No. 20-0558

IN THE

SUPREME COURT OF TEXAS

Exxon Mobil Corporation,

Petitioner,

v.

City of San Francisco, et al.,

Respondents.

From the Second District Court of Appeals,
Fort Worth, Texas
No. 02-18-00106-CV

BRIEF OF AMICUS CURIAE

MURRY B. COHEN
Texas Bar No. 04508500
judge@judgemurrycohen.com
2102 Dryden Road
Houston, Texas 77030
713.443.2623

IDENTITY OF AMICUS CURIAE

I have practiced law in Texas since 1972 as a solo practitioner, small firm lawyer, and partner in two international law firms. I have been an Assistant District Attorney for Harris County, a criminal defense lawyer, and a civil litigation lawyer. I have been certified by the Texas Board of Legal Specialization as a specialist in criminal law and in civil appellate law for thirty years each.

I have practiced before this Court, the U.S. Supreme Court, the Fifth Circuit, federal district courts, most Texas Courts of Appeals, and the Texas Court of Criminal Appeals. I taught law for years as an adjunct professor at two Texas law schools.

From 1983 to 2002, I served as a Justice of the First Court of Appeals, originally elected as a Democrat but in my final term as a Republican. In that period, I served as chairperson of committees of the State Bar of Texas Judicial Section dealing with judicial education, legislation, and ethics.

I have an interest in judicial ethics, having served as a member and chairperson of the Judicial Ethics Committee of the State Bar Judicial Section, which would answer in writing questions from

Texas judges about compliance with the Texas Code of Judicial Conduct. During my years as chairperson, I wrote the all of the Committee's opinions, which were joined by the members, published, and distributed to Texas judges.

I now conduct a solo practice as an arbitrator and appellate advocate.

This brief is filed on my behalf, without fee.

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INTEREST OF AMICUS CURIAE

I don't care whether review is granted, what rule of law controls this case, or who wins. I care whether this Court will publicly condemn the following language from Second Court of Appeals' opinion:

> "We confess to an impulse to safeguard an industry that is vital to Texas's economic well-being, particularly as we were penning this opinion weeks into 2020's COVID-19 pandemic-driven shutdown of not only Texas but America as a whole. Lawfare is an ugly tool by which to seek the environmental policy changes the California Parties desire, enlisting the judiciary to do the work that the other two branches of government cannot or will not do to persuade their constituents that anthropogenic climate change (a) has been conclusively proved and (b) must be remedied by crippling the energy industry. And we are acutely aware that California courts might be philosophically inclined to join the lawfare battlefield in ways far different than Texas courts.
>
> Being a conservative panel on a conservative intermediate court in a relatively conservative part of Texas is both a blessing and curse: Blessing, because we strive always to remember our oath to follow settled legal principles set out by higher courts and not encroach upon the domains of the other governmental branches; curse, because in this situation, at this time in history, we would very much like to follow our impulse instead.
>
> In the end, though, our reading of the law simply does not permit us to agree with Exxon's contention that the Potential Defendants have the purposeful contacts with our

> state needed to satisfy the minimum-contacts standard that binds us."

Op. at 48–49.

Chief Justice Sudderth went further, writing a concurring opinion suggesting she "loathed" having to follow controlling law from this Court and the U.S. Supreme Court and rule against Exxon.

This language caused me and Mr. Kenneth Marks, for decades a partner in Susman Godfrey LLP, to file a complaint with the Texas Commission on Judicial Conduct. *See* Ex. 1. On March 5, 2021, the Commission dismissed the complaint, stating the language "did not rise to the level of sanctionable conduct." *Id.* We filed a request for reconsideration, supported by the affidavit of Professor Charles Wolfram, an authority on legal and judicial ethics. *Id.* On December 20, 2021, the Commission denied the request for reconsideration. *Id.*

RELIEF REQUESTED

Given the Commission's decision, only this Court is left to protect the judiciary from this conduct. This Court should condemn the panel's political statements sufficiently to give pause to judges who would emulate it.

If this Court grants review, it should expressly and strongly disapprove the Second Court's statements. If this Court denies review, it should do the same thing, in a *per curiam* opinion disapproving the section of the Second Court's Opinion entitled "Some Final Thoughts."

If five Justices are not willing to do that, those who are should write a concurring opinion. Though less valuable than a statement by a majority, that would likely have two salutary effects: 1) Any judge who would emulate the Second Court would know this Court is watching, and 2) When the next complaint about conduct like this arrives at the Commission, it will know this Court is watching.

ISSUE PRESENTED

I. Does it violate the Texas Code of Judicial Conduct for an appellate court in an opinion to "confess to an impulse to safeguard an industry that is vital to Texas's economic well-being" and describe the "blessing" of being "a conservative panel on a conservative intermediate court in a relatively conservative part of Texas"?

ANSWER AND ARGUMENT

Yes. The Second Court of Appeals violated multiple Code provisions in *City of San Francisco v. Exxon Mobil Corporation*, No. 02-18-00106-CV, 2020 WL 3969558 (Tex. App.—Fort Worth, June 18, 2020, pet. pending) ("Opinion").

In this case, Dallas County-based Exxon filed suit in Tarrant County against California cities, counties, elected officials, government attorneys, and their private outside counsel, seeking a pre-suit deposition under Texas Rule of Civil Procedure 202.1 "to investigate a potential claim or suit." Exxon sought pre-suit discovery to determine whether the defendants' California litigation against Exxon and 17 other Texas-based energy companies was brought in "bad faith." Op. at 11. Most defendants in this case were plaintiffs in the California case, where they claimed Exxon was responsible for climate change damages. Exxon was unsuccessful in its multiple attempts to move the California suit against it, and its suits in California against the California parties, into federal court. *Id*. at 10–13.

The Tarrant County District Court denied the California parties' motion to dismiss for lack of personal jurisdiction, and they appealed. The Second Court unanimously reversed, held the California parties lacked contacts with Texas sufficient to justify personal jurisdiction over them, and rendered judgment denying Exxon relief. Op. at 4, 48.

Unfortunately, the Court's opinion added "Some Final Thoughts" that "confessed" its prejudice in favor of the Texas oil industry, effectively apologized for ruling against the Texas oil industry and Exxon, reassured the public of its conservative bona fides, and described the "blessing" of being conservative.

This public display of emotion and "confession" concerned only whether Exxon could take a deposition in Texas, which may or may not support Exxon in a lawsuit that it may or may not file someday. The Opinion does not say Exxon could not depose the witnesses in the California lawsuit. Nor does it describe any legal threat facing Exxon that only a Texas court could address.

The "Final Thoughts" are a political advertisement misplaced in a judicial opinion. They violate multiple Canons of the Code of Judicial Conduct, discredit the judiciary, and should generate meritorious motions to recuse these justices by litigants opposing oil industry parties in the Second Court of Appeals.

I. THE JUDGES VIOLATED THE CODE OF JUDICIAL CONDUCT

A. Canon 1: "Upholding the Integrity and Independence of the Judiciary"

Canon 1 of the Code requires that a judge maintain and enforce high standards of conduct "so that the integrity and independence of the judiciary is preserved."

Litigants now know the Second Court of Appeals is not independent, but has "an impulse to safeguard an industry that is vital Texas's economic well-being," an impulse so strong the Court cannot rule even on a procedural point where no merits are at stake without "confessing" regrets, prejudice, loathing, and reassuring everyone that the court is still conservative. The court effectively apologized to Exxon and the world, even though its opinion was based solidly in Texas and federal constitutional law that made the result seem not even close.

Consider:

1. What if the case had been close? Faced with a hard decision, would the court have overcome its impulse or yielded to it and ruled for Exxon?

2. Suppose the court had ruled for Exxon. Would it have "confessed" its bias then? Or would Exxon's opponent—and this Court—have to assume that result was based on the merits, not on the undisclosed "impulse to safeguard" Exxon?

3. Suppose parties opposing big oil companies in the Second Court of Appeals move to recuse these judges, based on their "confession" and their "loathing" to rule against the industry. Would that motion be meritorious under Texas Rule of Civil Procedure 18b ("A judge must recuse in any proceeding in which the judge's impartiality might reasonably be questioned")?

In the California case, Exxon had seventeen co-defendants, including entities from Shell, BP, Citgo, Conoco Phillips, Total, Anadarko, Apache, Phillips 66, Occidental, Repsol, Eni, and Marathon. If their opponents in cases before the Second Court of Appeals were to move for recusal based on this opinion, those motions would be as meritorious as one involving Exxon, which could significantly affect the court's docket.

4. What about "Little Oil"? Does the court yearn to safeguard it or just its Big Oil competitors "vital to Texas's economic well-being"? How about Baker Hughes, Halliburton, Schlumberger? Do they get equal protection based on the court's impulse, because their oil field services are essential to an industry vital to Texas's well-being? Aren't big pipeline companies essential to Texas' vital oil economy? How about employees? Are they vital to the oil industry's well-being? And what about big non-Texas oil companies that compete with Texas companies, who are thus harmful to the Texas economy? Are they disadvantaged when opposing Exxon and big Texas companies in Texas state courts?

5. What if the oil industry starts losing money, going bankrupt, and firing employees, as it does every few years? Would the judges abandon their impulse to safeguard the industry then, because it is no longer vital? If so, would the Court announce that in an opinion, to spread the good news that the playing field in the Second Court is now level? If the industry were to recover and become vital to Texas again, would the justices regain their protective impulse? If so, would the court announce that in an opinion?

That such questions should be asked shows the extent to which the Second Court's opinion has undermined the integrity and independence of the judiciary. The Second Court's impartiality should reasonably be questioned.

B. Canon 2: "Avoiding Impropriety and the Appearance of Impropriety in All of the Judge's Activities"

Canon 2 requires that a judge act in a manner that "promotes public confidence in the integrity of the judiciary," and "not allow any relationship to influence judicial conduct or judgment," and "not lend the prestige of judicial office to advance the private interests of the judge or others," nor convey "the impression that they are in a special position to influence the judge." Canon 2 A., B.

Imagine a mediation where Exxon or another big oil company facing a non-Texas opponent cites the Opinion as evidence of its influence in the Second Court, and says that after the *City of San Francisco* opinion, the court "owes us one" and obviously knows that. Can you imagine the opponent reading the Opinion and not finding that threat credible?

Would an attorney representing Big Oil's opponent dare advise the shocked client that the court did not mean what it wrote, was just politically posturing, and the client need not fear the court protecting Big Oil? Would any attorney put that in writing?

If all this happened in a mediation outside the Second Court's district but a mediation opponent touted the Opinion anyway,

could an attorney advise a client not to worry, because other conservative judges throughout Texas don't agree with the Second Court? Would a client believe that assurance?

Anyone who has mediated cases can recognize these scenarios. The court lent the prestige of its office to advance the private interests of others, and conveyed the impression that they are in a special position of influence. That violates Canon 2. What is worse, the court's statement is grounds for reasonable doubt about the integrity of other conservative Texas judges. That violates Canons 1 and 2.

C. Canon 3: "Performing the Duties of Judicial Office Impartially and Diligently"

Canon 3 provides: "A judge shall perform judicial duties without bias or prejudice," and "shall not be swayed by partisan interests, public clamor, or fear of criticism," and "shall not, in the performance of judicial duties, . . . manifest bias or prejudice based upon . . . socioeconomic status . . ." Canon 3B. (2), (5), (6).

The bias and prejudice for Exxon and an entire industry based on its economic status is proudly manifested. The fear of criticism

for ruling against Exxon in favor of Californians is not admitted, but obvious.

That's not all. The Court's criticism of Californians for "enlisting" the California judiciary to engage in "lawfare" is a political advertisement, *i.e.,* it is judges using an opinion to audition for higher office, appease Exxon, avoid criticism, and discourage conservative election opponents. Such language has nothing to do with personal jurisdiction, which is why the court did not mention it in the opinion's first 48 pages.

The Court's use of the word "enlist" is offensive. "Enlisting" means engaging in support of something. Filing a lawsuit is everybody's constitutional, statutory, precious right—the right Exxon exercised in this case. Filing a lawsuit does not "enlist" a court to do anything but decide it, maybe against you.

The Second Court strongly implied that California judges are biased in favor of Californians in the California case. Maybe they are, but unlike the Second Court, the California judges haven't yet bragged about it publicly in an opinion.

Combined with the Justices' infomercial for their conservative ideology, the opinion sends a clear message: "Give us half a chance, and we'll show those Californians some Texas justice!" That gun may kick as hard as it shoots.

Consider a lawsuit in another state between its residents and a Texas company that claims Texas is the proper forum. A good lawyer representing the locals would argue that the Opinion is a reason to keep jurisdiction away from Texas, because its courts don't hide their bias against outsiders; they flout it in opinions.

Forty-nine other states have industries they are proud of, and their courts won't want to send their citizens' lawsuits to Texas courts that trumpet bias against them. Will the Opinion give those courts an "impulse to safeguard" their locals and retain a case that should be tried in Texas? Yes.

There is more. The Opinion impugns the integrity of Texas judges who don't share the "blessing" of being conservative: "Being a conservative panel on a conservative intermediate court in a relatively conservative part of Texas is a . . . blessing, because ***we*** strive always to remember our oath to follow settled legal

principles set out by higher courts and not encroach upon the domains of the other governmental branches . . . ."

If "**we**" strive "to remember our oath," then who are "**they**" who do not? When a panel on an all-Republican court brags about being conservative, who are they differentiating from? Who does not strive to remember their oaths and follow settled legal principles? The court's answer: judges who aren't Republicans.

This is more than self-righteousness. It attributes bad motive to judicial colleagues. Gratuitously impugning the integrity of other judges' oaths based on being more conservative than thou undermines the integrity and independence of the judiciary.

Canon 3B. (10) provides: "**A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probably decision on any particular case**." The Justices violated this one, too.

Climate change litigation is likely to come before the Second Court again. Without evidence or even a live controversy

concerning climate change before them, the Justices could not resist declaring their views. They are declaring that (1) climate change has not been "conclusively proved," and even if it were, (2) solutions cannot be considered that might "cripple the energy industry." Political positions like that should not be gratuitously declared in an opinion when those subjects are not at issue.

In other contexts, conservatives might correctly call that judicial activism. They would be right.

II. THE CONCURRING OPINION

Chief Justice Sudderth's concurring opinion further embarrasses the judiciary. Canon 3B(2) provides, "A judge shall be faithful to the law and shall maintain professional competence in it."

Chief Justice Sudderth suggests she "loathed" having to apply settled Texas and federal law against Exxon, and urged "the Texas Supreme Court to reconsider the minimum-contacts standard that binds us." But the opinion the Chief Justice joined said the legal standard she loathed was dictated by precedent from the United States Supreme Court and this Court. This Court cannot

"reconsider" that standard, except by failing to "remember [their] oath to follow settled legal principles set out by higher courts." Op. at 49.

The Chief Justice never says why she loathes following the rule of law made by this Court and the United States Supreme Court, except that Exxon loses. Fortunately, it is unusual for an appellate judge to publicly "loathe" a rule of law in an opinion without saying why or what the law should be instead.

Any judge's presumed respect for authority would require not just that higher authority be followed, but that if wrong, it be professionally analyzed and respectfully criticized. Publicly loathing settled law does not move the law forward. The faithfulness to the law and professional competence in it required by Canon 3B (2) do.

III. A PERSONAL PERSPECTIVE

In almost five decades as a lawyer, I've read plenty of bad opinions. In almost two decades as an appellate judge, I surely wrote some. None was near this offensive. None of the distinguished lawyers, law professors, and former judges I

consulted in Texas and elsewhere had seen or imagined anything like it.

I write this as one who was elected to the Texas appellate bench four times, by both parties, and who served the Bar, law schools, and the judiciary for years in many capacities, including as chair of committees on legal education, judicial education, legislation, and judicial ethics. I was fortunate to be mentored by Justice Jackson B. Smith, who taught and thought about judicial ethics constantly.

Some may look at this and say: "What do you expect from elected judges?" I expect compliance with the Code. It establishes ethical standards. It does not excuse judges from ethical standards because they're elected.

Some may look and say: "The judges ruled against Exxon, so what did they do wrong?" The judges deserve no credit for ruling against Exxon correctly, if they did. They're paid to rule correctly. If they had ruled for Exxon, they would have kept their prejudice secret. They should have addressed only the issue before them; not discredited the judiciary by trumpeting their prejudice and

political superiority; not questioned the oaths and integrity of Texas and California judges who are as able and honest as they; they could have read the Code of Judicial Conduct and Rule of Civil Procedure 18(b)(1) and realized that a judge whose impartiality might reasonably be questioned should be recused. Being right on the law does not excuse violations of the Code. If it did, we wouldn't need a Code or a Commission. The Southwestern Reporter would be sufficient.

Some may look and say this conduct shows a need for more experienced judges, but these judges have between them decades of experience. None is new to the judiciary. But neither inexperience nor experience excuses misconduct.

Some may look and say we need merit selection, but this panel boasts graduates of prestigious universities, a former federal court law clerk, a board-certified civil appellate law specialist, service in respected law firms, long-term law school adjunct professorships, a master's degree in law from Duke University, and service to the public, the Bar, and the judiciary. These judges would make short lists for merit selection. But how we may someday select judges

has nothing to do with misconduct by current judges. Credentials do not excuse misconduct.

Some may look and say the judges did not understand the effect of their words. That is both impossible and insulting. If their credentials and experience do not charge them with knowledge, nothing could. This was a 50-page project involving three judges, resulting in two carefully crafted signed opinions, both of which distinctly separated conventional legal analysis from objectionable political territory. But if they didn't know what they were doing and the Commission on Judicial Conduct won't tell them, this Court should.

Some may say the judges need better leadership. I agree. Only this Court is left to provide it. United States Supreme Court Chief Justice John Roberts, a Republican who testified at his confirmation hearings that a judge's task was to neutrally "call balls and strikes," recently rebuked attempts to politicize the judiciary, stating that there are no Bush and Reagan judges, no Obama and Clinton judges, only judges trying to decide cases based on the law and facts before them. That is leadership.

Some may say, "The First Amendment protects this speech." But this Court wrote the Code of Judicial Conduct and it condemns this speech, as does a decent respect for the role of judges. Until this Court declares the Code unconstitutional, appellate judges should not be free to act like candidates for state representative.

Some may say, "At least we know about it. It's better for judges to say this publicly than secretly, because then we can address it." That's part right and part wrong. No, it definitely isn't better when judges say this in their opinions; it's worse. Yes, you definitely can and should address it, because no one else can or will.

Some may say this is the Commission's business; this Court should defer and not get involved. But the Commission has refused to enforce clear Canons, and this case now sits squarely in this Court's lap, which means this Court is involved. If you think the Commission will protect the Code of Judicial Conduct, consider its recent performance.

In December 2020, three months before the Commission exonerated these judges, it publicly admonished the constitutional Judge of the Travis County Commissioner's Court, a Democrat.

The complaint the Commission found meritorious alleged that "any conservative republican should be in fear when entering her courtroom," because, during a County Commissioner's Court meeting, the judge wore a "pussy hat" to protest Donald Trump's statement about women: "You can do anything you want—grab 'em by the pussy." *In re Inquiry Concerning Honorable Sarah Eckhardt*, Special Court of Review No. 21-001 (Commission Nos. 20-0148 and 20-0169) at 2–3. Available at www.scjc.texas.gov. *See* Exhibit 2. The judge appealed. The Special Court of Review, consisting of three Republican appellate judges, found the judge was not performing any judicial functions; was a judge "in name only;" vacated the Commission's sanction; and denied any sanction. *Id.* at 4, 8–10.

So when a conservative Republican complainant fears bias from a constitutional county commissioner's court judge who performs no judicial functions but wears a pussy hat while performing non-judicial duties, the Commission sanctions. When Exxon's opponents are shown confessed bias by conservative Republican judges in an appellate opinion, the Commission finds

that "does not rise to the level of sanctionable conduct." Ex. 1. Defer, and you would be deferring to that.

Public misconduct should be addressed in public, and this is your one opportunity to address uniquely awful conduct.

CONCLUSION AND PRAYER

This conduct should be condemned. With our judiciary and your Code under attack, someone besides two semi-retired solo practitioners should defend them. Now, only this Court can.

The integrity and independence of the judiciary are more important than almost all issues this Court reviews, certainly more than who can take a pre-suit deposition. Great reasons always abound to do nothing about almost anything. Doing nothing will encourage those happy to make the judiciary their political playground.

Respectfully submitted,

By: /s/ *Murry B. Cohen*

MURRY B. COHEN
Texas Bar No. 04508500
judge@judgemurrycohen.com
2102 Dryden Road
Houston, Texas 77030
Amicus Curiae

CERTIFICATE OF SERVICE

A true and correct copy of this brief was served via e-service on January 23, 2022 to all counsel of record.

/s/ Murry B. Cohen

CERTIFICATE OF COMPLIANCE

This amicus brief complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because the document is generated in Microsoft Word and printed in a conventional typeface no smaller than 14-point except for footnotes, which are no smaller than 12-point.

This amicus brief complies with the maximum length requirements of Texas Rule of Appellate Procedure 9.4(i)(2)(B) because it contains 3,204 words, excluding the parts of the brief excepted by Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Murry B. Cohen

Exhibit 1

State Commission on Judicial Conduct

March 5, 2021

CONFIDENTIAL

Hon. Murry Cohen
2102 Dryden Road
Houston, TX 77030

RE: CJC No. 20-1163

Dear Justice Cohen:

We appreciate the concerns raised in your complaint, including allegations that the judge, in a majority opinion in Case No. 02-18-00106-CV, *City of San Francisco, et. al. v. Exxon Mobil Corporation*; (i) acted in a manner that failed to promote public confidence in the integrity and impartiality of the judiciary; (ii) lent the prestige of judicial office to advance the private interests of the judge or others; (iii) was swayed by partisan interests, public clamor, or fear of criticism; (iv) demonstrated a bias in favor of a particular industry and/or prejudice against others; and/or, (v) made improper public comment regarding a pending or impending proceeding which may come before the judge's court in a manner suggesting the judge's probable decision in a particular case. The Commission reviewed the facts and evidence obtained in the course of its investigation, which evidence included reviewing the opinion at issue, as well as written responses from the judge regarding these issues. In its discretion, the Commission determined that the judge's conduct in this particular instance did not rise to the level of sanctionable misconduct. The Commission also notes that some of the Canons referenced in your complaint are aspirational in nature, and as such, could not form the basis for judicial discipline. In conformity with the specific constitutional provisions, statutes and canons, which control the Commission's actions in this matter, the Commission voted to dismiss your complaint, but has made the judge aware of your concerns.

If you have additional evidence (e.g., witness statements, affidavits, hearing transcripts, etc.) that you believe may not have been reviewed or considered by the Commission, you may request, **one time only**, a reconsideration by the Commission. Please provide your written Request for Reconsideration, along with photocopies of any documents you wish the Commission to review, **no later than** thirty (30) days from the date of this letter. Be sure to reference the above-listed file numbers in your requests.

While not all complaints result in a finding of misconduct, we appreciate your concerns and your interest in assisting us in maintaining the high ethical standards of the Texas judiciary. Thank you for bringing this issue to our attention.

P O Box 12265
Austin TX 78711-2265

(512) 463-5533
Toll Free (877) 228-5750

Sincerely yours,

Michael Graham
General Counsel

State Commission on Judicial Conduct
P. O. Box 12265
Austin, Texas 78711-2265

REQUEST FOR RECONSIDERATION

CJC No. 20-1163 Date of Dismissal Letter: 3/5/21
Complainant: Murry Cohen
****

State briefly what NEW evidence you wish the Commission to consider concerning your allegation of misconduct against the judge. Please type or print your response. DO NOT resubmit or restate allegations, evidence or information previously submitted. In support of your request for reconsideration, please attach photocopies of any new evidence or documents. Additional pages may be added as needed.

_____ _____
Signature **Date**

Your request for reconsideration must be postmarked not later than 30 days from the date of the letter notifying you of the Commission's decision to dismiss your complaint.

You may request reconsideration one time only. Please be sure to include all new information you have in support of this request.

State Commission on Judicial Conduct

March 5, 2021

CONFIDENTIAL

Hon. Murry Cohen
2102 Dryden Road
Houston, TX 77030

RE: CJC No. 20-1164

Dear Justice Cohen:

We appreciate the concerns raised in your complaint, including allegations that the judge, in a majority opinion and concurring opinion in Case No. 02-18-00106-CV, *City of San Francisco, et. al. v. Exxon Mobil Corporation*; (i) acted in a manner that failed to promote public confidence in the integrity and impartiality of the judiciary; (ii) lent the prestige of judicial office to advance the private interests of the judge or others; (iii) was swayed by partisan interests, public clamor, or fear of criticism; (iv) demonstrated a bias in favor of a particular industry and/or prejudice against others; and/or, (v) made improper public comment regarding a pending or impending proceeding which may come before the judge's court in a manner suggesting the judge's probable decision in a particular case. The Commission reviewed the facts and evidence obtained in the course of its investigation, which evidence included reviewing the opinion at issue, as well as written responses from the judge regarding these issues. In its discretion, the Commission determined that the judge's conduct in this particular instance did not rise to the level of sanctionable misconduct. The Commission also notes that some of the Canons referenced in your complaint are aspirational in nature, and as such, could not form the basis for judicial discipline. In conformity with the specific constitutional provisions, statutes and canons, which control the Commission's actions in this matter, the Commission voted to dismiss your complaint, but has made the judge aware of your concerns.

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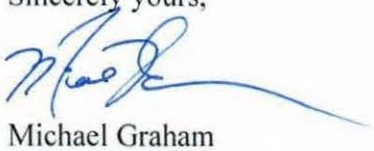
Sincerely yours,



Michael Graham
General Counsel

State Commission on Judicial Conduct
P. O. Box 12265
Austin, Texas 78711-2265

REQUEST FOR RECONSIDERATION

CJC No. 20-1164 Date of Dismissal Letter: 3/5/21
Complainant: Murry Cohen
****

State briefly what NEW evidence you wish the Commission to consider concerning your allegation of misconduct against the judge. Please type or print your response. DO NOT resubmit or restate allegations, evidence or information previously submitted. In support of your request for reconsideration, please attach photocopies of any new evidence or documents. Additional pages may be added as needed.

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Signature **Date**

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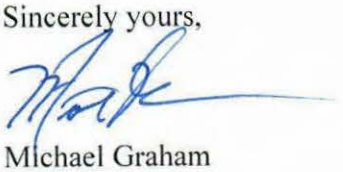
Toll Free (877) 228-5750

Sincerely yours,



Michael Graham
General Counsel

State Commission on Judicial Conduct
P. O. Box 12265
Austin, Texas 78711-2265

REQUEST FOR RECONSIDERATION

CJC No. 20-1165 Date of Dismissal Letter: 3/5/21
Complainant: Murry Cohen
****

State briefly what NEW evidence you wish the Commission to consider concerning your allegation of misconduct against the judge. Please type or print your response. DO NOT resubmit or restate allegations, evidence or information previously submitted. In support of your request for reconsideration, please attach photocopies of any new evidence or documents. Additional pages may be added as needed.

_____ _____

Signature **Date**

Your request for reconsideration must be postmarked not later than 30 days from the date of the letter notifying you of the Commission's decision to dismiss your complaint.

You may request reconsideration one time only. Please be sure to include all new information you have in support of this request.

Murry B. Cohen, Attorney, Arbitrator, Former Appellate Judge

Re: Cases no. 20-1163, 20-1164, 20-1165, Request for Reconsideration

Dear Commissioners:

By letter dated March 5, 2021, the State Commission on Judicial Conduct (the "Commission") notified the undersigned that the three complaints filed about "Some Final Thoughts" in the Fort Worth Court of Appeals' opinion in Case No. 02-18-00106-CV, *City of San Francisco v. Exxon Mobil,* was dismissed. In each case, the Commission "determined that the judge's conduct in this particular instance did not rise to the level of sanctionable conduct." We respectfully ask the Commission to reconsider.

As grounds, we submit the Declaration of Charles W. Wolfram. Professor Wolfram is one of the leading authorities in the United States on legal and judicial ethics. He was the Chief Reporter for the ALI's Restatement of the Law Governing Lawyers, the most authoritative treatise on the subject, and the author of Modern Legal Ethics, one of the most cited treatises in the U.S. Professor Wolfram's declaration was not filed with our complaint and has not been considered by the Commission.

Professor Wolfram concludes that "the published remarks of Justice Elizabeth Kerr involved here clearly indicate judicial conduct that violates the Texas Code [of Judicial Conduct] warranting censure." Wolfram Decl. at paragraph 2. He finds the Fort Worth Court's statements so plainly prejudicial that he cannot recall any instance of judicial misconduct as outrageous in his five decades of experience:

Exhibit 1

"In my more than fifty years of researching, studying, and teaching legal and judicial ethics, I can recall no violation of the Code of Judicial Conduct that was clearer that the 'final thoughts' utterances here." *Id.* at 10.

We are aware of no person more respected in the field of legal and judicial ethics than Charles Wolfram. He has no interest in the litigation between the California Parties and Exxon, and he received no compensation for making his declaration. His sole interest, like ours, is to rectify a gross abuse of judicial decision-making by the Fort Worth Court and to keep blatantly inappropriate extra-judicial considerations from influencing the judicial process in Texas.

Some Final Thoughts

Since we are not privy to the response sent to the Commission by Justice Kerr, Chief Justice Sudderth, and Justice Birdwell, we do not know what they said that persuaded the Commission the "final thoughts" were not sanctionable misconduct. In the hope of addressing some of the things they might have said, we ask the Commission to consider the following:

1. **This is not "no harm no foul."**

   The Fort Worth Court's "final thoughts" are not excused because they did not serve as the basis for the court's decision. The justices admit they considered improper factors in making their decision; they just overcame the improper factors because of the clear law against Exxon's position. The harm is in considering matters well outside the record, not in the outcome. Professor Wolfram addresses this in paragraph 10 of his declaration: "'No harm, no foul' might be sound when officiating in sports to hurry along the pace of games, but it serves no useful

purpose in this Commission's task of enforcing the Code of Judicial Conduct here."

Which makes us ask whether the Commission would have found sanctionable conduct if the Fort Worth Court had ruled in favor of Exxon. It is hard to believe the Commission would have overlooked the "final thoughts" if they were a basis for the decision, but why does that matter? For a court to declare "an impulse to safeguard an industry that is vital to Texas's economic well-being" and to admit that it sees itself as "a conservative panel on a conservative court in a relatively conservative part of Texas" is expressly conceding influence of improper factors. Regardless of outcome, the court considered these things, and they have no basis – none – in judicial decision-making.

2. The Commission is setting a dangerous precedent.

If the Commission does not reconsider its determination in this case, it will leave in place a dangerous precedent for the Texas legal system. The clear signal to all judges in Texas will be that their personal biases and favoritism toward certain parties (and hostility to others) are a permissible part of judicial decision-making in Texas. We understand that the Commission's decisions are not public, so there is not a precedent per se in its refusal to act. But leaving the Justices' "final thoughts" unsanctioned means other litigants and judges free to use them as precedent, and they will. The opinion in the Exxon case is published for all counsel and courts in Texas to see, and an appeal of the merits is now before the Texas Supreme Court. The Exxon case has gathered other publicity, including the article in the *Texas Lawyer* online written by Justice Cohen.

The legal community in Texas is or soon will be aware that the improper considerations in the "final thoughts" are fair game in Texas courts. This dangerous precedent can be stopped by the Commission with a public reprimand.

If the Commission does not reconsider its determination in this case, it will also set a dangerous precedent for itself. Even though the Commission's proceedings are not public, Commissioners presumably cannot ignore their own prior decisions. Will the Commission be similarly passive if the next case brought before it comes from a court in Dallas or Houston which admits to influence because it is a liberal court in a liberal jurisdiction or admits to favoring those who challenge fossil fuel companies or admits to the use of "lawfare" as a means of environmental change? How about the case where a court admits to preferring small businesses over large or specific parties over others? The list of possible cases to come before the Commission is as endless as the list of human prejudices. If the Commission does not reconsider its determination in this case, it inevitably will have to consider others which are legally indistinguishable.

Conclusion

Both of us are veterans of the Texas legal system. Justice Cohen, among other things, served for more than nineteen years on the First Court of Appeals, and Mr. Marks practiced law for more than thirty-three years with Susman Godfrey in Houston. We did not make our complaint to the Commission lightly. Neither of us has made a complaint before. But this case so clearly violates the Code of Judicial Conduct and so opens the door in Texas to courts considering an endless range of improper things that we had to bring this to the Commission. Professor Wolfram

feels the same. If this were a close case, we might accept the Commission's determination and not seek reconsideration. ***But this is not a close case.***

We ask the Commission to reconsider, withdraw the dismissal of our complaints, and render public reprimands of Justices Kerr, Sudderth, and Birdwell.

Sincerely,

/s/ Murry B. Cohen

Murry B. Cohen

2102 Dryden Road

Houston, TX 77030

judge@judgemurrycohen.com

(713) 443-2623

/s/ Kenneth S. Marks

Kenneth S. Marks

2326 Tangley Street

Houston, TX 77005

kmarks@markshouston.com

(713) 410-0674

STATE COMMISSION ON JUDICIAL MISCONDUCT

COMPLAINT CONCERING APPELLATE JUDGES INVOLVED IN CITY OF SAN FRANCISCO V. EXXON MOBIL CORPORATIONY CORPORATION (Court of Appeals of Texas, Fort Worth (No. 02-18-00106-CV)

CJC No. 20-1216

DECLARATION OF CHARLES W. WOLFRAM IN SUPPORT OF REQUEST FOR RECONSIDERATION

Charles W. Wolfram, under oath, declares and says:

I. INTRODUCTION

1. My name is Charles W. Wolfram. I am over the age of twenty-one and am fully competent and able to make this declaration. Facts stated here, unless otherwise described, are within my personal knowledge and are true and correct. I have written the entirety of this declaration, using my own office equipment and other resources. I am fully prepared to testify to my opinions and the grounds therefor as well as all aspects of the preparation of this declaration, should that be appropriate.

2. I submit this declaration at the suggestion of Houston lawyers Kenneth S. Marks and Murry Cohen who, with other Texas lawyers, initially complained about the judicial

conduct I consider here and who sought the Commission's ruling that the conduct violated the Texas Code of Judicial Conduct ("Texas Code"). The Commission has responded that "the judge's conduct in this particular instance did not rise to the level of sanctionable misconduct." For reasons that follow, in my opinion as an expert in matters of judicial ethics, I am respectfully satisfied that the unfortunate published remarks of Justice Elizabeth Kerr ("Kerr") involved here clearly indicate judicial conduct that violates the Texas Code warranting censure.

QUALIFICATIONS

3. I retired in July 1999 as the Charles Frank Reavis Sr. Professor Emeritus at the Cornell Law School, after a year as acting dean at the law school. I now reside in retirement in Berkeley, California and am not actively associated with any law school. (I have had no involvement in the California litigation to which Judge Kerr alludes.) I have been a member of the bar since shortly after graduating from the University of Texas School of Law in 1962 and a law professor since 1965. Since the Fall of 1975, I have been involved in research, writing, teaching, speaking, public-service activities, and consulting relating to legal and judicial ethics. Without implying that any organization specifically endorses the views stated here, for the thirteen years after 1986 I served as Chief Reporter for the American Law Institute's Restatement of the Law Governing Lawyers. The Institute approved the Restatement by vote of its membership in May 1998, and it was published in a two-volume set in the fall of 2000. The Restatement, my treatise, and other works that I have authored are known to and have been cited, quoted, and relied upon by scholars as well as by courts, including the Supreme Court of the United States, the Supreme Court of Texas, and the federal and state courts in many states. I am also the sole author of the West Publishing treatise Modern Legal Ethics (1986). A chapter in the

Practitioner's Edition (chapter 17) is devoted to judicial ethics. I have written about the professional responsibilities of lawyers and judges in other books, scholarly articles, book chapters, and newspapers and magazines. My Modern Legal Ethics treatise is listed as one of the "Most Cited Treatises and Texts" in Fred R. Shapiro, "The Most City Legal Books Published Since 1978," 29 Journal of Legal Studies 397, 404 (2000)—the only work on legal and judicial ethics listed.

4. I received my legal education in Texas (University of Texas School of Law, LL.B. 1962, with high honors), where I was taught the course in legal ethics by the late Fifth Circuit Judge Jerre S. Williams. Many of my consulting and public service involvement in matters of legal and judicial ethics have involved Texas. I have participated in a number of Texas law reform and continuing legal education activities over the years. Other information on my qualifications is given in my resume, a current copy of which is attached as Exhibit 1.

FACTS

5. The facts relevant to this declaration are laid out publicly in the opinions of the appellate judges in City of San Francisco v. Exxon Mobil Corporation, No. 02-18-00106-CV, 2020 WL3969558 at *20 (June 18, 2020) (not reported in Southwest Second Reporter). The author of the panel's opinion is Justice Kerr. Chief Justice Bonnie Sudderth added a brief concurring memorandum, and Justice J. Wade Birdwell Birdwell, the third member of the panel concurred in Justice Kerr's opinion without a separate opinion. For the purpose of my analysis, I assume familiarity with Justice Kerr's opinion and its concluding "final thoughts."

ANALYSIS

6. All judges in the Texas state court system are required to be familiar with the Texas Code and comply with it. It is also a basis for courts' rulings on the merits (or lack thereof) of complaints of judicial misconduct reviewed by this Commission. Of the several provisions of the Code that bear on the judicial conduct here, some may be regarded as aspirational, while others are more clearly mandatory and enforceable norms. However, I take it that any Texas judge would agree that it would violate the Texas Code if a judge were to write a published legal opinion that made a statement indicating that the judge was biased in favor of or against an identified person or persons, such as an identified business corporation, or an identified group of such persons, such as companies in an identified industry. Such a violation would clearly arise if a judge were biased for such a favored person or group who would certainly or probably appear again in litigation before the judge's court in the future. To that extent, the Texas Code is broader than the Texas recusal rule[1] which technically disqualifies a judge for bias only in an individual case. The Texas Code thus aspires to assure future Texas litigants that judges who might preside in litigation affecting them will be prepared to approach the merits of their position in litigation without any prejudgment. Instead, the judge will conduct any proceeding based only on established Texas substantive and procedural law and without favoritism toward or against any affected person or group.

[1] Rule 18b of the Texas Rules of Civil Procedure ("A judge must recuse in any proceeding in which the judge's impartiality might reasonably be questioned.").

7. The post-conclusion "final thoughts" in Justice Kerr's opinion fall far short of those requirements. Any reasonable person reading those gratuitous remarks would be rightfully concerned that their author entertained a highly favorable view of Exxon's importance to Texas and its citizens. Such a reasonable person would also readily conclude that Justice Kerr's favorable remarks about Exxon made in this litigated context indicate that Justice Kerr would ordinarily prefer and expect to rule in Exxon's favor and is here justifying or apologizing for her exceptional failure to do so in this litigation. That would clearly indicate to a reasonable person that, in future litigation in which Exxon or another Texas=based energy company is a party, she would be predisposed to interpret and apply the law and view the facts in a manner that supported Exxon's position as a litigant. Such a clear indication of a predisposition to favor one litigant over others is a core illustration of prejudicial judicial bias. It has no place in the expressions of any judge in any court. It constitutes a clear violation of the Texas Code.

8. To be sure, courts in all states are rightly reluctant to find sanctionable judicial bias when, as here, a judge makes statements about a litigant in the course of a judicial proceeding. For that reason, courts have generally required that a litigant who complains of judicial bias must show bias based, not on the judge's in-court statements or conduct, but based on an "extra-judicial source." [2] That is, the bias ordinarily must be shown from facts that are not of record in the same proceeding.

9. Here, Justice Kerr is clearly basing her Exxon-favoring statements on extensive extra-judicial sources, and on little or nothing in the record before her. An illustration of such

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[2] Cf., e.g., Liteky v. United States, 510 U.S. 650, 550-52, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) (discussing the extra-judicial concept as it applies to federal judicial recusal statutes).

reliance on extra-judicial sources that stands out in Justice Kerr's opinion is her antipathy toward what she refers to as "lawfare." Most readers of the opinion, including many lawyers, will find her unusual and obviously pejorative reference to be unfamiliar. My own web search reveals that Judge Kerr's reference is an apparent extension of the term lawfare (a portmanteau combining "law" and "[war]fare") beyond its original reference to a nation's misuse of law as an instrument of negative foreign policy or similar psychological warfare by one nation against an enemy nation or group, especially by challenging the legality of the enemy's military or foreign policy.[3] By extension, Justice Kerr might be referring to what she perceives to be the California courts' misuse of that state's own laws and judicial powers against Texas-based energy companies. Or perhaps she means to refer to what Exxon alleges as the defendants' meritless climate-change litigation in California. Whatever her intended meaning, the record before Judge Kerr would include no information about the truth or falsity of such subjects, except for Exxon's allegations in its pleadings and arguments in the record. And it is elementary that a partisan's allegations do not constitute proof of facts. Accordingly, Justice Kerr must have concluded that defendants' climate-change litigation about which Exxon complains is a kind of objectionable lawfare based on her personal experiences out of court in reading, talking, consuming political information, etc.—clearly extra-judicial sources. And the same must also be true of Justice Kerr's Exxon-favoring statements about the critical financial and social importance of Exxon and other energy companies to the current Texas economy and the desirability of ordinarily taking that into account when Texas judges decide cases in which members of the Texas energy economy are parties or who would be adversely impacted by an otherwise proper decision.

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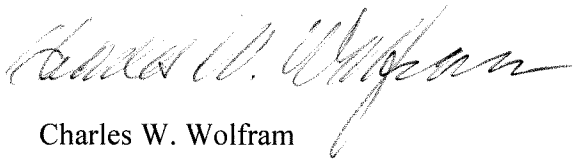
[3] See generally, e.g., Orde F. Kittrie, Lawfare: Law as a Weapon of War (Oxford

10. In my more than fifty years of researching, studying, and teaching legal and judicial ethics, I can recall no violation of the Code of Judicial Conduct that was clearer than the "final thoughts" utterances here. Justice Kerr's statements cannot be explained away on the notion that, whatever her words or inclinations, she ultimately held against Exxon on the merits. "No harm, no foul" might be sound when officiating in sports to hurry along the pace of games, but it serves no useful purpose in this Commission's task of enforcing the Code of Judicial Conduct here, where the decision-maker is presented with such an unambiguous instance of blatant judicial misconduct and with no comparable reason for neglecting to call out a wrong that so clearly demonstrates judicial partisanship rather than judicial independence. The Commission should do its duty: reconsider its position on the "final thoughts" and hold that these off-record and gratuitous remarks violated the Texas Code.

11. I declare under the penalty of perjury that the foregoing is true and correct and that I executed this declaration on this 23rd day of March 2021.



Charles W. Wolfram

University Press 2016).

State Commission on Judicial Conduct

Executive Director
Jacqueline R. Habersham

December 20, 2021

CONFIDENTIAL

Murry Cohen
2102 Dryden Road
Houston, TX 77030

Re: CJC Nos. 20-1163, 20-1164 & 20-1165

Dear Mr. Cohen:

During its meeting on December 3 & 8, 2021, we presented your request for reconsideration in the above-referenced matters, along with the additional materials you provided in support of your request, to the Commission. The Commission considered the information and voted to deny the request for reconsideration; therefore, the cases remain closed.

Sincerely,

Jacqueline R. Habersham
Executive Director

Exhibit 2

Opinion Issued January 11, 2022

DOCKET NO. SCR 21-0001

SPECIAL COURT OF REVIEW[1]

IN RE INQUIRY CONCERNING HONORABLE SARAH ECKHARDT
CJC Nos. 20-0148 and 20-0469

OPINION

"Can't tell a book by its cover"; "don't just scratch the surface"; "things aren't what they seem"; "all that glitter's not gold"; and "anything essential is invisible to the eyes" are just a few idioms describing the issue before this special court of review. We have been assigned to conduct a *de novo* review of and implicitly affirm disciplinary sanctions levied by the Texas State Commission on Judicial Conduct in December of 2020.[2] Upon conducting that review, we vacate the sanctions levied by the Commission and deny further sanction.

[1] The Special Court of Review consists of The Honorable Brian Quinn, Chief Justice of the Seventh Court of Appeals, presiding by appointment; The Honorable Charles Kreger, Justice of the Ninth Court of Appeals, participating by appointment; and The Honorable W. Stacy Trotter, Justice of the Eleventh Court of Appeals, participating by appointment.

[2] The parties agreed to submit the cause on a stipulated record.

Background

The sanctions in question consisted of a "public admonition." The Travis County Judge against whom the Commission assessed it relinquished that office months earlier. She now is a member of the Texas Senate. Her name is Sarah Eckhardt.

Of the two acts for which the Commission admonished her, one occurred approximately three years earlier on January 24, 2017. The other happened on September 27, 2019. Both garnered much public and media attention. Nevertheless, someone complained to the Commission on September 28, 2019, about both. The unnamed individual averred that "[j]udges take oaths of office to be non-partisan which is clearly not the case here." "[Eckhardt] does not take the oath of office seriously via public displays on and off the job," continued the complainant. "I do not trust her to have unbiased decisions and believe any conservative republican should be in fear when entering her courtroom." "She has lost the confidence of the public and is a partisan hack," concluded the individual.

Those allegations eventually resulted in the Commission's December 2020 admonition of Eckhardt "for engaging in willful conduct that cast public discredit upon the judiciary in violation of Article V, Section 1-a(6) of the Texas Constitution." The Commission took that action "pursuant to the . . . authority conferred it in Article V, § 1-a of the Texas Constitution in a continuing effort to protect the public and promote public confidence in the judicial system."

The January 2017 incident involved Eckhardt wearing "a pink knitted beanie with cat ears, referred to as a 'pussy hat,' while presiding over a meeting of the Travis County Commissioners Court." She and the Commission agreed that 1) the object was worn "as a political expression" protesting a statement uttered by the "the newly elected" United States President regarding the

treatment of women;[3] 2) the "[a]genda item 3 [about to be considered] at that meeting was a proposed resolution in support of women's health and reproductive rights"; and, 3) "[a]genda Item 3 . . . was legislative in nature" as were "[t]he actions of the Travis County Commissioners Court in considering and acting on [it]."

As for the September 2019 incident, the record illustrated that Eckhardt accepted an invitation to sit on "a panel at the annual 'Texas Tribune Festival,' scheduled for September 27–29, 2019." The other panelists were "a former mayor of Midland, Texas, the sitting Mayor of Santa Fe, New Mexico, and the former Deputy Mayor of New York City." Additionally, the panelists were assigned the topic of "'Civic Enragement: How progressive politics are turning citizens into warriors and cities into battlegrounds.'" The parties stipulated that the topic "did not include judicial matters." Upon the panel's convening at the festival, the moderator broached the subject of "actions at the state government level in Texas to override or preempt local government measures, such as regulation of ride sharing services and tree preservation ordinances."[4] Responding, Eckhardt quipped that "Texas Governor Greg Abbott 'hates trees because one fell on him.'" This utterance alluded to Governor Abbott's partial, yet permanent, paralysis caused when a falling tree struck him.

The Commission concluded that Eckhardt's wearing a "pussy hat" during a legislative forum as a political expression and alluding to the Governor's physical condition were instances of "willful conduct that cast public discredit upon the judiciary." Publicly admonishing her

[3] The statement consisted of the President saying, "You can do anything you want—grab 'em by the pussy."

[4] The Commission described the inquiry as "asking [Eckhardt] to speculate on why Governor Abbott would involve himself in the City of Austin's tree ordinance."

allegedly was necessary "to protect the public and promote public confidence in the judicial system."[5]

Jurisdiction

First, we return to a legal topic previously addressed yet again raised by Eckhardt and supported by amicus. Eckhardt earlier moved to dismiss this proceeding because the Commission allegedly lacked jurisdiction to discipline her. The absence of jurisdiction stemmed from the nature of her duties as Travis County Judge. That is, the post did not entail the performance of any traditional judicial functions. Her role solely consisted of acting as the presiding officer of the Travis County Commissioner's Court, which body governed the county. She entertained neither probate nor other judicial matters traditionally assigned constitutional county judges.[6]

Through our order of July 22, 2021, we rejected her contention and concluded that the Commission had the requisite jurisdiction. We reaffirm that decision for the reasons stated in the July 22, 2021 order. Simply put, "Texans vested the Commission with the authority to conduct disciplinary proceedings involving justices or judges of courts established by the [Texas] Constitution. One such court is a [constitutional] County Court, . . . and one such judge is the County Judge of that court." *In re Eckhardt*, No. SCR 21-0001 at 3 (Tex. Spec. Ct. Rev. July 22, 2021) (order). "[W]hether Eckhardt performed any judicial functions as County Judge for Travis County is inconsequential. The Commission's jurisdiction to discipline depended upon whether she held the post of judge of a court established by the Constitution or legislature. No one questions that she did." *Id.*

[5] Of note is that the neither the complainant nor the Commission objected to Eckhardt engaging in legislative activities or sitting on a panel debating political topics. They excepted to the expressive nature of what she did and said.

[6] She did perform marriages.

Merits

Our having dispensed with the procedural issue of jurisdiction, the merits call to us. Considering them begins with the constitutional provision under which the Commission acted. It provides that any judge or justice "of the courts established by this Constitution or created by the Legislature . . . may . . . be removed from office for . . . willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice." TEX. CONST. art. V, § 1-a(6)(A). In lieu of removal, the judge or justice may also "be disciplined or censured." *Id.* As said earlier, the Commission found Eckhardt's conduct "cast public discredit upon the judiciary" and, therefore, publicly admonished her. Eckhardt claims that admonishing her violated her First Amendment right to speak freely.[7] We agree.

In arriving at our conclusion, we accept the Commission's invitation to apply the two-step analysis espoused in *Scott v. Flowers*, 910 F.2d 201 (5th Cir. 1990) (involving restrictions on the speech of governmental employees), and reiterated in *In re Davis*, 82 S.W.3d 140 (Tex. Spec. Ct. Rev. 2002).[8] In the first step, we decide whether the form and context of the purportedly protected speech implicated a matter of legitimate public concern, given the context of the activity. *Scott*, 910 F.2d at 210; *In re Davis*, 82 S.W.3d at 149. The second requires us to balance the individual's First Amendment rights against the government's interest in promoting the efficient performance of its functions. *Id.*

[7] "The First Amendment provides that Congress 'shall make no law . . . abridging the freedom of speech." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 442 (2015); *accord* U.S. CONST. amend. I. "The Fourteenth Amendment makes that prohibition applicable to the States." *Williams-Yulee*, 575 U.S. at 442.

[8] *See In re Hecht*, 213 S.W.3d 547, 592 (Tex. Spec. Ct. Rev. 2006) (McClure, J., concurring) (questioning "the continued viability of *Scott* inasmuch as a judge's ability to offer personal opinions or viewpoints has since been found to be protected speech").

Step One

Before us, we have instances of Eckhardt donning a cap during a commissioner's court meeting and uttering a comment during a panel discussion. That wearing politically symbolic garb is protected speech has been true for innumerable years. *See, e.g.*, *Cohen v. California*, 403 U.S. 15, 24–26 (1971) (involving Cohen's wearing, in a courthouse, a jacket bearing the words "Fuck the Draft"); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (allowing students to wear black arm bands to protest Vietnam War). And, it remains true here. All concede that the cap Eckhardt wore represented a symbol responding to tasteless commentary about women uttered by a United States President. Moreover, she opted to wear it when the topic of women's rights came for discussion during a legislative session of the Travis County Commissioners Court. One cannot reasonably dispute that women's rights are a matter of public concern. Thus, Eckhardt's donning the cap in support of them and in protest of the President's utterance logically related to a matter of public concern.

As for Eckhardt's utterance about a tree falling on the governor, it was said during a public panel discussion. If one were to give meaning to the topic assigned the panel, he would see that the group was tasked with debating political activism and its impact on local communities.[9] And, to reiterate, the moderator had broached the subject of "actions at the state government level in Texas to override or preempt local government measures, such as regulation of ride sharing services and tree preservation ordinances." At that point, Eckhardt expressed her view about the governor and his reason for intervening into a debate concerning tree preservation. The debate apparently encompassed ecological matters like trees, the enactment of local zoning ordinances,

[9] The topic was named "'Civic Enragement: How progressive politics are turning citizens into warriors and cities into battlegrounds.'"

and the State's intervention in purportedly local matters. Those too are matters of public concern, and Eckhardt's words dealt with those topics and the debate surrounding them.

Her intended "joke" may be injudicious and callous; indeed, she admitted as much. Yet, "First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed." *Yankee Publ'g, Inc. v. News Am. Publ'g, Inc.*, 809 F. Supp. 267, 280 (S.D.N.Y. 1992); *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 159 (Tex. 2004) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)) (noting same). Jokes, parody, and satire often shine light on issues of public interest and concern. One need only recall the stand-up routines of George Carlin,[10] the pratfalls of Chevy Chase,[11] scenes from "Thank You for Smoking,"[12] or skits from Saturday Night Live as proof of that.[13] They remain protected expressions, nonetheless. "We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, . . . fundamental societal values are truly implicated." *Cohen*, 403 U.S. at 25. "That is why 'wholly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons,'" *id.* (quoting *Winters v. New York*, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting)), "and why 'so long as the means are peaceful, the communication need not meet standards of acceptability.'" *Id.* (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)). And, therein fall Eckhardt's words alluding to the Texas governor.

[10] https://youtu.be/0Hc8ZsywLYk

[11] https://youtu.be/_Sk0YubNnwY

[12] https://youtu.be/xuaHRN7UhRo

[13] https://youtu.be/kssJdMtcSVg; https://youtu.be/pVfUvwb167Q

Step Two

Yet speech, even that within the borders of the First Amendment, may be regulated. That leads us to the second step of *Scott*. Again, it obligates us to balance the individual's First Amendment rights against the government's interest in promoting efficient performance of its functions. The interest in play here relates to the judicial branch of our government. Preserving public confidence in it is "'a state interest of the highest order.'" *Williams-Yulee*, 575 U.S. at 446. A means of furthering that interest involves restricting judges from casting public discredit upon it and its obligation to administer justice. As said by our United States Supreme Court, "[t]he importance of public confidence in the integrity of judges stems from the place of the judiciary in the government." *Id.* at 445. "Unlike the executive or the legislature, the judiciary 'has no influence over either the sword or the purse; . . . neither force nor will but merely judgment.'" *Id.* (quoting The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton)). "The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions." *Id.* at 445–46.

Yet, what of an elected official performing duties akin to those of an executive and legislature and who holds the title of "judge" in name only—does he or she hold a place in the historical concept of the judiciary? Is he or she truly a "judge" for purposes of fostering the integrity of what we have come to know as and what the *Williams-Yulee* court understands to be the "judiciary"? A judge, in the common sense, adjudicates disputes. *See City of Round Rock v. Smith*, 687 S.W.2d 300, 302–03 (Tex. 1985) (stating that "[j]udicial power is the power conferred upon a public officer to adjudicate the rights of individual citizens by construing and applying the law"). He or she does not engage, as a matter of course, in legislative activities such as enacting laws, regulations, ordinances or public resolutions voicing positions on topics of public interest.

He or she does not engage, as a matter of course, in executive activities such as supervising the expansive operations of a city, county, or state. He or she does not solicit or heed public input, as a matter of course, to perform his or her duties or make decisions. He or she does not publicly voice preconceived answers to disputes on matters of public notoriety when seeking election or prior to performing his or her official duties. Those, among other characteristics, distinguish members of the judiciary from members of the the legislative and executive branches of our government. Most importantly, our citizenry ceded the pulpit to those within the legislative and executive branches, not to those in the judicial branch.

Comparing the characteristics of the role assigned Eckhardt as Travis County Judge to those of first the judicial branch and then to the legislative and executive branches identifies the true nature of her position. As with a book, a title signifies one thing but not necessarily the true substance of what one finds upon deeper search. As previously mentioned, constitutional county judges have been tasked duties of a judicial nature. Texas law permitted Eckhardt to relinquish them, however, and she did. Her primary duties were likened to those of a county executive or legislator, not a "judge." The plane on which she travelled while performing her duties came intertwined with public debate and input. Those indicia of her job cannot be ignored and are overwhelming considerations when undertaking the balance required by the second prong of *Scott.* Indeed, the record illustrated that her role as Travis County Judge implicated the performance of no judicial functions. She enjoyed the title "judge" but had none of its duties.

Our Texas Supreme Court repeatedly cautions us against elevating form over substance. *See, e.g., Godoy v. Wells Fargo Bank, N.A.*, 575 S.W.3d 531, 536 (Tex. 2019) (quoting *Dudley Constr., Ltd. v. Act Pipe & Supply, Inc.*, 545 S.W.3d 532, 538 (Tex. 2018), and stating that "'[w]henever possible, we reject form-over-substance requirements that favor procedural

machinations over reaching the merits of a case'"); *Thota v. Young*, 366 S.W.3d 678, 690 (Tex. 2012) (stating that "we have long favored a common sense application of our procedural rules that serves the purpose of the rules, rather than a technical application that rigidly promotes form over substance"). We heed that caution. The form of Eckhardt's office was the mere title "judge." Its substance was legislator and executive. So, the attributes of a judge found critical in *Williams-Yulee* as justifying unique treatment of the judiciary are absent here. The interest in restricting its members from injuring public confidence in the integrity of the judicial branch wanes when their status as a "judge" is in name only, like here. It wanes when the "judge" performs no judicial role, like here. It wanes when the sole function of the "judge," like here, is that of an executive or legislator thrust into an arena inherently requiring public debate and input as part of the office. This is not to say that a compelling interest may never arise to justify disciplinary measures against one in her unique position. However, the interest proffered by the Commission at bar is not one, given the particular circumstances before us. Thus, we strike the balance required of the second *Scott* test in favor of Eckhardt, vacate the sanctions levied by the Commission, and deny further sanction.

SPECIAL COURT OF REVIEW[14]

[14] The Special Court of Review consists of The Honorable Brian Quinn, Chief Justice of the Seventh Court of Appeals, presiding by appointment; The Honorable Charles Kreger, Justice of the Ninth Court of Appeals, participating by appointment; and The Honorable W. Stacy Trotter, Justice of the Eleventh Court of Appeals, participating by appointment.

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Bar No. 24084290
abender@thebenderfirm.com
Envelope ID: 61081464
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Associated Case Party: Exxon Mobil Corporation

Name	BarNumber	Email	TimestampSubmitted	Status
Karen Precella		karen.precella@haynesboone.com	1/24/2022 12:59:10 PM	SENT
Nina Cortell		nina.cortell@haynesboone.com	1/24/2022 12:59:10 PM	SENT
Michelle Meuhlen		michelle.meuhlen@haynesboone.com	1/24/2022 12:59:10 PM	SENT
Philip Vickers	24051699	pvickers@canteyhanger.com	1/24/2022 12:59:10 PM	SENT
Patrice Childress	24059569	patrice.b.childress@exxonmobil.com	1/24/2022 12:59:10 PM	SENT
Cecilia Hernandez		cecilia.hernandez@haynesboone.com	1/24/2022 12:59:10 PM	SENT
Cecilia Hernandez		cecilia.hernandez@haynesboone.com	1/24/2022 12:59:10 PM	SENT
Patrick Conlon	24054300	patrick.j.conlon@exxonmobil.com	1/24/2022 12:59:10 PM	SENT
Mike Hatchell		mike.hatchell@haynesboone.com	1/24/2022 12:59:10 PM	SENT
Theodore V.Wells, Jr.		twells@paulweiss.com	1/24/2022 12:59:10 PM	SENT
Daniel J.Toal		dtoal@paulweiss.com	1/24/2022 12:59:10 PM	SENT
Justin Anderson		janderson@paulweiss.com	1/24/2022 12:59:10 PM	SENT
Chris Knight		chris.knight@haynesboone.com	1/24/2022 12:59:10 PM	SENT

Associated Case Party: City of San Francisco

Name	BarNumber	Email	TimestampSubmitted	Status
Richard Kamprath	24078767	rkamprath@mckoolsmith.com	1/24/2022 12:59:10 PM	SENT
Benjamin G.Murray		bmurray@mckoolsmith.com	1/24/2022 12:59:10 PM	SENT
Alexandra F.Easley		aeasley@mckoolsmith.com	1/24/2022 12:59:10 PM	SENT
Roger Townsend		rtownsend@cokinoslaw.com	1/24/2022 12:59:10 PM	SENT
Dana Livingston		dlivingston@cokinoslaw.com	1/24/2022 12:59:10 PM	SENT
Robert M. Manley	787955	rmanley@mckoolsmith.com	1/24/2022 12:59:10 PM	SENT
Michael Rubin		mrubin@altber.com	1/24/2022 12:59:10 PM	SENT

Case Contacts

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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Martin Darren Woodward	797693	martin@kitnerwoodward.com	1/24/2022 12:59:10 PM	SENT
Tyler Bexley	24073923	tyler.bexley@rm-firm.com	1/24/2022 12:59:10 PM	SENT
Scott Kitner	24065563	skitner@stanleylawgroup.com	1/24/2022 12:59:10 PM	SENT
Steven Knowles Hayes	9280100	shayes@stevehayeslaw.com	1/24/2022 12:59:10 PM	SENT
Robert M. Roach	16969100	rroach@roachnewton.com	1/24/2022 12:59:10 PM	SENT
Marc Stanley	19046500	marcstanley@mac.com	1/24/2022 12:59:10 PM	SENT
Tammy Boshears		tboshears@cokinoslaw.com	1/24/2022 12:59:10 PM	SENT
Ralph Duggins		rduggins@canteyhanger.com	1/24/2022 12:59:10 PM	SENT
James Sullivan		james.sullivan@gov.texas.gov	1/24/2022 12:59:10 PM	SENT
Murry B. Cohen	4508500	judge@judgemurrycohen.com	1/24/2022 12:59:10 PM	SENT