No. 09-0530

In the Supreme Court of Texas

TEXAS DEPARTMENT OF PUBLIC SAFETY,
Petitioner,

v.

COX TEXAS NEWSPAPERS, L.P., AND
HEARST NEWSPAPERS, L.L.C.
Respondents.

On Petition for Review from the
Third Court of Appeals at Austin, Texas

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Nature of the Case:	This appeal arises from a suit for writ of mandamus against the Texas Department of Public Safety (DPS) to compel disclosure of travel vouchers submitted by DPS officers who serve on the Governor's security detail, pursuant to the Public Information Act, TEX. GOV'T CODE § 552.022 (PIA).
Trial Court:	The Honorable Scott H. Jenkins, 261st District Court, Travis County.
Trial Court Disposition:	Following a bench trial, the trial court granted a writ of mandamus against DPS. CR.32-33; App. B.[1]
Parties in Court of Appeals:	*Appellant*: Texas Department of Public Safety *Appellees*: Cox Texas Newspapers, L.P., and Hearst Newspapers, L.L.C.
Court of Appeals:	Third Court of Appeals, Austin. Opinion by Justice Waldrop, joined by Justices Patterson and Pemberton.
Court of Appeals Disposition:	The court of appeals affirmed the judgment of the trial court. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P.*, 287 S.W.3d 390 (Tex. App.—Austin 2009, pet. filed); App. A.

1. References to the Clerk's Record appear as CR.___. References to the Reporter's Record appear as RR.___.

STATEMENT OF JURISDICTION

The Court has jurisdiction in this case, both because it concerns the construction of a Texas statute (the Public Information Act) that is necessary to a determination of this case, and because the interpretation of the statute by the court of appeals presents an issue of great importance to the jurisprudence of the State. TEX. GOV'T CODE § 22.001(a)(3), (6).

ISSUES PRESENTED

1. Pursuant to the Public Information Act's authorization of common-law exceptions to disclosure, the Court permits withholding of public information that would injure a person by disclosure of embarrassing private facts. Should the Court do the same with respect to public information that would threaten *physical injury* to a person, consistent with over 30 years of undisturbed Attorney General legal opinion and recent legislative endorsement?

2. The Public Information Act excludes from required disclosure public information that is confidential under other law. Are the travel records of the Governor's security detail excused from disclosure because they relate to DPS's staffing requirements and tactical plans for protecting the Governor, his family, and others from attack, making the records confidential information under the Texas Homeland Security Act?

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PETITIONER'S BRIEF ON THE MERITS

Protecting the physical safety of its citizens is the "primary concern of every government." *United States v. Salerno*, 481 U.S. 739, 755 (1987). During the three decades since the enactment of the Public Information Act, the Office of the Attorney General has issued numerous legal opinions declining to require disclosure of public information when necessary to avoid a substantial threat to a person's physical safety, pursuant to its duty to interpret and enforce the PIA. *See, e.g.*, Tex. Att'y Gen. ORD-169, at 6 (1977); App. E. Not once during this time has the Legislature acted to upset these rulings.

The court of appeals's decision questions, for the first time, the Attorney General's legal framework for securing information from release that would threaten a person's physical safety. Although it acknowledged the importance of protecting physical safety, the

court below determined that it had no authority to apply a common-law exception that this Court has not yet recognized. *Cox*, 287 S.W.3d at 394-95.

Both the text of the PIA and the precedents of this Court contemplate the existence and validity of common-law exceptions to the disclosure of public information. Over 30 years ago, this Court exercised its common-law authority to prevent the release of public information that would cause injury to a person through the disclosure of embarrassing private facts. *Indus. Found. of the S. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683, 685 (Tex. 1976). The Court should now do the same for information that, if released, would create a substantial threat of *physical* injury—consistent with three decades of undisturbed legal opinions issued by the Office of the Attorney General. *See, e.g.*, Tex. Att'y Gen. ORD-169, at 6 (1977); App. E.

Additionally, the Court should confirm that the travel vouchers at issue in this case are excepted from the PIA's disclosure requirements because they are confidential under the Texas Homeland Security Act (THSA). The THSA mandates the confidentiality of, among other things, information held by governmental bodies concerning staffing requirements or tactical plans related to preventing, investigating, or responding to a terrorist attack or related criminal activity. The vouchers fall within that statutory protection. Because the PIA does not require disclosure of public information that is confidential under other law—and the vouchers are confidential under the THSA—they are not subject to release under the PIA.

Although the THSA prevents release of these particular vouchers, much more is at stake in this case. The need for physical safety protection under the PIA is profoundly compelling. Absent such protection, governmental bodies in Texas would be required to disclose information about both public employees and private citizens that would expose those individuals to a substantial threat of physical harm. If the court of appeals's decision stands, that outcome is inevitable.

STATEMENT OF FACTS

A. Statutory Framework

For over thirty years, Texas's Public Information Act has been a model of open government for the nation. Act of May 19, 1973, 63d Leg., R.S., ch. 424, 1973 Tex. Gen. Laws 1112. Animated by the principle that "government is the servant and not the master of the people," the PIA is designed to facilitate an informed populace so that "they may retain control over the instruments they have created." TEX. GOV'T CODE § 552.001. The PIA dictates that "public information"—any information owned, collected, assembled, maintained, or to which a governmental body has a right of access, *id*. § 552.002(a)—is available for public inspection during the normal business hours of the governmental body, *id*. § 552.021.

Yet the PIA's disclosure requirements are not unyielding. The Legislature recognized that some public information must remain confidential in order to ensure the effective functioning of government and the safety of public servants and private citizens. Balancing

the PIA's presumption of openness with genuine confidentiality interests, the Legislature created a number of exceptions to disclosure specifically set forth in the PIA itself. *Id*. §§ 552.101-.151. The Legislature also provided for incorporation of other exceptions from constitutional, common, and other statutory law. *Id*. §§ 552.101, .022.

Prior to 1999, the PIA's statutory exceptions applied uniformly to all public information. *In re City of Georgetown*, 53 S.W.3d 328, 331 (Tex. 2001). But in 1999, the Legislature amended the Act to generally exclude eighteen categories of public information from the scope of the PIA's statutory exceptions. TEX. GOV'T CODE § 552.022(a); *see also Georgetown*, 53 S.W.3d at 331 (noting that § 552.022 renders the PIA's statutory exceptions inapplicable to the categories of public information it lists). The vouchers in this case fall within the scope of that section as "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body." TEX. GOV'T CODE § 552.022(a)(3). Public information listed in § 552.022 generally may be withheld from disclosure only if the information is "expressly confidential under other law." *Id*. § 552.022(a). "Other law" is not defined in the PIA, but the Court has held that it includes common law, other statutes, and judicial rules. *Georgetown*, 53 S.W.3d at 332.

To ensure the uniform application, operation, and interpretation of the PIA, the Legislature entrusted the Attorney General with the Act's implementation and enforcement. *See, e.g.*, TEX. GOV'T CODE § 552.011 (calling for the Attorney General to prepare and distribute written decisions and opinions related to or based on the PIA). In that role, the PIA

requires governmental bodies to obtain a ruling from the Attorney General whenever they wish to withhold requested public information. *Id.* §§ 552.301, .306.[2]

Pursuant to its duty to interpret and enforce the PIA, the Attorney General has long permitted governmental bodies to withhold public information if disclosure would expose someone to a physical safety threat. Tex. Att'y Gen. ORD-169 (1977). The legal framework for such protection arose over thirty years ago when governmental bodies sought to withhold from disclosure the home addresses of their employees who faced threats of physical harm and harassment. *Id.* at 1, 6-7. Reasoning that threats of physical danger ("as opposed to a generalized and speculative fear of harassment or retribution") constitute "special circumstances" justifying protection under common-law privacy, the Attorney General concluded that the information should not be released. *Id.* Since then, the Attorney General has consistently employed that framework to permit government bodies to withhold public information if its release would threaten a person's physical safety. *See, e.g.*, Op. Tex. Att'y Gen. No. MW-283 (1980) (noting that a person's telephone number may be withheld from

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2. Every year, the Attorney General resolves thousands of requests from governmental bodies to withhold public information. In 2009, for example, the Attorney General issued over 18,000 rulings. *Greg Abbott Open Records Letter Rulings (ORLs)*, *available at* http://www.oag.state.tx.us/open/index_orl.php?ag=50abbott (numerically indexing, by year, the Attorney General's open record rulings). Rulings take two forms: informal letter rulings (cited as OR___) and formal open records decisions (cited as ORD-___). Due to the volume of requests, the Attorney General generally issues short, non-precedential letter rulings based on established law and practice that are applicable only to the specific facts of the particular request and are signed by assistant attorneys general in the Open Records Division. *Open Records Letter Rulings (ORLs)*, *available at* http://www.oag.state.tx.us/open/index_orl.php. Open records decisions, on the other hand, are formal opinions that "usually address novel or problematic legal questions and are signed by the Attorney General." *Open Records Decisions*, *available at* http://www.oag.state.tx.us/open/ogindex.shtml. Unlike letter rulings, these decisions "may be cited as precedent in briefing to the Open Records Division." *Id.*

release due to threats of physical danger); Tex. Att'y Gen. OR1999-2829 (1999) (permitting withholding of names of residents of a safe house due to physical safety threats); Tex. Att'y Gen. OR2004-10845 (2004) (shielding from release the identity of a victim in a criminal offense report regarding harassment for physical safety reasons); Tex. Att'y Gen. OR2008-07646 (2008) (preventing release of the home address of an elected federal official due to physical safety concerns). This case arose from one such ruling.

B. Proceedings Below

In 2007, Plaintiffs submitted an open records request to DPS, seeking certain expense records and travel vouchers for DPS officers who serve in the Governor's protective detail, which provides security to the Governor, his family, and others. CR.40-41.

DPS was concerned that disclosure of the vouchers would expose its officers assigned to the protective detail and the Governor himself to physical danger. RR.24, 42, 46. The Governor and his family regularly receive threats of physical violence, RR.42-45, and are the target of at least two long-time stalkers. RR.42, 44-45. Due to those threats, DPS concluded that release of the travel vouchers would pose a serious threat to the physical safety of the Governor and other protected persons by revealing many of the security detail's operational security measures, which could be used to a perpetrator's advantage in staging an attack. RR.15, 24, 46-47. In particular, DPS feared that the vouchers could be used to spot patterns of travel, methods of movements, the number and placement of DPS officers on the detail, and how far in advance officers visit the location prior to a protected person's arrival. RR.15, 47-48.

DPS sought a ruling from the Attorney General that the vouchers could be withheld from disclosure, due to its safety concerns. Tex. Att'y Gen. OR2007-11405 (2007); App. D. The Attorney General agreed, permitting DPS to withhold the vouchers pursuant to the longstanding "special circumstances" exception for threats of physical danger. *Id.* at 2.[3] Consistent with that ruling, DPS released trip summaries with aggregated, categorized travel expenses, but it did not provide the actual travel vouchers themselves. RR.14-15, 46-47.

Plaintiffs sued, seeking a writ of mandamus to force DPS to disclose the vouchers.[4] CR.3. Following a bench trial, the trial court granted Plaintiffs' mandamus petition and ordered DPS to produce the vouchers. CR.32; App. B.

On appeal, DPS argued, *inter alia*, that the court should invoke the common law and protect from disclosure information that would lead to threats of physical harm, in keeping with the Attorney General's established legal framework. The court affirmed the judgment of the trial court, explaining that it was duty-bound to follow Texas Supreme Court precedent—which to date had not acknowledged a common-law exception for physical harm. *Cox*, 287 S.W.3d at 394-95, 398.[5] In doing so, however, the court made clear that it did not

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3. Rather than specifically relying on the "other law" provision of § 552.022, DPS invoked § 552.101 in its request to withhold the vouchers because the Attorney General interprets § 552.022 to incorporate "other law" through § 552.101, the PIA provision specifically devoted to excepting the disclosure of information that is confidential under other law. *See* Tex. Att'y Gen. OR2007-11405 at 1-2 (2007).

4. The PIA permits a requestor to "file suit for a writ of mandamus" to compel disclosure when a governmental body declines to disclose requested public information, after the Attorney General has ruled that the information is not excepted by a PIA statutory exception. TEX. GOV'T CODE § 552.321.

5. The court of appeals also declined to endorse the Department's alternative constitutional argument that the 14th Amendment right to privacy protects the vouchers from disclosure. *Cox*, 287 S.W.3d at 394-95.

question either the sincerity of, or the evidentiary basis for, DPS's contention that public disclosure of the vouchers would pose "an imminent threat of physical danger." *Id*. at 395 and n.2. The court took pains to express that "[o]ur conclusion does not mean that we attach little significance to the right of privacy or the DPS's concern for the safety of the Governor and his travel group." *Id.* at 398.

Rather, the court of appeals granted mandamus relief because it believed that only this Court has the authority to adopt common-law protection from disclosure under the PIA in cases of physical danger. As the court explained, "[we] decline the DPS's invitation to expand the boundaries of common law as established by the supreme court," because "[a]s an intermediate appellate court, we are not free to mold Texas law as we see fit but must instead follow the precedents of the Texas Supreme Court unless and until the high court overrules them." *Id.* at 394-95 (quotations omitted).

Within days of the judgment below, and at the close of its regular session, the Legislature responded by enacting a new exception to disclosure under the PIA:

> Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the [disclosure] requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Act of June 3, 2009, 81st Leg., R.S., ch. 283 § 4, 2009 Tex. Gen. Laws 742 (codified at TEX. GOV'T CODE § 552.151).

SUMMARY OF THE ARGUMENT

Both the text of the PIA and the precedents of this Court recognize the common-law authority of Texas courts to adopt and enforce common-law exceptions to disclosure of public information. The Court has already exercised such authority to prevent the disclosure of public information that would cause injury to a person through the release of embarrassing private facts. The Court should likewise prevent the disclosure of public information that would threaten *physical* injury to a person, consistent with over three decades of undisturbed Attorney General legal opinions.

The Texas Homeland Security Act likewise confirms the importance of protecting information from disclosure that would threaten physical safety. It assigns confidentiality to information concerning a governmental body's staffing or tactical planning related to preventing, investigating, or responding to a terrorist attack or related criminal activity. The vouchers in this case fall within the scope of that protection and are thus excluded from disclosure under the PIA.

ARGUMENT

I. THE COURT HAS COMMON-LAW AUTHORITY TO PROTECT INFORMATION FROM DISCLOSURE UNDER THE PUBLIC INFORMATION ACT.

A. The Public Information Act Contemplates Common-Law Exceptions.

The Public Information Act articulates various statutory exceptions to disclosure of public information. In addition, a number of provisions of the PIA expressly contemplate

the authority of Texas courts to endorse additional exceptions to disclosure, pursuant to their powers under the common law.

To begin with, the PIA makes clear that public information may be excepted from disclosure "if it is information considered to be confidential by law, either constitutional, statutory, *or by judicial decision*." TEX. GOV'T CODE § 552.101 (emphasis added). Similarly, even public information under § 552.022 (information to which the PIA's statutory exceptions generally do not apply) may be withheld so long as "other law"—such as common law—authorizes the withholding of such information. *Id*. § 552.022(a), (b); *see also Georgetown*, 53 S.W.3d at 332 (interpreting the term "other law" to include "judicial decisions and rules"). As these provisions make clear, the Court may exercise its common-law authority to permit withholding even under circumstances not expressly covered by the PIA itself.

B. The Legislature Has Never Disturbed the Court's Authority to Recognize Additional, Judicially Created Exceptions to Disclosure.

Consistent with the aforementioned PIA provisions, this Court has already exercised its common-law authority to incorporate new exceptions to disclosure beyond those statutorily enumerated in the PIA. Just three years after the Legislature enacted the PIA, this Court adopted a common-law exception to protect a person from injury resulting from the release of embarrassing private facts, by recognizing a privacy right against disclosure of any public information that is (1) highly intimate or embarrassing to the person and (2) not of legitimate public concern. *Indus. Found.*, 540 S.W.2d at 683, 685. Justifying the new

exception, the Court reasoned that if a governmental body's release of information would invade a person's common-law interest in freedom from the publicizing of private affairs, then the information should be deemed confidential under the PIA. *Id*. at 683. In the over thirty years since *Industrial Foundation*, the Legislature has not once disturbed the Court's recognition of the privacy exception, indicating the Legislature's assent to the adoption of common-law exceptions to the PIA. *See F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 692 (Tex. 2007) (explaining that the Legislature's long acceptance of judicial interpretation of a statute indicates its approval of that interpretation).

More recently, the Court confirmed its authority to approve other disclosure exceptions when it applied the common-law-based attorney-client and work-product privileges to block release of public information that was otherwise subject to disclosure under the PIA. *Georgetown*, 53 S.W.3d at 332, 336; *cf. Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex. 1995) (noting that the attorney-client privilege is "'the oldest of the privileges for confidential communications known to the common law'" (quoting *United States v. Zolin*, 491 U.S. 554, 562 (1989))). In *Georgetown*, the Attorney General and the lower courts had ruled that a report prepared by a consulting expert related to pending and anticipated litigation was subject to disclosure because it was not covered by any *statutory* exception in the PIA. *Georgetown*, 53 S.W.3d at 331.

Recognizing that effective and efficient government operation depended on governmental entities' ability to obtain confidential written legal advice and to engage in

"frank, searching self-evaluations that involved legal counsel," *id*. at 333, the Court applied the attorney-client, work-product, and related consulting-expert privileges to permit withholding of the information, even though the report, as public information under § 552.022, was not excepted from disclosure by the PIA's relevant statutory exception, *id*. at 336. In doing so, the Court ratified its authority to apply judicially created exceptions to disclosure under the PIA. And as with *Industrial Foundation*, the Legislature has not once disturbed the Court's *Georgetown* decision.

II. THE COURT SHOULD EXERCISE ITS COMMON-LAW AUTHORITY TO PREVENT DISCLOSURES THAT WOULD POSE A SUBSTANTIAL THREAT OF PHYSICAL HARM.

A. Physical Safety Is a Compelling Common-Law Interest Worthy of the Court's Protection.

It is beyond dispute that protecting the physical safety of citizens is a compelling reason for government to act. Ensuring the physical safety of its citizens is the "primary concern of every government." *Salerno*, 481 U.S. at 755; *see also, e.g.*, *Operation Rescue-Nat'l v. Planned Parenthood of Houston & Se. Tex., Inc.*, 975 S.W.2d 546, 569 (Tex. 1998) (holding that protecting patient safety is a compelling reason to restrict demonstrations); *State v. Corpus Christi People's Baptist Church, Inc.*, 683 S.W.2d 692, 696 (Tex. 1984) (concluding that ensuring children's safety is a compelling reason to require a church to be licensed for day care). No less than William Blackstone observed that "the principal aim of society is to protect individuals" in enjoyment of their absolute rights, among which is the right of "personal security," which consists of a person's "enjoyment of his life,

his limbs, his body, his health, and his reputation." WILLIAM BLACKSTONE, 1 COMMENTARIES *120-26.

Under *Industrial Foundation*, courts already have the power to prevent disclosures that may result in harm to a person through the disclosure of embarrassing private facts. 540 S.W.2d at 682-83. If the common law protects the privacy interests of an individual by preventing disclosure of embarrassing private facts, *a fortiori* the common law should also guard against harm to life and limb.

As with privacy, the basis for preventing disclosures that would threaten physical safety is deeply rooted in common law. *Cf. Indus. Found.*, 540 S.W.2d at 682-83 (basing the privacy exception on the common-law interest in avoiding public disclosure of embarrassing private facts). It is well established that a person has a common-law interest in freedom from harmful physical contact, which is secured by the tort of battery. *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627, 629 (Tex. 1967); *see also* FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 3.2 (3d ed. 2006) (noting that the tort of battery concerns "the interest in the physical integrity of the body, that it be free from harmful contacts"); W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 9, p. 41 (5th ed. 1984) (explaining that the tort of battery protects, among other things, a person's interest in avoiding "physical harm"); Restatement (Second) of Torts, § 15 cmt. a (1965) (noting that a battery violates a person's "freedom from the intentional infliction of offensive bodily contacts"). Consistent with the Court's reasoning in *Industrial Foundation*, permitting a governmental body to withhold public information that, if released, would pose a physical safety threat would guard

against the invasion of a person's established common-law interest in freedom from bodily injury.

B. The Attorney General Has Long Shielded Public Information from Disclosure that Would Pose a Physical Safety Threat, With Legislative Acquiescence.

The Attorney General is uniquely charged with interpreting and enforcing the PIA. *See, e.g.*, TEX. GOV'T CODE §§ 552.011 (requiring the Attorney General to prepare written opinions related to the PIA in order to ensure uniform application, operation, and interpretation of the Act); §§ 552.301-.306 (compelling governmental bodies to seek a ruling from the Attorney General anytime they wish to withhold requested public information). Pursuant to that duty, the Attorney General has repeatedly recognized and enforced common-law protection against the disclosure of public information that would threaten physical injury to a person. *See* Tex. Att'y Gen. ORD-169, at 6 (1977); App. E; *see also, e.g.*, Op. Tex. Att'y Gen. No. MW-283 (1980) (noting that a person's telephone number may be withheld from release due to threats of physical danger); Tex. Att'y Gen. OR1999-2829 (1999) (permitting withholding of names of residents of a safe house due to physical safety threats); Tex. Att'y Gen. OR2004-10845 (2004) (shielding from release the identity of a victim in a criminal offense report regarding harassment for physical safety reasons); Tex. Att'y Gen. OR2008-07646 (2008) (preventing release of the home address of an elected federal official due to physical safety concerns).

Tellingly, not once has the Legislature taken any action during these past three decades to disrupt this established legal framework—suggesting that the Legislature has fully

acquiesced to the Attorney General's approach. *See, e.g.*, *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 366 (Tex. 2000) (noting that, by leaving pertinent language of the PIA intact, the Legislature acquiesced to the Attorney General's interpretation).

The validity and consistency of the Attorney General's enduring policy of physical safety protection is not thwarted by two prior non-precedential informal letter rulings that required release of similar travel vouchers, as Plaintiffs suggested in their petition response. Resp. at 8 (referencing Tex. Att'y Gen. OR2002-0605 (2002), and Tex. Att'y Gen. OR2004-4723 (2004)). Neither ruling considered whether physical safety would be threatened by release of the requested records (that issue was apparently not raised in the request), but rather each correctly determined that as information subject to § 552.022, the vouchers were not excused from release by the PIA's statutory law-enforcement exception, § 552.108. Tex. Att'y Gen. OR2002-0605 at 1-2 (2002); Tex. Att'y Gen. OR2004-4723 at 1-2 (2004). DPS's past decisions to not urge physical danger as a reason for withholding some vouchers (or to release some vouchers without seeking a ruling) also do not hinder DPS from raising such concerns in later requests in light of new developments. Nor should they cast doubt on the legitimacy of DPS's present concerns. Physical safety threats are not static. As one DPS officer described it, the Governor receives "numerous threats" on a "daily basis." RR.42. The two prior letter rulings are limited to their facts, and are irrelevant to resolution of this case.

C. The New Statutory Exception Signifies the Legislature's Approval of the Attorney General's Established Practice of Protecting Against Physical Safety Threats.

The Legislature expressly signaled its approval of the Attorney General's legal framework when it added a new exception to the PIA to allow the withholding of public information that would expose public employees to "a substantial threat of physical harm." Act of June 3, 2009, 81st Leg., R.S., ch. 283, § 4, 2009 Tex. Gen. Laws 742, 743 (codified at TEX. GOV'T CODE § 552.151).[6] Although DPS does not seek application of § 552.151 in this case, one thing is certain: the new legislation manifested the Legislature's forceful reaction against the court of appeals's decision. *See* Debate on Tex. S.B. 1068 on the Floor of the Senate, 81st Leg., R.S. (May 31, 2009) (Senator Wentworth, author of the bill, explaining that the legislation addresses the court of appeals's opinion, which "significantly narrowed" governmental bodies' ability to withhold public information that would threaten a person with physical injury); Debate on Tex. S.B. 1068 on the Floor of the House, 81st Leg., R.S. (May 31, 2009) (Representative Gallegos, noting that the legislation was a reaction

6. Other PIA exceptions also reflect the Legislature's determination that physical safety concerns are a valid basis for withholding public information. *See, e.g.*, TEX. GOV'T CODE § 552.1176 (requiring confidentiality of, among other things, the home address, phone number, and social security number of Texas lawyers, including judges); House Comm. on State Affairs, Bill Analysis, Tex. H.B. 1237, 80th Leg., R.S. (2007) (justifying the exception because release of personal information might "subject attorneys (including current and former state and federal judges and prosecutors) and their family members to harm relating to their personal safety or possible identity theft"); TEX. GOV'T CODE § 552.119 (requiring confidentiality of the photograph of a peace officer); House Comm. for Public Safety, Bill Analysis, Tex. H.B. 474, 70th Leg., R.S. (1987) (explaining that the exception was introduced to address concerns that the routine release of photographs of peace officers endangers the lives of those officers); TEX. GOV'T CODE § 552.127 (protecting the identity of neighborhood crime watch members); House Comm. on State Affairs, Bill Analysis, Tex. H.B. 273, 75th Leg., R.S. (1997) (explaining that the exception was introduced due to "threats and acts of retaliation against the members of these groups").

to the court of appeals's decision); *see also* Mike Ward, *Bill Passes to Keep Perry's Security Detail Records Private*, AUSTIN-AMERICAN STATESMAN, June 1, 2009, at A4 (describing the Legislature's "swift" action to "allow most travel records concerning Gov. Rick Perry's bodyguards to remain secret.").

Moreover, in creating the new exception, the Legislature did not disturb the Attorney General's longstanding "special circumstances" framework, further indicating its approval of the Attorney General's practice. And contrary to Plaintiffs' assertion in their petition response, the Legislature's decision to enact this exception—as opposed to a different one—reveals nothing about the Legislature's intent for this legislation. *See* Resp. at 7. Courts "cannot draw inferences of the legislature's intent from the failure of the bills to pass" because "[a]ny such inference would involve little more than conjecture" *Dutcher v. Owens*, 647 S.W.2d 948, 950 (Tex. 1983); *see also Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009) (explaining that the Court attaches "no controlling significance to the Legislature's failure to enact" one bill over another) (internal quotation marks omitted).

Judicial endorsement of common-law protection would not only honor the Legislature's effort to protect individuals from substantial threats of physical harm, it would also be consistent with the Court's precedent in similar circumstances. In *Georgetown*, for example, the Court applied the common-law-based attorney-client and work-product privileges to public information under § 552.022 of the PIA—even though the Legislature had already incorporated those privileges into the PIA as statutory exceptions. 53 S.W.3d

at 328, 331, 337. The Court's decision in *Georgetown* confirmed that the existence of a statutory exception does not prejudice the Court's authority to endorse similar exceptions in other areas of the PIA.

The newly raised doubts about the on-going legal validity of the Attorney General's established framework, presented by the decision below, have not been fully resolved by the recent, quickly-drafted legislation. Accordingly, this Court should remove all doubt in this area of law by officially incorporating the longstanding physical-safety protection into the common law of Texas.

III. THE ABSENCE OF CLEAR COMMON-LAW PROTECTION TO ENSURE PHYSICAL SAFETY CREATES INTOLERABLE UNCERTAINTY FOR THE PEOPLE OF TEXAS.

The potential for physical harm to result, due to the judgment below, is real, not imagined, and it extends well beyond the limited facts of this case. In just the last decade, the Attorney General has applied the "special circumstances" framework in over 230 cases. Recent examples (collected at App. F) include excepting from disclosure:

1. The home address, telephone number, and other personal information of a Dallas Area Rapid Transit employee requested by a former employee who had made threats against the person, Tex. Att'y Gen. OR2008-03289 (2008);

2. A security alert issued by the City of Houston against the requestor, a former employee that threatened city staff, due to the danger that the employee would be notified of, and then be able to avoid, the city's security procedures, Tex. Att'y Gen. OR2008-01570 (2008);

3. Information pertaining to the victim and the witnesses' identifying information in a criminal incident report, Tex. Att'y Gen. OR2007-1390 (2007);

4. The names of witnesses and informants in criminal offense reports requested by a prison gang member known to have threatened witnesses and potential witnesses with violence, Tex. Att'y Gen. OR2007-06993 (2007); and

5. The identity of a victim in a criminal offense report regarding harassment, Tex. Att'y Gen. OR2004-10845 (2004).

The court of appeals's decision undermines the Attorney General's ability to exercise this protection going forward. And significant risks remain—and arise daily—that require physical safety protection. For example, while law enforcement officials employed by Texas governmental bodies are afforded some protections under Texas law, law enforcement officers employed by other states do not receive similar protections. *See* TEX. GOV'T CODE §§ 552.117, 552.1175. Additionally, employees and officials of other States do not receive the same protections as Texas's employees and officials. Thus, the home address, telephone number, and family member information of a law enforcement officer or government employee from another state contained in documents held by a Texas governmental body would not, absent a common-law exception, be excepted from disclosure under Texas law. Today, federal and state agencies work together more than ever before. Agencies and police departments from other states should not have to fear placing their agents, and their families, at risk of physical danger as a result of cooperating with Texas law enforcement officials.

Relatedly, it is not difficult to see why many citizens who witness criminal activities are reluctant to speak to law enforcement because they may not want their identities to be disclosed for fear of violent retribution. For example, a resident of a neighborhood blighted by gang violence may be a witness to gang-related activity. But the resident may be willing

to come forward only if his or her identity will be held in strict confidence. The resident may reasonably fear violent retribution at the hands of the gang. Yet, in circumstances in which the PIA's statutory law-enforcement exception does not apply, the identity of a person who witnesses a crime is public information under the PIA, and thus ordinarily must be disclosed—absent a common-law safeguard against substantial threats to physical safety. *See, e.g.*, TEX. GOV'T CODE § 552.108; Tex. Att'y Gen. ORD-127 (1976) (concluding that a crime complainant's identity is basic public information that must be disclosed and is not covered by the law enforcement privilege); *see also, e.g.*, Tex. Att'y Gen. OR2009-02962 (2009), OR2008-13564 (2008) (permitting non-disclosure of witness information due to danger to the witnesses' personal safety).

IV. THE TEXAS HOMELAND SECURITY ACT MANDATES CONFIDENTIALITY OF THE TRAVEL RECORDS AT ISSUE IN THIS CASE.

The Texas Homeland Security Act also reflects the critical importance of safeguarding from disclosure information that would expose a person to physical harm. In pertinent part, the THSA mandates confidentiality of information that is "collected, assembled, or maintained" by a governmental body for the purpose of "preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity" and relates to either the staffing requirements of law enforcement (among others) or to an agency's tactical plan. TEX. GOV'T CODE § 418.176(a). The THSA does not define "terrorism," but its ordinary meaning is "[t]he use or threat of violence to intimidate or cause panic, esp. as a means of affecting political conduct." BLACK'S LAW DICTIONARY 1512-13 (8th ed. 2004).

The records in this case fall under the THSA's umbrella of confidentiality. The security detail travels with the Governor, his family, and others for the purpose of protecting them from all manner of attack. RR.42-45. And each of the DPS officers on the security detail are required to submit travel expense vouchers pursuant to providing that protection. RR.14-15. The travel vouchers also relate to the staffing and tactical operations of the security detail by revealing, among other things, travel patterns, methods of movements, the number and placement of DPS officers on the detail, and how far in advance officers visit the location prior to a protected person's arrival. RR.15, 46-48. As such, they are confidential under the THSA. TEX. GOV'T CODE § 418.176(a).

Because the travel vouchers are confidential under the THSA, the PIA does not require their release. Under the PIA, public information is excluded from required disclosure if it is confidential under other law, including statutory and common law. TEX. GOV'T CODE §§ 552.022(a); 552.101. The travel records in this case should therefore be withheld.

Contrary to Plaintiffs' petition-stage contention, Resp. at 14-15, DPS's argument on this point has not been waived. Since its initial request to withhold the vouchers from release, DPS has consistently argued that they are excluded from required disclosure by other law, which includes both common law and other statutes. *See, e.g.*, OR2007-11405 (noting DPS's request to withhold the vouchers pursuant to the PIA's exception for other law); CR.29 (arguing that disclosure is not required because the vouchers are "confidential under other law"). Admittedly, DPS did not specifically argue until this stage that the travel

vouchers are also confidential under the THSA. But that argument is simply an additional reason that the vouchers are excepted from disclosure under § 552.022 and § 552.101; it is not a new issue. And only issues—not arguments—are subject to waiver. *See* TEX. R. APP. P. 53.2(f) (noting that in a petition for review, "[t]he statement of an issue or point will be treated as covering every subsidiary question that is fairly included"); *El Paso Natural Gas Co. v. Minco Oil & Gas, Inc.*, 8 S.W.3d 309, 316 (Tex. 1999) (explaining that issues presented should be liberally construed). DPS's argument on this point is therefore not subject to waiver.

* * *

The other two branches of Texas government have taken action to prevent disclosure of public information that would present a substantial threat to physical safety. Indeed, the Office of the Attorney General has consistently shielded this type of information from disclosure for the last 30 years, with uninterrupted Legislative acquiescence. Accordingly, judicial endorsement of the established legal structure has not proven necessary—until now.

The court of appeals declined to permit withholding of the vouchers because this Court had not yet adopted a common-law exception that covers physical safety threats. *Cox*, 287 S.W.3d at 394-95. The Court's recognition of such common-law protection would not only shield the vouchers in this case from release, it would also affirm that no person should be exposed to a threat of physical violence due to a governmental body's disclosure. The Court should grant the petition for review to resolve the uncertainty created by the court of appeals's decision by clarifying that the common law protects information from disclosure

if its release would expose a person to a substantial threat of physical harm. The Court should also confirm that the vouchers are excluded from disclosure because they are confidential under the THSA.

PRAYER

The Court should grant the petition for review, reverse the judgment of the court of appeals, and render judgment that the vouchers are excepted from disclosure. Alternatively, the Court should reverse and remand for a new trial to apply a common-law exception for physical safety threats.

Respectfully submitted,

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