Patsy Spaw
JUL 31 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 EXCLUDE EVIDENCE OF ANY ALLEGED CONDUCT THAT OCCURRED PRIOR TO JANUARY 2023

The House and its counsel have promised the public that the evidence against the Attorney General is "clear, compelling and decisive" and "ten times worse than what has been public." But those statements, which have oft been quoted and re-quoted by the liberal press, were nothing but bluster and bluff. To be clear, the aggressive, reckless, misleading comments are flat wrong, and it is hard to imagine the House could exaggerate the scant "evidence" any more. Now that the House Managers have been forced by this Court to turn over their evidence through document production, it is clear that the evidence the House Managers have gathered is 100 times less compelling than what has been proclaimed. Indeed, now that the House Managers have produced more than fifty boxes of documents, there is little to no evidence whatsoever that supports their baseless allegations of wrongdoing, much less evidence that can support impeachment of the duly elected Attorney General of the State of Texas. The evidence provided by the House Managers is flimsy at best and insulting at worst. The House Manager's initiation of this whole proceeding and the so-called evidence upon which it relies is an utter farce.

But ultimately the House's weak evidence is of no matter. As set forth in General Paxton's corresponding Motion to Dismiss filed along with this Motion, an impeachment proceeding simply cannot be based on evidence of alleged conduct that was publicly known and that occurred before the official's election. As fully explained in the corresponding Motion, this rule, known as the "prior-term doctrine," is firmly rooted in Texas statutory law, Texas Supreme Court decisions, and Texas impeachment precedent.

Unfortunately for the House's misguided effort, with rare exception, the entirety of the evidence that the House Managers have produced and ostensibly intend to rely upon is based on conduct that occurred prior to January 2023. Because that is true, those Articles should be summarily dismissed, because to pursue an impeachment based on such evidence would equate to

an illegal impeachment, that is, an impeachment proceeding that is directly contrary to the Government Code, Texas case law, and impeachment precedent. And, for purposes of this Motion, none of the evidence that occurred prior to January 2023 can be legally considered; all courts of our great state would determine that this evidence in irrelevant.

In November 2022, Texas voters overwhelmingly reelected Attorney General Paxton to serve his third consecutive term, despite well-funded opposition in both the primary and general elections. Unable to defeat the Attorney General at the polls, the architects of the present impeachment caused the House to quickly file and pass twenty Articles of Impeachment—in a mere three days, presented at a four-hour hearing. The allegations making up the Articles contain unsupported, vague, and irrelevant assertions of non-impeachable conduct. Importantly, with one exception, the Articles are not based on any alleged conduct that occurred after the election of November 2022, or after the Attorney General Paxton began his third term in January 2023. Further, the Articles allege nothing that Texas voters have not heard from the Attorney General's losing political opponents—and their donors and supporters—for years. None of the allegations that occurred prior to January 2023 and make up nineteen of the Articles of Impeachment can or should be considered by this Court. The law requires that all such evidence be excluded.

STANDARD OF LAW

Pursuant to the Texas Rules of Evidence, "any preliminary question about whether... evidence is admissible" is a decision for the Court. Tex. R. Evid. 104(a); *see also Pierce v. State*, 32 S.W.3d 247, 251 (Tex. Crim. App. 2000) ("The admissibility of evidence is a matter for the court."). And "[t]he decision to exclude evidence could be determined by a ruling of law, a finding of fact, or both." *Pierce*, 32 S.W.3d at 251. The Court must exclude as inadmissible irrelevant evidence, and it "may exclude relevant evidence if its probative value is substantially outweighed

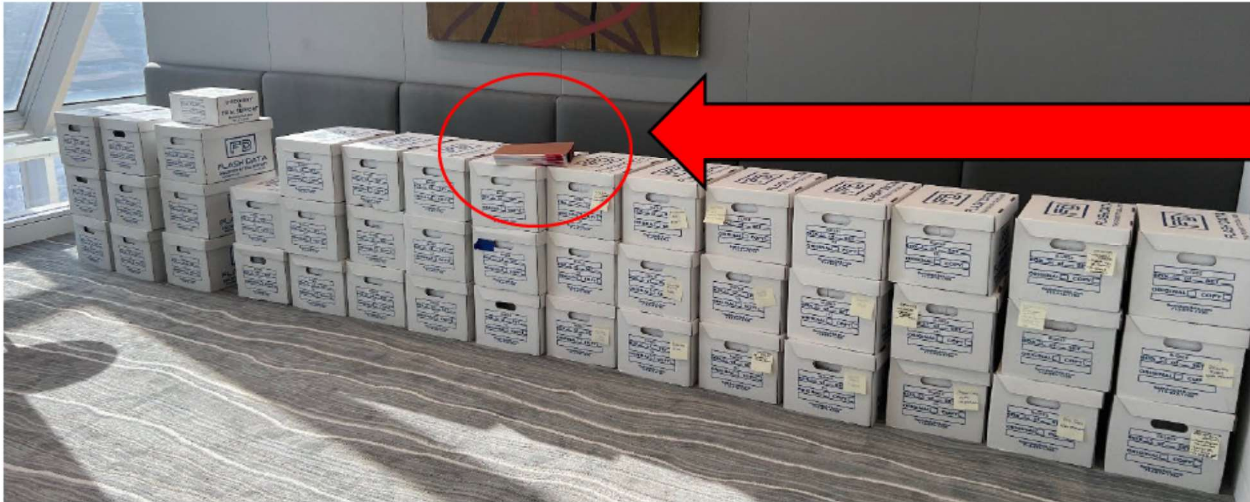
by a danger of... unfair prejudice, confusing the issues, misleading the jury, undue delay, or needless presenting cumulative evidence." *Id.* at 402, 403; *see also Hall v. State*, 663 S.W.3d 15, 32 (Tex. Crim. App. 2021). In this proceeding, rulings on evidence are made by the Presiding Officer, Lieutenant Governor Dan Patrick.

ARGUMENT

I. The So-Called Evidence in This Impeachment Proceeding Provided by the House Managers Is Grossly Underwhelming.

In a press conference, counsel for the House Board of Managers boldly stated that the evidence in the impeachment against Attorney General Ken Paxton was "10-times worse" than what was publicly known. That assertion raised some eyebrows. It was quoted and re-quoted repeatedly. But it was flat wrong. Bluster and bluffing will not prevail in this impeachment proceeding. At some point the truth matters. That point is now. The Attorney General has now received more than 150,000 pages of documents, making up more than fifty boxes of production. Contrary to the bluster from the House Managers and their legal team, the contents of that production have been grossly underwhelming. Not only is what has been produced mostly irrelevant, but the quality of what has been brought forward is shameful and abysmal—especially given the severity of the allegations brought forth by the House. Less here is certainly not more.

Even if the Senate were to wade through the avalanche of "evidence" produced by the House Managers, only a small folder of evidence is even remotely relevant to the Articles at issue in the impeachment trial—and none of it would come close to ***proving*** the Articles at issue in the impeachment trial—and even that production is related to conduct that occurred prior to January 2023, evidence that by law cannot be considered.



In reality, the so-called
"evidence" is 100-times less than what was promised.

What's worse, from the fifteen witnesses that the House Managers claim to have spoken to during their investigation, ***not one*** was placed under oath. And, shockingly, the investigators themselves who relayed the "testimony" of these fifteen "witnesses" at the committee hearing were also not placed under oath.[1] But it gets worse. In the unsworn witness statements, the witnesses make no effort to limit what they testify about to their personal knowledge, that is, what they actually saw, or what they actually heard, but rather are encouraged to freely speculate and provide their unsupported thoughts and opinions about the Attorney General and what "might" have potentially occurred. There was no smoking gun; there is no smoking gun. There is no persuasive proof of any wrongdoing—only conjecture and speculation. Indeed, after a careful review of what the House Managers call their "evidence," it is clear that the House's strategy was to shoot first and ask questions later. The House did not just miss, it missed badly.

[1] The House's failure to swear witnesses or require sworn testimony during their committee hearing was illegal, and will be the subject of further motion practice. *See* Tex. Gov't Code § 301.022.

II. The Prior-Term Doctrine Limits the Evidence that Can Be Considered at Trial.

The admitted evidence in this impeachment trial, if there is a need for a trial following the parties' motion practice, must be limited to that which occurred after the Attorney General's election, that is, after he took office for his third term in January 2023. *See* TEX. GOV'T CODE § 665.081. Attorney General Ken Paxton received nearly 4.3 million votes in his most recent re-election, besting his opponent by nearly 800,000 votes. Prior to the general election, General Paxton also was the runaway favorite for his re-election in the Republican primary runoff during 2022, receiving 68% of the vote over his opponent. As set forth in the corresponding Motion to Dismiss, the Attorney General's Primary and General Election victories occurred well after the public became aware of highly-publicized accusations against him—the exact same accusations that are the subject of this impeachment proceeding. There can be no doubt that the public was fully aware of these accusations, as evidenced by the intense media scrutiny and millions of dollars in campaigning done by Ken Paxton's political opponents in the 2022 election cycle.

Much of the evidence provided by the House is old, certainly as far as election cycles go. Indeed, many of the allegations that make up this impeachment proceeding occurred prior to Ken Paxton's *second* term as Attorney General of Texas, wherein he received nearly 4.2 million votes in the 2018 general election. Despite the public's knowledge of these accusations against him, Ken Paxton received more support for his 2022 re-election than he did in 2018. The will of Texas voters was made clear, and now this Court must limit the evidence in this trial to that which occurred after the Attorney General's most recent re-election.

III. The Texas Rules of Evidence Exclude All Prior-Term Evidence.

The Texas Rules of Evidence govern this impeachment proceeding. *See* Senate Rule 13(b). Under the Rules of Evidence, only evidence that is relevant is admissible. TEX. R. EVID. 402.

("[i]rrelevant evidence is not admissible.") Further, even relevant evidence is inadmissible if it is barred by the "United States or Texas Constitution [or] a statute." *Id.* at 402, 403; *see also Hall*, 663 S.W.3d at 32. And, of course, Texas courts routinely "may exclude relevant evidence if its probative value is substantially outweighed by the danger of... unfair prejudice, confusing the issues, misleading the jury, undue delay, or needless presenting cumulative evidence." Tex. R. Evid. 403. Any evidence of conduct occurring prior to January 2023 is excludable for all the above reasons.

This Court traditionally engages its constitutional duty to impeach by first excluding evidence that predates the official's election. *See* Price Impeachment Proceedings at 429-31 (prior-term demurrers sustained, precluding pre-election evidence); *see also* McGaughey Impeachment Proceedings at 9 (ten Senators—enough to acquit—sustained prior-term demurrers to preclude pre-election evidence). The Texas Supreme Court has also affirmed that evidence related to an official's pre-election conduct that was known to the public is not relevant to an impeachment inquiry because an officer cannot be removed for office for public, prior-term allegations. Moreover, prior-term evidence is expressly barred by the Texas Government Code governing impeachments. Texas Government Code section 665.081 states that "[a]n officer in this [S]tate may not be removed from office for an act the officer may have committed before the officer's election to office." Under Rule 402, evidence that supports prior-term allegations cannot be admissible.

The point is this, evidence in this matter of conduct that occurred prior to January 2023 is not relevant, and thus not admissible. And even if such evidence is somehow relevant to impeachment—it is not—certainly its probative value here is substantially outweighed by each factor justifying exclusion in Rule 403. In particular, prior-term evidence would likely: unfairly

prejudice Attorney General Paxton; confuse the issues and conflate the facts that House Managers must prove for each Article; mislead the Members of this Court by allowing the Court to consider pre-election facts; unduly delay the trial proceedings, which could be significantly reduced to the fair consideration of only one post-election Article; and needlessly require presentation of highly cumulative evidence, particularly related to Articles XVI through XX, which fail to allege offenses independent of the other Articles. Based on the Texas Rules of Evidence, any evidence the House relies on that pre-dates the Attorney General's most recent re-election to office irrelevant and inadmissible.

CONCLUSION AND REQUESTED RELIEF

The prior-term doctrine controls this impeachment proceeding. Any evidence that is offered to support conduct that occurred to prior to January 2023 is not relevant. Only relevant evidence is admissible. This Court should thus exclude all evidence of conduct that occurred prior to Attorney General Ken Paxton's most recent term, which began in 2023.

Respectfully submitted.

/s/ Tony Buzbee

Tony Buzbee
The Buzbee Law Firm
JP Morgan Chase Tower
600 Travis Street, Suite 7500
Houston, Texas 77002
Tbuzbee@txattorneys.com

Judd E. Stone II
Christopher D. Hilton
Allison M. Collins
Amy S. Hilton
Kateland R. Jackson
Joseph N. Mazzara

STONE|HILTON PLLC
P.O. Box 150112
Austin, Texas 78715
(737) 465-3897
judd.e.stone@proton.me
christopher.d.hilton@proton.me
allison.collins23@proton.me
amy.s.hilton@proton.me
kateland.jackson@proton.me
joseph.mazzara86@proton.me

Dan Cogdell
Cogdell Law Firm
1000 Main St., Suite 2300
Houston, TX 77002
dan@cogdell-law.com

Counsel for the Attorney General

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 July 31, 2023.

<u>/s/ Tony Buzbee</u>
Tony Buzbee