



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

LANORA C. PETTIT
Principal Deputy Solicitor General

(512) 463-2127
Lanora.Pettit@oag.texas.gov

August 7, 2024

Via CM/ECF

Mr. Lyle W. Cayce, Clerk
U.S. Court of Appeals for the Fifth Circuit

Re: *United States v. Abbott*, No. 23-50632

Dear Mr. Cayce:

As indicated yesterday, I am filing a copy of the hearing transcript for the status conference on August 6, 2024, that I referenced in my previous letter to the en banc Court. Yesterday afternoon, the district court ordered that the August 6th status conference be “continued in person” today. During this morning’s hearing, the district court verbally instructed me to file a copy of today’s transcript as well. Accordingly, the district court’s order and second transcript are also attached.

Respectfully submitted.

/s/ Lanora C. Pettit

Lanora C. Pettit
Principal Deputy Solicitor General

cc: all counsel of record (via CM/ECF)

**ATTACHMENT 1:
TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE DAVID A. EZRA
AUGUST 6, 2024**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

UNITED STATES OF AMERICA,) AU:23-CV-00853-DAE
)
Plaintiff,)
)
v.) AUSTIN, TEXAS
)
GREG ABBOTT, ET AL.,)
)
Defendants.) AUGUST 6, 2024

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE DAVID A. EZRA

FOR THE PLAINTIFF: BRIAN H. LYNK
U.S. DEPARTMENT OF JUSTICE
ENVIRONMENTAL DEFENSE SECTION
P.O. BOX 23986
WASHINGTON, D.C. 20026-3986

ANDREW D. KNUDSEN
BRYAN JAMES HARRISON
KIMERE J KIMBALL
U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT & NATURAL RESOURCES
P.O. BOX 7611
WASHINGTON, D.C. 20044

LANDON ALLEN WADE
UNITED STATES ATTORNEY'S OFFICE
903 SAN JACINTO BOULEVARD, SUITE 334
AUSTIN, TEXAS 78701

MARY F. KRUGER
UNITED STATES ATTORNEYS OFFICE
CHIEF, CIVIL DIVISION
601 NW LOOP 410, SUITE 600
SAN ANTONIO, TEXAS 78216

1 FOR THE DEFENDANTS: MUNERA AL-FUHAID
2 MONROE DAVID BRYANT, JR.
3 JOHNATHAN STONE
4 KYLE STEPHEN TEBO
5 OFFICE OF THE ATTORNEY GENERAL
6 PO BOX 12548
7 AUSTIN, TX 78711-2548
8
9 RYAN DANIEL WALTERS
10 OFFICE OF THE TEXAS ATTORNEY GENERAL
11 SPECIAL LITIGATION DIVISION
12 209 WEST 14TH STREET, 7TH FLOOR
13 AUSTIN, TEXAS 78701
14
15 JAMES P. SULLIVAN
16 OFFICE OF THE GOVERNOR
17 P.O. BOX 12428
18 AUSTIN, TEXAS 78711-2428
19
20 COURT REPORTER: ARLINDA RODRIGUEZ, CSR
21 501 WEST 5TH STREET, SUITE 4152
22 AUSTIN, TEXAS 78701
23 (512) 391-8791
24
25 Proceedings recorded by computerized stenography, transcript
produced by computer.

09:10:45 1 (Open court)

09:10:45 2 THE CLERK: AU:23-CV-853, *United States of*

09:10:49 3 *America v. Greg Abbott, et al.*

09:10:53 4 THE COURT: All right. Good morning to all of

09:10:55 5 you. Can we have appearances, please.

09:11:00 6 MR. LYNK: Good morning, Your Honor. For the

09:11:01 7 United States, Brian Lynk from the Department of Justice.

09:11:05 8 With me are Andrew Knudsen, Kimere Kimball,

09:11:09 9 Bryan Harrison, as well as Mary Kruger and Landon Wade of

09:11:15 10 the U.S. Attorney's Office.

09:11:18 11 MS. AL-FUHAID: Good morning, Your Honor.

09:11:19 12 THE COURT: Good morning.

09:11:19 13 MS. AL-FUHAID: Munera Al-Fuhaid on behalf of

09:11:19 14 Defendants Governor Greg Abbott and the State of Texas.

09:11:23 15 And with me are my colleagues from the Texas Attorney

09:11:25 16 General's Office, David Bryant, Johnathan Stone,

09:11:29 17 Zach Berg, Kyle Tebo, Ryan Walters.

09:11:42 18 THE COURT: And my buddy back there in the

09:11:42 19 courtroom, good to see you. You want to make your

09:11:42 20 appearance?

09:11:42 21 MR. SULLIVAN: Sure. James P. Sullivan,

09:11:45 22 General Counsel for the Governor of Texas, Greg Abbott.

09:11:47 23 THE COURT: Good. Good to see you.

09:11:49 24 MR. SULLIVAN: Thanks, Judge.

09:11:49 25 THE COURT: Okay. Well, we've had an eventful,

09:11:55 1 if not entirely clear opinion or a bunch of opinions, out
09:12:01 2 of the Fifth Circuit. And one of the things we need to
09:12:09 3 do today is decide how we're going to go forward.

09:12:11 4 I think the first thing we have to keep in mind
09:12:15 5 is that the *en banc* ruling was a ruling on a preliminary
09:12:19 6 injunction, not the merits. We haven't had the trial in
09:12:21 7 this case yet, so there is room for additional evidence.

09:12:25 8 Now, to the extent that the *en banc* ruling laid
09:12:29 9 out legal principles, those legal principles of course
09:12:32 10 are binding. But the problem is -- and several judges
09:12:41 11 who have read the opinions, and some law professors I
09:12:45 12 think have also weighed in -- we have a nine-nine split.

09:12:56 13 So you have the majority, which is nine judges,
09:13:06 14 for the -- for most of it, but then you have seven
09:13:13 15 judges -- seven or eight judges; I'm not sure -- who
09:13:18 16 Judge Richman, who did not agree with the majority. She
09:13:23 17 concurred in the judgment, but she did not agree with the
09:13:26 18 majority on the test for navigability. She took a
09:13:32 19 dispute with that. And Judge Ho didn't say anything
09:13:35 20 about it at all. So you actually have, if you look at
09:13:41 21 that issue, what could be said to be a nine-nine split.

09:13:48 22 I'm not sure about that. I'm not taking that
09:13:51 23 position, okay? I don't know. But it's something that
09:14:01 24 the parties are going to have to address.

09:14:04 25 Typically, if you have -- for instance, I'll

09:14:08 1 give you an example. I was on a panel. I sit regularly
09:14:12 2 with the Ninth Circuit Court of Appeals, and have for
09:14:15 3 over 35 years. And I was on a panel that made a very
09:14:20 4 important ruling involving the State of Oregon, and that
09:14:35 5 was appealed to the Supreme Court. Justice Kagan had to
09:14:46 6 recuse herself because she had been Solicitor -- I guess
09:14:49 7 she had been -- I'm not sure. I think she was Solicitor
09:14:52 8 General, right? at the time. So she had to recuse
09:14:56 9 herself, and the Supreme Court split four-four. The end
09:14:59 10 result was our ruling, the Ninth Circuit ruling, was
09:15:03 11 affirmed.

09:15:07 12 Now, we have done some research of our own on
09:15:16 13 this, and I think what we have to do is there's going to
09:15:20 14 have to be some parsing of these opinions and looking at
09:15:24 15 them carefully. But the point is that it isn't as clear
09:15:28 16 cut as one would seem, and I think both parties need to
09:15:32 17 understand that. I think we need to look at it very
09:15:36 18 carefully.

09:15:36 19 And I think Governor Abbott, who is himself an
09:15:42 20 attorney and a former State Supreme Court Justice, a very
09:15:46 21 bright man, he's made, obviously, a statement in support
09:15:51 22 of the decision, but he's been very -- otherwise, very
09:15:55 23 reserved, I thought, which leads me to believe that he
09:16:00 24 understands that this isn't quite as clear-cut as one
09:16:03 25 might think.

09:16:04 1 I don't know. I could be wrong here. But it
09:16:11 2 doesn't matter, quite frankly, because this case, I
09:16:15 3 predict -- and I'm a good predictor. I've had four
09:16:23 4 cases -- three or four cases that I said -- that I've
09:16:25 5 decided that I said would go to the Supreme Court, and
09:16:28 6 all four of them did.

09:16:34 7 I did okay at the Supreme Court except in
09:16:41 8 bump stock. I got -- I didn't do well in bump stock, but
09:16:45 9 I still think I was right on bump stock. The others the
09:16:52 10 Fifth Circuit was reversed. I was reversed, and then
09:16:55 11 they were reversed by the Supreme Court. The most recent
09:16:59 12 one was the 1983 case involving Castle Hills. And had
09:17:06 13 good dissent from, actually. Judge Oldham wrote a strong
09:17:10 14 dissent from the panel opinion. And think I -- Judge
09:17:14 15 Oldham and I were right, and the Supreme Court thought so
09:17:16 16 also.

09:17:16 17 But this case will end up, I think, in the
09:17:19 18 Supreme Court. So you have to take the long view. And
09:17:24 19 for sure SB 4 will end up at the Supreme Court. So we
09:17:29 20 have to take the long view in this case and remember
09:17:35 21 that, whatever we do, we have to do with a light of
09:17:40 22 trying to create the very best record we can, both sides,
09:17:45 23 because it isn't going to end here.

09:17:50 24 Whatever I do, we don't know whether we have a
09:17:53 25 jury yet. You know, that's still up there. And who

09:18:01 1 knows? I don't know why the State of Texas would
09:18:08 2 actually want a jury in this case, but all right. Unless
09:18:13 3 it was just a way to delay the case. I don't know. I'm
09:18:16 4 not sure. I would hope not. But a lot of people have
09:18:26 5 been shaking their heads on that one.

09:18:28 6 You know, I haven't ruled entirely against the
09:18:30 7 State of Texas in this case. I dismissed a cause of
09:18:33 8 action brought by the -- by the United States Government
09:18:41 9 in this case. It wasn't mentioned, I don't think, in the
09:18:44 10 *en banc*, but it did happen.

09:18:45 11 So here we are. Do we have any additional
09:18:55 12 discovery that needs yet to be done before we go to
09:18:58 13 trial?

09:18:58 14 MS. AL-FUHAID: No, Your Honor.

09:18:59 15 THE COURT: You don't?

09:19:01 16 MS. AL-FUHAID: Not from our perspective.

09:19:04 17 MR. LYNK: Your Honor, we're not requesting
09:19:05 18 that at this time. Now, we are of course looking, as you
09:19:10 19 mentioned, at the opinion carefully. We're also looking
09:19:13 20 at -- we'll be making our evaluation as to whether to
09:19:17 21 seek further appeal from the opinion. I think as part of
09:19:20 22 that, of course, we're going to reevaluate the evidence
09:19:23 23 that we have in light of the discussions in the opinion.
09:19:27 24 And so I can't rule that out entirely.

09:19:29 25 THE COURT: Yeah. I want to make it very clear

09:19:31 1 that I am personally not saying there is a definitive
09:19:36 2 split here. What I'm saying is that has -- that is the
09:19:42 3 chatter, okay? There are law professors and judges who
09:19:47 4 have said that Judge Willett's opinion is not
09:19:51 5 precedential. Now, I'm not saying that. I want to make
09:19:55 6 that very, very clear.

09:19:58 7 MR. LYNK: Yes.

09:19:58 8 THE COURT: I don't want to read a newspaper
09:20:01 9 article saying Judge Ezra said Judge Willett's opinion is
09:20:05 10 not precedential. I didn't say that, and I'm not saying
09:20:08 11 it.

09:20:08 12 MR. LYNK: Understood, Your Honor. But just on
09:20:10 13 your question of discovery, I think -- again, we're not
09:20:12 14 asking for it today, but I think we'd like the
09:20:14 15 opportunity to give you a firmer answer once we evaluate.

09:20:16 16 THE COURT: Okay. Let me explain to you, now,
09:20:19 17 the parties had requested a 60-day continuance. And you
09:20:22 18 might be wondering why there was a joint motion filed.
09:20:26 19 Or I guess the State had agreed to it or something?

09:20:29 20 MS. AL-FUHAID: We did not oppose the request,
09:20:31 21 Your Honor.

09:20:31 22 THE COURT: You didn't oppose the request.
09:20:33 23 Okay. Well, that's agreeing to it.

09:20:36 24 So why -- I don't know what -- is that --
09:20:41 25 that's kind of a --

09:20:43 1 Anyway, so the State didn't oppose the request.
09:20:48 2 The government made it. Why -- why 90 days instead of 60
09:20:52 3 days? The reason is you have to prepare for trial. I
09:20:59 4 used to be a trial lawyer in my time. I don't know how
09:21:03 5 long it will take the panel that is selected -- I don't
09:21:09 6 even know who the panel is in this case. Do we know?

09:21:12 7 MS. AL-FUHAID: We're not aware, Your Honor.

09:21:14 8 THE COURT: Yeah. I don't think we even know
09:21:16 9 Who the panel is. I don't know how long it's going to
09:21:22 10 take them. I mean, I'm still waiting even to this day
09:21:25 11 for a panel ruling on the SB 4 case. And I'm not chiding
09:21:28 12 the Fifth Circuit for that; it's a difficult issue. But
09:21:31 13 they haven't come down with an opinion in that, and that
09:21:33 14 was argued quite some time ago.

09:21:36 15 So sometimes it takes a while to get these
09:21:39 16 rulings out. And I know that because, as I said, I sit
09:21:42 17 on the Ninth Circuit. In fact, I'm about to go off to
09:21:46 18 Portland to sit on the Ninth Circuit again. We have some
09:21:49 19 important cases we're going to be deciding. So I'm
09:21:52 20 not -- I'm not critical at all. But we don't know.

09:21:56 21 And my concern was that, once you get a ruling,
09:22:01 22 you need to prepare for trial. And sometimes you prepare
09:22:04 23 differently if you're going to try the case to a jury
09:22:11 24 versus a judge. And I don't want to put you in the same
09:22:15 25 kind of squeeze play the State likes to put me in.

09:22:21 1 By the way, I think that's a bad practice. If
09:22:24 2 I were you, I would not continue -- I would talk to
09:22:26 3 whoever is in charge of that and not do these letters to
09:22:30 4 the judge saying, if you don't rule by tomorrow at 5:00,
09:22:33 5 I'm doing this. It kind of sounds like a threat, and
09:22:37 6 federal judges don't do threats well. I think it's not a
09:22:45 7 good idea to do that.

09:22:46 8 I have never in my entire 35, almost 36 years,
09:22:50 9 on the bench had it done to me, except by the State of
09:22:53 10 Texas twice now. So I think -- and I've handled big
09:22:59 11 cases. So I think it's a better practice not to do that.
09:23:04 12 Now, does it prejudice me against the State? Absolutely
09:23:08 13 not. I mean, I made my ruling for the State in this case
09:23:14 14 after they did it the first time. But I just think it's
09:23:18 15 not a good practice, and it doesn't look good. It
09:23:22 16 doesn't look good to me, and I don't even think it looks
09:23:25 17 good to the Fifth Circuit.

09:23:31 18 It would be me like putting an order out
09:23:33 19 saying, you know, if the Fifth Circuit doesn't do
09:23:36 20 something by X number hours, I'm going to do this, this,
09:23:40 21 or this. And I think a Fifth Circuit Judge would look at
09:23:44 22 that and say, Who does this guy think he is? So I think
09:23:46 23 it's not a good practice, and I would really kind of
09:23:48 24 avoid it.

09:23:49 25 If you intend to file a motion or a writ of

09:23:53 1 mandamus and you want to let the judge know, I would just
09:24:02 2 say, We are contemplating filing a writ of mandamus in
09:24:08 3 this matter, period. And if you're going to file it,
09:24:11 4 file it five minutes after you send me the notice. Or
09:24:14 5 file it two days after. But don't say, if you don't do
09:24:17 6 it by X hour, I'm going to drop the ball on you. I think
09:24:22 7 it just doesn't play well.

09:24:27 8 But that's an aside, all right? That's just a
09:24:30 9 little bit of advice from somebody who's been a lawyer
09:24:36 10 for 52 years.

09:24:39 11 So I wanted to be sure that both sides had a
09:24:44 12 full and ample opportunity to be prepared for whatever
09:24:49 13 kind of trial we get. We may get a ruling. I don't know
09:24:55 14 if they're going to have -- do they have oral argument on
09:24:57 15 this mandamus?

09:24:58 16 MS. AL-FUHAID: Right now no oral argument has
09:25:00 17 been scheduled, but I believe they could if they chose to
09:25:02 18 have an argument.

09:25:03 19 THE COURT: Sure. Did they have oral argument
09:25:06 20 the last mandamus, the one that they denied? The State
09:25:07 21 of Texas filed a mandamus the last time, and it was
09:25:10 22 denied.

09:25:11 23 MS. AL-FUHAID: They did not.

09:25:12 24 THE COURT: They did not have -- I think they
09:25:14 25 did, didn't they?

09:25:16 1 MR. SULLIVAN: They had an emergency oral
09:25:18 2 argument remotely the day after from the U.S. Supreme
09:25:23 3 Court.

09:25:23 4 MS. AL-FUHAID: I'm sorry, Your Honor. I stand
09:25:24 5 corrected.

09:25:29 6 THE COURT: That's okay. Listen, this has been
09:25:31 7 crazy. This has been crazy.

09:25:33 8 So the only reason I mentioned the chatter
09:25:35 9 about the nine-nine split is because I want you to be
09:25:39 10 ready for that. I want you to argue it and be able to
09:25:41 11 prepare it. If you sail along thinking, oh, well, we
09:25:46 12 won, maybe you didn't win as much as you thought you won
09:25:49 13 or maybe you did. I don't know. And I don't want the
09:25:55 14 State -- the Federal Government to be oblivious about
09:26:01 15 this either. I mean, this is an important issue. We
09:26:04 16 need to look at it.

09:26:05 17 There's an interesting water -- it's a water
09:26:07 18 case where the Supreme Court made it -- wrote a decision.
09:26:13 19 The case is -- my good law clerk Sam Krevlin found it --
09:26:20 20 *Rapanos v. United States*. It's not that old, really, in
09:26:22 21 Supreme Court terms. It's a 2006 decision at 547 U.S.
09:26:28 22 715, where there was this kind of a plurality. And one
09:26:35 23 of the justices agreed with the judgment but didn't go
09:26:38 24 along with all of the reasoning.

09:26:42 25 So you had kind of this four-four -- I mean,

09:26:46 1 you had four-four and then somebody else over here doing
09:26:50 2 something different. And two circuits did not follow the
09:26:56 3 four opinion, the, quote/unquote, majority opinion,
09:27:01 4 didn't follow it. And -- because they deemed it
09:27:05 5 non-precedential. And there's another case called *June*
09:27:10 6 *Medical Services v. Russo* which you might want to look
09:27:14 7 at. That's another one.

09:27:15 8 So there are these cases out there, and we need
09:27:21 9 to -- we need to look at it and I need to make a
09:27:23 10 decision. I mean, I might ultimately decide that, under
09:27:31 11 the circumstance of this case, that Judge Willett's
09:27:34 12 opinion controls. I might very well decide that, or I
09:27:43 13 may be convinced otherwise.

09:27:44 14 But let's just say there are law professors and
09:27:47 15 other judges out there who feel that isn't the case. And
09:27:51 16 I have not -- and I promise you this is true. I have not
09:27:54 17 made a decision one way or the other. I want to hear
09:27:59 18 from you. I want to hear from the lawyers. I want to
09:28:01 19 look at it much more carefully.

09:28:05 20 THE COURT: You want to introduce yourself,
09:28:11 21 because the record doesn't know who you are.

09:28:11 22 MR. STONE: Yes, Your Honor. I'm
09:28:12 23 Johnathan Stone. I just wanted to get a little follow-up
09:28:15 24 on that and get a little clarity. Are you wanting us --
09:28:18 25 are you going to enter a briefing schedule related to

09:28:20 1 this issue of what is the law of the case, and do you
09:28:22 2 want us to get with the plaintiff's counsel in this case
09:28:25 3 and see if we're in agreement on what is the law of the
09:28:28 4 case going forward? Or, if we disagree, do you want that
09:28:30 5 briefed as well?

09:28:31 6 THE COURT: Yeah. I think that would be --
09:28:32 7 that's one of the reasons we're here, is to try to figure
09:28:35 8 all this out. I mean, the United States might agree with
09:28:38 9 you or they may disagree. I mean, they're going to have
09:28:43 10 to look at it very carefully. I mean, this is a tricky
09:28:47 11 one, and, ultimately, this may be a decision made by the
09:28:55 12 Supreme Court in this case.

09:28:55 13 But this case is not going to go to the Supreme
09:28:58 14 Court, I don't think, on this record. I think it will go
09:29:01 15 after trial. They've been a little bit hesitant to take
09:29:06 16 things up on partial records recently. But I don't know.
09:29:09 17 You know a lot more. You live in Washington. I don't.
09:29:17 18 Although my cases seem to get there a lot.

09:29:20 19 I'm really happy, by the way, and this has
09:29:24 20 nothing to do with this case.

09:29:24 21 (Discussion off the record)

09:30:12 22 THE COURT: All right. What kind of a briefing
09:30:15 23 schedule, since we're going to allegedly go to trial --
09:30:20 24 by the way, 90 days would have been the day after the
09:30:24 25 election, but I moved it one more day past. Because I

09:30:29 1 didn't want anybody, no matter what their view was, to be
09:30:32 2 so depressed or so happy that they couldn't focus,
09:30:37 3 depending upon what happens in the presidential election,
09:30:41 4 assuming we even know by then, right? Sometimes you
09:30:48 5 don't.

09:30:48 6 I would certainly like to make a decision on
09:30:51 7 this prior to trial. I don't think we want to go to
09:30:54 8 trial not knowing whether it's, as Judge -- the
09:31:00 9 majority -- the dissents plus Judge Richman feel that the
09:31:07 10 definition by Judge Willett was too narrow and that it's
09:31:14 11 you can use "across the river" or whether the majority,
09:31:21 12 which says you can't go "across the river."

09:31:23 13 I know what you do in a lake. What do you do
09:31:26 14 with a lake? You know, there's a lot of lakes that are
09:31:30 15 navigable waters in the United States. What do you do
09:31:32 16 with a lake if you can't go across? Let's say the lake
09:31:36 17 is long and you go across, what do you? It's a problem.

09:31:47 18 Yes, ma'am?

09:31:47 19 MS. AL-FUHAID: Your Honor, may I make a
09:31:48 20 suggestion? The United States had requested a 60-day
09:31:51 21 stay of proceedings, and we agree with that request.
09:31:55 22 Would Your Honor be amenable to 60 days from now as
09:32:00 23 submitting briefing on this issue, and then that would
09:32:02 24 give them a chance to determine how they want --

09:32:05 25 THE COURT: Yeah. Hopefully by then we will

09:32:07 1 have heard on the mandamus petition as to whether we'll
09:32:09 2 have -- whether we have a jury or not doesn't matter on
09:32:13 3 this issue.

09:32:14 4 MS. AL-FUHAID: If that is agreeable to them.

09:32:16 5 MR. LYNK: Your Honor, I think a 60-day

09:32:18 6 interval to brief you on this question makes sense as

09:32:21 7 well.

09:32:21 8 THE COURT: Yeah. That's much longer than we

09:32:23 9 would normally do. You know ...

09:32:29 10 MR. LYNK: Your Honor, and the reason --

09:32:31 11 THE COURT: Yeah. No. I'll tell you what.

09:32:33 12 I'm going to give you 45 days so I've 15 days to look at

09:32:37 13 it before we get to the 60-day point, okay? Because I

09:32:40 14 really need to -- I need to do a lot of work on this

09:32:44 15 myself.

09:32:44 16 MS. AL-FUHAID: And would this be simultaneous

09:32:46 17 briefing, Your Honor?

09:32:47 18 THE COURT: Yes. We know what the issue is.

09:32:49 19 We're not going to go back and forth like a ping-pong

09:32:52 20 tournament.

09:32:53 21 MR. LYNK: Understood, Your Honor.

09:32:55 22 THE COURT: Friday, September 20th.

09:32:58 23 MR. LYNK: Do you -- are you proposing a page

09:32:59 24 limit for each side's brief on this?

09:33:02 25 THE COURT: Generally, 35 pages.

09:33:05 1 MS. AL-FUHAID: Thank you, Your Honor.

09:33:06 2 THE COURT: That should be enough.

09:33:16 3 MR. LYNK: And, just to be clear, you just want

09:33:17 4 a single filing from each side?

09:33:19 5 THE COURT: Yes.

09:33:19 6 MR. LYNK: Should we reply to each other?

09:33:20 7 THE COURT: No.

09:33:22 8 MR. LYNK: Okay. Thank you. No.

09:33:23 9 THE COURT: No. No. Say everything you need

09:33:25 10 to say right then and there. Yeah. She was just asking

09:33:52 11 me about the pretrial deadlines and so forth, which

09:33:54 12 obviously have to be continued. So you'll get that in

09:33:57 13 the order.

09:33:58 14 MS. AL-FUHAID: Thank you, Your Honor.

09:33:59 15 THE COURT: All right. Anything else?

09:34:07 16 MR. LYNK: Nothing that the United States can

09:34:12 17 think of, Your Honor.

09:34:13 18 MS. AL-FUHAID: Nothing from Texas at the

09:34:14 19 moment, Your Honor. Thank you.

09:34:15 20 THE COURT: Let me again make myself very

09:34:18 21 clear, because for some reason I've been misquoted and

09:34:25 22 people have jumped to conclusions. I have not reached

09:34:29 23 any decision as to what or even if there is an issue with

09:34:34 24 respect to Judge Willett's majority opinion. I'm not

09:34:40 25 suggesting here that it isn't precedential, all right? I

09:34:46 1 don't know.

09:34:46 2 I'm saying that there have been voices who have
09:34:51 3 said that because of the split, and I don't know. As I
09:35:01 4 look at it, I think that it's something that we need to
09:35:04 5 work out and I need to make a ruling on. And then that
09:35:10 6 becomes an appealable ruling one way or the other.
09:35:16 7 Unless the parties fully agree, and I may not even agree
09:35:17 8 with the parties.

09:35:27 9 I will tell you that the -- I had a bankruptcy
09:35:30 10 appeal that went to the Supreme Court where I disagreed
09:35:32 11 with the parties, and the -- and the Fifth Circuit agreed
09:35:35 12 with the parties and the Fifth Circuit was reversed
09:35:38 13 nine-zero. So I'm glad I didn't agree with the parties.

09:35:42 14 So I think we need to be very careful here. I
09:35:50 15 am not taking a position on this at this time. I'm just
09:35:55 16 saying that I needed to raise it because it's there.
09:36:04 17 And, I mean, the one -- the one opinion we don't need to
09:36:10 18 worry about is Judge Ho's, because he was off by himself
09:36:13 19 and nobody followed anything he did. And I'm not saying
09:36:18 20 that in a derogatory way, but it just -- he didn't
09:36:22 21 address this issue at all. So we have to look at the
09:36:27 22 other -- we have to look at the other opinions.

09:36:32 23 Yes, sir?

09:36:32 24 MR. LYNK: Your Honor, I did having something.
09:36:35 25 I think you mentioned you'll be issuing an order that

09:36:37 1 makes clear the pretrial deadlines are continued.

09:36:39 2 THE COURT: Right.

09:36:40 3 MR. LYNK: There was some filings yesterday.

09:36:42 4 Can we assume that, for the moment, those matters are
09:36:45 5 stayed?

09:36:45 6 THE COURT: I haven't seen those filings. I
09:36:47 7 just got here.

09:36:48 8 MR. LYNK: Okay.

09:36:49 9 THE COURT: What are those filings?

09:36:51 10 MS. AL-FUHAID: There was a motion related --

09:36:52 11 THE COURT: You didn't send me another filing
09:36:54 12 giving me 48 hours, did you, or 24 hours or 10 hours?

09:36:58 13 MS. AL-FUHAID: No, Your Honor.

09:36:59 14 THE COURT: I'm wasting my time sitting here.

09:37:01 15 MS. AL-FUHAID: No, Your Honor. Texas had some
09:37:05 16 lingering pretrial motions that it intended to file, and
09:37:09 17 we filed them yesterday. We were unsure as to whether
09:37:13 18 this conference --

09:37:13 19 THE COURT: What are those motions? Can you
09:37:15 20 give me --

09:37:16 21 MS. AL-FUHAID: There's a motion to preclude
09:37:18 22 one of the US's experts being presented in their case in
09:37:22 23 chief as opposed to a rebuttal expert. And was there ...

09:37:28 24 MR. BRYANT: Your Honor, the others are our
09:37:29 25 response to motions in limine filed by --

09:37:31 1 THE COURT: Oh. The motions in limine ones I'm
09:37:33 2 not so worried about. I'm going to -- I think it's been
09:37:41 3 referred to the magistrate. It automatically gets
09:37:44 4 referred.

09:37:45 5 MS. AL-FUHAID: Oh, okay. Thank you,
09:37:47 6 Your Honor.

09:37:48 7 THE COURT: And then the magistrate will make
09:37:51 8 a -- Judge Howell will make a preliminary ruling on it,
09:37:54 9 and then it can be appealed to me. As long it doesn't
09:38:00 10 have to do with the merits.

09:38:02 11 MS. AL-FUHAID: Well, Your Honor, what we were
09:38:03 12 unsure about, the reason we wanted to get those pretrial
09:38:06 13 filings, we were unsure as to whether Your Honor was
09:38:08 14 going to grant the United States's request for a stay at
09:38:11 15 this conference.

09:38:12 16 THE COURT: Oh, you mean --

09:38:13 17 MS. AL-FUHAID: We got those in before --

09:38:14 18 THE COURT: No, I don't want to -- I put the
09:38:17 19 trial date off. I don't want to stay that. I mean,
09:38:22 20 there's no reason I can't rule on an expert designation.
09:38:32 21 I don't see that as, in any way, shape, or form, having
09:38:34 22 any bearing.

09:38:36 23 I mean, look. The truth of the matter is, if
09:38:41 24 the opinion had gone a different way, we'd be in trial
09:38:44 25 today, right?

09:38:48 1 MR. LYNK: Correct. Your Honor, there were --
09:38:52 2 there was at least one ruling as to which we had been
09:38:56 3 preparing to file a notice of objections to the
09:38:59 4 magistrate judge ruling.

09:39:00 5 THE COURT: Okay.

09:39:01 6 MR. LYNK: Is that something that we should
09:39:02 7 proceed with on a normal schedule?

09:39:05 8 THE COURT: Yes. Yes. Don't give me a
09:39:07 9 vacation. I'm not entitled to it.

09:39:09 10 MR. LYNK: Understood. On August 2nd, on
09:39:12 11 Friday, obviously, there were a number of things that
09:39:14 12 originally were due and we understood those were
09:39:16 13 suspended as of late last week in the circumstances. How
09:39:20 14 are you going to --

09:39:21 15 THE COURT: What were those?

09:39:22 16 MR. LYNK: Generally, the response to the July
09:39:24 17 26th pretrial filing: objections to witnesses, objections
09:39:27 18 to exhibits, things like that.

09:39:29 19 THE CLERK: They didn't file those. You had
09:39:31 20 said to wait until today.

09:39:32 21 THE COURT: Oh, yes. Okay. Those I think
09:39:37 22 probably should wait. And the reason for that is we're
09:39:40 23 still waiting to figure out whether we have a jury or we
09:39:42 24 don't have a jury. And you may decide to go with certain
09:39:45 25 witnesses if you have a jury. I may even allow, because

09:39:53 1 if -- if it stays the way it is, if the Fifth Circuit
09:39:58 2 rules that there is no jury in this case, because it's
09:40:02 3 equitable, then I won't reopen.

09:40:09 4 But if we -- if they change the landscape and
09:40:14 5 say, well, you're going to have a jury now out of the
09:40:18 6 blue, then I may allow the parties to add additional
09:40:24 7 witnesses. And that may impact our trial date. So we'll
09:40:26 8 have to see where we are, okay?

09:40:28 9 MR. LYNK: And then, Your Honor, one other
09:40:30 10 motion I would bring to your attention, there was a
09:40:33 11 motion filed by Texas earlier to preclude some of the
09:40:36 12 injunctive relief that is sought in the case.

09:40:38 13 Now, that is a motion that we were preparing to
09:40:41 14 include our response to it in Friday's submissions, and
09:40:45 15 then obviously we didn't make submissions on Friday under
09:40:48 16 the circumstances.

09:40:48 17 THE COURT: Right.

09:40:49 18 MR. LYNK: How should we handle now the timing
09:40:52 19 of our opposition to that?

09:40:54 20 THE COURT: I don't remember that motion.

09:40:56 21 MR. LYNK: This is a motion --

09:40:58 22 THE CLERK: It's an opposed motion to exclude
09:41:01 23 relief requested by the plaintiff, filed by the State of
09:41:03 24 Texas on July 3rd.

09:41:06 25 MR. LYNK: So this is a motion that argues that

09:41:08 1 a number of the injunctive relief requests in our
09:41:11 2 complaint are not, in Texas's view, proper under the
09:41:14 3 statute. So they seek to exclude those.

09:41:15 4 THE COURT: Oh, okay. All right. I'm familiar
09:41:17 5 with that.

09:41:18 6 MR. LYNK: So that one I just wanted to clarify
09:41:19 7 when we would need to make our -- our opposition to that
09:41:23 8 and submit that on file.

09:41:24 9 THE COURT: Are you ready to file it?

09:41:26 10 MR. LYNK: This afternoon, no, but certainly by
09:41:29 11 the end of the week or sooner, if needed.

09:41:31 12 THE COURT: File it.

09:41:32 13 MR. LYNK: Okay.

09:41:32 14 THE COURT: By the end of the week -- next
09:41:34 15 week. File it by Monday.

09:41:37 16 MR. LYNK: Thank you, Your Honor.

09:41:38 17 THE COURT: And then you can reply, okay?

09:41:42 18 MS. AL-FUHAID: Is there a particular date by
09:41:44 19 which you would want our reply or just in accordance with
09:41:47 20 the rule?

09:41:47 21 THE COURT: The normal course of events.

09:41:50 22 MS. AL-FUHAID: Okay. Thank you.

09:41:52 23 MR. BRYANT: Your Honor, David Bryant.

09:41:54 24 THE COURT: I was waiting, because now we
09:41:56 25 have -- no. You haven't said anything officially.

09:42:00 1 you're just giving him the information. But we have
09:42:03 2 three, at least. You need to say something. You need to
09:42:06 3 earn your money. Yes?

09:42:08 4 MR. BRYANT: Your Honor, the defendants would
09:42:11 5 suggest that it may be appropriate to wait on resolving
09:42:21 6 some of these motions. I have no problem with going
09:42:23 7 ahead and briefing them, but wait on resolving them until
09:42:26 8 we know whether, among other things, the United States is
09:42:29 9 going to continue with the case, whether they're
09:42:32 10 appealing, until we get closer to trial and we know --

09:42:35 11 THE COURT: I mean, if the United States ends
09:42:37 12 up taking the position -- I've never -- I personally have
09:42:41 13 never seen it -- had it happen in any case I've been
09:42:45 14 involved in, but I have seen it happen in other cases
09:42:47 15 where some of my colleagues had -- and not involving the
09:42:51 16 United States, by the way. It was involving other
09:42:54 17 parties. But they got a negative ruling out of the --
09:42:58 18 interim ruling out of the Ninth Circuit, and they decided
09:43:03 19 they were going to allow the judge to just enter judgment
09:43:08 20 against them, because they could not effectively
09:43:11 21 prosecute their defense, and then immediately appealed on
09:43:18 22 the legal issues that had been decided.

09:43:21 23 Now, if the United States takes that position,
09:43:25 24 obviously, they would have to come to the conclusion that
09:43:28 25 Judge Willett's decision was not precedential and argue

09:43:32 1 that to me. And I would then have to make the ruling
09:43:35 2 that they were right, which I may not.

09:43:41 3 MR. BRYANT: So, Your Honor, the defendants
09:43:42 4 would suggest that, although we can go ahead and brief
09:43:44 5 everything, that the Court wait until after the 60-day
09:43:47 6 period to make the Court's rulings, which the Court may
09:43:50 7 wish to do anyway.

09:43:51 8 THE COURT: Yeah.

09:43:52 9 MR. BRYANT: So that we can have a better
09:43:54 10 picture as to what the procedural posture of the case
09:43:57 11 will be going into a trial or otherwise, maybe on appeal
09:44:03 12 rather --

09:44:04 13 THE COURT: Well, I'm not going to make that
09:44:06 14 decision today. I'll look at the -- I'll look at the
09:44:09 15 filings, and then I'll decide whether it's appropriate to
09:44:11 16 wait or to make a ruling. I don't like to have
09:44:14 17 unresolved motions hanging around. That's a -- it's a
09:44:21 18 bad look, you know. But I'll do what I can. I
09:44:29 19 understand your concern, I do.

09:44:34 20 All right. Anything else?

09:44:40 21 MR. LYNK: Nothing else from the government,
09:44:41 22 Your Honor. Thank you.

09:44:45 23 MR. WALTERS: Your Honor? Ryan Walters.

09:44:46 24 THE COURT: Okay. There you go.

09:44:46 25 MR. WALTERS: I'm taking your advice,

09:44:48 1 Your Honor.

09:44:52 2 THE COURT: Thank you.

09:44:52 3 MR. WALTERS: We would just suggest that if the
09:44:54 4 Court is considering reopening discovery -- so we don't
09:44:57 5 know that yet, whether the Department of Justice wants
09:44:59 6 that -- when the Fifth Circuit rules on our right to a
09:45:06 7 jury trial --

09:45:07 8 THE COURT: I can assure you that that will not
09:45:09 9 happen if they deny the request for a jury trial, only
09:45:15 10 because then that -- that means that the tenor of the
09:45:18 11 case has been the same since its inception.

09:45:22 12 MR. WALTERS: Right. What we're saying --

09:45:22 13 THE COURT: But if they -- if they say the
09:45:25 14 State gets a jury trial or gets a partial jury trial on
09:45:30 15 some issues and not on others, then I would consider it.
09:45:34 16 I'm not saying I would grant it, but I would certainly
09:45:37 17 consider it.

09:45:39 18 MR. WALTERS: But, Your Honor, I guess our
09:45:40 19 position is that, if the Fifth Circuit were to find that
09:45:43 20 we are entitled to a jury trial, the court would have to
09:45:46 21 resolve these motions again because the standard would be
09:45:51 22 different. So we would suggest not wasting the Court's
09:45:54 23 time in resolving these motions before we get a ruling
09:45:57 24 from the Fifth Circuit on --

09:45:58 25 THE COURT: I don't know that the legal

09:45:59 1 standard would be different.

09:46:01 2 MR. WALTERS: Well, the standard for
09:46:03 3 considering, like, experts, whether they're going to be
09:46:06 4 excluded or not, would be different.

09:46:07 5 THE COURT: Oh, I see what you're saying, in a
09:46:10 6 practical sense. Yeah. I would agree with you there. I
09:46:13 7 think that's right. I told you I will take a look at it.
09:46:15 8 I haven't made up my mind on that yet. I'll take a very
09:46:18 9 good look at it, okay.

09:46:20 10 MR. WALTERS: Thank you, Your Honor.

09:46:21 11 THE COURT: I mean, you're the folks that filed
09:46:23 12 the motion to exclude them.

09:46:27 13 MR. WALTERS: Your Honor, if -- if we -- if we
09:46:31 14 could stay all proceedings, then we would withdraw the
09:46:34 15 pending motions.

09:46:35 16 THE COURT: Well, I'm not going to stay
09:46:36 17 everything. There are other things that are going on
09:46:39 18 here we just talked about, but I certainly would stay
09:46:42 19 that. I mean, I wouldn't have to stay it. All I'd have
09:46:45 20 to do is tell you that I would give you leave to refile,
09:46:50 21 okay? I will -- if you withdraw it, you will get leave
09:46:54 22 to refile. And that means that you're safe. You're not
09:46:58 23 going to be time-barred.

09:47:04 24 MR. SULLIVAN: Your Honor, you know, this being
09:47:05 25 I think the second-largest geographic district in the

09:47:08 1 federal judiciary after the District of Alaska, as busy
09:47:10 2 as you are, as busy as Judge Howell is, we would suggest
09:47:13 3 that instead of looking at something twice, that could
09:47:15 4 just be looked at once.

09:47:16 5 THE COURT: I agree with you.

09:47:19 6 MR. SULLIVAN: And so whatever kind of stay
09:47:21 7 comes in Your Honor's order, again, we would respectfully
09:47:25 8 suggest that if it has to do with discovery, so the
09:47:27 9 motions in limine, the expert motions, because all of
09:47:29 10 that could be overtaken by events in a practical sense,
09:47:33 11 if not in a legal standard sense, we would respectfully
09:47:36 12 request clarity so that the parties can pull down any of
09:47:40 13 those kind of discovery motions and fights so that
09:47:41 14 they're not pending on your sheet with Chief Judge Moses
09:47:46 15 or anything like that.

09:47:47 16 THE COURT: Chief Judge Moses is very happy
09:47:49 17 with me at the moment. She's in the same boat I am.
09:47:52 18 Remember, she had the barbed wire case.

09:47:56 19 MR. SULLIVAN: I remember it well, sir. We've
09:47:58 20 had lovely times in Del Rio together as well with our --

09:48:00 21 THE COURT: Yeah. I used to sit in Del Rio. I
09:48:03 22 sat in Del Rio for the first few years I was here. I was
09:48:06 23 on the wheel down there, so I was down there every week.

09:48:09 24 MR. SULLIVAN: Appreciate your service for that
09:48:10 25 sir. So with clarification about discovery along those

09:48:13 1 lines, we can take things off of your, you know, 90-day
09:48:15 2 sheet or whatever it's called here and not do twice what
09:48:19 3 we can do once, if things are overtaken by events.

09:48:24 4 MR. LYNK: From our point of view, I guess I'm
09:48:27 5 not sure if there really is a further issue to resolve.
09:48:32 6 I think your prior comments suggested that there are some
09:48:35 7 things you want to deal with and some things that should
09:48:37 8 wait. And, generally, those seemed to make sense.

09:48:40 9 We can certainly respond, for example, to the
09:48:43 10 motion seeking to strike forms of injunctive relief by
09:48:47 11 Monday, as you've directed. And that doesn't seem to
09:48:51 12 be --

09:48:52 13 THE COURT: Are you concerned about that one?

09:48:55 14 MR. SULLIVAN: No concern there. It's well
09:48:57 15 said by my friend, Mr. Lynk. I suppose that the whole
09:49:00 16 point is we're all obviously going to do whatever the
09:49:03 17 Court, whatever you tell us to do. And so if your order
09:49:07 18 gives us clear marching orders, then we'll run up
09:49:10 19 whatever hills you want us to.

09:49:13 20 THE COURT: Well, let's do this: I think we
09:49:15 21 all agree that -- I think Mr. Lynk is right, and I
09:49:19 22 already said I would rule on that motion. That's purely
09:49:22 23 a legal issue. But I'll stay everything else.

09:49:29 24 MR. SULLIVAN: Thank you, sir.

09:49:30 25 THE COURT: And you're going to withdraw that,

09:49:32 1 then, without prejudice.

09:49:34 2 MR. WALTERS: Thank you, Your Honor.

09:49:35 3 THE COURT: Okay. So he's going to withdraw
09:49:36 4 without prejudice. You don't have to worry about it.
09:49:39 5 But leave the one we talked about.

09:49:41 6 MR. LYNK: So the motion to exclude our witness
09:49:42 7 for now is withdrawn without prejudice.

09:49:45 8 THE COURT: Yes. That's right.

09:49:48 9 MR. SULLIVAN: Thank you, sir.

09:49:48 10 THE COURT: Without prejudice so that he can
09:49:50 11 refile it. I don't want anybody to think they're being,
09:49:53 12 you know, hampered from refiling.

09:49:56 13 MR. SULLIVAN: Thank you, sir. Sorry for the
09:49:59 14 interruption.

09:50:00 15 THE COURT: No. Look. We need all the help we
09:50:03 16 can get around here. So, as usual, my very smart
09:50:31 17 courtroom deputy has a solution. What I'm going to do,
09:50:38 18 all the motions in limine that are on the record now I'm
09:50:40 19 going to deny as moot subject to refiling, and you can
09:50:47 20 then make a decision whether you want to refile those at
09:50:50 21 the appropriate time. We're going to give you deadlines
09:50:53 22 for those.

09:50:54 23 So the only thing that will be left on the
09:50:56 24 docket that I need to worry about is the -- is that one
09:51:01 25 motion we're talking about that he's going to be filing

09:51:04 1 on Monday.

09:51:06 2 THE CLERK: No. The motion to exclude, he's
09:51:07 3 going to file a response.

09:51:08 4 THE COURT: Yeah. The motion to exclude, he's
09:51:11 5 going to file a response.

09:51:15 6 MR. STONE: And, your Honor, there was one more
09:51:17 7 thing mentioned by our friends at the USA. They
09:51:20 8 mentioned filing objections to Magistrate Howell's prior
09:51:25 9 ruling. Is that also going to be stayed, or are they
09:51:26 10 going to proceed forward with that?

09:51:28 11 MR. LYNK: This was specifically -- we had a
09:51:31 12 motion to compel production of an email and a document
09:51:36 13 that were sent to a number of the expert witnesses,
09:51:41 14 Texas's. And Judge Howell reviewed the document and the
09:51:43 15 email in-camera, and then he ordered production of a --
09:51:47 16 of redacted versions of those.

09:51:49 17 THE COURT: And you want --

09:51:50 18 MR. LYNK: Our objection is to the redaction.
09:51:52 19 And so we were preparing to file a notice of objection as
09:51:56 20 that to see the whole document.

09:51:57 21 THE COURT: Don't do that. Just hold it. You
09:51:59 22 can file it later.

09:52:01 23 MR. LYNK: Okay.

09:52:01 24 THE COURT: You'll have time to file that
09:52:04 25 later.

09:52:05 1 MR. LYNK: Thank you.

09:52:06 2 THE COURT: We have to be flexible here. We've
09:52:08 3 got a very -- this -- look. This is a very unusual case,
09:52:15 4 to say the least. I mean, it's about a buoy floating
09:52:21 5 around in the Rio Grande River, after all, all by itself,
09:52:27 6 just bobbing around there.

09:52:31 7 I saw a picture the other day where two people
09:52:34 8 attempting to swim across the Rio Grande. I don't know
09:52:39 9 what they were doing, but they were resting on the buoy.
09:52:42 10 They were using the buoy as a rest. So I don't know.
09:52:46 11 They either go around it or you rest on it, or I don't
09:52:49 12 know what they're doing with the buoy. But there it is,
09:52:52 13 and it's there. And it's been there.

09:52:56 14 And the one thing I would disagree with my good
09:53:03 15 friend Judge Willett about, he made -- he always makes a
09:53:07 16 big deal of the fact that I didn't order the buoy removed
09:53:11 17 from the ocean -- ocean. This is what happens when you
09:53:15 18 decide dozens and dozens of cases involving the Pacific
09:53:20 19 Ocean because I came from Hawaii -- the river. We do
09:53:27 20 have an ocean pretty close.

09:53:32 21 The reason I did not order -- and I've said
09:53:36 22 this in writing, and I'll say it again. The reason I did
09:53:39 23 not order the buoy to be removed from the river, it was
09:53:45 24 put up against the bank so it would not be -- if my order
09:53:49 25 was followed, it would have been moved against the bank.

09:53:54 1 It would not have been a hazard to navigation because it
09:53:58 2 would have been right up against the bank, number one.

09:54:01 3 Number two, it would have saved the taxpayers
09:54:05 4 of the State of Texas tens of thousands of dollars if,
09:54:10 5 for instance, I had ordered it removed, it had been
09:54:13 6 removed, and then ordered placed back in the water, what
09:54:21 7 a waste of money. What an absolute waste of money.

09:54:28 8 And I was proven correct because I made my
09:54:33 9 ruling, that ruling was affirmed, originally, by a
09:54:37 10 three-judge panel. In the meantime, that thing could
09:54:39 11 have been removed. Then the *en banc* order comes along
09:54:44 12 and orders it, it would have to go back. What a waste of
09:54:49 13 money.

09:54:51 14 So I'm sorry, Judge Willett. That's the
09:54:55 15 reason. And I -- I did not want the taxpayers of the
09:55:00 16 State of Texas or the Governor's Office, because he's got
09:55:06 17 other things to spend his money on, to have to spend the
09:55:10 18 money to put it back, you know, in the water if I had
09:55:15 19 ordered it taken out.

09:55:16 20 Plus -- and this is from a kid who worked his
09:55:20 21 way up going through school doing construction -- putting
09:55:26 22 those things in and out of the water -- and I've seen it
09:55:29 23 many times; we have it in Hawaii all the time -- is a
09:55:33 24 dangerous proposition. And especially where those
09:55:39 25 concrete things have been laid down, to pull those out,

09:55:43 1 they get sunken in the mud. To pull those out, you get a
09:55:50 2 snapped chain or you get -- a machine doesn't work or
09:55:52 3 somebody falls in the water between the buoy and the
09:55:55 4 pillar under the water, they could be drowned or killed.
09:56:01 5 It's a hazard.

09:56:03 6 I didn't want that to happen more often than
09:56:07 7 necessary, period. Not because I didn't have faith in my
09:56:14 8 ruling or some such thing. It had nothing to do with it.
09:56:19 9 It had to do with money. I knew this thing would go on
09:56:22 10 appeal. I knew the State would -- I mean, this is the
09:56:26 11 Fifth Circuit. I knew the State had a chance of
09:56:30 12 prevailing. It's -- it was a close call to begin with.

09:56:35 13 And I just didn't want the expense, and I
09:56:39 14 didn't want the danger to those workers of having to go
09:56:43 15 back out there and move it and then remove it and then
09:56:46 16 put it back. It just didn't make sense to me. And that
09:56:51 17 was the reason I did what I did.

09:56:53 18 It had nothing to do -- and I -- to be honest
09:56:58 19 with you, I wouldn't think, knowing Governor Abbott, he
09:57:08 20 would have been unhappy about that. I mean, he wouldn't
09:57:13 21 say, jeez, I wish the judge had ordered it removed from
09:57:16 22 the water. That just would not -- you know, I think he
09:57:25 23 is a very smart man. He was a good lawyer. He was a
09:57:29 24 Supreme Court Justice. I'm sure that he understood what
09:57:32 25 I was doing. And I said it at the time.

09:57:37 1 So I don't know -- understand why my friend
09:57:40 2 Judge Willett, who I have the greatest regard for -- he's
09:57:44 3 a very fine jurist, and he's a nice man -- keeps thinking
09:57:48 4 that I did it because I wanted to -- I didn't have faith
09:57:53 5 in my order. Why did I not just order it removed? Well,
09:57:57 6 there's the reason: safety and money. Safety first and
09:58:02 7 money second.

09:58:05 8 Okay. Anything else?

09:58:09 9 MR. LYNK: No, Your Honor.

09:58:10 10 MS. AL-FUHAID: No, Your Honor. Thank you.

09:58:12 11 THE COURT: Okay. And, by the way, has there
09:58:14 12 been an appeal by the United States of my ruling against
09:58:18 13 you on the treaty issue?

09:58:22 14 MR. LYNK: No, there has not been an appeal
09:58:25 15 taken from that ruling.

09:58:26 16 THE COURT: But that -- you have -- you don't
09:58:28 17 have to file it now.

09:58:30 18 MR. LYNK: Right.

09:58:31 19 THE COURT: You can --

09:58:32 20 MR. LYNK: No interlocutory appeal was taken,
09:58:35 21 correct.

09:58:35 22 THE COURT: I suspect, ultimately, we will have
09:58:37 23 cross-appeals, so I'm in double jeopardy here. He stands
09:58:51 24 by my every day right there. No. I'm pointing to my
09:58:54 25 alabaster eagle. He's always faithful. He doesn't move.

09:58:57 1 He's right there.

09:58:57 2 Thank you all very much. It's good to see you.

09:59:00 3 You can be excused. Thank you.

09:59:00 4 MS. AL-FUHAID: Thank you, Your Honor.

09:59:00 5 (End of transcript)

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 **UNITED STATES DISTRICT COURT**)

2 **WESTERN DISTRICT OF TEXAS**)

3 I, Arlinda Rodriguez, Official Court Reporter, United
4 States District Court, Western District of Texas, do certify
5 that the foregoing is a correct transcript from the record of
6 proceedings in the above-entitled matter.

7 I certify that the transcript fees and format comply with
8 those prescribed by the Court and Judicial Conference of the
9 United States.

10 WITNESS MY OFFICIAL HAND this the 6th day of August 2024.

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

/S/ Arlinda Rodriguez
Arlinda Rodriguez, Texas CSR 7753
Expiration Date: 10/31/2025
Official Court Reporter
United States District Court
Austin Division
501 West 5th Street, Suite 4152
Austin, Texas 78701
(512) 391-8791

**ATTACHMENT 2:
ORDER SETTING FURTHER STATUS CONFERENCE**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

United States of America.,	§	
Plaintiff,	§	
vs.	§	NO: AU:23-CV-00853-DAE
	§	
Greg Abbott, et al.	§	
Defendants.	§	


ORDER SETTING FURTHER STATUS CONFERENCE

It is clear to this Court that the State of Texas misunderstands the substance of the status conference held on August 6, 2024 in this matter. To avoid any misunderstanding going forward, it is hereby ORDERED that the above entitled and numbered case is set for a continued **in person** STATUS CONFERENCE before Senior U.S. District Judge David Alan Ezra in Courtroom 2, on the Fourth Floor of the United States Courthouse, 501 West Fifth Street, Austin, TX, on **Wednesday, August 07, 2024 at 10:00 AM**. It is requested that Lanora C. Pettit, Principle Deputy Solicitor General be present at the scheduled conference.

In the event that lead counsel for the United States have returned to Washington DC, it is acceptable that a local representative from the United States Attorneys Office be present.

IT IS SO ORDERED.

DATED: Austin, Texas August 06, 2024.



DAVID ALAN EZRA
SENIOR U.S. DISTRICT JUDGE

**ATTACHMENT 3:
TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE DAVID A. EZRA
AUGUST 7, 2024**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

UNITED STATES OF AMERICA,) AU:23-CV-00853-DAE
)
Plaintiff,)
)
v.) AUSTIN, TEXAS
)
GREG ABBOTT, ET AL.,)
)
Defendants.) AUGUST 7, 2024

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE DAVID A. EZRA

FOR THE PLAINTIFF: BRIAN H. LYNK
ANGELINE PURDY
U.S. DEPARTMENT OF JUSTICE
ENVIRONMENTAL DEFENSE SECTION
P.O. BOX 23986
WASHINGTON, D.C. 20026-3986

ANDREW D. KNUDSEN
BRYAN JAMES HARRISON
KIMERE J. KIMBALL
U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT & NATURAL RESOURCES
P.O. BOX 7611
WASHINGTON, D.C. 20044

LANDON ALLEN WADE
UNITED STATES ATTORNEY'S OFFICE
903 SAN JACINTO BOULEVARD, SUITE 334
AUSTIN, TEXAS 78701

MARY F. KRUGER
UNITED STATES ATTORNEYS OFFICE
CHIEF, CIVIL DIVISION
601 NW LOOP 410, SUITE 600
SAN ANTONIO, TEXAS 78216

1 FOR THE DEFENDANTS: MUNERA AL-FUHAID
JOHNATHAN STONE
2 ZACHARY BERG
KYLE STEPHEN TEBO
3 OFFICE OF THE ATTORNEY GENERAL
PO BOX 12548
4 AUSTIN, TX 78711-2548

5 RYAN DANIEL WALTERS
OFFICE OF THE TEXAS ATTORNEY GENERAL
6 SPECIAL LITIGATION DIVISION
209 WEST 14TH STREET, 7TH FLOOR
7 AUSTIN, TEXAS 78701

8 APPEARING AT THE COURT'S REQUEST:
LANORA CHRISTINE PETTIT
9 OFFICE OF THE TEXAS ATTORNEY GENERAL
OFFICE OF THE SOLICITOR GENERAL
10 P.O. BOX 12548 (MC-059)
AUSTIN, TEXAS 78711-2548

11 FOR MS. PETTIT: JOSEPH N. MAZZARA
12 OFFICE OF THE TEXAS ATTORNEY GENERAL
P.O. BOX 12548 (MC-059)
13 AUSTIN, TX 78711-2548

14 COURT REPORTER: ARLINDA RODRIGUEZ, CSR
501 WEST 5TH STREET, SUITE 4152
15 AUSTIN, TEXAS 78701
(512) 391-8791
16
17
18
19
20
21
22
23

24 Proceedings recorded by computerized stenography, transcript
25 produced by computer.

09:31:53 1 (Open court)

09:31:53 2 THE CLERK: AU:23-CV-853, *United States of*
09:31:56 3 *America v. Abbott, et al.*

09:31:58 4 THE COURT: May we have appearances, please.

09:32:02 5 MR. WADE: Good morning, Your Honor. This is
09:32:04 6 Landon Wade with the U.S. Attorney's office for the
09:32:06 7 Western District of Texas on behalf of the United States.

09:32:08 8 THE COURT: Okay. And we do have the other
09:32:10 9 lawyers who are appearing by phone. Can we have their
09:32:13 10 appearances.

09:32:15 11 MR. LYNK: Good morning, Your Honor. This is
09:32:17 12 Brian Lynk. And I believe on the phone with me are
09:32:25 13 Andrew Knudsen, Kimere Kimball, Bryan Harrison, our
09:32:27 14 supervisor Angeline Purdy, and Mary Kruger, also from the
09:32:31 15 U.S. Attorney's office.

09:32:33 16 THE COURT: Okay. Thank you.
09:32:34 17 And can I have for the State of Texas.

09:32:37 18 MR. WALTERS: Good morning, Your Honor.

09:32:39 19 THE COURT: Good morning.

09:32:39 20 MR. WALTERS: Ryan Walters for the defendants.
09:32:43 21 With me are my colleagues Johnathan Stone, Munera
09:32:47 22 Al-Fuhaid, Zach Berg, and Kyle Tebo.

09:32:49 23 THE COURT: Okay. All right. And I had
09:32:53 24 invited, but had not ordered, Ms. Pettit to be here. Is
09:32:57 25 she here today?

09:33:01 1 MR. MAZZARA: Yes, Your Honor. She's here, and
09:33:01 2 I'm representing her. I'm her counsel, Joseph Mazzara,
09:33:04 3 for the purposes of this hearing today.

09:33:06 4 THE COURT: Mr. Mazzara, are you licensed here
09:33:08 5 in the Western District of Texas.

09:33:09 6 MR. MAZZARA: No. But the courtroom deputy
09:33:12 7 requested that I come before the bar to sit here, just to
09:33:15 8 make it easy with the microphone.

09:33:17 9 THE COURT: No. I don't have a problem. You
09:33:19 10 can sit right up here. I have no concern where you're
09:33:22 11 sitting. I just wanted to know whether you were
09:33:25 12 licensed. Now, if you're not licensed, technically, you
09:33:28 13 cannot argue.

09:33:31 14 MR. MAZZARA: Right. Yes, Your Honor. I
09:33:33 15 understand that. But given the short notice of the
09:33:34 16 hearing, putting in a *pro hac vice* application didn't
09:33:40 17 seem to be feasible. But, again, I'm just here on a very
09:33:44 18 limited capacity.

09:33:45 19 THE COURT: All right. Well, I -- let me --
09:33:46 20 let me clear any concerns that Ms. Pettit might have. If
09:33:51 21 I were here for the purpose of sanctioning Ms. Pettit,
09:34:00 22 the order would have said so. It would have been an
09:34:03 23 order to show cause why she should not be sanctioned.

09:34:07 24 I am not sanctioning Ms. Pettit. I am not mad
09:34:11 25 at Ms. Pettit. I am not going to be criticizing

09:34:17 1 Ms. Pettit personally. I am concerned about the filing
09:34:21 2 that was made, and I'm going to be questioning her about
09:34:25 3 that filing. But I am not in any way, shape, or form
09:34:31 4 going to be doing anything to her that she would require
09:34:38 5 an attorney.

09:34:40 6 MR. MAZZARA: Yes, Your Honor. Except for the
09:34:42 7 fact that you're going to be questioning her. She's an
09:34:44 8 attorney for the State, for sure, the second senior most
09:34:47 9 litigator, in fact, for the State of Texas.

09:34:50 10 THE COURT: Well, I'm very pleased to have her
09:34:51 11 here.

09:34:52 12 MR. MAZZARA: But he she's not made an
09:34:54 13 appearance in this case.

09:34:55 14 THE COURT: Well, she did, actually. She filed
09:34:58 15 this in this case.

09:35:00 16 MR. MAZZARA: But --

09:35:00 17 THE COURT: Yes, sir?

09:35:02 18 MR. MAZZARA: In the appellate court. Yes,
09:35:03 19 sir.

09:35:04 20 THE COURT: Yes. It doesn't matter. We are
09:35:06 21 one federal court, sir.

09:35:08 22 MR. MAZZARA: I understand that, Your Honor.
09:35:10 23 There are two case numbers. But, again, she --

09:35:12 24 THE COURT: Yeah. Well, her filing was
09:35:15 25 rejected by the Court of Appeals. Did you know that?

09:35:19 1 MR. MAZZARA: Your Honor, I'm representing
09:35:21 2 Ms. Pettit in this matter.

09:35:22 3 THE COURT: Yes. I'm just asking you: Were
09:35:24 4 you aware of that?

09:35:25 5 MR. MAZZARA: No, I was not. When was it
09:35:27 6 rejected, Your Honor?

09:35:28 7 THE COURT: It was rejected yesterday. The
09:35:29 8 case was closed. You didn't know that it was rejected?
09:35:35 9 Did the State know it was rejected?

09:35:39 10 MR. STONE: Your Honor, it was unfilled, but we
09:35:40 11 believe that it was refiled last --

09:35:41 12 MR. WALTERS: It was refiled last night.

09:35:43 13 THE COURT: Oh. Did they refile it?

09:35:44 14 MR. WALTERS: Yes, Your Honor.

09:35:45 15 THE COURT: Okay. Then I'm going to direct
09:35:47 16 that this transcript be filed, then.

09:35:51 17 MR. MAZZARA: And I believe they circulated it
09:35:52 18 to the entire *en banc* court as well.

09:35:54 19 THE COURT: Oh, okay. Well, that was not -- I
09:35:56 20 was not made aware of that. That's fine.

09:35:59 21 So I'd like Ms. Pettit to come forward.

09:36:04 22 MR. MAZZARA: Yes, Your Honor. Just a real
09:36:06 23 quick question before she does, just for the record.
09:36:08 24 What -- again, she's not an attorney in the case. Are
09:36:10 25 you asking her to appear as a witness?

09:36:12 1 THE COURT: I'm not asking her to appear as a
09:36:14 2 witness. She wrote a letter which addressed my comments
09:36:17 3 in this court, and I'm trying to find out the basis for
09:36:22 4 what she said, number one.

09:36:24 5 MR. MAZZARA: Yes, Your Honor.

09:36:25 6 THE COURT: Number --

09:36:25 7 MR. MAZZARA: Sorry.

09:36:26 8 THE COURT: Just a minute, sir. Let the court
09:36:28 9 finish. I will give you plenty of opportunity.

09:36:30 10 Number one. I want to make sure that -- as I
09:36:36 11 thought when I left the bench yesterday, we were on even
09:36:41 12 keel here and knew where we were going with this case.
09:36:43 13 And then this thing comes flying in which raised some
09:36:47 14 concern to me. So I need to address it so that I am
09:36:53 15 absolutely sure that going forward we are on the same
09:36:57 16 path. And that has, sir, nothing to do with you. That
09:37:02 17 has to do with the gentlemen who represent the State of
09:37:04 18 Texas.

09:37:05 19 MR. WALTERS: Your Honor, in that light, we --
09:37:08 20 I'm sure the Court understands that we -- no one here
09:37:11 21 will be able to talk about any of the internal
09:37:14 22 deliberations within the Attorney General's Office or
09:37:17 23 with our clients about the motivation or decisions to
09:37:20 24 file this letter to the Fifth Circuit.

09:37:26 25 THE COURT: I have no concern about that. I'm

09:37:27 1 not asking anybody about internal deliberations in the
09:37:30 2 Attorney General's Office. That is not my purpose here.

09:37:39 3 MR. MAZZARA: So, Your Honor, again, just for
09:37:42 4 Ms. Pettit, I mean, any questions regarding the letter
09:37:45 5 would be -- would fall under any number of privileges.

09:37:48 6 THE COURT: No, it doesn't. It's publicly
09:37:50 7 filed.

09:37:50 8 MR. MAZZARA: Not the letter. It's not the
09:37:52 9 words, the text of the letter itself, but any mental
09:37:56 10 impressions she had or any thought she had that went
09:37:57 11 into --

09:37:58 12 THE COURT: I have every right and obligation
09:38:00 13 to address the matters that are in the letter, so you may
09:38:04 14 be seated, sir.

09:38:07 15 Now, Ms. Pettit, you were -- this is your
09:38:10 16 letter? You wrote the letter?

09:38:12 17 MS. PETTIT: Yes, sir.

09:38:12 18 THE COURT: But you weren't here yesterday?

09:38:14 19 MS. PETTIT: No, Your Honor. As I noted in the
09:38:15 20 letter, I was not present.

09:38:17 21 THE COURT: Right. Now, you filed this under
09:38:19 22 Rule 28(j). You had this filed. It says: Pursuant to
09:38:27 23 Rule 28(j), counsel notified the Court of developments
09:38:31 24 during today's status conference in which the court may
09:38:34 25 wish to be aware before it issues its forthcoming

09:38:38 1 mandate.

09:38:41 2 MS. PETTIT: Yes, Your Honor.

09:38:41 3 THE COURT: That case is essentially closed,
09:38:43 4 but all right. Let's talk about whether this is a Rule
09:38:46 5 28(j) letter, all right?

09:38:48 6 MS. PETTIT: Your Honor, that is the nature of
09:38:50 7 the refilling. The Court asked us to file it simply as a
09:38:53 8 letter and not pursuant to Rule 28(j), because the
09:38:55 9 opinion had been issued but not the mandate.

09:38:58 10 THE COURT: Okay. Well, it isn't a Rule --
09:39:00 11 what is it, then, if -- it's just an attempt to do what.

09:39:06 12 MS. PETTIT: It's an attempt to keep the Court
09:39:08 13 apprised of developments similar to when this Court
09:39:11 14 issued a number of advisements. We filed those under
09:39:14 15 Rule 28(j) as well because there was no way other -- that
09:39:16 16 we could tell, other than that under the rule --

09:39:18 17 THE COURT: Well, when you initially filed it,
09:39:20 18 you filed it as Rule 28(j) letter, and it isn't -- as the
09:39:26 19 Court of Appeals has indicated, it isn't a Rule 28(j)
09:39:30 20 letter. And the reason it isn't is because it doesn't
09:39:33 21 address any of the issues, whatsoever, that are before me
09:39:41 22 for the purposes of the hearing I had yesterday.

09:39:46 23 MS. PETTIT: Your Honor, it apprised the Fifth
09:39:47 24 Circuit of the hearing yesterday, which has been at issue
09:39:50 25 in a number of prior letters that we filed. And we were

09:39:53 1 simply keeping the Court apprised.

09:39:55 2 THE COURT: It has nothing to do with what we
09:39:57 3 were doing yesterday. What we were doing yesterday was
09:40:00 4 going forward pursuant to the Fifth Circuit's ruling.
09:40:12 5 And the only issue that is now pending before the Fifth
09:40:16 6 Circuit, pending right now, is the issue of whether the
09:40:29 7 case is going to be tried to a jury or it's not going to
09:40:32 8 be tried to a jury. That is the only issue, and that's a
09:40:37 9 mandamus petition.

09:40:40 10 MS. PETTIT: Respectfully, Your Honor, the
09:40:41 11 mandate has not issued in the primary case.

09:40:44 12 THE COURT: It doesn't matter whether the
09:40:45 13 mandate has issued or not.

09:40:47 14 MS. PETTIT: The Court retains jurisdiction
09:40:49 15 until the mandate does.

09:40:51 16 THE COURT: It doesn't matter. There's no
09:40:52 17 litigation going on. There is -- the United States
09:40:56 18 didn't file anything. The State didn't file anything.
09:41:02 19 What happened here is you filed something which has
09:41:08 20 absolutely nothing to do with anything other than
09:41:13 21 attempting, I presume -- it isn't an appropriate filing.
09:41:18 22 You're not appearing in this case, are you?

09:41:20 23 MS. PETTIT: No, Your Honor. I do not
09:41:22 24 appear -- I did not appear in this case.

09:41:24 25 THE COURT: So you're kind of a volunteer, and

09:41:26 1 you write this letter to say -- you might as well just be
09:41:32 2 somebody sitting --
09:41:33 3 No. Sit down.
09:41:37 4 MR. MAZZARA: Your Honor, I just wanted to --
09:41:38 5 THE COURT: No, sir. Not yet.
09:41:42 6 MR. MAZZARA: All right.
09:41:43 7 THE COURT: I will give you plenty of
09:41:44 8 opportunity.
09:41:47 9 MR. MAZZARA: Fair enough, Your Honor. I just
09:41:48 10 want to, again, lodge an objection to this line of
09:41:51 11 questioning.
09:41:52 12 THE COURT: I don't know what line of
09:41:53 13 questioning you're talking about that there's an
09:41:55 14 objection to. All I'm saying is she's not appeared, and
09:41:59 15 she's acknowledged that she hasn't appeared.
09:42:00 16 MR. MAZZARA: In this case, Your Honor, before
09:42:02 17 the trial court.
09:42:02 18 THE COURT: That's correct.
09:42:04 19 MR. MAZZARA: Okay.
09:42:05 20 THE COURT: She hasn't appeared here.
09:42:09 21 MR. MAZZARA: She has appeared in the Fifth
09:42:10 22 Circuit and argued the *en banc* case.
09:42:13 23 THE COURT: That's fine. That is fine.
09:42:15 24 MR. MAZZARA: But I also still stand on the
09:42:17 25 objection about this line of questioning into

09:42:20 1 the appellate --

09:42:20 2 THE COURT: Counsel, listen. If you don't
09:42:22 3 listen to me, I'm going to have to ask you to step
09:42:26 4 outside. I told you I would give you plenty of
09:42:29 5 opportunity to address the court, and you will have that
09:42:34 6 opportunity and I respect your opportunity to do so. But
09:42:39 7 I can't have you jumping up like a jack-in-the-box every
09:42:42 8 two minutes.

09:42:44 9 MR. MAZZARA: Understood, Your Honor.

09:42:45 10 THE COURT: You're not even a member of this
09:42:47 11 court. You're lucky that I'm even letting you say
09:42:52 12 anything here.

09:42:53 13 MR. MAZZARA: Thank you, Your Honor.

09:42:55 14 THE COURT: So you wrote this letter, not
09:43:01 15 having been present, and your letter unfortunately
09:43:04 16 contains a number of inaccuracies.

09:43:09 17 MS. PETTIT: Respectfully, sir, we have checked
09:43:12 18 it against the transcript that we got last night, and we
09:43:16 19 consider it to be accurate and stand behind everything.

09:43:18 20 THE COURT: I'm very happy you did. I can
09:43:20 21 assure you we did, and I know what I said.

09:43:22 22 So let's go through it, okay?

09:43:25 23 MS. PETTIT: Certainly.

09:43:26 24 THE COURT: First of all, you make a big deal
09:43:29 25 out of the fact that, without prompting from either

09:43:32 1 party, the District Court raised the possibility that
09:43:37 2 Judge Willett's opinion from the *en banc* court might not
09:43:41 3 be precedential based on unspecified voices and chatter
09:43:45 4 the District Court had heard or read from *ex parte*
09:43:48 5 sources who suggested that the opinion was not entirely
09:43:51 6 clear.

09:43:51 7 That is absolutely true. That is true. I will
09:43:57 8 agree with you. I did raise it. The implication here is
09:44:02 9 that the court did so for the purpose of attempting to
09:44:06 10 encourage or announce its belief that Judge Willett's
09:44:11 11 opinion was not precedential or that I did not have the
09:44:15 12 authority or the right to raise it *ex parte*.

09:44:21 13 Let me read something to you, okay? This is
09:44:23 14 from the Fifth Circuit. It comes from a case called
09:44:30 15 *Ioannides v. The University of Texas M.D. Anderson*
09:44:33 16 *Center*, 418 F. App'x 269. It's a Fifth Circuit 2011
09:44:39 17 case. I presume it's unpublished, but it's okay.

09:44:41 18 Here's what it says: The District Court did
09:44:45 19 not error by considering substantive process issues
09:44:53 20 *sua sponte*, because the parties briefed it. As long as
09:44:57 21 the parties are given notice and opportunity to brief an
09:45:00 22 issue, the court can consider it *sua sponte*. Any issue.
09:45:06 23 Ultimately, what matters is the party knew the issue
09:45:09 24 could be considered by the District Court. So here we
09:45:14 25 are asking the parties to brief what the law is

09:45:17 1 applicable at the bench trial, giving the parties notice
09:45:21 2 and ability to brief it.

09:45:23 3 That was precisely what I was doing. I was
09:45:29 4 calling the issue to the attention of the parties, which
09:45:33 5 is not only my right, it is my obligation.

09:45:41 6 MS. PETTIT: Yes, Your Honor.

09:45:43 7 THE COURT: You got that?

09:45:44 8 MS. PETTIT: Yes, Your Honor.

09:45:44 9 THE COURT: Okay. And I wanted to give the
09:45:46 10 parties the opportunity to brief it. This was written in
09:45:50 11 the sense that I was somehow being proactive in
09:45:57 12 supporting the theory that Judge Willett's opinion was
09:46:03 13 not precedential, and I went out on my own to find an
09:46:09 14 issue and then to encourage the parties to brief it. You
09:46:13 15 make another misstatement there also, by the way, that
09:46:16 16 you will find is not in the -- in the record. I'll get
09:46:21 17 to that in just a minute.

09:46:22 18 So do you know who Judge Posner is?

09:46:33 19 MS. PETTIT: Yes, Your Honor.

09:46:33 20 THE COURT: Okay. Well, here's what
09:46:36 21 Judge Posner says about this. He says: They want to do
09:46:42 22 justice as well as merely not umpire disputes. And they,
09:46:48 23 the district courts, should not be criticized when they
09:46:51 24 point out to counsel a line of argument or inquiry that
09:46:55 25 has been overlooked.

09:47:03 1 Courts of appeals -- and I know because I sat
09:47:06 2 on the Ninth Circuit Court of Appeals for 35 years -- and
09:47:10 3 district courts regularly ask the parties *sua sponte* to
09:47:18 4 brief issues that the parties may not have been aware of
09:47:22 5 or which the court feels should be briefed on both sides.

09:47:32 6 So long as the court gives the parties the
09:47:35 7 opportunity to do so, and then fairly and adequately
09:47:40 8 reviews those briefings and takes them under
09:47:46 9 consideration, this circuit and every single circuit has
09:47:54 10 said, including the Supreme Court -- which often does
09:47:58 11 this, by the way -- that it is appropriate and, at times,
09:48:05 12 necessary.

09:48:07 13 It is not and was not my intent, as you seem to
09:48:13 14 imply here, to give to the parties some sort of marching
09:48:24 15 orders. You did not point out in your letter, which it
09:48:29 16 would have been fair for you to do if you were trying to
09:48:33 17 write a balanced letter, that I had mentioned at least
09:48:39 18 three to four times emphatically that I have not made up
09:48:45 19 my mind in this matter; that I indeed might find
09:48:54 20 Judge Willett's opinion precedential.

09:48:56 21 In fact, it is my fallback, and always has been
09:49:02 22 for the over 30 years I've been on the bench, that when a
09:49:07 23 majority opinion comes out, even if there are strong
09:49:10 24 dissents, to follow that majority opinion. And my
09:49:14 25 inclination is to do so here.

09:49:16 1 But there is an issue, and that issue needs to
09:49:22 2 be briefed. Here's the reason: This case is not going
09:49:26 3 to end with the Fifth Circuit. If by sending this letter
09:49:32 4 it was your intent to alert Judge Ho that he had not
09:49:38 5 written on this issue and to try to get him to amend his
09:49:41 6 opinion, that might work. I don't know. It wouldn't
09:49:47 7 look good, but it might work. I --

09:49:55 8 You'll get a chance.

09:49:58 9 So that's number one. What you should have
09:50:03 10 said in this letter, if you were trying to be, as you
09:50:08 11 say, just informing the Fifth Circuit, is that, oh, by
09:50:12 12 the way, Judge Ezra did say on multiple occasions that he
09:50:17 13 did not have his mind made up and that he might indeed
09:50:22 14 rule for Judge -- that Judge Willett's opinion was
09:50:26 15 precedential. But you didn't do that.

09:50:27 16 This is a -- this isn't a letter informing
09:50:31 17 them. It wasn't a 28(j) letter. This was an argument.
09:50:35 18 This is an argument trying to get the Fifth Circuit,
09:50:38 19 either Judge Willett to rewrite his opinion or to get
09:50:46 20 Judge Ho to change his opinion or to get judge -- Chief
09:50:49 21 Judge Richman to somehow change her opinion. That's
09:50:54 22 what -- I mean, it's pretty obvious.

09:50:56 23 So let's go on.

09:50:57 24 You say: Although undersigned was not present,
09:51:07 25 the District Court reportedly opined that we have a

09:51:10 1 nine-nine split.

09:51:11 2 What I said is it appears that there's a
09:51:14 3 nine-nine split. It could be a nine-nine split. I don't
09:51:18 4 know. And even if there were, what's the effect of it?
09:51:25 5 I don't know that either.

09:51:26 6 What I do know is that Judge Ho did not opine
09:51:34 7 at all on the issue. He took a totally different tack.
09:51:40 8 He felt that the case should be dismissed out of hand for
09:51:47 9 jurisdictional reasons. So he partially dissented,
09:51:50 10 actually. And we do know that Chief Judge Richman did
09:51:57 11 not agree with the majority, in part. She joined in
09:52:00 12 judgment, but she did not agree with the majority's
09:52:03 13 reasoning that the way you -- on the way that you judge
09:52:11 14 navigation, which was a hallmark of Judge Willett's
09:52:16 15 opinion. We know she didn't agree with that.

09:52:18 16 So that leaves -- that leaves us with some
09:52:23 17 uncertainty. I mean, you're a lawyer, right?

09:52:27 18 MS. PETTIT: Yes, Your Honor.

09:52:28 19 THE COURT: And you're a good one --

09:52:30 20 MS. PETTIT: Thank you, Your Honor.

09:52:31 21 THE COURT: -- or you wouldn't be in your
09:52:32 22 position. So you have to understand that.

09:52:37 23 Now, you say, we have -- and then you say, and
09:52:42 24 in quotes, as if this was all I said: Because
09:52:47 25 Judge Richman did not agree with the majority --

09:52:50 1 I didn't say that. I didn't say she didn't
09:52:52 2 agree with the majority. I said she didn't agree with
09:52:54 3 the majority on the navigation issue only, which she
09:52:59 4 didn't.

09:53:01 5 -- and the separate opinion by Judge Ho. And
09:53:06 6 here you put this in quotes, "did not say anything at
09:53:09 7 all," as if I was criticizing Judge Ho.

09:53:13 8 So let me make it very clear. I said
09:53:16 9 specifically that I was not criticizing Judge Ho. I said
09:53:22 10 that specifically. And I didn't say he didn't say
09:53:26 11 anything at all. I said he didn't say anything at all on
09:53:30 12 this issue, which he didn't. Not that he didn't say
09:53:36 13 anything at all, as if he wrote a bunch of nonsense. I
09:53:39 14 didn't say that. So why you left that out, I don't know.

09:53:47 15 Now, you say: Accordingly, the District Court
09:53:51 16 ordered the parties to file additional briefs no later
09:53:54 17 than September 20th -- that's true -- addressing the
09:53:58 18 impact of the Court's *en banc* decision. That's also
09:54:02 19 true. In the process the District Court provided
09:54:06 20 citations to decisions that neither party had previously
09:54:11 21 raised.

09:54:13 22 That's true: Supreme Court cases. I have every
09:54:19 23 responsibility to draw the parties' attention to
09:54:23 24 precedent. I believe that the Fifth Circuit is bound by
09:54:28 25 the Supreme Court. I certainly am.

09:54:32 1 MS. PETTIT: Certainly, Your Honor.

09:54:33 2 THE COURT: Either party -- and then you say:

09:54:35 3 Either party might consider citing in support of an

09:54:40 4 argument the District Court need not follow

09:54:43 5 Judge Willett's opinion.

09:54:44 6 That is absolutely false. I did -- I dare you

09:54:49 7 to find, or any of your lawyers, anywhere in the

09:54:55 8 transcript where I said that, or even implied, these are

09:55:05 9 the cases that support an argument and I wanted them -- I

09:55:13 10 wanted the parties to follow that argument.

09:55:16 11 I said the opposite, the exact opposite. I

09:55:22 12 said these are cases that are out there. They do show

09:55:28 13 situations where there has been a split. I even gave as

09:55:40 14 support a case in which I handled as a member of the

09:55:42 15 Ninth Circuit Panel where there was a four-four split

09:55:47 16 because Justice Kagan could not participate because she

09:55:51 17 had been Solicitor General. And, on top of that, I said

09:56:03 18 that that was just an example.

09:56:05 19 But guess what? Where there is a four-four

09:56:08 20 split in the Supreme Court, it gets remanded to the

09:56:14 21 Circuit Court, the decision is upheld, but it isn't

09:56:17 22 precedential. You know that, right? You're a good

09:56:19 23 lawyer.

09:56:20 24 MS. PETTIT: It is precedential only to the

09:56:22 25 extent of what the issue was decided, but it is not

09:56:24 1 precedent for any arguments that were presented.

09:56:27 2 THE COURT: You're right, and you are correct.

09:56:30 3 It is only precedential in the Ninth Circuit. It isn't

09:56:33 4 nationwide precedent.

09:56:34 5 MS. PETTIT: Yes, Your Honor.

09:56:35 6 THE COURT: Because the Supreme Court did not

09:56:36 7 make a decision.

09:56:38 8 MS. PETTIT: Correct, Your Honor.

09:56:39 9 THE COURT: So I did not under any

09:56:44 10 circumstances tell the parties to look at these cases for

09:56:47 11 the purpose of finding Judge Willett's opinion to be

09:56:52 12 nonprecedential, as you say in this letter. I didn't do

09:56:55 13 that. You won't find it in the record. I looked again

09:56:59 14 to make sure. My law clerks looked again to be sure.

09:57:06 15 It's not there, because I didn't do it. It is

09:57:12 16 misleading.

09:57:20 17 Now, the District Court also ordered the party

09:57:22 18 to refile any pretrial filings and motions in limine on

09:57:27 19 October 28th, with objections to follow on October 30th.

09:57:31 20 That was at the request of your own lawyers.

09:57:39 21 Meanwhile, the District Court opined a lot of

09:57:41 22 people are shaking their heads at why the -- why Texas

09:57:45 23 demand for a jury trial.

09:57:46 24 It's true. I can't -- I personally, as I sit

09:57:55 25 here, don't know why Texas would want a jury trial in

09:57:58 1 this case. You see, I presumed you would want a jury
09:58:02 2 trial if you thought that you had a sympathetic plaintiff
09:58:11 3 or you had an issue which was somehow primed for a jury.
09:58:23 4 This is on equitable case.

09:58:27 5 Would you like some water.

09:58:29 6 MS. PETTIT: No, thank you, Your Honor.

09:58:30 7 THE COURT: Okay. An equitable case. That was
09:58:32 8 just an offhand comment. It wasn't anything more than an
09:58:36 9 offhand comment. It had no precedential value. Who
09:58:45 10 cares? You've asked for a jury. The Fifth Circuit is
09:58:49 11 looking at it, and they will rule. And whatever they
09:58:51 12 rule, I will abide by. It doesn't matter to me.

09:58:56 13 But let's not forget something. It appears the
09:59:00 14 State of Texas has some idea in its head -- from where, I
09:59:04 15 don't know -- that I am not the right judge for this case
09:59:09 16 because I've already made up my mind. I haven't. Or
09:59:14 17 that I am prejudiced against the State of Texas. I am
09:59:17 18 not.

09:59:18 19 Let's look at a little history. Not that long
09:59:25 20 ago there was a law passed by the Texas State
09:59:31 21 Legislature, a very popular law by some and unpopular by
09:59:37 22 others, called the fetal burial law. Are you familiar
09:59:41 23 with that?

09:59:41 24 MS. PETTIT: Yes, Your Honor.

09:59:42 25 THE COURT: Okay. Guess who handled that case?

09:59:44 1 MS. PETTIT: I believe you did, Your Honor.

09:59:46 2 THE COURT: I did. Now, the only decision that
09:59:49 3 had been rendered on that exact law was rendered by the
09:59:55 4 Tenth Circuit. They had ruled that that statute -- not
10:00:03 5 the Texas one, but the one that they were dealing with,
10:00:06 6 which is exactly the same -- was flat-out
10:00:11 7 unconstitutional, and they struck it down.

10:00:15 8 And then there was an appeal by the State to
10:00:17 9 the United States Supreme Court which was pending at the
10:00:21 10 time I made my ruling. So the only decision out there on
10:00:26 11 the fetal burial law was that it was unconstitutional,
10:00:30 12 and that was by a circuit court of appeals, not a
10:00:33 13 district court.

10:00:33 14 I looked at it very carefully, and my view was
10:00:41 15 that the Tenth Circuit was wrong, that Texas was right,
10:00:43 16 and I ruled for the State of Texas that the law was in
10:00:46 17 fact constitutional. Subsequently, the Supreme Court
10:00:55 18 reversed the Tenth Circuit and found the law
10:00:59 19 constitutional.

10:01:02 20 Now, we didn't get a full ruling on that case
10:01:04 21 because that case basically mooted the issue. It went
10:01:12 22 away. So Judge Costa and the rest of that panel end up
10:01:18 23 dismissing the case. That was a big ruling, it was a
10:01:23 24 tough ruling, and I ruled for the State, as I have in
10:01:26 25 many other cases, including this one.

10:01:30 1 In this case the United States had two causes
10:01:33 2 of action. After very thorough briefing, and it was a
10:01:40 3 very tough issue, I ruled for the State of Texas in this
10:01:43 4 case and dismissed that cause of action.

10:01:47 5 Are you aware of that?

10:01:49 6 MS. PETTIT: Yes, Your Honor.

10:01:50 7 THE COURT: All right. Now, finally, let's get
10:01:57 8 to the last part of it, because this is what really kind
10:02:01 9 of made me -- really got me puzzled.

10:02:09 10 You say: Texas' demand for a jury trial, and
10:02:18 11 indicated that I may reopen discovery, but only if the
10:02:24 12 Fifth Circuit holds Texas is entitled to a jury. Okay.
10:02:32 13 Because the circumstances would have changed, in my view.

10:02:39 14 This was put in here, for whatever reason, I
10:02:43 15 presume to indicate that somehow I was favoring the
10:02:47 16 federal government by reopening discovery. Let me read
10:02:51 17 you, if I may, from the transcript of what Mr. Walters --

10:02:59 18 Help me find this, will you, Rose?

10:03:01 19 -- what Mr. Walters said, because I thought
10:03:03 20 Mr. Walters made an excellent point. Okay? Can you help
10:03:09 21 me find -- right here on my papers somewhere. Where is
10:03:14 22 it? Because I don't want to keep them here unnecessarily
10:03:19 23 for a long time while I'm searching for this. You had
10:03:25 24 highlighted what Mr. Walters had said somewhere.

10:03:35 25 Come up here. Help me find it.

10:04:01 1 I want to quote you correctly, Mr. Walters.

10:04:03 2 MR. WALTERS: I appreciate it, Your Honor.

10:04:12 3 THE COURT: Okay. Here's the discussion that
10:04:15 4 you were so concerned about, all right? It started with
10:04:17 5 Mr. Lynk. This is where I said I may reopen discovery.

10:04:23 6 "MR. LYNK: Understood. On August the 2nd, on
10:04:27 7 Friday, obviously, there were a number of things that
10:04:30 8 originally were due, and we understood that those were
10:04:34 9 suspended as of last week under the -- in the
10:04:37 10 circumstances.

10:04:39 11 "THE COURT: What were those?

10:04:41 12 "Generally, the response to July 26th pretrial
10:04:44 13 filing: objections to witnesses, objections to things
10:04:47 14 like, that." That's Mr. Lynk.

10:04:50 15 "THE COURT: Those I think probably should
10:04:53 16 wait. And the reason for this is that we're still
10:04:59 17 waiting to figure out whether we have a jury or we don't
10:05:02 18 have a jury. And you may decide to go with certain
10:05:07 19 witnesses if you have a jury. I may even allow, because
10:05:13 20 if -- if it stays the way it is, if the Fifth Circuit
10:05:16 21 rules there is no jury in this case, because it's
10:05:19 22 equitable, then I won't reopen.

10:05:21 23 "But if we -- if we have a change in the
10:05:24 24 landscape and say, well, you're going to have a jury now
10:05:30 25 out of the blue, then I may allow the parties to add

10:05:33 1 additional witnesses. And that may impact our trial
10:05:36 2 date."

10:05:36 3 In fairness to both parties, by the way.

10:05:42 4 "MR. WALTERS: We would suggest that if the
10:05:47 5 Court is considering reopening discovery -- so we don't
10:05:51 6 know that yet, whether the Department of Justice wants
10:05:53 7 that -- when the Fifth Circuit rules on our right to a
10:05:56 8 jury trial --

10:05:58 9 "THE COURT," here's what I say: "I can assure
10:06:00 10 you that will not happen if they deny the request for a
10:06:05 11 jury trial, only because then that -- that means that the
10:06:08 12 tenor of the case has been the same since its inception."

10:06:11 13 It was only recently that Texas really asked
10:06:15 14 for a jury.

10:06:17 15 All right.

10:06:17 16 "MR. WALTERS: Right. What we're saying --"

10:06:22 17 And this is the Court, but -- this is me, now.

10:06:25 18 "But if they -- if they say the State gets a
10:06:29 19 jury or gets a partial jury trial on some issues but not
10:06:34 20 others, then I would consider it. I'm not saying I would
10:06:37 21 grant it, but I would certainly consider it."

10:06:40 22 Now, here's the critical part. This is
10:06:45 23 Mr. Walters, your lawyer.

10:06:47 24 "But, Your Honor, I guess our position is that,
10:06:51 25 if the Fifth Circuit were to find we are entitled to a

10:06:55 1 jury trial, the Court would have to resolve these motions
10:06:58 2 again because the standard would be different. So we
10:07:07 3 would suggest not wasting the Court's time in resolving
10:07:10 4 these motions before we get a ruling from the
10:07:12 5 Fifth Circuit on --"

10:07:15 6 Then I say: "I don't know that the legal
10:07:16 7 standard would be different."

10:07:19 8 And here's Mr. Walters:

10:07:22 9 "Well, the standard for considering, like,
10:07:25 10 experts" -- which is what I was concerned about --
10:07:28 11 "whether they're going to be excluded or not, would be
10:07:30 12 different."

10:07:31 13 And here's what I say to Mr. Walters:

10:07:34 14 "Oh, I see what you're saying, in a practical
10:07:37 15 sense. Yeah. I would agree with you. I told you I will
10:07:42 16 take a look at it. I haven't made up my mind on that,
10:07:46 17 yet. I'll take a good look at it, okay?

10:07:49 18 "MR. WALTERS: Thank you."

10:07:52 19 That's what that was all about. Your side
10:08:00 20 appropriately, because they're trial lawyers and they're
10:08:05 21 good ones, is concerned that if the tenor of the case
10:08:08 22 changes from a nonjury trial to a jury trial, they may
10:08:12 23 need or may ask me to add an additional witness or two
10:08:16 24 because they've got to prove the case to the jury.

10:08:18 25 I have been involved in this case for a very

10:08:22 1 long time, and I understand the landscape. I know what's
10:08:29 2 there. I've heard lots and lots of testimony in this
10:08:32 3 case. So they would not have to educate me on the facts
10:08:39 4 or on the expert opinions, because I've heard it, or at
10:08:46 5 least part of it.

10:08:49 6 But a jury is different. They come in with a
10:08:54 7 clean slate. They have not heard it. They have not seen
10:08:57 8 it. They don't know what it's all about. So they need
10:09:02 9 to be carefully educated. That was my concern.

10:09:11 10 You can be seated. Thank you very much.

10:09:13 11 MS. PETTIT: Thank you.

10:09:17 12 MR. WALTERS: Your Honor, if I could just ask a
10:09:19 13 brief question. In our -- in the letter that was filed
10:09:21 14 in the Fifth Circuit, the last line references this:
10:09:24 15 When transcripts became available, we would submit them
10:09:29 16 to the Fifth Circuit. I understand Your Honor has
10:09:32 17 expressed a lot of concern about the Fifth Circuit not
10:09:35 18 getting the full context of what occurred in yesterday's
10:09:38 19 hearing. So we would ask for your direction as to
10:09:41 20 whether you would like the rough transcripts of both
10:09:44 21 yesterday --

10:09:44 22 THE COURT: The final transcript is done, is it
10:09:47 23 not? The final transcript is done. I'm not trying to
10:09:53 24 hide anything from the Fifth Circuit. Believe me. First
10:09:57 25 of all, I've spent 35-plus years of my life having

10:10:01 1 everything I said put down in writing. I'm not running
10:10:09 2 away from yesterday.

10:10:11 3 What worries me and gave me concern is that
10:10:15 4 this letter -- I'm not saying that Ms. Pettit did this
10:10:22 5 intentionally. I -- to be honest with you, I've heard
10:10:26 6 nothing but good things about Ms. Pettit, to be honest
10:10:30 7 with you. I've heard that she's a good lawyer, and I
10:10:34 8 heard that she does her job well. And I have no personal
10:10:40 9 animus whatsoever against Ms. Pettit.

10:10:45 10 But my concern is this. My concern is this:
10:10:51 11 Somebody -- and I don't think it's really Ms. Pettit.
10:10:54 12 But somebody seems to think that by sending a letter like
10:10:59 13 this in to the Fifth Circuit, they are in a position to
10:11:07 14 influence the Fifth Circuit to do something they might
10:11:10 15 not otherwise do. Why else would the letter be sent?

10:11:17 16 And I don't even know whether she actually
10:11:20 17 drafted the letter. My -- maybe, but maybe not. The
10:11:25 18 point is that it contains some flat-out inaccuracies, but
10:11:32 19 more important than that, half-truths. Things are taken
10:11:36 20 out of context. And that -- that's a shame. The Fifth
10:11:42 21 Circuit deserves better than that. You can be seated,
10:11:45 22 Counsel.

10:11:45 23 MR. WALTERS: Thank You, Your Honor.

10:11:50 24 MR. STONE: I just wanted to add one thing.
10:11:50 25 I'm sorry you feel that way. I want to add something

10:11:52 1 that -- just a point of correction for the last point
10:11:53 2 that you were making with Ms. Pettit, specifically about
10:11:56 3 reopening discovery.

10:11:57 4 At no point did Texas indicate that we were
10:12:00 5 open to reopening discovery or that that was even on the
10:12:03 6 table. That discussion that you quoted from Mr. Walters
10:12:06 7 was specifically in reference to deciding motions like
10:12:08 8 motions in limine.

10:12:09 9 THE COURT: Well, first of all, Mr. Walters can
10:12:11 10 speak for himself. But, in any event, go ahead.

10:12:14 11 MR. STONE: It was specifically in reference
10:12:16 12 things like motions in limine.

10:12:17 13 THE COURT: Yeah. I don't see anything here
10:12:19 14 that says anything about motions in limine.

10:12:22 15 MR. STONE: As well as experts, Your Honor. We
10:12:23 16 filed motions to exclude.

10:12:24 17 THE COURT: It doesn't -- but, Counsel, it
10:12:25 18 doesn't matter. It doesn't matter. I said clearly that
10:12:31 19 I had not made up my mind as to whether I would reopen
10:12:36 20 discovery. I would hear argument on that. It just means
10:12:41 21 that I had not made a decision, and the tenor of the
10:12:46 22 letter that was sent indicated that I had. And I hadn't.
10:12:50 23 And I made that very clear to Mr. Walters.

10:12:53 24 I said I would agree with you there. I agree
10:12:58 25 with Mr. Walters. I frequently agree with Mr. Walters.

10:13:02 1 I agree with you there. I told you I will take a look at
10:13:05 2 it. I haven't made up my mind on that yet. I will take
10:13:10 3 a very good look at it.

10:13:13 4 That's what I said. So you can be seated.

10:13:17 5 MR. STONE: Your Honor, although I will add
10:13:18 6 just for the record that I don't think that that final
10:13:19 7 sentence in the letter doesn't -- I think it says exactly
10:13:22 8 that, that you were open to the possibility of reopening
10:13:25 9 discovery depending on whether or not -- depending on the
10:13:27 10 outcome of that jury issue. That's what the letter said,
10:13:32 11 Your Honor, just so the record reflects that. Thank you.

10:13:32 12 THE COURT: Let me look at it. I don't have it
10:13:32 13 right in front of me. What did I do with it?

10:13:48 14 MR. STONE: I can read the sentence.

10:13:50 15 THE COURT: No. It's okay. I'm looking for
10:13:51 16 it. I'll find it. It's here somewhere. Here it is. We
10:14:15 17 found it. It got buried.

10:14:38 18 Okay I don't know why this sentence was put in
10:14:40 19 the letter. I mean, it just doesn't make sense to me. I
10:14:44 20 mean, why is it here?

10:14:45 21 MR. STONE: Because Texas will be materially
10:14:48 22 prejudiced if you reopen discovery, in our opinion.

10:14:50 23 THE COURT: That's something we will decide.

10:14:52 24 MR. STONE: Agreed, Your Honor.

10:14:53 25 THE COURT: And I said that.

10:14:55 1 MR. STONE: Yeah.

10:14:55 2 THE COURT: But why is it here? Why is it in
10:14:59 3 this letter? What does it have to do with anything? It
10:15:02 4 doesn't have to do with anything.

10:15:05 5 The real key to this letter is Texas was trying
10:15:09 6 to leave the impression with the *en banc* court that I had
10:15:15 7 made a decision or that I had somehow indicated, God
10:15:26 8 forbid, that there was an issue with respect to which was
10:15:33 9 the controlling opinion, if any. And that is a terrible
10:15:39 10 thing to do.

10:15:41 11 You know, I'll tell you what the worst part of
10:15:44 12 this is. And I don't think it's true. I really don't
10:15:49 13 think it's true. It could leave somebody with the
10:15:54 14 impression that the State of Texas thinks they've got the
10:15:57 15 Fifth Circuit in their back pocket.

10:15:59 16 Now, I don't think you believe that. I really
10:16:04 17 don't think the Attorney General's Office believes that
10:16:08 18 they have the State of Texas in their back pocket and
10:16:12 19 they can just file anything they want, prejudice the
10:16:17 20 Court against this Court, and get a successful ruling. I
10:16:21 21 do not believe the Attorney General's Office believes
10:16:24 22 that. If I did, you would know it.

10:16:31 23 MS. PETTIT: Your Honor, for the record, we
10:16:33 24 definitely do not.

10:16:34 25 THE COURT: You don't have to tell me that. I

10:16:36 1 already said I don't believe that you do. But somebody
10:16:40 2 who just read this and would say why did they send this
10:16:43 3 in? What was purpose of it? What is the big, important
10:16:49 4 issue here? I don't know. I don't know why it was sent
10:17:00 5 in. It was ill-advised.

10:17:03 6 It really shouldn't have been sent, because
10:17:06 7 it's neither a Rule 28(j) letter -- and if it's not a
10:17:10 8 28(j) letter, what is it? It's just a notice to the
10:17:15 9 Fifth Circuit that, gosh, you know that Judge David Ezra
10:17:19 10 actually said that, with this big split court, there
10:17:27 11 might be an issue as to whether Judge Willett's opinion
10:17:32 12 is precedential. Heaven forbid.

10:17:41 13 Do you think Judge Willett, who I know well and
10:17:44 14 who is a fine United States Circuit Judge of the highest
10:17:49 15 integrity, is going to read this and not sleep at night
10:17:54 16 and just say, oh, my God? He's going to read the
10:17:58 17 transcript, and he's going to see that David Ezra said in
10:18:02 18 multiple places that I have no opinion on that at all.

10:18:10 19 And I will say it again. My fallback position
10:18:15 20 is that Judge Willett's opinion is precedential, and I'm
10:18:21 21 inclined to find that it is. And I'll say that.

10:18:26 22 But there is an issue. We have a deeply
10:18:32 23 divided opinion. And it is in Judge -- and it's a fact
10:18:40 24 that Judge Ho did not weigh in on this issue. Maybe he
10:18:44 25 will now. Maybe he'll file some sort of an amended

10:18:48 1 opinion now that he's gotten your letter. I don't know.
10:18:51 2 But he could do that at any time. Maybe that was the
10:18:55 3 purpose of it. I don't know. I hope not. Or maybe
10:19:00 4 Judge Willett will file -- I have no idea.

10:19:07 5 But I surely don't understand, and have never
10:19:12 6 in my entire career -- and I've handled big cases all
10:19:21 7 across the country, big ones, much bigger than this. And
10:19:29 8 I've handled big cases sitting on the Court of Appeals.
10:19:31 9 I have never seen a letter like this filed, ever.

10:19:39 10 And maybe I'm just naive. No judge that I've
10:19:48 11 raised this with and talked to about this, just asked
10:19:54 12 them if this is a policy or if they've ever seen it,
10:19:57 13 nobody had ever seen it. And we're talking about
10:20:00 14 conservative judges now that I talked to. Nobody had
10:20:03 15 ever seen it or heard of it.

10:20:09 16 And at the time we thought it was a rule, as
10:20:16 17 you put it originally, a Rule 28(j) letter. They said,
10:20:22 18 Well, that's obviously not a 28(j) letter.

10:20:28 19 And if it's not a 28(j) letter, then what is
10:20:33 20 it? It's just telling them that I had a status
10:20:36 21 conference with the parties, I raised an issue which I
10:20:39 22 had heard -- I actually hadn't thought about it myself
10:20:43 23 initially. I just read Judge Willett's opinion, I read
10:20:46 24 all the other opinions and I just let it go at that and
10:20:50 25 set the status conference.

10:20:51 1 But then I heard some chatter. And then I
10:20:59 2 looked at it more carefully, and I thought this is
10:21:02 3 probably an issue that should be briefed, that we should
10:21:07 4 look at carefully, because this case may well not end
10:21:14 5 with the Fifth Circuit, regardless of what they do. It
10:21:18 6 could go to the Supreme Court.

10:21:21 7 And if I just take one position or another
10:21:27 8 without getting the full briefing of both sides and
10:21:30 9 carefully considering it, and it goes up to the Supreme
10:21:35 10 Court and they say, Wow, Ezra was wrong, that wasn't a
10:21:39 11 precedential opinion, he shouldn't have treated it as
10:21:42 12 such, or it was a precedential opinion and he didn't
10:21:46 13 treat it as such, the other way, it comes all the way
10:21:51 14 back down and we start all over again.

10:21:54 15 That doesn't make any sense. I have great
10:21:58 16 faith in the quality of the lawyers in this case. I've
10:22:04 17 read your briefing. Your briefing is good. And I am
10:22:10 18 looking to you to help me make the right decision here.
10:22:16 19 That's what this is all about. Just like I did, in my
10:22:22 20 view -- the United States doesn't agree -- when I
10:22:25 21 dismissed their cause of action in involving Mexico
10:22:35 22 international law. I got very good briefing on that, and
10:22:38 23 I ruled for the State because I think, looking at it
10:22:42 24 carefully, Texas is right. It's not a cause of action
10:22:48 25 here. Political question.

10:22:55 1 So, again, Ms. Pettit, I want to emphasize to
10:23:01 2 you that, first of all, I want to thank you for showing
10:23:05 3 up. I didn't order you here, you didn't have to come
10:23:09 4 here, and you didn't have to subject yourself to being
10:23:14 5 questioned by me on this letter. And your willingness to
10:23:22 6 do so says a lot, not only about you personally but about
10:23:29 7 your belief in your office. And that I think is
10:23:34 8 important. So I thank you very much for coming. You
10:23:39 9 didn't have to do it. I didn't order -- I could have
10:23:43 10 ordered you here, but I didn't. I simply requested that
10:23:46 11 you come. And you could have said, ah, I'm not coming.
10:23:50 12 We've got lawyers.

10:23:52 13 I want to thank counsel for her. You did the
10:23:55 14 best job you could. You didn't -- I didn't attack her in
10:23:58 15 any way, shape, or form. I'm not attacking her. I don't
10:24:03 16 know whether she even actually wrote the letter. She's
10:24:06 17 at a level where frequently other people write letters.
10:24:11 18 And so the errors in the letter may not even be hers.

10:24:18 19 But it doesn't matter. I'm not mad. I don't
10:24:25 20 hold grudges. In my entire career as a federal judge,
10:24:33 21 all the cases I've handled, all the circuits that have
10:24:37 22 heard my appeals, I have never to my knowledge been
10:24:44 23 removed -- or my recollection -- from a case for bias or
10:24:50 24 for any other reason.

10:24:51 25 Now I've recused myself because I had a

10:24:53 1 conflict. But I don't have a bias against the State of
10:24:59 2 Texas, and my record here proves it. By the way, I
10:25:04 3 handle a lot of State of Texas cases. They have nothing
10:25:08 4 to do with big issues like we have here, and I rule for
10:25:12 5 the State of Texas frequently. Nothing against the State
10:25:17 6 of Texas.

10:25:20 7 I love the State of Texas, actually. I didn't
10:25:23 8 have to become a member of the Texas Bar, but I did.
10:25:29 9 Why? Because I'm proud to be a member of the Texas Bar.
10:25:38 10 That's why. And my good friend, the Chief Justice, swore
10:25:42 11 me in his office. And I'm very proud of that, too.

10:25:47 12 And let me say again: I have no animus or any
10:25:52 13 concern about the Fifth Circuit Court of Appeals. They
10:25:56 14 will do whatever they need to do. Now, am I always happy
10:25:59 15 about every ruling they -- they hand down? No.
10:26:04 16 Absolutely not.

10:26:06 17 Look. I am very good friends with many of the
10:26:12 18 those judges. I don't know all of them well, but I know
10:26:15 19 most of them. And I have a wonderful relationship
10:26:19 20 with -- even like Judge Willett and I have a good
10:26:24 21 relationship. He's a great judge. Judge Elrod and I are
10:26:29 22 very good friends, very good friends. Judge -- Chief
10:26:36 23 Judge Richman and I are very good friends. Judge Oldham
10:26:41 24 and I are friends.

10:26:43 25 Now, Judge Elrod was in the majority that

10:26:47 1 reversed me in this. You think that makes any difference
10:26:49 2 to me? Absolutely not. She was doing her job the way
10:26:54 3 she thought she needed to do it. Judge Willett wrote the
10:26:58 4 opinion. Do I agree with him? No. But I don't think
10:27:03 5 that makes me a nut. There's a lot of Fifth Circuit
10:27:09 6 judges that didn't agree with them. So I don't think I'm
10:27:13 7 some sort of wild outlier here.

10:27:17 8 And President Ronald Reagan wasn't known for
10:27:26 9 appointing left-wing radical jurists, and I don't think
10:27:35 10 I've ever proven to be one. So I am going to ask that
10:27:44 11 when you send the transcript up to the Fifth Circuit, you
10:27:48 12 send this transcript with it, today's transcript.

10:27:55 13 MS. PETTIT: Certainly, Your Honor.

10:27:56 14 THE COURT: Okay?

10:27:58 15 MR. WALTERS: Absolutely, Your Honor.

10:27:59 16 THE COURT: Okay. Let them have both
10:28:01 17 transcripts. If they're going to read a transcript, let
10:28:03 18 them read it all.

10:28:05 19 MS. PETTIT: Absolutely.

10:28:06 20 THE COURT: They may be mad at me for calling
10:28:09 21 this hearing. I don't know. But I don't think so. I
10:28:11 22 mean, I don't think when I -- when we left yesterday, I
10:28:16 23 thought we were on solid ground as to what we were doing.
10:28:22 24 I thought we understood what we were doing, and we were
10:28:25 25 going forward.

10:28:26 1 I don't think -- I really don't think either
10:28:30 2 party, when they left -- tell me, please, if you will.
10:28:34 3 Did any party feel that the process that I set forth was
10:28:38 4 prejudicial or in some way did not follow what you would
10:28:45 5 like to have been done? I don't think so. I certainly
10:28:50 6 would have heard -- we don't have any shrinking flowers
10:28:53 7 here.

10:28:55 8 In fact, I agreed with the State of Texas more
10:28:59 9 than I agreed with the government -- the federal
10:29:01 10 government. You're the government, too. You're a
10:29:06 11 sovereign government, to use Governor Abbott's words,
10:29:14 12 which I agree with, by the way. Texas is a sovereign
10:29:17 13 state. It's a government, and it needs to be treated as
10:29:21 14 such.

10:29:21 15 So that's where we are. I intend to follow
10:29:35 16 through with the plan we worked out, and I hope when we
10:29:41 17 hear from the Fifth Circuit -- which it's a legal
10:29:47 18 question. You know, if the Fifth Circuit says, look,
10:29:50 19 they're entitled to a jury trial, that will be an issue
10:29:53 20 the Supreme Court will have to decide, ultimately. But
10:29:56 21 you're going to get a jury trial.

10:29:57 22 I mean, I think it's an equitable cause of
10:30:01 23 action. They're not seeking money damages. They're
10:30:04 24 seeking to have you remove the buoy. And with respect to
10:30:08 25 the potential of a fine, the government has not ever

10:30:13 1 indicated they're looking to recover a fine in this case.
10:30:19 2 They're not pursuing that remedy. They just want
10:30:23 3 equitable remedy. And, even if they were pursuing it, we
10:30:26 4 could handle that at a later time, and it would be a jury
10:30:28 5 trial.

10:30:28 6 But that's not -- I mean, are we even going to
10:30:34 7 get that far? I don't know. As I said the other day,
10:30:39 8 the United States may look at this and say, look, there's
10:30:42 9 no really -- there's no way, given the Fifth Circuit's
10:30:46 10 ruling, that we can adequately proceed. And that we may
10:30:52 11 have a trial on the record and have me enter judgment,
10:31:01 12 and then they can take their appeal, as for a *writ of*
10:31:08 13 *certiorari*.

10:31:08 14 I guess they would have to appeal to the Fifth
10:31:11 15 Circuit first, because that would be a trial on the
10:31:14 16 merits, the other -- we keep forgetting that that *en banc*
10:31:18 17 ruling was not on the merits of the case, it was on the
10:31:22 18 preliminary injunction. This thing is so complicated,
10:31:27 19 even I lose track of it half the time.

10:31:29 20 All right. Again, I want to thank all of you
10:31:33 21 for being here. And, by the way, if you don't think --
10:31:37 22 this is the really odd part of it. There's a reporter
10:31:44 23 for *The Statesman* who I've never personally met, who
10:31:50 24 happens to be an excellent reporter. What is his name
10:31:54 25 again? He's already got an article out on this.

10:32:03 1 Is it Jeremy?

10:32:06 2 THE CLERK: I don't think so. I don't have
10:32:07 3 Internet.

10:32:08 4 THE COURT: What is his name? Are you out
10:32:10 5 here? What is your name, sir.

10:32:12 6 MR. MORITZ: Your Honor, I'm John Moritz with
10:32:13 7 the *Austin American-Statesman*.

10:32:14 8 THE COURT: There you go. Mr. Moritz.

10:32:16 9 Mr. Moritz is an excellent reporter. I read
10:32:20 10 his articles many times. He generally gets it absolutely
10:32:24 11 right, which is not something that happens often. And
10:32:30 12 he's already written an article on this, and he has
10:32:33 13 brought out the facts in that article.

10:32:36 14 Do you think that these Fifth Circuit judges
10:32:39 15 live in some sort of a bubble and they don't read the
10:32:42 16 newspaper? They do. We don't all live in a bubble.
10:32:52 17 They read the newspapers. They go to Baylor games like
10:32:53 18 me. Judge Willett's a big Baylor fan, as is Judge Elrod
10:33:00 19 and I. That's our connection. And Judge Richman, by the
10:33:05 20 way, Chief Judge Richman.

10:33:10 21 Okay. And he'll write another article today
10:33:12 22 maybe. I don't know. But he is a good reporter.

10:33:17 23 All right. Anything else you would like to put
10:33:20 24 on the record?

10:33:23 25 MR. WALTERS: We're always happy to meet with

10:33:25 1 you, Your Honor.

10:33:27 2 THE COURT: Not always. You're about as always
10:33:32 3 happy to meet with me as I am to always read Fifth
10:33:36 4 Circuit opinions. Most of the time I get affirmed. You
10:33:39 5 know, I have a really good record in front of the Fifth
10:33:41 6 Circuit, I'm proud to say. Unfortunately, sometimes,
10:33:46 7 when I don't get affirmed, it's the ones that you read
10:33:48 8 about. What can you say?

10:33:54 9 Okay. Thank you. Anything else, Counsel?

10:33:57 10 MR. WADE: No, Your Honor. Thank you.

10:33:58 11 THE COURT: Anything from the people on the
10:34:02 12 phone? Hello? Are you there? Did we lose them?

10:34:11 13 MR. LYNK: Sorry. I was muted. But nothing
10:34:14 14 from the United States, Your Honor.

10:34:14 15 THE COURT: You may -- and I'm not telling you
10:34:16 16 to do so. But you may want to respond to Texas's letter,
10:34:23 17 if you wish, because it's now kind of *ex parte*. But you
10:34:29 18 also may want to wait and see if they request it.

10:34:34 19 Generally -- but that's up to you. I'm not
10:34:41 20 telling you to do it or not to do it.

10:34:45 21 MR. LYNK: Understood, Your Honor.

10:34:45 22 THE COURT: Okay. You do whatever you want to
10:34:47 23 do. But I want this transcript to go up. And if Texas
10:34:53 24 for some reason is unable to do it or didn't do it or
10:34:56 25 doesn't do it, I want the United States to send this

10:34:59 1 transcript up. Somebody send the transcript up to the
10:35:04 2 Fifth Circuit.

10:35:04 3 MR. WALTERS: We'd be happy to do it,
10:35:06 4 Your Honor.

10:35:07 5 THE COURT: If you say you will, you will. I
10:35:09 6 don't have any concerns about that.

10:35:12 7 MR. WALTERS: And, Your Honor, would you like
10:35:16 8 us to file the -- once we get a rough transcript, or
10:35:19 9 would you like to wait until you get a final transcript.

10:35:22 10 THE COURT: She'll get a finalized transcript
10:35:25 11 to you today.

10:35:26 12 MR. WALTERS: For today's hearing?

10:35:27 13 THE COURT: She's really good. She's an
10:35:29 14 excellent reporter.

10:35:30 15 MR. WALTERS: That is what I've heard. Thank
10:35:32 16 you very much. That's been our experience.

10:35:38 17 THE COURT: Anything else? You're chatting
10:35:39 18 among yourselves.

10:35:40 19 MR. WALTERS: No, Your Honor. We're good.

10:35:42 20 THE COURT: This is the kind of chatter we get,
10:35:44 21 you know. For all we know, somebody in the Fifth
10:35:47 22 Circuit -- in the Attorney General's Office, some
10:35:50 23 appellate lawyer, might have looked at this and said,
10:35:53 24 Whoops. We have an issue here. I think we've got a
10:35:56 25 winner, but we need to address it when it comes down to

10:36:01 1 the opinions. Some appellate lawyer might have said
10:36:05 2 that. And, if they did, they're smart.

10:36:07 3 Okay. Thank you very much. Court stands in
10:36:09 4 recess.

10:36:10 5 (End of transcript)

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 **UNITED STATES DISTRICT COURT**)

2 **WESTERN DISTRICT OF TEXAS**)

3 I, Arlinda Rodriguez, Official Court Reporter, United
4 States District Court, Western District of Texas, do certify
5 that the foregoing is a correct transcript from the record of
6 proceedings in the above-entitled matter.

7 I certify that the transcript fees and format comply with
8 those prescribed by the Court and Judicial Conference of the
9 United States.

10 WITNESS MY OFFICIAL HAND this the 7th day of August 2024.

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

/S/ Arlinda Rodriguez
Arlinda Rodriguez, Texas CSR 7753
Expiration Date: 10/31/2025
Official Court Reporter
United States District Court
Austin Division
501 West 5th Street, Suite 4152
Austin, Texas 78701
(512) 391-8791