Patsy Spaw

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CLERK OF THE COURT

THE SENATE OF THE STATE OF TEXAS
SITTING AS A HIGH COURT OF IMPEACHMENT

IN THE MATTER OF	§
WARREN KENNETH	§
PAXTON, JR.	§

HOUSE MANAGERS' RESPONSE TO PAXTON'S MOTION TO DISMISS ARTICLE VI
(Termination Of Whistleblowers)

To the Honorable Dan Patrick, President of the Court of Impeachment:

Warren Kenneth Paxton Jr. ("Paxton") filed a motion to dismiss Impeachment Article VI (Whistleblower Retaliation) ("Motion"). Below is the Response to the Motion by the Texas House of Representatives Board of House Managers ("House Managers").

INTRODUCTION

Article VI contends Paxton disregarded the duties of his office by retaliating against the Whistleblowers in violation of Texas law. Specifically, Article VI alleges that Paxton did so by firing the Whistleblowers for making good faith reports of his unlawful actions to law enforcement authorities; by firing them without good cause or due process and in retaliation for reporting his illegal acts and improper conduct; and by engaging in a public and private smear campaign to destroy their professional relationships or prejudice their future employment.[1]

Contrary to his claims otherwise, it is illegal for Paxton to retaliate against employees of the Office of Attorney General ("OAG") who report his misconduct (the "Whistleblowers"). Both the Texas Whistleblower Act ("Whistleblower Act" or "Act")[2] and the United States Constitution[3] forbid it. And for good reason. Whistleblower protections are designed to (1) ensure lawful conduct by those who direct and conduct State business (like Paxton); and (2) protect public employees who promote that purpose by blowing the whistle on unlawful conduct (like the

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[1] Paxton Articles of Impeachment, Article VI.

[2] *See* TEX. GOV'T CODE § 554.002(a).

[3] *See* U.S. CONST. amends. I (protecting free speech for public employees like the Whistleblowers who speak out on matters of public concern); XIV (protecting due process rights of public employees like the Whistleblowers whose employment is terminated under stigmatizing circumstances).

Whistleblowers).[4] Paxton's position that he can simply do whatever he wants to these public employees as an elected official violates both core whistleblower principles—and is legally and morally wrong. The Motion must be denied.

ARGUMENTS & AUTHORITIES

I. Paxton's Motion to Dismiss improperly attacks the House's decision to impeach him.

The Texas Constitution Article XV, § 1 grants the House sole authority to charge a person and prefer articles of impeachment to the Senate.[5] It is the House's role to determine "whether one of the people's servants has done an official wrong worthy of impeachment," and to decide "whether or not there is sufficient ground to justify the presentment of charges" to the Senate. Misconduct can support impeachment whether or not it constitutes an indictable crime.[6] Impeachment is not meant to punish the wrongdoer. Rather, it seeks to protect the State and its citizens against conduct that undermines the integrity of the office, disregards constitutional duties and oaths of office, abuses government process and power, and adversely impacts the system of government.[7] Article VI alleges precisely such misconduct.

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[4] *See* *Office of the Attorney Gen. of Tex. v. Brickman*, 636 S.W.3d 659, 662–63 (Tex. App.—Austin 2021, pet. abated).

[5] TEX. CONST. art. XV, § 1 ("The power of impeachment shall be vested in the House of Representatives."); *see also* Record of Proceedings of the High Court of Impeachment on the Trial of O.P. Carrillo, Judge, 229th District Court, at 239.

[6] *See* RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS xii, 70-71 (1974) (noting that history shows that "indictable crimes are not a prerequisite to impeachment."); CHARLES L. BLACK, JR. & PHILLIP BOBBITT, IMPEACHMENT: A HANDBOOK, NEW EDITION 35 (2018) (concluding that based on the language of the U.S. Constitution, impeachable offenses should include "those offenses which are rather obviously wrong, whether or not 'criminal,' and which so seriously threaten the order of political society as to make pestilent and dangerous the continuance in power their perpetrator.").

[7] Report of the Texas House Select Committee on Impeachment at 8, July 23, 1975.

As the Senate recognized in Senate Rule 13(b), the issues before the Senate are whether "the allegation in each article presented to you has been proven beyond a reasonable doubt, and if so, shall the article of impeachment be sustained which would result in removal of office."[8] Accordingly, Paxton has no basis for asking the Senate to summarily dismiss the House's finding that (1) sufficient evidence supported preferring the Articles of Impeachment to the Senate for trial, and (2) the conduct rose to the level of impeachable offense such that the Senate should proceed to try the Articles preferred.[9] Regardless, Paxton's Motion lacks merit.

II. Paxton has already lost the argument that the Whistleblower Act does not apply to him.

The Texas Attorney General's authority to appoint and remove OAG employees is not absolute. While the at-will employment doctrine generally permits either an employer or employee to terminate employment for any reason, the Whistleblower Act is a well-established exception. The Act specifically prohibits governmental entities from retaliating against public employees for reporting violations of law as follows:

> A state or local governmental entity may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority.[10]

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[8] Senate Rule 13(b).

[9] The House Managers have further addressed why the following complaints are improper: (1) the Articles are allegedly vague, *see* House Managers' Response to Paxton's Motion to Quash; (2) the Articles somehow lack evidentiary support, *see* House Managers' Response to Paxton's No Evidence Motion for Summary Judgment; and (3) the Articles purportedly fail to allege an impeachable offense, *see* House Managers' Response to Paxton's Request for Bill of Particulars.

[10] TEX. GOV'T CODE ANN. § 554.002(a).

In other words, a governmental employer may terminate an at-will public employee for any reason, *except* for an *unlawful* reason, such as to retaliate for blowing the whistle on unlawful conduct.[11] Without any authority, Paxton declares that this law does not apply to him as an elected official. Paxton is not, however, above the law.

First, the court in the Whistleblower case has already rejected Paxton's flawed interpretation of the Act:

> *The alleged misconduct was Paxton's own behavior or acts by others at the OAG at his direction—acts taken and directives given in his role as the head of the agency*. In other words, [the Whistleblowers] alleged that in Paxton's official leadership of the agency, he violated the law and caused the agency to do so as well. Given that (1) an agency cannot act on its own and (2) Paxton has the ultimate authority to decide how the OAG acts, *his official actions and directives, which [the Whistleblowers] allege were motivated by greed and graft and which guided the actions taken by the OAG and its agents, can be viewed as the decisions of the OAG itself.*[12]

This decision is binding on Paxton.[13]

Second, the court in *Brickman* got it right. Nothing in the broad language of the Act exempts an elected official from the Act's anti-retaliation provisions.[14] Nor is there any such

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[11] *See* Brickman, 636 S.W.3d at 679 ("The Texas Whistleblower Act provides an exception to that general [at-will employment] rule—a government employer may not fire an employee who makes a good-faith report of illegal conduct because he made the report.").

[12] *See* id. at 673 (emphasis added).

[13] For example, the doctrine of collateral estoppel prevents a party or its privy from relitigating an issue previously litigated and lost. *See* *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326, 332–33 (1979). In *Brickman*, OAG vigorously litigated and lost the same misguided interpretation of the Act Paxton promotes here. *See generally* *Brickman*, 636 S.W.3d at 670–75. When the case settled at mediation, OAG agreed that it would not seek to have the court of appeal's decision in *Brickman* withdrawn. Exhibit 92, § 4. Thus, *Brickman* remains binding on OAG and Paxton.

[14] *See* TEX. GOV'T CODE § 554.002(a).

exemption in the definitions of the terms "state governmental entity"[15] or "public employee."[16] Thus, the Act's plain language supports its application to Paxton, which is entirely consistent with the cases interpreting the Act where an elected official's misconduct is involved.[17]

Third, Paxton's interpretation violates the general rule that the Act must be broadly and liberally construed to meet its purpose.[18] The House Managers' interpretation furthers the Act's purpose; Paxton's defeats it. Thus, his flawed and self-serving interpretation cannot stand.

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[15] TEX. GOV'T CODE § 554.001(5)(A) ("state governmental entity" includes an agency of the state). Paxton claims this definition is stated in "corporate terms." Yet, at the same time, he ignores the well-established corporate liability principle that the acts of a vice principal are deemed to be the acts of the corporation itself. *See* *Bennett v. Reynolds*, 315 S.W.3d 867, 884 (Tex. 2010) (recognizing that the highest corporate officer and president of the corporation was "indisputably" a vice principal of the corporation and that the acts of the vice principal are the acts of the corporation).

[16] TEX. GOV'T CODE § 554.001(4) (defining "public employee" "an employee *or* appointed officer … who is paid to perform services for a state or local governmental entity") (emphasis added). This means that a public employee *or* an appointed officer of the state governmental entity can engage in conduct subject to the Act. While he is not an appointed officer, Paxton is paid by and works full-time for the State and is, therefore, a "public employee" under the Act.

[17] *See* *Brickman*, 636 S.W.3d at 673; *see also, e.g.*, *Tarrant County v. Bivins*, 936 S.W.2d 419, 422 (Tex. App.—Fort Worth 1996, no writ) (holding that the unlawful actions of a sheriff, an elected constitutional officer, constituted acts of the county itself under the Whistleblower Act).

[18] *See* *Burch v. City of San Antonio*, 518 S.W.2d 540, 544 (Tex. 1975) (stating general rule that a curative or remedial statute must be given the most comprehensive reading possible); *Brickman*, 636 S.W.3d at 664–65 (applying this general rule to the Texas Whistleblower Act); *see also* *Univ. of Houston v. Barth*, 178 S.W.3d 157, 162 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (holding that because the Whistleblower Act is remedial, the Act's provisions should be broadly construed to effectuate its legislative purpose—"to enhance openness in government and compel the government's compliance with the law by protecting those who inform authorities of wrongdoing[]").

Fourth, Paxton retaliated against the Whistleblowers so quickly after they went to law enforcement that the Act presumes that his acts were in unlawful retaliation for their reports.[19] Therefore, he needed to show "good cause" for his actions to rebut that presumption.[20] Which is precisely why Paxton orchestrated such an extensive smear campaign to discredit the Whistleblowers in the first place.[21]

Fifth, the fact that OAG is liable for Paxton's actions under the Act, rather than Paxton individually, does not mean that Paxton's actions complied with the Act. In this respect, the Whistleblower Act is no different from other employment laws holding employers responsible for the unlawful acts of employees who may not themselves be sued individually.[22]

Sixth, and finally, the only authority Paxton cites in support of his interpretation is a Letter of Amicus Curiae from Judge Hance urging the Texas Supreme Court to grant OAG's petition for review in *Brickman*.[23] The House Managers agree with Judge Hance that "words matter" in the

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[19] *See* TEX. GOV'T CODE § 554.004(a) (stating that if the adverse employment action happens to the whistleblower within ninety (90) days of making the report, the action is presumed to be because of the report).

[20] *See id.* § 554.004(b) (stating that the governmental entity may have an affirmative defense if it can prove that it "would have taken the action against the employee that forms the basis of the suit based solely on information, observation, or evidence that is not related to the fact that the employee made a report protected under this chapter of a violation of law[]").

[21] *See* Exhibits 7, 7-A, 8, 8-A. *See also* Exhibit 127.

[22] *See, e.g.*, *Physio GP, Inc. v. Naifeh*, 306 S.W.3d 886, 887 (Tex. App.—Houston [14th Dist.] 2010, no pet. h.) (employer, not individual supervisors engaging in conduct, is responsible for the wrongful termination of an employee for refusing to commit an illegal act); *Winters v. Chubb & Son, Inc.*, 132 S.W.3d 568, 580 (Tex. App.—Houston [14th Dist.] 2004, no pet.) ("It is well established in Texas that an individual cannot be held personally liable under [Chapter 21 of the Texas Labor Code governing unlawful employment discrimination].").

[23] Paxton also cites another Amicus Curiae from Governor Greg Abbott in support of the petition for review; however, Governor Abbot merely urged the court with statewide jurisdiction to

statute. The problem for Paxton is that the words in the Whistleblower Act do not support his position. Nor do the cases interpreting it. In the end, Paxton's contempt for the law does not shield him from the law, and he must be held accountable.

III. Article VI does not misstate the law regarding Paxton's wrongful retaliation against the Whistleblowers.

Paxton contends the House Managers misstate Texas law and that he is free to retaliate against the Whistleblowers without consequence because Texas is an at-will employment state. Paxton is, once again, wrong. As stated above, retaliating against public employees for reporting violations of law is an exception to the general rule that employment is "at-will" in Texas. And this exception is enshrined not only in Texas' whistleblower law, but also the United States Constitution.

For example, the First Amendment protects a public employee's right, in circumstances like these, to speak as a citizen on matters of public concern, even if that public employee is speaking about a governmental employer.[24] Clearly, speech regarding the corruption or unlawful actions of a public official is a matter of public concern.[25] In fact, "[t]he importance of public employee speech *is especially evident in the context of . . . public corruption*" since "speech by

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consider the case because it involved an official elected statewide. This letter lends no support to Paxton's interpretation of the Act.

[24] *See* U.S. CONST. amend. I; *Lane v. Franks*, 573 U.S. 228, 231 (2014) (holding that the First Amendment protected speech of a public employee who spoke on matter of public concern even if that speech concerned a public employer); *Anderson v. Valdez*, 845 F.3d 580, 597 (5th Cir. 2016) (holding that a public employee's statements or complaints on a matter of public concern that are made outside the duties of employment constitute speech made as a citizen and protected by the First Amendment).

[25] *Valdez*, 845 F.3d at 599 ("Speech which discloses any evidence of corruption, impropriety, or other malfeasance on the part of . . . officials, in terms of content, clearly concerns matters of public import.").

public employees regarding information learned through their employment" is the "very kind of speech necessary to" reveal bad acts by public officials.[26] This is what the Whistleblowers did when they spoke to law enforcement about Paxton's misdeeds in public office. Thus, Paxton was not free to trample on the Whistleblowers' constitutional rights by firing them for doing so.

Similarly, under the Fourteenth Amendment, the Whistleblowers had a right to due process because "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," that person's liberty interest is on the line, meaning that "notice and an opportunity to be heard are *essential*."[27] Here, Paxton made numerous and knowingly false statements in his effort to discredit the Whistleblowers. He called them "rogue employees."[28] He accused them of making false allegations to law enforcement.[29] He stated that he was hiring an "outside independent prosecutor" to investigate the Whistleblowers (when he knew he had no authority to do so).[30] And the OAG final report also accused several of the Whistleblowers of illegal conduct.[31] Therefore, when Paxton deliberately set out to destroy the Whistleblowers' reputation and future career prospects to cover up his misdeeds, the Whistleblowers had a due process right to clear their good names. They were, of course, denied that right.

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[26] *Franks*, 573 U.S. at 240–41 (emphasis added).

[27] *See* U.S. CONST. amend. XIV; *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 573 (1972) (emphasis added and internal quotations omitted).

[28] Exhibits 118, 119, 121, 122, 123.

[29] *Id*.

[30] *Id*.

[31] Exhibit 108.

Importantly, a governmental official is only shielded from individual liability if "their actions could reasonably have been thought to be consistent with the rights they are alleged to have violated."[32] As the top law enforcement officer in the state, there is no way Paxton reasonably believed his actions were consistent with the Whistleblowers' constitutional rights. "[N]umerous Supreme Court and Fifth Circuit decisions [give] … clear warning that when a public employee engages in speech outside of his employment duties, and the employee directs his speech externally rather than within the chain of command, the employer may not discipline the employee for engaging in the speech in question."[33] Also clear are the due process rights of public employees who have been unjustly stigmatized in the process of being fired.[34] Therefore, Paxton is not shielded from his numerous violations of the Whistleblowers' constitutional rights. [35]

CONCLUSION

Paxton's attempt to avoid Article VI by claiming he is above the law should be summarily rejected. Indeed, Paxton's feigned ignorance of the law only underscores the urgent need for this trial. For these reasons, the House Managers request that the Motion to Dismiss Art. VI be denied.

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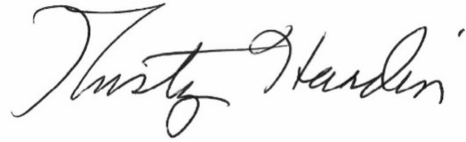
[32] *Good v. Curtis*, 601 F.3d 393, 400 (5th Cir. 2010) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)).

[33] *Hardesty v. Cochran*, 621 F. App'x 771, 780 (5th Cir. 2015) (citing *Cutler v. Stephen F. Austin State Univ*., 767 F.3d 462, 473 (5th Cir. 2014)). There also exists clear precedent that citizen speech can include information "related to or learned through public employment. *Franks*, 573 U.S. 228 at 236 (holding that protection of citizen speech "remains true when speech concerns information related to or learned through public employment").

[34] *See Roth*, 408 U.S. at 573.

[35] Paxton's continued claims that he does not have notice of the allegations against him are without merit. As set forth in the House Managers' Response to the Motion to Quash and the Request for Bill of Particulars, the Articles and the hearings in the House provide him more than sufficient notice. Moreover, Paxton cannot ask the Senate to review how the House chose to prefer the Articles of Impeachment.

Respectfully submitted,



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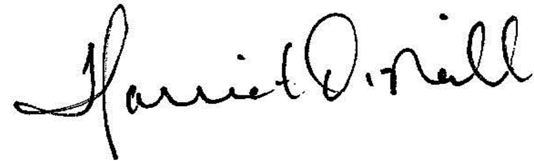

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Certificate Of Service

I certify that a true and correct copy of the foregoing was served on the following counsel for Paxton on August 15, 2023:

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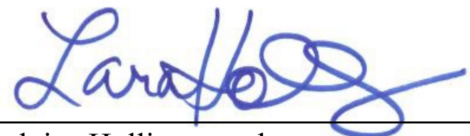

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