No. 03-21-00161-CV

In the Court of Appeals for the Third Judicial District Austin, Texas

OFFICE OF THE ATTORNEY GENERAL OF TEXAS,
Appellant,

v.

JAMES BLAKE BRICKMAN, ET AL.,
Appellees.

On Appeal from the
250th Judicial District Court, Travis County

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Statement of the Case

Nature of the Case: Plaintiffs ask the courts to order their reinstatement to high-level political appointments within the Office of the Attorney General (OAG). CR.428-29. Plaintiffs disagreed with certain legal positions that OAG took last year and ultimately concluded that the Attorney General acted unlawfully. CR.387-403. They assert that the Attorney General violated the Texas Whistleblower Act, Tex. Gov't Code ch. 554, when he removed them from those positions after they reported their concerns to law enforcement. CR.427-28.

Course of Proceedings: Plaintiffs have amended their operative pleading twice. OAG filed a plea to the jurisdiction asserting that the claims in the first amended petition fall outside the Act's limited waiver of sovereign immunity. CR.194-218. Plaintiffs subsequently filed a second amended petition, which did not address the jurisdictional faults in the prior petition. CR.377-441. Following delays caused by Winter Storm Uri, and over the objection of OAG, the trial court held a combined hearing regarding plaintiffs' request for a temporary injunction and OAG's plea to the jurisdiction on March 1, 2021. CR.615.

Trial Court: 250th Judicial District Court, Travis County
The Honorable Amy Clark Meachum

Trial Court Disposition: The trial court denied OAG's plea to the jurisdiction in an unreasoned three-line order. CR.648.

Statement Regarding Oral Argument

This case presents a question of first impression implicating the Office of the Attorney General's sovereign immunity, the power of elected officers to replace political appointees in whom they have lost confidence, and the separation of powers

enshrined in Texas's Constitution. Appellant respectfully requests oral argument and suggests that such argument will assist this Court in its decisional process.

Issues Presented

The Office of the Attorney General enjoys sovereign immunity and the right to fire its employees—especially its highest-level employees—at will. Only the Legislature may waive this immunity. It did so "to the extent of liability for the relief" under the Texas Whistleblower Act, but no further. Tex. Gov't Code § 554.0035. Relief, in turn, is available only for "a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority." *Id.* § 554.002(a). A "public employee" expressly includes "an employee or appointed officer" of a governmental entity, but does not include elected officers. *Id.* § 554.001(4).

Plaintiffs, who were once high-level political appointees of Texas's duly elected Attorney General, insist they may seek reinstatement to OAG based on their reports of publicly available information regarding potential future violations of unspecified criminal laws to federal authorities. The questions presented in this appeal are:

1. Whether a statute that protects against adverse employment action taken in retaliation for reporting unlawful activity by a public agency, "an employee or *appointed* officer other than an independent contractor" extends to reports of unlawful activity by an *elected* officer. Tex. Gov't Code § 554.001(4) (emphasis added);

2. Whether plaintiffs adequately pleaded that they made a good-faith report of a violation of law based solely on complaints of potential future violations; and

3. Whether plaintiffs adequately pleaded that each report went to an appropriate law-enforcement authority.

Introduction

Under Texas law, sovereign immunity is the rule; waivers of immunity—which only the Legislature may grant—are exceptions, and exceptionally narrow. Immunity does not merely protect governmental agencies from suit and liability: it protects the citizens of Texas from costs imposed by litigation—monetary costs associated with litigation, efficiency costs imposed by distracting public officials from their day-to-day duties, and other costs such as the publication of confidential information. Unless the Legislature has clearly waived immunity, courts lack subject-matter jurisdiction to hear a case against an immune entity. *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019).

The Legislature has narrowly waived immunity for a claim brought by "a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority." Tex. Gov't Code § 554.002(a). This case does not fit within that narrow waiver. The Act allows suits based on complaints of violations by an agency itself *or* by a public employee, defined to include employees and appointed officials. Whatever the merits of such a limitation as a policy matter, Texas's five elected constitutional officials are neither mentioned nor included.[1] Nor does the Act allow suits for reports of potential *future* violations—only ongoing or completed violations of law. And it does not encompass suits by political appointees who have lost the confidence of the

[1] The Constitution lists six officers. Tex. Const. art. IV, § 1. Only five, however, are elected. *Id.* § 2.

elected officer that appointed them, as such claims would attack the foundation of the separation of powers.

The Supreme Court has repeatedly refused to extend the Whistleblower Act beyond its express limitations; this Court should—indeed, must—follow suit.

Statement of Facts

I. The Texas Whistleblower Act

The Legislature passed the Texas Whistleblower Act in 1983, providing protections patterned on federal law to public employees alleging illegal activity by state agencies under certain circumstances. Act of May 30, 1983, 68th Leg., R.S., ch. 832, 1983 Tex. Gen. Laws 4751; *see also* House Comm. on State Affairs, Bill Analysis, Tex. H.B. 1078, 68th Leg., R.S. (1983). After a number of large, high-profile jury verdicts, *e.g.*, *Texas Dep't of Hum. Servs. v. Green*, 855 S.W.2d 136, 140 (Tex. App.—Austin 1993, writ denied), the Legislature further narrowed the Act's scope, including by severely curtailing the available remedies, House Comm. on State Affairs, Bill Analysis, Tex. H.B. 175, 74th R.S. at 3 (1995); *see also* 35 Tex. Prac., County & Special District Law § 8.3 (2d ed.). This history has resulted in "ambivalence in the law of whistleblowing that . . . reflects the balancing of competing public policies" and a scheme that is "not universal in its application." *Neighborhood Ctrs. Inc. v. Walker*, 544 S.W.3d 774, 749 (Tex. 2018).

Today, the Act prohibits state and local entities from taking "adverse personnel action against [] a public employee who in good-faith reports a violation [of state or federal law] by the employing entity or another public employee" to a defined group

of law-enforcement authorities. Tex. Gov't Code § 554.002(a). The Act defines a "public employee" to include "an employee or appointed officer other than independent contractor who is paid to perform services for a state or local governmental entity." *Id.* § 554.001(4). It defines State entities in corporate terms, including "a board, commission, department, office or other agency in the executive branch of state government." *Id.* § 554.001(5)(a). The Act creates a cause of action based on the misconduct of *appointed* officers, but does not create a similar provision with regard to the five *elected* officers whose positions are created by the Texas Constitution, article IV, § 1.

The Act also waives sovereign immunity "to the extent of liability for the relief allowed under this chapter for a violation of this chapter." Tex. Gov't Code § 554.0035. A plaintiff under the Act may therefore sue the "employing state or local governmental entity," *id.*, to the extent the plaintiff states a claim under the Act. Again, no mention is made of the State's five elected constitutional officers.

II. Plaintiffs' Role in and Departure from OAG

The Attorney General is one of those five elected officers listed in Article IV of the Constitution. Among other things, he is obligated to represent the State in "all suits and pleas in the Supreme Court of the State in which the State may be a party," to "give legal advice in writing to the Government and other executive officers," and to "perform such other duties as may be required by law." Tex. Const. art. IV, § 22.

Over the decades, the Legislature has passed numerous laws instructing the Attorney General to perform other duties beyond this constitutional minimum. *See gen-*

erally 7 Tex. Jur. 3d Attorney General § 13 (3d ed.) (summarizing the Attorney General's jurisdiction). For example, "[f]or and on behalf of the interest of the general public of this [S]tate in charitable trusts," the Attorney General is empowered to "intervene in [any] proceeding involving a charitable trust"; and to "join and enter into a compromise, settlement agreement, contract or judgment relating to a proceeding involving a charitable trust." Tex. Prop. Code § 123.002. Much of the Attorney General's jurisdiction is civil, but he has "concurrent jurisdiction" to prosecute certain crimes, including abuse of office and certain forms of fraud, when empowered to do so by the Legislature. Tex. Penal Code § 1.09. As plaintiffs acknowledge, these considerable duties result in a caseload of approximately 38,000 civil cases, 50,000 legal decisions, and numerous criminal matters per year. *Cf.* CR.380, 391.

Because no single lawyer could handle the vast responsibilities assigned to the Attorney General, OAG employs approximately 700 attorneys and thousands of additional staff in nearly 40 divisions. The structure of the office is described in Chapter 402 of the Texas Government Code. The Code contemplates that the Attorney General will appoint a number of high-level assistants who will act in his stead under certain circumstances. *E.g.*, Tex. Gov't Code § 402.001.

Plaintiffs and the other purported whistleblowers referenced in the petition, *e.g.*, CR.407, are among those who held the highest positions of trust within OAG.[2] By

[2] OAG disputes plaintiffs' account of the events leading to their departure. Because this suit is before the Court on a Rule 91a motion, however, this statement takes the allegations as true.

their own admissions, plaintiffs were—among other things—responsible for "investigating some of the most serious criminal matters and conduct" in Texas, CR.380, supervising multiple divisions, CR.380, and "represent[ing] the OAG before other state and federal governmental bodies," CR.380. Together they supervised more than 660 members of OAG's staff. CR.381. The "other Whistleblowers" referenced in the petition included the former First Assistant Attorney General, Jeff Mateer—the individual empowered by the Legislature to act on the Attorney General's behalf if he is unavailable. Tex. Gov't Code § 402.001(a).

This lawsuit arose out of the precipitous decline of the trust relationship that was necessary for plaintiffs to perform their duties on a day-to-day basis. *See* 2RR.152 (reflecting that Mateer resigned because "there was no longer a trust between the Attorney General and myself"). According to their operative pleading, plaintiffs developed concerns regarding several legal positions that the Attorney General directed OAG to take last year. CR.384-410. In particular, plaintiffs grew concerned that the Attorney General overrode the decision of his staff about whether to become involved in a lawsuit involving a charity known as the Mitte Foundation, CR.391-93; personally decided on the contents of an opinion letter that would be issued under his name, CR.393-94; and accepted a referral from the Travis County District Attorney to assist the District Attorney with her investigation into criminal allegations of public corruption, CR.394-403.

At some unspecified point in time, plaintiffs concluded that the Attorney General's directions may have exceeded the scope of reasonable legal judgment and in-

stead amounted to an abuse of office. CR.404. Unsatisfied with the Attorney General's decision to overrule their advice on these subjects, plaintiffs informed the Federal Bureau of Investigation, OAG's Human Resources Department, as well as, in their words, another "law enforcement authority" of the Attorney General's decisions. CR.406-10. Several of the most senior putative whistleblowers resigned after their reports were leaked to the press. CR.411, 419. At least one plaintiff refused to speak to the replacements of those who had resigned regarding what had happened. *See* CR.417. And, ultimately, plaintiffs were relieved of their leadership roles within the agency.

III. Procedural History

Plaintiffs brought this suit while one of them was still employed by OAG, asserting that the Attorney General's initial efforts to investigate and respond to their allegations created a hostile work environment. CR.418. They amended their petition after they were terminated to allege additional facts and request reinstatement to their prior posts. *See generally* CR.377-441. Their operative petition also seeks temporary relief. CR.428.

OAG moved to dismiss plaintiffs' first amended petition under Rule 91a for lack of jurisdiction. CR.194-218. OAG explained that the Act's limited waiver of sovereign immunity did not extend to claims by political appointees based on their removal from office by one of the State's five elected constitutional officers. OAG likewise explained that the Act did not waive immunity for claims based on reports regarding the Attorney General himself, as he is neither an employee nor an appointed officer

of OAG. CR.200-01. Though plaintiffs have since amended their petition, CR.377, those amendments did not cure these deficiencies because they cannot be cured.

Over OAG's repeated objections, *e.g.*, CR.506-07, 563-65, the trial court scheduled a combined hearing on OAG's plea and the merits of plaintiffs' request for a preliminary injunction on March 1, 2RR.1. At the end of extensive argument regarding the plea to the jurisdiction, the trial court functionally denied that plea by proceeding to hear and to rule upon multiple evidentiary objections regarding the merits of plaintiffs' claims. *E.g.*, 2RR.182-83 (finding that aspects of OAG's privilege had been waived by plaintiffs' decision to go to the FBI). OAG filed an immediate notice of appeal and sought to stop the hearing to allow this Court to assess the existence of jurisdiction based entirely on the pleadings. CR.616-21; *see also* Pet. for a Writ of Mandamus, *In re Office of the Attorney General*, No. 03-21-00096-CV (Mar. 1, 2021). Counsel for OAG also immediately informed the trial court of the pendency of the appeal and the applicability of the automatic stay under Texas Civil Practice & Remedies Code § 51.014(b). 2RR.132. The trial court refused to stop the hearing, stating "if and when you show me something from a Court of Appeals that you believe tells me differently, then I will stop." 2RR.135.

The Court then proceeded to hear evidence that both violated OAG's privileges and touched directly on whether plaintiffs can show that they made a good-faith report of criminal activities to the FBI. In particular, the Court heard testimony from Mateer in which he equivocated about whether plaintiffs witnessed the commission of any crime. *See* 2RR.190 (declining to answer "yes or no" when asked the question). Instead, he explained he "had potential concerns," 2RR.190, and that he and

his colleagues concluded that "had they gone down this path, would be in a position to assist and/or cover up with what . . . would be a crime." 2RR.181; *see also* 2RR.152 (testifying that he saw what he considered potential "abuse of power *or* violations of the law") (emphasis added). Mateer never claimed that the whistleblowers—or the Attorney General for that matter—actually went "down th[at] path." 2RR.181.

After ancillary proceedings before this Court, the trial court formally denied OAG's plea to the to the jurisdiction in a brief, unreasoned order, on March 23, 2021. CR.648. Later that day, OAG filed a second timely notice of appeal specific to that written order. CR.651-53.

Summary of the Argument

The Whistleblower Act provides a narrow exception to the State's sovereign immunity. That narrow exception balances two competing values: the desire to promote reporting of unlawful conduct by public officials on the one hand and the need of executive agencies to be able to function in an efficient manner on the other. Plaintiffs' claims do not fall within this narrow exception for at least three reasons.

First, plaintiffs do not adequately allege that they had a good-faith belief that a relevant entity or person actually violated the law. Instead, plaintiffs alleged that they thought that the Attorney General took actions that could *lead* to unlawful activity. But speculative concerns about potential future illegal activity do not fall within the Act's narrow scope. Moreover, plaintiffs' allegations of improper conduct were limited to acts taken by the Attorney General. This is insufficient to satisfy the Act, which distinguishes between legal violations of the governmental entity and any employee of that entity. Tex. Gov't Code § 554.002. Here, plaintiffs allege neither: they

allege no misdeeds by OAG, and cannot fall within the Act on that basis; and the Attorney General is not an employee of OAG, and thus plaintiffs cannot avail themselves of the Act for allegations against the Attorney General himself.

Second, even if plaintiffs believed in good faith that a crime had been committed by a relevant actor, they did not allege that they properly reported it. To satisfy the Whistleblower Act, plaintiffs must have reported facts that satisfy the specific elements of a crime (or other legal violation). Plaintiffs' allegations may raise the appearance of impropriety, but as alleged in the operative pleading, they do not rise to the level of an actual legal violation.

Third, to the extent that plaintiffs seek to rely on the report to OAG's Human Resources Department, this does not satisfy the Whistleblower Act. The Supreme Court has repeatedly held that reporting up the chain of command does not satisfy the requirement to report to an appropriate law-enforcement authority—even in an agency that has law-enforcement functions.

The fact plaintiffs cannot avail them of the Act does not mean OAG has not taken their allegations seriously. Upon learning of the allegations, OAG launched an immediate review of internal practices and procedures, which continues to affect the Agency's day-to-day operations. Nevertheless, the Legislature has not provided plaintiffs with a waiver of immunity, let alone the ability to seek judicial reinstatement to high-level political roles.

And that is for good reason: an arrangement by which the Legislature empowered private individuals to use the courts to take control of a constitutionally created

executive agency would completely vitiate the separation of powers. After all, by default, "the public official chosen by the voters to serve the public's interest holds the power and discretion to terminate the employment of subordinates and 'is accountable to no one other than the voters for his conduct.'" *Colorado County v. Staff*, 510 S.W.3d 435, 445 (Tex. 2017). A sweeping legislative mandate requiring elected officers to retain lieutenants who had publicly called their integrity into question would require those officials to surrender the most important personnel decisions they can make to a single district court. Neither the Act nor the Constitution would tolerate that result—and nor should this Court.

Standard of Review

This Court reviews a trial court's ruling on a plea to the jurisdiction de novo. *Grossman v. Wolfe*, 578 S.W.3d 250, 255 (Tex. App.—Austin 2019, pet. denied). Because OAG sought dismissal under Rule 91a, "the court must take the 'allegations' as true—but does not limit the scope of the court's legal inquiry in the same way." *Bethel v. Quilling*, 595 S.W.3d 651, 655 (Tex. 2020). Put another way, the Court typically may not look beyond the corners of the facts alleged in the petition, but the Rule "does not limit the universe of legal theories by which the movant may show that the claimant is not entitled to relief based on the facts alleged." *Id.* Because the trial court (improperly) permitted factual development before ruling on the plea, the Court may also "consider relevant evidence offered by the parties,'" *Farmers Tex. Cty. Mut. Ins. Co. v. Beasley*, 598 S.W.3d 237, 240 (Tex. 2020) (collecting cases), as well as matters subject to judicial notice, *Bridgeport Indep. Sch. Dist. v. Williams*, 447

S.W.3d 911, 916 & n.5 (Tex. App.—Austin 2014, no pet.) (citing *Freedom Commc'ns, Inc. v. Coronado*, 372 S.W.3d 621, 623-24 (Tex. 2012) (per curiam)).[3]

ARGUMENT

I. Plaintiffs Do Not State a Viable Whistleblower Act Claim.

A. Plaintiffs must demonstrate they fit within the Act's narrow immunity waiver to proceed.

Plaintiffs shoulder the "burden to affirmatively demonstrate the trial court's jurisdiction." *Town of Shady Shores*, 590 S.W.3d at 550. Because OAG is a governmental body, "[t]hat burden encompasses the burden of establishing a waiver of sovereign immunity." *Id.* (citing *TxDOT v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999)). "It is axiomatic that a waiver of sovereign immunity must be clear and unambiguous and that any ambiguity must be resolved in favor of retaining immunity." *W. Travis Cty. Pub. Util. Agency v. Travis Cty. Mun. Util. Dist. No. 12*, 537 S.W.3d 549, 554 (Tex. App.—Austin 2017, pet. denied) (citations and quotations omitted). "Statutes waiving governmental immunity are to be strictly construed." *Id.* at 554-55 (citing *City of Houston v. Jackson*, 192 S.W.3d 764, 770 (Tex. 2006)).

Under certain circumstances, the Texas Whistleblower Act "imposes a limited waiver of immunity"—namely, a waiver to the extent of OAG's liability under Texas Government Code § 554.002. *State v. Lueck*, 290 S.W.3d 876, 882 (Tex. 2009); *see* Tex. Gov't Code § 554.0035. "[S]imply alleging a violation under the Whistleblower

[3] For the avoidance of doubt: it remains OAG's position that the Court can resolve the current dispute based on the pleadings. But plaintiffs' evidence is in the record and may be considered to resolve the jurisdictional question.

Act" is, however, not "sufficient to confer subject matter jurisdiction on the trial court in suits against governmental entities." *Lueck*, 290 S.W.3d at 884. Because the Act waives sovereign immunity only for demonstrated violations of the Act, determining whether a complaint survives the pleadings requires "consideration of the section 554.002(a) elements, to the extent necessary in determining whether the claim falls within the jurisdictional confines of section 554.0035." *Id.* at 882; *see also Office of the Att'y Gen. v. Weatherspoon*, 472 S.W.3d 280, 282 (Tex. 2015) (per curiam).

In determining whether plaintiffs' claims fall within the narrow terms of the Whistleblower Act, this Court starts "with the statute's words," "consider[ing] the statute as a whole, interpreting it to give effect to every part." *Hunt Cty. Cmty. Supervision & Corr. Dep't v. Gaston*, 451 S.W.3d 410, 418-19 (Tex. App.—Austin 2014, pet. denied). This Court "presume[s] that the Legislature chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen." *Id.* at 419 (quoting *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 441 (Tex. 2011)). "[I]f a statute defines a term, a court is bound to construe that term by its statutory definition only." *TxDOT v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002) (citing Tex. Gov't Code § 311.011(b)). "Further, courts should not give an undefined statutory term a meaning out of harmony or inconsistent with other provisions, although it might be susceptible of such a construction if standing alone." *Id.*

Each plaintiff has failed to allege the elements of a claim under the Whistleblower Act, has offered evidence that affirmatively disproves an element, or both.

Because jurisdiction and liability are coterminous under the Whistleblower Act, plaintiffs have thus failed to establish a relevant waiver of sovereign immunity.

B. Plaintiffs have not alleged a good-faith belief that a governmental entity or public employee violated a law.

Plaintiffs' claims fail at the outset because they have not adequately alleged that they had a good-faith belief that a relevant entity or individual violated the law as defined in the Whistleblower Act. Here, "'[g]ood 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." *Wichita County v. Hart*, 917 S.W.2d 779, 784 (Tex. 1996). That means, for example, "[a] police officer's allegations of a violation of law may be more closely scrutinized because the officer may have had greater experience determining whether conduct violates the law than those of other backgrounds." *Hennsley v. Stevens*, 613 S.W.3d 296, 303 (Tex. App.—Amarillo 2020, no pet.).

Plaintiffs' job duties included—among other things—overseeing investigations and prosecutions of public corruption as well as issuing opinion letters defining the outer limits of state law. CR.379-81. Given plaintiffs' roles as the "most senior members" of the staff of the "Chief Law Enforcement Officer for the State of Texas,"—all with legal training and years or decades of experience—they must plead an actual violation of the law by a relevant person or entity. CR.377-78.

Plaintiffs fail to plead such a violation for at least two independent reasons. *First*, plaintiffs only reported that they *expected* laws *might* be violated, not that any law was actually violated. This is insufficient under the Whistleblower Act. *Second*, plaintiffs

fail to allege that OAG itself or another public employee violated any law. The Attorney General is not an employee for purposes of the Whistleblower Act—so plaintiffs have not alleged retaliation as a result of "a violation of law by the employing governmental entity or another public employee." Tex. Gov't Code § 554.002(a).

1. Allegations of hypothetical future violations do not satisfy the Act, which requires a current or past violation.

Mateer's testimony demonstrates an initial—and fatal—flaw in plaintiffs' claim: they reported their speculation that a crime would occur, not an actual crime. To satisfy the Whistleblower Act, plaintiffs must plead—and ultimately prove—that either OAG or another public employee had already committed or was then-committing a crime. *See, e.g.*, *Needham*, 82 S.W.3d at 320. A "prediction of possible regulatory non-compliance" in the future does not suffice. *Lueck*, 290 S.W.3d at 885; *see also City of Elsa v. Gonzalez*, 325 S.W.3d 622, 627 (Tex. 2010) (per curiam).

But Mateer's testimony confirms that he and his colleagues reported only speculation about what *could* happen if they took the course of action about which the Attorney General inquired. *See* 2RR.180-81. When directly asked whether he "c[a]me to believe that the Office of Attorney General was being engaged in ongoing criminal activity," Mateer was unable "to give a yes or no. . . . What [he] would say is it—it could have led to that." 2RR.189-90.

Plaintiffs offered Mateer as their primary witness. He was among the seven individuals who spoke to the FBI. CR.4-7. Plaintiffs have offered nothing by way of allegations or evidence that supports an inference that they were differently positioned than Mateer to know whether General Paxton or OAG had committed a

crime. Even if "when [they] made the reports" plaintiffs—like Mateer—believed that either OAG or Attorney General Paxton "might violate laws in the future" if they remained on their then-current course, "it does not follow that [plaintiffs] made a good-faith report of an existing or past violation of law." *City of Elsa*, 325 S.W.3d at 627. Plaintiffs' own evidence reveals that they "did not in good faith report a violation of law," and that they therefore cannot prove facts that fall within the Act's limited waiver of sovereign immunity. *Id.*

2. Plaintiffs have not alleged that the *Office* of the Attorney General violated any relevant law.

Plaintiffs' claims also fail because they do not identify a violation of law either by their "employing governmental entity"—OAG—or otherwise by "another public employee" of OAG. Tex. Gov't Code § 554.002(a) (emphasis added).

i. To start, plaintiffs do not allege that OAG *as an entity* violated any law. "The Whistleblower Act defines 'law' as a state or federal statute, an ordinance of a local governmental entity, or 'a rule adopted under a statute or ordinance.'" *Univ. of Hous. v. Barth*, 403 S.W.3d 851, 854 (Tex. 2013) (per curiam) (quoting Tex. Gov't Code § 554.001(1)). The bulk of plaintiffs' allegations focus not on whether OAG violated the law but on plaintiffs' belief that the Attorney General asked OAG to flout longstanding internal norms or to take steps with which they disagreed.

Plaintiffs claim, for example, that General Paxton ordered OAG to (1) release information plaintiffs thought should have been retained based on "[l]ongstanding OAG precedent and sound principles indicated," CR.390; (2) intervene in a lawsuit

"[a]gainst the advice of OAG staff," CR.392; (3) issue an opinion letter whose conclusion and timing plaintiffs find "bizarre," CR.394; and (4) investigate allegations of misconduct by federal officials, even though plaintiffs considered the allegations "outlandish and baseless," CR.395. Even if these concerns were well founded (and they were not), they are not the stuff of Whistleblower Act claims: mere "alleged violations of an agency's internal procedures and policies[] will not support a claim" under the Act. *Mullins v. Dallas Ind. Sch. Dist.*, 357 S.W.3d 182, 188 (Tex. App.—Dallas 2012, pet. denied); *see also Harris Cty. Precinct Four Constable Dep't v. Grabowski*, 922 S.W.2d 954, 956 (Tex. 1996) (per curiam); *Ruiz v. City of San Antonio*, 966 S.W.2d 128, 130 (Tex. App.—Austin 1998, no pet.).

ii. Even if simple departure from "[l]ongstanding OAG precedent and sound principles" could be construed as a crime, CR.390, the allegations still fall short. The crimes to which plaintiffs point require willfulness or an intent to defraud. *See* CR.404-06 (citing, *e.g.*, Tex. Penal Code § 39.02 (requiring "intent to obtain a benefit" or "to harm or defraud another")); 18 U.S.C. § 1510(a) (requiring a "willful[] endeavor[]" to "obstruct, delay, or prevent" an investigation)). But plaintiffs appear to concede that most "OAG employees whom Paxton enlisted to participate" in these activities did so "apparently unwittingly." CR.387. And negligence typically is not a crime. *Elonis v. United States*, 575 U.S. 723, 736 (2015); *Williams v. State*, 235 S.W.3d 742, 753 (Tex. Crim. App. 2007). Because plaintiffs' allegations show the absence of the requisite *mens rea*, plaintiffs could not have had the good-faith belief

that the conduct by OAG that they reported was a crime. *See Hennsley*, 613 S.W.3d at 303-04.[4]

iii. These pleading problems point to a related deficiency: plaintiffs' claims are not against OAG *as an entity*. Rather, as the above list of grievances shows, plaintiffs' concerns focus on General Paxton's conduct as an *individual*. At bottom, plaintiffs allege that the Attorney General acted in a manner "not authorized under OAG's own policies and procedures," not that OAG itself engaged in wrongdoing. CR.399; *see also* CR.404 (claiming the Attorney General "misused the funds, services, and personnel of his office to personally benefit" a donor).

To the extent the pleadings leave any room for doubt, Mateer's testimony confirmed that his colleagues did *not* make any allegations of misconduct on behalf of OAG—as opposed to the Attorney General. Mateer identified himself as being in the "control position" in OAG on a day-to-day basis. 2RR.180. When specifically asked whether *OAG* had violated any laws, he effectively said no. 2RR.181, 190. Indeed, the tenor of his entire testimony was about what *could* have happened if Mateer and the Deputy Attorneys General had "gone down th[e] path" he perceived the Attorney General as setting. 2RR.181. But Mateer stopped well short of saying that the *agency* went down that path.

It is unsurprising that plaintiffs are unable to forthrightly claim that OAG violated any law—and have in fact testified that the Office did not. 2RR.180-81, 190.

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[4] *See also, e.g.*, *Wilson v. Dall. Indep. Sch. Dist.*, 376 S.W.3d 319, 326 (Tex. App.—Dallas 2012, no pet.); *TDCJ v. Terrell*, 925 S.W.2d 44, 59–60 (Tex. App.—Tyler 1995, no writ).

After all, as a group, plaintiffs were the highest-ranking officials in OAG short of the Attorney General. CR.380-81. If OAG as an agency had committed illegal conduct, they would surely have been a party to it—indeed, their pleadings acknowledge as much. *E.g.*, CR.390 (discussing "inexplicable" "actions" taken by "Vassar at Paxton's direction"); CR.393-94 (describing Vassar's participation in the drafting of a "bizarre" opinion letter); CR.395 (detailing Maxwell and Penley's investigation of the Travis County criminal complaint).

Plaintiffs have insisted that the distinction between OAG and the Attorney General is irrelevant because acts taken in the Attorney General's official capacity *are* the acts of the agency. CR.351. Underlying sovereign immunity, however, is "the premise . . . that the State is not responsible for unlawful acts of officials." *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 76-77 (Tex. 2015); *see City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009) ("[A]cts of officials which are not lawfully authorized are not acts of the State."). That is why "suits complaining of ultra vires actions may not be brought against a governmental unit, but must be brought against the allegedly responsible government actor in his official capacity." *Patel*, 469 S.W.3d at 76. By contrast, a claim that an official properly applied an unconstitutional statute must be brought against the government entity. *Id.* "A statute is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it," *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990). Thus, when the Legislature creates a waiver of sovereign immunity that distinguishes between agencies, employees, and officers, that distinction should be presumed to be intentional. *Cf. id.*

The text of the Act confirms as much, and makes plain plaintiffs' error in collapsing an agency and its officers into one through attribution. If a governmental entity can have actions attributed to it, then the terms "governmental entity" and "public employee" no longer operate distinctly. Courts avoid such an interpretation—instead, preferring "to avoid ascribing to one word [in a list] a meaning so broad that it is incommensurate with the statutory context." *Greater Hous. P'ship v. Paxton*, 468 S.W.3d 51, 61 (Tex. 2015); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 174 (2012). Indeed, the term "[s]tate governmental entity" is defined in corporate terms to include "a board, commission, department, office, or other agency in the executive branch of state government, created under the constitution or a statute of the state." Tex. Gov't Code § 554.001(5)(A).

3. Plaintiffs' allegations against the Attorney General do not suffice because he is not a "public employee."

Plaintiffs' claims against the Attorney General do not satisfy the Whistleblower Act's requirements because allegations of a violation of law by the Attorney General are not allegations of a "violation of law by . . . another public employee." Tex. Gov't Code § 554.002(a).

In the Whistleblower Act, "'[p]ublic employee' means an employee *or appointed officer* other than an independent contractor who is paid to perform services for a state or local government entity." *Id.* § 554.001(4) (emphasis added). The definition makes no mention of elected officers. A waiver of sovereign immunity may only be

"effected by clear and unambiguous language." *Id.* § 311.034; *TxDOT v. City of Sunset Valley*, 146 S.W.3d 637, 641 (Tex. 2004). But the Act's definition of "public employee" provides the opposite: it unambiguously *excludes* elected officers such as the Attorney General. And even if there were an ambiguity, any such "ambiguity as to waiver is resolved in favor of retaining immunity." *Harris Cty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 844 (Tex. 2009) (citing *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697-98, 700 (Tex. 2003), *judgment withdrawn and reissued* (Tex. 2003)).

a. The Legislature excluded elected officers from the scope of the Act's waiver of sovereign immunity. Distinctions among public employees, appointed officers, and elected officers are pervasive in Texas law: the Texas Constitution itself distinguishes between "officers" and "offices" on the one hand,[5] and employees on the other.[6] The Legislature likewise differentiates among employees, appointed officers, and elected officers. For example, when defining the scope of the Public Integrity Unit's authority to protect against public corruption, the Legislature distinguished between a "State agency," Tex. Gov't Code § 411.0251(3); a "State employee," *id.* § 411.0251(4); and a "State officer," *id.* § 411.0251(5), which specifically includes

[5] *See, e.g.*, Tex. Const. art. XVI, § 1(a) (requiring "[a]ll elected and appointed officers" to take an official oath); *id.* § 30(a) ("The duration of all offices not fixed by this Constitution shall never exceed two years."); *id.* § 67(a)(1) ("The legislature may enact general laws establishing systems and programs of retirement and related disability and death benefits for public employees and officers.").

[6] *See, e.g.*, *id.* §40(b) ("State employees . . . shall not be barred from serving as members of the governing bodies"); *id.* § 66(a) (distinguishing between "public officers and employees" for death benefits).

"an elected officer, an appointed officer, a salaried appointed officer, an appointed officer of a major state agency, or the executive head of a state agency." *Id.* And for the purposes of financial-disclosure laws, the Legislature similarly defined "State officer[s]" to include "an elected officer, an appointed officer, a salaried appointed officer, an appointed officer of a major state agency, or the executive head of a state agency." *Id.* § 572.002(12).[7]

By contrast, in the Whistleblower Act, the Legislature chose to include in the definition of a "[p]ublic employee" only a state "employee or appointed officer." *Id.* § 554.001(4). The Legislature's choice to exclude elected officers from the scope of the definition should be read to exclude complaints about their behavior from the scope of the waiver. *Gaston*, 451 S.W.3d at 418-19. That presumption is particularly strong here where the distinction was made in light of longstanding caselaw distinguishing between elective and appointed officers. *Acker*, 790 S.W.2d at 301.[8]

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[7] *See also, e.g.*, Tex. Gov't Code § 418.005(a)(1) (requiring "an elected law enforcement officer or county judge, or an appointed public officer of the state or of a political subdivision" to participate in emergency-management training); *id.* §§ 553.001(2), (2)(B) (defining a "[p]ublic servant" as "a person who is elected, appointed, [or] employed ... as ... an officer of government"); *id.* § 556.001(3) ("'State employee' means an individual who is employed by a state agency. The term does not include an elected official or an individual appointed to office by the governor or another officer."); *id.* § 614.061 (including within the definition of "peace officer" certain persons who are "elected, appointed, or employed by a government entity").

[8] *See Green v. Stewart*, 516 S.W.2d 133, 136 (Tex. 1974) (reaffirming *Aldine Indep. Sch. Dist. v. Standley*, 280 S.W.2d 578 (Tex. 1955), *disapproved of by Nat'l Sur. Corp. v. Friendswood Indep. Sch. Dist.*, 433 S.W.2d 690 (Tex. 1968)); *see also, e.g.*, *Arredondo v. State*, 406 S.W.3d 300, 303-04 (Tex. App.—San Antonio 2013, pet. ref'd) (holding that a medical examiner is a public employee); *Prieto Bail Bonds v. State*, 994

Any elected officer can immediately identify the reason for this distinction: elected officers are accountable to the voters, and appointed officials or employees are not. Indeed, an elected officer, as regards to his "subordinates[,] 'is accountable to no one other than the voters for his conduct,'" *Colorado County*, 510 S.W.3d at 445, but that accountability is a powerful check on official conduct indeed. And the Legislature retains other mechanisms for expressing its disapproval of an elected officer's conduct. The Legislature can censure an elected officer; it can deduct from an officer's salary for neglect of duty, Tex. Const. art. XVI, § 10; it can hold hearings into an official's conduct, *see Ferguson v. Maddox*, 263 S.W. 888, 890 (Tex. 1924); and it can, as it deems necessary, impeach and remove an elected officer. Tex. Const. art. XV, § 2.

By providing protection only to whistleblowers who report violations of law by "another public employee," Tex. Gov't Code § 554.002(a)—defined as "an employee or an appointed officer other than an independent contractor," *id.* § 554.001(4)—the Whistleblower Act carefully distinguishes between reports of violations of law by appointed officers and employees on the one hand and elected officers on the other. Plaintiffs reported alleged future violations by an elected officer, not an employee or an appointed officer. Whatever the merits of that distinction as a policy matter, the Legislature did not provide whistleblower protections for such reports—and so plaintiffs' attempts to evade OAG's immunity fail.

S.W.2d 316, 320 (Tex. App.—El Paso 1999, pet. ref'd) (holding that a senior judge is a public officer).

b. Nor is the Attorney General an "employee." He is one of five elected office-holders of the executive department under the Texas Constitution. Tex. const. art. IV, § 1. As a constitutional matter, "the determining factor which distinguishes a public officer from an employee is whether any sovereign function of the government is conferred upon the individual to be exercised by him . . . largely independent of the control of others." *Aldine*, 280 S.W.2d at 583. The Attorney General easily meets that test. The Texas Constitution mentions the Attorney General more than three dozen times, and it expressly empowers—indeed requires—him to take a number of actions as the State's chief law-enforcement officer. Tex. Const. art. IV, § 22; *see also, e.g.*, Tex. Const. art. III, §§ 28, 49-f(f), 49-b(u), 49-k(h). He is "authorized by law to independently exercise functions" of an executive character, and "the exercise of this power . . . is subject to revision and correction only according to the standing laws of this [S]tate." *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 931 (Tex. Crim. App. 1994) (plurality op.) (orig. proceeding).

Because the Attorney General is an officer, he cannot also be an employee. *Thompson v. City of Austin*, 979 S.W.2d 676, 682 (Tex. App.—Austin 1998, no pet.). In contrast to an officer, "[a] public employee . . . is a person . . . whose duties are generally routine, subordinate, advisory and as directed." *Id.* An employee may only exercise a sovereign function as the subordinate of an officer. *Krier v. Navarro*, 952 S.W.2d 25, 28 (Tex. App.—San Antonio 1997, pet. denied). In *Pirtle*, for example, the Court held that "[a]n assistant attorney general is a public employee and not a public officer" precisely because he acts "under the direct supervision of the Attorney General and exercises no independent executive power." 887 S.W.2d at 931.

Under plaintiffs' theory, there is no distinction between an employee and an officer. If that were true, the statutory definition of "public employee" as an "employee or appointed officer" would be superfluous. It is not. The Legislature has confirmed the Attorney General's status as a public officer and *not* an employee.[9] For example, the operative pleading points to the Attorney General's participation in the State Employee Retirement System as evidence that he is an employee. CR.382. But Texas Government Code chapter 812 creates "two classes of membership" in the State's retirement system: "the elected class and the employee class." Tex. Gov't Code § 812.001. "Membership in the elected class of the retirement system is limited to . . . persons who hold state offices that are normally filled by statewide election." *Id.* § 812.002(a), (a)(1). "[M]embership in the employee class of the retirement system," however, "includes all employees and appointed officers of every department, commission, board, agency, or institution of the state." *Id.* § 812.003(a). General Paxton falls in the elected class—because he is an elected officer.

c. Plaintiffs asserted two primary arguments to the contrary in the trial court, neither of which has merit. *First*, plaintiffs offered evidence that OAG's administrative software designates General Paxton as an employee for personnel and payroll purposes. CR.381-32, 445-46. In particular, plaintiffs contrast the manner in which internal agency practices treat him as compared to independent contractors. CR.382-

[9] *See also, e.g.*, Tex. Gov't Code § 411.0251(3)-(5); *id.* § 553.001(2), (2)(B); *id.* § 572.002(12); *id.* § 614.061.

83. Assuming that plaintiffs interpret these documents correctly, this argument ignores that Texas law recognizes numerous other categories of individuals who perform actions on behalf of the State. *Supra* at nn. 7-8.

Moreover, internal agency billing practices cannot change the Attorney General's status under statute or the Texas Constitution. The Texas Comptroller of the Accounts establishes processes for all state agencies to ensure the orderly processing of payroll. Nonetheless, "[e]ntrusted with independent and sovereign powers," the Attorney General is a "public officer[] and public officers cannot be employees." *Thompson*, 979 S.W.2d at 682; *cf. Krier*, 952 S.W.2d at 29 (explaining that "indicia of a public office" "are not dispositive" of the employee-officer inquiry); *Harris County v. Schoenbacher*, 594 S.W.2d 106, 111 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.) (applying *Aldine* and focusing on the functions performed by the defendant, rather than his job title). The Attorney General's status as an elected officer does not and cannot depend on how OAG's accounting department keeps its records to comply with the Comptroller's processes.

Second, plaintiffs asserted that OAG is asking this Court to "judicially legislate" an exception to the waiver that "the Legislature did not add." CR.359. This gets matters precisely backwards. Sovereign immunity is the general rule to which the Act creates an exception; anything that does not meet the terms of that exception is governed by the general rule. *See Walker*, 544 S.W.3d at 749. The Legislature provided an exception for good-faith reports premised on violations of law by *employees* and *appointed* officials; plaintiffs are the ones attempting to engraft "and elected officers" onto the Act's scope. Because "[t]here is nothing in the plain language of the

Act that would indicate clear legislative intent to waive sovereign immunity from suit" for claims based on the violations of elected constitutional officers like the Attorney General, no such waiver exists. *City of Cockrell Hill v. Johnson*, 48 S.W.3d 887, 896 (Tex. App.—Fort Worth 2001, pet. denied).

Indeed, *plaintiffs'* atextually expansive reading of the Act would exceed this Court's judicial function. The Supreme Court has "repeatedly held that the waiver of governmental immunity is a matter addressed to the Legislature." *Guillory v. Port of Hous. Auth.*, 845 S.W.2d 812, 813 (Tex. 1993). That Court has therefore "rejected invitations to create a common-law cause of action for all whistleblowers" at least four times, "noting each time that a general claim would eclipse the Legislature's decision to enact a number of narrowly-tailored whistleblower statutes instead." *Walker*, 544 S.W.3d at 749. As a result, "[t]he [Whistleblower] Act's provisions" waiving immunity "are exclusive, and courts may not add to them." *Johnson*, 48 S.W.3d at 896. Accordingly, because plaintiffs have failed to allege a good-faith belief that a relevant person or entity had committed (or was committing) a crime, this Court should decline plaintiffs' invitation to craft a "broad[er] statute" than the one "carefully drawn" by the Legislature. *Walker*, 544 S.W.3d at 748.

C. Assuming there was a violation, plaintiffs have not alleged that they made a cognizable report.

Even if plaintiffs could establish that a governmental entity or public employee violated a law—as those terms are used in the statute—they still cannot prevail because they have not alleged that they made a legally cognizable report of

a violation to an appropriate law-enforcement authority, nor that *each* of them has done so.

1. Plaintiffs have not adequately alleged they made good-faith reports of legal violations.

To survive dismissal of their whistleblower claims, each plaintiff must allege *facts* showing he made a good-faith report of a violation of law to an appropriate law-enforcement authority. *See City of Elsa*, 325 S.W.3d at 625 (citing Tex. Gov't Code § 554.002); *Galveston Ind. Sch. Dist. v. Jaco*, 303 S.W.3d 699 (Tex. 2010). "[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ruth v. Crow*, No. 03-16-00326-CV, 2018 WL 2031902, at *5 (Tex. App.—Austin May 2, 2018, pet. denied) (mem. op.). "Mere unsupported legal conclusions are insufficient." *Gattis v. Duty*, 349 S.W.3d 193, 200 (Tex. App.— Austin 2011, no pet.).

And as the Texas Supreme Court has made clear when discussing the Act, conclusory, I-reported-wrongdoing pleadings such as those plaintiffs present here "do not provide sufficient jurisdictional facts to determine if the trial court ha[s] jurisdiction." *City of Elsa*, 325 S.W.3d at 625; *Lueck*, 290 S.W.3d at 884 (explaining that courts considering a plea to the jurisdiction should not "[a]llow[] a plaintiff's pleadings to stand on bare allegations, alone"). Although plaintiffs "need not [initially] identify in [their] report[s] the specific law [each plaintiff] asserts was violated, there must be some law prohibiting the complained-of conduct to give rise to the Whistleblower action." *Wilson*, 376 S.W.3d at 323. If plaintiffs were not required to identify

a report of a violation of an existing law, "every complaint, grievance, and misbehavior could support a claim." *Llanes v. Corpus Christi Ind. Sch. Dist.*, 64 S.W.3d 638, 642-43 (Tex. App.—Corpus Christi 2001, pet. denied).

Plaintiffs allege only that "[o]n September 30, plaintiffs Brickman, Penley and Vassar, along with several of their then-colleagues reported to the FBI what they collectively knew" about whether General Paxton or the agency had violated state or federal law. CR.407. No plaintiff has identified any purported report about OAG—the named defendant in plaintiffs' collective Whistleblower Act claims. That is unsurprising, given that Mateer testified he only had "potential concerns" certain conduct "could have led to" "the Office of Attorney General was [] being engaged in ongoing criminal activity." 2RR.189-90. Nor did any plaintiff even identify the content of his own contribution to the report against General Paxton. *Cf.* CR.406-10 (providing the only information regarding what was reported). And, plaintiffs admit that they did not report their "legal conclusions" to the FBI. CR.407. When plaintiffs do identify alleged crimes, they do so "[b]y way of example only." CR.404. By failing to identify the specific content of any report, plaintiffs' operative pleading is too vague to raise a viable claim that plaintiffs reported an actual violation of a law to federal authorities.

To the extent plaintiffs *do* identify particular laws, they fail to allege facts that would show those laws had been violated. Consider *Hennsley*, where a plaintiff "made reports of alleged witness tampering." 613 S.W.3d at 301. The plaintiff alleged that defendant had "use[d] [] his office as Chief of Police to threaten [the plaintiff] and quash an investigation." *Id.* at 304. The Amarillo Court of Appeals held that

these allegations did "not constitute a violation of the witness tampering provision of section 36.05" of the penal code. *Id.* The court explained section 36.05 "specifically pertain[ed] to instances in which an actor seeks to influence a witness or potential witness *in an official proceeding.*" *Id.* (emphasis added). The plaintiff, however, "never allege[d] any fact" showing a relevant official proceeding, or any fact that would support an allegation of witness tampering. *Id.* The court similarly found that other allegations in the report were insufficient to constitute abuse of office under section 39.02(a)(1) because the plaintiff did not "identify any violation of law related to [defendant's] office or employment, as required by" the statute. *Id.* Nor had the plaintiff "identified any government property, services, personnel, or other thing of value that was allegedly misused," which was "fundamental" to finding a violation under "section 39.02(a)(2)." *Id.* at 304.

Plaintiffs' pleadings suffer from similar flaws. For example, plaintiffs allege primarily that the Attorney General violated section 36.02 of the Texas Penal Code, which prohibits bribery. But plaintiffs do not plead that they reported to an appropriate law-enforcement authority "conduct" that "was a violation of section 36.02." *Hennsley*, 613 S.W.3d at 303. At a minimum, bribery requires that a defendant "'offer[]' or 'solicit[]' a benefit as consideration for an official act," *Valencia v. State*, No. 13-02-020-CR, 2004 WL 1416239, at *3 (Tex. App.—Corpus Christi June 24, 2004, pet. ref'd) (mem. op.) (quoting *Martinez v. State*, 696 S.W.2d 930 (Tex. App.—Austin 1985, pet ref'd)), and generally also "requir[es] a bilateral agreement" between the payor and payee of the bribe, *McCallum v. State*, 686 S.W.2d 132, 136 (Tex. Crim. App. 1985).

But plaintiffs have not identified (and cannot identify) an offer or solicitation of a bribe by either General Paxton or Nate Paul, let alone an agreement between General Paxton and Paul, which is necessary to support a violation of section 36.02. Plaintiffs have instead alleged that the Attorney General is friends with Paul, *e.g.*, CR.378, that Paxton has received political donations from Paul, CR.386, and that Paxton *might* even have had business dealings with Paul, CR.387 (reflecting only one of three "information and belief" allegations in the operative petition). None of these allegations of perfectly lawful conduct come close to making out a claim for bribery.

Plaintiffs also alleged that the positions the Attorney General chose to take with which they disagreed benefited Paul. *E.g.*, CR.394. But plaintiffs do not allege—let alone allege with enough specificity to state a claim—a link between General Paxton's official decisions and an offer by Paul to provide a benefit as consideration for an official act—*i.e.* the *quid pro quo* that is the hallmark of bribery and that would supply a good-faith basis to report that Texas's duly elected Attorney General had committed a crime.

Plaintiffs certainly speculate in unadorned legal conclusions that what they consider the Attorney General's "bizarre abuse off his office was the result of bribery." CR.406. But beyond these conclusory labels, plaintiffs do not actually allege that the legal positions the Attorney General took (with the exception of a criminal investigation into federal authorities, CR.395) were necessarily *wrong*.

In any event, "[w]hether an employee has a good-faith belief . . . 'turns on more than an employee's *personal* belief, however strongly felt or sincerely held.'" *Tex. Dep't of Hum. Servs. v. Okoli*, 440 S.W.3d 611, 614 (Tex. 2014). Plaintiffs are not just

attorneys or members of law enforcement; their job duties gave them specialized knowledge and experience in the areas of law at issue as well as in OAG's operations. *See* CR.379-80, 395-96.[10] Courts consider such specialized knowledge in determining whether their report was in "good faith." *Grabowski*, 922 S.W.2d at 956. As experienced attorneys and law-enforcement officers, they should know that the speculation they offer about why General Paxton *might* have overruled their advice about what actions OAG would take does not establish a crime. *E.g.*, *Gándara v. State*, 527 S.W.3d 261, 262 (Tex. App.—El Paso 2016, pet ref'd). So their speculation not only fails to state facts on which a claim may rest, but also indicates that their statements were not made in good faith within the meaning of the Act. Indeed, plaintiffs' conclusory statements are "so weak as to create no more than a 'surmise of suspicion' of a fact," which cannot survive a jurisdictional plea either. *Duvall v. Tex. Dep't of Hum. Servs.*, 82 S.W.3d 474, 483 (Tex. App.—Austin 2002,no pet.).

2. Plaintiffs have not adequately alleged that they *each* made a good-faith report of a legal violation.

Assuming that at least one plaintiff made an appropriate report, they have not adequately alleged that they *each* made a cognizable report. The Whistleblower Act protects only the employee "who in good faith report[s] a violation of law"—not everyone who contemporaneously agrees with that report. Tex. Gov't Code

[10] Indeed, plaintiffs' job duties are so intertwined with the subject matter at issue, that they could not plead retaliation under the First Amendment because their reports would have been considered *part* of their job duties. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006); *accord Guillaume v. City of Greenville*, 247 S.W.3d 457, 464 (Tex. App.—Dallas 2008, no pet.) (analogizing First Amendment and Whistleblower Act claims for certain purposes).

§ 554.002. Because this case involves multiple alleged whistleblowers, *each* alleged whistleblower must state facts showing that plaintiff *individually* made a unique, non-public, cognizable report. This Court must therefore determine whether each plaintiff has set out facts showing the conduct about which they complain constitutes an existing or past violation of an actual law, and whether each reported the same to an appropriate law-enforcement authority. *See, e.g.*, *City of Elsa*, 325 S.W.3d at 626; *Moore v. City of Wylie*, 319 S.W.3d 778, 783-84 (Tex. App.—El Paso 2010, no pet.). Plaintiffs' collective allegations fail to meet this test.

a. Whistleblower protections in Texas—indeed, federally—reflect a continual "balancing of competing public policies." *Walker*, 544 S.W.3d at 749. That balancing traces back to the federal False Claims Act, "which was passed during the Civil War" to "create[] a bounty system for those who disclosed fraud perpetuated against the government" in the provision of war supplies. Nancy M. Modesitt, *The Garcetti Virus*, 80 U. Cin. L. Rev. 137, 140 (2011) (summarizing history of whistleblower protections). "At the same time" as the False Claims Act "encourages whistleblowers, it discourages 'opportunistic' plaintiffs who 'merely feed off a previous disclosure of fraud.'" *United States v. Walgreen Co.*, 846 F.3d 879, 880 (6th Cir. 2017) (quoting *United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 507 (6th Cir. 2009)). It does so through a complex set of doctrines to limit the False Claims Act's protections to the first person to report information that was previously not available to the public. *E.g.*, *id.*; *United States. ex rel. Wilson v. Bristol-Myers Squibb, Inc.*, 750 F.3d 111, 117 (1st Cir. 2014) (collecting cases describing the "larger balancing act of the FCA's qui tam provision").

The Whistleblower Act's competing policy interests have also factored into the interpretation of its provisions. In *Texas Department of Human Services v. Hinds*, for example, the Supreme Court considered the question of causation under the Act. 904 S.W.2d 629 (Tex. 1995). "While the statute does not explicitly require an employee to prove a causal link between the report and the subsequent discrimination," *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 67 (Tex. 2000), the Court nonetheless rejected a rule that would create liability without considering "whether the [employer] would have reached the same [employment] decision regardless of the protected conduct." *Hinds*, 904 S.W.2d at 636. That kind of rule, the Court explained, "could place an employee in a better position as a result of the exercise of [] protected conduct than he would have occupied had he done nothing." *Id.* But the "principle[s] at stake [were] sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct." *Id.* Similarly, in *Montgomery County v. Park*, the Supreme Court defined "adverse" (within the meaning of the Act) only after undertaking a "careful balancing" between "the need to shield whistleblowers (and thereby encourage the reporting of governmental lawbreaking) and the need to protect government employers." 246 S.W.3d 610, 614 (Tex. 2007).

Identical reports by more than one employee implicate the same concerns. It is the first employee to approach an appropriate law enforcement authority who advances the interest animating the Act: "ferreting out government mismanagement." *Walker*, 544 S.W.3d at 748. So it is *that* employee who can invoke the "powerful argument in favor of legal [whistleblower] protection." *Id.* at 749. Not so for later

employees who add no unique information to the report of misconduct. A rule that similarly protects these latecomers places them "in a better position . . . than [they] would have occupied had [they] done nothing," *Hinds*, 904 S.W.2d at 636, even though they have contributed nothing "to the public welfare," *Walker*, 544 S.W.3d at 749. Whistleblower Act protection for duplicative reports therefore disrupts the delicate balance drawn by the Legislature.

b. Here, the operative pleading indicates that plaintiffs did *not* provide unique information to the Government and that much of the information they *did* provide was already public. All four plaintiffs assert that they made "direct good-faith complaints to the FBI and other law enforcement authorities," CR.379, but three of plaintiffs identify only one report that went to an outside entity:

> On October 1, seven of the eight Whistleblowers [including plaintiffs Brickman, Penley, and Vassar] signed and sent to the OAG's Director of Human Resources a letter notifying OAG that they had reported to an appropriate law enforcement authority a good faith belief of suspected violations of law.

CR.410. The report referenced in this notice was a meeting with FBI agents during which seven of the whistleblowers "reported all of what is described in paragraphs 17-92" of the operative petition. CR.407.[11] There are at least two problems with treating this report as cognizable under the Whistleblower Act.

First, the petition alleges that plaintiffs reported what they "collectively knew" about the issues discussed. CR.407. But there is no indication that any value was added by having more than one of them provide information. Instead, plaintiffs allege

[11] The notice itself does not suffice for the reasons discussed in Part III.C.

that they "each" "reported" the same alleged "facts to the FBI" that are detailed elsewhere in the petition. *Id.* And even if group think would ordinarily be enough to satisfy the Whistleblower Act, at least one of the seven individuals present at that meeting has now clarified that he had "potential concerns" regarding illegal activities rather than direct knowledge of an alleged crime. 2RR.190. There is nothing from which the Court may infer that plaintiffs were any better positioned. Because potential concerns about hypothetical future acts do not satisfy the Whistleblower Act, plaintiffs do not make a cognizable report—no matter how likely they think those acts are to occur. *Lueck*, 290 S.W.3d at 885.

Second, most of the facts referenced in paragraphs 17 to 92 were already public by September 30. Plaintiffs do not allege, for example, that General Paxton failed to comply with state law regarding disclosure of Paul's contribution to his latest political campaign. *See* Tex. Elec. Code § 254.031. And the petition focuses on OAG's activities that are, by definition, public—such as issuing an opinion letter, CR.394, and filing an intervention motion, CR.392.[12] If plaintiffs had provided information that links the former to the latter, *that* may have constituted a cognizable whistleblower report. *Hennsley*, 613 S.W.3d at 303-04. But plaintiffs have not alleged they did so—probably because no such link exists. OAG is aware of no authority for the notion that repeating publicly available information to the FBI implicates the Whistleblower Act, and plaintiffs certainly have not cited any. Again, it does nothing to

[12] As required, facts regarding the grand-jury investigation of Paul's allegations of abuse of power were not public. *Compare* CR.400-03, *with* Tex. Code Crim. Proc. art. 20A.202.

further the Whistleblower Act's purpose—"ferreting out government mismanagement to protect the public," *Walker*, 544 S.W.3d at 748—to predicate protection under the Act on information that was already public.

c. Even if the other three plaintiffs could state a claim based on a single report, the operative pleading makes clear that *Maxwell* merely later repeated the report the other three plaintiffs claim to have made. Specifically, plaintiffs admit that "Maxwell could not attend the September 30 meeting with the FBI," but repeated the same "acts described in paragraphs 17-92" on some unspecified date to "the Texas Rangers/Department of Public Safety, the FBI and Department of Justice, and the Travis County District Attorney's Office." CR.408. Plaintiffs do not allege that this subsequent report included any unique information at all. And they have cited no authority that echoing and purporting to join the report his fellow plaintiffs allege they had already made satisfies the narrow limits of the Whistleblower Act.

D. Plaintiffs have not alleged that they made each of their reports to an appropriate law-enforcement authority.

Finally, plaintiffs' whistleblower claims are barred by sovereign immunity to the extent that they rely on the report to OAG Human Resources because that report did not go to an appropriate law-enforcement authority. It is clearly established law that such an internal report is not sufficient to satisfy the Act.

Under the Whistleblower Act, an "appropriate law enforcement authority" is a part of a federal, state, or local governmental entity the employee believes (in good faith) can either "(1) regulate under or enforce the law alleged to be violated in the report; or (2) investigate or prosecute a violation of criminal law." Tex. Gov't Code

§ 554.002(b). The authority "must have outward-looking powers," *Weatherspoon*, 472 S.W.3d at 282, including, for example, the "authority to enforce, investigate, or prosecute violations of law against third parties outside of the entity itself, or it must have authority to promulgate regulations governing the conduct of such third parties," *Univ. of Tex. Sw. Med. Ctr. v. Gentilello*, 398 S.W.3d 680, 686 (Tex. 2013).

"[I]n determining whether a report was properly made to an appropriate law enforcement authority, it is the *entity's* authority to investigate allegations of criminal wrongdoing that must be the focus of the court's inquiry, and the individual to whom a report is made must be a 'part of' that entity." *Connally v. Dallas Indep. Sch. Dist.*, 506 S.W.3d 767, 781 (Tex. App.—El Paso 2016, no pet.). "[W]hen only some divisions within an agency have outward-looking law-enforcement authority, a report under the Whistleblower Act must have been made to the appropriate division within the agency having that power." *Id.* at 782 (citing *Weatherspoon*, 472 S.W.3d at 283). When it comes to OAG, "the authority of some [] divisions to investigate or prosecute crime does not transform the entire OAG into an appropriate law-enforcement authority." *Weatherspoon*, 472 S.W.3d at 283. Rather, a court must consider the investigative authority of the department to which the employee made the report. *Id.* at 282-83. Plaintiffs have "provided no evidence that" OAG's Human Resources Division "had outward-looking enforcement authority," *id.* at 282—because it does not. Thus, as a matter of law, to the extent that plaintiffs' claims rely on the Human Resources Report—as opposed to their discussion with the FBI—they have not satisfied the "appropriate law enforcement authority" element by reporting any alleged violations of law to OAG's Human Resources Division.

II. Extending the Act Beyond Its Terms to Cover the Conduct Here Would Present Significant Constitutional Concerns.

The Whistleblower Act creates an exception to the general rule of at-will employment. *Cf. Sawyer v. E.I. Du Pont de Nemours & Co.*, 430 S.W.3d 396, 399 (Tex. 2014). The narrow scope of the exception reflects not just a careful consideration of the public-policy interests, but also a recognition of the limits of the Legislature's constitutional authority. In particular, by omitting elected officers from the Act's coverage, the Legislature sensibly chose not to interfere with those officials' constitutional prerogative to oversee their offices in whatever manner they determine will best further the policies they were elected to implement. Any expansion of the Act beyond its terms—particularly in a case like this involving high-level appointees of a elected constitutional officer—would therefore have serious separation-of-powers implications.

A. For the electorate to truly be able "to choose policy at the polls, the representatives they elect must be able to make enough changes in the bureaucracy to put the winning side's program into effect." *Walsh v. Heilman*, 472 F.3d 504, 506 (7th Cir. 2006). Officers (like the Attorney General) with broad grants of authority "alone and unaided could not execute the laws" as passed by the Legislature, or make good on their campaign promises; they "must execute" those laws and promises "by the assistance of subordinates." *Myers v. United States*, 272 U.S. 52, 117 (1926).

As a result, "the power of appointing, overseeing, and controlling those who execute the laws" has long been considered at the heart of the executive power. *Free*

Enter. Fund v. PCAOB, 561 U.S. 477, 492 (2010) (quoting 1 Annals of Cong. 463 (1789) (Joseph Gales ed., 1834) (remarks of James Madison)). For that reason, acts of public antagonism by an employee, such as a lawsuit, against an officer "may be particularly disruptive," and "can interfere with the efficient and effective operation of government." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 390 (2011). That is why, "[i]n Texas, employees of any elected official serve at the pleasure of the elected official, regardless of whether there is a statute which specifies at-will status." *Garcia v. Reeves County*, 32 F.3d 200, 203 (5th Cir. 1994).

This political reality counsels constraint in the interpretation and application of the Whistleblower Act. "It is the law in Texas that an elected officer occupies a sphere of authority, which is delegated to him by the Constitution and laws, within which another officer may not interfere or usurp." *Renken v. Harris County*, 808 S.W.2d 222, 226 (Tex. App.—Houston [14th Dist.] 1991, no writ). Given the central importance of assistants to effective administration, "[i]f there is any point in which the separation of the legislative and executive powers ought to be maintained with great caution, it is that which relates to officers and offices." *Myers*, 272 U.S. at 116.

That caution is especially appropriate in this case. As plaintiffs acknowledge, they "served in the most senior levels" of OAG. CR.377. While the Whistleblower Act has long protected line-level public employees, OAG is unaware of any case in which it has been used to require a state-wide elected officer to continue to employ top-level deputies in whom he has lost confidence; and plaintiffs point to none. For good reason: "[t]hese appellees' positions enable[d] them to advance the [Attorney General's] policies, if they act[ed] faithfully, or to undermine those policies by overt

or covert opposition." *Gentry v. Lowndes County*, 337 F.3d 481, 488 (5th Cir. 2003). A rule allowing a court to second-guess the Attorney General's termination decisions would therefore improperly "impair[]" "his ability to execute the laws" in violation of the separation of powers. *Free Enter. Fund*, 561 U.S. at 496. At the very least, the Court should not announce such a rule without a clear statement by the Legislature, which is absent here. *See Kucana v. Holder*, 558 U.S. 233, 237 (2010); Scalia & Garner, *supra*, at 250; *cf. Keystone RV Co. v. Tex. DMV*, 507 S.W.3d 829, 831-33 (Tex. App.—Austin 2016, no pet.) (recognizing that "deference to the separation-of-powers concerns" requires "clear and unambiguous language" to provide judicial review of agency decisions).

B. In the trial court, plaintiffs dismissed the significance of these considerations on two primary grounds, neither of which has merit.[13]

1. First, plaintiffs insisted that federal case law about the executive's removal power was inapposite because it applies only to the President's powers under Article II of the U.S. Constitution. CR.362-63. There is, however, no removal clause in Article II. To the contrary, *Myers* itself recognized that its holding was based on "the reasonable implication" of granting executive power to an individual, "even in the absence of express words." 272 U.S. at 117. And it is in the nature "of his executive power [that] he should select those who were to act for him under his direction in

[13] Plaintiffs further insisted that "Congress has the power, in some circumstances[,], to limit the President's power to remove an officer from his post," and that "the Texas Legislature has done just that via the Whistleblower Act." CR.362. The first is an undisputed legal truism; the second is indisputably question begging.

the execution of the laws." *Id.*; *see also* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control,* 65 Ala. L. Rev. 1205, 1215 (2014).

These cases are instead based on general principles of checks and balances and the separation of powers. That is, since the Founding, it has been understood that the removal power is necessary "to keep [executive] officers accountable." *Free Enter. Fund*, 561 U.S. at 483; *cf.* Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021, 1067 (2006) ("After a great deal of high-level debate leading to the Decision of 1789, Congress decided that the President had a constitutional right to remove" principal officers.). This view "soon became the 'settled and well understood construction of the Constitution.'" *Free Enter. Fund*, 561 U.S. at 492 (quoting *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839)).

After all, if the President could not remove agents, then a "subordinate could ignore the President's supervision and direction without fear, and the President could do nothing about it." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 168 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).[14] And if the President "cannot oversee the faithfulness of the officers" who execute the law, then the carefully calibrated balance of power among co-equal branches of government begins to topple. *See Free Enter. Fund*, 561 U.S. at 513-14; *accord* The Federalist No. 70, at 423 (Hamilton) (C. Rossiter ed., 1961) (noting that the Executive cannot properly function if power, though "vest[ed] ostensibly in one man," remains "subject, in whole or in

[14] *See also, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) ("Once an officer is appointed, it is only the authority that can remove him . . . that he must fear and, in the performance of his functions, obey." (quotation marks omitted)).

part, to the control and cooperation of others"). Neither judicial nor legislative interference in that balance is countenanced.

Though the Texas Attorney General's scope of authority is certainly narrower than the President's, the same principles suggest a cautious approach here. If anything, these principles have more significance in the Texas Constitution. Unlike our federal charter, the Texas Constitution has an express provision that "[t]he powers of the Government of the State of Texas shall be divided into three distinct departments," and "no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others." Tex. Const. art. II, § 1. Applying these principles in other contexts, the Texas Supreme Court and this Court have been loath to examine elected officers' reasoning for terminating their high-level or confidential employees. *Colorado Cty.*, 510 S.W.3d at 445; *Abbott v. Pollock*, 946 S.W.2d 513, 517 (Tex. App.—Austin 1997, writ denied) ("[E]lected officers . . . discharge the public trust and carry the responsibility for the proper discharge of that trust, and therefore, should be free to select persons of their own choice to assist them.").

Nonetheless, plaintiffs' claims require this Court to examine the thought processes of an executive officer. For instance, to find causation, the finder of fact will need to decide that the Attorney General would not have fired plaintiffs even without the alleged report. *Hinds,* 904 S.W.2d at 633. This effectively gives this Court the ability to superintend the staffing choices of an elected officer of a co-equal branch of government, and to delve into the sincerity of the stated reasons behind them. Given plaintiffs' former positions, such an ability would be particularly problematic:

these officials were expressly empowered *by statute* to exercise the Attorney General's power on his behalf. *See, e.g.*, Tex. Gov't Code § 402.001(a).

Instead of assuming the role of a supervisor's supervisor, courts routinely recognize that "[e]lected officials must be able to assemble their own loyal staffs of advisors and administrators to assist them in formulating and implementing the policies necessary to carry out their electoral mandates." *Stegmaier v. Trammell*, 597 F.2d 1027, 1038 (5th Cir. 1979); *cf. Rutan v. Republican Party of Illinois*, 497 U.S. 62, 74 (1990) ("A government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views"). To say otherwise would be to "threaten[] the authority of the [officeholder] to run the office" and thereby to carry out the will of the electorate. *Lee-Khan v. Austin Indep. Sch. Dist.,* A-13-CV-00147-LY, 2013 WL 3967853 (W.D. Tex. July 31, 2013), *aff'd*, 567 Fed. Appx. 243 (5th Circ. 2014).[15]

This Court has itself expressly declined to engage in such an inquiry in other contexts. For example, in *Salazar v. Morales*, this Court adopted a broad concept of official immunity precisely to *avoid* examining the sincerity of an Attorney General's "explanation to the press, and hence the public, for the dismissal of employees" whose positions were far less sensitive than those at issue here. 900 S.W.2d 929, 934

[15] *See also, e.g.*, *Rankin v. McPherson*, 483 U.S. 378, 388 (1987); *Bardzik v. County of Orange*, 635 F.3d 1138, 1151 (9th Cir. 2011); *Sheppard v. Beerman*, 317 F.3d 351, 355 (2d Cir. 2003); *Fazio v. City & County of San Francisco*, 125 F.3d 1328, 1332 (9th Cir. 1997); *Wilbur v. Mahan*, 3 F.3d 214, 218 (2d Cir. 1993).

(Tex. App.—Austin 1995, no pet.). In reaching this conclusion, the Court recognized the public interest requires that "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties." *Id.* at 931 (quoting *Barr v. Matteo*, 360 U.S. 564, 571 (1959) (plurality op.)). Applying *Barr*, this Court afforded the Attorney General an "absolute privilege to publish defamatory statements in communications made in the performance of his official duties," even when those statements "were politically motivated." *Salazar*, 900 S.W.2d at 932, 934.[16] The constitutional concerns that led to the creation of that immunity should similarly lead the Court to reject plaintiffs' overbroad view of the Whistleblower Act. After all, even if the Legislature could constitutionally empower a court to choose who exercised the Attorney General's authority, there is certainly no clear statement of legislative intent that the Whistleblower Act permits this practice.

2. Plaintiffs also made the policy argument that adopting such a rule would eviscerate the Whistleblower Act by preventing those who are most likely to have information regarding misconduct from coming forward. CR.357-58. This argument ignores that illegal conduct by elected officers is quite rare.[17] Moreover, it ignores the

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[16] *Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909, 913 (Tex. 1942); *see also Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 767 (Tex. 1987); *Johnson*, 48 S.W.3d at 898t 848 n.48.

[17] Indeed, both state and federal law provides a strong presumption that public officials perform their duties in good faith and compliance with the law. *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1052-53 (5th Cir. 1997); *Vandygriff v. First Sav. & Loan Ass'n of Borger*, 617 S.W.2d 669, 673 (Tex. 1981).

Texas Supreme Court's repeated holdings that the Act is not myopically focused on maximizing potential reports of unlawful activity, but instead on balancing protecting the employee with the needs of the employer. *Wichita County*, 917 S.W.2d at 784; *see also, e.g.*, *Lopez v. Tarrant County*, No. 02-13-00194-CV, 2015 WL 5025233, at *6-7 (Tex. App.—Fort Worth Aug. 25, 2015, pet denied). Policy concerns, including "the duty of loyalty and other competing legal and ethical principles[,] are powerful arguments in favor of limits on what, when, to whom, how, and why whistleblowers may make their disclosures." *Walker*, 544 S.W.3d at 749. Those policy concerns are at their highest in cases like this where the reports directly implicate the inner workings of a State's chief law-enforcement agency.

More importantly, plaintiffs' policy concerns should be brought to the Legislature, which has the "sole province to waive or abrogate sovereign immunity"—not the Courts. *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002). As it stands, the Legislature has not deemed fit to extend the Whistleblower Act to circumstances like those presented here—assuming it could constitutionally do so.

Prayer

For the above reasons, the Court should reverse the trial court's order denying OAG's plea to the jurisdiction on the grounds of sovereign immunity and render judgment in favor of OAG.

Respectfully submitted.

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Certificate of Service

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