



RECENT CASES:
U.S. FIFTH CIRCUIT
and
DALLAS COURT OF
APPEALS



DAVID S. COALE
Dallas Bar Association
June 12, 2025

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In The
Court of Appeals
Fifth District of Texas at Dallas

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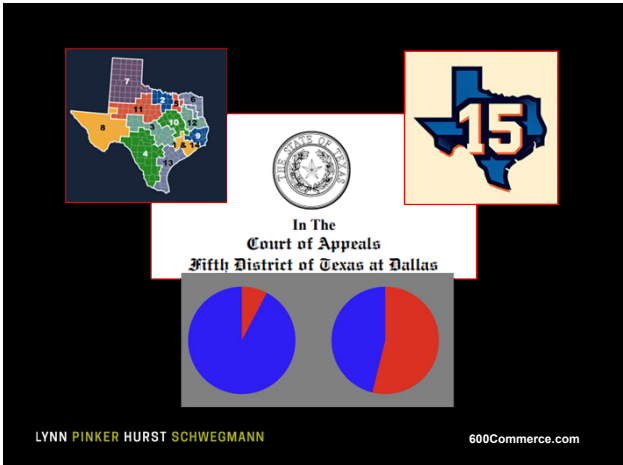


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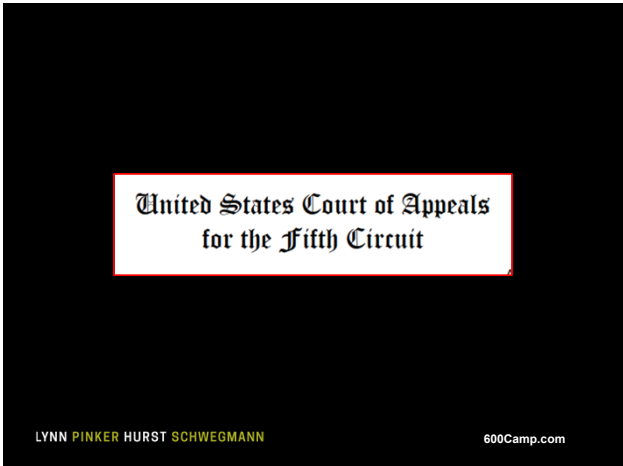
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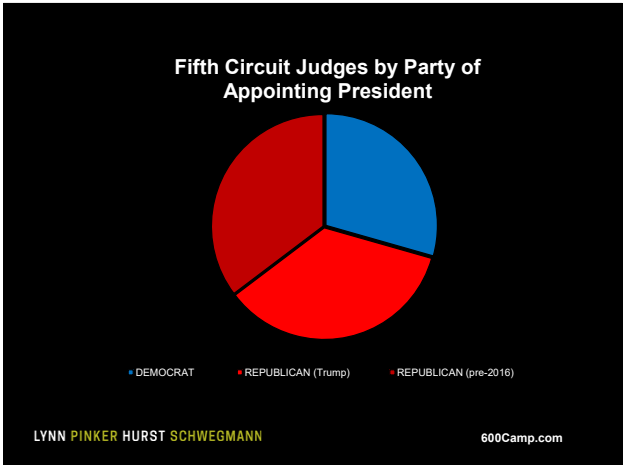
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Trump-appointed judges are shifting the country's most politically conservative circuit court further to the right

The Washington Post
Breaking News: Politics

Trump's lasting legacy on the judiciary is not just at the Supreme Court

By Ann E. Marston
January 26, 2023 at 9:00 a.m. EST

United States Court of Appeals for the Fifth Circuit

The Rogue Court That Paved the Way for Roe's Demise

Four judges on the Fifth Circuit are spearheading a partisan movement to redefine constitutional precedent. All of them got their start in Texas politics.

By Michael Hall
September 2022

The Trumpiest Federal Appeals Court Did Something Truly Beyond the Pale

BY MARK JOSEPH STEIN
OCT 20, 2022 - 4:56 PM

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United States Court of Appeals for the Fifth Circuit

Jacqueline Thomson
Reporter

- Constitutional challenges to agencies could still be heard
- Court will take up cases on Texas laws, Musk's X

The Fifth Circuit won't miss out on all major litigation during the next four years, even as the conservative appeals court is expected to lose its status as a go-to spot to challenge federal policies during Donald Trump's upcoming presidential term.

The New Orleans-based appeals court heard major federal challenges during the first Trump administration. It struck down the Affordable Care Act in a ruling later overturned by the Supreme Court, and found that the structure of the federal Housing Finance Agency was unconstitutional.

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PERSONAL JURISDICTION

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Ethridge v. Samsung,
137 F.4th 309 (5th Cir. 2025)

- "Since January 2019, Samsung has shipped 18650 batteries to **Black & Decker's Texas manufacturing facility** to be incorporated into sealed power tool battery packs."
- "For a number of years (at all times relevant to this litigation), Samsung has also shipped 18650 batteries to **HP and Dell** to be used as samples or for laptop repairs in their Texas service centers."
- "Samsung sells 18650 batteries to **'sophisticated and qualified' businesses**, which typically use them in battery packs. Some of these battery packs end up in products that are sold to Texas consumers."



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Ford Motor Co. v. Montana 8th District Court,
592 U.S. 351 (2021)

"In conducting so much business in Montana and Minnesota, Ford 'enjoys the benefits and protection of [their] laws—the enforcement of contracts, the defense of property, the resulting formation of effective markets. ... **All that assistance to Ford's in-state business creates reciprocal obligations**—most relevant here, that the car models Ford so extensively markets in Montana and Minnesota be safe for their citizens to use there."



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Ethridge v. Samsung,
137 F.4th 309 (5th Cir. 2025) (dissent)

"[A]n unbroken string of Supreme Court cases, with a recent, narrow exception in *Ford*, focus on the purposeful actions of the defendant in a forum state. ... [B]ecause Ethridge purchased the battery for his vape pen through **a channel that Samsung never authorized**, the fact of his injury should not make Texas a valid forum consistent with Due Process."



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Western Trails Charters & Tours LLC v. Provance,
No. 05-24-01089-CV (Tex. App.—Dallas May 29, 2025)

"We conclude that the liability allegations in this case are **principally concerned with the driver's operation of the bus in Utah** and SLE's conduct in employing the driver and otherwise providing the bus transportation in question. ... Appellees do not allege that SLE's allegedly tortious conduct relating specifically to this bus driver and this bus took place in Texas. Although appellees refer to violations of Texas motor-vehicle regulations, we do not see how those regulations are relevant to a Utah bus accident that occurred during travel from Boise, Idaho, to Salt Lake City, Utah."



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Conexiones Tornado v. Ramirez de Munoz,
No. 05-23-00353-CV (Tex. App.—Dallas Sept. 23, 2024)

"The facts before us are different, as Appellees allege that they suffered an out-of-state injury because of Conexiones's negligence in operating a bus, the tickets for which were advertised and sold in Texas. Unlike Montana and Minnesota in *Ford Motor Co.*, **Texas has no interest in regulating the operation of a Mexican bus on Mexican roads by a Mexican driver.**"



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**SUBJECT MATTER
JURISDICTION:
DIVERSITY**

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Cook v. Marshall,
126 F.4th 103 (5th Cir. 2025)



"No authority says we must also consider the citizenship of non-party trustees. To the contrary, consider how the Seventh Circuit approached this issue ... [holding that] **a non-party co-trustee's citizenship was irrelevant to diversity jurisdiction** because "traditional trusts ... were not considered distinct legal entities at common law, and hence cannot sue or be sued in their own name."

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INJUNCTIONS

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Totus Group, LLC v. Pruitt Family Living Trust,
No. 05-23-01222-CV
(Tex. App.—Dallas Feb. 14, 2025)

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Defendants, Totus Group, LLC, Totus Holdings, LLC and Totus Management LLC together with all of their Agents as defined herein, are hereby enjoined and prohibited from directly or indirectly




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Totus Group, LLC v. Pruitt Family Living Trust,
No. 05-23-01222-CV
(Tex. App.—Dallas Feb. 14, 2025)

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10. Failing to fund to the fullest extent on any note, security, guaranty, agreement or other loan document between any Defendants and/or between any Defendants and any of its Agents;



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Totus Group, LLC v. Pruitt Family Living Trust,
No. 05-23-01222-CV
(Tex. App.—Dallas Feb. 14, 2025)

granted. The Plaintiffs have shown that the Defendants have already engaged in conduct that has violated their agreements with the Plaintiffs and are violating Plaintiffs' interests and investment with respect to Totus Group, LLC, its wholly owned subsidiary, Totus Gift Card Management, LLC, and that unless the Defendants are restrained from any further such conduct, the Plaintiffs will suffer irreparable injury for which there is no adequate remedy at law.

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12. From interfering any Plaintiff or their trustees, agents, owners, representatives or beneficiaries to this lawsuit.




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Luxottica of Am., Inc. v. Gray,
No. 05-23-00020-CV
(Tex. App.—Dallas May 5, 2025)

(a) Interfere in any way with Plaintiffs' business operations at Store Nos. 8655 including, but not limited to, prohibiting the use of the Pearle Vision System and the Marks (as defined), or contacting any third party such as Google or Warrantech and informing them that any of Plaintiffs locations are closed;



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Hipps v. CBRE, Inc., No. 05-24-00056-CV
(Tex. App.—Dallas Aug. 15, 2024)

"CBRE distinguishes our holdings in *Computeek* and *McCaskill* on the ground that in both cases, **the employee was not the only party enjoined from contacting former clients**; the injunctions included the employees' new employers who 'cannot be presumed to have knowledge of who [the employees] interacted with as a client' at their former businesses."

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Hipps v. CBRE, Inc., No. 05-24-00056-CV
(Tex. App.—Dallas Aug. 15, 2024)

"In sum, we conclude that the Amended Order has alleviated the issues Hipps has identified. **The amendments clarify the activities restrained** by adding language from the RCA and EA and attaching both agreements to the Amended Order. The amendments also add specific time limitations to paragraphs 12.a through 12.k, and further define the category of "CBRE Clients" who may not be solicited."

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SpaceX v. NLRB,
129 F.4th 906 (5th Cir. 2025)



"Appeal cannot be achieved simply by asserting that the trial court has failed to act as promptly as wished by a party seeking an injunction. ... **The district court did not effectively deny the motion** for injunctive relief in failing to rule during months of procedural challenges—and within a week of SpaceX's first request for expedited consideration."

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ARBITRATION

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U.S. Trinity Energy Services, L.L.C. v. Southeast Directional Drilling, L.L.C.,
135 F.4th 303 (5th Cir. 2025)

"Grafting 'manifest disregard of the law' as a basis for a losing party at arbitration to prevail under § 10(a)(4) would risk tension with Hall Street—and would run headlong into Oxford Health—by forcing us to conduct a less deferential review of a panel's award than the FAA contemplates. Indeed, **adopting [Appellant's] reading essentially would rewrite the question a judge must ask** from 'whether the arbitrators construed the contract at all' to 'whether they construed it correctly.'"



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Baker Hughes Saudia Arabia Co. v. Dynamic Indus., Inc.,
126 F.4th 1073 (5th Cir. 2025)



"[T]he core dispute is novel, at least in this circuit: **whether a designated forum remains available where a functionally identical successor forum exists.** ... Decree 34, by its very terms, 'abolished' the DAI, which administered the DIFC-LCIA. That seems like strong evidence that the forum no longer exists. But the counter-argument is far from frivolous. The DIFC-LCIA's successor institution, the DIAC, is functionally identical to its predecessor in many key respects."

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Exencial Wealth Advisors LLC v. Sipes,
No. 05-24-00964-CV (Tex. App.—Dallas Jan. 31, 2025)

"Exencial offered only an affidavit from the company's Chief Operating Officer regarding his familiarity with a 2021 operating agreement. While this affidavit may be sufficient to authenticate the 2021 operating agreement by way of the affiant's position and personal knowledge that an operating agreement existed, the testimony is insufficient to determine whether Sipes was bound to it. Additionally, Exencial asserted Sipes did sign the operating agreement but did not offer the signed version into evidence: **"We have a signature. Again, it's not in evidence today. We do have a signature that we can admit into evidence where she did agree to it."**



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SUMMARY JUDGMENT

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Exporttek, Inc v. Vista Bank,
No. 05-24-00915-CV (Tex. App.—Dallas Apr. 24, 2025)

"These general and conclusory assertions do not satisfy the requirements of Rule 252. At best, Borrowers provided a vague description of the discovery they sought. Further, Borrowers failed to establish the materiality of any proposed discovery. Borrowers' claims are for breach of contract and the contract at issue contained entire-agreement and no-waiver provisions. **Motivations are not germane to the resolution of Borrowers' breach of contract claims.** Moreover, Borrowers did not provide any information regarding the diligence on their part in obtaining discovery prior to the hearing.



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Elsell v. Encore Wire Corp.,

No. 05-23-00588-CV (Tex. App.—Dallas March 14, 2025)

*"Bouchard's heavy reliance on the credibility of Davis, given Davis's own termination by Encore for document fraud and dishonesty, raises genuine issues of material fact as to whether (1) Bouchard actually considered Davis to be credible, (2) Bouchard actually grounded his decision to fire Elsell on Davis's above-described record of credibility, and (3) Bouchard actually decided to fire Elsell for the stated reason that Elsell lied. ... Additionally, **reasonable and fair-minded persons could differ** on whether Bouchard's stated reason for firing Elsell was actually based on an interview of Elsell that was objectively brief, conjectural, and uninformed."*

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SEALING



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8fig, Inc. v. Stepup Funny, LLC,
135 F.4th 285 (5th Cir. 2025)

*"The public has a common law right of access to judicial records.' ... A court may seal a judicial record only on a **case-by-case, document-by-document, line-by-line** basis and must balance 'the public's common law right of access against the interests favoring nondisclosure.'"*



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PRESERVATION OF ERROR

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*Santander Consumer USA v.
Enterprise Fin. Group,*
No. 05-23-0770-CV (Tex. App.—Dallas Jan. 3, 2025)

"The use of a **global denial** of objections and requests based solely on the parties' pretrial submission of proposed jury charges **does not preserve issues** of charge error for appellate review."

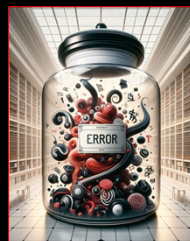


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J.A. Masters Investments v. Beltrami,
117 F.4th 321 (5th Cir. 2025)

"Plaintiffs' objection to Mauro's testimony cannot be squared with their later assent to admit Joint Exhibit 1, an exhibit that included Mauro's expenses calculations—the **same exact content of his testimony**. Plaintiffs have therefore waived any right to complain about it on appeal."



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SUPPOSITORIES

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Zyla Life Sciences v. Wells Pharma,
134 F.4th 326 (5th Cir. 2025)

"[P]reemption doctrine comes from the Supremacy Clause. But as the Supreme Court explained over a century ago, when state law mirrors federal law, it 'recognizes the supremacy of the national law' by 'conform[ing] to it.'"



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CONTRACTS: RED FLAGS



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Luxottica of Am., Inc. v. Gray,
No. 05-23-00020-CV
(Tex. App.—Dallas May 5, 2025)

- “The assignment agreement for each store, signed in June 2016 by Luxottica and Brave Optical, indicated that Brave Optical is **familiar with all obligations being assumed**’ under the license agreement and ancillary agreements and that it ‘irrevocably and absolutely assumes each and every duty and obligation of [Gutman Vision].’”
- “The license agreement for each store states, **‘No representations or warranties have been made** by [Luxottica] regarding Franchisee’s future success relating to the Franchise Business, and Franchisee did not rely on any incidental statements about success made by [Luxottica], its affiliates or employees.’”
- “The purchase agreement contained an **‘as-is’ provision** (stating, in part, the business/property is being conveyed ‘AS IS WHERE IS, WITHOUT WARRANTY EXPRESSED OR IMPLIED’) ... and made the sale contingent on the results of due diligence by appellees ...”

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CONTRACTS:
INTERPRETATION

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Equistar Chemicals v. Indeck Power Equip.,
No. 21-20345 (5th Cir. Apr. 23, 2025)

In the event [Equistar] disputes any invoice amount, [Equistar] may ... without waiver of any of its rights, including the right to seek reimbursement, pay the disputed amount and later seek reimbursement. In the event of a dispute, the Parties will promptly attempt to resolve the dispute

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(requirement that notices be in writing)

“[T]here is no conditional language connecting that notice requirement to Equistar’s ability to seek a contractual remedy. Article 8(b) does not use the words “if,” “provided that,” “on the condition that,” “prior to,” or any other similar phrase to create a condition. It also does not limit Equistar’s ability to exercise its contractual remedies. In other words, **there is no link between a condition precedent (notice) and a conditioned obligation (suing for breach of warranty or contract).**”

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Keiland Constr. Weeks Marine,
109 F.4th 406 (5th Cir. 2024)

COMPENSATION: As full consideration for the satisfactory performance by [Keiland] of this subcontract, [Weeks] shall pay to [Keiland] compensation in accordance with the prices set forth below.

[Keiland] shall be entitled to the actual and necessary expense of finishing its Work through the date of termination, the actual and necessary expenses of withdrawing from the Project site, and twenty-one percent (21%) for overhead and profit associated with its Work through the date of termination

"Keiland's reading, that the sections required compensation for pre-termination work on a lump-sum basis and post-termination work on a cost-plus basis, is plausible. **But so is Weeks's**, namely that Section 9 operated to convert all compensation due Keiland to cost-plus upon termination—particularly given that Section 9 specifies payment for 21% of costs "for overhead and profit associated with Work through the date of termination."

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ECONOMIC LOSS RULE

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Wal-Mart Stores, Inc. v. Xerox State & Local Solutions, Inc., No. 05-18-01421-CV
(Tex. App.—Dallas Dec. 12, 2024)

"It is inappropriate for the courts of Texas to disrupt the system of agreements of the different states with Xerox for protection of those states' retailers. Nor is it appropriate for Texas's courts to provide common-law protection for Wal-Mart when the statutes, regulations, and contracts governing the SNAP EBT program failed to do so. We conclude **the economic loss rule precludes our finding Xerox had a general common-law duty** to prevent Wal-Mart's losses from the store-and-forward transactions"



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DAMAGES

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Layla's Day Spa, Inc. v. HD Salon Group, LLC,
No. 05-24-00065-CV, (Tex. App.—Dallas May 21, 2025)



"[C]alculation of lost-profit damages must be based on net profits, not on gross revenue or gross profits."

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FINALITY

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McConathy v. Foundation Energy Fund, 111 F.4th 574 (5th Cir. 2024)

"AWI's position elides the distinction between 'finality' for the purposes of appealability and 'finality' for the purposes of res judicata. These are related, but separate concepts. Thus, **'finality for purposes of appeal is not the same as finality for purposes of preclusion.'**"

... Res judicata does not tie a bankruptcy court's hands to prevent the protection, disposition, or sale of estate property by lifting or modifying the automatic stay as changed conditions warrant."



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SANCTIONS / CONTEMPT

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ALFORD v. STATE. (No. 801).
(Court of Criminal Appeals of Texas. May 15, 1984).

Appeal from Hamilton county court; J. O. McCall, judge.

J. O. McCall was convicted of violating the laws against rape and sexual abuse. J. O. McCall, for appellant. Mark T. Davis, for the state.

DAVIDSON, J. This is a summary judgment case. The state has the burden of proof to show that the defendant is guilty of the crime charged. The state has failed to do so. The judgment is reversed, and the case is remanded to the county court for a new trial.

HURST, P. J., agrees.

VOUGHT v. STATE.
(Court of Criminal Appeals of Texas. May 15, 1984).

Appeal from Hamilton county court; J. O. McCall, judge.

J. O. McCall was convicted of violating the laws against rape and sexual abuse. J. O. McCall, for appellant. Mark T. Davis, for the state.

DAVIDSON, J. This is a summary judgment case. The state has the burden of proof to show that the defendant is guilty of the crime charged. The state has failed to do so. The judgment is reversed, and the case is remanded to the county court for a new trial.

HURST, P. J., agrees.

SEARCH

NEWS & COURTS

A Dallas lawyer cited cases appellate judges hadn't heard of. Did AI make them up?

The actions and declarations of the donor, coupled with the acceptance by the donee, were sufficient to establish constructive delivery, making the gift valid.

The facts in this case are similar to those found in *Gustaf v. Moore* in that the Rochens did everything they could to prospectively effectuate their estate planning wishes and transfer the gifted items with the following actions:

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“Signifier”



“Signified”



Derrida
and
Différance

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LEGAL WRITING


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Thryv, Inc. v. NLRB,
102 F.4th 727 (5th Cir. 2024)

effectively). And in any event, unlike the union in *Raven Services*, the Union in this case was not seeking information for the purpose of bargaining on a successor CBA. So it is far from obvious that the Union’s position actually follows from *Raven Services*.

* * *



Dinkus

In sum, Thryv’s layoffs were lawful so long as Thryv and the Union remained at overall impasse on September 20. The Board failed to justify its finding that CBA negotiations had resumed by that date. The Board’s and the Union’s other arguments are similarly unavailing, so we vacate the Board’s no-impasse finding.

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DIFFICULT CONSTITUTIONAL ISSUE

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Little v. Llano County,
106 F.4th 426 (5th Cir. 2025) (en banc)

- **Majority:** "We hold that plaintiffs cannot challenge the library's decision to remove the 17 books by invoking a right to receive information. Their Free Speech claims must therefore be dismissed."
- **Concurrence:** "[W]hen a government funds and operates a museum, it necessarily acts as a curator for the public's benefit—and there is no First Amendment claim when the government is curating, not regulating."
- **Dissent:** "By eliminating the public's right to challenge government censorship of public library books, our court's holding becomes a Trojan horse for the government speech doctrine that fails to command a majority in its own name. ... The government may not order books removed from public libraries out of hostility to disfavored ideas and information."

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RECENT CASES:

U.S. FIFTH CIRCUIT
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