

**CAUSE NO. D-1-GV-13-000376**

**THE STATE OF TEXAS**

**EX REL. KERRY V. O'BRIEN,**

**IN THE DISTRICT COURT OF**

**Relator-Plaintiff,**

**TRAVIS COUNTY, TEXAS**

**v.**

**ROSEMARY LEHMBERG,**

**In Her Official Capacity as District  
Attorney of Travis County, Texas,**

**\_\_\_\_\_ JUDICIAL DISTRICT<sup>1</sup>**

**Respondent-Defendant.**

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**FIRST AMENDED PETITION AND JURY DEMAND**

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TO THE HONORABLE JUDGE OF THIS COURT:

COMES NOW, the STATE OF TEXAS, by the relation of KERRY V. O'BRIEN ("O'Brien"), and files its First Amended Petition<sup>2</sup> and Jury Demand against Respondent-Defendant ROSEMARY LEHMBERG ("Lehmborg") in her official capacity as District Attorney of Travis County, seeking Lehmborg's removal from her public office pursuant to Chapter 87 of the Local Government Code, and in support would respectfully show as follows:

**I. DISCOVERY CONTROL PLAN**

1. Discovery will proceed under a Level 3 discovery control plan as set out in Texas Rule of Civil Procedure 190.4.

**II. PARTIES**

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<sup>1</sup> Currently unassigned.

<sup>2</sup> The Original Petition is being amended to include new allegations regarding Lehmborg's appalling conduct at the Travis County Jail, and to allege that Lehmborg should be removed not just for intoxication, but for incompetence and official misconduct as well. The additional information and allegations are found within paragraphs 12 and 16-18.

2. Kerry V. O'Brien is a resident of Travis County, Texas. O'Brien has resided in Travis County continuously since at least 1999. Pursuant to Local Government Code section 87.018, O'Brien is acting in the capacity of relator in this action being brought by the State of Texas. As required by Local Government Code section 87.015(b), O'Brien is not nor has he ever been under indictment for any crime in any jurisdiction.

3. Defendant Rosemary Lehmberg is the current criminal district attorney for Travis County, having been duly elected to that position in 2008 and re-elected in 2012. Lehmberg resides in Travis County. Lehmberg may be served with citation at her residence at 2606 Deerfoot Trail, Austin, Texas, or, in the alternative, at her current place of employment at the Travis County District Attorney's Office, 509 W. 11<sup>th</sup> Street, Austin, Texas.

### **III. JURISDICTION AND VENUE**

4. Pursuant to Texas Local Government Code section 87.015, this cause is being filed in the county of Lehmberg's residence.

5. The subject matter is within the jurisdiction of this court.

6. All parties are subject to this court's personal jurisdiction.

### **IV. BACKGROUND FACTS**

7. Lehmberg is the current criminal district attorney for Travis County, Texas. She was duly elected to her position in 2008, and re-elected in 2012.

8. Under Texas law, a Texas district attorney is responsible for representing the State in all criminal cases in the district courts of her district, and in appeals therefrom. Furthermore, the Travis County District Attorney holds the unique position of having the responsibility of enforcing the state's Government and Election codes statewide. The

Travis County District Attorney's office performs this function through the state-funded Public Integrity Unit. Therefore, Lehmborg holds the dual responsibility of leading the prosecution of local crimes as well as certain violations of law by Texas state and federal elected officials.

9. Upon information and belief, at or around 10:45 p.m. on April 12, 2013, Lehmborg was traveling in her vehicle on FM 620 near the Steiner Ranch neighborhood in northwest Travis County.

10. Upon information and belief, motorist Mark Weston, traveling behind Lehmborg, observed Lehmborg's 2001 Lexus swerving in and out of a bike lane for about one mile on the southbound side of FM 620 near RM 2222. As Lehmborg approached Comanche Trail, Weston observed Lehmborg's vehicle swerve into oncoming traffic. Weston called 911 to report the danger. Lehmborg subsequently pulled to the side of the road in front of St. Luke's on the Lake Episcopal Church in the 5600 block of FM 620.

11. Upon information and belief, within minutes, deputies from the Travis County Sheriff's Office reported to the scene and engaged with Lehmborg. Deputy J. Ribsam described Lehmborg as moderately intoxicated, with bloodshot, watery and glassy eyes. Deputy Ribsam further found that Lehmborg appeared "excited," "insulting," "cocky," yet "cooperative." He further described Lehmborg as disoriented, with slurred speech, and described seeing her swaying and staggering. After Lehmborg failed portions of the field sobriety test administered by the officer, she refused to cooperate with further testing. An open container of vodka was found in the passenger compartment of her vehicle. Lehmborg stated that she had consumed two vodka drinks earlier in the evening.

12. Upon information and belief, Lehmberg was transported to the Travis County Jail for booking. At the booking station, Lehmberg was highly combative, attempting to kick and spit at officers, screaming curse words as well as yelling “Call Greg!”, likely a reference to Sheriff Greg Hamilton. She was placed in an isolation room but continued to be physically belligerent. She was removed from the isolation room and strapped to a restraint chair. A spit restraint was fastened to Lehmberg’s face. She was then placed back in the isolation room. She was so belligerent that the magistrate judge refused to magistrate her until she calmed down. Upon information and belief, approximately three hours after the arrest, Lehmberg’s blood was drawn pursuant to a court order to examine her blood-alcohol concentration level. Lehmberg was released from custody the next morning, having been charged with Driving While Intoxicated. At this time, Relator is unaware of the results of the sample.

13. Under Texas Penal Code Chapter 49, a generic first-time conviction for DWI is a Class B misdemeanor, with a minimum of 72 hours of confinement. If the person operating the motor vehicle had an open container of alcohol in the person’s immediate possession, the offense is still a Class B misdemeanor, but with a minimum of six days of confinement. If it is shown at trial that an analysis of a specimen of the person’s blood, breath, or urine showed an alcohol concentration level of 0.15 or more at the time the analysis was performed, the offense becomes a Class A misdemeanor. Generally, the punishment for a Class B misdemeanor is a fine of up to \$2,000 and/or confinement for up to six months. Generally, the punishment for a Class A misdemeanor is a fine of up to \$4,000 and/or confinement for up to one year.

14. Upon information and belief, on or about April 14, 2013, Lehmberg emailed Travis County Attorney David Escamilla from her personal email account a letter in which she admits that she was guilty of driving while intoxicated:

To: Mr. David Escamilla and the Judge of any Court of Jurisdiction  
From: Rosemary Lehmberg  
Date: April 14, 2013

Please accept this as my Plea of Guilt to the Charge of Driving While Intoxicated, arising from my arrest on 4/12/13, for whatever level of offense is determined to be justified by the facts.

I enter this unconditional Plea without request for delay, without legal argument by counsel, without any plea bargain, and without any request for leniency or consideration of any type.

I am guilty of DWI and of acting unreasonably and the fault is all my own.

I am deeply sorry for my actions. I apologize to the citizens of Travis County and specifically to the dedicated officers and employees who had to deal with my violation and any disrespectful conduct after my arrest.

Further, I agree to appear, without delay, to enter this plea and I accept whatever assessment of jail time is deemed appropriate by the sentencing Court.

### **INTOXICATION**

15. Pursuant to Texas Local Government Code Section 87, a district attorney may be removed from office for intoxication on or off duty caused by drinking an alcoholic beverage. Lehmberg has already admitted that she was intoxicated and all indications suggest that it was caused by drinking an alcoholic beverage. Her forthcoming guilty plea will demonstrate such as a matter of law.

### **INCOMPETENCY**

16. Pursuant to Texas Local Government Code Section 87, a district attorney may be removed from office for incompetency. Lehmberg's violent and aggressive behavior at the Travis County Jail raises the specter that Lehmberg may have a medical issue that

makes her unfit to continue in her office. If she is not suffering from a medical issue to explain her behavior, then she is incompetent to perform in a law enforcement role. No district attorney can assault the peace officers that work on the public's behalf and still perform her duties competently. It obviously sets a deplorable precedent that can affect the credibility of the District Attorney's Office in some or all future prosecutions under Lehmberg's leadership. This puts the public at risk.

### **OFFICIAL MISCONDUCT**

17. Pursuant to Texas Local Government Code Section 87, a district attorney may be removed from office for official misconduct. While it does not appear that Lehmberg was engaged in official duties when she was driving drunk the night of April 12, 2013, she is the District Attorney. Because she is the District Attorney on a full-time basis, she is always acting her official capacity when interacting with law enforcement. Her conduct at the responding site as well as the booking station demonstrates an intentional and knowing violation of the law by a public servant. Allowing her to continue as District Attorney puts the public at risk and demeans the office.

18. While the removal law could be abused by overzealous citizens for political purposes, such is not the case here. With over 35 years of experience as prosecutor, Lehmberg was well aware of the extreme danger of getting behind the wheel of a car intoxicated and driving it at night on public roads. Lehmberg violated the public trust, demeaned her office and created a substantial risk of injury to others. Lehmberg's alleged conduct at the booking station clearly disqualifies her from continuing in her elected position. The fact that Lehmberg had an open container of vodka within her passenger compartment, refused to cooperate with the responding officers, attacked

officers and conducted herself in a manner completely unbecoming of a responsible adult let alone the most important district attorney in the State, demonstrates a dangerous and appalling disrespect for the public safety laws she is charged with enforcing. Her quick apology and guilty plea were clearly intended to suppress public disclosure of the facts of her arrest. Under the circumstances, Lehmberg has demonstrated that she should be removed from the office to which she was elected.

#### **V. JURY DEMAND**

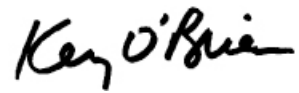
19. As required by Local Government Code section 87.018, a jury trial is demanded.

#### **VI. PRAYER FOR RELIEF**

WHEREFORE, PREMISES CONSIDERED, the State of Texas ex rel. Kerry V. O'Brien respectfully requests that:

- a. The Court order that citation and a certified petition be served on Lehmberg;
- b. The Court temporarily suspend Lehmberg and appoint another person to perform the duties of the office, in accordance with Local Government Code section 87.017;
- c. After service of citation, Defendant Lehmberg be summoned to answer this suit within the time required by law;
- d. After trial on the merits, a jury finding be entered that Rosemary Lehmberg was intoxicated on or off duty from drinking an alcoholic beverage, that she is incompetent, and/or that she committed official misconduct, thereby warranting removal from office pursuant to Local Government Code Chapter 87, and that Lehmberg be so removed; and
- e. The Court award court costs to the State and/or Relator and any other relief to which it may be entitled.

Respectfully submitted,

A handwritten signature in black ink, reading "Kerry O'Brien". The signature is fluid and cursive, with the first name "Kerry" and last name "O'Brien" clearly distinguishable.

Kerry V. O'Brien  
Relator

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