No. 24-0073

In the Supreme Court of Texas

IN RE OFFICE OF THE ATTORNEY GENERAL,
Relator.

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

BRIEF FOR AMERICA FIRST LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING RELATOR

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STATEMENT OF INTEREST OF AMICUS CURIAE

America First Legal Foundation is a nonprofit organization dedicated to promoting the rule of law in the United States and defending individual rights guaranteed under the Constitution and federal statutes. America First Legal submits this brief in support of the Relator to advise the Court about the potential ramifications if the Court does not intervene to stop the abusive, intrusive discovery below.

No fee has been or will be paid for the preparation of this brief.

TO THE HONORABLE SUPREME COURT OF TEXAS:

The push to compel the elected Attorney General of Texas to sit for a free-wheeling deposition on topics that have nothing to do with the decision to terminate the plaintiffs' employment is entirely unwarranted under Texas law. This Court must reject the invitation to rewrite well-established procedural rules on the proper scope of inquiry in wrongful termination litigation.

SUMMARY OF ARGUMENT

The civil litigation process is properly focused on resolving the claims plaintiffs have brought in the cases they have filed, not about providing remedies to allegations and grievances that "exceed the bounds of the claims at issue." *In re USAA Gen. Indem. Co.*, 624 S.W.3d 782, 791 (Tex. 2021).

To the extent any deposition testimony is permissible in this case, the proper party is "some other source that is more convenient, less burdensome, or less expensive" than the Texas Attorney General. *Id.* at 788 (quoting TEX. R. CIV. P. 192.4(a)). The plaintiffs want to depose Attorney General Paxton for reasons unrelated to the resolution of the facts at issue in the whistleblower case. However, the proportionality analysis considers the "needs of the case," not the parties' motivations. TEX. R. CIV. P.

192.4(b). Deposition testimony from a lower-level official is clearly more appropriate to resolving plaintiffs' wrongful termination dispute.

ARGUMENT

I. This Court Should Issue an Order Limiting the Scope of Discovery to the Issues Raised in This Case.

This case concerns allegations regarding whether the Attorney General wrongfully terminated the plaintiffs in retaliation for their filing of reports with the FBI. This case is not about—and is distinct from—the question of whether the conduct they reported was unlawful in itself, as "a retaliation claim focuses on the employer's response to an employee's protected activity," not whether the employer was justified in blowing the whistle in the first place. *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 763–64 (Tex. 2018).

The plaintiffs' civil lawsuit against the Attorney General is based on what happened *after* they went to the FBI. But perhaps frustrated by the lack of their desired results from the law enforcement and the impeachment processes, the plaintiffs recast their retaliation lawsuit into another attempt to punish the Attorney General for the same alleged misdeeds.

The plaintiffs have been clear about their motivations. "The impeachment process is over but we are not going away. We are not going away.

For us, this case has always been about more than money," Blake Brickman said in a September 25, 2023 news conference. Def. Amended Answer, *Brickman v. Office of Attorney General of Texas*, D-1-GN-20-006861 (250th Judicial District, Travis County, Tex.) (January 18, 2024) Ex. 4 at 3. Brickman's goal, as he explained later in the news conference, is to depose "Senator Angela Paxton about what she knew about the renovations of her home by Nate Paul," along with Laura Olson, Nate Paul, Raj Kumar, and "most importantly, Ken Paxton." *Id*. at 5–6.

Granting the plaintiffs' motion to force the Attorney General to testify because the case is "about more than money" would set a disastrous precedent. Compelling the Attorney General to answer questions under oath about interior decorating and donor relationships may be desirable for the plaintiffs. However, that is not the standard that lower courts apply in discovery disputes. Whatever the case may mean to the plaintiffs, the role of the courts is limited to addressing the legal claims raised in the parties' pleadings.

The plaintiffs have no grounds in this lawsuit for inquiring into the circumstances around the Paxtons' supposed home renovation or other issues that have no bearing on determining the issues in this case, which

revolve solely around whether plaintiffs were wrongfully terminated and not around other alleged actions of the Attorney General. Even if the plaintiffs were to prove that the Attorney General broke the law, that finding would not resolve their whistleblower claim because a claim of retaliation may not be viable even when the whistleblower has a valid claim that the employer committed wrongdoing apart from the retaliation. *Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 763–64 (explaining that a retaliation claim may be viable even when a discrimination claim is not).

To hold otherwise and expand the scope of discovery to cover topics outside of plaintiffs' termination would vastly expand the scope and cost of wrongful termination disputes. Such a precedent would deputize the plaintiffs' attorneys to conduct virtually endless investigations of companies even where the legality of a defendant's conduct is irrelevant to the retaliation claim at issue.

Take, for example, a company sued by an employee claiming that she was fired because she complained that the company's workplace safety protocols violated the local code. The company disputes the claim and offers the testimony of the former employee's manager, who is prepared to

testify that the employee was terminated for performance reasons. Should the former employee be able to depose the CEO to answer questions on the company's safety policies under oath? Even if the former employee were to obtain evidence of a safety infraction during the deposition of the CEO, the admission would not establish "that a materially adverse employment action resulted from the employee's protected activities." *Id.* at 764. Instead, the compelled testimony of the CEO would only give the plaintiff and her attorney leverage to demand a higher payout in return for releasing the company of any liability claims. In short, opening the deposition door to claims outside the scope of the pleadings, in this case, could set a precedent that can easily be exploited against corporate defendants who would rather grow their businesses than get trapped in costly litigation.

Accordingly, to the extent that this Court determines that further discovery is necessary in this case,[1] the justices should demand that the lower courts set boundaries to avoid discovery efforts "that this Court has repeatedly rejected as impermissible fishing expeditions." *In re Contract*

[1] This filing does not address Defendant's argument that further discovery is not authorized in light of its motion to enforce the parties' settlement agreement.

Freighters, Inc., 646 S.W.3d 810, 814 (Tex. 2022) (per curiam). The lower courts should be instructed to limit the scope of deposition testimony to the factors the Attorney General's office relied on when it decided to terminate plaintiffs.

Furthermore, as it is evident in this case that the plaintiffs suffered an adverse employment action when their employment was terminated, discovery should be permitted into the damages the plaintiffs allegedly incurred due to the wrongful termination. The lower courts should be instructed to order the parties to cease immediately any discovery directed at showing that the Attorney General broke any law other than the Texas Whistleblower Act under which plaintiffs bring this lawsuit.

II. The Attorney General is Not the Proper Party to Depose.

The plaintiffs' demand to force the Attorney General "to plead the Fifth" betrays their true feelings. Def. Amended Answer, *supra*, Ex. 4 at 6. Apparently, the plaintiffs believe that the Attorney General is a criminal, notwithstanding that he has yet to be indicted four years after their allegations, or the fact that the Texas Senate refused to convict him after hearing testimony from all eight of the former staffers who reported the

Attorney General to the FBI. Brickman has told the media that the "single biggest thing that happened in the impeachment trial" is that Lieutenant Governor Patrick, who presided over the impeachment trial, protected the Attorney General by ruling that the Attorney General "did not have to testify." Sarah Asch, *Paxton Whistleblower Blake Brickman on Why He and Fellow Staff Are Taking Their Case Back to Court*, KUT (Oct. 8, 2023), http://tinyurl.com/342mk6kp.

In a transparent attempt to retry the impeachment case in a trial court, plaintiffs now demand that the Attorney General testify under oath. But the rules of discovery in Texas are not a means by which a claimant can force the testimony of a witness based on facts alleged in a separate proceeding. Whether the testimony of a particular deponent is permissible depends on whether deposition is relevant to "the pending action," Tex. R. Civ. P. 192.3(a), and "obtainable from some other source that is more convenient, less burdensome, or less expensive." *Id*. 192.4(a). Here, plaintiffs have conceded in their public statements that they want discovery to provide allegations of wrongdoing that are wholly separate from the wrongful termination claims at issue in this case. They want a redo of the Attorney General's Senate trial, only with new witnesses who

did not testify in the earlier proceeding. However, the purpose of discovery rules is to allow for an orderly resolution of the claims brought in that case, not to provide a fallback venue for retrying separate claims that have been adjudicated elsewhere.

Furthermore, the evidence at the Senate impeachment trial establishes that the information relevant to the decision to terminate plaintiffs is obtainable from lower-level staffers at the Attorney General's office. During the impeachment trial, Henry de la Garza testified that he recommended firing plaintiffs and that the Attorney General was not involved in their termination. Patrick Svitek et al., *Paxton Trial Updates, Sept. 14: AG Supervisor Refutes Whistleblower Claims*, TEXAS TRIBUNE (Sep. 14, 2023), http://tinyurl.com/3vnemrrj.

Compelling the Attorney General to testify would upend this Court's precedent on the proper scope of discovery and create needless litigation expenses in ordinary commercial disputes. The precedent of forcing the Attorney General to testify when the evidence points away from his involvement could allow plaintiffs in other cases to demand the testimony of corporate executives upon mere conjecture and speculation that they must have been involved in any disputed employment matter involving

their companies. Under a "no-favorites" application of Texas's civil procedure rules, the burden of deposing the Attorney General in this case outweighs any benefit. Accordingly, to the extent any deposition testimony is necessary, the deponent should be a lower-level official, not the Attorney General. *See In re Office of the Attorney General* (Tex. Jan. 12, 2024) (Devine J., and Blacklock J., dissenting in part).

* * *

In sum, the plaintiffs may seek to misuse the civil litigation process to transform their whistleblower lawsuit into a free-wheeling investigation designed to get to the "truth" behind the years-old—and unproven—allegations that the Attorney General abused his office. In this case and future employment disputes, the discovery process must focus on resolving claims brought by the parties, not on litigating separate issues and conducting expensive and burdensome fact-finding about questions whose resolution will not affect the outcome of the case at hand. To rule otherwise here invites politics into the courts and potentially added unpredictability in employment and commercial disputes.

PRAYER

The Court should grant the Relator's petition.

Respectfully submitted.

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The undersigned certifies that on January 30, 2024, this document was served electronically on Lanora Pettit, lead counsel for Relator Office of the Attorney General, via Lanora.pettit@oag.texas.gov; Thomas A. Nesbitt, lead counsel for Plaintiff James Blake Brickman, via tnesbitt@dnaustin.com; Don Tittle, lead counsel for Plaintiff J. Mark Penley, via don@dontittlelaw.com; T.J. Turner, lead counsel for Plaintiff David Maxwell, via tturner@cstrial.com; and Joseph R. Knight, lead counsel for Plaintiff Ryan M. Vassar, via jknight@ebbklaw.com.

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CERTIFICATE OF COMPLIANCE

Microsoft Word reports that this brief contains 1,911 words, excluding the portions of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

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