L. REV. 429, 430 (1964) (describing supervisory jurisdiction as "plenary, unfettered by jurisdictional requirements, and exercisable at the complete discretion of the court.").

[51] LA. CONST. art. V, § 5 (A).

[52] *State v. Simpson*, 551 So. 2d 1303, 1304 (La. 1989).

assignment such as a geographic quota is highly suspect when it is cloaked in secrecy.

In addition to its role as protector of parties' constitutional rights, this Court has authority to resolve inter-circuit conflicts and maintain uniformity in the procedures of the intermediate appellate courts.[53] Further, this Court has a strong interest in ensuring transparency in lower courts' procedures. Transparency protects litigants and promotes the integrity of the judiciary. For this reason, article 193 of the Code of Civil Procedure requires that appellate court rules be published.[54]

Through Texas Brine's efforts, it is now apparent that the First Circuit failed to alter its case assignment practices after the August 1, 2018 effective date of article 2164.1 of the Code of Civil Procedure and the amendment to Revised Statutes §13:319.[55] Only after the specific issue of the First Circuit's noncompliance with state law in the *Solomon* mandamus petition, filed on July 31, 2019, did the First Circuit purport to alter its procedures: the Clerk of Court's affidavit refers to an ***updated*** version of its internal rules, noting they were "***revised August 2019***."[56] Even though the First Circuit now purports to have changed its rule to partially comply with the law, the panel assignments in the Sinkhole Cases continue to reflect use of a non-random assignment system.[57]

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[53] LA. CONST. art. V, § 5 (A); LA. SUP. CT. R. X, § 1(a), 1.
[54] *See* LA CODE PROC. art. 193.
[55] *See* LA. CODE CIV. PROC. art. 2164.1; LA. REV. STAT. § 13:319
[56] *See* Excerpt of First Circuit Rules, previously attached to the Clerk of Court's September 9, 2019 affidavit attached to Clerk of Court's Opposition to Petition for Writ of Mandamus.
[57] *See* Exhibit C, November 15, 2019 Affidavit of Robbie Beyl, Ph.D. at ¶¶ 18-20.

Texas Brine asks this Court to enforce the law to require truly random assignment of appellate panels in the Sinkhole Cases. Further, to avoid the appearance of impropriety as Judicial Canons 2A and 3B require,[58] Texas Brine asks this Court to transfer all pending appeals and writs in the Sinkhole Cases to another Louisiana Circuit Court of Appeal, as was done under far less egregious circumstances in *Tolmas*: no one suggested that the judge in *Tolmas* violated the law.

SPECIFICATION OF ERROR

The First Circuit's admitted practice of using a non-random geographic component in assigning appellate panels for civil appeals and writ applications violates Louisiana law, public policy, public confidence in the judiciary and Relators' constitutional rights to due process of law and equal protection under both the U.S. and Louisiana Constitutions.

ARGUMENT

I. The First Circuit's Use of an Unwritten Geographic Quota to Assign Civil Appellate Panels Violates Article 2164.1 of the Louisiana Code of Civil Procedure and Louisiana Revised Statutes § 13:319.

The First Circuit admits that it assigns civil appellate panels using an unwritten practice to ensure that one judge from each of its three geographic districts sits on each three-judge appellate panel.[59] This procedure does not constitute random assignment as required by article 2164.1 of the

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[58] *See* Canons of Jud. Conduct 2A, 3B.

[59] The First Circuit contains three geographic districts, but five election districts. The First Circuit's geographic quotas focus on the geographic districts, not the electoral districts.

Louisiana Code of Civil Procedure and Revised Statutes §13:319 since August 1, 2018.

A. Article 2164.1 of Louisiana Code of Civil Procedure and Louisiana Revised Statutes § 13:319 Require Random Assignment of Civil Appellate Panels.

Louisiana law, as provided by article 2164.1 of the Code of Civil Procedure and Revised Statutes §13:319, guarantees the random assignment of civil appeals. Before Article 2164.1's enactment, the Louisiana Code of Civil Procedure was silent on the issue of random assignment of civil appellate panels. The Code of Civil Procedure is no longer silent. Since August 1, 2018, the Code has expressed the legislative mandate to require random assignment of civil appeals.

The Louisiana Legislature amended §13:319 of the Louisiana Revised Statutes and enacted article 2164.1 of the Code of Civil Procedure, both with effective dates of August 1, 2018.[60] This law amended Revised Statutes §13:319 by providing that "each civil and criminal ***appeal*** . . . shall be randomly assigned by the clerk, subject to the direct supervision of the Court."[61] The word "appeal" replaced the word

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[60] *See* Legislative History of Senate Bill 273, attached as Exhibit 11 to Texas Brine's August 21, 2019 Amended Petition for Writ of Mandamus and Request for Stay.

[61] Previously, the word "appeal" was written as "proceeding." This textual change was to ensure that each separate "appeal" be randomly allotted even if it arose from the same underlying case. This substantive change was belatedly acknowledged by the First Circuit in its *per curiam* dated October 29, 2019 and in its amendment of its Internal Rules following the filing of the *Solomon* mandamus petition, in August 2019, a year after passage of Act 658 in 2018.

"proceeding" in the text.[62] This law also enacted article 2164.1 of the Code of Civil Procedure, which provides, "The provisions of R.S. 13:319 shall be applicable to ***assignment of appellate panels***."[63] The bill that became law was unanimously passed by the Louisiana Senate by a 37-0 vote and by the Louisiana House of Representatives by a 93-0 vote.[64]

The most effective way of discovering the true meaning of a law is by considering the reason and spirit of it, or the cause which induced the legislature to act.[65] The laws at issue here are clear: they require "**random assignment**" of "**appellate panels**" in civil cases. The Louisiana Legislature used the word "random"; it did not qualify or limit the term "random" to allow a geographic component. In *Sprint*, this Court held that a statute requiring district court cases to be "randomly assigned to a particular section or division of the court" was a "**clear and unambiguous** expression of the legislative mandate to end the practice of non-random assignment."[66] The purpose of Article 2164.1 and Revised Statutes §13:319 is also clear: to maintain the courts' integrity and neutrality and avoid the appearance of impropriety in assigning civil appeals. This purpose aligns with Louisiana's public policy of protecting the public's confidence in

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[62] *See* Text of Senate Bill 273 (emphasis added), attached as Exhibit 12 to Texas Brine's August 21, 2019 Amended Petition for Writ of Mandamus and Request for Stay.

[63] *See id*. (emphasis added).

[64] *See* Roll Call Vote by Louisiana Senate, attached as Exhibit 13 to Texas Brine's August 21, 2019 Amended Petition for Writ of Mandamus; Roll Call Vote by Louisiana House of Representatives, attached as Exhibit 14 to Texas Brine's August 21, 2019 Amended Petition for Writ of Mandamus.

[65] *Keelen v. State, Dept. of Culture*, 463 So. 2d 1287, 1289 (La. 1985).

[66] *Sprint*, 699 So. 2d at 1061-63 (emphasis added).

the integrity of the judiciary and avoiding even the appearance of impropriety.

The legislative hearing record on the underlying bill confirms this intent. At the May 3, 2018 House Judiciary Committee hearing, the bill's author testified as to random assignment:

> [A]s far as we can tell, most [circuits] do, or possibly all do, but there is one circuit that we found some cases that were not randomly selected, but it is the general rule, and the judges testified on the senate side and that is the right way to do it, and the Louisiana Supreme Court says that is the right way to do it.[67]

After Rep. Magee stated, "I assumed we had it [a random allotment requirement], to be honest with you," the bill's author explained, "It just wasn't in the statute."[68] Rep. Marino noted, "I just assumed that was the law that it had to be randomly selected and I am in favor of your bill."[69]

The Louisiana Legislature unanimously passed the random assignment bill over the objections of the Chief Judge of the First Circuit, her First Circuit colleague, Judge J. Michael McDonald, and Respondent Rodd Naquin, who appeared before the Senate Judiciary Committee. The Chief Judge defended the First Circuit's existing ***non-random***

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[67] *See* Video of May 3, 2018 La. House Jud. Comm. hearing, testimony of John Milkovich, available at http://house.louisiana.gov/H_Video/VideoArchivePlayer.aspx?v=house/2018/may/0503_18_JU , at 4:10 – 4:30.

[68] *Id*. 4:31- 4:35.

[69] *Id*. at 6:12- 6:17.

geographic quota procedures.[70] Judge McDonald also argued *__against__* the importance of random assignment of judges on the appellate versus the district court level, to which Senator Luneau responded, "**I can tell you this, Judge, there are a lot of practicing lawyers that wouldn't agree with you on that statement.**"[71] This Court should likewise disagree with the First Circuit's rejection of random assignment.

B. A Court Rule (Written or Unwritten) Cannot Contravene a Statute.

While Louisiana courts are granted powers necessary for the exercise of their jurisdiction, such as adopting rules of court, those powers are limited. Rules that contravene legislative enactments are null, void and unenforceable.[72] The constitutional delegation of certain rulemaking authority to the courts does not alter this principle. This Court should reject the First Circuit's brazen assertion that it may enact its own rules "***__notwithstanding any statutory enactment__***."[73]

The First Circuit's use of an unwritten geographic quota conflicts with the positive law, thereby violating the constitutional principle of separation of powers

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[70] *See* Exhibit 17 to Second Amended Petition, Transcript of Senate Judiciary Committee "A" Debate on Bill 273 (Apr. 10, 2019) at 46 ll. 8-10 (emphasis added).

[71] *Id*. at 35 l. 7 – 36 l. 5 (emphasis added).

[72] *See* LA CONST. art. V § 5(A); LA. CODE CIV. PROC. art. 193; D*evereax v. Atkins*, 51,473, (La. App. 2d Cir. 2017) 224 So. 3d 1160, 1164; *see also* Crawford Treatise on Court Rules, at Section III - Nonconflicting Rule-making.

[73] *See* October 29, 2019 *per curiam*, at p. 1 (emphasis added). Indeed, the rationale of the First Circuit's position suggests that it could also issue unwritten rules dictating the composition of appellate panels as to race, sex, political party, or eye color.

codified in Louisiana Constitution Article II, §§ 1 and 2. The judicial branch is prohibited from infringing upon the inherent powers of the legislative and executive branches.[74] The power to create legislation is vested in the Louisiana legislature.[75] The 1974 Constitution qualified this power to allow courts to make rules "**not inconsistent with law**."[76] The grant of rulemaking authority to the courts of Louisiana does not hobble the Legislature from making laws that apply to Louisiana state courts.

Separation of powers is a fundamental principle that binds the courts. This Court has held,

> The creation of written or unwritten court rules cannot trespass on this principle. The legislative power of the state is vested in the Legislature. La. Const. 1974, Art. III, § 1. Except as expressly provided by the constitution, no other branch of government, nor any person holding office in one of them, may exercise the legislative power. *Id*. Art. II, §§ 1 and 2. Furthermore, it is a general principle of judicial interpretation that, unlike the federal constitution, a state constitution's provisions are not grants of power but instead are limitations on the otherwise plenary power of the people of a state exercised through its legislature. In its exercise of the entire legislative power of the state, the

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[74] *LaBauvr v. La. Wildlife & Fisheries Comm'n*, 289 So.2d 150, 151 (1974).

[75] LA CONST. art. III § 1.

[76] LA CONST. art. § 5(A) (emphasis added).

> Legislature may enact any legislation that the state constitution does not prohibit.[77]

This Court has long recognized that the judicial branch must restrain itself from usurping legislative and executive functions.[78] The separation of powers doctrine embedded in the U.S. and Louisiana Constitutions embodies this concept. To make this separation clear, Louisiana Code of Civil Procedure article 193, provides: "A court may adopt rules for the conduct of judicial business before it, including those governing matters of practice and procedure **which are not contrary to the rules provided by law**. . . . Rules adopted by an appellate court **shall be published** in the manner which the court considers most effective and practicable."[79] Despite the First Circuit's contrary assertions, court-adopted rules remain subordinate to legislative actions. A court's rulemaking authority is limited by the deference to legislation: court rules lose legal effect if they conflict with legislation.[80]

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[77] *Board of Com'rs of Orleans Levee Dist. v. Dep't of Nat. Resources*, 496 So. 2d 281, 286 (La. 1986) (citations omitted). *See also State v. Mallery*, 364 So.2d 1283, 1284 (La. 1978) ("Except as limited by the constitution its power is plenary"); *Swift v. State*, 342 So.2d 191, 194 (La.1977) ("Unlike Congress, our State Legislature has all powers of legislation not specifically denied it by the Louisiana Constitution").

[78] *See LaBauve v. La. Wildlife & Fisheries Comm'n*, 289 So.2d 150, 151 (1974) (finding that equity powers of civil trial court were improperly invoked in attempt to prevent enforcement of statute).

[79] LA CODE PROC. art. 193 (emphasis added).

[80] *See* LA CONST. art. V § 5(A); La. Code Civ. Proc. art. 193; supra n.45 Crawford Treatise on Court Rules, at Section III - Nonconflicting Rule-making. *See also Futch v. Coumes*, 347 So.2d 1121, 1123 (La. 1977) ("Courts may not adopt rules 'contrary to rules provided by law.'"); *Trahan v. Petroleum Cas. Co.*, 250 La.

In *Sprint*, this Court enforced the legislative mandate to **end the practice of non-random assignment in civil cases** in district courts.[81] *Sprint* arose out of the transfer of two class actions in the 18th Judicial District Court to conserve judicial resources and maximize case management. This Court held that these practices violated Louisiana law and public policy, rejected the District Court's "judicial economy and case management" justification and held that "these [non-random] transfers violated La. Code of Civ. Proc. art. 253.1, Local Rule 9, and public policy and therefore cannot stand."[82] This Court should similarly recognize the primacy of the legislative mandate to end the practice of non-random assignment in civil cases in *appellate* court and transfer all pending appeals and writs in the Sinkhole Cases to another circuit.

C. The First Circuit's Unwritten Rule Requiring Geographic Quotas is Not Random, as It Eliminates Over 70% of Possible Combinations From Randomly Assigned Panels and Ensures that Two Members of the Same District Will Not Serve Together on a Three-Judge Panel.

The imposition of geographic quotas is anathema to the concept of randomness. Geographic quotas (1) ***eliminate more than 70% of all possible three-***

949, 200 So.2d 6, 8-9 (1967) ("rules of court which contravene legislative enactments are null and void and cannot be enforced."); *Helmer v. United Gas Pub. Serv.*, 175 La. 285, 143 So. 265 (1932); *Dawson v. Eppley*, 562 So.2d 1085 (La. App. 4 Cir. 1990); *Boudreaux v. Yancey*, 256 So.2d 1084 (La. App. 1 Cir. 1971); *Raymond v. Zeringue*, 386 So. 2d 1052 (La. App. 4th Cir. 1980).

[81] *Sprint*, 699 So. 2d at 1062.

[82] *Sprint*, 699 So. 2d at 1061.

judge combinations and (2) ensure that two judges from the same election district will never, absent recusals, serve together on the same three-judge panel. The term "random" connotes an equal probability of occurrence.[83] As to three-judge civil appellate panels, randomness requires a system in which each judge has an equal probability of appearing on any particular panel. In a random system, each First Circuit judge should expect to serve on a civil appellate panel with each of the other eleven judges equally often. The First Circuit's assignment process is not "random" and contravenes Louisiana law.

LSU biostatistics professor Robbie Beyl, Ph.D. analyzed the First Circuit's practices and the empirical breakdown of the Sinkhole appeals, with a particular focus on those occurring after the August 1, 2018 statutory effective date. Dr. Beyl computed that there are 220 possible three-judge combinations that can be formed from a twelve-judge appellate court.[84] However, by requiring exactly one judge from each of the three geographic districts, the First Circuit's unwritten rule ***eliminates 70.9% of all possible combinations***, leaving just 64 of those 220 combinations.[85]

The First Circuit's "longstanding practice" has the additional infirmity of preventing judges from the

[83] *See* MERRIAM-WEBSTER'S ELEVENTH NEW COLLEGIATE DICTIONARY (defining random as "without definite aim, direction, rule or method" and "being or relating to a set or to an element of a set each of whose elements has equal probability of occurrence") https://www.merriam-webster.com/dictionary/random.
[84] *See* Exhibit C, Beyl Affidavit, at ¶ 7; March 26, 2019 Beyl Affidavit, attached as Exhibit 3(a) to Petition.
[85] *Id*.

same district from serving together on the same three-judge panel. By default, if the First Circuit requires that exactly one judge from each district serve on each appellate panel, a necessary consequence of such a rule is that two judges from the same geographic district will never serve together on the same three-judge panel, absent recusals. "Random assignment" contemplates that a judge is equally likely to serve alongside each of his or her colleagues. But the First Circuit's rule renders that an impossibility – by design.\

After the August 1, 2018 effective date of article 2164.1 of the Code of Civil Procedure and amended Revised Statutes §13:319 to require random assignment of all civil appeals, the First Circuit has continued to impose geographic quotas in violation of these laws:

- 20 of the 33 appellate panels disclosed to the parties after August 1, 2018, but before the recusal of four judges on March 13, 2019, consisted of exactly one judge from each geographic district, even though there is only a 29.1% likelihood of a given panel featuring such a distribution.[86] The probability against this distribution randomly occurring is 29,588 to 1.[87]

- The odds become even more remote by including appeals in which the panel was

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[86] *See* Exhibit C, Beyl Affidavit, at ¶¶ 10-11. The possibility that certain judges separately recused themselves from the Sinkhole Cases prior to March 13, 2019, resulting in the reassignment of their places on the panels, prevents this proportion from being even higher. Regardless, these odds greatly exceed what would be expected under a genuinely random system.

[87] *Id*. at ¶ 9.

disclosed prior to August 1, 2018, but the appellate ruling was issued after that date. In such circumstances, in light of the new laws requiring random assignment of appellate panels, a ruling should not have been released by an invalidly constituted panel – those panels should have been reconfigured.

- All five appellate panels within this timeframe consisted of exactly one judge from each district.

- Taken together, the odds against 25 of 38 appellate panels either (1) disclosed between August 1, 2018 and March 13, 2019, or (2) disclosed prior to August 1, 2018 but issued an opinion subsequent to that date, consisting of exactly one judge per geographic district is over ***3 million to 1***.[88]

Even after the recusal of four judges on March 13, 2019, the First Circuit has persisted in constituting panels consisting of exactly one judge from each election district. Eleven of the fourteen appellate panels identified after the March 13, 2019 recusals of four judges fit this pattern. The odds against such a distribution arising due to random chance are 285 to 1.[89] The First Circuit has now ***admitted*** that it assigns appellate panels using an unwritten practice that ensures that a judge from each of the three geographic districts comprising the First Circuit sits

[88] *See* Exhibit C, Beyl Affidavit, at ¶ 12.
[89] *Id*. at ¶ 14.

on each three-judge appellate panel. This unwritten practice is not random allotment as required by law.

D. The Evidence Refutes the First Circuit's Claim that It Belatedly Changed Its Practices to Partially Comply with the Random Assignment Laws.

Although the First Circuit *claims* it belatedly altered its case assignment practices a year after the August 1, 2018 effective date for article 2164.1 of the Code of Civil Procedure and Revised Statutes §13:319,[90] Dockets released by the First Circuit confirm that nothing has changed. Random assignment is still not occurring.

The First Circuit admitted in its October 4, 2019 *per curiam* that it did not apply the express language in article 2164.1 of the Code of Civil Procedure and Revised Statutes §13:319 requiring that each civil appeal be randomly assigned. In situations where multiple appeals arose from the same underlying case in the District Court, the First Circuit admitted that it did not alter its standard practice of ***simply reassigning a prior panel from that same case*** for over a year.[91]

This year-long delay is inexplicable. A before-and-after comparison of appeals assigned in *Pontchartrain* undermines the First Circuit's assertion that it stopped reassigning previously constituted panels. Three appellate panels were disclosed to the parties in *Pontchartrain* on **June 28, 2019**, reflecting a panel of Judges Lanier, Higginbotham, and Penzato.[92] The

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[90] La. Code Civ. Proc. art. 2164.1; LA. REV. STAT. §13:319.

[91] *See* October 4, 2019 *per curiam*, at p. 2 (emphasis added).

[92] *See* Dockets for 2018-CA-0492 2018-CA-0493, and 2018-CA-0500, dated June 28, 2019. These panels contain exactly one judge from each of the three election districts in the First Circuit.

First Circuit purported to amend its Internal Rules "effective **July 10, 2019**, as specifically codified into the Court's Internal Rules on **August 9, 2019**."[93] But eighteen days *after* the First Circuit recodified its Internal Rules, it released three more appellate dockets in *Pontchartrain* – again reflecting identical panels of Judges Lanier, Higginbotham and Penzato in each of the three appeals:

Case	***Docket No.***	***Date Docket released***	***1st District Judge***	***2nd District Judge***	***3rd District Judge***
Pontchartrain	2018-CA-0492	6/28/2019	Lanier	Higginbotham	Penzato
Pontchartrain	2018-CA-0493	6/28/2019	Lanier	Higginbotham	Penzato
Pontchartrain	2018-CA-0500	6/28/2019	Lanier	Higginbotham	Penzato
Pontchartrain	2018-CA-0999	**8/27/2019**	Lanier	Higginbotham	Penzato
Pontchartrain	2018-CA-1159	**8/27/2019**	Lanier	Higginbotham	Penzato
Pontchartrain	2018-CA-1170	**8/27/2019**	Lanier	Higginbotham	Penzato

Thus, the composition of the three-judge panels disclosed on August 27, 2019 are identical to those released two months earlier in the same case. The odds against such a distribution arising due to random chance ***exceed 175,000 to 1***.[94]

The First Circuit may contend that the panels which were disclosed on the August 27, 2019 dockets in 2018-CA-0999, 2018-CA-1159, and 2018-CA-1170 were selected before the purported rule changes, but were disclosed later. Even if true, that explanation is

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[93] *See* October 4, 2019 *per curiam*, at p. 2 (emphasis added).
[94] *See* Exhibit C, Affidavit of Robbie Beyl, at ¶¶ 21-22.

insufficient. The First Circuit ***knew*** that Louisiana law required random assignment of all civil appeals as of August 1, 2018. The First Circuit also ***knew*** that its prior practices did not comply with the requirements mandated by law – which is precisely why it amended its Internal Rules. The First Circuit should never have released dockets that fail to comply with these statutes weeks after it amended its Internal Rules. Even though the First Circuit amended its Internal ***Rules***, it did not alter its internal ***practices***. That failure necessitates this Court's intervention.

E. The First Circuit's Prior Failure to Randomly Assign Appeals Created a Grossly Disproportionate Distribution of Appeals Among Its Judges.

Numbers tell the story in this matter. The First Circuit's systematic failure to randomly assign appeals creates a striking discrepancy in the number of appeals heard by each of the First Circuit's judges. The First Circuit disclosed to the parties in the Sinkhole Cases 33 appellate panels between August 1, 2018 (the effective dates of the statutes clarifying the random assignment requirement) and March 13, 2019 (the date when four judges recused themselves from further involvement in the Sinkhole Cases). Five more appellate rulings were released during this seven- and-a-half month window, without making any attempt to comply with the statutory mandate. Combined, on those 38 appeals, the First Circuit judges were distributed as follows:[95]

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[95] *See* Exhibit C, Beyl Affidavit, at ¶¶ 23-24. These totals do not include numerous other appeals adjudicated in the Sinkhole Cases prior to the August 1, 2018 effective date of the random assignment statutes. This breakdown consists only of pre-recusal appeals where (1) the panel composition was disclosed after the

1st District	**Number**	2nd District	**Number**	3rd District	**Number**
Theriot	**13**	McDonald	**24**	Crain	**21**
Holdridge	**9**	Guidry	**13**	Penzato	**13**
Lanier/Pettigrew[96]	**5**	Higginbotham	**12**	McClendon	**3**
Whipple	**0**	Welch	**1**	Chutz	**0**

This practice created gross statistical discrepancies – for example, one 2nd District judge was on 24 appeals during this timeframe while one of his 2nd District colleagues was on just one such panel. The odds against this discrepancy is strikingly high: over 994 billion to one.[97]

As discussed below, the First Circuit's failure to randomly assign appeals as required by law cannot simply be disregarded going forward. Instead, the consequences of the First Circuit's failure to apply Louisiana law requiring the random assignment of appeals requires the transfer of appellate litigation in the Sinkhole Cases to another circuit which faithfully applies Louisiana law.

F. Due to Recusals, the First Circuit's Use of Geographic Quotas Creates an Uneven Probability of Drawing All First Circuit Judges Going Forward.

Random assignment should require that the likelihood of drawing one judge for a particular appeal is equivalent to the likelihood of drawing any other

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August 1, 2018 statutory effective date, or (2) the appellate ruling was issued after the August 1, 2018 statutory effective date, thereby reflecting a failure to reassign the panels in accordance with article 2164.1 and Revised Statutes §13:319.

[96] Judge Lanier succeeded Judge Pettigrew in the 1st District, Division A, effective January 1, 2019.

[97] *See* Exhibit C, Beyl Affidavit, at ¶¶ 25-27.

unrecused judge. But the First Circuit's use of geographic quotas, coupled with the recusals of two judges from both the 1st and 3rd geographic districts, means that the likelihood of drawing one of the remaining judges from these districts is now markedly higher than drawing a particular judge from the 2nd district.

Two judges remain from the 1st District and the 3rd District, while all four 2nd District judges remain. The First Circuit's use of geographic quotas ensures that, going forward, the judges from the 1st and 3rd Districts will be ***overrepresented*** on panels in the Sinkhole Cases. Dr. Beyl attested that the remaining judges from Districts 1 and 3 would be on 30 of the 56 possible panels consisting of exactly one judge from each district, while a particular judge from District 2 should only be on 14 of the 56 possible panels. With random assignment, each of the eight remaining judges would have a 37.5% likelihood of being on one of the 56 possible panels (i.e. 21 panels).[98]

II. The First Circuit Violated Public Policy by Using an Unwritten Geographic Quota.

This Court held that "random assignment procedures promote fairness and impartiality and reduce the dangers of favoritism and bias"[99] and has invalidated case transfers that were not the result of a "**truly** random[] assign[ment]."[100] Why? Because randomness matters. Randomness matters because it prevents both the reality and the appearance of impropriety, by ***guaranteeing*** that no other process is used that could impact the outcome of the case.[101]

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[98] *Id.*, at ¶ 18-19.

[99] *Sprint*, 699 So.2d at 1063 (emphasis added).

[100] *Id.* (emphasis added)

[101] *See* Marin K. Levy, *Panel Assignment in the Federal Courts of Appeals*, 103 CORNELL L. REV. 65, 100-102 (2017), ("In the

"Not only is random assignment assumed to be the status quo, it is also a popular, venerated practice."[102] Random assignment provides a level playing field for all litigants – plaintiffs and defendants alike – and reduces the dangers of favoritism and bias. It does not matter whether the court actually acted in bad faith or with improper motives in the Sinkhole Cases. In addition to violating Louisiana law, the non-random unwritten geographic quota in these cases creates an appearance of impropriety. Such a system raises issues of partiality and calls into question the integrity of the decision-making process – and ultimately, erodes the public's faith in the integrity of the Court system.

III. The Use of a Geographic Quota Does Not Pass Constitutional Muster.

The First Circuit's imposition of geographic quotas, despite the statutory mandate requiring random assignment of civil appeals, is unconstitutional. As attested by Erwin Chemerinsky – the dean of the University of California, Berkeley School of Law and by some measures the nation's preeminent constitutional law scholar[103] – the First Circuit's case assignment practices infringe upon Texas Brine's rights to due process and equal protection. Notably, Professor Chemerinsky provides this analysis ***<u>uncompensated</u>***.[104] Moreover, the

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realm of assigning cases to panels, randomness ensures that no process is employed that would bias the outcome of cases and assures the public that the process is fair.").

[102] *See* Katherine A. MacFarlane, *The Danger of Nonrandom Case Assignment: How the Southern District of New York's "Related Cases" Rule Shaped Stop-and-Frisk Rulings*, 19 MICH. J. OF RACE & LAW 199, 205 (Issue 2, 2014).

[103] *See* n.6, *supra*.

[104] *See* Exhibit A, Chemerinsky Affidavit, at ¶ 3.

purported justification previously offered by the First Circuit flouts the principle of separation of powers. Finally, the use of geographic quotas cannot be justified on the basis of increasing minority participation on appellate panels.

A. The Right to Due Process Requires a Fair and Impartial Decisionmaker.

The Fourteenth Amendment to the U.S. Constitution and Article I, Sections 2 and 22 of the Louisiana Constitution ensure the right to due process.[105] The U.S. Supreme Court has held that "fundamental fairness" is the "touchstone of due process."[106] Further, "it is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'"[107] Both the "appearance as well as the actuality of fairness, impartiality, and orderliness" constitute "the essentials of due process."[108] The requirement of neutrality "preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done.'"[109] A due process violation may be shown by "objective standards that do not require proof of actual bias."[110] Moreover, the analysis is not restricted to criminal matters: the U.S. Supreme

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[105] U.S. CONST., 14TH AM., § 1; LA. CONST. ART. 1, §§ 2 & 22.
[106] *Gagnor v. Scarpelli*, 411 U.S. 778, 790 (1973).
[107] *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).
[108] *Application of Gault*, 387 U.S. 1, 26 (1967).
[109] *Marshall v. Jerrico, Inc.*, 446 U.S. at 242 (citing *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976) (quoting *Joint Anti-Fascist Committee v. McGrath,* 341 U.S. 123, 172(1951) (Frankfurter, J., concurring)).
[110] *Caperton*, 556 U.S. at 883.

Court has confirmed that the right to due process applies in civil settings as well.[111]

Here, Texas Brine enjoys property rights in numerous rulings issued by the District Court which are imperiled by the First Circuit's conscious disregard of Louisiana law in assigning civil appeals in a non-random fashion. Examples of such rulings include those (1) holding non-Texas Brine parties 65% responsible for causing the Bayou Corne sinkhole, thereby giving Texas Brine the right to recover its own damages in tort and/or contract, and (2) holding that certain insurers have a duty to defend Texas Brine in Sinkhole Cases and related proceedings. Texas Brine enjoys property rights in these rulings – but those property rights have been threatened by the First Circuit's case assignment practices, thereby implicating the Fourteenth Amendment to the U.S. Constitution as well as Article I, Sections 2 and 22 of the Louisiana Constitution.[112]

The First Circuit systematically disregarded the enactment of article 2164.1 of the Code of Civil Procedure and the amendment of Revised Statutes 13:319, after those statutes became effective on August 1, 2018. The First Circuit admitted in its October 4, 2019 *per curiam* that, for over a year, it continued to routinely assign civil appeals to appellate panels which had previously been convened within the same case. The First Circuit admitted in its October 29, 2019 *per curiam* that it <u>*still*</u> uses geographic quotas to assign judges to appellate panels.

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[111] *Id.* at 876. *See* also *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pens. Trust*, 508 U.S. 602, 617 (1993).

[112] *See* Exhibit A, Chemerinsky Affidavit, at ¶ 11.

Taken together, these practices have resulted in certain judges having a grossly disproportionate share of appeals in Sinkhole Cases, while others have handled comparatively few, creating troubling due process implications. Notably, four First Circuit judges recused themselves from *all* of the Sinkhole Cases, citing ***the need to "avoid the appearance of impropriety***" last March.[113] Even though those recusal orders were issued in the context of a motion to recuse a particular judge and a related motion to grant Texas Brine an evidentiary hearing, those four judges apparently remain recused, having cited the "appearance of impropriety." Over a dozen appeals have been assigned to three-judge panels since their recusal – but none to any of those four judges.

Instead, certain judges have appeared on over twenty appellate panels in the Sinkhole Cases since the August 1, 2018 statutory amendments. Other judges have appeared on very few panels. The disproportionate allotment of appeals, coupled with their sheer volume, creates an environment uniquely susceptible to the problems of cognitive bias and confirmation bias, where "individual decision-makers and decision-focused groups have a strong tendency to involuntarily and unconsciously search for and believe information that confirms previously formed judgments and opinions and limits objective attention so as to validate prior judgments rather than evaluating carefully the judgment tasks in front of them."[114] Confirmation bias is "particularly problematic over time because it creates commitment effects – the unconscious bias in favor of consistency with prior judgments rather than objectively

[113] *See* Orders of Recusal, Exhibit 4 to August 9, 2019 Petition for Writ of Mandamus.

[114] *See* Exhibit F, Rowland Affidavit, at ¶ 9.

evaluating the judgment task at hand."[115] Because these phenomena occur subconsciously, individuals are unaware of their effects, and any disclaimer that an individual is unbiased or maintains an open mind cannot be taken at face value.

This important concept has been acknowledged by no less than the U.S. Supreme Court. In *Williams v. Pennsylvania*, the Court held, "There is, furthermore, a ***risk that the judge 'would be so psychologically wedded' to his or her previous position*** as a prosecutor that the judge 'would consciously or unconsciously avoid the appearance of having erred or changed his position.'"[116] This language mirrors Dr. Rowland's explanation of confirmation bias. Notably, it arose in circumstances far more tenuous than exist here. In *Williams*, one appellate court judge served as the district attorney regarding the underlying crime 26 years earlier and made certain strategic decisions but was not involved in the day-to-day prosecution of the case. Conversely, here, certain judges have served on ***more than twenty appellate panels in the Sinkhole Cases in the fifteen months since the amended statutes requiring random allotment became effective***.[117] The actions giving rise to the risk of confirmation bias and cognitive bias are more numerous, more time-intensive, and more recent than the lone act in *Williams*.

Texas Brine is uniquely situated. The typical litigant is a one-time player with a single case assignment in dispute. Texas Brine, however, has been a party to literally scores of appeals in the Sinkhole litigation. The preeminent constitutional

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[115] *Id.* at ¶ 10.

[116] 136 S.Ct. 1899, 1906 (2016) (quoting *Withrow v. Larkin*, 421 U.S. 35, 57 (1975)).

[117] *See* Exhibit C, Beyl Affidavit, at ¶¶ 21-22.

law scholar Erwin Chemerinsky attested that, while a party may not *normally* be able to assert a due process violation based on random assignment, these are no ordinary circumstances: not only does Texas Brine have a substantial record of appeals, but the First Circuit has *admitted* to violating state law. Professor Chemerinsky identified four factors unique to this situation to justify a finding that the First Circuit violates Texas Brine's right to due process through its case assignment practices:[118]

> Although there is conflicting caselaw on the question of whether a violation of random assignment requirements constitutes a due process violation most such rulings involved a one-time litigant where it was not apparent how that party's case would have been assigned to another judge or panel. I am not aware of any jurisprudence asserting this principle in the context of (1) a litigant with literally dozens of separate appeals before a particular court where (2) the Court is subject to multiple governing statutes requiring that each appeal be randomly assigned, where (3) that Court has acknowledged that it has failed to apply those statutes during the pendency of several dozen appeals, and (4) where that Court has instead invoked an unwritten rule to justify its case assignment decisions.

Based on these considerations, Professor Chemerinsky concluded that "the First Circuit's case assignment practices, whereby it assigns exactly one judge from each of the circuit's three geographic

[118] *See* Exhibit A, Chemerinsky Affidavit, at ¶ 19 (emphasis added).

districts to each panel, ***fails to satisfy the requirements of due process***."[119]

B. The First Circuit's Use of Geographic Quotas Denies the Right of Equal Protection to Litigants in the First Circuit.

The Fourteenth Amendment to the U.S. Constitution also protects the right to equal protection under the law. Here, too, the First Circuit's case assignment procedures fall short, as confirmed by Professor Chemerinsky.

The First Circuit fails to apply Louisiana law uniformly. While article 2164.1 of the Code of Civil Procedure and Revised Statutes §13:319 mandate the random assignment of all civil appeals, the First Circuit employs markedly different case assignment procedures than the other four circuits, as confirmed by the Clerks of Court for the Second, Third, Fourth, and Fifth Circuits.[120] The clerks of the other four circuits have confirmed that they employ random case assignment processes, that they do not use geographic quotas, and that judges from their courts regularly serve on panels with each of their colleagues throughout the course of a year.[121]

The First Circuit's unwritten rule imposing geographic quotas ensures that a judge from East Baton Rouge Parish is, barring a recusal, on *every* First Circuit panel. The 2nd geographic district is

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[119] *Id.* at ¶ 20 (emphasis added).

[120] *See* Exhibit B, Affidavit of Lillian Evans Richie (Second Circuit); *see also* Affidavits of Renee Simien (Third Circuit), Justin Woods (Fourth Circuit), and Cheryl Q. Landrieu (Fifth Circuit), attached as Exhibits 6-8 to Petition.

[121] *Id.*

contiguous with East Baton Rouge Parish.[122] Thus, by unwritten rule, because the First Circuit normally assigns one judge from each geographic district to decide each appeal, East Baton Rouge Parish is *always* represented on appellate panels throughout the First Circuit. Indeed, all 52 Sinkhole Case appeals where either (1) the panel was disclosed after the August 1, 2018 effective date of the random assignment statutes, or (2) the appellate ruling was issued subsequent to August 1, 2018, featured a panel with a judge from East Baton Rouge Parish.[123] No other parish in Louisiana receives the same treatment by a rule of court, whether written or unwritten.

Unlike the other four circuits, the First Circuit does not provide random assignment in civil appeals. Litigants in those four circuits can be assured that their appellate panels are randomly assigned – but those in the First Circuit have no such assurance. The First Circuit persists in imposing an uncodified geographic quota. Moreover, the *Pontchartrain* appellate panels released on August 29, 2019 belie the First Circuit's assertion that it recently began randomly assigning panels – those three panels are *identical* to those issued in *Pontchartrain* two months earlier, when that court was admittedly reassigning previously constituted panels in the same case.[124]

In light of these considerations, Professor Chemerinsky concluded that "the First Circuit's case assignment procedures are arbitrary, capricious, and

[122] LA. REV. STAT. §13:312(1)(b) ("The Parish of East Baton Rouge shall compose the second district of the first circuit.").
[123] *See* Exhibit C, Beyl Affidavit, Appendix 1.
[124] A fuller discussion of this phenomenon is discussed on pages 14-15, *supra*.

fail to satisfy any rational purpose."[125] Thus, he opined that "the First Circuit has deprived Texas Brine of equal protection of the laws, specifically including article 2164.1 of the Louisiana Code of Civil Procedure and Revised Statutes §13:319."[126] He also emphasized that "no other parish" is guaranteed, by rule, to have a judge from that parish on a particular appellate panel, and "any such explicit requirement would implicate the equal protection clause and whether there is a rational basis for such a rule."[127] Notably, a Florida court held in *State ex rel. Zuberi v. Brinker* that "we have come to the conclusion that it may be a denial of equal protection of the law" for "two different methods" to be used in assigning judges to cases.[128] That situation exists here, when comparing the First Circuit to its sister circuits.

C. The First Circuit Ignores the Constitutional Principle of Separation of Powers.

In its October 29, 2019 *per curiam*, the First Circuit asserted that it enjoys the constitutional authority to enact its own rules governing the creation of appellate panels.[129] The First Circuit asserted that this right ***trumps the laws duly enacted by the Legislature***, asserting "the composition of such

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[125] *See* Exhibit A, Chemerinsky Affidavit, at ¶ 22; *see also* Lindsey v. Normet, 405 U.S. 56, 79 (1972) (holding that "arbitrary and irrational" requirement violates equal protection clause).
[126] *Id.* at ¶ 21.
[127] *Id.* at ¶ 24.
[128] 323 So.2d 623, 625 n.5 (Fla. App. 1975).
[129] *See* Additional Response, Oct. 4, 2019 *per curiam*; *see also*, Oct. 29, 2019 *per curiam* and Appendix A thereto.

panels is specifically reserved to each court, ***notwithstanding any statutory enactment***."[130]

This language distorts the courts' role in our constitutional framework.

As emphasized in Section I(B) *supra*, the separation of powers doctrine is firmly enshrined in Louisiana constitutional law. The judicial branch cannot infringe upon the province of the legislature to enact laws.[131] Article 2164.1 and Revised Statutes §13:319 mandate the random assignment of civil appeals.[132] Furthermore, article 193 of the Code of Civil Procedure requires that any "rules adopted by an appellate court ***shall be published*** in the manner which the court considers most effective and practicable."[133] As the Crawford Treatise on Court Rules emphasizes, ***Louisiana courts cannot disregard legislative authority***. Courts' rulemaking authority "has always been tempered with a separation of powers induced submission to a legislative enactment."[134] Consequently, the separation of powers doctrine provides yet another constitutional basis for this Court to reject the First Circuit's failure to randomly assign civil appeals.

D. The First Circuit's Use of a Geographic Quota Does Not Advance the Interest of Racial Diversity on Appellate Panels or Prevent "Home-Cooking."

Certain amici have suggested that the First Circuit's geographic quota ensures racial diversity on

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[130] *See* Oct. 29, 2019 *per curiam*, at p. 1 (emphasis added).

[131] *Board of Com'rs of Orleans Levee Dist. v. Dep't of Nat. Resources*, 496 So.2d 281, 286 (La. 1986).

[132] La. Code Civ. Proc. art. 2164.1; LA. REV. STAT. §13:319.

[133] La. Code Civ. Proc. art. 193 (emphasis added).

[134] *See* Crawford Treatise on Court Rules § 27:58, District court rules – Analysis and jurisprudence (Nov. 2018).

appellate panels.[135] The notion that the First Circuit's use of geographic quotas ensures racial diversity in appellate panels is incorrect, both from a mathematical and a common-sense standpoint. In fact, it makes ***no difference*** whether geographic quotas are used: either way, a particular judge should, barring recusals, appear on 25% of all panels. A false rationale cannot justify a policy that is prohibited by law, no matter how well-intentioned it may be.

The Louisiana Legislature has created one "majority-minority" electoral subdistrict in Division 2, with the objective of creating a more racially diverse judiciary. This mandamus claim does not, in any way, challenge that statutory enactment or the laudable goal of ensuring racial diversity in the judiciary. But to the extent that the First Circuit seeks to accomplish increased minority presence on appellate panels, its requirement that each panel contain exactly one member from each electoral district does nothing to advance this worthy objective. In a purely random system, where all possible combinations of judges can be selected, 55 out of 220 possible combinations will feature any one particular judge – *i.e.*, 25%.[136] If the panels are balanced to require exactly one judge from three geographic districts, then there are 64 possible panels, 16 of which would contain any one particular judge – ***once again, 25%***.[137] Thus, the requirement that each panel contain one member from each electoral district does not advance this objective – and as detailed above, this practice violates the statutory

[135] *See* affidavit of Gail Stephenson, originally filed March 26, 2019, attached as Appendix 2 to Peremptory Exception of No Cause of Action and Opposition to Petition for Writ of Mandamus, filed Sept. 9, 2019.
[136] *See* Exhibit C, Beyl Affidavit, at ¶ 28.
[137] *Id.*

requirement of random assignment. Moreover, for a Court to employ such a classification violates the equal protection clause.

At hearings on the random assignment bill, Chief Judge Whipple defended the First Circuit's geographic quota assignment method by suggesting that judges rule on the basis of localized preferences, stating, "In the First Circuit, we don't want home cooking . . . We don't have home cooking for or against anybody because we do that."[138] Such "home cooking" logic as a defense for the First Circuit's failure to comply with the substantive law requiring random assignment to appellate panels as effective August 1, 2018 is an affront, mistakenly treating judges as representatives of a particular region.[139] Judges are elected to district courts, appellate circuits, and the Supreme Court from various geographic elective districts across the state. Appellate judges in other circuits are randomly assigned to hear cases from throughout the parishes in their entire appellate circuit area, and this Court hears cases from all 64 parishes across the state. According to the "home cooking" rationales used to support the First Circuit's geographic quotas, the U.S. Fifth Circuit Court of Appeals would have to have a judge each from Texas,

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[138] Exhibit 17 to Second Amended Petition, Transcript of Senate Judiciary Committee "A" Debate on Senate Bill 273 (Apr. 10, 2019) at 46 *ll*. 8-10 (emphasis added).

[139] It is nonsensical to invoke a desire to avoid "home cooking" as a basis to impose geographic quotas: judges are not legislators, and they should not be presumed to represent particular localized interests. But even if this characterization were correct, the First Circuit's rule does nothing to ameliorate this problem. For example, by applying a rule requiring one judge from each of three geographic districts, nothing would prevent judges from two districts from agreeing to override the vote of the judge from a different, perhaps demographically distinct district.

Louisiana, and Mississippi on every three-judge panel – such is clearly not the case. The "home cooking" rationale relies on a mistaken conception of judges as legislators concerned solely with parochial interests.

IV. Texas Brine Is Entitled to Enforcement of Random Assignment of Civil Appellate Panels and Transfer of the Sinkhole Cases to Another Circuit Court of Appeal.

The general remedy in this case is for this Court to invalidate the non-random assignments of civil panels in all cases and to compel the First Circuit to comply with the law requiring random assignment of appeals and appellate panels. This remedy comports with this Court's ruling in *Sprint*, which addressed violations of random assignment statutes that apply to the district courts.

But additional relief is required here. All pending and future appeals and writ applications in the Sinkhole Cases must be transferred to another circuit. Texas Brine is directly adverse to the First Circuit as an institution in this mandamus action, and its judges have interjected themselves into the proceedings by issuing *per curiams* defending its practices against Texas Brine's charges. During the pendency of this mandamus claim, the First Circuit has continued to rule on appeals in the Sinkhole Cases – including setting four separate oral arguments on less than the 30 days notice required by Uniform Rule 2-11.9, and summarily denied Texas Brine's motions to stay those arguments.[140] Since this Court's September 20, 2019 Order reasserting its plenary jurisdiction over the mandamus action directed against the First Circuit's

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[140] *See* UNIF. R. LA. CT. APP. 2-11.9. The appeals in question bear docket numbers 2019-CA-0024, 2019-CA-0052, 2019-CA-0054, and 2019-CA-0624.

Clerk of Court, the First Circuit has issued seven appellate opinions[141] and a rehearing denial[142] – all adverse to Texas Brine.

A ruling merely stating that the First Circuit must randomly assign appeals and writ applications in the Sinkhole Cases, without more, will do nothing to rectify the problems created by the First Circuit's disregard of article 2164.1 of the Code of Civil Procedure and Revised Statutes §13:319. Appeals are not decided in a vacuum. Rulings already rendered by improperly constituted panels threaten to influence future decisions. Via the "law of the circuit" doctrine,"[143] even if a future First Circuit Sinkhole Case panel is randomly assigned in perfect compliance with state law, it may be ***constrained by rulings already rendered by an invalidly constituted panel***. In effect, future First Circuit panels may find their hands tied by rulings already

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[141] *See Pontchartrain Nat. Gas Sys. v. Texas Brine Co., LLC*, 2018-CA-0492 (La. App. 1 Cir. 9/27/2019), -- So.3d --, 2019 WL 4727542, *Pontchartrain Nat. Gas Sys. v. Texas Brine Co., LLC*, 2018-CA-0492 (La. App. 1 Cir. 9/27/2019), -- So.3d --, 2019 WL 4727543. Five rulings were issued on November 15, 2019, and they are not yet reported: these opinions are *Pontchartrain Nat. Gas Sys. v. Texas Brine Co., LLC*, 2018-CA-0500 (La. App. 1 Cir. Nov. 15, 2019); *Pontchartrain Nat. Gas Sys. v. Texas Brine Co., LLC*, 2018-CA-1159 (La. App. 1 Cir. Nov. 15, 2019); *Pontchartrain Nat. Gas Sys. v. Texas Brine Co., LLC*, 2018-CA-0999 (La. App. 1 Cir. Nov. 15, 2019); *Fla. Gas Transmission Co., LLC*, 2018-CA-1714 (La. App. 1 Cir. Nov. 15, 2019); and *Pontchartrain Nat. Gas Sys. v. Texas Brine Co., LLC*, 2018-CA-1170 (La. App. 1 Cir. Nov. 15, 2019). Notably, while some of these rulings dismissed appeals based on a lack of subject matter jurisdiction, Texas Brine was charged with all costs.

[142] *See Crosstex Energy Servs., LP v. Texas Brine Co., LLC*, 2018-CA-1231 (La. App. 1 Cir. 9/25/2019).

[143] *Succession of Johnson*, 2016-1115 (La. App. 1 Cir. 2/17/2017), 2017 WL 658775.

rendered by that Court on related issues in the Sinkhole Cases. This concern is not academic; on multiple instances to date – including one issued mere hours before this brief was submitted – the First Circuit has invoked the "law of the circuit" doctrine.[144] A motion is currently pending before the First Circuit regarding the Phase I liability judgment – the culmination of a three-week trial involving 50 witnesses (live and by deposition) and nearly 700 exhibits – seeking to vacate the District Court's assessment of liability against three parties based on the "law of the circuit" doctrine.[145] Any relief requiring Texas Brine to remain before an institutionally adverse court, and which threatens to defer future appeals and writ applications to prior rulings made by a series of illegally constituted appellate panels, would be purely illusory. At a minimum, such a scenario will create an appearance of impropriety far stronger than that which existed in *Tolmas*, where this Court held that transfer to a different circuit court was warranted.

Moreover, Dr. Rowland has opined that the rulings by the First Circuit in the Sinkhole Cases indicate the influence of cognitive bias, confirmation bias and groupthink — subconscious biases that affect the decision-making process under certain

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[144] *See Pontchartrain Nat. Gas Sys. v. Texas Brine Co., LLC*, 2018-0001 (La. App. 1 Cir. 6/4/2018), 253 So.3d 156; *Pontchartrain Nat. Gas Sys. v. Texas Brine Co., LLC*, 2018-0004 (La. App. 1 Cir. 6/6/2018), 255 So.3d 644. In addition, this doctrine was invoked in *Pontchartrain Nat. Gas Sys. v. Texas Brine Co., LLC*, 2018-CA-1170 (La. App. 1 Cir. Nov. 15, 2019); this case has not yet been reported on Westlaw as of the time of filing.

[145] *See* Motion, filed Oct. 4, 2019 in 2018-CA-1391, *Fla. Gas Transmission Co., LLC v. Texas Brine Co., LLC*.

circumstances.[146] Dr. Rowland notes that "[b]ecause of the subconscious nature of these biases, it is overwhelmingly improbable that their effect can be disregarded or bypassed."[147] In other words, it is not enough for a particular First Circuit judge to declare that he or she is not "biased." Dr. Rowland opines that "these biases have manifested in the First Circuit as a group through the history with the First Circuit as a whole and the public exposure of the First Circuit's violation of the Louisiana law requiring random assignment of appellate panels."[148] In Dr. Rowland's opinion, "the First Circuit as a whole cannot impartially decide the appeals and writ applications in the sinkhole cases going forward."[149] Indeed, the threat of confirmation bias has *already* manifested itself where the First Circuit made factual declarations that were affirmatively contradicted by the record, yet refused to correct itself after Texas Brine demonstrated that the record contradicted the Court's proclamations.[150]

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[146] *See* Exhibit F, Rowland Affidavit, at ¶¶ 6-12.

[147] *Id.* at ¶ 13.

[148] *Id.* at ¶ 14.

[149] *Id.* at ¶ 15.

[150] For example, in *Pontchartrain Natural Gas System v. Texas Brine Co., LLC*, the First Circuit ignored unrefuted expert testimony, which the District Court credited in its factual findings regarding the causation of the sinkhole, in affirming the involuntary dismissal of a party. 2018-0631 (La. App. 1 Cir. July 3, 2019), 2019 WL 2865136. Even after Texas Brine demonstrated that the First Circuit applied a legally incorrect standard – requiring Texas Brine to prove a "definitive path" for brine leakage rather than what was "more probable than not," the First Circuit refused to revisit its factual mischaracterization of the testimony. Compounding matters, the First Circuit has subsequently cited this ruling on multiple other occasions. *See Crosstex Energy Servs., L.P. v. Texas Brine Co., LLC*, 2018-CA-1122 (La. App. 1 Cir. 9/16/2019), 2019 WL 4409140; *Fla. Gas*

In *Tolmas*, this Court found transfer of a case from one circuit to another to be the proper remedy when necessary "to avoid even the appearance of impropriety."[151] That remedy is also necessary in the unique procedural posture of the Sinkhole Cases. The combination of (1) the sheer volume of civil appeals and writ applications involving Texas Brine, (2) the First Circuit's admitted failure to apply the laws requiring random assignment, (3) Texas Brine's role in exposing the First Circuit's noncompliance with article 2164.1 of the Code of Civil Procedure and Revised Statutes §13:319, and (4) the concerns of the "appearance of impropriety" already articulated by one-third of the First Circuit requires that a ruling in Texas Brine's favor also include the transfer of all pending and future appeals and writ applications in the Sinkhole Cases to another circuit.

CONCLUSION

The First Circuit has failed to comply with article 2164.1's and Revised Statutes §13:319's statutory mandate of random assignment of civil appeals. That court has admitted to violating the law, and the non-random assignment of civil appeals in the Sinkhole Cases persists to this day. Its continued used of unwritten rules in assigning appeals violates fundamental due process tenets. This Court has the duty to police the lower courts, as it did in *Sprint* – and particularly where a court usurps the role of the legislature. Likewise, this Court must protect against violation of litigants' rights to due process and equal

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Transmission Co., LLC v. Texas Brine Co., LLC, 2018-CA-0907 (La. App. 1 Cir. 8/29/2019), 2019 WL 4073383; *Crosstex Energy Servs., L.P. v. Texas Brine Co., LLC*, 2018-CA-0900 (La. App. 1 Cir. 8/5/2019), 2019 WL 3561759.

[151] *See* Tolmas, 87 So. 3d at 855.

protection and must enforce Louisiana's public policy requiring random allotment of all civil appeals. The First Circuit's disregard of its statutory duties requires that this Court enforce the random assignment requirement. But given the adversarial relationship Texas Brine has been forced to have with the First Circuit and the First Circuit's clearly entrenched positions (whether conscious or unconscious), coupled with the risk that rulings from illegally constituted appellate panels wills still influence the First Circuit's future actions, this Court should transfer all pending and future appeals and writ applications in the Sinkhole Cases to another circuit. Justice and fundamental fairness demand nothing less.

Respectfully submitted,

/s/ *James M. Garner*

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served on the following service list via e-mail this 15th day of November, 2019.

/s/ James M. Garner
JAMES M. GARNER

APPENDIX H

TWENTY-THIRD JUDICIAL DISTRICT COURT
PARISH OF ASSUMPTION
STATE OF LOUISIANA

NO. 34316 DIVISION "B"

FLORIDA GAS TRANSMISSION COMPANY, LLC

VERSUS

TEXAS BRINE COMPANY, L.L.C., ET AL.

NO. 34265 DIVISION "B"

PONTCHARTRAIN NATURAL GAS SYSTEM,
K/D/S PRO MIX, LLC, AND ACADIAN GAS
PIPLINE SYSTEM

VERSUS

TEXAS BRINE COMPANY, L.L.C., ET AL.

NO. 34202 DIVISION "B"

CROSSTEX ENERGY SERVICES, ET AL.

VERSUS

TEXAS BRINE COMPANY, L.L.C., ET AL.

FILED: ________________ ____________________

DEPUTY CLERK

JUDGMENT

Phase I (Liability) of this matter came for trial before this Court on September 18-29, October 9-11, and November 15, 2017.

Considering the pleadings and evidence submitted into the record, and arguments of counsel, and for the written reasons filed herein;

IT IS ORDERED, ADJUDGED, AND DECREED that liability for the sinkhole that appeared in Assumption Parish on August 3, 2012 is apportioned as follows:

Oxy[1] is assigned 50% of fault;

Texas Brine[2] is assigned 35% of fault·

Legacy Vulcan, LLC is assigned 15% of fault;

JUDGMENT READ, RENDERED AND SIGNED in Napoleonville, Louisiana, on this the 21nd day of December, 2017.

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THOMAS J. KLIEBERT, JR.
DIVISION "B"
JUDGE – 23RD JUDICIAL DISTRICT

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[1] Occidental Chemical Corporation, Occidental Petroleum Corporation, and Oxy USA, Inc.

[2] Texas Brine Company, LLC and United Brine Services.

TWENTY-THIRD JUDICIAL DISTRICT COURT
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FILED: ___________________ _______________________
DEPUTY CLERK

REASONS FOR JUDGMENT

I. INTRODUCTION

On August 3, 2012, a sinkhole began to emerge on a 40-acre tract of land ("North 40") along the western side of the Napoleonville Salt Dome in Assumption Parish, Louisiana. Florida Gas Transmission Company, LLC ("Florida Gas"), Pontchartrain Natural Gas System, K/D/S Promix, LLC, and Acadian Gas Pipeline System ("Pontchartrain"), and

Crosstex Energy Services ("Crosstex") each owned pipelines in the immediate vicinity of the Bayou Corne sinkhole which were rendered inoperable by the massive surface damage of the sinkhole. The main demand in all three cases is for damages to their respective pipelines. In addition, Texas Brine Company, LLC ("Texas Brine"[1]) maintains claims for response costs incurred as a result of the sinkhole. Finally, Texas Brine maintains claims for lost profits resulting from the sinkhole formation. It is undisputed that the damages asserted arose from the formation of the sinkhole. The Phase II trial will be held at a later date to quantify the alleged damages.

The Phase I trial was held for the purpose of determining what caused the sinkhole to form and who, if anyone, is at fault under any theory of law for causing the formation of the sinkhole. All other issues are reserved for trial in Phases 2-4. No party disputes that the sinkhole formed due to the failure of the western sidewall of the Oxy-Geismar No. 3 ("OG3") brine cavern on land owned by Occidental Chemical Corporation ("OxyChem"). The OG3 well was brought into operation in 1982, and the OG3 cavern was solution mined until March 2009 by Texas Brine as the operator of record. The brine produced from the OG3 supplied a chlor-alkali plant in Geismar, Louisiana. The plant was owned and operated by Legacy Vulcan Corp f/k/a Vulcan Materials Company ("Vulcan") until 2005, when Vulcan sold its chlor-alkali assets to Basic Chemicals Company, LLC ("Basic"), which later merged into OxyChem. For the reasons that follow, the Court finds that the Oxy entities, the Texas Brine entities, and Vulcan all bear responsibility for the formation of the Bayou Corne

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[1] Texas Brine and United Brine Services.

sinkhole, all of which has been shown by the testimony and evidence introduced at the Phase I trial.

II. CAUSATION

At trial, three experts testified directly about the cause of the sinkhole: Evan Passaris, Bob Thoms, and Neal Nagel. These experts agree that the sinkhole formed due to a failure of the OG3 cavern's western wall, which resulted from the cavern's proximity to the edge of the salt dome that provided for the leakage of brine into an under-pressured geological formation that reduced the pressure in the cavern sufficiently to compromise the integrity of the OG3 cavern wall. Dr. Nagel specifically identified the Adams-Hooker #1 ("AH-1") reservoir as the under-pressured geological formation. He testified that the only way to get a brine pressure drop sufficient to cause the OG3 cavern wall to fail is if it flows into the depleted AH-1 reservoir. No other testimony or evidence provides an alternative explanation to account for the depressurization necessary to compromise the OG3 cavern wall. Finally, the experts of this case agree that the untimely plugging and abandonment of the OG3 well, which prevented the OG3 cavern from being monitored and re-pressured, was a factor contributing to the cavern failure.

After examining the totality of the evidence and expert testimony, this Court concludes that the sinkhole was caused in various degrees by three elements: 1) the cavern's proximity to the edge of the salt dome resulting in an unreasonably thin cavern wall and an eventual brine leak; 2) the substantial depressurization of the OG3 cavern caused by brine leaking from the cavern into the AH1 reservoir; and 3) the timing of the plugging and abandoning of the OG3 well. Each element was caused by or contributed

to by a combination of the actions and inactions of the Oxy entities, the Texas Brine entities, and Vulcan.

Civil Code Article 2315 provides that every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. Further, Article 2316 provides that every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill. Under Civil Code Article 2317.1, the owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Louisiana jurisprudence has recognized the reality that custody or *garde* is a broader concept than ownership and custody or *garde* may be shared by multiple parties. Considering the totality of the evidence presented in this case, the Court finds that *garde* of the OG3 cavern was shared by the Oxy entities, the Texas Brine entities, and Vulcan.

Under Louisiana Civil Code Articles 2315 and 2317.1, Texas Brine is responsible for damages arising out of its negligence in operating the OG3 well, and Vulcan and OxyChem are responsible for damages arising out of their negligence in overseeing the development of the OG3 cavern. The OxyChem is additionally liable under Articles 2315 and 2317.1, along with its affiliates Occidental Petroleum Corporation ("Oxy Petro") and Oxy USA, Inc. ("Oxy USA"), for their failure to responsibly monitor the AH-1 well and depletion from the AH-1 reservoir.

III. PROXIMITY TO THE EDGE OF THE DOME

The close proximity of the OG3 cavern to the edge of the salt dome was a substantial factor in causing the sinkhole. The close proximity allowed for solution mining operations to eventually create an unreasonably thin cavern wall at the western edge of the salt dome. The thin wall was continuously depleted by solution mining until brine eventually began leaking out of the cavern to areas of lower pressure.

A. Siting of the OG3 Well

The OG3 well was drilled by Texas Brine in 1982. At the time of drilling, Hooker Chemical Corporation ("Hooker"), now known as Occidental Chemical Corporation was the owner of the land and minerals therein, Vulcan was the mineral lessee to the salt dome, and Texas Brine was the operator of record of two other brine wells, OG1 and OG2, providing brine to Vulcan's chlor-alkali plant in Geismar, Louisiana. An abundance of testimony and evidence was presented at trial by Vulcan and Texas Brine in an attempt to establish which party selected the initial siting location and final depth for the drilling of the OG3 well. However, the Court finds that 25 years of subsequent "textbook" cavern growth render the initial siting selection issue moot for purposes of causation.

Though the initial siting of the well is a moot issue, the facts surrounding site selection are relevant because both Vulcan and Texas Brine first gained knowledge of proximity concerns while conducting site analysis in preparation for drilling the OG3. Years prior to the OG3, Texas Brine first drilled the OG2 on the 40-acre tract to 6,600 feet as planned. The OG1, however, drilled out of salt almost 3,000 feet

above the planned 6,600 foot depth. While the initial drilling out of salt of the OG1 did not create an imminent safety concern, it was an unforeseen and financially costly occurrence, because the well was severely limited in its production capacity at half of the expected depth. OG1's limitations expedited the need for the drilling of the OG3 well. Therefore, in preparation for drilling the OG3 well, Vulcan and Texas Brine each took steps in an effort to avoid the problems encountered by OG1.

Texas Brine hired Leon Toups of Ted Hoz & Associates in 1976 as a consultant to provide advice with respect to drilling a third well on the North 40. In a series of written reports, Toups elaborated upon his geological analysis. He opined that the available data was too scarce to determine with certainty why the OG1 drilled out of salt at 3000 feet. However, he provided three possibilities, concluding that "the most reasonable interpretation" of the available data indicated the salt dome had an "overhang." Toups explained that "[t]he problem as I see it is that even if further wells on this tract remain in salt to the proposed total depths, their proximity to the steep dipping salt dome cap rock could limit the volume of salt that could be recovered from the well," adding that the risk of such an eventuality "may not be justified by the economic guidelines within which you have to operate." However, with the risks that he outlined, Mr. Toups provided to Texas Brine what he believed to be the "safest" location for the OG3, west of the OG2, and that it "should be a twin to the No. 2 . . . down to 6,600 feet."

In an effort to ensure that their next brine well investment would be worthwhile, Vulcan conducted independent analysis through its employee Mark Juszli and consultants PBKBB and Larry Sevenker.

On May 22, 1980, PBKBB issued a report to Vulcan suggesting studies that could be conducted to better define the dome flank, including refraction seismic surveying followed by boreholes to confirm the data collected by the survey. Recognizing the lack of information known about the dome flank, Mark Juszli, in a July 25, 1980 memorandum, concluded that he could not "in good conscience recommend siting a $1.5+ million brine well anywhere within Vulcan's lease tract" and that "drilling of an additional well within [Vulcan's] present lease tract is a multimillion dollar gamble." Additionally, Vulcan engaged salt cavern engineer Larry Sevenker to conduct a detailed analysis of the entire brine field. Between 1980 and 1984, Mr. Sevenker authored at least eight reports for Vulcan and oversaw Texas Brine's drilling of the OG3 on site on behalf of Vulcan. Sevenker calculated in 1982 that the recommended cavern sizes for the three Geismar wells resulted in realistic reserves for 13 years and optimistic reserves for 25-26 years. Importantly, Sevenker informed Vulcan in 1980 of the implications of neighboring reservoirs when analyzing the possibility of converting the caverns into storage caverns:

> "[p]roximity of the cavity to the edge of dome due to the salt overhang is possibly the most concerning item in the development of both cavities V #1 and V #2. [...] The possibility exists that fractures in the formations beyond the edge of the dome have allowed oil and gas to become trapped against the salt dome under the overhang. A number of oil wells exist just to the northwest of the site area of the overhang. [...] Development of mini-fractures into major connection could occur due to stress differences inside the cavity and

> the surrounding formations. Two direction flow would suddenly take place in the fracture or connection. Oil and gas would rush into the cavity and rise to the top forcing cavity brine out into the formations through the same connection and due to gravity differences flow to a lower zone in the outside formation."

The record is replete with evidence that both Texas Brine and Vulcan knew, before drilling the OG3 well, that the edge of the salt dome was a serious issue that would require the parties to proceed with caution. Although a risky endeavor, the OG3 well was drilled successfully to a depth just under 6,000 feet and subsequently operated without major incident for over two decades.

B. Expanding Facilities for Increased Brine Supply Requirements

In 1998, Vulcan investigated the possibility of doubling production rates from its existing brine wells in order to provide enough brine to sustain the increased brine requirements of the joint venture that it was forming with Mitsui. Jim Tichenor of Texas Brine recommended that Vulcan engage an outside firm to (1) assess existing salt reserves in light of the planned expansion and (2) explore whether a fourth well could be drilled on Vulcan's lease. Al Lupenski, Vulcan's director of purchasing, engaged RE/SPEC to perform the investigation.

Dr. Joseph Ratigan of RE/SPEC conducted a detailed analysis of data compiled by Texas Brine and issued a draft report in March of 1998. The report discussed options to increase well reserves by increasing the size of the existing caverns substantially beyond the 300 foot diameter cavern size contemplated in Texas Brine's mining plan or by

raising the cavern ceilings and mining above the existing caverns at substantially increased cavern diameters. The report flagged the possibility that the OG3 cavern was getting close to the salt dome edge and suggested that before implementing such a change, additional geomechanical studies were warranted. However, Dr. Ratigan did not conclude that the well needed to be shut down; did not have any concerns about the mechanical integrity of the OG3; and did not believe that the contemplated increase in production rates from the OG3 was cause for concern. After receiving the report, Texas Brine disagreed with RE/SPEC's projections of recoverable brine and the projected diameter of the caverns. RE/SPEC updated the report to include Texas Brine's assertions and provided the revised report to Vulcan on April 17, 1998.

In connection with the $14.6 million project to increase the production and delivery capacity of brine production facilities supplying the Geismar plant, Vulcan and Texas Brine finalized amendments to their existing Facilities Lease Agreement and Operating and Supply Agreement to memorialize the agreement for increased brine production. Texas Brine's president, Theodore Grabowski, testified that he believed there were minimal day-to-day operational risks associated with the increased production. However, he testified that he did believe the new operating agreement called into question the quantity of reserves remaining on the North 40 at the increased production rate. These concerns of Texas Brine were alleviated because the contracts obligated Texas Brine to use their best efforts to locate and obtain control over alternate sources of salt and did not require Texas Brine to make a representation or

warranty regarding the quantity or quality of the salt present on the lease.

The totality of the evidence makes it clear that though Texas Brine and Vulcan collaborated professionally on large capital expenditures involving brine mining, Vulcan was the party to decide how and where their money was ultimately spent, including when and where new brine wells would be drilled. Texas Brine asserts that it offered an option to Vulcan in 1998 that would allow Vulcan to pursue brine mining operations on Texas Brine's leased tract on the White Castle salt dome to avoid the imminent risks associated with the OG3. Texas Brine further asserts that it again sought to get out of the OG3 in 2003 when it offered Vulcan its land for solution mining operations at a reduced royalty rate. While there is no credible evidence that Texas Brine's motivation in these proposals was anything further than securing an expanded and long-term business relationship with Vulcan, the choice of where to operate elsewhere was clearly Vulcan's. Though the Court's conclusion regarding Vulcan's level of control is not based solely on evidence presented in connection with Texas Brine's 1998 White Castle option, the business relationship between Vulcan and Texas Brine in connection with the OG3 is epitomized therein. The minutes of a Vulcan meeting unambiguously state that:

> "The first session involved Vulcan personnel only. [...] Jim [Jim Richter of Vulcan] then discussed the White Castle option. [...] At that point Jim Tichenor [of Texas Brine] was invited to join the discussions. [...] Tichenor was informed that the group had decided that the Napoleonville option was the best

> economic choice for the Chlor-alkali Expansion project."

With Vulcan and Texas Brine fully aware of the edge of dome concerns, Texas Brine supplied brine to Vulcan at the accelerated rate until Vulcan sold its chlor-alkali assets to OxyChem via an Asset Purchase Agreement between Vulcan and Basic Chemicals, an OxyChem corporate affiliate which would later merge into OxyChem. The agreement was executed on October 11, 2004 and closed on June 7, 2005. While negotiating the sale in June 2004, Jack Durland of Vulcan contacted Ted Grabowski, Texas Brine's president, to acquire salt reserve estimates for the Vulcan wells so that he could provide that information to Jim Thomas of OxyChem. Mr. Grabowski provided the requested salt reserve numbers to Mr. Durland with a caveat detailing the ongoing concern about the OG3 cavern's proximity to the edge of the salt dome and the potential risk of losing the well prematurely. Concluding that it was not his responsibility to provide this information to OxyChem, Jack Durland omitted Mr. Grabowski's warning when he forwarded the reserve information to OxyChem's Jim Thomas.

From 1982 to OxyChem's acquisition of Vulcan's property in 2005, the OG3 well/cavern system exhibited no imminent indications of integrity loss. While this fact leads Vulcan to conclude that events subsequent to the Asset Purchase Agreement amount to intervening and superseding causes absolving Vulcan from liability, the totality of the evidence in this particular case leads the Court to a different conclusion. The vast majority of OG3 cavern growth occurred prior to 2005. Dr. Passaris opined that post-2005 growth of the OG3 cavern was negligible. Given Vulcan's level of control over large scale brining decisions and failure to disclose known risks during

corporate purchase negotiations, Vulcan bears a portion of fault for the Bayou Corne sinkhole. Considering the totality of the evidence, the Court finds that Texas Brine and Vulcan are both responsible and at fault for pre-2005 growth of the OG3 cavern and its contribution to causation of the Bayou Corne sinkhole.

C. Legend Data

After Vulcan's business was turned over to OxyChem, Texas Brine asserts that they made two recommendations to OxyChem, in 2005 and 2006, to get out of the OG3 and drill replacement wells elsewhere to avoid edge of dome concerns on the North 40. While the offers to OxyChem included reference to the proximity concern – i.e. "Risk of Well Failure" – the evidence suggests that the driving factor behind each of these offers was expanded business opportunities for Texas Brine, most notably securing OxyChem's brine mining business for the Taft facility. Moreover, Texas Brine's reserve calculations projected OG3 operation until 2015. OxyChem rejected these offers in the same manner as Vulcan did previously, on economic grounds.

In 2007, an oil and gas exploration company, Legend Petroleum, requested permission from the landowners on the Napoleonville Salt Dome to access their land to shoot a 3D seismic survey. In exchange for access, Legend agreed to make the data available to OxyChem and the operators of brine mines on the dome. Although OxyChem did not have prior experience with 3D seismic, Dr. Ratigan, Oxy's consultant on brine mining, flagged for OxyChem that this state-of-the-art data could be useful in OxyChem's project to locate a new well on their property. OxyChem obtained the data and contracted Kevin Hill of Hill Geophysical to analyze it and

provide his interpretation to Dr. Ratigan. Dr. Ratigan received Kevin Hill's analysis of the Legend 3D data on May 13, 2008.

On June 4, 2008, Dr. Ratigan presented his findings internally to OxyChem. Dr. Ratigan concluded that the OG3 cavern was closer to the edge of the salt dome than previously thought. Unlike Dr. Ratigan's 1998 warnings to Texas Brine and Vulcan, Dr. Ratigan now recommended that OxyChem terminate mining of the OG3 cavern and expressed concerns of environmental risks, including the remote possibility of a sinkhole. Though OxyChem's Gary Kinter met with Texas Brine to discuss Dr. Ratigan's conclusions on June 24, 2008, no credible evidence was presented to the Court to establish that either party agreed to shut down the OG3 well at this point. Presented with this looming risk that may limit brine supply during an economic recession, tension began to accumulate between OxyChem and Texas Brine. As the business relationship between Oxy and Texas Brine became more contentious, each party neglected the severity of OG3's condition. Both parties contend that the other party is responsible for continued mining following Dr. Ratigan's 2008 warning; however, both parties possessed the authority to immediately terminate OG3 operations and placed financial and business interests above environmental concerns.

While OxyChem contends that they were merely financing the brine mining operations and solely relied on Texas Brine regarding operations on the North 40, OxyChem undoubtedly played a larger role. Although Texas Brine largely controlled the day-to-day operations of the brine extraction process and cavern development from an inside-the-well/cavern-system perspective, OxyChem, like Vulcan, possessed

the ultimate decision making authority from an outside-the-well/cavern-system perspective. OxyChem had numerous geologists, geophysicists, and geomechanical engineers thoroughly analyzing OxyChem's brine caverns at the western edge of the Napoleonville Salt Dome independent of Texas Brine. Because the operating agreement was structured in a cost plus manner, OxyChem required approval of virtually every financial expenditure before work was undertaken. Moreover, the totality of the evidence establishes that OxyChem had the ultimate authority in determining the locations from where their brine would be extracted. OxyChem failed to prudently exercise this authority on mere economic grounds in the face of Dr. Ratigan's warnings and recommendation. Admittedly, at the time Texas Brine disagreed with Dr. Ratigan's warning and stated that brine production in the well showed no signs of failure, but it is also clear that the relationship between OxyChem and Texas Brine was not one of trust at this time.

Though OxyChem had the ultimate control of how their money was spent, Texas Brine had the duty to make prudent recommendations and the ability to override its customers' decisions if Texas Brine felt there was a safety or an environmental concern. In 2008, when presented with Dr. Ratigan's findings, Texas Brine rejected the interpretation of the data. Instead of addressing a looming environmental concern as a prudent operator should, Texas Brine's focus was fixated on its dwindling business relationship with OxyChem and the possibility of losing OxyChem's business to its competitor PB Energy. In an internal email regarding Gary Kinler's PowerPoint presentation of Dr. Ratigan's conclusions, McCartney commented: "Amazing. [...] Seismic (even

30) does not have resolution good enough to be certain this is correct [...] If salt flank was as shown, would we not have already had some indication of problems in the well? We have had gas ever since the well was drilled. [...] Do you think that PBESS is perhaps manipulating the data to their advantage?"

OxyChem's mission was evident early in its Geismar expansion and was highlighted in a 2007 internal email from Tom Feeney: "The concept is to defer the capital for replacing the well for Geismar. At the current state we need to drill a new well next year for Geismar and another one in 2013." This profits first culture did not waiver following Dr. Ratigan 's recommendation to terminate OG3 mining. Just months after Dr. Ratigan's warnings in November 2008 OxyChem reiterated its focus: "Since well #3 is close to the edge of the dome at the lower elevation of the cavern, we want to move forward with a plan and cost estimate to mill out the cemented casing of this well to an upper limit of 2000 feet. This will allow us to continue mining well #3 at a higher elevation which will reduce the risk of getting too close to the edge of the dome." OxyChem asserts that they moved forward with this plan keeping them in the OG3 only because their solution mining expert, Texas Brine, sold the idea to them; however, the evidence paints a different picture. While Texas Brine elected to pursue mining OG3 mining at a higher interval at this point, the concept of raising the cavern roof(s) first appeared in Dr. Ratigan's 1998 RE/SPEC report. Moreover, Tom Feeney's November 2008 reply email provides insight into OxyChem's level of control on the brine mining operations: "Based on what we have had them do it appears that for a couple hundred thousand $ of work on #3 we have reserves to carry us for at least 10 more years. We don't need another well nor to spend

$millions on 1&2. Based on where we have come with these guys since 2006 my guess is one more meeting and maybe they will be paying us."

Instead of collaborating together to prudently address Dr. Ratigan's warnings, OxyChem and Texas Brine lost trust in each other and attempted to address the situation internally with their individual interests in mind. Although OxyChem and Texas Brine each possessed knowledge of the risk and the authority to shut down the OG3 well, neither party acted prudently on that authority until it was too late. Ultimately, the OG3 cavern was mined until operations completely ceased in June 2010; however, as the parties later discovered, the OG3 cavern indicated signs of a leak in mid-2009 and started leaking during the July-August 2010 time period at the latest. An abundance of testimony focused on OxyChem and Texas Brine's September 2010 workover including Texas Brine's failed pressurization test on the OG3 cavern. However, the evidence shows that the cavern was already leaking prior to this workover.

OxyChem contends that cavern growth post-2005 is similarly irrelevant for purposes of causation because it occurred at a higher elevation in the cavern and did not cause growth deep in the cavern where the critically thin wall existed. OxyChem supports this contention with Dr. Passaris's testimony that post-2005 growth was negligible in comparison to pre-2005 growth. However, Dr. Passaris further testified that "raising the roof of the cavern further up in the attempt to extract more salt, you can't prevent the solution mining process also taking place in the lower part of the cavern. And in doing this process, all you're doing is reducing the wall thickness between the wall of the cavern, the edge of the cavern, and the edge of

the - - dome. And, as a result, you are introducing further risks associated with potential breakout." Post-2005 solution mining was unquestionably a substantial factor that contributed to the causation of the Bayou Corne sinkhole. Considering the totality of the evidence, the Court finds that Texas Brine and OxyChem are equally responsible for post-2005 growth of the OG3 cavern and its contribution to the causation of the Bayou Corne sinkhole.

IV. DEPRESSURIZATION OF THE OG3 CAVERN INTO THE AH-1 RESERVOIR

Proximity alone did not cause the failure of the OG3 cavern wall. The record indicates that there are at least five other caverns in Louisiana situated within 100 feet to the edge of the salt dome that have not failed. Further, even a leaking cavern will not necessarily cause a sinkhole. Experts in this case have offered the opinion that the occurrence of this sinkhole, resulting from a breach in the cavern wall at such a substantial depth, is most likely unprecedented. According to the undisputed expert testimony of Neal Nagel, the presence of the depleted Adams-Hooker #1 reservoir adjacent to the OG3 cavern is an essential factor that turned the leaking OG3 cavern into the Bayou Come sinkhole. For the cavern wall to fail there had to be a significant reduction in pressure support within the cavern. Dr. Nagel testified that the "only way to [...] get a brine pressure drop sufficient to cause the cavern to fail is if it flows into the depleted AH-1 reservoir."

On September 2, 1983, Hooker, now OxyChem, entered into an Oil, Gas, and Mineral Lease (the "Colorado Crude Lease") with Colorado Crude Company. The Colorado Crude Lease governed the drilling of the AH-1 well. Understanding the close proximity of the hydrocarbon operations to the brine

mining operations, sections 18 and 19 of the Colorado Crude Lease were added to the lease to protect the brine mining operations:

> 18. Notwithstanding anything to the contrary herein contained, in order that Lessee, Lessee's successor's or their assigns' operation will not conflict with Lessor's use of the surface estate of this lease, including the mining of salt and any other mineral not included within this Oil and Gas Lease, Lessee, Lessee's successors or their assigns shall secure Lessor's written approval (not to be unreasonably withheld) of any well locations, well casing programs, roads, pipeline right-of-ways, production facility sites and other operation locations, which shall exist in conjunction with this lease. Lessee shall diligently endeavor not to damage any salt formations which may exist upon the leased premises and shall pay for any actual damages which may occur from operations upon laid leased premises.
>
> 19. In connection with the drilling of any well in association with this lease, Lessee, Lessee's successors or their Assigns shall provide Cities Service Oil and Gas Corporation as Lessor's agent the following data including, but not limited to, data concerning salt mining to the representative listed below:
>
> > 1) Furnish a surveyor's location plat to Cities prior to the commencement of drilling.

2) Furnish daily drilling reports by telephone and mail a copy of the daily drilling reports to:

Cities Service Oil and Gas Corporation
P. O. Box 27570
Houston, Texas 77227-7570
Attention: Mr. Harold Hilton
Phone: 713-850-6326

3) Furnish Cities with one certified copy of all notices and reports, affecting this lease, filed by Lessee, Lessee's successors or his assigns with the federal, state or government agencies, including the Louisiana Department of Natural Resources.

4) Immediately upon Lessee's receipt, furnish Cities with copies of all well logs, surveys and test results of any well drilled on this lease, or pooled therewith by Lessee.

The Adams Hooker #1 well was spudded in 1986 and initially classified erroneously as water-driven. In actuality, the AH-1 reservoir was operated within industry standard as a depletion driven reservoir. Because a depletion driven reservoir does not refill the reservoir as it is depleted, the pressure in the Adams-Hooker #1 reservoir continuously dropped as hydrocarbons were extracted from nearly 2781 p.s.i. in 1986 to 916 p.s.i. by 2000. Though no evidence indicates that this drop of pressure in itself initiated the OG3 cavern leak, the close proximity of the substantially low pressure reservoir provided for an unreasonably dangerous condition once leaking

began. Once communication between the high pressure OG3 cavern and the low pressure AH-1 reservoir initiated, the substantial pressure differential required a significant pressure drop in the OG3 cavern to achieve pressure equilibrium. Dr. Nagel's unrebutted testimony establishes that this pressure loss was required to create the static stress change necessary to compromise the OG3 cavern wall.

OxyChem owed a duty to act as a prudent lessor under the Colorado Crude Lease. Though OxyChem informed Texas Brine of the surface location where the AH-1 drilling would occur, the Oxy entities were best situated to address the ongoing nature of the Adams-Hooker #1 reservoir and its relationship with the brine mining operations of the North 40. OxyChem is the only party to this case with a mineral and financial interest in both the Adams-Hooker #1 reservoir and the leased premises on the Napoleonville Salt Dome. OxyChem knew that the Adams-Hooker #1 well was drilled adjacent to the Napoleonville Salt Dome. This knowledge prompted OxyChem to insert the unique contractual provisions into the Colorado Crude Lease. In provision 19 Hooker (now OxyChem) appointed Cities Services, Oxy Petro and Oxy USA's predecessors in interest, as their agent to receive all data concerning drilling and production reports. There is no evidence in the record showing that OxyChem, Cities Service, or Cities Service's successors, Oxy Petro and Oxy USA, ever received or attempted to collect any operational data of the Adams-Hooker #1 well. OxyChem and its agent's, Oxy Petro and Oxy USA, failure to responsibly monitor the development of the AH-1 well and depletion from the AH-1 reservoir was imprudent and prevented all parties from considering the adjacent reservoir in their risk analysis. The Oxy entities are liable for the

entirety of the AH-1 reservoir's contribution to causing the Bayou Corne sinkhole.

V. PLUGGING AND ABANDONING

The OG3 well was plugged and abandoned in early June 2011, memorialized in a status update report by Joel Warneke, "May the well rest in peace and not create Lake McCartney." Dr. Passaris concluded that the plugging and abandoning was untimely, because monitoring was the last chance that the parties had to make sure that everything was okay before plugging the cavern. He opined that the monitoring process needs to be undertaken to ensure that cavern pressure is in equilibrium before it is plugged to prevent the development of any unsafe pressure changes inside the cavern. OxyChem asserts that Texas Brine alone, as the operator of record, was charged with the duty to assure that the OG3 cavern was in equilibrium before plugging and abandoning the OG3 well. However, the totality of the evidence establishes a significant level of involvement by OxyChem in the plugging and abandoning process by which OxyChem was also imputed a duty to act prudent. Both Texas Brine and OxyChem failed to prudently monitor the OG3 well/cavern system by not assuring that the OG3 cavern reached pressure equilibrium before plugging and abandoning.

After OxyChem and Texas Brine learned that the cavern was leaking, Texas Brine and OxyChem scheduled a meeting with Joe Ball, director of injection mining at the Louisiana Department of Natural Resources ("LDNR"). OxyChem engaged its expert consultant and agent, Dr. Ratigan, to supervise discussions with the LDNR and oversee the plugging and abandoning process. OxyChem made it clear that there would be no interaction with LADNR without Dr. Ratigan's participation or blessing. The parties

expressed to Mr. Ball their preference to monitor the OG3 before plugging and abandoning. Mr. Ball was not optimistic about the parties' "science experiment" and recommended that the parties move towards plugging and abandoning.

After an initial period of monitoring, Texas Brine viewed further monitoring as a waste of time and did not see that it was going to do any good. Texas Brine concluded in February 2011 that their best option at the time was to permanently abandon the cavern and to plug the wellbore in such a way as to protect the base of useable quality water from any leaks in the wellbore. Dr. Ratigan recommended to OxyChem that his preference was to continue monitoring the OG3 cavern, stating that there was no great rush to abandon. He testified at trial that he would have continued monitoring the OG3 cavern for as long as they would let him. Ratigan eventually gave OxyChem his blessing to allow Texas Brine to move forward with the plugging process, because Ratigan could not foresee or articulate the specific value to continued monitoring. Importantly, neither Texas Brine nor Dr. Ratigan had the opportunity to consider the depleted AH-1 reservoir when they concluded that plugging and abandoning was a prudent option, because of OxyChem's failure to collect AH-1 data. With no potential financial benefits remaining in the OG3 for either party, OxyChem and Texas Brine imprudently agreed to move forward with the plugging and abandoning process before assuring that the OG3 cavern had reached pressure equilibrium.

Although the untimely plugging and abandoning is considered a critical element in the emergence of the sinkhole, plugging and abandoning did not actively create the sinkhole. Once brine from the cavern began leaking into the AH-1 reservoir, all

conditions necessary were present to create the Bayou Corne sinkhole without further action. However, plugging and abandoning the OG3 well did completely prevent the parties from conducting any mitigation efforts. The totality of the evidence presented to the Court suggested that the parties may have had an opportunity to bring the situation under control had they indefinitely monitored the cavern. Though testimony established that, theoretically, brine could have been pumped back into the cavern continuously to account for the pressure loss, no witness addressed the actual feasibility of this plan, and feasibility is further called into question by the fact that this sinkhole occurred from an unprecedented set of circumstances. Even considering the foregoing, OxyChem and Texas Brine mutually and negligently agreed to plug and abandon the OG3 well in lieu of an indefinite period of monitoring. This decision sealed the fate of the OG3 cavern. Considering the totality of the evidence, the Court finds that Texas Brine and OxyChem are equally responsible for the untimely plugging and abandoning of the OG3 cavern and its contribution to causation of the Bayou Corne sinkhole.

VI. FAULT ALLOCATION

Given the totality of the evidence, including the sophistication of the parties and their respective levels of control in the operations that led to the sinkhole, OxyChem, Texas Brine, and Vulcan's actions and inactions each fell below the appropriate standard of care expected from a reasonable party similarly situated. Because the imprudent actions and inactions of each party each contributed substantially to the formation of the Bayou Corne Sinkhole, each party bears a portion of liability in their respective percentages. Louisiana's comparative fault statute, Civil Code article 2323, requires apportionment of the

degree or percentage of fault of all persons causing or contributing to the injury.

In determining the percentages of fault, the Court considers both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed. Factors to be considered when determining percentages of fault include: whether the conduct resulted from inadvertence or involved an awareness of the danger, how great a risk was created by the conduct, the significance of what was sought by the conduct, the capacities of the actor, whether superior or inferior, and any extenuating circumstances which might require the actor to proceed in haste, without proper thought.

1. All Parties Were Aware of the Substantial Risk Involved

As Jim Tichenor testified, there is nothing underground that is totally risk free. The operations on the North 40 that led to the development of this sinkhole were large scale industrial mining operations in which massive cavities were created below the surface of the earth. While the actual mining process is intricate, one does not need to possess a post-graduate degree in mining engineering to be aware of the risks associated with creating these massive caverns. However, the parties involved in this lawsuit are not uneducated individuals. OxyChem, Texas Brine, and Vulcan are successful and sophisticated businesses that attract and employ employees of the highest standard. While OxyChem and Vulcan were not the operator of record to the Oxy-Geismar brine wells, Vulcan owned and operated brine wells in Witchita, Kansas, and OxyChem is the operator of record for the brine wells in the same salt dome supplying their Taft facility. The Court is not

persuaded by the Plaintiffs, OxyChem, and Vulcan's notion that Texas Brine was the only party with the capacity to understand the level of risk created by continuously solution mining a massive brine cavern in such close proximity to the edge of a salt dome.

It is clear that OxyChem, Texas Brine, and Vulcan each acted with actual awareness of the possibility that severe environmental implications could result from their actions. In the early 1980s, Leon Toups warned Texas Brine that the dome likely sloped inward instead of outward and that drilling a third well was a risky proposition. Around the same time, Larry Sevenker warned Vulcan that the proximity to the edge of the salt dome was the major concern and additionally identified adjacent oil and gas reservoirs as a potential concern. Sevenker reported to Vulcan that a reasonable calculation of available reserves on the North 40 provided for around 13 years of operation and 25-26 years optimistically. Importantly, the Sevenker reports were not shared with Texas Brine.

After 16 years of production following Dr. Ratigan‘s warnings, Vulcan sought to double brine production rates to accommodate the requirements of their facilities expansion. When Vulcan approached Texas Brine to discuss this opportunity, Texas Brine recommended that Vulcan hire Dr. Ratigan to conduct a comprehensive analysis on the feasibility of accelerated operations on the North 40. After analysis, Dr. Ratigan issued a 1998 RE/SPEC report to Vulcan and Texas Brine highlighting the proximity concerns of the OG3 and recommending further studies of the geometry of the dome before proceeding. Vulcan and Texas Brine mutually agreed to the expanded operations without requesting or conducting further studies. After nearly completely depleting the cavern, Vulcan failed to inform Basic

Chemicals in asset purchase negotiation that the North 40 was in its 23rd year of a most optimistically projected 26 year lifespan of brine extraction, seven of which included accelerated production. To the contrary, the record reflects that Vulcan omitted Sevenker's projection and proximity concerns.

However, OxyChem was not left in the dark. OxyChem's knowledge of risks associated with the operations of the OG3 and the AH-1 extends back 1983. Actual knowledge of the close proximity of potential AH-1 operations and the existing brine caverns led Hooker (now OxyChem) to add unique provisions into the Colorado Crude Lease to protect operations being conducted on the North 40. Even though OxyChem did not purchase the Geismar facility until 2005, OxyChem owned a facility in Taft, Louisiana that received brine from brine wells located on land adjacent to the North 40. OxyChem was the operator of record for these brine wells. As a large corporate presence in the industry, OxyChem had a longstanding relationship with Dr. Ratigan, the author of the 1998 RE/SPEC report and a world class brine consultant.

Understanding the limitations of the North 40, OxyChem hired Dr. Ratigan after its Geismar acquisition to analyze available brine reserves and to evaluate locations for future caverns. After the Legend data became available in 2008, Dr. Ratigan concluded that the OG3 cavern's proximity was a larger concern than previously expected. OxyChem first discussed the implications of Dr. Ratigan's findings internally in a June 4, 2008 meeting. Dr. Ratigan testified that sinkholes were discussed at this meeting. OxyChem disclosed Dr. Ratigan's conclusions to Texas Brine approximately three weeks later on June 24, 2008. With this knowledge,

OxyChem consciously deferred the necessary capital to get out of the OG3 cavern.

While it is clear that Texas Brine imprudently operated the OG3 well for the entirety of its operational life with knowledge of proximity concerns, they did not act alone. The totality of the evidence and testimony makes it clear that OxyChem, Texas Brine, and Vulcan were each aware of the substantial risks associated with their conduct.

2. Pecuniary Interests Over Safety

A common theme of this case is that OxyChem, Texas Brine, and Vulcan each placed their economic interests over environmental and safety concerns. The snowball of events that led to the Bayou Corne sinkhole began in the early 1980s when Vulcan agreed, on economic grounds, to place one large well (OG3) on the North 40 in lieu of Larry Sevenker's recommendation for five smaller caverns. One larger well was simply more economical than five smaller wells. In 1998 with all of the OG3 data indicating current stability, Vulcan and Texas Brine passed on costly research to better define the edge of the dome. Finally, with the North 40 on its last leg and large brine well relocation costs looming, Vulcan cashed out in 2005 without voicing Texas Brine's concerns about the OG3.

Texas Brine operated the OG3 well for the entirety of its existence with fixated on the amount of money that could be solution mined out of the Napoleonville salt dome. Texas Brine asserts that OxyChem and Vulcan had the power of the purse and made all meaningful monetary decisions. Further, Texas Brine asserts that they had no interest in how many wells were drilled, because the operating agreements were structured as cost plus. The totality of the evidence does not support this assertion. The

OG3 well was the best brine producer on the North 40, and Texas Brine was in no hurry to cease the income therefrom without first establishing a replacement well or expanding its business relationship with OxyChem or Vulcan. Finally, when the OG3 was taken out of production, Texas Brine's preference was to stop wasting time and plug the nonproducing well.

Likewise, OxyChem's focus was primarily pecuniary. As the mineral lessor of both the salt dome and the hydrocarbons located on its neighboring tracts, OxyChem enabled the depletion of the AH-1 reservoir in exchange for royalties, knowing that its close proximity to the existing salt mining operations may be problematic. OxyChem's brine mining decisions were made simply on a price per ton basis. OxyChem's agent and expert consultant Dr. Ratigan warned other OxyChem consultants, PB Energy and RE/SPEC, to be "very, very, very careful" when they were dealing with OxyChem, and that OxyChem regularly resisted his recommendations for geomechanical analysis in order to save money. This culture of pecuniary interest first and delaying necessary capital expenditures rang down from the director of operations, Tom Feeney. Finally, during the plugging and abandoning process, when Dr. Ratigan could not express OxyChem's benefit to an indefinite period of monitoring, OxyChem directed that the well be plugged at the lowest cost option.

The warning signs were present for each party; however, each party was blinded by the financial implications of their actions.

3. Capacities

The capacities of the parties is a critically important factor in the fault allocation analysis of this case. Though Texas Brine was the party with its hands on the valves of the OG3 well on a daily basis,

it is clear that OxyChem and Vulcan were extremely sophisticated parties that exercised significant control in the larger scale brine mining decisions. Simply stated, all three defendants possessed the capacity and multiple opportunities to terminate solution mining of the OG3 cavern in the face of warning after warning. Through the life of the OG3, each defendant exercised their capacity over the other defendants to further their corporate interests. Inversely, after the once hypothetical risks of the operations became reality, each defendant attempted to shield themselves from liability by proclaiming their apparent lack of capacity over the situation. The fact remains that no party prudently stepped up to the plate and terminated the OG3 operations at the most critical stages of operations until it was far too late.

Unlike the Texas Brine and Vulcan, however, the Oxy entities possessed the capacity to influence the operations of both the OG3 and the AH-1. As the owner of the land, the mineral lessor for both the salt being extracted from the OG3 and the hydrocarbons being extracted from the AH-1, and the owner of the Geismar facility in which the brine was being supplied from 2005, OxyChem had the capacity to facilitate both mining operations necessary to create the Bayou Corne sinkhole. Stated plainly, OxyChem imprudently allowed the depletion driven AH-1 reservoir to operate in close proximity to brine mining operations that had known dome proximity concerns. With knowledge of the existence of both of these operations being undertaken on their land, OxyChem purchased the Geismar facility in 2005 and used its capacity to defer capital expenditures necessary to drill new brine wells. In consideration of large brine mining facilitation decisions, OxyChem failed to account for the relationship between the OG3 cavern

and the abutting and under-pressured AH-1 reservoir. While OxyChem contends that it relied on the opinions of its expert brine mining operator Texas Brine and its consultant Dr. Ratigan when making brine facilitation decisions, OxyChem's failure to collect neighboring AH-1 data prevented Texas Brine and Dr. Ratigan from considering the possible risks associated with operational proximity of the OG3 system and the depleted AH-1 reservoir. Considering the totality of the evidence, OxyChem possessed superior capacity over Texas Brine and Vulcan to prevent the Bayou Corne sinkhole.

VII. CONCLUSION

The devastation of the Bayou Corne sinkhole is apparent, and the resulting litigation up to this point has been staggering. While substantial in volume, the facts of this case are not overly complex. Considering the totality of the evidence, the Court finds that the Oxy entities, the Texas Brine entities, and Vulcan are each allocated a portion of responsibility for the damages occasioned by the Bayou Corne sinkhole under Civil Code Articles 2315 and 2317.1.

Although all internal data from the OG3 cavern indicated current stability when Vulcan sold their interests to OxyChem, Vulcan's negligence in failing to facilitate recommended studies to further define the edge of the Salt Dome before doubling production, which moved the cavern closer to the edge of the dome, coupled with Vulcan's failure to disclose the known risks associated with the OG3 in purchase negotiations with OxyChem, leads this Court to assign a portion of liability to Vulcan. Texas Brine, as the operator of the OG3 well for the duration of the well's operations, failed to prudently act as a world class brine mining company is expected to act in the face of numerous red flags. Though Texas Brine did

recommend that Vulcan and OxyChem drill additional wells, no evidence was presented that Texas Brine ever recommended terminating OG3 operations to Vulcan or OxyChem for safety or environmental purposes. Therefore, Texas Brine is allocated a significant percentage of fault for negligently operating the OG3 well/cavern system. Finally, the Oxy entities were in the best position to prevent the sinkhole. In the face of Dr. Ratigan's 2008 internal warnings to OxyChem of the critical nature of the OG3 cavern, OxyChem lost trust in their brine operator, asserted control over the situation, and focused on short term deficits over safety. Though the AH-1's proximity to the brine operations was initially recognized when unique provisions were added into the Colorado Crude Lease, the Oxy entities failed to collected data from the AH-1 and failed to account for the implications of the depleted AH-1 reservoir when the situation became critical. Therefore, the Oxy entities are assigned the majority of fault.

SIGNED in Napoleonville, Louisiana on 21st day of December, 2017.

____

THOMAS J. KLIEBERT, JR.
DIVISION "B"
JUDGE – 23RD JUDICIAL DISTRICT

APPENDIX I

COURT OF APPEAL
FIRST CIRCUIT
STATE OF LOUISIANA

No. 2018-CA-0075 c/w 2018-CA-0241 c/w 2018-CA-0796

2018-CA-0068 / 2018-CA-1098

2018-CA-0419 / 2018-CA-1122

FLORIDA GAS TRANSMISSION CO., L.L.C.,
Plaintiff

VERSUS

TEXAS BRINE COMPANY, L.L.C., ET AL.
Defendant / Appellee

FILED: _______________ _________________________
DEPUTY CLERK

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

AFFIDAVIT OF ROBBIE A. BEYL, PH.D.

BEFORE ME, the undersigned Notary Public, came and appeared

ROBBIE A. BEYL,

a person of the full age of majority, who upon being duly sworn, did depose and state as follows:

1. I am an assistant research professor of biostatistics, and I am employed at the Pennington Biomedical Research Center ("Pennington"), which is affiliated with Louisiana State University in Baton Rouge, Louisiana.
2. I graduated from Southeastern Louisiana University in 2006, majoring in mathematics. I earned a master's degree in biostatistics from Louisiana State University Health Science Center in 2008, and a doctorate in biostatistics from Louisiana State University Health Science Center in 2013.
3. In my work as a research professor at Pennington, I routinely engage in statistical analysis, including but not limited to the computation of the probability of certain events, or certain combinations of events, occurring. In the course of my statistical analysis work, I routinely consult with other postdoctoral researchers and university faculty.
4. The field of biostatistics applies statistical theory and mathematical principles to research questions involving biology, medicine, and public health. From a mathematical standpoint, the calculations used to determine the probability of a particular event occurring would be identical to address a similar issue arising in other contexts. In other words, biostatistics is an applied field: it applies the mathematical laws of statistics, which has broad application, to particularized inquiries arising in the context of biology, medicine, or public health. These mathematical principles can be applied, however, in any field of knowledge, including but not limited to, the

distribution of events or actions taken by a court of law.

5. I have co-authored 28 scholarly peer-reviewed research papers, and made 15 presentations at academic conferences. A true and correct copy of my curriculum vitae is attached as Exhibit 1 to this affidavit.
6. I was engaged by Texas Brine Company, LLC ("Texas Brine") to opine as to the likelihood of two discrete phenomena, and specifically, to determine the probability of each set of events arising due to random chance.
7. First, I have assessed the probability of Hon. J. Michael McDonald, as one of twelve judges serving on the Louisiana First Circuit Court of Appeal, being selected via random allotment to serve on thirty-one of fifty-two appellate panels, with each panel consisting of three of the twelve First Circuit judges. The underlying data, as provided to me by Texas Brine, is as follows:

Number	**Status**	**Case**	**Docket number**	**Judges**
1	pending	Florida Gas	2017-CA-0304	McDonald, Crain, Holdridge
2	pending	Florida Gas	2018-CA-0068	McDonald, Crain, Holdridge
3	pending	Florida Gas	2018-CA-0075	McDonald, Crain, Holdridge
4	pending	Florida Gas	2018-CA-0421	McDonald, Crain, Holdridge
5	pending	Florida Gas	2018-CA-0549	McDonald, Crain, Holdridge
6	pending	Florida Gas	2018-CA-0062	McDonald, Crain, Holdridge
7	pending	Florida Gas	2018-CA-0218	McDonald, Crain, Holdridge
8	pending	Florida Gas	2018-CA-0907	McDonald, Crain, Holdridge
9	pending	Florida Gas	2018-CA-0842	McDonald, Crain, Holdridge

10	pending	Florida Gas	2018-CA-0206	McDonald, Crain, Holdridge
11	pending	Florida Gas	2018-CA-1098	McDonald, Crain, Holdridge
12	pending	Crosstex	2018-CA-0117	McDonald, Crain, Holdridge
13	pending	Crosstex	2018-CA-1122	McDonald, Crain, Holdridge
14	pending	Crosstex	2018-CA-0749	McDonald, Crain, Holdridge
15	pending	Crosstex	2018-CA-0796	McDonald, Crain, Holdridge
16	pending	Crosstex	2018-CA-0863	McDonald, Crain, Holdridge
17	pending	Crosstex	2018-CA-0900	McDonald, Crain, Holdridge
18	pending	Crosstex	2018-CA-1189	McDonald, Crain, Holdridge
19	pending	Crosstex	2018-CA-1213	McDonald, Crain, Holdridge
20	pending	Crosstex	2018-CA-1231	McDonald, Crain, Holdridge
21	pending	Pontchartrain	2018-CA-0360	McClendon, Higginbotham, Crain
22	pending	Pontchartrain	2018-CA-0254	Guidry, McClendon, Higginbotham
23	pending	Pontchartrain	2018-CA-0244	McClendon, Higginbotham, Holdridge
24	pending	Pontchartrain	2018-CA-0241	McDonald, Crain, Holdridge
25	pending	Pontchartrain	2018-CA-0004	Holdridge, Higginbotham, Penzato
26	pending	Pontchartrain	2018-CA-0631	McClendon, Higginbotham, Theriot
27	pending	Pontchartrain	2018-CA-0606	Pettigrew, McClendon, Higginbotham
28	pending	Pontchartrain	2018-CA-0419	McDonald, McClendon, Higginbotham

29	pending	Pontcha rtrain	2018-CA-0435	McClendon, Higginbotham, Crain
30	pending	Marcha nd	2018-CA-0621	Guidry, Theriot, Penzato
31	pending	Marcha nd	2018-CA-1048	Guidry, Theriot, Penzato
32	pending	Marcha nd	2018-CA-1050	Guidry, Theriot, Penzato
33	pending	Marcha nd	2018-CA-1051	Guidry, Theriot, Penzato
34	pending	Marcha nd	2018-CA-1117	Guidry, Theriot, Penzato
35	non-pending	Florida Gas	2015-CA-1331	Whipple, Guidry, McClendon
36	non-pending	Florida Gas	2015-CA-1332	Whipple, Guidry, McClendon
37	non-pending	Florida Gas	2018-CA-0743	McDonald, Crain, Holdridge
38	non-pending	Florida Gas	2018-CA-0813	McDonald, Crain, Holdridge
39	non-pending	Crosste x	2015-CA-0600	McDonald, McClendon, Theriot
40	non-pending	Crosste x	2015-CA-0602	McDonald, McClendon, Theriot
41	non-pending	Crosste x	2017-CA-0863	Whipple, McDonald, Chutz
42	non-pending	Crosste x	2017-CA-0895	Whipple, McDonald, Chutz
43	non-pending	Crosste x	2017-CA-1405	McDonald, Chutz, Penzato
44	non-pending	Crosste x	2017-CA-1193	Guidry, McDonald, Chutz
45	non-pending	Crosste x	2017-CA-1192	McDonald, Crain, Chutz
46	non-pending	Pontcha rtrain	2018-CA-0001	Higginbotham, Holdridge, Penzato
47	non-pending	Pontcha rtrain	2018-CA-0391	Guidry, Theriot, Penzato
48	non-pending	Pontcha rtrain	2018-CA-0394	Guidry, Theriot, Penzato
49	non-pending	Labarre	2017-CA-0477	Theriot, Chutz, Penzato

50	non-pending	Labarre	2017-CA-1368	Higginbotham, Holdridge, Penzato
51	non-pending	Labarre	2017-CA-1370	Higginbotham, Holdridge, Penzato
52	non-pending	Marchand	2018-CA-0258	Guidry, Theriot, Penzato

8. I have also assessed the probability of Judge McDonald, as one of twelve judges serving on the Louisiana First Circuit Court of appeal, unilaterally signing sixty-one orders out of a universe of ninety-three orders issued by various First Circuit judges. Out of an abundance of caution, to the extent that certain signatures are illegible, I have not credited any such illegible signatures to Judge McDonald. The underlying data, as provided to me by Texas Brine and as set forth in its supplemental brief dated February 26, 2019, is as follows:[1]

number	Writ/Appeal No.	Date	Judge Signing
1	2015-CA-0206	March 3, 2015	Illegible
2	2015 CM 1103	July 22, 2015	Illegible
3	2017-CA-1332	December 3, 2015	Illegible
4	2017-CA-1332	December 17, 2015	Illegible
5	2015-CA-1332	January 25, 2016	Illegible
6	2016-CA-0771	July 12, 2016	Whipple
7	2016-CM-1019	July 29, 2016	McDonald
8	2016-CM-1020	July 29, 2016	McDonald
9	2016-CM-1021	July 29, 2016	McDonald
10	2016-CM-1022	July 29, 2016	McDonald
11	2016-CW-1564	February 21, 2017	McDonald

[1] The underlying orders are attached as Exhibit 2 to this Affidavit. Texas Brine's February 26, 2019 supplemental motion included a Rule to Show Cause in 2018-CA-1249, which was inadvertently included. It also inadvertently attributed one order to Judge Guidry which should have been attributed to Judge McDonald. Texas Brine referred to fifty-nine orders signed by Judge McDonald in its supplemental brief; on further review, the correct total is sixty-one of ninety-three.

12	2017-CW-0161	March 22, 2017	McDonald
13	2017-CW-1152	August 25, 2017	McDonald
14	2017-CW-1152	August 30, 2017	McDonald
15	2017-CW-1155	August 30, 2017	McDonald
16	2017-CW-1345	October 30, 2017	McDonald
17	2018-CA-0062	January 30, 2018	McDonald
18	2018-CA-0068	February 2, 2018	Guidry
19	2018-CA-0075	February 2, 2018	Guidry
20	2018-CA-0254	March 23, 2018	Guidry
21	2018-CA-0244	March 23, 2018	Guidry
22	2018-CA-0241	April 5, 2018	Guidry
23	2018-CA-0068	April 5, 2018	Guidry
24	2018-CA-0360	April 12, 2018	McDonald
25	2018-CA-0241	April 16, 2018	Guidry
26	2018-CA-0478	April 18, 2018	McDonald
27	2018-CA-0492	April 25, 2018	Guidry
28	2018-CA-0258	May 15, 2018	Illegible
29	2018-CA-0206	May 17, 2018	McDonald
30	2018-CA-0218	May 17, 2018	McDonald
31	2018-CA-0244	May 17, 2018	McDonald
32	2018-CA-0360	May 21, 2018	McDonald
33	2018-CA-0421	May 21, 2018	McDonald
34	2018-CA-0258	May 25, 2018	Guidry
35	2018-CA-0218	May 30, 2018	McDonald
36	2018-CA-0244	May 30, 2018	McDonald
37	2018-CA-0394	May 31, 2018	McDonald
38	2018-CA-0360	June 15, 2018	McDonald
39	2018-CA-0631	July 12, 2018	Illegible
40	2018-CA-0842	July 20, 2018	Illegible
41	2018-CA-0068	August 29, 2018	McDonald
42	2018-CA-0075	August 29, 2018	McDonald
43	2018-CA-0749	September 5, 2018	McDonald
44	2018-CA-1098	September 27, 2018	Illegible
45	2018-CA-1122	October 9, 2018	McDonald
46	2018-CA-1159	October 11, 2018	McDonald
47	2018-CA-1249	October 11, 2018	McDonald
48	2018-CA-1170	October 11, 2018	McDonald
49	2018-CA-1249	October 12, 2018	McDonald
50	2018-CA-1249	October 12, 2018	McDonald
51	2018-CA-1391	October 16, 2018	McDonald
52	2018-CA-1425	October 16, 2018	McDonald
53	2018-CA-1425	October 19, 2018	McDonald
54	2018-CA-1391	October 19, 2018	McDonald
55	2018-CA-1249	November 14, 2018	McDonald
56	2018-CA-1249	November 14, 2018	McDonald
57	2018-CA-1391	November 14, 2018	McDonald
58	2018-CA-1391	November 14, 2018	McDonald

59	2018-CA-1425	November 14, 2018	McDonald
60	2018-CA-1425	November 14, 2018	McDonald
61	2018-CA-1391	December 4, 2018	Guidry
62	2018-CA-1391	December 4, 2018	Guidry
63	2018-CA-1249	December 4, 2018	Guidry
64	2018-CA-1249	December 4, 2018	Guidry
65	2018-CA-1425	December 4, 2018	Guidry
66	2018-CA-1425	December 4, 2018	Guidry
67	2018-CA-1249	December 11, 2018	McDonald
68	2018-CA-1425	December 11, 2018	McDonald
69	2018-CA-1391	December 11, 2018	McDonald
70	2018-CA-1714	December 17, 2018	McDonald
71	2018-CA-1778	December 20, 2018	Guidry
72	2018-CA-1249	December 20, 2019	Guidry
73	2018-CA-1391	December 20, 2018	Guidry
74	2018-CA-1425	December 20, 2018	Guidry
75	2018-CA-1788	January 8, 2019	Holdridge
76	2018-CA-0054	January 22, 2019	McDonald
77	2018-CA-1249	January 25, 2019	McDonald
78	2018-CA-1249	January 25, 2019	McDonald
79	2018-CA-1249	January 25, 2019	McDonald
80	2018-CA-1425	January 25, 2019	McDonald
81	2018-CA-1425	January 25, 2019	McDonald
82	2018-CA-1425	January 25, 2019	McDonald
83	2018-CA-1391	January 25, 2019	McDonald
84	2018-CA-1391	January 25, 2019	McDonald
85	2018-CA-1391	January 25, 2019	McDonald
86	2018-CA-1626	January 29, 2019	McDonald
87	2018-CA-1714	February 12, 2019	Guidry
88	2018-CA-1714	February 12, 2019	Guidry
89	2018-CA-1714	February 19, 2019	McDonald
90	2018-CA-1714	February 19, 2019	McDonald
91	2018-CA-1391	February 26, 2019	McDonald
92	2018-CA-1425	February 26, 2019	McDonald
93	2018-CA-1249	February 26, 2019	McDonald

9. In order to compute the probability of Judge McDonald being selected to serve on thirty-one of fifty-two appellate panels, out of a universe of twelve judges, three of whom serve on any one panel, I made the following computation. We suppose that, given that each judge is assigned randomly to an appeal, there is a 1/4 chance that any one particular judge would be one of the three judges on the appellate panel. It is

therefore expected that Judge McDonald would be on (1/4)*52=13, panels of the 52 total appellate panels comprised to date. Thus, the statistical question is how unusual is it that Judge McDonald has been assigned to 31 panels given that he would be expected to only serve on about 13 panels. The binomial test is used to find an answer to this question. We test the probably that given that the judge assigned to the appeal is random, what is the probably of seeing results as extreme as or more extreme than the one observed. The binomial distribution BINOMIAL(N=52, p=1/4, x=31) to calculate the probability of serving on 31 or more appellate panels of 52 assuming that the true random probability of being on a particular appellate panel is 1/4. This distribution is the probability of adding up the probability of getting exactly 31 appeals, exactly 32 appeals, and so on up to 52.

10. This calculation yields a 0.0000000409%, or 4.09E-8%, likelihood that the selection of Judge McDonald to thirty-one out of fifty-two three-judge panels is attributable to random chance. This probability can also be expressed as an odds, 24,449,878 to 1. Another way to consider this probability is that it is more likely to pick 6 out of 6 lottery numbers (picking numbers between 1 and53).than it is assume that Judge McDonald was randomly selected to an appellate panel.
11. Put another way, the estimated probability of Judge McDonald being selected to thirty-one out of fifty-two three-judge panels via a random allotment process is 25%. However, that data show that the probability of Judge McDonald

serving on an appellate panel, based on the empirical data, is 59.6%.

12. In order to compute the probability of Judge McDonald unilaterally issuing sixty-one orders out of ninety-three orders, out of a universe of twelve judges, I made the following computation. We suppose that, given that the judge that issues the order is random, there is a 1/12 chance that any one particular judge would sign a given order. It is expected that Judge McDonald would sign (1/12)*93=7.75, or about 8, orders of the 93 total orders. Thus, the statistical question is how unusual is it that Judge McDonald signed 61 orders, given that he would be expected to only sign about 8. The binomial test is used to find an answer to this question. We test the probably that given that the orders are issued randomly, what is the probably of seeing results as extreme as or more extreme than the one observed. The binomial distribution BINOMIAL(N=93, p=1/12, x=61) is used to calculate the probability of 61 or more signed orders of 93, assuming that the true random probability of issuing an order is 1/12. This is the probability of adding up the probability of getting exactly 61 orders, exactly 62 orders, and so on up to 93.
13. This calculation yields a 1.30E-16% likelihood that Judge McDonald's issuance of sixty-one unilateral orders out of ninety-three issued by the twelve judges of the First Circuit Court of Appeal is attributable to random chance. Expressed as an odds, this probability would be 7.69 quadrillion to 1. Another way to consider this probability is more likely to roll "snake eyes" (two ones) on a pair of fair six-sided dice 50 out of

100 times than it is to assume that Judge McDonald was randomly selected to issue these orders.

14. Put another way, the estimated probability of Judge McDonald issuing any particular order, given a random distribution, is 8.3%. However, that data show that the probability of an order being signed by Judge McDonald is 65.6%.
15. In my expert opinion, based on the calculations and conclusions set forth in Paragraphs 9-11 above, the likelihood that Judge McDonald could have been selected to serve on thirty-one of fifty-two three-judge appellate panels cannot, by any measure of statistical analysis, be deemed to arise due to random chance.
16. In my expert opinion, based on the calculations and conclusions set forth in Paragraphs 12-14 above, the likelihood that Judge McDonald could have unilaterally issued sixty-one of ninety-three orders, cannot, by any measure of statistical analysis, be deemed to arise due to random chance.
17. I have not been asked to opine as to any other issues raised by Texas Brine's recusal motion, and I do not purport to offer any expert opinions as to any other issues before this Court.
18. I attest that the foregoing is true and correct and within my personal knowledge.

[handwritten signature]

ROBBIE A. BEYL, PH.D.

SWORN AND SUBSCRIBED
BEFORE ME the undersigned
Notary Public, this 26th day
of March, 2019.

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NOTARY PUBLIC

APPENDIX J

COURT OF APPEAL
FIRST CIRCUIT
STATE OF LOUISIANA

No. 2018-CA-0075 c/w 2018-CA-0241 c/w 2018-CA-0796
2018-CA-0068 / 2018-CA-1098 / 2018-CA-0419
2018-CA-1122 / 2018-CA-0907 / 2018-CA-0842
2018-CA-0549 / 2018-CA-0421 / 2018-CA-0206
2018-CA-0117 / 2018-CA-0900 / 2018-CA-1213
2018-CA-1323 / 2018-CA-0478 / 2018-CW-0364

FLORIDA GAS TRANSMISSION CO., L.L.C.,
Plaintiff

VERSUS

TEXAS BRINE COMPANY, L.L.C., ET AL.
Defendant/Appellee

PONTCHARTRAIN NATURAL GAS SYSTEM, K/D/S PROMIX, L.L.C., AND ACADIAN GAS PIPELINE SYSTEM, *Plaintiffs*

VERSUS

TEXAS BRINE COMPANY, L.L.C., ET AL.
Defendant/Appellee

CROSSTEX ENERGY SERVICES, L.P.,
Plaintiff
VERSUS

TEXAS BRINE COMPANY, L.L.C., ET AL.
Defendant/Appellee

FILED: ______________ ______________________
DEPUTY CLERK

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

SUPPLEMENTAL AFFIDAVIT OF ROBBIE A. BEYL, PH.D.

BEFORE ME, the undersigned Notary Public, came and appeared

ROBBIE A. BEYL,

a person of the full age of majority, who upon being duly sworn, did depose and state as follows:

1. I am an assistant research professor of biostatistics, and I am employed at the Pennington Biomedical Research Center ("Pennington"), which is affiliated with Louisiana State University in Baton Rouge, Louisiana.
2. I graduated from Southeastern Louisiana University in 2006, majoring in mathematics. I earned a master's degree in biostatistics from

Louisiana State University Health Science Center in 2008, and a doctorate in biostatistics from Louisiana State University Health Science Center in 2013.

3. In my work as a research professor at Pennington, I routinely engage in statistical analysis, including but not limited to the computation of the probability of certain events, or certain combinations of events, occurring. In the course of my statistical analysis work, I routinely consult with other post-doctoral researchers and university faculty.
4. The field of biostatistics applies statistical theory and mathematical principles to research questions involving biology, medicine, and public health. From a mathematical standpoint, the calculations used to determine the probability of a particular event occurring would be identical to address a similar issue arising in other contexts. In other words, biostatistics is an applied field: it applies the mathematical laws of statistics, which has broad application, to particularized inquiries arising in the context of biology, medicine, or public health. These mathematical principles can be applied, however, in any field of knowledge, including but not limited to, the distribution of events or actions taken by a court of law. Calculation for probability and odds were computed using SAS v9.4 (SAS Institute Inc., Cary, NC, USA) and Wolfram|Alpha 2018 (Wolfram Research, Inc.).
5. I have co-authored 28 scholarly peer-reviewed research papers, and made 15 presentations at

academic conferences. A true and correct copy of my curriculum vitae is attached as Appendix 1 to this affidavit.

6. I was engaged by Texas Brine Company, LLC ("Texas Brine") to opine as to the likelihood of two discrete phenomena, and specifically, to determine the probability of each set of events arising due to random chance. These opinions are set forth in my original affidavit of March 11, 2019. I have also reviewed the affidavit submitted by Occidental Chemical Corporation on March 11, 2019, and I have supplemented my affidavit to address the data presented in that affidavit.
7. First, I have assessed the probability of Judge McDonald, as one of twelve judges serving on the Louisiana First Circuit Court of appeal, unilaterally signing sixty-six orders out of a universe of one hundred and six orders issued by various First Circuit judges, using the statistics presented in the affidavit submitted by Occidental Chemical Corporation on March 11, 2019. These totals differ slightly from the totals which I used in my original March 11, 2019 affidavit: I used sixty-one orders out of ninety-three. Thus, Occidental has identified thirteen additional orders signed by a judge - five of which were signed by Judge McDonald. Out of an abundance of caution, to the extent that certain signatures are illegible, I have not credited any such illegible signatures to Judge McDonald.
8. Further, Occidental contends that fifty-nine orders were signed by the Clerk of Court or the Deputy Clerk of Court. While my focus was

originally limited to the universe of judge-signed orders, I have separately evaluated the probabilities of Judge McDonald signing sixty-six out of one hundred sixty-five orders given fourteen potential signers (the Clerk and the Deputy Clerk). Given that the Clerk and the Deputy Clerk have signed more orders than any judge other than Judge McDonald, I have also separately evaluated this likelihood whereby the odds of the Clerk and Deputy Clerk are weighted three times as compared to an individual judge.

9. Finally, I have also assessed the probability that forty-four of the fifty-two appellate panels that were convened as of March 11, 2019 contained exactly one judge from the First Election District, one from the Second Election District, and one from the Third Election District, would have occurred as a matter of random chance.
10. With respect to the orders signed by judges, I have refined my analysis using the data provided in Occidental's March 11, 2019 affidavit. This chart is attached as Appendix 2 to this affidavit.
11. In order to compute the probability of Judge McDonald unilaterally issuing sixty-six orders out of one hundred and six orders, out of a universe of twelve judges, I made the following computation. We suppose that, given that the judge who issues the order is random, there is a 1/12 chance that any one particular judge would sign a given order.
12. Using this framework, it is expected that Judge McDonald would sign (1/12)*106=8.83, or about

9, orders of the 106 total orders. Thus, the statistical question is how unusual is it that Judge McDonald signed 66 orders, given that he would be expected to only sign about 9. The binomial test is used to find an answer to this question. We tested the probably that given that the orders are issued randomly, what is the probably of seeing results as extreme as or more extreme than the one observed. The binomial distribution BINOMIAL(N=106, p=1/12, x=66) is used to calculate the probability of 66 or more signed orders of 106, assuming that the true random probability of issuing an order is 1/12. This is the probability of adding up the probability of getting exactly 66 orders, exactly 67 orders, and so on up to 165.

13. This calculation yields a 3.89E-42% likelihood that Judge McDonald's issuance of 66 unilateral orders out of 106 issued by the twelve judges of the First Circuit Court of Appeal is attributable to random chance. Expressed as an odds, this probability would be 25.7 tredecillion to 1 (i.e., a one with 42 zeros). Another way to consider this probability is that it is more likely to roll "snake eyes" (two ones - an event that has a one in thirty-six chance of occurring on any given roll) on a pair of fair six-sided dice 28 times in a row than it is to assume that Judge McDonald was randomly selected to issue these orders.
14. Put another way, the estimated probability of Judge McDonald issuing any particular order, given a random distribution, is 8.33%. However, that data show that the probability of

an order being signed by Judge McDonald is 62.3%.

15. In order to compute the probability of Judge McDonald unilaterally issuing sixty-six orders out of one hundred and six orders, out of a universe of twelve judges plus one Clerk of Court and one Deputy Clerk of Court, I made the following computation. We suppose that, given that the judge, Clerk of Court, or Deputy Clerk that issues the order is random, there is a 1/14 chance that any one particular judge, Clerk, or Deputy Clerk would sign a given order. This framework assumes that the probability of the Clerk and the Deputy Clerk signing any particular order is equivalent to the probability of each of the twelve judges signing the order, although empirically, both the Clerk and Deputy Clerk have signed more orders than any judge other than Judge McDonald.
16. Using this framework, it is expected that Judge McDonald would sign (1/14)*165=11.8, or about 12, orders of the 165 total orders. Thus, the statistical question is how unusual is it that Judge McDonald signed 66 orders, given that he would be expected to only sign about 12. The binomial test is used to find an answer to this question. We test the probably that given that the orders are issued randomly, what is the probably of seeing results as extreme as or more extreme than the one observed. The binomial distribution BINOMIAL(N=165, p=1/14, x=66) is used to calculate the probability of 66 or more signed orders of 165, assuming that the true random probability of

issuing an order is 1/14. This is the probability of adding up the probability of getting exactly 66 orders, exactly 67 orders, and so on up to 165.

17. This calculation yields a 1.25E-30% likelihood that Judge McDonald's issuance of 66 unilateral orders out of 165 issued by the twelve judges of the First Circuit Court of Appeal, the Clerk of Court, or the Deputy Clerk of Court is attributable to random chance. Expressed as an odds, this probability would be 80.0 nonillion to 1 (a nonillion is a one with 30 zeros). Another way to consider this probability is more likely to roll "snake eyes" (two ones - an event that has a one in thirty-six chance of occurring on any given roll) on a pair of fair six-sided dice 20 times in a row than it is to assume that Judge McDonald was randomly selected to issue these orders.
18. Put another way, the estimated probability of Judge McDonald issuing any particular order, given a random distribution, is 7.1%. However, that data show that the probability of an order being signed by Judge McDonald is 40.0%.
19. Because the Clerk of Court and Deputy Clerk of Court each signed more orders than each of the eleven judges other than Judge McDonald, I believe that the framework described in Paragraphs 15-18 is overly conservative. Instead, a more methodologically sound approach is to weight the likelihood of the Clerk or Deputy Clerk issuing an order as being likelier than any particular judge. For purposes of this analysis, I have weighted this probability as three times more likely. Putting

aside the illegible orders, the number of orders signed by both the Clerk of Court and Deputy Clerk of Court is more than three times greater than the amount of unilateral orders executed by ten of the twelve judges of the First Circuit.

20. Under this weighted approach, in order to compute the probability of Judge McDonald unilaterally issuing sixty-six orders out of one hundred and six orders, out of a universe of twelve judges plus one Clerk of Court and one Deputy Clerk of Court, I made the following computation. We suppose that, given that the judge, Clerk of Court, or Deputy Clerk that issues the order is random, there is a 1/18 chance that any one particular judge would sign a given order, and a 5/18 chance for both the Clerk of Court and the Deputy Clerk of Court.
21. Using this framework, it is expected that Judge McDonald would sign (1/18)*165=9.16 orders of the 165 total orders. Thus, the statistical question is how unusual is it that Judge McDonald signed 66 orders, given that he would be expected to only sign about 9. The binomial test is used to find an answer to this question. We tested the probably that given that the orders are issued randomly, what is the probably of seeing results as extreme as or more extreme than the one observed. The binomial distribution BINOMIAL(N=165, p=1/18, x=66) is used to calculate the probability of 66 or more signed orders of 165, assuming that the true random probability of issuing an order is 1/18. This is the probability of adding up the probability of getting exactly

66 orders, exactly 67 orders, and so on up to 165.

22. This calculation yields a 3.16E-37% likelihood that Judge McDonald's issuance of 66 unilateral orders out of 165 issued by the twelve judges of the First Circuit Court of Appeal, the Clerk of Court, or the Deputy Clerk of Court is attributable to random chance, based on a weighted approach whereby the likelihood of the Clerk of Court or the District Clerk of Court would issue a particular judgment is three times greater than an individual judge. Expressed as an odds, this probability would be 316 undecillion to 1 (an undecillion is a 1 with 36 zeros). Another way to consider this probability is that it is more likely to roll "snake eyes" (two ones - an event that has a one in thirty-six chance of occurring on any given roll) on a pair of fair six-sided dice 24 times in a row than it is to assume that Judge McDonald was randomly selected to issue these orders.
23. Put another way, the estimated probability of Judge McDonald issuing any particular order under this weighted approach, given a random distribution, is 5.55%. However, that data show that the probability of an order being signed by Judge McDonald is 40.0%.
24. I also have examined the distribution of appellate panels, and specifically, the frequency with which appellate panels consist of exactly one judge from Election District 1, one judge from Election District 2, and one judge from Election District 3. I previously evaluated the composition of fifty-two appellate

panels, thirty-one of which feature Judge McDonald. I have reviewed the composition of those fifty-two appellate panels, as they existed as of the time of my March 11, 2019 affidavit, and cross-referenced them against the breakdown by electoral district, as reflected on the First Circuit's website.[1] Based on my review, 44 of the 52 appellate panels feature this type of geographic balancing, as reflected below. The eight panels that serve as exceptions to this pattern are indicated by shading:

Number	Status	Case	Docket number	Judges
1	pending	Florida Gas	2017-CA-0304	McDonald, Crain, Holdridge
2	pending	Florida Gas	2018-CA-0068	McDonald, Crain, Holdridge
3	pending	Florida Gas	2018-CA-0075	McDonald, Crain, Holdridge
4	pending	Florida Gas	2018-CA-0421	McDonald, Crain, Holdridge
5	pending	Florida Gas	2018-CA-0549	McDonald, Crain, Holdridge
6	pending	Florida Gas	2018-CA-0062	McDonald, Crain, Holdridge
7	pending	Florida Gas	2018-CA-0218	McDonald, Crain, Holdridge
8	pending	Florida Gas	2018-CA-0907	McDonald, Crain, Holdridge
9	pending	Florida Gas	2018-CA-0842	McDonald, Crain, Holdridge
10	pending	Florida Gas	2018-CA-0206	McDonald, Crain, Holdridge
11	pending	Florida Gas	2018-CA-1098	McDonald, Crain, Holdridge
12	pending	Crosstex	2018-CA-0117	McDonald, Crain, Holdridge
13	pending	Crosstex	2018-CA-1122	McDonald, Crain, Holdridge

[1] A copy of the list of the judges of the First Circuit, along with their respective electoral districts, is posted on the First Circuit's website, at https://www/la-fcca.org/index.php/judges.html (last viewed March 23, 2019). A printout of this list is attached as Appendix 3 to this Supplemental Affidavit.

14	pending	Crosstex	2018-CA-0749	McDonald, Crain, Holdridge
15	pending	Crosstex	2018-CA-0796	McDonald, Crain, Holdridge
16	pending	Crosstex	2018-CA-0863	McDonald, Crain, Holdridge
17	pending	Crosstex	2018-CA-0900	McDonald, Crain, Holdridge
18	pending	Crosstex	2018-CA-1189	McDonald, Crain, Holdridge
19	pending	Crosstex	2018-CA-1213	McDonald, Crain, Holdridge
20	pending	Crosstex	2018-CA-1231	McDonald, Crain, Holdridge
21	pending	Pontchartrain	2018-CA-0360	McClendon, Higginbotham, Crain
22	pending	Pontchartrain	2018-CA-0254	Guidry, McClendon, Higginbotham
23	pending	Pontchartrain	2018-CA-0244	McClendon, Higginbotham, Holdridge
24	pending	Pontchartrain	2018-CA-0241	McDonald, Crain, Holdridge
25	pending	Pontchartrain	2018-CA-0004	Holdridge, Higginbotham, Penzato
26	pending	Pontchartrain	2018-CA-0631	McClendon, Higginbotham, Theriot
27	pending	Pontchartrain	2018-CA-0606	Pettigrew, McClendon, Higginbotham
28	pending	Pontchartrain	2018-CA-0419	McDonald, McClendon, Higginbotham
29	pending	Pontchartrain	2018-CA-0435	McClendon, Higginbotham, Crain
30	pending	Marchand	2018-CA-0621	Guidry, Theriot, Penzato
31	pending	Marchand	2018-CA-1048	Guidry, Theriot, Penzato
32	pending	Marchand	2018-CA-1050	Guidry, Theriot, Penzato
33	pending	Marchand	2018-CA-1051	Guidry, Theriot, Penzato
34	pending	Marchand	2018-CA-1117	Guidry, Theriot, Penzato
35	non-pending	Florida Gas	2015-CA-1331	Whipple, Guidry, McClendon
36	non-pending	Florida Gas	2015-CA-1332	Whipple, Guidry, McClendon
37	non-pending	Florida Gas	2018-CA-0743	McDonald, Crain, Holdridge
38	non-pending	Florida Gas	2018-CA-0813	McDonald, Crain, Holdridge
39	non-pending	Crosstex	2015-CA-0600	McDonald, McClendon, Theriot
40	non-pending	Crosstex	2015-CA-0602	McDonald, McClendon, Theriot
41	non-pending	Crosstex	2017-CA-0863	Whipple, McDonald, Chutz
42	non-pending	Crosstex	2017-CA-0895	Whipple, McDonald, Chutz

43	non-pending	Crosstex	2017-CA-1405	McDonald, Chutz, Penzato
44	non-pending	Crosstex	2017-CA-1193	Guidry, McDonald, Chutz
45	non-pending	Crosstex	2017-CA-1192	McDonald, Crain, Chutz
46	non-pending	Pontchartrain	2018-CA-0001	Higginbotham, Holdridge, Penzato
47	non-pending	Pontchartrain	2018-CA-0391	Guidry, Theriot, Penzato
48	non-pending	Pontchartrain	2018-CA-0394	Guidry, Theriot, Penzato
49	non-pending	Labarre	2017-CA-0477	Theriot, Chutz, Penzato
50	non-pending	Labarre	2017-CA-1368	Higginbotham, Holdridge, Penzato
51	non-pending	Labarre	2017-CA-1370	Higginbotham, Holdridge, Penzato
52	non-pending	Marchand	2018-CA-0258	Guidry, Theriot, Penzato

25. A two-step process is necessary to determine whether this phenomenon is attributable to random chance. The first step is to determine that, for all possible combinations of three judges, on a twelve-panel, exactly one judge will be from each of the three election districts. The next step is to determine the likelihood of that probability arising forty-four out of fifty-two times.
26. To compute the probability of the three judges on a panel corning from three different election districts, first the total number of the number of combinations of 3-judge panels is computed. This can be expressed as how many possible ways as group of 3 judges are paired up. The mathematical tool used for these calculations is the combination function. The expression 12choose3 indicates that 3 out of 12 possible choices are selected, resulting in 220 unique combinations. The number of judges from each district is randomly chosen from the pool of 4

potential judges. This is expressed mathematically as 4choose1, or 4.

27. There are 220 potential combinations of three-judge panels that could be selected, simply by picking three judges out of twelve at random. Using this geographic balancing reduces the number of potential combinations by approximately 70.9%, to just 64 potential combinations.
28. In order to compute the probability forty-four of fifty-two appellate panels featuring exactly one judge from each of the three election districts, I made the following computation. We suppose that, given that there is approximately a 29.1% probability of this distribution (derived by taking the 64 combinations featuring exactly one judge from each panel as a percentage of the 220 total combinations) occurring on a single appellate panel, it is therefore expected that this phenomenon would occur on (.291)*52=15.6 of the 52 appellate panels initially comprised as of the time of my initial affidavit. We tested the probability of seeing results as extreme as or more extreme than the one observed. The binomial distribution BINOMIAL(N=52, p=.291, x=44) to calculate the probability of 44 or more appellate panels of 52 featuring exactly one judge from each of the three election districts, assuming that the true random probability of this distribution occurring is 0.291. This distribution is the probability of adding up the probability of getting exactly 44 appeals, exactly 45 appeals, and so on up to 52.

29. This calculation yields a 1.34E-14% likelihood that forty-four of fifty-two appellate panels feature exactly one judge from each of the three appellate districts in the First Circuit is attributable to random chance. This probability can also be expressed as an odds, 7.46 quadrillion to 1. Another way to consider this probability is that it is more likely to roll "snake eyes" (two ones - an event that has a one in thirty-six chance of occurring on any given roll) on a pair of fair six-sided dice 9 times in a row than it is to assume that this type of geographic balancing is attributable to random chance.
30. Put another way, the estimated probability of forty-four out of fifty-two three-judge panels featuring exactly one judge from each of three election districts being selected via a random allotment process is 29.1%. However, that data show that the probability that a three-judge panel will feature exactly one judge from all three election districts, based on the empirical data, is 84.6%.
31. In my expert opinion, based on the calculations and conclusions set forth in Paragraphs 11-14 above, the likelihood that Judge McDonald could have unilaterally issued 66 of 106 orders issued unilaterally by judges of the First Circuit, cannot, by any measure of statistical analysis, be deemed to arise due to random chance.
32. In my expert opinion, based on the calculations and conclusions set forth in Paragraphs 15-23 above, the likelihood that Judge McDonald could have unilaterally issued 66 of 165 orders issued by the judges of the First Circuit along

with the Clerk of Court and Deputy Clerk of Court, cannot, by any measure of statistical analysis, be deemed to arise due to random chance. This conclusion holds regardless of whether the likelihood of the Clerk of Court and Deputy Clerk of Court signing a particular order is treated as being equally as likely as a particular judge signing a particular order, or whether that probability is weighted as being more likely.

33. My analysis and opinions regarding Judge McDonald's presence on thirty-one of fifty-two appellate panels is unchanged from my March 11, 2019 affidavit, and I incorporate that analysis and those opinions into this affidavit.
34. I have not been asked to opine as to, any other issues raised by Texas Brine's recusal motion, and I do not purport to offer any expert opinions as to any other issues before this Court.
35. I attest that the foregoing is true and correct and within my personal knowledge.

____
ROBBIE A. BEYL,
PH.D.

SWORN AND SUBSCRIBED
BEFORE ME the undersigned
Notary Public, this 26th day
of March, 2019.

____
NOTARY PUBLIC

APPENDIX K

STATE OF LOUISIANA, SUPREME COURT

DOCKET NO. 2019-OC-1503 c/w 2019-OC-1508

TEXAS BRINE COMPANY, LLC and UNITED BRINE SERVICES COMPANY, LLC
VERSUS
RODD NAQUIN, IN HIS CAPACITY AS CLERK OF COURT FOR THE FIRST CIRCUIT COURT OF APPEAL FOR THE STATE OF LOUISIANA

GARY N. SOLOMON, ET AL.
VERSUS
RODD NAQUIN, IN HIS CAPACITY AS CLERK OF COURT FOR THE FIRST CIRCUIT COURT OF APPEAL FOR THE STATE OF LOUISIANA

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

THIRD SUPPLEMENTAL AFFIDAVIT OF ROBBIE A. BEYL, PH.D.

BEFORE ME, the undersigned Notary Public, came and appeared

ROBBIE A. BEYL, PH.D.

a person of the full age of majority, who upon being duly sworn, did depose and state as follows:

1. I am an assistant research professor of biostatistics, and I am employed at the Pennington Biomedical Research Center

("Pennington"), which is affiliated with Louisiana State University in Baton Rouge, Louisiana.

2. I graduated from Southeastern Louisiana University in 2006, majoring in mathematics. I earned a master's degree in biostatistics from Louisiana State University Health Science Center in 2008, and a doctorate in biostatistics from Louisiana State University Health Science Center in 2013.
3. In my work as a research professor at Pennington, I routinely engage in statistical analysis, including but not limited to the computation of the probability of certain events, or certain combinations of events, occurring. In the course of my statistical analysis work, I routinely consult with other post-doctoral researchers and university faculty. I have co-authored 28 scholarly peer-reviewed research papers, and made 15 presentations at academic conferences. A true and correct copy of my *curriculum vitae* is in the record of this proceeding, as Exhibit 3(1) to Texas Brine's August 9, 2019 Petition for Mandamus.
4. I was engaged by Texas Brine Company, LLC and United Brine Services Company, LLC to opine as to the likelihood of various distributions of appellate panels, and whether the First Circuit Court of Appeal's practices result in a random distribution of appeals.
5. I have learned that the First Circuit admitted on October 29, 2019 that "by longstanding practice ... each regular panel of the First Circuit is comprised of one member randomly chosen through mechanical means from the four

members of each of the Court's three election districts." [1] I previously examined this practice in my March 26, 2019 Supplemental Affidavit. As noted in Paragraphs 26-27 of that affidavit, there are 220 unique combinations of three judges out of a universe of twelve judges.[2] By requiring exactly one judge from each district, that geographic balancing reduced the number of potential combinations by approximately 70.9% to just 64 potential combinations.

6. For purposes of my analysis, I focused upon forty-seven appeals where the panel was selected and disclosed subsequent to August l, 2018.[3] I also separately considered five appeals where the panel was selected prior to August 1, 2018, but where the ruling was issued after that date. The full set of appeals is set forth in Appendix 1 to this Affidavit.

7. I first focused on the period between August 1, 2018 (the effective dates of article 2164.1 of the Code of Civil Procedure and Revised Statutes §13:319) and March 13, 2019 (the date on which four judges (Judges Holdridge, Chutz, Whipple, and McClendon) recused themselves from further proceedings in the Bayou Come sinkhole litigation. There were 33 appeals where the docket was identified to the parties

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[1] *See* First Circuit's *Per Curiam,* October 29, 2019.

[2] As with my prior affidavits, all calculations for probability and odds were computed using SAS v9.4 (SAS Institute Inc., Cary, NC, USA) and Wolfram\Alpha 2018 (Wolfram Research, Inc.).

[3] I have been advised that two statutes requiring the random assignment of appellate panels, article 2164.1 of the Code of Civil Procedure and Revised Statutes § I 3:319, became effective on August 1, 2018.

in this eight-month window. In 20 of those 33 appeals, the panel consisted of exactly one judge from District 1, one Judge from District 2, and one judge from District 3 - a breakdown which has approximately 29.1% as noted above and in Paragraph 28 of my March 26, 2019 affidavit. Certain other parties have suggested, without providing written confirmation, that Judge Whipple and/or Judge Chutz previously self-recused prior to August l, 2019. If that is the case, then the probability of drawing exactly one judge from District 1, one from District 2, and one from District 3 would be 25% (only 30 out of 120 possible combinations) out of a universe of ten possible judges rather than twelve.

8. In order to compute the probability of twenty of thirty-three appellate panels featuring exactly one judge from each of the three election districts, I made the following computation. We suppose that, given that there is approximately a 29.1% probability of this distribution (derived by taking the 64 combinations featuring exactly one judge from each panel as a percentage of the 220 total combinations) occurring on a single appellate panel, it is therefore expected that this phenomenon would occur on (.291)*33= 9.6 of the 33 appellate panels identified during this timeframe. We tested the probability of seeing results as extreme as or more extreme than the one observed. The binomial distribution BINOMIAL(N=33, p=.291, x=20) to calculate the probability of 20 or more appellate panels of 33 featuring exactly one judge from each of

the three election districts, assuming that the true random probability of this distribution occurring is 0.291. This distribution is the probability of adding up the probability of getting exactly 20 appeals, exactly 21 appeals, and so on up to 33.

9. This calculation yields a 0.00338% likelihood that 20 of33 appellate panels feature exactly one judge from each of the three geographic districts in the First Circuit is attributable to random chance. This probability can also be expressed as an odds, 29,588 to l. I also prepared an alternative calculation, using a pool of ten judges based on the methodology in Paragraph 8, to address the scenario where both Judge Whipple and Judge Chutz had previously recused themselves. That approach yields a 0.000116% likelihood that this distribution is the result of random chance, or odds of 862,069 to 1.

10. In addition, there are five additional appeals, as reflected in Appendix 1, where the panel was identified prior to August 1, 2018, but where the opinion was issued after that date. All five of those appeals featured exactly one judge from each of the three election districts. To the extent that these additional appeals should also be considered, I re-ran the above calculations using 25 appeals featuring this 29.1% likelihood out of a universe of 38 appeals. Using the above-described methodology set forth in Paragraphs 8-9, this yields a 0.0000319% likelihood that 25 of 38 appellate panels feature exactly one judge from each of the three geographic districts in

the First Circuit is attributable to random chance. This probability can also be expressed as an odds, approximately 3.13 million to 1. These odds are more remote than the probability of rolling "snake eyes" (two ones - an event that has a one in thirty-six chance on any given roll of two dice) six times in a row. Using the same methodology, but with a universe of ten judges rather than twelve, this yields a 312 millionth% likelihood that 25 of 38 appeals would feature panels with exactly one judge from each of the appellate districts, or odds of 320 million to 1.

11. I understand that on March 13, 2019, two First Circuit judges (Holdridge and Whipple) and two Third Circuit judges (Chutz and McClendon) submitted notices of recusal, such that they would not participate in any sinkhole-related appeals going forward. Since that date, the First Circuit identified fourteen appellate panels - eleven consisting of exactly one judge from District 1, one judge from District 2, and one judge from District 3.
12. With eight remaining judges from the three districts, there are now 56 possible three-judge combinations, and there are 24 possible combinations consisting of exactly one judge from each of the three districts. Thus, even after accounting for the recusals, geographic balancing reduced the number of potential combinations by approximately 57.l %, leaving a 42.9% likelihood that any given panel would feature exactly one judge from each district.
13. In order to compute the probability of 11 of 14 appellate panels featuring exactly one judge

from each of the three election districts, I made the following computation. We suppose that, given that there is approximately a 42.9% probability of this distribution (as noted in Paragraph 12) occurring on a single appellate panel, it is therefore expected that this phenomenon would occur on (.429)*14= 5.9 of the 14 appellate panels identified during this timeframe. We tested the probability of seeing results as extreme as or more extreme than the one observed. The binomial distribution BINOMIAL(N=14, p=.429, x=11) to calculate the probability of 11 or more post-recusal appellate panels of 14 featuring exactly one judge from each of the three election districts, assuming that the true random probability of this distribution occurring is 0.421. This distribution is the collective probability of getting exactly 11 appeals, exactly 12 appeals, and so on up to 14.

14. This calculation yields a 0.35% likelihood that 11 of 14 appellate panels feature exactly one judge from each of the three appellate districts in the First Circuit is attributable to random chance. This probability can also be expressed as an odds, 285 to 1.
15. Instead of two separate probabilities, the two previous examples of three judge appeals with one from each district, 25 of 38 with 12 judges before March 13, 2019 and the 11 of 14 with 8 judges after March 13, 2019, can be combined to get the probability of the entire example. In order to compute the probability of 36 of 52 appellate panels featuring exactly one judge from each of the three election districts, I made

the following computation. We suppose that the joint probability is a weighted average of the two different examples, giving an overall approximately 32.8% probability of exactly one judge from each panel occurring on a single appellate panel. Thus, this occurrence should happen in (.328)*52=17.1 of the 56 appellate panels identified during this timeframe. Using the same type of binomial test as described above, we will be calculating the collective probability of getting this distribution of exactly one judge per election district for exactly 36 appeals, exactly 37 appeals, and so on up to 52.

16. This calculation yields a 1.10 millionth% likelihood that 36 of 52 appellate panels feature exactly one judge from each of the three appellate districts in the First Circuit is attributable to random chance. This probability can also be expressed as an odds, 910,000 to 1. Using the above-described methodology as applied to an initial pool of ten judges instead of twelve (to account for the possibility that Judges Whipple and Chutz had previously self-recused), this yields a 4.09 millionth% likelihood of this 36-of-52 distribution arising due to random chance, or as odds of 23 million to 1.
17. Going forward, with eight judges - including two apiece from District 1 and District 3 and four judges available from District 2 - if the First Circuit continues to geographically balance its panels, the likelihood of drawing a particular judge on a future panel is not equal for all judges. Instead, it is statistically more

likely, given the First Circuit's practice of geographically balancing panels to require one judge from each election district, that the remaining judges from District 1 and District 3 would be more likely to be on a panel than those on District 2. Going forward, if a now-recused judge is selected for a panel, and that spot is randomly re-allotted among the other non-recused judges who are not already on the panel, that would yield a situation where the remaining judges from District 1 and District 3 are more likely to be on a panel than the judges from District 2. Under this approach, a particular judge from District 1 would be on 30 of the 56 panels consisting of exactly one judge from each district, as would a particular judge from District 3. Conversely, a particular judge from District 2 would only be on 14 of these 56 panels. If appeals were randomly assigned, all judges should be equally likely going forward (3/8 or 37.5%) to serve on a given appellate panel in the sinkhole litigation

18. I am aware that the First Circuit has represented that it changed its case-assignment practices in light of the enactment of Article 2164.1 of the Code of Civil Procedure and Revised Statutes §13:319. Specifically, the First Circuit indicated in its October 4, 2019 *per curiam* that "Following this legislative amendment, the First Circuit reviewed and amended its Internal Rules effective July 10, 2019, as specifically codified into the Courts Internal Rules on August 9, 2019, to clarify that each appeal is randomly allotted, regardless of prior appeals in the First Circuit

arising from the same district court proceeding bearing that district court case number."

19. I have reviewed the assignment and allotment of appeals, both before and after the date on which the First Circuit purported to change its practices to reflect that each appeal is randomly allotted. Consider the following appeals from the *Pontchartrain* litigation, where three identical appellate panels were identified on June 28, 2019 *(i.e.* *before* the date on which the First Circuit purported to correct its practices) and three more identical panels were identified on August 27, 2019 - nearly three weeks after the date on which the First Circuit recodified its rules, and approximately seven weeks after the effective date of the stated amendment to the First Circuit's rules:

Case	***Docket No.***	***Date Panel Ruled***	***1st District Judge(s)***	***2nd District Judge(s)***	***3rd District Judge(s)***
Pontchartrain	2018-CA-0492	6/28/2019	Lanier	Higginbotham	Penzato
Pontchartrain	2018-CA-0493	6/28/2019	Lanier	Higginbotham	Penzato
Pontchartrain	2018-CA-0500	6/28/2019	Lanier	Higginbotham	Penzato
Pontchartrain	2018-CA-0999	8/27/2019	Lanier	Higginbotham	Penzato
Pontchartrain	2018-CA-1159	8/27/2019	Lanier	Higginbotham	Penzato
Pontchartrain	2018-CA-1170	8/27/2019	Lanier	Higginbotham	Penzato

20. As reflected in the above chart, the composition of the three appellate panels identified in Pontchartrain on August 27, 2019 are identical to the composition of the Pontchartrain appellate

panels identified on June 27, 2019 - notwithstanding the intervening amendment of the First Circuit's case assignment practices. The likelihood of this being attributable to random chance is 1 in 175,616 As noted above, post-recusal, there are 56 possible three-judge combinations that could be selected. The probability that the composition of each of the three August 27, 2019 panels identified above could be identical to the June 28, 2019 panels (i.e. those comprised before the First Circuit purported to amend its case assignment practices) equals 1 divided by (56*56*56), or 1 in 175,616.

21. As noted in Paragraph 7, there were 33 appellate panels identified by the First Circuit between August 1, 2018 (the effective date of the statutory amendment) and March 13, 2019 (the date on which four judges recused themselves). Further, as noted in Paragraph 19, the First Circuit has acknowledged that it did not alter its case-assignment practices at any point during this eight-month window. In addition, as noted in Paragraph 12, there are five additional appeals where the panel was identified prior to the statute's effective date, but the court did not issue an opinion until after the new statutes became effective.

22. Based on my review and manual tabulation, the twelve judges were represented as follows on these thirty-eight appellate panels:

1st District	**Number**	2nd District	**Number**	3rd District	**Number**
Theriot	**13**	McDonald	**24**	Crain	**21**
Holdridge	**9**	Guidry	**13**	Penzato	**13**

Lanier/ Pettigrew[4]	**5**	Higginbotham	**12**	McClendon	**3**
Whipple	**0**	Welch	**1**	Chutz	**0**

23. During this period when the First Circuit admittedly did not ensure random assignment of cases, the distribution of appeals between judges is striking. For example, Judge McDonald participated in 24 of 38 appeals, while his Second Circuit colleague, Judge Welch, participated in only 1 of 38 appeals.

24. In order to compute the probability of Judge McDonald appearing on 24 of 38 appellate panels while his similarly-situated colleague, Judge Welch, appeared on just one such panel, I made the following computation, first, obtaining the binomial probability of each judge being on the appellate panel based on the data. Judge McDonald is on 63.2%, or 24/38, of the appellate panels while Judge Welch is only on 2.6%, or 1/38. Assuming that the judges are assigned by a truly random allotment, these two binomial probabilities should be equal. The differences between these probabilities should be zero, but is in fact 60.6%. Similar to the previous sets of analyses, this probability of observing a difference this extreme (60.6%) or more than is based on calculating the probability of from a continuous Chi-squared distribution. Instead of adding up the numbers with the binomial distribution , the area under the curve of the Chi-squared distribution needs to be computed to get

[4] Judge Lanier succeeded Judge Pettigrew in the 1st District, Division A, which is why they are listed jointly.

the probability of the differences between 60.6% and 100%, or the most extreme difference. This calculation yields a 106 billionth% likelihood that Judge McDonald's presence on 24 of 38 appellate panels, as compared to Judge Welch's presence on just 1 of 38 appellate panels, is attributable to random chance. This probability can also be expressed as an odds, 994 billion to 1. Using the "snake eyes" die example from above, the probability of rolling "snake eyes" 9 times in a row is more likely than this distribution, assuming that Judge McDonald and Judge Welch have the same probability of getting assigned to appellate panels.

25. Finally, I am aware that certain parties have suggested that the First Circuit's use of geographic balancing promotes racial diversity in the judiciary. That goal is laudable, but the First Circuit's practice of requiring one judge from each election district to comprise each panel does nothing to advance that objective. I understand that the legislature has created a geographic subdistrict for Division 2, with the objective of creating a more racially diverse judiciary. From a statistical perspective, the odds that the judge elected from that subdistrict would be placed on a particular panel are identical, regardless of whether the panel is selected purely at random, or whether the panel is comprised by selecting exactly one judge from each of the three electoral districts - either way, there is a 25% chance of that judge being selected. As noted above, there are 220 possible three-judge combinations drawn purely at random from a twelve-judge judiciary , and 55 of

those 220 combinations will feature any one particular judge. Similarly, using geographic balancing, there are 64 possible three-judge combinations that can be selected using precisely one judge from each of the three election districts, and 16 of those 64 combinations will feature any one particular judge. Each of these scenarios presents a 25% chance of the judge from the electoral subdistrict being on the panel. Thus, the use of geographic balancing does not achieve the laudable goal of fostering racial diversity in the judiciary or across panels.

26. I attest that the foregoing is true and correct and within my personal knowledge.

/s/ handwritten signature

ROBBIE A. BEYL, Ph.D.

SWORN AND SUBSCRIBED BEFORE ME
the undersigned Notary Public, this 15th day
of November, 2019

/s/ handwritten signature

NOTARY PUBLIC

APPENDIX L

**COURT OF APPEAL
FIRST CIRCUIT
STATE OF LOUISIANA**

**No. 2018-CA-0075 c/w 2018-CA-0241 c/w 2018-CA-0796
2018-CA-0068 / 2018-CA-1098/ 2018-CA-0419 / 2018-CA-1122
2018-CA-0907 / 2018-CA-0842 / 2018-CA-0549/ 2018-CA-0421/ 2018-CA-0206
2018-CA-0117/ 2018-CA-0900/ 2018-CA-1213/ 2018-CA-1323 / 2018-CA-0478
2018-CW-0364**

FLORIDA GAS TRANSMISSION CO., L.L.C.,
Plaintiff

VERSUS

TEXAS BRINE COMPANY, L.L.C., ET AL.,
Defendant/Appellee

PONTCHARTRAIN NATURAL GAS SYSTEM, K/D/S PROMIX, L.L.C.,

AND ACADIAN GAS PIPELINE SYSTEM,
Plaintiffs

VERSUS

TEXAS BRINE COMPANY, L.L.C., ET AL.,
Defendant/Appellee

CROSSTEX ENERGY SERVICES, L.P., *Plaintiff*

VERSUS

TEXAS BRINE COMPANY, L.L.C., ET AL.,
Defendant/Appellee

Filed: ____________ ____________________________
Deputy Clerk

STATE OF LOUISIANA

PARISH OF TANGIPAHOA

AFFIDAVIT OF HON. EDWARD JAMES GAIDRY [RETIRED]

BEFORE ME, the undersigned Notary Public, came and appeared

EDWARD JAMES GAIDRY,

a person of the full age of majority, who upon being duly sworn, did depose and state as follows:

1. I am licensed to practice law in the State of Louisiana.
2. I am a retired judge. I served on the 32nd Judicial District Court for Terrebonne Parish from 1984 through 2002. Subsequently, I served as a judge on the Louisiana First Circuit Court of Appeal from 2002 through my retirement in 2012.
3. Based on my decade of service on the First Circuit, I am personally knowledgeable regarding the procedures employed by the First Circuit in allotting appeals, writs, and motions to the judges, including procedures that are not identified in the "Internal Rules" of the Court.
4. I am aware that Louisiana law, as reflected in article 2164.1 of the Code of Civil Procedure and Revised Statutes §13:319, requires the random allotment of appeals and writs by appellate courts.
5. I am personally aware, based on my experience as a First Circuit judge, that appellate panels are selected in a manner whereby each of the three judges on a particular panel comes from a different election district. This arrangement results in three judges coming from each of the three election districts within the First Circuit.
6. In my personal experience, the heavy majority of appellate panels and writ panels which I served on consisted of exactly one judge from District I, one judge from District 2, and one judge from District 3.
7. That approach does not yield random results. For example, in a random system, I would expect to serve on a panel with each of the other eleven judges of the First Circuit approximately an equal amount of times. But under the system

used by the First Circuit, I very rarely served with any of the other three judges of the 1st Election District on three judge panels.

8. In addition, three-judge panels are selected using this geographic balancing process once per year. This process yields four possible three-judge panels (absent recusals or vacancies) that sit on the First Circuit for a given year.
9. It is my understanding that the system used by the First Circuit to allot judges to three judge panels has not changed appreciably since my retirement in 2012.
10. Based on my personal knowledge, this system does not yield random allotment for two reasons. First, the geographic balancing requirement prevents judges from serving on panels with their colleagues from the same election district. Second, the same group of three judges sit together for an entire year.
11. Writ panels are also selected at the start of each calendar year, and they are selected in a similar fashion: three judges from each of the three election districts are selected to serve together for a single year.
12. As a result, judges in the First Circuit normally do not serve with any of the other three judges from their election district.
13. Each writ panel is identified on the calendar of the First Circuit's central staff at the start of the year. Writ applications are not assigned to a panel until a central staff attorney submits a memorandum analyzing the merits of the writ application and recommending a course of action.

14. The court's central staff is therefore aware of the composition of a particular writ panel at the time that they submit their memoranda analyzing a particular writ application.
15. Because the composition of the writ panels is known to the Court's central staff, this framework creates the opportunity for the central staff to manipulate which panel is assigned a particular writ application. For example, a staff attorney could delay the submission of a memorandum until a particular judge is scheduled to be on a writ panel — or alternatively, delay issuing the memorandum so as to ensure that a particular judge is not assigned to address that writ application. Although this opportunity exists, I am unaware of any instance in which this practice has actually occurred during the time I served on the Court.
16. In addition, central staff attorneys determine which writ applications are on the docket for an internal writ conference. In doing so, they are aware of which judges are on the writ panel that will evaluate the writ applications discussed during that conference. Again, this framework creates the opportunity for staff attorneys to manipulate or alter the assignment of writs. Although this opportunity exists, I am unaware of any instance in which this practice has actually occurred during the time I served on the Court, or after I left the Court in 2012.
17. This practice is not consistent with my understanding of the requirements of random allotment because it allows for writ applications to be steered to, or away from, particular judges.

18. It is my understanding that the system used by the First Circuit to allot judges to writ panels, or the information available to the First Circuit's central staff at the time that writ reports are submitted or when dockets for writ conferences are determined has not changed appreciably since my retirement in 2012.
19. I attest that the foregoing is true and correct and within my personal knowledge.

/s/ handwritten signature
HON EDWARD JAMES GAIDRY [RET.]

SWORN AND SUBSCRIBED BEFORE ME
the undersigned Notary Public, this 25th day
of March, 2019.

/s/handwritten signature
NOTARY PUBLIC