THE SENATE OF THE STATE OF TEXAS
COURT OF IMPEACHMENT

AUG 05 2023

CLERK OF THE COURT

IN THE MATTER OF
WARREN KENNETH PAXTON, JR.

ATTORNEY GENERAL WARREN KENNETH PAXTON, JR.'S MOTION TO DISMISS ARTICLES IX AND X

There are few accusations more serious in politics than charging an official with accepting a bribe. The House has shamefully bandied about this extraordinary accusation in prosecuting a political vendetta. First and foremost: the Attorney General has neither sought, been offered, nor accepted a bribe. The House knows it. Nonetheless, without any evidence that the Attorney General formed an illegal agreement—the *quid pro quo*—at the heart of any bribery charge, the House has preferred two Articles, IX and X, alleging the Attorney General has committed "constitutional bribery."

He has not. The Articles allege at most that the Attorney General received a benefit from a constituent at some point, and that the constituent benefited from one or more actions the Attorney General at some other point undertook. That is not a bribe: it is not a bargained-for agreement to exchange a benefit for an official act. Indeed, as they stand, the Articles allege nothing more than that the Attorney General had a personal relationship with a constituent and that the constituent found something the Attorney General did to be agreeable in some way. If that is enough to amount to a bribe, scarcely any elected official is innocent of the House's notion of bribery.

But it is not. The House should be ashamed for trying to make it so. Incanting the phrase "constitutional bribery" is not enough to transform otherwise innocuous acts into a crime. Bribery is a well-understood concept at common law, by statute, and in our Constitution—and the House utterly failed to allege the required elements of this millennia-old crime. This Court has both the authority and the responsibility to prevent the House's abuse of power in preferring these facially deficient Articles. This Court should dismiss Articles IX and X outright.

STANDARD

The Texas Constitution requires every prosecutor to include in every charging instrument the "accusation . . . with sufficient clarity and detail to enable the defendant to anticipate the

[prosecution's] evidence and prepare a defense to it." *Garcia v. State*, 981 S.W.2d 683, 685 (Tex. Crim. App. 1998); *see* Tex. Const. art. I, § 10. "An indictment [on a bribery charge] to be sufficient must specifically allege every constituent element of the offense and leave nothing to inference or intendment." *Selvidge v. State*, 72 S.W.2d 1079, 1080 (Tex. Crim. App. 1934). It cannot be "vague and uncertain" or "fail[] to charge any offense against the laws of this State." *Hutchinson v. State*, 36 Tex. 293, 294 (1871). The failure to "distinctly" allege any element of bribery creates a "fatal defect[] in the indictment" for which the underlying charge must be dismissed. *Id*. at 295. This Court has the power to dismiss Articles as a matter of law. S. Journal, 88th Cong., 1st Sess. at 40-52 (2023) (Rule 15).

ARGUMENT

Articles IX and X allege that Attorney General Paxton "engaged in bribery in violation of Section 41, Article XVI, Texas Constitution." When considering constitutional bribery, Texas courts assess the elements of the offense within the context of the Texas Penal Code. *See* Tex. Penal Code § 36.02. There is no example in Texas case law or impeachment history of an official being charged with and convicted of constitutional bribery alone. As Texas courts recognize, the Constitution "articulates the elements of th[e] offense," *Gandara v. State*, 527 S.W.3d 261, 268 (Tex. App.—El Paso 2016) (citing *Ex parte Perry*, 483 S.W.3d 884, 914 (Tex. Crim. App. 2016)), and the Legislature intended that the statute criminalizing bribery "contain all of the constitutionally required elements" of the offense, *Perry*, 483 S.W.3d 884, 914. Whether understood through the constitutional text standing alone or through criminal statutes and judicial precedent, however, Articles IX and X fail to adequately allege the elements of a bribery charge. Indeed, they fail the minimum standards for pleading *any* charge under our Constitution. *See* Tex.

Const. art. I, § 10; *Garcia*, 981 S.W.2d at 685; *Selvidge*, 72 S.W.2d at 1080; *Hutchinson*, 36 Tex. at 294-95. Both Articles must be dismissed.

I. Articles IX and X Fail to Sufficiently Allege the Elements of a Bribery Charge.

Texas courts regularly consider constitutional bribery within the context of a bribery statute analysis. *See* Tex. Penal Code § 36.02; *see, e.g.*, *Gandara*, 527 S.W.3d at 268-70; *McCallum v. State*, 686 S.W.2d 132, 133-34 (Tex. Crim. App. 1985); *Perry*, 483 S.W.3d at 914; *Mutscher v. State*, 514 S.W.2d 905, 916 (Tex. Crim. App. 1974); *Cox v. State*, 316 S.W.2d 891, 894 (Tex. Crim. App. 1958). The Attorney General is unaware of a single instance where an individual has been charged with or convicted of bribery through the constitutional definition alone. Nor has any other official—including those accused of embezzlement and other serious financial crimes—ever had an article of impeachment preferred against him on the basis of the Constitution's bribery provision. Instead, courts in Texas consistently and uniformly enforce the constitutional prohibition on bribery through the causes of action delineated by the legislature under the bribery statutes. *See, e.g.*, *Gandara*, 527 S.W.3d at 268-74; *Mutscher*, 514 S.W.2d at 915; *Cox*, 316 S.W.2d at 894. Indeed, the Court of Criminal Appeals has held that it cannot be "that the Legislature intended to criminalize bribery in statutes that do not contain all of the constitutionally required elements." *Perry*, 483 S.W.3d at 914. The bribery statute thus "is authorized by" and "implements the specific mandate of Article XVI, Sec. 41, of our State Constitution." *Mutscher*, 514 S.W.2d at 915. Accordingly, this Court must look to the relevant bribery statute when considering a constitutional bribery charge.

Texas Penal Code section 36.02 supplies the relevant charge. Relevant here, an individual commits bribery under section 36.02 "if he intentionally or knowingly offers, confers, . . . solicits, [or] accepts . . . any benefit as consideration for the recipient's . . . vote, or other exercise of

discretion as a public servant." Tex. Penal Code § 36.02(a)(1). Applying that statute, Texas courts recognize that "[o]btaining a personal benefit is a constitutionally required element of bribery," *Gandara*, 527 S.W.3d at 268 (citing *Perry*, 483 S.W.3d at 914 (internal citations omitted), and that it is "a violation of the Constitution for an officer of this state to solicit or consent to accept a bribe," *Cox*, 316 S.W.2d at 894. The Court of Criminal Appeals has construed bribery "as requiring a bilateral arrangement—in effect an illegal contract to exchange a benefit as consideration for the performance of an official function." *McCallum*, 686 S.W.2d at 136 (citing V.T.C.A., Penal Code § 36.02); *see also id*. at 133 (citing Tex. Const. art. XVI, § 41). The bilateral arrangement reflects the "implicit . . . requirement of a *quid pro quo*; that is, an agreement to exchange *any benefit* for the *exercise of discretion as a public servant*." *Gandara*, at 273 (citing *Isassi v. State*, 330 S.W.3d 633, 644 (Tex. Crim. App. 2010); *McCallum*, 686 S.W.2d at 136) (emphasis in original). The Court of Criminal Appeals looks to the officer's "state of mind" for evidence of a *quid pro quo*. *See, e.g.*, *Cox*, 316 S.W.2d at 894 (assessing "wilfull, deliberate, [and] corrupt perversion and betrayal of the public trust for [the officer's] financial gain," as charged and instructed); *Davis v. State*, 158 S.W. 288, 290-91 (Tex. Crim. App. 1913) (not guilty of bribery if "belief" that money would be used for appropriate expense, but guilty if money was "tendered" "to influence" official action); *Naill v. State*, 129 S.W. 630, 630 (Tex. Crim. App. 1910) (person "unlawfully, willfully, and corruptly" offered money "as a bribe and inducement to [official] to act in a particular manner").

Thus, in order to have properly alleged constitutional bribery in Articles IX and X, the House must have alleged that Attorney General Paxton: (1) intentionally or knowingly (the *mens rea*) (2) solicited, demanded, received, or obtained (3) money or something of value or personal advantage (4) from another (5) in exchange for his vote or exercise of official influence (6) as

expressly or impliedly agreed. *Selvidge*, 72 S.W.2d at 1080. Articles IX and X fail to allege several of these elements, let alone with the constitutionally required specificity.

Article IX simply alleges "[Attorney General] Paxton benefited from Nate Paul's employment of a woman with whom Paxton was having an extramarital affair," and "[Nate] Paul received favorable legal assistance from, or specialized access to, the office of the attorney general." But this allegation is deficient because it fails to allege that Attorney General Paxton *intentionally or knowingly* obtained the alleged employment *in exchange for* his influence or any other official act, made pursuant to an *explicit or implied agreement*. The allegations also fail to allege there was any understanding there would ever be such a result. Article IX fails to make these allegations because there was no such agreement, and the Attorney General was *not* improperly influenced, and the requisite *mens rea* did not exist. Accordingly, Article IX fails on its face.

Article X puts forth similarly flawed allegations: that the Attorney General "benefited from Nate Paul providing renovations to Paxton's home," and "[Nate] Paul received favorable legal assistance from, or specialized access to, the office of the attorney general." Again, the House has omitted the critical elements of bribery necessary to make this charge constitutionally sound on its face. Significantly, there is no allegation in this Article that Attorney General Paxton *intentionally or knowingly* obtained the renovations *in exchange for* his influence made pursuant to an *explicit or implied agreement*. Again, there are no such allegations because there was no such agreement, the Attorney General was *not* improperly influenced, and requisite *mens rea* did not exist. Without these elements detailed in the Article, the charge fails to meet basic constitutional due process standards. *See Garcia*, 981 S.W.2d at 685; *see also* Tex. Const. art. I, § 10.

With Articles IX and X, the House fails to "distinctly" allege the elements of a bribery offense as commonly understood by Texas courts interpreting constitutional bribery. *Hutchinson*,

36 Tex. at 295. Instead, the House transparently attempts to create the illusion of a *quid pro quo* through hand-waving. But a bribery charge cannot be alleged by inference. *Selvidge*, 72 S.W.2d at 1080. For these failings, Articles IX and X must be dismissed.

II. Even Under the Constitutional Standard Alone, Articles IX and X Fail to Allege the Required Elements of Bribery.

As explained above, Articles IX and X fail under the appropriate legal standard. But even under the House's inappropriate standard, the House has still failed to allege bribery. Texas's standard for "bribery comes to us from the common law," where it was understood as "a betrayal of public interest, and a debauchment of the public conscience." *Cox*, 316 S.W.2d at 894. Constitutional bribery was influenced by the common law and developed within the context of then-existing bribery statutes, which predate the Constitution. *Id*.; *see generally Hutchinson*, 36 Tex. at 293-95. Texas has adopted common law and statutory bribery elements in its Constitution. *See, e.g.*, *Hutchinson*, 36 Tex. at 293-95; Paschal's Digest, arts. 1869-75. Before the Constitution was enacted, George W. Paschal's well-respected Digest provided the commonly understood statutory bribery elements in Texas: "[a]ny legislative, executive, or judicial officer, who shall accept a bribe under an agreement, or with an understanding that his act, vote, opinion, or judgment, shall be done or given in any particular manner" commits bribery. Paschal's Digest, art. 1870. The term "bribe" was meant as "any gift, advantage, or emolument, bestowed for the purpose of inducing an officer . . . to do a particular act in violation of his duty, or as an inducement to favor." *Id*. at art. 1874. In applying the statute at that time, the Texas Supreme Court recognized that these elements are historically "necessary in order to constitute the crime of bribery." *Hutchinson*, 36 Tex. at 295.

Constitutional bribery merely joined this existing statutory framework. Under the Constitution, "[b]ribery may be defined generally as the voluntary giving or offering to, or the

acceptance by, any public officer or official, of any sum of money, present, or thing of value, to influence such officer or official in the performance of any official duty required of him, or to incline him to act contrary to known rules of honesty and integrity." Tex. Const. art. 16, § 41 Interp. Commentary (2018 Main Vol.). Specifically, the Constitution declares that a public official commits bribery if he

> solicit[s], demand[s] or receive[s], or consent[s] to receive, directly or indirectly, for himself, or for another, from any company, corporation or person, any money, appointment, employment, testimonial, reward, thing of value or employment, or of personal advantage or promise thereof, *for his vote or official influence*, or for withholding the same, or *with any understanding, expressed or implied*, that his vote or official action shall be in any way influenced thereby.

Tex. Const. art. XVI, § 41 (emphasis added).

Like Texas courts and statutes, the constitutional provision recognizes necessary elements of bribery. Relevant here, constitutional bribery requires some actual exchange ("*for* his vote or official influence") or "*with* any understanding, expressed or implied" that such resulting exchange will occur. While the Constitution provides these elements in the disjunctive—using "or" to separate the phrases—the failure to allege one of them is fatal to a bribery charge. *Selvidge*, 72 S.W.2d at 1080.

The missing key elements in the Articles here are (1) the *exchange* of *official action for* an alleged bribe and (2) any *expressed or implied understanding* that such an exchange would result in Attorney General Paxton's *official action*. These elements are so fundamental to bribery that they predate the Constitution. *See* Paschal's Digest, at art. 1870 ("under an agreement, or *with an understanding* that his act, vote, opinion, or judgment, shall be done or given in any particular manner"); *id*., at art. 1874 ("any gift, advantage, or emolument, bestowed *for the purpose of* inducing an officer . . . to do a particular act in violation of his duty, or as an inducement to favor").

Put differently, one does not even allege—let alone prove—a bribe merely by stating that a constituent furnished an elected official with some gift or advantage, and that the elected official took an action that benefited the constituent. Those are merely, at most, a *quid* and a *quo*—and usually not even that. Instead, a bribery charge must allege that the two were part of a bargained-for exchange: that both sides understood that they were forming an illegal agreement to deliberately trade the gift for the official act. The Managers cannot supply this missing element by gesturing at the Attorney General and Nate Paul having an otherwise friendly relationship.

This flaw points to more than just the House's poorly drafted, vague Articles. The Court of Criminal Appeals has held that even detailed indictments fail if they do not allege each element of the charge. *Selvidge*, 72 S.W.2d at 1079. For example, an indictment that included the requisite *mens rea*, the amount of money exchanged ($200), the official act invoked (refraining from official duties to allow transport of prohibited alcohol), the agreed-upon exchange ("to permit him . . . to unlawfully transport spiritous, vinous and malt liquors"), and the date the events occurred was still deficient because it failed to allege an official action within the officer's duties. *Id.*; *see also McCallum*, 686 S.W.2d at 139 (indictment included parties, *mens rea*, specific benefit, claimed consideration for vote, but no meaningful allegation that individual "conferred" champagne on the juror "in exchange or in consideration of her vote"). Regardless how detailed or well-drafted the pleadings, they are still "fatally defective" if they fail to allege a necessary, legal element of a bribery charge. *Selvidge*, 72 S.W.2d at 1080.

All Articles IX and X allege is that the Attorney General received a benefit and that Nate Paul benefited from some official action the Attorney General took. Completely independent of whether those allegations are true, each Article is fatally flawed because neither alleges that any of these purported benefits were exchanged for the other or for the purpose of inducing the

Attorney General to act. Moreover, each Article fails to allege that there was any express or implied understanding that the purported benefits to the Attorney General would influence his official action.

Federal law does not support the House's outlandish understanding of bribery, either. Under identical bribery language, the United States Supreme Court has determined that an "official action" expressly does not include "[s]etting up a meeting, talking to another official, or organizing an event (or agreeing to do so)." *McDonnell v. United States*, 579 U.S. 550, 574 (2016); *see generally Perry*, 483 S.W.3d at 884, 900 (considering U.S. Supreme Court precedent in interpreting Texas Constitution). While both Articles fail to allege the Attorney General took any official action to arrange meetings between Nate Paul and OAG, even the inference that he did falls within the scope of acceptable conduct under the Supreme Court's standard.

Without the constitutionally required level of specificity, the Articles miss core elements that form the essential *quid pro quo* of a bribery charge. *Selvidge*, 72 S.W.2d at 1080. Namely, the Articles fail to sufficiently allege Attorney General Paxton ever *intentionally or knowingly* received or obtained either alleged benefit from Nate Paul, that Attorney General Paxton ever *exchanged* his official action or exercise of office for either alleged benefit, or that Attorney General Paxton and Nate Paul had any *agreement or understanding—express or implied*—that such official action would ever result. Even under a plain reading of the constitutional bribery provision, then, the Articles fail to allege a bribe.

CONCLUSION AND REQUESTED RELIEF

Articles IX and X fail to allege the elements of bribery required by the Texas Constitution and Texas law. For these reasons, Attorney General Paxton respectfully requests that this Court dismiss Articles IX and X.

Respectfully submitted.

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CERTIFICATE OF SERVICE

This motion was served via email on the House Board of Managers' counsel, to wit: Rusty Hardin, rhardin@rustyhardin.com, and Dick DeGuerin, ddeguerin@aol.com, on August 5, 2023.

/s/ Kateland R. Jackson
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