NO. 21-1027

IN THE SUPREME COURT OF TEXAS

OFFICE OF THE ATTORNEY GENERAL,

PETITIONER,

V.

JAMES BLAKE BRICKMAN, J. MARK PENLEY, DAVID MAXWELL, AND RYAN M. VASSAR,

RESPONDENTS

APPEAL FROM CAUSE NO. **03-21-00161-CV**,
IN THE THIRD COURT OF APPEALS, TEXAS

JOINT RESPONSE BRIEF ON THE MERITS

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INTRODUCTION

This Court recently reiterated that the Texas Whistleblower Act is "aimed at 'ferreting out government mismanagement to protect the public.'" *City of Fort Worth v. Pridgen*, No. 20-0700, 2022 WL 1696036, at *6 (Tex. May 27, 2022) (quoting *Neighborhood Ctrs. Inc. v. Walker*, 544 S.W.3d 744, 748 (Tex. 2018)). The Court should deny review here because both lower courts reached the only decision that aligns with this Court's interpretation of the Act.

Accepting OAG's arguments would require the Court to hold that the Act grants every elected official in Texas—the thousands of apex officers who manage our government—*carte blanche* to retaliate against public employees who in good faith report illegal conduct committed by the officials or at their direction. And the Court would also have to conclude that the Legislature granted this license for corruption to all elected officials not by express statement in the statute, but by subtle implication in the definition of "public employee."

The court of appeals' rejection of OAG's position is not only without error, but compelling:

> We decline the OAG's invitation to hold that by choosing somewhat ambiguous language, the legislature hid in the Act an implied exclusion that would lead to the extreme consequence of excluding from whistleblower protection employees who report misconduct by any of the thousands of elected officials—the very officials who control this State's numerous governmental entities, a result in direct

> opposition to the purposes of the Act and overall State policies of transparency and accountability.

Office of Attorney Gen. of Tex. v Brickman, 636 S.W.3d 659, 675 (Tex. App—Austin 2021, pet. filed). "As the old maxim goes, the Legislature does not hide elephants in mouseholes." *Hogan v. Zoanni*, 627 S.W.3d 163, 174 (Tex. 2021).

STATEMENT OF FACTS

Respondents are dissatisfied with OAG's statement of facts because it is not faithful to the live pleading that controls this case. Because OAG is appealing from the denial of its motion to dismiss under Rule 91a, the *only* relevant facts are those alleged in Respondents' Second Amended Petition and its attachments. CR.377-505 (the "Petition"); TEX. R. CIV. P. 91a.6. OAG's resort to "facts" outside of the Petition is improper, and its distortion of Respondents' allegations portends the weakness of its case.

For example, OAG tells the Court "this case arises from what [former First Assistant Attorney General Jeff] Mateer described as a precipitous decline of the trust relationship between the Attorney General and his chief subordinates." OAG BOM at 6. This is false and outside the Petition, which says nothing about a decline in trust. Instead, the case arises from Respondents' report to law enforcement officials their good-faith belief that Ken Paxton and OAG were engaged in illegal conduct, and OAG's prompt retaliation in violation of the Whistleblower Act. CR.384-403.

Nor is it accurate to say that Respondents merely "developed concerns regarding several legal positions the Attorney General directed OAG to take." OAG BOM at 6. Over time, "concerns" developed into a good-faith belief that OAG was breaking the law as Respondents realized that the otherwise inexplicable positions OAG took on multiple issues were, in every instance, solely for the benefit of Paxton's personal benefactor, Nate Paul. CR.384-406.

I. OAG unlawfully worked against a charity to benefit Paul's companies.

The Petition does not merely recite that Respondents "grew concerned that the Attorney General overrode the recommendations of his staff about whether to become involved in a lawsuit involving a charity known as the Mitte Foundation." OAG BOM at 6-7. Sure, it was odd that Paxton overrode the decision of his Charitable Trusts Division, considering that he had never done so before or even shown any interest in a charity case. CR.391-93. But that is not why Respondents believed the conduct was illegal.

OAG neglects to mention that the defendants in the Mitte Foundation case were Nate Paul's companies. CR.391. OAG intervened not "on behalf of the interest of the general public of this state in charitable trusts," as required by statute, but for the unlawful purpose of exerting State resources *against* the charity to benefit Paul. CR.393; TEX. PROP. CODE § 123.002. Absent any legitimate agency rationale for OAG to work against the Mitte Foundation in the lawsuit, Respondents ultimately

came to believe that it was part of an illegal scheme of misusing OAG resources to benefit Paul. CR.393; TEX. PENAL CODE § 39.02.

II. OAG unlawfully issued an AG opinion to thwart foreclosure of Paul's property.

Similarly, Respondents did not merely allege that Paxton "decided on the contents of an opinion letter that would be issued under his name." OAG BOM at 7. Yes, it was odd that Paxton required OAG to opine that foreclosure sales should be suspended during the COVID-19 pandemic, considering that Paxton and OAG had opposed every other government restriction on gatherings at the time.[1] CR.393-94. But that is not why Respondents believed the conduct was illegal.

OAG neglects to mention that the sole purpose of the foreclosure opinion was to confer an unlawful benefit on Nate Paul. CR.393-94. Paxton demanded that OAG rush the decision to publication at 2:00 AM on Sunday, August 2, 2020 because (unknown to Respondents at the time), at least one of Paul's properties was scheduled to be sold at a foreclosure sale on Tuesday, August 4. CR.394. Paul's lawyers successfully utilized the AG opinion to prevent the foreclosure. *Id*. Without

[1] OAG's public opposition to public health measures in other instances throughout the State during the COVID-19 pandemic are well-known, became the subject of high-profile litigation, and directly contradict what Paxton engineered OAG to do for Nate Paul. *See, e.g.*, *State v. El Paso Cnty.*, 618 S.W.3d 812, 814–15, 818 (Tex. App.—El Paso 2020, no pet.) (OAG challenged El Paso County order responding to "a dramatic upswing in the COVID-19 pandemic"); *State v. City of Austin*, No. 03-20-00619-CV, 2021 WL 1313349, at *1 (Tex. App.—Austin Apr. 8, 2021, no pet.) (OAG sought to stop local officials' order from "temporarily suspend[ing] dine-in food and beverage service from 10:30 p.m. to 6:30 a.m." during New Year's weekend).

any legitimate agency rationale for this weekend rush to prohibit foreclosure sales, Respondents eventually deduced it was another part of an illegal scheme of misusing OAG resources to benefit Nate Paul. CR.393-94; TEX. PENAL CODE § 39.02.

III. OAG unlawfully used State resources to interfere with law enforcement investigations of Paul's alleged illegal activities.

Respondents did not merely plead that Paxton "accepted a referral from the Travis County District Attorney to assist with her investigation into criminal allegations of public corruption" or that Paxton simply "hired outside counsel, Brandon Cammack, to handle that investigation." OAG BOM at 7. Rather than "accepting" a referral from Travis County, Paxton personally orchestrated the referral so OAG could conduct the investigation. CR.394-95. Why? Because the person making the allegations was none other than the beneficiary of so many other OAG favors—Nate Paul. CR.394-403. In fact, the Travis County District Attorney later quashed OAG's attempt to characterize the situation as a routine investigative referral, expressing "serious concerns about the integrity of [OAG's] investigation and the propriety of [OAG] conducting it." CR.416.

State and federal law enforcement authorities had raided Paul's businesses in August 2019. CR.384. Paul claimed that he was being investigated as a result of criminal wrongdoing by the FBI, a respected federal magistrate judge, the DPS, and the U.S. Attorney's office. CR.394-403. After Paxton secured the referral of these

claims from Travis County to OAG, Respondents Maxwell and Penley investigated Paul's unlikely allegations and found no basis to support them. CR.395-96.

Unsatisfied with this news, Paxton took over. He required Vassar to help initiate the process of retaining outside counsel to perform the investigation at OAG expense. CR.397. But Paxton circumvented longstanding procedures for approving outside counsel contracts and personally committed OAG resources to a contract with someone he could direct and control—Brandon Cammack, a five-year lawyer with no law-enforcement or investigative experience. CR.396-400.

At Paxton's direction, Cammack falsely identified himself as an OAG "special prosecutor" and obtained some 39 grand jury subpoenas under false pretenses addressed to Nate Paul's adversaries. CR.400-02. In fact, Paul's attorney even accompanied Cammack when serving the improperly obtained subpoenas. CR.402-03. Respondents believed it was illegal for OAG to participate in a scheme by hiring an unqualified lawyer to manipulate the grand jury process in OAG's name, for the evident purpose of hindering the ongoing investigation into Paul's alleged criminal activities. CR.403-06.

IV. OAG unlawfully assisted Paul's effort to obtain records related to an active law enforcement investigation.

Respondents also alleged that Paxton intervened in a series of Open Records requests to use OAG to help Paul. CR.388-91. OAG does not mention these allegations in its statement of facts.

Paul served Open Records requests on the Texas State Securities Board and the Texas Department of Public Safety, seeking records related to the raid and the ongoing investigation of Paul and his companies. CR.388-89. He also sought an unredacted version of the FBI's brief opposing the release of records related to the ongoing criminal investigation of him. CR.389.

Ample precedent dictated that Paul's requests be denied; otherwise, the pending law-enforcement investigation would be jeopardized as would years of OAG precedent applying the exception to the Public Information Act for records related to ongoing criminal investigations. CR.389-90. Yet, Paxton—who had never personally involved himself in any of the 30,000-40,000 Open Records decisions OAG issues each year—intervened to have OAG help Paul. CR.389-90. Paxton personally spoke to Paul about the subject matter; told Vassar that he did not want to assist the FBI or DPS; took personal possession for several days of files that OAG could not *officially* release to Paul; and caused OAG to hand over the FBI's unredacted brief to Paul, which at a minimum, threatened to interfere with and obstruct the FBI investigation. CR.389-90. With no legitimate agency rationale for this conduct, Respondents ultimately figured out that it too was part of a long-running, illegal scheme to misuse OAG resources to benefit Nate Paul. CR.390-91; TEX. PENAL CODE § 39.02.

V. Respondents reported their good-faith beliefs to appropriate law enforcement authorities, and OAG immediately retaliated.

OAG correctly recites that Respondents reported this information and their beliefs to the FBI, the Travis County DA's office, and the Texas Rangers. OAG BOM at 7; *see* CR.406-10. It then says Respondents were "relieved of their leadership roles within the agency," as if they were merely reassigned. *Id*. The truth, as detailed in the Petition, is that OAG took swift and malicious retaliatory employment actions against Respondents—going so far as using armed officers to intimidate them in the workplace, demeaning them in front of their subordinates, suspending them from work, improperly asking Officer Maxwell to surrender his service weapon, and then firing them—all so swiftly that Respondents are entitled to a statutory presumption that OAG's actions were retaliatory. CR.411-28. And if that were not enough, OAG repeatedly deployed its vast media resources including issuing formal OAG press releases to publicly smear Respondents' reputations with false allegations and impede their efforts to obtain new jobs. *Id*.

VI. OAG has kept this case in the starting blocks for nearly two years.

Once they were all fired and publicly defamed, Respondents amended their claims to add requests for reinstatement during the pendency of the case. OAG moved to dismiss under Rule 91a, stonewalled all discovery, and opposed Respondents' efforts to seek a temporary injunction. In fact, OAG was so worried about evidence that might be offered at the TI hearing, that it repeatedly re-set its

Rule 91a motion for hearing on a separate day, before Respondents' setting on the TI. Respondents were forced to move the trial court to consolidate the hearings, as is customary in Travis County. CR.286. The trial court agreed and set the Rule 91a motion for hearing on February 16, 2021, with the TI hearing to follow immediately afterwards, if necessary. CR.331, 332.

Due to the winter storm, the hearings commenced March 1, 2021. The trial court heard extensive argument on the Rule 91a motion and explicitly took it under advisement. 2.RR 128. OAG immediately filed a notice of appeal, falsely representing that it was appealing the "denial of OAG's plea to the jurisdiction." CR.616. Because the trial court had not ruled on the Rule 91a motion, it commenced the TI hearing. 2.RR 131-32. Unfortunately, OAG's misrepresentation that the trial court had denied its Rule 91a motion induced the court of appeals to issue a stay later that night. CR.626. Eleven days later, the appellate court lifted the stay, denied OAG's mandamus petition, and dismissed its appeal for lack of jurisdiction. CR.642, 643.

But OAG had accomplished its mission. The eleven-day stay gave the trial court ample opportunity to reflect on the Rule 91a motion, and the court denied it before resuming the TI hearing. CR.648. OAG promptly noticed this appeal, invoking the automatic stay and preventing Respondents from being heard on their request for temporary injunctive relief. CR.651. The court of appeals affirmed the

trial court's order. Despite a consistent and unanimous lack of success on the merits, OAG has succeeded in its primary objective of keeping the stay in effect for a year and a half.

SUMMARY OF ARGUMENT

The Texas Whistleblower Act includes an express waiver of governmental immunity. Therefore, the only question in this Rule 91a appeal is whether Respondents' allegations, taken as true, together with inferences reasonably drawn from them, state a claim under the Act. Contrary to OAG's assertions, every presumption guiding the analysis of this question favors Respondents. The Act is construed broadly to effectuate its remedial purposes, and the Petition is construed broadly in light of the pleaders' intent. Respondents' Petition easily clears the bar, and the lower-courts' case-specific analysis of this pleading presents no issue worthy of Supreme Court review.

Respondents plainly pled that they made good-faith reports of unlawful conduct by their employing governmental entity. OAG does not challenge the existence of these allegations but argues that they are without legal effect because an inanimate entity such as OAG is incapable of possessing culpable intent. If that were true, the Legislature would not have provided protection in the Whistleblower Act for good-faith reports of illegal conduct by the employing governmental entity. Indeed, no corporate entity could ever engage in culpable conduct.

Like all corporate entities, OAG can and must act only through its human representatives. Ken Paxton is OAG's leader who swore a constitutional oath to perform OAG's many statutory duties. Conduct that this apex corporate officer committed and directed in the course and scope of his official duties is conduct of OAG, just as the corporate conduct of every other CEO is conduct of the entities they represent. The court of appeals correctly and unremarkably held that Respondents reported unlawful acts of OAG when they complained of official OAG acts performed by Paxton and at his direction.

Although the court of appeals did not decide the issue, it could also have affirmed the trial-court order on the basis that Paxton is an OAG employee in every ordinary sense of the word. OAG employs Paxton full time, pays him a salary, enrolls him the State employee retirement fund, and refers to him throughout Paxton's OAG personnel file as an employee. Nothing in Texas law prevents a person from being both an elected officer and an employee of the organization he leads. The court of appeals compellingly rejected the unlikely notion that when the Legislature enacted a statute intended to expose corruption by those who conduct our government, it impliedly exempted the thousands of elected officers who wield the most governmental power.

OAG's attack on the factual detail in Respondents' lengthy Petition has, if possible, even less merit. The Petition is replete with specific allegations that

Respondents told law enforcement officials of a series of instances in which Paxton directed OAG to take dubious positions solely for the unlawful purpose of conferring benefits on Nate Paul. They further explained to the FBI, the Texas Rangers, and the district attorney that, with the benefit of their experience as lawyers and law-enforcement officials, they had formed the firm belief that this series of highly unusual OAG activities benefitting Paul were illegal. And this good-faith belief was shared by no fewer than seven of the State's highest-ranking and most experienced legal officers. What OAG claims is missing from these detailed allegations would essentially evaluate a Whistleblower petition against the standards applied to a charging instrument—a requirement appearing nowhere in the statutory text or any judicial decision.

Last and certainly least, OAG's separation-of-powers "concerns" present nothing for this Court to review. Neither Respondents nor the lower courts have remotely questioned the Attorney General's authority to hire and fire staff members based on their political allegiances. Indeed, OAG may win this case on the merits if it convinces a jury that all four Respondents—whom Paxton hand-selected for their roles in the first place—were fired merely because their political views suddenly stopped aligning with his, rather than for unlawful retaliation. But that is for another day. Restricting the Attorney General's ability to fire staff for unlawful retaliation

presents no more separation-of-powers concern than restricting him from firing staff based on racial or sexual discrimination or any other unlawful purpose.

This case is almost exactly two years old. The Court should deny review or summarily affirm and let it proceed to the merits.

STANDARD OF REVIEW

To avoid even preliminary discovery, OAG packaged its jurisdictional challenge under Texas Rule of Civil Procedure 91a. The court of appeals correctly stated the standard of review for rule 91a motions and challenges to jurisdiction:

> Under rule 91a, a party may move to dismiss a claim on the grounds that it has no basis in law, meaning that the allegations, taken as true, and inferences reasonably drawn from them, would not entitle the claimant to the relief he seeks...In ruling on a Rule 91a motion to dismiss, a court may not consider evidence but must decide the motion based solely on the pleading of the cause of action, together with any permitted pleading exhibits. We review a trial court's ruling on a rule 91a motion de novo. The OAG sought dismissal based entirely on an asserted lack of jurisdiction, another issue we review de novo. Because a rule 91a motion challenges the sufficiency of the pleadings, we determine whether appellees alleged facts demonstrating the trial court's jurisdiction to hear the case, looking to their intent and construing the pleadings in their favor.

Brickman, 636 S.W.3d at 664 (internal citations and punctuation omitted).

Section 311.034 of the Texas Government Code states "a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language." OAG relies heavily on this provision and on cases

applying Section 311.034's clear-and-unambiguous waiver requirement in an attempt to restrict the Whistleblower Act and inflate Respondents' pleading burden. *See, e.g.,* OAG BOM at 1, 11-12 *citing* TEX. GOV'T CODE § 311.034; *Rolling Plains Groundwater Conservation Dist. v. City of Aspermont*, 353 S.W.3d 756, 759 (Tex. 2011); and *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2003).

But *Rolling Plains* and *Taylor*, like so many of the cases applying § 311.034, involve the courts determining whether there is an *implied* waiver of sovereign immunity within a statute that has no express waiver. These cases do not use the clear-and-unambiguous requirement, as OAG would, to scrutinize pleadings and parse statutes that contain *express* waivers such as that found in the Whistleblower Act. In fact, in *Taylor*, this Court referred to the Whistleblower Act's waiver as an exemplar of clear and unambiguous language:

> Some statutes leave no doubt about the Legislature's intent to waive immunity. When the Legislature pronounces, for example, that "sovereign immunity to…liability is waived and abolished to the extent of liability created by this chapter," we have had little difficulty recognizing a waiver of immunity from liability.

Taylor, 106 S.W.3d at 696, 696 n.5 (*See, e.g.*, TEX. GOVT. CODE § 554.0035 [the Act]); *see also*, *Alcala v. Tex. Webb Cnty.*, 620 F. Supp. 2d 795, 804 (S.D. Tex. 2009). ("Another example of the Legislature expressly waiving immunity through clear and unambiguous language is found in the Texas Whistleblower Act.")

Indeed, "[a]lthough [the courts] defer to the legislature to *waive* immunity, the judicial branch retains the authority and responsibility to determine whether immunity exists in the first place, and to define its *scope*." *Hillman v. Nueces Cnty.*, 579 S.W.3d 354, 361 (Tex. 2019) (emphasis added). And, as the court of appeals recognized, "the Act is a remedial statute and thus should be construed liberally." *Brickman*, 636 S.W.3d at 664 (citing *Tex. Dep't of Crim. Just. v. McElyea*, 239 S.W.3d 842, 849 (Tex. App.—Austin 2007, pet. denied) and *Univ. of Houston v. Barth*, 178 S.W.3d 157, 162 (Tex. App.—Houston [1st Dist.] 2005, no pet.)). Therefore, the Whistleblower Act should be "given the most comprehensive and liberal construction possible" and "certainly should not be given a narrow, technical construction." *Id*. (citing *Burch v. City of San Antonio*, 518 S.W.2d 540, 544 (Tex. 1975); *Traxler v. Entergy Gulf States, Inc*., 376 S.W.2d 742, 744–45 (Tex. 2012); and *City of Mason v. West Tex. Utils. Co.*, 237 S.W.2d 273, 280 (1951)). Thus, the presumptions guiding review of the lower-court rulings favor Respondents, both as to construction of the Act and interpretation of the operative pleading.

ARGUMENT

I. Respondents allege that OAG itself engaged in unlawful conduct at Paxton's direction.

The court of appeals correctly held that Respondents pled a claim under the Whistleblower Act because they "allege that the OAG itself, through its official actions carried out at Paxton's direction, committed acts improperly intended to

benefit Paul and/or Paxton" and that Respondents' reports to law enforcement "included allegations that *the office itself* committed misconduct on Paxton's instruction." *Brickman*, 636 S.W.3d at 670 (emphasis in original). These included allegations that "OAG improperly intervened in the Mitte Foundation's lawsuit against Paul; improperly contracted with Cammack, who then improperly obtained grand-jury subpoenas; and issued an opinion that had the effect of helping Paul avoid foreclosure sales." *Id*. at 670–71.

OAG challenges this holding by arguing that Respondents' pleading does not allege that OAG—an inanimate entity—committed every element of "an actus reus and a mens rea" comprising any particular crime. OAG BOM at 16. First, OAG's argument that Respondents must plead they reported a violation of a specific law is incorrect. "[T]o properly 'report' under the Act, a public employee must convey information that exposes or corroborates a violation of law or otherwise provide relevant, additional information that will help identify or investigate illegal conduct." *Pridgen*, 2022 WL 1696036, at *6. When making a report, "[t]here is no requirement that an employee identify a specific law," so long as there is "some law prohibiting the complained-of conduct." *McElyea*, 239 S.W.3d at 850 (citations omitted). In fact, a plaintiff may maintain a Whistleblower Act claim even without establishing an "actual violation of law." *City of Elsa v. Gonzalez*, 325 S.W.3d 622, 627 n.3 (Tex. 2010).

Respondents pled more than the Act and case law require. They did not allege OAG merely departed from the agency's longstanding precedent and sound principles (although it clearly did). As summarized above and detailed in the Petition, Respondents describe several specific reported allegations that Paxton *and* OAG violated Texas and federal criminal laws regarding bribery, tampering with government records, obstruction of justice, harassment, and abuse of office. CR.387-406. For example, Respondents allege they reported potential bribery and abuse of office when OAG intervened in a lawsuit between Paul and a charitable foundation to assist Paul rather than to protect the interests of the foundation (OAG's statutory mandate) and twenty-two days later Paul's lawyers donated $25,000.00 to Paxton's campaign. CR.393. Respondents also allege that OAG tampered with a governmental record in violation of Texas Penal Code § 37.10 and obstructed a criminal investigation in violation of 18 U.S.C. § 1510(a) with regard to Cammack. CR.404-06. Respondents allege that Paxton and OAG directed Cammack to falsely represent that he was a "special prosecutor" in order to obtain grand jury subpoenas under false pretenses and to issue those improperly obtained subpoenas to financial institutions adverse to Paul and, remarkably, to law enforcement agents and federal prosecutors involved in the investigation of Paul. CR.399-406.

Respondents also pled "the conduct they in good faith concluded Paxton *and OAG* had engaged in may violate 18 U.S.C. § 1344 (Bank Fraud); 18 U.S.C. § 1956

(Money Laundering); and 18 U.S.C. §§ 1961, 1962 (Racketeer Influenced and Corrupt Organizations)." CR.406 (emphasis added).

The allegations in Respondents' petition support the lower courts' decisions without further analysis, particularly when liberally construed as required. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004) (Courts construe pleadings liberally in favor of the plaintiffs and look to the pleaders' intent when determining whether plaintiffs stated facts sufficient to demonstrate the court's jurisdiction); *see also Koenig v. Blaylock*, 497 S.W.3d 595, 599 (Tex. App.—Austin 2016, pet. denied) (Courts reviewing the ruling on a 91a motion must construe the pleadings liberally in favor of the plaintiff, look to the pleaders intent, and accept as true the factual allegations in the pleadings).

Because an honest review of Respondents' petition easily reveals allegations of criminal conduct by the agency itself, OAG resorts to mischaracterizations of those allegations and nonsense arguments about *mens rea*. OAG contends that Respondents cannot state a claim that OAG violated the law because the agency "did not have the requisite corrupt motivation…" and "any mental state the Attorney General allegedly possessed cannot be attributed to OAG as though the two conspired." OAG BOM at 18, 19.

Of course OAG itself has no *mens rea*; it has no *mens*. But if the simple fact that governmental entities are inanimate precluded them from engaging in unlawful

conduct, then the entire Whistleblower Act would be nonsensical. The Legislature would not have expressly waived immunity for claims based on reporting of unlawful conduct "of the employing governmental entity" if agencies were incapable of ever engaging in illegal conduct because those inanimate entities will never have their own culpable mental state. Moreover, as shown in the next section, when Paxton utilized OAG to carry out unlawful conduct, OAG violated the law.

As the court of appeals explained, Respondents "leveled allegations of numerous instances of improper or illegal conduct, not mere changes in precedent or policy." *Brickman*, 636 S.W.3d at 675. The opinion correctly summarizes the crimes Respondents accused Paxton and OAG of committing and the facts and logical inferences drawn from those facts that Respondents shared with state and federal law enforcement officials. *Id.* at 675–79. The court of appeals' conclusion that Respondents adequately described reporting violations of law by their employing government entity so as to state a claim under the Whistleblower Act is correct, uncontroversial, and unworthy of further review.

II. Criminal acts directed by the Attorney General in his official capacity are acts of OAG.

The court of appeals also correctly held that Paxton's official acts in the course and scope of his service as Attorney General are the acts of the entity he leads. OAG's arguments against this inescapable holding would lead to absurd results, particularly the result OAG seeks in this case.

OAG concedes that it is a "State governmental entity," which the Whistleblower Act defines in corporate terms. TEX. GOV'T CODE § 554.001(5); *see* OAG BOM at 4, 23, 24. The phrase "office of the attorney general" appears more than 100 times in Texas statutes. The Legislature has assigned this corporate entity myriad duties that require human action. To cite just a few examples, OAG is statutorily required to:

- submit a report regarding all officer-involved injuries or deaths that occurred during the preceding year, TEX. CODE CRIM. P. ART. 2.139(e);
- establish an electronic gang resource system, TEX. CODE CRIM. P. ART. 67.251;
- develop, in conjunction with the State Board of Education, a parenting and paternity awareness program that a school district shall use in the district's high school health curriculum, TEX. EDU. CODE § 28.002(p);
- serve as the child support enforcement agency of this state, TEX. FAM. Code § 159.103;
- participate in coordinated enforcement efforts with respect to fraudulent insurance acts relating to the Medicaid program or the child health plan program, TEX. INS. CODE § 704.054(c); and
- provide staffing to support to the Red River Boundary Commission, TEX. Nat. RES. CODE § 12.055.

OAG obviously can perform these and its many other duties only through human representatives.

Paxton is the human representative who currently leads the entity and took an oath to "faithfully execute the duties of the *office of [Attorney General]*." TEX.

CONST. ART. IV, § 23; ART. XVI, § 1 (emphasis added). OAG's scattershot arguments offer neither logic nor precedent to conclude that Paxton does not represent OAG in its corporate capacity.

A. The Attorney General is OAG's agent in the same sense that all other apex officers are agents of the organizations they lead.

OAG's lead contention is that Paxton cannot be OAG's agent because OAG cannot exercise a principal's common-law prerogative of control. OAG BOM at 21. Under this nonsense argument, OAG would have no human agents at all, because the entity itself is not capable of controlling *any* human representative. Of course, this same argument could be made by every apex corporate officer. All CEOs could argue that they answer only to the board of directors, not to the company, and all board members could argue that they answer only to the shareholders, not to the entity. Yet no court has ever accepted the argument that an inanimate corporation's inability to exercise control over its human leaders prevents those leaders from being considered corporate agents.

The issue here is not whether OAG can exercise a human principal's prerogative of control. And it is not whether OAG is merely responsible for Paxton's conduct on a theory of *respondeat superior* (*see* OAG BOM at 21-22). The question is whether Paxton's unlawful conduct is considered conduct of OAG. To answer this question, the court of appeals correctly analogized to cases analyzing whether human misconduct is considered conduct of other corporate entities. *Brickman*, 636

S.W.3d at 671. Tellingly, OAG makes no attempt to distinguish the applicability or logic of these cases.

The leading authority is *Bennett v. Reynolds*, 315 S.W.3d 867, 883–85 (Tex. 2010), holding that an apex officer's criminal conduct was conduct of the corporation. In *Bennett*, this Court began with the premises that "[c]orporations, of course, 'can act only through human agents'" and "[c]orporate decisions, likewise, are ultimately made by human agents." *Id*. at 883 (citations omitted). Likewise, OAG can perform its duties only through its human agents, and OAG's decisions—including the decisions that are the subject of Respondents' pleading—are made by humans.

Of course, not all representative human conduct is corporate conduct. Only a vice-principal's unlawful acts are considered acts of the corporate entity "because the vice-principal 'represents the corporation in its corporate capacity.'" *Id*. (citations omitted). A vice-principal includes four classes of human agents:

> (a) Corporate officers; (b) those who have authority to employ, direct, and discharge servants of the master; (c) those engaged in the performance of nondelegable or absolute duties of the master; and (d) those to whom a master has confided the management of the whole or a department or division of his business.

Id. at 884 (quoting *Chrysler Ins. Co. v. Greenspoint Dodge of Houston, Inc*., 297 S.W.3d 248, 250 n. 1 (Tex.2009)). The Court concluded that Bennett, as the corporation's highest-ranking officer, met this test, and there can be no doubt that

Paxton likewise "represents [OAG] in its corporate capacity." Indeed, Paxton qualifies under all four agent classes because he (a) is OAG's apex officer; (b) has the ultimate authority to employ, direct, and discharge OAG servants (*see* OAG BOM at 22); (c) has a constitutional obligation and swore an oath to perform OAG's duties; and (d) is charged with the management of the whole organization.

The Court found it significant that Bennett claimed absolute power over the corporate entity, saying "I make the decisions," and "I run the ranch." *Id*. at 884. The Court then observed that Bennett used this power to cause the culpable conduct to occur: "Not only did Bennett direct ranch operations generally, but he used his authority to direct corporate employees, on corporation time, to [commit] the specific tortious conduct that led to the assessment of exemplary damages." *Id*. The Court therefore concluded that Bennett was not acting in a personal capacity, but instead in a corporate capacity attributable to the corporation: "Bennett used corporate authority over corporate employees, on corporate land, to convert cattle using corporate equipment. There is ample evidence that Bennett was acting in a corporate capacity." *Id*. at 885.

The parallel here is overwhelming. OAG adamantly insists that Paxton wields the same kind of absolute power over OAG: "no one controls how the Attorney General exercises his official duties." PFR at 11. Respondents have alleged in significant detail that, like Bennett, Paxton "used his authority to direct [OAG]

employees, on [OAG] time," to commit the specific Nate Paul favors and other acts that form the basis for Respondents' report to law enforcement authorities.

Paxton thus was not acting in a personal capacity, but in a corporate capacity as a representative of OAG in committing and causing the office to commit illegal acts. *Cf. City of Cockrell Hill v. Johnson,* 48 S.W.3d 887, 896 (Tex. App.—Fort Worth 2001, pet. denied) (explaining that a city alderman's family violence did not constitute conduct of the "employing governmental entity" because it was not committed in the alderman's official capacity).

The Court concluded its analysis in *Bennett* as follows:

> As a vice-principal acting in a corporate capacity, Bennett inarguably authorized and approved his own act of converting the cattle. The record is devoid of evidence that anyone else could have authorized it. The Corporation, therefore, authorized the doing and manner of the conversion, and Bennett's conduct was chargeable to the Corporation for purposes of exemplary damages.

Bennett, 315 S.W.3d at 885. The conclusion is equally inescapable that Paxton was a vice-principal of OAG acting in a corporate capacity when he approved his own unlawful decisions to direct OAG resources for the benefit of Nate Paul. No one else directed these acts. OAG therefore authorized the doing and manner of the unlawful acts, and Paxton's conduct is OAG conduct for purposes of assessing whether Respondents alleged an unlawful act of their employing governmental entity.

B. It does not matter that OAG had other agents and vice-principals.

OAG points out that it had other agents whose conduct might be attributable to the organization. It frets that if Paxton's guilt and the innocence of others could *both* be attributed to OAG, then "a governmental agency may simultaneously possess both an innocent and culpable mindset." OAG BOM at 22-23. But this possibility would hardly constitute a "bizarre regime" as OAG contends. *Id*. at 23. The law has never required *all* vice-principals to possess bad intent before human misconduct is considered corporate misconduct. It requires only that the misbehaving human be acting in a corporate capacity. *See*, *e.g.*, *Bennett*, 315 S.W.3d at 883-85; TEX. CIV. PRAC. & REM. CODE § 41.005(c). Ford could hardly have avoided punitive damages in the Pinto cases by identifying a single executive who did not know about the memo.

C. The conduct at issue was OAG conduct because it was committed in the course and scope of Paxton's official duties.

Third, OAG argues that because Respondents have alleged Paxton's illegal actions were for his personal benefit, the actions were not "on behalf of OAG" and cannot be attributed to OAG. OAG BOM at 23. This contention obfuscates the issue. It does not matter, for example, whether Respondents alleged that Paxton deposited the proceeds of any bribes into OAG's coffers. The conduct alleged against Paxton is OAG conduct because it was committed in OAG's name, directed by OAG's apex official in the course and scope of his duties as the organization's

leader, and was conduct that could only have been performed under OAG's authority.

On this point, OAG's citation to *Garza v. Harrison*, 574 S.W.3d 389, 400 (Tex. 2019), refutes its own position. Garza was an officer in the Navasota Police Department, and the claims against him arose from fatal shots he fired during an off-duty arrest attempt. Addressing whether suit should be brought against Garza or against the governmental entity, the issue was not whether the entity received benefits from Garza's alleged misconduct, as OAG implies; the issue was whether Garza's conduct was within the scope of his employment. *Garza*, 574 S.W.3d at 400. This Court held that it was and thus dismissed claims against Garza individually.

Instead of asking whether Garza was acting "on behalf of" the governmental entity, the Court said "the critical inquiry is whether, when viewed objectively, 'a connection [exists] between the employee's job duties and the alleged tortious conduct.'" *Id.* at 401. The Court concluded that police officers committing alleged misconduct during an attempted arrest—even off duty and outside of their employing jurisdiction— "are acting within the general duties of their office." *Id*. Accordingly, it held that the suit could not proceed against Garza in his personal capacity and that plaintiffs' remedy lay in a suit against the governmental entity. *Id*. at 405–06.

The *Garza* analysis defeats OAG's argument here. As OAG itself attempts to emphasize, Respondents' complaints relate to conduct committed in Paxton's official capacity within the scope of his duties as Attorney General. OAG BOM at 6-7. If Paxton participated in criminal conduct while directing OAG's intervention to help Paul in the Mitte Foundation suit, issuing the foreclosure opinion to help Paul, manipulating the investigation of Paul's adversaries, and otherwise—as Respondents allege—like Garza, he was "acting within the general duties of [his] office." *Garza*, 574 S.W.3d at 401. Therefore, the misconduct is OAG misconduct.

Using this same scope-of-official-duty analysis, Texas courts have repeatedly held in Whistleblower Act cases that misconduct of an agency's high-ranking officials, when acting in their official capacity, is misconduct of "the employing governmental entity" they represent. *See, e.g.*, *Hous. Auth. of the City of El Paso v. Rangel*, 131 S.W.3d 542, 548 (Tex. App.—El Paso 2004, rev'd & rem'd by agreement) (commissioners' misfeasance in their official duties was conduct of the housing authority); *Tarrant Cnty. v. Bivins*, 936 S.W.2d 419, 422 (Tex. App.—Fort Worth 1996, no writ) (misdeeds of sheriff—an elected constitutional officer—constituted acts of the county itself under the Whistleblower Act); *Wichita Cnty. v. Hart*, 892 S.W.2d 912, 929 (Tex. App.—Austin 1994), rev'd on other grounds, 917 S.W.2d 779 (Tex. 1996).

OAG questions the precedential value of these cases because "this Court reversed two" and the third was a no-writ case. OAG BOM at 26. But the two reversals were pursuant to a settlement in one instance and wholly unrelated to this issue in the other. Moreover, all of these cases have been on the books for more than two decades. In a dozen sessions since then, the Legislature has never amended the statute to require a different approach, and OAG can identify no authority criticizing their holdings, much less weakening their status as "good law." The holding here is consistent, correct, and unworthy of further review.

D. OAG cannot escape Paxton's misconduct at the pleadings stage on the notion that Paxton acted so contrary to the agency's interests as to exceed the scope of his agency.

Next OAG pivots to the argument that the conduct alleged against Paxton is so bad that it cannot be imputed to OAG. OAG BOM at 23-24. For this proposition, OAG relies on cases discussing when a corporate agent can be personally liable for tortiously interfering with one of the corporation's contracts. *See Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 694 (Tex. 2017); *Holloway v. Skinner*, 898 S.W.2d 793, 796 (Tex. 1995). Because a party cannot tortiously interfere with its own contract, this Court has explained:

> Thus, under our decision in *Holloway*, when the defendant is both a corporate agent and the interfering tortfeasor, the plaintiff carries the burden of proving as part of its "prima facie case" that the agent "acted in a fashion so contrary to the corporation's best interests that his actions could only have been motivated by personal interests" and thus could

> not have been acting within the scope of his agency at the time of the interference. *Id.* at 796; *see also Latch v. Gratty, Inc.*, 107 S.W.3d 543, 545 (Tex. 2003) (per curiam) ("Furthermore, an agent cannot be held to have acted against the principal's interests unless the principal has objected.").

Hansen, 525 S.W.3d at 691. This test is unique to tortious interference claims and has nothing to do with this case. Even if this analysis could be imported here by some sort of analogy, it would function as a defense—OAG would have to *prove* that Paxton "'acted in a fashion so contrary to [OAG's] best interests that his actions could only have been motivated by personal interests' and thus could not have been acting within the scope of his agency." Negating this [inapplicable] defense is not an element of Respondents' pleading burden under the Whistleblower Act. And finally, OAG does not address—and certainly cannot establish from Respondents' pleading—that OAG objected to Paxton's conduct as required by *Latch*. To the contrary, OAG steadfastly insists that Paxton did nothing wrong.

E. Allowing this case to proceed will not eliminate the statutory distinction between an "employing governmental entity" and "another public employee."

Finally, OAG errs by insisting that considering Paxton's misconduct as OAG misconduct would erase the statutory distinction between an "employing governmental entity" and "another public employee." OAG BOM at 24-25. First, this argument contradicts OAG's insistence that Paxton is not a public employee. The two phrases have separate meaning because "State governmental entity"

includes misconduct orchestrated by an elected officer in his official capacity that would otherwise fall outside of the statute under OAG's interpretation of "public employee." Second, the two phrases operate independently in the context of conduct committed by "another public employee" who works for a different "State governmental entity" than the reporting employee.

More importantly, OAG can make this argument only by resorting to straw men: (1) "if *any* act by a public officer or employee is attributable to the governmental entity itself, then the two phrases no longer operate distinctly;" (2) "If 'employing governmental entity' was merely a shorthand phrase for the individual conduct of *all* public officials or employees, there would have been no need for the Legislature to define 'State governmental entity' corporately." OAG BOM at 24, 25. (emphasis added). Respondents have never argued that *any* act or conduct by *all* public employees is conduct of the entity, and the court of appeals specifically explained that some acts by some employees would not be agency conduct:

> It is not hard to conceive of a situation in which an official or employee might violate the law within the context of his employment but in a manner that could not be attributed to the employing entity, such as unauthorized use of a state vehicle or theft of the entity's funds or property. In the situation before us, however, the alleged misconduct was Paxton's acts and directives in his official capacity as head of the OAG that caused or attempted to cause the agency to act improperly.

Brickman, 636 S.W.3d at 671 n.12. Similarly, not all culpable acts by an employee are attributable to an employer in the corporate context. *See, e.g.*, *Hennsley v. Stevens*, 613 S.W.3d 296, 303 (Tex. App.—Amarillo 2020, no pet.) (complaint that chief of police engaged in sexual misconduct is example of personal, not official act); TEX. CIV, PRAC. & REM. CODE § 41.005(c) (enumerating the limited circumstances in which an employer can be liable for punitive damages based on the criminal act of its employee). OAG suggests no reason for a different rule to apply here, other than the convenience of placing the current attorney general above the law.

III. Ken Paxton is a public employee.

Because it correctly held that Respondents alleged unlawful conduct by the employing governmental entity, the court of appeals did not decide whether Paxton is an employee of the state agency that pays him an annual salary of $153,750 plus employee health and retirement benefits for the full-time job of directing and conducting its affairs. Therefore, this issue presents no compelling reason to grant review, despite OAG devoting ten pages of argument to it. If the Court were to address this issue in the first instance, it should reject OAG's invitation to hold that Paxton is not an OAG employee. OAG BOM at 27-36.

A. Paxton is an OAG employee in the plain and ordinary meaning of the term.

The Act defines "public employee" as "an *employee* or appointed officer other than an independent contractor who is paid to perform services for a state or local governmental entity." TEX. GOVT. CODE § 554.001(4) (emphasis added). While "employee" is used in this definition, the term itself is not defined in the Act. Therefore, the Court must give the word "employee" its plain and ordinary meaning. *See, e.g.*, *Hogan*, 627 S.W.3d at 169 ("When a term is left undefined in a statute, 'we will use the plain and ordinary meaning of the term and interpret it within the context of the statute.'") (quoting *EBS Sols., Inc. v. Hegar*, 601 S.W.3d 744, 758 (Tex. 2020)); *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018). "To ascertain this plain and ordinary meaning, we start with dictionaries and 'then consider the term's usage in other statutes, court decisions, and similar authorities.'" *EBS Sols.,* 601 S.W.3d at 758 (quoting *Tex. State Bd. of Exam'rs of Marriage & Family Therapists v. Tex. Med. Ass'n*, 511 S.W.3d 28, 35 (Tex. 2017)); *see also Pridgen*, 2022 WL 1696036, at *5 (When determining a statutory term's common, ordinary meaning, this Court "typically consult[s] dictionaries.").

The Collins Dictionary defines employee as "a person who is paid to work for an organization or for another person." https://www.collinsdictionary.com/us/dictionary/english/employee (last visited September 15, 2022). The Cambridge English Dictionary defines an employee as

"someone who is paid to work for someone else." (https://dictionary.cambridge.org/us/dictionary/english/employee (last visited September 15, 2022)).

Under the plain meaning of employee, Paxton is an OAG employee as that word is commonly understood. OAG's own employment records show that OAG correctly considered Paxton to fit within the plain and ordinary meaning of the term "employee." As alleged in Respondents' Petition, OAG's own employment records:

- State that Paxton's "Date of Employment" with OAG was January 5, 2015. CR.381, 445-46.
- State that the "Employee Being Replaced" by Paxton in 2015 is Greg Abbott, who was the Attorney General prior to Paxton. CR.381, 446.
- Catalog Paxton's "Employee Information." CR.381, 446.
- List Paxton's Position Number. CR.381, 446.
- State that, since September 1, 2015 to the present, Paxton, has been paid a salary of at least $153,750 per year by OAG for his full-time, 40-hour per week employment at OAG. CR.382, 445-46.
- State that during that same time period, Paxton is an employee in a specific OAG-designated "pay group" and "Job Class Title." CR.382, 445-46.
- Show that, when Paxton receives a salary increase for his job at OAG, his salary increase is recorded, like it is for other employees, in a "Personnel Action Form." CR.382, 445-46.

As Respondents further pled, since January 5, 2015, Paxton has been contributing to and accruing employment-based service credit under an employee

pension plan administered by the *Employees* Retirement System of Texas. CR.382. That Paxton is an OAG employee in the plain and ordinary meaning of that term is further borne out by how OAG treats individuals who work at OAG in a *non-employee* capacity. When OAG compensates individuals or companies on a non-employee basis, it expressly identifies them as a non-employee in OAG records. CR.382-83, 447-62. But OAG does not identify Paxton that way in OAG's personnel file. CR.445-46.

OAG's actions and employee records are consistent with the conclusion that any ordinary citizen would draw from the fact that a state agency pays Paxton a salary of $153,750 per year for his full-time job, provides him with employee health care benefits and an employee pension, and refers to him as an employee throughout its own employee records. OAG presents no convincing reason why this Court should treat Paxton any differently in this lawsuit than OAG treats him in real life—as an employee in the plain and ordinary meaning of the word.

B. OAG's contention that Ken Paxton is not a public employee is repugnant to the purposes of the Act and would lead to absurd consequences.

In interpreting the statutory definition of employee, the Court looks to "the objective the Legislature sought to attain and the *consequences* of a particular construction." *Pridgen*, 2022 WL 1696036, at *6 (emphasis added); TEX. GOV'T CODE § 311.023(1).

The Texas Whistleblower Act is "aimed at 'ferreting out government mismanagement to protect the public.'" and "encourage[ing] disclosure of governmental malfeasance and corruption." *Pridgen*, 2022 WL 1696036, at *6; *City of Waco v. Lopez*, 259 S.W.3d 147, 154 (Tex. 2008). The Act is intended "to secure lawful conduct on the part of those who direct and conduct the affairs of government." *Herrera v. Dallas Indep. Sch. Dist.*, 609 S.W.3d 579, 588 n.15 (Tex. App.—Dallas 2020, pet. denied); *OakBend Med. Ctr. v. Simons*, No. 01-19-00044-CV, 2021 WL 3919218, at *4 (Tex. App.—Houston [1st Dist.] Sep. 2, 2021, no pet.); *City of Denton v. Grim*, No. 05-20-00945-CV, 2022 WL 3714517, at *6 (Tex. App.—Dallas Aug. 29, 2022, no pet. h.); *City of New Braunfels v. Allen*, 132 S.W.3d 157, 161 (Tex. App.—Austin 2004, no pet.); *Dinger v. Smith Cnty., Tex.*, No. 12-16-00101-CV, 2016 WL 6427868, at *3 (Tex. App.—Tyler Oct. 31, 2016, no pet.); *City of Lubbock v. Walck*, No. 07-15-00078-CV, 2015 WL 7231027, at *3 (Tex. App.—Amarillo Nov. 16, 2015, pet. denied); *City of Cockrell Hill*, 48 S.W.3d at 896.

OAG argues repeatedly that Paxton is entitled to unfettered "loyalty" from those who work for OAG (even apparently to the point of furthering illegal conduct). CR.196, 204, 207, 209. But the Whistleblower Act is intended in part to ensure that the voters and the Legislature learn of public corruption precisely so they, along with

law enforcement, can hold wrongdoers in places of public trust accountable. As the Austin Court of Appeals has stated:

> The State of Texas elevates public employees who report legal wrongdoing to a protected status as a matter of fundamental policy. The State views whistleblowing by a public employee as a courageous act of *loyalty to a larger community*, and we allow whistleblowing public employees to be made whole through lawsuits against the State.

Tex. Dep't of Assistive & Rehab. Servs. v. Howard, 182 S.W.3d 393, 396 (Tex. App.—Austin 2005, pet. denied) (emphasis added); *see also Bell Cnty. v. Kozeny*, No. 10-14-00021-CV, 2014 WL 4792656, at *3 (Tex. App.—Waco Sept. 25, 2014, no pet. (mem. op.) (same).

OAG invites this Court to interpret the Whistleblower Act in a way that would undermine the Act's purpose and negate potential whistleblowers' ability to report unlawful conduct at the highest levels of state government without fear of retaliation. It asks this Court to hold that reporting criminal conduct to law enforcement is not covered by the Act if an elected official committed, directed, or participated in any way in the unlawful conduct. OAG's plea would free thousands of apex officers who manage our government to do without legal consequence what Paxton did in this case: demand total loyalty (CR.196, 204, 207, 209) and, when his hand-picked public servants' duty to the larger community caused them to report corruption to law enforcement, fire them from their jobs without consequence. No known case

supports such an absurd interpretation of "public employee." No prior Attorney General or lawyer representing any governmental body has made such an argument. And no Court has acknowledged it.

Moreover, Paxton enlisted other OAG employees (who are clearly and undeniably "public employees") in the unlawful conduct that Respondents reported to law enforcement. CR.387-403, 467-69. As Respondents showed the trial court, citing extensive factual pleading and exhibits:

> Ken Paxton used and abused his office by causing the full weight of the office that he commands, deploying employees and resources of OAG spanning multiple functions and departments, to improperly interfere in the civil disputes and criminal matters involving his donor, friend and personal benefactor Nate Paul…. Plaintiffs have plead facts showing the criminal actions about which Plaintiffs complained to law enforcement were the actions of the OAG, Paxton as the top employee of OAG, *and the actions of other OAG employees whom Paxton enlisted to participate*, in most cases apparently unwittingly.

CR.347-48 (emphasis added). Thus, OAG asks this Court to hold that a report to law enforcement of unlawful conduct committed by public employees, which would otherwise be protected under the Whistleblower Act, loses protection and falls outside of the Act every time an elected official participates in or directs the unlawful conduct. No interpretation could be more antagonistic to the fundamental purposes of the Whistleblower Act.

C. Texas courts consider elected officials "employees" under the Whistleblower Act.

Texas courts interpreting the Texas Whistleblower Act have treated elected officials as employees under the Act. *See, e.g.*, *Patel v. Trevino*, No. 01-20-00445-CV, 2022 WL 3720135, at *11 (Tex. App.—Houston [1st Dist.] Aug. 30, 2022, no pet. h.) (holding that trial court erred in granting plea to the jurisdiction in Whistleblower Act case where plaintiff reported violations of law by elected constable); *City of Donna v. Ramirez*, 548 S.W.3d 26, 38–39 (Tex. App.—Corpus Christi-Edinburg 2017, pet. denied) (applying the Whistleblower Act to an employee who claimed to have reported violations of law by "one or more publicly elected [city] officials" prior to his termination); *City of Cockrell Hill*, 48 S.W.3d at 894 (assuming that the Act can apply to elected officials but concluding that it did not apply to an *unpaid* elected official).

D. The Texas Constitution and statutes demonstrate that elected officials are employees of the State.

Other provisions of Texas law further contradict OAG's claim that elected officials cannot also be state employees. For example, the Texas Constitution contemplates that even the Governor is "employed" by the state. *See* TEXAS CONST. ART. IV, § 17(b), (c) (providing that, when either the Lieutenant Governor or the President pro tempore of the Senate are exercising the duties of the Governor, they will "receive in like manner the same compensation which the Governor would have

received had the Governor been *employed* in the duties of that office") (emphasis added).

The Texas Workers' Compensation Act defines "employee" to include a person who is "in the service of the state pursuant to an election, appointment, or express oral or written contract of hire." TEX. LABOR CODE 501.001(5)(A). Thus, Paxton is eligible to receive workers' compensation benefits because he is an employee of the state. TEX. LABOR CODE 501.021.

As another example, Texas Government Code Chapter 660, which deals with travel and expense reimbursement while on state business, defines the term "state employee" to include a "key official" and "chief administrator," which includes elected officials. TEX. GOV'T CODE §660.002(4), (13), (20). The statute illustrates that categories of individuals can be overlapping; an elected official can also be an employee. *Id*.

E. When legislatures intend to exclude elected officials from the term "employee," they do so expressly.

OAG's argument is founded on the false premise that an individual must be either an employee or an elected official, but not both. However, the existence of an employer/employee relationship does not render another simultaneously existing relationship between the same parties void. *Bridges v. Andrews Transp., Inc.*, 88 S.W.3d 801, 805 (Tex. App.—Beaumont 2002, pet. denied); *see also* TEX. CONST. ART. IV, § 17(b), (c); TEX. GOV'T CODE §660.002(4), (13), (20).

When legislative bodies in other contexts intend to *exclude* a category of individuals from the definition of "employee," they usually do so expressly. For example, in the Fair Labor Standards Act, Congress defines "employee" as "any individual employed by an employer." 29 U.S.C. §203(e)(1). The FLSA defines "employ" as "to suffer or permit to work." 29 U.S.C. §203(g). It then expressly excludes categories of individuals from coverage under the defined term "employee," including elected officials who do not have state civil service protection. 29 U.S.C. §203(e)(2)(C). But there is no such express exclusion in the Texas Whistleblower Act.

Other employment statutes are similarly explicit when they express an intention to exclude elected officials from the definition of "employee." For example, the Texas Commission on Human Rights Act ("TCHRA") expressly carves out certain types of officials from the definition of "employee."[2] *See* TEX. LABOR CODE § 21.002 ("'employee' means an individual employed by an employer, including an individual subject to the civil service laws of this state or a political

[2] Title VII of the 1964 Civil Rights Act likewise expressly excludes officers from the definition of employee: "Title VII defines an employee as 'an individual employed by an employer,' with four exceptions: (1) an official elected by qualified voters; (2) a person chosen by an elected officer to be on the officer's personal staff; (3) an appointee on the policy making level; and (4) an 'immediate adviser with respect to the exercise of the constitutional or legal powers of the office.'" *Lloyd v. Birkman*, 127 F. Supp. 3d 725, 750 (W.D. Tex. 2015) (citing 42 U.S.C § 2000e(f)).

subdivision of this state, except that the term does not include an individual elected to public office in this state or a political subdivision of this state").

Likewise, laws concerning financial disclosure or Texas's Public Integrity Unit discussed in OAG's brief expressly *exclude* "officers" from the definition of "employee," suggesting that, absent their explicit exclusion, officers would fall within the definition of "employee." *See, e.g.*, TEX. GOV'T CODE § 572.002(11) (financial disclosure laws) and § 411.0251(4) (Public Integrity Unit) (both defining "state employee" as "an individual, *other than a state officer*, who is employed by" various government bodies) (emphasis added).

Because the Whistleblower Act does not expressly exclude "officers" from the definition of "employee," the Court should give dispositive weight to (i) the ordinary meaning of "employee," which includes a person paid to perform work for another; (ii) Respondents' clear pleading that Paxton is an OAG employee; (iii) the broad remedial purposes of the Whistleblower Act; and (iv) the undisputed fact that OAG itself considers Paxton to be an employee.

F. The cases OAG cites do not support declaring that Ken Paxton is not employed by the state agency he is paid to direct.

In Section I.B.b of its brief, OAG repeatedly insists that Paxton cannot be an "employee" in the ordinary meaning of that term because he is the sovereign. OAG BOM at 32-34. Setting aside that this argument contradicts OAG's argument that Paxton's acts are not the acts of the agency itself (OAG BOM at 20-27), it is also

wrong on the issue of whether Paxton is an employee in the ordinary meaning of that term.

The cases OAG cites in Section I.B.b. interpret other statutes in fundamentally different contexts. In *Green v. Stewart*, 516 S.W.2d 133, 136 (Tex. 1974), the Supreme Court held that a county tax assessor *is an employee* for purposes of the Civil Service Act. The Civil Service Act had a different statutory definition than the Whistleblower Act. *Id*. at 135. It defined "employee" as "any person who obtains his position by appointment and who is not authorized by statute to perform governmental functions in his own right involving some exercise of discretion but does not include a holder of an office the term of which is limited by the Constitution of the State of Texas." *Id*. OAG fails to explain how a holding that an individual is an employee under one statute aids in determining a different individual is not an employee under another statute. OAG fails to explain how a holding that an individual *is* an employee under one statute aids in determining a different individual is not an employee under another statute.

Similarly, the court in *Aldine Indep. Sch. Dist. v. Standley,* 280 S.W.2d 578, 579 (Tex. 1955) did not address at all whether an individual met a statutory or ordinary meaning definition of "employee." Rather, the holding turned on whether an individual was an "official" or an "officer," not whether the individual was or was not also an "employee."

For all of these reasons, OAG's "employee" arguments present no good reason to review this case. And if the Court were ever to reach the issue, it should vindicate the fundamental purposes of the Whistleblower Act by rejecting OAG's argument that the Attorney General—and thousands of other elected Texas officials who run our government—are not employees whose misconduct may be reported within the full protections of the Act.

IV. Respondents made good-faith reports of unlawful conduct.

In Section II of its brief, OAG contends that: (1) Respondents' pleading fails to sufficiently plead the factual basis of a good-faith reporting of unlawful conduct; and (2) Respondents' special training as attorneys and a law enforcement professional ought to impose heightened pleading requirements. OAG BOM at 36-44. Neither argument is supported by the plain language of the Act, nor the law. Regardless, Respondents' pleadings here clear any pleading hurdle.

Under Rule 91a, the Court not only takes Respondents' allegations as true, but draws all reasonable inferences from them in determining whether Respondents stated a claim. TEX. R. CIV. P. 91a.1. Even in a fact-based jurisdictional challenge—which this is not—Respondents would not be required to "prove [their] claim in order to satisfy the jurisdictional hurdle." *State v. Lueck*, 290 S.W.3d 876, 884 (Tex. 2009) (holding the burden of proof for jurisdictional facts "does not involve a significant inquiry into the substance of the claims"). "The purpose of a dilatory

plea is not to force the plaintiffs to preview their case on the merits but to establish a reason why the merits of the plaintiffs' claims should never be reached." *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000).

A. Respondents reported their good-faith beliefs of unlawful conduct.

OAG implies that the Whistleblower Act requires a civil plaintiff to plead all details that would be contained in an indictment or other charging document, but this is not required by the plain language of the Act or any authority from this Court. Whistleblowers must meet certain requirements to avail themselves of the protections and remedies in the Act, but not among those is a heightened super-pleading requirement to identify a specific law, describe in detail each element required to obtain a conviction, or use any "magic words."

OAG cites no authority for its contention that Respondents cannot even state a claim under the Whistleblower Act unless they plead every element of each crime they believe may have been committed. OAG BOM at 37. To the contrary, a plaintiff may maintain a whistleblower claim even without establishing "an actual violation of law" based merely on a good-faith belief that a violation of law has occurred *City of Elsa*, 325 S.W.3d at 627 n.3; *El Paso Healthcare Sys., Ltd. v. Murphy*, 518 S.W.3d 412, 419 (Tex. 2017).

"Good faith" "means that (1) the employee believed that the conduct reported was a violation of law and (2) the employee's belief was reasonable in light of the

employee's training and experience." *Hart*, 917 S.W.2d at 784 (Tex. 1996). Even an incorrect, albeit good-faith, belief that a violation has occurred is protected by the Act. *McElyea*, 239 S.W.3d at 850.

"[T]o properly 'report' under the Act, a public employee must convey information that exposes or corroborates a violation of law or otherwise provide relevant, additional information that will help identify or investigate illegal conduct." *Pridgen*, 2022 WL 1696036, at *6. This balance is consistent with the purpose of the Act: bringing potential wrongdoing in government to light, not covering it up until the evidence satisfies all discretionary prosecutorial considerations. *Walker*, 544 S.W.3d at 747–48 (stating Whistleblower Act was adopted "amidst a growing sense throughout the country that 'mismanagement in the public sector is inherently a matter [of] public concern, and that employees who disclose mismanagement deserve legal protection,'" and is aimed at "ferreting out government mismanagement to protect the public").

The difference between "subjective" and "objective" must mean something in a pleading analysis. Here, Respondents' pleading easily satisfies both the subjective and objective components.

1. Respondents believed that the conduct reported was a violation of law.

Although not required to do so, Respondents identified the specific statutes they contend that OAG and Paxton violated and the basis for their good-faith belief

that these violations occurred. *See* CR.404-06 (citing numerous statutes); *see also* Statement of Facts Sections I-IV *supra*. For example, Respondents pled:

> Specifically, each of the three Plaintiffs who attended the September 30 meeting reported to the FBI how Paxton and OAG intervened in Open Record Requests to help Nate Paul, intervened in civil litigation to help Nate Paul at the expense of a local charity, directed a legal opinion on foreclosure sales to help Nate Paul, and used OAG as a hammer to help Nate Paul by aiming a campaign of harassment and intimidation at Paul's perceived adversaries, all as described in detail above. Plaintiffs reported facts to the FBI, not legal conclusions, as would be expected in an interview with FBI. *But the three Plaintiffs who attended that meeting made very clear that they believed Paxton's and OAG's conduct were acts of criminal bribery, harassment, and abuse of office*.

CR.407-08 (emphasis added). Likewise, Respondents alleged:

> Since at least August of 2020, Maxwell has had a continuous subjective belief that the conduct of Ken Paxton and the OAG that he reported *violated the law* based on his decades in law enforcement and having been Ken Paxton's hand-picked top law enforcement officer in Texas. Maxwell has been a licensed peace officer since April of 1973 (nearly 48 years). Maxwell has decades of experience investigating, analyzing, and charging criminal conduct including decades of investigating public corruption. Maxwell has worked with the public integrity branch of the DPS.

CR.410 (emphasis added). Proof of these allegations, of course, will have to await discovery and trial. But these alleged facts, assumed to be true, and interpreted with all reasonable inferences that can be drawn from them, are more than sufficient to

state a claim that Respondents reasonably believed they had reported violations of the law.

In addition to pleading the specific laws that Respondents believed in good faith OAG and Paxton violated, paragraphs 95-97 of the Petition incorporate summaries of conversations with the proper law enforcement authorities and the factual basis for their beliefs detailed in paragraphs 17-92. CR.407-08; CR.384-406. This Petition is not "conclusory" or "vague," and it raises a viable claim that plaintiffs report an actual violation of law to proper law enforcement authorities.

2. Respondents' beliefs are reasonable in light of their training and experience

Regarding the "objective" component in this Rule 91a challenge, the Court's analysis focuses on whether the pleadings—when construed in the light most favorable to Respondents—show that a reasonable lawyer (or law enforcement professional) would believe that the conduct complained of was likely a violation of some law(s). Among other allegations, Respondents pled:

> In addition to being subjectively made in good faith, his beliefs are also objectively reasonable and in good faith. These beliefs are not only deeply rooted in his vast law enforcement experience but objectively supported by a plain reading of the laws at issue, *as well as by the similar conclusion reached and publicly expressed by seven (7) other high-level employees of the OAG who are all licensed and respected attorneys*.").

CR.410 (emphasis added).

To conclude that Respondents' beliefs were somehow objectively unreasonable at the pleading stage of this case, OAG would have to persuade the Court not just that one lawyer formed unreasonable conclusions from the facts, but seven experienced and well-respected lawyers—hand-chosen by Ken Paxton to hold some of the most consequential legal positions in the state—were all *unreasonable* in forming the same belief that one or more laws had been broken. CR.503. Such a conclusion would itself defy reason.

As the court of appeals observed, Respondents could have reasonably inferred Paxton's intent to receive an improper benefit from the highly unusual pattern of his repeated interference in matters regarding Paul. *Brickman*, 636 S.W.3d at 676. Respondents—Paxton's political allies, not enemies—came to these beliefs because OAGs conduct was so atypical and contrary to the manner in which things had been done procedurally and substantively (even under Paxton's current reign) that there was no reasonable alternative explanation for the attorney general tried so hard to benefit Nate Paul other than that some undue influence and untoward motivations. Paxton's actions in this case were improper and support an objective belief that he violated the law, just as former Attorney General Dan Morales violated the law when he misused OAG to benefit friends with unusual contracts in the tobacco litigation.[3]

[3] This Court could certainly take judicial notice of the charges and situation involving former OAG office holder Dan Morales. The publicly available reports and accounts about it are legion. *See, e.g.*, *Your Boss is a Crook! The Phone Call that Sent Texas AG Dan Morales to Prison*, Dallas

Construing the Petition in Respondents' favor, taking the facts plead as true, and giving effect to their intent shows that Respondents' extensive training and experience enabled them to put the pieces together and conclude that crimes had been committed (as set forth and cited to in Statement of Facts Sections I-IV *supra*) including:

- appointing an inexperienced "special" prosecutor in a manner outside the normal channels in order to "come after" the judge, the lawyer, and the receiver adverse to Nate Paul in a litigation;
- intervening against a charitable trust adverse to Nate Paul in a litigation;
- misusing the authority related to open records to benefit Nate Paul;
- aggressively "shutting down" an outdoor auction relying on COVID-19 that went beyond what the most pro-lockdown advocate would support (this was particularly uncharacteristic and suspicious given the OAG's aggressive challenge to so many COVID-19 restrictions during the 2020-21 pandemic); and
- interfering with a federal criminal investigation against Nate Paul.

The Whistleblowers here have certainly met the minimum Rule 91a pleading standards by setting forth sufficient facts to support their good-faith beliefs that a violation of the law had occurred and/or was occurring.

Morning News (Apr. 15, 2016), https://www.dallasnews.com/business/2016/04/15/your-boss-is-a-crook-the-phone-call-that-sent-texas-ag-dan-morales-to-prison/.

OAG is asking the Court to create new pleading standards that find no support in the text of the Whistleblower Act and are contrary to precedent. *See* OAG BOM at 38-44. It even invents extra requirements, such as wrongly arguing that bribery always requires allegations of a bilateral agreement. *See Valencia v. State*, No. 13–02–020–CR, 2004 WL 1416239, at *2–3 (Tex. App.—Corpus Christi-Edinburg June 24, 2004, pet. ref'd) (holding State was not required to prove the existence of a bilateral agreement). Regardless of whether claimed ignorance of the law provides clemency to an official accused of criminal conduct, OAG's argument in this civil matter improperly attempts to import requirements and words into the Act that simply do not exist.

OAG's contention regarding abuse of office likewise asks the Court to create a new pleading requirement that does not exist in the Act, Rule 91a, or any other Texas rule or law. Respondents have pled at least two express reasons why Paxton intended to obtain a benefit by repaying Nate Paul: for hiring Paxton's mistress to work for one of his companies, and for disproportionately large campaign contributions. CR 393, 404. Contrary to OAG's position, a whistleblower does not need to report or plead every fact necessary to prove guilt beyond a reasonable doubt. Rather, Respondents have adequately plead—in considerable detail given that Texas is a liberal pleading state and in the absence of any special exceptions—that their reports to law enforcement "convey information that exposes or corroborates a

violation of law or otherwise provide relevant, additional information that will help identify or investigate illegal conduct." *Pridgen*, 2022 WL 1696036, at *6.

B. Respondents' training and experience confirms rather than undermines their good-faith beliefs.

Respondents' pleading expressly identifies that all four Respondents complained to appropriate law enforcement authorities and provides extensive factual information about considerable wrongdoing. Brickman, Penley, and Vassar reported the unlawful conduct to the FBI. CR.406-08. Maxwell reported the unlawful conduct to the Texas Rangers/DPS, and subsequently to the FBI, and the Travis County District Attorney's Office. CR.408, 409; *see Mata v. Harris Cnty.*, No. 14–11–00446–CV, 2012 WL 2312707, at *3–6 (Tex. App.—Houston [14th Dist.] June 19, 2012, no pet.) (finding a reasonable basis for the belief that whistleblower was reporting a violation of law); *Hennsley*, 613 S.W.3d at 302 (holding officer sufficiently alleged a violation of law in report to various law enforcement officials).

Respondents are not only distinguished public servants, but they are also professionally trained in law enforcement and/or as attorneys. CR.379-81, 409-10. OAG tries cynically to turn this on its head by suggesting that Respondents' experience required them to make their civil pleading a charging instrument, but the Whistleblower Act and the cases interpreting it simply do not require this.

Unlike *Hennsley* and similar cases where a plaintiff alleged facts that disproved a necessary element of unlawful conduct (witness tampering in that case), Respondents' Petition is replete with facts showing the basis for their good-faith belief that OAG and Paxton violated multiple laws and OAG points to no facts affirmatively disproving them. *See Hennsley*, 613 S.W.3d at 302 (finding some reports inadequate where pleadings disproved the crimes).

OAG's doublespeak that Respondents were "disloyal" or merely disagreed with policy issues deliberately misconstrues their actual complaints that OAG and Paxton were involved in illegal, criminal, corrupt, and unlawful conduct. As in *McElyea*, the jury here will be in the best position to judge the facts and should be "free to disbelieve that explanation and believe that Moriarty's characterization of McElyea as 'disloyal' was a result of McElyea's reports." *See McElyea*, 239 S.W.3d at 856 n.12 (holding the jury is "in the best position to judge the credibility of the witnesses").

Drawing all reasonable inferences in Respondents' favor as Rule 91a requires, this Court should affirm the court of appeals' decision, rejecting OAG's suggestion that the whistleblowers' reports were insufficient because they did not provide direct "smoking gun" evidence such as an email between Paxton and Paul outlining the exchange of favors. Re-writing the Act to require conclusive evidence on all elements of a crime, as the OAG would have the Court do, would undermine the

Act's good-faith reporting element and create an impossible bar for whistleblowers, especially for those alleging inherently secretive illegal acts like those OAG and Paxton committed.

V. OAG's separation-of-powers argument is unfounded and inimical to the Whistleblower Act.

In the final section of its brief, OAG argues that the Court should "be leery of" the appellate court's decision that good-faith reports of criminal conduct perpetrated or directed by elected officials are protected under the Whistleblower Act. According to OAG, prohibiting an elected official from retaliating against such reports "unduly interferes" with the elected official's discretion to such a degree that he "cannot effectively exercise [his] constitutionally assigned powers." OAG BOM. at 45–49. The idea that an attorney general (or any other elected official, for that matter) "cannot effectively exercise [his] constitutionally assigned powers" without being given *carte blanche* to retaliate against employees who made good-faith reports of his suspected corruption is meritless and unprecedented.

Applying the Whistleblower Act to alleged criminal conduct of elected officials does not unduly interfere with their ability to carry out their duties. Like other employers, the Attorney General can fire employees for a wide variety of reasons, or for no reason at all, but not for an unlawful reason. And the agency has never properly asserted a challenge to the constitutionality of the Whistleblower Act in the first instance.

A. The narrow scope of the Whistleblower Act—which is limited to protecting good-faith reports of criminal conduct—does not interfere with an elected official's ability to exercise his assigned powers.

There are two tests to determine whether an action by one branch of government has offended the separation-of-powers guaranteed by the Texas Constitution. The first asks whether one branch "usurps another branch's power when it assumes, or is delegated, to whatever degree, a power that is more 'properly attached' to another branch." *Vandyke v. State*, 538 S.W.3d 561, 582 (Tex. Crim. App. 2017). That test is inapplicable here. The second, which OAG relies on, states that "Separation of powers is . . . violated when one branch unduly interferes with another branch such that the other branch cannot effectively exercise its constitutionally assigned powers." *Id.*

OAG's argument is fatally flawed in the mischaracterizations of Respondents' criticism of criminal conduct as mere "policy disagreements." OAG BOM. at 37. Only this mischaracterization of Respondents' Pleading allows OAG to argue that penalizing the termination of the whistleblowers "unduly interferes" with the attorney general's ability to make political appointments. In other words, this is simply an extension of OAG's argument that Respondents did not report a crime at all, and therefore do not fall within the ambit of the Whistleblower Act.

Respondents' detailed allegations contradict OAG's narrative that the terminations were due to "policy disagreements." *See supra*, Statement of Facts I–

V; CR 387–409. Contrary to the patronage cases OAG relies on, the whistleblowers were all hand-picked by the attorney general to fill their posts. CR.379. Respondents' allegations say nothing of "policy disagreements," and they establish a statutory presumption that OAG terminated them because of their reports to law enforcement, rather than some other reason such as political patronage. *See* TEX. GOVT. CODE § 554.004(a).

The Whistleblower Act does not interfere with an elected official's ability to exercise his or her assigned powers. It does nothing to hamper an elected official's ability to terminate senior-level employees for policy disagreements or political patronage. It simply prohibits retaliating against an employee who in good faith reports criminal conduct on the part of the official or agency.

In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the United States Supreme Court recognized this obvious difference. In holding that government employees are not entitled to protection for certain speech that is part of their job, the Court nonetheless observed that "[e]xposing governmental inefficiency and misconduct is a matter of considerable significance;…[t]he dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws…;" and "[t]hese imperatives, as well as obligations arising from any other applicable constitutional provisions and mandates of the criminal and civil laws,

protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions." *Id.* at 425–26.

OAG's political patronage cases might support an argument that the Attorney General can terminate an employee solely for disloyalty or "disagreeing with his policies." But reporting the Attorney General's *criminal* behavior is not disloyalty, and reporting *illegal* "policies" is not mere professional disagreement. Thus, prohibiting retaliation for such reports—as long as they meet the good-faith requirements of the Act, as Respondents' reports did—does not unduly interfere with an elected official's ability to carry out his duties.

And there is no doubt that the Texas Legislature possesses the ability to limit an executive officer's power to terminate state employees for reasons deemed important to the public. For example, the Attorney General could not lawfully terminate a "high-ranking" employee "because of race, color, disability, religion, sex, national origin, or age." TEX. LABOR CODE § 21.051. Similarly, the Legislature has ample authority to limit an elected officer's ability to terminate those who report his unlawful conduct.

B. OAG does not advance a viable constitutional challenge to the Whistleblower Act.

As a final matter, OAG's vague constitutional references do not advance a cognizable constitutional challenge to the Whistleblower Act. First, OAG did not plead any constitutional challenge in its Original Answer (CR.45), did not indicate

that this appeal involved the constitutionality of a statute in its docketing statement, and did not include its "constitutional concerns" in the issues presented on appeal. These indisputable facts make this a particularly inappropriate case to take up the issue of whether the Legislature unconstitutionally infringed on the powers of the executive branch by providing a remedy for public employees who are fired for having the audacity to report corruption by the elected officials who head the agencies they serve.

Second, "a separation of powers challenge is a *challenge to the facial constitutionality*[4] of a statute," not an as applied challenge. *Tex. Dep't of Family & Protective Servs. v. Dickensheets*, 274 S.W.3d 150, 155 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (citing *Reyes v. State*, 753 S.W.2d 382, 383 (Tex. Crim. App. 1988) (emphasis added). OAG's argument—that the Whistleblower Act violates the doctrine of separation of powers when it is relied upon by "high-level appointees" who report criminal conduct of an elected constitutional officer—is an invalid argument that the statute is unconstitutional as applied to this scenario, not that the

[4] *See Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 518 n.16 (Tex. 1995) (Parties may challenge the constitutionality of a statute by contending that the statute is facially invalid or is invalid as applied to that party).

Act always operates unconstitutionally.[5] OAG cites no authority for an "as applied" constitutional challenge based on separation of powers.

The Attorney General's job is to defend the constitutionality of Texas statutes, not attack them. The Government Code requires a litigant who challenges the constitutionality of a Texas statute to serve the Attorney General with notice and a copy of the pleading that raises such challenge. TEX. GOVT. Code § 402.010. The purpose of this requirement is to provide the Attorney General the opportunity to intervene and defend the constitutionality of the statute at issue.

Instead, in this instance, the official charged with defending the constitutionality of the laws of Texas stands accused of violating our laws, and yet the agency he runs argues it would be unconstitutional to apply our laws to him. At best, OAG's argument is either (a) one for the judicial creation of a policymaker exception to the Whistleblower Act; or (b) the equivalent of briefing dicta. Regardless, both arguments lack support and merit and this Court should reject any OAG attempt to challenge the constitutionality of the Whistleblower Act.

[5] To prevail on a facial invalidity challenge, the complaining party must establish that the statute, by its terms, always operates unconstitutionally. *City of Corpus Christi v. Pub. Util. Comm'n of Tex.*, 51 S.W.3d 231, 240–41 (Tex. 2001).

PRAYER

Respondents pray that the Court deny OAG's petition for review, or alternatively affirm the decisions of the lower courts, and permit this case to finally advance past initial pleadings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Texas Rule of Appellate Produce 9.4(i)(3), I certify that this Response Brief on the Merits contains 13,878 words, excluding the parts of the brief exempted by Rule 9.4(i)(1).

/s/ Joseph R. Knight
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Response Brief on the Merits has been served upon the following via electronic mail on the 15th day of September 2022.

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