

No. 08-0523

**In the Supreme Court of Texas**

---

TEXAS LOTTERY COMMISSION,  
*Petitioner,*

v.

FIRST STATE BANK OF DEQUEEN, STONE STREET CAPITAL, INC.,  
AND CLETIUS L. IRVAN,  
*Respondents.*

---

On Petition for Review from the  
Third Court of Appeals at Austin, Texas

---

**PETITIONER'S REPLY BRIEF**

---

GREG ABBOTT  
Attorney General of Texas

C. ANDREW WEBER  
First Assistant Attorney General

DAVID S. MORALES  
Deputy Attorney General for  
Civil Litigation

JAMES C. HO  
Solicitor General  
State Bar No. 24052766

MICHAEL P. MURPHY  
Assistant Solicitor General  
State Bar No. 24051097

OFFICE OF THE ATTORNEY GENERAL  
P.O. Box 12548 (MC 059)  
Austin, Texas 78711-2548  
[Tel.] (512) 936-2995  
[Fax] (512) 474-2697

COUNSEL FOR PETITIONER

**TABLE OF CONTENTS**

Index of Authorities ..... iii

I. The 1999 Lottery Act Amendments Are Designed To Protect Consumers and  
Thus Must Be Given Effect Under § 9.201 of the UCC. .... 2

II. This Court Should Reject Plaintiffs’ Attempt to Inject a “Magical Passwords”  
Requirement Into the Texas UCC. .... 4

Prayer ..... 9

Certificate of Service ..... 11

## INDEX OF AUTHORITIES

### Cases

<i>Great N. Ry. Co. v. United States</i> , 208 U.S. 452 (1908) .....	6
<i>In re Duboff</i> , 290 B.R. 652 (Bankr. C.D. Ill. 2003) .....	3
<i>In re Ellis</i> , 345 B.R. 11 (Bankr. D. Mass. 2006) .....	3
<i>In re Koonce</i> , 262 B.R. 850 (Bankr. D. Nev. 2001) .....	3
<i>Lockhart v. United States</i> , 546 U.S. 142 (2005) .....	5, 6
<i>Marcello v. Bonds</i> , 349 U.S. 302 (1955) .....	6
<i>Settlement Funding, LLC v. Von Neumann-Lillie</i> , 645 S.E.2d 436 (Va. 2007) .....	3
<i>Tex. Lottery Comm'n v. First State Bank of DeQueen</i> , 254 S.W.3d 677 (Tex. App.—Austin 2008, pet. filed) .....	3, 7
<i>Warden, Lewisburg Penitentiary v. Marrero</i> , 417 U.S. 653 (1974) .....	6
<i>Watts v. Mann</i> , 187 S.W.2d 917 (Tex. Civ. App.—Austin 1945, writ ref'd) .....	6

**Statutes, Rules, and Constitutional Provisions**

TEX. CONST. art. III, § 36 ..... 8

13 PA. CONS. STAT. § 9406(j) ..... 5

ALA. CODE § 7-9A-406(j) ..... 5

ARK. CODE § 4-9-406(j) ..... 5

DEL. CODE tit. 6, § 9-406(j) ..... 5

IOWA CODE § 554.9406(j) ..... 5

MASS. GEN. LAWS ch. 106, § 9-405(j) ..... 5

MISS. CODE § 75-9-406(j) ..... 5

N.C. GEN. STAT. § 25-9-406(j) ..... 5

N.H. REV. STAT. § 382-A:9-406(j) ..... 5

N.J. STAT. § 12A:9-406(j) ..... 5

OR. REV. STAT. § 79.0406(10) ..... 5

TENN. CODE § 47-9-406(j) ..... 5

TEX. BUS. & COM. CODE § 1.201(b)(11) ..... 4

TEX. BUS. & COM. CODE § 9.102(a)(22) ..... 4

TEX. BUS. & COM. CODE § 9.102(a)(26) ..... 4

TEX. BUS. & COM. CODE § 9.201 ..... 2

TEX. BUS. & COM. CODE § 9.201(b) ..... 2, 4

TEX. BUS. & COM. CODE § 9.201(c) ..... 2

TEX. BUS. & COM. CODE § 9.201(d) .....	2
TEX. BUS. & COM. CODE § 9.406 .....	2, 5, 7
TEX. BUS. & COM. CODE § 9.406(f)(1) .....	8
TEX. BUS. & COM. CODE § 9.406(f)(2) .....	8
TEX. GOV'T CODE § 311.023(5) .....	8
W. VA. CODE § 46-9-406(j) .....	5
WYO. STAT. § 34.1-9-406(j)-(k) .....	5

**Other Authorities**

Act of May 17, 1999, 76th Leg., R.S., ch. 414, § 1.01, 1999 Tex. Gen. Laws 2639 .....	2
Carlos Santos, <i>Lottery Dreams Shattered; Out-of-State Loan Firms Target Winners,</i> Richmond Times Dispatch, Feb. 13, 2000 .....	3
David Koenig, <i>Cashing In,</i> Dallas Morning News, July 11, 1999 .....	4
David Schuyler, <i>Finance firms seek loot from lottery champs,</i> Business J., Feb. 25, 2000 .....	3
Julie Waresch, <i>Firm Bets Lottery Winners Need Cash Now,</i> Palm Beach Post, Sept. 9, 1996 .....	4
Lyn Bixby, <i>Lottery Directors Lift Ban Preventing Winners From Selling Future Winnings,</i> Hartford Courant, Sept. 27, 1997 .....	4

Michael Moore,  
*N.J. Suit Alleges Lotto Loan Fraud*, *The Record*, Apr. 17, 1996 ..... 4

Steve McVicker,  
*Unlucky Strike; Less than two years after Billie Bob Harrell Jr.  
took the \$31 million lottery jackpot, he took his own life*,  
*Dallas Observer*, Feb. 10, 2000 ..... 3

No. 08-0523

## In the Supreme Court of Texas

---

TEXAS LOTTERY COMMISSION,  
*Petitioner,*

v.

FIRST STATE BANK OF DEQUEEN, STONE STREET CAPITAL, INC.,  
AND CLETIUS L. IRVAN,  
*Respondents.*

---

On Petition for Review from the  
Third Court of Appeals at Austin, Texas

---

**PETITIONER'S REPLY BRIEF**

---

Plaintiffs have ambitious goals for this litigation: They seek no less than to invalidate virtually an entire act of the Legislature expressly designed to protect lottery winners against unfair and predatory financial arrangements. They claim that the 1999 Lottery Act is invalid not because it is unconstitutional or preempted by federal law, but because, they contend, the act is somehow preempted by preexisting language from Texas law. This result would presumably come as a surprise to the House and Senate legislators who drafted, debated, and approved the bill. Tellingly, Plaintiffs do not claim that their interpretation vindicates the Legislature's actual intentions and expectations in enacting the 1999 Lottery Act amendments—and the reality is quite evidently the opposite.

To achieve this surprising result, Plaintiffs must overcome two insurmountable obstacles. To begin with, they must demonstrate that the Lottery Act amendments do not protect “consumers,” and thus need not be given effect pursuant to § 9.201(b)-(d) of the Uniform Commercial Code. In addition, Plaintiffs must also show that § 9.406 of the UCC imposed, in effect, a “magical passwords” requirement on all future legislation—a requirement that, Plaintiffs contend, the Legislature was bound to obey, but failed to satisfy when it enacted the 1999 Lottery Act amendments. Plaintiffs fail in each of these tasks.

**I. THE 1999 LOTTERY ACT AMENDMENTS ARE DESIGNED TO PROTECT CONSUMERS AND THUS MUST BE GIVEN EFFECT UNDER § 9.201 OF THE UCC.**

Plaintiffs argue that the Legislature amended Article 9 of the UCC to permit the assignment of lottery winnings. But in that very same act, the Legislature made clear that any conflict between Article 9 and any provision of Texas law concerning “consumers” must be resolved in favor of the consumer law. Act of May 17, 1999, 76th Leg., R.S., ch. 414, § 1.01, 1999 Tex. Gen. Laws 2639 (codified at TEX. BUS. & COM. CODE § 9.201). Specifically: “A transaction subject to [Article 9] is subject to any applicable rule of law that establishes a different rule for consumers,” TEX. BUS. & COM. CODE § 9.201(b), and in case of conflict, the consumer protection measure “controls,” TEX. BUS. & COM. CODE § 9.201(c). The 1999 Lottery Act amendments clearly establish a different rule for “consumers” and accordingly must be given effect under the plain terms of the UCC.

In response, Plaintiffs’ primary contention is that the 1999 Lottery Act amendments cannot constitute protections for “consumers” because Mr. Irvan does not want them. Resp.

Br. at 9-10. But that is a question for policymakers, not courts. Determining whether a particular consumer protection should be enacted is a matter for the Legislature to answer, not for litigants to question.<sup>1</sup>

The Legislature undeniably passed the 1999 amendments in order to protect consumers, as the legislative history repeatedly confirms, *see, e.g.*, Petr. Br. Tab G, at 1 (describing “specified consumer protection safeguards”); Petr. Br. Tab H, at 3 (“conditions designed to ensure that [a lottery winner’s] interest would be protected”); *id.* at 4 (recognizing need for “more consumer protections to prevent shady operators from taking advantage of newly wealthy lottery prize winners”)—and even the majority opinion below repeatedly acknowledges, *see Tex. Lottery Comm’n v. First State Bank of DeQueen*, 254 S.W.3d 677, 679 (Tex. App.—Austin 2008, pet. filed) (detailing the Act’s “consumer-protection requirements”); *id.* at 682 (describing the Act’s “consumer-protection elements”). Policymakers and observers across the country likewise understand that measures like the 1999 amendments are sorely needed to protect consumers.<sup>2</sup>

---

1. Not surprisingly, lottery winners across the country have sought to enforce protections like the 1999 Lottery Act amendments, *see, e.g.*, *In re Duboff*, 290 B.R. 652 (Bankr. C.D. Ill. 2003); *In re Ellis*, 345 B.R. 11 (Bankr. D. Mass. 2006); *Settlement Funding, LLC v. Von Neumann-Lillie*, 645 S.E.2d 436 (Va. 2007); *In re Koonce*, 262 B.R. 850 (Bankr. D. Nev. 2001), even if Mr. Irvan does not wish to.

Relatedly, Plaintiffs intimate that Stone Street Capital, Inc., is simply trying to help Mr. Irvan “avoid financial ruin.” Resp. Br. at 9. That benevolent view is legally irrelevant to this case—and in any event does not appear to have been the experience of some of their other customers. *See, e.g.*, Steve McVicker, *Unlucky Strike; Less than two years after Billie Bob Harrell Jr. took the \$31 million lottery jackpot, he took his own life*, Dallas Observer, Feb. 10, 2000; Carlos Santos, *Lottery Dreams Shattered; Out-of-State Loan Firms Target Winners*, Richmond Times Dispatch, Feb. 13, 2000, at A-1.

2. *See, e.g.*, David Schuyler, *Finance firms seek loot from lottery champs*, Business J., Feb. 25, 2000, at 25 (detailing need for “consumer protections” in Wisconsin law to combat “unscrupulous finance

Plaintiffs do not dispute (or even cite) the fact that the provisions in question comply with the UCC's definition of "consumer." See TEX. BUS. & COM. CODE § 1.201(b)(11) ("Consumer' means an individual who enters into a transaction primarily for personal, family, or household purposes."). Instead, Plaintiffs complain that the 1999 Lottery Act amendments fall outside the UCC's definition of "consumer debtor," which covers only certain "consumer transaction[s]" that are secured by collateral. See TEX. BUS. & COM. CODE § 9.102(a)(22), (26). These definitions bear no relevance to this case—§ 9.201(b) plainly gives effect to any "applicable rule of law that establishes a different rule for consumers," and not just those that apply to "consumer debtors." TEX. BUS. & COM. CODE § 9.201(b).

## II. THIS COURT SHOULD REJECT PLAINTIFFS' ATTEMPT TO INJECT A "MAGICAL PASSWORDS" REQUIREMENT INTO THE TEXAS UCC.

The consumer protections of the 1999 Lottery Act amendments must be given effect for an additional reason, separate and apart from the requirements of § 9.201(b) of the UCC.

---

companies" who attempt "to take advantage of lottery winners unaccustomed to managing large sums of money," noting that "many lottery winners don't make sound financial plans"); Michael Moore, *N.J. Suit Alleges Lotto Loan Fraud*, *The Record*, Apr. 17, 1996, at A09 (quoting director of New Jersey Lottery: "We've had a number of complaints from lottery winners about . . . coercive sales techniques"); Julie Waresh, *Firm Bets Lottery Winners Need Cash Now*, *Palm Beach Post*, Sept. 9, 1996, at 5 (stating that some financial institutions "hunt[] down winners and offer[] them immediate cash for their annual lottery payments," and noting concerns of "state attorneys general" that "lottery winners are signing over too much of their prize money to little-known, unregulated companies that in many cases charge exorbitant interest rates," resulting in a "formula for disaster"); Lyn Bixby, *Lottery Directors Lift Ban Preventing Winners From Selling Future Winnings*, *Hartford Courant*, Sept. 27, 1997, at A11 (quoting president of the Connecticut Lottery Corporation: "Unfortunately, the industry that finances the present value of lottery prizes is fraught with deceptive and predatory marketing practices . . . I hope the legislature will enact legislation in the next session with some consumer protection for our winners"); David Koenig, *Cashing In*, *Dallas Morning News*, July 11, 1999, at 45A ("Like similar statutes in 18 other states, the new Texas law includes some consumer safeguards" in response to "complaints against assignment companies" by "State officials," including "high-pressure sales tactics and interest rates . . . that they said bordered on criminal").

The Lottery Act amendments indisputably forbid the assignment of the final two years of lottery payments, and strictly regulate the assignment of other lottery winnings. Plaintiffs contend, however, that those protections cannot be given effect, because the Legislature failed to include explicit language specifically carving out those Lottery Act provisions from the reach of § 9.406 of the UCC, which generally permits assignments and overrides contrary laws limiting such assignments. Their argument essentially amounts to the claim that the Legislature failed to recite, to use Justice Scalia’s colorful formulation, the right “magical password” in order to ensure that the Lottery Act amendments would be given effect. *Lockhart v. United States*, 546 U.S. 142, 149 (2005) (Scalia, J., concurring).

The claim fails on two levels. First, nothing in the text of § 9.406 even attempts to impose a “magical password” requirement on all future legislation. Notably, the Legislature was perfectly aware of how to make § 9.406 apply to all “future” legislation—yet chose not to do so. Legislatures in at least 14 other states have expressly amended their state UCCs to expressly render ineffective all inconsistent “future” legislation, unless such laws explicitly reference, and override, the UCC.<sup>3</sup>

In addition, as detailed in the Commission’s previous briefing, Petr. Br. at 13, the process of statutory interpretation must be governed, at bottom, by statutory text. If a

---

3. See ALA. CODE § 7-9A-406(j); ARK. CODE § 4-9-406(j); DEL. CODE tit. 6, § 9-406(j); IOWA CODE § 554.9406(j); MASS. GEN. LAWS ch. 106, § 9-405(j); MISS. CODE § 75-9-406(j); N.H. REV. STAT. § 382-A:9-406(j); N.J. STAT. § 12A:9-406(j); N.C. GEN. STAT. § 25-9-406(j); OR. REV. STAT. § 79.0406(10); 13 PA. CONS. STAT. § 9406(j); TENN. CODE § 47-9-406(j); W. VA. CODE § 46-9-406(j); WYO. STAT. § 34.1-9-406(j)-(k).

magical password requirement has any legitimate purpose, it is to ensure the vindication of legislative intent as expressed in text. But courts have repeatedly held that clear legislative intent (as expressed in the clear and disputed text of the 1999 Lottery Act amendments) cannot be thwarted by nothing more than a previously enacted “magical password” requirement. As Justice Scalia has recently explained, “[w]hen the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs, *regardless* of its compliance with any earlier-enacted requirement of an express reference or other ‘magical password.’” *Lockhart*, 546 U.S. at 149 (Scalia, J., concurring). *See also Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 659-60 n.10 (1974) (a later-enacted statute can satisfy a preexisting express reference requirement by “fair implication” even in the absence of an express reference); *Marcello v. Bonds*, 349 U.S. 302, 310 (1955) (giving effect to a later-enacted statute despite the absence of an express reference as required by the Administrative Procedure Act); *Great N. Ry. Co. v. United States*, 208 U.S. 452, 465 (1908) (because an express reference provision “has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested either expressly *or by necessary implication* in a subsequent enactment”) (emphasis added); *Watts v. Mann*, 187 S.W.2d 917, 924 (Tex. Civ. App.—Austin 1945, writ ref’d) (“to hold that enactments of a particular class upon a given subject by one or more Legislatures may operate upon succeeding Legislatures as a limitation to that particular class of enactments upon the given subject would extend the

doctrine of legislative interpretation to fields foreign to those in which it has been or appropriately may be applied”).

Plaintiffs do not mention, let alone address, any of these rulings.

\* \* \*

Plaintiffs’ remaining contentions warrant only brief mention:

Plaintiffs object to the invocation of various canons of interpretation in support of the Lottery Act amendments. These canons need not be employed in light of the insurmountable obstacles facing Plaintiffs and described above. And in any event, Plaintiffs do not mention, let alone respond to, the Commission’s arguments with respect to the canons.

For example, with respect to the canon favoring specific provisions over general ones, the Commission argued, Petr. Br. at 17-18, and Plaintiffs do not dispute, that the Lottery Act amendments apply specifically to future payments from the Texas Lottery—whereas § 9.406 of the UCC applies generally to a wide variety of “accounts,” only one of which includes lottery winnings from *any* state. But if that is right, then Plaintiffs must be wrong when they contend that § 9.406 of the UCC is somehow more specific than the Lottery Act amendments.

Plaintiffs also repeat their earlier contention, pursuant to the last in time rule, that § 9.406 of the UCC is actually somehow the later-enacted statute—an odd claim that Plaintiffs also pressed in the court below but that even the majority below refused to accept. *See DeQueen*, 254 S.W.3d at 684. Specifically, Plaintiffs want this Court to consider the

Legislature's 2001 technical amendment to § 9.406(f)(2) of the UCC as somehow relevant to the discussion of § 9.406(f)(1). But the Legislature in 2001 republished the text of § 9.406(f)(1), without any change, simply to comply with TEX. CONST. art. III, § 36, which expressly requires the republication "at length" of any statute that a bill proposes to amend.

In addition, Plaintiffs spill much ink in an effort to synthesize the rulings of various courts across the country, presumably in hopes of rebutting the Commission's observation that the ruling below (and Plaintiffs' arguments before this Court) are unprecedented. Resp. Br. at 24-26. Yet Plaintiffs have essentially conceded the Commission's central point—that the ruling below "conflicts" with, and is "different" from, those of other courts across the country. *Id.* at 26.

Finally, Plaintiffs do not dispute the Commission's concern that the ruling below, if left standing, threatens to nullify various other Texas laws, other than to note the obvious—that the effectiveness of those other laws is technically "not at issue, and need not be decided, in this case." *Id.* But of course, the Legislature has expressly invited this Court to always consider "the consequences of a particular construction" of its laws. TEX. GOV'T CODE § 311.023(5). The Court should do so here.

\* \* \*

As noted in Petitioners' opening brief on the merits, the task of statutory interpretation is rooted in common sense, not gamesmanship. No reasonable person could contend that House and Senate legislators debated the merits of H.B. 1799, held hearings, adopted

amendments to strengthen the measure's consumer protections, and then approved the bill as amended—all so that this Court would deny virtually the entire Act any and all effect, based on Plaintiffs' mistaken stratagem. The Court should construe the 1999 Lottery Act amendments faithfully and enforce its provisions as written.

**PRAYER**

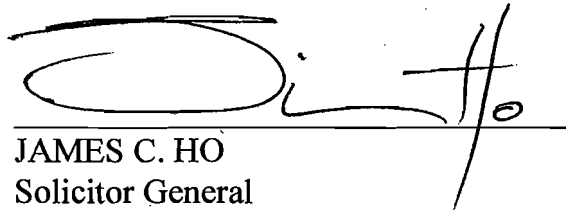
For the reasons stated herein and in Petitioner's Brief on the Merits, the Court should grant the petition for review, reverse the judgment of the court of appeals, and render judgment for the Texas Lottery Commission.

Respectfully submitted,

GREG ABBOTT  
Attorney General of Texas

C. ANDREW WEBER  
First Assistant Attorney General

DAVID S. MORALES  
Deputy Attorney General for Civil Litigation

A handwritten signature in black ink, appearing to read "J. Ho", written over a horizontal line.

JAMES C. HO  
Solicitor General  
State Bar No. 24052766

MICHAEL P. MURPHY  
Assistant Solicitor General  
State Bar No. 24051097

OFFICE OF THE ATTORNEY GENERAL  
P.O. Box 12548 (MC 059)  
Austin, Texas 78711-2548  
[Tel] (512) 936-2995  
[Fax] (512) 474-2697

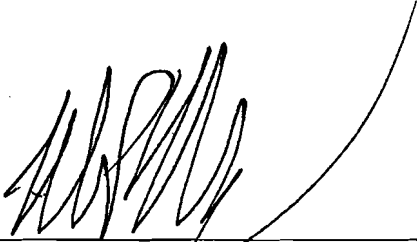
COUNSEL FOR PETITIONER

**CERTIFICATE OF SERVICE**

I certify that on January 15, 2009, a true and correct copy of this Petitioner's Reply Brief was served by certified U.S. mail, return receipt requested, on all appellate counsel of record in this proceeding as listed below:

Jeffrey S. Boyd  
Schuyler B. Marshall  
THOMPSON & KNIGHT, LLP  
98 San Jacinto Blvd., Suite 1900  
Austin, Texas 78701

COUNSEL FOR RESPONDENTS



---

Michael P. Murphy