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

REPLY IN SUPPORT OF PETITION FOR REVIEW

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Introduction

Contrary to the insistence of American Oversight ("Respondent"), this case is far from "an uncomplicated public records matter raising unexceptional issues." Resp.1. As this Court has recognized, "a mandamus proceeding against [an executive officer] ordinarily involves questions of general public import." *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 674 (Tex. 1995) (orig. proceeding). Here, Respondent has sought issuance of such a writ against two of the State's highest executive officers based on nothing more than supposition that they must be lying about whether the documents Respondent seeks actually exist.

The last time this Court considered such an extraordinary request, it held that the precursor to the Public Information Act ("PIA") did *not* authorize a trial court to grant mandamus relief against an executive officer. *Id.* at 673-74. True, the Legislature has since amended Government Code section 552.321(a). But as Respondent nowhere denies, this Court has never interpreted that amendment as it applies to executive officers. That alone is a question of statewide importance worthy of this Court's time.

If the scope of mandamus relief available under the PIA were not reason enough to grant review, this case also presents a second question of perhaps greater importance: Whether a requestor can seek mandamus relief based entirely on its own professed disbelief that the government entity complied with the PIA's requirement to make a diligent search for responsive documents—notwithstanding sworn affidavits to the contrary. Unlike the precedent on which Respondent relies, this case does not involve a legal dispute about whether the Act covers particular categories

of information. Because such a factual dispute precludes mandamus relief, and the officers have not refused to release any records to which Respondent is entitled, this Court should reverse the court of appeals' judgment.

ARGUMENT

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

The Governor and the Attorney General are both officers of the State's executive department. Tex. Const. art. IV, § 1. Only this 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." Tex. Gov't Code § 22.002(c). And even this Court lacks authority to issue a writ of mandamus against the Governor. *Id.* § 22.002(a); *see also* Tex. Const. art. V, § 3(a). Here, Respondent sought a writ of mandamus against the Governor and Attorney General. CR.728; *see* Tex. Gov't Code § 552.321(a). Accordingly, the trial court lacked jurisdiction to grant the only relief that Respondent sought and should have granted the pleas to the jurisdiction. PFR.9-15. Respondent makes three arguments in response. None has merit.

First, Respondent's principal response (at 9-11) is 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. Section 552.321(b) 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." But the

Legislature knows how to expressly address executive officers when it chooses to do so. *See, e.g.*, Tex. Gov't Code § 552.324(a)(1) (providing that a governmental body may sue the Attorney General to seek to withhold information). And, as the Governor and Attorney General explained, PFR.13-14, section 552.321(b) does not specifically address mandamus actions against executive officers.

For that reason, whether section 552.321(b) is a venue provision, PFR.11-12, or a jurisdictional grant, Resp.12-13, is 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). Given the "general public import" of "a mandamus proceeding" against an executive officer, *Sharp*, 904 S.W.2d at 674, this alone is reason to grant review.

II. This Court Should Clarify the Pleading Requirements to Seek a Writ of Mandamus 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 speculation about what documents a government entity *should* have in the face of affidavits about what documents the government entity *does* have. PFR.15-17. 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.

In holding to the contrary, the court of appeals stated that "jurisdictional evidence has not negated American Oversight's allegations that [the officers] have not complied with the PIA." *Paxton v. Am. Oversight*, 683 S.W.3d 873, 886-87 (Tex. App.—Austin 2024, pet. filed). 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). Respondent makes three arguments that the Court should nonetheless uphold the court of appeals' judgment. They also fail.

First, Respondent 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"); RR.21 ("We also don't believe that everything during that time period would have been attorney-client [privileged]."").

Such an inference is belied by sworn affidavits demonstrating that the offices of the Governor and Attorney General did just what the PIA required them to do. In particular, the Governor's public-information coordinator submitted an affidavit explaining how he: (1) "conducted and oversaw a diligent and good faith search for the information," CR.368; (2) sent "the request[s] to all public information liaisons in every division within the agency that may maintain responsive records," *id.*; (3) "circulated the request[s] [to] all employees, who in turn responded with potentially responsive documents," *id.*; (4) sought letter rulings from the Open Records Division

("ORD") of the Office of the Attorney General as appropriate, *id.*; (5) abided by those letter rulings, CR.369; and (6) released responsive records to Respondent, *id.* In conclusion, the public-information coordinator averred that he had neither "refused to produce [responsive] public information to which [Respondent] was entitled" nor "expressed an unwillingness to do so." CR.371.

Similarly, the Attorney General's public-information coordinator stated that she (1) sent the request to the relevant officials, "as well as their executive assistants and staff members," CR.511; (2) provided to Respondent documents "deemed to be responsive and subject to disclosure," CR.512; and (3) requested letter rulings as appropriate, *id.* She also averred that she had never refused to produce responsive information to which Respondent was entitled. CR.513.

Respondent has offered no contrary evidence to raise a fact question as to whether the officers have refused to provide information to which Respondent is entitled. Instead, it merely impugns the affidavits describing the processes used to search for responsive records. *E.g.*, RR.24; Resp.18. 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." *Abbott v. Anti-Defamation League Austin*, 610 S.W.3d 911, 923 (Tex. 2020) (per curiam).

Second, Respondent argues (at 18-19) that the meaning of "refuses" in section 552.321(a) needs no clarification because it includes any time a governmental body does not provide information to a requestor—even if ORD has determined that the information may be withheld. But 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.

Third, Respondent insists that the Third Court's decision "logically follows the principle established by this Court [in *Kallinen v. City of Houston*, 462 S.W.3d 25 (Tex. 2015) (per curiam),] that ORD decisions are subject to judicial review." Resp.19. But the Governor and Attorney General do not deny that courts may sometimes review ORD rulings. The question here is *what* courts are reviewing. *Kallinen* did not address that question—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 Act. 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, 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. *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). 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.

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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