



8-18-2023

Does the Prohibition of Counter-Supersedeas Against the State Prohibit Any Action with the Same Result?—A Look at *In re Texas Education Agency*

Heather C. Montoya

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [Civil Law Commons](#), [Civil Procedure Commons](#), [Courts Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Heather C. Montoya, *Does the Prohibition of Counter-Supersedeas Against the State Prohibit Any Action with the Same Result?—A Look at In re Texas Education Agency*, 54 ST. MARY'S L.J. 1205 (2023).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol54/iss4/9>

This Comment is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

COMMENT

DOES THE PROHIBITION OF COUNTER-SUPERSEDEAS AGAINST THE STATE PROHIBIT ANY ACTION WITH THE SAME RESULT?—A LOOK AT *IN RE TEXAS EDUCATION AGENCY*

HEATHER C. MONTOYA*

I. Introduction.....	1206
II. The Counter-Supersedeas Exception.....	1208
A. TGC Section 22.004’s Legislative History	1208
B. Motivation and Purpose Behind TGC Section 22.004(i)	1210
III. <i>In re</i> Texas Education Agency	1213
IV. Analysis.....	1216
A. The Texas Supreme Court’s Discussion of the Enactment of TGC Section 22.004(i) and its Legislative History.....	1216
B. How Should the Court Interpret the “Status Quo”?	1220
C. Does the End Result Make All the Difference?.....	1222
D. The Precedential Value of <i>In re</i> Texas Education Agency.....	1223

*St Mary’s University School of Law, J.D. 2023; University of Texas at San Antonio, B.A. 2019. The author would like to thank her family, Poli, Helen, Kaitlyn, Erica, Isaac, and her fiancé, Joseph, for their continued support. A special thanks to Kristen Pierce, Mary Bonilla, and Ben Cantu Jr. for their advice and guidance throughout the development of this Comment and law school. Additionally, the author would like to thank all Volume 54 members who helped edit this Comment, especially Comment Editor Amy Russo.

E. Can Theories of Statutory Interpretation Solve the Ambiguity Problem in Section 22.004(i)?.....	1229
F. Texas Code Construction Act.....	1233
V. Conclusion.....	1237

I. INTRODUCTION

Judicial decisions have potentially vast implications.¹ Judicial decisions not only provide guidance on interpreting state and federal laws, but they may also result in unexpected and far-reaching ramifications. Illustrating this principle—and the focus of this Comment—is the 2021 Texas Supreme Court decision in *In re Texas Education Agency*.² In this case, the court seemingly provides a loophole around a Texas statute that suspends adverse orders or judgments made against qualifying state agencies until the matter is heard on appeal.³ The statute aims to protect the state from the substantial costs of following orders that may not stand.⁴

By providing a method of circumventing this protection, the Texas Supreme Court now allows government entities to be subject to orders that have the effect of counter-supersedeas.⁵ This one decision regarding what appears to be a small, procedural issue actually has the power to affect the rights of parties in multitudes of cases and controversies pending appeal.⁶ This Comment argues that because the court holds such power of interpretation, the legislature should clarify statutory language that can be interpreted in more than one way and that can result in cases where more than one outcome is legally viable.

1. This Comment focuses on the repercussions arising from rulings issued in civil cases.

2. *In re Tex. Educ. Agency*, 619 S.W.3d 679 (Tex. 2021) (orig. proceeding).

3. TEX. GOV'T CODE ANN. § 22.004(i).

4. See Tex. H.R. Rep. No. 85-2776 (2017) (discussing the legislative purpose of § 22.004(i) and explaining that adverse judgments “can result in substantial cost to the state even if it eventually prevails in the suit”).

5. See, e.g., *Tex. Health & Hum. Servs. Comm'n v. Sacred Oak Med. Ctr. LLC*, No. 03-21-00136-CV, 2021 WL 2371356, at *4–5 (Tex. App.—Austin June 9, 2021, order) (per curiam) (citing precedent set by *In re Texas Education Agency* while reissuing a temporary injunction against the state).

6. Similar cases affected by the ruling in *In re Texas Education Agency* involve mask mandates, the continued operation of a psychiatric hospital, and usage of mail ballot applications during the COVID-19 pandemic. See generally *Abbott v. City of San Antonio*, No. 04-21-00342-CV, 2021 WL 3819514 (Tex. App.—San Antonio Aug. 19, 2021, order) (per curiam); *Sacred Oak*, 2021 WL 2371356; *State v. Tex. Democratic Party*, 631 S.W.3d 337 (Tex. App.—Houston [14th Dist.] 2020, order, no pet.).

The procedural concepts of supersedeas and counter-supersedeas are crucial to understanding the implications of both majority and dissenting opinions in *In re Texas Education Agency*. Texas Rule of Appellate Procedure 24.2(a)(3) provides that when a state agency or government head files an appeal, the order or judgment against them, such as a temporary injunction,⁷ is automatically suspended.⁸ This is known as the right of supersedeas.⁹ Courts interpret supersedeas as a method of preserving the status quo¹⁰ during a pending appeal and suspending the power of the lower court to “issue an execution on the judgment or decree” while the case is on appeal.¹¹ In effect, a supersedeas prevents the enforcement of a judgment during the trial court process.¹²

A counter-supersedeas prevents a supersedeas from taking effect.¹³ However, section 22.004(i) of the Texas Government Code (TGC) protects

7. *Injunction*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining a temporary injunction, also referred to as a preliminary injunction, as an order “issued before or during trial to prevent irreparable injury from occurring before the court has a chance to decide the case”). To obtain a preliminary injunction, “the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.” *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

8. TEX. R. APP. P. 24.2(a)(3) (stating “the trial court must permit a judgment to be superseded except in a matter arising from a contested case in an administrative enforcement action”).

9. *Supersedeas*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining the term as “a writ or bond that suspends a judgment creditor’s power to levy execution, usually pending appeal”); *Supersedeas*, MERRIAM-WEBSTER.COM DICTIONARY (2023) (defining the term as “a common-law writ commanding a stay of legal proceedings that is issued under various conditions”).

10. *Shell Petroleum Corp. v. Grays*, 62 S.W.2d 113, 118 (Tex. [Comm’n Op.] 1933) (“[T]he purpose of a supersedeas bond is to preserve the status quo by staying the execution or enforcement of the judgment or order appealed from pending the appeal.”); *see also In re City of Cresson*, 245 S.W.3d 72, 74 (Tex. App.—Fort Worth 2008, no pet.) (“Supersedeas preserves the status quo of the matters in litigation as they existed before the issuance of the order or judgment from which an appeal is taken.”).

11. *Hovey v. McDonald*, 109 U.S. 150, 159 (1883) (defining supersedeas as “a suspension of the power of the court below to issue an execution on the judgment or decree appealed from; or, if a writ of execution has issued, it is a prohibition emanating from the court of appeal against the execution of the writ”).

12. *See In re Tex. Educ. Agency*, 619 S.W.3d 679, 682 (Tex. 2021) (orig. proceeding) (“‘Supersedeas’ is a trial-court process for suspending enforcement of the judgment. Under the rules of appellate procedure, supersedeas is subject to review by the appellate courts, but the supersedeas process occurs in the trial court.” (citing TEX. R. APP. P. 24.1–4)).

13. *See Tex. Educ. Agency v. Hous. Indep. Sch. Dist. (HISD II)*, 609 S.W.3d 569, 573 (Tex. App.—Austin 2020, order, pet. granted) (describing a counter-supersedeas as a “discretionary security to prevent supersedeas”). Some describe counter-supersedeas as a trial court declining “to permit the judgment to be superseded if the judgment creditor posts security ordered by the trial court to secure the judgment debtor against any loss or damage that would be caused if the judgment is later reversed.”

the supersedeas of qualifying state agency appellants¹⁴ from “being counter-superseded under Rule 24.2(a)(3) . . . or any other rule.”¹⁵ In other words, counter-supersedeas is prohibited against qualifying state agencies. The task of adopting rules that protect a state agency’s right of supersedeas is delegated to the Texas Supreme Court.¹⁶ Nevertheless, contrary to this command, the court in *In re Texas Education Agency* held section 22.004(i) does not prevent the appellate court from enacting a temporary injunction against the state under a different rule—Texas Rule of Appellate Procedure 29.3.¹⁷ In essence, this decision gives the appellate court the authority to enforce a trial court’s adverse ruling “even though the [appellate court’s temporary order] may have the same effect” as a counter-supersedeas.¹⁸ The Texas Supreme Court’s decision in *In re Texas Education Agency* may not violate the literal instruction set forth in TGC section 22.004(i) but close analysis may reveal a violation of the law’s spirit.

II. THE COUNTER-SUPERSEDEAS EXCEPTION

A. TGC Section 22.004’s Legislative History

An examination of TGC section 22.004’s legislative history is useful when trying to determine the intention behind the statute and whether the legislators expected this provision to block all possible judicial actions that could

KAYLA D. CARRICK ET AL., TXCLE ADVANCED CIVIL APPELLATE PRACTICE pt. II, § d(1) (State Bar Tex. ed., 31st ed. 2017). Essentially, a counter-supersedeas undoes a supersedeas. See *HISD II*, 609 S.W.3d at 573 (“Rule 24.2(a)(3) [] allows the court to decline to permit the judgment to be superseded if the District (as judgment creditor) posts security in an amount and type ordered by the court to secure appellants ‘against any loss or damage caused by the relief granted.’” (quoting TEX. R. APP. P. 24.2(a)(3)).

14. At present, three entities qualify under section 22.004(i): “this state,” “a department of this state,” or “the head of a department of this state.” TEX. CIV. PRAC. & REM. CODE ANN. § 6.001(b)(1)–(3). The language used in TGC § 22.004(i) identifies these parties by stating “an appellant under Section 6.001(b)(1), (2), or (3), Civil Practice and Remedies Code.” TEX. GOV’T CODE ANN. § 22.004(i).

15. TEX. GOV’T CODE ANN. § 22.004(i).

16. See *id.* (“The supreme court shall adopt rules to provide that the right of an appellant . . . to supersede a judgment or order on appeal is not subject to being counter-superseded . . .”).

17. TEX. R. APP. P. 29(3) (“[T]he appellate court may make any temporary orders necessary to preserve the parties’ rights until disposition of the appeal . . .”).

18. See *In re Tex. Educ. Agency*, 619 S.W.3d 679, 682–83 (Tex. 2021) (orig. proceeding) (“We hold that the court of appeals’ temporary order does not conflict with Section 22.004(i)’s limitation on procedural rules authorizing counter-supersedeas.”). The court opined “[t]he temporary order is not counter-supersedeas relief within the meaning of the statute even though the order may have the same effect.” *Id.* at 682. Moreover, the court noted, “It is not uncommon for procedurally different processes to produce the same substantive effect.” *Id.* at 683.

produce the same results as counter-supersedeas.¹⁹ Scrutiny of legislative history, including legislative committee reports, is often crucial when interpreting statutory meaning.²⁰ The legislative history of TGC section 22.004(i) includes, *inter alia*, House Bill 2776.²¹ Effective on September 1, 2017,²² House Bill 2776 provided the Texas Supreme Court with the authority to amend TGC section 22.004.²³ House Bill 2776 intended to add subsection (i) to TGC 22.004:

(i) Requires the Texas Supreme Court (supreme court) to adopt rules to provide that the right of an appellant under Sections 6.001(b)(1) (relating to the state's exemption from the bond requirements), (2) (relating to a state department's exemption from the bond requirements), or (3) (relating to a state department head's exemption from the bond requirements), Civil Practice and Remedies Code, to supersede a judgment or order on appeal is not subject to being counter-superseded under Rule 24.2(a)(3), Texas Rules of Appellate Procedure, or any other rule.²⁴

House Bill 2776 faced little publicized opposition during the legislative sessions leading up to the bill's adoption.²⁵ When the Texas House of Representatives voted on House Bill 2776, it passed with 141 “yeas,” zero “nays,” and, uniquely, two representatives present, but whose votes did not count.²⁶ However, both representatives stated they would have voted in

19. See TEX. GOV'T CODE ANN. § 311.023 (allowing courts to examine legislative history when interpreting statutes).

20. See, e.g., KENT GREENAWALT, LEGISLATION, STATUTORY INTERPRETATION: 20 QUESTIONS 171 (1999) (describing legislative history as “the internal workings of the legislative process, including hearings, committee reports, statements on the floor of the legislature, and messages accompanying presidential signatures,” and “comparisons of the final language of an act with the language of previous drafts”).

21. See *Tex. Educ. Agency v. Hous. Indep. Sch. Dist. (HISD II)*, 609 S.W.3d 569, 574 (Tex. App.—Austin 2020, order, pet. granted) (outlining the history of House Bill 2776 pertaining to Rule 24.2(a)(3)); H.J. of Tex., 85th Leg., R.S. 65 (2017) (showing consensus on adopting the bill and its purpose).

22. Tex. H.B. 2776, 85th Leg., R.S. (2017).

23. Senate Comm. on State Affairs, Bill Analysis, Tex. H.B. 2776, 85th Leg., R.S. (2017) (“Rule-making authority is expressly granted to the Texas Supreme Court in SECTION 1 . . .”).

24. Tex. H.B. 2776, 85th Leg., R.S. (2017).

25. See H.J. of Tex., 85th Leg., R.S. 65 (2017) (recording the Texas House of Representatives' votes ultimately enacting House Bill 2776).

26. See *id.* (showing consensus toward adopting the bill and its purpose).

favor of the bill.²⁷ Consequently, the vote was closer to 143 “yeas” and zero “nays.”

B. *Motivation and Purpose Behind TGC Section 22.004(i)*

Before section 22.004(i) became effective, the Texas Supreme Court recognized a trial court’s “discretion to deny suspension of non-monetary, non-property judgments against governmental entities.”²⁸ Specifically, in 2014, the court in *In re State Board for Educator Certification*²⁹ faced the question of whether a trial court could deny a government entity’s supersedeas.³⁰ The court answered “yes,” holding “[a] governmental entity’s notice of appeal does not deprive a trial court of discretion to refuse suspension of its judgment.”³¹ Consequently, in the wake of this decision (and some say in response to it), the Texas Legislature adopted TGC section 22.004(i).³² This provision commands the court to adopt rules to ensure certain government entities can supersede a judgement or order without the court subjecting them to counter-supersedeas.³³ In response, the Texas Supreme Court adopted an amendment to Rule 24(a)(3), adding the following key language: “When the judgment debtor is the state, a department of this state, or the head of a department of this state, the trial court must permit a judgment to be superseded except in a matter arising from a contested case in an administrative enforcement action.”³⁴

27. *Id.* One of the two non-voting representatives abstained because their vote failed to register, while the other was away from his desk when the legislature collected the votes. *Id.*

28. CARRICK ET AL., *supra* note 13, at § d(1) (providing historical context on the development of section 22.004(i)).

29. *In re State Bd. for Educator Certification*, 452 S.W.3d 802 (Tex. 2014), *superseded by rule*, TEX. R. APP. P. 24.2(a)(3).

30. *Id.* at 805 (“Is the [State Board of Educator Certification] still entitled to an automatic right to supersedeas? Or does the trial court retain discretion—in effect, ‘superduperseas’—to deny it?”).

31. *Id.* at 809.

32. *See* CLYDE J. JACKSON III & BRIAN S. HUMPHREY II, TXCLE BUSINESS DISPUTES pt. VIII, § B(11) (State Bar Tex., ed., 13th ed. 2021) (“In response to *In re State Board for Educator Certification*, the Legislature adopted Tex. Gov’t Code § 22.004(i).”).

33. *See id.* (stating the Texas Supreme Court was instructed to adopt rules that would ensure select governmental entities retained the right to supersedeas on appeal not subject to counter-supersedeas).

34. Order Adopting Amendments to Texas Rule of Appellate Procedure 24.2, Misc. Docket No. 18-9061 (Tex. Apr. 12, 2018). Note that contested cases in administrative enforcement actions, or adjudications instituted and heard by government agencies themselves, are still subject to counter-supersedeas and are the exception to the revised version of Rule 24.2.

TGC section 22.004(i) addressed two main issues. First, the section provided clarity on the supersedeas process as it pertained to government entities. Second, legislators expressed concern with the state enduring substantial costs due to counter-supersedeas judgments against state actors.³⁵ Specifically, “some plaintiffs may be allowed to counter-supersede the judgment or order, which can result in substantial cost to the state even if it eventually prevails in the suit. H.B. 2776 seeks to address this issue through the adoption of certain rules by the Supreme Court of Texas.”³⁶ Section 22.004(i) was intended to expressly “clarify that the state’s right to supersede the judgment or order cannot be overcome by counter-supersedeas.”³⁷

Shortly after the legislature passed House Bill 2776, some commentators initially interpreted the bill as ending the practice of allowing “a party to counter-supersede a judgment against a government entity.”³⁸ Commentators noted section 22.004(i) prohibits not only counter-supersedeas under Rule 24.2(a)(3) but also “any other rule” against qualifying state-actors.³⁹ The Appellate Rules Subcommittee was admittedly unaware “of any other rule that would allow counter-supersedeas” when they considered how to appropriately amend Rule 24.2(a)(3).⁴⁰

Before the decision in *In re Texas Education Agency*, the court had yet to address the reach of TGC section 22.004(i).⁴¹ However, in 2020, approximately one year prior to the decision, then-appellate Chief Justice Kem Thompson Frost provided analysis on the rule when she dissented in *State v. Texas Democratic Party*.⁴² In this case, the appellees filed a motion requesting the court “enforce [against the State] the trial court’s temporary injunction or to issue an order that the trial court’s injunction remains in effect to preserve the parties’ rights until the disposition of the appeal.”⁴³

35. See Tex. H.R. Rep. No. 85-2776 (2017) (discussing the idea behind § 22.004(i)).

36. *Id.*

37. Senate Comm. on State Affs., Bill Analysis, Tex. H.B. 2776, 85th Leg., R.S. (2017).

38. Kent Rutter & Natasha Breaux, *Legislative Update: Appellate Practice*, HOUS. LAW., Sept.–Oct. 2017, at 16, 17.

39. TEX. GOV’T CODE ANN. § 22.004(i); Rutter & Breaux, *supra* note 38, at 17.

40. CARRICK ET AL., *supra* note 13, at § D(1).

41. See *In re Tex. Educ. Agency*, 619 S.W.3d 679, 682 (Tex. 2021) (orig. proceeding) (introducing the main issue in the case).

42. See *State v. Tex. Democratic Party*, 631 S.W.3d 337, 342 (Tex. App.—Houston [14th Dist.] 2020, order, no pet.) (Frost, C.J., dissenting) (concluding the temporary injunction was “not subject to counter-supersedeas under Rule 24.2(a)(3)”).

43. *Id.* at 337.

In her ruling, Justice Margaret Poissant referred to the appellate court's decision in *Texas Education Agency v. Houston Independent School District (HISD II)*⁴⁴—a case in *In re Texas Education Agency's* procedural history⁴⁵—and held the court could exercise its “inherent authority under Rule 29.3,” thereby granting the appellees' motion for temporary orders.⁴⁶

Justice Poissant's opinion did not address TGC section 22.004(i), but Chief Justice Frost's dissent discussed the rule.⁴⁷ Chief Justice Frost concluded the appellees' sought relief and the appellate court's inherent power “conflicts with the Legislature's determination that the State automatically supersedes an order or judgment by filing a notice of appeal and that courts cannot countermand the State's ability to supersede unless the case arises from a contested case in an administrative-enforcement action.”⁴⁸ In her discussion of TGC section 22.004(i), Chief Justice Frost noted the trial court granted appellees' temporary injunction and discussed the State's notice of interlocutory appeal.⁴⁹

She then discussed the history of section 22.004(i), specifically noting the legislature's requirement of the Texas Supreme Court to adopt rules in which “this state,” “department of this state,” or “head of a department of this state” would not be subject to counter-supersedeas.⁵⁰ The temporary injunction at issue, according to Chief Justice Frost, was not subject to counter-supersedeas because it was not an administrative enforcement action and thus not subject to the one exception to TGC 22.004(i).⁵¹ Chief Justice Frost's dissent in *State v. Texas Democratic Party* noted “the State

44. *Tex. Educ. Agency v. Hous. Indep. Sch. Dist. (HISD II)*, 609 S.W.3d 569 (Tex. App.—Austin 2020, order, pet. granted).

45. See discussion *infra* Part III.

46. See *Tex. Democratic Party*, 631 S.W.3d at 337 (“[T]he Austin Court of Appeals held . . . [Texas Rule of Appellate Procedure 29.3] provides a mechanism by which we may exercise the scope of our authority over parties, including our inherent power to prevent irreparable harm [A] temporary order is necessary in this case to preserve the parties' rights.” (citing *HISD II*, 609 S.W.3d at 578)).

47. *Id.* at 342 (Frost, C.J., dissenting) (introducing the dissent's discussion regarding section 22.004(i)).

48. *Id.* at 338.

49. *Id.* at 338–39.

50. See *id.* at 342 (“The Legislature required that ‘[t]he supreme court shall adopt rules to provide that the right of an appellant under [§ 6.001(b)(1)], (2), or (3) . . . to supersede a judgment or order on appeal is not subject to being counter-superseded under Rule 24.2(a)(3)’”); TEX. CIV. PRAC. & REM. CODE ANN. § 6.001(b)(1–3).

51. See *Tex. Democratic Party*, 631 S.W.3d at 342 (Frost, C.J., dissenting) (“Today's case does not involve a matter arising from a contested case in an administrative enforcement action. Thus, under the plain text of Rule 24.2(a)(3) and [TGC § 22.004(i)], the [temporary injunction] is not subject to counter-supersedeas under Rule 24.2(a)(3)”).

of Texas’s filing of a notice of appeal superseded the Injunction”⁵² and seemed to view the temporary order issued by the court of appeals under Rule 29.3 as a counter-supersedeas.⁵³ According to Chief Justice Frost, “the Injunction [was] not subject to counter-supersedeas under Rule 24.2(a)(3)”⁵⁴

Although Chief Justice Frost’s approach to applying counter-supersedeas preceded the *In re Texas Education Agency* opinions, she acknowledged that the majority based its ruling on the decisions leading up to the case.⁵⁵ She, however, distinguished the procedural dynamics in *State v. Texas Democratic Party* from *Texas Education Agency v. Houston Independent School District (HISD I)* based on the fact that the appellees in the former case did not seek relief based on ultra vires action.⁵⁶ Chief Justice Frost’s discussion of TGC section 22.004(i) demonstrates an early interpretation of the statute: a court of appeals cannot ordinarily counter-supersede specified state actors.⁵⁷

III. *IN RE TEXAS EDUCATION AGENCY*

In *In re Texas Education Agency*, the Texas Supreme Court faced its “first opportunity to consider the meaning and reach of Section 22.004(i) of the [TGC].”⁵⁸ The case arose in 2020 when Houston Independent School District (HISD) filed suit seeking declaratory and injunctive relief against the

52. *See id.* at 343.

53. *See id.* (discussing and interpreting Rule 29.3 as it related to the injunctions and supersedeas in the case). Chief Justice Frost seemed to arrive at the same conclusion as Chief Justice Hecht’s dissent in *In re Texas Education Agency*, giving an early indication that the holding *In re Texas Education Agency* would be subject to conflicting viewpoints. *See* discussion *infra* Part III.

54. *See id.* at 342 (analyzing Rule 24.2(a)(3) and TGC § 22.004(i)).

55. *See id.* at 343–44.

56. *Id.* at 344 (“[T]he published order in [*Houston Independent School District*] is not a binding precedent for today’s case.”). An ultra vires action occurs when an official makes an unauthorized decision. *Tex. Educ. Agency v. Hous. Indep. Sch. Dist. (HISD I)*, No. 03-20-00025-CV, 2020 WL 7757365, at *2 (Tex. App.—Austin Dec. 30, 2020) (mem. op.) (citing *Hall v. McRaven*, 508 S.W.3d 232, 243 (Tex. 2017)).

57. *Compare Tex. Democratic Party*, 631 S.W.3d at 338–46 (Frost, C.J., dissenting), *with In re Tex. Educ. Agency*, 619 S.W.3d 679, 698 (Tex. 2021) (orig. proceeding) (Hecht, C.J., dissenting) (“Section 22.004(i) and Rule 24.2(a)(3) prohibit the court of appeals from effectively imposing counter-supersedeas under Rule 29.3”). Although Chief Justice Frost acknowledged the principle of stare decisis and the appellate court’s authority to issue an injunction if circumstances would amount to irreparable harm, her interpretation of rules related to counter-supersedeas aligns with Chief Justice Hecht’s interpretation. *See* discussion *infra* Part III.

58. *In re Tex. Educ. Agency*, 619 S.W.3d at 682.

Texas Education Agency (TEA),⁵⁹ Commissioner of Education Mike Morath (Commissioner Morath), and Conservator Doris Delaney (Conservator Delaney).⁶⁰ Commissioner Morath had launched a Special Accreditation Investigation (SAI) against HISD to determine whether “HISD’s Board of Trustees ‘may have violated The Open Meetings Act’”⁶¹ After the investigation, Commissioner Morath “threatened to lower HISD’s accreditation status to ‘accredited-warned’” and appointed a board of managers to act as HISD’s board of trustees.⁶² The district court granted HISD a temporary injunction and denied Commissioner Morath’s right to supersede the temporary injunction on interlocutory appeal.⁶³ The court’s denial of Commissioner Morath’s right to supersede the temporary injunction constituted a counter-supersedeas.⁶⁴

On appeal, the Austin Court of Appeals granted Commissioner Morath’s motion to allow the State to supersede the lower court’s decision but also granted HISD’s motion for temporary injunction.⁶⁵ Subsequently, the

59. See TEX. EDUC. CODE ANN. § 4.001 (stating the mission of the Texas Education Agency is to “assist school districts and charter schools in providing career and technology education to students”).

60. See *HISD I*, 2020 WL 7757365, at *1 (providing factual background on the case).

61. See *id.* at *5.

62. See *id.* at *5–6. Under the Texas Education Code (TEC), the commissioner can “take any of the actions authorized by this subchapter to the extent the commissioner determines necessary if: (1) a school district does not satisfy: (A) the accreditation criteria under Section 39.052” TEX. EDUC. CODE ANN. § 39A.001. In addition to determining a school district’s accreditation status, the TEC provides guidelines for when the commissioner can revoke a school district’s accreditation and take specific actions. See *id.* § 39A.005 (“This section applies to a school district if the district is subject to commissioner action under Section 39A.001, and for two consecutive school years, including the current school year, the district has: (1) received an accreditation status of accredited-warned or accredited-probation”). The trial court looked at the commissioner’s actions and the corresponding statutes providing his authority and determined the commissioner did not have the authority he was exercising and had not met the prerequisites to appoint a board of managers. See *HISD I*, 2020 WL 7757365, at *5 (stating “Section 39A.906 does not give the Commissioner authority to appoint a board of managers” and citing EDUC. § 39A.111).

63. See *In re Tex. Educ. Agency*, 619 S.W.3d at 681 (summarizing procedural history of the case). An interlocutory appeal is defined as “[a]n appeal that occurs before the trial court’s final ruling on the entire case.” *Appeal*, BLACK’S LAW DICTIONARY (11th ed. 2019); see TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(d) (“An interlocutory appeal under Subsection (b) has the effect of staying the commencement of trial in the trial court pending resolution of the appeal.”); *id.* § 51.014(b) (describing an interlocutory appeal under specific sections as “stay[ing] all other proceedings in the trial court pending resolution of that appeal”).

64. *Tex. Educ. Agency v. Hous. Indep. Sch. Dist. (HISD II)*, 609 S.W.3d 569, 572–73 (Tex. App.—Austin 2020, order, pet. granted) (introducing case on appeal and describing counter-supersedeas as “discretionary security to prevent supersedeas”).

65. *Id.* at 578.

Supreme Court of Texas addressed the “limited and relatively technical issue”⁶⁶ raised during the course of this case—whether the appellate court’s temporary injunction conflicted with TGC section 22.004(i), which prohibits counter-supersedeas against a qualifying state agency.⁶⁷

In an 8–1 decision, Justice Eva M. Guzman wrote the opinion in which the Texas Supreme Court denied the TEA, Commissioner Morath, and Conservator Delaney relief because “the temporary order is not counter-supersedeas relief within the meaning of [TGC 22.004(i)] even though the order may have the same effect.”⁶⁸ Chief Justice Nathan L. Hecht, the only dissenter, viewed the majority’s decision as “using one Rule to give the District the very relief another Rule expressly denies, and not calling the effect ‘counter-supersedeas[.]’ even though it is.”⁶⁹

As the relevant procedural terms and rules apply in this case, HISD obtained a temporary injunction from the trial court prohibiting “(1) [Commissioner Morath] from appointing a board of managers to oversee the operations of HISD, (2) [Conservator Delaney] from acting outside her lawful authority, and (3) [Commissioner Morath] from imposing any sanctions or interventions on HISD based on the SAI.”⁷⁰ Had the trial court originally granted Commissioner Morath’s supersedeas during the pendency of the appeal,⁷¹ Commissioner Morath would have been able to proceed with “appointing a board of managers to oversee the operations of HISD”;

66. Stephen Gibson, *Texas Supreme Court Update: Opinions Issued March 19, 2021*, MUNSCH HARDT 8–9 (2021), <https://www.munsch.com/portalresource/lookup/wosid/cp-base-441904/overrideFile.name=/2021-03-19%20Opinions%20-%20Texas%20Supreme%20Court%20Update.pdf> [perma.cc/GL5G-CYLY].

67. *See In re Tex. Educ. Agency*, 619 S.W.3d at 682 (interpreting the appellate court’s order of a temporary injunction as not conflicting with TEX. GOV’T CODE § 22.004(i), which prohibits counter-supersedeas against qualifying state parties under TEX. R. APP. P. 24.2(a)(3)). Commissioner Morath and the TEA qualify as appellants who have a right to “supersede a judgement or order on appeal” but are not subject to counter-supersedeas. *Id.* at 692–93 (Hecht, C.J., dissenting) (citing CIV. PRAC. & REM. § 6.001(a) and TEX. R. APP. P. 24.2(a)(3)) (“[T]he Commissioner was entitled to suspend, or supersede, enforcement of the temporary injunction by appealing it.”).

68. *Id.* at 682 (holding the temporary order is not considered counter-supersedeas relief under section 22.004(i)).

69. *Id.* at 693 (Hecht, C.J., dissenting).

70. *Tex. Educ. Agency v. Hous. Indep. Sch. Dist. (HISD I)*, No. 03-20-00025-CV, 2020 WL 7757365, at *1 (Tex. App.—Austin Dec. 30, 2020) (mem. op.).

71. The injunction was in place for about three years. The trial court initially enjoined the Commissioner from following his plan of action in January 2020, and the Texas Supreme Court’s removal of the temporary injunction and its order for remand to the trial court occurred on January 13, 2023. *Tex. Educ. Agency v. Hous. Indep. Sch. Dist. (HISD III)*, No. 21-0194, 2023 WL 175524, at *1, 3 (Tex. 2023).

Conservator Delaney would have been able to act in accordance with the role of conservator; and Commissioner Morath could have continued to impose intervention on HISD.⁷²

The trial court's act of denying supersedeas resulted in a counter-supersedeas that violated TGC section 22.0004(i).⁷³ The appellate court corrected this violation by vacating the trial court's counter-supersedeas.⁷⁴ However, although the appellate court allowed the government to supersede the trial court's original order, it still granted HISD a temporary order as permitted by Texas Rule of Appellate Procedure 29.3,⁷⁵ which resulted in the same effect as a counter-supersedeas.⁷⁶

Analysis of the majority and dissenting opinions in *In re Texas Education Agency* seeks to answer two questions: (1) whether the majority correctly decided the issues related to counter-supersedeas; and (2) what should happen going forward to resolve similar issues.⁷⁷

IV. ANALYSIS

A. *The Texas Supreme Court's Discussion of the Enactment of TGC Section 22.004(i) and its Legislative History*

Both the majority opinion and the dissent in *In re Texas Education Agency* discuss *In re State Board for Educator Certification*, the 2014 case holding the

72. *HISD I*, 2020 WL 7757365, at *1; see *In re Tex. Educ. Agency*, 619 S.W.3d at 683 (“TEA and Commissioner Morath fall within the stated exception . . .”); TEX. EDUC. CODE ANN. § 7.055 (outlining the commissioner’s powers and duties, including “serv[ing] as the educational leader of the state”).

73. See *Tex. Educ. Agency v. Hous. Indep. Sch. Dist. (HISD II)*, 609 S.W.3d 569, 572–73 (Tex. App.—Austin 2020, order, pet. granted) (introducing the case on appeal and describing counter-supersedeas as a “discretionary security to prevent supersedeas”).

74. See *id.* at 578 (summarizing the court’s decision). Had the trial court not denied Commissioner Morath’s supersedeas on interlocutory appeal, Commissioner Morath’s act of appealing the judgment would have automatically superseded the judgment. See *In re Tex. Educ. Agency*, 619 S.W.3d at 680 (“When a state agency or department head files a notice of appeal, enforcement of an adverse judgment or order is automatically suspended without bond or other security.”).

75. *In re Tex. Educ. Agency*, 619 S.W.3d at 681–82 (“The court of appeals granted [appellants’] motion and vacated the portion of the trial court’s order granting HISD’s counter-supersedeas. . . . However, . . . the court also granted HISD’s cross-motion and ordered that the trial court’s temporary injunction would remain in effect pending disposition of the interlocutory appeal.”).

76. See *HISD II*, 609 S.W.3d at 578 (“We are not allowing the trial court to counter-supersede the temporary injunction; we are exercising our power to issue temporary orders.”).

77. See TEX. CONST. art. V, § 3 (“[The Supreme Court of Texas’s] appellate jurisdiction shall be final and shall extend to all cases except in criminal law matters and as otherwise provided in this Constitution or by law.”).

trial court could deny a government entity's supersedeas.⁷⁸ Both opinions agree the decision in *State Board* led to the legislature's revision of TGC 22.004, the statute at issue in *In re Texas Education Agency*.⁷⁹ However, the opinions interpret the *State Board* decision differently.

In the majority's opinion, the decision in *State Board* decided the issue of whether trial courts' "discretion to deny supersedeas extended to orders and judgments against governmental defendants the Legislature has exempted from filing an appeal bond."⁸⁰ According to the majority, the amendment to TGC 22.004 did not actually overrule the holding in *In re State Board for Educator Certification* because the case involved an administrative enforcement action, and thus would have been subject to the statute's exception.⁸¹ Additionally, the majority emphasized the court's decision to change Rule 24.2(a)(3) but not to revise Rule 29 in a way that would provide special treatment for state actors.⁸² Following this discussion, the majority phrased the dispute as "whether the legislatively mandated prohibition on counter-

78. *In re Tex. Educ. Agency*, 619 S.W.3d at 684; *id.* at 694–95 (Hecht, C.J., dissenting).

79. *Compare id.* at 684 ("A few years later, the Texas Legislature instructed this Court to adopt rules curbing judicial discretion to issue 'counter-supersedeas' orders."), *with id.* at 694 (Hecht, C.J., dissenting) ("The Legislature promptly countermanded our decision as it applied to three of the governmental entities covered by . . . Section 22.004(i) . . .").

80. *See id.* at 684 (introducing the issue in *In re State Board for Educator Certification*).

81. *See id.* at 684–85 ("This exception encompasses the situation that existed in *In re State Board for Educator Certification*, so our holding that the trial court had discretion to grant counter-supersedeas relief in that case remains intact.").

82. *Id.* at 685 (summarizing the changes to the Texas Rules of Appellate Procedure following *In re State Board for Educator Certification*). According to the majority, Rule 29.2 "refers to trial court orders 'supersed[ing]' an interlocutory order on appeal, while Rule 29.3 permitt[ed] an appellate court to enter temporary orders." *Id.* at 689. Rule 29.3 states the appellate court's authority to grant temporary orders:

When an appeal from an interlocutory order is perfected, the appellate court may make any temporary orders necessary to preserve the parties' rights until disposition of the appeal and may require appropriate security. But the appellate court must not suspend the trial court's order if the appellant's rights would be adequately protected by supersedeas or another order made under Rule 24.

TEX. R. APP. P. 29.3.

However, the *In re Texas Education Agency* majority noted Rule 29.1 exempted appellants who do not have to file an appeal bond from the supersedeas process but did not exempt them "from being subject to an appellate court's temporary orders." *In re Tex. Educ. Agency*, 619 S.W.3d at 689 (concluding Rule 29 allows the Court of Appeals to file temporary orders against appellants exempt from filing appeal bonds); *see also* TEX. R. APP. P. 29.1 ("Perfecting an appeal from an order granting interlocutory relief does not suspend the order appealed from unless: (a) the order is suspended in accordance with 29.2; or (b) the appellant is entitled to supersede the order without security by filing a notice of appeal.").

supersedeas grants . . . a substantive right to supersedeas that constrains courts of appeals from effectively granting the same relief under Texas Rule of Appellate Procedure 29.3 or otherwise.”⁸³

In his dissent, Chief Justice Hecht described the issue in *State Board* as whether “a trial court [had] discretion under Rule 24.3(a)(3) to deny the governmental entity supersedeas, as it would a private entity, if the judgment creditor counter-supersedes[.]”⁸⁴ According to Chief Justice Hecht, although the court answered the question with a “yes,” he described the legislature as countermanding the decision when it enacted section 22.004(i), an opinion that differs from the majority’s interpretation.⁸⁵ Further, Chief Justice Hecht described the court’s addition to Rule 24.2(a)(3) as complying with section 22.004(i).⁸⁶

The majority and dissent in *In re Texas Education Agency* agree that the holding in *State Board* ultimately led to the rules at issue before the court.⁸⁷ However, each opinion interpreted the resulting legislative enactment differently—the majority viewed the *State Board* decision as “remain[ing] intact” while the dissent viewed the enactment of section 24.004(i) as countermanding the decision.⁸⁸

Additionally, each opinion viewed the amendment to Rule 24.2(a)(3) and its relationship to Rule 29 differently. The majority viewed the amendment as depriving “trial courts of authority to deny supersedeas for non-monetary, non-property-interest judgments “[w]hen the judgment debtor is the state, a department of this state, or the head of a department of this state.”⁸⁹

83. *In re Tex. Educ. Agency*, 619 S.W.3d at 685.

84. *Id.* at 694 (Hecht, C.J., dissenting).

85. *See id.* (“The Legislature promptly countermanded our decision as it applied to three of the governmental entities covered by Section 6.001: the State, a department of the State, or a department head. It did so by enacting Section 22.004(i) of the [TGC] . . .”); *id.* at 684–85 (describing the situation in *In re State Board for Educator Certification* as an exception to the prohibition of counter-supersedeas against qualifying state actors).

86. *See id.* at 694 (“The Court complied by adding this sentence to Rule 24.2(a)(3): ‘When the judgment debtor is the state, a department of this State, or the head of a department of this state, the trial court must permit a judgment to be superseded.’” (citing Order Adopting Amendments to Texas Rule of Appellate Procedure 24.2, Misc. Docket No. 18-9061 (Tex. Apr. 12, 2018))).

87. *Id.* at 694 (Hecht, C.J., dissenting); *id.* at 685 (interpreting the decision in *In re State Board for Educator Certification*).

88. *See id.* at 685 (“This exception encompasses the situation that existed in *In re State Board for Educator Certification*, so our holding that the trial court had discretion to grant counter-supersedeas relief in that case remains intact.”); *Id.* at 694 (Hecht, C.J., dissenting) (“The Legislature promptly countermanded our decision . . .”).

89. *See id.* at 685 (interpreting the amendment to Rule 24.2(a)(3)).

The majority also noted the court did not make changes to Rule 29 in response to the legislature enacting TCG section 22.004(i) because Rule 29 did not involve supersedeas or counter-supersedeas.⁹⁰ In his dissent, Chief Justice Hecht viewed Rule 24.2(a)(3) as complying with the legislature's enactment of section 22.004(i).⁹¹ He also viewed the processes "to determine and alleviate the effects of appellate delay" involved in Rule 29.3 and Rule 24.2 as "essentially the same whether conducted in the trial court or in the court of appeals."⁹²

Another distinction between the two opinions in *In re Texas Education Agency* is how each interprets the phrase "any other rule" in section 22.004(i).⁹³ The majority opinion views the language as being textually limited to the supersedeas context.⁹⁴ Thus, even though an appellate court's temporary order results in the same practical effect as counter-supersedeas at the trial level, the prohibition of counter-supersedeas against those specified under section 6.001(b)(1), (2), and (3) does not "constrain an appellate court's power to issue temporary orders under other authority."⁹⁵

Chief Justice Hecht's dissent disagrees with limiting the phrase "any other rule" to the supersedeas context.⁹⁶ In his view, the majority's interpretation "reads the entire phrase out of the statute."⁹⁷ In fact, Chief Justice Hecht interprets the legislature's intention as "direct[ing] its mandate to a specific

90. *See id.* (comparing the Court's treatment of Rule 24.2 versus Rule 29 following the decision in *In re State Board of Educator Certification*).

91. *Id.* at 694 (Hecht, C.J., dissenting) ("The Court complied [with TGC § 22.004(i)] by adding this sentence to Rule 24.2(a)(3): 'When the judgment debtor is the state, a department of this state, or the head of a department of this state, the trial court must permit a judgment to be superseded'").

92. *Id.* at 696.

93. *See* TEX. GOV'T CODE ANN. § 22.004(i) ("The supreme court shall adopt rules to provide that the right of an appellant under Section 6.001(b)(1), (2), or (3) . . . is not subject to being counter-superseded under Rule 24.2(a)(3) . . . or any other rule.").

94. *See In re Tex. Educ. Agency*, 619 S.W.3d at 680 ("Section 22.004(i)'s prohibition against counter-supersedeas is textually limited to the supersedeas context and does not purport to constrain an appellate court's power to issue temporary orders under other authority.").

95. *See id.* (discussing the scope of TGC § 22.004(i)); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 6.001(b)(1–3) (listing "this state," "a department of this state," and "the head of a department of this state" as exempt from bond requirements).

96. *In re Tex. Educ. Agency*, 619 S.W.3d at 696 (Hecht, C.J., dissenting) ("But what the Court means is that because 'any other rule' is used in a statute about counter-supersedeas, it is limited to any other *counter-supersedeas* rule. Even if that interpretation of the statute were reasonable, and it is not, it makes the statute nonsensical because *there is no other counter-supersedeas rule.*").

97. *Id.*

Rule and then to ‘any other rule.’”⁹⁸ Further, if Commentators are unaware “of any other rule that would allow counter-supersedes,”⁹⁹ the entire phrase—“any other rule”—is meaningless.

B. *How Should the Court Interpret the “Status Quo”?*

The purpose of a supersedeas and a temporary injunction is partly to “preserve the status quo” while a case is on appeal.¹⁰⁰ Ascertaining the “status quo” in a case is not always straightforward. Here, the appellate court determined preserving the status quo meant issuing the temporary injunction.¹⁰¹ The court discussed the trial court’s conclusion that “the [school district] made a sufficient showing to establish a probable right to recovery on its ultra vires claim” and “made a sufficient showing that the alleged ultra vires conduct would cause irreparable harm because once the Commissioner performs a final administrative act, even if it is ultra vires, it would not be reviewable by an appellate court.”¹⁰² The majority reasons the suspension

98. *Id.* (interpreting the legislature’s intent when enacting TGC § 22.004(i)). According to Supreme Court Justice Antonin Scalia, “[W]e do not really look for subjective legislative intent. We look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.” ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, AN ESSAY BY ANTONIN SCALIA WITH COMMENTARY BY AMY GUTMANN 17 (Amy Gutmann ed., 1997).

99. CARRICK ET AL., *supra* note 13, at § d(1).

100. *See* Shell Petroleum Corp. v. Grays, 62 S.W.2d 113, 118 (Tex. [Comm’n Op.] 1933) (describing the purpose of a supersedeas bond as preserving the status quo); James v. E. Weinstein & Sons, 12 S.W.2d 959, 960–61 (Tex. [Comm’n Op.] 1929) (describing a temporary injunction as maintaining the status quo).

101. Tex. Educ. Agency v. Hous. Indep. Sch. Dist. (*HISD II*), 609 S.W.3d 569, 578 (Tex. App.—Austin 2020, order, pet. granted) (“We order that the trial court’s temporary injunction remains in effect to preserve the parties’ rights until the disposition of this appeal.”).

102. *See id.* at 577 (citing *Morath v. Progreso Indep. Sch. Dist.*, No. 03-16-00254-CV, 2017 WL 6273192, at *3–4 (Tex. App.—Austin Dec. 7, 2017, pet. denied) (mem. op.)). In the memorandum opinion arising from the appellant’s petition for review, Justice Gisela D. Triana affirmed the district court’s order. *See* Tex. Educ. Agency v. Hous. Indep. Sch. Dist. (*HISD I*), No. 03-20-00025-CV, 2020 WL 7757365, at *9 (Tex. App.—Austin Dec. 30, 2020) (mem. op.) (“[W]e conclude that the district court has subject-matter jurisdiction over HISD’s ultra vires claims and rule challenge and that the district court did not err in denying the plea to the jurisdiction or abuse its discretion in granting the temporary injunction. Accordingly, we affirm the district court’s order.”); *see also* TEX. EDUC. CODE ANN. § 39.151(d) (“The commissioner shall make a final decision under this section after considering the recommendation of the committee The commissioner’s decision may not be appealed under Section 7.057 or other law.”); 19 TEX. ADMIN. CODE § 157.1123(f) (2022) (Tex. Educ. Agency, Informal Review) (“Following the informal review by the TEA representative, a final report, assignment, determination, or decision will be issued. . . . A final report, assignment, determination, or decision issued following an informal review is final and may not be appealed, except as provided by law or rule.”).

of the temporary injunction would contradict the notion of maintaining the status quo because, without the injunction, “HISD’s manner of governance and accreditation rating could be changed from ‘the last, actual, peaceable non-contested status [that] preceded the pending controversy.’”¹⁰³

The dissent did not directly use the “status quo” language; however, Chief Justice Hecht alluded to his view on what the status quo could mean when he summarized the majority’s characterization of “preserv[ing] the parties’ rights until disposition of the appeal.”¹⁰⁴ Additionally, he emphasized that preventing Commissioner Morath from taking action had substantial effects:

After years-long investigations, the Texas Commissioner of Education has found serious, longstanding, and ongoing deficiencies in the quality of education provided by several schools in the Houston Independent School District, as well as violations of law in the District’s operations. The Commissioner has proposed measures for improvement, including appointing a conservator for the District and installing a board of managers to oversee its operations.¹⁰⁵ . . . Every day this case pends affects the lives and futures of thousands of public-school children.¹⁰⁶

Although Chief Justice Hecht did not directly address the status quo, he discussed the effects of the appellate court’s decision, which the majority found to preserve the status quo.¹⁰⁷

One court narrowed the definition to determine the status quo “in an injunction case wherein the very acts sought to be enjoined are acts which prima facie constitute the violation of expressed law, the status quo to be preserved could never be a condition of affairs where the respondent would

103. *In re Tex. Educ. Agency*, 619 S.W.3d at 683–84 (quoting *Clint Indep. Sch. Dist. v. Marquez*, 487 S.W.3d 538, 555 (Tex. 2016)).

104. *Id.* at 695–97 (Hecht, C.J., dissenting).

105. *See id.* at 692 (introducing the events leading up to the District’s complaint). Chief Justice Hecht discussed the effects of underperforming school districts on the education of students; he mentioned a specific instance in which Commissioner Morath appointed a conservator for one campus in 2016. *Id.* at 693; *see also* TEX. EDUC. CODE ANN. § 7.055 (listing the commissioner of education’s powers and duties).

106. *See In re Tex. Educ. Agency*, 619 S.W.3d at 698 (Hecht, C.J., dissenting) (comparing the critical nature of this case with mandamus proceedings in *In re State of Texas*, 602 S.W.3d 549 (Tex. 2020)).

107. *See id.* at 695 (summarizing appellate court’s discussion on preserving parties’ rights during the pending appeal (citing *Tex. Educ. Agency v. Hous. Indep. Sch. Dist. (HISD II)*, 609 S.W.3d 569, 578 (Tex. App.—Austin 2020, order, pct. granted)); *id.* at 683–84 (discussing the status quo)).

be permitted to continue the acts constituting that violation.”¹⁰⁸ In *In re Texas Education Agency*, deciding on a “violation of expressed law” may still fail to clarify the meaning of “status quo.” The violation could mean “violations of law in the District’s operations”¹⁰⁹ or the violation could be Commissioner Morath’s alleged actions “without legal authority.”¹¹⁰ If the violation is Commissioner Morath’s actions, then the appellate court’s temporary injunction would properly preserve the status quo, provided it complied with other rules.¹¹¹ However, if the violation is the district’s operations, then maintaining the status quo means prohibiting the district to “continue the acts constituting the violation” and should result in the appellate court refraining from issuing a temporary injunction, regardless of whether section 22.004(i) prohibits all judicial actions with the same result as a counter-supersedes.¹¹² Regardless of how the “status quo” is interpreted, both the majority and dissenting opinions discuss the importance of the status quo and preserving parties’ rights in analyzing the merits of the case.¹¹³

C. *Does the End Result Make All the Difference?*

On January 13, 2023, about three years after the trial court’s initial temporary injunction was issued on the TEA and Commissioner Morath, the Texas Supreme Court made a decision related to HISD’s original ultra vires

108. *Hous. Compressed Steel Corp. v. State*, 456 S.W.2d 768, 773 (Tex. App.—Houston [1st Dist.] 1970, no writ).

109. *See In re Tex. Educ. Agency*, 619 S.W.3d at 692 (Hecht, C.J., dissenting) (“After years-long investigations, [Commissioner Morath] has found serious, longstanding, and ongoing deficiencies in the quality of education provided by several schools in [HISD], as well as violations of law in the District’s operations.”).

110. *See id.* at 681 (listing the trial court’s findings supporting the court’s temporary injunction).

111. *See id.* (“After a hearing, the trial court temporarily enjoined the proposed actions, finding (1) HISD established a probably right to recovery on its claim that the challenged actions are without legal authority and ultra vires”); TEX. R. APP. P. 29.3 (“But the appellate court must not suspend the trial court’s order if the appellant’s rights would be adequately protected by supersedeas or another order made under Rule 24.”).

112. *See Hous. Compressed Steel Corp.*, 456 S.W.2d at 773 (defining the status quo when the enjoined acts are violations of express law); *In re Tex. Educ. Agency*, 619 S.W.3d at 680 (stating the question presented in the case as “whether the appellate court’s temporary order conflicts with Section 22.004(i)”; *see also id.* at 692–93 (Hecht, C.J., dissenting) (stating HISD was in violation of laws)).

113. *See In re Tex. Educ. Agency*, 619 S.W.3d at 688–89 (“The court of appeals’ temporary order preserving the status quo and ensuring the court’s ability to decide the case on the merits is not a supersedeas order.”); *see also id.* at 695 (Hecht, C.J., dissenting) (discussing the appellate court’s interpretation of preserving parties’ rights).

claim, which gave rise to the issues in *In re Texas Education Agency*.¹¹⁴ The Texas Supreme Court's ruling did three main things: (1) declared that HISD failed to demonstrate the Commissioner's actions were ultra vires under a new law, therefore reversing the court of appeal's judgment; (2) removed the temporary injunction against Commissioner Morath; and (3) remanded the case to the trial court.¹¹⁵ The Texas Supreme Court's decision in *Texas Education Agency v. Houston Independent School District (HISD III)*¹¹⁶ is distinct from *In re Texas Education Agency*. The former determined whether the district met its burden for ultra vires claims,¹¹⁷ while the latter determined the rights of the parties during the pendency of appeal for the ultra vires action.¹¹⁸

Ultimately, the Texas Supreme Court's decision favored the TEA and Commissioner Morath—the state actors.¹¹⁹ Years after the temporary injunction first prevented Commissioner Morath from acting on his original plans, the Texas Supreme Court removed the injunction.¹²⁰ The state most likely exhausted many resources since the outset of the ultra vires claims and in the proceedings directly associated with *In re Texas Education Agency*. Is this not the precise result the Legislature sought to prevent when enacting House Bill 2776 and section 22.004(i)?¹²¹

D. *The Precedential Value of In re Texas Education Agency*

Although the court's decision seems to have a narrow scope,¹²² the case has already set a precedent for other decisions.¹²³ The court's reasoning has

114. *Tex. Educ. Agency v. Hous. Indep. Sch. Dist. (HISD III)*, No. 21-0194, 2023 WL 175524, at *1, *3 (Tex. 2023).

115. *Id.* at *1.

116. *Tex. Educ. Agency v. Hous. Indep. Sch. Dist. (HISD III)*, No. 21-0194, 2023 WL 175524 (Tex. 2023).

117. *Id.*

118. *In re Tex. Educ. Agency*, 619 S.W.3d at 680–81.

119. *HISD III*, 2023 WL 175524, at *1.

120. *Id.* at *10.

121. *Tex. H.R. Rep. No. 85-2776* (2017).

122. *See In re Tex. Educ. Agency*, 619 S.W.3d at 682 (“Section 22.004(i) . . . prohibits this Court from adopting procedural rules authorizing counter-supersedeas of orders and judgments against certain governmental defendants except as to a narrow class of administrative cases.” (citing TEX. GOV'T CODE ANN. § 22.004(i))).

123. *See Abbott v. City of San Antonio*, No. 04-21-00342-CV, 2021 WL 3819514, at *2 (Tex. App.—San Antonio Aug. 19, 2021, order) (per curiam) (relying on the court's decision in *In re Texas Education Agency* to support the decision to issue a temporary injunction against a supersedeas); *see also* *Tex. Health & Hum. Servs. Comm'n v. Sacred Oak Med. Ctr. LLC*, No. 03-21-00136-CV, 2021 WL

extended to cases involving COVID-19 mask mandates¹²⁴ and the operation of a psychiatric hospital.¹²⁵

In *Abbott v. City of San Antonio*,¹²⁶ Governor Greg Abbott challenged a temporary order preventing the enforcement of Executive Order GA-38, which prohibited “local officials and governmental entities from requiring masks or face covers be worn in certain settings in the City of San Antonio and Bexar County.”¹²⁷ Governor Abbott signed Executive Order GA-38 on July 29, 2021.¹²⁸ Concerned with the order’s prohibition on government face mask requirements, the City of San Antonio and Bexar County filed suit seeking a declaratory judgment on August 10, 2021, which was granted.¹²⁹

Governor Abbott then filed a notice of appeal to supersede the temporary injunction.¹³⁰ In response to Governor Abbott’s supersedeas, the City of San Antonio and Bexar County filed an emergency motion requesting the court reinstate the temporary injunction.¹³¹ Throughout the appellate

2371356, at *5 (Tex. App.—Austin June 9, 2021, order) (per curiam) (“The Texas Supreme Court recently confirmed that courts of appeals have the power to provide relief from the State’s automatic right to supersedeas under Rule 29.3, even when Rule 24.2(a)(3) applies to preclude a trial court from issuing a counter-supersedeas order.” (citing *In re Tex. Educ. Agency*, 619 S.W.3d at 692)); *Abbott v. City of El Paso*, No. 08-21-00149-CV, 2021 WL 5903927, at *9 (Tex. App.—El Paso Sept. 30, 2021, order) (per curiam) (“Although the State may invoke the right to an automatic suspension of a temporary injunction . . . this Court still retains the discretion to issue a Rule 29.3 order . . . if maintaining the temporary injunction is necessary to preserve the parties’ rights.” (citing *In re Tex. Educ. Agency*, 619 S.W.3d at 692)).

124. *See Abbott v. City of San Antonio*, 2021 WL 3819514, at *4 (determining the reinstatement of the trial court’s temporary injunction as “necessary to prevent irreparable harm and preserve their rights during the pendency of this accelerated appeal”); *Abbott v. City of El Paso*, 2021 WL 5903927, at *1 (denying the city and county’s emergency motion to prevent Governor Abbott from enforcing Executive Order GA-38, which prohibits mask mandates).

125. *Sacred Oak*, 2021 WL 2371356, at *5 (explaining the status quo in this case, such as in *In re Texas Education Agency*, would change “from the last, actual, peaceable non-contested status” without the temporary injunction order (quoting *Clint Indep. Sch. Dist. v. Marquez*, 487 S.W.3d 538, 555 (Tex. 2016)) (internal quotation marks omitted).

126. *Abbott v. City of San Antonio*, No. 04-21-00342-CV, 2021 WL 3819514 (Tex. App.—San Antonio Aug. 19, 2021, order) (per curiam).

127. *See id.* at *1 (discussing Governor Abbott’s challenge on appeal).

128. Exec. Order No. GA-38 (2021), https://gov.texas.gov/uploads/files/press/EO-GA-38_continued_response_to_the_COVID-19_disaster_IMAGE_07-29-2021.pdf [<https://perma.cc/8MM7-5TK7>].

129. *See Abbott v. City of San Antonio*, 2021 WL 3819514, at *1 (providing background on the issue before the court).

130. *See id.* at *2 (summarizing Governor Abbott’s notice of appeal).

131. *See id.* (“However, in the emergency motion, the City and County ask us to preserve their rights by issuing an order reinstating the trial court’s temporary injunction.”).

court's discussion on its authority to grant relief, the court cited to both *HISD II* and *In re Texas Education Agency*.¹³² Although the court in *Abbott v. City of San Antonio* did not discuss counter-supersedeas, it cited to the language in *In re Texas Education Agency* in which the Texas Supreme Court held the prohibition on counter-supersedeas did not prohibit the appellate court's authorized temporary orders by way of Rule 29.3.¹³³ Interestingly, the Texas Supreme Court then issued an order in this case siding with Governor Abbott and staying the appellate court's Rule 29.3 order.¹³⁴ This order was not based on procedural issues, however, but on the court's view that maintaining the status quo in this case meant allowing continued gubernatorial discretion regarding these matters.¹³⁵

Similarly, *Abbott v. City of El Paso*¹³⁶ also considered the ruling in *In re Texas Education Agency*.¹³⁷ However, while the appellate court in *Abbott v. City of San Antonio* used Rule 29.3 to reinstate a temporary injunction against

132. See *id.* at *2 (“Texas intermediate appellate courts have inherent judicial power to preserve the parties’ rights during the pendency of an interlocutory appeal. . . . The Texas Supreme Court has acknowledged this inherent judicial power. . . .” (citing *Tex. Educ. Agency v. Houston Indep. Sch. Dist.*, 609 S.W.3d 569, 575 (Tex. App.—Austin 2020, order, pet. granted) and *In re Tex. Educ. Agency*, 619 S.W.3d 679, 682 (Tex. 2021) (orig. proceeding))).

133. Compare *In re Tex. Educ. Agency*, 619 S.W.3d at 692 (“We deny [appellants’] request for mandamus relief because Section 22.004(i)’s prohibition on counter-supersedeas refers to a particular procedural process, not an appellate court’s temporary orders under other authority. Accordingly, the court of appeals was not without power to issue temporary relief.”), with *Abbott v. City of San Antonio*, 2021 WL 3819514, at *2 (“The Texas Supreme Court has acknowledged this inherent judicial power, holding that one of our sister courts, the Austin court of appeals, had the authority under Rule 29.3 to provide relief from the state’s automatic right to suspend a temporary injunction.” (citing *In re Tex. Educ. Agency*, 619 S.W.3d at 692)).

134. Order, *In re Greg Abbott, In His Official Capacity as Governor of the State of Texas*, No. 21-0720 (Tex. Aug. 26, 2021).

135. *Id.* (“The status quo, for many months, has been gubernatorial oversight of such decisions at both the state and local levels. That status quo should remain in place while the court of appeals . . . examine the parties’ merits arguments . . .”).

136. *Abbott v. City of El Paso*, No. 08-21-00149-CV, 2021 WL 5903927 (Tex. App.—El Paso Sept. 30, 2021, order) (per curiam).

137. Compare *Abbott v. City of San Antonio*, 2021 WL 3819514, at *2 (“The Texas Supreme Court has acknowledged this inherent judicial power, holding that one of our sister courts, the Austin court of appeals, had the authority under Rule 29.3 to provide relief from the state’s automatic right to suspend a temporary injunction.” (citing *In re Tex. Educ. Agency*, 619 S.W.3d at 692)), with *Abbott v. City of El Paso*, 2021 WL 5903927, at *10 (Rodriguez, C.J., dissenting) (“[U]nless the Texas Supreme Court renders a merits decision on the pending mandamus actions stating that our sister courts substantively erred in issuing temporary relief under Rule 29.3, our discretion to fashion appropriate orders pending interlocutory appeal—including an order reinstating the temporary injunction—remains intact.” (citing *In re Tex. Educ. Agency*, 619 S.W.3d at 692)).

Executive Order GA-38, the court in *Abbott v. City of El Paso* did not.¹³⁸ In *Abbott v. City of El Paso*, the City sought to reinstate a temporary injunction issued by the trial court after it was superseded by the Governor.¹³⁹ However, here the appellate court relied on the Texas Supreme Court's order in *Abbott v. City of San Antonio*, which sought to maintain gubernatorial status quo, to make its decision.¹⁴⁰ Based on that order, the court in *Abbott v. City of El Paso* denied "the City's motion for emergency relief," which meant "the interlocutory appeal remain[ed] pending before this court, and all other deadlines set by previous orders remain[ed] in effect."¹⁴¹

Chief Justice Rodriguez's dissent in *Abbott v. City of El Paso* mentioned the ruling of *In re Texas Education Agency*.¹⁴² Chief Justice Rodriguez found that the temporary order issued by the Texas Supreme Court in *Abbott v. City of San Antonio* was not precedent the court was bound to follow¹⁴³ and that the appellate court could still issue a temporary injunction under Rule 29.3.¹⁴⁴ The procedural history in *Abbott v. City of El Paso* and *Abbott v. City of San Antonio* mirror the procedural history in *In re Texas Education Agency*—the trial courts issued a temporary injunction;¹⁴⁵ Governor Abbott challenged

138. Compare *Abbott v. City of San Antonio*, 2021 WL 3819514, at *2, *4 ("[I]n the emergency motion, the City and County ask us to preserve their rights by issuing an order reinstating the trial court's temporary injunction. . . . We grant the emergency motion and reinstate the trial court's temporary injunction pending final disposition of this appeal."), with *Abbott v. City of El Paso*, 2021 WL 5903927, at *1 ("Based on the stay order of *In re Abbott*, we DENY the City's motion for emergency relief. The interlocutory appeal remains pending before this Court, and all other deadlines set by previous orders remain in effect.").

139. *Abbott v. City of El Paso*, 2021 WL 5903927, at *1 ("The City of El Paso, Appellee, has filed a Rule 29.3 emergency motion for temporary relief seeking reinstatement of the temporary injunction order granted on September 2, 2021 . . .").

140. See *id.* at *1 (citing Order, *In re Greg Abbott, In His Official Capacity as Governor of the State of Texas*, No. 21-0720 (Tex. Aug. 26, 2021)).

141. See *id.* at *1.

142. See *id.* at *9–10 (Rodriguez, C.J., dissenting) (citing *In re Tex. Educ. Agency*, 619 S.W.3d 679, 692 (Tex. 2021) (orig. proceeding)) (summarizing the appellate court's authority under Rule 29.3 based on the Court's interpretation in *In re Texas Education Agency*).

143. See *id.* at *1 ("Chief Justice Rodriguez, respectfully, dissents from this Order. She finds the Texas Supreme Court's temporary order of August 26th is not precedent and maintains we are not bound by it.").

144. *Id.* at *10 (Rodriguez, C.J., dissenting) ("While the summary order constitutes persuasive authority . . . unless the [Court] renders a merits decision on the pending mandamus actions stating that our sister courts substantively erred in issuing temporary relief under Rule 29.3, our discretion to fashion appropriate orders pending interlocutory appeal . . . remains intact." (citing *In re Tex. Educ. Agency*, 619 S.W.3d at 692)).

145. See *id.* at *1 ("The trial court's temporary injunction . . ."); *Abbott v. City of San Antonio*, No. 04-21-00342-CV, 2021 WL 3819514, at *1 (Tex. App.—San Antonio Aug. 19, 2021, order) (per

the injunctions on appeal;¹⁴⁶ and then the question of the appellate courts' proper course of action was raised.¹⁴⁷ Although the majority opinion in *Abbott v. City of El Paso* did not discuss counter-supersedeas, the dissent cited *In re Texas Education Agency* to support the appellate court's discretion to grant a temporary injunction.¹⁴⁸

Additionally, in *Texas Health and Human Services Commission v. Sacred Oak Medical Center LLC*, the Texas Health and Human Services Commission (HHSC) and its Commissioner appealed the trial court's order granting Sacred Oak Medical Center LLC's (SOMC) motion for a temporary injunction.¹⁴⁹ The temporary injunction was intended to prevent the enforcement of HHSC's order against SOMC, which denied SOMC's application for its psychiatric hospital's license and required SOMC to stop its operation.¹⁵⁰ HHSC filed a notice of appeal, which superseded the trial court's order, and asserted "it was not subject to being counter-superseded under Texas Rules of Appellate Procedure 24.2(a)(3)."¹⁵¹ SOMC argued the Commission was not entitled to supersede the temporary injunction because this case was an administrative action.¹⁵² SOMC eventually filed an "Emergency Motion for Review of Denial of Counter-Supersedeas or for a Rule 29.3 Temporary

curiam) ("[T]he trial court signed an order granting the temporary injunction."); *In re Tex. Educ. Agency*, 619 S.W.3d at 681 ("After a hearing, the trial court temporarily enjoined the proposed actions . . .").

146. See *Abbott v. City of El Paso*, 2021 WL 5903927, at *2 (Alley, J., concurring) ("The City of El Paso asks us to exercise our discretion under [Rule] 29.3 to reinstate the trial court's temporary injunction which was automatically stayed by the State of Texas's notice of appeal."); *Abbott v. City of San Antonio*, 2021 WL 3819514, at *2 ("After the trial court signed the temporary injunction order, the Governor filed a notice of appeal in this court . . ."); *In re Tex. Educ. Agency*, 619 S.W.3d at 681 ("After perfecting an interlocutory appeal, Relators filed a motion to vacate the trial court's counter-supersedeas order . . .").

147. See *Abbott v. City of El Paso*, 2021 WL 5903927, at *1 ("The City of El Paso . . . filed a Rule 29.3 emergency motion for temporary relief seeking reinstatement of the temporary injunction order . . ."); *Abbott v. City of San Antonio*, No. 04-21-00342-CV, 2021 WL 5217636, at *1 (Tex. App.—San Antonio Nov. 10, 2021) ("In two issues, the Governor contends (1) the trial court abused its discretion in issuing the temporary injunction; and (2) the trial court lacked jurisdiction to enjoin GA-38."); *In re Tex. Educ. Agency*, 619 S.W.3d 679 at 680 ("The purely procedural question presented in this mandamus proceeding is whether the appellate court's temporary order conflicts with Section 22.004(i).").

148. *Abbott v. City of El Paso*, 2021 WL 5903927, at *9 (Rodriguez, C.J., dissenting).

149. See *Tex. Health & Hum. Servs. Comm'n v. Sacred Oak Med. Ctr. LLC*, No. 03-21-00136-CV, 2021 WL 2371356, at *1 (Tex. App.—Austin June 9, 2021, order) (per curiam) (introducing the basis for the order).

150. *Id.*

151. *Id.*

152. *Id.*

Order.”¹⁵³ The court of appeals held the trial court was correct in determining it lacked discretion to consider SOMC’s counter-supersedeas.¹⁵⁴ However, the court relied on language from *In re Texas Education Agency* to determine the court of appeals has “the power to provide relief from the State’s automatic right to supersedeas under Rule 29.3, even when Rule 24.2(a)(3) applies to preclude a trial court from issuing a counter-supersedeas order.”¹⁵⁵

These cases showcase the importance of correctly interpreting TGC section 22.004(i). Whether a temporary injunction issued by the court of appeals is seen as a counter-supersedeas under this provision is pivotal to deciding if government agencies could prohibit mask mandates;¹⁵⁶ whether a psychiatric hospital must cease its operations;¹⁵⁷ whether mail ballot applications would be received from those using the disability category due to COVID-19;¹⁵⁸ and whether Commissioner Morath could install Doris Delaney as the district conservator, replace HISD’s trustees, and lower HISD’s accreditation status—all while pending appeal.¹⁵⁹

153. *Id.* at *2 (stating the relief SOMC sought from the court of appeals).

154. *See id.* at *4 (“We conclude that the trial court correctly determined that it lacked discretion to consider Sacred Oak’s motion to counter-supersede the temporary injunction.”).

155. *Id.* at *5 (citing *In re Tex. Educ. Agency*, 619 S.W.3d 679, 692 (Tex. 2021) (orig. proceeding)).

156. *See Abbott v. City of San Antonio*, No. 04-21-00342-CV, 2021 WL 3819514, at *1 (Tex. App.—San Antonio Aug. 19, 2021, order) (per curiam) (describing the temporary injunction as restraining Governor Abbott’s enforcement of Executive Order GA-38).

157. *See Sacred Oak*, 2021 WL 2371356, at *1 (“The trial court granted Sacred Oak’s application for temporary injunction . . . which would allow Sacred Oak to reopen its psychiatric hospital.”).

158. *See State v. Tex. Democratic Party*, 631 S.W.3d 337, 338–39 (Tex. App.—Houston [14th Dist.] 2020, order, no pet.) (Frost, C.J., dissenting) (discussing the trial court’s injunction).

159. *See In re Tex. Educ. Agency*, 619 S.W.3d at 681 (“Among the actions HISD challenges are Commissioner Morath’s decision to (1) install Dr. Delaney as a district-level conservator, (2) replace HISD’s elected trustees with an appointed board of managers, and (3) lower HISD’s accreditation status.”).

E. *Can Theories of Statutory Interpretation Solve the Ambiguity Problem in Section 22.004(i)?*

Not only has the decision in *In re Texas Education Agency* set a precedent for cases procedurally,¹⁶⁰ but it has also set a precedent for statutory interpretation.¹⁶¹

When analyzing the functions of the procedural terms and relevant statutes, the majority opinion of *In re Texas Education Agency* distinguishes the appellate court's temporary injunction from counter-supersedeas based on statutory interpretation, even though the functions of these procedures have the same effect.¹⁶² In the past, the Texas Supreme Court has looked to the function of an order rather than its name¹⁶³—an idea that aligns with the dissent's argument.¹⁶⁴ The dissent finds a distinction between the temporary order and counter-supersedeas nonexistent and discusses a theory of

160. See Petition for Writ of Mandamus and for Writ of Injunction at *7, *In re State of Texas*, No. 21-0873, 2021 WL 4785741 (Tex. 2021) (per curiam) (No. 21-0873), 2021 WL 4947632, at *7 (referencing *In re Texas Education Agency* in a petition to the Texas Fourth Court of Appeals); Petition for Writ of Mandamus at *12, *Elec. Reliability Council of Tex., Inc. v. CPS Energy*, No. 04-21-00242-CV, 2021 WL 5879183 (Tex. App.—San Antonio Dec. 13, 2021) (No. 21-1061), 2021 WL 5893434, at *12 (referring to *In re Texas Education Agency* in a petition to the Supreme Court of Texas).

161. See, e.g., *In re NCS Multistage, LLC*, No. 08-21-00020-CV, 2021 WL 4785743, at *9 (Tex. App.—El Paso Oct. 14, 2021) (“[W]e are faced with a statutory construction question of first impression. . . . ‘The polestar of statutory construction is legislative intent, which we determine from the enacted language. . . . [W]e construe the Legislature’s chosen words and phrases within the context and framework of the statute as a whole, not in isolation.’” (quoting *In re Tex. Educ. Agency*, 619 S.W.3d at 687–88)). The court in *In re NCS Multistage, LLC* first looked at the plain meaning of the language in issue when constructing meaning. See *id.* at *9–10 (listing the steps the court in *In re Texas Education Agency* used to construe the meaning of enacted language and then “first consider[ing] the plain language of the two sections at issue” (citing *In re Tex. Educ. Agency*, 619 S.W.3d at 687–88)).

162. *In re Tex. Educ. Agency*, 619 S.W.3d at 682 (“We hold that the court of appeals’ temporary order does not conflict with Section 22.004(i)’s limitation on procedural rules authorizing counter-supersedeas. The temporary order is not counter-supersedeas relief within the meaning of the statute even though the order may have the same effect.”).

163. See *In re Tex. Nat. Res. Conservation Comm’n*, 85 S.W.3d 201, 205 (Tex. 2021) (“Whether an order is a non-appealable temporary restraining order or an appealable temporary injunction depends on the order’s characteristics and function, not its title.” (citing *Qwest Commc’ns Corp. v. AT & T Corp.*, 24 S.W.3d 334, 336 (Tex. 2000) and *Del Valle Indep. Sch. Dist. v. Lopez*, 845 S.W.2d 808, 809 (Tex. 1992))).

164. See *In re Tex. Educ. Agency*, 619 S.W.3d at 693 (Hecht, C.J., dissenting) (“In other words, using one Rule to give the District the very relief another Rule expressly denies, and not calling the effect ‘counter-supersedeas[.]’ even though it is.”).

statutory construction called “new purposivism,” a trend in which courts textually constrain or limit the language of statutes.¹⁶⁵

“Purposivism,” the ancestor of “new purposivism,” allows the judiciary to interpret statutes in a way that ensures statutes carry out their purposes as best as possible.¹⁶⁶ A purposivist focuses on a statute’s underlying purpose or policy objectives and will consider more than just the text of a statute to determine its meaning.¹⁶⁷

New purposivism, however, involves courts reading open-ended language “almost entirely in light of [their] perception of the statute’s ulterior purposes” because the text “invite[s] such an inquiry.”¹⁶⁸ New purposivism exemplifies purposivism’s evolution into a more text-centric approach; instead of focusing on the purpose of the statute, new purposivism focuses on “Congress’s choice of words to determine how and to what extent an interpreter may account for the policy rationale or ulterior purpose of a statute.”¹⁶⁹

In his dissent, Chief Justice Hecht discussed this trend of new purposivism and described the majority’s interpretation of the language “any other rule” as consistent with new purposivism.¹⁷⁰ According to Chief Justice Hecht, the court “refuse[d] to read [section 22.004(i)] exactly as

165. See *id.* at 696 (“The distinction between counter-supersedeas and unsupersedeas is not merely ‘fine’ or even ‘punctilious’; it is nonexistent. . . . [R]ecent legal literature has described courts’ finding language textually constrained or limited as the ‘new purposivism’ theory of statutory construction.” (citing Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1278 (2020))); see also John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 116–17 (2011) (“Two recent opinions for the Court by Justice Kagan, however, typify a new purposivism that relies on Congress’s choice of words to determine how and to what extent an interpreter may account for the policy rationale or ulterior purpose of a statute.”).

166. See Krishnakumar, *supra* note 165, at 1282 (defining purposivism).

167. See *id.* at 1282 (“Purposivism . . . differs from textualism both in its focus on identifying a statute’s underlying purpose or policy objectives and in its willingness to consider a range of extrinsic interpretive aids, including legislative history.”).

168. Manning, *supra* note 165, at 116–17 (providing examples of new purposivism). In *Milner v. Dep’t of Navy*, the United States Supreme Court used the statute’s purpose to reinforce the meaning of an exemption to the Freedom of Information Act. See *Milner v. Dep’t of Navy*, 562 U.S. 562, 571 (2011) (“The statute’s purpose reinforces this understanding of the exemption.”). The Court in *Fox v. Vice* discussed its reasoning in a previous case in which the Court looked at Congress’s intention in enacting the legislation at issue. See *Fox v. Vice*, 563 U.S. 826, 833 (2011) (“Congress sought ‘to protect defendants from burdensome litigation having no legal or factual basis.’” (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420 (1978))).

169. Manning, *supra* note 165, at 115 (describing the theory of new purposivism).

170. *In re Tex. Educ. Agency*, 619 S.W.3d at 696–97 (Hecht, C.J., dissenting) (“The Court’s description of Section 22.004(i)’s ‘any other rule’ language as ‘textually limited’ is consistent with new purposivism.”).

written,” but he also acknowledged the court’s power to not read the rule in this way. However, the chief justice’s issue with the court’s reasoning seems to arise because the court claimed to interpret the statute “exactly as written and then blatantly [did] the opposite.”¹⁷¹ These conflicting views between the justices on statutory interpretation raise the question of whether either side is correct in not only their perception of the opposing argument but also their own approach to statutory interpretation.¹⁷²

In this case, both justices have a reputation for being strict constructionists, yet the majority held the statute does not prohibit a temporary injunction at the appellate level because it is not a counter-supersedeas, and the dissent opined the contrary.¹⁷³ Strict constructionists construe the meaning of text strictly,¹⁷⁴ although the exact definition of strict constructionism is

171. *Id.* at 697.

172. See CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN’T MEAN WHAT IT MEANT BEFORE 25 (2009) (“My central goal in this chapter is to show that any particular approach to the Constitution must be defended on the ground that it makes the relevant constitutional order better rather than worse.”). Cass Sunstein analyzed various interpretations of constitutional provisions applicable to general statutory construction; according to Sunstein, the key question with regard to interpretation is whether the approach would make the system of law “much worse than it now is.” *Id.* at 32; see also Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 83 FORDHAM L. REV. 1249, 1252 (2015) (describing constructive interpretation as determining what “the authors of the text in question intended to say” and “trying to make the best sense we can of an historical event”).

173. Strict constructionism is not unfamiliar to the Justices of the Texas Supreme Court. See Press Release, Governor’s Press Office, Gov. Perry Appoints First Hispanic Female to Supreme Court of Texas (Oct. 8, 2009), https://www.txcourts.gov/All_Archived_Documents/SupremeCourt/CourtNewsAndAdvisories/advisories/Guzman.htm [<https://perma.cc/2N3J-3AKL>] (quoting Governor Rick Perry describing Texas Supreme Court Justice Eva M. Guzman as a strict constructionist); *Candidate Profile: Eva Guzman*, IVOTER GUIDE (Jan. 7, 2022), <https://ivoterguide.com/candidate?elecK=403&raceK=4672&primarypartyk=R&canK=27978&Address=75751&path=/my-ballot> [<https://perma.cc/54V9-5E4J>] (“The U.S. Constitution and my state constitution should be interpreted as living documents, rather than use a strict constructionist or originalist philosophy. Strongly disagree.”); see also *Candidate Profile: Nathan Hecht*, IVOTER GUIDE (Oct. 26, 2021), <https://ivoterguide.com/candidate?elecK=791&raceK=8310&primarypartyk=-&canK=3482&path=/all-in-state/Texas/> [<https://perma.cc/3TXP-5D4N>] (“The U.S. Constitution and my state constitution should be interpreted as living documents, rather than use a strict constructionist or originalist philosophy. Strongly disagree.”); Bruce Tomaso & Natalie Posgate, *Hecht Faces Meachum in SCOTX Chief Justice Race*, THE TEX. LAWBOOK (Oct. 21, 2020), <https://texaslawbook.net/hecht-faces-meachum-in-scotx-chief-justice-race/> [<https://perma.cc/E4WC-MGYB>] (quoting Travis County District Judge Amy Clark Meachum describing most members of the Texas Supreme Court justices as strict constructionists).

174. See Antonin Scalia, Assoc. J. of U.S. Sup. Ct., *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitutional and Laws* (March 8–9, 1995), in THE TANNER LECTURES ON HUM. VALUES 77, 98 (1995) (“Textualism should not be confused with so-called strict constructionism I am not a strict constructionist A text should

not entirely clear.¹⁷⁵ Definitions include “a close or rigid reading and interpretation of a law” and “that which refuses to expand the law by implications or equitable considerations, but confines its operation to cases which are clearly within the letter of the statute as well as within its spirit or reason, resolving all reasonable doubts against applicability of statute to particular case.”¹⁷⁶

In contrast, textualism involves using the “text of a statute as the primary source of statutory meaning.”¹⁷⁷ Textualists focus on the plain and objective meaning of the statute’s text, often times relying on “definitions, linguistic and grammar canons, or structural inferences about how different sections of a statute fit together.”¹⁷⁸ When determining legislative intent, textualists read and apply a statute as the legislature intended others to understand the statute; the idea behind this view is “the best indication of legislative intent is the statute itself.”¹⁷⁹

not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.”). Justice Scalia used *Smith v. United States* to show the difference between textualists and strict constructionists. See SCALIA, *supra* note 98, at 23–24 (“The difference between textualism and strict constructionism can be seen in a case my Court decided four terms ago.” (referring to *Smith v. United States*, 508 U.S. 223 (1993))); see also *Smith*, 508 U.S. at 241–47 (Scalia, J., dissenting) (interpreting the meaning of “use” and “in relation to” within a statute). According to Justice Scalia, a textualist would have acquitted the defendant in the case; when construing language of using a gun, it should be understood as “use of a gun for what guns are normally used for” See SCALIA, *supra* note 98, at 24 (implying a strict constructionist would view gun use as any use of a gun).

175. Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 581 (1990) (“I should think that the effort, with respect to *any* statute, should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning right How ‘liberal’ is liberal, and how ‘strict’ is strict?”) (emphasis in original); Morell E. Mullins, Sr., *Coming to Terms with Strict and Liberal Construction*, 64 ALB. L. REV. 9, 13 (2000) (describing the meaning of strict construction as “fuzzy”).

176. Mullins, *supra* note 175, at 19–20 (quoting *Strict Construction*, BLACK’S LAW DICTIONARY (6th ed. 1990)).

177. See Krishnakumar, *supra* note 165, at 1281 (detailing the textualist approach to statutory construction).

178. See *id.* (describing the practices textualists use when interpreting a statute).

179. See Daniel J. Olds, *Ordinary Meaning, Context, and Textualism in Texas Statutory Interpretation*, 52 TEX. TECH. L. REV. 485, 489 (2020) (providing reasoning behind the textualist approach). According to Justice Scalia, legislative history was used “in the sense that it was part of the *development* of the bill, part of the attempt to inform and persuade those who voted” but now is used as “authoritative expressions of ‘legislative intent.’” SCALIA, *supra* note 98, at 34 (emphasizing the use of legislative history historically and comparing its use to legislative history’s current use). In Justice Scalia’s opinion, “the original meaning of the text” should be sought, rather than the original drafter’s intentions, when interpreting statutes. *Id.* at 38.

According to Justice Antonin Scalia, legal scholars are undecided on whether good or bad rules of statutory interpretation exist.¹⁸⁰ Statutory interpretation is important generally; its application to TGC 22.004(i) is particularly critical to *In re Texas Education Agency* because of the far-reaching ramifications of this decision.¹⁸¹ Even though both Justice Guzman and Chief Justice Hecht are coined strict constructionists, the outcomes of their analyses differed.¹⁸² This raises the question of which technique of statutory construction should be applied to cases in which a statute is ambiguous.¹⁸³

F. *Texas Code Construction Act*

Ensuring the judiciary exercises its powers within proper bounds is important to the integrity of the judiciary itself.¹⁸⁴ Maintaining consistency throughout the exercise of judicial powers at the appellate level is crucial because courts' decisions shape legal practice in their respective jurisdictions.¹⁸⁵ Under the Texas Constitution, the Supreme Court of Texas's

180. See SCALIA, *supra* note 98, at 14 (“Whereas legal scholarship has been at pains to rationalize the common law—to devise the *best* rules governing contracts, torts, and so forth—it has been seemingly agnostic as to whether there is even any such thing as good or bad rules of statutory interpretation.”).

181. See *In re Tex. Educ. Agency*, 619 S.W.3d 679, 681 (Tex. 2021) (orig. proceeding) (listing the actions HISD wanted the Court to prevent); see also SCALIA, *supra* note 98, at 15 (“Despite the fact that statutory interpretation has increased enormously in importance, it is one of the few fields where we have a drought rather than a glut of treatises . . .”); Ronald Dworkin, *Law as Interpretation*, 9 CRITICAL INQUIRY 179, 194 (1982) (“[A]n interpretation of any body or division of law . . . must show the value of that body of law in political terms by demonstrating the best principle or policy it can be taken to serve.”).

182. Compare *In re Tex. Educ. Agency*, 619 S.W.3d at 689 (“[W]e conclude the statute only prohibits counter-supersedeas orders, which occur within a specific procedural context, and does not apply to orders issued by an appellate court under separate and distinct procedural mechanisms.”), with *id.* at 699 (Hecht, C.J., dissenting) (“A court of appeals can certainly consider other interim actions. . . . But it cannot grant statutorily prohibited relief by renaming it.”).

183. See Dworkin, *supra* note 181, at 181 (“When a statute (or the Constitution) is unclear on some point, because some crucial term is vague or because a sentence is ambiguous, lawyers say that the statute must be interpreted, and they apply what they call ‘techniques of statutory construction.’”).

184. See SUNSTEIN, *supra* note 172, at 32 (“To the extent that many minds are allowed to affect constitutional meaning, judicial self-discipline is indispensable.”); see also Stacy R. Obenhaus, *Inherent Judicial Power and the Principles of Appellate Review*, 22 APP. ADVOC. 368, 370 (2010) (“[T]he courts are generally cautious about defining the ‘judicial power’ too broadly, noting for example that ‘the Texas Constitution expressly grants the legislature ultimate authority over judicial administration.’” (quoting *In re State ex rel. O’Connell*, 976 S.W.2d 902, 911 (Tex. App.—Dallas 1998, no pet.))). Although courts have inherent judicial powers, the highest courts wish to avoid judicial activism. See *id.* at 375 (describing courts’ reluctance to “rest their decisions on their inherent judicial power”).

185. See Michael Gentithes, *Precedent, Humility, and Justice*, 18 TEX. WESLEYAN L. REV. 835, 837 (2012) (“[C]onsistent judicial reliance on precedent generates an assortment of ends . . .”).

jurisdiction is final and extends to all civil cases unless stated otherwise.¹⁸⁶ While the court has “full rulemaking power in the practice and procedure in civil actions,” it cannot make rules “abridg[ing], enlarg[ing], or modify[ing] the substantive rights of a litigant”;¹⁸⁷ it “may make and enforce all necessary rules of practice and procedure, not inconsistent with the law.”¹⁸⁸

Although the majority opinion in *In re Texas Education Agency* seems to have set a precedent with regard to the interpretation of section 22.004(i) and related rules, Chief Justice Hecht’s dissent proves this statute could be interpreted differently.¹⁸⁹ The statute is ambiguous.¹⁹⁰ Both the majority and dissent discuss the intention and purpose of the section, but only the legislature itself knows whether it intended for section 22.004(i) to prevent only counter-supersedeas or any judicial action offering the same result.¹⁹¹

Additionally, due to the precedential value of a Texas Supreme Court ruling and the lasting effects of the court’s decisions, judges must act consistently when interpreting state statutes. Texas’s Code Construction Act attempts to provide guidance on how Texas statutes should be construed.¹⁹² The Texas Legislature’s intentionality in enacting a provision to guide courts’ statutory construction should be considered.

186. See TEX. CONST. art. V, § 3 (“[The Supreme Court of Texas’s] appellate jurisdiction shall be final and shall extend to all cases except in criminal law matters and as otherwise provided in this Constitution or by law.”).

187. TEX. GOV’T CODE ANN. § 22.004(a) (explaining the court’s rule making power for practice and procedures in civil actions).

188. See *id.* § 22.003(b) (defining the scope of the Texas Supreme Court’s rulemaking power).

189. Compare *In re Tex. Educ. Agency*, 619 S.W.3d 679, 689 (Tex. 2021) (orig. proceeding) (concluding Rule 29 allows the court of appeals to file temporary orders against appellants), *with id.* at 699 (Hecht, C.J., dissenting) (“A court of appeals can certainly consider other interim actions But it cannot grant statutorily prohibited relief by renaming it.”).

190. *Tex. State Bd. of Examiners of Marriage & Fam. Therapists v. Tex. Med. Ass’n*, 511 S.W.3d 28, 41 (Tex. 2017) (“A statute is ambiguous if its words are susceptible to two or more reasonable interpretations, and we ‘cannot discern legislative intent in the language of the statute itself.’” (quoting *Tex. Lottery Comm’n v. First State Bank of DeQueen*, 325 S.W.3d 628, 639 (Tex. 2010))).

191. See Olds, *supra* note 179, at 489 (“[T]he best indication of legislative intent is the text of the statute itself.”); Dworkin, *supra* note 181, at 181 (“Most of the literature assumes the interpretation of a particular document is a matter of discovering what its authors . . . meant to say in using the words they did [L]awyers recognize that on many issues the author had no intention either way and that on others his intention cannot be discovered.”); *In re Tex. Educ. Agency*, 619 S.W.3d at 680 (stating the question presented in the case as “whether the appellate court’s temporary order conflicts with Section 22.004(i)”).

192. TEX. GOV’T CODE ANN. § 311.023 (providing guidance on interpreting statutes).

Currently, the Texas Code Construction Act permits courts to consider various factors when construing a statute, regardless of whether the statute is ambiguous or not:

[A] court may consider among other matters the:

- (1) object sought to be attained;
- (2) circumstances under which the statute was enacted;
- (3) legislative history;
- (4) common law or former statutory provisions, including laws on the same or similar subjects;
- (5) consequences of a particular construction;
- (6) administrative construction of the statute; and
- (7) title (caption), preamble, and emergency provision.¹⁹³

Both the majority and dissent in *In re Texas Education Agency* turned to some of these factors when interpreting section 22.004(i).¹⁹⁴

Following the guidance set forth in the Code Construction Act, an interpretation of section 22.004(i) as prohibiting any action that has the same effect of counter-supersedeas would be proper. This interpretation considers all of the following: (1) the objective the provision sought to attain, which was to diminish the State's expenses pending appeal;¹⁹⁵ (2) the circumstances under which the statute was enacted, which was in response to *In re State Board for Educator Certification*;¹⁹⁶ and (3) the legislative history, which states the purpose of the statute.¹⁹⁷

Although the Code Construction Act permits consideration of the “object sought to be attained” and the “circumstances under which the statute was enacted,” the Texas Supreme Court has previously refrained from using legislative history and other extrinsic aides when interpreting statutes because “the statute’s plain language most reliably reveals the legislature’s intent.”¹⁹⁸ Historically, the court specifically rejects using extrinsic aids when

193. *Id.*

194. *See supra* Parts II.B and IV.A (examining the majority and dissent’s analyses, which do not rely on the text alone to support their conclusions).

195. *See supra* Part II.B (discussing the legislature’s concern with the state enduring substantial costs).

196. *See supra* Part IV.A (showing both the majority and dissent’s analyses involved discussion about *In re State Board for Educator Certification*).

197. *See supra* Part II.B (referencing the legislature’s intent to minimize the costs incurred by the State during appeals).

198. *Tex. Health Presbyterian Hosp. of Denton v. D.A.*, 569 S.W.3d 126, 136 (Tex. 2018).

statutory language is clear.¹⁹⁹ But if the decisions of the court based on the enacted statutory language do not reflect the intent of the legislature, then the legislature must correct its errors.²⁰⁰

Further, some representatives in the Texas legislature seem to echo the court's view on avoiding the use of legislative history and intent when interpreting statutes.²⁰¹ Texas Representative Dustin Burrows proposed House Bill 2139 early in 2023. This bill would amend section 311.023 of the Code Construction Act and completely prohibit reliance on legislative history:

- (a) In construing a statute, a court may not under any circumstance consider, consult, cite, rely upon, or give any weight to:
 - (1) statements from individual legislators, including bill authors and sponsors;
 - (2) committee reports of any type;
 - (3) statements made in legislative hearings or floor debates; or
 - (4) signing statements.²⁰²

House Bill 2139 also proposes to prohibit intentionalism—courts would be unable to inquire into legislative intent or the objective the legislature hoped to accomplish.²⁰³ This proposal attempts to support the Texas Supreme Court's 2018 position that the text alone should give a statute meaning.²⁰⁴ However, this stance seems at odds with the majority and dissent's discussions in *In re Texas Education Agency*—both opinions in that case discuss the history and intent behind section 22.004(i).²⁰⁵

Regardless of whether House Bill 2139, or similar legislation, is passed, courts are not presently required to follow the legislature's guidance on

199. *Id.*

200. *Id.* at 137 (citing *Brown v. De La Cruz*, 156 S.W.3d 560, 566 (Tex. 2004); then citing *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 637–38 (Tex. 2010)).

201. Tex. H.R. No. 2139, 88th Leg., R.S. (2023).

202. *Id.*

203. *Id.*

204. *See Tex. Health Presbyterian Hosp.*, 569 S.W.3d at 136:

By focusing on the language enacted, we encourage the legislature to enact unambiguous statutes, we discourage courts from usurping the legislature's role of deciding what the law should be, and we enable citizens to rely on the laws as published without having to worry that they may carry some hidden meaning.

205. *See supra* Part IV.A (discussing the analyses in both opinions in *In re Texas Education Agency*).

statutory construction set forth in the Code Construction Act.²⁰⁶ Therefore, the legislature should clarify section 22.004(i) to ensure outcomes in accordance with the legislature's true intent by making it impossible to interpret the language in any other manner.

V. CONCLUSION

In re Texas Education Agency seemed to decide a small, procedural issue, but the decision has, and will continue to have, a substantial effect beyond the case itself.²⁰⁷ The majority and dissent, both written by justices coined as strict constructionists, provide thorough analyses of the rules at issue before the court but come to two very different conclusions.²⁰⁸ The history of TGC section 22.004(i) indicates the legislature's clear intention regarding the effect of this provision. Further, the Texas Supreme Court's 2023 ruling on the merits of the underlying issue in *In re Texas Education* supports the reason for the enactment of section 22.004(i)—to prevent “substantial cost to the state even if it eventually prevails in the suit.”²⁰⁹

The only way to prevent disparate interpretations of laws in the future is for the legislature to clarify statutory language, thereby ensuring the courts can rely on the text alone to get to the legislature's intended result. Here, the intended result seems to be prohibition from using any rule against a qualifying state agency that has the same result as counter-supersedeas, including Rule 29.3.

However, the legislature is unlikely to have predicted that section 22.004(i) would be construed so narrowly by the majority in *in re Texas Education Agency*. Texas lawmakers may consider a closer examination of the statute's language and anticipate lawful ways to work around the statute's prohibition of counter-supersedeas. Texas lawmakers may decide it is necessary to use even more specific language than the current phrase “and any other rule” to prohibit those work-arounds. By doing so, the legislature can

206. *Tex. Health Presbyterian Hosp.*, 569 S.W.3d at 136 (“Although [section 311.023] may grant us legal permission [to consider a statute's legislative history], not all that is lawful is beneficial. Constitutionally, it is the courts' responsibility to construe statutes, not the legislature's.”).

207. See discussion *supra* Part IV.D.

208. See *In re Tex. Educ. Agency*, 619 S.W.3d 679, 689 (Tex. 2021) (orig. proceeding) (“We conclude the statute only prohibits counter-supersedeas orders, which occur within a specific procedural context, and does not apply to orders issued by an appellate court under separate and distinct procedural mechanisms.”); *id.* at 699 (Hecht, C.J., dissenting) (“A court of appeals can certainly consider other interim actions But it cannot grant statutorily prohibited relief by renaming it.”).

209. See discussion *supra* Part II.A.

prevent opposing interpretations of the statute from occurring in the future. Such prevention is important because the interpretation of TGC section 22.004(i) ultimately determines whether appellate courts can prevent government entities from acting during a pending appeal. Such a power reaches far beyond a narrow, procedural issue and affects lives across the state of Texas.