

In The
Supreme Court of the United States

—◆—
THE ARANSAS PROJECT,

Petitioner,

v.

BRYAN SHAW, as Chairman of The Texas
Commission on Environmental Quality, et al.,

Respondents.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

—◆—
**BRIEF OF THE OFFICE OF VINCE RYAN,
HARRIS COUNTY ATTORNEY AS
AMICUS CURIAE IN SUPPORT OF
PETITIONER'S WRIT OF CERTIORARI**

—◆—
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**AMICUS CURIAE BRIEF OF THE
OFFICE OF VINCE RYAN, HARRIS COUNTY
ATTORNEY, IN SUPPORT OF PETITIONER'S
WRIT OF CERTIORARI¹**

Pursuant to Supreme Court Rule 37.2, the Office of Vince Ryan, Harris County Attorney (Harris County Attorney), respectfully submits this brief as amicus curiae in support of the Petitioner's, The Aransas Project, Petition for Writ of Certiorari.



INTERESTS OF THE AMICUS CURIAE

The Office of Vince Ryan, Harris County Attorney is the attorney for Harris County, Texas, a political subdivision of the State of Texas. The Harris County Attorney represents Harris County, its agencies, its Officials, and its employees in all civil matters filed in both state and federal court. As litigators in the federal courts of the Southern District of Texas and the Fifth Circuit Court of Appeals, the Harris County Attorney's Office has an interest in the proper application of the standards of review and the potential usurpation of the fact finder's role by appellate courts. Since the Harris County Attorney's Office initiates and defends suits in federal district court, the Fifth Circuit's decision may adversely affect

¹ Counsel for all parties received notice, at least 10 days prior to the due date of this brief, of amicus curiae's intention to file. All parties consent to the filing of this brief.

future suits in federal district court by the Harris County Attorney.

Moreover, the interest of the Harris County Attorney in this matter arises from its similarly situated position with the Petitioners. Just as the Petitioners in this case are fighting to stem the erosion of a habitat that brings richness to their lives and waterways, the Harris County Attorney must be ever vigilant against forces that would erode the uniqueness of lives near Galveston Bay.



STATEMENT OF THE CASE

The Harris County Attorney adopts the Introduction and Statement of the Case contained in the Petitioner's, The Aransas Project, Petition for Writ of Certiorari.



SUMMARY OF THE ARGUMENT

The Fifth Circuit's decision involves the flouting of established federal appellate procedure – Rule 52(a) of the Federal Rules of Civil Procedure, which provides that findings of fact must not be set aside unless they are clearly erroneous, thus helping to prevent the retrial of cases on appeal. The Fifth Circuit disregarded established federal procedure and embarked on its own fact-finding mission. It improperly reversed the opinion of the federal district court,

amounting to a retrial of the case on appeal in direct conflict with Rule 52(a).

This Court's review of the Fifth Circuit's decision involves the re-establishment of distinct roles of federal appellate courts and trial courts. It is the role of the trial courts – not the appellate courts – to engage in fact finding. While a trial court is charged with fact finding and determining the credibility of witnesses, the appellate court reviews and resolves legal issues when it “is left with the definite and firm conviction that a mistake has been committed” by the trial court. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). But this does not entitle the appellate court to reverse a decision of the trial court “because it is convinced it would have decided the case differently.” *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985).

Here, the Fifth Circuit adopted the distinct role of fact finder and reversed the decision of the trial court inconsistent with established federal procedure. If the Fifth Circuit's decision were to remain undisturbed, then its decision could wreak havoc on future litigants in federal district courts because the appellate court would be free to reverse a trial court's decision simply based on the fact that “it would have weighed the evidence differently.” *Id.* at 574. It would essentially toss aside the standards set out in Rule 52(a) and this Court's previous rulings, thus, undermining the trial court's role as fact finder. If allowed to stand, the Fifth Circuit's decision will have an

adverse effect on future litigants in the federal district court system.



ARGUMENT

I. THE FIFTH CIRCUIT EMBARKED ON A FACT FINDING MISSION IN CONFLICT WITH RULE 52 DISREGARDING THE DISTINCT ROLE OF THE TRIAL COURT AS FACT FINDER AND IMPROPERLY REVERSED THE JUDGMENT OF THE DISTRICT COURT.

The Fifth Circuit improperly embarked on a fact finding mission in conflict with Rule 52(a) of the Federal Rules of Civil Procedure disregarding the distinct role of the trial court as fact finder. Both the trial court and appellate court have distinct roles that are well established by this Court. The trial court's main role is that of fact finder and determining the weight of the evidence. *Id.* at 574. The appellate court's role is to review and resolve the legal questions presented. *Salve Regina College v. Russell*, 499 U.S. 225, 232 (1991). In this case, the Fifth Circuit found that the district court had an erroneous view of the law. Instead of remanding the case to the district court – the proper remedy – the Fifth Circuit departed from its role established by this Court and embarked on a fact-finding mission. Based on its additional factual findings, the Fifth Circuit replaced the district court's opinion with its own.

A. The Fifth Circuit's Decision Conflicts with Established Federal Procedure.

The Fifth Circuit's decision conflicts with established federal procedure. Rule 52(a) mandates that a reviewing court must not set aside a trial court's findings of fact unless those findings are clearly erroneous, "and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses." Fed. R. Civ. P. 52(a)(6). A clearly erroneous standard of review requires an appellate court to "uphold any district court determination that falls within a broad range of permissible conclusions." *Cooter Gell v. Hartmarx Corp.*, 496 U.S. 384, 400 (1990). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left [sic] with the definite and firm conviction that a mistake has been committed." *U.S. Gypsum Co.*, 333 U.S. at 395. Accordingly, a reviewing court may not reverse the decision of a trial court merely because it would have decided the case differently. *Anderson*, 470 U.S. at 573.

The Fifth Circuit weighed facts in direct conflict with Rule 52(a). The misapplication of this rule of procedure amounted to a fact-finding mission and disregarded the district court's role. In doing so, the Fifth Circuit questioned the district court's ability to make final determinations based on the evidence presented at trial. The dissenting opinion in the Fifth Circuit's denial of a rehearing en banc sounded the alarm on the Fifth Circuit's misapplication of Rule 52 and improper engagement in fact finding amounting

this course of action to “an alarming lack of trust in the work of our colleagues in the district courts.” *Aransas Project v. Shaw*, 774 F.3d 324, 331 (5th Cir. 2014) (Prado, J., dissenting). Prior to the 1985 Amendments to Rule 52(a), the Committee on Rules of Practice and Procedure and the Advisory Committee on Federal Rules of Civil Procedure specifically commented that “[t]o permit courts of appeals to share more actively in fact-finding function, would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.” Fed. R. Civ. P. 52 advisory committee’s note.

A reviewing court “oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court.” *Anderson*, 470 U.S. at 573. In the course of its review, the Fifth Circuit overstepped “the bounds of its duty under Rule 52(a)” by duplicating the role of the district court. *Id.* The trial on the merits was an eight-day bench trial in which the district court “watch[ed] ninety-plus hours of videotape and weighed the credibility of the competing expert witnesses. . . .” *Aransas Project*, 774 F.3d at 332 n.1. The Fifth Circuit disregarded expert witness credibility and a report of the U.S. Fish and Wildlife Service. The Fifth Circuit then engaged in a de novo review of the record by making independent conclusions of factual findings under the guise of its legal determinations for proximate cause. “In applying the clearly erroneous standard to the findings of a

district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide the factual issues de novo.” *Anderson*, 470 U.S. at 573 (citing to *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)).

For example, the district court held that the effect of water-permitting on freshwater inflows resulted in a takings of the whooping cranes in violation of the Endangered Species Act. *Aransas Project v. Shaw*, 930 F. Supp. 2d 716, 780 (S.D. Tex. 2013), *rev’d*, 756 F.3d 801 (5th Cir. 2014), *opinion amended and superseded*, 775 F.3d 641 (5th Cir. 2014). Its claim that this effect was foreseeable was based on the 2007 U.S. Fish and Wildlife Service International Whooping Crane Recovery Plan report which noted that “[u]pstream reservoir construction and water diversions for agriculture and human use reduce freshwater flows.” *Aransas Project v. Shaw*, 775 F.3d 641, 661 (5th Cir. 2014). Yet, despite the evidence and the testimony of credible, supporting witnesses, the Fifth Circuit found that this statement was not an indication of foreseeability to establish proximate cause. Instead, it found that “many existing water rights are currently only partially utilized. . . .” *Id.*

The Fifth Circuit also noted that other factual contingencies were purportedly “all outside of the state’s control and often outside of human control.” *Id.* at 661. In addition, necropsies produced as evidence at trial found that two whooping cranes died from emaciation that resulted in the decline of the whooping crane’s food source, which was due to the

decline of freshwater inflows. *Id.* at 660. Yet the Fifth Circuit invalidated the evidence when it found that the necropsy evidence did not matter because the whooping crane population continued to increase. *Id.*

Rule 52(a) mandates that an appellate court give due regard to the credibility determinations of the trial court. The Fifth Circuit disregarded the district court's credibility determinations including the necropsy evidence that pointed to the decline in freshwater inflows as a source of the whooping crane's death and came to its own conclusion based on new factual findings. Thus, the Fifth Circuit's fact finding mission and reversal of the district court's decision violated the express commands of Rule 52(a) and changed the outcome of the case.

B. The Roles of the Trial Court and Appellate Court are Distinct and Well Established by this Court.

The Fifth Circuit's reversal of the trial court's decision in this matter is a dramatic departure from the distinct and well established roles of the trial court and the appellate court. Trial courts have the responsibility of fact finding and a trial judge's most important role is the determination of fact. *Pullman-Standard v. Swint*, 456 U.S. 273, 291-292 (1982) (quoting *DeMarco v. U.S.*, 415 U.S. 449, 450 (1974)); *Anderson*, 470 U.S. at 574. There is a longstanding consensus that the trial court is in a better position to determine the facts. In 1930, the New York Court of

Appeals articulated this concept well. “Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of a [trial judge’s] power of observation often proves the most accurate method of ascertaining the truth.” *Boyd v. Boyd*, 169 N.E. 632, 634 (N.Y. 1930).

This Court recognized that an appellate court does not possess firsthand expertise to weigh purely factual issues presented in trial courts. *Berenyi v. Dist. Dir., Immigration & Naturalization Serv.*, 385 U.S. 630, 636 (1967). In fact, it is the trial court that devotes most of its time and energy “to the hearing of witnesses and reviewing evidence,” and has less time to “resolve complicated legal questions.” *Salve Regina College*, 499 U.S. at 232. However, “with the record having been constructed [in the trial court] and settled for the purposes of the appeal,” appellate courts are “structurally suited” and “appellate judges are able to devote their primary attention” and lend their expertise to resolve any legal questions presented. *Id.* Additionally, any duplication of a trial court’s role as fact finder is inefficient and leaves room for inaccuracies in an appellate court’s fact determination. *Anderson*, 470 U.S. at 775.

C. The Fifth Circuit Departed from the Distinct Roles Established by this Court when it Engaged in a Fact-Finding Mission and Reversed the Trial Court Decision.

In reversing the trial court's decision, the Fifth Circuit departed from the distinct roles established by this Court. In *Icicle Seafoods, Inc. v. Worthington*, the Ninth Circuit Court of Appeals reversed a district court's determination that certain employees were exempt from overtime under the Fair Labor Standards Act. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 710 (1986). Because the Ninth Circuit based its reversal of the trial court's decision on its own "fact finding," this Court granted certiorari and ultimately reversed and remanded the decision of the appellate court. *Id.* This Court noted that the court of appeals reviewed the district court's findings under the clearly erroneous standard but ignored the district court's own factual determinations that the employees were exempt under the Act. *Id.* at 713. The appellate court duplicated the role of the trial court by making its own factual findings. *Id.* at 714. This Court found the appellate court "was mistaken to engage in such fact finding" and "should not simply have made factual findings on its own." *Id.*

Similarly, the Fifth Circuit duplicated the role of the trial court by "egregiously" reweighing the facts of the case. *Aransas Project*, 774 F.3d at 327. Even after the district court judge made specific determinations of the credibility of ten expert witnesses who appeared

during the course of an eight-day bench trial, the Fifth Circuit “simply [discarded] these credibility determinations without explanation.” *Id.* The Fifth Circuit found that the trial court “maintained an erroneous view of proximate cause” and that foreseeability was an inherent factor in determining proximate cause. *Aransas Project*, 775 F.3d at 658. The Fifth Circuit then conducted its own fact-finding mission to determine foreseeability, ignoring the district court’s own factual determinations. Just as this Court found the appellate court in *Icicle Seafoods* mistaken when it engaged in “such fact finding,” this Court should also find the Fifth Circuit similarly misguided in its approach. *Icicle Seafoods*, 475 U.S. at 714.

The Fifth Circuit should have remanded in this case. Instead of remanding the case to the district court, as this Court requires, the Fifth Circuit entertained additional factual findings to determine whether the Endangered Species Act “take” was foreseeable. *See Pullman-Standard*, 456 U.S. at 291 (holding “when an appellate court discerns that a district court has failed to make a findings because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings.”); *See also, Icicle Seafoods*, 475 U.S. at 714 (holding “[i]f the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings.”).

Not only did the Fifth Circuit disregard credible expert witness testimony – it also decided that the 2007 U.S. Fish and Wildlife Service International Whooping Crane Recovery Plan failed to satisfy The Aransas Project’s burden of proof “that this drought or its severity was foreseeable.” *Aransas Project*, 775 F.3d at 661. Instead, the appellate court made its own factual findings regarding variable weather contingencies, the state’s macro level control over water usage, the use of water by individuals, tides and temperature conditions including Texas drought conditions, the decrease in freshwater inflows, and the varying population of the blue crab. *Id.* at 661-662. An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the appellate court might construe the facts differently. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 857-858 (1982). The Fifth Circuit was not at liberty to substitute its own conclusions for those of the trial court and render its own judgment in the matter. Instead, the Fifth Circuit should have remanded the case to the district court “to make findings of fact essential to a proper resolution of the legal question.” *Icicle Seafoods*, 475 U.S. at 714.

II. THE FIFTH CIRCUIT’S OPINION, IF NOT REVERSED BY THIS COURT, WILL HAVE AN ADVERSE EFFECT ON FUTURE LITIGANTS IN FEDERAL DISTRICT COURT.

If allowed to stand, the Fifth Circuit’s decision will have an adverse effect on future litigants in

federal district court. As the dissenting opinion for the Fifth Circuit's denial of the rehearing en banc noted, "if uncorrected by . . . the Supreme Court, this decision and others like it, sends a clear message to litigants: if you don't like the factual findings of a district court, the doors of our Court are wide open to endless retrials on appeal." *Aransas Project*, 774 F.3d at 326. Affirming the Fifth Circuit's de novo review sends the message that the district court is incapable of rendering sound judgment. Plaintiffs will have less confidence that a district court's outcome will stand, that evidentiary determinations at the district court level matter, and that appellate costs will not rise simply because the appellate court disagrees with some of the district court's factual findings, would construe some facts differently, or disagrees with the ultimate outcome.

The effect of the Fifth Circuit's decision could potentially diminish the effort and energy that a trial attorney would expend during a trial on the merits if the Fifth Circuit is allowed to establish that an appellate court can simply overturn a ruling if it does not agree with the judgment of the district court. As this Court previously stated, "the trial on the merits should be the main event . . . rather than a 'tryout on the road.'" *Anderson*, 470 U.S. at 575. "The parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is a correct one; requiring them to persuade three more judges at the appellate level is requiring too much." *Id.*

As litigators in federal district courts, the Harris County Attorney's Office, also has an interest in the proper application of appellate standards of review. The Harris County Attorney's Office represents Harris County in civil matters in both state and federal courts. The potential of the Fifth Circuit to usurp the fact finders' role and undermine the decision-making authority of district court judges could adversely affect future suits initiated or defended by the Harris County Attorney's Office. For example, injunctive relief afforded to Harris County against criminal enterprises or toxic environmental polluters could be reversed simply because the appellate court "would have weighed the evidence differently." *Anderson*, 470 U.S. at 574.

In addition, the Fifth Circuit's decision has the ability to subject Harris County to repeated litigation and endless trials on appeal; a costly burden on the County and its tax payers. The inconsistent application of the standard of reviews in appellate courts and the unpredictability of the appellate courts' willingness to reverse a district court judgment based on a difference of opinion has the potential to result in substantial harm to litigators, plaintiffs, and defendants. Allowing the Fifth Circuit the freedom to toss aside the standards set out in Rule 52(a) of the Federal Rules of Civil Procedure, and undermine the trial court's role as fact finder simply because the appellate court does not agree with the outcome, will wreak havoc for future litigants in federal district courts.



CONCLUSION

The Fifth Circuit's decision in this case erodes an important federal standard of review for appellate courts and diminishes the proper and distinct roles of trial and appellate courts. If left undisturbed, the Fifth Circuit's decision will undermine the ability of the district court to render judgment in a matter and wreak havoc on future litigants in the federal district court system. For each of the foregoing reasons, the Harris County Attorney's Office respectfully requests that the Aransas Project's Petition for Writ of Certiorari be granted and that the decision of the Fifth Circuit be reversed.

Respectfully submitted,

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