

## A PRIMER ON THE TEXAS BUSINESS COURT

by Jack Buckley DiSorbo\*

*On June 9, 2023, Governor Greg Abbott signed House Bill 19 and Senate Bill 1045, accomplishing what governors and legislatures have been trying to do for decades: establish a Business Court of Texas and an accompanying court of appeals. The most sweeping change to the state judiciary since the early 2000s tort reform, the Business Court is poised to revolutionize sophisticated commercial litigation in the State of Texas. This Article explains the mechanics of the new court, including jurisdiction, removal procedure, and more. It also recounts the history of the bills' passage, with consideration of why these bills succeeded where past bills failed. And finally, the Article previews the central obstacle to the Business Court's implementation: constitutional challenges to the courts' organization and procedure for selecting judges.*

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## INTRODUCTION

The State of Texas is known for business. In 2023, the Texas economy generated \$2.4 trillion, which places it as the eighth largest economy in the world.<sup>1</sup> It's also known for litigation. According to recent estimates, roughly 1.58 million civil lawsuits were filed in Texas state court in 2022, 36% more than the second-most litigious state (Florida).<sup>2</sup> And nearly 100,000 active lawyers practice before the state bar, which is the third most in the country.<sup>3</sup>

But Texas is not necessarily known for its *business litigation*. The court best known for that genre is the Delaware Court of Chancery, which recently has heard highly publicized commercial disputes such as *Twitter, Inc. v. Musk*—the lawsuit filed in response to Elon Musk's threat to terminate his contract to acquire X.<sup>4</sup> Even so, that commercial litigation supremacy might be challenged with the genesis of a new Texas business court. Many have billed the State's new court as an alternative for business leaders and

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<sup>1</sup>*Top Texas Touts: Economy*, TEXAS OFFICE OF THE GOVERNOR, <https://gov.texas.gov/top-texas-touts-economy> (last visited Feb. 16, 2024); *GDP By State*, BUREAU OF ECONOMIC ANALYSIS, <https://www.bea.gov/data/gdp/gdp-state> (last visited Feb. 16, 2024).

<sup>2</sup>*See Civil Caseload Detail*, CT. STAT. PROJECT, <https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-overview> (Oct. 9, 2023).

<sup>3</sup>*See Profile of the Legal Profession 2023*, A.B.A., <https://www.abalegalprofile.com/demographics.html> (last visited Feb. 16, 2024).

<sup>4</sup>*Twitter, Inc. v. Musk*, No. 2022-0613-KSJM, 2022 WL 4140502 (Del. Ch. Sept. 13, 2022); Ann M. Lipton & Eric L. Talley, *Twitter v. Musk: The "Trial of the Century" That Wasn't*, 40 DEL. LAW. 8, 9 (2022).

entrepreneurs who are dissatisfied with results from the Delaware Court of Chancery.<sup>5</sup> Prominent examples—such as Musk’s pledge to reincorporate SpaceX and Tesla in Texas in the wake of the Chancery’s decision to invalidate his \$55.8 billion compensation package—could suggest an untapped demand for an alternative businesses-litigation forum.<sup>6</sup>

For almost twenty years, Texas has tried to create that kind of alternative forum.<sup>7</sup> After considerable discussion with the bench, bar, and other stakeholders, and with real bipartisan support, the Texas Legislature accomplished that goal in the 2023 legislative session.<sup>8</sup> Two bills, House Bill 19<sup>9</sup> and Senate Bill 1045,<sup>10</sup> establish a new trial court with an array of jurisdiction over sophisticated business cases and a court of appeals with exclusive jurisdiction over business court judgments. When the doors open on September 1, 2024, the courts will begin a project to revolutionize high stakes litigation, making it faster, simpler, and more predictable.

The purpose of this Article is to introduce how those courts work, with emphasis on the Business Court. Part I offers a detailed summary of the nuts and bolts of the new court. The summary centers on the Business Court’s complicated jurisdictional rules, explaining which claims may be heard before the court, and which may not. This Part also includes a discussion of the court’s novel system of organization, how its judges obtain office, and who the first ten judges are. And it addresses some of the court’s major

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<sup>5</sup> See, e.g., Sujeet Indap, *Texas is Throwing Down a Legal Challenge to Delaware*, FIN. TIMES (Jan. 28, 2024), <https://www.ft.com/content/a02b96df-9ee1-4b3b-a31e-087b734840a1>; Shauneen Miranda, *Musk’s Threat to Re-Incorporate Tesla Boosts Texas’ Challenge to Delaware*, AXIOS (Feb. 1, 2024), <https://www.axios.com/2024/01/31/elon-musk-tesla-delaware-court-texas-law>.

<sup>6</sup> See *Tornetta v. Musk*, No. 2018-0408-KSJM, 2024 WL 343699, at \*84 (Del. Ch. Jan. 20, 2024); *Musk Says SpaceX has Moved its Incorporation to Texas from Delaware*, REUTERS (Feb. 14, 2024, 6:54 PM), <https://www.reuters.com/technology/space/musk-says-spacex-has-moved-its-incorporation-texas-delaware-2024-02-15/>.

<sup>7</sup> The Legislature has considered some form of a business court bill nearly every legislative session since 2007. See Tex. S.B. 1204, 80th Leg., R.S. (2007); Tex. H.B. 2906, 80th Leg., R.S. (2007); Tex. S.B. 992, 81st Leg., R.S. (2009); Tex. H.B. 1603, 84th Leg., R.S. (2015); Tex. H.B. 2594, 85th Leg., R.S. (2017); Tex. H.B. 4149, 86th Leg., R.S. (2019); Tex. H.B. 1875, 87th Leg., R.S. (2021); see also TEXANS FOR LAWSUIT REFORM FOUND., THE CASE FOR SPECIALIZED BUSINESS COURTS IN TEXAS 11–14 (2023), <https://www.tlrfoundation.org/wp-content/uploads/2021/12/The-Case-for-Specialized-Business-Courts-in-Texas-2.pdf> (giving an overview of the history of past business court bills).

<sup>8</sup> See *infra* note 143 (describing the vote breakdown).

<sup>9</sup> Tex. H.B. 19, 88th Leg., R.S. (2023).

<sup>10</sup> Tex. S.B. 1045, 88th Leg., R.S. (2023).

procedural characteristics, including filing, removal, venue, jury pools, written opinions, and appeals.

Part II considers the legislative process that led to the passage of H.B. 19 and S.B. 1045. It briefly reviews the history of specialized business courts, noting the different states that have enacted such courts. It then evaluates the past failed attempts by the Texas Legislature to pass a business court bill, which include the Judicial Panel on Complex Cases, the Texas Court of Chancery, the Business District Court, and the Court of Business Appeals.<sup>11</sup> Aided by insight from multiple stakeholders who helped pass H.B. 19, this Part offers an account of the legal and political obstacles to prior bills and describes the legislative process relating to the bill's passage.

Last, Part III addresses a significant obstacle to implementation of the two new courts: a constitutional challenge to the Business Court and the Fifteenth Court of Appeals. Since H.B. 19 and S.B. 1045 were introduced, supporters and opponents have argued over whether the courts' unique organization is consistent with the Texas Constitution.<sup>12</sup> Unlike any other trial court, the Business Court is organized as a court whose district is composed of the entire state.<sup>13</sup> It is divided into eleven "divisions," and, despite Texas's long tradition of choosing judges via partisan election,<sup>14</sup> its judges are appointed by the Governor and confirmed by the Senate.<sup>15</sup> And the Fifteenth Court of

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<sup>11</sup> See TEXANS FOR LAWSUIT REFORM FOUND., *supra* note 7, at 13–14.

<sup>12</sup> See, e.g., Scott Brister, *The Constitution Allows for Creating a New Statewide Appeals Court*, AUSTIN AM.-STATESMAN (May 12, 2023, 6:50 AM), <https://www.statesman.com/story/opinion/columns/your-voice/2023/05/12/opinion-the-constitution-allows-for-a-new-statewide-appeals-court/70196694007/>; David Coale, *Proposed 'Business Court' Isn't Worth the Constitutional Risk*, DALL. MORNING NEWS (Apr. 22, 2023, 12:01 PM), <https://www.dallasnews.com/opinion/commentary/2023/04/22/proposed-business-court-isnt-worth-the-constitutional-risk/>; Jason Villalba, *Why Texas Needs Business Courts*, DALL. MORNING NEWS (Mar. 21, 2023, 6:50 AM), <https://www.dallasnews.com/opinion/commentary/2023/03/21/why-texas-needs-business-courts/>; Steve Vladeck, *The Legislature's Shameless and Unconstitutional Court-Packing Plan*, AUSTIN AM.-STATESMAN (Mar. 19, 2023, 6:53 AM), <https://www.statesman.com/story/opinion/columns/your-voice/2023/03/19/opinion-the-legislatures-shameless-and-unconstitutional-court-packing-plan/70015627007/>.

<sup>13</sup> TEX. GOV'T CODE ANN. § 25A.003(a)–(b).

<sup>14</sup> For literature on the history of Texas's method of selecting judges, see generally ANTHONY CHAMPAGNE & KYLE CHEEK, *JUDICIAL POLITICS IN TEXAS: PARTISANSHIP, MONEY, AND POLITICS IN STATE COURTS* (2005); Anthony Champagne, *Judicial Reform in Texas*, 72 JUDICATURE 146 (1988); Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L. REV. 53 (1986); and Warren Burnett, *Observations on the Direct-Election Method of Judicial Selection*, 44 TEX. L. REV. 1098 (1966).

<sup>15</sup> TEX. GOV'T CODE ANN. § 25A.009(a).

Appeals, unlike any other intermediate court of appeals, has statewide jurisdiction and its judges are elected by statewide popular vote.<sup>16</sup> This Part introduces the arguments made for and against the constitutionality of the two courts (but does not take a position on them).

As a whole, this Article is intended as an introduction to the new Business Court, with the bulk of the material told from a practitioner's perspective. The court, still in its infant stages, will no doubt develop its own body of procedure and law. But the overview given here hopes to provide practicing lawyers with the basics.

### I. MECHANICS OF THE BUSINESS COURT

The stated purpose of H.B. 19 is to create a “specialty trial court” to hear certain sophisticated business disputes.<sup>17</sup> To that end, the law establishes a new statutory<sup>18</sup> court, with complex jurisdictional rules designed to ensure that the court hears only certain types of commercial lawsuits. The focus of this Part is to explain the Business Court's mechanics, with special attention to those jurisdictional rules. Also treated are how the court is organized, how its judges are selected, how to remove a case, general case procedure, and appeals.

Like most judicial reforms, H.B. 19 left gaps for how certain provisions would be implemented, intended to be filled either by new rules of civil procedure or local rules of the Business Court. In some places, the bill specifically directs the Texas Supreme Court to adopt new procedural rules, such as rules relating to removal.<sup>19</sup> The Legislature assigned the task of designing those rules to the Supreme Court Advisory Committee,<sup>20</sup> and the Committee presented its initial recommendations on October 13, 2023.<sup>21</sup> The

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<sup>16</sup> *Id.* § 22.201(p); Tex. S.B. 1045, 88th Leg., R.S. § 1.14(b) (2023).

<sup>17</sup> Tex. H.B. 19, 88th Leg., R.S. 1:2–3 (2023).

<sup>18</sup> TEX. GOV'T CODE ANN. § 25A.002 (“The business court is a statutory court created under Section 1, Article V, Texas Constitution.”); *but see infra* Part III.B. (discussing the argument that the Business Court is a *de facto* district court). Where possible, citation is made directly to the newly enacted statute as codified in the Texas Government Code instead of to H.B. 19 or S.B. 1045.

<sup>19</sup> TEX. GOV'T CODE ANN. § 25A.020(a)(1).

<sup>20</sup> *See* Memorandum from C.J. Nathan Hecht to Charles L. Babcock, Chair of Sup. Ct. Advisory Comm. 3 (June 3, 2023) (Referral of Rules Issues) *in* Sup. Ct. Advisory Comm. Meetings, *Materials*, TEXAS JUD. BRANCH, 5–8 (Aug. 18–19, 2023), <https://www.txcourts.gov/scac/meetings/2021-2030>.

<sup>21</sup> The Committee discussed proposed rules for the Business Court and Fifteenth Court of Appeals on June 16, August 18–19, and October 13 of 2023. Transcripts of those meetings and

Texas Supreme Court gave its preliminary approval to the proposed rules on February 6, 2024, and invited public comment.<sup>22</sup> These rules are discussed below along with relevant statutory provisions.

### A. *Structure and Organization*

The Business Court is organized as having one central “district” (composed of the entire state) and eleven geographic “divisions.”<sup>23</sup> The divisions are the same as the Administrative Judicial Regions created to report to the Office of Court Administration, the administrative agency of the Texas judiciary.<sup>24</sup> Administrative and personnel affairs of the Business Court are managed by the presiding judge, who is elected by a majority vote of the business court judges.<sup>25</sup>

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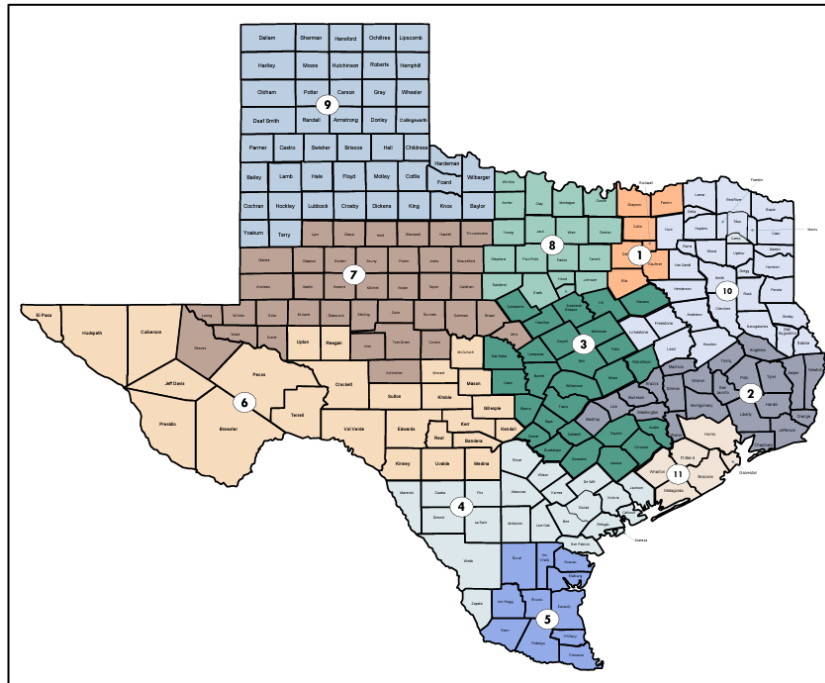
materials used in them may be found here: SUP. CT. ADVISORY COMM., *Meetings: 2021–2030*, <https://www.txcourts.gov/scac/meetings/2021-2030/> (last visited Feb. 16, 2024). *See generally* Memorandum from Bus. Ct. Subcomm. to Sup. Ct. Advisory Comm. (Oct. 2, 2023) (Proposed Amendments to the TRCP Rules for the Business Court) [hereinafter, “Business Court Subcommittee Memorandum”] *in* Sup. Ct. Advisory Comm. Meetings, *Materials*, TEXAS JUD. BRANCH, 4 (Oct. 13, 2023), <https://www.txcourts.gov/scac/meetings/2021-2030/>; Memorandum from Fifteenth Ct. App. Subcomm. to Sup. Ct. Advisory Comm. (Oct. 2, 2023) (Proposed Amendments to the TRAP Rules for the Fifteenth Court of Appeals) [hereinafter, “Fifteenth Court of Appeals Subcommittee Memorandum”] *in* Sup. Ct. Advisory Comm. Meetings, *Materials*, TEXAS JUD. BRANCH, 47 (Oct. 13, 2023), <https://www.txcourts.gov/scac/meetings/2021-2030/>.

<sup>22</sup> *See* Order, Misc. Doc. No. 24-9004 (Tex. Feb. 6, 2024) (Preliminary Approval of Rules for the Business Courts); Order, Misc. Doc. No. 24-9005 (Tex. Feb. 6, 2024) (Preliminary Approval of Amendments to the Texas Rules of Appellate Procedure Related to the Fifteenth Court of Appeals). The rules are expected to be finalized in the summer or early fall of 2024.

<sup>23</sup> TEX. GOV’T CODE ANN. § 25A.003(a)–(m).

<sup>24</sup> *Id.* § 25A.003(b)–(m); *see also id.* § 74.004 (creating the Office of Court Administration); *id.* § 74.042 (defining the administrative judicial regions).

<sup>25</sup> TEX. GOV’T CODE ANN. § 25A.009(d); *id.* § 25A.017(b).

**Figure 1: Administrative Judicial Regions<sup>26</sup>**

Although H.B. 19 creates eleven business court divisions, not all of those divisions will become active when the court takes effect. Instead, only the divisions with major metropolitan areas—the First Division (Dallas), the Third Division (Austin), the Fourth Division (San Antonio), the Eighth Division (Fort Worth), and the Eleventh Division (Houston)—will begin hearing cases on September 1, 2024. These divisions are also entitled to two business court judges, whereas the other divisions are only entitled to one.<sup>27</sup> And although the other divisions technically exist, the Governor may not appoint a judge to those divisions until July 1, 2026, and they will be abolished as a matter of law on September 1, 2026 unless the Legislature reauthorizes them.<sup>28</sup> The first two years thus function as a trial run; if the Business Court is successful in the big cities, H.B. 19 reserves the option to expand the court to more rural areas.

<sup>26</sup> *Administrative Judicial Regions* (illustrated map), in TEX. JUD. BRANCH, <https://www.txcourts.gov/media/1453885/ajr-map-2017.pdf> (last visited Feb. 16, 2024).

<sup>27</sup> TEX. GOV'T CODE ANN. § 25A.009(a)(1)–(2).

<sup>28</sup> *Id.* § 25A.003(d), (g), (h), (i), (k), (l), (n); Tex. H.B. 19, 88th Leg., R.S. § 6(b) (2023).

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### *B. Qualification and Selection of Judges*

One of the central features of the Business Court is the promise of judges with greater commercial experience than the standard district judge. To fulfill that promise, H.B. 19 sets forth specific qualifications for business court judges, and selects appointment, rather than election, as the method of selecting judges who meet those qualifications. As promoted by bill sponsor Sen. Bryan Hughes:

[O]nce business cases do get heard, they're often highly complicated and require a judge with deep background in commercial transaction law . . . . House Bill 19 lays out specific qualifications to make sure the judges who are appointed to these courts have the relevant experience to handle complex business cases. Now, the way to ensure that is through appointment by the Governor and confirmation by this body with a two-thirds vote.<sup>29</sup>

#### 1. Qualifications

The qualifications for a business court judge are greater than that apply to an ordinary district judge. District judges need only: be twenty-five years of age and less than seventy-four; be a citizen of the United States and a resident of Texas; be licensed to practice law in Texas; have practiced law (or served as a judge) for eight years; have resided in the relevant judicial district for two years prior to election or appointment; and reside in the district for the duration of the term of office.<sup>30</sup>

The requirements for a business court judge are higher in most of those categories. Most notably, a business court judge must have ten years of legal experience, and specifically in the field of complex commercial litigation or transactional law.<sup>31</sup> The age and residency requirements are also heightened; a business court judge must be at least thirty-five years of age and must have resided within the business court division for at least five years prior to appointment.<sup>32</sup>

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<sup>29</sup> S.J. of Tex., 88th Leg., R. S. 1–2 (May 12, 2023) (51st Addendum).

<sup>30</sup> TEX. CONST. art. V, § 7(b); TEX. GOV'T CODE ANN. § 24.001.

<sup>31</sup> TEX. GOV'T CODE ANN. § 25A.008(a)(4).

<sup>32</sup> *Id.* § 25A.008(a)(1), (a)(3).



In June, the Governor announced the nominations of the first ten business court judges.<sup>33</sup> The majority of the nominees appear primarily to have experience in commercial litigation, although a significant percentage have experience as a judge or in other government work. Seven of the nominees are or were partners at law firms; four of the nominees are or were either a district judge or a court of appeals justice; two of the nominees oversaw complex litigation divisions within the Texas Attorney General's Office; and two of the nominees are also adjunct law professors. Before these judges' nominations, some argued that the \$140,000 base salary of business court judge—which is the same as the salary for district court judges<sup>34</sup>—would detract from the State's ability to recruit qualified judges.<sup>35</sup> In that vein, the House passed a bill during the last legislative session that would have

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<sup>33</sup> *Governor Abbott Announces Appointments to New Austin Business Court Division*, TEXAS OFFICE OF THE GOVERNOR (June 11, 2024), <https://gov.texas.gov/news/post/governor-abbott-announces-appointments-to-new-austin-business-court-division>; *Governor Abbott Announces Appointments to New Dallas Business Court Division*, TEXAS OFFICE OF THE GOVERNOR (June 12, 2024), <https://gov.texas.gov/news/post/governor-abbott-announces-appointments-to-new-dallas-business-court-division>; *Governor Abbott Announces Appointments to New Fort Worth Business Court Division*, TEXAS OFFICE OF THE GOVERNOR (June 12, 2024), <https://gov.texas.gov/news/post/governor-abbott-announces-appointments-to-new-fort-worth-business-court-division>; *Governor Abbott Announces Appointments to New San Antonio Business Court Division*, TEXAS OFFICE OF THE GOVERNOR (June 13, 2024), <https://gov.texas.gov/news/post/governor-abbott-announces-appointments-to-new-san-antonio-business-court-division>; *Governor Abbott Announces Appointments to New Houston Business Court Division*, TEXAS OFFICE OF THE GOVERNOR (June 14, 2024), <https://gov.texas.gov/news/post/governor-abbott-announces-appointments-to-new-houston-business-court-division>.

<sup>34</sup> See TEX. GOV'T. CODE ANN. §§ 25A.005, 25A.011, 659.012(a)(1).

<sup>35</sup> See, e.g., Ryan Autullo, *Low Pay Plagues Judicial Recruitment in New Texas Business Court*, BLOOMBERG L. (Dec. 14, 2023, 4:00 AM), <https://news.bloomberglaw.com/litigation/low-pay-plagues-judicial-recruitment-in-new-texas-business-court>; Jolie McCullough, *Texas Supreme Court Chief Justice Calls for Higher Judicial Salaries, Business Courts*, TEX. TRIB. (Apr. 5, 2023), <https://www.texastribune.org/2023/04/05/texas-judiciary-business-courts/>; Maria Lenin Laus, *Challenges Mount for Texas Business Court as Judges' Salaries Remain Unchanged*, JD J. (Dec. 14, 2023), <https://www.jdjournal.com/2023/12/14/challenges-mount-for-texas-business-court-as-judges-salaries-remain-unchanged>. Chief Justice Hecht is not the first chief justice to raise the compensation issue. The Texas Supreme Court has long been concerned about the judiciary's ability to attract top talent to the bench. See, e.g., Chief Justice Wallace Jefferson, *The State of the Judiciary in Texas* (Feb. 23, 2005), reprinted in 68 TEX. B.J. 300, 301 (2005) (“The challenge is to fund the judiciary at a level sufficient to retain our most capable and experienced judges. Texas is losing judges at all levels of the judiciary due, at least in part, to salaries that have not kept pace with the times . . . . All too often, our brightest and most experienced judges are leaving the bench, moving on to other opportunities outside the judiciary.”).

increased the annual district court judge salary to \$155,400 in 2024 and then \$172,494 in 2025,<sup>36</sup> but it stalled after the Senate countered with significantly lower wage increases.<sup>37</sup> It remains to be seen whether a subsequent Legislature will raise judicial salaries—or if the level of compensation proves to be a problem for future appointments.

## 2. Appointment

Unlike many judges in Texas, business court judges are appointed by the Governor, with advice and consent of the Texas Senate.<sup>38</sup> As addressed below, this provision is one of the more controversial features of H.B. 19, with some arguing that it violates Article V of the Texas Constitution.<sup>39</sup> In any event, business court judges are appointed to two-year terms that always begin on September 1 of an even-numbered year, and judges may be reappointed without limit.<sup>40</sup> Vacancies are filled through the same appointment process described above.<sup>41</sup> And the Chief Justice may assign a retired or former judge as a visiting judge on the Business Court if that judge otherwise meets the requirements for a business court judge.<sup>42</sup> Retired and former judges also serve an important backstop function; in the event that the Texas Supreme Court determines that the appointment provision of H.B. 19 is unconstitutional, H.B. 19 specifies that appointed visiting judges are to staff the Business Court.<sup>43</sup>

As introduced above, business court judges are appointed to a particular division. And each judge must maintain chambers in a county (of the judge's choice) within the division to which the judge was appointed.<sup>44</sup> Even so, a

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<sup>36</sup> See Tex. H.B. 2779, 88th Leg., R. S. (2023).

<sup>37</sup> See H.J. of Tex., 88th Leg., R. S. 5875 (2023) (House refusing to concur in the Senate's amendments).

<sup>38</sup> TEX. GOV'T CODE ANN. § 25A.009(a); see also *supra* note 14.

<sup>39</sup> *Infra* Part III.

<sup>40</sup> TEX. GOV'T CODE ANN. § 25A.009(a)–(c). The two-year term limit is prescribed by the Constitution. See TEX. CONST. art. XVI, § 30 (“The duration of all offices not fixed by this Constitution shall never exceed two years.”).

<sup>41</sup> TEX. GOV'T CODE ANN. § 25A.010.

<sup>42</sup> *Id.* § 25A.014(a).

<sup>43</sup> Tex. H.B. 19, 88th Leg., R.S. (2023) (enrolled version).

<sup>44</sup> TEX. GOV'T CODE ANN. § 25A.017(c). Similarly, although the Clerk of the Business Court must reside in Travis County, *id.* § 25A.017(b), it appears that filings may also be made with deputy clerks or case managers, who will presumably maintain their office in the same county as the relevant business court judge. Although the Texas Supreme Court ultimately did not adopt a rule

judge may hold court in any county within his or her appointed division to the extent “necessary or convenient for a particular civil action.”<sup>45</sup> But, as is the case for most other trial judges, to “promote the orderly and efficient administration of justice,” judges have discretion to sit in other divisions in any matter before the court.<sup>46</sup>

### 3. Law Clerks

House Bill 19’s primary methods for ensuring that commercial disputes are heard in a timely and expert manner are those addressed above: appointment of judges who meet heightened qualifications.<sup>47</sup> But the law also authorizes each business court judge to hire a permanent law clerk (or staff attorney), a benefit that most district or county judges do not have.<sup>48</sup> By law, the Legislature is not required to appropriate funds for each district or county judge to have his or her own staff attorney. In fact, according to the State’s most recent data, only twelve of the over 450 district judges have hired a personal law clerk.<sup>49</sup> Clerks will further help business court judges, already familiar with this body of law, to address complicated legal questions that arise in largescale commercial litigation.<sup>50</sup>

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clarifying this power, the Advisory Committee debated the subject extensively. *See* Transcript of Meeting at 35471–91, Sup. Ct. Ad. Comm. (Oct. 13, 2023), <https://www.txcourts.gov/media/1457501/23-10-13-scac-transcript.pdf>.

<sup>45</sup>TEX. GOV’T CODE ANN. § 25A.017(d).

<sup>46</sup>*Id.* § 25A.009(f); *see also id.* § 24.003(b)(4) (allowing district courts to temporarily exchange benches); *id.* § 74.121 (same, as to constitutional county courts, statutory county courts, justice courts, and small claims courts).

<sup>47</sup>Another point raised during the legislative process in favor of the efficiency of the Business Court is that, unlike district court judges, business court judges will not be required to give preferential settings to certain types of cases, such as criminal actions, election contests, family protective order issues, etc. *See* TEX. GOV’T CODE ANN. §§ 23.101–23.103.

<sup>48</sup>*Id.* § 25A.017(i)(3).

<sup>49</sup>*See* Trial Courts by County, *District, County, and Justice Court Judges, and Personnel by County*, TEX. JUD. BRANCH (last updated June 12, 2023), <https://www.txcourts.gov/media/1456631/trial-court-judges-personnel.pdf>. Some counties, however, hire staff attorneys that assist all of the district judges within county. For instance, the Administrative Office of the District Courts in Harris County employs three staff attorneys. *See Administrative Office of the District Courts*, DIST. CTS. OF HARRIS CNTY. (last visited Feb. 16, 2024), <https://www.justex.net/office/admin>. But these staff attorneys serve dozens of judges at a time and cannot have as great an impact as an attorney specifically assigned to one judge.

<sup>50</sup>On the well documented impact that law clerks have a on judges’ work, see, e.g., TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* 38–144 (2006) (examining law clerks’ influence on Supreme Court Justices’

### C. Jurisdiction

Perhaps the most important features of H.B. 19 are the categories of jurisdiction established for the Business Court. The rules that govern the types of cases that may be heard by the court are divided into several categories. To start more generally, the court has all the same powers of a district court; the Business Court may issue final judgments, injunctions, writs of mandamus, etc.<sup>51</sup> The court may also hear claims seeking injunctive or declaratory relief, so long as the case otherwise falls within the court's jurisdiction.<sup>52</sup> And in all cases, the court's jurisdiction is concurrent with the district courts, meaning that any action that could be brought before the Business Court can still be heard by a district court, should the parties so choose.<sup>53</sup>

#### 1. Amount in Controversy Exceeds Five Million Dollars

The first category of cases that fall within the Business Court's jurisdiction are those in which the amount in controversy exceeds \$5 million and the subject concerns at least one of several subjects.<sup>54</sup> The covered subjects include: (i) a derivative proceeding; (ii) a corporate-governance action; (iii) an action involving state or federal securities laws or regulations; (iv) an action brought by an organization against an owner, controlling person, or managerial official (interchangeably referred to as a "senior officer");<sup>55</sup> (v) a claim alleging that a senior officer breached a duty to the

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writing and legal arguments); Rick A. Swanson & Stephen L. Wasby, *Good Stewards: Law Clerk Influence in State High Courts*, 29 JUST. SYS. J. 24, 41–43 (2008) (same, as to state supreme courts). And although there tend to be less law clerks or staff attorneys in the state courts as compared to federal courts, the state courts, including Texas specifically, have expanded the practice considerably since the beginning of the 21st Century. See Judson R. Peverall, *Inside State Courts: Improving the Market for State Trial Court Law Clerks*, 55 U. RICH. L. REV. 277, 325–34 (2020) (surveying the market for state district court law clerks and arguing for expanded access to such law clerks); James. T. Worthen, *The Organizational & Structural Development of Intermediate Appellate Courts in Texas*, 46 S. TEX. L. REV. 33, 47–55 (2004) (describing the origin and use of law clerks and staff attorneys in the Texas courts of appeals).

<sup>51</sup> TEX. GOV'T CODE ANN. § 25A.004(a).

<sup>52</sup> *Id.* § 25A.004(e).

<sup>53</sup> *Id.* § 25A.004(b), (c), (d), (e); see also *infra* text accompanying note 180 (explaining the constitutional implications of authorizing concurrent jurisdiction).

<sup>54</sup> TEX. GOV'T CODE ANN. § 25A.004(b).

<sup>55</sup> As defined by H.B. 19, these terms, as well as "governing person" and "governing official" have different meanings and apply to slightly different circumstances. See *id.* § 25A.001(1), (5), (8), (9), (11). But for purposes of understanding the basic limits of the Court's jurisdiction, it is enough

organization, including a breach of a duty of loyalty or good faith; (vi) a claim seeking to hold a senior officer liable for an obligation held by the organization; and (vii) an action arising out of the Business Organizations Code.<sup>56</sup>

Together, these categories cover most forms of *internal* business disputes; *i.e.*, disputes about the business's management, claims between shareholders and the company, and so on. *External* business disputes, *i.e.*, actions involving a company and a separate person or business, are reserved for the next category of jurisdiction, where the amount in controversy is heightened to \$10 million. Any claim that falls within one of the seven categories described above may be heard by the Business Court—regardless of the amount in controversy—if one of the parties is a publicly traded company.<sup>57</sup>

## 2. Amount in Controversy Exceeds Ten Million Dollars

The Business Court also has jurisdiction over certain high-dollar external disputes. In particular, provided that the amount in controversy exceed \$10 million, the court may hear: (i) an action arising out of a “qualified transaction”;<sup>58</sup> (ii) a case involving a contract in which the parties agreed that the Business Court would have jurisdiction (except an insurance dispute); and (iii) an action concerning a violation of the Finance or Business & Commerce Codes by an organization or officer acting on the organization's behalf (except a bank, credit union, or savings and loan association).<sup>59</sup> The first subcategory—a case involving a qualified transaction—will likely cover all bread-and-butter commercial cases where the plaintiff alleges a breach of contract or some similar claim, as long as the dispute satisfies the amount in controversy.

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to recognize that these terms intend to capture a personal or official who exerts significant control over the business at issue. For ease of reference, this Article refers to such a person as a “senior officer.”

<sup>56</sup> *Id.* § 25A.004(b)(1)–(7).

<sup>57</sup> *Id.* § 25A.004(c).

<sup>58</sup> A qualified transaction essentially means any agreement (except for a loan or advance of money or credit by a bank, credit union, or savings and loan institution) in which the aggregate value of the sale, loan, etc., is at least \$10 million. *Id.* § 25A.001(14)(A).

<sup>59</sup> *Id.* § 25A.004(d)(1)–(3).

### 3. Supplemental Jurisdiction

House Bill 19 expands the Business Court’s jurisdiction by providing for broad supplemental jurisdiction. Specifically, the court may hear any claim “related to a case or controversy within the court’s jurisdiction that forms part of the same case or controversy.”<sup>60</sup> This language mirrors the federal supplemental-jurisdiction statute, and presumably incorporates the same standard that applies in federal court.<sup>61</sup>

However, a claim that falls within the Business Court’s supplemental jurisdiction may proceed only if all of the parties and the judge agree.<sup>62</sup> This important compromise preserves a plaintiff’s ability to pursue ordinary claims in district or county court. If any party or the judge disagrees, the claim must be brought in a separate action. In that event, H.B. 19 specifies that the related claim may proceed concurrently in a court of original jurisdiction.<sup>63</sup>

### 4. Cases Excluded from the Business Court’s Jurisdiction

Finally, H.B. 19 explicitly removes certain cases from the Business Court’s jurisdiction. These are: (i) civil actions brought by or against governmental entities; (ii) civil foreclosure actions; (iii) certain claims arising under the Business and Commerce Code (involving non-competes and deceptive trade practices); (iv) certain claims arising under the Property Code (involving mechanics liens and trusts); (v) claims arising under the Estates, Family, or Insurance Codes; (vi) sales of farm products; (vii) consumer transactions; (viii) and insurance disputes.<sup>64</sup> But the claims listed above may be asserted if they fall within the Business Court’s

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<sup>60</sup> *Id.* § 25A.004(f).

<sup>61</sup> 28 U.S.C. § 1367(a) (authorizing district courts to hear claims where they are “so related to claims in the action within such original jurisdiction that they *form part of the same case or controversy* under Article III of the United States Constitution”) (emphasis added). *See* United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966) (holding that a district court may exercise supplemental jurisdiction where the claims to be asserted are so related to the original claims that they “derive from a common nucleus of operative fact”). Indeed, House bill author Rep. Andrew Murr promoted H.B. 19 as incorporating federal standards on supplemental jurisdiction. *See* Hearing on H.B. 19 Before the H. Comm. on Judiciary & Civ. Juris., 88th Leg., R.S. (Mar. 22, 2023) (acknowledging that the bill “borrowed the supplemental jurisdiction language from federal law”) (digital recording available through <https://house.texas.gov/video-audio/committee-broadcasts/88/>).

<sup>62</sup> TEX. GOV’T CODE ANN. § 25A.004(f).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* § 25A.004(g)(1)–(5).

supplemental jurisdiction, and all parties and the judge agree to allow the claim to proceed.<sup>65</sup>

There are some claims, though, that may not be asserted in the Business Court even if the court would otherwise have supplemental jurisdiction. These are claims for: (i) medical liability (including malpractice); (ii) personal injury; and (iii) legal malpractice.<sup>66</sup> For the trial bar, it was essential that these ubiquitous claims be allowed to proceed in district or county court.

#### *D. Filing and Removal of Cases*

The Legislature gave considerable attention to the procedure for bringing a case before the Business Court, which makes sense given the fact that the court's jurisdiction was so central to the bill. A case may be filed in the Business Court in the first instance if the matter falls within the court's jurisdiction.<sup>67</sup> To do so, the plaintiff must plead facts establishing the court's jurisdiction, as well as venue in a county that is which a particular division of the court.<sup>68</sup> It is not immediately clear what level of detail is required for the jurisdictional and venue pleading, though the Advisory Committee appears to understand the statute and rules as requiring more than notice pleading.<sup>69</sup>

Should the plaintiff fail to plead jurisdiction or venue, the case will be disposed in one of several ways. If the court determines that it lacks jurisdiction over the dispute, the plaintiff has the option of requesting transfer to a district or county court in which venue is proper, or dismissal without

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<sup>65</sup> *Id.* § 25A.004(f).

<sup>66</sup> *Id.* § 25A.004(h)(1)–(3).

<sup>67</sup> *Id.* § 25A.006(a).

<sup>68</sup> *Id.* With respect the venue, H.B. 19 provides that venue may be established by the ordinary method (i.e., by using Texas venue rules) or by agreement via a forum selection clause. *See id.*

<sup>69</sup> *See* Subcommittee Business Court Memorandum, *supra* note 21, at 2 (“While recognizing that this recommendation may depart from Texas’ notice pleading standards in some cases, the Subcommittee considers it necessary to assist the court and practitioners in navigating these threshold matters and potentially avoiding disputes about jurisdiction and venue.”); Transcript of Meeting at 35202–08, Sup. Ct. Ad. Comm. (Aug. 18, 2023) (debating the applicable standard of review), <https://test.txcourts.gov/media/1457110/scac23-08-18.pdf>; Sup. Ct. Ad. Comm., *supra* note 44, at 35507–08 (“[S]ome of the significant provisions here include an expectation that parties will plead with sufficient facts to make it clear that the business court has jurisdiction, and that would be a departure from our notice and pleading rules so that a failure to appropriately plead would be the basis for a challenge to, in effect, to the jurisdiction of the court.”) (Statement of Business Court Subcommittee member Robert Levy).

prejudice.<sup>70</sup> The defendant may also move to dismiss or transfer based on lack of jurisdiction, but any motion must be filed within thirty days after the answer is due or thirty days after the defendant's notice of appearance.<sup>71</sup> And if the court determines that venue is not proper in any county within the division, it must transfer the case to an operating division<sup>72</sup> of the business court in which venue is proper, if there is one.<sup>73</sup> If there is not, the court must transfer the case to a district or county court of proper venue of the plaintiff's choice.<sup>74</sup>

But if, as is the pattern in most cases as it pertains to federal-court removal, the plaintiff first files suit in a district or county court, any party to the action may remove the case to the Business Court if the case falls within the court's jurisdiction and venue is proper within an operating division.<sup>75</sup> Borrowing from federal law, the notice must contain "a short and plain statement of the grounds for removal, including the basis for the jurisdiction of the business court and a statement whether all parties agree to the removal of the action."<sup>76</sup>

In terms of timing, as in federal court, the notice of removal must be filed within thirty days of when the removing party discovers (or should have discovered) facts supporting the Business Court's jurisdiction.<sup>77</sup> A party can remove without fear of waiving certain defenses because removal is not

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<sup>70</sup>TEX. GOV'T CODE ANN. § 25A.006(b)(1)–(2). In the event that the case is dismissed without prejudice, the statute of limitations is tolled for the duration of time between filing in the Business Court and dismissal. *See* TEX. R. CIV. P. 357 (proposed Feb. 6, 2024); *see generally* Sanders v. Boeing Co., 680 S.W.3d 340, 348–49 (Tex. 2023) (explaining the meaning of Texas Civil Practice and Remedies Code § 16.003, which tolls the applicable statute of limitations when a case is dismissed for "lack of jurisdiction").

<sup>71</sup>*See* TEX. R. CIV. P. 354(c)(2) (proposed Feb. 6, 2024).

<sup>72</sup>The phrase "operating division" means a division that is presently in effect and refers to the fact that the Second, Fifth, Sixth, Seventh, Ninth, and Tenth Divisions will begin to operate until September 2026, and unless reauthorized by the Legislature. *Supra* note 28 and accompanying text.

<sup>73</sup>TEX. GOV'T CODE ANN. § 25A.006(c)(1).

<sup>74</sup>*Id.* § 25A.006(c)(2).

<sup>75</sup>*Id.* § 25A.006(d)–(e).

<sup>76</sup>TEX. R. CIV. P. 354(d)(2)(B) (proposed Feb. 6, 2024); *see also* Business Court Subcommittee Memorandum, *supra* note 21, at 3 ("This language tracks the federal statute on removal, *e.g.*, 28 U.S.C. § 1446(a).").

<sup>77</sup>TEX. GOV'T CODE ANN. § 25A.006(f)(1). In addition, if a motion for temporary injunction is pending on the date the removing party discovered (or should have discovered) facts supporting the Business Court's jurisdiction, the notice of removal must be filed within thirty days after the motion for temporary injunction is ruled upon. *Id.* § 25A.006(f)(2).



subject to the due-order-of-pleading rule, and does not waive a defect in venue or constitute an appearance for purposes of personal jurisdiction.<sup>78</sup> If, however, the removing party does not meet the thirty-day deadline, it may nonetheless remove the case if it obtains the agreement of all other parties.<sup>79</sup>

Procedurally, the removing party must file the notice of removal both with the Business Court and the court in which the case was originally filed. At that point, the clerk of the originally filed court transfers the action to the Business Court. The Business Court clerk then docket the case and assigns it to a random judge within the appropriate division.<sup>80</sup> But, as in federal court, a plaintiff may challenge removal by filing a motion to remand within thirty days after the filing of the notice of removal or thirty days after its answer is due.<sup>81</sup>

To ensure that defendants do not abuse the removal process or the Business Court's jurisdiction, H.B. 19 clarifies that Section 10.001 of the Civil Practice and Remedies Code—which requires attorneys to verify that all pleadings are, to the best of the attorney's knowledge, supported as a matter of fact and law—applies to the filing of a notice of removal.<sup>82</sup> Consequently, an attorney may be sanctioned if he or she removes a case to the Business Court without a good-faith basis.<sup>83</sup>

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<sup>78</sup>*Id.* § 25A.006(i)–(j); *see generally* 58 Tex. Jur. 3d *Pleading* § 130, (Westlaw database updated Jan. 2024) (explaining rules on due order of pleadings). Motions challenging venue must be brought within the same time limits as those that apply to district court proceedings. *See* TEX. R. CIV. P. 354(c)(1) (proposed Feb. 6, 2024).

<sup>79</sup>TEX. GOV'T CODE ANN. § 25A.006(f).

<sup>80</sup>*Id.* § 25A.006(g); *accord* TEX. R. CIV. P. 354(b) (proposed Feb. 6, 2024). There is a further method for transferring a case to the Business Court: a request by the judge who is assigned to the case as it was originally filed. TEX. GOV'T CODE ANN. § 25A.006(k). This provision appears designed to allow a district or county court, particularly one in a smaller jurisdiction, to prevent a complex business-court case from overwhelming its highly local docket. According to this procedure, the judge may request that the presiding judge of the court's administrative judicial region transfer the case to the Business Court if the case falls within the court's jurisdiction and that transfer would otherwise "facilitate the fair and efficient administration of justice." *Id.* In the event of such a request, the presiding judge must notify the parties and hold a hearing. H.B. 19 therefore contemplates the possibility of a case being transferred to the Business Court even if neither party moves for the case to be heard there.

<sup>81</sup>*See* TEX. R. CIV. P. 356(d) (proposed Feb. 6, 2024).

<sup>82</sup>TEX. GOV'T CODE ANN. § 25A.006(h).

<sup>83</sup>TEX. CIV. PRAC. & REM. CODE ANN. § 10.002(a). For an examination of bad-faith removal in federal court and the effectiveness of sanctions, *see* Zachary D. Clopton & Alexandra D. Lahav, *Fraudulent Removal*, 135 HARV. L. REV. F. 87, 99–103 (2021).

### *E. Case Procedure*

As with any new court, there must be rules to govern how the court will operate in practice. In general, the Texas Rules of Civil Procedure and Rules of Evidence that govern district court proceedings also govern business court proceedings, except to the extent that other, specific rules control.<sup>84</sup> On the latter point, H.B. 19 instructs the Texas Supreme Court to adopt rules needed to fill in the procedural details and authorizes the Business Court to establish local rules to the same effect.<sup>85</sup> Several aspects of the prescribed case procedure warrant discussion here.

First, the law requires the Texas Supreme Court to adopt rules concerning the issuance of written opinions.<sup>86</sup> During the legislative process, many witnesses and legislators expressed the need to develop a body of trial-level caselaw in order to make high-stakes litigation more predictable.<sup>87</sup> Since the bill was passed, the Texas Supreme Court has adopted Rule 359 of the Texas Rules of Civil Procedure, which concerns the issuance of opinions in business court cases. The rule requires a business court judge to issue a written opinion on any “issue important to the jurisprudence of the state,” or, if a party requests, on any “dispositive ruling.”<sup>88</sup>

Another major topic of concern during the legislative session was whether jury trials would be available for Business Court cases, and from where the jury would be drawn. For avoidance of doubt, H.B. 19 specifies that “[a] party

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<sup>84</sup>TEX. GOV'T CODE ANN. § 25A.015(g).

<sup>85</sup>*See id.* § 25A.020(a), (b).

<sup>86</sup>*Id.* § 25A.016.

<sup>87</sup>*See, e.g.*, Hearing on Tex. H.B. 19 Before the H. Comm. on Judiciary & Civ. Juris., 88th Leg., R. S. Part I at 23:50 (Mar. 23, 2023) (“Also . . . the other aspect of efficiency that comes through with the Business Court is you start getting written opinions. Ninety percent or more of the business cases that get decided in Texas get decided at the trial level and . . . there’s never an opinion issued out of those trial courts so nobody knows what the judge says the law was and the Business Court will know what the law is.”) (statement of Mike Tankersley, on behalf of the Texas Business Law Foundation) (digital recording available through [https://tlchouse.granicus.com/MediaPlayer.php?view\\_id=78&clip\\_id=24840](https://tlchouse.granicus.com/MediaPlayer.php?view_id=78&clip_id=24840)).

<sup>88</sup>TEX. R. CIV. P. 359(a)(1)–(2) (proposed Feb. 6, 2024). Although the rule does not define when an issue is important to the jurisprudence of the state, discussion within the Advisory Committee generally compared the standard to Rule 47.4 of the Texas Rules of Appellate Procedure, which help courts of appeals to determine whether an opinion should be published or unpublished. *See* Business Court Subcommittee Memorandum, *supra* note 21, at 25; TEX. R. APP. P. 47.4. The Committee proposed requiring the issuance of an opinion if the decision involved (i) a new or modified rule of law, (ii) an issue of constitutional or otherwise special importance, (iii) a ruling criticizing existing law, or (iv) a decision that resolving an existing conflict of authority. *Id.*

in an action pending in the business court has the right to a trial by jury when required by the constitution.”<sup>89</sup> As to venue, a plaintiff who files an action with the Business Court has the right to choose to demand a jury trial in any county within the division to which the case is assigned in which the case could have been filed.<sup>90</sup> This is a powerful jury-selection tool, especially given that juries in large metropolitan areas (where the majority of Business Court cases will presumably come from) will typically differ greatly from adjacent suburban or rural counties.<sup>91</sup> But if a case is removed to the Business Court, the trial must be held in the county where the case was originally filed.<sup>92</sup> However, the parties may agree, either *ex ante* by contract, or during the litigation itself, to hold the trial in any county of their choosing.<sup>93</sup>

In any event, after determining jurisdiction and venue, the Business Court is required to “declare” the county in which a jury trial will be held.<sup>94</sup> Rules governing jury selection and other “jury-related practice and procedure” are the same as those that apply for the district court in the county where the trial is held.<sup>95</sup>

House Bill 19 also provides several details concerning where judges may take their chambers and where proceedings may be conducted. To start, business court judges are allowed to maintain chambers in any county within the division to which they are assigned.<sup>96</sup> But they may hold court in any courtroom within the division, including borrowing from existing county courtrooms to the extent possible.<sup>97</sup> With respect to remote proceedings, the bill allows the Business Court to hold any proceeding remotely, subject to several exceptions: The court must hold jury trials in person,<sup>98</sup> and it must

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<sup>89</sup>TEX. GOV'T CODE ANN. § 25A.015(a).

<sup>90</sup>*Id.* § 25A.015(b).

<sup>91</sup>For literature considering the differences between urban and rural jurors, see, e.g., Debra Lyn Bassett, *The Rural Venue*, 57 ALA. L. REV. 941, 964–67 (2006); Craig C. New & Chris Dominic, *Us and Them*, 64 OR. ST. BAR BULL. 13, 16–17 (2003); Mary R. Rose & Neil Vidmar, *The Bronx “Bronx Jury”*: A Profile of Civil Jury Awards in New York Counties, 80 TEX. L. REV. 1889, 1896–98 (2002); Roselle L. Wissler et al., *Decisionmaking about General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751, 756, 783–84, 807–08 (1999); PATRICIA M. DANZON, *MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY* 74–75 (1985).

<sup>92</sup>TEX. GOV'T CODE ANN. § 25A.015(c).

<sup>93</sup>*Id.* § 25A.015(d)–(e).

<sup>94</sup>*Id.* § 25A.006(l).

<sup>95</sup>*Id.* § 25A.015(f).

<sup>96</sup>*Id.* § 25A.017(c).

<sup>97</sup>*Id.* § 25A.017(d).

<sup>98</sup>*Id.* § 25A.017(e).

also hold any hearing in which it will hear oral argument in person unless all parties consent.<sup>99</sup>

### *F. Appeals of Business Court Actions*

All the above describes the mechanics of trial-court level proceedings before the Business Court. But H.B. 19 and S.B. 1045 also provide a specific appellate process for business court cases. S.B. 1045 established a new intermediate court of appeals: The Court of Appeals for the Fifteenth Appeals District, which sits in the City of Austin.<sup>100</sup> The Fifteenth Court of Appeals has exclusive jurisdiction over appeals from the Business Court (and original proceedings relating to the Business Court, such as mandamus petitions).<sup>101</sup>

The Fifteenth Court of Appeals differs from the other intermediate courts of appeals in several significant respects. Perhaps most importantly, it is the only court of appeals to have both limited and exclusive jurisdiction.<sup>102</sup> As to the former, unlike the other courts of appeals, which have general jurisdiction over civil and criminal appeals filed within each appellate district, the Fifteenth Court of Appeals has no criminal jurisdiction and has jurisdiction over only certain civil cases.<sup>103</sup> And as to the latter, the Fifteenth Court of Appeals has exclusive jurisdiction over appeals from the Business Court.<sup>104</sup> The court's jurisdiction also includes: (i) a matter brought by or against the State or a state agency<sup>105</sup> and (ii) a case in which any party files a pleading

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<sup>99</sup> *Id.* In addition, any remote hearing must be conducted from state facilities, and the court must give the public reasonable notice and an opportunity to attend. *Id.* § 25A.017(e)–(g); *accord* TEX. R. CIV. P. 358 (proposed Feb. 6, 2024) (to be effective Sept. 1, 2024).

<sup>100</sup> *Id.* § 22.2151(a).

<sup>101</sup> *Id.* § 25A.007(a). H.B. 19 also provides that, should the Legislature fail to create the Fifteenth Court of Appeals, appeals are taken from the preexisting court of appeals with jurisdiction over the county in which the case proceeded in the Business Court. *Id.* § 25A.007(b). But that provision has no effect because the Legislature did in fact create the Fifteenth Court.

<sup>102</sup> *Cf. id.* § 22.220(a), (d) (providing that, except as to the Fifteenth Court of Appeals, intermediate courts of appeals have “appellate jurisdiction of all civil cases within its district” of which the lower court had jurisdiction and the amount in controversy exceeded \$250).

<sup>103</sup> TEX. CRIM. PROC. CODE ANN. §§ 4.01(2), 4.03, 44.25.

<sup>104</sup> TEX. GOV'T CODE ANN. § 25A.007(a); *see also id.* § 22.220(d)(3) (providing that the Fifteenth Court of Appeals shall have exclusive civil jurisdiction over “any other matter as provided by law”).

<sup>105</sup> Subject to the following exceptions: A proceeding under the Family Code, an action concerning a sexual assault protective order, a proceeding against a district or county attorney, a mental health commitment matter, a civil asset forfeiture case, an eminent domain proceeding, a tort claim brought pursuant to the Texas Tort Claims Act, a personal injury or wrongful death action,

challenging the constitutionality of a state law or regulation and in which the Attorney General is a party.<sup>106</sup> In the event that a case is incorrectly appealed to the Fifteenth Court of Appeals or a case within the Fifteenth Court's jurisdiction is appealed to a different court of appeals, the court (either on its own initiative or in response to a party's motion) will transfer the case to the appropriate court.<sup>107</sup>

As with the Business Court, the Fifteenth Court of Appeals comes into legal existence on September 1, 2024.<sup>108</sup> For the first three years, the court will be staffed by a chief justice and two associate justices, with two additional associate justices to be added beginning on September 1, 2027.<sup>109</sup> The court will decide cases in three-judge panels, and may hold court in any county within the state to the extent necessary.<sup>110</sup>

Regarding the selection of judges, S.B. 1045 provides that "the initial vacancies in the offices of chief justice and justices of the court" are to be filled by appointment.<sup>111</sup> After that, justices must run for election, to be decided by statewide popular vote.<sup>112</sup>

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a nuisance claim, an action to expunge criminal records or obtain an order of nondisclosure, appeals from a special three-judge district court (such as state redistricting cases), employment discrimination, an action to remove a local government official, or a civil commitment proceeding for a sexually violent predator. *Id.* § 22.220(d)(1)(A)–(O).

<sup>106</sup>*Id.* § 22.220(d)(1)–(2). S.B. 1045 also transfers jurisdiction to hear certain special cases as a district court and to hear certain appeals from administrative decisions from the Third Court of Appeals (the court that hears appeals from the City of Austin and surrounding areas) to the Fifteenth Court of Appeals. *Id.* §§ 2001.038(f), 2001.176(c); TEX. OCC. CODE ANN. § 2301.751(a); TEX. UTIL. CODE ANN. § 39.001(e).

<sup>107</sup>TEX. GOV'T CODE ANN. § 73.001(c); *accord* TEX. R. APP. P. 27A(b) and (c)(1)–(2) (to be effective by Sept. 1, 2024).

<sup>108</sup>Tex. S.B. 1045, 88th Leg., R.S. § 1.14(a) (2023).

<sup>109</sup>TEX. GOV'T CODE ANN. § 22.216(n-1), (n-2).

<sup>110</sup>*Id.* §§ 22.2151(b), 22.222(a); TEX. CONST. art. V, § 6(a).

<sup>111</sup>Tex. S.B. 1045, 88th Leg., R.S. § 1.14(b) (2023). The Governor has nominated Scott Brister, former justice of the Supreme Court of Texas and Chief Justice of the Fourteenth Court of Appeals, to be the first Chief Justice of the Fifteenth Court of Appeals. He has also nominated Judge Scott Field of the 480th Judicial District Court of Williamson County (and former justice of the Third Court of Appeals) and Justice April Farris of the First Court of Appeals to be the two associate justices. *Governor Abbott Appoints Inaugural Members to Fifteenth Court of Appeals*, TEXAS OFFICE OF THE GOVERNOR (June 11, 2024), <https://gov.texas.gov/news/post/governor-abbott-appoints-inaugural-members-to-fifteenth-court-of-appeals>.

<sup>112</sup>TEX. CONST. art. V § 6(b). S.B. 1045 neither addresses how the two additional judges are to obtain office or whether appointed judges may continue in office via reappointment. Given this silence, the default provisions of the Texas Constitution apply, meaning that justices of the Fifteenth

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As the Business Court’s promoters have repeated, the court is designed to offer quicker, more predictable decisions to high-stakes commercial disputes.<sup>113</sup> To that end, the Legislature has created a specialized court with specific jurisdictional requirements, and a filing-removal regime similar to that of federal court.<sup>114</sup> It also has attempted to provide for highly competent decision-makers, establishing heightened requirements for judges and providing them with law clerks and other essential resources.<sup>115</sup> Time will tell whether the court lives up to the billing.

## II. HISTORY AND PASSAGE OF THE BUSINESS COURT BILL

For nearly two decades, the Texas Legislature tried and failed to create some form of a business court. It first considered a business court bill during the 2007 legislative session, and did so almost every session for the next sixteen years.<sup>116</sup> Each time, the bill failed.<sup>117</sup> This Part surveys the history of those failed bills and provides an overview of the legislative process during the most recent session, where the Legislature finally succeeding in passing such a bill.

### A. History of Business Court Bills

The Business Court of Texas is the next in an increasing number of specialized commercial courts across the United States. Since the Delaware Court of Chancery’s inception in 1792, it has been considered the center of gravity for American business litigation.<sup>118</sup> But although the Court of

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Court of Appeals are to serve six-year terms, and must be elected besides the initial three appointments. *See id.* (providing that courts of appeals justices shall be elected “by the qualified voters of their respective districts”); TEX. GOV’T CODE ANN. § 22.201(p) (explaining that the Fifteenth Court of Appeals District is “composed of all counties in th[e] state”).

<sup>113</sup> *See supra* note 87 and accompanying text.

<sup>114</sup> *See supra* Part I.C. and text accompanying notes 75–77, 81.

<sup>115</sup> *See supra* Part I.B.

<sup>116</sup> *See supra* text accompanying note 7.

<sup>117</sup> *See infra* Part II.A. History of Business Court Bills.

<sup>118</sup> *See* William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery—1792–1992*, 18 DEL. J. CORP. L. 819, 840–65 (1993) (examining the Delaware Court of Chancery’s impact on corporate litigation, especially in the 20th Century); Jack Jacobs, *The Delaware Court of Chancery: A 225-Year Retrospective*, LAW360 (Sept. 27, 2017), <https://www.law360.com/articles/968498/the-delaware-court-of-chancery-a-225-year-retrospective>.

Chancery developed an expertise for deciding complex commercial disputes, its jurisdiction is not actually limited to such cases.<sup>119</sup> The first courts with jurisdiction limited to certain business disputes came into existence in the early 1990s, when the original states to implement the concept—Illinois, New York, New Jersey, and North Carolina—created business courts “as specialized dockets in existing courts for complex cases.”<sup>120</sup> Many states followed suit thereafter; to date, twenty-nine states<sup>121</sup> have adopted some form of a business court, and there is ample literature promoting their benefits.<sup>122</sup>

And so it was that Texas set out to join these states and adopt a business court of its own.<sup>123</sup> The first proposal came in 2007, in the form of a Judicial

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<sup>119</sup>See Lee Applebaum et al., *Through the Decades: The Development of Business Courts in the United States*, 75 BUS. LAW. 2053, 2058 (2020). Although Delaware has historically not operated a business-specific court, it does now. In 2010, the Delaware Superior Court created a special division for special business cases—the Complex Commercial Litigation Division of the Superior Court. See DEL. SUPER. COURT, ADMIN DIR. NO. 2010-3 (Apr. 26, 2010), [https://www.courts.delaware.gov/superior/pdf/Administrative\\_Directive\\_2010-3.pdf](https://www.courts.delaware.gov/superior/pdf/Administrative_Directive_2010-3.pdf).

<sup>120</sup>See Dimarie Alicea-Lozada, *Business Courts Expanding Across the States*, NAT’L CTR. FOR STATE CTS. (Aug. 9, 2023), <https://www.ncsc.org/information-and-resources/trending-topics/trending-topics-landing-pg/business-courts-expanding-across-the-states>.

<sup>121</sup>Besides Texas, these states are Illinois, New York, New Jersey, North Carolina, Wisconsin, Pennsylvania, Massachusetts, Nevada, Rhode Island, Maryland, Florida, Georgia, Maine, South Carolina, New Hampshire, Ohio, Delaware, West Virginia, Michigan, Iowa, Tennessee, Arizona, Indiana, Wyoming, Kentucky, Utah. See Applebaum et al., *supra* note 119, at App. A (cataloging all American state and local business courts). Colorado and Alabama once operated a specialized commercial dockets, but those programs are longer operational. *Id.* See also THE CASE FOR SPECIALIZED BUSINESS COURTS IN TEXAS, *supra* note 7, at 3–4 tbl. 1.

<sup>122</sup>See generally, e.g., Douglas L. Toering & Ian Williamson, *Michigan’s Business Courts: A Decade of Success*, 102 MICH. BUS. J. 28 (2023); Tyler Moorhead, Note, *Business Courts: Their Advantages, Implementation Strategies, and Indiana’s Pursuit of Its Own*, 50 IND. L. REV. 397 (2016); Sharon Lee & Justin Seamon, *Tennessee is Open for Business*, 51 TENN. BUS. J. 14 (2015); Joseph R. Slight III & Elizabeth A. Powers, *Delaware Courts Continue to Excel in Business Litigation with the Success of the Complex Commercial Litigation Division of the Superior Court*, 70 BUS. LAW. 1039 (2015); Andrew R. Jones, Note, *Toward a Stronger Economic Future for North Carolina: Precedent and the Opinions of the North Carolina Business Court*, 6 ELON L. REV. 189 (2014); Anne Tucker Nees, *Making a Case for Business Courts: A Survey of and Proposed Framework to Evaluate Business Courts*, 24 GA. STATE UNIV. L. REV. 477 (2007); ABA Ad Hoc Comm. on Bus. Courts, *Business Courts: Towards a More Efficient Judiciary*, 52 BUS. LAW. 947 (1997).

<sup>123</sup>For additional history on this subject, see THE CASE FOR SPECIALIZED BUSINESS COURTS IN TEXAS, *supra* note 7, at 10–13.

Panel on Complex Cases.<sup>124</sup> Under this proposal, parties would have been allowed to petition the Panel to transfer certain complex cases to particular judges deemed to have sufficient experience and availability.<sup>125</sup> The bill was generally well received, and passed the Senate on a 25-5 vote,<sup>126</sup> but died in the House in the closing days of the session.<sup>127</sup> A similar bill, that would have provided additional funding for cases deemed to be complex, rather than transferring them to a different judge, was proposed the next session, in 2009, but also failed.<sup>128</sup>

The business court project lay dormant until 2015, when it was revived and began to resemble the version of the court that was ultimately enacted.<sup>129</sup> In the 2015 legislative session, and then again in 2017, the House considered a bill that would have created the Texas Chancery Court and Court of Chancery Appeals.<sup>130</sup> The basic characteristics of the courts were similar to the current Business Court and Fifteenth Court of Appeals.<sup>131</sup> Namely, the jurisdiction of the Chancery Court would have had been limited to certain commercial disputes such as derivative actions, securities claims, and qualified transactions where the amount in controversy exceeded \$10 million.<sup>132</sup> Judges, both of the Chancery Court and Court of Chancery Appeals, were to be appointed by the Governor and confirmed by the Senate.<sup>133</sup> But there was insufficient interest in the project at the time, and neither bill made it out of the House.<sup>134</sup>

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<sup>124</sup>See Tex. S.B. 1204, 80th Leg., R.S. (2007).

<sup>125</sup>*Id.* § 8.02.

<sup>126</sup>S.J. of Tex., 80th Leg., R.S. 1609 (2007) (Committee Substitute Senate Bill 1204 on Third Reading).

<sup>127</sup>H.J. of Tex., 80th Leg., R.S. 4838 (2007) (CSSB 1204 Second Reading).

<sup>128</sup>See Tex. S.B. 992, 81st Leg., R.S. § 7.04 (2009).

<sup>129</sup>See H. Comm. on Bus. & Indus., Bill Analysis, Tex. C.S.H.B. 1603, 84th Leg., R.S. (2015) (explaining that bill would create a chancery court that has statewide jurisdiction over cases arising out of business transactions and other commercial matters).

<sup>130</sup>See Tex. H.B. 1603, 84th Leg., R.S. (2015); Tex. H.B. 2594, 85th Leg., R.S. (2017).

<sup>131</sup>See, e.g., Tex. H.B. 2595 §§ 24A.055(a), 24A.051(a)(1)–(10) (bills providing that judges to be appointed to the chancery court must meet certain qualifications, and that the chancery court has statewide jurisdiction over certain commercial matters).

<sup>132</sup>Tex. C.S.H.B. 1603, 84th Leg., R.S. § 24A.051(a) (2015) (providing for the court's jurisdiction).

<sup>133</sup>*Id.* §§ 24A.055(a), 24A.101(b).

<sup>134</sup>H.J. of Tex., 84th Leg., R.S. 2267 (2015) (final Legislative action on H.B. 1603); H.J. of Tex., 85th Leg., R.S. 970 (2017) (final Legislative action on H.B. 2594).



In the following two legislative sessions, the Legislature considered substantively similar bills, except that this time the proposed court was restyled as a “business district court” rather than a “chancery court.”<sup>135</sup> Although the committee hearings began to receive more attention, including testimony by major state organizations such as the Texas Business Law Foundation, Texas Trial Lawyers Association, and the American Board of Trial Advocates, neither bill ultimately progressed beyond the committee stage.<sup>136</sup>

Despite failure during the 2021 session, the business-court concept began to gather momentum. In September of 2022, the Texas Judicial Council announced a formal recommendation that the Texas Supreme Court adopt a business-court pilot program.<sup>137</sup> And during the legislative interim, the Texas House Committee on the Judiciary and Civil Jurisprudence—having been charged to study the business-court concept—also recommended that the Court adopt some initial form of a business court.<sup>138</sup> And so as the 2023 legislative session approached, businesses and lawmakers were beginning to coalesce around the notion of passing a business-court bill.

### *B. Passage of H.B. 19 and S.B. 1045*

The business court project received greater attention during the 88th Legislative Session than it ever had before. Showing coordinated support, the Governor, Lieutenant Governor, and Speaker all designated the business court a legislative priority.<sup>139</sup> This coordination extended to proponents, who

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<sup>135</sup> See Tex. H.B. 4149, 86th Leg., R.S. (2019); Tex. H.B. 1875, 87th Leg., R.S. (2021).

<sup>136</sup> See H. Comm. on Judiciary & Civ. Juris. Witness List, 87th Leg., R.S. (Apr. 6, 2021), <https://capitol.texas.gov/tlodocs/87R/witlistmtg/pdf/C3302021040608001.PDF>.

<sup>137</sup> See CIV. JUSTICE COMM., TEX. JUD. COUNCIL, REPORT AND RECOMMENDATIONS (2022), [https://www.txcourts.gov/media/1455006/2022\\_civil-justice-report-recommendations.pdf](https://www.txcourts.gov/media/1455006/2022_civil-justice-report-recommendations.pdf).

<sup>138</sup> See TEX. H.R., INTERIM COMM. CHARGES, 87th Leg., R.S., at 19 (2022), [https://house.texas.gov/\\_media/pdf/interim-charges-87th.pdf](https://house.texas.gov/_media/pdf/interim-charges-87th.pdf); H. COMM. ON JUDICIARY & CIV. JURIS., INTERIM REPORT, 88th Leg., R.S., at 29–30 (2022), [https://house.texas.gov/\\_media/pdf/committees/reports/87interim/Judiciary-&-Civil-Jurisprudence-Committee-Interim-Report-2022.pdf](https://house.texas.gov/_media/pdf/committees/reports/87interim/Judiciary-&-Civil-Jurisprudence-Committee-Interim-Report-2022.pdf).

<sup>139</sup> See Interview by Shelly Brisbin with John Moritz, *Texas’ ‘Big Three’ Lawmakers Want to Create a Specialty Business Court*, TEXAS STANDARD (Mar. 6, 2023, 2:20 PM), <https://www.texasstandard.org/stories/texas-top-lawmakers-want-specialty-business-court-legislature-2023/>; Press Release, Greg Abbott, Governor Abbot Delivers 2023 State of the State Address, OFFICE OF TEX. GOVERNOR (Feb. 16, 2023), <https://gov.texas.gov/news/post/governor-abbott-delivers-2023-state-of-the-state-address> (“To keep Texas the best state for business, our local communities need new economic development tools this session. And local businesses will flourish

organized dozens of business groups to testify in support of the bills, including, among others, major Texas employers such as Energy Transfer Partners, IBC Bank, CenterPoint Energy, and Occidental.<sup>140</sup> This level of engagement had not been present in prior efforts to pass a business court bill.<sup>141</sup>

Despite the increased support, the bill faced several obstacles during the legislative process. Most prominently, opponents argued that business court judges were constitutionally required to be elected instead of appointed.<sup>142</sup> Those arguments are introduced below, but it suffices to say that the subject was a point of severe contention. Amendments that would have replaced appointment with district-by-district election were offered in the House and the Senate, but both were ultimately defeated.<sup>143</sup>

The bill also experienced pushback from rural constituencies, that were unpersuaded that their less populous districts needed a specialized court for commercial disputes.<sup>144</sup> As initially introduced, the Business Court consisted

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even more if we reduce the gridlock in our courts by creating specialized courts with the expertise to deal with complex commercial litigation.”); Press Release, Dan Patrick, Lt. Gov. Dan Patrick Announces Top 30 Priorities for the 2023 Legis. Sess., OFFICE OF LIEUTENANT GOVERNOR OF TEX. (Feb. 13, 2023) <https://www.ltgov.texas.gov/2023/02/13/lt-gov-dan-patrick-announces-top-30-priorities-for-the-2023-legislative-session/>; Monica Madden, *Speaker Phelan Unveils Second Batch of Priorities Focused on Economy, Workforce*, KXAN (Mar. 1, 2023), <https://www.kxan.com/news/texas-politics/speaker-phelan-unveils-second-batch-of-priorities-focused-on-economy-workforce/>.

<sup>140</sup>Various chambers of commerce and business coalitions also testified, including the Greater Houston Partnership, San Antonio Chamber of Commerce, Texas Business Law Foundation, and Texas Association of Business. *See* Tex. H. Comm. on the Judiciary & Civ. Juris. Witness List, 88th Leg., R.S. H.B. 19 (Mar. 22, 2023), <https://capitol.texas.gov/tlodocs/88R/witlistmtg/html/C3302023032208001.htm>; Tex. S. Comm. on Juris. Witness List, 88th Leg., R.S. S.B. 1045 (Mar. 22, 2023) <https://capitol.texas.gov/tlodocs/88R/witlistmtg/pdf/C5502023032209001.PDF>.

<sup>141</sup>Compare *supra* note 140 with Tex. S. Comm. on State Affairs Witness List, 80th Leg., R.S. (March 26, 2007), <https://www.capitol.state.tx.us/tlodocs/80R/witlistmtg/html/C5702007032609001.HTM>, and Tex. H. Comm. on Bus. & Indus., Witness List, 84th Leg., R.S. (March 24, 2015), <https://www.capitol.state.tx.us/tlodocs/84R/witlistmtg/pdf/C0402015032411301.PDF>.

<sup>142</sup>*See infra* Part III.B.

<sup>143</sup>Both proposed amendments attracted significant attention, but in the end did not threaten the threshold needed to garner a majority. *See* H.J. of Tex., 88th Leg., R.S. 2573 (2023) (House Floor Amendment No. 8, failing 63–81); S.J. of Tex., 88th Leg., R.S. 1842 (2023) (Senate Floor Amendment No. 3, failing 11–19).

<sup>144</sup>*See* S.J. of Tex., 88th Leg., R. S. A-7 (2023) (Statement of Senator Hughes, explaining that bill was amended to postpone the activation of the rural divisions after receiving “input” from stakeholders).

of one district (the entire state) with no divisions.<sup>145</sup> In that form, business court cases could be filed or removed from anywhere in the state, including in more rural areas.<sup>146</sup> To address the concerns of these constituencies, the bill was amended to create the eleven-division system described above.<sup>147</sup> The compromise being that the divisions in more rural areas are presently inactive, and will not go into effect unless reauthorized by the Legislature in the 2025 session.<sup>148</sup>

Finally, the bill experienced considerable tweaking and haggling over the scope of the Business Court's jurisdiction. Although the final form of the bill is fairly narrowly tailored to capture sophisticated commercial litigation, concerns were expressed that the court's jurisdiction would subsume many ordinary legal claims.<sup>149</sup> The bill was amended on several occasions to address these concerns.<sup>150</sup> To ensure that certain common claims remained in district or county court, representatives on both sides of the aisle offered amendments that removed insurance claims from the Business Court's jurisdiction.<sup>151</sup> Similar amendments were offered and adopted with respect to personal injury claims, medical and legal malpractice claims, and claims relating to banking and loan institutions.<sup>152</sup> And the supplemental-jurisdiction provision was also modified, clarifying that a claim not falling within the Business Court's jurisdiction may proceed in district or county court concurrently with the business-court claim; this ensured that ordinary claims

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<sup>145</sup> See Tex. H.B. 19, 88th Leg., R.S. § 24A.004 (introduced Feb. 28, 2023). The different versions of the bill are available on the Legislature's website. See generally Tex. H.B. 19, 88th Leg., R.S. (2023), TEXAS LEGISLATURE ONLINE (last visited Feb. 16, 2024), <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=88R&Bill=HB19>.

<sup>146</sup> Tex. H.B. 19 (Feb. 28, 2023) at 7.

<sup>147</sup> *Supra* Part I.A; see also Tex. C.S.H.B. 19, 88th Leg., R.S. § 25A.003 (2023).

<sup>148</sup> TEX. GOV'T CODE ANN. § 25A.003(d), (g)–(i), (k)–(l).

<sup>149</sup> See S.J. of Tex., 88th Leg., R.S. A-2 to A-3 (2023) (“It’s my understanding that the intent of this bill is for the court, this court, to be one of limited original jurisdiction for business disputes only. Is it still your intent that these cases will be limited to large corporate transactions and will not cover typical consumer claims? . . . The vast majority of the claims brought by many of our constituents will not fall under the original jurisdiction of this court. . . . So, or in other words, the state district courts will continue to be the primary venue for our constituents ‘everyday disputes.’”) (statement of Sen. Carol Alvarado).

<sup>150</sup> See *infra* notes 151–153 and accompanying text.

<sup>151</sup> See H.J. of Tex., 88th Leg., R.S. 2569 (2023) (adopting Floor Amendment No. 2, offered by Rep. Julie Johnson); *id.* at 2569–70 (adopting Floor Amendment No. 3, offered by Rep. Dustin Burrows).

<sup>152</sup> See *id.* at 2567–69.

would not be forced to wait in line until the end of a business court proceeding.<sup>153</sup>

In the end, H.B. 19 received bipartisan, though not unanimous, support. Each bill passed the House and Senate with large margins, including votes from both parties, especially in the Senate.<sup>154</sup> And there are indications that the margins of support would have been even greater if not for the dispute regarding the appointment versus election of judges.<sup>155</sup> The Governor signed both bills on June 9, 2023.<sup>156</sup>

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Since the concept of a Texas business court was first proposed in 2007, the idea was raised and rejected many times.<sup>157</sup> Over that time, the demand for a specialized court to handle commercial disputes grew, and gradually evolved into a broad coalition of support from businesses and lawmakers.<sup>158</sup> That coalition finally pushed the bills over the finish line and saw them enacted into law.<sup>159</sup> But even before the Business Court and Fifteenth Court of Appeals began hearing cases, a challenge to their constitutionality was mounting.

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<sup>153</sup> See *id.* at 2568–69; *cf.* Tex. C.S.H.B. 19, 88th Leg., R.S. § 25A.004(b) (2023). These and other amendments were adopted during debate on the House Floor. To view these exchanges, see Hearing on Tex. H.B. 19 Before the Tex. H.R., 88th Leg., R.S. at 4:32:00 (May 1, 2023) (digital recording available through [https://tlchouse.granicus.com/MediaPlayer.php?view\\_id=80&clip\\_id=24739](https://tlchouse.granicus.com/MediaPlayer.php?view_id=80&clip_id=24739)).

<sup>154</sup> The House passed H.B. 19 90-51, with 83 Republicans and 7 Democrats voting in favor. H.J. of Tex., 88th Leg., R.S. 2637 (2023). The bill then passed the Senate 24-6, with 19 Republicans and 5 Democrats voting in favor, and the House concurred in the Senate’s version of the bill 86-53, with 83 Republicans and 3 Democrats voting in favor. S.J. of Tex., 88th Leg. R.S. 1842 (2023); H.J. of Tex., 88th Leg., R.S. 5337 (2023).

<sup>155</sup> See Hearing on Tex. H.B. 19 Before the Tex. H.R., 88th Leg., R.S. at 4:40:20, 5:00:30 (May 1, 2023) (statement of Rep. Joe Moody) (“I agree with the concept of higher qualifications for [business court] judges. . . . Here’s the thing: I agree with this concept. I think we should have business courts in Texas. But if we’re going to do them, we should do them correctly. And the correct way to do it is to amend our constitution [to allow for the appointment of business court judges].”) (digital recording available through [https://tlchouse.granicus.com/MediaPlayer.php?view\\_id=80&clip\\_id=24739](https://tlchouse.granicus.com/MediaPlayer.php?view_id=80&clip_id=24739)).

<sup>156</sup> H.J. of Tex., 88th Leg., R.S. 6490 (2023).

<sup>157</sup> See *infra* Part II.A.

<sup>158</sup> See *infra* notes 140–141, 154, and accompanying text.

<sup>159</sup> See *infra* note 154.

### III. PREVIEW OF CONSTITUTIONAL CHALLENGES

Beginning with the introduction of H.B. 19 and S.B. 1045, opponents of the bills have argued that the Business Court and the Fifteenth Court of Appeals violate the Texas Constitution.<sup>160</sup> They understand the Business Court to be unlawful because its judges are appointed instead of elected, and the Fifteenth Court to be unlawful because its jurisdiction is statewide, rather than be limited to a subset of the state.<sup>161</sup> These arguments were raised during the legislative process, including directly by Members and Senators, by witnesses, and in the media—and they will undoubtedly be raised in litigation before the Texas Supreme Court, which has exclusive and original jurisdiction over a challenge to the constitutionality of any part of either Act.<sup>162</sup> This Part introduces the details of those arguments, both in favor and against.

#### A. *Constitutional History*

The specific arguments for and against the Business Court and Fifteenth Court of Appeals are grounded on a 1891 amendment to the Texas Constitution.<sup>163</sup> Prior to that amendment, the Texas Supreme Court took a narrow view of the Legislature's authority to establish new courts.<sup>164</sup> As a consequence, the Texas Supreme Court refused to recognize multiple attempts by the Legislature to create new courts.<sup>165</sup> This, in turn, led to a concerning backlog of cases (typically in urban areas), especially with

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<sup>160</sup> See Jane Elliott, *Backlash to Business Court Bill Unites Litigators from Both Sides of the Docket*, THE TEXAS LAWBOOK (April 20, 2023), <https://texaslawbook.net/backlash-to-business-court-bill-unites-litigators-from-both-sides-of-the-docket/>.

<sup>161</sup> *Id.*

<sup>162</sup> Tex. H.B. 19 § 25.004(a).

<sup>163</sup> Tex. S.J. Res. 16, 22nd Leg., R.S. (1891) (“The Legislature may establish such other courts as it may deem necessary, and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto.”).

<sup>164</sup> Specifically, the Court held that, for inferior statutory courts, the Legislature could not grant such courts jurisdiction over matters that could already be heard by a constitutional court. *See, e.g.*, *Ginnocchio v. State*, 18 S.W. 82, 85–6 (Tex. App. 1891, no pet.); *Gibson v. Templeton*, 62 Tex. 555, 556 (1884); *see also* M.L. Cook, *Texas Courts of Exceptional Jurisdiction and Organization—Constitutionality—Small Claims Courts*, 9 TEX. L. REV. 388, 389–90 (1931) (describing pre-1891 caselaw on the Legislature authority to establish new courts).

<sup>165</sup> On multiple occasions, the Court of Criminal Appeals held that municipal courts (designed to hear cases concerning local criminal offenses) were unconstitutional. Cook, *supra* note 164, at 391 n.16–17 (collecting cases).

criminal prosecutions.<sup>166</sup> In this context, the Texas Constitution was amended to give the Legislature greater flexibility over the creation and amendment of courts, specifically adding the following language to Article V, Section 1:

The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law. *The Legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto.*<sup>167</sup>

The Texas Supreme Court came to understand the amendment as vesting broad power in the Legislature to create new judicial bodies:

Authority is expressly given to create and organize other courts, and to confer upon them such jurisdiction as may be deemed necessary; and, to enable the legislature to accomplish this, power is conferred to conform the jurisdiction of the district and other inferior courts to that of the courts created and organized by the legislature; that is, the courts created by the legislature might be invested with jurisdiction concurrent with the district or other inferior courts, or they might be empowered to exercise the judicial functions which, by the constitution, were conferred upon the district or other inferior courts, within a given territory, to the exclusion of the constitutional courts. In other words, the effect of the language is to place the subject at the complete disposal of the legislature so far as inferior courts are concerned.<sup>168</sup>

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<sup>166</sup>*Id.* at 391.

<sup>167</sup>TEX. CONST. art. V, § 1 (emphasis added). *See also* Harris County v. Stewart, 41 S.W. 650, 653–56 (Tex. 1897) (addressing the meaning of the 1891 amendment); Cook, *supra* note 164, at 391.

<sup>168</sup>*Stewart*, 41 S.W. at 655; *see also* Carter v. Missouri, K. & T. Ry. Co. of Texas, 157 S.W. 1169, 1172 (1913) (“It would be difficult to express more definitely the authority conferred in that clause of the Constitution-to ‘establish such other courts as it may deem necessary’-which places in the discretion of the Legislature the character and number of courts that may be created as well as

During the same constitutional amendment, the State adopted its present structure of appellate courts.<sup>169</sup> Prior to 1891, the State did not have an intermediate court of appeals.<sup>170</sup> The Texas Supreme Court (with assistance from the Commission of Appeals) heard most civil appeals, whereas the Court of Appeals heard criminal appeals and civil appeals from county courts.<sup>171</sup>

As with the trial courts, these appellate courts were substantially overburdened.<sup>172</sup> To alleviate these burdens, the 1891 constitution provided for court of appeals districts, and the Legislature thereafter enacted three courts of appeals, whose districts were headquartered in Austin, Galveston, and Fort Worth.<sup>173</sup> The Texas Supreme Court has interpreted the 1891 amendment as granting the Legislature discretion in designing specific components of the appellate courts' jurisdiction, such as whether counties may be included in multiple courts of appeals districts.<sup>174</sup> The Court has gone so far as to say that the Legislature has complete control over the courts' jurisdiction in civil cases: "[T]he appellate jurisdiction of the Courts of Civil Appeals in 'civil cases' is not unlimited or absolute, but is subject to control by the Legislature. This must be so because it is provided that such jurisdiction is under such restrictions and regulations as may be prescribed by law."<sup>175</sup>

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the manner in which the officers shall be chosen. The territory over which the jurisdiction of such court may be exercised and the subjects upon which its authority may be exerted are at the discretion of the Legislature.").

<sup>169</sup>Catherine K. Harris, *A Chronology of Appellate Courts in Texas*, 67 TEX. B.J. 668, 670 (2004).

<sup>170</sup>*Id.*

<sup>171</sup>TEX. CONST. art. V, §§ 1–6 (1876).

<sup>172</sup>See W.O. Murray, *Our Courts of Civil Appeals*, 25 TEX. B.J. 269, 269, 324–25 (1961) (providing an historical overview of the Texas courts of appeals); TEXANS FOR LAWSUIT REFORM FOUND., INTERMEDIATE APPELLATE COURTS IN TEXAS: A SYSTEM NEEDING STRUCTURAL REPAIR 3–17 (2020).

<sup>173</sup>Tex. Const. art. V, § 6 (1891); Act of Apr. 13, 1892, 22d Leg., 1st C.S., J.C.S.S.B. 32 & H.B. 11, ch. 15, §§ 1–4, 1892 Tex. Gen. Laws 25; TEXANS FOR LAWSUIT REFORM FOUND., *supra* note 172, at 3–17.

<sup>174</sup>See, e.g., *Miles v. Ford Motor Co.*, 914 S.W.2d 135, 137 n.3 (Tex. 1995) (*per curiam*) (recognizing the overlapping jurisdiction of several courts of appeals districts) ("Even though the Constitution provides that '[t]he state shall be divided into courts of appeals districts,' twenty-two counties are located in two appellate districts and one, Brazos County, is located in three.") (quoting TEX. CONST. art. V, § 6(a)) (emphasis in original).

<sup>175</sup>*Harbison v. McMurray*, 158 S.W.2d 284, 287 (Tex. 1942).

It is against this historical backdrop that the supporters and opponents of the Business Court and Fifteenth Court of Appeals make their arguments regarding the courts' constitutionality.

### *B. Challenge to the Business Court*

Starting with the Business Court, the primary objection raised is that the court, though nominally a statutory court, is *de facto* a constitutional district court, which judges must therefore be elected rather than appointed.<sup>176</sup> As an initial matter, it is generally uncontroversial that a judge of a constitutional district court must be elected and a judge of an inferior, statutory court may be appointed.<sup>177</sup> The issue, then, is whether a business court judge is a district judge for purposes of the constitution.

According to H.B. 19's proponents,<sup>178</sup> the Business Court is an inferior court, not a constitutional district court. The bill itself describes the court as "a statutory court created under Section 1, Article V, Texas Constitution."<sup>179</sup> And the court's jurisdiction is inferior to a district court's general jurisdiction

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<sup>176</sup>Opponents also object on the basis that the Business Court is not divided into geographic districts, as is arguably required for district courts. *See* TEX. CONST. art. V, § 7(a) ("The State shall be divided into judicial districts, with each district having one or more Judges as may be provided by law or by this Constitution."). This objection is essentially the same as the argument raised with respect to the Fifteenth Court of Appeals and is summarized in the section addressing that court. *Infra* Part III.C.

<sup>177</sup>*See, e.g.,* *Jordan v. Crudgington*, 231 S.W.2d 641, 645 (Tex. 1950) (approving the creation of the statutory Court of Domestic Relations, whose judges were appointed by the Governor); Tex. Sen. Journal at A-11, 88th Leg., Reg. Sess. (May 12, 2023) (Bill sponsor Sen. Bryan Hughes agreeing with Sen. Royce West, who opposed the bill, that Texas district judges must be elected).

<sup>178</sup>For a comparison of positions during the legislative session regarding the constitutionality of the Business Court, see Memorandum from Texans for Lawsuit Reform (Mar. 2, 2023) ("Legislative Authority to Create Specialized Courts"); Memorandum from Texas Trial Lawyers Association (Mar. 22, 2023) ("S.B.27/HB19 – *Jordan v. Crudgington* – It Doesn't Mean What You Think it Means").

<sup>179</sup>TEX. GOV. CODE § 25A.002; *see also* TEX. CONST. art. V, § 1 ("The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law. The Legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto."). This provision did not appear in the initial version of the bill, and was specifically added to address the constitutional issue. *Compare* H.B. 19 (Introduced), *with* H.B. 19 at § 1 p.4 ll. 24–25 (Committee Substitute).



in the sense that it is limited to the narrow subset of complicated commercial disputes described in the bill.<sup>180</sup>

This distinction is arguably in line with the seminal case on the subject, *Jordan v. Crudgington*, where the Texas Supreme Court explained that a statutory court does not become a district court “merely because it exercises some of the jurisdiction of district courts.”<sup>181</sup> And with statutory courts, the Court held, there are no restrictions with respect to how judges may obtain office: “There is no provision as to the mode of selecting judges for courts of that nature. The absence of any such provision evidences an intent to leave the power of appointment within the discretion of the Legislature.”<sup>182</sup>

But the bill’s opponents respond that, though a statutory court in name, the Business Court is substantively a district court.<sup>183</sup> Although the Texas

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<sup>180</sup> See Part I.C. *supra*; cf. TEX. CONST. art. V, § 8 (providing that district courts have “original jurisdiction of all actions, proceedings, and remedies” except as provided for by law). The bill does not grant exclusive jurisdiction to the Business Court in any respect. See *supra* note 53 and accompanying text (explaining that Business Court jurisdiction is concurrent with the district courts). This would likely have raised additional constitutional issues, seeing as the State’s highest courts have consistently understood Article V, Section 1 as prohibiting the Legislature from depriving a district court of the jurisdiction the constitution grants them. See *Kelly v. State*, 724 S.W.2d 42, 46 (Tex. Crim. App. 1987) (“The amendment [to the Texas constitution] not only authorizes the Legislature to create ‘other such courts,’ it may grant to newly created district courts the constitutional jurisdiction set out in Section 8 of Article I, thus causing them to be equals among all of the constitutional district courts. However, the amendment does not give the Legislature the authority to deprive any other district court of, or to detract from, the jurisdiction specifically granted them by the constitution.”); *Lord v. Clayton*, 352 S.W.2d 718, 721 (Tex. 1961) (“It is enough to say that we held invalid a provision of an act creating a Criminal District Court which undertook to give the court jurisdiction of divorce cases to the exclusion of other constitutional district courts. We specifically held that while the Legislature could create special courts under authority of an 1891 amendment to Section 1, Article 5 of the Constitution, and could confer on such courts concurrent jurisdiction over subjects mentioned in Section 8 of Article 5 of the Constitution, it could not deprive regular district courts of the jurisdiction conferred on them by the Constitution.”) (citing *Reasonover v. Reasonover*, 58 S.W.2d 817 (Tex. 1933)).

<sup>181</sup> *Jordan*, 231 S.W.3d at 645.

<sup>182</sup> *Id.* at 646; see also *id.* (“The authority given by the amendment [of the Texas Constitution] under review to the Legislature to prescribe the organization of courts created by it certainly is authority to provide it with a judge.”).

<sup>183</sup> See, e.g., Hearing of the Tex. H. Comm. on the Judiciary and Civil Jurisprudence at 1:18:30 (Mar. 22, 2023) (statement of Rep. Julie Johnson) (“This is one of the fundamental problems of this bill. We’re calling it a district [court], but . . . we’re going to call it something else to meet some perceived constitutional exception to Texas’s longstanding principle of electing judges.”); *id.* at 1:16:00 (statement of witness Brian Blevins) (“Just the fact that you call it a business court doesn’t make it a specialty court. . . . [L]ook at how many times this bill grants the powers and the ability

Supreme Court in *Jordan* acknowledged that statutory courts are not subject to the same constitutional requirements as district courts, it also appeared to hold that the line between statutory and district courts is functional, not nominal.<sup>184</sup> And the business court bears several functional similarities to a district court; it has the same powers as district courts, business court judges have the same powers, privileges, immunities, and salary as a district court judge (and are subject to the same standards of removal and disqualification), the business court clerk has the same duties as a district court clerk, and the rules for the Business Court large track the rules that apply in district court.<sup>185</sup> *Jordan* did not identify specific guidelines for whether a statutory court is functionally a district court, but these similarities lend themselves to such an argument with respect to the Business Court.<sup>186</sup>

### C. Challenge to the Fifteenth Court of Appeals

Turning to the designated court of appeals for the Business Court, the primary argument levied against the Fifteenth Court of Appeals is that its jurisdiction is statewide, rather than being limited to a subset of the state. Article V, Section 6 of the constitution addresses the organization of intermediate courts of appeals, and arguably contemplates that such courts must be territorially subdivided:

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and the jurisdiction of a district court. And so therefore, it is a constitutional district court.”); Tex. Sen. Journal at A-20 to A-21, 88th Leg., Reg. Sess. (May 12, 2023) (statement of Sen. Royce West) (arguing that the Business Court is unconstitutional on the basis that it is *de facto* a district court); Memorandum from Professor Stephen Vladeck at 4–6 (Apr. 5, 2023) (Constitutionality of Second Committee Substitute to HB19/SB27) (submitted in conjunction with testimony given in opposition to H.B. 19) [hereinafter Vladeck Memorandum].

<sup>184</sup> *Jordan*, 231 S.W.3d at 645 (explaining that the constitutional requirements for district courts apply to courts that “in fact, though not in name, are district courts”).

<sup>185</sup> TEX. GOV. CODE §§ 25A.004(a), 25A.005, 25A.011, 25A.012, 25A.017(a)(2), 25A.015(f)–(g).

<sup>186</sup> See *Jordan*, 231 S.W.3d at 645–47 (not specifically analyzing the question of when a statutory court is *de facto* a district court). At least one commentator has argued that the Business Court’s organization—one district divided into eleven divisions—is further evidence that the court is not inferior to a district court (which, at most, have jurisdiction over a particular county). See Vladeck Memorandum, *supra* note 183, at 3, 4–5. It is true that most statutory courts tend to be limited to a subset of cases within a particular geographic area, most typically a county. See *Kelly v. State*, 724 S.W.2d 42, 46 (Tex. Crim. App. 1987) (in the context of holding that the Dallas County Magistrates’ Act is constitutional, collecting cases regarding statutory courts such as the Probate Court of Harris County or the Domestic Relations Court of Potter County). But *Jordan* did not consider the geographic scope of the statutory court in reaching its holding, 231 S.W.3d at 647, and subsequent cases do not appear to have drawn a territorial distinction.

The state *shall be divided into courts of appeals districts*, with each district having a Chief Justice, two or more other Justices, and such other officials as may be provided by law. The Justices shall have the qualifications prescribed for Justices of the Supreme Court. . . . Said Court of Appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts, which shall extend to all cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law.<sup>187</sup>

Since their creation in 1891, the courts of appeals have been divided into geographical districts, and have had jurisdiction over appeals from district and county courts within their district.<sup>188</sup> S.B. 1045 assigns a district to the Fifteenth Court of Appeals, but unlike other appellate courts, its district includes all the counties in the state.<sup>189</sup> As such, after the first three justices are appointed, all future justices are elected by statewide vote.<sup>190</sup>

Opponents of S.B. 1045 read Article V, Section 6 to mean that a court of appeals must be subdivided.<sup>191</sup> For them, the requirement that the state be “divided” into districts and the provision that the jurisdiction extends to the “limits” of each district imply that a district may not include the entire state.<sup>192</sup> But proponents of the court take a broader view of the Legislature’s authority to craft courts of appeals districts.<sup>193</sup> For them, the 1891 amendments to the constitution stress the Legislature’s discretion to create

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<sup>187</sup>TEX. CONST. art. V, § 6(a) (emphasis added).

<sup>188</sup>Murray, *supra* note 172 at, 270, 324; INTERMEDIATE APPELLATE COURTS IN TEXAS, *supra* note 172, at 3; *see also* Clarence Guittard, *The Expanded Texas Courts of Appeals*, 14 TEX. TECH. L. REV. 549, 550–54 (1983) (providing historical background on changes to the Texas Constitution that granted jurisdiction to appellate courts over criminal appeals).

<sup>189</sup>TEX. GOV. CODE § 22.201(p).

<sup>190</sup>*Supra* notes 111–112 and accompanying text.

<sup>191</sup>Vladeck Memorandum, *supra* note 183, at 1–2.

<sup>192</sup>*See* Hearing of the Tex. Sen. Comm. on Jurisprudence at 29:00 (Mar. 22, 2023) (statement of witness Jim Perdue) (“The constitution lays out the very concept of division of the appellate courts. But fundamentally, the constitution of the state of Texas provides for electing our judges.”); Vladeck Memorandum, *supra* note 183, at 2, 6.

<sup>193</sup>*See* Brister, *supra* note 12 (“Our Constitution was amended 132 years ago for this very purpose, giving the Legislature authority to create new courts of appeals, modify their districts, and expand or restrict their jurisdiction.”).

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new courts, and to specify those courts' scope and jurisdiction, including creating a district that composes all the counties in the state.<sup>194</sup>

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It remains to be seen whether the Texas Supreme Court will uphold the Business Court and Fifteenth Court of Appeals, or if it will enjoin those courts before they can begin hearing cases in earnest. (Although interestingly, at least one Justice has previously opined that a substantially similar version of the Business Court would be constitutional.)<sup>195</sup> Either way, the future of Texas's judicial project will depend on the resolution of the constitutional and historical questions introduced above.

## CONCLUSION

The Business Court is the product of nearly twenty years of unsuccessful attempts to create a specialty commercial court in Texas. The 88th Legislature succeeded where past legislatures failed in large part due to increased political attention by Texas lawmakers and largescale, coordinated support by industry groups. The result is a new specialized court that aims to bolster Texas's pro-business credentials, seeking to challenge other states' supremacy in adjudicating high-dollar disputes, and promising an efficient and predictable tribunal to hear cases from the many groups that do business in the state. The Legislature has attempted to fulfill that promise by offering judges with heightened business experience, a trial court with a docket of cases limited to certain sophisticated commercial cases, and a statewide court of appeals to hear appeals from Business Court decisions.

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<sup>194</sup>See Hearing of the Tex. Sen. Comm. on Jurisprudence at 10:52 (Mar. 22, 2023) (statement of S.B. 1045 author Sen. Joan Huffman) ("I don't think the Legislature has ever read Section 6 as requiring the counties to be divided evenly."); Brister, *supra* note 12 ("The Constitution requires that state government "be divided into three distinct departments," but it does not require that appellate districts be distinct, and for nearly 60 years two courts of appeals in Houston have had identical districts. Given the Legislature's broad power to organize new courts and the state's long practice of overlapping appellate districts, nothing appears to prevent the Legislature from creating a district containing all 254 counties.").

<sup>195</sup>Before he became a member of the Texas Supreme Court, Justice Evan Young testified in favor of the 2021 iteration of the business court bill, House Bill 1875. See Tex. H.B. 1875, 87th Leg., R.S. (2021). Regarding the constitutionality of that bill, he said: "I'm confident that it's constitutional. The Supreme Court of Texas resolved that you know over half a century ago. The first provision of the judicial article of the Constitution allows the legislature to create new kinds of Courts, and it expressly States the kinds of courts that do require election." Hearing of the Tex. H. Comm. on the Judiciary and Civil Jurisprudence at 4:28:30 (Apr. 6, 2021).

The new court faces many questions. Not least of which is whether the Business Court (and its cousin, the Fifteenth Court of Appeals) will go into effect at all. Litigation concerning the constitutionality of those courts should begin as soon as the courts open their doors, and will turn on the meaning of the 1891 amendment to the Texas Constitution and the extent of the Legislature's power to create new court systems. And even if the courts are upheld, many uncertainties remain, such as how much demand the court will experience, whether cases really will be decided quicker and more predictably, and whether the court can attract top-quality judges who are up to the task.

As the Business Court attempts to cement its status as a critical judicial body and develops its own body of jurisprudence, this Article hopes to introduce the fundamentals. Bearing in mind the basic components of the court's procedure and history, the practitioner will be well placed to appear before the State of Texas's brand new court.