IN THE
COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

NO. 05-16-0004-CR
NO. 05-16-0005-CR
NO. 05-16-0006-CR

EX PARTE WARREN KENNETH PAXTON, JR.

On Appeal from the 416th Judicial District Court
Collin County, Texas
Trial Court Cause nos. 416-81913-2015,
416-82148-2015, 416-82149-2015

APPELLANT'S BRIEF

Philip H. Hilder
State Bar No. 09620050
Q. Tate Williams
Paul L. Creech
Hilder & Associates, P.C.
819 Lovett Blvd.
Houston, Texas 77006
(713) 6565-9111 Office
(713) 655-9112 Fax
philip@hilderlaw.com
tate@hilderlaw.com
paul@hilderlaw.com

ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

APPELLANT:

Warren Kenneth Paxton, Jr.
c/o Hilder & Associates, P.C.
819 Lovett Blvd.
Houston, Texas 77006

DEFENSE COUNSEL AT TRIAL AND COUNSEL ON APPEAL FOR APPELLANT:

Philip H. Hilder
Q. Tate Williams
Paul L. Creech
Hilder & Associates, P.C.
819 Lovett Blvd.
Houston, Texas 77006

Dan Cogdell
Cogdell Law Firm, PLLC
402 Main Street, 4th Floor
Houston, Texas 77002

William Mateja
Polsinelli, P.C.
2950 N. Harwood, Suite 2100
Dallas, TX 75201

Terri Moore
300 Burnett St., Ste. 160
Fort Worth, TX 76102-2755

Heather J. Barbieri
Barbieri Law Firm, P.C.
1400 Gables Court
Plano, Texas 75075

J. Mitchell Little, Of Counsel
Scheef & Stone, LLP
2600 Network Blvd., Ste. 400
Frisco, TX 75034

ATTORNEYS PRO TEM (STATE OR SPECIAL PROSECUTORS) AND COUNSEL ON APPEAL FOR APPELLEE:

Kent A. Schaffer / Nicole DeBorde
712 Main, Suite 2400
Houston, Texas 77002

Brian Wice
440 Louisiana St., Suite 900
Houston, Texas 77002-1635

APPOINTED PRESIDING JUDGE OF THE 416TH JUDICIAL DISTRICT COURT, COLLIN CO., TX

Hon. George Gallagher
396th District Court
Tarrant County, TX
401 W. Belknap Street
Fort Worth, Texas 76196

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STATEMENT OF THE CASE

Appellant, Warren Kenneth Paxton, Jr. ("Paxton" or "Appellant"), was indicted by a Collin County grand jury alleging felony violations of Sections 29-I and 29-C of the Texas Securities Act. C.R.I., 15-16; C.R.II., 11-12; C.R.III., 11-12. Paxton filed four applications for writs of habeas corpus challenging the formation of the grand jury that returned all three indictments, whether he can be prosecuted under Section 29-I and the facial constitutionality of Section 29-I. C.R.I, 17-228. After an oral hearing on December 1, 2015, all requested relief was denied by assigned judge, the Hon. George Gallagher. R.R.1, C.R.I., 359-362. This appeal followed.

STATEMENT REQUESTING ORAL ARGUMENT

Oral argument should be granted because (1) the facts and legal arguments deserve discussion beyond the statements in his Brief and any Response, and (2) because the issues raised by Appellant are of first impression in Texas and the decisional process would be significantly aided by oral argument.

STATEMENT REGARDING CITATIONS TO THE RECORD

Appellant has attached an appendix to his brief, which will be cited to as A. followed by the page number. All citations to the reporter's record are to what is labeled volume 2 will be cited as R.R. followed by the page number. The Clerk's record in trial court case number 416-81913-2015 will be cited as C.R.I., followed by the page number; in case number 416-82148-2015, C.R.II., followed by the page number; and in 416-82149-2015, as C.R.III., followed by the page number.

STATEMENT OF FACTS

Paxton is accused in three felony indictments of violations of the TSA. The first indictment was true-billed on July 7, 2015, in case number 416-81913-2015. C.R.I., 15. The remaining two indictments were true-billed case numbers 416-82148-2015 and 416-82149-2015 on August 18, 2015.[1] C.R.II., 11; C.R.III., 11. All indictments were returned by a grand jury of the 416th District Court impaneled on or about June 12, 2015, to serve July 1, 2015, thru December 31, 2015 ("Grand Jury"). C.R.I., 189; C.R.II., 74; C.R.III., 74. Paxton had not been arrested and was not charged with any offense by information, complaint, or indictment when the 416th grand jury was organized.[2]

Paxton challenged all three indictments in four applications for writ of habeas corpus filed on November 2, 2015. C.R.I., 17-128; C.R.II., 13; C.R.III., 13. After the State's reply and Paxton's response, the trial court conducted a hearing on December 1, 2015. R.R. 1. The trial court denied the writ application on December 12, 2015. C.R.I., 364; C.R.II., 127; C.R.III., 127. Notice of appeal was timely given. C.R.I., 359-362; C.R.II., 129-130; C.R.III., 129-130.

[1]Two earlier indictments dismissed on that date were also true billed by the same grand jury. R.R. 9; C.R.II., 4, 32, 37, C.R.III., 4, 32, 37.

[2]Paxton had to subpoena records relating to the formation of the grand jury because they were sealed by order of the impaneling Judge, and the prosecution and court reporters all sought to quash his subpoenas and keep the proceedings secret. *See* C.R.I., 7-8, C.R.II., 5-6, C.R.III., 5-6.

SUMMARY OF THE ARGUMENT

Paxton was entitled to habeas corpus relief as requested. Section 29-I of the Texas Securities Act is not a statute under which he can be charged because it does not regulate the conduct of representatives of federally filed investment advisers. Section 29-I is also is unconstitutionally vague on its face as a matter of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 19 of the Texas Constitution, because the Act fails to give notice of what conduct constitutes rendering services as an investment adviser representative and allows for arbitrary enforcement because "investment adviser representative" is either undefined or subject to two conflicting, incompatible definitions.

Section 29-I is also is unconstitutionally overbroad and vague on its face as a matter of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 19 of the Texas Constitution because it unconstitutionally regulates free commercial speech and fails to give a person fair notice of what conduct is prohibited by the statute and allows for arbitrary enforcement because "solicit" is undefined.

Finally, all three indictments were returned by a grand jury of volunteers improperly selected in violation of the Chapter 19 of the Texas Code of Criminal Procedure in a manner that destroyed its intended randomness.

ISSUES PRESENTED

I. FIRST APPLICATION FOR WRIT OF HABEAS CORPUS SHOULD HAVE BEEN GRANTED BECAUSE THERE IS NO VALID STATUTE UNDER WHICH PAXTON CAN BE CHARGED.

Paxton sought a pretrial writ of habeas corpus on the basis that Paxton may not be charged under the Texas Securities Act ("TSA") for failing to register because merely failing to register is not a crime and investment adviser representatives for federal covered investment advisers are excluded from the registration requirement. Paxton's First Application for Writ of Habeas Corpus should have been granted.

A. Pretrial Relief by Writ of Habeas Corpus is Proper.

1. Applicable Law.

Pretrial writs of habeas corpus are available to challenge whether there is a valid statute under which the accused can be charged. *Ex parte Psaroudis*, 508 S.W.2d 390, 391 (Tex. Crim. App. 1974) ("If there is no valid statute under which he can be charged, he is entitled to be discharged.") (citing *Ex parte Sanford*, 163 Tex. Crim. 160, 289 S.W.2d 776 (1956)). Included is the contention that the statute does not prohibit the charged conduct. *Sanford*, 163 Tex. Crim. at 161 (relator alleged "that the indictments charge the commission by him of no act made unlawful by the statute law of this state.").

2. Discussion.

The question presented is whether a valid statute prohibits rendering services as an Investment Advisor Representative ("IAR") without being registered. The TSA does not prohibit the charged conduct. The TSA prohibits rendering services as an IAR without being registered "as required by the Act." TEX. REV. CIV. STAT. ANN. ART. 581-29(I) (West 2011). But the registration requirement does not apply to IARs for federal covered investment advisers. *Id.* at 581-12-1(B).

This case is analogous to *Ex parte Psaroudis*, 508 S.W.2d 390 (Tex. Crim. App. 1974), where the Court of Criminal Appeals considered an appeal of a denial of a pre-writ of habeas corpus alleging that the statute on which the indictment was based did not prohibit delivery or possession of hashish. *Id.* at 390-91. While the Court ultimately disagreed with the petitioner, the issue here is strikingly similar. In *Psaroudi*, the Court was required to determine whether hashish was prohibited as a controlled substance. *Id.* Expert testimony was taken in that case. Here, the Court is required to determine whether merely failing to register, or rendering services as an IAR while acting for a federal covered investment adviser without registering, is prohibited. The answer is no in both cases. Just as hashish was *included* as a controlled substances, federal covered investment advisers and IARs are *excluded*. *See id.* at 390 ("He argues that Section 4.02 of the Texas Controlled Substances Act, Vernon's Texas Session Law, Chapter 429, page 1148, effective

August 27, 1973, excludes hashish."). Had hashish been excluded, Psaroudi would have been entitled to habeas relief.

A pretrial writ of habeas corpus is "generally not available to construe the meaning and application of the statute defining the offense charged." citing *Ex Parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010). However, no such construction is required and *Psaroudi* has never been expressly overruled. What is required, however, is the application of state law to an undisputed set of facts. *See generally Ex parte Roberts*, 409 S.W.3d 759, 762 (Tex. App.—San Antonio 2013, no pet.) (holding trial court's application of law to undisputed facts is reviewed de novo). A pretrial writ is appropriate if there is no valid statute that prohibits the charged conduct because Paxton's first writ challenged whether the statute prohibits the alleged conduct, is cognizable.

B. The Indictment Fails to Allege a Crime Under the Texas Securities Act.

The TSA does not prohibit the alleged conduct.

1. Applicable Law.

The TSA prohibits individuals from knowingly providing services as an investment adviser representative (IAR) in Texas "unless the person is registered or submits a notice filing as an [IAR] for the investment adviser *as provided in Section 18 or 12-1 of this Act.*" TSA § 581-12(B). Rendering services as an IAR "without being registered *as required by this Act* is a third degree felony. *Id.* at §

581-29(I). The TSA excludes IARs for federal covered investment advisers from the registration requirement. *Id.* at § 581-12-1(B). "Federal covered investment adviser" is defined by the TSA as an investment adviser registered under the Investment Advisers Act of 1940. *Id.* at § 581-4(O). The TSA requires federal -covered investment advisers and IARs to notice file with the state securities commissioner and pay a fee. *Id.* at § 591-12-1(B).

2. Discussion.

Paxton is entitled to relief if no valid statute does prohibits the charged conduct. *Psouradis*, 508 S.W.2d at 391. The TSA does not criminalize failing to register as an IAR. It criminalizes failure to register "as required by this Act." TSA § 581-29(I). Further, the TSA affirmatively excludes federal -covered investment advisers and representatives from any registration requirement. *Id.* at § 581-12-1(B). The State cannot, and has not, disputed that Paxton need not register as an IAR if the investment adviser he represents is federally covered. Thus, the only question is whether a valid statute prohibits Paxton's alleged conduct. The answer is clearly no because rendering services as an IAR while not being registered is not a crime unless required by the TSA, and Paxton was excluded from the registration requirements of the TSA.[3]

[3] The TSA contains a number of other exceptions not relevant to this issue. *See* TEX. ADMIN. CODE § 116.1(a)(6), (7).

The only facts necessary to resolve this issue are (1) the alleged date of referral, and (2) whether the investment adviser was "federal covered" on that date.[4] The Indictment itself contains the relevant date at issue, July 18, 2012. C.R.I., 15-16. The State alleged that Mowery was the investment adviser in the amended Indictment. C.R.I., 357. Evidence was admitted without objection that Mowery was federally covered on July 18, 2012. R.R.II., 83; R.R.III., Def. Exhibit 1. Consequently, Paxton has conclusively demonstrated that the TSA did not require him to register with them on the date of the offense.

Should some of the facts be outside of the Indictment, the analysis does not change. The only facts not included in the Indictment itself are the identity of the investment adviser for whom Paxton was acting as a representative, and whether the investment adviser was federally registered on the date of the offense. The State stipulated that Mowery Capital Management was the investment representative. And uncontroverted evidence was admitted at the hearing that Mowery was federally covered on July 18, 2012. Considering undisputed facts outside the Indictment is permissible. *See, e.g., Ex parte Psaroudis, supra; Ex Parte Rathmell*, 717 S.W.3d 33, 34 (Tex. Crim. App. 1986) (state stipulated to the facts necessary for disposition of the writ).

[4] Paxton does not concede he was acting as an investment adviser representative. The Court may assume Paxton was acting as an IAR for disposition of this point of error.

Further, the trial court, or this Court, could also take judicial notice of the fact that Mowery was a federal covered investment adviser on July 18, 2012.[5] *See Lewis v. State*, 674 S.W.2d 423, 426 n.1 (Tex. App.—Dallas 1984, pet. ref'd) ("We may take judicial notice of facts which are notorious, well known or easily ascertainable."); *see also J.J.T.B., Inc. v. Guerrero*, 975 S.W.2d 737 (Tex. App.—Corpus Christi, 1998) (taking judicial notice of attorney's status with the State Bar of Texas); *Trujillo v. State*, 809 S.W.2d 593 (Tex. App.—San Antonio, 1991) (taking judicial notice of the accreditation status of a particular high school). Mowery's status was easily ascertainable from a reputable source. Mowery Capital Management's registration could be viewed by anyone in America with internet access at the Investment Adviser Registration Depository. C.R.I., 314-319. Additionally, an SEC-certified copy of Mowery Capital Management's Form ADV-W reflecting the final withdrawal of its registration status on October 11, 2012, is part of the record. C.R.I., 313; R.R.III., 9.

The TSA's registration requirement does not apply to IARs for federal covered investment advisers. Because it is undisputed that Mowery was the investment adviser and was federally covered on July 18, 2012, Paxton was not

[5] To the extent necessary, Paxton requests the Court take judicial notice of the fact that Mowery was a federal covered investment adviser on July 18, 2012. C.R.I., 90-102; R.R.II., 83. *See Lewis v. State*, 674 S.W.2d 423, 426 n.1 (Tex. App.—Dallas 1984, pet. ref'd) ("We may take judicial notice of facts which are notorious, well known or easily ascertainable.") (citing *Eagle Trucking Company v. Texas Bitulithic Company*, 612 S.W.2d 503, 506 (Tex. 1981); *Ex parte Britton*, 382 S.W.2d 264, 265 (Tex. Crim. App. 1964)).

required to register. Thus, there is no valid statute under which Paxton can be charged for failing to register.

Contrary to the State's position in the trial court, the Court need not construe the applicable statute, it only need determine whether the statute criminalizes certain conduct as occurred in *Ex parte Psaroudis*. For this analysis, the Court may assume the following allegations are true:[6]

- Paxton functioned as an IAR for Mowery;
- Paxton referred clients of his, the Henrys, to Mowery on July 18, 2012;
- Mowery was federally registered on July 18, 2012, and continued to be federally covered until October 11, 2012.

This operative issue, therefore, turns on a purely legal question, does the TSA prohibit failing to register with the TSSB while acting as an IAR for a federal covered investment adviser? It is of no moment that the TSA requires federal covered IARs to file a notice with the TSSB commissioner and pay a fee. TSA § 581-12-1(B). **The TSA does not criminalize the failure to file a notice.** *Id.* at § 581-29(I). Even if so, Paxton is only charged with failing to *register*, not failing to file a notice or pay a fee. C.R.I., 31-32. The TSA unequivocally distinguishes between the two. Compare TSA §§ 581-12(B) and 581-12-1(B) *with* § 581-4(M), (Q). Likewise, courts would certainly construe the TSA as encompassing two

[6] Paxton asserts these facts for the sole purpose of demonstrating that, even if true, the conduct as alleged is not a crime under the TSA.

different requirements. *See, e.g., Thomas v. State*, 919 S.W.2d 427, 430 (Tex. Crim. App. 1996) (". . . we must recognize that the State Securities Act is highly penal in nature and requires that it be strictly construed. A forbidden act must come clearly within the prohibition of the TSA and any doubt as to whether an offense has been committed should be resolved in favor of the accused.") (quoting *Bruner v. State*, 463 S.W.2d 205, 215 (Tex. Crim. App. 1970)). As such, there is no valid statute criminalizing Paxton's alleged conduct.

C. Conclusion.

Habeas relief is proper because there is no valid statute that criminalizes the charged conduct, specifically, rendering services as an IAR without being registered or notice filed. Additionally, the TSA excludes IARs for federal covered investment advisers from the registration requirement. Accordingly, because there is no valid statute under which Paxton can be charged with a crime, the trial court erred by denying Paxton's First Application for Writ of Habeas Corpus as to the registration count.

II. SECOND APPLICATION FOR WRIT OF HABEAS CORPUS SHOULD BE GRANTED BECAUSE SECTION 581-29(I) IS UNCONSTITUTIONALLY VAGUE BECAUSE THERE IS NO VALID DEFINITION OF INVESTMENT ADVISER REPRESENTATIVE.

The Indictment charges Paxton with rendering services as an investment adviser representative without being registered as required by the TSA. The

offense found at § 581-29(I) is invalid and cannot support the charge because it is unconstitutionally vague. Specifically, the TSA fails to give a person fair notice of what conduct is prohibited or required and allows for arbitrary enforcement because "investment adviser representative" is either undefined or subject to two conflicting, incompatible definitions.

A. Applicable Law.

1. Pretrial Writ of Habeas Corpus.

A facial challenge to the constitutionality of a statute that defines the charged offense may be raised by means of pretrial application for a writ of habeas corpus. *Ex Parte Thompson*, 442 S.W.3d 325, 333 (Tex. Crim. App. 2014). This is because if the statute is facially invalid, then the charging instrument is void. *Ex Parte Weise*, 55 S.W.3d 617, 620 (Tex. Crim. App. 2001); *see also Ex Parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010). Likewise, a pretrial writ of habeas corpus is also appropriate to challenge a statute that has been repealed. *Ex Parte Mangrum*, 564 S.W.2d 751, 752 (Tex. Crim. App. 1978). Thus, the Court "must determine on this habeas corpus hearing whether or not the facts set forth in the indictment constitute a violation of any valid penal statute." *Ex Parte Meyer*, 357 S.W.2d 754, 405 (Tex. Crim. App. 1962).

2. Vagueness.

Criminal laws must be sufficiently clear for a person of ordinary intelligence to have a reasonable opportunity to know what is prohibited. *Long v. State*, 931 S.W.2d 285, 287 (Tex. Crim. App. 1996) (citing *Grayned v. Rockford*, 408 U.S. 104, 108 (1972)). The law must also establish determinate guidelines for law enforcement. *Id.* (citing *Grayned*, 408 U.S. at 108-9). Statutory terms need not be defined in order to avoid vagueness, but if they are not defined, courts apply their ordinary meaning. *Watson v. State*, 369 S.W.3d 865, 870 (Tex. Crim. App. 2012). *See Dallas Morning News Co. v. Bd of Trustees of Dallas Indep. Sch. Dist.*, 861 S.W. 532, 535 (Tex.App.-Dallas 1993), writ denied (Mar. 30, 1994).

3. Preemption.

"Under the Supremacy Clause, if a state law conflicts with federal law, the state law is preempted and "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Federal preemption acts as an effective repeal of contrary state law. *PLIVA, Inc. v. Mensing*, 113 S. Ct. 2567, 2579-80 (2011) ("The non obstante provision in the Supremacy Clause therefore suggests that federal law should be understood to impliedly repeal conflicting state law.").

B. Discussion.

The operative provisions of the TSA are unconstitutionally vague because a person of ordinary sensibilities cannot determine what conduct is prohibited or required and the definition of IAR has been preempted by federal law.

1. Without a Valid Definition of IAR, the Statute is Unconstitutionally Vague.

Paxton is alleged, in part, to have rendered services as an IAR without registering and in violation of Section 29(I) of the TSA. However, neither he nor any other person could read the face of the statute and discern what conduct is prohibited or required. The language of Section 29(I) and its related statutes are unconstitutionally vague, as they fail to give a person fair notice of what conduct is prohibited by the statute. The TSA also allows for arbitrary or uneven enforcement because the term "investment adviser representative" as defined in Section 4(P) of the TSA has been preempted, and thus repealed, by federal law, rendering the statutory definition on which the State relies a nullity.

Both the U.S. Supreme Court and the Texas Court of Criminal Appeals have held that criminal laws must be sufficiently clear for a person of ordinary intelligence to have a reasonable opportunity to know what is prohibited. *Long*, 931 S.W.2d at 287. The law must also establish determinate guidelines for law enforcement. *Id.* Section 581-29(I) fails in both regards because the definition of "investment adviser representative" incorporated by it is no longer valid. Without a valid definition of IAR, the statute is unconstitutionally vague.

2. Who is an Investment Adviser Representative? Depends on Who is Asked.

a. IARs Under the TSA.

The TSA defines an "Investment Adviser Representative" as follows:

> [E]ach person or company who, for compensation, is employed, appointed, or authorized by an investment adviser to solicit clients for the investment adviser or who, on behalf of an investment adviser, provides investment advice, directly or through subagents, as defined by Board rule, to the investment adviser's clients. The term does not include a partner of a partnership or an officer of a corporation or other entity that is registered as an investment adviser under this Act solely because of the person's status as an officer or partner of that entity.

See TSA § 581-4(P). Section 29(I) generally prohibits one from rendering services as an Investment Adviser Representative without being registered as required by the TSA. *Id.* at § 581-29(I). Standing alone, Section 29(I) of the Act does not create an offense; a person's criminal liability is established only when that statute is read in conjunction with Sections 4(P), 12 and 12-1 of the Act, along with the Board Rules, to determine whether one is (1) rendering services as an "Investment Adviser Representative" and (2) required to register.

One must look to the definitions in Section 4 when considering whether the provisions of Section 29 are vague. *Morgan v. State*, 557 S.W.2d 512, 514 (Tex. Crim. App. 1977). To know who is covered by the TSA as an IAR, one need look to § 581-4(P). Since the Court's opinion in *Morgan*, however, the definition found at Section 4(P) has been preempted by federal law and is no longer valid, thus rendering § 581-29(I) void for vagueness. The Board's own answer to the question, "Who is an Investment Adviser Representative?" is not so clear. In fact,

the Board answers this question on its website and § 581-4(P) is not even mentioned:

> A supervised person is also an IAR if the supervised person has more than five clients who are natural persons and more than 10% of the person's clients are natural persons. This client test is measured with respect to all of an IAR's clients nationwide, and compliance with the 5-client and 10% text is to be determined at all times (rather than periodically) with respect to current clients. Supervised persons who do not, on a regular basis, solicit, meet with, or otherwise communicate with clients of the investment adviser, or who provide only impersonal investment advice, are excluded from the definition of IAR. If more than one supervised person provides advice to a client, the client is attributed to each supervised person. Client in this context has the same meaning as that discussed in FAQ 1.A.11. *See* SEC Rule 203A-3(a) (17 CFR § 275.203A-3(a)).
>
> Two categories of natural persons excluded from the 5-client or 10% threshold are: a natural person who has at least $1.0 million under management with the IAR's firm immediately after entering into an advisory contract or a natural person who the firm reasonably believes has a net worth in excess of $2.0 million (together with assets held jointly with a spouse) prior to entering into the advisory contract. *See* SEC Rule 205-3(d)(1) (17 CFR § 275.205-3(d)(1).

TSSB FAQs for Investment Advisors and their Representatives. It appears obvious that there is some confusion as to what currently constitutes an IAR under state law.

b. IARs Under Federal Law.

Federal law defines "investment adviser representative" at Section 203A of the Advisers Act and Rule 203A-3 promulgated by the Securities and Exchange Commission. 15 U.S.C. § 80b-3a(b)(1); 17 C.F.R. § 275.203A-3. Rule 203A-3 defines an IAR as:

> § 275.203A-3 Definitions.
>
> For purposes of section 203A of the Act (15 U.S.C. 80b-3a) and the rules thereunder:
> (a)
>
> (1) Investment adviser representative. "Investment adviser representative" of an investment adviser means a supervised person of the investment adviser:
>
> (i) Who has more than five clients who are natural persons (other than excepted persons described in paragraph (a)(3)(i) of this section); and
>
> (ii) More than ten percent of whose clients are natural persons (other than excepted persons described in paragraph (a)(3)(i) of this section).
>
> (2) Notwithstanding paragraph (a)(1) of this section, a supervised person is not an investment adviser representative if the supervised person:
>
> (i) Does not on a regular basis solicit, meet with, or otherwise communicate with clients of the investment adviser; or
>
> (ii) Provides only impersonal investment advice.
>
> (3) For purposes of this section:
>
> (i) "Excepted person" means a natural person who is a qualified client as described in § 275.205-3(d)(1).
>
> (ii) "Impersonal investment advice" means investment advisory services provided by means of written material or oral statements that do not

> purport to meet the objectives or needs of specific individuals or accounts.
>
> (4) Supervised persons may rely on the definition of "client" in § 275.202(a)(30)-1 to identify clients for purposes of paragraph (a)(1) of this section, except that supervised persons need not count clients that are not residents of the United States.

15 U.S.C. § 80b-3a(b)(1); 17 C.F.R. § 275.203A-3.

Whether intentionally or inadvertently, § 581-4(P) ignores the federal definition of an "Investment Adviser Representative." The definition at Rule 203A-3 to the Investment Advisers Act of 1940—not the definition at Section 4(P) of the Act—is the definition that applies to this case. Importantly, the two definitions are vastly different and incompatible as the federal definition contains far more elements and limitations. 17 C.F.R. § 275.203A-3. The correct definition is not incorporated, or even identified, anywhere in the TSA. Consequently, the crux of the issue, and the basis for the vagueness challenge, is determining which definition applies. Because federal law preempts state law, TSA is left without a valid definition of IAR.

3. The Federal Definition of IAR Preempts the State Definition.

Federal preemption falls into three categories: express, conflict, and field preemption. Here, federal law expressly preempts the state definition of IAR.

Additionally, the TSA definition is preempted because it conflicts with, and is incompatible with, federal law. Paxton addresses both below.

a. The Advisers Act Expressly Preempts State Law.

Section 203A(b) of the Advisers Act preempts state law and provides as follows:

> No law of any State or political subdivision thereof requiring the registration, licensing, or qualification as an investment adviser or supervised person of an investment adviser shall apply to any person—
> (A) that is registered under section 203 as an investment adviser, or that is a supervised person of such person, except that a State may license, register, or otherwise qualify any investment adviser representative who has a place of business located within that State; or
> (B) that is not registered under section 203 because that person is excepted from the definition of an investment adviser under section 202(a)(11).

15 U.S.C. § 80b-3a(b)(1). This provision clearly provides for express preemption of contrary state-law licensing or registration requirements. *See Murphy v. Reynolds*, No. 02-10-00229-CV, 2011 Tex. App. LEXIS 7818, at *8 (Tex. App.—Fort Worth Sept. 29, 2011, no pet.) (mem. op.) ("Any entity or person qualifying for an exemption under the federal definition of investment advisor is statutorily exempt from state registration."); *Hara v. Kunath, Karren, Rinne, & Atkin LLC*, No. 71767-7-I, 2015 Wash. App. LEXIS 1319, at *17 (Wash. Ct. App., June 22, 2015) (stating that "15 U.S.C. § 80b-3a(b)(1)(A) preempts most state regulation of investment advisers.").

Additionally, the history of federal regulation confirms that federal law was intended to preempt state law. The State law definition of "Investment Adviser Representative" found in Section 4 of the TSA was preempted almost 20 years ago by the National Securities Markets Improvement Act of 1996 (NSMIA), specifically the portion known as the "Coordination Act" and redefined by the rules to the Investment Advisers Act of 1940 (the "Advisers Act"). The purpose of NSMIA and the Coordination Act was to resolve any conflict between state and federal law in the securities realm in favor of federal law. NSMIA and the rules promulgated by the Securities and Exchange Commission thereunder directly preempted state securities laws that had been in effect for quite some time. The Board Rules of the TSSB itself confirm this in Rule 116.1(b)(2) and its reference to Public Law No. 104-290, Title III, which is more commonly known as NSMIA and its Coordination Act. TEX. ADMIN. CODE § 116.1(b)(2).

Needless to say, there was such a tumult over this loss of state power to regulate investment advisers and their representatives, in fact, that the SEC issued Release No. IA-1633 to address this issue specifically. The Release provides:

> **In addition to preempting state law with respect to investment advisers registered with the Commission, the Coordination Act preempts state law with respect to their "supervised persons."** A supervised person is defined as any "partner, officer, director . . . , or employee of an investment adviser, or other person who provides investment advice on behalf of the investment adviser and is subject to the supervision and control of

the investment adviser." The Coordination Act preserves certain state laws with respect to certain supervised persons of Commission-registered advisers by providing that a "State may license, register, or otherwise qualify any investment adviser representative who has a place of business located within that State." The Coordination Act does not define "investment adviser representative," nor does it describe what constitutes a "place of business." In order to provide clarification, the Commission is adopting definitions of these terms. […]

The Commission received extensive comment on the proposed definition of investment adviser representative. Most investment adviser commenters asserted that it was important for the Commission to adopt a single definition of the term in order to effect the purpose of Congress in creating a more uniform, rational system of adviser regulation. NASAA and most of the states opposed the adoption of any Commission definition, arguing that (i) the Commission has no authority to define the term, (ii) Congress intended for the states to define the term, and (iii) the states have already defined the term.

There is no contemporaneous legislative history explaining what Congress meant by the term investment adviser representative in section 203A(b)(1)(A). **The definition of investment adviser representative varies substantially from state to state.** As a result, the incorporation of state law would conflict with one of the primary goals of the Coordination Act, which is to promote uniformity of regulation. Likewise, the incorporation of state law would be at odds with Congress' determination to preempt state laws regulating the offering of mutual fund shares, as state investment adviser representative definitions generally encompass persons who provide advisory services to mutual funds. Incorporation of state law also would be inconsistent with Congress' intention to limit the application of state law to at least some supervised persons. **If a state**

> **adopted a sufficiently broad definition of the term investment adviser representative, the Coordination Act would have no preemptive effect, since all supervised persons would be subject to state licensing, registration, or qualification** (hereinafter, "state qualification requirements.").
>
> The Coordination Act does not contain any direction to incorporate state law. In light of the many provisions in the 1996 Act designed to promote uniformity of regulation, the decision of Congress to preempt state mutual fund regulation, and the preemptive language used by Congress, **the Commission does not believe that Congress intended the definition of investment adviser representative to incorporate state law. Rather, the Commission believes that Congress left the term investment adviser representative undefined with the expectation that the Commission would use its rulemaking authority to define the term.**
>
> **The Commission's authority to adopt a rule classifying certain supervised persons as investment adviser representatives is clear.** The ambiguities created by Congress' use of the undefined term investment adviser representative make it important that the Commission, as the federal agency charged with administering the Advisers Act, define the term so that the substantial uncertainties and costly disputes likely to occur in the absence of such a definition may be avoided. **Only by adopting a uniform, national definition of investment adviser representative can Congress' intent to "delineate more clearly the securities law responsibilities of federal and state governments" be achieved.**

SEC Release No. IA-1633, File No. S7-31-96, RIN 3235-AH07 (emphasis added); Rules Implementing Amendments to the Investment Advisers Act of 1940, Securities and Exchange Commission, p. 42-48.

Later, the Securities and Exchange Commission doubled down on this rationale in Release IA-1733, stating:

> **Section 203A preempts most state regulatory requirements for Commission-registered investment advisers and their supervised persons,** but permits a state to continue to license, register, or otherwise qualify an "investment adviser representative" who has a place of business in the state. **Under the current definition of investment adviser representative in rule 203A-3**, supervised persons of Commission-registered investment advisers are not deemed to be investment adviser representatives and thus not subject to state qualification requirements if no more than ten percent of their clients are natural persons other than "excepted persons" ("ten percent allowance").

SEC Release No. IA-1733, File No. S7-28-97, RIN 3235-AH22 (emphasis added); Exemption for Investment Advisers Operating in Multiple States; Revisions to Rules Implementing Amendments to the Investment Advisers Act of 1940; Investment Advisers with Principal Offices and Places of Business in Colorado or Iowa, Securities and Exchange Commission.

From the express language of the Advisers Act, to the abundance of additional materials from the SEC, as well as the Board's own rules and comments, it is clear that federal law expressly preempts state law with respect to the definition of IAR and the registration requirements for investment advisers and IARs. Thus, the TSA has no valid definition with respect to IARs. Without a

definition of IAR to guide conduct and enforcement, the statute is unconstitutionally vague.

b. State Law Conflicts with Federal Law.

In addition to express preemption, conflict preemption also applies. Federal law limits the scope of IARs to a subset of supervised persons that meet certain requirements. 17 C.F.R. § 275.203A-3. The TSA sweeps into its ambit vastly more persons, including all who solicit clients for an investment adviser, or provide advice to an investment adviser's clients, for compensation. TSA § 581-4(P). But under federal law, an IAR is defined as:

- a "supervised person" of the investment adviser, as defined at Section 202(a)(25) of the Advisers Act, who provides investment advice on behalf of the investment adviser and is subject to the supervision and control of the investment adviser. 15 U.S.C. § 80b-2(a)(25);

- That has more than five (5) clients who are natural persons (other than "excepted persons"—qualified clients with the requisite net worth provided in Rule 205-3 of the Advisers Act). 17 C.F.R. § 275.203A-3(a)(1)(i); 17 C.F.R. § 275.205-3;

- That has more than ten percent of his clients who are natural persons. 17 C.F.R. § 275.203A-3(a)(1)(ii);

- That on a regular basis, solicits, meets with, or otherwise communicates with clients of the investment adviser. 17 C.F.R. § 275.203A- 3(a)(2)(i);

- That does not provide only impersonal investment advice. 17 C.F.R. § 275.203A-3(a)(2)(ii); and

- That has a "place of business" in the State of Texas: an office at which he regularly provides investment advisory services, solicits, meets with, or

> otherwise communicates with clients, or any other location that is held out to the general public as a location at which the Investment Adviser Representative provides investment advisory services, solicits, meets with, or otherwise communicates with clients. 17 C.F.R. § 275.203A-3(b).

These elements are fundamentally different and in no way similar to the definition at Section 4(P) of the TSA. The two definitions cannot be reconciled. At best, Section 4(P) has been superseded by § 275.203A-3, and, at worst, outright repealed. Federal law, therefore, preempts the definition of IAR contained in § 581-4(P).

4. Federal Preemption Renders Section 29(I) of the Act Unconstitutionally Vague.

Because the definition of IAR found in § 581-4(P) has been preempted by federal law, it is no longer valid. Concomitantly, the correct federal definition is not incorporated into the TSA by reference. Thus, the provisions incorporating this definition promulgating the duty to register at §§ 581-12 and 12-1, along with the penal provision at § 581-29(I), fail to convey to a person of ordinary intelligence what conduct is required or prohibited by the TSA. Instead, they misinform. Furthermore, government authorities lack the guidance to correctly enforce. In other words, without a correct definition of IAR, it is impossible to ascertain who is subject to the TSA's provision.

a. No Valid Definition.

Confusion renders the statute itself unconstitutionally vague. "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). "Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Kolender*, 461 U.S. at 357 (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)). Statutes without identifiable standards "allow [ ] policemen, prosecutors, and juries to pursue their personal predilections." *Smith*, 415 U.S. at 575. Except where First Amendment rights are involved, vagueness challenges must be evaluated in the light of the facts of the case at hand. *See United States v. Mazurie*, 419 U.S. 544, 550 (1975).

b. No Context.

The failure of the Securities Act to provide a valid definition "Investment Adviser Representative" renders the statute under which Paxton is charged vague because it fails to provide adequate notice of the prohibited conduct and it gives law enforcement officers and prosecutors "too much room for interpretation" when

applying the statute. It is true that a statute is not unconstitutionally vague merely because it fails to define words or phrases. *Morgan v. State*, 557 S.W.2d 512, 514 (Tex. Crim. App. 1977). Ordinarily, words in a statute are to be "read in context and construed according to the rules of grammar and common usage." TEX. GOV'T CODE ANN. § 311.011(a) (West 2005). However, this provision of the Code Construction Act has not been incorporated into the TSA as it was into the Penal Code. *See* TEX. PEN CODE § 1.05(b) (making section 311.011 applicable to Texas Penal Code and concurrently stating that "[t]he rule that a penal statute is to be strictly construed does not apply to this [Penal] code.").

Instead, as the Court of Criminal Appeals has repeatedly held: "The State Securities Act is highly penal in nature and requires that it be strictly construed. A forbidden act must come clearly within the prohibition of the statute and any doubt as to whether an offense has been committed should be resolved in favor of the accused." *Thomas v. State*, 919 S.W.2d 427, 429 (1996) (quoting *Bruner v. State*, 463 S.W.2d 205 (Tex. Crim. App. 1970)).

Strictly construed, the Court of Criminal Appeals has held it might still be possible to clarify the meaning of an undefined term by the context in which it is found. *See Morgan*, 557 S.W.2d at 515. However, the term addressed by *Morgan* was "material fact," which was not purported to be defined elsewhere in the TSA and had a meaning clear from the remainder of the text, "omi(ssion) to state a

material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading." *Id.* There is no such clarifying context surrounding the term "Investment Adviser Representative" in § 581-29(I), which merely states that "a person who shall (I) render services as an investment adviser or an investment adviser representative without being registered as required by this Act shall be deemed guilty of a felony and on conviction of the felony shall be sentenced to pay a fine of not more than $5,000 or imprisonment in the penitentiary for not less than two or more than 10 years, or by both the fine and imprisonment." TSA § 581-29(I).

Instead of being clarified by the context, it is in fact confused by it, as the only definition in the TSA, § 581-4(P), is an invalid definition. There are no other subsections of Section 29(I) or anywhere else in the TSA that defines IAR or details the prohibited conduct. There is simply no place in the TSA that any citizen or public official can look to determine who is an "Investment Adviser Representative" or who may be penalized for failing to register. Having to look outside the TSA to determine whether federal law applies, and, if so, whether it applies to the exclusion of federal law, highlights its vagueness. Thus, the guidance for citizens and for law enforcement regarding the scope of the statute is so inadequate that it is relegated to the subjective interpretation of law enforcement officials and creates the risk of improperly motivated selective enforcement.

c. No Incorporation by Reference.

Incorporation by reference can also provide fair warning in criminal statutes. *See Hines v. Baker*, 422 F.2d 1002, 1005 (10th Cir. 1970) ("Such incorporation by reference to other defined offenses is not impermissibly vague."). Incorporation by reference, however, gives fair warning only so long as the incorporation is sufficiently clear. *See United States v. Lanier*, 520 U.S. 259, 264–67 (1997). It follows that when an element of a criminal statute defining persons or activities subject to criminal sanctions derives its meaning from another source, a clear reference to that source is necessary in order to properly comport conduct or guide law enforcement. Section 581-29(I) of the TSA fails in that regard because it indirectly references the preempted definition found at § 581-4(P) with the phrase "as required by this Act." As discussed above, federal law does provide a valid definition of IAR containing a number of additional elements. § 17 C.F.R. 275.203A-3. However, the federal provision is neither incorporated nor referenced by the TSA. As a result, § 581-29(I) is unconstitutionally vague.

C. Conclusion.

Section 581-29(I) contains no definition of "investment adviser representative." TSA's only definition at § 581-4(P) has been expressly preempted by federal law. The context provides no clues and the statute neither incorporates nor references another definition. As a result, the statute under which Paxton is

charged is vague because it either has no valid definition of an IAR, or two substantively different, and wholly incompatible, definitions with which people of reasonable sensibilities along with law enforcement would need to wrestle. Because Section 29(I) of the TSA fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or required, and fails to provide explicit standards to those who enforce and apply the statute, § 581-29(I) is impermissibly vague. Accordingly, Paxton's Second Application for Writ of Habeas Corpus as to the registration count should have been granted.

III. THIRD APPLICATION FOR WRIT OF HABEAS CORPUS SHOULD BE GRANTED BECAUSE THE GRAND JURY THAT RETURNED ALL THREE INDICTMENTS WAS IMPROPERLY FORMED RENDERING INDICTMENTS VOID AND DEPRIVING COURT OF THE POWER TO PROCEED.

Paxton challenged the formation of the grand jury that returned all three indictments in his "Third Application for Writ of Habeas Corpus Based on Improper Impanelment of Grand Jury." The grand jury that indicted Paxton was impaneled by the Hon. Chris Oldner, Presiding Judge of the 416th District Court, in arbitrary violation of Chapter 19 of the Texas Code of Criminal Procedure. The Judge added an impermissible, additional qualification for grand jury service, "willingness to serve" prior to qualifying anyone on the venire according to the statute and then selected the grand jurors/alternates exclusively from that small

pool of volunteers. This process deprived the venire and grand jury of the random character intended by the Texas Legislature.

This practice of forming grand juries from volunteers is a question of utmost importance in Texas given recent legislative changes to the Code of Criminal Procedure to guaranty randomness in grand jury formation by abolishing the "key-man" system. Using volunteers for grand jury service undermines and frustrates the legislative reforms rendering them meaningless.

A. Paxton's Claim is Cognizable in a Pretrial Writ of Habeas Corpus under *Ex Parte Becker*.

It has long been recognized that a pretrial writ of habeas corpus is an appropriate vehicle for challenging the formation of a grand jury that returned an indictment as it questions the trial court's power to proceed because the indictment is void. *Ex parte Becker*, 459 S.W.2d 442, 443 (Tex. Crim. App. 1970). An indictment may be challenged by habeas corpus when it "would render the proceedings void." *Ex Parte Smith*, 152 S.W.3d 170, 171-172 (Tex.App. – Dallas 2004) *affirmed* 185 S.W.3d 887 (Tex.Crim.App. 2006) citing *Becker* ("pretrial habeas permitted to raise challenge that composition of grand jury illegal, rendering indictment void"). Paxton challenged the formation of the grand jury that indicted him and consequentially, the trial court's power to proceed. Therefore, habeas corpus is appropriate.

B. Relevant Facts: Formation of the Grand Jury that Indicted Paxton.

At the time of the grand jury that indicted Paxton was formed, Texas grand jurors could be selected using either a commissioner-based-- "key-man" --system or using the random selection system used to select civil trial juries. *See* TEX. CODE CRIM. PROC. ANN. Art. 19.01 (West 2005).[7] The grand jury that indicted Paxton was formed via the latter random system under then CODE CRIM. PROC. Art. 19.01(b) on June 12, 2015, by the 416th Judicial District Court of Collin County, Texas. R.R., Vol. 2, 28.

The prosecutor assigned to that grand jury, Assistant Collin County District Attorney Gail Leyko, testified that the grand jury panel was assembled through driver's licenses "on a random basis." R.R., Vol. 2, 27-28. Approximately one hundred (100) prospective grand jurors appeared for the venire on June 12, 2015. *Id.* at 50. Once assembled, Presiding Judge of the 416th Judicial District Court Chris Oldner examined the panel. C.R.I., 159, C.R.II., 44, C.R.III., 44.

Shortly after beginning voir dire, the Judge listed the statutory qualifications aloud. C.R.I., 161-162; C.R.II., 46-47; C.R.III., 46-47. Then he asked "if any of those disqualifications apply to any one of you, any of them, please come forward now." *Id.* After interviewing a few people who stepped forward, the Judge recited

[7]The"key-man" system was removed by HB2150 of the 84th Texas Legislature. Act of June 1, 2015, 84th R.S., ch. 929, General and Special Laws of Texas.

Article 19.25's excuses. C.R.I., 165-166; C.R.II., 50-51; C.R.III., 50-51. Then, the Judge decided to ask for volunteers to serve on the grand jury, explaining as follows:

> I'm going to, since we have such a long line here, I'm going to do something to try to save everybody a little bit of time, ... **how many of you, if you would raise your right hand, are willing to serve on the Grand Jury if called? Of those of you who are seated, how many of you would be willing to do it? All right. If all of you that have your hand raised, if you come over and have a seat on the left-hand side over here if you're willing to serve. ...** Yes, ma'am. That's perfectly fine. ... Here is what we're going to do to try to save everybody a little bit of time. This is a little bit of a different way of impaneling panels than we've done in the past. ... There are still a couple of hoops we have to jump through before I can say all of y'all to go home, but **I need to have some time to talk and get the list of names here and do a little bit of work with the people willing to serve.** So instead of talking to each of you individually, ..., let me see if we have enough people here who are qualified and don't meet any of the issues we need to address. **And if that works, will be able to get our Grand Jury from the people here to my left.**
>
> C.R.I., 167-168; C.R.II., 52-53; C.R.III., 52-53.

At least seventeen (17) volunteered for grand jury service. After inquiring about the various parts of the county where the volunteers lived, the Judge said, "[a]ll right. Those of you willing to serve, I have some more specific questions I'm going to ask you individually." C.R.I., 171; C.R.II., 56; C.R.III., 56. Then the Judge asked the four statutory qualification questions exclusively of the seventeen volunteers. C.R.I., 171-189; C.R.II., 56-73; C.R.III., 56-73; TEX. CODE CRIM. PRO. ART. 19.23. The remaining eighty-three (83) candidates summoned who did not

volunteer as "willing to serve" were never asked the four statutory questions. C.R.I., 169-196; C.R.II., 54-81; C.R.III., 54-81. After he completed his individual interrogation of the volunteers, Judge Oldner inquired about scheduling issues and *then* exercised his Art. 19.25 discretion and excused two *qualified volunteers* because of work conflicts. C.R.I., 191-196; C.R.II., 76-81; C.R.III., 76-81.[8]

The Judge repeatedly recognized this small group as "volunteers," stating "[o]nce you are served and I swear you in, your **voluntary services** is no longer voluntary." C.R.I., 189; C.R.II., 74; C.R.III., 74. "[A]t this point you're really kind of **volunteering** your service," p. 37, C.R.I., 193; C.R.II., 78; C.R.III., 78; "Anyone else on my left who **volunteered** who is going to have a problem." C.R.I., 194; C.R.II., 79; C.R.III., 79. He even asked another "[a]m I correct that you weren't originally in the group that **volunteered**?" *Id.*

Then, the Judge impaneled a grand jury exclusively from this group of volunteers and excused the remaining persons summoned. He told the panel that "because of the willingness of the persons who are going to serve, we are going to be able to excuse the rest of you at this time." C.R.I., 196; C.R.II., 81; C.R.III., 81. The oath was then administered to the qualified volunteers. *Id.* C.R.I., 198-199; C.R.II., 83-84; C.R.III., 83-84. No persons who were randomly summoned but did not volunteer as "willing to serve" were impaneled as grand jurors or alternates.

[8]The only other person individually examined who was not sworn may have been disqualified by statute. *See* C.R.I., 174, 196; C.R.II., 59, 81; C.R.III., 59, 81.

C.R.I., 167-171, 189-191, 196; C.R.II., 52-56, 74-76, 81; C.R.III., 52-56, 74-76, 81. This volunteer grand jury subsequently indicted Paxton.

C. The Judge Improperly Added a Qualification – "Willingness to Serve."

The impaneling Judge improperly added an additional qualification for grand jury service not found in law, "willingness to serve" and used it as a threshold qualification *prior* to testing the statutory qualifications of the venire in the required manner and excluding anyone unwilling to serve from grand jury service.

The statutory qualifications of a grand juror are set forth in Article 19.08 of the Texas Code of Criminal Procedure; "willingness to serve" is not one of them. These qualifications are tested individually by interrogation under oath "by the Court or under his direction." TEX. CODE CRIM. PRO. ART. 19.21-19.22. In that test, the following questions "shall be asked,"

1. Are you a citizen of this state and county, and qualified to vote in this county, under the Constitution and laws of this state?

2. Are you able to read and write?

3. Have you ever been convicted of a felony?

4. Are you under indictment or other legal accusation for theft or for any felony?

TEX. CODE CRIM. PRO. ART. 19.23.

These questions were not individually posed to each person on the panel, but only to the seventeen volunteers. This violated the custom, tradition, and text of Texas law.

By statute, persons who appear qualified after interrogation on four statutory questions shall be accepted by the Court unless it is shown that he/she is not of sound mind or good moral character or not qualified. *See* TEX. CODE CRIM. PRO. ART. 19.24. It has long been recognized that "by custom and tradition" that the district court takes the first twelve qualified grand jurors. *Ex Parte Becker,* 459 S.W.2d 442, 444 (Tex. Cr. App. 1970) (referring to grand juror lists prepared by commissioners). That was not followed in this case. Indeed, none of the required statutory procedures were observed until after the pool of potential grand jurors persons was limited only to the volunteers.

The use of this improper additional qualification excluded other members of the randomly summoned pool from grand jury service before even testing their actual statutory qualifications. This was inconsistent with law.

D. The Judge Arbitrarily Disregarded the Dictates of TEX. CODE CRIM. PROC. Chapter 19.

The addition of an improper qualification for grand jury service and selection of a grand jury exclusively composed of volunteers violated TEX. CODE CRIM. PROC. Chapter 19 arbitrarily. According to the record, this was done for no

reason other than a whim. The Judge was *required* to follow the statutory formation framework in CCP Chapter 19 and did not. The arbitrary disregard of those statutes rendered the grand jury without authority.

1. The Grand Jury Statutes are Required to be Followed.

In *Becker*, the Court of Criminal Appeals corrected any misimpression that the statutory framework was optional, unambiguously stating:

> Although it has been said that the statutes relating to the organization of grand juries are directory and not mandatory, *Ex parte Traxler*, 148 Tex.Cr.R. 550, 189 S.W.2d 749, 752, **district courts are required to follow the means and methods provided by the Legislature in the selection of grand juries**. *Terrell v. State*, 139 Tex.Cr.R. 130, 139 S.W.2d 108. An arbitrary disregard of those statutes in the selection and organization of a grand jury vitiates and renders such grand jury without authority. *Martinez v. State*, 134 Tex.Cr.R. 180, 114 S.W.2d 874; *Hunter v. State*, 108 Tex.Cr.R. 142, 299 S.W. 437 and cases there cited.

Ex Parte Becker, 459 S.W.2d 442, 444-445 (Tex.Crim.App. 1970)(emphasis added). Chapter 19 has been amended since *Becker*, including the addition of the random method of grand jury selection in 19.01(b) and accompanying exemptions in 19.25. Under *Becker*, the impaneling Judge was prohibited from arbitrarily disregarding those .

2. The Judge Arbitrarily Disregarded Chapter 19 to Save Time When Nothing Indicates Time Was of the Essence.

The "means and methods" of CCP Chapter 19 were disregarded by the Judge to, "save everybody a little bit of time." This conduct was arbitrary because

it was not part of any system or routine and not necessitated by any conditions existing on June 12, 2015.[9] The Judge expressly acknowledged his deviation was not part of any system and different from the way things were done. C.R.I., 167-168; C.R.II., 52-53; C.R.III., 52-53. Yet, the record documents no reason for this haste or that time was of the essence.

June 12, 2015, was a Friday. C.R.I., 159; C.R.II., 44; C.R.III., 44. Voir dire began sometime after lunch followed by one recess –reconvening at 2:30 p.m. *Id.* C.R.I., 171; C.R.II., 55; C.R.III., 55. There was no apparent emergency or any complaint by anyone summoned that they had to be somewhere that day by a particular time. Nothing in the record suggests that the Judge could not have examined an equal number of persons in the panel in order or even the entire panel in the time remaining in the business day. The timesaving tactic used by the Judge appears to have been nothing more than a personal whim. By limiting his individual questioning of persons to volunteers and impaneling a grand jury exclusively from that limited pool for no reason, the Judge arbitrarily violated the statute.

E. The Judge Had no Discretion to Call for Volunteers or Prematurely Excuse Potential Grand Jurors.

[9]Contrary to what the Judge said, an Assistant District Attorney testified that other Judges had also used volunteers. R.R. 40-41. In their pleadings, the prosecution quoted transcripts from the other 2015 grand jury impanelment transcripts that other District Judges in Collin County also asked for volunteers, apparently at the request of the District Attorney. C.R.I., 276 at fn. 3-5.

The Judge was without discretion to disregard or excuse potential grand jurors whose qualifications had not yet been tested. The only discretion the Judge could properly exercise was whether to elect either the "key-man" or "random" system to summon the panel as per Art. 19.01(b), and then to decide reasonable excuses of qualified persons under Art. 19.25(5). Both these provisions were added in 1979 by the Texas Legislature to create a random process to form a grand jury and nothing in Chapter 19 allowed the Court to disregard the "random" process, once begun, by limiting service to volunteers. Absent individually interrogating the randomly selected persons about their qualifications, the Judge could not even consider any excuse those who did not volunteer may have had.

1. Chapter 19 Requires Courts to Test the Qualifications of Persons Summoned before Excusing any from Grand Jury Service.

According to the "random" system employed in this case, "[t]he Judge shall try the qualifications for and excuses from service as a grand juror." TEX. CODE CRIM. PRO. Art. 19.01(b). Chapter 19 then outlines the qualifications, commands the Court to interrogate "each person" under oath and gives the mode of test before listing excuses from service. *See id.* at Art. 19.21-19.24. According to Art. 19.25, only persons whose qualifications have been tested may be excused. Those who do "not possess requisite qualifications" are excused and then "qualified persons may be excused." Art. 19.25. No one was excused prior to forming the grand jury.

2. The Judge Did Not Actually Excuse Anyone Who Did Not Volunteer Before Forming the Grand Jury From Those Who Did.

At the beginning of the process the Judge discussed qualification concerns with a few persons randomly summoned, but did not actually excuse anyone prior to calling for volunteers. C.R.I., 162-168; C.R.II., 47-53; C.R.III., 47-53. Rather, the Judge excused the remaining panel members only after the twelve grand jurors and two alternates were seated. C.R.I., 196; C.R.II., 81; C.R.III., 81. The Judge never exercised any 19.25(5) discretion on any potential grand juror who did not volunteer. By statute, he could not have because he never tested their qualifications.

F. The Judge's Selection of Only Volunteers to Serve Fatally Undermined the Randomness of the Grand Jury that Indicted Paxton.

The Judge's selection of only volunteers to serve as grand jurors in this case eliminated the randomness intended and imposed by TEX. CODE CRIM. PROC. Chapter 19 in a manner condemned by other courts. While the one hundred persons initially summoned may have been randomly selected as per Art. 29.01(b), those who volunteered were not. By limiting selection of grand jurors to fourteen of the seventeen volunteers, the Judge eliminated eighty-three percent (83%) of the one hundred randomly summoned jurors. This was not a minor deviation from the statute. *See e.g. Gentry v. State*, 770 S.W.2d 780, 794-795 (addressing violations

of where envelope containing grand jury list to be delivered and opened). The 66th Legislature enacted Articles 19.01(b) and 19.25(1)-(5) with the express intent to create a "random" system. Forming the grand jury exclusively from volunteers destroyed it's intended random character.

1. The Legislative History Demonstrates the Grand Jury Was Intended to Be Entirely Randomly Selected.

The 66th Texas Legislature added Articles 19.01(b) and the 19.25 (1)-(5) to the Texas Code of Criminal Procedure through HB1436. *See* Act of May 3, 1979, 66th Leg., ch. 184, Sec. 2, 1979 Tex. Gen. Laws 391-393.[10] Prior to enactment, Texas law only authorized a Judge to form a grand jury through the "key-man" system and no statute excused qualified persons from grand jury service.[11] HB1436 was specifically drafted to address judicial decisions about Texas' "key-man" system.

CCP Article 19.01(b) was designed to assure that Judges cannot game the system by impaneling grand jurors of their own choosing or that have ulterior motives. Before the 66th Legislature, a study committee analyzed and proposed a solution in HB 1436. The House Study Group reported, "As a result of the decision in *Castaneda*, and a long line of criticism of the Texas system of selecting

[10] http://www.lrl.state.tx.us/scanned/sessionLaws/66-0/HB_1436_CH_184.pdf (last viewed February 12, 2016).

[11] Only the language to excuse *unqualified* jurors was in Article 19.25, before there was a random system of grand jury formation. *See* Act of May 27, 1965, 59th Leg., vol. 2, ch. 722, 1965 Tex. Gen. Laws 391, http://www.lrl.state.tx.us/scanned/sessionLaws/59-0/SB_107_CH_722.pdf

grand jurors, a joint committee was selected in the interim to study the Texas grand jury system."[12] In its analysis, the study committee noted that "[t]his bill gives district Judges authority to direct that the grand jury panel be selected at random. Random selection will insure that the panel reflects the make-up of the county." *Id.* "This bill allows… the selection of the grand jury panel on a random basis in the same manner as juries are selected for civil cases." It further observed "[t]his bill gives district Judges authority to direct that the grand jury panel be selected at random. Random selection will insure that the panel reflects the make-up of the county." *Id.*

HB1436 also amended Article 19.25 because the random selection process necessitated a Judge to excuse otherwise qualified persons summoned. The four non-discretionary excuses added by HB1436 mirrored the exemptions from jury duty in then V.A.C.S. Art. 2135 recodified by as Act of May 17, 1985, 69th R.S., ch. 480, § 1, 1985 Tex. Gen. Laws 2014 (current version at TEX. GOVT. CODE § 62.106 (Vernon 2015)). This was not a feature of the "key-man" system because the commissioners pre-screened the candidates. Only when the pool is selected at random do circumstances addressed by the additional excuse language arise.

[12]HOUSE STUDY GROUP, BILL ANALYSIS, Tex. HB1436, 66th Leg., R.S. (1979) available at http://www.lrl.state.tx.us/scanned/hroBillAnalyses/66-0/HB1436.pdf (last viewed February 11, 2016).

Allowing Judges to qualify and select grand jurors exclusively from volunteers negated the randomness built into Article 19.01(b) as it existed on June 12, 2015. This practice will irreparably undermine clear legislative intent even more now because random selection became the exclusive method to summon prospective grand jurors on September 1, 2015.

2. Limiting Grand Jury Service to Volunteers Undermines the 2015 Grand Jury Reforms Eliminating the "Key-Man" System in Favor of Randomness.

The "key-man" system was eliminated entirely by the 84th Legislature. Similar to the reasons given in creating the random system in 1979, the "Background and Purpose" section of the "Bill Analysis" of HB2150 noted,

> [T]he grand jury system has recently come under scrutiny because concern has been raised about how effective the system is in removing bias from a grand jury pool. HB2150 seeks to address these concerns.[13]

One of the many criticisms of the grand jury commissioner system was that it allowed the Courts to compose grand juries of prosecution friendly volunteers.[14] The impaneling Judge's arbitrary disregard of the statute in this case perpetuated

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[13]HOUSE COMM. ON CRIM. JUSTICE, BILL ANALYSIS, TEX. HB2150, 84TH LEG., R.S. (2005) available at http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=84R&Bill=HB2150 (last viewed November 22, 2015).

[14]*See* Langford, Terri, *Is it Time to Ditch Texas' Key Man Grand Jury System*, TEXAS TRIBUNE, September 15, 2014, available at *http://www.texastribune.org/2014/09/15/time-ditch-key-man-grand-jury-system/* (last viewed November 22, 2015); Balko, Radley, *Houston Grand Juries: too white, too law-and-order, and too cozy with cops.* WASHINGTON POST, August 1, 2014, available at https://www.washingtonpost.com/news/the-watch/wp/2014/08/01/houston-grand-juries-too-white-too-law-and-order-and-too-cozy-with-cops/ (last viewed November 22, 2015).

problems inherent in the "key-man" system by continuing to limit grand jury service to volunteers even though ostensibly using the civil jury panel's random selection system. This undid the randomness of the panel summoned in three ways: i) the volunteer grand jurors were self-selecting; ii) the number of volunteers to be impaneled was left to the impaneling Judge, and iii) the Judge placed the volunteers in preferential positions for selection rather than their previous position on the panel, assuring them of inclusion on the grand jury. As a result, one non-randomly selected subgroup was preferred for inclusion on the grand jury over a randomly selected group of potential grand jurors. The jury summons was not the fatal flaw to the formation of the grand jury that indicted Paxton, rather the judge's selection of volunteers that destroyed the grand jury's randomness.

Under analogous circumstances, the Fifth Circuit opined, "[f]ormer purity cannot randomize what has become unrandom." *United States v. Kennedy,* 548 F.2d 608, 612 (5th Cir. 1977), cert. denied, 434 U.S. 865, 98 S.Ct. 199, 54 L. Ed. 2d 140 (1977), *overruled on other grounds by United States v. Singleterry,* 683 F.2d 122 (5th Cir. 1982). "Providing prospective jurors with complete discretion whether or not to serve negates the statutory mandate of random selection." *Id*.

3. Federal Courts Have Ruled Volunteers are Not Random and Dismissed Indictments in a Similar Case.

In the federal system both petit and grand jury service are covered by the Jury Selection and Service Act of 1968 ("JSSA"), as amended, 28 U.S.C. § 1861-78. The JSSA's purpose, which similar to that of the Texas statutes, is that *all* persons have the right to grand juries randomly selected, the opportunity to be considered for service on grand juries, and the obligation to serve when summoned. 18 U.S.C. § 1861. In analogous cases, two circuits determined that the demonstrable use of volunteers to the exclusion of others allows a subjective element of opting in or out of jury selection but constitutes a substantial violation of the JSSA. *Kennedy*, 548 F.2d at 610-12 (petit jury); *United States v. Branscome*, 682 F.2d 484, 485 (4th Cir. 1982) (grand jury).

In *Branscome*, the Fourth Circuit unanimously affirmed a district court's dismissal of indictments under facts nearly identical to Paxton's. In that case:

> The district court dismissed two indictments because the grand jury which returned them was organized in violation of the Jury Selection and Service Act of 1968, as amended, 28 U.S.C. § 1861-76. The violation consisted of asking for volunteers to serve on the grand jury from the pool of prospective jurors who had been randomly selected. Each prospective juror who volunteered was permitted to serve, and the full complement of the grand jury was thereafter filled by random selection.

Id. Paxton's circumstances are even more egregious as the *entire* grand jury that indicted him was composed of volunteers whereas only part of Branscome's was filled with volunteers.

The Fourth Circuit determined the record was insufficient to conclude the selection of volunteers diminished the likelihood that a fair cross section of the community will be represented on a given grand jury. *Id.* Yet, it also found that point unnecessary because the dismissal of the indictments was proper on either of the other two grounds relating to the selection of volunteers: i) it introduced an unauthorized subjective criterion, and ii) it resulted in a non-random selection process that violated legislative intent. *Id.* That is precisely what occurred on June 12, 2015. The Judge introduced a qualification not authorized by Chapter 19 and violated the legislative intent of random selection.

Branscome affirmed the judgment of the trial court and reasons for it. *Id.* citing *United States v. Branscome*, 529 F. Supp. 556 (E.D. Va. 1982). That decision relied upon the Fifth Circuit's analysis in *United States v. Kennedy*, 529 F. Supp. at 559-562. Succinctly, the Fifth Circuit stated that it was "self-evident" that allowing persons to decide whether to perform a task was the opposite of selecting those who are required to, even given exemptions and excuses. *Kennedy* at 611. "**A volunteer is not a random selectee."** *Id.* The Fifth Circuit also observed that "[n]onrandom selection of a subgroup from a randomly selected group does not make for a randomly selected subgroup. *Id.* at 612. In restricting the qualification and selection of the grand jurors to volunteers on June 12, 2015, the Judge undid the randomness of the initial jury summons. As a result, TEX. CODE CRIM. PROC.

Chapter 19 was violated in fact, intent, and effect just as the federal statute was in *Branscome*.

The analysis necessitating dismissal of Branscome's indictments demands the same result in Paxton's case. As in *Branscome*, no evidence was required to reach this conclusion. Similar to the call for volunteers in violation of federal law discussed therein, the violations of Chapter 19 by the Judge in this case introduced "a subjective criterion for grand jury service" not authorized by Article 19.01(b). This yielded a non-random selection that violated the legislative intent of randomness. Although *Branscome* addressed a federal statute, the statutory requirement and clear legislative intent that the grand jury be formed randomly is shared by CCP Chapter 19. As the federal courts have the ability to dismiss indictments for violations of the JSSA, Texas law allows similar relief by motion or writ because "arbitrary disregard of the statutes in the selection and organization of the grand jury vitiates and renders such grand jury without authority." *Ex parte Becker,* 459 S.W.2d 442, 444 (Tex. Cr. App. 1970).

G. Paxton Was Individually and Uniquely Harmed by the Call for Volunteers.

Although Paxton does not concede that he need show individual harm or prejudice to be entitled to relief by writ of habeas corpus, it occurred in this case. As documented in the trial Court, there was a large amount of publicity regarding

the investigation and potential indictment of Paxton, the Attorney General of Texas. C.R.I., 337-338; C.R.II., 111-112; C.R.III., 111-112. This publicity and the Court's selection of volunteers to serve as grand jurors assured that anyone who wished to serve specifically to indict Paxton could do so who otherwise would not have been on the grand jury.

H. Conclusion.

Paxton's Third Application for a Writ of Habeas Corpus should have been granted and the Indictments against Paxton dismissed

IV. FOURTH APPLICATION FOR WRIT OF HABEAS CORPUS SHOULD HAVE BEEN GRANTED BECAUSE THE STATUTE HE WAS CHARGED WITH IS FACIALLY UNCONSTITUTIONAL BECAUSE IT IS OVERBROAD AND VAGUE.

Paxton sought a pretrial writ of habeas corpus on the basis that the statute he was charged with under the TSA for failing register as an investment adviser representative with overbroad as it unconstitutionally regulates free commercial speech and is so vague it fails to give a person fair notice of what conduct is prohibited by the statute and allows for arbitrary enforcement. The State failed to shoulder its burden under *Central Hudson Gas & Electric Corp. v. Public Services Commission*, 447 U.S. 557 (1980) as to overbreadth and its arguments rebutting Paxton's vagueness challenge have no merit. Therefore, Paxton's Fourth Application for Writ of Habeas Corpus should have been granted.

A. Paxton's Challenge to the Facial Constitutionality of the Financial Advisor Representative Registration Statute is Cognizable by Pretrial Writ of Habeas Corpus.

The writ of habeas corpus is an extraordinary writ. *Ex parte Weise*, 55 S.W.3d 617, 619 (Tex. Crim. App. 2001). Neither a trial court nor an appellate court should entertain an application for writ of habeas corpus when there is an adequate remedy by appeal. *Id.* Additionally, an applicant must be illegally restrained to be entitled to relief. *Id.* Paxton was restrained of his liberty within the meaning of article 11.01 of the Texas Code of Criminal Procedure when he was charged with "render[ing] services as an investment advisor representative [without being] duly registered" and released on bond to await trial. C.R.I., 15-16, 225-228.

Paxton challenged the facial constitutionality of the statute on which the charge is based, TEX. REV. CIV. STAT. ANN. § Art. 581-29(I), as it incorporates TEX. REV. CIV. STAT. ANN. § art 581-4(P)'s definition of "investment advisor representative" ("Statute" or "Regulation"). *See* C.R.I., 210-228. A facial challenge to the constitutionality of a statute that defines the charged offense may be raised by means of pre-trial application for a writ of habeas corpus. *Ex parte Thompson*, 442 S.W.3d 325, 333 (Tex.Crim.App. 2014).

B. Section 581-29(I) is Void as Overboard as it Unconstitutionally Regulates Commercial Free Speech Because it is not Reasonably Tailored or Proportional to the Harm the State Seeks to Prevent.

The State failed to satisfy its burden under *Central Hudson Gas & Electric Corp. v. Public Services Commission*, 447 U.S. 557 (1980), because it did not to submit any offer proof that the statute: (i) directly advanced the State's interests or (ii) is narrowly tailored to accomplish the stated goals. C.R.I., 281-300, R.R. 123:19-124:9. By failing to present any evidence to the district court on *Central Hudson*'s second and third prongs scant evidence on the first prong, the Court must hold § 581-29(I), as it incorporates § 581-4(P)'s definition of "investment advisor representative," is an unconstitutional prohibition on protected commercial speech. *See Anderson Courier Servs. v. State*, 104 S.W.3d 121, 126 (Tex.App.-Austin 2003) (Statute found to unconstitutionally regulate commercial free speech where the State failed to offer proof that the Statute directly advanced the State's interests or that it was narrowly tailored to accomplish the State's substantial interest.).

1. Governing Principles.

Paxton's facial challenges are grounded in the doctrines of "overbreadth" and "vagueness" that derive from the "freedom of speech" guaranteed by the First Amendment of the United States Constitution, which has been applied through the Fourteenth Amendment. *See Ex parte Thompson*, 442 S.W.3d at 334. Whether a statute is facially constitutional is a question of law that is reviewed *de novo*. *Ex*

Parte Lo, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013). When the constitutionality of a statute is attacked, it usually carries with it the presumption that the statute is valid and that the legislature has not acted unreasonably or arbitrarily. *Id.* at 14-15. The burden normally rests upon the person challenging the statute to establish its unconstitutionality. *Id.* at 15. However, when the government seeks to restrict and punish commercial speech, the usual presumption of constitutionality is reversed. *See Anderson Courier Servs.*, 104 S.W.3d at 125.

The State agreed that § 581-29(I), as it incorporates § 581-4(P)'s definition of "investment advisor representative," attempts to regulate commercial speech. C.R.I., 285.

To determine whether regulation of commercial speech survives First Amendment scrutiny Texas courts look to *Central Hudson*'s test. *Id.* If Texas wishes to regulate truthful, non-deceptive speech relating to a commercial transaction, it must pass the *Central Hudson* test by showing that: (1) the State has a substantial interest in supporting the regulation; (2) the regulation directly and materially advances that interest; and (3) the regulation is narrowly tailored to advance that interest. *Id.* Thus, if the State seeks to regulate truthful, non-deceptive speech relating to a commercial transaction, the State bears the burden. *See Central Hudson*, 447 U.S. at 564; *Anderson Courier Servs.*, 104 S.W.3d at 125. The State failed to meet its burden on each *Central Hudson* prong to justify

the regulation. Therefore, the Court must hold § 581-29(I), as it incorporates § 581-4(P)'s definition of "investment advisor representative," is an unconstitutional prohibition on protected commercial speech.

2. The Charged Offense.

The TSA's purpose is to protect Texas investors, and encourage capital formation, job formation, free and competitive securities markets, and to minimize regulatory burdens on issuers and persons subject to the Act, especially small businesses.[15] Section 581-29(I), the offense charged, states "Render services as an investment adviser or an investment adviser representative without being registered as required by this Act shall be deemed guilty of a felony of the third degree."

"Investment advisor representative," according to the face of the TSA, includes each person or company who, for compensation, is employed, appointed or authorized by an investment adviser to solicit clients for the investment adviser or who, on behalf of an investment adviser, provides investment advice to the investment advisor's clients. Section 581-4(P). "Solicit" is not defined within the Act or by Texas State Securities Board ("TSSB") rules.

[15] "A. This Act may be construed and implemented to effectuate its general purpose to maximize coordination with federal and other states' law and administration, particularly with respect to: (1) procedure, reports, and forms; and (2) exemptions. B. This Act may be construed and implemented to effectuate its general purposes to protect investors and consistent with that purpose, to encourage capital formation, job formation, and free and competitive securities markets and to minimize regulatory burdens on issuers and persons subject to this Act, especially small businesses." TEX. REV. CIV. STAT. ANN.§ art. 581-10-1.

3. State Failed to Show it has a Substantial Interest in Supporting the Regulation.

Authority cited by the State to the district court does not establish the State's substantial interest in the regulation requiring registration of some investment advisor representatives under § 581-29(I). The State called no witnesses at the hearing and the only supporting evidence were exhibits attached to its Reply brief. C.R.I., 293-300, R.R.II., 123:19-124:9. "Under a commercial speech inquiry, it is the State's burden to justify its content-based law as consistent with the First Amendment." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667, 180 L. Ed. 2d 544 (2011).

In an attempt to answer *Central Hudson*'s first prong the State quotes the synopsis of the Act's recent amendments without articulating how it specifically supports a requirement for investment advisor representatives to register with the TSSB, rather any of the other provisions of the bill. C.R.I., 285-286. Instead of explaining the State's interest, the State attempted to apply the provision to its unsupported allegations regarding Paxton's conduct, C.R.I., 285, to prop up the Statute.

The State attaches as an exhibit, the synopsis of SB1060, which likewise fails to articulate the State's substantial interest. SB1060 simply provides for "improved investment securities enforcement" but is silent as to (i) why the State has a substantial interest in investment securities enforcement or (ii) how that

supports the State's substantial interest by requiring some, but not all, investment advisor representatives operating within the State of Texas to register with the TSSB.

4. State Failed to Show the Regulation Directly and Materially Advances its Substantial Interest.

The State did not carry its burden, failed to produce a single witness, and presented no evidence to help establish how the regulation directly and materially advances the State's interest. *See Anderson Courier Servs.*, 104 S.W.3d at 125 ("By only producing a single witness with no data or empirical evidence, the State has failed to satisfy its burden of showing that [the regulation] materially and directly advances its interests.) C.R.I., 281-300, R.R.II., 123:19-124:9. Even if the State could articulate a substantial interest, "the State must still satisfy the second and third prongs of *Central Hudson.*" *Anderson Courier Servs.*, 104 S.W.3d at 125. The State bears the burden of showing that the regulation in question directly and materially advances its substantial interests. *Id.* "The Supreme Court has established that "mere speculation or conjecture" will not satisfy that burden; "rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* quoting *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993).

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An investment advisor representative may either be a person who gives investment advice to the clients of an investment advisor or merely solicit clients for the investment advisor. *See* § 581-29(I), § 581-4(P). The State failed to address how the regulation advances the State's substantial interest as to each of these groups. The State faces a greater hurtle as to solicitors. Registration of solicitors does not directly or materially protect Texas investors because the solicitor is not in a position to cause the investor harm. A solicitor does not give a Texas investor investment advice, issue or sell securities, or take custody of client funds, but merely directs, without obligation, interested persons to persons or companies who are registered with and regulated by the TSSB or the SEC to perform those services. *See* §§ 581-4, 7, 12.

5. State Failed to Show the Regulation is Narrowly Tailored to Advance its Substantial Interest.

The State fails to argue, present evidence or cite to any authority showing that the regulation, § 581-29(I), is narrowly tailored to advance the State's substantial interest. C.R.I., 281-300, R.R.II., 123:19-124:9.

The State did not carry its burden, failed to produce a single witness, and presented no evidence to help establish that the regulation is reasonably tailored and proportional to the harm the State seeks to prevent. *See Anderson Courier*

Servs., 104 S.W.3d at 125 (Finding that the State failed to meet its burden as to the third prong of the *Central Hudson* test, "In the case at bar, the State produced no explanation of why less-burdensome alternatives…were not considered.").

The State failed to establish the statute is narrowly tailored as to investment advisor representatives who (i) advise clients or (ii) solicit. Solicitor registration requirement is most clearly not narrowly tailored to advance the State's interests because it is an invalid prior restraint in the face of less burdensome alternatives. The requirement that solicitors register as investment advisor representatives prior to soliciting any client is not narrowly tailored to advance the interest in protecting Texas investors from harm in that (1) the regulation reaches a wide variety of conduct unlikely to cause the kind of harm the TSA is designed to protect, (2) the regulation is an invalid prior restraint on commercial speech, and (3) less burdensome alternatives such as the SEC rule that does not require the registration of solicitors.

a. Section 581-29(I) is Not Limited to a Particular Type of Solicitation, Reaching a Wide Variety of Conduct Unlikely to Cause the Kind of Harm the Act is Designed to Protect.

The regulation prohibiting solicitation by unregistered as investment advisor representatives touches on persons engaged in a wide spectrum of conduct unlikely to cause the harm the TSA exists to protect. By failing to limit the registration to a particular type of solicitation, § 581-29(I) is not narrowly tailored. *See Anderson*,

104 S.W.3d at 126. In addition to persons who communicate with strangers to direct them to a certain investment advisor, § 581-29(I) also requires registration of persons who, for compensation, direct their friends, family and business relations to a certain investment advisor. The Statute equally applies to a roadside employee dancing with a large red arrow, soliciting passersby to the investment advisor's office. The wide range of commercial speech that is subjected to regulation is unlimited. The breath of conduct falling within the sweep of § 581-29(I) illustrates why it fails *Central Hudson*'s second prong, as it is not narrowly tailored to advance a substantial interest. *See Anderson*, 104 S.W.3d at 125-6.

b. The Registration Requirement is an Invalid Prior Restraint on Commercial Speech.

Prohibiting any person from referring another to an investment advisor for compensation without being registered with the State is a prior restraint on free speech, which is generally disfavored. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2541, 189 L. Ed. 2d 502 (2014); *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2740, 180 L. Ed. 2d 708 (2011); *Sorrell v. IMS Health Inc.*, 131 S. Ct. at 2667. Laws subjecting the exercise of First Amendment freedoms to the prior restraint of a license must be narrowly tailored as to not unnecessarily interfere with the peaceful enjoyment of those freedoms. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-56 (1969); *See Smith v. California*, 361 U.S. 147, 149 (1959); *Schneider v. State*, 308 U.S. 147, 160, (1939) (Licensing scheme too

restrictive of First Amendment freedoms). The use of a broad and disfavored prior restraint is not proportional to harm the Act seeks to address. *See Anderson,* 104 S.W. 3d at 126.

c. Less Burdensome Alternatives Exist, Such as the SEC rule.

The SEC's rule allows persons to solicit clients without requiring the solicitor to the register with the agency. *See* 17 C.F.R. § 275.206(4)-3 (2015). Instead of a registration requirement, the SEC requires that the solicitor and the investment advisor memorialize their agreement in a private writing. *Id.* The SEC's rule also addresses the type of solicitation within its scope and the materials that may be communicated. *Id.* This rule allows the solicitor to exercise free commercial speech rights without the burden of registration, placing any burden of the regulation on the registered party who is responsible for investment advice, may take custody of client funds and be in a position to harm the investor. *See id.* In the face of a less burdensome alternative, such as the SEC's rule, § 581-29(I)'s overbreadth is apparent.

6. State Failed to Carry its Burden and the Statute Must be Found to Unconstitutionally Regulate Commercial Free Speech.

The State failed to satisfy its burden under the *Central Hudson* test, therefore, Paxton's Writ of Habeas Corpus should have been granted and the Indictment dismissed.

C. Section 581-29(I) is Void for Vagueness as it Unconstitutionally Fails to Give a Person Fair Notice of What Conduct is Prohibited by the Statute and Allows for Arbitrary Enforcement of the Statute.

The language of § 581-29(I) is unconstitutionally vague, as it fails to give a person fair notice of what conduct is prohibited by the statute and allows for arbitrary enforcement in that (i) the term "solicit" as incorporated from § 581-4(P) is undefined and failure to define that term renders the statute vague and (ii) the § 581-29(I) lack of a scienter requirement renders the statute vague.

The Court of Criminal Appeals has repeatedly held,

> [T]he State Securities Act is highly penal in nature and requires that it be strictly construed. A forbidden act must come clearly within the prohibition of the statute and any doubt as to whether an offense has been committed should be resolved in favor of the accused.

Thomas v. State, 919 S.W.2d 427, 429 (1996) quoting *Bruner v. State*, 463 S.W.2d 205, 215 (Tex.Crim.App. 1970).

When First Amendment freedoms are implicated, the law must be sufficiently definite to avoid chilling those freedoms. *Long*, 931 S.W.2d at 287. Statutes restricting First Amendment freedoms require a greater degree of specificity than other contexts. *Id.* citing *Grayned*, 408 U.S. at 109; *Kramer v.*

Price, 712 F.2d 174, 177 (5th. Cir. 1983). Commercial speech is subject to constitutional protection by the First Amendment. *Celis v. State*, 354 S.W.3d 7, 35 (Tex. App.—Corpus Christi 2011), aff'd, 416 S.W.3d 419 (Tex. Crim. App. 2013).

1. The Term "Solicit" as Incorporated from § 581-4(P) is Undefined Rendering § 581-29(I) Unconstitutionally Vague.

The Act does not define what it means to "solicit." *See* TEX. REV. CIV. STAT. ANN. § art 581 et seq. "Solicit" means to ***ask for something***, such as money from a person, a group or companies. *Solicit*, Merriam-Webster, http://www.merriam-webster.com/dictionary/solicit (last visited Feb. 19, 2016). Section 581-29(I), incorporating § 581-4(P), generally prohibits all solicitation by any person for an investment advisor without out registration. The TSA's failures to define solicit as used in § 581-4(P) renders § 581-29(I) vague because a person of ordinary intelligence would not know whether their communications constitute violations. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991) ("The question is not whether discriminatory enforcement occurred here, and we assume it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real possibility.").

The term does not give an indication as to what forms of communication are regulated, what its limitations are, nor what content is required before triggering criminal liability. The person or company that places a television, radio or internet

based advertisement for an investment advisor cannot know if registration is required by the face of the Statute. Likewise, the street sign holder, sign painter, and web host cannot clearly ascertain whether their conduct requires registration with the TSSB. The Regulation simply lacks the degree of specificity required when a law seeks to restrict protected commercial speech. *See Long*, 931 S.W.2d at 287. Due to the vagueness of solicit within § 581-4(P), it cannot be said that the act alleged in the Indictment clearly comes within the prohibition of § 581-29(I) and therefore any doubt as to whether an offense has been committed should be resolved in favor of the accused. *See Thomas*, 919 S.W.2d at 429.

2. Section 581-29(I)'s Lack a Scienter Requirement Renders the Statute Vague.

Section 581-29(I) lacks a scienter requirement. Section 581-4(P), which is incorporated into § 581-29(I) and sets forth the manner and means, which likewise lacks a scienter requirement. These statutes fail to plainly dispense with a culpable mental state, which would indicate strict liability was intended. *See* TEX. PEN. CODE § 6.02. The lack of an articulated mental state, markedly exacerbated by the vagueness discussed above, renders § 581-29(I) void for unconstitutional vagueness.

TEX. PEN. CODE §§ 6.02-3 requires culpable mental states for offenses, even when the statutes fail to prescribe one, and directs how such mental states are

applied to the proscribed conduct. Whether mental culpability is required as to the act of solicitation, the circumstance of not being registered with the Texas State Securities Board, or both, are questions unaddressed by any Texas appellate court.

Lack of a well-defined *mens rea* requirement related to the universal prohibition on solicitation fail to give a person of ordinary intelligence notice of what is proscribed. *See Long,* 931 S.W.2d at 287. Lacking specificity as to *mens rea* requirements for culpability and imprecise into how TEX. PEN. CODE §§ 6.02-3 would apply, § 581-29(I)'s regulation of protected free speech is void as unconstitutionally vague. *See id.* Due to the vagueness scienter requirements, the act alleged in the Indictment does not clearly come within the prohibition of the statute and therefore any doubt as to whether an offense has been committed should be resolved in favor of the accused. *See Thomas*, 919 S.W.2d at 429.

D. Conclusion.

Paxton's Fourth Application for Writ of Habeas Corpus should have been granted and the Indictment dismissed.

PRAYER FOR RELIEF

Mr. Paxton respectively asks that this Court reverse the Judgment of the Trial Court and rule that Paxton's First, Second, Third, and Fourth Applications for

Writs of Habeas Corpus should have been granted, and the Indictments against Appellant be dismissed.

Respectfully submitted,
HILDER & ASSOCIATES, P.C.

/s/ Philip H. Hilder

Philip H. Hilder
Texas Bar No. 09620050
Q. Tate Williams
Texas Bar No.: 24013760
Paul L. Creech
Texas Bar No. 24075578
(713) 655-9111 telephone
(713) 655-9112 facsimile
philip@hilderlaw.com
tate@qtatewilliamslaw.com
paul@hilderlaw.com

CERTIFICATE OF SERVICE

I certify that on February 22, 2016, I provided a copy of the foregoing Brief to the Collin County District Attorney by delivering a true and correct copy to them by electronic delivery at the time this Brief was filed through the same service provider.

/s/ Philip H. Hilder
Philip H. Hilder

CERTIFICATE OF REDACTION

I certify that I have made any necessary redactions in accordance with the Orders of the Texas Supreme Court. None were required in this case.

/s/ Philip H. Hilder
Philip H. Hilder