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.

BRIEF FOR *AMICI CURIAE* THE CATO INSTITUTE, THE AMERICAN CIVIL LIBERTIES UNION, THE DUE PROCESS INSTITUTE, LAW ENFORCEMENT ACTION PARTNERSHIP AND TEXAS CRIMINAL LAW SCHOLARS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The Cato Institute (the "Cato Institute") is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice focuses on the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional safe-guards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

The American Civil Liberties Union Foundation (the "ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 1.75 million members dedicated to the principles of liberty and equality embodied in the Constitution and the Nation's civil rights laws. Since its founding in 1920, the ACLU has appeared in numerous cases before courts in this state, both as counsel representing parties and as *amicus curiae*.

The Due Process Institute is a non-profit, bipartisan, public interest organization that works to honor, preserve, and restore principles of fairness in the criminal legal system. The organization believes it is critically important for the preservation of due process rights to 1) support a prosecutorial ethos in which ethics, fairness, and restraint are valued in the pursuit of their duties and 2) improve the fairness and efficacy of criminal discovery practice.

The Law Enforcement Action Partnership (the "LEAP") is a 501(c)(3) nonprofit of police, prosecutors, judges, corrections officials, and other law enforcement professionals dedicated to improving the criminal justice system. LEAP believes it is of the utmost importance to protect the jobs of criminal justice professionals who work to uphold the principles of the Constitution.

This *amici curiae* brief is also submitted on behalf of 27 Texas criminal law scholars who specialize in criminal law at law schools throughout Texas (the "Texas Criminal Law Scholars," collectively with the Cato Institute, the ACLU, the Due Process Institute and LEAP, the "*Amici*"). A complete list of the Texas Criminal Law Scholars is provided in Appendix 1.

Amici and the undersigned counsel have received no fee regarding the submission of this brief. Counsel are submitting this brief, *pro bono*, in order to provide *Amici*'s perspective on the very significant issues raised by this appeal as well as to set out how a ruling in Petitioner's favor will underscore Texas' commitment to eradicate wrongful convictions.

SUMMARY OF ARGUMENT

This case presents an opportunity for this Court to provide a critical avenue of recourse for a conscientious prosecutor who was wrongfully terminated after refusing to violate both criminal law and his ethical obligations by withholding exculpatory information from a defendant – and in so doing, to underscore Texas'

commitment to eradicate wrongful convictions, by protecting law enforcement officials whose ethical conduct is critical to that effort.

In 2014, Eric Hillman, then an Assistant District Attorney in Nueces County, was prosecuting David Sims, who was charged with intoxication assault (operation of a motor vehicle while intoxicated, causing serious bodily injury to another), a third-degree felony. During his investigation, Hillman interviewed the mother of one of the young women that Sims and his friends were with that night. The mother – whom Sims had never met before the night in question and lived hours away – told Hillman that she was acting as a chaperone that night, and had observed Sims driving the vehicle (a rented golf cart) in which the injured young woman was a passenger. She then informed Hillman that Sims had only consumed a small amount of alcohol and was *not* intoxicated – that, in her view, the overturned golf cart was simply an accident resulting from horseplay, and was unrelated to alcohol consumption.

Hillman correctly determined that he was required to turn over this exculpatory witness statement to Sims and his lawyer. He informed his supervisor, Deborah Rudder, that he intended to do so, but she told him not to turn over the evidence. Hillman thereafter called *two* state legal ethics hotlines – the Texas Center for Legal Ethics and the State Bar's ethics hotline – both of which confirmed his belief that he had to turn over the evidence. Faced with this dilemma

on the eve of trial, Hillman did the right thing: he told his supervisor he would not follow her illegal directive, and would disclose the evidence to the defense. He was promptly fired for "refusing to follow orders."

Hillman was placed in a situation that no employee – private or public – should ever have to face. He was forced to choose between losing his job because he obeyed the law or keeping his job and breaking it. For Hillman, the stakes were even higher: violating the law also meant violating the constitutional rights of a criminal defendant, the rules of professional responsibility, the canons of legal ethics, and basic decency.

Respondents and their *amici* argue that Hillman has no recourse under the law. They say that this Court's *Sabine Pilot* decision cannot be extended to conscientious prosecutors like Hillman, and that Hillman *may* not have faced any criminal exposure had he kept his mouth shut and broken the law. Both arguments are without merit.

Under both Texas and federal law, prosecutors have a clear legal duty to turn over exculpatory evidence to criminal defendants. The information Hillman obtained and sought to disclose falls squarely within the ambit of both *Brady* and the Michael Morton Act (the "Morton Act"). *See* 83d Leg., R.S., ch. 49, § 2, 2013 Tex. Gen. Laws 106 (codified at Tex. Code Crim. Proc. art. 39.14). Hillman would

have faced criminal liability for following his supervisor's order, and he certainly would have violated his professional responsibilities and the canons of legal ethics.

Respondents' *amici*, including the State, argue that even if this Court extended the rule in *Sabine Pilot* to prosecutors who refuse to violate the law, Eric Hillman could not prevail because he faced no criminal exposure if he had carried out his supervisor's scheme to suppress the material exculpatory evidence. They turn *Brady* and the Morton Act on their heads by arguing that Hillman had no obligation to turn over the exculpatory evidence in question because Sims knew (or should have known) that the witness existed, and her exculpatory information was as "readily available" to him as to the state. Therefore, they argue, Hillman would not have committed a crime if he had complied with his supervisor's direction. As set forth in this brief, these *amici* are incorrect on both points. Violating *Brady* and the Morton Act can certainly lead to criminal prosecution – as it did for Ken Anderson in connection with multiple *Brady* violations in his 1987 prosecution of Michael Morton. And in Hillman's case, as discussed *infra*, there are *at least nine criminal statutes* under which he would have risked criminal prosecution had he knowingly suppressed this evidence, which he was required to disclose under both *Brady* and the Morton Act.

Respondents and their *amici* also incorrectly argue that this Court should not judicially abrogate sovereign immunity in this case to extend the *Sabine Pilot*

doctrine to prosecutors such as Hillman. Even though judicial abrogation is (and should be) rare, there is no dispute that such an abrogation is well-within this Court's authority and that this Court has already exercised its authority to abrogate sovereign immunity for certain intentional tort claims. And, while retaliatory terminations of employees who refuse to commit illegal acts are exceedingly rare (as they should be), this Court in *Sabine Pilot* recognized the overwhelming public policy concerns that such an occasion raises and created a narrow exception to at-will employment for the private employee whose case was then before the Court.

This case shares the public policy concerns that led this Court to its *Sabine Pilot* decision but also raises additional critical public policy concerns regarding nothing less than the life and liberty of citizens who may be wrongfully accused of crimes. And the case for extending *Sabine Pilot* to prosecutors like Hillman is further strengthened by this Court's supervisory role over the attorneys admitted to practice law in this state, and its enforcement of the rules of professional responsibility and legal ethics. Eric Hillman was a prosecutor, carrying out the most critical and sensitive aspects of the state's police power. Had he followed his supervisor's order, he would have violated several attorney disciplinary and ethics rules. Rule 3.09(d) of the Texas Disciplinary Rules of Professional Conduct requires a prosecutor 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."

Though violations of these rules are not criminal violations, they go to the core of the criminal justice system and this Court's oversight function, making judicial abrogation entirely appropriate.

Nor does this Court need to hold that *all* public employees may sue for wrongful discharge under *Sabine Pilot* to protect the core public policy interests implicated by Hillman's petition. Instead, this Court can craft an extremely narrow judicial abrogation that takes these specific public policy concerns into consideration. The Court could, for example, abrogate only those claims where – as here – a prosecutor or other law enforcement officer is wrongfully terminated for refusing to suppress exculpatory evidence and thereby violate the criminal law, their professional obligations, and (for attorneys) the canons of legal ethics.

Texas would not be alone in adopting such a rule. The vast majority of states have some form of explicit "illegal act" public policy exception to at-will termination, and most of those make *no distinction* between public and private employees. As courts across the country have recognized (and as this Court recognized in *Sabine Pilot*), narrow public policy exceptions to the at-will employment doctrine are critical for protecting employees faced with impossible dilemmas like the one Eric Hillman faced. No lawyer should be placed in the position of choosing between his or her career and following the law. And a limited abrogation of immunity is *necessary* to safeguard the Texas criminal justice

system and to ensure that lawyers engaged in the system all act ethically and play by the rules.

For these reasons and those stated below, *Amici* respectfully request that the Court judicially abrogate sovereign immunity for those rare circumstances presented in this case.

ARGUMENT

I. Eric Hillman Had a Clear Legal and Ethical Duty to Turn over Exculpatory Evidence and Would Have Exposed Himself to Criminal Liability Had He Not Done So

In connection with the prosecution of David Sims, former Assistant District Attorney Eric Hillman learned of the existence of material exculpatory evidence. A critical and independent fact witness told Hillman in an interview that she had spent a substantial portion of the evening with Sims and that he had only consumed two alcoholic beverages and was *not* intoxicated at the time of the accident that gave rise to Sims' prosecution. As set forth in the Innocence Project's Letter Brief dated October 9, 2018 (the "IP Letter Brief"), this witness was not one of Sims' friends or companions. IP Letter Br. at 2. Indeed, Sims was not even acquainted with the witness before the night of the accident. *Id*. She was, instead, the mother of one member of a group of young women with whom Sims and his friends had socialized that night (which included the injured female complainant), and she was not even listed in the police reports; Hillman happened to discover that she was an

eyewitness to the events in question only after he conducted interviews of multiple other witnesses who were listed in the official reports. IP Letter Br. at 2-3. The witness's statement was plainly and materially favorable to Sims.

Under state and federal law, prosecutors have undisputed legal and ethical duties to turn over such statements to criminal defendants. Hillman believed he had to disclose the statements and told his supervisor he planned to do so. Hillman has alleged that his supervisor, nevertheless, *ordered* him not to reveal the exculpatory evidence. Hillman's supervisor even went so far as to suggest that he was less of a "real" prosecutor for scrupulously following the law – telling him, "Eric, you need to decide if you want to be a prosecutor or a defense attorney." *See* Innocence Project, Inc. and Innocence Project of Texas *Amici Curiae* Brief dated March 27, 2018, (the "IP Brief"), at 24. Hillman thereafter contacted *two* legal ethics authorities – the Texas Center for Legal Ethics and the Texas State Bar's ethics hotline – and was advised by *both* authorities that he had to turn over the witness statement. Had Hillman followed his supervisor's order, he would have faced potential criminal liability for doing so, and he certainly would have been violating his professional responsibilities and the canons of legal ethics.

Respondents have never disputed that the exculpatory evidence in this case falls within the disclosure obligations of *Brady v. Maryland*, 373 U.S. 83 (1963), and the Morton Act. However, Respondents' *amici* (including the State of Texas

("State") and the Texas Municipal League *et al.*, ("Municipal League," collectively, the "Government *amici*")) argue that Hillman has not alleged a *Sabine Pilot* claim because there was no obligation in this case to turn over the evidence in question. Therefore, they argue, Hillman would not have committed a crime if he complied with his supervisor's direction. State Br. at 18. For the reasons that follow, Government *amici* are incorrect on both fronts.

A. Hillman Had a Clear Legal Duty to Turn over the Evidence under *Brady* and the Morton Act

In *Brady*, the United States Supreme Court held that the Constitutional guarantee of Due Process of Law requires that prosecutors disclose to the defense evidence material to a defendant's guilt or punishment. 373 U.S. at 87; *see also Floyd v. Vannoy*, 894 F.3d 143, 161 (5th Cir. 2018); *U.S. v. Tavera,* 719 F.3d 705, 710 (6th Cir. 2013) (noting the protection as a "cardinal rule of criminal procedure since *Brady* . . ."). The Morton Act codified prosecutors' existing *Brady* obligations and swept well beyond them, imposing expansive discovery requirements on prosecutors.[1]

[1] Additionally, Rule 3.09(d) of the Texas Disciplinary Rules of Professional Conduct extends beyond *Brady* to require disclosure of "all" favorable evidence or information known to the prosecutor, regardless of materiality. Tex. Disciplinary Rules Prof'l Conduct R. 3.09(d); *Schultz v. Comm'n for Lawyer Discipline of the State Bar of Tex.*, 2015 WL 9855916, at *2 (Tex. Bd. Disp. App. Dec. 17, 2015).

The government's violation of *Brady* will result in reversal of a defendant's conviction, whenever it fails to disclose favorable evidence, where the "suppressed" evidence was material. *Brady*, 373 U.S. at 87. The Morton Act, which is codified at Article 39.14 of the Texas Code of Criminal Procedure, has two key provisions concerning disclosure. First, under Article 39.14(a), upon a timely request, the prosecutor must make available to defendants "evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state." Tex. Crim. Proc. Code art. 39.14(a); *see also Ehrke v. State*, 459 S.W.3d 606, 611 (Tex. Crim. App. 2015) (recognizing Article 39.14(a) of the Texas Code of Criminal Procedure creates an absolute right to production of material evidence). Second, under Article 39.14(h), even without a request, the state must disclose to the defendant "any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged." Tex. Crim. Proc. Code art. 39.14(h). Thus, the Morton Act goes beyond *Brady* since it creates an ongoing disclosure obligation of all evidence, including police reports and witness statements, unless a limited statutory exception for confidentiality or work product applies. *Id*. at art. 39.14(a). It also contains no materiality requirement, but instead requires disclosure of all evidence that simply

"tends to negate" a defendant's guilt. *See Ex parte Temple*, No. WR-78,545-02, 2016 WL 6903758, at *3, n.20 (Tex. Crim. App. 2016) ("The Michael Morton Act created a general, ongoing discovery duty of the State to disclose before, during, or after trial any evidence tending to negate the guilt of the defendant or reduce the punishment the defendant could receive.").

Here, the evidence in question is a patently exculpatory witness statement, from a witness who (as the mother of a friend of the injured complainant) is not only truly independent – but might be considered adverse to the defendant. As such, the information Hillman obtained and sought to disclose falls squarely within the ambit of both *Brady* and the Morton Act.

1. Government Amici*'s Argument That* Brady *and/or the Morton Act Do Not Apply Because the Mother's Statement Was as "Readily Available" to Sims as to the State is Incorrect*

Government *amici* maintain that, despite the exculpatory and material nature of the mother's statement and the clear dictates of *Brady* and the Morton Act, Hillman had no disclosure obligations because Sims knew or should have known that the witness existed and that her exculpatory information was "readily available" to him as to the State. State Br. at 16. This characterization is simply incorrect and is unsupported by the evidentiary record available to this Court. Hillman was aware of potential exculpatory evidence and had no way of ascertaining whether this evidence was known by Sims but for disclosure thereof.

2. Brady v. Maryland

Government *amici* argue that *Brady* does not apply here because the prosecutor has no responsibility to direct the defense toward exculpatory evidence that is either known to the defendant or could have been discovered through the exercise of due diligence. State Br. at 18-19; Municipal League Br. at 41, n.42. But that argument both misstates the facts and is a far too narrow reading of *Brady*'s requirements. "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004), *superseded on other grounds by statute,* Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d)(1), *as stated in Dawkins v. Kirkpatrick*, No. 09CV5756-LAP-FM, 2016 WL 8738236, at *8 (S.D.N.Y. Jan. 27, 2016). That untenable rule is exactly the interpretation of *Brady* that the Government *amici* advance here. In the State's view, there would be no *Brady* violation had Hillman withheld the evidence because the defendant "surely" knew about the witness and to what the witness could testify. State Br. at 18. Incredibly, the State persists in its position even when alerted to the actual underlying facts, as set forth in the IP Letter Brief (and which the State did not refute when alerted to them), which are worlds apart from those incorrectly asserted in the State's brief. The witness was not listed in the police reports, was someone that Sims had only met the night of the accident, lived two to

three hours outside of Nueces County, and Sims was unaware of what her statement might be. IP Letter Br. at 2.

The Government *amici* have cited no authority for their position that *Brady* and the Morton Act do not require disclosure under the circumstances present in Sims' prosecution, and with good reason. Courts have, instead, routinely found that *Brady* requires prosecutors to disclose witness statements in similar situations. For example, in *Floyd*, the State argued that an exculpatory statement, which it had failed to disclose, should have been discovered by a reasonably diligent defense attorney. 894 F.3d at 165. The State maintained that the statement was effectively disclosed because a detective's report named a third party (Bloodworth), who had identified Clegg, the person whose exculpatory statement was withheld by the State. The Fifth Circuit rejected this argument:

> [t]he State claims the Clegg statement was effectively disclosed because "a reasonably diligent defense attorney would have similarly interviewed Bloodworth and, through him, learned of Clegg" and interviewed him. As discussed *supra*, the prosecutor's *Brady* duty is not absolved through asserting various opportunities available for the defense to have uncovered the evidence.

Id. (citing *Banks*, 540 U.S. at 696).

In *Thomas*, the Texas Court of Criminal Appeals (the "CCA") considered whether the suppression of a witness statement by a witness who reportedly arrived at the crime scene *with the defendant*, yet placed the defendant in a different

location than the one alleged at the time of the shooting the defendant allegedly committed, rose to the level of a *Brady* violation. *Thomas v. State*, 841 S.W.2d 399 (Tex. Crim. App. 1992). The court concluded that the prosecutor's failure to disclose this statement from a witness, who was with the defendant at the time of the crime, to the defendant was an unlawful failure to disclose exculpatory information, in violation of *Brady*. *Id*. at 406. The CCA noted that "the State's failure to disclose Walker's testimony adversely affected the preparation and presentation of appellant's case, and by failing to disclose Walker's exculpatory testimony, the State prevented appellant from effectively mounting a defense, and *denied the jury an exculpatory version of the events* when deliberating appellant's guilt." *Id*. at 406-07 (emphasis added). The *Thomas* Court clearly found that the State had "an affirmative duty to disclose" this evidence, which it failed to do. *Id*. at 407.

In *Tavera*, Tavera was convicted of conspiracy to distribute methamphetamine with a co-defendant, with whom he had traveled on a ride from North Carolina to Tennessee. 719 F.3d at 707. In connection with the co-defendant's guilty plea, he gave a statement that Tavera was not aware that they were transporting drugs. Prosecutors failed to disclose the co-defendant's statement to Tavera. The Sixth Circuit found a *Brady* violation, holding that the prosecutors had an obligation to disclose the co-defendant's exculpatory statement,

again rejecting that Tavera could have discovered the statements if he had interviewed his co-defendant – arguments similar to those advanced here by the State. *See also Amado v. Gonzalez*, 758 F.3d 1119 (9th Cir. 2014) (finding the state court's requirement of due diligence in the Brady context was an unreasonable application of clearly established Federal law); *Boss v. Pierce*, 263 F.3d 734, 740 (7th Cir. 2001) (regarding "as untenable a broad rule that any information possessed by a defense witness must be considered available to the defense for *Brady* purposes."); *U.S. v. Payne*, 63 F.3d 1200 (2d Cir. 1995) (finding that the government suppressed an affidavit of a co-defendant that she had not entered into a conspiracy with anyone because it was clear that the affidavit was favorable to defendant and rejecting the argument that defense counsel could have discovered the affidavit if he had exercised due diligence); *U.S. v. Kelly*, 35 F.3d 929 (4th Cir. 1994) (finding, *inter alia*, that the government improperly withheld an affidavit for a search warrant, rejecting the argument that defense counsel could have obtained the affidavit had he exercised due diligence). Thus, under the facts presented here, Hillman had a clear legal obligation to turn over the evidence to Sims.

The State's reliance on *United States v. Sipe*, 388 F.3d 471 (5th Cir. 2004), and *Pena v. State*, 353 S.W.3d 797 (Tex. Crim. App. 2011) is particularly misplaced. In *Sipe*, the court ultimately ordered a new trial under *Brady* based on the cumulative impact of the withheld evidence (an issue that cannot be evaluated

here given the posture of this case). As to a statement of one of the defendant's classmates that the prosecution failed to produce, the court found that the statement was not favorable to the defendant and that where the defendant and a witness are "personal acquaintances and associates," as was the case in *Sipe*, a defendant is deemed to have access to the witness. 388 F.3d at 487. Here, the facts as set forth in the IP Letter Brief establish that the witness's statement was both highly exculpatory and that Sims was not a "personal acquaintance and associate" of the witness. IP Letter Br. at 2.[2]

Similarly, in *Pena* the court found that the prosecution had violated *Brady* when it failed to turn over the audio portion of a video recording of the defendant's statement to the police and his transportation to the police station at the time of his

[2] In its briefing, the State argues that a *Brady* violation does not exist where the prosecution fails to disclose the existence of an exculpatory witness where the defendant "should have been aware of the witness." State Br. at 19, n.7. The cases it cites in support of this proposition, however, are incongruous with the present circumstances. In *Henness v. Bagley*, the witness statement in question was made by the defendant himself, not a third party. 644 F.3d 308, 325 (6th Cir. 2011). In *Woodfox v. Cain*, the witness statement in question pertained to a prison warden's testimony made at the defendant's re-trial that was not made at his initial trial. 609 F.3d 774 (5th Cir. 2010). As the Fifth Circuit observed, it could not find a *Brady* violation when "[i]f Warden Henderson was willing to testify in 1998, it is not clear why Woodfox could not have also presented the same testimony at the 1973 trial." *Id*. at 803. In *United States v. Roane*, the potentially exculpatory statement concerned the identity of an alibi witness the defendant alleged was withheld from him. 378 F.3d 382, 402 (4th Cir. 2004). By contrast, the existence of a third party who could testify that Sims was not intoxicated at the time of the accident goes beyond what would have been readily known to him. Finally, *United States v. Zuazo* concerned the statements made by a co-conspirator in a drug smuggling conviction. 243 F.3d 428 (8th Cir. 2001). The Eighth Circuit noted that "the underlying facts comprising the relevant evidence contained in [the withheld statements] were not unknown to [the defendant], who himself testified to the same facts." *Id*. at 431. This is distinguishable, as Sims would not have testified to facts giving rise to his conviction, necessitating Hillman's obligation to disclose.

arrest. 353 S.W.3d at 810. The court rejected the argument that defendant was aware of the statements because they were his own since the defendant had been consistently told that the videotapes contained no audio. *Id*. Thus, *Pena* has no bearing on whether or not Hillman had a duty to turn over the identity of the witness and her statement here.

Indeed, the State's argument turns *Brady* on its head; if adopted by this Court, it would create a brand-new exception to this longstanding constitutional rule that has never been suggested by the CCA or (so far as *Amici* are aware) any other court. It would afford a prosecutor broad discretion to withhold evidence, which could be justified in virtually any case by asserting that the defense attorney could simply have found it herself. Under the State's view, even exculpatory information such as DNA results or confessions by the actual perpetrator that are in the possession of a police officer who is not listed in any official report could be withheld because the defense could, in theory, conduct its own investigation; discover that the officer had relevant information to provide; interview the officer; and obtain the information. "[T]he prosecutor's *Brady* duty is not absolved through asserting various opportunities available for the defense to have uncovered the evidence." *Floyd*, 894 F.3d at 165. The Court should reject the State's mischaracterization of a prosecutor's obligations under *Brady*. Accordingly, the Court should find that Hillman indeed had a statutory and constitutional duty to

disclose the statement in question, and that his refusal to violate that duty falls within the public policy exception to at-will employment outlined in *Sabine Pilot*.

3. The Michael Morton Act

Under the Morton Act, unless information meets certain privilege or confidentiality requirements, there are no exceptions to the requirement that the contents of the prosecutor's files be turned over upon request, as Sims' counsel did here.[3] Moreover, where the information is an "exculpatory, impeachment or mitigating document, or an item or information that tends to negate guilt," the disclosure duty is *affirmative* in nature, and exists *regardless* of whether the defendant has requested information pursuant to the Morton Act. *See Glover v. State*, 496 S.W.3d 812, 815 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). The plain language of the Morton Act provides a clear line for discovery in a criminal matter and little is left to the prosecutor's discretion.

Thus, Government *amici*'s argument that a prosecutor need not turn over information that a defendant knew or should have known has no basis in law nor in the Morton Act's plain language, particularly where the evidence in question is a

[3] To the extent that a prosecutor withholds documents on the basis of privilege under the Morton Act, that fact also must be disclosed to the defendant so that the defendant has an opportunity to raise any issues with the court concerning the withheld documents. Thus, even assuming that the notes of the witness interview were work product as argued by the Municipal League, under the Morton Act a prosecutor would be required to notify a defendant that certain material was withheld on privilege grounds. Tex. Code Crim. Proc. art. 39.14(c). Moreover, Article 39.14(h) appears to require that even work product be turned over to the extent it contains favorable information.

witness statement that "tends to negate guilt," as here. Indeed, the Morton Act was enacted in response to a case in which the prosecutor suppressed statements from Morton's own son. The prosecutor in that case unsuccessfully tried to cite this fact as a reason why he should not be disbarred or prosecuted for failing to turn over the detailed exculpatory statement in the State's files. For a full discussion of the circumstances leading up to the enactment of the Morton Act, *see* IP Br. at 9-13.

This Court should reject the Government *amici*'s arguments that the type of information at issue would not be the type that a prosecutor would be required to disclose to a defendant under the Morton Act. As with their distortions of *Brady*, *supra,* the Government *amici* are asking this Court to rewrite the statute that, in its current form, puts prosecutors on clear notice that they must promptly disclose *all* favorable evidence that does not meet statutorily-defined privilege exceptions.

B. Hillman Faced Criminal Exposure Had He Followed His Supervisor's Order to Conceal the Information

The State's argument that Hillman faced no criminal exposure here is premised solely on their flawed contention that withholding the exculpatory witness statement would not violate *Brady* or the requirements of the Morton Act. State Br. at 19-20. The State essentially concedes that if they are wrong on their *Brady* and Morton Act analysis – which they most certainly are – then Hillman

would have been subject to criminal exposure: just like Ken Anderson had exposure for withholding evidence in the Michael Morton case.[4]

A violation of either *Brady* or the Morton Act can lead to criminal prosecution. As detailed in the Innocence Project's *Amici* Brief, it was Michael Morton's exoneration and the subsequent criminal charges against his prosecutor, Ken Anderson, in connection with multiple *Brady* violations that led the Texas legislature to enact the Morton Act. IP Br. at 10-12. Judge Sturns of the 26th Judicial District Court of Williamson County found probable cause to arrest and charge Anderson with three crimes under Texas law relating to his suppression of evidence: Texas Government Code Section 21.001(a) (contempt), Texas Penal Code Section 37.09(a)(1) (tampering with or fabricating physical evidence), and Texas Penal Code Section 37.10(a)(3) (tampering with government records). *See* IP Br. at 12, n.11. That finding was based on Anderson's violation of a trial court order to turn over certain reports prepared by the lead detective and by falsely responding "No, sir," when asked by the trial judge if he had any information favorable to the defense. *Id*.

[4] In addition to the laws that Anderson was charged with violating, a prosecutor could also face criminal exposure for violating Texas Penal Code Section 37.09(a)(2) (tampering with or fabricating physical evidence), Sections 37.10(a)(1), (2) and (5) (tampering with government records), Sections 37.02 (perjury) and 37.03 (aggravated perjury) for making false certifications to the court. A prosecutor could also be charged with a violation of Section 39.02(a)(1) (abuse of official capacity) for improperly withholding evidence in violation of *Brady* and the Morton Act based on the theory that he has defrauded the defendant or defense counsel.

Had Hillman followed his supervisor's improper order and withheld the clearly exculpatory evidence, he would have violated or put himself in immediate danger of violating these same criminal statutes and others under Texas law, including contempt,[5] tampering with or fabricating physical evidence,[6] and tampering with government records,[7] as well as possible violations of federal law.[8]

Further, as the underlying case proceeded to trial, Hillman likely would have been required by the court to make affirmative representations and certifications regarding his compliance with his *Brady* obligations. Additionally, the Morton Act specifically requires prosecutors to affirm in writing or on the record everything turned over to the defense. Tex. Code Crim. Proc. art. 39.14(j). Indeed, many courts in Texas issue standard discovery orders mandating compliance with Article 39.14 and *Brady*.

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[5] Tex. Gov't Code § 21.001(a).

[6] Tex. Penal Code § 37.09(a)(1) ("A person commits an offense if, knowing that an investigation or official proceeding is pending or in progress, he…[a]lters, destroys, or *conceals* any record, document, or thing with intent to *impair its….availability as evidence* in the investigation or official proceeding") (emphasis supplied).

[7] Tex. Penal Code § 37.10(a)(3) ("A person commits an offense if he…intentionally destroys, *conceals*, removes, or otherwise impairs the verity, legibility, *or availability* of a governmental record") (emphasis supplied).

[8] Had Hillman withheld from the defense evidence that he knew he was obligated by the Due Process Clause of the Fourteenth Amendment to disclose (*i.e.*, committed an intentional *Brady* violation), that act would have "willfully subject[ed]" the defendant in *State v. Sims* to a deprivation of "rights . . . protected by the Constitution" in violation of federal civil rights law, and thus subjected Hillman to potential federal criminal penalties. *See* 18 U.S.C. § 242.

In this case, Hillman was even provided with clear instructions *by the Nueces County District Attorney* that he was to err on the side of disclosure, just weeks before he was fired for refusing to withhold information he was required to disclose to defendant Sims. Specifically, on December 31, 2013, in a memo issued to local police agencies and copied to all Assistant District Attorneys, Nueces County District Attorney Mark Skurka advised them of the strict requirements of the new law, and warned them that "[b]asically, *all* information in the possession of the prosecutor or the police *must* be turned over to the defense…. As prosecutors, we rely on law enforcement to provide us with evidence that it has collected during the investigation. This evidence must be turned over to the prosecution so that we may, in turn, provide it to the defense in every case." *See* Memo from Nueces County District Attorney Mark Skurka to all Law Enforcement Agencies, December 31, 2013 (the "Skurka Memo"),[9] at 1 (emphasis in original). The Skurka Memo included a new form for each case, entitled "Discovery Compliance Documentation Prior to Trial" and captioned with the case name and cause number, which *all assistant district attorneys* would be required to sign and provide to defense counsel, attesting to the county's compliance with these newly expanded disclosure requirements. *Id*. at 6.

[9] *Available at*: https://www.innocenceproject.org/wp-content/uploads/2018/10/20131231-Skurka-memo-and-attachments.pdf.

In addition, any prosecutor who proceeds to trial in the post-Morton Act era (or at any time, since *Brady* sets the "floor" of disclosure obligations for all prosecutors) faces the very real prospect that, separate and apart from any written certifications filed, he may at any time be asked by the trial judge on the record whether he has in fact complied with all of his statutory and constitutional obligations to disclose exculpatory evidence – as Ken Anderson was by the *Morton* judge on the eve of trial in 1987. If Hillman had falsely answered "yes" to such question(s) while knowing that he had, at his supervisor's direction, failed to disclose the eyewitness statement that strongly supported Sims' actual innocence claim, he would have faced still further criminal exposure.

The statutes that Hillman would have violated had he made such knowingly false written certifications and/or statements to the trial court in the *Sims* case include, but are not limited to Texas Penal Code Section 39.02 (abuse of official capacity);[10] Texas Penal Code Section 39.03 (official oppression); additional counts of tampering with a governmental record under Texas Penal Code Section

[10] "A public servant commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he intentionally or knowingly…[v]iolates a law relating to the public servant's office or employment." Tex. Penal Code § 39.02(a)(1).

37.10(a)(5);[11] as well as the perjury statutes (Texas Penal Code Sections 37.02 and 37.03).[12]

Thus, had Hillman followed his supervisor's orders to withhold exculpatory evidence, he not only would have faced prosecution for crimes of criminal tampering (arising from the act of concealment) directly analogous to those that former District Attorney Ken Anderson committed at the Michael Morton trial in 1987. He would have also found himself facing the prospect of being forced to make false statements (and/or filings) to the court in violation of a court order, his professional responsibilities and the canons of legal ethics – the act for which Ken Anderson was, in fact, sent to jail and disbarred in 2013.

Because withholding the exculpatory statement ran contrary to *Brady* and the Morton Act, Hillman's insistence on disclosing the information over his supervisor's objection amounted to a "refusal to commit a crime" under the *Sabine Pilot* doctrine.

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[11] "A person commits an offense if he…makes, presents, or uses a governmental record with knowledge of its falsity." Tex. Penal Code § 37.10(a)(5); *see also State v. Vasilas*, 187 S.W.3d 486 (Tex. Crim. App. 2006) (holding that an attorney who makes a legal filing that contains a knowingly false statement may be prosecuted under § 37.10).

[12] "A person commits an offense if, with intent to deceive and with knowledge of the statement's meaning…he makes a false statement under oath or swears to the truth of a false statement previously made and the statement is required or authorized by law to be made under oath." Tex. Penal Code § 37.02(a)(1); *see also* Tex. Penal Code § 37.03 (act constitutes aggravated perjury if false statement is "made during an official proceeding" and "is material").

C. Hillman Faced Professional Discipline under the Texas Disciplinary Rules of Professional Conduct Had He Followed His Supervisor's Order to Conceal the Information

While *Sabine Pilot* itself was limited to protections for non-lawyer employees who refuse to commit crimes, this Court may also wish to consider the additional significant fact that that if Hillman followed his supervisor's order, he would have violated several attorney disciplinary rules.[13] Rule 3.04(a) of the Texas Disciplinary Rules of Professional Conduct, for example, provides that an attorney shall not "unlawfully obstruct another party's access to evidence." Rule 8.04(a) states that a lawyer shall not commit any "criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer" or "engage in conduct constituting obstruction of justice." The Texas Disciplinary Rules of Professional Conduct also set forth specific responsibilities for a prosecutor. Under Rule 3.09(d), for example, a prosecutor is required 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." Though not violations of criminal laws, violations of these ethical standards are serious and puts a prosecutor's ability to practice law in jeopardy, and provide additional public policy grounds for which to grant Hillman a remedy (*see* Section D, *infra*).

[13] Non-compliance with the Morton Act subjects a prosecutor to discipline under the Texas Disciplinary Rules of Professional Conduct. *See* State Bar of Texas Committee on Professional Ethics Opinion No. 646, 78 TEX. B. J. 78 (January 2015).

D. An Adverse Ruling Against Hillman Risks Eroding the Progress That Texas Has Made in the Wake of Michael Morton and Anthony Graves Cases to Ensure Meaningful Compliance with *Brady* and Prevent Wrongful Convictions

As is more fully described in the Innocence Project's *Amicus* Brief, Texas has taken substantial steps to address a prosecutor's failure to comply with *Brady*. IP Br. at 15-22. The Morton Act was just the beginning of legislative, executive, and judicial action that followed Michael Morton's exoneration to prevent the wrongful imprisonment and execution of Texas' citizens and to reform prosecutorial misconduct. *Id*. at 15-16.

The Morton Act led to the codification of ethical rules requiring disclosure of all evidence favorable to a criminal defendant, and it brought about cases like *Schultz*, in which the prosecutor conceded that he should have disclosed certain favorable evidence. 2015 WL 9855916 at *2. *Schultz* put prosecutors on notice that failing to disclose can cost them their law licenses, and it was critical in shifting prosecutorial attitudes to favor habitual disclosure.[14] Change by prosecutors led to statewide legislative reform in the form of an internal checklist and tracking system to ensure that all relevant information was fully investigated and disclosed prior to calling jailhouse witnesses. IP Br. at 20. District Attorneys' offices in Dallas, Harris, Tarrant, Travis, and Bexar Counties have all implemented

[14] 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.

"conviction integrity units" to resolve and investigate claims of wrongful conviction. *Id.* at 21. Texas' improvements to its criminal justice system seem hollow when, despite all of the efforts of the Texas Legislature and Texas Judiciary to date, a prosecutor can be terminated for following the law and legal ethics.

The fact that significant strides have been made in the Texas Legislature and through executive action should not, however, relieve this Court of its independent responsibility to protect prosecutors like Hillman, whose voluntary and meaningful compliance with these rules is essential to their success. That only five District Attorneys in Texas' 254 counties have created "conviction integrity units" suggests that leadership on these issues within the closed walls of at least some prosecutors' offices may not have kept pace with the broader public mandate. And while egregious acts of wrongful termination against prosecutors like Hillman are, fortunately, quite rare, the "chilling effect" of allowing him to be summarily fired without recourse for this most fundamental and laudatory conduct cannot be overstated. Indeed, one need look no further for the potential implications of such unchecked retaliatory action than Nueces County itself, which, in the year after Hillman's firing, witnessed a remarkably similar case with exactly the opposite effect – an assistant prosecutor who, after meeting with Respondent (then-DA) Skurka about a discovery issue, failed to disclose exculpatory evidence, leading to the wrongful conviction of a murder defendant and the judicial dismissal with

prejudice of the indictment when the suppression finally came to light. *See* IP Br. at 27-29 (discussing Courtney Hayden trial and subsequent judicial findings of intentional prosecutorial misconduct).

II. This Court Has the Power to Create a Narrow Judicial Abrogation of Sovereign Immunity in Cases like Hillman's to Address a Critical Public Policy Concern: Ensuring that Innocent Citizens Are Not Convicted or Sentenced to Death for Crimes They Did Not Commit

Petitioner requests a limited abrogation of sovereign immunity to protect conscientious prosecutors who refuse to knowingly violate the rights of the accused and expose themselves to criminal liability. For all of Respondents' and their *amici*'s lengthy discussion of the infrequency with which this Court has historically exercised its authority in similar circumstances, there is no dispute that such an abrogation is well-within this Court's authority.

The doctrine of sovereign immunity in Texas is a common-law doctrine, and, as such, it can be abrogated by this Court. *See* IP Br. at 32 (citing *Hosner v. DeYoung*, 1 Tex. 764, 768-69 (1847)); *Reata Constr. Co. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006) ("[I]t remains the judiciary's responsibility to define the boundaries of [immunity] and to determine under what circumstances sovereign immunity exists in the first instance."); *see also State ex rel. Best v. Harper*, No. 16-0647, 2018 WL 3207125, at *13 (Tex. June 29, 2018) (abrogating sovereign immunity under the Texas Citizens Participation Act and finding that "Abrogation remains the judiciary's responsibility."); *Engelman Irrigation Dist. v.*

Shields Bros., Inc., 514 S.W.3d 746, 753 (Tex. 2017) ("We have recognized that the decision to waive sovereign immunity is largely left to the Legislature….But we have also recognized that sovereign immunity is a common-law creation, and it remains the judiciary's responsibility to define the boundaries of the doctrine."); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2003), judgment withdrawn and reissued (May 13, 2003) ("[W]e have not absolutely foreclosed the possibility that the judiciary may abrogate immunity by modifying the common law…"). State supreme courts across the country have similarly abrogated sovereign immunity.[15]

The State asserts that this limited abrogation of sovereign immunity "would be no different than amending the [Texas] Tort Claims Act" (TTCA). State Br. at 24. But while the Texas Legislature certainly has the power to create an explicit cause of action for persons such as Hillman (although such protections would not

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[15] *See, e.g.,* Renna Rhodes, *Principles of Governmental Immunity in Texas: The Texas Government Waives Sovereign Immunity When It Contracts - or Does It?,* 27 ST. MARY'S L.J. 679, 714 (1996) (citing cases from Arizona, Colorado, and Nevada: *Stone v. Ariz. Highway Comm'n*, 93 Ariz. 384, 392, 381 P.2d 107, 112 (1963) (abrogating substantive defense of governmental immunity, which, though later overruled in part, was codified at A.R.S. §§ 12-820 (1984)); *Colo. Racing Comm'n v. Brush Racing Ass'n*, 136 Colo. 279, 283-84, 316 P.2d 582, 585-86 (1957) (eliminating governmental immunity and noting that ancient immunity is "proper subject for discussion by students of mythology"); *Rice v. Clark Cnty.*, 79 Nev. 253, 256, 382 P.2d 605, 606 (1963) (removing governmental immunity for counties and county officials)). *See also Simon v. Heald*, 359 A.2d 666 (Del. Super. 1976) (abrogating sovereign liability to allow suits for state officer/employee negligence); *Cootey v. Sun Inv., Inc.,* 68 Haw. 480, 718 P.2d 1086 (1986) (abrogating sovereign immunity such that the state will be liable for the torts of its employees in the same manner and to the same extent as a private person under the same circumstances); *Masad v. Weber*, 772 N.W.2d 144 (S.D. 2009) (abrogating sovereign immunity for breach of contract claims).

apply to him retroactively), that possibility does nothing to undermine the inherent authority of this Court to articulate state common law – including the scope of sovereign immunity.

If anything, the TTCA analogy only underscores this Court's authority and, indeed, its responsibility to act where, as here, powerful public policy interests warrant the exercise of that authority.

This Court has previously limited sovereign immunity under the TTCA itself. The State cites *Safeshred, Inc. v. Martinez* as the case in which this Court classified retaliation as "an intentional tort." State Br. at 24 (citing *Safeshred Inc. v. Martinez*, 365 S.W.3d 655, 660 (Tex. 2012)). This Court in *Safeshred* noted that this finding was consistent with the treatment of statutory workers' compensation retaliation claims arising under Texas Labor Code Section 451.001, which prevents the discharge of employees for filing a workers' compensation claim. *Id.* at 660. Notably, however, this Court discussed that Anti-Retaliation statute in *Kerrville State Hospital v. Fernandez* and held that it applied to state agencies as well as private employers. *See* 28 S.W.3d 1, 2 (Tex. 2000). Though the statute did not expressly waive sovereign immunity, this Court looked beyond its express language to infer that the legislature intended such waiver, despite the limitations of the TTCA. *Id.*

Petitioner's request for limited judicial abrogation in this case is even more modest than the waiver of sovereign immunity that the Court already recognized in *Kerrville*. To be clear, this is not an instance in which the Texas Legislature has *precluded* a cause of action for individuals like Hillman. Petitioner is therefore not asking that the Court rewrite the TTCA to find a waiver not expressly provided; he is simply asking that the Court exercise its common-law authority to define the scope of sovereign immunity in a manner that comports with the extraordinary public-policy interests at stake in this litigation.

Neither *Amici* nor Petitioner dispute that this Court's judicial abrogation of sovereign immunity has been – and should remain – exceedingly rare. But it is also clear that this Court has already exercised its authority to abrogate sovereign immunity for intentional tort claims, and it has the authority to do so again in this case. Because the public policies in Hillman's case implicate nothing less than the life and liberty of Texas' citizens, and the fair administration of the criminal justice system, there is every reason for this Court to do so here.

III. Public Policy Overwhelmingly Justifies a Limited Abrogation of Sovereign Immunity to Protect Law Enforcement Officials Working in the Criminal Justice System

While retaliatory terminations of employees who refuse to commit illegal acts rarely occur, this Court in *Sabine Pilot* recognized the overwhelming public policy concerns that such an occasion raises and created a narrow exception for at-

will employment. The issue raised here is whether the public policy concerns that led this Court to recognize a remedy for a wrongfully terminated private employee in *Sabine Pilot*, *as well as* the additional and critical public policy concerns described above and in the Innocence Project and Texas Criminal Defense Lawyer's Association ("TCDLA") *amicus* briefs – concerns that go straight to the heart of Texas' criminal justice system and the enforcement of its canons of legal ethics – justify a limited abrogation of sovereign immunity. They plainly do.

Importantly, this Court need *not* judicially abrogate sovereign immunity for wrongful termination claims potentially brought by the many thousands of state and municipal employees who work in other government positions. Hillman's case poses only the question whether public policy warrants an express recognition by this Court that *Sabine Pilot* protects the *particular class of government employees* Hillman represents: law enforcement officials who refuse to violate the United States Constitution, statutory law, their professional obligations, and the canons of legal ethics by knowingly suppressing evidence that is favorable to an accused.

For this reason, and for others set forth below, the concerns raised by the Government a*mici* about the potentially unlimited pool of potential government-employee litigants and potentially devastating impact on the public fisc created by a ruling in Hillman's favor is a red herring. Other government employees – whether in Texas' school systems, regulatory entities, or public safety agencies –

no doubt serve important functions, and there may well be other reasons this Court would choose to protect them from wrongful termination for refusal to commit crimes as a condition of employment should it be presented with a case or controversy raising that question. But the balancing of interests in favor or against such a broad abrogation of immunity for all government employees is not presented here. Hillman's case turns, instead, on the overwhelming public policy mandate reflected in the Due Process Clause of the United States Constitution, the Morton Act, and other measures enacted to prevent wrongful convictions of the actually innocent in this state in recent years, and the particularly weighty interests served by robust enforcement of those rules when it comes to the prosecutors charged with carrying them out.

This Court's role as the ultimate arbiter of the professional ethics applicable to prosecutors in Texas more than justifies the discrete abrogation of sovereign immunity required to protect vulnerable public employees engaged in the criminal justice system.

A. Many States Have an Illegal-Act Exception Similar to *Sabine Pilot* and Have Not Hesitated to Extend Its Protections to All Employees

The vast majority of states (at least 42) have some form of explicit "illegal act" public policy exception to at-will termination.[16] Twenty of the forty-two states have specifically considered cases where the plaintiff has brought suit against a *public* employer, and *none* of those courts have made a distinction between public or private employers in applying the exception.[17] For example, the South Carolina

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[16] *See* Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, 124 Monthly Lab. Rev., Jan. 2001, at 2, *available at* https://www.bls.gov/opub/mlr/2001/01/art1full.pdf.

[17] States in which courts have recognized the three-prongs of this exception include: Arizona, Arkansas, California, Connecticut, Hawaii, Idaho, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, North Carolina, North Dakota, Oklahoma, South Carolina, Texas, and Washington. *See Woerth v. City of Flagstaff,* 167 Ariz. 412, 418, 808 P.2d 297, 303 (Ct. App. 1990); *City of Green Forest v. Morse*, 316 Ark. 540, 546, 873 S.W.2d 155, 158 (1994); *Sinatra v. Chico Unified Sch. Dist*., 119 Cal. App. 4th 701, 706, 14 Cal. Rptr. 3d 661, 664 (2004); *Miller-Black v. Reg'l Sch. Dist. 11*, No. CV075003467, 2009 WL 323368, at *3 (Conn. Super. Ct. Jan. 14, 2009) (unpublished opinion); *Smith v. Chaney Brooks Realty, Inc.*, 10 Haw. App. 250, 257-58, 865 P.2d 170, 174 (1994); *Mallonee v. State*, 139 Idaho 615, 621-22, 84 P.3d 551, 557-58 (2004); *Tony v. Elkhart County*, 851 N.E.2d 1032, 1037 (Ind. Ct. App. 2006); *Ackerman v. State*, 913 N.W.2d 610, 615 (Iowa 2018); *Borschel v. City of Perry*, 512 N.W.2d 565, 567 (Iowa 1994); *Hill v. Ky. Lottery Corp*., 327 S.W.3d 412, 422 (Ky. 2010); *Mitchell v. Univ. of Ky.*, 366 S.W.3d 895, 898 (Ky. 2012); *Smack v. Dep't of Health & Mental Hygiene*, 134 Md. App. 412, 427, 759 A.2d 1209, 1217 (2000), aff'd sub nom. *Smack v. Dep't Of Health And Mental Hygiene*, 378 Md. 298, 835 A.2d 1175 (2003); *Parker v. Town of N. Brookfield*, 68 Mass. App. Ct. 235, 240, 861 N.E.2d 770, 774-75 (2007); *Flynn v. City of Boston*, 59 Mass. App. Ct. 490, 493, 796 N.E.2d 881, 884 (2003); *Austin v. Wayne State Univ*., No. 220169, 2001 WL 732379, at *3 (Mich. Ct. App. June 12, 2001); *Ford v. Minneapolis Pub. Sch.*, 874 N.W.2d 231, 233 (Minn. 2016) (relying on a common law exception that has a statutory counterpart in state law); *Harris v. Miss. Valley State Univ*., 873 So. 2d 970 (Miss. 2004); *Wadsworth v. State*, 275 Mont. 287, 305, 911 P.2d 1165, 1175 (1996) (interpreting the state wrongful discharge statute as applied to retaliatory termination, and the court did not discuss any distinction between the application of the statute to private or public employers); *Porter v. City of Manchester*, 151 N.H. 30, 39, 849 A.2d 103, 114 (2004); *Blakeley v. Town of Taylortown*, 233 N.C. App. 441, 452, 756 S.E.2d 878, 886 (2014); *Lee v. Walstad*, 368 N.W.2d 542, 547 (N.D. 1985); *Vannerson v. Bd. of Regents of Univ. of Okla.*, 1989 OK 125, 784 P.2d 1053, 1054-55; *Donevant v. Town of Surfside Beach*, 414 S.C. 396, 409, 778 S.E.2d 320, 327

Supreme Court recently affirmed the application of the public policy exception to the at-will doctrine for a public employer. The Court of Appeals of South Carolina had noted that judge-made public policy fills in "in the absence of legislative declaration." *Donevant v. Town of Surfside Beach*, 414 S.C. 396, 409, 778 S.E.2d 320, 327 (Ct. App. 2015), aff'd, 422 S.C. 264, 811 S.E.2d 744 (2018). In *Donevant*, the court made no distinction between public and private employers when it found that the plaintiff, a former town building official, had a "well-settled cognizable claim" that she had been fired for refusing to violate the state building code, and that violating the code was a "condition of continued employment." *Id.*

Only a few courts (Colorado,[18] Missouri,[19] and Tennessee[20]) make any distinction between public and private employers in applying the illegal act exception. Notably, however, each of those states – unlike Texas – have sovereign immunity statutes that *explicitly* bar such lawsuits.

This case is not, as the State suggests, a "bid for judicial activism." State Br. at 1. Instead, as courts across the country have recognized (and as this Court recognized in *Sabine Pilot*), narrow public policy exceptions to the at-will

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(Ct. App. 2015), aff'd, 422 S.C. 264, 811 S.E.2d 744 (2018); *Dicomes v. State*, 113 Wash. 2d 612, 618, 782 P.2d 1002, 1006-07 (1989).

[18] *Holland v. Bd. of Cnty. Com'rs of County of Douglas*, 883 P.2d 500, 508 (Colo. App. 1994).

[19] *Newsome v. Kansas City, Mo. Sch. Dist*., 520 S.W.3d 769, 777 (Mo. 2017), reh'g denied (June 27, 2017).

[20] *Williams v. City of Burns*, 465 S.W.3d 96, 109 (Tenn. 2015).

employment doctrine are critical for protecting employees faced with impossible dilemmas. Those protections apply with even greater force in the context of a prosecutor making life-and-death decisions as part of the criminal justice system, particularly given that *Brady* and Morton Act disclosures are, by their very nature, largely self-enforcing and depend on prosecutorial compliance – behind closed doors – to function as written. *See* TCDLA Br. at 4. Far from being outside the appropriate scope of this Court's authority, such matters go to the heart of its responsibility to ensure the fair administration of justice in the State of Texas.

B. The Lower Court's Ruling in This Case Would Leave Hillman and Similarly Situated Employees No Recourse Under Texas Law

The State argues that the Whistleblower Act protects "a public employee who in good faith reports a violation of law by the employing governmental entity to an appropriate law enforcement authority," (State Br. at 29 (citing *Tex. Dep't. of Assistive & Rehab. Servs. v. Howard*, 182 S.W.3d 393, 399 (Tex. App.—Austin 2005, pet. denied))), but this argument, too, is a red herring. By the State's own admission, the Whistleblower Act does not cover Hillman's conduct (State Br. at 8) because, as the prosecutor who obtained and controlled access to the exculpatory evidence in question, *he himself* was the person being ordered to violate the law; he was not "blowing the whistle" on anyone else. As the State concedes, Hillman did not attempt to report law-breaking (State Br. at 8); rather, he was dismissed for *refusing* to violate the law and the canons of legal ethics. Thus,

the Whistleblower Act does not apply to the facts of this case because Hillman did not report another's illegal conduct.

Nor can Hillman remotely be faulted for failing to do so. He repeatedly attempted to convince his supervisor to allow him to follow the plain language of the statute and ethics rules; phoned not one but two ethics hotlines for advice and back-up authority to present to his superiors; and was summarily fired for "refusing to follow orders" before he could even exhaust his own efforts to appeal his supervisors or take the matter to the trial judge. IP Br. at 24. The Municipal League *amici's* blithe comment that prosecutors have ample on-the-job protections for any criminal acts they may be ordered to commit because "the local district attorney (or, in Hillman's case, the Texas Rangers) is just a phone call away" (Municipal League Br. at 43) remarkably ignores the fact that it was *the District Attorney himself* who fired Hillman for refusing to break the law, as would likely be the case with any other assistant prosecutor. Nor would it make any sense for this Court, as a matter of public policy, to require that the Texas Rangers be brought in to investigate employment disputes (even serious ones with grievous consequences) when employment law provides a far more efficient and effective deterrent.

A limited abrogation of immunity is *necessary* to safeguard the criminal justice system and to ensure that prosecutors working in that system all act

ethically and play by the rules. No prosecutor should be placed in the position of choosing between his or her career and following the law. The illegal-act exception should be available to law enforcement officials charged with protecting the most fundamental rights of citizens, just as it is for private employees.

The public policy interests warranting recognition of such protections are made vividly clear by contrasting those currently available to lawyers who frequently practice in fields where the stakes for Texas citizens (and the system as a whole) are not nearly so grave. If a partner at a private law firm ordered an associate to fabricate evidence in a civil or criminal trial (perhaps by suppressing evidence subject to court-ordered reciprocal disclosure, or suborning perjury) and the associate rightly refused to do so and was fired, *Sabine Pilot* (which was based on public policy concerns) would allow for a claim against the law firm and the offending partner. That same protection should exist on the other side of the criminal justice system. A lawyer who chooses to work for the government and who upholds the law and legal ethics should have recourse when a supervisor fires that lawyer for refusing to commit a crime or violate the state's legal ethics rules.[21]

[21] In Texas, all attorneys are instructed that they shall not "unlawfully obstruct another party's access to evidence" (Texas Disciplinary Rule of Professional Conduct Section 3.04(a)); nor make "a false statement of material fact or law to a third person" (Texas Disciplinary Rule of Professional Conduct Section 4.01(a)). In addition, the "Specific Responsibilities of a Prosecutor" of Texas Disciplinary Rule of Professional Conduct Section 3.09 impose 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."

This is particularly so because of the unique role that a prosecutor plays in carrying out the state's police powers. Indeed, ethics rules are the backbone of the legal profession. The rules must be safeguarded, and public employees who uphold these ethics must be protected by the Court that enacts and enforces the legal ethics for the State of Texas.

The record is clear that Hillman contacted the Texas State Bar's ethics hotline for advice. IP Br. at 23-24. The Texas State Bar, an administrative agency of the judicial branch,[22] advised him that he should turn over exculpatory evidence, and Hillman was terminated when he refused to withhold the evidence as his supervisor ordered. IP Br. at 24. This Court has both the responsibility and the discretion to determine whether a prosecutor deserves the same protections as a private employee when he is terminated for following the judiciary's own professional ethics and guidance.

This Court should reverse the decisions of the lower courts in this case to protect prosecutors from such wrongful termination, and to ensure that criminal defendants are not deprived of access to exculpatory evidence.

[22] Tex. Gov't Code § 81.011 ("(a) The state bar is a public corporation and an administrative agency of the judicial department of government….(c) The Supreme Court of Texas, on behalf of the judicial department, shall exercise administrative control over the state bar under this chapter").

C. The Fact That an Attorney's Conduct under the Disciplinary Rules is Also Implicated Here Provides Further Support That This Court – Rather Than the Texas Legislature – is the More Appropriate Forum to Resolve the Issue of Whether Immunity Applies under *Sabine Pilot*

This Court has the inherent power "to maintain appropriate standards of professional conduct." Texas Rules of Disciplinary Procedure, preamble; s*ee also Royston, Rayzor, Vickery, & Williams LLP v. Lopez,* 467 S.W.3d 494, 506 (Tex. 2015) ("As a court, we are constitutionally and statutorily charged with promoting and enforcing ethical behavior by attorneys. This is a solemn duty the Court has guarded for decades.") (citing Tex. Const. art. V, § 31; Tex. Gov't Code §§ 81.024, .071–.072; Tex. Disciplinary Rules Prof'l Conduct, preamble, reprinted in Tex. Gov't Code, tit. 2, subtit. G, App. A–1). As noted in Section III(B), *supra*, had Hillman followed his supervisor's order, he would have violated several disciplinary rules.

Indeed, refusal to violate ethical rules falls into the broad category of public policy that other courts have held is an exception to at-will employment. *See*, *e.g.*, *Smith v. Chaney Brooks Realty, Inc.*, 10 Haw. App. 250, 257-58, 865 P.2d 170, 174 (1994) (an employer's right to discharge an at-will employee "does not extend to a termination that conflicts with state public policy[,]" for example, "performing an important public obligation, such as … *refusing to violate a professional code of ethics*") (emphasis added); *Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz.

370, 378, 710 P.2d 1025, 1031 (1985), *superseded on other grounds by statute,* Arizona Employment Protection Act, A.R.S. § 23–1501 et seq., *as stated in Powell v. Washburn*, 211 Ariz. 553, 125 P.3d 373 (2006) (noting that expressions of public policy are not only in statutory and constitutional law and that public policy exceptions to at-will employment are not limited to violations of a criminal statute); *Miller-Black v. Reg'l Sch. Dist*. 11, No. CV075003467, 2009 WL 323368, at *3 (Conn. Super. Ct. Jan. 14, 2009) (unpublished opinion) ("[i]n evaluating [wrongful termination] claims, [courts] look to see whether the plaintiff has…alleged that his dismissal contravened any judicially conceived notion of public policy"); *Flynn v. City of Boston,* 59 Mass. App. Ct. 490, 493, 796 N.E.2d 881, 884 (2003) ("The existence of a clearly defined public policy is a question of law for the court….It is for the judge, not the jury, to determine whether, on the evidence, there is a basis for finding that a well-defined, important public policy has been violated") (internal quotations omitted); *Parker v. Town of N. Brookfield*, 68 Mass. App. Ct. 235, 240, 861 N.E.2d 770, 774–75 (2007) ("an at-will employee may maintain a cause of action and find redress where the termination results from the employee's assertion of some legally guaranteed right, or refusal to engage in illegal or harmful conduct"); *Donevant v. Town of Surfside Beach*, 414 S.C. at 409 ("public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions,

should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection") (internal citation omitted).

The Court, as the authority over attorney conduct and the disciplinary rules, is best situated to grasp the full picture resulting from the application of government immunity in this instance, that there are additional consequences and public policy concerns beyond the exposure of criminal liability specifically addressed in *Sabine Pilot*.

D. The Potential for Ruinous Judgments Should the Court Allow the Claim to Proceed is Vastly Overstated

Respondents and the Municipal League repeatedly warn of potential fiscal Armageddon should the Court allow Hillman's claim to proceed under *Sabine Pilot. See, e.g.,* Res. Merits Br. at 15 ("abrogating immunity will expose the treasuries of every government entity in Texas, all the way from the State to its smallest town"); Res. Merits Br. at 16 (claiming abrogating immunity "*will* imperil public funds") (emphasis in the original); Municipal League Br. at 30 (asserting "a grave danger to the public fisc"). Their contention is flawed for several reasons.

First, allowing a discrete abrogation of sovereign immunity will not imperil public funds. The TTCA strictly limits the state government's liability to a maximum amount of $250,000 for each person, liability for local government units is capped at $100,000 per person, and municipalities' liability is capped at $250,000 per

person. Tex. Civ. Prac. & Rem. Code §§ 101.023(a)-(c).[23] Relevant to this case, the District Attorney's office is a governmental unit under the TTCA, *which would cap Hillman and any future petitioner's damage award at $100,000*. Tex. Civ. Prac. & Rem. Code §§ 101.001(3)(A), (D) (defining a "governmental unit" as the state, including "other agencies bearing different designations, and all departments, bureaus, boards, commissions, offices, agencies, councils, and courts" and "any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution.").

Second, it mischaracterizes Hillman's claim as one that necessarily would abrogate sovereign immunity for *all* government employees throughout the state, not the far smaller class of employees Hillman's case implicates: prosecutors and other law enforcement officials who are retaliated against and discharged for refusal to suppress exculpatory evidence.

Third, it ignores the experience of the numerous states that have long afforded such protections not just to prosecutors, but to a broad array of government employees, without any apparent devastation to the public fisc. These states' experiences suggest that such retaliatory actions have been and remain quite rare,

[23] The TTCA establishes further limitations on liability for each single occurrence of injury in addition to the maximum amounts available for each person. §§ 101.023(a)-(c).

and that the judicial recognition of an appropriate remedy for such employees may well have served its intended deterrent effect.

Respondents and the Municipal League acknowledge that there is rarely an instance where a supervising prosecutor fires an employee for refusing to commit a criminal violation, much less an epidemic of instances. *See, e.g.*, Municipal League Br. at 43 (asserting that it would be rare, given the high risk of exposure that a senior prosecutor would run). Respondents and the Municipal League therefore have refuted their own claims that public funds will be unduly exposed by allowing a claim under *Sabine Pilot* to proceed. Indeed, neither Respondents nor their *amici* have provided any examples of any large monetary awards to private employees under *Sabine Pilot*, much less a spate of such awards – from the last *thirty years* since the *Sabine Pilot* decision.

Accordingly, unless there is a pervasive problem of government supervisors ordering their prosecutors to commit crimes, and terminating their employment for failure to follow those orders, a ruling in favor of Hillman will not "imperil public funds." To the contrary, Hillman's claim represents the ideal middle ground: a claim that is fortunately rare, but also sufficiently important to protect fundamental public policy, particularly to the criminal defendants whose very liberty depends upon law enforcement officials acting ethically and without fear of retaliation for doing so.

The Court should therefore rule in favor of Hillman to protect those accused of crimes from wrongful conviction; to protect the public from the potential consequences of "getting it wrong" and allowing the real perpetrators of those crimes to evade justice; and to protect conscientious, law-abiding prosecutors from wrongful termination because they refused to commit crimes, and instead adhered to their most fundamental legal and ethical obligations even in the face of direct orders to violate the law.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge this Court to reverse the decision of the lower courts and extend *Sabine Pilot*'s protection against wrongful termination to conscientious law enforcement officials like Petitioner who refuse to commit illegal acts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Excluding the portions of this Brief exempted by T.R.A.P. 9.4(i)(1), this Brief contains 11,740 words.

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