No. 23-30319

In the United States Court of Appeals for the Fifth Circuit

IN RE STARR SURPLUS LINES INSURANCE COMPANY

Petitioner

From the United States District Court for the
Western District of Louisiana
Lake Charles Division, Judge James D. Cain, Jr. Presiding
No. 2:22-cv-5880

THE STATE OF LOUISIANA'S AMICUS CURIAE BRIEF IN OPPOSITION TO STARR SURPLUS INSURANCE COMPANY'S PETITION FOR A WRIT OF MANDAMUS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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INTEREST OF AMICUS CURIAE

The State of Louisiana opposes Starr Surplus Lines Insurance Company's petition for a writ of mandamus. The State has an interest in ensuring that its political subdivisions—including the City of Jennings—receive the protections of the laws enacted by the Louisiana legislature. Likewise, the State has an interest in ensuring that its political subdivisions are not dragged to distant jurisdictions to litigate. The State submits this brief to explain that the forum selection clause here is unenforceable and to address the serious flaws with Starr's analysis of Louisiana law.

SUMMARY OF THE ARGUMENT

Forum selection clauses are unenforceable if they are contrary to public policy. Louisiana law declares "null, void, unenforceable, and against public policy" forum selection clauses in public contracts, including the insurance contract between Jennings and Starr at issue here. Attempting to evade this clear prohibition, Starr advances a statutory definition of "public contract" that expressly does not apply to the statute relevant here, and that Starr never presented to the district court. But the ordinary meaning of the term "public contract"—which

controls here—encompasses the insurance contract at issue. This conclusion is confirmed by other provisions of Louisiana law, and is consistent with prior opinions of the Louisiana Attorney General. No statute exempts public surplus-lines insurance contracts from Louisiana's general prohibition of forum selection clauses in public contracts.

Even if this Court believed that the district court erred by concluding that the forum selection clause here is unenforceable, its error is neither a "clear abuse of discretion that produce[d] [a] patently erroneous result[,]" nor does it "amount[] to a judicial usurpation of power." *Leonard v. Martin*, 38 F.4th 481, 489 (5th Cir. 2022).

The petition for a writ of mandamus should be denied.

ARGUMENT

I. STARR'S RIGHT TO THE WRIT IS NOT CLEAR AND INDISPUTABLE.

Mandamus "is an extraordinary remedy for extraordinary causes." *United States v. Denson*, 603 F.2d 1143, 1146 (5th Cir. 1979) (*en banc*). Among other exacting requirements, the Court will not issue a writ of mandamus unless "the petitioner has demonstrated a right to the issuance of a writ that is clear and indisputable." *In re United States ex*

rel. Drummond, 886 F.3d 448, 449–50 (5th Cir. 2018) (internal quotation marks omitted). In other words, in light of the procedural posture, the question for this Court is not whether it would agree with the district court on *de novo* review. This Court can issue the writ only if the district court's error is "clear and indisputable." *Id.*

Starr cannot meet this demanding standard. For the following reasons, the district court correctly concluded that, under Louisiana law, forum selection clauses in public contracts violate public policy and are therefore unenforceable. Even if the Court thinks the question presents a close call, mandamus relief is nonetheless inappropriate.

A. Forum selection clauses in public contracts are null and void under Louisiana law.

While not per se invalid, forum selection clauses are unenforceable if they are contrary to Louisiana public policy. *Shelter Mut. Ins. Co. v. Rimkus Consulting Grp., Inc.*, 2013-1977 (La. 7/1/14), 148 So. 3d 871, 881.[1] Louisiana law expressly prohibits and declares null, void, unenforceable, and against public policy forum selection clauses in all public contracts. *See* La. R.S. 9:2778. As the district court correctly

[1] The same is true when federal law applies in determining a forum selection clause's enforceability. *See, e.g.*, *Haynsworth v. The Corporation*, 121 F.3d 956, 963 (5th Cir. 1997).

concluded, La. R.S. 9:2778 applies without limitation to all public contracts, including to insurance contracts like the one at issue here.

B. Starr's statutory argument about the meaning of "public contract" is forfeited and irrelevant.

Starr argues that the "district court committed a clear and unmistakable error of law" by concluding that the insurance contract here was a "public contract" within the meaning of La. R.S. 9:2778. Starr Br. at 4. According to Starr, this is because the Louisiana Legislature elsewhere defined a "public contract" as a contract "for the making of any public works or for the purchase of any materials or supplies." *Id.* (quoting La. R.S. 38:2211(A)(11)). That statute defines "public work," in turn, as "the erection, construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a public entity." La. R.S. 38:2211(A)(13). So, Starr's argument goes, because a contract for insurance is a contract for none of these things, it is not a "public contract" within the meaning of Section 9:2778.

Starr never argued before the district court that La. R.S. 38:2211 and its definition of "public contract" controlled here. In fact, Starr never even mentioned this provision until now. Its petition for a writ of mandamus should be denied for this reason alone. *See, e.g., Def.*

Distributed v. Grewal, 971 F.3d 485, 496 (5th Cir. 2020) ("The general rule of this court is that arguments not raised before the district court are waived and will not be considered on appeal."). Application of this "general rule" is particularly appropriate where a petitioner seeks a writ of mandamus against a district court.

In any event, Starr's argument is meritless. Starr fails to acknowledge that La. R.S. 38:2211, in its very first line, expressly limits its definitions to Chapter 10 of Title 38 of the Louisiana Revised Statutes. So, this definition of "public contract" is irrelevant: It does not even apply to the whole of Title 38, much less to La. R.S. 9:2778, which is located in Title 9. The narrow meaning it affixes to "public contract" cannot be grafted on to other portions of the Louisiana Revised Statutes. *See, e.g., Hunter v. Rapides Par. Coliseum Auth.*, 2014-784 (La. App. 3 Cir. 2/4/15), 158 So. 3d 173, 178, *writ denied*, 2015-0737 (La. 6/1/15), 171 So. 3d 934 (refusing to borrow a definition of "employer" that was limited to those who employ twenty or more employees to a whistleblower statute when that definition was from a different Chapter's definitions section and that definitions section expressly limited its application to the Chapter in which it was located); *United States v. Romero-Ortiz*, 541 F. App'x 460,

463 (5th Cir. 2013) (refusing to "shoe-horn" a definition of "violence" from a dating and sexual violence statute into a "generic" assault statute because the statute containing that definition of "violence" "limit[ed] its definition of violence to that section only[]").

After all, the purpose of a section defining certain words or phrases as used within a particular set of statutes is to establish a definition that is more precise or specific than the meanings that would otherwise be assumed.[2] Take, for instance, the definition of "liquidated damages" contained in La. R.S. 38:2211—the very same definitions section that Starr points to for its definition of "public contract." For purposes of Chapter 10 of Title 38, "liquidated damages" are defined as "a fixed sum of damages stipulated in a public works construction contract . . . ." La. R.S. 38:2211(7). The legislature expressly limited this definition to Chapter 10 of Title 38. Applying it across all Louisiana statutes, regardless of Chapter or Title, would lead to serious errors. For example, Chapter 2 of Title 9 of the Louisiana Revised Statutes deals with the

[2] Of course, a definitions section could also be used to confer a broader meaning upon a term than its ordinary definition. *See, e.g., Romero-Ortiz*, 541 F. App'x at 463 (considering a statutory definition of violence that included "stalking and aggravated stalking"). Ultimately, the point is that a statutory provision specifically defining a particular word or phrase becomes necessary when the legislature wants a word or phrase to carry a meaning *different* from that word's or phrase's ordinary one.

"leases of movables" and contains a statute addressing the recovery of "liquidated damages" from broken leases. La. R.S. 9:3325. "[L]iquidated damages" in Chapter 2 is undefined. *See* La. R.S. 9:3306. Using the definition from Chapter 10 of Title 38—"a fixed sum of damages stipulated in a public works construction contract"—would obviously lead to absurd results. La. R.S. 38:2211(7).

But that is exactly the "shoe-horn[ing]" error Starr commits here by suggesting that the definition of "public contract" for the purposes of one chapter in Title 38 also establishes the meaning of "public contract" in Title 9. *Romero-Ortiz*, 541 F. App'x at 463. Chapter 10 of Title 38's definition of "liquidated damages" is narrow, context specific, and intentionally limited to a certain kind of liquidated damages—those in public works contracts. Just so, Chapter 10 of Title 38's definition of "public contracts" is narrow, context specific, and intentionally limited to a certain kind of public contract—those involving public works.

In fact, if anything, the necessity of a definition for the term "public contract" specific to Chapter 10 of Title 38 indicates that the general meaning of the term is far broader than the narrow definition given to it in La. R.S. 38:2211, as is the case with "liquidated damages." Indeed, La.

R.S. 38:2211 alone contains many definitions of words and phrases that are far narrower than their ordinary meaning. For example, it defines "alternate" as "an item on the bid form that may either increase or decrease the quantity of work or change the type of work within the scope of the project, material, or equipment specified in the bidding documents, or both." La. R.S. 38:2211(1). It defines "negotiate" as "the process of making purchases and entering into contracts without formal advertising and public bidding with the intention of obtaining the best price and terms possible under the circumstances." La. R.S. 38:2211(9).

By Starr's logic, these definitions of "alternate" and "negotiate," or at least something close to them, should apply with full force across the rest of the Louisiana Revised Statutes. Obviously, they do not. These definitions define "alternate" and "negotiate" very narrowly for the purposes of statutes addressing the bidding process for public contracts of the public works variety. And they do so to indicate that the far broader, ordinary meanings of "alternate" and "negotiate" do not apply.

Likewise, La. R.S. 38:2211's definition of "public contract"—which limits its meaning to contracts of the public works variety, along the exact same lines as La. R.S. 38:2211's definitions of "alternate," "negotiate,"

and "liquidated damages"—suggests that the term has a much broader ordinary meaning that would apply absent a narrowing definition. So, La. R.S. 38:2211's relevance here is exactly opposite to what Starr argues: It suggests a broad ordinary meaning of "public contract" rather than a narrow one equivalent to La. R.S. 38:2211's definition.

C. The ordinary meaning of the term "public contract" encompasses the insurance contract at issue here.

Rather than "shoe-horn" a narrow definition from an entirely different set of statutes, the proper approach when one encounters an undefined term in a statute is to determine the term's plain meaning, and to consider the context of its usage. *See Romero-Ortiz*, 541 F. App'x at 463; *see also David v. Our Lady of the Lake Hosp., Inc.*, 2002-2675 (La. 7/2/03), 849 So. 2d 38, 46 ("Nothing is better settled than that in the construction of a law its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written, provided it be within the constitutional authority of the legislative body which passed it." (quoting *United States v. Standard Brewery, Inc.*, 251 U.S. 210, 217 (1920))). The Louisiana legislature commands that "[w]ords and phrases shall be read with their context and shall be construed according to the common and approved usage of the

language." La. R.S. 1:3. Moreover, "technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." *Id.*

Here, whether one considers the ordinary meaning of the words "public" and "contract" or a technical, legal meaning of "public contract" as a whole, the phrase plainly encompasses the insurance contract at issue here. Merriam-Webster's dictionary, for instance, defines "public" as "of or relating to a government." *Public*, Merriam-Webster.Com, https://www.merriam-webster.com/dictionary/public (last visited May 21, 2023). It defines "contract" as "a binding agreement between two or more persons or parties." *Contract*, Merriam-Webster.Com, https://www.merriam-webster.com/dictionary/contract (last visited May 21, 2023). Considering these two definitions together, the insurance contract at issue here is unquestionably a "public contract." *See* MR283–84; MR345 (The district court considered whether the insurance contract at issue here is both (1) a contract and (2) "of or relating to" to a governmental entity and its property, and it explained in its memorandum opinion that the insurance contract here was "purchased

with public money and covers public property; there is thus every basis for considering it a 'public contract.'"); *cf. Am. Deposit Ins. Co. v. Myles*, 2000-2457 (La. 4/25/01), 783 So. 2d 1282, 1287 (considering the ordinary definitions of the component words individually to determine the meaning of "rewrite policy"); *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1740–41 (2020) (considering the ordinary definitions of the individual words in the phrase "discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin[]" to determine the phrase's meaning as a whole).

Treating the term "public contract" as a "technical word[] [or] phrase[]" that has "acquired a peculiar and appropriate meaning in the law" leads to the same conclusion. La. R.S. 1:3. Black's Law Dictionary defines "public contract" as "[a] contract that, although it involves public funds, may be performed by private persons and may benefit them." *Contract*, Black's Law Dictionary (11th ed. 2019). This broad definition does not even hint at the "public works" limitation upon which Starr insists, and plainly encompasses the insurance contract at issue here. Starr points to no alternative definition other than the one contained in La. R.S. 38:2211(A)(11).

D. Starr's interpretation of La. R.S. 9:2778 would render other Louisiana statutes redundant.

Other provisions of the Louisiana Revised Statutes confirm that the meaning of "public contracts" in La. R.S. 9:2778 is not limited to public contracts of the public works variety.

Consider La. R.S. 9:2779, which was enacted one year before its next-door neighbor La. R.S. 9:2778, and is identical to it in every respect material here expect that it applies to "construction contracts, subcontracts, and purchase orders for *public and private works projects* . . . ." (emphasis added). Provisions in "contracts, subcontracts, and purchase orders" for "public works projects requiring disputes arising thereunder to be resolved in a forum outside of this state or requiring their interpretation to be governed by the laws of another jurisdiction" are declared "inequitable and against the public policy of this state." La. R.S. 9:2779(A). And such provisions are "null and void and unenforceable as against public policy." La. R.S. 9:2779(B). So, if the meaning of "public contracts" in La. R.S. 9:2778 was limited to contracts involving public works, it would be entirely redundant of La. R.S. 9:2779, which was enacted just one year prior to La. R.S. 9:2778.

But "[t]he legislature is presumed to have acted with deliberation and to have enacted a statute in light of the preceding statutes involving the same subject matter[,]" and "courts are bound to give effect to all parts of a statute and cannot give a statute an interpretation that makes any part superfluous or meaningless, if that result can be avoided." *Louisiana Municipal Ass'n v. State*, 2004-0227, p. 35 (La. 1/12/05), 893 So. 2d 809, 837. So, "public contract" must be given a meaning that is broader than public works construction contracts and that encompasses the insurance contract here.

And this Court need not simply rely on presumptions as to how the legislature acts to reach this conclusion here. Rather, the legislative record confirms that the legislature was aware of La. R.S. 9:2779 when it enacted La. R.S. 9:2778, and that it enacted La. R.S. 9:2778 to broaden La. R.S. 9:2779's public-works-contract-specific prohibition to all public contracts. Immediately before the Senate Judiciary Committee unanimously reported favorably the bill that became La. R.S. 9:2778, the Deputy Parish Attorney of Jefferson Parish explained to the Committee that the year prior

> the legislature [had] passed [the act that became La. R.S. 9:2779] indicating that in construction contracts, it was

> against public policy of the state to provide that the construction works done in the state would be subject to law or proceedings outside the state. *With respect to public bodies, [La. R.S. 9:2779] only applied to public works contracts, and [the bill that became La. R.S. 9:2778] would expand it to all public contracts.*

S. Comm. on Judiciary A, *Minutes of Mtg. of May 5, 1992* (La. 1992) PDF at 29. (emphasis added).

And La. R.S. 9:2779 is not the only statute indicating that the term "public contract" in La. R.S. 9:2778 must be given a broader interpretation than Starr suggests. Indeed, just three weeks before enacting La. R.S. 9:2778, the Louisiana legislature enacted La. R.S. 38:2196—which is located in the Chapter of Title 38 from which Starr borrows the definition of "public contract" it advances. Similar to La. R.S. 9:2779, La. R.S. 38:2196 "declares null and void and unenforceable as against public policy" forum selection clauses in public works contracts.[3] So, the narrow definition for "public contract" within the meaning of La. R.S. 9:2778 that Starr advances would render La. R.S. 9:2778 redundant. This is yet another indication that the definition of "public contract" within the meaning of La. R.S. 9:2778 must be broader than Starr

[3] Unlike La. R.S. 9:2779, La. R.S. 38:2196 applies only to such *public* construction contracts rather than to *private* ones as well.

suggests. *La. Municipal Ass'n*, 893 So. 2d at 837.

E. Louisiana Attorney General opinions generally apply La. R.S. 9:2778's prohibitions to public contracts.

As the district court noted, an interpretation of "public contract" that includes the insurance contract at issue here is consistent with multiple opinions issued by the Louisiana Attorney General. MR343. In a 1996 opinion, the Attorney General determined that La. R.S. 9:2778's restrictions applied with full force to a contract involving the lease of land owned by the South Louisiana Port Commission—a political subdivision like Jennings—to a private plant operator. La. Att'y Gen. Op. No. 96-127, 1996 WL 210828 (Mar. 26, 1996). Likewise, in 2003, the Attorney General concluded that contracts the Louisiana Department of Economic Development's Film and Video Commission entered for the production of films in Louisiana implicated La. R.S. 9:2778's limitations. La. Att'y Gen. Op. No. 03-0046, 2003 WL 295602 (Jan. 30, 2003). To state the obvious, lease contracts and film production contracts are not public works construction contracts. But, when governmental entities are parties to them, they are public contracts within the meaning of the term in La. R.S. 9:2778. So is the insurance contract here.

F. There is No Conflict Between La. R.S. 9:2778 and La. R.S. 22:868(D).

As a general matter, Louisiana law prohibits forum selection clauses in insurance contracts. La. R.S. 22:868(A) forbids provisions in insurance contracts that "depriv[e] the courts of [Louisiana] of the jurisdiction or venue of action against the insurer" or "requir[e] [the contract] to be construed according to the laws of any other state or country . . . ." La. R.S. 22:868(C) declares such clauses in insurance contracts void. La. R.S. 22:868(D) creates a narrow exception to this general prohibition, providing that "[t]he provisions of Subsection A of [La. R.S. 22:868] shall not prohibit a forum or venue selection clause in a policy form that is not subject to approval by the Department of Insurance[,]" which includes surplus-lines insurance policies.

Starr seizes upon La. R.S. 22:868(D), arguing that it allows the forum selection clause at issue here, and that the district court was wrong to conclude otherwise. But La. R.S. 22:868(D) does no such thing. Rather than affirmatively blessing forum selection clauses in non-approved contracts, all La. R.S. 22:868(D) does is exempt such contracts from La. R.S. 22:868(A)'s prohibition. It does not purport to exempt—either expressly or by implication—non-approved insurance contracts from any

other statutory prohibition of forum selection clauses, including La. R.S. 9:2778's prohibition of forum selection clauses in public contracts. In fact, it expressly limits its exemption *only* to La. R.S. 22:868(A)'s prohibition. *See* La. R.S. 22:868(D) ("*The provisions of Subsection A of [La. R.S. 22:868] shall not prohibit* a forum or venue selection clause in a policy form that is not subject to approval by the Department of Insurance." (emphasis added)). So there is absolutely no conflict between La. R.S. 22:868(D) and La. R.S. 9:2778, and Starr's reliance on La. R.S. 22:868(D) here is misplaced.

The district court was right to conclude that La. R.S. 22:868(D) does not authorize the forum selection clause here. Rather, it is void and unenforceable under La. R.S. 9:2778.

* * *

Against this mountain of textual evidence and legal authority indicating that the district court's interpretation of La. R.S. 9:2778 was correct, all that Starr can muster is a definition from an entirely different title of the Louisiana Revised Statutes that expressly does not apply to La. R.S. 9:2778—a definition that Starr never presented to the district

court.[4] Starr cannot demonstrate that the district court "misinterpreted the law[]" or "misapplied it to the facts[.]" *In re JPMorgan Chase & Co.*, 916 F.3d 494, 499 (5th Cir. 2019). So, Starr falls well short of establishing that the district court committed a "clear abuse of discretion that produce[d] [a] patently erroneous result[]" or engaged in a "usurpation of judicial power." *Id.* Starr is not clearly or indisputably entitled to the writ.

II. STARR FORFEITED ITS KEY STATUTORY ARGUMENT, SO MANDAMUS IS INAPPROPRIATE UNDER THE CIRCUMSTANCES.

A court should not issue mandamus relief unless it "in the exercise of its discretion, is satisfied that the writ is appropriate under the circumstances." *Drummond*, 886 F.3d at 450 (internal quotation marks omitted). As discussed, Starr did not raise its key statutory argument before the district court. That alone makes mandamus inappropriate.

CONCLUSION

The petition for a writ of mandamus should be denied.

[4] Starr admits that the handful of cases from which it claims support "rely[] on La. R.S. 38:2211" and its definition of "public contract," as was appropriate in those cases given the statutes involved. Starr Br. at 21–22.

May 25, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2023, I filed the foregoing document through the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because the brief contains 3,707 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. R. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook font.

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