No. 20-60051

In the United States Court of Appeals for the Fifth Circuit

Texas Education Agency,
Petitioner,

v.

United States Department of Education,
Respondent.

Petition for Review of the
Department of Education Case No. 19-73-CP

REPLY BRIEF FOR PETITIONER

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy First Assistant Attorney General

DARREN L. MCCARTY
Deputy Attorney General, Civil Litigation

THOMAS A. ALBRIGHT
Chief, General Litigation Division

DREW L. HARRIS
State Bar No. 24057887
CYNTHIA O. AKATUGBA
State Bar No. 24087083
Assistant Attorneys General

Office of the Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Phone (512) 463-2120
drew.harris@oag.texas.gov
cynthia.akatugba@oag.texas.gov

Counsel for Petitioner

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Introduction

The U.S. Department of Education's ("Department") response confirms that the administrative law judge's ("ALJ") order was unlawful. The ALJ in this case ordered the Texas Education Agency ("TEA") to pay Laurel Kash under the National Defense Authorization Act of 2013 ("NDAA") more than $200,000 because it fired her for covering up the sexual abuse of a six-year-old child.

In its response, the Department expressly acknowledges that the ALJ erred when he based his jurisdiction to order that award on the limited waiver of sovereign immunity contained in the Individuals with Disabilities Education Act ("IDEA"). *See* Respondent Br. at 39 n.5.

Abandoning the ALJ's jurisdictional basis, the Department now raises the stakes by relying upon an interpretation that the NDAA—solely by referencing "contractor" and "grantee"—acts as a *global* waiver of sovereign immunity for *any* State that enters into *any* contract with or receives *any* grant from the federal government. But when accepting the IDEA funds from the Department of Education, Texas accepted specific liability as detailed by the IDEA statute, codified in Title 20 of the United States Code. It did not "knowingly" and "voluntarily" accept whistleblower protection liability under the NDAA, codified under Title 41.

The Supreme Court has emphasized that courts should "indulge every reasonable presumption against waiver" of sovereign immunity. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999). This rule applies universally, including where the waiver is required as a condition of receipt of federal funds. *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 246-47 (1985). But the Department's interpretation would mean that any federal statute imposing a condition on a "contractor" or a "grantee" acts as a potential waiver of state sovereign immunity.

This interpretation contradicts decades of Supreme Court guidance that courts will only find waiver where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Fla. Dep't of Health & Rehab. Servs. v. Fla. Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)). Further, the only two courts to have considered whether the NDAA acted as a waiver of sovereign immunity both rejected it. This Court too should hold that the NDAA does not meet the "stringent clear statement rule" in waiving state sovereign immunity.

Because the Department has conceded that the ALJ erred in finding jurisdiction, this Court need not reach the other issues raised in the petition for review. But if the Court were to do so, the ALJ also erred by:

- Issuing his determination outside of the 30-day statutory period;
- Conducting a hearing with no applicable published agency rules to provide procedural due process;
- Being unconstrained by any rules of evidence to outright exclude or fail to consider evidence of a legitimate intervening event;
- Acting arbitrarily and capriciously in basing his factual findings on a misleadingly out-of-context use of the word "unbelievable"; and
- Making adverse inferences from a privileged attorney-client meeting.

For these reasons, this Court should vacate the ALJ's order and issue judgment in favor of Petitioner.

Argument

I. The NDAA does not meet the "stringent clear statement rule" for being a valid waiver of sovereign immunity.

Acknowledging the ALJ erred in his reliance upon the IDEA waiver of state sovereign immunity, the Department now instead relies upon the language of the NDAA itself as the sole basis for any possible waiver. Looking at the NDAA text itself, and at the reasoning of the only courts to interpret that text in this context, the Court should find the NDAA does not meet the "stringent clear statement rule" to

waive sovereign immunity for claims that fall outside the scope of the IDEA waiver. *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 279 (5th Cir. 2005) (en banc).

A. The NDAA text only references "contractors" and "grantees," and does not mention states or state sovereign immunity at all.

The NDAA's text does not contain any language clearly waiving state sovereign for Kash's claims. The Supreme Court has repeatedly emphasized that "in those instances where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly." *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17–18 (1981). In *Pace*, this Court held that the IDEA statute waived sovereign immunity for certain, specific claims arising from that statute because it "conditions a state's receipt of federal money on its waiver of Eleventh Amendment immunity." *Pace*, 403 F.3d at 280. The Department has now conceded that this IDEA waiver does not extend to the claims raised by Kash. Respondent Br. at 39 n.5. The Department may not create an end run around that limitation by relying on boilerplate language contained in a completely unrelated statute.

In contrast to the IDEA statute, the NDAA statutory text makes no reference to "states" or to "immunity." Instead, the NDAA simply states it applies to an "employee of a contractor, subcontractor, grantee, or subgrantee or personal services contractor." 41 U.S.C. § 4712(a)(1). The Department argues that this

language by itself somehow "clearly mandates that all grantees are subject to the remedies specified in the statute," and thus by accepting *any* federal grant, the state is knowingly and voluntarily waiving sovereign immunity with respect to whistleblower protection liability under the NDAA. Respondent Br. at 38. The Department is wrong.

The NDAA does not have any express language demonstrating an intent to extend its liability to states. "Contractor" or "grantee" are nowhere defined in the NDAA to also include state governments. The Department's interpretation—that Congress intended a federal statutory reference to "contractor" or "grantee" to automatically include states (which under the Constitution, have sovereign immunity) would theoretically waive immunity with respect to enforcement of all manner of conditions imposed on grantees and contractors. *See, e.g.*, 41 U.S.C. § 103 (drug-free workplace requirements for federal grant recipients); 40 U.S.C. § 3702 (overtime pay requirements for federal contractors). That cannot be squared with how courts have construed statutory causes of action where states may fall within the potential defendants. *See e.g.*, *Hurst v. Tex. Dep't of Assistive & Rehab. Servs.*, 482 F.3d 809 (5th Cir. 2007); *Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1226 (11th Cir. 2000).

Here, Texas received federal money under the IDEA and is bound by the explicit conditions in that statute, as recognized in *Pace*. Texas did not receive federal money under the NDAA, and is not subject to the NDAA's conditions. Indeed, the Department's own cited authority shows why there was no waiver here.

In *Chippewa Cree Tribe of Rocky Boy's Reservation, Montana v. U.S. Dep't of Interior*, 900 F.3d 1152 (9th Cir. 2018), a tribe receiving funds under the American Recovery and Reinvestment Act ("ARRA") contended their tribal sovereign immunity to a whistleblower claim had not been waived. *Id.* at 1158. The court looked at the language of the ARRA whistleblower provisions, and found that the ARRA itself "makes clear that it applies to tribes." *Id.* With the ARRA, Congress demonstrated that it knows how to impose a waiver on immunity for whistleblowing protection if it chooses to do so. But there is no "express language" in the IDEA or NDAA that Congress intended to impose a similar waiver for whistleblowing protection liability. The presence of a waiver in one whistleblower statute is evidence that Congress did *not* intend to create such a waiver in this whistleblower statute. *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

The Department's reliance on *AT&T Communications v. Bellsouth Telecommunications Inc.*, 238 F.3d 636 (5th Cir. 2001), is similarly misplaced. As this Court has explained, the holding in that case is narrow: the "pervasiveness of the federal preemption and the exclusivity of the federal appeal make clear that participation by the state in the federal regulatory scheme entailed waiver of immunity from suit in federal court." *Hurst*, 482 F.3d 809 at 813. The Department effectively conceded that no similarly pervasive regulatory scheme exists in the field of education when it acknowledged that the IDEA's waiver does not extend to Kash's claims.

B. This conclusion is consistent with every other federal court to address the NDAA.

Though the NDAA has not frequently been litigated, every other federal court who has addressed the question has held that the NDAA does not create a waiver of sovereign immunity in this context. *See Williams v. Morgan State Univ.*, No. GLR-19-5, 2019 WL 4752778 (D. MD. Sept. 30, 2019); *Slack v. Washington Metro. Area Transit Auth.*, 353 F. Supp. 3d 1 (D.D.C. 2019). Though these district court decisions are not binding here, this Court should adopt their view as their reasoning is straight-forward, sound, and applies equally here.

In *Williams*, the court started by looking at the statutory text, finding that the "text of the NDAA does not mention sovereign immunity or provide that the states

shall not be immune from suit." 2019 WL 4752778 at *6. The *Williams* court carefully examined *Atascadero* and other cases for the "stringent" test for finding waiver of immunity. *Id.* at *5. And it properly held that "Congress did not expressly condition receipt of NDAA funds on a waiver of sovereign immunity." *Id.* at 6. This step-by-step analysis is how this Court examines waivers, and the *Williams* holding should be similarly adopted here.

The *Slack* case goes a step further and also considered federal agency regulations related to the NDAA. *Slack*, 353 F. Supp. 3d at 10. The Department suggests (at page 41) that *Slack* did not address sovereign immunity because the plaintiff did not assert—as the Department asserts here—that Congress intended the NDAA to waive state sovereign immunity. To the contrary, the *Slack* court held that while Congress could condition receipt of federal funds with waivers of immunity, an agency cannot unilaterally do so through its regulations. 353 F. Supp. 3d at 11. The court explicitly held: "The problem here is that *Congress* has not conditioned receipt of federal funds on WMATA's waiver of sovereign immunity." *Id.* (emphasis in original).

Slack is also instructive here because the Department defends its position by citing a regulation that states that the "non-Federal entity is responsible for complying with all requirements of the Federal award," including the "statutory

requirements for whistle-blower protections at … 41 U.S.C. 4712." 2 C.F.R. § 200.300(b). As an initial matter, this reference is deceptive because the regulation is inapplicable. *Id.* (referring to a grantee's self-created internal controls). Second, when the NDAA was first enacted as a pilot program in 2013, it only required implementation in the *Federal Acquisition Regulation*, which applies only to contracts and contractors, not grants or grantees. 126 Stat. 1841; 48 C.F.R. § 3.908-1 (implementing NDAA for civilian agencies). Federal agencies that wanted to apply the NDAA to grantees amended their regulations to incorporate the NDAA or included the NDAA in grant agreements. *See, e.g.*, 2 C.F.R. § 1402.207 (Dep't of Interior requiring domestic for-profit entities to comply with NDAA). Notably, the Department did *not* implement the NDAA for its IDEA grant programs—meaning this regulation does not clearly apply to the TEA.

Moreover, as previously briefed, *Slack* explained that this exact same regulation did not meet the "clear statement" test:

> And even if the Secretary of Transportation—not Congress—could condition receipt of federal funds on an entity's waiver of its sovereign immunity, this regulation does not do so…. It does not suggest that receipt of federal funding is conditioned on compliance with these federal regulations; there is no conditional language. And the regulation does not reference sovereign immunity or the Eleventh Amendment.

Slack, 353 F. Supp. 3d at 11 (interpreting 2 C.F.R. § 200.300(b)).

Apart from mischaracterizing *Williams* and *Slack* as requiring "magic words," the Department does not explain why the straight-forward reasoning behind these district court cases is incorrect. Indeed, it cannot: The Supreme Court has expressly stated that a boilerplate "agreement to obey federal law"—like the one in section 200.300—is *not* "sufficient to waive the protection of the Eleventh Amendment." *Fla. Dep't of Health & Rehab. Servs.*, 450 U.S. at 150.

While the instant case may be a matter of first impression for a circuit court to apply that principle to the NDAA, there is ample prior guidance for this Court to follow in finding that the "stringent clear statement rule" has not been met.

II. The ALJ committed procedural error barring the damages award.

Because there is no waiver of sovereign immunity, the ALJ acted unlawfully in ordering the TEA to pay Kash. Even if there were a waiver, however, the Department would have lacked jurisdiction because it failed to act within the statutorily prescribed time period. Moreover, the order is procedurally invalid because the ALJ denied the TEA of due process.

A. The Department lost jurisdiction when it failed to issue a timely decision.

Even if there were a relevant waiver of sovereign immunity, the Secretary's failure to issue an order on Kash's complaint within the time period specified in 41 U.S.C. § 4712(c) voids the agency's actions taken, and the order issued after the

prescribed time period. *See Brock v. Pierce County*, 476 U.S. 253, 262 (1986); *Etape v. Chertoff*, 497 F.3d 379, 381-84 (4th Cir. 2007); *United States v. Hovsepian*, 359 F.3d 1144, 1160-61 (9th Cir. 2004) (en banc).

For the first time in this proceeding, the Department contends that its September 6, 2019 report was a "preliminary" report and therefore did not trigger the statutory deadlines. Respondent Br. 27. The record does not support this argument. The report was not labeled "preliminary" when issued, and the Secretary's October 7, 2019 letter explicitly noted it had received the OIG's entire "Report of Investigation (ROI), inclusive of approximately 1000 pages of referenced attachments." JA.1053.

Further, a later-issued "Report of Investigation" would still not comply with the NDAA, which gave the OIG 360 days to complete its investigation and issue its report. *See* 41 U.S.C.§ 4712(b)(2)(B) (normally 180 days with a potential 180-day extension). Kash submitted her complaint on September 15, 2018, giving the OIG until September 10, 2019 to issue a final report (which it did on September 6, 2019). The Department cites no authority for the OIG to unilaterally extend its deadline to investigate, nor the Secretary to unilaterally extend its deadline to render a decision.

The Department contends that because Congress provided for "an optional mechanism for resolution of untimely agency decisions, Congress did not intend for

its deadline to be jurisdictional." Respondent's Br. 28-29. This argument is expressly contradicted by the statute, which provides that a limitation clock starts running after the statutory 210-day period for the agency to issue a denial. *See Reed v. Keypoint Gov't Sols.*, 2020 WL 4199726, at *3 (D. Colo. July 22, 2020). In *Reed*, the court rejected the notion that an agency could issue a decision after 210 days with no consequence: "a plaintiff could resurrect an otherwise time-barred claim if the agency happened to issue a denial more than 210 days after the complaint is submitted. If Congress had intended to create reset button on the exhaustion clock, it would have said so." *Id.* The court further noted that the Department's interpretation "would render the 210-day provision meaningless." *Id.*

Thus, like in *Etape* and *Hovsepian*, the plain language of the NDAA gives district courts the last word on complaints of reprisals, specifies a consequence for the agency's delay in making a decision, and indicates concurrent jurisdiction would undermine congressional policy objectives. *Etape*, 497 F.3d at 386–87; *Hovsepian*, 359 F.3d at 1163-64. Therefore, the deadline is jurisdictional, and the Department violated 41 U.S.C. § 4712(c)(1) by issuing a decision after the statutory timeline expired.

B. The ALJ's procedures were constitutionally inadequate.

Moreover, even if the ALJ had jurisdiction, it acted unlawfully by depriving the TEA of due process. Under the NDAA, TEA had two phases to contest the proof for the NDAA—the nearly year-long investigation phase and the 30-day decision-making phase. *See* 41 U.S.C. § 4712(c)(6) ("The legal burdens of proof … shall be controlling for the purposes of **[1]** any investigation conducted by an Inspector General, **[2]** decision by the head of an executive agency, or judicial or administrative proceeding …").

The Department contends that "before the agency makes a reprisal determination, the OIG conducts an investigation during which the employer is afforded notice and an opportunity to present evidence and its explanation for the personnel action." Respondent's Br. 32. The Department did not do this.

To comport with due process, "the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959). "Notice of an employee's complaint of retaliatory discharge and of the relevant supporting evidence would be of little use if an avenue were not available through which the employer could effectively articulate its response." *Brock*, 481 U.S. at 265.

At no time during the investigation process did the OIG provide TEA a copy of the complaint. TEA received a copy of Kash's complaint on October 29, 2019—after the OIG had completed its investigation and already delivered its report to the Secretary. While Kash knew the contents of her complaint, and Kash was able to direct the OIG's investigation in a way that amassed evidence in her favor, TEA was not afforded the same opportunity. Due process requires a level playing field.

Moreover, TEA was not provided its statutorily guaranteed opportunity to present evidence during the 30-day decision-making phase that commenced after the OIG issued its report. 41 U.S.C. § 4712(c)(6). In actuality, TEA had 13 days to respond to the OIG's year-long investigation without any guidelines on the applicable procedure. JA.843 (setting hearing on 13-day notice). Despite the fact that the NDAA was enacted in 2013, the Department did not have any regulations or rules governing NDAA proceedings. In particular, the Department did not have any procedural rules concerning evidentiary hearings. While TEA concedes that administrative agencies are "free to fashion their own rules of procedures," the absence of a rule is not a rule of procedure, and the rules must still observe "the fundamentals of fair play. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940).

Accordingly, the issues related both to the investigation phase as well as the decision-making phase warrant setting aside the ALJ's order because TEA was

deprived of its property rights without constitutional due process. *See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974) ("the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation").

III. The ALJ's findings are not supported by the evidence.

Finally, even if the order were procedurally proper, it is unsupported on the merits. This is not simply a case where the Department just needs to point to some circumstantial evidence that the protected disclosures were a contributing factor. The ALJ also needed to consider all the relevant record evidence to determine if TEA showed by "clear and convincing evidence" that it would have taken the same action in response to the 2017 lawsuit against Kash in the absence of the protected disclosures. *See* 5 U.S.C. § 1221(e)(1). It was reversible error to ignore TEA's evidence, or to simply dismiss the evidence as "murky." The ALJ's Order is not supported by substantial evidence in the record.

A. The ALJ acted arbitrarily and capriciously in excluding or ignoring relevant evidence.

In its opening brief (at 37-42), TEA pointed out several instances where the ALJ affirmatively excluded evidence (like testimony of an inverse comparator) or simply ignored it (like the contemporaneous July 2017 memo regarding TEA's knowledge at Kash's hiring). The Department does not defend the evidence exclusion, except

to argue that "TEA has not explained how any of the evidence would be relevant." Respondent Br. at 23.

As an initial matter, the Department's argument shows a misunderstanding of the "clear and convincing evidence" standard. Clear and convincing evidence does not require proof beyond a reasonable doubt. Rather, TEA must show that it was "highly probable" that TEA would have terminated Kash based on the Coverup Allegations. *See Colorado v. New Mexico*, 467 U.S. 310, 316 (1984). "Quantified, the probabilities might be in the order of above 70% under a clear and convincing evidence burden." *United States v. Fatico*, 458 F. Supp. 388, 405 (E.D.N.Y.1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980). An ALJ's exclusion or dismissal of evidence as irrelevant can be reversible error where that excluded evidence bolsters TEA's other proffered evidence as "highly probable" to be true. In other words, this Court can review the ALJ's relevancy determinations to see if they were correct.

Testimony about an inverse comparator who was not terminated is clearly relevant. Here, the Commissioner gave testimony about an inverse comparator that, like Kash, "had concerns that one of our deputy commissioners was profiting financially from one of our agency initiatives" and had filed whistleblower reports. JA.1032 at 208:3-14. The report was investigated and found to be without merit, but

that comparator is "still with the agency now, so whistleblowers are valuable, even when [they are] incorrect." *Id.* at 208:15-23. Before this testimony could be developed further, the ALJ cut off questioning and indicated he would not consider the inverse comparator at all (and indeed, makes no reference to her in his order). *Id.* at. 209:14-210:7. TEA's treatment of other whistleblowers highlights that what was exceptional in Kash's case was not her whistleblowing, but rather the lawsuit allegation she covered up sexual abuse of a child.

Further, the ALJ simply ignored (making no reference in his order) one of the most relevant and important pieces of documentary evidence: the July 27, 2017 memo that is the only contemporaneous written evidence of TEA's knowledge before hiring Kash. JA.761. This evidence vitiates the ALJ's main reasoning for rejecting TEA's evidence, namely that "[i]t would not follow that TEA believed that Kash had to be removed from the job as Special Education Director based on the allegations if TEA also hired Kash less than half a year earlier knowing that she had such allegations against her." *See* JA.47. But if TEA had knowledge of the serious Coverup Allegations, the contemporaneous memo would have reflected those allegations (rather than the less serious "kissing" ones actually documented).

Thus, TEA's evidence demonstrated it was "highly probable" that it would have terminated Kash absent the protected disclosures: (1) the only

contemporaneous documentary evidence showed that the decision-maker Commissioner Morath lacked prior knowledge of the allegations in the lawsuit against Kash (JA.761); (2) the Commissioner found the lawsuit allegations credible because of specific references to discoverable emails (JA.1031); (3) Kash was a probationary employee in a highly visible position of public trust, whose lawsuit resulted in Texas parents calling and emailing TEA about their loss of trust (JA.1031 at 205:11–22); and (4) this was occurring against a backdrop of a deficit of trust in the special education community (JA.994 at 57:16-20).

This evidence together meets the clear and convincing evidence standard by showing it was highly probable that the lawsuit would lead to Kash's termination, regardless of her reports about a minor SPEDx contract.

Indeed, viewing the evidence the other way, if Kash had previously disclosed the Coverup Allegations to Porter, it would be highly improbable that Porter's July 27, 2017 memo would not mention those allegations. JA.761. Similarly, it would be highly improbably that the decision to terminate Kash—who held a high ranking and high-profile position at TEA—would be decided by anybody other than the Commissioner. But the ALJ irrationally invented an ambiguity as to who made the decision to terminate Kash. JA.49.

In sum, it is highly improbable that TEA would not have terminated Kash when

her position of public trust was compromised by the lawsuit. TEA meet its burden in providing clear and convincing—that is, highly probable—evidence that it would have acted the same regardless of Kash's SPEDx reports.

B. The ALJ acted arbitrarily and capriciously in making an adverse inference from the attorney-client privileged meeting.

The Department attempts to defend the ALJ's conclusion as a "reasonable inference" from a three-sentence email that a previously-scheduled meeting between Porter and TEA's General Counsel was to "discuss Kash's employment status." Respondent's Br. at 25. The email is copied in its entirety below:

From: Porter, Justin
Sent: Saturday, November 18, 2017 5:42 PM
To: Byer, Von <Von.Byer@tea.texas.gov>; Acuna, Gene <Gene.Acuna@tea.texas.gov>; Schwinn, Penny <Penny.Schwinn@tea.texas.gov>
Subject: Seattle Times Article

All,
This article was posted to FB today by a local Austin independent advocate.

https://www.seattletimes.com/nation-world/school-employees-file-1-8m-lawsuit-over-alleged-harassment/

Please let me know if there's anything to do over the weekend. I'm meeting with Von Monday already on a related topic.

Justin

JA.408 (Porter email). There is no reference to Kash's employment status. There was no other testimony about the meeting with the General Counsel, because plainly it was a privileged conversation. But the ALJ speculated about the meeting anyway, and in an arbitrary and capricious manner, drew an adverse inference against TEA. This was plain reversible error. *See Parker v. Prudential Ins. Co. of America*, 900 F.2d

772, 775 (4th Cir. 1990) (error in drawing adverse interference from conversation with attorney, because "[a]ny such inference would intrude upon the protected realm of the attorney-client privilege."); *Anascape, Ltd. v. Microsoft Corp.*, 2008 WL 7182476, *3 (E.D. Tex. 2008) (improper to "speculate on the existence of evidence" within privileged documents).

Conclusion

For the reasons above, the Court should set aside the ALJ's order, and order judgment in favor of the Petitioner TEA.

Date: August 14, 2020

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy First Assistant Attorney General

DARREN L. MCCARTY
Deputy Attorney General, Civil Litigation

THOMAS A. ALBRIGHT
Chief, General Litigation Division

/s/ Drew L. Harris
DREW L. HARRIS
State Bar No. 24057887
CYNTHIA O. AKATUGBA
State Bar No. 24087083
Assistant Attorneys General
Office of the Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Phone (512) 463-2120
drew.harris@oag.texas.gov
cynthia.akatugba@oag.texas.gov
Counsel for Petitioner

Certificate of Service

On August 14, 2020, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ *Drew L. Harris*
DREW L. HARRIS
Counsel for Petitioner

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains **4,537** words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity Text A) using Microsoft Word (the same program used to calculate the word count).

/s/ *Drew L. Harris*
DREW L. HARRIS
Counsel for Petitioner