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AUG 05 2023

CLERK OF THE COURT

THE SENATE OF THE STATE OF TEXAS
COURT OF IMPEACHMENT

IN THE MATTER OF
WARREN KENNETH PAXTON, JR.

ATTORNEY GENERAL WARREN KENNETH PAXTON JR.'S MOTION TO DISMISS ARTICLES VII AND XV

Articles VII and XV challenge the veracity of a detailed, almost 400-page report published by the Office of Attorney General following an investigation into complaints made by former political appointees. OAG spent ten months gathering information, conducting interviews, and assessing the evidence.[1] The resulting report was based on hundreds of pages of evidence and acknowledged that some information was missing because the former appointees had "instruct[ed] subordinates not to document their actions, dismiss[ed] other employees so that they could have secret meetings, [and] delet[ed] emails."[2] OAG's painstaking work was thoroughly documented with voluminous citations to contemporaneous documents, including handwritten notes and emails, and the documents are comprised in an appendix that is hundreds of pages long. The report was the product of an earnest inquiry into the truth.

While the House disagrees with the report's conclusions, as Justice Harriet O'Neill put for a unanimous Supreme Court, "every investigation that an employer conducts requires it to resolve factual disputes and make reasonable credibility determinations." *Texas Farm Bureau Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604, 610. "[S]econd guessing an employer's judgment in such a situation" serves only to "provide[] a strong disincentive for companies to investigate" at all, which "is simply not in the public's interest." *Id.* at 610. Nor is it in the State's—or electorate's—interest. Such determinations are within the authority of the investigating employer and not the type of "grave official wrong" subject to impeachment. *Ferguson v. Maddox*, 263 S.W. 888, 892 (Tex. 1924). If an elected officeholder can be impeached because his agency conducted an internal

[1] *Texas Attorney General's Office Releases Internal Report*, ATTORNEY GENERAL OF TEXAS (Aug. 24, 2021), https://tinyurl.com/TXAGInternalRpt; *Report on the Investigations into Complaints Made and Actions Taken by Former Political Appointees of the Texas Attorney General*, https://tinyurl.com/TXAGInternalReport ("OAG Report").
[2] OAG Report at 3.

review of his employees, all state agencies will be discouraged from investigating any alleged wrongdoing.

Articles VII and XV must also be dismissed because they fall far short of providing the Attorney General with the constitutionally required detail. Our Constitution requires Articles VII and XV to identify any false statements the House views as impeachable offenses; both the Articles and House refused to do so. As they admitted, they are "not going to give you an exhaustive list" of the purportedly false and misleading statements. Transcript, *In re Paxton*, at 125:7-8. This refusal is fatal to the charging instrument under Texas law. And the handful of disagreements the investigators identified in their public testimony are petty disputes about when the report could have been supplemented and disagreements about legal conclusions. These trifling disagreements are not impeachable offenses. Articles VII and XV do not articulate even a civil tort under Texas law—let alone an impeachable offense. Both should be dismissed.

STANDARD

Impeachment is reserved only for the gravest wrongs as historically understood in English and early American practice "by an examination of the Constitution, legal treatises, the common law[,] and parliamentary precedents." *Ferguson*, 263 S.W. at 892. It is an extraordinary remedy used to protect the State from only the most serious offenses. As a Court of Impeachment, the Senate "must determine whether or not the articles presented by the House set forth impeachable offenses." *Id.* at 893. "Impeachment is used only in extreme cases," *Ferguson v. Wilcox*, 28 S.W.2d 526, 533 (Tex. 1930), consistent with "such official delinquencies, wrongs, or malfeasances as justified impeachment according to" the 500 years of English and American practice preceding the framing of our Constitution, *Ferguson*, 263 S.W. at 892. This Court decides whether an Article as alleged rises to the historical level of an impeachable offense as a matter of law. *Id.* at 893. This

Court may dismiss an Article outright—either for failing to rise to that level, or for any other legal defect. *Id.*; S. Journal, 88th Cong., 1st Sess. at 40–52 (2023).

ARGUMENT

I. Articles VII and XV Do Not Describe Impeachable Offenses.

The Office of Attorney General's investigation into its employees and publication of a report with its findings is a far cry from even a tort—let alone a grave official wrong. As the Supreme Court has explained, impeachable offenses under our Constitution include only those "established by the common law and the practice of the English Parliament and the parliamentary bodies in America." *Ferguson*, 263 S.W. at 893. So far as the Attorney General is aware, no court of impeachment has recognized conducting an internal review and drafting a report as an impeachable offense—for good reason. They are hardly acts of such urgency directed against the State such that overturning the will of the voters is the only possible remedy.

"When the Constitution of Texas was adopted, it was done in the light of, and with a full knowledge and understanding of, the principles of impeachment as theretofore established in English and American parliamentary procedure. The [Texas] Constitution in this matter of impeachment created nothing new. By it, something existing and well understood was simply adopted." *Id.* at 97. At the 1787 Constitutional Convention, the Framers expressly rejected "maladministration" as a ground for impeachment. Charles L. Black, Jr., *Impeachment: A Handbook*, in IMPEACHMENT: A HANDBOOK, NEW EDITION at 26–27 (Charles L. Black, Jr. & Philip Bobbit, 2018). James Madison noted that "[s]o vague a term w[ould] be equivalent to a tenure during pleasure of the Senate." *Id.* at 26. In its place, the Framers substituted "high Crimes and Misdemeanors," signaling that they believed impeachable offenses must "hav[e] about them some flavor of criminality." *Id.* at 27–28. Indeed, even opponents of the federal Constitution's

impeachment power concurred that "[e]rror in judgment, or want of capacity to discharge the duties of the office, can never be supposed to be included in these words, *high crimes and misdemeanors*." *The Anti-Federalist*, Essays of Brutus XV, 185 (Herbert J. Storing, University of Chicago Press 1985) (emphasis in original).

Historically, Texas has taken the same approach. When the Texas House preferred twenty-five articles of impeachment against Land Commissioner McGaughey, it charged that McGaughey's sale of certain properties violated the land laws—but not that McGaughey did so out of a personal financial interest. This Court concluded that was not enough, and it conclusively rejected every charge.[3] Judge Price was impeached on twelve articles, the accusations in which included approving payment reimbursements that exceeded verifiable work-related expenses and costs and writing a literal blank check drawing on State funds for a witness fee. This Court recognized that these charges simply failed to qualify as "grave offenses" requiring the extraordinary remedy of impeachment. S. Journal, 42nd Cong., 2nd Sess. at 429-431 (1931).

The same is true here. And the Texas Supreme Court has recognized that an employer investigating employee conduct does not amount to a cognizable tort, much less an impeachable offense. In *Sears*, a terminated employee brought multiple claims against his former employer, alleging that the employer's "investigation and its post-termination conduct were extreme and outrageous." 84 S.W.3d at 611. The employee described "alleged inconsistencies and deficiencies in the way [the employer] conducted the investigation." *Id.* The Court held that while the investigation may have been "understandably unpleasant," even taking all of the employee's allegations as true, the employee's claim "was in the nature of an 'ordinary employment dispute' and did not rise to the level of extreme and outrageous conduct sufficient to sustain a claim for

[3] *See* State of Tex. Senate, Rec. of the High Ct. of Impeachment on the Trial of W.L. McGaughey, Land Comm'r, S. 23, Reg. Sess. at 169-78 (1893).

intentional infliction of emotional distress." *Id.* at 611–12 (citing *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 612–13 (Tex. 1999)).

Indeed, the Supreme Court has flatly held employer conduct unactionable when employers have done far worse than publish a report that includes legal conclusions with which some persons disagree. For example, the Supreme Court held that a former employee lacked a viable tort action when, after her termination, her former employer orchestrated her eviction, refused to provide references for her, and sent a company-wide email reminding employees not to contact former employees. *Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 817 (Tex. 2005). Even if "all of these actions were the result of a vendetta directed at [the former employee]," the Supreme Court held "this post-termination conduct is legally insufficient." *Id.* at 817. Texas law does not recognize "callous, meddlesome, mean-spirited, officious, overbearing, and vindictive" post-termination conduct as a tort. *Id.* at 817–18. To have a viable tort action, the employer's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Id.* at 817–18 (internal quotations omitted). And plainly legal disagreements on matters of public disputes fall far short of "atrocious and utterly intolerable in a civilized community"—let alone the sort of grave wrong against the state on par with treason that rises to an impeachable offense.

As Justice O'Neill recognized, employees cannot sustain causes of action against former employers who conduct "negligent," "offensive," "inconsistent[]," "deficien[t]," or incomplete investigations into alleged wrongdoing. *Sears*, 84 S.W.3d at 611–12. And employers, such as the Office of the Attorney General, do not even owe their employees "a duty of ordinary care in investigating alleged misconduct." *Id.* at 607, 610. It is fully within "the bounds of its discretion" for an employer to "review" the conduct of its agents. *Id.* at 611. While an employer's conduct

related to an internal investigation "may at times be insensitive, stressful, or even unnecessary, [the employer] must be afforded some latitude to discover and eliminate . . . employee misconduct." *Id.* at 612.

The conduct with which the House takes issue here hardly constitutes a tort—much less impeachable offenses. For example, the House's foremost challenge to the report is the representation that it "will be updated and supplemented as further interviews are conducted and if any additional evidence is obtained." Transcript at 125:10-13. The House retorts that "[t]here have been no supplements and no amendments or additions." *Id.* at 125:14-15. Setting aside the fact that the Office of Attorney General published an additional 56-page report from an outside law firm[4], the House's disputes with the report pale in comparison to accusations that the Supreme Court has categorically rejected as not actionable—let alone impeachable.

In another example, the House takes issue with the informal guidance OAG issued related to foreclosure sales. Transcript at 126:11-19. First, the House asserts that OAG's statement that the guidance was written "in response to a request . . . from Senator Bryan Hughes" is "misleading," because "[i]t *did* come from Senator Bryan Hughes after it was drafted and provided by the Office of the Attorney General." Transcript at 126:15-19 (emphasis added). This allegation is patently insufficient to constitute an impeachable offense. Even if the House's allegations were true, the House admits that the request *did* come from Senator Bryan Hughes, and the House does not contend that any part of the interaction was unlawful.

The House next points to a statement in the report that says "it cannot reasonably be argued" that OAG's conclusion that foreclosure sales were subject to Governor Abbott's Executive Order GA-28 "was an unusual or unwarranted result." Transcript at 126:22-25; OAG Report at 50.

[4] *Report Regarding Retaliation Claims by Former Employees* (May 24, 2023), https://www.texasattorneygeneral.gov/sites/default/files/images/press/Report.pdf.

The House argues this statement is "[f]alse." In other words, the House's argument is that the Attorney General should be impeached and removed from office because, in their view, it "[*can*] reasonably be argued" that OAG's conclusion was "unusual or unwarranted." This is an extraordinary position. The Supreme Court does not recognize a tort action against a former employer who orchestrated an employee's *eviction* as part of a personal campaign against them. But the House inexplicably contends that these petty quarrels should be enough to remove the elected Attorney General from office.

The House's allegations do not even "meet the exacting requirements of [a] tort." *Creditwatch*, 157 S.W.3d at 815. They cannot meet the far higher standard of an impeachable offense.

II. Articles VII and XV Should Be Dismissed As Unconstitutionally Vague.

Articles VII and XV also fail to identify essential facts underlying the (deficient) charges they mean to articulate. This failure independently requires dismissal.

Both Articles are intolerably vague. Article VII accuses the Attorney General of "direct[ing]" unnamed employees "to conduct a sham investigation," but the Article does not explain how he allegedly directed it, who he directed, or why it constituted a "sham." Both Article VII and Article XV contend that the OAG Report includes "false or misleading statements," but neither article identifies a single specific statement. In the public hearing, the House refused to provide "an exhaustive list" and instead recited a handful of statements from the 400-page OAG Report and announced them as either "false," "misleading,"—or, curiously, "true" and "also true." Transcript at 126–127.

These scattershot allegations are not enough. In Texas, a respondent is entitled to sufficient notice of the charges against him so he "can adequately prepare a defense." *State v. Moff*, 154

S.W.3d 599, 602 (Tex. Crim. App. 2004). The Texas Code of Criminal Procedure requires "*everything*" to "be stated in an indictment which is necessary to be proved." Tex. Code Crim. Pro. art. 21.03 (emphasis added). "[T]he accused has the right to notice that is specific enough to allow him to investigate the allegations against him and establish a defense." *Moff*, 154 S.W.3d at 602. The respondent cannot be asked to look outside the four corners of the charging instrument and "speculat[e]" about the "acts with which he is charged." *Terry v. State*, 471 S.W.2d 848, 852 (Tex. Crim. App. 1971).

Yet that is exactly what the House would have the Attorney General do. Without knowing what statements the House contests and the basis for their objection to each statement, the Attorney General cannot fairly or adequately rebut the allegations the House Managers may later choose to make. Indeed, the foundation of these Articles—the basis on which all the allegations within them are made—is that the Attorney General "directed employees of his office" to take the actions at issue and publish a report. But that foundation is wholly controverted by the House investigators themselves: "There is evidence based on interviews and phrasing in the document referred to as the OAG report that [*First Assistant Attorney General Brent Webster*] was the person who conducted that investigation, attempted to clear the attorney general's office, and wrote the report." Transcript at 119:3-7.[5]

Without being notified of what statements the House contests, let alone any evidence that might support the House's claims, the Attorney General cannot fairly or adequately prepare his defense to rebut the allegations the House Managers may later choose to identify. At best, these Articles "give[] the *appearance* of notice to [the Attorney General], while leaving the State free to

[5] To the extent the House contests the level of oversight the Attorney General exercised over the report, such an accusation falls squarely within the realm of "maladministration," which the Framers expressly repudiated as a basis for impeachment. *See infra* p. 3.

shift strategies at trial if needed." *Ex parte Perry*, 483 S.W.3d 884, 891 (Tex. Crim. App. 2016) (internal quotation marks omitted) (emphasis in original).

Basic fairness entitles the Attorney General to adequate notice of the specific charges against him—and Texas law requires it. The Attorney General is entitled "to know which false statement or statements the State would rely upon for conviction." *Amaya v. State*, 551 S.W.2d 385, 387 (Tex. Crim. App. 1977). The Texas Court of Criminal Appeals has reversed a defendant's conviction for making a false statement when the charging instrument made "no attempt to set out the specific 'willfully false statement' the [defendant] was alleged to have made." *Id.* at 387; *see also* Attorney General Paxton's Motion to Quash and Request for Bill of Particulars. The House made no attempt to so specify in the Articles, nor did it do so when it had the opportunity at the public hearing. These Articles are unconstitutionally vague and indefinite, and the House has admitted that the evidence shows that First Assistant Webster, not the Attorney General, "conducted [the] investigation . . . and wrote the report," Transcript at 119:3-7, in any event. These Articles must be dismissed.

III. Articles VII and XV Fail as a Matter of Law.

Although the Attorney General should not be required to look beyond the Articles to ascertain the charges against him, the Attorney General nevertheless posits that the allegations at issue in Article VII appear to allude to Tex. Penal Code § 39.02. Under that section, a "public servant commits an offense, if, *with intent* to obtain a benefit or *with intent* to harm or defraud another, he *intentionally or knowingly*: . . . (2) misuses government property, services, personnel, or any other thing of value belonging to the government that has come into the public servant's custody or possession by virtue of the public servant's office or employment." (emphasis added). To the extent the House attempts to bring an Article of Impeachment based on this statute, it should

be dismissed because the Article fails to even allege the requisite intent. "[A]ny element that must be proved should be stated in [the charging instrument]," "leaving nothing to inference or intendment." *Green v. State*, 951 S.W.2d 3, 4 (Tex. Crim. App. 1997). An impeachment requires a two-thirds supermajority, Tex. Const. art. XV, § 3, and consensus is required on every essential element of an alleged offense, including the requisite mental state required to commit it. *Pizzo v.* State, 235 S.W.3d 711, 714–15 (Tex. Crim. App. 2007). Failing to even allege the requisite mental state, Article VII must be dismissed.

Similarly, the allegations at issue in Article XV appear to allude to Tex. Penal Code § 37.10. Under that section, "[a] person commits an offense if he: (1) knowingly makes a false entry in, or false alteration of, a governmental record." But, for the same reason Article VII fails a matter of law, Article XV fails too. The House wholly fails to even allege that the Attorney General "knowingly" made any false statements in a government record.

In sum, while the House disagrees with the OAG Report's conclusions, this Court should follow Justice O'Neill's recognition that an employer's "resol[ution] [of] factual disputes" and "reasonable credibility determinations" are well within its authority. *Sears*, 84 S.W.3d at 610. Disagreement with such determinations is not the type of "grave official wrong" that subjects elected officeholders to impeachment. *Ferguson*, 263 S.W. at 892.

CONCLUSION AND RELIEF REQUESTED

The Attorney General respectfully requests the Court dismiss Articles VII and XV.

Respectfully submitted.

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CERTIFICATE OF SERVICE

This motion was served via email on the Senate, the Lieutenant Governor, and the House Board of Managers through their counsel, Rusty Hardin, Dick DeGuerin, and Harriet O'Neill on August 5, 2023.

/s/ Amy S. Hilton
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