No.

In the Supreme Court of the United States

Arthur Dale Lothringer,
Petitioner

v.

United States of America,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether Texas statutory law supersedes Fifth Circuit precedent regarding alter-ego determinations.

List of Parties to Proceeding

Respondent:	**Counsel for Respondent:**
United States of America	Janet Bradley of U.S. Department of Justice, Washington, DC Ramona Notinger of U.S. Department of Justice, Dallas, TX
Petitioner:	**Counsel for Petitioner:**
Arthur Dale Lothringer	Sherry M. Barnash Charles J. Muller IV Ezekiel J. Perez CJ Muller & Associates, PLLC, San Antonio, TX
Other Interested Persons	**Counsel for Other Interested Persons**
Janet Lynn Lothringer Pick-Ups, Inc.	Everett R. "Rhett" Buck of the Buck Law Firm, Houston, TX

Corporate Disclosure Statement

1. Petitioner Arthur Dale Lothringer is the sole shareholder of Defendant Pick-Ups, Inc.

2. Respondent the United States of America has no corporate connection to any party in the underlying case.

List of Proceedings

1. United States Court of Appeals for the Fifth Circuit; Case No. 20-50823; 2021WL7414609 (5th Cir. 2021), Judgment entered October 8, 2021, rehearing denied, November 26, 2021.

2. United States District Court for the Western District of Texas, San Antonio Division; Case No. 5:18-cv-00373, Judgment entered August 20, 2020.

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The Opinion in the United States Court of Appeals for the Fifth Circuit was filed on October 8, 2021, is unpublished and is reproduced in the Appendix at page 55. The Opinion of the United States District Court for the Western District of Texas was filed on August ll, 2020 is reproduced in the Appendix on page 14. The Judgment of the United States District Court for the Western District of Texas was filed on August 20, 2020 is reproduced in the Appendix on page 50.

Statement of the Basis for Jurisdiction

The Judgement of the Court of Appeals was entered on October 8, 2021. A petition for rehearing was denied on November 26, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

Constitutional and Statutory Provisions Involved

The Tenth Amendment to the Constitution of the United States provides as follows: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

28 U.S. Code § 1345 provides: Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

Statement of the Case

The United States of America (the "Government") sued Arthur Dale Lothringer ("Lothringer") and his company Pick-Ups, Inc. ("Pick-Ups") seeking to determine that Lothringer was personally liable for Pick-Ups' tax debts. The Government subsequently moved for summary judgment and argued that Lothringer was the alter ego of Pick-Ups as a matter of law. ROA 64. Lothringer responded by disputing material issues of fact regarding the Government's alter ego claim. ROA 66. The district court recognized these material issues of fact but granted summary judgment in favor of the Government based on a number of factors that should not have been considered under Texas law. ROA 71. In particular, the trial court relied heavily on evidence wrongfully suggesting that Pick-Ups "failed to adhere to corporate formalities."

The United States Court of Appeals for the Fifth Circuit affirmed the trial court's summary judgment because it determined "a failure to observe corporate formalities is no longer a factor in proving the alter ego theory in contract claims." Opinion at *3 (emphasis in original). Relying upon *W. Horizontal Drilling, Inc. v. Jonnet Energy Corp.*, 11 F.3d 65 (5th Cir. 1994), the Fifth Circuit held that "a failure to observe corporate formalities is no longer a factor in proving the alter ego theory in contract claims." *Id.* Based on this assertion, it

concluded "Lothringer has provided no support that tax collection should be treated like a contract claim and no persuasive reason to deviate from [the Court's] precedent applying Texas law." *Id.*

This erroneous conclusion has created two legal precedents in Texas. As the state level, consideration of adherence to corporate formalities is a factor that is statutorily barred from consideration in all causes of action. This statute was enacted because "adherence to corporate formalities" is an inherently nebulous standard that was historically ripe for abuse. On the other hand, the Fifth Circuit has announced that "adherence to corporate formalities" can be considered in all cases except contract cases. The rationale for this inconsistent standard is inexplicable. Moreover, the Fifth Circuit's ruling is directly contrary to Texas statutory law. If this ruling is not reversed, it will create a competing alter ego standard in Texas that will be the catalyst for forum shopping and abusive alter ego claims.

Reasons For Granting the Writ

W. Horizontal Drilling, Inc. v. Jonnet Energy Corp. was decided in 1994. It cites to and relies upon a statute that was subsequently amended in 1997. The 1997 amendment struck the term "contractual" from sub-section (a)(3) of the statute so that it presently states an "owner, or subscriber or[,] of the corporation, may not be held liable to the corporation or its obligees with respect to . . . any obligation of the corporation on the basis of the failure of the corporation to observe any corporate formality . . . ." TEX. BUS. ORG. CODE § 21.223(a)(3) (emphasis added) (the word "contractual" was previously contained between the word "any" and the word "obligation.")

As such, the Fifth Circuit incorrectly applied *Jonnet* to this case. Lothringer did not need to show that a tax collection case should be treated like a contract claim because Section 21.223 of the Texas Business Organizations Code is not presently restricted to "contractual obligations." It prohibits consideration of corporate formalities with regard to "any obligations." TEX. BUS. ORG. CODE § 21.223(a)(3).

Jonnet misstates and directly contradicts current alter ego law in Texas. Section 21.223(a)(3) of the Texas Business Organizations Code prohibits a trial court from considering any failure to adhere to corporate formalities when making an alter ego

determination. As such, the trial court's summary judgment should have been vacated by the Fifth Circuit.

The Texas Business Organizations Code:

The Texas Business Organizations Code states:

> (a) A holder of shares, an owner of any beneficial interest in shares, or a subscriber for shares whose subscription has been accepted, or any affiliate of such a holder, owner, or subscriber or of the corporation, may not be held liable to the corporation or its obligees with respect to:
>
> . . .
>
> (2) **any contractual obligation** of the corporation or any matter relating to or arising from the obligation on the basis that the holder, beneficial owner, subscriber, or affiliate is or was the alter ego of the corporation or on the basis of actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory; or
>
> (3) **any obligation** of the corporation on the basis of the failure of the corporation to observe any corporate formality, including the failure to:
>
> (A) comply with this code or the certificate of formation or bylaws of the corporation; or

> (B) observe any requirement prescribed by this code or the certificate of formation or bylaws of the corporation for acts to be taken by the corporation or its directors or shareholders.

TEX. BUS. ORG. CODE. § 21.223 (emphasis added). The phrase "any contractual obligations"—emphasized in bold above—contains restrictions that are placed only upon the terms contained in sub-section (a)(2) of the statute. The same phrase is clearly omitted from sub-section (a)(3). This omission demonstrates a purposeful decision by the Texas legislature to place limitations regarding "contractual obligations" only on sub-section (a)(2) of the statute, and not sub-section (a)(3). The statute must be interpreted according to its plain and ordinary meaning, that is: (1) veil piercing claims cannot be applied to contract claims in Texas, and (2) veil piercing claims can be applied to non-contract claims but a failure to abide by corporate formalities cannot be considered. This case involved a non-contract claim, so the consideration of any purported failure to abide by corporate formalities is statutorily forbidden.

Jonnet compared to the Texas Business Organizations Code.

Jonnet is outdated and simply misstates the current version of the Texas Business

Organizations Code by including the phrase "any contractual obligations" within sub-section (a)(3) of the statute. *Jonnet* states:

> The *Castleberry* [*v. Branscum*, 721 S.W.2d 270 (Tex. 1986)] decision significantly curtailed shareholders' rights relative to common law corporate disregard theory. In response, the Texas legislature amended its Business Corporation Act in 1989 to read, in part:
>
> > A. A holder of shares, an owner of any beneficial interest in shares, or a subscriber for shares whose subscription has been accepted shall be under no obligation to the corporation or to its obligees with respect to:
> >
> > . . .
> >
> > (3) **any contractual obligation** of the corporation on the basis of the failure of the corporation to observe any corporate formality, including without limitation: (a) the failure to comply with any requirement of this Act or of the articles of incorporation or bylaws of the corporation; or (b) the failure to observe any requirement

> prescribed by this Act or by the articles of incorporation or bylaws for acts to be taken by the corporation, its board of directors, or its shareholders.
>
> TEX. REV. CIV. STAT. ANN. art. 2.21 A(3) (Vernon Supp. 1993). The amendments overruled *Castleberry* to the extent that a failure to observe corporate formalities is no longer a factor in proving the alter ego theory in contract claims.

Jonnet, 11 F.3d at 68. However, the Texas Business Corporations Act was amended in 1993[1] and 1997.[2] The current version of Texas Business Corporations Act was adopted by the 78th Legislature in 2003 and codified as Section 21.223 of the Texas Business Organizations Code, effective January 1, 2006. Section 21.223 currently includes much of the same text originally stated in Article 2.21A of the Texas Business Corporations Act; however, sub-section (a)(3) of section 21.223 applies to "any obligation" and is not limited to contractual obligations as stated in *Jonnet*. This modification—omitting the term "contractual" and replacing it with "any obligation" shows that the

[1] Acts 1993, 73rd Leg., R.S. ch. 215, Sec. 2.05, eff. Sept. 1, 1993.

[2] Acts 1997, 75th Leg., R. S. ch. 375, Sec. 7, eff. Sept. 1, 1997.

Texas Legislature purposefully removed the restrictions referenced by *Jonnet*. *See* Tex. S.B. 555, 75th Leg., R.S. (1997). *Jonnet* is simply outdated and its ruling with regard to alter ego claims has been superseded by statute.

Current Texas Law

In support of its holding, *Jonnet* cites to *Farr v. Sun World Sav. Ass'n.*, 810 S.W.2d 294, 296 (Tex. App.—El Paso 1991, no pet.). *Farr* was written prior to the adoption of the Texas Business Organizations Code and cites to Article 2.21A of the Texas Business Corporations Act, effective August 28, 1989. Consistent with the Court's holding in *Jonnet*, Article 2.21A bars liability for "any contractual obligation of the corporation on the basis of the failure of the corporation to observe any corporate formality…." The Texas Fourteenth Court of Appeals has now recognized that *Farr* was based upon "section 21.223's statutory predecessor." *Hong v. Havey*, 551 S.W.3d 875, 885 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

Recent Texas case law further clarifies this issue. Following the adoption of the Texas Business Organizations Code, several Texas courts have held "general (mis)handling of corporate accounts, records keeping, and operations" are insufficient to support a finding of alter ego. *Mungas v. Odyssey Space Research, LLC*, 2021 WL

3416500, *5 (Tex. App.—Houston [14th Dist.] 2021, no pet.); *see also Doyle v. Kontemporary Builders, Inc.*, 370 S.W.3d 448, 458 (Tex. App.—Dallas 2012, pet. denied); *Penhollow Custom Homes, LLC v. Kim*, 320 S.W.3d 366, 372 (Tex. App.—El Paso 2010, no pet.); *Sparks v. Booth*, 232 S.W.3d 853, 868-69 (Tex. App.—Dallas 2007, no pet.).

> Under Section 21.223(a)(2) of the Texas Business Organizations Code, a shareholder may not be held liable to the corporation or its obligees with respect to any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the shareholder is or was the alter ego of the corporation or on the basis of actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory.

Penhollow Custom Homes, 320 S.W.3d at 372 (*citing* TEX. BUS. ORGS. CODE ANN. § 21.223(a)(2)).

Similarly, the Fourteenth District Court of Appeals has held, a "holder of shares . . . may not be held liable to the corporation or its obligees with respect to . . . **any** obligation of the corporation on the basis of the failure of the corporation to observe any corporate formality . . . ." *Durham v. Accardi*, 587 S.W.3d 179, 186 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (citing *Sparks*, 232 S.W.3d at 868-69) (emphasis added). "[T]he lack of corporate

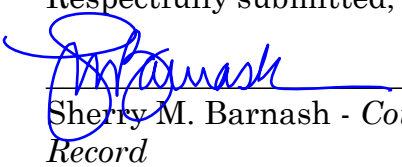
formalities is no longer a consideration when determining an alter ego question" with respect to any debt. *Id.*

Jonnet has clearly been superseded by statute with respect to veil piercing on the basis of the failure of the corporation to observe any corporate formality. *Jonnet* misstates and directly contradicts current alter ego law in Texas. Section 21.223(a)(3) of the Texas Business Organizations Code prohibits consideration of any failure to adhere to corporate formalities when making an alter ego determination. The Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

Conclusion

Mr. Lothringer respectfully requests that this Court issue a Writ of Certiorari.

Respectfully submitted,



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