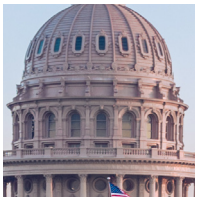

TEXAS PUBLIC POLICY FOUNDATION

# BillAnalysis

April 2019
*Center for the American Future*

# SB 2371 and HB 2854

by Chance Weldon, Attorney

## Purpose

SB 2371 and HB 2854 would require Texas courts to apply standard rules of statutory interpretation to determine the meaning of statutes and regulations, rather than deferring to the preferred interpretations of administrative agencies arguing before them.

## Background

Our state and federal governments are divided into three separate branches—legislative, executive, and judicial. In this divided system, it is the unique duty of the judiciary to "say what the law is."[1] This division of authority is not arbitrary formalism. Our nation's Founders believed the separation of powers was necessary for ordered liberty.[2]

Unfortunately, the Texas Supreme Court has increasingly abdicated its duty to "say what the law is" in litigation involving administrative agencies. Relying on doctrines borrowed from federal law, the Texas Supreme Court has held that courts are required to defer to agency interpretations of contested statutes and regulations, even when the agency's interpretation may not be correct. [3]

While these doctrines are relatively new in Texas, we have seen the mischief that they can create at the federal level. For example, courts have acquiesced in federal agencies interpreting the term "Navigable Waters" in the Clean Water Act to acquire federal jurisdiction over dry private land, miles from the nearest river. [4]

## Analysis and Recommendation

The judiciary is supposed to be a neutral arbiter between parties and "an impenetrable bulwark" against government overreach.[5] When courts are required to defer to agency interpretations of the law, however, it places an almost insurmountable thumb on the scales in favor of government. That is not the government the Founders intended.

SB 2371 and HB 2854 are a straightforward solution to this problem. They require Texas courts to perform their constitutionally mandated role of interpreting statutes and regulations, rather than deferring to state agencies, who are often parties in the litigation.

SB 2371 and HB 2854 track similar reforms in Arizona and Florida and those proposed on the federal level by several justices of the United States Supreme Court.[6] Moreover, they would restore traditional separation of powers and due process principles to Texas courts. We strongly recommend their adoption.

1 *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

2 *The Federalist No. 47*, (J. Madison).

3 See *Texas Dep't of Ins. v. Am. Nat. Ins. Co.*, 410 S.W.3d 843, 853 (Tex. 2012); *Pub. Util. Comm'n of Texas v. Gulf States Utilities Co.*, 809 S.W.2d 201, 207 (Tex. 1991).

4 See, e.g., *Precon Dev. Corp. v. United States Army Corps of Engineers*, 603 Fed. Appx. 149 (2015).

5 1 *Annals of Congress*. 457 (Joseph Gales ed., 1790) (James Madison introducing the Bill of Rights).

6 See, e.g., *Garco Const., Inc. v. Speer,* 138 S. Ct. 1052, (2018) (Thomas and Gorsuch, dissenting)*; Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1212–13 (2015) (Scalia, J., concurring in the judgment); *id*. at 1210 (Alito, J., concurring in part and concurring in the judgment). *Decker v. Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 615-616 (2013) (Roberts, C.J., concurring).

***Chance Weldon*** *is an attorney with the Center for the American Future at the Texas Public Policy Foundation where he litigates issues of constitutional and administrative law. He is licensed to practice law in Texas, California, the U.S. District Court of Texas, and the U.S. Supreme Court.*

Texas Public Policy Foundation

901 Congress Avenue | Austin, Texas 78701 | (512) 472-2700 | www.TexasPolicy.com