Supreme Court of Louisiana

FOR IMMEDIATE NEWS RELEASE NEWS RELEASE #005

FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **31st day of January, 2020** are as follows:

PER CURIAM::

2019-OC-01503 TEXAS BRINE COMPANY LLC AND UNITED BRINE SERVICES COMPANY, LLC VS. RODD NAQUIN IN HIS CAPACITY AS CLERK OF COURT FOR THE FIRST CIRCUIT COURT OF APPEAL FOR THE STATE OF LOUISIANA (Parish of Assumption)

CONSOLIDATED WITH

2019-OC-01508 GARY N. SOLOMON, STEPHEN H. JONES, TERRY D. JONES, AND HEALTH SCIENCE PARK, L.L.C. VS. RODD NAQUIN, IN HIS CAPACITY AS CLERK OF COURT FOR THE FIRST CIRCUIT COURT OF APPEAL FOR THE STATE OF LOUISIANA (Parish of East Baton Rouge)

In these consolidated actions, we are called upon to decide whether a writ of mandamus should issue to the clerk of an appellate court for the purpose of directing the clerk to comply with certain rules for the random assignment of panels and cases in that court. For the reasons which follow, we deny the petitions for writ of mandamus.

Writ of Mandamus Denied.

Retired Judge James Boddie Jr., appointed Justice ad hoc, sitting for Justice Marcus R. Clark. Chief Judge Susan M. Chehardy of the Court of Appeal, Fifth Circuit, appointed Justice ad hoc, sitting for Crain, J., recused.

Johnson, C.J., additionally concurs and assigns reasons.
Hughes, J., concurs in part and dissents in part.
Crichton, J., dissents and assigns reasons.
Genovese, J., dissents and assigns reasons.

01/31/20

SUPREME COURT OF LOUISIANA

NO. 2019-OC-1503
NO. 2019-OC-1508

TEXAS BRINE CO., LLC AND
UNITED BRINE SERVICES CO., LLC

V.

RODD NAQUIN, IN HIS OFFICIAL CAPACITY
AS CLERK OF COURT FOR THE FIRST CIRCUIT
COURT OF APPEAL FOR THE STATE OF LOUISIANA

c/w

GARY N. SOLOMON, STEPHEN H. JONES, TERRY D.
JONES, AND HEALTH SCIENCE PARK, L.L.C.
CENTERPOINT ENERGY RESOURCES CORP., ET AL.

V.

RODD NAQUIN, IN HIS CAPACITY AS CLERK OF
COURT FOR THE FIRST CIRCUIT COURT OF APPEAL FOR
THE STATE OF LOUISIANA

ON WRIT OF MANDAMUS TO THE COURT OF APPEAL,
FIRST CIRCUIT

PER CURIAM*

In these consolidated actions, we are called upon to decide whether a writ of mandamus should issue to the clerk of an appellate court for the purpose of directing the clerk to comply with certain rules for the random assignment of panels and cases in that court. For the reasons which follow, we deny the petitions for writ of mandamus.

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* Retired Judge James Boddie Jr., appointed Justice ad hoc, sitting for Justice Marcus R. Clark. Chief Judge Susan M. Chehardy of the Court of Appeal, Fifth Circuit, appointed Justice ad hoc, sitting for Crain, J., recused.

FACTS AND PROCEDURAL HISTORY

On July 31, 2019, Gary N. Solomon, Stephen H. Jones, Terry D. Jones, and Health Science Park, LLC (collectively referred to hereinafter as the "Solomon plaintiffs") filed a petition for mandamus in the Court of Appeal, First Circuit (hereinafter referred to as the "First Circuit") against Rodd Naquin, in his capacity as the Clerk of Court for the First Circuit Court of Appeal for the State of Louisiana (hereinafter referred to as "clerk"). The petition sought an order directing the clerk "to follow the statutory mandate to randomly allot each appeal and each writ application to appeal and writ panels. . . ."

On August 9, 2019, Texas Brine Co., LLC and United Brine Services Co., LLC (collectively referred to hereinafter as "Texas Brine") filed a similar mandamus petition in the First Circuit against the clerk. As in the Solomon petition, Texas Brine's petition sought an order directing the clerk "to follow the statutory mandate to randomly allot each appeal and each writ application to appeal and writ panels. . . ."

The First Circuit issued en banc orders recusing the court from both actions. In incorporated reasons, the orders explained recusal of the entire court was mandated because each petition "when read as a whole, seeks to mandamus the court itself. . . ."

On September 20, 2019, we exercised our plenary supervisory jurisdiction under La. Const. Art. V, §5(A) to assume jurisdiction over both actions.[1] We further directed the First Circuit to "submit a per curiam to this court detailing the internal allotment procedures for appeals and applications for supervisory writs in that court."

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[1] This court had initially transferred the actions to the Court of Appeal, Fourth Circuit upon the recusal of the First Circuit. The September 20, 2019 order vacated this order, and directed the records be transferred directly to this court.

On October 4, 2019, the First Circuit filed a per curiam pursuant to this court's order. The per curiam was signed by every member of the court of appeal, with Judge Crain concurring with reasons[2] and Judge McDonald concurring without reasons. The per curiam references the court of appeal's internal rules, and those rules referenced are attached to the per curiam.

In its three-page per curiam, the First Circuit explained its allotment procedures were changed in 2019 after the 2018 amendment to La. R.S. 13:319.[3] Prior to the 2019 change, the court used an allotment process, applicable to appeals only, which it explained as follows:

> Prior to legislative amendment in 2018, La. R.S. 13:319 provided that "[e]ach civil and criminal **proceeding** and each application for writs shall be randomly assigned by the clerk, subject to the direct supervision of the court." Thus, with regard to the random allotment of appeals, prior to the 2018 amendment and in compliance with the pre-amendment language of the statute, where an appeal arose from a judgment in a judicial district court proceeding from which a prior appeal had previously arisen, the subsequent appeal in that same district court

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[2] Judge Crain stated:

> I agree the facts set forth in the per curium are accurate and our court is properly responding to the Supreme Court's directive. I write separately to emphasize the underpinning of the parties' arguments is the assumption that the legislative branch, as opposed to the judicial branch, has the constitutional authority to dictate the manner in which cases are assigned within the court. The assumption is not only arguably flawed, but also threatens the ability of our courts to independently perform their adjudicative functions. Furthermore, there has been no constitutional challenge asserted as to this court's allotment procedures.

[3] La. R.S. 13:319, as amended by Acts 2018, No. 658, § 1, effective August 1, 2018, provides:

> Each civil and criminal **appeal** and each application for writs shall be randomly assigned by the clerk, subject to the direct supervision of the court. [emphasis added].

Prior to that time, the statute provided:

> Each civil and criminal **proceeding** and each application for writs shall be randomly assigned by the clerk, subject to the direct supervision of the court. [emphasis added].

> case number (proceeding) was assigned to the same primary judge who had authored the prior appeal in that district court proceeding, sitting with that primary judge's current panel.
>
> However, by Acts 2018, No. 658, the Legislature amended La. R.S. 13:319 to change the word "proceeding" to "appeal," thus now providing that"[e]ach civil and criminal **appeal** and each application for writs shall be randomly assigned by the clerk, subject to the direct supervision of the court." Following this legislative amendment, the First Circuit reviewed and amended its Internal Rules effective July 10, 2019, as specifically codified into the Court's Internal Rules on August 9, 2019, to clarify that each appeal is randomly allotted, regardless of prior appeals in the First Circuit arising from the same district court proceeding bearing that district court case number. See Internal Rule 2.3d(l)(c). [emphasis in original].

Going forward, the First Circuit stated it adopted rules requiring a procedure for random allotment by the Clerk's office of both appeals (Internal Rule 2.3(d)(l)(c)) and writ applications (Internal Rules 3.9(a)),[4] with consideration for recusals and emergencies.

The First Circuit also explained its rules require random allotment after recusal of a member of a panel:

> Appeals are randomly allotted to a panel by the clerk's office, as described above, taking into account any standing recusal

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[4] Internal Rule 3.9(a)(1) further provides:

> 3.9a(1) Writ applications. Other than the below-described procedure for emergency or expedited writ applications, the Clerk's Office shall randomly allot writ applications in court of appeal docket number order, in groups of 4, from 2 pools.
>
> 3.9a(1)(a) Pool 1 shall consist of writ applications entered into the Court's case management system from the 1st day of the month, until the 15th day of the month plus all writ applications not previously allotted. Pool 2 shall consist of writ applications entered into the Court's case management system from the 16th day of the month, until the last day of the month plus all writ applications not previously allotted.
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> 3.9a(1)(b) The clerk's office shall make note of the two people present for the allotment process. The clerk's office shall provide the list of writ applications and the allotments to Central Staff after each pool's allotment.

> a judge may have. If a member of panel has a standing recusal applicable to a particular appeal, the matter is randomly allotted to one of the remaining panels. See Rule 2.3d(l)(c)(i). However, if more than one panel must be removed from the allotment process due to standing recusals, the clerk of court, utilizing two clerk's office staff members, randomly draws a special panel by removing the judges with the standing recusals from the selection process and then randomly drawing the special panel from the remaining judges. See Internal Rules 2.3d(1)(c)(ii).
>
> If a judge is later recused following the initial random allotment of an appeal or writ application, the judge is replaced by the assignment of another judge, by random allotment. The clerk of court utilizes two clerk's office staff members to randomly select the replacement judge. See Internal Rules 2.3d(l)(c)(i) and 3.9f(l).

Finally, the per curiam discusses allotments for emergency filings:

> The allotment process for writs is also by random allotment, as set forth in Rule 3.9. Writ applications designated for emergency or expedited consideration are allotted to the writ panel on duty as the nature of the emergency so requires. See Internal Rule 3.9a.

On October 21, 2019, we issued an order directing the First Circuit to submit a supplemental per curiam "discussing whether the court's allotment procedures incorporate any geographical considerations. . . ."

Pursuant to that order, the First Circuit submitted a supplemental per curiam on October 29, 2019. The supplemental per curiam draws a distinction between random allotment of appeals/writ applications and the drawing of panels:

> The random allotment of appeals and writ applications to a particular panel is entirely independent of the process of composing appellate panels and writ duty panels. The First Circuit Court of Appeal's procedures for the **allotment of appeals and writs**, as detailed in this court's prior per curiam delivered to the Supreme Court on October 4, 2019, do not incorporate any geographical considerations, as such allotments are made by random assignment, in accordance with applicable statutes.
>
> As to the **drawing of panels**, the composition of panels is reserved to the courts of appeal by Louisiana Constitution, Article V, Section 8(A). Thus, the constitutional provision

> requires only that the First Circuit sit in panels of at least three judges selected according to rules adopted by the Court, as the composition of such panels is specifically reserved to each court, notwithstanding any statutory enactment. The rules adopted by the First Circuit establish that the Court sits in at least six appeal cycles annually, with four regular panels of three judges each, throughout the court year. The Court's procedures for the composition of regular panels is random within the geographic divisions of the court, as more fully described in the following paragraph. The composition and terms of the Court's panels and the schedule of oral argument dates and writ conference dates are formulated and recommended by the Case Flow and Scheduling Committee, subject to approval of the Conference of the First Circuit. See Internal Rule 2.1a. [emphasis in original].

The supplemental per curiam then discusses the composition of the panels:

> By longstanding practice, and in accord with the constitutional authority specifically reserving such to each court of appeal, absent recusals, each regular panel of the First Circuit is comprised of one member randomly chosen through mechanical means from the four members of each of the Court's three election districts. The random composition of the initial three-judge panels is adopted pursuant to a five-year plan of rotation of members among the panels. To further ensure random composition of the panels, panel members of particular panels do not sit as an intact panel in the following year. The four randomly drawn regular panels also sit on writ duty throughout the Court's six appeal cycles. Summer writ duty panels, which rotate duty on a two-week basis, are established by seniority, without regard to the allotment of any writ or appeal, to account for summer scheduling. Rotation of the composition of the panels occurs in August of each year.

Following receipt of the supplemental per curiam, we issued a special briefing order which consolidated both mandamus actions and scheduled them for oral argument.

DISCUSSION

Propriety of the Mandamus Petitions

Prior to discussing the merits of the mandamus petitions, we must first consider

whether the mandamus remedy is procedurally appropriate under the facts presented.

Pursuant to La. Code Civ. P. art. 3863, "[a] writ of mandamus may be directed to a public officer to compel the performance of a ministerial duty required by law. . . ." We have explained mandamus "is an extraordinary remedy, to be applied where ordinary means fail to afford adequate relief." *Hoag v. State*, 2004-0857, p. 6 (La. 12/1/04), 889 So. 2d 1019, 1023. It is well settled "that the only circumstances under which courts may cause a writ of mandamus to issue is where the actions sought to be performed by the legislature are purely ministerial in nature." *Id.*

Mandamus is to be used only when there is a clear and specific legal right to be enforced or a duty that ought to be performed. It never issues in doubtful cases. *Bonvillian v. Dep't of Ins.*, 2004-0332, p. 3 (La. App. 1 Cir. 2/16/05), 906 So.2d 596, 599, *writ not considered*, 2005-0776 (La. 5/6/05), 901 So.2d 1081; *Wiginton v. Tangipahoa Parish Council*, 2000-1319, p. 4 (La. App. 1 Cir. 6/29/01), 790 So.2d 160, 163, *writ denied*, 2001-2541 (La. 12/07/01), 803 So.2d 971. In mandamus proceedings against a public officer involving the performance of an official duty, nothing can be inquired into but the question of duty on the face of the statute and the ministerial character of the duty he is charged to perform. *Plaisance v. Davis*, 2003-0767, p. 11 (La. App. 1 Cir.11/07/03), 868 So.2d 711, 718, *writ denied*, 2003-3362 (La. 2/13/04), 867 So.2d 699.

Although they differ in their specific allegations, both petitions for writ of mandamus generally seek to compel the clerk to comply with La. R.S. 13:319, which provides, "[e]ach civil and criminal appeal and each application for writs shall be randomly assigned by the clerk, subject to the direct supervision of the court," and La. Code Civ. P. art. 2164.1, which provides, "[t]he provisions of R.S. 13:319 shall be applicable to assignment of appellate panels."

In order for mandamus to apply, we must determine whether these provisions impose a ministerial duty on the clerk. A ministerial duty has been defined as "a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law." *Hoag*, 889 So.2d at 1024. An examination of these provisions indicate neither La. Code Civ. P. art. 2164.1 nor La. R.S. 13:319 prescribe any definite duties on the clerk for assignment of appeals or writ applications other than the provisions in La. R.S. 13:319 requiring such cases must be "randomly assigned." In this regard, the language of La. R.S. 13:319 stands in clear contrast to the provisions of La. Code Civ. P. art. 253.1, which sets forth explicit procedures for random assignment of cases in the district courts.[5] In the absence of any specific or definite procedures for random assignment of cases in the appellate court, the statute gives the clerk discretion to select an appropriate method to randomly assign such matters. If a public officer is vested with any element of discretion, mandamus will not lie. *Hoag*, 889 So.2d at 1024. Therefore, on this ground alone, the petitions for writ of mandamus must fail.

Nonetheless, we recognize the true intent of petitioners is to determine whether the First Circuit's assignment procedure comports with generally accepted principles of random allotment. Although it was perhaps error for petitioners to urge this relief through writs of mandamus, our jurisprudence has long declined to place form over

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[5] La. Code Civ. P. art. 253.1 provides:

> All pleadings filed shall be randomly assigned to a particular section or division of the court by either of the following methods:
>
> (1) By drawing indiscriminately from a pool containing designations of all sections or divisions of court in the particular jurisdiction in which the case is filed.
>
> (2) By use of a properly programmed electronic device or computer programmed to randomly assign cases to any one of the sections or divisions of court in the particular jurisdiction in which the case is filed.

substance, and instead requires courts to look to the facts alleged to discover what, if any, relief is available to the parties. *See, e.g.*, *Reynolds v. Brown*, 2011-0525, p. 6 (La. App. 5 Cir. 12/28/11), 84 So.3d 655, 659.

La. Const. art. V, § 5(A) grants this court "general supervisory jurisdiction over all other courts." It is well recognized the constitutional grant of supervisory authority to this court is plenary, unfettered by jurisdictional requirements, and exercisable at the complete discretion of the court. *Unwired Telecom Corp. v. Par. of Calcasieu*, 2003-0732, p. 8 (La. 1/19/05), 903 So.2d 392, 400 (on rehearing).

Accordingly, in the exercise of supervisory authority, we will entertain petitioners' arguments on the question of whether the rules of the First Circuit are consistent with the statutory and jurisprudential requirements for random assignment of cases.

Petition of Texas Brine

Texas Brine's petition alleges the First Circuit follows "an internal policy of allocating judges to appellate panels according to the geographic makeup of the First Circuit's election districts—allocating one judge from each district to each panel." According to Texas Brine, this policy "dramatically limits the number of unique panels that can hear writs, appeals, and contested motions before the First Circuit from 220 unique combinations to 64 unique combinations—a reduction of approximately 70.9%." It concludes this policy is an "affront to the requirement of randomness."

Although this policy has apparently not been formally codified by the First Circuit, its October 29, 2019 supplemental per curiam explains the First Circuit, by "longstanding practice," forms panels "comprised of one member randomly chosen

through mechanical means from the four members of each of the Court's three election districts." The court sits in at least six appeal cycles annually, with four regular panels of three judges each, throughout the court year.

At the outset, it is important to recognize the policy challenged by Texas Brine relates to the selection of appellate panels, rather than the assignment of cases to those panels. This distinction is significant, because the selection of appellate panels is governed by La. Const. Art. V, § 8(A), which provides:

> Section 8(A) Circuits, Panels. The state shall be divided into at least four circuits, with one court of appeal in each. Each court shall sit in panels of at least three judges **selected according to rules adopted by the courts**. [emphasis added].

This provision expressly grants the courts of appeal the authority to adopt rules for the selection of panels. However, Texas Brine submits the Legislature recognized selection of panels must be done through random assignment through its enaction in 2018 of La. Code Civ. P. art. 2164, which states the random assignment provisions of R.S. 13:319 "shall be applicable to assignment of appellate panels."

The question of whether the legislature may impose limitations or restrictions on the rule-making authority granted to the courts of appeal under La. Const. Art. V, § 8(A) is not raised by these pleadings, and we therefore express no opinion on this issue. Rather, it suffices to say we have long recognized due process requires assignments be done on a random or rotating basis. *State v. Simpson*, 551 So.2d 1303, 1304 (La. 1989) (on rehearing). La. Code Civ. P. art. 2164.1 has the effect of recognizing and codifying this fundamental aspect of our law. Based on our review, we see nothing in the First Circuit's rules for selection of panels which runs counter to the principles of random assignment from a statutory or due process standpoint.

As discussed earlier, La. R.S. 13:319 requires appeals and writ applications to

be "randomly assigned," but does not provide any specific procedures or requirements for such random assignments. Similarly, neither the statutes nor jurisprudence mandate any specific methods for random selection of judges for appellate panels. In the absence of any specific rules or procedures for random assignments, a system which results in random assignments is not invalid simply because it is possible to conceive of a more random system.

In addressing the due process aspects of random allotment, our jurisprudence has never required an allotment system to be purely random. In *State v. Cooper*, 2010-2344, p. 13 (La. 11/16/10), 50 So.3d 115, 126, we explained:

> Our inquiry here is not to determine whether the district judges selected the "best" or "easiest" method of allotting criminal cases. Our focus here is only on whether the 2010 Plan which was adopted violates the law. We have established a framework in the uniform rules whereby district judges may tailor their case allotment plans in ways that will take into consideration the unique characteristics of their judicial district and the resources available to them. **In our goal of ensuring due process is provided to litigants, we have never required an allotment system which was purely random**. [emphasis added].

Our cases in this area have instead focused on whether assignments are subject to intentional manipulation by either the courts or litigants. *See, e.g.*, *State v. Sprint Communications Co*., 1996-3094, p. 4 (La. 9/9/97), 699 So.2d 1058, 1062 (explaining interdivisional transfers of cases between judges after the cases were randomly assigned "would defeat the purpose of the statute and render it meaningless"); *Simpson*, 551 So.2d at 1304 (explaining criminal cases must be allotted for trial using a procedure "which does not vest the district attorney with power to choose the judge to whom a particular case is assigned."). However, we have declined to find the principles of random assignment are violated where there is a mere potential the assignments might be subject to manipulation. *State v. Nunez*, 2015-1473, 2015-

1486, p. 13 (La. 1/27/16), 187 So.3d 964, 973 (explaining it would be "burdensome and untenable" to invalidate an assignment system for "merely being susceptible to manipulation").

While Texas Brine argues the use of a geographical component may result in panel assignments which are not equal from a purely mathematical standpoint, there is no indication these assignments are not random. As explained in the First Circuit's October 29, 2019 per curiam, each panel is created by randomly selecting one member through mechanical means from the four members of each of the court's three election districts. To further ensure random composition of the panels, panel members of particular panels do not sit as an intact panel in the following year.

As we explained in *Cooper*, it is not our role to determine whether a particular allotment system is the best or easiest method available, nor have we required the adoption of systems resulting in a purely random distribution of cases among judges. Without passing on the wisdom of the First Circuit's assignment system, we find the system is reasonably designed to select judges for panels in a random fashion which does not permit intentional manipulation by either the judges or the litigants. Appeals and writ applications are then randomly assigned among these panels, further ensuring there is no pattern or predictability as to which judges hear specific cases. This procedure comports with statutory and jurisprudential requirements for random assignment.[6]

Accordingly, Texas Brine's petition for writ of mandamus is denied.

The Solomon Plaintiffs' Petition

[6] Texas Brine argues the First Circuit's system results in circumstances where a single judge might serve disproportionately on panels involving separate appeals from the same litigation, thereby creating the potential for "confirmation" bias on the part of that judge. However, any questions of bias are more properly raised through a motion to recuse.

The Solomon plaintiffs' mandamus petition is premised on the First Circuit's practice, used between 2006-2018, of assigning subsequent appeals or applications for writs to a panel which included a judge who sat on the original panel and may have taken the lead or authored the first opinion/ruling in the case. Specifically, the Solomon plaintiffs alleged:

> The First Circuit Clerk of Court presumably assigns the first appeal or writ application in a case to a sitting panel by random allotment. Upon information and belief, however, and from the history of [the Solomon plaintiffs'] dealings with this Court from 2006 through 2018 and supported by the summary chart attached to Exhibit A and the table provided above, each subsequent application for a writ or appeal in that case is then assigned by the Clerk's office to a panel that includes a judge who sat on the original panel and who may have taken the lead or authored the first opinion/ruling in the case. That judge, and the panel to which he or she is yearly assigned, will receive all subsequent writs or appeals in the case. Regardless of any efficiency this practice may theoretically provide the Court, it is antagonistic to the very purpose of random allotment - to ensure that freedom from bias stays the norm, which can only be accomplished when true neutral and random assignment of cases is the rule. The conscious or unconscious mindset about a case with which a judge has history cannot help but color the lenses through which the judge views issues subsequently presented in the case. True random allotment will not guarantee that a particular judge will not be assigned to subsequent matters but it will certainly even the odds and provide a more level playing field for the parties.

The Solomon plaintiffs' petition for mandamus was filed on July 31, 2019. On August 9, 2019, the First Circuit amended its internal rules to clarify that each appeal is randomly allotted, regardless of any prior appeals arising from the same case. In its current version, the First Circuit's rule for allotment of appeals, Internal Rule 2.3d(1)(c), provides, in pertinent part:

> 2.3d(1)(c) Random allotment process. The clerk's office shall use two clerk's office staff members **for the random allotment of each civil and criminal appeal to a panel**, taking into account all standing recusals, and to thereafter

designate a primary (or writing) judge. [emphasis added].

Similarly, the rule for allotment of writ applications, Internal Rule 3.9a, provides:

> 3.9a Allotment, After each writ application is given an appellate docket number, **each writ application shall be randomly allotted to a panel in accordance with Louisiana Revised Statute 13:319**. [emphasis added].

In *Cat's Meow v. City of New Orleans through Dept. of Finance*, 1998-0601, p. 8-9 (La. 10/20/98), 720 So.2d 1186, 1193-1194, we explained a dispute can become moot if the challenged provision is amended during the pendency of the suit:

> According to Louisiana jurisprudence, an issue is "moot" when a judgment or decree on that issue has been "deprived of practical significance" or "made abstract or purely academic." *Perschall v. State*, 96-0322 (La.7/1/97), 697 So.2d 240; *Louisiana Associated Gen. Contractors, Inc.*, 669 So.2d at 1193; *American Waste & Pollution Control Co.*, 627 So.2d at 162. A case is "moot" when a rendered judgment or decree can serve no useful purpose and give no practical relief or effect. *Robin*, 384 So.2d at 405. If the case is moot, then "`there is no subject matter on which the judgment of the court can operate.'" *St. Charles Parish Sch. Bd.*, 512 So.2d at 1171 (citing *Ex parte Baez*, 177 U.S. 378, 20 S.Ct. 673, 44 L.Ed. 813 (1900)). That is, jurisdiction, once established, may abate if the case becomes moot.
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> * * *
>
> **When the challenged article, statute, or ordinance has been amended or expired, mootness may result if the change corrects or cures the condition complained of or fully satisfies the claim. Further, if it is concluded that the new legislation was specifically intended to resolve the questions raised by the controversy, a court may find that the case or controversy is moot**. In such a case, there is no longer an actual controversy for the court to address, and any judicial adjudication on the matter would be an impermissible advisory opinion. [emphasis added].

In the instant case, the changes to Internal Rules 2.3d(1)(c) and 3.9a resolve the questions over allotments raised by the Solomon plaintiffs. The Solomon

plaintiffs acknowledge the existence of this rule change, but argue this court should nonetheless consider their petition because there is a possibility the First Circuit could change its rules again in the future.

In *State v. Rochon*, 2011-0009, p. 11 (La. 10/25/11), 75 So.3d 876, 884 (footnote omitted), we recognized an exception to the mootness doctrine for cases capable of repetition, yet evading review. We explained that "[u]nder this exception, a court may consider the merits of a case that would otherwise be deemed moot when the challenged action was in its duration too short to be fully appealed prior to its cessation or expiration and a reasonable expectation existed that the same complaining party would be subjected to a similar action." *Id.*

We do not believe this exception is applicable under the facts presented. While it is possible the court of appeal could change these rules in the future, any opinion by this court at this time would be based on speculative facts and would be advisory in nature. By all indications, the First Circuit's amended rules were adopted for the purpose of bringing the court's rules into compliance with the 2018 legislation, and we have no reason to believe the court will not continue to adhere to the legislative requirements.[7]

Accordingly, we deny the Solomon plaintiffs' petition for writ of mandamus as moot.

DECREE

For the reasons assigned, the petitions for writ of mandamus are hereby denied.

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[7] Although there is no formal requirement that the courts of appeal publish their internal rules of assignments, we believe that such publication would be useful in ensuring full transparency and promoting confidence of attorneys and litigants who appear before those courts. Therefore, we strongly encourage all courts of appeal to codify and publish their internal assignment rules on their respective websites.

01/31/20

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NO. 2019-OC-1508

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ON WRIT OF MANDAMUS TO THE COURT OF APPEAL,
FIRST CIRCUIT

JOHNSON, C.J., additionally concurs and assigns reasons.

I agree with the Per Curiam and write separately simply to emphasize that a mandamus will not lie in this case because the clerk of court has discretion in selecting a method of random allotment. Given the element of discretion, a petition for mandamus is not procedurally appropriate.

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FIRST CIRCUIT

Hughes, J., concurs in part and dissents in part.

I do not find any problem in the inclusion of a geographical factor in the initial allotment of cases by the First Circuit. However, given that four of the twelve judges of that court are unable to participate in matters involving the sink-hole cases, I would refer those cases to another circuit for resolution.

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GARY N. SOLOMON, STEPHEN H. JONES, TERRY D.
JONES, AND HEALTH SCIENCE PARK, L.L.C.
CENTERPOINT ENERGY RESOURCES CORP., ET AL.

V.

RODD NAQUIN, IN HIS CAPACITY AS CLERK OF
COURT FOR THE FIRST CIRCUIT COURT OF APPEAL FOR
THE STATE OF LOUISIANA

ON WRIT OF MANDAMUS TO THE COURT OF APPEAL, FIRST CIRCUIT

CRICHTON, J., dissents and assigns reasons:

I dissent to the majority opinion as it relates to matter number 2019-OC-01503, which addresses the petition for writ of mandamus filed by Texas Brine Co., LLC and United Brine Services Co., LLC (collectively herein, "Texas Brine"). As the majority notes, we exercised our plenary supervisory jurisdiction pursuant to La. Const. Art. V, §5(A) when assuming jurisdiction over this matter. This supervisory authority is "plenary, unfettered by jurisdictional requirements, and exercisable at the complete discretion of the court." Albert Jr. Tate, Supervisory Powers of the Louisiana Courts of Appeal, 38 Tul. L. Rev. 429, 430 (1964). Nevertheless, we have self-imposed restrictions on this power, exceptions to which should be made only where extraordinary circumstances justify this Court's intervention. In my view,

such extraordinary circumstances are present here and require this Court to issue a writ of mandamus ordering the Clerk of Court of the First Circuit Court of Appeal to assign panels in a manner that does not include geographical limitations based on election districts.

Preliminarily, I disagree with the majority that Texas Brine's petition for writ of mandamus must fail irrespective of the merits. Whether or not mandamus is an appropriate remedy for an action depends on whether the duty sought to be performed is ministerial or discretionary. *See* La. C.C. art. 3863 ("A writ of mandamus may be directed to a public officer to compel the performance of a ministerial duty required by law, or to a former officer or his heirs to compel the delivery of the papers and effects of the office to his successor."). "It is well settled that mandamus will lie to compel performance of prescribed duties that are purely ministerial and in which no element of discretion is left to the public officer." *Felix v. St. Paul Fire & Marine Ins. Co.*, 477 So. 2d 676, 682 (La. 1985). The duty must be "clear and specific." *Id.*

Louisiana Revised Statute 13:319 provides "[e]ach civil and criminal appeal and each application for writs shall be randomly assigned by the Clerk, subject to the direct supervision of the court," and this provision "*shall* be applicable to assignment of appellate panels." C.C.P. art. 2164.1. The relevant inquiry in determining if mandamus is an appropriate remedy, then, is whether the Clerk's duty to randomly assign appellate panels to civil and criminal appeals and each application for writs is ministerial or discretionary.

The majority relies on this Court's prior decision in *Hoag v. State*, 04-0857 (La. 12/1/04), 889 So. 2d 1019, 1023, in finding that the duty of the Clerk in this matter is discretionary, rather than ministerial. The duty present in *Hoag*, however, is clearly distinguishable from the duty set forth in C.C.P. art. 2164.1. In *Hoag*, the relevant question was whether a court could order the legislature by writ of

mandamus to appropriate funds to pay a judgment pursuant to La. R.S. 13:5109(B), which required that any judgment rendered against the state must be paid out of funds appropriated for that purpose by the legislature. *Id*. at 1023-1024. In finding that the act of appropriating funds is discretionary and not subject to a mandamus action, this Court held that "appropriating funds is, by its nature, discretionary and specifically granted to the legislature by the constitution" and "[t]his Court has consistently recognized the legislature's absolute control over the finances of the state, except as limited by the constitution." *Id*. at 1024 (internal citations omitted). Notably, La. R.S. 13:5109(B) did not impose a duty on the legislature but instead provided the manner in which judgment would be paid, *i.e.* at the legislature's discretion.

Unlike the provision at issue in *Hoag*, the mandate by the legislature to the clerks of court of each court of appeal to randomly allot cases is not by its nature a discretionary act. The language requiring assignment of panels to be random is "clear and specific" and leaves no discretion to the Clerk to choose whether or not to assign panels at random. *See* La. C.C.P. art. 2164.1 ("The provisions of R.S. 13:319 *shall* be applicable to assignment of appellate panels."). Accordingly, I would find that Texas Brine's petition for writ of mandamus does not seek a remedy that this Court cannot afford in accordance with La. C.C. art. 3863.

As to the merits of Texas Brine's petition – *i.e.*, whether the First Circuit's panel assignments are random – I dissent from the majority's finding that the First Circuit's procedure is consistent with the statutory and jurisprudential requirements for random assignment of cases. In reaching this conclusion, I find it significant that the Clerk fails to provide any compelling reason for the geographical limitation on its ministerial duty under C.C.P. art. 2164.1. While we have recognized that the goal of insuring due process to litigants does not require an allotment system that is "purely random," *see State v. Cooper*, 10-2344 (La. 11/16/10), 50 So. 3d 115, in

each of the cases on which the majority relies to condone the First Circuit's geographical limitations there was a concern for judicial efficiency or costs that necessitated the manner in which allotment was effected. *See, e.g.*, *Cooper*, *supra* (finding that two-year geographical assignments of judges within a district court did not violate due process where it was necessary for judicial efficiency and costs); *State v. Sprint Communications Co.*, 96-3094, p. 3 (La. 9/9/97), 699 So. 2d 1058, 1062 ("The decision to disturb the equitable distribution of assignments should not be made lightly. Judges cannot decide to accept or reject cases unless a valid reason for recusation exists."); *State v. Nunez*, 15-1473, 15-1486, p. 13 (La. 1/27/16), 187 So. 3d 964, 973 (declining to adopt a "burdensome and untenable rule" that an allotment procedure violates due process principles merely by being susceptible to manipulation).

Again, contrary to the jurisprudence on which the majority relies, the Clerk provides no compelling reason for the geographical limitation in its allotment procedure in the nature of judicial efficiency or otherwise. In fact, every other court of appeal in Louisiana operates without this limitation on random panel assignments. I therefore decline to expand the scope of our earlier decisions permitting limitations on random allotment, *see Cooper*, *supra*, absent proof that this deviation is required for judicial efficiency.

Accordingly, I find that the extraordinary circumstances in this matter necessitate the rare exercise of this Court's plenary authority pursuant to La. Cont. art. V, §5(A), and I am therefore duty-bound to dissent. I would issue a writ of mandamus to the Clerk of Court of the First Circuit Court of Appeal ordering its performance of the ministerial duties set forth in La. C.C.P. art. 2164.1 to randomly assign panels in this matter and in all future panel assignments of that court. However, I vote to deny Texas Brine's request to transfer the so-called "Sinkhole Cases" to another circuit court.

01/31/20

SUPREME COURT OF LOUISIANA

NO. 2019-OC-1503
NO. 2019-OC-1508

TEXAS BRINE CO., LLC AND
UNITED BRINE SERVICES CO., LLC

V.

RODD NAQUIN, IN HIS OFFICIAL CAPACITY
AS CLERK OF COURT FOR THE FIRST CIRCUIT
COURT OF APPEAL FOR THE STATE OF LOUISIANA

c/w

GARY N. SOLOMON, STEPHEN H. JONES, TERRY D. JONES, AND HEALTH SCIENCE PARK, L.L.C.
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V.

RODD NAQUIN, IN HIS CAPACITY AS CLERK OF COURT FOR THE FIRST CIRCUIT COURT OF APPEAL FOR THE STATE OF LOUISIANA

ON WRIT OF MANDAMUS TO THE COURT OF APPEAL, FIRST CIRCUIT

GENOVESE, J., dissents in part and assigns the following reasons:

I dissent from this per curiam with respect to 2019-OC-1503, as it employs a metamorphosis in linguistics and lexicology by redefining the word "random." The issue in this case is what is the definition of the word "random" in the phrase random allotment as it pertains to the selection of members serving on an appellate court panel. Louisiana Constitution Article V, § 8(A), provides each court of appeal "shall sit in panels of at least three judges selected according to rules adopted by the court." "Each civil and criminal appeal and each application for writs shall be randomly assigned by the clerk, subject to the direct supervision of the court." La.R.S.

13:319.[1] "The provisions of R.S. 13:319 shall be applicable to assignment of appellate panels." La.Code Civ.P. art. 2164.1.[2]

Let us first look at the Merriam-Webster Dictionary, in service since 1828, which is one of America's most trusted dictionaries for English word definitions, meanings, and pronunciations. The Merriam-Webster Dictionary defines random as being "without definite aim, direction, rule, or method." Another source, Dictionary.com, defines the word random as "proceeding, made, or occurring without definite aim, reason, or pattern."

These definitions of random seem pretty clear to me, and not one of these definitions recite any restriction, qualification, or limitation in defining the word random. That is what makes random, random. And random is random, period. How much more clear can it be?

The legal issue in this case is whether the First Circuit Court of Appeal (1CCA) of this state employs constitutionally and legislatively mandated random allotment in its panel selection for review of lower court rulings coming before it. In my view, the answer is clearly no, it does not. The 1CCA has twelve judges and establishes its three-member panels by employing three geographical districts.[3] In other words, in comprising its panels of three members each, it randomly draws one panel member from each of the three geographical districts in order to make up its three-judge panel. I agree that there is random selection from each of the three

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[1] Prior to its amendment by La. Acts 2018, No. 658, § 1, effective August 1, 2018, La.R.S. 13:319 provided: "Each civil and criminal proceeding and each application for writs shall be randomly assigned by the clerk, subject to the direct supervision of the court."

[2] Louisiana Code of Civil Procedure Article 2164.1 was added by La. Acts 2018, No. 658, § 2.

[3] Though the 1CCA represents that its random selection is employed via these "election" districts, in truth and in fact, its random selection is via three mystical "geographical" districts. The 1CCA's alleged random selection does not employ election districts, as there are five election districts, yet it only draws from three geographical districts. Thus, these three geographical districts are not the equivalent of its five election districts. Furthermore, if these geographical districts were created for the purpose of promoting diversity, it restricts as opposed to promotes diversity, and certainly does not establish a true random allotment.

geographical districts, but there is no random selection among the twelve members of the 1CAA, which I find violates the constitutional and legislative mandates of our law. For there to be a random selection of the members of the 1CCA, as is done in all other courts of appeal of this state, said random selection must be made from all twelve members of the court — not from three mystical, geographical districts.

What defeats random allotment in this case is the fact that the employment of these geographical districts in satisfaction of random allotment qualifies, limits, restricts, and confines random allotment to said geographical districts. Again, random allotment is random allotment. When you confine and/or restrict random allotment, it is no longer random allotment. To allow such a geographical allotment is to allow a definite aim, direction, rule, method, reason and pattern of allotment, which is totally contrary to the very definition of the word random. Our law does not provide for a limited, restricted, or geographical random allotment; it requires random allotment, pure and unadulterated, not quasi-random allotment. Had the legislature allowed for such segmented, random allotment, it would have enacted legislation to do so.

Additionally, the 1CCA's alleged random allotment is skewed even more so when employing a five-judge panel (5JP). A 5JP comes into play when a three-judge panel (3JP) votes two to one to modify or reverse a lower court's judgment. When this occurs, two additional judges are added to the 3JP to make the 5JP. However, and inconsistent with the selection of the 3JP via geographical districts, these two additional judges are drawn in a real random allotment process from all of the remaining nine judges of the 1CCA, and not from the three geographical districts. I might also add that these 5JPs sit for an entire year and not just for a cycle. In my view, litigants having to appeal to the 1CCA are denied the equal protection and due process of litigants having to appeal in all other courts of appeal in this state.

Thus, I disagree with the majority decision in this matter and find the 1CCA's "geographical" allotment procedure to be constitutionally and legislatively impermissible, and I would mandate the 1CAA's allotment procedure to be in line with the other four courts of appeal of this state and implement a true and unrestricted random allotment of its panels.