

In the
Supreme Court of the United States

ROBERT COX, ET AL.,

Petitioners,

v.

HELENA CHEMICAL COMPANY, ET AL.,

Respondents.

**On Petition for a Writ of Certiorari to the
Supreme Court of Texas**

PETITION FOR A WRIT OF CERTIORARI

Don C. Burns
Counsel of Record
Cody McCabe
Matt Johns
LAW OFFICE OF BURNS & MCCABE
1109 S. Abe Street
San Angelo, TX 76903
(325) 227-8663
law@burnsmccabelaw.com

QUESTIONS PRESENTED

1. Whether the Due Process Clause prohibits a state court from depriving petitioners of property protected by the Fourteenth Amendment without allowing them to present evidence in the form of personal observations of the condition of their property, or expert opinions on the same subject.
2. Whether the Due Process Clause prohibits denial of petitioners' rights guaranteed by the Fourteenth Amendment that results from reversal of case law with deep historical roots in Anglo-American jurisprudence and in fundamental principles of justice protecting property owners.
3. Whether a state court can nullify the regulations of the Environmental Protection Agency which apply to aerial application of toxic herbicide in Texas.
4. Whether the Chief Justice of the Supreme Court of Texas should have recused himself from deciding the case in light of his long history of financial dealings with the same firm that represents the respondent chemical company, and following a defense provided by that firm against charges of judicial misconduct.

PARTIES TO THE PROCEEDINGS

Petitioners

- Robert Cox
- Tanner Cox
- Cox Farms
- James Cox Trust
- David Stubblefield
- Brooks Wallis
- Russel Erwin
- Jack Ainsworth
- Loren Rees
- Tyson Price
- Nathan Hoyle
- Rushell Farms
- Hoyle & Hoyle
- Wallis Farms

Respondent

- Helena Chemical Company
- Lauderdale Aerial Spraying, L.L.C.
- Kenneth Lauderdale
- Heli Ag, L.L.C.

CORPORATE DISCLOSURE STATEMENT

None of the corporate petitioners—who are Cox Farms, Rushell Farms, Hoyle & Hoyle, and Wallis Farms—has a parent company and no public company owns 10% or greater of any corporate petitioner's stock.

LIST OF PROCEEDINGS

Supreme Court of Texas

No. 20-0881

Helena Chemical Company, *Petitioner*,
v. Robert Cox, et al., *Respondents*.

Date of Final Opinion: March 3, 2023

Date of Rehearing Denial: May 5, 2023

Texas Eleventh Court of Appeals

No. 11-18-00215-CV

Robert Cox, et al., *Appellants*, v.
Helena Chemical Company, *Appellee*.

Date of Final Opinion: October 16, 2020

Mitchell County, Texas 32nd Judicial District

No. 16643

Robert Cox, Tanner Cox, Cox Farms, James Cox
Trust, David Stubblefield, Brooks Wallis, Russel Erwin,
Jack Ainsworth, Loren Rees, Tyson Price, Nathan
Hoyle, Rushell Farms, Hoyle & Hoyle, Wallis Farms,
Et Al., *Plaintiffs*, v. Helena Chemical Company,
Lauderdale Aerial Spraying, L.L.C., Kenneth
Lauderdale, Heli Ag, L.L.C. et al., *Defendants*.

Date of Final Order: May 24, 2018

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
CORPORATE DISCLOSURE STATEMENT	iii
LIST OF PROCEEDINGS	iv
TABLE OF AUTHORITIES	ix
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	4
I. THE EVIDENCE	4
A. Experts and the State Inspector Confirmed the Farmers' Observations of Sendero Damage	5
B. Photographs Showed Consistent Widespread Damage to Cotton	5
C. TDA Inspector Observed Unique Markers for Sendero	6
D. Lab Results Confirmed Both Unique Markers for Sendero	6
E. Focus by State Court on "Pattern" Is Misplaced; Paint Brush Swath Was Not Expected by Experts in the Field	7

TABLE OF CONTENTS – Continued

	Page
F. Evidence in the Record Is Clear: Computer Modeling in Extreme Wind Conditions Experienced During Helena’s Application Is Unreliable	8
G. As a Matter of Law, Sendero Damages Cotton and Reduces Yield	8
H. There Was No Plausible Alternative Source of Herbicide Damage in Evidence	9
II. THE RULINGS BELOW	10
III. CERTIORARI SHOULD BE GRANTED TO REDRESS THE DENIAL OF DUE PROCESS AND NULLIFICATION OF FEDERAL STATUTES BY THE SUPREME COURT OF TEXAS	11
A. Petitioners were denied due process of law by the blanket exclusion of their testimony and refusal to consider expert opinions founded on experience and investigation, amounting to a loss of the right to be heard	12
B. Petitioners were deprived of their rights and remedies by changing the standard for opposition to a no- evidence motion for summary judgement	16
C. Petitioners were deprived of due process by changing the law <i>ex post facto</i> , disallowing recovery of nominal damages, and increasing the non- movant’s burden	22

TABLE OF CONTENTS – Continued

	Page
D. The authority of the EPA was nullified by imposing on the petitioners an insurmountable burden of proof of herbicide damage to crops	25
E. The Chief Justice of the Supreme Court of Texas should have recused himself from this case where the respondent chemical company was being defended by the same law firm that defended him against a charge of judicial misconduct and provided him substantial direct financial benefits	32
CONCLUSION.....	36

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS**OPINIONS AND ORDERS**

Opinion of the Supreme Court of Texas (March 3, 2023)	1a
Mandate of the Supreme Court of Texas (March 3, 2023)	30a
Opinion of the Eleventh Court of Appeals for the State of Texas (October 16, 2020)	32a
Order on Defendant Helena Chemical Company's No Evidence Motion for Summary Judgment and Final Judgment (May 24, 2018)	56a

REHEARING ORDER

Order of the Supreme Court of Texas Denying Petition for Rehearing (May 5, 2023)	58a
---	-----

OTHER DOCUMENTS

Sworn Complaint Before the Texas Ethics Commission (July 23, 2007)	59a
Cox Et Al. Motion for Rehearing Filed in the Supreme Court of Texas (March 20, 2023).....	63a
Sendero Specimen Label with Directions for Use and Precautions, Excerpts	88a
Plea in Intervention and Motion to Disqualify Filed by Texans for Public Justice (October 14, 2014)	90a

TABLE OF AUTHORITIES

	Page
CASES	
<i>Adickes v. S. H. Kress & Co.</i> , 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)	20
<i>Bayard v. Singleton</i> , 1 N.C. (Mart.) 5 (1787)	23
<i>Brinkerhoff-Faris Trust & Savings Co. v. Hill</i> , 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930)	22
<i>Caperton v. A.T. Massey Coal Co., Inc.</i> , 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009)	33
<i>Champion v. Vincent</i> , 20 Tex. 811 (1858)	23
<i>City of Keller v. Wilson</i> , 168 S.W.3d 802 (Tex. 2005)	5, 9
<i>Coastal Oil & Gas Corp. v. Garza Energy Trust</i> , 268 S.W.3d 1 (Tex. 2008)	23
<i>Demorest v. City Bank Farmers Trust Company</i> , 321 U.S. 36, 64 S.Ct. 384, 88 L.Ed. 526 (1944)	18, 19
<i>Gulbenkian v. Penn</i> , 151 Tex. 412, 252 S.W.2d 929 (1952).....	21
<i>Huckabee v. Time Warner Ent. Co. L.P.</i> , 19 S.W.3d 413 (Tex. 2000)	21
<i>International Harvester Co. v. Kesey</i> , 507 S.W.2d 195 (Tex. 1974)	24

TABLE OF AUTHORITIES – Continued

	Page
<i>Kennedy v. Silas Mason Co.</i> , 334 U.S. 249, 68 S.Ct. 1031, 92 L.Ed. 1347 (1948)	20
<i>Kossick v. United Fruit Co.</i> , 365 U.S. 731, 81 S.Ct. 886, 6 L.Ed.2d 56, <i>rehearing denied</i> , 366 U.S. 941, 81 S.Ct. 1657, 6 L.Ed.2d 852 (1961)	31
<i>Lyle v. Waddle</i> , 188 S.W.2d 770 (Tex. 1945)	22
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).....	25
<i>Marshall v. Jerrico</i> , 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980)	33
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)	19, 20
<i>Mosley v. Texas Health & Hum. Servs.</i> <i>Comm'n</i> , 593 S.W.3d 250 (Tex. 2019)	20
<i>Offutt v. United States</i> , 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954)	11
<i>Pitchfork Land & Cattle Co. v. King</i> , 346 S.W.2d 598 (Tex. 1961)	24
<i>Rice v. Sioux City Memorial Park Cemetery</i> , 75 S.Ct. 614, 349 U.S. 70, 99 L.Ed. 897 (1955)	11

TABLE OF AUTHORITIES – Continued

	Page
<i>Rock v. Arkansas</i> , 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)	14
<i>South Central Bell Telephone Co. v. Alabama</i> , 526 U.S. 160, 119 S.Ct. 1180, 143 L.Ed.2d 258 (1999)	13
<i>Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection</i> , 560 U.S. 702, 130 S.Ct. 2592, 177 L.Ed.2d 184 (2010)	18
<i>Time, Inc. v. Firestone</i> , 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976)	16
<i>Vance v. Terrazas</i> , 444 U.S. 252, 100 S.Ct. 540, 62 L.Ed.2d 461 (1980)	11
<i>Williams v. Pennsylvania</i> , 579 U.S. 1, 136 S.Ct. 1899, 195 L.Ed.2d 132 (2016)	34
<i>Yiatchos v. Yiatchos</i> , 376 U.S. 306, 84 S.Ct. 742, 11 L.Ed.2d 724 (1964)	31

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV.....	2, 16, 17, 34
-----------------------------	---------------

STATUTES

7 U.S.C. §§ 136-136y	2, 26
28 U.S.C. § 1257(a)	2, 12, 16

TABLE OF AUTHORITIES – Continued

Page

JUDICIAL RULES

Tex. R. Civ. P. 166a(c).....	24
Tex. R. Evid. 701.....	13, 14

REGULATIONS

40 C.F.R. § 152.....	2, 26
40 C.F.R. § 156.....	26, 27

OTHER AUTHORITIES

Linda S. Mullenix, <i>Summary Judgment: Taming the Beast of Burdens</i> , 10 AM. J. TRIAL ADVOC. 433 (1987)	21
Roy McDonald et al., TEXAS CIVIL PRACTICE (Allen et al., eds. 1992).....	21
Samuel Issacharoff et al., <i>Second Thoughts About Summary Judgment</i> , 100 YALE L. J. 73 (1990)	21



PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Supreme Court of Texas, entered in this case on May 5, 2023.



OPINIONS BELOW

The ruling of the trial court, the 32nd Judicial District Court for Mitchell County, Texas appears at App.56a to this petition. This order summarily dismissed the case on Respondents’ “No Evidence” motion. The trial judge did not issue a written opinion or make a detailed record of his reasons for granting the motion.

The opinion of the Eleventh Court of Appeals appears at App.32a to the petition and is reported at 630 S.W.3d 234. Reviewing the record *de novo*, the appeals court reversed and remanded for trial.

The opinion of the Supreme Court of Texas, the highest state court to review the merits of this case appears at App.1a to the petition and is reported at 664 S.W.3d 66. This opinion reversed the opinion of the appeals court and reinstated the summary dismissal.



JURISDICTION

The Supreme Court of Texas decided the merits of the case on March 3, 2023. A timely motion for rehearing was made and appears at App.63a. Peti-

tioners' motion for rehearing was denied on May 5, 2023. A copy of the order denying the motion appears at App.58a. The mandate to the trial court appears at App.30a.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1257(a) to review by writ of certiorari a final judgment rendered by the highest court of a state in which a decision could be had.



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV

This case involves the first section of the 14th Amendment to the Constitution of the United States, which provides, in pertinent part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

7 U.S.C. §§ 136-136y

This case also involves provisions of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). 7 U.S.C. §§ 136-136y, empowering the Environmental Protection Agency ("EPA") to regulate pesticides. Pertinent regulations appear at 40 C.F.R. Part 152, et seq., and are set out hereinafter.



STATEMENT OF THE CASE

This is an action for damages brought by petitioner farmers to compensate for damage to their growing cotton caused by defendant's aerial application of Sendero, a powerful broadleaf herbicide, that drifted from targeted pastures, downwind to cotton fields. By excluding the petitioners' testimony¹, increasing the burden imposed on the non-moving party in a no-evidence motion for summary judgment², and changing long-established remedial rules which permit recovery of nominal damages for trespass³, the Supreme Court of Texas deprived the petitioners of due process, nullified federal environmental safety regulations⁴ and usurped the legislative role, while casting a pall over the ideal of judicial impartiality.

¹ App.14a (excludes farmers' testimony in the form of lay opinions about impact on crops).

² App.16a (sufficient to survive summary judgment); App.17a (multiple lab tests); App.25a (estimate of how much); and App.29a (extent of crop damage).

³ App.24a (how much Sendero landed on the crops).

⁴ App.3a (highly toxic); App.24a (how much exposure . . . would cause reduced crop yield); App.27a, 29a.



REASONS FOR GRANTING THE PETITION

I. THE EVIDENCE

This petition stems from a “no-evidence” motion for summary judgment by the respondent chemical company. As the non-moving party, the petitioner farmers’ evidence in opposition is at the heart of the determination by the Supreme Court of Texas. The Eleventh Court of Appeals, summarized the key evidence of the herbicide drift event:

According to Appellants’ summary judgment evidence, Pence [the inspector sent by the Texas Department of Agriculture to investigate farmers’ complaints] traced the damage symptoms to the Spade Ranch, where over 3,300 gallons of Sendero had been applied aerially to mesquite trees on July 1, 2, 3, and 4 by two planes in conditions that were, at times, adverse to the aerial application of chemicals. The adverse conditions included high winds blowing in the direction of Appellants’ various cotton fields; high temperatures; the release of chemicals while the plane was flying above the recommended height; and the application of an inappropriate amount of chemicals, which would have created smaller droplets or “driftable fines” more susceptible to drifting “miles and miles” away from the target field.

(App.45a).

A. Experts and the State Inspector Confirmed the Farmers' Observations of Sendero Damage.

Dr. Banks, Helena's own expert, confirmed the farmers' observation of Sendero damage in their fields. Dr. Banks reported that he saw "Sendero damage" and that the plant injuries he observed were, in his opinion, "from Sendero."⁵ The experts retained by the petitioners confirm the farmers' capacity to observe and report their crop damage and yield loss. (App.67a-68a).

Mr. Pence, a senior inspector for the Texas Department of Agriculture ("TDA"), in the course of his duties, relied, in part, on the observations of farmers to locate damaged cotton.⁶ The TDA inspector reported that he traced consistent symptoms of Sendero damage from the target pastures on Spade Ranch, downwind to the farmers' cotton fields. (App.59a).

B. Photographs Showed Consistent Widespread Damage to Cotton.

Petitioners' expert, Mr. Halfmann, found that the photographs by TDA in the damaged cotton fields display consistent herbicide effects.⁷ Dr. Carrillo, a plant physiologist retained by the petitioners, relied on hundreds of photos in conjunction with lab results

⁵ The Supreme Court of Texas fails to acknowledge that the respondent's expert identification of damage "from Sendero" months after the drift event (App.67a-68a). That evidence is sufficient to defeat the "no-evidence" motion in Texas. *City of Keller v. Wilson*, 168 S.W.3d 802, 803.

⁶ The decision acknowledges that the TDA inspector found "crop damage" responding to farmers' complaints. (App.3a).

⁷ Mr. Halfmann's expertise is not disputed. (App.5a).

to confirm the cause of damage to cotton plants.⁸ He was able to match farmers' descriptions of damage with the TDA photos. Helena's own expert, Dr. Banks also uses photographs to "depict" the condition of plants. (App.68a).⁹

C. TDA Inspector Observed Unique Markers for Sendero.

As the Supreme Court of Texas recognized, only Sendero contains both aminopyralid and clopyralid. Inspector Pence identified both unique markers by comparing his field observations to reference photos obtained from the UC Davis data bank. (App.69a).¹⁰

D. Lab Results Confirmed Both Unique Markers for Sendero.

A TDA lab report showed aminopyralid present, but not measurable.¹¹ Numerous lab results showed clopyralid in cotton plant fiber. No other herbicide contains both aminopyralid and clopyralid. Although negative lab tests are reported, the dispersion of

⁸ Dr. Carrillo's expertise is not disputed. (App.6a).

⁹ The Supreme Court of Texas acknowledges the presence of "hundreds" of photographs of crop damage (App.4a, n.2), but fails to acknowledge expert reliance on photographs to form opinions that cotton was damaged is evidence sufficient to defeat a "no-evidence" motion.

¹⁰ Contrary to the factual representation by the Supreme Court of Texas, the TDA inspector explained at his deposition that he would refer to his reference material to identify the markers for the active ingredients of Sendero. (*Cf.* App.3a; App.69a, subsection C-D).

¹¹ App.69a, Subsection D.

positive results leaves no doubt that drift was widespread. (App.69a).¹² The private lab results obtained by farmers were consistent with the TDA inspection.¹³

E. Focus by State Court on “Pattern” Is Misplaced; Paint Brush Swath Was Not Expected by Experts in the Field.

Mr. Pence, the TDA inspector, did not expect to find a “pattern.”¹⁴ After a long career investigating drift for the State of Texas, Mr. Halfmann expected no discernable pattern. He described a drift pattern as spotty; sporadic; and hopscotch. Respondent’s expert Dr. Zannetti acknowledged that numerous variables impact drift patterns, resulting in unexpected outcomes. (App.70a, Subsection E).¹⁵

¹² The lab testing identifies the location of the samples by the name of the farmer or consultant who took the sample. (App.78a-79a, Subsection b).

¹³ The TDA inspector traced consistent symptoms from the target pastures on Spade Ranch to the farmers’ cotton fields. (App.59a, Subsection A).

¹⁴ The contrary representation by the Supreme Court of Texas is unsupported by the record. (App. 70a, Subsection F; App.77a, Subsection 6).

¹⁵ The Supreme Court of Texas mischaracterizes the observation of the TDA inspector, as well as the experts opinions relating to the pattern to expect from a drift event. (App.3a [consistent pattern]; App.19a [predictable pattern]). Nobody expected a paint-brush pattern. It was described as sporadic, fingers, hopscotch. The only certainty is that drift travels downwind. (App.70a, Subsection E; App.77a, Subsection 6).

F. Evidence in the Record Is Clear: Computer Modeling in Extreme Wind Conditions Experienced During Helena's Application Is Unreliable.

Contrary to the suggestion by the Supreme Court of Texas, Mr. Halfmann finds the use of AGDISP as a predictive model useless in this context. He attests that, although he helped develop the modeling technology in use today during his long career investigating herbicide drift events, computer models are not programmed to account for wind speeds as high as those experienced during the Helena application.¹⁶ Another expert on chemical effects on cotton, Dr. Rosenfeld, does not find current computer modeling reliable in this context.¹⁷ AGDISP contains a disclaimer that it does not work beyond two miles—observed, reported and verified impact was as far as twenty (20) miles from the target pastures. (App.70a).¹⁸

G. As a Matter of Law, Sendero Damages Cotton and Reduces Yield.

The Sendero label developed under the direction of the EPA is uncontestable scientific evidence that

¹⁶ App.70a, Subsection F, App.77a, Subsection 6 (models cannot account for extreme wind speed).

¹⁷ *Id.*

¹⁸ Despite the unanimous rejection of computer modeling by petitioners' experts (App.70a, 77a), the Supreme Court of Texas posits a failing by the farmers who did not rely on models which offer little or no utility in modeling drift events under the conditions present in the relevant timeframe. (App.19a).

Sendero is toxic to cotton.¹⁹ The toxin is very persistent in organic material and soil. (App.88a, Avoiding Injury to Non-Target Plants; Including cotton; App.89a, Crop Rotation; one or more years to replant).

Dr. Rosenfeld cited a peer reviewed study from Texas that clopyralid causes a “very significant” yield reduction in cotton. On Dr. Rosenfeld’s instruction, another expert, with twenty (20) years in experimental agriculture, graded and recorded 1600 mostly negative germination tests and photographed the results as part of a bio-assay.

The plant physiologist, Dr. Carrillo attested:

Any impact on physiological growth of the plant is going to impact yield.

(App.71a, Subsection G, Emphasis added).²⁰

H. There Was No Plausible Alternative Source of Herbicide Damage in Evidence.

Helena’s pilots saw no other chemical applications during the Spade Ranch application. Helena’s site manager saw no other applications during the multiple projects in the area under his supervision. For TDA, Mr. Pence searched, but found no alternative source of the herbicide damage he observed and documented.²¹

19 The Supreme Court of Texas acknowledges Sendero’s toxicity to cotton. (App.24a).

20 The Supreme Court of Texas fails to acknowledge this uncontested expert opinion. (App.13a, 24a, 29a). That evidence alone was sufficient to defeat a “no-evidence” summary judgment motion. City of Keller, *supra*.

21 The comment that “there could have been any number of other herbicide applications” found at App.26a, on examination,

The respondent did make other applications of Sendero during the same timeframe on nearby acreage—that would not qualify as an “alternative” source of herbicide drift.²²

Helena’s experts, Drs. Zannetti and Banks, were provided no evidence of an alternative source of herbicide damage to cotton and acknowledged that gap in their final opinions expressed at their depositions.²³ Nor did Helena’s expert evidence posit that drought might be confused with herbicide symptoms—that postulate was cut from whole cloth by the Supreme Court of Texas.²⁴

II. THE RULINGS BELOW

The Trial court ruled that there was no evidence that Helena’s application of Sendero damaged cotton in Mitchell County. (App.56a-57a). The Eleventh Court of Appeals reversed that ruling. (App.32a-55a). The Supreme Court of Texas decided that farmers’ obser-

must be balanced against the admission by both experts for the respondent that they knew of no potential alternative source. (App.72a).

22 The Supreme Court of Texas refers to another Sendero application in the area (App.26a), but the record reflects only simultaneous applications of Sendero by the respondent chemical company. (App.82a-83a).

23 This omission by respondent’s experts is ignored in the factual analysis by the Supreme Court of Texas, but the absence of evidence of an alternative source of herbicide damage made proof of the contrary unnecessary. (*Cf.* App.26a-27a).

24 This purported deficiency is raised by the Supreme Court of Texas without benefit of support in the record. (App.26a). No expert in the field drew comparison between loss caused by herbicide, and loss caused by drought.

vations of consistent herbicide damage, lab testing that showed the unique active ingredients of Sendero in cotton plant fibers, and expert analysis of the collected facts did not constitute admissible evidence and reversed the Court of Appeals. (App.1a-29a).

III. CERTIORARI SHOULD BE GRANTED TO REDRESS THE DENIAL OF DUE PROCESS AND NULLIFICATION OF FEDERAL STATUTES BY THE SUPREME COURT OF TEXAS.

The Supreme Court can grant a petition for a writ of certiorari as to virtually any issue in a case it wishes to review and can decide cases on any ground it feels is appropriate. *Vance v. Terrazas*, 444 U.S. 252, 258, 100 S.Ct. 540, 554, 62 L.Ed.2d 461, n. 5 (1980). Certiorari should be granted in cases involving principles the settlement of which is of importance to the public. *Rice v. Sioux City Memorial Park Cemetery*, 75 S.Ct. 614, 349 U.S. 70, 99 L.Ed. 897 (1955). The arbitrary departure from respected precedents, elimination of remedies, and nullification of federal law, under circumstances casting grave doubts on the tribunal's impartiality justifies granting certiorari in this case.

It is right to remember that “[J]ustice must satisfy the appearance of justice.” *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954). The abrupt departure from well settled law and the ratio of reasoning to *ipse dixit* by the Supreme Court of Texas prompts scrutiny of the decision, and reveals that certiorari should be granted to avoid injustice.

The Supreme Court of Texas deprived a group of farmers of property without due process and overrode the EPA's unequivocal dictate that Sendero harms cotton, requiring farmers to reconfirm that scientific

certainty by lab testing of limited reliability, but excluded visual observations by those who know cotton and herbicides best. In a denial of due process, politics, it appears, prevailed over justice and, on remand, must be redressed.

28 U.S.C. § 1257(a) provides in part:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a . . . statute of the United States is drawn in question . . . or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or . . . statutes of, or any authority exercised under, the United States.

In addition to federal statutes and treaties, this jurisdictional statute embraces claims of the preemptive effects of administrative regulations, and interpretation of state law.

- A. Petitioners were denied due process of law by the blanket exclusion of their testimony and refusal to consider expert opinions founded on experience and investigation, amounting to a loss of the right to be heard.**
 - 1. Excluding testimony by the farmers that was not challenged below was a denial of due process.**

Denial of due process results from the arbitrary deprivation of the right to be heard that followed

exclusion of the farmers' testimony.²⁵ Texas Rules of Evidence, Rule 701, provides:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception; and
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue.

Id.

Describing their personal observation of herbicide damage symptoms on cotton plants in their own fields was well within the ambit of the petitioner farmers' perception. Although the Supreme Court of Texas purports to follow federal due process mandates, it arbitrarily quashed the testimony of the petitioners, *and* the evidence presented by experts and State authorities who relied on farmers' observations in an alarming example of judicial overreach. Due process forbids an arbitrary blanket exclusion of testimony of every farmer, without consideration of each potential witness' opportunity to observe and report the condition of their crops.

In *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 165–167, 119 S.Ct. 1180, 1184–1185, 143 L.Ed.2d 258 (1999), the state trial court held the plaintiffs in a second action challenging a tax on

²⁵ The Supreme Court of Texas refers to the exclusion in terms of “the source of their crop failure” (App.14a) when the relevant evidence related to the appearance of cotton after exposure to the drift event, and expert reliance on descriptions consistent with photographs. (App.71a, Subsection G; App.81a-82a).

foreign corporations were precluded by the judgment in an earlier action brought by different plaintiffs. The Supreme Court ruled that if the *per curiam* affirmation by the state supreme court meant to rely on this *res judicata* ground, it was not an independent and adequate state ground because due process forbids binding a nonparty by the judgment in an action to which they were not party. Because there is no sound basis in the law of Texas to exclude all testimony describing damage observed on plants, due process would equally prevent exclusion of petitioners' testimony in pursuit of their state-law tort claims based on Federal regulations.

2. Exclusion of all expert opinion relating to causation was a denial of due process.

This Court has rejected the wholesale exclusion of a particular type of scientific evidence. In *Rock v. Arkansas*, 483 U.S. 44, 61, 107 S.Ct. 2704, 2714, 97 L.Ed.2d 37 (1987), this Court held that a State's "legitimate interest in barring unreliable evidence does not extend to *per se* exclusions" of evidence that may be reliable, as it is in the instant case. The Court based its decision, in part, on the Due Process Clause of the Fourteenth Amendment. *Id.* at 2708–10. Here, the same reasoning justifies remand.

Farmers have experience and training relating to the effect of herbicides on cotton, sufficient to admit their observations under Texas Rules of Evidence, Rule 701. Observations of farmers are relied on, and confirmed by the Texas Department of Agriculture inspector, experts for plaintiff (Dr. Rosenfeld; Dr. Carrillo; Mr. Halfmann) and the defense (Dr. Banks);

and cross-referenced with “hundreds” of photos of damaged plants. (App.67a-68a, Subsections A-B).

It was not asserted by the chemical company in its moving papers that Sendero’s effect on cotton is not easily recognized on visual inspection. Nor did the respondent chemical company, in its moving papers, object to admission of the farmers’ testimony. On remand, the petitioners can lay a proper foundation to testify that their observations of the condition of their crops were rationally based on perception.

By requiring the same degree of proof of causation that applies to human exposure to toxic substances ignores that botanical fact that every plant bears silent witness to the impact of Sendero.²⁶ The farmers, after years in their specialty, and the experts who specialize in the physiology of cotton or the impact of herbicides are abundantly qualified to compare the unique effects of various herbicides to the condition of cotton observed, photographed and reported by numerous witnesses after the drift event.²⁷

Unlike human physiology, no post-mortem exam was required to recognize the impact of Sendero on

26 The state court holds that the proof required from injured plaintiffs in a toxic-exposure case is also required for injured crops in an herbicide-drift case although plant physiology is far less complex. (App.15a-16a).

27 The Supreme Court of Texas stretches to be the first judicial authority to apply human epidemiology standards to herbicide damage, but fails to acknowledge expert testimony in the record that Sendero’s phytotoxicity occurs at levels undetectable by standard lab testing, and a dose rate as low as one part per billion of Sendero is phytotoxic for cotton. (App.15a-16a; but *cf.* App.69a, Subsection D).

cotton plants. Nor are there multiple potential causes for the damage caused by herbicides that are designed to cause altered broadleaf growth. Easy visual observation shows the altered growth pattern expected from the ingredients unique to Sendero. There was no justification for changing the burden of proof or excluding evidence of an agency of harm—a high volume Sendero drift.

B. Petitioners were deprived of their rights and remedies by changing the standard for opposition to a no-evidence motion for summary judgement.

Questions of fact are not insulated from review by the language of 1257(a). It was once common to state that questions of fact antecedent to a determination of federal rights were beyond the Court's jurisdiction, but modern decisions have reduced this view to a postscript. The Court has preserved jurisdiction to review fact questions in order to ensure its full power to protect federal rights effectively. The appropriate relief is to vacate the judgment of the Supreme Court of Texas and remand for further proceedings. *Time, Inc. v. Firestone*, 424 U.S. 448, 464, 96 S.Ct. 958, 970, 47 L.Ed.2d 154.

Denial of due process results from the arbitrary ruling that lab tests, which are of uncertain accuracy and sensitivity, are required to prove the impact of herbicide on cotton plants. On the contrary, retained experts in this agricultural specialty, for both petitioners and respondent, rely on visual inspection to

identify herbicide impact.²⁸ By demanding more evidence of herbicide damage from the farmers, the decision raised the bar for the party opposing summary adjudication.²⁹

The decision by the Supreme Court of Texas changed the standard for ruling on a no-evidence motion for summary judgment, from requiring only that the non-moving party produce “more than a scintilla” of evidence of a material factual dispute, to now requiring the same party to produce “enough” evidence, inviting trial court judges to weigh evidence in opposition to a no-evidence motion.³⁰ Due process at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner on the exclusion of testimony from the petitioners.

Requirements of due process apply to state court enforcement of state rights. State procedure can never be independent of the requirements of due process. In *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702, 130

28 Dr. Banks reported “Sendero damage” based on visual observations in fields in Mitchell County months after the drift event. (App. 67a-68a).

29 The Supreme Court of Texas acknowledges that positive lab tests are evidence of Sendero’s presence in some areas—but were not evidence of its presence “anywhere else.” (App.18a, n.7). This excludes circumstantial evidence and raises the quantum of proof required in opposition to a “no-evidence” motion for summary judgment.

30 The decision mistakenly notes that only three photographs of plant damage are part of the record. (App.4a, n.2). The experts, on the contrary, relied on “hundreds” of photographs of damaged cotton plants. (App.4a, n.2).

S.Ct. 2592, 177 L.Ed.2d 184 (2010), the Florida Supreme Court reversed the court of appeals, ruling that a beach restoration and nourishment plan did not take the property of littoral owners. The petitioner sought rehearing because the decision itself was an unconstitutional taking. A request for rehearing was denied. The Court recognized that ordinarily it will not consider an issue first presented to a state court by a petition for rehearing, but added: “[W]here the state-court decision itself is claimed to constitute a violation of federal law, the state court’s refusal to address that claim put forward in a petition for rehearing will not bar our review.” *Id.* at 560 U.S. 712, 130 S.Ct. 2600, n. 4. Here, a denial of due process results from entry of judgment without allowing the petitioners to introduce evidence to contradict the moving party’s evidence or address the issues raised for the first time in the decision of the Supreme Court of Texas, *e.g.*, exclusion of farmers’ testimony; and heightened burden to oppose summary adjudication.

The appropriate test for review was later adopted in *Demorest v. City Bank Farmers Trust Company*, 321 U.S. 36, 64 S.Ct. 384, 88 L.Ed. 526 (1944). There, a New York statute provided rules for apportioning the results of mortgage salvage operations between the income and principal beneficiaries of property held in trust. The statute was challenged by beneficiaries of trusts that had been established before the legislation was enacted, on the ground that it interfered with rights established by a state court decision that had intervened between creation of the trusts and passage of the statute. The state court rejected the attack “on the ground that appellants never possessed under New York law such a property right as they

claim has been taken from them.” The Supreme Court limited review to the demand that the ruling have a fair or substantial basis in state law. *Id.* at 321 U.S. 42, 64 S.Ct. 388. This standard for review should result in remand to hear the foundation for testimony from petitioner farmers about observed damage.

It should be appreciated that the decision of the Supreme Court of Texas cloaked in scientific vernacular is in direct conflict with the accumulated experience, training and observations of the TDA inspector and farmers. Moreover, the Supreme Court of Texas erects an unrealistic burden of proof under circumstances of a widespread agricultural setting, rendering impossible a finding of liability against a chemical trespasser. Most troubling is the introduction of an impermissible weighing process for judges on summary judgment.³¹

“Due process at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). What process is due is measured under a “flexible standard” that depends on “the practical requirements of the circumstances.” *Id.* Deciding the instant case on a basis never advanced in the moving papers offends this standard.

The *Mathews* standard includes three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government’s

³¹ See discussion about limited photographs of damaged plants, and limited positive lab tests. (App.4a ,17a).

interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews*, 424 U.S. at 335, 96 S.Ct. 893. *Accord, Mosley v. Texas Health & Hum. Servs. Comm'n*, 593 S.W.3d 250, 265 (Tex. 2019). Denial of due process results from excluding petitioners' testimony and the retroactive and arbitrary imposition of a heightened burden of proof on the petitioners. Because the respondent destroyed healthy plant growth, the heightened requirement to test and measure the destruction, rewards the tortfeasor.

The standard for due process in the context of summary adjudication demands that the petitioners' evidence is to be believed, and all justifiable inferences are to be drawn in their favor. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-159, 90 S.Ct. 1598, 1608-1609, 26 L.Ed.2d 142 (1970). This required the testimony of the petitioners and experts to be believed. On the contrary, the Supreme Court of Texas excluded their testimony and made inferences against the petitioner farmers, deciding they did not take enough photos of plant damage or obtain enough lab results showing the presence of the unique ingredients of Sendero.

This Court recognizes that the trial courts should act with caution in granting summary judgment and may deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257, 68 S.Ct. 1031, 1034, 92 L.Ed. 1347 (1948). That conservative course was forsaken by the Supreme Court of Texas.

Texas law has always emphasized that trial courts must not weigh the evidence at the summary judgment

stage. *See Gulbenkian v. Penn*, 151 Tex. 412, 252 S.W.2d 929, 931 (1952); 3 McDonald, TEXAS CIVIL PRACTICE § 18.26, at 499 (Allen et al., eds. 1992). Instead, a trial court's only duty at the summary judgment stage is to determine if a material question of fact exists. *See Gulbenkian*, 252 S.W.2d at 931. There is no justification for the arbitrary departure from this traditional demarcation between factfinder and judge by enabling trial courts to weigh evidence at the summary judgment stage. *Huckabee v. Time Warner Ent. Co. L.P.*, 19 S.W.3d 413, 422 (Tex. 2000). Whether it was three photos of plant damage, or three hundred; three lab tests or three dozen, in the context of a no-evidence motion, the petitioners showed damage to cotton sufficient to defeat the motion.³²

Commentators have agreed that trial judges cannot determine the “caliber and quantity” of evidence without performing some of the functions of a finder of fact. *See Issacharoff & Loewenstein, Second Thoughts About Summary Judgment*, 100 YALE L. J. 73, 85 (1990); Mullenix, *Summary Judgment: Taming the Beast of Burdens*, 10 AM. J. TRIAL ADVOC. 433, 462 (1987). Nothing justifies the abrupt departure in Texas.

³² See reference to the evidence of damage to cotton plants. (App.4a, 17a).

C. Petitioners were deprived of due process by changing the law *ex post facto*, disallowing recovery of nominal damages, and increasing the non-movant's burden.

1. Nominal damages have been allowed for trespass in Texas for more than one hundred and sixty (160) years.

Denial of due process rights “need not be by legislation.” It is the duty of the Supreme Court of Texas to follow the law as established in that jurisdiction, as it relates to private property, including the right to nominal damages for trespass. A denial of due process results from unjustified change to remedial rules in this retroactive fashion. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 678-679, 50 S.Ct. 451, 453-454, 74 L.Ed. 1107 (1930). The Court said that its concern was “solely with the question whether the plaintiff has been accorded due process in the primary sense—whether it has had an opportunity to present its case and be heard in its support.” 281 U.S. at 681, 50 S.Ct. at 454 (*per* Brandeis, J.). A description of the condition of their cotton plants by the petitioners was not heard, and there can be no justification for the exclusion.

The law did not require the petitioner farmers to raise more than a scintilla of evidence of damage to cotton plants because injury and nominal damages are presumed in trespass cases. Trespass is the misfeasance or wrongful act, and the “injury is the result of the trespass” rather than a part of it. *Lyle v. Waddle*, 188 S.W.2d 770, 773 (Tex. 1945). For more than a century in Texas, trespass against a possessory interest has not required actual injury to be actionable

and may result in an award of nominal damages. *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 12 n. 36 (Tex. 2008)); *see also Champion v. Vincent*, 20 Tex. 811, 815 (1858) (“The law supposes that every trespass, committed upon property, is necessarily attended with some damage, however inconsiderable the injury; and hence the right to a recovery of damages for a trespass cannot be denied.”)³³

2. Denial of due process results from changing remedial rules in retroactive fashion and usurpation of the legislative function.

The judicial branch is designed to resolve legal disputes and to ensure that the other branches do not violate the constitution. Judicial review, however, is not unlimited. Since the first articulation of the doctrine of judicial review in *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787), courts have refused to exercise that power if the constitution assigns the matter to the legislative branch, or the constitution does not provide a judicially discoverable or manageable standard, or resolution of the matter involves policy choices. Such matters are deemed political questions and are nonjusticiable.

Here, the Supreme Court of Texas eliminated availability of nominal damages for trespass without prompting, but went further. The decision amplifies the burden of proof for the victims of herbicide

³³ The Supreme Court of Texas refers to “trivial” damages caused by the Sendero drift, but ignores the availability of nominal damages for trespass and enters judgment for the respondent. (App.26a; App.31a).

trespass, abrogating *Pitchfork Land & Cattle Co. v. King*, 346 S.W.2d 598 (Tex. 1961) without justification. At the same time, the decision imposes new hurdles for those whose crops are damaged in the field, effectively reversing *International Harvester Co. v. Kesey*, 507 S.W.2d 195, 197 (Tex. 1974), without analysis or explanation. The taking results from the sudden demand that farmers catch the trespasser in the act, and disallowance of circumstantial evidence of the results of the trespass. Dramatic changes in the law imposed by a single, overbroad decision of the Supreme Court of Texas impermissibly usurps the legislative role by altering Texas Rule of Civil Procedure, Rule 166a(c), providing in pertinent part, that:

The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response.

Id. (Emphasis added)

The Supreme Court of the United States recognized limitations on the power of courts to change

the law in the seminal case, *Marbury v. Madison*, in which it first adopted the concept of judicial review:

It is scarcely necessary for the court to disclaim all pretensions to [intermeddle with the prerogatives of another branch]. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to enquire how [other branches] perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to [another branch], can never be made in this court.

5 U.S. (1 Cranch) 137, 170, 2 L.Ed. 60 (1803).

The changes wrought in the long-established law of Texas were not briefed by the parties but flowed from avidity favoring the respondent chemical company. The changes to the law imposed by the Supreme Court of Texas' decision should be reserved to the Legislature.

D. The authority of the EPA was nullified by imposing on the petitioners an insurmountable burden of proof of herbicide damage to crops.

When due process was denied by the Supreme Court of Texas, federal statutory law was nullified in the process. Despite unequivocal instructions and clear-cut warnings from the EPA, the Supreme Court of Texas is the first judicial body to reject the EPA's

authoritative determination that Sendero causes damage to cotton plants.³⁴

EPA is responsible under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) for regulating pesticides. 7 U.S.C. §§ 136-136y. Specific requirements for pesticide labels are found in the Code of Federal Regulations. 40 C.F.R. Part 156, *et seq.*

Preliminarily, 40 C.F.R. § 152.3 defines a pesticide as “any substance or mixture of substances . . . intended for use as a plant regulator, defoliant, or desiccant In turn, 40 C.F.R. § 152.5 defines pests as

An organism . . . under circumstances that make it deleterious to man or the environment, if it is:

. . . .

(c) Any plant growing where not wanted

Id.

In the instant setting, Mesquite trees in ranchland pastures are the pest to be destroyed. Unfortunately, the targeted pest is often found near cotton planted by neighboring farmers.

The authority of EPA to control the labeling of pesticides is spelled out in 40 C.F.R. § 156.10. The following applies:

³⁴ The evidence is uncontested that the drift event involved over 3,300 gallons of Sendero applied by the respondent during high winds blowing *toward* petitioners' cotton fields. (App.45a). The Sendero label mandates that Sendero should be applied only when the *wind is blowing away* from sensitive crops. (App.89a).

(a) General —

(1) Contents of the label. Every pesticide product shall bear a label containing the information specified by the Act and the regulations in this part. The contents of a label must show clearly and prominently the following:

....

(vii) Hazard and precautionary statements as prescribed in subpart D of this part for human and domestic animal hazards and subpart E of this part for environmental hazards.

(viii) The directions for use as prescribed in paragraph (i) of this section

Id.

The EPA is authorized to dictate precautions for specific hazards in 40 C.F.R. § 156.80, which provides in pertinent part (emphasis added):

(a) Requirement. Each product is required to bear hazard and precautionary statements for environmental hazards, including hazards to non-target organisms, as prescribed in this subpart. Hazard statements describe the type of hazard that may be present, while precautionary statements direct or inform the user of actions to take to avoid the hazard or mitigate its effects.

Id.

40 C.F.R. § 156.85, relating to Non-target Organisms, provides in pertinent part:

(a) Requirement. Where a hazard exists to non-target organisms, EPA may require precautionary statements of the nature of the hazard and the appropriate precautions to avoid potential accident, injury, or damage.

(i) Directions for Use —

(1) General requirements —

(i) Adequacy and clarity of directions. Directions for use must be stated in terms which can be easily read and understood by the average person likely to use or to supervise the use of the pesticide. When followed, directions must be adequate to . . . prevent unreasonable adverse effects on the environment.

(2) Contents of Directions for Use. The directions for use shall include the following, under the headings *Directions for Use*:

....

(ii) Immediately below the statement of use classification, the statement "It is a violation of Federal law to use this product in a manner inconsistent with its labeling."

Id.

That required language appears in the Sendero label, under the heading *Directions for Use*.

....

- (x) Any limitations or restrictions on use required to prevent unreasonable adverse effects, such as:

....

- (C) Warnings as required against use on certain crops, animals, objects, or in or adjacent to certain areas.

(App.88a).

In relevant part, the label mandates:

Avoiding Injury to Non-Target Plants: Do not aerially apply Sendero within 50 feet of a border downwind (in the direction of wind movement), or allow spray drift to come in contact with, any broadleaf crop or other desirable broadleaf plants, including, but not limited to, alfalfa, cotton, dry beans, flowers, grapes, lettuce, potatoes, radishes, soybeans, sugar beets, sunflowers, tobacco, tomatoes or other broadleaf or vegetable crop, fruit trees, ornamental plants, or soil where sensitive crops are growing or will be planted. Avoid application under conditions that may allow spray drift because very small quantities of spray may seriously injure susceptible crops.

(App.88a-89a, *Use Precautions and Restrictions*. Emphasis added).

The label for Sendero, as it was applied in Mitchell County by the defendant chemical company provided, in part:

Avoid application under conditions that may allow spray drift because very small quantities of spray, which may not be visible, may injure susceptible crops. This product should be applied only when the potential for drift to adjacent sensitive areas (e.g., residential areas, bodies of water, nontarget crops and other plants) is minimal (e.g., when wind is blowing away from the sensitive areas

(App.89a, *Precautions for Avoiding Spray Drift*. Emphasis added).

It is undisputed that the respondent chemical company applied Sendero, however, when the wind was blowing toward cotton. (App.19a-20a, “heavy south wind”; “affected fields are north of the Spade Ranch”.)

This case presents questions as to the preemptive effect of administrative regulations and the interplay of state and environmental law. It is apparent that the Supreme Court of Texas had before them a record that amply demonstrated: 1.) The respondent applied a large volume of toxins during adverse weather conditions (high winds and high temperatures) which the EPA dictated should preclude aerial application³⁵; and 2.) The respondent ignored the EPA mandate to apply Sendero only when the wind is blowing away from sensitive areas (cotton fields).³⁶ Yet the Supreme Court of Texas excluded farmers’ observations of herbicide damage symptoms and expert opinions to conclude no evidence of damage by Sendero was present in the record. Because the respondent applied Sendero

35 App.88a-89a.

36 App.89a.

in a manner inconsistent with its label, the violation of Federal law requires a result different from that reached by the state court.³⁷

A petition for certiorari is appropriately granted where, as here, the case presents questions as to interplay of state and federal environmental law. *See Kossick v. United Fruit Co.*, 365 U.S. 731, 733, 81 S.Ct. 886, 889, 6 L.Ed.2d 56 (1961), *rehearing denied*, 366 U.S. 941, 81 S.Ct. 1657, 6 L.Ed.2d 852. The changes made to the law in Texas eviscerate the federal law pronounced on the Sendero label. Incomprehensively, the decision mandates collection of extensive and expensive evidence of dubious weight (modeling and lab tests) to prove what is dictated by the EPA on the label, *i.e.*, “very small quantities” of Sendero “seriously injure” cotton.³⁸

Jurisdiction is available when there is a not insubstantial claim that any variety of federal law applies to require a result different from that reached by the state courts. In addition to federal statutes and treaties, this jurisdiction clearly embraces claims of the preemptive effects of administrative regulations. Certiorari was granted without further comment on jurisdiction where a state court disposition of property conflicted with federal regulations. *See Yiatchos v. Yiatchos*, 376 U.S. 306, 313, 84 S.Ct. 742, 747, 11 L.Ed. 2d 724 (1964) (A judgment of the Supreme Court of Washington that failed to apply federal regulations

³⁷ The Supreme Court of Texas ignores the Sendero label warning that the product “should be applied only . . . when wind is blowing away from the sensitive areas.” (App.89a).

³⁸ App.88a-89a.

to determine rights of the parties was reversed and the matter was remanded.)

E. The Chief Justice of the Supreme Court of Texas should have recused himself from this case where the respondent chemical company was being defended by the same law firm that defended him against a charge of judicial misconduct and provided him substantial direct financial benefits.

Chief Justice Hecht should have recused himself based on his long personal relationship with Jackson Walker, the same firm defending the respondent. At the latest, the relationship began when that firm defended (then) Justice Hecht before the State Commission on Judicial Conduct in 2006. The relationship continued to payment to Jackson Walker of more than \$300,000 from the jurist's election campaign funds in 2007.³⁹ A discount on his bill or legal fees resulted in a fine of \$29,000 levied by the Texas Ethics Commission on December 4, 2008. The controversy continued after a plea in intervention and motion to disqualify the Attorney General's office in 2014 for failure to collect the \$29,000 fine imposed against Chief Justice Hecht.⁴⁰

39 The Sworn Complaint before the Texas Ethics Commission, dated July 23, 2007, at App.59a-62a, was discovered in the records of the Texas Ethics Commission after the petitioners' motion for rehearing was denied.

40 App.90a-99a (Plea in Intervention: App.90a (Cause no. D-1-GN-09-000251, District Court of Travis County, 250th Judicial District)).

The Due Process Clause entitles a person to “an impartial and disinterested tribunal” in civil cases. *Marshall v. Jerrico*, 446 U.S. 238, 242, 100 S.Ct. 1610, 1613, 64 L.Ed.2d 182 (1980). There, the Court dictated that:

The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. . . . At the same time, it preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Id. (Emphasis added)

In *Caperton v. A.T. Massey Coal Co., Inc.* 556 U.S. 868, 886, 129 S.Ct. 2252, 2265, 173 L.Ed.2d 1208 (2009), the Court mandated that, “The proper constitutional inquiry is ‘whether sitting on the case then before the Supreme Court of [Texas] “would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.’” *Id.* at 886. In *Caperton* significant financial dealings between the Justice and the coal company caused the Court to send the matter back for consideration by the reconstituted state court. Given the duration of the Chief Justice’s relationship with the firm representing the respondent and the sum of the fees and campaign contributions involved, the appearance of

temptation to lose “balance” would not be unblushingly denied.⁴¹

More recently, in *Williams v. Pennsylvania*, 579 U.S. 1, 136 S.Ct. 1899, 195 L.Ed.2d 132 (2016) the Supreme Court found that the right of due process was violated when a Justice of the Supreme Court of Pennsylvania who had a “significant, personal involvement” in the same case sat on arguments and joined in reaching a decision, because the previous contact gave rise to an impermissible risk of personal bias. The party was entitled to “a proceeding in which he may present his case with assurance” that no member of the court is “predisposed to find against him.” *Id.* at p. 579 U.S. 16, 136 S.Ct. 1910.

Williams was remanded to the Pennsylvania Supreme Court, notwithstanding the fact that the Justice did not cast a deciding vote, but merely participated in the panel’s deliberations. *Id.* That Justice’s participation was sufficient to taint public confidence in the proceedings and constitute reversible error. *Ibid.* The same taint is present on the instant facts.

In Texas, the Canons of Judicial Conduct, Canon 2, entitled *Avoiding Impropriety and the Appearance of Impropriety in All of the Judge’s Activities* dictates that, in pertinent part:

- A. A judge shall comply with the law and should act at all times in a manner that promotes

⁴¹ The sworn complaint incorporates a statement of facts that points out the bill to defend Justice Hecht was “approximately \$450,000.” The firm discounted its legal fees by “more than \$100,000” and the discount became the basis for an action before the Texas Ethics Commission for violations of the Elections Code. (App.59a-61a).

public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

....

Id.

It should be conceded that by taking part in arguments and assigning the opinion to his colleague Justice Blacklock, the Chief Justice blithely ignored both Section A and Section B of Canon 2. In light of the turmoil surrounding his relationship with the Jackson Walker firm, Chief Justice Hecht should have recused himself from a matter involving that firm.



CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the petitioners respectfully urge this honorable Court to grant certiorari, and, after briefing and argument, vacate the judgment of the Supreme Court of Texas and remand the matter for further proceedings.

Respectfully submitted,

Don C. Burns
Counsel of Record
Cody McCabe
Matt Johns
LAW OFFICE OF BURNS & MCCABE
1109 S. Abe
San Angelo, TX 76903
(325) 227-8663
law@burnsmccabelaw.com

Counsel for Petitioners

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