SUPREME COURT

STATE OF LOUISIANA

No. _____

THE LEMOINE COMPANY, L.L.C., METRO SERVICE GROUP, LLC,
AND THE MCDONNEL GROUP, LLC,
Plaintiffs-Respondents,

versus

THE ERNEST N. MORIAL EXHIBITION HALL AUTHORITY, JERRY REYES, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE ERNEST N. MORIAL NEW ORLEANS EXHIBITION HALL AUTHORITY, AND NEW ORLEANS PUBLIC FACILITY MANAGEMENT, INC.,
Defendant-Applicant.

On Application for Writ of Certiorari or Review to the Court of Appeal, Fourth Circuit,
Parish of Orleans, Chief Judge Terri F. Love and Judges Karen K. Herman,
Dale N. Atkins, Tiffany G. Chase, and Roland L. Belsome

APPLICATION FOR WRIT OF CERTIORARI OR REVIEW ON BEHALF OF DEFENDANT-APPLICANT ERNEST N. MORIAL NEW ORLEANS EXHIBITION HALL AUTHORITY

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SUPREME COURT OF LOUISIANA

CIVIL

WRIT APPLICATION FILING SHEET

TO BE COMPLETED BY COUNSEL OR PRO SE LITIGANT FILING APPLICATION

CASE TITLE: The Lemoine Company, L.L.C., et al. v. The Ernest N. Morial Exhibition Hall Authority, et al.

APPLICANT PARTY NAME(S): Ernest N. Morial New Orleans Exhibition Hall Authority

Have there been any other filings in this Court in this matter: □ YES ■ NO

Are you seeking a Stay Order? □ YES ■ NO. If so, you MUST complete a civil priority form.

Are you seeking Priority Treatment? □ YES ■ NO. If so, you MUST complete a civil priority form.

Does this pleading contain confidential information? □ YES ■ NO. If so, please file a motion to seal.

Does any pleading contain a constitutional challenge to any Louisiana codal or statutory provision? □ YES ■ NO

If yes, which pleading? _____

If yes, has the Office of the Louisiana Attorney General been notified pursuant to La. R.S. 13:4448? □ YES □ NO

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Is the pleading being filed: □ In proper person. □ In forma pauperis

Are there any pro se litigants involved in this matter: □ YES ■ NO

TYPE OF PLEADING

□ Tort □ Contract □ Property □ Probate □ Family □ Juvenile □ Workers' Comp. □ Revenue (tax) ■ Civil Other

□ Administrative Agency □ Bar Admission □ Lawyer Discipline □ Judicial Discipline □ Licensing / Discipline Other

LOWER COURT INFORMATION

Parish and Judicial District Court: Civil District Court, Orleans Parish Docket No: 2021-07651

Judge and Section: Judge Paulette R. Irons, Div. M, Sec. 13 Date of Ruling: 12/17/2021

APPELLATE COURT INFORMATION

Circuit: 4 Docket No.: 2022-CA-0217 Applicant: The Lemoine Company, L.L.C., et al. Filing date: 8/16/2022

Was this pleading simultaneously filed? □ YES ■ NO.

Ruling date: 4/12/2023 Action: Reversed and remanded

Panel of Judges: Terri F. Love, Roland L. Belsome, Tiffany G. Chase, Dale N. Atkins, Karen K. Herman En Banc: □

REHEARING INFORMATION

Applicant: Ernest N. Morial New Orleans Exhibition Hall Authority Filing date: 4/24/2023 Ruling date: 5/3/2023

Action: Denied Panel of Judges: Love, Belsome, Chase, Atkins, Herman En Banc: □

PRESENT STATUS

□ pre-trial

□ hearing; scheduled date: _____

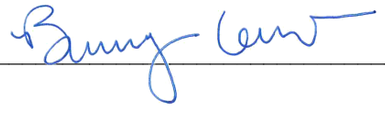
□ trial; scheduled date: _____

□ trial in progress Other: Trial has already occurred; case was remanded to trial court

Is there a stay now in effect: □ YES ■ NO

VERIFICATION

I certify that the above information and all of the information contained in this application is true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to this filing. I further certify that a copy of this application has been mailed or delivered to the appropriate court of appeal, to the lower court judge, and to all other counsel and unrepresented parties.

Date: 6/1/2023 Signature:  (Rev. 12/2022)

ATTACHMENT TO CIVIL WRIT APPLICATION FILING SHEET

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STATEMENT OF WRIT-GRANT CONSIDERATIONS

The following considerations weigh in favor of granting the Ernest N. Morial New Orleans Exhibition Hall Authority's ("Authority") application for a writ of certiorari or review:

I. Erroneous Interpretation and Application of Laws

A divided five-judge panel of the Fourth Circuit, in a 3–1–1 decision, failed to apply the manifest-error standard of review, substituted its own findings for those of the factfinder, and threw out the Authority's construction manager at risk ("CMAR") contractor selection. As the first reported decision to apply the CMAR statute, La. R.S. 38:2225.2.4, the majority opinion threatens to sow confusion into the law and to jeopardize future CMAR projects. This Court's intervention is necessary to stop those harmful effects.

The Authority undertook an extensive process to select a CMAR contractor. A selection review committee scored AECOM Hunt/Broadmoor, A Joint Venture ("Hunt/Broadmoor") the highest of all proposers and recommended that it be awarded the contract. When Plaintiffs-Respondents The Lemoine Company, L.L.C., Metro Service Group, LLC, and The McDonnel Group, LLC (collectively, "Lemoine"), a losing proposer, raised concerns about Hunt/Broadmoor's license status, the Authority did what any reasonable public entity would do: it went straight to the state licensing agency to solicit their opinion. But the agency refused to answer whether Hunt/Broadmoor was properly licensed in accordance with its own rules. Based on the agency's failure to render an opinion, the Authority's legal counsel advised the Authority to accept the committee's recommendation. The Authority followed that advice, voting 10–1 to accept the recommendation after considering numerous public comments and engaging in a robust debate at an open meeting.

These facts were critical to the trial court's judgment, which found that the Authority was not arbitrary and capricious in refusing to disqualify a proposer as improperly licensed when the licensing agency itself refused to render that opinion. But, in the eyes of the majority, these facts were meaningless. The Fourth Circuit failed to conduct any sort of inquiry into the record to determine whether there is a reasonable factual basis for the trial court's factual findings. Instead, the Fourth Circuit sidestepped the manifest-error analysis by conducting an unprecedented *de novo* review and focusing on the correctness of the Authority's *decision*, rather than on the

reasonableness of the Authority's decision-making *process*. In doing so, the Fourth Circuit failed to heed this Court's repeated warnings that an appellate court improperly acts as a choice-making court, and not an error-correcting court, when it misapplies the manifest-error standard of review. *Hayes Fund for First United Methodist Church of Welsh, LLC v. Kerr-McGee Rocky Mountain, LLC*, 14-2592, p. 2 (La. 2015), 193 So. 3d 1110, 1112.

To make matters worse, the majority opinion—which is the first reported decision to apply the CMAR statute—contains serious legal errors that threaten future CMAR projects. For one, it subjects public entities to never-before-asserted claims for damages by aggrieved bidders and proposers. In the trial court, Lemoine never sought damages, nor did it reserve its right to seek damages in its petition. The focus of the underlying lawsuit, the trial, and the appeal was solely on the issue of injunctive relief. Yet, the Fourth Circuit unilaterally expanded the scope of the pleadings by suggesting that Lemoine has a claim for damages against the Authority for awarding the contract to Hunt/Broadmoor. That suggestion was improper, especially in light of the fact that whether such damages are even available is an open question under Louisiana law, as this Court acknowledged in *Airline Construction Co. v. Ascension Parish School Board*, 568 So. 2d 1029, 1033 (La. 1990).

II. Overruling or Modification of Controlling Precedents

In large part, the majority's reasoning is propped up by this Court's nearly century-old decisions in *Daily States Publishing Co. v. Uhalt*, 126 So. 228 (La. 1930), and *Ault & Wiborg Co. of Canada v. Carson Carbon Co.*, 160 So. 298 (La. 1935). In those cases, this Court, without any reasoning, drew a distinction between joint ventures and partnerships, stating in dicta that an "actual partnership" cannot be a joint venture. In deciding these cases, this Court did not apply Civil Code principles concerning partnership law. Rather, the Court resorted to common-law authorities to perpetuate a nonexistent distinction between joint ventures and partnerships.

Uhalt and *Ault* squarely conflict with Louisiana Civil Code article 2801, which defines a partnership as "a juridical person, distinct from its partners, created by a contract between two or more persons to combine their efforts or resources in determined proportions and to collaborate at mutual risk for their common profit or commercial benefit." Article 2801—which was enacted well after *Uhalt* and *Ault* were decided—does not draw a distinction between single-

purpose partnerships (which is what a joint venture is) and multipurpose partnerships. Thus, to the extent that *Uhalt* and *Ault* state that an "actual partnership" cannot be a joint venture, those cases should be overruled or modified in light of Article 2801.

* * *

The Fourth Circuit's disregard of this Court's teachings on the manifest-error standard of review calls for a writ grant under Rule X, § 1(a)(4). Additionally, this Court's statements in *Uhalt* and *Ault*, which purport to create an extralegal distinction between joint ventures and partnerships in conflict with Article 2801, should be revisited under Rule X, § 1(a)(3).

STATEMENT OF THE CASE

I. The Authority selects Hunt/Broadmoor, the recommended and highest-scored proposer, to be the CMAR contractor.

This is a public works dispute over a significant $300 million project that is currently underway at the New Orleans Ernest N. Morial Convention Center, which is owned by the Authority. In May 2021, the Authority issued a request for qualifications ("RFQ") to select a CMAR contractor under La. R.S. 38:2225.2.4, the CMAR statute. The CMAR statute permits public entities, like the Authority, to use the CMAR project delivery method as an alternative to the traditional low-bid method. La. R.S. 38:2225.2.4(A)(1). Rather than awarding the contract to the lowest responsive and responsible bidder, the CMAR statute endows public entities with the discretion to select a CMAR contractor based upon the recommendation of a selection review committee, which scores the proposers based on RFQ-established criteria. *Compare* La. R.S. 38:2212(A)(1)(a), *with* La. R.S. 38:2225.2.4(F)(4). Relevant here, Section 7.9(3) of the RFQ required proposers to "be licensed in Building Construction in accordance with the rules of the Louisiana State Licensing Board for Contractors at the time of submittal of its [statement of qualifications]." R. 180.

Three entities responded to the RFQ: Hunt/Broadmoor; Lemoine; and WLV GC, A Joint Venture. The Authority's staff initially screened the proposers' statements of qualifications for compliance with the RFQ's requirements, and all three teams were deemed compliant. R. Sup. Vol. II, 90:7–15. The selection review committee then interviewed and scored the teams. Hunt/Broadmoor received the highest score of 94.2 points, Lemoine received 91.4 points, and WLV GC, A Joint Venture received 87.6 points. R. 287. The committee recommended that Hunt/Broadmoor, as the team with the highest score, be awarded the contract. The committee met a second time in a public meeting and unanimously ratified its earlier decision.

On August 22, 2021—3 days before the Authority Board was scheduled to take up the committee's recommendation and 79 days since the teams' statements of qualifications had been submitted—Lemoine raised concerns about Hunt/Broadmoor's license status with the Authority. All three teams claimed to be joint ventures; all component members of the teams were individually licensed; but none of the teams were licensed in their own names. But because

Hunt/Broadmoor registered as a partnership with the Louisiana Secretary of State, Lemoine argued that Hunt/Broadmoor was required to be separately licensed. Since it was not, Lemoine claimed that Hunt/Broadmoor did not comply with the RFQ's license requirement and could not be awarded the contract.

To settle the dispute, the Authority sought the opinion of the Louisiana State Licensing Board for Contractors ("LSLBC"), the state regulatory agency for contractors that was specifically referenced in the RFQ, on whether Hunt/Broadmoor was properly licensed. Rather than answering a simple yes-or-no question, the LSLBC refused to answer the question. Instead, the LSLBC sent a letter to the Authority that merely restated information already in the Authority's possession, i.e., that none of the teams were separately licensed and that Hunt/Broadmoor had registered with the Secretary of State. R. 194–95. Importantly, however, the LSLBC demurred on the ultimate question of whether Hunt/Broadmoor was licensed in accordance with its rules. *Id.* Instead, the LSLBC punted back to the Authority, stating: "The decision to award the contract either in whole or part is not within the scope of authority of LSLBC and lies solely with the awarding authority." R. 195.

The Authority also vetted the issue with its legal counsel, who confirmed that he "had several conversations with the people at the [LSLBC]" and that "[i]t became clear . . . that there is a difference of opinion inside the agency on this exact question," that is, whether a joint venture that registers with the Secretary of State is required to be separately licensed. R. 1072. The Authority's counsel also advised that "the LSLBC did not take a position on this issue" and "the fact that the LSLBC is not willing to comment on this . . . makes us wary of advising [the Authority] to disqualify a team based on something that the licensing agency won't even comment on." R. 1072; R. Sup. Vol. II, 104:29–32.

On August 25, 2021, the Authority met to take action on the committee's recommendation. The Authority received and considered numerous public comments and engaged in lengthy debate at an open meeting. The Authority also discussed the LSLBC's letter, which, according to the Authority's president, failed to provide "a clear and definitive answer" on the licensing issue. Sup. R. Vol. II, 101:3–4. *See also* Sup. R. Vol. II, 96:5–8 (stating that the letter "did not give us a clear answer to what we thought was a yes or no question"). Armed with legal advice from

its counsel to not disqualify Hunt/Broadmoor, coupled with the LSLBC's silence on the issue, the Authority's governing body voted 10–1 to accept the committee's recommendation and to award the contract to the highest scored proposer: Hunt/Broadmoor. Sup. R. Vol. II, 97:24–29; R. 303–04.

II. The trial court correctly finds that the Authority was not arbitrary and capricious.

Then began Lemoine's legal attacks on the Authority's decision. The next month, Lemoine sued to enjoin the Authority from executing the contract with Hunt/Broadmoor, arguing that the Authority had arbitrarily and capriciously selected Hunt/Broadmoor. A bench trial was held on December 10, 2021, at which the trial court heard from seven witnesses and admitted several hundred pages of exhibits into evidence. On December 17, 2021, and "after much consideration and deliberation," the trial court rendered judgment in favor of the Authority, denying Lemoine's request for a permanent injunction. R. 1128–30. In its written reasons, the trial court explained: "[T]he issue before the court is not whether AECOM Hunt/Broadmoore [sic] is a partnership or a joint venture but rather whether the . . . Authority was arbitrary or capricious in its award of the contract." R. 1129. The trial court ultimately concluded that the Authority was not arbitrary and capricious and cited several facts in support of this conclusion. R. 1130.

First, the trial court found that the Authority requested the LSLBC's guidance on whether Hunt/Broadmoor was licensed in accordance with its rules, but that the LSLBC "did not give the [Authority] a definitive answer to that question." R. 1129–30. Thus, the Authority "declined to disqualify a group for an alleged violation of a rule the rule maker itself would not confirm." R. 1130. *Second*, the trial court found that the selection review committee was "fair and thorough" in its review of Hunt/Broadmoor's proposal and that Hunt/Broadmoor's score was "fairly earned." R. 1129. Further, it found that the Authority "fairly consider[ed]" Hunt/Broadmoor's "qualifications compared to the other candidates." R. 1130. *Third*, the trial court found that Hunt/Broadmoor submitted documentation evidencing its intent to bid as a joint venture and that the Authority's selection was based on that intent. R. 1129.

III. A divided five-judge panel misapplies the standard of review and reverses the trial court's judgment.

Lemoine appealed. But, while the appeal was pending, the Authority and Hunt/Broadmoor executed the CMAR contract and work began on the project. On April 12, 2023, a divided five-judge panel of the Fourth Circuit, in a 3–1–1 decision, reversed the trial court's judgment. The majority found that Hunt/Broadmoor was not properly licensed and that the Authority had acted arbitrarily and capriciously. *Lemoine Co. v. Ernest N. Morial Exhibition Hall Auth.*, 22-0217 (La. App. 4 Cir. 4/12/23), ____ So. 3d _____, 2023 WL 2910736. One judge concurred only in the result. *Id.* (Chase, J., concurring).

Judge Roland L. Belsome dissented, arguing that the issue before the court was not whether Hunt/Broadmoor was properly licensed, but rather whether the Authority acted arbitrarily and capriciously. *Id.* at 1 (Belsome, J., dissenting). According to Judge Belsome, "[t]he record reflects that the Authority, in good faith and with due deliberation, fairly considered the issue of whether Hunt/Broadmoor was properly licensed" and that the LSLBC "expressly refused to take a position on the ultimate issue (whether Hunt/Broadmoor was required to possess such a license), instead deferring to the Authority." *Id.* at 1–2. Further, Judge Belsome emphasized the Authority's reliance on the advice of its counsel, who could not advise the Authority to disqualify Hunt/Broadmoor "given the LSLBC's silence on the issue . . . ." *Id.* at 2.

The Authority applied for a rehearing, which was denied (again, in a split decision) on May 5, 2023. The Authority now applies for a writ of certiorari or review.

ASSIGNMENT OF ERRORS

1. The Fourth Circuit violated the manifest-error standard of review by usurping the trial court's factfinding role, substituting its own findings for those of the factfinder, and finding that the Authority arbitrarily and capriciously selected Hunt/Broadmoor to be the CMAR contractor.

2. The Fourth Circuit erred in concluding that a joint venture is not a partnership.

3. The Fourth Circuit erred in granting Lemoine a never-before-asserted claim for damages and by incorporating low-bid principles into the CMAR statute.

SUMMARY OF THE ARGUMENT

The Fourth Circuit did not simply misapply the manifest-error standard of review. It failed to apply it at all. The trial court found that the Authority's selection of Hunt/Broadmoor to be the CMAR contractor was not arbitrary and capricious, and that factual determination is fully supported by the record. That evidence, however, went overlooked by the Fourth Circuit, which never conducted an analysis of whether the record contains a reasonable factual basis for the trial court's findings. Behind the majority's rote recitation of the standard of review is, in actuality, an improper *de novo* review.

The Fourth Circuit's wholesale substitution of its own findings on whether the Authority was arbitrary and capricious for those of the trial court eviscerates the manifest-error standard of review and opens all actions taken by public entities—related to public works or otherwise—to unwarranted attack. This Court should grant the writ application, reverse the Fourth Circuit's judgment, and reinstate the trial court's judgment.

ARGUMENT

I. In substituting its own findings for those of the trial court, the Fourth Circuit failed to properly apply the manifest-error standard of review.

Time and again, this Court has explained the standard of review governing an appellate court's review of a trial court's factual findings. The Louisiana Constitution vests original jurisdiction in the district courts, not the appellate courts. La. Const. art. V, § 16(A)(1). This means that the appellate court does not function as a choice-making court; it functions as an error-correcting court. *Hayes Fund for First United Methodist Church of Welsh, LLC v. Kerr-McGee Rocky Mountain, LLC*, 14-2592, p. 2 (La. 2015), 193 So. 3d 1110, 1112. An appellate court may not set aside a trial court's finding merely because it would have found the facts or weighed the evidence differently. *Id.* at 1115 (citation omitted). Instead, an appellate court may only set aside a trial court's factual finding if: (1) there is no reasonable factual basis for the trial court's conclusion; and (2) the record establishes that the finding is manifestly erroneous or clearly wrong. *Bonin v. Ferrellgas, Inc.*, 03-3024, p. 6 (La. 2004), 877 So. 2d 89, 94.

Under the manifest-error standard, the appellate court must do more than simply review the record for some evidence supporting or controverting the trial court's finding. *Hayes Fund*,

193 So. 3d at 1116. The appellate court must review the entire record to determine whether the finding was manifestly erroneous. *Id.* The issue to be resolved on review is not whether the trial court's finding was right or wrong, but whether it was reasonable. *Id.* Reasonable persons frequently disagree regarding factual issues in a particular case. *McGlothin v. Christus St. Patrick Hosp.*, 10-2775, p. 17 (La. 2011), 65 So. 3d 1218, 1231. But where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous. *Hayes Fund*, 193 So. 3d at 1116.

The manifest-error standard is not easily met. Rarely can there be no reasonable basis for a finding in a case with opposing views. It is not hard to prove a reasonable basis for a finding, which makes the manifest-error standard very difficult to breach. It should be a rare day for an appellate court to find manifest-error when two opposing views are presented to the trier of fact. *Id.* at 1117.

A. The Fourth Circuit ignored or discounted the ample factual basis for the trial court's judgment.

Here, the Fourth Circuit did exactly what this Court has said not to do under the manifest-error standard: it substituted its own findings for those of the trial court. Worse, the Fourth Circuit's opinion fails to analyze any of the record evidence that supports the trial court's judgment.

When considered in its entirety, the record establishes a reasonable basis for the trial court's conclusion that the Authority did not arbitrarily and capriciously select Hunt/Broadmoor to be the CMAR contractor, which is a factual determination subject to the manifest-error standard of review. *See Albright v. S. Trace County Club of Shreveport, Inc.*, 03-3413 (La. 2004), 879 So. 2d 121, 141 (Knoll, J., concurring); *Parrish v. Van-Tel Commc'ns*, 07-454, p. 6 (La. App. 3 Cir. 10/10/07), 967 So. 2d 592, 597 (citation omitted). In *Hayes Fund*, this Court undertook a "tortuous[]" study of the trial court record because "[i]t is destructive to the manifest-error analysis for a reviewing court to make its choice of the evidence rather than look for clear error in the reasonable basis found by the trier of fact." 193 So. 3d at 1150. Based on this Court's example in *Hayes Fund*, the following summarizes the evidence presented to the trial court, which the Fourth Circuit ignored or discounted.

The Authority appointed a selection review committee to review and score the proposals and to recommend a team to be selected as the CMAR contractor. R. 268. Consistent with the CMAR statute's requirements, *see* La. R.S. 38:2225.2.4(B)(5), the committee was composed of a neutral design professional, a neutral licensed contractor, an owner's representative, and two at-large members. R. 268; Sup. R. Vol. II, 89:1–10. The committee interviewed and scored the three teams, with Hunt/Broadmoor receiving the highest score. R. 287. The committee then recommended that Hunt/Broadmoor be awarded the contract.

The Authority's governing body met on two occasions to discuss the committee's recommendation. At the first meeting, the Authority voted to direct the committee to reconvene in a public meeting. Sup. R. Vol. II, 92:30–93:7. Then, after public comment, the committee voted unanimously to ratify its prior scores and recommendation. R. 494; Sup. R. Vol. II, 93:15–20.

Before the Authority's second meeting, Lemoine raised concerns about Hunt/Broadmoor's license status with the Authority. In performing its due diligence, the Authority asked the LSLBC whether Hunt/Broadmoor was licensed in accordance with its rules. After all, the RFQ section at issue hinged compliance on the proposer being licensed "in accordance with the rules of the" LSLBC, so the Authority reasonably believed that the LSLBC would be in the best position to address contractor licensing issues. *See* Sup. R. Vol II, 100:28–101:4.

In response, the LSLBC sent a letter to the Authority's legal counsel. R. 194–95. The letter stated that Hunt/Broadmoor, as an entity, was not licensed as a contractor by the LSLBC, but that Hunt Construction Group, Inc. and Broadmoor, LLC—the two component members of the Hunt/Broadmoor joint venture—were licensed "as individual entities." R. 194. *See also* R. 129. In other words, Hunt/Broadmoor's license status was no different than Lemoine's. Notably, the letter did not state that Hunt/Broadmoor was not properly licensed in accordance with LSLBC rules. In fact, the letter explicitly punted on the issue and deferred to the Authority. R. 195.

The next day, the Authority held an open meeting to take action on the committee's recommendation. The Authority received and considered numerous public comments and engaged in lengthy debate. *See generally* Sup. R. Vol. II, 44:14–25. The Authority also discussed the LSLBC's letter. Sup. R. Vol. II, 95:27–31. According to the Authority's president, the Authority had asked LSLBC "a specific question," that is, whether Hunt/Broadmoor was properly li-

censed in accordance with LSLBC rules, and the Authority "expected a yes or no in terms of the requirements being met . . . ." Sup. R. Vol. II, 101:1–3.

Yet the letter did not provide "a clear and definitive answer" to the Authority. Sup. R. Vol. II, 101:3–4. *See also* Sup. R. Vol. II, 96:5–8. Instead, the letter merely restated information already in the Authority's possession. R. 336. Since the LSLBC's response did not clearly and definitively state that Hunt/Broadmoor was not properly licensed in accordance with LSLBC rules, the Authority's legal counsel recommended that the Authority accept the committee's recommendation. Sup. R. Vol. II, 96:21–97:3 ("[T]he LSLBC itself has declined to weigh in on . . . the issue of licensure. We cannot advise [the Authority] to disqualify the AECOM Hunt/Broadmoore [sic] team on this issue."), 104:27–105:5. And the Authority's governing body followed that advice, voting 10–1 to accept the committee's recommendation and to award the contract to Hunt/Broadmoor. Sup. R. Vol. II, 97:24–29; R. 303–04.

To recap, the record reflects that:

- a selection review committee reviewed the proposals, scored Hunt/Broadmoor the highest, and unanimously recommended that Hunt/Broadmoor be awarded the contract, R. 287;
- the Authority solicited the LSLBC's opinion on whether Hunt/Broadmoor was properly licensed, R. 194–95;
- the LSLBC refused to take a position on whether Hunt/Broadmoor was properly licensed, R. 194–95, Sup. R. Vol. II, 95:27–96:8;
- based on LSLBC's refusal, the Authority's legal counsel declined to advise the Authority to disqualify Hunt/Broadmoor, Sup. R. Vol. II, 44:14–25; and
- the Authority's governing body voted 10–1 in an open meeting to award the contract to Hunt/Broadmoor after receiving numerous public comments and debating the issue, Sup. R. Vol. II, 97:24–29.

Taken together, these actions support the trial court's factual finding that the Authority did not act arbitrarily and capriciously. Remarkably, however, the majority opinion failed to analyze any of these facts through the lens of the manifest-error standard of review. Instead, the Fourth Circuit short-circuited its factual analysis by overlooking the ample evidence to support the Authority's decision-making process and instead focusing solely on the issue of whether Hunt/Broadmoor was properly licensed.

That is not the proper focus of the arbitrary-and-capricious standard. The arbitrary-and-capricious standard focuses on the rationality of an agency's decision-making *process* rather than on the rationality of the actual *decision*. *See Toups v. City of Shreveport*, 10-1559, pp. 3–4 (La. 2011), 60 So. 3d 1215, 1217 ("[A]n action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed an erroneous conclusion has been reached."). *See also United States v. Garner*, 767 F.2d 104, 116–17 (5th Cir. 1985) (citations omitted).

The majority also ran afoul of this Court's repeated admonitions that the manifest-error standard requires an appellate court to "review the entire record" rather "than simply review[ing] the record for some evidence, which supports or controverts the trial court's findings." *Hayes Fund for First United Methodist Church of Welsh, LLC v. Kerr-McGee Rocky Mountain, LLC*, 14-2592, p. 8 (La. 2015), 193 So. 3d 1110, 1116. By focusing solely on the narrow issue of licensure and the correctness of the Authority's ultimate decision, the majority failed to give proper weight to the evidence that supports the rationality of the Authority's decision-making process. In short, the Fourth Circuit "misapplied the standard of review by completely rejecting the reasonable basis in the record to support the [factfinder's] finding that" the Authority was not arbitrary and capricious. *Toston v. Pardon*, 03-1747, p. 14 (La. 2004), 874 So. 2d 791, 801.

B. The Fourth Circuit's decision opens any agency action to attack as arbitrary and capricious.

The Fourth Circuit's decision also subjects public entities to an unreasonably high standard. In effect, the majority held that it is arbitrary and capricious for a public entity to award a contract to an entity that is recommended by a neutral committee composed of subject matter experts; to consult with a regulatory agency; to refuse to disqualify a team for an alleged violation of a rule that the rule maker itself would not confirm; and to rely on the advice of counsel. If true, then nearly any action by a public entity—related to public works or otherwise—is subject to attack as being arbitrary and capricious. Such a result turns the typically deferential arbitrary-and-capricious standard on its head and cannot stand.

II. The Fourth Circuit's decision perpetuates a nonexistent legal distinction between partnerships and joint ventures.

The Fourth Circuit's misapplication of the standard of review in and of itself merits this Court's review. Its conclusion that Hunt/Broadmoor is unlicensed and that the Authority waived the RFQ's licensing requirement is a second, independent basis for this Court's intervention.

The RFQ required proposers to be properly licensed in accordance with the LSLBC's rules. Section 307 of the LSLBC rules provides: "When two or more persons bid as a joint venture on any project in the amount for which a license is required from the board, all parties to the joint venture are required to be licensed by the board at the time the bid is submitted." La. Admin. Code tit. 46, pt. XXIX, § 307(A). This rule does not require a joint venture to hold a separate license apart from its component members. *See J. Caldarera & Co., Inc. v. Hosp. Serv. Dist. 2 of Par. of Jefferson*, 97-1025, pp. 6–7 (La. App. 5 Cir. 2/11/98), 707 So. 2d 1023, 1026, *writ denied*, 98-0644 (La. 1998), 717 So. 2d 1177.

Here, Hunt/Broadmoor formed a joint venture through a "Joint Venture Agreement." R. 505. Hunt/Broadmoor was composed of two members, and both members were licensed by the LSLBC. But because Hunt/Broadmoor registered as a partnership with the Secretary of State, the Fourth Circuit held that Hunt/Broadmoor was not a joint venture and was required to be separately licensed. This holding, however, is premised on a false distinction between joint ventures and partnerships. This distinction has no basis in Louisiana law, but rather stems from a misconstruction of a common-law rule exception from the nineteenth century.

A. The Fourth Circuit perpetuates the "joint venture fable."

Initially, "partnership disputes were to be resolved in equity by an action to account, and not by an action at law (assumpsit)." Robert Flannigan, *The Joint Venture Fable*, 50 AM. J. LEGAL HIST. 200, 204 (2010). An exception to this rule was later carved out for partnerships that were organized for a single transaction. *Id.* Thus, "partnerships for a single object or transaction would be treated differently than other partnerships for the purposes of determining the nature of the action that was appropriate to address disputes between partners." *Id.* at 207. But this single-transaction exception "had nothing to do with attempting to establish that the joint venture was a discrete form of association." *Id.* at 204.

In the later part of the century, some courts misconstrued this exception and made "unjustified conceptional leap[s]" to distinguish joint ventures from partnerships. *Id.* at 207–08. "In one line of cases, judges defensively qualified their analysis by stating that the arrangement before them might be something other than a 'strict' or 'technical' partnership." *Id.* at 207. This is strikingly similar to the qualifying language used by the majority to distinguish "actual" partnerships from joint ventures. *See Lemoine Co. v. Ernest N. Morial Exhibition Hall Auth.*, 22-0217, pp. 10–11, 15–16 (La. App. 4 Cir. 4/12/22), ___ So. 3d _____, 2023 WL 2910736, at *5, *8.

In short, a "review of the nineteenth century case law indicates that the joint venture claim arose initially as a mutation or adulteration of a process initiative." Flannigan, *supra*, at 210. Thus, "[t]he claim of distinct status for the joint venture is illusory. . . . Every arrangement said to constitute a joint venture, if not another recognised legal form, fits comfortably within the conventional definition of partnership." *Id.* at 222.

At best, the distinction between a joint venture and a partnership is purely a semantic one, not a legal one.[1] As one scholar noted: "[T]he use of a distinctive name such as 'joint adventure' is of no legal significance whatever. This is simply because, at the present time, there is no law of joint adventure. There is a law of partnership and that is all." Frank L. Mechem, *The Law of Joint Adventures*, 15 MINN. L. REV. 644, 666 (1931). Yet another scholar explained:

> A joint venture is a variety of partnership, distinguishable only by vague considerations of scope, duration or continuity of business, all of which relate to matters of degree rather than to essential differences in kind. It is impossible to formulate a definition or test which will satisfactorily segregate a joint venture from a partnership. Even if such a definition or test can be found, there are no differences in legal policy or rules which indicate that special consequences would follow.

George William Miller, Comment, *The Joint Venture: Problem Child of Partnership*, 38 CAL. L. REV. 860, 874 (1950). In essence, the term "joint venture" is merely a "casual generic label," and "[t]he label does not describe a distinct legal form of joint endeavor." Flannigan, *supra*, at 222. *See also* 7 LA. CIV. L. TREATISE, *Business Organizations* § 1:9 n.2 ("[T]here appears to be no good reason why at some ill-defined, arbitrary point the law draws a nominal distinction between

[1] "The term 'joint venture' has been accorded greater recognition in business terminology than in legal phraseology. This term is usually used in referring to a business operation rather than to a separate legal concept, form or principle." Henry W. Nichols, *Joint Ventures*, 36 VA. L. REV. 425, 441 (1950).

'partnerships' on the one hand and 'joint ventures' which are merely governed by partnership law on the other.").

The confusion over joint ventures regrettably crept into early Louisiana caselaw and, eventually, the majority opinion. First, in *Daily States Publishing Co. v. Uhalt*, 126 So. 228 (La. 1930), this Court quoted the *Corpus Juris* definition of joint venture: "A joint adventure has been aptly defined as a special combination of two or more persons, where in some specific venture a profit is jointly sought without any actual partnership or corporate designation." *Id.* at 901 (quoting 33 C.J. p. 841) (internal quotation marks omitted). Then, in in *Ault & Wiborg Co. of Canada v. Carson Carbon Co.*, 160 So. 298 (La. 1935), the analysis mutated with the Court stating that "there is no joint adventure where an actual partnership exists or where the business or enterprise is organized and operated in corporate form." *Id.* at 688. This confusion is also seen in the Fourth Circuit's own jurisprudence. For instance, in *Acrement Boat Rentals, Inc. v. Good*, 01-1860 (La. App. 4 Cir. 5/29/02), 820 So. 2d 615, which the majority relied on, the Fourth Circuit recited the *Uhalt* definition of joint venture. *Id.* at 618. But then, in the very next paragraph, the court explained that, "[i]n order to form a valid joint venture in Louisiana," "[a]ll parties must consent to formation of a *partnership* . . . ." *Id.* (emphasis added).

B. Under Article 2801, a joint venture is a type of partnership.

Uhalt and *Ault* aside, the classification of a joint venture under Louisiana law is not governed by the *Corpus Juris* or jurisprudence from common-law jurisdictions. Instead, the relevant law is La. Civ. Code art. 2801, which defines a partnership as "a juridical person, distinct from its partners, created by a contract between two or more persons to combine their efforts or resources in determined proportions and to collaborate at mutual risk for their common profit or commercial benefit." Article 2801 does not draw a distinction between partnerships formed for a single purpose and partnerships formed for multiple purposes. Indeed, a partnership may be formed for 1 project or 100 projects—the Civil Code makes no distinction, because the formation of a partnership does not hinge on the number of its projects or purposes. Thus, there is "no valid reason why the so-called 'joint venture' cannot be handled by the courts directly under the partnership provisions of the Louisiana Civil Code." Blake West, Comment, *The Business Joint Venture in Louisiana*, 25 TUL. L. REV. 382, 397 (1951).

The proposition that a joint venture is simply a type of partnership is also supported by legislative history. Prior to the enactment of Article 2801, the Civil Code recognized a type of partnership known as a "special commercial partnership." F. Hodge O'Neal, *An Appraisal of the Louisiana Law of Partnership: A Comparative Law Focus on Source Materials and Underlying Practices (Part I)*, 9 LA. L. REV. 307, 333 (1949). This type of partnership was formed for a "certain speculation," as opposed to an ordinary partnership, which was formed to conduct ongoing business relations.[2] La. Civ. Code bk. III, tit. IX, ch. II, arts. 15, 18 (1808). Early Louisiana cases employing the term "joint adventure" rather than "special commercial partnership" merely did so because they borrowed Anglo-American terminology, not because there was a substantive legal distinction between joint ventures and partnerships. *See* O'Neal, *supra*, at 333. *See also* West, *supra*, at 383 n.14; F. Hodge O'Neal, *An Appraisal of the Louisiana Law of Partnership: A Comparative Law Focus on Source Materials and Underlying Practices (Part II)*, 9 LA. L. REV. 450, 487–88 (1949).

Here, the Fourth Circuit recited Article 2801's definition of partnership and then referenced a jurisprudentially created definition of joint venture. *Lemoine Co. v. Ernest N. Morial Exhibition Hall Auth.*, 22-0217, p. 10 (La. App. 4 Cir. 4/12/22), ___ So. 3d _____, 2023 WL 2910736, at *5. But the court's analysis of joint ventures versus partnerships abruptly ends there. Had the Fourth Circuit applied Article 2801 as written, then it would have concluded that joint ventures are merely a type of partnership.

The majority's reasoning is also troubling because it elevates jurisprudence above positive law like Article 2801. This Court has repeatedly stressed that "legislation, the solemn expression of the legislative will, is the superior source of law" and that even *jurisprudence constante* "is not the law and must yield to legislative pronouncements." *Clark v. Bridges*, 23-00237, p. 6 (La. 2023), ___ So. 3d _____, 2023 WL 2175035, at *3 (quoting ALAIN LEVASSEUR, LOUISIANA LAW OF OBLIGATIONS IN GENERAL-A COMPARATIVE CIVIL LAW PERSPECTIVE, author's notes, p. xix (2010)). "In a civilian jurisdiction such as ours, where [courts] are bound to follow the positive

[2] The Louisiana Civil Code of 1808 also recognized a type of partnership known as a "particular partnership," which was a "contract by which several persons associate together . . . for a *specified undertaking* . . . ." La. Civ. Code bk. III, tit. IX, ch. II, art. 13 (1808) (emphasis added). Again, the Civil Code's recognition of a type of partnership for a "specified undertaking," as opposed to a partnership used to conduct ongoing business relations, solidifies the view that the phrase "joint venture" is merely the Anglo-American terminology for a single-purpose partnership under current Louisiana law.

law, decisional law should not supplant legislative or constitutional authority." *Garlington v. Kingsley*, 289 So. 2d 88, 92–93 (La. 1974). This is especially true where, as here, there is legislative authority (Article 2801) directly on point and the jurisprudence misapplied the law.

This Court has not hesitated to revisit its prior decisions to repudiate common-law doctrines that contravene the Louisiana Civil Code. *See, e.g.*, *Leisure Recreation & Entm't, Inc. v. First Guar. Bank*, 21-00838, pp. 12–14 (La. 2022), 339 So. 3d 508, 517–18. Just last year, this Court in *Leisure Recreation* abrogated precedent after concluding that the common-law "voluntary payment doctrine" was "in direct conflict with the current Civil Code." *Id.* at 517. Focusing on the text of La. Civ. Code art. 2299, this Court explained that the code article "[m]ake[s] no mention of voluntary payments" and that "[t]here is no place in Louisiana law for a common law estoppel doctrine that addresses a subject already encompassed within positive law of the Civil Code." *Id.* Succinctly stated, "[j]urisprudence superseded by legislation does not support diverging from the Civil Code's plain language." *Id.*

This case calls for similar intervention. Article 2801 defines a partnerships as "a juridical person, distinct from its partners, created by a contract between two or more persons to combine their efforts or resources in determined proportions and to collaborate at mutual risk for their common profit or commercial benefit." Properly understood, a joint venture meets this definition. The only distinguishing feature between a joint-venture partnership and a non-joint-venture partnership is that the former is formed for a single purpose, while the latter is formed for multiple purposes. But, like in *Leisure Recreation*, Article 2801 makes no mention of the number of purposes for which a partnership can be formed. Article 2801 was enacted in 1980, well after *Uhalt* and *Ault* were decided. Because any common-law notions that an "actual partnership" cannot be a joint venture were superseded by Article 2801, this Court should revisit its prior decisions and clarify the current state of Louisiana law on joint ventures. Otherwise, courts will continue to disqualify qualified contractors, like Hunt/Broadmoor, from significant public works projects, all at the taxpayers' expense.

III. The Fourth Circuit's decision contains serious legal errors.

Besides its misapplication of the standard of review and reliance on questionable caselaw, the Fourth Circuit's decision also contains serious legal errors. As the first reported decision to

apply the CMAR statute, the majority's flawed reasoning threatens future CMAR projects and should be corrected by this Court.

A. The majority opinion threatens to open the floodgates to damages claims against public entities, even when no such claim has been asserted by the plaintiff.

For one, the majority incorrectly suggests that "Lemoine may be entitled to damages due to the Authority's awarding the contract to" Hunt/Broadmoor. *Lemoine Co. v. Ernest N. Morial Exhibition Hall Auth.*, 22-0217, p. 8 (La. App. 4 Cir. 4/12/23), ____ So. 3d _____, 2023 WL 2910736, at *4. The Fourth Circuit cited three cases in support of this position, all of which are distinguishable. In *Command Construction Industries, L.L.C. v. City of New Orleans*, 13-0524 (La. App. 4 Cir. 10/23/13), 126 So. 3d 716, the plaintiff reserved the right to seek damages in its petition. *Id.* at 723. In *D & O Contractors, Inc. v. St. Charles Parish*, 00-882 (La. App. 5 Cir. 2/28/01), 778 So. 2d 1285, *writ denied*, 01-1213 (La. 2001), 794 So. 2d 812, and *State Machinery and Equipment Sales, Inc. v. Livingston Parish Gravity Drainage District No. 5*, 00-2066 (La. App. 1 Cir. 11/14/01), 818 So. 2d 133, the plaintiffs sought damages in their petitions. *D & O Contractors*, 778 So. 2d at 1287; *State Machinery*, 818 So. 2d at 135.

Unlike the plaintiffs in those three cases, Lemoine did not seek, nor did it reserve its right to seek, damages in its petition. *See* R. 1–14. The relief sought by Lemoine was narrow: an injunction to enjoin the Authority from executing a contract with Hunt/Broadmoor. R. 14. At trial, Lemoine's representative confirmed that Lemoine's sole request for relief was an injunction, not damages. Sup. R. Vol. II, 44:4–6 (confirming Lemoine's understanding that the purpose of the lawsuit is to obtain an injunction). To complicate matters, whether an aggrieved *bidder* (not a proposer, like Lemoine) who was denied a public works contract can recover damages is an open question under Louisiana law, as this Court acknowledged in *Airline Construction Co. v. Ascension Parish School Board*, 568 So. 2d 1029, 1033 (La. 1990). It was, therefore, inappropriate for the Fourth Circuit to subject the Authority to a never-before-asserted claim for damages by Lemoine.

B. The majority opinion improperly incorporates low-bid principles into the CMAR statute.

Finally, the majority opinion improperly incorporated low-bid principles into the CMAR statute. Low-bid public work projects are governed by La. R.S. 38:2212; CMAR public work projects are governed by La. R.S. 38:2225.2.4. The majority, however, failed to appreciate this dis-

tinction and held the Authority to low-bid standards not found in the CMAR statute. For instance, the Fourth Circuit relied on La. R.S. 38:2212(B)(1) to suggest that the Authority could not waive any RFQ requirements. *Lemoine Co. v. Ernest N. Morial Exhibition Hall Au.th*, 22-0217, p. 19 (La. App. 4 Cir. 4/12/23), ____ So. 3d _____, 2023 WL 2910736, at *9 n.16. La. R.S. 38:2212(B)(1) provides: "The provisions and requirements of this Section and those stated in the bidding documents shall not be waived by any entity." The CMAR statute does not require "bidding" or "bidding documents," so this provision is inapplicable.

The majority opinion also suggests that the RFQ is only permitted to request the specific information enumerated in La. R.S. 38:2212(B)(2), the low-bid statute. *Lemoine*, 2023 WL 2910736, at *9 n.16. But, again, La. R.S. 38:2212 does not apply to CMAR solicitations. Rather, La. R.S. 38:2225.2.4, the CMAR statute, prescribes the required contents of an RFQ and even affords a public entity with the discretion to request additional information that would, in its own opinion, assist with selecting a CMAR contractor. *See* La. R.S. 38:2225.2.4(F)(2)–(3). The Fourth Circuit's incorporation of these low-bid principles into a CMAR statute runs afoul of the statutory text.

CONCLUSION

The record is replete with evidence that provides a reasonable factual basis for the trial court's factual finding that the Authority was not arbitrary and capricious: Hunt/Broadmoor was the highest-scored proposer; a committee recommended that it be awarded the contract not once, but twice; the Authority sought the opinion of the state licensing authority, but the LSLBC refused to provide an answer; the Authority relied on the advice of its legal counsel to accept the committee's recommendation; and the Authority's governing body considered numerous public comments and engaged in a robust debate on the issue. The Fourth Circuit ignored this evidence, instead focusing on its view of the correctness of the ultimate result rather than on the Authority's decision-making process. In doing so, the Fourth Circuit acted in direct contradiction of well-settled mandates from this Court and improperly acted as a choice-making court and not an error-correcting court.

The Authority prays that the Court grant its application for a writ of certiorari or review, reverse the judgment of the Fourth Circuit, and reinstate the judgment of the trial court.

* * *

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Respectfully submitted,

/s/ *Bradley C. Guin*

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APPENDIX

1. Trial Court's Judgment (Dec. 17, 2021)
2. Trial Court's Written Reasons for Judgment (Dec. 17, 2021)
3. Court of Appeal's Majority Opinion (Apr. 12, 2023)
4. Dissenting Opinion (Belsome, J.) (Apr. 12, 2023)
5. Concurring Opinion (Chase, J.) (Apr. 12, 2023)
6. Court of Appeal's Rehearing Denial (May 3, 2023)
7. Dissenting Opinion from Denial of Rehearing (Belsome, J.) (May 3, 2023)