No. 17-0588

IN THE SUPREME COURT OF TEXAS

ERIC HILLMAN,
Petitioner/Plaintiff,

v.

NUECES COUNTY, TEXAS *and*
NUECES COUNTY DISTRICT ATTORNEY'S OFFICE,
Respondents/Defendants.

AMICI CURIÆ BRIEF OF **INNOCENCE PROJECT, INC.** AND **INNOCENCE PROJECT OF TEXAS**

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INTEREST OF AMICI CURIÆ

This *amici* brief is submitted on behalf of the Innocence Project and the Innocence Project of Texas, nonprofit organizations devoted to exonerating persons convicted of crimes they did not commit, and to using the “lessons learned” from those cases to implement common-sense reforms to the criminal justice system that can prevent wrongful convictions from occurring in the first place.

The Innocence Project, Inc. (“IP”) is a national legal services and criminal justice reform organization based in New York, New York. Founded in 1992 by Barry Scheck and Peter Neufeld, the IP represents convicted persons who seek to overturn their convictions based on actual innocence, including but not limited to DNA evidence. To date, IP’s attorneys have served as lead or co-counsel for more than 200 innocent persons in the United States—including 26 in Texas—who were exonerated based on evidence that was newly discovered and/or subjected to forensic testing during post-conviction proceedings. The IP also regularly consults with and conducts trainings for legislatures, judges, prosecutors, and defense attorneys on how to identify and prevent wrongful convictions, including those caused by suppression of exculpatory evidence.

Of particular significance for the instant case, the IP served as lead counsel for more than eight years for Michael Morton of Williamson County, who was exonerated and freed from prison in 2011 after DNA evidence and previously-

undisclosed *Brady* material discovered by the IP in the District Attorney's trial file cleared Mr. Morton of the 1986 murder of his own wife. It was in Mr. Morton's name, and with *amici*'s assistance, that this State's comprehensive discovery-reform law, the "Michael Morton Act," was enacted by a unanimous State Legislature in its 2013 term – *i.e.,* the statute upon which Petitioner chiefly relies to advance his claim in this Court.

The Innocence Project of Texas ("IPTX"), based in Fort Worth, Texas, was founded in 2006. Like the Innocence Project, the IPTX is dedicated to exonerating the wrongly convicted through newly discovered or newly available evidence of innocence, and is actively engaged in reform efforts to provide the wrongful convicted with meaningful avenues through which they may seek relief from their convictions in court. IPTX's Executive Director, Mike Ware, is the past Special Fields Bureau Chief for the Dallas County District Attorney's Office. That office instituted the first-of-its-kind Conviction Integrity Unit, designed to re-examine questionable convictions and set guidelines for prosecutors to guard against future error. To date, IPTX has helped free 16 wrongfully convicted persons in Texas and currently has more than 500 prospective cases under review.

Amici and the undersigned counsel have received no fee regarding the submission of this brief. Counsel are submitting this brief, *pro bono*, so that this Court might have the most information available regarding the Michael Morton Act,

sovereign (governmental) immunity, Texas employment law, and other provisions governing the legal and ethical duties of prosecutors and the broader public policy considerations in deciding whether to accept this case for review.

PURPOSE OF THIS BRIEF AND SUMMARY OF REASONS TO GRANT THE PETITION

This brief serves two purposes. *First*, amici seek to give the Court some important context on the nature of the illegal act that Mr. Hillman refused to perform and its significance for Texas jurisprudence (from the perspective of lawyers and public policy experts who deal with these issues on a day-to-day basis). This will be done in Sections I and II. *Second,* we hope to provide the Court with context for where this case fits in the constellation of cases involving Government Immunity and Texas employment law, and specifically why this Court (and not the Legislature) is the appropriate forum in which to resolve the critical legal issue that Hillman raises in his petition (Sections III and IV).

The Importance of this case for the Criminal Justice System

In recent years, Texas's legislative, judicial, and executive branches have made this State a national leader in the movement to identify and prevent wrongful convictions of the innocent. Of particular note is the extent to which this State has taken action on multiple fronts to ensure that criminal defendants have meaningful access to exculpatory evidence in the State's possession before they are sentenced

to prison or (worse) executed for crimes they did not commit – in essence, to do far better at fulfilling this fundamental rule of justice than in the past.

The impetus for such sweeping reforms included, most notably but not exclusively, the infamous case of Michael Morton of Williamson County -- an innocent man who served nearly 25 years in prison wrongly convicted of the murder of his wife, before being cleared by DNA evidence that identified the real killer. In the proceedings that led to Morton's exoneration, it emerged that his original conviction was tainted by prosecutorial misconduct – violations of law so egregious that the man who sent him to prison, former District Attorney and Judge Ken Anderson, became the first prosecutor in the nation to face disbarment *and* jail time for his role in securing a wrongful conviction. Fortunately, in the wake of these revelations, Texas has made enormous strides towards changing both prosecutorial culture and the laws regarding an accused citizen's access to favorable evidence.

The Legislature has (through the "Michael Morton Act") dramatically transformed its pretrial discovery rules, *unanimously* voting to give defendants access to virtually all evidence in the State's possession that may aid their defense; extended the statute of limitations on bar discipline against prosecutors whose misconduct leads to wrongful convictions; and expanded defense access to DNA testing and critical information regarding jailhouse informant and "confession" evidence. Perhaps even more admirably, many members of the "prosecutorial" bar

have followed suit, voluntarily adopting new policies to prevent and identify wrongful convictions, and obtaining professional discipline and more against prosecutors who intentionally withhold evidence.

Hillman's case poses a critical test of this State's continued commitment to those fundamental principles. The lower courts' refusal to allow Hillman's wrongful termination suit to proceed not only rests on an unduly restrictive ruling of the *Sabine Pilot* doctrine. If allowed to stand, it would permit a small minority of District Attorneys to not only violate these and other laws with impunity, but to retaliate against those conscientious prosecutors who – like Hillman – refuse to violate their core legal and ethical obligations, and thereby create a culture of disregard for the law that is the exact opposite of what so many in this State have worked so hard to achieve. And the consequences of undermining existing law could not be higher. As the Morton case and countless others have shown, wrongful convictions jeopardize nothing less than the lives, liberty, and public safety of Texas's citizens.

How This Case Fits within Texas Jurisprudence on Immunity and Employment-At-Will

Because *Sabine Pilot*'s limited protection for employees who refuse to commit illegal acts is a judicially created doctrine, this Court – not the Legislature – is the appropriate forum to recognize and define the contours of those protections for government officials (including prosecutors, who hold a unique place in the law as "ministers of justice" rather than merely as advocates). For these reasons, *amici*

strongly urge this Court to grant Hillman's petition for review, and extend *Sabine Pilot's* protections to include, at the very least, government officials who refuse to deprive their fellow citizens of access to exculpatory evidence.

ARGUMENT & AUTHORITIES

I. THE "PUBLIC POLICY" UPON WHICH THIS COURT DECIDED *SABINE PILOT* IS EQUALLY IF NOT MORE APPLICABLE HERE -- AS THE GOVERNMENT HAS ALREADY MADE CLEAR THROUGH A SERIES OF LEGISLATIVE ENACTMENTS AND OTHER REFORMS

In 1985, this Court examined and relied on "changes in American society" and in Texas law regarding employee rights and welfare in the workplace to adopt judicially-created protections for "at will" employees who refuse to follow an employer's instructions to violate the law. *Sabine Pilot v. Hauck,* 687 S.W.2d 733, 734-35 (Tex. 1985). Citing legislative enactments, scholarly research, and judicial holdings, this Court declared that henceforth, as a matter of "public policy," an employer in this State may not discharge "an employee who refused to commit an illegal act" solely for that reason. *Id.* In so doing, it rejected the contention that extending such protections should be left to the legislature, not the courts. *See id.*

Petitioner's request that this Court expressly hold that *Sabine Pilot* protects government lawyers who refuse to intentionally violate the due process rights of criminal defendants finds support in a similar public policy "wave" of reform. Thanks largely (but by no means exclusively) to the power of modern DNA science,

which "has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty," *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 55, (2009), our nation has witnessed the release of factually innocent persons from its jails and prisons in numbers scarcely imagined a generation ago. Since 1989, newly discovered evidence of innocence has helped exonerate at least 2,189 persons wrongly convicted of serious crimes, 354 of them through DNA evidence.[1]

To date, Texas has seen more post-conviction DNA exonerations (52) than any State in the nation -- nearly 15 % of the national total.[2] It also leads the nation in total exonerations (332) since 1989 -- that is, persons who were exonerated after trials or guilty pleas not only through previously-unavailable DNA testing, but also other kinds of exculpatory evidence such as revelations of suppressed *Brady* material or non-DNA forensic testing).[3]

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[1] *See* National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited March 19, 2018); Innocence Project, *Exonerated by DNA* (last visited March 16, 2018), *available at* https://www.innocenceproject.org/all-cases/#exonerated-by-dna. For purposes of this data, an "exoneration" is defined as a case in which a conviction is vacated in whole or in part based on newly discovered evidence supporting a claim of actual innocence, and the defendant's indictment is thereafter dismissed, the defendant is acquitted at retrial, and/or the defendant receives a pardon.

[2] *See* Innocence Project, *Exonerated by DNA, supra* n. 1.

[3] *See* National Registry of Exonerations, *supra* n. 1, at http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=ST&FilterValue1=TX.

Some of these wrongful convictions were tragic but unavoidable relics of an earlier era. Many cases from the 1980s and 1990s, for example, involved limitations in scientific technology that predated modern DNA science, or mistaken eyewitness testimony that today's more accurate pretrial identification procedures (including those that have now been mandated statewide in Texas) will go a long way towards preventing.[4] The Texas Legislature has, for example, twice in recent years enacted significant statewide reforms to improve eyewitness identification procedures used by police and substantially reduce the risk of wrongful convictions in this area.[5]

However, a smaller but not-insignificant subset of these wrongful convictions revealed another "hard truth": that some prosecutors and police officials, in their zeal to obtain convictions, had either negligently or deliberately failed to disclose evidence of innocence that was in the State's possession and control prior to trial or the entry of a plea. For example, the University of Michigan's National Registry of Exonerations annual report on post-conviction exonerations in the United States found that in 2017, that a "record number" of exonerations nationally (87 out of 139)

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[4] *See, e.g.,* Jolie McCollough and Justin Deen, "How Texas is becoming the 'gold standard' against wrongful convictions," *Texas Tribune,* Sept. 20, 2017 (discussing Texas legislature's enactment of reforms to improve eyewitness identifications, reduce false confessions, and track informant testimony between 2010-2017).

[5] See Tex. Code Crim. Proc. Art. 38.20 (Vernon's 2017); HB 215 (Acts 2011, 82nd Leg., ch. 219 (H.B. 215), § 1, eff. Sept. 1, 2011) & HB 34 Acts 2017, 85th Leg., ch. 686 (H.B. 34), §§ 4, 5, eff. Sept. 1, 2017.

involved "official misconduct" as a contributing factor, and that "the most common misconduct documented . . . involves police or prosecutors (or both) concealing exculpatory evidence."[6] Indeed, official misconduct has been a factor in more than half (1134) of the nationally-reported exonerations since 1989, with at least 68 occurring in Texas.[7]

To its credit, Texas has done far more than most states to acknowledge these miscarriages of justice and prevent them from recurring.[8] Thus, as in *Sabine Pilot*, this Court can look to a host of legislative enactments, government actions, scholarly and lay writings, and other indicia of a broad consensus on this issue. Simply put, there is overwhelming support for the "public policy" behind the modest but critical legal protection that Hillman seeks to have this Court recognize. Those same enactments (especially, but not only, the Michael Morton Act) make clear that if this Court does *not* act, Hillman and others like him will face an intolerable "Hobson's

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[6] *See* National Registry of Exonerations, EXONERATIONS IN 2017, March 14, 2017, at pp. 6-7, *available at* https://www.law.umich.edu/special/exoneration/Documents/ExonerationsIn2017.pdf

[7] *See* National Registry of Exonerations, *supra* n. 1, at http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?FilterClear=1&View={faf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7}&SortField=OM&SortDir=Asc&FilterField1=OM&FilterValue1=8_OM&FilterField2=ST&FilterValue2=TX (last visited March 19, 2018).

[8]*See* McCollough & Deen, *supra* n. 4.

choice" between their employment on the one hand, and potentially losing their law licenses and facing criminal prosecution on the other.

A. Michael Morton's Exoneration, and Ken Anderson's Prosecution

In October 2011, Michael Morton of Williamson County walked free from prison after DNA evidence proved that he had served nearly twenty-five years behind bars for allegedly killing his own wife; Morton had not only lost his life partner, but also custody of their only child (a four-year-old son), and was falsely branded a killer of the woman he loved most in the world, before he finally cleared his name. And while his was by no means the first wrongful conviction identified by DNA evidence to seize public attention, the Morton case riveted the citizens of this State and nation because of two additional, horrific factors at play. First, DNA proved that while Morton was in prison, the real killer of his wife had gone on to murder *another* young wife and mother named Debra Baker in an adjoining County, a crime that could well have been prevented had State officials not rushed to judgment against Morton and done a meaningful investigation of the crime. Second – and most critically – his lawyers discovered that the former District Attorney, Ken Anderson, who prosecuted Morton and had gone on to become the senior District Judge in Williamson County, had deliberately withheld multiple items of evidence exculpating Morton that were contained in his trial files, including an eyewitness account from the couple's young child that described the crime and the "monster"

who committed it in chilling and accurate detail, and made clear that "Daddy" was not the killer.[9]

After Morton's release, his legal team joined with leaders of the Bar and bench in this State to hold the former prosecutor accountable for his misdeeds. Invoking a little-known Texas legal mechanism called a "court of inquiry," which permits district judges to issue arrest warrants for public officials against whom there exists probable cause to believe they have committed a criminal act, Morton's lawyers successfully petitioned this Court to appoint Houston attorney Rusty Hardin (a longtime former prosecutor) as special counsel, and the Hon. Louis Sturns to preside, in a Court of Inquiry regarding Anderson's alleged suppression of evidence at the Morton trial.[10] After a hearing, which included testimony by Anderson and his former colleagues, Judge Sturns found probable cause to arrest and charge Anderson with three crimes under Texas law, all related to his suppression of evidence in 1987: TEX GOV'T CODE §21.001(a) (criminal contempt of court); TEX. PENAL CODE § 37.09(a) (1) (tampering with or fabricating physical evidence), and Tex. Penal Code

[9] For a comprehensive account of Morton's wrongful conviction and the misconduct that led to it, see Pamela Colloff's National Magazine Award-winning *Texas Monthly* series, "The Innocent Man," *available at* https://www.texasmonthly.com/politics/the-innocent-man-part-one/ (Nov. 2012) *and* https://www.texasmonthly.com/articles/the-innocent-man-part-two/ (Dec. 2012).

[10] *See* Tex. Code Crim. Proc. art. 52.01 *et seq.*

§37.10(a)(3) (tampering with government records).[11] Specifically, Judge Sturns found probable cause to conclude that Anderson had violated a trial court order to turn over, for *in camera* review, reports prepared by the lead detective (withholding the exculpatory material in those files from what he produced), and by falsely responding "No, sir," when asked by the trial judge if he had any information favorable to the defense.[12]

On a parallel track, the State Bar of Texas initiated disciplinary proceedings against Anderson, and he resigned from the bench in September 2013, before those proceedings were even complete.[13] Ultimately, on November 8, 2013, Anderson entered into a plea agreement and settlement in both cases, in which he (1) permanently surrendered his license to practice law, and (2) pleaded *nolo contendere* to one count of criminal contempt, for which he received a negotiated sentence of ten days in the Williamson County jail.[14]

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[11] *See In Re Honorable Ken Anderson*, Cause No. 12-0420-K26, Findings of Fact and Conclusions of Law (April 19, 2013), *available at* https://www.innocenceproject.org/wp-content/uploads/2016/02/0702_Morton_COI-Findings-of-Fact-and-Conclusions-of-Law_041913.pdf

[12] *See id.*

[13] *See* Pamela Colloff, "Why Michael Morton's Prosecutor Finally Resigned," *Texas Monthly*, Sept. 26, 2013, *available at* https://www.texasmonthly.com/articles/why-michael-mortons-prosecutor-finally-resigned/

[14] *See* Chuck Lindell, "Ken Anderson to Serve 10 Days in Jail," *Austin American Statesman*, Nov 8, 2013; Texas Bar Journal, *Disciplinary Actions,* Feb. 2014, *available at* https://www.law.uh.edu/libraries/ethics/attydiscipline/2014/February2014.pdf.

B. The Michael Morton Act

Morton's exoneration and Judge Anderson's disbarment and criminal prosecution sent shock waves through Texas's legal system. Kim Ogg, the District Attorney of Harris County, described the Morton case to the *New York Times* as "the single most important development in her 30 years of criminal practice."[15] Fortunately, however, lawmakers and other state officials did more than offer condolences to the Morton family, and the family of the second victim (Debra Baker) who was murdered by the same intruder while Morton sat in prison. They acted to reduce the risk that other wrongly accused defendants and crime victims would suffer the same fate.

Most notably, in the session that followed Morton's exoneration, the Texas Legislature unanimously passed the Michael Morton Act (the "MMA" or "Morton Act"), TEX. CODE CRIM. PROC. ANN. ART. 39.14 *et seq.* (2013). The Morton Act dramatically revamped the procedures for pretrial discovery in criminal cases, making disclosure of all evidence in the law enforcement's possession the default

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[15] Emily Bazelon, "She Was Convicted of Killing Her Mother. Prosecutors Withheld the Evidence That Would Have Freed Her," *New York Times Magazine*, Aug 2, 2018 (available at https://www.nytimes.com/2017/08/01/magazine/she-was-convicted-of-killing-her-mother-prosecutors-withheld-the-evidence-that-would-have-freed-her.html) (describing case of Noura Jackson, reversed by Tennessee Supreme Court based on prosecutorial misconduct, and surveying landscape of prosecutor-accountability rulings and reforms nationally); *see also id.* (quoting Gary Udashen, president of Innocence Project of Texas, that Morton case "changed the whole landscape" in Texas, putting newfound fear into prosecutors that they would be "caught withholding exculpatory evidence").

rule (with certain exceptions for witness safety and privacy), rather than relying on prosecutors to determine what evidence they possessed that was "favorable" to a defendant and subject to mandatory disclosure. And while the MMA did not alter prosecutors' longstanding obligations under the state and federal constitutions to disclose exculpatory evidence in the State's possession under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, the Act included a series of prophylactic measures to prevent such violations from occurring, including (1) listing specific categories of information that prosecutors are required to obtain from other agencies and promptly disclose to the defense, (2) codifying the requirement in Texas Rule of Professional Conduct 3.09(d) that prosecutors timely disclose any information they possess that "tends to negate the defendant's guilt"; and (3) specifying time frames and procedures for disclosure -- including orders the district courts are empowered to issue to ensure State compliance, and *representations that must be made by counsel, on the record*, regarding discovery provided prior to entry of a guilty or no-contest plea. *See, e.g.,* TEX. CODE CRIM. PROC. art. 39.14 (a),(b),(h),(j).

The Morton Act was the first bill signed into law that session in a public signing ceremony by then-Gov. Perry, who called it "a major victory for integrity and fairness in our judicial system."[16] The Governor added that with Texas's "law and order" tradition "comes a very powerful responsibility to make sure that our

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[16] Brandi Grissom, "Perry Signs Michael Morton Act," *Texas Tribune,* May 16, 2013.

judicial process is as transparent and open as humanly possible."[17] The new law was also widely praised, by Democratic and Republican lawmakers (who called it a "milestone in the journey towards justice in Texas") and lawyers from the Texas Defender Service (whose director described the bill signing as "a great day for fairness in Texas" and "something we can all be proud of").[18] Indeed, the swift passage of the Morton Act did much to offset the criticism from many commentators that the relatively light (or, as the Dallas *Morning News* termed it, "ridiculously short") 10-day jail term that Anderson had received would not meaningfully deter future miscarriages of justice.[19] As the *Morning News* editorial board explained, "The Legislature has sounded the warning loudly and clearly, should other prosecutors consider following in Anderson's footsteps").[20]

C) Wave of Reform

The Morton Act's passage was not a "one and done" remedial measure. Instead, the legislative (and public) consensus that comprehensive action must be taken to prevent Texas's citizens from being wrongly imprisoned or executed – and that prosecutors must be held accountable for violations of the law – was reflected

[17] *Id.*
[18] *Id.*
[19] Editorial, "Justice for Ken Anderson," *Dallas Morning News*, Nov. 10, 2013.
[20] *Id.*

in further legislative, executive, and judicial action in the years that followed. For example:

A reinvigorated State Bar holds prosecutors to account. Ken Anderson may have been the first prosecutor to be disciplined by the State Bar for knowingly withholding evidence that led to a wrongful conviction, but he was not the last. In January 2014, the State Bar of Texas ("SBT") brought charges against Charles Sebesta, the former Burleson County District Attorney, alleging that he had knowingly withheld multiple items of favorable evidence in the 1994 trial of Anthony Graves – who spent 12 years on death row before being exonerated and freed in 2012. After a trial and appeal, the charges were substantiated and Sebesta's license to practice law was permanently revoked in February 2016.[21]

The Board of Disciplinary Appeals Codifies Broad Interpretation of Ethical Rules, Coextensive with the Morton Act. Notably, the SBT has continued to investigate and discipline prosecutors for intentional withholding of all evidence *favorable* to a criminal defendant -- even where such evidence is not wholly exculpatory or "material" – and the Board of Disciplinary Affairs has backed them up in no uncertain terms. For example, in *Schulz v. Commission for Lawyer Discipline*,[22] No. 55649 (Dec. 17, 2015), the Board of Disciplinary Appeals

[21] *See Sebesta v. Comm'n for Lawyer Discipline of the State Bar of Texas,* No. 56406 (Feb. 8, 2016), *available at* http://txboda.org/sites/default/files/pdfs/Sebesta56406Opinion.pdf
[22]The *Schultz* opinion can be found

(appointed by this Court) affirmed the Commission's imposition of sanctions against a prosecutor who knew, but failed to disclose prior to entry of defendant's guilty plea, that the State's chief identification witness had a limited ability to view the assailant's face. Schultz ultimately conceded that he should have disclosed this information, but maintained that his conduct did not constitute a violation of TEX. RULE PROF. COND. 3.09(d) because such evidence was merely impeaching, but not "exculpatory." The BDA disagreed, issuing a lengthy opinion (1) holding that Rule 3.09(d)'s scope is broader than what is constitutionally required under *Brady*, requiring disclosure of all evidence that, *inter alia,* "tends to negate the guilt of the defendant," (2) noting that the Rule was codified into the terms of the Michael Morton Act, making such broad disclosures a statutory as well as ethical duty, and (3) holding that prosecutors are legally obligated to turn over all evidence favorable to a defendant, without regard to whether it is "material" to the outcome of the trial or plea proceeding. *Id.* at 9-11.

Schultz was – with good reason – the focus of much attention among state prosecutors. *Texas Prosecutor* featured the case in its cover story ("Just Disclose It") in the journal's March-April issue, followed by a "deeper discussion" of what *Schultz* requires by a host of statewide experts in the May-June online edition.[23]

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at http://www.txboda.org/sites/default/files/pdfs/Schultz55649%20Opinion.pdf

[23] *See* Texas District and County Attorneys Association, "A Deeper Discussion of BODA's Schultz Decision," *Texas Prosecutor,* May-June 2016, Volume 46, No. 3, *available at*

One elected D.A. warned TCDAA members that *Schultz* "put prosecutors on notice that disclosure is a matter of such significance that even relatively minor mistakes can leave one's law license in the balance"; another cautioned that BODA had "attached a significant penalty" to what some might see as even minor violations of the Morton Act and Rule 3.09(d). A third advised that prosecutors must protect themselves by "making full disclosure a culturally habitual practice within the office."[24]

Extended statute of limitations on Bar discipline. In 2013, the Legislature gave a fresh four-year time clock for the State Bar to discipline prosecutors who have obtained wrongful convictions through egregious violations of their discovery obligations. The new law, SB 825, now provides that "that the statute of limitations applicable to a grievance filed against a prosecutor that alleges a violation of a disclosure rule [ref. Rule 3.09(d)] does not begin to run until the date on which a wrongfully imprisoned person is release from a penal institution."[25] The change was inspired not just by Ken Anderson's proceedings (in which the Bar faced timeliness objections that were mooted by Anderson's plea agreement), but by the case of

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https://www.tdcaa.com/journal/deeper-discussion-boda%E2%80%99s-schultz-decision; Texas District and County Attorneys Association, "Just Disclose It," *Texas Prosecutor,* March-April 2016, Vol. 46, No.2, *available at* https://www.tdcaa.com/journal/just-disclose-it.

[24] *Id.* (emphasis supplied).

[25] *See* TEX. GOV'T CODE § 81.072; SB 825 http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=83R&Bill=SB825

Anthony Graves, *see supra,* a wrongly convicted Burleson County man who spent 18 years in prison – twelve of them on death row – in large part due to suppression of evidence by his trial prosecutor, Charles Sebesta. The State Bar's initial proceedings against Sebesta were deemed time-barred because the misconduct (and subsequent Bar action) occurred years before Graves was found "actually innocent" by the Texas courts and released from prison. After the passage of SB 825, however, the Bar was able to initiate new charges, and after a disciplinary trial, succeeded in revoking Sebesta's law license.[26]

Making Complete Disclosure a Reality. Equally reflective of the broad consensus on this issue are the proactive steps taken by elected District Attorneys to fulfill the mandate of the Morton Act – *i.e.,* to ensure that line prosecutors are aware of the full universe of exculpatory and impeachment information they need to disclose, and do so. Some of these proactive measures have, in turn, prompted statewide legislative reform.

In 2016, for example, Tarrant County Criminal District Attorney Sharen Wilson (a Republican elected in 2014 with a history as a "tough judge," and who pledged to be "a stronger voice for crime victims and arresting officers")[27] joined in a motion to vacate the conviction of Innocence Project client John Nolley, who had

[26] *See supra* n. 21.
[27] *See* Fort Worth Star-Telegram, "Wilson for DA, But With Caution," Feb. 11, 2014.

served 18 years in prison for a murder he had always maintained he did not commit, based on documents her staff discovered in TCCDA archives that contradicted the testimony of a jailhouse informant who had testified against Nolley in 1997, but of which it appeared that the trial prosecutor had also been unaware, because the files had been maintained by a different unit in the DA's office. Concerned that prosecutors working on active cases under her supervision might not themselves be aware of information covered by *Brady* and the Morton Act that related to informants' history, CDA Wilson and her staff went beyond merely recommending relief in Mr. Nolley's case, and created a comprehensive internal checklist and tracking system to ensure that all such information would be (a) fully investigated, and (b) disclosed to the defense, *before* any jailhouse witnesses are called to testify.[28] Tarrant County's model policy, in turn, became the basis for a mandatory, *statewide* jailhouse informant tracking system and discovery checklist enacted by the Legislature in 2017 – now codified into the state's criminal discovery rules, including but not limited to art. 39.14(h) (the Morton Act).[29]

[28]*See* Christopher Connelly, "A Lying Jailhouse Snitch Sent a Man to Prison; Texas Passed a Law to Prevent That," KERA News, Sept. 18, 2017, *available at* http://keranews.org/post/lying-jailhouse-snitch-sent-man-prison-texas-passed-law-prevent.

[29]*See id.;* 2017 Tex. Sess. Law Serv. Ch. 686 (H.B. 34), *available at* http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=85R&Bill=HB34

To date, the District Attorneys in each of Texas's five largest counties (Dallas, Harris, Tarrant, Travis, and Bexar) have dedicated staff and funding to create their own "conviction integrity units" – divisions tasked with investigating claims of wrongful conviction, and consenting to post-conviction relief without litigation when such claims are well-founded.[30] Nationally, these CIU's (many of them modeled after the pioneering work done by Dallas County, which created one of the first CIU's in the nation in 2007) have played a key role in at least 269 exonerations – 42 of them in 2017 alone.[31] And some of those CIU-led investigations have exposed serious misconduct on the part of active or former ADA's, the egregiousness of which – to their credit – the elected District Attorneys have not denied. In January 2018, for example, the Court of Criminal Appeals granted post-conviction *Brady* relief to two of *amici*'s clients who were wrongly convicted of a murder in Dallas County eighteen years ago.[32] The findings adopted by the CCA were based on a joint reinvestigation of the case conducted by *amici* and the Dallas District Attorney's Office, which led the State to agree that a former trial prosecutor

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[30] *See generally* Barry Scheck, "Conviction Integrity Units Revisited," 14 Oh. St. Jour. Crim. L. 705 (2017) (discussing rise of conviction integrity units nationally and Dallas County's model).
[31] *See* Exonerations in 2017, *supra* n.5, at 2.

[32] *See* Innocence Project, "Texas High Court Overturns Murder Convictions of Two Men," Jan. 10, 2018, *available at* https://www.innocenceproject.org/high-texas-court-overturns-murder-convictions-of-two-men/.

had suppressed exculpatory evidence regarding, and/or presented false testimony from, more than a dozen informants and eyewitnesses.[33]

In sum, this Court has ample grounds to find that the overwhelming "public policy" of this State – reflected in bold action by all three branches of government to prevent wrongful convictions generally, and prosecutorial misconduct specifically – supports Hillman's far more modest claim for legal protection here.

II. DEFENDANTS' UNLAWFUL "ORDER" THAT HILLMAN VIOLATE THE LAW UNDERMINES PUBLIC POLICY AND PUBLIC SAFETY – AND HILLMAN'S REFUSAL MERITS JUDICIAL PROTECTION

A. Former ADA Hillman Followed the Law, Even Though His Supervisors Ordered Him To Break It

Mr. Hillman's actions prior to his termination reflect precisely the sort of conscientious, careful attention to the Morton Act's requirements and underlying constitutional mandates that all three branches of Texas government worked so hard to instill among prosecutors statewide in the wake of the Morton and Graves exonerations. By contrast, the conduct of then-District Attorney Skurka and Hillman's line supervisor, Deborah Rudder, fly in the face of – and, if unchecked, pose a real threat to – the fairness and accuracy of our justice system.

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[33] *See id.*; *see also Ex Parte Mozee and Ex Parte Allen,* Findings of Fact and Conclusions of Law, Mar. 3, 2017, *available at https://www.innocenceproject.org/wp-content/uploads/2018/01/1087_Mozee-and-Allen-Agreed-Findings-2017-1.pdf.*

As set forth in his Second Amended Petition (the facts of which must, of course, be taken as true at this stage of the proceedings), it is clear that by January 2014, Hillman had learned the lessons of the Morton case and the Act passed in his name. He diligently investigated the case assigned to him, declining to accept the offense reports as the last word on what had transpired. He located a new eyewitness who contradicted law enforcement's claim that the defendant was intoxicated at the scene, and went on to confirm with the victim of the accident that this witness had, in fact, been present. Yet his supervisor, Deborah Rudder, ordered him not to disclose this obviously exculpatory information because it was a product of his own "independent investigation" -- a patently false interpretation of *Brady*, the Morton Act, and Rule 3.09(d) that finds no support in case law, the statute, or ethics opinions. *See., e.g., Ex Parte Miles,* 359 S.W.3d 647 (Tex. Crim. App. 2012) (*Brady* requires disclosure of all favorable evidence possessed by "the State," which "includes, *in addition to the prosecutor, other lawyers and employees in his office* and members of law enforcement connected to the investigation and prosecution of the case") (emphasis supplied).

Concerned about his supervisor's misinterpretation of the law – and no doubt, in the wake of Ken Anderson's high profile prosecution two months earlier, the risk of his own criminal prosecution (as *Sabine Pilot* envisions) if he knowingly failed to disclose exculpatory evidence – Hillman contacted both the Texas Center for

Legal Ethics and the State Bar's ethics hotline for a second opinion. Both told him in no uncertain terms what he already knew: turn it over. And so he did. When he went back and informed his supervisor, she derisively told him, "Eric, you need to decide if you want to be a prosecutor or a defense attorney" – as if following the law (and the State Bar's directive) by disclosing evidence that might aid a defendant made Hillman less, not more, of a "true" prosecutor.[34] One week later, on the day the trial was to begin, Hillman was summoned to District Attorney Skurka's office, where the DA told him he was being fired immediately for refusing to "follow orders."

B. Hillman Risked Criminal Prosecution if He Followed Defendants' Unlawful "Orders" to Withhold Exculpatory Evidence from the Defense

The Morton Act codified prosecutors' existing *Brady* obligations and their ethical responsibilities under Rule 3.09(d) into the Code of Criminal Procedures. And it includes additional prophylactic measures (such as mandatory discovery of all investigative documents in the State's possession, absent limited exceptions) to

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[34] *Cf. Berger v. United, States,* 295 U.S. 78, 88 (1935) (the prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one").

ensure broad compliance. It is important to note, however, that while the Morton Act reflects an overwhelming policy mandate in favor of robust *Brady* disclosures that this Court can and should consider, *it has always been unlawful* for prosecutors to intentionally conceal exculpatory evidence from a criminal defendant, as the case of Ken Anderson made clear. In April 2013, Judge Louis Sturns, presiding at this Court's appointment over a special Court of Inquiry, found probable cause to conclude that in 1987 (*i.e.,* decades before Morton was exonerated or the MMA was enacted) Anderson committed three criminal offenses when he failed to produce the exculpatory police reports in his possession: Criminal Contempt of Court; Tampering With or Fabricating Criminal Records; and Tampering With Government Records.[35] In November 2013, Anderson pled no contest to the contempt charge, and was jailed.[36]

Certainly, a prudent prosecutor considering whether to disclose exculpatory information nine months after Anderson's high-profile arrest (as Hillman did, in January 2014) would have a well-founded fear that he risked criminal prosecution if he failed to do so and was caught, even if acting at the direction of the District Attorney (since "following the boss's orders" has never been a defense to a criminal act). That is exactly the kind of fear that the Legislature and Governor who passed

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[35] *See* supra n. 11-12.

[36] *See supra n.* 14.

the Morton Act sought to put into the hearts and minds of prosecutors who might otherwise be tempted to cross an ethical line in their zeal to convict. Indeed, the terms of the Morton Act itself, while they do not alter existing obligations to disclose favorable evidence, make that risk more likely, because the timetables and procedures set forth in the Act lay an even stronger groundwork for potential contempt-of-court charges if violated. Given that most criminal trial judges routinely enter discovery orders, and many inquire about the State's compliance in open court (as Morton's judge did in 1987), a prosecutor in Hillman's position could well find himself *committing criminal contempt* in flouting those orders after the Morton Act's passage.

C. Defendants' Violations of the Morton Act Continued – with Even Greater Consequences – in the Wake of Hillman's Termination

The importance of the protections Hillman seeks from this Court is underscored by what transpired in Nueces County *after* he was summarily fired for refusing to violate a law that carries criminal penalties. For not only did the Defendants' violations of the Morton Act and *Brady* continue, but Hillman's termination for refusing to "follow orders" appears to have sent an unequivocal message to other ADAs that they defied supervisory instructions to suppress evidence at their peril – with even greater consequences to accused defendants (and public confidence in the system) than in the vehicular-accident case Hillman was prosecuting in 2014.

The year after Hillman was fired, a Nueces County resident named Courtney Hayden was charged with murder. Hayden did not deny she had pulled the trigger, but claimed she acted in self-defense. The State's pathologist initially backed up Hayden's account that she had shot the decedent at close range as he came at her, telling the ADA assigned to the case that the fatal shot appeared to be a contact wound. Just after meeting with the ADA and learning the State's theory of the case, however, the expert substantially changed his opinion, texting the ADA to let her know he could now "live with three feet" as the estimated shooting distance. The ME also stated that he often changed his opinions (or, in his words, "highlight[ed]" them) to fit the theory of the party that had retained him. Concerned she needed to disclose the expert's statements under the Morton Act and Brady, the ADA consulted with then-DA Skurka himself, who told her she did not need to do so; she also consulted with Skurka's first assistant. Unlike Hillman, however, the ADA in the *Hayden* case dared not contradict her superiors, and went to trial without disclosing any of this information.

Two weeks after Hayden was convicted of murder in November 2015, the information came to light through a partial disclosure to the defense made in the form of a letter from the First Assistant DA, Retha Cable. After a two-day evidentiary hearing, the district judge who had presided over the trial threw out Hayden's conviction, finding that the Nueces County DA's Office had (1)

intentionally suppressed material, exculpatory evidence at trial, and (2) compounded its misconduct by "intentionally omit[ing] material and relevant facts" in its post-trial disclosure about the details of the evidence and the extensive pretrial discussions held among multiple lawyers in the office regarding its suppression. This, the court found, "constitutes prosecutorial misconduct and undermines public confidence in the judicial system."[37]

The following year, with the State determined to retry Hayden, the Court cited the District Attorney's "morally and ethically offensive behavior" and took the extraordinary step of dismissing Hayden's murder indictment with prejudice. Noting the heavy costs that the prosecution's misconduct had already exacted on the decedent's family, the trial jury (which devoted weeks of its time to a trial marred by "deceitful evidence"), the taxpayers, and "public confidence in our judicial system," the Court concluded that the only proportionate sanction for such egregious misconduct was to bar the DA's Office from retrying the case entirely.[38] Finally, on

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[37] *State v. Hayden*, 14-CR-1156-A and 14-CR-1557-A, Order Granting Defendant's Motion for a New Trial and Arrest of Judgment/Findings of Fact and Conclusions of Law, Jan. 31, 2016, *available at* https://www.law.umich.edu/special/exoneration/Documents/HaydenCourtney%20new%20trial%20ruling.pdf; National Registry of Exonerations, "Courtney Hayden," *available at* https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5270.

[38] *See id.*, Order of Dismissal, May 31, 2017, *available at* https://www.law.umich.edu/special/exoneration/Documents/HaydenCourtney%20dismissal%20order.pdf.

January 19, 2018, a newly elected District Attorney, Marc Gonzalez, announced that his office would accept the judge's ruling and abandon an appeal the dismissal of Hayden's murder indictment.[39]

Unlike Hillman, however, the trial prosecutor who knowingly suppressed exculpatory evidence in Hayden remains on the Nueces County DA's payroll. Not only was she not disciplined; upon information and belief, she has since been promoted to Chief of Training in the DA's office. The new District Attorney justified her retention because, in his assessment, she was "simply following her supervisor's orders" in the Hayden case; he has maintained, however, that "everyone knows that [such conduct] won't be tolerated" in the office going forward.[40]

D. The Stakes Could Not Be Higher

The importance of judiciary's vigorous enforcement of the Morton Act and the due process principles it codifies cannot be overstated. *Brady* violations are, by their nature, difficult to detect because they involve the concealment of evidence in the exclusive possession and control of the State. And no laws (criminal or civil) can entirely deter the small minority of prosecutors who may be unethical and brazen enough to intentionally suppress exculpatory evidence. Weeks ago, for example, the

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[39] *See* National Registry of Exonerations, "Courtney Hayden," *supra* n.37.

[40] *Carimiah Towns,* "Is Mark Gonzalez the Reformer He Promised to Be?" *In Justice Today*, Nov. 21, 2017, *available at* https://injusticetoday.com/is-mark-gonzalez-the-reformer-he-promised-to-be-462f199a60c.

Harris County District Attorney made a public announcement that its email archives revealed that a former ADA, Dan Rizzo, had been notified *in writing* by homicide detectives, prior to trial, that police had obtained records corroborating key portions of the alibi of Alfred Brown; Brown was convicted of murdering a police officer in 2005 and spent nearly a decade on death row before being cleared by the discovery of those same alibi documents and other new evidence in 2015. The new disclosures revealed that Rizzo had apparently not only failed to turn over the alibi evidence at trial, but went so far *as to deny in a sworn affidavit* submitted in post-conviction proceedings that he ever knew about their existence.[41] As a result, Mr. Brown was nearly executed for a crime he did not commit – and the real killer of the police officer in question has never been charged.

Cases like *Brown* and *Morton* thus bring to life the maxim that when an innocent person is wrongly convicted, the real assailant eludes justice. So does the data. For example, in fully 29% of the post-conviction DNA exonerations in the United States that have been documented over a twenty-five year period (1986-2014), the same DNA testing that exculpated a wrongly convicted defendant was used to identify an alternate suspect.[42] Those systemic errors have direct and

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[41] *See* Lisa Falkenberg, "Rizzo's defense in Alfred Dewayne Brown case questionable then, chilling now," *Houston Chronicle*, March 11, 2018.

[42] *See* West & Meterko, *DNA Exonerations 1989-2014: Review of Data and Findings from the First Twenty-Five Years,* 79 Alb. Law Rev. 717, 730-31 (2015-16).

devastating consequences not just for the victim's and defendant's families, but for the public at large. For just as the real killer of Michael Morton's wife went on to murder Debra Baker -- leaving behind another grieving husband and two young children -- many of the other true assailants went on to commit additional violent crimes. In the DNA exoneration cases, for example, *sixty-eight* of the true perpetrators had gone on to commit at least 142 additional violent crimes while the exoneree languished in prison – including 34 homicides and 77 rapes.[43]

Of course, this Court cannot prevent all wrongful convictions, nor can it make police investigations infallible. But it can, and should, ensure that its court-made remedies reflect and further the Texas public policy against prosecutorial misconduct that can lead to the conviction or execution of an innocent person.

III. THIS MUST BE THE PLACE: THIS COURT (AND NOT THE LEGISLATURE) NEEDS TO DECIDE THESE IMPORTANT ISSUES.

This case presents important issues involving *common law* doctrines that are best resolved by this Court (one way or the other). Because all of the issues in this case involve court-created rules (and not statutes), they should be resolved by this Court (and should not be ducked with the notion that the Legislature is the appropriate "decider"). This is so because this case exists at the cross-roads of the following *judge-created* rules:

[43] *See id.* at 731.

- **Sovereign (really, Governmental) Immunity**:[44] The doctrine of sovereign and governmental immunity is a common-law doctrine, created by judges, not legislators. *Hosner v. DeYoung,* 1 Tex. 764, 768-69 (1847). As this Court held in *Reata Construction,* "it remains the judiciary's responsibility to define the boundaries of [immunity] and to determine under what circumstances sovereign immunity exists in the first instance." *Reata Constr. Co. v. City of Dallas*, S.W.3d 271, 375 (Tex. 2006).
- **Employment-at-Will**: In Texas, the doctrine of employment-at-will was created by this Court (and not the Legislature). *Eastline & R. R. R. v. Scott,* 10 S.W.99, 102 (Tex. 1888). As such, this Court is situated to decide when exceptions to that common-law doctrine are to be imposed. *See Winters v. Houston Chronicle*, 795 S.W.2d 723 (Tex. 1990)(declining to create common-law exception to employment at-will for private whistleblowers or to impose a common-law duty of good faith and fair dealing in at-will employment).

[44] To be technically, and pedantically, precise, this case presents an issue of *governmental* immunity, not *sovereign* immunity, because we are dealing with a County (or County officials) and not "the State." *Travis Central Appraisal Dist. v. Norman*, 342 S.W.3d 54, 57–58 (Tex. 2011)("Sovereign immunity protects the state and its various divisions, such as agencies and boards, from suit and liability, whereas governmental immunity provides similar protection to the political subdivisions of the state, such as counties, cities, and school districts."). Of course, most courts and practitioners use these terms interchangeably, although precision is compromised when that occurs.

- **The *Sabine Pilot* Exception to At-Will Employment**: The exception to at-will employment at the heart of this case was created by this Court (and not the legislature). *Sabine Pilot v. Hauck,* 687 S.W.2d 733 (Tex. 1985). Of course, when *Sabine Pilot* was decided, this Court never stated that it applied *only* to private employers. So, the decision of whether it should be so limited is a decision that should be made by the creators of the cause of action and not a different branch of government (more on this below).
- **The Ethical Obligations of Prosecutors and Government Lawyers**: At the heart of this (Hillman) case is a violation of law based upon the obligations of government lawyers to turn over exculpatory evidence to citizens on trial for their liberty. This Court, as the final and most learned authority on the Texas Disciplinary Rules of Professional Conduct, is also situated to decide if violations of such provisions merits an exception to employment at-will or government-immunity. For example, Disciplinary Rule §3.04(a) states that a lawyer shall not "unlawfully obstruct another party's access to evidence. . . ."); §4.01 forbids the making of false statements of fact to third persons, including the other-side in all proceedings, criminal or civil); and §3.09 specifies the "Specific Responsibilities of a Prosecutor") including §3.09d) imposing the ethical obligation to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the

guilt of the accused. . . ." We do not cite these provisions as the "law" that Hillman was asked to violate (that statute is the Michael Morton Act and the related criminal statutes, such as contempt and tampering, when a prosecutor violates its terms). Rather, we cite these provisions to demonstrate that this Court is the body with the authority and expertise to balance and resolve all of the issues in this important case.

- **Ultra Vires Claims:** And, to close this loop, respondents also ask that a cause of action that be established, at least under the *ultra vires* theory. *Respondents' Brief at viii, 25*. The *ultra vires* theory, of course, permits suit against "the government," through an official named in her individual capacity only, for acts that are outside of the law. See *City of El Paso v. Heinrich*, 284 S.W.3d 366, 374 (Tex. 2009). Of course, that cause of action is also one that is created at common law, re-created by this Court, and is thus another aspect that it would be inappropriate to "ask the legislature" to resolve.

The County cites cases where this Court determined that certain statutory causes of action should not be extended to government entities, such as *Wichita State Falls Hosp. v. Taylor.* 106 S.W.3d 692 (Tex. 2003); *Respondents' Brief at 4, 9, 22-23*. Of course, in those situations—where we are interpreting a statutory cause of action—the Legislature may be the best position to determine if it should apply to

government services (like the Patient's "Bill of Rights" statute in the Wichita Falls Hospital case.

This *Hillman* case is much more like *Wasson* where the issue was whether immunity should be waived (a common law doctrine) in a breach of contract suit (again, a common law issue): In cases like *Wasson*, it only makes sense for this Court to decide the contours of its creations (immunity, employment at-will, *Sabine Pilot*¸ and the like). *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 433 (Tex. 2016).

It makes little sense for our issue to be shunted off to the Legislature. What would we ask of that body: "Senator, please get involved in doctrines you did not create and fashion a cause of action that you did not have a hand in." Why would the legislature get involved in tinkering with a claim that it did not create when that could be done by the creators of the doctrines that established the claim?

Since these doctrines are from the common-law, it should be the province of this Court: "This court nonetheless has been willing to carve out narrow exceptions when the employer's primary motivation for termination directly contradicted important societal interests." *Winters*, 795 S.W.2d at 726 (J. Doggett, concurring). Of course, if it is against society's interests for an employer to fire for refusing to perform an illegal act, it is just as vile (if not more so) for that decision to be made with taxpayer money and clothed in governmental authority.

Even if the Legislature took on this task in the future, it would not do anything to remedy the injustice in this case and the loss of a job for Mr. Hillman (it can only act prospectively, of course (and, even then, only every two years)). That is just one of many reasons why "[i]n this situation, judicial failure to modify the law constitutes neither restraint nor neutrality, but rather an active participation in perpetuating injustice." *Id.*

That such injustices will be "perpetuated" if this Court does not grant a remedy to Hillman is vividly demonstrated by the fact that in at least one high-profile murder case in Nueces County since Hillman's discharge, a court has found that an ADA intentionally suppressed material, exculpatory evidence at the direction of multiple supervisors – violations so severe that the court not only threw out the conviction, but dismissed the entire murder case with prejudice (*see supra* pp. 27-29). This Court may also consider what many scholars have recognized as the central and unique role that the judicial branch plays in preventing *Brady* violations.[45]

Respondents are correct that if the *Sabine Pilot* cause of action were applicable to government employers, then punitive damages should be excluded. There is not a societal basis for awarding punitive damages against a government

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[45] *See generally, e.g.,* Cynthia Jones, *Here Comes the Judge: A Model for Judicial Oversight and Regulation of the Brady Disclosure Duty*, 87 Hofstra L. Rev. 46 (2018).

entity, as that does not punish the right "person." But, again, since the rules of when punitive damages are recoverable in a *Sabine Pilot* claim were created by this Court (in *Safeshred)* then it is certainly in this Court's tool-kit to be the entity to articulate when such damages are not recoverable. *Safeshred, Inc. v. Martinez*, 365 S.W.3d 655, 660 (Tex. 2012). *Safeshred* further demonstrates that this Court is the proper place for this issue to be decided.

So, in sum, what would we ever "say" to the Legislature: Please jump into the middle of a common-law discussion and please enact laws guessing at what the Texas Supreme Court did and meant when it decided *Sabine Pilot?* Can you please analyze these 5 or 6 different Texas Supreme Court cases and tell us what the Court meant? This Court should take this case and resolve a vital issue that this Court (with all due respect) created by not stating in *Sabine Pilot* if it intended for this vitally important protection to apply to government employers.

Respondents do a good job of citing a number of lower court cases that decide *Sabine Pilot* cases involving government employers. But the "flip side" of those cases (that defer a decision on immunity to a higher-source) is that it they underscore the frequency with which some government employers demand their employees violate the law, just like private sector employers sometimes do – thus underscoring the real need for this Court to do what the intermediate courts have not done, and extend protections to those employees.

The County claims that these cases only state that this decision is best left to the Legislature, but in reality, they state that the decision needs to come from "someone" other than an intermediate court. Lower courts that have addressed this issue recognize that this Court (and not just the Legislature) is situated to resolve this issue. *See Ochoa v. City of Palmview*, 2014 WL 7404594, at *7 (Tex. App.—Corpus Christi 2014, no pet.)(the "courts" should determine the interaction between *Sabine Pilot* and governmental immunity." *Id at 22-23*). In the words of the Third Court, "the lower courts "are not licensed in that opinion [Sabine Pilot]" to modify employment-at-will or to "modify the Supreme Court's earlier decision in [Eastline & R.R.R. v.] *Scott Jennings v. Minco Tech. Labs, Inc.*, 765 S.W.2d 497, 501 (Tex. App.—Austin 1989, writ denied). It is also worth noting that, in the three decades since *Sabine Pilot* was decided, the Legislature has left the matter to this Court, declining to codify or otherwise modify the scope of the remedy.

IV. IF IMMUNITY DOES NOT PERMIT A *SABINE PILOT* DAMAGE CLAIM, THEN THERE IS NO BASIS TO DENY ULTRA VIRES LIMITED LIABILITY TO AN EMPLOYEE TERMINATED FOR THE SOLE REASON THAT THEY REFUSED TO PERFORM A CRIMINAL ACT.

If this Court were not to permit "full" *Sabine Pilot* liability upon defendants, then this Court should take this case to permit limited ultra vires liability on individual defendants for prospective relief. While ultra vires liability would not do nearly as much to deter prosecutorial misconduct, prevent wrongful convictions of

the innocent, and protect those conscientious prosecutors who act ethically and lawfully, it would at least leave Hillman and those similarly situated with some measure of protection.

Here, plaintiff sued both Nueces County *and* its District Attorney (at the time of suit, Mark Skurka) *and* the "Nueces County District Attorney's Office." In this case, it is alleged that the *District Attorney* (through specific supervisory officials) ordered Mr. Hillman to violate the law and when Mr. Hillman refused, the District Attorney fired him.

Thus, there is no dispute that these facts, if proven establish a violation of the *Sabine Pilot* cause of action and Texas law. As such, **and as respondents ask this Court to do**, then at a minimum, an ultra vires claim (with very restricted government liability) should be recognized. As this Court knows (because it created the doctrine), if a government official acts outside legal authority then such a suit is not considered a suit against the government and is not barred by immunity. See *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009)("To fall within this ultra vires exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act.")

In an *ultra vires* suit, the remedies are very limited and the plaintiff may, customarily, only sue for prospective relief and not money damages: in an

employment case, they might sue for declaratory relief (under Chapter 38 of the Civil Practices and Remedies Code) and an injunction compelling reinstatement (and a prohibition of future retaliation). *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 374 (Tex. 2009)(In such suits, "retrospective monetary claims are generally barred by immunity").

This Court has strongly implied, but has yet to expressly hold, that back pay and other forms of monetary relief are not permitted in such claims against government officials in their official capacities. Although *amici* believe that if a government employer terminates an employee for the sole reason that the employee refuses to perform an illegal act (that carries criminal penalties), then that government employer should be liable for the full panoply of make-whole and compensatory relief. Any lesser relief is likely to result in less than adequate deterrence for those officials who might otherwise feel emboldened to retaliate against ADAs who refuse to "follow orders" and violate the Morton Act. But, if this Court believes that such an outcome shall be permitted, then as a compromise, it should permit a very-limited *ultra vires* claim, within the very-narrow *Sabine Pilot* claim, as the next-best compromise. As this Court has recognized, the entire field of governmental/sovereign immunity is comprised of "contested compromises." Douglas Laycock, MODERN AMERICAN REMEDIES 482 (3d ed. 2002), cited in *Heinrich*, 284 S.W.3d at 374.

This relief seems even more appropriate here and now, as the defendant/employer is also asks this Court to fashion that as a remedy in this situation. *Respondents' Brief at viii, 25.* In such a situation (should this court refuse to create a damage causes of action against government employers), then it should **remand** this case for the plaintiff to re-plead his claim and name the District Attorney, in his/her official capacity, for the limited relief available in an *ultra vires* suit. This Court permitted such re-pleading in *Texas Parks & Wildlife Dept. v. Sawyer Trust*, where this Court ruled that the proper party was not the agency, but specific officials in their official capacity via an *ultra vires* suit. 354 S.W.3d 384, 394 (Tex. 2011)("Plaintiff should be given an opportunity to amend and cure the pleading and party defects, if it chooses to do so, and have the suit proceed against the governmental actors [in their official capacity laying claim to the streambed.")

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to grant the petition for discretionary review, reverse the decision of the lower courts, and extend *Sabine Pilot*'s protection against wrongful termination to conscientious government officials like Petitioner who refuse to commit illegal acts. At the very least, this Court should make clear that prosecutors who are discharged for refusing to illegally suppress exculpatory evidence from an accused defendant, in violation

of the laws and public policy of this State, are entitled to some meaningful measure of judicial protection and relief.

Respectfully submitted,

/s/ Philip Durst

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CERTIFICATE OF COMPLIANCE

As required by Texas Rule of Appellate Procedure 9.4(i)(3), the above-signed counsel for Appellees certifies that the number of words in this document, excluding those properly excluded under TRAP 9.4(i)(1), is 10,089.

/s/ Philip Durst

CERTIFICATE OF SERVICE

As required by Texas Rule of Appellate Procedure 6.3 and 9.5, I certify that I have served this document on the below-listed counsel for all other parties on March 27, 2018, by e-filing:

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