

Temporary Relief Requested

No. _____

**In the
SUPREME COURT OF TEXAS**

**In re Reginald Willis and
Allied Aviation Fueling Company of Houston, Inc.**

Relators.

**Original Proceeding from the
270th Judicial District Court of Harris County, Texas**
Honorable Dedra Davis, Presiding Judge

PETITION FOR WRIT OF MANDAMUS

Stuart B. Brown, Jr.

bbrown@jw.com

State Bar No. 24006914

Brett Kutnick

bkutnick@jw.com

State Bar No. 00796913

Justin V. Lee

jlee@jw.com

State Bar No. 24097982

JACKSON WALKER LLP

2323 Ross Avenue, Suite 600

Dallas, Texas 75201

Tel: 214-953-6000

Fax: 214-953-5822

Joseph A. Fischer, III

tfischer@jw.com

State Bar No. 0789292

JACKSON WALKER LLP

1401 McKinney Street

Suite 1900

Houston, Texas 77010

Tel: 713-752-4200

Fax: 713-308-4114

Rusty Hardin

rhardin@rustyhardin.com

State Bar No. 08972800

Joe Roden

jroden@rustyhardin.com

State Bar No. 00794549

Ryan Higgins

rhiggins@rustyhardin.com

State Bar No. 24007362

Daniel R. Dutko

ddutko@rustyhardin.com

State Bar No. 24054206

RUSTY HARDIN & ASSOCIATES LLP

5 Houston Center

1401 McKinney Street, Suite 2250

Houston, Texas 77010

Tel: 713-652-9000

Fax: 713-652-9800

Attorneys for Relators

IDENTITY OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. 52.3(a), the following is a complete list of all parties and the names and addresses of all counsel:

1. Relators (Defendants in the trial court):

Reginald Willis (“Willis”)
Allied Aviation Fueling Company of Houston, Inc. (“Allied”)

2. Counsel for Relators:

Rusty Hardin (rhardin@rustyhardin.com)
Ryan Higgins (rhiggins@rustyhardin.com)
Joe Roden (jroden@rustyhardin.com)
Daniel R. Dutko (ddutko@rustyhardin.com)
Leah Graham (lgraham@rustyhardin.com)
Victoria Reilly (treilly@rustyhardin.com)
Rusty Hardin & Associates LLP
5 Houston Center
1401 McKinney Street, Suite 2250
Houston, Texas 77010

Stuart B. Brown, Jr. (bbrown@jw.com)
Brett Kutnick (bkutnick@jw.com)
Justin V. Lee (jlee@jw.com)
Jackson Walker LLP
2323 Ross Avenue, Suite 600
Dallas, Texas 75201

Joseph A. Fischer, III (tfischer@jw.com)
Jackson Walker LLP
1401 McKinney Street, Suite 1900
Houston, Texas 77010

3. Respondent:

The Honorable Dedra Davis (c/o Daiquiri_Roy@Justex.net)
270th Judicial District Court
Harris County Civil Courthouse
201 Caroline, 13th Floor
Houston, Texas 77002

4. Real Parties in Interest (Plaintiffs in the trial court):

Cecilia Cruz, individually and as Representative of Ulysses D. Cruz and
XXX Cruz, a minor
Angelo G. Cruz

5. Counsel for Real Parties in Interest:

Randall O. Sorrels (randy@sorrelslaw.com)
Alexandra Farias-Sorrels (alex@sorrelslaw.com)
Sorrels Law
800 Commerce St.
Houston, Texas 77002

TABLE OF CONTENTS

Identity of Parties and Counsel	2
Record References	6
Index of Authorities	7
Statement of the Case.....	10
Statement of Jurisdiction.....	12
Issues Presented	12
Introduction	14
Statement of Facts	14
Argument.....	17
I. The trial court abused its discretion by setting this case for a virtual jury trial over Defendants’ objections.....	17
A. This Court’s Thirty-Eighth Emergency Order Regarding the Covid-19 State of Disaster does not authorize a remote jury trial without the consent of all parties.....	18
B. A virtual jury trial violates Defendants’ constitutional rights to the due course and due process of law.	22
C. A virtual jury trial will deprive Defendants of their constitutional rights to the equal protection of the law.	28
II. Defendants lack an adequate remedy by appeal.....	30
Prayer	31
Rule 52.3(j) Certification	32
Certificate of Compliance	32
Certificate of Service	33
Verification of Appendix	34

Appendix36

 May 20, 2021 email from trial court coordinator of the 270th
 Judicial District Court setting the case for a virtual jury trial
 (R.519) tab A

 Certified transcript from June 4, 2021 hearing on Defendants’
 Objections to a Virtual Jury Trial (R.754-86) tab B

 Thirty-Eighth Emergency Order Regarding the Covid-19
 State of Disaster (R.748-53) tab C

 TEX. CONST. art. I, § 15 tab D

 TEX. CONST. art. V, § 10 tab E

 TEX. CONST. art. I, § 19 tab F

 TEX. CONST. art. I, § 3 tab G

 TEX. CONST. art. II, § 1 tab H

 U.S. CONST. amend. VII tab I

 U.S. CONST. amend. XIV tab J

RECORD REFERENCES

“R.” refers to Relators’ Record in Support of Petition for Writ of Mandamus. A citation to the mandamus record is followed by the PDF bates-labeled page number(s) on which the information appears.* (For example, a citation to R.91 refers to page 91 of the mandamus record.)

“App.” refers to items included in the Appendix attached to the Petition for Writ of Mandamus. A citation to the Appendix is followed by the electronically bookmarked tab letter where the item appears. (For example, a citation to R.519 [App. A] refers to page 519 of the mandamus record, which also can be found as tab A of the Appendix.)

* The PDF bates-labeled page number can be found on the bottom right corner of each page. Those bates labels correspond with the electronic page number found in the toolbar of Adobe Acrobat.

INDEX OF AUTHORITIES

Cases

<i>Anthony v. State</i> , 209 S.W.3d 296 (Tex. App.—Texarkana 2006, no pet.).....	25
<i>Bell Helicopter Textron, Inc. v. Abbott</i> , 863 S.W.2d 139 (Tex. App.—Texarkana 1993, writ denied)	17
<i>Bennett v. Reynolds</i> , 315 S.W.3d 867 (Tex. 2010)	23
<i>City of Houston v. Downstream Envtl., L.L.C.</i> , 444 S.W.3d 24 (Tex. App.—Houston [1st Dist.] 2014, pet. denied)	28
<i>Coy v. Iowa</i> , 487 U.S. 1012 (1988).....	23, 24
<i>Davidson v. Great Nat’l Life Ins. Co.</i> , 737 S.W.2d 312 (Tex. 1987)	23, 24
<i>Downer v. Aquamarine Operators, Inc.</i> , 701 S.W.2d 238 (Tex. 1985)	17
<i>Ex Parte Taylor</i> , 957 S.W.2d 43 (Tex. Crim. App. 1997)	23
<i>Gen. Motors Corp. v. Gayle</i> , 951 S.W.2d 469 (Tex. 1997) (orig. proceeding)	12, 17
<i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970).....	23
<i>Granger v. Folk</i> , 931 S.W.2d 390 (Tex. App.—Beaumont 1996, orig. proceeding).....	17
<i>Houston Belt & Terminal Ry. Co. v. City of Houston</i> , 487 S.W.3d 154 (Tex. 2016)	21
<i>In re Dawson</i> , 550 S.W.3d 625 (Tex. 2018)	17

<i>In re Murchison</i> , 349 U.S. 133 (1955).....	25
<i>In re Prudential Ins. Co. of Am.</i> , 148 S.W.3d 124 (Tex. 2004)	17, 30
<i>In re Webb-Goetz</i> , No. 01-19-00139-CV, 2019 WL 3293697 (Tex. App.—Houston [1st Dist.] July 23, 2019, orig. proceeding)	16
<i>Maryland v. Craig</i> , 497 U.S. 836 (1990).....	24
<i>S.C. Dep’t of Soc. Servs. v. Wilson</i> , 574 S.E.2d 730 (S.C. 2001)	24-25
<i>Spradlin v. Jim Walter Homes, Inc.</i> , 34 S.W.3d 578 (Tex. 2000).....	21
<i>State v. Rosseau</i> , 396 S.W.3d 550 (Tex. Crim. App. 2013)	28
<i>White v. White</i> , 196 S.W. 508 (Tex. 1917).....	12
 Statutes, Rules, and Constitutional Provisions	
FED. R. CIV. P. 43, 1996 Notes of Advisory Committee ¶ 3	23
TEX. CIV. PRAC. & REM. CODE § 30.012.....	18, 24
TEX. CONST. art. I, § 3.....	28
TEX. CONST. art. I, § 15.....	12, 17
TEX. CONST. art. I, § 19.....	22
TEX. CONST. art V, § 10	17
TEX. GOV’T CODE § 22.221.....	12
TEX. R. APP. P. 52.3(k)(1)(A)	16

TEX. R. CIV. P. 18c.....	18
TEX. R. CIV. P. 226a.....	18
TEX. R. CIV. P. 267.....	18
TEX. R. CIV. P. 271.....	18
TEX. R. CIV. P. 282.....	18
TEX. R. CIV. P. 284.....	18
TEX. R. CIV. P. 286.....	18
TEX. R. CIV. P. 295.....	18
TEX. R. EVID. 201(b)(2)	28
U.S. CONST. amend. VII	17
U.S. CONST. amend. XIV, § 1	22, 28

Other Authorities

ANTONIN SCALIA & BRYAN A. GARNER, <i>READING LAW: THE INTERPRETATION OF LEGAL TEXTS</i> 435 (2012).....	21
Jennifer Lapinski, Robert Hirschhorn, & Lisa Blue, <i>Zoom Jury Trials: The Idea Vastly Exceeds the Technology</i> , NEWS.LAW (Aug. 25, 2020), http://news.law/zoom-jury-trials-the-idea-vastly-exceeds-the-technology/ (last visited June 3, 2021).....	27

STATEMENT OF THE CASE

Nature of the Underlying Proceeding: This petition for writ of mandamus arises from the trial court’s ruling setting this case for a virtual jury trial over the objections of Reginald Willis (“Willis”) and Allied Aviation Company of Houston, Inc. (“Allied”) (collectively, “Defendants”). (See R.519, 562-66, 769)

The underlying case is a personal injury action brought by Cecilia Cruz, individually and as representative of Ulysses D. Cruz and XXX Cruz (a minor), and Angelo G. Cruz (collectively, “Plaintiffs”), seeking over \$45 million in economic damages, plus unspecified non-economic damages and exemplary damages from Willis and Allied. (See R.58-69, 352-53)

Respondent: The Honorable Dedra Davis, 270th Judicial District Court of Harris County, Texas

Respondent’s Action from which Relators Seek Relief: On May 20, 2021, the First Court of Appeals conditionally granted the petition for writ of mandamus filed by Willis and Allied in No. 01-21-00208-CV and ordered the trial court to (1) vacate its written order and oral rulings denying Defendants’ request for a jury trial, and (2) set this case for a trial by jury. See *In re Willis*, No. 01-21-00208-CV, 2021 WL 2006317 (Tex. App.—Houston [1st Dist.] May 20, 2021, orig. proceeding) (mem. op.). Shortly thereafter, the trial court vacated its previous written order and oral rulings denying the request for a jury trial. (R.518) In addition, the trial court set the case for a “Full Virtual Jury Trial” on the June 7, 2021 two-week jury docket and assigned the case for trial on June 9, 2021. (R.519 [App. A])

Although Defendants are ready, willing, and able to try this case in person in front of a live jury on June 9 without a continuance (see R.255, 257), Defendants objected to trying this case virtually (R.562-66). At a June 4, 2021 hearing (R.717), the trial court acknowledged it has conducted “zero jury trials through Zoom.” (R.770 [App. B]) Nevertheless, the trial court overruled Defendants’ objections to a virtual

jury trial by announcing it was proceeding with “the virtual trial.” (R.769 [App. B])

Course of Proceedings in the Court of Appeals:

On June 4, 2021, Realtors/Defendants filed a Petition for Writ of Mandamus, as well as a Motion for Emergency Temporary Relief, in the Court of Appeals for the First District of Texas at Houston, challenging the trial court’s decision to proceed with a virtual jury trial over Defendants’ objections.

Court of Appeals:

First Court of Appeals in Houston (Justices Kelly, Landau, Hightower, participating)

Court of Appeals’ Disposition:

On June 7, 2021, the court of appeals summarily denied the petition for writ of mandamus in a memorandum opinion and dismissed any pending motions as moot.

STATEMENT OF JURISDICTION

The Court has jurisdiction to issue a writ of mandamus pursuant to TEX. GOV'T CODE § 22.221.

ISSUES PRESENTED

The Texas Constitution provides that “[t]he right of trial by jury shall remain inviolate.” TEX. CONST. art. I, § 15. And the Texas Supreme Court has long recognized that “[t]he right to jury trial is one of our most precious rights, holding ‘a sacred place in English and American history.’” *Gen. Motors Corp. v. Gayle*, 951 S.W.2d 469, 476 (Tex. 1997) (orig. proceeding) (quoting *White v. White*, 196 S.W. 508, 512 (Tex. 1917)). Since the adoption of the Texas Constitution in 1876, jury trials have traditionally and routinely been conducted in person.

In this case, the trial court has denied Willis and Allied their sacred constitutional rights by setting this case for a “full virtual jury trial” without the consent of the parties and depriving Defendants of their ability to effectively select a jury panel, present evidence, and confront and cross-examine witnesses in person before a live jury that can fully participate in the jury process in a courtroom—not virtually on a small laptop or iPad while at home in front of a television or in bed with external distractions. The trial court’s ruling presents the following issues:

1. Did the trial court clearly abuse its discretion in setting this case for a “full virtual jury trial” over the objections of Willis and Allied when:

- a. this Court's Thirty-Eighth Emergency Order Regarding the Covid-19 State of Disaster ("Thirty-Eighth Emergency Order") nowhere authorizes remote jury trials without the consent of all parties;
- b. a virtual jury trial will deprive Defendants of their constitutional rights to the due course of law guaranteed by Article I, § 19, of the Texas Constitution and the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution;
- c. a virtual jury trial will deprive Defendants of their constitutional rights to the equal protection of the law guaranteed by Article I, § 3, of the Texas Constitution and the Fourteenth Amendment to the United States Constitution;
- d. a virtual jury trial will deprive Defendants of their constitutional rights to the "trial by jury" guaranteed by the Texas Constitution [*unbriefed*];
- e. a virtual jury trial will violate the Texas statutes governing juror qualification/disqualification, as well as the Thirty-Eighth Emergency Order, by excluding potential and selected jurors without access to the technology necessary to participate remotely [*unbriefed*]; and
- f. the trial court lacks authority to permit remote witness testimony by electronic means at a virtual jury trial without the agreement of the parties [*unbriefed*]?

2. Do Willis and Allied lack an adequate remedy by appeal from the trial court's decision to proceed with a virtual jury trial over Defendants' objections?

INTRODUCTION

Numerous courts in Harris County (and across Texas) are conducting jury trials live and in person. Defendants are ready, willing, and able to try this case in person on June 9, 2021, without a continuance. But the trial court below refuses to allow Defendants to do so. The trial court acknowledged it has conducted “zero [virtual] jury trials through Zoom.” (R.770) Nevertheless, it made the unilateral, arbitrary, and unauthorized decision to use this case—in which Plaintiffs seek over \$100 million in damages—as its proverbial guinea pig by scheduling a “Full Virtual Jury Trial” (over Defendants’ objections) without any established rules, procedures, or process. Nothing supports the trial court’s actions or gives the trial court authority or discretion to dispense with a live in-person jury trial.

Mandamus relief is warranted and necessary here to compel the trial court to set this case for an in-person jury trial.

STATEMENT OF FACTS

In November 2019, Plaintiffs sued Allied and Willis for “serious and debilitating injuries” allegedly sustained by Ulysses Cruz when he was struck by van driven by Willis (and owned by Allied) at the Houston Intercontinental Airport. (*See* R.7-16) This is not a routine personal injury lawsuit. Plaintiffs seek over \$45 million in economic damages (R.352-53), plus unspecified non-economic and exemplary damages (R.65-66)—a sum that could exceed nine figures. Further, Plaintiffs

identify 64 fact witnesses; they have retained four experts; and they have disclosed over 175 non-retained experts who may testify. (R.353-93) Not surprisingly, there are numerous disputed facts to be tried in this high-stakes lawsuit. (R.266-67)

The trial court denied Defendants’ jury demand. Although Plaintiffs’ pleadings and discovery consistently evidenced their desire for a jury trial (*see* R.12-15, 41-43, 65-68, 274-348, 352), Plaintiffs had not paid the jury fee (R.265). Accordingly, on April 6, 2021—more than 30 days before the May 17, 2021 trial setting (R.56)—Defendants timely filed their own jury demand and paid the jury fee. (R.91)

The trial court, however, immediately (and *sua sponte*) denied Defendants’ jury demand as untimely less than five hours later in a personal telephone call to a paralegal for Defendants. (R.441-42; *see* R.264-65, 269-71) After additional briefing (*see* R.96-106, 244-458, 459-60), the trial court again ruled it was “not going to allow the jury trial” (R.487).

The court of appeals orders the trial court to set the case for a jury trial, and the trial court sets the case for a “Full Virtual Jury Trial” over Defendants’ objections. On April 29, 2021, Defendants filed a mandamus petition (No. 01-21-00208-CV) in the First Court of Appeals challenging the trial court’s denial of their jury request. (*See* R.505) The next week, the trial court signed an order again denying Defendants’ jury trial request. (R.500-01) In its order, the trial court

stated that its jury trial docket was “significantly backlogged” and that “resetting” the case for a jury trial “would delay the trial most likely by years.” (R.501) On May 20, 2021, the court of appeals conditionally granted Defendants’ mandamus petition and ordered the trial court to set the case for a jury trial. (R.502-17)

The trial court, in turn, immediately set this case for trial on June 9, 2021. (R.519) The trial court did not, however, set the case for an in-person jury trial (*see id.*), as the Texas Rules of Civil Procedure and Texas Constitution contemplate and as numerous courts in Harris County have done (*see, e.g.*, R.571-716, 720-27). Rather, without a request by or the consent of the parties, the trial court unilaterally determined the case will have a “Full Virtual Jury Trial.” (R.519 [App. A]) In so ordering, the trial court did not provide the parties with any rules, procedures, or process it has adopted or intends to follow in conducting a virtual trial. (*See id.*)

Defendants objected to a virtual jury trial. (R.562-66) At a June 4, 2021 hearing (R.717), the trial court acknowledged it has “done zero [virtual] jury trials through Zoom.” (R.770 [App. B]) Nevertheless, the trial court overruled Defendants’ objections by announcing it is going to proceed with “the virtual trial.” (R.769 [App. B])¹

¹ Mandamus relief may be based on an oral order that is “clear, specific, and enforceable” and “adequately shown by the record.” *In re Webb-Goetz*, No. 01-19-00139-CV, 2019 WL 3293697, at *3 (Tex. App.—Houston [1st Dist.] July 23, 2019, orig. proceeding) (mem. op.); *see* TEX. R. APP. P. 52.3(k)(1)(A).

ARGUMENT

This Court has long recognized that “[t]he right to jury trial is one of our most precious rights, holding ‘a sacred place in English and American history.’” *Gayle*, 951 S.W.2d at 476. It is thus “fundamental to our system of justice” to “permit all persons to have a trial by jury of any facts affecting their property rights.” *Granger v. Folk*, 931 S.W.2d 390, 393 (Tex. App.—Beaumont 1996, orig. proceeding).

Both the United States Constitution and Texas Constitution guarantee an individual’s right to a jury trial. *See* U.S. CONST. amend. VII [App. I]; TEX. CONST. art. I, § 15 [App. D]; TEX. CONST. art V, § 10 [App. E]. In light of these constitutional guarantees, “[r]estrictions placed on the right to a jury trial will be subjected to utmost scrutiny.” *Bell Helicopter Textron, Inc. v. Abbott*, 863 S.W.2d 139, 141 (Tex. App.—Texarkana 1993, writ denied).

I. The trial court abused its discretion by setting this case for a virtual jury trial over Defendants’ objections.

To be entitled to a writ of mandamus, the relator must show that the trial court clearly abused its discretion and that the relator lacks an adequate remedy by appeal. *In re Dawson*, 550 S.W.3d 625, 628 (Tex. 2018). A trial court has “no ‘discretion’ in determining what the law is or applying the law to the facts.” *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135 (Tex. 2004). A trial court abuses its discretion when its decision is arbitrary, unreasonable, and without reference to guiding principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241 (Tex.

1985). The trial court clearly abused its discretion by setting this case for a virtual jury trial over Defendants' objections.

A. This Court's Thirty-Eighth Emergency Order Regarding the Covid-19 State of Disaster does not authorize a remote jury trial without the consent of all parties.

The sole basis for the trial court's purported authority to compel a virtual jury trial over Defendants' objections is this Court's Thirty-Eighth Emergency Order. (*See* R.763-65) But that order nowhere authorizes a jury trial to be conducted entirely remotely without the consent of all parties. The trial court abused its discretion in concluding otherwise.

Absent express authority or consent, jury trials in Texas must occur live and in-person. Texas history, traditions, statutes, and rules compel that conclusion. *See, e.g.*, TEX. R. CIV. P. 226a (Instructions to Jury: "Your conclusions about this case must be based only on what you see and hear in this courtroom."); TEX. R. CIV. P. 282 (Jury Kept Together: When a jury retires to deliberate, "they shall be kept together in some convenient place, under the charge of an officer . . ."); TEX. CIV. PRAC. & REM. CODE § 30.012 (prohibiting witness testimony at trial by electronic means absent the parties' agreement); *see also* TEX. R. CIV. P. 18c, 267, 271, 284, 286, 295.

The Covid-19 pandemic, however, caused a great strain on the Texas legal system. In an attempt to provide some relief, this Court issued a series of emergency orders specifying when and how a trial court could proceed remotely.

At the June 4, 2021 hearing on Defendants’ objections to a virtual jury trial, Plaintiffs relied on the Thirty-Eighth Emergency Order. (R.763-65) But notably absent from that order is a grant of authority to trial courts to compel remote jury trials without the parties’ consent. (*See App. C*) A remote jury trial is such a radical departure from the norm in Texas for the last 150 years that this Court would have been explicit if it intended to grant trial courts the authority to compel a remote jury trial over objection.

Nine accomplished appellate justices (and skilled writers) sit on this Court; they say what they mean and mean what they say. If the Court had intended to grant trial courts the authority to compel remote jury trials over a party’s objections in its Thirty-Eighth Emergency Order, it could have easily (and expressly) stated: “Trial courts may conduct jury trials remotely, such as by teleconferencing, videoconferencing, or other means, without the parties’ consent.” But the Court did not do so. (*See id.*) In the absence of any such express grant, the trial court lacked authority to compel a remote jury trial over Defendants’ objections.

To be sure, the Thirty-Eighth Emergency Order permits courts to require *individuals*—including “a party, attorney, witness, court reporter, grand juror, or

petit juror” in the singular—to appear remotely without “a participant’s consent.” (See App. C at ¶¶ 3(b), 14(b))² But the only *proceeding* the Court specifically authorizes to be conducted remotely without a participant’s consent is “an evidentiary panel in an attorney professional disciplinary or disability proceeding”:

14. An evidentiary panel in an attorney professional disciplinary or disability proceeding may—and must to avoid risk to panel members, parties, attorneys, and the public—without a participant’s consent:

a. conduct the proceeding remotely, such as by teleconferencing, videoconferencing, or other means;

(*Id.* ¶ 14(a))

Critically, paragraphs 3(b) and 14(b) are remarkably similar. (*See supra* note 2) Thus, if paragraph 3(b) authorizes trial courts to conduct jury trials remotely without consent, as Plaintiffs assert (R.764-65), it necessarily follows that the similar language in paragraph 14(b) would have a similar effect—*i.e.*, paragraph 14(b)

² Paragraph 3(b) states:

3. Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—without a participant’s consent:

b. except as this Order provides otherwise, allow or require anyone involved in any hearing, deposition, or other proceeding of any kind—including but not limited to a party, attorney, witness, court reporter, grand juror, or petit juror—to participate remotely, such as by teleconferencing, videoconferencing, or other means;

For attorney disciplinary proceedings, paragraph 14(b) likewise provides:

14. An evidentiary panel in an attorney professional disciplinary or disability proceeding may—and must to avoid risk to panel members, parties, attorneys, and the public—without a participant’s consent:

b. allow or require anyone involved in the proceeding—including but not limited to a party, attorney, witness, court reporter—to participate remotely, such as by teleconferencing, videoconferencing, or other means; and

would authorize evidentiary panels in attorney disciplinary proceedings to conduct remote proceedings without consent.

But if that were so, paragraph 14(a)—which expressly authorizes evidentiary panels in attorney disciplinary proceedings to “conduct the proceedings remotely” without consent—would be rendered superfluous and meaningless. Such a construction is improper. *See Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 164 (Tex. 2016) (a court should “presum[e] the enacting body purposefully included each word” in an ordinance and “constru[e] the ordinance to avoid rendering any word or provision meaningless”); *Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000) (“We avoid constructions that would render any [] provision meaningless or nugatory.”); *see generally* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174 (2012) (under the “Surplusage Canon,” no provision “should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence”).

As evidenced by paragraph 14(a), the Court knew precisely how to authorize a tribunal to conduct a *proceeding* remotely without consent when that was its intent. (App. C at ¶ 14(a)) The fact that the Court did not similarly authorize trial courts to conduct jury trials remotely without consent demonstrates that the Court did not mean to do so.

Because neither the Thirty-Eight Emergency Order nor any other Texas law authorizes the trial court to compel a remote jury trial without the consent of all parties, the trial court abused its discretion in ordering a “full virtual jury trial” over Defendants’ objections.

B. A virtual jury trial violates Defendants’ constitutional rights to the due course and due process of law.

Even if paragraph 3 of the Thirty-Eighth Emergency Order authorizes remote jury trials over a party’s objections, the order is expressly subject “to constitutional limitations.” (App. C at ¶ 3) Article I, Section 19 of the Texas Constitution guarantees that “[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.” TEX. CONST. art. I, § 19 [App. F]. The Fourteenth Amendment to the United States Constitution similarly guarantees that no “State [shall] deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1 [App. J].

The virtual jury trial ordered by the trial court violates Defendants’ constitutional rights under these provisions in multiple respects.

Inability to confront witnesses face-to-face in the jury’s presence. Among the rights guaranteed by the due process and due course of law clauses are the rights to confront and cross-examine witnesses. “In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to *confront*

and cross-examine adverse witnesses.” *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (emphasis added); accord *Davidson v. Great Nat’l Life Ins. Co.*, 737 S.W.2d 312, 314 (Tex. 1987) (“Due Process requires an opportunity to *confront* and cross-examine adverse witnesses.”) (emphasis added).³

“The main purpose of confrontation is to enhance the accuracy of fact-finding by subjecting a witness to rigorous testing before the trier of fact, thus ensuring reliability by the *physical presence of the witness*, the oath, cross-examination, and observation of demeanor by the trier of fact.” *Ex Parte Taylor*, 957 S.W.2d 43, 45 (Tex. Crim. App. 1997) (discussing the purpose of confrontation in the context of the due process clause); see generally FED. R. CIV. P. 43, 1996 Notes of Advisory Committee ¶ 3 (“The importance of presenting *live testimony in court* cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling. The opportunity to judge the demeanor of a witness *face-to-face* is accorded great value in our tradition.”) (emphasis added).

“The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it.” *Coy v. Iowa*, 487 U.S. 1012, 1019

³ Although this case does not invoke the Sixth Amendment’s right to confrontation because it is not a criminal prosecution, it is nevertheless quasi-criminal, in part, and subject to heightened due process scrutiny because Plaintiffs seek exemplary damages. (R.65-68); see *Bennett v. Reynolds*, 315 S.W.3d 867, 873 & n.21 (Tex. 2010) (exemplary damages are “quasi-criminal” in nature, and the U.S. Supreme Court has “steadily restricted exemplary damages and tightened the due-process standards by which courts assess them”).

(1988). “A witness ‘may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts.’”

Id.

Recognizing the impediment to a fair trial imposed by a lack of face-to-face confrontation in the presence of the jury, the Texas Legislature has statutorily declared that the public policy of Texas permits witnesses to testify at trial by electronic means—thereby avoiding the face-to-face confrontation in the jury’s presence required by the due process and due course of law clauses—*only* “with the agreement of the parties” and when the witness previously has been deposed. *See* TEX. CIV. PRAC. & REM. CODE § 30.012(a)-(b).

Here, a virtual jury trial will prevent Defendants from confronting the witnesses against them face-to-face in front of the jury. As a result, “the greatest legal engine ever invented for the discovery of the truth”⁴—cross-examination—“a safeguard essential to a fair trial and a cornerstone in the quest for truth”⁵ will suffer significantly, as will the jury’s ability to assess the credibility of witnesses. The impairment of cross-examination and credibility assessment will severely hamstring the jury’s fact-finding function and deny Defendants a fair trial in violation of their constitutional rights to due process and due course of law. *See S.C. Dep’t of Soc.*

⁴ *Maryland v. Craig*, 497 U.S. 836, 846 (1990).

⁵ *Davidson*, 737 S.W.2d at 314.

Servs. v. Wilson, 574 S.E.2d 730, 736-37 (S.C. 2001) (family court’s decision to allow a witness to testify outside a party’s presence violated due process because it denied the party the right of confrontation).

Lack of protocols for a virtual trial. Moreover, the trial court has not adopted, much less made Defendants aware of, a protocol or plan for conducting a “full virtual jury trial.” Ordering Defendants to try a lengthy, complex, high-stakes jury trial virtually without knowing the rules that will govern this newly invented proceeding will deprive Defendants of a fair trial. *See Anthony v. State*, 209 S.W.3d 296, 306-09 (Tex. App.—Texarkana 2006, no pet.) (“Due process is ordinarily absent if a party is deprived of his or her property or liberty without evidence having been offered against him or her in accordance with established rules.”). The court coordinator’s reference to a PowerPoint presentation by one Travis County district court judge as a possible “helpful tool” is inadequate. (*See* R.519-61) The trial court has not adopted that “Anatomy of a Remote Jury Trial in Travis County Civil Courts” as *its* protocol or plan, let alone notified the parties here that it or Harris County are ready and able to perform all the tasks in that Travis County plan.

Litany of likely additional problems. At its core, due process requires a fair trial in a fair tribunal. *In re Murchison*, 349 U.S. 133, 136 (1955). A virtual jury trial—particularly in a case like this involving high stakes, hotly disputed facts, and a lengthy trial—is likely to result in an unfair trial because, among other reasons:

- technological limitations and inequality in the availability of that technology;
- the risk of displaced aggression or misattributed frustration with technological difficulties over a lengthy proceeding;
- user error in remote jury trials;
- the quality of the presentation and listener experience;
- auditory or visual interruptions;
- the inability of the court to maintain control over a virtual environment and impede jurors from being influenced by externalities;
- the inability of jurors to observe critical, nonverbal communication from advocates and witnesses;
- the inability of jurors, attorneys, and witnesses to see the entire room at one time;
- Zoom fatigue and the infeasibility of jurors digesting critical information by staring at a small screen all day;
- the substantial impediments to the process of jury selection by remote technology that prevents attorneys from viewing the reaction and demeanor of other potential jurors when another panel member is asked a question during voir dire; and
- the inability of jurors deliberating remotely to observe the individual demeanor of other jurors, to assess the group dynamic, and to participate fully in persuading and being persuaded—which is exactly what each and every juror must do.

While not perfect, jury trials have been refined and honed over centuries to produce the best process for finding the truth. The resulting exercise is remarkably complex and delicately balanced. The legion of significant changes that remote procedures will introduce into the jury-trial process will necessarily upset that

careful balance without first undergoing the deliberate study and reflection that have always preceded other significant changes to jury trials.⁶ That is a recipe for injustice.

Many of the issues with remote jury trials were described in a recent article by noted and experienced authors who participated in two groundbreaking remote jury trials—one civil and one criminal, one mock and one real. Although they were predisposed to embrace remote technology as the future of jury trials, after participating in the two trials, the authors categorically rejected future remote jury trials as “not only a bad idea, but a very bad idea.” Jennifer Lapinski, Robert Hirschhorn, & Lisa Blue, *Zoom Jury Trials: The Idea Vastly Exceeds the Technology*, NEWS.LAW, (Aug. 25, 2020), <http://news.law/zoom-jury-trials-the-idea-vastly-exceeds-the-technology/> (last visited June 6, 2021). The detailed litany of problems encountered during those short jury trials is a cautionary tale.

In light of the significant problems that are almost certain to occur in a lengthy virtual jury trial, Defendants’ rights to due process and the due course of law may be protected only by conducting this jury trial live and in-person.

⁶ The Supreme Court Advisory Committee is uniquely qualified to study whether justice is adequately served by remote jury trials, perhaps by analyzing the advantages and disadvantages of remote jury trials when they occur with the consent of the parties. Following such analysis, the Court can knowledgeably decide whether to permit them over a party’s objections. This approach will avoid injustice in the interim.

C. A virtual jury trial will deprive Defendants of their constitutional rights to the equal protection of the law.

Article I, Section 3 of the Texas Constitution and the Fourteenth Amendment to the United States Constitution guarantee the equal protection of the law. TEX. CONST. art. I, § 3 [App. G]; U.S. CONST. amend XIV, § 1 [App. J]. Both provisions require that all persons similarly situated be treated alike under the law. *See State v. Rosseau*, 396 S.W.3d 550, 557 (Tex. Crim. App. 2013) (“The Equal Protection Clause of the Fourteenth Amendment requires that ‘all persons similarly situated shall be treated alike’ under the law.”); *City of Houston v. Downstream Envtl., L.L.C.*, 444 S.W.3d 24, 39 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (“to assert an equal-rights claim under article I, section 3, a claimant must allege that it was treated differently from other similarly situated parties, without a reasonable basis.”).

Here, Defendants are similarly situated to other litigants in Harris County civil district courts who are entitled to jury trials. At least 64 of those litigants, evidenced by 32 verdicts, have received live, in-person jury trials since January 1, 2021. (*See* R.723)⁷ But unlike those litigants, Defendants have been denied the right to a live, in-person jury trial for the sole random reason that their case is in the 270th Judicial District Court.

⁷ Defendants request that the Court take judicial notice of the verdicts and judgments in those 32 in-person jury trials. *See* TEX. R. EVID. 201(b)(2).

The reason proffered by the trial court for compelling a remote jury trial without Defendants' consent is the court's own personal preference for remote trials over in-person trials. (*See* R.770-73) But the trial court's personal preference and its decision to deny Defendants a live, in-person jury trial does not serve a compelling governmental interest. Nor is there a reasonable or rational basis for doing so. The trial court's refusal was therefore arbitrary and capricious.

Numerous live, in-person jury trials have occurred in Harris County since the pandemic began. Between July 6, 2020 and April 19, 2021, 100 jury panels were delivered to Harris County courts, including 53 for civil courts. (R.725-26) And as previously noted, numerous in-person jury trials have already occurred—and are currently occurring—in Harris County's civil district courts. (R.723; *see* R.571-716)

Because Defendants are similarly situated to other litigants in Harris County civil district courts who have had—and are having—live, in-person jury trials in 2021, but Defendants have been denied that right for no compelling reason and without a reasonable or rational basis, Defendants have been denied the equal protection of the law guaranteed by the Texas and United States Constitutions. For this reason as well, the trial court abused its discretion in ordering a virtual jury trial over Defendants' objections.

II. Defendants lack an adequate remedy by appeal.

Whether Defendants have an adequate remedy by appeal is determined by weighing the benefits of mandamus review against the detriments. *Prudential*, 148 S.W.3d at 136. Mandamus review of “significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss” and “spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.” *Id.* That is precisely the case here.

This Court has recognized that “the denial of trial by jury trial” is “reviewable by mandamus.” *Id.* at 139. It necessarily follows that mandamus review is also warranted here to spare the parties and public of the time and money utterly wasted on a virtual jury trial that is neither authorized nor constitutional. That is particularly true in this case because (1) Plaintiffs seek over \$100 million in actual and exemplary damages, and (2) the trial will be lengthy with Plaintiffs alone having identified over 200 fact and expert witnesses. (*See* R.65-67, 352-415) Under these circumstances, vigorous and live cross-examination of witnesses in person with a jury physically present and paying attention is essential to preserve Defendants’ rights to a fair trial.

PRAYER

Relators/Defendants respectfully pray that the Court grant their petition for writ of mandamus, order the trial court to set this case for an in-person jury trial, and grant such other relief to which Relators may be entitled.

Respectfully submitted,

/s/ Rusty Hardin

Stuart B. Brown, Jr.

bbrown@jw.com

State Bar No. 24006914

Brett Kutnick

bkutnick@jw.com

State Bar No. 00796913

Justin V. Lee

jlee@jw.com

State Bar No. 24097982

JACKSON WALKER LLP

2323 Ross Avenue, Suite 600

Dallas, Texas 75201

Tel: 214-953-6000

Fax: 214-953-5822

Joseph A. Fischer, III

tfischer@jw.com

State Bar No. 0789292

JACKSON WALKER LLP

1401 McKinney Street, Suite 1900

Houston, Texas 77010

Tel: 713-752-4200

Fax: 713-308-4114

Rusty Hardin

rhardin@rustyhardin.com

State Bar No. 08972800

Joe Roden

jroden@rustyhardin.com

State Bar No. 00794549

Ryan Higgins

rhiggins@rustyhardin.com

State Bar No. 24007362

Daniel R. Dutko

ddutko@rustyhardin.com

State Bar No. 24054206

RUSTY HARDIN & ASSOCIATES LLP

5 Houston Center

1401 McKinney Street, Suite 2250

Houston, Texas 77010

Tel: 713-652-9000

Fax: 713-652-9800

Attorneys for Relators

RULE 52.3(j) CERTIFICATION

I have reviewed the petition for writ of mandamus and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record.

/s/ Stuart B. Brown, Jr.
Stuart B. Brown, Jr.

CERTIFICATE OF COMPLIANCE

Relying on the word count function of the computer software used to prepare this document, the undersigned certifies that the Petition for Writ of Mandamus contains 3,998 words (excluding the sections excepted under TEX. R. APP. P. 9.4(i)(1)) and was typed in 14-point font with footnotes in 12-point font.

/s/ Stuart B. Brown, Jr.
Stuart B. Brown, Jr.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Petition for Writ of Mandamus was served in accordance with TEX. R. APP. P. 9.5 upon the Respondent and following counsel of record for Real Parties in Interest on this 7th day of June, 2021:

Via Electronic Service

The Honorable Dedra Davis (c/o Daiquiri_Roy@Justex.net)
270th Judicial District Court
Harris County Civil Courthouse
201 Caroline, 13th Floor
Houston, Texas 77002
(Respondent)

Via Electronic Service

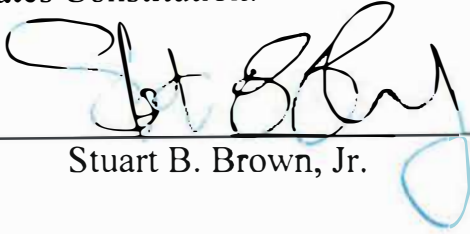
Randall O. Sorrels (randy@sorrelslaw.com)
Alexandra Farias-Sorrels (alex@sorrelslaw.com)
Sorrels Law
800 Commerce St.
Houston, Texas 77002
(Attorneys for Real Parties in Interest/Plaintiffs)

/s/ Stuart B. Brown, Jr.
Stuart B. Brown, Jr.

VERIFICATION OF APPENDIX

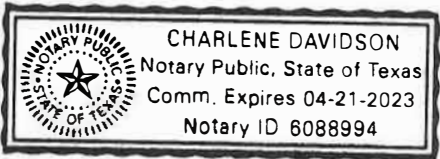
Before me, the undersigned authority, on this day personally appeared Stuart B. Brown, Jr., who being by me sworn, deposed and stated based upon his personal knowledge that (1) he is one of the attorneys for Relators Allied Aviation Fueling Company of Houston, Inc. and Reginald Willis in the underlying trial court proceedings; (2) tab A of the Appendix is a true and correct copy of a May 20, 2021 email (without attachments) I received from the trial court coordinator of the 270th Judicial District Court of Harris County, Texas, setting the underlying case for a “full virtual jury trial” on June 9, 2021; (3) tab B of the Appendix is a true and correct copy of the certified transcript from the electronic recording of the June 4, 2021 hearing on Defendants’ Objections to a Virtual Jury Trial; (3) tab C of the Appendix is a true and correct copy of the Thirty-Eighth Emergency Order Regarding the Covid-19 State of Disaster issued by the Texas Supreme Court on May 26, 2021; (4) tab D of the Appendix is a true and correct copy of Article I, § 15, of the Texas Constitution; (5) tab E of the Appendix is a true and correct copy of Article V, § 10, of the Texas Constitution; (6) tab F of the Appendix is a true and correct copy of Article I, § 19, of the Texas Constitution; (6) tab G of the Appendix is a true and correct copy of Article I, § 3, of the Texas Constitution; (7) tab H of the Appendix is a true and correct copy of Article II, § 1, of the Texas Constitution; (8) tab I of the Appendix is a true and correct copy of the Seventh Amendment to the United States

Constitution; and (9) tab J of the Appendix is a true and correct copy of the Fourteenth Amendment to the United States Constitution.



Stuart B. Brown, Jr.

Subscribed and sworn to me on this 4th day of June, 2021.





Notary Public, State of Texas

APPENDIX

May 20, 2021 email from trial court coordinator of the 270th Judicial District Court setting the case for a virtual jury trial (R.519)..... tab A

Certified transcript of June 4, 2021 hearing on Defendants’ Objections to a Virtual Jury Trial (R.754-86)..... tab B

Thirty-Eighth Emergency Order Regarding the Covid-19 State of Disaster (R.748-53) tab C

TEX. CONST. art. I, § 15..... tab D

TEX. CONST. art. V, § 10 tab E

TEX. CONST. art. I, § 19..... tab F

TEX. CONST. art. I, § 3..... tab G

TEX. CONST. art. II, § 1 tab H

U.S. CONST. amend. VII..... tab I

U.S. CONST. amend. XIV..... tab J

TAB A

From: Roy, Daiquiri (DCA) <Daiquiri_Roy@Justex.net>
Sent: Thursday, May 20, 2021 2:34 PM
To: rhardin@rustyhardin.com; Randall Sorrels; Brown, Brad
Subject: 2019-81830 Assigned To Trial June 09, 2021 @ 9:00am
Attachments: Fwd: Travis County Remote Jury Trial information

****RECEIVED FROM EXTERNAL SENDER – USE CAUTION****

Hello All,

In light of the recent opinion from the Court of Appeals this case is being placed on the Jury Trial docket.

This case is now on the June 07, 2021 two-week jury docket. The 270th will begin **Full Virtual Jury Trial** during this two-week period.

This case is being assigned for June 09, 2021 @ 9:00 AM. Please make sure that you have exchanged all pre-trial docs such as exhibits, exhibit list, and witness list. We will pre admit those items which can be agreed upon in the pre-trial. Please email me a copy of the exhibits that you plan to use so that I can print out a copy for Judge Davis & the Court Recorder to follow along with.

Should this case settle before the assigned date let me know so I can remove you and reassign another cases. As you may know last minute re-assignments for “On-Call” cases can be cumbersome.

The Attachment above comes from Travis County and may be a helpful tool in preparing for a Virtual Jury Trial.

Thank You in Advance,

Daiquiri K. Roy, Trial Coordinator
Dedra Davis, Judge, 270th District Court
201 Caroline St., 13th Floor
Houston, Texas 77002
(832) 927-2250

TAB B

1
2
3
4
5
6
7
8
9

CAUSE NO. 2019-81830

CECILIA CRUZ, INDIVIDUALLY) IN THE DISTRICT COURT OF
AND AS NEXT FRIEND AND AS)
REPRESENTATIVE OF)
ULYSSES D. CRUZ, ET AL.)
Plaintiffs,)
VS.) HARRIS COUNTY, TEXAS
ALLIED AVIATION FUELING)
COMPANY OF HOUSTON, INC. AND)
REGINALD WILLIS)
Defendants.) 270TH JUDICIAL DISTRICT

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

TRANSCRIPTION OF AUDIO RECORDING

PRETRIAL HEARING

JUNE 4, 2021

TRANSCRIPTION UNDER RULE 203.6(a) by Certified Court Reporter of the status conference, at the instances of the Defendant, taken in the above-styled and numbered cause on June 4, 2021, via tape recording under Rule 199.1(c), pursuant to the Texas Rules of Civil Procedure and agreements stated on the record.

Pursuant to the information submitted to the deposition officer at the time said request for transcription was made, the following includes all parties present.

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

A P P E A R A N C E S

APPEARING FOR PLAINTIFF:

Mr. Randall O. Sorrels
SORRELS LAW
800 Commerce Street
Houston, Texas 77002
Telephone: 713.226.5156

APPEARING FOR DEFENDANT:

Mr. Joe Roden
RUSTY HARDIN & ASSOCIATES, LLP.
5 Houston Center
1401 McKinney Street, Suite 2250
Houston, Texas 77010
Telephone: 713.652.9000
Fax: 713.652.9800
E-mail: rhardin@rustyhardin.com

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

INDEX

	PAGE
Recording Begins	4
Recording Concludes	32
Court Reporter's Certificate	33

1 PROCEEDINGS

2 (Recording begins)

3 THE COURT: This is a special hearing for
4 Cause Number 2019-81830, Cecilia Cruz, Individually and
5 as Representative of Ulysses D. Cruz and as -- as --
6 as -- as -- as Cruz, a minor, and Angela D. Cruz,
7 Plaintiffs versus Allied Aviation Fueling Company of
8 Houston, Incorporated, and Reginald Willis, the
9 Defendants.

10 So today with us, we have Mr. Joe Roden,
11 Tori Reilly, Randy Sorrels, Brad Brown, Yacian Perez --
12 it's not marked on here -- and Joey Fischer.

13 UNIDENTIFIED FEMALE SPEAKER: That's
14 Rusty Hardin. But --

15 THE CLERK: Rusty.

16 UNIDENTIFIED FEMALE SPEAKER: -- today
17 you can call him "Rusty iPad Number 3."

18 THE COURT: Thank you so much. You did a
19 wonderful job.

20 That's --

21 THE CLERK: Thank you.

22 THE COURT: -- for those who just joined
23 us, that's one of our many summer law clerks,
24 Marissa Sobalos.

25 So we are now 3 minutes into your

1 15-minute hearing. I will give you your 3 minutes back,
2 so we'll stop at 18 or 19 after.

3 And, Counselor, you can begin.

4 MR. RODEN: Thank you, Your Honor. On
5 behalf of the Defendants, Joe Roden from Rusty Hardin
6 and Associates.

7 Judge, there -- there are, really, two
8 questions that you have before you today. As you know,
9 the Court has a -- approved the court coordinator told
10 us that we're going to have a full virtual jury trial.
11 The Defendants hereby formally object as to having a
12 virtual jury trial.

13 With that said, I would like the Court to
14 know that we stand ready, willing, and able to proceed
15 in person in a live jury trial next Wednesday as
16 scheduled.

17 And our concern, really, is -- is
18 twofold. Number one, we don't believe the Court has the
19 authority, frankly, to -- to order a virtual jury trial
20 over the party's objections.

21 I -- I noticed that Mr. Sorrels had filed
22 a -- a copy of the Supreme Court's 38th Emergency Order,
23 addressing COVID-19 matters last night, and -- and I
24 won't run from that. I'd -- I'd like to directly
25 address it, if I could.

1 MR. SORRELS: If Your --

2 MR. RODEN: Now --

3 MR. SORRELS: -- if --

4 MR. RODEN: I --

5 MR. SORRELS: -- Your Honor -- excuse me,
6 Mr. Roden. Your Honor, are we on the record? I -- I
7 just want to make sure that we have a record going.

8 THE COURT: Yes, we certainly are. And,
9 you know, I would love for you two, when you want to
10 talk, unmute; and, when you're talking -- when you're
11 not talking, mute. Because you have a beep that sends
12 us in a whole another world. So we're not having any
13 beeps today.

14 If you're not talking, mute; and, if
15 you're talking, unmute, and then talk and then go back
16 on mute. So we're going to keep this a beep-free
17 experience today.

18 Go ahead, Counselor.

19 MR. RODEN: Thank you, Judge.

20 So I -- I won't run from the 38th order.
21 I'm sure that Mr. Sorrels is going to talk about it. So
22 I'd like to address it directly.

23 That order, written by the Supreme Court,
24 you know, we -- who are -- they are professional
25 writers. They -- they mean what they say and they say

1 what they mean. And what they have not said in that
2 order anywhere -- if I'm mistaken, I'm sure that
3 Mr. Sorrels will point it out to the Court. But what
4 they have not said in that order at any place is that a
5 Court may compel a remote jury trial without party's
6 consent. It simply does not say that.

7 And so with that -- we -- we know that if
8 that is in the Court's intention to radically depart
9 from 150 years of in-person jury trials in this case,
10 they clearly would have said it. They didn't. And,
11 therefore, frankly, it's -- this order does not give the
12 Court the authority to do the remote jury trial over our
13 objections.

14 Now, they do state in the order in one
15 place the ability -- or the authority for a tribunal to
16 pursue remotely without a party's consent, and that's in
17 Paragraph 14A, according to that Paragraph 14A of the
18 order.

19 And you'll see, Judge, that it talks
20 about an evidentiary panel in a attorney disciplinary
21 proceeding may, without a party's consent -- or
22 participant's consent, may conduct the proceeding
23 remotely. Okay? That is the only place in this order
24 where the Supreme Court has authorized the tribunal or a
25 Court to proceed remotely without a party's consent.

1 What this proves to us, Judge, is that
2 they know how to say it, they know how to give that
3 authority when that's their goal. They did it in this
4 instance, and they did not enter it with respect to any
5 civil jury trial.

6 And so, we don't think that the order
7 authorizes the Court to -- to proceed remotely over our
8 objection.

9 We have made a number of constitutional
10 objections, I don't really have time to go into those.
11 But I -- I -- I would want to call two things to the
12 Court's attention.

13 Even if the Court is permitted -- and we
14 don't think you are, but even if the Court is permitted
15 to proceed remotely, you shouldn't. And the reason for
16 that is very simple. This is a high stakes, complex,
17 lengthy personal-injury case.

18 I suspect that this will be the Court's
19 first remote jury trial. That brings with it --
20 regardless of how good you are, Judge, that brings with
21 it a host of technological problems, logistical
22 problems, but it also impedes the ability of the process
23 to do what it is meant to do and that is to find the
24 truth in a given set of circumstances.

25 And it impedes that process because, if

1 we don't have the ability to confront a witness, you
2 know, face-to-face, then the jury does not get to truly
3 assess the credibility of that witness.

4 Now, that is obvious in the criminal
5 context of the system and it requires it. The Courts,
6 including the Texas Supreme Court have had a time with
7 that confrontation right through the due process clause
8 and applied it to the civil case.

9 Not only that but the jury, as a fact
10 finder must be able to assess the credibility of a
11 juror [sic]. There are nonverbal reactions that
12 witnesses give every day on the stand. You see it in
13 every trial that you've ever had. The jury sees that,
14 too. And that's critical for the jury to be able to
15 assess the credibility of a witness.

16 And so we don't think you have the
17 authority do it, Judge. The 38th Emergency Order from
18 the Supreme Court doesn't give you that authority.

19 But even if you somehow found that
20 authority, you shouldn't -- I -- look, we're an -- we're
21 as an adventurous group of lawyers as any you will find,
22 but we don't want to be the guinea pig for a first
23 remote jury trial when the stakes are this high, both
24 for us and for the Plaintiffs.

25 And so, for that reason, we would request

1 that you remove this case -- or -- or -- or instead of
2 holding this case a remote jury trial, give us the live,
3 in-person jury trial that Texas law entitles us to.

4 *THE COURT:* Thank you, sir.

5 Counselor?

6 *MR. SORRELS:* Okay. I unmuted. Thanks,
7 Your Honor.

8 So Mr. Roden was -- was right about a
9 couple of things. Number one, we did attach the 38th
10 Order to a -- our filing last night. The filing last
11 night actually was filing a mandamus that I'm not sure
12 this Court is aware of that was filed against
13 Judge Davidson.

14 There is a case that is pending that was
15 ordered by Judge Davidson to be a -- a virtual jury
16 trial. And what I filed last night is a -- three
17 things. Number one, I filed the motion, under the
18 original proceeding for a mandamus.

19 Number two, I filed the Court's ruling,
20 which happened yesterday. And this is in the case of
21 In Re: J-M Manufacturing Company. And Judge Davidson
22 ordered that the -- that case be tried virtually. And
23 the -- both parties filed an agreed mandamus requesting
24 that the Appellate Court order a -- an in-person jury
25 trial.

1 And yesterday morning, in what I filed,
2 the memorandum opinion said the petition for writ of
3 mandamus challenging the May 24th order regulating jury
4 trial entered by Honorable Mark Davidson, presiding
5 pretrial judge for asbestos multi-district litigation
6 case was denied. So there's actually a precedent where
7 the Court of Appeals, yesterday, denied that.

8 And then as you know, as Mr. Roden
9 pointed out, the 38th Order says, in Paragraph
10 Number 3 -- and the way I read it, and -- and Mr. Roden
11 is a -- is certainly a -- a scholar and -- and student
12 of -- of these orders, Paragraph 3 says: Subject only
13 to constitutional limitations, all courts in Texas
14 may -- so the Supreme Court is giving you authority --
15 in any case, civil or criminal, without a participant's
16 consent.

17 Okay. So it's saying you, Judge, have
18 the authority without our consent. If you go down to B:
19 Allow or require anyone involved in any hearing,
20 deposition -- and Mr. Roden is right, they use their
21 words very intentionally, it can't be any broader than
22 this -- or other proceeding of any kind, including but
23 not limited to party, attorney, witnesses,
24 court reporter, grand jury, or petit jury to participate
25 remotely, such as by teleconferencing, videoconferencing

1 or other means.

2 So I think that you do have the authority
3 to proceed, as you have ordered, number one, that it's
4 a -- it's indicated in -- in the 38th Order.

5 Number two, a request by other parties
6 to -- to have a -- this virtual trial set aside has been
7 rebutted by the Court of Appeals.

8 And -- and the only thing that of
9 concern, as I've gone -- read the record, and Mr. Roden
10 is right, this is a very important case. I -- I think
11 lives depend upon it. It is, if they raise -- and I
12 just want to make sure it doesn't go u- -- unaddressed,
13 is in Paragraph Number 11 of the order, and this is an
14 important one that I think that I don't want to get
15 reversed on, except for nonbinding proceedings -- and
16 this, of course, will be a binding proceeding -- a Court
17 may not permit or require a petit juror to appear
18 remotely, unless the Court ensures that all potential
19 and slanted petit jurors have access to technology to
20 participate remotely.

21 And I assume that -- that the Harris
22 County has done that, I just know enough. But they
23 raised it in their -- in their filing yesterday and I
24 haven't had time to check that out.

25 The only other thing I would say is is

1 that both parties have tried cases in the COVID era to
2 juries. But I can tell you, in the case I tried, we had
3 a number of witnesses that appeared by Zoom in -- live
4 by Zoom, where the jurors were -- were required, and did
5 judge the credibility of those people who were appearing
6 in front of the jurors.

7 In other words, our jurors were live, but
8 they were watching a TV, which is not much different
9 than them watching the -- the same witness on their own
10 screen. So I don't think that there's a legitimate
11 argument to be made that we have to see someone in
12 person to know if they're telling the truth or not.

13 We've been doing it in Harris County over
14 the last year, many, many times -- dozens of times and
15 no one has taken it to the Court of Appeals: We can't
16 judge their credibility because they're not live and in
17 person.

18 In -- in fact, for decades now, we have
19 video depositions being played, and the jurors are
20 required to judge the credibility of those witnesses who
21 are on video deposition. So I think that argument is a
22 little bit weak.

23 And that's all I have to offer,
24 Your Honor.

25 THE COURT: Thank you. Thank you, both.

1 Excuse me.

2 We have, I think, 3 minutes left. Any --

3 MR. RODEN: Your Honor --

4 THE COURT: -- other words?

5 MR. RODEN: Yes -- yes, Your Honor, just
6 very briefly. When you pull up the -- the comparison of
7 3B and 14B. Your Honor, what Mr. Sorrels has referred
8 you to is Section 3B. And he suggested that that
9 permits the Court to hold a remote proceeding over the
10 party's objection.

11 But if you look at the language of 3B,
12 initially, what that is addressing is the Court's
13 ability to require individuals to proceed remotely under
14 certain circumstances.

15 And so, if -- and there is similar
16 language in Paragraph 14B, which is why I have shown the
17 Court both of these at the same kind. And so, if as
18 Mr. Sorrels says, 3B really permits the Court to order a
19 remote proceeding without consent, then the similar
20 language in 14B would have that same effect in that type
21 of proceeding.

22 But here's the difference: 14B is
23 preceded by 14A which expressly gives the Court the
24 power to order a proceeding to occur remotely. So what
25 this means is, under Mr. Sorrels' interpretation of the

1 similar language in 3B, 14A would be (unintelligible).
2 And we don't -- as the Court, knows that we don't
3 interpret written documents, contracts, orders, or
4 anything else where we give no effect to a particular
5 provision.

6 What 3B is -- addresses is individuals.
7 It doesn't address proceedings. We know that because
8 14B addressed -- with similar language addresses
9 individuals, not proceedings; but 14A addresses a
10 proceeding in an attorney disciplinary context. And
11 there is no similar authorization for this Court to
12 proceed remotely in a jury trial.

13 And with respect to the mandamus
14 proceeding, as -- as Mr. Sorrels knows, that's not even
15 precedent in that case, much less this case because it's
16 simply a denial of mandamus without any reasoning or
17 anything. And they make wholly different arguments in
18 that case than we will make in this case.

19 THE COURT: And --

20 MR. SORRELS: Just one -- one other
21 thing, Your Honor, just for clarification. I think
22 everyone knows that Paragraph 14 deals with attorney
23 discipline. And in that program, to the -- through the
24 State Bar, disciplinary panels are -- are appointed by
25 the State Bar directors where attorneys can choose to

1 have their cases heard.

2 And so that para- -- paragraph is giving
3 the authority for the State Bar discipline process to
4 work remotely as well. That doesn't have anything to do
5 with the court system or jury trials.

6 *THE COURT:* Thank you. Thank you,
7 Counselor.

8 So -- and I appreciate you-all scheduling
9 the hearing and giving us all an opportunity to come
10 together and voice our concerns and voice our opinions.
11 And we all have, basically, an open conversation about
12 this process.

13 I am going to have the virtual trial.

14 However, I want you to -- I disagree,
15 Attorney Roden, with your interpretation. And, you
16 know, great minds are allowed to -- to disagree.

17 When I look at your desk, mine's almost
18 there. I did a little cleanup this weekend. And I'm
19 just thinking great mind, great mind. That this I --
20 I -- I see it, I feel it. You know, I cleaned it a
21 little this weekend and it's getting back that way, so
22 you and I are here. Right?

23 *MR. RODEN:* I hoped you wouldn't -- I had
24 hoped you wouldn't notice, Judge.

25 *THE COURT:* Oh, no. No. I -- it's --

1 it's a -- it's a -- it's a good thing because it helped
2 us connect.

3 I -- I have personally done over 60
4 trials through Zoom. I have a very strong comfort level
5 with doing trials through Zoom. As you've pointed out,
6 I've done zero jury trials through Zoom, but I think my
7 60-plus trials has taken me through quite a bit with the
8 testimonies, with the evidence, it -- I have thoroughly
9 enjoyed, through Zoom, each and every one of them.

10 I did not have an opportunity to have the
11 cat. That -- that would have been really fun, if I had
12 him, "I'm not a cat, Your Honor." You know, I didn't --
13 I haven't had that, not yet.

14 However, I've had a -- a -- a glitch
15 here, a glitch there. We had a glitch, right? And with
16 every glitch, which have not, by the way, been as many
17 as I've had with live juries. I've had more glitches
18 with live juries.

19 And since being here, with the staff to
20 correct, I haven't even had 15 live juries since being
21 on the bench, I don't think. Because I try to see a
22 lot. But with the jury pool, I wasn't always able to --
23 to see the jury. But -- and I'm not talking about
24 during the pandemic, I'm just saying since -- since
25 being on this bench.

1 But I had more, kind of, mishaps with a
2 juror in the jury box snoring, and we're all, "Who's
3 snoring? What's going on?" You know, and -- and -- and
4 the next juror next to him, hitting him, you know, that
5 kind of thing.

6 I think you're -- you just, kind of, be
7 flexible, you wake him up and -- and you go. But that
8 was in person.

9 And with us having the depositions, some
10 lawyers are better than others. Of course, I have my
11 experts here. And -- so some aren't as engaging. You
12 know, some aren't as animated, they can't keep the --
13 the jury over there -- and I'm pointing this way, do you
14 see my hand, because that's where my jury box is --
15 they're not keeping them as -- as interested or as
16 engaged. Ask the man who fell asleep, right?

17 But what I've found and what I've been
18 finding, when I'm sitting here on the computer, and I've
19 heard this reconfirmed many times in a slew of seminars
20 and CLEs and conferences that have been taking place
21 during the pandemic, that they are paying a -- a bit
22 more attention.

23 I know that me, personally, the way I'm
24 able to look at each one of you and see your facial
25 expressions and almost read what some of you are saying

1 and -- and feel the daggers going into my spine and
2 heart, you'll -- you'll be able to do that, too.

3 It's a new experience. It's not what
4 we're always going to have through the end, but I think
5 you're going to find -- or what I have found is it has
6 served me very well. When I'm in court and I have the
7 juror -- jurors over there, or I have the witness in a
8 jury box looking at the side of the witness' head. They
9 turn, you know, every now and then, I -- I'm, you know,
10 trying to pay attention, trying to get everything. Now,
11 is the microphone working?

12 You know, I'm -- I'm just not getting
13 is -- I don't get as rich of an experience I have found
14 when I have the juror here with me in the courtroom in
15 this seat, as I've been getting with them on the screen.
16 And that includes the lawyers as well. That includes,
17 when I'm listening to some of the litigants, and I'm
18 able to ask them extra questions.

19 I had a young man in a structured
20 settlement, and I give them a hard time with those
21 structured settlements because I think you just need to
22 work through it, don't give up \$8 million for 10,000.
23 You know, don't do that. So I -- I give them a
24 difficult time, but it's out of love, it's out of care,
25 and I want this person -- usually, it's a young

1 person -- I want them to walk through another stance.

2 And on the screen, I was able to see his
3 eyes kind of welling up. I can hear better because I'm
4 able to turn these microphones, I can hear if there is a
5 crack or something in a voice. And I'm able to say,
6 "Young man, why are your eyes welling up? What's going
7 on? What -- what haven't I heard? What didn't I know?
8 Talk -- let's -- talk -- talk to me."

9 And for that, that has increased, in my
10 opinion, my ability to be an effective jurist and I
11 think that it will increase your ability to continue to
12 be spectacular attorneys.

13 It's new, it's different, it's not
14 always -- I know that we want what we want, but I want
15 you to know that it is not my intention to injure anyone
16 in this process. Not at all.

17 I would like for it to move in an
18 expeditious fashion. I would like for it to be
19 effective, efficient, the best experience that you could
20 possibly have. And here, on this screen, I think that
21 it's more than possible.

22 And I also think, from talking to judges
23 that have been to NRG and my lawyer friends that have
24 been to NRG and tried to pick juries and tried to do
25 everything, it's -- it's -- I think it's going to be a

1 much better experience. Better in terms of them trying
2 to get there and trying to be on time, rushing through
3 traffic, sitting around NRG, trying to hear acoustically
4 at -- you know, at NRG.

5 Are you vaccinated? Aren't you
6 vaccinated? Are you COVID? Or aren't you COVID?

7 I mean, it's just so many things to think
8 about. Whereas, here, we were all, you know, in the
9 comfort of wherever we are. It won't be perfect, but
10 it'll be awesome. And just know that I'm -- I'm doing
11 my best to help you get to where you need to be. And
12 that's a resolution and on to your next matters.

13 And that's why I try to move swiftly, and
14 that's why I try to listen to you within the confines of
15 the time period, as -- as much as I can, and make sure
16 and give you my full attention.

17 And, as you sit there, and you're looking
18 at me, hopefully, you see the sincerity in my face,
19 the -- the attent- -- a -- the attentioness [sic] to
20 when you're talking to me -- if that's the correct word,
21 one of the young people can tell me, I don't even
22 remember. And I know that I'm -- I'm looking forward to
23 a wonderful trial and a -- a wonderful experience.

24 And Attorney Sorrels, the county has
25 addressed making sure all the jurors are accommodated.

1 And we'll continue to do so.

2 And if there's something that I need to
3 do to make sure the experience is a great experience, I
4 am committed to doing that. I am committed to each one
5 of you. I'm committed to your matter, and I want to
6 assure you that I will do my very best and more to make
7 sure that this is the great experience that you needed
8 it to be.

9 The worst thing in the world is to have
10 spectacular lawyers on both sides and some little
11 something messed it up. I'm looking forward to you
12 going after each other, tearing each other apart, and
13 then going and have dinner later when you finish. So --

14 MR. RODEN: Judge --

15 THE COURT: I --

16 MR. RODEN: I --

17 THE COURT: Yes.

18 MR. RODEN: I -- I appreciate you giving
19 us a solution. Obviously, we had a -- a disagreement
20 over --

21 THE COURT: Uh-huh.

22 MR. RODEN: -- over what the law permits
23 or requires.

24 THE COURT: Yes, sir.

25 MR. RODEN: But -- but I appreciate your

1 comments and I appreciate you taking the time to hear
2 us.

3 THE COURT: It's my pleasure. It's my
4 pleasure.

5 There is -- and, now, do you know
6 Christian Nelson? I let her in, because I thought she
7 might be with you.

8 MS. NELSON: No, Judge. I am here on a
9 DWOP hearing that I've got calendared at 9:00 with you.

10 THE COURT: Oh, that's Daiquri.
11 Daiquiri, would you -- re- -- 832- --

12 MS. NELSON: Uh-huh.

13 THE COURT: -- 927-2250.

14 Attorney Nelson, you are very lucky,
15 though, because you had the opportunity to come and sit
16 and listen to some wonderful, wonderful lawyers. You
17 didn't get to hear all the arguments --

18 MS. NELSON: Uh-huh.

19 THE COURT: -- but you got to hear some.
20 And they have an opportunity to meet you.

21 Hello, gentleman and ladies, this is
22 Christian Nelson. And she's trying to keep her case
23 from being DWOPed. So she's going to call -- she's
24 going to call Mr. Roy as soon as possible and never get
25 in this situation again. So --

1 MS. NELSON: Yes, ma'am.

2 THE COURT: -- you are excused.

3 And back to the rest of you, gentlemen.

4 MR. SORRELS: Your Honor --

5 THE COURT: Yes --

6 MR. SORRELS: Your Honor?

7 THE COURT: -- sir.

8 MR. SORRELS: If I --

9 THE COURT: Yes.

10 MR. SORRELS: If I may ask, while --

11 while we've got you. Do you anticipate the case -- the
12 case is assigned for Wednesday morning at 9:00 a.m. Do
13 you anticipate the case actually being put to trial at
14 that time?

15 THE COURT: So the voir dire -- the voir
16 dire. The voir dire --

17 MR. SORRELS: Yeah.

18 THE COURT: -- yes.

19 MR. SORRELS: Oh, okay.

20 THE COURT: Uh-huh.

21 MR. SORRELS: So you do -- you do
22 anticipate starting trial Wednesday morning of that --

23 THE COURT: And -- and -- and keeping the
24 group -- yes. Yes. Uh-huh. Uh-huh. Absolutely.

25 Absolutely. You never know around here what pops up,

1 jumps up, whatever, but I am absolutely -- absolutely.
2 And I'm trying to help you get to where you need to be.
3 And I --

4 MR. SORRELS: Okay. Judge, and just one
5 last question that's, sort of, raised from the
6 off-stream. It's pretty close -- I'm not aware of a --
7 of a pretrial hearing currently set.

8 THE COURT: Daiquiri? Because today is
9 Friday. Is Daiquiri there?

10 MR. ROY: Yes, Judge, I'm here.

11 THE COURT: Oh, okay. Is there a
12 pretrial?

13 MR. ROY: We -- we can do the pretrial --
14 how much time do you guys need on the pretrial?

15 MR. RODEN: Brad, do you want to --

16 MR. BROWN: Well, Rusty, I think I --
17 we'll have -- there's motions in limine. There's going
18 to be some objections to some deposition designations
19 that'll be exchanged. I -- I don't -- probably a couple
20 of hours maybe to go through all that at some point.

21 We do have the hearings on some experts
22 next Tuesday already set.

23 MR. ROY: Okay. You know, generally,
24 from what I gathered from speaking to the IT people,
25 that, once we conclude with the voir dire and the panel,

1 then we should -- or we may be able to do the voir dire
2 that Wednesday afternoon.

3 THE COURT: I'm sorry, what?

4 MR. RODEN: I lost you there.

5 THE COURT: I lost you, too. What?

6 Let -- let me stop -- let me stop for a minute. I'll
7 stop for a minute. Are you prepared to engage in some
8 or part of your pretrial this afternoon?

9 MR. RODEN: We have not -- we just
10 exchanged exhibits and depo designations. We haven't
11 filed objections at this point. So probably not today.

12 THE COURT: Okay. Monday, you're
13 prepared to do your pretrial arguments -- or engage in
14 your pretrial?

15 MR. RODEN: It -- it -- we'd have to --
16 yeah, we would need to get our objections on file today,
17 I guess. So, if we can -- you know, I guess, Monday or
18 Tuesday would probably be preferable, since we already
19 have hearings set Tuesday with the experts.

20 THE COURT: Tuesday and Mondays are as
21 well. But Tuesdays are very, very full and structured.
22 You'll have 20-plus at -- in 15-minute increments
23 through -- through the day. And so, it's difficult on a
24 Tuesday.

25 Like, the slots that you have for your

1 hearing are 15-minute slots for those hearings. And
2 you'll have find that how I've talked a little long --
3 we've gone a little longer. There is no little longer
4 on a Tuesday. And so --

5 MR. RODEN: Do we know when the jury is
6 going to be assembled on Wednesday? Could we do it
7 prior to that?

8 THE COURT: We --

9 MR. RODEN: Or not?

10 THE COURT: Go ahead.

11 MR. RODEN: Well, because Mr. Roy made a
12 comment about Wednesday afternoon for voir dire, so
13 that's what --

14 THE COURT: So what I will do is become
15 more involved in that particular process with Daiquiri
16 and find out. Because I was asking questions yesterday
17 also, because I -- I -- for some reason was thinking we
18 were doing part of pretrial today. But I'll get more
19 involved with him on that. Today you will hear from us
20 with more concrete information.

21 I know, yesterday, he was telling me
22 about the lady here, I think Melissa in -- in getting
23 some more information. But I will be very dogmatic
24 about it and make sure I get very concrete information,
25 which I'll try to get before 12. I'll -- I don't know

1 if you know, but I'm kind of like a dog with a bone when
2 I -- when I stick my head in something. So I -- I'm
3 going to become very hands-on in that situation, so that
4 you can be comfortable with how we're going to move
5 forward. Okay?

6 I want everyone comfortable. I want as
7 few issues or problems as we can possibly have. And
8 I'll help you anyway I can and you help me when you can.

9 The pamphlet with the Travis County,
10 that's been very helpful going through that. If anyone
11 needs another copy, feel free to let us know and we'll
12 be happy to send you another copy of that.

13 If you want to do some kind of -- I don't
14 know what your day is like, but if you -- I had a -- a
15 trial where they settled, so I have more time later
16 today. If you find that you want to come on and do some
17 practicing or something, you're welcome to do that.
18 Even if we need to put you in a breakout room and you
19 practice in the breakout room. We want it to be as
20 comfortable as possible for you.

21 Our Zoom is up every day 8:00 to 5:00,
22 Monday through Friday. So, even if I'm in hearings on a
23 Tuesday, you can set -- you can pop on. Because they're
24 15 minutes, so you won't wait more than 15 minutes for
25 us to get to you. And say, "Can you put us in a

1 breakout room so we can practice with each other," or
2 something -- you know, something along those lines.

3 But anything we can do to help facilitate
4 you being comfortable with this process, because I think
5 you're going to be very, very pleased and -- and
6 actually excited about how you can read the jurors.

7 You'll want to have computers -- and you
8 probably already know this with -- with -- signed onto
9 Zoom on two different things so you can have it all laid
10 out for you. You're able to put 49 on a screen. You're
11 able to take your mouse and move the people around,
12 which is wonderful. So as we do the shuffle, you can
13 move them on your screen in the order. And you don't
14 have to guess who is what and what number. You're able
15 to -- you know, we change the names.

16 So there's so much we can do. And -- and
17 we're all in this together. And we're happy to
18 accommodate you any way that we can through this
19 process.

20 I know it's not what you want, but I'm --
21 I'm going to try as much as I can to make it as painless
22 as possible and make it the best experience. So when
23 you go and tell everybody over golf, you're like, "Oh my
24 goodness, that virtual is the best."

25 So thank you very much. Is there

1 anything else I can do to try and help you?

2 MR. SORRELS: Well, to help you-all, I
3 noticed in your -- in your rulings that -- or your
4 orders that we should provide electronic copies of
5 documents. We have a couple of hundred exhibits. But
6 in the second hundred, there's literally thousands of
7 pages.

8 So rather than you-all copy them and
9 print them out, what we've done and would like to do is
10 to bring you the first hundred, which are bound to
11 follow liability, we can bring two copies. We've
12 already gotten them printed for you, so your court
13 doesn't have to print them out, and for the
14 court reporter. And we've provided them to the other
15 side.

16 The second hundred, which are tens of
17 thousands of pages of medical records, I -- I will
18 forward them, just as you say, but I wouldn't encourage
19 Daiquiri to hit the print button, because you'll run out
20 of paper pretty quickly.

21 THE COURT: Okay. Okay. That's great.
22 The wonderful thing about this process is we're sitting
23 here and -- and Attorney Roden showed you, you can hit
24 the button, you can show this, you can do it all really
25 quickly. And I -- I won't have to fumble through a

1 bunch of paper, when you're in trial. Because you'll --
2 your tech people will make it pop -- make it pop. They
3 bring it in. They put it back. They draw circles.
4 They do all kind of stuff that really helps highlight
5 it. And it's right here in your face.

6 And it -- it just brings it to life so
7 much more when it's here and the transition is quicker.
8 That's the other thing I'm finding that the trial is
9 moving quicker because the transition is quicker, versus
10 waiting for people to get up and move over and hang
11 you -- and all that, the transition is really quick.
12 You're comfortable with your own computer.

13 And if not, let's practice. You can
14 practice, like I said. You can come on, you can go into
15 the -- the -- into the breakout room and just practice
16 the -- because we can't see you when you're in the
17 breakout room. You know when we join you. So you're
18 able to go into breakout rooms and have privacy.

19 And just have your tech people or
20 whatever practice. We're fine with that.

21 The Zoom number is the same for the year. So,
22 you know, memorize the number. Come on, it's fine
23 Monday through Friday. If you would like other times or
24 more times, I am more than happy to accommodate you.
25 Usually a Thursday or Friday, if you're, like, "Can we

1 keep it up until 9:00 or 10:00 or 11:00?" I'm happy to
2 do so. I -- I can do whatever you need me to do to help
3 you to get where you need to be. Okay? Anything else?

4 *(No response)*

5 *THE COURT:* Not right now?

6 *MR. SORRELS:* I'm done.

7 *THE COURT:* Well, if we need some more
8 hearings or anything, just let us know. You're in luck,
9 there's -- that trial settled. And even if it didn't
10 settle, I'd still figure out a way to get you in to make
11 sure we -- we get you to where you need to be. Because
12 I understand being accustomed to something and then
13 something new. I -- I totally get it. It's not that I
14 don't understand. I do. I do.

15 *MR. SORRELS:* Thanks, Judge.

16 *THE COURT:* Thank you. Thank you-all
17 very much. Oh, let me -- let me stop the recording.

18 *(Recording concluded)*

19

20

21

22

23

24

25

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

TRANSCRIPTION OF AUDIO RECORDING

PRETRIAL HEARING

JUNE 4, 2021

REPORTER'S CERTIFICATE

I, Tiffany Pino Newell, court-approved transcriber, certify that the foregoing is a correct transcription from the audio recording of the proceedings in the above-entitled matter.

I further certify that I am neither counsel for, related to, not employed by any of the parties to the action in which this hearing was taken, and further that I am not financially or otherwise interested in the outcome of the action.

/s/Tiffany P. Newell

Tiffany Pino Newell, CSR, RPR
Texas CSR 7766
Advanced Court Reporting Services, LLC.
5222 Bartlett Vista Court
Fulshear, Texas 77441
Telephone: 281.831.4765
Expiration: April 30, 2023

TAB C

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 21-9060

THIRTY-EIGHTH EMERGENCY ORDER REGARDING THE COVID-19 STATE OF DISASTER

ORDERED that:

1. Governor Abbott has declared a state of disaster in all 254 counties in the State of Texas in response to the imminent threat of the COVID-19 pandemic. This Order is issued pursuant to Section 22.0035(b) of the Texas Government Code.

2. The Thirty-Sixth Emergency Order (Misc. Dkt. No. 21-9026) is renewed as amended.

3. Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—without a participant’s consent:

a. except as provided in paragraph 4, modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, for a stated period ending no later than August 1, 2021;

b. except as this Order provides otherwise, allow or require anyone involved in any hearing, deposition, or other proceeding of any kind—including but not limited to a party, attorney, witness, court reporter, grand juror, or petit juror—to participate remotely, such as by teleconferencing, videoconferencing, or other means;

c. consider as evidence sworn statements made out of court or sworn testimony given remotely, out of court, such as by teleconferencing, videoconferencing, or other means;

d. conduct proceedings away from the court’s usual location with reasonable

notice and access to the participants and the public;

e. require every participant in a proceeding to alert the court if the participant has, or knows of another participant who has: (i) COVID-19 or a fever, chills, cough, shortness of breath or difficulty breathing, fatigue, muscle or body aches, headache, sore throat, loss of taste or smell, congestion or runny nose, nausea or vomiting, or diarrhea; or (ii) recently been in close contact with a person who is confirmed to have COVID-19 or exhibiting the symptoms described above;

f. take any other reasonable action to avoid exposing court proceedings and participants to the threat of COVID-19.

4. In any proceeding under Subtitle E, Title 5 of the Family Code, all deadlines and procedures must not be modified or suspended, unless permitted by statute, after August 1, 2021, except the dismissal date may be extended as follows:

a. for any such proceeding that, on the date of this Order, has a dismissal date that was previously modified under a prior Emergency Order Regarding the COVID-19 State of Disaster, the court may extend the dismissal date for a stated period ending no later than December 1, 2021;

b. for any such proceeding that, on the date of this Order, has been previously retained on the court's docket pursuant only to Section 263.401(b) or (b-1), the court may extend the dismissal date for a stated period ending no later than February 1, 2022;

c. for any such proceeding that, on the date of this Order, has not been previously retained on the court's docket pursuant to Section 263.401(b) or (b-1), the court may extend the initial dismissal date as calculated under Section 263.401(a) for a stated period ending no later than April 1, 2022; or

d. for any such proceeding that is filed on or after the date of this Order, the court may extend the initial dismissal date as calculated under Section 263.401(a) only as provided by Section 263.401(b) or (b-1).

5. Courts should continue to use reasonable efforts to conduct proceedings remotely.

6. Upon request and good cause shown by a court participant other than a juror—including but not limited to a party, an attorney, a witness, or a court reporter—a court must permit the participant to participate remotely in any proceeding, subject to constitutional limitations.

7. A court of appeals may conduct in-person proceedings if the chief justice of the court of appeals adopts minimum standard health protocols for court participants and the public attending court proceedings that will be employed in the courtroom and in public areas of the court building.

8. A district court, statutory or constitutional county court, statutory probate court, justice court, or municipal court may conduct in-person proceedings, including both jury and non-jury proceedings, if the local administrative district judge or presiding judge of a municipal court, as applicable, adopts, in consultation with the judges in the county or municipal court buildings:

a. minimum standard health protocols for court proceedings and the public attending court proceedings that will be employed in all courtrooms and throughout all public areas of the court buildings, including masking, social distancing, or both; and

b. an in-person proceeding schedule for all judges in the county or municipal court buildings, as applicable.

9. A court may conduct an in-person jury proceeding if:

a. to assist with coordination of local resources and to manage capacity issues, the court has obtained prior approval, including a prior approved schedule, for the jury proceeding from the local administrative district judge or presiding judge of the municipal courts, as applicable;

b. the court has considered on the record any objection or motion related to proceeding with the jury proceeding at least seven days before the jury proceeding or as soon as practicable if the objection or motion is made or filed within seven days of the jury proceeding;

c. the court has established communication protocols to ensure that no court participants have tested positive for COVID-19 within the previous 10 days, have had symptoms of COVID-19 within the previous 10 days, or have had recent known exposure to COVID-19 within the previous 14 days;

d. the court has included with the jury summons information on the precautions that have been taken to protect the health and safety of prospective jurors and a COVID-19 questionnaire to be submitted in advance of the jury selection that elicits from prospective jurors information about their exposure or particular vulnerability to COVID-

19; and

e. the court has excused or rescheduled prospective jurors who provide information confirming their COVID-19 infection or exposure, or their particular vulnerability to COVID-19 and request to be excused or rescheduled.

10. In criminal cases where confinement in jail or prison is a potential punishment, remote jury proceedings must not be conducted without appropriate waivers and consent obtained on the record from the defendant and prosecutor. In all other cases, remote jury proceedings must not be conducted unless the court has complied with paragraph 9(b).

11. Except for non-binding proceedings, a court may not permit or require a petit juror to appear remotely unless the court ensures that all potential and selected petit jurors have access to technology to participate remotely.

12. The Office of Court Administration should issue, and update from time to time, best practices to assist courts with safely and effectively conducting in-person and remote court proceedings under this Order.

13. In determining a person's right to possession of and access to a child under a court-ordered possession schedule in a Suit Affecting the Parent-Child Relationship, the existing trial court order shall control in all instances. Possession of and access to a child shall not be affected by any shelter-in-place order or other order restricting movement issued by a governmental entity that arises from the pandemic. The original published school schedule shall also control, and possession and access shall not be affected by the school's closure that arises from the pandemic. Nothing herein prevents parties from altering a possession schedule by agreement if allowed by their court order(s), or courts from modifying their orders on an emergency basis or otherwise.

14. An evidentiary panel in an attorney professional disciplinary or disability proceeding may—and must to avoid risk to panel members, parties, attorneys, and the public—without a participant's consent:

a. conduct the proceeding remotely, such as by teleconferencing, videoconferencing, or other means;

b. allow or require anyone involved in the proceeding—including but not limited to a party, attorney, witness, court reporter—to participate remotely, such as by teleconferencing, videoconferencing, or other means; and

c. consider as evidence sworn statements or sworn testimony given remotely, such as by teleconferencing, videoconferencing, or other means.

15. This Order is effective immediately and expires August 1, 2021, except as otherwise stated herein, unless extended by the Chief Justice of the Supreme Court.

16. The Clerk of the Supreme Court is directed to:

a. post a copy of this Order on www.txcourts.gov;

b. file a copy of this Order with the Secretary of State; and

c. send a copy of this Order to the Governor, the Attorney General, and each member of the Legislature.

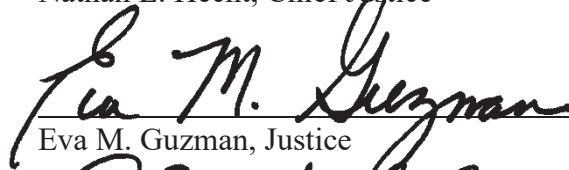
17. The State Bar of Texas is directed to take all reasonable steps to notify members of the Texas bar of this Order.

Dated: May 26, 2021

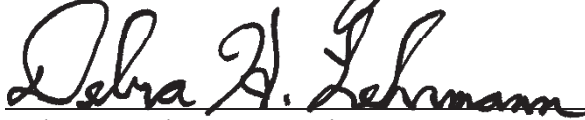
JUSTICE BOYD, JUSTICE DEVINE, and JUSTICE BLACKLOCK dissent.



Nathan L. Hecht, Chief Justice



Eva M. Guzman, Justice

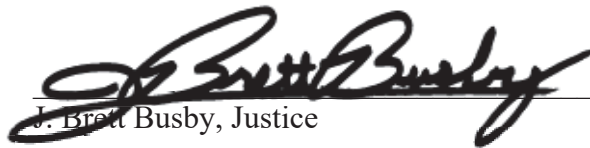


Debra H. Lehrmann, Justice

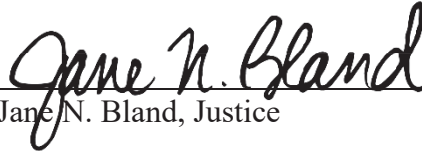
Jeffrey S. Boyd, Justice

John P. Devine, Justice

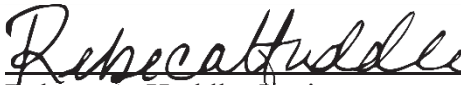
James D. Blacklock, Justice



J. Brett Busby, Justice



Jane N. Bland, Justice



Rebeca A. Huddle, Justice

TAB D

Vernon's Texas Statutes and Codes Annotated
Constitution of the State of Texas 1876 (Refs & Annos)
Article I. Bill of Rights (Refs & Annos)

Vernon's Ann.Texas Const. Art. 1, § 15

§ 15. Right of trial by jury

[Currentness](#)

Sec. 15. The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency. Provided, that the Legislature may provide for the temporary commitment, for observation and/or treatment, of mentally ill persons not charged with a criminal offense, for a period of time not to exceed ninety (90) days, by order of the County Court without the necessity of a trial by jury.

Credits

Amended Aug. 24, 1935.

Sections 1 to 8 appear in this Volume

Vernon's Ann. Texas Const. Art. 1, § 15, TX CONST Art. 1, § 15

Current through legislation effective May 26, 2021, of the 2021 Regular Session of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

T A B E

Vernon's Texas Statutes and Codes Annotated
Constitution of the State of Texas 1876 (Refs & Annos)
Article V. Judicial Department

Vernon's Ann.Texas Const. Art. 5, § 10

§ 10. Trial by jury

[Currentness](#)

Sec. 10. In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury; but no jury shall be empaneled in any civil case unless demanded by a party to the case, and a jury fee be paid by the party demanding a jury, for such sum, and with such exceptions as may be prescribed by the Legislature.

Vernon's Ann. Texas Const. Art. 5, § 10, TX CONST Art. 5, § 10

Current through legislation effective May 26, 2021, of the 2021 Regular Session of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

TAB F



KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

Vernon's Texas Statutes and Codes Annotated
Constitution of the State of Texas 1876 (Refs & Annos)
Article I. Bill of Rights (Refs & Annos)

Vernon's Ann.Texas Const. Art. 1, § 19

§ 19. Deprivation of life, liberty, etc.; due course of law

[Currentness](#)

Sec. 19. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

Sections 1 to 8 appear in this Volume

Vernon's Ann. Texas Const. Art. 1, § 19, TX CONST Art. 1, § 19

Current through legislation effective May 26, 2021, of the 2021 Regular Session of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

TAB G

Vernon's Texas Statutes and Codes Annotated
Constitution of the State of Texas 1876 (Refs & Annos)
Article I. Bill of Rights (Refs & Annos)

Vernon's Ann.Texas Const. Art. 1, § 3

§ 3. Equal rights

[Currentness](#)

Sec. 3. All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

Sections 1 to 8 appear in this Volume

Vernon's Ann. Texas Const. Art. 1, § 3, TX CONST Art. 1, § 3

Current through legislation effective May 26, 2021, of the 2021 Regular Session of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

TAB H

Vernon's Texas Statutes and Codes Annotated
Constitution of the State of Texas 1876 (Refs & Annos)
Article II. The Powers of Government

Vernon's Ann.Texas Const. Art. 2, § 1

§ 1. Division of powers; three separate departments; exercise of power properly attached to other departments

[Currentness](#)

Sec. 1. The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

Vernon's Ann. Texas Const. Art. 2, § 1, TX CONST Art. 2, § 1

Current through legislation effective May 26, 2021, of the 2021 Regular Session of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

TAB I

United States Code Annotated
Constitution of the United States
Annotated
Amendment VII. Civil Trials

U.S.C.A. Const. Amend. VII

Amendment VII. Civil Trials

[Currentness](#)

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S.C.A. Const. Amend. VII, USCA CONST Amend. VII

Current through PL 117-15 with the exception of PL 116-283. Incorporation of changes from PL 116-283 are in progress. See credits for details.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

TAB J

United States Code Annotated
Constitution of the United States
Annotated

Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection;
Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

U.S.C.A. Const. Amend. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE
PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION;
DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see [USCA Const Amend. XIV, § 1-Citizens](#)>

<see [USCA Const Amend. XIV, § 1-Privileges](#)>

<see [USCA Const Amend. XIV, § 1-Due Proc](#)>

<see [USCA Const Amend. XIV, § 1-Equal Protect](#)>

<sections 2 to 5 of this amendment are displayed as separate documents,>

<see [USCA Const Amend. XIV, § 2,](#)>

<see [USCA Const Amend. XIV, § 3,](#)>

<see [USCA Const Amend. XIV, § 4,](#)>

<see [USCA Const Amend. XIV, § 5,](#)>

U.S.C.A. Const. Amend. XIV, USCA CONST Amend. XIV

Current through PL 117-15 with the exception of PL 116-283. Incorporation of changes from PL 116-283 are in progress. See credits for details.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below:

Yolanda Lopez on behalf of Stuart Brown
Bar No. 24006914
ylopez@jw.com
Envelope ID: 54166927
Status as of 6/7/2021 3:19 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Stuart BradBrown		bbrown@jw.com	6/7/2021 2:32:17 PM	SENT
Brett David Kutnick	796913	bkutnick@jw.com	6/7/2021 2:32:17 PM	SENT
Joseph August Fischer	789292	tfischer@jw.com	6/7/2021 2:32:17 PM	SENT
Justin Lee	24097982	jlee@jw.com	6/7/2021 2:32:17 PM	SENT
Leah Graham	24073454	lgraham@rustyhardin.com	6/7/2021 2:32:17 PM	SENT
Ryan Kees Higgins	24007362	rhiggins@rustyhardin.com	6/7/2021 2:32:17 PM	SENT
Russell Hardin	8972800	rhardin@rustyhardin.com	6/7/2021 2:32:17 PM	SENT
Daniel Dutko	24054206	ddutko@rustyhardin.com	6/7/2021 2:32:17 PM	SENT
Randall Sorrels	10000000	Randy@SorrelsLaw.com	6/7/2021 2:32:17 PM	SENT
Joe Roden	794549	jroden@rustyhardin.com	6/7/2021 2:32:17 PM	SENT
Victoria Reilly	24118679	treilly@rustyhardin.com	6/7/2021 2:32:17 PM	SENT
Honorable Dedra Davis		daiquiri_roy@justex.net	6/7/2021 2:32:17 PM	SENT
Alexandria Farias-Sorrels		alex@sorrelslaw.com	6/7/2021 2:32:17 PM	SENT