

not exist to reach the merits of TXU's petition. Because I believe this Court does not have jurisdiction to mandamus a state board or commission, I can only concur in the Court's judgment that TXU is not entitled to mandamus relief.

I. PROCEDURAL BACKGROUND

In March 2000, nine electric utilities (including TXU) each filed an application requesting the Public Utilities Commission to approve unbundled costs of service rates under section 39.201 of the Public Utilities Regulation Act (PURA). Because the nine cases raised similar issues, the PUC created Docket No. 22344, a "generic-docket" proceeding, to consider the threshold issues that would impact all nine cases. In this proceeding, the PUC issued several orders that identified allowable modifications to the PUC's excess costs over market (ECOM) model. Under the generic-docket orders, the PUC reran the ECOM model to determine the utilities' estimated stranded costs. And, in certain cases, including TXU's, the model generated a negative number for the utility's estimated stranded costs.

In October 2000, because of these negative estimates, the administrative law judge issued an order certifying issues to the PUC. Specifically, the PUC had to determine whether the law contemplates a utility having negative excess cost over market and whether the PUC has authority to consider and "remedy" excess mitigation. The parties filed briefs on both issues, which the PUC considered in an open meeting beginning on November 1, 2000. On November 14, 2000, the PUC entered its order on the certified issues and held that it did have the authority — and the obligation — to remedy excess mitigation. On November 29, 2000, TXU filed its motion for rehearing with respect to the PUC's certified-issues order

as it affected TXU. On November 30, 2000, the PUC declined to consider TXU's motion.

On December 29, 2000, TXU sued the PUC in a Travis County District Court, seeking judicial review of the PUC's certified-issues order. TXU asserted that the PUC erred in entering this order because it prejudices TXU's substantial rights. TXU asked the district court to reverse the PUC's order and remand to the PUC for further proceedings. This suit remains pending.

On June 1, 2001, the PUC entered an "Interim Order" noting TXU's overrecovery of stranded costs under the new ECOM model and thus ordering TXU to reverse its stranded-costs mitigation. On June 20, 2001, TXU filed its petition for writ of mandamus with this Court. The Court requested a response and full briefing. TEX. R. APP. P. 52.8(b)(1),(2).

Subsequently, the Court set the petition for oral argument on December 12, 2001. TXU asserts that the PUC abused its discretion by contravening statutory procedures when it entered the interim order against TXU. TXU names the PUC, and its three Commissioners individually, as respondents. However, TXU only requests relief against the PUC. The parties argued the case before the Court on December 12, 2001. A week after oral argument, on December 17, 2001, TXU filed a second suit involving the same orders in another Travis County District Court, and again made the PUC the only defendant. The second suit also only asked for relief against the PUC in the form of a reversal of the Commission's order. Notably, the issues that TXU raises here are the same issues it raises for judicial review in both suits now pending in different Travis County District Courts.

II. THE THRESHOLD ISSUE

The preliminary issue the Court should consider is whether section 22.002(a) of the Texas Government Code confers original jurisdiction upon this Court to grant mandamus relief against the PUC in this case. TXU argues that it does and relies on *State v. Thomas*, 766 S.W.2d at 217, and *Chemical Bank & Trust Co. v. Falkner*, 369 S.W.2d 427 (Tex. 1963), to support that argument.

III. APPLICABLE LAW

A. SECTION 22.002(A)

The Texas Government Code provides:

The supreme court or a justice of the supreme court may issue writs of procedendo and certiorari and all writ of quo warranto and mandamus agreeable to the principles of law regulating those writs, against a district judge, a court of appeals or a justice of a court of appeals, or any officer of state government except the governor, the court of criminal appeals, or a judge of the court of criminal appeals.

TEX. GOV'T CODE § 22.002(a). This provision has its genesis in an 1892 statute that granted this Court power to mandamus an officer of state government, excepting the governor. *See* Act of April 13, 1892, 22nd Leg., 1st C.S., ch. 14, 1892 Tex. Gen. Laws 385. After 1892, the Legislature amended this statute several times before codifying it in our Government Code in 1985. *See* TEX. REV. CIV. STATS. arts. 946, 949, 4861 (Vernon 1895); TEX. REV. CIV. STATS. arts. 1526, 1526, 1528, 1529, 5732 (Vernon 1911); Act of Mar. 28, 1913, 33d Leg., R.S., ch. 55, § 1, 1913 Tex. Gen. Laws 108; Act of Mar. 15, 1917, 35th Leg., R.S., ch. 75, § 1, 1917 Tex. Gen. Laws 141; Act of Feb. 14, 1930, 41st Leg., 4th C.S., ch. 4, § 1, 1930 Tex. Gen. Laws 4; Act of June 8, 1981, 67th Leg., R.S., ch. 291, § 19, 1981 Tex. Gen. Laws 773; Act of June 12, 1985, 69th Leg., R.S., ch. 480, § 1, 1985 Tex. Gen. Laws 1724.

All the predecessors to section 22.002(a) used similar language relevant to the issue here. That is, the statutes, in relevant part, provided that this Court has original jurisdiction to issue writs of mandamus against an “officer of state government.”

B. CASE LAW

The first occasion this Court had to determine whether it could exercise its original mandamus jurisdiction over a state board or commission was in 1903. *See Betts*, 73 S.W. at 4. In that case, Betts moved for mandamus to compel Johnson and others, as members of the Board of Eclectic Medical Examiners for the State of Texas, to issue Betts a license to practice medicine. The Court held it did not have jurisdiction to grant a writ of mandamus in such a case. *Betts*, 73 S.W. at 4. The Court determined that “officer of state government” does not encompass all state officers for purposes of this Court’s original mandamus jurisdiction. Rather, the Court concluded, the Legislature intended that jurisdiction extend only to state officers who are the “heads of state departments.” *Betts*, 7 S.W. at 4.

After defining the limited scope of the term “state officer,” the Court noted that Betts actually sought mandamus against a board of officers and not against a single officer. It explained that if the statute’s purpose was to empower the Court to issue the writ against a board of officers as well as against a single officer, the statute’s language would have been ““any officer *or board of officers* of the state government.”” *Betts*, 73 S.W. at 5 (emphasis added). Consequently, the Court denied the writ.

Since *Betts*, the Court has not wavered from its view that its original mandamus jurisdiction does not extend to *all* state officers — or, more importantly, to boards or commissions of state officers. *See*,

e.g., *Superior Oil Co.*, 458 S.W.2d at 56 (holding this Court may not issue mandamus against state boards and commissions) (citations omitted). As recently as 1999, this Court reaffirmed that holding. *See In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768, 776 (Tex. 1999) (citing *Superior Oil Co.* and *Betts*); *see also A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 684 (Tex. 1995); (Hecht, J., dissenting) (observing that “any officer of state government” under section 22.022(a) does not include a board of officers and, therefore, this Court lacks jurisdiction to mandamus such a board) (citing *Betts*).

IV. ANALYSIS

The PUC is a Texas administrative agency the Legislature created under the PURA. *See* TEX. UTIL. CODE § 12.001. The PUC is comprised of three commissioners whom the Governor appoints with the senate’s advice and consent. *See* TEX. UTIL. CODE § 12.051. As a legislatively created entity, the PUC can only exercise the power that the law, in clear and express statutory language, confers upon it. *See* TEX UTIL. CODE § 12.001; *Key W. Life Ins. Co. v. State Bd. of Ins.*, 350 S.W.2d 839, 848 (Tex. 1961); *Railroad Comm'n v. Rowan Oil Co.*, 259 S.W.2d 173, 176 (Tex. 1953).

The PURA provides that the PUC has “the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by [statute] that is necessary and convenient to the exercise of that power and jurisdiction.” TEX. UTIL. CODE § 14.001. However, the PURA provisions that describe the PUC’s powers authorize the PUC to act as an entity and do not give the individual commissioners any separate powers. *See, e.g.*, TEX. UTIL. CODE §§ 14.001-14.057, 32.001, 39.103, 39.201. Thus, the PURA does not confer any powers upon an individual

commissioner so that he or she has separate and distinct duties from the other commissioners or so that he or she may act alone.

TXU recognizes that the PUC is a distinct entity of the state and that it acts only through its three commissioners.

C Following the PUC's November 14, 2000 certified-issues order, TXU sued the PUC as the only defendant when it sought judicial review of that order in the Travis County District Court.

C In that petition, TXU recognizes the PUC as an entity and requests relief only against the PUC in the form of reversing the PUC order.

C TXU did not join the individual commissioners as parties in that suit.

In its mandamus petition, TXU complains about the same certified issues, and the PUC interim order against TXU based on those certified issues, as it does in its district court suit.

C Here, though, TXU names the three PUC members as additional, individual respondents.

C But, as in the district court cases, TXU seeks no relief against any individual commissioner and requests relief only against the **PUC**.

C Further, in its brief on the merits, TXU likewise asserts that the issue is whether the **PUC** abused its discretion when it entered the orders about reversing stranded-cost mitigation.

C And, during oral argument, TXU admitted that it only sought relief against the **PUC** and that it named the PUC commissioners individually only because TXU contends they are "state officers."

Additionally, a week after oral argument in this case, TXU filed a second suit in another Travis County District Court complaining about the PUC's final order as it affected TXU.

C In this second suit, TXU sued the PUC as the only defendant, and did not join the individual Commissioners as parties.

C In this second suit, TXU again recognizes the PUC as a entity and requests relief only against the PUC in the form of reversing the PUC order.

TXU has consistently sought relief only against the PUC in every proceeding it has initiated. It is clear that TXU recognizes the PUC as a separate entity and as the only party against whom it can secure relief. Consequently, it is also clear, that by naming the individual Commissioners as respondents in this proceeding, TXU did so purely to circumvent this Court's holdings that section 22.002(a) does not confer original jurisdiction for this Court to mandamus state boards or commissions.

In its reply brief on the merits, TXU more precisely argues that this Court has original mandamus jurisdiction here because this Court issued mandamus against the individual commissioners in *Thomas*, 766 S.W.2d at 217. TXU contends that the State's attempts to distinguish *Thomas* fail. Further, TXU urges that *Thomas* is not an "aberration" as the State contends.

Thomas is in fact an aberration. Moreover, it was wrongly decided. In *Thomas*, the State, as an electricity consumer, filed a petition for writ of mandamus against Dennis Thomas, Jo Campbell, and Mart Greytok, the PUC's chairman and commissioners, respectively. The State sought mandamus to compel the individual commissioners to perform their duty to permit the Attorney General to intervene in the underlying administrative proceeding. The State asserted jurisdiction under section 22.002(a) of the Government Code.

Though the record indicates that the PUC was not a respondent in *Thomas*, the Court disregarded this omission in its opinion. Instead, the Court concluded that the Public Utility Commission could not

constitutionally deny the Attorney General's intervention on behalf of consumer state agencies. *Thomas*, 766 S.W.2d at 219. And then, without discussing its mandamus jurisdiction, it granted the writ and ordered the "Public Utility Commission" — not the individual commissioners — to vacate its order. *Thomas*, 766 S.W.2d at 220. The Court's judgment likewise ordered mandamus against the "Public Utility Commission."

Accordingly, TXU's assertion that the *Thomas* Court issued mandamus against the individual commissioners is incorrect. Moreover, *Thomas* is an aberration for three reasons: (1) *Thomas* failed to question the State's assertion that the Court had jurisdiction under section 22.002(a); (2) the Court did not grant relief against the only three respondents the State named in the petition; and (3) the Court improperly granted relief against the PUC, an entity not a party to the case. Furthermore, for reasons unknown, the Court completely ignored the fact that it did not have original mandamus jurisdiction over the PUC in the first instance. See *Superior Oil Co.*, 458 S.W.2d at 56, *Betts*, 73 S.W. at 5; see also *A & T Consultants*, 904 S.W.2d at 684 (Hecht, J., dissenting).

TXU also relies on *Chemical Bank*, 369 S.W.2d at 427, to support its jurisdictional argument in this case. However, *Chemical Bank* is readily distinguishable. In that case, Chemical Bank sought mandamus from this Court to compel Falkner, as Banking Commissioner of Texas, to issue Chemical Bank a certificate of authority to operate in Harris County, Texas. Two banks in Harris County, who opposed issuing a charter to Chemical Bank, intervened in the mandamus proceeding. The intervenors argued that the Court had no jurisdiction to issue mandamus against the Banking Commissioner, because he was not a state officer within article 1733's meaning. *Chemical Bank*, 369 S.W.2d at 429 (citing language in article

1733, a predecessor to section 22.002(a)).

The Court concluded that Falker, as the Banking Commissioner, is an officer of state government within the statute's meaning. The Court pointed out that although Falkner was a Finance Commission employee, this did not prevent Falkner from being an officer of the state government. The Court observed that Falkner was far more than just a Finance Commission employee, because the many powers and duties the Legislature conferred upon him were not subject to the Finance Commission's control. *Chemical Bank*, 369 S.W.2d at 430. For example, the Court observed, although Falkner's duties included presiding over Finance Commission meetings, he did not vote unless to break a tie. And he had other powers, such as issuing a charter, that the Finance Commission did not control. *Chemical Bank*, 369 S.W.2d at 430-31. The Court concluded that the Legislature gave the Banking Commissioner, individually, the authority to carry out the general administration of the State's banking affairs. Thus, the Court held that Falkner was performing sovereign functions of the government for the protection and benefit of the public and, as such, he was a state officer as article 1733 contemplated. *Chemical Bank*, 369 S.W.2d at 430.

Chemical Bank involved a single state government officer and not a board or commission. Further, the state officer subject to mandamus in *Chemical Bank* had statutory powers and duties apart from those of the commission for which he worked. *Chemical Bank*, 369 S.W.2d at 430. It is thus distinguishable from this case.

In sum, this case is not any different from *Betts* and its progeny which recognize that, under section 22.022(a) and its predecessor statutes, this Court does not have original jurisdiction to mandamus a state commission or board. Accordingly, the Court does not have original mandamus jurisdiction over the PUC

and should dismiss TXU's petition for want of jurisdiction.

V. THE COURT'S WRITINGS

Seven Justices agree that the Court has jurisdiction to review TXU's petition. Of the seven Justices who agree we have jurisdiction, four would deny TXU relief, but for different reasons. *See* ___ S.W.3d ___ (Phillips, C.J., concurring); ___ S.W.3d ___ (Brister, J., concurring). Three Justices not only find we have jurisdiction but also would grant relief. Because I believe that the Court has no jurisdiction as a threshold matter, I believe it is not only appropriate but necessary that I comment on Justice Hecht's and Chief Justice Phillips' writings.¹

A. JUSTICE HECHT'S DISSENT

Justice Hecht dedicates about thirty percent of his writing to attempt to explain why he believes this Court has original jurisdiction to mandamus the PUC commissioners. Ironically, Justice Hecht required only a sentence or two in more recent cases to hold that mandamus jurisdiction does not exist against state boards or commissions. *See In Re Nolo Press*, 991 S.W.2d at 776; *A & T Consultants*, 904 S.W.2d at 684 (Hecht, J., dissenting). But to avoid this and other precedent and to reach his desired result, Justice Hecht purposely misstates the threshold issue here.

My position is that the threshold issue the Court must determine is whether we have original

¹ Justice Hecht's dissent is the only writing that discusses the jurisdiction issue. I presume, therefore, that the other writers adopt his entire jurisdiction argument *sub silentio*.

jurisdiction under section 22.002(a) to mandamus the *Public Utility Commission*. And TXU's naming the individual commissioners as respondents here is nothing more than a ruse — apparently an effective one given the Court's holding today — to divert this Court's attention from this issue.

But Justice Hecht intentionally mischaracterizes the jurisdiction issue to raise it as a strawman so he can then knock it down, thereby allowing him to conclude that “we have jurisdiction to mandamus *the members of the Commission* as TXU requests.” __ S.W.3d at __ (Hecht, J., dissenting) (emphasis added). Justice Hecht relies on four cases to argue that my view is inconsistent with Texas law. *See McFall*, 110 S.W. at 739; *Middlekauff v. State Banking Bd.*, 242 S.W. 442 (Tex. 1922); *Thomas*, 766 S.W.2d at 217; *State Banking Bd. v. Winters State Bank*, 13 S.W.2d 391 (Tex. Civ. App.--Austin 1929, writ ref'd). However, these cases are not inconsistent with my real jurisdiction argument.

In *McFall*, the relator requested this Court to issue mandamus against certain *individuals* — the Governor, the Comptroller, and the Secretary of State — who constituted the State Board of Education. *McFall*, 110 S.W. at 739. Because the Court did not have original mandamus jurisdiction over the Governor, the Court concluded that it could not grant relief. Without further elaboration, the Court only stated that “[t]he writ must go against all or none. . . .” *McFall*, 110 S.W. at 740. The Court then noted that, in any event, it could not grant the relief requested because the relator asked the Court to set aside the Board's order and to make a different decision. *McFall*, 110 S.W. at 740. Because we cannot issue mandamus to compel a tribunal to decide an issue in a certain way, the Court suggested that the relator seek mandamus relief in the trial court against a lesser school official who had authority to carry out the board's order. *McFall*, 110 S.W. at 740.

Although the relator in *McFall* sought relief against individuals, the Court recognized it could not — so it did not — grant relief against the board. Moreover, the Court recognized it could not issue mandamus to compel an entity to make a certain decision. Consequently, although *McFall* is factually distinguishable, its holding is consistent with my view that this Court does not have original jurisdiction under section 22.022(a) to mandamus the PUC to change its rulings in an administrative order.

Likewise, *Middlekauff* does not support Justice Hecht’s contention that my jurisdiction analysis is contrary to Texas law. The relator in *Middlekauff* sought mandamus relief against several individuals and entities — the State Banking Board, the Commissioner of Insurance and Banking, the State Treasurer, and the Attorney General — to compel payment of monies from the State’s guaranty fund. *Middlekauff*, 242 S.W. at 442. It is unclear against whom the Court issued mandamus, because the opinion only states that the suit would “be dismissed as to the respondents no longer in office, and that a writ of mandamus be issued against the remaining respondents” *Middlekauff*, 242 S.W. at 443. But at the time, the State Banking Board comprised the Attorney General, the Commissioner of Insurance and Banking, and the Treasurer. Act of May 12, 1909, 31st Leg., 2d C.S., ch. 15, § 2, 1909 Tex. Gen. Laws 406, 406. These are the same individuals against whom the relator sought mandamus relief. Accordingly, *Middlekauff* is distinguishable from this case and, therefore, is not contrary to my jurisdiction argument. *Middlekauff*, 242 S.W. at 443.

Winters State Bank is also distinguishable. 13 S.W.2d at 391. In *Winters State Bank*, the court of appeals held that, although the banking commissioner did have a duty to pay funds as alleged, the State Banking Board had not waived its sovereign immunity from a suit to recover monies from the guaranty fund.

Winters State Bank, 13 S.W.2d at 392. But the court of appeals opined that, because “it is the clear ministerial duty of the state banking board and the banking commissioner to return [the funds],” the plaintiff could seek mandamus from this Court. *Winters State Bank*, 13 S.W.2d at 393. For this proposition, the court of appeals cited a predecessor statute to section 22.002(c), the provision conferring original mandamus jurisdiction on this Court to compel officers of the State’s executive departments to perform ministerial duties. *Winters State Bank*, 13 S.W.2d at 393. Although the court of appeals also cited *Middlekauff*, its reliance on a different jurisdictional statute, and its focus on the individual banking commissioner’s ministerial duties, shows it is distinguishable and does not control the outcome here.

Next, I need not dwell further on why *Thomas* is an aberration and was wrongly decided. But Justice Hecht pontificates that, in *Thomas*, the Court’s granting relief against the PUC rather than the individual commissioners was “a technical flaw immaterial to the scope of the Court’s original mandamus jurisdiction.” He also opines that “[t]he Court’s mistake in the rendition of judgment does not detract from its decision to grant relief against the state officers it clearly determined were within its original mandamus jurisdiction.” __ S.W.3d at __ (Hecht, J., dissenting). Such reasoning borders on the ludicrous.

Justice Hecht’s cursory conclusion that our issuing mandamus against an entity not a party to the suit is a mere “technical flaw” flouts a bedrock principle in Texas jurisprudence. No court, including this one, can grant relief against a person or entity that is not a party to the litigation. *See, e.g., Werner v. Colwell*, 909 S.W.2d 866, 869 (Tex. 1995). Moreover, the *Thomas* Court never discussed its jurisdiction. Indeed, even Justice Hecht, who dissented in that case, recognized that “[t]he Court assumes, without discussion, the availability of mandamus in this case.” *Thomas*, 766 S.W.2d at 225 (Hecht, J.,

dissenting). Thus, contrary to Justice Hecht's cavalier contention, it is not so "clear" that the Court determined the commissioners were within its original mandamus jurisdiction. *See* __ S.W.3d at __ (Hecht, J., dissenting).

Furthermore, Justice Hecht accuses me of unfairly taking two sentences from TXU's petition and brief to conclude that "TXU is not entitled to relief against the individual commissioners." __ S.W.3d at __ (Hecht, J., dissenting). Justice Hecht deliberately misstates my jurisdiction argument when he urges that my position is we cannot issue mandamus relief against the individual commissioners. The record demonstrates that TXU's trial court pleadings and briefs in this Court all only seek relief against the PUC as an entity. Not once does TXU pray for relief against the individual commissioners. This is because only the PUC, as an entity, entered the order TXU complains about. And only the PUC as an entity, and not an individual commissioner, has authority to remedy any wrong in that order. Consequently, TXU names the individual commissioners as respondents here only in an attempt to invoke this Court's mandamus jurisdiction and to avoid the well-established procedures our Legislature has created for judicial review of administrative orders.

Finally, Justice Hecht fails to refute my argument that this case will provide the basis for parties to seek mandamus from this Court against state boards and commissions whenever they allege that an administrative order, such as the one here, is erroneous. Justice Hecht contends that "the demise of the ordinary process for judicial review of ordinary administrative decisions" will not happen because the Court knows how to "turn away *ordinary* cases." __ S.W.3d at __ (Hecht, J., dissenting) (emphasis added). But Justice Hecht's reasoning begs the question and presupposes that our mandamus jurisdiction depends

on whether a case is “ordinary.” This is absolutely not true under Texas law. In an original proceeding, the threshold issue is whether this Court has mandamus jurisdiction under the parameters Texas’s Legislature and citizens have defined. *See* TEX. GOV’T CODE § 22.002; TEX. CONST. art. V, § 3. Then, *if* jurisdiction exists, only then may the Court consider the case’s nature — extraordinary or otherwise — as part of the Court’s merits inquiry for determining whether it should grant relief. *See Canadian Helicopters Ltd. v. Wittig*, 876 S.W.2d 304, 309 (Tex. 1994) (stating, in reviewing a trial court order denying a special appearance, that appeal may be inadequate and thus mandamus relief appropriate if the Court determines the case presents “extraordinary” circumstances). Thus, Justice Hecht’s response does not disprove my position that, after this case, parties can simply name individual members of a state board or commission to obtain relief that Texas’s Legislature and citizens have made available only in the trial courts or through the ordinary administrative judicial review process. *See* TEX. GOV’T CODE §§ 2001.171-.178; TEX. UTIL. CODE § 15.001; TEX. GOV’T CODE § 24.007; TEX. CONST. art. V, § 8.

In sum, Justice Hecht’s jurisdiction analysis purposely ignores the real issue here — whether this Court has original mandamus jurisdiction over the PUC. The answer is “no” because we have steadfastly held that this Court’s jurisdiction under section 22.002(a) does not extend to state boards or commissions. And, it logically follows that TXU cannot confer jurisdiction on this Court simply by naming the individual PUC commissioners as respondents.

B. CHIEF JUSTICE PHILLIPS’ CONCURRENCE

In rejecting TXU's request for mandamus relief, Chief Justice Phillips frames TXU's issue as whether "we should mandamus the Commissioners to preserve the integrity of the Legislature's plan for deregulation." __ S.W.3d at __ (Phillips, C.J., concurring). But this is not the relief TXU requests. As the record shows, in this mandamus proceeding, although TXU named the commissioners individually, TXU has not asked for any relief against an individual commissioner. TXU requests relief only against the Public Utility Commission as a legislatively created entity.

I do not disagree with the premise that in appropriate circumstances, this Court does have original jurisdiction to grant mandamus relief against "any officer of state government except the Governor." TEX. GOV'T CODE § 22.002(a). But that power does not encompass the power to mandamus a board or commission as an entity because that power lies not in our Court but in a Travis County District Court. *See* TEX. CONST. art. V, § 8; TEX. GOV'T CODE § 24.007; *see also In Re Nolo Press*, 991 S.W.2d at 776; *A & T Consultants, Inc.*, 904 S.W.2d at 684 (Hecht, J., dissenting); *Superior Oil Co.*, 458 S.W.2d at 56; *Betts*, 73 S.W. at 5.

Ignoring this Court's precedent that we do not have jurisdiction to mandamus boards or commissions, and assuming jurisdiction when we have none, affects not only the case we decide today, but the course of administrative law proceedings in the future. Chief Justice Phillips' opinion alludes to this problem when he states: "If mandamus were justified whenever a government official or a lower court misread a statute, mandamus would supplant appeal as a normal avenue for statutory interpretation." __ S.W.3d at __ (Phillips, C.J., concurring). It seems to me that the real import of the Court's decision today is what will happen in future administrative proceedings when a party is dissatisfied with a board or

commission order. That party will not only file a petition for judicial review in a Travis County District Court, but will also file a petition for mandamus in this Court. And the party can rely on this case to do so.

I refer the Court to what happened after this Court created a common law tort cause of action for an insurer's breach of its duty of good faith and fair dealing. *See Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987). After *Arnold*, every lawsuit by an insured against an insurer in Texas almost always included a bad-faith allegation, at least every one a competent lawyer filed. *See State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 454 (Tex. 1997) (Hecht, J., dissenting).

Opening the door for this Court to mandamus state boards or commissions, with the lure that a party may achieve a quick fix, in all probability will dramatically increase the number of such mandamus petitions filed directly in this Court. And it will thus supplant the appellate process already in place as a normal avenue for relief from a board or commission order. Accordingly, continuing to adhere to precedent, and denying TXU's petition for want of jurisdiction will reinforce and reaffirm the legislatively adopted appellate process for determining disputes involving administrative boards, commissions, and agencies.

VI. CONCLUSION

Today, the Court overturns ninety-eight years of precedent holding that section 22.002(a) does not confer original jurisdiction on this Court to mandamus state boards or commissions. I am convinced that we do not have jurisdiction to entertain this petition, and the Court should dismiss it for want of jurisdiction. Because the Court decides otherwise, I concur in the Court's judgment only to the extent that it determines

TXU is not entitled to mandamus relief.

James A. Baker, Justice

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