

1766261 and 1766262

STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
<i>Versus</i>	§	HARRIS COUNTY, TEXAS
	§	
WALLIS NADER	§	174th JUDICIAL DISTRICT

**MOTION TO DISQUALIFY
THE HARRIS COUNTY DISTRICT ATTORNEY’S OFFICE
AND APPOINT AN ATTORNEY *PRO TEM***

TO THE HONORABLE HAZEL JONES:

Wallis Nader asks the Court to disqualify the Harris County District Attorney’s Office and appoint an attorney *pro tem*, and shows the following supporting this request:

INTRODUCTION

“A prosecutor should avoid the appearance or reality of a conflict of interest with respect to [her] official duties.” *Ex parte Spain*, 589 S.W.2d 132, 134 (Tex. Crim. App. 1979) (citing ABA Standards Relating to the Prosecution Function and the Defense Function § 1.2). Such conflicts may violate due process, warranting the prosecutor’s disqualification and replacement with an unbiased attorney in her place. *See State ex rel. Sherrod v. Carey*, 790 S.W.2d 705, 708 (Tex. App.—Amarillo 1990, no writ); *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 927 (Tex.Crim.App.1994). Disqualification and substitution exist to ensure “that the prosecutor avoid[s] participation in a case in circumstances where any implication of partiality may cast a shadow over the integrity of [her] office.” *Spain*, 589 S.W.2d at 134.

District Attorney Kim Ogg has engaged in a months-long, highly public feud with Harris County Judge Lina Hidalgo. Ogg has continually demanded that Judge Hidalgo vastly expand the District Attorney’s budget. Ogg then complained loudly and incessantly when the Harris County

Commissioners Court provided increases that amounted to less than what Ogg sought. Additionally, Ogg clashed with Judge Hidalgo and other officials over Ogg's flip-flop on misdemeanor bail reform. Ogg took the rejection of her funding requests as a personal insult by Judge Hidalgo. Despite claiming to be a Democrat, Ogg has aligned herself with her former Republican colleagues in retaliation against Judge Hidalgo. Ogg's unprofessional conduct violates a slew of prosecutorial ethical rules and norms, and wastes taxpayers' funds in the process.

Ogg opened a grand jury investigation into Judge Hidalgo and her staff merely because the Commissioners Court decided to allocate funds to programs and priorities other than the District Attorney's Office. Ogg's actions create a clearly impermissible conflict of interest. Ogg compounded this conflict by demanding that the investigation be led by a prosecutor who until recently was a senior lawyer at the County Attorney's Office advising these very Defendants. This attorney previously had responsibility for advising Judge Hidalgo, the other members of Commissioners Court, and their staff on dealings with the firm at the heart of this investigation. This created yet another conflict in its own right and violated attorney ethics rules.

Ogg's other prosecutors also working on the investigation have violated professional norms and have admitted animus toward the Commissioners Court for failing to increase the DA's budget as requested. Ogg's office made the bizarre and wholly unfounded claim that the County Judge's office was engaging in "obstruction" merely by asserting standard attorney-client privilege claims. She then repeatedly moved to compel the production of privileged documents. Frustrated by the grand jury court's rulings on those challenges, her prosecutors sought and obtained search warrants – from a judge with no relation to the case – to seize the *same material* that they had already received months earlier by grand jury subpoena. In doing so, the DA trampled on the attorney-client privilege.

Several weeks later, she posted those search warrants on the Harris County District Clerk’s website, revealing copious amounts of grand jury materials. When various news outlets began questioning the accuracy of the search warrant affidavits, Ogg and her prosecutors ignored the reports. Instead, they rushed to indict three of Judge Hidalgo’s senior staffers – Alex Triantaphyllis (Chief of Staff), Wallis Nader (Policy Director), and Aaron Dunn (then-Senior Advisor for Public Safety and Emergency Management) (collectively, “Defendants”) – a week after the critical news reports appeared.

Ogg is far from the impartial prosecutor that due process demands. Her conflicts of interest are blatant and numerous. They are individually and collectively disqualifying. This Court should exercise its authority under the Texas Code of Criminal Procedure by appointing a conflict-free attorney *pro tem* to take Ogg’s place in this matter.

FACTUAL BACKGROUND

The Harris County Commissioners Court is a constitutional body charged with overseeing all aspects of county government. It comprises the County Judge as its presiding officer, and one County Commissioner from each of Harris County’s four precincts.¹ The County Attorney’s Office serves as legal counsel for the Commissioners Court, including Judge Hidalgo.

The Commissioners Court has the responsibility to decide how to allocate funding among the County’s various agencies, departments, and programs. This includes the District Attorney’s Office. The Commissioners Court sets the compensation, office and travel expenses, and all other

¹ At all times relevant to this motion, the Commissioners Court consisted of County Judge Lina Hidalgo and County Commissioners Rodney Ellis (D-Pct. 1), Adrian Garcia (D-Pct. 2), Tom Ramsey (R-Pct. 3), and Jack Cagle (R-Pct. 4), each with their own separate offices and staff.

allowances for the District Attorney’s Office’s employees, as well as funding for the Office’s facilities and court buildings.²

The District Attorney’s Office competes against many other worthy priorities within the County for funding, including the Sheriff’s Office and other law enforcement, roads and transportation, flood control, parks, libraries, and public health. Despite Ogg’s repeated claims of being insufficiently funded, the District Attorney’s Office’s budget has in fact *increased dramatically* since 2017 (the year before Judge Hidalgo was elected), rising 24 percent from \$77 million to over \$95 million in 2022.³ For the shortened 2022 fiscal year,⁴ Judge Hidalgo and the other members of Commissioners Court allocated *nearly 70 percent* of a \$1.3 billion budget to public safety, including pay raises for entry-level prosecutors in Ogg’s office that put her attorneys’ salaries well above the next-highest paying county in Texas.⁵

Ignoring this ample increase in funding, Ogg has repeatedly chastised Judge Hidalgo and the Democratic Commissioners for not giving her more money, while allying with the two Republican Commissioners. Ogg’s demands began just after Judge Hidalgo took office in early 2019. In February 2019, Ogg urged the Commissioners Court to approve a multimillion-dollar, 31 percent increase in funding for her office.⁶ Instead, led by “[t]he three Democratic members—Commissioners Rodney Ellis and Adrian Garcia and County Judge Lina Hidalgo,” the Court approved a 7 percent increase, in line with other counties; the local press deemed the result “a

² See, e.g., Tex. Loc. Gov’t Code Ann. § 152.011; Op.Atty.Gen.1976, No. H-908; Op.Atty.Gen.1988, No. JM-0947.

³ Annual funding statistics available at <https://cjo.harriscountytexas.gov/Newsroom/Truth-Center>.

⁴ Harris County recently changed the timing of its fiscal year from starting on March 1 to starting on October 1 and is currently in the midst of a shortened, seven-month fiscal year spanning from March 1 to September 30, 2022.

⁵ See Andrew Schneider, *Harris County adopts budget with focus on public safety. GOP commissioners say it’s not enough*, Houston Public Media (Feb. 8, 2022).

⁶ Zach Despart, *Commissioners Court rejects Ogg pitch for more prosecutors*, Houston Chronicle (Feb. 12, 2019).

stinging public defeat for the first-term Democratic district attorney [Ogg] by members of her own party.”⁷ Four months later, Ogg returned to Commissioners Court to ask for more money – and was again rebuffed.⁸ In December 2019, Ogg again sought a sharp increase in funding.⁹ Again, she was rejected, with press reporting that Ogg had again “struck out” at Commissioners Court.¹⁰

Undeterred, Ogg continued seeking outsized budget increases during the COVID-19 pandemic while embarking on a media campaign to pressure the Commissioners Court for more money.¹¹ Her frequent media appearances seemed designed to distract voters from the disarray in her Office, where a steady stream of departures, high-profile losses, and low morale had hobbled Ogg’s effectiveness. Ogg had proven incapable of reducing the felony backlog and combatting crime rates in the County that, like in the rest of the country, had risen during the pandemic. In Judge Hidalgo and the Democratic Commissioners, she saw a scapegoat.

Ogg pursued the same strategy on misdemeanor bail reform.¹² In her 2016 bid for District Attorney, the former Republican Ogg had called the County’s cash bail system “a tool to oppress the poor” to build her *bona fides* as a “progressive prosecutor.”¹³ She abruptly reversed course in 2021 and announced her opposition to misdemeanor bail reform, allying with the GOP

⁷ *Id.*

⁸ Jasper Scherer, *Commissioners court rejects Ogg request for more staff to handle botched drug raid*, Houston Chronicle (June 24, 2019).

⁹ Keri Blakinger, *Advocates, reformers oppose Harris County DA’s request for more prosecutors*, Houston Chronicle (Dec. 8, 2019).

¹⁰ Zach Despart, *Lina Hidalgo: \$3.2 billion budget is imperfect, but a better fit for Harris County*, Houston Chronicle (Feb. 11, 2020).

¹¹ *See, e.g.*, Remarks of District Attorney Kim Ogg, Commissioners Court Meeting (June 29, 2021); Michael Hagerty, *District Attorney Kim Ogg*, Houston Matters (July 19, 2021).

¹² Aaron Barker, *Judge approves plan to reform Harris County’s bail system*, NBC Channel 2 (Nov. 21, 2019).

¹³ Alex Hannaford, *Harris County D.A. ran as a reformer. So why is she pushing high bail for minor offenses?*, The Appeal (Aug. 9, 2018).

Commissioners, Texas Attorney General Ken Paxton, and Republican candidates looking to unseat Hidalgo in the 2022 election for County Judge.¹⁴

Ogg was heavily criticized for her about-face. The Houston Chronicle said a report Ogg submitted to the Commissioners Court blaming misdemeanor bail reform for rising crime “mischaracterize[d] key data,” “fail[ed] to substantiate [Ogg’s] claim,” and “tailor[ed] a conclusion to fit her thesis,” suggesting Ogg was “falsely blaming” bail reform to “change[] the subject” from surging crime rates that her office had failed to tackle.¹⁵ *Id.* A leading civil rights group called “Ogg’s self-serving advocacy around cash bail [] shameful.”¹⁶

Ogg soon moved on to a new scapegoat: the County’s Democratic judges. In doing so, she joined Republican Governor Greg Abbott and the increasingly partisan “Crime Stoppers of Houston” group Ogg once headed.¹⁷ Ogg’s First Assistant District Attorney, David Mitcham, threatened the judges on a conference call that there would be a “reckoning” if they failed to start setting higher bonds.¹⁸ The incident served as another example of Ogg aligning with Republicans to attack fellow Democrats.

These disputes highlight Ogg’s alienation from her own ostensible political party. Numerous news stories report that “progressives have soured on Ogg” for her opposition to

¹⁴ Jill Ament, *Ken Paxton and Kim Ogg Want to Stop Changes to Harris County’s Cash Bail System*, Texas Public Radio (Oct. 23, 2019); Michael Hardy, *Republicans Have Their Knives Out for Harris County Judge Lina Hidalgo*, Texas Monthly (April 27, 2022).

¹⁵ Editorial, *Why is DA Ogg scapegoating misdemeanor bail reform in crime spike?*, Houston Chronicle (Oct. 3, 2021).

¹⁶ Samantha Ketterer, *DA Kim Ogg challenges monitors over bail reform reports*, Houston Chronicle (Sept. 2, 2021).

¹⁷ David A. Fahrenthold and Keri Blakinger, *How a Crime-Fighting Institution Took a Partisan Turn*, The New York Times (April 21, 2021).

¹⁸ Michael Hardy, *Kim Ogg Blames Rising Crime on Houston Judges. 14 of Her Prosecutors Are Vying to Unseat Them*, Texas Monthly (March 2022).

misdemeanor bail reform and her “repeated attempts to expand her office.”¹⁹ One political website quoted a veteran Democratic consultant explaining, “There’s been a lot of bitterness from having had this policy fight with [Ogg’s] fellow Democrats for a few years.”²⁰ The consultant identified a personal dynamic at work as well: while Ogg was “the biggest star in Harris County politics” when she was elected in 2016, “she was eclipsed by this young Latina who came out of nowhere and became a national star who was appearing on the front page of the Houston Chronicle and in the New York Times.”²¹ The negative press surrounding Ogg’s handling of misdemeanor bail reform and other key issues only stoked Ogg’s resentment toward Judge Hidalgo. And, as Ogg’s former First Assistant District Attorney Tom Berg put it, “[o]nce [Ogg] personalizes a comment or a circumstance as an insult, it becomes an act of disloyalty to her,” inviting retribution.²²

Media reports began to emerge of the alliance between Republicans eager to strip Hidalgo of the County Judgeship and return it to their party, and Ogg – the former Republican who increasingly finds herself at odds with her current party of record.²³ As one reporter recently observed, “One of the most interesting political stories in Houston is how Kim Ogg beat the Republican DA as a progressive candidate in 2016 and now counts Republicans as her most

¹⁹ Michael Barajas, *The Definition of “Progressive Prosecutor” in Texas*, Texas Observer (Feb. 7, 2020).

²⁰ Michael Vermeulen, *Kim Ogg and the Conservative Pushback against Lina Hidalgo*, The Texas Signal (April 21, 2022).

²¹ *Id.*

²² Michael Hardy, *The Hunt for a Leaker at the Harris County District Attorney’s Office*, Texas Monthly (May 15, 2020).

²³ See, e.g., David A. Fahrenthold and Keri Blakinger, *How a Crime-Fighting Institution Took a Partisan Turn*, The New York Times (April 21, 2022); Michael Vermeulen, *Kim Ogg and the Conservative Pushback against Lina Hidalgo*, The Texas Signal (April 21, 2022).

important allies in her fight against her fellow Democrats who run the county.”²⁴ In targeting Judge Hidalgo, she and her Republican allies found common cause. This prosecution ensued.

The investigation—and the subject of Defendants’ indictments—concerned a COVID-19 vaccine outreach campaign to improve vaccination rates in Harris County (the “Vaccine Outreach Contract”). Critically, *Judge Hidalgo could have awarded the contract to any vendor of her choosing using her emergency powers, and thereby avoid competitive bidding and public scrutiny entirely.*²⁵ She instead chose to put it up for public bidding to ensure the highest quality of proposals and in the interest of transparency, a key element of Judge Hidalgo’s campaign and governing philosophy. A weeks-long public bidding and negotiation process began in spring 2021. The County Attorney’s Office, the Purchasing Department, the County Judge’s Office, and the Public Health Department all took part.

One of the four firms that bid on the project was Elevate Strategies LLC (“Elevate”) – a Houston-based data analytics and outreach firm that had recently completed work (with three other firms) on a similar grassroots outreach project for the County’s 2020 Census efforts (the “Census Outreach Contract”). Elevate’s work on the Census project had received high marks. Notably, Assistant District Attorney Barbara Armstrong, who now supervises this prosecution and is also Ogg’s Deputy Chief of Staff, was a supervising attorney at the County Attorney’s Office while it advised Judge Hidalgo and the Commissioners (and their staff) on Elevate’s Census Outreach Contract. In fact, *Armstrong was in charge of the group that handled Elevate’s Census Outreach Contract.*

²⁴ Zach Despart, @zachdespart, Twitter (April 22, 2022 1:52 PM).

²⁵ 21 See Tex. Loc. Gov’t Code Ann. § 262.024(a); Tex. Gov’t Code Ann. § 418.108.

For the Vaccine Outreach Contract, Elevate submitted a highly detailed, 87-page proposal.²⁶ The document identified by name and experience nearly three-dozen professionals who would be working on the project for Elevate, along with a half-dozen subcontractors.²⁷ It also recounted Elevate’s recent engagements with public entities like Harris County, Fort Bend County, and the City of Houston; corporate clients like the ridesharing company Lyft; and non-governmental organizations like Harvey Home Connect.²⁸ The proposal—available *for months* on Judge Hidalgo’s website and the subject of Texas Public Information Act requests—lays bare the lie peddled by certain Republican officials and right-wing news outlets that Elevate was an unqualified, “one-woman company” operating out of an apartment in Montrose.²⁹

After the bids were received, members of an RFP evaluation committee (the “RFP Committee”), composed of employees from the Public Health Department and the Defendants, each scored the submissions on their own. This *initial* round of scoring was done individually, before the RFP Committee members had met to discuss the bids and bidders. Another of the bidders, UT Health, scored highest during that *initial* round, slightly ahead of Elevate. The RFP Committee then met, exchanged information about the committee members’ past experiences with the bidders, reviewed reference information from the bidders’ past clients, and conducted further due diligence. They also invited in the top three bidders from the initial scoring round to make presentations and to answer questions.

²⁶ See Elevate Strategies, *Targeted Community Vaccine Outreach* (March 8, 2021) (available at https://cjo.harriscountytexas.gov/Portals/66/Documents/Truth-Center/Elevate_Proposal.pdf).

²⁷ *Id.*

²⁸ *Id.*

²⁹ See, e.g., Greg Groogan, *Serious questions emerge around \$11 million Harris County COVID-19 contract*, Fox 26 Houston (Sept. 2, 2021).

Elevate, represented by several top executives, promptly interviewed and made a compelling presentation. *UT Health failed to show for its interview.* Meanwhile, concerns were raised on the RFP Committee about another COVID-related, outreach-based contract for the County that UT Health had won. *UT Health’s performance on that contract was so ineffective that by March 2021, it was recommended to be canceled.* At a Commissioners Court meeting the next month, UT Health’s engagement was not renewed. (It was in this context that Mr. Triantaphyllis sent the oft-republished text messages that he did not want UT Health to get the Vaccine Outreach Contract; he *never* said it must go to Elevate.) Despite this disappointing track record, Mr. Triantaphyllis and the other members of the RFP Committee extended the evaluation timeline to give UT Health another chance to interview out of fairness. At the end of that process, a three-person final meeting of the RFP Committee—composed of two representatives from Public Health and only one from the County Judge’s Office—voted *unanimously* to award the Vaccine Outreach Contract to Elevate.

The award was approved by the Commissioners Court on June 8, 2021, on a bipartisan, 4-1 vote.³⁰ Then, in early August, conservative media outlets, Commissioner Cagle, and Commissioner Ramsey—who had voted *for* the Elevate contract—began publicly criticizing the contract and Judge Hidalgo. These critics complained that Elevate CEO Felicity Pereyra had worked with Democratic candidates in the past.³¹ On cue, Barbara Armstrong sent an email to Commissioner Cagle—and *only* Commissioner Cagle—requesting documents about the award to

³⁰ See Commissioners Court Meeting (June 8, 2021). Only Commissioner Cagle voted “no” on the Elevate contract.

³¹ See, e.g., Greg Groogan, *\$11 million Harris County COVID-19 contract drawing scrutiny, concern*, Fox 26 Houston (Aug. 17, 2021).

Elevate, underscoring the partisan origins of this investigation. *See* Ex. A, Sept. 17, 2021 email from Barbara Armstrong to Commissioner Cagle.

Concerned that the issue was distracting from Harris County’s critical work in combatting the pandemic, Judge Hidalgo canceled the Vaccine Outreach Contract in early September.³² Nevertheless, the complaints from conservative corners continued.³³

This wholly political criticism was baseless. There has been no allegation that any Defendant – or any other County employee – received a personal benefit of any kind from recommending that the contract be awarded to Elevate. There is similarly no allegation that any Defendant had a personal relationship with Pereyra or anyone else working on the contract. No Defendant had any reason to jeopardize his or her career and liberty to steer a contract to Elevate. The hollow cries of “public corruption” – including from Ogg herself – have never addressed these gaping holes in the prosecution.

Ogg joined in the Republican-led criticism to advance her own agenda. On October 10, 2021, Ogg was interviewed on Fox 26. The host summarized Ogg’s remarks as “lashing out at the Democratic majority on Commissioners Court.”³⁴ During a commentator panel that followed the interview, one member said, “***District Attorney Ogg does have an office that could look into that and find out where some of that money is going in the County.***”³⁵ Another panel member admonished, “***Kim Ogg, you should have been doing something before today. . . . You[’re] saying you[’re] bothered, you want to know where the money is—you could have investigated this a long***

³² Zach Despart, *Hidalgo to cancel controversial \$11 million vaccine outreach contract, saying it has become politicized*, Houston Chronicle (Sept. 8, 2021).

³³ *See, e.g.*, Houston Keene, *High-profile Houston Democrats face corruption allegations*, Fox News (Dec. 12, 2021).

³⁴ Greg Groogan, *Kim Ogg interview*, Fox 26 Houston (Oct. 10, 2021).

³⁵ *Id.*

time ago.” The woman continued, “you [District Attorney Ogg] already know how much money they took. . . to give it to the COVID lady [Elevate CEO Felicity Pereyra] *So if you’re really sincere about investigating this, do it.*”³⁶

So Ogg did it. First, following the Republican Commissioners’ complaints, she opened a grand jury investigation into the Vaccine Outreach Contract. Media reports in November 2021 stated that her office had issued grand jury subpoenas for documents related to the award process.³⁷ How the grand jury subpoenas made their way to the press despite the obligation that they be kept secret remains an unanswered question, but Ogg has tellingly exhibited no interest in answering it.³⁸ Then, Ogg assigned Barbara Armstrong as one of the lead prosecutors overseeing the investigation. Ogg did this despite Ms. Armstrong’s immediately previous role at the County Attorney’s Office, where she provided legal advice to Judge Hidalgo and County staff – including these very Defendants - and oversaw the group handling Elevate’s Census Outreach Contract.

Meanwhile, Ogg continued to demand budget increases and to publicly criticize the Commissioners Court for not giving her more funding. Ogg once more stated in interviews that refusing her more money was to “de-fund” public safety, omitting that her budget was higher than ever in its history.³⁹ She urged her Twitter followers to call on the Commissioners Court to approve more money for her office⁴⁰ while warning, “[T]hey’re going to need to increase the number of

³⁶ *Id.*

³⁷ See, e.g., Ted Oberg, *Harris County District Attorney’s Office demands documents on county’s \$11 million vaccine contract*, ABC 13 Eyewitness News (Nov. 15, 2021); Greg Groogan, *Grand jury subpoenas for county commissioners over COVID communication contract*, Fox 26 Houston (Nov. 28, 2021).

³⁸ See Tex. Code Crim. Pro. Ann. Art. 20A.202.

³⁹ Michael Hagerty, *Harris County DA Kim Ogg*, Houston Matters (Dec. 20, 2021).

⁴⁰ Kim Ogg (@kimogforda), Twitter (Jan. 29, 2022, 8:26 AM *et seq.*).

[Ogg's] lawyers.”⁴¹ Ogg failed to mention that sky-high attorney attrition rates at her Office left many funded positions empty. Among the scores of attorneys that have left on Ogg's watch was a senior attorney who resigned because of Ogg's penchant for “choosing which cases to prosecute based on politics and not justice.”⁴²

Counsel for Judge Hidalgo asked to meet with Ogg about the Elevate investigation in advance of the Commissioners Court's February 8, 2022 budget vote, when Ogg was expected to again press for more money. Through her staff, Ogg declined. Instead, counsel met with David Mitcham (First Assistant District Attorney), Barbara Armstrong (Deputy Chief of Staff), and Aaron Chapman (then serving as head of Public Corruption). At this meeting, Judge Hidalgo's attorneys, concerned that the District Attorney's Office was pursuing this investigation on a fundamentally flawed misunderstanding of the facts, offered to have a fact-specific discussion of the events in question in hopes of providing important context and information so that prosecutors could properly evaluate whether any crime had been committed. None of the prosecutors raised any factual issue or posed any questions. Instead, Ogg's staff was entirely dismissive of counsel's offer to provide clarifying information. Mr. Mitcham claimed that something corrupt had occurred and that the County Judge's Office's assertion of attorney-client privilege over the handful of documents that had been withheld was “obstruction.”⁴³

⁴¹ Andrew Schneider, *Harris County DA Kim Ogg wants to hire 82 more prosecutors. Democrats haven't been receptive*, Houston Public Media (Feb. 1, 2022).

⁴² Steven Romo, *2 Harris County prosecutors resign in scathing letters*, ABC 13 (Sept. 9, 2020).

⁴³ In pre-indictment litigation, the District Attorney's Office had repeatedly moved to compel the County Judge's Office to produce the few dozen documents that had been withheld on privilege grounds. The court ordered that some be produced (and such documents were quickly produced) but confirmed that others were indeed privileged.

Then, on March 10, 2022, prosecutors sought search warrants to seize the Defendants' County-issued computers and phones located at the County Judge's Office or in their possession.⁴⁴ The District Attorney's Office did not seek the search warrants from the court overseeing the ongoing grand jury investigation that had already yielded the same materials from these very same computers and phones. Instead, shortly after 9:30 p.m. on March 10, the prosecution team went to the duty judge, 337th Criminal Court Judge Colleen Gaido. Ogg has not disclosed whether Judge Gaido was told that the materials sought had already been obtained through grand jury subpoenas. Further, there was no exigency that required the prosecutors to seek nighttime search warrants from the duty judge, rather than the court overseeing the grand jury. There was no reason to believe the devices might be destroyed or spirited away, nor that any documents or material on the devices would be destroyed.

Early the next morning, investigators converged on Defendants' homes, demanding the devices identified in the warrants. One account described their needlessly heavy-handed tactics:

The doorbell of Alex Triantaphyllis's townhome in Houston's Museum District began to ring repeatedly at 6:50 a.m. on March 11. So did his cellphone. When he opened his door he saw a Texas Ranger and two officials from the Harris County district attorney's office standing at the locked gate, seeking entry. According to Triantaphyllis's attorney, Marla Poirot, the Ranger's vehicle was parked diagonally across his driveway, as if to prevent an escape, and its lights were flashing, drawing the attention of neighbors who emerged to see what the ruckus was about. Triantaphyllis, the chief of staff to Harris County Judge Lina Hidalgo, spoke to the three officers at his gate. As his wife and two daughters looked on, he examined a search warrant the officers had given him. Triantaphyllis retrieved and handed the officers a laptop computer and a smartphone; a separate team of investigators seized

⁴⁴ There were four search warrants in total. The substantive allegations in the affidavits to each were nearly identical and appeared to have been simply copied and pasted between documents. One sought devices located at the Harris County Administration Building. Ex. B. Another sought a number of devices owned by Harris County and issued to Dunn, Nader, and Triantaphyllis and, as described below, was executed at the staffers' homes. Ex. C. A third sought an Apple MacBook Pro owned by Nader but used for Harris County business as part of her job. Ex. D. The fourth was served on Google and sought electronic data and profile information for Judge Hidalgo and a number of her staffers, as well as several Google Docs that were cited (and sometimes quoted) in the search warrant affidavits. Ex. E.

a second computer from his office in the county administration building downtown.⁴⁵

They also took devices from the County Judge's Office in downtown Houston. The seized devices contain materials that the court overseeing the grand jury had already deemed privileged. The non-privileged material on the devices related to the subject matters sought by the warrants had already been produced to the District Attorney's Office months earlier. Moreover, the seized devices contain internal communications at the County Judge's Office about Ogg's many funding requests and other disagreements with Ogg.

On March 18, 2022, three of the search warrant affidavits were posted on the Harris County District Clerk's website.⁴⁶ While unremarkable in itself – search warrant affidavits are routinely made public – the affidavits' detailed recitation of material gathered by grand jury subpoena was highly unusual. Materials produced to the grand jury are meant to be kept secret.⁴⁷ Like the leaks of the subpoenas in November 2021, publication of the warrants and their supporting affidavits succeeded in drumming up negative press about Judge Hidalgo and the Defendants. These leaks occurred in the middle of an ongoing grand jury investigation.

As she and her prosecutors grew ever more aggressive and predetermined in their investigative tactics, Ogg continued to pressure Judge Hidalgo and the Commissioners for more taxpayer money despite the historic funding level her Office had already been granted. At a

⁴⁵ See Mike Snyder, *Lina Hidalgo Aides Are Accused of Steering a Contract to an Ally. Internal Communications Paint a Murkier Picture*, Texas Monthly (March 29, 2022).

⁴⁶ The fourth, served on Google, was published on April 7, 2022.

⁴⁷ See Tex. Code Crim. Pro. Ann. Art. 20A.202.

Commissioners Court meeting in March, Ogg harangued Judge Hidalgo and her colleagues for “defunding” her office, proclaiming that it “must stop.”⁴⁸

At a news conference during a break at that same meeting, a TV reporter stated that Ogg had urged him to publicly ask Judge Hidalgo whether she had received a “target letter” from the grand jury. This was yet another violation of the strict grand jury secrecy rules that Texas law imposes.⁴⁹ Once again, Ogg’s efforts to squeeze Judge Hidalgo and the Democratic Commissioners for more money merged with the threat of criminal prosecution. Several weeks later, Ogg vowed to keep asking for more money, even after the Commissioners Court authorized an *additional* \$7.2 million outside the budget cycle—beyond the unprecedented funding she already received.⁵⁰

At the same time, Ogg was apparently also leaking information about the grand jury investigation to Judge Hidalgo’s political adversaries, including prominent Republican and former County Judge Ed Emmett, whom Hidalgo had defeated in a historic upset in 2018 and who has been exceedingly critical of Hidalgo since. Ogg was spotted conferring with Emmett over coffee two months before news of the grand jury investigation broke publicly,⁵¹ then in early April Emmett claimed in emails to colleagues at Rice University to be “far more informed about these matters than most people,” implying that he had inside information about the investigation’s progress. *See* Ex. F, April 1, 2022 emails. Emmett also falsely claimed that the County Judge’s

⁴⁸ Dug Begley, *Kim Ogg accuses Commissioners Court of ‘defunding’ DA’s office, asks for \$6M more*, Houston Chronicle (March 22, 2022).

⁴⁹ *See* Mike Snyder, *Lina Hidalgo Aides Are Accused of Steering a Contract to an Ally. Internal Communications Paint a Murkier Picture*, Texas Monthly (March 29, 2022).

⁵⁰ *See* Michael Vermeulen, *Kim Ogg and the Conservative Pushback against Lina Hidalgo*, The Texas Signal (April 21, 2022).

⁵¹ *See* <https://twitter.com/strawburriez/status/1435958590485970944?s=21>.

Office had failed to comply with subpoenas—an allegation that could only have come from the prosecution team and mirrored Mitcham’s “obstruction” comment two months before.

After the search warrants and their accompanying detailed affidavits were published, media outlets such as the Houston Chronicle and Texas Monthly began questioning their accuracy.⁵² Some reported that they had reviewed documents revealed in the search warrant affidavits that proved the search warrant allegations misleading and inaccurate.⁵³ Press accounts in March and April showed attorneys for Defendants and Judge Hidalgo imploring the District Attorney’s Office to correct their misunderstanding of the documents, even pointing out a critical distinction the investigators had missed.⁵⁴ These published revelations had no effect on Ogg. Rather than reengage counsel or even pause to reassess the evidence, Ogg and her prosecutors ignored these warnings and barreled forward. Indictments were announced against the Defendants a week later.

This motion concerns the concrete and objectively improper ways in which Ogg has acted with bias toward the Defendants arising from clear conflicts of interest. Ogg’s animus toward Judge Hidalgo has driven this investigation, not the facts. Defendants are merely the collateral damage of Ogg’s personal vendetta. Under these circumstances, we have no choice but to seek Ogg’s disqualification.

⁵² See Editorial, *Did Texas Rangers miss a key fact in probe of Lina Hidalgo’s office?*, Houston Chronicle (April 3, 2022); Mike Snyder, *Lina Hidalgo Aides Are Accused of Steering a Contract to an Ally. Internal Communications Paint a Murkier Picture*, Texas Monthly (March 29, 2022).

⁵³ See, e.g., Mike Morris and Nicole Hensley, *Lawyers for Hidalgo, aides say records undercut allegations in vaccine contract probe*, Houston Chronicle (April 3, 2022).

⁵⁴ See, e.g., Jeremy Rogalski, *‘Let the process play out’; Judge Hidalgo won’t ask aides to step down in wake of criminal investigation*, KHOU-11 (March 22, 2022) (quoting Hidalgo attorney: “Many of the emails and text messages in the affidavit relat[e]ing to a different project than the vaccine outreach contract awarded to Elevate Strategies. Yet they are taken out of context and presented as though they all address the same thing.”).

ARGUMENT AND AUTHORITY

A. The Standard for Disqualification

“The duty to avoid a conflict of interest has long been imposed on the prosecutors of this state.” *Carey*, 790 S.W.2d at 708 (citing *Garrett v. State*, 94 Tex.Crim. 556, 252 S.W. 527 (1922)). When a prosecutor violates that duty and compromises the accused’s right to due process, that prosecutor should be disqualified. *Hill*, 887 S.W.2d at 927; *see also Carey*, 790 S.W.2d at 708 (“[C]ases involving an apparent conflict of interest on behalf of the State present constitutional questions of due process, and require no specific showing of prejudice by the defendant.”).⁵⁵ What rises to a due process violation “is not a technical conception with a fixed content unrelated to time, place and circumstances,” but rather depends on careful consideration of whether the apparent conflict undermines the public’s “sense of the legitimacy of official behavior.” *In re Goodman*, 210 S.W.3d 805, 810 (Tex. App.—Texarkana 2006, no pet.) (citations omitted). As set forth below, several apply here. *See infra* Sec. IV(A) and (B).

A “trial court’s duty when ruling on a motion to disqualify is to ensure that the defendant’s constitutional rights are not violated by any alleged conflict of interest.” *Sherrod*, 790 S.W.2d 709. The trial court is afforded wide latitude in determining whether to disqualify a prosecutor and will be reversed only for abuse of discretion. *Landers v. State*, 256 S.W.3d 295, 303 (Tex. Crim. App. 2008) (“The trial court abuses its discretion only when the decision lies ‘outside the zone of reasonable disagreement.’”); *see also Neville*, 622 S.W.3d at 102 (noting that, “in reviewing the historical facts upon which the trial court’s ruling on a motion to disqualify is based, an appellate

⁵⁵ The right to due process in criminal cases is guaranteed by both the United States and Texas State Constitutions. *See* U.S. Const. amend. XIV § 1 (providing that no state shall “deprive any person of life, liberty, or property, without due process of law”); Tex. Const. art. I, § 19 (“No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.”).

court should afford almost total deference to a trial court’s determination of the historical facts that the record supports”). When disqualification is warranted, the court selects an attorney *pro tem* to replace the disqualified prosecutor. Tex. Code Crim. Proc. Ann. Art. 2.07(a).

B. The District Attorney’s Office Should Be Disqualified from This Investigation

1. The District Attorney Has a Clear Conflict of Interest in Prosecuting This Case

Disqualification is warranted when the prosecutor has a personal interest in pursuing a matter beyond her “primary duty . . . not to convict, but to see that justice is done.” Tex. Code Crim. Pro. Ann. Art. 2.01. “A personal interest which is inconsistent with that duty is a conflict that could potentially violate a defendant’s fundamental due process rights, requiring disqualification.” *Neville v. State*, 622 S.W.3d 99, 102 (Tex. App.—Waco 2020, no pet.) (identifying personal interest of prosecutor as “another avenue for disqualification” beyond Article 201’s prohibition on prosecuting former clients); *see also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249–50 (1980) (“A scheme injecting a personal interest, financial *or otherwise*, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.”) (emphasis added).

Likewise, an ulterior motive that affects the prosecutor’s objectivity and substitutes some other consideration for the narrow question of whether the facts merit prosecution is also improper. *See State v. Hill*, 558 S.W.3d 280, 284 (Tex. App.—Dallas 2018, no pet.) (“[T]he absence of an impartial and disinterested prosecutor can also violate a defendant’s due process rights. Partiality in this context is like a conflict of interest in the sense that the prosecutor has a personal interest in the outcome of the criminal prosecution.”) (citation omitted); Edward L. Wilkinson, *Conflicts of Interest in Texas Criminal Cases*, 54 *Baylor L. Rev.* 171, 182 (2002) (“The courts appear in little doubt that a defendant enjoys a right to be prosecuted by a ‘disinterested prosecutor.’”).

An opinion from the Texas Committee on Professional Ethics involving facts less disturbing than those at issue here lays bare the conflict created when funding decisions and court matters collide. *See* Tex. Comm. On Professional Ethics, Op. 530, V. 62 Tex. B.J. 904 (1999). That opinion involved a Dallas County commissioner who was also an attorney practicing law in courts funded by the county's commissioners court. The Ethics Committee noted that, like here, the commissioners court was responsible for all matters of funding the courts, the district attorney's office, and the daily reimbursement of jurors. *Id.* Deeming the attorney's dual role as funding source and advocate a conflict of interest, the Committee wrote:

[A]lthough not in daily control over the workings of these courts, certainly the perception of control over the various courts through fiscal authority and the approval of personnel appointments is likely apparent not only to the public but to the judges and other officials of the courts. Further, the budgetary authority of the county commissioners extends to the salaries of the criminal district attorney, assistant district attorneys, and all other personnel in that office. The attorney, by practicing in these courts, places himself or herself in a conflict between protecting the county's (and since he or she is a commissioner, his or her) interest and protecting the client's interest.

Id. The Committee concluded that this conflict violated the Texas Disciplinary Rules of Professional Conduct and applied to all lawyers associated with the attorney's firm. *Id.*⁵⁶

Leaving aside Ogg's personal and political animus for Judge Hidalgo and, by proxy, Defendants, the conflict here is far more serious. Defendants here face felony convictions. By targeting Judge Hidalgo's staff, Ogg threatens the *same office* that she consistently criticizes. And the specific basis for Ogg's prosecution of Defendants stems from that *same criticism*—the County

⁵⁶ The Committee also recounted a similar opinion that precluded an attorney serving as a city commissioner and his law partner from representing criminal defendants in cases involving city judges funded by the city commissioners. *Id.* (citing Tex. Comm. on Professional Ethics, Op. 497, 57 Tex.B.J. 1136 (1994)). The Committee noted: "The underlying issue in that opinion, as in the instant opinion, was the perceived influence created by the budgetary and personnel authority of the city commissioners who hired the city judge, city manager, city attorney, and set the budget for the city police." *Id.*

Judge’s decision not to agree to Ogg’s demands for even more money than the unprecedented amounts Ogg has already received. This is a structural conflict exacerbated by Ogg’s conduct, and it cannot be cured as long as Ogg remains in charge of this matter.

2. Attorney Armstrong’s Participation in This Matter Violates Due Process, the Texas Code of Criminal Procedure, and the Texas Disciplinary Rules of Professional Conduct

It is a *per se* due process violation when a prosecutor targets someone she previously represented—particularly where the matters are related or confidential information may be misused. *See* Tex. Code Crim. Pro. Ann. Art. 2.01; *see also United States v. Schell*, 775 F.2d 559, 566 (4th Cir. 1985) (“[D]ue process is violated when an attorney represents a client and then participates in the prosecution of that client with respect to the same matter.”). Such conflicts also violate the Texas Disciplinary Rules of Professional Conduct and render the offending attorney “subject to the disciplining authority of the State Bar.” *State ex rel. Eidson v. Edwards*, 793 S.W.2d 1, 7 (Tex. Crim. App. 1990); *see also* TX ST RPC Rule 1.09(a) (“[A] lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client . . . if the representation in reasonable probability will involve a violation of Rule 1.05; *or* . . . if it is the same or a substantially related matter.”) (emphasis added); TX ST RPC Rule 1.05(b) (“[A] lawyer shall not knowingly . . . [u]se confidential information of a former client to the disadvantage of the former client . . .”).⁵⁷

⁵⁷ While the *Eidson* plurality stated that “[i]f there is a conflict of interests on the part of the district attorney or his assistants, . . . the responsibility of recusal lies with them, not with the trial court judge,” its opinion does not change the rule that conflicts constituting due process violations result in disqualification. *Eidson*, 793 S.W.2d at 6. The plurality also acknowledged that “violation of the rules will subject [the district attorney’s] cases to reversal on appeal when his unprofessional conduct results in a denial of due process to a defendant.” *Id.* at 7.

One of the lead prosecutors handling this investigation has such a conflict. Barbara Armstrong worked at the County Attorney’s Office from 2007 to November 2020, rising to Managing Attorney and General Counsel (May 2016 to May 2019) and Executive Managing Attorney (May 2019 to 2020). In all of her roles there, Armstrong represented and advised the Commissioners Court, as well as the County Judge’s Office and staff on all matters of County business.⁵⁸ There is no question that the members of Commissioners Court and their staff were her “clients.”

Nevertheless, after joining the District Attorney’s Office in November 2020, DA Ogg assigned Ms. Armstrong to this investigation. Armstrong then played a leading role in presenting evidence to the grand jury. More recently, Ogg put Armstrong in charge of the investigation, and she remains actively involved in the cases currently pending against the Defendants.⁵⁹

An ethics opinion from 2012 addressed a similar situation—a prosecutor who had previously represented and advised a public official regarding the official’s public duties was asked to investigate the official for alleged abuse of office or official oppression. *See* Professional Ethics Comm. Op. 615 (April 2012). The Committee concluded that the prosecutor could participate in the investigation *only* if: (1) there was no reasonable probability that confidential information obtained in the representation of the official would be disclosed or used in violation of the district attorney’s obligations to protect the confidential information of the official; (2) the proposed

⁵⁸ *See* Office of the Harris County Attorney, <http://cao.harriscountytexas.gov> (last visited February 2, 2022) (“The office provides legal counsel to Harris County government, elected officials, and employees, and represents them in civil lawsuits.”).

⁵⁹ The trial prosecutor on Defendants’ pending criminal cases, ADA Michael Levine, copies Armstrong on communications with defense counsel regarding discovery questions and related matters on these cases, and Armstrong was in the courtroom for the State on May 13, 2022, when this Court addressed the issue of bond conditions for the Defendants.

current representation is not substantially related to the prior representation of the official; *and* (3) it reasonably appeared, or the district attorney reasonably believed, that representing the State would not be adversely limited by his duties to his former client. *Id.* If any one of those criteria were not met, the prosecutor could no longer continue working on the investigation.

None of these criteria is satisfied here. First, because of Armstrong’s high-level positions at the County Attorney’s Office at critical times, this Court cannot conclude that there is “no reasonable probability” that confidential information gained during her tenure there could be used or disclosed in this investigation. Armstrong was Executive Managing Attorney of the County Attorney’s Office when it advised the members of Commissioners Court on Elevate’s Census Outreach Contract. In fact, she oversaw the group handling that contract. Elevate’s strong performance on the census work was an important factor in its successful bid for the Vaccine Outreach Contract. Armstrong plainly had access to confidential—and likely privileged—communications with the members of Commissioners Court and their staff, which could be used to Defendants’ prejudice in this prosecution.

Second, there is obvious factual overlap between Armstrong’s time at the County Attorney’s Office and these cases. As just noted, the Census Outreach Contract and Vaccine Outreach Contract are inextricably linked, meaning Ms. Armstrong’s knowledge of the former relates directly to the latter. Separately, in her senior role with the County Attorney’s Office, Ms. Armstrong served as the County’s legal representative at public events addressing its response to the COVID-19 pandemic. This creates further factual overlap between the present prosecution and her prior representation of Commissioners, the County Judge, and their respective staff, including these Defendants.

Finally, it does not “reasonably appear” that Ms. Armstrong’s prior participation in this matter will not limit her representation of the State at the District Attorney’s Office. To the contrary, her senior role at the County Attorney’s Office when the County’s relationship with Elevate began, and her involvement in the County’s COVID response overall, indicate that *she could be a fact witness in this matter*. This unequivocally precludes her involvement as a prosecutor. *See, e.g., Ligon*, 408 S.W.3d at 896 (disqualifying district attorney named as victim in charging instrument partly on ground that prosecutor would be trial witness).

Texas courts regularly disqualify prosecutors when their past representation creates such a conflict. *See, e.g., Garrett v. State*, 94 Tex. Crim. at 560 (reversing judgment of conviction and remanding so that “the state may be represented by some attorney not embarrassed by a former employment by accused”); *Ex parte Morgan*, 616 S.W.2d 625, 626 (Tex. Crim. App. 1981); *Spain*, 589 S.W.2d at 134; *Goodman*, 210 S.W.3d at 809–10.⁶⁰ In fact, so grave is a conflict arising from the prosecution of a former client that it is grounds to disqualify not only the prosecutor herself, but *her entire office*. *See, e.g., Sherrod*, 790 S.W.2d at 707 (disqualifying entire office because of one assistant prosecutor’s apparent conflict); *State v. May*, 270 S.W.2d 682 (Tex.Civ.App.—San Antonio 1954, no writ) (per curiam) (trial court did not abuse its discretion in disqualifying an assistant district attorney when the District Attorney had been disqualified); *Canady v. State*, 100 S.W.3d 28, 32 (Tex. App.—Waco 2002, no pet.) (“If an elected district attorney is lawfully disqualified from prosecution of a certain cause, his assistants will also be disqualified.”); *In re Ligon*, 408 S.W.3d 888, 896 (Tex.App.—Beaumont 2013, orig. proceeding). The rules of

⁶⁰ Although ethical breaches do not result in automatic disqualification, courts frequently look to the disciplinary rules as “reasonable guidance” in considering whether disqualification is warranted. *See Goodman*, 210 S.W.3d at 809-10 (collecting cases).

professional conduct hold the same. *See* TX ST RPC Rule 1.09(b) (imputing conflicts to all lawyers in a conflicted lawyer’s organization); Professional Ethics Comm. Op. 615 (“[S]ince the district attorney’s office is a ‘firm’ under the Texas Disciplinary Rules, if the district attorney is prohibited by [the conflicts rules] from representing the State in a manner adverse to [the official], then ***all other lawyers in the district attorney’s office would likewise be prohibited from such representation of the State.***”) (citing definition of “Firm” in Texas Disciplinary Rules of Professional Conduct, Terminology; Rule 1.09(c) and Rule 1.06(f); and Professional Ethics Comm. Op. 539 (February 2002)) (emphasis added).

Because there can be no dispute that Armstrong represented Defendants and the County Judge on matters touching on this case, she must be disqualified along with the District Attorney’s Office.

3. Ogg’s Own Staff Confirmed Her Improper Motives

The conduct of Ogg and her staff throughout this investigation shows that it involves actual animus, not merely a budget dispute. As one example, Ogg’s prosecutors have repeatedly served represented parties directly with grand jury subpoenas, despite knowing that they were represented (and having spoken with their counsel beforehand). *See* Ex. G, Affidavit of Samy Khalil (“Khalil Aff.”) ¶¶ 3, 5. This violates the rules of professional conduct. TX ST RPC Rule 4.02(a) (prohibiting communications with a represented person without consent of that person’s counsel). Ogg’s prosecutors have also repeatedly served grand jury subpoenas with less than two days’ notice, depriving the recipients of time to review documents, prepare for testimony, or meaningfully consult with qualified counsel. *See* Ex. G, Khalil Aff. ¶ 5. Separately, prosecutors disregarded witnesses’ concerns about COVID-19 exposure during the pandemic. *See id.* ¶¶ 6-9. Then, when counsel for a witness expressed his concern about the lack of social distancing and mask-wearing

to the prosecutors, the assistant district attorney responded, “We wouldn’t have this problem if your client put us in a building with a bigger grand jury room.” *Id.* ¶ 9. The remark parroted Ogg’s demands to the Commissioners Court for more funds.

Ogg’s prosecutors’ misuse of search warrants shows that their animus has spiraled out of control. Assistant District Attorney David Mitcham’s absurd charge that the County Judge’s Office was engaged in “obstruction” merely by appropriately asserting the attorney-client privilege—a foundational element of American law—demonstrates how the DA’s Office has run amok in this case. Mitcham’s comment highlights the District Attorney’s Office’s frustration at having found no evidence to support convictions here despite having obtained thousands of pages of documents, not to mention the testimony of numerous witnesses.

After the grand jury court ruled that some of the handful of documents withheld are indeed protected by privilege, that frustration boiled over. The DA’s Office decided to seek after-hours search warrants from the duty judge without the slightest exigency, despite its prosecutors having repeatedly appeared before the court overseeing the grand jury investigation in this matter.

The search warrants were plainly inappropriate. For one, the County Judge’s Office and its staff would have provided the devices had they simply been asked. Judge Hidalgo and her staff – including Defendants – have complied with investigators’ requests from the outset. More concerning is that the warrants sought the *same material that had already been produced to the DA’s office months earlier*, with the exception of those documents the grand jury court confirmed were privileged. For example, the grand jury subpoena to Wallis Nader sought “Any and All Communication [sic] and Documents” related to: the composition and work of the RFP “Contract Committee,” the Vaccine Outreach Contract, Elevate Strategies, Elevate CEO Felicity Pereyra, and bids by UT Health and others for the Vaccine Outreach Contract. *See* Ex. H-1, Subpoena *duces*

tecum to Wallis Nader (issued November 12, 2021)⁶¹; *see also* See Ex. H-2, Subpoena *duces tecum* to Alex Triantaphyllis (issued November 12, 2021).

By comparison, the March 10, 2022 search warrants sought “messages,” “call logs,” “voice messages,” “electronic messages,” and “any other form of communication of which said Electronic Devices are capable” [i.e., the same “communications” sought by the grand jury subpoenas] and “documents,” “files,” and “screenshots or photographs” [i.e., the same “documents” sought by the grand jury subpoenas] relating to the following topics: the vaccine outreach RFP; the “selection and service on the Evaluation Committee” and “work of the Evaluation Committee” [i.e., the composition and work of the RFP “Contract Committee”]; the hiring, contracting, or scope of work of Ms. Pereyra or Elevate; discussions about UT Health; and buzz phrases concerning the Vaccine Outreach Contract – in short, the same subjects as the subpoenas. *See* Ex. C, Search Warrant for Electronic Devices Issued to Aaron Dunn, Wallis Nader, and Alex Triantaphyllis (signed March 10, 2022). Incredibly, these materials ***had already been produced***.

It is unclear whether Judge Gaido was told that the warrants she was signing (1) sought the same material from the same custodians covered by months-old grand jury subpoenas, (2) that the recipients of the subpoenas had produced the requested materials months earlier, or (3) that the grand jury court had already determined through in-camera review that some of the materials sought by the warrants were privileged. If Judge Gaido was not, it means Ogg intentionally made an end-run around the grand jury court’s prior rulings.

Regardless, because the responsive, non-privileged material sought by the warrants had already been produced to the District Attorney’s Office, the warrants had no proper basis. Indeed,

⁶¹ The subpoenas *duces tecum* served on Ms. Wallis and Mr. Triantaphyllis were cut off as reflected in Exhibit H-1. Mr. Triantaphyllis’s counsel was later able to obtain a properly formatted version. *See* Ex. H-2.

given the overlap of the grand jury subpoenas, it is difficult to see what the warrants were designed to yield *other than* the documents the grand jury court had already deemed privileged.

Meanwhile, the warrants contain no provision for a “filter team” to search the devices. This means the prosecutors and their investigators in this case will be able to read privileged materials. Defense counsel repeatedly attempted to determine whether a proper filter team was in place. Counsel also asked for information about the protocol to protect privileged information located on the seized devices. The District Attorney’s Office refused even to respond. *See* Ex. I, March 25, 2022 letter from Marla Poirot to Aaron Chapman; Ex. J, March 25, 2022 email at 12:10pm from Chapman to Poirot; and Ex. K, March 25, 2022 email at 12:48pm from Poirot to Chapman.

Equally worrying is what the warrants did *not* explicitly seek but which the prosecutors no doubt knew they would obtain. Given Defendants’ high-level positions at the County Judge’s Office, their seized devices contain extensive internal discussions about Ogg’s funding demands. Ogg’s demands are part of the improper purpose behind this investigation and create the major conflict of interest that should disqualify Ogg and her Office. Given the clear link between this investigation and Judge Hidalgo’s budgeting decisions, the use of search warrants to obtain this material is improper and unethical. There is no indication that prosecutors have or will set up any safeguards to avoid it.

To the contrary, these same prosecutors have already expressed their anger over the rejection of Ogg’s funding demands. Exposed to these internal discussions, the District Attorney’s animus will only deepen, heightening the danger of prejudice to Defendants and, to the extent the investigation is ongoing, to Judge Hidalgo.

Finally, the District Attorney’s refusal to pause and take stock of her prosecutors’ understanding of the facts – even after that understanding was called into question by credible

sources – is both deeply troubling and unprofessional. The Court of Criminal Appeals directs that the State “has only one, indivisible interest in a criminal prosecution: to see that justice is done.” *Ex parte Taylor*, 36 S.W.3d 883, 887 (Tex. Crim. App. 2001) (citing Tex. Code Crim. Pro. Ann. Art. 2.01 (“It shall be the primary duty of all prosecuting attorneys . . . not to convict, but to see that justice is done.”)). Similarly, the American Bar Association instructs that “[t]he primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict,” and that “[t]he prosecutor should seek to protect the innocent and convict the guilty.” (citing ABA Standards Relating to the Prosecution Function and the Defense Function, Section 1.2) (“Functions and Duties of the Prosecutor”). To fulfill this duty, the prosecutor must keep an open mind, evaluate the evidence impartially, and be willing to reassess that evidence when given good reason to do so.

To that end, it is routine practice of prosecutors nationwide to meet with defense attorneys to hear their versions of the facts—particularly where those attorneys insist the prosecutors have gotten it wrong and are willing to explain why. Here, however, the District Attorney’s Office refused to listen, even if it meant prosecuting three innocent County employees. The reason is simple: Ogg is more interested in pursuing a personal and political vendetta than in fulfilling her duties as a prosecutor. Her refusal is evidence that she is willing to waste the same taxpayer money she seeks more of to wage her own personal crusade.

With the prosecutors slamming the door (but eager to leak misleading information to create negative publicity about Defendants and Judge Hidalgo), defense counsel responded to media inquiries by pointing out critical errors in the prosecution team’s core theory. This, in turn, prompted respected news outlets to question whether investigators had wrongly conflated two separate projects. Even then, Ogg and her team refused to reconsider—let alone invite counsel in

to explain. Instead, they rushed into the grand jury, emerging with indictments in hand little more than a week after those critical news reports appeared.

Grand jury secrecy rules preclude the public's review of what the grand jury was told. However, the prosecutors' unwillingness to consider alternatives even when counsel urged them to reevaluate their case, and Ogg's haste in obtaining indictments even after key questions were raised, is strong circumstantial evidence that the grand jury was misled. If true, this was also improper. ABA Criminal Justice Standards for the Prosecution Function, Section 3-4.5, Fourth Ed. (2017) ("Relationship with a Grand Jury") ("In presenting a matter to a criminal grand jury, and in light of its *ex parte* character, the prosecutor . . . should not preempt a function of the grand jury, ***mislead the grand jury***, or abuse the processes of the grand jury."). Unfortunately, the decision to seek indictment was only another car in a long train of prosecutorial misconduct showing Ogg's improper animus toward Defendants—and further amplifying her conflict of interest.

4. The Court Must Replace Ogg If She Does Not Recuse Herself

The Court of Criminal Appeals instructs that "when a conflict of interest may arise[,] the prosecutor should recuse himself and make appropriate arrangements for the handling of the particular matter by other counsel" so as to "avoid participation in a case in circumstances where any implication of partiality may cast a shadow over the integrity of his office." *Spain*, 589 S.W.2d at 134 (citing ABA Standards Relating to the Prosecution Function and the Defense Function, Section 1.2).⁶²

⁶² The ABA's present guidance emphasizes not only the importance of recusal, but also the prosecutor's vigilance in monitoring for conflicts that could require recusal:

The prosecutor should know and abide by the ethical rules regarding conflicts of interest that apply in the jurisdiction, and be sensitive to facts that may raise conflict issues. When a conflict requiring recusal exists and is non-waivable, or informed consent has not been obtained, the prosecutor should

Texas District Attorneys have routinely abided by this principle for decades by voluntarily recusing themselves for various real or apparent conflicts. *See, e.g., State v. Rosenbaum*, 852 S.W.2d 525, 525–26 (Tex. Crim. App. 1993) (district attorney’s office recused because district attorney could be called to testify); *Rogers v. State*, 956 S.W.2d 624, 625 (Tex. App.—Texarkana 1997, pet. Ref’d) (district attorney recused because defendant had filed official complaint against district attorney); *Hilbig*, 877 S.W.2d at 471 (district attorney’s office recused because of misconduct allegations against it).

District Attorney Ogg is aware of such precedents. Indeed, she has abided by them in the past. Ogg recused her office from a case in 2017 in which certain employees were perceived to have a conflict of interest.⁶³ In another, she dismissed felony money laundering charges against nine gambling defendants because of her campaign donor and contract employee’s affiliation with the defendants.⁶⁴ In neither of those cases, however, did Ogg have a personal, financial, or political interest in pursuing those cases in the face of those conflicts, nor did she have a personal animus against the defendants. *Neville*, 622 S.W.3d at 102.

Other recent cases make clear the danger of allowing Ogg to maintain control over a matter in which she has an obvious conflict of interest. For instance, in *State of Texas v. Brown*, the defendant moved to disqualify Ogg based on her personal animus and allegations of Ogg’s improper political motivations. *See* Cause No. 1643982 in the 209th Criminal District Court of

recuse from further participation in the matter. The office should not go forward until a non-conflicted prosecutor, or an adequate waiver, is in place.

ABA Criminal Justice Standards for the Prosecution Function, Section 3-1.7, Fourth Ed. (2017) (“Conflicts of Interest”).

⁶³ *See News Release of Harris County District Attorney Kim K. Ogg* (May 5, 2017).

⁶⁴ *See Zach Despart, Ogg dismisses poker room cases, citing conflict with consultant and fundraiser*, Houston Chronicle (July 16, 2019).

Harris County. While the conflicts were less substantial than those at issue here, the presiding judge permitted the defendant to take depositions on written questions of Ogg and Ogg’s chief of staff, Vivian King, to explore Ogg’s biases. Ogg’s office dismissed the charges shortly before trial. Even so, the case proved an unjustifiable waste of judicial resources and public funds.

The now-infamous Arkema prosecution is another telling example. After an accident at the Houston-area Arkema chemical plant overcome by flooding during Hurricane Harvey, Ogg made headlines when she publicly declared—*pre-indictment*—that “[c]ompanies should be on notice that we care when they pollute our air, our water, our environment. . . . Arkema is under criminal investigation.”⁶⁵ Then, in a glaring conflict of interest, ***Ogg announced indictments against company executives the same day as plaintiffs’ lawyers suing Arkema for the same incident held a fundraiser for her reelection campaign.***⁶⁶ See ABA Criminal Justice Standards for the Prosecution Function, Section 3-1.7(f), Fourth Ed. (2017) (“Conflicts of Interest”) (“The prosecutor should not permit the prosecutor’s professional judgment or obligations to be affected by the prosecutor’s personal, *political*, financial, professional, business, property, or other interests or relationships. A prosecutor should not allow interests in personal advancement or aggrandizement to affect judgments regarding what is in the best interests of justice in any case.”).

Ogg held a press conference announcing the indictments in which she publicly prejudged the guilt of the accused, long before a single juror was impaneled:

The facts show Arkema knew of the dangers, withheld vital information, and unleashed harm on first responders and the community. This felony indictment is a

⁶⁵ Dianna Hunt and Robert Downen, *Arkema, now facing criminal probe, hires veteran Houston attorney*, Houston Chronicle (Sept. 29, 2017).

⁶⁶ St. John Barned-Smith, *After a string of high-profile losses, Harris County DA Kim Ogg is left to battle critics on all sides*, Houston Chronicle (March 16, 2022).

wake-up call to companies that would pollute our air and waterways, ignore best practices in safety, and put our communities at risk.⁶⁷

Ogg’s comments were a blatant violation the Texas Disciplinary Rules of Professional Conduct, which apply to all attorneys. *See* TDRPC Rule 3.07 (“[A] lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding.”). Her comments also violated core prosecutorial ethics. *See* ABA Criminal Justice Standards for the Prosecution Function, Section 3-1.10, Fourth Ed. (2017) (“The prosecutor should not make, cause to be made, or authorize or condone the making of, a public statement that the prosecutor knows or reasonably should know will have a substantial likelihood of materially prejudicing a criminal proceeding or heightening public condemnation of the accused The prosecutor should not allow prosecutorial judgment to be influenced by a personal interest in potential media contacts or attention. . . . The prosecutor should not offer commentary regarding the specific merits of an ongoing criminal prosecution or investigation.”).

The Arkema prosecution ended in disgrace. The court dismissed certain charges and issued a directed verdict on all others at trial. This was only *after* Ogg’s prosecutors had been repeatedly accused of misconduct.⁶⁸ To no one’s surprise, Ogg blamed the judge for the debacle, not her own flawed judgment.⁶⁹

⁶⁷ Perla Trevizo, *Arkema and its executives to go on trial for releasing pollutants, injuring deputy sheriffs during Harvey*, Houston Chronicle (Feb. 16, 2020).

⁶⁸ Katie Watkins and Paul Debenedetto, *No convictions in Arkema trial after judge drops remaining charges*, Houston Public Media (Oct. 1, 2020).

⁶⁹ *See* St. John Barned-Smith, *After a string of high-profile losses, Harris County DA Kim Ogg is left to battle critics on all sides*, Houston Chronicle (March 16, 2022).

While the Arkema defendants were not convicted, they were forced to endure a meritless prosecution. In remarks applicable here, a lawyer for Arkema mused, “*It brings me to the question about what this district attorney’s office is really after. . . . Is it justice, or is it political motives to advance their own careers?*”⁷⁰ It was one of many of what a Houston Chronicle headline called Ogg’s “string of high-profile losses.”⁷¹

The parallels between this case and Arkema are striking. Both matters involve Ogg ignoring obvious professional and financial conflicts of interest. Both matters involve Ogg pursuing press-heavy prosecutions for political gain, and issuing prejudicial statements to the media long before trial. Both involve similar violations of prosecutorial ethics. And both exhibit a callous disregard for the real-world consequences of using the criminal justice system for political vanity projects, where even a defendant exonerated at trial is forced to live through the crucible of a highly public, financially and psychologically onerous ordeal to clear his or her name.

While this is the first time Defendants have been accused of misconduct, the same cannot be said of DA Ogg. If she insists on maintaining her grip on this flawed prosecution when alternatives exist, it is only more evidence of her “axe to grind.” *Wright*, 732 F.2d at 1056; *see also* *Wilkinson*, 54 Baylor L. Rev. at 182. She must be replaced.

C. The Court Should Disqualify the District Attorney’s Office and Appoint an Attorney Pro Tem to Take Its Place

Ogg should not be allowed to remain in a position of threatening the County Judge and criminally prosecuting her staff amid Ogg’s myriad conflicts and demonstrated personal and

⁷⁰ Samantha Ketterer, *High-profile Arkema trial ends with no convictions as Harris County judge acquits final defendants*, Houston Chronicle (Oct. 1, 2020) (internal quotes omitted).

⁷¹ St. John Banned-Smith, *After a string of high-profile losses, Harris County DA Kim Ogg is left to battle critics on all sides*, Houston Chronicle (March 16, 2022).

political biases. *See* ABA Criminal Justice Standards for the Prosecution Function, Section 3-1.6, Fourth Ed. (2017) (“A prosecutor should not use other improper considerations, such as partisan or political or personal considerations, in exercising prosecutorial discretion.”); *Nelville*, 622 S.W.3d at 102. The only option to eliminate the due process violation here is to appoint a truly independent, conflict-free prosecutor not under Ogg’s control. For that reason, hiring a special prosecutor—a favorite tactic of Ogg’s in sensitive investigations—will not suffice. The Court of Criminal Appeals has noted that “a special prosecutor participates in a case *only to the extent allowed by the district attorney* and operates *under h[er] supervision.*” *Coleman v. State*, 246 S.W.3d 76, 82 n.19 (Tex. Crim. App. 2008) (emphasis added).

In contrast, “[a]n attorney *pro tem* assumes all the duties of the district attorney, *acts independently*, and, in effect, replaces the district attorney.” *Id.* (emphasis added). Only an attorney *pro tem* will cure Ogg’s conflict. The clear remedy to Ogg’s conflicts is thus to disqualify the District Attorney’s Office from this matter and appoint an attorney *pro tem* in its place. Tex. Code Crim. Proc. Ann. art. 2.07(a); *see also State v. Rosenbaum*, 852 S.W.2d 525, 528 (Tex. Crim. App. 1993) (“[A]n attorney *pro tem* . . . takes the place of the disqualified district attorney assuming all the district attorney’s powers and duties in the case.”).⁷²

Doing so would benefit all legitimate interests involved: (1) it would protect the integrity of the budget process from improper influence or threat; (2) it would protect Defendants from a prosecution that is or appears biased; (3) it would protect the State by removing the perception of impropriety; and (4) it would protect the public’s “interest in being represented by an attorney who

⁷² If the Court were to deny this request that the District Attorney be disqualified, the Court should, at minimum, find that Assistant District Attorney Armstrong’s participation in the investigation and grand jury presentation incorrigibly tainted the grand jury and dismiss the indictments against all Defendants.

is not burdened by the danger of conflicting obligations” while permitting the District Attorney’s Office to focus its resources on matters in which it faces no such conflicts. *Simons v. State*, 234 S.W.3d 652, 654 n.5 (Tex. App.—Amarillo 2007, no pet.); *see also Eidson*, 793 S.W.2d at 11 (Teague, J., dissenting) (urging disqualification of district attorney so as not to “give the general public the appearance of impropriety,” which “can be just as harmful as actual impropriety”).

I. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court disqualify the Harris County District Attorney’s Office from this matter and appoint an attorney *pro tem* in its place.

Respectfully submitted,

/s/ *David Adler*

David Adler
State Bar of Texas 00923150
6750 West Loop South, Suite 120
Bellaire (Houston), Texas 77401
(713) 666-7576
(713) 665-7070 (Fax)

/s/ *Brett Podolsky*

Brett A. Podolsky
State Bar of Texas 24002781
917 Franklin Street, Suite 510
Houston, Texas 77002
(713) 227-0087
(713) 227-9900 (Fax)

Attorneys for Defendant,
Wallis Nader

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Bar No. 24002781
podolaw@gmail.com
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Brett APodolsky		podolaw@gmail.com	6/1/2022 3:12:28 PM	SENT