CONCUR; Opinion Filed August 20, 2021

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00274-CV

STEWARD HEALTH CARE SYSTEM LLC AND SOUTHWEST GENERAL HOSPITAL, LP, Appellants
V.
FRANK SAIDARA, Appellee

On Appeal from the 193rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-18-16862

CONCURRING OPINION

Before the Court sitting En Banc.
Opinion by Justice Schenck

I concur in the majority's decision to affirm the trial court's order granting the special appearance of a defendant against whom no plaintiff has pled to have committed any tort in Texas. My opinion that follows is comprised of two distinct parts, merits in Part I and supplement in Parts II, III, and IV. In the first part, I explain my concurrence with the majority's analysis of the merits of this case. In the second part, I acquit myself of my ethical and constitutional obligations to the parties to disclose to them my concerns about the process by which this *en banc* decision was reached.

PART I: THE MERITS

I agree, for the most part, with the majority's reasoning regarding the scope of appellate review of the record of a special-appearance ruling in harmony with rules of civil procedure and controlling supreme court authority. However, I believe the majority's interpretation to be too strict in it that it would appear to restrict the trial court from admitting evidence presented at the hearing in support of the exercise of jurisdiction without a particularized, supporting pleading. Further, even if the plaintiffs had met their burden to plead and prove sufficient allegations to bring the defendant within the provisions of the Texas long-arm statute, I would conclude the exercise of jurisdiction over Saidara would offend traditional notions of fair play and substantial justice.

Moreover, I write to address arguments raised in dissenting and concurring opinions. In spite of our directive to affirm on any meritorious ground supported by the record, the dissenting justices would conclude the trial court has jurisdiction over a defendant no plaintiff has shown to have committed any tort in Texas. I disagree with that conclusion and with my colleagues' reasoning, which both imposes a burden to negate an allegation that is not present at the time the special appearance must be filed and expands the scope of appellate review of the record of a special-appearance ruling in conflict with rules of civil procedure and controlling supreme court authority. Additionally, some of the dissenting justices engage in what I view as an unnecessary discussion of the fiduciary shield doctrine.

I. Scope of Review of Trial Court's Special Appearance Ruling Includes Pleadings and Evidence

The majority focuses on the adequacy of the pleadings and the burdens of the parties in a special appearance, which raise what I believe to be the appropriate preliminary matter to address: the scope of our review.

The Texas long-arm statute permits a court to compel the appearance of a non-resident defendant if he or she: (1) commits a tort in whole or in part in this state; (2) contracts with a Texas resident for either party to perform a contract in whole or in part in this state; or (3) recruits Texas residents for employment. *See* TEX. CIV. PRAC. & REM. CODE § 17.042. Since the supreme court's decision in *Moki Mac River Expeditions v. Drugg*, the respective burdens and method of proof have been clear. 221 S.W.3d 569, 574 (Tex. 2007). The defendant bears the burden of negating all factual allegations *in the petition* that would support the exercise of jurisdiction. *Id.* The plaintiff may then introduce evidence to support its allegations. *See* TEX. R. CIV. P. 120a(3). Where there is no allegation, there is no duty to negate. *See Moki Mac*, 221 S.W.3d at 574. An allegation coming from outside the plaintiff's pleadings is insufficient to create a duty to negate. *See id.* While the plaintiff may make additional allegations and introduce evidence at the resulting hearing, an allegation, unsupported by actual proof or any corresponding duty to negate by the opponent, is just that—an allegation.

In their petition, Steward Health and Southwest General alleged:

> Saidara visited Texas in connection with the sale of Southwest General's assets and participated in numerous communications (both electronically and telephonically) with counterparties in Dallas during which he misrepresented Prospect's intention to purchase Southwest General.[1]

In his special appearance, Saidara challenged the sufficiency of the jurisdictional allegations in the petition.

The majority concludes the allegations here are insufficient and that we may not look to the response to Saidara's special appearance. I agree. However, where I disagree is with any implication that we would ignore any evidence the plaintiffs brought forth to support any additional allegations in their response.

In her concurring and dissenting opinion, Justice Osborne concludes the allegations here are sufficient but that even if they are not, we may look to the response to Saidara's special appearance, in which Steward Health and Southwestern General *allege* Saidara not only traveled to Texas but that he "also engaged in many telephonic and electronic communications with individuals in Texas regarding the transaction" and that "*[d]uring his visit to Texas* and his other communications with parties in Texas, Saidara made misrepresentations to Plaintiffs, which form a material part of Plaintiff[s'] fraud claim." (Emphasis added.) Thus, according to this concurring and dissenting opinion, Steward Health and Southwestern General alleged that Saidara committed a tort in Texas. Critically,

[1] Further, although Steward Health and Southwest General amended their petition the day before filing their response, they did not change the allegation quoted above and instead only added the following sentence: Saidara's communications were intentional and were directed to Steward in Texas.

however, this concurring and dissenting opinion does not even suggest, much less explain, how Saidara had an obligation to negate an allegation that was not present when he was obliged to file his special appearance.

Although Steward Health and Southwest General's response included the more detailed allegations about Saidara's communications, it did not include any additional evidence to support these more detailed allegations. And, the parties do not contend that the hearing conducted on Saidara's special appearance was an evidentiary hearing. *See Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 783–84 (Tex. 2005) (declining to presume special-appearance hearing was evidentiary when parties conceded that it was not). While the trial court was free at the hearing to consider allegations if it wanted, its decision and ours turn on proof and presumptions.

The majority overrules prior decisions of this Court to quite properly conclude that Rule 120a does not permit considering jurisdictional "allegations" made in a document captioned "response." *See, e.g.*, *Jani-King*, 2016 WL 2609314, at *4; *see, e.g.*, *Invasix, Inc. v. James*, No. 05-19-00494-CV, 2020 WL 897243, at *4 (Tex. App.—Dallas Feb. 25, 2020, no pet.) (mem. op.) ("[W]e have held the plaintiff's original pleading as well as its response to the defendant's special appearance can be considered in determining whether the plaintiff satisfied its burden."); *Munz v. Schreiber*, No. 14-1700687-CV, 2019 WL 1768590, at *5 n.4 (Tex. App.—Houston [14th Dist.] Apr. 23, 2019, no pet.) (mem. op.) (considering pleadings and special

appearance response); *N. Frac Proppants, II, LLC v. 2011 NF Holdings, LLC*, No. 05-16-00319-CV, 2017 WL 3275896, at *2 (Tex. App.—Dallas July 27, 2017, no pet.) (mem. op.) ("We draw these allegations from plaintiffs' live petition and their trial court brief opposing defendants' special appearance.").

In contrast, Justice Osborne relies on language from a prior decision of this Court to conclude that Rule 120a contemplates considering jurisdictional "allegations" made in a document captioned "response." *See, e.g.*, *Jani-King Franchising, Inc. v. Falco Franchising, S.A.*, No. 05-15-00335-CV, 2016 WL 2609314, at *4 (Tex. App.—Dallas 2016, no pet.) (mem. op); *see, e.g.*, *Invasix*, 2020 WL 897243, at *4 ("[W]e have held the plaintiff's original pleading as well as its response to the defendant's special appearance can be considered in determining whether the plaintiff satisfied its burden."); *Munz v. Schreiber*, No. 14-1700687-CV, 2019 WL 1768590, at *5 n.4 (Tex. App.—Houston [14th Dist.] Apr. 23, 2019, no pet.) (mem. op.) (considering pleadings and special appearance response); *N. Frac Proppants, II, LLC v. 2011 NF Holdings, LLC*, No. 05-16-00319-CV, 2017 WL 3275896, at *2 (Tex. App.—Dallas July 27, 2017, no pet.) (mem. op.) ("We draw these allegations from plaintiffs' live petition and their trial court brief opposing defendants' special appearance.").

The question raised by the majority's interpretation is what role those allegations play in the special appearance decision if they are supported by evidence or subject to the burden to negate them? The question posed by Justice Osborne's

interpretation is what role those allegations play in the special appearance decision if they are not supported by evidence or subject to the burden to negate them?[2] Of course, we could not conclude a defendant had the burden to negate unsupported allegations made only in a plaintiff's response and not his or her pleading.[3] Any such decision would run counter to supreme court authority. *See Moki Mac*, 221 S.W.3d at 574.

Moreover, such a decision would be inconsistent with the express language of the rule itself, which does not provide that jurisdictional allegations contained solely in a document captioned "response," standing alone, will suffice. The rule provides:

> The court shall determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony.

TEX. R. CIV. P. 120a(3).

Indeed, the Texas Supreme Court held, "Because the plaintiff defines the scope and nature of the lawsuit, the defendant's corresponding burden to negate jurisdiction ***is tied to the allegations in the plaintiff's pleading***." *Kelly v. Gen.*

---

[2] In each of the cases cited by Justice Osborne, the allegation was supported by evidence presented at the hearing. *See, e.g.*, *Jani-King*, 2016 WL 2609314, at *4 (jurisdictional allegations upon which case was decided were taken from original petition); *see also Flanagan v. Royal Body Care, Inc*., 232 S.W.3d 369, 376 (Tex. App.—Dallas 2007, pet. denied) (evidence to support allegations attached to response).

[3] However, a plaintiff may amend its pleadings as Steward Health and Southwest General did here. *See* TEX. R. CIV. P. 63. At that point, the defendant may amend its special appearance to address the additional allegations. *See* TEX. R. CIV. P. 120a; *Dawson-Austin v. Austin*, 968 S.W.2d 319, 321–22 (Tex. 1998).

Interior Constr., Inc., 301 S.W.3d 653, 659 (Tex. 2010) (emphasis added). The supreme court further clarified our scope of review:

> While the pleadings are essential to frame the jurisdictional dispute, they are not dispositive. Rule 120a requires a special appearance to be made by sworn motion, TEX. R. CIV. P. 120a(1), and also requires the trial court to "determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, ***such affidavits and attachments as may be filed by the parties***, the results of discovery processes, ***and any oral testimony***," TEX. R. CIV. P. 120a(3). Even so, this additional evidence merely supports or undermines the allegations in the pleadings.

Id. at 658 n.4 (citing TEX. R. CIV. P. 120a) (emphasis added).

As reflected above, the rule clearly contemplates consideration of—and the supreme court further underscored we must consider—things other than just the pleadings, namely, evidence. *See id.* Evidence is typically attached to a special appearance response. Our own decision in *Golden Peanut, Co. LLC v. Give & Go Prepared Foods Corp.*, No. 05-18-00626-CV, 2019 WL 2098473, at *4 (Tex. App.—Dallas May 14, 2019, no pet.) (mem. op.), touched on this notion:

> Because the plaintiff defines the scope and nature of the lawsuit, ***the defendant's corresponding burden to negate jurisdiction is tied to the allegations in the plaintiff's pleading*** . . . . While rule 120a requires the trial court to determine the special appearance based on the pleadings and certain specified evidence, this additional evidence merely supports or undermines the allegations in the pleadings.

Id. (emphasis added).

Thus, when courts determine a special appearance, the rule instructs that they consider pleadings, stipulations, affidavits and attachments, discovery and any oral testimony. *See* TEX. R. CIV. P. 120a(3). A response to a special appearance is not a

"pleading." *See* TEX. R. CIV. P. 45 (defining "pleadings" to include petition and answer); *see also In re SAP*, 156 S.W.2d 574, 576 n.3 (2005); *Jobe v. Lapidus*, 874 S.W.2d 764, 765–66 (Tex. App.—Dallas 1994, writ denied); *Eidson v. Perry Nat'l Bank*, 278 S.W.2d 556, 557 (Tex. App.—Waco 1955, no writ) (pleadings define the issues to be tried and are distinguished from evidence). But it is a mechanism for introducing affidavits and discovery, which is contemplated by the rule. It is obviously impossible for the defendant to carry the burden to "negate" an allegation that has not been lodged. At the same time, however, the plaintiff has the right to introduce all evidence within the range of "relevance" to the existing pleading. To the extent a wholly new claim or theory would require a pleading, the plaintiff obviously should be required, subject to liberal leave standards to amend.

Accordingly, while I agree with the majority's conclusion that unsupported allegations within a response to a special appearance cannot support a finding of jurisdiction, I would permit a trial court to consider any actual evidence attached to a response or that is otherwise actually presented by the plaintiff to the trial court subject to any objection of surprise and/or request for continuance.

On the other hand, Justice Osborne would perpetuate the imprecise application of the rule, claiming that to determine whether a plaintiff has met its initial burden to plead sufficient allegations to invoke jurisdiction over a nonresident defendant under the Texas long-arm statute, an appellate court looks at the jurisdictional facts pleaded in its petition, as well as the jurisdictional facts alleged

in its response to the nonresident defendant's special appearance. But again, the response is only the vehicle through which the plaintiff introduces evidence to support jurisdiction once the burden shifts back to the plaintiff. *See Kelly*, 301 S.W.3d at 659 & n.6. As the response contained no evidence that Saidara committed any tort, much less one "in Texas" and the pleadings contained no such allegation that Saidara was under a duty to negate, the trial court cannot be reversed on this basis.[4]

Curiously, Justice Osborne adopts an inconsistent attitude towards the response to the special appearance—as apparently within the duty to negate matters raised by the *pleadings* though absent from the pleadings—and the trial court's ability to consider the content of the actual pleadings themselves.[5] Steward Health

---

[4] Contrary to my friend Justice Osborne's opinion, it has long been held an appellate court cannot *reverse* on the basis of error not presented to the trial court. *See In re G.X.H.*, No. 19-0959, 2021 WL 1704234, at *3 (Tex. Apr. 30, 2021) (citing TEX. R. APP. P. 33.1(a), 53.2(f) ("Our rules regarding preservation are clear that, with limited exceptions, a party cannot obtain reversal of a trial court's judgment on appeal based on an error that was never raised in the trial court.").

Moreover, to the extent Justice Osborne argues the supreme court's opinions in *St. John's* and *Horton* would allow us to construe rules of civil procedure liberally, such opinions address preservation and presentation of error at the trial court to an appellate court and not the parties' presentation of their arguments to the trial court. *St. John Missionary Baptist Church v. Flakes*, 595 S.W.3d 211, 214–15 (Tex. 2020) (per curiam) (holding appellant's briefing did not waive consideration of both grounds presented to trial court); *Horton v. Stovall*, 591 S.W.3d 567, 568 (Tex. 2019) (per curiam) (holding where error preserved at trial court, briefing deficiency should not have been fatal to appeal absent time to cure). As an intermediate court we may "question [a supreme court's opinion's] continued vitality in light of [later] opinions," but overruling them is not an option for us. *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 674 (Tex.2004) ("if a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [a lower court] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions" (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)).

[5] It is because of the trial court's ability to consider the content of the pleadings themselves, as well as our directive to affirm on any meritorious ground supported by the record before the court, that I disagree with the majority's comment that because neither Saidara nor appellants raised the forum-selection clause in the special appearance or response thereto, it is inapplicable to our review.

and Southwest General's petition referenced a Clean Team Agreement, which expressly authorized officers and high-level employees of Prospect Medical—including Saidara—to view sensitive materials for Prospect Medical's use in evaluating the proposed transaction, prohibited the unauthorized sharing or dissemination of such materials, and restricted their use of the sensitive information to the purposes permitted by a mutual non-disclosure and confidentiality agreement (Confidentiality Agreement). Saidara attached a copy of the Clean Team Agreement to his special appearance. The Clean Team Agreement specifically referred to the Confidentiality Agreement. The Confidentiality Agreement contained a forum-selection clause providing for disputes to be submitted to and decided by courts in Massachusetts.[6] According to Justice Osborne, however, our review does not include the Confidentiality Agreement because it was attached to the answer filed by Saidara's employer and co-defendant, Prospect Medical, though it was not resubmitted as an attachment to Saidara's own answer.[7]

---

[6] The opening paragraph of the Clean Team Agreement provides in relevant part, ". . . Steward and Prospect wish to enter into this ["Clean Team Agreement"] ***as a supplement to the Confidentiality Agreement*** . . . ." (Emphasis added). As noted by my friend Justice Carlyle in his dissent, the Clean Team Agreement did not include a forum-selection provision, but it clearly referred to the Confidentiality Agreement, which does contain such a provision. Considering that specific reference and the fact that both agreements were executed to address the same transaction and were entered into by the same parties, I would construe the documents as if they formed a single, unified instrument for determining whether the forum-selection provision in the Confidentiality Agreement applied to the Clean Team Agreement. *Cf. Rieder v. Woods*, 603 S.W.3d 86, 102 (Tex. 2020).

[7] Justice Osborne also suggests the trial court could not have properly considered the Confidentiality Agreement because that document was attached to Prospect Medical's pleading and not offered and admitted by the trial court. The authority she cites is inapposite. Moreover, that suggestion ignores the plain text of Rule 120a, which describes the scope of the trial court's review to include "such affidavits *and attachments* as may be filed by the parties." *See* TEX. R. CIV. P. 120a(3).

Turning to the text of Rule 120a again:

> The court shall determine the special appearance on the basis of the *pleadings*, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony.

TEX. R. CIV. P. 120a(3) (emphasis added). Nowhere within this rule are the "pleadings" (plural) limited to the plaintiff's petition or the answer filed by the defendant who files a special appearance. Further, nothing in the trial court's order indicates the trial court so limited its own review. Instead, the order states, explicitly, that its ruling is "[***b*]*ased on the parties'* [***again plural*] *pleadings*** and the declaration submitted by Defendant Frank Saidara." Accordingly, I would conclude the scope of our review includes all pleadings, including the co-defendant Prospect Medical's answer and the attached Confidentiality Agreement with its Massachusetts form-selection clause. *See, e.g.*, *Retzlaff v. Tex. Dep't of Crim. Justice*, 135 S.W.3d 731, 737 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (reviewing court presumes trial court looked at all pleadings in reaching its conclusion).

II. Reviewing the Record Set Forth by Rule 120a, I Would Affirm the Trial Court's Ruling

A. I Would Be Hard-Pressed to Conclude Saidara's Activities Were Purposefully Directed toward Texas

As discussed above, the appellate scope of review begins with the allegations made in the petition:

> Saidara visited Texas in connection with the sale of Southwest General's assets and participated in numerous communications (both electronically and telephonically) with counterparties in Dallas during

> which he misrepresented Prospect's intention to purchase Southwest General.

The foregoing clearly establishes two allegations Saidara was required to negate: (1) he visited Texas; (2) he participated in numerous communications (both electronically and telephonically) during which he misrepresented his employer's intention to purchase Southwest General. Justice Osborne would interpret the petition to allege that *while visiting Texas* Saidara engaged in misrepresentations, and, concomitantly, that Saidara would have been obliged to so read and negate it. The sentence structure does not support such an interpretation. Nor does the parenthetical that describes the communications as both electronic and telephonic. Further, although Steward Health and Southwest General amended their petition the day before filing their response, they did not change the sentence quoted above and instead only added the following sentence: "Saidara's communications were intentional and were directed to Steward in Texas." If anything, this addition only confirms the plain reading of the original petition. If the petition, amended or otherwise, alleged a misrepresentation while in Texas, which it does not, how could such misrepresentations not be "directed towards Steward in Texas," and why would it be necessary to so allege, if it was made while he was physically present?

Justice Osborne cites the rules of civil procedure to support a liberal construction of the petition so as to perform substantial justice, without explaining how the trial court could have erred in reading the petition in keeping with its language and its resulting decision. However, Rule 45's direction is to construe "all

pleadings . . . so as to do substantial justice." Pleadings include both the petition and the answer and thus Rule 45's direction is not to liberally construe a plaintiff's allegation but instead to construe *all* of the pleadings so as to do substantial justice to all parties.

Additionally, although Justice Osborne interprets the allegations in the response as clarifying the allegations made in the petition, as discussed above, such "clarification" is fine so far as it goes, but insofar as it is said to trigger a presumption and a duty to negate on Saidara's part, it is contrary to multiple supreme court decisions, and is not part of the scope of our review, which is limited to the pleadings and evidence reviewed by the trial court. *See Moki Mac*, 221 S.W.3d at 574; *Kelly*, 301 S.W.3d at 659.

In his special appearance, Saidara urged the trial court cannot exercise specific jurisdiction because (a) the alleged activities supporting the claims against him occurred while Saidara was in California acting in the course of his employment with Prospect Medical, (b) all of his alleged wrongful acts were in connection with his employment so he is protected by the fiduciary shield doctrine, and (c) "[Steward Health and Southwest General] have failed to plead any purposeful (wrongful) activities by Saidara originating in Texas." Attached to Saidara's special appearance were his declaration and the Clean Team Agreement.

In his declaration, Saidara declared that he is a resident of California and works at Prospect Medical's offices in California, he does not regularly conduct

business in Texas, he traveled to Texas one time in connection with Prospect Medical's due diligence for the proposed transaction, he was a member of the clean team and had access to the information contained in the virtual clean room, all of his activities in the clean room were in compliance with the terms of the Clean Team Agreement and for legitimate purposes related to the proposed transaction, and at the time he allegedly inappropriately downloaded confidential information or trade secrets he was located in California.

Generally, telephone calls and correspondence as activities directed at the forum state are insufficient to establish purposeful availment. *See, e.g.*, *Fried, Frank, Harris, Shriver & Jacobson, LLP v. Millennium Chems., Inc*., No. 05-16-01132-CV, 2017 WL 3276010, at *6 (Tex. App.—Dallas July 31, 2017, pet. denied) (mem. op.) (contacts through telephone and email communications insufficient to demonstrate purposeful availment); *KC Smash 01, LLC v. Gerdes, Hendrichson, Ltd., L.L.P*., 384 S.W.3d 389, 393–94 (Tex. App.—Dallas 2012, no pet.) (same); *Ahrens & DeAngeli, P.L.L.C. v. Flynn*, 318 S.W.3d 474, 479, 484 (Tex. App.—Dallas 2010, pet. denied) (mem. op.) (same); *see also Holten*, 168 S.W.3d at 791. As the Texas Supreme Court has noted, "changes in technology have made reliance on phone calls obsolete as proof of purposeful availment" because the phone number "no longer necessarily indicates anything about the caller's location" given that the other party may have "forwarded calls or traveled with a mobile phone." *Holten*, 168 S.W.3d at 791. Thus, specific jurisdiction is not necessarily established by

allegations that a nonresident committed a tort in a telephone call. *See id*. at 791–92. For this reason, courts frequently consider "additional evidence regarding the initiator of the call, the location of the recipient, and the knowledge of the caller regarding the recipient's location [as being] relevant in establishing jurisdiction." *See Yong Zhang v. Med-Towel Enters., Ltd.*, No. 03-09-00457-CV, 2010 WL 1404613, at *5 n.1 (Tex. App.—Austin Apr. 8, 2010, pet. denied) (mem. op.).

Here, Saidara declared that he engaged in conversations concerning the transaction in his capacity as the vice president for Prospect Medical, and that these conversations occurred while he was outside of Texas. There is no evidence of how many calls there were, who initiated the calls, where the calls' recipients were located when the calls were received, or Saidara's knowledge of the recipients' locations. As a result, the phone call allegations do not form an adequate basis to conclude that the calls that Saidara participated in, in his corporate capacity, equate to purposeful availment.

Accordingly, I would be inclined to agree with the trial court's reading of the pleadings and its conclusion that, "Saidara has not purposefully directed any

business activities toward Texas, nor has he engaged in any activities that would support the exercise of specific jurisdiction."

However, even if I were inclined to conclude otherwise, I would conclude that the exercise of personal jurisdiction over Saidara would not comport with traditional notions of fair play and substantial justice, as more fully discussed herein.

B. The Exercise of Personal Jurisdiction Over Saidara Would Not Comport with Traditional Notions of Fair Play and Substantial Justice

In all events, as more fully explained *infra*, due process further imposes a requirement that the assertion of jurisdiction "be consistent with traditional notions of fair play and substantial justice," and I would conclude this additional requirement controls here. *See Kelly*, 301 S.W.3d at 657 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).[8] A reviewing court typically considers fair play as it relates to the sufficiency of the defendant's forum contacts after evaluating their quality and collective sufficiency to support personal jurisdiction. In this case, however, the fair play issue is separately affected by the contract—specifically, the Confidentiality Agreement—that gives rise to the underlying claims. For that reason, I would begin

[8] Courts evaluating whether exercising jurisdiction offends traditional notions of fair play and substantial justice should consider the following factors, when appropriate (1) the burden on the nonresident, (2) the interests of the forum in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the international judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several nations in furthering fundamental substantive social policies. *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 155 (Tex. 2013).

with the language from the Confidentiality Agreement by which the plaintiffs alleged they were fraudulently induced to permit access to their proprietary information. That agreement was undeniably before the trial court, included in the "pleadings of the parties," cited by the court in its order under review here, and plainly within the trial court's purview under Rule 120a and our scope of review. *Kelly*, 301 S.W.3d at 658 n.4; *see also, e.g.*, *Black v. Dallas Cty. Child Welfare Unit*, 835 S.W.2d 626, 631 (Tex. 1992); *In re Estate of Guerrero*, 465 S.W.3d 693, 708 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (where court does not specify basis for ruling appellate court affirms on any basis supported by record).[9]

The causes of action asserted against Saidara are fraud, misappropriation of trade secrets, unfair competition (specifically, breach of a confidential business relationship), and violation of the Texas Harmful Access by Computer Act. The allegations against Saidara are that, on behalf of his employer, he misrepresented Prospect Medical's intention to purchase the assets of Southwest General as part of the scheme to obtain Southwest General's trade secrets and other highly confidential information for tortious purposes and that his "surreptitious middle-of-the-night downloading" of the entire contents of the "clean room" was unlawful and constituted a theft of Steward Health's confidential information.

[9] As noted above, in this case the trial court's order explicitly indicates that it *did* consider "the parties' pleadings" in any event.

Soon after Prospect Medical approached Steward Health to express interest in buying the assets of Southwest General, Prospect Medical and Steward Health signed the Confidentiality Agreement in which they agreed they would not disclose the confidential information they learned about each other. Given this sequence of events and this agreement, the parties anticipated the risks associated with disclosing confidential information and acted to mitigate those risks and included steps to confirm how (or at least where) any dispute would be resolved. Prospect Medical included a copy of the Confidentiality Agreement as an exhibit to its special exceptions, original answer, and counterclaim.[10] It provides:

> 16. Jurisdiction. ***In the event a dispute arises concerning any of the provisions of this Agreement, it shall be submitted to and decided by the Courts of the Commonwealth of Massachusetts ("Court")***. Since a public hearing to enforce any of the provisions contained in this Agreement might cause disclosure of Confidential Information contrary to the intent of the Parties, the Parties hereby stipulate that, in the event there is litigation of any of the provisions in the Agreement, the Court file shall be sealed and the Court may issue [a] protective order prohibiting the disclosure of any of the Confidential Information, and limiting the disclosure of any other information obtained though discovery proceedings.

Additionally, Prospect Medical and Steward Health entered, "**as a supplement to the Confidentiality Agreement**," the Clean Team Agreement, which, among other things, allowed the access that is the subject of the alleged unauthorized sharing or dissemination of the materials in the "clean room." That

[10] "The court shall determine the special appearance on the basis of the pleadings . . . ." *See* TEX. R. CIV. P. 120a(3); *see also* TEX. R. CIV. P. 45 (defining "pleadings" to include petition and answer).

supplement covered any documents created that incorporated or used that sensitive information and restricted their use "**solely for the purposes permitted by the Confidentiality Agreement**." Although Steward Health and Southwest General did not attach a copy of the Clean Team Agreement—or the Confidentiality Agreement—to their pleadings, their petition alleges that "before Prospect was able to access any of Plaintiffs' confidential and trade secret information, Prospect was required to enter into [the] Clean Team Agreement." Saidara included a copy of the Clean Team Agreement as an exhibit to his special appearance.

The record further reveals the only party with any stated connections to or with Massachusetts is Steward Health. Meanwhile, the Confidentiality Agreement contains a provision that requires any notices to Steward Health be directed to the attention of its general counsel in Boston, Massachusetts.

Based on the foregoing, I would conclude the parties must have reasonably expected that any litigation between them would not take place in Texas. Indeed, as noted above, the Confidentiality Agreement includes a forum-selection clause designating Massachusetts as the locus of litigation.[11] *See, e.g.*, *Marathon v. A.G. Ruhrgas*, 182 F.3d 291, 295 (5th Cir. 1999) (suit brought by two *non*-signatories to contract containing arbitration clause not reasonably foreseeable to defendant to support specific jurisdiction in Texas despite multiple in-person meetings to discuss

[11] The Clean Team Agreement does not contain a forum-selection clause but instead provides that it is a "supplement" to the Confidentiality Agreement.

underlying project with plaintiffs, allegations of fraud to induce non-signatories funding of project from Texas, and lack of enforceability of arbitration clause as against those plaintiffs, because defendants would have reasonably expected claims to proceed in Sweden in view of arbitration clause); *D'Almeida v. Stork Brabant B.V.*, 71 F.3d 50, 51 (1st Cir. 1995) (indemnification suit brought by distributor of equipment produced by European manufacturer not foreseeable in Massachusetts where manufacturer sent equipment to Massachusetts on distributor's instruction but contract between distributor and manufacturer contained forum-selection clause designating Holland as forum for litigation).

Accordingly, I would conclude the record supports the trial court's conclusion "that the exercise of personal jurisdiction over [] Saidara would not comport with traditional notions of fair play and substantial justice."

III. Parties May Not Engage in Artful Pleading to Avoid a Contract Claim

According to Steward Health and Southwest General, the Clean Team and Confidentiality Agreements are irrelevant to the issue of personal jurisdiction over Saidara because they do not bring a claim for breach of contract and because Saidara was not a party to either agreement. However, such arguments are no more than efforts to prop up the artful pleading appellants attempted to engage in.

A party may not engage in artful pleading to avoid contractual obligations. *See Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 617–18 (Tex. 1986) ("Although the principles of contract and tort causes of action are well settled, often

it is difficult in practice to determine the type of action that is brought. We must look to the substance of the cause of action and not necessarily the manner in which it was pleaded.").

The entire substance of the claims against Saidara is that he gained access to confidential information wrongfully. Such was a foreseeable risk, so foreseeable that the parties actually agreed to the Confidentiality Agreement, which provided a provision for "jurisdiction" of "a dispute . . . concerning any of the provisions of this Agreement." Additionally, Steward Health and Southwest General foresaw the risk of allowing Saidara access to highly sensitive information such that they required the Clean Team Agreement, which specifically referred to the Confidentiality Agreement.

The plaintiffs here are not the first to allege wrongful tortious injuries by defendants only to later reveal or discover their claims are covered by agreements entered into by the parties. *See id.*; *see also Marathon Oil Co*, 182 F.3d 291, 293 n.2 (5th Cir. 1999) (holding "Marathon Oil" not a party to arbitration agreement and unable to compel others to defend suit in Texas where facts underlying suit arose from contractual agreements calling for application of Norwegian law and arbitration in Norway).

Because the injuries alleged here are precisely the risks addressed by the Confidentiality Agreement, which contains a jurisdiction provision agreed to by the parties—and perhaps required by Steward Health, I would conclude this provision

would also independently support the trial court's decision to grant Saidara's special appearance. *See Black*, 835 S.W.2d at 631 ("appellate courts must give effect to the intended findings of the trial court and affirm the judgment if it can be upheld on any legal theory that finds support in the evidence. If no findings of fact or conclusions of law are filed, the reviewing court must imply all necessary fact findings in support of the trial court's judgment.").

IV. Discussion of the Fiduciary Shield Doctrine Is Unnecessary

Separate and apart from the foregoing, Justice Osborne begins her analysis by addressing the fiduciary shield doctrine, a discussion I would pretermit. *See* TEX. R. APP. P. 47.4.

The fiduciary shield doctrine is a judicially created principle that precludes the exercise of personal jurisdiction over nonresident corporate agents or employees who are acting in the forum state in their role as corporate agents or employees. *See* 79 A.L.R.5th 587 (originally published in 2000). The rationale of the doctrine is that it is unfair to force an individual to defend a suit brought against the party personally in a forum where the individual's only relevant contacts are acts performed not for personal benefit but for the benefit of the employer. *See id.* Thus, the fiduciary shield doctrine is an exception to personal jurisdiction authority that evidence of sufficient contacts with the forum state give rise to personal jurisdiction, either general or specific. *See Stull v. LaPlant*, 411 S.W.3d 129, 133–34 (Tex. App.—Dallas 2013, no pet.). However, this Court and other Texas courts of

appeals—although not the Texas Supreme Court—have suggested that a corporate agent can both be held liable and subject to suit (i.e., to personal jurisdiction) for allegedly committing a tort or wrong while engaged in the business of the corporate principal based on the agent's personal acts. *See id.* at 135; *see also Jani-King,* 2016 WL 2609314, at *4 (corporate agents alleged to be acting on their own behalf to usurp opportunity of principal).

Justice Osborne concludes the fiduciary shield doctrine does not protect an employee from the exercise of specific jurisdiction if he is alleged to have engaged in tortious or fraudulent conduct directed at the forum state for which he may be held personally liable—even if the employee's contacts with Texas were performed in a corporate capacity. However, this exception to the fiduciary shield doctrine begs the question: when would a corporate agent not be personally liable for actions his employer directs toward the forum state? Corporations do not have a corporeal existence and can only act through their agents. This "exception to the exception" appears to eviscerate the fiduciary shield doctrine and render it meaningless. Every allegation of a corporate tort would subject at least one individual to a personal capacity suit in a distant forum. While the notion of an employee being subject *both* to suit and to potential liability in such a forum makes sense to me where the employee is not only acting as an agent but on his own behalf, I do not believe this is the appropriate case even to address that question. Accordingly, I cannot agree with Justice Osborne to reach this holding.

V. Conclusion on the Merits

Because I agree with—but find too restrictive—the majority's reasoning and because I would conclude the exercise of jurisdiction over Saidara offends traditional notions of fair play and substantial justice, I concur in the majority's decision to affirm the trial court's order granting Saidara's special appearance.

PART II: PROCESS CONCERNS

I find myself in the unenviable position of being legally and ethically compelled to disclose to the parties my objections to irregularities in the process by which this case was decided. Because these irregularities could readily affect the positions and the rights of the parties before us and have already resulted in inordinate delay in the disposition of this matter, I am obligated to take appropriate action, including the following limited discussion of that process that in my view is necessary to permit the parties to pursue any relief they consider expeditious and appropriate. I will first briefly explain what I believe to be the source of this obligation.

Parties who appear before us are entitled to be heard and to have their cases decided in accordance with the governing rules. This is the irreducible minimum and tautological essence of "due process." The rules by which cases are heard and decided are not a matter of convenience or individual discretion, but a matter of law by which judges, no less than litigants, are obliged both to know and to follow. *Mo. Pac. R.R. Co. v. Cross*, 501 S.W.2d 868, 872 (Tex. 1973) (rules of procedure "have

same force and effect as statutes"). Departures from the governing rules may be the innocent product of confusion, where they are not recurring, or may be the subject of good-faith debate over their proper interpretation or application. Nevertheless, where a court departs from the rules, it literally denies the parties of the process that is "due" and, concomitantly, their right to be heard in accordance with the law. Whether a judge who becomes aware of such a departure is obliged to disclose it to the parties, or take some other action, is a potentially complicated question that may depend on, among other things, the nature of the departure, the posture of the case, and the practical ability to remedy any harm without unreasonable delay. *E.g.*, TEX. CODE OF JUDICIAL CONDUCT Canon 1 ("A judge should participate in . . . enforcing high standards of conduct . . . .").

The Due Process Clause of United States Constitution and the Due Course of Law Guarantee of the Texas Constitution assure litigants in Texas courts that their matters will be decided not only by a judge who is in fact impartial, but who would be perceived as such by a reasonable person with knowledge of the circumstances. Because "[b]ias is easy to attribute to others and difficult to discern in oneself . . . [due process] precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) ("Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of

law itself."); *Caperton v. A.T. Massey Coal*, 556 U.S. 868, 872, 881 (2009) (inquiry turns not on subjective intent, but objective appearance).

Accordingly, judicial action, whether innocently conceived and fairly intended or not, that would nevertheless cause a reasonable, objective observer to question whether the tribunal is "hold[ing] the balance, nice, straight and true" is unconstitutional. *In re Murchison*, 349 U.S. 133, 136 (1955). "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way justice must satisfy the appearance of justice." *Id.* (internal quotation omitted). Obviously, that due process concern applies to appellate justices and tribunals as well. *Williams*, 136 S. Ct. at 1905 ("A multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part."). Thus, my duty to uphold and defend the constitution forbids me to acquiesce or to appear complicit in a process that I understand to violate it and compels me to take corrective action. *E.g.*, *Grutter v. Bollinger*, 288 F.3d 732, 814 n.49 (6th Cir. 2002) (Boggs, J., dissenting) ("Legitimacy protected only by our silence is fleeting.").

As a due process violation may arise either where a judge is acting within the rules governing his or her actions, as with the lawful acceptance of campaign contributions in *Caperton*, *or* where he or she acts in contravention of them, I find it

inescapable to avoid the conclusion that judicial actions that are both contrary to those rules, but concealed from the parties, and that could, regardless, give rise to a due process problem would compel a judge with knowledge of the problem to take appropriate action by seeking correction internally and, where that fails, by disclosure. *E.g.*, JUDICIAL CONDUCT Canons 1, 2A, 3B(2),(8) & D. Because the process in this case departed from the rules, as I understand them, *and* the manner in which these departures took place could create in the mind of the reasonable, objective observer serious questions as to the impartiality of the tribunal, I need not decide whether either irregularity, standing alone, would require disclosure to the parties. Doing so at this stage is the only way to provide the parties with the information necessary so that they might seek relief without still further delay and by which I might discharge the constitutional and ethical obligations incumbent upon me as a judicial officer.

Out of an abundance of caution I will, at this stage, detail only those facts I regard as essential to explain the problem.[12]

[12] I am aware not only of my obligations to the parties and to take appropriate action, but also of Judicial Conduct Canon 3B(11) ("A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity. The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court's judgment, a written opinion or in accordance with Supreme Court guidelines for a court approved history project.").

A. This Accelerated Appeal Was Unreasonably and Improperly Delayed Before This *En Banc* Reconsideration Proceeding

This interlocutory appeal is "accelerated" as a matter of law. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (a)(7); TEX. R. APP. P. 28.1(a). By rule, the appellant has 20 days to perfect the appeal and the parties' expected briefing cycle is shortened to 60 days. *See* TEX. R. APP. P. 38.6. The parties' last brief in this case was filed on June 11, 2019, and the case was submitted with oral argument on October 2, 2019. The parties were provided notice of *en banc* submission on February 8, 2021.

The rules contemplate either of two methods of submission for an initial "decision" that take on relevance only with respect to those courts, like this one, with more than three assigned justices. *See id.* 41. While a court may under extraordinary circumstances undertake the original submission before its full, *en banc* membership, the governing rules provide, "unless a court of appeals . . . votes to decide a case *en banc*, a case *must be assigned for decision* to a panel of the court consisting of three justices." *Id.* 41.1 (emphasis added). Except as permitted by the same rules, "the panel's opinion constitutes the court's opinion, and the court must render a judgment in accordance with the panel opinion." *Id.*

"While the court has plenary power, a majority of the court may, with or without a motion [for reconsideration], order *en banc reconsideration* of a panel opinion." *Id.* 49.7 (emphasis added). A decision to reconsider a panel decision will in turn extend the court's plenary power and a concomitant delay in issuance of its

mandate, although the mandate may issue with the judgment in an accelerated appeal. *See id.* 18, 19. Alterations of panel composition after the issues are known, and particularly after the justices' positions have been announced, raise their own due process concerns. *E.g.*, Brown & Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1099 (2000); *see also In re Union Carbide*, 273 S.W.3d 152, 157 (Tex. 2008) (practices that "subvert random assignment procedures breed disrespect for and threaten the integrity of our judicial system").

This case, like virtually all others, was submitted to a panel of three justices who, as I understand it, should be randomly drawn and decide the case in accordance with the constitution, the rules of appellate procedure, the case's accelerated posture, and the panel's conference following the argument. In my view, that did not happen here. The three panel members included myself, a second panel member who stood for re-election on November 3, 2020 and whose term of office ended at midnight December 31, 2021, and a third justice.

After hearing oral argument on October 2, 2019, and conducting a conference, authorship of the panel decision was assigned to the third justice on our panel. More than 10 months later, a draft panel opinion was circulated with a result contrary to the one discussed at conference.[13] This event immediately prompted a further conference that took place on September 1, 2020, during which the author agreed to

[13] That a justice would take 10 months to produce a draft opinion is not necessarily extraordinary in and of itself.

consider certain material revisions. However, it was not until November 6[14] that the then-authoring Justice responded to the questions raised in the September 1 conference.[15] This prompted further email exchanges in mid-November that finally confirmed, on November 23, 2020, that a new majority opinion would be necessary. That opinion was circulated to the panel and approved for "issuance" by a majority on December 9, 2020, and is in keeping with Part I of this opinion.[16] A dissent within the panel was also finalized well before December 31, 2020.

I will not fully detail the events transpiring between December 9 and the expiration of second panel member's term of office.[17] At this stage (and subject to directive from a higher court), I will only note that a reasonable, objective observer having full knowledge of those events could conclude that justices of the Court first sought to delay and, thereafter, obstructed the release of the opinion to the parties. That obstruction came from a justice outside the panel in the form of electing to record a vote requesting a two-week study, which was cast late in the day of December 29, and was only confirmed, despite my objection to the delay and

---

[14] The second panel member did not prevail in his bid for re-election.

[15] Admittedly, my own error in mis-recording an electronic vote to approve the then-recirculated opinion may have contributed to one week of this delay in November.

[16] As noted below, justices and panels do not "issue" opinions; they author and approve them. The Clerk simply gives "notice" of that decision. Thus, after the second panel member approved the majority opinion on December 9, 2020, there was nothing more for him to do. The term "issuance" in our parlance appears to be based in our internal operating procedures, which as further noted simply allow any justice to request *en banc* reconsideration. Nothing in those procedures purports to authorize delay in notice of the panel decision to the parties in conflict with rule 41.1.

[17] For reasons set forth hereafter, including requests by several my colleagues for further detail of events that involve them, I have provided a supplement below.

appearance concerns, on the afternoon of December 31—far too late to permit recourse to the *en banc* conference to rectify. It is my understanding that this latter effort was contrary to the rules of appellate procedure and this Court's internal operating procedures, and, in all events, undertaken with knowledge of the age of the case, and that doing so would obstruct the clerk's release of the opinion and create, at a minimum, legal issues and the appearance of attempting to manipulate the panel result by substituting a new member.

As I understand them, the rules of appellate procedure and the Texas Constitution require that a decision by a panel should be handed down promptly after submission *as the decision of the Court* by the justices duly authorized, randomly assigned, and participating in the ultimate decision. Likewise, no internal operating procedure of this Court purports to authorize what transpired here or to obstruct the panel majority's right to hand down its decision at any time once it has been approved by a majority. Nor could they. TEX. R. APP. P. 1.2 (forbidding contrary local rules and practices), 41.1 ("*except as provided in these rules*, a panel's opinion constitutes the court's opinion").

Justices, of course, do not "issue" decisions or any other orders. They sign or join opinions, in ink or electronically, and the clerk's office simply provides notice of them in accordance with the rules at some point thereafter. TEX. R. APP. P. 12.6. Insofar as panel "decisions" are concerned, once two or more justices have agreed

on the judgment, the case is "decided." *Id.* 41.1.[18] Any delay in the clerk's giving notice, by mistake, panel assent to the delay, or some internal obstacle, does not affect the validity of the decision. *See, e.g.*, *Law Offices of Robert D. Wilson v. Tex. Univest-Frisco, Ltd.*, 291 S.W.3d 110, 113 (Tex. App.—Dallas 2009, no pet.); *see also* TEX. R. CIV. P. 306a. In fact, under the rules, appellate opinions do not "issue" at all; the court's *mandate* "issues" long thereafter, affording the parties and the court alike with the full and transparent opportunity to seek further review, *en banc* or otherwise in the interim. TEX. R. APP. P. 18.1. Were it otherwise, the constitutional judicial office would be compromised and subject to retroactive abolition.[19] *E.g., State v. Sink*, 685 S.W.2d 403, 403 n.1 (Tex. App.—Dallas 1985, no writ) (per curiam) (treating justice's participation and vote on completed opinion during and through end of judge's constitutional term of office as valid despite release to the parties coming after expiration of term); *see also In re Castillo,* 201 S.W.3d 682, 685 (Tex. 2006) (confirming justice's full right to vote through end of term).

In all events, the concern here is not only the proper construction of the rules or this Court's operating procedures, but rather the obvious due process concerns

[18] Our internal operating rules merely authorize a member of the Court to request an *en banc* conference before the opinion has been issued to the parties. Whether the opinion functions as a decision of the Court is governed by rule 41.1 and the will of the majority according to its plain language.

[19] I am aware of instances involving the death of a justice prior to that justice's decision or release thereof to the parties. I am also aware that justices may sometimes "change their minds" about a previous decision. A justice may indeed change his mind after a decision "issues" to the parties and seek rehearing or reconsideration *en banc.* That, of course, would have no effect on a decision that was already made, that is, unless and until a different decision is approved later. And while one might wonder whether a deceased justice might have "changed his mind," we need not speculate here as to whether the second panel member might have done so.

arising from the facts. If any member of the Court disagreed with the panel opinion, there were established, legal avenues available to express that disagreement in a transparent fashion. For example, every opinion of the Court is subject to any member's request for *en banc* reconsideration and any disagreement with the panel's decision could be expressed through that process, including by dissent, if necessary. *See O'Connor v. First Court of Appeals*, 837 S.W.2d 94, 97 (Tex. 1992). Thus, it was known that delaying release of the panel's decision to the parties could serve only to create circumstances in which substitution of panel membership—and hence concomitant potential change in the result between the litigants—appeared to be intended by any justice embracing a contrary understanding of the rule regarding efficacy of a recorded decision. As it would happen, no member of the Court requested *en banc* reconsideration prior to the expiration of the second panel member's term of office. Instead, an attempt was made to substitute a justice on the panel who would later cast a contrary vote.[20]

Before going further, I will note that I am aware of no prior case[21] in this or any other appellate court, in which the release of the panel decision was delayed against the will of the majority or, more critically, where the actor (or actors) precipitating it was aware that the delay would coincide with a pending end of term

[20] As noted *supra* n. 17, further details of this Justice's participation have been requested and are set forth in a supplement below.

[21] *See infra* n.29.

and would engender controversy and appearance concerns over a possible change in result.

B. A Reasonable Observer Could Conclude that the *En Banc* Reconsideration Not Only Further Delayed Our Disposition, But Had the Effect, Intended or Not, of Obscuring or Concealing Efforts to Manipulate the Result Before the Panel

No request for *en banc* reconsideration came for two weeks following the expiration of the second panel member's term of office. Instead, as noted, an attempt was made to substitute a new justice and vote that would have brought a different result on the assumption that the second panel member's participation in the prior panel decision and vote could be retroactively negated.

On January 12, I requested that the Court release the panel opinion to the parties with any justice interested in pursuing reconsideration, or expressing their opinion, being freely able to do so, pointing to rule 41's provision that the "panel's opinion constitutes the court's opinion, and the court must render judgment in accordance with the panel opinion" and to the prior precedent of this Court confirming the validity of the second panel member's previous vote, notwithstanding the expiration of that justice's term of office prior to the release of the opinion.[22] *State v. Sink*, 685 S.W.2d 403, 403 n.1 (Tex. App.—Dallas 1985, no writ) (per curiam).

[22] At all times relevant, *Sink* was binding authority, and any attempt to retroactively overrule its rule at this stage would cast a further and longer shadow over our existing appearance problems. Regardless, *Sink* appears to acknowledge the obvious constitutional reality that the choice of whether to participate in a

On January 14, after receiving what I perceived as an inapposite response, I directed the Clerk of the Court to issue the opinion absent explicit contrary direction from the Chief Justice. The Clerk received that direction from the Chief Justice that same morning. The first request for "review" by the Court sitting *en banc* did not come until later that afternoon. That request was then urged, retroactively, as a basis for withholding release of the panel decision.[23] The Court's actual decision to proceed *en banc* was apparently not made until February 8, when that decision was made known via a letter to the parties. *See* TEX. R. APP. P. 12.7.

The question of whether the parties would be notified of the panel's opinion next arose at an administrative conference. Out of an abundance of caution, I will say only that a majority of the Court refused to permit a record of their vote with respect to the question of whether the parties or the public should be permitted to see the panel decision.[24]

To my knowledge, no prior panel decision of this Court has previously been withheld from the parties over the will of the panel majority and no duly recorded

---

decision during his or her tenure belongs to the judge, and where the decision has been made and recorded, it cannot be retroactively abridged. The fact that *Sink* was issued as a *per curiam* opinion is irrelevant to its explicit recognition of the signing justice's right to participate in the decision. Likewise, recognition of a justice's decision obviously does not depend on whether another justice has dissented. In fact, the existence of a dissent only makes its recognition more critical to maintain the appearance that the case has been decided by an impartial process.

[23] The substitute justice voted in favor of the dissent only after voting on the request for *en banc* "review."

[24] As detailed below, this administrative conference was reconvened after internal circulation of this opinion and over my objection to any linkage of it to the parties' rights in this case, including their right to a decision.

vote of a justice who fully participated in a decision has been eviscerated in the manner involved here.

Of course, the issue here is not whether a good-faith rationale prompted the delay in releasing the panel opinion in December, including "study" of a possible *en banc* request. It is not even whether the result in this case was subject to reconsideration by the *en banc* court. As it stands, however, even the question of whether we are convened for reconsideration or asking the parties to accept that we did not in fact arrive at a panel decision, remains somewhat unclear. Engaging in "*re*consideration" of the panel decision, which is plainly permitted under the rules, would require acknowledging the obvious—that this case was submitted to and "decided" by the panel, but with the result withheld from the parties and the public.

Ignoring the due process concerns surrounding *how* that happened, the *why* question lingers: what authority would authorize a single member of the Court or the Court itself to hinder release of the panel opinion to the parties in the interim, and certainly before (1) the request for a poll was even made; (2) or the Court entered an order to convene *en banc* on February 8. While I accept that a panel may (and often will) decide to refrain from releasing its decision pending an *en banc* poll or decision, that did not happen here. Moreover, no authority suggests that the *en banc* court could suppress release of the original panel opinion (and "decision"). Rule 41.1's controlling, exclusive language, provides the contrary, presumably to avoid problems such as this. *Id.* ("Except as provided *in these rules*, . . ."*)*.

On the other hand, if we are asking the parties to pretend that that the original submission and decision never happened and that this case is still submitted for an initial decision, the problem becomes only more acute. We would be left with the even more uncomfortable question as to why any justice would have sought to delay release of the opinion in order to "study" a possible *en banc* proceeding whose only purpose would be to rectify the Court's inability to arrive at a decision *because of the delay precipitated by that very request*. The absurd circularity of that notion is self-evident. Further, as this Court is unique in hand-screening cases prior to assignment to panels for submission, one would be left to wonder what about this case has changed since the time it was screened and found proper for panel disposition, other than our knowledge of the result under the panel's decision.

In all events, and regardless of how one interprets the rules or any possible good-faith disagreements about their interpretation, the timing of this request, and the unprecedented nature by which it has been pursued (combined with the earlier events that delayed release of the panel decision), create an unavoidable appearance problem that, whether intended or not, undermines confidence in the apparent impartiality of the tribunal. Any judge operating with knowledge of this process would be obliged to determine whether silence or inaction is appropriate or consistent with their ethical obligation. *See* JUDICIAL CONDUCT Canon 3 D(1).

C. In Light of the Concerns Discussed Above in Sections A and B, Failing to Inform the Parties Would Be Inappropriate and Unethical

I find myself faced with knowledge of what I see as a constitutional violation in a case I participated in as a panel member and which remains pending before me. I am constitutionally and ethically obligated to take appropriate action to avoid the appearance of acquiescence. While that vague proscription might be satisfied—depending on the posture of the case, my role in it, and the history of other like efforts—simply by raising an objection internally, I do not believe that my raising further internal objections would be sufficient here for a variety of reasons, some of which I have conveyed above. It suffices at this stage to note the rights of the parties in this case are directly affected, earlier efforts to avoid or correct the problem have failed, and that prompt direct review in a superior court appears to be the only reasonable, forward-looking solution available to the parties at this stage.

For all of these and other reasons, I find this separate opinion and disclosure not only to be appropriate, but necessary.

PART III: SUPPLEMENT

This supplemental opinion is necessitated by events that occurred after the initial circulation of my dissenting (now concurring) opinion to the full court.

After the circulation of what was my dissent, now a concurrence, a separate opinion circulated proposing the same result between the parties as had been called for in Part I of my dissent (now concurrence), but without any discussion of the

process by which this case came to be heard and decided (*i.e.*, Part II above). Meanwhile, before and after circulation of that new opinion, I received entreaties urging—notwithstanding the facts or law—that I withdraw that part of my opinion; I will not detail those requests here other than to note that I have continually responded with a request to identify any material error in the facts or law in this opinion, which have been met with equally persistent refusals to identify any such error.

Over my objection, the opinions in this case were then linked to a demand to reconvene an administrative conference to discuss events and issues that had been raised and discussed in a previous administrative conference in January.[25] That January conference addressed broad concerns over the Court's operations, including the procedures employed in this and other cases. Before that meeting, I circulated a multi-page memorandum internally detailing (and not for the first time) the Court's increasingly recurring encounters with practices that myself and others have questioned as potentially inconsistent with the rules of appellate procedure and the need for the appearance of neutral, random dispositions of matters. Apart from a non-sequitur demurrer from the Chief Justice, no one denied the past practices, and the conference, as noted above, yielded only the decision, by unrecorded vote, to withhold release of the panel decision and without a corresponding order.

[25]One justice indicated any response would only be made during an administrative conference.

As I did not believe that any reference to those previous instances or the broader, persistent administrative challenges this Court faces (or has created) in maintaining the appearance of random neutral assignments was necessary to disclose to the parties in this case, I refrained from discussing them in Part II of the original dissent. While I objected to the linkage of the parties' rights or the opinions in this case to a renewal of that earlier administrative meeting, I also asked (repeatedly) if, now six months later, any justice was aware of any material error in the facts laid out in that memorandum concerning the Court's recurring practices or in Part II of this opinion. Again, no one identified any.

During and after the reconvened administrative meeting, I was asked to reconsider the need to release Part II of my opinion, ostensibly in view of the change in result between the litigants following circulation of my dissent. Other justices, while also not identifying material factual errors, asked for factual detail of certain events that involved themselves and were addressed in an abbreviated fashion in Part II above. I have separately been asked, however, to consider whether release of the opinion might, in light of a restrictive interpretation of Judicial Conduct Canon 3B(1), violate rules of ethics or deprive my colleagues of their ability to respond. It is in response to and in consideration of these and other communications from my colleagues that I supplement my earlier opinion with the following.

A. Denial of the Due Process Right to an Impartial Tribunal Is a Structural Error Affecting All Parties and Not Subject to Harm Analysis

First and foremost, I address the argument that there is no "harm" here where the ultimate judgment of the *en banc* Court is the same as the original panel opinion approved by the panel majority in December 2020. As referenced above, I have been requested to withdraw my opinion in view of certain changes in votes since the *en banc* conference and the circulation of my original draft opinion. The reasoning for this request is to the effect that, as the party I believed should prevail under our judgment "is now winning," there is no harm to that litigant and any objections I might have to the process by which we arrived at this *en banc* proceeding are now moot.[26]

To be sure, the question of whether the outcome in this case affects our legal and ethical duties to address the irregularities that produced it is an interesting one. However, tempting as it is to, once again, avoid the unpleasantness and controversy that accompanies disclosure in this or other cases implicated by our recurring "administrative" challenges, my research shows that harm to the litigants is irrelevant to the analysis or must be presumed, because, by its nature the error is structural. *See Abdygapparova v. State*, 243 S.W.3d 191, 209 (Tex. App.—San Antonio 2007, pet. ref'd) (citing *Arizona v. Fulminante*, 499 U.S. 279, 309

[26] As I believe my original dissent made clear, my concerns with this case are not related to who prevails under the Court's judgment. I have no interest in the outcome between these parties, other than to correctly apply the law to the facts presented.

(1991); *Chapman v. California*, 386 U.S. 18, 23 & n. 8 (1967); *Tumey v. Ohio*, 273 U.S. 510 (1927); *Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997) ("The United States Supreme Court has repeatedly held that a violation of the right to an impartial judge is a structural error that defies harm analysis.")).[27]

I feel compelled to reiterate that my concerns expressed above were raised internally and that even after circulating my original separate opinion to the *en banc* decision, I repeatedly requested responses to the events I recounted above. No one responded. Instead, my colleagues insisted on linking the opinions in this case to administrative matters, and at the administrative conference, urged that the irregularities here (that no one denies) remain obscured from view based on the change in the outcome as between the parties.

Given the expressed concerns about disclosure of the irregularities in this case, the corresponding change in outcomes, and the requests to avoid release of Part II of this opinion, it is easy to understand why the need to respond to irregularities

---

[27] *See also Webb v. Texas*, 409 U.S. 95, 98 (1972) (holding judge's threatening remarks effectively drove witness off stand, and thus deprived petitioner of due process); *Arnold v. State*, No. 05-07-00120-CR, 2008 WL 3307079, at *6 (Tex. App.—Dallas July 31, 2008, no pet.) (holding error structural where trial court's actions created appearance of unfairness and a lack of impartiality thus depriving appellant of his fundamental right to fair sentencing hearing before impartial tribunal).

Any doubt that this risk of structural error exists only in criminal cases has been effectively addressed by the United States Supreme Court and other lower courts. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (holding requirement of due process to be hearing before impartial tribunal and that same requirement applies in both civil and criminal cases); *Clements v. Airport Auth. of Washoe Cty.*, 69 F.3d 321, 333 (9th Cir. 1995) (same) (citing *Ward v. Vill. of Monroeville*, 409 U.S. 57, 59–60 (1972)); *Harjo v. City of Albuquerque*, 326 F. Supp. 3d 1145, 1184 (D.N.M. 2018) (same) (citing *Marshall*, 446 U.S. at 242); *Wallace v. Powell*, No. 3:09-CV-0291, 2014 WL 70092, at *8 (M.D. Pa. Jan. 9, 2014) (same) (citing *Marshall*, 446 U.S. at 242).

of this nature is not tied to any particularized injury to either side of the docket. *Fulminante*, 499 U.S. at 309; *Abdygapparova*, 243 S.W.3d at 209. We have now arrived at a third result in this case. The first, the December panel opinion, was concealed from both parties. The second, a proposed majority *en banc* opinion, was abandoned after the irregularities in the process were set to be disclosed and further scrutiny of the Court's practices loomed, and the third is proposed to be an anodyne declaration that the appellants lose.

To be sure, the ever-changing fate of the parties may quite properly be seen as the product of a timely reconsideration of the record and the law governing rule 120a and be completely unrelated to any concerns over the release of this opinion or the lingering administrative issues to which it is connected. Nevertheless, at this point, if I were counsel for the appellants,[28] I would wonder where this case would have ended had a justice not raised concerns over the procedural irregularities that affected the case. Indeed, were I counsel for any party in this case, I would be forced to wonder how (or when) this case would have been decided in a more transparently impartial tribunal.

[28] Again, I have no interest in which side of the docket prevails in this or any other matter. If, but for the process here, the appellants would prevail, albeit over my dissent, I would not hope for any other result. Both sides are entitled to a fair tribunal. If I were to withdraw my objections to the process because it has now yielded a victory to the appellee, I would open myself to the charge that my objections were intended to achieve that result. At this stage, the process in the case has so infected the result that either party would have an equal objection to it and the only viable remedy I can perceive is a plenary, fresh disposition. Given the extraordinary delay at this stage, assignment of this case to another intermediate court of appeals, to be potentially followed by a petition to a higher court, seems improper.

B. Requests for Clarification

As previously mentioned, although they were unable to identify any material error in the facts described in my opinion, several of my colleagues have requested clarification of their role and questioned whether disclosure of those facts by me or in any response by them to Part II was permissible in light of Judicial Conduct Canon 3B. I will begin with clarifying details respecting the actions and their timing giving rise to my concerns and later address why I believe such disclosure is not only permissible but required.

Again, the parties in this case have received no decision from the Court more than two years after appellants filed their notice of expedited appeal. This delay, which some members of this Court would ascribe to administrative issues, is due to the withholding of the panel opinion—over the majority of the panel's consent—following a first-ever obstruction of the release of the panel opinion at the end of a Justice's term, a first-ever interpretation of appellate rule 41.1,[29] and a later (unrecorded and unreduced to the form of an order) *en banc* vote affirming that

[29] It appears that my colleagues on the Fourteenth Court of Appeals are under the impression that their controversial decision to deny the parties access to a panel opinion, despite rule 41.1, following a vote to convene *en banc* was perhaps unprecedented. *Werner Enters. v. Blake,* 2021 WL 3164005 (Tex. App.—Houston [14t Dist.] July 27, 2021, no pet.). They are wrong, though they could not have known it. That court recorded its vote to withhold the panel decision, released an order documenting its action to which a dissent could be appended, and evidently assumed that any other court would have done the same. Of course, the debate in that court also took place without the added drama of year-end obstruction of the release the panel decision or the shifting, executory substitution of a new vote in advance of the request to convene *en banc*.

interpretation. *See* TEX. R. APP. P. 12.5, 41.1.[30] The first *request* for *en banc* consideration of this case came only *after* (1) action a reasonable observer could see as obstruction of release of the panel majority decision; (2) substitution of a new panel member after positions of the original panel had been announced; and (3) the rule 41.1 issue was presented with a clear demand to release the December 9 panel decision.

To be clear, the delay prior to December 9 is not good, but it is the delay associated with the obstruction of the release of the opinion on December 29 and 31, together with this *en banc* proceeding, that gives rise to acute neutrality problems. Why was this case not set for consideration by the Court sitting *en banc* in October 2019, when it was first heard by the panel, if it inherently warranted such consideration? Why was there no request for *en banc* reconsideration prior to the Chief Justice's refusal to release the December 9 panel decision in mid-January 2020? Why (or by what authority) would a single justice not on the panel and knowing of an imminent departure obstruct the release of a divided panel opinion in

[30] As discussed in Part II, rule 41.1 defines the constitution of a panel as follows and precludes contrary local rules or practices:

> Unless a court of appeals with more than three justices votes to decide a case en banc, a case must be assigned for decision to a panel of the court consisting of three justices, although not every member of the panel must be present for argument. If the case is decided without argument, three justices must participate in the decision. A majority of the panel, which constitutes a quorum, must agree on the judgment. ***Except as otherwise provided in these rules,*** **a panel's opinion constitutes the court's opinion, and the court must render a judgment in accordance with the panel opinion.**

TEX. R. APP. P. 41.1(a) (emphasis added).

a grossly stale, expedited appeal much less without that justice (or anyone else for that matter) even requesting reconsideration? And, why was the panel decision not released thereafter at any time prior to a majority of the Court actually convening *en banc* in February?

While I believe that all of this was contrary to the rules of appellate procedure and our internal operating rules, what I see as the departure from the rules hardly operates in a vacuum here. The due process problem screams most loudly from the sequential combination of these extraordinary actions, and their timing, in, among other things, obstructing the release of the panel opinion to the parties on December 31, the substitution of another justice, and the request of *en banc* reconsideration, only (and immediately) after the Chief Justice imposed his construction of rule 41.1 and our prior precedent in *Sink. State v. Sink*, 685 S.W.2d 403, 403 n.1 (Tex. App.—Dallas 1995, no writ) (per curiam). The due process problems created by these and other actions are obvious, would obtain regardless of whether any rule could be interpreted to permit them, and go beyond Part II above. As several justices complained of the incompleteness (although not of the accuracy) of that discussion, I will now supplement them here as narrowly as feasible to address their concerns.

1. Delay and Process Concerns Prior to December 29–31

As noted in Part II above, I believe that a reasonable person looking at the events described above (and others) would question not just the delay produced by the late-arriving *en banc* request and the later decision to withhold the panel

decision, but also the delay before and especially in December. Most importantly, one could question whether there was an orchestrated effort to forestall release of the panel opinion to the parties with the expectation that doing so would allow substitution of a new member who might support a desired result.

Ignoring the delay in settling on an initial panel result in advance of the November election that would appear less concerning if it stood by itself, that delay does not stand by itself. The panel opinion here was ultimately approved by the panel majority on December 8 and recorded as such on the Court's opinion tracking software the next day. On Friday, December 18, after the end of the eight-day period for the third panel member to cast a vote, I proposed the immediate release of the majority opinion, with her dissenting opinion noted to follow. She declined, observing that she was already conforming her dissent and would circulate it, after the weekend, on the following Monday. At the end of the day Monday, she indicated that she would circulate the opinion on Tuesday, December 22.[31] I then asked whether she would insist on full court circulation of the opinions, which is optional at the election of any justice on the panel under the court's internal operating procedures. She in fact insisted on full court circulation, though promising she would also request that it be expedited. My last communication from her, prior to

[31]To be sure, the third panel member might have claimed the right under our internal operating rules to thirty days from December 9 to circulate her dissent Had she done so at that point, the panel majority would have had ample time to seek *en banc* or mandamus intervention, and the due process problem concern would be, if anything, worse, and anchored to that action rather than those of late December 29 and 31.

December 31, was a text message I received on December 22: "Just talked to the Chief he approved shortened circulation time," which was accompanied by two "thumbs up" emojis. Her email thanking the Chief Justice for his approval of the expedited circulation period, also copied to me the same day, reads in relevant part: "The reduced circulation time *is necessary here* so that both opinions can issue together w/any necessary corrections *before [the panel majority member's] term ends*." (emphasis added).

On December 28, I was made aware that a Justice not sitting on the panel had electronically recorded a vote requesting a two-week study.[32] I called him and asked why. He told me that the third panel member, who had insisted on full court circulation and secured ostensibly expedited circulation of the opinion, had asked him to record the vote as she was contemplating submitting an *en banc* request and was unable to locate another Justice she intended to enlist to request two weeks' study. I reminded this Justice of the imminent departure of the second panel member, the ostensible "expediting" of the circulation for that reason, and that further delay could, at a minimum, create the appearance that someone was seeking to manipulate the result at the panel by substituting a new justice after the panel votes had been taken. I also noted that any justice on this Court could request *en banc*

[32] The Court's opinion tracking software provides justices with the option of electronically recording with the clerk votes to approve, dissent, concur, or request two weeks for further consideration in connection with a circulating opinion.

reconsideration of the panel opinion at any time, making delay for any other purpose unnecessary. This Justice told me that he would speak with the third panel member. He called the next day and told me: (1) he had informed the third panel member that he was going to withdraw his request for two-week study and that (2) he was concerned that the effort could appear to be perceived as an effort to stall and to substitute a new, potentially different vote.

2. Delay and Process Concerns Between December 29–31

On December 29, that Justice withdrew his two-week study vote. Four hours later, at 4:48 p.m., yet another Justice not sitting on the panel (again with no notice) changed his prior vote of "no comment" to "two-week study" request. The next morning, December 30, I sent this Justice an email, copied to both my third panel member and the Justice who had just withdrawn the like vote he had been solicited to record. In that email, I reminded the Justice of both the "expedited" nature and age of the case, that any member of the Court could seek *en banc* reconsideration or write as they saw fit, and of the prior Justice's withdrawal of a like vote for these reasons. I also noted that if he maintained his action at this point, it would be seen to "create the prospect of substitution of a new panel after the original panel has voted and the possibility of the outcome between the parties being altered as a result."

That Justice responded on the afternoon of December 31, saying that the timing of his changed vote was coincidental, he had been contemplating a vote of

two-week study for some time,[33] was acting in accordance with his conscience, and would not withdraw his recorded vote. Neither that Justice nor my third panel member requested *en banc* reconsideration through the end of the "two-week study" period.

I, of course, accept that Justice's statement of his intentions at face value and assume that the delay at the panel prior to November and further delay after December 9 and until December 29–31 were all coincidental.[34] That is not consistent with the controlling constitutional standard, however. The decision to obstruct the release of the opinion on New Year's Eve casts "a very long shadow" and adds an unhelpful aspect to still other events before and after that are, in and of themselves, problematic. *See Cruz v. Abbate*, 812 F.2d 571, 574 (9th Cir. 1987) (noting that even the "suggestion that the case assignment process is being manipulated for motives other than the efficient administration of justice casts a very long shadow" and "must not remain unexamined and unanswered"). An employer's declaration that he fired the plaintiff four hours after she filed an EEOC complaint

[33] As noted, rule 41.1 provides the panel assigned to hear the case with the authority to decide a case and mandates that the panel's opinion "constitutes the court's opinion" and the court "must render judgment in accordance with an opinion." While the Court's internal operating procedures authorize a member of the panel to record a two-week study vote and purports to further confer authority to record such a vote on justices not on the panel in *published criminal cases*, despite rule 41.1, it provides no such color of authority to record such a vote to off-panel justices in civil cases. *See In re Castillo*, 201 S.W.3d 682, 684 (Tex. 2006) (affirming right of justice to vote "on cases heard by her panel," not her court). Of course, had the third panel member exercised that procedure and timely recorded such a vote after the December 9 circulation the opinion would have issued before December 31.

[34] As noted in Part II, I am not aware of any prior instance in Texas in which the release of a completed panel opinion being deliberately delayed at the end of a justice's term by the actions of a justice not on the panel.

"because she was late for work" and not in retaliation for the filing of an EEOC complaint does not end the discussion. Judges, of course, are held to a higher, not lower, objective standard under the Due Process Clause.

To be clear, the obstruction of the release to the Court's panel opinion to the parties at that stage and the attempt to substitute another vote was, in my view, contrary to the rules of appellate procedure and unsupported by any provision of our internal operating procedures—not that they could provide otherwise. More importantly, however, these delaying actions were undertaken not only with full knowledge of the due process problem it provoked, but that this "expedited" appeal had been lingering under submission since early October 2019. As an appellate court, we would not hesitate to find a trial court to have clearly abused its discretion in delaying a decision and grant mandamus in like circumstances. *In re Upcurve Energy*, No. 08-21-00053-CV, 2021 WL 2659832 (Tex. App.—El Paso June 29, 2021) (orig. proceeding) (thirteen months); *In re Reiss*, No. 05-20-00708-CV, 2020 WL 6073881 (Tex. App.—Dallas Oct. 15, 2020) (orig. proceeding) (mem. op.) (six to twenty-four months). Deliberately delaying release of a decision in an accelerated appeal *that has in fact been decided* more than fifteen months after submission and nearly two years after it was initially filed is, to say the least, extraordinary.

3 Delay and Process after December 31

As noted, no justice sought *en banc* reconsideration in connection with the delay in releasing the panel opinion in late December. Instead, a new Justice was

substituted with appearance concerns having already been created by the events transpiring before January 1 and preceding the substitution. That appearance problem was not helped thereafter.

Prior to her decision to participate in this case, the substituted Justice was forwarded the emails of late December laying out the pre-existing appearance problem. On the afternoon of January 12, the substituted Justice indicated that she had not yet decided whether she should participate and had not completed the review of the record that she felt to be necessary to support her participation. She then received a response from yet another Justice suggesting that he did not believe that it would be "fair (or legal)" for her to substitute and cast a vote at that stage. That email attached and highlighted a further email she had received separately pointing to rule 41.1 and prior court precedent in *Sink* and requesting release of the December 9 panel decision.

On the morning of January 14, the substituted justice was aware of my directive to the Clerk to release the panel opinion to the parties in keeping with prior court precedent and rule 41.1, absent a contrary instruction from the Chief Justice; of the Chief Justice's so instructing the Clerk; of the first request for *en banc* "review" coming immediately thereafter at 1:58 p.m.; and of the Chief Justice's utilization of that request as retroactive support for withholding the opinion.

The substituted Justice, then, and despite her concerns over the record, voted to decide or reconsider the case *en banc* at 5:54 p.m. Then, at 5:56 p.m., with

insufficient votes to proceed *en banc*, the substituted justice also recorded a vote to decide the case at the panel, albeit with a change to the panel result. Of course, no one has attempted to argue that this substituted "fourth" panel vote could have validly changed the result—as it would have obviously mooted the pending *en banc* request to the extent it sought *re*consideration. Meanwhile, an operative fourth panel vote could only be seen to be at odds with any assertion that an initial *en banc* decision was premised on the lack of a result at the panel.

While these actions are consistent with a Justice eager to engage on evolving matters, the appearance concerns remain extant. A cynic might see the timing of the panel fourth vote as a stop-gap measure to support delay of release of the panel opinion while *en banc* votes were assembled. Separately, a cynic might view this *en banc* proceeding as an effort to obscure the appearance problems associated with the obstruction of the release of the December 9 panel opinion, the attempted substitution, and the later, fourth vote. Again, I assume that the timing here was coincidental; that the substituted Justice carefully examined the arguments, the record, and the rules, and concluded that Rule 41.1 supported a substitution; concluded that the pre-existing appearance problems were insubstantial; decided that the appellants' position was well supported; and in no way timed her attempted participation and votes to support further delay in the release of the panel opinion pending an effort to obtain *en banc* reconsideration. The standard, however, is an objective one that is unaffected by subjective intent.

C. Ethical and Legal Standards Both Require "Appropriate Action"

I will conclude this part of my opinion by addressing several concerns in connection with my decision to address the irregularities in the process used in this case, including whether my discussion above violates rules of ethics, deprives any Justice of their ability to respond, or their right to confidentiality.[35] I believe these concerns are unsupported by any relevant authority or plausible argument for extension of it and state the minimum judicial obligations in reverse. The further complication this presents, and that I would have hoped to have avoided, stems from the continuing administrative issues to which this opinion has been joined and requests that I withdraw my opinion based upon changing fates of the parties in this case.[36]

[35] Contrary to any suggestion that my discussion of internal matters of this Court is unprecedented and not permitted by our judicial canons, I note several similar opinions were issued by the Waco Court of Appeals and other Texas and federal appellate courts. *See, e.g*, *Tex. A & M Univ. v. Bading*, 236 S.W.3d 801, 803 (Tex. App.—Waco 2007, pet. granted) (citing special notes detailing the Chief Justice's objections to his colleagues' actions to "alter[] the process of judicial review.").

[36] To be sure, I do not have a "side" in this case. I have asked at least five times for a response to my recitation of the events, authorities I have cited, and interpretation of legal authorities. No substantive response was provided until the Chief Justice circulated his concurring opinion in August 2021, setting forth his understanding of "customary practices" of the Court.

1. Where Judicial Conduct Affects the Parties' Right to An Evidently Impartial Tribunal Courts Alone Are Both Empowered and Required to Act

I will begin with the constitution. Since at least the time of the Supreme Court's 2009 *Caperton* decision,[37] if not before,[38] it has been clear the federal constitution's Due Process Clause required an objective analysis into the apparent impartiality of the tribunal. *Caperton*, of course, was more complicated in that it involved no actual action by the Justice himself, but the appearance created by the financial activities of one of the litigants before him. In such settings, this Court has spoken clearly about *other* tribunals, as a matter of both *"federal and state* constitutional law." *See, e.g.*, *Rymer v. Lewis*, 206 S.W.3d 732, 736 (Tex. App.—Dallas 2006, no pet.). In reversing a trial court judgment on direct appeal we observed:

> One of the most fundamental components of a fair trial is a neutral and detached judge. The impartiality of the judge is not only a matter of constitutional law, but also of public policy. Public policy demands that a trial judge ***act with absolute impartiality. It also demands that a judge appear to be impartial so that no doubts or suspicions exist as to the fairness or the integrity of the court. A judge should not act as an advocate for any party. Nor should a judge act as any party's adversary.***

Id. at 736 (emphasis added).

---

[37] *Caperton v. A.T. Massey Coal*, 556 U.S. 868, 879, 883 (2009) (test is an "objective one" posing question as whether the risk of "bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.").

[38] *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *In re Murchison*, 349 U.S. 133 (1955).

This Court (and others) have also encountered the due process question where the parties were not aware of facts giving rise to the due process problem that were known to (but undisclosed from) the other side of bench. Of course, no court has ever suggested judicial silence or leaving the problem to some other body would even be proper. Quite the opposite, where such an undisclosed problem arises in a lower court, we have held that even a final judgment should be set aside—and without regard to the actual merits of the claim or defense or whether the problem is alleged with particularity. *See Thomas v. 462 Thomas Fam. Prop.*, 559 S.W.3d 634, 641–44 (Tex. App.—Dallas 2018, pet. denied). In keeping with the notion that such departures are structural in nature, this Court reversed the dismissal of a bill of review when the judge but not the litigant was aware of the underlying circumstances, "applying the notice pleading standard and liberally construing appellant's petition according to his intent." *Id.* Thus, when the question arises in connection with the actions of a trial court, our own answer has been to address the issue in an opinion, as opposed to a memorandum opinion or more discrete mechanism, notwithstanding the judge's interest in privacy.

It seems plain to me that these constitutional minimums apply to appellate courts and not just to others. No one would suggest, for example, that any appellate court or its members would be exempt from the public charge its decisions reflect a bias toward a particular result. *E.g.*, *Bell Helicopter v. Dickson*, 601 S.W.3d 1 (Tex. App.—Dallas 2020, no pet.) (denial of rehearing). But the question of whether a

judge on an appellate court may (or must) confront the concern takes on a different aspect, and one requiring more, not less transparency, when we confront not simply an inclination toward a particular reading of the law, but to actions that affect the random submission and disposition of a particular case.[39]

Long before either *Caperton* or our own decision in *Rymer* amplified the due process concerns they implicate, other appellate courts confronted and publicly addressed court practices, otherwise undisclosed to the parties, where they effected random dispositions in those courts. *Grutter v. Bollinger*, 288 S.W.2d 732, 753–58 & 811–14 (6th Cir. 2002) (en banc); *In re Byrd*, 269 F.3d 578 (6th Cir. 2001); *Cruz v. Abbate*, 812 F.2d 571, 574 (9th Cir. 1987); *Armstrong v. Bd. of Educ. of Birmingham*, 323 F.2d 333, 352 (5th Cir. 1963) (Cameron, J., dissenting). Still others confronted, and again publicly debated, their objections to other internal practices or methods of proceeding as inherent to their judicial duties. *E.g.*, *In re Doe*, 19 S.W.3d 346 (Tex. 2000); *Bading*, 236 S.W.3d at 803.

Other courts have been even more explicit about the need to confront these issues. The Supreme Court, for example, has held that a litigant is entitled *to*

[39] I believe that the Texas Constitution requires random assignment of justices on those courts with more than three justices. *Rymer*, 206 S.W.3d at 736; *see also In re Union Carbide*, 273 S.W.3d 152, 157 (Tex. 2008) (practices that "subvert random assignment procedures breed disrespect for and threaten the integrity of our judicial system"). While courts elsewhere have divided over the question of whether the federal due process clause invariably requires initially random assignments on multi-member courts, *compare Tex. Brine Co. v. Naquin*, Nos. 2019-OC-1503, 2019-OC-1508, 2020 WL 543513, at *6 (La. Jan. 31, 2020), *and Firischtak v. Holder*, 636 F.3d 305, 309–10 (7th Cir. 2011), all appear to agree that departures from a purportedly random process that undermine the appearance of impartiality would violate the federal constitution. *Id.*; *Cruz*, 812 F.2d at 574 (assignments, if not required to be random, may not be made in a biased manner "or [with] the desire to influence the outcome of the proceedings").

discovery in a due process claim not only where he alleges specific facts in connection with his trial supporting an inference of actual bias but where the facts support an inference that "risks of bias" are "too high to be constitutionally tolerable." *Rippo v. Baker*, 137 S. Ct. 905 (2017) (citing *Williams*, 136 S. Ct. at 1905). The Ninth Circuit, speaking directly to the need for random assignment of judges, did not suggest that the question should be maintained as an internal confidence or re-directed elsewhere. On the contrary, speaking to practices in a federal district court, it observed: "The suggestion that the case assignment process is being manipulated for motives other than the efficient administration of justice casts a very long shadow, . . . Such charges, to the extent they are being raised***, must not remain unexamined and unanswered.***" *Cruz*, 812 F.2d at 574 (emphasis added).

What is notable about the Texas standard is that unlike the model ethical rules governing internal deliberations in most state and federal courts, the Texas rule that protects those deliberations and votes makes clear that the prohibition on disclosure "for any purpose unrelated to judicial duties," obviously does not apply to "an opinion" and affirmatively permits judges (or requires) judges to make a report to the State Commission on Judicial Conduct but, independently and separately, requires judges to "*take appropriate action*" separate and apart from a report to the Commission. JUDICIAL CONDUCT Canon 3 C (10), D(1) (emphasis added). While a report to that Commission may be appropriate, depending on the circumstances,

the Commission has no jurisdiction to adjudicate pending disputes or authority to provide any remedies to parties in them before or after judgment; neither would it have any ability to order the reform of court practices apart from taking or recommending actions be taken as to a particular judge or justice.[40] Those actions, where appropriate, must be accomplished elsewhere.

The obligation to decide cases in accordance with the rule of law, to recognize and enforce the rights of parties in cases and to provide whatever remedies are required by law is directly vested in the judges themselves, as reflected in the oath of office. And, whether the question relates to the result in a particular case or to a court's mode of practice more generally, that "supervisory and administrative control" over the courts themselves is vested directly in the Texas Supreme Court, TEX. GOV'T CODE § 74.021, and is properly exercised by direct appeal or mandamus. *Shamrock Psychiatric v. Dep't of Health,* 540 S.W.3d 553 (Tex. 2018) (mandamus); *Ray Ins. Co. v. Jones*, 92 S.W.3d 530 (Tex. 2002) (direct appeal).

[40] Where proceedings before the Commission are separately initiated, the proceedings of the Commission themselves will be confidential; the underlying conduct does not become exempt from notice or disclosure as a special protection for the office holder. S.C.J.C. Proc. R. 17. The judiciary does not have special exemptions from scrutiny except insofar as might be permitted by an administrative agency. *Id.*; *see also Nixon v. Warner Comm.*, 435 U.S. 589, 598 (1978) (explaining basis for public access right). On the contrary, judges are as subject to the rule of law as anyone and uniquely obliged to uphold it.

2. Disclosure to the Parties Here is Not Only Proper, But Mandatory

As noted, it is exclusively the responsibility of the courts to decide cases and, at a minimum, to afford the litigants an impartial tribunal in that process, to acknowledge when that has failed, and to afford an appropriate remedy. The question of whether a judge *may* disclose facts necessary to develop that question in an opinion is, in my view, not subject to reasonable debate. As outlined above, judges on other state and federal courts have done so repeatedly, and the Texas rule explicitly confirms that discussion within an opinion is properly a part of the judicial duties. I will close this portion of my opinion by answering why I believe it is not only proper but mandatory here.

I accept that the "appropriate action" mandate may sometimes involve wholly internal efforts at correction or reform. But, as I tried to indicate softly in the first draft of this opinion, this is hardly the first time this Court has confronted problems like this, or that I and others have raised such concerns loudly and in writing without avail. For example, the problems giving rise to my decision to draft this opinion came, by my count, after seven separate internal efforts to avoid them.

While I will continue to resist unnecessarily detailing like concerns in other specific cases or elaborating on broader questions about whether the Court's current practices afford the minimum due process appearance assurance to any litigant who appears before this Court, the fact is that they exist, have been repeatedly voiced by myself and others, and have yet yielded processes like the one used in this case and

have continued since. It suffices to say, at this point, my concern is not that I have acted too hastily or precipitously in this case; but, rather, that I have waited too long and written too many internal emails and memoranda. I acted in this case because I sat on the panel, had direct knowledge of conduct at issue, and because I believe that conduct raised such obvious due process implications that disclosure was not only permissible but mandatory under the due process clause and, perhaps, the governing rules of ethics.

Still, and notwithstanding my efforts in this case and my drafting and sharing my thought on these matters, the same conduct giving rise to this controversy has persisted. Again, barring further request from my colleagues, I will not detail this additional concern except to identify its recurrence as further supporting, if not mandating, my decision to act. I will simply note, again, that a justice who does not sit on a panel has no authority under the rules of appellate procedure or our internal operating procedures to obstruct release of a panel opinion, surreptitiously craft and release dicta in a separate opinion and retroactively claim it to control the result in the case so delayed. Such efforts create needless conflict and the appearance of bias among the parties, the subject matter or both, which should be impossible under our rules or the due process assurance. TEX. R. CIV. P. 18b(1)–(2); *Caperton*, 556 U.S. at 877.

Meanwhile, a passive approach to these issues among the majority of the Court, whether it relates to panel formation, personnel,[41] assignment of cases to panels, the removal or substitution of justices after submission *or votes* or other concerns ostensibly left in the hands of a single actor or a minority of the Court opens the whole of the Court to unnecessary and avoidable appearance problems. *Williams*, 136 S. Ct. at 1909. None of this should be possible on a multi-member court with all justices engaged. TEX. GOV'T CODE § 22.223; *In re Yates*, 960 S.W.2d 652 (Tex. 1997). Conversely, leaving the conduct of the Court to a minority, does nothing to promote the appearance of impartiality or to absolve the balance of the court of its obligations to respond when the lack of that appearance is impossible to ignore. Obstruction of panels, undisclosed orders, undisclosed or manufactured substitution of judges at the behest of a minority of the Court is no way to do business. As Judge Boggs observed: "this type of secret undocumented decision-making by exclusive in-groups is the way decisions are made in totalitarian countries." *In re Byrd*, 269 F.3d 578, 583 (6th Cir. 2001) (Boggs, J., dissenting).

[41] It should not be possible, for example, for a single Justice or a minority of the Court selected by that Justice to make up panels by hand, including motions panels casting what are now outcome conclusive results, or to hire and deploy staff to screen significant matters in the wake of a vote of the full court to prohibit such hiring without its prior approval. Neither should it be possible, in view of the due process assurance, that such a justice might deploy such staff to screen significant cases on which he does not sit, to propose a desired outcome and substitute into a panel, without notice to the parties, and declare the desired result—or, for that matter, to remove a justice after hours, and cast a different vote. And, against this backdrop, the idea that staff reporting to that single Justice should be hand assigning all cases to panels after conducting review of the parties and issues they present raises further, obvious appearance concerns that, while obviously not the fault of the staff, are plainly inconsistent with the Court's obligations.

We are well past the point where due process demands that the Court make public its processes for forming panels, including panels deciding motions and extraordinary writs, assigning cases to panels, and removing or substituting justices from formed panels (before and after they have recorded votes) and provide notice to all parties currently before us or with matters in which our mandate has not yet issued notice of any departure from our existing written procedures, including the pertinent circumstances of any undisclosed substitutions.

CONCLUSION

As I discussed in Part II, the rules by which cases are heard and decided are a matter of law judges are obliged to know and follow, and departures from those governing rules deny the parties the process that is "due," particularly where the circumstances suggest a lack of neutrality. I reiterate this principle to give further context to this case—in view of and in consideration of my colleagues' request for more detail, their requests that I withdraw my opinion and to explain my understanding of the legal and ethical obligation to take necessary, appropriate action. I have observed continuing challenges in this and other cases that present not only administrative challenges but directly affect the constitutional rights of parties I am obliged to recognize. In the context of these difficulties, I now observe my colleagues changing their votes after my opinion circulated and urging my silence by various means and rationales, including their expressed concern for protecting the Court. As tempting as that may be, I agree with Judges Boggs and

Batchelder that my colleagues have it backwards: "Legitimacy protected only by our silence is fleeting. If any damage has been done to the court, it is the work of the actors, not the reporters." *Grutter v. Bollinger*, 288 F.3d 732, 814 n.49 (6th Cir. 2002), aff'd, 539 U.S. 306 (2003) (Supp. Op. of Boggs, J.).

PART IV: SECOND SUPPLEMENT

Response to the Chief Justice's Concurring Opinion

The Chief Justice's long-awaited opinion assiduously avoids the due process problem that compelled this opinion in the first instance or any rejoinder to any of the facts that relate to it.[42] Instead, his opinion obliquely describes the events as "common practices" and suggests that delays in the release of the panel opinion to the parties after December 22 and December 29, 2020, were respectively mandated and permitted by the Court's "administrative rules" and that the expiration of a justice's term required the delay of the release of the panel opinion and the substitution of a new justice on the panel. Because each of those assertions is false, I am compelled to supplement my opinion, to explain why I disagree with the Chief Justice's position and to discuss the importance of adherence to actual rules of law, as opposed to unwritten *post hoc* declarations of accepted and "common" practices or policies. More importantly, the unusual "practices" said to be at issue here are in

[42] Likewise, Justice Osborne's recently arriving opinion, in footnote 1, obliquely "declines to address or otherwise entertain" my "account of the facts or allegations . . . [as] "not relevant to the disposition of this appeal." As I noted above, despite numerous, repeated requests to identify any material factual or legal error in any earlier drafts of the opinion so that I might avoid the need to write it or to include any such error in it, I have received no response.

fact not "common," and would be *contrary to* the Court's own written, approved rules, *as well as* the rules of appellate procedure, *and* the parties' right to due process.

A. Due Process, Rules, and Practice

Because courts exist to enforce the rights and interests of the parties who appear before them, our first, last, and unavoidable judicial duty, despite the discomfort and threats that may be involved, is to address the due process problem and respect the rights and interests of the parties appearing before us. That due process right includes the right to be heard both in accordance with the rules and by a decision maker whose impartiality would not be open to question by an objective observer. As I have previously detailed, we failed in both respects here. While I take no pleasure in being forced to say so and understand why a few others would prefer to simply avoid addressing the problem, our principal obligation is to the parties.

1. The Rules of Appellate Procedure Unambiguously Call for "Decisions" and "Judgments" By Panels, "Promptly" after Submission with the Opinion Immediately Available to the Parties and Public—With the Right of Other Members of the Court to Participate Preserved by Reconsideration.

The Chief Justice's opinion now addresses my concern with the Court's adherence to the rules of appellate procedure, including, among other concerns, the proper interpretation of rule 41.1, which he mistakenly describes as the "linchpin" of my concerns. His opinion, however, ultimately pronounces the delay in the release of the Court's December opinion, the resulting attempted panel substitution,

and the scramble for *en banc* proceedings not as a product of a procedure in the sense one would understand as part of the assurance of "due process," but far more worryingly, as his subjective recollection of evolving, unwritten "common practice." I do not agree that what happened here is common or the product of any rule at all, though that is hardly the extent of the problem.

To be sure, I interpret rule 41.1 to authorize panels to make decisions and not simply to serve as a screening mechanism to propose an outcome at the panel level conditional and subject to the unrevealed approval of, for example, a single individual justice outside of it. That reading would be contrary to the text of rule 41.1 itself and the rules that follow, including, at least, rules 43.1,[43] 47.3,[44] 48.1.[45] It would also render meaningless rule 49.7, governing *en banc re*consideration, as the panel opinion would have to be pre-approved before it could be handed down, making any reconsideration unnecessary. It would in essence make panel opinions

---

[43] "The court of appeals *should render its judgment promptly after submission of a case*." TEX. R. APP. P. 43.1 (emphasis added).

[44] "*All opinions of the courts of appeals are open to the public* and must be made available to public reporting services, print or electronic." TEX. R. APP. P. 47.3 (emphasis added).

[45] On the date when an appellate court's opinion is handed down, the appellate clerk must send or deliver copies of the opinion and judgment to the following persons:

(a) the trial judge;

(b) the trial court clerk;

(c) the regional administrative judge; and

(d) all parties to the appeal.

TEX. R. APP. P. 48.1. As noted elsewhere, the clerk, not the panel Justices, "hands down" opinions. The problem here arises from the actions obstructing that process in advance of an attempted panel substitution.

in the Texas courts of appeals resemble the "decisions" of Special Trial Judges in the United States Tax Courts that were the subject of the Supreme Court's rebuke in *Ballard*, demanding that such practices at least appear in the court's published rules.[46] *See Ballard v. C.I.R.*, 544 U.S. 40, 59–60 (2005). No one would question that a panel might circulate or take comments and input from other members of the Court for even an extended period, regardless of any internal procedural mechanism. But, that is not remotely the situation presented here.

One of the many serious questions posed by the actions of certain justices in this case is whether a court with more than three justices either could, or did, authorize a justice, not on the panel, to record a vote against the will of the panel practically obstructing the clerk from "hand[ing] down"[47] the Court's decision and delaying the Court from "issuing its judgment" under rule 41.1, particularly where the panel is divided in the result and the vote is cast in the expectation that it will change the panel's composition. That question, in turn, raises the broader question of whether courts are obliged to have and follow any written rules at all. That question was answered by the Supreme Court long ago.

---

[46] In *Ballard*, the United States Supreme Court held the Tax Court, like all other decision-making tribunals, including this Court, is obliged to follow its own rules, and that its practice of not disclosing the special trial judge's initial opinion, of obscuring the Tax Court judge's mode of reviewing that report, and releasing only the final combined work product of the Tax Court was a warrantless deviation from the rules. *See id.* at 59. Notably, the issue in that case came to light, once again, by a disclosure of the facts to the parties in view of the overarching due process concerns, leading to three due process challenges in as many circuits and the eventual decision of the United States Supreme Court. *See id.* at 51.

[47] TEX. R. APP. P. 48.1.

2. Local Rules and Procedure Must Be in Writing and Approved by the Supreme Court and a Majority Vote of the Court Itself Respectively— *Post Hoc* Declarations Are Not Rules at All and Cannot Conflict with the Actual Written Rules.

Whether the question relates to panel formation, the way cases are assigned to panels, or how decisions are released to the parties, courts of appeals must govern themselves in accordance with the rules of appellate procedure, promulgated by the Texas Supreme Court, local rules that have been submitted to and approved by the supreme court, and internal operating procedures. As the justices on the Court have been keenly aware for some time now, any attempt to adopt or implement local rules or internal operating procedures (or other like actions) requires a vote and approval of a majority of the Court. *See* TEX. GOV'T CODE § 22.223; *In re Yates*, 960 S.W.2d 652 (Tex. 1997).

Thus, in the *Castillo* decision, the Texas Supreme Court permitted a written plan governing the authoring assignments on the Thirteenth Court of Appeals. *See In re Castillo*, 201 S.W.3d 682, 685 (Tex. 2006). Notably, at each step, that court reduced its understanding to a writing and approved the rule by a majority vote. *See id.* at 682. This, of course, is not only a mandate of law, *e.g.*, *Yates*, but practically necessary in a first-world system organized around the rule of law to avoid unwritten *post* and *ad hoc* declarations of acceptable "practices" by a single individual or a minority as serving in the place of rules.

As the Chief Justice's opinion acknowledges, a court may adopt written local rules to the extent they have been submitted to and approved by the Texas Supreme

Court as consistent with the rules of appellate procedure. As his opinion also acknowledges, this Court has essentially no such rules. This Court does have internal operating procedures that were adopted in keeping with *Yates* and that the Court has largely declined to share with the public.

3. While it is Hardly the Only Concern Here, The Court's Written Internal Operating Procedures Did Not Require the Delay Before the "Two-Week Study" Vote and Did Not Authorize that Vote on December 29–31

While it is ultimately obscured and appears only briefly amongst the surrounding procedural discussion, the Chief Justice asserts that the delay in the release of the opinion from December 2020 for internal study purposes was not a matter of choice but mandatory in certain cases, in particular any case involving multiple opinions. The Chief Justice's opinion also says that the delay in the release or "issuance" of the panel's opinion prior to the expiration of the second panel member's term (said to eliminate the effect of that previously recorded vote) was caused by this mandatory circulation and by the subsequent decision, said to be permitted by our practices, on December 29 through December 31 to record a two-week study vote. He is mistaken.

The review and study period in this case was prompted, not by a mandatory or permissive "practice," but by a written internal rule ("IOP") permitting, not

requiring, circulation to the full Court at the election of a panel member.[48] That review and study period ended on December 29, 2020, prior to the expiration of a panel member's term.[49] The only interference to the release of the opinion prior to the end of the term of the second panel member (to the extent it could possibly control the outcome between the parties) was the decision to record (late on December 29) and continue to hold a "two-week" study vote on the afternoon of December 31. The Chief Justice's opinion suggests that this vote was lawful and authorized by his understanding of the Court's practices. Again, however, the Court's written rules disagree.

Though we have declined to share them with the Court's users for reasons unknown to me, I am compelled to note that our written internal rules also address this topic explicitly and authorize such a vote to be recorded in three instances: (1) a panel member may request a two-week delay to study a proposed panel majority opinion; and, (2) any member of the Court may request a two-week delay to study a proposed *en banc* opinion; or (3) a proposed panel decision to publish a criminal decision. Conspicuously absent from our written rules is any authorization for a

---

[48] I am obliged to disclose the following: "An opinion in a civil case shall be circulated to all Justices not on the sitting panel ***at the request of any member of the sitting panel*** after it is approved by the sitting panel. An opinion may issue eight calendar days after the opinion is circulated to all Justices. A request for full-Court circulation should be guided by the criteria for non-memorandum opinions set out in Texas Rule of Appellate Procedure 47.4." I.O.P. 5.09(c)(1) (emphasis added).

[49] The Chief Justice himself approved a shortened review and study period—out of consideration for the pending expiration of the panel member's term, but even had he not, the eight-day review and study period permitted by our internal rules would have ended on December 31, 2020, prior to the expiration of the panel member's term.

non-panel member of the Court to request a two-week study delay in a civil case, such as this one.

And while the Chief Justice's opinion suggests that this "practice" is "common" or necessary to permit justices not on the panel to participate in any case of their choosing, neither of those things is true. Prior to the actions in this case, I do not recall such a vote in my six years on the Court; and, more to the point, I am not aware of any like vote *ever* being recorded in *any* appellate court in the face of an expiring term with the expectancy that it might result in a panel substitution after the panel had fully submitted and decided the case. Non-panel justices, of course, are at no risk of being denied an opportunity to participate in a case, as that right is specifically preserved to them in rule 49 by seeking *en banc* reconsideration or by filing a dissent to the denial of a request for *en banc* consideration, as the Chief Justice's reference to *O'Connor* confirms. *See O'Connor v. First Court of Appeals*, 837 S.W.2d 94 (Tex. 1992).[50]

To be direct, neither our internal operating rules nor the rules of appellate procedure permit a non-panel member of this Court to disrupt or delay the release of

[50] I will also note that the apparent concern said to motivate this new unwritten "practice" in protecting the rights of the off-panel justice, notice and the right to participate in the panel's disposition does not appear to currently extend to other recent decisions from this Court, *see Winstead v. Moore*, No. 05-20-00050-CV, 2021 WL _____ (Tex. App.—Dallas Aug. 20, 2021, no pet. h.) (Schenck, J., concurring with denial of en banc consideration) (two-week study vote in full court circulation of panel majority and dissent permitted while subsequent panel decision is "issued" first and to be later used as prior panel precedent in request for en banc consideration of the earlier panel decision), or involving panels speaking to particularly significant matters. *E.g.*, *In re Greg Abbott*, No. 05-21-00687-CV, 2021 WL 3610314, at *1 (Tex. App.—Dallas Aug. 13, 2021, no pet. h.) (rejecting governor's petition for writ of mandamus challenging temporary restraining order enjoining portions of executive order in memorandum opinion).

a panel opinion by, for example, requesting a two-week study when an opinion in a civil case circulates to the full Court at the request of a panel member, or by blocking the release of an opinion approved by a majority of the panel members.[51] The review and study period in this case was prompted, not by a "practice," but by a rule permitting, but not requiring, circulation to the full Court at the election of a panel member. That review and study period ended on December 29, 2020, prior to the expiration of a panel member's term. Thus, the Chief Justice is mistaken when he suggests that anything other than a two-week study vote delayed release of the panel decision.

4. The Concern Here Is Not Just that These Actions Were Contrary to the Actual, Written Rules.

Putting all of that aside, let us suppose for the moment that the proper interpretation of the rules of appellate procedure and our "practices" make a panel's decision executory after a majority of the panel agrees on the judgment. Let us further assume that the decision and the recorded votes so declaring are of no effect until the panel's decision has been circulated to and approval by justices who were not assigned to sit on the panel, are subject to further delay in the release to the

[51] The Chief Justice's attempt to suggest that the release of the opinion in the *Sink* case, after Justice Stewart retired, may have occurred as a result of Justice Stewart sitting by assignment following her retirement is unavailing, as this Court clearly noted that the opinion was prepared and approved by her prior to the expiration of her term and stated that Justice Keith was sitting by assignment. *Sink v. State*, 685 S.W.2d 403, 403, n.1, n.2 (Tex. App.—Dallas 1936, no writ) (per curiam). It is clear that this Court is capable of, and does, identify justices who are sitting by assignment. *E.g.*, *Lee v. Nguyen*, No. 05-18-01256-CV, 2020 WL 5554936, at *1 n.1, n.2 (Tex. App.—Dallas Sept. 17, 2020, no pet.) (mem. op.). Justice Stewart was not.

parties by any justice outside the panel, and take effect only when the opinion is permitted by that justice to be released or "handed down" to the parties. Suppose also that all of this is consistent with rules 41.1,[52] 43.1,[53] 47.3,[54] governing precedent,[55] rule 49.7's authorization for an otherwise superfluous *re*consideration, and our own written, approved internal operating procedures, making an impending term ending have the potential to trigger an expurgation of that justice's recorded vote, a substitution of a new panel member, and all that is said to be the perfectly natural and predictable sequence that followed.

With the few Justices[56] of the Court active in this matter knowing all of this, what possible inference would a reasonable, objective observer draw from the actions to seek "expedited" circulation because of that ending term, whilst simultaneously recruiting votes to delay the release of the opinion that is supposed to be necessary to avoid a substitution? Likewise, what inference arises when a

---

[52] "Except as otherwise provided in these rules, the panel's opinion constitutes the court's opinion, and the court must render a judgment in accordance with an opinion." TEX. R. APP. P. 41.1.

[53] "The court of appeals should render its judgment promptly after submission of a case." TEX. R. APP. P. 43.1.

[54] "All opinions of the court are open to the public and must be made available . . . ." TEX. R. APP. P. 47.3.

[55] Of course, this assertion is also contrary to the established law, not only as recognized by this Court in *Sink,* but by the Texas Supreme Court in the *Castillo* case the Chief Justice cites in his opinion. There, in conceding the withdrawal of its original "exit plan" for a justice was improper, the appellate court "correctly agreed that the Justice, 'like every other justice on the court,'" had the right to vote on cases heard by her panel. *Castillo*, 201 S.W.3d at 684.

[56] Contrary to the Chief Justice's assertion, at no point does my opinion accuse twelve justices of engaging in the conduct giving rise to this problem. Quite to the contrary, the majority of the Court is presented with the awkward problem of determining the appropriate response to the affirmative, unprecedented actions and decisions of a minority. *See* discussion *infra* in Part III, C.

Justice, not on the panel, acting with notice of the exorbitant delay in an accelerated case, the impending term ending of one of the panel justices, and the earlier solicitation of and withdrawal of a stalling vote, insists, on the afternoon of December 31, 2020, on leaving a two-week study vote on file? What inference arises from that Justice not seeking "reconsideration" at any point through that "two-week study," the substitution of an outcome-altering panel vote, the harried request for *en banc* review only after being directed to rule 41.1 and *Sink*, the decision to ignore that substituted vote, or the subsequent refusal to permit a record of the vote to withhold the panel decision or to acknowledge it in a resulting order?

While all of this may *also* be properly the subject of mandamus or other proceedings, I refuse to accept that any of this was in keeping with "ordinary practices," much less any rule of this or any other court, or that it does not implicate the constitutional rights of the parties before us or that this Court is not obligated to acknowledge as much and deal with the parties' rights first.

As to the Chief Justice's comments concerning the "issuance" of the opinion, as I stated before, judges do not issue opinions, the clerk's office sends notice of decisions to the parties (i.e. "hands down" the decision under rule 48.1),[57] and Rule 41.1 of the Texas Rules of Appellate Procedure and *Sink* make it clear that the majority's approval of the opinion is the decision of the Court, regardless of whether

[57] The question of whether and when an opinion will function as precedent after it has been handed down and the Court's mandate has been issued is addressed in rule 47.7 and is irrelevant here.

a justice whose term expires prior to the clerk's office releasing the opinion is eligible to sit by assignment. No one contests that the panel member whose term was about to expire approved the majority opinion prior to the expiration of his term or that the opinion circulated to the full Court on December 23, 2020, on an expedited basis. And even if the panel opinion had not circulated on such a basis, under our operating rules the opinion would have been ready to release to the parties on December 31, eight days after full Court circulation, and prior to the expiration of the second panel member's term. On December 31, the release of the opinion was delayed by a single justice over objection, without any basis in the rules, in contravention of the plain language of rule 41.1, and under circumstances that would cause a reasonable observer to question the purpose other than the delay itself and resulting substitution. That the panel opinion was still withheld thereafter, again in contravention of the rules of appellate procedure *and* prior precedent, and these *en banc* proceedings have proceeded as they have, does little to help matters.

B. Mandamus or Opinion

As I have detailed above, I believe the appropriate action in this instance is to disclose in an opinion, as others have done before me, my concerns regarding the actions taken by members of this Court in deciding this appeal. The Chief Justice does not agree that this is an appropriate forum in which to disclose my concerns and instead states his view that I should raise my due-process concerns in a petition

for writ of mandamus.[58] As an initial matter, I note that, immediately following the events in December and January, it would have been injudicious of me to have pursued a mandamus proceeding without knowing where the Court was ultimately going in this case, what the rationale for our actions would ultimately be,[59] and, most critically, before giving the justices an opportunity to know the basis for my opinion and an opportunity to correct me if and where I am wrong on the facts or the law.

Moreover, why a mandamus action would be preferable to disclosure in an opinion is hard to fathom given his stated concern. The Chief Justice does not suggest that such an original proceeding should or even could be filed secretly or under seal. *See Nixon v. Warner Commc'n, Inc.*, 435 U.S. 589, 598 (1978) (purpose of presumed right of access to court filings is to keep public eye on judiciary and other governmental agencies); *see also In re Policy Mgmt. Sys. Corp.*, Nos. 94-2254, 94-2341, 1995 WL 541623, at *4 (4th Cir. Sept. 13, 1995); *Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1299 n.7 (7th Cir. 1980) ("the purpose of the common law right of access is to check judicial abuses"). In fact, he cites opinions in which various internal workings of the courts are disclosed and discussed in mandamus proceedings. *See, e.g.*, *Castillo*, 201 S.W.3d 682; *Yates*, 960 S.W.2d at 652;

[58] The Chief Justice also states his belief that a complaint with the State Commission on Judicial Conduct would be appropriate here. However, as I have already stated in Part III of this opinion, that action would provide no relief to the parties affected here.

[59] As noted above, it was not clear in January whether the Court was *re*considering the December panel opinion, purporting to make an initial decision *en banc*, contrary to its earlier screening and assignment to a panel, or reconsidering the decision of the fourth panel member late in the afternoon of the first *en banc* request. The Chief Justice's long-awaited opinion sheds less than a complete light on that question.

O'Connor, 837 S.W.2d at 95. Meanwhile, the practical effect of the pursuit of such a proceeding, rather than disclosure in this opinion, would be to make the issue public to every observer of the Texas Supreme Court's docket, leaving only the parties affected by it ignorant except insofar as they might discover their due-process problem by happenstance.

The Chief Justice thus does not explain why filing a petition for writ of mandamus, with the disclosures made here, would in any way alleviate his concern that such a disclosure of what transpired in this case would constitute a violation of the state constitution or code of judicial conduct. S*ee* TEX. CONST. art. V, § 1-a(6)(A); Tex. Code Jud. Conduct, Canon 2A, reprinted in TEX. GOV'T. CODE ANN., tit. 2, subtit. G, app. C.[60]

It is apparent to me that the Chief Justice's suggestion that mandamus or a report to the commission on judicial conduct is the course that I should have pursued highlights this Court's concern about protecting individual justices on the Court. While I share that concern, I am also concerned about, and constitutionally and ethically obliged to acknowledge and protect, the rights of the parties.

While I believe that the appellants' arguments in this case are unavailing and that nothing about this case warranted the extraordinary actions, including the

[60] One might wonder, too, how this Court managed to avoid any violation of these same authorities in addressing the allegations of judicial misconduct and due process violations in opinions regarding lower court judges. *See, e.g.*, *Thomas v. 462 Thomas Fam. Prop.*, 559 S.W.3d 634, 641–44 (Tex. App.—Dallas 2018, pet. denied); *Rymer v. Lewis*, 206 S.W.3d 732, 736 (Tex. App.—Dallas 2006, no pet.).

bewildering delay or this *en banc* proceeding, my opinion may or may not be correct and cannot serve as a basis to deprive appellants of the right to review of that structural question. While the challenges facing the Court may be broader than the actions taken in this case,[61] the actions here are sufficient to warrant, indeed, to require, notice to the parties, as they deserve an outcome in accordance with the rules and from a transparently impartial tribunal. I do not intend to preclude the possibility that the issues presented in this case may also be proper for mandamus or other proceedings elsewhere, but the rights of the parties must be addressed first. Here, in view of the existing delay, direct review and final decision, rather than transfer to another court of appeals to start over would seem advisable, with the supreme court deciding whether such review is necessary and making any such further direction and referrals as it deems proper.

I conclude by noting, if I am wrong in my view of the facts and of the due process problem in this extraordinary case, as the Chief Justice contends but will not elucidate, where is the harm to the judiciary in my stating that view? Meanwhile, if I am correct in my view, how could withholding that information from the parties directly affected by it fulfill my constitutional and ethical obligations or advance the legitimacy of the judiciary? Indeed, my leaving both parties to their fates and

[61] I do not agree, for example, with the Chief Justice that *Castillo* supports non-random panel formations or the manual assignment of cases to those panels. *Castillo* simply addressed the manner of making writing assignments within panels. Meanwhile, whatever process has been used to assign a case to a panel, the parties have a right to that decision, not a particular outcome decreed by someone else.

standing silent pending the possible or likely development of this problem elsewhere would undermine, not promote confidence in the judiciary. As Judge Batchelder put it in similar, awkward circumstances: "Public confidence in this court or any other is premised on the certainty that the court follows the rules in every case . . . Unless we expose to public view our failures to follow the court's established procedures, our claim to legitimacy is illegitimate." *Grutter*, 288 F.3d at 782.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

190274CF.P05