No. 24-0162

In the Supreme Court of Texas

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS TEXAS ATTORNEY GENERAL; AND GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS TEXAS GOVERNOR,
Petitioners,

v.

AMERICAN OVERSIGHT,
Respondent.

On Petition for Review
from the Third Court of Appeals, Austin

BRIEF ON THE MERITS FOR PETITIONERS

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Table of Contents

Index of Authorities

Page(s)

Cases:

Constitutional Provisions, Statutes, & Rules:

Other Authorities:

Statement of the Case

Nature of the Case:	Respondent American Oversight sought a writ of mandamus against Governor Greg Abbott and Attorney General Ken Paxton, in their official capacities, to require them to release "public information" that Respondent alleges was withheld from the responses to its Texas Public Information Act ("PIA") requests. CR.713. Petitioners filed pleas to the jurisdiction asserting sovereign immunity from suit. CR.347, 500.
Trial Court:	250th Judicial District Court, Travis County The Honorable Daniella DeSeta Lyttle
Disposition in the Trial Court:	The trial court denied Petitioners' pleas to the jurisdiction. CR.1087–88.
Parties in the Court of Appeals:	Petitioners were the appellants. Respondent was the appellee.
Disposition in the Court of Appeals:	The court of appeals affirmed. *Paxton v. Am. Oversight*, 683 S.W.3d 873 (Tex. App.—Austin 2024, pet. pending) (Theofanis, J., joined by Byrne, C.J., and Kelly, J.).

Statement of Jurisdiction

The Court has jurisdiction under Texas Government Code section 22.001(a).

Issues Presented

The PIA generally requires a governmental body to release public information to a requestor. If the governmental body refuses to seek the Attorney General's ruling on whether responsive information should be disclosed, refuses to follow that ruling and release public information identified by the Attorney General, or refuses to release public information, the Legislature has permitted requestors to seek a writ of mandamus against the governmental body. Tex. Gov't Code § 552.321(a). That permission is, however, limited. Like any suit against a government entity, to survive a plea to the jurisdiction, the requestor must state a viable claim for relief within an applicable waiver of sovereign immunity.

The issues presented are:

1. Whether the trial court has jurisdiction to issue a writ of mandamus against Petitioners, who are two of the State's six executive officers under the Constitution.
2. Whether Respondent met its burden to show a facially valid claim that Petitioners "refuse[d]" to provide public information.

Introduction

Consistent with the "fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people," it has long been "the policy of this [S]tate that each person is entitled . . . to complete information about the affairs of government and the official acts of public officials and employees." Tex. Gov't Code § 552.001(a). Nevertheless, Texas law "simultaneously recognizes that public interests are best advanced by shielding some information from public disclosure." *Paxton v. City of Dallas*, 509 S.W.3d 247, 249–50 (Tex. 2017). Executive officers and their staff, in particular, are often entrusted with the confidential information of citizens. And to "promote broader public interests," privileges like the one between an attorney and client rightly shield information from public dissemination. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

Here, Petitioners struck the balance between transparency and confidentiality that the Legislature commanded in the PIA. Petitioners' public-information coordinators conducted thorough searches for records responsive to Respondent's requests. When appropriate, they sought rulings from the public-information attorneys in the Attorney General's Office. They abided by those rulings, disclosing some documents to Respondent while withholding others.

Dissatisfied, Respondent speculates that additional documents must exist. But the trial court was not the right court to hear Respondent's complaint. The Constitution "enables the legislature to so mold the judicial system of the [S]tate as to meet the wants of the people" within certain constitutional limits. *Harris County v.*

Stewart, 41 S.W.650, 656–57 (Tex. 1897); *see also Jordan v. Crudgington*, 231 S.W.2d 641, 645 (Tex. 1950). The Legislature has wielded its authority to shape the judiciary to prohibit district courts from granting mandamus relief against the executive officers named in the Constitution, including the Governor and the Attorney General.

Moreover, even if the trial court had mandamus jurisdiction, Respondent provided no concrete allegations or evidence to support its speculation that Petitioners did not comply with the PIA. And Respondent's belief—no matter how sincere—is not enough to overcome Petitioners' sovereign immunity or the presumption that the State's constitutional executive officers act in good faith.

This case involves weighty questions affecting the operations of two of the State's highest officials. The Court should grant the petition for review, reverse the court of appeals' judgment, and dismiss the case for lack of jurisdiction.

Statement of Facts

The court of appeals correctly stated the nature of the case. *See supra* p.viii.

I. American Oversight's Public-Information Requests

This appeal arises from seven information requests Respondent submitted to the Office of the Governor ("OOG") and the Attorney General's Office ("OAG") between March 2021 and June 2022. *See* CR.714–23.

A. From OOG, Respondent requested:

> (1) on January 7, 2022, emails from the Governor's unofficial email address to his official email address, his chief of staff, or his deputy chief of staff from

April 1, 2020, CR.731;

(2) on June 6, 2022, emails and text messages[1] between specified officials in OOG and specified "gun groups" between May 24 and June 3, 2022, CR.800–01; and

(3) on January 8, 2022, text messages "pertaining to official business" sent or received by the Governor from January 1, 2021, CR.760.[2]

In processing each request, OOG conducted a thorough search of locations where responsive materials might be found, as its public-information coordinator would later describe. *Infra* p.5–6. OOG found some documents responsive to the first request but concluded that they were exempt from disclosure. CR.755–56. As required by the PIA, OOG requested review of those documents and a decision from OAG's Open Records Division ("ORD"), which determined that all the documents were privileged or related to pending litigation. CR.755–57. OOG found no responsive public documents for the second request. CR.955–58.

Regarding documents responsive to the third request, OOG again had privilege and confidentiality concerns. OOG again requested that ORD review those documents and consult with the Texas Department of Public Safety ("DPS"), whose confidentiality concerns were also implicated. *See* CR.791; Tex. Gov't Code § 552.304.

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[1] "Text messages" included "messages on messaging applications similar in form to text messages." CR.12.

[2] Some of the document requests at issue in this appeal sought information that was more than a year old at the time of the request. CR.714–23. Absent a contrary statute (or a litigation hold), government agencies are typically allowed to create document- retention polices that may permit disposal of emails or text messages in significantly less than that time. *See* Tex. Gov't Code § 552.0215.

Based on OOG's and DPS's information, ORD determined that some information was exempt from disclosure under sections 552.103 (pending litigation), 552.104 (competitive business advantage), 552.107 (attorney-client privilege), 552.111 (policymaking processes), or the Homeland Security Act, CR.791–98. But it concluded that other information should be disclosed. CR.793.

OOG followed ORD's directions and provided Respondent with 100 pages of messages, CR.398–497, 791, several of which concerned arrangements for conversations over the phone, *e.g.*, CR.414, 425, 435, 488.

B. From OAG, Respondent sought:

> (1) on March 25, 2021, emails from the Attorney General or Solicitor General between January 6 and 8, 2021, CR.718–19;
>
> (2) on August 6, 2021, emails from the Attorney General's unofficial email to his official email, his chief of staff, or deputy chief of staff from April 1, 2020, CR.719–20;
>
> (3) on May 2, 2022, text messages "pertaining to official business" that the Attorney General sent or received from November 3, 2020, CR.721; and
>
> (4) on June 7, 2022, email and text communications between named OAG officials and "gun groups" between May 24 and June 3, 2022, CR.722–23.

As with OOG, OAG's public-information coordinator—who works in a separate division from the attorneys at ORD—directed a search of potentially responsive materials that she would later describe in court filings. *Infra* p.6–7. For the January 6-8 communications, CR.891, and unofficial email requests, CR.903, OAG released some records, CR.512–13, 817–20, 897, and its public-information coordinator confirmed with ORD that the others were privileged attorney-client

communications, CR.900, 911. OAG released two records in response to Respondent's text-messages request, CR.512–13, 914, 921, and ORD approved withholding the other records as attorney-client privileged, CR.922. For the gun groups request, CR.722–23, there were no responsive documents, CR.930.

II. Trial-Court Proceedings

Unsatisfied with those results, Respondent filed a petition for a writ of mandamus in district court against the Governor and Attorney General in their official capacities under Government Code section 552.321. CR.713. Respondent alleged that Petitioners' responses were deficient, as it believed there must be more responsive records in Petitioners' possession that were not exempt from disclosure. CR.727. In addition, Respondent speculated that Petitioners' "reliance on [ORD's] rulings constitutes an improper withholding of responsive records" because there must be additional "'public information' under [s]ection 552.022(a)(3)" of the PIA which "must be produced." *Id.*

Petitioners filed pleas to the jurisdiction, arguing that Respondent had not pleaded a viable claim that Petitioners had "refuse[d]" to provide public information. CR.358–62, 505–06. Because the documents they provided were all the public documents that the PIA required to be released, Petitioners further explained that Respondent's claim was moot. CR.362–64, 506–07.

Attached to the Governor's plea was the sworn and notarized affidavit of Kieran Hillis, OOG's public-information coordinator and assistant general counsel, in which he described the method he used to fulfill Respondent's request. CR.954–58. He explained that he "conducted and oversaw a diligent and good faith search for

the information responsive to this request and gather[ed] the information [OOG] owned, controlled, or had a right of access to." CR.955. In accordance with OOG's standard procedures, he distributed the requests "to all public information liaisons in every division within the agency that may maintain responsive records," who coordinated with employees within those divisions to provide "potentially responsive documents." *Id.* Hillis also pulled responses from earlier similar requests and reviewed the returned records for responsiveness. *Id.* If he intended to withhold any records, he first requested a ruling on them from ORD. CR.955–56. He then either released the documents or withheld them consistent with ORD's letter ruling. CR.956.

The Attorney General included in his plea to the jurisdiction the sworn declaration of OAG's public-information coordinator, Lauren Downey, who also described, under penalty of perjury, how OAG responded to Respondent's public-information requests. CR.887. Like Hillis, Downey testified that she "conducted a diligent and good faith search for responsive information in accordance with OAG's standard procedures for responding to PIA request[s]." *Id.* Downey's searches were also tailored to each specific request. *Id.* In response to the request for the January 6-8 communications, for example, Downey contacted both the Attorney General and the Solicitor General personally, as well as "their executive assistants and staff members," to inform them of the information requests and coordinate compilation of potentially responsive documents. *Id.* After reviewing those documents for responsiveness, Downey sent those she believed were exempt from release or representative samples

to ORD along with an explanation of why the documents should not be released, CR.888, and accepted ORD's rulings, CR.887–89.

The trial court denied both Petitioners' pleas to the jurisdiction. CR.1087. According to the trial court, "[t]he initial responses of Lauren Downey . . . may have identified [public] documents as 'non-responsive' and therefore excluded them entirely." CR.1088. In addition, the court asserted that Hillis's affidavit used the phrase "official communications," but "the requester did not so limit [its] language." *Id.* Ultimately, the trial court expressed "concern" that "the public information rulings were [not] correct" about what constituted "official business" and privileged attorney-client communications and concluded that "on the current filings," it could not decide if "there remains a right of judicial review." *Id.* The court denied the pleas to the jurisdiction "until [the] documents are provided for in camera inspection" to show Petitioners' rationale. *Id.*

III. Court-of-Appeals Proceedings

Petitioners filed an interlocutory appeal. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8). The Third Court of Appeals affirmed the trial court's order. *Am. Oversight*, 683 S.W.3d at 889. The court's analysis proceeded in two relevant parts.

First, the court rejected Petitioners' argument that they could not be subject to an action under section 552.321 because Government Code section 22.002(c) expressly prohibits mandamus actions against executive officers in the district courts, and article V, section 3 of the Constitution prohibits assigning this Court the ability to mandamus the Governor. *Id.* at 882. The court relied on the later-enacted section 552.321(b), reasoning that this amendment reflected the Legislature's intent to allow

district courts to issue writs of mandamus against Petitioners despite prior law. *Id.* at 882–83. In addition, the court reasoned that because article V, section 3 prohibited the Legislature only from assigning mandamus actions against the Governor to this Court, the Legislature was free to assign them to the district court. *Id.* at 883.

Second, having determined that it must accept Respondent's "unnegated factual allegations," *id.* at 886, the court held that Petitioners had "refuse[d]" to provide public information per section 552.321 because certain data was putatively missing from the production. For example, in response to OOG reporting (and ORD confirming) that responses to one request were exempted from release, Respondent argued that "it defies belief that every responsive record created for nearly two years was related to pending litigation and/or to facilitate the rendition of professional legal services." CR.725.

The court of appeals also held that "by seeking a decision from the ORD that they could decline to produce some of the requested information and then withholding the information based on the ORD's letter rulings, [Petitioners] are refusing to supply that portion of the public information." 683 S.W.3d at 885 (quotation marks omitted). The court recognized that it had previously held that that a city was not "refusing to supply public information" when the city had searched for requested documents and produced them. *City of El Paso v. Abbott*, 444 S.W.3d 315, 327 (Tex. App.—Austin 2014, pet. denied) (cited at *Am. Oversight*, 683 S.W.3d at 885 n.6). But the court relied on *Kallinen v. City of Houston*, 462 S.W.3d 25, 28 (Tex. 2015) (per curiam), and distinguished *City of El Paso* on the ground that Petitioners "withh[eld]

information based on exceptions that they could waive, such as the attorney-client privilege." *Am. Oversight*, 683 S.W.3d at 885 n.6. This petition followed.

Summary of the Argument

I. The Texas Constitution gives the Legislature broad authority to structure the jurisdiction of the State's courts. *E.g.*, Tex. Const. art. V, §§ 3, 8. Exercising that authority, the Legislature has assigned to this Court—and this Court alone—jurisdiction to issue a writ of mandamus against the constitutional executive officers. Tex. Gov't Code § 22.002(c). And it has also provided that the Court may not grant mandamus relief against the Governor. *Id.* § 22.002(a). Thus, the trial court lacked jurisdiction over Respondent's mandamus suit.

Section 552.321(b) is not to the contrary. That provision just specifies where a PIA mandamus action must be filed. It does not address executive officers, much less overcome the more specific jurisdictional prohibition in section 22.002(c). Accordingly, the trial court lacked jurisdiction over Respondent's mandamus action.

II. Even if the trial court otherwise had jurisdiction to grant relief, Respondent failed to show that its claim fell within the PIA's waiver of sovereign immunity. Instead of alleging facts showing that Petitioners withheld public information to which Respondent was entitled, Respondent merely speculates that Petitioners failed to comply with their statutory duties. But Respondent's musings about what must, in its view, exist are insufficient to make a prima facie case under the PIA or overcome the presumption that Petitioners follow the law in good faith.

In any event, Petitioners did not refuse to supply public information within the meaning of section 552.321(a) of the PIA. Petitioners conducted good-faith searches

for responsive documents, sought ORD decisions, complied with those decisions, and gave to Respondent all the records to which it was entitled. Because Petitioners did not refuse to supply public information, the trial court erred in denying the pleas to the jurisdiction.

ARGUMENT

I. The Governor and Attorney General Are Not Proper Defendants Under Section 552.321.

"The jurisdiction of all Texas courts, including this Court, derives from the Texas Constitution and state statutes." *In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 459 (Tex. 2011) (orig. proceeding). Article V, section 8 of the Constitution gives district courts "exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, *except* in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body." Tex. Const. art. V, § 8 (emphasis added). Here, the Legislature's "clear and unambiguous language," *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002), in the Government Code and the Constitution prevents the district court from granting such an extraordinary writ against Petitioners.

A. Only this Court may issue a writ of mandamus against the Attorney General, and no court may issue a writ of mandamus against the Governor.

Jurisdiction to issue writs of mandamus typically lies in the district courts, unless either a statute or the Constitution dictates otherwise. Tex. Const. art. V, § 8.

Section 552.321(b) reflects this default rule by providing that a writ of mandamus "under this section must be filed in a district court for the county in which the main offices of the governmental body are located." Tex. Gov't Code § 552.321(b). But that rule does not apply "in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law," Tex. Const. art. V, § 8, such as those singling out Petitioners as executive officers.

The Constitution identifies the six officers constituting the "Executive Department of the State." *Id.* art. IV, § 1. They include the Governor and the Attorney General. *Id.* The Legislature has decided that only this Court may issue a writ of mandamus against one of those executive officers:

> Only the supreme court has the authority to issue a writ of mandamus or injunction, or any other mandatory or compulsory writ or process, against any of the officers of the executive departments of the government of this state to order or compel the performance of a judicial, ministerial, or discretionary act or duty that, by state law, the officer or officers are authorized to perform.

Tex. Gov't Code § 22.002(c). And the Legislature has imposed a further restriction concerning the Governor, providing that this Court may issue "all writs of quo warranto and mandamus agreeable to the principles of law regulating those writs, against . . . any officer of state government *except the governor*." *Id.* § 22.002(a) (emphasis added). That restriction is consistent with the Constitution's provision that "[t]he Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, *except as against the Governor of the State*." Tex. Const. art. V, § 3(a) (emphasis added).

Thus, because Petitioners are executive officers, only this Court may grant mandamus relief against them under section 22.002(c). And because section 22.002(a) further qualifies subsection (c), not even this Court may grant mandamus relief against the Governor.

This Court recognized the implications of these jurisdictional limitations for suits to compel the release of public information in *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995) (orig. proceeding). There, the relator sought a writ of mandamus under the PIA's precursor to compel the Comptroller to produce certain information. *Id.* at 670. The Comptroller, like the Governor and Attorney General, is an executive officer under the Constitution. *Id.* at 672 (citing Tex. Const. art. IV, § 1). The Court acknowledged that "[d]istrict courts are always the courts of exclusive original jurisdiction for mandamus proceedings unless the constitution or a law confers such jurisdiction on another tribunal," *id.* at 671–72, but observed that "[t]he problem with [mandamus] jurisdiction arises when the respondent is an executive officer named by the [C]onstitution," *id.* at 672. That is because "the legislature conferred exclusive original jurisdiction on this Court over mandamus proceedings against executive officers, except for the governor, in section 22.002(c) of the Government Code." *Id.* "Thus, district courts generally have no jurisdiction over executive officer respondents." *Id.* The Court further explained that "[a]ny exception to this rule would require express statutory authorization by the legislature naming district courts as the proper fora." *Id.*

To give an example of the type of express statutory authorization that could overcome section 22.002(c)'s baseline rule, the Court cited Government Code

section 552.353(b)(3). *Id.* At the time, that provision expressly referred to the filing of a petition for a writ of mandamus "against the attorney general in a Travis County district court." Act of May 29th, 1995, 74th Leg., R.S., ch. 1035, § 25, 1995 Tex. Gen. Laws 5127, 5141. By specifically naming the Attorney General, the Legislature made it clear that it was creating an exception to section 22.002(c)'s prohibition on a district court granting mandamus relief against that particular executive officer.

Having examined this constitutional and statutory framework, the Court concluded that "[it] alone ha[d] jurisdiction to hear A & T's petition to compel the comptroller to perform his duties . . . to disclose public records." *Sharp*, 904 S.W.2d at 673. Therefore, "[i]f A & T had petitioned for mandamus relief against the comptroller in district court, that court would have had little difficulty in determining that it should dismiss the petition for want of jurisdiction over the comptroller pursuant to section 22.002(c) of the Government Code." *Id.*

The same is true here. Respondent sought a writ of mandamus against the Governor and Attorney General. CR.728; *see* Tex. Gov't Code § 552.321(a). But the Governor and the Attorney General are both officers of the State's executive department. Tex. Const. art. IV, § 1. As in *Sharp*, only this Court has the authority to issue a writ of mandamus against the Attorney General, and no Texas court can mandamus the Governor. Accordingly, the trial court lacked jurisdiction to grant the only relief that Respondent sought and should have granted the pleas to the jurisdiction.

B. Section 552.321(b) did not give the trial court mandamus jurisdiction over the Governor or the Attorney General.

1. In nevertheless allowing this suit to proceed, the court of appeals pointed to the fact that the Legislature amended section 552.321 in 1999 to include a new subsection (b). *Am. Oversight*, 683 S.W.3d at 882. That subsection provides that "[a] suit filed by a requestor under this section must be filed in a district court for the county in which the main offices of the governmental body are located," and "[a] suit filed by the attorney general under this section must be filed in a district court of Travis County." Tex. Gov't Code § 552.321(b). The court interpreted section 552.321(b) as a later-enacted provision meant "to expressly delegate jurisdiction to the district courts over mandamus actions for violations of the [Act]." 683 S.W.3d at 882. In the panel's view, this solved the executive-officer problem identified in *Sharp* because, as a later enactment, section 552.321(b) applied rather than section 22.002(c). *See id.* at 883. But that conclusion does not follow.

The court of appeals misapplied the general/specific canon in holding that section 552.321(b) trumped section 22.002. *See id.* Although the court of appeals agreed with Petitioners' argument that "when a general provision conflicts with a special or local provision, the 'special or local provision prevails,'" it held that such a rule did not apply when "the general provision is the later enactment and the manifest intent is that the general provision prevail." *Id.* (quoting Tex. Gov't Code § 311.026(b)).

But the general/specific canon also applies when a "general authorization and a more limited, specific authorization exist side-by-side." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). In such a scenario, "[t]he

terms of the specific authorization must be complied with." *Id.* That is because "the specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 183 (2012). Even if another law *could* provide an exception to section 22.002(c) by virtue of it being the later-enacted statute, that exception should be "express," not implied. *Sharp*, 904 S.W.2d at 672.

The plain text of section 552.321(b) illustrates that the Legislature did not expressly authorize an exception to the prohibition on district courts issuing writs of mandamus against Petitioners. Section 552.321(b) is a *venue* provision, not a jurisdictional one. *See Dall. Area Rapid Transit v. Johnson*, No. 05-00-00657-CV, 2001 WL 88195, at *4 (Tex. App.—Dallas Jan. 26, 2001, no pet.) (not designated for publication) (noting that a provision allowing an employee to sue "in a district court of the county in which the cause of action arises or in a district court of Travis County" is a venue provision). As this Court held in *Wichita County v. Hart*, "the language of some laws unambiguously indicates that the Legislature intended them to be jurisdictional in nature." 917 S.W.2d 779, 783 (Tex. 1996) (rejecting an argument that a venue provision mandated exclusive jurisdiction in particular counties). As in *Hart*, section 552.321 "does not mention jurisdiction." *Id.* And while the language is mandatory, requiring suit in the specific locations mentioned in section 552.321(b) is for the convenience of the parties—just like any venue provision. *See id.* There is no indication that this venue provision was meant to replace longstanding barriers to mandamus actions against Petitioners.

Moreover, reading section 552.321(b) to contradict section 22.002(c) in the PIA context violates the presumption against implied repeals. "[R]epeal by implication is not favored." *Standard v. Sadler*, 383 S.W.2d 391, 395 (Tex. 1964) (citing *Gordon v. Lake*, 356 S.W.2d 138, 139 (Tex. 1962)). "So long as the original provision is susceptible to a construction that is in harmony with the amendment, so as to avoid implied repeal of some part of the original, salvage rather than subtraction should be the preferred judicial response . . . ." *Diruzzo v. State*, 581 S.W.3d 788, 800 (Tex. Crim. App. 2019). And "if statutes are to be repealed, they should be repealed with some specificity." *Id.* (quoting Scalia & Garner, *supra*, at 327). Because section 552.321(b) can be read as a venue provision that does not confer jurisdiction that the Legislature expressly denied in section 22.002(c), the two laws can and should be harmonized.

Instead of harmonizing the texts, the court of appeals relied heavily on *Sharp* to support its conclusion that section 552.321(b) granted the district court jurisdiction. *Am. Oversight*, 683 S.W.3d at 882–83. But that case supports Petitioners, not Respondent. In *Sharp*, this Court held that only it had jurisdiction to issue a writ of mandamus under the PIA's predecessor against an executive officer—there, the Comptroller—who was not the Governor. 904 S.W.2d at 674. The Court stated that "[n]either the constitution nor any other statute" discusses "which courts have jurisdiction over mandamus proceedings initiated to enforce the Act." *Id.* at 672. *But*, the Court noted, the Constitution mandates an exception for the Governor, Tex. Const. art. V, § 3(a), and authorizes an exception for the State's remaining executive officers, *id.* § 8; *see Sharp*, 904 S.W.2d at 672. Because "district courts generally have

no jurisdiction over executive officer respondents," the Court explained, an action under section 552.321 against those respondents "would require express statutory authorization by the legislature naming district courts as the proper fora." *Sharp*, 904 S.W.2d at 672 (citing Tex. Gov't Code § 552.353(b)(3)).

The *Sharp* Court "encourage[d] the [L]egislature to take another look" at the PIA's predecessor, because, at the time, "section 552.321 authorize[d] mandamus actions against a governmental body, although [the statute] impose[d] the duty of compliance upon the public records officer." *Id.* at 681. The Court acknowledged that "[t]his discrepancy can be overlooked in most cases," *id.*, but not where the recipient of a public-information request is an executive officer. Thus, this Court—not the district court—had jurisdiction over a mandamus action against the Comptroller. *Id.* at 673.

The court of appeals below held that the Legislature solved the "problem" in *Sharp*, 904 S.W.2d at 672, by amending section 552.321(b) five years later, *Am. Oversight*, 683 S.W.3d at 882. The court held that section 552.321(b)'s references to a "district court" indicated that the Legislature meant to exempt section 552.321 from section 22.002's prohibitions against mandamus actions against executive officers. *Id.*

The court of appeals misread the amendment, and more importantly, read it out of context. In *Sharp*, the Court provided examples of what express authorization to bring an action against an executive officer might look like. In particular, the Court cited Government Code section 552.353(b)(3), which, as described above, provided for a petition for a writ of mandamus "against the attorney general in a Travis County

district court." *See supra* p.13; *see also Sharp*, 904 S.W.2d at 672. Similarly, section 552.324 limits the suits a governmental body can bring to one "filed in a Travis County district court *against the attorney general* in accordance with Section 552.325." Tex. Gov't Code § 552.324(a)(1) (emphasis added). In each, the Legislature expressly indicated that the suit could be brought against an executive officer.

In contrast, section 552.321 does not address mandamus actions against executive officers such as the Attorney General or the Governor. Moreover, the "suit filed by a requestor under this section," *id.* § 552.321(b), is defined in subsection (a) as a "suit for a writ of mandamus compelling a *governmental body* to make information available for public inspection," *id.* § 552.321(a) (emphasis added). Per the PIA, a "governmental body" excludes officers. *Id.* § 552.003(1). True, the definition encompasses an "office that is within or is created by the executive or legislative branch of state government," *id.* § 522.003(1)(A)(i), but Respondent sued the Governor and Attorney General—*not* their offices, CR.713. The two cannot be conflated. *Cf. Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 76 (Tex. 2015).

2. Respondent contends that Petitioners failed to raise this argument below. Resp.9 & n.2, 12. Even if true, it is blackletter law in Texas that "while appellate courts 'do not consider *issues* that were not raised . . . below,' parties may 'construct new *arguments* in support of issues' that were raised." *Li v. Pemberton Park Cmty. Ass'n*, 631 S.W.3d 701, 704 (Tex. 2021) (quoting *Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 764 n.4 (Tex. 2014)). And issues are "treated as covering every subsidiary question that is fairly included." Tex. R. App. P. 38.1(f).

In any event, this appeal asks whether the trial court erred in denying the pleas to the jurisdiction, and jurisdictional challenges may be raised at any time, including on appeal. *See Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012). "Thus, an appellate court's review of a plea to the jurisdiction is not limited to the grounds set forth in the governmental unit's plea in the trial court." *Tex. Dep't of Transp. v. Self*, 690 S.W.3d 12, 20 (Tex. 2024).

3. Apart from waiver, Respondent advances at least four arguments in support of its theory that section 552.321 is an exception to section 22.002's rule that a district court may not issue a writ of mandamus against an executive officer. Each fails.

First, Respondent's principal response (at 9–11) is to echo the court of appeals' conclusion that, by enacting section 552.321(b), the Legislature was taking this Court up on its invitation to "specify which courts are to have jurisdiction over remedial actions to enforce" the State's public-information laws. *Sharp*, 904 S.W.2d at 681. But as explained above (at 17–18), the Legislature knows how to address executive officers expressly when it chooses to do so. The Legislature *could* have responded to *Sharp* by specifying that executive officers are subject to a mandamus action in district court. Instead, it created section 552.321(b), which makes no mention of mandamus actions against executive officers. This omission must be read in the light of the general rule that sovereign immunity, unless waived, prevents a court from reviewing the actions an executive officer takes in his official capacity. *See Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 844 (Tex. 2007).

For that reason, whether section 552.321(b) is a venue provision, PFR.11–12, or a jurisdictional grant, Resp.12–13, is ultimately irrelevant. The question remains

whether it provides the trial court with jurisdiction over the Governor and Attorney General despite section 22.002(c). It does not. Section 552.321(b) applies generally to governmental bodies. But section 22.002(c) applies exclusively to the six executive officers mentioned in the Constitution. *See* Tex. Const. art. IV, § 1; *Sharp*, 904 S.W.2d at 672. Section 22.002(c) is thus the more specific provision, and "the specific provision will ordinarily prevail unless the general provision is the later enactment *and* the manifest intent is that the general provision prevail." *EXLP Leasing, LLC v. Galveston Cent. Appraisal Dist.*, 554 S.W.3d 572, 583 (Tex. 2018) (emphasis added). Although section 552.321(b) is the later enactment, the Court "must presume that the Legislature's omission" of any reference to executive officers in section 552.321 "is intentional and purposeful." *Sunstate Equip. Co. v. Hegar*, 601 S.W.3d 685, 699 (Tex. 2020). And it should conclude that the Legislature did *not* manifest an intent for section 552.321(b) to prevail over section 22.002.

Second, Respondent insists (at 10–11) that section 552.321(b) is actually the more specific provision because it applies particularly in the PIA context. Where each of two provisions can be deemed the more specific depending on the exact metric—here, officers or legal actions—identifying *which* is the relevant metric turns on the larger statutory context. *E.g.*, *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 791 (1st Cir. 1996). Given that the language of section 22.002(c) has remained unchanged since 1985, *see* Act of May 17, 1985, 69th Leg., R.S., ch. 480, § 1, sec. 22.002, 1985 Tex. Gen. Laws 1720, 1723, it is unlikely that the Legislature would abrogate it lightly. "Separation-of-powers concerns, moreover, caution . . . against reading legislation, absent clear statement," *Kucana v. Holder*, 558 U.S. 233, 237 (2010), to

allow a trial court to issue a writ of mandamus to two of the State's highest executive officers.

The Sixth Court of Appeals addressed a similar issue in *Hargett v. McDaniel*, where the relator sought a writ of mandamus ordering the Secretary of State to disqualify a candidate in a run-off election and the Attorney General to defend a constitutional provision. 717 S.W.2d 688, 689 (Tex. App.—Texarkana 1986, no writ). In holding that it lacked authority to issue such an order under section 22.002, *id.* at 689–90, the court noted that Government Code section 22.221 and Election Code section 273.061 expressly "provide[d] that the courts of appeals may issue writs of mandamus against public or political party officers in connection with the holding of general, special or primary elections," *id.* at 690. But the court nevertheless determined that "the specific prohibition of Section 22.002 constitutes a limitation on the general powers granted by Sections 22.221 and 273.061." *Id.* In other words, even though section 273.061 was specific to the election context, section 22.002 prevailed because it was specific to executive officers. In the same way, section 22.002 prevails over section 552.321(b).

Third, Respondent asserts that section 552.321(b) is superfluous unless it gives district courts authority to grant mandamus relief against executive officers because "district courts already had jurisdiction over most PIA actions." Resp.12. But as Respondent recognizes, subsection (b) can have another purpose besides conferring jurisdiction: It specifies where the mandamus petitions are to be filed. *Id.* And because its purpose is to specify venue, it cannot trump section 22.002(c). *See Brown v. Owens*, 674 S.W.2d 748, 750 (Tex. 1984).

Respondent similarly argues that section 552.321(b) is superfluous under Petitioners' reading because "[t]he venue provision applicable to public records suits prior to 1999 is functionally the same as that appearing in Subsection (b)." Resp.12. That general venue provision states that, with certain exceptions, "all lawsuits shall be brought . . . in the county of the defendant's principal office in this state, if the defendant is not a natural person." Tex. Civ. Prac. & Rem. Code § 15.002(a)(3). But section 552.321(b) is not superfluous, because the general venue provision uses the term "principal office." *Id.* And that term "means a principal office of the corporation, unincorporated association, or partnership in this state." *Id.* § 15.001(a). Respondent cites no authority showing that an executive officer is a "corporation, unincorporated association, or partnership." To the contrary, this Court has recognized that an executive officer *cannot* be treated as indistinguishable from the office he holds. *Patel*, 469 S.W.3d at 76.

Moreover, to the extent Respondent is correct that identical language appears in section 552.321(b) and the general venue statute, that just confirms that section 552.321(b) addresses venue, not jurisdiction, because the general venue statute is not jurisdictional. *See Tex. Windstorm Ins. Ass'n v. Pruski*, 689 S.W.3d 887, 891–92 (Tex. 2024); *Morales v. Liberty Mut. Ins. Co.*, 241 S.W.3d 514, 516 n.1 (Tex. 2007). After all, courts "generally presume the Legislature uses the same word consistently . . . and uses different words to convey different meanings." *Malouf v. State ex rels. Ellis*, No. 22-1046, 2024 WL 3075672, at *11 (Tex. June 21, 2024) (citing, *inter alia*, *S.C. v. M.B.*, 650 S.W.3d 428, 445 (Tex. 2022)); *accord Bush v. Lone Oak Club, LLC*, 601 S.W.3d 639, 647 (Tex. 2020) (applying the same principle across different statutes

addressing the same subject matter). "*Venue* signifies the county in which a plaintiff has the legal right to institute and maintain his suit," while "*[j]urisdiction* means the power conferred upon a court by the Constitution and laws to determine the merits of that suit as between the parties and to carry its judgment into effect." *Nat'l Life Co. v. Rice*, 167 S.W.2d 1021, 1024 (Tex. [Comm'n Op.] 1943).

And *fourth*, Respondent challenges Petitioners' distinction between an executive officer and his or her office. Resp.14–16. Without elaboration, Respondent argues that *Patel* is distinguishable because it "dealt with *ultra vires* acts." *Id.* at 14 n.6. But Petitioners do not deny that, in many contexts, "a suit against a state official is merely 'another way of pleading an action against the entity of which [the official] is an agent.'" *Id.* at 14 (quoting *Koseoglu*, 233 S.W.3d at 844 (alteration in original)). Rather, Respondents are just reiterating what this Court recognized in *Sharp*: that a "problem with jurisdiction arises when the respondent [in a public-information mandamus action] is an executive officer named by the constitution." *Sharp*, 904 S.W.2d at 672. And if the Legislature wanted to overcome that problem and allow a mandamus action against an executive officer to proceed, it needed to state that expressly—not merely refer to "the main offices of the governmental body." Tex. Gov't Code § 552.321(b). Because section 552.321(b) does not refer to executive officers at all, it cannot negate the specific prohibition of section 22.002(c).

* * *

Petitioners do not maintain that the Governor and Attorney General are entirely exempt from the requirements of the PIA. Public officials are *always* subject to the requirements of the law—simply "because it is the law." *In re Stetson Renewables*

Holdings, LLC, 658 S.W.3d 292, 297 (Tex. 2022) (orig. proceeding). But not every legal violation requires the specific legal remedy sought by a plaintiff—especially "if a judicial remedy that seeks to vindicate" that violation "might itself compel violating some other statutory command." *Id.* at 296. Even when a statute "is mandatory," "[w]hether the statute imposes a specific penalty for noncompliance is a separate question." *Image API, LLC v. Young*, 691 S.W.3d 831, 841 (Tex. 2024).

A writ of mandamus against a high-ranking executive is a "drastic and extraordinary" remedy that has been described as one of "the most potent weapons in the judicial arsenal." *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380 (2004). And this Court has recognized that such "a mandamus proceeding . . . involves questions of general public import." *Sharp*, 904 S.W.2d at 674. The Legislature simply did not provide the "express statutory authorization" required by *Sharp* to allow for such a remedy against either the Attorney General or the Governor or to "nam[e] district courts as the proper fora." *Id.* at 672. The Court should grant review and reject the court of appeals' conclusion that the Legislature responded to *Sharp*'s criticism by including the Governor and other executive officers within the mandamus jurisdiction of district courts in section 552.321.

II. Sovereign Immunity Bars Respondent's Claim Because Respondent Failed to Allege a Cause of Action Under Section 552.321.

The Court should also grant review to clarify that even if the trial court otherwise has jurisdiction to issue a writ of mandamus, it cannot do so based on a requestor's ungrounded speculation that a governmental entity failed to comply with the PIA. The PIA waives sovereign immunity for a mandamus action if a governmental

body "refuses to request an attorney general's decision as provided by Subchapter G or refuses to supply public information or information that the attorney general has determined is public information that is not excepted from disclosure under Subchapter C." Tex. Gov't Code § 552.321(a) (footnotes omitted). But Respondent's allegations, taken as true, do not show that the Governor or Attorney General refused to take any of those actions. To the contrary, Petitioners and their staff conducted thorough searches for responsive records, sought ORD decisions, abided by those decisions, and released documents to Respondent. *See supra* p.5–7. Accordingly, Respondent has not pleaded a claim for which the PIA waives Petitioners' sovereign immunity.

The court of appeals nevertheless held that Respondent could defeat a plea to the jurisdiction by relying on skepticism unaccompanied by facts. *Am. Oversight*, 683 S.W.3d at 886–87. That is, in the court of appeals' view, Respondent is entitled to overcome a governmental body's sovereign immunity on the bare assertion that a government body "must" have more public information than that produced. That rule would not only open the floodgates for litigation under the PIA but would also contradict the presumption of regularity applicable to government bodies.

A. Respondent offered only conclusory allegations.

Conclusory assertions that Petitioners must have refused to follow the PIA are insufficient when a court's jurisdiction—and an executive officer's immunity—are at stake. *See State v. Lueck*, 290 S.W.3d 876, 884 (Tex. 2009). This Court has repeatedly held that "[t]o invoke a waiver of immunity," plaintiffs "*must allege facts* to support their claim." *Dohlen v. City of San Antonio*, 643 S.W.3d 387, 394 (Tex. 2022)

(emphasis added). For good reason: "[I]f . . . plaintiffs were allowed to stand on talismanic allegations alone, the constraining power of pleas to the jurisdiction would practically be eliminated." *Mission Consol. ISD v. Garcia*, 372 S.W.3d 629, 638 (Tex. 2012).

The PIA is no different. *City of Dallas v. Dall. Morning News, LP*, 281 S.W.3d 708, 716 (Tex. App.—Dallas 2009, no pet.) (explaining that assumptions about the existence of responsive, unproduced emails are "legally insufficient evidence" to bring a claim within the PIA's waiver of sovereign immunity). If a requestor could simply accuse a governmental body of mistake or misconduct without evidence and defeat a plea to the jurisdiction, every requestor would be able to show jurisdiction in every case. In addition, this nullifies the "presum[ption] that public officials act in good faith and without" improper motive in performing their public functions. *Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions*, 610 S.W.3d 911, 923 (Tex. 2020) (per curiam).

Furthermore, the court of appeals stated that "jurisdictional evidence has not negated American Oversight's allegations that [the officers] have not complied with the PIA." *Am. Oversight*, 683 S.W.3d at 886–87. But the burden is on *requestors* to bring their claims within the PIA's waiver of sovereign immunity—not on government officials to disprove them. *See Matzen v. McLane*, 659 S.W.3d 381, 394 (Tex. 2021). Requiring governmental bodies to submit evidence proving that they have complied with every public-information request would radically alter the PIA's application and significantly increase the cost of compliance. And even if Petitioners bore some burden, they *did* submit evidence in the form of affidavits from their

public-information coordinators, yet the court of appeals deemed that evidence insufficient. *Am. Oversight*, 683 S.W.3d at 886–87.

Moreover, just as Respondent has not alleged facts showing a claim that would fall within the PIA's immunity waiver, it has also not offered any evidence to raise a fact question as to whether the officers have refused to provide information to which Respondent is entitled. Instead, Respondent merely impugns the affidavits describing the processes used to search for responsive records, *e.g.*, RR.24; Resp.18, and asks for an "inference that Petitioners' responses to its PIA requests are incomplete," Resp.16–17, based on its earlier speculation that the Governor's and Attorney General's assertions to the contrary "def[y] belief," are "highly implausible," and are "not credible," CR.725–26; *see also, e.g.*, RR.20–21 (arguing that "there is good reason to believe that there wasn't a complete search for or compilation of these records"), 21 ("We also don't believe that everything during that time period would have been attorney-client [privileged]."). Such a position is, however, without limit. And it cannot be squared with the principle that this Court "presume[s] that public officials act in good faith." *Anti-Defamation League Austin*, 610 S.W.3d at 923.

B. Petitioners did not refuse to supply public information to which Respondent was entitled.

This Court should also clarify what constitutes a refusal to supply public information under section 552.321. Mandamus relief is available only "if the governmental body . . . *refuses* to supply public information or information that the attorney general has determined is public information." Tex. Gov't Code § 552.321(a) (emphasis added). The PIA does not define "refuses," but rules of "statutory construction . . .

require[] [courts] to apply the common meanings of a word used in a statute" unless it is clear the Legislature meant to apply a different meaning. *Harris Cnty. Appraisal Dist. v. TWC*, 519 S.W.3d 113, 121 (Tex. 2017); *see* Tex. Gov't Code § 311.011(a). The ordinary meaning of "refuse" is to "indicate unwillingness to do, accept, give, or allow," not just to "fail," "leave undone," or "omit to perform." *City of El Paso*, 444 S.W.3d at 324. By seeking an ORD opinion, OOG and OAG did not just indicate a *willingness* to abide by the PIA—they engaged in the very process designed by the Legislature to balance the public's interest in scrutinizing the officials elected to public service against the need to "shield[] . . . information from public disclosure." *City of Dallas*, 509 S.W.3d at 249–50.

Under the court of appeals' decision, however, "by seeking a decision from the ORD that they could decline to produce some of the requested information and then withholding some of the information based on the ORD's letter rulings, [Petitioners] are 'refusing to supply that portion of the public information,'" *Am. Oversight*, 683 S.W.3d at 885 (quoting *Muir v. Univ. of Tex. at Austin*, No. 03-22-00196-CV, 2023 WL 4110843, at *4 (Tex. App.—Austin June 22, 2023, no pet.) (mem. op.)), subjecting them to a petition for writ of mandamus, *id.*, or, at minimum, its documents to *in camera* inspection, Tex. Gov't Code § 552.3221. In fact, in the court of appeals' view, just by "withholding information based on exceptions that they could waive, such as the attorney-client privilege," governmental bodies are refusing to supply information. *Am. Oversight*, 683 S.W.3d at 885 n.6. The PIA's text does not support such a burden. And to show that such a remarkable position is well-settled, Respondent cites only the Third Court's decision in this case and one other Third Court

decision. Resp.19. Two decisions from a single court of appeals hardly show that the issue is settled and does not warrant this Court's review.

Respondent also insists that the court of appeals' decision "logically follows the principle established by this Court [in *Kallinen*] that ORD decisions are subject to judicial review." *Id.* But Petitioners do not deny that courts may sometimes review ORD rulings. The question here is *what* courts are reviewing. *Kallinen* did not address that question—it addressed only whether the trial court lacked subject-matter jurisdiction over a PIA mandamus action until ORD issued a ruling. 462 S.W.3d at 27.

Nor do the cases this Court cited in *Kallinen* resolve the present question. *DPS v. Cox Texas Newspapers, L.P.* addressed whether the term "other law" in section 552.022(a) "includes a common law right to be free from physical harm." 343 S.W.3d 112, 115 (Tex. 2011). *In re City of Georgetown* considered whether "other law" includes "the work-product and consulting-expert privileges codified in the rules of procedure." 53 S.W.3d 328, 331 (Tex. 2001) (orig. proceeding). In *City of Garland v. Dallas Morning News*, the issue was whether a particular memorandum whose general subject was undisputed was public information and whether it fell under the agency-memoranda exception to disclosure. 22 S.W.3d 351, 355 (Tex. 2000) (plurality op.). And in *Sharp*, the Court determined whether specific categories of information were subject to mandatory disclosure. 904 S.W.2d at 677–81.

In contrast, the dispute here is not about whether certain categories of information must be disclosed under the PIA. Instead, the question is *factual*: Whether the Governor and Attorney General are secretly withholding information in their

possession or blatantly mischaracterizing documents. *See Am. Oversight*, 683 S.W.3d at 886. In other words, Respondent ultimately challenges "the adequacy of the searches." *Id.* Because mandamus relief typically is not available in the face of factual disputes, *Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 714 (Tex. 1990), that is a material distinction from the cases Respondent cites.

The difference between a typical PIA action and Respondent's suit is also evident from the relief that would be required to remedy the alleged harm. Ordinarily, a court orders the defendant to release a particular document, *e.g.*, *Dall. Morning News*, 22 S.W.3d at 355, or categories of documents, *e.g.*, *Sharp*, 904 S.W.2d at 681. But here, the order would presumably just instruct the Governor and Attorney General to conduct good-faith searches for public information and act lawfully—something they have attested to and are already presumed to have done in good faith. *See Abbott*, 610 S.W.3d at 923; *see also, e.g.*, *Tex.-Mexican Ry. Co. v. Locke*, 12 S.W. 80, 89 (Tex. 1889) (noting that "the governor of the state and other officials . . . must be presumed to have understood their powers, and in good faith acted upon them"). The standard by which requestors can overcome that presumption is one that only this Court can resolve, and it should grant review here to do so.

III. This Case Merits the Court's Review.

This dispute has the potential to affect every PIA request in the State. After all, the PIA has over 70 enumerated mandatory and waivable exceptions, *see* Tex. Gov't Code §§ 552.101–.163, some of which can be enforced through criminal penalties, *e.g.*, *id.* § 552.352. This dispute may also affect thousands of requests every year just as applied to one agency. *City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010).

OAG records show that during fiscal year 2023, the agency received well over 3,000 PIA requests. Office of the Attorney General, Open Records Reports, Fiscal Year 2023, Office of the Attorney General, https://tinyurl.com/oag-pia-2023 (all websites last accessed Aug. 21, 2024). That same year, Texas governmental bodies received a combined total of more than 1.2 *million* requests for public information. Office of the Attorney General, Open Records Reports, Fiscal Year 2023, All Agencies, https://tinyurl.com/all-pia-2023.

If mere speculation is enough for the PIA to waive sovereign immunity, the plea to the jurisdiction will become a useless tool in the PIA context, because every dissatisfied requestor will opine that the governmental body *must* have more information. And each step in the PIA process consumes the time and salaries of government employees—and thus taxpayer money. Extrapolated to all governmental entities subject to the PIA, the issues in this case merit this Court's review.

Prayer

The Court should grant the petition for review, reverse the court of appeals' judgment, and dismiss the case for lack of jurisdiction.

Respectfully submitted.

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