No. _____

In the Court of Appeals for the Third Judicial District Austin, Texas

IN RE OFFICE OF THE ATTORNEY GENERAL,
Relator.

On Petition for Writ of Mandamus
to the 250th Judicial District Court, Austin

APPENDIX

VERIFICATION

THE STATE OF TEXAS §
§
COUNTY OF TRAVIS §

Before me, the undersigned notary, on this day personally appeared Judd E. Stone II, the affiant, a person whose identity is known to me. After I administered the oath to affiant, he testified as follows:

1. "My name is Judd E. Stone II. I am over 18 years of age, of sound mind, and can make this affidavit. The facts in this affidavit are within my personal knowledge and are true and correct."

2. "I am the Solicitor General of Texas. I represent the Office of the Attorney General of Texas, the relator in this original proceeding. The Mandamus Record (MR) attached hereto contains true and correct copies of pleadings, exhibits, orders, and other documents material to relator's claim for relief."

3/1/21

Judd E. Stone II

Subscribed and sworn to me this the 1st day of March 2021.

Brittany B. Hornsey

Notary Public in and for the State of Texas

My commission expires: Sept. 27, 2021

BRITTANY B. HORNSEY
Notary Public-State of Texas
Notary ID #126247293
Commission Exp. SEPT. 27, 2021
Notary without Bond

CAUSE NO. D-1-GN-20-006861

JAMES BLAKE BRICKMAN, DAVID MAXWELL, J. MARK PENLEY, and RYAN M. VASSAR Plaintiffs,	§	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS	§	
Defendant.	§	250th JUDICIAL DISTRICT

PLAINTIFFS' ORIGINAL PETITION

> "The Texas Whistleblower Act protects public employees who make good faith reports of violations of law by their employer to an appropriate law enforcement authority. An employer may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who makes a report under the Act." [1]

This correct statement of Texas law is taken directly from the Texas Attorney General's website and can be found there as of the date of this pleading. It is sadly ironic, then, that Attorney General Warren Kenneth Paxton -- the Chief Law Enforcement Officer for the State of Texas -- has flagrantly violated and apparently believes he is above the very law he promotes on his own website. Plaintiffs are dedicated, respected, public servants, officers of the court, and—until the events that are the basis of this Whistleblower Suit transpired—honorably served in the most senior levels of the Office of the Texas Attorney General ("OAG").

[1] https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/general-oag/WhistleblowerPoster.pdf

The Texas Legislature passed the Texas Whistleblower Act in 1983 to prevent the very conduct by Attorney General Ken Paxton that forms the basis of this case. The most senior members of the OAG believed in good faith that Paxton was breaking the law and abusing his office to benefit himself as well as his close friend and campaign donor, Austin businessman Nate Paul, and likely the woman with whom, according to media reports, Paxton has carried on a lengthy extramarital affair. On September 30, 2020, the Plaintiffs, along with three other Executive Deputies and the First Assistant Attorney General, reported the facts underlying Paxton's illegal conduct to law enforcement, as was their duty. Thus, they became "whistleblowers" (collectively "Whistleblowers"). On October 1, they reported the fact of their whistleblower report of the previous day to the OAG Human Resources Division and to Paxton.

Paxton responded to the report immediately and with ferocity, as though he was trying consciously to show Texans exactly what retaliation against whistleblowers looks like. Paxton falsely smeared the whistleblowers publicly in the manner calculated to harm them most, threatened them, tried to intimidate them, and engaged in all manner of retaliation ranging from serious to petty to pathetic. Then, within about a month of learning of their whistleblowing, Paxton and his OAG fired several of the Plaintiffs. Less than six weeks after they reported Paxton's wrongdoing, only one of the Whistleblowers remains employed at the OAG, and even he has been stripped of all responsibility, placed on leave, and constructively discharged. It is hard to imagine more flagrant violations of the Texas Whistleblower Act.

At the crux of this case is Texas' core and necessary government policies of transparency, honesty, and integrity—as opposed to corruption and favoritism—within the State's highest law enforcement office and instruments. Plaintiffs hope that this lawsuit following upon their direct,

good-faith complaints both to the current elected office holder at the helm of the OAG and to proper law enforcement agencies will help to restore integrity to this exceedingly important office.

Plaintiffs James Blake Brickman, David Maxwell, J. Mark Penley, and Ryan M. Vassar file this Original Petition against the Office of the Attorney General of the State of Texas. Plaintiffs respectfully show the Court the following:

I. Parties

1. Until they were fired and otherwise retaliated against by the Office of the Attorney General at the instruction of Ken Paxton shortly after reporting to law enforcement their concerns about Paxton's criminal conduct, the four Plaintiffs were among Paxton's most senior staff, each of them hand-picked by Paxton himself, and each of whom directly interacted with Paxton on a frequent basis.

2. Plaintiff James Blake Brickman ("Brickman") was the Deputy Attorney General for Policy & Strategy Initiatives from February 2020 until he was wrongfully terminated October 20, 2020. Brickman is a lawyer and veteran public servant. Prior to being recruited to the OAG by Paxton, Brickman served as the Chief of Staff for the Governor of Kentucky, a Republican, for four years. Earlier in his career, he also served as Chief of Staff to a United States Senator, a Republican, in Washington, D.C., attorney in private practice, and as a federal law clerk to the Honorable Amul R. Thapar (now a sitting judge on the Court of Appeals for the Sixth Circuit). Before Brickman made a good faith report to an appropriate law enforcement authority of criminal wrongdoing by Paxton, Paxton regularly and publicly lauded Brickman's work. Just by way of example, in May, Paxton publicly praised Mr. Brickman's work in the monthly meeting of senior OAG staff. Paxton presented Brickman with a book on which Paxton inscribed a note saying he was "so grateful [Brickman] joined our team." Paxton praised Brickman as an "amazing addition"

to the AG's office. Brickman relocated to Austin, with his wife and three young children, to take his job at OAG at Paxton's request and is a resident of Travis County, Texas.

3. Plaintiff David Maxwell ("Maxwell") is and has been a law enforcement professional. Until he was wrongfully terminated on November 2, 2020, Maxwell served as the Deputy Director, and then the Director, of Law Enforcement Division for the OAG for approximately 10 years, collectively, where he oversaw 350 employees. Maxwell's storied 48-year career in law enforcement in the State of Texas includes over 35 years with the Texas Department of Public Safety – 24 years as a Texas Ranger. Maxwell has been involved in investigating some of the most serious criminal matters and conduct in this State for decades and has a well-earned reputation as an honest, thorough, and tough law enforcement investigator. Maxwell is a resident of Burnet County, Texas.

4. Plaintiff J. Mark Penley ("Penley") was the Deputy Attorney General for Criminal Justice at the OAG from October 8, 2019 until November 2, 2020, when he was wrongfully terminated. He supervised the Criminal Prosecutions, Special Prosecutions, Criminal Appeals, and Crime Victims Services Divisions which were comprised of approximately 220 employees. Penley has 36 years of legal experience and is a retired federal prosecutor. Penley is a resident of Dallas County, Texas.

5. Plaintiff Ryan M. Vassar ("Vassar") is the Deputy Attorney General for Legal Counsel at the OAG. In that role, until he was retaliated against and constructively discharged, Vassar served as the chief legal officer for the OAG. He represented the OAG before other state and federal governmental bodies and oversaw 60 attorneys and 30 professional staff across 5 different divisions, which are responsible for rendering approximately 50,000 legal decisions each year. Vassar served in different roles at the OAG for over 5 years. Before joining the OAG, Vassar

served as a law clerk for three years at the Supreme Court of Texas. Vassar is a resident of Travis County, Texas.

6. Defendant Office of the Attorney General of the State of Texas ("OAG") is an agency of the State of Texas and may be served with process by serving the Attorney General, Ken Paxton at the Price Daniel Sr. State Building, 209 West 14th Street, Austin, Texas 78701.

II. Jurisdiction, Venue, Rule 47 Disclosure, and Discovery Control Plan

7. This Court has jurisdiction because the amount in controversy exceeds the minimum jurisdictional limit of this Court. In addition, the Texas Whistleblower Act waives any immunity that might otherwise deprive this Court of jurisdiction. TEX. GOV'T CODE §554.0035 ("A public employee who alleges a violation of this chapter may sue the employing state or local governmental entity for the relief provided by this chapter. Sovereign immunity is waived and abolished to the extent of liability for the relief allowed under this chapter for a violation of this chapter."). Furthermore, each of the Plaintiffs exhausted any administrative remedies having participated in formal complaint procedures within the OAG with such procedures concluding without resolution.

8. Venue is proper in Travis County because the Texas Whistleblower Act provides that a public employee of a state governmental entity may sue in a district court of the county in which the cause of action arises or in a district court of Travis County. TEX. GOV'T CODE §554.007(a). This cause of action arises in Travis County, Texas as all Plaintiffs were employed in Travis County, and worked at OAG offices near the Capitol Building in Austin, Texas in Travis County, were fired or constructively terminated in Travis County, and were subject to acts of retaliation in Travis County. Venue is also proper under §15.002 TEX. CIV. PRAC. & REM. CODE

because all or a substantial part of the events or omissions giving rise to this claim occurred in Travis County, Texas.

9. Pursuant to TEX. R. CIV. P. 47(c)(4), Plaintiffs seek monetary relief of over $1,000,000.

10. Plaintiffs intend for discovery to be conducted in accordance with a discovery control plan under TEX. R. CIV. P. 190.4 (Level 3).

III. Facts

Ken Paxton's Donor and Friend, Nate Paul

11. On August 14, 2019, FBI agents executed a search warrant at the home of Austin real-estate investor Nate Paul. That same day, agents executed search warrants at two separate office locations of Nate Paul's real estate business, World Class Holdings. A long-serving and highly respected United States Magistrate Judge issued those warrants on August 12. A fourth search warrant was executed a few days later at a records storage unit rented by Paul's company.

12. Paul has had many well-documented troubles in 2019 and 2020 in addition to the execution of search warrants at his home and offices by federal law enforcement. Paul is an Austin businessman who invests in real estate through his company, World Class Holdings and through single-purpose limited liability companies controlled by Paul and/or World Class Holdings. In 2019 and 2020, according to media reports, at least 16 Paul-controlled entities have filed for bankruptcy protection, and lenders have initiated foreclosure proceedings on over $250 million in delinquent debt held by over two dozen of Paul's companies.

13. Also in 2020, Paul created a company for the purpose of suing a local charity, the charity's lawyer, and a court-appointed receiver. The district judge presiding over the case dismissed the case shortly after the suit was filed, ruled that the suit was groundless and filed in

bad faith for the purpose of harassment, and sanctioned Paul's company and his lawyer over $225,000 for the frivolous and malicious use of the justice system.

14. Mr. Paul also spent time in 2020 making requests—both formally and informally—that the Travis County District Attorney and the Office of the Attorney General of the State of Texas launch criminal investigations of Mr. Paul's perceived adversaries. By way of example, Mr. Paul made formal written requests for criminal investigations of:

a. The federal magistrate judge who issued the search warrants authorizing the search of Paul's offices and homes;

b. The FBI agents and state law enforcement agents who carried out the searches;

c. The Assistant United States Attorney who had obtained the search warrants from the federal magistrate judge;

d. A federal bankruptcy judge;

e. A local charity that was a co-investor with Paul-controlled entities in two properties;

f. The local charity's lawyer;

g. A credit union that held a lien on one of Paul's entities' properties; and

h. The receiver appointed by the Travis County Court to take control of certain properties pending resolution of the lawsuit between the charity and Paul-controlled entities.

15. Despite a very busy 2019 and 2020, Mr. Paul, age 33, also found time to enjoy his personal friendship with the Attorney General of the State of Texas, Ken Paxton, age 57.

16. Just by way of example, in 2020, Paxton and Paul met regularly in Austin, Texas, in meetings usually without Paxton's staff or security detail present, and in meetings that were not included on Paxton's official schedule.

17. Nate Paul is also a major donor to Paxton's campaign. On or about October 29, 2018, Paul made a $25,000 contribution to Paxton's political campaign committee.

18. According to an Associated Press article dated November 5, 2020, Paxton "had an extramarital affair with a woman whom he later recommended for a job" with Paul, and whom Paul in fact employed. According to the same news article, the woman previously worked for a Republican Texas State Senator.

Paxton Abused the Office of the Texas Attorney General to Benefit Paul

19. During the Spring and Summer of 2020, Paxton began taking more interest in legal matters involving Nate Paul and applying more pressure on the Plaintiffs and the other Whistleblowers to use the personnel, legal authority and other resources of the OAG to advance the legal and personal interests of Nate Paul and his business activities. Paxton showed a pattern of not listening to the Whistleblowers, including Plaintiffs, when they raised valid objections to his instructions regarding Nate Paul's legal matters that were brought before the OAG. Plaintiffs, along with the other Whistleblowers, became increasingly concerned over time as the Attorney General became less rational in his decision-making and more unwilling to listen to reasonable objections to his instructions, and placed increasing, unusual priority on matters involving Paul.

20. The Whistleblowers, including Plaintiffs, ultimately formed a good faith belief that Paxton had violated Texas criminal law, including but not limited to the laws regarding bribery, improper influence, and abuse of office as follows:

a. Texas Penal Code section 36.02 defines bribery as a second degree felony. The offense of bribery occurs if a person "intentionally or knowingly . . . solicits, accepts or agrees to accept from another: (1) any benefit as consideration for the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant . . .; and (3) any benefit as consideration for a violation of a duty imposed by law on a public servant or party official;

b. Texas Penal Code, section 36.03, Coercion of Public Servant or Voter, states that an offense occurs if a person, by means of coercion, "(1) influences or attempts to influence a public servant in a specific exercise of his official power or a specific performance of his official duty or influences or attempts to influence a public servant to violate the public servant's known legal duty." An offense under TPC 36.03 is a Class A misdemeanor; and

c. Texas Penal Code, section 39.02(a)(2) Abuse of Official Capacity, states that a public servant commits an offense, "with intent to obtain a benefit . . ., he intentionally or knowingly: misuses government property, services, personnel, or any other thing of value belonging to the government . . . ." If the value of the thing misused is $2,500 or more but less than $30,000, the offense is classified as a state jail felony.

21. Paxton's abuse of the OAG to benefit Paul began in or around November 2019. But as 2020 progressed, Paxton's efforts on Paul's behalf became increasingly reckless, bold, and apparent to Plaintiffs.

Paxton Intervened in Nate Paul's Open Record Requests

22. A state agency that receives a request for records under the Texas Public Information Act and wishes to withhold documents responsive to that request based on statutory exceptions must request a ruling from the OAG as to whether the asserted exceptions are applicable. The OAG issues approximately 30,000 to 40,000 open records decisions each year, but Plaintiffs are only aware of Paxton taking a personal interest in decisions that related to Paul.

23. In the Fall of 2019, lawyers for Paul issued an open records request to the Texas State Securities Board for records related to the search of Paul's properties in August 2019 and the

Board requested an open records decision from the OAG. On or about November 25, 2019, and despite Paxton's pressure on Whistleblower Ryan Bangert to release the records, OAG issued a ruling that all records related to this request were **not** subject to disclosure due to a pending investigation against Paul.

24. On or about March 13, 2020, lawyers for Paul issued an open records request to the Texas Department of Public Safety ("DPS") for records related to the search of Paul's properties in August 2019. Because the search of Paul's properties in August 2019 was conducted by the Federal Bureau of Investigation, the FBI filed a brief with the OAG concerning this request, and also sent a redacted version of the brief to Paul's lawyers.

25. Paxton contacted Ryan Vassar, Deputy Attorney General for Legal Counsel, several times related to this request. In meetings between Paxton and Vassar, Paxton revealed that he had spoken personally with Paul about the activities that occurred on the day the search warrants of Paul's properties were executed. Paxton stated that he did not want to use the OAG to help the FBI or DPS in any way.

26. Longstanding OAG precedent and sound principles indicated that disclosure of the documents should be prevented, but Paxton directed Vassar to find a way to release the information. Vassar struggled with this directive because allowing disclosure of the information requested by Paul would overturn decades of settled expectations among sister law enforcement agencies, compromise the OAG's own law enforcement information, and likely spark innumerable lawsuits challenging the newly announced application of the law.

27. Paxton then personally took the file, including all the responsive documents, which included documents sealed by a federal court, and did not return it for approximately seven to ten

days. Paxton also directed that the final opinion, issued on June 2, 2020, take no position on whether the documents should be released.

28. On or about May 20, 2020, lawyers for Paul issued an open records request to the OAG for the un-redacted FBI brief referenced above. Paxton asked Vassar for a copy of the un-redacted FBI brief, and directed Vassar to find a way to release the un-redacted FBI brief in a July 24, 2020 opinion, which ultimately concluded that the FBI brief must be released.

Paxton Intervened in Civil Litigation Involving Nate Paul

29. The OAG has approximately 35,000 open civil litigation cases each year, but Paxton has only taken a personal interest in one case. That case involves Paul.

30. The Roy F. and Joann Cole Mitte Foundation ("Mitte Foundation") is a non-profit corporation and charitable foundation located in Austin, Texas. The Mitte Foundation invested in and was a limited partner of several entities associated with World Class Holdings, Nate Paul's company. In 2018, the Mitte Foundation filed suit against several of those entities controlled by Paul's World Class Holdings claiming, among other things, that the Mitte Foundation was being denied access to the books and records of the companies. That litigation grew and ultimately resulted in the court appointment of a receiver over the World Class entities.

31. The Financial Litigation and Charitable Trust Division of the OAG has the power to intervene in any litigation involving charities if doing so will protect the assets of the charity.[2] Around January 2020, lawyers in the Charitable Trust division of the OAG filed a notice with the court declining to intervene in the case. Paxton was not involved in this decision. However, Paxton began to take a deep personal interest in this case in May and June of 2020 and had several discussions with OAG staff about intervening in the case. OAG staff advised Paxton that OAG

[2] *See* Tex. Prop. Code § 123.001, *et seq*

had no interest in intervening in the case, as the Mitte Foundation was the plaintiff in the case and instituted the suit to protect the charity's interest, making OAG's intervention unnecessary.

32. Against the advice of OAG staff, including some of the Whistleblowers, and contrary to OAG's prior decision not to intervene, Paxton directed the Charitable Trusts Division to intervene in the lawsuit on or about June 8, 2020 in order to exert pressure on the parties to settle.

33. On or about July 6, 2020, Paxton asked Brickman to review the pleadings in the case. On or about July 6, 2020, Brickman informed Paxton that OAG had no interest in the case and should not waste resources of the OAG intervening in a dispute in which the charity – which the OAG should have wanted to protect – was the plaintiff and represented by capable counsel in a legitimate dispute. Additionally, Brickman informed Paxton that the parties reached a settlement agreement in August 2019, which Paul subsequently breached.

34. On or about July 22, 2020, then-First Assistant Jeff Mateer and Brickman talked Paxton out of personally attending and appearing before the Travis County District Court in this matter, which would have been an unprecedented event as Paxton has not appeared in any court on behalf of the OAG in years.

35. Plaintiffs saw that Paxton was seeking to exert influence in the case not to assist the charity, but to pressure the charity to reach a settlement favorable to the World Class entities.

36. On or about October 1, 2020, then-Deputy Attorney General for Civil Litigation and Whistleblower Darren McCarty directed the Financial Litigation and Charitable Trusts Division to withdraw from the case.

Paxton Directed a Legal Opinion to Benefit Nate Paul

37. On or about July 31, 2020, Paxton contacted Whistleblower Bangert and asked him to look into whether restrictions on in-person gatherings due to COVID prevented the foreclosure sales of properties. Bangert consulted Vassar. After hearing their researched views on this subject, Paxton made clear that he wanted OAG to express a specific conclusion: that foreclosure sales should not be permitted to continue. On August 2, 2020 at approximately 2:00 a.m., OAG issued an informal legal opinion concluding that foreclosure sales should not be permitted to continue in light of the then-existing restrictions on in-person gatherings to prevent the spread of COVID-19. Unbeknownst to Plaintiffs at the time, this opinion favored persons such as Paul who hoped to stave off foreclosure sales. According to media reporting, on the very next day, Monday, August 3, 2020, lawyers for Paul showed Paul's creditors a copy of Paxton's opinion to prevent the foreclosure sales of Paul's properties that were scheduled for August 4, 2020.

Paxton Plotted OAG Investigations into Nate Paul's Adversaries

38. The OAG has approximately 400 open criminal cases and 2,000 open criminal investigations each year. Paxton rarely showed an interest in any pending criminal investigations, but he showed an extraordinary interest in the investigation sought by Paul.

39. In May of 2020, Paxton contacted the Travis County District Attorney and requested a meeting to help Nate Paul present a criminal complaint. A meeting was held with the DA's staff. Paxton attended the meeting along with Paul and his attorney. Paul also submitted a written complaint accusing federal law enforcement, a federal magistrate judge, Texas state law enforcement, and a prosecutor with the U.S. Attorney's office of violating his rights.

40. By letter dated June 10, 2020, The Travis County DA's Office referred Paul's criminal complaint to the OAG. Paxton assigned the matter to Plaintiffs Maxwell and Penley for investigation.

41. Maxwell scheduled an initial meeting with Paul and his attorney, Michael Wynne, at which they stated their contentions that the federal search warrants executed in August 2019 had been altered by a federal prosecutor after they were signed by the federal magistrate judge.

42. Penley and Maxwell held a second meeting, at which Paul and Wynne gave a further explanation of their complaints and produced a thumb drive containing documents which they contended would support their claims. Wynne conveyed that he had presented his concerns about the alleged alterations of the search warrants, which were under seal at the federal District Clerk's office, to the magistrate judge at a hearing in February 2020, and that the judge had released some documents to him. Maxwell and Penley advised that many of Paul's complaints were outside state jurisdiction, as Paul and Wynne were relating alleged violations of the Federal Rules of Criminal Procedure, and that their complaint that some or all of the search warrants had allegedly been altered by a federal prosecutor after they were signed by the federal magistrate judge could be best investigated by the U.S. Department of Justice Inspector General's Office ("DOJ IG").

43. The next day, Maxwell and Penley consulted with forensic experts in the OAG Criminal Investigation Division ("CID") and determined that no credible evidence existed to support any state law charges.

44. In or around this time, Paul leaked the fact that the OAG was investigating his complaint against federal officials to the media.

45. Soon thereafter, Paxton, Paxton's assistant, Penley, Maxwell, Paul, Wynne, and two CID forensic experts attended a third meeting regarding Paul's complaints. When Penley announced his recommendation that the investigation be closed, Paul, Paul's attorney and Paxton pushed back. As a result of Paxton's surprising response, Penley thereafter requested additional documents from Paul's counsel, but the attorney never provided those documents despite repeated requests. After the third meeting, it was obvious that Paxton was dissatisfied with Maxwell's and Penley's opinions and recommendation.

46. On August 18, 2020, Paxton contacted Vassar, asking him to explain how the OAG could retain outside legal counsel. Vassar obliged, explaining that the OAG's approval process requires authorization from no less than 10 different OAG personnel. Various stages throughout the OAG's review process provide that: a contract must be drafted; it must be approved; conflicts must be cleared; and funding must be obligated. Vassar also explained that retaining outside counsel is usually limited to matters in which the OAG does not have the necessary experience (*e.g.*, patent law), license requirements (*e.g.*, patent law or pro hac vice admission), or where an actual or apparent conflict of interest may arise in the matter.

47. On or about August 26, 2020, Paxton contacted Vassar again and asked if retaining outside counsel to investigate criminal allegations was permissible. Vassar explained that Texas law contemplates two unique scenarios involving the appointment of a special or outside prosecutor. The first scenario involves a situation where a prosecutor may recuse herself to allow the trial court to appoint an attorney pro tem as a prosecuting attorney. Tex. Code Crim. Pro. art. 2.07(a); *see also* Tex. Att'y Gen. Op. KP-0273 (2019). Paxton stated that a court-appointed attorney pro tem was not acceptable. The second scenario involves a situation where a prosecuting attorney may "request the assistance of the attorney general, and the attorney general may offer to

the prosecuting attorney the assistance of his office." Tex. Gov't Code §§ 41.102(b); 402.028(a). Vassar cautioned, however, that he would need to defer to Penley on whether engaging outside counsel in this situation would be appropriate, based on the allegations that had been made. Paxton then asked Vassar to contact two potential candidates who may be willing to serve as outside legal counsel.

48. On or about August 26, 2020, Vassar began contacting the two potential candidates who Paxton said might be willing to serve as outside counsel. During these contacts, Vassar explained the outside counsel process and asked both potential candidates to provide him with their proposed hourly rates and an estimate of the cost for conducting an investigation. One of the candidates was Brandon R. Cammack, a Houston criminal defense attorney who had been licensed only 5 years and never served as a prosecutor. The other candidate was a veteran former state and federal prosecutor with decades of experience.

49. On or about September 3, 2020, Paxton announced his decision to retain Cammack as outside counsel. Paxton instructed Vassar to draft an outside counsel contract and send it to Cammack that same day. Paxton stated that this needed to be done immediately because the Travis County District Attorney-elect would not be cooperative with this investigation and may rescind the referral to the OAG. Vassar followed Paxton's order, obtained a copy of the criminal referral, for the first time, and prepared a draft contract for Cammack to review. At Paxton's direction, Vassar also sent a copy of the draft agreement to Paxton that same day.

50. On or about September 4, 2020, Cammack notified Vassar that the contract terms were acceptable. Vassar then forwarded the draft agreement to the General Counsel Division to begin the OAG's internal review and approval process.

51. On or about September 23, 2020, Cammack contacted Vassar and asked him if Cammack could obtain an email address from the OAG or some other official documentation to identify himself as an attorney working for the OAG, because a certain prosecutor's office was asking for verification of Cammack's relationship with the OAG. Vassar explained to Cammack that his contract had not been approved yet, but that he would discuss potential ways to document Cammack's involvement in an investigation with relevant OAG personnel. Later that same day, Paxton called Vassar, asking if Cammack could obtain an OAG email address and asking why Cammack's contract had not been approved yet. Vassar explained that the process can take time due to the multiple approvals required. Paxton asked who was currently reviewing the agreement and exclaimed that he was "tired of his people not doing what he had asked." Upon checking the OAG's contract-approval application, Vassar identified that Penley was currently reviewing the agreement. Paxton then ended the call.

52. On or about September 24, 2020, Penley refused to sign a memo to approve the hiring of Cammack to take over the investigation of Paul's complaint. Penley believed that the claim alleging alterations to search warrants was unsupported by credible evidence.

53. Plaintiffs later learned that, on or about September 3, 2020, Paxton had asked Cammack, to begin work as an outside counsel despite not having a contract approved to retain him.

54. Matters came to a head during the week of September 28, when Cammack obtained 39 grand jury subpoenas from the Travis County Grand Jury. All of the subpoenas were outside the appropriate scope of the June 10 referral from the Travis County District Attorney's office concerning Paul's complaints against federal law enforcement and judicial officials. Some of the subpoenas caused the Whistleblowers, including Plaintiffs, to believe Cammack, Paul and Paxton

were using them to obtain documents related to Paul's civil cases. The Whistleblowers learned that one of the subpoenas was served on an entity that was involved with one of Paul's properties and Cammack was accompanied by Paul's attorney, Michael Wynne, when that subpoena was served. On September 30, the Whistleblowers learned of a second grand jury subpoena served on an entity that had business dealings with Paul. Other subpoenas were designed to harass law enforcement agents and federal prosecutors. The subpoenas shocked the Whistleblowers because they were highly improper and far outside the bounds of any reasonable investigation. Paxton and Paul were using their so-called "special prosecutor" to bring the weight of the OAG to bear on Paul's enemies.

Plaintiffs Make a Good Faith Reports about Paxton's Abuse of Power to Law Enforcement

55. On September 30 and October 1, the Whistleblowers, including Plaintiffs, having concluded that Paxton appeared to be using the resources and authority of the OAG to benefit the personal and financial interests of his friend and campaign donor, Nate Paul, made good faith reports of criminal activity by Paxton to appropriate law enforcement authorities. On October 1, seven of the Whistleblowers signed and sent to the OAG's Director of Human Resources a letter notifying OAG that they had reported to an appropriate law enforcement authority a good faith belief of suspected violations of law committed by Paxton and OAG. Plaintiff Maxwell did not sign the October 1 letter because he was out of state on vacation at the time the letter was drafted, but he was in complete agreement with the letter. He sent a separate written notice to Human Resources regarding his whistleblower complaint to an appropriate law enforcement authority. Plaintiff Maxwell would have signed the letter had he been present to do so. The October 1 letter states:

This letter is intended to serve as notice to the Office of the Attorney General that on September 30, 2020, we, the undersigned individuals, reported to an appropriate law enforcement authority a potential violation of law committed by Warren K. Paxton, Jr., in his official capacity as the current Attorney General of Texas. We have a good faith belief that the Attorney General is violating federal and/or state law, including prohibitions relating to improper influence, abuse of office, bribery, and other potential criminal offenses. Each signatory below has knowledge of facts relevant to these potential offenses and has provided statements concerning those facts to the appropriate law enforcement authority. Additionally, today, October 1, 2020, the undersigned notified the Attorney General via text message that they have reported the violations to the appropriate law enforcement authority. A copy of the text message is attached hereto.

Paxton and OAG Take Immediate Adverse Employment Actions

56. Paxton swiftly began retaliating against the Whistleblowers both individually and as a group. Paxton's acts were deliberately calculated to try to impugn these public servants, denigrate their legitimate, good-faith complaints about Paxton's corruption, attempt to silence or divide them, and deter others from making such complaints about Paxton's unlawful conduct.

Friday, October 2 -- Paxton Suspends and Later Terminates Penley and Maxwell

57. On October 2, one day after the letter to OAG Human Resources, Plaintiffs Penley and Maxwell were placed on "investigative leave" at the direction of Paxton. Their email accounts and building access badges were disabled. Paxton and the OAG refused to tell Penley or Maxwell what was being investigated or even whether they were accused of wrongdoing of any kind. For the next 2 weeks, the OAG made no attempts to interview Penley or Maxell as part of any alleged investigation. On October 15, newly appointed First Assistant Brent Webster[3] extended Penley's and Maxwell's respective investigative leaves to Monday, November 2, again without giving any explanation for placing them on that status or disclosing the reason for the investigation or the scope of it. Penley made several requests, by phone call and email, seeking that information, but never received a response from Paxton, Webster or anyone else at the OAG.

[3] Whistleblower Jeff Mateer, the previous First Assistant Attorney General, resigned on October 2, 2020.

Saturday, October 3 – Paxton and OAG Smear the Whistleblowers

58. On Saturday, October 3, the OAG Communications Department issued the following statement:

> The complaint filed against Attorney General Paxton was done to impede an ongoing investigation into criminal wrongdoing by public officials including employees of this office. Making false claims is a very serious matter and we plan to investigate this to the fullest extent of the law.

59. This statement was blatantly false in numerous respects and clearly intended to intimidate and retaliate against the Whistleblowers. First, the reports to law enforcement were not made "to impede an ongoing criminal investigation." Rather, the Whistleblowers' reports to law enforcement were made based on their good faith belief that Attorney General Paxton was abusing the Office of Attorney General to benefit a campaign donor and private individual.

60. Further, there was no OAG investigation into "employees of this office" as Paxton claimed in his press release. Paxton was trying to mislead the public into believing that the Whistleblowers themselves were under investigation for criminal misconduct when they went to law enforcement with their concerns about Paxton. This false statement was clearly intended to punish the Whistleblowers by smearing and discrediting them.

61. Paxton also asserted in the October 3 statement that the Whistleblowers made "false claims" to law enforcement. This too was a lie. The Whistleblowers provided only accurate information to law enforcement. Moreover, Paxton did not even know on October 3 what information the Whistleblowers had provided to law enforcement. Paxton was certainly aware of his own corrupt conduct and worried about it being exposed, but he did not know what specifically the Whistleblowers had reported and therefore had no basis upon which to accuse seven of his most senior staff of making false claims to law enforcement. Nor did he seek any transparency,

the appointment of any truly neutral or objective special investigator, contact any proper law enforcement agency, or act in any way as a proper steward of the OAG would act.

62. Paxton punctuated his October 3 statement by threatening the Whistleblowers. The final sentence of his official statement read, "Making false claims is a serious matter and ***we plan to investigate this to the fullest extent of the law***." (Emphasis added).

63. It is hard to imagine a more egregious act of retaliation against a whistleblower than what Paxton began on Saturday morning, October 3. The life's work of each of the Whistleblowers was the law or law enforcement or both. Their credibility and integrity are their essential stock-in-trade. Paxton's statement was a pack of lies intended to hit the Whistleblowers where he thought it would hurt them most: false claims that the Whistleblowers made untrue accusations to law enforcement and had impeded a lawful investigation and a threat of investigation and legal consequences. The potential and certainly-intended effect would be to chill further revelations about Paxton's wrongdoing and try to smear the good name, character, and reputation of these public servants. Paxton's actions were straight out of the playbook he had been running against the enemies of his friend and donor Nate Paul. Now, on a Saturday morning less than 48 hours after learning of the Whistleblowers' reports to law enforcement, Paxton was running the same play against his own senior deputies, the Plaintiffs here.

October 5 and 7 -- More Retaliation

64. Over the weekend of October 3-4, media continued reporting about the relationship and connections between Paxton and Nate Paul and Paxton's personal involvement in the use of his office to investigate and attack Paul's enemies. In response to this more detailed reporting, Paxton again treated the official, taxpayer-funded Communications Department of the OAG as an

instrument of retaliation. The OAG Communications Division released this official statement on Monday, October 5 at Paxton's direction (incorrect capitalization in original):

> The Texas attorney general's office was referred a case from Travis county regarding allegations of crimes relating to the FBI, other government agencies and individuals. My obligation as attorney general is to conduct an investigation upon such referral. Because employees from my office impeded the investigation and because I knew Nate Paul I ultimately decided to hire an outside independent prosecutor to make his own independent determination. Despite the effort by rogue employees and their false allegations I will continue to seek justice in Texas and will not be resigning.

65. The first two sentences of Paxton's October 5 statement were intended to mislead the public into believing that, in conducting the investigations of Nate Paul's enemies, OAG was merely carrying out a legal obligation to investigate a matter referred from the Travis County District Attorney. Of course, this lie by Paxton was calculated to counter the emerging truth that Paxton was personally orchestrating the use of the OAG to attack Paul's enemies.

66. Two days later, the OAG Communications Division released another official statement at Paxton's direction, reiterating some of the prior statement's untruths and falsely implying that the Cammack contract had been approved through proper OAG procedures:

> Employee, Ryan Vassar, drafted the contract for outside counsel and communicated directly with Independent Counsel Brandon Cammock to assist in the execution of the contract. The Attorney General signed the contract.
>
> Mr. Vassar included the job description in this contract that legally authorized Independent Counsel Brandan Cammock to act. Mr. Vassar also provided this contract directly to Attorney General Paxton for his signature.

67. This official communication omits the key facts that what Vassar circulated to both Cammack and Paxton was clearly labeled a "draft" contract, prepared at Paxton's direct command; that (as Paxton well knows) Vassar lacks authority to individually authorize retention of outside counsel; and that the required OAG approvals for the Cammack contract were *never* obtained. Vassar demanded correction of the false statement, but his request was ignored.

68. It was not only the Whistleblowers who were alarmed by Paxton's false October 5 and 7 statements. Margaret Moore, the District Attorney of Travis County, rightly and justly called Paxton out on his misleading statements. In response to Paxton's October 5 and 7 statements, Travis County D.A. Moore wrote to Paxton on October 9:

> On June 10, 2020, my office sent to David Maxwell [the then-current Deputy Director of Law Enforcement Division for the OAG] a letter referring a Request to Investigate (RTI) filed in our office by Nate Paul. You asked my office to hear his complaints. The referral to the OAG was made with your approval. We did not conduct any investigation into the merits of the matters complained of.…
>
> The referral cannot and should not be used as any indication of a need for investigation, a desire on the Travis County D.A.'s part for an investigation to take place, or an endorsement of your acceptance of the referral.
>
> My office has closed this file and will take no further action. Furthermore, I have instructed my employees to have no further contact with you or your office regarding this matter.

69. The District Attorney closed her letter to Paxton by expressing her evident alarm at Paxton's conduct:

> Any action you have already taken or will take pursuing this investigation is done solely on your own authority as provided by Texas law. The newly surfaced information raises serious concerns about the integrity of your investigation and the propriety of your conducting it.
>
> Sincerely,
>
> Margaret Moore
>
> Margaret Moore
>
> Cc: Brent Webster

70. As recently as yesterday, November 11, 2020, Paxton repeated in the *New York Times* the lie that that his investigation of the magistrate judge and state and federal law enforcement officials was initiated by the Travis County District Attorney.

Monday, October 5 – Wednesday, October 28 –
Paxton Removes Duties, Tries to Intimidate Whistleblowers

71. On Friday October 2, 2020, First Assistant Attorney General Jeff Mateer, who was one of the Whistleblowers, resigned. Paxton quickly hired Brent Webster, who was previously with the Williamson County, Texas D.A.'s office, to replace Mateer as First Assistant Attorney General. October 5 was Webster's first day on the job. At 9:00 a.m., Webster began his first day by dismissing Plaintiff Brickman from a very important legislative meeting with Attorney General Paxton. In an obvious effort to embarrass Brickman, Webster waited until the meeting began and then instructed Brickman, with great ceremony but without explanation, to leave the meeting. As the Deputy Attorney General for Policy and Strategic Initiatives, Brickman had always participated in these meetings with the First Assistant and/or Attorney General Paxton. Removing Brickman from the meeting was clearly intended to diminish Brickman's duties and responsibilities to punish him, to try to intimidate and embarrass or humiliate him, and to send a message to other employees that Brickman was being punished and stripped of responsibilities and thereby deter similar attempts to complain about or hold Paxton accountable for his official misconduct.

72. Later that same morning, First Assistant Brent Webster arrived at Brickman's office escorted by an armed peace officer who identified herself as Sergeant Amy Biggs. Mr. Webster repeatedly insisted that he speak alone with Brickman. Brickman politely offered to meet with Mr. Webster in the presence of other deputies but prudently and respectfully declined to meet with Mr. Webster alone or in the presence only of the armed guard accompanying Webster. Confronting Brickman – in needless and unprecedented, banana republic-like, fashion with an armed guard – and insisting on meeting alone for unspecified reasons was clearly an attempt by Webster to intimidate Brickman.

73. About thirty minutes later, Webster came by Brickman's office, saw him talking on his cell phone, and instructed Brickman to take his cell phone to his car and leave it there. At the time, Brickman was talking on his cell phone with a colleague, Senior Counsel to Attorney General Paxton, Zina Bash. Webster's instruction to take the phone to the car was not consistent with any rule or policy of the office. Other employees also carry and use personal cell phones. In fact, Paxton himself carries multiple personal cell phones, including routinely cycling through "burner" cell phones. This needless instruction to Brickman was not just a bush-league attempt at intimidation; not having his cell phone posed a significant issue for Brickman because his school-age children only have his personal cell phone number. Additionally, Brickman is the guardian for his 96 year-old grandmother who suffered a recent fall and broke her back, and Brickman coordinates her care.

74. Still on Monday, October 5, Brickman learned that the Scheduler, a position that reported to Brickman, had been replaced without any involvement by Brickman. This was yet another power play by Webster, clearly intended to demote and demean Brickman by removing responsibilities.

75. After Mateer resigned and Maxwell and Penley were placed on leave, the remaining Whistleblowers and other employees of the OAG watched as their colleagues were systematically retaliated against, mistreated, placed on leave, harassed and fired.

76. On October 8, 2020, during a regular meeting of the OAG's deputies, directors, and other senior members, Whistleblower McCarty asked Webster and Paxton whether the OAG would continue to make disparaging remarks to the media about the Whistleblowers. Paxton did not respond and Webster expressly refused to answer.

77. On October 13, Paxton conducted an interview with the Southeast Texas Record in which he once again maligned the Whistleblowers, stating that his deputies and former first assistant engaged in "an effort to cover up the reality of what really happened [with Paul]."

78. Several of the Whistleblowers had job duties removed, were excluded from regular meetings, and encountered the armed guard that had begun accompanying Webster. Some indicated in formal complaints to the OAG that they believed their OAG issued electronic devices were being monitored and were told that they were "under investigation." The Whistleblowers also received "litigation hold" letters concerning Paul that instructed them to preserve all correspondence and documents related to his complaints. Someone even placed empty boxes near the offices of some of the Whistleblowers. All of these actions were overt and intended to dissuade other OAG employees from engaging in protected conduct and to create a hostile work environment to persuade the remaining Whistleblowers to resign. It worked.

79. On October 19, Ryan Vassar, one of the Whistleblowers, received an email from Webster asking to meet in Webster's office at 1:00. Vassar, who was working remotely at the time, acknowledged Webster's email and reported to Webster's office. Webster invited Vassar into his office and left the door open while armed guard, Amy Biggs, sat in a chair outside the door. After a meaningless, five-minute conversation, Webster announced that he was placing Vassar on investigative leave for two weeks. Vassar asked multiple times why he was being investigated, but Webster refused to answer. Webster, instead, said that the investigation was "open-ended." At the end of the meeting, Webster directed Vassar to leave his agency-issued laptop and cell phone on Webster's desk. Webster and Sergeant Biggs then escorted Vassar to his office to collect his personal belongings, parading him around the building in front of his colleagues in what could have only been intended to demean Vassar and intimidate him and the other Whistleblowers. After

collecting his belongings, Sergeant Biggs then accompanied Vassar in the elevator and escorted him outside the building. Vassar's leave was supposed to end on November 2, 2020, but his earlier request for clarification went unanswered by anyone at the OAG until the next day, November 3, 2020, when the Human Resources Division notified him that his leave had been extended for another 80 hours. Thus, Vassar has, without justification or explanation, been completely stripped of his job responsibilities and constructively discharged.

80. On October 20, Plaintiff Brickman and Whistleblowers Lacey Mase were wrongfully terminated by Paxton and Webster for making their whistleblower report.

81. On October 26, Whistleblowers Darren McCarty resigned.

82. On October 28, Whistleblowers Ryan Bangert resigned.

83. As of the date of this filing, less than six weeks after they in good faith reported Paxton's wrongdoing to appropriate law enforcement authorities, Vassar is the only Whistleblower who remains technically employed at OAG, although he remains placed on leave without explanation.

Paxton Uses His Report to the Texas Legislature as a Tool to Further Retaliate Against the Whistleblowers.

84. Texas State Representative Jeff Leach is the Republican Chairman of the House Committee on Judiciary and Civil Jurisprudence. Rep. Leach represents parts of Collin County, where Paxton is from. Rep. Leach has been a political ally of Paxton's. On October 9, 2010, Rep. Leach wrote to Paxton, "Texans have good reason to be concerned that the important work of [the Office of the Attorney General] may not be possible under your continued leadership. If there is any truth whatsoever to the factual and legal claims of your own senior staff, I believe you must voluntarily resign your position and urge you to do so."

85. Rep. Leach expressed that his paramount concern was that the operations of the OAG "continue without interruption and the trust of the people of Texas in their Chief Law Enforcement Officer must be restored." Rep. Leach requested that Paxton provide a written report to all members of the Texas Legislature as to what specific steps are being taken by Paxton and Brent Webster to ensure that the effective operation of the OAG continue in full force and effect. Rep. Leach asked for the report to be provided within seven (7) days.

86. OAG Director of Legislative Affairs Ryan Fisher emailed various staffers requesting their input into the letter. Although several of the Whistleblowers raised concerns with the operation of the office and the effect of the retaliation on pending matters, none of this criticism made its way into the response to Chairman Leach, which on information and belief was written by Paxton and Webster – not Fisher.

87. Paxton sent his written report to Chairman Leach and the 181 members of Texas Legislature on October 16, 2020. The report was a barely-two-page, self-aggrandizing letter that failed to respond to Rep. Leach's inquiry in any substantive respect. The letter was a combination of misleading statements, material omissions, and praise for work that mostly began well before First Assistant Webster assumed his new role on October 5, 2020 and that had no bearing on the concern raised by Rep. Leach in his October 9 letter.

88. Paxton used the report requested by Rep. Leach to again defame and retaliate against the Whistleblowers. Paxton's letter began with a lie and a smear: "Thank you for your October 9 letter asking whether OAG operations continue apace despite the false claims made by some OAG employees." Rep. Leach never said the allegations the Whistleblowers took to law enforcement were "false claims." Paxton was yet again making that allegation to smear and

discredit the Whistleblowers, and he was using a formal, written report requested by a leader in the Texas House of Representatives to amplify his attacks on the Whistleblowers.

89. Notably, in his response to a request for specific steps he was taking to ensure the office was functioning effectively, Paxton failed to even inform Rep. Leach that at least five of the Whistleblowers had recently filed formal internal grievances alleging that Paxton was harassing and using his office to punish the Whistleblowers. Those complaints from high-ranking deputies were filed in writing and addressed serious concerns about the functioning of the Office of Attorney General. Yet Paxton's report to the Legislature made no mention of the complaints. Paxton's report to the Legislature was to the effect of, "all is well."

October 9 -- Paxton Claims to Shut Down Cammack Investigation of Nate Paul Enemies

90. At the end of a busy Friday, October 9, Paxton claimed to be concluding the Cammack investigation of Nate Paul's enemies. OAG issued a statement from Paxton saying, "In this case, we can only investigate in response to a request for assistance from the District Attorney's office. This investigation is now closed." Subsequent events suggest this was yet another effort by Paxton to mislead the public.

October 19 -- Paxton and Webster Indicate they Will Reopen Investigation of Nate Paul's Enemies

91. Although Paxton told the public on October 9 that the investigation into Nate Paul's enemies "is now closed," after 9:00 p.m. on October 19, several of the Whistleblowers received an odd email from First Assistant Attorney General Brent Webster. It read in part, "Given your conflicts, you are instructed not to work on any OAG business relating to your allegations against Nate Paul, General Paxton, or any connected cases or OAG matters."

92. Plaintiffs were puzzled by what matters still pending in the OAG might relate to Nate Paul or Paxton. One Plaintiff, Blake Brickman, wrote back the next morning seeking

clarification. Brickman wrote to Webster:

> Good morning Brent -
>
> I am confused by your email and would like some clarification to ensure that I comply with your directive.
>
> 1. I am not aware of any open OAG matters involving Nate Paul. I believe all such matters have been closed. Please advise if that is not the case and please specify exactly what open Nate Paul related matters you reference in your email so I can fully understand and comply with the directive in your email.
>
> 2. As many other senior OAG officials have told General Paxton repeatedly over the course of the last several months, General Paxton has a "personal conflict" with respect to any Nate Paul related matter.
>
> I sincerely hope that your email does not mean that OAG will reopen past matters - or open new matters - that benefit Nate Paul and his business interests under your watch as First Assistant.
>
> Sincerely,
>
> Blake Brickman

93. Brent Webster responded without answering Brickman's questions. Rather, Webster wrote, "Let's meet at 1:30 in my office to discuss this." Brickman expressed reluctance to meet with Webster to speak about Nate Paul related matters. Brickman offered to meet with Webster at 1:30 with a fellow deputy attorney general present. Brickman also pointed out that, since the directive to stay away from Nate Paul or "related" matters was made in writing, it was appropriate that he receive in writing a response identifying those matters. But Webster was adamant that they meet alone to discuss these unknown Nate Paul related matters that Webster was instructing Brickman to stay away from.

94. Webster had no intention of telling Brickman about the Nate Paul matters he was referring to in his email from the night before. When Brickman arrived at Webster's office,

Webster, an armed guard, and a human resources employee were present. Webster brought Brickman into the office and fired him. Webster said Brickman had been "insubordinate."

November 2 – OAG and Paxton terminate Maxwell and Penley

95. On or about October 23, 2020, 3 weeks after Maxwell was put on investigative leave, the OAG collected Maxwell's agency issued laptop and cell phone. On October 28, nearly 1 month after he was put on investigative leave, the OAG requested Maxwell provide his passwords.

96. On or about the afternoon of October 28, 2020, nearly 1 month after Penley was put on investigative leave, Penley received a request to return the following day his agency issued laptop and cell phone, and Penley complied.

97. On Friday October 30, 2020, Penley and Maxwell were instructed to report to separate buildings at the Austin office of the OAG on November 2, 2020 at 9 a.m. OAG's Human Resources department sent the following email to Maxwell:

> Director Maxwell:
>
> Please be advised that you are directed to report to the William P. Clements Building on Monday , November 2, 2020 at 9:00 a.m. Please proceed to 205J (large training room) on the 2nd floor. Please confirm receipt of this email.
> Thank you for your cooperation.
>
> HR-Help

98. Penley asked what the purpose of the meeting was and was only told it was "work-related."

99. Maxwell and Penley appeared as requested at the OAG's Austin office on November 2, 2020, and they both experienced even more irregularities, harassment, and retaliation. Contrary to Texas law and Paxton's instituted written policy preventing the disarming of licensed peace officers, Brent Webster issued orders to OAG staff to prevent Maxwell from

entering if armed, despite Maxwell's status and distinguished career. The OAG violated Maxwell's rights as a licensed peace officer, with a valid License to Carry, to possess a legal weapon at a State Office, contrary to Article 30.06. Penley was escorted up the elevator and into the Executive Conference Room by an armed guard, who remained stationed outside the room throughout the meeting, which lasted from about 9 a.m. to 5 p.m.

100. Penley and Maxwell were subjected to hostile conditions and conduct throughout the entire day. Webster refused to tell Penley or Maxwell why they had been placed on investigative leave, the reason for the investigation or the scope of it. He also denied Penley's request to have one of the other Whistleblowers attend the meeting as a witness. Instead, Webster proceeded to interrogate Penley and Maxwell in a hostile and aggressive manner. The OAG engaged in a charade under the guise of an administrative investigation interview, but it was apparent that the Whistleblowers' complaints about Paxton's misconduct were the driving force for the events of November 2. Webster pressured both Maxwell and Penley to resign, which they refused to do. At the end of the day, the OAG wrongfully terminated Maxwell's and Penley's employment in retaliation for their protected complaints of illegal conduct by Paxton.

Plaintiffs File Formal Complaints with OAG

101. On October 16 and again on October 29, Plaintiff Brickman initiated action under any applicable grievance or appeal procedure of the OAG relating to suspension or termination of employment or adverse personnel action pursuant to TEX. GOV'T CODE §554.006(a). Although the agency had 60 days to investigate his complaint pursuant the Whistleblower Act, OAG HR responded to the October 16 complaint in less than 24 hours stating that there was no complaint procedure available to Deputy Attorney Generals like Brickman and immediately dismissing the complaint.

102. On October 12 and again on November 10, 2020, Plaintiff Penley initiated action under any applicable grievance or appeal procedure of the OAG relating to suspension or termination of employment or adverse personnel action pursuant to TEX. GOV'T CODE §554.006(a). OAG HR responded to the Friday, October 12 complaint by letter dated October 16 stating that there was no complaint procedure available to Deputy Attorney Generals like Penley and immediately dismissing the complaint. Penley subsequently inquired whether there was another internal administrative procedure at the OAG by which he could appeal his wrongful termination claim other than the formal complaint process under which he had attempted to initiate a complaint on October 12. By letter dated November 10, the Formal Complaint Officer replied:

> ….This letter is to inform you that there is no other internal administrative procedure at the Office of the Attorney General other than the formal complaint process by which you may appeal your termination….

103. On November 10, Penley initiated another grievance by submitting a formal complaint about his wrongful termination.

104. On October 13 and again on November 4, 2020, Plaintiff Maxwell initiated action under any applicable grievance or appeal procedure of the OAG relating to suspension or termination of employment or adverse personnel action pursuant to TEX. GOV'T CODE §554.006(a).

105. On October 15, 2020, Plaintiff Vassar initiated an action under any applicable grievance or appeal procedure of the OAG relating to suspension or termination of employment or adverse personnel action pursuant to TEX. GOV'T CODE §554.006(a). His formal complaint detailed a litany of unlawful and retaliatory actions taken against him by Paxton and OAG since his good-faith report to appropriate law enforcement authorities of legal violations by the OAG and by the Attorney General Ken Paxton. Although the agency had 60 days to investigate his

complaint pursuant the Whistleblower Act, OAG HR responded to the October 15 complaint the very next day stating that there was no complaint procedure available to Deputy Attorney Generals such as Vassar and immediately closing the complaint.

November 5 – the Smear Campaign Continues

106. On November 5, 2020, Paxton's campaign spokesperson, Ian Prior, who is not an OAG employee and is therefore without knowledge on any OAG personnel matters, referred to Plaintiffs in a news article as "desperate former employees trying to spin a false narrative".

107. On November 11, 2020, the New York Times reported:

> Mr. Paxton told the New York Times in a statement that the latest controversy was created by members of his staff who had opposed his decisions without having all the facts and who made 'their disagreement noisy and public' in an attempt to undermine the integrity of the office.

IV. Cause of Action

Count 1: Violation of Texas Whistleblower Act

108. Plaintiffs incorporate and re-allege paragraphs 1-107 above.

109. Plaintiffs were all public employees employed by the OAG, which is a state governmental entity and unit of the State of Texas.

110. Plaintiffs all in good faith made reports to law enforcement authorities of violations of criminal law by the OAG and by the Attorney General Ken Paxton. The OAG and Paxton specifically were aware of Plaintiffs' good faith reports to law enforcement.

111. Plaintiffs were subsequently subjected to adverse personnel actions by OAG and Paxton – including demotion, suspension, removal of work assignments, hostile work environment, constructive termination and termination of employment – because of the reports they made. The adverse employment actions would not have been taken against them had they not made the good-faith reports to law enforcement. Each of the adverse employment actions was

committed within 90 days of the reports to law enforcement, and in some cases within 1 business day of Paxton's learning of the reports. Thus, under Texas law, there is a presumption that the adverse employment actions were taken because the employee made the report to law enforcement. TEX. GOV'T CODE §554.004(a). In addition, the circumstances of the actions prove that the adverse actions were taken because of the reports of Attorney General Paxton's criminal conduct to law enforcement.

112. The adverse employment actions have caused Plaintiffs damages, including but not limited to past lost wages, past and future lost benefits, loss of future earnings and earning capacity, harm to his reputation, emotional pain, mental anguish, and loss of enjoyment of life.

113. Plaintiffs seek legal and other equitable remedies, reinstatement to their former positions or equivalent positions and to have lost fringe benefits and seniority rights reinstated, including but not limited to the vesting of retirement benefits.

114. Plaintiffs have all invoked any available grievance or appeal procedure.

115. All conditions precedent have been met, waived, or otherwise been satisfied to Plaintiffs' filing suit.

V. Jury Demand

116. Having tendered the appropriate fee, Plaintiffs hereby demand a trial by jury.

VI. Attorneys' Fees

117. Plaintiffs have retained the undersigned attorneys to prosecute this case and seek to be awarded their reasonable and necessary attorneys' fees and costs of court.

VII. Civil Penalty

118. Pursuant to TEX. GOV'T CODE §554.008(a), Plaintiffs hereby request the District Attorney of Travis County, Texas to intervene in this suit and seek the imposition of a civil penalty

of $15,000 against any supervisor, including Ken Paxton, for each adverse personnel action taken against any Plaintiff in violation of the Texas Whistleblower Act.

VIII. Request for Disclosure

119. Under Texas Rule of Civil Procedure 194, Plainitffs request that Defendant disclose, within fifty (50) days of the service of this request, the information and materials described in Rule 194.2(a) through (l).

IX. Damages, Conclusion and Prayer

Plaintiffs respectfully request that they have judgment against Defendants for:

a. Actual damages;

b. Compensation for wages lost during the period of suspension or termination, including back pay and lost benefits;

c. Compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.

d. Injunctive relief ordering Plaintiffs reinstated to their former positions or equivalent positions;

e. Exemplary damages;

f. Reasonable attorneys' fees for prosecution of this case at trial and on appeal;

g. All costs of expert witnesses and other costs of litigation;

h. Pre-judgment interest as required by Chapter 304 of the Texas Finance Code or other applicable laws;

i. Post-judgment interest at the maximum legal rate; and

j. All other relief to which Plaintiffs may be entitled at law, or in equity.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF RYAN M. VASSAR

Cause No. D-1-GN-20-006861

James Blake Brickman, *et al.*, Plaintiffs, v. **Office of the Attorney General of Texas,** Defendant.	**In the District Court of** **Travis County, Texas** **250th Judicial District**

Defendant's Original Answer

Defendant, the Office of the Attorney General of Texas answers Plaintiffs James Blake Brickman, David Maxwell, J. Mark Penley, and Ryan M. Vassar's original petition and respectfully shows the following:

General Denial

1. As permitted by Rule 92 of the Texas Rules of Civil Procedure, the Office of the Attorney General generally denies each and every claim and allegation Plaintiffs assert. The Office of the Attorney General demands Plaintiffs prove each and every claim Plaintiffs assert by a preponderance of the evidence as is required by the Constitution and laws of the State of Texas.

2. Pleading further, Plaintiffs' claims and damages, if any, are barred because Plaintiffs have failed to satisfy all conditions precedent required under the Texas Whistleblower Act, Tex. Gov't Code § 554.001, *et seq*.

Sovereign Immunity

3. The Office of the Attorney General is a state governmental entity protected from suit and liability by sovereign immunity, which is not waived to the extent that this suit fails to allege a violation of this chapter. *See State v. Lueck*, 290 S.W.3d 876 (Tex. 2009).

Affirmative Defense

4. Consistent with Section 554.004(b) of the Texas Government Code, Plaintiffs' claims are barred because any action Plaintiffs allege to be an adverse employment action was the result of each Plaintiff's own misconduct, lack of competence, and/or disloyalty to the Office. No Plaintiff suffered any adverse personnel action as a result of any report of an alleged violation of law that any Plaintiff made or claims to have made.

Prayer

Defendant, the Office of the Attorney General of Texas respectfully prays judgment be rendered in its favor that Plaintiffs take nothing by reason of this suit and that the Court grant the Office of the Attorney General all other relief to which it is justly entitled in law and equity.

Dated: December 14, 2020

Respectfully submitted,

Lewis Brisbois Bisgaard & Smith LLP

/ s / William S. Helfand
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Attorneys for Defendant,
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Certificate of Service

I certify a true and correct copy of Defendant, Office of the Attorney General of Texas's Original Answer has been served on the following counsel of record by electronic filing on December 14, 2020.

Thomas A. Nesbitt
Scott F. DeShazo
Laura J. Goodson
DeShazo & Nesbitt LLP

-and-

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CAUSE NO. D-1-GN-20-006861

JAMES BLAKE BRICKMAN, DAVID MAXWELL, J. MARK PENLEY, and RYAN M. VASSAR Plaintiffs,	§ § § § §	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS	§ §	
Defendant.	§	250th JUDICIAL DISTRICT

PLAINTIFFS' FIRST AMENDED ORIGINAL PETITION AND VERIFIED MOTION FOR TEMPORARY INJUNCTION AND PERMANENT INJUNCTION

> "The Texas Whistleblower Act protects public employees who make good faith reports of violations of law by their employer to an appropriate law enforcement authority. An employer may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who makes a report under the Act." [1]

This correct statement of Texas law is taken directly from the Texas Attorney General's website and can be found there as of the date of this pleading. It is sadly ironic, then, that Attorney General Warren Kenneth Paxton -- the Chief Law Enforcement Officer for the State of Texas -- has flagrantly violated and apparently believes he is above the very law he promotes on his own website. Plaintiffs are dedicated, respected, public servants, officers of the court, and—until the events that are the basis of this Whistleblower Suit transpired—honorably served in the most senior levels of the Office of the Texas Attorney General ("OAG").

[1] https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/general-oag/WhistleblowerPoster.pdf

The Texas Legislature passed the Texas Whistleblower Act in 1983 to prevent the very conduct by Attorney General Ken Paxton that forms the basis of this case. The most senior members of the OAG believed in good faith that Paxton was breaking the law and abusing his office to benefit himself as well as his close friend and campaign donor, Austin businessman Nate Paul, and likely the woman with whom, according to media reports, Paxton has carried on a lengthy extramarital affair. On September 30, 2020, the Plaintiffs, along with three other Executive Deputies and the First Assistant Attorney General, reported the facts underlying Paxton's illegal conduct to law enforcement, as was their duty. Thus, they became "whistleblowers" (collectively "Whistleblowers"). On October 1, they reported the fact of their whistleblower report of the previous day to the OAG Human Resources Division and to Paxton.

Paxton responded to the report immediately and with ferocity, as though he was trying consciously to show Texans exactly what retaliation against whistleblowers looks like. Paxton falsely smeared the whistleblowers publicly in the manner calculated to harm them most, threatened them, tried to intimidate them, and engaged in all manner of retaliation ranging from serious to petty to pathetic. Then, within about a month of learning of their whistleblowing, Paxton and his OAG fired the Plaintiffs. Less than two months after they reported Paxton's wrongdoing, none of the Whistleblowers remains employed at the OAG. It is hard to imagine more flagrant violations of the Texas Whistleblower Act.

At the crux of this case is Texas' core and necessary government policies of transparency, honesty, and integrity—as opposed to corruption and favoritism—within the State's highest law enforcement office and instruments. Plaintiffs hope that this lawsuit following upon their direct, good-faith complaints both to the current elected office holder at the helm of the OAG and to proper law enforcement agencies will help to restore integrity to this exceedingly important office.

Plaintiffs James Blake Brickman, David Maxwell, J. Mark Penley, and Ryan M. Vassar file this Original Petition against the Office of the Attorney General of the State of Texas. Plaintiffs respectfully show the Court the following:

I. Parties

1. Until they were fired and otherwise retaliated against by the Office of the Attorney General at the instruction of Ken Paxton shortly after reporting to law enforcement their concerns about Paxton's criminal conduct, the four Plaintiffs were among Paxton's most senior staff, each of them hand-picked by Paxton himself, and each of whom directly interacted with Paxton on a frequent basis.

2. Plaintiff James Blake Brickman ("Brickman") was the Deputy Attorney General for Policy & Strategy Initiatives from February 2020 until he was wrongfully terminated October 20, 2020. Brickman is a lawyer and veteran public servant. Prior to being recruited to the OAG by Paxton, Brickman served as the Chief of Staff for the Governor of Kentucky, a Republican, for four years. Earlier in his career, he also served as Chief of Staff to a United States Senator, a Republican, in Washington, D.C., attorney in private practice, and as a federal law clerk to the Honorable Amul R. Thapar (now a sitting judge on the Court of Appeals for the Sixth Circuit). Before Brickman made a good faith report to an appropriate law enforcement authority of criminal wrongdoing by Paxton, Paxton regularly and publicly lauded Brickman's work. Just by way of example, in May, Paxton publicly praised Mr. Brickman's work in the monthly meeting of senior OAG staff. Paxton presented Brickman with a book on which Paxton inscribed a note saying he was "so grateful [Brickman] joined our team." Paxton praised Brickman as an "amazing addition" to the AG's office. Brickman relocated to Austin, with his wife and three young children, to take his job at OAG at Paxton's request and is a resident of Travis County, Texas.

3. Plaintiff David Maxwell ("Maxwell") is and has been a law enforcement professional. Until he was wrongfully terminated on November 2, 2020, Maxwell served as the Deputy Director, and then the Director, of Law Enforcement Division for the OAG for approximately 10 years, collectively, where he oversaw 350 employees. Maxwell's storied 48-year career in law enforcement in the State of Texas includes over 38 years with the Texas Department of Public Safety – 24 years as a Texas Ranger. Maxwell has been involved in investigating some of the most serious criminal matters and conduct in this State for decades and has a well-earned reputation as an honest, thorough, and tough law enforcement investigator. Maxwell is a resident of Burnet County, Texas.

4. Plaintiff J. Mark Penley ("Penley") was the Deputy Attorney General for Criminal Justice at the OAG from October 8, 2019 until November 2, 2020, when he was wrongfully terminated. He supervised the Criminal Prosecutions, Special Prosecutions, Criminal Appeals, and Crime Victims Services Divisions which were comprised of approximately 220 employees. Penley has 36 years of legal experience and is a retired federal prosecutor. Penley is a resident of Dallas County, Texas.

5. Plaintiff Ryan M. Vassar ("Vassar") was the Deputy Attorney General for Legal Counsel at the OAG. In that role, until he was retaliated against and wrongfully terminated, Vassar served as the chief legal officer for the OAG. He represented the OAG before other state and federal governmental bodies and oversaw 60 attorneys and 30 professional staff across 5 different divisions, which are responsible for rendering approximately 50,000 legal decisions each year. Vassar served in different roles at the OAG for over 5 years. Before joining the OAG, Vassar served as a law clerk for three years at the Supreme Court of Texas. Vassar is a resident of Travis County, Texas.

6. Defendant Office of the Attorney General of the State of Texas ("OAG") is an agency of the State of Texas. OAG was served with process on or about November 20, 2020 and has filed an answer in this case.

II. Jurisdiction, Venue, Rule 47 Disclosure, and Discovery Control Plan

7. This Court has jurisdiction because the amount in controversy exceeds the minimum jurisdictional limit of this Court. In addition, the Texas Whistleblower Act waives any immunity that might otherwise deprive this Court of jurisdiction. TEX. GOV'T CODE §554.0035 ("A public employee who alleges a violation of this chapter may sue the employing state or local governmental entity for the relief provided by this chapter. Sovereign immunity is waived and abolished to the extent of liability for the relief allowed under this chapter for a violation of this chapter."). Furthermore, each of the Plaintiffs exhausted any administrative remedies having participated in formal complaint procedures within the OAG with such procedures concluding without resolution.

8. Venue is proper in Travis County because the Texas Whistleblower Act provides that a public employee of a state governmental entity may sue in a district court of the county in which the cause of action arises or in a district court of Travis County. TEX. GOV'T CODE §554.007(a). This cause of action arises in Travis County, Texas as all Plaintiffs were employed in Travis County, and worked at OAG offices near the Capitol Building in Austin, Texas in Travis County, were fired or constructively terminated in Travis County, and were subject to acts of retaliation in Travis County. Venue is also proper under §15.002 TEX. CIV. PRAC. & REM. CODE because all or a substantial part of the events or omissions giving rise to this claim occurred in Travis County, Texas.

9. Pursuant to TEX. R. CIV. P. 47(c)(4), Plaintiffs seek monetary relief of over $1,000,000.

10. Plaintiffs intend for discovery to be conducted in accordance with a discovery control plan under TEX. R. CIV. P. 190.4 (Level 3).

III. Facts

Ken Paxton's Donor and Friend, Nate Paul

11. On August 14, 2019, FBI agents executed a search warrant at the home of Austin real-estate investor Nate Paul. That same day, agents executed search warrants at two separate office locations of Nate Paul's real estate business, World Class Holdings. A long-serving and highly respected United States Magistrate Judge issued those warrants on August 12. A fourth search warrant was executed a few days later at a records storage unit rented by Paul's company.

12. Paul has had many well-documented troubles in 2019 and 2020 in addition to the execution of search warrants at his home and offices by federal law enforcement. Paul is an Austin businessman who invests in real estate through his company, World Class Holdings and through single-purpose limited liability companies controlled by Paul and/or World Class Holdings. In 2019 and 2020, according to media reports, at least 16 Paul-controlled entities have filed for bankruptcy protection, and lenders have initiated foreclosure proceedings on over $250 million in delinquent debt held by over two dozen of Paul's companies.

13. Also in 2020, Paul created a company for the purpose of suing a local charity, the charity's lawyer, and a court-appointed receiver. The district judge presiding over the case dismissed the case shortly after the suit was filed, ruled that the suit was groundless and filed in bad faith for the purpose of harassment, and sanctioned Paul's company and his lawyer over $225,000 for the frivolous and malicious use of the justice system.

14. Mr. Paul also spent time in 2020 making requests—both formally and informally—that the Travis County District Attorney and the Office of the Attorney General of the State of

Texas launch criminal investigations of Mr. Paul's perceived adversaries. By way of example, Mr. Paul made formal written requests for criminal investigations of:

a. The federal magistrate judge who issued the search warrants authorizing the search of Paul's offices and homes;

b. The FBI agents and state law enforcement agents who carried out the searches;

c. The Assistant United States Attorney who had obtained the search warrants from the federal magistrate judge;

d. A federal bankruptcy judge;

e. A local charity that was a co-investor with Paul-controlled entities in two properties;

f. The local charity's lawyer;

g. A credit union that held a lien on one of Paul's entities' properties; and

h. The receiver appointed by the Travis County Court to take control of certain properties pending resolution of the lawsuit between the charity and Paul-controlled entities.

15. Despite a very busy 2019 and 2020, Mr. Paul, age 33, also found time to enjoy his personal friendship with the Attorney General of the State of Texas, Ken Paxton, age 57.

16. Just by way of example, in 2020, Paxton and Paul met regularly in Austin, Texas, in meetings usually without Paxton's staff or security detail present, and in meetings that were not included on Paxton's official schedule.

17. Nate Paul is also a major donor to Paxton's campaign. On or about October 29, 2018, Paul made a $25,000 contribution to Paxton's political campaign committee. It has also been publicly reported that the political action committee of a law firm representing Nate Paul's interests in litigation between Nate Paul-related entities and the Mitte Foundation made a $25,000 contribution to Paxton's campaign on or about June 30, 2020, which was 22 days after the OAG intervened in the litigation.

18. According to an Associated Press article dated November 5, 2020, Paxton "had an extramarital affair with a woman whom he later recommended for a job" with Paul, and whom Paul in fact employed. According to the same news article, the woman previously worked for a Republican Texas State Senator.

Paxton Abused the Office of the Texas Attorney General to Benefit Paul

19. During the Spring and Summer of 2020, Paxton began taking more interest in legal matters involving Nate Paul and applying more pressure on the Plaintiffs and the other Whistleblowers to use the personnel, legal authority and other resources of the OAG to advance the legal and personal interests of Nate Paul and his business activities. Paxton showed a pattern of not listening to the Whistleblowers, including Plaintiffs, when they raised valid objections to his instructions regarding Nate Paul's legal matters that were brought before the OAG. Plaintiffs, along with the other Whistleblowers, became increasingly concerned over time as the Attorney General became less rational in his decision making and more unwilling to listen to reasonable objections to his instructions, and placed increasing, unusual priority on matters involving Paul.

20. The Whistleblowers, including Plaintiffs, ultimately formed a good faith belief that Paxton had violated Texas criminal law, including but not limited to the laws regarding bribery, improper influence, and abuse of office as follows:

a. Texas Penal Code section 36.02 defines bribery as a second degree felony. The offense of bribery occurs if a person "intentionally or knowingly . . . solicits, accepts or agrees to accept from another: (1) any benefit as consideration for the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant . . .; and (3) any benefit as consideration for a violation of a duty imposed by law on a public servant or party official;

b. Texas Penal Code, section 36.03, Coercion of Public Servant or Voter, states that an offense occurs if a person, by means of coercion, "(1) influences or attempts to influence a public servant in a specific exercise of his official power or a specific performance of his official duty or influences or attempts to influence a public servant to violate the public servant's known legal duty." An offense under TPC 36.03 is a Class A misdemeanor; and

c. Texas Penal Code, section 39.02(a)(2) Abuse of Official Capacity, states that a public servant commits an offense, "with intent to obtain a benefit . . ., he intentionally or knowingly: misuses government property, services, personnel, or any other thing of value belonging to the government . . . ." If the value of the thing misused is $2,500 or more but less than $30,000, the offense is classified as a state jail felony.

21. Paxton's abuse of the OAG to benefit Paul began in or around November 2019. But as 2020 progressed, Paxton's efforts on Paul's behalf became increasingly reckless, bold, and apparent to Plaintiffs.

Paxton Intervened in Nate Paul's Open Record Requests

22. A state agency that receives a request for records under the Texas Public Information Act and wishes to withhold documents responsive to that request based on statutory exceptions must request a ruling from the OAG as to whether the asserted exceptions are applicable. The OAG issues approximately 30,000 to 40,000 open records decisions each year, but Plaintiffs are only aware of Paxton taking a personal interest in decisions that related to Paul.

23. In the Fall of 2019, lawyers for Paul issued an open records request to the Texas State Securities Board for records related to the search of Paul's properties in August 2019 and the

Board requested an open records decision from the OAG. On or about November 25, 2019, and despite Paxton's pressure on Whistleblower Ryan Bangert to release the records, OAG issued a ruling that all records related to this request were **not** subject to disclosure due to a pending investigation against Paul.

24. On or about March 13, 2020, lawyers for Paul issued an open records request to the Texas Department of Public Safety ("DPS") for records related to the search of Paul's properties in August 2019. Because the search of Paul's properties in August 2019 was conducted by the Federal Bureau of Investigation, the FBI filed a brief with the OAG concerning this request, and also sent a redacted version of the brief to Paul's lawyers.

25. Paxton contacted Ryan Vassar, Deputy Attorney General for Legal Counsel, several times related to this request. In meetings between Paxton and Vassar, Paxton revealed that he had spoken personally with Paul about the activities that occurred on the day the search warrants of Paul's properties were executed. Paxton stated that he did not want to use the OAG to help the FBI or DPS in any way.

26. Longstanding OAG precedent and sound principles indicated that disclosure of the documents should be prevented, but Paxton directed Vassar to find a way to release the information. Vassar struggled with this directive because allowing disclosure of the information requested by Paul would overturn decades of settled expectations among sister law enforcement agencies, compromise the OAG's own law enforcement information, and likely spark innumerable lawsuits challenging the newly announced application of the law.

27. Paxton then personally took the file, including all the responsive documents, which included documents sealed by a federal court, and did not return it for approximately seven to ten

days. Paxton also directed that the final opinion, issued on June 2, 2020, take no position on whether the documents should be released.

28. On or about May 20, 2020, lawyers for Paul issued an open records request to the OAG for the un-redacted FBI brief referenced above. Paxton asked Vassar for a copy of the un-redacted FBI brief, and directed Vassar to find a way to release the un-redacted FBI brief in a July 24, 2020 opinion, which ultimately concluded that the FBI brief must be released.

Paxton Intervened in Civil Litigation Involving Nate Paul

29. The OAG has approximately 35,000 open civil litigation cases each year, but Paxton has only taken a personal interest in one case. That case involves Paul.

30. The Roy F. and Joann Cole Mitte Foundation ("Mitte Foundation") is a non-profit corporation and charitable foundation located in Austin, Texas. The Mitte Foundation invested in and was a limited partner of several entities associated with World Class Holdings, Nate Paul's company. In 2018, the Mitte Foundation filed suit against several of those entities controlled by Paul's World Class Holdings claiming, among other things, that the Mitte Foundation was being denied access to the books and records of the companies. That litigation grew and ultimately resulted in the court appointment of a receiver over the World Class entities.

31. The Financial Litigation and Charitable Trust Division of the OAG has the power to intervene in any litigation involving charities if doing so will protect the assets of the charity.[2] Around January 2020, lawyers in the Charitable Trust division of the OAG filed a notice with the court declining to intervene in the case. Paxton was not involved in this decision. However, Paxton began to take a deep personal interest in this case in May and June of 2020 and had several discussions with OAG staff about intervening in the case. OAG staff advised Paxton that OAG

[2] *See* Tex. Prop. Code § 123.001, *et seq*

had no interest in intervening in the case, as the Mitte Foundation was the plaintiff in the case and instituted the suit to protect the charity's interest, making OAG's intervention unnecessary.

32. Against the advice of OAG staff, including some of the Whistleblowers, and contrary to OAG's prior decision not to intervene, Paxton directed the Charitable Trusts Division to intervene in the lawsuit on or about June 8, 2020 in order to exert pressure on the parties to settle.

33. On or about July 6, 2020, Paxton asked Brickman to review the pleadings in the case. On or about July 6, 2020, Brickman informed Paxton that OAG had no interest in the case and should not waste resources of the OAG intervening in a dispute in which the charity – which the OAG should have wanted to protect – was the plaintiff and represented by capable counsel in a legitimate dispute. Additionally, Brickman informed Paxton that the parties reached a settlement agreement in August 2019, which Paul subsequently breached.

34. On or about July 22, 2020, then-First Assistant Jeff Mateer and Brickman talked Paxton out of personally attending and appearing before the Travis County District Court in this matter, which would have been an unprecedented event as Paxton has not appeared in any court on behalf of the OAG in years.

35. Plaintiffs saw that Paxton was seeking to exert influence in the case not to assist the charity, but to pressure the charity to reach a settlement favorable to the World Class entities.

36. On or about October 1, 2020, then-Deputy Attorney General for Civil Litigation and Whistleblower Darren McCarty directed the Financial Litigation and Charitable Trusts Division to withdraw from the case.

Paxton Directed a Legal Opinion to Benefit Nate Paul

37. On or about July 31, 2020, Paxton contacted Whistleblower Bangert and asked him to look into whether restrictions on in-person gatherings due to COVID prevented the foreclosure sales of properties. Bangert consulted Vassar. After hearing their researched views on this subject, Paxton made clear that he wanted OAG to express a specific conclusion: that foreclosure sales should not be permitted to continue. On August 2, 2020 at approximately 1:00 a.m., OAG issued an informal legal opinion concluding that foreclosure sales should not be permitted to continue in light of the then-existing restrictions on in-person gatherings to prevent the spread of COVID-19. Unbeknownst to Plaintiffs at the time, this opinion favored persons such as Paul who hoped to stave off foreclosure sales. According to media reporting, on the very next day, Monday, August 3, 2020, lawyers for Paul showed Paul's creditors a copy of Paxton's opinion to prevent the foreclosure sales of Paul's properties that were scheduled for August 4, 2020.

Paxton Plotted OAG Investigations into Nate Paul's Adversaries

38. The OAG has approximately 400 open criminal cases and 2,000 open criminal investigations each year. Paxton rarely showed an interest in any pending criminal investigations, but he showed an extraordinary interest in the investigation sought by Paul.

39. In May of 2020, Paxton contacted the Travis County District Attorney and requested a meeting to help Nate Paul present a criminal complaint. A meeting was held with the DA's staff. Paxton attended the meeting along with Paul and his attorney. Paul also submitted a written complaint accusing federal law enforcement, a federal magistrate judge, Texas state law enforcement, and a prosecutor with the U.S. Attorney's office of violating his rights.

40. By letter dated June 10, 2020, The Travis County DA's Office referred Paul's criminal complaint to the OAG. Paxton assigned the matter to Plaintiffs Maxwell and Penley for investigation.

41. Maxwell scheduled an initial meeting with Paul and his attorney, Michael Wynne, at which they stated their contentions that the federal search warrants executed in August 2019 had been altered by a federal prosecutor after they were signed by the federal magistrate judge.

42. Penley and Maxwell held a second meeting, at which Paul and Wynne gave a further explanation of their complaints and produced a thumb drive containing documents which they contended would support their claims. Wynne conveyed that he had presented his concerns about the alleged alterations of the search warrants, which were under seal at the federal District Clerk's office, to the magistrate judge at a hearing in February 2020, and that the judge had released some documents to him. Maxwell and Penley advised that many of Paul's complaints were outside state jurisdiction, as Paul and Wynne were relating alleged violations of the Federal Rules of Criminal Procedure, and that their complaint that some or all of the search warrants had allegedly been altered by a federal prosecutor after they were signed by the federal magistrate judge could be best investigated by the U.S. Department of Justice Inspector General's Office ("DOJ IG").

43. The next day, Maxwell and Penley consulted with forensic experts in the OAG Criminal Investigation Division ("CID") and determined that no credible evidence existed to support any state law charges.

44. In or around this time, Paul leaked the fact that the OAG was investigating his complaint against federal officials to the media.

45. Soon thereafter, Paxton, Paxton's assistant, Penley, Maxwell, Paul, Wynne, and two CID forensic experts attended a third meeting regarding Paul's complaints. When Penley announced his recommendation that the investigation be closed, Paul, Paul's attorney and Paxton pushed back. As a result of Paxton's surprising response, Penley thereafter requested additional documents from Paul's counsel, but the attorney never provided those documents despite repeated requests. After the third meeting, it was obvious that Paxton was dissatisfied with Maxwell's and Penley's opinions and recommendation.

46. On August 18, 2020, Paxton contacted Vassar, asking him to explain how the OAG could retain outside legal counsel. Vassar obliged, explaining that the OAG's approval process requires authorization from no less than 10 different OAG personnel. Various stages throughout the OAG's review process provide that: a contract must be drafted; it must be approved; conflicts must be cleared; and funding must be obligated. Vassar also explained that retaining outside counsel is usually limited to matters in which the OAG does not have the necessary experience (*e.g.*, patent law), license requirements (*e.g.*, patent law or pro hac vice admission), or where an actual or apparent conflict of interest may arise in the matter.

47. On or about August 26, 2020, Paxton contacted Vassar again and asked if retaining outside counsel to investigate criminal allegations was permissible. Vassar explained that Texas law contemplates two unique scenarios involving the appointment of a special or outside prosecutor. The first scenario involves a situation where a prosecutor may recuse herself to allow the trial court to appoint an attorney pro tem as a prosecuting attorney. Tex. Code Crim. Pro. art. 2.07(a); *see also* Tex. Att'y Gen. Op. KP-0273 (2019). Paxton stated that a court-appointed attorney pro tem was not acceptable. The second scenario involves a situation where a prosecuting attorney may "request the assistance of the attorney general, and the attorney general may offer to

the prosecuting attorney the assistance of his office." Tex. Gov't Code §§ 41.102(b); 402.028(a). Vassar cautioned, however, that he would need to defer to Penley on whether engaging outside counsel in this situation would be appropriate, based on the allegations that had been made. Paxton then asked Vassar to contact two potential candidates who may be willing to serve as outside legal counsel.

48. On or about August 26, 2020, Vassar began contacting the two potential candidates who Paxton said might be willing to serve as outside counsel. During these contacts, Vassar explained the outside counsel process and asked both potential candidates to provide him with their proposed hourly rates and an estimate of the cost for conducting an investigation. One of the candidates was Brandon R. Cammack, a Houston criminal defense attorney who had been licensed only 5 years and never served as a prosecutor. The other candidate was a veteran former state and federal prosecutor with decades of experience.

49. On or about September 3, 2020, Paxton announced his decision to retain Cammack as outside counsel. Paxton instructed Vassar to draft an outside counsel contract and send it to Cammack that same day. Paxton stated that this needed to be done immediately because the Travis County District Attorney-elect would not be cooperative with this investigation and may rescind the referral to the OAG. Vassar followed Paxton's order, obtained a copy of the criminal referral, for the first time, and prepared a draft contract for Cammack to review. At Paxton's direction, Vassar also sent a copy of the draft agreement to Paxton that same day.

50. On or about September 4, 2020, Cammack notified Vassar that the contract terms were acceptable. Vassar then forwarded the draft agreement to the General Counsel Division to begin the OAG's internal review and approval process.

51. On or about September 23, 2020, Cammack contacted Vassar and asked him if Cammack could obtain an email address from the OAG or some other official documentation to identify himself as an attorney working for the OAG, because a certain prosecutor's office was asking for verification of Cammack's relationship with the OAG. Vassar explained to Cammack that his contract had not been approved yet, but that he would discuss potential ways to document Cammack's involvement in an investigation with relevant OAG personnel. Later that same day, Paxton called Vassar, asking if Cammack could obtain an OAG email address and asking why Cammack's contract had not been approved yet. Vassar explained that the process can take time due to the multiple approvals required. Paxton asked who was currently reviewing the agreement and exclaimed that he was "tired of his people not doing what he had asked." Upon checking the OAG's contract-approval application, Vassar identified that Penley was currently reviewing the agreement. Paxton then ended the call.

52. On or about September 24, 2020, Penley refused to sign a memo to approve the hiring of Cammack to take over the investigation of Paul's complaint. Penley believed that the claim alleging alterations to search warrants was unsupported by credible evidence.

53. Plaintiffs later learned that, on or about September 3, 2020, Paxton had asked Cammack, to begin work as an outside counsel despite not having a contract approved to retain him.

54. Matters came to a head during the week of September 28, when Cammack obtained 39 grand jury subpoenas from the Travis County Grand Jury. All of the subpoenas were outside the appropriate scope of the June 10 referral from the Travis County District Attorney's office concerning Paul's complaints against federal law enforcement and judicial officials. Some of the subpoenas caused the Whistleblowers, including Plaintiffs, to believe Cammack, Paul and Paxton

were using them to obtain documents related to Paul's civil cases. The Whistleblowers learned that one of the subpoenas was served on an entity that was involved with one of Paul's properties and Cammack was accompanied by Paul's attorney, Michael Wynne, when that subpoena was served. On September 30, the Whistleblowers learned of a second grand jury subpoena served on an entity that had business dealings with Paul. Other subpoenas were designed to harass law enforcement agents and federal prosecutors. The subpoenas shocked the Whistleblowers because they were highly improper and far outside the bounds of any reasonable investigation. Paxton and Paul were using their so-called "special prosecutor" to bring the weight of the OAG to bear on Paul's enemies.

Plaintiffs Make a Good Faith Reports about Paxton's Abuse of Power to Law Enforcement

55. On September 30 and October 1, the Whistleblowers, including Plaintiffs, having concluded that Paxton appeared to be using the resources and authority of the OAG to benefit the personal and financial interests of his friend and campaign donor, Nate Paul, made good faith reports of criminal activity by Paxton to appropriate law enforcement authorities. On October 1, seven of the eight Whistleblowers signed and sent to the OAG's Director of Human Resources a letter notifying OAG that they had reported to an appropriate law enforcement authority a good faith belief of suspected violations of law committed by Paxton and OAG. Plaintiff Maxwell did not sign the October 1 letter because he was out of state on vacation at the time the letter was drafted, but he was in complete agreement with the letter. He sent a separate written notice to Human Resources regarding his whistleblower complaint to an appropriate law enforcement authority. Plaintiff Maxwell would have signed the letter had he been present to do so. The October 1 letter states:

> This letter is intended to serve as notice to the Office of the Attorney General that on September 30, 2020, we, the undersigned individuals, reported to an appropriate law enforcement authority a potential violation of law committed by Warren K. Paxton, Jr., in his official capacity as the current Attorney General of Texas. We have a good faith belief that the Attorney General is violating federal and/or state law, including prohibitions relating to improper influence, abuse of office, bribery, and other potential criminal offenses. Each signatory below has knowledge of facts relevant to these potential offenses and has provided statements concerning those facts to the appropriate law enforcement authority. Additionally, today, October 1, 2020, the undersigned notified the Attorney General via text message that they have reported the violations to the appropriate law enforcement authority. A copy of the text message is attached hereto.

Paxton and OAG Take Immediate Adverse Employment Actions

56. Paxton swiftly began retaliating against the Whistleblowers both individually and as a group. Paxton's acts were deliberately calculated to try to impugn these public servants, denigrate their legitimate, good-faith complaints about Paxton's corruption, attempt to silence or divide them, and deter others from making such complaints about Paxton's unlawful conduct.

Friday, October 2 -- Paxton Suspends and Later Terminates Penley and Maxwell

57. On October 2, one day after the letter to OAG Human Resources, Plaintiffs Penley and Maxwell were placed on "investigative leave" at the direction of Paxton. Their email accounts and building access badges were disabled. Paxton and the OAG refused to tell Penley or Maxwell what was being investigated or even whether they were accused of wrongdoing of any kind. For the next 2 weeks, the OAG made no attempts to interview Penley or Maxell as part of any alleged investigation. On October 15, newly appointed First Assistant Brent Webster[3] extended Penley's and Maxwell's respective investigative leaves to Monday, November 2, again without giving any explanation for placing them on that status or disclosing the reason for the investigation or the scope of it. Penley made several requests, by phone call and email, seeking that information, but never received a response from Paxton, Webster or anyone else at the OAG.

[3] Whistleblower Jeff Mateer, the previous First Assistant Attorney General, resigned on October 2, 2020.

Saturday, October 3 – Paxton and OAG Smear the Whistleblowers

58. On Saturday, October 3, the OAG Communications Department issued the following statement:

> The complaint filed against Attorney General Paxton was done to impede an ongoing investigation into criminal wrongdoing by public officials including employees of this office. Making false claims is a very serious matter and we plan to investigate this to the fullest extent of the law.

59. This statement was blatantly false in numerous respects and clearly intended to intimidate and retaliate against the Whistleblowers. First, the reports to law enforcement were not made "to impede an ongoing criminal investigation." Rather, the Whistleblowers' reports to law enforcement were made based on their good faith belief that Attorney General Paxton was abusing the Office of Attorney General to benefit a campaign donor and private individual.

60. Further, there was no OAG investigation into "employees of this office" as Paxton claimed in his press release. Paxton was trying to mislead the public into believing that the Whistleblowers themselves were under investigation for criminal misconduct when they went to law enforcement with their concerns about Paxton. This false statement was clearly intended to punish the Whistleblowers by smearing and discrediting them.

61. Paxton also asserted in the October 3 statement that the Whistleblowers made "false claims" to law enforcement. This too was a lie. The Whistleblowers provided only accurate information to law enforcement. Moreover, Paxton did not even know on October 3 what information the Whistleblowers had provided to law enforcement. Paxton was certainly aware of his own corrupt conduct and worried about it being exposed, but he did not know what specifically the Whistleblowers had reported and therefore had no basis upon which to accuse eight of his most senior staff of making false claims to law enforcement. Nor did he seek any transparency, the

appointment of any truly neutral or objective special investigator, contact any proper law enforcement agency, or act in any way as a proper steward of the OAG would act.

62. Paxton punctuated his October 3 statement by threatening the Whistleblowers. The final sentence of his official statement read, "Making false claims is a serious matter and ***we plan to investigate this to the fullest extent of the law***." (Emphasis added).

63. It is hard to imagine a more egregious act of retaliation against a whistleblower than what Paxton began on Saturday morning, October 3. The life's work of each of the Whistleblowers was the law or law enforcement or both. Their credibility and integrity are their essential stock-in-trade. Paxton's statement was a pack of lies intended to hit the Whistleblowers where he thought it would hurt them most: false claims that the Whistleblowers made untrue accusations to law enforcement and had impeded a lawful investigation and a threat of investigation and legal consequences. The potential and certainly-intended effect would be to chill further revelations about Paxton's wrongdoing and try to smear the good name, character, and reputation of these public servants. Paxton's actions were straight out of the playbook he had been running against the enemies of his friend and donor Nate Paul. Now, on a Saturday morning less than 48 hours after learning of the Whistleblowers' reports to law enforcement, Paxton was running the same play against his own senior deputies, the Plaintiffs here.

October 5 and 7 -- More Retaliation

64. Over the weekend of October 3-4, media continued reporting about the relationship and connections between Paxton and Nate Paul and Paxton's personal involvement in the use of his office to investigate and attack Paul's enemies. In response to this more detailed reporting, Paxton again treated the official, taxpayer-funded Communications Department of the OAG as an

instrument of retaliation. The OAG Communications Division released this official statement on Monday, October 5 at Paxton's direction (incorrect capitalization in original):

> The Texas attorney general's office was referred a case from Travis county regarding allegations of crimes relating to the FBI, other government agencies and individuals. My obligation as attorney general is to conduct an investigation upon such referral. Because employees from my office impeded the investigation and because I knew Nate Paul I ultimately decided to hire an outside independent prosecutor to make his own independent determination. Despite the effort by rogue employees and their false allegations I will continue to seek justice in Texas and will not be resigning.

65. The first two sentences of Paxton's October 5 statement were intended to mislead the public into believing that, in conducting the investigations of Nate Paul's enemies, OAG was merely carrying out a legal obligation to investigate a matter referred from the Travis County District Attorney. Of course, this lie by Paxton was calculated to counter the emerging truth that Paxton was personally orchestrating the use of the OAG to attack Paul's enemies.

66. Two days later, the OAG Communications Division released another official statement at Paxton's direction, reiterating some of the prior statement's untruths and falsely implying that the Cammack contract had been approved through proper OAG procedures:

> Employee, Ryan Vassar, drafted the contract for outside counsel and communicated directly with Independent Counsel Brandon Cammock to assist in the execution of the contract. The Attorney General signed the contract.
>
> Mr. Vassar included the job description in this contract that legally authorized Independent Counsel Brandan Cammock to act. Mr. Vassar also provided this contract directly to Attorney General Paxton for his signature.

67. This official communication omits the key facts that what Vassar circulated to both Cammack and Paxton was clearly labeled a "draft" contract, prepared at Paxton's direct command; that (as Paxton well knows) Vassar lacks authority to individually authorize retention of outside counsel; and that the required OAG approvals for the Cammack contract were *never* obtained. Vassar demanded correction of the false statement, but his request was ignored.

68. It was not only the Whistleblowers who were alarmed by Paxton's false October 5 and 7 statements. Margaret Moore, the District Attorney of Travis County, rightly and justly called Paxton out on his misleading statements. In response to Paxton's October 5 and 7 statements, Travis County D.A. Moore wrote to Paxton on October 9:

> On June 10, 2020, my office sent to David Maxwell [the then-current Deputy Director of Law Enforcement Division for the OAG] a letter referring a Request to Investigate (RTI) filed in our office by Nate Paul. You asked my office to hear his complaints. The referral to the OAG was made with your approval. We did not conduct any investigation into the merits of the matters complained of....
>
> The referral cannot and should not be used as any indication of a need for investigation, a desire on the Travis County D.A.'s part for an investigation to take place, or an endorsement of your acceptance of the referral.
>
> My office has closed this file and will take no further action. Furthermore, I have instructed my employees to have no further contact with you or your office regarding this matter.

69. The District Attorney closed her letter to Paxton by expressing her evident alarm at Paxton's conduct:

> Any action you have already taken or will take pursuing this investigation is done solely on your own authority as provided by Texas law. The newly surfaced information raises serious concerns about the integrity of your investigation and the propriety of your conducting it.
>
> Sincerely,
>
> Margaret Moore
>
> Margaret Moore
>
> Cc: Brent Webster

70. On November 11, 2020, Paxton repeated in the *New York Times* the lie that that his investigation of the magistrate judge and state and federal law enforcement officials was initiated by the Travis County District Attorney.

Monday, October 5 – Wednesday, October 28 –
Paxton Removes Duties, Tries to Intimidate Whistleblowers

71. On Friday October 2, 2020, First Assistant Attorney General Jeff Mateer, who was one of the Whistleblowers, resigned. Paxton quickly hired Brent Webster, who was previously with the Williamson County, Texas D.A.'s office, to replace Mateer as First Assistant Attorney General. October 5 was Webster's first day on the job. At 9:00 a.m., Webster began his first day by dismissing Plaintiff Brickman from a very important legislative meeting with Attorney General Paxton. In an obvious effort to embarrass Brickman, Webster waited until the meeting began and then instructed Brickman, with great ceremony but without explanation, to leave the meeting. As the Deputy Attorney General for Policy and Strategic Initiatives, Brickman had always participated in these meetings with the First Assistant and/or Attorney General Paxton. Removing Brickman from the meeting was clearly intended to diminish Brickman's duties and responsibilities to punish him, to try to intimidate and embarrass or humiliate him, and to send a message to other employees that Brickman was being punished and stripped of responsibilities and thereby deter similar attempts to complain about or hold Paxton accountable for his official misconduct.

72. Later that same morning, First Assistant Brent Webster arrived at Brickman's office escorted by an armed peace officer who identified herself as Sergeant Amy Biggs. Mr. Webster repeatedly insisted that he speak alone with Brickman. Brickman politely offered to meet with Mr. Webster in the presence of other deputies but prudently and respectfully declined to meet with Mr. Webster alone or in the presence only of the armed guard accompanying Webster. Confronting Brickman – in needless and unprecedented, banana republic-like, fashion with an armed guard – and insisting on meeting alone for unspecified reasons was clearly an attempt by Webster to intimidate Brickman.

73. About thirty minutes later, Webster came by Brickman's office, saw him talking on his cell phone, and instructed Brickman to take his cell phone to his car and leave it there. At the time, Brickman was talking on his cell phone with a colleague, Senior Counsel to Attorney General Paxton, Zina Bash. Webster's instruction to take the phone to the car was not consistent with any rule or policy of the office. Other employees also carry and use personal cell phones. In fact, Paxton himself carries multiple personal cell phones, including routinely cycling through "burner" cell phones. This needless instruction to Brickman was not just a bush-league attempt at intimidation; not having his cell phone posed a significant issue for Brickman because his school-age children only have his personal cell phone number. Additionally, Brickman is the guardian for his 96 year-old grandmother who suffered a recent fall and broke her back, and Brickman coordinates her care.

74. Still on Monday, October 5, Brickman learned that the Scheduler, a position that reported to Brickman, had been replaced without any involvement by Brickman. This was yet another power play by Webster, clearly intended to demote and demean Brickman by removing responsibilities.

75. After Mateer resigned and Maxwell and Penley were placed on leave, the remaining Whistleblowers and other employees of the OAG watched as their colleagues were systematically retaliated against, mistreated, placed on leave, harassed and fired.

76. On October 8, 2020, during a regular meeting of the OAG's deputies, directors, and other senior members, Whistleblower McCarty asked Webster and Paxton whether the OAG would continue to make disparaging remarks to the media about the Whistleblowers. Paxton did not respond and Webster expressly refused to answer.

77. On October 13, Paxton conducted an interview with the Southeast Texas Record in which he once again maligned the Whistleblowers, stating that his deputies and former first assistant engaged in "an effort to cover up the reality of what really happened [with Paul]."

78. Several of the Whistleblowers had job duties removed, were excluded from regular meetings, and encountered the armed guard that had begun accompanying Webster. Some indicated in formal complaints to the OAG that they believed their OAG issued electronic devices were being monitored and were told that they were "under investigation." The Whistleblowers also received "litigation hold" letters concerning Paul that instructed them to preserve all correspondence and documents related to his complaints. Someone even placed empty boxes near the offices of some of the Whistleblowers. All of these actions were overt and intended to dissuade other OAG employees from engaging in protected conduct and to create a hostile work environment to persuade the remaining Whistleblowers to resign. It worked.

79. On October 19, Ryan Vassar, one of the Whistleblowers, received an email from Webster asking to meet in Webster's office at 1:00. Vassar, who was working remotely at the time, acknowledged Webster's email and reported to Webster's office. Webster invited Vassar into his office and left the door open while armed guard, Amy Biggs, sat in a chair outside the door. After a meaningless, five-minute conversation, Webster announced that he was placing Vassar on investigative leave for two weeks. Vassar asked multiple times why he was being investigated, but Webster refused to answer. Webster, instead, said that the investigation was "open-ended." At the end of the meeting, Webster directed Vassar to leave his agency-issued laptop and cell phone on Webster's desk. Webster and Sergeant Biggs then escorted Vassar to his office to collect his personal belongings, parading him around the building in front of his colleagues in what could have only been intended to demean Vassar and intimidate him and the other Whistleblowers. After

collecting his belongings, Sergeant Biggs then accompanied Vassar in the elevator and escorted him outside the building. Vassar's leave was supposed to end on November 2, 2020, but his earlier request for clarification went unanswered by anyone at the OAG until the next day, November 3, 2020, when the Human Resources Division notified him that his leave had been extended for another 80 hours. Thus, Vassar was, without justification or explanation, completely stripped of his job responsibilities and constructively discharged.

80. On October 20, Plaintiff Brickman and Whistleblowers Lacey Mase were wrongfully terminated by Paxton and Webster for making their whistleblower report.

81. On October 26, Whistleblowers Darren McCarty resigned.

82. On October 28, Whistleblowers Ryan Bangert resigned.

83. Vassar's second 80-hour investigative leave period was set to expire on November 16. However, on November 13—the day after this lawsuit was filed—Vassar was summoned to the Price Daniel building on four hours' notice. After responding that he was out of town and unable to make the suddenly scheduled meeting, Vassar was directed to report at 8:00 AM the following Monday, November 16.

84. Upon his arrival that morning, the retaliation immediately resumed. Vassar was escorted to the eighth floor of the building, where an armed officer required Vassar to surrender his mobile phone and subjected him to a physical search for recording devices (no word on what OAG was afraid might be recorded). After a half-hour wait, Vassar was escorted into the office of First Assistant Webster, with the armed officer prominently standing guard outside the door. Webster stated that his investigation of Vassar was 99% complete and then proceeded to interrogate him on various subjects. When Webster was finished, the armed officer escorted Vassar back down the elevator and outside the building.

85. Then Vassar was ordered to report back to the Price Daniel Building the next day, November 17, at 10:00 AM. Vassar arrived promptly at 10:00 AM.. Webster and HR personnel arrived at 10:30 AM. Webster then fired Vassar for false and pretextual reasons. And just like that—less than two months after their legally protected, good-faith report to law enforcement authorities, OAG had run off all eight whistle blowers.

Paxton Uses His Report to the Texas Legislature as a Tool to Further Retaliate Against the Whistleblowers.

86. Texas State Representative Jeff Leach is the Republican Chairman of the House Committee on Judiciary and Civil Jurisprudence. Rep. Leach represents parts of Collin County, where Paxton is from. Rep. Leach has been a political ally of Paxton's. On October 9, 2010, Rep. Leach wrote to Paxton, "Texans have good reason to be concerned that the important work of [the Office of the Attorney General] may not be possible under your continued leadership. If there is any truth whatsoever to the factual and legal claims of your own senior staff, I believe you must voluntarily resign your position and urge you to do so."

87. Rep. Leach expressed that his paramount concern was that the operations of the OAG "continue without interruption and the trust of the people of Texas in their Chief Law Enforcement Officer must be restored." Rep. Leach requested that Paxton provide a written report to all members of the Texas Legislature as to what specific steps are being taken by Paxton and Brent Webster to ensure that the effective operation of the OAG continue in full force and effect. Rep. Leach asked for the report to be provided within seven (7) days.

88. OAG Director of Legislative Affairs Ryan Fisher emailed various staffers requesting their input into the letter. Although several of the Whistleblowers raised concerns with the operation of the office and the effect of the retaliation on pending matters, none of this criticism

made its way into the response to Chairman Leach, which on information and belief was written by Paxton and Webster – not Fisher.

89. Paxton sent his written report to Chairman Leach and the 181 members of Texas Legislature on October 16, 2020. The report was a barely-two-page, self-aggrandizing letter that failed to respond to Rep. Leach's inquiry in any substantive respect. The letter was a combination of misleading statements, material omissions, and praise for work that mostly began well before First Assistant Webster assumed his new role on October 5, 2020 and that had no bearing on the concern raised by Rep. Leach in his October 9 letter.

90. Paxton used the report requested by Rep. Leach to again defame and retaliate against the Whistleblowers. Paxton's letter began with a lie and a smear: "Thank you for your October 9 letter asking whether OAG operations continue apace despite the false claims made by some OAG employees." Rep. Leach never said the allegations the Whistleblowers took to law enforcement were "false claims." Paxton was yet again making that allegation to smear and discredit the Whistleblowers, and he was using a formal, written report requested by a leader in the Texas House of Representatives to amplify his attacks on the Whistleblowers.

91. Notably, in his response to a request for specific steps he was taking to ensure the office was functioning effectively, Paxton failed to even inform Rep. Leach that at least five of the Whistleblowers had recently filed formal internal grievances alleging that Paxton was harassing and using his office to punish the Whistleblowers. Those complaints from high-ranking deputies were filed in writing and addressed serious concerns about the functioning of the Office of Attorney General. Yet Paxton's report to the Legislature made no mention of the complaints. Paxton's report to the Legislature was to the effect of, "all is well."

October 9 -- Paxton Claims to Shut Down Cammack Investigation of Nate Paul Enemies

92. At the end of a busy Friday, October 9, Paxton claimed to be concluding the Cammack investigation of Nate Paul's enemies. OAG issued a statement from Paxton saying, "In this case, we can only investigate in response to a request for assistance from the District Attorney's office. This investigation is now closed." Subsequent events suggest this was yet another effort by Paxton to mislead the public.

October 19 -- Paxton and Webster Indicate they Will Reopen Investigation of Nate Paul's Enemies

93. Although Paxton told the public on October 9 that the investigation into Nate Paul's enemies "is now closed," after 9:00 p.m. on October 19, several of the Whistleblowers received an odd email from First Assistant Attorney General Brent Webster. It read in part, "Given your conflicts, you are instructed not to work on any OAG business relating to your allegations against Nate Paul, General Paxton, or any connected cases or OAG matters."

94. Plaintiffs were puzzled by what matters still pending in the OAG might relate to Nate Paul or Paxton. One Plaintiff, Blake Brickman, wrote back the next morning seeking clarification. Brickman wrote to Webster:

> Good morning Brent -
>
> I am confused by your email and would like some clarification to ensure that I comply with your directive.
>
> 1. I am not aware of any open OAG matters involving Nate Paul. I believe all such matters have been closed. Please advise if that is not the case and please specify exactly what open Nate Paul related matters you reference in your email so I can fully understand and comply with the directive in your email.
>
> 2. As many other senior OAG officials have told General Paxton repeatedly over the course of the last several months, General Paxton has a "personal conflict" with respect to any Nate Paul related matter.

I sincerely hope that your email does not mean that OAG will reopen past matters - or open new matters - that benefit Nate Paul and his business interests under your watch as First Assistant.

Sincerely,

Blake Brickman

95. Brent Webster responded without answering Brickman's questions. Rather, Webster wrote, "Let's meet at 1:30 in my office to discuss this." Brickman expressed reluctance to meet with Webster to speak about Nate Paul related matters. Brickman offered to meet with Webster at 1:30 with a fellow deputy attorney general present. Brickman also pointed out that, since the directive to stay away from Nate Paul or "related" matters was made in writing, it was appropriate that he receive in writing a response identifying those matters. But Webster was adamant that they meet alone to discuss these unknown Nate Paul related matters that Webster was instructing Brickman to stay away from.

96. Webster had no intention of telling Brickman about the Nate Paul matters he was referring to in his email from the night before. When Brickman arrived at Webster's office, Webster, an armed guard, and a human resources employee were present. Webster brought Brickman into the office and fired him. Webster said Brickman had been "insubordinate."

November 2 – OAG and Paxton terminate Maxwell and Penley

97. On or about October 23, 2020, 3 weeks after Maxwell was put on investigative leave, the OAG collected Maxwell's agency issued laptop and cell phone. On October 28, nearly 1 month after he was put on investigative leave, the OAG requested Maxwell provide his passwords.

98. On or about the afternoon of October 28, 2020, nearly 1 month after Penley was put on investigative leave, Penley received a request to return the following day his agency issued laptop and cell phone, and Penley complied.

99. On Friday October 30, 2020, Penley and Maxwell were instructed to report to separate buildings at the Austin office of the OAG on November 2, 2020 at 9 a.m. OAG's Human Resources department sent the following email to Maxwell:

> Director Maxwell:
>
> Please be advised that you are directed to report to the William P. Clements Building on Monday , November 2, 2020 at 9:00 a.m. Please proceed to 205J (large training room) on the 2nd floor. Please confirm receipt of this email.
> Thank you for your cooperation.
>
> HR-Help

100. Penley asked what the purpose of the meeting was and was only told it was "work-related."

101. Maxwell and Penley appeared as requested at the OAG's Austin office on November 2, 2020, and they both experienced even more irregularities, harassment, and retaliation. Contrary to Texas law and Paxton's instituted written policy preventing the disarming of licensed peace officers, Brent Webster issued orders to OAG staff to prevent Maxwell from entering if armed, despite Maxwell's status and distinguished career. The OAG violated Maxwell's rights as a licensed peace officer, with a valid License to Carry, to possess a legal weapon at a State Office, contrary to Article 30.06. Penley was escorted up the elevator and into the Executive Conference Room by an armed guard, who remained stationed outside the room throughout the meeting, which lasted from about 9 a.m. to 5 p.m.

102. Penley and Maxwell were subjected to hostile conditions and conduct throughout the entire day. Webster refused to tell Penley or Maxwell why they had been placed on

investigative leave, the reason for the investigation or the scope of it. He also denied Penley's request to have one of the other Whistleblowers attend the meeting as a witness. Instead, Webster proceeded to interrogate Penley and Maxwell in a hostile and aggressive manner. The OAG engaged in a charade under the guise of an administrative investigation interview, but it was apparent that the Whistleblowers' complaints about Paxton's misconduct were the driving force for the events of November 2. Webster pressured both Maxwell and Penley to resign, which they refused to do. At the end of the day, the OAG wrongfully terminated Maxwell's and Penley's employment in retaliation for their protected complaints of illegal conduct by Paxton.

Plaintiffs File Formal Complaints with OAG

103. On October 16 and again on October 29, Plaintiff Brickman initiated action under any applicable grievance or appeal procedure of the OAG relating to suspension or termination of employment or adverse personnel action pursuant to TEX. GOV'T CODE §554.006(a). Although the agency had 60 days to investigate his complaint pursuant the Whistleblower Act, OAG HR responded to the October 16 complaint in less than 24 hours stating that there was no complaint procedure available to Deputy Attorney Generals like Brickman and immediately dismissing the complaint.

104. On October 12 and again on November 10, 2020, Plaintiff Penley initiated action under any applicable grievance or appeal procedure of the OAG relating to suspension or termination of employment or adverse personnel action pursuant to TEX. GOV'T CODE §554.006(a). OAG HR responded to the Friday, October 12 complaint by letter dated October 16 stating that there was no complaint procedure available to Deputy Attorney Generals like Penley and immediately dismissing the complaint. Penley subsequently inquired whether there was another internal administrative procedure at the OAG by which he could appeal his wrongful

termination claim other than the formal complaint process under which he had attempted to initiate a complaint on October 12. By letter dated November 10, the Formal Complaint Officer replied:

> ….This letter is to inform you that there is no other internal administrative procedure at the Office of the Attorney General other than the formal complaint process by which you may appeal your termination….

105. On November 10, Penley initiated another grievance by submitting a formal complaint about his wrongful termination.

106. On October 13 and again on November 4, 2020, Plaintiff Maxwell initiated action under any applicable grievance or appeal procedure of the OAG relating to suspension or termination of employment or adverse personnel action pursuant to TEX. GOV'T CODE §554.006(a).

107. On October 15, 2020, Plaintiff Vassar initiated an action under any applicable grievance or appeal procedure of the OAG relating to suspension or termination of employment or adverse personnel action pursuant to TEX. GOV'T CODE §554.006(a). His formal complaint detailed a litany of unlawful and retaliatory actions taken against him by Paxton and OAG since his good-faith report to appropriate law enforcement authorities of legal violations by the OAG and by the Attorney General Ken Paxton. Although the agency had 60 days to investigate his complaint pursuant the Whistleblower Act, OAG HR responded to the October 15 complaint the very next day stating that there was no complaint procedure available to Deputy Attorney Generals such as Vassar and immediately closing the complaint.

November 5 – the Smear Campaign Continues

108. On November 5, 2020, Paxton's campaign spokesperson, Ian Prior, who is not an OAG employee and is therefore without knowledge on any OAG personnel matters, referred to Plaintiffs in a news article as "desperate former employees trying to spin a false narrative".

109. On November 11, 2020, the New York Times reported:

> Mr. Paxton told the New York Times in a statement that the latest controversy was created by members of his staff who had opposed his decisions without having all the facts and who made 'their disagreement noisy and public' in an attempt to undermine the integrity of the office.

IV. Cause of Action

Count 1: Violation of Texas Whistleblower Act

110. Plaintiffs incorporate and re-allege paragraphs 1-109 above.

111. Plaintiffs were all public employees employed by the OAG, which is a state governmental entity and unit of the State of Texas.

112. Plaintiffs all in good faith made reports to law enforcement authorities of violations of criminal law by the OAG and by the Attorney General Ken Paxton. The OAG and Paxton specifically were aware of Plaintiffs' good faith reports to law enforcement.

113. Plaintiffs were subsequently subjected to adverse personnel actions by OAG and Paxton -- including demotion, suspension, removal of work assignments, hostile work environment, constructive termination and termination of employment – because of the reports they made. The adverse employment actions would not have been taken against them had they not made the good-faith reports to law enforcement. Each of the adverse employment actions was committed within 90 days of the reports to law enforcement, and in some cases within 1 business day of Paxton's learning of the reports. Thus, under Texas law, there is a presumption that the adverse employment actions were taken because the employee made the report to law enforcement. TEX. GOV'T CODE §554.004(a). In addition, the circumstances of the actions prove that the adverse actions were taken because of the reports of Attorney General Paxton's criminal conduct to law enforcement.

114. The adverse employment actions have caused Plaintiffs damages, including but not limited to past lost wages, past and future lost benefits, loss of future earnings and earning capacity, harm to his reputation, emotional pain, mental anguish, and loss of enjoyment of life.

115. Plaintiffs seek legal and other equitable remedies, reinstatement to their former positions or equivalent positions and to have lost fringe benefits and seniority rights reinstated, including but not limited to the vesting of retirement benefits.

116. Plaintiffs have all invoked any available grievance or appeal procedure.

117. All conditions precedent have been met, waived, or otherwise been satisfied to Plaintiffs' filing suit.

V. Verified Motion for Temporary Injunction

118. Plaintiffs incorporate by reference paragraphs 1 -117 above and the declarations attached hereto respectively verifying them.

119. Plaintiffs file the verified motion for temporary injunction asking the Court to order reinstatement of Plaintiffs pending trial of this case.

A. Temporary Injunction Standards

120. An applicant for temporary injunction must (a) plead a cause of action; (b) show a probable right to recover on that cause of action; and (c) show a probable, imminent, and irreparable injury in the interim. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

121. As the Texas Supreme Court has stated in *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993):

> The decision to grant or deny a temporary writ of injunction lies in the sound discretion of the trial court, and the court's grant or denial is subject to reversal only for a clear abuse of that discretion. At the hearing for a temporary writ of injunction, the applicant is not required to establish that she will prevail on final trial; the only question before the trial court is whether the applicant is entitled to preservation of the status quo pending trial on the merits.

122. In the context of an injunction, the status quo is defined as "the last, actual, peaceable, non-contested status that preceded the pending controversy." *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004); *Intercontinental Terminals Co., LLC v. Vopak N. Am., Inc.*, 354 S.W.3d 887, 892 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

123. In a Texas Whistleblower Act case in which a plaintiff seeks a temporary injunction, preserving the status quo means restoring the plaintiff to the position the plaintiff held before the allegedly retaliatory act. *City of Galveston v. Humphrey*, 2001 Tex. App. LEXIS 1365 *8 (Tex. App. – Houston [1st Dist.] 2001, no pet.).

B. Plaintiffs Have a Probable Right to Recovery.

124. To establish a claim under the Texas Whistleblower Act, a plaintiff must plead: (1) that he was a public employee, (2) that he reported what he in good faith believed was a violation of law committed by his employing governmental entity or another public employee, (3) that the report was made to what the employee in good faith believed was an appropriate law enforcement authority, and (4) that his employing governmental entity took an adverse personnel action against him because of the report. TEX. GOV'T CODE §554.001 *et. seq.*; *Tex. Dep't. of Human Servs. v. Okoli*, 440 S.W.3d 611, 614 (Tex. 2014); *Resendez v. Tex. Comm'n on Envtl. Quality*, 391 S.W.3d 312, 322 (Tex. App. – Austin 2012, reversed on other grounds).

125. As described in the foregoing verified recitation of the facts and as will be demonstrated in the hearing on this motion, Plaintiffs have a probable right of recovery.

126. All of the Plaintiffs were public employees employed by the Office of the Attorney General of the State of Texas, which is a state governmental entity and unit of the State of Texas.

127. Each of the Plaintiffs formed a good faith belief that Paxton and the OAG violated laws regarding bribery, improper influence, and abuse of office by using OAG's and Paxton's

extraordinary influence and power to aid Paxton's close friend and donor and to attack the friend and donor's criminal investigators and civil adversaries.

128. On September 30, 2020, each of the Plaintiffs in good faith made reports to law enforcement authorities of suspected violations of criminal law by the OAG and by Paxton.

129. On October 1, 2020, OAG and Paxton learned of Plaintiffs' good faith reports to law enforcement because seven of the eight OAG whistleblowers, including Plaintiffs Brickman, Penley and Vassar, signed and sent to the OAG's Director of Human Resources a letter notifying OAG of their good faith report to an appropriate law enforcement authority of suspected violations of law committed by Paxton and OAG. Plaintiff Maxwell did not sign the October 1 letter but sent a separate written notice to Human Resources regarding his good faith whistleblower report to an appropriate law enforcement authority.

130. OAG and Paxton learned of Plaintiffs' good faith reports on October 1, 2020, and took the adverse employment actions with knowledge of them. Each of the acts of retaliation alleged, including the termination of all of the Plaintiffs, occurred within 90 days of their reports to law enforcement. Thus, under Texas law, there is a presumption that the OAG took these adverse employment actions because the Plaintiffs made their reports to law enforcement. TEX. GOV'T CODE §554.004(a).

131. Even without the applicability of the presumption, Plaintiffs are likely to succeed on the merits of establishing a causal connection between their reports to law enforcement and the termination of their employment and other retaliation by OAG.

132. Circumstantial evidence can be sufficient to establish a causal link between the adverse employment action and the reporting of illegal conduct. *Tex. Dep't of Criminal Justice v. McElyea*, 239 S.W.3d 842, 855-56 (Tex. App.—Austin 2007, pet. denied). Such evidence

includes (1) knowledge of the report of illegal conduct, (2) expression of a negative attitude toward the employee's report of the conduct, (3) failure to adhere to established company policies regarding employment decisions, (4) discriminatory treatment in comparison to similarly situated employees, and (5) evidence that the stated reason for the adverse employment action was false. *Id.* A plaintiff need not present evidence involving all five categories to prove causation. *See Continental Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 452 (Tex. 1996).

133. The evidence is overwhelming that OAG retaliated against Plaintiffs because of their reports to law enforcement. For example, on October 2, one day after the letter to OAG Human Resources, Plaintiffs Penley and Maxwell were placed on "investigative leave" at the direction of Paxton. OAG disabled their email accounts and building access badges. Paxton and the OAG refused to tell Penley or Maxwell what was being investigated or whether they were accused of wrongdoing.

134. On Saturday, October 3 and Monday October 5, the OAG Communications Department issued public statements that were false and misleading and that were intended to intimidate and retaliate against whistleblowers, including the Plaintiffs. For example, in official OAG statements on October 3 and 5, 2020 directly related to Plaintiffs' reports to law enforcement, OAG referred to the Plaintiffs as "rogue employees" and accused Plaintiffs of making "false reports" to law enforcement. OAG also accused Plaintiffs publicly of making their reports to law enforcement "to impede an ongoing investigation into criminal wrongdoing by public officials including employees of this office." OAG also threatened Plaintiffs by stating publicly in regard to their reports to law enforcement that "making false claims is a very serious matter and we plan to investigate this to the fullest extent of the law."

135. On Monday, October 5, OAG retaliated further against Plaintiff Brickman by removing responsibilities and authority. For example, on Monday October 5, Plaintiff Brickman was abruptly dismissed from a legislative meeting with Attorney General Paxton. The manner in which Plaintiff Brickman was dismissed from the meeting suggests a motive to intimidate and retaliate and send a message to Brickman and to others that whistleblowing would be punished. Also on October 5, the OAG's new First Assistant, Brent Webster, arrived at Brickman's office escorted by an armed peace officer in a manner calculated to intimidate and retaliate against Plaintiff Brickman. About thirty minutes later, First Assistant Webster instructed Brickman, contrary to any policy and contrary to normal practice for all other employees, to take his cell phone to his car and leave it there. Still on Monday, October 5, Brickman learned that Paxton's scheduler, a position that reported to Brickman, had been replaced without any involvement by Brickman.

136. On October 7, 2020, OAG issued a public statement falsely insinuating that Vassar had approved of the hiring of a so-called "special prosecutor" to investigate a federal magistrate judge, and federal and state prosecutors.

137. On October 19, Plaintiff Vassar was placed on leave for investigative reasons. Plaintiff Vassar learned of the leave at a meeting OAG First Assistant Webster called and during which Webster posted an armed guard just outside the open door to Webster's office. Webster refused to answer when Plaintiff Vassar asked why he was being investigated. Webster would only say the investigation was "open-ended." OAG had Plaintiff Vassar escorted from the building by the armed guard in front of his colleagues and coworkers in what was an effort intended to demean and intimidate Vassar and send a message of warning to other actual or would-be whistleblowers.

138. On October 20, 2020, OAG fired Plaintiff Brickman. That same day, OAG fired Lacey Mase, who was one of the 7 signers of the October 1 whistleblower letter.

139. On October 26, 2020, Darren McCarty, one of the signers of the October 1 whistleblower letter resigned. On October 28, 2020, another signatory, Ryan Bangert, resigned.

140. On November 2, 2020, OAG fired Plaintiff Maxwell and Plaintiff Penley.

141. On November 17, 2020, OAG fired Plaintiff Vassar.

142. By November 17, 2020, four of the seven signers of the October 1 whistleblower letter had been fired, and the other three had resigned. In addition, Plaintiff Maxwell, who did not sign the October 1 letter but communicated separately that he had made a report to law enforcement, had also been fired – all within seven (7) weeks of their good faith reports to law enforcement.

143. In addition, OAG's conduct toward Plaintiffs failed to adhere to its established policies and processes regarding employment decisions. For example, an armed guard was used to try to intimidate some of the Plaintiffs. Plaintiff Brickman was instructed, contrary to OAG policy, to take his cell phone to his car and leave it there. Plaintiff Brickman was also stripped of authority and responsibilities. Some of Plaintiffs were placed on investigative leave without explanation and in contravention OAG policy and practice.

C. Plaintiffs Can Show Probable, Imminent, Irreparable Harm.

144. An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

145. An adequate remedy at law is one that is "as complete, practical, and efficient to the ***prompt*** administration of justice as is equitable relief." *Intercontinental Terminals Co., LLC v.*

Vopak N. Am., Inc., 354 S.W.3d 887, 895 (Tex. App.—Houston [1st Dist.] 2011, no pet.)(emphasis added). "Thus, if damages do not provide as complete, practical and efficient a remedy as may be had by injunctive relief, the trial court does not err in granting temporary injunction so long as the other elements of injunctive relief are satisfied." *Id.*

146. Threatened injury to reputation and good will are frequently the basis for temporary injunctive relief. *Id.* (citing *Lifeguard Benefit Servs*. v. *Direct Med. Network Solutions, Inc.,* 308 S.W.3d 102, 118; *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc*., 281 S.W.3d 215, 228 (Tex. App.—Fort Worth 2009, pet. denied); *T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc*., 965 S.W.2d 18, 24 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd); *Townson v. Liming*, No. 06-10-00027-CV, 2010 Tex. App. LEXIS 5459, 2010 WL 2767984, at *2-3 (Tex. App.—Texarkana July 14, 2010, no pet.) (mem. op.); *Lionheart Co., Inc. v. PGS Onshore, Inc*., No. 10-06-00303-CV, 2007 Tex. App. LEXIS 4628, 2007 WL 1704906, at *2 (Tex. App.—Waco June 13, 2007, no pet.) (mem. op.); *RenewData Corp. v. Strickler*, No. 03-05-00273-CV, 2006 Tex. App. LEXIS 1689, 2006 WL 504998, at *15-16 (Tex. App.—Austin Mar. 3, 2006, no pet.) (mem. op.).

147. Also, "[i]f damages cannot compensate for any wrong committed by [the defendant], or if the damages are not measurable by any certain pecuniary standard, then the injury is irreparable and the injunction should issue." *Townson v. Liming*, No. 06-10-00027-CV, 2010 Tex. App. LEXIS 5459, at *8-9 (Tex. App.—Texarkana July 14, 2010, no pet.). "Certain" means "fixed, settled, and indisputable." *Id.* The value of "lost business contacts and collaborations" and lost employment opportunities are "anything but fixed, settled, and indisputable." *Id.*

148. In addition, the Texas Whistleblower Act expressly provides reinstatement as a remedy for a retaliatory termination. The legislature has therefore acknowledged that money damages alone cannot in some situations remedy a retaliatory discharge of a whistleblower.

149. Money damages alone cannot adequately remedy the retaliatory discharges and other retaliatory actions in this case. OAG's retaliation consists of firing and publicly accusing Plaintiffs of serious personal and professional misconduct in a manner likely to foreclose other professional opportunities. By way of example, OAG retaliated against Plaintiffs by publicly accusing Plaintiffs, all of whom are either lawyers or law enforcement officials, of making false reports to law enforcement and doing so to interfere with an OAG investigation. The harm to Plaintiffs from losing their jobs in this highly public and disparaging way will be exacerbated by continued unemployment and will be avoided or mitigated in significant respect by reinstatement to their positions. The kind of harm being inflicted on Plaintiffs by remaining terminated from their positions at OAG under these circumstances is extremely difficult if not impossible to measure by a certain pecuniary standard.

150. In addition, the retaliation by OAG and Plaintiffs' loss of employment will cause continued harm such as loss of reputation and goodwill in their professions unless a temporary injunction is issued reinstating them to their jobs. Plaintiffs have demonstrated that, without a temporary injunction, they will suffer loss of goodwill and reputation with other lawyers, OAG colleagues, potential clients and others in their industry and that such injury is difficult to calculate or monetize. Plaintiffs, whose careers have consisted largely of public service legal and law enforcement positions, are particularly susceptible to the kind of harm the retaliation by the OAG inflicts on them while they remain terminated. This loss of goodwill and reputation constitutes irreparable injury.

151. In addition, an injury is irreparable if it cannot be adequately remedied at law – i.e., if the applicant cannot be adequately compensated in damages or if damages are very difficult to measure by any certain pecuniary standard. Many of the kinds of damages Plaintiffs seek in this case will be very difficult to measure by a pecuniary standard. Plaintiffs, if they prevail, may be awarded, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to their reputation, and loss of future earning capacity associated with being terminated abruptly and with the public smearing of Plaintiffs by OAG. An injunction ordering reinstatement pending trial could lessen many of these kinds of harm, which are very difficult to measure by any certain pecuniary standard.

152. In addition, reinstating Plaintiffs pending trial will mitigate the chilling effect that OAG's retaliation and public statements have had and will have continue to have on witnesses, including both present and former OAG employees.

153. In addition, the delay that will be occasioned by OAG's interlocutory appeal or other procedural tactics will prevent a legal remedy or reinstatement upon final judgment from providing an adequate remedy.

154. All of the harm described above that Plaintiffs would sustain without temporary injunctive relief is imminent. The harm is in fact happening already, and this injunction seeks to avoid further injury in the interim between the issuance of this order and entry of final judgment.

155. For these reasons, Plaintiffs seek a temporary injunction decreeing that Defendant Office of the Attorney General of the State of Texas, and its officers, agents, servants, employees, and attorneys and those acting in active concert or participation with them who receive actual notice of the order by personal service or otherwise be ORDERED:

1. To immediately REINSTATE Plaintiff James Blake Brickman to the position of Deputy Attorney General for Policy & Strategy Initiatives in the OAG and to compensate him starting immediately by paying him at the rate of pay and level of benefits, including health care and retirement benefits and all other perquisites of employment as were in effect as of September 30, 2020;

2. To immediately REINSTATE Plaintiff David Maxwell to the position of Director of the Law Enforcement Division in the OAG and to compensate him starting immediately by paying him at the rate of pay and level of benefits, including health care and retirement benefits and all other perquisites of employment as were in effect as of September 30, 2020;

3. To immediately REINSTATE Plaintiff J. Mark Penley to the position of Deputy Attorney General for Criminal Justice at the OAG and to compensate him starting immediately by paying him at the rate of pay and level of benefits, including health care and retirement benefits and all other perquisites of employment as were in effect as of September 30, 2020;

4. To immediately REINSTATE Plaintiff Ryan M. Vassar to the position of Deputy Attorney General for Legal Counsel at the OAG and to compensate him starting immediately by paying him at the rate of pay and level of benefits, including health care and retirement benefits and all other perquisites of employment as were in effect as of September 30, 2020;

5. To RETAIN Plaintiffs Brickman, Maxwell, Penley, and Vassar in those positions of employment at that rate of pay and benefits, including any pay or benefits increases, but not decreases, that would, in the ordinary course of the affairs of the OAG, be provided to employees in such Plaintiff's position, except that Defendant may terminate a Plaintiff's employment if, and only if, Defendant obtains an order from this Court for good cause found after written motion, notice to Plaintiffs, and a hearing; and

6. To grant such other injunctive relief as the Court may deem appropriate.

VI. Jury Demand

156. Having tendered the appropriate fee, Plaintiffs hereby demand a trial by jury.

VII. Attorneys' Fees

157. Plaintiffs have retained the undersigned attorneys to prosecute this case and seek to be awarded their reasonable and necessary attorneys' fees and costs of court.

VIII. Civil Penalty

158. Pursuant to TEX. GOV'T CODE §554.008(a), Plaintiffs hereby request the District Attorney of Travis County, Texas to intervenene in this suit and seek the imposition of a civil penalty of $15,000 against any supervisor, including Ken Paxton, for each adverse personnel action taken against any Plaintiff in violation of the Texas Whistleblower Act.

IX. Request for Disclosure

159. Under Texas Rule of Civil Procedure 194, Plainitffs request that Defendant disclose, within fifty (50) days of the service of this request, the information and materials described in Rule 194.2(a) through (l).

X. Damages, Conclusion and Prayer

Plaintiffs respectfully request that they have judgment against Defendants for:

1. A temporary injunction as described in Section V. herein;
2. A permanent injunction ordering reinstatement and all other equitable relief to which Plaintiffs may be entitled;
3. Actual damages;
4. Compensation for wages lost during the period of suspension or termination, including back pay and lost benefits;
5. Compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, including injury to Plaintiffs' reputations;
6. Recovery for future lost earning capacity;
7. Injunctive relief ordering Plaintiffs reinstated to their former positions or equivalent positions;

8. Exemplary damages;

9. Reasonable attorneys' fees for prosecution of this case at trial and on appeal;

10. All costs of expert witnesses and other costs of litigation;

11. Pre-judgment interest as required by Chapter 304 of the Texas Finance Code or other applicable laws;

12. Post-judgment interest at the maximum legal rate; and

13. All other relief to which Plaintiffs may be entitled at law, or in equity.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF RYAN M. VASSAR

CERTIFICATE OF SERVICE

I certify the foregoing document has been served on the following counsel of record via email on the 17th day of December, 2020:

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/s/ Thomas A. Nesbitt
Thomas A. Nesbitt

CAUSE NO. D-1-GN-20-006861

JAMES BLAKE BRICKMAN, DAVID MAXWELL, J. MARK PENLEY, and RYAN M. VASSAR Plaintiffs,	§	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS	§	
Defendant.	§	250th JUDICIAL DISTRICT

Declaration of James Blake Brickman

1. My name is James Blake Brickman. I am over the age of eighteen years, am of sound mind and capable of making this Declaration. I have personal knowledge of the facts stated in this Declaration, and they are true and correct.

2. The facts plead in paragraphs 1, 2, 6, 7, 8, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 21, 55, 56, 58-67, 68-78, 80-82, 86-96, 103, 108-109 of the foregoing Plaintiffs' First Amended Petition and Verified Motion for Temporary Injunction and Permanent Injunction are within my personal knowledge and are true and correct or, where specifically noted, are based upon published reports. I hereby attest that the facts plead in paragraphs 29-37 of the foregoing Plaintiffs' First Amended Petition and Verified Motion for Temporary Injunction and Permanent Injunction are true and correct because they were reported to me by individuals I have reason to believe had personal knowledge.

3. My name is James Blake Brickman, my date of birth is 7/[redacted]/19[redacted], and my address is [redacted], Austin, Texas 7[redacted]. Pursuant to TEX. CIV. PRAC. & REM. CODE § 132.001, I declare under penalty of perjury that the foregoing is true and correct.

Executed in Travis County, State of Texas, on the 16th day of December, 2020.

James Blake Brickman

[redacted]

CAUSE NO. D-1-GN-20-006861

JAMES BLAKE BRICKMAN, DAVID MAXWELL, J. MARK PENLEY, and RYAN M. VASSAR Plaintiffs,	§ § § § §	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS	§ §	
Defendant.	§	250th JUDICIAL DISTRICT

Declaration of David Maxwell

1. My name is David Maxwell. I am over the age of eighteen years, am of sound mind and capable of making this Declaration. I have personal knowledge of the facts stated in this Declaration, and they are true and correct.

2. The facts plead in paragraphs 3, 38-45, 55-57, 68, 75, 97-102, 106, 129, 133-134, 140, and 142 of the foregoing Plaintiffs' First Amended Petition and Verified Motion for Temporary Injunction and Permanent Injunction are within my personal knowledge and are true and correct or, where specifically noted, are based upon published reports.

My name is David Maxwell, my date of birth is [redacted] and my address is [redacted], Bertram, Texas 78[redacted]. Pursuant to TEX. CIV. PRAC. & REM. CODE § 132.001, I declare under penalty of perjury that the foregoing is true and correct.

Executed in Travis County, State of Texas, on the 10 day of December, 2020.

David Maxwell

CAUSE NO. D-1-GN-20-006861

JAMES BLAKE BRICKMAN, DAVID MAXWELL, J. MARK PENLEY, and RYAN M. VASSAR Plaintiffs,	§ § § § §	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS	§ §	
Defendant.	§	250th JUDICIAL DISTRICT

Declaration of J. Mark Penley

1. My name is J. Mark Penley. I am over the age of eighteen years, am of sound mind and capable of making this Declaration. I have personal knowledge of the facts stated in this Declaration, and they are true and correct.

2. The facts plead in paragraphs 4, 40-45, 52, 54-57, 59, 98-102, 104-105, 129-130, 133, 140, and 142 of the foregoing Plaintiffs' First Amended Petition and Verified Motion for Temporary Injunction and Permanent Injunction are within my personal knowledge and are true and correct or, where specifically noted, are based upon published reports.

My name is J. Mark Penley, my date of birth is 12[redacted], and my address is [redacted], Dallas, Texas. Pursuant to TEX. CIV. PRAC. & REM. CODE § 132.001, I declare under penalty of perjury that the foregoing is true and correct.

Executed in Dallas County, State of Texas, on the 16th day of December, 2020.

s/ J. Mark Penley
J. Mark Penley

[redacted]

CAUSE NO. D-1-GN-20-006861

JAMES BLAKE BRICKMAN, DAVID MAXWELL, J. MARK PENLEY, and RYAN M. VASSAR Plaintiffs,	§ § § § §	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS	§ §	
Defendant.	§	250th JUDICIAL DISTRICT

Declaration of Ryan M. Vassar

1. My name is Ryan M. Vassar. I am over the age of eighteen years, am of sound mind and capable of making this Declaration. I have personal knowledge of the facts stated in this Declaration, and they are true and correct.

2. The facts plead in paragraphs 5, 14, 18–28, 37, 46–56, 58–70, 75–92, 107–109 of the foregoing Plaintiffs' First Amended Petition and Verified Motion for Temporary Injunction and Permanent Injunction are within my personal knowledge and are true and correct or, where specifically noted, are based upon published reports.

My name is Ryan M. Vassar, my date of birth is [redacted], 19[redacted] and my address is [redacted] [redacted]Avenue, Austin, Texas 78[redacted] Pursuant to TEX. CIV. PRAC. & REM. CODE § 132.001, I declare under penalty of perjury that the foregoing is true and correct.

Executed in Travis County, State of Texas, on the 17 day of December, 2020.

Ryan M. Vassar

[redacted]

CAUSE NO. D-1-GN-20-006861

JAMES BLAKE BRICKMAN, DAVID MAXWELL, J. MARK PENLEY, and RYAN M. VASSAR Plaintiffs,	§ § § § §	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS	§ §	
Defendant.	§	250th JUDICIAL DISTRICT

PLAINTIFFS' NOTICE OF HEARING ON MOTION FOR TEMPORARY INJUNCTION

Please take notice that Plaintiffs' Motion for Temporary Injunction is set for hearing beginning at 9:00 AM on Monday, February 22, 2021, on the Central Docket, Travis County Courthouse, 1000 Guadalupe, Austin, Texas, 78701. The Court has allotted a maximum of four days for the hearing.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF RYAN M. VASSAR

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served on January 6, 2021, via the Court's electronic filing service to the following counsel of record:

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Cause No. D-1-GN-20-006861

James Blake Brickman, *et al.*, Plaintiffs, v. **Office of the Attorney General of Texas,** Defendant.	**In the District Court of** **Travis County, Texas** **250th Judicial District**

Office of the Attorney General of Texas's
Motion to Dismiss Based on Lack of Subject Matter Jurisdiction

Defendant, Office of the Attorney General of Texas ("OAG"), moves the Court under Rule 91a of the Texas Rules of Civil Procedure to dismiss for lack of subject matter jurisdiction the claims asserted by Plaintiffs James Blake Brickman, David Maxwell, J. Mark Penley, and Ryan M. Vassar under the Texas Whistleblower Act, Tex. Gov't Code § 554.001, *et seq.*

Based solely upon the controlling law and Plaintiffs' first amended petition, the Court should dismiss this suit under Rule 91a because the Court lacks subject matter jurisdiction.

Introduction

Plaintiffs are all political appointees. Their requested relief in this case contradicts the Texas Constitution's guarantee of the separation of powers, subverts the concept of a political appointee, and cannot be allowed to stand. In the United States and in Texas, when a political appointee reaches a point where they do not agree with or cannot support an action by their elected official, the appropriate thing to do is resign, as political appointees do not have independent authority outside their elected official. Plaintiffs in this case have taken a position that would

require elected officials to retain political appointees that do not align with or support positions taken by their elected official who appointed them.

The Court's decision in this case will have broad and significant impact on the concept of political appointees for current and future elected officials in Texas, both Republican and Democrat. The decision in this case will impact the role of political appointees for the Governor, the Lt. Governor, Attorney General, Comptroller of Public Accounts, Commissioner of the General Land Office, Judges, Sheriffs, District Attorneys, and any other elected official that have political appointees under their authority.

Plaintiffs' position would give political appointees independent authority from the elected officials, in that they can take a position adverse to the elected official, destroy all trust between the elected official, and still retain a position of authority within the elected official's administration, to do as they see fit. This position undermines the will of the voters, who chose Ken Paxton as their Attorney General. The Attorney General's powers are vast and flow directly from the Texas Constitution, Tex. Const. art. IV, § 22, which in turn rests on the sovereignty of the people of the State of Texas who elected him. *Id.*, preamble. Plaintiffs are not granted such power. Plaintiffs' position should be summarily rejected and this plea to the jurisdiction should be granted for the benefit of all duly-elected Texas Officers and so that the will of the voters is upheld.

Statement of Position

The OAG is a state governmental entity presumptively immune from suit and liability unless the Legislature has expressly waived sovereign immunity. The Texas Whistleblower Act provides a *limited* waiver of immunity, but only for claims of adverse employment actions against a public employee taken in response to a good faith report to an appropriate law enforcement authority of unlawful acts "*by the employing governmental entity or another public employee*."

Tex. Gov't Code § 554.002(a) (emphasis added). Here, Plaintiffs claim to have reported unidentified unlawful acts Plaintiffs claim were only committed personally by the Attorney General, who is neither the "employing governmental entity" nor "a public employee." Accordingly, the OAG's immunity from suit is not waived.

This important distinction, contained within the statute itself, implicates critical and core constitutional principles: the separation of powers and the necessity that elected officers at the highest level of state government must have confidence in, and to be able to rely upon, the loyalty and fidelity of their closest aides. While Plaintiffs allege they were "among [the Attorney General's] most senior staff"[1] and thus individuals in whom the Attorney General had placed, and from whom he rightfully required, significant personal loyalty, trust, and confidence. As Plaintiffs' pleading admits, Plaintiffs not only lacked that requisite loyalty, trust, and confidence, Plaintiffs broadcasted their lack of it.

The Court also lacks subject matter jurisdiction because, even if any Plaintiff might otherwise be protected under the Whistleblower Act, it is well established that internal reports made "up the chain of command about conditions in a workplace" are not protected under the Whistleblower Act because, as Plaintiffs admit in their own petition, they are reports made in the course of each Plaintiff's duties. As political appointees who admit they were tasked with, among other things, "investigating some of the most serious criminal matters and conduct in [Texas],"[2] "supervis[ing] the [OAG's] Criminal Prosecutions, Special Prosecutions, Criminal Appeals, and Crime Victims Services Divisions,"[3] and "represent[ing] the OAG before other state and federal governmental bodies [who] oversaw 60 attorneys and 30 professional staff across 5 different

[1] Pls.' 1st Am. Pet., ¶ 1.

[2] *Id.*, ¶ 3.

[3] *Id.*, ¶ 4.

divisions,"[4] each Plaintiff admits each acted only "as was their duty."[5] Thus, regardless of the inaccuracy (or more likely falsity) of their alleged report, no Plaintiff engaged in any protected speech or conduct.

Additionally, the OAG's immunity is not waived because Plaintiffs have failed to allege facts demonstrating any Plaintiff—let alone each Plaintiff—made a good faith report of a violation of law to an appropriate law enforcement authority that is protected under the Whistleblower Act. Indeed, Plaintiffs expressly admit that Plaintiff David Maxwell did neither.[6]

Argument & Authorities

1. Standard of Review

Rule 91a of the Texas Rules of Civil Procedure allows a party to move to dismiss a cause of action when it has no basis in law or fact. Tex. R. Civ. P. 91a.1. "A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." Tex. R. Civ. P. 91a.1. Texas courts have described two situations in which a claim has no basis in law: (1) the petition alleges too few facts to demonstrate a viable, legally cognizable right to relief; and (2) the petition alleges additional facts that, if true, bar recovery. *See Stallworth v. Ayers*, 510 S.W.3d 187, 190 (Tex. App.—Houston [1st Dist.] 2016, no pet.). Plaintiffs' petition presents both grounds for dismissal for lack of a waiver of the OAG's immunity from suit.

In assessing whether a cause of action has any basis in law or fact under Rule 91a, "the court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action." Tex. R. Civ. P. 91a.6. "[Rule 91a] limits the scope of the

[4] *Id.*, ¶ 5.

[5] *Id.*, p. 2.

[6] *Id.*, ¶ 55.

court's factual inquiry—the court must take the 'allegations' as true—*but does not limit the scope of the court's legal inquiry in the same way*." *Bethel v. Quilling*, 595 S.W.3d 651, 655 (Tex. 2020) (emphasis added). Applicable here, "[Rule 91a] does not limit the universe of legal theories by which the movant may show that the claimant is not entitled to relief based on the facts as alleged." *Id*.

"As a procedural matter . . . a jurisdictional challenge, including one premised on sovereign immunity, 'may be raised by a plea to the jurisdiction[.]'" *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019) (quoting *State v. Lueck*, 290 S.W.3d 876, 884 (Tex. 2009)). If there is no subject matter jurisdiction, the claim has no basis in law and thus "Rule 91a can be used to obtain dismissal." *Thibodeau v. Lyles*, 558 S.W.3d 166, 169 (Tex. App.—Houston [14th Dist.] 2018, no pet.). Accordingly, a challenge to subject matter jurisdiction based on sovereign or governmental immunity may be raised by any dispositive motion, including a motion under Rule 91a. *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724–25 (Tex. 2016), *accord, City of Austin v. Liberty Mut. Ins*., 431 S.W.3d 817 (Tex. App.—Austin 2014, no pet.).

At all times, "[t]he plaintiff bears the burden to establish the trial court's jurisdiction." *Heckman v. Williamson County*, 369 S.W.3d 137, 150 (Tex. 2012). "Governmental immunity from suit defeats a trial court's subject matter jurisdiction." *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 637 (Tex. 1999); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004). Governmental entities are not only presumed immune from suit, *Lubbock Cty. Water Control & Improv. Dist. v. Church & Akin, L.L.C.*, 442 S.W.3d 297, 300 (Tex. 2014), but there is in fact a "heavy presumption in favor of immunity," *City of Galveston v. State*, 217 S.W.3d 466, 469 (Tex. 2007).

Subject matter jurisdiction is essential to the power of a court to decide a case, and without subject matter jurisdiction a court cannot render a valid judgment. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). Subject matter jurisdiction may not be presumed and cannot be waived. *Cont'l Coffee Prod. Co. v. Cazarez*, 937 S.W.2d 444, 448–49 n.2 (Tex. 1996). Whether a court has subject matter jurisdiction is a question of law, *Hoff v. Nueces Cty*., 153 S.W.3d 45, 48 (Tex. 2004), which may be challenged through a plea to the jurisdiction, *Harris Cty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004).

1.1. The Texas Whistleblower Act's Limited Waiver of Sovereign Immunity.

The OAG is a governmental entity of the State of Texas protected from suit and liability by sovereign immunity. *See* Tex. Gov't Code § 311.034; *State v. Lueck*, 290 S.W.3d 876, 880 (Tex. 2009). "Unless waived or abrogated, sovereign immunity shields the state from a lawsuit for damages by depriving the trial court of subject-matter jurisdiction." *Bansal v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 502 S.W.3d 347, 351 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (citing *Hous. Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 158 n.1 (Tex. 2016)). "It is axiomatic that a waiver of immunity must be clear and unambiguous and that any ambiguity must be resolved in favor of retaining immunity." *W. Travis Cty. Pub. Util. Agency v. Travis Cty. Mun. Util. Dist. No. 12*, 537 S.W.3d 549, 554–55 (Tex. App.—Austin 2017, pet. denied) (citations and quotations omitted). "Statutes waiving governmental immunity are to be strictly construed." *Id.* (citing *City of Houston v. Jackson*, 192 S.W.3d 764, 770 (Tex. 2006)).

Under certain circumstances, the Texas Whistleblower Act "imposes a *limited* waiver of immunity that allows consideration of the section 554.002(a) elements, to the extent necessary in determining whether the claim falls within the jurisdictional confines of section 554.0035." *Lueck*, 290 S.W.3d at 882 (emphasis added); *see also Office of the Att'y Gen. v. Weatherspoon*, 472 S.W.3d 280, 282 (Tex. 2015). The Texas Supreme Court, however, has "rejected the argument

that simply alleging a violation under the Whistleblower Act is sufficient to confer subject matter jurisdiction on the trial court in suits against governmental entities." *Lueck,* 290 S.W.3d at 884. The Whistleblower Act waives sovereign immunity only for demonstrated violations of the Act. *See id.* at 883–84.

"The elements of section 554.002(a) can be considered to determine both jurisdiction and liability." *Id.* at 883. Here, because Plaintiffs have failed to allege facts sufficient to demonstrate all elements of a claim under the Whistleblower Act, and because they also admit facts disproving their claim, Plaintiffs fail in their burden to disprove the "heavy presumption" of the OAG's sovereign immunity from this suit. The Court must dismiss each Plaintiff's claim.

2. Plaintiffs' allegations fall outside the scope of the Whistleblower Act's limited waiver of sovereign immunity.

2.1. The Attorney General is neither a governmental entity nor a public employee and, thus, the Whistleblower Act does not extend protection to reports of unlawful conduct made against the Attorney General personally.

"[I]f a statute defines a term, a court is bound to construe that term by its statutory definition only." *Tex. Dep't of Transp. v. Needham,* 82 S.W.3d 314, 318 (Tex. 2002) (citing Tex. Gov't Code § 311.011(b)). "Further, courts should not give an undefined statutory term a meaning out of harmony or inconsistent with other provisions, although it might be susceptible of such a construction if standing alone." *Id.*

By its own terms, the Whistleblower Act applies only in certain circumstances. Crucially, the complaining public employee must have "report[ed] a violation of law *by the employing governmental entity or another public employee*." Tex. Gov't Code § 554.002(a) (emphasis added). Here, Attorney General Ken Paxton—an elected officer and one of only six officeholders

of the executive department under the Texas Constitution[7]—is neither a governmental entity nor a public employee. Thus, the Act does not apply—and therefore does not waive sovereign immunity—for reports made about actions taken personally by the elected Attorney General, as Plaintiffs have alleged.[8]

The Legislature's omission of elected, constitutional officeholders from the Whistleblower Act is no oversight. Because the Attorney General's actions implicate authority conferred on him directly by the Texas Constitution and chapter 402 of the Texas Government Code, the Whistleblower Act does not interfere with the Attorney General's discretion to discharge his constitutional and statutory duties, which includes the latitude to hire and fire high-ranking political appointees in whom the Attorney General must have complete trust and confidence.

Plaintiffs only conclusorily state they "in good faith made reports to law enforcement authorities of suspected violations of criminal law by the OAG and by [Ken] Paxton,"[9] but Plaintiffs have alleged only unlawful acts by the Attorney General himself. Accordingly, none has alleged facts showing any one of them reported "a violation of law by the employing governmental entity or another public employee." Tex. Gov't Code § 554.002(a). The Whistleblower Act does not extend to Plaintiffs' supposed reports.

Under the Texas Whistleblower Act, a public employee is "an employee or appointed officer other than an independent contractor who is paid to perform services for a state or local governmental entity." *Id.* § 554.001(4). The Attorney General, on the other hand, is a *constitutional*

[7] "The Executive Department of the State shall consist of a Governor, who shall be the Chief Executive Officer of the State, a Lieutenant Governor, Secretary of State, Comptroller of Public Accounts, Commissioner of the General Land Office, and Attorney General." Tex. Const. art. IV, § 1.

[8] Pls.' 1st Am. Pet., ¶ 55.

[9] *Id.*, ¶ 128.

officer of the executive department of the state, Tex. Const. art. IV, § 1, who is *elected* by the electorate of Texas at-large, *id.* art. IV, §§ 2, 23.

The Legislature's decision to include "appointed officers" but to exclude "elected officers" from the Whistleblower Act's definition of "public employees" can support only one conclusion:

> [t]here is nothing in the plain language of the [Whistleblower] Act that would indicate clear legislative intent to waive sovereign immunity from suit based on the private acts of *elected officials*. The [Whistleblower] Act's provisions are exclusive, and courts may not add to them.

City of Cockrell Hill v. Johnson, 48 S.W.3d 887, 896 (Tex. App.—Fort Worth 2001, pet. denied) (emphasis added) (citations omitted); *see also*, *Needham*, 82 S.W.3d at 318 (courts determine the Legislature's intent by looking "at the statute's plain and common meaning.").[10] The Whistleblower Act plainly excludes reports related to elected officers and, therefore, Plaintiffs' claims against the Office of the Attorney General remain barred by sovereign immunity even if Plaintiffs' allegations are assumed true.

Because an essential element of Plaintiffs' lawsuit (a report of a violation of law by the "employing governmental entity or another public employee") is admittedly absent, no Plaintiff alleges conduct protected under the Act. Since this leaves the Court without subject matter jurisdiction over any Plaintiff, the Court must dismiss Plaintiffs' lawsuit on this ground alone.

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[10] This is not, moreover, some one-off drafting error. The Government Code elsewhere also distinguishes between elected and appointed officers. *Compare* Tex. Gov't Code § 572.002(4)(B) ("an executive . . . officer elected in a statewide election"), *with* Tex. Gov't Code § 572.002(1) (emphasis added) (defining an "Appointed officer" as:

A. the secretary of state;
B. an individual appointed with the advice and consent of the senate to the governing board of a state-supported institution of higher education;
C. an officer of a state agency who is appointed for a term of office specified by the Texas Constitution or a statute of this state, **excluding an appointee to a vacated elective office;** or
D. an individual who is a member of the governing board or commission of a state agency, who is not appointed, and who is not otherwise:
(i) an elected officer;
(ii) an officer described by Paragraphs (A) through (C); or
(iii) an executive head of a state agency.)

As an elected officer of the executive department, the Attorney General is clearly not an "appointed officer."

2.2. As members of "the Attorney General's most senior staff," Plaintiffs served at the pleasure of the Attorney General and are not protected by the Whistleblower Act.

As noted above, Plaintiffs' failure to report any alleged violation of law by an employing governmental entity or public employee bars their claims. But even had they done so, Plaintiffs' claims still fail as a matter of law for the additional reason that extending Whistleblower Act protection to "the four Plaintiffs [who] were among [the Attorney General's] most senior staff" is unconstitutional.[11] Simply put, the Whistleblower Act cannot be read to force elected officers who draw their authority directly from the Texas Constitution to retain direct-report, senior-level, political appointees in whom the officer lacks personal trust and confidence.

To be clear, the Whistleblower Act—long the protection for the line-level public employee who dutifully reports wrongdoing by an "employing governmental entity or another public employee"—has *never* been invoked, and cannot be used, to require a statewide elected officer to continue to employ self-described top-level deputies against his or her will, and for good reason. To do so would violate the separation-of-powers guarantee enshrined in the Texas Constitution. *See* Tex. Const. art. II, § 1.[12] Simply put, the Legislature's statutes, including the Whistleblower Act, cannot be read to deprive the Attorney General, or any other elected officer, of his constitutional duty and concomitant authority to carry out his discretionary duties, including the latitude to hire and fire top-level deputies who serve at his pleasure.

The specific issue presented here has not been directly decided in Texas state courts. But while there appears to be no reported Whistleblower Act case brought by individuals in such an

[11] Pls.' 1st Am. Pet., ¶ 1.

[12] "The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." Tex. Const. art. II, § 1.

admittedly high position of trust and confidence, the Texas Supreme Court has recognized that even though "[t]he Whistleblower Act protects public employees who attempt to report illegal activity . . . public employers must preserve their right to discipline employees who make either intentionally false or objectively unreasonable reports," *Wichita County v. Hart*, 917 S.W.2d 779, 784 (Tex. 1996), or whose "'demeanor and conduct' . . . completely undermine[] the trust and confidence required for [elected officials] . . . to successfully perform [their] duties," *Lopez v. Tarrant Cty.*, No. 02-13-00194-CV, 2015 Tex. App. LEXIS 8899 *18 (Tex. App.—Fort Worth, Aug. 25, 2015, pet. denied). As the Texas Supreme Court has observed, "the duty of loyalty and other competing legal and ethical principles are powerful arguments in favor of limits on what, when, to whom, how, and why whistleblowers may make their disclosures." *Neighborhood Ctrs. Inc. v. Walker*, 544 S.W.3d 744, 749 (Tex. 2018) (quoting Daniel P. Westman & Nancy M. Modesitt, Whistleblowing: The Law of Retaliatory Discharge 41 (Bureau of Nat'l Aff. 2d ed. 2004)).

Analogous case law likewise supports the underlying rationale for the Legislature's decision to exclude reports of alleged violations of law by elected officers from the Whistleblower Act's protections. In the official immunity context, for example, Texas courts have held that "[w]hen the head of a state executive agency offers an explanation to the press, and hence the public, for the dismissal of employees, he acts within his official duties." *Salazar v. Morales*, 900 S.W.2d 929, 934 (Tex. App.—Austin 1995, no pet) (addressing terminated public employee's defamation claim). Similarly, in its opinion in *Barr v. Matteo*, 360 U.S. 564 (1959), the United States Supreme Court held, in pertinent part, that:

> [i]t has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which

> might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

Id. at 571. Relying on *Barr*, the Austin Court of Appeals has held "the Texas Attorney General has an absolute privilege to publish defamatory statements in communications made in the performance of his official duties," *Salazar*, 900 S.W.2d at 932, even if the Attorney General's statements "were politically motivated," *id*. at 934, or, as the Texas Supreme Court noted, were "published with express malice," *Reagan v. Guardian Life Ins. Co*., 166 S.W.2d 909, 913 (Tex. 1942); *see also Hurlbut v. Gulf Atlantic Life Ins. Co*., 749 S.W.2d 762, 767 (Tex. 1987); *Johnson*, 48 S.W.3d at 898 n.48.

The source and scale of the constitutional authority enjoyed by the President of the United States and the Texas Attorney General differ, to be sure. But the underlying rationale for an executive's authority to remove high-ranking political appointees applies with equal force, and federal case law is therefore instructive. In *Myer v. United States*, 27 U.S. 52 (1925), the Supreme Court considered whether the President could unilaterally remove—without first obtaining the advice and consent of the Senate—certain appointed officers,[13] a point on which the Constitution is silent. In concluding the President could, the *Myer* court considered, in addition to records of the constitutional debates, the implicit requirement that the authority to remove officers exists so the executive office may properly function.

This is fundamentally a separation of powers question: "If there is a principle in our Constitution, indeed in any free Constitution more sacred than another, it is that which separates the legislative, executive and judicial powers. If there is any point in which the separation of the legislative and executive powers ought to be maintained with great caution, *it is that which relates*

[13] The U.S. Constitution authorizes the President to, with the advice and consent of the Senate, "appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States." U.S. Const. art. II, § 2, cl. 2.

to officers and offices." *Id.* at 116 (quoting 1 Annals of Congress, 581 (James Madison)) (emphasis added). The Court continued:

> The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this court. As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.

Id. at 117 (citations omitted).

From this, the *Myer* Court deduced a "well-approved principle of constitutional and statutory construction that the power of removal of executive officers was incident to the power of appointment." *Id.* at 119. "The reason for the principle is that those in charge of and responsible for administering functions of government, who select their executive subordinates, need in meeting their responsibility to have the power to remove those whom they appoint." *Id.*

In explaining the perils of limiting the President's removal authority, the *Myer* Court again turned to the constitutional debates:

> The degree of guidance in the discharge of their duties that the President may exercise over executive officers varies with the character of their service as prescribed in the law under which they act. The highest and most important duties which his subordinates perform are those in which they act for him. In such cases they are exercising not their own but his discretion. This field is a very large one. It is sometimes described as political. Each head of a department is and must be the President's alter ego in the matters of that department where the President is required by law to exercise authority.

Id. at 132–33 (citations omitted). Quoting further from the transcripts of the constitutional debates, the Court continued, in terms clearly applicable to the Plaintiffs' request in this case for reinstatement to their former high offices:

> Shall a man under these circumstances be saddled upon the President, who has been appointed for no other purpose but to aid the President in performing certain duties? Shall he be continued, I ask again, against the will of the President? If he is, where is the responsibility? Are you to look for it in the President, who has no control over the officer, no power to remove him if he acts unfeelingly or unfaithfully? Without you make him responsible, you weaken and destroy the strength and beauty of your system.

Id. at 132 (quoting 1 Annals of Congress, 522 (Sedgwick of Massachusetts)).

The *Myer* Court sums up the importance of this authority in ringing terms:

> In all such cases, the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it. In this field his cabinet officers must do his will. He must place in each member of his official family, and his chief executive subordinates, implicit faith. The moment that he loses confidence in the intelligence, ability, judgment, or loyalty of any one of them, he must have the power to remove him without delay. To require him to file charges and submit them to the consideration of the Senate might make impossible that unity and co-ordination in executive administration essential to effective action.

Id. at 134.[14]

Federal case law is likewise instructive in the context of public "whistleblower" claims under the First Amendment. There, the United States Supreme Court has long exempted "patronage dismissals" from protection, recognizing that a dismissed governmental employee's First Amendment interest must be balanced with the governmental employer's need to "insure that policies which the electorate has sanctioned are effectively implemented" by the elected official's chosen employees. *Elrod v. Burns*, 427 U.S. 347, 372 (1976). In other words, even a public employee's constitutional right must give way to a public officeholder's prerogative to do the job to which the public elected him as he sees fit. Since "[p]reservation of the democratic process is certainly an interest protection of which may in some instances justify limitations on First

[14] Although *Myer* has been limited by subsequent cases in other respects, *see, e.g.*, *Humphrey's Executor v. United States*, 195 U.S. 602 (1935), its broad assertion of the President's authority to remove his closest and most trusted appointed officers has not been narrowed.

Amendment freedoms," *id.* at 368, a public employee's First Amendment right to free speech must be balanced against "the interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees," *Pickering v. Bd. of Ed. of Township High Sch. Dist. 205*, 391 U.S. 563, 568 (1968).

An elected officeholder's top deputies do not enjoy statutory job protection that forces an elected official to discharge his constitutional and statutory duties while hamstrung by staff that thwarts his efforts and decisions. If even the sacrosanct First Amendment must sometimes yield to an elected official's mandate from the electorate, so must the Whistleblower Act—a limited exception from at-will employment—give way to the "[p]reservation of the democratic process." *Elrod*, 472 U.S. at 368.[15]

This important point is equally consistent with the well-settled law that, "[i]n Texas, employees of any elected official serve at the pleasure of the elected official, regardless of whether there is a statute which specifies at-will status." *Garcia v. Reeves County*, 32 F.3d 200, 203 (5th Cir. 1994) (citing *Renken v. Harris County*, 808 S.W.2d 222 (Tex. App.—Houston [14th Dist.] 1991, no writ.)). The OAG and the Texas Attorney General are no different.

The U.S. Supreme Court's holding regarding the office of the Louisiana district attorney is applicable to the Office of the Texas Attorney General. In order to discharge his constitutional and statutory duties and responsibilities, the Attorney General:

> as an employer, must have wide discretion and control over the management of [his] personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can

[15] The Whistleblower Act provides only a limited exception to the rule that at-will employment is the law of the land in Texas. "For well over a century, the general rule in this State, as in most American jurisdictions, has been that absent a specific agreement to the contrary, employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all." *Sawyer v. E. I. du Pont de Nemours & Co.*, 430 S.W.3d 396, 399 (Tex. 2014).

> adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

Connick v. Myers, 461 U.S. 138, 151 (1983) (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974)). Thus, particularly in the context of a whistleblower complaint, "additional weight must be given to the [Attorney General's] view that [a whistleblowing employee] has threatened the authority of the [Attorney General] to run the office." *Lee-Khan v. Austin Ind. Sch. Dist.*, No. A-13-CV-00147-LY, 2013 WL 3967853, at *3 (W.D. Tex. July 31, 2013) (citing *Connick*, 461 U.S. at 153). "Elected officials must be able to assemble their own loyal staffs of advisors and administrators to assist them in formulating and implementing the policies necessary to carry out their electoral mandates . . . . Certainly elected officials should be permitted to dismiss their predecessor's personal secretaries and a few others who work closely with such officials in positions requiring a relationship of mutual trust." *Stegmaier v. Trammell*, 597 F.2d 1027, 1038 (5th Cir. 1979) (citation omitted).

Indeed, Plaintiffs' own pleadings and their decision to broadcast far and wide their lack of trust, confidence, and loyalty in the elected official they served, regardless of whether such absence was real or merely feigned as a cover for their own misconduct, admits that all Plaintiffs "threatened the authority of the [Attorney General] to run the office." *Lee-Khan*, 2013 WL 3967853, at *3.[16] Based on the Plaintiffs' own public statements, the Attorney General was free—indeed obligated, if his office was to function effectively—to remove Plaintiffs from such highly-placed positions within the OAG.

[16] Federal and state courts outside of Texas have so held under facts similar to those presented here. *See, e.g.*, *Rankin v. McPherson*, 483 U.S. 378, 388 (1987); *Bardzik v. County of Orange*, 635 F.3d 1138, 1151 (9th Cir. 2011); *Sheppard v. Beerman*, 317 F.3d 351, 355 (2d Cir. 2003); *Fazio v. City & County of San Francisco*, 125 F.3d 1328, 1332 (9th Cir. 1997); *Wilbur v. Mahan*, 3 F.3d 214, 218 (2d Cir. 1993).

2.3. Because Plaintiffs admit their official duties included investigating and reporting alleged violations of law, Plaintiffs' reports are not protected under the Texas Whistleblower Act.

When public employees speak "pursuant to their official duties, the employees are not speaking as citizens for First Amendment [whistleblowing] purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). There is no practical distinction between a whistleblower claim under the First Amendment to the United States Constitution and one pursued under the Texas Act. *See, e.g.*, *Guillaume v. City of Greenville*, 247 S.W.3d 457, 464 (Tex. App.—Dallas 2008, no pet.) ("Based on the similarity between claims under the Whistleblower Act and retaliation claims under the First Amendment, we hold that the same causation standard applies to both claims."); *Alief Ind. Sch. Dist. v. Perry*, 440 S.W.3d 228, 245 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) ("[D]amages recoverable under . . . [W]histleblower [Act] and First Amendment claims are identical."). Thus, while Texas courts have not addressed the difference between a report of a violation of law made by an employee who spoke as a citizen on a matter of public concern versus an employee who makes a report pursuant to the duty of their office, federal First Amendment cases that have should apply equally to the Whistleblower statute. *See Powers v. Northside Ind. Sch. Dist.*, 951 F.3d 298, 307–08 (5th Cir. 2020).

The analogy to federal First Amendment claims for public "whistleblowing" is an obvious one. For such claims under 42 U.S.C. § 1983, the first step in that analysis "sets out two predicates for public-employee speech to receive [whistleblower] protection: the speech must be (1) made as a citizen and (2) on a matter of public concern." *Id.* (quoting *Gibson v. Kilpatrick*, 773 F.3d 661, 667 (5th Cir. 2014)). "The 'as a citizen' requirement draws a distinction between when public employees speak in their private capacities and when they speak '*pursuant to their official duties*.'" *Id*. (emphasis added) (quoting *Garcetti*, 547 U.S. at 421). The OAG submits that, "[w]hen public

employees engage in speech pursuant to their official duties, they 'are not speaking as citizens for [whistleblower] purposes, and the [Texas Whistleblower Act] does not insulate their communications from employer discipline.'" *Harmon v. Dallas Cty.*, 927 F.3d 884, 893 (5th Cir. 2019) (quoting *Garcetti*, 547 U.S. at 421).[17] Since the determination of the protected status of the speech presents a question of law rather than fact, *see Connick*, 461 U.S. at 148 n.7, this issue is particularly appropriate for resolution under Rule 91a.

Thus, "[a]lthough reporting [alleged] . . . corruption undoubtedly constitutes speech on a matter of public concern . . . [w]hen public employees engage in speech pursuant to their official duties, they are not speaking as citizens for [whistleblower] purposes . . . ." *Harmon*, 927 F.3d at 893. "Quite simply, there is 'no relevant analogue to speech by citizens.'" *Nixon v. City of Houston*, 511 F.3d 494, 497 (5th Cir. 2007) (citing *Garcetti*, 547 U.S. at 424). The Whistleblower Act was not created to insulate from discipline all employees who, as these Plaintiffs allege they did, make a report of what they consider to be a violation of law "as was their duty."[18]

3. Each Plaintiff has failed to plead facts supporting a waiver of the OAG's sovereign immunity based on the requirements of the Act.

Even if the Court were to assume the Whistleblower Act covers any Plaintiff's claim, each Plaintiff has failed to set out even the most basic allegations necessary to state a claim under the Act. Although the Whistleblower Act waives sovereign immunity for claims that meet all of the essential elements of Section 554.002(a), immunity is not waived for claims that involve a report made to someone who is not "an appropriate law enforcement authority" or for claims that do not allege a "violation of law." *Lueck*, 290 S.W.3d at 882.

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[17] *Compare Gibson v. Kilpatrick*, 773 F.3d 661, 672–73 (5th Cir. 2014), *with Rogers v. City of Yoakum*, 660 Fed. Appx. 279, 283 (5th Cir. 2016).

[18] Pls.' 1st Am. Pet., p. 2.

To state a claim, each Plaintiff must allege facts that make out a plausible claim of relief. "[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ruth v. Crow*, No. 03-16-00326-CV, 2018 WL 2031902, at *5 (Tex. App.—Austin May 2, 2018, pet. denied) (mem. op.) (citation and quotations omitted). "Mere unsupported legal conclusions are insufficient." *Gattis v. Duty*, 349 S.W.3d 193, 200 (Tex. App.—Austin 2011, no pet.).

To survive dismissal of their whistleblower claims, each Plaintiff must allege *facts* showing he made a good-faith report of a violation of law to an appropriate law-enforcement authority. *See City of Elsa v. Gonzalez*, 325 S.W.3d 622, 625 (Tex. 2010) (citing Tex. Gov't Code § 554.002); *Galveston Ind. Sch. Dist. v. Jaco*, 303 S.W.3d 699 (Tex. 2010). Because the Whistleblower Act protects only those who make a report that comports with the strict statutory requirements of the Act, not everyone who merely agrees or assists another with such a report qualifies for protection under the Act. Here, for example, multiple plaintiffs allege making multiple, unidentified reports to unidentified "appropriate law enforcement authorities." In such circumstances, the Court must analyze each plaintiff's alleged report *individually* to determine whether each plaintiff has set out facts showing the conduct about which they complain constitutes an existing or past violation of an actual law, and whether each reported same to an appropriate law enforcement authority. *See, e.g.*, *City of Elsa*, 325 S.W.3d at 626; *Moore v. City of Wylie*, 319 S.W.3d 778 (Tex. App.—El Paso 2010, no pet.).

Plaintiffs repeatedly allege the same conclusory statement the Supreme Court found deficient in *City of Elsa:*

> On September 30, 2020, each of the Plaintiffs in good faith made reports to **[unidentified]** law enforcement authorities of [**unidentified**] suspected violations of criminal law by the OAG and by [the Attorney General].[19]

Here *no Plaintiff has identified their own purported report, the "appropriate law enforcement authority" to whom the reports were made, or the content of any such report.* Plaintiffs' conclusory pleading is insufficient to waive the OAG's sovereign immunity. This defect alone is fatal to Plaintiffs' whistleblower lawsuit. *See Ruth*, 2018 WL 2031902, at *5.

In the context of the Whistleblower Act itself, the Texas Supreme Court has made abundantly clear that conclusory pleadings such as those Plaintiffs present here "do not provide sufficient jurisdictional facts to determine if the trial court ha[s] jurisdiction." *City of Elsa*, 325 S.W.3d at 625. "Allowing a plaintiff's pleadings to stand on bare allegations, alone, without allowing the State to challenge plaintiff's compliance with the immunity statute, would practically eliminate the use of pleas to the jurisdiction, which [the Supreme Court has] already approved as the proper 'procedural vehicle to challenge subject matter jurisdiction in trial courts for over a century and a half." *Lueck*, 290 S.W.3d at 884. Plaintiffs' whistleblower claims should be dismissed based upon this failure alone, in addition to the other grounds set forth herein.

3.1. Plaintiffs fail to plead *facts* showing each made a good faith report of a legal violation.

To overcome the OAG's sovereign immunity, Plaintiffs must plead facts demonstrating each Plaintiff reported conduct he in good faith believed violated an existing law. Tex. Gov't Code § 554.002(a); *Lueck*, 290 S.W.3d at 878, 881. "The Whistleblower Act defines 'law' as a state or federal statute, an ordinance of a local governmental entity, or 'a rule adopted under a statute or ordinance.'" *Univ. of Houston v. Barth*, 403 S.W.3d 851, 854 (Tex. 2013) (quoting Tex. Gov't Code § 554.001(1)). "Other complaints and grievances, including alleged violations of an agency's

[19] Pls.' 1st Am. Pet., ¶ 128*; see also id.* ¶ 55.

internal procedures and policies, will not support a claim." *Mullins v. Dallas Ind. Sch. Dist.*, 357 S.W.3d 182, 188 (Tex. App.—Dallas 2012, pet. denied); *see also Harris Cty. Precinct Four Constable Dep't v. Grabowski*, 922 S.W.2d 954, 956 (Tex. 1996); *Ruiz v. City of San Antonio*, 966 S.W.2d 128, 130 (Tex. App.—Austin 1998, no pet.).

Although Plaintiffs "need not [initially] identify in [their] report[s] the specific law [each Plaintiff] asserts was violated, there must be some law prohibiting the complained-of conduct to give rise to the Whistleblower action." *Wilson v. Dallas Ind. Sch. Dist.*, 376 S.W.3d 319, 323 (Tex. App.—Dallas 2012, no pet.). If Plaintiffs were not required to identify a report a violation of an existing law, "every complaint, grievance, or misbehavior could support a claim." *Llanes v. Corpus Christi Ind. Sch. Dist.*, 64 S.W.3d 638, 642-43 (Tex. App.—Corpus Christi 2001, pet. denied).

By failing to identify the specific content of any report, let alone identify or attach each individual Plaintiff's report to Plaintiffs' operative pleading, however, Plaintiffs have again failed to plead facts sufficient to overcome the OAG's sovereign immunity. Further, despite alleging that the Attorney General violated Sections 36.02, 36.03, and 39.02(a)(2) of the Texas Penal Code, Plaintiffs have failed to affirmatively plead facts showing any Plaintiff *reported* any of those alleged allegations to an appropriate law enforcement authority.

As discussed above, "[c]onclusory statements are not competent evidence in a plea to the jurisdiction proceeding." *Wilson*, 376 S.W.3d at 326; *see also Gonzalez*, 325 S.W.3d at 625. Plaintiffs' conclusory statements are "so weak as to create no more than a 'surmise of suspicion' of a fact." *Duvall v. Texas Dep't of Human Servs.*, 82 S.W.3d 474, 483 (Tex. App.—Austin 2002, no pet.). Additionally, because state agencies' internal policies are not "laws" under the Whistleblower Act, *Mullins*, 357 S.W.3d at 188, Plaintiffs—three of whom are not just attorneys

but who also allege specialized knowledge and experience in this very area of law—cannot reasonably believe that reporting actions "not consistent with any rule or policy of the [O]ffice,"[20] is a "good faith" report of a legal violation.

3.2 Four Plaintiffs cannot in good faith report the same violation of law.

Despite alleging in the most general and impermissibly conclusory manner that all four Plaintiffs "made good faith reports of criminal activity,"[21] Plaintiffs identify only one report: Plaintiffs allege Brickman, Penley, and Vassar "signed and sent to the OAG's Director of Human Resources a letter notifying OAG that they had reported to an appropriate law enforcement authority a good faith belief of suspected violations of law."[22] Nothing in the law provides group protection to a cadre of individuals who admit make but a single report. But here, *Plaintiffs' own pleading makes clear that Maxwell did not make any such report*, but merely later added his name to "a[n unidentified] report the other three Plaintiffs claim to have made.[23] Even assuming that Brickman, Penley, and Vassar made the same, *singular* whistleblower report, Plaintiffs' own pleading is fatal to all Plaintiffs' claims. And certainly, at the very least, it defeats Maxwell's claim. Plaintiffs' own pleading admits Maxwell did not make any unique report at all, but merely *later* sent along a letter echoing and purporting to join the report his fellow Plaintiffs allege they had already made. This is clearly insufficient to trigger protection of the Act and is fatal to Maxwell's claim. Maxwell cannot simply "borrow" the other Plaintiffs' alleged report to overcome the fatal deficiency that he made none. Plaintiffs' allegations fail to show they made a protected report; but,

[20] *Id.*, ¶ 73.

[21] *Id.*, ¶ 55 (underline added).

[22] *Id.*

[23] *Id.* (Maxwell "was out of state on vacation" and "sent a separate written notice to Human Resources regarding his whistleblower complaint.").

alternatively—and at a minimum—Plaintiffs have affirmatively pleaded Maxwell out of the protections afforded by the Act, and therefore outside the jurisdiction of this Court.

3.3. Plaintiffs also fail to plead facts demonstrating any Plaintiff made a good faith report to an appropriate law enforcement authority.

Plaintiffs' whistleblower claims are also barred by sovereign immunity because they have failed to identify any law enforcement authority to whom Plaintiffs claim to have made a report. Even assuming, contrary to case law cited above, that "[internally] report[ing] the fact of their whistleblower report . . . to the OAG Human Resources Division,"[24] satisfies the report element, Plaintiffs' whistleblower claims still fail since neither the OAG nor any of its divisions constitute an appropriate law enforcement authority.

Under the Whistleblower Act, an "appropriate law enforcement authority" is a part of a federal, state, or local governmental entity the employee in good faith believes is authorized to either "(1) regulate under or enforce the law alleged to be violated in the report; or (2) investigate or prosecute a violation of criminal law." Tex. Gov't Code § 554.002(b). The authority "must have outward-looking powers," *Weatherspoon*, 472 S.W.3d at 282, including, for example, the "authority to enforce, investigate, or prosecute violations of law against third parties outside of the entity itself, or it must have authority to promulgate regulations governing the conduct of such third parties," *Univ. of Tex. Sw. Med. Ctr. v. Gentilello*, 398 S.W.3d 680, 686 (Tex. 2013).

"[I]n determining whether a report was properly made to an appropriate law enforcement authority, it is the *entity's* authority to investigate allegations of criminal wrongdoing that must be the focus of the court's inquiry, and the individual to whom a report is made must be a 'part of' that entity." *Connally v. Dallas Ind. Sch. Dist.*, 506 S.W.3d 767, 781 (Tex. App.—El Paso 2016,

[24] Pls.' 1st Am. Pet., p. 2.

no pet.). Importantly, however, "[a]n authority's power to discipline its own or investigate internally does not support a good-faith belief that it is an appropriate law-enforcement authority." *Weatherspoon*, 472 S.W.3d at 282 (citing *Gentilello*, 398 S.W.3d at 686 (Tex. 2013)). That limitation remains true even where, as here, an OAG employee internally reports an alleged violation of law. As a matter of law the OAG is not an "appropriate law enforcement authority" to investigate claims of violations of law within the OAG itself. *Id*. Thus, as a matter of law, Plaintiffs have not satisfied the "appropriate law enforcement authority" element by reporting any alleged violations of law to the OAG's HR Division.[25]

Prayer

For all these reasons, Defendant OAG respectfully prays that the Court dismiss Plaintiffs' suit under Rule 91a because the Court lacks subject matter jurisdiction. The OAG further prays that Plaintiffs take nothing by reason of this suit, and that the Court grant the OAG all other relief to which it is justly entitled in law and equity.

Dated: January 8, 2021

Respectfully submitted,

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[25] In light of *Weatherspoon*, it is not reasonable for any member of "[the Attorney General's] most senior staff" to assert a good faith belief—contrary to a 2015 decision of the Texas Supreme Court discussing the very agency that employs them—that the OAG's HR Division could be an appropriate law enforcement authority under the Act. *See also, Robinson v. Dallas Cty. Cmty. Coll. Dist*., No. 3:14-CV-4187-D, 2016 WL 1273900 (N.D. Tex. Feb. 18, 2016).

Certificate of Service

I certify a true and correct copy of the foregoing Motion to Dismiss Based on Lack of Subject Matter Jurisdiction of Defendant, Office of the Attorney General of Texas, has been served on the following counsel of record by electronic filing on January 8, 2021.

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Ryan M. Vassar

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Cause No. D-1-GN-20-006861

James Blake Brickman, *et al.*, Plaintiffs, v. **Office of the Attorney General of Texas,** Defendant.	**In the District Court of** **Travis County, Texas** **250th Judicial District**

Notice of Hearing

Please take notice that Defendant, Office of the Attorney General of Texas's Motion to Dismiss based on Lack of Subject Matter Jurisdiction is set for oral hearing at 9:00 a.m. on February 16, 2021, on the Central Docket, Travis County Courthouse, 1000 Guadalupe, Austin, Texas 78701.

Dated: January 8, 2021

Respectfully submitted,

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Certificate of Service

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CAUSE NO. D-1-GN-20-006861

JAMES BLAKE BRICKMAN, DAVID MAXWELL, J. MARK PENLEY, and RYAN M. VASSAR Plaintiffs,	§ § § § §	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS	§ §	
Defendant.	§	250th JUDICIAL DISTRICT

PLAINTIFFS' AMENDED NOTICE OF HEARING ON MOTION FOR TEMPORARY INJUNCTION

Please take notice that Plaintiffs' Motion for Temporary Injunction is now set for hearing beginning at 9:00 AM on Tuesday, February 16, 2021, on the Central Docket, Travis County Courthouse, 1000 Guadalupe, Austin, Texas, 78701. The hearing will be conducted remotely via Zoom, and the Court will provide login information before the hearing commences.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served on January 13, 2021, via the Court's electronic filing service to the following counsel of record:

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Cause No. D-1-GN-20-006861

James Blake Brickman, *et al.*, Plaintiffs, v. **Office of the Attorney General of Texas,** Defendant.	**In the District Court of** **Travis County, Texas** **250th Judicial District**

Amended Notice of Hearing

Please take notice that Defendant, Office of the Attorney General of Texas's Motion to Dismiss based on Lack of Subject Matter Jurisdiction is set for oral hearing on February 10, 2021 at 2:00 p.m. on the Central Docket of the Travis County Civil District Courts. This hearing will take place remotely, using Zoom videoconferencing.

Dated: January 19, 2021

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Certificate of Service

I certify a true and correct copy of the foregoing amended notice of hearing of the Motion to Dismiss Based on Lack of Subject Matter Jurisdiction of Defendant, Office of the Attorney General of Texas, has been served on the following counsel of record by electronic filing on January 19, 2021.

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CAUSE NO. D-1-GN-20-006861

JAMES BLAKE BRICKMAN, DAVID MAXWELL, J. MARK PENLEY, and RYAN M. VASSAR Plaintiffs,	§ § § § §	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS	§ §	
Defendant.	§	250th JUDICIAL DISTRICT

PLAINTIFFS' MOTION TO CONSOLIDATE HEARINGS ON DEFENDANT'S MOTION TO DISMISS AND PLAINTIFFS' APPLICATION FOR TEMPORARY INJUNCTION

On January 8, 2021, the Office of Attorney General ("OAG") challenged jurisdiction in a Rule 91a Motion to Dismiss and—without consulting Plaintiffs—set it for hearing on February 16. In doing so, OAG not only violated Local Rule 2.2 but sought to undercut Plaintiffs' pre-existing February 22 setting on their Application for Temporary Injunction. Plaintiffs then shuffled their schedules and re-set their TI hearing for OAG's chosen day, February 16. In turn, OAG re-set its Rule 91a hearing for February 10. This is a silly game. To promote efficiency and preserve the Court's ability to consider Plaintiffs' application, the Court should consolidate OAG's Motion to Dismiss and Plaintiffs' TI application for hearing at the same time.

Argument and Authorities

OAG's strategy is clear. It wants the Court to decide the Rule 91a motion before commencing a hearing on Plaintiffs' first-filed application so that, even if the Court is satisfied of its jurisdiction, OAG can tie this case up on an interlocutory appeal—and stay all proceedings here—before the Court has any opportunity to consider granting temporary relief to public servants

who are unemployed because OAG unlawfully fired them. *See* Tex. Civ. Prac. and Rem. Code § 51.014. Because such an appeal often takes years, this strategy is OAG's best shot at maximizing Plaintiffs' hardship while avoiding even a preliminary glance into the merits of the case during Ken Paxton's term in office. *See, e.g., Texas Health and Human Servs. Comm'n v. Vestal*, No. 03-19-00509-CV, 2020 WL 7252320 (Tex. App—Austin December 10, 2020) (affirming in December 2020 this Court's July 2019 order denying HHSC's plea to the jurisdiction in a whistleblower case); *Texas Health and Human Servs. Comm'n v. Pope*, No. 03-19-00368-CV, 2020 WL 6750565 (Tex. App.—Austin November 18, 2020) (affirming in November 2020 this Court's May 2019 order denying HHSC's plea to the jurisdiction in a whistleblower case).

But nothing in Rule 91a—OAG's chosen vehicle for challenging jurisdiction—or the relevant case law gives OAG a right to duck Plaintiffs' TI application. For the sake of efficiency and fairness to Plaintiffs, whose application was filed and set before OAG's motion, the Court should hear the jurisdictional challenge and request for temporary relief at the same time. Consolidating the settings would preserve the Court's ability to grant temporary relief if it is satisfied of its jurisdiction and would give the court of appeals a full record to address both issues simultaneously as both rulings are subject to interlocutory appeal. *See* Tex. Civ. Prac. and Rem. Code §§ 51.014(a)(4) (temporary injunction) and 51.014(a)(8) (plea to the jurisdiction).

I. Efficiency and fairness are best served by consolidating the motions for hearing.

When Plaintiffs set their application for TI, they candidly advised the Court Administrator that OAG had expressed an intention to challenge jurisdiction and suggested that if and when OAG asserts such a challenge it should be taken up at the same time as the TI. Plaintiffs then conferred with OAG on the setting, allowed OAG's lawyer to choose between two available dates, and invited OAG to set its hearing for the same date. But no good deed goes unpunished, and OAG has repeatedly set and reset its second-filed motion a week before Plaintiffs' setting.

The Court will likely take both matters under advisement anyway, and there is no good reason to commence two separate hearings (likely before two different judges). Consolidation is especially appropriate here because of the inevitable immediate appeals. Regardless of how it rules, if the Court decides OAG's motion before allowing the parties to present Plaintiffs' TI application, the Court will forfeit its ability to even *consider* the relief Plaintiffs seek, and Plaintiffs will have no recourse regardless of the merits of their application.[1] But if the Court hears both matters and rules on them in concert, the Court will (i) preserve the option of granting Plaintiffs relief if warranted and within the Court's jurisdiction, and (ii) allow the court of appeals to review both issues in a timely manner.

II. OAG has no legal right to a ruling on its Rule 91a motion before the Court hears plaintiffs' application for temporary relief.

OAG insists that the Court can do nothing in this case—including conduct a hearing on Plaintiffs' TI application—until it decides OAG's Rule 91a motion. But OAG can cite no authority for this position. Rather, Rule 91a expressly gives the Court 45 days from the date the 91a motion is filed to rule on OAG's motion with no restrictions on what the Court does in the meantime. *See generally Texas Gen. Land Office v. La Concha* Condo. *Ass'n*, No. 13-19-00357-CV, 2020 WL 2610934, at *3 (Tex. App.—Corpus Christi-Edinburg May 21, 2020) ("this case must be judged under the constraints of Rule 91a because that is the procedural framework which the GLO's motion invoked and by which the trial court made its decision"). The deadline for the Court to rule on OAG's 91a motion is February 22, 2021.

The jurisdictional cases on which OAG relies likewise do not prevent the Court from hearing Plaintiffs' application for TI while considering a challenge to its jurisdiction. Of course,

[1] If the Court grants OAG's motion, obviously, the case will be over and Plaintiffs will be appellants. But if the Court denies OAG's motion, OAG will take an interlocutory appeal, which will stay proceedings here, thus preventing the Court from considering Plaintiffs' application for temporary relief. *See* Tex. Civ. Prac. and Rem. Code § 51.014(a)(8).

the Court cannot decide the merits of a case before resolving a jurisdictional challenge. *See, e.g., State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex.1994). Short of that, the Supreme Court has instructed only that courts should determine their jurisdiction at their "earliest opportunity," or "as soon as practicable." *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). These vague standards obviously defer to the Court's considerable discretion to manage its cases, and they will easily be satisfied here by the Court's ruling within Rule 91a's 45-day window. OAG cites no case instructing that trial courts must determine jurisdiction before hearing a request for temporary relief or before exercising other basic authority over their docket.

Conclusion

The Court Administrator has stated that the matters could be set together on February 8 or February 16. Either date works for Plaintiffs.[2] The important thing is that one judge hear both issues at the same hearing. Only by doing so would the Court preserve its opportunity to award temporary relief if the Court is satisfied of its jurisdiction and finds that Plaintiffs' application has merit.

[2] Counsel for OAG has stated that he has a conflict on February 8.

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CERTIFICATE OF CONFERENCE

I certify that I have engaged in extensive consultations with OAG's lead counsel, Bill Helfand on the subject of this motion, and OAG is opposed to the relief sought.

/s/ Joseph R. Knight
Joseph R. Knight

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served on January 20, 2021, via the Court's electronic filing service to the following counsel of record:

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CAUSE NO. D-1-GN-20-006861

JAMES BLAKE BRICKMAN, DAVID MAXWELL, J. MARK PENLEY, and RYAN M. VASSAR Plaintiffs,	§ § § § §	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS	§ §	
Defendant.	§	250th JUDICIAL DISTRICT

PLAINTIFFS' NOTICE OF HEARING ON MOTION TO CONSOLIDATE HEARINGS

Please take notice that Plaintiffs' Motion to Consolidate Hearings on Defendant's Motion to Dismiss and Plaintiffs' Application for Temporary Injunction is set for hearing beginning at 2:00 PM on Thursday, January 28, 2021, on the Central Docket, Travis County Courthouse, 1000 Guadalupe, Austin, Texas, 78701. The hearing will be conducted remotely via Zoom, and the Court will provide login information before the hearing commences.

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CERTIFICATE OF SERVICE

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Re: Cause No. **D-1-GN-20-006861**; James Blake Brickman, David Maxwell, J. Mark Penley, and Ryan M. Vassar vs. Office of the Attorney General of the State of Texas; in the 250th Judicial District Court, Travis County, Texas

Dear Counsel,

I have reviewed the file in this matter in advance of Thursday's hearing. Thank you for your briefing and numerous communications with Court Administration. After review of the file, I have scheduled the Plea to the Jurisdiction for Tuesday, February 16, 2021, at 9 a.m., with the Temporary Injunction hearing to directly follow (if necessary). You will be set on the central long docket for a virtual three-day hearing. If the plea is granted, all three days will not be necessary. The lawyers should receive notification and logistics from the assigned court on the afternoon of February 12.

Our civil judges and staffs are incredibly busy addressing the needs of the public, lawyers and litigants during this pandemic. Our dockets are more demanding than ever, and we do not have the court time to have three different hearings when one will suffice. We will proceed in this manner in the interest of judicial economy and efficiency and to meet the demands of all cases. We are also currently without a judge – as we await appointment by Governor Abbott for the 455th District Court. This means even more challenges meeting docket supply to docket demand.

As you are aware, trial courts have wide discretion in managing our dockets. During the challenging times of the COVID-19 pandemic, our courts and dockets have been incredibly busy rising to this the challenge. We must balance the needs and demands of all our cases and the public to ensure that we handle our cases expeditiously.

Thank you for your attention to this matter. Please be on the lookout for the court assignment from your judge on February 12th for your February 16th hearing.

Sincerely,

_____
Amy Clark Meachum
Civil Presiding Judge
Travis County, Texas

Original: Velva L. Price, District Clerk

Cause No. D-1-GN-20-006861

JAMES BLAKE BRICKMAN,	§	IN THE DISTRICT COURT
DAVID MAXWELL,	§	
J. MARK PENLEY, and	§	
RYAN M. VASSAR	§	
Plaintiffs,	§	
	§	TRAVIS COUNTY, TEXAS
vs.	§	
	§	
OFFICE OF THE ATTORNEY GENERAL	§	
OF THE STATE OF TEXAS	§	
Defendant	§	250th JUDICIAL DISTRICT

PLAINTIFFS' RESPONSE TO DEFENDANT'S RULE 91a MOTION TO DISMISS BASED ON LACK OF SUBJECT MATTER JURISDICTION

TO THE HONORABLE DISTRICT JUDGE:

Plaintiffs James Blake Brickman, David Maxwell, J. Mark Penley, and Ryan M. Vassar (collectively, Plaintiffs) file their Response to Defendant Office of the Attorney General of the State of Texas' (OAG) Rule 91a Motion, and would respectfully show the Court as follows:

I. INTRODUCTION

After Plaintiffs reported to federal and state law enforcement agencies what they believed in good faith to be criminal conduct committed by Attorney General Ken Paxton and OAG, the agency promptly fired all four of them.[1] It is hard to imagine a more clear-cut violation of the Texas Whistleblower Act (the "Act").[2]

[1] Three other whistleblowers were either fired or effectively forced to resign in the immediate aftermath of Plaintiffs' good-faith report. The then-current First Assistant Attorney General, himself a whistleblower, resigned immediately. A host of other senior members of OAG's staff have resigned since, including the Solicitor General after he refused to sign on to Ken Paxton's ill-fated suit attempting to challenge the results of the U.S. presidential election.

[2] OAG retaliated so swiftly that Plaintiffs are entitled to a presumption that they were terminated because they reported Ken Paxton and OAG's illegal conduct. *See* TEX. GOVT. CODE § 554.004(a).

OAG's Rule 91a motion is brazen. It would have this Court rule that when a public employee witnesses unlawful conduct by the Attorney General—or the Governor, Lieutenant Governor, Comptroller, or Land Commissioner, for that matter—the employee's only options are to look the other way or quit. Not content with merely breaking the law, now OAG argues that this Court should re-write the law and hold that Ken Paxton is above it. Granting OAG's motion would gut the functional check on abuse of power by public officials and the protection for employees that report such abuse that the Legislature codified as public policy of the State in enacting the Whistleblower Act. The Court should deny OAG's motion entirely.

II. STANDARD OF REVIEW AND THE TEXAS WHISTLEBLOWER ACT

A. Rule 91a Motions Must be Strictly Construed and Facts Plead by Plaintiffs Must be Liberally Construed.

1. Dismissal is appropriate under Rule 91a only if the cause of action is "baseless," or "if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought … [or] no reasonable person could believe the facts pleaded." TEX. R. CIV. P. 91a.1. Whether the dismissal standard is satisfied depends "solely on the pleading of the cause of action." TEX. R. CIV. P. 91a.6. "The court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59." TEX. R. CIV. P. 91a.6.

2. A court applying the fair notice standard to a Rule 91a motion to dismiss must construe the pleadings liberally in the plaintiff's favor, look to the pleader's intent, and accept as true the pleading's factual allegations. *Koenig v. Blaylock*, 497 S.W.3d 595, 599 (Tex. App.—Austin 2016, pet. denied); *Darnell v. Rogers*, 588 S.W.3d 295, 301 (Tex.

App.—El Paso 2019, no pet.). If nothing in the pleading itself triggers a clear legal bar to the claim, then there is a basis in law and the motion should be denied. *Darnell*, 588 S.W.3d at 301. Because Rule 91a imposes harsh remedies, it must be strictly construed. *In re Farmers Tex. County Mut. Ins. Co.*, 604 S.W.3d 421, 426 (Tex. App.—San Antonio 2019, no pet.).

3. A plea to the jurisdiction is a dilatory plea, the purpose of which is generally to defeat an action without regard to whether the claims asserted have merit. *Tex. Health & Human Servs. Commission v. Pope*, No. 03-19-00368, 2020 WL 6750565, at *5 (Tex. App.—Austin Nov. 8, 2020, no pet. h.) (citing *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012); *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000)). "The plea typically challenges whether the plaintiff has alleged facts that affirmatively demonstrate the Court's jurisdiction to hear the case." *Id.* (citing *Mission Consol. Indep. Sch. Dist.*, 372 S.W.3d at 635; *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993)).

4. The pleadings in a subject matter jurisdiction challenge must be liberally construed to give effect to the pleader's intent and provide broad opportunities to amend as needed. *Miranda*, 133 S.W.3d at 226-27. In determining a plea to the jurisdiction, the Court liberally construes pleadings in the plaintiff's favor as to the plaintiff's intent "to determine whether the facts alleged affirmatively demonstrate the court has jurisdiction to hear the matter." *City of Houston v. Houston Municipal Employees Pension System,* 549 S.W.3d 566, 575 (Tex. 2018).

5. Sovereign immunity deprives a trial court of jurisdiction over lawsuits in which a plaintiff sues the state or certain governmental units, unless the state consents to suit. *Id*. (citing *State v. Lueck*, 290 S.W.3d 876, 880 (Tex. 2009)).

6. Express legislative consent exists here. The Whistleblower Act provides:

> "[a] public employee who alleges a violation of this chapter may sue the employing state ... entity for the relief provided by this chapter. **Sovereign immunity is waived and abolished to the extent of liability for the relief allowed under this chapter for a violation of this chapter**."

TEX. GOV'T CODE § 554.0035 (emphasis added).

7. OAG claims Plaintiffs cannot and have not plead facts sufficient to state a claim under the Act and, therefore, OAG's immunity from suit has not been waived and the court lacks subject matter jurisdiction. Texas courts have analyzed the Act for nearly four decades, yet OAG's motion is based not on established doctrine but on specious arguments entirely unsupported by the statute or any case law. It should be denied.

B. The Texas Whistleblower Act Must be Liberally Construed to Achieve its Purposes.

8. "The Whistleblower Act is a broad remedial measure intended to encourage disclosure of governmental malfeasance and corruption." *City of Waco v. Lopez*, 259 S.W.3d 147, 154 (Tex. 2008). The Act "prohibits a state or local government from terminating the employment of a public employee who in good faith reports a violation of law by another public employee to an appropriate law enforcement authority." *Rogers v. City of Fort Worth* 89 S.W.3d 265, 275 (Tex. App.—Fort Worth, 2002, no pet.) *citing* Tex. Govt. Code Ann. § 554.002(a). It must be liberally construed. *Allen*, 132 S.W.3d at 161; *Id*. (*citing Castaneda v. Tex. Dep't. of Ag*., 831 S.W.2d 501, 503 (Tex. App.—Corpus Christi 1992, writ denied)).

9. "The purposes of the Texas Whistleblower Act are to (1) protect public employees from retaliation by their employer when, in good faith, they report a violation of law, and (2) secure lawful conduct by those who direct and conduct the affairs of government." *City of New Braunfels v. Allen*, 132 S.W.3d 157, 161 (Tex. App—Austin 2004, no pet.). Courts have further noted that the Act's purposes are (1) to enhance openness in government by protecting public employees who inform proper authorities of legal violations and (2) to secure governmental compliance with the law on the part of those who direct and conduct governmental affairs." *See Rogers v. City of Fort Worth* 89 S.W.3d 265, 275 (Tex. App.—Fort Worth, 2002, no pet.) (*citing Upton County v. Brown*, 960 S.W.2d 808, 817 (Tex. App.—El Paso 1997, no pet.) and *Tarrant County v. Bivins*, 936 S.W.2d 419, 421 (Tex. App.—Fort Worth 1996, no writ)). No specific form for reporting the suspected unlawful conduct is required. *See Texas Dept. of Assistive and Rehabilitative Services v. Howard*, 182 S.W.3d 393 (Tex. App.—Austin 2005, pet. denied) (affirming jury verdict in case arising from oral reporting to the State Auditor's Office).

10. The elements of a prima facie case under the Whistleblower Act are: (1) the plaintiffs are public employees; (2) who made a good-faith report of a violation of law by their employing governmental entity or another public employee; (3) they made the report to an appropriate law enforcement authority; and (4) they suffered retaliation as a result of making the report. *See* TEX. GOV'T CODE § 554.002(a); *see also, Lueck*, 290 S.W.3d at 878; *Hunt Cmty. Supervision and Corrs. Dep't v. Gaston*, 451 S.W.3d 410, 417 (Tex. App.—Austin 2014, pet. denied).

III. ARGUMENT & AUTHORITIES

11. OAG does not challenge Plaintiffs' allegations that they in good faith reported violations of the law committed by Ken Paxton in the course and scope of his duties for OAG. But OAG argues that the Attorney General's conduct is neither conduct of the employing governmental entity (OAG) nor conduct of a public employee so as to bring that conduct within the scope of the Whistleblower Act's protections. MDT § 2.1. In other words, OAG argues that, if the Attorney General himself – or any other elected official for that matter – was involved in the criminal conduct that an employee reports to law enforcement, then the whistleblower is not protected against retaliation for that report. Report crimes committed by lower-ranking employees? You're protected. Report crimes committed by the head of the agency? You're not protected.

12. The OAG's outrageous position is contrary to Texas law. First, it is contrary to the plain language of the statute. Second, it seeks to emasculate the public policy behind the Whistleblower Act. Third, no court has ever come to this conclusion. Fourth, other cases have allowed suits under the Act providing a protectable cause of action arising from reporting the alleged criminal conduct of elected officials including on occasion statewide elected officials. The Court should decline the OAG's grotesque invitation to rewrite the Act to include an exception for the Attorney General and other elected officials. This request not only seeks to lead the Court into error but invokes the worst type of anti-public-integrity, judicial activism and is, in lay terms,–nonsense.

A. Plaintiffs Reported and Described Unlawful Conduct by OAG.

13. The Act protects from retaliation public employees who in good faith report "a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority." TEX. GOV'T. CODE § 402.002. The Act defines

"state governmental entity" in relevant part as "a board commission, department, office, or other agency in the executive branch of state government, created under the constitution or statute of the state…" TEX. GOV'T. CODE §554.001(5)(A). OAG is a state agency in the executive branch of state government created by statute. *See* TEX. CONST. art. IV, § 22 and TEX. GOV'T. CODE § 402.001, *et seq*. Courts have recognized that OAG is a proper defendant for a whistleblower action. *See OAG v. Rodriguez*, 605 S.W.3d 183 (Tex. 2020) (finding absence of causation between complaints and adverse action). *Ritter v. Abbott, Attorney General of the State of Texas*, No. 03-14-00233-CV (Tex. App.—Austin July 24, 2014) (noting dismissal of whistleblower suit against OAG by settlement of the parties).

14. At all relevant times, the Plaintiffs were employees of OAG.[3]

15. As Plaintiffs have plead in extensive detail, each of them reported criminal wrongdoing by OAG, which was their employing governmental entity. Plaintiffs hereby incorporate Plaintiffs' Second Amended Original Petition and Verified Motion for Temporary Injunction and Permanent Injunction ("Second Amended Petition") by reference and summarize here what is plead much more extensively in the Second Amended Petition.

16. In paragraphs 17 – 28 of the Second Amended Petition, Plaintiffs describe the close personal friendship and other shadowy connections between Ken Paxton, age 57, and Nate Paul, age 33, connections both men have sought to obscure.

17. As described in paragraphs 17-20 of the Second Amended Petition, Nate Paul is an Austin real estate investor whose home and offices were searched by the FBI in

[3] *See* Plaintiffs' Second Amended Petition ¶¶ 2-6.

August 2019 amid well-documented financial troubles and bankruptcies that have spiraled into a whirlwind of litigation and other legal problems for Paul and his companies in 2019 and 2020. Among Nate Paul's legal entanglements over the span of the last two years have been (a) bankruptcies of companies Paul controls, (b) legal disputes with investors in some of those companies, including Austin-based charity the Mitte Foundation, (c) attempts by creditors to foreclose on properties owned by companies Paul controls; (d) the apparent criminal investigation of Paul or his companies that precipitated the August 2019 searches of his home and office by the FBI; and (e) Nate Paul's efforts to have law enforcement officials criminally investigate his perceived enemies, including the federal magistrate judge who issued the search warrants authorizing the search of his home and offices, the FBI agents and state law enforcement agents who carried out the searches, the Assistant United States Attorney who had obtained the search warrants from the federal magistrate judge, a federal bankruptcy judge, a local charity that was a co-investor with Paul-controlled entities in two properties, the local charity's lawyer, creditors of Paul-controlled entities, and the receiver appointed by the Travis County Court in the dispute involving the charity's investment.

18. As Plaintiffs describe in paragraphs 22-28 of the Second Amended Petition, the origins and full dimensions of the relationship between Mr. Paul and Mr. Paxton are net yet known. But what is known paints a picture of personal, reputational, and financial ties to Mr. Paul that almost certainly explain why Paxton, acting in the scope of his official duties for OAG, abused his office and brought the power, resources, and personnel of OAG to bear in outlandish ways to personally benefit Mr. Paul and to benefit Paxton himself.

19. By way of example only, and as plead in detail in paragraphs 22-28 of the Second Amended Petition, Paxton and Paul met regularly in 2020, usually without

Paxton's staff or security detail present, and in meetings that were not included on Paxton's official schedule. Paul is a major donor to Paxton's campaign, having donated $25,000 in October 2018. It has also been publicly reported that the political action committee of a law firm representing Nate Paul's interests in litigation between Nate Paul-related entities and the Mitte Foundation made a $25,000 contribution to Paxton's campaign on or about June 30, 2020, which was 22 days after the OAG intervened in the litigation to advantage Paul personally. Ken Paxton also has personal and financial ties to Nate Paul through an individual with whom Ken Paxton carried on an extramarital affair and who now works for Nate Paul (based on Ken Paxton's recommendation) in a construction project management job despite having no prior experience in the construction industry.

20. Plaintiffs have also plead on information and belief that Nate Paul and Ken Paxton have a relationship related to the renovation construction of a home Paxton was renovating in Austin.

21. Paul and Paxton have sought to obscure the nature of their relationship and the extent of their connections. For example, Nate Paul repeatedly refuses to answer questions in civil litigation he is involved in about the nature of his relationship with the Attorney General. And the individual with whom Paxton had the extramarital affair conceals her work for a Nate Paul-controlled company in her LinkedIn profile. (*See* paragraphs 23 and 26 of Second Amended Petition).

22. In paragraphs 29 -84 of the Second Amended Petition, Plaintiffs describe in detail how Ken Paxton used and abused his office by causing the full weight of the office that he commands, deploying employees and resources of OAG spanning multiple functions and departments, to improperly interfere in the civil disputes and criminal

matters involving his donor, friend and personal benefactor Nate Paul. Plaintiffs reasonably believed that Paxton and OAG engaged in these acts not only to benefit Paul, but to benefit Paxton personally because of the financial, reputational and personal relationships between Paul and Paxton, relationships Paul and Paxton work hard to conceal.

23. Plaintiffs have plead facts showing the criminal actions about which Plaintiffs complained to law enforcement were the actions of the OAG, Paxton as the top employee of OAG, and the actions of other OAG employees whom Paxton enlisted to participate, in most cases apparently unwittingly. Some of Paxton's actions directing the OAG to benefit Paul were criminal without regard to motive. Others were so egregious and so contrary to appropriate use of his office, that they could only have been prompted by illicit motives such as a desire to repay debts, pay hush money, or reciprocate favors extended by Paul.

24. By way of example, and as plead in detail in paragraphs 33 – 41 of the Second Amended Petition, Ken Paxton, after personally speaking with Nate Paul about a request Paul's lawyers made under the Texas Public Information Act, personally intervened and caused OAG to help Nate Paul obtain documents related to an ongoing law enforcement investigation. Paxton's decision gave Nate Paul what he wanted – access to information about the FBI search of his home. But the decision dictated by Paxton overturns decades of settled expectations among sister law enforcement agencies, compromised the OAG's own law enforcement information, and will likely spark lawsuits challenging the newly announced application of the law.

25. Also by way of example, Paragraphs 42 - 52 detail how OAG and Paxton caused the powers, employees and other resources of the Financial Litigation and

Charitable Trust Division of OAG to be brought to bear illegally to help Nate Paul by pressuring a local charity with whom Paul was involved in a business dispute.

26. Paragraphs 53 - 54 of the Second Amended Petition describe how Paxton personally directed OAG to issue a legal opinion restricting foreclosure proceedings for the purpose of directly benefitting Nate Paul and himself.

27. Paragraphs 55 - 84 of the Second Amended Petition describe how Paxton abused his office to further Nate Paul's efforts to have his adversaries criminally investigated. In doing so, Paxton and OAG directed the work of an outside lawyer who was not properly authorized to perform work for OAG and who was not empowered to prosecute or hold himself out as a prosecutor. Together, OAG, Paxton and this outside lawyer obtained subpoenas under false pretenses and then worked in concert with Nate Paul's lawyer to have subpoenas served on Nate Paul's perceived adversaries, all in a flagrant abuse of OAG's power and resources.

28. In paragraphs 85 – 92 of the Second Amended Petition, Plaintiffs detailed how the actions described previously gave rise to their reasonable and good faith belief that Ken Paxton and OAG committed numerous crimes related to abuse of office, tampering with government records, obstruction of criminal investigations, and bribery.

29. In paragraphs 93 - 103 of the Second Amended Petition, Plaintiffs described in detail how each of them, along with other whistleblowers, went to federal and state law enforcement authorities to report their good faith belief of OAG's and Ken Paxton's criminal conduct.

B. The Actions of the Attorney General taken in his Official Capacity are the Actions of the OAG.

30. These allegations satisfy the statutory requirement that Plaintiffs in good faith report "a violation of law by the employing governmental entity." Tex. Govt. Code § 402.002. Ken Paxton's conduct as alleged in the Second Amended Petition *is* OAG's conduct because Paxton was acting within the scope of his official duties when committing the acts that Plaintiffs reported.

31. The Whistleblower Act's remedial purpose is to secure lawful conduct on the part of those who direct and conduct the affairs of public bodies. *See*, *City of Cockrell Hill*, 48 S.W.3d at 897 (emphasis added). In *Wichita County v. Hart*, the Austin Court of Appeals analyzed whether the reported acts of a sheriff could be the acts of the county for purposes of the Act. *Wichita County v. Hart*, 892 S.W.2d 912 (Tex. App.—Austin 1994, rev'd on other grounds). In doing so, the Court held that a "sheriff is part of the county's government when he is acting in his official capacity, and consequently the county is liable for his misdeeds." *Id*.

32. Later, in another whistleblower suit, the Fort Worth Court of Appeals relied on *Hart* to reach the same conclusion: that the Sheriff of Tarrant County who was acting in his official capacity was part of the County's government for purpose of the Act. *See Tarrant County v. Bivins*, 936 S.W.2d 419, 421-22 (Tex. App.—Fort Worth 1996, no writ) (comparing its holding to that in *Cf. Familias Unidas v. Briscoe*, 619 F. 2d 391, 404 (5th Cir. 1980) (county may be held liable for actions of elected county officials, such as sheriff, treasurer, or county judge, when those officials act in areas where they, alone, are 'the final authority or ultimate repository of county power.')).

33. In *City of Cockrell Hill*, the plaintiff, relying on *Hart* and *Bivins*, argued that a city alderman whose illegal conduct she reported was the equivalent of the employing governmental entity (the city) and therefore she had reported unlawful conduct on the part of the entity. *City of Cockrell Hill v. Johnson*, 48 S.W.3d 887 (Tex. App.—Fort Worth 2001, pet. Denied). The court rejected that argument, distinguishing *Hart* and *Bivins* because the reported conduct engaged in by the officials in those cases was committed in the scope of the officials' duties, while the conduct of the alderman in *Cockrell Hill* (alleged family violence) was committed in that person's individual capacity and had nothing to do with his office. *Id.* In so doing, however, the Fort Worth Court of Appeals affirmed its position that officials who are acting in their official capacity are the employing governmental entity for purposes of the Act. *Id.*

34. The Attorney General directs and conducts the affairs of OAG. His actions when taken in his official capacity are the actions of the agency. Even if the Plaintiffs only reported or alleged wrongful conduct on the part of Ken Paxton, so long as he engaged in the reported conduct in his capacity as attorney general and the acts related to his office, those acts were necessarily that of OAG as well. *See also Housing Auth. of City of El Paso v. Rangel*, 131 S.W.3d 542, 548 (Tex. App.—El Paso 2004) ("We conclude that the actions of Commissioners Licon and Lozano fall within the official duties and affairs of HACEP and their misconduct should be construed as acts of the employing governmental entity.").

35. OAG does not address this consistent line of cases or offer any authority supporting its counterintuitive suggestion that Ken Paxton's conduct in the course and scope of his office is somehow not the conduct of OAG. Plaintiffs have alleged in great detail that Ken Paxton *used and abused* his office by causing OAG to improperly interfere

in the civil disputes and criminal matters of his donor and associate Nate Paul. (*See* paragraphs 17-92 of the Second Amended Petition). Ken Paxton could only engage in the reported conduct because of his office, and the reported conduct is not some individual indiscretion unrelated to his post. Because Ken Paxton was acting in his capacity as Attorney General, his conduct was the conduct of OAG. Therefore, Plaintiffs reported criminal conduct on the part of their employing government entity in satisfaction of the requirements of the Act, and OAG's motion should be denied.

C. The Attorney General is a Public Employee

36. Although the Court need not reach this issue because Plaintiffs have sufficiently plead that they reported violation of law by their employing entity, OAG is also wrong in its even more counterintuitive argument that Ken Paxton is not a "public employee."

37. The Act defines "public employee" as "an employee or appointed officer other than an independent contractor who is paid to perform services for a state or local governmental entity." TEX. GOVT. CODE §554.001(4).

38. According to OAG's novel theory, the Attorney General of Texas is not a public employee because he is an elected "constitutional officer."[4] In fact, OAG argues that no Texas elected official is a public employee under the Whistleblower Act and, even though elected officials hold the most power and thus have the most ability to engage in corrupt behavior, no report of illegal conduct by an elected official can trigger whistleblower protection under the Texas Whistleblower Act. The Act makes no such

[4] Def. Motion at 7-9.

distinction. OAG's argument is repugnant to the purposes of the Act and to the principles of a democracy premised on elected officials being accountable to the public.

39. OAG cites only one case for its extreme proposition but quotes the case entirely out of context and uses that quote in a significantly misleading manner.[5] OAG provides the following quote from the *Cockrell Hill* case in support of its position:

> "[t]here is nothing in the plain language of the [Whistleblower] Act that would indicate clear legislative intent to waive sovereign immunity from suit based on the private acts of *elected officials*. The [Whistleblower] Act's provisions are exclusive, and courts may not add to them."

Id. (brackets and emphasis supplied by OAG.) OAG emphasizes the phrase "elected officials" to imply the Court held that the Act does not apply to reports of criminal conduct engaged in by elected officials. But *Cockrell Hill* does not stand for this proposition. It actually supports the opposite conclusion OAG asks this Court to make.

40. *Cockrell Hill* involves an elected city alderman accused of family violence. It separately considers whether the alderman qualified as (1) a public employee or (2) the employing governmental entity, when committing the alleges abuses. The Court held that the alderman was not a public employee, but that holding—contrary to OAG's implication—has nothing to do with the fact that the alderman was an elected official. Rather, the holding rests exclusively on the fact that the alderman was not paid for his services. *See id*. at 894 ("Because Smith was not paid to perform any services for the City, he was not a public employee under the Act."). Here, of course, the situation is indisputably different as the State of Texas pays Ken Paxton a salary of at least $153,750 per year by OAG for his full-time, 40-hour per week employment at OAG in addition to

[5] *See* Def. Motion at 9 citing *City of Cockrell Hill v. Johnson*, 48 S.W.3d 887, 896 (Tex. App.—Fort Worth 2001, pet. Denied).

other benefits that are part of his compensate from the public. *See* Second Amended Petition par. 9.

41. OAG's quotation does not appear in the section of the opinion discussing public employee. It is found two pages later, where the Court is considering whether the alderman was acting as the employing governmental entity when he allegedly abused a family member at their private home. *See id*. at 896. Holding that he was not, the Court reiterated the exact distinction that makes Paxton's acts those of OAG here: "there is no allegation or evidence that [the alderman] acted in his official capacity with regard to the alleged assault, sexual assault, or drug-related activities." *Id*. This is the context in which the Court said it could find no intent "to waive sovereign immunity from suit based on the *private acts* of elected officials." *Id*. (emphasis added).

42. The Court's holding thus turns on the private nature of the accused criminal conduct, not the elected status of the official. Absolutely nothing in the *Cockrell Hill* opinion suggests that a *paid* elected official is not a public employee, and the case affirmatively confirms that agencies are liable under the Act for acts committed by elected officials in their *official* capacity.

43. The court also stated:

> We believe our decision on this issue is in keeping with the Act's remedial purpose of *securing lawful conduct* on the part of *those who direct and conduct the affairs of public bodies*. To achieve this purpose, the Act is directed toward public employers' violations of the law that are detrimental to the public good or society in general.

Id. at 897 (emphasis added) *citing Stinnett v. Williamson County Sheriff's Dep't*, 858 S.W.2d 573, 575 (Tex. App.—Austin 1993, writ denied).

44. Indeed, to accept OAG's argument would rob the Act of this intended purpose to the secure lawful conduct of the person who directs and conducts the affairs

of OAG: Ken Paxton. Not only is there nothing in the statute that dictates this result, but other whistleblower suits have proceeded to trial in Travis County arising from complaints of alleged criminal conduct by the elected officials who were the incumbent elected officials of state agencies.[6] The OAG's argument is repugnant to the very purpose of the Texas Whistleblower Act and would create a non-statutory exception for the very people who should be held most accountable for abiding by the law and most responsible for violating it.

45. The Court's goal in construing statutes is to "ascertain and give effect to the Legislature's intent as expressed by the language of the statute." *Houston Municipal Employees Pension System*, 549 S.W.3d at 580. As the Texas Supreme Court has held for decades:

> The fundamental rule controlling the construction of a statute is to ascertain the intention of the Legislature expressed therein. That intention should be ascertained from the entire act, and not from isolated portions thereof. This Court has repeatedly held that the intention of the Legislature in enacting a law is the law itself; and hence the aim and object of construction is to ascertain and enforce the legislative intent, and not to defeat, nullify, or thwart it. . . It is settled that the intention of the Legislature controls the language used in an act, and in construing such act the court is not necessarily confined to the literal meaning of the words used therein, and the intent rather than the strict letter of the act will control.

City of Mason v. West Texas Utilities Co., 150 Tex. 18, 237 S.W.2d 273, 278 (1951).

46. OAG's footnoted citation to sections of the Government Code outside of the Act where other statutes distinguish between elected and appointed officers is likewise unpersuasive.[7] If the Legislature wanted to exclude elected officials from the Act it would

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[6] *See e.g., Scott v. General Land Office*, 99--3926in the 345th District Court of Travis County, Texas (whistleblower claim against GLO predicated on Land Commissioner David Dewhurst's alleged unlawful conduct); *see also Aina Kim Hill v. Texas Commission on Fire Protection,,* 97-13261, in the 201st District Court of Travis County, Texas, on appeal as 03-00-00662-CV, Third Court of Appeals (filed on 10/03/2000).

[7] Def. Motion at 9.

have, but it did not. *See* TEX. GOV'T CODE §§ 311.021, 312.002, 312.005, 312.006. The Legislature intended for the Act to apply to Texas' elected officials and to situations like the one before this Court. To hold otherwise would undermine the entire purpose of the statute.

47. The Act, which the Court is to construe broadly, defines "public employee" as "an employee or appointed officer other than an independent contractor who is paid to perform services for a state or local governmental entity." Tex. Govt. Code §554.001(4). Indeed, the case law analyzing the question of whether the subject of a report under the Act is a public employee or not turns on whether the alleged employee is paid for their services. *See, e.g, Cockrell Hill*, infra; *see also, Housing Authority of the City of El Paso v. Rangel*, 131 S.W.3d 542 (Tex. App—El Paso 2004, no pet., reversed and remanded by agreement) (unpaid commissioners not public employees, but acts were in official capacity and therefore acts of employing entity).

48. The Attorney General is a public employee based on the plain language of the Act and fits directly in line with the Act's definition and purposes. *See* TEX. GOV'T CODE §§ 311.021, 312.002, 312.005, 312.006. Ken Paxton is "paid to perform services for a state governmental entity." *Id.* at § 554.001(4). The Texas Constitution provides "the Attorney General…shall receive an annual salary in an amount to be fixed by the Legislature and perform such duties as are or may be required by law." TEX. CONST. ART. IV § 23; *see also* TEX. CONST. ART. III § 62 (relating to the salary of the Attorney General).

49. Plaintiffs have plead extensive facts demonstrating that, at all times relevant to this action, Ken Paxton has been an employee of OAG. Paragraphs 8-12 of the Second Amended Petition, along with exhibits 1 and 2, allege facts that overwhelmingly

demonstrate the common-sense proposition that Ken Paxton has been an employee of OAG at all times relevant to this action.

50. In sum, Plaintiffs' detailed live pleading asserts that Plaintiffs reported to law enforcement what they reasonably believed were violations of law both by "the employment governmental entity" and by a "public employee."

D. The Whistleblower Act Protects Senior Staff of State Agencies

51. In Section 2.2 of its motion, OAG argues that the Plaintiffs cannot state a claim under the Act because state officials must have the unfettered right to terminate their senior staff if those employees are not absolutely loyal – even to the point of condoning the official's illegal conduct.[8]

52. As OAG admits, there is nothing in the Whistleblower Act that suggests that members of an elected official's senior staff – whatever that might mean – are exempt from the protections of the Whistleblower Act. The statute plainly protects "public employees" who engage in whistleblowing. TEX. GOV'T. CODE §54.002(a); 54.001(4). Nothing in the statute exempts "public employees" who happen to be "senior staff," much less provides a workable definition of which employees might be excluded by the OAG's contention.

53. To hold as OAG argues would undermine the purposes of the Whistleblower Act. OAG asks the Court to find, without any statutory or case law support, that those officials whose position would afford them the most knowledge of an agency's or public

[8] Def. Motion at 10. In the introduction to its motion, OAG argues that the appropriate thing for public employees to do when they cannot support an illegal action by their elected official is to resign. *Id* at 2. This notion absolutely flies in the face of the policy behind the Whistleblower Act. In the beginning of Section 2.3, OAG also conflates the Plaintiffs right to reinstatement under the Act with some absolute right to employment. Plaintiffs have never made this argument and it is irrelevant to a jurisdictional analysis of whether Plaintiffs have pled sufficient facts to state a claim under the Act.

employee's criminal wrongdoing, and who are in the best position to report corruption, cannot bring claims for retaliation they suffer after reporting crime.

54. When the Texas Legislature intends to exempt certain employees from protection under an anti-retaliation statute, it knows how to do so. For example, Chapter 21 of the Texas Labor Code, formerly known as the Texas Commission on Human Rights Act, is the state law analog to Title VII of the Civil Rights Act of 1964. Chapter 21 prohibits, among other things, employment discrimination on the basis of race, color, sex, and national origin. Tex. Lab. Code §21.051. It also prohibits retaliation against an employee who files a charge of discrimination, opposes discriminatory treatment, or participates in an investigation, proceeding or hearing related to such a charge. Tex. Lab. Code §21.055.

55. Prior to 1993, Chapter 21 specifically exempted from protection a person on the "personal staff" of or serving in a "policy-making" position for an elected official. That statutory exclusion in the Texas statute was consistent with Title VII, which was amended in 1972 to include (and still includes) an express statutory provision stating that certain policy-making employees are excluded from Title VII coverage. 29 U.S.C. §2000e(f); *EEOC v. Vermont*, 904 F.2d 794, 799 (2nd Cir. 1990) (quoting 118 Cong.Rec. 4492-93 (1972)) ("Basically the purpose of the amendment . . . [is] to exempt from coverage those who are chosen by the Governor or the mayor or the county supervisor, whatever the elected official is, *and who are in a close personal relationship and an immediate relationship with him*.").

56. The Texas Legislature's inclusion of that statutory exemption evidences its ability to write an exception from an employment retaliation statute when it intends to. The Texas Legislature has never implemented this kind of exemption in the Texas Whistleblower Act.

57. In fact, the Texas Legislature decided to eliminate that express statutory exclusion from Chapter 21 in 1993, a decision that was implemented during the 1995 legislative session. *See* Acts 1995, 74th Leg., ch. 76 (S.B. 959), § 9.05(a), effective September 1, 1995.

58. Also in 1995, the Texas Legislature made significant amendments to the Texas Whistleblower Act. *Neighborhood Centers, Inc. v. Walker*, 544 S.W.3d 744 (Tex. 2018) (citing Act of May 25, 1995, 74th Leg., R.S., ch.721, § 3, 1995 Tex. Gen. Laws 3812, 3812–3813 (amending Tex. Gov't Code § 544.003)). Notably, the Legislature did not add the exclusion that OAG asks the Court to judicially legislate today. To the contrary, the Legislature removed a similar, express exclusion from a different anti-retaliation provision.

59. Probably because of the absence of any statutory, judicial, or logical support for its position, the part of OAG's motion asking the Court to judicially legislate a "senior official" exclusion from coverage under the Whistleblower Act relies on a mish-mash of dicta from inapplicable federal and state court opinions outside the context of the Texas Whistleblower Act. OAG's "authority" ranges from a 1926 United States Supreme Court opinion (the reach of which has been severely limited by opinions in the last hundred years), to late 20th century First Amendment political speech and patronage dismissal cases, to more recent cases that still have no applicability to this dispute or any dispute under the Texas Whistleblower Act.

60. Most of the cases and quotes are mischaracterized and taken out of context. Worse yet, OAG applies remarkably loose use of brackets within a quotation from a more recent ruling in a Title VII case to attempt to transform that case into something resembling persuasive authority. All of this to attempt to persuade this Court that it lacks

subject matter jurisdiction over Plaintiffs claims under the Act because OAG should be free to fire Plaintiffs because they were disloyal in reporting criminal abuse of office by Ken Paxton to proper law enforcement authorities. To so hold would be error.

61. OAG begins this portion of its motion by cherry-picking quotes from cases that at least involve the Act but are nonetheless off base. For example, OAG quotes the Texas Supreme Court's opinion in *Hart* for the proposition that "public employers must preserve their right to discipline employees who make either intentionally false or objectively unreasonable reports," to justify its argument that the Attorney General has the absolute authority to terminate senior staff.[9] However, the *Hart* opinion had nothing to do with jurisdictional analysis, or an analysis of an official's authority to terminate an employee.[10] *Id*. The quote OAG pulled from the case comes instead from the court's analysis of the "good faith" reporting requirement of the Act, an element OAG does not challenge in its Rule 91a motion here. *Id*. The *Lopez* case did not involve a jurisdictional analysis either, but instead analyzed the affirmative defense available to employers under the Act who are able to demonstrate a legitimate reason for terminating the public employee that is unrelated to the employee's report of criminal conduct, also an issue not challenged by OAG in its 91a motion.[11] *Lopez* has nothing to do with whether an official has absolute authority to terminate its senior staff without liability under the Act.

62. OAG also cites the opinion in *Neighborhood Ctrs.*, stating:

> …the Texas Supreme Court has observed, "the duty of loyalty and other competing legal and ethical principals are powerful arguments in favor of

[9] Def. Motion at 11 *citing Wichita County v. Hart*, 917 S.W.2d 779, 784 (Tex. 1996)
[10] While the *Hart* opinion from the lower Austin court (892 S.W.2d 912) did contain jurisdictional issues, those issued were not appealed to the Texas Supreme Court. Instead, the Supreme Court Opinion only analyzed arguments concerning venue and the definition of "good faith."
[11] *See* Def. Motion at 11 *citing Lopez v. Tarrant Cty*. No. 02-13-00194-CV, 2015 Tex. App. LEXIS 8899*18 (Tex. App.—Fort Worth, Aug. 25, 2015, pet. Denied).

limits on what, when, to whom, how, and why whistleblowers may make their disclosures.'"[12]

63. First, the sole issue in that case was whether the Act applied to an open enrollment charter school and the opinion does not contain *any* analysis of issues relating to the application of the Act to senior staff. *See id.* Further, the quoted language is not from the court's holding, but is misconstrued *dicta* and an incomplete quote from a secondary source. *Id.* at 749. OAG omits the preceding sentence from the source which states, "Prevention of harm to the public welfare is a powerful argument in favor of legal protection for whistleblowers." *Id. citing* Daniel P. Westman & Nancy Modesitt, Whistleblowing: The Law of Retaliatory Discharge 67 (Bureau of Nat'l Aff. 2d ed. 2004).

64. This is the extent of Whistleblower Act cases OAG relies on in this section of its motion. Lacking any actual authority, OAG quickly moves to more tenuous "analogous" (they are not) case law citing defamation cases (*Salazar*, *Barr*, *Reagan*, and *Hurlbut*) before moving to the U.S. Supreme Court's analysis of the U.S. President's executive Authority in *Myer*.[13]

65. Many of these inapposite cases involve patronage dismissals of employees who supported a political opponent or who opposed the newly elected official. The public policy behind those cases—which are not whistleblower cases—is the unremarkable proposition that an elected official should be able to choose his or her own staff. Here, by sharp contrast from the circumstances in those cases, the Whistleblowers were chosen by Ken Paxton. The reason for OAG terminating them was not a political or policy disagreement. Engaging in bribery and unlawfully exploiting public office is not a

[12] *See* Def. Motion at 11 *citing Neighborhood Ctrs. Inc. v. Walker*, 544 S.W.3d 744, 749 (Tex. 2018).
[13] Def. Motion at 11-13. Note that

"Republican" political position or a "Democratic" political position. Yet that is the logical extension of where OAG's preamble in pages 1-2 of its motion extends. The Plaintiffs reported and complained of Ken Paxton's violations of the law. It is this illegality—not his political views or policy positions—that gives rise to Plaintiffs' protections under the clear and express terms of the Texas Whistleblower Act. OAG cannot rely on patronage dismissal cases for the proposition that an elected official can terminate employees because they report that official's illegal conduct. These are apples and orangutans.

66. *Myer* considered whether, under the Constitution, the President has the exclusive power to remove executive officers of the United States "whom he appointed" by and with the advice and consent of the Senate. *See Myer v. United States*, 272 U.S. 52 (1926).[14] The *Myer* Court said yes. However, the Supreme Court significantly limited that power in later decisions. *See Humphrey's Executor v. United States*, 295 U.S. 602 (1935); s*ee also, Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (The separation of powers principle does not "grant the President an absolute authority to remove any and all Executive Branch officials at will.") The *Free Enterprise* court actually held that Congress has the power, in some circumstances to limit the President's authority to remove an officer from his post. *Id.* In this case, the Texas Legislature has done just that via the Whistleblower Act – limited state agencies' and official's authority to terminate employees because the employee reported criminal conduct by the agency and/or official.

67. The remainder of cases cited by OAG are no more applicable to this dispute or supportive of its argument than *Myer*. The *Elrod* case is a federal suit involving

[14] OAG's citation for Myer is incorrect as is the year of publication.

patronage dismissals and political speech.[15] OAG completely mischaracterizes the holding in that case. The *Elrod* Court actually found that patronage dismissals severely restrict political belief and association and violate both the First and Fourteenth Amendment and held that the terminated plaintiffs had stated a claim on which relief could be granted. *Id*. Yet, OAG cites this case for the proposition that "even a public employee's constitutional right must give way to a public officeholder's prerogative to do the job to which the public elected him as he sees fit."[16]

68. Similarly, *Pickering* has nothing to do with reporting a criminal violation of a superior.[17] *Pickering* is a First Amendment case concerning a teacher's right to publicly criticize a school board. *See Pickering v. Bd. Of Ed. Of Township High Sch. Dist. 205*, 391 U.S. 563, 568 (1968).

69. The *Garcia* case is not a whistleblower case and neither is *Renken,* or *Connick*, or *Arnett*.[18] None of these cases offer any instruction on whether senior staff level employees are exempt from the protections of employment anti-retaliation statutes.

70. Thus we arrive at OAG's citation to Magistrate Judge Austin's Report and Recommendation in the *Lee-Khan* case. Here, OAG replaces the words in Judge Austin's analysis of a § 1983 and Title VII claim with words it wishes were there.[19] The following table illustrates the significant differences in Judge Austin's ruling and OAG's "quote":

[15] Def. Motion at 14.
[16] Def, Motion at 14.
[17] Def. Motion at 15.
[18] Def. Motion at 15.
[19] Def. Motion at 16.

Judge Austin's Actual Ruling	OAG's "Quote" of the Ruling
When an employee's speech concerning office policy arises from an employment dispute concerning the very application of the policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office. *Lee-Khan v. Austin Ind. Sch. Dist.*, No. A-13-CV-00147-LY, 2013 WL 3967853, at *3 (W.D. Tex. July 31, 2013).	Thus, particularly in the context of a whistleblower complaint, "additional weight must be given to the [Attorney General's] view that [a whistleblowing employee] has threatened the authority of the [Attorney General] to run the office." Def. Motion at 16 *citing Lee-Khan.*

71. These are two completely different statements. OAG is essentially arguing the Attorney General ought to be able to fire an employee that reports his illegal conduct if that report hurts his ability to run the agency, regardless of the veracity of that report, the severity of the conduct reported, or the employee's good faith in reporting it. This statement is completely contrary to the purpose and intent and clear language of the Act.

72. Finally, and unsurprisingly, *Stegmar* is another inapposite opinion related to patronage dismissals.[20]

73. In Section 2.2 of its motion, OAG attempts to use cases in which courts have discussed governmental officials' right to terminate employees in certain situations or, ironically, cases where courts have found a violation of employee's constitutional rights when an employer took adverse action, to support an argument that the Attorney General can terminate an employee for disloyalty or "disagreeing with his policies" when the disloyalty the employee exhibits is reporting of the Attorney General's criminal behavior and the "policies" disagreed with are illegal. There is no authority for OAG's argument and it cannot be fairly characterized as a good faith effort to modify or extend existing law. OAG's motion should be denied.

[20] Def. Motion at 16.

E. The Whistleblower Act Applies to the Plaintiffs' Reports

74. In Section 2.3 of its Motion, OAG argues that the Plaintiffs' reports to law enforcement are not protected under the Act because the Plaintiffs official duties included investigating and reporting alleged violations of the law.[21]

75. OAG begins this section of their motion with another admission to a lack of any authority to support its position:

> "Thus, while Texas courts have not addressed the difference between a report of a violation of law made by an employee who spoke as a citizen on a matter of public concern versus an employee who makes a report pursuant to the duty of their office, federal First Amendment cases should apply equally to the Whistleblower statute."[22]

76. Once again, OAG attempts to support its argument with more inapplicable cases and additional loose use of brackets.

77. The OAG is also wrong about a lack of authority. There are several cases analyzing whether a report made as part of an employee's job is sufficient to trigger the Texas Whistleblower Act, but the cases do not support OAG's position. Various Texas courts of appeals have addressed OAG's argument and uniformly rejected it.

78. In *Rogers v. City of Fort Worth*, the Fort Worth Court of Appeals considered "whether the Texas Whistleblower Act protects an employee who reports a violation of law at the direction of his supervisor rather than on the employee's own initiative." *See Rogers v. City of Fort Worth* 89 S.W.3d 265 (Tex. App.—Fort Worth, 2002, no pet.). In that case, a municipal judge directed Rogers, a deputy marshal, to report wrongdoing by another deputy marshal. *Id*. The city argued that "Rogers did not report a violation of law unless he made his report primarily as a citizen, not an

[21] Def. Motion at 17.
[22] Def. Motion at 17.

employee…" *Id*. at 275. The court disagreed stating, "while it appears that Rogers made his report primarily in his role as an employee rather than a citizen, we decline to hold, based on this fact, that Rogers did not report a violation of law." *Id*. at 276. The court supported its conclusion with the following string cite:

> *See City of Weatherford v. Catron*, 83 S.W.3d 261, 270 (Tex. App.—Forth Worth 2002, no pet.) (rejecting city's argument that city water plant manager was 'simply doing his job' when he reported low chlorine levels in city's water supply to Texas Natural Resources Conservation Commission); *City of San Antonio v. Heim*, 932 S.W.2d 287, 290-91 (Tex. App.—Austin 1996, writ denied) (op. on reh'g)(holding that police officer who, in the course of his employment, arrested an off duty officer for driving while intoxicated reported a violation of law within the meaning of the Act; *Castaneda v. Tex Dep't of Ag*., 831 S.W.2d 501, 503 (Tex. App.—Corpus Christi 1992, writ denied) (holding that public employee who participated in investigation at the request of law enforcement authorities reported a violation of law protected by the Act).

79. The cases OAG cites in this section are inapposite and either do not discuss or apply to the Act or are quoted completely out of context. OAG places the word "whistleblower" in a quote from the *Garcetti* case, but that case did not examine the Texas Whistleblower Act; it was not a Texas case but a federal First Amendment retaliation case. OAG cites the *Guillarme* and *Perry* cases for the proposition that "there is no practical distinction between a whistleblower claim under the First Amendment to the United States Constitution and one pursued under the Texas act." Def. Motion at 17. However, this is incorrect. The courts in *Guillarme* and *Perry* reached no such conclusion. *See Guillarme v. City of Greenville*, 247 S.W.3d 457 (Tex. App.—Dallas 2008, no pet.) and *Alief Ind. Sch. Dist. v. Perry*, 440 S.W.3d 228 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). Instead, the *Guillarme* court held that the *causation* standards for a First Amendment Claim and a Whistleblower Claim are the same, but the court did not make any comparison as to the remaining elements of each claim. *Id.* In *Perry*, the court made

the referenced statement on damages in the context of a "one satisfaction rule" argument. It did not, however, find that a whistleblower claim (which is statutory) and a First Amendment claims (which is a common law claim) were synonymous generally--but instead undertook a separate analysis for each claim.

80. Likewise, the *Powers* case provides no support whatsoever for OAG's argument—quite the opposite. In that case, the claimants filed both First Amendment and Whistleblower claims. *See Powers v. Northside Ind. Sch. Dist.*, 951 F.3d 298 (5th Cir. 2020). The court dismissed the First Amendment claims on dispositive motions because the claimants were not speaking as citizens, while the Whistleblower claim survived summary judgment and was heard at trial. *Id.* Clearly then there is a "practical distinction" between First Amendment and Whistleblower Act claims.

81. None of the remaining cases cited by OAG in this section of its motion analyze or involve the Act. Instead, following its fallacious conclusion that there is no difference between First Amendment claims and those under the Act, OAG once again employs brackets to insert "whistleblower" and "Texas Whistleblower Act" into quotes from these cases analyzing *completely different statutory and/or common law causes of action.*

82. Even if the Court accepts OAG's invitation to judicially legislate into the Whistleblower Act the *Garcetti* exception drawn from First Amendment retaliation cases, dismissal is not appropriate. The nature of the reports Plaintiffs made to law enforcement would easily satisfy the standard OAG asks the Court to adopt here.

83. The First Amendment case law relied upon by OAG is clear that when "a public employee takes his job concerns to persons outside the work place in addition to raising them up the chain of command at his workplace, then those external

communications are ordinarily not made as an employee, but as a citizen." *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008) (citing *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006) ("*Freitag*"). This holds true even when the employee's job responsibilities include investigating and reporting misconduct or violations of the law. The plaintiff in Davis was a computer auditor whose responsibilities included auditing and reporting on the use of computers by employees at the University of Texas *Id*. at 304. She had reported to the FBI and the Equal Employment Opportunity Commission that certain University of Texas employees were unlawfully accessing pornography on the school's computers. *Id*. The plaintiff in *Freitag* was a corrections officer who had submitted reports of sexual harassment to a California State Senator and the state's Office of Inspector General. The court held that she made these reports as a citizen, noting that "[i]t was certainly not part of her official tasks to complain to the Senator or the IG about the state's failure to perform its duties properly, and specifically its failure to take corrective action to eliminate sexual harassment in its workplace." *Id*. at 545.

84. Consistent with *Davis*, U.S. District Courts in the Fifth Circuit have held that when a law enforcement officer reports misconduct outside the normal chain of command, the report is not made pursuant to their official duties, notwithstanding a law enforcement officer's general duty to investigate and report unlawful conduct. In *Ezell v. Wells*, 2015 U.S. Dist. LEXIS 90280, *1-2 (N.D. Tex. July 10, 2015), the plaintiff was a sheriff's deputy who was terminated for providing testimony in a civil action for employment discrimination brought by a former employee of the sheriff's department. The court held that "[s]uch external communication to a court is not speech made pursuant to official duties and is instead treated as a communication made by a citizen." *Id*. at *25.

85. Similarly, in *Winn v. New Orleans City,* 2014 U.S. Dist. LEXIS 24365, *19-20 (E.D. La., Feb. 25, 2014), the court held that a police officer who testified in a criminal trial of one of his coworkers did so as a citizen, and not pursuant to his job duties as police officer, noting that "[p]laintiff's obligation as a citizen to provide truthful testimony in a judicial proceeding is independent of his duties as a public servant."

86. Furthermore, "when a public employee speaks in direct contravention to his supervisor's orders, that speech may often fall outside of the speaker's professional duties." *Dahlia v. Rodriguez*, 735 F.3d 1060, 1075 (9th Cir. 2013). *See also Batt v. City of Oakland,* 2006 U.S. Dist. LEXIS 47889, 2006 WL 1980401 at *4 (N.D. Cal. Jul. 13, 2006) (where plaintiff, a former police officer who reported unlawful conduct outside the normal chain in command, presented evidence that "the culture of the OPD and the express commands of his direct supervisors established that plaintiff had a duty *not* to report misconduct," court found that he raised a fact issue as to whether his outside reports were made pursuant to his official duties); *Livingston v. Bartis*, 2008 U.S. Dist. LEXIS 4316, *24 (E.D. Mo. Jan. 18, 2006) (external complaints by police officer about misconduct by other officers was arguably protected citizen speech because "the Police Department's regulations did not require Livingston and O'Connor to report Bartis' alleged misconduct to the FBI," and in fact actively discouraged such reports). The fact that Plaintiffs were terminated for making their reports is *prima facie* evidence that the OAG had an internal policy discouraging employees from making reports to outside law enforcement agencies.

F. Plaintiffs have alleged Sufficient Facts to State a Claim under the Act

87. "Texas is a fair notice pleading jurisdiction and [the courts] apply this doctrine to Rule 91a motions to dismiss." *In re Odebrecht Construction, Inc.* 548 S.W.3d

739, 746 (Tex. App.—Corpus Christi 2018, no pet.). "The test for determining whether a petition provides fair notice is whether the opposing party can ascertain from the pleading the nature and basic issues presented by the controversy and what evidence might be relevant. *Id.* "Under this standard, [the courts] look to the pleader's intent and uphold the pleading even if some element of a cause of action has not been specifically alleged because every fact will be supplied that can be reasonably inferred from what is specifically stated. *Id.* (internal quotation marks and citations omitted). "When applying the fair notice standard to review of the pleadings on a Rule 91a motion to dismiss, [the court] must construe the pleadings liberally in favor of the plaintiff, look to the pleader's intent, and accept as true the factual allegations in the pleadings to determine if the cause of action has a basis in law or fact. *Id.*

88. When making a report, there is no requirement that the employee identify a specific law or use specific phrasing, so long as there is some law prohibiting the complained-of conduct to give rise to a whistleblower claim. *Texas Dep't of Crim. Justice v. McElyea*, 239 S.W.3d 842, 850 (Tex. App.—Austin 2007, pet. denied); *Texas Dep't of Assistive & Rehab. Servs. v. Howard*, 182 S.W.3d 393, 400 (Tex. App.—Austin 2005, pet. denied). The Whistleblower Act defines "law" as: (a) a state or federal statute; (b) an ordinance of a local governmental entity; or (c) a rule adopted under a statute or ordinance." TEX. GOV'T CODE § 554.001(1).

89. An actual violation of law is not required. *City of Elsa v. Gonzalez*, 325 S.W.3d 622, 627 n.3 (Tex. 2010). Rather, only a good-faith *belief* that a violation of law has occurred. *Id.* (emphasis added). "Good faith" means that: (1) the employee believed that the conduct reported was a violation of law; and (2) the employee's belief was

reasonable in light of the employee's training and experience." *Wichita County v. Hart*, 917 S.W.2d 779, 784 (Tex. 1996).

90. The employee must further prove that his report was made to an appropriate law-enforcement authority, or that he had a good-faith belief that it was. *Texas Dep't of Human Servs. v. Okoli*, 440 S.W.3d 611, 614 (Tex. 2014) (citing *Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 320 (Tex. 2002)). In this instance, an employee's belief is in good faith if: (1) the employee believed the governmental entity qualified; and (2) the employee's belief was reasonable in light of the employee's training and experience. *Id.* at 321.

91. As outlined in section III.A. above, and as detailed in paragraphs 17 -107 of the Second Amended Petition, Plaintiffs have plead in extensive detail the facts they relied upon in concluding that Ken Paxton used and abused his office by causing the full weight of the office that he commands, deploying employees and resources of OAG spanning multiple functions and departments, to improperly interfere in the civil disputes and criminal matters involving his donor, friend and personal benefactor Nate Paul. Plaintiffs detailed in those paragraphs how and why they reasonably believed that Paxton and OAG engaged in these acts not only to benefit Paul, but to benefit Paxton personally because of the financial, reputational and personal relationships between Paul and Paxton, relationships Paul and Paxton work hard to conceal. Plaintiffs plead facts showing the criminal actions about which Plaintiffs complained to law enforcement were the actions of the OAG, Paxton as the top employee of OAG, and the actions of other OAG employees whom Paxton enlisted to participate, in most cases apparently unwittingly.

92. In paragraphs 85 – 92 of the Second Amended Petition, Plaintiffs detailed how the actions described gave rise to their reasonable and good faith belief that Ken

Paxton and OAG committed numerous crimes related to abuse of office, tampering with government records, obstruction of criminal investigations, and bribery.

93. In paragraphs 93 - 103 of the Second Amended Petition, Plaintiffs described in detail how each of them, along with other whistleblowers, went to federal and state law enforcement authorities to report their good faith belief of OAG's and Ken Paxton's criminal conduct.

94. Finally, the OAG's Motion on page 22 suggests—without textual or other legal support—that somehow there cannot be more than one whistleblower. Not only is there no support for that in the Act or the law, other cases and even high-profile public cases in other context show that position also lacks merit. *See Bates v. Randall County*, 297 S.W.3d 828, 831-32 (Tex. App.—Amarillo 2009, no pet. h.) (more than one whistleblower); *Allen*, 132 S.W.3d at 159--60 (same), and *Dinger v. Smith County, Texas*, 12–16–00101–CV, 2016 WL 6427868(Tex. App.—Tyler Oct. 31, 2016, no pet. h.)(same).

IV. CONCLUSION AND PRAYER

In its Rule 91a Motion, OAG advances arguments that would rob the Texas Whistleblower Act of its most vital functions: protecting public employees who inform proper authorities of legal violations and securing governmental compliance with the law on the part of those who direct and conduct governmental affairs. OAG has no actual legal support for its autocratic position; no case law where a Court has agreed with it. Instead—in begging for the crassest form of judicial activism—it argues for vast extensions or modifications of existing law with no relationship to the unique and supremely important Whistleblower Act, and it does so only for delay. OAG's argument is entirely without merit. For all these reasons, Plaintiffs ask the Court to deny OAG's Motion in full and grant Plaintiffs all other just relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify the foregoing document has been served on the following counsel of record via email on the 9th day of February, 2021:

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CAUSE NO. D-1-GN-20-006861

JAMES BLAKE BRICKMAN, DAVID MAXWELL, J. MARK PENLEY, and RYAN M. VASSAR Plaintiffs,	§ § § § §	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS	§ §	
Defendant.	§	250th JUDICIAL DISTRICT

PLAINTIFFS' SECOND AMENDED ORIGINAL PETITION AND VERIFIED MOTION FOR TEMPORARY INJUNCTION AND PERMANENT INJUNCTION

> "The Texas Whistleblower Act protects public employees who make good faith reports of violations of law by their employer to an appropriate law enforcement authority. An employer may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who makes a report under the Act." [1]

This correct statement of Texas law is taken directly from the Texas Attorney General's website and can be found there as of the date of this pleading. It is sadly ironic, then, that Attorney General Warren Kenneth Paxton -- the Chief Law Enforcement Officer for the State of Texas -- has flagrantly violated and apparently believes he is above the very law he promotes on his own website. Plaintiffs are dedicated, respected, public servants, officers of the court, and—until the events that are the basis of this Whistleblower Suit transpired—honorably served in the most senior levels of the Office of the Texas Attorney General ("OAG").

[1] https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/general-oag/WhistleblowerPoster.pdf

The Texas Legislature passed the Texas Whistleblower Act in 1983 to prevent the very conduct by Attorney General Ken Paxton and OAG that forms the basis of this case. The most senior members of the OAG believed in good faith that Paxton was breaking the law and abusing his office to benefit himself as well as his close friend and campaign donor, Austin businessman Nate Paul, and likely the woman with whom, according to media reports, Paxton has carried on a lengthy extramarital affair. On September 30, 2020, the Plaintiffs, along with three other Executive Deputies and the First Assistant Attorney General, reported the facts underlying Paxton's and OAG's illegal conduct to the Federal Bureau of Investigation ("FBI") and other law enforcement authorities, as was their duty. The three Plaintiffs who attended that meeting made very clear that they believed Paxton's and OAG's conduct were acts of criminal bribery, tampering with government records, harassment, obstruction of justice, and abuse of office. Thus, they became "whistleblowers" (collectively "Whistleblowers"). On October 1, they reported the fact of their whistleblower report of the previous day to the OAG Human Resources Division and to Paxton.

Paxton responded to the report immediately and with ferocity, as though he was trying consciously to show Texans exactly what retaliation against whistleblowers looks like. Paxton falsely smeared the whistleblowers publicly in the manner calculated to harm them most, threatened them, tried to intimidate them, and engaged in all manner of retaliation ranging from serious to petty to pathetic. Then, within about a month of learning of their whistleblowing, Paxton and the OAG fired the Plaintiffs. Less than two months after they reported Paxton's and OAG's wrongdoing, none of the Whistleblowers remains employed at the OAG. It is hard to imagine more flagrant violations of the Texas Whistleblower Act.

At the crux of this case are Texas' core and necessary government policies of transparency, honesty, and integrity—as opposed to corruption and favoritism—within the State's highest law

enforcement office and instruments. Plaintiffs hope that this lawsuit following upon their direct, good-faith complaints to the FBI and other law enforcement authorities will help to restore integrity to this exceedingly important office.

Plaintiffs James Blake Brickman, David Maxwell, J. Mark Penley, and Ryan M. Vassar file this Second Amended Original Petition against the OAG. Plaintiffs respectfully show the Court the following:

I. Parties

1. Until they were fired and otherwise retaliated against by the OAG at the instruction of Ken Paxton shortly after reporting to law enforcement their concerns about Paxton's and OAG's criminal conduct, the four Plaintiffs were among Paxton's most senior staff, each of them hand-picked by Paxton himself, and each of whom directly interacted with Paxton on a frequent basis.

2. Plaintiff James Blake Brickman ("Brickman") was the Deputy Attorney General for Policy & Strategy Initiatives from February 2020 until he was wrongfully terminated October 20, 2020. Brickman is a lawyer and veteran public servant. Prior to being recruited to the OAG by Paxton, Brickman served as the Chief of Staff for the Governor of Kentucky, a Republican, for four years. Earlier in his career, he also served as Chief of Staff to a United States Senator, a Republican, in Washington, D.C., attorney in private practice, and as a federal law clerk to the Honorable Amul R. Thapar (now a sitting judge on the Court of Appeals for the Sixth Circuit). Before Brickman made a good faith report to an appropriate law enforcement authority of criminal wrongdoing by Paxton, Paxton regularly and publicly lauded Brickman's work. Just by way of example, in May, Paxton publicly praised Mr. Brickman's work in the monthly meeting of senior OAG staff. Paxton presented Brickman with a book on which Paxton inscribed a note saying he was "so grateful [Brickman] joined our team." Paxton praised Brickman as an "amazing addition"

to the AG's office. Brickman relocated to Austin, with his wife and three young children, to take his job at OAG at Paxton's request and is a resident of Travis County, Texas.

3. Plaintiff David Maxwell ("Maxwell") is and has been a law enforcement professional. Until he was wrongfully terminated on November 2, 2020, Maxwell served as the Deputy Director, and then the Director, of Law Enforcement Division for the OAG for approximately 10 years, collectively, where he oversaw 350 employees. Maxwell's storied 48-year career in law enforcement in the State of Texas includes over 38 years with the Texas Department of Public Safety – 24 years as a Texas Ranger. Maxwell has been involved in investigating some of the most serious criminal matters and conduct in this State for decades and has a well-earned reputation as an honest, thorough, and tough law enforcement investigator. Maxwell is a resident of Burnet County, Texas.

4. Plaintiff J. Mark Penley ("Penley") was the Deputy Attorney General for Criminal Justice at the OAG from October 8, 2019 until November 2, 2020, when he was wrongfully terminated. He supervised the Criminal Prosecutions, Special Prosecutions, Criminal Appeals, and Crime Victims Services Divisions which were comprised of approximately 220 employees. Penley has 36 years of legal experience and is a retired federal prosecutor. Penley is a resident of Dallas County, Texas.

5. Plaintiff Ryan M. Vassar ("Vassar") was the Deputy Attorney General for Legal Counsel at the OAG. In that role, until he was retaliated against and wrongfully terminated, Vassar served as the chief legal officer for the OAG. He represented the OAG before other state and federal governmental bodies and oversaw 60 attorneys and 30 professional staff across 5 different divisions, which are responsible for rendering approximately 50,000 legal decisions each year. Vassar served in different roles at the OAG for over 5 years. Before joining the OAG, Vassar

served as a law clerk for three years at the Supreme Court of Texas. Vassar is a resident of Travis County, Texas.

6. As described in the paragraphs immediately above, all four Plaintiffs were, at all relevant times, employees of the OAG.

7. Defendant Office of the Attorney General of the State of Texas ("OAG") is an agency of the State of Texas in the executive branch of state government created by statute. *See* Tex. Const. art. IV, §22 and Tex. Govt. Code §402.001, *et. seq.* OAG is a proper defendant in a claim under the Texas Whistleblower Act. OAG was served with process on or about November 20, 2020 and has filed an answer in this case.

8. At all times relevant to this action, Ken Paxton has been an employee of OAG. The OAG's own employment records identify Ken Paxton as an employee of OAG. For example, **Exhibit 1** to this pleading is a true and correct copy of public records and business records from Ken Paxton's employee file at OAG. OAG's employment records show that Ken Paxton's "Date of Employment" with OAG was January 5, 2015. Ken Paxton has been an employee of OAG since January 5, 2015 and remains so to this day. The OAG employee records identify the "Employee Being Replaced" by Ken Paxton in 2015 as Greg Abbott, who was the Attorney General prior to Ken Paxton. The OAG employee records catalog Ken Paxton's "Employee Information." OAG employee records list Ken Paxton's Position Number. OAG employment records designate Ken Paxton as an exempt employee under the Fair Labor Standards Act, a law that only applies to employees and exempts certain employees. Thus, OAG's own HR department deems Paxton an employee, but an employee who is exempt from the overtime and minimum wage provisions of the FLSA.

9. From at least September 1, 2015 to the present Ken Paxton's full-time job has been as Attorney General of the State of Texas. At all times from at least September 1, 2015 to the present Ken Paxton has been paid a salary of at least $153,750 per year by OAG for his full-time, 40-hour per week employment at OAG. Throughout that same time period, Ken Paxton has been listed in the employment records of OAG as an employee, has an OAG-designated "pay group" and "Job Class Title" in the employment records of OAG, and has been eligible for and has received employment benefits including health care benefits offered only to employees of OAG. When Ken Paxton receives a salary increase for his job at OAG, his salary increase is recorded, like it is for other employees, in a "Personnel Action Form."

10. Since January 5, 2015 and up to the present day, Ken Paxton has been contributing to and accruing employment-based service credit under an employee pension plan administered by the Employees Retirement System of Texas. The Employees Retirement System of Texas states that its purpose is to "manage[] a defined benefit retirement plan ***for State of Texas employees***."

11. At all times relevant to this action, Ken Paxton has been the leading executive employee of the OAG and has been responsible for directing and conducting the affairs of OAG. Ken Paxton's actions, when taken in his official capacity as Attorney General, are the actions of the agency itself.

12. That Ken Paxton is an OAG employee is further borne out by how OAG treats individuals who work at OAG in a non-employee capacity. When OAG compensates a person or a company on a non-employee basis, it expressly identifies them as a non-employee in OAG records. For example, **Exhibit 2** to this pleading is a contract OAG claims it entered into with a lawyer named Brandon Cammack with the Cammack Law Firm PLLC. In that contract, OAG took care to specify that Cammack and the Cammack Law Firm were "independent contractors of

[OAG] and are not employees of Agency or the State of Texas." OAG has never entered into any agreement with Ken Paxton specifying that he is not an employee of the State of Texas.

II. Jurisdiction, Venue, Rule 47 Disclosure, and Discovery Control Plan

13. This Court has jurisdiction because the amount in controversy exceeds the minimum jurisdictional limit of this Court. In addition, the Texas Whistleblower Act waives any immunity that might otherwise deprive this Court of jurisdiction. TEX. GOV'T CODE §554.0035 ("A public employee who alleges a violation of this chapter may sue the employing state or local governmental entity for the relief provided by this chapter. Sovereign immunity is waived and abolished to the extent of liability for the relief allowed under this chapter for a violation of this chapter."). Furthermore, each of the Plaintiffs exhausted any administrative remedies having participated in formal complaint procedures within the OAG with such procedures concluding without resolution.

14. Venue is proper in Travis County because the Texas Whistleblower Act provides that a public employee of a state governmental entity may sue in a district court of the county in which the cause of action arises or in a district court of Travis County. TEX. GOV'T CODE §554.007(a). This cause of action arises in Travis County, Texas as all Plaintiffs were employed in Travis County, and worked at OAG offices near the Capitol Building in Austin, Texas in Travis County, were fired or constructively terminated in Travis County, and were subject to acts of retaliation in Travis County. Venue is also proper under §15.002 TEX. CIV. PRAC. & REM. CODE because all or a substantial part of the events or omissions giving rise to this claim occurred in Travis County, Texas.

15. Pursuant to TEX. R. CIV. P. 47(c)(4), Plaintiffs seek monetary relief of over $1,000,000.

16. Plaintiffs intend for discovery to be conducted in accordance with a discovery control plan under TEX. R. CIV. P. 190.4 (Level 3).

III. Facts

Ken Paxton's Donor and Friend, Nate Paul

17. On August 14, 2019, FBI agents executed a search warrant at the home of Austin real-estate investor Nate Paul. That same day, agents executed search warrants at two separate office locations of Nate Paul's real estate business, World Class Holdings. A long-serving and highly respected United States Magistrate Judge issued those warrants on August 12. A fourth search warrant was executed a few days later at a records storage unit rented by Paul's company.

18. Paul has had many well-documented troubles in 2019, 2020, and 2021 in addition to the execution of search warrants at his home and offices by federal law enforcement. Paul is an Austin businessman who invests in real estate through his company, World Class Holdings, and through single-purpose limited liability companies controlled by Paul and/or World Class Holdings. In 2019 and 2020, according to media reports, at least 16 Paul-controlled entities have filed for bankruptcy protection, and lenders have initiated foreclosure proceedings on over $250 million in delinquent debt held by over two dozen of Paul's companies.

19. Also in 2020, Paul created a company for the purpose of suing a local charity, the charity's lawyer, and a court-appointed receiver. The district judge presiding over the case dismissed the case shortly after the suit was filed, ruled that the suit was groundless and filed in bad faith for the purpose of harassment, and sanctioned Paul's company and his lawyer over $225,000 for the frivolous and malicious use of the justice system.

20. Mr. Paul also spent time in 2020 making requests—both formally and informally—that the Travis County District Attorney and the Office of the Attorney General of the State of

Texas launch criminal investigations of Mr. Paul's perceived adversaries. By way of example, Mr. Paul made formal written requests for criminal investigations of:

a. The federal magistrate judge who issued the search warrants authorizing the search of Paul's offices and home;

b. The FBI agents and state law enforcement agents who carried out the searches;

c. The Assistant United States Attorney who had obtained the search warrants from the federal magistrate judge;

d. A federal bankruptcy judge;

e. A local charity that was a co-investor with Paul-controlled entities in two properties;

f. The local charity's lawyer;

g. A credit union that held a lien on one of Paul's entities' properties; and

h. The receiver appointed by the Travis County Court to take control of certain properties pending resolution of the lawsuit between the charity and Paul-controlled entities.

21. Despite a very busy 2019 and 2020, Mr. Paul, age 33, also found time to enjoy his personal friendship with the Attorney General of the State of Texas, Ken Paxton, age 57.

22. The origins and full dimensions of the relationship between Mr. Paul and Mr. Paxton are net yet known. But what is known paints a picture of personal, reputational, and financial ties to Mr. Paul that almost certainly explain why Paxton, acting in the scope of his official duties, abused his office and brought the power, resources, and personnel of OAG to bear in outlandish ways to personally benefit Mr. Paul and to benefit Paxton himself.

23. It is known, for example, that in 2020, Paxton and Paul met regularly in Austin, Texas, in meetings usually without Paxton's staff or security detail present, and in meetings that were not included on Paxton's official schedule. It is also known that Nate Paul repeatedly refuses to answer questions in civil litigation he is involved in about the nature of his relationship with the Attorney General.

24. Nate Paul is also a major donor to Paxton's campaign.

25. On or about October 29, 2018, Paul made a $25,000 contribution to Paxton's political campaign committee. It has also been publicly reported that the political action committee of a law firm representing Nate Paul's interests in litigation between Nate Paul-related entities and the Mitte Foundation made a $25,000 contribution to Paxton's campaign on or about June 30, 2020, which was 22 days after the OAG intervened in the litigation to advantage Paul personally.

26. Ken Paxton also has personal and financial ties to Nate Paul through an individual with whom Ken Paxton carried on an extramarital affair and who now works for Nate Paul on Ken Paxton's recommendation. In late 2019 or 2020, Paxton admitted to several OAG staffers that he had been involved in an extramarital affair with an individual whose name Plaintiffs do not include in this pleading. This individual is a former staffer of a Texas state senator – a different state senator than Mr. Paxton's wife who serves in the Texas Senate. At the time Plaintiffs went to law enforcement to report a wide array of criminal conduct by Ken Paxton and OAG, Plaintiffs suspected a connection between Ken Paxton's affair with this individual and Nate Paul. Nate Paul has subsequently admitted that the individual with whom Paxton carried on the affair was recommended to Nate Paul for a job, and that she was then hired to work for a Nate Paul entity. Nate Paul did not know the individual prior to her being recommended to Nate Paul for a job with one of Nate Paul's companies. Notably, the individual's LinkedIn profile conceals her work for a Nate Paul-controlled company, further evidence of its illicit nature.

27. On information and belief, that individual still works for one of Nate Paul's companies as a construction project manager even though that individual has no prior experience in the construction industry, much less managing construction projects.

28. Also on information and belief, Nate Paul and Ken Paxton have a relationship related to the renovation construction of a home Paxton was renovating in Austin. In 2018, Ken Paxton bought a home valued at approximately $1 million in the Tarrytown neighborhood of central Austin, although permitting records in Travis County could not be located. In 2020, Ken Paxton was undergoing a major remodeling project on the home. In mid-2020, some of the Plaintiffs received information suggesting that Nate Paul, either personally or through a construction company he owns and controls, was involved in the project.

Paxton Abused the Office of the Texas Attorney General to Personally Benefit Paul and Himself

29. Over the course of 2019 and 2020, Ken Paxton used and abused his office by causing the full weight of the office that he commands, deploying employees and resources of OAG spanning multiple functions and departments, to improperly interfere in the civil disputes and criminal matters of his donor, friend and personal benefactor Nate Paul. Plaintiffs reasonably believed that Paxton and OAG engaged in these acts not only to benefit Paul, but to benefit Paxton personally because of the financial, reputational and personal relationships between Paul and Paxton, relationships Paul and Paxton work hard to conceal.

30. As described in greater detail below, the criminal actions about which Plaintiffs complained to law enforcement were the actions of the OAG, Paxton as the top employee of OAG, and the actions of other OAG employees whom Paxton enlisted to participate, in most cases apparently unwittingly. Some of Paxton's actions directing the OAG to benefit Paul were criminal without regard to motive. Others were so egregious and so contrary to appropriate use of his office, that they could only have been prompted by illicit motives such as a desire to repay debts, pay hush money, or reciprocate favors extended by Paul.

31. During the Spring and Summer of 2020, Paxton began taking more interest in legal matters involving Nate Paul and applying more pressure on the Plaintiffs and the other Whistleblowers to use the personnel, legal authority and other resources of the OAG to advance the legal and personal interests of Nate Paul and his business activities. Paxton showed a pattern of not listening to the Whistleblowers, including Plaintiffs, when they raised valid objections to his instructions regarding Nate Paul's legal matters that were brought before the OAG. Plaintiffs, along with the other Whistleblowers, became increasingly concerned over time as the Attorney General became less rational in his decision making and more unwilling to listen to reasonable objections to his instructions, and placed increasing, unusual priority on matters involving Paul.

32. Paxton's abuse of the OAG to benefit Paul began in or around November 2019. But as 2020 progressed, Paxton's efforts on Paul's behalf became increasingly reckless, bold, and apparent to Plaintiffs.

Paxton Intervened to Benefit Nate Paul in Nate Paul's Open Record Requests

33. A state agency that receives a request for records under the Texas Public Information Act and wishes to withhold documents responsive to that request based on statutory exceptions must request a ruling from the OAG as to whether the asserted exceptions are applicable. The OAG issues approximately 30,000 to 40,000 open records decisions each year, but Plaintiffs are only aware of Paxton taking a personal interest in decisions that related to Paul.

34. In the Fall of 2019, lawyers for Paul issued an open records request to the Texas State Securities Board for records related to the August 2019 search of Paul's properties by the FBI and other federal and state law enforcement officials. In effect, Paul was seeking to gain information about the federal investigation into his own conduct. The State Securities Board requested an open records decision from the OAG as to whether it was required to produce records

relating to this ongoing investigation. Paxton put pressure on Whistleblower Ryan Bangert to issue an opinion that would have allowed for the records Paul sought to be released to Paul – a highly unusual move that was contrary to well-established precedent related to protecting the integrity of criminal investigations. Despite this pressure from Paxton to issue a highly irregular ruling to benefit Nate Paul, OAG issued a ruling that all records related to this request were **not** subject to disclosure due to a pending criminal investigation of Paul.

35. On or about March 13, 2020, lawyers for Paul tried again, this time issuing an open records request to the Texas Department of Public Safety ("DPS") for records related to the FBI's search of Paul's properties in August 2019. DPS had cooperated with and assisted the FBI in conducting the search of Paul's office and properties. Because the search of Paul's properties in August 2019 was conducted by the Federal Bureau of Investigation, the FBI filed a brief with the OAG urging OAG to follow its longstanding practice of not providing documents related to an ongoing investigation. The FBI also sent a redacted version of the brief to Paul's lawyers. A law enforcement agency, when submitting a brief like this one, will typically redact a copy of the brief to conceal information a law enforcement agency would not want the subject of an ongoing negotiation to know during the investigation itself. The FBI sent the redacted version of the brief to Paul's lawyers. But Paul wanted the unredacted brief. Paxton tried to help Paul get the unredacted brief.

36. Paxton contacted Ryan Vassar, then the Deputy Attorney General for Legal Counsel, several times related to Paul's request and pressured him to issue an opinion favorable to Nate Paul's efforts to get information about the FBI's ongoing investigation of Paul. In meetings between Paxton and Vassar, Paxton revealed that he had spoken personally with Paul about the

activities that occurred on the day the search warrants of Paul's properties were executed. Paxton stated that he did not want to use the OAG to help the FBI or DPS in any way.

37. Longstanding OAG precedent and sound principles indicated that disclosure of the documents should be prevented, yet Paxton directed Vassar to find a way to release the information. Vassar struggled with this directive because allowing disclosure of the information requested by Paul would overturn decades of settled expectations among sister law enforcement agencies, compromise the OAG's own law enforcement information, and likely spark innumerable lawsuits challenging the newly announced application of the law.

38. Paxton then personally took the file, including all the responsive documents, which included documents sealed by a federal court, and did not return it for approximately seven to ten days. Paxton also directed that the final opinion, issued on June 2, 2020, take no position on whether the documents should be released.

39. On or about May 20, 2020, lawyers for Paul issued an open records request to the OAG for the un-redacted FBI brief referenced above. Paxton asked Vassar for a copy of the un-redacted FBI brief, and directed Vassar to find a way to release the un-redacted FBI brief. Paxton then directed Vassar, an OAG employee at the time, to release the opinion dated July 24, 2020, which ultimately concluded that the unredacted FBI brief must be released.

40. These actions of OAG, Paxton, and Vassar at Paxton's direction are inexplicable in the absence of an illicit motive by Paxton to personally assist his friend, donor and financial associate, Nate Paul and to thereby benefit Paxton himself.

41. The work and powers of the Open Records division of OAG is only one of the functions and powers Paxton and OAG brought to bear at the expense of Texans and in favor of

Nate Paul and Ken Paxton personally. *See, e.g.*, TEX. GOV'T CODE §552.306 (requiring the attorney general to render a decision regarding release of public information).

Paxton Caused OAG to Intervene in Civil Litigation To Pressure a Charity to Settle a Dispute with Nate Paul

42. OAG and Paxton also caused the powers, employees and other resources of the Financial Litigation and Charitable Trust Division of OAG to be brought to bear illegally to help Nate Paul by pressuring a local charity with whom Paul was involved in a business dispute.

43. The OAG has approximately 35,000 open civil litigation cases each year, but Paxton has only taken a personal interest in one case. That case involves Paul.

44. The Roy F. and Joann Cole Mitte Foundation ("Mitte Foundation") is a non-profit corporation and charitable foundation located in Austin, Texas. The Mitte Foundation invested in and was a limited partner of several entities associated with World Class Holdings, Nate Paul's company. In 2018, the Mitte Foundation filed suit against several of those entities controlled by Paul's World Class Holdings claiming, among other things, that the Mitte Foundation was being denied access to the books and records of the companies. That litigation grew and ultimately resulted in the court appointment of a receiver over the World Class entities.

45. The Financial Litigation and Charitable Trust Division of the OAG has the power to intervene in any litigation involving charities if doing so will protect the assets of the charity.[2] On January 31, 2020, lawyers in the Charitable Trust division of the OAG filed a notice with the court declining to intervene in the case. (*See* **Exhibit 3**). The decision not to intervene reflected the obvious and prudent conclusion by OAG staff that OAG's intervention in a suit of this nature – a dispute among owners (including the charity) of a valuable piece of Austin real estate in which

[2] *See* Tex. Prop. Code § 123.001, *et seq*

the charity was the plaintiff and represented by capable legal counsel at one of Texas's most established and reputable law firms – was not warranted.

46. However, months later, in May or June of 2020, Paxton began to take a deep personal interest in this case. Paxton had several discussions with OAG staff about intervening in the case. OAG staff advised Paxton that OAG had no interest in intervening in the case, as the Mitte Foundation was the plaintiff in the case and instituted the suit to protect the charity's interest, making OAG's intervention unnecessary.

47. Against the advice of OAG staff, including some of the Whistleblowers, and contrary to OAG's prior decision not to intervene, Paxton directed the Charitable Trusts Division to intervene in the lawsuit, which OAG did on or about June 8, 2020. (*See* **Exhibit 4**). The OAG, with Paxton acting in his official capacity and with other employees of OAG (as reflected in Exhibit 4) carrying out the direction of Paxton, intervened for the purpose of exerting pressure on the Mitte Foundation to settle on terms favorable to Nate Paul.

48. On or about July 6, 2020, Paxton asked Brickman to review the pleadings in the case. On or about July 6, 2020, Brickman informed Paxton that OAG had no interest in the case and should not waste resources of the OAG participating in a dispute in which the charity – which the OAG should have wanted to protect – was the plaintiff and represented by capable counsel in a legitimate dispute. Additionally, Brickman informed Paxton that the parties reached a settlement agreement in August 2019, which Paul subsequently breached. Paxton did not waver in his desire to bring the power and resources of OAG to bear in this civil litigation to help Nate Paul at the expense of the charity that the OAG should have been protecting.

49. So intense and bizarre was Paxton's desire to help Nate Paul that, on or about July 22, 2020, then-First Assistant Jeff Mateer and Brickman had to talk Paxton out of personally

attending and appearing before the Travis County District Court in this matter, which would have been an unprecedented event as Paxton has not appeared in any court on behalf of the OAG in the memory of any of the Plaintiffs, if he ever has.

50. Plaintiffs saw that Paxton was seeking to exert influence in the case not to assist the charity, but to pressure the charity to reach a settlement favorable to the World Class entities controlled by Nate Paul.

51. On or about October 1, 2020, then-Deputy Attorney General for Civil Litigation and Whistleblower Darren McCarty directed the Financial Litigation and Charitable Trusts Division to withdraw from the case. (*See* **Exhibit 5**).

52. Plaintiffs knew when they went to the FBI in September 30, 2020 that no legitimate, lawful exercise of the powers of the OAG could explain OAG's and Paxton's intervention and actions to help Nate Paul on the Mitte Foundation case. Plaintiffs would later learn that the political action committee of a law firm that at that time represented Nate Paul's interests on the Mitte Foundation case made a $25,000 contribution to Paxton's campaign on or about June 30, 2020, a mere 22 days after the OAG intervened in the litigation at Ken Paxton's insistence and over the objections of OAG staff.

Paxton Directed a Legal Opinion to Benefit Nate Paul

53. On or about July 31, 2020, Paxton contacted Whistleblower Bangert and asked him to look into whether restrictions on in-person gatherings due to COVID prevented the foreclosure sales of properties. Bangert consulted Vassar. After hearing their researched views on this subject, Paxton made clear that he wanted OAG to express a specific conclusion: that foreclosure sales should ***not*** be permitted to continue. That Paxton would become personally involved in a question

such as whether foreclosures should be suspended was surprising enough. That he would come down so personally and adamantly that COVID should ***stop*** foreclosure sales seemed bizarre.

54. Even more bizarre was the speed and timing of the release of the opinion Paxton sought, and the connection to Nate Paul that soon became apparent. On Sunday, August 2, 2020 at approximately 1:00 a.m., OAG issued an informal legal opinion Paxton sought, concluding that foreclosure sales should not be permitted to continue in light of the then-existing restrictions on in-person gatherings to prevent the spread of COVID-19. Unbeknownst to Plaintiffs at the time, this opinion favored persons such as Paul who hoped to stave off foreclosure sales. According to media reporting, on the very next day, Monday, August 3, 2020, lawyers for Paul showed Paul's creditors a copy of Paxton's opinion to prevent the foreclosure sales of Paul's properties that were scheduled for August 4, 2020. Here again, Plaintiffs reasonably concluded that OAG and Paxton abused the office's powers and personnel to personally benefit Nate Paul and Ken Paxton.

Paxton Used OAG to Investigate Nate Paul's Adversaries

55. The OAG has approximately 400 open criminal cases and 2,000 open criminal investigations each year. Paxton rarely showed an interest in any pending criminal investigations, but he showed an extraordinary interest in investigations sought by Nate Paul.

56. In May of 2020, Paxton contacted the Travis County District Attorney and requested a meeting to help Nate Paul present a criminal complaint. A meeting was held with the DA's staff. Paxton attended the meeting along with Paul and his attorney. Paul also submitted a written complaint accusing federal law enforcement, a federal magistrate judge, Texas state law enforcement, and a prosecutor with the U.S. Attorney's office of violating his rights. Specifically, Paul was alleging that federal law enforcement officials – either FBI agents or a federal prosecutor – had made substantive alterations to a warrant for the search of his property after it had been

signed by the federal magistrate judge. With OAG's and Paxton's help, Paul was asking the Travis County DA to investigate the FBI and a federal prosecutor.

57. Paxton knew that the Travis County DA would have nothing to do with such an outlandish and baseless accusation. But Paxton also knew he could request the Travis County DA to refer the complaint to the OAG where, yet again, Ken Paxton could cause the OAG to bring its resources and employees to bear to help Paxton's friend and donor, Nate Paul.

58. By letter dated June 10, 2020, The Travis County DA's Office referred Paul's criminal complaint to the OAG. Paxton assigned the matter to Plaintiffs Maxwell and Penley, both employees of OAG, for investigation.

59. Maxwell, an employee of OAG at the time, scheduled an initial meeting with Paul and his attorney, Michael Wynne, at which they stated their contentions that the substance of a federal search warrant executed in August 2019 had been altered by a federal law enforcement officer or federal prosecutor after they were signed by the federal magistrate judge.

60. Penley and Maxwell held a second meeting, at which they believed Paul and Wynne would produce evidence supporting their claim. Paul and Wynne gave a further explanation of their complaints and produced a thumb drive containing documents which they contended would support their claims. After the second meeting, Penley and Maxwell examined the contents of the thumb drive.

61. Shortly thereafter, Maxwell and Penley consulted with forensic experts in the OAG Criminal Investigation Division ("CID") and determined that no credible evidence existed to support any state law charges. Paul's allegation of misconduct by federal law enforcement consisted entirely of a claim that the ***copy*** he had of the warrant contained metadata showing that at some point the ***copy*** had been altered in some way. Paul and his lawyer had no evidence

indicating how the copy had been altered. As Penley and Maxwell had learned from the forensic experts in the CID and then explained to Nate Paul and his lawyer, metadata would show that a copy of a document had been altered for a variety of common reasons having nothing to do with changing the content of the warrant itself. For example, metadata showing the copy had been altered would be present when a document was merely (a) saved as a .pdf; (b) redacted pursuant to a court-prescribed redaction process to conceal sensitive information; or (c) emailed in an encrypted format. All three of those things had been done to the copy of the warrant in Paul's possession.

62. Maxwell and Penley conveyed to Paul that they found no evidence of a crime under Texas law. They suggested that, if Paul had concerns about the conduct of the federal prosecutor and the FBI agents – concerns Maxwell and Penley did not share – they could present their concerns to the federal court and/or to the Department of Justice Office of Inspector General (DOJ/OIG).

63. Paul's lawyer said that he had presented his concerns about the alleged alterations of the search warrants, which were under seal at the federal District Clerk's office, to the magistrate judge at a hearing in February 2020, and that the judge had released some documents to him.

64. In or around this time, Paul leaked the fact that the OAG was investigating his complaint against federal officials to the media.

65. Soon thereafter, Paxton, Paxton's assistant, Penley, Maxwell, Paul, Wynne, and two CID forensic experts attended a third meeting regarding Paul's complaints. When Penley announced his recommendation that the investigation be closed, Paul, Paul's attorney and Paxton pushed back. As a result of Paxton's surprising response, Penley thereafter requested additional documents from Paul's counsel, but the attorney never provided those documents despite repeated

requests. After the third meeting, it was obvious that Paxton was dissatisfied with Maxwell's and Penley's opinions and recommendation.

66. On August 18, 2020, Paxton contacted Vassar, asking him to explain how the OAG could retain outside legal counsel. Vassar obliged, explaining that the OAG's approval process for hiring outside counsel requires authorization from no less than 10 different OAG personnel. Various stages throughout the OAG's review process, which is designed in part to prevent the hiring of unqualified, conflicted lawyers to undertake unnecessary work or work that can be provided by current OAG staff, provide that: a contract must be drafted; it must be approved; conflicts must be cleared; and funding must be obligated. Vassar also explained that retaining outside counsel is usually limited to matters in which the OAG does not have the necessary experience (*e.g.*, patent law), license requirements (*e.g.*, patent law or pro hac vice admission), or where an actual or apparent conflict of interest may arise in the matter.

67. On or about August 26, 2020, Paxton contacted Vassar again and asked if retaining outside counsel to investigate criminal allegations was permissible. Vassar explained that Texas law contemplates two unique scenarios involving the appointment of a special or outside prosecutor. The first scenario involves a situation where a prosecutor may recuse herself to allow the trial court to appoint an attorney pro tem as a prosecuting attorney. Tex. Code Crim. Pro. art. 2.07(a); *see also* Tex. Att'y Gen. Op. KP-0273 (2019). Paxton stated that a court-appointed attorney pro tem was not acceptable. The second scenario involves a situation where a prosecuting attorney may "request the assistance of the attorney general, and the attorney general may offer to the prosecuting attorney the assistance of his office." Tex. Gov't Code §§ 41.102(b); 402.028(a). Vassar cautioned, however, that he would need to defer to Penley on whether engaging outside counsel to conduct a criminal investigation would be appropriate, given Penley's responsibility to

oversee OAG's criminal prosecutions. Paxton then asked Vassar to contact two potential candidates who may be willing to serve as outside legal counsel, to explain the basic retention process.

68. On or about August 26, 2020, Vassar began contacting the two potential candidates who Paxton said might be willing to serve as outside counsel. During these contacts, Vassar explained the outside counsel process and asked both potential candidates to provide him with their proposed hourly rates and an estimate of the cost for conducting an investigation. One of the candidates was Brandon R. Cammack, a Houston criminal defense attorney who had been licensed only 5 years and never served as a prosecutor. The other candidate was a veteran former state and federal prosecutor with decades of experience.

69. On or about September 3, 2020, Paxton announced his decision to retain Cammack as outside counsel. Paxton instructed Vassar to draft an outside counsel contract and send it to Cammack that same day. Paxton stated that this needed to be done immediately because the Travis County District Attorney-elect would not be cooperative with this investigation and may rescind the referral to the OAG. Vassar followed Paxton's order, obtained a copy of the criminal referral, for the first time, and prepared a draft contract for Cammack to review. At Paxton's direction, Vassar also sent a copy of the draft agreement to Paxton that same day.

70. On or about September 4, 2020, Cammack notified Vassar that the contract terms were acceptable. Vassar then forwarded the draft agreement to the General Counsel Division to begin the OAG's internal review and approval process.

71. On or about September 23, 2020, Cammack contacted Vassar and asked him if Cammack could obtain an email address from the OAG or some other official documentation to identify himself as an attorney working for the OAG, because a certain prosecutor's office was

asking for verification of Cammack's relationship with the OAG. Vassar explained to Cammack that his contract had not been approved yet, but that he would discuss potential ways to document Cammack's involvement in an investigation with relevant OAG personnel. Later that same day, Paxton called Vassar, asking if Cammack could obtain an OAG email address and asking why Cammack's contract had not been approved yet. Vassar explained that the process can take time due to the multiple approvals required. Paxton asked who was currently reviewing the agreement and exclaimed that he was "tired of his people not doing what he had asked." Upon checking the OAG's contract-approval application, Vassar identified that Penley was currently reviewing the agreement. Paxton then ended the call.

72. On or about September 24, 2020, Penley refused to sign a memo to approve the hiring of Cammack to take over the investigation of Paul's complaint. Penley believed that the claim alleging that federal law enforcement officers or a federal prosecutor had altered search warrants was unsupported by credible evidence.

73. On Saturday, September 26, 2020, Paxton asked Penley to meet him in McKinney. Paxton pressured Penley to approve the contract for Cammack. Penley again said he could not in good conscience approve the contract as there was no factual basis for the absurd investigation ordered by Nate Paul of the FBI agents and federal prosecutor involved in obtaining search warrants for Paul's home and offices. Thus, as late as September 26, 2020, Paxton clearly knew that the contract he wanted with Cammack needed Penley's approval and was therefore not authorized under OAG's own policies and procedures.

74. Plaintiffs would later learn that, on or about September 3, 2020, Paxton had asked Cammack, to begin work as an outside counsel despite not having a contract approved to retain him.

75. The week of September 28, Cammack still did not have a contract that was approved through OAG's policies. He was therefore not authorized to engage in any work for the OAG. **Exhibit 6** to this pleading is a true and correct copy of the contract OAG now claims OAG made with Cammack to provide legal services for OAG. This is the contract that was never properly approved; it is the contract Paxton asked Penley to approve on September 24 and again on September 26.

76. The contract states that Cammack was to provide legal services only as directed by the OAG. (Exhibit 6, Addendum A). The contract states that Cammack would be hired as "Outside Counsel." Importantly, the contract ***does not*** identify Cammack as a prosecutor. It specifically states that Cammack is not to represent OAG in litigation (§1.2.1), and also specifically states that Cammack is not to provide indictment or prosecution legal services (Exhibit 6, Addendum A).

77. Yet, at Paxton's and OAG's direction, Cammack proceeded to conduct work without a validly approved contract and then, at Ken Paxton's and OAG's direction, falsely represented that he was a "special prosecutor" in order to obtain grand jury subpoenas under false pretenses to investigate, harass, and intimidate Nate Paul's perceived adversaries. Grand jury subpoenas were signed by Cammack as "Special Prosecutor."

78. The following are screen shots of an actual subpoena that was served on a financial institution by Cammack. Nate Paul's lawyer accompanied Cammack when serving the subpoena.

GRAND JURY SUBPOENA DUCES TECUM

460th GRAND JURY

TRAVIS COUNTY, TEXAS

The State of Texas, to any Peace Officer:

You are commanded to summon:

[redacted]

To appear before the Travis County Grand Jury at the courthouse in said county on the **12th day of October, 2020 at 4:00 o'clock p.m.**, at 700 Lavaca, Multifunction Space B, Room 1.113, Austin, Texas, and thereafter from day to day until he/she shall be released by the foreperson of the Grand Jury, to then and there

...

Please return the requested documents to the attention of Brandon R. Cammack, Special Prosecutor for the Office of the Attorney General, 4265 San Felipe Street, Suite 1100 Houston, TX 77027 or electronically to Mr. Cammack at Brandon@cammacklawfirm.com with an original business records affidavit mailed to the address above.

Herein fail not, and due return make hereof.

Signed on this day of 9/28/2020 | 11:16 AM CDT.

KEN PAXTON
Texas Attorney General

By: DocuSigned by: Brandon R. Cammack 9ABC5FC0C1E5472...
Brandon R. Cammack
Special Prosecutor
Office of the Attorney General

79. On or before September 29, 2020, at Paxton's and OAG's direction, Cammack obtained 39 grand jury subpoenas from the Travis County Grand Jury by falsely claiming he was a "Special Prosecutor" authorized to represent OAG before the Grand Jury. He did so on the

instructions and with the involvement of Ken Paxton acting in the course and scope of his duties as the Attorney General of the State of Texas. Ken Paxton's actions in directing and coordinating this activity are the actions of the OAG and of an employee of OAG.

80. Not only were Paxton and OAG directing the OAG "outside counsel" to obtain subpoenas on Paul's enemies based on false representations that Cammack was a prosecutor, they were causing the outside counsel to conduct an investigation outside the scope of what the outside counsel's purported contract even contemplated. Numerous of the subpoenas obtained by Cammack and Paxton were outside the appropriate scope of the June 10 referral from the Travis County District Attorney's office. It would later be learned that Paul had sought an additional investigation, this one asserting a wild conspiracy theory implicating the lawyers for the Mitte Foundation charity, the court-appointed receiver in that litigation, the lawyer for the receiver, and even a federal bankruptcy judge in what Paul called "on ongoing conspiracy" to defraud Nate Paul. A copy of Nate Paul's request is attached to this pleading as **Exhibit 7**. This request to investigate was never the subject of the attempt to appoint Cammack. Thus, not only was Cammack never properly approved under OAG policies to conduct any investigation in the first place and never had the title or powers of a prosecutor, he was now obtaining subpoenas under false pretenses to conduct an investigation that was never in the scope of his asserted contract with OAG. And he was doing all of this at the direction of OAG and Ken Paxton to benefit Nate Paul and Ken Paxton.

81. On or about September 29, Plaintiffs each learned that Paxton was causing OAG to use the grand jury process and the subpoenas obtained under false pretenses to investigate and intimidate Nate Paul's perceived financial adversaries. For example, the Whistleblowers learned that one of the subpoenas was served on Independent Financial in Round Rock, a financial

institution that was involved with one of World Class's properties, and that Cammack was accompanied by Nate Paul's attorney, Michael Wynne, when the subpoena was served.

82. On September 30, each of the Plaintiffs learned of a second grand jury subpoena served on Amplify Credit Union in Austin, a World Class creditor.

83. On September 29 or 30, each of the Plaintiffs learned that many of the other subpoenas obtained by OAG, Paxton and Cammack under false pretenses were directed to law enforcement agents and federal prosecutors involved in the search warrants executed on Paul's offices and home back in August and in the investigation of Nate Paul. The subpoenas directed to law enforcement agents sought personal information such as their personal cell phone information and were clearly designed only to harass and intimidate the law enforcement officers.

84. Plaintiffs were shocked at what was transpiring – the Attorney General influencing a criminal investigation that could be referred to the OAG, improperly hiring an "outside counsel" and directing that individual to obtain grand jury subpoenas on false pretenses, all in an effort to investigate and intimidate the federal law enforcement agents who were investigating Nate Paul and some of Nate Paul's lenders and financial adversaries in the many civil legal and foreclosure proceedings swirling around Nate Paul.

Plaintiffs' Good Faith Belief that OAG and Paxton Committed Crimes

85. During the last week of September 2020, the Plaintiffs talked frequently about what each of them knew about the various actions Paxton and OAG were taking to benefit Nate Paul and Ken Paxton personally. Because Paxton's and OAG's actions to benefit Paul were so sweeping and occurring across numerous divisions of OAG, not every Plaintiff knew the whole picture.

86. But by the afternoon of September 29, 2020 or the morning of September 30, 2020, each of the Plaintiffs knew -- through direct observation or discussion with others with direct

knowledge or review of documents and reasonable inferences -- every fact described in the paragraphs above that had occurred by that time. And based on what they had observed, what they had been told, and based on their experience, each of the Plaintiffs formed a good faith belief that Paxton and OAG had violated Texas and federal criminal law, including but not limited to laws regarding bribery, tampering with government records, obstruction of justice, harassment, and abuse of office.

87. By way of example only, Texas Penal Code §39.02, titled Abuse of Official Capacity, makes it a criminal offense for a public servant, with intent to obtain a benefit or with intent to harm or defraud another, intentionally or knowingly misuse government property, services, personnel or any other thing of value belonging to the government. As of September 30, 2020, because of the conduct of OAG and Paxton described above, each Plaintiff had a subjective and reasonable belief that Paxton and OAG misused the funds, services and personnel of his office to personally benefit Nate Paul and to benefit himself. Plaintiffs reasonably concluded that Paxton's bizarre, obsessive use of the power of his office to help Nate Paul was an effort to repay Paul for Paul's help with Paxton's home remodel and/or to silence or repay Paul for helping or paying Paxton's mistress, and/or to encourage Paul not to reveal that Paxton had had an affair and/or to repay Paxton's campaign contribution, and/or to cause Paul to continue giving campaign contributions.

88. Also by way of example, Texas Penal Code §37.10, titled Tampering With Governmental Record, makes it a criminal offense to knowingly make a false entry in, or false alteration of, a governmental record or to make, present or use any record, document, or thing with knowledge of its falsity and with intent that it be taken as a genuine governmental record, or to make, present or use a governmental record with knowledge of its falsity. By September 30, 2020,

each of the Plaintiffs had formed a good faith and reasonable belief that Paxton and OAG directed and participated in creating, presenting, and using false government records with knowledge of their falsity. For example, Paxton and OAG knew that Cammack's contract was not properly authorized under OAG policy, that Cammack was never even allegedly authorized to investigate the second Nate Paul complaint (Paul's allegation of a conspiracy against him by a charity, a court-appointed receiver, their lawyers, creditors, and a federal bankruptcy judge), that Cammack was not a prosecutor or retained to be a prosecutor. Paxton and OAG directed Cammack to nevertheless file applications for, obtain, and then serve subpoenas obtained on false pretenses, all in an effort to intimidate and harass Nate Paul's perceived adversaries, including his creditors and the law enforcement professionals involved in investigating him. Each Plaintiff reasonably and in good faith believed that Paxton and OAG engaged in conduct meeting these elements of this crime.

89. Texas Penal Code §36.02, titled Bribery, makes it a criminal offense to offer, confer, or agree to confer on another, or solicit or accept or agree to accept from another any benefit as consideration for the recipient's decision, opinion, recommendation, vote, or other exercise of discretion as a public servant, party official, or voter or for the exercise of official discretion in a judicial or administrative proceeding. By September 30, 2020, each Plaintiff formed a good faith and reasonable belief, based upon the conduct described above, that Paxton and OAG had been bribed. Paxton's decisions, opinions, and exercise of discretion described in detail above were far removed from the bounds of what an ordinary, prudent civil servant would do. They were all ostensibly for the benefit of a single person, a 33 year-old real estate investor under FBI investigation and caught in a maelstrom of business failure and litigation. That real estate investor was also a major donor to Paxton's campaign, was assisting Paxton in the remodel of his personal

residence, and was the employer of Paxton's mistress. Plaintiffs reasonably believed Paxton's bizarre abuse of his office was the result of bribery.

90. 18 U.S.C. §1510(a), titled Obstruction of Criminal Investigations, states:

> Whoever willfully endeavors by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator shall be fined under this title, or imprisoned not more than five years, or both.

91. Under 18 U.S.C. §1512(c)(2), it is a federal crime to obstruct, influence or impede any official proceeding or attempt to do so. Under 18 U.S.C. §1512(d), it is a federal crime to intentionally harass another person and thereby hinder them from attending or testifying in an official proceeding. By September 30, 2020, all of the Plaintiffs knew that Paxton and OAG were orchestrating a campaign to use the levers of power of OAG to investigate, harass and intimidate the federal law enforcement agents who were investigating and would likely testify in official proceedings about the search warrants on Nate Paul's home and offices. In addition, each Plaintiff reasonably believed that Paxton was being bribed to orchestrate the harassment and witness intimidation.

92. These are just examples of the specific criminal statutes covering the conduct Plaintiffs reasonably and in good faith believed Ken Paxton and OAG had committed. Plaintiffs also assert that the conduct they in good faith concluded Paxton and OAG had engaged in may violate 18 U.S.C. §1344 (Bank Fraud); 18 U.S.C. §1956 (Money Laundering); and 18 U.S.C. §1961 and 1962 (Racketeer Influenced and Corrupt Organizations).

Plaintiffs Make a Good Faith Reports about Paxton's Abuse of Power to Law Enforcement

93. On September 30, Plaintiffs Brickman, Penley, and Vassar went together to meet with agents for the Federal Bureau of Investigation in Austin, Texas. They were joined at the

meeting by other Whistleblowers. As described below, Plaintiff Maxwell separately reported his good faith belief of crimes committed by Paxton and OAG on, before, and after September 30.

94. Although Plaintiffs were public employees of OAG and observed criminal conduct by OAG and other OAG employees, Plaintiffs were not acting as prosecutors or law enforcement officers when they went to the FBI to report the criminal conduct of the OAG and Paxton. They were acting as concerned public employees who had a good faith belief that crimes had been committed and went outside OAG to report it to law enforcement.

95. On September 30, Plaintiffs Brickman, Penley and Vassar, along with several other Whistleblowers reported to the FBI what they collectively knew. Each of the Plaintiffs reported all of what is described in paragraphs 17-92 above to the FBI. Plaintiffs Brickman, Penley, Vassar and the others sat in the same room with at least two FBI agents for several hours. They went around the room telling what they knew, what they'd heard, what they had observed, and the reasonable inferences that could be drawn from known facts. They each answered questions put to them by the FBI. The facts described in paragraphs 17-92 above (those that had occurred by September 30) accurately summarize what Plaintiffs Brickman, Penley and Vassar collectively shared with the FBI on September 30 by way of reporting their good faith belief that Paxton had engaged in criminal conduct.

96. Specifically, each of the three Plaintiffs who attended the September 30 meeting reported to the FBI how Paxton and OAG intervened in Open Record Requests to help Nate Paul, intervened in civil litigation to help Nate Paul at the expense of a local charity, directed a legal opinion on foreclosure sales to help Nate Paul, and used OAG as a hammer to help Nate Paul by aiming a campaign of harassment and intimidation at Paul's perceived adversaries, all as described in detail above. Plaintiffs reported facts to the FBI, not legal conclusions, as would be expected

in an interview with FBI. But the three Plaintiffs who attended that meeting made very clear that they believed Paxton's and OAG's conduct were acts of criminal bribery, harassment, and abuse of office.

97. David Maxwell could not attend the September 30 meeting with the FBI. But Plaintiff Maxwell complained in good-faith of the acts described in paragraphs 17-92 above in which Ken Paxton abused his office and his employer, the OAG, not just to one, but to three (3) appropriate law-enforcement authorities before his termination by the OAG: the Texas Rangers/Department of Public Safety, the FBI and Department of Justice, and the Travis County District Attorney's Office.

98. Although Maxwell was a public employee of OAG and observed criminal conduct by OAG and other OAG employees, Maxwell was not acting as a prosecutor or law enforcement officer when he went to the FBI to report the criminal conduct of the OAG and Paxton. He was acting as concerned public employee who had a good faith belief that crimes had been committed and went outside OAG to report it to law enforcement.

99. Prior to making these good-faith reports to these appropriate law enforcement authorities, Maxwell had communicated his concerns about his good-faith—both objectively and subjectively—reports and complaints about the violations of state and federal laws. Maxwell has believed and knows from his considerable experience that the authorities to whom he reported the unlawful conduct are authorized to investigate or prosecute violations of criminal law, things of which this Court can—and should—take judicial notice of.

100. Apart from reporting to proper law enforcement authorities, Maxwell had also communicated to people at the OAG's office including Ken Paxton himself that the conduct Ken Paxton and the OAG had engaged in in connection with Nate Paul was contrary to the law and

violated Texas laws prohibiting tampering with government records, harassment, abuse of office[3] and bribery[4] as well as the federal laws of obstruction of justice.[5] Maxwell stated that Ken Paxton "was going to get himself indicted" and objected to others at the OAG willing to go along with this unlawful behavior. Maxwell also communicated that the misuse of grand jury subpoenas could also constitute falsification of official records and tampering with witnesses.[6]

101. The OAG was implicated in the unlawful conduct as well as Ken Paxton because Ken Paxton committed these acts while acting as the Attorney General and under color of his official capacity.[7] The OAG is certainly subject to whistleblower claims. *See e.g., Office of Attorney General v. Rodriguez*, 605 S.W.3d 183, 185 (Tex. 2020) ("we decide **whether sufficient evidence** exists to support a finding that a state agency violated the Texas Whistleblower Act when it fired one of its managers.") (emphasis added).

102. Plaintiff Maxwell reported the unlawful conduct to Randy Prince, Deputy Director Law Enforcement Operations of the Texas Rangers, on September 30, 2020. Ranger Prince is a person with direct ability to initiate the investigation or prosecution of the laws that Maxwell reported had been violated. After Maxwell notified people at the OAG about these concerns about violation of law and while on administrative leave but before OAG further retaliated by terminating him on November 2, 2020, Maxwell made the same good-faith reports to the FBI and Department of Justice, and the Travis County District Attorney's Office.

[3] Texas Penal Code § 39.02.
[4] Texas Penal Code § 37.10, 36.02.
[5] See e.g., 18 U.S.C. § 1510(a); 1512(c)(2), (d), and (k).
[6] Texas Penal Code § 37.10, 36.05.
[7] To the extent Defendant advances the theoretical argument that any unlawful act is not actionable because it would be ultra vires if committed by a public employee or governmental entity being steered by the person running it in his official capacity, that argument or construction would do violence to, and run directly contrary to, both the purpose and language of the Whistleblower Act.

103. Since at least August of 2020, Maxwell has had a continuous subjective belief that the conduct of Ken Paxton and the OAG that he reported violated the law based on his decades in law enforcement and having been Ken Paxton's hand-picked top law enforcement officer in Texas. Maxwell has been a licensed peace officer since April of 1973 (nearly 48 years). Maxwell has decades of experience investigating, analyzing, and charging criminal conduct including decades of investigating public corruption. Maxwell has worked with the public integrity branch of the DPS. In addition to being subjectively made in good faith, his beliefs are also objectively reasonable and in good faith. These beliefs are not only deeply rooted in his vast law enforcement experience but objectively supported by a plain reading of the laws at issue, as well as by the similar conclusion reached and publicly expressed by seven (7) other high-level employees of the OAG who are all licensed and respected attorneys.

Paxton's and OAG's Knowledge of Plaintiffs' Reports to Law Enforcement

104. On October 1, seven of the eight Whistleblowers signed and sent to the OAG's Director of Human Resources a letter notifying OAG that they had reported to an appropriate law enforcement authority a good faith belief of suspected violations of law committed by Paxton and OAG. A true and correct copy of that letter is attached to this pleading as **Exhibit 8**.

105. Plaintiff Maxwell did not sign the October 1 letter because he was out of state on vacation at the time the letter was drafted, but he was in complete agreement with the letter. He sent a separate written notice to Human Resources regarding his whistleblower complaint to an appropriate law enforcement authority. Plaintiff Maxwell would have signed the letter had he been present to do so.

106. The OAG's office knew that Maxwell was fully in agreement with the views expressed in the October 1, 2020 letter signed by the lawyers, and that Maxwell would have signed

but for being physically outside of Texas on that day. Not only was Ken Paxton aware of Maxwell's complaints and reports, but Brent Webster, Ken Paxton's hand-picked successor as First Assistant was also aware at the time the OAG decided to retaliate against Maxwell.

107. The October 1 letter states:

> This letter is intended to serve as notice to the Office of the Attorney General that on September 30, 2020, we, the undersigned individuals, reported to an appropriate law enforcement authority a potential violation of law committed by Warren K. Paxton, Jr., in his official capacity as the current Attorney General of Texas. We have a good faith belief that the Attorney General is violating federal and/or state law, including prohibitions relating to improper influence, abuse of office, bribery, and other potential criminal offenses. Each signatory below has knowledge of facts relevant to these potential offenses and has provided statements concerning those facts to the appropriate law enforcement authority. Additionally, today, October 1, 2020, the undersigned notified the Attorney General via text message that they have reported the violations to the appropriate law enforcement authority. A copy of the text message is attached hereto.

Paxton and OAG Take Immediate Adverse Employment Actions

108. Ken Paxton swiftly began retaliating against the Whistleblowers both individually and as a group. Paxton's acts were deliberately calculated to try to impugn these public servants, denigrate their legitimate, good-faith complaints about Paxton's corruption, attempt to silence or divide them, and deter others from making such complaints about Paxton's unlawful conduct.

Friday, October 2 -- Paxton Suspends and Later Terminates Penley and Maxwell

109. On October 2, one day after the letter to OAG Human Resources, Plaintiffs Penley and Maxwell were placed on "investigative leave" at the direction of Paxton. Their email accounts and building access badges were disabled. Paxton and the OAG refused to tell Penley or Maxwell what was being investigated or even whether they were accused of wrongdoing of any kind. For the next 2 weeks, the OAG made no attempts to interview Penley or Maxell as part of any alleged investigation. On October 15, newly appointed First Assistant Brent Webster[8] extended Penley's and Maxwell's respective investigative leaves to Monday, November 2, again without giving any

[8] Whistleblower Jeff Mateer, the previous First Assistant Attorney General, resigned on October 2, 2020.

explanation for placing them on that status or disclosing the reason for the investigation or the scope of it. Penley made several requests, by phone call and email, seeking that information, but never received a response from Paxton, Webster or anyone else at the OAG.

110. If Maxwell and Penley had not reported the unlawful conduct, the OAG would not have placed them on investigative leave. No other reason was provided at the time, and the events leading up to it point to that conclusion.

Saturday, October 3 – Paxton and OAG Smear the Whistleblowers

111. On Saturday, October 3, the OAG Communications Department issued the following statement:

> The complaint filed against Attorney General Paxton was done to impede an ongoing investigation into criminal wrongdoing by public officials including employees of this office. Making false claims is a very serious matter and we plan to investigate this to the fullest extent of the law.

112. This statement was blatantly false in numerous respects and clearly intended to intimidate and retaliate against the Whistleblowers. First, the reports to law enforcement were not made "to impede an ongoing criminal investigation." Rather, the Whistleblowers' reports to law enforcement were made based on their good faith belief that Attorney General Paxton was abusing the Office of Attorney General to benefit a campaign donor and private individual and to benefit himself.

113. Further, there was no OAG investigation into "employees of this office" as Paxton claimed in his press release. Paxton was trying to mislead the public into believing that the Whistleblowers themselves were under investigation for criminal misconduct when they went to law enforcement with their concerns about Paxton. This false statement was clearly intended to punish the Whistleblowers by smearing and discrediting them.

114. Paxton also asserted in the October 3 statement that the Whistleblowers made "false claims" to law enforcement. This too was a lie. The Whistleblowers provided only accurate information to law enforcement. Moreover, Paxton did not even know on October 3 what information the Whistleblowers had provided to law enforcement. Paxton was certainly aware of his own corrupt conduct and worried about it being exposed, but he did not know what specifically the Whistleblowers had reported and therefore had no basis upon which to accuse eight of his most senior staff of making false claims to law enforcement. Nor did he seek any transparency, the appointment of any truly neutral or objective special investigator, contact any proper law enforcement agency, or act in any way as a proper steward of the OAG would act.

115. Paxton punctuated his October 3 statement by threatening the Whistleblowers. The final sentence of his official statement read, "Making false claims is a serious matter and ***we plan to investigate this to the fullest extent of the law***." (Emphasis added).

116. It is hard to imagine a more egregious act of retaliation against a whistleblower than what Paxton began on Saturday morning, October 3. The life's work of each of the Whistleblowers was the law or law enforcement or both. Their credibility and integrity are their essential stock-in-trade. Paxton's statement was a pack of lies intended to hit the Whistleblowers where he thought it would hurt them most: false claims that the Whistleblowers made untrue accusations to law enforcement and had impeded a lawful investigation and a threat of investigation and legal consequences. The potential and certainly-intended effect would be to chill further revelations about Paxton's wrongdoing and try to smear the good name, character, and reputation of these public servants. Paxton's actions were straight out of the playbook he had been running against the enemies of his friend and donor Nate Paul. Now, on a Saturday morning less than 48 hours

after learning of the Whistleblowers' reports to law enforcement, Paxton was running the same play against his own senior deputies, the Plaintiffs here.

October 5 and 7 -- More Retaliation

117. Over the weekend of October 3-4, media continued reporting about the relationship and connections between Paxton and Nate Paul and Paxton's personal involvement in the use of his office to investigate and attack Paul's enemies. In response to this more detailed reporting, Paxton again treated the official, taxpayer-funded Communications Department of the OAG as an instrument of retaliation. The OAG Communications Division released this official statement on Monday, October 5 at Paxton's direction (incorrect capitalization in original):

> The Texas attorney general's office was referred a case from Travis county regarding allegations of crimes relating to the FBI, other government agencies and individuals. My obligation as attorney general is to conduct an investigation upon such referral. Because employees from my office impeded the investigation and because I knew Nate Paul I ultimately decided to hire an outside independent prosecutor to make his own independent determination. Despite the effort by rogue employees and their false allegations I will continue to seek justice in Texas and will not be resigning.

118. The first two sentences of Paxton's October 5 statement were intended to mislead the public into believing that, in conducting the investigations of Nate Paul's enemies, OAG was merely carrying out a legal obligation to investigate a matter referred from the Travis County District Attorney. Of course, this lie by Paxton was calculated to counter the emerging truth that Paxton was personally orchestrating the use of the OAG to attack Paul's enemies.

119. Two days later, the OAG Communications Division released another official statement at Paxton's direction, reiterating some of the prior statement's untruths and falsely implying that the Cammack contract had been approved through proper OAG procedures:

> Employee, Ryan Vassar, drafted the contract for outside counsel and communicated directly with Independent Counsel Brandon Cammock to assist in the execution of the contract. The Attorney General signed the contract.

> Mr. Vassar included the job description in this contract that legally authorized Independent Counsel Brandan Cammock to act. Mr. Vassar also provided this contract directly to Attorney General Paxton for his signature.

120. This official communication omits the key facts that what Vassar circulated to both Cammack and Paxton was clearly labeled a "draft" contract, prepared at Paxton's direct command; that (as Paxton well knows) Vassar lacks authority to individually authorize retention of outside counsel; and that the required OAG approvals for the Cammack contract were *never* obtained. Vassar demanded correction of the false statement, but his request was ignored.

121. It was not only the Whistleblowers who were alarmed by Paxton's false October 5 and 7 statements. Margaret Moore, the District Attorney of Travis County, rightly and justly called Paxton out on his misleading statements. In response to Paxton's October 5 and 7 statements, Travis County D.A. Moore wrote to Paxton on October 9:

> On June 10, 2020, my office sent to David Maxwell [the then-current Deputy Director of Law Enforcement Division for the OAG] a letter referring a Request to Investigate (RTI) filed in our office by Nate Paul. You asked my office to hear his complaints. The referral to the OAG was made with your approval. We did not conduct any investigation into the merits of the matters complained of….
>
> The referral cannot and should not be used as any indication of a need for investigation, a desire on the Travis County D.A.'s part for an investigation to take place, or an endorsement of your acceptance of the referral.
>
> My office has closed this file and will take no further action. Furthermore, I have instructed my employees to have no further contact with you or your office regarding this matter.

122. The District Attorney closed her letter to Paxton by expressing her evident alarm at Paxton's conduct:

Any action you have already taken or will take pursuing this investigation is done solely on your own authority as provided by Texas law. The newly surfaced information raises serious concerns about the integrity of your investigation and the propriety of your conducting it.

Sincerely,

Margaret Moore

Margaret Moore

Cc: Brent Webster

123. On November 11, 2020, Paxton repeated in the *New York Times* the lie that that his investigation of the magistrate judge and state and federal law enforcement officials was initiated by the Travis County District Attorney.

Monday, October 5 – Wednesday, October 28 –
Paxton Removes Duties, Tries to Intimidate Whistleblowers

124. On Friday October 2, 2020, First Assistant Attorney General Jeff Mateer, who was one of the Whistleblowers, resigned. Paxton quickly hired Brent Webster, who was previously with the Williamson County, Texas D.A.'s office, to replace Mateer as First Assistant Attorney General. October 5 was Webster's first day on the job. At 9:00 a.m., Webster began his first day by dismissing Plaintiff Brickman from a very important legislative meeting with Attorney General Paxton. In an obvious effort to embarrass Brickman, Webster waited until the meeting began and then instructed Brickman, with great ceremony but without explanation, to leave the meeting. As the Deputy Attorney General for Policy and Strategic Initiatives, Brickman had always participated in these meetings with the First Assistant and/or Attorney General Paxton. Removing Brickman from the meeting was clearly intended to diminish Brickman's duties and responsibilities to punish him, to try to intimidate and embarrass or humiliate him, and to send a message to other employees

that Brickman was being punished and stripped of responsibilities and thereby deter similar attempts to complain about or hold Paxton accountable for his official misconduct.

125. Later that same morning, First Assistant Brent Webster arrived at Brickman's office escorted by an armed peace officer who identified herself as Sergeant Amy Biggs. Mr. Webster repeatedly insisted that he speak alone with Brickman. Brickman politely offered to meet with Mr. Webster in the presence of other deputies but prudently and respectfully declined to meet with Mr. Webster alone or in the presence only of the armed guard accompanying Webster. Confronting Brickman – in needless and unprecedented, banana republic-like, fashion with an armed guard – and insisting on meeting alone for unspecified reasons was clearly an attempt by Webster to intimidate Brickman.

126. About thirty minutes later, Webster came by Brickman's office, saw him talking on his cell phone, and instructed Brickman to take his cell phone to his car and leave it there. At the time, Brickman was talking on his cell phone with a colleague, Senior Counsel to Attorney General Paxton, Zina Bash. Webster's instruction to take the phone to the car was not consistent with any rule or policy of the office. Other employees also carry and use personal cell phones. In fact, Paxton himself carries multiple personal cell phones, including routinely cycling through "burner" cell phones. This needless instruction to Brickman was not just a bush-league attempt at intimidation; not having his cell phone posed a significant issue for Brickman because his school-age children only have his personal cell phone number. Additionally, Brickman is the guardian for his 96 year-old grandmother who suffered a recent fall and broke her back, and Brickman coordinates her care.

127. Still on Monday, October 5, Brickman learned that the Scheduler, a position that reported to Brickman, had been replaced without any involvement by Brickman. This was yet

another power play by Webster, clearly intended to demote and demean Brickman by removing responsibilities.

128. After Mateer resigned and Maxwell and Penley were placed on leave, the remaining Whistleblowers and other employees of the OAG watched as their colleagues were systematically retaliated against, mistreated, placed on leave, harassed and fired.

129. On October 8, 2020, during a regular meeting of the OAG's deputies, directors, and other senior members, Whistleblower McCarty asked Webster and Paxton whether the OAG would continue to make disparaging remarks to the media about the Whistleblowers. Paxton did not respond and Webster expressly refused to answer.

130. On October 13, Paxton conducted an interview with the Southeast Texas Record in which he once again maligned the Whistleblowers, stating that his deputies and former first assistant engaged in "an effort to cover up the reality of what really happened [with Paul]."

131. Several of the Whistleblowers had job duties removed, were excluded from regular meetings, and encountered the armed guard that had begun accompanying Webster. Some indicated in formal complaints to the OAG that they believed their OAG issued electronic devices were being monitored and were told that they were "under investigation." The Whistleblowers also received "litigation hold" letters concerning Paul that instructed them to preserve all correspondence and documents related to his complaints. Someone even placed empty boxes near the offices of some of the Whistleblowers. All of these actions were overt and intended to dissuade other OAG employees from engaging in protected conduct and to create a hostile work environment to persuade the remaining Whistleblowers to resign. It worked.

132. On October 19, Ryan Vassar, one of the Whistleblowers, received an email from Webster asking to meet in Webster's office at 1:00. Vassar, who was working remotely at the time,

acknowledged Webster's email and reported to Webster's office. Webster invited Vassar into his office and left the door open while armed guard, Amy Biggs, sat in a chair outside the door. After a meaningless, five-minute conversation, Webster announced that he was placing Vassar on investigative leave for two weeks. Vassar asked multiple times why he was being investigated, but Webster refused to answer. Webster, instead, said that the investigation was "open-ended." At the end of the meeting, Webster directed Vassar to leave his agency-issued laptop and cell phone on Webster's desk. Webster and Sergeant Biggs then escorted Vassar to his office to collect his personal belongings, parading him around the building in front of his colleagues in what could have only been intended to demean Vassar and intimidate him and the other Whistleblowers. After collecting his belongings, Sergeant Biggs then accompanied Vassar in the elevator and escorted him outside the building. Vassar's leave was supposed to end on November 2, 2020, but his earlier request for clarification went unanswered by anyone at the OAG until the next day, November 3, 2020, when the Human Resources Division notified him that his leave had been extended for another 80 hours. Thus, Vassar was, without justification or explanation, completely stripped of his job responsibilities and constructively discharged.

133. On October 20, Plaintiff Brickman and Whistleblower Lacey Mase were wrongfully terminated by Paxton and Webster for making their whistleblower report.

134. On October 26, Whistleblower Darren McCarty resigned.

135. On October 28, Whistleblower Ryan Bangert resigned.

136. Vassar's second 80-hour investigative leave period was set to expire on November 16. However, on November 13—the day after this lawsuit was filed—Vassar was summoned to the Price Daniel building on four hours' notice. After responding that he was out of town and

unable to make the suddenly scheduled meeting, Vassar was directed to report at 8:00 AM the following Monday, November 16.

137. Upon his arrival that morning, the retaliation immediately resumed. Vassar was escorted to the eighth floor of the building, where an armed officer required Vassar to surrender his mobile phone and subjected him to a physical search for recording devices (no word on what OAG was afraid might be recorded). After a half-hour wait, Vassar was escorted into the office of First Assistant Webster, with the armed officer prominently standing guard outside the door. Webster stated that his investigation of Vassar was 99% complete and then proceeded to interrogate him on various subjects. When Webster was finished, the armed officer escorted Vassar back down the elevator and outside the building.

138. Then Vassar was ordered to report back to the Price Daniel Building the next day, November 17, at 10:00 AM. Vassar arrived promptly at 10:00 AM.. Webster and HR personnel arrived at 10:30 AM. Webster then fired Vassar for false and pretextual reasons. And just like that—less than two months after their legally protected, good-faith report to law enforcement authorities, OAG had run off all eight whistle blowers.

Paxton Uses His Report to the Texas Legislature as a Tool to Further Retaliate Against the Whistleblowers.

139. Texas State Representative Jeff Leach is the Republican Chairman of the House Committee on Judiciary and Civil Jurisprudence. Rep. Leach represents parts of Collin County, where Paxton is from. Rep. Leach has been a political ally of Paxton's. On October 9, 2010, Rep. Leach wrote to Paxton, "Texans have good reason to be concerned that the important work of [the Office of the Attorney General] may not be possible under your continued leadership. If there is any truth whatsoever to the factual and legal claims of your own senior staff, I believe you must voluntarily resign your position and urge you to do so."

140. Rep. Leach expressed that his paramount concern was that the operations of the OAG "continue without interruption and the trust of the people of Texas in their Chief Law Enforcement Officer must be restored." Rep. Leach requested that Paxton provide a written report to all members of the Texas Legislature as to what specific steps are being taken by Paxton and Brent Webster to ensure that the effective operation of the OAG continue in full force and effect. Rep. Leach asked for the report to be provided within seven (7) days.

141. OAG Director of Legislative Affairs Ryan Fisher emailed various staffers requesting their input into the letter. Although several of the Whistleblowers raised concerns with the operation of the office and the effect of the retaliation on pending matters, none of this criticism made its way into the response to Chairman Leach, which on information and belief was written by Paxton and Webster – not Fisher.

142. Paxton sent his written report to Chairman Leach and the 181 members of Texas Legislature on October 16, 2020. The report was a barely-two-page, self-aggrandizing letter that failed to respond to Rep. Leach's inquiry in any substantive respect. The letter was a combination of misleading statements, material omissions, and praise for work that mostly began well before First Assistant Webster assumed his new role on October 5, 2020 and that had no bearing on the concern raised by Rep. Leach in his October 9 letter.

143. Paxton used the report requested by Rep. Leach to again defame and retaliate against the Whistleblowers. Paxton's letter began with a lie and a smear: "Thank you for your October 9 letter asking whether OAG operations continue apace despite the false claims made by some OAG employees." Rep. Leach never said the allegations the Whistleblowers took to law enforcement were "false claims." Paxton was yet again making that allegation to smear and

discredit the Whistleblowers, and he was using a formal, written report requested by a leader in the Texas House of Representatives to amplify his attacks on the Whistleblowers.

144. Notably, in his response to a request for specific steps he was taking to ensure the office was functioning effectively, Paxton failed to even inform Rep. Leach that at least five of the Whistleblowers had recently filed formal internal grievances alleging that Paxton was harassing and using his office to punish the Whistleblowers. Those complaints from high-ranking deputies were filed in writing and addressed serious concerns about the functioning of the Office of Attorney General. Yet Paxton's report to the Legislature made no mention of the complaints. Paxton's report to the Legislature was to the effect of, "all is well."

October 9 -- Paxton Claims to Shut Down Cammack Investigation of Nate Paul Enemies

145. At the end of a busy Friday, October 9, Paxton claimed to be concluding the Cammack investigation of Nate Paul's enemies. OAG issued a statement from Paxton saying, "In this case, we can only investigate in response to a request for assistance from the District Attorney's office. This investigation is now closed." Subsequent events suggest this was yet another effort by Paxton to mislead the public.

October 19 -- Paxton and Webster Indicate they Will Reopen Investigation of Nate Paul's Enemies

146. Although Paxton told the public on October 9 that the investigation into Nate Paul's enemies "is now closed," after 9:00 p.m. on October 19, several of the Whistleblowers received an odd email from First Assistant Attorney General Brent Webster. It read in part, "Given your conflicts, you are instructed not to work on any OAG business relating to your allegations against Nate Paul, General Paxton, or any connected cases or OAG matters."

147. Plaintiffs were puzzled by what matters still pending in the OAG might relate to

Nate Paul or Paxton. One Plaintiff, Blake Brickman, wrote back the next morning seeking clarification. Brickman wrote to Webster:

> Good morning Brent -
>
> I am confused by your email and would like some clarification to ensure that I comply with your directive.
>
> 1. I am not aware of any open OAG matters involving Nate Paul. I believe all such matters have been closed. Please advise if that is not the case and please specify exactly what open Nate Paul related matters you reference in your email so I can fully understand and comply with the directive in your email.
>
> 2. As many other senior OAG officials have told General Paxton repeatedly over the course of the last several months, General Paxton has a "personal conflict" with respect to any Nate Paul related matter.
>
> I sincerely hope that your email does not mean that OAG will reopen past matters - or open new matters - that benefit Nate Paul and his business interests under your watch as First Assistant.
>
> Sincerely,
>
> Blake Brickman

148. Brent Webster responded without answering Brickman's questions. Rather, Webster wrote, "Let's meet at 1:30 in my office to discuss this." Brickman expressed reluctance to meet with Webster to speak about Nate Paul related matters. Brickman offered to meet with Webster at 1:30 with a fellow deputy attorney general present. Brickman also pointed out that, since the directive to stay away from Nate Paul or "related" matters was made in writing, it was appropriate that he receive in writing a response identifying those matters. But Webster was adamant that they meet alone to discuss these unknown Nate Paul related matters that Webster was instructing Brickman to stay away from.

149. Webster had no intention of telling Brickman about the Nate Paul matters he was referring to in his email from the night before. When Brickman arrived at Webster's office, Webster, an armed guard, and a human resources employee were present. Webster brought Brickman into the office and fired him. Webster said Brickman had been "insubordinate."

November 2 – OAG and Paxton terminate Maxwell and Penley

150. On or about October 23, 2020, 3 weeks after Maxwell was put on investigative leave, the OAG collected Maxwell's agency issued laptop and cell phone. On October 28, nearly one month after he was put on investigative leave, the OAG requested Maxwell provide his passwords.

151. On or about the afternoon of October 28, 2020, nearly one month after Penley was put on investigative leave, Penley received a request to return the following day his agency issued laptop and cell phone, and Penley complied.

152. On Friday October 30, 2020, Penley and Maxwell were instructed to report to separate buildings at the Austin office of the OAG on November 2, 2020 at 9 a.m. OAG's Human Resources department sent the following email to Maxwell:

> Director Maxwell:
>
> Please be advised that you are directed to report to the William P. Clements Building on Monday , November 2, 2020 at 9:00 a.m. Please proceed to 205J (large training room) on the 2nd floor. Please confirm receipt of this email.
>
> Thank you for your cooperation.
>
> HR-Help

153. Penley asked what the purpose of the meeting was and was only told it was "work-related."

154. Maxwell and Penley appeared as requested at the OAG's Austin office on November 2, 2020, and they both experienced even more irregularities, harassment, and

retaliation. Contrary to Texas law and Paxton's instituted written policy preventing the disarming of licensed peace officers, Brent Webster issued orders to OAG staff to prevent Maxwell from entering if armed, despite Maxwell's status and distinguished career. The OAG violated Maxwell's rights as a licensed peace officer, with a valid License to Carry, to possess a legal weapon at a State Office, contrary to Article 30.06. Penley was escorted up the elevator and into the Executive Conference Room by an armed guard, who remained stationed outside the room throughout the meeting, which lasted from about 9 a.m. to 5 p.m.

155. Penley and Maxwell were subjected to hostile conditions and conduct throughout the entire day. Webster refused to tell Penley or Maxwell why they had been placed on investigative leave, the reason for the investigation or the scope of it. He also denied Penley's request to have one of the other Whistleblowers attend the meeting as a witness. Instead, Webster proceeded to interrogate Penley and Maxwell in a hostile and aggressive manner. The OAG engaged in a charade under the guise of an administrative investigation interview, but it was apparent that the Whistleblowers' complaints about Paxton's misconduct were the driving force for the events of November 2. Webster pressured both Maxwell and Penley to resign, which they refused to do. At the end of the day, the OAG wrongfully terminated Maxwell's and Penley's employment in retaliation for their protected complaints of illegal conduct by Paxton and the OAG.

Plaintiffs File Formal Complaints with OAG

156. On October 16 and again on October 29, Plaintiff Brickman initiated action under any applicable grievance or appeal procedure of the OAG relating to suspension or termination of employment or adverse personnel action pursuant to TEX. GOV'T CODE §554.006(a). Although the agency had 60 days to investigate his complaint pursuant the Whistleblower Act, OAG HR responded to the October 16 complaint in less than 24 hours stating that there was no complaint

procedure available to Deputy Attorney Generals like Brickman and immediately dismissing the complaint.

157. On October 12 and again on November 10, 2020, Plaintiff Penley initiated action under any applicable grievance or appeal procedure of the OAG relating to suspension or termination of employment or adverse personnel action pursuant to TEX. GOV'T CODE §554.006(a). OAG HR responded to the Friday, October 12 complaint by letter dated October 16 stating that there was no complaint procedure available to Deputy Attorney Generals like Penley and immediately dismissing the complaint. Penley subsequently inquired whether there was another internal administrative procedure at the OAG by which he could appeal his wrongful termination claim other than the formal complaint process under which he had attempted to initiate a complaint on October 12. By letter dated November 10, the Formal Complaint Officer replied:

> ….This letter is to inform you that there is no other internal administrative procedure at the Office of the Attorney General other than the formal complaint process by which you may appeal your termination….

158. On November 10, Penley initiated another grievance by submitting a formal complaint about his wrongful termination.

159. On October 13 and again on November 4, 2020, Plaintiff Maxwell initiated action under any applicable grievance or appeal procedure of the OAG relating to suspension or termination of employment or adverse personnel action pursuant to TEX. GOV'T CODE §554.006(a).

160. On October 15, 2020, Plaintiff Vassar initiated an action under any applicable grievance or appeal procedure of the OAG relating to suspension or termination of employment or adverse personnel action pursuant to TEX. GOV'T CODE §554.006(a). His formal complaint detailed a litany of unlawful and retaliatory actions taken against him by Paxton and OAG since

his good-faith report to appropriate law enforcement authorities of legal violations by the OAG and by the Attorney General Ken Paxton. Although the agency had 60 days to investigate his complaint pursuant the Whistleblower Act, OAG HR responded to the October 15 complaint the very next day stating that there was no complaint procedure available to Deputy Attorney Generals such as Vassar and immediately closing the complaint.

November 5 – the Smear Campaign Continues

161. On November 5, 2020, Paxton's campaign spokesperson, Ian Prior, who is not an OAG employee and is therefore without knowledge on any OAG personnel matters, referred to Plaintiffs in a news article as "desperate former employees trying to spin a false narrative".

162. On November 11, 2020, the New York Times reported:

> Mr. Paxton told the New York Times in a statement that the latest controversy was created by members of his staff who had opposed his decisions without having all the facts and who made 'their disagreement noisy and public' in an attempt to undermine the integrity of the office.

IV. Cause of Action

Count 1: Violation of Texas Whistleblower Act

163. Plaintiffs incorporate and re-allege paragraphs 1-162 above.

164. Plaintiffs were all public employees employed by the OAG, which is a state governmental entity and unit of the State of Texas.

165. As described in paragraphs 17-103 above, Plaintiffs all in good faith made reports to law enforcement authorities of violations of criminal law by the OAG and by the Attorney General Ken Paxton, who is an employee of OAG and whose criminal actions were taken in the course of his duties for OAG.

166. The OAG and Paxton specifically were aware of Plaintiffs' good faith reports to law enforcement.

167. Plaintiffs were subsequently subjected to adverse personnel actions by OAG and Paxton -- including demotion, suspension, removal of work assignments, hostile work environment, constructive termination and termination of employment – because of the reports they made. The adverse employment actions would not have been taken against them had they not made the good-faith reports to law enforcement.

168. Each of the adverse employment actions was committed within 90 days of the reports to law enforcement, and in some cases within 1 business day of OAG's and Paxton's learning of the reports. Thus, under Texas law, there is a presumption that the adverse employment actions were taken because the employee made the report to law enforcement. TEX. GOV'T CODE §554.004(a). In addition, the circumstances of the actions prove that the adverse actions were taken because of the reports of Attorney General Paxton's criminal conduct to law enforcement.

169. The adverse employment actions have caused Plaintiffs damages, including but not limited to past lost wages, past and future lost benefits, loss of future earnings and earning capacity, harm to his reputation, emotional pain, mental anguish, and loss of enjoyment of life.

170. Plaintiffs seek legal and other equitable remedies, reinstatement to their former positions or equivalent positions and to have lost fringe benefits and seniority rights reinstated, including but not limited to the vesting of retirement benefits.

171. Plaintiffs have all invoked any available grievance or appeal procedure.

172. All conditions precedent have been met, waived, or otherwise been satisfied to Plaintiffs' filing suit.

V. Verified Motion for Temporary Injunction

173. Plaintiffs Maxwell and Vassar incorporate by reference paragraphs 1 - 172 above and the declarations attached hereto respectively verifying them.

174. Plaintiffs Maxwell and Vassar file the verified motion for temporary injunction asking the Court to order reinstatement pending trial of this case and other relief as requested herein.

A. Temporary Injunction Standards

175. An applicant for temporary injunction must (a) plead a cause of action; (b) show a probable right to recover on that cause of action; and (c) show a probable, imminent, and irreparable injury in the interim. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

176. As the Texas Supreme Court has stated in *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993):

> The decision to grant or deny a temporary writ of injunction lies in the sound discretion of the trial court, and the court's grant or denial is subject to reversal only for a clear abuse of that discretion. At the hearing for a temporary writ of injunction, the applicant is not required to establish that she will prevail on final trial; the only question before the trial court is whether the applicant is entitled to preservation of the status quo pending trial on the merits.

177. In the context of an injunction, the status quo is defined as "the last, actual, peaceable, non-contested status that preceded the pending controversy." *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004); *Intercontinental Terminals Co., LLC v. Vopak N. Am., Inc.*, 354 S.W.3d 887, 892 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

178. In a Texas Whistleblower Act case in which a plaintiff seeks a temporary injunction, preserving the status quo means restoring the plaintiff to the position the plaintiff held before the allegedly retaliatory act. *City of Galveston v. Humphrey*, 2001 Tex. App. LEXIS 1365 *8 (Tex. App. – Houston [1st Dist.] 2001, no pet.).

B. Plaintiffs Have a Probable Right to Recovery.

179. To establish a claim under the Texas Whistleblower Act, a plaintiff must plead: (1) that he was a public employee, (2) that he reported what he in good faith believed was a violation

of law committed by his employing governmental entity or another public employee, (3) that the report was made to what the employee in good faith believed was an appropriate law enforcement authority, and (4) that his employing governmental entity took an adverse personnel action against him because of the report. TEX. GOV'T CODE §554.001 *et. seq.*; *Tex. Dep't. of Human Servs. v. Okoli*, 440 S.W.3d 611, 614 (Tex. 2014); *Resendez v. Tex. Comm'n on Envtl. Quality*, 391 S.W.3d 312, 322 (Tex. App. – Austin 2012, reversed on other grounds).

180. As described in the foregoing verified recitation of the facts and as will be demonstrated in the hearing on this motion, Plaintiffs have a probable right of recovery.

181. All of the Plaintiffs were public employees employed by the Office of the Attorney General of the State of Texas, which is a state governmental entity and unit of the State of Texas.

182. Each of the Plaintiffs formed a good faith belief that Paxton in his official duties for OAG, OAG itself, and other employees Paxton enlisted either wittingly or unwittingly, violated laws regarding bribery, tampering with government records, obstruction of justice, harassment, and abuse of office by using OAG's and Paxton's extraordinary influence and power to aid Paxton's close friend and donor and to attack the friend and donor's criminal investigators and civil adversaries as described in detail above.

183. On September 30, 2020, each of the Plaintiffs in good faith made reports to law enforcement authorities of suspected violations of criminal law by the OAG and by Paxton.

184. On October 1, 2020, OAG and Paxton learned of Plaintiffs' good faith reports to law enforcement because seven of the eight OAG whistleblowers, including Plaintiffs Brickman, Penley and Vassar, signed and sent to the OAG's Director of Human Resources a letter notifying OAG of their good faith report to an appropriate law enforcement authority of suspected violations of law committed by Paxton and OAG. Plaintiff Maxwell did not sign the October 1 letter but sent

a separate written notice to Human Resources regarding his good faith whistleblower report to an appropriate law enforcement authority.

185. OAG and Paxton learned of Plaintiffs' good faith reports on October 1, 2020, and took the adverse employment actions with knowledge of them. Each of the acts of retaliation alleged, including the termination of all of the Plaintiffs, occurred within 90 days of their reports to law enforcement. Thus, under Texas law, there is a presumption that the OAG took these adverse employment actions because the Plaintiffs made their reports to law enforcement. TEX. GOV'T CODE §554.004(a).

186. Even without the applicability of the presumption, Plaintiffs are likely to succeed on the merits of establishing a causal connection between their reports to law enforcement and the termination of their employment and other retaliation by OAG.

187. Circumstantial evidence can be sufficient to establish a causal link between the adverse employment action and the reporting of illegal conduct. *Tex. Dep't of Criminal Justice v. McElyea*, 239 S.W.3d 842, 855-56 (Tex. App.—Austin 2007, pet. denied). Such evidence includes (1) knowledge of the report of illegal conduct, (2) expression of a negative attitude toward the employee's report of the conduct, (3) failure to adhere to established company policies regarding employment decisions, (4) discriminatory treatment in comparison to similarly situated employees, and (5) evidence that the stated reason for the adverse employment action was false. *Id.* A plaintiff need not present evidence involving all five categories to prove causation. *See Continental Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 452 (Tex. 1996).

188. The evidence is overwhelming that OAG retaliated against Plaintiffs because of their reports to law enforcement. For example, on October 2, one day after the letter to OAG Human Resources, Plaintiffs Penley and Maxwell were placed on "investigative leave" at the

direction of Paxton. OAG disabled their email accounts and building access badges. Paxton and the OAG refused to tell Penley or Maxwell what was being investigated or whether they were accused of wrongdoing.

189. On Saturday, October 3 and Monday October 5, the OAG Communications Department issued public statements that were false and misleading and that were intended to intimidate and retaliate against whistleblowers, including the Plaintiffs. For example, in official OAG statements on October 3 and 5, 2020 directly related to Plaintiffs' reports to law enforcement, OAG referred to the Plaintiffs as "rogue employees" and accused Plaintiffs of making "false reports" to law enforcement. OAG also accused Plaintiffs publicly of making their reports to law enforcement "to impede an ongoing investigation into criminal wrongdoing by public officials including employees of this office." OAG also threatened Plaintiffs by stating publicly in regard to their reports to law enforcement that "making false claims is a very serious matter and we plan to investigate this to the fullest extent of the law."

190. On Monday, October 5, OAG retaliated further against Plaintiff Brickman by removing responsibilities and authority. For example, on Monday October 5, Plaintiff Brickman was abruptly dismissed from a legislative meeting with Attorney General Paxton. The manner in which Plaintiff Brickman was dismissed from the meeting suggests a motive to intimidate and retaliate and send a message to Brickman and to others that whistleblowing would be punished. Also on October 5, the OAG's new First Assistant, Brent Webster, arrived at Brickman's office escorted by an armed peace officer in a manner calculated to intimidate and retaliate against Plaintiff Brickman. About thirty minutes later, First Assistant Webster instructed Brickman, contrary to any policy and contrary to normal practice for all other employees, to take his cell phone to his car and leave it there. Still on Monday, October 5, Brickman learned that Paxton's

scheduler, a position that reported to Brickman, had been replaced without any involvement by Brickman.

191. On October 7, 2020, OAG issued a public statement falsely insinuating that Vassar had approved of the hiring of a so-called "special prosecutor" to investigate a federal magistrate judge, and federal and state prosecutors.

192. On October 19, Plaintiff Vassar was placed on leave for investigative reasons. Plaintiff Vassar learned of the leave at a meeting OAG First Assistant Webster called and during which Webster posted an armed guard just outside the open door to Webster's office. Webster refused to answer when Plaintiff Vassar asked why he was being investigated. Webster would only say the investigation was "open-ended." OAG had Plaintiff Vassar escorted from the building by the armed guard in front of his colleagues and coworkers in what was an effort intended to demean and intimidate Vassar and send a message of warning to other actual or would-be whistleblowers.

193. On October 20, 2020, OAG fired Plaintiff Brickman. That same day, OAG fired Lacey Mase, who was one of the 7 signers of the October 1 whistleblower letter.

194. On October 26, 2020, Darren McCarty, one of the signers of the October 1 whistleblower letter resigned. On October 28, 2020, another signatory, Ryan Bangert, resigned.

195. On November 2, 2020, OAG fired Plaintiff Maxwell and Plaintiff Penley.

196. On November 17, 2020, OAG fired Plaintiff Vassar.

197. By November 17, 2020, four of the seven signers of the October 1 whistleblower letter had been fired, and the other three had resigned. In addition, Plaintiff Maxwell, who did not sign the October 1 letter but communicated separately that he had made a report to law enforcement, had also been fired – all within seven (7) weeks of their good faith reports to law enforcement.

198. In addition, OAG's conduct toward Plaintiffs failed to adhere to its established policies and processes regarding employment decisions. For example, an armed guard was used to try to intimidate some of the Plaintiffs. Plaintiff Brickman was instructed, contrary to OAG policy, to take his cell phone to his car and leave it there. Plaintiff Brickman was also stripped of authority and responsibilities. Some of Plaintiffs were placed on investigative leave without explanation and in contravention OAG policy and practice.

C. Plaintiffs Can Show Probable, Imminent, Irreparable Harm.

199. An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). The Texas Whistleblower Act expressly provides for injunctive relief as a remedy. TEX. GOV'T CODE §554.003(a)(1).

200. An adequate remedy at law is one that is "as complete, practical, and efficient to the ***prompt*** administration of justice as is equitable relief." *Intercontinental Terminals Co., LLC v. Vopak N. Am., Inc.*, 354 S.W.3d 887, 895 (Tex. App.—Houston [1st Dist.] 2011, no pet.)(emphasis added). "Thus, if damages do not provide as complete, practical and efficient a remedy as may be had by injunctive relief, the trial court does not err in granting temporary injunction so long as the other elements of injunctive relief are satisfied." *Id.*

201. Threatened injury to reputation and good will are frequently the basis for temporary injunctive relief. *Id.* (citing *Lifeguard Benefit Servs*. v. *Direct Med. Network Solutions, Inc.,* 308 S.W.3d 102, 118; *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc*., 281 S.W.3d 215, 228 (Tex. App.—Fort Worth 2009, pet. denied); *T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc*., 965 S.W.2d 18, 24 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd); *Townson v. Liming*, No. 06-10-00027-CV, 2010 Tex. App. LEXIS 5459, 2010 WL 2767984, at *2-3 (Tex. App.—

Texarkana July 14, 2010, no pet.) (mem. op.); *Lionheart Co., Inc. v. PGS Onshore, Inc.*, No. 10-06-00303-CV, 2007 Tex. App. LEXIS 4628, 2007 WL 1704906, at *2 (Tex. App.—Waco June 13, 2007, no pet.) (mem. op.); *RenewData Corp. v. Strickler*, No. 03-05-00273-CV, 2006 Tex. App. LEXIS 1689, 2006 WL 504998, at *15-16 (Tex. App.—Austin Mar. 3, 2006, no pet.) (mem. op.).

202. Also, "[i]f damages cannot compensate for any wrong committed by [the defendant], or if the damages are not measurable by any certain pecuniary standard, then the injury is irreparable and the injunction should issue." *Townson v. Liming*, No. 06-10-00027-CV, 2010 Tex. App. LEXIS 5459, at *8-9 (Tex. App.—Texarkana July 14, 2010, no pet.). "Certain" means "fixed, settled, and indisputable." *Id.* The value of "lost business contacts and collaborations" and lost employment opportunities are "anything but fixed, settled, and indisputable." *Id.*

203. In addition, the Texas Whistleblower Act expressly provides reinstatement as a remedy for a retaliatory termination. TEX. GOV'T CODE §554.003(a)(1). The Legislature has therefore acknowledged that money damages alone cannot in some situations remedy a retaliatory discharge of a whistleblower.

204. Money damages alone cannot adequately remedy the retaliatory discharges and other retaliatory actions in this case. OAG's retaliation consists of firing and publicly accusing Plaintiffs of serious personal and professional misconduct in a manner likely to foreclose other professional opportunities. By way of example, OAG retaliated against Plaintiffs by publicly accusing Plaintiffs, all of whom are either lawyers or law enforcement officials, of making false reports to law enforcement and doing so to interfere with an OAG investigation. The harm to Plaintiffs from losing their jobs in this highly public and disparaging way will be exacerbated by continued unemployment and will be avoided or mitigated in significant respect by reinstatement

to their positions. The kind of harm being inflicted on Plaintiffs by remaining terminated from their positions at OAG under these circumstances is extremely difficult if not impossible to measure by a certain pecuniary standard.

205. In addition, the retaliation by OAG and Plaintiffs' loss of employment will cause continued harm such as loss of reputation and goodwill in their professions unless a temporary injunction is issued reinstating them to their jobs. Plaintiffs have demonstrated that, without a temporary injunction, they will suffer loss of goodwill and reputation with other lawyers, OAG colleagues, potential clients and others in their industry and that such injury is difficult to calculate or monetize. Plaintiffs, whose careers have consisted largely of public service legal and law enforcement positions, are particularly susceptible to the kind of harm the retaliation by the OAG inflicts on them while they remain terminated. This loss of goodwill and reputation constitutes irreparable injury.

206. In addition, an injury is irreparable if it cannot be adequately remedied at law – i.e., if the applicant cannot be adequately compensated in damages or if damages are very difficult to measure by any certain pecuniary standard. Many of the kinds of damages Plaintiffs seek in this case will be very difficult to measure by a pecuniary standard. Plaintiffs, if they prevail, may be awarded, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to their reputation, and loss of future earning capacity associated with being terminated abruptly and with the public smearing of Plaintiffs by OAG. An injunction ordering reinstatement pending trial could lessen many of these kinds of harm, which are very difficult to measure by any certain pecuniary standard.

207. In addition, reinstating Plaintiffs pending trial will mitigate the chilling effect that OAG's retaliation and public statements have had and will have continue to have on witnesses, including both present and former OAG employees.

208. In addition, the delay that will be occasioned by OAG's interlocutory appeal or other procedural tactics will prevent a legal remedy or reinstatement upon final judgment from providing an adequate remedy.

209. All of the harm described above that Plaintiffs would sustain without temporary injunctive relief is imminent. The harm is in fact happening already, and this injunction seeks to avoid further injury in the interim between the issuance of this order and entry of final judgment.

210. For these reasons, Plaintiffs seek a temporary injunction decreeing that Defendant Office of the Attorney General of the State of Texas, and its officers, agents, servants, employees, and attorneys and those acting in active concert or participation with them who receive actual notice of the order by personal service or otherwise be ORDERED:

1. To immediately REINSTATE Plaintiff David Maxwell to the position of Director of the Law Enforcement Division in the OAG and to compensate him starting immediately by paying him at the rate of pay and level of benefits, including health care and retirement benefits and all other perquisites of employment as were in effect as of September 30, 2020;

2. To immediately REINSTATE Plaintiff Ryan M. Vassar to the position of Deputy Attorney General for Legal Counsel at the OAG and to compensate him starting immediately by paying him at the rate of pay and level of benefits, including health care and retirement benefits and all other perquisites of employment as were in effect as of September 30, 2020;

3. To RETAIN Plaintiffs Maxwell and Vassar in those positions of employment at that rate of pay and benefits, including any pay or benefits increases, but not decreases, that would, in the ordinary course of the affairs of the OAG, be provided to employees in such Plaintiff's position, except that Defendant may terminate a Plaintiff's employment if, and only if, Defendant obtains an order from this Court for good cause found after written motion, notice to Plaintiffs, and a hearing;

4. To REFRAIN from any retaliation against the reinstated Plaintiffs, and

5. To PRESERVE and not DESTROY any potentially relevant evidence including any materials pertaining to contacts between the OAG and:

- Nate Paul or any entity in which he holds an interest, and any of his or their attorneys or agents;
- Any federal investigations or inquiries including from the FBI, DOJ, or other law enforcement pertaining to the conduct complained of by Plaintiffs;
- Any investigations or inquiries including from the Travis County DA's office, the Texas Rangers/DPS, or other law enforcement pertaining to the conduct complained of by Plaintiffs;
- Any open records requests relating to any of the issues in the case; and

6. To grant such other injunctive relief as the Court may deem appropriate.

VI. Jury Demand

211. Having tendered the appropriate fee, Plaintiffs hereby demand a trial by jury.

VII. Attorneys' Fees

212. Plaintiffs have retained the undersigned attorneys to prosecute this case and seek to be awarded their reasonable and necessary attorneys' fees and costs of court.

VIII. Civil Penalty

213. Pursuant to TEX. GOV'T CODE §554.008(a), Plaintiffs hereby request the District Attorney of Travis County, Texas to intervene in this suit and seek the imposition of a civil penalty of $15,000 against any supervisor, including Ken Paxton and Brent Webster, for each adverse personnel action taken against any Plaintiff in violation of the Texas Whistleblower Act.

IX. Request for Disclosure

214. Under Texas Rule of Civil Procedure 194, Plaintiffs previously requested that Defendant disclose, within fifty (50) days of the service of that request, the information and materials described in Rule 194.2(a) through (l). Defendant has failed to comply with this request and with Rule 194.

X. Damages, Conclusion and Prayer

Plaintiffs respectfully request that they have judgment against Defendants for:

1. A temporary injunction as described in Section V. herein;

2. A permanent injunction ordering reinstatement of Plaintiffs Maxwell and Vassar and all other equitable relief to which Plaintiffs may be entitled;

3. Actual damages;

4. Compensation for wages lost during the period of suspension or termination, including back pay and lost benefits;

5. Compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, including injury to Plaintiffs' reputations;

6. Recovery for future lost earning capacity;

7. Injunctive relief ordering Plaintiffs reinstated to their former positions or equivalent positions;

8. Exemplary damages;

9. Reasonable attorneys' fees for prosecution of this case at trial and on appeal;

10. All costs of expert witnesses and other costs of litigation;

11. Pre-judgment interest as required by Chapter 304 of the Texas Finance Code or other applicable laws;

12. Post-judgment interest at the maximum legal rate; and

13. All other relief to which Plaintiffs may be entitled at law, or in equity.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF RYAN M. VASSAR

CERTIFICATE OF SERVICE

I certify the foregoing document has been served on the following counsel of record via email on the 10th day of February, 2021:

William S. Helfand
bill.helfand@lewisbrisbois.com
Sean O'Neal Braun
sean.braun@lewisbrisbois.com
24 Greenway Plaza, Suite 1400
Houston, Texas 77046

/s/ Thomas A. Nesbitt
Thomas A. Nesbitt

CAUSE NO. D-1-GN-20-006861

JAMES BLAKE BRICKMAN, DAVID MAXWELL, J. MARK PENLEY, and RYAN M. VASSAR Plaintiffs,	§ § § § §	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS	§ §	
Defendant.	§	250th JUDICIAL DISTRICT

Declaration of James Blake Brickman

1. My name is James Blake Brickman. I am over the age of eighteen years, am of sound mind and capable of making this Declaration. I have personal knowledge of the facts stated in this Declaration, and they are true and correct.

2. The facts plead in paragraphs 1,2,6,17-19,21-25, 28-32, 81-91, 93-96, 104, 107, 108, 111-119, 121-131, 133, 139-149, 156, 161, 162 of the foregoing Plaintiffs' Second Amended Petition and Verified Motion for Temporary Injunction and Permanent Injunction are within my personal knowledge and are true and correct or, where specifically noted, are based upon published reports. I hereby attest that the facts plead in paragraphs 42-54 of the foregoing Plaintiffs' First Amended Petition and Verified Motion for Temporary Injunction and Permanent Injunction are true and correct because they were reported to me by individuals I have reason to believe had personal knowledge and based on the documents referred to.

3. My name is James Blake Brickman, my date of birth is [redacted], and my address is [redacted]. Pursuant to TEX. CIV. PRAC. & REM. CODE § 132.001, I declare under penalty of perjury that the foregoing is true and correct.

Executed in Travis County, State of Texas, on the 9th day of February, 2021

/s/ *James Blake Brickman*
James Blake Brickman

CAUSE NO. D-1-GN-20-006861

JAMES BLAKE BRICKMAN, DAVID MAXWELL, J. MARK PENLEY, and RYAN M. VASSAR Plaintiffs,	§ § § § §	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS Defendant.	§ § § §	250th JUDICIAL DISTRICT

Declaration of David Maxwell

1. My name is David Maxwell. I am over the age of eighteen years, am of sound mind and capable of making this Declaration. I have personal knowledge of the facts stated in this Declaration, and they are true and correct.

2. The facts plead in paragraphs 3, 58-62, 64-65, 81-100, 102-106, 108-110, 121, 128, 150, 152, 154-155, 159, 181-186, 188-89, 195, and 197 of the foregoing Plaintiffs' Second Amended Petition and Verified Motion for Temporary Injunction and Permanent Injunction are within my personal knowledge and are true and correct or, where specifically noted, are based upon published reports.

My name is David Maxwell, my date of birth is [redacted], and my address is [redacted]. Pursuant to TEX. CIV. PRAC. & REM. CODE § 132.001, I declare under penalty of perjury that the foregoing is true and correct.

Executed in Matagorda County, State of Texas, on February 9, 2021.

DocuSigned by:
David Maxwell
787AE2CA1730425...

David Maxwell

CAUSE NO. D-1-GN-20-006861

JAMES BLAKE BRICKMAN, DAVID MAXWELL, J. MARK PENLEY, and RYAN M. VASSAR Plaintiffs,	§	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS	§	
Defendant.	§	250th JUDICIAL DISTRICT

Declaration of Ryan M. Vassar

1. My name is Ryan M. Vassar. I am over the age of eighteen years, am of sound mind and capable of making this Declaration. I have personal knowledge of the facts stated in this Declaration, and they are true and correct.

2. The facts plead in paragraphs 5–6, 20, 29, 31–41, 53–54, 66–72, 74–89, 91–96, 104, 111, 114–115, 117, 119–122, 129–145, 160–162 of the foregoing Plaintiffs' First Amended Petition and Verified Motion for Temporary Injunction and Permanent Injunction are within my personal knowledge and are true and correct or, where specifically noted, are based upon published reports.

My name is Ryan M. Vassar, my date of birth is [redacted] and my address is [redacted] Pursuant to TEX. CIV. PRAC. & REM. CODE § 132.001, I declare under penalty of perjury that the foregoing is true and correct.

Executed in Travis County, State of Texas, on the 9th day of February, 2021.

Ryan M. Vassar

MR 243

Office of the Attorney General

Name (Last,First,Middle)	User ID	Social Security Number	Effective Date
PAXTON, WARREN K JR			09/01/15

Action
LEGISLATIVE SALARY INCREASE

FROM	EMPLOYEE INFORMATION	TO
EXECUTIVE MANAGEMENT 725	Division Budget Org1 Code	EXECUTIVE MANAGEMENT 725
20150132	Position Number	20150132
40	Weekly Hours	40
E01	Pay Group	301
12,500.00 / 150,000.00	Monthly/Annual Salary	12,812.50 / 153,750.00
10656	PCA	10656
A080	Class Number	A080
ATTORNEY GENERAL	Job Class Title	ATTORNEY GENERAL
725ADMAM4AM	Organization Code	725ADMAM4AM

EX. I

Office of the Attorney General

PERSONNEL ACTION FORM PAF Transaction ID: 00006780	RN#	Human Resources Liaison Jessica Herrera	Phone Number 475-4387
Name (Last, First, Middle) Paxton Jr.,Warren K	User ID	Social Security Number	Effective Date of Action 01/05/2015
Work Address 209 W. 14Th & Lavaca St, 8th Fl, Austin, TX 78701		Mail Code 001	Work Phone
Date of Employment 01/05/2015	Last Evaluation Period	Last Merit/Promotion Date	Date Entered Into PS

Action Hire	Code 012 - Interagy Xfer-No Chg Cls $	Direct Transfer: State Agency/Institution of Higher Ed E
Separation Date	Last Day Physically Worked	Leave Without Pay Period to

FROM:	EMPLOYEE INFORMATION	TO:
-	Division/Budget Division Code	725 - Executive Administration
	Position Number	20150132
	FLSA Indicator (HRD Use)	E
0	Weekly Hours	40
	Pay Group	E 01
0.00 / 0.00	Monthly/Annual Salary	12,500.00 / 150,000.00
	Primary PCA/Secondary PCA (Budget Use)	10656
/	Class Number/EEO Function	A080 / E
	Manager/Supervisor Flag	M
	Job Class Title	Attorney General
	Organization Code (Budget Use)	725ADMAM4AM
Comments		WIT Account ___ Yes X No ___ Revoke Leave Liaison UserID/Position Nbr ___/___
Name/UserID of Employee Being Replaced (if applicable) Abbott,Greg W /		

REQUSTING DIVISION		
Supervisor Name/UserID /	Division Chief Signature	Date
HUMAN RESOURCES DIVISION		
Posting Approval [ ] Yes [ ] No	Signature	Date
Action Approval [✓] Yes [ ] No	Signature Jon Poole	Date 01/05/2015
BUDGET DIVISION		
Funds Certification [✓] Yes [ ] No	Signature J Michael Lair	Date 1/5/2015
DEPUTY ASSISTANT ATTORNEY GENERAL/EXECUTIVE DEPUTY		
Action Approval [ ] Yes [ ] No	Signature	Date
FIRST ASSISTANT ATTORNEY GENERAL		
Action Approval [ ] Yes [ ] No	Signature	Date

End of Report

OUTSIDE COUNSEL CONTRACT

OAG Contract No. _____

This Agreement, including all Addenda (the Addenda are incorporated herein by reference), is hereinafter referred to as the "Outside Counsel Contract" or "OCC." This Outside Counsel Contract is made and entered into by and between the Office of the Attorney General of Texas ("Agency," "Attorney General," or "OAG") and Cammack Law Firm, PLLC ("Outside Counsel"). The term "Parties" as used in this OCC refers to Agency and Outside Counsel. This OCC is made and entered into with reference to the following facts:

INDUCEMENTS

Whereas, Agency requires the assistance of outside legal counsel in carrying out its responsibilities; and

Whereas, Outside Counsel desires to provide legal services to Agency, subject to the authority of the Texas Attorney General.

AGREEMENT

Now, therefore, in consideration of the inducements, covenants, agreements, and conditions herein contained, the Parties agree as follows:

Section 1. Purpose.

1.1 Purpose. The purpose of this OCC is for Outside Counsel to provide legal services to Agency, as described in Addendum A.

1.2.1 Litigation. OUTSIDE COUNSEL SHALL NOT REPRESENT AGENCY IN ANY LITIGATION UNLESS ADDENDUM A SPECIFICALLY AUTHORIZES LITIGATION IN A PARTICULAR MATTER.

1.2.2 Appellate Matters. Irrespective of any authorization to engage in litigation in this OCC, or in a writing outside of this OCC, OUTSIDE COUNSEL IS NOT AUTHORIZED TO PROCEED ON ANY APPEAL, IN ANY CAPACITY, WHETHER INTERLOCUTORY OR OTHERWISE, WHETHER AS APPELLANT, APPELLEE, RESPONDENT, APPLICANT, OR OTHERWISE, WITHOUT FIRST OBTAINING THE WRITTEN PERMISSION OF THE ATTORNEY GENERAL, FIRST ASSISTANT ATTORNEY GENERAL, OR SOLICITOR GENERAL.

1.2.3 OAG Review of Outside Counsel Invoice and Release of Payment. Outside Counsel invoices will be reviewed and approved by the OAG pursuant to Subsection 402.0212(b) of the Texas Government Code and Title 1, Chapter 57 of the Texas Administrative Code.

Section 2. OCC Term.

This OCC shall commence on 9/3/2020, and shall terminate on 8/31/2021 (hereinafter "OCC Term"), unless terminated earlier pursuant to Section 7 of this OCC. The OCC Term may not be extended except by amendment pursuant to Section 9.12 of this OCC.

Section 3. Obligations of Outside Counsel.

3.1 Duties. Outside Counsel shall provide professional legal services to Agency as described in Addendum A. Outside Counsel shall represent Agency with due professional care as required by applicable law and disciplinary rules.

3.2 Staff. Outside Counsel is expected to perform valuable services for Agency, and the method and amount or rate of compensation are specified in Section 5 and Addendum B of this OCC. Outside Counsel staff and employees are expected to perform work of a type commensurate with their professional titles. Outside Counsel agrees that any person employed or engaged by Outside Counsel and who assists in performing the services agreed to herein shall not be considered employees or agents of Agency or the State of Texas.

3.3 Public Information and Client Communications. Outside Counsel acknowledges that information created or exchanged in the course of representation of a governmental body may be subject to the Texas Public Information Act, Chapter 552 of the Texas Government Code, and may be subject to required disclosure in a publicly accessible format pursuant to Section 2252.907 of the Texas Government Code. Outside Counsel will exercise professional judgment and care when creating documents or other media intended to be confidential or privileged attorney-client communications that may be subject to disclosure under the Public Information Act (e.g. invoices where incidental notation may tend to reveal litigation strategies or privileged information). Outside Counsel should mark confidential or privileged attorney-client communications as confidential. This subsection shall not be interpreted to limit Outside Counsel's duty to provide full disclosure to Agency as necessary in Outside Counsel's judgment to represent Agency with due professional care or as required by applicable law or disciplinary rules.

3.4 Status. Pursuant to the standard of professional care owed to the Agency, Outside Counsel shall endeavor to keep Agency fully informed about all material matters relating to legal services provided under this OCC.

3.5 Subcontracting Authority. In the event Outside Counsel determines it is necessary or expedient to subcontract for any of the performances herein, or in support of any of those performances, Outside Counsel may enter into such subcontract(s) after obtaining express written approval from Agency. If Outside Counsel purports to enter into a subcontract without express written approval from Agency, the Parties agree that such contract shall be voidable at the option of Agency and that Outside Counsel shall have no recourse against Agency or the State of Texas for any direct or indirect costs, damages, or any other expenses related to the subcontractor. For all subcontracts entered by Outside Counsel, the Parties agree that all such subcontracts are subject to Section 4 (Liability), Subsection 5.2 (Reimbursement of Expenses),

Subsection 5.3 (Subcontractor Payments), Subsection 6.2 (Subcontractor Invoices), and Subsection 6.5 (Supporting Documents; Right-to-Audit; Inspection of Records) of this OCC. Furthermore, if Outside Counsel elects to enter into a subcontract for any legal services, then the Parties agree that Agency shall not be liable to Outside Counsel for any rates or rate ranges greater than or inconsistent with the highest rate or rate range specified in Addendum B unless prior written approval is obtained from Agency. Any subcontracted legal counsel also must comply with Subsections 5.5 (Administrative Staff/Clerks) and 9.8 (Conflict of Interest) of this OCC.

Outside Counsel agrees to comply with all state and federal laws applicable to any subcontractors, including, but not limited to, laws regarding wages, taxes, insurance, historically underutilized businesses, and workers' compensation.

In no event shall this section or any other provision of this OCC be construed as relieving Outside Counsel of the responsibility for ensuring that all services rendered under this OCC, and any subcontracts thereto, are rendered in compliance with all of the terms of this OCC.

Section 4. Liability.

4.1 Limitation of Liability. The Parties stipulate and agree that the State of Texas and Agency's total liability to Outside Counsel, including consideration for the full, satisfactory, and timely performance of all its duties, responsibilities, and obligations, and for reimbursement of all expenses, if any, as set forth in this OCC or other liability arising out of any performance herein shall not exceed:

$25,000.00 for this OCC Term.

Outside Counsel agrees that the State of Texas and its agencies (other than Agency) shall have no liability arising out of this OCC or the services of this OCC to Outside Counsel.

4.2 Subject to Appropriation. The Parties acknowledge and agree that nothing in this OCC will be interpreted to create a future obligation or liability in excess of the funds currently appropriated to Agency.

Section 5. Compensation/Expenses.

5.1 Fees to Outside Counsel. Consistent with Title 1, Chapter 57 of the Texas Administrative Code, Agency agrees to pay Outside Counsel in consideration of full and satisfactory performance of the legal services under this OCC. Services for non-attorney timekeeper classifications listed on Addendum B, if applicable, such as paralegal, legal assistant, or patent agent, must be of a substantive legal nature in order to be reimbursable. Outside Counsel agrees to the fee schedule as described in Addendum B.

5.2 Reimbursement of Expenses. Agency will reimburse Outside Counsel for actual expenses incurred in the performance of the legal services described in Addendum A, if such expenses are reasonable and either necessary or advisable. Outside Counsel must provide copies

of original receipts as evidence of actual expenditures. Limitations on the amount and type of reimbursement include the following, unless otherwise agreed upon by Agency in writing, in advance, and in accordance with Agency policy and relevant law:

5.2.1 Mileage. Agency will reimburse Outside Counsel for reasonable and necessary travel mileage at the per mile rate posted on the Texas Mileage Guide adopted under Section 660.043 of the Texas Government Code. The Texas Mileage Guide is currently available on the Comptroller of Public Accounts's website, at: https://fmx.cpa.state.tx.us/fm/travel/travelrates.php.

5.2.2 Meals. Agency will reimburse Outside Counsel for reasonable and necessary meal expenses in accordance with the Textravel guide published by the Texas Comptroller of Public Accounts. Agency will reimburse Outside Counsel at the allowable rate provided by the Textravel guide or actual expenses, whichever is less, for each timekeeper as listed in Addendum B for each day requiring overnight travel and on the return day of travel. Agency will not reimburse Outside Counsel for the purchase of alcohol. The Textravel guide is currently available on the Comptroller of Public Accounts's website at: https://fmx.cpa.texas.gov/fmx/travel/textravel/rates/current.php.

5.2.3 Lodging. Agency will reimburse Outside Counsel for reasonable and necessary lodging expenses. Unless otherwise agreed upon by Agency in writing in advance, Texas lodging or overnight accommodations will be reimbursed at the lesser amount of the actual expense or $200.00 per timekeeper, as listed in Addendum B, per night. Unless otherwise agreed upon by Agency in writing in advance, out-of-Texas lodging or overnight accommodations will be reimbursed at the lesser amount of the actual expense or $250.00 per timekeeper, as listed in Addendum B, per night.

5.2.4 Airfare. Airfare will be reimbursed at the lesser amount of the actual expense or the regular published rates for airfares for commercial airlines. Agency will not reimburse Outside Counsel for expenses relating to first-class airfare, which includes first- or business-class airfare or any other expense related to premium or preferred airfare benefits.

5.2.5 Expert Services. Subject to Agency's prior approval, Agency will reimburse Outside Counsel for the reasonable and necessary cost of expert services.

5.2.6 Other Reimbursable Expenses. Agency will reimburse the actual cost for other expenses if Outside Counsel provides a reasonable and sufficient explanation of the nature and purpose of the charge and the charge is reasonable and either necessary or advisable.

5.2.7 Non-Reimbursable Expenses. Agency expects Outside Counsel to anticipate and include routine operating expenses and disbursements as part of overhead and, therefore, part of a basic hourly rate or flat rate. Therefore, Agency will not reimburse Outside Counsel for: routine copying and printing charges; fax charges; routine postage; office supplies; telephone charges unless related to teleconferencing services; local travel (within 20-mile radius of office including mileage, parking, and tolls) not relating to overnight travel; all delivery services

performed by internal staff; electricity or other utilities; software costs or subscription fees; and internet or wireless access charges.

5.2.8 Gratuity. Agency will not reimburse Outside Counsel for tips or gratuities.

5.2.9 Reimbursement for Agency Employee Expenses. Agency will not reimburse Outside Counsel for the cost of expenses incurred by Agency employees.

5.2.10 No Mark-up. Outside Counsel will only be reimbursed for actual expenses. Outside Counsel shall not be reimbursed for any mark-up or other overhead costs.

5.3 Subcontractor Payments. Subject to Agency's prior approval, Agency will reimburse Outside Counsel for the actual, reasonable and necessary expenses relating to Outside Counsel's use of subcontractors. Outside Counsel shall be responsible for any payments and other claims due to subcontractors for work performed under this OCC. Outside Counsel, in subcontracting for any performances or in support of any of the performances specified herein (e.g., expert services, local counsel, and other services), expressly understands and agrees that Agency shall not be directly liable in any manner to Outside Counsel's subcontractor(s).

5.4 Legal Research. Agency may reimburse Outside Counsel for its reasonable and necessary expenses relating to legal research, including online legal research.

While Agency should be paying Outside Counsel to apply the knowledge and expertise for which it was hired, and not paying Outside Counsel to obtain that knowledge through extensive legal research, Agency understands that situations arise that justify extensive research on how best to proceed in order to achieve a desired result. Therefore, the need for extensive legal research will be addressed on a case-by-case basis by Outside Counsel and Agency.

5.5 Administrative Staff/Clerks. Agency will only pay for substantive legal work performed by attorneys or other qualified personnel, regardless of the job title or classification applicable to such individual. For purposes of this agreement, "substantive legal work" has the same meaning as defined by the Texas Paralegal Standards adopted by the Board of Directors of the State Bar of Texas. Agency will not pay for law clerks or interns, however classified, under any circumstances. Agency will not pay for administrative staff, such as secretarial support, librarians, case clerks, and accounting and billing clerks, for activities including but not limited to the following: overtime, file opening, file organization, docketing, and other administrative tasks; and preparation of billing, invoice review, budget preparation, and communications regarding same or any other accounting matter.

5.6 Training. Agency will not pay for the education or training of attorneys, paralegals, or other staff of Outside Counsel, including assigning such staff on a transient basis to an Agency matter.

Section 6. Invoices for Payment.

6.1 General. Outside Counsel agrees to abide by the administrative rules adopted by the OAG governing the submission, review, and approval of invoices found at Title 1, Chapter 57 of the Texas Administrative Code. Outside Counsel understands and agree that no invoice shall seek reimbursement for services performed or expenses incurred in violation of the provisions of this OCC.

6.1.1 Billing Period. The billing period is the interval (ex. monthly) which determines the frequency Outside Counsel will submit invoices to the Agency. The billing period for this OCC is specified in Addendum B. Unless otherwise specified in Addendum B of the Contract, a billing period defined as "monthly" shall begin with the first day of the calendar month and end with the last day of the calendar month.

6.1.2 Billable Time. Agency will only pay for the services of individuals covered in Addendum B. All times must be billed in one-tenth hour or one-quarter hour increments, and must reflect only actual time spent. Tasks referencing correspondence and filings must describe the document received or authored. Agency expects to be billed for the actual time it takes to modify standardized forms, filings, and/or correspondence for use on the matter being billed. Agency will not reimburse Outside Counsel for the time it originally took to prepare any such standardized documents. Agency will not pay for review, execution, and processing of the OCC and submission of invoices.

6.1.3 Submission of Invoices. Outside Counsel must submit invoices to Agency for review within one calendar month from the end of the relevant billing period covered by the invoice. Outside Counsel must submit invoices to Agency at:

general.counsel@oag.texas.gov

OR

Attn.: General Counsel Division
Office of the Attorney General
Mail Code 074
Post Office Box 12548
Austin, Texas 78711-2548

6.2 Subcontractor Invoices. Subcontractor(s) shall directly invoice Outside Counsel, and Outside Counsel shall then invoice Agency for the work performed. The actual work performed by subcontractor shall be specifically identified in the invoice supported by attached documentation.

6.3 Prompt Payment. Payments to Outside Counsel by Agency under this OCC shall be in compliance with Chapters 2251 of the Texas Government Code and Title 34, Chapter 20, Subchapter F of the Texas Administrative Code.

6.4 Supporting Documents; Right-to-Audit; Inspection of Records.

6.4.1 Duty to Maintain Records. Outside Counsel shall maintain adequate records to support its charges, procedures, and performances to Agency for all work related to this OCC. Outside Counsel shall also maintain such records as are deemed necessary by Agency, the State Auditor's Office, or federal auditors if federal funds are used to pay Outside Counsel, to ensure proper accounting for all costs and performances related to this OCC.

6.4.2 Records Retention. Outside Counsel shall retain, for a period of at least seven (7) years after the later of (1) the expiration or termination of this OCC or (2) the resolution of all issues that arise from any litigation, claim, negotiation, audit, open records request, administrative review, or other action involving this OCC, such records as are necessary to fully disclose the extent of services provided under this OCC, including but not limited to any daily activity reports, time distribution and attendance records, and other records that may show the basis of the charges made or performances delivered.

6.4.3 Inspection of Records and Right to Audit. Outside Counsel shall make available at reasonable times and upon reasonable notice, and for reasonable periods, all information related to the State of Texas' property, services performed, and charges, such as work papers, reports, books, data, files, software, records, and other supporting documents pertaining to this OCC, for purposes of inspecting, monitoring, auditing, or evaluating by Agency, the State of Texas, or their authorized representatives. Outside Counsel shall cooperate with auditors and other authorized Agency and State of Texas representatives and shall provide them with prompt access to all of such property as requested by Agency or the State of Texas.

6.4.4 State Auditor. In addition to and without limitation on the other audit provisions of this OCC, pursuant to Section 2262.154 of the Texas Government Code, the State Auditor's Office may conduct an audit or investigation of Outside Counsel or any other entity or person receiving funds from the State of Texas directly under this OCC or indirectly through a subcontract under this OCC. The acceptance of funds by Outside Counsel or any other entity or person directly under this OCC or indirectly through a subcontract under this OCC acts as acceptance of the authority of the State Auditor's Office, under the direction of the Legislative Audit Committee, to conduct an audit or investigation in connection with those funds. Under the direction of the Legislative Audit Committee, Outside Counsel or any other entity or person that is the subject of an audit or investigation by the State Auditor's Office must provide the State Auditor's Office with access to any information the State Auditor's Office considers relevant to the investigation or audit. Outside Counsel further agrees to cooperate fully with the State Auditor's Office in the conduct of the audit or investigation, including providing all records requested. Outside Counsel shall ensure that this paragraph concerning the authority to audit funds received indirectly by subcontractors through Outside Counsel and the requirement to cooperate is included in any subcontract it awards. The State Auditor's Office shall at any time have access to and the right to examine, audit, excerpt, and transcribe any pertinent books, documents, working papers, and records of Outside Counsel related to this OCC.

Section 7. Termination

7.1 Convenience of the State. Agency has the right to terminate this OCC, in whole or in part, without penalty, by notifying Outside Counsel in writing of such termination prior to the effective date of such termination. Such notification of termination shall state the effective date of termination. In the event of such termination, Outside Counsel shall, unless otherwise mutually agreed upon in writing, cease all services immediately, except such services that are necessary to wind-up, in a cost-effective manner, all services being provided. Subject to Section 4 of this OCC, Agency shall be liable for payments for all services performed under this OCC to the effective date of termination, plus any necessary services to cost effectively wind-up.

7.2 Cause/Default. In the event that Outside Counsel commits a material breach of this OCC, Agency may, upon written notice to Outside Counsel, immediately terminate all or any part of this OCC. Termination is not an exclusive remedy but will be in addition to any other rights and remedies provided in equity, by law, or under this OCC.

7.3 Rights Upon Termination or Expiration. Upon expiration or termination of this OCC for any reason, Outside Counsel shall, subject to Outside Counsel's professional obligations, immediately transfer to Agency all information and associated work products prepared by Outside Counsel or otherwise prepared for Agency pursuant to this OCC, in whatever form such information and work products may exist, to the extent requested by Agency. At no additional cost to Agency and in any manner Agency deems appropriate in its sole discretion, Agency is granted the unrestricted right to use, copy, modify, prepare derivative works from, publish, and distribute any component of the information, work product, or other deliverable made the subject of this OCC.

7.4 Remedies. Notwithstanding any exercise by Agency of its rights of early termination, Outside Counsel shall not be relieved of any liability to Agency for damages due to Agency by virtue of any breach of this OCC by Outside Counsel or for amounts otherwise due Agency by Outside Counsel.

7.5 Termination by Outside Counsel. Consistent with applicable rules of professional conduct, Outside Counsel may terminate this OCC upon reasonable notice for material breach by Agency.

Section 8. Certifications of Outside Counsel

By agreeing to and signing this OCC, Outside Counsel hereby makes the following certifications and warranties:

8.1 Delinquent Child Support Obligations. Outside Counsel certifies that it is not ineligible to receive any grant, loan, or payment under this OCC pursuant to Section 231.006 of the Texas Family Code and acknowledges that this OCC may be terminated and payment may be withheld if this certification is inaccurate.

8.2 Buy Texas. With respect to any services purchased pursuant to this OCC, Outside Counsel represents and warrants that it will buy Texas products and materials for use in providing the services authorized herein when such products and materials are available at a comparable price and within a comparable period of time when compared to non-Texas products and materials. This subsection does not apply to Outside Counsel providing legal services located outside the State of Texas.

8.3 Gift to Public Servant. Outside Counsel warrants that it has not given, nor does it intend to give at any time hereafter, any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with the award of this OCC.

8.4 Franchise Tax. By signing this OCC, Outside Counsel certifies that its Texas franchise tax payments are current, or that it is exempt from or not subject to such tax, consistent with Chapter 171 of the Texas Tax Code.

8.5 Outside Counsel License/Conduct. Outside Counsel certifies that each attorney performing services under this OCC is an attorney in good standing under the laws of the State of Texas or the jurisdiction where the representation occurs. Outside Counsel will notify Agency in writing within one business day of any lapse in an assigned attorney's licensed status or any final disciplinary action taken against an assigned attorney. For the Lead Counsel(s) named in Addendum B, Outside Counsel will provide documentation of good standing from the state bar or the licensing authority of the jurisdiction in which the attorney resides and is licensed. An attorney that is not licensed by the State Bar of Texas may not provide legal services and advice concerning Texas law.

8.6 Debt to State. Outside Counsel acknowledges and agrees that, to the extent Outside Counsel owes any debt (child support or other obligation) or delinquent taxes to the State of Texas, any payments Outside Counsel are owed under this OCC may be applied by the Comptroller of Public Accounts toward any such debt or delinquent taxes until such debt or delinquent taxes are paid in full.

8.7 Prohibited Bids and Contracts. Under Section 2155.004 of the Texas Government Code, Outside Counsel certifies that it is not ineligible to receive this OCC and acknowledges that this OCC may be terminated and payment withheld if this certification is inaccurate.

8.8 Compliance with State Law Contracting Provisions. Agency and Outside Counsel certify that this OCC is compliant, and will remain compliant, with any and all applicable laws governing contracts involving the State of Texas or its agencies, including, but not limited to, Sections 572.054 (Representation by Former Officer or Employee of Regulatory Agency Restricted; Criminal Offense), 572.069 (Certain Employment for Former State Officer or Employee Restricted), 669.003 (Contracting with Executive Head of State Agency), 2252.901 (Contracts with Former or Retired Agency Employees), 2252.908 (Disclosure of Interested Parties), and 2261.252 (Disclosure of Potential Conflicts of Interest; Certain Contracts Prohibited) of the Texas Government Code.

8.9 Does not Boycott Israel. Pursuant to Section 2270.002 of the Texas Government Code, Outside Counsel certifies, by executing this OCC, that Outside Counsel does not, and will not during the term of this OCC, boycott Israel. Outside Counsel further certifies that no subcontractor of Outside Counsel boycotts Israel or will boycott Israel during the term of this agreement. Outside Counsel agrees to take all necessary steps to ensure this certification remains true during the term of this OCC.

8.10 Prohibited Companies. Outside Counsel certifies, by executing this OCC, that neither Outside Counsel, nor any subcontractor of Outside Counsel, is a company under Texas Government Code section 2252.152 with which Agency may be prohibited from contracting. Outside Counsel agrees to take all necessary steps to ensure this certification remains true during the term of this OCC.

8.11 Limitation on Abortion Funding. Outside Counsel acknowledges and agrees that, under article IX, section 6.25 of the General Appropriations Act, 86th Leg., R.S. (2019), and except as provided by that Act, funds may not be distributed under this OCC to any individual or entity that: (1) performs an abortion procedure that is not reimbursable under the State of Texas' Medicaid program; (2) is commonly owned, managed, or controlled by an entity that performs an abortion procedure that is not reimbursable under the State of Texas' Medicaid program; or (3) is a franchise or affiliate of an entity that performs an abortion procedure that is not reimbursable under the State of Texas' Medicaid program.

Section 9. General Terms and Conditions

9.1 Independent Contractor. Outside Counsel agrees and acknowledges that during the OCC Term, Outside Counsel and Outside Counsel's subcontractors are independent contractors of Agency or the State of Texas and are not employees of Agency or the State of Texas.

9.1.1 Outside Counsel will be solely and entirely responsible for its acts and the acts of its agents, employees, subcontractors, and representatives in the performance of this OCC.

9.1.2 Outside Counsel agrees and acknowledges that during the OCC Term, Outside Counsel shall be entirely responsible for the liability and payment for Outside Counsel or Outside Counsel's employees or assistants, of all taxes of whatever kind, arising out of the performances in this OCC. Other than the payments described in this OCC, Outside Counsel agrees and acknowledges that Outside Counsel or Outside Counsel's employees or assistants shall not be entitled to any State benefit on account of the services provided hereunder. AGENCY SHALL NOT BE LIABLE TO OUTSIDE COUNSEL, ITS EMPLOYEES, AGENTS, OR OTHERS FOR THE PAYMENT OF TAXES OR THE PROVISION OF UNEMPLOYMENT INSURANCE AND/OR WORKERS' COMPENSATION, OR ANY BENEFIT DUE TO A STATE EMPLOYEE. If Agency or the State of Texas shall nonetheless become liable for such payments or obligations, Outside Counsel shall promptly pay or reimburse Agency or the State of Texas for such liability or obligation.

9.2 Assignment of OCC. Outside Counsel may not assign this OCC, or assign any right or delegate any duty under this OCC, without prior written approval from Agency.

9.3 Survival. The obligations of Outside Counsel under the following sections and subsections shall survive the termination or expiration of this OCC: 3.3, 4, 5, 6.4, 7.1, 7.3, 7.4, 8.8, 9.7, 9.8, 9.11, and 9.13.

9.4 Copyright/Intellectual Property. Outside Counsel shall take reasonable measures to protect Agency from material risks of Agency liability known to Outside Counsel for any copyright or patent infringement or disclosure of trade secrets resulting from the use of any equipment, materials, information, or ideas furnished by Outside Counsel pursuant to this OCC (other than equipment, materials, information, or ideas supplied or required by Agency or its employees or other agents). Outside Counsel and Agency agree to furnish timely written notice to each other of any claim of copyright, patent, trade secret, or other intellectual property infringement arising out of services under this OCC.

9.5 Media Releases or Pronouncements. Outside Counsel understands that Agency does not endorse any vendor, commodity, or service. Outside Counsel, its employees, representatives, agents, or subcontractors may not participate in any media event or issue any media release, advertisement, publication, editorial, article, or public pronouncement that pertains to this OCC or the services or project to which this OCC relates or that mentions Agency without the prior written approval of Agency.

9.6 Written Notice Delivery. Any notice required or permitted to be given under this OCC by one party to the other party shall be in writing and shall be given and deemed to have been given immediately if delivered in person to the recipient's address set forth in this subsection, or on the date shown on the certificate of receipt if placed in the United States mail, postage prepaid, by registered or certified mail with return receipt requested, addressed to the receiving party at the address hereinafter specified.

9.6.1 Outside Counsel's Address. The address for Outside Counsel for all purposes under this OCC and for all notices hereunder shall be:

Brandon Cammack
Cammack Law Firm PLLC
4265 San Felipe St #1100
Houston, Texas 77027
Phone: 713-300-9291
Email: brandon@cammacklawfirm.com

9.6.2 OAG's Address. The addresses for the OAG for all purposes under this OCC, except as provided by Subsection 6.1.3, and for all notices hereunder shall be:

Office of the Attorney General
General Counsel Division, Mail Code 074
Post Office Box 12548
Austin, Texas 78711-2548

9.7 Dispute Resolution.

9.7.1 The dispute resolution process provided for in Chapter 2260 of the Texas Government Code shall be used, as further described herein, by Agency and by Outside Counsel to attempt to resolve any claim for breach of this OCC made by Outside Counsel.

9.7.2 Outside Counsel's claims for breach of this OCC that the Parties cannot resolve in the ordinary course of business shall be submitted to the negotiation process provided in Chapter 2260, Subchapter B, of the Government Code. To initiate the process, Outside Counsel shall submit written notice, as required by Subchapter B, to the Agency's contact with a copy to the Texas First Assistant Attorney General or his/her designee. Said notice shall specifically state that the provisions of Chapter 2260, Subchapter B, are being invoked. A copy of the notice shall also be given to all other representatives of Outside Counsel and Agency otherwise entitled to notice under this OCC. Compliance by Outside Counsel with Subchapter B is a condition precedent to the filing of a contested case proceeding under Chapter 2260, Subchapter C, of the Government Code.

9.7.3 The contested case process provided in Chapter 2260, Subchapter C, of the Texas Government Code is Outside Counsel's sole and exclusive process for seeking a remedy for any and all alleged breaches of this OCC by Agency or the State of Texas if the Parties are unable to resolve their disputes under Section 9.7.2 of this OCC.

9.7.4 Compliance with the contested case process provided in Chapter 2260, Subchapter C, of the Texas Government Code is a condition precedent to seeking consent to sue from the Legislature under Chapter 107 of the Texas Civil Practices and Remedies Code. Neither the execution of this OCC by Agency nor any other conduct of any representative of Agency relating to this OCC shall be considered a waiver of sovereign immunity.

9.7.5 The submission, processing, and resolution of Outside Counsel's claim is governed by Title 1, Chapter 68 of the Texas Administrative Code adopted by the OAG pursuant to Chapter 2260, as currently effective, hereafter enacted, or subsequently amended, shall govern.

9.8 Conflict of Interest.

9.8.1 Neither local funds nor funds appropriated by the General Appropriations Act may be expended to pay the legal fees or expenses of Outside Counsel in representing Agency in any matter if Outside Counsel is representing a plaintiff in a proceeding seeking monetary damages from the State of Texas or any of its agencies. For these purposes, "proceedings seeking monetary damages" do not include actions for tax refunds, compensation for exercise of eminent domain authority, or reimbursement of costs of litigation and attorney's fees.

9.8.2 Neither local funds nor funds appropriated by the General Appropriations Act may be used to pay the legal fees or expenses of Outside Counsel under this OCC if Outside Counsel

currently represents, has represented in the six months preceding this OCC, or will represent in the six months following the termination of this OCC, a client before Agency.

9.8.3 Outside Counsel shall regularly conduct conflicts analyses on its interests and those of its clients and any subcontractor and immediately disclose, in writing, to Agency any actual or potential conflict with respect to Agency or the State of Texas.

9.8.4 Outside Counsel has a continual and ongoing obligation to immediately notify Agency, in writing, upon discovery of any actual or potential conflict to Agency or the State of Texas.

9.9 Taxes. This OCC shall not be construed so as to supersede the laws of the United States or the State of Texas that accord the State of Texas, Agency, and all departments, agencies, and instrumentalities of the State of Texas exemptions from the payment(s) of all taxes of whatever kind. To the extent allowed by law, Agency will provide, upon the request of Outside Counsel during this OCC Term, all applicable tax exemption documentation.

9.10 Signatories. Having agreed to the terms herein, the undersigned signatories hereby represent and warrant that they have authority to enter into this OCC and are acting in their official capacities.

9.11 Applicable Law and Venue. This OCC is made and entered into in the State of Texas, and this OCC and all disputes arising out of or relating to this OCC shall be governed by the laws of the State of Texas, without regard to any otherwise applicable conflict of law rules or requirements.

Outside Counsel agrees that Agency and the State of Texas do not waive any immunity (including, without limitation, state or federal sovereign immunity). Outside Counsel further agrees that any properly allowed litigation arising out of or in any way relating to this OCC shall be commenced exclusively in a court of competent jurisdiction in Travis County, Texas. Outside Counsel thus hereby irrevocably and unconditionally consents to the exclusive jurisdiction of a court of competent jurisdiction in Travis County, Texas for the purpose of prosecuting or defending such litigation. Outside Counsel hereby waives and agrees not to assert: (a) that Outside Counsel is not personally subject to the jurisdiction of a court of competent jurisdiction in Travis County, Texas, (b) that the suit, action or proceeding is brought in an inconvenient forum, (c) that the venue of the suit, action or proceeding is improper, or (d) any other challenge to jurisdiction or venue.

9.12 Amendments. This OCC, including addenda hereto, may be amended only upon written agreement signed by the Parties.

9.13 Severability/Interpretation. The fact that a particular provision in this OCC is held under any applicable law to be void or unenforceable in no way affects the validity of other provisions, and this OCC will continue to be binding on both Parties. Any provision that is held to be void or unenforceable will be interpreted by the Parties or the courts to be replaced with language that is as close as possible to the intent of the original provision so as to effectuate the

purpose of this OCC. Any ambiguous or conflicting terms shall be interpreted and construed in such a manner as to accomplish the purpose of this OCC.

9.14 Insurance Required. Outside Counsel will undertake reasonable efforts to obtain and maintain during this OCC Term malpractice insurance in an amount not less than $10,000.00 or the amount specified in Section 4.1 of this OCC, whichever is more.

Further, Outside Counsel agrees to give notice to Agency in the event any amount of malpractice insurance is canceled. Outside Counsel also agrees to furnish to Agency certified copies of such insurance policies when requested. Outside Counsel agrees that no claim by Agency and the State of Texas for damages resulting from breach of Outside Counsel's duties to Agency under this OCC shall be limited to the amount of malpractice insurance maintained by Outside Counsel.

9.15 Additional Terms. Any additional terms agreed to by Outside Counsel and Agency shall be listed in an optional Addendum C. These terms shall not be inconsistent with or contrary to the Contract terms listed above, and nothing in Addendum C shall remove or modify terms contained in Sections 1–9. In the event of any conflict, ambiguity or inconsistency between the terms of Addendum C and Sections 1–9 of this Outside Counsel Contract, Sections 1–9 shall take precedence and control.

9.16 Counterparts. This OCC may be executed in multiple counterparts.

IN WITNESS THEREOF, THE PARTIES HAVE SIGNED AND EXECUTED THIS OCC.

Cammack Law Firm PLLC

By: Brandon Cammack
4265 San Felipe St #1100
Houston, Texas 77027
Phone: 713-300-9291
Email: brandon@cammacklawfirm.com

Office of the Attorney General of Texas

Attorney General or designee

OUTSIDE COUNSEL CONTRACT

OAG Contract No. _____

Addendum A

Services

The Travis County District Attorney's Office referred a criminal complaint to the OAG. The District Attorney's Office requested that the OAG conduct a review of the allegations, which include complaints of potential criminal violations made by certain state and federal employees.

State law allows the OAG to provide assistance to a prosecutor's office, such as the Travis County District Attorney's Office, in the prosecution of criminal cases. *See* Tex. Gov't Code §§ 402.028(a); 41.102(b).

Outside Counsel will conduct an investigation, under the authority of the OAG, of the criminal allegations contained in the complaint referred to the OAG by the District Attorney's Office and shall prepare a report documenting any potential criminal charges that may be discovered in the course of the investigation. Notwithstanding anything to the contrary contained in this OCC, Outside Counsel shall conduct its investigation only as consistent with the complaint referred to the OAG and only as directed by the OAG. Except for Outside Counsel's duty to provide a post-investigation report, this OCC expressly excludes legal services relating to any other post-investigation activities, including, but not limited to, indictment and prosecution.

OUTSIDE COUNSEL CONTRACT

OAG Contract No. _____

Addendum B
Rates

Attorneys working on Agency matters, including necessary and appropriate personal appearances before the Court, as requested and authorized by Agency Counsel shall be paid according to the following terms:

Name(s) of Lead Counsel: Brandon Cammack

Timekeeper classification	Hourly Rate (in United States Dollars)
Brandon Cammack	$300.00

Billing Period. The billing period for this OCC shall be: **Monthly**

Travel Rate. An attorney's travel rate may not exceed one-half of that attorney's hourly rate listed above. If no hourly rate is identified above or no travel rate(s) listed below, Outside Counsel may not charge Agency for time spent traveling on Agency matters.

CAUSE NO. D-1-GN-18-007636

THE ROY F & JOANN COLE MITTE FOUNDATION, Plaintiff, V. WC 1st AND TRINITY, LP, WC 1st AND TRINITY GP, LLC, WC 3rd AND CONGRESS, LP AND WORLD CLASS CAPITAL GROUP, LLC	§ § § § § § § § § §	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 126TH JUDICIAL DISTRICT

ATTORNEY GENERAL'S WAIVER

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Ken Paxton, Attorney General for the State of Texas (referred to herein as the "Attorney General"), and files this Waiver in the above-referenced cause of action and respectfully shows the Court as follows:

I.

Pursuant to §123.002 of the Texas Property Code and the common law, the Attorney General is a proper party and may intervene in a proceeding involving a charitable trust on behalf of the interest of the general public.

II.

Based upon the pleadings that have been provided to him to date, the Attorney General has determined not to intervene and by this Waiver declines in writing to be a party to the proceeding in its current state, pursuant to §123.004(b)(1) of the Property Code. Accordingly, the Attorney General waives further notice of the proceedings in this case as it is currently constituted.

III.

If any pleading is filed herein that adds additional parties or causes of action, such pleading would constitute a new or additional proceeding involving a charitable trust, which will require additional notice to the Attorney General pursuant to §123.003 of the Property Code. This Waiver

is not intended to constitute a declination in writing to be a party to any such new proceeding.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

DARREN L. McCARTY
Deputy Attorney General for Civil Litigation

JOSHUA R. GODBEY
Division Chief
Financial Litigation and Charitable Trusts Division

/s/ Cathleen M. Day
Cathleen M. Day
Assistant Attorney General
State Bar No. 24105783
Financial Litigation and Charitable Trusts Division
P.O. Box 12548
Austin, Texas 78711-2548
(512) 463-9507 - Direct Line
(512) 477-2348 - Fax
cathleen.day@oag.texas.gov

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Attorney General's Waiver* was served on January 31, 2020, via e-service to the following:

Ray C. Chester
Michael A. Shaunessy
MCGINNIS LOCHRIDGE, LLP
600 Congress Ave, Ste. 2100
Austin, TX 78701
rchester@mcginnislaw.com
mshaunessy@mcginnislaw.com

Edward F. Fernandes
Katherine Stein
KING & SPALDING, LLP
500 W. 2nd St., Ste. 1800
Austin, TX 78701
efernandes@kslaw.com
kstein@kslaw.com

/s/ Cathleen M. Day
Cathleen M. Day

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 31, 2020

Velva L. Price
Travis County District Clerk
P.O. Box 1748
Austin, TX 78767

Re: Cause No. D-1-GN-18-007636; *The Roy F. & Joann Cole Mitte Foundation v. WC 1st and Trinity, LP, WC 1st and Trinity GP, LLC, WC 3rd and Congress, LP and World Class Capital Group, LLC*; In the 126th Judicial District Court of Travis County, Texas; ***Attorney General's Waiver***

Dear Ms. Price:

The following pleadings have been received by this office relating to the above-referenced cause:

- *Plaintiff's Original Petition;*
- *Plaintiff's Third Amended Original Petition;*
- *Defendants' Memorandum on Remand for Determination of Adequacy of Supersedeas or Other Order under Tex. R. App. P.24;*
- *Order Appointing Receiver;*
- *Applicant's Notice of Filing of Applicant's Bond;*
- *Bond Securing Appointment of Receiver;*
- *Receiver's Interim Report;* and
- *Receiver's Quarterly Report for the Period December 10, 2019 to December 31, 2019.*

This *Waiver* is a waiver of the right to intervene in this case only as it is currently constituted. If any pleading is filed herein that adds additional parties or causes of action, such pleading will constitute a new or additional proceeding involving a charitable trust, which will require additional notice to the Attorney General pursuant to §123.003 of the Property Code. This Waiver is not intended to constitute a declination in writing to be a party to any such new proceeding.

Sincerely,

/s/ Kathleen M. Day
Kathleen M. Day
Assistant Attorney General
State Bar No. 24105783
Financial Litigation and Charitable Trusts Division
P.O. Box 12548

Austin, Texas 78711-2548
(512) 463-9507 - Direct Line
cathleen.day@oag.texas.gov

CMD/did
Enclosure

cc: Ray C. Chester
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600 Congress Ave., Ste. 2100
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mshaunessy@mcginnislaw.com

Edward F. Fernandes
Katherine Stein
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Austin, TX 78701
efernandes@kslaw.com
kstein@kslaw.com

CAUSE NO. D-1-GN-18-007636

THE ROY F & JOANN COLE MITTE FOUNDATION, *Plaintiff*,	§	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
WC 1st AND TRINITY, LP, WC 1st AND TRINITY GP, LLC, WC 3rd AND CONGRESS, LP AND WORLD CLASS CAPITAL GROUP, LLC	§	126TH JUDICIAL DISTRICT
Defendants.	§	

ATTORNEY GENERAL'S PETITION IN INTERVENTION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES KEN PAXTON, Attorney General of Texas, on behalf of the public interest in charity, ("Attorney General") and files this Petition in Intervention in the above-referenced cause, and would respectfully show the Court the following:

I.

Pursuant to §123.002 of the Texas Property Code, the Attorney General is a proper party and may intervene in a "proceeding involving a charitable trust." On December 11, 2019, The Attorney General received notice of the above-captioned case pursuant to §123.003 of the Texas Property Code, and subsequently filed the Attorney General's Waiver of Intervention. The Attorney General recently received notice of a new cause of action filed in this matter. For and on behalf of the interest of the general public of this state in charitable trusts, the Attorney General hereby files this Petition in Intervention in this proceeding, pursuant to §123.002 of the Texas Property Code and Rule 60 of the Texas Rules of Civil Procedure.

II.

The Attorney General's presence in this matter is warranted to protect the interests of the public in the event that the public's interest and the parties' interests diverge. In addition, this litigation affects a substantial sum of charitable funds and involves the expenditure of these funds.

EX. 4

The Attorney General specifically asserts his right to amend this Petition in Intervention as necessary to assert additional affirmative relief following his review of the complete pleadings and the development of further information.

III.

The Attorney General has found it necessary to intervene in this proceeding to protect the public interest in charity. He requests that the Court award reasonable and necessary attorney's fees and costs as are equitable and just for services rendered by the Attorney General in accordance with §123.006(b) of the Texas Property Code.

PRAYER

WHEREFORE, the Attorney General prays for such relief to which he may be entitled on behalf of the public interest in charity.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy First Assistant Attorney General

DARREN L. MCCARTY
Deputy Attorney General for Civil Litigation

/s/ Cathleen M. Day

Joshua R. Godbey, Division Chief
State Bar No. 24049996
Cathleen M. Day, Assistant Attorney General
State Bar No. 24105783
Financial Litigation and Charitable Trusts Division
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(512) 463-9507 Phone
(512) 477-2348 Fax
joshua.godbey@oag.texas.gov
cathleen.day@oag.texas.gov

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Attorney General's Petition in Intervention* was served by e-service on June 8, 2020, to the following:

Ray C. Chester
Michael A. Shaunessy
McGINNIS LOCHRIDGE, LLP
600 Congress Ave., Ste. 2100
Austin, TX 78701
rchester@mcginnislaw.com
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Terry L. Scarborough
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Stephen W. Lemmon
Rhonda B. Mates
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1801 South Mopac, Ste. 320
Austin, Texas 78746
lemmon@slollp.com
mates@slollp.com

/s/ Cathleen M. Day
Cathleen M. Day

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Sharron Lee on behalf of Cathleen Day
Bar No. 24105783
sharron.lee@oag.texas.gov
Envelope ID: 43565120
Status as of 06/11/2020 16:50:18 PM -05:00

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Jason Snell	24013540	firm@snellfirm.com	6/8/2020 4:35:03 PM	SENT
Katherine Stein	24083980	kstein@kslaw.com	6/8/2020 4:35:03 PM	SENT
Ray Chester	4189065	rchester@mcginnislaw.com	6/8/2020 4:35:03 PM	SENT
Michael A. Shaunessy	18134550	mshaunessy@mcginnislaw.com	6/8/2020 4:35:03 PM	SENT
Angela Mays		amays@munsch.com	6/8/2020 4:35:03 PM	SENT
Julie Doss		jdoss@mcginnislaw.com	6/8/2020 4:35:03 PM	SENT
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Maria AmeliaCalaf		mac@wittliffcutter.com	6/8/2020 4:35:03 PM	SENT
James Ray		jray@munsch.com	6/8/2020 4:35:03 PM	SENT
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Annette Bittick		abittick@mcginnislaw.com	6/8/2020 4:35:03 PM	SENT
Kim McBride		kmcbride@mcginnislaw.com	6/8/2020 4:35:03 PM	SENT
Lisa Garrett		lgarrett@munsch.com	6/8/2020 4:35:03 PM	SENT
John Saba		john@wittliffcutter.com	6/8/2020 4:35:03 PM	SENT

Associated Case Party: GregoryS.Milligan

Name	BarNumber	Email	TimestampSubmitted	Status
Rhonda Bear Mates	24040491	Mates@slollp.com	6/8/2020 4:35:03 PM	SENT
Stephen W. Lemmon		lemmon@slollp.com	6/8/2020 4:35:03 PM	SENT

Associated Case Party: WC 1st and Trinity, LP

Name

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Sharron Lee on behalf of Cathleen Day
Bar No. 24105783
sharron.lee@oag.texas.gov
Envelope ID: 43565120
Status as of 06/11/2020 16:50:18 PM -05:00

Associated Case Party: WC 1st and Trinity, LP

Viola Pena	24050372	bpena@hslawmail.com	6/8/2020 4:35:03 PM	SENT
Nicholas Bacarisse	24073872	nbacarisse@adjtlaw.com	6/8/2020 4:35:03 PM	SENT
Adam Gray	24087616	agray@kslaw.com	6/8/2020 4:35:03 PM	SENT
Wallace Jefferson	19	wjefferson@adjtlaw.com	6/8/2020 4:35:03 PM	SENT
Terry Lane Scarborough	17716000	tscarborough@hslawmail.com	6/8/2020 4:35:03 PM	SENT
Edward FFernandes		efernandes@kslaw.com	6/8/2020 4:35:03 PM	SENT
Kate Stein		kstein@kslaw.com	6/8/2020 4:35:03 PM	SENT
Kevin Orellana		paralegal@hslawmail.com	6/8/2020 4:35:03 PM	SENT

Associated Case Party: Ken Paxton on Behalf of the Public Interest in Charity

Name	BarNumber	Email	TimestampSubmitted	Status
Cathleen Day	24105783	cathleen.day@oag.texas.gov	6/8/2020 4:35:03 PM	SENT

Associated Case Party: WC 1st and Trinity GP, LLC

Name	BarNumber	Email	TimestampSubmitted	Status
Edward FFernandes		efernandes@kslaw.com	6/8/2020 4:35:03 PM	SENT
Kate Stein		kstein@kslaw.com	6/8/2020 4:35:03 PM	SENT

Associated Case Party: WC 3rd and Congress, LP

Name	BarNumber	Email	TimestampSubmitted	Status
Edward FFernandes		efernandes@kslaw.com	6/8/2020 4:35:03 PM	SENT
Kate Stein		kstein@kslaw.com	6/8/2020 4:35:03 PM	SENT

Associated Case Party: World Class Capital Group, LLC

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Sharron Lee on behalf of Cathleen Day
Bar No. 24105783
sharron.lee@oag.texas.gov
Envelope ID: 43565120
Status as of 06/11/2020 16:50:18 PM -05:00

Associated Case Party: World Class Capital Group, LLC

Name	BarNumber	Email	TimestampSubmitted	Status
Edward FFernandes		efernandes@kslaw.com	6/8/2020 4:35:03 PM	SENT
Kate Stein		kstein@kslaw.com	6/8/2020 4:35:03 PM	SENT

CAUSE NO. D-1-GN-18-007636

THE ROY F. & JOANN COLE MITTE FOUNDATION, *Plaintiff*,	§	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
WC 1st AND TRINITY, LP, WC 1st AND TRINITY GP, LLC, WC 3rd AND CONGRESS, LP AND WORLD CLASS CAPITAL GROUP, LLC *Defendants*.	§	IN THE 126TH JUDICIAL DISTRICT

ATTORNEY GENERAL OF TEXAS'S NOTICE OF NONSUIT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES KEN PAXTON, Attorney General of Texas, and in accordance with Texas Rule of Civil Procedure 162, files this Notice of Nonsuit of his Petition in Intervention in the above-referenced cause.

The Attorney General hereby gives notice to this Court that he is taking a nonsuit without prejudice of his Petition in Intervention which was brought for and on behalf of the interest of the general public of this state in charity, pursuant to Section 123.002 of the Texas Property Code. The Attorney General hereby notifies this Court and the parties that his nonsuit shall be effective immediately on its filing date.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy First Assistant Attorney General

DARREN L. McCARTY
Deputy Attorney General for Civil Litigation

/s/ Joshua R. Godbey
Joshua R. Godbey, Division Chief
Assistant Attorney General
State Bar No. 24049996
Financial Litigation and Charitable Trusts Division
Office of the Attorney General
P.O. Box 12548/Mail Stop 017
Austin, Texas 78711-2548
Telephone: (512) 475-4209
Facsimile: (512) 477-2348
joshua.godbey@oag.texas.gov

On behalf of the Public Interest in Charity

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2020, the foregoing *Attorney General's Notice of Nonsuit* was filed with the Clerk of this Court and served on all parties of record via EFileTexas.gov efiling service:

Ray C. Chester/Michael A. Shaunessy
McGinnis Lochridge, LLP
rchester@mcginnislaw.com
mshaunessy@mcginnislaw.com

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Streusand, Landon, Ozburn & Lemmon, LLP
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Counsel for Receiver

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Wallace B. Jefferson/ Nicholas Bacarisse
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Counsel for Defendants

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Gregor Wynne Arney, PLLC
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hmartinez@gcfirm.com

Counsel for Super Majority Parties

/s/ Joshua R. Godbey
Joshua R. Godbey, Division Chief
Assistant Attorney General

Automated Certificate of eService

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Laura Edwards on behalf of Joshua Godbey
Bar No. 24049996
laura.edwards@oag.texas.gov
Envelope ID: 46708034
Status as of 10/1/2020 8:58 AM CST

Associated Case Party: WC 1st and Trinity, LP

Name	BarNumber	Email	TimestampSubmitted	Status
Viola Pena	24050372	bpena@hslawmail.com	9/30/2020 12:08:30 PM	SENT
Wallace Jefferson	19	wjefferson@adjtlaw.com	9/30/2020 12:08:30 PM	SENT
Nicholas Bacarisse	24073872	nbacarisse@adjtlaw.com	9/30/2020 12:08:30 PM	SENT
Terry Lane Scarborough	17716000	tscarborough@hslawmail.com	9/30/2020 12:08:30 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Michael A. Shaunessy	18134550	mshaunessy@mcginnislaw.com	9/30/2020 12:08:30 PM	SENT
Joshua Godbey	24049996	Joshua.Godbey@oag.texas.gov	9/30/2020 12:08:30 PM	SENT
Ray Chester	4189065	rchester@mcginnislaw.com	9/30/2020 12:08:30 PM	SENT
Heather Martinez		hmartinez@gcfirm.com	9/30/2020 12:08:30 PM	SENT

Associated Case Party: GregoryS.Milligan

Name	BarNumber	Email	TimestampSubmitted	Status
Rhonda Bear Mates	24040491	Mates@slollp.com	9/30/2020 12:08:30 PM	SENT
Stephen W. Lemmon		lemmon@slollp.com	9/30/2020 12:08:30 PM	SENT

Associated Case Party: World Class Interests, LLC

Name	BarNumber	Email	TimestampSubmitted	Status
Michael JohnWynne		mwynne@gcfirm.com	9/30/2020 12:08:30 PM	SENT

Associated Case Party: Ken Paxton on Behalf of the Public Interest in Charity

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Laura Edwards on behalf of Joshua Godbey
Bar No. 24049996
laura.edwards@oag.texas.gov
Envelope ID: 46708034
Status as of 10/1/2020 8:58 AM CST

Associated Case Party: Ken Paxton on Behalf of the Public Interest in Charity

Name	BarNumber	Email	TimestampSubmitted	Status
Cathleen Day	24105783	cathleen.day@oag.texas.gov	9/30/2020 1:08:30 PM	SENT

OUTSIDE COUNSEL CONTRACT

OAG Contract No. _____

This Agreement, including all Addenda (the Addenda are incorporated herein by reference), is hereinafter referred to as the "Outside Counsel Contract" or "OCC." This Outside Counsel Contract is made and entered into by and between the Office of the Attorney General of Texas ("Agency," "Attorney General," or "OAG") and Cammack Law Firm, PLLC ("Outside Counsel"). The term "Parties" as used in this OCC refers to Agency and Outside Counsel. This OCC is made and entered into with reference to the following facts:

INDUCEMENTS

Whereas, Agency requires the assistance of outside legal counsel in carrying out its responsibilities; and

Whereas, Outside Counsel desires to provide legal services to Agency, subject to the authority of the Texas Attorney General.

AGREEMENT

Now, therefore, in consideration of the inducements, covenants, agreements, and conditions herein contained, the Parties agree as follows:

Section 1. Purpose.

1.1 Purpose. The purpose of this OCC is for Outside Counsel to provide legal services to Agency, as described in Addendum A.

1.2.1 Litigation. OUTSIDE COUNSEL SHALL NOT REPRESENT AGENCY IN ANY LITIGATION UNLESS ADDENDUM A SPECIFICALLY AUTHORIZES LITIGATION IN A PARTICULAR MATTER.

1.2.2 Appellate Matters. Irrespective of any authorization to engage in litigation in this OCC, or in a writing outside of this OCC, OUTSIDE COUNSEL IS NOT AUTHORIZED TO PROCEED ON ANY APPEAL, IN ANY CAPACITY, WHETHER INTERLOCUTORY OR OTHERWISE, WHETHER AS APPELLANT, APPELLEE, RESPONDENT, APPLICANT, OR OTHERWISE, WITHOUT FIRST OBTAINING THE WRITTEN PERMISSION OF THE ATTORNEY GENERAL, FIRST ASSISTANT ATTORNEY GENERAL, OR SOLICITOR GENERAL.

1.2.3 OAG Review of Outside Counsel Invoice and Release of Payment. Outside Counsel invoices will be reviewed and approved by the OAG pursuant to Subsection 402.0212(b) of the Texas Government Code and Title 1, Chapter 57 of the Texas Administrative Code.

Section 2. OCC Term.

This OCC shall commence on 9/3/2020, and shall terminate on 8/31/2021 (hereinafter "OCC Term"), unless terminated earlier pursuant to Section 7 of this OCC. The OCC Term may not be extended except by amendment pursuant to Section 9.12 of this OCC.

Section 3. Obligations of Outside Counsel.

3.1 Duties. Outside Counsel shall provide professional legal services to Agency as described in Addendum A. Outside Counsel shall represent Agency with due professional care as required by applicable law and disciplinary rules.

3.2 Staff. Outside Counsel is expected to perform valuable services for Agency, and the method and amount or rate of compensation are specified in Section 5 and Addendum B of this OCC. Outside Counsel staff and employees are expected to perform work of a type commensurate with their professional titles. Outside Counsel agrees that any person employed or engaged by Outside Counsel and who assists in performing the services agreed to herein shall not be considered employees or agents of Agency or the State of Texas.

3.3 Public Information and Client Communications. Outside Counsel acknowledges that information created or exchanged in the course of representation of a governmental body may be subject to the Texas Public Information Act, Chapter 552 of the Texas Government Code, and may be subject to required disclosure in a publicly accessible format pursuant to Section 2252.907 of the Texas Government Code. Outside Counsel will exercise professional judgment and care when creating documents or other media intended to be confidential or privileged attorney-client communications that may be subject to disclosure under the Public Information Act (e.g. invoices where incidental notation may tend to reveal litigation strategies or privileged information). Outside Counsel should mark confidential or privileged attorney-client communications as confidential. This subsection shall not be interpreted to limit Outside Counsel's duty to provide full disclosure to Agency as necessary in Outside Counsel's judgment to represent Agency with due professional care or as required by applicable law or disciplinary rules.

3.4 Status. Pursuant to the standard of professional care owed to the Agency, Outside Counsel shall endeavor to keep Agency fully informed about all material matters relating to legal services provided under this OCC.

3.5 Subcontracting Authority. In the event Outside Counsel determines it is necessary or expedient to subcontract for any of the performances herein, or in support of any of those performances, Outside Counsel may enter into such subcontract(s) after obtaining express written approval from Agency. If Outside Counsel purports to enter into a subcontract without express written approval from Agency, the Parties agree that such contract shall be voidable at the option of Agency and that Outside Counsel shall have no recourse against Agency or the State of Texas for any direct or indirect costs, damages, or any other expenses related to the subcontractor. For all subcontracts entered by Outside Counsel, the Parties agree that all such subcontracts are subject to Section 4 (Liability), Subsection 5.2 (Reimbursement of Expenses),

Subsection 5.3 (Subcontractor Payments), Subsection 6.2 (Subcontractor Invoices), and Subsection 6.5 (Supporting Documents; Right-to-Audit; Inspection of Records) of this OCC. Furthermore, if Outside Counsel elects to enter into a subcontract for any legal services, then the Parties agree that Agency shall not be liable to Outside Counsel for any rates or rate ranges greater than or inconsistent with the highest rate or rate range specified in Addendum B unless prior written approval is obtained from Agency. Any subcontracted legal counsel also must comply with Subsections 5.5 (Administrative Staff/Clerks) and 9.8 (Conflict of Interest) of this OCC.

Outside Counsel agrees to comply with all state and federal laws applicable to any subcontractors, including, but not limited to, laws regarding wages, taxes, insurance, historically underutilized businesses, and workers' compensation.

In no event shall this section or any other provision of this OCC be construed as relieving Outside Counsel of the responsibility for ensuring that all services rendered under this OCC, and any subcontracts thereto, are rendered in compliance with all of the terms of this OCC.

Section 4. Liability.

4.1 Limitation of Liability. The Parties stipulate and agree that the State of Texas and Agency's total liability to Outside Counsel, including consideration for the full, satisfactory, and timely performance of all its duties, responsibilities, and obligations, and for reimbursement of all expenses, if any, as set forth in this OCC or other liability arising out of any performance herein shall not exceed:

$25,000.00 for this OCC Term.

Outside Counsel agrees that the State of Texas and its agencies (other than Agency) shall have no liability arising out of this OCC or the services of this OCC to Outside Counsel.

4.2 Subject to Appropriation. The Parties acknowledge and agree that nothing in this OCC will be interpreted to create a future obligation or liability in excess of the funds currently appropriated to Agency.

Section 5. Compensation/Expenses.

5.1 Fees to Outside Counsel. Consistent with Title 1, Chapter 57 of the Texas Administrative Code, Agency agrees to pay Outside Counsel in consideration of full and satisfactory performance of the legal services under this OCC. Services for non-attorney timekeeper classifications listed on Addendum B, if applicable, such as paralegal, legal assistant, or patent agent, must be of a substantive legal nature in order to be reimbursable. Outside Counsel agrees to the fee schedule as described in Addendum B.

5.2 Reimbursement of Expenses. Agency will reimburse Outside Counsel for actual expenses incurred in the performance of the legal services described in Addendum A, if such expenses are reasonable and either necessary or advisable. Outside Counsel must provide copies

of original receipts as evidence of actual expenditures. Limitations on the amount and type of reimbursement include the following, unless otherwise agreed upon by Agency in writing, in advance, and in accordance with Agency policy and relevant law:

5.2.1 Mileage. Agency will reimburse Outside Counsel for reasonable and necessary travel mileage at the per mile rate posted on the Texas Mileage Guide adopted under Section 660.043 of the Texas Government Code. The Texas Mileage Guide is currently available on the Comptroller of Public Accounts's website, at: https://fmx.cpa.state.tx.us/fm/travel/travelrates.php.

5.2.2 Meals. Agency will reimburse Outside Counsel for reasonable and necessary meal expenses in accordance with the Textravel guide published by the Texas Comptroller of Public Accounts. Agency will reimburse Outside Counsel at the allowable rate provided by the Textravel guide or actual expenses, whichever is less, for each timekeeper as listed in Addendum B for each day requiring overnight travel and on the return day of travel. Agency will not reimburse Outside Counsel for the purchase of alcohol. The Textravel guide is currently available on the Comptroller of Public Accounts's website at: https://fmx.cpa.texas.gov/fmx/travel/textravel/rates/current.php.

5.2.3 Lodging. Agency will reimburse Outside Counsel for reasonable and necessary lodging expenses. Unless otherwise agreed upon by Agency in writing in advance, Texas lodging or overnight accommodations will be reimbursed at the lesser amount of the actual expense or $200.00 per timekeeper, as listed in Addendum B, per night. Unless otherwise agreed upon by Agency in writing in advance, out-of-Texas lodging or overnight accommodations will be reimbursed at the lesser amount of the actual expense or $250.00 per timekeeper, as listed in Addendum B, per night.

5.2.4 Airfare. Airfare will be reimbursed at the lesser amount of the actual expense or the regular published rates for airfares for commercial airlines. Agency will not reimburse Outside Counsel for expenses relating to first-class airfare, which includes first- or business-class airfare or any other expense related to premium or preferred airfare benefits.

5.2.5 Expert Services. Subject to Agency's prior approval, Agency will reimburse Outside Counsel for the reasonable and necessary cost of expert services.

5.2.6 Other Reimbursable Expenses. Agency will reimburse the actual cost for other expenses if Outside Counsel provides a reasonable and sufficient explanation of the nature and purpose of the charge and the charge is reasonable and either necessary or advisable.

5.2.7 Non-Reimbursable Expenses. Agency expects Outside Counsel to anticipate and include routine operating expenses and disbursements as part of overhead and, therefore, part of a basic hourly rate or flat rate. Therefore, Agency will not reimburse Outside Counsel for: routine copying and printing charges; fax charges; routine postage; office supplies; telephone charges unless related to teleconferencing services; local travel (within 20-mile radius of office including mileage, parking, and tolls) not relating to overnight travel; all delivery services

performed by internal staff; electricity or other utilities; software costs or subscription fees; and internet or wireless access charges.

5.2.8 Gratuity. Agency will not reimburse Outside Counsel for tips or gratuities.

5.2.9 Reimbursement for Agency Employee Expenses. Agency will not reimburse Outside Counsel for the cost of expenses incurred by Agency employees.

5.2.10 No Mark-up. Outside Counsel will only be reimbursed for actual expenses. Outside Counsel shall not be reimbursed for any mark-up or other overhead costs.

5.3 Subcontractor Payments. Subject to Agency's prior approval, Agency will reimburse Outside Counsel for the actual, reasonable and necessary expenses relating to Outside Counsel's use of subcontractors. Outside Counsel shall be responsible for any payments and other claims due to subcontractors for work performed under this OCC. Outside Counsel, in subcontracting for any performances or in support of any of the performances specified herein (e.g., expert services, local counsel, and other services), expressly understands and agrees that Agency shall not be directly liable in any manner to Outside Counsel's subcontractor(s).

5.4 Legal Research. Agency may reimburse Outside Counsel for its reasonable and necessary expenses relating to legal research, including online legal research.

While Agency should be paying Outside Counsel to apply the knowledge and expertise for which it was hired, and not paying Outside Counsel to obtain that knowledge through extensive legal research, Agency understands that situations arise that justify extensive research on how best to proceed in order to achieve a desired result. Therefore, the need for extensive legal research will be addressed on a case-by-case basis by Outside Counsel and Agency.

5.5 Administrative Staff/Clerks. Agency will only pay for substantive legal work performed by attorneys or other qualified personnel, regardless of the job title or classification applicable to such individual. For purposes of this agreement, "substantive legal work" has the same meaning as defined by the Texas Paralegal Standards adopted by the Board of Directors of the State Bar of Texas. Agency will not pay for law clerks or interns, however classified, under any circumstances. Agency will not pay for administrative staff, such as secretarial support, librarians, case clerks, and accounting and billing clerks, for activities including but not limited to the following: overtime, file opening, file organization, docketing, and other administrative tasks; and preparation of billing, invoice review, budget preparation, and communications regarding same or any other accounting matter.

5.6 Training. Agency will not pay for the education or training of attorneys, paralegals, or other staff of Outside Counsel, including assigning such staff on a transient basis to an Agency matter.

Section 6. Invoices for Payment.

6.1 General. Outside Counsel agrees to abide by the administrative rules adopted by the OAG governing the submission, review, and approval of invoices found at Title 1, Chapter 57 of the Texas Administrative Code. Outside Counsel understands and agree that no invoice shall seek reimbursement for services performed or expenses incurred in violation of the provisions of this OCC.

6.1.1 Billing Period. The billing period is the interval (ex. monthly) which determines the frequency Outside Counsel will submit invoices to the Agency. The billing period for this OCC is specified in Addendum B. Unless otherwise specified in Addendum B of the Contract, a billing period defined as "monthly" shall begin with the first day of the calendar month and end with the last day of the calendar month.

6.1.2 Billable Time. Agency will only pay for the services of individuals covered in Addendum B. All times must be billed in one-tenth hour or one-quarter hour increments, and must reflect only actual time spent. Tasks referencing correspondence and filings must describe the document received or authored. Agency expects to be billed for the actual time it takes to modify standardized forms, filings, and/or correspondence for use on the matter being billed. Agency will not reimburse Outside Counsel for the time it originally took to prepare any such standardized documents. Agency will not pay for review, execution, and processing of the OCC and submission of invoices.

6.1.3 Submission of Invoices. Outside Counsel must submit invoices to Agency for review within one calendar month from the end of the relevant billing period covered by the invoice. Outside Counsel must submit invoices to Agency at:

general.counsel@oag.texas.gov

OR

Attn.: General Counsel Division
Office of the Attorney General
Mail Code 074
Post Office Box 12548
Austin, Texas 78711-2548

6.2 Subcontractor Invoices. Subcontractor(s) shall directly invoice Outside Counsel, and Outside Counsel shall then invoice Agency for the work performed. The actual work performed by subcontractor shall be specifically identified in the invoice supported by attached documentation.

6.3 Prompt Payment. Payments to Outside Counsel by Agency under this OCC shall be in compliance with Chapters 2251 of the Texas Government Code and Title 34, Chapter 20, Subchapter F of the Texas Administrative Code.

6.4 Supporting Documents; Right-to-Audit; Inspection of Records.

6.4.1 Duty to Maintain Records. Outside Counsel shall maintain adequate records to support its charges, procedures, and performances to Agency for all work related to this OCC. Outside Counsel shall also maintain such records as are deemed necessary by Agency, the State Auditor's Office, or federal auditors if federal funds are used to pay Outside Counsel, to ensure proper accounting for all costs and performances related to this OCC.

6.4.2 Records Retention. Outside Counsel shall retain, for a period of at least seven (7) years after the later of (1) the expiration or termination of this OCC or (2) the resolution of all issues that arise from any litigation, claim, negotiation, audit, open records request, administrative review, or other action involving this OCC, such records as are necessary to fully disclose the extent of services provided under this OCC, including but not limited to any daily activity reports, time distribution and attendance records, and other records that may show the basis of the charges made or performances delivered.

6.4.3 Inspection of Records and Right to Audit. Outside Counsel shall make available at reasonable times and upon reasonable notice, and for reasonable periods, all information related to the State of Texas' property, services performed, and charges, such as work papers, reports, books, data, files, software, records, and other supporting documents pertaining to this OCC, for purposes of inspecting, monitoring, auditing, or evaluating by Agency, the State of Texas, or their authorized representatives. Outside Counsel shall cooperate with auditors and other authorized Agency and State of Texas representatives and shall provide them with prompt access to all of such property as requested by Agency or the State of Texas.

6.4.4 State Auditor. In addition to and without limitation on the other audit provisions of this OCC, pursuant to Section 2262.154 of the Texas Government Code, the State Auditor's Office may conduct an audit or investigation of Outside Counsel or any other entity or person receiving funds from the State of Texas directly under this OCC or indirectly through a subcontract under this OCC. The acceptance of funds by Outside Counsel or any other entity or person directly under this OCC or indirectly through a subcontract under this OCC acts as acceptance of the authority of the State Auditor's Office, under the direction of the Legislative Audit Committee, to conduct an audit or investigation in connection with those funds. Under the direction of the Legislative Audit Committee, Outside Counsel or any other entity or person that is the subject of an audit or investigation by the State Auditor's Office must provide the State Auditor's Office with access to any information the State Auditor's Office considers relevant to the investigation or audit. Outside Counsel further agrees to cooperate fully with the State Auditor's Office in the conduct of the audit or investigation, including providing all records requested. Outside Counsel shall ensure that this paragraph concerning the authority to audit funds received indirectly by subcontractors through Outside Counsel and the requirement to cooperate is included in any subcontract it awards. The State Auditor's Office shall at any time have access to and the right to examine, audit, excerpt, and transcribe any pertinent books, documents, working papers, and records of Outside Counsel related to this OCC.

Section 7. Termination

7.1 Convenience of the State. Agency has the right to terminate this OCC, in whole or in part, without penalty, by notifying Outside Counsel in writing of such termination prior to the effective date of such termination. Such notification of termination shall state the effective date of termination. In the event of such termination, Outside Counsel shall, unless otherwise mutually agreed upon in writing, cease all services immediately, except such services that are necessary to wind-up, in a cost-effective manner, all services being provided. Subject to Section 4 of this OCC, Agency shall be liable for payments for all services performed under this OCC to the effective date of termination, plus any necessary services to cost effectively wind-up.

7.2 Cause/Default. In the event that Outside Counsel commits a material breach of this OCC, Agency may, upon written notice to Outside Counsel, immediately terminate all or any part of this OCC. Termination is not an exclusive remedy but will be in addition to any other rights and remedies provided in equity, by law, or under this OCC.

7.3 Rights Upon Termination or Expiration. Upon expiration or termination of this OCC for any reason, Outside Counsel shall, subject to Outside Counsel's professional obligations, immediately transfer to Agency all information and associated work products prepared by Outside Counsel or otherwise prepared for Agency pursuant to this OCC, in whatever form such information and work products may exist, to the extent requested by Agency. At no additional cost to Agency and in any manner Agency deems appropriate in its sole discretion, Agency is granted the unrestricted right to use, copy, modify, prepare derivative works from, publish, and distribute any component of the information, work product, or other deliverable made the subject of this OCC.

7.4 Remedies. Notwithstanding any exercise by Agency of its rights of early termination, Outside Counsel shall not be relieved of any liability to Agency for damages due to Agency by virtue of any breach of this OCC by Outside Counsel or for amounts otherwise due Agency by Outside Counsel.

7.5 Termination by Outside Counsel. Consistent with applicable rules of professional conduct, Outside Counsel may terminate this OCC upon reasonable notice for material breach by Agency.

Section 8. Certifications of Outside Counsel

By agreeing to and signing this OCC, Outside Counsel hereby makes the following certifications and warranties:

8.1 Delinquent Child Support Obligations. Outside Counsel certifies that it is not ineligible to receive any grant, loan, or payment under this OCC pursuant to Section 231.006 of the Texas Family Code and acknowledges that this OCC may be terminated and payment may be withheld if this certification is inaccurate.

8.2 Buy Texas. With respect to any services purchased pursuant to this OCC, Outside Counsel represents and warrants that it will buy Texas products and materials for use in providing the services authorized herein when such products and materials are available at a comparable price and within a comparable period of time when compared to non-Texas products and materials. This subsection does not apply to Outside Counsel providing legal services located outside the State of Texas.

8.3 Gift to Public Servant. Outside Counsel warrants that it has not given, nor does it intend to give at any time hereafter, any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with the award of this OCC.

8.4 Franchise Tax. By signing this OCC, Outside Counsel certifies that its Texas franchise tax payments are current, or that it is exempt from or not subject to such tax, consistent with Chapter 171 of the Texas Tax Code.

8.5 Outside Counsel License/Conduct. Outside Counsel certifies that each attorney performing services under this OCC is an attorney in good standing under the laws of the State of Texas or the jurisdiction where the representation occurs. Outside Counsel will notify Agency in writing within one business day of any lapse in an assigned attorney's licensed status or any final disciplinary action taken against an assigned attorney. For the Lead Counsel(s) named in Addendum B, Outside Counsel will provide documentation of good standing from the state bar or the licensing authority of the jurisdiction in which the attorney resides and is licensed. An attorney that is not licensed by the State Bar of Texas may not provide legal services and advice concerning Texas law.

8.6 Debt to State. Outside Counsel acknowledges and agrees that, to the extent Outside Counsel owes any debt (child support or other obligation) or delinquent taxes to the State of Texas, any payments Outside Counsel are owed under this OCC may be applied by the Comptroller of Public Accounts toward any such debt or delinquent taxes until such debt or delinquent taxes are paid in full.

8.7 Prohibited Bids and Contracts. Under Section 2155.004 of the Texas Government Code, Outside Counsel certifies that it is not ineligible to receive this OCC and acknowledges that this OCC may be terminated and payment withheld if this certification is inaccurate.

8.8 Compliance with State Law Contracting Provisions. Agency and Outside Counsel certify that this OCC is compliant, and will remain compliant, with any and all applicable laws governing contracts involving the State of Texas or its agencies, including, but not limited to, Sections 572.054 (Representation by Former Officer or Employee of Regulatory Agency Restricted; Criminal Offense), 572.069 (Certain Employment for Former State Officer or Employee Restricted), 669.003 (Contracting with Executive Head of State Agency), 2252.901 (Contracts with Former or Retired Agency Employees), 2252.908 (Disclosure of Interested Parties), and 2261.252 (Disclosure of Potential Conflicts of Interest; Certain Contracts Prohibited) of the Texas Government Code.

8.9 Does not Boycott Israel. Pursuant to Section 2270.002 of the Texas Government Code, Outside Counsel certifies, by executing this OCC, that Outside Counsel does not, and will not during the term of this OCC, boycott Israel. Outside Counsel further certifies that no subcontractor of Outside Counsel boycotts Israel or will boycott Israel during the term of this agreement. Outside Counsel agrees to take all necessary steps to ensure this certification remains true during the term of this OCC.

8.10 Prohibited Companies. Outside Counsel certifies, by executing this OCC, that neither Outside Counsel, nor any subcontractor of Outside Counsel, is a company under Texas Government Code section 2252.152 with which Agency may be prohibited from contracting. Outside Counsel agrees to take all necessary steps to ensure this certification remains true during the term of this OCC.

8.11 Limitation on Abortion Funding. Outside Counsel acknowledges and agrees that, under article IX, section 6.25 of the General Appropriations Act, 86th Leg., R.S. (2019), and except as provided by that Act, funds may not be distributed under this OCC to any individual or entity that: (1) performs an abortion procedure that is not reimbursable under the State of Texas' Medicaid program; (2) is commonly owned, managed, or controlled by an entity that performs an abortion procedure that is not reimbursable under the State of Texas' Medicaid program; or (3) is a franchise or affiliate of an entity that performs an abortion procedure that is not reimbursable under the State of Texas' Medicaid program.

Section 9. General Terms and Conditions

9.1 Independent Contractor. Outside Counsel agrees and acknowledges that during the OCC Term, Outside Counsel and Outside Counsel's subcontractors are independent contractors of Agency or the State of Texas and are not employees of Agency or the State of Texas.

9.1.1 Outside Counsel will be solely and entirely responsible for its acts and the acts of its agents, employees, subcontractors, and representatives in the performance of this OCC.

9.1.2 Outside Counsel agrees and acknowledges that during the OCC Term, Outside Counsel shall be entirely responsible for the liability and payment for Outside Counsel or Outside Counsel's employees or assistants, of all taxes of whatever kind, arising out of the performances in this OCC. Other than the payments described in this OCC, Outside Counsel agrees and acknowledges that Outside Counsel or Outside Counsel's employees or assistants shall not be entitled to any State benefit on account of the services provided hereunder. AGENCY SHALL NOT BE LIABLE TO OUTSIDE COUNSEL, ITS EMPLOYEES, AGENTS, OR OTHERS FOR THE PAYMENT OF TAXES OR THE PROVISION OF UNEMPLOYMENT INSURANCE AND/OR WORKERS' COMPENSATION, OR ANY BENEFIT DUE TO A STATE EMPLOYEE. If Agency or the State of Texas shall nonetheless become liable for such payments or obligations, Outside Counsel shall promptly pay or reimburse Agency or the State of Texas for such liability or obligation.

9.2 Assignment of OCC. Outside Counsel may not assign this OCC, or assign any right or delegate any duty under this OCC, without prior written approval from Agency.

9.3 Survival. The obligations of Outside Counsel under the following sections and subsections shall survive the termination or expiration of this OCC: 3.3, 4, 5, 6.4, 7.1, 7.3, 7.4, 8.8, 9.7, 9.8, 9.11, and 9.13.

9.4 Copyright/Intellectual Property. Outside Counsel shall take reasonable measures to protect Agency from material risks of Agency liability known to Outside Counsel for any copyright or patent infringement or disclosure of trade secrets resulting from the use of any equipment, materials, information, or ideas furnished by Outside Counsel pursuant to this OCC (other than equipment, materials, information, or ideas supplied or required by Agency or its employees or other agents). Outside Counsel and Agency agree to furnish timely written notice to each other of any claim of copyright, patent, trade secret, or other intellectual property infringement arising out of services under this OCC.

9.5 Media Releases or Pronouncements. Outside Counsel understands that Agency does not endorse any vendor, commodity, or service. Outside Counsel, its employees, representatives, agents, or subcontractors may not participate in any media event or issue any media release, advertisement, publication, editorial, article, or public pronouncement that pertains to this OCC or the services or project to which this OCC relates or that mentions Agency without the prior written approval of Agency.

9.6 Written Notice Delivery. Any notice required or permitted to be given under this OCC by one party to the other party shall be in writing and shall be given and deemed to have been given immediately if delivered in person to the recipient's address set forth in this subsection, or on the date shown on the certificate of receipt if placed in the United States mail, postage prepaid, by registered or certified mail with return receipt requested, addressed to the receiving party at the address hereinafter specified.

9.6.1 Outside Counsel's Address. The address for Outside Counsel for all purposes under this OCC and for all notices hereunder shall be:

Brandon Cammack
Cammack Law Firm PLLC
4265 San Felipe St #1100
Houston, Texas 77027
Phone: 713-300-9291
Email: brandon@cammacklawfirm.com

9.6.2 OAG's Address. The addresses for the OAG for all purposes under this OCC, except as provided by Subsection 6.1.3, and for all notices hereunder shall be:

Office of the Attorney General
General Counsel Division, Mail Code 074
Post Office Box 12548
Austin, Texas 78711-2548

9.7 Dispute Resolution.

9.7.1 The dispute resolution process provided for in Chapter 2260 of the Texas Government Code shall be used, as further described herein, by Agency and by Outside Counsel to attempt to resolve any claim for breach of this OCC made by Outside Counsel.

9.7.2 Outside Counsel's claims for breach of this OCC that the Parties cannot resolve in the ordinary course of business shall be submitted to the negotiation process provided in Chapter 2260, Subchapter B, of the Government Code. To initiate the process, Outside Counsel shall submit written notice, as required by Subchapter B, to the Agency's contact with a copy to the Texas First Assistant Attorney General or his/her designee. Said notice shall specifically state that the provisions of Chapter 2260, Subchapter B, are being invoked. A copy of the notice shall also be given to all other representatives of Outside Counsel and Agency otherwise entitled to notice under this OCC. Compliance by Outside Counsel with Subchapter B is a condition precedent to the filing of a contested case proceeding under Chapter 2260, Subchapter C, of the Government Code.

9.7.3 The contested case process provided in Chapter 2260, Subchapter C, of the Texas Government Code is Outside Counsel's sole and exclusive process for seeking a remedy for any and all alleged breaches of this OCC by Agency or the State of Texas if the Parties are unable to resolve their disputes under Section 9.7.2 of this OCC.

9.7.4 Compliance with the contested case process provided in Chapter 2260, Subchapter C, of the Texas Government Code is a condition precedent to seeking consent to sue from the Legislature under Chapter 107 of the Texas Civil Practices and Remedies Code. Neither the execution of this OCC by Agency nor any other conduct of any representative of Agency relating to this OCC shall be considered a waiver of sovereign immunity.

9.7.5 The submission, processing, and resolution of Outside Counsel's claim is governed by Title 1, Chapter 68 of the Texas Administrative Code adopted by the OAG pursuant to Chapter 2260, as currently effective, hereafter enacted, or subsequently amended, shall govern.

9.8 Conflict of Interest.

9.8.1 Neither local funds nor funds appropriated by the General Appropriations Act may be expended to pay the legal fees or expenses of Outside Counsel in representing Agency in any matter if Outside Counsel is representing a plaintiff in a proceeding seeking monetary damages from the State of Texas or any of its agencies. For these purposes, "proceedings seeking monetary damages" do not include actions for tax refunds, compensation for exercise of eminent domain authority, or reimbursement of costs of litigation and attorney's fees.

9.8.2 Neither local funds nor funds appropriated by the General Appropriations Act may be used to pay the legal fees or expenses of Outside Counsel under this OCC if Outside Counsel

currently represents, has represented in the six months preceding this OCC, or will represent in the six months following the termination of this OCC, a client before Agency.

9.8.3 Outside Counsel shall regularly conduct conflicts analyses on its interests and those of its clients and any subcontractor and immediately disclose, in writing, to Agency any actual or potential conflict with respect to Agency or the State of Texas.

9.8.4 Outside Counsel has a continual and ongoing obligation to immediately notify Agency, in writing, upon discovery of any actual or potential conflict to Agency or the State of Texas.

9.9 Taxes. This OCC shall not be construed so as to supersede the laws of the United States or the State of Texas that accord the State of Texas, Agency, and all departments, agencies, and instrumentalities of the State of Texas exemptions from the payment(s) of all taxes of whatever kind. To the extent allowed by law, Agency will provide, upon the request of Outside Counsel during this OCC Term, all applicable tax exemption documentation.

9.10 Signatories. Having agreed to the terms herein, the undersigned signatories hereby represent and warrant that they have authority to enter into this OCC and are acting in their official capacities.

9.11 Applicable Law and Venue. This OCC is made and entered into in the State of Texas, and this OCC and all disputes arising out of or relating to this OCC shall be governed by the laws of the State of Texas, without regard to any otherwise applicable conflict of law rules or requirements.

Outside Counsel agrees that Agency and the State of Texas do not waive any immunity (including, without limitation, state or federal sovereign immunity). Outside Counsel further agrees that any properly allowed litigation arising out of or in any way relating to this OCC shall be commenced exclusively in a court of competent jurisdiction in Travis County, Texas. Outside Counsel thus hereby irrevocably and unconditionally consents to the exclusive jurisdiction of a court of competent jurisdiction in Travis County, Texas for the purpose of prosecuting or defending such litigation. Outside Counsel hereby waives and agrees not to assert: (a) that Outside Counsel is not personally subject to the jurisdiction of a court of competent jurisdiction in Travis County, Texas, (b) that the suit, action or proceeding is brought in an inconvenient forum, (c) that the venue of the suit, action or proceeding is improper, or (d) any other challenge to jurisdiction or venue.

9.12 Amendments. This OCC, including addenda hereto, may be amended only upon written agreement signed by the Parties.

9.13 Severability/Interpretation. The fact that a particular provision in this OCC is held under any applicable law to be void or unenforceable in no way affects the validity of other provisions, and this OCC will continue to be binding on both Parties. Any provision that is held to be void or unenforceable will be interpreted by the Parties or the courts to be replaced with language that is as close as possible to the intent of the original provision so as to effectuate the

purpose of this OCC. Any ambiguous or conflicting terms shall be interpreted and construed in such a manner as to accomplish the purpose of this OCC.

9.14 Insurance Required. Outside Counsel will undertake reasonable efforts to obtain and maintain during this OCC Term malpractice insurance in an amount not less than $10,000.00 or the amount specified in Section 4.1 of this OCC, whichever is more.

Further, Outside Counsel agrees to give notice to Agency in the event any amount of malpractice insurance is canceled. Outside Counsel also agrees to furnish to Agency certified copies of such insurance policies when requested. Outside Counsel agrees that no claim by Agency and the State of Texas for damages resulting from breach of Outside Counsel's duties to Agency under this OCC shall be limited to the amount of malpractice insurance maintained by Outside Counsel.

9.15 Additional Terms. Any additional terms agreed to by Outside Counsel and Agency shall be listed in an optional Addendum C. These terms shall not be inconsistent with or contrary to the Contract terms listed above, and nothing in Addendum C shall remove or modify terms contained in Sections 1–9. In the event of any conflict, ambiguity or inconsistency between the terms of Addendum C and Sections 1–9 of this Outside Counsel Contract, Sections 1–9 shall take precedence and control.

9.16 Counterparts. This OCC may be executed in multiple counterparts.

IN WITNESS THEREOF, THE PARTIES HAVE SIGNED AND EXECUTED THIS OCC.

Cammack Law Firm PLLC

By: Brandon Cammack
4265 San Felipe St #1100
Houston, Texas 77027
Phone: 713-300-9291
Email: brandon@cammacklawfirm.com

Office of the Attorney General of Texas

Attorney General or designee

OUTSIDE COUNSEL CONTRACT

OAG Contract No. _____

Addendum A

Services

The Travis County District Attorney's Office referred a criminal complaint to the OAG. The District Attorney's Office requested that the OAG conduct a review of the allegations, which include complaints of potential criminal violations made by certain state and federal employees.

State law allows the OAG to provide assistance to a prosecutor's office, such as the Travis County District Attorney's Office, in the prosecution of criminal cases. *See* Tex. Gov't Code §§ 402.028(a); 41.102(b).

Outside Counsel will conduct an investigation, under the authority of the OAG, of the criminal allegations contained in the complaint referred to the OAG by the District Attorney's Office and shall prepare a report documenting any potential criminal charges that may be discovered in the course of the investigation. Notwithstanding anything to the contrary contained in this OCC, Outside Counsel shall conduct its investigation only as consistent with the complaint referred to the OAG and only as directed by the OAG. Except for Outside Counsel's duty to provide a post-investigation report, this OCC expressly excludes legal services relating to any other post-investigation activities, including, but not limited to, indictment and prosecution.

OUTSIDE COUNSEL CONTRACT

OAG Contract No. _____

Addendum B
Rates

Attorneys working on Agency matters, including necessary and appropriate personal appearances before the Court, as requested and authorized by Agency Counsel shall be paid according to the following terms:

Name(s) of Lead Counsel: Brandon Cammack

Timekeeper classification	Hourly Rate (in United States Dollars)
Brandon Cammack	$300.00

Billing Period. The billing period for this OCC shall be: **Monthly**

Travel Rate. An attorney's travel rate may not exceed one-half of that attorney's hourly rate listed above. If no hourly rate is identified above or no travel rate(s) listed below, Outside Counsel may not charge Agency for time spent traveling on Agency matters.

Return to:
Travis County District Attorney's Office
Special Prosecution Unit
416 W. 11th Street, Suite 200
Austin, Texas 78701

Austin Police Department
Travis County Sheriff's Office
Travis County District Attorney's Office
(512) 854-9530
FAX: 854-4810

REQUEST TO INVESTIGATE

This complaint form is provided to you with the understanding that this office may conduct investigations to determine if a firm or person is in violation of Penal Laws of the State of Texas. We strongly recommend that you consult with your own private attorney to determine your legal rights and civil remedies in this matter.

(PLEASE TYPE OR PRINT)

I. INFORMATION ABOUT THE PARTY OR FIRM COMPLAINED OF:
See attached.

_____
Full Name

_____
Address (Street, City, State, Zip) *Telephone*

_____
Race *Sex* *Height* *Weight* *Hair* *Eyes* *D.O.B or Approximate Age*

_____
Driver's License # *D.L. State* *Social Security Number*

II. COMPLAINING PARTY AND WITNESS:
See attached.

_____
Your Full Name (and Company Name, if applicable)

_____
Address (Street, City, State, Zip)

_____
Telephone Numbers (Office & Home) *D.O.B.* *Driver's License #* *D.L. State*

_____
WITNESS – Name

_____
Address and Telephone

_____
WITNESS – Name

_____
Address and Telephone

III. INFORMATION ABOUT ALLEGED OFFENSE:
See attached.

Date of alleged offense: _____

Where did the offense occur: _____

What property was taken: _____

Total value of property taken: _____

What, if any, property have you recovered: _____

_____

What is the business and/or personal relationship between you and the party or firm complained of:

_____

_____

Have you discussed this matter with the person or firm: _____ Their reply: _____

_____

_____

Did you sign a contract: _____ If so, enclose a copy.

What other agencies have you reported this matter to: _____

(PLEASE TYPE OR PRINT)

IV. FACT DESCRIPTION: *(attach additional pages as needed)*

Describe the exact nature of your complaint below and on additional sheets, if necessary. Please be complete. Include the name of the individual that you dealt with and dates. If possible, recite facts in the order in which they occurred. You must provide copies of all relevant documents (see attached list). **Keep all originals in a safe place in the event they are needed for court purposes.**

See attached.

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

I certify that the information that I have furnished the District Attorney in this complaint is true and correct to the best of my knowledge and belief, and is furnished for the sole purpose of instituting a criminal prosecution where the investigation indicates criminal activity and not for the purpose of recovering personal property or any other thing of value. I authorize the District Attorney to use the information given in any manner that he deems necessary and proper. I further certify that I understand that the District Attorney's Office cannot give me legal advice or act as my attorney. I also understand that the completion of this form will not constitute the filing of criminal charges. I have not withheld any information pertinent to this complaint.

SIGNATURE OF COMPLAINTANT

Natin Paul
PRINTED NAME OF COMPLAINTANT

SUBSCRIBED AND SWORN TO before me this the _____ day of _____, A.D., 20____.

(Seal)

Notary Public in and for the State of Texas
My Commission Expires: _____

Information needed from you to begin an investigation may include the following, please send as many of these documents as you have available:

1) In the fact description, be very detailed about what specifically you are alleging (attach additional sheets as necessary.)

2) If checks, drafts or other bank items were used in the commission of the alleged offense include:

   a) Copies of bank statements

   b) Copies of the front and back of checks

   c) Copies of wire orders

   d) Checkbook registers, check stubs, accounting ledgers, and/or complete backup copies of QuickBooks or Peachtree accounting software (include version number). If you use another type of software, check with the assigned investigator prior to sending a backup file.

   e) Identification of all of the victim's bank accounts.

3) If the victim is a business or association:

   a) Copies of documents used for the legal formation of the business (partnership agreements, articles of incorporation, etc.)

   b) Description of business, including type of operation, names of owners or partners, names of directors and contact information (include on a separate sheet).

   c) The affiant's position within the business

4) If the party about which you are complaining is/was an employee:

   a) Complete personnel file, including application, resume, IRS Forms W2 and W4, direct deposit information, copies of paychecks, list of all direct deposits, copies of reimbursements, time sheets, and relevant correspondence.

5) Promissory notes, security agreements, or loan agreements

6) All civil pleadings and orders related to the actions about which you are complaining.

7) Copies of any receipts or invoices involved

8) Copies of all contracts or written agreements between involved parties

9) Copies of any pertinent written or email correspondence between parties

10) A forensic audit

I. INFORMATION ABOUT THE PARTY OR FIRM COMPLAINED OF:

Dorsey Bryan ("Bryan") Hardeman
[redacted]

William Bryan ("Will") Hardeman
[redacted]

Christopher L. Dodson
[redacted]

Stephen Benesh
[redacted]

Jason Cohen
[redacted]

Mark Riley
[redacted]

Justin Bayne
[redacted]

Tony M. Davis
[REDACTED]

Ray Chester
[redacted]

Gregory Milligan
[redacted]

[redacted]

Dilum Chandrasoma

[redacted]

II. COMPLAINING PARTY AND WITNESS:

Natin "Nate" Paul

[redacted]

Witness

Jeremy Stoler

[redacted]

III. INFORMATION ABOUT ALLEGED OFFENSE:

Date of Alleged Offense: January 2020 – Ongoing

Where did the offense occur: Austin, Travis County, Texas

IV. FACT DESCRIPTION: *(attach additional pages as needed)*

Describe the exact nature of your complaint below and on additional sheets, if necessary. Please be complete. Include the name of the individual that you dealt with and dates. If possible, recite facts in the order in which they occurred. You must provide copies of all relevant documents (see attached list). **Keep all originals in a safe place in the event they are needed for court purposes**.

This complaint is regarding a fraudulent financial scheme to defraud mortgage borrowers that is currently an ongoing conspiracy orchestrated by Bryan Hardeman, Will Hardeman, Justin Bayne, Mark Riley, Christopher Dodson, Steve Benesh, Jason Cohen, Gregory Milligan, Ray Chester, Dilum Chandrasoma, and Judge Tony Davis. The mortgage borrowers that are being defrauded are single-purposes LLC's owning properties that are owned/controlled by myself, Natin "Nate" Paul and/or my company, World Class Holdings.

Starting with the first loan purchase that occurred in May 2020, the conspirator group led by Bryan and Will Hardeman of the Hardeman Family Joint Venture have acquired mortgage loans from banks that were the mortgage holders on 8 different properties in Austin, San Antonio, and Plano, Texas.

These individual loan purchases all shared very concerning characteristics from an "anonymous LLC loan purchaser". The loans were all at very low loan-to-value ratios and it became very clear the new "anonymous lender" was moving in an aggressive manner to call loans in to default and pursue remedies.

These remedies include trying to push for foreclosure on the commercial properties when such legal action was prohibited by orders of the City of Austin, Travis County, and the state of Texas.

Our team conducted extensive investigation to unearth the circumstances behind these loan purchases and the principals behind the anonymous LLC but were unable to find the details we sought through the legal process while the anonymous lender LLC continued an aggressive litigation strategy against the borrowers.

However, that changed when I received a phone call from our lender on one of our properties in downtown Austin. That lender is Alan Nalle.

Alan Nalle called me on Wednesday, September 16th, to let me know of a phone call he received the week prior from Bryan Hardeman. Bryan Hardeman disclosed to Alan Nalle that he had purchased 8 other loans on properties I owned, and that he wanted to acquire Alan Nalle's loan on another one of our properties. Alan told him he would only ever consider selling his loan if a buyer were to pay a large premium, which would not make economic sense for a buyer since they would take a loss when we pay off the loan if the buyer of the loan paid a premium. Bryan Hardeman proceeded to tell Mr. Nalle that he would be willing to pay a premium because the property was worth so much more than the loan balance, and if he bought the loan and proceeded to auction at foreclosure, that all proceeds would go to him as the new loan owner.

Mr. Nalle corrected Mr. Hardeman that he would technically only be allowed to collect on the loan principal balance and unpaid interest in a scenario as he outlined, to which Mr. Hardeman disagreed. He reiterated to Mr. Nalle that when he auctioned the property that he would retain all the proceeds – essentially stating he believed he was buying "ownership" of these properties by solely buying the loans. This raised a red flag to Mr. Nalle. Bryan Hardeman was very confident that he was correct in this assertion and informed Alan Nalle that he was proceeding with this same strategy with the other loans he had purchased.

On this initial call, Bryan Hardeman continued to use the word "we" as he described the actions taken to buy loans and pursue the strategy. Alan Nalle asked Bryan who is "we", and his response was "my family". He told Alan Nalle that his son, Will Hardeman, was "running the deal" and that the capital behind these loan purchases were "his family's money".

Bryan Hardeman told Alan Nalle that he was "using a law firm out of Houston" to pursue these loan purchases, which matched up with the lawyers that were representing the anonymous LLC Lenders: lawyers from Bracewell's Houston office and Mark Riley out of Houston. These anonymous LLC's have only ever presented Justin Bayne as the sole "business person" representing the LLC's as Justin Bayne is named as the sole Manager of the entities. The lawyers have gone to extreme efforts to conceal the identity of the partners behind these anonymous LLC's.

Bryan Hardeman claimed to Alan Nalle on this call many times with pride that he had already purchased approximately $43 million in loans. This amount is consistent with the total loan balances of the 8 loans purchased by anonymous lender LLC's,

Bryan Hardeman made many additional disparaging comments about me that were all false to Alan Nalle on this call to dissuade him from continuing to be my lender and as a motivation for him to sell his loan to him. This is the same strategy he and his co-conspirators did in calling my other lenders where they have purchased and/or attempted to purchase loans. Hardeman claimed to Alan Nalle that he learned of some of these issues from Robert F. Smith, which we believe to be a false statement. He knowingly

made false statements to banks to induce them in to sell him loans on properties for him to undertake this complex fraudulent scheme to steal the properties.

Bryan Hardeman insinuated on this call with Alan Nalle that he was working on this loan purchase strategy with Dilum Chandrasoma, the former President of the Mitte Foundation. On a call to Dani Tristan, Bryan Hardeman stated he has been working with Ray Chester, the lawyer for the Mitte Foundation.

Bryan Hardeman said he was hoping that he would be happy to own the properties at the loan purchase amounts or if someone bid it up to a high amount since he would make all the money someone would pay in an auction – which is incorrect. Bryan Hardeman was steadfast that all the proceeds from the sale of a property would go to him as the loan holder.

I have a very strong relationship with Alan Nalle and he is a well-respected businessman in Austin. Bryan Hardeman was unaware that Alan Nalle and I have a very good relationship of many years and that Alan Nalle has been very pleased with us as a borrower. Alan Nalle called me after receiving this call from Bryan Hardeman because he said the call was very strange and concerning. After he informed me of the details of the call, he let me know that he would call me if he heard from Bryan Hardeman again. By way of background, Alan Nalle has known Bryan Hardeman for over 50 years.

On Friday, September 18th, I received another call from Alan Nalle. He called to let me know he received another call from Bryan Hardeman that was very shocking.

Bryan Hardeman called Alan Nalle as a follow up to their initial call and proceeded to tell him of his real plan and his intentions in making these loan purchases and the details of his complex scheme. On this call, Bryan Hardeman outlined the complex fraudulent scheme that he and his co-conspirators are actively pursuing to take these properties involving all of the named subjects of this complaint.

Bryan Hardeman called to let him know that in the Bankruptcy Court for the Western District of Texas that the Bankruptcy Judge had dismissed the bankruptcy cases on 2 properties. These 2 properties are 2 where the Mitte Foundation is a small limited partner and Gregory Milligan has been involved as a receiver at Mitte's direction.

Bryan then told Alan Nalle that the bankruptcy judge for the US Courts system of the Western District, Tony Davis, lives in Austin but has an apartment in Houston because his wife is undergoing a lung transplant. Bryan told Alan that his lawyers in Houston are good friends with Judge Tony Davis and that they have cut a "deal" with Judge Davis and have him on board with this elaborate scheme.

According to Bryan Hardeman, his lawyers are going to move to consolidate the loans that he has purchased in to a single bankruptcy case in Judge Davis' court in the "coming week or two". They will then file a motion to appoint Gregory Milligan as a receiver/trustee over these properties to act at his direction. According to Bryan Hardeman, this conspiracy and collusion between Hardeman, his lawyers, and Milligan was proposed to Judge Tony Davis and that Judge Davis has told them that if they file such actions, he would approve the motion and go along with their plan. This "side agreement" allegedly took place in a meeting between his lawyers and Judge Davis in Houston.

This "move", as Bryan Hardeman calls it, is Hardeman's grand plan to remove me from control of my own properties by having Judge Tony Davis approve the insertion of Gregory Milligan. He then states that Milligan is on board with his plan to let him move to auction the assets and steal the equity in the properties in this orchestrated scheme. Bryan Hardeman stated to Alan Nalle that he and Gregory Milligan have a coordinated effort for this plan.

We have seen the anonymous lender LLC in one of the loans he has purchased (4th and Colorado) make a motion to attempt to appoint Gregory Milligan as receiver over control of the property. However, we put that property in to Chapter 11 bankruptcy to ward off the predatory lender. Hardeman's scheme he outlined to Nalle would entail him bringing Milligan in to the bankruptcy to work at his direction to disadvantage and steal from the borrower.

Bryan Hardeman then told Alan Nalle another shocking statement. Hardeman told Nalle that he has previously foreclosed on loans to take back properties against other property owners where third-party bidders showed up to purchase the properties. Hardeman said he had his lawyers present at the auctions to talk to the third-party bidders and tell them to stop bidding on the loans because the Hardeman entities were going to bid the loan amount to take ownership of the property at the loan balance and they would then turn around and sell the property to the third party bidder at a price slightly lower than they would pay in the legal foreclosure auction bid process. This highly illegal "rigged auction" process, coordinated by Hardeman and his lawyers, is the reason he stated to Nalle on the previous call that he expects to be the beneficiary of all sale proceeds when he auctions properties as a remedy. This is the strategy Bryan Hardeman is pursuing in this fraudulent scheme to steal the properties.

Alan Nalle then told Bryan Hardeman, "Why would a bidder agree to this on the courthouse steps and act on a verbal agreement. This sounds like a conspiracy to defraud the landowner of what his part of the deal." Bryan Hardeman responded, "I have done this before. It works."

Alan Nalle stated he believed Bryan Hardeman told him what he was doing because they have a 50-year relationship. Alan Nalle stated he believed Bryan also told him this because he expects Bryan's next call will be to Alan to ask if he wants to partner with him on these loan purchases he made. Alan Nalle stated he would have no interest if such an offer is made. Alan Nalle stated on the call that Bryan Hardeman's scheme is a "clear conspiracy to defraud the landowners" and is "illegal". Even more alarming is that this a scheme he has completed before and gotten away with it.

Mark Riley, one of Hardeman's Houston lawyers, serves as General Counsel to the anonymous LLCs that own the loans. He has been named as the "substitute trustee" to handle the auctions in the event of a foreclosure auction and will be the party that is running the rigged bidding auctions.

Alan Nalle stated Bryan Hardeman was "braggadocious" in explaining his concocted scheme to defraud me and was bragging about having done this to other landowners before.

Bryan Hardeman reiterated on this call to Alan Nalle that he owns $43 million in loans on properties I own and that he is actively working to acquire another loan on a shopping center I own in San Antonio and that he fully expects to close on that loan purchase.

I informed Alan Nalle that the properties I own that have the $43 million in loans are valued at approximately $200 million. Therefore, my equity in the properties is approximately $157 million.

Bryan Hardeman's complex fraudulent scheme is to steal this $150+ million in equity in these properties because he and his lawyers have struck an illegal deal with the bankruptcy Judge to consolidate loans in to a single bankruptcy and to appoint Gregory Milligan to be in charge prior to any of this ever actually occurring in the judicial process. Hardeman's plan is to then take ownership of the properties by moving to "auction" the properties in the "rigged bidding" scheme with his lawyers which will give him the opportunity to credit bid and take fee simple ownership of $200 million in properties for the $43 million loan balance which is approximately what he paid for the loans. Alan Nalle stated that Bryan

Hardeman's intention is clearly to "take the difference between the value of the properties and the loans – he is playing to take your equity"

Bryan Hardeman clearly stated he purchased these loans with the intention of completing this fraudulent scheme as he outlined. He has already taken actions in these separate legal disputes on the respective properties which show that this plan is well underway. His intention with purchasing these loans is to defraud the borrower by colluding with his lawyers, the Judge, the proposed receiver/trustee, and potential bidders to take ownership of all of the properties and to deprive me of my legal and constitutional rights.

This fraudulent financial scheme has been orchestrated by Bryan and Will Hardeman on behalf of the Hardeman Family Joint Venture. The lawyers that Hardeman claims have struck the illegal side deal with Judge Davis, and that will be handling the illegal rigged bidding to steal the properties are: Christopher Dodson, Steve Benesh, Jason Cohen, and Mark Riley. Hardeman's partners in these LLC's are Justin Bayne and Mark Riley. The bankruptcy Judge that, according to Hardeman, has agreed to this scheme is Judge Tony M. Davis. Gregory Milligan has conspired with the Hardeman group by agreeing to go along with the scheme by serving as a proposed "neutral" receiver/trustee that will be appointed by Judge Davis. Dilum Chandrasoma and Ray Chester are co-conspirators with the Hardeman group and provide the link between the Hardemans and Milligan through their prior relationship with Milligan. According to Bryan Hardeman statements, all of these parties are aware of his plan and are playing their respective roles in this fraudulent scheme.

October 1, 2020

Dear Mr. Simpson:

This letter is intended to serve as notice to the Office of the Attorney General that on September 30, 2020, we, the undersigned individuals, reported to an appropriate law enforcement authority a potential violation of law committed by Warren K. Paxton, Jr., in his official capacity as the current Attorney General of Texas. We have a good faith belief that the Attorney General is violating federal and/or state law, including prohibitions relating to improper influence, abuse of office, bribery, and other potential criminal offenses. Each signatory below has knowledge of facts relevant to these potential offenses and has provided statements concerning those facts to the appropriate law enforcement authority. Additionally, today, October 1, 2020, the undersigned notified the Attorney General via text message that they have reported the violations to the appropriate law enforcement authority. A copy of the text message is attached hereto.

Sincerely,

Jeffrey C. Mateer
First Assistant Attorney General

Ryan L. Bangert
Deputy First Assistant Attorney General

James Blake Brickman
Deputy Attorney General for Policy & Strategy Initiatives

Lacey E. Mase
Deputy Attorney General for Administration

Darren L. McCarty
Deputy Attorney General for Civil Litigation

J. Mark Penley
Deputy Attorney General for Criminal Justice

Ryan M. Vassar
Deputy Attorney General for Legal Counsel

THE STATE OF TEXAS

CAUSE NO. D-1-GN-20-006861

JAMES BLAKE BRICKMAN, DAVID MAXWELL, J. MARK PENLEY, and RYAN M. VASSAR,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
v.	§	TRAVIS COUNTY, TEXAS
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS,	§	
Defendant.	§	250TH JUDICIAL DISTRICT

SUBPOENA FOR HEARING—KEN PAXTON

TO: Defendant Office of the Attorney General of Texas, 300 W. 15th St., Austin, TX 78701 through its counsel of record.

GREETINGS:

YOU ARE HEREBY COMMANDED TO SUMMON Ken Paxton to appear remotely via Zoom video conference on Tuesday, February 16, 2021 at 9:00 a.m. before the Presiding Judge, to attend and give testimony at a hearing regarding the Temporary Injunction Hearing in this case, and to remain in attendance until lawfully discharged.

The Zoom Information for the hearing will be provided by the court to all counsel of record on February 12, 2021. The undersigned will provide a link and password to the Zoom hearing in advance of the witness's required attendance. Only the counsel of record, the parties, witnesses, and their attorneys are allowed to have the Zoom link and password. Dissemination of the Zoom link and password to any other person is strictly prohibited. For purposes of this anticipated testimony, the witness must be prepared to utilize a laptop or desktop computer with an internet connection, video camera, microphone, and speaker capabilities. If this will be an issue for the

witness, the witness must let the undersigned know immediately such that alternative accommodations may be made.

FAILURE TO OBEY THIS SUBPOENA MAY BE TREATED AS A CONTEMPT OF COURT. TEXAS RULE OF CIVIL PROCEDURE 176.8 PROVIDES AS FOLLOWS: "FAILURE BY ANY PERSON WITHOUT ADEQUATE ESCUSE TO OBEY A SUBPOENA SERVED UPON THAT PERSON MAY BE DEEMED A CONTEMPT OF THE COURT FROM WHICH THE SUBPOENA IS ISSUED OR A DISTRICT COURT IN THE COUNTY IN WHICH THE SUBPOENA IS SERVED, AND MAY BE PUNISHED BY FINE OR CONFINEMENT, OR BOTH.

This Subpoena is issued at the request of Plaintiff David Maxwell, whose lead counsel of record is Carlos R. Soltero, of Austin, Texas.

Date of Issuance: February 10, 2021 **SUBPOENA ISSUED BY CARLOS R. SOLTERO**

/s/ *Thomas A. Nesbitt*
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Facsimile: 877.851.6384

ATTORNEYS FOR PLAINTIFF RYAN M. VASSAR

RETURN OF SUBPOENA

I certify that I served the attached Subpoena by delivering a copy and the required fee of $_____ to the witness, in person, at (address):

_____

_____

On the _____ (day) of _____ (month), at _____ a.m./p.m. (time). My fee for this service is $_____.

_____
Officer

CERTIFICATE OF SERVICE

I certify the foregoing document has been served on the following counsel of record via email on February 10, 2021:

William S. Helfand
bill.helfand@lewisbrisbois.com
Sean O'Neal Braun
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24 Greenway Plaza, Suite 1400
Houston, Texas 77046

/s/ Carlos R. Soltero
Carlos R. Soltero

THE STATE OF TEXAS

CAUSE NO. D-1-GN-20-006861

JAMES BLAKE BRICKMAN, DAVID MAXWELL, J. MARK PENLEY, and RYAN M. VASSAR,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
v.	§	TRAVIS COUNTY, TEXAS
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS,	§	
Defendant.	§	250TH JUDICIAL DISTRICT

SUBPOENA FOR HEARING—BRENT WEBSTER

TO: Defendant Office of the Attorney General of Texas, 300 W. 15th St., Austin, TX 78701 through its counsel of record.

GREETINGS:

YOU ARE HEREBY COMMANDED TO SUMMON Brent Webster to appear remotely via Zoom video conference on Tuesday, February 16, 2021 at 9:00 a.m. before the Presiding Judge, to attend and give testimony at a hearing regarding the Temporary Injunction Hearing in this case, and to remain in attendance until lawfully discharged.

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This Subpoena is issued at the request of Plaintiff David Maxwell, whose lead counsel of record is Carlos R. Soltero, of Austin, Texas.

Date of Issuance: February 10, 2021 **SUBPOENA ISSUED BY CARLOS R. SOLTERO**

/s/ *Thomas A. Nesbitt*
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/s/ *Don Tittle*
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ATTORNEYS FOR PLAINTIFF RYAN M. VASSAR

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/s/ Carlos R. Soltero
Carlos R. Soltero

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February 12, 2021

File No. 49442.02

VIA ELECTRONIC MAIL ONLY

Hon. Amy Clark Meachum
State District Judge
Heman Marion Sweatt Travis County Courthouse
1000 Guadalupe, Third Floor
Austin, Texas 78701
E-Mail: 201.submission@traviscountytx.gov

Re: Cause No. D-1-GN-20-006861, James Blake Brickman, et al. v. Office of the Attorney General of the State of Texas, In the 250th Judicial District Court of Travis County, Texas

Your Honor:

On behalf of the Office of the Attorney General of the State of Texas, I write to respectfully request that the Court provide a three-hour recess between its hearing on OAG's plea to the jurisdiction and its hearing on plaintiffs' application for a temporary injunction.

The Office of the Attorney General is sensitive to the importance of judicial economy; after all, the Office is responsible, in whole or part, for over 37,000 civil matters at present—not including criminal or child-support-related matters. But while judicial economy is an important question, it cannot abrogate rights granted to all litigants under the appropriate rules of civil and appellate procedure, nor can it abrogate the special solicitude that the Legislature has granted OAG as a governmental litigant.

This posture of this litigation implicates two of those rights. First, OAG is entitled to sovereign immunity—which is both an immunity from liability and from process. *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002). Second, OAG is entitled to a stay of further proceedings pending appeal if this Court determines OAG is not entitled to immunity. Tex. Civ. Prac. & Rem. Code §§ 51.014(a)(8)(b).

The Court's combined hearing schedule may implicate one or both of these rights. If the Court rules against OAG on immunity, then OAG ought be provided a short break to decide to file an immediate appeal to exercise its automatic-stay rights, if appropriate. Conversely, if the Court opts not to rule on OAG's immunity challenge prior to plaintiffs' temporary-injunction hearing, OAG should have an opportunity to vindicate its immunity from process in the Third Court of Appeals, or, if necessary, the Supreme Court. In either event, a three-hour recess will not prejudice plaintiffs, who will enjoy the balance of Tuesday and all of Wednesday and Thursday for their hearing, as necessary.

For the reasons presented in the contemporaneously filed Motion to Quash, its Motion to Dismiss, and the other papers filed with the Court, OAG respectfully reiterates to this Court the importance that this Court rule on its jurisdiction prior to hearing plaintiffs' application for a temporary injunction. While the Court no doubt enjoys great latitude in managing its heavy workload, that latitude cannot itself abrogate a governmental litigant's claim to immunity—or worse, do so while denying effective appellate review. At the Court's request, OAG would be glad to more fully brief this matter for the Court's ruling on Tuesday

Respectfully,

William S. Helfand of
LEWIS BRISBOIS BISGAARD & SMITH LLP

WSH:sb

cc: Vicky Mescher
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CAUSE NO. D-1-GN-20-006861

JAMES BLAKE BRICKMAN, DAVID MAXWELL, J. MARK PENLEY, and RYAN M. VASSAR Plaintiffs,	§ § § § §	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS	§ §	
Defendant.	§	250TH JUDICIAL DISTRICT

PLAINTIFF'S NOTICE OF FILING NON-PARTY SUBPOENAS

Plaintiff David Maxwell files hearing subpoenas to nonparties Ken Paxton, Brent Webster, and Jeff Mateer.

Respectfully submitted,

/s/ *Carlos R. Soltero*
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ATTORNEYS FOR PLAINTIFF DAVID MAXWELL

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via the Court's e-filing system as provided by the rules on February 12, 2021 on counsel of record for all parties.

/s/ Carlos R. Soltero
Carlos R. Soltero

THE STATE OF TEXAS

CAUSE NO. D-1-GN-20-006861

JAMES BLAKE BRICKMAN, DAVID MAXWELL, J. MARK PENLEY, and RYAN M. VASSAR,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
v.	§	TRAVIS COUNTY, TEXAS
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS,	§	
Defendant.	§	250TH JUDICIAL DISTRICT

SUBPOENA FOR HEARING—KEN PAXTON

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This Subpoena is issued at the request of Plaintiff David Maxwell, whose lead counsel of record is Carlos R. Soltero, of Austin, Texas.

Date of Issuance: February 10, 2021 **SUBPOENA ISSUED BY CARLOS R. SOLTERO**

/s/ *Thomas A. Nesbitt*
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/s/ Carlos R. Soltero
Carlos R. Soltero

THE STATE OF TEXAS

CAUSE NO. D-1-GN-20-006861

JAMES BLAKE BRICKMAN, DAVID MAXWELL, J. MARK PENLEY, and RYAN M. VASSAR,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS,	§	
Defendant.	§	250TH JUDICIAL DISTRICT

SUBPOENA FOR HEARING—BRENT WEBSTER

TO: Defendant Office of the Attorney General of Texas, 300 W. 15th St., Austin, TX 78701 through its counsel of record.

GREETINGS:

YOU ARE HEREBY COMMANDED TO SUMMON Brent Webster to appear remotely via Zoom video conference on Tuesday, February 16, 2021 at 9:00 a.m. before the Presiding Judge, to attend and give testimony at a hearing regarding the Temporary Injunction Hearing in this case, and to remain in attendance until lawfully discharged.

The Zoom Information for the hearing will be provided by the court to all counsel of record on February 12, 2021. The undersigned will provide a link and password to the Zoom hearing in advance of the witness's required attendance. Only the counsel of record, the parties, witnesses, and their attorneys are allowed to have the Zoom link and password. Dissemination of the Zoom link and password to any other person is strictly prohibited. For purposes of this anticipated testimony, the witness must be prepared to utilize a laptop or desktop computer with an internet connection, video camera, microphone, and speaker capabilities. If this will be an issue for the

witness, the witness must let the undersigned know immediately such that alternative accommodations may be made.

FAILURE TO OBEY THIS SUBPOENA MAY BE TREATED AS A CONTEMPT OF COURT. TEXAS RULE OF CIVIL PROCEDURE 176.8 PROVIDES AS FOLLOWS: "FAILURE BY ANY PERSON WITHOUT ADEQUATE ESCUSE TO OBEY A SUBPOENA SERVED UPON THAT PERSON MAY BE DEEMED A CONTEMPT OF THE COURT FROM WHICH THE SUBPOENA IS ISSUED OR A DISTRICT COURT IN THE COUNTY IN WHICH THE SUBPOENA IS SERVED, AND MAY BE PUNISHED BY FINE OR CONFINEMENT, OR BOTH.

This Subpoena is issued at the request of Plaintiff David Maxwell, whose lead counsel of record is Carlos R. Soltero, of Austin, Texas.

Date of Issuance: February 10, 2021 **SUBPOENA ISSUED BY CARLOS R. SOLTERO**

/s/ *Thomas A. Nesbitt*
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Telephone: 512.770.4010
Facsimile: 877.851.6384

ATTORNEYS FOR PLAINTIFF RYAN M. VASSAR

RETURN OF SUBPOENA

I certify that I served the attached Subpoena by delivering a copy and the required fee of $_____ to the witness, in person, at (address):

_____

_____

On the _____ (day) of _____ (month), at _____ a.m./p.m. (time). My fee for this service is $_____.

_____
Officer

CERTIFICATE OF SERVICE

I certify the foregoing document has been served on the following counsel of record via email on February 10, 2021:

William S. Helfand
bill.helfand@lewisbrisbois.com
Sean O'Neal Braun
sean.braun@lewisbrisbois.com
24 Greenway Plaza, Suite 1400
Houston, Texas 77046

/s/ Carlos R. Soltero
Carlos R. Soltero

THE STATE OF TEXAS

CAUSE NO. D-1-GN-20-006861

JAMES BLAKE BRICKMAN, DAVID MAXWELL, J. MARK PENLEY, and RYAN M. VASSAR,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
v.	§	TRAVIS COUNTY, TEXAS
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS,	§	
Defendant.	§	250TH JUDICIAL DISTRICT

SUBPOENA FOR HEARING—JEFF MATEER

TO: Jeff Mateer at his place of business, 2001 W. Plano Parkway, Suite 1600, Plano, TX 75075

GREETINGS:

YOU ARE HEREBY COMMANDED TO SUMMON Jeff Mateer to appear remotely via Zoom video conference on Tuesday, February 16, 2021 at 9:00 a.m. before the Presiding Judge, to attend and give testimony at a hearing regarding the Temporary Injunction Hearing in this case, and to remain in attendance until lawfully discharged.

The Zoom Information for the hearing will be provided by the court to all counsel of record on February 12, 2021. The undersigned will provide a link and password to the Zoom hearing in advance of the witness's required attendance. Only the counsel of record, the parties, witnesses, and their attorneys are allowed to have the Zoom link and password. Dissemination of the Zoom link and password to any other person is strictly prohibited. For purposes of this anticipated testimony, the witness must be prepared to utilize a laptop or desktop computer with an internet connection, video camera, microphone, and speaker capabilities. If this will be an issue for the

witness, the witness must let the undersigned know immediately such that alternative accommodations may be made.

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This Subpoena is issued at the request of Plaintiff David Maxwell, whose lead counsel of record is Carlos R. Soltero, of Austin, Texas.

Date of Issuance: February 12, 2021 **SUBPOENA ISSUED BY CARLOS R. SOLTERO**

/s/ *Thomas A. Nesbitt*
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ATTORNEYS FOR PLAINTIFF J. MARK PENLEY

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Telephone: 512.770.4010
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ATTORNEYS FOR PLAINTIFF RYAN M. VASSAR

RETURN OF SUBPOENA

I certify that I served the attached Subpoena by delivering a copy and the required fee of $_____ to the witness, in person, at (address):

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_____

On the _____ (day) of _____ (month), at _____ a.m./p.m. (time). My fee for this service is $_____.

_____
Officer

CERTIFICATE OF SERVICE

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William S. Helfand
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Sean O'Neal Braun
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24 Greenway Plaza, Suite 1400
Houston, Texas 77046

/s/ Carlos R. Soltero
Carlos R. Soltero

Cause No. D-1-GN-20-006861

James Blake Brickman, *et al.*, Plaintiffs, v. **Office of the Attorney General of Texas,** Defendant.	**In the District Court of** **Travis County, Texas** **250th Judicial District**

Office of the Attorney General of Texas's Motion to Quash Plaintiff Maxwell's Subpoenas and Motion for Entry of Protective Order

On February 10, 2021, Plaintiff David Maxwell attempted to serve on the Office of the Attorney General subpoenas purporting to compel Attorney General Warren Kenneth Paxton and First Assistant Attorney General Brent Webster to appear and testify during plaintiffs' three-day hearing regarding two plaintiffs' application for a temporary injunction.[1]

These subpoenas were not properly served and, as detailed below, are invalid even without the need to file this motion to quash. Additionally, Maxwell's effort to use the Court's jurisdiction to question a constitutional elected officer of the State of Texas and his senior-most deputy is entirely improper in light of the pending question of the Court's subject matter jurisdiction,[2] which is presumed not to exist. Because the plea challenges the legal sufficiency of plaintiffs' allegations and the related questions of subject matter jurisdiction, this Court may neither compel testimony regarding the merits of plaintiffs' claims nor reach the merits of those claims until that plea has been resolved.

[1] Plaintiff David Maxwell's subpoenas to Attorney General Paxton and First Assistant Attorney General Webster are attached as Exhibit 1.

[2] *See* OAG's motion to dismiss based on lack of subject matter jurisdiction, filed January 8, 2021.

Likewise, neither Paxton nor Webster are needed—or may be compelled—to testify on the central questions underlying plaintiffs' claims. Finally, the request is particularly burdensome because the testimony that plaintiffs presumably seek to adduce implicates numerous privilege questions that should not be broached until the Court has been assured of its own jurisdiction.

Background

The Attorney General is one of six Executive Branch officers whose powers and duties were created by the State's Constitution. Tex. Const. art. IV, § 1. Among other things, the Attorney General is obligated to represent the State in "all suits and pleas in the Supreme Court of the State in which the State may be a party," to "give legal advice in writing to the Governor and other executive officers," and to "perform such other duties as may be required by law." *Id.* art. IV, § 22. By statute, the Attorney General represents the State in many areas of significant civil litigation as well as certain types of criminal cases. *See generally,* 7 *Tex. Jur. 3d Attorney General* § 13. Because no single attorney could perform the functions that have been assigned to the Attorney General, OAG employs nearly 750 attorneys and thousands of additional staff in nearly 40 Divisions. As of this filing, OAG participates in or is responsible on some level for over 37,000 pending civil suits—and that figure excludes criminal prosecutions and child support matters.

Plaintiffs used to be four of the most senior members of the Attorney General's staff, responsible for, in their words, "investigating some of the most serious criminal matters and conduct in [Texas],"[3] supervising multiple Divisions,[4] and "represent[ing] the OAG before other state and governmental bodies."[5] Together, they supervised more than 600 members of OAG staff.[6]

[3] Pls.' 2d Am. Pet., ¶ 3.

[4] *Id.*, ¶ 4.

[5] *Id.*, ¶ 5.

[6] *Id.*, ¶¶ 2-5.

As the Fifth Circuit recently reiterated, elected officials need a high degree of confidence and trust in high-level lieutenants, such as these individuals because they are "uniquely positioned to frustrate the policy agendas of the elected officials[] for whom they work." *Haddock v. Tarrant County*, No. 19-11327, ___ F.3d ___, 2021 WL 319378, at *3 (5th Cir. Feb. 1, 2021).

This case arises from the precipitous breakdown of that trust. Per their operative pleading, plaintiffs developed concerns regarding several legal positions that the Attorney General took last year.[7] In lieu of speaking with the Attorney General at the outset about their pending criminal complaint, plaintiffs instead made, according to their pleading, "good faith reports" of alleged "criminal activity" to OAG's Human Resources Department and "an appropriate law enforcement authority."[8] The publication of these reports started a chain of events that was designed to disrupt the operation of OAG. Nevertheless, plaintiffs maintain that the Texas Whistleblower Act, Tex. Gov't Code §§ 554.001, et seq. (the "Act"), requires the Attorney General to keep them in their posts—where they would be uniquely positioned to frustrate the important and ongoing operations of OAG.[9]

OAG filed a motion to dismiss the First Amended Petition under Texas Rule of Civil Procedure 91(a) on sovereign-immunity grounds. As OAG explained, the Legislature's limited waiver of sovereign immunity for whistleblower claims does not extend to claims arising from reports regarding one of Texas's six constitutional executive officers, nor for claims by political appointees of those officers.[10] Plaintiffs' Second Amended Petition did not—and could not—cure this or several other jurisdictional defects. This Court has not yet resolved that plea.

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[7] *Id.*, ¶¶ 29-84.

[8] *Id.*, ¶ 99.

[9] *Id.*, ¶¶ 163-72.

[10] OAG's Mot. to Dismiss, pp. 7-16.

Despite the pending challenge to this Court's subject-matter jurisdiction, plaintiffs have attempted to subpoena the testimony of the Attorney General and First Assistant Attorney General Brent Webster, who is charged by statute to act on his behalf should he be unavailable. Tex. Gov't Code § 402.001(a). Plaintiffs have not communicated the substance or parameters of the testimony they seek to elicit from these witnesses. But their purpose is clear: They seek testimony regarding the merits of plaintiffs' own claims[11]—and seek it before this Court rules on its own jurisdiction. This they cannot have.

Argument & Authorities

1. Neither General Paxton nor First Assistant Webster were properly served a subpoena.

Plaintiff Maxwell directed by email his two subpoenas for the appearance of two non-party individuals to "Defendant Office of the Attorney General of Texas, 300 W. 15th St., Austin, TX, 78701 through its counsel of record"—but he did not subpoena the Office.[12] Rather, Maxwell seeks the testimony of two non-parties—Attorney General Ken Paxton and First Assistant Attorney General Brent Webster—over the course of plaintiffs' planned, but inappropriately timed three-day preliminary-injunction hearing. Maxwell has not properly effected service, even if he could—and he cannot. *See generally infra*, §§ 2-3.

Rule 176.5 requires that a subpoena "must be served by delivering a copy **to the witness**," and allows that only "[i]f the **witness is a party and is represented by an attorney of record** in the proceeding, the subpoena may be served on the witness's attorney of record." Tex. R. Civ. P. 176.5(a) (emphasis added). But neither Paxton nor Webster are parties to this suit—thus making

[11] Indeed, this is the plaintiff's second attempt to obtain discovery testimony from these two individuals. On February 10, 2021, plaintiffs served notices of deposition for both gentlemen, which defendant timely quashed based upon the very same point; that discovery is not appropriate unless and until the Court's subject matter jurisdiction has been confirmed. The plaintiffs have made no effort to seek a ruling on that motion.

[12] Ex. 1.

service through any attorney improper in the first place. What's more, neither witness is represented by an attorney of record in this proceeding, and neither Paxton nor Webster agreed to accept service through OAG's counsel. OAG's counsel promptly informed plaintiffs through counsel of these service defects, and that neither Paxton nor Webster had been properly served.[13]

Nonetheless, OAG moves to quash these subpoenas for several reasons. First, instead of responding to the OAG's counsel's notice of non-service, plaintiff Maxwell has recently filed copies of several subpoenas, none of which show a proper return of service; and which, as to Paxton and Webster, mislead the court by suggesting that Maxwell is not aware that he has failed to perfect service on either gentleman under Rule 176.5. Second, the attempted subpoenas would unnecessarily burden the OAG itself in any event; a protective order is therefore appropriate.

2. This Court lacks jurisdiction to address any issues relating to the merits of the case before addressing OAG's jurisdictional challenge.

Sovereign immunity is not merely an affirmative defense: it "encompasses two principles: immunity from suit and immunity from liability." *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002). This case illustrates the difference. Plaintiffs seek to compel testimony from a statewide elected official and his top deputy over the course of three days *before* this Court resolves OAG's jurisdictional challenges. That is no accident: plaintiffs have assiduously sought a combined hearing on OAG's jurisdictional plea and their application for a temporary injunction.[14] If this Court denies the motion (or takes it under advisement), they hope to compel testimony before OAG can exercise its right to stay proceedings pending appeal.[15] Sovereign immunity does not merely ensure that plaintiffs cannot *prevail* on claims against

[13] The February 10, 2021 letter sent by the OAG's lead counsel, William S. Helfand to Maxwell's counsel, Carlos Soltero is attached as Exhibit 2.

[14] *See, e.g.*, Pls.' Mot. to Consolidate Hearings.

[15] Pls.' 2d Am. Pet., ¶ 208 (reciting likely delays due to an appeal not yet filed).

immune parties; it prevents precisely this sort of process-based gamesmanship. *State v. Luecke*, 290 S.W.3d 876, 880 (Tex. 2009) (citing *TDCJ v. Simons*, 140 S.W.3d 338, 349 (Tex. 2004)) (noting that, under such circumstances, evidentiary hearings must be limited to jurisdictional facts).

This immunity protects the citizens of Texas as well as officials. Litigation imposes not only monetary costs on the State, but additional, practical costs imposed when public officials are distracted from discharging the day-to-day responsibilities of their offices due to litigation tactics. Likewise, public officials cannot function at full effectiveness when litigation threatens to reveal the contents of their confidential communications. That is why sovereign immunity affects the subject-matter jurisdiction of this Court. *Town of Shady Shores v. Swanson,* 590 S.W.3d 544, 550 (Tex. 2019). Immunity deprives a court of jurisdiction in order to prevent such costs.

"Subject-matter jurisdiction is a multiple choice question with only two answers: yes or no." *City of Anson v. Harper*, 216 S.W.3d 384, 390 (Tex. App.—Eastland 2006, no pet.). If a trial court lacks jurisdiction to order relief to the plaintiffs, it lacks jurisdiction to order discovery or take evidence on the merits of the plaintiffs' claims. *See id.*; *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 479 (Tex. 2018). The production and presentation of evidence is never proper on an issue that must be decided as a matter of law and without taking evidence.

The Supreme Court has made clear that a defendant may challenge the jurisdiction of the court by challenging the sufficiency of the plaintiff's pleadings, the existence of jurisdictional facts, or both. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225-28 (Tex. 2004).[16]

[16] *See also TDCJ v. Rangel*, 595 S.W.3d 198, 205 (Tex. 2020); *Alamo Heights ISD v. Clark*, 544 S.W.3d 755, 770 (Tex. 2018); *see also, e.g., Davis v. Wells Fargo*, 824 F.3d 333, 346 (3d Cir. 2016) (reflecting that, in federal court, this distinction is known as the difference between a "facial attack" and a "factual attack" on jurisdiction).

Which option a defendant chooses impacts this Court's ability to order the production of, and ultimately to hear, evidence regarding the facts alleged in the complaint. *Id.*

OAG's plea to the jurisdiction raises pure questions of law. It explains that immunity deprives the court of jurisdiction over plaintiffs' claims unless they can establish a valid waiver of, or exception to, sovereign immunity. *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012). Immunity is typically waived by statute, *Nazari v. State*, 561 S.W.3d 495, 500 (Tex. 2018), but plaintiffs cannot satisfy their burden merely by referring to a statutory or constitutional waiver. *TDCJ v. Miller*, 51 S.W.3d 583, 586-87 (Tex. 2001). Rather, they must allege facts that state a claim within that waiver. *Mission Consol'd ISD v. Garcia*, 372 S.W.3d 629, 636-37 (Tex. 2012). Here, plaintiffs rely on the statutory waiver of immunity contained in the Texas Whistleblower Act.[17] As with all waivers of immunity, that Act must be strictly construed; and any ambiguity must be resolved against a finding of waiver. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003). And the Whistleblower Act's waiver extends only to "public employee[s] who allege[] a violation" of the Act for suits against "the employing state or local governmental entity." Tex. Gov't Code § 554.0035.

As OAG has argued in its jurisdictional challenge, the Act does not extend—and certainly does not unambiguously extend—to claims by political appointees of one of the six constitutional officers of Texas.[18] Likewise, Attorney General Paxton is not a "public employee" under the Act because he is neither "an employee or appointed officer," but an *elected* officer—and so plaintiffs' reports are not covered by the Act.[19] The scope of the Whistleblower Act's waiver of immunity on each of these lines is a pure question of law that requires no evidence—and certainly not the

[17] *See* Pls.' 2d Am. Pet., ¶ 13 (citing Tex. Gov't Code § 554.0035).

[18] OAG's Mot. to Dismiss, pp. 7-16.

[19] *Id*.

Attorney General's testimony—to resolve. *E.g.*, *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 620 (Tex. 2011).

Because the OAG "argue[d] that the plaintiff[s] ha[ve] not alleged facts that, if proven true, constitute a valid claim over which there is jurisdiction," this Court may not order discovery or otherwise develop the facts regarding the merits of the plaintiffs' claims ahead of ruling on its plea to the jurisdiction. *City of Magnolia 4A Econ. Dev. Corp. v. Smedley*, 533 S.W.3d 297, 301 (Tex. 2017) (per curiam); *see also Luecke*, 290 S.W.3d at 881 (stating that to proceed to discovery on a whistleblower-retaliation claim a plaintiff "must actually allege a violation of the Act"). That is, the Court may only "consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised" in a defendant's plea. *Miranda*, 133 S.W.3d at 227. Here, no evidence is necessary to determine whether the Whistleblower Act waives immunity for plaintiffs' claims. To order testimony on issues not relevant to that inquiry—in this case, any evidence, due to the Rule 91a posture of the plea—is legal error and therefore an abuse of discretion. *In re Brown*, No. 05-20-00639-CV, 2020 WL 4047965, at *3 (Tex. App.—Dallas July 20, 2020) (vacating discovery order where plea raised no fact-specific issues); *see also Walker v. Parker*, 827 S.W.2d 833, 840 (Tex. 1992).

3. The Attorney General and First Assistant neither need mor must testify for Plaintiffs to prove their claims.

Plaintiffs cannot avoid this conclusion by arguing that the proposed testimony goes to their request for a temporary injunction and thus does not necessarily go to the merits of their claim. Indeed, plaintiffs—and neither Paxton nor Webster—are in unique possession of the information underlying the merits of their claims. And again, this Court may not examine the merits of plaintiffs' claims without first establishing its jurisdiction to do so.

Courts sometimes permit a plaintiff to offer evidence that interim relief is necessary to preserve the status quo pending a ruling on a plea. *City of Rio Grande City, Tex. v. BFI Waste Servs. of Tex*., LP, 511 S.W.3d 300, 303 (Tex. App.—San Antonio 2016, no pet.) (collecting cases). Plaintiffs, however, seek reinstatement to positions that have been filled by others—not maintenance of the status quo.[20] This is a form of mandatory relief. *See Derebery v. Two-Way Water Supply Corp*., 590 S.W.2d 647, 649 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (concluding that seeking reinstatement of water services constitutes a mandatory injunction). Temporary relief that mandates an affirmative action is generally disfavored and only available upon a heightened showing that the "mandatory order is necessary to prevent irreparable injury or extreme hardship." *LeFaucheur v. Williams*, 807 S.W.2d 20, 22 (Tex. App.—Austin 1991, no writ) (citing *Iranian Muslim Org. v. City of San Antonio*, 615 S.W.2d 202, 208 (Tex.1981)). The potential hardship to plaintiffs absent relief is a topic that is peculiarly within the possession of the plaintiffs—not these would-be witnesses.

As is information regarding the merits of plaintiffs' claims. After all, "top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions." *In re Office of Inspector Gen.*, 933 F.2d 276, 278 (5th Cir. 1991) (per curiam) (quoting *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985)); *see, e.g.*, *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007). Because public officials are, by definition, charged with protecting the wellbeing of the public, "depositions of public officials create unique concerns." *Stagman v. Ryan*, 176 F.3d 986, 994 (7th Cir. 1999). They are not required to "spend their time giving [testimony] in cases arising out of the performance of their official duties unless there is some reason to believe" that the testimony is admissible or a

[20] Pls.' 2d Am. Pet., ¶¶ 2-5, 170.

"deposition will produce or lead to admissible evidence." *Id.* at 994–95. This rule is frequently applied to Attorneys General.[21] So plaintiffs cannot ask either General Paxton or First Assistant Webster to explain the basis for their termination, absent extraordinary circumstances not present here.

Nor are Paxton or Webster needed to explain the questions at the core of plaintiffs' claims—namely whether they acted in good faith, made their reports to an appropriate law-enforcement authority, and so on. Plaintiffs are in unique possession of the best evidence of their good faith: their own testimony. While perhaps other members of OAG, such as human resources officials, could comment on plaintiffs' disciplinary records, and similar questions, neither Paxton nor Webster are the appropriate officials to answer these questions. Indeed, given the agency-wide scope of their responsibilities, Paxton and Webster are especially ill-suited to testify on general questions regarding the OAG's human-resources responsibilities. And to the extent that the Attorney General and the First Assistant may at some later date be able to give admissible testimony *on the merits* of plaintiffs' claims, this Court may not hear such testimony until resolving the plea to the jurisdiction for the reasons discussed above.

4. Plaintiff Maxwell's subpoenas are particularly burdensome.

It would be particularly improper to require the Attorney General and First Assistant Attorney General to testify before the Court rules on the motion to dismiss because their testimony will be unusually burdensome to the OAG in several ways.

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[21] *See, e.g.*, *Wilkins v. Office of Mo. Att'y Gen.*, 464 S.W.3d 271, 276–77 (Mo. App. 2015) (Missouri Attorney General); *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, No. 05-cv-329, 2007 WL 649335, at *2–4 (N.D. Okla. Feb. 26, 2007) (Oklahoma Attorney General); *Summers v. Cherokee Children & Family Servs., Inc.*, 112 S.W.3d 486, 530 (Tenn. App. 2002) (Tennessee Attorney General); *In re United States*, 197 F.3d 310, 314–16 (8th Cir. 1999) (U.S. Attorney General); *Stagman v. Ryan*, 176 F.3d 986, 994 (7th Cir. 1999) (Illinois Attorney General); *State Bd. of Pharm. v. Super. Ct. of City & Cty. of San Francisco*, 78 Cal. App. 3d 641, 644–45 (Cal. App. 1st Dist. 1978) (California Attorney General); *Hyland v. Smollok*, 349 A.2d 541, 543 (N.J. Super. Ct. App. Div. 1975) (New Jersey Attorney General); *United States v. Northside Realty Assocs., Inc.*, 324 F. Supp. 287, 294 (N.D. Ga. 1971) (U.S. Attorney General); *United States v. Bridges*, 86 F. Supp. 931, 932–33 (N.D. Cal. 1949) (U.S. Attorney General).

First, plaintiffs' subpoenas present unique and difficult privilege questions. One of the rights protected by sovereign immunity is a government agency's right to be free "from the costs of any litigation." *City of Houston v. Williams*, 216 S.W.3d 827, 829 (Tex. 2007) (per curiam); *see also Texas v. Caremark, Inc.*, 584 F.3d 655, 658 (5th Cir. 2009). These costs are particularly high here because the nature of plaintiffs' claims require the Court to delve into the decision-making process of the State's chief legal officer and his most senior staff.[22] Evidence that must be discovered and that might be discussed during the hearing will inherently implicate numerous confidentiality laws and evidentiary privileges—*e.g.*, attorney-client privilege, the attorney-work-product doctrine, and the deliberative-process privilege. Many of these privileges "belong[] to the client," not the attorney. *Carmona v. State*, 947 S.W.2d 661, 663 (Tex. App.—Austin 1997, no pet.).[23] In this case, that client is the State—not the plaintiffs or the Attorney General.

It is unclear how the Court would be able to resolve the competing interests and privilege questions at issue in this case. Adequate and time-consuming precautions to protect the State's privilege will need to be taken. Moreover, because disclosure vitiates privilege, adverse privilege holdings may need to be appealed through petitions for writs of mandamus. *See, e.g.*, *In re Christus Santa Rosa Health Sys*., 492 S.W.3d 276, 279 (Tex. 2016). This process would represent a significant investment of resources that is entirely improper ahead of a preliminary ruling by this Court that it has jurisdiction to hear plaintiffs' claims.

Second, the current legislative session imposes significant requirements on both Paxton and Webster. Earlier this week, both were called to testify before the Legislature regarding agency

[22] Pls.' 2d Am. Pet., ¶¶ 179-98 (acknowledging their burden to establish that they believed in good faith their report of alleged criminal activity).

[23] The deliberative-process privilege, which protects a government official's ability to seek advice from his subordinates, may be an exception. But it presents its own complications because it involves multiple, overlapping areas of law. *Arlington ISD v. Tex. Atty. Gen*., 37 S.W.3d 152, 158 (Tex. App.—Austin 2001, no pet.) (discussing how federal and state law regarding the deliberative process privilege overlap but are not coextensive).

litigation activity and agency priorities. Each has been called again to testify before the Legislature on Thursday, February 18. Compelling Paxton or Webster to testify—let alone both—would deprive the Legislature of guidance regarding OAG's activities during the limited legislative session in which the Legislature sets funding levels for the agency, passes laws OAG is tasked with enforcing, and takes other actions critical to OAG's mission and the State. Plaintiffs' attempts to compel Paxton and Webster to testify during the legislative session—especially when they are scheduled to appear before the Legislature—could disrupt OAG's operations for months or years to come. Plaintiffs cannot justifiably impose such an extraordinary cost on either OAG or the State.

Prayer

The Court should quash the present subpoenas and enter a protective order preventing the introduction of any evidence regarding the merits of plaintiffs' claims ahead of a ruling on the plea to the jurisdiction. In the alternative, the Court should issue a ruling on the plea in advance of the hearing.

Dated: February 12, 2021

Respectfully submitted,

Lewis Brisbois Bisgaard & Smith LLP

/ s / William S. Helfand
William S. Helfand
Texas Bar No. 09388250
Sean O'Neal Braun
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bill.helfand@lewisbrisbois.com
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Attorneys for Defendant,
Office of the Attorney General of Texas

Certificate of Service

I certify a true and correct copy of Defendant, Office of the Attorney General of Texas's opposed motion to quash and for entry of a protective order has been served on the following counsel of record by electronic filing on February 12, 2021.

Thomas A. Nesbitt
Scott F. DeShazo
Laura J. Goodson
DeShazo & Nesbitt LLP

-and-

T.J. Turner
Cain & Skarnulis PLLC

Attorneys for Plaintiff,
James Blake Brickman

Carlos R. Soltero
Matthew Murrell
Gregory P. Sapire
Soltero Sapire Murrell PLLC

Attorneys for Plaintiff,
David Maxwell

Don Tittle
Roger Topham
Law Offices of Don Tittle

Attorneys for Plaintiff,
J. Mark Penley

Joseph R. Knight
Ewell Brown Blanke & Knight LLP

Attorney for Plaintff,
Ryan M. Vassar

/ s / William S. Helfand
William S. Helfand

THE STATE OF TEXAS

CAUSE NO. D-1-GN-20-006861

JAMES BLAKE BRICKMAN, DAVID MAXWELL, J. MARK PENLEY, and RYAN M. VASSAR,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
v.	§	TRAVIS COUNTY, TEXAS
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS,	§	
Defendant.	§	250TH JUDICIAL DISTRICT

SUBPOENA FOR HEARING—KEN PAXTON

TO: Defendant Office of the Attorney General of Texas, 300 W. 15th St., Austin, TX 78701 through its counsel of record.

GREETINGS:

YOU ARE HEREBY COMMANDED TO SUMMON Ken Paxton to appear remotely via Zoom video conference on Tuesday, February 16, 2021 at 9:00 a.m. before the Presiding Judge, to attend and give testimony at a hearing regarding the Temporary Injunction Hearing in this case, and to remain in attendance until lawfully discharged.

The Zoom Information for the hearing will be provided by the court to all counsel of record on February 12, 2021. The undersigned will provide a link and password to the Zoom hearing in advance of the witness's required attendance. Only the counsel of record, the parties, witnesses, and their attorneys are allowed to have the Zoom link and password. Dissemination of the Zoom link and password to any other person is strictly prohibited. For purposes of this anticipated testimony, the witness must be prepared to utilize a laptop or desktop computer with an internet connection, video camera, microphone, and speaker capabilities. If this will be an issue for the

witness, the witness must let the undersigned know immediately such that alternative accommodations may be made.

FAILURE TO OBEY THIS SUBPOENA MAY BE TREATED AS A CONTEMPT OF COURT. TEXAS RULE OF CIVIL PROCEDURE 176.8 PROVIDES AS FOLLOWS: "FAILURE BY ANY PERSON WITHOUT ADEQUATE ESCUSE TO OBEY A SUBPOENA SERVED UPON THAT PERSON MAY BE DEEMED A CONTEMPT OF THE COURT FROM WHICH THE SUBPOENA IS ISSUED OR A DISTRICT COURT IN THE COUNTY IN WHICH THE SUBPOENA IS SERVED, AND MAY BE PUNISHED BY FINE OR CONFINEMENT, OR BOTH.

This Subpoena is issued at the request of Plaintiff David Maxwell, whose lead counsel of record is Carlos R. Soltero, of Austin, Texas.

Date of Issuance: February 10, 2021 **SUBPOENA ISSUED BY CARLOS R. SOLTERO**

/s/ *Thomas A. Nesbitt*
Thomas A. Nesbitt
State Bar No. 24007738
tnesbitt@dnaustin.com
Scott F. DeShazo
State Bar No. 24011414
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Laura J. Goodson
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512/617-5563 (Fax)

/s/ *T.J. Turner*
T.J. Turner
State Bar No. 24043967
tturner@cstrial.com
Cain & Skarnulis PLLC
400 W. 15th Street, Suite 900
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512-477-5000
512-477-5011—Facsimile

ATTORNEYS FOR PLAINTIFF JAMES BLAKE BRICKMAN

/s/ *Don Tittle*
Don Tittle
State Bar No. 20080200
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ATTORNEYS FOR PLAINTIFF J. MARK PENLEY

/s/ *Carlos R. Soltero*
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Matthew Murrell
State Bar No. 24083545
matthew@ssmlawyers.com
Gregory P. Sapire
State Bar No. 00791601
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7320 N Mopac Suite 309
Austin, Texas 78731
512-422-1559 (phone)
512-359-7996 (fax)

ATTORNEYS FOR PLAINTIFF DAVID MAXWELL

/ s / Joseph R. Knight
Joseph R. Knight
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111 Congress Ave., 28th floor
Austin, TX 78701
Telephone: 512.770.4010
Facsimile: 877.851.6384

ATTORNEYS FOR PLAINTIFF RYAN M. VASSAR

RETURN OF SUBPOENA

I certify that I served the attached Subpoena by delivering a copy and the required fee of $_____ to the witness, in person, at (address):

_____

_____

On the _____ (day) of _____ (month), at _____ a.m./p.m. (time). My fee for this service is $_____.

_____
Officer

CERTIFICATE OF SERVICE

I certify the foregoing document has been served on the following counsel of record via email on February 10, 2021:

William S. Helfand
bill.helfand@lewisbrisbois.com
Sean O'Neal Braun
sean.braun@lewisbrisbois.com
24 Greenway Plaza, Suite 1400
Houston, Texas 77046

/s/ Carlos R. Soltero
Carlos R. Soltero

THE STATE OF TEXAS

CAUSE NO. D-1-GN-20-006861

JAMES BLAKE BRICKMAN, DAVID MAXWELL, J. MARK PENLEY, and RYAN M. VASSAR,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
v.	§	TRAVIS COUNTY, TEXAS
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS,	§	
Defendant.	§	250TH JUDICIAL DISTRICT

SUBPOENA FOR HEARING—BRENT WEBSTER

TO: Defendant Office of the Attorney General of Texas, 300 W. 15th St., Austin, TX 78701 through its counsel of record.

GREETINGS:

YOU ARE HEREBY COMMANDED TO SUMMON Brent Webster to appear remotely via Zoom video conference on Tuesday, February 16, 2021 at 9:00 a.m. before the Presiding Judge, to attend and give testimony at a hearing regarding the Temporary Injunction Hearing in this case, and to remain in attendance until lawfully discharged.

The Zoom Information for the hearing will be provided by the court to all counsel of record on February 12, 2021. The undersigned will provide a link and password to the Zoom hearing in advance of the witness's required attendance. Only the counsel of record, the parties, witnesses, and their attorneys are allowed to have the Zoom link and password. Dissemination of the Zoom link and password to any other person is strictly prohibited. For purposes of this anticipated testimony, the witness must be prepared to utilize a laptop or desktop computer with an internet connection, video camera, microphone, and speaker capabilities. If this will be an issue for the

witness, the witness must let the undersigned know immediately such that alternative accommodations may be made.

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This Subpoena is issued at the request of Plaintiff David Maxwell, whose lead counsel of record is Carlos R. Soltero, of Austin, Texas.

Date of Issuance: February 10, 2021 **SUBPOENA ISSUED BY CARLOS R. SOLTERO**

/s/ *Thomas A. Nesbitt*
Thomas A. Nesbitt
State Bar No. 24007738
tnesbitt@dnaustin.com
Scott F. DeShazo
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/s/ *T.J. Turner*
T.J. Turner
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ATTORNEYS FOR PLAINTIFF JAMES BLAKE BRICKMAN

/s/ *Don Tittle*
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ATTORNEYS FOR PLAINTIFF J. MARK PENLEY

/s/ *Carlos R. Soltero*
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State Bar No. 24083545
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/ s / Joseph R. Knight
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111 Congress Ave., 28th floor
Austin, TX 78701
Telephone: 512.770.4010
Facsimile: 877.851.6384

ATTORNEYS FOR PLAINTIFF RYAN M. VASSAR

RETURN OF SUBPOENA

I certify that I served the attached Subpoena by delivering a copy and the required fee of $_____ to the witness, in person, at (address):

_____

_____

On the _____ (day) of _____ (month), at _____ a.m./p.m. (time). My fee for this service is $_____.

_____
Officer

CERTIFICATE OF SERVICE

I certify the foregoing document has been served on the following counsel of record via email on February 10, 2021:

William S. Helfand
bill.helfand@lewisbrisbois.com
Sean O'Neal Braun
sean.braun@lewisbrisbois.com
24 Greenway Plaza, Suite 1400
Houston, Texas 77046

/s/ Carlos R. Soltero
Carlos R. Soltero

[EXT] OAG litigation matter

Carlos Soltero <carlos@ssmlawyers.com>

Wed 2/10/2021 1:11 PM

To: Helfand, Bill <Bill.Helfand@lewisbrisbois.com>; Braun, Sean <Sean.Braun@lewisbrisbois.com>
Cc: Joe Knight <jknight@ebbklaw.com>; Don Tittle <don@dontittlelaw.com>; Tom Nesbitt <tnesbitt@dnaustin.com>; TJ Turner <tturner@cstrial.com>; Carlos Soltero <carlos@ssmlawyers.com>

2 attachments (231 KB)

2021-02-10_Subpoena Ken Paxton.pdf; 2021-02-10-Subpoena Brent Webster.pdf;

Bill

I hope that you are well and I'm sure we'll be seeing each other virtually next week.
In preparation for the injunction hearing, attached please find hearing subpoenas for Ken Paxton and Brent Webster.

Sincerely,

CRS

SSM LAWYERS

https://www.ssmlawyers.com

Carlos Soltero, *Partner*
Soltero Sapire Murrell PLLC

Email: carlos@ssmlawyers.com
Mobile: (512) 422-1559

7320 N. MoPac Expy, Ste 309, Austin TX 78731
Office: (737) 202-4873 • Fax: (512) 359-7996

LEWIS BRISBOIS

LEWIS BRISBOIS BISGAARD & SMITH LLP

William S. Helfand
24 Greenway Plaza, Suite 1400
Houston, Texas 77046
Bill.Helfand@lewisbrisbois.com
Direct: 832.460.4614

February 10, 2021

Via Email: carlos@ssmlawyers.com
Carlos Soltero
Soltiero Sapire Murrell, PLLC
7320 N. MoPac Expy, Ste 309
Austin TX 78731

Re: Cause No. D-1-GN-20-006861; *James Brickman, David Maxwell, Mark Penley and Ryan Vassar v. Office of the Attorney General of the State of Texas*; in the 250th District Court of Travis County, Texas.

Dear Carlos:

I have just seen your email of 12:11 p.m. today, attaching two subpoenas.

Neither of the individuals listed in the subpoenas are a party to the suit and I only represent the Office of the Attorney General at this time, not Attorney General Ken Paxton or any OAG employee.

I am not authorized to accept service on behalf of either of these individuals. You should not consider your email to me as service on either individual.

I do not intend to do anything what you sent me with your email of 12:11 p.m. today.

If you intend to subpoena witnesses for next week's scheduled hearing, I would respectfully ask that you comply with Rule 176.5.

Sincerely,

William S. Helfand of
LEWIS BRISBOIS BISGAARD &
SMITH LLP

WSH/dg

cc: Joseph R. Knight
Ewell Brown Blanke & Knight LLP
111 Congress Ave., 28th floor
Austin, TX 78701
Facsimile: 877.851.6384

Thomas A. Nesbitt
Scott F. DeShazo
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** SENDING NOTIFICATION : FAX SENT SUCCESSFULLY **

TIME SENT	REMOTE CSID	DURATION	PAGES	STATUS
February 10, 2021 at 3:09:44 PM PST	512 477 5011	141	3	Sent

24 Greenway Plaza, Suite 1400

Houston

Texas 77046

FROM

Name: Dawn Garrard

Phone: 832.460.4614 Fax: 713.759.6830

E-mail: Dawn.Garrard@lewisbrisbois.com

TO

15124775011

Sent: 2/10/21 at: 3:07:23 PM 3 page(s) (including cover)

Subject: Correspondence re OAG litigation

Comments:

Gentlemen,

On behalf of Bill Helfand, please see attached correspondence.

LEWIS BRISBOIS

Dawn Garrard
Legal Secretary to William S. Helfand and Shane L. Kotlarsky
dawn.garrard@lewisbrisbois.com

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24 Greenway Plaza, Suite 1400, Houston, Texas 77046 | LewisBrisbois.com

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** SENDING NOTIFICATION : FAX SENT SUCCESSFULLY **

TIME SENT	REMOTE CSID	DURATION	PAGES	STATUS
February 10, 2021 at 3:10:06 PM PST		163	3	Sent

24 Greenway Plaza, Suite 1400

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Texas 77046

FROM

Name: Dawn Garrard

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E-mail: Dawn.Garrard@lewisbrisbois.com

TO

12143891002

Sent: 2/10/21 at: 3:07:23 PM 3 page(s) (including cover)

Subject: Correspondence re OAG litigation

Comments:

Gentlemen,

On behalf of Bill Helfand, please see attached correspondence.

LEWIS BRISBOIS

Dawn Garrard
Legal Secretary to William S. Helfand and Shane L. Kotlarsky
dawn.garrard@lewisbrisbois.com

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** SENDING NOTIFICATION : FAX SENT SUCCESSFULLY **

TIME SENT	REMOTE CSID	DURATION	PAGES	STATUS
February 10, 2021 at 3:11:37 PM PST	POTS modem 1	109	3	Sent

24 Greenway Plaza, Suite 1400

Houston

Texas 77046

FROM

Name: Dawn Garrard

Phone: 832.460.4614 Fax: 713.759.6830

E-mail: Dawn.Garrard@lewisbrisbois.com

TO

15126175563

Sent: 2/10/21 at: 3:07:23 PM 3 page(s) (including cover)

Subject: Correspondence re OAG litigation

Comments:

Gentlemen,

On behalf of Bill Helfand, please see attached correspondence.

LEWIS BRISBOIS

Dawn Garrard
Legal Secretary to William S. Helfand and Shane L. Kotlarsky
dawn.garrard@lewisbrisbois.com
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** SENDING NOTIFICATION : FAX SENT SUCCESSFULLY **

TIME SENT	REMOTE CSID	DURATION	PAGES	STATUS
February 10, 2021 at 3:12:21 PM PST	18778516384	133	3	Sent

24 Greenway Plaza, Suite 1400

Houston

Texas 77046

FROM

Name: Dawn Garrard

Phone: 832.460.4614 Fax: 713.759.6830

E-mail: Dawn.Garrard@lewisbrisbois.com

TO

18778516384

Sent: 2/10/21 at: 3:07:23 PM 3 page(s) (including cover)

Subject: Correspondence re OAG litigation

Comments:

Gentlemen,

On behalf of Bill Helfand, please see attached correspondence.

LEWIS BRISBOIS

Dawn Garrard
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24 Greenway Plaza, Suite 1400, Houston, Texas 77046 | LewisBrisbois.com

Representing clients from coast to coast. View our locations nationwide.

Garrard, Dawn

From: Garrard, Dawn
Sent: Wednesday, February 10, 2021 5:07 PM
To: 18778516384@fax.lewisbrisbois.com; 15126175563 @fax.lewisbrisbois.com; 15124775011@fax.lewisbrisbois.com; 12143891002@fax.lewisbrisbois.com
Cc: carlos@ssmlawyers.com
Subject: Correspondence re OAG litigation
Attachments: subpoena letter.pdf

Gentlemen,

On behalf of Bill Helfand, please see attached correspondence.

LEWIS BRISBOIS

Dawn Garrard
Legal Secretary to William S. Helfand and Shane L. Kotlarsky
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24 Greenway Plaza, Suite 1400, Houston, Texas 77046 | **LewisBrisbois.com**

Cause No. D-1-GN-20-006861

James Blake Brickman, *et al.*, Plaintiffs, v. **Office of the Attorney General of Texas,** Defendant.	**In the District Court of** **Travis County, Texas** **250th Judicial District**

Office of the Attorney General of Texas's Objection to Consolidated Hearings of the OAG's Motion to Dismiss and Plaintiffs Maxwell and Vassar's Motion for Temporary Injunction

Subject to announcing "ready" for the hearing of its motion to dismiss based on lack of subject matter jurisdiction,[1] Defendant, Office of the Attorney General of Texas reasserts its objection to the Court's *sua sponte* consolidation of the oral hearings of the OAG's motion to dismiss based on lack of subject matter jurisdiction and Plaintiffs David Maxwell and Ryan Vassar's motion for temporary injunction.

Because the OAG's sovereign immunity is a jurisdictional bar, the Court must resolve its subject matter jurisdiction before exercising any jurisdiction the law presumes this Court does not have and, thus, the Court may neither consider nor rule on Maxwell and Vassar's motion for temporary injunction until it resolves the OAG's jurisdictional challenge.[2] Alternatively, the OAG

[1] "Ready Announcement" for the hearing of the OAG's motion to dismiss on March 1, 2021 at 10:00 a.m., Ex. 1.

[2] The OAG incorporates its opposed motion to quash, filed January 7, 2021, and its opposed motion for entry of a protective order, filed January 14, 2021, as if set forth fully herein.

respectfully requests the Court provide a three-hour recess between its hearing on OAG's motion to dismiss and the hearing of Maxwell and Vassar's motion for temporary injunction.[3]

Defendant, Office of the Attorney General of Texas, respectfully requests the Court sustain the OAG's objection and enter an order continuing the hearing of Plaintiffs Maxwell and Vassar's motion for temporary injunction until a reasonable time after the Court's subject matter jurisdiction over Plaintiffs' claims is resolved.

Dated: February 24, 2021

Respectfully submitted,

Lewis Brisbois Bisgaard & Smith LLP

/ s / William S. Helfand
William S. Helfand
Texas Bar No. 09388250
Sean O'Neal Braun
Texas Bar No. 24088907
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Houston, Texas 77046
(713) 659-6767 Telephone
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bill.helfand@lewisbrisbois.com
sean.braun@lewisbrisbois.com

Attorneys for Defendant,
Office of the Attorney General of Texas

[3] *See* Letter to Hon. Amy Clark Meachum, dated and filed February 12, 2021.

Certificate of Service

I certify a true and correct copy of he foregoing document has been served on the following counsel of record by electronic filing on February 24, 2021.

Thomas A. Nesbitt
Scott F. DeShazo
Laura J. Goodson
DeShazo & Nesbitt LLP

-and-

T.J. Turner
Cain & Skarnulis PLLC

Attorneys for Plaintiff,
James Blake Brickman

Carlos R. Soltero
Matthew Murrell
Gregory P. Sapire
Soltero Sapire Murrell PLLC

Attorneys for Plaintiff,
David Maxwell

Don Tittle
Roger Topham
Law Offices of Don Tittle

Attorneys for Plaintiff,
J. Mark Penley

Joseph R. Knight
Ewell Brown Blanke & Knight LLP

Attorney for Plaintff,
Ryan M. Vassar

/ s / William S. Helfand
William S. Helfand

Cause No. D-1-GN-20-006861

James Blake Brickman, *et al.*, Plaintiffs, v. **Office of the Attorney General of Texas,** Defendant.	**In the District Court of** **Travis County, Texas** **250th Judicial District**

Office of the Attorney General of Texas's Objection to Consolidated Hearings of the OAG's Motion to Dismiss and Plaintiffs Maxwell and Vassar's Motion for Temporary Injunction

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Because the OAG's sovereign immunity is a jurisdictional bar, the Court must resolve its subject matter jurisdiction before exercising any jurisdiction the law presumes this Court does not have and, thus, the Court may neither consider nor rule on Maxwell and Vassar's motion for temporary injunction until it resolves the OAG's jurisdictional challenge.[2] Alternatively, the OAG

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Defendant, Office of the Attorney General of Texas, respectfully requests the Court sustain the OAG's objection and enter an order continuing the hearing of Plaintiffs Maxwell and Vassar's motion for temporary injunction until a reasonable time after the Court's subject matter jurisdiction over Plaintiffs' claims is resolved.

Dated: February 24, 2021

Respectfully submitted,

Lewis Brisbois Bisgaard & Smith LLP

/ s / William S. Helfand
William S. Helfand
Texas Bar No. 09388250
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sean.braun@lewisbrisbois.com

Attorneys for Defendant,
Office of the Attorney General of Texas

[3] *See* Letter to Hon. Amy Clark Meachum, dated and filed February 12, 2021.

Certificate of Service

I certify a true and correct copy of he foregoing document has been served on the following counsel of record by electronic filing on February 24, 2021.

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-and-

T.J. Turner
Cain & Skarnulis PLLC

Attorneys for Plaintiff,
James Blake Brickman

Carlos R. Soltero
Matthew Murrell
Gregory P. Sapire
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CIVIL DISTRICT COURT ANNOUNCEMENT FORM

THIS FORM MUST BE **FILLED OUT IN FULL** AND **RECEIVED NO LATER THAN 5:00 P.M. ON WEDNESDAY OF THE WEEK PRIOR** IN ORDER FOR THE ANNOUNCEMENT TO BE PROCESSED. ANNOUNCEMENT MUST BE E-MAILED TO: TC.CivilDistrictAnnounce@traviscountytx.gov

Date of Setting: March 1, 2021 ;

Cause Number: D-1-GN-20-006861

Case Style: Brickman, et al. v. Office of the Attorney General of Texas

Hearing(s)/Trial(s) that are set: OAG's Motion to Dismiss under Rule 91a, T.R.C.P.

Time Estimate **(TOTAL TIME FOR ENTIRE HEARING OR TRIAL)**: 2 hours

For Jury docket cases and Family and Civil Monday Long docket cases only:

Has Alternative Dispute Resolution (ADR) been completed or waived by the Court?:

Yes:_____; No:_____(If Not, Reason?_____)

FOR FAMILY LAW CASES ONLY:

Is/Are Hearing(s) Still Necessary?: Yes:_____; No:_____

(If no, provide reason:_____)

Hearing/Trial Preference: Zoom:_____; In-person:_____ (If so, explain below)

District Judge being requested?: Yes: _____; No:_____

Has an Agreement been filed waiving right to De Novo?: Yes:_____; No:_____

Request for Record to be made of Proceeding?: Yes:_____; No:_____

Reason for In-person hearing:_____

_____

_____

_____

CONTACT INFORMATION IS REQUIRED FOR ALL CIVIL AND FAMILY CASES:

Party Making Announcement: Defendant Office of the Attorney General of Texas
(Specify party type (i.e. Plaintiff/Defendant ; Petitioner/Respondent) **and** Party Name)

Announcing Attorney / Self-Represented Litigant:

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Cause No. D-1-GN-20-006861

James Blake Brickman, *et al.*, Plaintiffs, v. **Office of the Attorney General of Texas,** Defendant.	**In the District Court of** **Travis County, Texas** **250th Judicial District**

Office of the Attorney General of Texas's Opposition to Plaintiffs' Verified Motion for Temporary Injunction

Subject to its motion to dismiss based on lack of subject matter jurisdiction, Defendant, the Office of the Attorney General of Texas opposes David Maxwell's and Ryan Vassar's motion for temporary injunction.[1]

The OAG has sovereign immunity from this suit and the Court lacks subject matter jurisdiction. Accordingly, and for reasons detailed in OAG's Plea to the Jurisdiction, the hearing on the Movants' motion is premature and should not go forward until the Court's jurisdiction has been finally determined. Accordingly, proceeding with Movants' motion puts OAG in a double bind: it can either conduct discovery to defend against the temporary injunction on the facts—and thereby vitiate in substantial part its sovereign immunity protection—or defend the motion without the benefit of discovery, which deprives it of due process. Nonetheless, and despite the denial of basic due process to fully respond to this

[1] Unless stated otherwise *infra*, "Movants" refers to David Maxwell and Ryan Vassar. "Plaintiffs" refers to James Brickman, Mark Penley, David Maxwell, and Ryan Vassar.

motion, and, thus, the OAG can show that neither Maxwell nor Vassar is entitled to a temporary injunction that seeks to re-insert them into two of the OAG's highest appointed offices, for the following reasons:

Introduction

This suit under the Texas Whistleblower Act, Tex. Gov't Code § 554.001, *et seq.*, arises from Plaintiffs' allegations the OAG retaliated against James Blake Brickman, Mark Penley, Ryan Vassar, and David Maxwell for reporting unlawful acts allegedly committed by the elected Attorney General.

As more extensively addressed in the OAG's pending Rule 91a motion to dismiss, Plaintiffs have not alleged–and indeed cannot allege–facts demonstrating a waiver of the OAG's sovereign immunity from suit. For this reason alone, the Court lacks subject matter jurisdiction over Plaintiffs' claims and thus jurisdiction to enter a temporary injunction.

Moreover, a temporary injunction which reinstates Movants to two of the highest appointed positions in the OAG is neither permitted in light of the general requirements for any temporary injunction; and, in the specific case of a Whistleblower claim, until such time as either Movant *actually proves* a violation. That is, while the statute provides for reinstatement upon a finding of a violation, it does not allow reinstatement based merely on a showing of a substantial likelihood of *later* proving a violation.[2]

[2] While Movants point to the *rebuttable* presumption under § 554.004(a) of the Act, "[w]hen applicable, this statutory presumption [only] relieves the employee of his initial burden to prove that he was terminated because he reported a violation of the law. The presumption does not shift the burden of proof, however, and stands only in the absence of evidence to the contrary. Therefore, once an employer produces sufficient evidence to support a finding of the nonexistence of a causal connection between the employee's termination and the report, the case then proceeds as if no presumption ever existed." *Tex. HHS Comm'n v. Vestal*, No. 03-19-00509-CV, 2020 Tex. App. LEXIS 9616, at *8-9 (Tex. App.—Austin Dec. 10, 2020) (citations omitted). As discussed *infra,* the OAG's inability to conduct discovery at this nascent stage of the case, while

Procedural Posture

On December 14, 2020, the OAG answered Plaintiffs' lawsuit by asserting the OAG's sovereign immunity and, therefore, the Court's lack of subject matter jurisdiction over Plaintiffs' claims. Only after learning of the OAG's intention to file a plea to the jurisdiction did Movants embark on a race to the courthouse in an effort to conduct a temporary injunction hearing before the Court resolves the question of subject matter jurisdiction and before, consistent with Texas statute, that issue is resolved by an interlocutory appeal.

On January 8, 2021, the OAG filed its Rule 91a to dismiss Plaintiffs' claims for lack of subject matter jurisdiction. Consistent with Rule 91a.2, the OAG's motion to dismiss is based solely upon the controlling law and Plaintiffs' first amended petition. Since the OAG's sovereign immunity is a jurisdictional bar, Texas case law prohibits the Court from proceeding on the merits of this case until it determines whether it has jurisdiction to proceed. *See, infra.*

Moreover, the relief Movants seek through a temporary injunction – immediate reinstatement of each Movant to his previous position, compensation, and benefits – is the exact relief Movants seek at the conclusion of this lawsuit in the form of a permanent injunction.[3] Thus, Movants are not only improperly asking the Court to exercise subject matter jurisdiction it is presumed not to have, but Movants' request for a temporary

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the Court is presumed not to have subject matter jurisdiction, *see infra* at n.4, cannot form the basis for an assertion of an entitlement to an injunction.

[3] Pls.' 2d Am. Pet., § X, p. 63.

injunction also seeks to have the Court pre-judge the suit's merits, and grant them effectively final relief, *before the OAG may even conduct discovery.* This procedure, contrary to clear Texas statutory and case law, deprives OAG of due process.

Further, because Movants have failed to: (1) state a cognizable claim under the Whistleblower Act; (2) establish a right to a temporary injunction reinstating Movants' employment; and (3) demonstrate a probable, imminent, and irreparable injury in the interim, Movants are not entitled to any injunctive relief.

Arguments & Authorities

1. The Court can neither consider nor rule on Movants' motion for temporary injunction before the Court first rules on its subject matter jurisdiction and, if necessary, that issue is decided on appeal.

Subject matter jurisdiction is essential to the power of a court to decide a case, and without subject matter jurisdiction a court cannot render a valid judgment. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). Because "a court must not act without determining that it has subject-matter jurisdiction to do so," *Bland I.S.D. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000), it is axiomatic that "a court must not proceed on the merits of a case until legitimate challenges to its jurisdiction have been decided." *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004). *See also, State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994).

"The high cost of defending a suit against a governmental entity, borne ultimately by the public, is strong motivation for allowing *any* jurisdictional issue to be resolved before the merits of the suit are litigated." *City of Austin v. L.S. Ranch*, 970 S.W.2d 750, 753 Tex. App.—Austin 1998, no pet.) (emphasis in original). Similarly, the policy reasons

underlying the statutorily-provided interlocutory appeal from an order granting or denying a plea to the jurisdiction apply here: "the [OAG] should not have to expend resources in trying a case on the merits if it is immune from suit." *City of Galveston v. Gray*, 93 S.W.3d 587, 592 (Tex. App.—Houston [14th Dist.] 2002) (orig. proceeding).

> The legislative history of Section 51.014(a) underscores the Legislature's concern with preventing such inefficiency.... Supporters of the provision believed "incorrect rulings on [jurisdictional pleas] **needlessly waste the time of the courts and can cost litigants hundreds of thousands of dollars as they defend cases which should have been dismissed**."

Tex. A&M Univ. Sys. v. Koseoglu, 233 S.W.3d 835, 845 and n.2 (Tex. 2007) (emphasis added) (quoting House Comm. on Civ. Practices, Bill Analysis, Tex. S.B. 453, 75th Leg., R.S. (1997)). Where, as here,[4] a trial court lacks subject matter jurisdiction over a cause of action under the Whistleblower Act "the trial court likewise lacks subject-matter jurisdiction to enter a temporary injunction." *Beaumont Indep. Sch. Dist. v. Guillory*, No. 09-15-00531-CV, 2016 Tex. App. LEXIS 5045, at *21 (Tex. App.—Beaumont May 12, 2016).

By enacting section 51.014(a)(8) of the Texas Civil Practice & Remedies Code, "[t]he Legislature provided for an interlocutory appeal when a trial court denies a governmental unit's challenge to subject matter jurisdiction, irrespective of the procedural vehicle used." *Thomas v. Long*, 207 S.W.3d 334, 339 (Tex. 2006). "Even in the absence of an explicit denial of a jurisdictional challenge,... if a trial court rules on the merits of an issue without explicitly rejecting an asserted jurisdictional attack, it has implicitly denied

[4] Governmental entities are not only presumed immune from suit, *Lubbock Cty. Water Control & Improv. Dist. v. Church & Akin, L.L.C.*, 442 S.W.3d 297, 300 (Tex. 2014), but there is in fact a "heavy presumption in favor of immunity." *City of Galveston v. State*, 217 S.W.3d 466, 469 (Tex. 2007).

the jurisdictional challenge." *City of Houston v. ATSER, L.P.*, 403 S.W.3d 354, 357 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (citing *Thomas*, 207 S.W.3d at 339-40). Notably, in its recent opinion in *Tex. Mun. League Intergovernmental Risk Pool v. City of Hidalgo*, No. 13-19-00096-CV, 2020 Tex. App. LEXIS 2093 (Tex. App.—Corpus Christi, Mar. 12, 2020, no pet.), the Corpus Christi Court of Appeals held a trial court "[r]eached the merits of the [plaintiffs'] claims" and implicitly denied a jurisdictional challenge "by ordering the parties to participate in appraisal." *Id.* at *9.

Thus, Texas law precludes the Court from considering, let alone ruling on, Movants' motion for temporary injunction before the Court determines its jurisdiction. The Court must not, in other words, elevate efficiency and convenience over resolution of the Court's subject matter jurisdiction.

1.1. By permitting Plaintiffs to conduct a temporary injunction hearing, the Court would violate the Rules of Civil Procedure and deprive the OAG of due process.

Rule 681 of the Texas Rules of Civil Procedure provides that "[n]o temporary injunction shall be issued without notice to the adverse party," Tex. R. Civ. P. 681, "implying that there will be an adequate opportunity to be heard." *Elliott v. Lewis*, 792 S.W.2d 853, 855 (Tex. App.—Dallas 1990, no pet.). *See also, Austin v. Texas Public Employees Ass'n*, 528 S.W.2d 637, 640 (Tex. App.—Austin 1975, no pet.). "The underlying basis for enactment of Tex. R. Civ. P. 681 was the recognition of an individual's fundamental right to due process of law." *Kramer Trading Corp. v. Lyons*, 740 S.W.2d 522, 524 (Tex. App.—Houston [1st Dist.] 1987, pet. denied) (citing Tex. Const. art. 1, § 19; the Texas Due Process clause).

Thus, while, "the trial court is entitled to reasonably limit the proceedings [in a temporary injunction hearing]" *Elliott*, 792 S.W.2d at 855, "[d]ue process requires adequate and reasonable notice appropriate to the nature of the hearing." *Amalgamated Acme Affiliates v. Minton*, 33 S.W.3d 387, 396 (Tex. App.—Austin 2000, pet. denied). "Such notice involves a reasonable time for preparation." *Id*. As a matter of basic due process, "the trial court may not deprive a party of its right to offer any evidence." *RRE VIP Borrower, LLC v. Leisure Life Senior Apt. Hous., Ltd.*, No. 14-09-00923-CV, 2011 Tex. App. LEXIS 3304, *7 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (citing *Elliott*, 792 S.W.2d at 855). Indeed, "[t]he opportunity to be heard and present evidence **must amount to more than the mere opportunity to cross-examine the other party's witnesses**." *Id.* (emphasis added).

"[A] trial court is not authorized to enter a temporary injunction order against a party before that party has had an opportunity to present its defenses and has rested its case." *Hudson v. Aceves*, 516 S.W.3d 529, 539 (Tex. App.—Corpus Christi 2016, no pet.) (quoting *Elliott*, 792 S.W.2d at 855). *See also, Kramer*, 740 S.W.2d at 524; *City of Austin v. Texas Public Employees Ass'n*, 528 S.W.2d 637, 640 (Tex. Civ. App.—Austin 1975, no writ). "A party must be given an opportunity to **fully litigate** the issue before the court grants the injunction." *Minton*, 33 S.W.3d at 396 (citing *Tober v. Turner of Tex., Inc.*, 668 S.W.2d 831, 836 (Tex. App.—Austin 1984, no writ)) (emphasis added).

Further, "[j]udicial curtailment of a constitutional right or freedom cannot be justified in the name of efficiency or by the erroneous notion that the resultant benefit will be judicial economy." *Kramer*, 740 S.W.2d at 524. "[T]he Code of Judicial Conduct

mandates that a judge…'accord to every person who is legally interested in a proceeding,… full right to be heard according to law." *Id.* (quoting Texas Supreme Court, Code of Judicial Conduct, Canons 3A(3), (4) (1980)).

As discussed *supra* and in the OAG's original answer, motion to quash, motion to dismiss, and motion for entry of protective order, because conducting any discovery is not permissible in light of the Court's lack of subject matter jurisdiction, *see, City of Galveston v. Gray*, 93 S.W.3d 587 (Tex. App.—Houston [14th Dist.] 2002, orig. proceeding), the OAG has been precluded from propounding written discovery or obtaining any deposition testimony, even that of the Movants themselves. This is a basic denial of due process the Court is duty-bound to preclude. *Kramer*, 740 S.W.2d at 524. By requiring the OAG to participate in the multiple-day hearing on Movants' temporary injunction without the benefit of any pre-hearing discovery, the Court would not only strip the OAG's sovereign immunity protection, but it would also deprive the OAG of its due process right to be heard and present evidence during Movants' hearing. *See RRE VIP supra*. Indeed, the OAG would be able to do nothing more than "cross-examine [Movants'] witnesses." *Id.*

2. Because reinstating Movants' employment would accomplish the object of Plaintiffs' suit, as a matter of law the Court cannot enter a temporary injunction that does so.

"A temporary injunction is an extraordinary remedy [that] does not issue as a matter of right." *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). "A temporary injunction's purpose is to preserve the status quo of the litigation's subject matter pending a trial on the merits." *Clint Indep. Sch. Dist. v. Marquez*, 487 S.W.3d 538, 555 (Tex. 2016) (quoting *Butnaru*, 84 S.W.3d at 204). The status quo in this case is that both Movants have

been separated from employment with the OAG based on each Movant's own misconduct. Because the injunctive relief that Movants seek would, if granted, afford them effectively complete relief, it is unavailable via the temporary injunction they have filed.

It is well-settled under Texas law that "the … relief awarded [by a temporary injunction] cannot be such as to accomplish the object of the suit." *Babu v. Zeeck*, 478 S.W.3d 852, 854 (Tex. App.—Eastland 2015, no pet.), or "to obtain an advance ruling on the merits." *Iranian Muslim Organization v. San Antonio*, 615 S.W.2d 202, 208 (Tex. 1981). *See also, Garza v. Mission*, 684 S.W.2d 148, 154 (Tex. App.—Corpus Christi 1984, pet. denied). "To do so is tantamount to adjudicating the litigants' respective rights without the benefit of a trial and, therefore, is error." *Babu*, 478 S.W.3d at 854 (quoting *Friona Indep. Sch. Dist. v. King*, 15 S.W.3d 653, 657 (Tex. App.—Amarillo 2000, no pet.)). "A temporary injunction may run afoul of this prohibition even though the trial court does not grant all the relief sought. It is enough that the decision gives [movant] most or substantially all of it." *Friona Indep. Sch. Dist.*, 15 S.W.3d at 657.

Since Movants seek to obtain through a temporary injunction "all the relief they would be entitled to if successful in a trial on the merits," *State Dep't of Highways & Pub. Transp. v. Elkins Lake Mun. Util. Dist.*, 593 S.W.2d 401, 402-03 (Tex. App.—Houston [14th Dist.] 1980, no writ), Movants' motion for temporary injunction asks the Court to prematurely adjudicate the merits of their whistleblower claims. Specifically, Movants seek a temporary injunction immediately reinstating both Maxwell's and Vassar's employment to, as they allege, two of the highest appointive positions in the OAG,

compensation, and benefits, pending trial.[5] Tellingly, Movants seek the very same relief through "a permanent injunction ordering reinstatement" following trial.[6]

Under similar facts in *Cano v. Rio Grande City Ind. Sch. Dist.*, No. 3-91-506-CV, 1992 Tex. App. LEXIS 1040 (Tex. App.—Austin Apr. 29, 1992, no pet.), the Austin Court of Appeals held the plaintiff in a whistleblower case was not entitled to a temporary injunction precluding his termination from employment under section 554.003. "It is error for a trial court to grant a temporary injunction, the effect of which would be to accomplish the object of the suit. **To do so would be to determine rights without a trial**." *Cano*, at *9 (emphasis added) (quoting *Dallas Ind. Sch. Dist. v. Daniel*, 323 S.W.2d 639 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.)). *See also, e.g., Texas Foundries, Inc. v. International Moulders & Foundry Workers Union*, 248 S.W.2d 460, 464 (Tex. 1952).

Ignoring these well-established propositions of Texas law, Movants have demonstrated a specific intent to proceed with a temporary injunction before a determination of the threshold issue of jurisdiction in an effort to ambush the OAG at a hearing while asking the Court to pre-judge the ultimate merits so as to alleviate the Movants' burden to prove their case at a trial on the merits. But the Court cannot consider Movants' motion for a temporary injunction reinstating Maxwell and Vassar, let alone determine whether that remedy is even feasible,[7] until after the Court decides its subject matter jurisdiction to hear the merits of Movants' claims.

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[5] Pls.' 2d Am. Pet., pp. 61-62.

[6] *Id.*, § X, p. 63. Plaintiffs Brickman and Penley initially joined Movants in seeking interim injunctive relief, Pls.' 1st Am. Pet., but have since withdrawn that request.

[7] *See infra*, pp. 12-14.

2.1. Immediate reinstatement is neither permissible nor appropriate.

Even if the Court determines their request for temporary injunctive relief is not an adjudication on the merits, Movants are not and will not be entitled to reinstatement under section 554.003(b) unless and until Movants successfully demonstrate – and not simply allege – that the OAG fired Movants in violation of the Whistleblower Act. Tex. Gov't Code § 554.003.

Broadly, "the Texas Whistleblower Act entitles **a successful plaintiff** to recover – in addition to actual damages – up to $250,000 for emotional damages as well as **injunctive relief**, court costs, attorney's fees **and reinstatement**." *Watson v. Houston Indep. Sch. Dist.*, No. 14-03-01202-CV, 2005 Tex. App. LEXIS 6261, *19 (Tex. App.—Houston [14th Dist.] Aug. 9, 2005, no pet.) (emphasis added) (citing Tex. Gov't Code § 554.003), *accord Powers v. Northside Indep. Sch. Dist.*, 951 F.3d 298, 308 (5th Cir. 2020). *See also, e.g.*, *Bates v. Randall County*, 297 S.W.3d 828, 836 (Tex. App.—Amarillo 2009, pet. denied); *Galveston Indep. Sch. Dist. v. Jaco*, 278 S.W.3d 477, 481 (Tex. App.—Houston [14th Dist.] 2009), *rev'd on other grounds*, 303 S.W.3d 699 (per curiam);[8] *City of Houston v. Levingston*, 221 S.W.3d 204, 237 (Tex. App.—Houston [1st Dist.] 2006, no pet.).[9]

[8] Damages for present and future lost wages, employment benefits, attorneys' fees, inconvenience, loss of enjoyment of life, emotional distress, and mental anguish constitute relief available under the Whistleblower Act to prevailing public employees. *Jaco I*, 278 S.W.3d at 481.

[9] "As a **prevailing plaintiff in a Whistleblower suit**, Levingston was entitled to … recovery [under section 554.003(a)]." *Levingston*, 221 S.W.3d at 237 (emphasis added).

Specifically, under section 554.003(a),

> [a] public employee whose employment is suspended or terminated or who is subjected to an adverse personnel action **in violation of Section 554.002** is entitled to sue for: (1) injunctive relief; (2) actual damages; (3) court costs; and (4) reasonable attorney fees.

Tex. Gov't Code § 554.003(a) (emphasis added). Similarly, under section 554.003(b),

> A public employee whose employment is suspended or terminated **in violation of this chapter** is [also] entitled to: (1) reinstatement to the employee's former position or an equivalent position; (2) compensation for wages lost during the period of suspension or termination; and (3) reinstatement of fringe benefits and seniority rights lost because of the suspension or termination."

Tex. Gov't Code § 554.003(b). Again, as the Austin Court of Appeals made clear in *Cano v. Rio Grande City I.S.D.*, **section 554.003 does not authorize continued employment as pre-judgment, injunctive relief**. *Cano*, 1992 Tex. App. LEXIS 1040, *9.

Moreover, while prevailing plaintiffs are statutorily entitled to reinstatement following trial under section 554.003(b), state and federal courts in Texas have acknowledged that reinstatement is often not in the public's or the public entity's interest and have "recognized the availability [under the Whistleblower Act] of an equitable award for front pay when reinstatement is not a feasible option," *City of Houston v. Levingston*, 221 S.W.3d 204, 232 (Tex. App.—Houston [1st Dist.] 2006, no pet.),[10] or "when job reinstatement is not feasible." *Powers*, 951 F.3d at 308.

Reinstatement may not be feasible when, for example, "practicalities such as the unavailability of a position for reinstatement, the displacement of a current employee, or

[10] "Front pay is generally considered an alternative to reinstatement where reinstatement is not a feasible option. Thus, the remedies of reinstatement and front pay are traditionally viewed as alternative, rather than cumulative." *Tex. Comm'n on Human Rights v. Morriso*n, 346 S.W.3d 838, 851 (Tex. App.—Austin 2011), *rev'd on other grounds*, 381 S.W.3d 533 (Tex. 2012) (citing *Suggs v. Service Master Educ. Food Mgmt.*, 72 F.3d 1228, 1234 (6th Cir. 1996)).

… when excessive hostility or animosity exists between the parties." *Bell Helicopter Textron, Inc. v. Burnett*, 552 S.W.3d 901, 920 (Tex. App.—Fort Worth 2018, pet. denied). *See also, Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 (2001); *Levingston*, 221 S.W.3d at 233. Texas courts have repeatedly recognized the propriety of front pay in lieu of reinstatement where the former employer defendant objected to reinstatement, *see, e.g., Bell*, 552 S.W.3d at 920; *Levingston*, 221 S.W.3d at 232-33, or stipulated it would not reinstate the dismissed employee. *Dell, Inc. v. Wise*, 424 S.W.3d 100, 117 (Tex. App.—Eastland 2013, no pet.).

As discussed *supra*, Movants' motion for temporary injunction seeks immediate reinstatement pending a trial on the merits of Movants' whistleblower claims. Even though Plaintiffs correctly observe that the Whistleblower Act "expressly provides for" injunctive relief and reinstatement as remedies "for a [finding of] retaliatory termination,"[11] Movants ignore that the Whistleblower Act's remedies are available to a prevailing plaintiff, not a plaintiff who has not yet prevailed. *See Watson*, 2005 Tex. App. LEXIS 6261, at *19. It is no surprise that Movants fail to cite any legal authority where a fired whistleblower plaintiff has been reinstated to his or her previous job before trial.[12] Movants are not successful plaintiffs—nor will they be following a temporary injunction hearing—and,

[11] Pls.' 2d Am. Pet. at ¶ 203.

[12] Indeed, the only opinion Movants cite in support of this argument for entry of a temporary injunction reinstating Plaintiffs' employment with the OAG, *City of Galveston v. Humphrey*, No. 01-99-01373-CV, 2001 Tex. App. LEXIS 1365 (Tex. App.—Houston [1st Dist.] 2001, no pet.), is easily distinguished from the case at bar. In *Humphrey*, the First Court of Appeals affirmed the trial court's temporary injunction reinstating a **transferred** — but not fired — plaintiff to his previous position **based on the plaintiff's severe health conditions**. *Id*. at * 14.

thus, Movants are not entitled to reinstatement via injunctive relief under the Whistleblower Act. *See id.*

In addition to this well-settled proposition of law, the existence of excessive hostility and animosity between Movants, who have demonstrated a total lack of loyalty, trust, and confidence in the Attorney General, belies any argument Movants could assert supporting a determination, whether now or after a trial on the merits, that reinstatement is a feasible option.[13] *Levingston*, 221 S.W.3d at 233. Movants' request for reinstatement is further undermined by the fact that Maxwell's[14] and Vassar's[15] former positions are filled by others since the OAG hired two highly qualified, loyal, and trustworthy individuals to fill Movants' former positions and, thus, any order reinstating Movants would displace current OAG employees. *See Palasota v. Haggar Clothing Co.*, 499 F.3d 474, 489 (5th Cir. 2007) ("[E]xcept under extraordinary circumstances...innocent incumbents may not be displaced."). *See also, Hansard v. Pepsi-Cola Metro. Bottling Co.*, 865 F.2d 1461, 1469 (5th Cir. 1989).

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[13] *See generally* Pls.' 2d Am. Pet.

[14] The OAG has hired Brent Dupre as Director of Law Enforcement. Because its hiring of Mr. Dupre is easily ascertainable and not subject to reasonable dispute, *compare In re Newby*, 280 S.W.3d 298, 302 n.2 (Tex. App.—El Paso 2008, no pet.), the OAG requests the Court take judicial notice of the OAG's press release announcing Mr. Dupre's hiring:

AG Paxton Announces Hiring of Brent Dupre as Director of Law Enforcement, Press Releases (Feb. 11, 2021), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-announces-hiring-brent-dupre-director-law-enforcement.

[15] The OAG has hired Murtaza Sutarwalla as the OAG's Deputy Attorney General for Legal Counsel. Because its hiring of Mr. Sutarwalla is easily ascertainable and not subject to reasonable dispute, *compare Newby*, 280 S.W.3d at 302 n.2, the OAG requests the Court take judicial notice of the OAG's press release announcing Mr. Sutarwalla's hiring:

AG Paxton Announces Hiring of Murtaza Sutarwalla as Deputy Attorney General for Legal Counsel, Press Releases (Feb. 11, 2021), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-announces-hiring-murtaza-sutarwalla-deputy-attorney-general-legal-counsel.

3. Movants have failed to demonstrate they are entitled to a temporary injunction reinstating each Movant's employment with the OAG.

As the party applying for a temporary injunction, Plaintiffs "must plead and prove three specific elements: (1) a cause of action against the [OAG]; (2) a probable right to the relief sought; and (3) a probable imminent, and irreparable injury in the interim." *Butnaru*, 84 S.W.3d at 204. "[Maxwell and Vassar] must establish each element." *Abbott v. Anti-Defamation League Austin, Southwest, & Texoma Regions*, No. 20-0846, 2020 Tex. LEXIS 994, *5 (Tex. Oct. 27, 2020) (per curiam).

3.1 Movants have each failed to state a cognizable claim under section 554.002 of the Texas Whistleblower Act.

As set forth in great detail in the OAG's motion to dismiss based on lack of subject matter jurisdiction, Movants Maxwell and Vassar have each failed to set out even the most basic allegations necessary to state a claim under the Whistleblower Act. To state a claim, Maxwell and Vassar must each allege facts that make out a plausible claim of relief. "[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ruth v. Crow*, No. 03-16-00326-CV, 2018 WL 2031902, at *5 (Tex. App.—Austin May 2, 2018, pet. denied) (mem. op.) (citation and quotations omitted). "Mere unsupported legal conclusions are insufficient." *Gattis v. Duty*, 349 S.W.3d 193, 200 (Tex. App.—Austin 2011, no pet.).

To state a claim under section 554.002, each Movant must allege *facts* showing he made a good-faith report of a violation of law to an appropriate law-enforcement authority. *See City of Elsa v. Gonzalez*, 325 S.W.3d 622, 625 (Tex. 2010) (citing Tex. Gov't Code § 554.002); *Jaco*, 303 S.W.3d 699.

"The Whistleblower Act defines 'law' as a state or federal statute, an ordinance of a local governmental entity, or 'a rule adopted under a statute or ordinance.'" *Univ. of Houston v. Barth*, 403 S.W.3d 851, 854 (Tex. 2013) (quoting Tex. Gov't Code § 554.001(1)). Although Movants "need not [initially] identify in [their] report[s] the specific law [each Movant] asserts was violated, there must be some law prohibiting the complained-of conduct to give rise to the Whistleblower action." *Wilson v. Dallas Ind. Sch. Dist.*, 376 S.W.3d 319, 323 (Tex. App.—Dallas 2012, no pet.). If Movants were not required to identify a report of a violation of an existing law, "every complaint, grievance, or misbehavior could support a claim." *Llanes v. Corpus Christi Ind. Sch. Dist.*, 64 S.W.3d 638, 642-43 (Tex. App.—Corpus Christi 2001, pet. denied).

An "appropriate law enforcement authority" under the Act is a part of a federal, state, or local governmental entity the employee in good faith believes is authorized to either "(1) regulate under or enforce the law alleged to be violated in the report; or (2) investigate or prosecute a violation of criminal law." Tex. Gov't Code § 554.002(b). The authority "must have outward-looking powers," *Weatherspoon*, 472 S.W.3d at 282, including, for example, the "authority to enforce, investigate, or prosecute violations of law against third parties outside of the entity itself, or it must have authority to promulgate regulations governing the conduct of such third parties," *Univ. of Tex. Sw. Med. Ctr. v. Gentilello*, 398 S.W.3d 680, 686 (Tex. 2013).

It is notable that, despite amending their petition, twice, and filing a motion for temporary injunction, Movants have failed to allege any facts, let alone attach any evidence identifying the specific content of any report or specific actions supporting each element

of each law Movants contend Attorney General Paxton violated,[16]; and, moreover, Movants have failed to affirmatively plead facts showing that Vassar or Maxwell *reported* any of those alleged allegations to an appropriate law enforcement authority. Accordingly, the OAG incorporates its motion to dismiss briefing regarding Movants' failure to state a cognizable claim under section 554.002 herein.

3.2 Movants have each failed to demonstrate a probable right to the relief sought.

To show a probable right to the relief sought, Movants must allege a cause of action and present some evidence tending to sustain it. *Taylor Hous. Auth. v. Shorts*, 549 S.W.3d 865, 877-78, (Tex. App.—Austin 2018, no pet.). "In the absence of an agreement between the parties, the proof required to support a judgment issuing a temporary injunction generally may not be made by affidavit." *Cf.*, *Burkholder v. Wilkins*, 504 S.W.3d 485, 491, (Tex. App.—Corpus Christi 2016, pet. denied). In other words, "[p]leadings, even if sworn, affidavits, and legal arguments will not support injunctive relief unless the parties agree otherwise." *Sanadco Inc. v. Hegar*, No. 3-14-00771-CV, 2015 Tex. App. LEXIS 6885, *2 (Tex. App.—Austin July 3, 2015, no pet.) (mem. op.).

While Movants have alleged a cause of action under section 554.002 of the Texas Whistleblower Act and despite contending "[t]he evidence is overwhelming that OAG retaliated against [Movants] because of [Movants'] reports to law enforcement,"[17] Maxwell and Vassar have nonetheless failed to present *any evidence* tending to sustain Movants' claims against the OAG. Instead, Maxwell and Vassar's allegations rely upon

[16] Pls.' 2d Am. Pet., ¶ 182.

[17] *Id.*, ¶ 188.

only unsupported, vague, and conclusory statements,[18] references to external documents Movants failed to attach,[19] hearsay,[20] and legal conclusions unsupported by admissible evidence.[21]

Further, as discussed *supra*, Movants cannot as a matter of law prevail on their motion for temporary injunction because, under well-settled law, the "trial court should not issue a temporary injunction if [Movants] would thereby obtain substantially all the relief which is properly obtainable in a final hearing." *Garza*, 684 S.W.2d at 154. Specifically, Movants seek a temporary injunction immediately reinstating Movants to their previous positions in the OAG which Movants would seek to make permanent should they prevail on the merits at trial. Accordingly, the effect of the Court granting Movants' improper and premature temporary injunction would be a "determin[ation] of rights without a trial." *Id*.

3.3 Movants have each failed to demonstrate a probable, imminent, and irreparable injury.

Probable injury, for temporary injunction purposes, includes elements of imminent harm, irreparable injury, and no adequate remedy at law for damages. *Surko Enters., Inc. v. Borg-Warner Acceptance Corp.*, 782 S.W.2d 233, 225 (Tex. App.—Houston [1st Dist.] 1989, no writ). An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any pecuniary standard. *Butnaru*, 84 S.W.3d at 204. "Damages are usually an adequate remedy at law, and the

[18] *See, e.g., id.*, ¶¶ 190-92.

[19] *Id*., ¶ 198.

[20] *Id*., ¶ 192.

[21] *Id*., ¶¶ 19.

requirement of demonstrating an interim injury is not to be taken lightly." *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993).

As discussed *supra*, Movants cannot obtain a temporary injunction immediately reinstating Movants' employment with the OAG because reinstatement is only available to plaintiffs who prevail on the merits of their whistleblower claim. But, even if the Whistleblower Act permitted Movants to obtain reinstatement through a temporary injunction, reinstatement is not feasible since Movants' former positions are unavailable and, thus, reinstatement would displace current OAG employees, and, most notably, excessive hostility, animosity, and a lack of trust and confidence exist between the OAG and Movants.

Regardless, Movants' request further fails on the basic, but essential burden to show "irreparable harm."

> The test for temporary injunctions in whistleblower actions is not, and should not be, different from the standard requirement that the appellant prove a likelihood of irreparable injury and probability of success on the merits. To hold otherwise would require a temporary injunction in every whistleblower suit of this nature.

Cano, 1992 Tex. App. LEXIS 1040 at *9. Thus, a temporary injunction is not appropriate in this alleged wrongful employment termination lawsuit because both Movant's damages are subject to calculation of precise economic loss, just as is the case for any employee who claims to have been wrongfully fired:

> The injury [Movants] allegedly suffered is no greater than any other employee wrongly fired for poor performance. Such damage is properly compensated by a monetary award, **if in a trial on the merits** the court finds the [OAG] wrongfully terminated [either Movant's] employment.

Cano, 1992 Tex. App. LEXIS 1040 at *10.[22] Simply put, it is well-settled that "[a] temporary loss of income or difficulties in finding other employment does not support a finding of irreparable injury." *Graham v. Wilson N. Jones Mem'l Hosp.*, No. 05-93-01843-CV, 1994 Tex. App. LEXIS 4052, at *10 (Tex. App.—Dallas June 16, 1994) (citing *Sampson v. Murray*, 415 U.S. 61, 92 n. 68 (1974) and *Ford v. Landmark Graphics Corp.*, 875 S.W.2d 33, 35 (Tex. App.--Texarkana, April 13, 1994, n.w.h.). Because this is the very, and only, "irreparable injury" Movants claim, and since such losses are both subject to precise mathematical calculation and the Act expressly provides for money damages to compensate any such proven loss, neither Movant can show the necessary irreparable injury required to obtain injunctive relief.

Prayer

For all these reasons, Defendant, Office of the Attorney General of Texas respectfully prays that the Court refrain from addressing Movants David Maxwell and Ryan Vassar's motion for temporary injunction until such time as the threshold issue of the Court's subject matter jurisdiction has been resolved as required under statute; and, if then, only after the OAG has had a reasonable opportunity to conduct discovery and has been

[22] Movants contention that "OAG's retaliation consists of firing and publicly accusing [Movants] of serious personal and professional misconduct in a manner likely to foreclose other professional opportunities," Pls.' 2d Am. Pet., ¶ 204, even if true, is not actionable. Under well-settled Texas law, "[w]hen the head of a state executive agency offers an explanation to the press, and hence the public, for the dismissal of employees, he acts within his official duties." *Salazar v. Morales*, 900 S.W.2d 929, 934 (Tex. App.—Austin 1995, no pet.) (addressing terminated public employee's defamation claim). While the OAG's comments in this instance were neither false, defamatory, malicious, or politically motivated, the case law is clear that public officials in such circumstances have "an absolute privilege to publish defamatory statements in communications made in the performance of [their] official duties," *Salazar*, 900 S.W.2d at 932, even if such statements "were politically motivated," *id.* at 934, or "published with express malice." *Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909, 913 (Tex. 1942).

afforded the basic due process for any injunction proceeding. Alternatively, should the Court elect to proceed prior to a determination of its subject matter jurisdiction to do so, for the foregoing reasons the Court should deny Movants' request for a temporary injunction and grant the OAG all other relief to which it is justly entitled.

Dated: February 26, 2021

Respectfully submitted,

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Cause No. D-1-GN-20-006861

James Blake Brickman, *et al.*, Plaintiffs, v. **Office of the Attorney General of Texas,** Defendant.	**In the District Court of** **Travis County, Texas** **250th Judicial District**

Office of the Attorney General of Texas's
Notice of Accelerated Interlocutory Appeal

Defendant, Office of the Attorney General of Texas which files this Notice of Accelerated Interlocutory Appeal. OAG respectfully appeals this Court's denial of OAG's plea to the jurisdiction. OAG exercises its right to seek an accelerated appeal to the Third Court of Appeals in Austin, Texas. *See* Tex. R. App. P. 28.1(a).

Notice of Automatic Stay

This interlocutory appeal stays all further proceedings in this Court, including the scheduled hearing on Plaintiffs David Maxwell's and Ryan Vassar's motion for temporary injunction. The Texas Civil Practice and Remedies Code permits an immediate, interlocutory appeal from a decision of this Court that "grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001." Tex. Civ. Prac. & Rem. Code § 51.014(a)(8). This rule applies whether the plea is denied explicitly or implicitly. *Thomas v. Long*, 207 S.W.3d 334, 339–40 (Tex.2006) (holding that trial court's order ruling on merits of even a subset of claims constitutes implicit denial of plea

to jurisdiction and was appealable under section 51.014(a)(8)); Tex. R. App. P. 33.1(a)(2)(A) (stating that a trial court need only "rule[] on the request, objection, or motion, either expressly or implicitly.").

Such "[a]n interlocutory appeal under Subsection (a)(3), (5), (8), or (12) also stays all other proceedings in the trial court pending resolution of that appeal." Tex. Civ. Prac. & Rem. Code § 51.014(b). This stay is immediate, nondiscretionary, and comprehensive; it stays all other proceedings, including discovery and hearings. *In re Geomet Recycling LLC*, 578 S.W.3d 82 (Tex. 2019) (issuing mandamus where court of appeals lifted stay to allow temporary injunction hearing to proceed); *id.* at 91–92 ("The court of appeals committed an error of law and thereby clearly abused its discretion when it authorized the trial court to conduct further trial-court proceedings in violation of the legislatively mandated stay of 'all other proceedings in the trial court.'").[1]

[1] *See also*, *In re Texas Educ. Agency*, 441 S.W.3d 747, 750 (Tex. App.—Austin 2014, orig. proceeding) ("[T]he stay set forth in section 51.014 is statutory and allows no room for discretion.") (collecting cases applying stay to orders granting, among other things, severance and leave to file an amended petition); *City of Galveston v. Gray*, 93 S.W.3d 587, 592 (Tex. App.—Houston [14th Dist.] 2002, orig. proceeding) (granting conditional mandamus where trial court ordered discovery ahead of ruling on a plea to the jurisdiction because it would defeat purpose of interlocutory appeal); *accord In re Texas Educ. Agency*, 441 S.W.3d 747, 750 (Tex. App.—Austin 2014, org. proceeding) ("[T]he stay set forth in section 51.014 is statutory and allows no room for discretion."); *In re Univ. of the Incarnate Word*, 469 S.W.3d 255, 259 (Tex. App.—San Antonio 2015, orig. proceeding) ("We conclude the trial court's order compelling discovery responses was an abuse of the district court's discretion because it violated the automatic stay of 'all other proceedings in the trial court' under section 51.014(b)."); *In re I-10 Colony, Inc.*, No. 01-14-00775-CV, 2014 WL 7914874, at *2 (Tex. App.—Houston [1st Dist.] Feb. 24, 2014, orig. proceeding) (mem. op.) (holding that discovery order violated state even though the trial court made an oral ruling on a motion for discovery prior to the imposition of the automatic stay); *In re Kinder Morgan Prod. Co., LLC*, No. 11-20-00027-CV, 2020 WL 1467281, at *4 (Tex. App.—Eastland Mar. 26, 2020, orig. proceeding) (holding that an order consolidating three cases for purposes of discovery violated the stay because "[a]ll proceedings, including discovery, are stayed pending the resolution of the interlocutory appeal").

Notice that the Office of the Attorney General Need Not File a Cost Bond

OAG further respectfully notifies the Court that, as a "department of this [S]tate," it is not required to file a bond for court costs. *See* Tex. Civ. Prac. & Rem. Code § 6.001(b). OAG's appeal is therefore perfected upon the filing of the notice of appeal.

Dated: March 1, 2021

Respectfully submitted,

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