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Andres Medrano

Laurie Ratliff

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Texas Tech University School of Law
1802 Hartford Avenue
Lubbock, Texas 79410
alj.law@ttu.edu

SPEAKERS

Laurie Ratliff and Andres Medrano

CONTRIBUTING AUTHORS

(Texas Tech Administrative Law Journal Editors)

Brendan Reeder <i>Editor in Chief</i> (Vol. 17)	Morgan McCorvey <i>Executive Lead Articles Editor</i> (Vol. 17)	Macy Cotton <i>Executive Student Writing Editor</i> (Vol. 17)
Emily Copeland <i>Editor in Chief</i> (Vol. 18)	Madison Murray <i>Executive Managing Editor</i> (Vol. 18)	Miriam Aguayo <i>Executive Lead Articles Editor</i> (Vol. 18)
Kathryn Jones <i>Executive Student Writing Editor</i> (Vol. 18)	Lauren Arredondo <i>Organizational Development Chair</i> (Vol. 18)	Joseph Higgins <i>Executive Business Manager</i> (Vol. 18)
Meagan Ghormley <i>Executive Technology Editor</i> (Vol. 18)	Emilie Blake <i>Comment Editor</i> (Vol. 18)	Triana Gonzalez <i>Comment Editor</i> (Vol. 18)
Brandon King <i>Comment Editor</i> (Vol. 18)	Tiffany Pham <i>Comment Editor</i> (Vol. 18)	Andrew Ashton <i>Articles Editor</i> (Vol. 18)
Sam Ballard <i>Article Editor</i> (Vol. 18)	Alyssa Bolin <i>Article Editor</i> (Vol. 18)	Breann Hunter <i>Article Editor</i> (Vol. 18)
Kendra Naranjo <i>Article Editor</i> (Vol. 18)	Annie Northcutt <i>Article Editor</i> (Vol. 18)	Erin Van Pelt <i>Article Editor</i> (Vol. 18)
	Ashley Yi <i>Article Editor</i> (Vol. 18)	

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Student Author Biographies

Δ **Miriam Aguayo**, J.D. Candidate 2017, is the Executive Lead Articles Editor for Volume 18 of the Texas Tech Administrative Law Journal. Miriam was born in Monterrey, N.L., Mexico and moved to United States at the age of 6. She graduated magna cum laude from the University of Texas at Brownsville with a Bachelor's degree in History. Miriam is the president and founder of the Immigration Law Association and currently serves as the Student Chair of Immigration Efforts. She has a strong interest in immigration law and hopes to one day help influence immigration policy.

Γ **Lauren Arredondo**, J.D. Candidate 2017, is the Organizational Development Chair for Volume 18 of the Texas Tech Administrative Law Journal. She was born and raised in San Antonio, Texas. She received her Bachelor of Arts from the University of Texas at Austin in 2014, majoring in Government with a minor in History and certificates in Business and European Studies. Her primary legal interests include business, energy, and employment law.

␣ **Andrew Ashton**, J.D./M.E.N Candidate 2017, is an Article Editor for Volume 18 of the Texas Tech Administrative Law Journal. Raised in Plano, TX, Andrew attended the University of Arizona and received his Bachelor of Science in Engineering Management and a Minor in Industrial Engineering. He is currently working toward a Masters of Engineering focusing in nano and bio manufacturing design, materials, and processes, concurrently with a law degree. His legal interest is in patent litigation.

£ **Sam Ballard**, J.D. Candidate 2017, is an Article Editor for Volume 18 of the Texas Tech Administrative Law Journal. He grew up in Houston, Texas, and still dreams about the glory days when he was the most popular kid in junior high. Sam graduated from Baylor in May 2014 with a Bachelor of Arts in Environmental Studies; he still complains about trading his waders for a suit and tie. He currently serves as the Vice President of the Environmental Law Society and as a Clerk for Phi Alpha Delta. Sam has a firm interest in Texas Water Rights and Natural Resource Law.

⊛ **Emilie Blake**, J.D. Candidate 2017, is a Comment Editor for Volume 18 of the Texas Tech Administrative Law Journal. She was born and raised in Albuquerque, New Mexico. She received her Bachelor of Arts in International Studies and a minor in Business

Administration from Colorado State University. After traveling the nation as a consultant, she moved to Texas to pursue her legal interest in water, environmental, and oil & gas law.

β **Alyssa Bolin**, J.D. Candidate 2017, is an Article Editor for Volume 18 of the Texas Tech Administrative Law Journal. She was born and raised in Center Point, Texas, a very small town an hour outside San Antonio. She received her Bachelor of Arts in Psychology from Texas Tech University and could not find it in her heart to leave Lubbock. Her primary legal interest is in Corporate Law, and her dream jobs include either serving as Chancellor of Texas Tech University or as in-house counsel for the San Antonio Spurs.

ø **Emily Copeland**, J.D. Candidate 2017, is the Editor in Chief for Volume 18 of the Texas Tech Administrative Law Journal. She is from Dallas, Texas, but traveled north of the Red River for college. In May 2014, Emily received her Bachelor of Arts from the University of Oklahoma majoring in Journalism with a focus in Public Relations and minoring in Spanish. Her legal interests include family, business, and tort law.

Ω **Macy Cotton**, J.D. Candidate 2016, served as the Executive Student Writing Editor for Volume 17 of the Texas Tech Administrative Law Journal. She was born and raised in Midland, Texas. She received her Bachelor of Arts from Texas A&M University in 2012, graduating cum laude and double majoring in English and Hispanic Studies with a concentration in Rhetoric and Cultural Studies. She worked as a legislative aid for State Representative Myra Crownover in Austin, Texas, before coming to Tech Law. She served as the secretary of the Texas Aggie Bar Association and is involved with the Innocence Project of Texas. Her primary legal interest is non-profit law.

φ **Meagan Ghormley**, J.D. Candidate 2017, is the Executive Technology Editor for Volume 18 for the Texas Tech Administrative Law Journal. She graduated cum laude from Texas A&M University with her Bachelor of Science in Agricultural Communications. She interned for Texas State Representative Kevin Brady in Washington, D.C. before coming to Tech Law. Her legal interests are oil and gas, water, and criminal law.

δ **Triana Gonzalez**, J.D. Candidate 2016, is a Comment Editor for Volume 18 for the Texas Tech Administrative Law Journal. She was born and raised in Laredo, Texas. She received her Bachelor of Arts in English with a minor in Economics from Texas A & M International University, graduating magna cum laude. She also obtained a Master of Arts in English from Texas A & M International University. She worked as a 6th, 7th, and 8th Grade Language Arts & Literature teacher in her border-town community. She is currently pursuing the Health Law Concentration and is the President of Tech Health Law Association. She is also a Senior Writer for the Texas Bank Lawyer Magazine. Her primary legal interests include administrative, employment, and health law.

π **Joseph Higgins**, J.D. Candidate 2017, is the Executive Business Manager for Volume 18 of the Texas Tech Administrative Law Journal. Joe, a citizen of both the United States and Canada, was born in Spring, Texas and spent part of his childhood living in Victoria, B.C. before moving to Carrollton, Texas in 4th grade. Joe received a Bachelor of Science in Sport Management with a certificate in Business Foundations from the University of Texas at Austin in 2013. His primary legal interests include sports and administrative law.

Ξ **Breann Hunter**, J.D. Candidate 2017, is an Article Editor for Volume 18 of the Texas Tech Administrative Law Journal. She was born in Rock Hill, South Carolina, but raised in Houston, Pennsylvania. She received her Bachelor of Arts in English Writing and Rhetoric from St. Edward's University in 2014, graduating cum laude. Her legal interests include oil and gas, water, and environmental law.

η **Kathryn Hand**, J.D. Candidate 2017, is the Executive Student Writing Editor for Volume 18 of the Tech Administrative Law Journal. She was born and raised in Spring, Texas. She received her Bachelor of Arts from The University of Oklahoma in Norman, Oklahoma where she majored in Letters and minored in Spanish. She is a Contracts tutor for first year students. Her primary legal interests are employment and administrative law.

ψ **Brandon King**, J.D. Candidate 2017, is a Comment Editor for Volume 18 of the Texas Tech Administrative Law Journal. He was born and raised in the Southeast, having lived in Georgia, Alabama, and Mississippi. Importantly, Brandon is the only Auburn fan in an Alabama household, so he does not return home often. He received his Bachelor of Arts from Texas Tech University, graduating cum laude and majoring in History and Russian Language Studies. He

is primarily interested in civil litigation.

★ **Morgan McCorvey**, J.D. Candidate 2016, was the Executive Lead Articles Editor for Volume 17 of the Texas Tech Administrative Law Journal. She was born in Columbia, South Carolina, but was raised in Southlake, Texas. She received her Bachelor of Arts from Oklahoma State University majoring in Psychology and minoring in History. Throughout law school, Morgan was a Court Appointed Special Advocate for CASA of the South Plains and worked for a local criminal defense firm. Her primary legal interests are criminal defense, estate planning, and administrative law.

μ **Madison Murray**, J.D. Candidate 2017, is the Executive Managing Editor for Volume 18 of the Texas Tech Administrative Law Journal. She was born in Amarillo and raised in Monahans, Texas. She graduated magna cum laude from Texas Tech University majoring in Public Relations and Communication Studies and minoring in Spanish. Her legal interests include labor and employment, non-profit, civil litigation, and family law.

∞ **Kendra Naranjo**, J.D. Candidate 2017, is an Article Editor for Volume 18 of the Texas Tech Administrative Law Journal. She was born in and raised in Brownsville, Texas. She received her Bachelor of Fine Arts concentrated in Photography from Baylor University in 2013. Her legal interests include family, immigration, and criminal law.

v **Annie Northcutt**, J.D. Candidate 2017, is an Article Editor for Volume 18 of the Texas Tech Administrative Law Journal. Born and raised in Plano, Texas, she graduated from Texas A&M University in 2014, with a major in Business Administration and two minors in Economics and Agronomy. She is the treasurer of the Student Animal Legal Defense Association, as well as a member of the Phi Delta Phi legal honor society. Her primary legal interests include business, oil and gas, and bankruptcy law.

Λ **Tiffany Pham**, J.D. Candidate 2017, is a Comment Editor for Volume 18 of the Texas Tech Administrative Law Journal. She was born in Fort Smith, Arkansas, but raised in Spring, Texas. She received her Bachelor of Science in Communication Studies from the University of Texas at Austin in 2014. She is the treasurer of the Hispanic Law Student Association, as well as a member of the Phi Delta Phi legal honor society. Her legal interests include oil and gas, toxic torts, and water law.

⊠ **Brendan Reeder**, J.D./M.B.A. Candidate 2016, was the Editor in Chief for Volume 17 of the Texas Tech

Administrative Law Journal. He was born and raised in Indiana where he received his Bachelor degree from Indiana University South Bend in Business Administration. As the son of a police officer, Brendan has always had a strong interest in criminal law.

⌘ **Erin Van Pelt**, J.D. Candidate 2017, is an Article Editor for Volume 18 of the Texas Tech Administrative Law Journal. Erin is from Las Cruces, New Mexico and received her Bachelor of Arts degree from Texas Tech University in 2014, graduating Summa Cum Laude with Highest Honors. Her legal interests include criminal, family, and non-profit law.

Σ **Ashley Yi**, J.D. Candidate 2017, is an Article Editor for Volume 18 of the Texas Tech Administrative Law Journal. Ashley was born and raised in Houston, Texas. She graduated with honors from The University of Texas at Austin in 2013 with a Bachelor of Arts in Sociology and a minor in Korean. She is a dual-degree student—J.D./ Masters of Science in Personal Financial Planning. Also, she is the treasurer for the Asian Law Student Association and secretary for the Christian Legal Society. Ashley hopes to practice corporate law in the future.

Table of Contents

I. INTRODUCTION	6
II. Agency Authority	6
<i>Machete's Chop Shop, Inc. v. Tex. Film Comm'n</i> , No. 03-14-00098-CV, ___S.W.3d___, 2016 WL 368534, 2016 Tex. App. LEXIS 953 (Tex. App.—Austin Jan. 29, 2016, no pet.). £	6
<i>McMillen v. Tex. Health & Human Servs. Comm'n</i> , No. 15-0147, ___S.W.3d___, 2016 WL 766799, 2016 Tex. LEXIS 178 (Tex. Feb. 26, 2016). Ω	7
III. AGENCY INTERPRETATION OF STATUTES AND RULES	7
<i>Brown v. Hegar</i> , No. 03-14-00492-CV, 2015 WL 7708947, 2015 Tex. App. LEXIS 12254 (Tex. App.—Austin Dec. 3, 2015, no pet.). Γ	7
<i>State Bd. for Educator Certification v. Montalvo</i> , No. 03-13-00370-CV, 2015 WL 1405883, 2015 Tex. App. LEXIS 12025 (Tex. App.—Austin Nov. 24, 2015, pet. filed). β	8
<i>R.R. Comm'n of Tex. v. Gulf Energy Corp.</i> , No. 14-0534, ___S.W.3d___, 2016 WL 363771, 2016 Tex. LEXIS 98 (Tex. Jan. 29, 2016). δ	9
<i>In re N. G.-D.</i> , No. 03-14-00437-CV, 2016 WL 105948, 2016 Tex. App. LEXIS 174 (Tex. App.—Austin January 8, 2016, no pet.). π	10
<i>Cnty. of La Salle v. Weber</i> , No. 03-14-00501-CV, 2016 WL 1084100, 2016 Tex. App. LEXIS 2839 (Tex. App.—Austin Mar. 18, 2016, no pet. h.). Ξ	11
<i>Allstate Ins. Co. v. Hegar</i> , No. 03-13-00341-CV, ___S.W.3d___, 2016 WL 690822, 2016 Tex. App. LEXIS 1603 (Tex. App.—Austin Feb. 18, 2016, no pet. h.). ν	11
<i>Verticor, Ltd. v. Wood</i> , No. 03-14-00277-CV, ___S.W.3d___, 2015 WL 7166024, 2015 Tex. App. LEXIS 11722 (Tex. App.—Austin Nov. 13, 2015, pet. filed). ς	12
<i>State Bd. for Educator Certification v. Lange</i> , No. 03-12-00453-CV, 2016 WL 785538, 2016 Tex. App. LEXIS 1886 (Tex. App.—Austin Feb. 25, 2016, no pet.). ⌘	13
<i>BCCA Appeal Group Inc., v. City of Houston</i> , NO. 13-0768, 2016 WL 1719182 (Tex. 2016). ρ	14
<i>Antioch St. Johns Cemetery Co. v. Tex. Dep't of Banking Comm'r</i> , No. 03-15-00341-CV, 2016 WL 3611006, 2016 Tex. App. LEXIS 6867 (Tex. App.—Austin June 30, 2016, no pet.). ν	15
<i>Tex. Comm'n on Env't'l Quality v. Exxon Mobil Corp.</i> , No. 03-14-00667-CV, 2016 WL 1406859 (Tex. App.—Austin April 8, 2016, no pet.). η	15
<i>Chambers-Liberties Cntys. Navigation Dist. v. State of Texas</i> , No. 03-15-00744-CV, 2016 WL 3136850 (Tex. App.—Austin July 8, 2016, no pet.). Γ	16
<i>Garcia v. Tex. Real Estate Comm'n</i> , No. 03-14-00349-CV, 2016 Tex. App. LEXIS 5638 (Tex. App.—Austin May 27, 2016, no pet.). μ	17
<i>Polsky v. State</i> , No. 03-14-00068-CV, 2016 Tex. App. LEXIS 5081 (Tex. App.—Austin May 13, 2016, no pet.). μ	17
<i>Morello v. Texas</i> , No. 03-15-00428-CV, ___S.W.3d___, 2016 WL 2742380 (Tex. App.—Austin May 06, 2016, no pet.). £	18
IV. Discovery	19

<i>In re Xerox Corp.</i> , No. 03-15-00401-CV, 2016 WL 768134, 2016 Tex. App. LEXIS 2027 (Tex. App.—Austin Feb. 26, 2016, no pet.). Σ	19
V. Due Process	19
<i>Maverick Cnty v. R.R. Comm’n of Tex.</i> , No. 03-14-00257-CV, 2015 WL 9583873, 2015 Tex. App. LEXIS 12971 (Tex. App.—Austin Dec. 29, 2015, pet. filed). Δ	19
<i>A.S. v. Tex. Dep’t. of Pub. Safety</i> , No. 03-15-00331-CV, 2015 WL 9583882, 2015 Tex. App. LEXIS 13027 (Tex. App.—Austin Dec. 31, 2015, no pet.). Λ	20
<i>Citizens Against the Landfill in Hempstead v. Tex. Comm’n on Env’tl. Quality</i> , No. 03-14-00718-CV, 2016 Tex. App. LEXIS 3743 (Tex. App. —Austin Apr. 13, 2016). Β	21
VI. JURISDICTION	22
A. Sovereign Immunity	22
<i>Nazari v. State</i> , No. 03-15-00252-CV, ___ S.W.3d ___, 2016 WL 767997, 2016 Tex. App. LEXIS 2003 (Tex. App.—Austin Feb. 26, 2016, no pet.). ☼	22
<i>Morath v. La Marque Indep. Sch. Dist.</i> , No. 03-16-00062-CV, 2016 WL 3517955, (Tex. App.—Austin June 24, 2016, no pet.). ☼	22
<i>Johnson v. Tex. Dep’t of Criminal Justice</i> , NO. 03-15-00343-CV, 2016 WL 3390855 (Tex. App.—June 16, 2016, no pet.). ☼	23
<i>Traylor v. Diana D.</i> , No. 03-15-00657-CV, ___ S.W.3d ___, 2016 WL 1639871 (Tex. App.—Austin April 21, 2016, pet filed). £	23
<i>Tex. Educ. Agency v. Acad. of Careers & Techs., Inc.</i> , No. 03-15-00528-CV, 2016 WL 3917177, 2016 Tex. App. LEXIS 7404 (Tex. App.—Austin July 13, 2016, no pet.). Λ	24
B. Prerequisites to Suits	25
C. Exhaustion of Remedies	25
<i>Perez v. Tex. Med. Bd.</i> , No. 03-14-00644-CV, 2015 WL 8593555, 2015 Tex. App. LEXIS 12492 (Tex. App.—Austin Dec. 10, 2015, pet. denied). þ	25
<i>Jones v. Angelo State Univ.</i> , No. 03-14-00112-CV, 2015 WL 9436523, 2015 Tex. App. LEXIS 12805 (Tex. App.—Austin Dec. 18, 2015, no pet.). ∞	25
<i>Tex. HHS v. Comm’n v. Puglisi</i> , No. 03-15-00226-CV, 2016 WL 1179075, 2016 Tex. App. LEXIS 2979 (Tex. App.—Austin Mar. 24, 2016, no pet.). Λ	26
D. Standing	26
<i>Texas Quarter Horse Ass’n. v. Am. Legion Dep’t. of Texas</i> , NO. 03-15-00118-CV, 2016 WL 3230664 (Tex. App.—Austin, June 8, 2016, no pet.). ☼	26
<i>Sierra Club v. Tex. Comm’n On Env’tl. Quality</i> , No. 03-14-00130-CV, 2016 WL 1304928 (Tex. App.—Austin March 31, 2016, no pet.). η	27
E. Right to Judicial Review	27
<i>Alphonso Crutch Life Support Ctr. v. Williams</i> , No. 03-13-00789-CV, 2015 WL 7950713, 2015 Tex. App. LEXIS 12151 (Tex. App.—Austin Nov. 30, 2015, no pet.). ★	27
<i>A.I. Divestitures, Inc. v. Tex. Comm’n on Env’tl. Quality</i> , No. 03-15-00814-CV, 2016 WL 3136850 (Tex. App.—Austin June 2, 2016, no pet.). Γ	28
<i>Texas Bd. of Nursing v. Moriarty</i> , No. 03-15-00742-CV, 2016 Tex. App. LEXIS 5408 (Tex. App.—Austin May 24, 2016, no pet.). μ	29
<i>Tex. Dep’t of Pub. Safety v. Littlepage</i> , No. 03-14-00194-CV, 2016 WL 3677086 (Tex. App.—Austin July 8, 2016, no pet.). Δ	29
VII. Motions for Rehearing	30
VIII. Open Government: Public Information Act and Open Meetings Act	30
IX. Orders	30
X. Rules	30

	<i>Los Fresnos Consol. Indep. Sch. Dist. v. Vazquez</i> , No. 03-14-00629-CV, 481 S.W.3d 742, 2015 WL 9583894, 2015 Tex. App. LEXIS 13006 (Tex. App.—Austin Dec. 30, 2015, pet. filed). η	30
	<i>Tex. State Bd. of Veterinary Med. Exam'rs v. Jefferson</i> , 03-14-00774-CV, 2016 WL 768778, 2016 Tex. App. LEXIS 2002 (Tex. App.—Austin Feb. 26, 2016, no pet.). ψ	30
XI. Utilities		31
	<i>Kidd v. Tex. Pub. Util. Comm'n</i> , NO. 03-14-0061-CV, 481 S.W.3d 388, 2015 WL 7697794, 2015 Tex. App. LEXIS 12054 (Tex. App.—Austin Nov. 25, 2015, no pet.). ø	31
	<i>Entergy Tex., Inc. v. Pub. Util. Comm'n of Tex.</i> , No. 03-14-00709-CV, 2016 WL 1039023, 2016 Tex. App. LEXIS 2436 (Tex. App.—Austin Mar. 9, 2016, no pet.). φ	32
	<i>Entergy Texas, Inc. v. Pub. Util. Comm'n of Tex.</i> , No. 03-14-00735-CV, 2016 Tex. App. LEXIS 3651 (Tex. App. —Austin Apr. 8, 2016, no pet.). ß.....	32
XII. Miscellaneous.....		33
	<i>Henson v. Tex. Health & Human Servs. Comm'n</i> , No. 03-13-00621-CV, 2015 WL 6830677, 2015 Tex. App. LEXIS 11416 (Tex. App.—Austin Nov. 5, 2015, no pet.). μ	33

I. INTRODUCTION

This case law update includes many of the administrative law cases decided in Texas between November 2015 and mid-July 2016. This is not an exhaustive review of all administrative law cases, nor do these synopses exhaustively cover all issues raised by these cases. We have attempted to choose cases representative of issues raised in Texas courts and to highlight the most salient points of each. Our views are not to be taken as the views of Texas Tech University School of Law and should not be interpreted as predictive of the result of future cases.

II. AGENCY AUTHORITY

Machete's Chop Shop, Inc. v. Tex. Film Comm'n, No. 03-14-00098-CV, __S.W.3d__, 2016 WL 368534, 2016 Tex. App. LEXIS 953 (Tex. App.—Austin Jan. 29, 2016, no pet.). ¶

Machete's Chop Shop, Inc. (Machete) brought suit against a number of parties, including: the Texas Film Commission (the Commission); the Director of the Commission, Heather Page; the Music, Film, Television, and Multimedia Office (the Office); the Office of the Governor; and the Governor of Texas, Greg Abbott (collectively, the State Defendants), after the Commission denied Machete's grant application from the Moving Image Industry Incentive Program (the Program). Machete sought declaratory relief, alleging the Commission mishandled its grant application from the Program and also sought a declaration from the court that a statute and two administrative rules that governed the program were unconstitutionally vague or, alternatively, that the rules did not apply to Machete. The trial court granted the State Defendants' plea to the jurisdiction and dismissed the lawsuit. Machete then appealed, and the Austin Court of Appeals affirmed the trial court's judgment.

The Office delegated administration of the Program to the Commission, which

then developed administrative rules to govern the procedure for submitting grant applications and the awarding of such grants. The administrative rules are codified in the Texas Government Code section 485.002 and title 13 of the Texas Administrative Code sections 121.1–.14, 121.4(b), which permit the Commission to deny a grant application if it finds the content of a film is inappropriate or depicts Texas or Texans in a negative light. According to these administrative rules, such content has the effect of revoking the eligibility of the applicant for grant funds, even after a project's completion.

In this case, Machete submitted a grant application in 2009, seeking funds in connection with its feature film *Machete*. The Commission initially approved the application for acceptance into the incentive program after reviewing the film's initial content but notified Machete that approval would not necessarily guarantee incentive funds. Following the film's release in 2010, the Commission notified Machete that based on a final review of the film's content, Machete no longer qualified for the Program grant pursuant to the relevant administrative rules and statutes.

As a result, Machete brought suit against the State Defendants, asserting that Page and Governor Abbott acted beyond the scope of their authority, or *ultra vires*, in denying the application and further argued that the applicable administrative rules and statutes were impermissibly vague in violation of the Fourteenth Amendment of the United States Constitution and the Due Course of Law provisions of the Texas Constitution. In bringing this lawsuit, Machete maintained that Texas Government Code section 2001.038 provided the trial court with appropriate subject-matter jurisdiction because the statute allows a party to challenge the applicability or validity of an agency rule through a declaratory action.

However, the appellate court ultimately found that section 2001.038 requires a justiciable controversy to establish subject-matter jurisdiction, and the justiciable controversy Machete pleaded

centered on its claim that the Commission's denial of the Program grant was unauthorized. Most importantly, the court held that sovereign immunity barred these claims, therefore Machete's § 2001.038 declaratory action was moot. Thus, the appellate court affirmed the trial court's decision granting the State Defendants' plea to the jurisdiction and dismissed Machete's lawsuit for lack of subject-matter jurisdiction.

McMillen v. Tex. Health & Human Servs. Comm'n., No. 15-0147, __S.W.3d__, 2016 WL 766799, 2016 Tex. LEXIS 178 (Tex. Feb. 26, 2016). Ω

Karen Nelson, a Deputy Inspector General for the Health and Human Services Commission's Office of the Inspector General (OIG), instructed the Deputy Counsel for the Commission, Michael McMillen, to research the Commission's practice of obtaining payments from certain recipients of Medicaid benefits. Through a memorandum, McMillen stated that the Commission did not have a legal basis for obtaining these payments. McMillen then gave the memorandum to Nelson, the OIG Internal Affairs Division, and the Commission's Executive Commissioner.

The Commission soon after terminated McMillen; McMillen, in turn, sued the Commission and its Executive Commissioner under the Whistleblower Act. Tex. Gov't Code § 554.0035 (West 1995). The Whistleblower Act shields "a public employee who in good faith reports a violation of law be employing the governmental entity or another public employee to an appropriate law enforcement authority." Tex. Gov't Code § 554.002(a).

The Texas Supreme Court faced the question of whether McMillen, in good faith, reported this alleged legal violation to the appropriate law enforcement authority when he reported this violation to the Executive Commissioner of the OIG. The OIG's powers include investigating fraud and abuse regarding health and human services issues, and investigating fraud by providers and recipients. *Id.* at § 531.102(a) (West 2015); *Id.*

at § 531.102(f)(2). The Act distinguished the powers of the OIG from the powers of the department chair of the University of Texas Southwestern Medical Center when it noted that the OIG has outward-looking enforcement authority into matters of fraud and abuse. *Univ. of Tex. Southwestern Med. Ctr. v. Gentilello*, 398 S.W. 3d 380, 385 (Tex. 2013). Ultimately, the Supreme Court held that McMillen reported the alleged legal violation to an appropriate law enforcement authority and reversed the court of appeals' judgment and remanded back to the court of appeals.

III. AGENCY INTERPRETATION OF STATUTES AND RULES

Brown v. Hegar, No. 03-14-00492-CV, 2015 WL 7952259, 2015 Tex. App. LEXIS 12254 (Tex. App.—Austin Dec. 3, 2015, no pet.). Γ

This case concerns the sale of an airplane to Mr. W. Robert Brown from CMB wherein neither Brown nor CMB paid any taxes to the state regarding the sale. Brown argued that the district court erred in granting the motion for summary judgment filed by the Comptroller of Public Accounts of the State of Texas (Comptroller) and the airplane qualified as an occasional sale. Therefore, according to Brown the sale was exempt from taxation and a four-year statute of limitations barred the taxes called for by the Comptroller's tax assessment. An administrative law judge decided that Brown did not show that the sale qualified for the occasional sale exemption and that he should have filed a use-tax report. After each party filed motions for summary judgment, the district court granted the Comptroller's motion, which alleged that the sale of the airplane did not qualify as an occasional sale, and held that the statute of limitations was not applicable due to Brown's failure to file a tax report. Brown appealed the district court's judgment.

Section 111.2104 of the Texas Tax Code includes a provision allowing for a four-year statute of limitations on assessing taxes, which Brown contended had run when

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