

1 **REPORTER'S RECORD**
 2 **VOLUME 2 OF 3 VOLUMES**
 3 **TRIAL COURT CAUSE NO. D-1-GN-20-006861**
 4 **COURT OF APPEALS NO. 03-21-00161-CV**

FILED IN
 3rd COURT OF APPEALS
 AUSTIN, TEXAS

4/19/2021 6:32:11 PM
 DISTRICT COURT
 JEFFREY D. KYLE
 Clerk

5 JAMES BLAKE BRICKMAN,
 6 DAVID MAXWELL,
 7 J. MARK PENLEY, AND
 8 RYAN M. VASSAR,
 Plaintiffs,

) IN THE
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)
) TRAVIS COUNTY, TEXAS
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)
) OFFICE OF THE ATTORNEY
) GENERAL OF THE STATE OF
) TEXAS,
)
) Defendant.) 250TH JUDICIAL DISTRICT

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 15 **HEARING ON MOTION TO DISMISS AND TEMPORARY INJUNCTION**
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 20 On the 1st day of March, 2021, the following
 21 proceedings came on to be heard in the above-entitled
 22 and numbered cause before the Honorable Amy Clark
 23 Meachum, Judge Presiding, held in Austin, Travis
 24 County, Texas:

25 Proceedings reported by machine shorthand.

House Managers

EX. 466

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1 THE COURT: Going on the record. This is
2 Cause No. GN-20-6861, Brickman, Maxwell, Penley, and
3 Vassar vs. Office of the Attorney General of the State
4 of Texas. This is Judge Amy Clark Meachum. Welcome to
5 the 201st Court in the time of the Coronavirus and the
6 COVID-19 pandemic.

7 This proceeding is being conducted
8 pursuant to rules and orders adopted by the Texas
9 Supreme Court, the Travis County civil and family
10 courts and the inherent power of this Court in response
11 to the COVID-19 pandemic and existing emergency
12 conditions. In order to ensure that justice is not
13 unnecessarily delayed, the Court has determined that
14 this proceeding will be conducted remotely with the use
15 of available technology to assist the Court and the
16 litigants in the orderly administration of pending
17 litigation.

18 Today's date is March 1st, 2021. A
19 record is being made by the court reporter for the
20 201st District Court, Alicia Racanelli. We are
21 primarily using the Zoom format for our hearing today,
22 as well as broadcasting this case on our YouTube
23 channel to comply with the Open Courts provision of the
24 Texas Constitution. In addition, we are using the Box
25 application, which the Court has communicated with all

1 the lawyers for all the parties as the primary way in
2 which to load and use to admit exhibits in order for
3 the Court to enter exhibits as part of the record of
4 this trial.

5 I'm going to do a few more admonishments
6 and announcements, and then we're going to do the
7 announcements of who everybody's representing for the
8 record. Unauthorized audio and video recording is
9 prohibited, and violations are subject to the contempt
10 power of the Court. The only official record of this
11 proceeding will be taken by the court reporter.

12 Thank you everyone for being here and
13 ready to go and actually having all of your mics
14 working, which we checked before we went on the YouTube
15 channel. Typical courtroom demeanor and decorum are
16 expected and will be enforced, including but not
17 limited to reasonable attire, one speaker at a time,
18 and so on and so forth. No use of the chat function,
19 except for breakout rooms, if we want to go to those,
20 and please mute your microphone whenever you can. The
21 muting is more for the purposes of making sure we
22 proceed today without interruption.

23 I will let you all know, because it
24 appears many of you are in your offices, at your office
25 at work, which was one of the reasons we didn't proceed

1 on February 22nd, when this case was originally set. I
2 am at home, and so at times there could be distractions
3 on my end. And what I would say is, if you have
4 distractions, if you can't hear me because of my
5 distractions or some sort of connectivity issue, please
6 let me know. The main thing we want to make sure of is
7 that everyone can hear, everybody can participate at
8 all times.

9 Sometimes you'll have objections and your
10 objections will be slightly late because you're using
11 the mute function on and off. I will not penalize you
12 for that. It's better to keep our mute on and not have
13 background noise and not have distractions because that
14 just -- in our year of -- almost a year of doing this,
15 that has worked much better.

16 Let me also explain, this is one of those
17 hearings where there's so many parties and so much
18 interest, I might have gone to the courthouse to
19 conduct this one; however, our courthouse is still shut
20 down. Because in addition to the COVID-19 pandemic,
21 when February 22nd and our winter storms hit Texas, one
22 of the things that happened is our courthouse flooded
23 completely. And while we still have running -- well,
24 we didn't have running water for a week. While my
25 understanding is water is back up, the courthouse was

1 so flooded, literally inches of water on the floor in
2 all different stories of the building, that they're
3 having to do air quality studies and water quality
4 studies in the courthouse itself.

5 So even had we been able to overcome one
6 crisis in the COVID-19 pandemic and had this hearing
7 been scheduled to have at the courthouse, we couldn't
8 have overcome the second crisis because the current
9 courthouse is not open yet to the public because of
10 emergency conditions due to the winter storms on top of
11 the emergency conditions regarding the COVID-19
12 pandemic.

13 So that said, we use the Zoom platform.
14 It has been working pretty well. It will have things
15 that frustrate you. It will have things that work
16 better. But we will work it out together, and we will
17 make sure we get this done and everybody has their
18 opportunity to be heard and due process before this
19 Court and the Travis County civil and family courts.

20 At this time, for the record, if everyone
21 could make your attorney announcements and who you're
22 representing.

23 MR. NESBITT: Your Honor, Tom Nesbitt
24 with the law firm of DeShazo & Nesbitt representing
25 James Blake Brickman. I'm joined by my co-counsel

1 T.J. Turner of the Law Firm of Cain & Skarnulis, and
2 Mr. Ma- -- rather, Mr. Brickman is also here with us
3 today.

4 MR. BRICKMAN: Good morning, Your Honor.

5 MR. SOLTERO: Your Honor, Carlos Soltero
6 with the law firm Soltero Sapire Murrell. I represent
7 David Maxwell, and Mr. Maxwell is here with us as well.
8 He's one of the plaintiffs.

9 MR. TITTLE: Your Honor, I'm Don Tittle
10 with the Law Offices of Don Tittle. With me today is
11 an associate from my office, Roger Topham, and also my
12 client, Mark Penley.

13 MR. KNIGHT: And, Your Honor, I'm Joe
14 Knight. My law firm is Ewell Brown Blanke & Knight. I
15 represent plaintiff Ryan Vassar, and Mr. Vassar is also
16 here.

17 MR. HELFAND: Good morning, Your Honor.
18 William Helfand and Sean Braun of the law firm of Lewis
19 Brisbois Bisgaard & Smith on behalf of the Office of
20 the Attorney General of the State of Texas.

21 THE COURT: And there is no in-house
22 representative from the Attorney General, correct?

23 MR. HELFAND: Mr. Braun and I will be the
24 only representatives of the Office of the Attorney
25 General for this hearing, Your Honor.

MOTION TO DISMISS

1
2 THE COURT: Thank you. Okay. So we have
3 a couple of things set. And as you all know, it is a
4 difficult docket right now at the courthouse. We're
5 dealing with a lot of different issues that I have just
6 explained. And for economy reasons, we have set all
7 these matters before the Court today.

8 We have a motion to dismiss, and we also
9 have a temporary injunction. And the way we are going
10 to do this is the motion to dismiss will be argued
11 first and then the temporary injunction will be argued
12 second. And so the motion to dismiss is brought by the
13 Attorney General, and you may proceed with your
14 argument at this time.

15 MR. HELFAND: Thank you, Your Honor. One
16 minor correction, but just to be clear, the motion to
17 dismiss is urged by the Office of the Attorney General
18 of the State of Texas, not the elected Attorney
19 General, who is not a party to this lawsuit.

20 THE COURT: So every time that you have
21 me refer, you want me to say the Office of the Attorney
22 General? I was just doing that as shorthand, but I
23 can -- I can change my vernacular, if that makes you
24 more comfortable. And every time I will say the Office
25 of the Attorney General of the State of Texas, if

1 that's what you would prefer.

2 MR. HELFAND: I appreciate that, Your
3 Honor. That is the defendant. I -- and -- and -- and
4 both --

5 THE COURT: Can I call it OAG just for
6 shorthand?

7 MR. HELFAND: May we both? That would be
8 easier for both of us, I think.

9 THE COURT: Okay. Then let's -- I will
10 try my best. About 20 percent of our docket involves
11 the Attorney General, and so it is difficult sometimes
12 for me to change practices after a decade, but I am
13 going to do my level best to constantly say OAG and
14 make sure we make that specific distinction.

15 **ARGUMENT BY MR. HELFAND**

16 MR. HELFAND: Very well, Your Honor. And
17 I will also understand that if the Court calls it the
18 Attorney General's Office, that is not the Court
19 referring to the elected Attorney General but rather
20 the defendant in this lawsuit. But I think that the
21 distinction is important because, as the pleadings
22 demonstrate and as the rampant media releases that the
23 plaintiffs have made, seem to attempt to blur the line
24 or even confuse the difference between the elected
25 Attorney General, who is a constitutionally created

1 officer of the State of Texas, and the Office of the
2 Attorney General, which is the only defendant in this
3 lawsuit. So thank you for that.

4 Your Honor is presented with a motion to
5 dismiss under Rule 91a of the Rules of Civil Procedure.
6 As the Court knows, under Rule 91a, the Court confines
7 the resolution of the question of the motion to dismiss
8 here asserting a lack of subject matter jurisdiction
9 based upon the pleadings. The Court takes the factual
10 allegations but not any conclusory statements as true.
11 That is, most of the plaintiffs' amended petition is
12 conclusory in nature. And the Court -- the Austin
13 Court of Appeals has made clear that consistent with
14 the United States Supreme Court holdings in *Iqbal vs.*
15 *Ashcroft* and *Twombly* that conclusory statements and
16 allegations of law are not afforded any credibility or
17 truthfulness. The Court decides the law on its own.
18 But the Court does take the factual allegations as
19 true, but by the same token, the Court's scope of legal
20 inquiry is not limited in any way.

21 Rule 91a, according to the Supreme Court,
22 does not limit in any way the universe of legal
23 theories by which the defendant may show that the
24 claimant is not entitled to relief based upon the
25 factual allegations. And again, here, the Court starts

1 with the -- what the Supreme Court has called heavy
2 presumption of governmental immunity afforded to the
3 Office of the Attorney General and requires that the
4 plaintiffs demonstrate a waiver of that immunity. It
5 is not for the Office of the Attorney General to prove
6 immunity because immunity is already subject to a heavy
7 presumption; rather, it is the plaintiffs' burden to
8 demonstrate a waiver of that.

9 There are two situations in which the
10 Court may find a lack of basis in the law sufficient to
11 require a dismissal under Rule 91a. And again, here,
12 they're particularly aimed at the question of subject
13 matter jurisdiction. There's no waiver of governmental
14 immunity under any statutory waiver that applies,
15 except to the extent that the plaintiff may demonstrate
16 full compliance with the requirements of the statute so
17 as to raise the question of waiver.

18 The two circumstances are, one, the
19 petition alleges too few facts to demonstrate a viable
20 legally cognizable, in this case, waiver of immunity or
21 the petition alleges additional facts that, if assumed
22 are true, would actually demonstrate a lack of a waiver
23 of immunity. The plaintiffs' petition in this case,
24 even after the benefit of the OAG's motion to dismiss,
25 presents both grounds for dismissal.

1 And as the Court probably observed in
2 reviewing the Office of the Attorney General's motion
3 to dismiss, there are four separate fatal defects to an
4 assertion of a waiver of immunity. It bears repeating,
5 because of so much of the argument that's been advanced
6 both in the pleadings and in the numerous misleading
7 public press statements made by the plaintiffs, that
8 this lawsuit does not involve the Attorney General of
9 the State of Texas. It is a lawsuit against the Office
10 of the State of Texas -- I'm sorry -- against the State
11 of Texas through the Office of the Attorney General.

12 Of course, I think it's undisputed that
13 the Office of the Attorney General is a state
14 governmental entity presumptively immune from suit
15 unless the Legislature has expressly waived that
16 immunity. Again, it's a heavy presumption of immunity,
17 and it is the plaintiffs' burden to show the waiver.

18 Now, the only cause of action upon which
19 a waiver here is asserted is the Texas Whistleblower
20 Act, Chapter 552 of the -- did I say that right? --
21 Chapter 552 of the Government Code. 554, excuse me.
22 554 of the Government Code. Based upon the plaintiffs'
23 own pleading admissions, however, the Act does not
24 cover the plaintiffs' claims against the Office of the
25 Attorney General in this case.

1 Now, as the Court also knows, but it
2 bears repeating, these plaintiffs, like most employees
3 in Texas, have always been employees at will. And
4 therefore, as the Texas Supreme Court has repeatedly
5 made clear, those employees -- those at-will employees
6 could have quit or, perhaps more importantly for our
7 circumstances here, been fired with or without prior
8 notice and, quote, for a good reason, a bad reason, or
9 no reason at all.

10 And as ample case law shows -- and I'll
11 get to it shortly -- at-will employment status is
12 particularly important in the context of executive
13 branch appointees, as each plaintiff here admits they
14 were. As the United States Court of Appeals for the
15 Fifth Circuit explained on the *Garcia vs. Reeves County*
16 case, citing Texas authority, Texas employees of any
17 elected official always serve at the pleasure of the
18 elected official.

19 Now, as it relates to a claim under the
20 Whistleblower Act, in *State vs. Lueck*, L-u-e-c-k, which
21 is cited in the briefing, the Texas Supreme Court
22 expressly rejected the assertion that simply alleging a
23 violation of the Whistleblower Act is sufficient to
24 confer subject matter jurisdiction on the trial court
25 in a suit against a governmental entity. And *Lueck* is

1 quite notable as it relates to this issue for the Court
2 because the Supreme Court in *Lueck* in 2009 explained
3 that the elements of the cause of action are not just
4 necessary to state a claim, but sufficient
5 demonstration of all of the elements of the cause of
6 action for a whistleblower claim are necessary to
7 demonstrate a waiver of immunity.

8 Now, by the very terms of the act itself,
9 a cause of action for, quote, unquote, whistleblowing
10 applies only where an employee makes a good faith
11 report of a violation by -- and I'm quoting now -- the
12 employing governmental entity or another public
13 employee. The employing governmental entity for these
14 four plaintiffs was the Office of the Attorney General
15 of the State of Texas. And another public employee is
16 an important legislative definition that demonstrates
17 that the plaintiffs' allegations against the elected
18 Attorney General do not fall within the limited waiver
19 of subject matter -- limited waiver of immunity or the
20 limited waiver of employment at will as it relates to
21 these four plaintiffs because the elected Attorney
22 General, like several other statewide elected
23 officials, the office for whom -- I'm sorry -- the
24 position of which is created by the Texas Constitution,
25 is not an employing governmental entity or another

1 public employee.

2 The Whistleblower Act does not extend its
3 protection to reports of unlawful conduct made about a
4 state elected official. The Legislature did not
5 include that in the statute. And the reason the
6 Legislature did not include that, which we'll get to,
7 is that the Legislature cannot, under the
8 constitutional separation of powers required by the
9 Texas Constitution, legislate regarding the other two
10 branches of government, the executive branch, which
11 applies here, and, as we'll talk about shortly, the
12 judicial branch either.

13 Now, in fact, the plaintiffs seem to
14 recognize this fatal defect in their claims by
15 attaching documents that show that the Office of the
16 Attorney General maintains records showing that the
17 elected Attorney General is paid by the State through
18 that office and that the office maintains some other,
19 in many cases, statutorily required documentation
20 regarding the elected Attorney General.

21 But for that matter, in fact, that seems
22 to demonstrate that the plaintiff recognized the
23 infirmity of their assertion and the applicability of
24 this exception, because what they try to do is contend
25 that the elected Attorney General is an employee of the

1 Office of Attorney General, and that's wrong on a
2 number of counts, no different than -- than a district
3 judge is paid through the county in which they are
4 serve -- in which they serve, yet they are a state
5 elected official as well.

6 But, in fact, the reason the argument
7 fails first and foremost is the Texas Constitution
8 creates the executive officer. The Texas Constitution
9 actually calls for a statewide elected Attorney
10 General. The Office of the Attorney General is not the
11 elected Attorney General's employer. The office is
12 created in order to serve the elected Attorney General.

13 In fact, under the constitutional
14 mandate, but not as a matter of practicality, the
15 elected Attorney General could operate without an
16 Office of Attorney General if he or she deemed it
17 appropriate. Now, again, that wouldn't be practical.
18 But the idea that an office created to do the work of
19 the constitutionally created officer of Attorney
20 General makes that person an employee of the Office of
21 Attorney General borders on the absurd. More -- and we
22 know that because the Government Code undoes all of
23 that argument, because the Legislature has actually
24 made quite clear, beyond the constitutional creation of
25 the office -- of the position itself that the elected

1 AG is not a state employee of any office, including the
2 Office of the Attorney General.

3 As the Court knows and the Supreme Court
4 has made clear -- and this is in *Texas Department of*
5 *Transportation vs. Needham*, N-e-e-d-h-a-m, which is
6 cited I believe in the briefing, but it's at 82 S.W.3d
7 314. And it cites the Texas Government Code
8 Section 311.011(b). The Supreme Court said, quote, if
9 a statute defines a term, a Court is bound to construe
10 that term by its statutory definition only. And that's
11 important to the plaintiffs' efforts to try to argue
12 that the elected Attorney General is an employee of the
13 Office of Attorney General. He's not.

14 So let's step through that if you'll --
15 if you'll allow me, Judge, in terms of the statutes
16 that apply. Under the Whistleblower Act,
17 Section 554.011, sub 4 defines public employee. It is,
18 quote, an employee or appointed officer other than an
19 independent contractor who is paid to perform services
20 for a state or local governmental entity. So it's an
21 employee in this case or appointed officer.

22 Now, obviously, the easy thing here is
23 to -- to get rid of the appointed officer because the
24 Attorney General of the State of Texas is not an
25 appointed officer. In this case, presently a

1 gentleman, he is an elected official. And we need look
2 no further than Section 572.002, sub 1 of the Texas
3 Government Code in which the Legislature has defined
4 appointed officer as not an elected officer.

5 Therefore, any suggestion that the individual elected
6 Attorney General could fall within the definition of
7 554.0014 as an appointed officer is undone by the
8 Legislature's statutory definition of appointed officer
9 itself because it does not include elected officer.

10 Now, in 572.0024(b), the Legislature
11 defines elected officer, which is distinct then from
12 the definition of appointed officer. Not surprisingly,
13 Judge -- and we'll come back to this in the next
14 point -- the Legislature in the same definition makes
15 clear the judges of the courts of appeals and the
16 district courts are also not -- are neither appointed
17 officers nor state employees. They are rather what are
18 deemed separately defined as elected officers.

19 And the Legislature in 572.002, sub 11
20 defines state employee. A state employee means an
21 individual, quote, other than a state officer. A state
22 officer is defined by 572.002, sub 12, which means an
23 elected officer and others.

24 So simple application of the statute, the
25 Legislature's own definition, which the Court is bound

1 to accept, demonstrates that the elected Attorney
2 General, along with other constitutionally created
3 offices and, like judges of the courts of appeals and
4 the district courts, are not a -- a public employee,
5 nor are they the office or the entity -- the
6 governmental entity itself.

7 The Legislature did not include state
8 officers or elected officers within the ambit of the
9 Whistleblower Act about whom an allegation of a
10 violation of law triggers protection under the Act.
11 And as we'll get to in just a moment, the reason that
12 the Legislature did not do that is because that would
13 exceed both the separation of powers requirement under
14 the Constitution and create a legislative remedy for
15 executive or, by the same token, judicial action that
16 the Legislature is not empowered to do.

17 Now, the -- the elected Attorney General
18 is a state officer and, in the context of the executive
19 branch at the state level, one of only six office
20 holders of the executive department, which is a term
21 defined by the Texas Constitution. Therefore, the
22 elected individual Attorney General is neither a
23 governmental entity nor a public employee about whom
24 any report triggers the limited statutory terms of the
25 Whistleblower Act.

1 Now, I noticed that the plaintiffs
2 mistakenly asserted that this is a new argument that
3 nobody's ever heard before, but the Court knows better
4 than that, and the briefing demonstrates that. In
5 fact, courts have found even municipal judges to be a
6 public official who -- whose acts are not within the
7 reach of legislative enactments that create causes of
8 action for governmental or public employees, like the
9 Whistleblower Act.

10 For example, in *City of Roman Forest vs.*
11 *Stockman* at 141 S.W.3d 805, the Beaumont Court of
12 Appeals held that a municipal judge of the City of
13 Roman Forest was not a public employee but rather a,
14 quote, public official.

15 Perhaps even more compelling, and
16 certainly to a greater degree controlling of the issue
17 in this court, is the opinion of the Austin Court of
18 Appeals in *Thompson vs. City of Austin*, which is cited
19 at 979 S.W.2d 676. It was decided by the Austin Court
20 of Appeals in 1998. There was no petition after that
21 decision.

22 That was also construing a municipal
23 court judge of the City of Austin, and in that case the
24 question was the Legislature's enactment of the Texas
25 Commission on Human Rights Act. And that, as the Court

1 knows, is an analogue to the Federal Title VII in our
2 state system under Chapter 21 of the Labor Code.

3 But the important thing that the Court of
4 Appeals held in the *Thompson* case for our purposes here
5 is that a municipal judge is not a governmental
6 employee for the TCHRA either. The municipal judge is,
7 again, a, quote, public official, closed quote.

8 This distinction has been demonstrated in
9 significant and ample case law in Texas. And while the
10 plaintiffs would like to ignore it, the Court can't
11 because the Court is bound to the strictures of the
12 limited waiver of immunity that the Legislature has
13 created, and the plaintiffs must fix their case, not
14 within an argument that the concept of a public
15 official doesn't exist, number one, that it does, not
16 in the argument that no one's ever heard it before,
17 because obviously we have, but rather, they must
18 demonstrate that the plaintiffs' claims fall within the
19 limited waiver provisions of the Act. And because they
20 are not -- because no plaintiff complains of having
21 made an allegation of a violation of law by the Office
22 of the Attorney General or by a public employee of the
23 Office of the Attorney General, on that first point the
24 plaintiffs' claims fail, and dismissal for lack of
25 subject matter jurisdiction is required. I should --

1 THE COURT: I'm going to ask a question
2 here.

3 MR. HELFAND: Yes.

4 THE COURT: Mostly because when they come
5 to me, I might interrupt your argument a little bit and
6 ask a question. So is the -- where does your argument
7 end? Would you say this is -- the point that you're
8 making, it's all judges and it's all state elected
9 officials? Or does your argument hold you would claim
10 that no elected official -- I guess the Legislature
11 would be something different because they could pass a
12 law that would involve them. But county attorneys,
13 district attorneys, are you saying the Whistleblower
14 Act couldn't apply to any other public official?

15 MR. HELFAND: I understand your question,
16 and I'll apologize, Judge, that I really haven't
17 researched the question of the extent of the
18 Legislature's authority to regulate the judicial or
19 executive offices at the -- below the state level. We
20 know that there's a constitutional prohibition at the
21 state level. It's Article 2, Section 1, as it relates
22 to, for example, in this case, allegations against the
23 elected Attorney General. But I don't -- I have not
24 researched the question of can -- if I understand the
25 Court's question, can the Legislature, for example,

1 except -- or create a waiver of immunity, for example,
2 for a county judge? I think that's Your Honor's
3 question. I just haven't researched it yet because
4 it's not material to the issue before the Court right
5 now, in my opinion.

6 THE COURT: I guess it almost seems like
7 your exception would swallow the rule in the way that
8 you're stating it to the Court. If it doesn't apply to
9 any public official or any elected official in the way
10 that you're stating it, who does it apply to?

11 MR. HELFAND: Well, I think it applies
12 to -- and let me just say, Judge, again, if that -- if
13 it makes you more comfortable, I'm not asking you --
14 and I don't think it's -- with due respect to the
15 Court's jurisdiction, I don't think it's within the
16 Court's purview to announce a general rule but rather
17 to analyze this case under the specific facts that are
18 presented here.

19 I know that, as I've just walked through
20 the Court -- with the Court, it's quite clear that the
21 executive department of the State of Texas, which is
22 six constitutionally identified individuals, do not
23 fall within the Legislature's limited waiver of
24 immunity under the Tort Claims Act -- I'm sorry --
25 under the Whistleblower Act. Excuse me.

1 THE COURT: And then my next question
2 is -- I -- I -- I hear your response to that. My next
3 question is: Would there be an oath of office that --
4 that might bring the Attorney General under the
5 umbrella of the Office of the Attorney General because
6 elected officials do take oaths of office?

7 MR. HELFAND: They do take oaths of
8 office, Your Honor. I have not looked at the oath that
9 is prescribed for the elected Attorney General, but it
10 wouldn't matter, if -- if I may continue. I want to
11 answer your question, but may I tell why you that
12 doesn't matter?

13 THE COURT: Sure. Yeah, that's why I'm
14 asking. Yes.

15 MR. HELFAND: It wouldn't matter, Judge,
16 because the Supreme Court has repeatedly made clear
17 that waivers of governmental immunity must be
18 expressed. They cannot be inferred. They cannot be
19 implied. And so the Court -- I'll give you an analogy
20 that I know the Court may be familiar with. There used
21 to be a -- a rampant assertion of the argument that
22 enabling statutes that said that a governmental entity
23 can sue and be sued was sufficient to waive immunity.
24 The Supreme Court did away with that idea in the early
25 '90s, to my recollection, by pointing out that a waiver

1 of immunity may not be inferred. So even if there were
2 such an oath, that would be an inference of an immunity
3 waiver that doesn't exist in the statute.

4 I mean, to be sure, Judge -- and -- and,
5 again, I'm not -- I think the -- I'm going to tell you
6 off the top of my head, I think the Legislature --
7 because every subdivision of the state, certainly below
8 the county level -- let me -- let me come back to your
9 prior question.

10 Municipalities, cities and villages, are
11 a creation of the Legislature of the state of Texas,
12 either general-law cities, for example, or the
13 authority to enact home rule. So the Legislature gives
14 a city the power to create itself and -- and govern
15 itself either, again, under the general law or the home
16 rule regime.

17 And so I certainly can imagine -- I
18 haven't researched it, but in order to answer the
19 Court's question, I certainly can imagine that the
20 Legislature can enact statutes that limit the authority
21 of a municipality, because they've authorized the
22 creation, to hire and fire their employees. But that
23 is a -- truly a horse of a different color when we are
24 talking about constitutionally created elected offices,
25 and the reason for that comes back to separation of

1 powers.

2 With all due respect to the Legislature,
3 but the Supreme Court has made clear, the
4 Legislature -- there are areas in which the Legislature
5 is constitutionally prohibited from legislating, and
6 this is one of them. Let's be clear. I mean, again,
7 I'm sure it's not lost on the Court, although my
8 friends on the other side seem to ignore it, that the
9 Legislature was very careful in the language they used
10 in what protections exist under 554.002. And that is,
11 the Legislature could have enacted a statute -- I mean,
12 hypothetically, not constitutionally. But if the
13 Legislature were going to do what the plaintiffs here
14 are claiming the Legislature has done, they would have
15 simply said an employee who reports an allegation of a
16 violation of law in connection with their employment is
17 protected from retaliation.

18 The Legislature was very careful in the
19 wording that they used here. They used public employee
20 or entity, and then they went on to define what a
21 public employee is, and the Legislature has further
22 defined public employee versus an elected official or
23 public official. And, again, none of this is new,
24 Judge, because -- for example, even at the municipal
25 level, not to denigrate the role of a municipal judge,

1 but certainly less authority than a district judge,
2 even at the municipal level, the Austin Court of
3 Appeals has held that a municipal judge is not a
4 governmental employee. He or she is a public official.

5 Now, the plaintiffs' own pleading
6 allegations prove that their claims do not meet this
7 basic requirement of a report under the limited
8 circumstances of a statutory definition under 554.002.

9 I do want to point out that, again,
10 there's a lot of hyperbole in the response and a lot of
11 argument, but not citation to applicable law. And the
12 argument that no Texas public official -- no elected
13 official is a public employee under the Whistleblower
14 Act, and even though those elected officials hold the
15 most power and have the most ability to engage in
16 corrupt behavior, no report of illegal conduct by an
17 elected official can trigger whistleblower protection,
18 that's a -- that's a statement by the plaintiffs.
19 That -- that totally misconstrues this argument,
20 because, as I've pointed out, I -- again, back to the
21 Court's question, I have not researched the assertion
22 that no elected official falls within the statute,
23 although it certainly doesn't appear to,
24 notwithstanding the -- the hyperbolic argument.

25 What I pointed out to the Court is the

1 Attorney General is -- the elected Attorney General is
2 one of five -- is, I'm sorry, one of six
3 constitutionally created offices. As the Court knows,
4 the Legislature cannot enact legislation that's
5 inconsistent with the Texas Constitution. So I'll
6 leave for my friends on the other side to argue about
7 offices other than the six constitutionally created
8 offices of the executive branch of state government,
9 because the Court need only concern itself with one of
10 those six created offices.

11 As I mentioned earlier, Judge, Article 2,
12 Section 1 of the Consti- -- of the Texas Constitution
13 specifically provides that no person or collection of
14 persons, in this case our Legislature, being of one of
15 these departments shall exercise any power properly
16 attached to either of the others except as defined in
17 the Constitution. I'm paraphrasing there. It actually
18 says except in the instances herein expressly
19 permitted. There is nothing in the Constitution that
20 authorizes the Legislature to legislate the appointment
21 or dismissal of individuals employed by any of the six
22 members of the executive branch of our state
23 government, and to do so would run afoul of this
24 express prohibition.

25 Again, my friends on the other side argue

1 that this is repugnant -- I think that's their word --
2 to the purposes of the Act, but that's really not the
3 question. That's just hyperbolic argument. The Court
4 is required to fix a specific statutory waiver, not
5 respond to emotional arguments with a lot of
6 adjectives.

7 In fact, I think that the plaintiffs
8 resort to that mere argument because the clear terms of
9 the law excludes their claims. The plaintiffs point to
10 no case in which any court has determined that the
11 Whistleblower Act extends to a judicial officer of the
12 judicial branch or an executive officer as created by
13 the Texas Constitution.

14 And to the extent that my friends on the
15 other side contend that this diminishes accountability,
16 the Legislature has never claimed that the enactment of
17 the Whistleblower Act was to create public
18 accountability, and a lawsuit -- a private lawsuit for
19 money damages has nothing to do with accountability.
20 To be sure, there are mechanisms by which the
21 constituency may hold elected officials accountable,
22 and the Texas Whistleblower Act is not one of those.

23 The plaintiffs do not cite this Court to
24 any case that speaks to this issue, Your Honor. And
25 the legislative enactment is carefully created to avoid

1 a -- a violation of the separation of powers. What I
2 see the plaintiffs cite to is a number of cases
3 involving local elected officials, but again, that
4 doesn't have anything to do with what we're here about
5 today.

6 Moreover, the plaintiffs cite to some
7 cases involving the Office of the Attorney General.
8 And I can tell you on behalf of my client, the Office
9 of the Attorney General does not dispute that there are
10 circumstances in which the Legislature has prescribed a
11 waiver of immunity, and those circumstances track the
12 statute directly.

13 Under 554.002, that is where an employee
14 of the Office of the Attorney General makes a
15 good-faith report to an appropriate law enforcement
16 authority of an allegation of a violation of law by the
17 entity or by a public employee, which does not include
18 the elected Attorney General in this case. Now, that's
19 the first reason that the Court should grant the plea
20 to the jurisdiction and find that the plaintiffs have
21 not demonstrated a waiver.

22 The second related reason, again, is
23 related to the separation of powers that precludes the
24 Legislature from mandating the continued employment of
25 an employee of a state executive who serves that state

1 elected official. In *Neighborhood Centers vs. Walker*,
2 which is cited at 544 S.W.3d 744, specifically 8749, in
3 2018 the Supreme -- the Texas Supreme Court held,
4 quote, the duty of loyalty and other competing legal
5 and ethical principles are powerful arguments in favor
6 of limits on what, when, to whom, how, and why
7 whistleblowers may make their disclosures. And in
8 there the Texas Supreme Court cited a treatise called
9 "Whistleblowing: The Law of Retaliatory Discharge,"
10 which is cited in the briefing.

11 So beyond the fact that the Legislature
12 hasn't done what would be necessary for these
13 plaintiffs to identify a waiver of immunity, the Texas
14 Constitution would pro- -- not only prohibit the
15 Legislature from doing it but has also inclined, as I
16 said, the Supreme Court to recognize the distinctions
17 between these particular offices.

18 In fact, that very precept is consistent
19 with the United States Supreme Court's decision in *Myer*
20 *vs. United States*. It's cited in the briefing, but
21 it's at 27 U.S. 52 1925, in which the Supreme Court
22 considered whether the president of the United States
23 under the United States Constitution, which also
24 mandates a separation of powers, could unilaterally
25 remove, without obtaining the advice and consent of the

1 Senate, certain officers the president had appointed
2 or, as they used to say on the West Wing, I serve at
3 the pleasure of the president. Just like the people
4 who served at the pleasure of the president, these
5 plaintiffs served at the pleasure of the elected
6 Attorney General.

7 And the United States Supreme Court made
8 it clear that while the offices are different, Judge,
9 the rule is the same. The Supreme Court made clear the
10 necessity that an executive branch officer have the
11 ability to discharge those whom he or she appoints
12 unfettered by interference from the Legislature or the
13 judiciary because -- and this is a quote from the
14 Supreme Court: Those in charge of and responsible for
15 administering functions of government who select their
16 executive subordinates need, in meeting their
17 responsibility, to have the power to remove those whom
18 they appoint.

19 Notably, the plaintiffs, in response to
20 this point, misconstrue a dissenting opinion in a more
21 recent Supreme Court opinion, the *Free Entertainment*
22 *{sic} Fund vs. Publishing Company Accounting Oversight*
23 *Board* at 561 U.S. 477, specifically at Page 516, a 2010
24 United States Supreme Court opinion, which, again, the
25 plaintiffs point to for the dissent, which, of course,

1 everyone on this call knows is not law but rather a
2 learned justice's opinion in conflict with the holding
3 of the case.

4 In that case, again, construing the
5 authority of the president, the majority, whose
6 decision applies and created further law on this point,
7 made clear that the Constitution that makes the
8 president accountable to the people for executing the
9 laws also gives him the power to do so.

10 That power includes, as a general matter,
11 the authority to remove those who assist him in
12 carrying out his duties. Without such power -- I'm
13 going to interlineate here, Judge -- the Attorney
14 General could not be held fully accountable for
15 discharging his own responsibilities. The buck would
16 stop somewhere else. Such diffusion of authority would
17 greatly diminish the intended and necessary
18 responsibility of the elected official himself. The
19 term the Supreme Court used was chief magistrate,
20 because they're quoting the *Federalist Papers*.

21 There's no difference in the need for
22 the -- for a state elected executive at the state level
23 to be able to appoint and remove those who he or she
24 believe are necessary to be appointed and necessary to
25 be removed to carry out the functions of the office.

1 So we see not only why the Legislature
2 did not include a member of the executive branch of the
3 government or, for that matter, the judiciary in the
4 definition of about whom complaints of violations of
5 law may trigger protections under the whistleblower
6 statute and, therefore, a waiver of subject matter
7 jurisdiction, but that even if they had, that provision
8 would be unenforceable in light of the Texas Supreme
9 Court's holding in *Neighborhood Centers* and
10 well-settled Federal Analogue law.

11 Another example of that, Judge, is what
12 the federal courts do in terms of, quote, unquote,
13 whistleblower claims. As the Court knows, there is no
14 whistleblower protection for a public employee in
15 the -- of a -- of a state level public employee in
16 the -- in the federal system. However, under 42 USC,
17 Section 1983, the federal Civil Rights -- what's often
18 referred to as the federal Civil Rights Act but is
19 actually the Klu Klux Klan Act of 1871, public
20 whistleblower claim -- or a whistleblower claim by
21 public employees are deemed to fall within -- well,
22 potentially fall within the ambit of the First
23 Amendment.

24 And so where a public employee,
25 including, for example, potentially these plaintiffs,

1 although not under the circumstances they've alleged
2 here, makes a -- exercises their right to free speech
3 regarding a matter of public concern, they may gain
4 protection under the First Amendment and have a cause
5 of action under Section 1983. But notably -- and
6 perhaps one of the leading cases on this is *Elrod vs.*
7 *Burns* from the United States Supreme Court in 1976.
8 This is cited in the briefing. The United States
9 Supreme Court has long exempted from that protection
10 patronage dismissals based upon the recognition that a
11 public employee's First Amendment interest has to be
12 balanced with the government employer's need to, quote,
13 ensure that policies which the elect- -- electorate has
14 sanctioned are effectively implemented by the elected
15 official's chosen employees.

16 And so as the Supreme Court said even
17 earlier than that in 1968 in *Pickering vs. Board of*
18 *Education of Township High School District 205*, which
19 is also cited in the briefing, a public employee's
20 First Amendment right to free speech must be balanced
21 against the interest of the state as an employer in
22 promoting the efficiency of public service as it
23 performs through its employees.

24 I would point out, Judge, that in this
25 regard, the Austin Court of Appeals opinion in *Thompson*

1 vs. *City of Austin* again applies to this point as well.
2 That is, because in that case the municipal judge was a
3 public official and not a governmental employee, his
4 employment does not fall within the legislative --
5 Legislature's reach under the Texas Commission on Human
6 Rights Act.

7 So for that second reason, Judge, even if
8 the Legislature had tried to exercise its authority --
9 and I don't think that the Court's going to find that
10 the Legislature did -- but even if the Legislature had
11 tried to exercise its authority, it would be superceded
12 by the constitutional authority of these executive
13 branch officers to appoint and to remove unfettered
14 by -- by review or limitation by the executive or
15 legislative -- I'm sorry -- by the legislative or -- or
16 judicial branches, excuse me, those people that they've
17 appointed.

18 And I don't think we'll get to the
19 temporary injunction, because whether the Court grants
20 or denies the plea, it's subject to review and a stay
21 at the trial court, as the Court knows, but obviously
22 this would -- this would touch on the question of
23 injunction as well --

24 THE COURT: Let me ask you a question.
25 You just called it a plea. Are you here on a motion to

1 dismiss under 91a, or are you here on a plea?

2 MR. HELFAND: I'm here on a plea to the
3 jurisdiction that is -- that is -- that is advanced
4 under Rule 91a. The Texas Supreme Court has said 91a
5 may be used to assert a plea to the jurisdiction. The
6 assertion here for the Court --

7 THE COURT: I just wanted to make sure.
8 That's all I was asking, because you referred to it as
9 a plea as if it was a separate motion, and I didn't
10 know if you had a separate plea filed. I didn't think
11 you did. You're here under your 91a motion?

12 MR. HELFAND: That's right, Judge. It's
13 a plea to the jurisdiction advanced under 91a. As the
14 Court knows, the governmental entity can file a plea to
15 the jurisdiction that's based on evidence. That's not
16 necessary here because the pleadings themselves failed
17 to demonstrate a waiver of immunity. And -- and on
18 that --

19 THE COURT: And you were saying the
20 Supreme Court has decided that you could bring a
21 jurisdictional plea under a 91a motion? You were going
22 to cite that case?

23 MR. HELFAND: Yes. Let me find that case
24 for you. Let me -- Mr. Braun will give me that case.
25 I think it's in the original briefing, Judge. Let me

1 take a quick look at my 91a motion. It's a race
2 between me and Mr. Braun of who will find it first,
3 Judge, but I'll give you that in one second here. Yes.
4 One second here.

5 Sure, Judge. I want to say from my
6 memory -- all right. The win goes to Mr. Braun,
7 Your Honor. Which case is it? Oh, yes. Sorry. Texas
8 Supreme Court in *City of Dallas vs. Sanchez*, Judge,
9 it's cited on Page 5 of the motion to dismiss. It's
10 494 S.W.3d 722 at 724-25. The Austin Court of Appeals
11 has held in accord and cited that case in *City of*
12 *Austin Vs. Liberty Mutual Insurance*, 431 S.W.3d 817 in
13 2014. There was no petition. And just so the record's
14 clear, when Mr. Braun found it, I was about to find it
15 myself.

16 Okay, Judge. So that's two of the four
17 reasons that the statute does not create a waiver for
18 the plaintiffs' allegations in this case even if
19 they're true. There are two more.

20 One is -- the next one is that each of
21 the plaintiffs at Page 2 of their amended petition --
22 and by the -- well, let me back up for a second and
23 give the Court some context.

24 Plaintiffs submitted -- plaintiffs
25 submitted a petition, and in that petition they alleged

1 that they were duty bound to make the reports of
2 allegations against the elected Attorney General. In
3 response, I raised, as one of the points in the motion
4 to dismiss and plea to the jurisdiction, that a report
5 based upon an asserted duty does not gain protection
6 because the -- the report would have been made
7 regardless of the employee's personal beliefs, personal
8 motivations, or public speech. In fact, the report was
9 made because, according to the plaintiffs, it was
10 required. And I'll get to the law on that in just a
11 second. But I want to point out for the Court's
12 benefit that having seen that -- and -- and the
13 plaintiffs did a lot to try to amend around these
14 problems. They didn't do it, but I -- but I see the
15 effort to try to amend around these problems, for
16 example, claiming that because the Office of the
17 Attorney General issues a paycheck to the elected
18 Attorney General, he's an employee. That's not -- that
19 doesn't work, but I get the effort.

20 In this regard, however, on notice of the
21 fact that the law -- that there's law that supports the
22 argument that there is no protection for a report made
23 based upon duty, the plaintiffs restated at Page 2 of
24 their amended petition that their complaints were as a
25 matter of duty. And that's important because, again,

1 as the United States Supreme Court -- and -- and by the
2 way, Judge, let me say this does not appear to be an
3 issue that has yet been presented to a Texas appellate
4 court or the Texas Supreme Court.

5 But the United States Supreme Court, in
6 considering First Amendment claims of essentially
7 whistleblowing, has made clear that when public
8 employees speak pursuant to their official duties, they
9 are not speaking as citizens for First Amendment or
10 whistleblowing purposes. The Constitution does not
11 insulate their communications from employer discipline.
12 That's the -- the Court may be familiar with the
13 *Garcetti vs. Ceballos*, C-e-b-a-l-l-o-s, case cited at
14 547 U.S. 410.

15 There is no practical distinction between
16 the whistleblower claim under the First Amendment and
17 the United States Constitution pursued under the Texas
18 Act. And, in fact, both the Dallas Court of Appeals
19 and the 14th Court of Appeals in Houston have
20 analogized the Whistleblower Act to the First Amendment
21 whistleblowing claim. The quote is: Based on the
22 similarity between the claims under the Whistleblower
23 Act and retaliation claims under the First Amendment,
24 we hold that the same causation standard applies to
25 both claims. And that's -- I'm going to butcher this,

1 Judge -- *Guillaume, G-u-i-l-l-a-u-m-e, vs. The City of*
2 *Greenville* cited at 247 S.W.3d 457. That quote's at
3 Page 464, the Dallas Court of Appeals from 2008 with no
4 petition. And then the 14th Court of Appeals held that
5 a court in *Alief Independent School District vs. Perry,*
6 at 440 S.W.3d 228, specifically Page 245 -- that was
7 2013 in which the Supreme Court denied petition for
8 review.

9 So for that third reason -- and I don't
10 think the Court gets there. But for that third reason,
11 the Court should find that the plaintiffs' own
12 admissions demonstrate that they do not fall within the
13 limited waiver of governmental immunity, which is
14 presumed under the Whistleblower Act.

15 But there's also a fourth, Judge.
16 Despite amendment -- again, with the benefit of the
17 Office of the Attorney General's explanation of the
18 law, each of the plaintiffs fail to establish that each
19 made a report of a violation of law to an appropriate
20 law enforcement authority. In fact, it looks like what
21 the plaintiffs attempted to do in response to the
22 motion to dismiss by amending was to simply just throw
23 more scurrilous allegations about the elected Attorney
24 General into a petition, but the issue is -- before the
25 Court in a whistleblower claim is not whether the

1 elected Attorney General committed some wrongful act.
2 That doesn't factor into a whistleblower claim at all.

3 At some point, if it were determined that
4 the trial court had jurisdiction and this case could
5 proceed beyond this motion, the Court would be -- might
6 be -- well, let's just take it in an abstract case,
7 because I don't see, with all due respect here, how
8 this case gets beyond the resolution of this plea to
9 the jurisdiction. But in an abstract case, the
10 question before the Court is not whether the target of
11 the allegations of a violation of law did or did not
12 violate the law. It's immaterial to a whistleblower
13 claim.

14 The question is simply whether that
15 individual, based upon their individual circumstances,
16 had a reasonable belief that there had been a violation
17 of law by a public employee or the entity itself. That
18 is the target of their allegation.

19 I understand the political ramifications
20 of 92 paragraphs that attempt to malign the elected
21 Attorney General, but they have no bearing on a
22 whistleblower claim, but that's what the plaintiffs did
23 in response to the motion to dismiss. They didn't cure
24 the defects of their pleadings, which I pointed out to
25 them meticulously with citation to controlling

1 authority. They just doubled or tripled down on their
2 scurrilous allegations against the elected official.

3 So what Your Honor has is Paragraph 1
4 through 92 of the amended petition are simply attacks
5 on the elected Attorney General but not factual
6 allegations that might trigger the whistleblower
7 statute. In fact, it seems to all be offered to
8 disguise the plaintiffs' ultimate inability to address
9 the basic requirements of the statute so as to effect a
10 waiver, because they were simply expanded and made more
11 scurrilous, while the plaintiffs seem to try to
12 continue to skirt the requisite elements of a
13 whistleblower claim.

14 Now what the Court has in just two
15 paragraphs as it relates to three of the four
16 plaintiffs, Brickman, Penley, and Vassar, is a
17 conclusory statement that all reported everything in
18 Paragraphs 1 through 92 in a meeting to the FBI. That
19 is not sufficient to explain how each gains protection
20 under the Act. In fact, none identifies anything
21 any one of them reported, and the plaintiffs actually
22 admit that the meeting at which they claim to have made
23 that report was attended by and that the same reports
24 were made by non-plaintiffs in this case.

25 There is nothing in whistleblower -- in

1 the whistleblower statute nor any of the interpretive
2 jurisprudence that provides that everybody who adds
3 their name to a complaint gains protection under the
4 Act, and that is contrary to the provisions of the
5 statute itself.

6 Even more problematic, and clearly the
7 admission is fatal as it relates to Mr. Maxwell, is
8 Mr. Maxwell's admission that after his three
9 co-plaintiffs had already made the exact same
10 complaints, Mr. Maxwell claims to later have made the
11 same exact reports, again, simply incorporating
12 Paragraphs 17 through 92, but acknowledging that his
13 co-plaintiffs and non-plaintiff employees of the office
14 had already made those complaints.

15 The Court surely should recognize that
16 four plaintiffs cannot make a good-faith report of the
17 same violation of law over -- over an extended period
18 of time, particularly when the plaintiffs admit that
19 non-plaintiffs made those same reports.

20 Now, again, the -- the Supreme Court has
21 written extensively on the nature of the good faith,
22 and -- but they have not -- they have not -- the
23 Supreme Court has not been presented, nor has the Court
24 of Appeals been presented with a unique case like this,
25 which is where some individuals who are not plaintiffs

1 in this case made the exact same reports of the
2 plaintiffs, but the plaintiffs attempt to co-opt that
3 report into becoming their own report of a violation of
4 law for purposes of whistleblower protection. But I
5 would submit that the statute does not authorize that,
6 and there is no case law that authorizes that.

7 And in the absence of case law,
8 Your Honor, even if the Court disagrees -- in the
9 absence of case law, the plaintiffs cannot meet their
10 burden because, again, it's not my job -- in fact, it's
11 clearly not the defendant's job to demonstrate a lack
12 of subject matter jurisdiction. The lack of subject
13 matter jurisdiction is presumed. Your Honor presumes
14 at this moment there is no subject matter jurisdiction
15 and requires the plaintiffs under clear Supreme Court
16 and Austin Court of Appeals authority to demonstrate a
17 waiver.

18 So even as to this -- as to both the
19 question of what I'll call the *Garcetti* exception, that
20 is the duty to report, and how many different people
21 can gain protection from the same report, it's the
22 plaintiffs' burden to show you that that falls within
23 the statute by virtue of some authority, not just by
24 virtue of -- of strong argument, because the Court does
25 not accept as true argument. The Court can only accept

1 facts as true. The plaintiffs cite no fact and
2 certainly no law that says that the Court can fix a
3 waiver of immunity under the whistleblower statute. I
4 don't think the Court gets there, but even if you do,
5 based upon a duty to report or, as to the last point,
6 where the plaintiffs simply jump onto somebody else's
7 report and claim that they have obtained protection.

8 As I mentioned, Judge, those -- those are
9 four separate reasons. The first is straight statutory
10 construction, and then the others all support the fact
11 that there's no waiver of immunity here.

12 And if the Court will indulge me just a
13 moment, I'd like to ask Mr. Braun if I've missed
14 anything. May I have just a moment, Judge?

15 THE COURT: You may.

16 *(Off the record.)*

17 MR. HELFAND: Thank you. Thank you,
18 Judge. Subject to the opportunity to reply to any
19 argument that the plaintiffs have, I -- I don't have
20 anything further, unless the Court has any questions.

21 THE COURT: I have one more question, I
22 think, and it's really with regard to your last two
23 prongs. And I might be conflating them, and so just
24 correct me if I am.

25 But, you know, a 91a motion can only be

1 made on the pleading and no evidence considered, but
2 wouldn't the last two, if -- and I understand your
3 point, which is if you -- you can't make it past the
4 statutory construction argument. But the last,
5 wouldn't those require some jurisdictional facts and
6 have an opportunity for them to present evidence? It
7 wouldn't so much be the 91a motion at that point. It
8 would be more in line with a more typical plea to the
9 jurisdiction, or do you not think so?

10 MR. HELFAND: The answer to your
11 question, Judge, is in this circumstance, no. As I
12 pointed out at the outset of the argument, the Court
13 could either find that there are insufficient facts to
14 demonstrate a waiver -- and let's call that the first
15 one or two -- certainly first one point and probably
16 two. As to the last two, the al- -- the alternative is
17 the Court grants a plea to the jurisdiction/91a motion
18 where the petition itself alleges additional facts
19 that, if true, would bar recovery.

20 So, as I pointed out, these are things in
21 the petition. The plaintiffs admit -- as to the third
22 ground for dismissal, no waiver of immunity, the
23 plaintiffs admit that they made the report because they
24 were duty bound. So let's accept that as true. And
25 whether they might later think better of that decision

1 and whether there might be a factual dispute, they're
2 stuck with the petition that they've presented.

3 By the same token, as to the last point,
4 the plaintiffs admit that they went to visit the FBI
5 with other non-plaintiff individuals who made the same
6 reports. And Mr. Maxwell admits that he did not go to
7 that meeting but rather made the same exact report
8 after he learned that his co-plaintiffs had gone to the
9 FBI. In the -- in the original petition, which I know
10 is superceded, Mr. Maxwell claimed that he wrote a
11 letter joining his co-plaintiffs.

12 Now, having the benefit of the Office of
13 the Attorney General's motion to dismiss, Mr. Maxwell
14 has come up with new allegations of his reports, but
15 all which, again, admit were made after non-plaintiffs
16 had made the same report and his co-plaintiffs had made
17 the same report, so I think the Court can decide those
18 issues under 91a.

19 THE COURT: All right. Thank you. Thank
20 you for your argument. I think what I'd like to do --
21 it's 11:18. Let's take a break until 11:30, and then
22 we will hear from the plaintiffs and their response.
23 They all have to -- they've all been allotted a time.
24 They have to collectively respond, so I'm not for sure
25 which one of them is going to be making the main

1 argument here. But then we will go for their allotted
2 time and then come back. So it might be 1:00 or so
3 before we're at lunch, but I just want you to prepare
4 accordingly.

5 So we are going to take an 11-minute
6 break. Stay on your feed. Just go mute and go off
7 your video if you want to, but don't disconnect from
8 Zoom. And we will be back in 10 minutes -- 11 minutes
9 to continue. Thank you.

10 *(Recess was taken.)*

11 THE COURT: We can go back on the record
12 at this time and turn over the argument for the
13 plaintiffs. And I am assuming that you all have
14 conferred and agreed in what order you're going to make
15 argument. Is that correct?

16 MR. NESBITT: It is, Your Honor. I will
17 go first, if it pleases the Court.

18 THE COURT: Please do. And I -- I also
19 heard from Vicky that one of you might have a
20 PowerPoint. I'm not for sure if it's as to this
21 argument, but I have -- I have let the parties share
22 their screen. So you --

23 MR. NESBITT: I --

24 THE COURT: -- may proceed.

25 MR. NESBITT: I'm sorry, Judge. I do. I

1 have a very short kind of PowerPoint to put the statute
2 up there and a few things. And if it's okay --

3 THE COURT: You should have the ability
4 to do it, and so if you don't, let me know.

5 MR. NESBITT: Thank you. You ready for
6 me, Judge?

7 THE COURT: I am.

8 **ARGUMENT BY MR. NESBITT**

9 MR. NESBITT: All right. Judge, my name
10 is Tom Nesbitt and -- on behalf of Blake Brickman. I
11 am joined by T.J. Turner, my co-counsel. Blake
12 Brickman -- I think some context of what occurred here
13 might assist the Court, especially in light of the
14 argument that was made right at the end that multiple
15 people can't be whistleblowers.

16 Blake Brickman was one of seven
17 high-ranking employees of the Office of the Attorney
18 General who on September 30th went to law enforcement,
19 to the FBI in particular, to report what they in good
20 faith believed was the corrupt, criminal conduct of the
21 Office of the Attorney General itself, conduct
22 orchestrated personally by the Attorney General
23 himself.

24 Like I said, an eighth whistleblower,
25 Mr. Maxwell, a plaintiff in this case, that same day

1 went to the Texas Rangers to report the same concerns.
2 I will describe later, Judge, and the petition lays out
3 in detail -- the live petition is the second amended
4 petition -- why these individuals went together. And
5 it is because the corruption Ken Paxton was so
6 widespread and across so many different functions of
7 his sprawling agency that not everybody knew everything
8 at the beginning. It was only after they were able to
9 compare notes that they realized just how sprawling and
10 corrupt was the conduct of the Office of the Attorney
11 General.

12 The day after they went to the FBI and
13 the Texas Rangers, October 1st, 2020, the eight
14 whistleblowers notified the Office of the Attorney
15 General and Ken Paxton himself in writing that they had
16 made these reports. And the retaliation by Ken Paxton
17 and the Office of the Attorney General began
18 immediately. The office issued public statements
19 smearing these public servants in the media. They
20 immediately placed two of them on investigative leave.
21 They immediately took duties away from other
22 whistleblowers. They engaged in a variety of attempts
23 to intimidate the whistleblowers that were, quite
24 frankly, Judge, pathetic.

25 Within less than 50 days, the following

1 happened. On October 20th, the Office of the Attorney
2 General fired my client, Blake Brickman, and that same
3 day fired another of the whistleblowers, Ms. Lacey
4 Mase. She's not a plaintiff in this case, but she was
5 a whistleblower as well. On November 2nd, so 31 days
6 after learning, they fired -- the Office of the
7 Attorney General fired plaintiff Mark Penley and
8 plaintiff David Maxwell. And on November 17th, the
9 Office of the Attorney General fired Ryan Vassar.

10 Of the eight whistleblowers, five of them
11 were fired and three resigned under pressure from Ken
12 Paxton all within 50 days of their reports to law
13 enforcement. You could not, Your Honor, script more
14 obvious retaliation against whistleblowers. And the
15 Office of the Attorney General comes to you today not
16 saying, oh, we didn't fire these whistleblowers in
17 retaliation for the whistleblowers. They're not coming
18 to you saying, oh, we have other reasons for firing
19 them. No. They come to you and they advance three
20 arguments, legal arguments. One, they say the law
21 shouldn't apply to Ken Paxton because Ken Paxton is an
22 elected official. So if someone reports criminal
23 conduct that he participated in, well, the
24 Whistleblower Act does not apply.

25 He also argues that the law should not

1 protect these particular whistleblowers. He claims
2 these whistleblowers were so important in my office
3 that they owe me a unbridled duty of loyalty, a duty of
4 loyalty that is so overwhelming that I ought to be able
5 to fire them if they go to law enforcement and report
6 my criminal conduct.

7 And third, they say that the
8 Whistleblower Act wouldn't apply or shouldn't apply to
9 these reports because the Whistleblower Act should not
10 protect employees who work in an agency with law
11 enforcement responsibilities, because, after all, they
12 would just be doing their job to go to law enforcement,
13 the FBI and the Texas Rangers, which are not part of
14 the Office of the Attorney General, and report criminal
15 conduct.

16 As we have briefed and as we will lay out
17 today, Your Honor, none of these propositions have any
18 support in the Whistleblower Act itself. No case -- no
19 court case has ever held that any one of these
20 propositions is correct in a Texas Whistleblower Act
21 case. And, Your Honor, these assertions by the Office
22 of the Attorney General, they're repugnant to the very
23 purposes of the Texas Whistleblower Act. To rewrite
24 the statute as the Office of the Attorney General asks
25 you to do today in the ways that they ask you to

1 rewrite the statute would be to turn the Texas
2 Whistleblower Act completely on its head. These are
3 the assertions of a would-be junior varsity autocrat,
4 is what they are, Judge.

5 And before I address those legal
6 arguments, I want to go back and ask the Court
7 to remember that we are dealing here in an area where
8 actually the Office of the Attorney General bears a
9 steep burden here. There is an express statutory
10 waiver of immunity in the Whistleblower Act itself. I
11 don't think the Office of the Attorney General
12 mentioned it, but their -- the Whistleblower Act
13 contains an express statutory waiver of immunity.

14 What they come in to say is you should,
15 in a Rule 91a motion, rewrite the Whistleblower Act to
16 include these requirements that don't exist in the
17 statute itself. And the Court need not be reminded
18 that under Rule 91a that it is a -- that you are to
19 construe the pleadings liberal -- liberally. You are
20 to accept as true the factual allegations of the
21 plaintiffs. It's an extreme remedy brought on purpose
22 by the Office of the Attorney General before any
23 discovery in the case has been conducted, and it must
24 therefore be strictly construed, 90 -- Rule 91a. The
25 Texas Whistleblower Act, on the other hand, is, as the

1 Supreme Court reminds us, a broad remedial measure. It
2 must be liberally construed by the Court.

3 Judge, before -- last thing before we
4 launch into these legal arguments, I think it's
5 important for the Court to remember the public -- the
6 purposes of the Texas Whistleblower Act. And courts
7 repeat these purposes over and over like a mantra
8 almost. The purposes of the Texas Whistleblower Act
9 are to, one, protect public employees from retaliation
10 when in good faith they report a violation of law and,
11 two, to secure lawful conduct by those who direct and
12 conduct the affairs of government. Now, let me repeat
13 that second one one more time, to secure lawful conduct
14 by those who direct and conduct the affairs of
15 government.

16 So it is notable that the first argument
17 that the OAG makes is that Ken Paxton, who directs and
18 controls the affairs of government, that his actions,
19 his criminal actions reported by these whistleblowers
20 aren't covered by the Texas Whistleblower Act. And
21 let's -- let's address that argument first because the
22 Office of the Attorney General really did not cast much
23 light on the statute itself.

24 So if I can share my screen, Your Honor,
25 I'll show this little PowerPoint. Can you see this

1 beautifully decorated slide here, Judge?

2 THE COURT: I can, though I might argue
3 with you on it's beautifully decorated.

4 MR. NESBITT: Okay. That's fair enough.
5 Your Honor, this is the operative language of the Texas
6 Whistleblower Act. The Act protects from retaliation
7 public employees who in good faith report one of two
8 different things, a violation of law by the employing
9 governmental entity or another public employee to an
10 appropriate law enforcement authority.

11 Mr. Helfand spent a lot of time on
12 another public employee, and he spent a lot of time
13 pulling a stat- -- a definition from a completely
14 separate statute, Chapter 572 of the Government Code,
15 which has to do with governmental ethics reports. It's
16 not in the Whistleblower Act itself, but he spent a lot
17 of time trying to convince you that the man who
18 controls and directs and gets paid a salary and gets
19 employment benefits from the Office of the Attorney
20 General isn't an employee of the Office of the Attorney
21 General, but he spent very little time on the first
22 part of the definition. If the plaintiffs reported a
23 violation of law by the employing governmental entity,
24 then they are protected.

25 Now, there is no dispute in this case

1 that the Office of the Attorney General is a
2 governmental entity, that the plaintiffs were employees
3 of the governmental entity. And what we will show you
4 as we go through some of these cases and the statute
5 itself is that acts that Ken Paxton committed in the --
6 well, in the course and scope of performing his duties,
7 in his official capacity, those are acts of the
8 employing governmental entity under the Texas
9 Whistleblower Act. The case law is clear on that.

10 In Paragraphs 17 through 103, now,
11 Mr. Helfand complained that we were smearing the
12 Attorney General. We were reciting the facts in great
13 detail about the corruption, the enormous power of the
14 Office of the Attorney General and its other staff and
15 its resources that Ken Paxton criminally brought to
16 bear to benefit himself and to benefit a man named Nate
17 Paul, one of his close friends, one of his associates,
18 a man with whom he has numerous connections. We don't
19 know them all, but we know a lot of them.

20 And so in Paragraphs 17 through 103, we
21 describe how the conduct that our clients reported
22 follows first and foremost under the first prong of
23 what the Texas Whistleblower Act covers, and that is
24 violations of law by the employing governmental entity.
25 And I'll get to the case law in a minute, but I do

1 think, Your Honor -- I don't know how in much detail
2 you've been able to go through the second amended
3 petition, but I'd like to just summarize for the Court
4 what is alleged. This goes not only to this first
5 issue, that is, that the conduct that was reported
6 falls within this first prong of the -- what -- the
7 Texas Whistleblower Act, but also to the allegation
8 that we have somehow failed to be specific in what we
9 pled was the criminal conduct that the plaintiffs in
10 good faith believed had occurred and that they in good
11 faith reported to the FBI and the Texas Rangers.

12 You first have to understand under -- to
13 get some of the context, who Nate Paul is. Nate Paul
14 is an Austin real estate investor whose home and
15 offices were searched by the FBI in August of 2019 amid
16 well-documented, well-litigated troubles and bankruptcy
17 that have spiraled for Mr. Paul into a whirlwind of
18 litigation and other legal problems throughout 2019 and
19 2020.

20 Among Nate Paul's legal entanglements
21 over the span of those two years were bankruptcies of
22 numerous of his companies that he controls, legal
23 disputes with co-investors in these properties,
24 including one Austin-based charity, the Mitte
25 Foundation. Mitte Foundation had to sue Mr. Paul just

1 to get records. That suit blazes on as we speak.
2 Attempts by creditors to foreclose on properties owned
3 by the companies that Nate Paul controls. Another of
4 Mr. Paul's problems were the apparent criminal
5 investigation of him and his companies that led to the
6 August 19th search by the FBI of his home and his
7 properties.

8 Nate Paul's -- another category of his
9 legal problems or legal activities were Nate Paul's own
10 efforts in 2020 to have his perceived adversaries
11 intimidated and investigated by law enforcement,
12 including the federal magistrate judge who issued the
13 search warrants back in Austin, the FBI agents and
14 other law enforcement agents who carried out the
15 searches, the assistant United States attorney who
16 would obtain the search warrants from the magi- --
17 federal magistrate judge, a federal bankruptcy judge,
18 the local charity, the Mitte Foundation, its lawyers,
19 the court-appointed receiver. Mr. Paul set out to have
20 all of them criminally investigated as a tool of
21 intimidation.

22 Now, let's -- Mr. -- Ken Paxton, using
23 the Office of the Attorney General as a bludgeon for
24 Mr. Paul, helped Mr. Paul personally in every one of
25 those legal entanglements, those legal activities by

1 Ken -- by Nate Paul that I just described. And let me
2 go over those briefly.

3 As we have pled in Paragraphs 29 -- or
4 rather, 33 through 41, the Office of the Attorney
5 General at Ken Paxton's specific direction, but
6 employing other employees of the office as part of the
7 scheme, helped Nate Paul in the Open Records Act. We
8 describe this in much more detail in the petition, but
9 Ken Paxton, after personally speaking with Nate Paul
10 about an Open Records Act request that Nate Paul put in
11 to get information about the search of his home and his
12 offices by law enforcement, asked for open --
13 information under the Public Records Act.

14 Now, as we have pled, to grant this
15 request would have, and later did, upset
16 well-established policies of not producing information
17 related to an ongoing investigation. But Ken Paxton
18 personally intervened and caused the OAG to issue an
19 Open Records Act opinion that gave Nate Paul what he
20 wanted, access to information about the FBI's search of
21 his home and his office, and that overturns decades of
22 settled expectations among sister law enforcement
23 agencies. So we have pled that in Paragraphs 33
24 through 41. That was among the concerns that these
25 individuals have.

1 And as we'll get to in a minute,
2 Your Honor, some of this picture came into focus slowly
3 and over time, like I said, because it came from so
4 many different areas of the Office of the Attorney
5 General. I'm going to -- so the second area, the OAG
6 used the financial litigation and charitable trust
7 division to intervene in a civil lawsuit between Paul
8 and the charity. This is in Paragraphs 42 through 52.
9 We detail how in a lawsuit filed against some of Nate
10 Paul's companies by the Mitte Foundation, a charity
11 that was a co-investor with him in -- with his
12 companies and properties, that they filed a lawsuit
13 against Nate Paul.

14 And the Office of the Attorney General,
15 which has authority to intervene in litigation to help
16 charitable trusts, their staff made a routine decision
17 early in that case we're not going to intervene here.
18 The charity is the plaintiff. The charity is
19 represented by, you know, extremely capable counsel
20 at one of the state's most renowned law firms. There's
21 no interest in intervening in this case.

22 But a few months later, Ken Paxton got
23 involved in it personally, and he directed his office
24 to intervene in that lawsuit, which they did, not to
25 help the charity, but to -- to strong arm the charity

1 into trying to settle with Nate Paul on favorable
2 terms. That's after Nate Paul's company had already,
3 almost a year earlier, entered into a settlement
4 agreement and then breached it by not paying for the
5 settlement agreement.

6 So Ken Paxton, intervening personally to
7 cause his office to pressure that charity, is
8 another -- again, an act of the Office of the Attorney
9 General itself -- of the office itself personally
10 orchestrated by Ken Paxton was another of the
11 concerns -- and I'll get in a minute to, you know, the
12 statutes that they believed had been violated. But
13 that wasn't all, because Nate Paul brought yet another
14 division -- I mean, rather, Ken Paxton brought yet
15 another division of the OAG to bear to try to stop
16 foreclosure sales to keep one of Nate Paul's properties
17 from being sold at an upcoming foreclosure sale. This
18 is outlined in Paragraphs 53 through 54 of the amended
19 petition.

20 On -- and a little bit of timing on this,
21 the Court may be aware that judicial -- nonjudicial
22 foreclosure sales -- nonjudicial foreclosure sales
23 happen on the first Tuesday of the month, I think
24 unless they fall on the 4th of July and New Year's Day.
25 Well, on July 31st, Ken Paxton got personally involved

1 in -- asked his staff to look into whether he could
2 issue an opinion that would either stop or make it hard
3 or impossible to have nonjudicial foreclosure sales in
4 Travis County, Texas. After hearing his staff's views
5 on the subject, Ken Paxton made clear he wanted OAG to
6 express a specific conclusion, a conclusion that
7 foreclosure sales should not be permitted to continue
8 or that would cast the ability -- cast doubt on the
9 ability to schedule foreclosure sales.

10 Now, you know, in light of how Ken
11 Paxton's office and how Your Honor spent the afternoon
12 of New Year's Eve, you can probably -- in which the OAG
13 was trying to get an injunction to allow gatherings --
14 mass gatherings indoors in bars in Travis County, you
15 can imagine how surprised his own staff was to see him
16 coming down this way on this issue. But even more
17 bizarre was the speed and the timing of the release of
18 that opinion, because after raising it for the first
19 time on December 31st, that opinion was rushed out at
20 Ken Paxton's direction and issued at 2:00 in the --
21 1:00 in the morning on Sunday, August 2nd.

22 Now, the members of the office that were
23 involved in it did not understand at the time the full
24 picture of why take this bizarre position? Why rush it
25 out? Why rush it out at 1:00 in the morning on a

1 Sunday? Well, they later learned, because by Monday
2 the 3rd, Nate Paul's lawyers were waving in his
3 creditors' faces trying to get a foreclosure sale on at
4 least one of his properties scheduled for the next
5 Tuesday closed. So this was again an example of Ken
6 Paxton engaging in bizarre activity, using the powers
7 of his office to benefit Nate Paul, to bring the powers
8 of his office to bear to help Nate Paul.

9 Paragraphs 55 through 84 describe how
10 Paxton abused yet another division of his office to
11 help Nate Paul, and that was to further his efforts to
12 have Nate Paul's adversaries criminally investigated
13 and intimidated. Paxton personally directed the OAG to
14 go out and bring in an outside lawyer, a lawyer with
15 about five years of experience practicing law, never
16 been a prosecutor before, to come in and help
17 investigate Nate Paul's adversaries.

18 Now, it's important to understand here,
19 Judge, that this lawyer was never actually correctly
20 approved to be an outside lawyer by the Office of the
21 Attorney General. The Office of the Attorney General
22 has practices designed to keep unqualified people from
23 pursuing unmeritorious investigations. And that
24 process was not complete, but Ken Paxton brought him in
25 and directed his activities anyway. Even if the Office

1 of the Attorney General could in this context challenge
2 that assertion, which the Court must accept as true,
3 there is no dispute that this individual was never
4 empowered to prosecute or hold himself out as a
5 prosecutor. The contract which we have attached to our
6 second amended petition that they purport to be the --
7 the -- the valid contract -- we dispute it's valid.
8 But even if it is valid, it says he can't be a
9 prosecutor.

10 And -- but what he did instead, this
11 fifth-year lawyer with no prosecutorial experience, is
12 frankly shocking, Your Honor. At Ken Paxton's
13 direction -- and by the way, the contract that they
14 claim gives him authority to act requires him to act
15 only at the direction of the Office of the Attorney
16 General. So what he did he must have been doing at the
17 direction of the Office of the Attorney General.

18 And what he did was go and falsely
19 represent himself to be a special prosecutor in order
20 to obtain search warrants to carry out a shocking
21 scheme to intimidate and investigate the federal
22 magistrate judge here in Austin, the FBI agents who
23 raided or searched Mr. Paul's house and offices, the
24 United States attorney who had obtained a search
25 warrant on Mr. Pax- -- Mr. Paul's home and offices, a

1 federal bankruptcy judge, again, the local charity, its
2 lawyers, the receiver appointed by the district court
3 in Travis County, the receiver's lawyer. At least one
4 credit union that held a lien on one of Mr. Paul's
5 properties received one of these subpoenas issued on
6 false pretenses to this so-called outside counsel.

7 And, Judge, this is -- this is where it
8 just -- you know, to top it off, when this outside
9 counsel, having obtained subpoenas under false
10 pretenses, showed up to serve one of them at a local
11 credit union or financial institution that was one of
12 Nate Paul's creditors, Mr. Paul's lawyer was with him
13 when he did it, just further evidencing what was
14 already obvious, that this was the Office of the
15 Attorney General turning itself over, using its staff,
16 its resources, and its power to do Nate Paul's bidding
17 by intimidating law enforcement and other individuals
18 who were Mr. Paul's perceived adversaries.

19 Now, some of this activity constitutes a
20 crime whether Paxton personally benefited from this
21 conduct or not. For example, one of the concerns that
22 the plaintiffs had was that he was -- that OAG was
23 turning itself over to conduct -- conduct that was
24 obstructing an investigation of these law enforcement
25 agencies, harassing potential witnesses in the matters

1 being investigated about Nate Paul, tampering with
2 governmental records by going and getting search
3 warrants, claiming to be a special prosecutor when he
4 was not, at the direction of the Office of the Attorney
5 General.

6 Those crimes don't require that we
7 establish any benefit to Ken Paxton himself personally,
8 but some of the allegations that -- some of the
9 concerns that the plaintiffs had that they took to law
10 enforcement that this had every appearance and
11 reasonable belief that this was a payback to Nate Paul
12 for something. And so it is important for the Court to
13 know what the relationship was between Ken Paxton and
14 Nate Paul.

15 Now, admittedly, the full picture --
16 because they've been ducking discovery and not -- and
17 not answering -- Mr. Paul is not answering questions
18 and other litigation about the full scope of the
19 relationship between Nate Paul and Ken Paxton, the
20 whistleblowers knew plenty about that relationship that
21 gave them a good-faith belief that this over-the-top
22 activity for Mr. Paul by the OAG was to benefit Ken
23 Paxton in some way.

24 For example, they knew they were close
25 personal friends of some sort because Ken Paxton and

1 Nate Paul met regularly in 2020, usually without
2 Paxton's staff or security detail present and in
3 meetings that were usually not included -- actually, I
4 don't think they ever were included on Ken Paxton's
5 official schedule, so some kind of personal
6 relationship they sought to conceal.

7 Paul is a major donor to Ken Paxton's
8 campaign. In October of 2018, Nate Paul donated
9 \$25,000 to Ken Paxton. In addition, a political action
10 committee for a law firm that was representing Nate
11 Paul's interest in that Mitte Foundation lawsuit --
12 remember, the Mitte Foundation sued a Nate Paul related
13 entity. And the OAG intervened in that case midway
14 through the case to exert pressure, the plaintiffs have
15 alleged, on the Mitte Foundation to resolve their
16 dispute with Mr. Paxton -- Mr. Paul under favorable
17 terms.

18 22 days after the Office of the Attorney
19 General intervened in that case, that -- Mr. Paul's
20 lawyers donated \$25,000 to Mr. Paxton's campaign.
21 Paxton also has personal and financial ties to Nate
22 Paul through an individual with whom Ken Paxton had --
23 has admitted to carrying on an extramarital affair.

24 And I will -- this is an issue,
25 Your Honor, that the plaintiffs -- as they have pled in

1 this lawsuit, they did not know of any specific
2 connection between Nate Paul and the individual with
3 whom Ken Paxton had an affair, but they -- when they
4 went to law enforcement, they suspected, in light of
5 this over-the-top conduct and in light of the -- the
6 relationship between Mr. Paul and Mr. Paxton, that
7 Mr. Paul must have known about the extra- --
8 extramarital affair and that that may have motivated
9 Ken Paxton to bend over backwards in such extreme ways
10 for Nate Paul.

11 It turns out they were right because
12 shortly after going to the FBI, the plaintiffs became
13 aware that Nate Paul hired this individual who was
14 having an -- who had had an affair with Ken Paxton on
15 Ken Paxton's recommendation, that Nate Paul didn't know
16 this person before. Ken Paxton said, hey, I want to
17 recommend her for a job with you. What is that job?
18 That job is as a construction manager even though this
19 individual has no background or experience in
20 construction. All of that is pled in plaintiffs'
21 second amended petition.

22 Finally -- or next to finally, Nate Paul
23 and Ken Paxton have a -- some kind of relationship
24 related to the renovation of Mr. Paxton's Austin house.
25 And then the plaintiffs also alleged -- and it -- that

1 Nate Paul and Ken Paxton have sought to obscure the
2 nature of their relationship and their connections to
3 each other. Just a few examples of that is Nate Paul
4 repeatedly refusing in other matters to describe his
5 relationship with Ken Paxton, also the individual that
6 now works for Nate Paul -- or did go to work. We don't
7 know if she still works there, Your Honor, but we do
8 know she went to work there at Nate Paul's company on
9 the strength of a recommendation from Ken Paxton, and
10 we know that this is not shown on this person's
11 public-facing professional biographies that are on the
12 Internet.

13 Your Honor, the plaintiffs, because of
14 this conduct, formed a reasonable belief that the
15 Office of the Attorney General and Ken Paxton and those
16 other employees of the OAG that he directed in these
17 efforts had committed numerous crimes, crimes related
18 to abuse of office, tampering with government records,
19 obstruction of criminal investigations, intimidating
20 witnesses in criminal investigations, and bribery.
21 That is outlined, including the statutes.

22 And Judge, the law does not require the
23 plaintiffs to identify a statute that has been
24 violated. It certainly does not require the plaintiffs
25 to prove that a criminal violation did, in fact, occur,

1 but they did -- we have pled extensively what state and
2 federal crimes these individuals had a reasonable
3 belief had been violated, violated by Ken Paxton, by
4 his office, and by employees that he directed.

5 In Paragraphs 85 through 103 of the
6 second amended petition, the plaintiffs describe in
7 detail how they came slowly as a group to learn about
8 the extent of this corruption across so many different
9 divisions of the Office of the Attorney General and how
10 they compared notes, talked about the different issues
11 that were going on.

12 And by September 30th, which was
13 really -- when it came to a head was when people
14 started getting subpoenas issued by this so-called
15 outside counsel that wasn't a prosecutor, accompanied
16 by Nate Paul's lawyer, getting subpoenas to investigate
17 and intimidate Nate Paul's adversaries.

18 The plaintiffs, again, eight -- the four plaintiffs and
19 four other whistleblowers who for various reasons are
20 not plaintiffs in this case, they compared notes, and
21 they understood the full scope of what we have pled
22 here.

23 And in Paragraphs 85 through 103, we
24 describe what they knew, what they reasonably believed
25 by reasonable inference, also things they knew from

1 just the policies and the procedures of the office and
2 how they went seven of them together to the FBI, the
3 eighth one to the Texas Rangers, to report the conduct
4 that I have just described, I have just summarized, and
5 it is laid out in much more detail in plaintiffs'
6 second amended petition.

7 THE COURT: Let me interrupt and ask a
8 question here. Do the plaintiffs believe that they
9 need to put on any jurisdictional fact evidence in
10 response to the 91a motion and the plea, or are the
11 plaintiffs also standing on the plea?

12 MR. NESBITT: Your Honor, I mean, let
13 me -- let me say on behalf of Blake Brickman only --
14 and I'll let my colleagues representing the other
15 plaintiffs speak to this -- we believe that the
16 pleadings are far and away sufficient to meet the
17 standard. We do believe, though, that to the extent --
18 and I'm not really sure I understand OAG's argument on
19 we haven't pled enough facts. But to the extent they
20 stand up and say this is speculation or this is --
21 you know, that there are facts that they -- that -- he
22 said it's conclusory. I mean -- so I guess my position
23 is, A, that's not true. We've been very specific about
24 the facts we knew, the facts that were reported -- I
25 say "we" -- the plaintiffs knew, the plaintiffs

1 reported. We think that's sufficient.

2 But to the extent there is an argument
3 that we have been merely conclusory, then, yeah, I
4 think we ought to be able to take discovery in this
5 case, and we've been trying to. You know, Judge.
6 They've been trying to stop us from taking discovery in
7 the case. So...

8 THE COURT: All right. And I think at
9 this time let me go ahead and hear from all the other
10 plaintiffs' lawyers and see if they're in general
11 agreement with that or if they want to add any more to
12 it.

13 MR. NESBITT: And just to be clear, you
14 want them to talk now or you want me to continue?

15 THE COURT: I think -- I think I just
16 would like on this point, since I asked this question,
17 if I'm the -- jurisdictional claims by the Office of
18 the Attorney General or the Attorney General come
19 before this Court all the time. And plea to the
20 jurisdiction law can be quite confusing. It's very
21 dearth. It's often disputed procedurally how this is
22 done and can be complicated and confusing. And so I
23 want to make sure that I understand the procedural
24 argument and the arguments that the plaintiffs are
25 making with regard to how the Court should proceed on

1 the motion to dismiss. Is it a pleading, argument
2 versus argument? Or is there some evidence that they
3 are going to put on with regard to jurisdiction, which
4 happens all the time at the trial court level? We hear
5 jurisdictional facts related to jurisdictional
6 argument.

7 Now, certainly one of the defendant's
8 arguments is -- would -- would mean that no facts would
9 be relevant or necessary. And, frankly, even your
10 argument, I think, Mr. Nesbitt, about employing
11 government entity wouldn't be even relevant to their --
12 one of their arguments, which is just, even if the
13 Legislature put those words in, it doesn't matter
14 because the Legislature, based on a separate --
15 separation of powers argument, can't do it in any
16 respect, even if they intended to and intended to by
17 their words, which is what we do in textualism
18 interpretation.

19 But the one thing I want to understand
20 from everybody else too on the plaintiffs' side is if
21 they are planning to put on evidence with regard to
22 jurisdiction. I don't know how to be clearer than
23 that.

24 MR. KNIGHT: Well, Your Honor, I'll
25 answer the question if I can on behalf of Mr. Vassar.

1 Like you --

2 THE COURT: I can see your emails. You
3 probably want to take those down.

4 MR. NESBITT: Sorry. I get these notes
5 from my co-counsel telling me what I'm doing wrong,
6 Judge.

7 MR. TURNER: Right now what you're doing
8 wrong is sharing your screen. There you go.

9 THE COURT: All right. Mr. Knight,
10 you're up.

11 **ARGUMENT BY MR. KNIGHT**

12 MR. KNIGHT: Your Honor, like you, I have
13 never seen a jurisdictional challenge packaged in a
14 Rule 91a before, and I -- and every plea to the
15 jurisdiction in which I have participated has included
16 an offer of evidence. But my position on this one is
17 basically the -- because the Office of the Attorney
18 General elected to package it up under Rule 91a, that
19 severely restricts the way they can argue it, and I'm
20 willing to live with those restrictions.

21 And so given -- given the presumptions
22 that govern Rule 91a, including construing our
23 pleadings liberally in favor of stating a cause of
24 action and -- the double presumption, because the cause
25 of action is under the Whistleblower Act, which

1 likewise has to be construed in the plaintiffs' favor,
2 I don't think the Office of the Attorney General on a
3 non-evidentiary pleadings-only basis can come close to.
4 And so I'm willing to forego evidence and have it --
5 have our petition judged as it's written.

6 THE COURT: Thank you. Mr. Soltero on
7 behalf of Mr. Maxwell.

8 **ARGUMENT BY MR. SOLTERO**

9 MR. SOLTERO: Yes, Your Honor. I agree
10 with both Mr. Nesbitt and Mr. Knight. I would also
11 just add a couple of things, which is, of course, under
12 Rule 91a, attachments to the petition under Rule 57
13 would be considered as part of what the Court may look
14 at, and we've done that in the amended petition. And,
15 secondly, I'd say, if this were done in a traditional
16 way, like we see often from the Office of the Attorney
17 General or in these plea to the jurisdictions, we would
18 have had almost a complete or a substantial overlap
19 between what Your Honor's considering in this Rule 91a
20 motion and some of the things that we'll hear in the
21 temporary injunction hearing. And so I think that
22 would have been expected to some extent, but I agree
23 with Mr. Knight. Given how they have chosen to box and
24 pigeon themselves, hole themselves into solely Rule 91a
25 to try to avoid having any evidence come before the

1 Court, then I think we're comfortable with that as
2 well.

3 THE COURT: And then, finally, Mr. Tittle
4 on behalf of Mr. Penley.

5 **ARGUMENT BY MR. TITTLE**

6 MR. TITTLE: Your Honor, I agree with the
7 position of my co-counsel.

8 THE COURT: All right. Thank you.

9 MR. HELFAND: Judge, may I speak now on
10 behalf of the movant?

11 THE COURT: I already think I know your
12 position, but if you want to make it clear -- I asked
13 you that earlier, and you answered, but you can go
14 ahead and give additional if you want -- if you'd like.

15 **ARGUMENT BY MR. HELFAND**

16 MR. HELFAND: Well, Judge, I'm not going
17 to speak to all of the colloquy about how hard I've
18 made it for the Office of the Attorney General. Again,
19 the burden is on the plaintiffs. There is no burden on
20 the Office of the Attorney General that hasn't been
21 pled.

22 In answer to the question the Court
23 asked, the *City of Austin vs. Liberty Mutual* case from
24 the Austin Court of Appeals makes clear that a 91a plea
25 to the jurisdiction allows the Court only to review the

1 case based on the pleadings; that is, the Court may not
2 consider evidence. And the argument that there's
3 something unusual about this plea is belied by the fact
4 that both the Supreme Court and the Austin Court of
5 Appeals have endorsed it as long as -- in the Austin
6 Court of Appeals seven years ago -- well, six and a
7 half years ago. So there's nothing unusual about this,
8 but the answer to the question the Court actually
9 asked, without all the editorializing about how unusual
10 this is, because that's baseless, is the Court may not
11 consider evidence even if the plaintiffs wish to
12 proffer it.

13 THE COURT: I think I understand all of
14 that, and -- and there's really not too much
15 disagreement, I think, despite that took ten minutes.
16 I think there is consensus almost on this point.

17 MR. TURNER: Judge Meachum --

18 THE COURT: And so we'll go back to the
19 main body of the argument. Mr. Turner is trying to say
20 something. Also, he is co-counsel with Mr. Nesbitt,
21 and so I will turn it back to the Brickman attorneys
22 who have the floor. And if Mr. Nesbitt wants to yield
23 some time to Mr. Turner, you may proceed.

24 **ARGUMENT BY MR. TURNER**

25 MR. TURNER: I apologize for interrupting

1 you, Judge. I just want to echo what Mr. Soltero said
2 because what Mr. Helfand said just now is -- was --
3 frankly, it was incomplete. What Mr. Soltero pointed
4 out to the Court was that Rule 91a(6) -- and they --
5 they cite the rule incompletely, "they" being OAG in
6 their -- in their motion as well.

7 91a(6) clearly says -- it says the Court
8 may not consider evidence in ruling on the motion and
9 must decide the motion based solely on the pleading of
10 the cause of action. What they leave out is "together
11 with any pleading exhibits permitted by Rule 59." So
12 the Court can clearly consider exhibits to our petition
13 that are attached to our petition that form the basis
14 of their claim we've sued upon.

15 MR. HELFAND: Judge, let me be clear.

16 MR. TURNER: That's all I want --

17 **ARGUMENT BY MR. HELFAND**

18 MR. HELFAND: I'm not disputing that and
19 I didn't say that. Everything that's attached to the
20 petition is part of the petition. And the Office of
21 the Attorney General has never, as counsel just
22 suggested, suggested otherwise. I didn't say that.
23 What I said was the Court can only consider the
24 petition, including any attachments to it.

25 MR. TURNER: No. They just left it --

1 THE COURT: I think -- never mind. I
2 think we're now arguing about something that doesn't
3 need to be argued about and that we have consensus on
4 and understanding from the Court on. The Court, by the
5 way, will take judicial notice of the file in this
6 matter for purposes of this hearing. And let's get
7 back to the main argument with Mr. Nesbitt.

8 MR. HELFAND: May I raise an objection,
9 Your Honor? The Court may not consider the entire
10 file, but only the petition.

11 THE COURT: The Court will take -- at
12 this time then, the Court will only take judicial
13 notice of the petition in this matter.

14 MR. HELFAND: Thank you, Judge.

15 THE COURT: Thank you.

16 **ARGUMENT BY MR. NESBITT**

17 MR. NESBITT: Your Honor, so having --
18 and this, again, is laid out extensively in the second
19 amended petition and the exhibits attached thereto,
20 but -- you know, I'm not sure anybody could have
21 foreseen just such across-the-board obvious grimy
22 corruption as the plaintiffs took to law enforcement.
23 But we do know this, that the scenario that occurred,
24 and that is public servants standing up to corruption,
25 going to outside law enforcement agencies -- they

1 didn't go -- they did notify the Office of the Attorney
2 General they had made reports, but they didn't go down
3 and open up an HR file. These were not memos these men
4 were -- and one woman were writing in the course and
5 scope of their employment. They went outside of their
6 agency to the Texas Rangers and to the FBI to make
7 complaints. And to protect public servants from
8 retaliation against that is exactly what the Texas
9 Whistleblower Act is designed to prevent.

10 And, Your Honor, I know that causation is
11 not at issue in this case, but I do -- I do want to
12 just briefly run you back through what happened at that
13 point because it kind of sets up some of the other
14 arguments. And I'll share my screen if the Court will
15 permit, if I'm able to do it.

16 THE COURT: Just don't share your emails
17 again.

18 MR. NESBITT: Okay. All right. Judge,
19 the -- so September 30th is when they went to the FBI
20 and to the Texas Rangers. October 1st, the -- the --
21 all -- well, seven whistleblowers sent this letter --
22 this is an exhibit to the petition -- to the Office of
23 the Attorney General explaining that they had gone to
24 law enforcement to report in good faith criminal
25 conduct by the office. That's the same day that

1 Mr. Maxwell went to the Texas Rangers.

2 Now, on October 2nd, the OAG suspended
3 plaintiffs Penley and Maxwell. On October 3rd, a
4 Saturday, they start issuing these press statements
5 accusing the whistleblowers of acting to impede an
6 investigation, threatening the whistleblowers with
7 investigation. October 5th, they continue to smear the
8 whistleblowers. On -- and then throughout the month of
9 October, we have extensively pled the -- frankly, the
10 pathetic acts of intimidation, but attempt to
11 intimidate these whistleblowers that occurred
12 throughout the month of October.

13 And on October 20th, the firings start,
14 Brickman and Mase on the 20th; Penley and Maxwell on
15 November 2nd; Vassar on the 17th of November. Of the
16 eight whistleblowers, five had been fired, and three
17 had resigned under pressure, all within 50 days of the
18 report, well within the 90-day presumption of
19 causation.

20 Now, this really isn't -- it's not even
21 in dispute, I don't believe, in respect to this 91a
22 motion. They concede for purposes of this motion a
23 causal connection between the reports to law
24 enforcement and the termination of these four
25 plaintiffs' employment. But it also is important

1 because a lot of the argument here is about how
2 fundamentally against the purposes of the Texas
3 Whistleblower Act that Office of the Attorney General's
4 argument's on.

5 Let's talk about their first argument
6 again, and let's go back to the statute as the Court
7 should. Their first argument is that these reports to
8 law enforcement don't qualify as protected
9 whistleblowing because the Attorney General himself
10 participated in them.

11 Now, Your Honor, the -- you know, what we
12 will establish here is that these reports are protected
13 under both of the prongs, both, because the plaintiffs
14 reported violations of law by the employing
15 governmental unit and another public employee. But you
16 start with the statute. And public employee means an
17 employee, so it's kind of a circular definition. But
18 anybody who's an employee is also a public employee or
19 an appointed officer other than an independent
20 contractor.

21 But -- but more -- more fundamentally,
22 the -- excuse me. Let me go back here. This is the
23 operative wording of the statute, 554.002(a). And the
24 case law makes clear that when Ken Paxton or anyone
25 else that is an elected office or appointed office acts

1 in the course and scope of their official duties, that
2 conduct is the conduct by the employing governmental
3 unit. As we just established, these -- these
4 whistleblowers didn't go and report Ken Paxton for
5 unlawful conduct having nothing to do with his official
6 duties. All of them centered on his official duties.

7 I think the best case here, Your Honor,
8 is *Housing Authority of City of El Paso vs. Rangel*.
9 *Housing Authority of City of El Paso vs. Rangel*.
10 That's an El Paso Court of Appeals opinion, 2004.
11 There the plaintiffs made complaints to law enforcement
12 that two unpaid appointed commissioners of a public
13 housing authority had engaged in various alleged
14 criminal conduct. They allege that one of them --
15 remember, these are commissioners of a housing
16 authority. They were saying one of them had a conflict
17 of interest that they didn't disclose, a conflict
18 that -- that they had an interest in some housing
19 project that they didn't disclose and that their
20 failure to disclose it was a -- was a criminal act.
21 They allege that another commissioner had misreported
22 her income so as to qualify for benefits under this
23 housing program, and they said that conduct was
24 criminal.

25 And the issue in the case was whether

1 under the Texas Whistleblower Act the plaintiffs had
2 met the first prong of this test, that is, had they
3 reported a violation of law by the employing
4 governmental entity. The Court actually started with
5 the second part of the test, and they said, you know,
6 we can't say they were public employees because they
7 didn't get paid. The statute requires them to be paid.

8 Now, we're going to talk about it in a
9 minute. Ken Paxton is paid. He is an employee. But
10 the Court in Housing Authority -- sorry. I'm trying to
11 maneuver two screens here, and I keep moving off the
12 screen. They -- the first court said, hey, these
13 aren't -- these commissioners aren't paid, so they
14 don't meet that second prong. But the acts that are
15 complained of, because they relate to the official
16 duties of these commissioners, they are the acts of the
17 employing governmental entity. And the rule that is
18 laid out in El Paso is that an employee's actions taken
19 pursuant to his duties and authorized by state law are
20 considered actions taken by the state. Conversely,
21 acts outside the scope of an official's employ- --
22 official duties are not the actions of the state.

23 But the issue in the case was whether
24 those actions were the actions of the state, and they
25 said that they were. They said, look, the commissioner

1 with the conflict of interest, you know, the failure to
2 disclose the conflict of interest was related to his
3 official duties. Those actions were the actions of the
4 employing governmental entity under the Texas
5 Whistleblower Act.

6 Same thing with the failure to report
7 income, which caused that commissioner to get benefits
8 under the housing authority program, and they
9 determined that is sufficiently related to your
10 official duties that you meet -- even though you're
11 not -- these commissioners weren't public employees
12 because they weren't paid, they met this first test.

13 Now, there are two cases that are prior
14 to that, *Wichita County vs. Hart* and *Tarrant County vs.*
15 *Bivins*. They also hold that where the conduct is of an
16 official -- in these cases, sheriffs of a county.
17 Where the sheriffs' actions that are being complained
18 of are in the course and scope of the sheriffs'
19 official duties, then that qualifies. Those are the
20 actions of the governmental entity.

21 Another case, Your Honor, is *City of*
22 *Cockrell Hill vs. Johnson*. That's a 2001 Fort Worth
23 case. This is actually cited by OAG in the second part
24 of this analysis where they're evaluating another
25 public employee. But it also bears on the first part

1 of the definition of whose conduct can give rise to a
2 Whistleblower Act claim. In *Cockrell Hill*, the
3 whistleblowers reported that an unpaid city alderman
4 had engaged in criminal conduct. And, again, the Court
5 is evaluating, well, what was -- what was the
6 whistleblowers reported, was it the act of an employing
7 governmental entity or another public employee, either
8 one? And, again, they first evaluated another public
9 employee, and they said he's not that because the
10 alderman is unpaid.

11 But when -- and then in evaluating
12 whether the acts complained of were the acts of the
13 employing governmental entity, the Court said, hey,
14 look, if these were official duties that you complained
15 of, you'd meet that test, but you don't meet that test
16 because in this case, in *City of Cockrell Hill*, the
17 allegations that the whistleblowers took to law
18 enforcement were of sexual -- allegations of sexual
19 assault and drug use, having nothing whatsoever to do
20 with the alderman's official duties. But in holding
21 that that prong was not met in this case, they affirmed
22 the rule, which is that the plaintiff meets the
23 definition of reporting a violation by the employing
24 governmental entity when what they report to law
25 enforcement were the actions of an official taken in

1 their official duty -- capacity, which is, of course,
2 what the plaintiffs reported in this case.

3 The courts in those cases also said this
4 is the only result consistent with the purposes of the
5 Texas Whistleblower Act, which are to ensure compliance
6 with the law by those people who guide and direct the
7 governmental entities. Your Honor, the statute does
8 not say and no case holds that simply because you are
9 an elected official you can't -- your criminal conduct
10 can't form the basis of a Whistleblower Act claim. It
11 simply cannot be that the Legislature enacted a broad
12 remedial statute intended to protect against such a
13 corruption and didn't write into the statute the
14 outlandish exception that the OAG wants you to write
15 into the statute.

16 But more fundamentally too, when we move
17 to that second prong, another public employee, it is
18 crystal clear that the Attorney General is a public
19 employee. Now, remember, the statute they cited to you
20 where they were going through these definitions -- I
21 can't remember the exact terms -- you know, appointed
22 officer versus elected officer, those were taken out of
23 Chapter 572 of the Government Code, not Chapter 554 of
24 the Whistleblower Act. They pulled a completely
25 separate statute intended to address completely

1 separate issues and said, hey, use these definitions to
2 guide you as opposed to the definition that the Texas
3 Legislature supplied in the Whistleblower Act itself.
4 And that definition focuses on whether the person is
5 paid, whether another public employee is a paid
6 employee or not.

7 Your Honor, on this point, *City of*
8 *Cockrell Hill* is also important. And I do want to
9 point out that I think OAG has improperly cited that
10 opinion. When -- when the Court in *Cockrell Hill* went
11 through their analysis, they got to the part where they
12 were evaluating whether the employee was a public
13 employee, the person who was accused of the wrongdoing.
14 And all they've looked at was: Was he paid? And
15 because he wasn't, they said he was not a public
16 employee. It certainly does not establish, as I think
17 OAG implies in their motion, that it establishes some
18 rule that if you are elected, then you are not a public
19 employee. That is -- that is not what the *City of*
20 *Cockrell Hill* stands for.

21 Your Honor, we have pled extensively the
22 facts that show that Ken Paxton was a public employee.
23 This is the definition of the Whistleblower Act -- in
24 the Whistleblower Act, not this other statute that they
25 want you to go look at to determine what a public

1 employee is for purposes of the Texas Whistleblower
2 Act. But a public employee means an employee.

3 Ken Paxton is an employee of the Office
4 of the Attorney General. And this is -- this is a
5 screenshot here, Your Honor, of some of the allegations
6 that the plaintiffs have made. And these allegations
7 are supported by the personnel records of the Office of
8 the Attorney General that we obtained in an Open
9 Records Act request.

10 The OAG's own open record -- I mean, own
11 employment records identify Ken Paxton as an employee.
12 They say -- I mean, this is an attachment to the
13 pleading. They say that Ken Paxton's date of
14 employment started January 5th, 2015. The Office of
15 the Attorney General employment records identify the,
16 quote, employee being replaced by Ken Paxton, and that
17 employee was Greg Abbott, who was the Attorney General
18 who Mr. Paxton preceded. The record is replete with
19 references to his employee information, his position
20 number. The records identify Mr. Paxton as an exempt
21 employee under the Fair Labor Standards Act. Your
22 Honor, this is a legal admission that Mr. Paxton is an
23 employee, because a person is only covered and exempt
24 by the Fair Labor Standards Act if they are an employee
25 to begin with.

1 That's not all. We further pled this --
2 which is true, that this is his full-time job. He
3 earns a salary like employees earn of \$153,750 a year.
4 He has a job class title. He receives -- the records
5 of the Office of the Attorney General show he receives
6 employment benefits, benefits that are only available
7 to employees. When he -- when his pay changes, they do
8 it on a personnel action form like they do for
9 employees.

10 He is earning employment-based service
11 credit under an employee pension plan of the State, a
12 pension plan that the State itself says is a defined
13 benefit retirement plan for State of Texas employees.

14 We have thoroughly pled, Your Honor, that
15 Ken Paxton is an employee of the Office of the Attorney
16 General. Now, of course, the Court need not even reach
17 that decision, but either/or -- either a showing that
18 the actions complained of were the actions of the
19 office itself, which they were, or that Ken Paxton was
20 a public employee satisfies that.

21 We have also pled, Your Honor, that Ken
22 Paxton involved other employees of the OAG in his
23 scheme. Now, we're not accusing specific other people
24 necessarily of knowing they were violating criminal
25 law, but the -- but the petition is replete with

1 examples where Ken Pax- -- he couldn't do it by
2 himself. He had to direct other employees to intervene
3 in the Mitte Foundation case, to run -- run this
4 contract through the processes, to work with that
5 out- -- so-called outside counsel. So even if you
6 determine that Ken Paxton's acts are not the acts of
7 the Office of the Attorney General or that Ken Paxton
8 isn't an employee of the OAG, other employees were
9 enlisted by Mr. Paxton in this scheme.

10 Your Honor, their second argument is also
11 unsupported. The second argument, they say that the
12 Whistleblower Act does not protect senior staff of
13 state agencies. Again, there's -- no case says that.
14 The statute doesn't say that. What they're trying to
15 do is import concepts that have been legislated into
16 other statutes and say that they -- you should rewrite
17 this statute to apply them.

18 Your Honor, remember that a -- this is,
19 again, back to the definition of what the -- of the
20 cause of action. A state of -- a state or local
21 government may not suspend or terminate the employment
22 of or take other adverse personnel action against a
23 public employee who in good faith reports a violation
24 of the law.

25 Now, the Legislature could have said

1 we're going to define that to mean only certain
2 employees, but they didn't. Public employee means any
3 employee, and it means or -- and "or" to include in the
4 definition -- or appointed officers. There's nothing
5 in the statute that indicates an intent to limit
6 protection by removing that protection from so-called
7 senior employees.

8 Now, Your Honor, the OAG admits there's
9 no statutory support for rewrite -- for saying that
10 employee means only certain employees. They admit
11 there is no case holding that so-called senior
12 employees are not protected by the Whistleblower Act.
13 There's no evidence also of whether the plaintiffs meet
14 that determination even if you were to judicially
15 create one.

16 Also, again, this would undermine the
17 purposes of the Act to say, oh, those employees who
18 were in the most senior positions who were most likely
19 to have the kind of information that could -- should be
20 reported to law enforcement are for some reason not
21 covered under the Act.

22 And, Your Honor, finally, when the Texas
23 Legislature decides to exempt a subset of employees
24 from an anti-retaliation statute, they know how to do
25 it. And you need look no further than Chapter 21 of

1 the Texas Labor Code. That is -- and Mr. Helfand
2 referred to this law earlier. And this is pretty
3 important on this point where they're trying to say,
4 oh, employees should mean only some employees, some
5 non-senior employees.

6 The Texas Labor Code, Chapter 21 -- it
7 used to be called the Texas Commission on Human Rights
8 Act. It is the state law analogue to Title VII. It
9 prohibits race discrimination, religious
10 discrimination, various other forms of discrimination.
11 It also prohibits retaliation against people who make
12 certain complaints of retaliation or participate in
13 investigations. It used to have the specific exception
14 that I think the OAG wants you -- although it's not
15 crystal clear -- wants you to write into the
16 Whistleblower Act, because Chapter 21 used to exclude
17 from coverage, exclude from protection the personal
18 staff serving in policymaking positions for elected
19 officials. Title VII still contains that statutory
20 exclusion from coverage.

21 Well, but the Texas Legislature in
22 1995 -- again, that exclusion has never been in the
23 Texas Whistleblower Act. It's not in there now. It
24 never was in the Texas Whistleblower Act. All -- all
25 by itself, that tells you that the Texas Whistleblower

1 Act does not contain the exception that the OAG asks
2 you today to judicially legislate into the statute.

3 But it's even -- it's even worse than
4 that, because in 1995 the Texas Legislature took that
5 exception out of Chapter 21, out of the Civil Rights
6 Act analogue. And, of course, they never added that
7 exception to the Whistleblower Act. And so, you know,
8 to buy the OAG's argument, you have to believe the
9 Legislature, you know, knew about this senior staff or
10 policymaking exclusion, wrote it into one law but never
11 wrote it into the Whistleblower Act, took it out of the
12 other law.

13 And by the way, 1995 -- we pled this in
14 our response. 1995 was the last time the Texas
15 Legislature actually substantively amended the Texas
16 Whistleblower Act. So the Legislature was amending the
17 Whistleblower Act at the same time it was taking out
18 this exception from a different statute that they want
19 you to write into the law.

20 Your Honor, their last legal argument is
21 that the Texas -- that you ought to, again, amend the
22 Texas Whistleblower Act to find that there is an
23 exception to coverage if someone works in a law
24 enforcement agency. What I think -- what I think
25 they're saying is they want you to take a concept out

1 of a common law cause of action for First Amendment
2 retaliation. It's the *Garcetti* and the *Pickering* line
3 of cases that limit First Amendment retaliation only to
4 reports that someone -- or speech that someone engages
5 in that is both as a private citizen and relates to a
6 matter of public concern.

7 Now, that is a long-established concept
8 in First Amendment retaliation, which the Texas
9 Legislature has never written into the Texas
10 Whistleblower Act. It simply isn't in there. They
11 want you to write it into the law. The -- so this --
12 there actually is case law rejecting the very request
13 that the OAG makes of you today.

14 In *Rogers vs. City of Fort Worth* -- this
15 is a 2002 Fort Worth opinion, *Rogers vs. City of Fort*
16 *Worth* -- a municipal judge directed Rogers, who was a
17 deputy marshal, to report wrongdoing by another deputy
18 marshal. In the Whistleblower Act lawsuit that
19 followed after this, when Rogers -- after Rogers was
20 retaliated against, the City argued, hey, Rogers did
21 not report a violation of law unless he made his report
22 primarily as a citizen, not as part of some official
23 act, and the Court disagreed. And the Court said while
24 it appears that Rogers made his report primarily in his
25 role as an employee rather than as a citizen, we

1 decline to hold, based on that fact, that Rogers did
2 not report a violation of law. That's under the
3 Whistleblower Act, and it's important. This is at
4 Page 28 of our response. It -- it's cited as authority
5 for that position, rejecting expressly the argument
6 that the OAG is making today with a string cite of
7 other cases reaching the same conclusion. That's at
8 Page 28 of our response.

9 Your Honor, the cases they -- they admit
10 there's no legal authority for this. So then they
11 start to cite a bunch of First Amendment retaliation
12 cases. I will remind the Court that the Texas
13 Whistleblower Act is a statutory cause of action. The
14 Legislature clearly defined both what has to be -- let
15 me back up one step.

16 Sometimes people file First Amendment
17 claims, retaliation claims, that alleges the same
18 conduct as a Texas Whistleblower Act claim. They say,
19 hey, I went and made a report, and that activity was
20 both an exercise of my First Amendment rights and it
21 was a report under the Texas Whistleblower Act.

22 But the Texas Whistleblower Act has a
23 very specific and narrower scope. It applies only when
24 reports are made to a law enforcement agency, and it
25 applies only when there is a good-faith belief of a

1 crime having been committed. So it is much narrower
2 than a First Amendment claim, which might cover all
3 kinds of activity, you know, putting things on the
4 Internet, political activity, you know, criticism in a
5 public forum of an elected official. And so in the
6 context of that common law cause of action, the Supreme
7 Court has drawn limitations, limitations that have
8 never been applied to the Texas Whistleblower Act and
9 that Texas courts hold do not apply under a Texas
10 Whistleblower Act claim.

11 Finally, Judge -- and this is set out in
12 our response as well. Let's assume you do what the
13 Office of the Attorney General is asking you to do and
14 write into the Texas Whistleblower Act these *Garcetti*
15 and *Pickering* public -- private speech about a matter
16 of public concern requirements and import those into
17 the Texas Whistleblower Act. It's crystal clear that
18 our clients -- even if that was a requirement of the
19 Texas Whistleblower Act, the plaintiffs would meet
20 those requirements far and away, and we have cited
21 numerous cases that illustrate that point.

22 Remember, our clients -- where courts
23 have said you don't have First Amendment protection is
24 when you're a police officer and you're claiming that
25 the free speech was something you put in a memo only to

1 your supervisor. Okay. That's not what happened here.
2 Our clients went outside of the OAG to federal and
3 state law enforcement officials, not as part of their
4 day-to-day duties. And what Mr. Helfand was referring
5 to about the duty, we have said generally these men
6 and one woman that were whistleblowers considered it
7 their -- their duty to report criminal conduct. They
8 didn't say they were doing that in the course and scope
9 of their employment, which is what would have to have
10 been made.

11 You know, citizens have a duty to show up
12 and answer questions under oath when subpoenaed. One
13 of the cases we cite said when that happens -- it's a
14 police officer who was subpoenaed to testify in a
15 criminal trial where a fellow officer was a criminal
16 defendant. And the Court said, look, even though you
17 were subpoenaed to give information you learned in the
18 course and scope of your employment, when you walk into
19 court, even under -- compelled by subpoena, you are
20 acting under your duty as a private citizen, not your
21 duty to the law enforcement agency.

22 But the *Davis* and the *Ezell vs. Wells*
23 case and the *Winn vs. New Orleans City* case show that
24 even if you hold that the Texas Whistleblower Act
25 should only protect -- should -- should only protect

1 the kinds of reports that a First Amendment claim would
2 protect, the facts here clearly meet that burden.
3 These were people going outside their agency to law
4 enforcement as private citizens to report a matter of
5 public concern. And corruption by the Attorney General
6 of the State of Texas is clearly a public concern. The
7 cases we cite, many of them address that second part of
8 the analysis as well. And there's been no argument by
9 the OAG that even if you write this requirement into
10 the statute, that we don't meet that requirement.

11 Your Honor, I think their fourth
12 argument, which is we have not pled with speci- --
13 sufficient specificity, I believe I've already
14 addressed that. I think you really can't fully take
15 the measure of how -- of that argument without
16 reviewing the petition because we go into great detail.

17 And you know what? We did amend the
18 petition after they filed this motion. We amended the
19 petition because there were certain things -- because
20 our clients went to law enforcement and particular law
21 enforcement agencies, they were careful not to say --
22 they didn't want to say too much. They didn't want to
23 get in the way of these investigations that may be
24 going on. And so we did replead to make much more
25 specific who they went to and when and why, but that is

1 laid out in the second amended petition. And I think
2 the Court -- that's probably the reason why they -- I
3 always make my weakest arguments fourth. I don't know
4 if that's good -- a good practice or not, but I think
5 that's why they made that argument fourth.

6 And I would like to just -- you know,
7 I'll, of course, answer any questions the Court has,
8 but I'd also like to turn it over to some of my
9 co-counsel if I've left them any time.

10 THE COURT: You have. I think we have
11 about 15 minutes left, so we can give each of them five
12 minutes. I did want to ask a question. I'm not for
13 sure where you addressed it, and maybe -- I get lost in
14 which prong is which prong on the OAG's side of the
15 case. But I feel like they have this umbrella
16 argument, and maybe I misinterpreted them, that you
17 haven't addressed yet. So when the other lawyers speak
18 for the plaintiffs, maybe they'll address this one.

19 It's the separation of powers argument,
20 that even if the statute -- the Whistleblower -- the
21 Government Code says what it says, that because the
22 Office of the Attorney General is a constitutional
23 executive created by the Constitution, the
24 Legislature -- and maybe I'm misunderstanding the
25 argument, but I thought it was just that the

1 Legislature couldn't even pass a Whistleblower Act that
2 would apply to one of these constitutional offices.

3 I think that's the argument, and I don't
4 know that I heard you address -- it's almost more
5 simple than some of the more specific arguments you got
6 into about the textualist interpretation of the statute
7 itself and all these different definitions of public
8 employee, et cetera. It's a kind of umbrella argument
9 about separation of power. But I'll either let you
10 address it or we can start turning to some of your
11 counsel for the other plaintiffs if you would like to.

12 MR. NESBITT: Let me just briefly address
13 it from my perspective. I -- I didn't understand
14 their -- I understood their separation of powers
15 arguments to be an explanation of why they think that
16 the Whistleblower Act means what they say it means, not
17 a separate independent allegation. Maybe it is. I --
18 I know there's no legal support for the conclusion that
19 the Texas Legislature overstepped its bounds in
20 implementing. I understood them to be saying that
21 there's a reason that they had the definitions the way
22 they had, kind of ignoring the first prong of the
23 definition and misconstruing the second one. But I --
24 I think probably some of my colleagues here might be
25 able to speak to that better than I.

1 THE COURT: All right. Let's go ahead.
2 I don't -- I don't have a preference of which one of
3 you speak first.

4 **ARGUMENT BY MR. KNIGHT**

5 MR. KNIGHT: Well, Judge, I was -- I was
6 going to say that I had nothing to add, but I may
7 quickly try to address this.

8 Tom, if you could, since you are the
9 keeper of the PowerPoint, can you put back up the
10 definition that includes the governing entity? Yes.
11 Yeah, that -- that'll be fine.

12 Your Honor, my understanding of their --
13 of their separation of powers argument is it is in
14 support of their contention that Ken Paxton, as an
15 elected constitutional officer, is not a public
16 employee. We think that argument is wrong. We think
17 it would be fraught with quite a bit of legal danger if
18 he were exempted through that kind of interpretation.

19 But to me, the answer -- if the Court is
20 accepting or intrigued by that argument at all, it
21 doesn't go at all to this first prong that we have
22 alleged that there -- we reported -- our clients
23 reported violations of the law by the employing
24 governmental entity. So even if you accepted the idea
25 that Ken -- Ken Paxton as an elected officer is above

1 the law, is not a public employee, there is no
2 question, I submit, that we have alleged in great
3 detail that he caused the Office of the Attorney
4 General, the employing governmental entity over which
5 the Legislature clearly has control and discretion, to
6 commit unlawful acts, which we then -- our clients then
7 reported to law enforcement. So I think even if there
8 was something to that, it falls apart on the analysis
9 of the phrase "employing governmental entity." That's
10 all I have to add.

11 THE COURT: Sorry. I meant to unmute me,
12 and I muted you. But thank you. I think you ended
13 with that's all you had to add. So let's go to
14 Mr. Soltero --

15 MR. SOLTERO: Yes, Your Honor --

16 THE COURT: -- for any comments you have.

17 MR. SOLTERO: Yes, Your Honor, just a
18 few -- few comments. And I'll start right where you
19 were asking questions and were just reminded about. In
20 addition to no authority supporting that position, no
21 case, et cetera, we, in Footnote 6 to the response, not
22 to the petition, but to the response to the Rule 91a
23 motion, have referred to two cases here in Travis
24 County, one involving David Scott who filed a
25 whistleblower suit against then Land Commissioner David

1 Dewhurst's conduct. It was against the GLO, of course,
2 because it's the governmental entity that employed him
3 that took the actions, just like in this case, but it
4 was the conduct of then Commissioner Dewhurst that I
5 understand was at issue in that case. The Legislature
6 didn't change the whistleblower after that case, and
7 there were, like, newspaper articles about it,
8 et cetera, and it didn't have that prohibition before
9 or after the *Sky* case.

10 And I think there's a second case that I
11 understand from one of the lawyers who handled it, even
12 though we haven't been able to access the file yet,
13 that it was against -- complaining about the
14 commissioner -- the fire protection commissioner
15 board's conduct also, which would be a similar sort of
16 top of the agency, even though it wouldn't be one of
17 the six that Mr. Helfand mentioned. But the bottom
18 line is that there is no such exception. This is a --
19 a really created for this case argument and really
20 encouraging this judicial activism.

21 There -- my colleagues touched on other
22 public employees whose conduct was also at issue here.
23 And then with regards to -- like Mr. Brent Webster, for
24 instance, who did the actual termination and separation
25 portion at the end -- actually, followed the directive

1 from Paxton and in retaliation for what the plaintiffs
2 did terminate them.

3 And then with regards to Mr. Maxwell
4 specifically, since it's been raised a little bit I
5 think in Mr. Helfand's argument and some of his papers,
6 I would direct the Court to Paragraphs 97 to 103 of our
7 second amended petition with regards to the specifics
8 of his whistleblowing. He's the only non-lawyer. He
9 reported it to three law enforcement agencies. He
10 first reported it to the Texas Rangers, the appropriate
11 entity before he was put on leave, and then afterwards
12 reported it to the FBI and to the Travis County
13 District Attorney's Office before he was terminated.

14 And the last thing I'd say is he --
15 Mr. Helfand suggests that there can only be one
16 whistleblower, was an argument that we heard. And
17 putting aside sort of -- sort of things that we might
18 know from the public that we've seen, like, for
19 instance, the movie Bombshell, where there were
20 numerous allegations of alleged sexual harassment at
21 Fox News, for instance, Your Honor knows that often in
22 employment cases there can be multiple plaintiffs
23 complaining about illegal conduct of different type.
24 And there's no exception for whistleblowing, and
25 there's certainly no prohibition of there being more

1 than one whistleblower complaining about illegal
2 conduct.

3 And, in fact, in Paragraph 94 of our
4 response to the Rule 91A motion, we cite three cases
5 where there were multiple whistleblower plaintiffs, and
6 some of those were law enforcement officers. So their
7 arguments are not well taken. We would ask that it be
8 denied.

9 Oh, and one last thing. I noticed that
10 when Mr. Helfand was reciting the at-will doctrine, he
11 mentioned that an employer can terminate somebody for
12 no reason, a bad reason, or a good reason, but he
13 failed to admit the last part of that test, which is it
14 can't be for an illegal reason. And that's the most
15 important thing, because that's what we have here. It
16 is illegal to retaliate and fire public whistleblowers.
17 That's precisely what the OAG did in this case, and
18 we're prepared to prove it. And we would ask that the
19 Court take it under advisement and deny the motion to
20 dismiss. And I join my colleagues with the other
21 arguments.

22 THE COURT: And then finally, Mr. Tittle,
23 anything to add on behalf of Mr. Penley?

24 **ARGUMENT BY MR. TITTLE**

25 MR. TITTLE: Your Honor, like my

1 co-counsel, I adopt the -- of course, the joint
2 response and all the arguments that they've made. The
3 only thing I would simply clarify would be sort of what
4 Mr. Soltero was saying near the end. This idea by
5 Mr. Helfand that there was somehow one whistleblower
6 report that is adopted by all is just simply an
7 incorrect interpretation of our petition. We have
8 alleged that there was a joint meeting at the FBI but
9 that each whistleblower individually reported
10 violations of the law or what they in good faith
11 believed were violations of the law.

12 So just to the extent that Mr. Helfand
13 may have mischaracterized our pleading, I want to
14 clarify that these -- there were individual reports
15 made by each whistleblower to an appropriate law
16 enforcement authority.

17 THE COURT: All right. Thank you. Okay.
18 Mr. Helfand, I'm sure there are things with what was
19 just said in plaintiffs' counsel's arguments that you
20 may want to address. Unfortunately, I have a meeting
21 at one o'clock, so I need to take a break. So we're
22 going to come back at two o'clock for you to do that,
23 and then we'll make some decisions about -- I know that
24 you all have some arguments you want to make about what
25 the Court can do and can't do, but I'm going to see

1 everybody at two o'clock, and we will continue with
2 your final thoughts on this, Mr. Helfand, which you can
3 do as the movant. And I want to give you a chance to
4 address anything said by plaintiffs' counsel, and then
5 we will proceed from there with some decisions
6 regarding some of the outstanding issues on this Court.

7 And also I need the plaintiffs to be
8 ready to begin with their temporary injunction at that
9 time and ready to go depending on what the Court does.
10 All right?

11 MR. SOLTERO: Your Honor, we are prepared
12 to move forward. We have witnesses lined up and ready
13 to go.

14 THE COURT: Okay. So we're going to do
15 that. We're going to take a break. Now we will all go
16 off of our Zoom. We'll close everything out and then
17 we will link back on. Let's do that at about 1:55 to
18 start kind of getting back on so we can be prepared for
19 two o'clock to resume argument. All right. Thanks
20 everybody. I'll see you in an hour.

21 *(Lunch recess.)*

22 THE COURT: Okay. We are back on
23 YouTube, and now we are going to go back on the record
24 with Ms. Racanelli. A reminder to anybody who could be
25 watching this in any of your offices, no audio or video

1 recording is allowed of this procedure. Ms. Racanelli
2 is taking the official record, and hers will be the
3 only record.

4 We are broadcasting, however, on our
5 YouTube channel to fulfill the open courts presentation
6 of the Texas Constitution. And I believe it does a
7 pretty accurate reconstruction of people who can just
8 walk into the courtroom and, in fact, maybe even makes
9 it easier access for people than usual than having to
10 walk down to the courthouse and into a courtroom.

11 So we're going to keep going and proceed.
12 We're going to pick back up with where we left off,
13 which is going back to Mr. Helfand and you having an
14 opportunity to address the arguments of plaintiffs'
15 counsel that we heard before lunch. Thank you.

16 **ARGUMENT BY MR. HELFAND**

17 MR. HELFAND: Thank you, Your Honor.
18 Well, of course, about 45 minutes of the plaintiffs'
19 presentation have nothing to do with demonstrating a
20 waiver or attempting to demonstrate a waiver of
21 governmental immunity under the Tort Claims Act. It
22 appeared more perhaps directed to the continuing media
23 efforts to malign the elected Attorney General and some
24 other people. It has no place in this case.

25 But I do want to respond to something

1 that Mr. Nesbitt said. Again, I know he knows that
2 denials are not part of a Rule 91a motion, so the
3 assertion that there's no opposition to the factual
4 allegations is just inappropriate here. Again, that
5 seems to be more media fodder than it is related to the
6 issue before the Court.

7 However, I should point out, the answer
8 identifies that each plaintiff was fired for, among
9 other things, their own misconduct. And I don't think
10 we'll ever get there in light of the lack of subject
11 matter jurisdiction. But that's not appropriate for
12 today, and it's not appropriate for a lawyer to argue
13 to the Court that issues outside of the scope of
14 Rule 91a are not addressed in the 91a motion and,
15 therefore, they must be conceded. Be sure, they're not
16 conceded.

17 Mr. Nesbitt knew when he made that
18 statement that the Office of the Attorney General has
19 already demonstrated in its answer that each of the
20 individual plaintiffs were fired for their own
21 misconduct. And I won't get into that today, Judge,
22 because it's just -- it would be just as inappropriate
23 to start chronicling that misconduct. But I will
24 say -- and, again, this isn't the Court's first
25 whistleblower case -- that these whistleblower

1 allegations, these claimed whistleblowers are typical
2 of people who find themselves in trouble in their
3 employment because of their own misconduct and then
4 rush to find something to report with the hope that
5 that will insulate them from the appropriate and
6 responsible discipline or, in some cases, separation.
7 But that's for another day.

8 Mr. Nesbitt spent over 45 minutes talking
9 about a fellow named Nate Paul, who is not a party or
10 related to this case in any way, an unidentified
11 special prosecutor, and all kinds of speculation about
12 individual motivation. None of that is a reference to
13 a fact but rather theories, none of which are
14 purported -- purported any presumption of truth. But
15 they are perhaps the best evidence that the plaintiffs
16 have acknowledged that they really don't have the facts
17 to show a waiver of the heavy presumption of immunity.

18 And I want to speak to that first because
19 we need to realign for the record -- and, again, I may
20 be telling the Court something it already knows, but I
21 want to -- I would be remiss if I didn't point this
22 out. The -- all four plaintiffs' counsel argue about
23 what they contend is the Office of the Attorney
24 General's failure in the plea to the jurisdiction. I'm
25 sorry. I'm looking for two cases here, Judge. I'll

1 find it.

2 That is a complete misunderstanding, and
3 I'm assuming it's an innocent one and not an attempt to
4 mislead the Court, of the law. The Office of the
5 Attorney General is not asking Your Honor to write --
6 rewrite the statute, nor is the Office of the Attorney
7 General asking the Court to create immunity where it
8 doesn't already exist. I don't have to ask Your Honor
9 to do that. The law requires Your Honor to impose upon
10 the plaintiff the burden of showing a waiver of
11 immunity. Immunity is presumed. Right now my client
12 is immune from suit. And the plaintiff cannot
13 demonstrate a waiver of immunity, which, again, I think
14 explains why they spent so much time talking about what
15 they contend is my failure to prove immunity. I don't
16 have to prove immunity. The Court presumes immunity.

17 And as the Supreme Court said in *DART vs.*
18 *Whitley*, which is cited at 104 S.W.3d 504 and
19 specifically at Page -- I'll look at the -- 5 --
20 sorry -- 540, not 504 -- at 542, quote, in a suit
21 against a governmental unit, the plaintiff must
22 affirmatively demonstrate the Court's jurisdiction, and
23 they do so by demonstrating a valid waiver of immunity.
24 The Supreme Court restated that in *State vs. Lueck*,
25 which we talked about, which is a whistleblower case

1 and is cited in the briefs in which the Supreme Court
2 held -- and, again, this is right out of the case. I'm
3 trying to find the page. Here we go. 883. The
4 Supreme Court in *Lueck* took up the question of whether
5 the elements of the statute are simply for purposes of
6 determining liability or whether they must also be
7 demonstrated each of the elements to establish subject
8 matter jurisdiction. The Court held: We hold the
9 elements of Section 554.002(a) can be considered to
10 determine both jurisdiction and liability.

11 Thus, the question is not whether the
12 Office of the Attorney General could demonstrate its
13 immunity. The immunity is presumed. The Court must
14 accept the immunity unless the plaintiffs can show that
15 they fall within the express waiver provision of the
16 statute by satisfying each of the elements of 554.002.
17 Now, they don't, because what they say is that the
18 Office of the Attorney General is claiming that the law
19 does not apply to the elected AG. That is not a
20 correct statement. That is not even a fair
21 interpretation of the pleading. That's really
22 something that should be saved for press release, which
23 it's already been subject to a couple of times.

24 The Court takes the statute, and the
25 question is: Have the plaintiffs demonstrated that the

1 statute applies to them in every single respect? So
2 the question is not whether the law applies to the
3 elected Attorney General. It is that everyone must
4 acknowledge it's just a matter of reading the statute
5 that the Legislature did not include elected executive
6 branch officials as defined by the Texas Constitution
7 in the statute. That is, the Legislature listed public
8 employees and the public entity but did not include in
9 the statute the term "public official."

10 The Texas Supreme Court has demonstrated
11 the distinction between a public official and a public
12 employee in, for example, *Tarrant County vs. Ashmore* at
13 635 S.W.2d 417, specifically Page 420 from 1982, in
14 which the Supreme Court explained public office is a,
15 quote, right, authority, and duty, and created and
16 confirmed by law for a given period. An individual is
17 invested with some portion of the sovereign functions
18 of the government to be exercised by him for the
19 benefit of the public. And a public officer is one who
20 is authorized by law to exercise the functions of
21 either an executive, legislative, or judicial office.
22 And that's *Prieto vs. -- Bails Bond vs. State of Texas*
23 at 994 S.W.2d 316, specifically Page 320 from the Texas
24 Court of Appeals in El Paso in 1999 with the writ
25 being -- petition for review being refused.

1 THE COURT: Okay. So your argument isn't
2 so much that the Legislature could not do this, of the
3 separation of powers, but that they did not do this
4 because of the language that they used in the
5 Whistleblower Act specifically?

6 MR. HELFAND: If I may, Judge, your --
7 the argument as to the first point is the Legislature
8 did not put it in the statute. That is correct. The
9 Legislature did not put it in the statute because the
10 Legislature could not put it in the statute.

11 And the second point that I made -- the
12 second of four points that mandate dismissal for lack
13 of subject matter jurisdiction is if the Court were to
14 think it's in the statute, which clearly cannot be
15 found in the statute, then the Legislature's effort to
16 do so would be unconstitutional.

17 And Your Honor asked at the end -- I'll
18 jump ahead in order to answer the Court's question.
19 Your Honor asked my opposing counsel whether they
20 wanted to respond further to the separation of powers
21 argument, and respectfully -- and, again, I think it's
22 honestly -- they just don't get it. I think maybe the
23 Court -- I get the impression the Court did.

24 The separation of powers issue touches on
25 both the first and second points, each of which require

1 dismissal. One, the Legislature removed -- I'm
2 sorry -- the Legislature chose not to include elected
3 officials, that is, the executive branch members of the
4 government. And by the way, we also don't see in there
5 any reference to judges because of the judicial branch
6 independence.

7 And so -- excuse me. And so the
8 Legislature did not write it in because we'll give them
9 the credit for -- it's a matter of statutory
10 construction that we assume the Legislature knew what
11 they were doing, and so the Legislature did not write
12 it in because they could not write it in.

13 But if for some reason the Court thinks
14 it's implicit in there, which is what, by the way, the
15 plaintiffs are asking the Court to rewrite the statute
16 to do, to be more expansive than its express terms,
17 then the Court would still have to find that that's an
18 unconstitutional effort by the Legislature. I don't
19 believe the Legislature would, but that's what the
20 plaintiffs are arguing. And if the Legislature
21 attempted to do that, it is the plaintiffs' burden to
22 show that that is actually in the statute. And
23 again --

24 THE COURT: Okay. One more question.

25 MR. HELFAND: Okay.

1 THE COURT: And try to answer this.
2 Remember, you all have been living this in the time
3 that I've been handling dozens of cases for the last
4 couple of months. So I do have a question. Why
5 couldn't a reasonable reading of the statute be that,
6 in fact, the public official that you're claiming is
7 not in there would be General Paxton himself, but the
8 public entity would be the Office of the Attorney
9 General? Why couldn't that be a reasonable
10 interpretation of the text of the statute?

11 MR. HELFAND: The answer is they are --
12 they are two different things. It is a reasonable
13 interpretation to recognize that the public entity
14 that's in 554.002 -- let me grab a copy of it to give
15 you the right term specifically.

16 554.0025 defines a state governmental
17 entity in the Act. And, again, if we look at 554.002,
18 to answer the Court's question, which are the elements
19 of the waiver of immunity, all of those have to be
20 satisfied to find a waiver of immunity. There is a
21 requirement that there be a report of a violation by
22 the employing governmental entity or another public
23 employee.

24 Now, I focused -- Mr. Nesbitt was correct
25 to say I focused significantly on the fact that the

1 Attorney General is not another public employee, and
2 the plaintiffs have now attempted to argue that
3 everything that the Attorney General does is a matter
4 of the operation of the governmental entity. But
5 here's why that fails, to answer Your Honor's question.
6 Simply because he is the elected Attorney General, his
7 actions do not become actions of the Office of the
8 Attorney General for purposes of the statute.

9 I want to get to Your Honor's question,
10 but I just want to mention one other thing that I think
11 might be helpful. Mr. Nesbitt criticized my citation
12 Section 572 of the -- of the Government Code as not
13 being 554. He's absolutely right. 572 is not 554.
14 But he -- but, again, if the plaintiffs want to argue
15 that elected official is the same thing as the Office
16 of the Attorney General or the same thing as a public
17 employee -- I think they've conceded he's not a public
18 employee -- then they must demonstrate that somewhere
19 in the law. It's not enough to just assert it as a
20 matter of musing. And, in fact, if the Legislature
21 intended to write it that way, it would have -- the
22 Court stuck with -- the Court applies the statute. The
23 statute doesn't say what the Court just posited, which
24 is, couldn't I read that to be the actions of the
25 Attorney General and the operation of his role as the

1 Attorney General are the actions of the Office of the
2 Attorney General? If the Legislature intended that to
3 be in the statute, they would have written that. The
4 absence of the term "public official" where the
5 Legislature has defined public official as an officer
6 of the state is significant here.

7 And to respond to Mr. Nesbitt's criticism
8 of my citation of 572, let me point out to the Court --
9 because I think this answers Your Honor's question --
10 in Section 651.001 of the Government Code, the
11 Legislature has expressly enacted a statute that says,
12 in any state statute, officer means an officer of this
13 state unless expressly provided -- unless otherwise
14 expressly provided.

15 So we know that the Attorney General is
16 an officer of the state, and we know that the
17 Legislature has not included the term officer -- state
18 officer or elected public office -- elected public
19 office holder in the statute. So the answer to the
20 question, I think, if Your Honor -- if I haven't
21 already said it is the Court cannot read into the
22 statute something that isn't there because the Court
23 must strictly construe the statute. And that's where
24 the Supreme Court's holding in *Bland ISD vs. Blue*
25 applies as well. The Court does not -- again, these

1 are legal conclusions. These are not factual
2 assertions that the Court credits as true.

3 The plaintiffs -- the Court's going to
4 construe 554.002 to determine whether the plaintiffs
5 have alleged facts demonstrating that their claims fall
6 within each of the elements of that cause of action.
7 The Court may not, respectfully, read that statute,
8 other than as written. The Court may not substitute
9 attorney -- complaints about the Attorney General
10 as a -- as complaints about the Office of the Attorney
11 General because that's a legal question. Statutory
12 interpretation is a legal question.

13 So the Court disregards in all respects
14 the plaintiffs' argument that the law ought to, should,
15 or even does include the elected official of the
16 executive branch because the Court credits -- doesn't
17 credit legal assertions at all. The Court decides the
18 statute for itself.

19 The Office of the Attorney General is
20 asking the Court not to rewrite the statute but to
21 apply the statute as written. On the other hand, the
22 plaintiffs are asking the Court to read into the
23 statute something that's not there.

24 And Mr. Nesbitt talked about two cases in
25 that regard. One was *El Paso Housing Authority vs.*

1 *Rangel*. And in that case, Mr. Nesbitt talked about the
2 fact that the Court of Appeals held that members of the
3 Municipal Housing Authority conduct or misconduct could
4 be attributed to the Housing Authority itself. That
5 was, again, an effort to rewrite the statute to ask the
6 Court to find something in the statute that isn't
7 there, that is, that there is a link between the
8 conduct of an individual and the office itself.

9 Number one, *El Paso Housing Authority vs.*
10 *Rangel* does not apply to constitutionally created state
11 offices. But more importantly, Judge, that decision
12 was vacated by the Supreme Court. The very decision
13 and holding that Mr. Nesbitt rested his argument on,
14 according to my review of Lexis -- if I can find my
15 note here -- was vacated at 2004 Tex. Lexis 952. It is
16 not authority for anything, because as the Court knows,
17 when the Supreme Court vacates an opinion, it is if it
18 were never written.

19 The other case that Mr. Nesbitt cited was
20 *City of Cockrell Hill vs. Johnson*. And to his credit,
21 at least in this case, Mr. Nesbitt acknowledged that
22 opinion actually holds in a manner consistent with the
23 Office of Attorney General's position, that is, that
24 the statute cannot be read to equate the conduct of a
25 governmental official operating through their office to

1 be the conduct of the office itself. And I don't
2 really know why then the plaintiffs cited that case
3 because it holds directly inapposite to their efforts
4 to get the Court to read the statute more expansively
5 than it's written.

6 THE COURT: All right. Thank you so much
7 for your reply.

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1 **MOTION TO DISMISS TAKEN UNDER ADVISEMENT**

2 THE COURT: I am continuing to read the
3 significant briefing on this issue and to consider the
4 91a motion. You all have given me a lot to think about
5 and a lot to consider. And I read the briefing before
6 the hearing, but I also want to continue to consider it
7 and give it its appropriate due.

8 So what I would like to do now is take
9 this matter under advisement. I do intend to rule on
10 it. I can rule on it at any time and will definitely
11 rule on it before the temporary injunction, but we will
12 also -- at this point, I intend to slide into the
13 temporary injunction hearing and continue at this time.

14 MR. HELFAND: Your Honor, may I finish my
15 argument on the Rule 91a?

16 THE COURT: I think we're out of time. I
17 mean, if there's a couple of things that you want to
18 say here at the end and you can fit it into the next
19 two minutes, why don't you take two to five minutes to
20 finish it, if you felt like you were cut off. But I
21 know we need to get to things. And I think Mr. Knight
22 let the Court know that they've managed to condense
23 this to a day and a half. And I want to be respectful
24 of their time, and I don't want to go into Wednesday
25 because I have other things to do on Wednesday.

1 And so I just want to make sure that we
2 consider timeliness in all of this. But if you want to
3 take two to three minutes and finish up your argument,
4 please do so.

5 **ARGUMENT BY MR. HELFAND**

6 MR. HELFAND: Well, Judge, I -- I -- I
7 will compress -- I will -- I will hit some things, but
8 I -- I need more than two to three minutes, but I
9 understand the Court is only permitting an additional
10 two to three minutes. So if I may, with that
11 understanding.

12 I -- I do want to respond to a couple of
13 other things. Mr. Mr. Soltero invited the Court's
14 consideration of *Scott vs. General Land Office* and *Hill*
15 *vs. Texas Fire Commission*. Neither of those are re- --
16 reported opinions at all. He's talking, I think, about
17 the district court case that was pending. There's no
18 authority, with all due respect to the decisions of the
19 district judges, coming out of either of those cases.
20 They're not even unpublished opinions, they're -- that
21 I could find. The citations in the footnote are to the
22 district court cause of action number.

23 Mr. Tittle made a comment, Your Honor,
24 that each of the plaintiffs have identified in their
25 petition what their -- what their report for a

1 violation of law is, and I don't see that -- that is
2 not in the petition at all. In fact, to the contrary,
3 I think it's at Paragraph 95 through 98 -- I'm trying
4 to find the petition and move quickly here for you,
5 Judge. Here we go -- where the plaintiffs -- no.
6 That's not it -- where the plaintiffs simply say,
7 Everybody reported everything. They cite Paragraph 17
8 through 92. And I don't see anywhere in anybody's
9 response or in their petition that the plaintiffs
10 identified which plaintiff reported which thing.

11 And in that regard, Judge, I should point
12 out as well that the plaintiffs' assertion that there
13 are cases where there have been more than one alleged
14 whistleblower, none of the cases they cited address the
15 question of whether one could be a multiple
16 whistleblower reporting the same allegations. In fact,
17 for example, one of the cases the appellate opinion is
18 on the award of fees, not the question of whether there
19 can be multiple whistleblowers who make the same
20 allegations.

21 Additionally, the -- I think the
22 plaintiffs misunderstand, again, the issue of senior
23 employees. In fact, I've never used the term "senior
24 employees." Each plaintiff admits in the -- in the
25 petition that they held positions of the highest level

1 of authority under the Attorney General by virtue of
2 the Attorney General's appointment to those positions.

3 The case law demonstrates that those
4 individuals are subject to being removed at the
5 pleasure of the person who appointed them, the elected
6 official. And it's got nothing to do with senior
7 employees. It has everything to do with the
8 well-settled proposition that the elected official
9 cannot carry out his or her responsibilities without
10 people in the highest positions who can -- can work
11 with and under that appointed individual. It is --

12 THE COURT: I remember this argument from
13 earlier. You -- you made your able reference to the
14 West Wing who serve at the pleasure of the president.
15 I remember this argument, and I think at this point,
16 it's pretty repetitive. You've been so good on your
17 argument. It's very comprehensive and well-argued, but
18 I do think, to be respectful of everybody's time, we
19 need to move forward.

20 MR. HELFAND: I understand, Your Honor.
21 I'm trying to reply. Let me ask this. I've asked the
22 Court to interpose a break, because if the Court
23 intends to proceed to a hearing on the merits of the
24 case, then I -- I need to file a notice of appeal.

25 THE COURT: I'm going to -- I'm -- I'm

1 taking under advisement the 91a motion, and we are
2 proceeding to a temporary injunction hearing at this
3 time. And I am -- we're going to continue on to that.
4 I know that there are several lawyers, including
5 Mr. Braun, who's on this Zoom, as well as at your firm,
6 as well as hundreds of attorneys at the Office of
7 Attorney General, and I know they know the way to any
8 sort of relief that you would be seeking.

9 And so if you want to simultaneously
10 reach out and attempt to do that, you may do so, but we
11 are going to continue to proceed right now on the
12 temporary injunction hearing.

13 MR. HELFAND: Well, Your Honor, I have
14 just filed a appeal under 51.014 of the Civil Practice
15 and Remedies Code. I'm sending Ms. Mescher and all
16 counsel a copy of that, but it is on file. And as the
17 Court knows under 51.014, Sub B, that stays all further
18 activity in the trial court, so I would ask the Court
19 to respect that statutory limitation and -- and
20 discontinue any further activity in the case.

21 THE COURT: All right. Well, I haven't
22 seen it yet, but while I'm waiting to see it -- I
23 understand you sent it to Ms. Mescher -- let me hear
24 from the other side.

25 MR. KNIGHT: Your Honor, you want to hear

1 from us on -- on this issue of whether we can proceed?

2 THE COURT: Yes.

3 **ARGUMENT BY MR. KNIGHT**

4 MR. KNIGHT: You know, I -- I almost
5 don't have the words. And -- and I -- I want to be
6 mindful of decorum here, but I don't see any way the
7 Office of the Attorney General, in good faith, can file
8 an appeal of something on which you have not yet ruled.
9 I was sort of expecting they might try to file some
10 sort of mandamus petition to prevent the Court from
11 hearing our petition for temporary injunction.

12 They've obviously tried everything they
13 could to derail our attempt to be heard on that motion,
14 but there's nothing to appeal. I don't see how
15 anything could be automatically stayed at this point,
16 and we are -- we are prepared to proceed with the TI
17 right now.

18 THE COURT: Any other plaintiffs'
19 attorney want to weigh in on this? Has anybody seen
20 the brief?

21 **ARGUMENT BY MR. SOLTERO**

22 MR. SOLTERO: I've not seen it, Judge.
23 Very briefly, I'll echo what Joe said and -- Joe
24 Knight. And I will also say, if this were true, then
25 every time somebody asserted sovereign immunity or plea

1 to the jurisdiction, they can just immediately go to
2 the Court of Appeals upon the filing of -- of the
3 motion, without there being any ruling from the Court.
4 The Court gets to make the ruling before that can be
5 challenged, and I think Your Honor has said you're
6 going to take it under advisement.

7 THE COURT: I --

8 MR. HELFAND: Your Honor, may I respond?
9 I'm sorry.

10 THE COURT: No. I'm -- I'm coming back
11 to you, Mr. Helfand. I'm not cutting you off.

12 MR. HELFAND: I -- I didn't mean to
13 interrupt, Judge.

14 THE COURT: I would like you to be
15 respectful of me, as I have been respectful of you.
16 And at this time, what exactly is it that you are
17 appealing, that you think you have the power to appeal
18 that this Court has ruled upon?

19 **ARGUMENT BY MR. HELFAND**

20 MR. HELFAND: First of all, let me
21 apologize, Judge. I -- I -- if I -- if you inferred
22 any disrespect, it certainly was not my intent. I just
23 wanted to be sure that I had an opportunity to respond
24 to the question that Mr. Knight implicitly raised,
25 which is, what is the authority? Your Honor has asked

1 the question directly, so let me answer.

2 The -- the appellate opinions -- and I'm
3 going to get you a citation right now to one -- make
4 clear that once the trial court's jurisdiction has been
5 drawn into question -- and we all acknowledge I think
6 that it has here -- that if the Court proceeds to
7 address substantive issues in the case without
8 resolving its jurisdictional question, then the -- I
9 think the words of the Supreme Court are, that is an
10 implicit denial. And the case law is clear that an
11 implicit denial authorizes an appeal under
12 51.014(a) (8). And I'll get you a citation to a case in
13 just a moment, Judge. I'm just a little bit...

14 THE COURT: All right. Well, I don't
15 think that I agree with you. I do not think I have
16 implicitly denied your motion, and we're going to keep
17 going. So if and when --

18 MR. HELFAND: Can I mention one other
19 thing?

20 THE COURT: -- if and when you show me
21 something from a Court of Appeals that you believe
22 tells me differently, then I will stop, but I would
23 like to afford the plaintiffs the courtesy now of
24 continuing forward with their case. You may proceed.

25 MR. HELFAND: Can I -- can I make one

1 other point, Your Honor?

2 THE COURT: You can continue with the
3 point, but it's -- it's starting to feel like you might
4 be just elongating things for the purpose of elongating
5 them rather than actually in good faith responding to
6 arguments. So I will give you one minute to say what
7 you want to say and then we are going to keep going.

8 MR. HELFAND: Thank you, Judge. My goal
9 is to make sure that the Court is sufficiently
10 informed. The two points I would make is, one, I would
11 ask the Court to look at *Texas Municipal League*
12 *Intergovernmental Risk Pool vs. City of Hidalgo*, which
13 is cited at 2020 Tex. App. Lexis 2093, which the -- the
14 Corpus Christi Court of Appeals in 2020, and addresses
15 this very issue of implicit.

16 But the other thing I want to point out,
17 Judge is -- and I'm not trying to elongate anything.
18 It won't take me but ten seconds to point out. There
19 is nothing under 51.014 or any jurisprudence that
20 allows the trial court to determine the effectiveness
21 or propriety of the notice of appeal. Rather, once
22 it's filed, the case is stayed, even if the trial court
23 thinks it's an inappropriate notice of appeal.

24 THE COURT: Thank you. I'm going to
25 start looking at all of this while we continue on to

1 the temporary injunction. I might change my mind at
2 any time, but let's go forward plaintiffs.

3 **TEMPORARY INJUNCTION**

4 THE COURT: But let's go forward,
5 plaintiffs, if you have argument or opening statement
6 or however you want to proceed, if you want to call a
7 witness, but you can also do a brief opening statement.

8 MR. KNIGHT: That's what I was going to
9 propose, Your Honor. You've heard a lot about the case
10 already today, so I thought maybe five minutes or so to
11 outline where we expect to go with this particular
12 hearing, and then we'll call our first witness.

13 THE COURT: All right. Please proceed.
14 Thank you.

15 **OPENING STATEMENT BY MR. KNIGHT**

16 MR. KNIGHT: All right. Thank you,
17 Your Honor. Joe Knight on behalf of plaintiff Ryan
18 Vassar. The other movement -- movant, of course, in
19 this hearing is Mr. Maxwell. As the Court has already
20 heard today, there are -- the Texas Legislature enacted
21 the Whistleblower Act for two primary purposes; one, to
22 protect public employees from employer retaliation when
23 they in good faith report violations of the law; and
24 two, to secure lawful conduct for those conducting the
25 affairs of our government.

1 This -- the relief we seek in this
2 hearing is reinstatement to these two gentlemen's
3 former position, and that relief would serve both of
4 the Act's purposes. Reinstatement is a remedy that is
5 specifically authorized under the whistleblower statute
6 in Section 554.003, and injunctive relief is a remedy
7 specifically authorized in the statute.

8 The brief they filed on Friday night, the
9 Office of Attorney General filed, suggests that there's
10 something radical about asking for this relief in the
11 form of a temporary injunction or that temporary
12 injunctions aren't appropriate in whistleblower cases,
13 but that's all -- that's just not right. The same
14 brief includes the following quote from one of their
15 Austin Court of Appeals cases.

16 The test for temporary injunctions in
17 whistleblower actions is not and should not be
18 different from the standard requirement that the
19 appellant prove a likelihood of irreparable injury and
20 a probability of success on the merits, in other words,
21 Your Honor, the same two elements that any plaintiff
22 has to prove any time they seek to invoke the Court's
23 discretionary and equitable remedy of a temporary
24 injunction.

25 I'm not going to dwell on the success on

1 the merits prongs now because you kind of heard a lot
2 about what we have alleged and believe we can prove to
3 establish a probability of success on the merits. We
4 will present that in evidentiary form over the course
5 of the next day and a half. And then the other prong
6 that we, of course, have to prove is a likelihood of
7 irreparable injury.

8 And that's why we're here. We're here
9 because we feel like these two plaintiffs are suffering
10 irreparable harm. Their firings from very prestigious
11 state positions were extremely public and followed by
12 repeated public statements issued through the official
13 media channels of the Office of the Attorney General.

14 Mr. Maxwell -- and Mr. Soltero may want
15 to speak more to this -- but had a very unique position
16 at the Attorney General's Office, effectively reaching
17 the apex of his distinguished 38-year law enforcement
18 career. There is no real comparable position for him.
19 There isn't -- there's -- there's nothing that can
20 substitute for the position he had.

21 My client, Mr. Vassar, is at the other
22 end of the spectrum. He was the young star of the
23 Attorney General's Office. His performance during five
24 and a half years he was there earned him a position of
25 authority and prestige and pay that a lawyer of his

1 experience can't replicate in the public or private
2 sector, as much as he has tried to. And he has a wife
3 and four young kids depending on him. This is a
4 situation where the harm of being unemployed is real,
5 where the money damages will be inadequate to fix and
6 to compensate for the public trashing of these two
7 gentlemen's careers and the very prospect of the little
8 tussle we just had, Your Honor.

9 It's very clear that once the Court rules
10 on both the jurisdiction challenge and this motion for
11 temporary injunction, both are subject to interlocutory
12 appeals, and the Office of Attorney General is going to
13 tie this case up for however many years that
14 interlocutory process takes, and it's going to be that
15 much longer before these gentlemen have the opportunity
16 to seek permanent relief.

17 Our proof in the next day and a half will
18 be extremely focused. Each movant will testify about
19 the circumstances of his claim and the harm he is
20 suffering. We will also call two other witnesses. We
21 will call Jeff Mateer, who served as Ken Paxton's first
22 assistant attorney general, and, of course, he too
23 became a whistleblower. He is in a position to know
24 the quality of these gentlemen's work and their
25 reputation within the office, and he will testify to

1 that. And we believe he will debug any notion that
2 their firings were for poor job performance or other --
3 anything other than brazen retaliation.

4 And we will call Ray Chester, who's an
5 accomplished trial lawyer who experienced firsthand the
6 abuse of the OAG resources to benefit Nate Paul that
7 ultimately became the gravamen of these plaintiffs'
8 whistleblowing reports.

9 We would like to ask questions of the
10 Attorney General and the new first assistant. We
11 subpoenaed both of them to this hearing, but we're told
12 they are going to be no-shows. Likewise, OAG has
13 submitted no exhibit list, but at least they're
14 consistent. They also refused to give depositions.
15 They refused to answer any of the discovery we served
16 on them, even answer requests for disclosure to which
17 the rules expressly say there is no objection.

18 So their defense is not going to be on
19 the facts or the evidence. It's going to be on the
20 same dangerous legal argument that you've been hearing
21 all day today, that the AG is so above the law that the
22 Whistleblower Act simply doesn't apply to him, that
23 this Court should divine some unwritten exception to
24 the statute where the two movement -- movants, whose
25 careers have been trashed, don't enjoy the same

1 protections under the Whistleblower Act as every other
2 public employee and that the AG answers to no one for
3 misusing his office. We don't think that's the law,
4 and we look forward to showing you that David Maxwell
5 and Ryan Vassar meet the two requirements for
6 injunctive relief.

7 THE COURT: Thank you. Mr. Soltero, any
8 opening from you?

9 **OPENING STATEMENT BY MR. SOLTERO**

10 MR. SOLTERO: Very briefly. I want to
11 talk about two things, and then I want to get to the
12 evidence as soon as possible. The first thing I want
13 to mention is echo what Mr. Knight said about the
14 injunctive portion of it and specifically that in this
15 case money damages will be difficult to quantify,
16 inadequate, too late, that because of Mr. Maxwell's
17 unique role at the apex of law enforcement, there's no
18 comparable position.

19 And then I'd also note that in law
20 enforcement cases, it is -- it is not uncommon that if
21 there's, for instance, a police shooting or some type
22 of issue that implicates the conduct of a public
23 official who happens to be an officer, while the
24 pendency of that suit goes on, it is common for them to
25 be on paid administrative leave while that works

1 through the legal system. So we are certainly asking
2 for reinstatement. In the alternative, we think some
3 sort of paid leave would be appropriate and within the
4 Court's injunctive relief.

5 Secondly, with regards to the issue of --
6 Mr. Knight is correct about everything he said on what
7 we expect the evidence to show and who the witnesses
8 will be. I wanted to clarify something on the subpoena
9 issue because I was handling much of that myself. We
10 initially tried to take depositions of Ken Paxton and
11 Brent Webster. The Office of Attorney General moved to
12 quash. They asserted the apex deposition exception but
13 did not produce any kind of declaration or affidavit,
14 which is required in order to avail yourself of that,
15 even if it doesn't apply in this case, and then never
16 took the position that they didn't represent Ken Paxton
17 or Brent Webster. But when we went to serve them a
18 hearing subpoena, they for the first time took the
19 position that they have to be personally served and
20 that serving the lawyer for the Office of the Attorney
21 General wasn't good enough.

22 And I understand that's a strict reading
23 of those -- of the rules. It's not the way it's
24 customarily done with companies and -- or entities and
25 individuals under their control, but we went ahead and

1 we had somebody go sit -- and go to the OAG and try to
2 serve them personally. We went ahead and had somebody
3 sit outside Mr. Paxton's house to try to serve him
4 personally. I understand he was in Utah for some
5 period of time. The hearing was now reset. I
6 understand he's been in Florida on some political
7 stuff. And so we have not been, perhaps, technically
8 able to serve them, but it's our position certainly
9 that their failing to appear here is a clear signal
10 that they have no evidence, credible or otherwise, that
11 they can bring to this Court to rebut what we'll show
12 in the temporary injunction hearing.

13 So with that, Your Honor, we would
14 respectively ask that the Court grant the injunction at
15 the conclusion of our evidence. Thank you.

16 And by the way, our first witness is
17 Mr. Mateer. Should I go ahead and call him and tell
18 him to be ready?

19 THE COURT: I would. If you could go
20 ahead and have Mr. Mateer call into the Zoom, and we
21 will bring him in at the appropriate time.

22 MR. SOLTERO: Yes, Your Honor, I'll do
23 just that.

24 THE COURT: All right. And then while
25 we're -- while you're doing that, I need to take

1 opening statement regarding the temporary injunction
2 from either Mr. Helfand or maybe Mr. Braun. I'm not
3 for sure who's taking the lead at this time.

4 **OPENING STATEMENT BY MR. HELFAND**

5 MR. HELFAND: I'm sure Mr. Braun would do
6 a better job, Judge, but if you'll indulge me, I will
7 do it. Before I do, Judge, because I find myself in
8 the position of having to seek a temporary order from
9 the Court of Appeals under 29.3 of the Texas Rules of
10 Appellate Procedure, may I ask whether Mr. -- whether
11 any of the plaintiffs agree to that temporary relief,
12 staying this case, or if they're opposed, so I can
13 represent to the Court of Appeals that I've had the
14 conference required?

15 MR. SOLTERO: We oppose it.

16 MR. HELFAND: I will so represent to the
17 Court of Appeals.

18 Your Honor, then thank you for the
19 opportunity to respond. There's a -- I guess there's a
20 number of things there. The Office of the Attorney
21 General is going to follow the statute and already has
22 followed the statute. Assertions that the Office of
23 the Attorney General is doing something to do something
24 is just in the minds of {Zoom drop}. The Office of the
25 Attorney General is complying with Section 51.014 of

1 the Civil Practice & Remedies Code which, again, the
2 Supreme Court and the Austin Court of Appeals have made
3 clear preempts any further activity in the trial court.

4 It is not the case that a party may ask a
5 trial court to withhold ruling on a plea to the
6 jurisdiction to proceed to the substance of the case,
7 because the Court is not permitted to exercise its
8 jurisdiction until it's decided its jurisdiction. So
9 the assertion that the Office of the Attorney General
10 is doing something to slow things down is simply
11 incorrect.

12 I'm complying with the statute on behalf
13 of my client. So are all of the scurrilous comments
14 about discovery. And they have no place in connection
15 with a temporary injunction, including the suggestion,
16 which I've never heard from a lawyer before, that the
17 Court should infer from the fact that nonparties don't
18 testify that they don't contest the movant's position.
19 I've never heard a lawyer make that representation
20 before, and it finds no place in the statute or the
21 case law.

22 Whether the nonparties do or do not
23 testify turns on exactly what Mr. Soltero has
24 acknowledged. Neither of those nonparties who the
25 plaintiffs would like to call -- or the movants here

1 would like to call as witnesses have been served with a
2 subpoena. The -- nor does the fact that the Office of
3 the Attorney General move for protection in light of
4 the lack of subject matter jurisdiction allow the Court
5 to infer anything other than that based upon the
6 presumption of a lack of jurisdiction, the plaintiffs'
7 efforts to exercise the Court's jurisdiction to proceed
8 with discovery was inappropriate. My client did not
9 simply claim an apex basis for not taking the
10 deposition of the nonparty elected Attorney General. I
11 advanced several reasons that discovery was not
12 appropriate, starting with the Court's lack of subject
13 matter jurisdiction.

14 Now, those were all done pursuant to a
15 motion for protection as provided by the rules. And as
16 the Court knows, but for some reason the plaintiffs
17 don't acknowledge, the plaintiffs could have brought
18 those issues to the Court and asked the Court to rule
19 on the motion for protection, but they chose not to.
20 So the protection applies until such time as the Court
21 overrules that motion for protection.

22 I don't know what "technically served"
23 means in light of the statute. There is no case law,
24 no statute that talks about technically served. And
25 nonparties, as the Court knows, must be personally

1 served. One person's inability to comply with the
2 statute to serve is perhaps another person's dodging
3 service, but that -- the Court need not resolve that
4 question in light of Mr. Soltero's acknowledgement,
5 both here and in an email, which he provided to me on
6 February 13th at 10:48 a.m., which I'm happy to share
7 with the Court if there's any question.

8 These nonparties who the plaintiffs/
9 movants would like to question have not been served
10 with a subpoena. And there's no "the way things
11 normally work." There's the statute. And the
12 plaintiffs have admitted that they did not comply with
13 the statute.

14 Now, leaving all of that aside, because
15 none of that goes to the elements and the plaintiffs'
16 burden of a temporary injunction -- again, it seems to
17 be more for purposes of media attention than court
18 ruling, the -- the fact is a court that lacks subject
19 matter jurisdiction lacks the authority to entertain a
20 hearing on a temporary injunction, let alone to
21 actually grant a temporary injunction.

22 In *Bland ISD vs. Blue*, the Texas Supreme
23 Court said a court must not act without determining
24 that it has subject matter jurisdiction to do so. In
25 *Texas Department of Parks & Wildlife vs. Miranda*, the

1 Supreme Court said, quote, a court must not proceed on
2 the merits of the case until legitimate challenges to
3 its jurisdiction have been decided.

4 The Legislature enacted in 51.014, which
5 is cited at Page 5 of my opposition to the -- to the
6 temporary injunction here, makes it very clear that the
7 Legislature's intent was not to have further hearings
8 after a notice of appeal has been filed.

9 THE COURT: All right. Thank you.

10 MR. HELFAND: Well, there's --

11 THE COURT: We are going to proceed. We
12 are going to proceed with the testimony at this time.

13 MR. HELFAND: I understand the Court's
14 ruling.

15 MR. SOLTERO: Your Honor, the plaintiffs
16 would call Jeff Mateer.

17 THE COURT: All right. Hi, Mr. Mateer.
18 Welcome to the 201st District Court. You have been
19 called as a witness by the plaintiffs in this case.
20 This is Judge Amy Clark Meachum. We are currently in
21 the middle of our temporary injunction hearing.

22 I believe you know all the players here,
23 but I do want to make sure that you do just in case,
24 since you're not a party. You have been called by the
25 plaintiffs. There are four plaintiffs in this case.

1 Mr. Soltero, I believe, will be starting, and he
2 represents David Maxwell. Joe Knight represents
3 Mr. Vassar. And then there are two other plaintiffs
4 who are not seeking a temporary injunction. So I'm not
5 for sure they will ask any questions. But Mr. Nesbitt
6 represents Mr. Brickman, and Mr. Tittle represents
7 Mr. Penley. And then we have two attorneys here for
8 the Office of the Attorney General, Mr. Helfand and
9 Mr. Braun.

10 At this time I'm going to swear you in as
11 a witness and we will get started. Please raise your
12 right hand.

13 *(Witness sworn in.)*

14 THE COURT: All right. Thank you. You
15 may proceed.

16 **JEFF MATEER,**

17 having been first duly sworn, testified as follows:

18 **DIRECT EXAMINATION**

19 BY MR. SOLTERO:

20 Q. Good afternoon, sir. Can you tell us your
21 full name for the record?

22 A. Yeah. Jeffrey Mateer.

23 Q. Mr. Mateer, how long have you been an
24 attorney?

25 A. I graduated in 1990, so I guess that makes it

1 30 plus years.

2 Q. Can you tell us a little bit about your
3 background, where you worked prior to coming to work
4 for the Attorney General's office?

5 A. Yeah. I started at Carrington Coleman back in
6 1990, and then a group of us left in about 1996 and
7 formed a litigation boutique firm. I did that until I
8 came to first what then was Liberty Institute back in,
9 I believe, 2010 and did that up until the time that I
10 started with the Office of Attorney General, which
11 would have been in March -- I believe March of 2016.

12 Q. And when you joined the Office of the Attorney
13 General, what was your position, sir?

14 A. I was the first assistant attorney general.

15 Q. And I suspect the Court knows, but can you
16 tell us just generally what it means to be the first
17 assistant at the Office of the Attorney General?

18 A. Yeah. The first assistant oversees the entire
19 office, so all 4200 employees, and I think when I left
20 it, around 800 attorneys, give or -- give or take a
21 few.

22 Q. And you directly reported to the General?

23 A. Yes. I believe I was the General's only
24 direct report.

25 Q. And who reported directly to you of the

1 directors?

2 A. Yeah. We called them then deputies. And
3 there were 12 divisions of the Office of Attorney
4 General, and those deputies would report to me.

5 Q. When did you resign?

6 A. I resigned on October 2nd of this past year.

7 Q. Why did you do that, sir?

8 A. I -- it came to a point where, in light of the
9 events that had occurred that week, the -- I guess the
10 week of -- whatever that is -- September 26th, that
11 there was no longer a trust between the Attorney
12 General and myself. And -- and in light of that, it
13 made sense since in that position you need -- you need
14 someone who trusts you, and the person who's first
15 assistant needs to trust the person who's in the --
16 in -- serving as Attorney General.

17 Q. Prior to resigning, did you complain to one or
18 more law enforcement authorities regarding what you
19 believed were abuse of power or violations of the law
20 by either Ken Paxton or the Office of the Attorney
21 General?

22 A. Yes.

23 Q. And why did you believe that that was
24 occurring?

25 MR. HELFAND: Objection; speculation.

1 MR. SOLTERO: Your Honor, his -- his
2 belief as to why it was happening is not speculation.

3 MR. HELFAND: His belief of somebody --

4 THE COURT: Sustained.

5 MR. HELFAND: -- else's conduct is
6 speculation.

7 THE COURT: Sustained. Mr. Helfand, I
8 sustained it.

9 Mr. Soltero, ask a different question.

10 MR. SOLTERO: Yes, Your Honor.

11 Q. (BY MR. SOLTERO) Mr. Mateer, what was the
12 basis for you complaining to law enforcement about
13 things you had concerns about?

14 A. I mean, the -- the letter sets forth what we
15 said, that the group of us, the -- the signatories on
16 the letter had a good-faith belief that the Attorney
17 General was violating federal and/or state law,
18 including prohibitions relating to improper influence
19 of use of office, bribery, and other potential criminal
20 offenses.

21 MR. SOLTERO: Your Honor, may I share --
22 may I use the share screen feature to show him an
23 exhibit for identification purposes?

24 THE COURT: Yes, I just allowed it.

25 MR. SOLTERO: Okay.

1 Q. (BY MR. SOLTERO) Mr. Mateer, I'd like to show
2 you what has been marked for this hearing as
3 Plaintiffs' Exhibit 4. You can see the marking there.
4 And if you need me to make it a different size or
5 change anything, please let me know. Can you -- do you
6 recognize what this document is?

7 A. Yes. That's -- that's -- that's the letter
8 that the group of us sent to the director of HR.

9 Q. And director of HR at the Office of Attorney
10 General?

11 A. At the Office of Attorney General, yes, sir.

12 Q. And was this letter signed on October 1st,
13 2020?

14 A. Yes.

15 Q. Is that your signature at the top, Jeffrey C.
16 Mateer, First Assistant Attorney General?

17 A. Yes, sir.

18 MR. SOLTERO: Your Honor, we would offer
19 Plaintiffs' Exhibit 4 into evidence.

20 MR. HELFAND: Your Honor, I have two
21 objections. One is that I was not provided these
22 exhibits until I requested them this morning during the
23 hearing on the plea to the jurisdiction. And second,
24 this is obviously hearsay.

25 THE COURT: Objections are overruled. 4

1 is admitted.

2 *(Plaintiffs' Exhibit 4 admitted.)*

3 Q. (BY MR. SOLTERO) Okay. And, Mr. Mateer, in
4 this letter that was -- who were the other six
5 attorneys who signed -- you don't need to necessarily
6 tell them by name, but what were their positions and
7 why were they also signing this letter with you?

8 A. The --

9 MR. HELFAND: I object to the -- the
10 multifarious nature of the question, and the second
11 half calls for speculation as to why somebody else --
12 or hearsay why somebody else was signing a letter.

13 MR. SOLTERO: I'll rephrase --

14 THE COURT: Sustained.

15 MR. SOLTERO: -- the question, Your
16 Honor.

17 Q. (BY MR. SOLTERO) Mr. Mateer, at the time you
18 signed this letter, did you believe what was in here to
19 be true?

20 A. Yes.

21 Q. And do you stand by it today?

22 A. Yes.

23 Q. Were you aware as to -- and by the way, before
24 I get to that, had you had conversations prior to
25 October 1st with Ken Paxton where you had expressed

1 concerns about his behavior that led to this letter and
2 reporting of -- good-faith reporting of criminal
3 activity?

4 THE WITNESS: Your Honor, I know I'm a
5 witness and I'm not represented by counsel, but I did
6 receive a letter from the Office of Attorney General
7 cautioning me about sharing any confidential or
8 attorney-client communications, and so I'm raising that
9 because this is asking me for conversations with the
10 Attorney General.

11 MR. HELFAND: Your Honor, may I speak to
12 that?

13 THE COURT: I think he is telling you you
14 should, yes.

15 MR. HELFAND: Well, Judge, Mr. Mateer is
16 correct, as it will relate to anyone who worked in the
17 Attorney General's Office or who currently works in the
18 Attorney General's Office, that there are several
19 privileges which belong to the office, not the least of
20 which is the deliberative process and the
21 attorney-client privilege.

22 I did not object under those privileges
23 because the question called for a yes or no answer,
24 whether he had conversations with General Paxton, to my
25 understanding, regarding things that are in the letter.

1 I don't have a problem with him answering that question
2 yes or no.

3 Beyond that, Mr. Mateer correctly infers
4 that the substance of those conversations would be
5 privileged, and that privilege belongs to the Office of
6 the Attorney General under the deliberative process
7 privilege, the work product privilege, and the
8 attorney-client communication privilege.

9 MR. SOLTERO: In response, Judge, it
10 sounds like there's --

11 THE COURT: Well, first off, let's answer
12 the question and then we'll get to the response. So
13 ask the question that you asked one more time that
14 there is no objection to, and let's get an answer from
15 that question. And then let's have a question on the
16 table to which there's going to be an objection to and
17 then let's cross that bridge.

18 Q. (BY MR. SOLTERO) Mr. Mateer, had you had
19 conversations with Ken Paxton about the concerns that
20 led you to sign the letter that's in evidence as
21 Plaintiffs' Exhibit 4?

22 A. Yes.

23 Q. Prior to the letter going out?

24 A. Yes.

25 Q. And, in fact, had you expressed concerns that

1 he may be engaged in activity which violates the law?

2 MR. HELFAND: Judge, that -- that is an
3 invasion of the deliberative process and
4 attorney-client privileges.

5 THE COURT: Okay. Now, the witness
6 doesn't have a lawyer. The witness is a lawyer.
7 Oftentimes in this instance I feel like the witness'
8 lawyer would make argument here. But let's go to
9 Mr. Soltero first and get Mr. Soltero's response to the
10 attorney-client privilege objection as well as the
11 deliberative process objection.

12 MR. SOLTERO: There's no -- Your Honor,
13 there's no deliberative process here. The question is
14 once there had been questions about illegal conduct,
15 crimes being committed, fraud possibly, or obstruction
16 of justice, bribery, abuse of office, 503(d) would
17 vitiate any privilege as to -- under the crime-fraud
18 exception, and there's just simply no deliberative
19 process objection at all that I think is valid here.
20 And I think as to the attorney-client, 503(d) would --
21 would overrule that privilege.

22 THE COURT: 503(d) would talk about --
23 I'm not looking at it, and I should be -- but an
24 ongoing crime or fraud. Are you not currently asking
25 him about -- the way you phrased the question, didn't

1 you ask him about past crime or fraud? And so I think
2 as to that question, on attorney-client privilege, I
3 have to sustain that objection.

4 MR. SOLTERO: Okay. I'll ask a different
5 question, Your Honor.

6 Q. (BY MR. SOLTERO) Prior to your signing
7 Exhibit 4, had Mark Penley and David Maxwell expressed
8 concerns to you about potential unlawful conduct by Ken
9 Paxton?

10 MR. HELFAND: Objection; calls for
11 hearsay.

12 MR. SOLTERO: Your Honor, it's not
13 hearsay as to the Office of the Attorney General and
14 people who worked there.

15 THE COURT: I'm going to overrule
16 hearsay.

17 A. The answer is yes.

18 THE COURT: It cut off slightly. The
19 answer -- I think you stated the answer is yes. Is
20 that correct?

21 THE WITNESS: It muted on me. I'm sorry.
22 Can you guys hear me?

23 THE COURT: Now we can, yes.

24 THE WITNESS: Okay. Did I answer?

25 THE COURT: Yes. You -- you answered --

1 I heard yes, but you were cutting off.

2 THE WITNESS: Yeah. I'm sorry.

3 MR. SOLTERO: All right. Thank you.

4 Let's --

5 THE COURT: Can I also say to Mr. Mateer,
6 at this point -- wow. Did he just cut off?

7 THE WITNESS: No. I'm -- I think I'm
8 here. Am I...

9 THE COURT: Somebody just cut off, I
10 thought. Okay. There you are.

11 THE WITNESS: Okay. Sorry.

12 THE COURT: All right. Mr. Mateer, I am
13 not your lawyer. Obviously, none of these other people
14 are your lawyer. You can be your own lawyer, but we
15 know what the truism about that is. And so I want to
16 say to you that, you know, I'm not making your
17 objections for you, and no one else is making your
18 objections for you, and I think you have to make
19 objections for yourself if you feel you need to assert
20 them.

21 You are both a witness here, but I think
22 I have to also allow you an opportunity to be your own
23 lawyer here as well if you feel you need to assert an
24 objection. Do you understand that?

25 THE WITNESS: I understand.

1 THE COURT: All right. Thank you.

2 MR. HELFAND: Your Honor, may I make a
3 comment in that regard?

4 THE COURT: Mr. Helfand, yes.

5 MR. HELFAND: Thank you, Judge. With all
6 due respect to the Court's comments, and obviously
7 Mr. Mateer should be careful because he has an
8 obligation to preserve those privileges, but the
9 privileges belong to the Office of the Attorney
10 General. That is, Mr. Mateer cannot choose to waive
11 them.

12 THE COURT: I don't even disagree with
13 you on that, Mr. Helfand. I understand that. My only
14 point was to Mr. Mateer, and Mr. Mateer -- making sure
15 he understood that if he believes he had an objection,
16 he could state it. But I agree with you as to the
17 attorney-client privilege. The attorney-client
18 privilege belongs to the client to assert, not to the
19 attorney.

20 MR. HELFAND: Thank you, Judge.

21 THE COURT: Though the attorney can also
22 assert it, it belongs to the client.

23 MR. SOLTERO: I think I'm going to make
24 things a little bit easier for everybody. I'm going to
25 move to a slightly different -- less, I think,

1 controversial area, but we'll see.

2 Q. (BY MR. SOLTERO) Mr. Mateer, David Maxwell
3 reported directly to you in the chain of command?

4 A. That's correct.

5 Q. Okay. Is David Maxwell a competent
6 professional law enforcement officer?

7 A. Yes.

8 MR. HELFAND: Objection; calls for
9 opinion testimony the witness is not authorized to
10 give.

11 THE COURT: Overruled.

12 A. The answer is yes.

13 Q. (BY MR. SOLTERO) And what type of reputation
14 did Mr. Maxwell have in the time you knew him up until
15 you left on October 2nd, 2020, at the Attorney
16 General's office?

17 MR. HELFAND: Objection under Rule 404.

18 THE COURT: I believe there is an
19 exception, so overruled.

20 A. Mr. Maxwell had a -- and at the time Director
21 Maxwell had an outstanding reputation as a law
22 enforcement official.

23 Q. (BY MR. SOLTERO) In the time that you were
24 his supervisor or his direct report, was Mr. Maxwell
25 ever terminated or there was a threat that he was going

1 to be terminated while you were still there?

2 A. No.

3 Q. How about a demotion while he was -- while you
4 were there?

5 A. Mr. Maxwell was never demoted.

6 Q. While you were there, was Mr. Maxwell ever
7 placed on any type of administrative or any other kind
8 of leave?

9 A. No.

10 Q. While you were there, was Mr. Max- -- Director
11 Maxwell's salary, were any duties reduced or any
12 adverse employment action taken against him while you
13 were still there?

14 A. His salaries were never reduced. No adverse
15 employment action was ever taken against him.

16 Q. Okay. And as of the time you were still there
17 and he was your report, was there any reason to have
18 terminated him that you're aware of?

19 A. I was unaware of any reason for him to be
20 terminated.

21 Q. And do you believe that but for his
22 complaining about the conduct of Ken Paxton and the
23 Office of the Attorney General, would he have not been
24 terminated when he was in November of 2020?

25 MR. HELFAND: Objection; leading and

1 speculation.

2 MR. SOLTERO: I'll withdraw. I'll
3 withdraw the question.

4 Q. (BY MR. SOLTERO) Let me ask it this way,
5 Mr. Mateer. Up until the time you left, you were
6 unaware of -- were you aware of any basis for
7 Mr. Maxwell to have been terminated or put on any kind
8 of administrative leave?

9 A. I was not aware of any basis for him to be
10 terminated.

11 THE COURT: All right. I'm going to
12 pause, Mr. Soltero, one minute before you ask another
13 question and just ask him for the sake of Ms. Racanelli
14 to, in his questions, maybe slow down the pace. I know
15 I want us to proceed, but she's taking a record. So if
16 you could just go a little more deliberately in your
17 questions, I know she would appreciate it.

18 I -- we have this dispute, Ms. Racanelli
19 and I do, a lot. I like when people fast talk, but she
20 does not so much. And so she's the one taking the
21 record, so I'm going to defer to her, if you'll go a
22 little more slowly.

23 MR. SOLTERO: And, Your Honor, my
24 apologies to Ms. Racanelli and to the Court. I have
25 been talking fast my entire life. I will do better to

1 go slow and at a measured pace.

2 Q. (BY MR. SOLTERO) Mr. Mateer, I would like to
3 ask you about the facts surrounding Nate Paul and what
4 led you to make your complaints. Okay?

5 MR. HELFAND: Your Honor, I need to
6 object. Issues regarding Mr. Paul are not relevant to
7 the claim -- the whistleblower claim or the relief
8 that's being sought.

9 MR. SOLTERO: Your Honor, would you like
10 me to --

11 THE COURT: Overruled.

12 Q. (BY MR. SOLTERO) Mr. Mateer, how do you
13 recall that the Nate Paul issue first came to your
14 attention?

15 A. Now, I do think -- again, this is going into
16 an area that I've been cautioned by from counsel from
17 the Office of Attorney General that would -- that could
18 cause me to reveal internal communications at the
19 Office of Attorney General that could be
20 attorney-client, depending on how the question is
21 asked, could contain confidential information.

22 MR. HELFAND: And, Your Honor, I wanted
23 to assert an objection in that regard. Mr. Soltero's
24 question is too broad to preclude invasion of those
25 privileges.

1 **THE COURT:** All right. Let's ask a more
2 specific question, I think, because I think I see a
3 place where some questions might fall within
4 privileged, perhaps, communication, and some questions
5 might fall outside of it in terms of general business
6 type questions. **So let's be pretty specific and we'll**
7 **move deliberately here.**

8 **Q. (BY MR. SOLTERO) Mr. Mateer, were the**
9 **complaints that led you to sign Plaintiffs' Exhibit 4**
10 **related in part to Nate Paul?**

11 **A. The answer is yes.**

12 **Q. And what about Nate Paul caused you to have**
13 **those concerns that led you to sign the letter marked**
14 **as Exhibit 4?**

15 **MR. HELFAND:** **Again, Judge, the way the**
16 **question's asked, there -- it's too likely to invade**
17 **those privileges.**

18 **MR. SOLTERO:** And, Your Honor, I'd say
19 that he's aware of the -- by the way, I think there was
20 a letter sent to him when he was coming here to testify
21 as a witness basically strongly trying to limit what he
22 would say. And if he's aware of the privilege
23 assertion and as a lawyer -- and I'm sure he can answer
24 with a non-privilege answer if he can.

25 **MR. HELFAND:** Your Honor, let me respond.

1 Your Honor should look at the letter. Again,
2 everything doesn't have to be so pejorative. There's
3 nothing strongly reminding him. As he's acknowledged,
4 he's obligated to protect the privilege, and all I did
5 was remind him of that fact, and the Court can look at
6 that letter. The adjectival description is
7 inappropriate.

8 Moreover, the idea that the Court can --
9 and I know the Court's not going to -- ignore the
10 privilege, as Mr. Soltero has said, because, don't
11 worry, the witness is going to -- is going to parse the
12 answer is not the answer to the question. The
13 questions have to be narrowly focused so as to not even
14 require the witness to try to figure out where to draw
15 that line.

16 THE COURT: All right.

17 MR. KNIGHT: Your Honor, could -- would
18 it be appropriate for me to weigh in with one thought
19 on this general topic?

20 THE COURT: You may weigh in with one
21 thought on this general topic.

22 MR. KNIGHT: Because I know we're going
23 to face this with the witnesses I call and perhaps the
24 whole hearing. To me, the Office of the Attorney
25 General has issued multiple public statements to the

1 effect that all of the allegations raised by these
2 seven whistleblowers are false, that these former
3 high-ranking officials were rogue employees.

4 To me, they have -- they have so clearly
5 waived any privilege that might conceivably attach to
6 the core of the allegations that formed the
7 whistleblower complaint that none of these objections
8 are well-founded.

9 MR. HELFAND: May I respond, Your Honor?

10 THE COURT: Yes. And then I think we're
11 going to take about a 10- to 15-minute break. I'm
12 going to look at the letter again. We're at break time
13 almost anyway, and so I want to do that, if I'll have
14 the patience of Mr. Mateer to come back after the
15 break, and let me kind of decide the parameters of how
16 we're going to move forward on this issue. I think
17 that would help everyone.

18 But why don't you go ahead and say what
19 you were going to say, Mr. Helfand. I might hear one
20 more thing from Mr. Soltero on this. I might hear
21 something from Mr. Mateer on this if he wants to weigh
22 in, though I'll understand if he doesn't. And then
23 we'll take a break, and the Court will come back and
24 hopefully have a little more clarity for everyone as we
25 move forward. Everybody might not be happy, but it

1 will at least bring more clarity. Go ahead.

2 MR. HELFAND: Thank you, Judge. I don't
3 know to what public statements Mr. Knight is referring
4 that the Office of the Attorney General has supposedly
5 published saying that all of the allegations are false,
6 but I don't -- I don't recall anything coming out of
7 the Office of the Attorney General asserting the
8 falsity of the allegations of -- that form the basis of
9 a whistleblower claim, but maybe there's something.
10 But I think the Court oughtn't make a decision based
11 simply upon the fact that Mr. Knight thinks that's
12 happened.

13 But even if that were true, that actually
14 makes my argument for me. The client who says I did
15 nothing wrong and the answer to that is based upon my
16 attorney-client communications and the deliberative
17 process discussions which I had does not waive the
18 privilege. They have every right to say, if they did,
19 I did nothing wrong. Why? Because my attorney told me
20 so.

21 If then the question is "What did your
22 attorney tell you?" that invades the privilege. There
23 is nothing that waives the privilege by asserting that
24 whether the individual thinks they did nothing wrong,
25 who's not a party to this lawsuit, or the Office of the

1 Attorney General thinks that nothing was done wrong.
2 There's nothing about that that waives the privilege.
3 In fact, it attenuates the privilege because --

4 THE COURT: Okay.

5 MR. HELFAND: -- it means --

6 THE COURT: Let me ask a question on
7 that. Let me ask you a question. And then we'll get
8 to deliberative privilege, because I feel -- on the
9 attorney-client privilege, what exactly is Mr. Mateer's
10 role in conversations? Is he acting as the attorney
11 for the Office of the Attorney General in this
12 capacity?

13 I mean, I have cases -- and the reason I
14 say this is because there are many situations in a
15 Travis County district court case where I will often
16 have three different attorneys general representing
17 three different parties with multiple conflicting
18 interests. And so my question is with regard -- we'll
19 get to deliberative in a minute, because maybe that's
20 more apropos here, and I need to understand that
21 argument.

22 But on the attorney-client privilege,
23 you know, it's one thing for him to be acting as an
24 attorney for a client. It's another thing for him to
25 be acting as a manager in a role consulting other

1 managers in roles. And just because they're attorneys
2 doesn't necessarily shield them from talking on things.
3 They may not be talking as attorneys. They're acting
4 as managers in employment positions and not attorneys
5 for clients. And I think that's a -- with the
6 attorney-client privilege, that might be a distinction
7 here that I want to understand.

8 Now, there's also the deliberative
9 privilege on top of that, but this is complicated, and
10 I want to make a ruling that everyone understands, even
11 if it's not one that everyone's happy with, and
12 understand the arguments. But I do think there might
13 be a distinction as to Mr. Mateer's role in some of
14 these conversations. Is he an attorney acting on
15 behalf of the Office of Attorney General, or is he a
16 manager acting as a manager in an employment role and
17 as a -- almost a mid-level employment role between two
18 different categories of personnel?

19 MR. HELFAND: Well, Judge, I will leave
20 aside the deliberative process privilege for the moment
21 in light of the Court's direction. I do -- except to
22 say that I think that you're right, if I'm inferring
23 correctly what you're saying, that there's some overlap
24 here.

25 But as it relates specifically to the

1 attorney-client privilege, the answer is quite simple.
2 Mr. Mateer cannot stop being an attorney when he is
3 advising or directing the conduct of subordinates in
4 the office, whether attorneys or staff, nor can he stop
5 being an attorney when he gives the Attorney General
6 his opinion about the conduct of the Office of the
7 Attorney General or of the elected Attorney General
8 himself. He doesn't stop being a lawyer simply because
9 he holds a management position.

10 And, in fact, it's the nature of the
11 operation of the Office of the Attorney General,
12 perhaps more than any other entity in the state of
13 Texas, that everything that they do is work product or
14 attorney-client privilege discussions, except to the
15 extent that they then expose them to the outside.

16 MR. SOLTERO: Your Honor, the --
17 Mr. Mateer, together with six other attorneys,
18 correctly, as was their moral and ethical obligation as
19 lawyers, complained about criminal conduct, okay, about
20 the very issues we're asking about and went to the FBI
21 and discussed these issues. Okay? I don't know how
22 the privilege could survive that when there's been
23 discussions already made and they're the basis of the
24 under -- similar and related issues to the underlying
25 claims that the plaintiffs collectively in this case

1 are making.

2 And I would say, Judge, that if the -- if
3 they -- for purposes of this hearing only, they want to
4 stipulate that the plaintiffs had a good-faith belief
5 that laws were being violated, I think we could skip
6 this whole questioning and we can get to a few more
7 areas that I have to cover with Mr. Mateer. But if
8 they're contesting that, I think it's absolutely
9 appropriate --

10 MR. HELFAND: May I respond, Your Honor?
11 I'm sorry. May I respond, Judge?

12 THE COURT: Let me first ask Mr. Mateer
13 if he wants to say anything as a lawyer here or if he
14 wants to simply stay out of this and let the lawyers
15 make argument.

16 THE WITNESS: The only thing I would add
17 and why it's hard in this situation based upon the
18 questions that are being asked is because I do think
19 exploring the waiver is important because it --
20 although the office may not have spoken, certainly the
21 campaign spokesperson has publicly spoken on this.

22 He has been -- what I would want to know
23 and why it's hard for me to evaluate and me to make any
24 sort of objection on a question as to me is whether --
25 whether the privilege has been waived, because we know

1 the campaign spokesperson has spoken. He is not -- the
2 campaign spokesperson, who I've never met, he is not an
3 employee of the Office of Attorney General. He works
4 for the campaign of the Attorney General Ken Paxton.

5 And somebody, I assume, because he's out
6 speaking on this, has shared information with him. If
7 that person has received information that's now being
8 said is attorney-client or -- or somehow otherwise
9 protected from disclosure, then I think I have -- I can
10 talk about it, if it -- but I think that's important to
11 know. I don't know that information, and that's why
12 I'm in a -- in a difficult position. I can only,
13 you know, raise the issue and allow these very, very
14 good attorneys to inform you.

15 MR. SOLTERO: And, Your Honor, very
16 briefly, since Your Honor indicated you wanted to take
17 a break, before that happens and to address this issue
18 specifically, I would offer Plaintiffs' Exhibit 5 and
19 Plaintiffs' Exhibit 6 into evidence. Both are con- --
20 while some of that may be hearsay, what I'm offering
21 Plaintiffs' 5 for is specifically on Page 3, the
22 portion in this article where it says that a
23 spokeswoman for the Attorney General's office said in a
24 statement that the complaint filed against Attorney
25 General Paxton was done to impede an ongoing

1 investigation into criminal wrongdoing by public
2 officials, including employees of the office. Making
3 false claims is a very serious matter, and we plan to
4 investigate to the fullest extent of the law. As well
5 as Plaintiffs' Exhibit 6, which is an official press
6 release where Ken Paxton, Attorney General's Office of
7 Texas, specifically addressed these allegations
8 referring to the plaintiffs and the other
9 whistleblowers as rogue employees making false
10 allegations. So I believe that should be -- I'd offer
11 5 and 6 into evidence.

12 MR. HELFAND: Well, Your Honor, I don't
13 see 5 and 6. And as I said, I -- I don't have
14 immediate access to them. I -- if -- if 6 is what
15 Mr. Soltero purports it to be, a statement of the
16 Office of the Attorney General, I'd like to see that.
17 The other one sounds like a newspaper article, which is
18 just hearsay.

19 THE COURT: Okay. Well, you should have
20 all the exhibits. They would have given you copies of
21 everything, and so that -- I don't know why you don't
22 have those. I have them and can see them. And if you
23 have Box, you should be able to see them as well.

24 I'm going to overrule those objections,
25 and 5 and 6 are hereby admitted for this limited

1 purpose while the Court's making these determinations.

2 *(Plaintiffs' Exhibits 5 and 6 admitted.)*

3 THE COURT: And then explain to me -- I
4 saw the letter from this morning, but I was preparing
5 for everything else you all have sent me in this case,
6 so better lay out for me your deliberative privilege,
7 deliberative process.

8 MR. HELFAND: Okay, Judge. I want to
9 respond to the Court's question, but I do need to
10 respond to all the other things that Mr. Mateer and
11 Mr. Soltero have said about attorney-client. But let
12 me speak -- let me speak -- let me first answer the
13 Court's question, and I hope I'll have a chance.

14 THE COURT: Now you're going too fast.
15 Slow down a little. I'll give you time. We don't have
16 to take a break right this second, but go ahead and
17 respond, but do so in a way that doesn't get
18 Ms. Racanelli upset with all of us. You're muted.

19 MR. HELFAND: Sorry, Judge. I'll do the
20 best I can. Here we go. The deliberative process
21 exception, according to the Austin Court of Appeals,
22 protects advice and opinions on policy matters to allow
23 frank and open discussion within an agency in
24 connection with decision-making. And so pre-decisional
25 discussions or discussions that -- in an effort to

1 change a decision, like Mr. Mateer has already alluded
2 to through Mr. Soltero's questions to change the
3 Attorney General's position on a matter are within the
4 deliberative process privilege.

5 THE COURT: All right. Thank you.
6 All right. I'm going to look at the letter that was
7 sent to me this morning. I'm going to consider the
8 arguments that were made just now. Let's --

9 MR. HELFAND: May I respond to the rest,
10 Your Honor?

11 THE COURT: Oh, I'm sorry. Yes. Respond
12 to the rest. You have a couple more minutes to respond
13 to the rest before we take our break. Go ahead.

14 MR. HELFAND: Thank you, Judge. The --
15 the fact that there was a report made to the FBI by
16 people who may have violated the privilege somehow
17 waives the privilege is just an absurd statement. The
18 only person who can waive the privilege in this case is
19 the Office of the Attorney General. And the plaintiffs
20 are not showing you anything that shows that the Office
21 of the Attorney General has waived the privilege. It
22 belongs to the OAG.

23 The fact that Mr. Mateer and others may
24 have disclosed things that would violate the
25 attorney-client privilege or the work product privilege

1 or the deliberative process privilege or more than one
2 of those doesn't waive the privilege, which is what
3 Mr. Soltero was suggesting. That just makes no sense
4 at all, with all due respect.

5 Similarly, Mr. Mateer posits an excellent
6 proposition, but as he honestly acknowledges, there's
7 no evidence before the Court to find a waiver, and that
8 is that a campaign spokesperson reported -- and I think
9 we'd have to look at specifically what the report
10 was -- that the allegations against the Attorney
11 General are false. I'm taking that as Mr. Mateer
12 presented it. I don't know what the actual statement
13 was.

14 But as Mr. Mateer acknowledges, the
15 campaign spokesperson is not an employee of and
16 certainly not authorized by the Office of the Attorney
17 General to waive any privilege at all. Now, I think
18 what Mr. Mateer was saying -- and again, I think it's a
19 very intelligent point -- is if the Court could find
20 evidence that someone in the Office of the Attorney
21 General had waived the privilege that exists by sharing
22 that information -- specific information with the
23 campaign spokesperson so as to allow the campaign
24 spokesperson to make a general statement, then the
25 Court might find that as to the information that was

1 shared to this third-party outside the office, that
2 there's been a waiver, but -- but it would have to
3 proceed in that regard. I think Mr. Mateer was saying,
4 I certainly would argue, that the Court would have to
5 find first that privileged information was shared with
6 that third-party that allowed the third party to offer
7 a statement of opinion.

8 The -- the idea that Mr. Mateer or any of
9 the movants or any of the other people who claim to be
10 whistleblowers could have created a waiver by
11 disclosing this information is just absolutely obscene.
12 Violating the privilege doesn't create a waiver. It
13 violates the privilege.

14 MR. SOLTERO: Your Honor, may I respond?
15 Anybody -- if Mr. Mateer and others had a belief that
16 there was an ongoing criminal -- criminal actions
17 happening, then no privilege would attach to that, and
18 that's what I think Plaintiffs' Exhibit 4 establishes.
19 And if my question was unclear, I'll be happy to ask
20 Mr. Mateer that directly.

21 MR. HELFAND: Well, let me -- Judge, let
22 me just cite the statute because Mr. Soltero is wrong.
23 The crime-fraud exception under 503(d)(1) only applies
24 if the lawyer's services were obtained to enable or aid
25 someone to commit or plan to commit a crime or fraud.

1 Unless Mr. Mateer says that his consultation with the
2 Office of the Attorney General was in furtherance of a
3 crime or fraud, which I'm assuming he's not going to
4 say, there is no exception. The lawyer who observes
5 their client perpetrating a crime or a fraud does not
6 have the authority to vitiate the attorney-client
7 privilege.

8 THE WITNESS: Your Honor, can I -- can I
9 weigh in as an attorney, not the witness?

10 THE COURT: You may.

11 THE WITNESS: The group going to the
12 FBI -- I was at the time the first assistant attorney
13 general of Texas, and I think I was in the control
14 position. The Attorney General does not run the office
15 day to day. So if anybody can go to the FBI and have a
16 conversation, it has to be the first attorney general,
17 assistant attorney, and his deputy attorney generals.
18 And if anybody can waive, unless the office's attorney
19 is now -- is now claiming that the only person who can
20 waive the attorney -- is the Attorney General, who is
21 then the subject of the complaint, that would mean that
22 the Attorney General could never be investigated ever
23 for any crime no matter whatever he did, which can't be
24 the result. And so --

25 THE COURT: All right. Thank you

1 everyone.

2 THE WITNESS: -- I disagree with that. I
3 also would -- I'm sorry. I wasn't --

4 THE COURT: Go ahead.

5 THE WITNESS: I'm sorry, Judge. I
6 certainly don't want to cut you off.

7 THE COURT: No. Go ahead. Go ahead.

8 THE WITNESS: And I also disagree with
9 the interpretation of the attorney -- crime-fraud
10 exception because I do believe it covers this
11 situation. And if asked questions, I think I could
12 explain why I do believe, because I do believe that the
13 deputies, had they gone down this path, would be put in
14 a position to assist and/or cover up with what -- what
15 would -- would be a crime.

16 THE COURT: Okay.

17 MR. HELFAND: Your Honor, I just want to
18 point out, Mr. Mateer cannot now claim that he had the
19 authority to waive the office's privilege. The
20 privilege still exists. To the extent that he's waived
21 it on a limited basis by disclosing it to someone is
22 not now grounds to disclose it further. No such --

23 THE COURT: Thank you.

24 MR. HELFAND: No such exception exists in
25 the law.

1 THE COURT: Thank you. All right. We're
2 going to take a 15-minute break while I consider all of
3 this and we come back from the break. This is how we
4 do it, Mr. Mateer, because you weren't here last time.
5 We stay connected. We don't disconnect. We just go on
6 mute and we go off video, and then in 15 minutes we all
7 show back up after our break. But at this time, we
8 will be back at 3:45. Thank you.

9 *(Recess was taken.)*

10 THE COURT: At this time we will go back
11 on the record. Thank you, Ms. Racanelli.

12 So I have been reviewing the letter from
13 this morning and Texas Rule of Evidence 503, as well as
14 considering the argument. And I think on two points
15 the attorney-client privilege has been waived. I was
16 persuaded with Mr. Mateer's argument at the end that
17 actually more people than just the elected Attorney
18 General or the Office of the Attorney General and that
19 in his activity to go and speak to the FBI, that that
20 was, in fact, a waiver of the privilege and -- from the
21 Office of the Attorney General.

22 And then also I think there is also some
23 waiver within the exhibits that the Court just
24 admitted. Those are going to be -- all of these
25 questions, though, may still be case by case, question

1 by question, and so it might not be that this is the
2 sort of thing that we can do easily. We're just going
3 to have to do it the hard way, and we're going to have
4 to ask questions, and objections are going to have to
5 be made, and then the Court's going to have to rule on
6 that, and then we will have to proceed that way.

7 I wish there were an easy way to do it,
8 but I don't think there is, and I'm not going to hold
9 it against the lawyers that there's not an easy way to
10 do this, because I think we have to proceed in a way
11 that allows everyone to maintain their arguments for
12 the record.

13 So at this time, we are back, and we will
14 continue with the testimony of Mr. Mateer and the
15 questioning by Mr. Soltero. You may proceed --

16 MR. SOLTERO: Thank you, Your Honor.

17 THE COURT: -- Mr. Soltero.

18 MR. SOLTERO: Thank you, Your Honor.

19 Q. (BY MR. SOLTERO) Mr. Mateer, let me direct
20 your attention to what's been marked as Plaintiffs'
21 Exhibit 12. See if you could take a second to look at
22 this. And if you need me to scroll down further, I
23 will, or shrink it.

24 A. No, no. Thank you. Okay. Yes. I...

25 Q. Is this a true and correct copy of an email

1 that you received on or about July 23rd, 2020, while
2 you were at the Attorney General's office from Nate
3 Paul?

4 A. Yes.

5 Q. Okay.

6 MR. SOLTERO: Your Honor, we would offer
7 Plaintiffs' Exhibit 12 into evidence.

8 MR. HELFAND: Your Honor, Plaintiffs'
9 Exhibit 12 is clearly hearsay from a fellow named Nate
10 Paul. The mere fact that Mr. Mateer received it
11 doesn't alleviate the hearsay objection.

12 THE COURT: Response, Mr. Soltero?

13 MR. SOLTERO: Judge, I'd say two things.
14 One, it is information acted upon because this was
15 something that was received by the Attorney General in
16 connection with a complaint by Nate Paul, and so I was
17 going to ask him personally what he did in response to
18 it. It also may refresh his recollection as to
19 conversations with Nate Paul.

20 MR. HELFAND: Your Honor, may I respond?

21 THE COURT: I'm going to overrule the
22 objection. You may answer, Mr. Mateer.

23 Q. (BY MR. SOLTERO) Okay. So Mr. Mateer --

24 THE COURT: Oh, I'm sorry. That was an
25 offer. Sorry. That's my bad. This is Exhibit 12?

1 MR. SOLTERO: Yes.

2 THE COURT: Exhibit 12 is hereby
3 admitted. Sorry.

4 MR. SOLTERO: Okay. Yes, Your Honor.
5 *(Plaintiffs' Exhibit 12 admitted.)*

6 Q. (BY MR. SOLTERO) Mr. Mateer, do you remember
7 the context and situation around which you received
8 Plaintiffs' Exhibit 12?

9 A. Do I remember? Yes, I -- I do remember or
10 have a memory.

11 Q. Right. And so -- so if -- if in here it
12 mentions a Josh Godbey, what was -- what was Josh
13 Godbey's role at the time in connection with this
14 dispute going on between one of Nate Paul's entities
15 and the Mitte Foundation?

16 A. Josh Godbey at this time and I believe at the
17 time that I resigned -- I don't know what his position
18 is today -- was the division chief over financial
19 litigation, which included charitable trusts.

20 Q. So it would have been within the ordinary
21 course of his duties to deal with charitable trusts,
22 right?

23 A. He oversaw the lawyers who dealt with
24 charitable trusts, correct.

25 Q. Okay. And did you take this -- what was your

1 response when you received this email from Mr. Paul?

2 A. I -- I believe I -- I responded to it, but I
3 didn't respond to Mr. Paul. I responded to Mr. Paul's
4 attorneys.

5 Q. Okay. And there's -- was -- there's no
6 attorney-client relationship between the Attorney
7 General's Office and Mr. Paul, is there?

8 A. Not that I'm aware of.

9 Q. Okay. What did you -- what did you say in
10 your response to the lawyer for Mr. Paul?

11 A. Now, I don't have that document, but what --
12 to the best of my memory --

13 MR. HELFAND: I object to this as
14 hearsay.

15 MR. SOLTERO: Your Honor, what he did --
16 what he told somebody before -- let me -- it's not
17 hearsay when the person is on the stand and can be
18 subject to cross-examination as to his own statements.

19 MR. HELFAND: Sure, it is, Judge. It's
20 his out-of-court statement being offered to prove the
21 truth of the matter asserted. It doesn't matter that
22 he's the witness.

23 MR. SOLTERO: As an employee of the
24 defendant at the time.

25 MR. HELFAND: Again, Judge, it doesn't

1 matter that he was an employee of the defendant.

2 It's -- there's no exception to the hearsay objection.

3 MR. SOLTERO: It's a statement -- it's --
4 it's admission against a party opponent.

5 MR. HELFAND: No, no. Mr. Mateer cannot
6 make an admission of a -- against a party opponent
7 when --

8 THE COURT: I'm going to sustain -- I'm
9 going to sustain hearsay. Ask another question.

10 MR. SOLTERO: Okay.

11 Q. (BY MR. SOLTERO) What was your impression and
12 interpretation of what Mr. Paul was reaching out to you
13 for in this?

14 MR. HELFAND: Objection; speculation.

15 MR. SOLTERO: Let me rephrase.

16 Q. (BY MR. SOLTERO) Mr. Mateer, when you
17 received this, how did you read it and interpret it?

18 MR. HELFAND: The same objection;
19 speculation. His interpretation of somebody else's
20 words is pure speculation.

21 THE COURT: Overruled.

22 A. My -- my impression was that Mr. Paul was
23 complaining about Mr. Godbey, one of -- one of our
24 employees.

25 Q. (BY MR. SOLTERO) And specifically was he

1 complaining about his -- what was he complaining about
2 in respect to the Mitte Foundation case?

3 MR. HELFAND: Objection; speculation.

4 THE COURT: Overruled.

5 A. He -- well, it went -- the letter went away.
6 But what he was -- what I believed he was complaining
7 about was that Mr. Godbey was not being aggressive
8 enough in investigating the charitable trust who was in
9 litigation against some of Mr. Paul's entities.

10 Q. (BY MR. SOLTERO) And do you remember whether,
11 in addition to just wanting to come after the entities,
12 did he also want to come after the attorneys and the
13 receiver?

14 MR. HELFAND: Objection; speculation and
15 leading.

16 A. Yeah. I -- I don't --

17 THE COURT: Sustained. Hold on.

18 THE WITNESS: Oh, sorry.

19 THE COURT: I'm going to sustain that
20 one. Another question needs to be asked.

21 Q. (BY MR. SOLTERO) Would it -- okay. Let me --
22 all right. Let me move on.

23 Did you have any in-person meetings with
24 Nate Paul?

25 A. I've never met Nate -- Nate Paul.

1 Q. Okay. Did you express concerns -- well, let
2 me -- let me come at it the other way.

3 Did anybody working and reporting to you
4 express concerns about Nate Paul around this time in
5 June of 2020?

6 MR. HELFAND: Objection. That invades
7 the attorney-client privilege, work product, and
8 deliberative process privileges, every single one of
9 them, Judge.

10 THE COURT: Overruled. If the witness
11 feels he can answer based on the Court's rulings of
12 waiver, you may proceed.

13 A. Yeah. I think it calls for yes or no, and the
14 answer is yes.

15 Q. (BY MR. SOLTERO) Okay. And did you come to
16 believe that the Office of Attorney General was being
17 engaged in ongoing criminal activity in connection with
18 Nate Paul?

19 MR. HELFAND: Objection, Your Honor.
20 That calls for speculation. It also invades the
21 deliberative process, the attorney-client, and the
22 work product privilege if he obtained that information
23 based upon his work for the Attorney General -- Office
24 of the Attorney General.

25 THE COURT: The Court has previously made

1 rulings as to waiver and believes that waiver applies
2 in this instance as well and is overruling that
3 objection. The witness can answer if the witness
4 believes he can answer.

5 MR. HELFAND: Your Honor, may I ask that
6 the Court allow an *in camera* voir dire and an *in camera*
7 answer to allow the Court to assess the privilege?

8 THE COURT: Not on to this question. We
9 might get to that point, but it's just a yes or no
10 question, and I believe that the press statements also
11 play into waiver here. And there's very little to
12 protect in an *in camera* instruction at this time.

13 MR. HELFAND: I understand the Court's
14 ruling. Thank you.

15 A. And I know it called for yes or no, but it's a
16 question that it's hard to give a yes or no, so that
17 makes it difficult for me as -- as -- as the witness.
18 What I would say is it -- it could have led to that.
19 Certainly it's -- did I have concerns? I had potential
20 concerns.

21 Q. (MR. SOLTERO) Okay. And did that have to do
22 with activities involving Nate Paul?

23 A. Again, at that time, yes.

24 Q. Okay. And what were the concerns of unlawful
25 or criminal activity that you had at that time?

1 A. Again --

2 MR. HELFAND: I'm sorry, Your Honor. I
3 need to object that that goes right at the heart of
4 privilege as to work product, attorney-client, and
5 deliberative process privileges. And I would ask that
6 the Court here that *in camera* before allowing that to
7 be put on the record.

8 THE COURT: That one I do believe would
9 be appropriate for the Court to hear *in camera*. But I
10 think let's keep going for now, Mr. Soltero, if you
11 could go to a different area, and we can come back and
12 hear those perhaps *in camera* in some sort of respect.

13 MR. SOLTERO: I understand, Your Honor.

14 Q. (BY MR. SOLTERO) Mr. Mateer, switching gears,
15 did you ever come to believe that any federal agent,
16 magistrate judge, or anyone who was involved in the
17 Nate Paul investigation committed any kind of crime?

18 MR. HELFAND: Your Honor, again, without
19 the context of where this witness would have obtained
20 information that led to his opinions, it appears as
21 those that came from his operations as the first
22 assistant to the Attorney General and the Office of the
23 Attorney General and, therefore, attorney-client,
24 work product, and deliberative process privileges would
25 apply.

1 THE COURT: Overruled as to this
2 question.

3 A. I -- I did not -- I was unaware of any
4 violations by those officers.

5 Q. (BY MR. SOLTERO) Did you -- what were the --
6 I'd like to -- were you -- when did you become aware
7 that Nate Paul had been a contributor to Ken Paxton's
8 campaign?

9 A. Sometime in 2020, certainly not at the time
10 the contribution was made. I -- my best recollection
11 would have been the summer of 2020, July 2020 perhaps.
12 But again, that's my best -- best memory.

13 Q. And did you learn how much Mr. Paul had
14 contributed to Mr. Paxton's campaign?

15 MR. HELFAND: Your Honor, object to the
16 relevance. This has nothing to do with the
17 whistleblower claim.

18 MR. SOLTERO: Your Honor, it does because
19 it goes to part of the good-faith belief the
20 whistleblowers had that criminal activity had been
21 occurring.

22 MR. HELFAND: No, Judge. A good-faith
23 belief that criminal activity had been occurring is
24 that a criminal act had occurred, and there's no
25 criminal act in a campaign contribution.

1 MR. SOLTERO: Your Honor --

2 THE COURT: Okay. I'm going to overrule
3 the objection. I'm letting you lay a foundation and
4 putting forward some context. But I will also alert
5 you, Mr. Soltero, that the Court will hold you to your
6 time announcement, and so you have some limitation on
7 time. So keep that in mind.

8 MR. SOLTERO: Okay.

9 Q. (BY MR. SOLTERO) Mr. Mateer, did you ever
10 learn how much that campaign contribution was worth?

11 A. I believe it was 25,000, but I'm -- I'm
12 questioning myself right now, but I believe it was
13 25,000.

14 Q. And did that contribute to your perception and
15 belief that there may have been unlawful conduct
16 involving Nate Paul --

17 MR. HELFAND: Objection --

18 A. -- and --

19 MR. HELFAND: I'm sorry. Objection;
20 speculation as to this witness. Mr. Mateer's beliefs
21 are not material to this case.

22 MR. SOLTERO: Your Honor, they are
23 because they go to the issue of good faith
24 whistleblowing complaint. That's exactly what it is.
25 Another reasonable --

1 THE COURT: Overruled. Overruled. You
2 can answer the question.

3 A. That Mr. Paul was a campaign contributor did
4 play a part of our beliefs -- or my belief.

5 Q. (BY MR. SOLTERO) Okay. And, Mr. Mateer, are
6 you familiar with outside counsel contracts?

7 A. I am.

8 Q. Okay. Let me show you what -- for
9 identification purposes, what's been marked as
10 Plaintiffs' Exhibit 2 and ask you if you can -- if
11 you've seen this before? I know I'm scrolling through
12 it quickly. I'm trying to get to the signature page.

13 MR. HELFAND: Let me raise an objection,
14 Your Honor. Is the question whether he's seen a form
15 of an outside counsel contract before or whether he's
16 seen this outside contract?

17 MR. SOLTERO: My question was --

18 THE COURT: Let's be specific, yes,
19 Mr. Soltero. Which question are you asking?

20 MR. SOLTERO: Yes, Your Honor.

21 Q. (BY MR. SOLTERO) First let me -- let me break
22 it down and make it two questions. Mr. Mateer, you've
23 seen -- have you seen outside counsel contracts before
24 in your work as first assistant at the Office of the
25 Attorney General?

1 A. Yes.

2 Q. Okay. Have you seen this particular one that
3 was signed by Brandon Cammack and on the other side by
4 Ken Paxton?

5 A. Yes.

6 Q. When did you become aware of this happening?

7 A. I believe it was on October 1st, is the
8 first -- October 1st, 2020; maybe September 30th, but
9 that -- that week.

10 Q. Okay.

11 MR. SOLTERO: And, Your Honor, I would
12 offer Plaintiffs' Exhibit 2 into evidence.

13 MR. HELFAND: Your Honor, I would object
14 to the relevance of Plaintiffs' Exhibit No. 2. It has
15 no bearing on any of the elements of a whistleblower
16 claim.

17 THE COURT: Overruled. 2 is admitted.

18 *(Plaintiffs' Exhibit 2 admitted.)*

19 Q. (BY MR. SOLTERO) In the ordinary course -- I
20 want to ask about this contract in specific in just a
21 second, Mr. Mateer. But first of all, let me ask this
22 predicate question. In the ordinary course of the
23 instances when the Attorney General's Office does
24 retain outside counsel, such as in the outside counsel
25 contract, would that be something that typically would

1 come through your office before it would get to the
2 signature of the Attorney General?

3 A. Yeah, your question -- I need to break your
4 question apart because it has some underlying
5 inaccuracies in it. It assumes that the Attorney
6 General signs outside counsel contracts.

7 Q. Thank you for that. Typically, does the
8 Attorney General sign outside counsel contracts?

9 A. No.

10 Q. Okay. What is the proper typical procedure at
11 the Office of Attorney General for the signing of
12 outside counsel contracts?

13 MR. HELFAND: Your Honor, again, I object
14 to relevance of how contracts are signed in the Office
15 of the Attorney General.

16 THE COURT: Overruled.

17 A. The -- the procedure that was in place when I
18 began and went -- and went on the day that I resigned
19 was that for outside counsel contracts, like every
20 other contract in the Office of Attorney General, was
21 through an executive approval memorandum process in
22 which a contract would go through a review at several
23 levels by deputy -- by deputies and other leaders in
24 the office.

25 And so if you had a -- if you had a

1 contract, for instance, that needed to be signed,
2 several members of the executive staff would see it and
3 then would approve its signature. And it would
4 ultimately end up on -- on the desk of the first
5 assistant, when I was there, me, and then I would get a
6 memo that showed that it had been reviewed, for
7 instance, by the -- the general counsel and/or the
8 deputy for legal counsel, and they would have signed
9 off. I would see that budget had signed off and that
10 there had been -- that there are funds in the budget.
11 And then upon that, you know, I would have the
12 opportunity to review and make a determination of
13 whether the contract should be signed or not.

14 Q. (BY MR. SOLTERO) Okay. And in this instance,
15 when -- with this -- Mr. Cammack's outside counsel
16 contract, was that process followed?

17 A. I'm unaware of it being followed because I
18 didn't see it until after it had been signed by the
19 Attorney General.

20 Q. And did you ever become aware that one of the
21 directors who would have reviewed it prior to it coming
22 to your desk refused to sign it? Is that something
23 that you ever learned?

24 MR. HELFAND: Objection. That calls for
25 hearsay.

1 MR. SOLTERO: Your Honor, conversations
2 between people at the Attorney General's office when
3 the Attorney General's office is the defendant would
4 not be hearsay as to them.

5 MR. HELFAND: Of course it is, Judge.
6 Internal communications prior to the lawsuit are
7 hearsay. Mr. Mateer cannot repeat what he learned.
8 Moreover, as to the propriety or impropriety of this
9 contract to the extent the Court deems it relevant at
10 all, again, that invades the attorney-client, the
11 work product, and the deliberative process procedure --
12 privileges, excuse me. Whether somebody else in the
13 office offered a legal opinion as to whether it was
14 appropriate to sign this contract is right down the
15 middle of those privileges.

16 MR. SOLTERO: The fact, Your Honor,
17 whether somebody refused to sign it or not is not a
18 legal opinion.

19 MR. HELFAND: Well, it is, Judge, because
20 it -- the question of why they refused to do it falls
21 right within the privilege. But, again, whether
22 somebody refused -- unless Mr. Mateer can demonstrate
23 that he has personal knowledge except from talking to
24 someone else other than Mr. Soltero assures us that
25 it's not hearsay, it sounds like exactly what hearsay

1 is prohibited to do.

2 THE COURT: All right. The question that
3 was asked calls for hearsay, so hearsay is sustained.

4 Q. (BY MR. SOLTERO) Okay. It -- let me ask a
5 different question. Mr. Mateer, in all your time that
6 you were at the Attorney General's Office as first
7 assistant, did the Attorney General sign other outside
8 counsel contracts?

9 MR. HELFAND: Objection; irrelevant, and
10 it's also objectionable under 404 and 405.

11 THE COURT: Overruled.

12 A. I'm unaware of any other contracts concerning
13 outside counsel --

14 Q. (BY MR. SOLTERO) And do you see that as part
15 of this contract on Para- -- on Page 15, it
16 specifically excludes legal services relating to
17 post-investigation activities, including but not
18 limited to indictment and prosecution? Do you see that
19 right there?

20 MR. HELFAND: I mean, I object to --
21 Your Honor, I object to the leading and argument.
22 There's no question there.

23 THE COURT: I'll let you ask it in terms
24 of it's a placeholder question.

25 MR. SOLTERO: Sure.

1 THE COURT: You're pointing the witness
2 out to a specific part of the document, which you are
3 allowed to do. And do you want to ask a substantive
4 question on top of that?

5 MR. SOLTERO: Right. Yes. Yes, Your
6 Honor.

7 Q. (BY MR. SOLTERO) Mr. Mateer, you notice that
8 limitation that's placed in this agreement, correct?

9 A. I see it, yes.

10 Q. Are you familiar with that kind of a
11 limitation?

12 A. That -- I -- my recollection is that would be
13 standard in this type of contract.

14 Q. So this person -- this contract would not have
15 provided for somebody to be a prosecutor, correct?

16 MR. HELFAND: Objection. That's leading
17 and it also calls for speculation. And the document --
18 Mr. Mateer is not -- is not able to interpret the
19 document. The Court interprets the evidence.

20 MR. SOLTERO: Your Honor --

21 THE COURT: Sustained. No, I'm going to
22 sustain that question --

23 MR. SOLTERO: Okay.

24 THE COURT: -- the objection on that
25 question. I think the document speaks for itself.

1 MR. SOLTERO: And at this point, subject
2 to us being able to go *in camera* and continuing to
3 explore some of the specifics, I would pass the
4 witness. I don't know if Mr. Knight or Mr. Helfand
5 have any questions.

6 THE COURT: Okay. Mr. Knight, you're
7 first.

8 MR. KNIGHT: I have just a few, Your
9 Honor.

10 **CROSS-EXAMINATION**

11 BY MR. KNIGHT:

12 Q. Mr. Mateer, do you know my client,
13 Ryan Vassar?

14 A. Yes.

15 Q. How long have you known him and in what
16 capacity?

17 A. Let's see. I think the first time I met
18 Mr. Vassar was when I became first assistant back in
19 2016, in March of 2016.

20 Q. All right. So you've known him in a
21 professional capacity for approximately five years?

22 A. Yes.

23 Q. Did he report to you?

24 A. He eventually reported to me, yes.

25 Q. Do you have personal knowledge of his

1 performance as a lawyer and a public servant?

2 A. Mr. Vassar is an outstanding lawyer and an
3 honorable public servant.

4 MR. HELFAND: Objection; nonresponsive
5 and opinion testimony this witness is not qualified to
6 give. The question was yes or no, Judge.

7 THE COURT: Overruled.

8 A. Yes.

9 Q. (BY MR. KNIGHT) Since Mr. Vassar was fired,
10 have you recommended him to other prospective
11 employers?

12 A. Yes.

13 Q. And have you done -- have you had any
14 reservations about such a recommendation?

15 A. None whatsoever.

16 Q. Prior to the day that you resigned as first
17 assistant attorney general, were any steps being taken
18 at OAG to terminate Mr. Vassar's employment?

19 A. I'm unaware of any such steps.

20 Q. Given your position, if those were underway,
21 would you have been aware of them?

22 MR. HELFAND: Objection; calls for
23 speculation.

24 MR. KNIGHT: He ran the office --

25 THE COURT: Overruled. Overruled.

1 A. I would think I would have known, yes.

2 Q. (BY MR. KNIGHT) All right. A couple hours
3 ago Mr. Helfand told the Court that this was a typical
4 situation where the seven whistleblowers, including my
5 client, Mr. Vassar, found themselves in trouble with
6 their jobs and made a rush to find something to report
7 to try to get protected status. Is that true?

8 A. That's --

9 MR. HELFAND: Objection, Your Honor.
10 That's speculation on behalf of this witness.

11 MR. KNIGHT: He ran the office.

12 MR. HELFAND: It doesn't matter --

13 THE COURT: Overruled.

14 MR. HELFAND: -- if he ran the office --

15 THE COURT: Overruled.

16 A. That is absolutely not true, and I --
17 Mr. Helfand, I'm sure, knows that.

18 MR. KNIGHT: No further questions, Your
19 Honor.

20 MR. HELFAND: Your Honor, object to the
21 nonresponsiveness after "true." Mr. Mateer is not in a
22 position to comment on what I do or don't know.

23 THE COURT: I will sustain your
24 nonresponsive objection, correct. Now, Mr. Helfand,
25 you're up.

1 MR. HELFAND: Thank you. Except perhaps
2 to inform the Court as to Mr. Mateer's advocacy here as
3 opposed to simply being a witness, that comment is
4 inappropriate.

5 MR. KNIGHT: Well, now who's doing
6 sidebar --

7 THE COURT: Mr. Helfand --

8 MR. KNIGHT: -- Your Honor?

9 THE COURT: Hold on.

10 THE WITNESS: Your Honor, I apologize.

11 THE COURT: Hold on. Hold on everybody.
12 Thank you, Mr. Mateer.

13 But Mr. Helfand, I have sustained your
14 objection, and so you didn't need the additional
15 commentary.

16 MR. HELFAND: Thank you, Your Honor.

17 THE COURT: So you may proceed on
18 cross-examination of this witness.

19 MR. HELFAND: Thank you, Your Honor. I
20 know that the Court is trying to act expediently and,
21 therefore, I wasn't able to finish my opening
22 statement.

23 I wanted to include the fact that
24 proceeding to this temporary injunction, which
25 contemplates the merits of this case and actually the

1 ultimate relief when the statute provides that only --
2 reinstatement is only a remedy for a proven violation,
3 not as -- a temporary injunction require even evidence
4 of a substantial likelihood of prevailing.

5 I -- my -- my client is at an unfair
6 disadvantage here, Your Honor, because this is
7 tantamount to a denial of due process, with all due
8 respect to the Court. I cannot, on behalf of my
9 client, be put in a position where I cannot exercise
10 the jurisdiction of the Court that doesn't exist and is
11 presumed not to exist so as to prepare for a temporary
12 injunction hearing, and then, when the Court elects to
13 proceed without ruling on that question as required by
14 the law, be requested to address the substantive merits
15 of the claim. That's just a simple basic denial of due
16 process, and I'm not in a position to ask questions of
17 Mr. Mateer of any substance, except for two.

18 But I don't want for anyone to think for
19 a moment that the fact that I'm precluded from doing
20 that by this, let's say, unusual approach to a
21 temporary injunction hearing where the Court has chosen
22 not to address the question of jurisdiction is a denial
23 of due process to my client.

24 So I'm only going to ask two basic
25 questions if I may, Judge, but the fact that I can't

1 otherwise is not by choice. It's unfortunately because
2 I've been put in this unusual position.

3 MR. SOLTERO: And, Your Honor, we would
4 object to this as pure sidebar. I think Mr. Helfand
5 had plenty of time to argue what he wanted, and it's
6 not a question here for the witness.

7 MR. HELFAND: Judge, obviously, it's not
8 for Mr. Soltero to comment whatsoever except that the
9 Court will recall that Your Honor did truncate my
10 effort to provide an opening, which would have included
11 those comments. But be that as it may --

12 THE COURT: It is sidebar when it comes
13 to questioning. I was choosing to allow it because I
14 did truncate your comments when you were deliberately
15 elongating them at the beginning of this process. But
16 at this time, you can ask those questions that you're
17 wanting to ask, and you can choose not to go forward
18 with other questions. You have that choice as well.
19 You may proceed, Mr. Helfand.

20 MR. HELFAND: Thank you. As I said,
21 Judge, I can only ask a few. I'm precluded from any
22 others, but I will ask what I can. Thank you.

23 **CROSS-EXAMINATION**

24 BY MR. HELFAND:

25 Q. Mr. Mateer, were you involved in any of the

1 discussions that resulted in the firing of Mr. Maxwell
2 from the Office of the Attorney General?

3 A. I was not.

4 Q. Would I be correct to say, then, that
5 Mr. Mateer has no personal knowledge as to why
6 Mr. Maxwell was fired?

7 A. Are you asking me? You said "Mr. Mateer has
8 no."

9 Q. Yes.

10 A. Whether I have personal knowledge? No, I have
11 no personal knowledge of why Mr. Maxwell was fired.

12 Q. And as to Mr. Vassar, do you have any personal
13 knowledge as to why he was fired from the Office of the
14 Attorney General?

15 A. I have no personal knowledge, no.

16 Q. In your time, how long did you serve as first
17 assistant, sir?

18 A. I -- March 9th, 2016, until October 2nd, 2020.

19 Q. Okay. So I would say -- would I correctly --
20 can we agree that that's about three and a half years?

21 A. No. I think it's actually four years and
22 about eight months.

23 Q. Thank you. I was trying to do math on the
24 fly, and that never works well for me.

25 A. Which you know we don't do well, do we, as

1 lawyers?

2 Q. Agreed. Thank you. Misery loves company.

3 Let me -- let me inquire, then, if I may.
4 I don't want to get into any specific individual, but
5 in your time as first assistant, did you have occasion
6 from time to time to consult with others in the office
7 about a decision of whether to separate an employee of
8 the Office of the Attorney General?

9 A. We -- I would be con- -- I would be informed
10 of a decision with regard to separation of an employee.

11 Q. All right.

12 A. I think the only time that the first assistant
13 would be consulted would be if -- a direct report. And
14 I don't believe -- and gosh, you're now testing mine --
15 back during my time there was any discussion of
16 terminating any deputy or direct report to the first
17 assistant. What usually happens --

18 MR. HELFAND: Let me object --

19 A. -- would be --

20 MR. HELFAND: Let me object as
21 nonresponsive, Your Honor. The witness has answered
22 the question.

23 THE COURT: Sustained. You may ask
24 another question.

25 MR. HELFAND: Thank you.

1 Q. (BY MR. HELFAND) Mr. Mateer, whenever you
2 were either consulted or informed of a decision to
3 separate an employee of the Office of the Attorney
4 General, was it -- were there times where to your
5 observation or knowledge that person had been a good
6 employee up until whatever occurred to cause the
7 decision to fire them?

8 A. I mean, quite frankly, usually it would have
9 been an employee that I didn't have any knowledge of,
10 because with 4200 employees, more likely than not this
11 was -- they were advising me of someone who I'd never
12 had any contact or any meaningful contact with.

13 Q. Okay. But -- well, I'll leave it at that.

14 MR. HELFAND: Thank you, Judge. I don't
15 think that under the circumstances, having been
16 precluded from doing discovery before the hearing, I
17 can ask any other questions at this time.

18 MR. SOLTERO: Your Honor, very quick
19 redirect.

20 **REDIRECT EXAMINATION**

21 BY MR. SOLTERO:

22 Q. Just to be clear, Mr. Mateer, as --
23 Mr. Helfand just asked you about things that happened
24 after you left, right?

25 A. Correct.

1 Q. So -- but as of the time you left, which --
2 what date exactly did you resign?

3 A. October 2nd, 2020.

4 Q. So as of October 2nd, 2020, was there any
5 legitimate basis that you were aware of of why either
6 Mr. Maxwell, Mr. Vassar, Mr. Penley or any of the
7 whistleblowers would have had any legitimate reason to
8 be terminated, to your knowledge?

9 MR. HELFAND: I need to raise an
10 objection both that it calls for speculation and the
11 use of the term "legitimate reason" calls for the
12 witness to speculate.

13 MR. SOLTERO: Let me rephrase, Your
14 Honor, to cure the objection.

15 Q. (BY MR. SOLTERO) As of the time you were
16 there and when you left, was there any reason you were
17 aware of why David Maxwell would have been fired?

18 A. No.

19 Q. And as of the time you were there, were you
20 aware of any reason why Mr. Vassar would have been
21 fired?

22 A. No.

23 Q. Were you aware of any reason why Mr. Penley
24 would have been fired?

25 A. No.

1 Q. Were you aware of any reason why anybody else
2 who complained about the conduct would have been fired?

3 A. No.

4 Q. Including Mr. Brickman?

5 A. Correct. I'm not aware of any reason.

6 MR. SOLTERO: Your Honor, I would pass
7 the witness.

8 THE COURT: All right. Mr. Knight?

9 MR. KNIGHT: Your Honor, the only other
10 thing I wanted to do is -- and I apologize. The letter
11 to this witness from counsel for OAG was marked this
12 morning when we became aware of it as Exhibit 32. And
13 I didn't keep up with whether that was offered into
14 evidence or not. If not, I'd like to offer it.

15 MR. HELFAND: And, Your Honor, I would
16 object to letter 32 being offered into evidence. It's
17 not relevant to any issue in this case.

18 THE COURT: Overruled. And I will admit
19 Exhibit 32, Plaintiffs' Exhibit 32 at this time.

20 *(Plaintiffs' Exhibit 32 admitted.)*

21 MR. KNIGHT: I have no further questions.

22 MR. SOLTERO: And, Judge, out of -- out
23 of an abundance -- you know, concern for expediency and
24 making sure we get -- we keep with our time
25 announcement, I'd say we let Mr. Mateer go for now.

1 MR. HELFAND: Well, Judge, we're going to
2 have to address the questions of privilege *in camera*.
3 Obviously, we can do that as the Court deems
4 appropriate.

5 THE COURT: I guess I didn't --
6 Mr. Soltero was letting this witness go. I don't know
7 why you would want him to stay. But if you want to
8 continue to ask -- if you want to give Mr. Soltero and
9 Mr. Knight some time to ask this witness questions
10 about things that you deem privileged to which he was
11 just allowing him to be excused, we can proceed to
12 that.

13 MR. HELFAND: Well, I just don't want --
14 I don't -- I want to resolve that issue, Judge. I
15 didn't hear Mr. Soltero say he was done with the
16 witness. He said in the interest of time, let's let
17 him go for now, if I heard him correctly.

18 THE COURT: Well, he's time limited, and
19 he understands that, and so I guess if he's saying he
20 wants to bring him back later, he can. This is going
21 to continue to be an issue, but I think -- I can't -- I
22 can't remember. I know there's a lot about subpoenas.
23 This witness is under subpoena or not under subpoena?

24 MR. SOLTERO: Yes, Judge.

25 THE COURT: He is under subpoena?

1 MR. SOLTERO: Yes. And what I would say,
2 Judge, is we're --

3 THE COURT: Is your intention -- you are
4 time limited. And so is your intention to possibly
5 bring him back, or is your intention to basically let
6 him go for now because you believe you have got what
7 you need for your case-in-chief to proceed on a
8 temporary injunction? I turn that question to you.

9 MR. SOLTERO: The latter, Your Honor.
10 What I'm saying is for purposes of the injunction, we
11 have what we need from Mr. Mateer. There are other
12 witnesses who can cover some of the same areas that we
13 were going to go into with him. And because we have a
14 limited time and being respectful of both Mr. Mateer's
15 time, the Court's time, everybody's time, we would
16 excuse him from his subpoena and proceed with our case.

17 THE COURT: Okay. Then --

18 MR. SOLTERO: But if Mr. Helfand --

19 THE COURT: Mr. Helfand, do you want me
20 to keep him under his subpoena and have him stick
21 around?

22 MR. HELFAND: The record will reflect,
23 Judge, I gave you a thumbs up. I think Mr. Mateer
24 should go back to his life.

25 THE COURT: Okay. Then at this time,

1 Mr. Mateer, you are released from your subpoena. You
2 are excused as a witness, and you are free to go.
3 Thank you for your time.

4 THE WITNESS: Thank you, Judge.

5 MR. HELFAND: Thank you, Mr. Mateer.

6 MR. SOLTERO: Thank you for your time,
7 Mr. Mateer.

8 THE COURT: All right. So that leaves us
9 at 4:23. Would you like to move on to the next
10 witness? We have a little more time this afternoon.

11 MR. KNIGHT: Your Honor, I'd like to call
12 Ryan Vassar as our next witness. I don't know that I
13 can finish him by 5:00, but we can certainly get a good
14 start.

15 THE COURT: Okay. Then let's get a start
16 in for sure, and we'll call Mr. Vassar.

17 MR. KNIGHT: Unmute yourself, my friend.

18 THE COURT: I'm asking -- there he went.
19 All right. Mr. Vassar, please raise your right hand
20 and be sworn.

21 *(Witness sworn in.)*

22 THE COURT: All right. Before -- you can
23 lower your hand. Before Mr. Knight asks you a
24 question, just because I've been staring at it all day,
25 what is behind you on the wall?

1 THE WITNESS: Those are actually slices
2 of a granite rock that's been framed, so...

3 THE COURT: All right. All right. I
4 had -- I couldn't tell if it was rocks. Okay. I
5 couldn't tell if it was fingerprints or some sort of
6 mutating virus, but I wasn't -- I had not gotten to
7 granite rocks, so thank you for that.

8 That was my question for the witness,
9 Mr. Knight. Now you may proceed.

10 MR. KNIGHT: All right.

11 **RYAN VASSAR,**
12 having been first duly sworn, testified as follows:

13 **DIRECT EXAMINATION**

14 BY MR. KNIGHT:

15 Q. Well, for the record, go ahead and reintroduce
16 yourself to the Court.

17 A. Ryan Vassar.

18 Q. And where are you right this minute,
19 Mr. Vassar?

20 A. I'm in my home.

21 Q. Is anybody there with you?

22 A. No, sir.

23 Q. Do you have any script or notes or anything
24 like that in front of you to testify from today?

25 A. No, sir.

1 Q. And do you have any means of communicating
2 with me other than through this Zoom proceeding?

3 A. No, sir.

4 Q. All right. How old a man are you, Mr. Vassar?

5 A. I am 36.

6 Q. Are you currently employed?

7 A. I am working part time for my father and
8 grandfather's certified public accounting practice, but
9 I'm not full -- I'm not employed full time as a lawyer.

10 Q. Are you a lawyer by education and training?

11 A. Yes, sir.

12 Q. Where is the last full-time job you held?

13 A. I was deputy attorney general for legal
14 counsel at the Office of Attorney General.

15 Q. All right. And I think it's known to
16 everybody now that you were terminated from that job
17 last November?

18 A. Yes, sir.

19 Q. Can you just give us a brief summary of your
20 educational background and your employment history
21 until you came to the Attorney General's Office?

22 A. I went to undergraduate at Texas Tech
23 University where I obtained a bachelor's of business
24 administration. I majored in accounting. I went to
25 South Texas College of Law. After law school, I

1 clerked for three years at the Supreme Court of Texas.
2 And after a three-year period at the Court, I moved to
3 the Attorney General's Office.

4 Q. When did you graduate from law school?

5 A. December of 2011.

6 Q. And did you take the bar right away?

7 A. Yes, sir. The February 2012 bar.

8 Q. Did you pass on the first try?

9 A. Yes, sir.

10 Q. And when did you go to work at the Attorney
11 General's Office?

12 A. I started July 1st of 2015.

13 Q. All right. We're going to get into the
14 details of your employment there in just a minute, but
15 just a couple more background questions. Mr. Vassar,
16 do you have a family?

17 A. I do. I've been married to my wife for seven
18 years, and we have four children ages 5, 4, 2, and nine
19 months.

20 Q. When was the youngest one born?

21 A. May 30th of 2020.

22 Q. What was your salary as deputy attorney
23 general for legal counsel?

24 A. It was approximately \$200,000 a year.

25 Q. Did you receive any benefits along with that

1 salary?

2 A. Yes. I was eligible to participate in the --
3 the pension plan offered by the Employees Retirement
4 System of Texas. I also received health insurance
5 benefits through the State.

6 Q. Other than the accounting-related work that
7 you're doing for your father and grandfather, does your
8 family have any other sources of income today?

9 A. No, sir.

10 Q. Do you have health insurance for your four
11 children?

12 A. Yes. I'm continuing to purchase the COBRA
13 insurance coverage through the State's plan.

14 Q. How much does that cost you?

15 A. It's approximately \$1800 a month.

16 Q. How does that compare to what you paid for
17 health insurance while you were employed?

18 A. As an employee, it was approximately \$500 a
19 month.

20 Q. All right. Let's talk about your work at the
21 Attorney General's Office. I think you told us you
22 started there in July of 2015?

23 A. That's correct.

24 Q. What position did you take?

25 A. I joined the general counsel division as an

1 assistant general counsel.

2 Q. So is that like an entry level or line level
3 attorney position in the Attorney General's Office?

4 A. It is.

5 Q. Is entry level the right phrase? Does that
6 fit there?

7 A. It would. It would -- it's an entry level
8 attorney position.

9 Q. Okay. And what were your responsibilities as
10 an entry level lawyer in the general counsel division
11 just generally?

12 A. I was assigned tasks involving advice and
13 counsel to other agen- -- other divisions within the
14 agency and my direct supervisors.

15 Q. Who did you report to?

16 A. At the time it was the division chief, Amanda
17 Crawford.

18 Q. Did anyone report to you?

19 A. No, sir.

20 Q. Do you remember what your salary was?

21 A. My first salary, I think it was approximately
22 \$70,000 a year.

23 Q. All right. Why did you leave the position of
24 a -- of an entry level lawyer in the general counsel
25 division?

1 A. I was promoted to be a deputy general counsel
2 within the division based on my performance within my
3 capacity as an assistant general counsel.

4 Q. All right. When were you promoted to deputy
5 general counsel?

6 A. I -- it was approximately September of 2016.

7 Q. All right. And what were your
8 responsibilities in that position?

9 A. I assisted the division chief with the
10 management of the general counsel division while also
11 continuing to provide advice and counsel within the
12 agency to different divisions of the Attorney General's
13 Office.

14 Q. All right. Did anybody report to you in that
15 position?

16 A. Yes. I believe at the time there were four
17 different attorneys and three professional staff.

18 Q. And what was your salary as deputy general
19 counsel?

20 A. It was approximately \$90,000.

21 Q. And why did you leave that position?

22 A. I was promoted to the general counsel position
23 as the division chief of the general counsel division.

24 Q. All right. When were you promoted to division
25 chief or general counsel?

1 A. I think it was approximately May of 2018.

2 Q. And I think I'm going to use the title general
3 counsel for that role, if that works for you.

4 A. Yes, sir.

5 Q. What were your responsibilities as general
6 counsel?

7 A. I oversaw the management of the general
8 counsel division. I oversaw four different attorneys
9 and one professional staff and assisted executive staff
10 in providing advice and counsel across the agency, as
11 well as representing the agency in hearings before
12 other officials, such as the Legislature.

13 Q. All right. What was your salary as general
14 counsel?

15 A. It was approximately \$120,000 a year.

16 Q. And why did you leave that position?

17 A. I was promoted to the position of deputy
18 attorney general for legal counsel.

19 Q. When was your promotion to deputy attorney
20 general for legal counsel?

21 A. It was effective April of 2020.

22 Q. All right. And that's the position from which
23 you were terminated last November?

24 A. Yes, sir.

25 Q. All right. Before we talk about that position

1 and your performance of that job in a little more
2 detail, let me ask you this. In the nearly five years
3 that you held the positions of line level lawyer and
4 then deputy general counsel and then general counsel,
5 was your job performance ever formally evaluated?

6 A. I received at least one performance evaluation
7 when I was an assistant general counsel, the first
8 position that I held, and it was favorable.

9 MR. HELFAND: Objection;
10 nonresponsiveness before "favorable," Your Honor. The
11 question was simply whether he was evaluated.

12 THE COURT: I'm going to overrule that.
13 That's more a form objection, and we'll keep going.

14 Q. (BY MR. KNIGHT) All right. You volunteered
15 for us that it was favorable. Was your job performance
16 criticized in any way?

17 A. No.

18 MR. HELFAND: Objection, Your Honor;
19 relevance and calls for hearsay.

20 THE COURT: Overruled.

21 Q. (BY MR. KNIGHT) You may answer, Mr. Vassar.

22 A. No, sir, it was not.

23 Q. All right. In the five years or so that you
24 held those first three positions in the Attorney
25 General's Office, were you ever placed on investigative

1 leave?

2 MR. HELFAND: Objection; relevance.

3 THE COURT: Overruled.

4 A. No, sir.

5 Q. (BY MR. KNIGHT) Were you ever placed on any
6 other kind of leave?

7 MR. HELFAND: Same objection.

8 THE COURT: Overruled.

9 A. Yes. In my capacity as the general counsel --

10 MR. HELFAND: Objection; nonresponsive
11 after yes.

12 MR. KNIGHT: Your Honor, we're going to
13 be here a long time.

14 THE COURT: Overruled.

15 MR. HELFAND: We're not going to be here
16 a long time, Judge, if the questions and the answers
17 comport with the rules. And I'm not familiar with the
18 long time objection.

19 Q. (BY MR. KNIGHT) You may answer, Mr. Vassar.

20 A. Yes. In my capacity as the general counsel, I
21 received 32 hours of compensatory leave in recognition
22 of outstanding performance within that role.

23 MR. KNIGHT: Your Honor, may I try the
24 share screen function?

25 THE COURT: You may. It's working.

1 MR. KNIGHT: All right.

2 THE COURT: So you may. We'll see if you
3 can.

4 MR. KNIGHT: Right. Can you see what we
5 have marked as Plaintiffs' Exhibit 1?

6 THE COURT: Not yet.

7 MR. KNIGHT: Really? Hang on.

8 THE COURT: Yeah. Sometimes -- I will
9 tell you, if you haven't done this a whole lot,
10 sometimes working with the exhibits out of Box results
11 in a long delay. But we do not see Exhibit 1 yet. We
12 just see the Box list of exhibits.

13 MR. KNIGHT: All right. Let me see. Let
14 me -- sorry for this, Your Honor. Speaking of being
15 here for a long time, let me see if I can figure out
16 what I'm doing wrong. Okay.

17 THE COURT: And the sake -- for the sake
18 of time, if one of the others wants to show
19 Plaintiffs' 1, you may, if you want to assist -- if
20 somebody else -- since their functions were working. I
21 can also do it in a pinch as well. Oh, look. There's
22 Mr. Soltero.

23 MR. KNIGHT: Look at you.

24 THE COURT: But we're still at the same
25 place, so let's see.

1 MR. TURNER: Y'all might try opening the
2 exhibit before you share your screen.

3 MR. KNIGHT: Yeah, I thought I had it
4 open. Carlos, are you still working on this or not?

5 MR. HELFAND: Are we looking at the
6 exhibit, Your Honor, because all I'm seeing is -- it
7 looks like something -- a frozen screen.

8 THE COURT: Yeah. It's -- we're not
9 looking at the exhibit. You are correct.

10 MR. HELFAND: Okay.

11 THE COURT: Thank you.

12 MR. HELFAND: I just didn't want to miss
13 anything.

14 THE COURT: Okay. There we go.

15 MR. KNIGHT: All right. So Carlos has
16 the screen?

17 MR. SOLTERO: Yes, sir.

18 MR. KNIGHT: Believe it or not, I
19 practiced this and it worked flawlessly before, so I
20 apologize.

21 MR. SOLTERO: Mr. Knight, do you want to
22 tell me where -- which -- where to scroll down to?

23 Q. (BY MR. KNIGHT) Well, let me just ask the
24 witness, do you recognize this document?

25 A. I do.

1 Q. Can you identify it for the Court?

2 A. It's the personnel action form that was
3 completed for my promotion from deputy general counsel
4 to general counsel in May of 2018.

5 Q. Okay.

6 MR. KNIGHT: And, Mr. Soltero, can we
7 look at Page 2?

8 MR. HELFAND: I just want to point out,
9 somebody might want to redact some of the personal
10 information that's being displayed, if it's thrown up
11 on YouTube, Your Honor.

12 Q. (BY MR. KNIGHT) Does this refer to the
13 performance-based administrative leave that you
14 testified to?

15 A. Yes.

16 Q. All right. And I'm going to put you on the
17 stop.

18 MR. KNIGHT: Well, first of all,
19 Your Honor, I'd like to offer Plaintiffs' Exhibit 1
20 into evidence.

21 MR. HELFAND: No objection, Your Honor.

22 THE COURT: 1 is admitted.

23 *(Plaintiffs' Exhibit 1 admitted.)*

24 MR. HELFAND: Well, again, I think it
25 needs to be redacted to comport with the rules and for

1 Mr. Vassar's benefit.

2 MR. KNIGHT: The --

3 MR. SOLTERO: We can do that, Your Honor.

4 THE COURT: Okay. If you want to -- if
5 you have a redacted exhibit that you'll replace with
6 this and you work on it with Ms. Racanelli, because she
7 controls the exhibits, I have no problem with that.
8 And it sounds like Mr. Helfand would have no problem
9 with that either. So for now we've admitted Exhibit 1,
10 but if we need to withdraw this Exhibit 1 and admit
11 another Exhibit 1 to comport with redaction for
12 personal information, we will do so.

13 Q. (BY MR. KNIGHT) All right. Mr. Vassar, let
14 me put you on the spot and ask you to read for all of
15 our benefits what it says under the explanation
16 section.

17 A. It says: Over the last year, the General
18 Counsel Division has experienced transition and has at
19 times been quite short on resources. However, under
20 Ryan's leadership, the division continued to meet all
21 their deadlines, satisfy all their commitments, and
22 serve without hesitation and with excellence. Ryan is
23 the very essence of dependability, and he is a true
24 asset to the OAG.

25 Q. Thank you.

1 MR. KNIGHT: Mr. Soltero, we can stop the
2 sharing now.

3 Q. (BY MR. KNIGHT) You told us that you were
4 promoted to deputy attorney general for legal counsel
5 in the spring of 2020. How exactly did you get that
6 promotion?

7 A. I was invited to a conference call with the
8 Attorney General, first assistant at the time, Jeff
9 Mateer, and deputy attorney general for legal counsel,
10 Ryan Bangert.

11 Q. And who offered you the position?

12 A. The Attorney General offered me the position
13 of deputy attorney general for legal counsel.

14 Q. What were your responsibilities in this -- in
15 this position?

16 A. I oversaw five different divisions: the
17 general counsel division, the open records division,
18 the public finance division, the opinion committee, and
19 the legal technical solutions division. Those
20 divisions consisted of approximately 100 full-time
21 employees.

22 Q. All right. And who did you report to?

23 A. At the time, Jeff Mateer as the first
24 assistant attorney general.

25 Q. And you may have kind of already answered

1 this, but how many people reported to you in that
2 position?

3 A. It was approximately 100 -- 100 different
4 people. I believe it consisted of 60 attorneys and
5 approximately 30 professional staff.

6 Q. Mr. Mateer told us a little while ago there
7 were approximately 800 lawyers in the Attorney
8 General's Office. Does that sound about right to you?

9 A. I believe that's -- that's accurate.

10 Q. How many of those 800 lawyers served at the
11 level of deputy attorney general?

12 A. Approximately 12.

13 Q. Of the 12 deputy attorneys general, were any
14 of them younger than you?

15 A. I'm not aware of any that were.

16 Q. Did any of them rise from the level of line
17 level lawyer to deputy in five years or less?

18 A. I'm not aware of any that had.

19 Q. What was your salary as deputy attorney
20 general?

21 A. It was approximately \$200,000 a year.

22 Q. Do you know how that compares to the Attorney
23 General's salary?

24 A. I believe the Attorney General is capped at
25 150,000 -- or approximately 150,000 a year.

1 Q. All right. Prior to October of 2020, was your
2 job performance as deputy attorney general ever
3 evaluated?

4 A. It was never formally evaluated, but my
5 work --

6 MR. HELFAND: Objection; nonresponsive
7 after "never formally evaluated."

8 MR. KNIGHT: I didn't ask him if he was
9 formally evaluated, Your Honor. He's just explaining
10 his answer.

11 MR. HELFAND: Well, Judge, he can't just
12 narratively answer a question. The question was: Were
13 you evaluated? His answer was: It was not evaluated.

14 MR. KNIGHT: That wasn't his answer.

15 THE COURT: At this point just --
16 Mr. Knight, why don't you ask a different question now?

17 MR. KNIGHT: All right.

18 Q. (BY MR. KNIGHT) We will break this down into
19 a couple of questions, Mr. Vassar. Let me ask the
20 question that you probably have already answered. Was
21 your performance ever formally evaluated?

22 A. No, not in my capacity as deputy for
23 attorney -- deputy attorney general for legal counsel.

24 Q. So now tell me, yes or no, was it ever
25 informally evaluated?

1 MR. HELFAND: Objection, Your Honor.
2 That assumes facts not in evidence, which is what does
3 "informally evaluated" mean?

4 THE COURT: Overruled.

5 A. Yes.

6 Q. (BY MR. KNIGHT) And how -- how did -- was
7 your work informally evaluated?

8 A. My work product was tweeted all over the
9 social media accounts of the Attorney General and the
10 Office of the Attorney General and adopted as the
11 position statement of the agency in various cases.

12 Q. Prior to October of 2020, was your job
13 performance as deputy attorney general ever criticized?

14 MR. HELFAND: Objection; calls for
15 speculation.

16 THE COURT: I think you might need to add
17 one phrase on that, Mr. Knight, to make it not call for
18 speculation, so I'll sustain the question as -- sustain
19 the objection to the question that was asked.

20 Q. (BY MR. KNIGHT) Prior to October of 2020, did
21 anybody in the Attorney General's Office ever provide
22 you with a critical review or report of your work
23 product?

24 MR. HELFAND: Objection to vague as --
25 vague as to critical review as to work product or

1 performance.

2 THE COURT: Overruled.

3 A. No.

4 Q. (BY MR. KNIGHT) Prior to October of 2020,
5 were you ever reprimanded or disciplined?

6 A. No, sir.

7 Q. Prior to October of 2020, were you ever placed
8 on investigative leave?

9 A. No, sir.

10 Q. Or any other kind of leave other than the
11 performance-based award that we've already talked
12 about?

13 A. No, sir.

14 Q. And just for the formal record, let me hear it
15 from you. Why did you leave the position of deputy
16 attorney general for legal counsel?

17 A. I was terminated.

18 Q. All right. So now let's shift our focus to
19 the specific events that brought us together here by
20 Zoom today. That last series of questions I asked you
21 all began with the phrase "prior to October of 2020."
22 What changed on approximately that date for you in your
23 career?

24 A. Around that time, I and other members of the
25 Attorney General senior -- senior staff had concluded

1 that the Office of the Attorney General was being used
2 for the benefit of Mr. Nate Paul in a manner that was
3 likely criminal. We reported those conclusions to the
4 Federal Bureau of Investigations and notified the
5 Office of the Attorney General that we had made that
6 report.

7 Q. All right. And we're going to talk about that
8 report in a little while. But you said you and other
9 members of General Paxton's senior staff. How many
10 members of that staff?

11 A. Seven of us met with the FBI, and one other
12 member met separately with the Texas Rangers.

13 Q. Did each of you have personal knowledge of
14 every detail that the group ultimately reported?

15 MR. HELFAND: Objection. The witness can
16 testify for himself, Your Honor, but he'd be
17 speculating as to what other people had personal
18 knowledge of, or it calls for hearsay.

19 THE COURT: Overruled.

20 MR. HELFAND: May I take the witness on
21 voir dire on this issue, Your Honor?

22 THE COURT: Not at this time. I
23 understand the point of your objection, and I'm going
24 to see how he answers it. And it may be that the next
25 question asked you have an objection to that I'll

1 sustain, but at this time I'm going to let him answer
2 the question that has been asked.

3 MR. HELFAND: Thank you, Judge.

4 A. No.

5 Q. (BY MR. KNIGHT) All right. Let's -- let me
6 ask you this: Were you present when other members of
7 that group of eight shared the details of which they
8 had personal knowledge that led to the conclusion
9 you've already told us about?

10 A. Yes.

11 Q. All right. Can you give us -- to frame the
12 discussion that we're about to have, can you give us
13 kinds of a high-level timeline of the events that led
14 to your conclusion that the Office of Attorney General
15 was being -- was involved in something illegal
16 regarding Nate Paul?

17 MR. HELFAND: Your Honor, I just need to
18 raise an objection, just to be clear, because
19 Mr. Vassar has sometimes included information that's
20 not in the question. If the question is a timeline, I
21 have no objection. If it goes to the substance of
22 discussions, I have objections both to hearsay as well
23 as privilege.

24 THE COURT: Let's start with the question
25 as asked and answer with regard to a timeline.

1 Q. (BY MR. KNIGHT) Do you think you can do that?

2 A. Yes, sir.

3 Q. All right. Let's start going through it and
4 see how we go.

5 A. All right. It all started in August of 2019.
6 During that time, the Federal Bureau of Investigation
7 had executed a series of search warrants on Mr. Paul's
8 home and business properties. After that, the Office
9 of the Attorney General became involved in at least
10 five different Nate Paul-related matters that we
11 eventually connected. Those matters included a
12 November 2019 --

13 MR. HELFAND: Your Honor, I object. This
14 is beyond the question of a timeline. This is a
15 substantive discussion of information that Mr. Vassar
16 learned in his role as an employee of the Office of the
17 Attorney General and, therefore, violates the
18 deliberative process privilege, the attorney-client
19 privilege, and the work product privilege.

20 THE COURT: Overruled for now. I do want
21 the witness -- and I caution you to keep it pretty high
22 level at this point in terms of a timeline, because I
23 do think that would be helpful for the Court. But I
24 don't want you to -- to the extent possible,
25 Mr. Vassar, not yet, to start connecting too much or

1 digging too much into the substance of all of this.
2 Stay with the timeline for now.

3 MR. KNIGHT: And, Your Honor, to maybe
4 help steer this, because this really is important for
5 the context of what we're about to do. What I'd like
6 to -- he said that they eventually connected five Nate
7 Paul-related events. What I really just want to do is
8 put a date and a label on each of those five events so
9 that we can start peeling them back.

10 THE COURT: And I know that Mr. Helfand
11 is going to object on relevance on this and a bunch of
12 other things. But I'm going to overrule that,
13 Mr. Helfand, because I would like to know the timeline
14 as well and the events involving Mr. Paul, which I
15 don't think are privileged. I really don't, because
16 most of them are either at the Travis County Courthouse
17 and therefore something the Court can take judicial
18 notice of or published in a newspaper and therefore
19 something the Court can take judicial notice of. And
20 so I'm going to allow this in context for the Court
21 because I think it would save us some time.

22 MR. HELFAND: And I just want to be
23 clear, Judge, so if it comes up later, I -- Your Honor
24 understands my objections, you've overruled my
25 objections, but I just -- again, I think the answer to

1 this is simply this Nate Paul incident is something
2 that I learned about on such and such a date, not the
3 substance of how I connected them, which I think does
4 get to privilege.

5 MR. KNIGHT: That's all we want to do to
6 start.

7 THE COURT: Okay. I'm overruling your
8 objection for now, Mr. Helfand. I know you want a
9 ruling on the record, and so I'm giving you that
10 ruling.

11 MR. HELFAND: Thank you, Your Honor.

12 THE COURT: And we'll proceed from there.

13 MR. HELFAND: Can I ask one other
14 question, Judge? Do you know how late we're going to
15 go. I just have to make some arrangements.

16 THE COURT: I don't really plan on going
17 that much past 5:00. I think we fit in the usual five
18 and a half, six hours. It's usually what we do a day.
19 And so if we need to, to get to a good stopping point,
20 but not too much longer.

21 MR. HELFAND: Thank you, Judge. I
22 appreciate that.

23 MR. KNIGHT: And honestly, if we get this
24 timeline established in the next couple of minutes,
25 that might be a very logical time to stop, because then

1 I want to start trying to drill down on each event, and
2 we may be going very iteratively.

3 THE COURT: Okay. I agree. Let's try
4 and get the timeline done and then we may break for the
5 day.

6 Q. (BY MR. KNIGHT) All right. So Mr. --

7 THE COURT: All right. Let's ask another
8 question now because I'm confused as to what the
9 question was.

10 MR. KNIGHT: That's what I was just going
11 to suggest.

12 Q. (BY MR. KNIGHT) Let me see if I can bring us
13 back to where I believe we are all trying to be.
14 You've already testified that after the August 19 raid
15 on Nate Paul properties the Attorney General's Office
16 became involved in five Nate Paul-related events. And
17 what I'd like you to do is just give us a date and a,
18 you know, one-phrase description of those five events,
19 if you can.

20 A. In November of 2019, lawyers for Nate Paul
21 submitted an open records request to the Texas State
22 Securities Board.

23 Q. Okay. That's one.

24 A. In April 2020, lawyers for Nate Paul submitted
25 an open records request to the Department of Public

1 Safety.

2 Q. Two.

3 A. In the summer of 2020, lawyers for Nate Paul
4 had sued a charity named The Mitte Foundation.

5 Q. That's three.

6 A. In August 2020, the AG's office issued a -- an
7 opinion involving whether foreclosure sales could be
8 allowed to proceed under COVID restrictions.

9 Q. That's four.

10 A. And in September of 2020 was the outside
11 counsel contract involving Mr. Brandon Cammack.

12 Q. Of those five issues that you said the
13 Attorney General's Office got involved in, how many
14 were you personally involved in?

15 A. Three.

16 Q. And which three were those?

17 A. The April 2020 open records request to the
18 Department of Public Safety, the August 2020 AG opinion
19 involving foreclosure sales, and the September 2020
20 outside counsel contract involving Mr. Cammack.

21 MR. KNIGHT: Your Honor, I can start on
22 those three topics now or we can pick up there in the
23 morning.

24 THE COURT: I think let's pick up there
25 in the morning.

1 MR. KNIGHT: I think it's a logical
2 place.

3 THE COURT: That's the best break of our
4 time.

5 MR. HELFAND: What time did you want
6 to --

7 THE COURT: I think --

8 MR. HELFAND: -- start? I'm sorry.

9 THE COURT: Hold on. Let's start
10 again -- the schedule worked pretty well. We'll start
11 again at 10:00 a.m. Just if you'll be in kind of the
12 Zoom and ready to go a little bit before 10:00, and we
13 will get up and running at that time.

14 I obviously need to read -- I know I
15 stated earlier on the record from Mr. Braun I hadn't
16 received anything yet, but I did receive it as we
17 proceeded on this afternoon. So I'm going to look at
18 what was filed to -- I don't know if it was filed in
19 the Court of Appeals. I guess it was filed in the
20 Third Court of Appeals. I haven't even had a chance to
21 review it. Whatever that motion is -- whatever that
22 brief is, I need to review that. I still have the 91a
23 motion under advisement.

24 But at this time, we will proceed
25 tomorrow morning at 10:00 a.m. with Mr. Vassar unless

1 the lawyers for some reason need to call somebody by
2 subpoena out of order. Do we know?

3 MR. SOLTERO: We don't anticipate that,
4 Your Honor. We'll be starting with Mr. Vassar.

5 THE COURT: All right. Then we will
6 start tomorrow with Mr. Vassar at 10:00 a.m., and then
7 I assume we will also hear from Mr. Maxwell in the day
8 tomorrow.

9 MR. SOLTERO: Yes, Your Honor.

10 THE COURT: There are two other witnesses
11 to expect as well?

12 MR. SOLTERO: Well, we've paired things
13 down as much as we can to get what we need but not be
14 repetitive, et cetera. And so we anticipate the other
15 witness will be Ray Chester.

16 THE COURT: Okay. And then, Mr. Helfand,
17 I am assuming you don't have any witnesses because of
18 many of your objections, but perhaps I'm wrong. But I
19 just want to know what to expect tomorrow and if your
20 side has any witnesses.

21 MR. HELFAND: Your Honor, in light of the
22 fact that we're currently proceeding in violation of
23 51.014(b) of the Civil Practice and Remedies Code, I
24 have no intention of calling any witnesses. I -- due
25 process wouldn't allow me to do so at this point

1 anyway.

2 THE COURT: All right. Thank you. And I
3 will see everybody tomorrow morning at 10:00 a.m. You
4 are excused for the evening.

5 MR. HELFAND: Thank you, Your Honor.
6 Have a good evening.

7 *(Court adjourned.)*

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REPORTER'S CERTIFICATE

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STATE OF TEXAS)
)
COUNTY OF TRAVIS)

I, Alicia Racanelli, Official Court Reporter in and for the 201st District Court of Travis County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, offered in evidence by the respective parties.

WITNESS MY OFFICIAL HAND this the 11th day of March, 2021.

 /s/ Alicia Racanelli
Alicia Racanelli, Texas CSR No. 3591
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