No. 03-21-00096-CV

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

IN RE OFFICE OF THE ATTORNEY GENERAL,

Relators.

On Petition for Writ of Mandamus to the
250th Judicial District Court, Travis County

PETITION FOR WRIT OF MANDAMUS

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ORAL ARGUMENT REQUESTED

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Statement of the Case

Nature of the Underlying Proceeding:	Plaintiffs ask the courts to order their reinstatement to high-level political appointees within the Office of the Attorney General (OAG). MR 227-28. Plaintiffs disagreed with certain legal positions that OAG took last year and ultimately concluded that the Attorney General acted unlawfully. MR 186-202. 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. MR 226-27 (2d Am. Pet. at 51-52). OAG filed a plea to the jurisdiction asserting that these claims fall outside the Act's limited waiver of sovereign immunity. MR 103-112 (Def.'s Plea to the Jurisdiction at 7-16).
Respondent:	201st Judicial District Court, Travis County The Honorable Amy Clark Meachum
Respondent's Challenged Conduct:	Under Texas law, when a defendant files a plea to the jurisdiction challenging the sufficiency of the plaintiffs' pleadings, the defendant is entitled to a final ruling on the plea *before* the trial court hears testimony or issues a ruling on the merits. OAG urged that its sovereign immunity protected it from further evidentiary proceedings as well as liability, and thus proceeding to a temporary injunction hearing would effectively deny OAG's plea. After purporting to take OAG's plea to the jurisdiction under advisement, the trial court implicitly denied the plea by proceeding to plaintiffs' temporary injunction hearing. OAG immediately appealed that denial to this Court. MR 393-96. Yet despite the automatic stay of further proceedings guaranteed by Tex. Civ. Prac. & Rem. Code § 51.014(b), the court is currently holding additional hearings in this case.

Statement Regarding Oral Argument

This Court has jurisdiction to issue a writ of mandamus to any trial-court judge within this judicial district who has clearly abused his or her discretion. Tex. Gov't Code § 22.221(b). Such jurisdiction exists here because once OAG appealed the trial court's denial of OAG's plea to the jurisdiction, the trial court had to halt further proceedings. *In re Geomet Recycling LLC*, 578 S.W.3d 82, 92 (Tex. 2019). It had "no room for discretion" to continue inquiring into the merits of plaintiffs' claims. *In re Tex. Educ. Agency*, 441 S.W.3d 747, 750 (Tex. App.—Austin 2014, orig. proceeding). Because of the urgent nature of the relief sought here, OAG respectfully suggests that the delay associated with oral argument could prejudice OAG's rights to immunity and an automatic stay pending appellate review. OAG therefore urges that if this Court would find oral argument helpful in resolving this petition, this Court should first grant an administrative stay of further proceedings under Rule 29.3 pending argument.

Issues Presented

Whether, in light of OAG's notice of interlocutory appeal, the trial court violated the automatic stay required by Texas Civil Practice and Remedies Code section 51.014(b) by refusing to postpone a hearing regarding plaintiffs' request for interim relief at which plaintiffs plan to take testimony on the merits of plaintiffs' claims.

To the Honorable Third Court of Appeals:

Sovereign immunity 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, including the potential publication of confidential information. Under Texas law, sovereign immunity deprives a court of subject-matter jurisdiction. *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019). "Subject-matter jurisdiction is a multiple choice question with only two answers: yes or no." *City of Anson v. Harper*, 216 S.W.3d 384, 390 (Tex. App.—Eastland 2006, no pet.). If a court lacks jurisdiction to order plaintiffs' requested relief, it likewise lacks jurisdiction to hear the merits of plaintiffs' claims. *See id.* A court may hear evidence before determining its jurisdiction *only* if the defendant—here, OAG—challenges the existence of a jurisdictional fact in its plea to the jurisdiction. *See State v. Lueck*, 290 S.W.3d 876, 881 (Tex. 2009) (citing *TDCJ v. Simons*, 140 S.W.3d 338, 349 (Tex. 2004)).

OAG did not. Instead, OAG challenged the legal sufficiency of plaintiffs' pleadings, which seek to force the Attorney General to return former political appointees to their post despite the complete breakdown of their professional relationship. Specifically, plaintiffs allege that the Attorney General violated Texas Government Code section 554.002 by terminating their employment after they reported alleged misconduct to law-enforcement authorities. As OAG explained in its plea, however, the Act's limited waiver of sovereign immunity does not extend to plaintiffs' claims: the Act does not extend to political appointees predicated on the termination of their

appointments by one of the State's six constitutional elected officers, nor does it extend to reports made against elected officers, as opposed to appointed officers or employees, as the Act specifies.

The trial court effectively denied that plea by proceeding to the temporary injunction hearing—which, as OAG is entitled to sovereign immunity, cannot proceed. OAG immediately noticed an appeal and notified the trial court of a statutory stay pending appeal. MR 393-96. The trial court nonetheless stated that the hearing would continue. The court lacked discretion to maintain the hearing in violation of the automatic stay, and mandamus should issue.

STATEMENT OF FACTS

I. The Act's Limited Waiver of Sovereign Immunity

Passed in 1983, the Texas Whistleblower Act prohibits state and local entities from taking "adverse personnel action against [] a public employee who in good faith reports a violation [of state and federal law] by the employing governmental entity or another public employee" to a defined group of law-enforcement authorities. Tex. Gov't Code § 554.002. The Act defines a "public employee" to include "an employee or appointed officer other than an independent contractor who is paid to perform services for a state or local governmental entity." *Id.* § 554.001(4). The Act also 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). Though the Act specifically addresses *appointed* officers, it never mentions the six *elected* officers whose positions are created by the Texas Constitution, article IV, § 1.

The Act contains a separate provision stating that "[s]overeign immunity is waived and abolished to the extent of liability for relief allowed under this chapter for a violation of this chapter." Tex. Gov't Code § 554.0035. As a result of this provision, suit may be brought against the "employing state or local governmental entity." *Id.* Again, no mention is made of the State's six constitutional elected officers.

II. Plaintiffs' Role in and Departure from OAG

The Attorney General is one of only six executive 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 Governor 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 imposing additional obligations on the Attorney General. *See generally* 7 Tex. Jur. 3d Attorney General § 13 (summarizing the Attorney General's jurisdiction). As plaintiffs acknowledge, these numerous duties result in a caseload of approximately 35,000 civil cases, 50,000 legal decisions, and numerous criminal matters per year. MR 179, 190 (2d Am. Pet. at 4, 15).

Because no single lawyer could handle the vast responsibilities assigned to the Attorney General, OAG employs approximately 750 attorneys and thousands of ad-

ditional staff in nearly 40 Divisions. The structure of the office is described in Chapter 402 of the Texas Government Code. That Code expressly 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. As the Fifth Circuit recently reiterated, elected officials need a high level of confidence and trust in high-level lieutenants, such as these individuals because they are "uniquely positioned to frustrate the policy agendas of the elected officials for whom they work." *Haddock v. Tarrant County*, No. 19-11327, 2021 WL 319378, at *3 (5th Cir. Feb. 1, 2021).

Plaintiffs and the "other Whistleblowers" referenced in the complaint (*e.g.*, MR 206 (2d Am. Pet. at 31), are among those who held the highest positions of trust within OAG. By their own admission, Plaintiffs were—among other things—responsible for "investigating some of the most serious criminal matters and conduct" in Texas, MR 179 (2d Am. Pet. at 4), supervising multiple Divisions, MR 179-80 (2d Am. Pet. at 4-5), and "represent[ing] the OAG before other state and federal governmental bodies," MR 179 (2d Am. Pet. at 4). Together they supervised more than 600 members of OAG's staff, including many dozens of lawyers. MR 178-80 (2d Am. Pet. at 3-5). The other alleged whistleblowers referenced in the complaint also included the individual empowered by the Legislature to act on the Attorney General's behalf if he is unavailable. *Compare* Tex. Gov't Code § 402.001(a), *with* MR 177 (2d Am. Pet. at 2).

This lawsuit arose out of the precipitous decline of the trust relationship that allowed plaintiffs to perform their duties on a day-to-day basis. Per their operative

pleading, plaintiffs developed concerns regarding several legal positions that the Attorney General took last year. MR 186-202 (2d Am. Pet. at 11-27). At an unspecified point in time, they concluded that the Attorney General's directions exceeded the scope of reasonable legal judgment and instead amounted to an abuse of office. In lieu of speaking with the Attorney General at the outset about these concerns, plaintiffs made, in their view, "good-faith reports" of this perceived misconduct to OAG's Human Resources Department and an "appropriate law enforcement authorit[y]." MR 207 (2d Am. Pet. at 32). These reports led to the resignation of several alleged whistleblowers. MR 210, 218 (2d Am. Pet. at 35, 43). Efforts by their replacements to discuss plaintiffs' concerns were rebuffed. *E.g.*, MR 216 (2d Am. Pet. at 41). And, ultimately, plaintiffs were released from their political appointments. MR 178-179 (2d Am. Pet. at 3-4).

III. Procedural History

Plaintiffs brought this lawsuit while several were still employed by OAG, asserting that the Attorney General's initial efforts to investigate and respond to their allegations created a hostile work environment. MR 001 – 37. They subsequently amended their complaint twice to provide additional factual allegations and to add a request for reinstatement to their prior posts. *See generally* MR 176 – 240. The Second Amended Petition, the operative pleading, includes a request for temporary relief. MR 227 – 37.

OAG moved to dismiss the First Amended Petition under Rule 91a, which included a plea to the jurisdiction. MR 097 - 121. 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 six constitutional elected officers. MR 103 – 112. The Second Amended Petition did not cure this deficiency because it cannot be cured.

Over OAG's repeated objection, and without ruling on the plea, the trial court scheduled a multi-day evidentiary hearing regarding plaintiffs' request for preliminary relief for March 1 and 2. MR 138-39. On February 10, 2020, plaintiffs attempted to subpoena the Attorney General, W. Ken Paxton, and First Assistant Attorney General, Brent Webster to attend and be prepared to testify during that hearing. MR 303-12. On February 12, 2021 OAG moved to quash that subpoena on the grounds that these witnesses could only testify to the merits of plaintiffs' claims, and the court may not receive evidence regarding the merits of plaintiffs' claims until it ascertained its own jurisdiction. MR 332-62 (Def.'s Mot. to Quash at 1-30).

Earlier today, after arguing its plea to the jurisdiction, OAG reiterated that the trial court was obligated to determine its own jurisdiction before proceeding to plaintiffs' temporary injunction hearing, and that proceeding to the hearing would effectively deny OAG's plea and infringe on its sovereign immunity. The trial court proceeded nonetheless, implicitly denying OAG's plea to the jurisdiction. OAG immediately appealed and notified the trial court of the pendency of the automatic stay. MR 393-96. The trial court nonetheless communicated that the hearing will proceed as scheduled. This petition followed.

Summary of the Argument

The trial court's decision to go forward with an inquiry into the merits of plaintiffs' claims is unlawful. The court is aware that OAG has noticed an appeal of its

implicit denial of the plea to the jurisdiction. Whether or not the trial court believes that appeal is appropriate, that matter remains for this Court to decide; the notice of appeal itself invoked the automatic stay conferred by Texas Civil Practice and Remedies Code section 51.014(b), depriving the trial court of authority to act until the companion appeal is resolved. Aside from the fact the trial court lacked authority to proceed to the merits prior to resolving whether it had jurisdiction in the first place, the automatic stay under section 51.014(b) plainly obligated the trial court to halt proceedings. It has not.

Moreover, mandamus is appropriate relief because OAG has no effective remedy on appeal. OAG has a constitutional right to be free from suit absent a valid waiver of sovereign immunity and a statutory right to an immediate appeal to determine the existence of such a waiver. Both rights will be irretrievably lost if the hearing proceeds. Moreover, the hearing raises another danger: Due to the unique nature of the plaintiffs' claims, inquiring into their merits requires investigating the thought process of the State's senior most legal representatives before deciding to take legal positions on behalf of the State. Such an inquiry raises thorny privilege issues that must be resolved—a process that will likely prove burdensome and should not be overtaken before the court ascertains its jurisdiction.

ARGUMENT

Mandamus relief is available where the trial court's error "constitute[s] a clear abuse of discretion," and the relator lacks "an adequate remedy by appeal." *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). Both elements are easily met here: Precedent clearly required the trial court to decide OAG's plea to the jurisdiction without

ordering testimony on the merits of plaintiffs' claims—or at the very least to stop receiving such testimony once OAG noticed its appeal. Moreover, the trial court's error deprives OAG of a right not to litigate pending resolution of its jurisdictional challenge. By definition, that right not cannot be vindicated if the case continues to be litigated while the companion appeal resolves OAG's jurisdictional challenge.

I. The Trial Court Clearly Abused Its Discretion by Refusing to Postpone the Hearing.

In its plea to the jurisdiction, OAG demonstrated that plaintiffs have failed to affirmatively plead that the trial court has jurisdiction over this suit. MR 103 - 112 (Def.'s Plea to the Jurisdiction at 7-16). Because OAG's plea challenged the legal sufficiency of plaintiffs' allegations, the trial court could neither compel testimony regarding the merits of plaintiffs' claims nor reach the merits of those claims. Its decision to compel OAG to provide that could only have gone to the merits of plaintiffs' claims implicitly denied that plea. Once OAG appealed that denial, the court lacked authority to take further action.

A. The trial court lacked authority to hear evidence regarding the merits of plaintiffs' claims ahead of ruling on the plea.

As the party invoking the courts' jurisdiction, plaintiffs were under an affirmative obligation to plead facts that, if proven, would establish an applicable waiver of sovereign immunity. They did not. Because OAG's plea relied on deficiencies in plaintiffs' legal theories, the trial court neither needed nor was permitted to hear evidence before ruling on the plea. Even if the trial court could have heard evidence regarding other elements of the plaintiffs' preliminary-injunction burden—*e.g.*, the

likelihood they will suffer irreparable harm—the Attorney General and Assistant Attorney General possess no such evidence. The trial court's order requiring their testimony is a clear indication that it intends to improperly extend its inquiry into the merits of plaintiffs' claims.

1. Without subject-matter jurisdiction, a trial court lacks power to order relief. *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 479 (Tex. 2018). "If the trial court does not have jurisdiction to enter a judgment, it does not have jurisdiction . . . to conduct discovery." *City of Anson*, 216 S.W.3d at 390. And it may not conduct an "inquiry . . . into the substance of the claims presented." *Bland ISD v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). Instead, the trial court may only "hear evidence as necessary to determine the issue before proceeding with the case." *Id.*

When a state agency validly asserts sovereign immunity against a pending claim, that immunity deprives the court of jurisdiction over the claim. *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012). The most common way that immunity is lifted is through statute. *Nazari v. State*, 561 S.W.3d 495, 500 (Tex. 2018). But plaintiffs cannot satisfy their burden merely by referencing a statutory or constitutional waiver. *TDCJ v. Miller*, 51 S.W.3d 583, 586-87 (Tex. 2001). Rather, they must allege facts that state a claim within the waiver. *Mission Consol. ISD v. Garcia*, 372 S.W.3d 629, 636-37 (Tex. 2012).

A plea to the jurisdiction may dispute jurisdiction by challenging the sufficiency of plaintiffs' pleadings, the existence of jurisdiction facts, or both. *TDCJ v. Rangel*, 595 S.W.3d 198, 205 (Tex. 2020); *Alamo Heights ISD v. Clark*, 544 S.W.3d 755, 770

(Tex. 2018); *according Davis v. Wells Fargo*, 824 F.3d 333, 346 (3d Cir. 2016) (describing a similar federal distinction as between a "facial attack" and a "factual attack"). A trial court "must consider evidence" only when a defendant's plea makes it necessary "to address jurisdictional facts." *State v. Lueck*, 290 S.W.3d 876, 880-81 (Tex. 2009) (citing *Simons*, 140 S.W.3d at 349).

2. OAG's plea is a facial attack on the court's jurisdiction to hear this dispute, which raises pure questions of law. Plaintiffs rely on the statutory waiver of immunity contained in the Texas Whistleblower Act. *See* MR 182 (2d Am. Pet. at 7) (citing Tex. Gov't Code § 554.0035). As the Supreme Court has explained, because section 554.0035 extends only to claims for a "violation of this chapter." *Lueck*, 290 S.W.3d at 881. Thus, to satisfy their pleading burden, plaintiffs "must actually allege a violation of the Act." *Id.*

OAG's plea explained that, properly interpreted, the Act's waiver does not extend to claims by political appointees based on their removal from office by one of Texas's six constitutional executive officers. MR 103 - 112 (Def.'s Plea to the Jurisdiction at 7-16). The Act's substantive protections—and by extension its sovereign-immunity waiver—apply only to adverse employment actions taken by a "governmental entity or another public employee." Tex. Gov't Code § 554.002. Though the definition of "public employee," expressly includes "appointed officers," it does not include elected officers. *Id.* § 554.001(4). Similarly, "governmental entity" is defined in corporate terms. Tex. Gov't Code § 554.001(5). As a result, an elected officer's removal of his own political appointees does not constitute a violation of section 554.002 or trigger the sovereign-immunity waiver. *Cf. Lueck*, 290 S.W.3d at

881 (holding that determining whether a whistleblower claim falls within the waiver requires examining the substantive elements of the claim).

The interpretation of a statutory waiver of immunity is a pure question of law, which this Court would review de novo. *Tex. DOT v. Sefzik,* 355 S.W.3d 618, 620 (Tex. 2011). That Act must be strictly construed, and any ambiguity must be resolved against a finding of waiver. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003). The limitations are discussed above significant: The acts of an officer are imputed to his agency for many purposes, *Wichita County v. Hart*, 892 S.W.2d 912 (Tex. App.—Austin 1994, rev'd on other grounds), but for sovereign immunity, they are considered separately.[1] Under ordinary rules of construction, the Legislature is presumed to have acted intentionally when it created liability for adverse employment actions by governmental entities, employees, and *appointed* officers in the Act but omitted elected officers is presumed to be intentional ambit. *Comm'n for Lawyer Discipline v. Rosales*, 577 S.W.3d 305, 312 (Tex. App.—Austin 2019, pet. denied) (citing, inter alia, *United States v. Giordano*, 416 U.S. 505, 513-14 (1974) (holding that because statute named two types of high-ranking officials, all other officials were excluded)).

[1] *Compare Sefzik*, 355 S.W.3d at 621 ("[T]he proper defendant in an *ultra vires* action is the state official whose acts or omissions allegedly trampled on the plaintiff's rights, not the state agency itself."), *with Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 76 (Tex. 2015) (concluding that constitutional challenges to a state law should be brought against the agency that enforces that law, *not* an individual officer).

OAG's interpretation is further buttressed by the implications of plaintiffs' arguments: in the name of construing a remedial statute broadly to achieve its purpose, they ask the courts to read legislative silence to allow the courts to force a constitutional elected officer to keep a political appointee in whom he has lost confidence. MR 145 - 157 (Pl.'s Resp. to Def.'s Plea to the Jurisdiction at 6-18). Such a rule raises significant concerns in light of the Constitution's protection for the separation of powers. Tex. Const. art. II, § 1. As a result, this Court should avoid reading the Act as a legislative command that a constitutional executive officer must retain political appointees he no longer has confidence in without the Legislature's clearest possible mandate for that result. *See Kucana v. Holder*, 558 U.S. 233, 237 (2010) (requiring a clear statement of legislative intent when a statute has separation-of-powers implications). And this argument, too, is entirely legal, requiring no factual development by the trial court.

3. Because OAG "argue[d] that the plaintiff[s] ha[ve] not alleged facts that, if proven true, constitute a valid claim over which there is jurisdiction," the trial court could permit inquiry into the merits of those allegations before resolving OAG's plea to the jurisdiction. *City of Magnolia 4A Econ. Dev. Corp. v. Smedley*, 533 S.W.3d 297, 301 (Tex. 2017) (per curiam). The court was required to construe the allegations of plaintiffs' favor. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). But it was also required to consider whether the allegations satisfy the jurisdictional requirements. *Chambers-Liberty Ctys. Navigation Dist. v. State*, 575 S.W.3d 339, 354-55 (Tex. 2019) (orig. proceeding). As plaintiffs' allegations do not satisfy

the Act's waiver, the plea should have been granted on the parties' written submissions. *Miranda*, 133 S.W.3d at 226-27. But even if the court concluded that plaintiffs had pleaded a viable claim, the plea should have been denied. *Kubosh v. Harris County*, 416 S.W.3d 483, 486 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). To have permitted testimony on issues not relevant to the jurisdictional inquiry was legal error and an abuse of discretion. *See In re Brown*, No. 05-20-00639-CV, 2020 WL 4047965, at *3 (Tex. App.—Dallas July 20, 2020, no pet.) (vacating discovery order where plea raised no fact-specific issues); *see also Walker*, 827 S.W.2d at 840.

4. It is no response to argue that the trial court is permitted to take evidence because plaintiffs requested a temporary injunction. Courts occasionally permit a plaintiff to offer evidence that interim relief is necessary to preserve the status quo pending a ruling on a plea. *See City of Rio Grande County v. BFI Waste Servs. of Tex.*, 511 S.W.3d 300, 303 (Tex. App.—San Antonio 2016, no pet.) (collecting cases).

As an initial matter, plaintiffs do not seek to maintain the status quo: instead, they seek reinstatement to positions that have been filled by others. Second Am. Pet. ¶¶ 2-5, 170. This is a form of mandatory relief. *See Derebery v. Two-Way Water Supply Corp.*, 590 S.W.2d 647, 649 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (concluding that seeking reinstatement of water services constitutes a mandatory injunction). Temporary relief that mandates an affirmative action is generally disfavored precisely *because* it upsets the status quo. It is only available upon a heightened showing that the "mandatory order is necessary to prevent irreparable injury or extreme hardship." *LeFaucheur v. Williams*, 807 S.W.2d 20, 22 (Tex. App.—Austin 1991, no writ) (citing *Iranian Muslim Org. v. City of San Antonio*, 615 S.W.2d 202, 208

(Tex.1981)). And plaintiffs have not argued, let alone proven, that they have satisfied this heightened showing.

But even assuming that the Court may ever consider a request to upend the status quo before resolving its jurisdiction, doing so would not permit the trial court to order high-level testimony here. Ordinarily, a plaintiff may only require the testimony of high-level executives if that individual possesses "unique or superior knowledge of discoverable information." *In re Asplundh Tree Expert Co.*, 03-13-00782-CV, 2014 WL 538967, at *1 (Tex. App.—Austin Feb. 5, 2014, no pet.) (citing *In re Alcatel USA, Inc.*, 11 S.W.3d 173, 175–76 (Tex.2000)). Courts routinely apply the same rule to efforts to seek testimony from high-ranking government officials. *See, e.g.*, *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007); *Stagman v. Ryan*, 176 F.3d 986, 994 (7th Cir. 1999); *In re Office of Inspector Gen.*, 933 F.2d 276, 278 (5th Cir. 1991) (per curiam) (quoting *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985)). The potential hardship to plaintiffs absent relief is a topic that is peculiarly within the possession of the plaintiffs—not the Attorney General and First Assistant Attorney General of Texas. Instead, the only topic on which these witnesses could speak is whether plaintiffs have shown a likelihood of success on the merits—a topic into which the trial court had no discretion to inquire.

B. The trial court compounded its error by continuing to hear evidence after the OAG filed its notice of appeal.

To the extent that the trial court *ever* had discretion to take testimony before ruling on OAG's plea, it lost that authority when OAG filed its notice of appeal. The Legislature considers sovereign immunity to be of such fundamental importance that

it provides OAG an immediate right to appeal any adverse ruling. Tex. Civ. Prac. & Rem. Code § 51.014(a)(8). That right attaches when the trial court denies the plea "either expressly or implicitly." Tex. R. App. P. 33.1(a)(2)(A); *Thomas v. Long*, 207 S.W.3d 334, 339-40 (Tex.2006); *see also Pac. Emp'rs Ins. Co. v. Twelve Oaks Med. Ctr.*, No. 03-08-00059-CV, 2010 WL 1511753 at *1 (Tex. App.—Austin Apr. 16, 2010, no pet.) (mem. op.) ("[A] trial court that rules on the merits of an issue without explicitly rejecting an asserted jurisdictional attack has implicitly denied the jurisdictional challenge.").

Because the trial court was not permitted to hear evidence on the merits of plaintiffs' claims before addressing the plea (*supra*), its decision to proceed to a temporary injunction hearing triggered OAG's right to appeal because it represents an implicit ruling that the plea is without merit. *Long*, 207 S.W.3d at 339-40. OAG exercised that right by filing an immediate notice of appeal. MR 393-96.

OAG's decision to file an immediate interlocutory appeal under Texas Civil Practice and Remedies Code section 51.014(a)(8) "stays all . . . proceedings in the trial court pending resolution of that appeal." Tex. Civ. Prac. & Rem. Code § 51.014(b). "[T]he stay set forth in section 51.014 is statutory and allows no room for discretion." *TEA*, 441 S.W.3d at 750. "[A]nd its text admits of no exceptions to that rule." *In re Geomet*, 578 S.W.3d at 87. That is, the stay applies to *any* further

proceedings—not simply a formal trial on the merits.[2] As soon as OAG filed its notice of appeal, the trial court lost any discretion it may previously have had to hold a hearing or compel testimony. *In re Univ. of the Incarnate Word*, 469 S.W.3d 255, 259 (Tex. App.—San Antonio 2015, orig. proceeding). Its refusal to postpone the hearing was legal error and thus a clear abuse of discretion. *See Geomet*, 578 S.W.3d at 91-92.

II. Mandamus Is an Appropriate Remedy Because No Effective Remedy is Available on Appeal.

OAG lacks an adequate remedy for the trial court's unlawful action by ordinary appeal. Mandamus is an appropriate remedy when a party is "in danger of permanently losing substantial rights." *In re Goodyear Tire & Rubber Co.*, 437 S.W.3d 923, 927 (Tex. App.—Dallas 2014, orig. proceeding) (citing *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 211 (Tex. 2004) (orig. proceeding) (per curiam)). For example, because discovery costs cannot be recouped, the Supreme Court has repeatedly stated that "[m]andamus relief is available when the trial court compels production beyond the permissible bounds of discovery." *In re Weekley Homes LP*, 295 S.W.3d 309, 322 (Tex. 2009) (orig. proceeding) (citing *In re Am. Optical Corp.*, 988 S.W.2d 711, 714 (Tex. 1998) (orig. proceeding) (per curiam)). The trial court's actions in this case imperil at least two closely related rights.

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[2] *E.g.*, *City of Galveston v. Gray*, 93 S.W.3d 587, 592 (Tex. App.—Houston [14th Dist.] 2002, orig. proceeding); *In re I-10 Colony, Inc.*, No. 01-14-00775-CV, 2014 WL 7914874, at *2 (Tex. App.—Houston [1st Dist.] Feb. 24, 2014, orig. proceeding) (mem. op.); *In re Kinder Morgan Prod. Co., LLC*, No. 11-20-00027-CV, 2020 WL 1467281, at *4 (Tex. App.—Eastland Mar. 26, 2020, orig. proceeding) (mem. op.).

First, it imperils one a key aspect of sovereign immunity itself: That "immunity encompasses two principles: immunity from suit and immunity from liability." *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002). The district court's action disregards the first, which it amounts to a right, held by OAG on behalf of the people of Texas, to be free "from the costs of any litigation" absent the State's consent. *City of Houston v. Williams*, 216 S.W.3d 827, 829 (Tex. 2007) (per curiam); *see also Texas v. Caremark, Inc.*, 584 F.3d 655, 658 (5th Cir. 2009). These costs take many forms, including both time and treasure, and the State's immunity from them is "a doctrine of constitutional significance." *Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 804 & n.49 (Tex. 2016) (citing *Alden v. Maine*, 527 U.S. 706, 733 (1999) ("Although the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design.")).

Second, the trial court's decision to continue to the merits has vitiated OAG's statutory right not to litigate the merits of Plaintiffs' claims pending resolution of the companion appeal. Tex. Civil Prac. & Rem. Code § 51.014(b). This too is an important right because, as the Fifth Circuit has noted, the value of OAG's immunity from suit "is for the most part lost as litigation proceeds past motion practice." *Sherwinski v. Peterson*, 98 F.3d 849, 851 (5th Cir. 1996) (explaining why sovereign immunity falls within the collateral-order doctrine allowing immediate appeal in federal court). This appeal process will take months and could take far longer. If the trial proceedings continue while it is pending, there will effectively be nothing left of

OAG's immunity from suit at the time of judgment. That cannot be remedied on appeal.

These costs are particularly high here. The nature of plaintiffs' claims invites the trial court to delve into the decision-making process of the State's chief legal officer and his most senior staff. Second Am. Pet. ¶¶ 179-98 (acknowledging that their burden to believe their good faith in reporting alleged criminal activity). Evidence that must be discovered and that might be discussed during the hearing will inherently implicate numerous confidentiality laws and evidentiary privileges—*e.g.*, attorney-client privilege, the attorney-work-product doctrine, and the deliberative-process privilege. Many of these privileges "belong[] to the client," not the attorney. *Carmona v. State*, 947 S.W.2d 661, 663 (Tex. App.—Austin 1997, no pet.).[3] In this case, that client is the State—not the plaintiffs or the Attorney General.

It is unclear how these privilege issues will ultimately be resolved. Adequate precautions to protect the State's privilege will, however, need to be taken. Moreover, because disclosure vitiates privilege, adverse privilege holdings may need to be appealed through petitions for writs of mandamus. *See, e.g.*, *In re Christus Santa Rosa*

[3] The deliberative-process privilege, which protects a government official's ability to seek advice from his subordinates, may be an exception. But it presents its own complications because it involves multiple, overlapping areas of law. *Arlington ISD v. Tex. Atty. Gen.*, 37 S.W.3d 152, 158 (Tex. App.—Austin 2001, no pet.) (discussing how federal and state law regarding the deliberative process privilege overlap but are not coextensive).

Health Sys., 492 S.W.3d 276, 279 (Tex. 2016). This process would represent a significant investment of resources that is entirely improper ahead of a ruling by this Court that it has jurisdiction to hear plaintiffs' claims.

The legislative session likewise imposes significant requirements on both Paxton and Webster. Both have recently been required to testify before the Legislature regarding agency litigation activity and agency priorities. Each has been, or expects to be, called again before the Legislature in the near future. Permitting the trial court to proceed to an evidentiary hearing implicating Paxton or Webster—let alone both—could deprive the Legislature of guidance regarding OAG's activities during the limited legislative session in which the Legislature sets funding levels for the agency, passes laws OAG is tasked with enforcing, and takes other actions critical to OAG's mission and the State. Preventing that form of extraordinary cost to the OAG and the State is one of the primary reasons that the Supreme Court requires the trial court to resolve pleas to the jurisdiction based on legal deficiencies in the plaintiff's claim based on the contents of the pleadings. *Williams*, 216 S.W.3d at 829; *Miranda*, 133 S.W.3d at 226-27.

Prayer

The Court should grant the petition and order the trial court to postpone all further proceedings pending resolution of the companion appeal of its denial of OAG's plea to the jurisdiction.

Respectfully submitted.

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Mandamus Certification

Pursuant to Texas Rule of Appellate Procedure 52.3(j), I certify that I have reviewed this petition and that every factual statement in the petition is supported by competent evidence included in the appendix or record. Pursuant to Rule 52.3(k)(1)(A), I certify that every document contained in the appendix is a true and correct copy.

/s/ Judd E. Stone II
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