Memorandum

To: Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Date: February 14, 2023

Re: September 15, 2022 Referral Letter relating to TRAP 28.3

I. Matter referred to subcommittee

> **Permissive Appeals.** The Court requests the Committee to consider whether Rule 28.3 or Rule 47 of the Texas Rules of Appellate Procedure should be amended to require a court of appeals to provide more than the "basic" reasons for its decision to reject a permissive appeal and to draft any recommended amendments. *Industrial Specialists, LLC v. Blanchard Refining Company LLC*, 2022 WL 2082236 (Tex. 2022) may inform the Committee's work.

II. Subcommittee recommendations

The Subcommittee recommends that Rule 28.3 be amended by adding Rule 28.3(*l*):

> ***(l) When Petition Denied.*** If the petition is denied, the court must specifically identify [explain] in its order the reasons, if any, the petition does not satisfy the statutory or procedural requirements for a permissive appeal.

The Subcommittee also recommends that the Court consider repealing Rule 28.2, because, as discussed below, it is unlikely that there are going to be any more appeals to which Rule 28.2 would apply.

III. Discussion

A. Statutory history

CPRC 51.014(d) was intended to provide an additional avenue for immediate appeals of certain interlocutory orders where immediate appeal would advance termination of the litigation. In its first iteration (adopted in 2001), section 51.014(d) required that the parties agree to an interlocutory appeal. *See* Acts 2001, 77th Leg., R.S., Ch. 1389, § 1. The Court adopted TRAP 28.2 to provide procedures for agreed interlocutory appeals.

In 2011, section 51.014(d) was amended to remove the requirement that the parties agree to the appeal. *See* Acts 2011, 82nd Leg., ch. 203, § 3.01. At the same time, the Legislature enacted section 51.014(f), which gives the court of appeals discretion to accept an appeal under section 51.014(d). *Id.* The amended statute applies only to cases filed after September 1, 2011. *Id.* To effectuate the amendments, the Court adopted TRAP 28.3 and TRCP 168 to set out the procedures for parties to seek

the trial court's permission to appeal and for parties to ask the court of appeals to accept the appeal. At the time, the Court retained Rule 28.2 for any case filed before September 1, 2011, which would be governed by the former version of section 51.014(d).

Under the current version of section 51.014(d), a trial court may grant permission to appeal an otherwise unappealable interlocutory order if: "(1) the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion; and (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation." TEX. CIV. PRAC. & REM. CODE § 51.014(d); *see also* TEX. R. CIV. P. 168. If the trial court grants permission, then the party seeking to appeal must file a petition for permission to appeal in the court of appeals. TEX. R. APP. P. 28.3.

Additional background about the procedural and statutory requirements for permissive interlocutory appeals can be found in "*Permissive Appeals in the Wake of* Sabre Travel," which is attached to this memo.

B. *Sabre Travel* and *Industrial Specialists*

In *Sabre Travel International, Ltd. v. Deutsche Lufthansa AG*, the Supreme Court considered intermediate appellate courts' discretion regarding appeals under section 51.014(d). 567 S.W.3d 725, 729 (Tex. 2019). The Court unanimously held that section 51.014(f) gives appellate courts discretion to deny permission to appeal even if the statutory and procedural requirements for appeal are met. *Id.* at 732. But the Court also strongly encouraged appellate courts to accept these appeals when the requirements are met:

> When courts of appeals accept such permissive appeals, parties and the courts can be spared the inevitable inefficiencies of the final judgment rule in favor of early, efficient resolution of controlling, uncertain issues of law that are important to the outcome of the litigation. Indeed, the Legislature enacted section 51.014 to provide "for the efficient resolution of certain civil matters in certain Texas courts" and to "make the civil justice system more accessible, more efficient, and less costly to all Texans while reducing the overall costs of the civil justice system to all taxpayers." If all courts of appeals were to exercise their discretion to deny permissive interlocutory appeals certified under section 51.014(d), the legislative intent favoring early, efficient resolution of determinative legal issues in such cases would be thwarted. Just because courts of appeals can decline to accept permissive interlocutory appeals does not mean they should; in fact, in many instances, courts of appeals should do exactly what the Legislature has authorized them to do—accept permissive interlocutory appeals and address the merits of the legal issues certified.

Id. at 732–33.

The Supreme Court was again asked to address intermediate appellate courts' discretion in *Industrial Specialists, LLC v. Blanchard Refining Co., LLC*, 652 S.W.3d 11 (Tex. 2022). A copy of the opinion is attached to this memo.

The court of appeals had issued a 3-sentence opinion denying the petition for permission to appeal. *Industrial Specialists, LLC v. Blanchard Refining Co., LLC*, 634 S.W.3d 760 (Tex. App.—Houston [14th Dist.] 2019) (mem. op.). In the first sentence the court identified the parties. *Id.* In the second, the court set out the statutory requirements for a permissive appeal. *Id.* And in the third, the court stated: "Because we conclude that the petition fails to establish each requirement of Rule 28.3(3)(e)(4), we deny the petition for permissive appeal." *Id.* Both parties petitioned for review in the Supreme Court, arguing that the court of appeals abused its discretion by (1) denying the petition for permission to appeal and (2) failing to adequately explain its reasoning.

There was no majority opinion, but the judgment of the Court was that the court of appeals did not abuse its discretion. Justice Boyd authored a plurality opinion, joined by Justice Devine and Justice Huddle. *Id.* at 13. Justice Blackrock wrote a concurring opinion, joined by Justice Bland. *Id.* at 21. And Justice Busby dissented, joined by Chief Justice Hecht and Justice Young. *Id.* at 23. (Justice Lehrmann did not participate in the decision. *Id.* at 21.)

The Court's holding (in Justice Boyd's plurality and joined by the concurring justices) is:

> We hold that section 51.014(f) permits Texas courts of appeals to accept a permissive interlocutory appeal when the two requirements of section 51.014(d) are met, but it grants the courts discretion to reject the appeal even when the requirements are met.

Id. at 21 & n.16.

The parties in *Industrial Specialists* argued that after *Sabre Travel*, the courts of appeals had not followed the Court's encouragement to grant permission to appeal when the statutory requirements are met. They also pointed out that courts of appeals routinely deny permission to appeal in short opinions similar to the one the court of appeals had issued. And some courts issue opinions that simply note that the court has reviewed the petition and denied it.

A statistical analysis in "*Permissive Appeals in the Wake of* Sabre Travel" found that from February 1, 2019 through June 2022, approximately 129 petitions for permission to appeal were filed in courts of appeals. Of those, only about 35 (or about 27%) were granted. Interestingly, the grant rate appears to have declined after *Sabre Travel*. A prior version of the article found that the grant rate on petitions for permission to appeal filed between 2011 and 2016 was about 40%. Courts of appeals appear to have focused more on the comments about discretion in *Sabre Travel* than on the encouragement to grant permission to appeal.

The table below summarizes some of the key positions of and disagreements among the three opinions in *Industrial Specialists*.

Plurality	Concurrence	Dissent
"If the two [statutory] requirements are satisfied, the statute then grants vast--indeed unfettered--discretion to accept or permit the appeal." The court of appeals' opinion was sufficient because it stated that the court considered whether the statutory requirements were met and found that they were not. "We could perhaps impose stricter requirements by amending our rules, but we cannot do so by holding that the statute imposes limits it simply does not impose." An opinion that merely states that the court of appeals considered the petition and denied it might not be sufficient.	"The plurality and dissent spend dozens of thoughtful pages analyzing the appellate courts' discretion to deny permissive appeals. One word would have been enough, and we have already said it. The discretion is 'absolute.'"	Would have held that the courts of appeals' discretion is not "absolute," but must adhere to guiding principles and cannot be exercised arbitrarily or unreasonably. Would have held that the courts of appeals do not have discretion in their analysis of the statutory requirements. Would have held that the court of appeals' opinion was not adequate. Points out that there is a lack of authority about the statutory requirements and about the factors courts of appeals should consider in exercising their discretion to grant or deny permission to appeal.

C. Considerations and Concerns

The Court's referral asks the Committee to consider first *whether* the rules should be amended to require more than "basic" reasons for denial of a petition for permission to appeal.

The Subcommittee discussed several possible issues that weigh against requiring additional detail. There was a concern that an amendment would increase the burdens on already busy courts of appeals. Moreover, the Subcommittee did not want to propose an amendment that would micromanage how the courts of appeals write their orders or that would require a full opinion (especially because the record will not be fully developed at the petition stage). Moreover, the statute expressly grants discretion to the courts of appeals over whether to grant permission to appeal and the Subcommittee does not want to propose an amendment that would interfere with that discretion.

Some members of the Subcommittee also expressed concerned about whether a detailed order (particularly an order explaining why there is not a substantial ground for difference of opinion) could be treated as law of the case and affect further proceedings in the case even though the issues are not

fully briefed. For example, an order saying that there is not a ground for difference of opinion because the law is settled could be interpreted as law of the case on that issue.

On the other hand, as noted in the dissent in *Industrial Specialists*, there is a lack of authority interpreting the statutory and procedural requirements for a permissive interlocutory appeal. Parties and trial courts need additional guidance about how these requirements are being interpreted and applied by the appellate courts. Moreover, as the unanimous Court noted in *Sabre Travel*, permissive interlocutory appeals can aid in the "early, efficient resolution of determinative legal issues" in proper cases. An amended rule could encourage courts of appeals to grant permission to appeal in those cases.

Accordingly, the Subcommittee agreed to recommend a narrow rule that requires some additional explanation of the statutory and procedural requirements without imposing too much on the appellate courts' discretion or requiring a full opinion on the merits.

D. Proposed Rule 28.3(*l*)

The Subcommittee first recommends that any rule about the requirements of an opinion denying permission to appeal should be included in Rule 28.3, rather than in Rule 47. Because these requirements would apply only to permissive interlocutory appeals, putting the requirements in the rule that specifically governs these appeals will make it easier for parties and courts to find them and follow them. Moreover, there was some disagreement among the justices in *Industrial Specialists* about whether Rule 47 even applies to the denial of a petition for permission to appeal. Thus, the most natural place for a rule about what a court of appeals must do in denying permission to appeal is Rule 28.3. Moreover, putting the new rule in Rule 28.3 will make clear that its requirements apply only to petitions for permission to appeal under section 51.014(d) and avoid any potential spillover into orders on other discretionary actions like mandamus petitions or petitions for review.

The Subcommittee next considered what aspects of the court of appeals' analysis should be required in the opinion. The Subcommittee recommends that the rule require specific identification of any statutory or procedural requirement it finds not to be satisfied and an explanation for why it is not satisfied. The dissent in *Industrial Specialists* noted the scarcity of appellate authority interpreting and applying the statutory and procedural requirements. And as noted in "*Permissive Appeals in the Wake of* Sabre Travel," there is inconsistency in decisions that do address the requirements. In particular, it is not clear when there is "substantial ground for difference of opinion." Some courts have held that if it is matter of first impression, this requirement is met. *See Byrd v. Phillip Galyen, P.C.*, 430 S.W.3d 515, 520 (Tex. App.—Fort Worth 2014, pet. denied). Others have held that if it is a matter of first impression, it is not met. *See Devillier v. Leonards*, No. 01-20-00223-CV, No. 01-20-00224-CV, 2020 WL 5823292, at *1 (Tex. App.—Houston [1st Dist.] Oct. 1, 2020, no pet.). A rule requiring courts of appeals to identify and analyze compliance with the statutory and procedural requirements will help parties and trial courts better understand their meaning and application.

The Subcommittee also considered a provision that would require courts of appeals to explain a decision to exercise their discretion not to grant permission to appeal even when the statutory and

procedural requirements are met. The Subcommittee rejected that provision in light of the concerns discussed in section C, above.

E. HB 1561

After the Supreme Court's referral to the Committee, Representative Smithee filed HB 1561, "An Act relating to the decision of a court of appeals not to accept certain interlocutory appeals." A copy of HB 1561 (as introduced) is attached to this memo. The bill has not yet been assigned to a committee. HB 1561 would add section 51.014(g) and (h):

> (g) If a court of appeals does not accept an appeal under Subsection (f), the court shall state in its decision the specific reason for finding that the appeal is not warranted under Subsection (d).
>
> (h) The supreme court may review a decision by a court of appeals not to accept an appeal under Subsection (f) under an abuse of discretion standard.

The Subcommittee does not recommend using this formulation of a requirement for the court of appeals to explain its reasoning. Arguably, a court of appeals that issues an opinion similar to the opinion at issue in *Industrial Specialists* would satisfy proposed subsection (g). In stating that the statutory requirements are not met, the court of appeals would state the specific reason for finding that the appeal is not warranted. Moreover, proposed subsection (f) seems superfluous because it is consistent with the decision in *Industrial Specialists* that the Supreme Court has the power to review a decision to deny permission to appeal.

F. TRAP 28.2

In addition to adding Rule 28.3(*l*), the Subcommittee recommends that the Court consider repealing Rule 28.2 As noted above, Rule 28.2 was adopted to provide procedures for agreed interlocutory appeals under the former version of section 51.014(d). The 2011 comments to Rule 28.3 note that "Rule 28.2 applies only to appeals in cases that were filed in the trial court before September 1, 2011." Given that it has been nearly 12 years since September 1, 2011, it is unlikely that there are any remaining cases to which Rule 28.2 could apply. To avoid confusion about the proper procedures under section 51.014(d), the Court should consider repealing Rule 28.2.

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PRESENTED AT

32nd Annual Conference on State and Federal Appeals

June 16-17, 2022
Austin, Texas

Permissive Appeals in the Wake of *Sabre Travel*

Richard B. Phillips, Jr.

Author Contact Information:
Richard B. Phillips, Jr.
Brandon King
Holland & Knight LLP
Dallas, Texas

Rich.Phillips@hklaw.com
Brandon.King@hklaw.com

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I. INTRODUCTION

Interlocutory orders cannot be appealed absent specific authority to do so. *E.g.*, *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 92 (Tex. 2012). "Appellate courts do not have jurisdiction over interlocutory appeals in the absence of a statutory provision permitting such an appeal." *De La Torre v. AAG Props., Inc.*, No. 14-15-00874-CV, 2015 WL 9308881, at *1 (Tex. App.—Houston [14th Dist.] Dec. 22, 2015, no pet.); *CMH Homes v. Perez*, 340 S.W.3d 444, 447 (Tex. 2011); *Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007); *Hebert v. JJT Constr.*, 438 S.W.3d 139, 140 (Tex. App.—Houston [14th Dist.] 2014, no pet.). In addition to granting authority for interlocutory appeals from an ever-increasing list of specific orders, the Legislature has also granted trial courts the authority to certify other orders for immediate appeal if certain criteria are met. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(d).

The current version of section 51.014(d) was enacted in 2011. The prior version permitted an interlocutory appeal only with the parties' agreement. *See* Act of May 27, 2005, 79th Leg., R.S., ch. 1051, § 1, 2005 Tex. Gen. Laws 3512, 3513. The 2011 amendment made section 51.014(d) similar to federal law. *See* Act of May 25, 2011, 82d Leg., ch. 203, § 3.01, 2011 Tex. Gen. Law 758 (current version at TEX. CIV. PRAC. & REM. CODE § 51.014(d)); TEX. R. APP. P. 28.3 cmt.; *see also* 28. U.S.C. § 1292(b).

This article outlines the requirements of a permissive interlocutory appeal under section 51.014(d) and examines how appellate courts have applied those requirements. While the case authority is still somewhat scant on the exact application of some of the statutory requirements, there are cases that provide some guidance.

A prior version of this article also looked at how often appellate courts granted permission to appeal and looked at common reasons for denial. That article found that statewide, about 40% of petitions for permission to appeal were granted and that many denials were based on the courts' conclusion that one or more statutory requirements were not met. The statistics also showed that grant rates tended to be higher in the smaller appellate courts.[1]

In 2019, the Supreme Court of Texas decided *Sabre Travel International, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 729 (Tex. 2019). While the Supreme Court confirmed that appellate courts have discretion over whether to grant permission to appeal, the Court strongly encouraged courts to grant permission when the statutory requirements are met. Thus, this version of the article looks at some statistics about how appellate courts have responded to *Sabre Travel*. It will also look at some lessons that can be drawn from post-*Sabre Travel* decisions on petitions for permission to appeal.

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[1] That article also noted that the statistical analysis was limited by the fact that the appellate courts do not always track or report how many petitions for permission to appeal were filed or granted.

II. SECTION 51.014(D) AND RELATED RULES

The amendment to section 51.014(d) was introduced as part of tort reform legislation aimed at lowering the costs of litigation and improving judicial efficiency by allowing appellate courts to address and answer controlling questions of law without the need for the parties to incur the expense of a full trial. *See* House Research Organization, Bill Analysis, H.B. 274, 82d Leg., R.S. (2011).[2]

As amended, section 51.014(d) authorizes a trial court, on the motion of a party or on its own initiative, to permit an appeal from an order that is not otherwise appealable if (1) the order involves a controlling question of law as to which there is a substantial ground for disagreement; and (2) an immediate appeal will materially advance the termination of the litigation. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(d). The amendment eliminates the previous requirement that the parties agree to an immediate appeal and allows the trial court to grant an appeal on its own initiative or on the motion of a party. The amendment also imposes a two-tiered approval process in which both the trial court and the appellate court must authorize the appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(f).

Section 51.014(f) specifies the procedure for bringing a permissive interlocutory appeal under section 51.014(d):

> (f) An appellate court may accept an appeal permitted by Subsection (d) if the appealing party, not later than the 15th day after the date the trial court signs the order to be appealed, files in the court of appeals having appellate jurisdiction over the action an application for interlocutory appeal explaining why an appeal is warranted under Subsection (d). If the court of appeals accepts the appeal, the appeal is governed by the procedures in the Texas Rules of Appellate Procedure for pursuing an accelerated appeal. The date the court of appeals enters the order accepting the appeal starts the time applicable to filing the notice of appeal.

TEX. CIV. PRAC. & REM. CODE § 51.014(f).

The Rules of Appellate Procedure were also amended in 2011 to address the new permissive interlocutory appeal procedure. *See* TEX. R. APP. P. 28.3 cmt. (noting that the amendment to section 51.014(d) necessitated the addition of Rule 28.3 and the adoption of Rule of Civil Procedure 168). Appellate Rule 28.3 was added to provide in part:

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[2] The amendment was deemed an important component of tort reform legislation aimed at making the Texas civil justice system "more efficient, less expensive, and more accessible." C.S.H.B. 274, Committee Report, Bill Analysis; *see* TEX. CIV. PRAC. & REM. CODE § 51.014(d). *See also* Lynne Liberato, Will Feldman, *How to Seek Permissive Interlocutory Appeals in State Court*, 26 APP. ADVOC. 287, 287 (2013).

> (a) *Petition Required.* When a trial court has permitted an appeal from an interlocutory order that would not otherwise be appealable, a party seeking to appeal must petition the court of appeals for permission to appeal.
>
> (b) *Where Filed.* The petition must be filed with the clerk of the court of appeals having appellate jurisdiction over the action in which the order to be appealed is issued. The First and Fourteenth Courts of Appeals must determine in which of those two courts a petition will be filed.

TEX. R. APP. P. 28.3(a), (b). In addition, Rule 28.3(e) specifies the required contents for a petition for permission to appeal. Under this rule, the petition must:

> (1) contain the information required by Rule 25.1(d) to be included in a notice of appeal;
>
> (2) attach a copy of the order from which appeal is sought;
>
> (3) contain a table of contents, index of authorities, issues presented, and a statement of facts; and
>
> (4) argue clearly and concisely why the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion and how an immediate appeal from the order may materially advance the ultimate termination of the litigation.

TEX. R. APP. P. 28.3(e).

Texas Rule of Civil Procedure 168 was also added in 2011 to implement the new permissive-appeal procedure. The rule states:

> On a party's motion or on its own initiative, a trial court may permit an appeal from an interlocutory order that is not otherwise appealable, as provided by statute. Permission must be stated in the order to be appealed. An order previously issued may be amended to include such permission. The permission must identify the controlling question of law as to which there is a substantial ground for difference of opinion, and must state why an immediate appeal may materially advance the ultimate termination of the litigation.

TEX. R. CIV. P. 168. Under this rule, the trial court's permission, the controlling legal issue, and the reasons why an immediate appeal will materially advance the litigation must be stated in the order to be appealed. TEX. R. CIV. P. 168.

In sum, following the 2011 amendments to section 51.014, the amendment to Texas Rule of Appellate Procedure 28, and the related adoption of Texas Rule of Civil Procedure 168, the following must occur to perfect a permissive interlocutory appeal:

(1) on a party's motion or on its own initiative, the trial court must issue a written order (or amend a prior order) that includes both an interlocutory order that is not otherwise appealable and a statement of the trial court's permission to appeal this order under Texas Civil Practice and Remedies Code § 51.014(d);

(2) in this statement of permission, the trial court must identify and rule on the controlling question of law as to which there is a substantial ground for difference of opinion and must state why an immediate appeal may materially advance the ultimate termination of the litigation;

(3) after the trial court signs the order granting permission in accordance with Texas Civil Practice and Remedies Code § 51.014(f) and Texas Rule of Appellate Procedure 28.3, the appellant must timely file a petition seeking permission from the court of appeals to appeal; and

(4) the court of appeals must grant the petition for permission to appeal.

See TEX. CIV. PRAC. & REM. CODE § 51.014(d)-(f); TEX. R. APP. P. 28.3 & cmt; TEX. R. CIV. P. 168. The procedure for bringing a permissive appeal is discussed in greater detail in the following section.

III. SECTION 51.014(D) IN PRACTICE

A. Step One: The Trial Court's Permission to Appeal

The appeal process under section 51.014(d) begins in the trial court. After an interlocutory order is entered, a party seeking appeal should file a motion with the trial court for permission to appeal. TEX. R. CIV. P. 168. The motion should explain how the order to be appealed involves "a controlling question of law" as to which there is a substantial ground for difference of opinion and why an immediate appeal may "materially advance the ultimate termination of the litigation." TEX. CIV. PRAC. & REM. CODE § 51.014(d); TEX. R. CIV. P. 168. The rules do not set a deadline for a party to ask the trial court to amend an order to grant permission to appeal. *Id.* The trial court may also grant permission to appeal on its own initiative. TEX. R. CIV. P. 168.

If the trial court grants permission to appeal, it must state its permission in the order being appealed, not in a separate order. TEX. R. CIV. P. 168. The court may amend a previously entered interlocutory order to include the required information. TEX. R. CIV. P. 168.

The trial court's order must "identify," but does not have to explain or discuss, the controlling legal question as to which there is a substantial ground for difference of opinion. But the order must explain the basis for the court's finding that the order to be appealed involves a controlling issue of law, and it must state why an immediate appeal may materially advance the ultimate termination of the litigation. *See* TEX. R. CIV. P. 168.

B. Step Two: The Court of Appeals' Permission to Appeal

After the trial court enters the order granting permission to appeal, the appellant must file a petition for permissive appeal in the court of appeals. Prior to the 2011 amendment, when the trial court authorized an agreed permissive appeal, the court of appeals could not reject the appeal unless it lacked jurisdiction. Under the new statute and amended rules, the court of appeals ultimately decides whether an interlocutory appeal may proceed. *See* TEX. R. APP. P. 28.2.

The petition for permission to appeal must be filed with the clerk of the court having jurisdiction over the action. TEX. R. APP. P. 28.3(b). For appeals that would go to either the First or the Fourteenth Court of Appeals, the petition should be filed with the clerk of the First Court during the first half of the calendar year and with the clerk of the Fourteenth Court during the second half of the calendar year. 1st & 14th Tex. App. Loc. R. 1.6. The petitions are then assigned to either the First or the Fourteenth Court on an alternating basis. *Id.*

The time period to file the petition is relatively short: the petition must be filed within 15 days after the order to be appealed is signed, unless the order is amended to add the permission to appeal, in which case the 15-day period runs from the date on which the amended order is signed. TEX. R. APP. P. 28.3(c); . An extension may be granted if the party files the petition within 15 days after the deadline and files a motion complying with Texas Rule of Appellate Procedure 10.5(b).

The petition for permission to appeal must: (1) contain the information required for a notice of appeal Texas Rule of Appellate Procedure 25; (2) attach a copy of the order from which appeal is sought; (3) contain a table of contents, an index of authorities, issues presented, and a statement of facts; and (4) argue "clearly and concisely" why the order at issue "involves a controlling question of law as to which there is a substantial ground for difference of opinion." TEX. R. APP. P. 28.3(e). The petition must also explain "how an immediate appeal from the order may materially advance the ultimate termination of the litigation." TEX. R. APP. P. 28.3(e). In the First and Fourteenth Courts, the petition must also state whether a related appeal or original proceedings has previously been filed in or assigned to either the First or the Fourteenth Court. 1st & 14th Tex. App. Loc. R. 6.1(d).

The briefing schedule for a petition for permission is abbreviated, although the court has discretion to grant extensions. A cross-petition may be filed within 10 days after an initial petition is filed. TEX. R. APP. P. 28.3(f). A response to a petition or cross-petition

is due 10 days after the petition or cross-petition is filed. TEX. R. APP. P. 28.3(f). A petitioner or cross-petitioner may reply to any matter in a response within 7 days after the day on which the response is filed. TEX. R. APP. P. 28.3(f). The petition and any cross-petitions, responses, and replies, must comply with the word-count and page limitations for petitions generally. TEX. R. APP. P. 28.3(g). This means a petition and response cannot exceed 4,500 words, and a reply is limited to 2,400 words. *See* TEX. R. APP. P. 9.4(i)(2)(D)–(E).

The court will generally rule on a petition without oral argument "no earlier than 10 days after the petition is filed." TEX. R. APP. P. 28.3(j). In some cases, the court may order additional jurisdictional briefing from the parties. *See generally, Double Diamond-Del., Inc. v. Walkinshaw*, No. 05-12-01140-CV, 2013 WL 3327523, at *1 (Tex. App.—Dallas June 27, 2013, no pet.) (requesting additional jurisdictional briefing); *Bank of N.Y. Mellon v. Guzman*, 390 S.W.3d 593, 594 (Tex. App.—Dallas 2012, no pet.) (requesting additional briefing under former 51.014(d)).

If the petition for permissive appeal is granted, the notice of appeal is deemed to have been filed under Appellate Rule 26.1(b) on the date the petition is granted, and the appellant is not required to file a separate notice of appeal. TEX. R. APP. P. 28.3(k). The case is considered an accelerated appeal with the appellant's brief on the merits due 20 days after filing of the clerk's record. TEX. R. APP. P. 28.3(i).

Granting permission to appeal does not automatically stay proceedings in the trial court. Either the parties must agree to a stay or the trial court or court of appeals must order a stay. TEX. CIV. PRAC. & REM. CODE § 51.014(e)(1), (2).

IV. RECENT CASES ADDRESSING 51.014(D) APPEALS

A. What is the scope of the appellate court's discretion?

In 2019, the Supreme Court of Texas issued its decision in *Sabre Travel*, a case in which the court of appeals had denied permission to appeal. 567 S.W.3d at 729. The Supreme Court first held that because the court of appeals had discretion to grant or deny review, the Court could not hold that the court had abused its discretion in denying permission. *Id.* at 732. But at the same time, the Court also expressly encouraged intermediate appellate courts to exercise their discretion to grant permission to appeal when the statutory requirements are met:

> When courts of appeals accept such permissive appeals, parties and the courts can be spared the inevitable inefficiencies of the final judgment rule in favor of early, efficient resolution of controlling, uncertain issues of law that are important to the outcome of the litigation. Indeed, the Legislature enacted section 51.014 to provide "for the efficient resolution of certain civil matters in certain Texas courts" and to "make the civil justice system more accessible, more efficient, and less costly to all Texans while reducing the overall costs of the civil justice system to all taxpayers." If all courts of

> appeals were to exercise their discretion to deny permissive interlocutory appeals certified under section 51.014(d), the legislative intent favoring early, efficient resolution of determinative legal issues in such cases would be thwarted. Just because courts of appeals can decline to accept permissive interlocutory appeals does not mean they should; in fact, in many instances, courts of appeals should do exactly what the Legislature has authorized them to do—accept permissive interlocutory appeals and address the merits of the legal issues certified.

Id. at 732–33. Finally, the Court held that it had jurisdiction to grant a petition for review even if the court of appeals had denied permission to appeal. *Id.* at 736.

Then, in June 2022, the Supreme Court decided *Industrial Specialists, LLC v. Blanchard Refining Co., LLC*, No. 20-0174, __ S.W.3d __, 2022 WL 2082236 (Tex. June 10, 2022). The trial court granted permission to appeal, but the court of appeals denied the petition with just a cursory statement that the statutory requirements were not met. *Id.* at *1. Both parties argued in the Supreme Court that the court of appeals had abused its discretion in denying permission to appeal. *Id.* at *3. The Supreme Court disagreed. Justice Boyd authored a plurality opinion (joined by Justice Devine and Justice Huddle), noting that "the limits section 51.014 imposes restrict the permitting and accepting—not the denial or refusal—of an interlocutory appeal." *Id.* at *3. Thus, the plurality reasoned that the court of appeals did not (and could not) abuse its discretion in denying permission to appeal. *Id.* at *6. The plurality also rejected the parties' contention that the court of appeals was required to give a more detailed explanation for its decision to deny permission to appeal. *Id.* at *7. It was sufficient that the court stated that it found that the statutory requirements were not met. *Id.*[3]

Justice Blacklock wrote a concurring opinion (joined by Justice Bland), agreeing with the plurality's conclusion that "section 51.014(f) permits Texas courts of appeals to accept a permissive interlocutory appeal when the two requirements of section 51.014(d) are met, but it grants the courts discretion to reject the appeal even when the requirements are met." *Id.* at *7–9. Otherwise, Justice Blacklock and Justice Bland concurred in the judgment.

Justice Busby (joined by Chief Justice Hecht and Justice Young) dissented. *Id.* at *9–23. The dissent notes that *Sabre Travel*'s admonition did not appear to have the desired effect of encouraging courts of appeals to grant permission to appeal when the statutory requirements are met. *Id.* The dissenters would have held that the court of appeals abused its discretion by not adequately advising the parties of the basis for its decision. *Id.* They also would have held that the court of appeals abused its discretion in finding that the

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[3] In a footnote, the plurality notes that an opinion that simply states "Having fully considered the petition for permissive appeal and response, we deny the petition for permissive appeal," may not be sufficient. *Id.* at *6 n.13.

statutory requirements were not met. *Id.* They would have remanded the case for the court of appeals to exercise its discretion in deciding whether to accept an appeal where the statutory requirements are met. *Id.*

Thus, the Supreme Court has held that the courts of appeal have discretion to deny permission to appeal even if the statutory requirements are met. Moreover, the court of appeals does not have to fully explain the basis of its decision to deny permission to appeal. But a mere statement that the court has considered the petition and denies it, may not be sufficient. The dissenters in *Industrial Specialists* recognize that the courts of appeals have discretion to deny permission to appeal even if the statutory requirements are met but did not elaborate on how to review that exercise of that discretion.

B. What is the scope of the appeal?

The Supreme Court addressed the scope of a permissive appeal in *Elephant Insurance Co., LLC v. Kenyon*, 644 S.W.3d 137 (Tex. 2022). The controlling question of law at issue was whether the insurance company owed a duty to its insured "to process a single-vehicle accident claim without requesting that the insured take photographs or to issue a safety warning along with any such request." *Id.* at 140. The court of appeals "constrained its principal analysis to only a portion of the duty inquiry—whether any duty exists at all." *Id.* at 147. The Supreme Court held that this was too narrow. Instead, "when an appellate court—this or any other—accepts a permissive interlocutory appeal, the court should do what the Legislature has authorized and "address the merits of the legal issues certified." *Id.* And this means, just as with any other appeal, that the appellate court can address and resolve "all fairly included subsidiary issues and ancillary issues pertinent to resolving the controlling legal issue." *Id.*

C. How should the statutory requirements be analyzed?

The dissent in *Industrial Specialists* noted that one reason for requiring a more detailed explanation for denying permission to appeal is "to develop the jurisprudence regarding non-arbitrary reasons why permissive appeals should be accepted or denied in order to supply guidance and promote comparable outcomes in future case." 2022 WL 2082236, at *10. There has been relatively little development in the case law about what some of the statutory requirements mean or how they should be applied. In particular, there is not much guidance about how to determine whether there is a substantial ground for difference of opinion.

(1) What constitutes a controlling question of law?

The meaning of "question of law" is fairly straightforward. Courts consistently hold that if the trial court's decision turns on fact issues, there is no controlling question of law to support a permissive appeal. *E.g.*, *Progressive Cty. Mut. Ins. Co. v. Wade*, No. 03-21-00415-CV, 2022 WL 406360, at *2 (Tex. App.—Austin Feb. 10, 2022, no pet.) (denying permission to appeal because the legal issue turned on determinations of fact issues); *Estate of Barton*, No. 06-21-00009-CV, 2021 WL 1031540, at *4 (Tex. App.—Texarkana Mar. 18,

2021, no pet.) (determining certified question does not constitute controlling question of law because "the fact-intensive nature of the question before the trial court" resulted in "a controlling fact issue, not a legal one"); *Pueblitz v. Lemen*, No. 13-21-00395-CV, 2021 WL 6060980, at *2 (Tex. App.—Corpus Christi Dec. 21, 2021, no pet.) ("A permissive appeal to a denial of summary judgment on that issue would be inappropriate because whether Lemen used due diligence and brought his suit within reasonable time is a fact question."); *R&T Ellis Excavating, Inc. v. Page*, No. 09-20-00080-CV, 2020 WL 1592977, at *3 (Tex. App.—Beaumont Apr. 2, 2020, pet. denied) (denying permissive appeal because "whether immunity applies depends on the outcome of issues that involve unresolved questions of fact").

But the meaning of "controlling" is still not as clear. The observation that "[t]here has been little development in the case law construing section 51.014 regarding just what constitutes a controlling legal issue about which there is a difference of opinion and the resolution of which disposes of primary issues in the case" still holds true. *Gulf Coast Asphalt Co., L.L.C. v. Lloyd*, No. No. 14–13–00991–CV, 2015 WL 393407 at *4 (Tex. App.—Houston [14th Dist.] Jan. 29, 2015, no pet.).

One commentator has suggested a few characteristics of a "controlling question of law:"

- The issue "deeply affects the ongoing process of litigation."
- Resolution of the issue "will considerably shorten the time, effort, and expense of fully litigating the case."
- "[T]he viability of a claim rests upon the court's determination" of the question.

Renee Forinash McElhaney, *Toward Permissive Appeal in Texas*, 29 ST. MARY'S L.J. 729, 747–49 (1998) (cited with approval by *Gulf Coast Asphalt*, 2015 WL 393049 at *4)).

One court found that the identified question of law—whether Texas law or New Mexico law governed the dispute—was not "controlling." *JAJ Equip., Inc. v. Ramos*, No. 04-21-00459-CV, 2021 WL 6127925, at *3 (Tex. App.—San Antonio Dec. 29, 2021, no pet.). The court noted that the petitioners did not establish a "material variance" in Texas law and New Mexico law. *Id.* Moreover, the petitioners argued only that the choice of law issues "may" be outcome determinative. *Id.* Ultimately, whether a legal issue is "controlling" is still within the eye of the beholder.

Texas courts have apparently still not resolved whether a permissive appeal may involve more than one controlling question of law. In *Johnson v. Walters*, 14-15-00759-CV, 2015 WL 9957833, at *1 (Tex. App.—Houston [14th Dist.] Nov. 17, 2015, no pet.), the panel denied the petition for permissive appeal because the summary judgment order at issue required the court to consider and decide more than just a "single" controlling question of law. Strictly construing the plain language of the statute, the court found that

the use of the singular, in referring to controlling "issue" of law, required that any permissive appeal only involve a single issue. *See also Armour Pipe Line Co. v. Sandel Energy, Inc.,* No. 14-16-00010-CV, 2016 WL 514229, at *3 (Tex. App.—Houston [14th Dist.] Feb. 9, 2016, no pet.) (questioning whether the court has jurisdiction to hear more than one controlling question of law). In contrast, other courts have accepted permissive appeals presenting multiple questions. *See Ho v. Johnson*, No. 09-15-00077-CV, 2016 WL 638046, at *1 (Tex. App.—Beaumont Feb. 18, 2016, pet. filed) (accepting permissive appeal of multiple issues in healthcare liability suit); *Landmark Am. Ins. Co. v. Eagle Supply & Manufacturing L.P.*, No. 11-14-00262-CV (accepting permissive appeal of multiple issues arising out of trial court orders denying motions for summary judgment).

(2) When is there a substantial ground for difference of opinion?

Whether there is a substantial ground for difference of opinion is even less clear. The fact that the trial court disagreed with the appellant's position is not sufficient to satisfy the threshold for "substantial ground for difference of opinion." *WC Paradise Cove Marina, LP v. Herman*, No. 03-13-00569-CV, 2013 WL 4816597, at *1 (Tex. App.—Austin Sept. 6, 2013, no pet.) ("The fact that the trial court ruled against petitioners does not mean that the court decided a controlling question of law about which there is substantial ground for a difference of opinion.").

Some courts have held that if the issue is one of first impression, there is a substantial ground for difference of opinion. *See Byrd v. Phillip Galyen, P.C.*, 430 S.W.3d 515, 520 (Tex. App.—Fort Worth 2014, pet. denied) (granting review of interlocutory permissive appeal and noting that issue presented was matter of first impression). But more recently, in *Devillier v. Leonards*, the court held that the mere fact that the issue was one of first impression was *not* sufficient to show that there was a substantial ground for a difference of opinion. No. 01-20-00223-CV, No. 01-20-00224-CV, 2020 WL 5823292, at *1 (Tex. App.—Houston [1st Dist.] Oct. 1, 2020, no pet.).

And in *Snowden v. Rivkin*, the court held that there was not a substantial ground for difference of opinion because the petitioner's arguments were based on settled law. No. 05-20-00188-CV, 2020 WL 3445812, at *1 (Tex. App.—Dallas June 24, 2020, no pet.). *See also Target Corp. v. Ko*, No. 05-14-00502-CV, 2014 WL 3605746, at *1 (Tex. App.—Dallas July 21, 2014, no pet.) (holding that because the law was well-settled on the issue, "the fact that the trial court may have erred in not granting summary judgment is not a basis for permissive appeal").

The most obvious scenario for a substantial ground for difference of opinion is a split of authority. But short of that, it is not clear how to demonstrate that this requirement is met. In any event, the petition must attempt to show why the legal issue is open to interpretation or disagreement. *See also Barton*, 2021 WL 1031540, at *4 (denying petition and observing that "nothing in the record suggests that the issue before the trial court presented a novel or difficult legal question or one that presents a conflict among the courts of appeals").

(3) When will an immediate appeal materially advance termination of the litigation?

The requirement of a controlling question of law is tethered to the question of whether an immediate appeal "may materially advance the ultimate termination of the litigation." TEX. CIV. PRAC. & REM. CODE § 51.014(d)(2). That is, there must be a "controlling legal question as to which there is a substantial ground for difference of opinion," the immediate appeal of which will "materially advance the ultimate termination of the litigation." *Id.* § 51.014(d)(1)&(2). Noting the interplay between these requirements, courts and commentators have (as noted above) described the latter portion as being satisfied "when resolution of the legal question dramatically affects recovery in a lawsuit.":

> If resolution of the question will considerably shorten the time, effort, and expense of fully litigating the case, the question is controlling... Substantial grounds for disagreement exist when the question presented to the court is novel or difficult, when controlling ... law is doubtful, when controlling ... law is in disagreement with other courts of appeals, and when there simply is little authority upon which the district court can rely.... *Generally, a district court will make [a finding that the appeal will facilitate final resolution of the case] when resolution of the legal question dramatically affects recovery in a lawsuit*.

Barton, 2021 WL 1031540, at *4 (quoting *Gulf Coast Asphalt*, 457 S.W.3d at 545 and Renee F. McElhaney, *Toward Permissive Appeal in Texas*, 29 ST. MARY'S L.J. 729, 747 (1998) (emphasis added)); *ADT Sec. Servs., Inc. v. Van Peterson Fine Jewelers*, No. 05-15-00646-CV, 2015 WL 4554519, at *2 (Tex. App.—Dallas July 29, 2015, no pet.).

Courts have observed, however, that, even if the ultimate appeal is successful, the presence of "other" legal issues counsels against granting a permissive appeal. *See Barton*, 2021 WL 1031540, at *5 (collecting cases); *see Harden Healthcare, LLC v. OLP Wyo. Springs, LLC*, No. 03-20-00275-CV, 2020 WL 6811994, at *1 (Tex. App.—Austin Nov. 20, 2020, no pet.) (collecting cases and denying petition because, even if appeal were successful, issue of liability would remain pending to be tried with other remaining issues); *Trailblazer Health Enters. v. Boxer F2, L.P.*, No. 05-13-01158-CV, 2013 WL 5373271, at *1 (Tex. App.—Dallas Sept. 23, 2013, no pet.) (mem. op.) (noting that "there are several other issues in the litigation; there is no evidence that the ultimate termination of the litigation would be advanced by allowing this appeal").

The critical inquiry seems to be whether granting the appeal would be dispositive of most or all of the issues in any given case. *See Barton*, 2021 WL 1031540, at *5 ("[A] permissive appeal should provide a means for expedited appellate disposition of focused and potentially dispositive legal questions.") (citation omitted); *see also Triple P.G. Sand Dev., LLC v. Nelson*, No. 14-21-00066-CV, 2022 WL 868868, at *2 n.1 (Tex. App.—Houston [14th Dist.] Mar. 24, 2022, no pet. h.) (granting permission to appeal and noting that "resolution of over seventy percent of the pending claims in the MDL litigation would be a material advancement in the ultimate termination of the litigation.").

As noted, both the trial court's order, *see* TEX. R. CIV. P. 168, and the petition, *see* TEX. R. APP. P. 28.3(e), must explain how an immediate appeal may materially advance the ultimate termination of the litigation—courts will deny petitions where either of these requirements are not satisfied. *E.g.*, *Devillier v. Leonards*, No. 01-20-00223-CV, 2020 WL 5823292, at *1 (Tex. App.—Houston [1st Dist.] Oct. 1, 2020), *reh'g denied* (Dec. 31, 2020) ("Further, the trial court's orders do not explain how the determination of the appeals would materially advance the ultimate termination of the litigation. Nor do appellants explain in their petitions how resolution of the issue would materially advance the ultimate termination of the litigation."); *Feagan v. Wilson*, No. 11-21-00032-CV, 2021 WL 1134804, at *1 (Tex. App.—Eastland Mar. 25, 2021, no pet.) (denying petition because "the trial court's order d[id] not comply with the requirements of Rule 168").

Some courts require the trial court's order to contain more in the way of analysis. In *International Business Machines Corp. v. Lufkin Industries, Inc.*, for example, the trial court's order identified three "novel issues under Texas law," and stated that an immediate appeal "may materially advance the ultimate termination of the litigation because it will foreclose duplicative litigation costs and remove years of litigation expense and effort from this case." No. 12-20-00249-CV, 2020 WL 6788140, at *3 (Tex. App.—Tyler Nov. 18, 2020, pet. dism'd). The Sixth Court dismissed the petition, however, noting the lack of substantive rulings on the issues of law and that the order "d[id] not state why an immediate appeal may materially advance the ultimate termination of the litigation." *Id.* On the other end of the spectrum, some courts require less in the way of explanation. *E.g.*, *StarNet Ins. Co. v. RiceTec, Inc.*, 586 S.W.3d 434, 442 (Tex. App.—Houston [1st Dist.] 2019, pet. denied) (granting petition where order stated only that immediate appeal may materially advance the ultimate termination of this litigation because remaining damages claims were based on duty to defend).

All things considered, whether an immediate appeal will materially advance the litigation's ultimate resolution may be largely conditioned on the presence of a controlling question of law. Indeed, one dissenting opinion appears to suggest that the presence of a controlling question of law necessarily means that the litigation's ultimate termination would be materially advanced. *Devillier v. Leonards*, No. 01-20-00224-CV, 2020 WL 7869217, at *3 (Tex. App.—Houston [1st Dist.] Dec. 31, 2020, no pet.) (Keyes, J., dissenting) ("The petitions clearly seek a ruling on a controlling question of law as to which there is substantial ground for difference of opinion, so granting the petitions would materially advance the ultimate resolution of the litigation, with substantial savings of litigation and judicial resources.").

V. STATISTICS SINCE *SABRE TRAVEL*

In *Industrial Specialists*, the dissent noted that even after *Sabre Travel*, courts of appeals were still frequently denying permission to appeal. 2022 WL 2082236, at *20. One purposes of this updated article is to look at statistics since *Sabre Travel* to evaluate the impact, if any, of the Supreme Court's encouragement to the appellate courts to grant review when the statutory requirements are met.

The statistical analysis is hampered somewhat by record-keeping differences among the courts of appeals. Some of the courts use the "permissive appeal" event in TAMES, which allows easier searching of cases in which petitions were filed. But most do not. As a result, in preparing this paper, we used a combination of Westlaw and the Texas Courts online database to search for any Texas case, written order, or written opinion citing to section 51.014(d), 51.014(f), or Texas Rule of Appellate Procedure 28.3. We then removed opinions and orders arising out of petitions filed before February 1, 2019 (*i.e.*, before *Sabre Travel* was decided). We also contacted the clerks of the intermediate appellate courts to see if they had better information than we had been able to find; some were able to provide their internal statistics. We are grateful to the clerks for their assistance. Note this statistical analysis is subjected to variances. The first complexity is that while denials tend to be issued through memorandum opinions, grants are issued through orders that do not generally show up on Westlaw. Thus, we generally found grants only for cases in which the court has issued an opinion on the merits. We are aware of some permissive appeals that have been granted but are awaiting a decision. We have included those we are aware of in our statistics. But it is likely that there are other grants that we were unable to find. Further, docket-equalization orders and consolidations may affect these statistics.

A. Petitions for Permissive Appeal Post-*Sabre Travel*

We found 129 petitions for permissive appeal have been filed in Texas courts under amended section 51.014(d) between February 1, 2019, when *Sabre Travel* was decided, and the date of this article. The following chart breaks down the number of petitions addressed by each court of appeals and the outcomes for those petitions.

Court of Appeals	Petitions Filed	Petition Dismissed or Denied	Review Granted	% Granted
Houston [1st]	18	15	2[4]	11%
Fort Worth [2nd]	22	20	2	9%
Austin [3rd]	16	8	7[5]	44%
San Antonio [4th]	9	7	2	22%
Dallas [5th]	17	15	2	12%

[4] As of the date of this article, one of the petitions for permission to appeal remains pending.

[5] As of the date of this article, one of the petitions for permission to appeal remains pending.

Court of Appeals	Petitions Filed	Petition Dismissed or Denied	Review Granted	% Granted
Texarkana [6th]	1	1	0	0%
Amarillo [7th]	2	1	1	50%
El Paso [8th]	5	1[6]	4	80%
Beaumont [9th]	6	3	3	50%
Waco [10th]	1	1	0	0%
Eastland [11th]	4	3	1	25%
Tyler [12th]	6	2	4	67%
Corpus Christi [13th]	11	6	5	45%
Houston [14th]	11	9	2	18%
Totals	**129**	**92**	**35**	**27%**

B. Lessons from Post-*Sabre Travel* Cases

(1) Limitations of the Statistics

The raw numbers above seem to bear out the concern expressed in the dissent in *Industrial Specialists*. In fact, while the prior version of this paper found that from 2011 through 2016, the statewide grant rate was around 40%. And the analysis above suggests that the grant rate has fallen since *Sabre Travel* to around 26%. But these numbers may not reflect the appellate courts' willingness to grant review for several reasons.

First, a sizable portion of the denials relate to procedural defects, rather than the appellate court's discretion. The prior version of this paper noted that one of the most common reasons for denial was failure to satisfy procedural requirements. This continues to be a common theme in decisions that explain the denial of permission to appeal. For example, in several cases, the appellant simply failed to establish that the trial court granted permission to appeal, *see e.g., Estate of Tenison, v. Brookshire Grocery Co.*, No. 05-21-00455-CV, 2021 WL 3160522, at *1 (Tex. App.—Dallas July 26, 2021, no pet.) (dismissing appeal

[6] This one was initially granted but was later dismissed as improvidently granted. *El Paso Tool & Die Co., Inc. v. Mendez*, 593 S.W.3d 800, 805–06 (Tex. App.—El Paso 2019, no pet.).

where trial court did not grant permission); *Hudnall v. Smith & Ramirez Restoration, L.L.C.*, No. 08-19-00217-CV, 2019 WL 4668508, at *1 (Tex. App.—El Paso Sept. 25, 2019, no pet.) (dismissing appeal where trial court did not grant permission); *Progressive County Mut. Ins. Co. v. McCormack*, No. 04-21-00001-CV, 2021 WL 186675, at *2 (Tex. App.—San Antonio Jan. 20, 2021, pet. denied) (per curiam) (no permission from trial court).

Other petitions were dismissed where the trial court failed to rule on the ultimate issue to be appealed. *See, e.g., Mid-Continent Cas. Co. v. Harris Cty. Mun. Util. Dist. No. 400*, No. 09-21-00326-CV, 2021 WL 6138974, at *2 (Tex. App.—Beaumont Dec. 30, 2021, no pet.) (denying petition for permissive appeal where "nothing in the record show[ed] the trial court made a substantive ruling on any of the issues presented"); *Scott v. West*, 594 S.W.3d 397, 401 n. 5 (Tex. App.—Fort Worth 2019, pet. denied) (refusing to rule on issues the trial court did not rule on).

The fact that so many denials hinge on procedural failures means that the overall grant rate likely does not accurately reflect the appellate courts' willingness to accept permissive appeals. Removing the procedural default cases from the analysis would increase the grant rate. Accurately removing those denials is not possible because some of the denial orders do not distinguish between procedural issues and other statutory issues (such as a controlling question of law). Moreover, it is not clear (and is, in fact, unlikely) that the courts would have granted permission to appeal in all cases in which the procedural failures were cured. But the appellate courts are likely somewhat more willing to grant permission to appeal than the raw statistics would suggest.

Second, as discussed above, one limitation in searching for cases is that some grants can only be "found" when the court issues its opinion on the merits. Until then, only the parties and the court know about the grant and we have not found a good way to find those orders. So, it is almost certain that there are an additional number of granted petitions that won't be searchable until the court issues its opinion on the merits.

In short, while the statistics have value, it is important to understand these limitations before relying on them to make any conclusions about the likelihood that a particular court will or won't grant permission to appeal.

(2) Other Issues

A few other lessons can be drawn from these post-*Sabre Travel* decisions. First, as noted above, careful attention to exact compliance with the procedural issues is essential. In particular, there appears to still be some confusion about the timing for filing a petition for permission to appeal in the court of appeals. More than one petition was denied because the petitioner filed in the court of appeals before the trial court granted permission to appeal, mistakenly believing that the deadline to seek permission was about to expire. For example, in *Houston Foam Plastics, Inc. v. Anderson*, the trial court had not granted permission to appeal. No. 01-20-00714-CV, 2020 WL 7349090 (Tex. App.—Houston [1st Dist.] Dec. 15, 2020). The petitioner explained that it filed without permission because,

even though it was in the process of seeking permission from the trial court, "it was necessary for appellant to file its petition now because the fifteen-day time period provided under Section 51.014(d) for filing the petition [in the appellate court] runs from the signing of the 'the order to be appealed.'" *Id.* at *1. The court of appeals denied the petition, explaining that the 15-day deadline to file the petition in the court of appeals did not start to run until after the trial court amended the order at issue to grant permission to appeal. *Id.*

Second, the trial court must actually decide the legal issue that is the subject of the appeal; it is not sufficient merely to identify the issue. For example, in *IBM v. Lufkin*, the trial court denied summary judgment and identified three issues of law. No. 12-20-00249-CV, 2020 WL 6788140, at *3 (Tex. App.—Tyler Nov. 18, 2020, no pet.) But the trial court did not actually decide any of the three issues. *Id.* The court of appeals noted that:

> The order sets forth no substantive ruling on any of the three issues identified therein. Nor does the record otherwise indicate the trial court's substantive ruling on each issue. As such, the order serves as nothing more than an attempt to certify three legal questions for our review.

Id. Accordingly, the court denied the petition for permission to appeal. *See also Sealy Emergency Room, LLC v. Leschper*, No. 01-19-00196-CV, 2019 WL 3293699, at *1 (Tex. App.—Houston [1st Dist.] July 23, 2019, no pet.) (denying permission to appeal because "the trial court's order identified 'the controlling question[ ] of law decided by the [c]ourt' but did not include a substantive ruling on that issue").

Third, if you find that there may be a procedural issue after you have filed a petition for permission to appeal, all may not be lost. In *Duncan v. Prewett Rentals Series 2 752 Military, LLC*, the court of appeals noted that the trial court had not granted permission for an appeal. No. 03-21-00244-CV, 2021 WL 2604053, at *1 (Tex. App.—Austin June 25, 2021, no pet.). But the court noted that "the record reflects that Duncan has sought permission to appeal and we have been informed the trial court has conducted a hearing and rendered an oral ruling on Duncan's motion." *Id.* The court therefore abated the appeal to allow the petitioner to secure a written ruling and to supplement the record on appeal with that written order granting permission to appeal. *Id.* at *2.[7]

Finally, the Supreme Court has rejected a party's attempt to use the theoretical availability of a permissive interlocutory appeal to avoid mandamus relief. In *In re American Airlines, Inc.*, the real party in interest argued that the relator had an adequate remedy by appeal because it could have sought to appeal under section 51.014(d). 634 S.W.3d 38, 43 (Tex. 2021). The Supreme Court found that the relator did not have an adequate remedy by appeal because the requirements of section 51.014(d) were not met. *Id.* The order at

[7] After the record was supplemented, the court granted permission to appeal. *Duncan v. Prewett Rentals Series 2 752 Military, LLC*, No. 03-21-00244-CV, 2021 WL 3118420, at *2 (Tex. App.—Austin July 22, 2021, no pet.)

issue allowed an apex deposition. So, it is not hard to see why that order would not satisfy the requirements. The Supreme Court's opinion seems to leave open the possibility that the availability of a permissive appeal could preclude mandamus relief. But since the Court has now repeatedly held that appellate courts have discretion to deny permissive appeals even if the statutory requirements are met, it seems unlikely that the Court would hold that the mere possibility of a permissive appeal would preclude mandamus relief.

VI. Conclusion

Just over 10 years after section 51.014(d) was adopted, courts are still wrestling with how it should be applied. The fractured opinion in *Industrial Specialties* illustrates these difficulties. The statute grants appellate courts discretion in whether to accept permissive appeals, but does not set the parameters of that discretion. It appears that the Supreme Court's encouragement to intermediate appellate courts to accept these appeals has not had the desired effect. But because of the number of denials based on procedural defects, the raw numbers likely do not tell the whole story.

Because opinions denying review have tended to be fairly short, the case law has not really developed about what the statutory requirements mean or how they should be applied. This is particularly true for the requirement that there be a substantial ground for difference of opinion and the requirement that an immediate appeal may materially advance the termination of the litigation. Nor has there been any development of the factors that might inform the decision to grant review when all of the factors are met.

The main lessons from the first decade of permissive interlocutory appeals are: (1) follow the procedures in the statute and the rules to the letter; (2) make sure that the trial court expressly decides the controlling issues of law; and (3) in explaining how the statutory requirements are met, be sure to give the court of appeals a good reason to exercise its discretion to grant review. That is, a petition for permission to appeal needs to look a bit like a petition for review; it will need to convince the court of appeals that an immediate appeal is a good use of judicial resources. Merely showing compliance with the statutory requirements will not be enough.

INDUSTRIAL SPECIALISTS, LLC, Petitioner,

v.

BLANCHARD REFINING COMPANY LLC and Marathon Petroleum Company LP, Respondents

No. 20-0174

Supreme Court of Texas.

Argued February 1, 2022

OPINION DELIVERED: June 10, 2022

Background: Refinery owner brought action against turnaround-services company to recover under indemnity provision of the parties' contract, which demand stemmed from refinery owner's settlement of claims asserted against it by turnaround-services company's employees who were injured when a fire occurred in a regenerator vessel. The 212th District Court, Galveston County, Patricia Grady, J., denied the parties' competing summary-judgment motions but granted refinery owner's unopposed motion to pursue a permissive interlocutory appeal. In a one-page memorandum decision, the Houston Court of Appeals, First District, 634 S.W.3d 760, denied refinery owner's petition for permissive interlocutory appeal. Refinery owner petitioned for review.

Holdings: The Supreme Court, Boyd, J., held that:

(1) the Court of Appeals did not abuse its discretion by denying the petition for permissive appeal, and

(2) the Court of Appeals' memorandum decision, although brief, sufficiently explained its reasons for denying the petition.

Affirmed.

Blacklock, J., concurred in part, concurred in the judgment, and filed opinion, which Bland, J., joined.

Busby, dissented and filed opinion, which Hecht, C.J., and Young, J., joined.

1. Appeal and Error ⚿366

Court of Appeals did not abuse its discretion by denying refinery owner's petition for permissive interlocutory appeal of trial court's denial of summary judgment on its claim that turnaround-services company was contractually required to indemnify it for settlement of claims asserted against it by turnaround-services company's employees who were injured when a fire occurred in a regenerator vessel; despite argument that the two statutory requirements were satisfied, i.e., that the appealed order involved a controlling question of law as to which there was a substantial ground for difference of opinion and that an immediate appeal could materially advance the ultimate termination of the litigation, nothing in the interlocutory-appeal statute or in the rules implementing that statute provided that the courts had to permit and accept an interlocutory appeal when the requirements were met. Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014(d), 51.014(f); Tex. R. App. P. 28.3(e)(4).

2. Appeal and Error ⚿366

Interlocutory-appeal statute permits appellate courts to accept a permissive interlocutory appeal when the two statutory requirements—i.e., that the appealed order involved a controlling question of law as to which there was a substantial ground for difference of opinion and that an immediate appeal could materially advance the ultimate termination of the litigation—are met, but it grants the courts discretion to reject the appeal even when the requirements are met. Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014(d), 51.014(f).

3. Courts ⚿89

A trial court's conclusion that the statutory requirements for an interlocutory appeal are met has no bearing on a Court of Appeals' subsequent evaluation of the requirements. (Per Boyd J., with two Justices joining and two Justices concurring in the judgment.) Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014(d), 51.014(f).

4. Appeal and Error ⚿4785

Court of Appeals' memorandum decision sufficiently explained its reasons for denying refinery owner's petition for permissive interlocutory appeal of trial court's denial of summary judgment on its claim that turnaround-services company was contractually required to indemnify it for settlement of claims asserted against it by turnaround-services company's employees who were injured when a fire occurred in a regenerator vessel; although brief, the decision stated that the statutory requirements i.e., that the appealed order involved a controlling question of law as to which there was a substantial ground for difference of opinion and that an immediate appeal could materially advance the ultimate termination of the litigation, were not met, and that sufficed. (Per Boyd J., with two Justices joining and two Justices concurring in the judgment.) Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014(d), 51.014(f); Tex. R. App. P. 28.3(e)(4), 47.1, 47.4.

5. Appeal and Error ⚿4785

Opinions issued solely to deny permissive interlocutory appeals must be memorandum opinions. (Per Boyd J., with two Justices joining and two Justices concurring in the judgment.) Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014(d), 51.014(f); Tex. R. App. P. 28.3(e)(4), 47.4.

6. Appeal and Error ⚿4117

The Supreme Court may review an interlocutory appeal that the trial court has permitted even when the Court of Appeals has refused to hear it. (Per Boyd J., with two Justices joining and two Justices concurring in the judgment.) Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014(d), 51.014(f).

7. Appeal and Error ⚿4117

The Supreme Court has broad discretion in choosing whether to exercise jurisdiction over a permissive interlocutory appeal. (Per Boyd J., with two Justices joining and two Justices concurring in the judgment.) Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014(d), 51.014(f).

On Petition for Review from the Court of Appeals for the First District of Texas

Matthew H. Frederick, Lehotsky Keller LLP, Austin, Scott Keller, Lehotsky Keller LLP, Dallas, for Amici Curiae The American Petroleum Institute, The National Association of Manufacturers, American Fuel & Petrochemical Manufacturers, The Texas Oil & Gas Association.

Dylan B. Russell, Hoover Slovacek LLP, Houston, for Amici Curiae Mosaic Baybrook One, L.P., Mosaic Baybrook Two, L.P.

R. L. Michael Northrup, Dallas, Pro Se.

Michael A. Golemi, James T. Kittrell, Jody M. Schisel-Meslin, Liskow & Lewis, Houston, Shelly White, Wright Brown & Close, LLP, Houston, Michael A. Choyke, Jessica Zavadil Barger, Brian J. Cathey, Wright Close & Barger, LLP, Houston, for Petitioner.

Joel Zane Montgomery, Jonathan Bruce Smith, Zachary Alex Rodriguez, Amy Douthitt Maddux, Shipley Snell Montgomery LLP, Houston, for Respondents.

Justice Boyd announced the Court's judgment and delivered an opinion in which Justice Devine and Justice Huddle joined.

After denying the parties' competing summary-judgment motions, the trial court entered an order permitting an interlocutory appeal. The court of appeals, however, refused the application for permissive appeal, stating that the application failed to establish the statutory requirements. Both parties contend the court of appeals abused its discretion, both by refusing the permissive appeal and by failing to adequately explain its reasons. We disagree with both arguments and affirm.

I.

Background

Blanchard Refining Company [1] hired Industrial Specialists to provide turnaround services at Blanchard's refinery in Texas City. Three years into the five-year contract, a fire occurred in a regenerator vessel, injuring numerous Industrial Specialists employees and one employee of another contractor. The employees sued Blanchard and all of its other contractors, but they did not sue Industrial Specialists.[2] Blanchard demanded a defense and indemnity from Industrial Specialists pursuant to an indemnity provision in the parties' contract. Industrial Specialists rejected the demand.

Blanchard and the other contractors ultimately settled all the employees' claims for $104 million. Blanchard paid $86 million of that total. Blanchard then filed this suit against Industrial Specialists, seeking to enforce the indemnity provision. Blanchard and Industrial Specialists filed competing summary-judgment motions. The trial court denied both without explaining its reasons but granted Industrial Specialists' unopposed motion to pursue a permissive interlocutory appeal under section 51.014(d) of the Texas Civil Practice and Remedies Code.

The court of appeals denied Industrial Specialists' petition for permissive appeal. 634 S.W.3d 760, 760 (Tex. App.—Houston [1st Dist.] 2019). In a one-page memorandum opinion, the court concluded that "the petition fail[ed] to establish each requirement" for a permissive appeal. *Id.* (citing TEX. R. APP. P. 28.3(e)(4)). We granted Industrial Specialists' petition for review.

II.

Permissive Interlocutory Appeals

Since at least as early as the federal Judiciary Act of 1789, American law has generally permitted appeals only from "final decrees and judgments."[3] We have honored this final-judgment rule in Texas, recognizing that it promotes "[c]onsistency, finality, and judicial economy" and ensures that courts decide cases expediently and on a full record. *Sabre Travel Int'l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 730 (Tex. 2019).

1. Blanchard is a wholly owned subsidiary of Blanchard Holdings Company, LLC, which is owned by Marathon Petroleum Company. Blanchard and Marathon are both parties and respondents in this case. We will refer to them collectively as Blanchard.

2. The Workers' Compensation Act barred the Industrial Specialists employees from suing their employer. *See* TEX. LABOR CODE § 408.001(a). The other contractor's employee apparently elected not to sue Industrial Specialists.

3. *See* Judiciary Act of 1789, ch. XX, § 22, 1 Stat. 73, 84 (codified at 28 U.S.C. § 1291 (2012)) (permitting circuit courts to review "final decrees and judgments" from district courts).

The final-judgment rule, however, has its exceptions.[4] The Texas Legislature has created numerous exceptions through the years, first allowing interlocutory appeals in a few narrow circumstances as early as 1892.[5] In 1985, the legislature enacted section 51.014(a) of the Texas Civil Practice and Remedies Code, gathering into one subsection the four types of then-existing interlocutory appeals by right.[6] By 2001, those original four had doubled to eight, prompting then-JUSTICE HECHT to observe a "recent and extensive legislative expansion of the jurisdiction of the courts of appeals over a wider variety of interlocutory orders." *Wagner & Brown, Ltd. v. Horwood*, 53 S.W.3d 347, 350 (Tex. 2001) (HECHT, J., dissenting) (citing TEX. CIV. PRAC. & REM. CODE §§ 15.003, 51.014(a)(7), (8)).

That same year, however, we continued to characterize the final-judgment rule as "the general rule, with a few mostly statutory exceptions." *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). But the legislature continued to create additional exceptions, expanding section 51.014(a) by 2019 to permit appeals from fourteen different types of interlocutory orders. We acknowledged the shifting legal landscape that year, observing that the practice of "[l]imiting appeals to final judgments can no longer be said to be the general rule." *Dall. Symphony Ass'n, Inc. v. Reyes*, 571 S.W.3d 753, 759 (Tex. 2019). In 2021, the legislature amended section 51.014(a) to authorize interlocutory appeals in three additional circumstances, increasing the total to seventeen.[7]

In addition to authorizing appeals from specific types of interlocutory orders, the legislature added a broader exception in 2011, authorizing permissive appeals from interlocutory orders that are "not otherwise appealable." TEX. CIV. PRAC. & REM. CODE § 51.014(d). Subsection (d) says trial courts "may" permit an appeal from an interlocutory order that is not otherwise appealable if (1) the order "involves a controlling question of law as to which there is a substantial ground for difference of opinion," and (2) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.* And subsection (f) provides that, if a trial court permits such an appeal, the court of appeals "may" accept the appeal if the appealing party timely files "an application for interlocutory appeal explaining why an appeal is warranted under Subsection (d)." *Id.* § 51.014(f).

We enacted two new procedural rules in 2011 to accommodate this new permissive-appeal exception. First, we enacted rule 168 of the Texas Rules of Civil Procedure, requiring that trial-court orders authorizing permissive appeals "identify the con-

4. For example, article V, section 3-b of the Texas Constitution, adopted in 1940, authorizes the legislature to permit appeals directly to this Court from "an order of any trial court granting or denying an interlocutory or permanent injunction on the grounds of the constitutionality or unconstitutionality of any statute of this State, or on the validity or invalidity of any administrative order issued by any state agency under any statute of this State." TEX. CONST. art. V, § 3-b.

5. *See* Elizabeth L. Thompson, *Interlocutory Appeals in Texas: A History*, 48 ST. MARY'S L.J. 65, 69–70 (2016).

6. Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3280.

7. *See* Act effective Sept. 1, 2021, 87th Leg., R.S., ch. 167, § 1, 2021 Tex. Gen. Laws ——, ——; Act effective June 14, 2021, 87th Leg., R.S., ch. 528, § 1, 2021 Tex. Gen. Laws ——, ——; Act effective June 16, 2021, 87th Leg., R.S., ch. 813, § 1, 2021 Tex. Gen. Laws ——, —— (collectively codified at TEX. CIV. PRAC. & REM. CODE § 51.014(a)(15)).

trolling question of law as to which there is a substantial ground for difference of opinion" and "state why an immediate appeal may materially advance the ultimate termination of the litigation." TEX. R. CIV. P. 168. We then enacted rule 28.3 of the Texas Rules of Appellate Procedure, addressing the procedural requirements for perfecting a permissive appeal in the courts of appeals. *See* TEX. R. APP. P. 28.3. Subsection (e) of rule 28.3 requires that a petition for permission to appeal must "argue clearly and concisely why the order to be appealed" meets those two requirements. TEX. R. APP. P. 28.3(e)(4).

In this case, the trial court granted Industrial Specialists' unopposed motion for permission to appeal, and the parties do not dispute that the court's order complied with rule 168. The court of appeals, however, declined to accept the appeal and issued a memorandum opinion stating its conclusion "that the petition fails to establish each requirement of Rule 28.3[ ](e)(4)." 634 S.W.3d at 760. In this Court, Industrial Specialists argues (and Blanchard agrees) that the court of appeals abused its discretion by refusing to accept the appeal and by failing to adequately explain its reasons for that decision. Based on the plain language of section 51.014(f) and the applicable rules, we disagree.

A. Discretion to Refuse a Permissive Appeal

[1] As explained, section 51.014(d) provides that a trial court "*may* . . . permit an appeal from an order that is not otherwise appealable *if*" the two requirements are met, and section 51.014(f) provides that a court of appeals "*may* accept" such an appeal "*if* the appealing party" timely files an application "explaining why an appeal is warranted under Subsection (d)." TEX. CIV. PRAC. & REM. CODE § 51.014(d), (f) (emphases added). Similarly, the rules this Court enacted to implement subsections (d) and (f) provide that "a trial court *may* permit" a permissive appeal, TEX. R. CIV. P. 168 (emphasis added), and an appeal "is deemed" filed "[i]f" the court of appeals grants the petition, TEX. R. APP. P. 28.3(k).

We recently reviewed these provisions for the first time in *Sabre Travel.* We held in a unanimous opinion that the use of the phrase "may accept" in section 51.014(f) "convey[s] a discretionary function in the court of appeals," and the phrase "may . . . permit" in subsection (d) grants similar discretion to the trial court. 567 S.W.3d at 731. Based on the statute's unambiguously permissive language, we held that "courts of appeals have discretion to accept or deny permissive interlocutory appeals certified under section 51.014(d)," and added that "[o]ur procedural rules make that clear." *Id.* at 732.

Nevertheless, Industrial Specialists argues that the court of appeals abused its discretion by refusing this permissive appeal because the trial court concluded that the two requirements are satisfied and both parties agree with that conclusion. Arguing that the court of appeals' discretion "cannot be unlimited," Industrial Specialists insists that the court's actions were "arbitrary and unreasonable" because, as both parties agree, "this case falls squarely within" subsection (d)'s requirements "and is precisely the type of case for which [the permissive-appeal] process was designed."

[2] We agree that section 51.014 limits courts' discretion when addressing permissive appeals. But the limits section 51.014 imposes restrict the permitting and accepting—not the denial or refusal—of an interlocutory appeal. A trial court may permit an appeal only "if" subsection (d)'s two requirements are met, and the court of appeals "may accept" the appeal only if the application explains "why an appeal is warranted under Subsection (d)." TEX. CIV.

PRAC. & REM. CODE § 51.014(d), (f). The courts have no discretion to permit or accept an appeal if the two requirements are not satisfied. But if the two requirements *are* satisfied, the statute then grants courts vast—indeed, unfettered—discretion to accept or permit the appeal. Nothing in the statute or in our rules implementing the statute can be read to provide that the courts *must* permit and accept an appeal when the requirements are met.

Nor do the "guiding principles" recognized by our precedent—which cabin discretion by prohibiting arbitrary and unreasonable acts—impose a limit here. *See, e.g., Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985) (describing abuse of discretion as "a question of whether the court acted without reference to any guiding rules and principles"). Section 51.014 does not expound on the guiding principles that limit a court of appeals' discretion, but its application does not intrinsically implicate them. The statute instead defines *when* a court of appeals "may" exercise discretion and when it may not. Even if we, like our dissenting colleagues, believe that guiding principles are "particularly important" in these circumstances, we cannot rewrite a statute that imposes no such principles. *Post* at 24 (BUSBY, J., dissenting). Section 51.014 addresses whether discretion exists at all; it does not impose principles to guide the exercise of that discretion when it does exist.

Industrial Specialists argues that a court of appeals would act arbitrarily and unreasonably if it were to accept or refuse a permissive appeal without considering whether the two requirements are satisfied. In response to this point, we note that subsection (f)'s requirement that the appealing party explain in its application "why an appeal is warranted under subsection (d)" is not accompanied by any express command that the courts of appeals then consider the appealing party's explanation. But given that this obligation would be rendered essentially meaningless if the statute did not implicitly charge courts of appeals with the duty to consider the party's explanation, a court of appeals might abuse its discretion by failing to do so. But here, the court of appeals' opinion confirms that the court did consider the two requirements and concluded that the petition did not satisfy them. The statute does not expressly state whether more or less is required. Our dissenting colleagues would require more, *post* at 39 (BUSBY, J., dissenting); our concurring colleagues would require less, *post* at 22 (BLACKLOCK, J., concurring). Which view is correct is not a question we must resolve today. The court of appeals' opinion states that it considered the statute's two requirements and determined they were not satisfied, so we need not decide whether it would have abused its discretion if it had rejected the appeal without considering the requirements.

[3] We do not agree that a trial court's conclusion that the requirements are met (or the parties' agreement with that conclusion) somehow constrains the court of appeals' discretion. Under subsection (f), the trial court's decision to permit the appeal is merely the prerequisite for the court of appeals to exercise its discretion at all. The trial court's conclusion regarding the two requirements has no bearing on the court of appeals' subsequent evaluation of the requirements under subsection (f).[8]

8. Our dissenting colleagues agree with the trial court's conclusion that the two requirements "have been met," *post* at 25 (BUSBY, J., dissenting), but that assertion—even if true—is irrelevant. Our disagreement with the result of the court of appeals' properly exercised discretion as to the two requirements cannot, standing alone, establish abuse of discretion.

Nor does the federal permissive-appeals statute impose or suggest a limit on the discretion of Texas courts of appeals. As we explained in *Sabre Travel*, "the Legislature modeled section 51.014(d) after the federal counterpart to permissive interlocutory appeals," and the United States Supreme Court has interpreted that counterpart "as providing federal circuit courts *absolute discretion* to accept or deny permissive appeals." *Sabre Travel*, 567 S.W.3d at 731–32 (emphasis added) (addressing 28 U.S.C. § 1292(b)). Industrial Specialists suggests that section 1292(b) is distinguishable, however, because it states that a court of appeals "may . . . *in its discretion*, permit an appeal to be taken." 28 U.S.C. § 1292(b) (emphasis added). But the legislature's choice to omit "in its discretion" while retaining the word "may" cannot be read as diminishing the fundamentally discretionary nature of the word "may." *See* TEX. GOV'T CODE § 311.016(1) (" 'May' creates discretionary authority or grants permission or a power."); *May*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/may (last visited May 27, 2022) (defining "may" as an auxiliary verb "used to indicate possibility or probability" and meaning to "have permission to" or "be free to"); *May*, DICTIONARY.COM, https://www.dictionary.com/browse/may (last visited May 27, 2022) (defining "may" as an auxiliary verb "used to express possibility" or "opportunity or permission"). Discretion is the indispensable precondition for meaningful judgment, and as such it cannot be capped by a party's own wishful revisionism, self-serving interpretation, or impatience with time-tested methods of just and measured adjudication. We cannot interpose a firm limit on a court of appeals' discretion under section 51.014(f) when the statute itself grants the court discretion and imposes no such limit.

In our comment accompanying rule 28.3(e)(4), we noted that it was "intended to be similar" to rule 53.1, which governs petitions for review in this Court. TEX. R. APP. P. 28.3 cmt. Rule 53.1, which states that this Court "*may* review" properly filed petitions for review, does not require that we grant any particular petition, even if the lower courts and the parties all agree that we should grant it. *See* TEX. R. APP. P. 53.1, 56.1(a) ("Whether to grant review is a matter of judicial discretion."). As we concluded in *Sabre Travel*, "the courts of appeals can similarly accept or deny a permissive interlocutory appeal as we can a petition for review." 567 S.W.3d at 731 (citing TEX. R. APP. P. 28.3 cmt.).

In this case, the court of appeals acknowledged subsection (d)'s requirements and concluded that this appeal fails to satisfy either of them. We need not analyze whether the court of appeals reached the correct conclusion because it acted within its discretion in exercising its independent judgment. But we note that its conclusion was, at a minimum, plausible. Although both Blanchard and Industrial Specialists filed summary-judgment motions and the trial court denied them both, only Industrial Specialists requested and received permission to appeal. *If* the court of appeals concluded that the trial court correctly denied Industrial Specialists' summary-judgment motion, subsection (d)'s second requirement would not be satisfied because granting the permissive appeal simply to affirm the trial court's denial of a summary-judgment motion would not have materially advanced the litigation. In any event, the abuse-of-discretion stan-

And if we believe the court of appeals objectively erred, as our dissenting colleagues believe, our procedural rules permit us to accept the appeal ourselves even though the court of appeals declined it. *See Sabre Travel,* 567 S.W.3d at 729–30. Ironically, our dissenting colleagues do not even suggest that we should do so here.

dard does not permit us to second-guess the court's judgment on that question.

The parties highlight the admonition we expressed in *Sabre Travel*: "Just because courts of appeals *can* decline to accept permissive interlocutory appeals does not mean they *should*." *Id.* at 732–33 (emphases added). As they note, the court of appeals' denial of Industrial Specialists' permissive interlocutory appeal follows a clear trend: since our 2019 decision in *Sabre Travel*, this same court of appeals has reviewed requests from nine parties that received a trial court's permission to pursue an interlocutory appeal under section 51.014(d).[9] The court denied permission in eight of the nine cases, twice incurring a dissent from denial of rehearing,[10] and tellingly published an identical typographical error—"Rule 28.3(3)(e)(4)" instead of "Rule 28.3(e)(4)"—in four of those eight orders.[11] The court's duplicative denials could at least be read to indicate its disagreement with our exhortation in *Sabre Travel*.

We observed in *Sabre Travel* that "[i]f all courts of appeals were to exercise their discretion to deny permissive interlocutory appeals certified under section 51.014(d), the legislative intent favoring early, efficient resolution of determinative legal issues in such cases would be thwarted." *Id.* at 732. But our warning in *Sabre Travel* was issued to "caution," not to command. *Id.* The court of appeals' recurring rejections may signify disrespect for the line between discretion and dereliction, but that is a line the legislature chose to draw quite loosely in section 51.014(f). We could, perhaps, impose stricter requirements by amending our rules, but we cannot do so by holding that the statute imposes limits it simply does not impose. We thus conclude that the court of appeals did not abuse its discretion by refusing to accept this permissive interlocutory appeal.

B. Explanations for Refusals

[4, 5] Industrial Specialists argues that, even if the court of appeals did not

9. *See Devillier v. Leonards*, Nos. 01-20-00223-CV & 01-20-00224-CV, 2020 WL 5823292, at *1 (Tex. App.—Houston [1st Dist.] Oct. 1, 2020, no pet.) (per curiam) (mem. op.); *Quintanilla v. Mosequeda*, No. 01-20-00387-CV, 2020 WL 3820256, at *1 (Tex. App.—Houston [1st Dist.] July 7, 2020, no pet.) (per curiam) (mem. op.); *Sealy Emergency Room, LLC v. Leschper*, No. 01-19-00923-CV, 2020 WL 536013, at *1 (Tex. App.—Houston [1st Dist.] Feb. 4, 2020, pet. denied) (per curiam) (mem. op.); 634 S.W.3d at 760; *StarNet Ins. Co. v. RiceTec, Inc.*, 586 S.W.3d 434, 442 (Tex. App.—Houston [1st Dist.] 2019, pet. denied); *By the Sea Council of Co-owners, Inc. v. Tex. Windstorm Ins. Ass'n*, No. 01-19-00415-CV, 2019 WL 3293701, at *1 (Tex. App.—Houston [1st Dist.] July 23, 2019, no pet.) (per curiam) (mem. op.); *Thien Nguyen v. Garza*, No. 01-19-00090-CV, 2019 WL 1940802, at *1 (Tex. App.—Houston [1st Dist.] May 2, 2019, pet. denied) (per curiam) (mem. op.); *Thompson v. Landry*, No. 01-19-00203-CV, 2019 WL 1811087, at *1 (Tex. App.—Houston [1st Dist.] Apr. 25, 2019, no pet.) (per curiam) (mem. op.); *Mosaic Baybrook One, L.P. v. Simien*, No. 01-18-00995-CV, 644 S.W.3d 671, 671–72 (Tex. App.—Houston [1st Dist.] Feb. 12, 2019, pet. granted) (per curiam) (mem. op.).

10. *See Devillier v. Leonards*, No. 01-20-00224-CV, 2020 WL 7869217, at *1–3 (Tex. App.—Houston [1st Dist.] Dec. 31, 2020, no pet.) (Keyes, J., dissenting from denial of rehearing) (arguing that review was necessary because the case involved an issue of first impression); *Mosaic Baybrook One, L.P. v. Simien*, No. 01-18-00995-CV, 650 S.W.3d 1, 3–4 (Tex. App.—Houston [1st Dist.] June 13, 2019, pet. granted) (Keyes, J., dissenting from denial of rehearing en banc) (arguing that the court abused its discretion by denying appeal of a controlling issue of law that would determine a class-certification issue).

11. *See Devillier*, 2020 WL 5823292, at *1; *Sealy Emergency Room*, 2020 WL 536013, at *1; 634 S.W.3d at 760; *Mosaic Baybrook One*, 644 S.W.3d at 671– 72.

abuse its discretion by refusing the appeal, it did abuse its discretion by failing to adequately explain its reasons for doing so. For support, it relies on Texas Rule of Appellate Procedure 47.1, which requires courts of appeals to "hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal," and rule 47.4, which requires that memorandum opinions be "no longer than necessary to advise the parties of the court's decision and the basic reasons for it." TEX. R. APP. P. 47.1, 47.4.[12] Blanchard agrees, asserting that "the court of appeals erred in denying [Industrial Specialists'] request for a permissive interlocutory appeal without giving any reason for its ruling."

But the court of appeals' opinion in this case complied with these rules. The court's "decision" was to reject the interlocutory appeal, and its opinion explained that its decision was based on its conclusion that "the petition fails to establish each requirement of Rule 28.3[ ](e)(4)." 634 S.W.3d at 760. The opinion addressed the only issue "raised and necessary to final disposition of the appeal," as rule 47.1 requires, and advised the parties "of the court's decision [to refuse the appeal] and the basic reasons for it," as rule 47.4 requires. According to the opinion, the court of appeals did not refuse the appeal without having considered whether (or despite a finding that) the requirements were met; rather, it refused the appeal *because* it concluded they were not met.[13] And the opinion explained this while remaining "as brief as practicable" and "no longer than necessary," as the rules also require.

Our dissenting colleagues demand far more from the court of appeals' opinion than our rules and our precedent require. Critically, the dissent interprets rule 47.4 as requiring the opinion to "explain the basic reasons" it disagreed with the parties' arguments that "the two requirements for a permissive appeal were met." *Post* at 25 (BUSBY, J., dissenting). But the court's decision and disposition were to reject the interlocutory appeal, and its opinion duly described its basic reason for doing so: "Because we conclude the petition fails to establish [the two requirements], we deny the petition for permissive appeal." 634 S.W.3d at 760. This was the basic, and only, reason for the court's decision not to accept the appeal.[14] But our

12. Opinions issued solely to deny permissive interlocutory appeals must be memorandum opinions, which are required where the opinion does not establish or modify a rule of law, apply a rule to novel facts likely to recur, involve constitutional or other important legal issues, criticize existing law, or resolve an apparent conflict of authority. *See* TEX. R. APP. P. 47.4(a)–(d).

13. It is the presence of *reasoning*—not a ''boilerplate conclusion,'' as envisioned by the dissent—that separates the court of appeals' opinion here from the seven other opinions cited by the dissent, *see post* at 34 (BUSBY, J., dissenting), all of which fail to state the ''basic reasons'' for their decision. *See, e.g., BPX Operating Co. v. 1776 Energy Partners, LLC*, No. 04-21-00054-CV, 2021 WL 1894830, at *1 (Tex. App.—San Antonio May 12, 2021, no pet.) (per curiam) (mem. op.) (''Having fully considered the petition for permissive appeal and response, we deny the petition for permissive appeal.'').

14. The dissenting opinion describes four issues that might motivate a court of appeals to deny permission for permissive appeal, only one of which concerns whether the two requirements of section 51.014(d) are met. *Post* at 25–28 (BUSBY, J., dissenting). Had the court of appeals' opinion here relied on one of these other reasons, such as untimely filing, there would of course be no need to address the two requirements. And given section 51.014(f)'s instruction that the court of appeals may accept the appeal if the application explains ''why an appeal is *warranted*,'' the dissent is correct to note that other factors beyond the two requirements might prompt a court to deny permissive appeal. TEX. CIV. PRAC.

dissenting colleagues would require more, demanding that the court engage with the parties' arguments against those reasons. *Post* at 30 (BUSBY, J., dissenting). Rule 47.4 imposes no such requirement, and our precedent—contrary to the dissenting opinion's characterizations—does not require more, either. *See, e.g., Citizens Nat'l Bank in Waxahachie v. Scott*, 195 S.W.3d 94, 96 (Tex. 2006) (per curiam) (holding court of appeals violated rule 47.4 by "failing to give *any reason whatsoever* for its conclusion that the evidence established a finding of nonpayment" (emphasis added)).

Industrial Specialists and Blanchard raise various policy reasons why the Court should require courts of appeals to provide more than the "basic" reasons for their decision to reject a permissive appeal. We have imposed similar requirements in other circumstances. *See, e.g., In re Columbia Med. Ctr.*, 290 S.W.3d 204, 212–13 (Tex. 2009) (requiring trial courts to give reasons for disregarding a jury verdict and granting a new trial); *Gonzalez v. McAllen Med. Ctr.*, 195 S.W.3d 680, 680–81 (Tex. 2006) (per curiam) (requiring courts of appeals to explain reasons for concluding that factually sufficient evidence supports a jury verdict); *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986) (requiring courts of appeals to detail relevant evidence and "clearly state" their reasons for finding the evidence factually insufficient to support a jury verdict). Although these decisions are distinguishable because they aimed to protect the sanctity of the constitutional right to jury trial, we do not completely disregard the parties' point. And in a similar vein, the dissenting opinion supplies an abundance of policy considerations to support its view that we "should" require explanations from courts denying permissive appeals, including ensuring meaningful deliberation, facilitating appellate review, developing Texas jurisprudence, fostering predictability, and furthering the statute's purpose. *Post* at 34 (BUSBY, J., dissenting). To the extent we agree with these policy arguments, or believe that more thorough explanations are desirable, we may consider amending rule 47 to revise its requirements. But we will not supplant our proven and principled method of revising our rules by imposing such a change today by judicial fiat.

We are asked whether the court of appeals abused its discretion, and we cannot conclude that it did so by failing to comply with what the rules *ought* to say. We thus conclude that the court of appeals did not abuse its discretion by failing to more thoroughly explain its reasons for refusing to accept this permissive appeal.

C. This Court's Discretion

[6] Finally, as we explained in *Sabre Travel*, a trial court's conclusion that subsection (d)'s two requirements are satisfied and decision to permit an appeal under section 51.014(d) "permits an appeal" from the order, "and this Court's jurisdiction is then proper under [Texas Government Code] section 22.225(d) regardless of how the court of appeals exercises its discretion over the permissive appeal." *Sabre Travel*, 567 S.W.3d at 733. Thus, we may review an interlocutory appeal that a trial court has permitted even when the court of appeals has refused to hear it.[15] Both parties urge

& REM. CODE § 51.014(f) (emphasis added); *post* at 26 (BUSBY, J., dissenting). And as noted, we expressly decline to rule further than necessary by opining on whether a court of appeals that failed to consider the two requirements would abuse its discretion. Here, the court unequivocally rested its denial on the petition's failure to establish the two requirements, 634 S.W.3d at 760, so by stating they were unmet, the court gave its "basic reasons." TEX. R. APP. P. 47.4.

15. Although we exercised jurisdiction in *Sabre Travel* under the now-superseded section 22.225(d), we have interpreted section

us to exercise our jurisdiction here, arguing that "[j]udicial efficiency weighs in favor of this Court deciding those issues now, rather than remanding for the court of appeals."

[7] Like the courts of appeals, we have broad discretion in choosing whether to exercise our jurisdiction. We are reluctant, however, to intervene at the summary-judgment stage, with an incomplete record, and before the courts below have resolved the case on the merits. *See, e.g., Pidgeon v. Turner*, 538 S.W.3d 73, 81 & n.15 (Tex. 2017). The final-judgment rule may entail "inevitable inefficiencies," *Sabre Travel*, 567 S.W.3d at 732, and permissive appeals may reduce those inefficiencies, but we are not inclined to allow the permissive-appeal process to morph into an alternative process for direct appeals to this Court, particularly from orders denying summary-judgment motions. A just and deliberate judicial system remains far preferable to a merely efficient one.

III.

Conclusion

We hold that section 51.014(f) permits Texas courts of appeals to accept a permissive interlocutory appeal when the two requirements of section 51.014(d) are met, but it grants the courts discretion to reject the appeal even when the requirements are met.[16] And rule 47 requires the courts to state only their basic reasons for their decision to accept or reject the appeal. Accordingly, we conclude that the court of appeals did not abuse its discretion by refusing to accept this permissive interlocutory appeal or by failing to provide more thorough reasons for that decision. We decline to reach the merits of the underlying case, affirm the court of appeals' judgment, and remand the case to the trial court for further proceedings.

Justice Blacklock filed a concurring opinion in which Justice Bland joined.

Justice Busby filed a dissenting opinion in which Chief Justice Hecht and Justice Young joined.

Justice Lehrmann did not participate in the decision.

Justice Blacklock, joined by Justice Bland, concurring.

The plurality and dissent spend dozens of thoughtful pages analyzing the appellate courts' discretion to deny permissive appeals. One word would have been enough, and we have already said it. The discretion is "absolute." *Sabre Travel Int'l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 732 (Tex. 2019). This Court held unanimously three years ago that "Texas courts of appeals have discretion to accept or deny permissive interlocutory appeals certified under section 51.014(d), *just as federal circuit courts do*." *Id.* (emphasis added). This, we said, is because "the [Texas] Legislature modeled section 51.014(d) after

22.001(a)'s jurisdictional grant as being broader than section 22.225(d), *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 549 (Tex. 2019), ensuring that *Sabre Travel* is still both relevant and instructive here. *Sabre Travel*, 567 S.W.3d at 733–34 (holding that a trial court's certification of an interlocutory order under section 51.014(d) was sufficient to implicate our jurisdiction even where the appellate court denied permissive appeal).

16. Our concurring colleagues join in this holding, making it a holding of the Court. *See post* at 23 (BLACKLOCK, J., concurring). And even the dissenting opinion, for all of its bluster, agrees that "nothing in the statute or our rules requires a court to accept the appeal when section 51.014(d)'s requirements are met." *See post* at 27 (BUSBY, J., dissenting). Considering we unanimously said this just three years ago in *Sabre Travel*, our unanimous agreement today should be no surprise.

the federal counterpart to permissive interlocutory appeals." *Id.* at 731. *Compare* 28 U.S.C. § 1292(b), *with* TEX. CIV. PRAC. & REM. CODE § 51.014 (d), (f). In the federal system, courts of appeals may "deny review on the basis of *any* consideration." *Microsoft Corp. v. Baker*, —— U.S. ——, 137 S. Ct. 1702, 1710, 198 L.Ed.2d 132 (2017) (quotation omitted) (emphasis in original). Thus, Texas courts of appeals, like federal courts of appeals, have "absolute discretion" to accept or deny an appeal under section 51.014(f). *Sabre Travel*, 567 S.W.3d at 732.

If the Legislature wants to require courts of appeals to take more interlocutory appeals, it can certainly do so. I tend to think that earlier and quicker appellate review of dispositive legal issues would be a salutary thing. But the Legislature has not amended section 51.014(f) in response to our observation in *Sabre Travel* that Texas's permissive appeal scheme mirrors its well-known federal counterpart. Nor has this Court amended the Rules of Appellate Procedure. When we decided *Sabre Travel*, we thought that "[o]ur procedural rules make [courts of appeals' absolute discretion] clear." *Id.* The rules have not changed, so resolving the issue today ought to require nothing more than a citation to *Sabre Travel.*

Sabre Travel is not just this Court's precedent. It is correct. A court of appeals "may" accept a permissive appeal. TEX. CIV. PRAC. & REM. CODE § 51.014(f). Not "shall" or "must" or "should," but "may." The dissent is right, of course, that "may" does not always confer unfettered discretion. *Post* at 31–32. But it often does. One place it does is in the rules governing petitions for review in this Court: "The Supreme Court *may* review a court of appeals' final judgment on a petition for review." TEX. R. APP. P. 53.1 (emphasis added). Elsewhere, the rules state that "[w]hether to grant [a petition for] review is a matter of judicial discretion." TEX. R. APP. P. 56.1(a). *Sabre Travel*, section 51.014, and the procedural rules together make clear that whether to grant a petition for permissive appeal is likewise a matter of judicial discretion. *See* 567 S.W.3d at 732.

Absolute discretion to decide whether to review another judge's decision *right now*—instead of later—is a far cry from absolute discretion to, for instance, set aside a jury verdict. *See In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 213 (Tex. 2009) (requiring a trial court "to give its reasons for disregarding the jury verdict"). Indeed, unreviewable discretion *to decide which cases to hear* is well within the confines of traditional appellate judging. Contrary to the dissent's concerns, unfettered discretion over which cases to hear is not an abandonment of reasoned decision-making or an impediment to confidence in the rule of law. And if it is, then we are in trouble. Deciding which cases to hear—with absolute discretion and without explanation—is the daily business of this Court. Under section 51.014 and the Rules of Appellate Procedure, it is also, occasionally, the business of the courts of appeals.

I am not the first to note the similarity between this Court's absolute discretion to deny petitions for review and an appellate court's absolute discretion to deny petitions for permission to appeal. We described it in *Sabre Travel. See* 567 S.W.3d at 731. And the comments to Rule 28.3, which governs permissive appeals, explain succinctly that "[t]he petition procedure in Rule 28.3 is intended to be similar to the Rule 53 procedure governing petitions for review in the Supreme Court."[1] The com-

1. One difference, which we recognized in *Sabre Travel,* is that this Court may take up a

ment's guidance is well supported by the statute and the rules, and we reinforced it in *Sabre Travel.* We need say no more to explain our decision today. I would hold that a court of appeals' decision to grant or deny a petition for permissive appeal is entirely discretionary and need not be explained.[2] If that is a bad rule, the Legislature should amend the statute, or this Court should amend the appellate rules within the confines of the statute.[3]

I join the Court's holding that "section 51.014(f) permits Texas courts of appeals to accept a permissive interlocutory appeal when the two requirements of section 51.014(d) are met, but it grants the courts discretion to reject the appeal even when the requirements are met." *Ante* at 21. Otherwise, I respectfully concur in the judgment.

Justice Busby, joined by Chief Justice Hecht and Justice Young, dissenting.

For many years, this Court has demonstrated its commitment to the efficient administration of justice, transparency, and a substance-over-form approach to procedure. Regrettably, the plurality and concurrence sound a retreat on all these fronts today, allowing courts of appeals to avoid hearing permissive appeals at their pleasure and with no explanation so long as their standard-form denials recite the following pass-phrase: "the petition fails to establish each requirement." *See ante* at 19.

The plurality recognizes that this approach thwarts the statute's express goal of advancing the termination of litigation, but it concludes that the Legislature sig-

permissive appeal that the court of appeals has declined to hear, whereas when this Court denies a petition for review there is usually no further recourse. *See* 567 S.W.3d at 733.

2. Both the dissent and the plurality interpret Rule 47.1 to require courts of appeals to issue written opinions explaining the denial of permissive appeals. I disagree. Rule 47.1 requires a "written opinion" explaining the "final disposition of the appeal." Under section 51.014 and the Rules of Appellate Procedure, however, there is no "appeal" to be finally disposed of under Rule 47.1 until the court of appeals accepts a permissive appeal. A permissive appeal "is governed by the procedures in the Texas Rules of Appellate Procedure for pursuing an accelerated appeal," but this is only "[i]f the court of appeals accepts the appeal." TEX. CIV. PRAC. & REM. CODE § 51.014(f). Likewise, "[t]he date the court of appeals enters the order accepting the appeal starts the time applicable to filing the notice of appeal." *Id.* In other words, the statute indicates that only after the petition to appeal is accepted do the usual procedures governing appeals apply. The Rules indicate the same. A notice of appeal is "deemed to have been filed" when the petition for permission to appeal is granted, not when the petition is filed. TEX. R. APP. P. 28.3(k). Thus, until the court of appeals accepts the appeal, there is no appeal. There is only a "petition" for "permission to appeal." TEX. R. APP. P. 28.3(a).

Such a petition is akin to a motion, to which Rule 47.1's written-opinion requirement does not apply. An even closer analogue is this Court's disposition of petitions for review, which very rarely includes a written explanation—even though, like the courts of appeals, this Court is obligated to explain in writing its decisions on cases it has chosen to hear. *See* TEX. R. APP. P. 63. As with permissive appeals, the procedural rules describe factors this Court considers when ruling on a petition for review. *See* TEX. R. APP. P. 56.1(a). The existence of these factors—like the two factors courts of appeals should consider when deciding whether to hear permissive appeals—does not constrain this Court's discretion or require it to explain why the factors were not satisfied when it denies a petition for review. The same is true for courts of appeals deciding petitions for permission to appeal.

3. Parties and judges ought to be able to know exactly how to approach a procedural question of this nature by consulting the relevant statutes and procedural rules. They should not also have to consult, and attempt to harmonize, multiple opinions of this Court.

naled an intent to sabotage its own work by including the word "may" in the statute. That conclusion is wrong: our cases have held in many contexts that "may" alone does not confer unreviewable discretion. And our appellate rules independently require courts of appeals to explain why each requirement was not met. I respectfully dissent.

Section 51.014(d) of the Civil Practice and Remedies Code authorizes an appeal from an interlocutory order that (1) "involves a controlling question of law as to which there is a substantial ground for difference of opinion" when (2) "an immediate appeal ... may materially advance the ultimate termination of the litigation." TEX. CIV. PRAC. & REM. CODE § 51.014(d). After obtaining the trial court's written permission to appeal, the appealing party must file "an application for interlocutory appeal" in the court of appeals. *Id.* § 51.014(f). Assuming the application is timely filed, the court of appeals "may accept [the] appeal." *Id.*

A majority of the Court reads into the word "may" a grant of unfettered discretion that empowers a court of appeals to deny a permissive interlocutory appeal for any reason (according to the plurality), or even for no expressed reason at all (according to the concurrence). This decision rests on a misreading of our rules, which require a court of appeals to issue a written opinion that explains—as to "every issue ... necessary to final disposition of the appeal"—"the court's decision and the basic reasons for it." TEX. R. APP. P. 47.1, 47.4.

The Court's embrace of discretion to shield such a denial from any scrutiny is a straw man. What little the court of appeals did say in its opinion shows that the only issue it decided—whether subsection (d)'s two prerequisites were satisfied—is not an issue committed to the court of appeals' discretion, as the plurality concedes. *Ante* at 15–16 (explaining that "courts have no discretion" unless "the two requirements *are* satisfied"). And it cannot be disputed that the court of appeals failed to advise the parties of the reasons why it concluded those prerequisites were not met.

Yet even if discretion were implicated here, neither text nor precedent supports insulating that discretion from review; our cases require courts exercising discretion to follow guiding principles and refrain from acting arbitrarily or unreasonably. The only contrary example that the plurality and concurrence identify is our discretion to deny petitions for review. But the rules expressly authorize us to do so with a brief notation rather than an opinion, and as a matter of jurisdiction and court structure we have the last word on state-law procedural matters.

The opposite is true in the intermediate courts of appeals. And in the context of permissive appeals, it is particularly important that their opinions discuss and apply guiding principles for three reasons: (1) to facilitate each panel's reasonable consideration of whether the requirements selected by the Legislature have been met in a particular case; (2) to reveal whether the panel is denying permission to appeal on discretionary or non-discretionary grounds and enable further review when necessary; and (3) to develop the jurisprudence regarding non-arbitrary reasons why permissive appeals should be accepted or denied in order to supply guidance and promote comparable outcomes in future cases.

Finally, the Court casts aside the Legislature's recognized goal of providing for early, efficient appellate resolution of determinative legal issues—which the plurality candidly acknowledges courts of appeals are flouting with their "recurring rejections." *Ante* at 18–19. In 2019, we

cautioned courts of appeals to accept permissive interlocutory appeals when section 51.014(d)'s requirements are satisfied. *See Sabre Travel Int'l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 732 (Tex. 2019). But as the parties and amici note, courts of appeals continue to deny the vast majority of permissive appeals—and they do so without giving any explanation of the reasons for their actions. The plurality at least acknowledges in passing our original admonition to the courts of appeals, but there is no reason to think that finger-wagging will have any more effect this time than it did in *Sabre Travel.*

The parties and the trial court in this case were unanimous in concluding that the requirements for a permissive appeal were met and that addressing the merits would promote the efficient resolution of this dispute. Yet the court of appeals disagreed that the requirements were met without even providing them the courtesy of an explanation, and the plurality's effort to imagine what the reason might have been does not withstand scrutiny. To the contrary, the trial court's determination that subsection (d)'s requirements have been met is legally correct. Because the court of appeals' opinion does not comply with our rules, and there are also compelling reasons grounded in the statute and our precedent for requiring the court to advise the parties of its reasons for denying a permissive appeal, I would reverse.

I. By failing to disclose its basic reasons for deciding that the petition did not meet each requirement for a permissive appeal, the court of appeals violated Appellate Rule 47.

In this Court, all parties contend that the court of appeals erred by failing to hand down an opinion that explained the basic reasons for its decision on each issue necessary to its denial of permission to appeal. A careful examination of our statutes, rules, and precedents demonstrates that they are correct. The plurality's opinion skips some key steps in this inquiry, which must take into account what issues are necessary to dispose of a petition for permission to appeal, as well as what sort of explanation our rules require as to each of those issues.

Here, as the plurality recognizes, the disputed issue necessary to the court of appeals' denial of the petition was whether it established the two predicate requirements for a permissive appeal. *Ante* at 14–15. The court of appeals provided no explanation whatsoever for its decision that the petition "fails to establish each requirement." 634 S.W.3d 760 (Tex. App.—Houston [1st Dist.] 2019).

A. There are four issues a court of appeals may encounter in determining whether to accept a section 51.014(d) appeal.

The Legislature has granted our courts of appeals jurisdiction to hear appeals of certain otherwise unappealable interlocutory orders if the trial court's order permits the appeal and the appealing party timely files an application—or, as our rules call it, a petition for permission to appeal—in the court of appeals. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(d), (f); TEX. R. APP. P. 28.3; TEX. R. CIV. P. 168. There are at least four types of issues that can be presented to a court of appeals considering whether to accept an appeal permitted by the trial court.

First, the parties may dispute whether the trial court followed the requirements for an order granting permission to appeal. The order must decide "a controlling question of law." TEX. CIV. PRAC. & REM. CODE § 51.014(d); *Orion Marine Constr., Inc. v. Cepeda*, No. 01-18-00323-CV, 2018 WL 3059756, at *3 (Tex. App.—Houston [1st Dist.] June 21, 2018, no pet.) (mem. op.)

(Bland, J.) ("The courts of appeals are not statutorily authorized to decide controlling questions of law in the first instance.").[1] In addition, the trial court's permission "must be stated in the order to be appealed," and "[t]he permission must identify the controlling question of law ... and ... state why an immediate appeal may materially advance the ultimate termination of the litigation." TEX. R. CIV. P. 168. Failure to satisfy these requirements will result in rejection of the appeal.[2] And appellate courts generally decline to address issues not specified in the trial court's order. *E.g.*, *BPX Operating Co. v. Strickhausen*, 629 S.W.3d 189, 195 n.4 (Tex. 2021).

Second, there may be a question about whether the appellant timely filed a petition for permission to appeal the order. "[N]ot later than the 15th day after the date the trial court signs the order to be appealed," the appealing party must file an "application for interlocutory appeal" in the court of appeals. TEX. CIV. PRAC. & REM. CODE § 51.014(f); *see also* TEX. R. APP. P. 28.3(c) (detailing requirements for "petition" for permission to appeal), 28.3(d) (providing for extension of time to file petition). When the appealing party fails to do so, courts of appeals have concluded that they lack jurisdiction over the appeal entirely. *E.g.*, *Progressive Cnty. Mut. Ins. Co. v. McCormack*, No. 04-21-00001-CV, 2021 WL 186675, at *2 (Tex. App.—San Antonio Jan. 20, 2021, pet. denied) (per curiam) (mem. op.).

Third, there are two minimum requirements that must be met before the court of appeals may accept an appeal permitted by the trial court, and there may be a dispute about whether one or both of those prerequisites are satisfied. Section 51.014(f) provides that the court of appeals "may accept" the appeal "*if* the appealing party ... files ... an application for interlocutory appeal explaining why an appeal is warranted under [section 51.014(d)]." TEX. CIV. PRAC. & REM. CODE § 51.014(f) (emphasis added). As discussed above, the two requirements of subsection (d)—echoed in Rule of Appellate Procedure 28.3(e)(4)—are that (1) the trial court's order involves a controlling question of law as to which there is a substantial ground for difference of opinion, and (2) an immediate appeal from that order may materially advance the ultimate termination of the litigation.[3]

Because courts of appeals may accept a permissive interlocutory appeal only "if" section 51.014(d)'s requirements are met, *see id.*, I agree with the plurality that courts of appeals "have no discretion to permit or accept an appeal" when section 51.014(d)'s "requirements are not satis-

1. *See also, e.g., Garcia v. Garcia*, No. 14-19-00375-CV, 2019 WL 2426680, at *2 (Tex. App.—Houston [14th Dist.] June 11, 2019, no pet.) (per curiam) (mem. op.); *Borowski v. Ayers*, 432 S.W.3d 344, 347 (Tex. App.—Waco 2013, no pet.) (collecting cases); *Bank of N.Y. Mellon v. Guzman*, 390 S.W.3d 593, 597 (Tex. App.—Dallas 2012, no pet.).

2. *See Patel v. Nations Renovations, LLC*, No. 02-21-00031-CV, 2021 WL 832719, at *1 (Tex. App.—Fort Worth Mar. 4, 2021, no pet.) (per curiam) (mem. op.) (rejecting interlocutory appeal where trial court's order neither identified controlling question of law nor stated why immediate appeal would materially advance litigation's termination); *Cather v. Dean*, No. 05-20-00737-CV, 2020 WL 5554924, at *1 (Tex. App.—Dallas Sept. 17, 2020, no pet.) (mem. op.) (rejecting interlocutory appeal due to order's lack of "statement of permission").

3. Subsection (e)(4) tracks section 51.014(d)'s language and requires that the petition "argue clearly and concisely why the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion and how an immediate appeal from the order may materially advance the ultimate termination of the litigation." TEX. R. APP. P. 28.3(e)(4).

fied." *Ante* at 15–16. Indeed, there is no reason for us to review the court of appeals' views regarding those requirements deferentially as an exercise of discretion; we are in an equally good position to determine whether there are substantial grounds for a difference of legal opinion and whether immediate review would materially speed the resolution of the litigation. *E.g.*, TEX. R. APP. P. 56.1(a)(1)–(2) (listing factors this Court may consider in granting review, including disagreement on important legal points); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding) (considering whether mandamus review would "spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings").

Fourth, if section 51.014(d)'s requirements are met, the court of appeals can decide whether it wishes to exercise its discretion to accept the appeal. Beyond providing that the court of appeals "may accept an appeal permitted by [section 51.014(d)]," TEX. CIV. PRAC. & REM. CODE § 51.014(f), the statute offers little guidance to courts regarding which appeals to accept.

The plurality and I agree that this fourth issue is the only one involving an exercise of discretion. *Ante* at 16 ("[I]f the two requirements [of subsection (d)] *are* satisfied, the statute then grants courts . . . discretion to accept or permit the appeal."). I also agree with the plurality that nothing in the statute or our rules requires a court to accept the appeal when section 51.014(d)'s requirements are met. *See id.* In such situations, we have said, "[t]he principles that are to guide [the] court's discretionary decision are determined by the purposes of the rule at issue." *Samlowski v. Wooten*, 332 S.W.3d 404, 414 (Tex. 2011) (Guzman, J., concurring); *see id.* at 410 (plurality op.); *Womack v. Berry*, 156 Tex. 44, 291 S.W.2d 677, 683 (Tex. 1956) (orig. proceeding). Unfortunately, the courts of appeals are not exploring those principles in their opinions.

The failure to distinguish among these four issues has led to some confusion and contradiction in court of appeals decisions. There are several opinions in which courts of appeals have both dismissed a permissive interlocutory appeal for want of jurisdiction—purportedly because section 51.014(d)'s requirements are not satisfied—and denied the petition for permission to appeal, seemingly exercising discretion they believed themselves without jurisdiction to exercise.[4]

B. The court failed to give reasons for its decision on every issue necessary to the final disposition of the appeal.

Understanding the issues at play helps to inform how a court of appeals must

4. *See, e.g., JAJ Equip., Inc. v. Ramos*, No. 04-21-00459-CV, 2021 WL 6127925, at *4 (Tex. App.—San Antonio Dec. 29, 2021, no pet.) (per curiam) (mem. op.); *Corley v. Corley*, No. 04-21-00181-CV, 2021 WL 2669343, at *1 (Tex. App.—San Antonio June 30, 2021, pet. denied) (per curiam) (mem. op.); *ConocoPhillips Co. v. Camino Agave, Inc.*, No. 04-20-00282-CV, 2020 WL 4929794, at *1 (Tex. App.—San Antonio July 29, 2020, pet. denied) (per curiam) (mem. op.); *Thompson v. Landry*, No. 01-19-00203-CV, 2019 WL 1811087, at *1 (Tex. App.—Houston [1st Dist.] Apr. 25, 2019, no pet.) (per curiam) (mem. op.); *Rubicon Representation, LLC v. Johnson*, No. 05-18-00798-CV, 2018 WL 3853475, at *1 (Tex. App.—Dallas Aug. 14, 2018, no pet.) (mem. op.); *Total Highway Maint., LLC v. Sixtos*, No. 05-17-00102-CV, 2017 WL 1020663, at *1 (Tex. App.—Dallas Mar. 16, 2017, no pet.) (mem. op.). Some courts have properly dismissed a permissive appeal for lack of jurisdiction without addressing the petition. *See Hudnall v. Smith & Ramirez Restoration, L.L.C.*, No. 08-19-00217-CV, 2019 WL 4668508, at *2 (Tex. App.—El Paso Sept. 25, 2019, no pet.) (mem. op.).

address those issues under the Rules of Appellate Procedure that govern their opinions. "[C]ourt[s] of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal." TEX. R. APP. P. 47.1. The requirement that Texas appellate courts explain the reasons for their decisions stretches back more than a century,[5] and its obvious and salutary purposes include promoting respect for court decisions and confidence in the rule of law, enhancing the transparency we strive to achieve in our legal system, and upholding parties' reasonable expectations that their arguments will be fairly heard and reasonably considered. *E.g., In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 213 (Tex. 2009) (orig. proceeding). There are circumstances in which Rule 47.1 does not apply, *see* TEX. R. APP. P. 52.8(d), but those are not present here.

When "the issues are settled," our rules provide that courts of appeals "should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it." TEX. R. APP. P. 47.4. But the memorandum-opinion rule does not excuse the court from addressing every issue necessary to the final disposition, as Rule 47.1 requires. *See West v. Robinson*, 180 S.W.3d 575, 576–77 (Tex. 2005) (per curiam) (reviewing memorandum opinion and reversing because court of appeals failed to address every issue in violation of Rule 47.1). Thus, as to each issue necessary to the court's disposition denying a petition for permission to appeal, the court must "advise the parties of the court's decision" on that issue "and the basic reasons for it." TEX. R. APP. P. 47.4.

As the cases cited throughout this opinion show, courts of appeals uniformly issue memorandum opinions when they dispose of "[a]n appeal under Subsection (d)"[6] of section 51.014 by denying the petition. I join the plurality in concluding that Rule 47 applies to these opinions denying permissive appeals. But I disagree with the plurality's conclusion that the court of appeals' opinion here complies with the rule. *Ante* at 18–19. The plurality paints an incomplete picture of what Rule 47 requires, and it loses sight of the particular issue that was the basis of the court of appeals' disposition.

Though our memorandum-opinion rule demands brevity, a court of appeals cannot "fail[ ] to give any reason whatsoever for its conclusion." *Citizens Nat'l Bank in Waxahachie v. Scott*, 195 S.W.3d 94, 96 (Tex. 2006) (per curiam). "[A] memorandum opinion generally should focus on the basic reasons why the law applied to the facts leads to the court's decision." *Gonzalez v. McAllen Med. Ctr., Inc.*, 195 S.W.3d 680, 681 (Tex. 2006) (per curiam). Even when a court of appeals affirms a jury verdict in the face of a factual-sufficiency challenge, "merely stating that [the challenge] *is* overruled does not count as providing the 'basic reasons' for that decision." *Id.*

The court of appeals' three-sentence memorandum opinion in this case does not satisfy these requirements. The opinion identifies the parties and the order that the trial court granted permission to appeal, recites the two requirements "[t]o be

5. *See* Act of March 30, 1905, 29th Leg., R.S., ch. 51, § 1, 1905 Tex. Gen. Laws 71 (requiring courts of appeals "to decide all issues presented to them ... and announce in writing their conclusions so found"). This statute was repealed when the Legislature gave this Court full power to make rules of procedure. *See* Act of May 12, 1939, 46th Leg., R.S., ch. 25, § 1, 1939 Tex. Gen. Laws 201.

6. TEX. CIV. PRAC. & REM. CODE § 51.014(e).

entitled to a permissive appeal" set out in section 51.014(d) and repeated in Rule of Appellate Procedure 28.3(e)(4), and includes a single sentence stating its analysis and ruling: "Because we conclude that the petition fails to establish each requirement of Rule 28.3(3)(e)(4) [sic], we deny the petition for permissive appeal." 634 S.W.3d at 760.

The issue the court of appeals identified as necessary to its disposition was the third type of issue discussed above: whether "the petition fail[ed] to establish each requirement" of section 51.014(d) and "Rule 28.3[ ](e)(4)." *Id.* The plurality agrees. *Ante* at 19. But as to that issue, the court of appeals merely stated its conclusion that the requirements were not established; it did not offer any reason whatsoever for its decision that the petition failed to do so. *But see Gonzalez*, 195 S.W.3d at 681; *Citizens Nat'l Bank*, 195 S.W.3d at 96.

The plurality attempts to support its departure from the rule and our precedent by misstating my position, suggesting that I would require the court of appeals to engage with each of the parties' arguments underlying a particular disputed issue. *Ante* at 19–20. Not at all. I would simply require the court of appeals to do what Rule 47 plainly says it must: fairly consider and provide the basic reasons for its decision as to "*every issue* raised [by the parties] and necessary to final disposition of the appeal"[7] —in particular, the issue whether the requirements of section 51.014(d) were met here. Nowhere does the plurality explain why those requirements should not be considered a distinct issue for Rule 47 purposes on which a reasoned decision was needed. The plurality's view that the court need only identify a basis for its bottom-line "decision" or "disposition" of the entire appeal[8]—whether to deny, affirm, or reverse—is flatly contrary to our decisions in *West*, *Gonzalez*, and *Citizens National Bank*, cited above.[9]

The concurrence, for its part, concludes that Rule 47 is inapplicable because an application for interlocutory appeal is not an actual "appeal" until it is accepted. *Ante*

7. TEX. R. APP. P. 47.1 (emphasis added).

8. *Ante* at 19.

9. Specifically, the court of appeals in *West* reversed the trial court's judgment confirming an arbitration award, giving as the reason for its disposition that the arbitrator had exceeded his authority. No. 11-03-00028-CV, 2004 WL 178586, at *3 (Tex. App.—Eastland Jan. 30, 2004) (mem. op.). We held that the court's memorandum opinion "did not comply with Rule 47.1" because it did not address "modification and waiver as *distinct issues associated with the relief* the parties requested." 180 S.W.3d at 576 (emphasis added). In *Gonzalez*, the court of appeals affirmed the trial court's judgment, explaining that the decision was based on its conclusion "that appellants' factual sufficiency challenge fails because the jury's verdict was not against the great weight of the evidence." No. 13-00-296-CV, 2003 WL 21283132, at *2 (Tex. App.—Corpus Christi–Edinburg June 5, 2003) (mem. op.). We concluded this memorandum opinion "does not count as providing the 'basic reasons' " for the court's holding on the issue of "*why* the jury's verdict can or cannot be set aside." 195 S.W.3d at 681, 682 (emphasis added). And in *Citizens National Bank*, the court of appeals reversed the trial court's judgment on a note, giving as the reason for its disposition that "the evidence conclusively establishes, as a matter of law, all vital facts to support a finding of payment." No. 10-03-00322-CV, 2005 WL 762585, at *2 (Tex. App.—Waco Mar. 30, 2005) (mem. op.). We held that the court's memorandum opinion "fail[ed] to give *any reason whatsoever for its conclusion* that the evidence established a finding of nonpayment." 195 S.W.3d at 96 (emphasis added).

Here, the court of appeals identified section 51.014(d)'s requirements as the distinct issue that formed the basis of its decision to deny the petition. But it likewise failed to give any reason for its conclusion on that issue.

at 23 n.2 (Blacklock, J., concurring). That conclusion is not consistent with the text of section 51.014. For example, subsection (f) refers to "an appeal permitted by Subsection (d)"—that is, "an appeal" permitted "by written order" of "a trial court"—as "*the* appeal" that "[a]n appellate court may accept." TEX. CIV. PRAC. & REM. CODE § 51.014(d), (f) (emphasis added); *see also id.* § 51.014(e) (referring to "[a]n appeal under Subsection (d)").

Industrial Specialists provided the court of appeals ample support for its position that the requirements of subsection (d) were met here, explaining that each side's competing interpretation of the indemnity provision was supported by authority and that determining its proper interpretation would speed resolution of the case. Courts of appeals have taken different approaches to the merits issue presented by the permissive appeal, which we agreed to review.[10] Notably, Marathon did not oppose Industrial Specialists' motion for permission to appeal the denial of its motion for summary judgment. Nor did Marathon file a response to or otherwise challenge Industrial Specialists' petition for permission to appeal. *See* TEX. R. APP. P. 28.3(f).

Faced with these substantial reasons why the two requirements for a permissive appeal were met, our rules required the court of appeals to explain the basic reasons for its contrary conclusion on this issue. This requirement "is mandatory, and the courts of appeals are not at liberty to disregard it." *West*, 180 S.W.3d at 577. Because the court of appeals did so here, our rules and precedents require that we remand to give the court of appeals another opportunity to provide the explanation to which the parties are entitled. *Id.*; *see also Gonzalez*, 195 S.W.3d at 681; *Citizens Nat'l Bank*, 195 S.W.3d at 96. We should reverse and remand on this basis alone.[11]

II. Though section 51.014(f) gives courts of appeals discretion whether to accept interlocutory appeals that meet the requirements, it does not permit them to act arbitrarily.

Our rules of procedure are not the only reason for requiring courts of appeals to explain their reasons on all issues necessary to the denial of a permissive appeal. Such a requirement is also necessary to ensure that the courts are properly exercising their discretion rather than arbitrarily flouting the clear intent of the Legislature in authorizing such appeals.

Together, the plurality and concurrence form a majority for the holding that courts of appeals have unfettered discretion to grant or deny permissive appeals that meet the criteria set out in the statute and

10. *Compare Transcon. Gas Pipeline Corp. v. Texaco, Inc.*, 35 S.W.3d 658, 669 & n.7 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (determining express-negligence test's applicability by looking to whether claims for which indemnity is sought are for indemnitee's negligence), *with Helicopter Textron, Inc. v. Hous. Helicopters, Inc.*, No. 2-09-316-CV, 2010 WL 3928741, at *3 (Tex. App.—Fort Worth Oct. 7, 2010, pet. denied) (mem. op.) (determining whether express-negligence test applies by looking to whether contract at issue indemnifies indemnitee for its own negligence).

11. The plurality expresses a sense of "iron[y]" regarding why I do not advocate that we decide this appeal on the merits ourselves. *Ante* at 16–17 n.8. One reason is that it would take five votes to render such a decision, and neither the plurality nor the concurrence say that they favor doing so. Another reason is that it would be more efficient in the long run for courts of appeals to do their job and decide permissive appeals like this one in the first instance. *See G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 519 (Tex. 2015).

rules.[12] Both the plurality and concurrence place abundant emphasis on section 51.014(f)'s use of the word "may," concluding that we "cannot interpose a firm limit on the court of appeals' discretion ... when the statute itself grants the court discretion and imposes no such limit." *Ante* at 16 (plurality op.) (citing TEX. CIV. PRAC. & REM. CODE § 51.014(f)); *see also ante* at 22–23 (Blacklock, J., concurring) (characterizing the court's decision as "entirely discretionary"). This emphasis is misplaced because the court of appeals was not exercising discretion here. Rather, as explained in Part I.B., the court decided that the requirements for a permissive appeal were not satisfied. And as the plurality agrees, "courts have no discretion to permit or accept an appeal if the two requirements are not met." *Ante* at 16.

Yet even if the court of appeals were exercising discretion, our cases have held time and again that "may" alone does not confer unreviewable discretion, and they support requiring the court to explain the reasons for its exercise. "While the permissive word 'may' imports the exercise of discretion, 'the court is not vested with unlimited discretion.'" *Iliff v. Iliff*, 339 S.W.3d 74, 81 (Tex. 2011) (quoting *Womack*, 291 S.W.2d at 683); *see also, e.g., Perry Homes v. Cull*, 258 S.W.3d 580, 598 (Tex. 2008) (observing that "abuse-of-discretion review" is not "the same as no review at all"); *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 683 (Tex. 2007) (orig. proceeding) (Willett, J., concurring) ("Permissive does not mean limitless, and while appellate courts should not second-guess trial court rulings cavalierly, the word 'may' does not render such rulings bullet-proof and unreviewable.").[13]

As we have frequently explained, a court's discretionary decisions must not be "arbitrary" or "unreasonable" and must "adhere to guiding principles." *Pirelli Tire*, 247 S.W.3d at 676. Courts are "required to exercise a sound and legal discretion within limits created by the circumstances of the particular case" and "the purpose of the rule" at issue. *Womack*, 291 S.W.2d at 683; *see also Samlowski*, 332 S.W.3d at 410 (plurality op.), 414 (Guzman, J., concurring). Accordingly, we have imposed limits on courts' discretion and required them to explain their reasons even when the source of their authority is silent regarding that discretion's bounds. *E.g., Columbia Med. Ctr.*, 290 S.W.3d at 212–13 (requiring trial court that sets aside jury verdict to explain its reasoning because trial judge cannot "substitute his or her own views for that of the jury without a valid basis"); *Gonzalez*, 195 S.W.3d at 681 (observing that under Rule 47.4, appellate court cannot overrule factual sufficiency challenge to jury verdict without explain-

12. *Ante* at 15–16 (plurality op.); *id.* at 23 (Blacklock, J., concurring).

13. To the extent the plurality and concurrence rely on descriptions of federal courts' discretion to grant permissive appeals as "unfettered," *cf. Microsoft Corp. v. Baker*, —— U.S. ——, 137 S. Ct. 1702, 1709, 198 L.Ed.2d 132 (2017), the federal permissive appeal statute is different in that it contains an express reference to discretion. *See* 28 U.S.C. § 1292(b) (providing that court of appeals "may ..., in its discretion, permit an appeal"). And even with this express discretion, federal appellate courts have issued many more substantive opinions on permissive appeals than their Texas counterparts, developing a body of law that provides useful guidance to bench and bar regarding the exercise of that discretion. *See, e.g., ICTSI Or., Inc. v. Int'l Longshore & Warehouse Union*, 22 F.4th 1125, 1131–32 (9th Cir. 2022); *Nice v. L-3 Commc'ns Vertex Aerospace, LLC*, 885 F.3d 1308, 1312–13 (11th Cir. 2018); *Union County v. Piper Jaffray & Co., Inc.*, 525 F.3d 643, 646–47 (8th Cir. 2008); *Caraballo-Seda v. Municipality of Hormigueros*, 395 F.3d 7, 9 (1st Cir. 2005); *Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 675–77 (7th Cir. 2000) (Posner, C.J.).

ing why); *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986) ("[C]ourts of appeals, when reversing on insufficiency grounds, should, in their opinions, ... clearly state why the jury's finding is factually insufficient...."). It is particularly appropriate to require an explanation from an intermediate appellate court—which, after all, is in the business of explaining its decisions.

The plurality asserts that *Columbia Medical Center*, *Gonzalez*, and *Pool* are "distinguishable because they aimed to protect the sanctity of the constitutional right to jury trial." *Ante* at 20. Yet interestingly, many of the reasons the plurality gives for its decision today mirror those in the *Columbia Medical Center* dissent. *See* 290 S.W.3d at 216 (O'Neill, J., dissenting).

Moreover, the plurality is simply wrong that section 51.014 "grants courts vast—indeed, unfettered—discretion." *Ante* at 16. There are many other instances in which we have concluded that a "grant[ ] of authority couched in permissive terms" does not exempt a court from "adher[ing] to guiding principles" or authorize it to act arbitrarily or unreasonably. *Pirelli Tire*, 247 S.W.3d at 676 (plurality op.). Former section 71.051(a) of the Civil Practice and Remedies Code gave courts discretion to dismiss an action based on forum non conveniens, but we rejected the contention that this discretion was "virtually unlimited." *Id.* at 675. Although trial courts have "broad discretion" in determining whether to dismiss a case on grounds of forum non conveniens, their decision—"as with other discretionary decisions"—is still "subject to review for clear abuse of discretion." *Id.* at 676; *see id.* at 682–83 (Willett, J., concurring) (" '[M]ay' simply confirms that the district court's decision is a matter of discretion, subject to review for abuse of that discretion, or, when the case is before us on mandamus, a *clear* abuse of discretion.").

Similarly, former Rule of Civil Procedure 215a(c) provided that a trial court "may" strike an answer in certain circumstances. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241 (Tex. 1985). But we held the court's decision was reviewable for abuse of discretion—that is, for whether the trial court's act was "arbitrary or unreasonable" or taken "without reference to any guiding rules and principles." *Id.* at 241–42; *see Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 138, 126 S.Ct. 704, 163 L.Ed.2d 547 (2005) ("[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." (quoting *United States v. Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (C.C.D. Va. 1807) (Marshall, C.J.))).[14]

In addition, our procedural rules provide that a court "*may* order a separate trial" of a claim or issue. TEX. R. CIV. P. 174(b) (emphasis added). But we have held that its discretion to do so is "not unlimited." *In re Ethyl Corp.*, 975 S.W.2d 606, 610 (Tex. 1998) (orig. proceeding). Courts also have "broad discretion" to consolidate cases. *Pirelli Tire*, 247 S.W.3d at 676 (citing TEX. R. CIV. P. 174(a)). Yet they can abuse that discretion by failing to consider specific factors. *See In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 211 (Tex. 2004) (per curiam) (orig. proceeding) (granting mandamus relief from trial court's consolidation order in mass tort case). We also afford courts discretion to exclude relevant

14. *See also Alexander v. Smith*, 20 Tex.Civ. App. 304, 49 S.W. 916 (Tex. App.—San Antonio 1899, no writ) ("The judicial discretion is not an arbitrary right to do whatever an individual judge's whim, caprice, or passion may suggest, for what is not reasonable, or not in accordance with common justice, no judge has a right to do.").

evidence when its prejudicial effect outweighs its probative value, *see* TEX. R. EVID. 403, but this discretion is "not boundless." *Coastal Oil & Gas Corp. v. Garza Energy Tr.*, 268 S.W.3d 1, 25–26 (Tex. 2008).[15]

The plurality chides us for looking beyond the supposedly plain meaning of the word "may" to discern the limits of the discretion it confers, which the plurality characterizes as an attempt to "rewrite [the] statute" or "revis[e] our rules ... by judicial fiat." *Ante* at 16, 20–21. Yet it is our typical practice to consider context—not merely dictionaries—when the Legislature chooses to employ a word with a legal meaning that we have previously expounded in similar situations. *E.g.*, TEX. GOV'T CODE § 311.011(b); *Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101, 106–07 (Tex. 2021); *Phillips v. Bramlett*, 407 S.W.3d 229, 241 (Tex. 2013) ("We therefore must conclude that the Legislature selected the term 'judgment' for the purpose of conveying a meaning consistent with that which we historically afforded to it."). And that is precisely what we did in the cases just discussed, which hold that "may" alone does not confer discretion to act arbitrarily, unreasonably, or without reference to guiding principles and that an explanation may be necessary to ensure that courts are not doing so. It is unclear what is different about today's case.

The only example the plurality and concurrence give in which the word "may" confers unreviewable discretion is this Court's discretion to deny petitions for review without explanation. *See* TEX. R. APP. P. 56.1. But the word "may" *alone* does not produce that result. Rather, our rules expressly authorize us to "deny or dismiss the petition ... with one of the following notations"—"Denied." or "Dismissed w.o.j."—rather than with an explanatory opinion. TEX. R. APP. P. 56.1(b). And a matter of jurisdiction and court structure, we have the last word on state-law procedural matters, which are not subject to review by the Supreme Court of the United States. *See* 28 U.S.C. § 1257(a). On both counts, the opposite is true of our intermediate courts of appeals. *See* TEX. R. APP. P. 47 (requiring reasoned opinions); *ante* at 20–21 & n.15 (addressing our jurisdiction to review permissive appeal after court of appeals has declined to accept it).

Consistent with the authorities just discussed, requiring courts of appeals to explain their rulings on petitions for permission to appeal would ensure that the panel has not acted arbitrarily but has meaningfully and reasonably discharged its "duty to consider" the particular issues raised by the petition—a duty the plurality half-heartedly acknowledges. *Ante* at 16.[16] As discussed in Part I.A. above, many of those issues do not involve any exercise of discretion. An explanation by the court of appeals would also facilitate our review of the court's rulings on the issues in play when necessary. *See, e.g., In re RSR Corp.*, 475 S.W.3d 775, 779 (Tex. 2015) (orig. proceeding) (holding trial court abused discretion because order on attorney disqualification reflected it did not

15. *See also, e.g., McDaniel v. Yarbrough*, 898 S.W.2d 251, 253 (Tex. 1995) (holding trial court's failure to apply correct law in dismissing juror as disabled was abuse of discretion); *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding) (holding court's "clear failure ... to analyze or apply the law correctly will constitute an abuse of discretion").

16. *Cf. Ahrenholz*, 219 F.3d at 677 (Posner, C.J.) (emphasizing "the duty of the district court and of [the Seventh Circuit] as well to allow an immediate appeal to be taken when [the federal permissive appeal statute's] criteria are met").

consider relevant factors). And an explanation is particularly called for in this case, where the court of appeals "based [its decision] on other reasons not even urged by . . . and still unknown to both parties. [They] should be told why" the court concluded the requirements were not met. *Columbia Med. Ctr.*, 290 S.W.3d at 213.

Requiring courts of appeals to explain their permissive appeal rulings would also develop Texas jurisprudence regarding why such appeals should be accepted or denied, providing guidance for future courts and fostering comparable outcomes in similar cases. "Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike." *Martin*, 546 U.S. at 139, 126 S.Ct. 704 (citing Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982)).

As it currently stands, Texas precedent on accepting a permitted appeal is quite sparse. *See, e.g., Gulf Coast Asphalt Co. v. Lloyd*, 457 S.W.3d 539, 544 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (noting that "[t]here has been little development in the case law construing section 51.014 regarding just what constitutes a controlling legal issue"). Indeed, some courts issue opinions even shorter than the one issued by the court of appeals here, stating simply that "[a]fter considering" the parties' filings, "we deny the petition and dismiss the appeal for want of jurisdiction."[17]

The plurality believes that these opinions fall short of Rule 47's requirements because they "fail to state the 'basic reasons' for their decision." *Ante* at 19 n.13. But it says adding the boilerplate conclusion that "the petition fails to establish each requirement of Rule 28.3(3)(e)(4) [sic]," 634 S.W.3d at 760, is enough to comply with the rule. *Ante* at 19. I fail to see the sense in the line the plurality draws. It certainly cannot be tied to the language of Rule 47, which as explained in Part I.B. above requires the court to give its reasons as to "every issue" necessary to its decision—here, the issue whether each requirement for a permissive appeal has been met.

The plurality eventually acknowledges that it might be arbitrary and unreasonable for a court of appeals to "refuse a permissive appeal without considering whether the two requirements [of section 51.014(d)] are satisfied." *Ante* at 16. Why the plurality harbors any doubt on this point is hard to fathom. It is obvious to me, though apparently not to our concurring colleagues, that a court of appeals would abuse its discretion if it denied a permissive appeal because a flipped coin came up tails or the panel members wanted to take a vacation. But how will anyone know whether a court of appeals acted without properly considering the statute's requirements unless the court is required to say why it decided the issue as it did?

17. *Danylyk v. City of Euless*, No. 05-21-01074-CV, 2022 WL 818964, at *1 (Tex. App.—Dallas Mar. 18, 2022, no pet.) (mem. op.); *see also BioTE Med., LLC v. Carrozzella*, No. 02-21-00272-CV, 2021 WL 4205000, at *1 (Tex. App.—Fort Worth Sept. 16, 2021, no pet.) (per curiam) (mem. op.); *BPX Operating Co. v. 1776 Energy Partners, LLC*, No. 04-21-00054-CV, 2021 WL 1894830, at *1 (Tex. App.—San Antonio May 12, 2021, no pet.) (per curiam) (mem. op.); *Nationstar Mortg. LLC v. Earley*, No. 13-19-00618-CV, 2020 WL 241956, at *1 (Tex. App.—Corpus Christi–Edinburg Jan. 16, 2020, no pet.) (mem. op.); *LeBlanc v. Veazie*, No. 09-18-00470-CV, 2019 WL 150947, at *1 (Tex. App.—Beaumont Jan. 10, 2019, no pet.) (mem. op.); *Thompson*, 2018 WL 6540152, at *1 (Tex. App.—Houston [1st Dist.] Dec. 13, 2018, no pet.); *Morgan Stanley & Co. v. Fed. Deposit Ins. Corp.*, No. 14-14-00849-CV, 2014 WL 6679611, at *1 (Tex. App.—Houston [14th Dist.] Nov. 25, 2014, no pet.) (per curiam) (mem. op.).

The plurality offers no answer. Its acknowledgment that a court of appeals might act arbitrarily or unreasonably thus has no real meaning, and the true message its opinion sends to those courts is clear: say as little as possible in denying permission to appeal.

That approach undermines in fact—and tarnishes in appearance—the "just and deliberate judicial system" the plurality claims to prefer. *Ante* at 21. Absent a requirement that the court of appeals share its reasons, there will continue to be no predictability regarding which cases should be heard on permissive interlocutory appeal. Courts of appeals have developed some conflicting understandings of section 51.014(d)'s requirements. *Compare Patel v. Patel*, No. 05-16-00575-CV, 2016 WL 3946932, at *2 (Tex. App.—Dallas July 19, 2016, no pet.) (mem. op.) (concluding "substantial ground for difference of opinion" prong is not satisfied where disagreement is between parties), *with Austin Com., L.P. v. Tex. Tech Univ.*, No. 07-15-00296-CV, 2015 WL 4776521, at *2 (Tex. App.—Amarillo Aug. 11, 2015, no pet.) (per curiam) (suggesting that "substantial ground for difference of opinion" prong can be satisfied by disagreement between parties). That is unlikely to change under our decision today, which both incentivizes courts of appeals not to issue reasoned opinions and fully insulates those opinions from any scrutiny.

Indeed, even the requirement to include the now-approved boilerplate sentence seems rather pointless. According to the plurality, even if the court of appeals concludes that the requirements are perfectly met, it may freely reject the appeal without further discussion. Nor does anything change if the court of appeals is *wrong*—objectively wrong, as-a-matter-of-law wrong—in its recitation that the requirements are not met. If such an error arises, the plurality contends, this Court is powerless to take the modest step of sending the case back so that, shorn of its error, the court of appeals could reconsider.

But for all we know, the court of appeals may have desperately *wanted* to take the appeal, yet believed itself to be without discretion—or even without jurisdiction—to do so because it genuinely thought that one of the statutory requirements was unmet.[18] As I discuss below, the court of appeals' assessment of the requirements in this case was legally wrong. That conclusion would be good news to an appellate court that stayed its hand only because it believed itself to lack jurisdiction to proceed. Under our normal practice, we could correct that error and then remand so that the court of appeals could accept the appeal after all. Or even if the court did not particularly want to decide the appeal, correcting its legal error would at least allow it to provide a non-erroneous ground for denying permission. *Ante* at 15–16.

Yet the plurality's new doctrine of "discretion" would deem Rule 47 satisfied even if a court of appeals were to say the following:

> We have considered the timely application for an interlocutory appeal. We conclude that the trial court's order, which it granted permission to appeal, decided a controlling question of law. We agree that there is a substantial ground for difference of opinion about that question. We also agree that an immediate appeal may materially advance the ultimate termination of the litigation. We nonetheless dismiss the application for

18. I do not take a position here on whether a court of appeals would lack jurisdiction or simply lack discretion to accept an appeal in a case where the statutory requirements are not met. As noted above, courts of appeals have taken both approaches.

want of jurisdiction. *See* TEX. R. APP. P. 28.3(e)(4).

Under the plurality's approach, a self-contradictory opinion like this one must be upheld because it includes what the plurality requires: a statement that the court of appeals has *considered* the statutory factors. If such a gibberish opinion *could* be reversed, it would only be because there must in fact be some limit to the court of appeals' discretion, which would doom the plurality's whole theory. Of course there *is* such a limit. Just a few weeks ago we reiterated the (until today, at least) unquestioned principle that "[a] court clearly abuses its discretion when it makes an error of law." *In re Abbott*, 645 S.W.3d 276, 282, 67 Tex. Sup. Ct. J. 1071, 1074 (Tex. 2022). Only time will tell whether the plurality's error today will tear down any more of that previously venerable principle.[19]

I doubt, of course, that any court of appeals will be quite as blatant as this hypothetical opinion, although some of them have come close. My point is only that the plurality's approach deems any error of law or any act of caprice—blatant or otherwise—to *not* be an abuse of discretion. That approach transforms judicial discretion into judicial fiat.

Another reason we should require courts of appeals to explain their permissive appeal rulings is that doing so furthers "the purpose of the [statute]," which we consider in shaping the principles that should guide the courts' discretion. *Womack*, 291 S.W.2d at 683; *see also Samlowski*, 332 S.W.3d at 410 (plurality op.), 414 (Guzman, J., concurring). The permissive appeal statute is expressly designed to "materially advance the ultimate termination of . . . litigation." TEX. CIV. PRAC. & REM. CODE § 51.014(d)(2). Thus, in *Sabre Travel*, we explained that the Legislature's evident purpose in enacting section 51.014(d) and (f) was to promote "early, efficient resolution of controlling, uncertain issues of law that are important to the outcome of the litigation," 567 S.W.3d at 732, thereby "mak[ing] the civil justice system more accessible, more efficient, and less costly to all Texans while reducing the overall costs of the civil justice system to all taxpayers." *Id.* (quoting Senate Comm. on State Affs., Engrossed Bill Analysis, Tex. H.B. 274, 82d Leg., R.S. (2011)).

Yet many courts of appeals continue to deny the vast majority of permissive appeals despite our exhortations in *Sabre Travel*.[20] In doing so, these courts thwart

19. The plurality even says that "the abuse-of-discretion standard does not permit us to second-guess the court [of appeals]' judgment" on the purely legal question whether the statute's requirements have been satisfied. *Ante* at 17–18.

20. As the plurality notes, since *Sabre Travel*, the First Court of Appeals has been denying permission to appeal using a recycled order. *Ante* at 18 & n.9. And the Fifth Court of Appeals has also been issuing recurring denials using what appears to be a recycled form opinion even shorter than that used by the First Court. In some opinions, it cites to section 51.014(f). *See, e.g., Danylyk*, 2022 WL 818964, at *1; *Cae Simuflite, Inc. v. Talavera*, No. 05-21-01022-CV, 2022 WL 202987, at *1 (Tex. App.—Dallas Jan. 24, 2022, pet. filed) (mem. op.); *Novo Point, LLC v. Katz*, No. 05-21-00395-CV, 2021 WL 5027761, at *1 (Tex. App.—Dallas Oct. 29, 2021, no pet.) (mem. op.); *Scott & White Health Plan v. Lowe*, No. 05-20-00049-CV, 2020 WL 4592790, at *1 (Tex. App.—Dallas Aug. 11, 2020, no pet.) (mem. op.); *Heron v. Gen. Supply & Servs., Inc.*, No. 05-20-00491-CV, 2020 WL 2611260, at *1 (Tex. App.—Dallas May 22, 2020, no pet.) (mem. op.); *Driver Pipeline Co. v. Nino*, No. 05-19-01409-CV, 2020 WL 1042648, at *1 (Tex. App.—Dallas Mar. 3, 2020, pet. denied) (mem. op.). In others, the court uses the same basic language but cites to subsection (d). *See, e.g., Snowden v. Ravkind*, No. 05-20-00188-CV, 2020 WL 3445812, at *1 (Tex. App.—Dallas June 24, 2020, no pet.) (mem. op.). Regardless of the statutory provision cited,

the Legislature's intent in enacting the statute. *See Devillier v. Leonards*, No. 01-20-00224-CV, 2020 WL 7869217, at *3 (Tex. App.—Houston [1st Dist.] Dec. 31, 2020, no pet.) (Keyes, J., dissenting) (arguing that panel abused discretion by denying rehearing of petitions for permission to appeal); *Sealy Emergency Room, LLC v. Leschper*, No. 01-19-00923-CV, 2020 WL 536013, at *1 (Tex. App.—Houston [1st Dist.] Feb. 4, 2020, pet. denied) (per curiam) (mem. op.).

It is unclear what good the plurality thinks quoting those exhortations will do. Given the plurality's "prefer[ence]" for a "deliberate judicial system" over an "efficient one," and its dim view of the "impatience with time-tested methods of ... measured adjudication" that the parties and the trial court supposedly displayed by invoking this legislatively created appellate remedy, *ante* at 21, 17, perhaps it is not meant to do any good at all. If nothing else, perhaps today's opinion and the courts of appeals' continued course of thwarting the Legislature's intent will cause the Legislature to reconsider its 2011 decision to restore discretion to the courts of appeals to decline permissive appeals—discretion that the Legislature had previously eliminated in 2005.[21]

Finally, the Court's other justification for refusing to intervene—that the order being appealed is a denial of summary judgment—is unavailing. The Court suggests that it is inappropriate to hear a permissive appeal when the record is incomplete and the lower courts have yet to resolve the case on the merits. *Ante* at 21. But the "controlling question of law" requirement indicates that a full record is unnecessary in permissive interlocutory appeals. *See Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 677 (7th Cir. 2000) (Posner, C.J.) (observing that federal permissive appeal statute's reference to a "question of law" envisions "something the court of appeals could decide quickly and cleanly without having to study the record").

Moreover, although "[a] denial of summary judgment is a paradigmatic example of an interlocutory order that normally is not appealable," *id.* at 676, that has not dissuaded courts of appeals from hearing such interlocutory appeals when section 51.014(d)'s requirements are satisfied. *E.g., City of Houston v. Hous. Pro. Fire Fighters' Ass'n, Loc. 341*, 626 S.W.3d 1, 7–8 (Tex. App.—Houston [14th Dist.] 2021, pet. granted); *State Farm Mut. Auto. Ass'n v. Cook*, 591 S.W.3d 677, 679 (Tex. App.—San Antonio 2019, no pet.). For all these reasons, courts of appeals should be required to explain their decision on the issue whether those requirements are satisfied. I would at minimum reverse and remand for the court of appeals to do so.

III. The court of appeals was incorrect in concluding that the requirements of section 51.014(d) are not satisfied.

Clearing away the plurality's argument regarding the denial of summary judgment reveals a second, independent basis for reversing the court of appeals' decision to deny permission to appeal: not only did that court fail to explain its reasons for concluding that section 51.014(d)'s requirements have not been established, the record shows that its conclusion regarding those requirements is every bit as incor-

each opinion both denies the petition for permission to appeal and—confusingly—dismisses the appeal for want of jurisdiction.

21. *See* Act of May 30, 2005, 79th Leg., ch. 1051, § 2, 2005 Tex. Gen. Laws 3512, 3513 (amended 2011) (current version at Tex. Civ. Prac. & Rem. Code § 51.014(f)).

rect as the hypothetical order I described above. As discussed in Part I.A., whether subsection (d)'s two prerequisites are satisfied is not an issue committed to the court of appeals' discretion.

In the disputed contract provision at issue here, Industrial Specialists agreed to indemnify Blanchard "from and against all ... suits and other liabilities ... except to the extent the liability, loss, or damage is attributable to and caused by the negligence of [Blanchard]." Blanchard moved for partial summary judgment on its claim for a declaratory judgment that this provision required Industrial Specialists to indemnify it for amounts it paid to settle liabilities attributable to other parties. And Industrial Specialists moved for summary judgment on various grounds, including that the indemnity is unenforceable because it fails the express-negligence test.

The trial court initially denied both parties' motions. But in its subsequent amended order granting permission to appeal, the court "makes the following substantive ruling" in favor of Blanchard:

> The March 14, 2013 Major Service Contract between [Industrial Specialists] and Plaintiff Blanchard Refining Company LLC does not prohibit Plaintiffs Blanchard and Marathon Petroleum Company LP from seeking indemnity from [Industrial Specialists] for personal-injury settlement payments Plaintiffs made, to the extent those payments were attributable to or caused by the negligence of parties other than Plaintiffs.

The trial court went on to find that there was "substantial ground for difference of opinion" regarding "whether the parties' written agreement prohibits Plaintiffs from seeking indemnity," and that "an immediate appeal of ... this Court's ruling on this controlling question of law" may "materially advance the ultimate termination of this litigation."

The trial court's determinations on the section 51.014(d) requirements are legally correct. Regarding substantial ground for difference of opinion, courts of appeals are divided regarding the enforceability of Industrial Specialists' agreement to indemnify Blanchard. *See* p. 15 n.10, *supra.* We regarded this difference as substantial enough that we granted review to resolve it. And as to advancing termination, reversing the trial court's substantive ruling that indemnity is not prohibited would resolve the case entirely in Industrial Specialists' favor, while affirming it would "considerably shorten the time, effort, and expense of" litigating Blanchard's remaining claim for breach of the indemnity provision. *Gulf Coast Asphalt*, 457 S.W.3d at 544–45 (quoting Renee Forinash McElhaney, *Toward Permissive Appeal in Texas*, 29 ST. MARY'S L.J. 729, 747–49 (1998)).

The plurality is wrong to bless the court of appeals' contrary conclusion as, "at a minimum, plausible." *Ante* at 17. There is no plausible argument that a substantial ground for difference of opinion is lacking; even the plurality pushes no such theory. The second requirement is only that the appeal "*may* materially advance the ultimate termination of the litigation." TEX. CIV. PRAC. & REM. CODE § 51.014(d)(2) (emphasis added). The statute does not say that the appeal "will certainly" or even "probably" bring the litigation to a sooner end. There is genuine contradiction in how the plurality treats the word "may" in this statute. It rides "may" to its outermost limit when the statute says that the court of appeals "may accept" the appeal. *Id.* § 51.014(f). But the plurality all but ignores "may" when the Legislature used that word to set a generous threshold for taking permissive appeals. It is implausible to conclude that regardless of how the

court of appeals might rule on the summary judgment, the end of this litigation would not be substantially hastened. The opposite is true.

For these reasons, the court of appeals erred in concluding that "the petition fails to establish each requirement" of section 51.014(d) and Rule 28.3(e)(4). 634 S.W.3d at 760. I would reverse and remand for the court of appeals to exercise its discretion whether to accept this appeal meeting the statutory requirements.

* * *

Although section 51.014(d) appeals are "permissive" in nature, courts of appeals still must adhere to guiding principles in determining whether to accept or deny such an appeal. An error of law can never be a proper exercise of discretion, and it is a modest request that a court of appeals provide enough reasoning to ensure that its broad discretion was not abused. Despite acknowledging that courts of appeals continue to deny permissive appeals without any indication of having meaningfully considered them, the plurality and concurrence conclude the discretion given to those courts is so broad that we cannot intervene. Because the statutory text does not support this conclusion, our procedural rules require more, and these unexplained denials undermine section 51.014(d)'s utility, I respectfully dissent.

Glenn HEGAR, Comptroller of Public Accounts of the State of Texas, and Ken Paxton, Attorney General of the State of Texas, Petitioners,

v.

HEALTH CARE SERVICE CORPORATION,
Respondent

No. 21-0080

Supreme Court of Texas.

Argued February 3, 2022

OPINION DELIVERED: June 17, 2022

Background: Insurer brought action against Comptroller of State of Texas, seeking refund of premium and maintenance taxes paid over course of year for premiums collected on "stop-loss" policies issued to employers that self-funded health insurance for their employees. The 200th District Court, Travis County, Amy Clark Meachem, J., granted insurer's summary judgment motion. Comptroller appealed. The Austin Court of Appeals, Rose, C.J., 2020 WL 7294614, affirmed. Comptroller petitioned for review.

Holdings: The Supreme Court, Bland, J., held that:

(1) policies covered risks on "individuals" and "groups" within meaning of statute imposing tax on insurance policy premiums;

(2) policies "arose from the business of health insurance" within meaning of statute; and

(3) premiums collected by insurer were subject to maintenance tax.

Reversed.

Blacklock, J., filed dissenting opinion which was joined by Devine, J., Busby, JJ., and Young, JJ.

By: Smithee H.B. No. 1561

A BILL TO BE ENTITLED

AN ACT

relating to the decision of a court of appeals not to accept certain interlocutory appeals.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 51.014, Civil Practice and Remedies Code, is amended by adding Subsections (g) and (h) to read as follows:

(g) If a court of appeals does not accept an appeal under Subsection (f), the court shall state in its decision the specific reason for finding that the appeal is not warranted under Subsection (d).

(h) The supreme court may review a decision by a court of appeals not to accept an appeal under Subsection (f) under an abuse of discretion standard.

SECTION 2. The change in law made by this Act applies only to an application for interlocutory appeal filed on or after the effective date of this Act.

SECTION 3. This Act takes effect September 1, 2023.