

No. 08-0696

**In the  
Supreme Court of Texas**

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UNIVERSITY OF TEXAS SOUTHWESTERN  
MEDICAL CENTER AT DALLAS,  
*Petitioner,*

v.

LARRY M. GENTILELLO, M.D.,  
*Respondent.*

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On Petition for Review from the  
Fifth Court of Appeals, Dallas

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**REPLY IN SUPPORT OF PETITION FOR REVIEW**

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The principal issue in this case is whether Texas courts have subject-matter jurisdiction over incurably invalid suits purportedly brought under the Texas Whistleblower Act, TEX. GOV'T CODE §§ 554.001-.010—a question the Court is already considering in *Texas Department of Transportation v. Lueck*, No. 06-1034, *Texas Department of Health and Human Services v. Okoli*, No. 07-0642, and *Texas Department of Transportation v. Garcia*, No. 07-1030. The Court has granted the petition and heard argument in *Lueck*, and it has requested full briefing in *Okoli* and *Garcia*.

In this case, the court of appeals rejected the University of Texas Southwestern Medical Center at Dallas's ("UTSW's") jurisdictional challenge even though plaintiff Larry Gentilello not only failed to allege a violation of the Whistleblower Act, but also gave testimony at the hearing on UTSW's plea to the jurisdiction that precluded any such allegation. The court of appeals failed to recognize the pleading deficiency and refused to consider Gentilello's self-defeating testimony. Because the facts and procedural history of this case invite exploration of a legal argument not developed in *Lueck*, *Okoli*, or *Garcia*, see *infra* at 7-8—the Court should order full briefing, grant the petition, and reverse the court of appeals' erroneous judgment.<sup>1</sup>

## ARGUMENT

### **I. THE COURT SHOULD GRANT THE PETITION TO CLARIFY JURISDICTIONAL REVIEW OF WHISTLEBLOWER ACT CLAIMS, AND IT HAS JURISDICTION TO DO SO.**

The primary question that this case presents is of undoubted statewide significance. Its resolution will determine whether governmental entities purportedly sued under the Texas Whistleblower Act may be forced to bear the expense of discovery and trial not only when the plaintiff fails to allege a violation of the Act, but also when the defendant can readily establish—in this case, through the plaintiff's own testimony—that the pleading deficiency is incurable. Under the text of the Act, its legislative history, and case law from both this Court and several courts of appeals, Gentilello's suit is barred.

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1. In addition to requesting that UTSW's petition for review be denied, Gentilello's response urges dismissal of this appeal. Pet. Resp. at 4, 15. UTSW addressed the latter argument in its January 16, 2009 response to Gentilello's motion to dismiss.

Although Gentilello argues otherwise, Pet. Resp. at xi-xii, 10, 15, there could be little doubt that the Court has conflicts jurisdiction. While four courts of appeals have concluded that jurisdictional review of Whistleblower Act suits is strictly limited to the plaintiff's pleadings, several more—in keeping with this Court's approach in other contexts<sup>2</sup>—have looked beyond the plaintiff's allegations and considered evidence when evaluating a trial court's ruling on a plea to the jurisdiction. See Pet. at 5 nn.2 & 3 (citing cases on each side of the split); see also *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Gentilello*, 260 S.W.3d 221, 226 n.1 (Tex. App.—Dallas 2008, pet. filed) (acknowledging the inconsistency of its conclusion with the results in other cases). This split of authority certainly reflects “inconsistency . . . that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants,” TEX. GOV'T CODE § 22.225(e)—regardless of how detailed the conflicting courts' analyses may have been.

## **II. THE FACTS OF THIS CASE HIGHLIGHT AN IMPORTANT POINT ABOUT JURISDICTIONAL ANALYSIS UNDER THE WHISTLEBLOWER ACT.**

### **A. Because Gentilello's Whistleblower Act Allegation Was Invalid—and His Own Testimony Confirmed It—UTSW Was Entitled to Dismissal.**

To allege a violation of the Whistleblower Act, a plaintiff's petition must assert, among other things, that the plaintiff reported a violation of law to a person or entity that he or she in good faith believed was an “appropriate law enforcement authority” within the

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2. E.g., *State v. Holland*, 221 S.W.3d 639, 643-44 (Tex. 2007) (takings); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004) (Tort Claims Act); *Tex. Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001) (same); *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000) (standing).

meaning of Texas Government Code section 554.002. An “appropriate law enforcement authority” is part of a governmental entity “authorized to . . . regulate under or enforce the law alleged to be violated in the [plaintiff’s] report; or . . . investigate or prosecute a violation of criminal law.” *Id.* § 554.002(b).

Gentilello alleged that he reported violations of “Medicare and Medicaid rules, regulations, statutes, and ordinances” only to his supervisor, Dr. Robert Rege. CR.10. Although he alleged a good-faith belief that Rege “had the authority to investigate and correct” the alleged violations, CR.11, Gentilello did not allege that Rege was part of a governmental entity authorized either to “regulate under or enforce the law alleged to be violated in [Gentilello’s] report; or . . . investigate or prosecute a violation of criminal law.” TEX. GOV’T CODE § 554.002(b). And at a hearing on UTSW’s plea to the jurisdiction at which the trial court requested the submission of evidence, RR.26, Gentilello clarified his good-faith belief. He explained his understanding that, although Rege had authority to stop illegal procedures and practices within UTSW and “suspend any surgeon who he felt was billing improper procedures,” RR.32-33, any enforcement of Medicare or Medicaid laws or regulations would have to be performed by federal authorities charged with enforcing the law, RR.32-33, 36; *see* Pet. at 3-4 (summarizing Gentilello’s testimony).

“Liberally construing” his petition, the court of appeals concluded that Gentilello had alleged a violation of the Whistleblower Act. *Gentilello*, 260 S.W.3d at 227. It further

concluded that Gentilello's testimony at the plea hearing was beyond the scope of its jurisdictional review. *Id.* Neither conclusion was correct.

On the first point, Gentilello's allegation was deficient not because it failed to precisely track the language of the Act, *see* Pet. Resp. at 13 n.8, but rather because it alleged a good-faith belief about Rege's authority that was irrelevant to what the statute requires. *See* CR.23-24 (UTSW's plea to the jurisdiction). It is settled law that a plaintiff's good-faith belief must be that the person to whom the report was made had the authority specifically described in section 554.002(b), not that he merely had the power, as a supervisory employee, to "investigate and correct," CR.11, other employees' allegedly illegal practices. *Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 320-22 (Tex. 2002).<sup>3</sup>

On the second point, ignoring Gentilello's own testimony confirming that his good-faith belief was something other than what the statute requires would be erroneous under any approach to the necessary jurisdictional analysis. As noted below, the court of appeals' limitation of its inquiry to the four corners of Gentilello's petition was erroneous in light of

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3. In *Needham*, the Court held that an agency with "authority to regulate and investigate its employees' conduct only to carry out its internal disciplinary process procedures" is not an "appropriate law enforcement authority" within the meaning of section 554.002. 82 S.W.3d at 320. It expressly rejected a good-faith argument "based on the erroneous assumption that section 554.002(b)'s 'appropriate law enforcement authority' definition includes an employer's power to discipline an employee for allegedly violating a law." *Id.* at 321.

The court of appeals' attempt to avoid *Needham* based on an internal UTSW billing-compliance program, *Gentilello*, 260 S.W.3d at 228, is erroneous. The authority to "ensure [that UTSW] complied with the applicable Medicare and Medicaid rules and regulations," *id.*, is categorically different from the authority to regulate under or enforce federal law. And Gentilello's attempt to distinguish *Needham* based on its procedural posture, Pet. Resp. at 14, fails in light of this Court's precedent establishing the relevance of evidence to several types of jurisdictional inquiries. *See supra* at 3 n.2 (citing *Holland*, *Miranda*, *Miller*, and *Bland*); *infra* at 7-8 (discussing *Bland*).

the Whistleblower Act's provision making waiver of immunity from suit coextensive with waiver of immunity from liability. But even if jurisdictional review in Whistleblower Act cases is generally limited to plaintiffs' allegations, it extends to evidence that readily establishes whether those allegations are fraudulent or plainly false. *See infra* Part II.B.

**B. Because It Calls for a Closer Look at Texas Government Code Section 554.0035, This Case Warrants Full Consideration Before *Lueck, Okoli, and Garcia* Are Decided.**

In *Lueck, Okoli, and Garcia*, the briefing has focused on whether the first or second sentence of Texas Government Code section 554.0035 addresses immunity from suit.<sup>4</sup> On that point, and contrary to Gentilello's assertions, Pet. Resp. at 7-9, 11, the first sentence of section 554.0035 cannot properly be read as waiving immunity. *Cf. Tooke v. City of Mexia*, 197 S.W.3d 325, 328-29, 342 (Tex. 2006) (noting that "immunity is waived only by clear and unambiguous language" and holding that the words "sue and be sued" do not themselves waive immunity). As reflected by the statute's text and legislative history (which UTSW will present in detail if the Court requests full briefing), that sentence merely addresses the range of remedies a Whistleblower Act plaintiff may seek. *See* Tex. H.B. 1075, As Introduced, 68th Leg., R.S. (1983) (predecessor of current section 554.0035's first sentence providing, under the heading "Remedy; Burden of Proof; Venue," that "[a] public employee who alleges a violation of this Act may sue for injunctive relief, damages, or both").

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4. Section 554.0035 provides: "A public employee who alleges a violation of this chapter may sue the employing state or local governmental entity for the relief provided by this chapter. Sovereign immunity is waived and abolished to the extent of liability for the relief allowed under this chapter for a violation of this chapter."

Only section 554.0035's second sentence, which is virtually identical to the Tort Claims Act's waiver provision that the Court construed in *Miranda*, 133 S.W.3d at 224 (construing TEX. CIV. PRAC. & REM. CODE § 101.025(a)), addresses immunity from suit. And because that sentence, like the corresponding sentence in the Tort Claims Act, makes the Whistleblower Act's waivers of immunity from suit and liability coextensive, a plaintiff's suit should be dismissed for lack of jurisdiction when it falls outside of the Act's substantive category of claims. *See, e.g., id.* at 232.

Significantly, however, the facts of this case highlight an important element of legal analysis—not developed in *Lueck*, *Okoli*, or *Garcia*—that would become relevant if the Court concluded that the *first* sentence of section 554.0035 waived immunity from suit. Under *Bland*, even when jurisdictional analysis is limited to what a plaintiff alleged, courts may look beyond the bare allegations if the defendant either asserts that they constitute a sham for purposes of creating jurisdiction or can “readily establish” their falsity. 34 S.W.3d at 554 (discussing a jurisdictional challenge to a plaintiff's allegation of the amount in controversy). Thus, although the *Bland* Court observed that a plaintiff cannot be forced “to try his entire case” at the plea-to-the-jurisdiction stage, it likewise rejected the idea that courts are bound to accept fraudulent or plainly false allegations. *Id.*<sup>5</sup>

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5. In *Miranda*, the Court strictly limited the requirement that a defendant affirmatively plead fraud in a plaintiff's pleadings to the amount-in-controversy context. 133 S.W.3d at 224 & n.4. And defendants have never been required to specifically allege that evidence integral to a plaintiff's petition reveals the falsity of a plaintiff's allegations.

The court of appeals' reading of section 554.0035's first sentence would unreasonably restrict Texas courts' ability to determine their own jurisdiction in the face of clear proof of its absence. Federal courts reviewing motions to dismiss for lack of jurisdiction are not so confined. They may consider the plaintiff's complaint and undisputed facts, and they may also resolve disputed facts when necessary. *E.g.*, *Johnson v. United States*, 534 F.3d 958, 962 (8th Cir. 2008); *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003). In allowing Texas courts to look beyond the four corners of a plaintiff's petition for the limited purpose of revealing fraud or the plain falsity of jurisdictional allegations, *Bland* properly affords Texas courts similar latitude.

Accordingly, even if the Court rejects the construction of section 554.0035's second sentence that UTSW and the *Lueck*, *Okoli*, and *Garcia* petitioners advance, Gentilello's testimony confirmed that he did not "allege[] a violation" of the statute. TEX. GOV'T CODE § 554.0035. Especially when given at the hearing on a plea to the jurisdiction, a Whistleblower Act plaintiff's testimony readily establishing that his allegations are incurably invalid should remain squarely within the scope of Texas courts' jurisdictional review.<sup>6</sup>

### PRAYER

The Court should grant the petition, reverse the court of appeals' judgment, and render judgment dismissing Gentilello's suit for lack of subject-matter jurisdiction.

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6. This argument would, of course, also defeat jurisdiction where a plaintiff's written report supporting a putative Whistleblower Act violation—whether attached to the plaintiff's petition or obtained through targeted discovery—reveals a plain mismatch between the allegations and the actual facts.

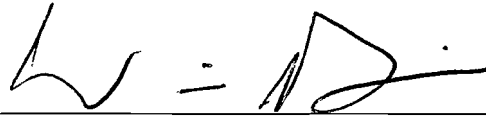
Respectfully submitted,

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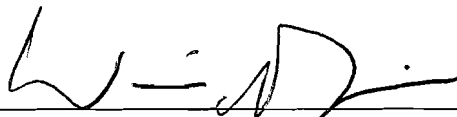
On January 23, 2009, a copy of the foregoing document was served by electronic mail and certified U.S. mail, return receipt requested, on:

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