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URGENT TIME SENSITIVE

Ken Paxton

Texas Attorney General

P.O. Box 12548

Austin, Texas 78711

Texas Governor Greg Abbott

Bobby Wilkinson, Budget Analyst

Cara Crawford, Budget Analyst

Senate State Affairs Chairman Senator Joan Huffman

Senate State Affairs Vice Chair Senator Rodney Ellis

Senate State Affairs Member Senator Brian Birdwell

Senate State Affairs Member Senator Brandon Creighton

Senate State Affairs Member Senator Craig Estes

Senate State Affairs Member Senator Troy Fraser

Senate State Affairs Member Senator Jane Nelson

Senate State Affairs Member Senator Charles Schwertner

Senate State Affairs Member Senator Judith Zaffirini

**Re: Amended Notice of Lawsuit for Violations of TOMA with respect to
HB 1438 & Request for Investigation**

Dear Governor Abbott, Attorney General Paxton and Senators:

Please accept this as an amended notice of intent to file a declaratory judgment¹

¹ Chapter 37 of the Texas Civil Practice and Remedies Code, generally, and

and request for injunctive relief regarding House Bill 1438, as void for the House Judiciary and Civil Jurisprudence Committee and/or a sub-group thereof violating the Texas Open Meetings Act (TOMA).²

H.B. 1438 is the product of a small group of public officials, a judge and REPTL lawyers violating the law. The Bill was surreptitiously passed through Judge Guy Herman's "improper influence,"³ violation of separation of powers under the Texas Constitution and Judicial Canons, and TOMA violations set forth herein. The means by which the Bill was passed reveal that the House Committee on the Judiciary and Civil Jurisprudence and/or this group, violated TOMA with respect to:

- Unlawful closed meetings between Representative Senfronia Thompson, Judge Guy Herman, Laura Upchurch and Craig Hopper
- Unlawful private communications between the foregoing individuals constituting deliberations for HB 1438
- Rubber-stamping a Bill previously deliberated upon and passed in violation of TOMA
- Approving the Bill prior to and without mandatory public testimony in light of the substantial changes to the Bill, rendering it a new Bill entirely;

Section 37.004 thereof, in particular, which provides: "A person...whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder." TEX. CIV. PRAC & REM. CODE §37.004.

² Tex. Govt. Code 551.090; The Open Meetings Act (the "Act") was adopted to help make governmental decision-making accessible to the public. It requires meetings of governmental bodies to be open to the public, except for expressly authorized closed sessions, and to be preceded by public notice of the time, place and subject matter of the meeting. "The provisions of [the Act] are mandatory and are to be liberally construed in favor of open government." Tex. Govt Code 551.101.

- Illegally placing a knowingly controversial, opposed bill on the Local and Consent Calenders, reserved for Bills upon which no opposition is anticipated;
- Inadequate notice to the public of the May 12, 2015 formal meeting to deliberate on the Bill;
- Inadequate notice by vague description of the subject matter to be deliberated upon in open meeting
- Efforts to avoid technical violation of TOMA through “walking quorums.”
- Stuffing HB 1438 with a committee substitute full of illegal, void provisions that the foregoing individuals knew were highly objectionable, controversial, which were defeated in the 83rd Legislative Session;

Evidence exists to prove that Herman and Thompson intentionally and/or knowingly placed a controversial Bill on the Local and Consent Calendar in an effort to “fly under the radar” and avoid detection—depriving the public of their right to testify and express outrage of the Bill’s illegal provisions prior to passing in the House.⁴ Public testimony

⁴Judge Guy Herman, Travis County Probate Judge, took a 3-month sabbatical to work on his Spanish and manipulated the Travis County Commissioners to serve as his accomplice in violating federal law to obtain retirement benefits without retiring. Herman had a guaranteed return to the bench in November because he was running unopposed, so he got the commissioners to agree to replace him with Associate Judge Dan Prashner pending his return, at which time Prashner was again demoted. This is illegal, but Herman called it “small potatoes” in reports to the Austin American Statesmen. Federal tax rules prohibit an employee from receiving retirement benefits if there exists an arrangement or agreement for the employee to be rehired by the same employer. A violation of this rule would result in the return of any disbursed retirement benefits or the possibility of the disqualification of the entire county retirement plan by the IRS. Herman's attorney explained there may be some disagreement with the IRS about the retirement system, but that he would be surprised if it became much of an issue. According to the Texas County and District Retirement System, a "bona fide termination" is required in order for an employee to receive benefits, and a guaranteed return to the bench by an unopposed election race would not qualify as such. Even if this scenario cannot be deemed an “agreement,” Herman did not even take the 6 months required, but only 3.

that is knowingly false before a Legislative body is perjury and includes the failure to disclose when such failure would have the tendency to mislead.

H.B. 1438 was first presented to the House on March 9, 2015 as a rather benign Bill, though still controversial. Given the widespread abuse and financial exploitation by guardianship programs, few guardianship Bills could ever be characterized as “noncontroversial” in good faith. Victims of guardianship have cause to complain about routine deprivations of liberty and property without due process of law because even if the letter of the law is adhered to, the spirit is not. Rest assured, the law is routinely violated to achieve the desired ends and the result is exploitation, neglect and abuse. This includes Medicaid and Medicare fraud.

On April 14, 2015, Judge Herman testified that he spent the entire summer working with Laura Upchurch (REPTL), Craig Hopper (REPTL) and Representative Senfronia Thompson, in closed-door meetings where illegal deliberations were had in a “walking quorum.” Given the entire summer that the foregoing individuals spent working on this Bill, it is inconceivable that the supposedly “noncontroversial” committee substitute was not firmly decided upon and ready April 14, 2015, when Senfronia Thompson said this in public testimony.

Witnesses testified without having any notice of the 8 controversial, objectionable Bills fraudulently stuffed into this “Trojan horse” on April 15, 2015 at approximately 12:30 to 1:00 a.m. The Bill was clearly pushed to last of 40 Bills that day to ensure critics would be gone when the Bill was read. Suddenly, Judge Guy Herman and REPTL Attorneys Craig Hopper and Laura Upchurch, appeared in unison as if summoned by personal invitation to support the illegal Bill. Senfronia Thompson intentionally distorted known facts, stating that the Bill’s committee substitute rolled in “a couple” of “non-controversial” guardianship bills. This necessarily means that the Bill was ineligible for Local and Consent Calenders and should never have been passed by the House of Representatives. If the members had known the truth, the Bill would not have passed because its provisions did not even get out of committee in the 83rd Legislature.

Only 4 witnesses testified for and 8 were against, with the 8 being advocates and families victimized by guardianship. The committee substitute was not made available for public review until May 7, 2015 and Thompson, Committee Chairperson of Local and Consent Calendars, rammed it through the House in 24 hours for a third reading to pass it—without complying with the 24-hour requirement. Judge Herman appears to be the force behind the Legislature’s approval of virtually all guardianship Bills because he testifies on behalf of himself and all other statutory probate judges in Texas, telling the committees how many statutory probate judges voted in favor or against a Bill, when those Judges are not testifying before the committee. Without disclosing conflicts of interest Judge Herman has, motivating his zealous advocacy in the Legislature, his mere presence tends to be the deciding factor in whether a Bill succeeds or fails.

Judge Guy Herman has overstepped the bounds of his office and is drafting legislation to benefit the probate bar and personal financial interests, using Representatives Elliot Naishtat and Senfronia Thompson. Judge Herman testifies on virtually every Bill in the Legislature regarding guardianship and does not disclose the fact that he is the person behind the Bill being drafted. This violates separation of powers because the Judiciary is limited to interpreting the law, not making it. He has not disclosed his financial interest in the Bills he proposes, nor has he disclosed his improper influence and/or illegal communications and meetings, which violate the Texas Open Meetings Act.

The Bill has now been picked up by Senator Judith Zaffirini—leaving families no choice but to sue to have the Bill enjoined and declared unconstitutional. H.B. 1438 is so grossly unconstitutional, it’s criminal—official oppression, abuse of office, and intentional deprivation of privileges and immunities guaranteed by the Texas and United States Constitutions. 18 U.S.C. 241, 242; Tex.Penal Code 34.03 First and foremost, the Bill rolled in “eight” highly illegal, unconstitutional and controversial bills into the committee substitute in a veritable midnight heist in the House of Representatives. Thompson and Herman knew the Bill would not survive public testimony because the Bills failed in the last session when witnesses expressed outrage. Judge Guy Herman’s “improper influence” is the reason this Bill passed.

It is intolerable for citizens to have to police lawmakers. Nevertheless, I trust that you will intervene and investigate because you have taken action to stop Judge Guy

Herman's attempts to far exceed his jurisdiction and violate the Constitution before. A judge who believes it's "small potatoes" to violate criminal statutes does not deserve the privilege of sitting on the bench. Judge Herman should be ordered to comply with his oath to uphold the Constitution and Laws of this State—or step down. The same is true of any lawmaker who violates the Texas Open Meetings Act, Constitution, Laws of Texas or Ethics rules.

Whether last minute amendments to fix this illegal Bill occur or not, the Attorney General's office should pursue the TOMA violations and not represent the offenders, but the citizens of Texas. Judges and lawmakers who violate the law cease to represent the government and should be treated accordingly. A lawsuit is being prepared by a group of attorneys who have seen the abuses of statutory probate courts to enjoin further action on this Bill. Having previously notified you of the unconstitutional provisions, I will simply refer to the TOMA violations, which cannot be cured in retrospect.

I urge you to seek an injunction from the Texas Supreme Court and declaratory judgment that H.B. 1438 is void for violating the Texas Open Meetings Act for the protection citizens certain to be victimized by this Bill's illegal provisions. The primary violations of TOMA relate to attempts to evade its requirements and improper notice required by the Statute. House Journals reflect routine agreements to suspend the rules, but such suspensions may not invalidate the Texas Open Meetings Act or the act would be meaningless. Instead, the Act imposes a near strict liability criminal standard for violations of its provisions. Attempts to evade its requirements are evident in:

- Illegal deliberations occurring between Representatives, REPTL Attorneys and Judge Herman by his own testimony on April 14, 2015, with such deliberations constituting "walking quorums" at a minimum;
- Fraudulent placement of HB 1438 on the Local and Consent Calendar to evade Representatives and Senators suspicion that the committee substitute was stuffed with illegal provisions consisting of failed and highly objectionable Bills.
- Senfronia Thompson's April 14, 2015 testimony that the Bill contained a couple of non-controversial Bills knowing that 8 highly controversial Bills were rolled into it under circumstances that show an intent to defraud;

The Act applies to a governmental body, as defined by section 551.001(3),

when it engages in a “regular, special, or called meeting.” Informal meetings of a quorum of members of a governmental body are also subject to the Act. “Deliberation” means a verbal exchange during a meeting between a quorum of a governmental body, or between a quorum of a governmental body and another person, concerning an issue within the jurisdiction of the governmental body or any public business. “Deliberation” and “discussion” are synonymous for purposes of the Act. A “verbal exchange” clearly includes an exchange of spoken words, but it may also include an exchange of written materials or electronic mail. The Act includes two definitions of “meeting.” Section 551.001(4)(A) uses the term “deliberation” to define “meeting”:

a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person, during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action

The following test has been applied to determine when a discussion among members of a statewide governmental entity is a “meeting” as defined by section 551.001(4)(A):

- (1) The body must be an entity within the executive or legislative department of the state.
- (2) The entity must be under the control of one or more elected or appointed members.
- (3) The meeting must involve formal action or deliberation between a quorum of members.
- (4) The discussion or action must involve public business or public policy.
- (5) The entity must have supervision or control over that public business or policy.

Statewide governmental bodies that have supervision or control over public business or policy are subject to the Act, and so are the local governmental bodies expressly named in the definition of “governmental body.” A purely advisory

body, which has no authority over public business or policy, is not subject to the Act, unless a governmental body routinely adopts or “rubber stamps” the recommendations of the advisory board. Section 551.001(4)(B) defines “meeting” as follows: except as otherwise provided by this subdivision, a gathering:

- (i) that is conducted by the governmental body or for which the governmental body is responsible;
- (ii) at which a quorum of members of the governmental body is present;
- (iii) that has been called by the governmental body; and
- (iv) at which the members receive information from, give information to, ask questions of, or receive questions from any third person, including an employee of the governmental body, about the public business or public policy over which the governmental body has supervision or control.

On occasion, a governmental body has tried to avoid complying with the Act by deliberating about public business without a quorum being physically present in one place and claiming that this was not a “meeting” within the Act. Conducting secret deliberations and voting over the telephone, when no statute authorized this, was one such method. Having a “walking quorum” is another.

A “walking quorum” is described in *Esperanza Peace and Justice Center v. City of San Antonio*. *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433 (W.D. Tex. 2001). The night before an open city council meeting was to be held, the mayor met with several city council members in the city manager’s office and spoke with others by telephone about the city budget. **A decision was made that night and ratified at the public meeting the next day.** The federal court stated that it would violate the spirit of the Act and render a result not intended by the Legislature “[i]f a governmental body may circumvent the Act’s requirements by ‘walking quorums’ or serial meetings of less than a quorum, and then ratify at a public meeting the votes already taken in private.” The *Esperanza* court said that a meeting of less than a quorum is not subject to the Act “when there is no intent to avoid the Act’s requirements.” The evidence showed that the city council intended to violate the Act. For example, the mayor met with council members constituting less than a quorum to reach a conclusion; the city manager kept track of the number of council members present so as to avoid a

formal quorum; the consensus reached was memorialized in a memorandum containing the signatures of each council member; and the consensus was “manifested” when adopted at an open meeting. The Committee is prohibited from deciding an issue outside of an open meeting, which is a prohibited deliberation—and then attempting to legitimize that decision by rubber-stamping it in an open meeting that is form over substance.

Notably, this is not a one-time occurrence, as a witness will testify that she was informed the night before an open meeting that it had already been decided that a Bill was going to pass, rendering public testimony and official voting in the open meeting prohibited rubber-stamping under TOMA. Governmental actions taken in violation of the notice requirements of the Act are voidable. TEX. GOV’T CODE ANN. § 551.141.

The intentionally vague substance of the “notice” provided also violated TOMA, stating:

Bill HB 1438 (By S. Thompson), Relating to guardianships and other matters related to incapacitated persons.

Generalized terms such as “old business,” “new business,” “regular or routine business,” and “other business” are not proper terms to give notice of a meeting because they do not inform the public of its subject matter. Tex. Att’y Gen. Op. No. H-662 (1975) at 3. In the *Cox Enterprises* case, the Court held insufficient the notice of a school board’s executive session that listed only general topics such as “litigation” and “personnel.” 706 S.W.2d 956 (Tex. 1986). One of the items considered at the closed session was the appointment of a new school superintendent. The court noted that the selection of a new superintendent was not in the same category as ordinary personnel matters, because it is a matter of special interest to the public; thus, the use of the term “personnel” was not sufficient to apprise the general public of the board’s proposed selection of the new superintendent. The court also noted that “litigation” would not sufficiently describe a major desegregation suit that had occupied the district’s time for a number of years.

Notice was also defective for failure to provide 72 hours notice of a public

meeting in which deliberation occurred due to the substantial amendments to this “Trojan horse” HB 1438, which fundamentally changed the Bill as to constitute an entirely different Bill. To find otherwise would encourage and reward fraud. Notice must be posted for a minimum length of time before each meeting. Section 551.043(a) states the general time requirement as follows: The notice of a meeting of a governmental body must be posted in a place readily accessible to the general public at all times for at least 72 hours before the scheduled time of the meeting, except as provided by Sections 551.044–551.046.

Furthermore, the notice requirement for even an emergency meeting was violated on May 12, 2015 when the committee was granted permission to meet at 12:50 at approximately 12:23 for failure to provide the mandatory two hours notice, notwithstanding the lack of emergency. The public notice of an emergency meeting must be posted at least two hours before the meeting is scheduled to begin. Tex. Govt. Code. 511.045.

NEED FOR STATEWIDE INVESTIGATION

The entire guardianship system in Texas is grossly unconstitutional and crimes are committed against the elderly and disabled on a routine basis by the same court appointed lawyers and ad litem that virtually run Texas Courts. I have personally witnessed, as *a pro bono attorney*, gross deprivations of civil rights by court appointed attorneys as they cherry pick the provisions of the Code to achieve the desired ends. I am also aware of Harris County making money off of disabled and elderly victims of guardianship through management trusts and a master trust involving “pre-need funeral services.” My awareness of this came through a client who owns a casket and funeral service business. Harris County’s website discloses the “cut” judges and the County take from the ward’s estate by various and sundry acts of exploitation and the business of guardianship is organized crime on a Statewide basis. The Attorney General’s office must intervene and investigate for the protection of Texas citizens. Guardianship does not protect, but exploits and harms the elderly and disabled. The following acts represent the rule, not an exception:

- Deprivations of the right to “effective” assistance of counsel to zealously represent Constitutional due process rights under the 7th Amendment
- Deprivations of the 14th Amendment right to due process through the

- widespread use of Rule 11 Agreements between attorney ad litem and guardian ad litem to force guardianship on the elderly and disabled;
- Deprivation of the 14th Amendment right to a jury trial, guaranteed by the Estates Code, but never occurs;
 - Illegal taking of private property of the ward before any determination of incompetency by clear and convincing evidence is made, with Judges signing orders to sell real estate and place proposed ward's money in management trusts without any legal authority to do so;
 - Outrageous and unnecessary appointment of attorney ad litem and guardian ad litem fees, routinely escalating to \$100,000, rather than a few thousand as Judge Herman falsely represents;
 - Corruption amongst the key attorneys who control Harris County Judges with rulings that violate the law; such as fraud, forgery, extortion, bribery and witness intimidation;
 - Gross abuse of the appointment process by Judges, who select the same small pool of lawyers that violate citizen's rights;
 - Gross abuses of the indigent defense fund, including the sale of an autistic young man for \$100,000 to a perjuring child abuser instead of the qualified mother;
 - Guardian ad litem who do not have a clue about the disability a person suffers from and cannot qualify to testify under the Rules of Evidence concerning their "best interest," though they are charged with the life altering decision;
 - Attorney ad litem who zealously advocate that the proposed ward be put in guardianship for the inability to get paid out of the estate if they are not;
 - Physicians being bought out by lawyers and testifying that competency evaluations are not even conducted because they just get together with Sarah Pacheco and decide a person is incompetent;
 - A ward has called me complaining that his guardian is exploiting and neglecting him, with court records demonstrating that Howard Reiner is depriving him of oil royalties and government benefits;
 - Insiders flipping real estate between themselves for 50 cents on the dollar;
 - Fraudulent Inventories being filed to defraud Medicare, when the individual does not qualify due to income;
 - Social Workers referring individuals for court initiated guardianship and

- receiving a finder's fee;
- Being personally threatened and intimidated in every Court in which I have appeared, to include;
 - Being threatened 10-15 times by Judge Olsen for making a record of the Legislature's denial of three Bills proposing bonds to cover security for costs as he entered an order requiring my indigent mother to pay \$15,000 before the cost bond was legal (2012);
 - Having a Judge nearly hit me in the face with a file for trying to recuse him as he swung a file folder within inches of my nose in chambers and said he was calling Judge Herman;
 - Being threatened by an attorney ad litem, Howard Reiner, to get out of a case or else, impairing my client's right to counsel;
 - Being intimidated by bailiffs as they rubbed their pistols staring me down;
 - Being yelled at by Judges who insisted that "I don't hear very well" and "I'm not getting the message" for which their cronies turned up the volume and illegally sanctioned me \$15,000 as I was told by Judge Wright that he had much higher numbers in mind;
 - Trying to represent my client and the disabled person involved because not one of the Court appointees were advocating for their own clients' interests or following the law;
 - Watching Judge Olsen bounce a ball and engage in other inappropriate activities designed to let me know that nothing I would do would change his mind because the decision was made when my client could not pay the illegal bond of \$15,000;
 - Fighting 4-5 lawyers in every case for the ward's best interests because the Estates Code and Harris County's opportunistic application of it is set up to exploit, not protect;
 - Filing emergency TRO's and Temporary Injunctions that were denied as two women died in the manner that I stated would occur;
 - Seeing the devastation of a client whose wife was kidnapped by Harris County as Fatima Breland ciphoned almost every dollar from the \$400,000 community property estate down to \$25,000 in 4 short years. I am having to file habeas corpus in the Supreme Court for this client

because I am quite certain I cannot win in probate court and the Court cared nothing about violating Section 883 of the Code, which mandates the Spouse be given guardianship;

- Watching Terry Hammond, former Executive Director of the National Guardianship Association financially exploit wards as he tried to illegally hide his attorneys' fees from public knowledge because he is double or triple dipping and violating the Supreme Court's order to report fees;
- Ad litem fraudulently reporting their fees to the Office of Court Administration for only a fraction of the illegal fees they are paid;
- Gross violations of the Harris County fee guidelines and indigent defense fund
- The Department of Aging and Disability pursuing only 11 cases of 78,000 facilities regarding neglect, exploitation and abuse last year;

The foregoing list is not exhaustive. I assure you that in counties having guardianship programs⁵, the court appointees are there to profit, so they form limited liability companies to warehouse the elderly who languish in neglect. In every case where my client objected to financial exploitation and illegal chemical restraints, they were threatened with arrest by the assisted living facilities that insiders routinely refer wards to be warehoused. The attorneys then conspired to protect each other, while sending me a loud message that I was not welcome in Harris County.

The Legislature has made them more vulnerable by stripping them of their rights and removing Adult Protective Services' jurisdiction to intervene. Once a person is in guardianship, the District Attorney will not intervene and considers it a civil matter, even when the Penal Code is being violated for exploitation, abuse and neglect of an elderly or disabled person. This does not occur when a family member is guardian, but only where the person is given a private, paid guardian. I implore you to take action and investigate

⁵ The contrast between counties that engage in "for profit" guardianship rackets and those who do not is striking. A model judge in the area of guardianship is Susan Lowry of Fort Bend County. I was astonished that Judge Lowry respected civil rights and followed the letter and spirit of the law to protect wards, rather than cherry picking the Code to exploit them.

with the Texas Rangers because Texans are being victimized and dying as a result of the unimaginably criminal acts of insiders in guardianship. Reports of the same abuse, exploitation and neglect flood the media Statewide and yet, not one agency will lift a finger to protect our elderly and vulnerable citizens.

Experience has shown me that I am virtually certain to experience the wrath of those engaged in this criminal conduct, but as an attorney of this State, I am bound to report. Nevertheless, I am by no means a lone ranger and a slew of victims will be contacting your office to provide their own sworn testimony. Reports to other law enforcement agencies have already been made. If Texas Judge and leaders truly desire to protect the elderly and disabled, I trust they will do the right thing. I further request that you handle this investigation appropriately and for all concerned recipients to not run to the defense of those involved and for Whistleblower protection.

Respectfully submitted,

/s/ Candice Schwager

Candice Schwager