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May 21, 2015

URGENT TIME SENSITIVE

Ken Paxton

Texas Attorney General

P.O. Box 12548

Austin, Texas 78711

Texas Governor Greg Abbott

Bobby Wilkinson, Budget Analyst

Cara Crawford, Budget Analyst

Senate State Affairs Chairman Senator Joan Huffman

Senate State Affairs Vice Chair Senator Rodney Ellis

Senate State Affairs Member Senator Brian Birdwell

Senate State Affairs Member Senator Brandon Creighton

Senate State Affairs Member Senator Craig Estes

Senate State Affairs Member Senator Troy Fraser

Senate State Affairs Member Senator Jane Nelson

Senate State Affairs Member Senator Charles Schwertner

Senate State Affairs Member Senator Judith Zaffirini

Re: Pre-Lawsuit Notice of Unconstitutional House Bill 1438

Dear Governor Abbott, Attorney General Paxton and Senators:

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

¹ Chapter 37 of the Texas Civil Practice and Remedies Code, generally, and Section 37.004 thereof, in particular, which provides: "A person...whose rights, status, or other legal relations

injunctive relief regarding House Bill 1438, which is grossly unconstitutional. It was enacted by a small group of public officials breaking the law.² The Bill is the product of

are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.” TEX. CIV. PRAC & REM. CODE §37.004.

² TITLE 18, U.S.C., SECTION 241

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;...

They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

Sec. 39.03. OFFICIAL OPPRESSION. (a) A public servant acting under color of his office or employment commits an offense if he:

(1) intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful;

(2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful; or

(3) intentionally subjects another to sexual harassment.

(b) For purposes of this section, a public servant acts under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity.

(c) In this section, "sexual harassment" means unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, submission to which is made a term or condition of a person's exercise or enjoyment of any right, privilege, power, or immunity, either explicitly or implicitly.

Judge Guy Herman's "improper influence,"³ violation of separation of powers under the Texas Constitution and Judicial Canons.. The means by which the Bill was passed reveal that Representative Senfronia Thompson, Judge Guy Herman, Laura Upchurch and Craig Hopper violated the law and committed fraud upon to pass this unconstitutional Bill. The Bill must be declared unconstitutionally, as it is already void for violating the U.S. and Texas Constitutions. The Supremacy Clause deems any contrary state law void and attempts to violate the U.S. or Texas Constitution constitute treason, an impeachable offense.

The Supremacy Clauses states,
"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to

(d) An offense under this section is a Class A misdemeanor, except that an offense is a felony of the third degree if the public servant acted with the intent to impair the accuracy of data reported to the Texas Education Agency through the Public Education Information Management System (PEIMS) described by Section [42.006](#), Education Code, under a law requiring that reporting.

³ Sec. 36.04. IMPROPER INFLUENCE. (a) A person commits an offense if he privately addresses a representation, entreaty, argument, or other communication to any public servant who exercises or will exercise official discretion in an adjudicatory proceeding with intent to influence the outcome of the proceeding on the basis of considerations other than those authorized by law.

(b) For purposes of this section, "adjudicatory proceeding" means any proceeding before a court or any other agency of government in which the legal rights, powers, duties, or privileges of specified parties are determined.

(c) An offense under this section is a Class A misdemeanor.

support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.”

This is not the first time you have had to intervene to stop Judge Guy Herman from violating the Texas Constitution. Last year, you intervened and sought declaratory and injunctive relief to stay and invalidate an ORDER issued by Judge Guy Herman, striking down the Constitutional Amendment, defining marriage as between one man and one woman. Your statement was particularly appropriate to Judge Herman’s unethical activities in the Legislature, driving legislation to benefit the probate bar:

"The law of Texas has not changed and will not change due to the whims of any individual judge or county clerk operating on their own capacity anywhere in Texas," Paxton said. "Activist judges don’t change Texas law, and we will continue to aggressively defend the laws of our state and will ensure that any licenses issued contrary to law are invalid."

Judge Guy Herman has overstepped the bounds of his office and is now drafting legislation and using Elliot Naishtat and Senfronia Thompson to get it passed through fraud and violations of law regarding the need for public testimony on proposed Bills.⁴

⁴Judge Guy Herman, Travis County Probate Judge, took a 3-month sabbatical to work on his Spanish and manipulated the Travis County Commissioners to serve as his accomplice in violating federal law to obtain retirement benefits without retiring. Herman had a guaranteed return to the bench in November because he was running unopposed, so he got the commissioners to agree to replace him with Associate Judge Dan Prashner pending his return, at which time Prashner was again demoted. This is illegal, but Herman called it “small potatoes” in reports to the Austin American Statesmen. Federal tax rules prohibit an employee from receiving retirement benefits if there exists an arrangement or agreement for the employee to be rehired by the same employer. A violation of this rule would result in the return of any disbursed retirement benefits or the possibility of the disqualification of the entire county retirement plan by the IRS. Herman's attorney explained there may be some disagreement with the IRS about the retirement system, but that he would be surprised if it became much of an issue. According to the Texas County and District Retirement System, a "bona fide termination" is required in order for an employee to receive benefits, and a guaranteed return to

Judge Herman demonstrates a profound disrespect for the U.S. Constitution, Texas Constitution, and laws—in pursuit of personal agendas. Herman was mandamus-ed with your office seeking injunctive relief and declaratory judgment when he tried to strike down the Texas Constitution’s ban on gay marriage last year—and improperly transferred a divorce/child custody matter to probate court, requiring mandamus to transfer it back because he lacked the jurisdiction of a District Court Judge. He admitted last year that his “3-month sabbatical” taken to obtain State retirement benefits without actually retiring violated the law, but called it “small potatoes.”

The means by which the Bill was passed were blatant fraud on the public. Witnesses waited over ten hours to testify on H.B. 1438, which was rather benign April 14, 2015 when presented for public testimony--before it was stuffed with unconstitutional, illegal provisions on May 7, 2015. Witnesses waited until approximately 12:30-1:00 in the morning on the 15th of April. The Bill was clearly pushed to last of 40 Bills that day to ensure critics like Michael Easton would be gone when the Bill was read. Suddenly, Judge Guy Herman and REPTL Attorneys Craig Hopper and Laura Upchurch, appeared in unison as if summoned by personal invitation to support the illegal Bill. Senfronia Thompson intentionally distorted known facts, stating that the Bill’s committee substitute rolled in “a couple” of “non-controversial” guardianship bills. Only 4 witnesses testified for and 8 were against, with the 8 being advocates and families victimized by guardianship.

The committee substitute was not made available for public review until May 7, 2015 and Thompson, Committee Chairperson of Local and Consent Calendars, rammed it through the House in 24 hours for a third reading to pass it. Judge Guy Herman testified (as he does on every probate/guardianship Bill) that he spent an entire summer working with Craig Hopper, Laura Upchurch, and Senfronia Thompson on this bill—begging the question of why the Bill still was not ready for public review and outrage. It further begs the question of why our Legislators are allowing a Judge to violate the

the bench by an unopposed election race would not qualify as such. Even if this scenario cannot be deemed an “agreement,” Herman did not even take the 6 months required, but only 3.

Texas Constitution on separation of powers, draft bills and conspire to shove them down citizens' throats in the middle of the night.

Guy Herman is a Judge, who deprives citizens of their Constitutional rights by placing them in guardianship—and appointing attorneys like Craig Hopper, a Board Member of Family Eldercare, Inc., with fees that demonstrate Family Eldercare, Inc. is violating the IRS regulations for 501c3 non-profits. Family Eldercare, Inc. is engaged in the business of guardianship, not charity, as evidenced by attached bills of an estimated \$50,000 to Craig Hopper from Judge Guy Herman from an estate of a disabled/elderly ward. The Texas Office of Court Administration confirms that Craig Hopper and Family Eldercare, Inc. have received substantial payments from Judge Guy Herman—from the estates of disabled persons Herman put into guardianship.⁵

The Bill has now been picked up by Senator Judith Zaffirini—leaving families no choice but to sue to have the Bill enjoined and declared unconstitutional. H.B. 1438 is so grossly unconstitutional, it's criminal—official oppression⁶, abuse of office,⁷ and

⁵ See Records from 2014 and 2015, attached hereto and incorporated by reference. Notably, Court clerks across the State of Texas concede to the fact that they are not reporting in compliance with the Supreme Court's Order, attached hereto.

⁶ Sec. 39.03. OFFICIAL OPPRESSION.

(a) A public servant acting under color of his office or employment commits an offense if he:

- (1) Intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful;
- (2) Intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful; or
- (3) Intentionally subjects another to sexual harassment.

(b) For purposes of this section, a public servant acts under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity.

⁷ Sec. 39.02. ABUSE OF OFFICIAL CAPACITY. (a) A public servant commits an offense if, with intent to obtain a benefit or with intent to harm or

intentional deprivation of privileges and immunities guaranteed by the Texas and United States Constitutions. 18 U.S.C. 241, 242; Tex.Penal Code 34.03. Senfronia Thompson, Craig Hopper, Laura Upchurch and Judge Guy Herman know this Bill is far from “uncontroversial” because it incorporates highly objectionable, illegal failed bills from the 83rd Legislative Session. It is this small group of people’s refusal to take “no” as an answer from the people and will not be tolerated.

First and foremost, the Bill rolled in “eight” highly illegal, unconstitutional and controversial bills into the committee substitute in a veritable midnight heist in the House of Representatives. Thompson and Herman knew the Bill would not survive public testimony because the Bills failed in the last session when witnesses expressed outrage. Judge Guy Herman’s “improper influence” is the reason this Bill passed.

I urge you to seek an injunction from the Texas Supreme Court and declaratory judgment that H.B. 1438 is unconstitutional for the protection of elderly and disabled citizens certain to be victimized by this Bill’s illegal provisions. The Bill is a blatant deprivation of fundamental Constitutional rights protecting citizens from the deprivation of property and liberty without due process of law. The Bill evidences violates substantive and procedural due process rights and actually commits crimes against citizens. Nevertheless, a lawsuit will be filed in Federal District Court to enjoin this Bill and have it declared unconstitutional if your office does not take action. On behalf of the citizens of Texas, we thank you.

Below please find a summary of the most egregious provisions of this Bill,

defraud another, he intentionally or knowingly:

- (1) Violates a law relating to the public servant's office or employment; or
 - (2) Misuses government property, services, personnel, or any other thing of value belonging to the government that has come into the public servant's custody or possession by virtue of the public servant's office or employment.
- (b) An offense under Subsection (a)(1) is a Class A misdemeanor.
- (c) An offense under Subsection (a)(2) is:
- (1) A Class C misdemeanor if the value of the use of the thing misused is less than \$20;

constituting a taking of property without due process of law and equal protection of the law under the 14th Amendment and violating the Constitutional guarantee against unreasonable search and seizure of the 4th Amendment to the U.S. Constitution as well as Texas Constitution, Art. I, Sec. 3 (equal rights); Sec. 9 (unreasonable search and seizure), Sec. 15 (trial by jury right shall forever remain inviolate); Sec. 19 (deprivation of property or liberty without due process), 13 (open courts)⁸, Sec. 15 and 15a (limiting civil commitment of mentally ill to 90 days), Sec. 17 (taking private property), and the Americans with Disabilities Act of 1990, 42 U.S.C. 12101.⁹ It is surreal that we protect

⁸ All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

⁹ **FINDINGS AND PURPOSES**

SEC. 12101. *[Section 2]*

(a) Findings. - The Congress finds that-

(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to

our vulnerable elderly and disabled less than real estate. H.B. 1438, purports to legalize “theft by judicial order,” taking private property without due process of law, violation of the Open Courts Provision of the U.S. Constitution and Texas Constitution, and violations of the Federal Banking Privacy Rights Act “under Color of State Law.” This entire bill includes a litany of crimes against citizens “under Color of State Law” and is unconstitutional. These provisions are included below for your consideration, with the Bill discussed thereafter:

TEXAS CONSTITUTION VIOLATIONS

Sec. 19. DEPRIVATION OF LIFE, LIBERTY, ETC.; DUE COURSE OF LAW. 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.

Sec. 29. PROVISIONS OF BILL OF RIGHTS EXCEPTED FROM POWERS OF GOVERNMENT; TO FOREVER REMAIN INVIOLOATE. To guard against transgressions of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void.

lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity. *See also implementing regulations attached hereto and incorporated by reference.*

Sec. 9. SEARCHES AND SEIZURES. The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

Sec. 15. RIGHT OF TRIAL BY JURY. The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency. Provided, that the Legislature may provide for the temporary commitment, for observation and/or treatment, of mentally ill persons not charged with a criminal offense, for a period of time not to exceed ninety (90) days, by order of the County Court without the necessity of a trial by jury.

(Amended Aug. 24, 1935.)

Sec. 15-a. COMMITMENT OF PERSONS OF UNSOUND MIND. No person shall be committed as a person of unsound mind except on competent medical or psychiatric testimony. The Legislature may enact all laws necessary to provide for the trial, adjudication of insanity and commitment of persons of unsound mind and to provide for a method of appeal from judgments rendered in such cases. Such laws may provide for a waiver of trial by jury, in cases where the person under inquiry has not been charged with the commission of a criminal offense, by the concurrence of the person under inquiry, or his next of kin, and an attorney ad litem appointed by a judge of either the County or Probate Court of the county where the trial is being held, and shall provide for a method of service of notice of such trial upon the person under inquiry and of his right to demand a trial by jury.

(Added Nov. 6, 1956.)

Sec. 17. TAKING, DAMAGING, OR DESTROYING PROPERTY FOR PUBLIC USE; SPECIAL PRIVILEGES AND IMMUNITIES; CONTROL OF PRIVILEGES AND FRANCHISES. (a) No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person, and only if the taking, damage, or destruction is for:

(1) the ownership, use, and enjoyment of the property, notwithstanding an incidental use, by:

(A) the State, a political subdivision of the State, or the public at large; or

(B) an entity granted the power of eminent domain under law; or

(2) the elimination of urban blight on a particular parcel of property.

(b) In this section, "public use" does not include the taking of property under Subsection (a) of this section for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues.

(c) On or after January 1, 2010, the legislature may enact a general, local, or special law granting the power of eminent domain to an entity only on a two-thirds vote of all the members elected to each house.

(d) When a person's property is taken under Subsection (a) of this section, except for the use of the State, compensation as described by Subsection (a) shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature, or created under its authority, shall be subject to the control thereof.

Sec. 3. EQUAL RIGHTS. All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

UNITED STATES CONSTITUTION VIOLATIONS:

Amendment XIV, U.S. CONSTITUTION

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The fourteenth amendment to the United States Constitution provides that no

state may "deprive any person of life, liberty, or property without due process of law." deprived of life, liberty, or property "except by due course of the law of the land." These guarantees are essentially synonymous. *Mellinger v. City of Houston*, 3 S.W. 249, 252 (Tex. 1887). Courts utilize a two-step analysis to determine whether a person has been deprived of life, liberty, or property without due process of law. First, the court decides whether a constitutionally cognizable life, liberty, or property interest exists. If it finds that such an interest does exist, it then decides what procedures constitute "due process of law" under the circumstances and whether those procedures have been followed. *Ingraham v. Wright*, 430 U.S. 651, 672 (1977); *Sullivan v. University Interscholastic League*, 599 S.W.2d 860, 863 (Tex. Civ. App. - Austin 1980), *aff'd in part, rev'd in part*, 616 S.W.2d 170 (Tex. 1981).

The requirements of both procedural and substantive due process must be satisfied. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977). At a minimum, procedural due process requires that a deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for a hearing appropriate to the nature of the case. *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306, 314 (1950). Due course of the law of the land" requires a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after trial. *Union Central Life Insurance Company v. Chowning*, 26.W. 982, 984 (Tex. 1894). The right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

H.B. 1438 violates substantive and procedural due process rights. It is arbitrary and unreasonable and fails to provide equal protection of the law on the basis of disability, a suspect class, rendering the Statute unconstitutional and void. It is "eminent domain" of the person and all of their assets without just compensation or even the opportunity to be heard. Texas has an entire body of law via "eminent domain" prohibiting the government from taking private property without just compensation and strict procedural requirements of due process.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and

particularly describing the place to be searched, and the persons or things to be seized.

UNCONSTITUTIONAL PROVISIONS OF H.B. 1438

A. SECURITY FOR COSTS

Section 6 of HB 1438: Allows "the court to obtain an Order requiring a person who files an application, complaint, or opposition relating to a guardianship proceeding, other than a guardian, attorney ad litem, or guardian ad litem, **to provide security for probable costs of the proceeding *before* filing the application, complaint, or opposition.**"

C.S.H.B. 1438, for purposes of the authorization for a county clerk to require a person who files an application, complaint, or opposition relating to a certain guardianship proceeding to provide security for the probable costs of the proceeding before filing the application, complaint, or opposition, to also authorize the clerk to obtain from the court an order requiring that action.

The original bill filed by Rep. S. Thompson was HB 2928, there was no opportunity given to the public citizens of Texas to testify in the interest of this bill as filed in any House Committee and it violates Article I, Section 13 of the Texas Constitution, among other provisions related to due process and criminal statutes prohibiting intentional deprivation of privileges and immunities guaranteed by the U.S. Constitution. See 18 U.S.C. 241, 242.

Article I, Section 13 which guarantees that "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." It is a fundamental deprivation of due process to condition access to the Courts based upon the payment of money, violating the 14th Amendment. It works to deprive citizens of liberty and property by virtually ensuring they will be taken into guardianship, whereupon their assets will be illegally seized by the State of Texas, and given to private attorneys and guardians without their consent.

Moreover, attorney ad litem do not get paid from the estate unless the person is made a ward of the State, rendering the elderly and disabled victims of the State if their relatives cannot afford the cost to fight the illegal search and seizure and deprivation of due process of law. Jury trials are theoretically permitted, but never provided to victims of guardianship. Attorneys seeking to profit from disabled and elderly victims have no incentive to zealously fight the unconstitutional deprivation of rights and they do not. When a person has dementia, the only hope they have of not being falsely imprisoned by the State of Texas is an advocate. This provision ensures they have no voice and will not be heard, a fundamental component of the right to due process.

B. MANAGEMENT TRUSTS PRE-INCAPACITATION

Section 10 of HB 1438 states:

(b) After *examining the proposed ward's assets or the assets of any management trust created for the proposed ward's benefit under Chapter 1301*, and determining that the proposed ward or the management trust is unable to pay for services provided by the guardian ad litem, the court may authorize compensation from the county treasury..H.B. 1438 expands the sources from which a court may compensate a guardian ad litem, regardless of whether a guardianship is created for the proposed ward, to include a management trust, if a management trust has been created for the benefit of the proposed ward under the applicable statutory provisions. H.B. 1438 creates management trusts to qualify a proposed ward or ward for government benefits such as Medicaid—at which time all of their property and assets are confiscated by the guardian and court as they are forced into a Medicare nursing home without due process. All the cost will be forced upon a proposed ward, ward, or families while court appointed guardian ad litem, attorney ad litem, guardians of the estates, private professional guardians, guardianship programs, guardianship corporations, medical professionals, interpreters, and courts costs.

C.S.H.B. 1438 authorizes a court, before an order appointing a guardian is entered or in such an order, to require the deposit of cash, securities, or other assets of a proposed ward or ward in a financial institution, as described by applicable statutory provisions governing an agreement regarding the deposit of estate assets,

for safekeeping. Courts are already illegally taking property of the elderly and disabled and putting it in safekeeping. This will purportedly legalize the theft.

This provision of the bill will create “taking” of a proposed ward’s financial resources, prior to being determined to be incapacitated--the amount of “cash” required left to the discretion of the judge. In a court initiated guardianship the proposed ward will bear all costs for deposit into safekeeping, payments for court appointee fees, payments for filing fees, payments for medical evaluations, payments for their court appointed guardianship service provider or guardian, without proceeding with the preference of a proposed ward. All the cost and financial resources could be confiscated by the court and not returned to the proposed ward once the proceeding has begun.

Creating a management trust in a guardianship proceeding is normal practice to qualify a person for government benefits such as Medicaid and Medicare. The management trusts are being used to pay attorneys and guardianship fees while the Texas taxpayers are paying for the medical and long term care needs of a ward once a management trust is created. It is within the charge and responsibility for the guardian who is an attorney, or a guardianship service provider to begin to sell all property and personal belongings of the elderly for disbursements into the management trust that pays for the courts appointees’ fees, bank fees and any other expenses not paid by government benefits.

This Bill purports to legitimize theft by judicial order and unconstitutional takings without due process of law as well as illegal search and seizure of assets by creating management trusts with “proposed wards” assets before they are ever deemed incompetent by clear and convincing evidence. The elderly and disabled’s assets can be seized by the State to pay lawyers hundreds of thousands of dollars in ad litem, trustee, expert and other illegal fees with no determination that they are incapacitated or incompetent sufficient to satisfy the constitutional mandate of due process prior to the taking of liberty or property by a State.

Section 15 of HB 1438 allows the court to set all court costs – which can easily run into the \$100,000 of dollars, especially when judges, having already examined the ward's assets (see Section 10 of HB 1438) know that the ward not

only possesses enough assets to cover extensive and lengthy litigation, but the assets of the ward are now under court control and can be spent on:

“...The court costs of the proceeding, including the cost of the guardians ad litem, attorneys ad litem, court visitor, mental health professionals, and interpreters appointed under this title, shall be set in an amount the court considers equitable and just....”**This is unconstitutional and represents illegal search & seizure by the courts.**

C. UNLAWFUL DEPRIVATION OF LIBERTY

Section 20 of HB 1438 Extends to 12 months the length of a “temporary” guardianship, allowing what should have been “temporary” guardianships to endure for much longer, and violates Section 15a’s Constitutional limit of detaining a mentally incompetent person against their bill beyond 90 days. It legislates false imprisonment, which is a crime.

Sec. 20.02. UNLAWFUL RESTRAINT. (a) A person commits an offense if he intentionally or knowingly restrains another person.

D. UNREASONABLE SEARCH AND SEIZURE AND VIOLATION OF RIGHT TO FINANCIAL PRIVACY ACT, 12 U.S.C. 3401-342¹⁰

C.S.H.B. 1438 amends the Finance Code to exclude from the application of statutory provisions providing the exclusive method for compelled discovery of a record of a financial institution a record request in connection with an investigation conducted under Estates Code—violating federal law by eliminating the requirement of notice and a legitimate law enforcement investigation. This violates the Rights of the Financial Privacy Act- This will open up the financial records for guardianship purposes in a court-initiated guardianship, in the absence of a legitimate law enforcement investigation—required by Federal Law. This bill was originally created in the 83rd legislative session in HB 2303- sponsored by Rep.

¹⁰ See Attached Right to Financial Privacy Act of 1978.

Eddie Rodriguez of Travis Count for Judge Guy Herman. This bill did not pass. It was revived under HB 1333 this legislative session by Rep. Naishtat. This bill was added into the Committee Substitute of HB 1438 without a public hearing for the interest of the public

SECTION 28. Section 59.006(a), Finance Code, is amended to read as follows:

(a) This section provides the exclusive method for compelled discovery of a record of a financial institution relating to one or more customers but does not create a right of privacy in a record. This section does not apply to and does not require or authorize a financial institution to give a customer notice of:

(1) a demand or inquiry from a state or federal government agency authorized by law to conduct an examination of the financial institution;

(2) A record request from a state or federal government agency or instrumentality under statutory or administrative authority that provides for, or is accompanied by, a specific mechanism for discovery and protection of a customer record of a financial institution, including a record request from a federal agency subject to the Right to Financial Privacy Act of 1978 (12 U.S.C. Section 3401 et seq.), as amended, or from the Internal Revenue Service under Section 1205, Internal Revenue Code of 1986;

(3) A record request from or report to a government agency arising out of:

(A) The investigation or prosecution of a criminal offense;

(B) The investigation of alleged abuse, neglect, or exploitation of an elderly or disabled person in accordance with Chapter 48, Human Resources Code; or

(C) the assessment for or provision of guardianship services under Subchapter E, Chapter 161, Human Resources Code;

(4) A record request in connection with a garnishment proceeding in which the financial institution is garnishee and the customer is debtor;

(5) A record request by a duly appointed receiver for the customer;

(6) An investigative demand or inquiry from a state legislative investigating committee;

(7) An investigative demand or inquiry from the attorney general of this state as authorized by law other than the procedural law governing discovery in civil cases;

[~~or~~]

(8) The voluntary use or disclosure of a record by a financial institution subject to other applicable state or federal law; or

(9) A record request in connection with an investigation conducted under Section 1054.151, 1054.152, or 1102.001, Estates Code.

This Bill evidences crimes against the public by government officials “under color of State law”, violating the following State and Federal Laws:

The Right to Financial Privacy Act of 1978 protects the confidentiality of personal financial records by creating a statutory Fourth Amendment protection for bank records. The Act was essentially a reaction to the U.S. Supreme Court's 1976 ruling in *United States v. Miller*, where the Court found that bank customers had no legal right to privacy in financial information held by financial institutions. 425 U.S. 435 (1976). Generally, the RFPA requires that federal government agencies provide individuals with a notice and an opportunity to object before a bank or other specified institution can disclose personal financial information to a federal government agency, often for law enforcement purposes. The only instance in which a person’s banking information can be “spied” upon by the government is pursuant to a “legitimate” law enforcement investigation.

Courts are not law enforcement investigators—with such authority vested solely in the executive branch of the government. Court investigators’ only requirement is to “know the judge,” necessarily depriving them of any semblance of law enforcement credentials. HB 1438 purports to allow Courts to access federally protected private banking information on anyone they “suspect” may need protection in violation of Federal Law, the U.S. Constitution, and Texas Constitution.

A federal district court, interpreting the Obama administration’s data mining of ordinary citizens not suspected of crimes, to be unconstitutional. On December 16, 2013, a federal judge for the District of Columbia issued an injunction prohibiting the U.S. government from collecting telephonic metadata as part of a National Security Agency ("NSA") surveillance program. *Klayman v. Obama*, No. 13-0851, slip op. at 67 (D.D.C. Dec. 16, 2013). The U.S. government was further ordered to destroy any metadata in its possession that was collected through the program.

The case is one of several recent lawsuits arising from public revelations that the U.S. government, through the NSA and with the cooperation of various telecommunications companies, has been conducting surveillance and intelligence-gathering programs that collect metadata about the telephone and internet activity of American citizens within the U.S. According to media reports, the FISC order "show[ed] . . . that under the Obama administration the communication records of millions of U.S. citizens are being collected indiscriminately and in bulk—regardless of whether they are suspected of any wrongdoing." Glenn Greenwald, NSA Collecting Phone Records of Millions of Verizon Customers Daily, GUARDIAN, June 5, 2013, available at <http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order>.

The Court's ruling centered on whether the NSA surveillance program violates privacy rights afforded by the Fourth Amendment of the U.S. Constitution. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. Amend IV. A Fourth Amendment "search" occurs either when "the Government obtains information by physically intruding on a constitutionally protected area," *United States v. Jones*, 132 S. Ct. 945, 950 n.3 (2012), or when "the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001). The Court of Appeals affirmed.

This inquiry concerned (1) whether the plaintiffs had a "reasonable expectation of privacy" that was violated by the NSA surveillance program, and (2) whether the search violating such expectation of privacy was reasonable. Much like HB 1438, the Court found that the "almost-Orwellian technology that enables the Government to store and analyze the phone metadata of every telephone user in the United States" almost certainly violates the plaintiffs' reasonable expectation of privacy. Distinguishing the NSA surveillance program from other permissible data collection, the Court stated: "It's one thing to say that people expect phone companies to occasionally provide information to law enforcement; it is quite another to suggest that our citizens expect all phone companies to operate what is effectively a joint intelligence-gathering operation with the Government."

Second, the Court found the searches conducted under the NSA surveillance program were not reasonable, emphasizing that "the Government does not cite a single instance in which analysis of the NSA's bulk metadata collection actually ...aided the Government in achieving any objective that was time-sensitive in nature." Id. At 61. Likewise, Judge Herman and the proponents of this Bill cannot cite a single instance in which access to an elderly or disabled person's finances to spy before they are taken into guardianship and hundreds of thousands ciphoned off to lawyers—protects the person the entire system of guardianship was allegedly designed to protect. This is theft "under color of State law" and must be deemed illegal and unconstitutional. It is criminal. See 18 U.S.C. 241, 242.

RECUSAL & DISQUALIFICATION

This Bill is Judge Herman's attempt to control the entire State with respect to guardianship and probate by violating the Constitution with respect to recusing a judge. Herman's financial conflicts of interest should categorically disqualify him from serving as a Statutory probate judge. Nevertheless, this is one more example of treason to the Constitution via illegal Bills to victimize the elderly and disabled "under Color of State Law."

The Section on recusal was originally created in HB 3669 by Rep. Naishtat in the 83rd Legislative Session and was highly controversial as evidenced by testimony of opponents on 4/15/13 at the Judiciary & Civil Jurisprudence Committee. There was opposition to this bill due to the lack of respect to the rules set by the Texas Supreme Court to ensure the public of Texas received unbiased and impartial recourse for the recusal of any probate judge in probate or guardianship proceedings. This bill did not pass in the 83rd Legislative Session.

It was revived by Rep. Senfronia Thompson's original bill of HB 2858 added into the Committee Substitute HB 1438 without the opportunity for the interest of the public in a public hearing. C.S.H.B. 1438 The bill grants the presiding judge of the statutory probate courts the authority to perform, and requires the presiding judge to perform, the functions and duties of the presiding judge of the administrative judicial region under the rules, including the duty to

hear or rule on a referred motion of recusal or disqualification or, subject to certain conditions, to assign a judge to hear and rule on such a motion. The bill authorizes the presiding judge of the statutory probate courts to assign a presiding judge of the administrative judicial region to hear and rule on a referred motion of recusal or disqualification only with the consent of the presiding judge of the administrative judicial region. The bill prohibits the presiding judge of the statutory probate courts from assigning a judge of a statutory probate court located in the same county as the statutory probate court served by the judge who is the subject of the motion of recusal or disqualification.

Guy Herman¹¹ has become a near fixture in the Legislature, as opposed to a resource witness. He is violating the Constitution, Judicial Canons, and State lobbying laws, for failing to register as a lobbyist as he “improperly influences” legislators with illegal direct communications. He is now driving almost every controversial Bill in guardianship—to the detriment of Texas citizens. Judge Herman is illegally lobbying by virtue of the admitted direct communications he has had and continues to have with Senfronia Thompson and Elliot Naishtat. Rep. Naishtat has carried two dozen bills of Judge Guy Herman and it’s a violation of our Constitutional mandate for separation of powers that citizens will not tolerate.

¹¹ § 36.04. Improper Influence

(a) A person commits an offense if he privately addresses a representation, entreaty, argument, or other communication to any public servant who exercises or will exercise official discretion in an adjudicatory proceeding with intent to influence the outcome of the proceeding on the basis of considerations other than those authorized by law.

(b) For purposes of this section, “adjudicatory proceeding” means any proceeding before a court or any other agency of government in which the legal rights, powers, duties, or privileges of specified parties are determined.

(c) An offense under this section is a Class A misdemeanor.

I respectfully implore you to seek declaratory and injunctive relief from the Texas Supreme Court against H.B. 1438—or the citizens of Texas will. The Petition is ready to file.