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Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. FD 36629

ENTERED
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March 13, 2025
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Public Record

RAIL LINK, INC. - PETITION FOR DECLARATORY ORDER

STATUS UPDATE AND MOTION TO CONTINUE ABEYANCE

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ATTORNEYS FOR INJURY
PLAINTIFF DEMAREE REED

In accordance with the Surface Transportation Board’s February 20, 2025 order, Demaree Reed files this update on the status of his petition for writ of mandamus. As explained in more detail below, Mr. Reed respectfully requests that this Board continue to hold these proceedings in abeyance until: (1) the final resolution of his mandamus petition, which is now pending before the Supreme Court of Texas (*see In re Reed*, No. 25-0149 (Tex.) ([link to docket](#))); or (2) the Texas district court’s withdrawal of the referral order based on reconsideration under Texas Rule of Appellate Procedure 7.2(b).

1. This Board’s recent order accurately summarizes the proceedings. Petitioner Rail Link, Inc. filed the current petition for declaratory order after the 215th District Court of Harris County, Texas (*Hon. Elaine Palmer, presiding judge*) granted Rail Link’s motion to refer the issue of its “common carrier” status under Section 1 of the Federal Employers’ Liability Act. The district court’s referral order rested on its application of the “primary-jurisdiction doctrine.”

2. Mr. Reed thereafter filed a petition for writ of mandamus in the Houston (First) Court of Appeals, challenging the district court’s referral order as a clear abuse of discretion for which he had no adequate remedy by appeal. *See* Pet. for Writ of Mandamus, *In re Reed*, No. 01-22-00794 (Tex. App.—Houston [1st Dist.]) (filed Oct. 25, 2022) ([link to docket](#)). He then requested that this Board hold Rail Link’s declaratory-order petition in abeyance until the resolution of his mandamus petition. The Board granted that request. *See* STB Order, 2022 WL 16525107, at *1 (Oct. 28, 2022).

3. On July 23, 2024, a divided panel of the Court of Appeals denied Mr. Reed’s petition. *In re Reed*, No. 01-22-00794, 2024 WL 3503062 (Tex. App.—Houston [1st Dist.]

July 23, 2024, orig. proceeding [mand. pending]) (**Exhibit 1**). Justice Kelly dissented without opinion. *Id.*

4. Mr. Reed sought rehearing from the Court of Appeals’ denial of his petition. On December 31, 2024, a divided panel again denied Mr. Reed’s motion. *In re Reed*, No. 01-22-00794, — S.W.3d —, 2024 WL 5248555 (Tex. App.—Houston [1st Dist.] Dec. 31, 2024, orig. proceeding [mand. pending]) (**Exhibit 2**). Justice Kelly dissented with written opinion. *Id.*

5. On February 14, 2025—45 days after the Court of Appeals’ denial of his motion for rehearing¹—Mr. Reed filed a petition for writ of mandamus in the Supreme Court of Texas. *See* Pet. for Writ of Mandamus, *In re Reed*, No. 25-0149 (Tex.) (filed Feb. 14, 2025) (**Exhibit 3**). Like his petition before the Court of Appeals, Mr. Reed’s petition before the Supreme Court again challenges the district court’s referral order as a clear abuse of discretion for which he had no adequate remedy by appeal.²

6. Simultaneously with his mandamus petition, Mr. Reed filed a motion to temporarily abate the Supreme Court proceedings under Texas Rule of Appellate Procedure 7.2(b). That rule requires an appellate court to abate an original proceeding when the original judge who issued the challenged decision has been replaced, in order “to allow the successor [judge] to reconsider the original party’s decision.” Tex. R. App. P. 7.2(b); *see also, e.g., In re Baylor Med. Ctr. at Garland*, 280 S.W.3d 227, 227 (Tex. 2008) (orig. proceeding) (explaining that when “a new judge presides over the trial court, Rule 7.2 requires abatement of [an]

¹ Cf. Tex. R. App. P. 53.7(a)(2) (providing 45-day deadline for filing petition for review in Supreme Court from Court of Appeals’ ruling on timely filed motion for reconsideration).

² Unless a “compelling reason” exists, a litigant must “first seek mandamus review in a court of appeals” before doing so in the Supreme Court. *In re Dallas Cnty.*, 697 S.W.3d 142, 151 (Tex. 2024) (orig. proceeding) (explaining Texas Rule of Appellate Procedure 52.3(e)).

original proceeding to allow the successor to reconsider the [challenged] order”). The rule came into play here because, on January 1, 2025 (one day after the Court of Appeals denied Mr. Reed’s motion for rehearing), Judge Nathan J. Milliron succeeded Judge Palmer as the presiding judge of the 215th District Court. *See* Opposed Mot. for Temporary Abatement, *In re Reed*, No. 25-0149 (Tex.) (filed Feb. 14, 2025).

7. On March 7, 2025, the Supreme Court granted Mr. Reed’s motion for temporary abatement under Rule 7.2(b). *In re Reed*, No. 25-0149 (Tex. Mar. 7, 2025) (**Exhibit 4**). In its order, the Supreme Court abated the mandamus proceeding “for thirty days to allow [Judge Milliron] to reconsider the original judge’s decision.” *Id.* at 1. Accordingly, the Supreme Court removed Mr. Reed’s petition from its active docket until April 7, 2025, “by which time the parties must file either a status report or a motion to dismiss.” *Id.* In compliance with the Supreme Court’s order, Mr. Reed intends to file his motion for reconsideration before the district court on Monday (March 17, 2025), and will request the earliest possible hearing date.

8. If the district court grants Mr. Reed’s reconsideration motion and withdraws the referral order, that will moot his mandamus petition in the Supreme Court and the proceedings here. But if the court denies the reconsideration motion and adheres to the referral order, the Supreme Court will lift its abatement and proceed to resolve Mr. Reed’s petition on the merits. *See, e.g., In re Kuraray Am., Inc.*, 656 S.W.3d 137, 141 n.2 (Tex. 2022) (orig. proceeding) (per curiam).³

9. Regardless, for largely the same reasons previously provided, this Board should continue its abatement of these proceedings. *See generally* Mot. to Stay and Hold in Abeyance

³ If the district court fails to rule in a timely manner, the Supreme Court may also proceed to resolve the petition on the merits. *In re Facebook, Inc.*, 625 S.W.3d 80, 86 n.2 (Tex. 2021) (orig. proceeding).

(Oct. 26, 2022), at 3–7. *First*, the district court will very likely conclude that the primary-jurisdiction doctrine has no application here and withdraw the former judge’s referral order—entirely mooted this proceeding. *See id.* at 4–5. Alternatively, should the district court adhere to the referral order, the Supreme Court will lift its abatement and resolve Mr. Reed’s petition, where it will likely order the district court to withdraw the referral order. *Second*, continued abatement is necessary to avoid the irreparable harm Mr. Reed would suffer from being subject to an improper adjudicatory proceeding—one that would needlessly waste both Board and judicial resources. *See id.* at 5–6. *Third*, the Board’s continued abatement will only benefit (and not prejudice) Rail Link by preserving Rail Link’s resources. *See id.* at 6. *Fourth*, abatement will promote federalism, the separation of powers, and comity. *See id.* at 6–7.

10. The proper course is thus to allow the Texas proceedings to come to a final resolution—whether through the Supreme Court’s final resolution of Mr. Reed’s petition, or the district court’s withdrawal of its referral order based on reconsideration under Texas Rule of Appellate Procedure 7.2(b)—before this Board and the parties expend further, and potentially unnecessary, action on the current declaratory-order proceedings.

11. Mr. Reed will promptly update this Board upon pertinent updates from the Texas proceedings.

*

For these reasons, Mr. Reed respectfully requests that this Board continue its abatement of these proceedings until the final resolution of his mandamus petition that is pending before the Supreme Court of Texas, or the Texas district court’s withdrawal of the referral order based on reconsideration under Texas Rule of Appellate Procedure 7.2(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to all counsel of record by electronic filing on this the 13th day of March, 2025.

/s/ Roland Christensen

Roland Christensen

EXHIBIT 1

2024 WL 3503062

Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas, Houston (1st Dist.).

IN RE Demaree REED, Relator

NO. 01-22-00794-CV

|

Opinion issued July 23, 2024

Original Proceeding on Petition for Writ of Mandamus**Attorneys and Law Firms**

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Wayne Lindsey Robbins Jr., Lincoln Floyd, William J. Collins III, Laura S. Favaloro, for Real party in interest Trans-Global Solutions, Inc.

Panel consists of Chief Justice Adams and Justices Kelly and Goodman.

MEMORANDUM OPINION

Terry Adams, Chief Justice

*1 This lawsuit involves claims of negligence and gross negligence under the Federal Employer's Liability Act (FELA) against several defendants, arising from an injury

to Demaree Reed involving a slow-moving railcar.¹ The trial court referred the threshold question of Rail Link, Inc.'s² common carrier status, for purposes of the FELA, to the Surface Transportation Board (STB)³ pursuant to the doctrine of primary jurisdiction. Reed now seeks mandamus relief from that order. *See* TEX. R. APP. P. 52.

¹ The underlying case is *Demaree Reed v. INEOS Americas LLC, INEOS USA, LLC, Trans-Global Solutions, Inc., Genesee & Wyoming Railroad Services, Inc., and Rail Link, Inc.*, cause number 2019-29955, pending in the 215th District Court of Harris County, Texas, the Honorable Elaine Palmer presiding.

² Rail Link, Inc. is a defendant in this lawsuit and a real party in interest to this mandamus proceeding.

³ The Surface Transportation Board was created on January 1, 1996, and is the successor to the former Interstate Commerce Commission. It has “‘exclusive’ jurisdiction over transportation by rail carriers” including “classifications, rules [and] practices” by such carriers. *See Horton v. Kansas City S. Ry. Co.*, 692 S.W.3d 112, 129 (Tex. 2024) (citing 49 U.S.C. § 10501(b)); *see also* www.stb.gov.

“Primary jurisdiction ... is a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency. It requires the court to enable a ‘referral’ to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling.” *Reiter v. Cooper*, 507 U.S. 258, 268, 113 S.Ct. 1213, 122 L.Ed.2d 604 (1993).

This doctrine is prudential and “operates to allocate power between courts and agencies when *both* have authority to make initial determinations in a dispute.” *Subaru of Am. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002). “Trial courts should defer to appropriate administrative agencies when (1) the agency is staffed with experts trained in handling complex problems within the agency's purview, and (2) great benefit is derived from the agency's uniform interpretation of laws within its purview and the agency's rules and regulations when courts and juries might reach differing results under similar fact situations.” *In re*

Southwestern Bell Tel. Co., L.P., 226 S.W.3d 400, 403 (Tex. 2007).

Reed does not challenge the STB's expertise under the first prong. Instead, Reed only argues that the trial court clearly abused its discretion, by failing to analyze and apply the law of primary jurisdiction correctly, because, according to Reed, no great benefit will be derived from this referral.

*2 We deny Reed's petition for writ of mandamus. *See* TEX. R. APP. P. 52.8(a); *see also In re Mabray*, 355 S.W.3d 16,

22 (Tex. App.—Houston [1st Dist.] 2010, orig. proceeding) (“Even if the reviewing court would have decided the issue differently, it cannot disturb the trial court's decision unless the decision is shown to be arbitrary and unreasonable.”). We dismiss any pending motions as moot.

Justice [Kelly](#), dissenting, with opinion to follow.

All Citations

Not Reported in S.W. Rptr., 2024 WL 3503062

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EXHIBIT 2

2024 WL 5248555

Only the Westlaw citation is currently available.

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Court of Appeals of Texas, Houston (1st Dist.).

IN RE Demaree REED, Relator

NO. 01-22-00794-CV

I

Opinion issued December 31, 2024

Original Proceeding on Petition for Writ of Mandamus

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Panel consists of Chief Justice Adams and Justices Kelly and Goodman

Opinion

*1 Rehearing denied.

OPINION DISSENTING FROM THE DENIAL OF REHEARING

Peter Kelly, Justice

Relator Demaree Reed brought suit in the court below for damages under the Federal Employer's Liability Act ("FELA"). Six months after denying defendant Rail Link, Inc.'s motion for summary judgment on the issue of its status as a common carrier under FELA, the court below referred the question to the federal Surface Transportation Board ("STB") for determination under the doctrine of "primary jurisdiction." The STB does not have primary jurisdiction over the question; indeed, it does not have any jurisdiction at all.

This is how the STB itself describes its jurisdiction:

The Surface Transportation Board is an independent federal agency that is charged with the economic regulation of various modes of surface transportation, primarily freight rail.

The agency has jurisdiction over railroad rate, practice, and service issues and rail restructuring transactions, including mergers, line sales, line construction, and line abandonments. The STB also has jurisdiction over certain passenger rail matters, the intercity bus industry, non-energy pipelines, household goods carriers' tariffs, and rate regulation of non-contiguous domestic water transportation (marine freight shipping involving the mainland United States, Hawaii, Alaska, Puerto Rico, and other U.S. territories and possessions).

<https://www.stb.gov/about-stb/> (Last accessed Dec. 23, 2024). It is a rate-setting body, and it does not have jurisdiction to determine common-carrier status for tort liability under FELA. The ICC Termination of Act of 1995, by which Congress created the STB, does not confer such jurisdiction. The STB Reauthorization Act of 2015, by which Congress established the STB as a wholly independent federal agency, does not confer such jurisdiction. *See generally* 49 U.S.C. § 10501. One might scour the entirety of the United States Code and the Federal Register and find nary a trace of such jurisdiction.

The doctrine of primary jurisdiction permits a court to refer a question to an agency only "when *both* have authority to

make initial determinations in a dispute.” *Subaru of Am. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002) (emphasis in original); see *In re Reed*, No. 01-22-00794-CV, 2024 WL 3503062, at *1 (Tex. App.—Houston [1st Dist.] July 23, 2024, orig. proceeding) (quoting *Subaru of Am.*, 84 S.W.3d at 221). The court below is possessed of that authority, but the STB is not. The trial court thus abused its discretion, and shirked its duties to the State of Texas, in making the

referral to the STB. This Court should have granted relief to the relator.

Justice [Kelly](#), dissenting to the denial of rehearing.

All Citations

--- S.W.3d ----, 2024 WL 5248555 (Mem)

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EXHIBIT 3

No. 25-_____

IN THE SUPREME COURT OF TEXAS

In re Demaree Reed,
Relator.

PETITION FOR WRIT OF MANDAMUS

Original Proceeding from the Court of Appeals for the First District
of Texas at Houston (No. 01-22-00794-CV) and the 215th Judicial District Court of
Harris County, Texas (Cause No. 2019-29955)

Hon. Nathan J. Milliron, Presiding Judge
(Hon. Elaine Palmer, Former Presiding Judge)

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ABBREVIATIONS AND REFERENCES

Abbreviations:

Mr. Reed: Relator Demaree Reed, plaintiff below.

Real Link: Real Party in Interest Rail Link, Inc., defendant below.

Genesee & Wyoming Defendants: Real Parties in Interest Genesee & Wyoming, Inc. and Genesee & Wyoming Railroad Services, Inc., defendants below.

Ineos: Real Parties in Interest Ineos Americas LLC and Ineos USA LLC, defendants below.

Trans-Global: Real Party in Interest Trans-Global Solutions, Inc., defendant below.

FELA: Federal Employer Liability Act.

STB: Surface Transportation Board.

References:

The mandamus record is cited as “[volume number]MR:[page number].”

STATEMENT OF THE CASE

Nature of proceeding This is a personal-injury lawsuit. While working for his employers—Rail Link, Inc., Genesee & Wyoming, Inc., and Genesee & Wyoming Railroad Services, Inc.—Demaree Reed’s foot was run over by a railcar, requiring his leg’s partial amputation. 1MR:72, 412–15.

On April 29, 2019, Mr. Reed brought claims of negligence and gross negligence under the Federal Employer Liability Act against Rail Link and the Genesee & Wyoming Defendants, as well as under Texas common law against Ineos Americas LLC, Ineos USA LLC, and Trans-Global Solutions, Inc. 1MR:69-81. Trial was scheduled for August 2022. 4MR:1398–99.

Respondent Hon. Nathan J. Milliron
(formerly Hon. Elaine Palmer)
215th Judicial District Court
201 Caroline, 13th Floor
Houston, Texas 77002

Respondent’s action On December 9, 2021, the trial court denied Rail Link’s motion for summary judgment on the issue of common carriage under FELA section 1. 4MR:1398. Then, on July 7, 2022, it granted Rail Link’s motion for reconsideration in part, accepting Rail Link’s alternative request to refer the common-carrier issue to the Surface Transportation Board. 4MR:1468. Finally, on August 15, 2022, the court denied Mr. Reed’s motion to reconsider its referral order. 4MR:1503. On September 19, 2022, the STB granted Rail Link’s petition to commence a declaratory proceeding. 4MR:1530.

Court of appeals First Court of Appeals in Houston, Texas (Adams, C.J.; Kelly, Goodman, JJ.)

Court of appeals’ disposition: On October 25, 2022, Mr. Reed filed a petition for writ of mandamus in the First Court of Appeals. 5MR:1594. The STB granted a stay of proceedings pending this petition’s resolution. 5MR:1775.

On July 23, 2024, a divided panel denied Mr. Reed’s petition, holding that the trial court’s STB referral was not a clear abuse of discretion. 5MR:1945. Chief Justice Adams, joined by Justice Goodman, authored the majority opinion. Justice Kelly dissented without opinion. The memorandum opinion can be located at 2024 WL 3503062. *See also* 5MR:1945.

Mr. Reed moved for rehearing, which the divided panel denied on December 31, 2024. 5MR:2039. Dissenting from the denial of rehearing, Justice Kelly opined that the STB lacks any jurisdiction—including primary jurisdiction—over Rail Link’s common-carrier status under FELA. 5MR:2040. The opinions on rehearing can be located at —S.W.3d —, 2024 WL 5248555. *See also* 5MR:2039–40.

Rule 7.2
Notice

On January 1, 2025, Judge Nathan J. Milliron succeeded Judge Palmer as the presiding judge of the 215th Judicial District Court. With this petition, Mr. Reed files a motion for temporary abatement so that Judge Milliron may have the opportunity to reconsider Judge Palmer’s decisions that are the subject of this original proceeding. *See* Tex. R. App. P. 7.2(b).

STATEMENT OF JURISDICTION

This Court has jurisdiction to issue a writ of mandamus in this case under Section 22.221(b)(1) of the Texas Government Code.

ISSUES PRESENTED

- I.** Whether the trial court clearly abused its discretion in referring a garden-variety legal issue to the Surface Transportation Board under the primary-jurisdiction doctrine when: (A) that doctrine, which impermissibly delegates judicial authority to administrative agencies, should be abrogated under the U.S. Supreme Court's opinion in *Loper Bright Enterprises v. Raimondo*; (B) at minimum, the doctrine should be narrowed, rendering it inapplicable here; *or* (C) even applying the doctrine as it currently exists, neither of the doctrine's two requirements is satisfied.
- II.** Whether Mr. Reed lacks an adequate remedy by appeal when: (A) the trial court's referral order impermissibly allows this case to proceed in the wrong court; (B) the court's order has resulted in an indefinite abatement of this case; *and* (C) the petition presents an important, but elusive, legal issue of first impression.

INTRODUCTION

Should Texas courts be allowed to delegate typical legal issues to administrative agencies for decisionmaking? Like *Chevron* deference, the “primary-jurisdiction doctrine” is the product of a bygone era in which courts impermissibly ceded judicial power to agencies under the guise of “agency expertise.” The U.S. Supreme Court’s opinion in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), rightly restores judicial power to where it always belonged: the judicial branch, not the administrative state. This Court should do likewise, abrogate the primary-jurisdiction doctrine—the sole basis for the trial court’s improper referral to the Surface Transportation Board—and grant this petition.

After Demaree Reed suffered an amputation-requiring workplace injury, he sued his employers under the Federal Employer Liability Act. One employer, Rail Link, Inc., sought summary judgment on the sole ground that it was not a “common carrier by railroad” under FELA section 1, and thus FELA could not apply. After initially denying the motion, the court took unprecedented action: It granted Rail Link’s belated request that it “refer” the issue to the STB under the primary-jurisdiction doctrine. No Texas state court—*none*—has ever made such a referral.

Understandably so: The referral was improper. The primary-jurisdiction doctrine, developed in the U.S. Supreme Court in the 1950s and adopted shortly

thereafter in Texas, permits courts to delegate judicial authority to decide a legal issue to an administrative agency under two supposed conditions: (1) the issue presents a technically complex problem within the agency's purview, and (2) great benefit would result from an agency's uniform interpretation of the law.

But that doctrine cannot stand after *Loper Bright*. Overruling *Chevron*, the U.S. Supreme Court held that courts “may *not* defer to an agency interpretation of the law[.]” *Loper Bright*, 603 U.S. at 413 (emphasis added). The Court expressly rejected deference based on (1) an agency's “subject matter expertise” or (2) the argument that deference “promote[s] the uniform construction of federal law[.]” *Id.* at 401.

More to the point: *Loper Bright* expressly disapproved of both underpinnings of the primary-jurisdiction doctrine. Properly following federal law, this Court should abrogate the doctrine, which (like *Chevron*) is not saved by *stare decisis*.

At minimum, this Court should narrow the doctrine's scope under *Loper Bright* by directing courts to: (1) scrutinize an agency's authorizing statutes in determining whether it has concurrent jurisdiction to begin with; (2) defer only to an agency's factual findings, not its legal conclusions; *and* (3) discount the purported “uniformity” benefit of an agency's legal conclusions, as courts alone retain final authority in matters of legal interpretation. Applying those principles here, the trial

court's referral order cannot stand. As Justice Kelly rightly explained in his dissent, the STB—a rate-setting body—has no concurrent jurisdiction over common-carrier status for tort liability. What's more, the court's order raised only a garden-variety legal issue—not a request for any factual finding.

Yet even somehow assuming the doctrine's continued vitality in its original form, the trial court badly misapplied it. The legal question of whether Rail Link's operations made it a "common carrier by railroad" under FELA section 1 is not a technically complex problem implicating the STB's expertise. Nor, as myriad other courts have held, is there any possible "uniformity" benefit to a regulatory scheme—let alone the requisite "*great* benefit"—if the STB decides this issue.

For many reasons, Mr. Reed also lacks an adequate remedy by appeal. The order sends his case to the wrong adjudicatory authority. It results in an indefinite abatement of proceedings. And it raises a novel legal issue that eludes appeal.

Like the U.S. Supreme Court, this Court should hold that Texas courts cannot cede judicial authority to administrative agencies. Given the issue's critical importance to Texans, this Court should order briefs on the merits, simultaneously set argument, and grant the petition.

STATEMENT OF FACTS

I. Rail Link's unsafe working conditions severely injure Mr. Reed.

On January 27, 2019, 23-year-old Demaree Reed fell from a moving railcar at Ineos's LaPorte, Texas facility while working as a switchman for Rail Link and the Genesee & Wyoming Defendants. *See* 1MR:416-67. His injury required his left leg's amputation:



1MR:426-27.

Mr. Reed thereafter sued Rail Link and the Genesee & Wyoming Defendants for negligence and gross negligence under FELA.¹ 1MR:1-8, 69-79, 91, 93.

II. Refusing to decide whether Rail Link is a “common carrier” under FELA, the trial court refers the legal issue to the STB under the primary-jurisdiction doctrine.

In June 2021, Rail Link moved for summary judgment on the sole ground that it was “not a ‘common carrier by railroad’ as is required for [] FELA to apply.” 1MR:323-24 & n.2 (citing 45 U.S.C. § 51). Rail Link argued that it “merely performed in-plant switching services at the Ineos chemical plant under a private contract solely with Ineos, did not offer its service to the general public, and did not operate outside of” the plant. 1MR:328-29. Following a hearing, the trial court denied the motion (as well as the Genesee & Wyoming Defendants’ separate summary-judgment motion) and set trial for August 2022. 4MR:1392, 1398-99.

Two months before that trial, Rail Link moved for reconsideration on the issue of common carriage. 4MR:1401. For the first time, it alternatively requested that the court “refer this single issue to the [STB], the federal agency with primary jurisdiction over common carrier railroads.” 4MR:1401. Refusing to decide that issue, the trial court granted Rail Link’s alternative request and referred the issue to

¹ Mr. Reed also brought the same claims under Texas common law against Ineos (the facility owner) and Trans-Global (the track maintenance company). 1MR:1-8, 69-79.

the STB. 4MR:1468. It then denied Mr. Reed's subsequent reconsideration motion. 4MR:1503.

III. A divided panel denies Mr. Reed's mandamus petition.

In October 2022, Mr. Reed petitioned the First Court of Appeals for mandamus relief. 5MR:1594. The STB granted a stay of proceedings pending this petition's resolution. 5MR:1775.

In July 2024, a divided panel denied Mr. Reed's petition, holding that the trial court's referral order was not a clear abuse of discretion. 5MR:1945. Mr. Reed moved for rehearing, which the divided panel also denied in December 2024. 5MR:2039. Dissenting, Justice Kelly opined that the STB is solely "a rate-setting body" that "does not have jurisdiction to determine common-carrier status for tort liability under FELA." 5MR:2041. Thus, the STB not only "does not have primary jurisdiction over the question" but "does not have any jurisdiction at all." 5MR:2040.

ARGUMENT

“Mandamus is warranted when [1] a trial court clearly abuses its discretion and [2] the relator has no adequate remedy by appeal.” *In re YRC Inc.*, 646 S.W.3d 805, 808 (Tex. 2022) (orig. proceeding) (per curiam). As explained below, the trial court’s erroneous referral order meets both prongs for mandamus relief.

I. The trial court clearly abused its discretion in outsourcing a garden-variety legal issue to the STB under the “primary-jurisdiction doctrine.”

The trial court clearly abused its discretion in referring this case to the STB under the primary-jurisdiction doctrine.² Under *Loper Bright*, that doctrine should be abrogated or, at minimum, narrowed. But even considering the doctrine as it currently stands, it still does not apply.

A. This Court should abrogate the primary-jurisdiction doctrine, which impermissibly delegates judicial authority to administrative agencies.

The primary-jurisdiction doctrine improperly allows Texas courts to delegate judicial authority to decide a legal issue to an administrative agency. It does so on two supposed grounds: the agency’s specialized knowledge and to further uniform interpretation of the law. But *Loper Bright* expressly disapproves of both criteria.

² “[A]n error of law or an erroneous application of law to facts is always an abuse of discretion.” *In re Facebook, Inc.*, 625 S.W.3d 80, 86 (Tex. 2021) (orig. proceeding).

Properly following federal law in this realm (as it has for decades), this Court should abrogate the primary-jurisdiction doctrine.

1. The primary-jurisdiction doctrine outsources judicial decisionmaking to administrative agencies.

The primary-jurisdiction doctrine improperly permits courts to refer legal issues—and thereby cede judicial authority—to administrative agencies for decisionmaking.

The U.S. Supreme Court developed the earliest form of the primary-jurisdiction doctrine—now called “exclusive agency jurisdiction”—in the early twentieth century, referring rate-setting and labor issues to agencies when required by statute. Diana R. H. Winters, *Restoring the Primary Jurisdiction Doctrine*, 78 OHIO ST. L.J. 541, 546 (2017) (“Winters”). The Court developed the doctrine in its current formulation in the 1950s, using “expansive” rhetoric that led to the doctrine’s expansion and, in turn, broad deference to agencies. *Id.* at 552; *see also id.* at 543, 546 & n.31; 567-75, 584.

Under the primary-jurisdiction doctrine, courts may “refer” to agencies issues within agencies’ “special competence,” staying trial-court proceedings and retaining subject-matter jurisdiction pending the agency’s decision. *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956). In the U.S. Supreme Court’s words,

primary jurisdiction “allocat[es] the law-making power” to the agency, “*transfer[ring]*” that power “*from court to agency[.]*” *Id.* at 65 (emphasis added).

Shortly following suit, Texas adopted the primary-jurisdiction doctrine.³ *Gregg v. Delhi-Taylor Oil Corp.*, 344 S.W.2d 411, 414 (Tex. 1961) (discussing *Kavanaugh v. Underwriters Life Ins. Co.*, 231 S.W.2d 753 (Tex. Civ. App.—Waco 1950, writ ref’d). Under this “prudential” doctrine, “trial courts should allow an administrative agency to initially decide” a legal issue when two requirements are met:

- (1) an agency is typically staffed with experts trained in handling the complex problems in the agency’s purview; *and*
- (2) great benefit is derived from an agency’s uniformly interpreting its laws, rules, and regulations, whereas courts and juries may reach different results under similar fact situations.

Forest Oil Corp. v. El Rucio Land & Cattle Co., Inc., 518 S.W.3d 422, 429-30 (Tex. 2017).

2. The primary-jurisdiction doctrine is inconsistent with *Loper Bright*.

The U.S. Supreme Court’s correct decision in *Loper Bright* fatally undermines the primary-jurisdiction doctrine.

³ It also adopted the exclusive-jurisdiction doctrine, which is not at issue here. *Kavanaugh*, 231 S.W.2d at 755-56.

To begin, *Loper Bright* overruled *Chevron*⁴ deference: when a statute is ambiguous or silent, courts must defer to an administrative agency’s interpretation or application of a statute “if it is a permissible construction of the statute.” *Loper Bright*, 603 U.S. at 397. *Chevron* was “misguided because agencies have no special competence in resolving statutory ambiguities. Courts do.” *Id.* at 400-01. Thus, deference to an agency’s “legal interpretation” (*id.* at 412)—even over “a technical matter” or based on “a desire for the uniform construction” of law—is improper, as there is no value in “uniformity for uniformity’s sake” (*id.* at 402-03). What matters is “the correct interpretation” of the law, which is the exclusive domain of courts. *Id.* at 403.

Accordingly, courts may not cede the task of “legal interpretation” “just because a court has an agency to fall back on.” *Id.* (citation and quotation marks omitted). Rather, courts must “confront statutory ambiguities” and “resolve them by exercising independent legal judgment.” *Id.* at 401. As a result, courts “may not defer to an agency interpretation of the law[.]” *Id.* at 413.

Under *Loper Bright*, the primary-jurisdiction doctrine cannot stand. Like *Chevron*, that doctrine is another form of agency deference: it “*requires* a trial court to *defer* to an agency to make an initial determination” of a legal matter when “both

⁴ *Chevron U.S.A. Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

have the authority” to make that determination. *Forest Oil*, 518 S.W.3d at 429 (emphases added). But *Loper Bright* expressly—and rightly—rejected agency deference based on (1) an agency’s “subject matter expertise” or (2) the theory that agency deference “promote[s] the uniform construction of federal law[.]” 603 U.S. at 401. It thus disapproved of the very requirements underpinning the primary-jurisdiction doctrine. *See Forest Oil*, 518 S.W.3d at 429-30.

Properly following federal law (where the doctrine originated⁵), this Court should abrogate the primary-jurisdiction doctrine. Consider its first requirement: the existence of “complex problems” to be addressed by agency experts. *Forest Oil*, 518 S.W.3d at 429-30. *Loper Bright* held that administrative agencies “have no special competence in resolving statutory ambiguities” (603 U.S. at 400-01) or in matters of “legal interpretation” (*id.* at 412). Rather, as “final authorit[ies] on issues of statutory construction[,]” “[c]ourts do.” *Id.* at 401; *see also Subaru*, 84 S.W.3d at 220; TEX. CONST. art. V, §§ 1, 8 (vesting “judicial power” in Texas courts). As such, an agency’s expertise and the existence of “complex problems” are not proper bases for deferring legal issues to agencies. *Loper Bright*, 603 U.S. at 400-04.

⁵ *See, e.g., Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002) (following *Western Pac.*, 352 U.S. at 64-65).

Next, consider the doctrine’s second requirement: “great benefit” from uniformity in an agency’s legal interpretations. *Forest Oil*, 518 S.W.3d at 430. *Loper Bright* held that deferring to an agency’s legal conclusion out of “a desire for [] uniform construction” of law is improper. 603 U.S. at 401. That is because there is no value in an agency’s uniformity “over the correct interpretation” of the law, which is the exclusive domain of courts. *Id.* at 403.

3. *Stare decisis* does not save the doctrine.

Just as *stare decisis* could not properly save *Chevron* deference, it cannot save the primary-jurisdiction doctrine.

This Court may abrogate a case or doctrine when (1) it is wrong, and (2) its overruling serves the purposes of *stare decisis*: efficiency, fairness, and legitimacy. *Mitschke v. Borromeo*, 645 S.W.3d 251, 260-67 (Tex. 2022).

Both principles apply here. The primary-jurisdiction doctrine is wrong. *See supra* Part I.A.2. Abrogating it serves efficiency interests because applying the doctrine results in “lengthy delays”—and often “unreasonable delay” (as this case exemplifies)—as litigants “approach the relevant agency, request a determination, and then reapproach the court[.]” *Winters* at 592-93; *see Mitschke*, 645 S.W.3d at 263-64. The doctrine’s abrogation promotes fairness, as there is only a “remote possibility” that anyone “arrang[es] [their] affairs” in reliance on the doctrine’s

availability. *Mitschke*, 645 S.W.3d at 264-65. And it furthers the “appropriate role” and legitimacy of the judiciary in legal decisionmaking. *Id.* at 266.

4. As a result, the trial court’s STB referral was improper.

Once this Court abrogates the primary-jurisdiction doctrine, there is no lawful basis for the trial court’s referral to the STB. The order was a clear abuse of discretion.

B. Alternatively, this Court should narrow the doctrine’s reach.

1. *Loper Bright* requires close scrutiny of an agency’s statutory authority and narrowed deference to its findings.

Even assuming the primary-jurisdiction doctrine’s continued viability, *Loper Bright* necessarily narrows its scope in three ways.

First, given the primacy of courts in deciding legal issues (*see Loper Bright*, 603 U.S. at 401-04, 412-13), courts must closely scrutinize an agency’s authorizing statutes to determine whether the agency has concurrent jurisdiction to begin with. *See, e.g.*, 5MR:2041 (Kelly, J., dissenting).

Second, *Loper Bright* narrows the first primary-jurisdiction prong. Although an agency may be “staffed with experts trained in handling the complex problems in the agency’s purview” (*Forest Oil*, 518 S.W.3d at 429-30), a court may only defer to an agency’s “findings of fact.” *Loper Bright*, 603 U.S. at 387. Absent express legislative

delegation, it may not “extend similar deference to agency resolutions of questions of law.” *Id.* (emphasis in original); *see also id.* at 413.

Loper Bright thus bolsters a principle Texas courts have always maintained: the doctrine “does not apply to claims that are inherently judicial in nature.” *Forest Oil*, 518 S.W.3d at 430. And applying the law to facts is inherently judicial. *See Loper Bright*, 603 U.S. at 386, 401-03, 412. That is so even when the task involves “technical detail,” as “many statutory cases call upon courts to interpret the mass of technical detail that is the ordinary diet of the law.” *Id.* at 402 (alteration, citation, and quotation marks omitted).

Third, *Loper Bright* also limits the second primary-jurisdiction prong. It heavily discounts any “great benefit” to be “derived from an *agency’s* uniformly interpreting its laws[.]” *Forest Oil*, 518 S.W.3d at 430 (emphasis added). Rightly so: “there is little value in imposing a uniform interpretation of a statute if that interpretation is wrong.” *Loper Bright*, 603 U.S. at 403. The correct interpretation falls within the purview of courts, not agencies. *Id.*

2. Applying that scrutiny, the trial court’s STB referral was improper.

Under these principles, the trial court’s STB referral was improper.

A careful review of the STB’s authorizing statutes—the ICC Termination Act (49 U.S.C. § 10101 *et seq.*) and the STB Reauthorization Act (*id.* § 10501 *et seq.*)—

confirms Justice Kelly’s conclusion: the STB is “a rate-setting body” with no “jurisdiction to determine common-carrier status for tort liability under FELA.” 5MR:2041; *accord S. Plains Switching, Ltd. Co. v. Surface Transp. Bd.*, No. 5:07-CV-047-C ECF, 2007 WL 9754682, at *1 (N.D. Tex. Sept. 25, 2007). That conclusion is reinforced by the STB’s own description of its jurisdiction, which focuses on “*economic* regulation” of railroad rates and restructuring transactions. 5MR:2041 (citing Surface Transportation Board, *About STB*, available at <https://www.stb.gov/about-stb/>) (emphasis added). But neither the parties nor the trial court presented *any* rate-setting or economic issue to the STB. Justice Kelly thus is right: The STB had no concurrent jurisdiction to begin with.

Even were it otherwise, the trial court’s referral was improper because it presented solely a *legal* question: whether, under the facts of this case, Rail Link is “common carrier by railroad” under FELA section 1. *See* 4MR:1528 (referral order). The trial court raised no request for factual findings. *See id.* So any *legal* conclusion from the STB would be owed no deference. *See Loper Bright*, 603 U.S. at 389, 413. Nor would it merit any deference on “uniformity” grounds. Courts—not agencies—are the proper authorities “over the correct interpretation” and application of 45 U.S.C. § 51. *Id.* at 403.

Accordingly, even if this Court declines to abrogate the primary-jurisdiction doctrine under *Loper Bright*, it should narrow the doctrine's reach. With the doctrine properly narrowed, the trial court's STB referral was an abuse of discretion.

C. Regardless, the courts below misapplied the primary-jurisdiction doctrine.

But even were this Court to maintain the primary-jurisdiction doctrine without modification, the result is the same: the trial court's STB referral was an abuse of discretion because it flunks both primary-jurisdiction requirements.

1. This case presents no question for which the STB's technical expertise is necessary.

The trial court's referral fails the first requirement: to present a "complex problem[]" implicating technical issues "within the agency's purview." *Forest Oil*, 518 S.W.3d at 429-30. Put otherwise, the referral must present "questions" "that require the special knowledge, experience and services of the administrative tribunal to determine technical and intricate matters of fact." *Cash Am. Intern. Inc. v. Bennett*, 35 S.W.3d 12, 18 (Tex. 2000).

No such question exists here.⁶ The legal issue of a party's common-carrier status under FELA is one courts have decided for more than a century without

⁶ According to the majority below, Mr. Reed did not challenge "the STB's expertise under the first prong." 5MR:1947. Not so: his petition and reply thoroughly challenged this prong. *See* 5MR:1637, 1640, 1643-44, 1864-70.

agency intervention.⁷ Indeed, Rail Link *itself* has previously sought and obtained determination of its common-carrier status before *courts*—not the STB—in at least four earlier cases. 4MR:1546.

The issue is simply not a “complex problem” requiring the STB’s economic regulatory expertise. *Cf. Cash Am.*, 35 S.W.3d at 18 (“We can discern no special expertise that would be required to resolve [the plaintiff’s] claims”). Courts faced with comparable facts have rejected requests for STB referral when, as here, the agency had no special expertise over the issue and the straightforward facts presented a straightforward application of law.⁸ And at least one court has rejected *the precise referral request here*—for the STB to determine “the common-carrier question[.]” *Union Pac. R.R. Co. v. Reg’l Transp. Auth.*, No. 19-CV-7957, 2020 WL 6930458, at *2 (N.D. Ill. Aug. 27, 2020), *aff’d*, 74 F.4th 884 (7th Cir. 2023).

⁷ See *Washington Ry. & Elec. Co. v. Scala*, 244 U.S. 630, 638 (1917); see also, e.g., *Durisseau v. Union Tank Car Co.*, No. 1:22-CV-432, 2024 WL 1288633, at *9 (E.D. Tex. Mar. 25, 2024); *Ashworth v. Railserve, Inc.*, No. 09-09-00187-CV, 2010 WL 2172377, at *1 (Tex. App.—Beaumont May 27, 2010, no pet.); *Nichols v. Pabtex Inc.*, 151 F. Supp. 2d 772, 775-79 (E.D. Tex. 2001).

⁸ See, e.g., *Norfolk S. Ry. Co. v. Baltimore & Annapolis R.R.*, 715 F. App’x. 244, 249 (4th Cir. 2017); *CSX Transp. Co. v. Novolog Bucks Cnty.*, 502 F.3d 247, 252 (3d Cir. 2007); *Baltimore & Ohio Chicago Terminal R. Co. v. Wisconsin Cent. Ltd.*, 154 F.3d 404, 411 (7th Cir. 1998); *Wilbert Family Ltd. P’ship v. Dallas Area Rapid Transit*, No. 3:10-CV-2052-D, 2012 WL 246091, at *5 (N.D. Tex. Jan. 26, 2012); *Miller v. WD-40 Co.*, 29 F. Supp. 2d 1040, 1045 (D. Minn. 1998).

2. No great uniformity benefit may be derived from the STB’s assessment of the ordinary facts here.

The court’s referral also flunks the second primary-jurisdiction requirement: that “great benefit [be] derived from [the] agency’s uniformly interpreting its laws, rules, and regulations[.]” *Forest Oil*, 518 S.W.3d at 430.

“[A]lthough rail transportation is a highly regulated area of law, resolving this issue in this forum [*i.e.*, the court] is unlikely to threaten uniformity or disrupt a delicate regulatory scheme.” *Wilbert Family*, 2012 WL 246091, at *5; *see also Miller*, 29 F. Supp. 2d at 1045 (rejecting request for STB referral where dispute did not implicate “larger issues of transportation policy that demand uniform administration by an expert body”). To the contrary, this case merely presents a classic “issue of statutory interpretation: whether [Rail Link] does or does not have common-carrier obligations[.]” *Reg’l Transp. Auth.*, 2020 WL 6930458, at *3. “Considering such legal issues is what ... courts do every day.” *Id.* As a result, it “would not be appropriate to refer such an issue to an agency.” *Id.* (collecting cases).

Though no more is necessary, the unprecedented nature of the trial court’s referral order implies its error. So far as Mr. Reed has found, no Texas state court—at least, until now—has ever referred the question of an entity’s common-carrier status to the STB. What is more, by his search, only one Texas state court has ever previously referred *any* issue to the STB, and the STB rendered no decision. *See*

Trinity Indus., Inc.-Petition for Declaratory Order, No. MC-C-30154, 1989 WL 239075, at *1 (I.C.C. July 25, 1989).

Thus it was not “appropriate to refer such an issue to [the] agency.” *Reg’l Transp. Auth.*, 2020 WL 6930458, at *3. As the court clearly abused its discretion in so doing, mandamus relief is warranted. *In re Discovery Operating, Inc.*, 216 S.W.3d 898, 905 (Tex. App.—Eastland 2007, orig. proceeding) (granting mandamus petition when trial court improperly referred case to Texas Railroad Commission).

II. Mr. Reed lacks an adequate remedy by appeal.

For three reasons, Mr. Reed lacks an adequate remedy by appeal.

A. The trial court’s referral order impermissibly allows the case to proceed in the wrong court.

The trial court’s referral order sends this case to the wrong adjudicatory body. “Permitting a case to proceed in the wrong court necessarily costs private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.” *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287, 299 (Tex. 2016) (orig. proceeding) (quotation marks omitted).

The trial court’s referral order does precisely that here. It improperly transfers this case to an agency that, as just explained, lacks a lawful basis for considering this legal dispute. After STB proceedings and appeals taking potentially years (*see infra* Part II.B), the matter will finally return to the trial court, where an appeal will

confirm the improper STB referral. Although that appeal would nullify any action taken by the STB, the time and money wasted litigating the issue before an improper adjudicatory body will never be recovered. That reason alone warrants mandamus relief.

B. The court’s order has indefinitely abated Mr. Reed’s claims against Rail Link.

Mandamus relief also is proper because the referral order has effectively resulted in an indefinite abatement of Mr. Reed’s claims against Rail Link.

An appellate remedy is inadequate when protracted related proceedings “would unduly and unjustly delay the trial and final disposition” of a dispute. *In re RSR Corp.*, 568 S.W.3d 663, 667 (Tex. 2019) (per curiam) (orig. proceeding). In such a case, “[a]n adequate remedy by appeal does not exist” because “the plaintiff is effectively denied any other method of challenging the court’s action for an indefinite period of time during which the case remains in a suspended state.” *In re Lombana*, 542 S.W.3d 699, 701-02 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding).

Here, the referral order effectively stays all trial-court proceedings against Rail Link—in a 2019 case set for trial in 2022—until the conclusion of STB proceedings. 4MR:1481-82, 1493-94. And the STB’s decision is not necessarily final. Whatever the agency decides, the aggrieved party will presumably exercise its statutory right

to appeal the decision to the relevant federal circuit court of appeals. *See* 28 U.S.C. § 2321(a); *id.* § 2342(5). And still then, perhaps the aggrieved party may petition that court for panel or en banc rehearing. Fed. R. App. P. 35, 40. Or perhaps it may exercise its right to petition the U.S. Supreme Court for a writ of certiorari. 28 U.S.C. § 1254.

Whichever it may be, the result is the same: yet more delay. This reason, too, merits mandamus relief.

C. The elusiveness of this important issue supports granting this petition.

Finally, the elusiveness of this critical legal issue provides yet another reason why mandamus relief is appropriate. Mandamus relief is proper to “give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments[.]” *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding). That is particularly the case when the petition presents a novel issue that is “of first impression” and “likely to recur[.]” *Id.* at 138.

The question of law here—the existence and proper application of the primary-jurisdiction doctrine—is one such novel legal issue well-suited for mandamus relief. It is of first impression to Texas appellate courts. It is important to Texas jurisprudence. And it is likely to recur: Armed with Rail Link’s strategy, defendants routinely may seek to punt garden-variety legal issues that Texas trial

courts have long adjudicated to an administrative agency merely to delay a trial. Facing the costs of an indefinite delay caused by a referral order and the resulting appellate process, many parties may be forced to withdraw their disputes rather than waiting for a final agency decision, appealing that decision, and then returning to the trial court and appealing the initial referral order. To prevent that elusive and improper outcome, this Court should grant the petition.

PRAYER

This Court should grant this petition, direct the trial court to rescind its STB-referral order, and grant Mr. Reed all other relief to which he is entitled.

Dated: February 14, 2025.

Respectfully Submitted,

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CERTIFICATION

I certify that I have reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record. Tex. R. App. P. 52.3(j).

I further certify that the attached appendix contains true and correct copies of the original documents pertinent to the issues presented for review. Tex. R. App. P. 52.3(k).

/s/ Andrew R. Gould

Andrew R. Gould

CERTIFICATE OF COMPLIANCE

I certify that this document contains 4,496 words, as determined by Microsoft Word's word-count function, excluding the sections of the document listed in Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Andrew R. Gould

Andrew R. Gould

CERTIFICATE OF SERVICE

I certify that on February 14, 2025, I served a copy of this document on all counsel of record using the Court's electronic-filing system:

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/s/ Andrew R. Gould
Andrew R. Gould

EXHIBIT 4

IN THE SUPREME COURT OF TEXAS

No. 25-0149

IN RE DEMAREE REED, PETITIONER

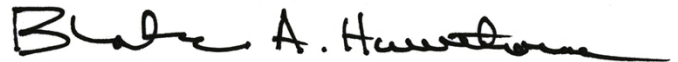
ON PETITION FOR WRIT OF MANDAMUS

ORDER

1. The motion to abate filed February 14, 2025, is granted, and this case is abated for thirty days to allow the successor judge to reconsider the original judge's decision. *See* TEX. R. APP. P. 7.2(b).

2. This case is removed from the Court's active docket until **April 7, 2025**, by which time the parties must file either a status report or a motion to dismiss. The parties shall immediately notify this Court about any changes in status in the settlement proceedings.

Done at the City of Austin, this 7th day of March, 2025.



BLAKE A. HAWTHORNE, CLERK
SUPREME COURT OF TEXAS

By Claudia Jenks, Chief Deputy Clerk