Case No. 25-0094

IN THE SUPREME COURT OF TEXAS

IN RE BERNADINE EDWARDS, INDIVIDUALLY AND ON BEHALF OF THE HEIRS AND BENEFICIARIES OF LAURALENE BUTLER JACKSON, DECEASED,
Relator

Original Proceeding from the First Court of Appeals at Houston, Texas
Cause No. 01-23-00102-CV

Briefing consolidated with Case No. 25-0103

IN RE ALL AMERICA INSURANCE COMPANY, ET AL.,
Relators

Original Proceeding from the First Court of Appeals at Houston, Texas
Cause No. 01-23-00393-CV

Briefing consolidated with Case No. 25-0114

IN RE RANDY TURNER, O/B/O TERRILL TURNER A/K/A TERRELL TURNER, DECEASED, LIZ CHAVEZ, SHANNON HUDGE, KEVIN WON, SCOTT MINNICK AND HOLLY PRIDE, ET AL.,
Relators

Original Proceeding from the First Court of Appeals at Houston, Texas
Cause No. 01-23-00097-CV

Briefing consolidated with Case No. 25-0121

IN RE VALERIE DANIELS,
Relator

Original Proceeding from the First Court of Appeals at Houston, Texas
Cause No. 01-23-00392-CV

Briefing consolidated with Case No. 25-0129

IN RE ERNEST PETERMAN, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF ELLA PETERMAN,
Relator

Original Proceeding from the First Court of Appeals at Houston, Texas
Cause No. 01-23-00103-CV

RELATORS' CONSOLIDATED BRIEF ON THE MERITS

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IDENTITY OF PARTIES AND COUNSEL

Due to the large number of parties and counsel for this consolidated brief, a complete index of parties and counsel—as required by Texas Rule of Appellate Procedure 55.2(a)—is attached as Appendix Tab 1.

CITATIONS IN CONSOLIDATED BRIEF

As used throughout this consolidated brief, the "Plaintiff Relators" are retail customers and Texas residents who seek to recover damages suffered as a result of the Real Parties' acts and omissions, whereas the "Subrogation Relators" are insurers pursuing claims in subrogation for sums to paid to their insureds as a result of the Real Parties' acts and omissions.

This consolidated brief references mandamus record documents filed by both the Plaintiff Relators and Subrogation Relators. The citations to the mandamus records are as follows:

- Mandamus Record in Case No. 25-0103: **AmericaMR#**
- Mandamus Record in Case No. 25-0114: **TurnerMR#**

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STATEMENT OF THE CASE

***Nature of the Case*:** This original proceeding arises from multi-district litigation concerning the February 2021 Winter Storm Uri, the collapse of the Texas power grid, and the resulting loss of power that affected more than 4.5 million Texas households and caused deaths, serious personal injuries, and widespread property damage throughout the State. AmericaMR322–50. An MDL court was established for all claims related to "power shortages and electrical outages" during this storm, including claims against several power generation companies ("PGCs")—who are the Real Parties to these proceedings. AmericaMR18.

At issue here is the MDL court's Rule 91a order related to five bellwether cases styled in the trial court as follows: (i) Cause No. 2021-24797, *Randy Turner, et al. v. NRG Texas Power, et ux.* ("Turner"); (ii) Cause No. 2022-13706, *All America Insurance Company, et al. v. Electric Reliability Council of Texas, Inc., et al.* ("All America"); (iii) Cause No. 2021-84438, *Bernadine Edwards, et al. v. Electric Reliability Council of Texas, Inc., et al.* ("Edwards"); (iv) Cause No. 2021-18513, *Valerie Daniels v. CenterPoint Energy, Inc., et al.* ("Daniels"); and (v) Cause No. 2021-18532, *Ernest Peterman, et al. v. Electric Reliability Council of Texas, Inc., et al.* ("Peterman"). AmericaMR157.

Because many of the claims, allegations, and arguments in these bellwether cases overlap, the global term "Relators" will apply to all relators from

the five cases currently pending in this Court. However, for purposes of this consolidated briefing, if a distinction is necessary, the relators in Case Nos. 25-0094, 25-0114, 25-0121, and 25-0129 will be referred to as the "Plaintiff Relators" while the relators in Case No. 25-0103 will be referred to as the "Subrogation Relators."

In the trial court, the PGCs moved to dismiss all of the Relators' claims under Rule 91a, claiming they owed Relators no legal duties. AmericaMR288–469; TurnerMR569-625.

***Trial Court*:** MDL Master File No. 2021-41903 [MDL Case No. 5.001781] in the 281st Judicial District Court of Harris County, Texas, the Hon. Sylvia Matthews, presiding.

***Trial Court Actions*:** After detailed briefing and a two-day hearing, the MDL trial court ultimately denied the PGCs' Rule 91a motion to dismiss with respect to Relators' claims for negligence, negligent undertaking, nuisance, and gross negligence. AmericaMR1087. The MDL court also denied the PGCs' opposed motion to seek an interlocutory appeal from that order. AmericaMR1088. The PGCs subsequently sought mandamus relief from that order in each of the five bellwether cases.

Court of Appeals: The Court of Appeals for the First District of Texas, at Houston. Chief Justice Adams and Justices Landau and Hightower.

Court of Appeals Actions:

The PGCs sought mandamus relief in the First Court of Appeals and in the Fourteenth Court of Appeals. AmericaMR1135–37. The mandamus proceedings from the five bellwether cases were styled as follows: (i) Cause No. 01-23-00097-CV ("Turner"); (ii) Case No. 01-23-00102-CV ("Edwards"); (iii) Case No. 01-23-00103-CV ("Peterman"); (iv) Case No. 14-23-00096-CV ("Daniels"); and (v) Case No. 14-23-00097-CV ("All America"). The Plaintiff Relators are comprised of all relators in the *Turner*, *Edwards*, *Peterman*, and *Daniels* cases while the Subrogation Relators include all of the insurance companies party to the *All-America* bellwether case.

Case Nos. 14-23-00096-CV and 14-23-00097-CV were transferred to the First Court of Appeals and restyled 01-23-00392-CV and 01-23-00393-CV, respectively. Although it did not formally consolidate them, the First Court of Appeals considered all of these cases together. AmericaMR1144, 46.

On December 14, 2023, the court of appeals issued a single opinion for all the bellwether cases, holding that the retail customers' claims for negligence, gross negligence, nuisance, and negligent undertaking have "no basis in law under the facts alleged" and directing the MDL court to grant the PGCs' Rule 91a motions. *In re Luminant Generation Co. LLC*, No. 01-23-00393-CV, 2023 WL 8630982, at *13 (Tex. App.—

Houston [1st Dist.] Dec. 14, 2023, orig. proceeding [mand. pending]). AmericaMR1146–78.

Relators timely sought en banc reconsideration. AmericaMR1179–1296. Nearly one year later, a four-member en banc court of appeals (consisting of Chief Justice Adams and Justices Landau, Hightower, and Kelly) denied reconsideration by a 3-1 vote. AmericaMR1378. Justice Kelly dissented from the denial and would have held that Relators' claims are not foreclosed as a matter of law and that dismissal under Rule 91a was improper. AmericaMR1379–88.

STATEMENT OF JURISDICTION

This Court has jurisdiction to issue writs of mandamus directed to an intermediate appellate court of this state. *See* TEX. CONST. art. V, § 3; TEX. GOV'T CODE § 22.002(a).

ISSUES PRESENTED

1. The refusal to dismiss Relators' well–pleaded claims alleging certain power generating companies' ("PGCs") failure to adequately winterize their facilities—despite knowledge of past damage caused by inadequate weatherization and express warnings that extreme winter weather would occur again in 2021—directly caused deaths, personal injuries, and substantial and widespread property damage throughout Texas was well within the MDL trial court's discretion.

   The court of appeals' decision, which reversed the MDL trial court's ruling and directed it to dismiss Relators' claims against the PGCs, is irreconcilable with this Court's controlling precedent on, among other issues: (i) the proper application of Rule 91a to claims, which does not permit a *Phillips*-factors analysis; (ii) the proper interpretation of statutory construction rules, which require express legislative *abrogation* of existing common–law duties, not express *codification* of such duties; and (iii) whether privity is required between the PGCs and the property owners harmed by their conduct, when the Legislature included no such requirement when it enacted provisions of the Utilities Code and PURA affirming long–standing common law duties.

   The immediate impact of the decision below is to immunize the PGCs—now and in perpetuity—from any and all tort liability for harms to Texas citizens and property owners caused by their acts and omissions. The harmful and pervasive impacts of such a ruling cannot be overstated. This Court's intervention is necessary, and mandamus relief is warranted.

2. The court of appeals' decision directly conflicts with precedent from this Court and other intermediate appellate courts by:

- Misconstruing Relators' common law negligence claims as asserting a theory of strict liability ("to continuously supply electricity to the power grid") instead of evaluating Relators' actual allegation that the PGC's breached their common law duty to operate their generation facilities with ordinary care, and then mistakenly determining a duty of ordinary care is "unworkable," without regard to a century of Texas law demonstrating the historical application of precisely such a standard to electrical generators;

- Prematurely conducting a *Phillips*-factors analysis at the Rule 91a stage, and engaging in impermissible (and unfounded) fact finding (outside the record) to assess whether Relators' damages were foreseeable, and holding that Texas property owners must foresee the negligence of third parties;

- Improperly creating new elements for negligent undertaking claims to require privity between the PGCs and Relators, and limiting tort duties to contractual duties, contrary to Texas law which holds that such duties arise independently;

- Misapplying negligent undertaking precedent by narrowly focusing on the end-result of the tortfeasor's conduct rather than the affirmative conduct alleged to have caused the harm.

- Dismissing the Plaintiff Relators' well-pleaded nuisance claim.

3. Mandamus relief from the court of appeals' decision is warranted here, because its holdings:

- Reject long-standing common law duties owed to consumers, without identifying any statutory abrogation of such duties;

- Misinterpret PURA and the administrative code by failing to recognize the Legislature's enactment and affirmation of the pre-existing common law rules applicable to electricity companies;

- Misapply Rule 91(a) by refusing to accept as true Relators' allegations of industry standards for weatherization (including those established by the PGCs themselves), that demonstrate the foreseeability of harm and the duty of ordinary care owed by the PGCs.

TO THE HONORABLE SUPREME COURT OF TEXAS

In this consolidated briefing, both the Plaintiff Relators[1] and the Subrogation Relators[2] (collectively, "Relators") respectfully request this Court grant mandamus relief vacating the court of appeals' decision compelling the MDL trial court to dismiss Relators' claims, reinstating the trial court's original order denying dismissal, and permitting the underlying litigation to proceed.

PRELIMINARY STATEMENT

This proceeding arises from the catastrophic—but preventable—collapse of the Texas electrical grid during Winter Storm Uri in February 2021, which impacted millions of Texans, caused billions of dollars in property damage, and resulted in significant loss of life. Several thorough and well-publicized investigations concluded these losses resulted directly from the failure of some Power Generation Companies ("PGCs") to exercise ordinary care by not "winterizing" their facilities to industry reliability standards and ensuring their operation during foreseeable

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[1] The Plaintiff Relators are retail customer and Texas residents who seek to recover damages suffered as a direct result of the PGCs' acts and omissions.

[2] The Subrogation Relators are insurers pursuing claims in subrogation for sums to paid to their insureds as a direct result of the PGCs' acts and omissions.

adverse weather conditions, so as not to adversely affect the reliability of the grid.

Relators pursued tort claims against the PGCs in the MDL court, seeking to recover damages directly traceable to the PGCs' negligence. Although the collective impact of the PGC's negligence resulted in the failure of the entire ERCOT power grid, Relators did not pursue their claims indiscriminately. Instead, Relators identified precisely which PGCs owed a duty to operate reliably and specifically named as defendants certain PGCs who committed to supply electricity to the ERCOT grid pursuant to their contractual obligations and/or ERCOT protocols at the time and/or were relied upon by ERCOT to supply electricity to the grid because they were actively providing electricity to the grid and/or undertook the responsibility to do so. TurnerMR469-70, 488 ¶¶2, 45. Rather than suing every PGC as an insurer of continuous electric supply, Relators' petitions limited their claims only to PGCs whose negligent failure to winterize caused them to go offline, resulting in Relators' damages—specifically, those "outages and derates identified by ERCOT beginning at midnight on February 15 to 9:00 am February

20 identified by power source, time of outage, and resource entity." TurnerMR480-85 ¶33.

The PGCs responded by filing a Rule 91a motion to dismiss all of the Relators' tort claims; arguing that Relators' claims had no basis in fact or Texas law. The MDL trial court granted the PGCs' Rule 91a motion in part, but permitted Relators' negligence, negligent undertaking, gross negligence, and nuisance claims to proceed. The PGCs immediately sought dismissal of the remaining claims via mandamus.

The relief afforded by the court of appeals effectively announced a fundamental revolution in Texas tort law, holding—for the first time—that private power generation companies owe no duty of ordinary care to Texas citizens. This holding rejected long-standing Texas law that "[w]hile a public utility is not an insurer of continuous service, it will be liable for the damages that result from its negligence." *Bearden v. Lyntegar Elec. Co-Op., Inc.*, 454 S.W.2d 885, 887 (Tex. App.—Amarillo 1970, no writ). After accepting the PGCs' mischaracterization of Relators' theory of liability as imposing a duty Relators *specifically disclaimed,* "to continuously supply electricity," the court of appeals granted mandamus relief. AmericaMR1152.

Compounding its errors, the court of appeals exceeded established bounds of 91a practice by engaging in a detailed duty analysis which considered factual matters outside of the parties' pleadings. The court of appeals should have limited its analysis to whether or not Relators' claims—taken as true—are foreclosed as a matter of law. Instead, the court impermissibly expanded the scope of the proceedings to address whether a duty *should* be recognized. AmericaMR1383

After concluding that deregulation precluded the PGCs from having any "legal relationship with retail customers as a matter of law," the appeals court immunized the PGCs from all liability in tort by abrogating all pre-existing common law duties. AmericaMR1157–58. This reasoning violates decades of legal precedent, nullifies consumer protections in the Texas Utilities Code, and deprives Texas property owners of the ability to protect their valuable property rights.

The issues presented here are undeniably important to Texas jurisprudence. The court of appeals' opinion represents an extraordinary departure from prevailing Texas law, impacts thousands of Texans who sustained billions of dollars in personal and property losses, adversely affects all Texans who rely on the power grid for electricity, and leaves

no remedy against those whose actions directly caused it to fail. That result is plainly unconscionable in light of this Court's affirmation, just months ago, that electrical service is "essential to the life, health, and safety of the public." *See In re Oncor Elec. Delivery Co. LLC*, 716 S.W.3d 525, 533 (Tex. 2025) (orig. proceeding).

Despite the recognized impact to all Texans, the court of appeals effectively presupposed that facts had already been resolved in the PGCs' favor and applied the wrong legal standard to Rule 91a proceedings. The court of appeals' grant of mandamus relief answers the wrong question, creates jurisprudential uncertainty, and portends far-reaching negative consequences. Extraordinary circumstances necessitate extraordinary remedies. This Court's intervention is warranted.

STANDARD FOR MANDAMUS RELIEF

This Court "review[s] a court of appeals' issuance of a writ of mandamus for an abuse of discretion, but in doing so [the] focus remains on the trial court's order." *In re Christianson Air Conditioning & Plumbing, LLC*, 639 S.W.3d 671, 681 (Tex. 2022) (orig. proceeding). The court of appeals may grant relief if the trial court abused its discretion. *In re Essex Ins. Co.*, 450 S.W.3d 524, 526 (Tex. 2014) (orig. proceeding)

(per curiam). Texas courts "review the merits of a Rule 91a ruling de novo; whether a defendant is entitled to dismissal under the facts alleged is a legal question." *In re Farmers Tex. Cnty. Mut. Ins. Co.*, 621 S.W.3d 261, 266 (Tex. 2021) (orig. proceeding).

STATEMENT OF FACTS

I. Relevant Factual Background

On or about February 15, 2021, an intense winter storm named "Winter Storm Uri" reached Texas. As a result of negligence on the part of several power generation companies (PGCs), more than 4.5 million Texas households lost power for substantial amounts of time. AmericaMR322. This preventable calamity resulted in many deaths, disrupted basic aspects of life, and caused significant and widespread property damage. AmericaMR322. Much, if not all, of this harm was preventable, had the PGCs conformed to industry reliability standards and heeded recommendations from state and federal authorities to properly winterize their facilities. The PGCs' negligence caused generating equipment to fail mid-operation, resulting in electrical failures and catastrophic damage statewide.

Relators' petitions cite a University of Texas at Austin Report explaining that repeat failures occurred in some of the largest generators

in Texas (AmericaMR338-39 ¶ 111), and while more than 50% of generators operated reliably during the event, some of those who did not were "Black Start" facilities—PGC's who specifically contracted to provide emergency generation service to the grid during in the event of catastrophe. AmericaMR346 ¶ 122. Relators also cite ERCOT's own annual inspection records, which show that many PGC's were failing to comply with their own *internal* winterization standards. AmericaMR317 ¶58. Regulators found widespread outages occurred because the PGCs' refusal to prepare and adequately weatherize, after being told to do so, caused frozen sensing lines, frozen water lines, frozen valves, exceedances of low temperatures/ice accumulation on wind tribunes, and flooded equipment. AmericaMR314-15 ¶50; TurnerMR485-86 ¶37. Moreover, regulators found in the vast majority of these cases, the equipment failures occurred at temperatures above the generating unit's ambient design temperature. AmericaMR342 ¶117. Relators quote the FERC-NERC November 2021 report's damning conclusions that the catastrophe happened because of ill-preparedness and PGCs' failures to follow the FERC 2011 Report recommendations. TurnerMR491-93 ¶¶54-57. In the face of these warnings, the PGCs failed to adequately winterize

or to secure alternate fuel supplies. TurnerMR498-500 ¶¶70-75; TurnerMR512-13 ¶143.

The PGCs knew since 1989.

Relators' petitions also identify technical governmental reports which placed the PGCs on notice of necessary winterization measures they failed to take. *E.g.*, TurnerMR488-93 ¶¶46-57, TurnerMR498-500 ¶¶70-75; TurnerMR512-13 ¶143. Notably, Relators' pleadings demonstrate the PGCs' were on notice that failure of critical electrical infrastructure would directly result in deaths and property losses. *E.g.*, TurnerMR488-89 ¶46-49; TurnerMR492-93 ¶57. After a 1989 cold weather event that lasted three days and caused blackouts, the Public Utilities Commission of Texas (PUCT) developed a number of safety recommendations applicable to utility companies. TurnerMR488-89 ¶¶46-47. The PGCs were instructed to adopt the PUCT's recommendations "to ensure their reliability in extreme weather conditions"; "to ensure readiness for cold weather operations" during annual Fall reviews of equipment and procedures; "to correct defective cold weather protection equipment prior to the onset of cold weather"; to "maintain insulation integrity and heat tracing systems in proper

working order"; and to train for bad weather, including periodic drills. TurnerMR488-89 ¶¶46-47. But Winter Storm Uri revealed that many of the PGCs simply chose not to do so. *See* TurnerMR489 ¶48.

The PGCs were warned in 2011.

After the 2011 Texas blackouts, the Federal Energy Regulatory Commission (FERC) and North American Electrical Regulatory Corporation (NERC) issued a report ("FERC 2011 Report") instructing PGCs and the other power generators how to prepare for the winter season. TurnerMR489 ¶48. The majority of the failures observed in 2011 were substantially similar to those identified in PUCT's 1989 Report, and "in many cases, these failures were experienced by the same generators," FERC reported. *Id*. Had the PGCs followed the recommendations contained within the FERC 2011 Report, it would have ameliorated the 2021 catastrophe.

The PGCs were warned again in 2014.

In 2014, NERC issued another report following another instance of widespread power outages. Many of FERC's 2014 findings duplicated the same recommendations from the 1989 and 2011 reports, including that PGCs "review and update power plant weatherization programs."

TurnerMR489 ¶49. However, the PGCs again ignored recommendations that they adequately prepare for extremely cold weather. *Id.*

Relators were unaware of the PGCs' continued malfeasance

The PGCs' conduct was *not* foreseeable to Relators. In seasonal notices and weatherization plans, the PGCs falsely represented to ERCOT that they were weatherizing their facilities and equipment. *See, e.g.,* TurnerMR514-16 ¶146.

II. Relevant Procedural History

After suffering damages due to the PGCs' tortious acts, Relators filed suit in courts across Texas. These suits were later merged into MDL Master Cause No. 2021-41903. AmericaMR26. Relators alleged the named PGCs breached common law duties which proximately caused Relators' damages. AmericaMR356–60; TurnerMR555-63. Although the specifics of each lawsuit differed slightly, Relators tailored their allegations to the negligent actions of specific PGCs[3] in performing electricity generation services relied upon by ERCOT consumers. AmericaMR356–60. In the alternative, Relators alleged the PGCs

[3] This consolidated brief is focused on the various Relators' pleaded allegations against different PGCs. In addressing these specific claims, Relators expressly reserve and do not waive any allegations or arguments it may have against any other defendants or PGCs.

voluntarily undertook to perform services necessary to protect Texas residents—including "winterizing" their facilities after being warned by ERCOT and others to do so, and entering into agreements to provide emergency power during Winter Storm Uri—but failed to exercise reasonable care in doing so. AmericaMR362–66. Relators also alleged the PGCs were grossly negligent, acted with conscious indifference to Relators' rights, and pleaded nuisance claims. AmericaMR366; TurnerMR533-34.

The PGCs jointly moved to dismiss the Relators' claims. Relators responded, and the PGCs replied. AmericaMR388-437, 470-516, 572-604; TurnerMR569-625. The trial court considered the PGCs Rule 91a motions at a two-day hearing, and denied them with respect to Relators' negligence, negligent undertaking, nuisance, and gross negligence claims. AmericaMR643-44, 655-874, 1087; TurnerMR1600-03.

The PGCs then sought mandamus relief. After various original proceedings were consolidated in the First Court of Appeals, that court granted mandamus relief, directing the MDL court to vacate its earlier ruling and grant the Rule 91a motions. AmericaMR1146–78. All Relators sought en banc reconsideration of that decision. AmericaMR1179–1296;

TurnerMR2236-63. The en banc court (consisting of the original panel and one additional Justice) denied reconsideration 3-1, with the sole additional justice dissenting. AmericaMR1378–88.

ARGUMENT

I. The MDL trial court correctly applied Rule 91a's pleading standards, and mandamus relief was granted in error

Under Rule 91a, a court may only dismiss a cause of action if it lacks a basis in law. Courts must "construe the pleadings liberally in favor of the plaintiff, look to the pleader's intent, and accept as true the factual allegations in the pleadings[.]" *Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). "A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them" do not entitle the plaintiff to relief. TEX. R. CIV P. 91a.1.

Rule 91a challenges test the legal sufficiency of a petition. Pleadings are legally sufficient when a cause of action can reasonably be inferred from the facts pleaded. *Roark v. Allen*, 633 S.W.2d 804, 809 (Tex. 1982); *McNeil v. Nabors Drilling USA, Inc.*, 36 S.W.3d 248, 250 (Tex. App.—Houston [1st Dist.] 2001, no pet.). Texas courts apply fair-notice pleading standards to determine whether the allegations are

sufficient to allege causes of action under Rule 91a. *Reaves v. City of Corpus Christi*, 518 S.W.3d 594, 608 (Tex. App.—Corpus Christi 2017, no pet.). Parties are not required to allege every element of a cause of action, or even identify specific statutory violations, to survive a Rule 91a motion, so long as the allegations are sufficient to give the opposing party fair notice of the claim's basis. *Yeske v. Piazza Del Arte, Inc.*, 513 S.W.3d 652, 662 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

To prevail under Rule 91a, the defendant must show that recovery on plaintiffs' claims is ***foreclosed***, (i.e., any recovery is impossible by necessary consequence of law). A claim is foreclosed when either plaintiffs' causes of action are not recognized by Texas law or plaintiffs "plead themselves out of court" by alleging facts that preclude their causes of action under settled law. In other words, Rule 91a tests whether a claim is foreclosed as a matter of law because recovery by the plaintiff is legally impossible. *In re Shire PLC*, 633 S.W.3d 1, 19 (Tex. App.—Texarkana 2021, orig. proceeding [mand. denied]).

Crucially, Rule 91a dictates that "the court may not consider evidence in ruling on the motion and must decide the motion ***based solely on the pleading of the cause of action***, together with any

pleading exhibits permitted by Rule 59." TEX. R. CIV. P. 91a.6 (emphasis added). Texas law strictly prohibits consideration of *any* extrinsic evidence when ruling on a Rule 91a motion. *Bedford Internet Office Space, LLC v. Texas Ins. Grp., Inc.*, 537 S.W.3d 717, 720 (Tex. App.—Fort Worth 2017, pet. dism'd) ("The plain language of the rule requires the trial court to wear blinders to any pleadings except [the petition]."). The rule provides no exception for extrinsic facts that a party believes the court may find "instructive" or helpful. *San Jacinto River Auth. v. Burney*, 570 S.W.3d 820, 831 (Tex. App.—Houston [1st Dist.] 2018), aff'd sub nom., *San Jacinto River Auth. v. Medina*, 627 S.W.3d 618 (Tex. 2021).

A. The MDL trial court correctly found a legal basis for Relators' claims.

A claim has a Rule 91a "basis in law" when "the law has recognized such a duty under the same or similar circumstances." AmericaMR1154 (Op. at 9). For nearly a century, Texas common law has recognized a duty to operate, inspect, and maintain electrical facilities to avoid harm, acknowledging "[t]he general rule [] that an electric company is liable for

injuries caused by defects in its plant or system." *Tex. Utilities Co. v. Dear*, 64 S.W.2d 807, 811 (Tex. App.—Amarillo 1933, writ dism'd).[4]

This common law duty "is based on the traditional concept of negligence requiring proof that the electric company could reasonably anticipate injury resulting from its conduct." *Mosby v. Sw. Elec. Power Co.*, 659 F.2d 680, 681 (5th Cir. 1981). This Court has acknowledged that the "duty owed" by an electric company to "member[s] of the public" turns on "[t]he ability to have foreseen and prevented the harm." *Houston Lighting & Power Co. v. Brooks*, 336 S.W.2d 603, 605-06 (Tex. 1960).

Texas courts have consistently affirmed these common law duties extend to entities like the PGCs, not because they are strictly liable for ***any*** interruption of service, but because ***negligent*** operation of their facilities directly and foreseeably results in damage. *Bearden v. Lyntegar Elec. Co-op., Inc.*, 454 S.W.2d 885, 887 (Tex. App.—Amarillo 1970, no writ). In *Bearden*, plaintiffs brought negligence claims against an electricity co-op after a service interruption caused damages, alleging the outage was caused by a failure in the co-op's equipment. 454 S.W.2d at

[4] Without directly addressing Relators' authorities, the PGCs meagerly respond that these statutes and cases govern public utilities and do not apply to them.

887. The *Bearden* court upheld plaintiffs' negligence claim, confirming, in light of the policy that furnishing electric energy to the public "is absolutely essential to the life, health and safety of all of the people," that a "power failure" can result in foreseeable harm. *Id.* That a power generator is not "an insurer of continuous service" did not exempt it from the common-law rule that "it will be liable for damages which result from its negligence." *Id.* (citing *Dear*, 64 S.W.2d at 807).

This Court—in a different Winter Storm Uri case—acknowledged a substantively similar duty earlier this year. *See In re Oncor Elec. Delivery Co. LLC*, 716 S.W.3d 525, 534-35 (Tex. 2025) ("*Oncor II*"). In *Oncor II*, this Court acknowledged that a gross negligence action may accrue when a Transmission and Distribution Utility ("TDU") could have reduced the injuries the storm caused while complying with applicable legal requirements and guidelines, and yet chose not to do so, demonstrating conscious indifference to the resulting injuries. *Id.* at 535.

The PGCS have maintained that dismissal under Rule 91a was proper because "no Texas authority has ever recognized the sweeping duty" Relators (purportedly) assert. Resp. to *All America* Pet. at 6, 7-8. This characterization is plainly incorrect. The Texas cases establishing a

utility's common law duty have never been overruled, nor has any Texas court (before now) exempted privately-owned power generators. Instead, they have held the opposite and acknowledged the existence of common law negligence duties for Texas utilities. *Oncor II*, 716 S.W.3d at 534; *In re CenterPoint Energy Houston Elec., LLC*, 629 S.W.3d 149, 163 (Tex. 2021) (orig. proceeding); *Bearden v. Lyntegar Electric Cooperative, Inc.*, 454 S.W.2d 885, 887 (Tex. App.—Amarillo 1970, no writ).

While this Court's holding in *Oncor II* remanded the case to permit the plaintiffs to replead their claims against the utilities, such an effort would be pointless if the utilities owed no tort duty and were immune to gross negligence claims. *Oncor II*, 716 S.W.3d at 534 ("But the plaintiffs here needed to allege that the Utilities . . . could have meaningfully acted differently and thereby lessened the injuries . . ."). And *Bearden* expressly acknowledged that, although a power generator "is not an insurer of continuous service," it is nonetheless subject to the common law rule that "it will be liable for damages which result from its negligence." *Bearden*, 454 S.W.2d at 887.[5]

[5] *Bearden* reflects similar common law duties recognized by states across the country. *See e.g.*, *Tyus v. Indianapolis Power & Light Co.*, 134 N.E.3d 389, 403 (Ind. Ct. App. 2019) (holding "Public utilities . . . which provide for the accommodation

of the general public in return owe a duty to the public . . . extend[ing] to 'third persons' who are 'affected' by the utility's actions or non-actions; *i.e.*, a utility's duties extend to individuals who are strangers to the utility's contracts with its 'customers."); *accord Langley v. Pac. Gas & Elec. Co.*, 262 P.2d 846, 849 (Cal. 1953) (holding electric companies are not abrogated from "duty to exercise reasonable care in operating its system to avoid unreasonable risks of harm to the persons and property of its customers"); *accord Perez v. New York City Hous. Auth.*, 452 N.Y.S.2d 510 (Civ. Ct. 1982) (Public utility company was liable for injuries sustained by tenant during power failure where utility obligated itself to servicing building; court held that public utility "actively worked an injury and created a duty from it to plaintiff . . . and it therefore could be held liable for damages arising from a breach of its duty."); *accord Anderson v. Davoren*, No. A-6430-06T3, 2010 WL 307956, at *1 (N.J. Super. Ct. App. Div. Jan. 28, 2010) (Pedestrian injured due to malfunctioning streetlight could hold electric company liable because "duty of care existed under the circumstances of this case that a reasonable jury could have found was breached."); *accord Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co.*, 106 A.3d 27, 39 (Pa. 2014) ("We have no intention of exempting a company administering a dangerous commodity from well-recognized duties of care, in the face of actual or constructive knowledge of a danger. [Requiring an electric company to take] . . . reasonable efforts to avert harm prior to restoring power—at least some form of warning as envisioned by the Superior Court—represents a relatively modest measure in the face of an unreasonable risk of which a utility knows or should be aware."); *accord Cates v. Elec. Power Bd. of Metro. Gov't of Nashville & Davidson Cnty.*, 655 S.W.2d 166, 170, 173 (Tenn. Ct. App. 1983) (plaintiffs who sustained property damage caused by their electric company's negligent disconnection of electricity could hold electric company liable); *accord Walton Elec. Membership Corp. v. Snyder*, 508 S.E.2d 167, 168–69 (Ga. 1998) (holding energy business is "of a public nature designed to meet a public necessity . . . the grant of a franchise from the state to operate a utility for the benefit of the citizenry . . . imposes a duty to the public."); *accord Tesoro Ref. & Mktg. Co. LLC v. Pac. Gas & Elec. Co.*, 146 F. Supp. 3d 1170, 1184 (N.D. Cal. 2015) (holding electric company could not rely on California Public Utilities Commission rule for limiting liability after a power outage caused by equipment failure); *accord Nat'l Union Ins. Co. of Pittsburgh, Pa. v. Puget Sound Power & Light*, 972 P.2d 481, 486-87 (Pa. 1999) (holding electric company liable for "service interruption" that it could have controlled or mitigated but for its unreasonable failure to reestablish service with a minimum of delay); *accord Caraglio v. Frontier Power Co.*, 192 F.2d 175, 177–78 (10th Cir. 1951) (holding care required by electric company is "commensurate with the dangerous character of the business and consistent with its practical operation, and it extends not only to the erection, maintenance, and operation of the company's plant and apparatus, but also to an inspection thereof and to the discovery of defects"); *accord Curry v. Norwood Elec. Light & Power Co.*, 211 N.Y.S.

Taken together, the court of appeals' holding that common-law duties no longer apply to PGCs is wrong. Relators' claims against the PGCs are supported by long-standing Texas law and existing, recognized common law duties. Whether or not the court of appeals or this Court may subsequently reconsider the extent and outer bounds of the duty owed by PGCs does not control—or even impact—the question of whether the trial court abused its discretion in denying the PGCs' Rule 91a motions. It did not.

B. The Utilities Code codified the PGCs' duty of ordinary care to operate in a manner which prevents interruption of service.

In addition to established common law duties, the Texas Legislature explicitly codified that "[c]ontinuous service by a public utility is essential to the life, health, and safety of the public." TEX. UTIL. CODE § 186.002(a). In *Oncor II,* this court recognized that this provision of the Texas Utilities Code ***reaffirmed*** the existence of a duty of

441, 443 (Co. Ct. 1925) (holding that, when power interruption is caused by act or omission of human agency, factfinder should decide if defendant should "have anticipated or expected such a situation to arise[.]"); *accord Weld v. Gas & Elec. Light Comm'rs*, 84 N.E. 101, 102 (Mass. 1908) ("It is [an electricity provider's] duty to exercise this franchise for the benefit of the public, with a reasonable regard for the rights of individuals who desire to be served, and without discrimination between them. It cannot relieve itself from this duty so long as it retains its charter.").

reasonable care "even in normal times." *Oncor II*, 716 S.W.3d at 534 – 535. The Texas Utilities Code prohibits negligent acts and omissions that adversely affect the reliability of the electric grid, and expressly preserves Relators' common law rights. *See* 16 TEX. ADMIN. CODE §§ 25.503(g), (h), (o)(6). On that basis, the MDL trial court did not abuse its discretion under Rule 91a by finding a basis in law for Relators' claims.

1. Texas regulations require the PGCs' to reasonably protect against service interruptions.

The Texas Utilities Code is unambiguous about the responsibilities of utilities. "A public utility is dedicated to public service. The primary duty of a public utility, including its management and employees, is to maintain continuous and adequate service at all times to protect the safety and health of the public against the danger inherent in the interruption of service." §186.002(b) This Code applies directly to the PGCs: "In this subchapter, 'public utility' means and includes a private corporation that does business in this state and has the right of eminent domain" and is "engaged in the business of: (1) generating … electric energy" for the public. *Id.*, §186.001.

The PGCs engage in the business of generating electric energy for the public. Texas law also expressly grants the PGCs the power of eminent domain. An "electric corporation has the right and power to enter on, condemn, and appropriate the land . . . of any person or corporation." *Id.,* § 181.0004. The definition of "electric corporation," for purposes of the grant of eminent domain, also includes the PGCs. *Id.,* § 181.041. Consequently, the PGCs are "public utilities" under the subchapter 186 of the Texas Utilities Code and are charged with the concomitant duties to use reasonable care.

In the courts below, and in this Court, the PGCs have claimed, without merit, that they are not "public utilities"—relying on two *entirely different portions* of the Utilities Code. *See* Resp. to *All America* Pet. at 9 (citing TEX. UTIL. CODE §§ 11.004, 31.002(6)(C)). Section 31.002's definition of "electric utility" applies, by its terms, *only* to Title 2, Subtitle B: Electric Utilities, which ranges from § 31.001 to § 43.152. TEX. UTIL. CODE § 31.002 ("In this subtitle . . . ."). Similarly, section 11.004's definitions of "public utility" or "utility" apply only to "Subtitle A [of Title 2]," ranging from § 11.001 to § 17.203. TEX. UTIL. CODE § 11.004. The

PGCs ignore these distinctions entirely, pretending that their preferred text applies to the entirety of the Texas Utilities Code.

Of course, "text should never be divorced from context." *United States v. Koutsostamatis*, 956 F.3d 301, 306 (5th Cir. 2020); *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011).. Here, the Legislature deliberately chose to include distinct definitions of public utilities applicable to different portions of the Utilities Code. Commonly accepted rules of construction establish that the definition of "public utilities" contained within subchapter 186 should govern the interpretation of that same subchapter. This Court has repeatedly—and recently—rejected atextual statutory interpretations. *See American Pearl Group, L.L.C. v. National Payment Sys., L.L.C.*, 715 S.W.3d 383, 387 (Tex. 2025) (noting that, "with every question of statutory construction, the text is the alpha and omega of the interpretive process"); *Combs*, 340 S.W3d at 441.

Accepting the PGCs' self-serving reading that they can never be public utilities requires Texas courts to rewrite or ignore the plain language of Chapter 186 and the Legislature's mandate that "[e]ach court and administrative agency" must "recognize the policy stated in [§

186.002]" and "interpret and apply [Chapter 186, Subchapter A] in accordance with that policy." TEX. UTIL. CODE § 186.002(c). Because courts cannot legislate from the bench, the duty of care codified into law by the Legislature should be recognized by this Court.

2. The court of appeals' "last-in-time" analysis is fundamentally flawed.

The court of appeals' conclusion that the 1999 Amendments to the Public Utility Regulatory Act ("PURA") abrogated all pre-existing tort duties nullifies the operative sections of the Texas Utilities Code. Sections 186.001–002 of the Utilities Code reaffirm that any "private corporation" that is "engaged in the business of generating […] electric energy […] to the public" has an obligation to maintain service to protect against dangers "inherent in the interruption of service." AmericaMR1159 (Op. at 14). That provision of the Texas Utilities Code was enacted in 1997. Nonetheless, the court of appeals concluded that the Legislature struck these provisions of the Code just two years later as part of a larger deregulation. Citing Government Code section 311.025, the court of appeals reasoned, "to the extent that these statutes conflict, the most recently enacted statute prevails." AmericaMR1159 (Op. at 14).

This is the wrong legal test. The court of appeals failed to first determine whether these two provisions are "irreconcilable." TEX. GOV'T CODE § 311.025. Negation of prior legislation is a remedy of last resort, not a first step. Two statutes covering the same subject matter "should be construed together and harmonized" whenever possible. *In re State ex rel. O'Connell*, 976 S.W.2d 902, 906–07 (Tex. App.—Dallas 1998, orig. proceeding). Only ***after*** a court determines two statutes are irreconcilable, and that neither is more specific than the other, will the later-enacted statute prevail. *Tiscareno v. State*, 608 S.W.3d 434, 438 (Tex. App.—Houston [1st Dist.] 2020, pet. ref'd).

Ultimately, the court of appeal's application of the "last-in-time" rule misunderstands deregulation history. "Context is a primary determinant" of meaning, and the context here demonstrates the court of appeals' error. *Wal-Mart v. Xerox State & Local Sols.*, 663 S.W.3d 569, 578 (Tex. 2023). The court of appeals incorrectly assumed deregulation was a single event, where everything "changed on January 1, 2002." AmericaMR1156 (Op. at 11). In truth, deregulation was a years-long effort across multiple legislative sessions.

The wholesale energy market in which the PGCs participate was partially deregulated in 1995, pursuant to Senate Bill 373. *Pub. Util. Comm'n of Tex. v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 312 (Tex. 2001). Two years later, the Legislature passed Senate Bill 1751 as the next step of those deregulation efforts. Bill 1751 further deregulated the market by requiring "all transmission-owning utilities to provide 'open access' to their transmission facilities for wholesale transmission." *Id.*; TEX. UTIL. CODE § 31.001, *et. seq.* That same bill also codified the public policy that "the primary duty of a public utility" is to maintain service and protect the public "against the danger inherent in the interruption of service." TEX. UTIL. CODE § 186.002. Importantly, this policy statement included a mandate to the judiciary that "[e]ach court and administrative agency of this stall ***shall recognize the policy*** stated in this section." TEX. UTIL. CODE § 186.002(c)(1) (emphasis added). This policy statement and instruction to Texas courts has never been repealed.

In 1999, the Legislature passed Senate Bill 7, fully deregulating the market, effective January 1, 2002. Because the final stage of deregulation required utilities to unbundle transmission and generation services, it

was necessary to redraft and replace *some* portions of the Code. But the Legislature did not discard all prior legislation and start from scratch. Thus, read in context, the 1999 Amendments to PURA modified Texas Utility Code section 31.002 as it applies ***only to that subtitle***, to clarify that power generating companies were no longer required to provide "open access" to transmission facilities they no longer owned.

Senate Bill 7 ***did not repeal*** the 1997 deregulation legislation. In fact, the Legislature "fully recognized when it restructured the state's electricity market" this transition "must also safeguard retail customers by ensuring 'safe, reliable, and reasonably priced electricity.'" *TXU Generation Co., L.P. v. Pub. Util. Comm'n of Tex.,* 165 S.W.3d 821, 847 (Tex. App.—Austin 2005, pet. denied.). The court of appeals' failure to harmonize the Legislature's sequential deregulation bills runs contrary to Texas law and vitiates the clear, legislative directives that Texas courts interpret PURA to "recognize the policy" of Senate Bill 1751. TEX. UTIL. CODE § 186.002(c)(1).

The 1999 PURA amendments did not remove the PGCs from the category of public utility, nor did they expressly abrogate the PGCs' duties set out in other provisions of the Utilities Code. Under these

conditions, the court of appeals should have given effect to both provisions: "If a general provision conflicts with a special or local provision, the provisions *shall* be construed, if possible, so that effect is given to *both*." TEX. GOV'T CODE § 311.026 (emphasis added).

Instead of establishing any true conflict, the PGCs' convinced the court of appeals that only the most recently enacted statute controlled. But in the absence of a true conflict, Texas Utilities Code section 31.002(6)'s status as the "most recently enacted" is irrelevant. *See* TEX. GOV'T CODE § 311.025. Indeed, this Court confirmed that subchapter 186 remains good law mere months ago. *See Oncor II*, 716 S.W.3d at 533 ("Even in normal times, 'continuous service by a public utility is essential to the life, health, and safety of the public.'") (citing TEX. UTIL. CODE § 186.002(a), (c)(1)). The court of appeals' disregard of subchapter 186 simply cannot be squared with controlling Texas law or this Court's recent ruling in *Oncor II*.

3. Statutory and regulatory language preserves common law remedies against the PGCs.

Rather than overturning the pre-existing common law, the "deregulation" regime and complementary regulations expressly preserve common law remedies, including as follows:

- "[T]his subsection does not prevent any person" from pursuing "relief available by law" against market participants, 16 TEX. ADMIN. CODE § 25.503(o)(6); and

- This chapter does not relieve "non-utility wholesale and retail market participants" from "any duties under the laws[.]" 16 TEX. ADMIN. CODE § 25.3(a).

Consistently, post-deregulation decisions apply the "reasonably prudent person" standard. See *In re Centerpoint Energy*, 629 S.W.3d at 161-63 (plurality) (PURA did not abrogate the "common law duty to operate as a reasonably prudent electricity distribution company" because "[s]tatutes and regulations generally requiring a party to act safely or reasonably do not substitute a legislatively imposed standard of conduct" for common law duties); see also *Cura-Cruz v. CenterPoint Energy Houston Elec., LLC*, 522 S.W.3d 565, 572 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) ("as it relates to retail customers . . . CenterPoint's tariff did not create a new or additional standard of care contrary to that already established by Texas common law."); *cf.*, *In re Oncor Elec. Delivery Co. LLC*, 630 S.W.3d 40, 43 (Tex. 2021) ("*Oncor I*") (recognizing utility regulations informed the common law for decades and rejecting argument that customer's personal injury action could not be adjudicated in the courts).

4. The court of appeals' decision results in improper abrogation of common law duties.

In order to find that the MDL trial court abused its discretion under Rule 91a, the court of appeals necessarily held that the 1999 amendments to PURA removed any basis in law for Relators' claims. In practice, this means the court of appeals interpreted changes in statutory law as an elimination of common law tort duties. That holding is unsupportable under Texas law.

Texas courts do not "construe statutes to deprive citizens of common-law rights unless the Legislature ***clearly expressed*** that intent." *Abutahoun v. Dow Chem. Co.*, 463 S.W.3d 42, 51 (Tex. 2015). (emphasis added); see also *Cash Am. Int'l Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000). "[S]tatutes can modify or abrogate common law rules, but only when that was what the Legislature clearly intended." *Abutahoun*, 463 S.W.3d at 51. Because "abrogation is disfavored," Texas courts must "examine [a] statute's plain language for the Legislature's clear intention to replace a common law remedy[.]" *Id.*

Contrary to the court of appeals' holding, Texas law does not require the Legislature to expressly opt into common-law—i.e. express codification—but follows "an 'opt-out' approach that incorporates

common-law principles absent the Legislature's clear repudiation." *Taylor v. Tolbert*, 644 S.W.3d 637, 650 & n. 62 (Tex. 2022). And the Legislature presumptively acts "with knowledge of the common law and court decisions." *JCB, Inc. v. Horsburgh & Scott Co.*, 597 S.W.3d 481, 486 (Tex. 2019). Thus, the continued vitality of existing common law duties does not turn on express ***codification*** but on express ***abrogation***. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 318 (2012) (emphasis added). Nonetheless, the court of appeals' decision treats deregulation as a form of implied abrogation.

Although the PGCs disclaim the "abrogation" label, merely renaming their approach does not alter its essence. Based on the PGCs' arguments below, the court of appeals resorted to abrogation without identifying any statutory provisions terminating the PGCs' common law duties—effectively finding *implicit* abrogation of common law remedies against the PGCs on the ground that the Legislature did not include a statement preserving them. AmericaMR1160 (Op. at 15). This approach flips the standard for abrogation of common law causes of action on its head and is incompatible with this Court's controlling precedent and with established statutory construction rules.

Ultimately, the PGCs' arguments below (and the court of appeals' decision) rests on an incorrect assumption that "deregulation" modified common law duties imposed on the PGCs without the "express terms or necessary implications" indicating such intent. *Forest Oil Corp. v. El Rucio Land & Cattle Co.*, 518 S.W.3d 422, 428 (Tex. 2017). The amendments to the Utilities Code include no such language, and its provisions "should be construed together and harmonized" whenever possible. *In re State ex rel. O'Connell*, 976 S.W.2d 902, 906–07 (Tex. App.—Dallas 1998, no pet.).

Put simply, the PGCs must act as reasonable market participants,[6] and the Legislature did not abrogate common law duties to exercise reasonable care, either expressly or by necessary implication. By finding abrogation without identifying the requisite statutory language, the court of appeals abused its discretion—and its decision leaves Texas citizens, property owners, and businesses with no recourse for the deaths, personal injuries, and property damage sustained as a direct result of the PGCs' negligence. Mandamus is warranted.

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[6] *See, e.g.*, TEX. UTIL. CODE §39.101(a)(1), (f), (h), §39.151(j), §39.351(b); 16 TEX. ADMIN. CODE §25.503(c)(5), (f)-(h).

C. Leaving the decision below undisturbed immunizes private companies from liability and deprives Texas citizens of fundamental private property rights.

Despite numerous provisions of the Texas Utilities Code to the contrary, the court of appeals concluded that the PGCs' potential tort liability was effectively abrogated by legislative fiat. AmericaMR1156–60 (Op. at 11-15). To reach its conclusion, the court of appeals evaluated the interplay between the Relators' tort claims and the PGCs' statutory obligations by weighing and evaluating unpleaded facts and ultimate questions of control and causation between the PGCs and ERCOT. This was improper. Absent something in Relators' detailed pleadings "to suggest that the causes of action pleaded have no basis in law," a Rule 91a dismissal because there *might* be an alternative, administrative remedy is improper.); *Davis v. Homeowners of Am. Ins. Co.*, 700 S.W.3d 837, 844 (Tex. App.—Dallas 2023, no pet.).

The court of appeals placed responsibility to "ensure the reliability and adequacy of the Texas power grid" solely with ERCOT. AmericaMR1158 (Op. at 13). In practice, this holding effectively immunizes every PGC from liability for damages directly caused by its own negligence. Given that injured citizens cannot sue ERCOT, shielding

the PGCs under that same legislative umbrella removes *any possible avenue* for Texans to obtain relief. *See CPS Energy v. Elec. Reliability Council of Tex.*, 671 S.W.3d 605, 621–28 (Tex. 2023).

Unlike ERCOT, the PGCs are not "organs of the government" and are not immune from suit or liability. *CPS Energy*, 671 S.W.3d at 621–28. The PGCs are privately-owned (and sometimes publicly traded) companies that operate as public utilities to generate power for profit. *CPS Energy*, 671 S.W.3d at 616–17. Fully insulating the PGCs from the results of their own negligent conduct, *without a clear statement of such intent by the Legislature*, fundamentally undermines Relators' only legal remedy to recover for the valuable personal and property damages sustained by thousands of Texans.

This Court should consider the broad, statewide, and obviously deleterious effects of the court of appeals' insulation of the PGCs from the consequences of their own actions. The PGCs are private corporations that voluntarily chose to operate as public utilities and generate power. That choice—to sell an essential service to the public—is paired with a statutory responsibility to operate "safely" and "reliably," according to the Legislature. To fully insulate the PGCs from the results of their own

negligent conduct fundamentally undermines the social contract imposed on the PGCs and requires correction.

The court of appeals improperly invaded the province of the Legislature by: (i) concluding the Legislature "chose not to" codify common law duties in its deregulation legislation; (ii) improperly "flipping" the standard for determining abrogation of long-standing common law rights of Texas property owners; (iii) ignoring the Legislature's preservation of such common law duties in PURA and the Texas Utilities Code; and (iv) failing to harmonize the Legislature's sequential deregulation bills, contrary to Texas law and the clear instructions that Texas courts shall interpret PURA to "recognize the policy" of Senate Bill 1751. TEX. UTIL. CODE § 186.002(c)(1). AmericaMR1160 (Op. at 15). Mandamus relief is warranted here.

D. The Relators' negligent undertaking claim should likewise survive Rule 91a dismissal.

The court of appeals also improperly concluded that Relators' negligent undertaking claims were subject to Rule 91a dismissal. In doing so, the court of appeals created new elements for this cause of action and misapplied this Court's precedent.

Relators alleged the PGCs negligently operated generation equipment, causing failures, endangering the entire energy grid and requiring load shed to rebalance the grid. This Court has long recognized "a duty to use reasonable care" when someone "undertakes to provide services to another, either gratuitously or for compensation." *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 837 (Tex. 2000). Once a defendant affirmatively assumes a duty, its breach may be shown by negligent acts *or* omissions. *Osuna v. Southern Pac. R.R. Co.*, 641 S.W.2d 229, 230 (Tex. 1982).

While the ***duty*** in a negligent undertaking claim must be established through an affirmative act, *Elephant Ins. Co., LLC v. Kenyon*, 644 S.W.3d 137, 152 (Tex. 2022), that affirmative act may be gratuitous or result from a contractual obligation. *Guillory v. Seaton, LLC*, 470 S.W.3d 237, 241 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). However, once a defendant affirmatively assumes a duty, its breach of that duty may be shown by negligent acts ***or*** omissions. *Osuna v. Southern Pac. R.R. Co.*, 641 S.W.2d 229, 230 (Tex. 1982).

Given this framework, the court of appeals misapplied this Court's recent caselaw—*In re First Reserve Mgmt., L.P.*, 671 S.W.3d 653 (Tex.

2023) (orig. proceeding)—and wrongly concluded Relators' negligent undertaking claim was improperly predicated on omissions. AmericaMR1172-73 (Op. at 27-28). But *First Reserve* held no such thing. There, the plaintiffs never alleged the defendant negligently managed its chemical plant; instead, they alleged the defendant was negligent for ***failing to involve itself*** in the plant's operations. On those facts, this Court held passive ownership alone did not establish a duty; instead, plaintiffs should have pleaded facts alleging the defendant ***undertook a duty*** through active involvement and operational decisions that ultimately caused harm. *Id.* at 660.

Conversely, the nature of the PGCs' undertaking is uncomplicated: generating electricity in exchange for compensation. Relators allege the PGCs *negligently* operated their generation equipment. Relators allege that the abrupt failure of generation equipment caused a frequency imbalance to ripple throughout the grid and load shed orders to be issued. AmericaMR331. Relators allege that this failure of equipment during Winter Storm Uri had a reasonably foreseeable adverse effect on the reliability of the ERCOT system, violating a duty established by Texas law. *See* 16 TEX. ADMIN. CODE §§ 25.503(g); AmericaMR320 ¶65.

Further, Relators allege the PGCs exercised control over their own operations and their negligent or intentional operational acts and omissions breached duties they voluntarily *undertook*. Contrary to the PGCs' reframing, merely failing to provide power *is not the breach*. The breaches include the negligent acts or omissions in which the PGCs engaged while providing power to the grid——the duty they voluntarily undertook in exchange for compensation—and which ultimately resulted in grid failure, power outages, load shed to rebalance the grid, and direct harm to Relators and their property. Further, Relators allege the PGCs exercised control over their own operations and decision making and their negligent or intentional operational acts and omissions breached the duty they voluntarily ***undertook***, harming Relators.

Finally, the court of appeals erroneously found it fatal to the undertaking claim that "the retail customers have not pleaded the existence of any special relationship, or any third-party beneficiary status conferred to them." AmericaMR1176 (Op. at 31). This is ***not*** a pleading requirement for negligent undertaking required by Texas law, and certainly not a requirement at the Rule 91a stage. This Court should

grant mandamus relief and correct the court of appeals' improper holdings regarding Relators' negligent undertaking claims.

E. The court of appeals erroneously dismissed the Plaintiff Relators' intentional nuisance claims.

The Plaintiff Relators alleged private nuisance in Count Eleven. *E.g.*, TurnerMR533-34. The court of appeals ordered the dismissal of the negligent nuisance claims based on its no-duty finding. AmericaMR1171 (Op. at 26, n.17). This was error.

Nuisance claims "generally present questions of fact for the jury to decide." *Crosstex N. Texas Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 609 (Tex. 2016) (citations omitted). Negligence nuisance claims are "governed by ordinary negligence principles" and require proof of "the existence of a legal duty, a breach of that duty, and damages proximately caused by the breach." *Id*. at 607 (citing *IHS Cedars Treatment Ctr., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004)). "[T]he condition the defendant causes may interfere with a wide variety of the plaintiffs' interests in the use and enjoyment of their property." *Id.* at 596. These include: "physical damage to the plaintiffs' property, economic harm to the property's market value, harm to the plaintiff's health, or psychological harm to the

plaintiffs' 'peace of mind' in the use and enjoyment of their property." *Id*. Retail Relators amply pled negligence causing nuisance.

In *In re Oncor*, this Court held the transmission and distribution utilities ("TDUs"), which were held to be immunized from negligence claims by tariffs inapplicable to the PGCs, could not be sued for *intentional* nuisance because those defendants were not the source of the cold weather. 716 S.W.3d at 531. This Court's ruling was limited to "intentional-nuisance liability," and the examples referenced in the analysis exemplify different varieties of intentional nuisances. *See, e.g., id*. (citing *Crosstex*, 505 S.W.3d at 592 n.5); *Brewster v. City of Forney*, 223 S.W. 175, 178 (Tex. 1920) (whether party "was guilty of negligence or not," nuisance theory was viable) (*Brewster* cited in *Crosstex* note 5); *Rainey v. Red River, T. & S. Ry. Co*., 99 Tex. 276, 282, 89 S.W. 768, 770 (1905) (discussing abatement notwithstanding no guilt for negligence) (*Rainey* cited in *Crosstex* note 5). *Cf. also Atlas Chem. Indus., Inc. v. Anderson*, 514 S.W.2d 309, 314 (Tex. App.—Texarkana 1974), *aff'd*, 524 S.W.2d 681 (Tex. 1975) ("We have applied strict liability only to those pollution cases in which the defendant has set the substance in motion

for escape, such as the discharge of the harmful effluent or the emission of a harmful gas or substance.").

Negligent nuisance claims do not require that defendant be a "source." Rather, *Crosstex* describes the required jury findings:

> In a claim alleging a negligently created nuisance, the jury must find both that the effects on the plaintiffs of the interference with their use and enjoyment of land were unreasonable (and thus, the condition causing the interference qualifies as a nuisance), and that the defendant's conduct that created the condition was unreasonable (and thus the defendant negligently created the nuisance), but it need not separately find that the defendant's use of its land was unreasonable.

Crosstex, 505 S.W.3d at 614–15. Therefore, *In re Oncor* is distinguishable as to negligent nuisance claims.

II. The court of appeals ignored Relators' pleaded claims and instead undertook an improper *Phillips* analysis.

For Rule 91a purposes, Relators' allegations must be "taken as true" and all "inferences reasonably drawn from them" must be made in Relators' favor. TEX. R. CIV. P. 91a.1. The court of appeals disregarded this portion of Rule 91a, and instead improperly evaluated Relators' allegations from the perspective of the PGCs.

At bottom, the court of appeals concluded that "Texas does not currently recognize a legal duty owed by wholesale power generators to

retail customers to provide continuous electricity to the electric grid." AmericaMR1160-61 (Op. at 15-16). But Relators' claims never depended on the recognition of such a broad duty. In reality, Relators asserted common law claims against the PGCs "based on the *traditional concept of negligence* requiring proof that the electric company could reasonably anticipate injury resulting from its conduct." *Mosby*, 659 F.2d at 681 (emphasis added); *accord Dear*, 64 S.W.2d at 811 (holding "an electric company is liable for injuries caused by defects in its plant or system.").

At no point did Relators allege the PGCs should be held strictly liable for failing to continuously generate electricity. However, the PGCs repeatedly distorted the pleadings and briefings to reframe Relators' claims as a strict liability claim. For example, at the Petition stage, the PGCs claimed that "nearly every participant in the Texas electricity market" was sued (Resp. to *All America* Pet. at 1), and selectively plucked words like "continuing" and "continue" out of context from the Petition in an attempt to misstate Relators' theory of liability. Resp. to *All America* Pet. at 9 (quoting isolated words and phrases from TurnerMR5036-37).

In addition to blatant mischaracterization, the PGCs elide that Relators' only brought suit against the particular PGCs who *through*

their voluntary actions committed to supplying electricity during the operative time period. TurnerMR5015 ¶45. By cherry-picking selective quotes, the PGCs evade the pleadings' detailed discussion of the day-ahead schedule, adjustment period, and identification of specific generation outages and derates, all of which showed that not "nearly every participant" (Resp. to Pet. at 1) was sued for failing to generate power during Winter Storm Uri. TurnerMR4999-5015.

Unfortunately, and in contravention of the standards of Rule 91a, the court of appeals accepted the PGCs' mischaracterization of the Relators' petition and claims as true. In truth, the PGC's representations regarding Relators' claims are nothing more than an elaborate strawman. Relators sued only some PGCs in the ERCOT system (AmericaMR302–12; TurnerMR555-63), limiting their claims to those who—upon information and belief—acted negligently before, during, and after Winter Storm Uri. Relators alleged that negligent acts of ***specific*** PGCs proximately caused Relators' damages. AmericaMR332–33, 356–66. These negligent PGCs owed Relators a common law duty to operate their facilities non-negligently; a cause of action expressly acknowledged by the Legislature and Texas common law. The PGCs' statutorily

imposed duty to act "safely" incorporates common-law ordinary care standards. TEX. UTIL. CODE § 39.101(a)(1); 16 TEX. ADMIN. CODE § 25.503(g); *In re CenterPoint Energy Houston Elec., LLC*, 629 S.W.3d 149, 163 (Tex. 2021) (holding that the common law is applied to statutes and regulations requiring a party to act safely and reasonably). Relators pleaded that the PGCs failed to comply with their statutory and common law duties, satisfying their burden at the Rule 91a stage.

Because the court of appeals wrongly accepted the PGCs representation that Relators were alleging the existence of a new duty under Texas law, it then considered whether it should recognize the "new" duty defined by the PGCs. This, too, was an improper judicial path and resulted in error. To determine the existence of a duty and its parameters, Texas courts apply the "*Phillips* factors" to weigh the risk, foreseeability, and likelihood of injury against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant." *Elephant Ins.*, 644 S.W.3d at 149.

In doing so, Courts consider "social, economic, and political questions and their ***application to the facts***." *Pagayon v. Exxon Mobil*

Corp., 536 S.W.3d 499, 504 (Tex. 2017) (emphasis added) (quoting *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 182 (Tex. 2004)); *see also Praesel v. Johnson*, 967 S.W.2d 391, 397-98 (Tex. 1998); *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). Here, the court of appeals' *Phillips*–factors analysis improperly (1) failed to analyze Relators' claims as pled, (2) engaged in prohibited fact finding to conduct a foreseeability analysis, and (3) failed to recognize that even conducting such an analysis counseled against Rule 91a dismissal.

A. The court of appeals erred by concluding—without any factual basis—that imposing a duty of ordinary care on the PGCs is unworkable.

The court of appeals concluded the PGCs had no "control over the electricity they produce once it leaves their generation facility" and that this necessarily affected their duties to Relators. AmericaMR1163 (Op.at 18). Based on this "downstream" consideration, the court of appeals concluded the PGCs purported ***post***-generation lack of control weighed against the existence of any duties surrounding their generation of electricity. But not only is the extent of the PGCs' post-generation control not in the record, it is entirely irrelevant.

Relators make no claims against the PGCs concerning the transmission or distribution of electricity. Relators allege that the failure of the PGCs' generation equipment during Winter Storm Uri resulted from conduct within their control and that this negligence proximately caused the emergency load shed orders and Relators' damages. By improperly considering unpleaded "facts" concerning "downstream" control, the court of appeals misapplied the Rule 91a standard for reviewing the relevant, pleaded claims and the accompanying facts. Mere weeks ago, this Court identified that gross negligence claims (and therefore negligence claims) against utilities for acts and omissions during Winter Storm Uri are not entirely foreclosed by law. *Oncor II*, 716 S.W.3d at 534-35. This Court permitted the plaintiffs in *Oncor II* to replead their gross negligence claims with sufficient specificity—a futile act if utilities owe no common law duties as a matter of law. *Id.*

Moreover, in analyzing the "burden" of placing a duty on the PGCs, the court of appeals found "[PGCs] cannot produce electricity in a continuous manner but only when electricity is needed." AmericaMR1169 (Op. at 24). Based on this additional and unsupported fact finding, the court of appeals held a duty to "continuously" produce electricity was

"unworkable." AmericaMR1169 (Op. at 24). The circumstances alleged by Relators, however, are that the PGCs were legally and contractually obligated to provide power during Winter Storm URI and that electricity was needed and required by ERCOT but was not supplied because of the PGCs' negligence. AmericaMR330–34; TurnerMR498-500 ¶¶70-75, 512-13 ¶143. Texas courts are required to determine whether a duty exists ***only*** under the facts alleged. The court of appeals' conclusion is both legally wrong and unsupported by the record here.

The court of appeals also erroneously engaged in weighing various policy concerns, theorizing that a duty to continuously generate power during the circumstances alleged was "unworkable" because "generators rely on different sources of power to produce electricity that they do not control." AmericaMR1169 (Op. at 24 n.14). Again, no facts in the record support this finding. In fact, Relators alleged the opposite, including the findings of an official investigation conducted by the Federal Energy Regulatory Commission that natural gas-powered generators who adequately prepared for the storm did not experience any fuel supply problems. AmercaMR343–49. Similarly, no facts in the record support

the court of appeals' unprompted findings concerning wind-powered and solar-powered generators. AmericaMR341, 357–59.

The court of appeals further held that because "power generators are now statutorily precluded" from having a direct *contractual* relationship with retail consumers, they have "no legal relationship with retail customers as a matter of law." AmericaMR1157 (Op. at 12). But "[t]ort obligations are . . . imposed by law, *apart from and independent from promises made* . . . to avoid injury to others." PROSSER AND KEETON THE LAW OF TORTS § 92 (5th ed. 1984). Ignoring this fundamental principle, the court of appeals limited the PGCs' tort liability *solely* to contractual partners. This Court has already rejected such a rule, reasoning that it would "swallow all claims between contractual and commercial strangers" because "a party could avoid tort liability to the world simply by entering into a contract with one party." *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 420 (Tex. 2011).

The court of appeals' findings contradict the pleadings and are improper at the Rule 91a stage. If a claim requires balancing factors and weighing factual considerations of risk, burden, control, and causation to determine its viability, it meets the pleading requirements necessary to

survive Rule 91a scrutiny. *In re Odebrecht Constr., Inc.*, 548 S.W.3d 739, 750 (Tex. App.—Corpus Christi–Edinburg 2018, orig. proceeding).

B. The court of appeals engaged in additional, and impermissible, fact finding.

Next, the court of appeals erred by evaluating evidence regarding what the PGCs and the Relators may (or may not) have known prior to Winter Storm Uri. The court of appeals erroneously concluded that "the risks associated with extreme weather in our state and losing electricity was . . . ***equally foreseeable to the retail customers***." AmericaMR1166 (Op at 21) (emphasis added).

The court concluded that, because Relators apparently could (or should) have predicted the possibility of ***an*** outage, they "were also in as good a position to contemporaneously assess their physical safety and economic interests and to act." AmericaMR1164–65 (Op. at 19-20). This conclusion plainly rests on unsubstantiated assumptions and premature fact finding, none of which was appropriate under Rule 91a. There is no evidence concerning the information Relators possessed before Winter Storm Uri, nor have Relators found examples of other Texas courts engaging in foreseeability speculation at the Rule 91a stage. In doing so, the court of appeals erroneously ignored Relators' allegations that the

PGCs' actions caused the grid to fail, and the PGCs acted negligently (or intentionally) despite their knowledge that doing so would harm the Plaintiff Relators and the insureds of the Subrogation Relators. *See* AmericaMR330-34, 340-43, 348-49, 351-52.

The focus of a foreseeability inquiry is the negligent actor and the anticipated danger his conduct creates, not on those injured by the actor's conduct. *See Univ. of Tex. M.D. Anderson Cancer Ctr. v. McKenzie*, 578 S.W.3d 506, 519 (Tex. 2019); *El Chico Corp. v. Poole*, 732 S.W.2d 306, 315 (Tex. 1987). The court of appeals departed from established caselaw by erroneously assuming Relators could foresee the PGCs' negligence. No Texas case has ever held that a class of plaintiffs should, as a matter of law, foresee the negligence of third parties. Absent special knowledge, Texas law presumes the negligence of third persons is not foreseeable to a property owner. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 550 (Tex. 1985); *De Winne v. Allen*, 277 S.W.2d 95, 98 (Tex. 1955).

Even assuming a risk of harm is foreseeable to an injured party, that would not ***foreclose*** any basis in law or fact for a tort claim. AmericaMR1165–66 (Op. at 20-21); *Davis*, 700 S.W.3d at 844. Such

knowledge might be grounds for consideration of proportionate responsibility, but not Rule 91a dismissal.

C. Resorting to the *Phillips* factors confirms that Relators' claims are not "foreclosed" by Texas law.

Moreover, because the parties do not dispute that negligence and negligent undertaking are causes of action under Texas law, it was improper for the court of appeals to even evaluate and apply the *Phillips* factors to require Rule 91a dismissal. *HNMC, Inc. v. Chan*, 683 S.W.3d 373, 381 (Tex. 2024)(holding that courts should not evaluate *Phillips* factors if a general duty rule exists); *Davis*, 700 S.W.3d at 844.

Applying this legal standard, the court of appeals had no need for the *Phillips* factors, given the duty of care for negligence and negligent undertaking are well-established in Texas law. *See HNMC, Inc.*, 683 S.W.3d at 381. By undertaking such analysis, the court of appeals tacitly conceded these are viable claims under Texas law. AmericaMR1383 (Kelly, J., dissenting from denial of rehearing en banc) ("The mere fact that the panel engages in a *Phillips* analysis to determine whether the wholesalers owe the customers duties under tort law demonstrates that the causes of action have not been foreclosed.").

Whether or not the PGCs owed a duty to Relators under ***these*** factual circumstances is a question reserved for summary judgment or trial, not Rule 91a. *Davis*, 700 S.W.3d at 847–48 (holding Rule 91a "is not a substitute for summary judgment practice"). By including improper considerations and engaging in a legal analysis of facts outside of the Rule 91a record, the court of appeals erred.

III. Alternatively, the Court should find a common law duty under these facts.

The court of appeals also accepted the PGCs' argument that Relators' alleged duty of reliability—which mirrors the Legislature's own enacted duty discussed above—is too open-ended, presenting market participants with unknown risks. Courts have previously rejected similar concerns from these and other utilities in Texas. *E.g.*, *TXU Generation Co., L.P. v. Pub. Util. Comm'n of Tex.*, 165 S.W.3d 821, 839 (Tex. App.—Austin 2005, pet. denied) (rejecting generators' open-ended liability argument). But the PGCs' duty in this case is not novel or new; it is merely the general duty to exercise reasonable care for the physical safety of persons and their property. *TXU Generation,* 165 S.W.3d at 839; *see also Great Atlantic & Pacific Tea Co. v. Evans*, 175 S.W.2d 249, 251 (Tex. 1943).

Relators specifically pleaded that each PGC was under a duty to use the degree of care that PGCs of ordinary knowledge and skill would use under the same or similar circumstances to provide for the safety of the citizens of Texas and their property; to adequately winterize and/or maintain their facilities and equipment, to ensure they had adequate and properly qualified staff during their operations, to provide necessary reserve energy to the ERCOT power grid, and to otherwise conduct their operations as a reasonably prudent power generating company in order to supply steady, continuous, and adequate, electricity to the ERCOT power grid; to conform their operations to good utility practice; and to exercise reasonable care in performing the multitude of services they undertook, which each Relator recognized or should have recognized as necessary for the protection of the Plaintiffs, their insureds, and their property. *E.g.*, AmericaMR356-60, 362-66; TurnerMR489-93, 498-500, 512-13.

To determine the existence of a duty and its parameters, Texas courts apply the "*Phillips* factors" to weigh the risk, foreseeability, and likelihood of injury against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the

consequences of placing the burden on the defendant." *Elephant Ins.*, 644 S.W.3d at 149. Courts consider "social, economic, and political questions and their ***application to the facts***." *Pagayon v. Exxon Mobil Corp.*, 536 S.W.3d 499, 504 (Tex. 2017) (emphasis added) (quoting *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 182 (Tex. 2004)); *see also Praesel v. Johnson*, 967 S.W.2d 391, 397-98 (Tex. 1998); *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990).

Weighing all of the *Phillips* factors—many of which the PGCs conceded before the MDL court—the imposition of a duty of ordinary care on the PGCs related to their voluntary undertaking to furnish Relators with electricity is plainly justified under Texas law.

A. Foreseeability.

Foreseeability is "the foremost and dominant consideration" of whether there is a duty. *Phillips*, 801 S.W.2d at 525. "[T]he wholesale power generators did not dispute below that not providing continuous electricity could foreseeably cause harm[.]" AmericaMR2080 (Op. at 20). Notwithstanding that the foremost and dominant consideration indisputably weighs in Plaintiffs' favor in significant part, the Opinion waives this away by analyzing a different set of facts than those placed

at issue in Plaintiffs' pleadings in direct violation of Rule 91a.1's command that Plaintiffs' "allegations [be] taken as true.

Relators' allegations are based on governmental reports and investigative analyses. In reasoning that is contrary to the Relators' pleadings, the court of appeals suggested that the foreseeable bad winter weather was not "predictab[le]" and that "the specific danger at hand" was unanticipated. AmericaMR1164-65 (Op. at 19-20) (citation omitted). The court of appeals' descriptions of an "unprecedented demand for electricity" and "extraordinary sequence of events," AmericaMR1148, 1165 (Op. at 3, 20), ignore Relators' pleadings, which were that the PGCs knew "long before" Uri that the worst-case scenario posed by such a storm would threaten the supply of electricity to Texas consumers. TurnerMR477 ¶25.

Moreover, Uri's peak demand load of 69,692 megawatts was not unforeseeable to those within the ERCOT system. TurnerMR479 ¶29. The projection was between 68,915 to 74,915, placing 69,692 at the low end. TurnerMR479 (1,000 – 3,000 megawatts/year increase from 65,915 three years earlier). Furthermore, ERCOT's resource planning report for that winter had informed every PGC that margins would be razor thin,

and that an extreme weather event was projected to create a Level 3 emergency, necessitating load shed. AmericaMR328-30 ¶¶ 83-87. Accordingly, every PGC was on notice that a failure of their generation equipment that winter could result in load shedding when consumers would be most vulnerable. The PUCT, FERC, and NERC all warned PGCs of the need to winterize and otherwise prepare for the weather conditions Uri brought to Texas.

B. Risk of Harm.

The PGCs' negligence risked severe property damage, injury, and even death. The court of appeals focused on control, and its acknowledgement that "power generators have some control" is a serious understatement. AmericaMR1162 (Op. at 17). Temperatures plunged lower in areas outside of Texas without catastrophic grid failures, and more than half of Texas generators maintained reliable generation, proving generators could have kept operating had they exercised due care. AmericaMR339 ¶ 112. The court of appeals blamed other market players, AmericaMR1163-64 (Op. at 18-19), but proportionate responsibility lies within the jury's province. And it is inescapably true

that the Texas power grid was uniquely more deadly than in any other location where Uri struck.

C. Social Utility.

The court of appeals relied on the factual conclusion that there is an "indisputabl[e] … great benefit" of "wholesale power generators in the state." AmericaMR1167 (Op. at 22). As it described, this benefit is "reliable electricity, especially during extreme weather." *Id*. Indeed, the statutes and regulations impose a duty upon PGCs and other market participants to act as reasonable participants in a reliable grid. *E.g.*, TEX. UTIL. CODE §§ 39.101, 39.351(b), 186.002; 16 TEX. ADMIN. CODE § 25.503(c)(5), (g). Irreconcilably, the court of appeals' decision eliminates the duty that these statutes and regulations impose, while at the same time concluding that the PGCs provide "reliable electricity, especially during extreme weather." AmericaMR1167 (Op. at 22). Thus, the court of appeals relied on a presumed fact—refuted by the factual allegations in the Relators' pleadings—that the PGCs provide reliable electricity especially during extreme weather, as a basis for effectively negating their statutory, regulatory, and common law duties to act as reasonable market participant in a reliable electric grid.

D. The common law duty does not exceed the PGCs' mandatory statutory compliance.

As a legal matter, the duty Relators focus on here existed long before the current statutory scheme. Relators' position is that the PGCs violated common law as well as statutory duties, making a *Phillips* analysis superfluous. Nevertheless, these common law duties do not impose new, substantial duties on the PGCs.

E. Consequences of imposing the duty on the PGCs.

Although required by Texas law to develop winterization plans, the PGCs ignored or negligently performed these duties. TurnerMR491-92 ¶¶54-56, 498-500 ¶¶70-75). The court of appeals suggests the Legislature fixed the problem, but then reasons that the problem cannot or should not be fixed because to do so is "essentially unworkable," would "upend" the framework, increase prices, and discourage investors—all unproven, unsupported factual assumptions. AmericaMR1168-69 (Op. at 23-24).

The burden is demonstrably not "unworkable," because the majority of the power generators in the ERCOT system remained online. AmericaMR339 ("[A]pproximately 51.4% of the power generation in ERCOT was online despite the weather event . . . ."). Moreover, numerous governmental reports instructed power generators to protect their

facilities and advised them how to make the grid workable (see Factual Background, *supra*). The court of appeals purports to protect "long-term investment in wholesale power generators in Texas" from "discourag[ement]" without any proof that the purported feelings of investors will actually enhance Texas investments, or that it is a goal that should supersede the straightforward application of Texas law. AmericaMR1169 (Op. at 24). Put simply, the court of appeals abused its discretion and erroneously applied the *Phillips* factors. The PGCs owe a common law duty to operate as reasonable power generators should.

IV. Relators lack an adequate remedy by appeal.

Extraordinary remedies are necessary to correct extraordinary wrongs, particularly where, as here, "mandamus review will determine the fate of hundreds of suits by thousands of plaintiffs." *See Oncor II*, 716 S.W.3d at 530.

As this Court has recognized, "[a] court of appeals may issue a writ of mandamus only if the trial court abused its discretion and there is no adequate remedy by appeal." *In re Christianson*, 639 S.W.3d at 681. The court of appeals' decision is gravely erroneous and necessitates mandamus relief. Mandamus review of significant rulings in exceptional

cases is essential to "spare private parties and the public the time and money utterly wasted" enduring unnecessary proceedings. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding).

An appeal from a trial court order dismissing Relators' claims to the court of appeals will be an utter waste of time, energy, and judicial and party resources. The parties already know what the court of appeals will do. This Court should spare the parties the expense and delay of a futile appeal, resolve this issue on mandamus, and permit Relators to continue litigation in the MDL court.

CONCLUSION

For all the reasons stated herein, Relators respectfully ask this Court to grant review of the petitions and grant mandamus relief directing the court of appeals to vacate its decision.

Relators request any other relief to which they are entitled.

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RULE 52.3(J) CERTIFICATION

I certify that I have reviewed this Consolidated Brief on the Merits and conclude that the factual statements are supported by competent evidence included in the mandamus records.

/s/ R. Russell Hollenbeck
R. Russell Hollenbeck

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this computer-generated document complies with Texas Rule of Appellate Procedure 9.4(i)(2)(B) because it contains 11,802 words excluding the parts exempted by Texas Rule of Appellate Procedure 9.4(i)(1) according to the word count provided by Microsoft Word.

/s/ R. Russell Hollenbeck
R. Russell Hollenbeck

CERTIFICATE OF SERVICE

I certify that on September 26, 2025, a true and correct copy of Relators' Consolidated Brief on the Merits was electronically served on counsel for the Real Parties in Interest identified in the Identity of Parties and Counsel (Appendix Tab 1) and was served on the Respondent as follows:

Respondent – Via U.S. Mail (*Petition Only*)
Deborah M. Young
Clerk, First Court of Appeals
First Court of Appeals
301 Fannin Street, Room 245
Houston, Texas 77002-2066

/s/ R. Russell Hollenbeck
R. Russell Hollenbeck

APPENDIX

Tab 1 – Identity of Parties and Counsel

Tab 2 – December 14, 2023, First Court of Appeals Opinion.

Tab 3 – November 26, 2024, Order Denying Motion for En Banc Reconsideration.

Tab 4 – Opinion Dissenting from Denial of En Banc Reconsideration.

APPENDIX TAB 1 – IDENTITY OF PARTIES AND COUNSEL

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Tab 2

Opinion issued December 14, 2023

In The

Court of Appeals

For The

First District of Texas

NO. 01-23-00097-CV

NO. 01-23-00102-CV

NO. 01-23-00103-CV

NO. 01-23-00392-CV

NO. 01-23-00393-CV

IN RE LUMINANT GENERATION COMPANY LLC, NRG TEXAS POWER LLC, CALPINE CORP., EXGEN HANDLEY POWER, LLC N/K/A CONSTELLATION HANDLEY POWER LLC, ET AL., Relators

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Original Proceeding on Petition for Writ of Mandamus

O P I N I O N

The underlying multidistrict litigation ("MDL") arises from Winter Storm Uri that hit Texas in February 2021 and the resulting outages of electricity that crippled much of the state. Hundreds of retail electricity customers sued hundreds

of entities involved in the electricity market in Texas—including natural gas providers, power generators and co-generators (collectively "wholesale power generators"),[1] transmission utilities, public power companies, retail electric providers, and the Electric Reliability Council of Texas ("ERCOT")—for damages sustained due to the loss of electrical power.[2]

This mandamus proceeding concerns the retail customers' claims against the wholesale power generators for negligence, gross negligence, and negligent undertaking, and their assertions of nuisance. The wholesale power generators, the relators, argue that the claims brought by the retail customers, the real parties in interest, have no basis in law or fact and that the pretrial MDL court, the respondent, abused its discretion by denying their Rule 91a motions to dismiss these claims.

We agree and conditionally grant mandamus relief.

Background

In February 2021, Winter Storm Uri hit Texas. It swept bone chilling Arctic air and frigid precipitation across the state. For nearly a week, temperatures

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1 Power generators, including co-generators, generate electricity that is intended to be sold at wholesale. *See* TEX. UTIL. CODE § 31.002(10). A separate "retail electric provider" then sells the electricity to retail customers in this state. *Id.* § 31.002(17).

2 The Supreme Court of Texas recently held that ERCOT is protected from suit by sovereign immunity. *See CPS Energy v. Elec. Reliability Council of Tex.*, 671 S.W.3d 605, 621, 629 (Tex. 2023).

plunged to record lows—with many areas experiencing prolonged temperatures in the teens, and even below zero. For many Texans, the extreme cold was accompanied by heavy accumulations of snow and ice. It has been noted that Winter Storm Uri was "catastrophic" and "may have been the most severe winter weather event in the recorded history of Texas." *See CPS Energy v. Elec. Reliability Council of Tex.*, 671 SW.3d 605, 612 (Tex. 2023); *see also Luminant Energy Co. v. Pub. Util. Comm'n of Tex.*, 665 S.W.3d 166, 174 (Tex. App.—Austin 2023, pet. granted).

The prolonged and extreme cold temperatures along with the heavy snow and ice led to an unprecedented demand for electricity and resulting power blackouts across the state. *CPS Energy*, 671 SW.3d at 612; *Luminant*, 665 S.W.3d at 173–76. It has been estimated that approximately 4.5 million households and businesses lost electrical power for days at a time during some of the coldest days ever recorded in the state's history. *See Luminant*, 665 S.W.3d at 175. This litigation followed.

As noted above, hundreds of retail customers across Texas sued hundreds of entities involved in the Texas electricity market for damages sustained due to the resulting electrical outages. The MDL Panel established a pretrial MDL court to

streamline the various lawsuits.[3] The pretrial MDL court ordered the parties to select five bellwether suits to proceed first with dispositive motions and discovery.

The five bellwether suits that were chosen have dozens of retail customers as plaintiffs and hundreds of defendants, including over 200 wholesale power generators.[4] With respect to the wholesale power generators, the retail customers alleged negligence, gross negligence, negligent undertaking, nuisance, tortious interference with contract, civil conspiracy, concert of action, and indivisible injury against them.[5]

The wholesale power generators filed motions to dismiss under Rule 91a.[6] *See* TEX. R. CIV. P. 91a. After conducting a two-day hearing, the pretrial MDL

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3 TEX. R. JUD. ADMIN 13. The MDL panel selected the Honorable Sylvia A. Matthews to serve as the pretrial judge.

4 The five bellwether suits, which were transferred into the MDL court for pretrial proceedings, Master Cause Number 2021-41903, include: *Randy Turner, Individually and as Personal Representative of the Estate of Terrill Turner a/k/a Terrell Turner, Deceased, et al v. NRG Texas Power, et ux*, cause no. 2021-24797, pending in the 164th District Court of Harris County; *Bernadine Edwards, Individually, as Next of Kin of Lauralene Butler Jackson, Deceased, and as Wrongful Death Beneficiary v. ERCOT, Inc. et al*, cause no. 2021-84438, pending in the 281st District Court of Harris County; *Ernest Peterman, Individually and on Behalf of the Estate of Ella Peterman v. ERCOT et al*, cause no. 2021-18532, pending in the 164th District Court of Harris County; *Valerie Daniels v. Centerpoint Energy, Inc. et al*, cause no. 2021-18513, pending in the 215th District Court of Harris County; and *All America Ins. Co. et al v. ERCOT et al*, cause no. 2022-13706, pending in the 281st District Court of Harris County.

5 All of the bellwether suits asserted nuisance except *All America Insurance*.

6 After the retail customers amended their pleadings, the wholesale power generators filed amended Rule 91a motions. *See* TEX. R. CIV. P. 91a. These are the live pleadings governing this mandamus proceeding.

court signed orders granting in part and denying in part the Rule 91a motions. Without elaboration, the pretrial MDL court dismissed the causes of action against the wholesale power generators for tortious interference with contract, civil conspiracy, concert of action, and indivisible injury—and allowed the claims and assertions for negligence, gross negligence, negligent undertaking, and nuisance to proceed.

The wholesale power generators in the five bellwether suits now seek mandamus relief from the denial in part of their Rule 91a motions.[7] *See* TEX. R. JUD. ADMIN. 13.9(b) (authorizing review by court of appeals of order or judgment from MDL pretrial court).

Standard of Review

Mandamus relief is appropriate when a trial court abuses its discretion in denying a Rule 91a motion to dismiss. *In re Farmers Tex. Cnty. Mut. Ins. Co.*, 621 S.W.3d 261, 266 (Tex. 2021) (orig. proceeding). A trial court abuses its discretion when it fails to correctly analyze or apply the law. *In re Cerberus Cap. Mgmt. L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding). "A trial court has no

[7] Three of the five mandamus petitions were filed in this Court (Nos. 01-23-00097-CV, 01-23-00102-CV, and 01-23-00103-CV). The other two were filed with our sister court and then transferred to our Court, to promote judicial efficiency, under our Local Rule 2 (Nos. 01-23-00392-CV, 01-23-00393-CV). *See* 1st TEX. APP. (Houston) LOC. R. 2 (permitting transfer of cases between First and Fourteenth Court of Appeals in MDL). Because all five mandamus petitions are nearly identical, we address them together in this opinion. *Id*.

discretion in determining what the law is or applying the law to the facts, even when the law is unsettled." *In re Prudential Ins. Co.*, 148 S.W.3d 124, 135 (Tex. 2004) (orig. proceeding). Mandamus relief will issue only when the moving party has no adequate remedy by appeal. *See In re Essex Ins. Co.*, 450 S.W.3d 524, 528 (Tex. 2014) (orig. proceeding).

Rule 91a allows a party to move for early dismissal of a cause of action on the ground that it has "no basis in law or fact." *See Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 654 (Tex. 2020) (quoting TEX. R. CIV. P. 91a.1). A cause of action has no basis in law if the allegations, taken as true, together with any inferences reasonably drawn from them, do not entitle the claimant to the relief sought. *Id.* A cause of action has no basis in fact if no reasonable person could believe the facts as pleaded. *Id.*

We review a trial court's decision on a Rule 91a motion de novo. *See id.* This is so because the availability of a remedy under the facts alleged is a question of law and the rule's factual-plausibility standard is akin to a legal sufficiency review. *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016).

In conducting our review, we cannot consider any evidence. *See In re First Reserve Mgmt., L.P.*, 671 S.W.3d 653, 659 (Tex. 2023) (orig. proceeding). Rather, we must make our determination based solely on the substance of the Rule 91a

motion, the plaintiff's live pleadings, and any pleading exhibits permitted by Rule 59. *See id*. at 660.

Negligence

The retail electricity customers alleged that the wholesale power generators had continuing duties to: (1) weatherize and maintain their facilities and equipment to prevent the loss of electrical power; (2) assure that they had adequately trained staff to prevent the loss of electrical power; (3) provide reserve electricity to the ERCOT power grid; (4) provide electricity to the ERCOT power grid; and (5) supply electricity to the ERCOT power grid to assure its reliability.

Taken together and construed liberally, as we must, the retail customers principally allege that the wholesale power generators had an overarching duty to continuously supply electricity to the power grid, and thus to all retail customers. They further assert that preceding and during Winter Storm Uri, the wholesale power generators breached that duty in various ways that can be summarized as follows: (1) failing to winterize and maintain its equipment; (2) failing to supply electricity to the ERCOT power grid by not securing adequate fuel supply and reserve energy; (3) failing to properly supervise and train workers to ensure against generator outages that occurred during Winter Storm Uri; (4) failing to ensure that their facilities and equipment would be exempted from ordered blackouts by filing appropriate forms and/or taking other necessary or reasonable actions; and

(5) failing to avoid more widespread power blackouts by enrolling in ERCOT's emergency load-shedding program, which caused the retail customers to lose electricity when ERCOT activated the program.

This asserted duty forms the basis of the retail customers' cause of action for negligence against the wholesale power generators, including their assertion of negligent nuisance.[8] It is therefore the beginning point, and crux, of our analysis.

A. Legal Duty

"The threshold inquiry in a negligence case is duty." *Elephant Ins. Co. v. Kenyon*, 644 S.W.3d 137, 145 (Tex. 2022) (quoting *Greater Hous. Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990)). This is a "question of law for the court to decide from the facts surrounding the occurrence in question." *Id*. at 144–45 (quoting *Phillips*, 801 S.W.2d at 525). This inquiry encompasses several questions of law; namely, the existence, scope, and elements of such a duty. *Id*. Here, the initial controlling question before us is whether the wholesale power generators owed a duty to the retail customers to continuously supply them with electricity under the factual allegations presented. *See id*.

[8] "[T]he term 'nuisance' refers not to a cause of action . . . but to the legal injury . . . that gives rise to the cause of action." *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 604 (Tex. 2016). "[A] claim [for negligent nuisance] is governed by ordinary negligence principles. The elements the plaintiff must prove are 'the existence of a legal duty, a breach of that duty, and damages proximately causes by the breach.'" *Id.* at 607.

"A duty is 'a legally enforceable obligation to conform to a particular standard of conduct'" and can be assumed by contract or imposed by law. *Helbing v. Hunt*, 402 S.W.3d 699, 702 (Tex. App.—Houston [1st Dist.] 2012, pet. denied); *see, e.g.*, *Elliott–Williams Co. v. Diaz*, 9 S.W.3d 801, 803–04 (Tex. 1999). Here, the retail customers do not allege any duty imposed by contract.[9] Consequently, we must determine whether the retail customers pleaded a recognized legal duty owed to them by the wholesale power generators to continuously supply electricity.

To determine whether a defendant owes a particular legal duty to a claimant, a court must first ascertain whether the law has recognized such a duty under the same or similar circumstances. *Elephant Ins.*, 644 S.W.3d at 144–45 (explaining that duty inquiry involves evaluating factual situation presented "in the broader context of similarly situated actors" (quoting *Pagayon v. Exxon Mobil Corp*., 536 S.W.3d 499, 504 (Tex. 2017)). For example, if a special relationship exists between the parties under a statute or legal precedent that gives rise to a legal duty, that duty exists in the case presented as a matter of law and "the duty analysis ends there." *Golden Spread Council, Inc. v. Akins*, 926 S.W.2d 287, 292 (Tex. 1996); *see Tex. Home Mgmt., Inc. v. Peavy*, 89 S.W.3d 30, 33–34 (Tex. 2002)

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[9] The wholesale power generators had bilateral contracts with purchasers of wholesale energy, including the retail electric providers, but not with any retail customers.

(recognizing that relationship between parties is factor to consider in determining whether duty exists). That, however, is not the case here. The retail customers also did not plead any facts to support the existence of any special relationship with the wholesale power generators. *See, e.g.*, *Wakefield v. Bank of Am., N.A.*, No. 14-16-00580-CV, 2018 WL 456721, at *5 (Tex. App.—Houston [14th Dist.] Jan. 18, 2018, no pet.) (mem. op.).

1. *Existing Legal Duty*

For much of the Twentieth Century, electric utilities in Texas were authorized by law to operate as tightly regulated, vertically integrated monopolies. *See Luminant*, 665 S.W.3d at 170. In any given geographic area of Texas, just a single, vertically integrated electric utility was authorized to provide electricity to every retail customer in the area. *Id*.

Under that regime, being vertically integrated meant that an electric utility controlled every principal component of how electricity actually reached each retail customer in its area—(1) the generation of electrical power; (2) the transmission of that electrical power on high-voltage lines over long distances; and (3) the distribution of electricity over shorter distances to the ultimate retail customer. *Id*. at 171; *Oncor Elec. Delivery Co. v. Pub. Util. Comm'n of Tex.*, 507 S.W.3d 706, 708–09 (Tex. 2017).

All of that changed on January 1, 2002. That is when Texas implemented a new, fully-competitive retail market for electricity.[10] Under this new regime, every retail customer chooses its own provider of electricity and the rates are set by competition rather than by regulation. TEX. UTIL. CODE § 31.002(4); *see Luminant*, 665 S.W.3d at 171; *Oncor Elec. Delivery*, 507 S.W.3d at 711–12. This meant that every vertically integrated electric utility had to "unbundle" into three separate units: (1) a power generation company that generates electricity to be sold at wholesale; (2) a retail electric provider; and (3) a transmission and distribution utility that actually provides electricity to the retail customers. *See* TEX. UTIL. CODE § 39.051(b); *see also id*. § 31.002(10), (17), (19).

The end-result is that wholesale power generators are no longer public electric utilities. *See id*. §§ 11.004(1), 31.002(2), (5). Wholesale power generators do not, and cannot, own or operate the transmission and distribution facilities that carry electricity to the retail customers. *See id*. § 31.002(10). They also do not, and cannot, enter into agreements with retail customers to sell them electricity. *See id*. § 31.002(6)(C), (16)–(17).

Instead, wholesale power generators solely produce "electricity that is intended to be sold at wholesale" to retail electric providers, who in turn sell the

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[10] *See* TEX. UTIL. CODE § 39.001(b)(1) ("The legislature finds that it is in the public interest to: implement on January 1, 2002, a competitive retail electric market that allows each retail customer to choose the customer's provider of electricity and that encourages full and fair competition among all providers of electricity.").

electricity directly to retail customers. *See id*. § 31.002(10)(A), (17). The electricity enters a sprawling electrical grid managed and operated by ERCOT,[11] and then transmission utilities distribute the electricity to retail customers. *See id*. § 31.002(19).

Importantly for our analysis here, wholesale power generators are now statutorily precluded by the Legislature from having any direct relationship with retail customers of electricity. *See, e.g.*, *id*. §§ 31.002(10), (16), (17), 39.051. Under this statutory framework, wholesale power generators can have no legal relationship with retail customers as a matter of law. *See id*.; *see also Hous. Area Safety Council, Inc. v. Mendez*, 671 S.W.3d 580, 588 (Tex. 2023) (noting that petitioners had no direct relationship with employee in finding no duty); *Guerra v. Regions Bank*, 188 S.W.3d 744, 747 (Tex. App.—Tyler 2006, no pet.) (holding no duty as matter of law owed to plaintiff because plaintiff was not customer and had no relationship to bank).

Indeed, we are not aware of any controlling Texas authority under this current statutory scheme, and the retail customers have cited none, that holds a wholesale power generator owes a legal duty to continuously supply electricity to

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[11] This self-contained grid covers approximately 70 percent of the State of Texas geographically and serves nearly 90 percent of the state's electricity customers. *See Luminant Energy Co. v. Pub. Util. Comm'n of Tex*., 665 S.W.3d 166, 171–72 (Tex. App.—Austin 2023, pet. granted).

the grid and thus ultimately to retail customers—who must contract with retail electric providers to purchase their electricity.

Instead, the retail customers rely upon *In re Centerpoint Energy Houston Electric, LLC*, 629 S.W.3d 149, 161–63 (Tex. 2021), *Cura-Cruz v. Centerpoint Energy Houston Electric LLC*, 522 S.W.3d 565, 572 (Tex. App.—Houston [14th Dist.] 2017, pet. denied), and *Bearden v. Lyntegar Electric Co-op., Inc*., 454 S.W.2d 885, 887 (Tex. App.—Amarillo 1970, no writ), for the proposition that wholesale power generators have a common law duty to provide reliable electricity. But these cases are distinguishable for several reasons.

First, *Bearden* was decided pre-deregulation. Since 2001, ERCOT is the entity that has the statutory responsibility "to ensure the reliability and adequacy" of the Texas power grid. *See CPS Energy*, 671 S.W.3d at 611; *see also* TEX. UTIL. CODE § 39.151. Second, none of these cases hold that a wholesale power generator under the current statutory regime has a duty to continuously supply electricity to the grid and thus to retail customers.

The retail customers also contend that our Legislature has codified common law duties owed to them by the wholesale power generators. Relying on sections 186.001 and 186.002 of the Utilities Code, the retail customers maintain that a wholesale power generator is a "public utility" and, as such, owe them a duty "to maintain continuous and adequate service at all times." *See* TEX. UTIL. CODE

§§ 186.001–.002. Significantly, these statutory provisions were enacted pre-deregulation. *See* Act of May 8, 1997, 75th Leg., R.S., ch. 166, § 1, sec. 186.001–.002, 1999 Tex. Gen. Laws 998, 999 (codified at TEX. UTIL CODE §§ 186.001–.002). Section 186.001 defines a "*public utility*" as a "private corporation that does business in this state and *has the right of eminent domain* . . . engaged in the business of generating, transmitting, or distributing electric energy to the public." TEX. UTIL. CODE § 186.001 (emphasis added).

Section 186.002(b) then provides that "[a] *public utility* is dedicated to public service [and] [t]he primary duty of a public utility . . . is to maintain continuous and adequate service at all times to protect the safety and health of the public against the danger inherent in the interruption of service." *Id*. § 186.002(b); *see also id*. §§ 11.004 (defining "*public utility*" or "*utility*" to mean an "*electric utility*" as defined in section 31.002 (emphasis added)).

But the more recently enacted provisions in section 31.002 of the Utilities Code, that are part of the current statutory framework, state that the term "*electric utility*" "does not include . . . a power generation company." TEX. UTIL. CODE § 31.002(6) (emphasis added) (Act of May 27, 1999, 76th Leg., R.S., ch. 405, § 11, sec. 31.002, 1999 Tex. Gen. Laws 2547, 2548). To the extent that these statutes conflict, the most recently enacted statute prevails. *See* TEX. GOV'T CODE § 311.025 ("[I]f statutes enacted at the same or different sessions of the legislature

are irreconcilable, the statute latest in date of enactment prevails."). Here, the most recently enacted and prevailing statute is section 31.002 of the Utilities Code.

Even if sections 186.001 and 186.002 of the Utilities Code could be applicable here, they still would not support the retail customers' argument. This is because we are not aware of any Texas authority, and the retail customers have cited none, that currently gives the wholesale power generators the power of eminent domain—which is necessary to trigger these statutes. *See* TEX. UTIL. CODE §§ 186.001–.002.

In rewriting the electricity market in Texas, the Legislature could have codified the retail customers' asserted duty of continuous electricity on the part of wholesale power generators into law. But it chose not to do so. And we may not impose our own judicial meaning on these statutes by adding words and creating relationships and duties that are not contained in the plain language of the statutes. *See Silguero v. CSL Plasma, Inc.*, 579 S.W.3d 53, 59 (Tex. 2019). Indeed, "judicial policy preferences should play no role in statutory interpretation." *See McLane Champions, LLV v. Hous. Baseball Partners LLC*, 671 S.W.3d 907, 918 (Tex. 2023).

Accordingly, based on the current state of our jurisprudence in Texas and the plain language of the controlling deregulatory statutes, we conclude that Texas does not currently recognize a legal duty owed by wholesale power generators to

retail customers to provide continuous electricity to the electric grid, and ultimately to the retail customers, under the allegations pleaded here by the retail customers. We must therefore determine whether, under the MDL pretrial court's orders, Texas caselaw should recognize this duty.

2. *Creation of a New Legal Duty*

The retail customers maintain that even if the Legislature and Texas courts have not recognized a duty owed by wholesale power generators to provide continuous electricity to the electric grid, and thus ultimately to them, that their pleadings are sufficient to establish such a duty. "When a duty has not [already] been recognized in particular circumstances, the question [for the Court] is whether one should be." *Elephant Ins.*, 644 S.W.3d at 145 (quoting *Pagayon*, 536 S.W.3d at 506).

Our supreme court has instructed that courts must weigh what are often referred to as the "*Phillips* factors" in determining whether a duty exists and what it is. *See id*. at 149. Specifically, we must weigh "the risk, foreseeability, and likelihood of injury against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant.'" *Id.* (citing *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 182 (Tex. 2004)). We may also consider whether one party had

superior knowledge of the risk or right to control the actor who caused the harm. *Id*.

In determining whether to impose a duty in a defined class of cases, we do not determine whether the facts show a breach of an applicable standard of care. *Id*. at 145. Instead, the duty inquiry involves evaluating the factual situation presented "in the broader context of similarly situated actors." *Id*. In this context, "[c]ourts may not hold people to very general duties of exercising ordinary care in all circumstances." *Id*. Rather, Texas law requires courts to be specific in determining the existence, scope, and elements of any new legal duties. *Id.* (quoting *Pagayon*, 536 S.W.3d at 506).

Here, under the facts alleged, the relevant risk of injury is that multiple wholesale power generators cannot provide electricity to the ERCOT power grid, potentially leaving retail customers without electricity. We note that wholesale power generators have some control over whether they can generate electricity by how they maintain their equipment. *See Luminant*, 665 S.W.3d at 170 (noting that "generation and consumption must at all times be maintained in near-perfect balance" or "else a total grid collapse"). And the Legislature has given ERCOT oversight and enforcement authority to ensure a reliable and safe electrical grid and that electricity production is accurately accounted for among the generators. *See* TEX. UTIL. CODE § 39.151(a)–(j).

But, even if the wholesale power generators had perfect maintenance and complete control over their production of electricity, the retail customers' pleadings acknowledge that it is "ERCOT [who also] manages the delivery of that electricity" and that "ERCOT's function is 'power dispatch,' or the scheduling and managing of how electricity will flow through the network." Thus, as the retail customers have pleaded, and the current statutory framework makes clear, wholesale power generators have no actual control over the electricity they produce once it leaves their generation facility. *See Luminant*, 665 S.W.3d at 170 (noting that "constraints on transmission can result in grid congestion, and power generated in one geographic region may not be available to consumers in another").

The retail customers have also pleaded that the wholesale power generators send electricity to the ERCOT power grid and then transmission utilities transport the electricity, which ultimately results in delivery to the retail customers. And, in the event of load-shed orders, "transmission owners then decide where to cut power and how to rotate outages."[12] Thus, the retail customers have also acknowledged that the wholesale power generators neither have control over how

[12] A load-shed event occurs when ERCOT "directs operators of the transmission system to reduce electricity consumption by involuntarily disconnecting customers from the grid." *RWE Renewables Americas, LLC v. Pub. Util. Comm'n of Tex*., 669 S.W.3d 566, 570–71 (Tex. App.—Austin 2023, pet. granted); *see also* TEX. UTIL. CODE § 38.076.

transmission utilities distribute electricity, nor control over ERCOT—which "monitors the flow of energy from more than 680 generation units to more than 26 million customers over more than 46,500 miles of transmission lines, all while balancing generation with load to maintain a system frequency of 60 Hertz." *Luminant*, 665 S.W.3d at 172; *City of San Antonio v. Pub. Util. Comm'n of Tex.*, 506 S.W.3d 630, 635 (Tex. App.—El Paso 2016, no pet.).

Moreover, the retail customers could not plead that they have any direct relationship with the wholesale power generators in purchasing electricity—because the Legislature has precluded any such relationship as a matter of law. *See* TEX. UTIL. CODE §§ 31.002(10), (16), (17), 39.051; *see also Mendez*, 671 S.W.3d at 588 (noting that petitioners had no direct relationship with employee in finding no duty); *Peavy*, 89 S.W.3d at 33–34 (recognizing that relationship between parties is factor to consider in determining whether duty exists).

In conducting this duty analysis, foreseeability is a dominant consideration. *See Phillips*, 801 S.W.2d at 525. But foreseeability alone is not enough to create a duty. *City of Waco v. Kirwan*, 298 S.W.3d 618, 624 (Tex. 2009). "Foreseeability does not necessarily equate to predictability." *Univ. of Tex. M.D. Anderson Cancer Ctr. v. McKenzie*, 578 S.W.3d 506, 519 (Tex. 2019). "Rather, 'foreseeability' means that the actor should have reasonably anticipated the dangers that his negligent conduct created for others." *Id*.

Although foreseeability of the "general danger" is a key part of the inquiry, we must also evaluate the foreseeability of the specific danger at hand—namely, "whether the injury to the particular plaintiff or one similarly situated could be anticipated." *Elephant Ins.*, 644 S.W.3d at 149 (quoting *Bos v. Smith*, 556 S.W.3d 293, 303 (Tex. 2018)). But "foreseeability requires more than someone, viewing the facts in retrospect, theorizing an extraordinary sequence of events whereby defendant's conduct brings about the injury." *Id.* at 150 (quoting *Doe v. Boys Clubs of Greater Dall., Inc.*, 907 S.W.3d 472, 478 (Tex. 1995)).

Here, the wholesale power generators did not dispute below that not providing continuous electricity could foreseeably cause harm, and we acknowledge that multiple wholesale power generators being unable to produce electricity during a winter storm or otherwise would foreseeably result in a general danger to retail customers. But, just as the wholesale power generators could foresee extreme weather impacting their ability to generate electricity, retail customers were also in as good a position to contemporaneously assess their physical safety and economic interests and to act. *See Elephant Ins.*, 644 S.W.3d at 150.

In that regard, the retail customers' pleadings mention previous weather events that resulted in the loss of electricity, such as a 1989 cold weather event, a 2011 winter storm, and the 2014 polar vortex. Accordingly, just as the wholesale

power generators could foresee that extreme weather could limit their production of electricity, the retail customers could also foresee from these previous extreme-weather events that they could experience outages. *See Elephant Ins.*, 644 S.W.3d 144–45. This is not uncommon in Texas during an extreme-weather event. Thus, the risks associated with extreme weather in our state and losing electricity was, and is, equally foreseeable to the retail customers.

We may also consider the existing statutory regulatory framework in the *Phillips*-factor analysis. *See, e.g.*, *Mission Petroleum Carriers, Inc. v. Solomon*, 106 S.W.3d 705, 714–15 (Tex. 2003) (declining to impose duty after "[a]pplying the *Phillips* risk/utility factors" because, in part, "comprehensive statutory and regulatory scheme" reduces risk of harm). The retail customers acknowledge that the Legislature created a comprehensive statutory framework to oversee and manage the Texas electrical market, which went into effect in 2002. *See* TEX. UTIL. CODE § 39.001.

As described above, this framework delegates oversight to creating a reliable and safe electrical grid to ERCOT. *See id*. § 39.151(a). ERCOT has authority from the Public Utility Commission ("PUC")[13] to "adopt and enforce rules relating to the reliability of the regional electrical network." *See id*. § 39.151(d). Market participants, including the wholesale power generators in these proceedings, "are

[13] *See* TEX. UTIL. CODE §§ 12.001 et seq.

statutorily required to abide by all rules and procedures established by [ERCOT], and their failure to do so could result in a penalty." *CPS Energy*, 671 S.W.3d at 616–17. It is the Legislature's prerogative to create this statutory framework, which may not completely eliminate the risk from electrical-grid outages, but it meaningfully reduces the risk of harm. *See, e.g.*, *Mission Petroleum*, 106 S.W.3d at 714–15 (declining to impose duty after "[a]pplying the *Phillips* risk/utility factors" because, in part, "comprehensive statutory and regulatory scheme" reduces risk of harm).

We next weigh the aforementioned factors against the social utility of the wholesale power generators' conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant. *See Elephant Ins.*, 644 S.W.3d at 145.

The social utility of the wholesale power generators in the state is indisputably of great benefit. Retail customers and commercial and industrial businesses depend upon having reliable electricity, especially during extreme weather. The burden of guarding against the injury that retail customers experience by not having electricity during extreme weather is not entirely clear.

But the retail customers list several burdens that they believe the wholesale power generators would need to undertake, such as weatherizing equipment, adequately staffing generation facilities during extreme weather, and verifying

adequate fuel to power generators, among others. After Winter Storm Uri, the Texas Legislature sought to address these same concerns by passing legislation that requires weatherization of wholesale power generators' assets and giving ERCOT authority to inspect for compliance. *See CPS Energy*, 671 S.W.3d at 628; *see, e.g.*, TEX. UTIL. CODE § 35.0021 (providing that PUC will require each power generation company to prepare generation assets to provide adequate electric generation service during weather emergency). And, in doing so, the Legislature did not create any new or corresponding duties on wholesale power generators owed to retail customers. *See* TEX. UTIL. CODE § 35.0021.

We also must consider the consequences and burden of placing the new duty urged by the retail customers on the wholesale power generators. If we created a new duty for wholesale power generators to supply continuous electricity to the grid, and ultimately to the retail customers, we would upend the carefully-crafted framework that the Legislature has implemented. And legislative silence on this new asserted duty does not give us the power to legislate from the bench. *See Tex. Med. Res., LLP v. Molina Healthcare of Tex., Inc*., 659 S.W.3d 424, 432 (Tex. 2023); *see also* TEX. CONST. art. II, § 1 (dividing powers of state government among "three distinct departments" and providing that their respective powers are mutually exclusive).

In any event, the wholesale power generators cannot produce electricity in a continuous manner but only when electricity is needed. *See Luminant*, 665 S.W.3d at 170 (noting that "most electricity generation must occur concurrently with consumption"). Moreover, the supply of electricity must be "maintained in near-perfect balance at an equilibrium point of 60 Hertz" or the electric grid may fail or cause damage to grid equipment. *Id*. Accordingly, the new duty that the retail customers assert for wholesale power generators, providing continuous electricity, is essentially unworkable from a practical and statutory standpoint.[14]

Finally, if we created a new duty for wholesale power generators to supply continuous electricity to retail customers, the potential burden of liability of wholesale power generators to every retail customer would be statewide. Considering that extreme weather is a normal occurrence in Texas, such a duty would likely have significant consequences by increasing the price of electricity as well as discouraging long-term investment in wholesale power generators in Texas.

In sum, and as referenced above, we believe that imposing any such new duty on wholesale power generators is more appropriate for the Legislature, "which is accountable to the people through the political process,"[15] and who can

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[14] Indeed, different generators rely on different sources of power to produce electricity that they do not control. In addition to natural gas, wind generation requires wind which is not always available. And solar powered generation requires sunlight which is limited by cloud cover.

[15] *See CPS Energy*, 671 S.W.3d at 627.

"balance [the] competing factors apart from the common law."[16] Our conclusion is mandated by the separation of powers provision in our state constitution. *See* TEX. CONST. art. II, § 1. We must respect the Legislature's policy choices in enacting the current statutory framework for the electricity marketplace in Texas. Indeed, the core responsibility of our judicial branch of government is to interpret and apply the law consistently and predictably based on precedent, not to create it by judicial fiat. *Id*.; *see also Mouton v. Hous. Indep. Sch. Dist.*, No. 01-22-00205-CV, 2023 WL 4065602, at *4 (Tex. App.—Houston [1st Dist.] June 20, 2023, pet. denied) (mem. op.). As an intermediate appellate court, we are particularly cognizant of these principles. *See Emscor Mfg. Inc. v. Alliance Ins. Grp.*, 879 S.W.2d 894, 910 (Tex. App.—Houston [14th Dist.] 1994, writ denied) ("It is not for an intermediate appellate court to create new causes of action.")

We therefore decline to create a new negligence-based duty on the wholesale power generators to continuously generate electricity for the retail customers in these proceedings. To the extent that the MDL pretrial court recognized and

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16 *See Hous. Area Safety Council, Inc. v. Mendez*, 671 S.W.3d 580, 590 (Tex. 2023); *see, e.g.*, *Mission Petroleum Carriers, Inc. v. Solomon*, 106 S.W.3d 705, 714–15 (Tex. 2003) (declining to impose duty after "[a]pplying the *Phillips* risk/utility factors" because, in part, "comprehensive statutory and regulatory scheme" reduces risk of harm); *see J.P. Morgan Chase Bank v. Tex. Cont. Carpet, Inc.*, 302 S.W.3d 515, 535 (Tex. App.—Austin 2009, no pet.) (noting reluctance as intermediate court in recognizing new common-law duty with no existence in established law); *Nichols v. McKinney*, 553 S.W.3d 523, 528–29 (Tex. App.—Waco 2018, pet. denied) (declining invitation to impose new duty).

imposed such a new duty on the wholesale power generators, it clearly abused its discretion. Accordingly, we hold, for all of these reasons, that the MDL pretrial court clearly abused its discretion in denying this aspect of the wholesale power generators' Rule 91a motions and in not dismissing the retail customers' claims for negligence and assertions for negligent nuisance because they have no basis in law or fact as alleged.[17]

Negligent Undertaking

In their second issue, the wholesale power generators argue that the retail customers' claims for negligent undertaking, which are pled in the alternative to negligence, also have no basis in law or fact because they "all involve purported failures to take various reliability measures."

The retail customers pleaded that the "Power Generator Defendants are liable to Plaintiffs, as consumers of the ERCOT grid, for their negligent performance of multiple voluntary undertakings." The retail customers then generally alleged that "[e]ach Power Generator Defendant undertook, either

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[17] Because the retail customers' negligence-based claims fail on the threshold element of legal duty, it is unnecessary for us to address the other elements of negligence or their assertion of negligent nuisance. *See* TEX. R. APP. P. 47.1; *Nichols*, 553 S.W.3d at 532 (negligent nuisance fails in absence of legal duty). For the same reason, it is also unnecessary for us to address the retail customers' claim for gross negligence because, without a legal duty, the claim of gross negligence also has no basis in law or fact as alleged. *See RT Realty, L.P. v. Tex. Util. Elec. Co*., 181 S.W.3d 905, 915 (Tex. App.—Dallas 2006, no pet.) ("Without a duty, there can be no negligence and no gross negligence."); *see also* TEX. R. CIV. P. 91a; TEX. R. APP. P. 47.1.

gratuitously or for consideration, to render services to Plaintiffs, which each Power Generator Defendant recognized or should have recognized as necessary for the protection of the Plaintiffs and their property."

After that, the retail customers pleaded a series of alleged undertakings by the wholesale power generators that can be summarized as follows: (1) undertaking to winterize and maintain its equipment; (2) providing generating resources to the grid for its registered rated load; (3) securing adequate fuel supply and choosing to source critical natural gas supplies; (4) generating into the grid when instructed to come online by ERCOT; (5) hiring and/or staffing an adequate amount of workers before and during Winter Storm Uri to ensure against generator outages and derates, as well as to ensure the power generating facility and equipment was operating at maximum generation capacity; (6) ensuring that its natural gas suppliers' were exempted from ordered blackouts by filing appropriate forms and/or taking other necessary or reasonable actions; and (7) warning plaintiffs and/or ERCOT prior to Winter Storm Uri about the likelihood of outages and derates in its equipment and facilities.

Our supreme court has recently explained that, "[u]nder Texas law, a defendant who undertakes to render services that it knows or should know are necessary for the protection of the other's person or things must generally exercise reasonable care in performing the undertaking." *First Reserve*, 671 S.W.3d at 660

(internal quotations omitted). "The critical inquiry concerning the duty element of a negligent-undertaking theory is whether a defendant acted in a way that requires the imposition of a duty where one otherwise would not exist." *Id*. (quoting *Nall v. Plunkett*, 404 S.W.3d 552, 555 (Tex. 2013)).

The supreme court in *First Reserve* also importantly emphasized that "[this] duty is only implicated when the complained-of undertaking is an affirmative course of action; liability for negligent undertaking cannot be predicated on an omission." *Id*. (quoting *Elephant Ins.*, 644 S.W.3d at 152 & n. 80 ("[N]ot giving a safety warning is an omission, not an undertaking.")).

Here, essentially every omission pleaded by the retail customers to support their negligence cause of action is also alleged granularly as an affirmative undertaking to support their negligent-undertaking claim. It is settled that a party may plead multiple allegations in the alternative against a defendant, and they may even conflict. *See Low v. Henry*, 221 S.W.3d 609, 615 (Tex. 2007); *see also* TEX. R. CIV. P. 48. But Rule 48 does not permit a party to plead "in the alternative" a claim that has no basis in law or fact. *See Low*, 221 S.W.3d at 615. "That is simply not permitted by Texas law." *Id*. And artful pleading does not change the true nature and gravamen of such claims. *See In re Breviloba, LLC*, 650 S.W.3d 508, 512 (Tex. 2022) (orig. proceeding); *Yamada v. Friend*, 335 S.W.3d 192, 196 (Tex. 2010).

By initially pleading their negligent undertaking allegations as negligent omissions, the retail customers have acknowledged that their complained-of undertakings are not affirmative courses of action—and their artful pleading cannot recast those alleged omissions to be otherwise. *See Breviloba*, 650 S.W.3d at 512; *Yamada*, 335 S.W.3d at 196. Because the retail customers rely on purported omissions and failures to act to support their negligent-undertaking claims, they have not made factual allegations constituting a cause of action for negligent undertaking against the wholesale power generators with a basis in law. *See First Reserve*, 671 S.W.3d at 660, 663; *see also Garcia v. Kellogg Brown & Root Servs., Inc.*, No. 01-19-00319-CV, 2020 WL 3820426, at *10 (Tex. App.—Houston [1st Dist.] July 7, 2020, no pet.) (mem. op.) ("[F]ailures to act do not create a negligent-undertaking duty.").

The retail customers also argue that the wholesale power generators' action in generating electricity for the grid can be an affirmative course of action to support their negligent-undertaking claim.

As detailed above, the retail customers pleaded that the wholesale power generators failed to continuously provide electricity to them during Winter Storm Uri due to various purported omissions and failures to act (i.e., failures to winterize, failures to source adequate fuel, and failures to adequately staff). They also pleaded that the wholesale power generators "undertook, either gratuitously or

for consideration, to render services to Plaintiffs." But the retail customers did not plead that the complained-of undertaking by the wholesale power generators was the production of electricity during Winter Storm Uri. Indeed, such an allegation would be nonsensical. *See First Reserve*, 671 S.W.3d at 660 ("[L]iability for negligent undertaking cannot be predicated on an omission."); *Garcia*, 2020 WL 3820426, at *10 ("[F]ailures to act do not create a negligent-undertaking duty.").

Nevertheless, the retail customers argue that their general assertion that "[e]ach Power Generator failed to exercise reasonable care while rendering such services" is enough to bridge the substantive gap for their negligent-undertaking claims. Under the current statutory framework, the only service that wholesale power generators can provide is the generation of electricity that is sold to retail electric providers. *See* TEX. UTIL. CODE § 31.002(10)(A). And the wholesale power generators can have no direct relationship with any retail customer. *Id.* The retail customers must purchase their electricity through separate contracts with a retail electric provider. *Id*. § 31.002(17).

As a result, this argument by the retail customers is plainly based on the wholesale power generators agreements with retail electric providers to generate and sell electricity. *See id*. § 31.002(10)(A). According to the retail customers, the contractual obligations owed by wholesale power generators to the retail electric

providers can spring into a broad negligent undertaking duty owed by wholesale power generators to all retail customers to continuously produce electricity.

But the retail customers have not directed us to any Texas authority, and we are aware of none, that transforms the contractual duties owed by wholesale power generators to the retail electric providers under the current statutory framework into tort duties owed by the wholesale power generators to the third-party retail customers.[18] And the retail customers have not pleaded the existence of any special relationship or any third party beneficiary status conferred to them from the agreements between the wholesale power generators and the retail electric providers.

Accordingly, this argument by the retail customers is simply a bridge too far. We therefore conclude that the retail customers' negligent undertaking against the wholesale power generators also has no basis in law or fact as alleged and that the trial court clearly abused its discretion in denying the Rule 91a motions on this claim.[19]

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[18] *See, e.g.*, *Sw. Bell Tel. Co. v. DeLanney,* 809 S.W.2d 493, 494–95 (Tex. 1991) (claim for negligence could not be based on allegation that party failed to adequately perform contract—such claim sounded in contract, not tort); *Kuentz v. Cole Sys. Grp., Inc.*, 541 S.W.3d 208, 219 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (contractual obligations owed by pre-employment background screening company to car dealership client for background screening services did not impose generalized tort duty owed to third-party victim of criminal act).

[19] In light of concluding that the negligence and negligent-undertaking claims have no basis in law or fact, it is unnecessary to address substantively whether the

Adequate Remedy by Appeal

Having concluded that the pretrial court abused its discretion in failing to dismiss the retail customers' claims for negligence, gross negligence, negligent undertaking, and for nuisance, under Rule 91a because they have no basis in law under the facts alleged, we now turn to the second requirement for mandamus relief—whether the wholesale power generators have an adequate remedy by appeal. *See Essex*, 450 S.W.3d at 528.

"The adequacy of an appellate remedy must be determined by balancing the benefits of mandamus review against the detriments." *Id*. (citing *Prudential*, 148 S.W.3d at 136). In balancing these interests, the Texas Supreme Court has explained that "mandamus relief is appropriate to 'spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.'" *In re John G. & Marie Stella Kenedy Mem'l Found*., 315 S.W.3d 519, 523 (Tex. 2010) (orig. proceeding) (quoting *Prudential*, 148 S.W.3d

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pretrial court properly denied the Rule 91a motions on the retail customers' remaining assertions of nuisance. *See* TEX. R. APP. P. 47.1. As our supreme court has instructed, nuisance is not a claim or cause of action—but a type of legal injury. *See Crosstex*, 505 S.W.3d at 588, 594–95. Because the four bellwether petitions asserting nuisance lack any surviving claim or cause of action against the wholesale power generators, all of the assertions of nuisance against them (including for negligent nuisance discussed above), likewise fails, as a matter of law. *See Bolton v. Fisher*, 528 S.W.3d 770, 778 (Tex. App.—Texarkana 2017, pet. denied) (concluding that trial court properly granted summary judgment on nuisance when plaintiff's petition did not include cause of action); *Amini v. Spicewood Springs Animal Hosp*., *LLC*, No. 03-18-00272-CV, 2019 WL 5793115, at *10 (Tex. App.—Austin Nov. 7, 2019, no pet.) (mem. op.).

at 136). When a trial court abuses its discretion in denying a Rule 91a motion, this test is satisfied and mandamus relief is appropriate. *See Farmers*, 621 S.W.3d at 266; *In re Hous. Specialty Ins. Co.*, 569 S.W.3d 138, 142 (Tex. 2019) (orig. proceeding).

Accordingly, in light of our holdings above that the retail customers' pleadings allege causes of actions that have no basis in law or fact and should have been dismissed under Rule 91a, we further conclude that mandamus relief is appropriate here to spare the parties and the public the time and money spent on fatally flawed proceedings. *See Essex*, 450 S.W.3d at 528.

Conclusion

We conditionally grant mandamus relief. We direct the respondent to grant the wholesale power generators' Rule 91a motions to dismiss the retail customers' claims for negligence, gross negligence, negligent undertaking, and the assertions of nuisance in these five bellwether petitions. Our writ will issue only if the respondent fails to comply in accordance with this opinion.

Terry Adams
Chief Justice

Panel consists of Chief Justice Adams and Justices Landau and Hightower.

Tab 3

COURT OF APPEALS FOR THE
FIRST DISTRICT OF TEXAS AT HOUSTON

ORDER ON MOTIONS FOR EN BANC RECONSIDERATION

Appellate case name:	In re Luminant Generation Company LLC, NRG Texas Power LLC, Calpine Corp., Exgen Handley Power, LLC N/K/A Constellation Handley Power LLC, et al.
Appellate case number:	01-23-00097-CV, 01-23-00102-CV, 01-23-00103-CV, 01-23-00392-CV, 01-23-00393-CV
Trial court case number:	2021-24797, 2021-84438, 2021-18532, 2021-18513, 2022-13706
Trial court:	164th District Court of Harris County
Date motion filed:	January 29, 2024
Party filing motion:	Real Parties in Interest

It is ordered that the motions for en banc reconsideration filed by the real parties in interest are **denied**. *See* TEX. R. APP. P. 41.2, 49.5.

Judge's signature: /s/ Terry Adams
Acting for the En banc Court

En banc Court consists of: Chief Justice Adams and Justices Kelly, Landau, and Hightower.

Justice Kelly, dissenting to the denial of en banc reconsideration.

Justices Goodman, Countiss, Rivas-Molloy, Guerra, and Gunn, not sitting.

Date: November 26, 2024

MR1378

Tab 4

Opinion issued November 26, 2024

In The

Court of Appeals

For The

First District of Texas

NO. 01-23-00097-CV

NO. 01-23-00102-CV

NO. 01-23-00103-CV

NO. 01-23-00392-CV

NO. 01-23-00393-CV

IN RE LUMINANT GENERATION COMPANY LLC, NRG TEXAS POWER LLC, CALPINE CORP., EXGEN HANDLEY POWER, LLC N/K/A CONSTELLATION HANDLEY POWER LLC, ET AL., Relators

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Original Proceeding on Petition for Writ of Mandamus

OPINION DISSENTING FROM THE DENIAL OF EN BANC RECONSIDERATION

[T]he spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and

> processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government. . . . This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law.

Hurtado v. California, 110 U.S. 516, 530 (1884).

* * *

As Winter Storm Uri struck Texas in February 2021, large swaths of the state's electricity grid failed, causing mass power outages across the state. Seeking recompense for the damages caused by those outages, injured retail power customers brought suit against entities involved in the electricity market in Texas, including wholesale power generators, asserting claims for negligence, gross negligence, negligent undertaking, and nuisance. The wholesale power generators moved for dismissal of the entire case under Rule 91(a), and the trial court granted the motion in part and denied it in part. This Court conditionally granted the generators' petitions for mandamus relief, directing the trial court to dismiss the customers' case in toto. *In re Luminant Generation Co. LLC*, No. 01-23-00097-CV, 2023 WL 8630982, at *1 (Tex. App.—Houston [1st Dist.] Dec. 14, 2023, orig. proceeding). The panel reached this conclusion because it is "not aware of any controlling Texas authority under this current statutory scheme, and this retail customers have cited none, that holds a wholesale power generator owes a legal duty to continuously supply electricity to the grid." *Id.* at *6. The Court went on to conduct a *Phillips* analysis to determine whether to recognize a duty owed by the

wholesalers to the customers, ultimately concluding that "imposing any new such duty on wholesale power generators is more appropriate for the Legislature." *Id.* at *10; *see Greater Hous. Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). The customers then filed two motions for en banc reconsideration.

Rule 91a states that a "cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." TEX. R. CIV. P. 91a.1. A Rule 91(a) motion to dismiss should "address the pleadings or the deficiency of any cause of action" and a court should not consider evidence. *AC Ints., L.P. v. Tex. Comm'n on Env't Quality*, 543 S.W.3d 703, 706 (Tex. 2018) (holding that Rule 91(a) motion to dismiss "was not the proper motion to file" when defendant asked court to dismiss appeal because plaintiff failed to comply with statutory requirement); *see In re Farmers Tex. Cnty. Mut. Ins. Co.*, 621 S.W.3d 261, 266 (Tex. 2021) (orig. proceeding); *see also ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858, 880 (Tex. 2018). To establish that there is no basis in law for a Rule 91(a) motion to dismiss, the

> defendant must show that recovery on the claims in the plaintiff's petition is foreclosed (i.e., that the plaintiff's recovery is impossible by necessary consequence of law) because either (1) the causes of action in the petition are not recognized by Texas law, or (2) the plaintiff has alleged facts that defeat those causes of action under settled law (i.e., the plaintiff has pleaded itself out of court. In other words, a claim is foreclosed as a matter of law where recovery by the plaintiff is legally impossible.

In re Shire PLC, 633 S.W.3d 1, 19 (Tex. App.—Texarkana 2021, orig. proceeding [mand. denied]) (holding that denial of Rule 91(a) was proper based on having basis in law because defendant did not establish that plaintiff's claims were legally impossible and that defendants' authority did not bar claim).

The panel's misprision of the scope and effect of Rule 91a leads the panel to answer a question it has not been asked. It has not been asked to determine whether the facts of a case, determined by a jury after a trial on the merits, support the recognition of a duty borne by the defendant, and other defendants similarly situated. *See Pagayon v. Exxon Mobil Corp.*, 536 S.W.3d 499, 504 (Tex. 2017) (cited by *Luminant Generation Co.*, 2023 WL 8630982, at *4, *7). Nor has it been asked, on permissive appeal, to write on a controlling question of law as to which there is a substantial ground for difference of opinion. *Elephant Ins. Co., LLC v. Kenyon*, 644 S.W.3d 137, 146 (Tex. 2022) (cited by *Luminant Generation Co.*, 2023 WL 8630982, at *4, *8–9). Rather, it has been asked whether under Texas law the causes of action asserted below have been **foreclosed**. *See FarmersTex. Cnty. Mut.*, 621 S.W.3d at 276 ("Rather, our holding is limited to the scope of Farmers' Rule 91a motion and clarifies a narrow issue: *Stowers* and the other principles of Texas insurance law cited by Farmers do not **foreclose** as a matter of law a claim for breach of contract against an insurer regarding its indemnity obligation." (emphasis added)); *see Davis v. Homeowners of Am. Ins. Co.*, No. 05-

21-00092-CV, 2023 WL 3735115, at *4 (Tex. App.—Dallas May 31, 2023, no pet.) (holding that "there is nothing before us to suggest that the causes of action pleaded have no basis in law because they are not cognizable under Texas law," and "nothing within [plaintiff's] pleading itself triggers a clear legal bar to their claims").

To "foreclose" means to "debar, prevent, hinder, preclude." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002). There is no authority suggesting that the customers' causes of action have been foreclosed. The best the wholesalers (and the panel) can do is assert that the particular causes of action asserted have not been recognized under Texas law—but that assertion is pregnant with a "yet." *See Luminant Generation Co.*, 2023 WL 8630982, at *5 ("Indeed, we are not aware of any controlling Texas authority under this current statutory scheme, and the retail customers have cited none."). The mere fact that the panel engages in a *Phillips* analysis to determine whether the wholesalers owe the customers duties under tort law demonstrates that the causes of action have not been foreclosed. *Hous. Area Safety Council, Inc. v. Mendez*, 671 S.W.3d 580, 583 (Tex. 2023) (considering *Phillips* factors to determine whether common-law duty exists). Neither the Texas Supreme Court nor the Legislature have decided whether a wholesale power generator owes a legal duty to continuously supply electricity to the grid. Thus, Texas law does not foreclose the customers' causes of action.

Stated simply: if our Texas Supreme Court has announced a cause of action does not exist in a circumstance, that cause of action has been foreclosed, and such a claim would rightly be dismissed under Rule 91a.[1] If the Supreme Court has not so ruled, and the claim is colorable enough to provoke multiple pages of *Phillips* analysis from an intermediate court, that claim has not been foreclosed, and is not susceptible to 91a dismissal. Any other rule would be tantamount to requiring pre-approval of causes of action lest they be dismissed before getting substantively under way or discovery could even start. The common law would be stifled, and could no longer develop to account for new interrelationships created by our increasingly complex economy.

* * *

War hero, United State Supreme Court Justice, and one of the most profound thinkers to contemplate the purpose and functioning of the common law, Oliver Wendell Holmes observed that "[t]he life of the law has not been logic; it has been

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[1] Presumably, if Texas law indeed precludes or forecloses the customers' causes of action, the panel could have and would have said so. *See, e.g.*, *Bethel v. Quilling*, 595 S.W.3d 651, 656 (Tex. 2020) (holding that, taking the plaintiff's allegations as true, "the trial court determined that . . . [the plaintiff] was not entitled to the relief sought because attorney immunity barred . . . [plaintiff's] claims."); *In re Hous. Specialty Ins. Co.*, 569 S.W.3d 138, 139 (Tex. 2019) (orig. proceeding) (holding that because Supreme Court decision bars plaintiff's legal malpractice claim, claims have no basis in law); *In re Essex Ins. Co.*, 450 S.W.3d 524, 525–26 (Tex. 2014) (orig. proceeding) (holding that because Texas law "prohibits a plaintiff from suing a defendant's liability insurer . . . until the defendant's liability . . . has been established[,]" and there were disputes of whether plaintiff was an employee, Texas law bars this claim so there is no basis in law).

experience." Oliver Wendell Holmes, THE COMMON LAW 5 (Little, Brown and Company 1963). The common law is judge-made; it develops through judicial decisions issued over time. Published opinions set forth holdings and the rationales for them. These decisions then become the raw material for deciding the appeals that follow.

Development over time is one of the chief virtues of a common law system. "[I]nherent in the common-law is a dynamic principle which allows it to grow and to tailor itself to meet changing needs within the doctrine of stare decisis, which, if correctly understood, was not static and did not forever prevent the courts from reversing themselves or from applying common-law to new situations as the need arose." *Brigance v. Velvet Dove Rest., Inc.*, 725 P.2d 300 (Okla. 1986). "[I]t is the strength of the common law to respond, albeit cautiously and intelligently, to the demands of common-sense justice in an evolving society." *Madden v. Creative Servs.*, 646 N.E.2d 780 (N.Y. 1995).

The Texas Supreme Court has long recognized this principle:

> As demonstrated by the actions of the majority of states, the common law is not frozen or stagnant, but evolving, and it is the duty of this court to recognize the evolution. *See Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 310 (Tex. 1983). Indeed, it is well established that the adoption of the common law of England was intended "to make effective the provisions of the common law, so far as they are not inconsistent with the conditions and circumstances of our people." *Grigsby v. Reib*, 105 Tex. 597, 153 S.W. 1124, 1125 (1913). Our courts have consistently made changes in the common law of torts as the need arose in a changing society. *See, e.g.*, *Sanchez v. Schindler*,

> 651 S.W.2d 249 (Tex. 1983) (recovery of loss of society and mental anguish allowed in response to needs of modern society); *Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex. 1978) (landowner's duty owed to tenants extends to guests); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967) (strict liability in tort expanded to include defective products); *Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942) (manufacturer of impure food liable for injuries in absence of negligence as a matter of public policy); *Hill v. Kimball*, 76 Tex. 210, 13 S.W. 59 (1890) (recognition of cause of action for infliction of emotional and mental distress).

El Chico Corp. v. Poole, 732 S.W.2d 306, 310–11 (Tex. 1987) (superseded by statute by *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 682 (Tex. 2007). More recently, Justice Boyd again reaffirmed this principle in his dissenting opinion in *Houston Area Safety Council*:

> [W]e have not rejected our longstanding recognition that "changing social standards and increasing complexities of human relationships in today's society" may "justify imposing a duty" the common law has not previously imposed. It remains true today that, because our society and its standards are constantly changing, "the common law is not frozen or stagnant, but evolving, and it is the duty of this court to recognize the evolution." When prevailing norms favor a change in the law, it is this Court's duty to recognize the tidal shift.

Houston Area Safety Council, 671 S.W.3d at 605 (citations omitted).

Even when precedent is clear that a certain cause of action has been foreclosed, the common law allows that to change. The costs of imposing a duty might fall dramatically as a result of technological advancement; the costs of a breach of a duty might rise exponentially. Karl Llewellyn called this flexibility, this capacity for evolution "the leeways of precedent." Karl N. Llewellyn, THE

COMMON LAW TRADITION: DECIDING APPEALS 62–91 (Little, Brown and Co. 1960). He notes that existing precedent does not necessarily dictate an outcome. *Id.* at 62. According to Llewellyn, "only in times of stagnation or decay does an appellate system even faintly resemble such a picture of detailed dictation by precedents. . . ." *Id.*

The common law is concerned with the resolution of conflicts as they arise, and as society grows more complex, new and different types of conflicts emerge. Because it is more flexible, it encourages economic growth in a way that a civil law system, based on legislative prescriptions and proscriptions that determine outcomes before the conflicts arise, cannot. *See* Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 JOURNAL OF LEGAL STUDIES 503–525 (2001); *see also* Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, *The Economic Consequences of Legal Origins*, National Bureau of Economic Research (November 2007), https://www.nber.org/system/files/working_papers/w13608/w13608.pdf. The common law's ability to grow and develop is not merely theoretically pleasing; it is also a crucial engine in economic growth. *See* Jim Harper, *Remember the Common Law*, Cato Institute (March/April 2016), https://www.cato.org/policy-report/march/april-2016/remember-common-law. Stifling the common law by not

allowing new duties and causes of action to develop over time will lead to legal ossification, and in turn economic stagnation.

* * *

The Texas Legislature rearranged the electricity generation and distribution markets in 2002, creating a raft of new economic relationships, benefits, duties, and obligations. Our common law should be allowed to grow to accommodate those changes. The panel's holding prevents that growth. Accordingly, I dissent from this Court's denial of the motions for en banc reconsideration.

Peter Kelly
Justice

The en banc court consists of Chief Justice Adams and Justices Kelly, Landau, and Hightower.

Justices Goodman, Countiss, Rivas-Molloy, Guerra, and Gunn, not sitting.

Justice Kelly, dissenting to the denial of en banc reconsideration.

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