AUG 15 2023

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 VIII

(Whistleblower Settlement)

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

Warren Kenneth Paxton, Jr.'s ("Paxton's") Motion to Dismiss Impeachment Article VIII ("the Motion") related to the Whistleblower Settlement claims it is "inconceivable" that the House impeached him for entering into a "routine" settlement agreement in an "ordinary" litigation. But this settlement was hardly run-of-the-mill. Paxton fired hand-picked, high-level senior staff employees (the "Whistleblowers") of the Office of Attorney General ("OAG") in blatant retaliation for their reporting of his misconduct to law enforcement. Paxton did not settle with the Whistleblowers to protect Texas. He settled to protect himself by preventing further *discovery* into his official misdeeds. After all, it is much easier on the campaign trail to combat allegations rather than facts, documents, and testimony proving the *truth* of those allegations. And, at the same time Paxton suppressed the truth of the Whistleblowers' allegations via settlement, he also used state funds to create and publish reports to discredit those allegations and mislead the public.[1] Paxton's Motion should be summarily denied.

INTRODUCTION

Article VIII contends Paxton misused his official powers by concealing his wrongful acts in connection with the Whistleblowers' complaints by entering into a settlement agreement with them (the "Settlement Agreement")[2] in the underlying lawsuit. The Settlement Agreement committed payment from public funds and stayed the Whistleblower litigation, thus suspending any discovery of damaging evidence against Paxton. Even worse, he used the OAG website as his

[1] *See* House Managers' Response to Lewis Brisbois Motion to Quash Subpoena.

[2] Exhibit 92.

personal mouthpiece to distribute his self-directed version of the facts, making it impossible for voters to make an informed decision when voting for attorney general. [3]

Paxton moves to dismiss Article VIII on the grounds that settling a lawsuit is not an impeachable offense and the Settlement Agreement served the best interests of the State. But the only best interests Paxton served were his own. By concealing the *evidence* that the Whistleblowers' complaints were *true*, while at the same time publishing his own one-sided version of the facts, Paxton protected himself from personal exposure for violating the Whistleblowers' constitutional rights.

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 the sole authority to charge a person and prefer articles of impeachment to the Senate.[4] 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.

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."[5] Accordingly, Paxton has no basis for asking the Senate to summarily dismiss the House's finding

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[3] Paxton Articles of Impeachment, Article VIII.

[4] 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.

[5] Senate Rule 13(b).

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.[6] Regardless, Paxton's Motion lacks merit.

II. Paxton's conduct in Article VIII is impeachable.

Paxton ignores that legally permissible acts are impeachable when performed with an improper purpose that results in a private benefit, whether to the officeholder or another. Misconduct can support impeachment whether or not it constitutes an indictable crime.[7] The Texas Supreme Court explained that "*the wrongs justifying impeachment need not be statutory offenses or common-law offenses, or even offenses against any positive law*."[8]

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.[9] The conduct alleged in Article VIII (settling the whistleblower complaints to

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[6] 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.

[7] *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.").

[8] *Ferguson v. Maddox*, 263 S.W. 888, 892 (Tex. 1924).

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

conceal his wrongful conduct) is precisely the type that the Framers were concerned about when they included impeachment in the Constitution:

> In framing the impeachment provisions, the concern of the framers was not limited to crimes of which private citizens and public officials could be equally guilty. Had that been their concern, impeachment might not have been necessary, as such offenses could be handled by the ordinary courts. What the framers seemed greatly concerned about during their discussion of impeachment was the abuse or betrayal of a public trust, offenses peculiar to public officials.… The debates reveal that the framers were heavily motivated in fashioning the impeachment provisions by the possibility of tyrannical, oppressive, corrupt and willful use of the power connected with a public office. Offenses of this character, involving as they do the highest officers of the country, required a special forum."[10]

The conduct alleged in Article VIII clearly rises to the level of impeachable offense and Paxton's attempts to explain it away cannot support the Senate summarily dismissing the Article.

III. The Settlement Agreement benefited Paxton at the expense of the public.

Paxton finds it "laughable" that he is accused of using the Settlement Agreement to conceal the Whistleblowers' complaints because those complaints were in public filings and subject to media attention. Paxton misses the point. Article VIII is not about Paxton trying to conceal the Whistleblower *complaints* from the public. Article VIII concerns Paxton's effort to conceal the *proof* from the public that those complaints were *true*.

This was Paxton's legal strategy from the beginning. An outline for the initial litigation plan expressly includes challenging the court's jurisdiction as the way "***to tie up discovery and litigation***."[11] And that is exactly what he did.

First, Paxton immediately asked the trial court to prevent the Whistleblowers from deposing himself, Brent Webster, Brandon Cammack, World Class Capital Group, LLC (Nate

[10] John D. Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1, 53 (1970).

[11] *See* Exhibit 90 at n.1.

Paul's company), and Laura Olsen (Paxton's mistress).[12] He based his request on the court's obligation to determine jurisdiction before proceeding with litigation and discovery.[13] At the same time, Paxton also sought protection from *any* discovery until the court decided the jurisdiction issues. [14] As a result, neither these depositions nor any other discovery went forward in the case.[15]

Second, Paxton asked the trial court to dismiss the entire case based on sovereign immunity even though the Texas Whistleblower Act ("Whistleblower Act" or "Act") waives sovereign immunity for claims asserted under the Act.[16] Paxton claimed that somehow the Act did not apply to elected officials. But nothing in the Act's language carves out an exception for elected officials.[17] Paxton's position also defeats the Act's two primary purposes: to (1) ensure lawful conduct by those who direct and conduct State business (like Paxton); and (2) protect the public employees who promote that purpose by blowing the whistle on unlawful conduct (like the

[12] *See* Exhibit 124.

[13] *See id*.

[14] *See id*.

[15] Paxton used the same argument to prevent the Whistleblowers from getting documents and other written discovery. *See* Exhibit 115. He also tried to prevent either himself or Brent Webster from testifying at the temporary injunction hearing set in the case. *See* Exhibit 126.

[16] TEX. GOV'T CODE § 554.0035.

[17] *See Office of the Attorney Gen. of Tex. v. Brickman*, 636 S.W.3d 659, 670–75 (Tex. App.—Austin 2021, pet. abated) (rejecting identical arguments that the Whistleblower Act did not apply to Paxton as an elected official); TEX. GOV'T CODE § 554.002(a) (prohibiting state employer from retaliating a public employee for reporting violations of law by the state government entity or another public employee to the appropriate law enforcement agency); TEX. GOV'T CODE § 554.001(5)(A) (defining "state governmental entity" as, among others, an agency in the executive branch of state government); TEX. GOV'T CODE § 554.001(4) (defining "public employee" as employee or appointed officer paid to perform services by the state).

Whistleblowers).[18] The legal merits of the arguments were, of course, irrelevant. The jurisdictional challenge had its intended effect—it continued to keep discovery stopped in its tracks.

Third, when the trial court rejected Paxton's arguments (which it did),[19] Paxton knew that he could immediately appeal that decision to the court of appeals (which he did).[20] This procedural maneuver automatically stayed any further proceedings in the case, including discovery. [21]

Fourth, when the court of appeals rejected Paxton's arguments (which it did),[22] Paxton knew that he could then immediately file a petition for review in the Texas Supreme Court (which he did).[23] And discovery in the case remained at a dead stop by statute.[24]

Fifth, by this point, Paxton was nearing the end of his options to delay the upcoming rigorous discovery process, which would shine light on his many misdeeds. So, he approached the Whistleblowers (not the other way around) about potential settlement.[25] He did so to make sure that the evidence of his misconduct remained concealed. A funded Settlement Agreement meant that there would never be any discovery into the Whistleblower complaints, and thus the

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[18] *See* *Brickman*, 636 S.W.3d at 662–63; *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[]").

[19] Exhibit 129.

[20] Exhibit 128.

[21] Under Texas law, an interlocutory appeal on a plea to the jurisdiction "stays all other proceedings in the trial court pending resolution of that appeal." TEX. CIV. PRAC. & REM. CODE § 51.014(b).

[22] *See* *Brickman*, 636 S.W.3d at 670–75.

[23] *See* Exhibit 130.

[24] *See* TEX. CIV. PRAC. & REM. CODE § 51.014(b).

[25] Exhibits 136, 131.

complaints would forever remain allegations that Paxton could easily sweep aside. Ultimately, Paxton entered into the Settlement Agreement to benefit himself, not Texas.[26]

IV. The Settlement Agreement also benefited Paxton by eliminating the risk of individual liability for violating the Whistleblowers' constitutional rights.

Paxton's argument that he did not personally benefit from the settlement because he did not face individual liability under the Whistleblower Act misses the point. Even without personal liability under the Act, Paxton benefited from the settlement by avoiding discovery of the information proving that the Whistleblowers' allegations were true.

Moreover, while Paxton may not have had personal liability under the Act, he still faced individual liability for violating the Whistleblowers' constitutional rights. 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.[27] Clearly, speech regarding the corruption or unlawful actions of a public official is a matter of public concern.[28] In fact, "[t]he importance of public employee speech *is especially evident in the context of . . . public corruption*" since "speech by public employees regarding

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[26] Also, presumably the settlement should not have cost the Texas taxpayers nearly as much if Paxton truly believed that he would prevail at trial, especially having already spent hundreds of thousands of dollars in tax-payer money to investigate and defend the case. Exhibits 115, 116.

[27] *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).

[28] *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.").

information learned through their employment" is the "very kind of speech necessary to" reveal bad acts by public officials.[29]

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*."[30] Here, Paxton deliberately set out to destroy the Whistleblowers' reputation and future career prospects to cover up his misdeeds and provided them no due process as constitutionally required.

A governmental official is only shielded from individual liability if "their actions could reasonably have been thought consistent with the rights they are alleged to have violated."[31] As the State's top law enforcement officer, there is no way Paxton reasonably believed his actions were consistent with the constitutional rights of the Whistleblowers. "[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."[32] Also clear are the due process rights of public employees who have been unjustly

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

[30] *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).

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

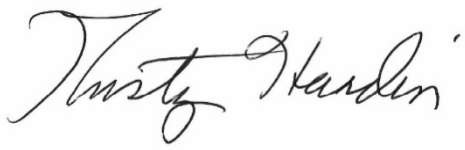
[32] *Hardesty v. Cochran*, 621 F. App'x 771, 780 (5th Cir. 2015) (citing *Cutler v. Stephen F. Austin State Univ.*, 767 F.3d 462, 473 (5th Cir. 2014)). There also exists clear precedent that citizen speech can include information "related to or learned through public employment. *Franks*, 573 U.S. at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

stigmatized in the process of being fired.[33] Therefore, Paxton is not shielded from his numerous violations of the Whistleblowers' constitutional rights, and the Settlement Agreement was personally advantageous to him.

CONCLUSION

Paxton's strategy in settling the Whistleblower litigation was not done to save Texas money. Paxton pushed settlement to benefit himself. That is an abuse of office. For these reasons, the Motion to Dismiss Art. VIII must be denied.

Respectfully submitted,



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

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