

CAUSE NO. _____

STEVEN HOTZE, M.D., ALLESAN PAIGE §
STREETER, HONORABLE MOLLY WHITE, §
SAM MALONE, §

Plaintiffs, §

V. §

THE TEXAS STATE SENATE, §
AUSTIN OSBORN in his official capacity as §
Sergeant-at-Arms for the Texas State Senate; §
DAN PATRICK in his official §
capacity as Lieutenant Governor §
of the State of Texas, §

Defendants. §

TRAVIS COUNTY, TEXAS

____ JUDICIAL DISTRICT

**PLAINTIFFS’ PETITION, APPLICATIONS FOR EMERGENCY TEMPORARY
RESTRAINING ORDER, TEMPORARY INJUNCTION, AND PERMANENT
INJUNCTION**

Plaintiffs Steven Hotze, M.D., Allesan Paige Streeter, Honorable Molly White, and Sam Malone file this Plaintiffs’ Original Petition, Application for Emergency Temporary Restraining Order, Temporary Injunction, and Permanent Injunction against The Texas Senate, Austin Osborn in his official capacity as Sergeant-at-Arms for the Texas Senate, Dan Patrick in his official capacity as Lieutenant Governor of the State of Texas and would show the following:

**I.
INTRODUCTION**

Just nine months ago, Texans overwhelmingly reelected Attorney General Ken Paxton (“General Paxton”) to serve his third term as attorney general for the State of Texas.¹ In his

¹ On November 8, 2022, Republican Ken Paxton defeated Democrat Rochelle Garza 53.4% (4,278,986) to 43.7% (3,497,267). This was preceded by a Republican primary victory by

victory speech General Paxton stated, “Just because we won tonight, the fight is not over. They’re going to continue to come after me, they’re going to continue to come after Texas. They’re going to continue to come after Republicans around the country and we cannot let them win.”² Truer words were never spoken.

Texas House’s Secret Impeachment Proceeding

On May 27, 2023, just a few months after being overwhelmingly elected to his third term, during the final hours of the legislative session a group of legislators in the Texas House impeached General Paxton. The vote came only two days after a secret investigative committee unveiled articles of impeachment— and two days before the close of a biennial legislative session. Following the House vote that impeached him, General Paxton said, “The ugly spectacle in the Texas House today confirmed the outrageous impeachment plot against me was never meant to be fair or just. It was a politically motivated sham from the beginning. ... What we witnessed today is not just about me. It is about the corrupt establishment's eagerness to overpower the millions of Texas voters who already made their voices heard when they overwhelmingly re-elected me.”³ The articles of impeachment were then sent to be tried in the Texas Senate.

Texas Senate Hides its Work from Texans

On May 29, 2023, the last day of the regular legislative session, the Senate passed a resolution creating a seven-member committee to draft rules for the impeachment trial of General Paxton. The rule making committee worked in secret for three weeks drafting the

General Paxton where he defeated former Land Commissioner George P. Bush 68% (631,581) to 32% (297,480).

² James Barragan, *Ken Paxton wins third term as attorney general, beating Democrat Rochelle Garza*, Texas Tribune, Nov. 8, 2022.

³ Twitter, @KenPaxtonTX, “ May 27, 2023.

proposed rules without telling the public when and where they were meeting. No information about the committee, its membership or anything else related to it was ever published on the official Senate website. The committee never gave public notice for its meetings, despite Senate rules requiring committees to provide 24-hour notice for meetings, even if they intend to meet privately in executive session.⁴ The rules were presented to the full Senate on June 20, 2023.

Following two days of closed-door debate, the Texas Senate approved the rules for the impeachment trial of General Paxton. The Rules were approved on a vote of 25 to 3 without debate on the floor. The process has been anything but transparent and has excluded Texans from participating and having their voices heard in a proceeding that could result in almost 30 million Texans being disenfranchised from the voting process.

The Secret Rules

On June 21, 2023, the Senate's secret rules first saw the light of day and were adopted as Senate Resolution No. 35 ("S.R. 35"). (Exhibit "A") Prior to the Senate adopting its rules for the impeachment trial, Senator Angela Paxton indicated that she would "carry out (her) duties" as a state senator and not recuse herself ahead of General Paxton's upcoming impeachment trial.⁵ Senator Paxton further emphasized, "As a member of the Senate, I hold these obligations sacred and I will carry out my duties, not because it is easy, but

⁴ Not only are Senate committees normally required to give prior notice of meetings, they also have to adopt their own rules and keep minutes of their meetings. The rule-making committee was established as a "special committee," but Senate rules do not exempt special committees from any rules unless the resolution forming them says so. The resolution makes it clear the Senate can meet in executive session; however, it does not address whether they are exempt from the Senate rules regarding 24-hour notice and keeping minutes of the meeting. The resolution gave the committee the power to meet at the call of the chair and to meet in closed sessions. Otherwise, it did not exempt the committee from any Senate rules.

⁵ Statement from Senator Paxton, *Senator Angela Paxton Releases Statement Regarding Impeachment Proceedings*, Monday, June 19, 2023.

because the Constitution demands it and because my constituents deserve it.”⁶ Senator Paxton’s issued a formal statement regarding her decision not to recuse herself, stating:

“I have twice been elected to represent the nearly one million Texans who reside in Senate District 8, and it is a tremendous honor and privilege to be their voice in the Texas Legislature. Each time I was elected, I took an oath to uphold the Constitution and the laws of this great state, and Texas law compels each member of the Senate to attend when the Senate meets as a court of impeachment. As a member of the Senate, I hold these obligations sacred and I will carry out my duties, not because it is easy, but because the Constitution demands it and my constituents deserve it.”⁷

Senator Paxton was right; Article 15 of the Texas Constitution demands she serve in the court of impeachment.

Senate Excludes Senator Paxton: S.R. 35, Rule 31

Not satisfied with Senator Paxton’s decision, and in an effort to exclude her from the impeachment trial, the Senate included Rule 31 in S.R. 35, stating:

“A member of the court who is the spouse of a party to the court of impeachment is considered to have a conflict pursuant to Article III, Section 22, of the Texas Constitution. Such member of the court shall be seated in the court of impeachment pursuant Article 15 of the Texas Constitution. However, such member of the court shall not be eligible to vote on any matter, motion, or question, or participate in closed sessions or deliberations.

Notwithstanding any other rule, a member of the court who is the spouse of a party to the court of impeachment shall be considered present and eligible only for the purpose of calculating the number of votes required for any and all matters, motions, and questions under these rules.”

S.R. No. 35, Rule 31 (June 21, 2023) (Exhibit “A”). Rule 31 ignores the plain language of Article III, Section 22 which prohibits any member who has a “personal or private interest”

⁶ AP, *Texas lawmaker says she will ‘carry out’ duties in husband’s impeachment trial*, June 20, 2023.

⁷ Statement from Senator Paxton, *Senator Angela Paxton Releases Statement Regarding Impeachment Proceedings*, Monday, June 19, 2023.

in a “measure or bill” from voting. TEX. CONST., Art. 3, § 22.⁸ Rule 31 targets one senator, Angela Paxton, as having a “personal or private interest” under Article III, Section 22. Because the Rules Committee met in secret, there is no way to know how the committee arrived at the conclusion that Senator Paxton had a disqualifying conflict of interest. Did any other Senator or the Lieutenant Governor disclose a “personal or private interest” or pecuniary interest as required by Article 3, § 22.

Arguably, every senator and the Lieutenant Governor have “personal or private interests” under Article 3, § 22. However, they are conspicuously absent from the language of Rule 31; allowing them to fully participate in the impeachment trial. For instance, Senator Charles Schwertner (R-Georgetown) endorsed George P. Bush in the Republican Primary against General Paxton. George P. Bush is quoted in the Texas Tribune on September 15, 2021: “Everyone knows Ken Paxton is corrupt.” By endorsing General Paxton’s primary opponent, and given the incendiary language by Bush directed towards General Paxton, Senator Schwertner has a “personal or private interest” in seeing that General Paxton is convicted. However, he is not excluded under Rule 31.

Senator Mayes Middleton (R-Galveston) invested in former State Rep. Matt Krause’s campaign and later Louie Gohmert’s campaign in the primary against General Paxton. Both candidates made statements expressing concern about Ken Paxton’s legal troubles but Gohmert was particularly critical, raising the prospect that Paxton might be indicted before the election and a Democrat would take the position by default. Gohmert’s website read: “Texas needs an attorney general whose top attorneys working for him have not found it necessary to send a letter

⁸ Article 3, Sec. 22. of the Texas Constitution states: DISCLOSURE OF PERSONAL OR PRIVATE INTEREST IN MEASURE OR BILL; NOT TO VOTE. A member who has a personal or private interest in any measure or bill, proposed, or pending before the Legislature, shall disclose the fact to the House, of which he is a member, and shall not vote thereon.

to the FBI urging an investigation into the corruption of their boss.” If we assume that Senator Middleton was so concerned about Ken Paxton’s legal troubles that he would contribute large sums into his challengers’ campaigns, he has a personal, private, and pecuniary interest in seeing a return on his investment even if he reaches his goal in a different manner. Like Senator Schwertner, Senator Middleton is not excluded in Rule 31. Additionally, the Senate Democrats have worked for years to defeat General Paxton; however, they too are not excluded in Rule 31. Article 3, § 22 is much broader than the marital relationship identified in Rule 31.

The impeachment trial is scheduled to begin on September 5, 2023.

Lieutenant Governor and Senators Refuse to Speak with or Hear from Their Constituents: S.R. 35, Rule 10 and Gag Order

As part of the impeachment Rules, the Senate prohibits senators from interacting with their constituents, effectively silencing the voice of all Texans in this historic process.⁹ Specifically, Rule 10 states:

“ **Gag Order.** (a) A gag order that meets state and federal law standards shall be issued by the presiding officer of the court as soon as practicable after adoption of the rules for the court of impeachment.

(b) **Communication Rules.** No members of the court, staff of members of the court, presiding officer of the court, and legal counsel of the presiding officer **shall discuss or comment on any matter relating to the merits of the proceedings before the court of impeachment with Warren Kenneth Paxton, Jr., and his counsel, the House Board of Managers and their counsel, or any persons** other than members of the court, the presiding

⁹ In general, impeachments are a rare occurrence. In Texas, three officials have been impeached and two were removed from office after impeachment—Governor James Ferguson (D) in 1917 and State District Judge O.P. Carillo in 1975. Ferguson was indicted on charges including embezzlement while Carillo spent three years in jail following his impeachment. *Baylor University*, "O.P. Carrilo," accessed November 4, 2013.

Specifically, Judge Carillo was impeached and removed in 1976 for "schem[ing] to take Duval County taxpayers’ money through phony equipment rentals." *Daily Texas Online*, "The Daily Texan editorial board's endorsements for the Tuesday, Nov. 5 election," November 3, 2013.

officer of the court, legal counsel to the presiding officer, or staff or legal counsel to members of the court.”

On July 17, 2023, Lieutenant Governor Patrick issued a broad Gag Order related to the impeachment trial of General Paxton stating “out-of-court statements” by both sides could jeopardize the trial in the Texas Senate.¹⁰ Violators of the Gag Order can be found in contempt of court and punished with up to six months in a county jail and a fine of up to \$500. (Exhibit “B”) Among other things, the order prohibits parties — including members of the Senate and House and their staffs, witnesses and attorneys — from making statements that they “reasonably should know” will have a “substantial likelihood of materially prejudicing the trial.” (Exhibit “B”)

Rule 10 and the Gag Order (Exhibits “A” and “B”) prohibit, among other things, the senators and state representatives from communicating with their constituents on a matter of statewide importance, silencing the voice of the people. Rule 10 and the Gag Order trample on the constitutional rights of all Texans.

II. DISCOVERY CONTROL PLAN

Plaintiffs intend to conduct discovery under Level 2 of the rules set forth in Rule 190 of the Texas Rules of Civil Procedure.

III. TRCP 47 STATEMENT

Plaintiffs are suing for injunctive relief and declaratory relief. Plaintiffs are seeking monetary relief of less than \$100,000.00.

IV. JURISDICTION AND VENUE

¹⁰ Robert Downen, *Acting as Paxton impeachment judge, Lt. Gov. Dan Patrick issues sweeping gag order*, Texas Tribune, July 17, 2023.

“The courts, in proper cases, may always inquire whether any department of the government has acted outside of and beyond its constitutional authority.” *Ferguson v. Maddox*, 114 Tex. 85, 100 (Tex. 1924). The acts of the Senate, sitting as a court of impeachment, are not exempt from this judicial power....” *Id.* The Senate is bound by the Texas Constitution. *Id.*

The Court has subject-matter jurisdiction under the Texas Constitution, Article V, § 8, as the amount in controversy exceeds the minimum jurisdictional limits of the court of exclusive interest. Plaintiffs seek relief that can be granted by courts of law or equity.

The Court has jurisdiction over the Plaintiffs’ request for declaratory relief against Defendants because the Declaratory Judgment Act waives governmental immunity when the plaintiff is challenging the validity of an ordinance, order, resolution, or government action. See Tex. Civ. Prac. & Rem. Code §§ 37.004, 37.006; *Texas Lottery Comm’n v. First State Bank of DeQueen*, 325 S.W.3d 628 (2010); *Texas Ed. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994).

The Court has jurisdiction over the Plaintiffs’ request for injunctive relief against Defendants because Defendants are acting *ultra vires* by unlawfully enforcing a provision and/or rules that violates the Texas Constitution. See Tex. Civ. Prac. & Rem. Code § 65.021; see also *City of El Paso v. Heinrich*, 284 S.W.3d 366-368-69 (Tex. 2009).

Plaintiffs have standing to seek declaratory and injunctive relief because they are adversely and irrevocably harmed by the illegal rules Defendants are implementing.

The Court has personal jurisdiction over the Defendants.

Venue is proper in Travis County because Defendants have their principal office in Travis County, Texas. See Tex. Civ. Prac. & Rem. Code § 15.002(a)(3) and 15.005 Tex. Gov. Prac. & Rem. Code.

Plaintiffs have provided the Texas Attorney General with notice of this suit as required by Texas Civil Practice & Remedies Code §30.004(b).

**V.
PARTIES**

Plaintiff Steven Hotze, M.D. (“Dr. Hotze”) is a resident of Harris County, Texas, and a citizen of the United States. Dr. Hotze is a registered voter in Harris County, Texas. Dr. Hotze has reached out to numerous state senators and state representatives regarding the impeachment of General Paxton and has not received a response. Previously, the senators and state representatives promptly responded to Dr. Hotze’s calls and/or communications. Additionally, Dr. Hotze voted in the 2022 Republican Primary and general election. Dr. Hotze supports General Paxton and is opposed to his impeachment.

Plaintiff Allesan Paige Streeter is a resident of Collin County, Texas, and a citizen of the United States. Ms. Paige is a registered voter in Senate District 8. Ms. Paige voted in the 2022 Republican Primary and general election. She voted for Senator Angela Paxton. By excluding Senator Paxton from the impeachment process, Ms. Paige is left without representation in a matter of state wide importance.

Plaintiff Honorable Molly White is a former member of the Texas House of Representatives District 55, a resident of Sutton County, Texas, and a citizen of the United States. Representative White has reached out to numerous state senators and state representatives regarding the impeachment of General Paxton and has not received a response. Previously, the senators and state representatives promptly responded to Representative White’s calls and/or communications. Additionally, Representative White voted in the 2022 Republican Primary and general election. Representative White supports General Paxton and is opposed to his impeachment.

Plaintiff Sam Malone is a resident of Harris County, Texas, and a citizen of the United States. Ms. Malone voted in the 2022 Republican Primary and general election. Mr. Malone is a supporter of General Paxton and Rule 10 and the Gag Order prohibit him from communicating with his state senator and/or state representative regarding the impeachment of General Paxton.

All individual Defendants are being sued in their official capacity.

Defendant Texas State Senate is recognized under the Texas Constitution, Article III, Sec. 1, stating, “Legislative power of this State shall be vested in a Senate and House of Representatives, which together shall be styled ‘The Legislature of the State of Texas.’” The Texas Senate may be served through the President Pro Tempore of the Texas Senate, Brian Birdwell, or the Attorney General for the State of Texas, 300 W. 15th St., Austin, Texas 78701.

Defendant Austin Osborn (“Osborn”) is the Sergeant-at-Arms for the Texas Senate. He is sued in his official capacity as Sergeant-at Arms of the Texas Senate. Osborn and the Office of the Sergeant-at-Arms is responsible for enforcing S.R. 35 and the Gag Order which are the basis for this suit. The Sergeant-at-Arms may be served through the Attorney General of the State of Texas, 300 W. 15th St., Austin, Texas 78701.

Defendant Dan Patrick (“Patrick”) is the Lieutenant Governor and President of the Senate of Texas. He is sued in his official capacity as the Lieutenant Governor of the State of Texas. The Lieutenant Governor decides all questions of parliamentary procedure in the Senate and is responsible for the Gag Order which is the basis of this suit. The Lieutenant Governor may be served through the Attorney General of the State of Texas, 300 W. 15th St., Austin, Texas 78701.

VI. STATEMENT OF THE CLAIM

A. Rule 31 Violates the Texas Constitution: Article 3, Section 22 is not applicable to Impeachment Proceedings.

Article 15, section 2 of the Texas Constitution states: “TRIAL OF IMPEACHMENT OF CERTAIN OFFICERS BY SENATE. Impeachment of the...Attorney General...shall be tried by the Senate.” The inclusion of the word “shall” requires Senator Paxton to fully participate in the impeachment trial, including deliberations relating to the ultimate outcome. Article 15 is limited to impeachment proceedings and is the only article in the Texas Constitution addressing the impeachment and trial of an attorney general. In its Rules for the impeachment trial, the Senate goes outside Article 15 to exclude Senator Paxton and her constituents from the impeachment trial. To achieve the goal of excluding Senator Paxton, Senate Rule 31 cites Article 3, § 22, stating:

Conflict. A member of the court who is the spouse of a party to the court of impeachment is considered to have a conflict pursuant to Article III, Section 22, of the Texas Constitution. Such member of the court shall be seated in the court of impeachment pursuant to Article 15 of the Texas Constitution. However, such member of the court **shall not be eligible to vote on any matter, motion, or question, or participate in closed sessions or deliberations.**

S.R. Rule 35, (June 21, 2023) (Exhibit “A”).

Conspicuously absent from Article 15 is any language that allows the Senate to exclude one of its members from “vot[ing] on any matter, motion or question, or participating in closed sessions or deliberations.” The personal or private interest language identified in Article 3, § 22 are not found in Article 15. In fact, Rule 31 fails to recognize that Article 3, § 22 is much broader than the husband and wife relationship and if accurately applied would likely result in every senator and the Lieutenant Governor being excluded from the impeachment trial. Specifically, Article 3, § 22 states:

Sec. 22. DISCLOSURE OF PERSONAL OR PRIVATE INTEREST IN MEASURE OR BILL; NOT TO VOTE. A member who has a personal or private interest in any measure

or bill, proposed, or pending before the Legislature, shall disclose the fact to the House, of which he is a member, and shall not vote thereon.

Article 3, § 22 has remained unchanged since 1876. McKay's summarized Debates of the 1875 Convention do not mention it, but one may speculate that the section was a response to the widespread corruption in the Reconstruction legislatures. No authoritative interpretation of this section was found, probably because, in practice, it is considered a prohibition "with which each Member is left to comply according to his [or her] own judgment as to what constitutes a personal or private interest." Tex. H. Rule 12, sec. 2, comment p. 67 (1973). No remedy is provided in the constitution (or in the statutes for the act of voting) for violating the section. Section 22 is unenforceable as presently worded. Moreover, efforts to define conflict of interest in the constitution are doomed from the beginning because of the infinite variety of conflicts possible. Here, arguably every Senator and the Lieutenant Governor have a conflict of interest with respect to the impeachment proceeding.

The language found in Article 3, § 22 is conspicuously absent from Article 15. Unlike Article 15, Article 3 does not address impeachment. In fact, the word impeachment is nowhere to be found in Article 3. However, Article 15 includes a provision to ensure an "[i]mpartial trial by [the] Senate." TEX. CONST, art. 15, § 3. To ensure that "personal or private interest" are not an issue. Specifically, "When the Senate is sitting as a Court of Impeachment, **the Senators shall be on oath, or affirmation of impartiality to try the party impeached**, and no person shall be convicted without the concurrence of two-thirds of the Senators present." TEX. CONST. art. 15, § 3. Through the oath, or affirmation of impartiality, Article 15, § 3 addresses personal or private interest, including the relationship between General Paxton and Senator Paxton.

Impeachment is a unique proceeding that is inherently political.¹¹ The fact that the trial is taking place in the state Senate and not a court of law further highlights the political nature of the proceeding. The impeachment trial is not presided over by a judge but instead a Lieutenant Governor who is not a lawyer, further highlighting the political nature of the proceeding. The so called “jurors” are duly elected senators who would never survive the voir dire process in a civil or criminal legal proceeding. The senators, presiding officer (Lieutenant Governor), and the Attorney General are all politicians subject to an election every four years. Politics, personal relationships, and political vendettas are impossible to avoid in an impeachment proceeding because the proceedings are held by a political body and run by politicians. This is not and should not be considered anything close to a court of law. Because the impeachment proceeding is highly partisan and political by definition, the Texas Constitution has an entire article dedicated to this unique and rare process - Article 15.

In 1876 when Article 15, § 3 was adopted, there was an appreciation for the fact the senators serving in the trial of impeachment would likely have supported or opposed the Governor, Lieutenant Governor, Attorney General, Commission of General Land Office, Comptroller and the Judges of the Supreme Court, Court of Appeals and District Court who were potentially the subjects of an impeachment proceeding under Article 15. Some senators would likely have personal, private, and financial relationships with the elected official who was the subject of the impeachment trial. Because Texas has a citizen legislature, it is likely that many of the senators and the impeached interact in their personal and professional lives. Again, to deal with this potential partiality, the Texas Constitution requires each senator to take an oath or

¹¹ Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* (3d ed.). University of Chicago Press. pp. 106–07. ISBN 9780226554976 (2019).

affirmation of impartiality prior to trying the impeached official. Article 15, Section 3. Applying Article 3, § 22 to the senators presiding over the impeachment trial of General Paxton would arguably result in every senator and the Lieutenant Governor from voting on anything related to the impeachment trial.

Every senator presiding over General Paxton's impeachment trial has a bias or partiality for or against General Paxton. Party affiliation alone raises partiality concerns. The Democrats in the Senate have worked to defeat General Paxton for years and most of the Republican senators have supported General Paxton. Identifying all the "private or personal" interests between senators, the Lieutenant Governor, and General Paxton would consume hundreds of pages.

This is a political body and impeachment is a political process. The Texas Constitution appreciates these conflicts and the political nature of the process and remedies the issues with the oath and affirmation of impartiality found in Article 15, § 3. Article 15 does not expressly exclude political opponents, financial donors to General Paxton or his opponents, those lending money to or from the impeached, spouses, or any other senator and/or the Lieutenant Governor. Again, the partiality issue is satisfied through oath and affirmation. TEX. CONST. art. 15, § 3.

Despite the fact that every senator and the Lieutenant Governor arguably have a conflict "personal or private" interest in the impeachment proceeding and/or biases for or against General Paxton, Rule 31 targets one individual, Senator Angela Paxton, and the voters who live in Senate District 8. Again, Rule 31 expressly prohibits Senator Angela Paxton from voting on any matter, motion, or question, or participating in closed sessions or deliberations. Effectively, the Rule makes Senator Paxton a bystander in the court of impeachment. Rule 31 violates Article

15, section 2 of the Texas Constitution and the Senate should be restrained from implementing it with respect to Senator Angela Paxton. Further, Rule 31 should be declared unconstitutional.

B. Rule 10 and the Gag Order Violate the Texas Constitution

The Texas Constitution prohibits laws that abridge the freedom of speech or the right of the people to petition the government for a redress of grievances. Article 1, § 27 Although the Texas Constitution provides that each “House may determine the rules of its own proceedings.” TEX. CONST. Art. 3, § 11. However, the House and Senate must determine procedures, consistent with the Texas and U.S. Constitutions, for providing public access, conducting public testimony, debate and voting on legislation during the legislative session. Because Rule 10 and the Gag Order prohibits the public from communicating with their senators, state representative, or the Lieutenant Governor regarding the impeachment proceeding, they violate Article 1, § 8, and Article 1, § 27 of the Texas Constitution.

The Senate must create rules, consistent with the Texas Constitutions, for providing public access, conducting public testimony, debate and voting on legislation during the legislative session. “All government power in this country, no matter how well-intentioned, derives only from the state and federal constitutions.” *In re Salon A La Mode et al.*, No. 20-0340 (concurring opinion, J Blacklock) (Tex. May 5, 2020). During an impeachment proceeding “the judiciary, the other branches of government, and our fellow citizens—must insist that every action our governments take complies with the Constitution, especially now. If we tolerate unconstitutional government orders during an emergency, whether out of expediency or fear, we abandon the Constitution at the moment we need it most.” *Id.* Any government that has made the grave decision to suspend the liberties of a free people must demonstrate that its chosen measures are absolutely necessary to combat a threat of overwhelming severity. *Id.* Before

suspending freedoms protected from infringement by the Constitution, the government is also required to demonstrate that less restrictive measures cannot adequately address the threat. *Id.* Whether it is strict scrutiny or some other rigorous form of review, courts must identify and apply a legal standard by which to judge the constitutional validity of the government's actions. Justice Blacklock previously stated: "[W]hen constitutional rights are at stake, courts cannot automatically defer to the judgments of other branches of government." *Id.*

Government power cannot be exercised in conflict with the constitution. *In re Abbott*, 2020 WL 1943226 at *1 (Tex. Apr. 23, 2020). Texas law does not and cannot empower the Texas Senate to exclude the people from communicating with their duly elected representatives.

1. Rule 10 and the Gag Order Violate Article 1, § 8 of the Texas Constitution

Article 1, § 8 of the Texas Constitution provides: "Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press." By prohibiting senators (and agents), state representatives (and agents), and the Lieutenant Governor from communicating with their constituents regarding the impeachment of General Paxton, Defendants' trample on Plaintiffs' rights under Article 1, § 8. A rule that unreasonably restricts speech by prohibiting communication with an elected official or their agents violates Tex. Const. art. I § 8.

Pre-speech sanctions, or prior restraints such as those imposed by Rule 10 are presumed to be unconstitutional under this provision of our state constitution. *San Antonio Express-News, Div. of Hearst Corp. v. Roman*, 861 S.W.2d 265 (Tex. App.- San Antonio 1993, no writ). In *Kinney v. Barnes*, the Texas Supreme Court defined the free speech presumption, stating, "Enshrined in Texas law since 1836, this fundamental right recognizes the 'transcendent

importance of such freedom to the search for truth, the maintenance of democratic institutions, and the happiness of individual men.' Tex. Const. art. I, § 8 interp. commentary (West 2007). Commensurate with the respect Texas affords this right is its skepticism toward restraining speech. While abuse of the right to speak subjects a speaker to proper penalties, we have long held that 'pre-speech sanctions' are presumptively unconstitutional." 443 S.W.3d 87, 90 (Tex. 2014) (footnotes omitted).

In *Operation Rescue-Nat'l v. Planned Parenthood of Houston and Southeast Texas*, 975 S.W.2d 546, 559 (Tex. 1998) (footnote omitted), the Texas Supreme Court identified the applicable standard for judging restrictions on free speech, stating, "To define the protections of Article I, Section 8 simply as one notch above First Amendment protections is to deny state constitutional guarantees any principled moorings whatever. We reject this approach. The text, history, and purposes of Article 1, § 8 have been thoroughly examined by this Court. We know of nothing to suggest that injunctions [or rules] restricting speech should be judged by a different standard under the state constitution than the First Amendment."

Two factors are considered in determining the standard by which legislative restrictions on freedom of expression are to be measured: whether the forum is public, and whether the restriction is based on the content of the speech. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-46 (1983). When the forum is public and the restriction is content based, strict scrutiny should be applied to the restriction. *Id.* When the forum is public and the statutory restriction content-neutral, the Texas Constitution requires an "intermediate" scrutiny and permits regulation of the time, place, and manner of expression that is narrowly tailored to serve a significant governmental interest and that leaves open ample alternative channels of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Operation Rescue-*

Nat'l v. Planned Parenthood of Houston and Southeast Texas, 975 S.W.2d 546, 556 (Tex. 1998).

Here, the forum is public and the restrictions are content based. Therefore, strict scrutiny should be applied to Rule 10 and the Gag Order.

Plaintiffs and many Texans have very strong views regarding the impeachment and trial of General Paxton. Accordingly, the government action restricting the speech in question must satisfy strict scrutiny review from this court. Rule 10 and the Gag Order do not satisfy the rigors of strict scrutiny review.

2. Rule 10 Violates Article I, § 27 of the Texas Constitution

The Texas Constitution creates a right for citizens to petition their government: “The citizen shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance.” TEX. CONST. art. I, §27 (“Petition Clause”). Article I, section 27 assures citizens of an important substantive political right—the right to petition the government for redress. *Corpus Christi Indep. Sch. Dist. v. Padilla*, 709 S.W.2d 700, 704 (Tex. App.-Corpus Christi 1986, no writ). The Petition Clause of the Texas Constitution reserves the right to petition the government for a redress of grievances as follows: Right of Assembly; petition for redress of grievances. The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those vested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance. Tex. Const. art. 1. § 27.

The right to petition is inseparable from the right of free speech. Although the rights are distinct guarantees, they are cut from the same constitutional cloth, inspired by the same principles and ideals. Thus, as a general rule, the rights are subject to the same constitutional

analysis. *Clay v. Jenkins*, 248 S.W.3d 418, 423 (Tex. App.-Amarillo 2009, no writ). By prohibiting communication between senators, state representative, the Lieutenant Governor and their constituents, Rule 10 and the Gag Order prohibit Texans from petitioning their government for redress of grievances they may have.

VII. CAUSES OF ACTION

The Plaintiffs bring their claims for relief under the Uniform Declaratory Judgment Act. They also bring suit under *City of El Paso v. Heinrich*, 284 S.W.3d, 366, 368-369 (Tex. 2009), which authorizes *ultra vires* claims against public officials who act in violation of state law.

Plaintiffs are seeking relief entirely under state law and are not asserting any claims that arise under federal law.

VIII. EMERGENCY APPLICATION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs incorporate the foregoing paragraphs and incorporate them here as if fully set forth herein.

Plaintiffs seek a temporary restraining order preventing Defendants from implementing and enforcing Rule 31, Rule 10 and the Gag Order. A temporary restraining order serves to provide emergency relief and preserve the status quo until a hearing may be had on a temporary injunction. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). To obtain injunctive relief, “the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparably injury in the interim.” See *Butnaru*, 84 S.W.3d at 204. An applicant must plead a cause of action and present some evidence that tends to sustain it to show a probable right of recovery. *Intercontinental Terminals Co., LLC v. Vopak N. Am., Inc.*, 354 S.W.3d 887, 897

(Tex.App.—Houston [1st Dist.] 2011, no pet.). “[T]he applicant is not required to establish that it will prevail on final trial.” *Texas Kidney, Inc. v. ASD Specialty Healthcare*, No. 14-13-01106-CV, 2014 WL 3002425, at *2 (Tex. App.—Houston [14th Dist.] July 1, 2014, no pet.).

The Uniform Declaratory Judgment Act and *Heinrich* each provide Plaintiffs with a cause of action to seek declaratory and injunctive relief against the Defendants. Plaintiffs have a probable right to relief because, for the reason described above, the Defendants’ conduct violates their rights under the Texas Constitution. Plaintiffs will suffer probable, imminent, and irreparable injury absent a temporary restraining order and temporary injunction because the Defendants are trampling on Plaintiffs’ rights under the Texas Constitution and are exceeding Defendants’ authority under the Texas Constitution. The deprivation of liberty is an irreparable injury.

Without immediate relief, Plaintiffs will suffer imminent and irreparable harm. With each day that passes Plaintiffs are deprived of their liberty and rights under the Texas Constitution in that they are prohibited from communicating with their senators, state representative, and the Lieutenant Governor regarding the impeachment of General Paxton. Additionally, Senate District 8 will lack representation in the impeachment trial if Rule 31 is not restrained from being implemented.

The harm to Plaintiffs described herein is a direct and proximate result of the acts of Defendants enforcing and implementing Rule 10, Rule 31 and the Gag Order. The requested temporary restraining order is appropriate to preserve the status quo until a hearing on Plaintiffs’ application for temporary injunctive relief can be held. For just cause, Plaintiffs request the entry of a Temporary Restraining Order as follows, and further requests entry of a Preliminary Injunction following a notice and hearing:

Plaintiffs will provide Defendants' counsel with notice of this Application for Temporary Restraining Order and hearing on same.

Plaintiffs file this Application for a Temporary Restraining Order and Other Equitable Relief pursuant to general principles of equity, Texas Rules of Civil Procedure 680, *et seq.*, and Texas Civil Practice and Remedies Code section 65.011. Plaintiffs are willing to post a bond as required by Texas law in an amount determined by the Court.

**IX.
GROUNDS FOR TEMPORARY INJUNCTION**

Plaintiffs incorporate the foregoing paragraphs as if fully set forth herein.

Plaintiffs request this Court to set their Request for a Temporary Injunction for hearing, and, after hearing, issue a temporary injunction against Defendants.

Additionally, Plaintiffs further request that, following a trial on the merits of this case, the Court enter a permanent injunction against Defendants.

**X.
DEMAND FOR JUDGMENT**

Plaintiffs demand the following relief:

a. A declaration that Senate Resolution No. 35, Rules 10, 31 and the Gag Order violate Article I § 8 of the Texas Constitution and are invalid;

b. a declaration that Senate Resolution No. 35, Rules 10, 31 and the Gag Order violate Article I § 27 of the Texas Constitution and are invalid;

c. a temporary and permanent injunction that prevents Defendants from enforcing and implementing Senate Resolution No. 35, Rules 10, 31, and the Gag Order;

d. a temporary restraining order that suspends the enforcement of Senate Resolution No. 35, Rules 10, 31, and the Gag Order;

- e. an award of nominal and compensatory damages;
- f. an award of costs and attorneys' fees; and
- g. all other relief that the Court may deem just, proper, or equitable.

Respectfully submitted,

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