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No. 23-0694

In The Supreme Court of Texas

BRENT EDWARD WEBSTER,
PETITIONER

v.

COMMISSION FOR LAWYER DISCIPLINE,
RESPONDENT

On Petition for Review from the
Eighth Court of Appeals, El Paso
Case No. 08-22-00217-CV

BRIEF OF RESPONDENT COMMISSION FOR LAWYER DISCIPLINE

SEANA WILLING
CHIEF DISCIPLINARY COUNSEL

ROYCE LEMOINE
DEPUTY COUNSEL FOR ADMINISTRATION

MICHAEL G. GRAHAM
APPELLATE COUNSEL

OFFICE OF THE CHIEF DISCIPLINARY COUNSEL

COMMISSION FOR LAWYER DISCIPLINE
STATE BAR OF TEXAS
Michael.Graham@texasbar.com
P.O. BOX 12487
AUSTIN, TEXAS 78711-2487
T: (512) 427-1350; (877) 953-5535
F: (512) 427-4253

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The Commission for Lawyer Discipline submits this brief in response to the brief filed by Petitioner, Brent Edward Webster. For clarity, this response refers to Respondent as the "Commission" and Petitioner will be referred to as "Petitioner" or "Webster." This response designates record references as CR (clerk's record), RR (reporter's record), and App. (appendix). References to Webster's brief and appendix are labeled Pet. Br., followed by the relevant page number(s) and/or appendix reference. References to rules are references to the Texas Disciplinary

Rules of Professional Conduct[1] (the "TDRPCs") or the Texas Rules of Disciplinary Procedure[2] (the "TRDPs" or the "Rules") unless otherwise noted.

[1] *Reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G. app. A (West 2024).
[2] *Reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G. app. A-1 (West 2024).

STATEMENT OF THE CASE

Type of Proceeding:	Attorney Discipline
Petitioner:	Brent Edward Webster
Respondent:	The Commission for Lawyer Discipline
Appellate Court:	Court of Appeals, Eighth Judicial District of Texas in El Paso, Texas.
Disposition in the Trial Court:	The trial court granted Webster's plea to the jurisdiction and dismissed the Commission's Original Disciplinary Petition with prejudice. [App 1] [CR 1917].
Disposition in the Court of Appeals:	The Court of Appeals reversed the trial court's order in a published opinion, holding that neither the separation of powers doctrine nor sovereign immunity deprive the trial court of subject matter jurisdiction in the underlying attorney discipline case against Webster. *See Comm'n for Lawyer Discipline v. Webster*, 676 S.W.3d 687 (Tex.App. – El Paso 2023, pet. pending). [App 2].

ISSUES PRESENTED

The Texas Supreme Court has the inherent authority to regulate the practice of law, arising from Article II, Section 1, and Article V, Sections 1 and 3 of the Texas Constitution. The Texas Legislature has established the State Bar Act (TEX. GOV'T CODE CH. 81) in aid of and furtherance of the Court's inherent authority in this respect. The Court exercises such authority (in large part) through the attorney disciplinary system it has established in the TDRPCs and TRDPs. The substantive standards of professional conduct set forth in the TDRPCs and the procedural rules governing attorney disciplinary proceedings set forth in the TRDPs, as well as corresponding provisions of the State Bar Act, by their terms, apply to **all** attorneys licensed to practice law by the Texas Supreme Court.

Pursuant to Tex. R. App. P. 53.3(c)(1), the Commission offers that the issues presented are:

I. Whether the separation of powers doctrine deprives the trial court of subject matter jurisdiction over the attorney disciplinary proceeding against Webster premised on allegations he engaged in conduct involving dishonesty, fraud, deceit or misrepresentation by making specific misrepresentations in pleadings seeking (amongst other things) extraordinary injunctive relief, in violation of TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04(a)(3), based solely on his employment as an assistant attorney general.

II. Whether sovereign immunity deprives the trial court of subject matter jurisdiction over this attorney disciplinary proceeding against Webster, based solely on his employment as an assistant attorney general.

STATEMENT OF FACTS

Webster seeks review of the El Paso Court of Appeals' determination that neither the separation of powers doctrine nor sovereign immunity deprive the trial court of subject matter jurisdiction over the Commission's attorney disciplinary action against him. In reaching its determination, the Court of Appeals reversed the trial court's decision holding that the separation of powers doctrine did bar such a proceeding. The material facts pertinent to this appeal are largely undisputed.

I. The Commission's pending disciplinary action against Webster.

On December 7, 2020, Webster, the First Assistant Attorney General in the Office of the Texas Attorney General, along with Attorney General Warren Kenneth Paxton, Jr., filed several pleadings with the United States Supreme Court in Case No. 22O155, *State of Texas v. Commonwealth of Pennsylvania, et. al*. ("*Texas v. Penn*"). [App 3] [CR 23-29; 171-546] – Webster's Answer, Defenses, and Plea to the Jurisdiction (the "Plea to the Jurisdiction"). The pleadings filed by Webster in *Texas v. Penn* that are relevant in this disciplinary action consist of: (1) a Motion for Leave to File Bill of Complaint, and associated Bill of Complaint, and Brief in Support of Motion for Leave to File Bill of Complaint [CR 171-262]; (2) a Motion for Expedited Consideration of the Motion for Leave to File Bill of Complaint [CR 264-433]; (3) a Motion for Preliminary Injunction and Temporary Restraining Order or, Alternatively, for Stay and Administrative Stay [CR 435-478]; (4) a Motion to

Enlarge Word-Count Limit and Reply in Support of Motion for Leave to File Bill of Complaint [CR 480-528]; and (5) a Reply in Support of Motion for Preliminary Injunction and Temporary Restraining Order or, Alternatively, for Stay and Administrative Stay. [CR 530-546].

On March 11, 2021, Brynne VanHettinga ("VanHettinga") filed a grievance against Webster with the Office of the Chief Disciplinary Counsel (the "CDC") concerning the pleadings Webster had filed in *Texas v. Penn*. [CR 680-690]. In pertinent part, VanHettinga alleged that Webster's pleadings were dishonest, as they offered "specious legal arguments," "unsupported factual assertions," "unfounded claims," and "conspiracy theories" in support of the relief sought. [CR 687-690]. More specifically, VanHettinga asserted that Webster's conduct violated the prohibitions in, at least, TDRPC 3.01 (bringing a proceeding that the lawyer does not have a reasonable belief is not frivolous), TDRPC 3.03 (making knowingly false statements of material fact or law to a tribunal), and TDRPC 8.04(a)(3) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). [CR 687-690].

After the CDC initially classified VanHettinga's grievance as an inquiry and dismissed same, she appealed that classification to the Board of Disciplinary Appeals ("BODA"). [CR 633]. BODA is "a statewide independent adjudicatory body of 12 attorneys appointed by the Supreme Court of Texas to hear certain attorney discipline cases and to promote consistency in interpretation and application

of the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure…including grievance screening decisions (classification appeals) by the State Bar of Texas Chief Disciplinary Counsel's Office…" *See* The Board of Disciplinary Appeals, *BODA* (visited Mar. 8, 2024) <https://www.txboda.org. In this instance, BODA granted VanHettinga's classification appeal, finding the grievance alleged possible violations of the TDRPCs, and returned the matter to the CDC as a complaint for a full investigation and a determination of whether there was just cause to believe Webster had committed professional misconduct. [CR 633].

In order to comply with the Rules, on June 16, 2021, the CDC provided Webster (through counsel) a copy of the complaint and requested that he respond to same per the Rules. [CR 627-628]. On July 15, 2021, Webster provided his response to the complaint.[3] [CR 64-85]. Webster's response claimed that the *Texas v. Penn* pleadings contained "solid evidentiary support," and the State Bar of Texas' review of the complaint filed against him "violates the Separation of Powers Clause." [Id.]. On August 23, 2021, Webster provided a supplemental response making the same arguments. [CR 143-145].

[3] The response the CDC received in the Webster matter was submitted by counsel for the Attorney General's office as a joint response to the complaint filed against Webster by VanHettinga, and four other pending complaints against Attorney General Paxton related to the same set of facts.

The matter was subsequently set for hearing before an Investigatory Hearing Panel, and in advance of that hearing Webster filed a Motion to Dismiss, or Alternatively to Transfer Venue (premised on his separation of powers and sovereign immunity arguments), as well as a Motion to Recuse Panel Members (based on his perception of their adverse "political" stances). [CR 87-97 & 99]. On December 8, 2021, the District 9 Grievance Committee Chair denied Webster's above-referenced motions. [CR 99].

On January 5, 2022, an Investigatory Hearing Panel for the District 9 Grievance Committee convened an investigatory hearing regarding VanHettinga's complaint against Webster, but Webster **did not personally appear or provide any testimony** concerning the allegations.[4] [CR 101-140]. On January 7, 2022, the CDC provided Webster notice of the panel's conclusion that there was credible evidence to support a finding of professional misconduct against him for violation of TDRPC 8.04(a)(3), and the panel's recommended resolution of the complaint with the entry of a Public Reprimand. [CR 630-631]. The notice informed Webster that he could accept the sanction recommendation, or if he chose not to, the CDC would be **required to file** a disciplinary petition on behalf of the Commission before a district court or an evidentiary panel based on his election. [Id.]; TEX. RULES DISCIPLINARY P.R. 2.14 & 2.15.

[4] The investigatory hearing also concerned the related complaints against Attorney General Paxton.

After Webster notified the CDC that he would not accept the panel's recommendation and elected to have the disciplinary matter heard in district court, the CDC, as required under TRDP 3.01, notified the Presiding Judge for the Third Administrative Judicial Region, the Honorable Billy Ray Stubblefield. Judge Stubblefield then assigned the Honorable John W. Youngblood, Judge of the 20th Judicial District Court of Milam County, to preside over the disciplinary matter. [CR 11-12]. On May 6, 2022, the CDC filed the Commission's Original Disciplinary Petition (the "Petition") against Webster in the 368th Judicial District Court of Williamson County. [App 4] [CR 7-13]. On May 10, 2022, Webster was served, through counsel, with the Commission's Petition. [CR 14-22].

On June 27, 2022, Webster filed his Plea to the Jurisdiction in response to the Commission's Petition. [App 3] [CR 23-691]. Webster's Plea to the Jurisdiction sought dismissal of the disciplinary action against him on two grounds: (1) as a violation of the separation of powers doctrine embodied in Texas Constitution, Article II, Section 1; and (2) as barred by principles of sovereign immunity. [CR 48-59]. On July 21, 2022, the Commission filed its Response to Webster's Plea to the Jurisdiction. [App 5] [CR 692-1763].

Webster's plea was set for hearing on September 6, 2022. [CR 1674-1675]. On September 6th Webster filed his Reply in Support of Plea to the Jurisdiction. [CR 1828-1912]. That same day the trial court held a hearing on the matter. [*see generally*

RR]. Counsel for the Commission and for Webster made arguments before Judge Youngblood, but no evidence was offered or received by the Court. [Id.].

After considering the pleadings on file and the arguments of counsel, the trial court entered its Order Granting Webster's Plea to the Jurisdiction. [App 1]. Judge Youngblood held Webster's plea should be granted "as the separation of powers doctrine deprives this court of subject-matter jurisdiction," and dismissed the Commission's claims with prejudice, while denying any other relief sought that was not expressly granted in the Order. [App 1]. On September 30, 2022, the Commission filed its Notice of Appeal as to the trial court's order granting the Plea to the Jurisdiction. [CR 1922-1923].

On July 13, 2023, the El Paso Court of Appeals reversed the trial court's order granting Webster's plea to the jurisdiction and remanded his attorney discipline case for further proceedings. [App 2]. Webster's Petition for Review followed.

To date, of the three courts that have examined the issues presented herein (two trial courts – one each in Webster's and Paxton's cases, and the Court of Appeals in Webster's case) only the trial court in Webster's case determined that (despite the authority delegated by this Court through its attorney discipline system) it did not have subject matter jurisdiction, and then only pursuant to the separation of powers doctrine. [App 1]. Paxton's appeal of the trial court's denial of *his* plea to the jurisdiction remains pending before the Dallas Court of Appeals. *See* No. 05-23-

00128-CV, *Warren Kenneth Paxton, Jr., v. Commission for Lawyer Discipline*, In the Court of Appeals, Fifth District of Texas, Dallas Texas.

II. Webster's Statement of Facts.

The Commission is satisfied that its statement of the facts set forth above, as well as that set forth by the Court of Appeals in the "Background" section of its Opinion below, fairly summarize the facts relevant to the Court's determination of the jurisdictional issues concerned herein. *Webster*, 676 S.W.3d at 691-95; [App 2].

However, Webster devotes a significant portion of his Brief to arguing factual matters that have no bearing on the ultimate issue presented in this Appeal: whether the trial court has subject-matter jurisdiction over the Commission's attorney disciplinary action against Webster. [Pet. Br. 3-18]. Amongst other things, issues regarding the complainant who filed the grievance, the Office of Chief Disciplinary Counsel's (the "CDC") pre-litigation investigation, the allegations contained in the Commission's pleadings, and whether Webster made the representations in the underlying *Texas v. Penn* case "in good faith", are either not relevant to the subject matter jurisdiction inquiry or illustrate contested factual matters regarding the *substantive* issues in the disciplinary proceeding itself.[5]

[5] Indeed, the record is devoid of **any** evidence regarding Webster's state of mind with respect to any such representations, as he has not provided testimony (affidavit or otherwise) in either the pre-litigation or litigation phases of this attorney disciplinary proceeding.

More importantly, Petitioner's Statement of Facts misstates and/or mischaracterizes certain aspects of both the attorney discipline process generally and the Commission's pending disciplinary action against him specifically, which warrant further clarification/correction. [Pet. Br. 3-18]; TEX. R. APP. P. 53.3(b).

A. The attorney discipline process generally.

A disciplinary action brought by the Commission before a district court does not consist of the presentation of "the complainant's case." [Pet. Br. 9]. Rather, such disciplinary action consists of the CDC's presentation of the Commission's case, resulting from the CDC's pre-litigation investigation, required to be conducted in accordance with the Rules, and the litigation itself. TEX. RULES DISCIPLINARY P.R. 2.14 & 2.17, and 3.01-.08.

B. The pending disciplinary action against Webster.

1. The Commission's allegations

Webster asserts that the attorney disciplinary action against him, "stems from the Texas Attorney General's *decision to file* an original action in the U.S. Supreme Court on behalf of the State of Texas." [Pet. Br. 9 (emphasis added)]. **But the record does not support such an assertion**.

The Commission's Petition clearly sets forth its allegations of professional misconduct against Webster, none of which regards the decision to file suit in *Texas v. Penn*. [App 4]. Rather, the Petition sets forth specific representations Webster

made in the *Texas v. Penn* pleadings, which the Commission alleges were dishonest and/or were misrepresentations, within the meaning of TDRPC 8.04(a)(3). [Id.].

2. The pre-litigation investigatory hearing

Webster contends that he filed a motion to transfer venue of the pre-litigation investigatory hearing requested by the CDC, in order to have such hearing heard in Williamson County, which he claimed was "consistent with the venue provisions of the Texas Rules of Disciplinary Procedure for investigatory hearings regarding alleged professional misconduct that occurred outside of the State of Texas," citing TRDP 2.11(A). [Pet. Br. 14]. However, the relevant venue rule states:

> Investigatory Panel Proceedings. Proceedings of an Investigatory Panel shall be conducted by a Panel for the county where the alleged Professional Misconduct occurred, in whole or in part. If the acts or omissions complained of occurred **wholly** outside the State of Texas, proceedings shall be conducted by a Panel for the county of Respondent's residence and, if Respondent has no residence in Texas, by a Panel for Travis County, Texas.
>
> --TEX. RULES DISCIPLINARY P.R. 2.11(A) (emphasis added).

As such, Webster's motion to transfer was properly denied by the Chair of the District 9 Grievance Committee. [CR 99].

Next, Webster attributes the description of TDRPC 8.04(a)(3) as a "gap filling provision" to the Commission, citing its brief in *Rosales v. Comm'n for Lawyer Discipline*, No. 03-18-00725-CV, 2019 WL 1901320, at *51 (Tex.App. – Austin

April 25, 2019, no pet.). [Pet. Br. 14]. However, in that brief, the Commission was citing the view taken by two commentators:

> "Rule 8.04(a)(3) encompasses conduct also prohibited by other rules, but it is also a broader rule designed to prohibit dishonest or deceitful conduct not otherwise captured by the other rules. See Robert P. Schuwerk & Lillian B. Hardwick, Texas Practice: Handbook of Texas Lawyer and Judicial Ethics §13:4 (2018) (discussing Rule 8.04(a)(3) as a *gap filling provision* to cover dishonest conduct that does not fall within the ambit of more specific provisions that also prohibit specific types of dishonesty)."
>
> --Brief of Appellee, Commission for Lawyer Discipline, *Rosales*, 2019 WL 1901320, at *51 (emphasis added).

In fact, the most recent edition of the relevant treatise opines, "…given the extreme importance of honesty and integrity in the professional life of a lawyer, the drafting committee chose to retain this provision in order to fill any gaps that may exist between [the] other Rules." Robert P. Schuwerk & Lillian B. Hardwick, *Texas Practice: Handbook of Texas Lawyer and Judicial Ethics* §13:4 (2023 ed.).

Finally, Webster also asserts that after the investigatory hearing panel determined there was credible evidence his conduct violated TDRPC 8.04(a)(3), "the CDC then put [Webster] to the choice," of accepting a recommended sanction or proceeding to litigation. [Pet. Br. 14]. However, Webster fails to mention that he chose not to personally appear at the hearing to answer any questions the panel may have had concerning the allegations, or that the Rules **required** the CDC to inform

him of his options following the panel's determination, pursuant to TRDPs 2.11(A), 2.14 and 2.15.

SUMMARY OF THE ARGUMENT

Every attorney admitted to practice in the State of Texas is subject to the TDRPCs and TRDPs promulgated by the Texas Supreme Court. Webster's arguments to the contrary are strawmen. He challenges an imagined disciplinary petition filed by the Commission that he alleges seeks to "superintend" the Attorney General's *decision* to file the *Texas v. Penn* pleadings, rather than the actual disciplinary petition filed by the Commission, which clearly sets forth specific representations in those pleadings that the Commission contends were dishonest, deceitful or misrepresentations, in violation of the Texas Disciplinary Rules of Professional Conduct.

The separation of powers doctrine does not deprive the courts of subject matter jurisdiction over lawyer discipline matters involving executive branch attorneys, including attorneys employed by the Texas Attorney General's office like Webster. The Court has created an attorney disciplinary system governed by the TDRPCs and the TRDPs, with the aid of the Legislature provided through the State Bar Act. That system does not interfere with the Attorney General's executive authority to represent the State of Texas in civil proceedings. Especially here, where the alleged conduct at issue is not any executive decision that the respondent attorney could, or could not, have made independently, but rather, specific representations in pleadings before a court that are alleged to be dishonest.

Likewise, sovereign immunity does not deprive the courts of subject matter jurisdiction over lawyer discipline matters involving executive branch attorneys. As with all other Texas-licensed attorneys, Webster (and all other government attorneys) are obliged to adhere to the ethical standards established by the TDRPCs and are subject to the disciplinary procedures established by the TRDPs.

ARGUMENT

I. Standard of Review

A trial court's ruling on subject-matter jurisdiction is a question of law that is reviewed *de novo*. *EBS Solutions, Inc. v. Hegar*, 601 S.W.3d 744, 749 (Tex. 2020) (citing *Hous. Belt & Terminal Ry. Co. v. City of Hous.*, 487 S.W.3d 154, 160 (Tex. 2016)). When reviewing a plea to the jurisdiction, the court looks to the allegations in the pleadings, construing the pleadings liberally in the plaintiff's favor and considering the pleader's intent. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-227 (Tex. 2004); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993); see also, *Comm'n for Lawyer Discipline v. Stern*, 355 S.W.3d 129, 134 (Tex.App. – Houston [1st Dist.] 2011, pet. denied). The court takes as true all factual allegations in the plaintiff's petition. *Axtell v. University of Tex*. 69 S.W.3d 261, 264 (Tex.App. – Austin 2002, no pet.) (citing *Brannon v. Pacific Employers Ins. Co*., 224 S.W.2d 466, 469 (Tex. 1949)). Further, the plaintiff bears the burden of alleging facts affirmatively demonstrating the trial court's jurisdiction to hear a case. *Tex. Air Control Bd.*, 852 S.W.2d at 446.

Additionally, if a plea to the jurisdiction challenges the existence of jurisdictional facts, the court will consider the facts alleged in the petition and, if relevant to the *jurisdictional* issue, relevant evidence submitted by the parties to the trial court. *Miranda*, 133 S.W.3d at 227 (citing *Bland Indep. Sch. Dist. v. Blue*, 34

S.W.3d 547, 555 (Tex. 2000)). But here, Webster did not substantively challenge the existence of jurisdictional facts in the Commission's Petition. [App 3]. Moreover, no evidence was offered or admitted by the parties at the hearing on Webster's Plea to the Jurisdiction. [*see generally* RR]. Thus, the jurisdictional issue in this case should be decided by the Court *de novo*, by reference to the pleadings.

II. The Court of Appeals correctly held that the separation of powers doctrine does not deprive the court of subject matter jurisdiction over the Commission's pending disciplinary action against Webster.

A. The Texas Supreme Court has the inherent, and exclusive, authority to regulate the practice of law.

This Court's authority to regulate the practice of law is an inherent power derived from the Texas Constitution's delegation of the *judicial* power of the Government of the State of Texas to the judiciary and the Court. TEX. CONST. ART. II, SEC. 1 & ART. V, SEC. 1 & 3; *see also, Eichelberger v. Eichelberger*, 582 S.W.2d 395, 397-399 (Tex. 1979); *In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768, 769-770 (Tex. 1999); *Webster,* 676 S.W.3d at 697 [App 2]. As the Court has explained, "The inherent powers of a court are those which it may call upon to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity," and such power, "[h]as existed since the days of the Inns of Court in common law English jurisprudence." *Eichelberger*, 582 S.W.2d at 398-399 (citations omitted).

Texas courts have regularly held, for well over a century and a half, that the power to regulate the practice of law is among the inherent powers of the courts. *See e.g.*, *Jackson v. State*, 21 Tex. 668, 672-673 (Tex. 1858); *Scott v. State*, 24 S.W. 789, 790 (Tex. 1894); *State v. Pounds*, 525 S.W.2d 547, 551-552 (Tex.Civ.App. – Amarillo 1975, writ ref'd n.r.e.); *State Bar of Texas v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994); *In re Nolo Press*, 991 S.W.2d at 769-770; *In re State Bar of Texas*, 113 S.W.3d 730, 732 (Tex. 2003) (orig. proceeding). In point of fact, this inherent power "springs from the doctrine of separation of powers between the three governmental branches." *Eichelberger,* 582 S.W. 2d at 399.

Recognizing the judicial branch's "powers under the constitution to regulate the practice of law," and in aid thereof, the Legislature promulgated the State Bar Act and created the State Bar. TEX. GOV'T CODE ANN. §81.011(b) (West 2023). Moreover, the Legislature; (1) affirmed that all Texas-licensed attorneys are subject to the disciplinary and disability jurisdiction of not only the Texas Supreme Court, but the Commission; and (2) "In furtherance of the supreme court's powers to supervise the conduct of attorneys," established general disciplinary and disability procedures for the attorney disciplinary and disability system. TEX. GOV'T CODE ANN. §§81.071 & 81.072 (West 2023). For its part, the Court has promulgated the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure, setting forth both the standards of conduct to which all

Texas attorneys are to be held (the TDRPCs) and the procedural rules by which attorney disciplinary actions are to be governed (the TRDPs).

Webster has pointed to no authority demonstrating that the power to regulate the practice of law lies with any branch other than the judiciary, as there is no such authority.

B. <u>All</u> Texas-licensed attorneys are members of the State Bar and subject to the inherent power of the Supreme Court of Texas to regulate the practice of law.

The State Bar Act provides, among other things:

- BAR MEMBERSHIP REQUIRED. (a) The state bar is composed of those persons licensed to practice law in this state. Bar members are subject to this chapter and to the rules adopted by the supreme court; (b) Each person licensed to practice law in this state shall, not later than the 10th day after the person's admission to practice, enroll in the state bar by registering with the clerk of the supreme court. TEX. GOV'T CODE ANN. §81.051.
- DISCIPLINARY JURISDICTION. **Each attorney admitted to practice in this state** and each attorney specially admitted by a court of this state for a particular proceeding **is subject to the disciplinary and disability jurisdiction of the supreme court and the Commission for Lawyer Discipline**, a committee of the state bar. TEX. GOV'T CODE ANN. §81.071 (emphasis added).
- GENERAL DISCIPLINARY AND DISABILITY PROCEDURES. (a) In furtherance of the supreme court's powers to supervise the conduct of attorneys, the court shall establish disciplinary and disability procedures in addition to the procedures provided by this subchapter; (b) The supreme court shall establish minimum standards and procedures for the attorney disciplinary and disability system…(d) **Each attorney is subject to the Texas Rules of Disciplinary Procedure and the Texas Disciplinary Rules of Professional Conduct**. TEX. GOV'T CODE ANN. §81.072 (emphasis added).

Texas courts have consistently held that each attorney admitted to practice in the State of Texas is subject to the disciplinary jurisdiction of the Texas Supreme Court and to the rules of professional conduct and disciplinary procedures promulgated by the Court. *See McAfee v. Feller*, 452 S.W.2d 56, 57 (Tex.Civ.App. – Houston [14th Dist.] 1970, no writ); *Belt v. Comm'n for Lawyer Discipline*, 970 S.W.2d 571, 574 (Tex.App. – Dallas 1997, no pet.); *Kaufman v. Comm'n for Lawyer Discipline*, 197 S.W.3d 867, 872 (Tex.App. – Corpus Christi-Edinburg 2006, pet. denied); *In re Caballero*, 441 S.W.3d 562, 570-571 (Tex.App. – El Paso 2014, no pet.).[6]

Webster has pointed to no authority supporting the argument that an attorney(s) acting under the authority of the Office of the Attorney General, is/are the sole Texas attorney or class of attorneys exempted from the disciplinary and disability jurisdiction of the Texas Supreme Court, as there is no such authority.[7]

C. The Commission's jurisdictional allegations affirmatively demonstrated the district court's jurisdiction to hear the pending disciplinary action against Webster.

Webster contends that the "State Bar of Texas," via the Commission, "seeks an order imposing sanctions and declaring that [he], engaged in professional

[6] Including executive branch attorneys, up to and including the Texas Attorney General. See Order of the Supreme Court of Texas in Misc. Docket No. 03-9205, *In the Matter of Daniel C. Morales*. [CR 1250-1252].

[7] Indeed, the Commission is aware of no authority exempting *any* attorney or class of attorneys from the disciplinary and disability jurisdiction of the Texas Supreme Court.

misconduct when he filed an original action on behalf of the State of Texas in the United States Supreme Court at the direction of the Texas Attorney General…" [Pet. Br. xiii]. But that contention is not supported by the record. [App 4]. The Court of Appeals correctly recognized that "nowhere in the Commission's disciplinary proceeding does it challenge the Attorney General's decision to file the [*Texas v. Penn*] suit." *Webster*, 676 S.W.3d at 698. [App 2].[8] As the court there stated, the pending disciplinary action "points directly to the allegations within the *Texas v. Pennsylvania* pleadings it contends violates 8.04(a)(3)". [Id.].

As alluded to above, the Commission had no authority to treat Webster differently from any other Texas-licensed attorney once he chose not to accept the investigatory panel's recommendation. By rule, once a complaint against an attorney is, "[d]etermined to be supported by just cause, the attorney is given written notice of the allegations and rule violations," and must then elect to have the allegations of professional misconduct heard by an Evidentiary Panel of a District Grievance Committee or by a district court. *See James v. Comm'n for Lawyer Discipline*, 310 S.W.3d 586, 589 (Tex.App. – Dallas 2010, no pet.) (citing TEX. RULES DISCIPLINARY P.R. 2.12-.15). When a respondent elects to proceed in district court, the case "[p]roceeds like other civil cases, except where the Rules of Disciplinary Procedure

[8] And at any rate, Webster was/is not an elected official with the independent authority to make the decision to file the *Texas v. Penn* pleadings.

vary from the Rules of Civil Procedure," including providing for an appeal from the district court's judgment "as in civil cases generally." *See Stern*, 355 S.W.3d at 135, citing TEX. RULES DISCIPLINARY P.R. 3.02, 3.03, 3.08B & 3.16.

Rule 3.01 describes the matters the Commission must plead in an original disciplinary petition. TEX. RULES DISCIPLINARY P.R. 3.01. And, while not all statutory prerequisites for suit are jurisdictional, an attorney's election under Rule 2.15, along with the Commission's pleading of factual allegations that; (1) the respondent is a Texas-licensed attorney; (2) describe the acts or conduct of the respondent giving rise to the alleged professional misconduct; and (3) list the specific rule(s) of the TDRPCs allegedly violated, establish the trial court's jurisdiction to hear the disciplinary action.[9] *James*, 310 S.W.3d at 589; TEX. RULES DISCIPLINARY P.R. 2.15 & 3.01; *see also*, *Diaz v. Comm'n for Lawyer Discipline*, 953 S.W.2d 435, 436-437 (Tex.App. – Austin 1997 no pet.); *Kaufman*, 197 S.W.3d at 872 (citing *Belt*, 970 S.W.2d at 574)*; Stern*, 355 S.W.3d at 134-135; *Webster*, 676 S.W.3d at 695-96 [App 2].

Pursuant to Webster's election, the Commission was **required** to file its Original Disciplinary Petition in the 368th Judicial District Court of Williamson

[9] The Texas Supreme Court promulgated the TRDPs pursuant to statutory authority as well as inherent authority. *Gomez*, 891 S.W.2d at 245. Because the Rules have the same force and effect as statutes, general principles of statutory construction apply when interpreting them. *O'Quinn v. State Bar of Texas*, 763 S.W.2d 397, 399 (Tex. 1998); *Love v. State Bar of Texas*, 982 S.W.2d 939, 942 (Tex.App.-Houston [1st Dist.] 1998, no pet.); *Comm'n for Lawyer Discipline v. DeNisco*, 132 S.W.3d 211, 214 (Tex.App.-Houston [14th Dist.] 2004, no pet.).

County. TEX. RULES DISCIPLINARY P.R. 2.15 & 3.01. And, when reviewing a plea to the jurisdiction, the court looks to the allegations in the pleadings, construing the pleadings liberally in the plaintiff's favor and considering the pleader's intent. *Miranda*,133 S.W.3d at 226-227. Here, the Commission's Petition alleged in pertinent part that:

> (1) Webster is a Texas-licensed attorney;
>
> (2) Webster appeared and filed pleadings in Case No. 22O155, styled *State of Texas v. Commonwealth of Pennsylvania, State of Georgia, State of Michigan, and State of Wisconsin*, seeking, amongst other things, injunctive relief against multiple Defendant States related to alleged violations of federal elections laws;
>
> (3) In those pleadings, Webster made several representations that were dishonest, as they were not supported by any charge, indictment, judicial finding, or credible or admissible evidence, including, but not limited to representations that; (i) an outcome-determinative number of votes in the 2020 presidential election were tied to unregistered voters; (ii) votes were switched by a glitch with Dominion voting machines; (iii) state actors 'unconstitutionally revised their state's election statutes'; and (iv) 'illegal votes' had been cast that affected the outcome of the election; and
>
> (4) Webster's representations in those respects constituted conduct involving dishonesty, deceit, or misrepresentation, in violation of Texas Disciplinary Rule of Professional Conduct 8.04(a)(3).
>
> -- [App 4].

In short, the jurisdictional allegations in the Commission's Petition on their face, and certainly when construed liberally in the Commission's favor, affirmatively demonstrated the court's subject-matter jurisdiction to hear the disciplinary action against Webster. TEX. RULES DISCIPLINARY P.R. 2.15 & 3.01; *see also, Diaz,* 953

S.W.2d at 436-437; *Kaufman*, 197 S.W.3d at 872 (citing *Belt*, 970 S.W.2d at 574); *James*, 310 S.W.3d at 589; *Stern*, 355 S.W.3d at 134-135; *Webster*, 676 S.W.3d at 695-96 [App 2].

D. Neither of the two situations in which a separation of powers violation might occur is present here.

Article II, Section 1 of the Texas Constitution provides:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: those which are Legislative to one; those which are Executive to another; and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.
>
> --TEX. CONST. ART. II, §1.

A violation of the separation of powers doctrine embodied in Article II, Section 1, occurs in one of two situations; (1) when one branch of government assumes or is delegated a power "more properly attached to another"; or (2) when "one branch unduly interferes with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers." *Sullivan v. Texas Ethics Commission*, 660 S.W.3d 225, 237 (Tex.App. – Austin 2022, pet. denied) (citing *Texas Dep't of Fam. & Protective Servs. v. Dickensheets*, 274 S.W.3d 150, 156 (Tex.App. – Houston [1st Dist.] 2008, no pet.); *see also*, *Holmes v. Morales*, 906 S.W.2d 570, 573 (Tex.App. – Austin 1995) (citing *Government Servs. Ins. Underwriters v. Jones*, 368 S.W.2d 560, 564-565 (Tex. 1963)), *rev'd in part on other*

grounds, 924 S.W.2d 920 (Tex. 1996). Here, the separation of powers doctrine does not deprive the trial court of subject-matter jurisdiction over the disciplinary action against Webster on either basis.

1. The trial court's exercise of subject-matter jurisdiction does not constitute the use of executive branch authority in violation of the separation of powers doctrine.

"The separation of powers doctrine prohibits one branch of government from exercising a power belonging inherently to another." *In re Dean*, 393 S.W.3d 741, 747 (Tex. 2012); *see also*, *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 600 (Tex. 2001); *Tex. Air Control Bd.*, 852 S.W.2d at 444. Here, Webster did not challenge the trial court's exercise of subject-matter jurisdiction as a violation of the separation of powers doctrine on this ground, with good reason.

As detailed in Sec. II(A), above, the power to regulate the practice of law, including through the attorney disciplinary process, is an inherent power of the judicial branch arising from the Texas Constitution's delegation of the *judicial* power of the government of the State of Texas to the judicial branch and the Texas Supreme Court. TEX. CONST. ART. II, SEC. 1 & ART. V, SEC. 1 & 3; *see also*, *Eichelberger*, 582 S.W.2d at 397-399; *Gomez*, 891 S.W.2d at 245; *In re Nolo Press*, 991 S.W.2d at 769-770. Neither the Commission's bringing its disciplinary action against Webster pursuant to the TDRPCs and the TRDPs, nor the trial court's exercise of subject-matter jurisdiction in that action, would constitute anything other

than an exercise of the inherent power of the judiciary to regulate the practice of law. Further, there is clearly no exercise or threatened exercise of **any** power inherently belonging to the executive branch by the judicial branch implicated in this matter.

2. The pending disciplinary action against Webster does not "unduly interfere" with the executive branch's exercise of its authority.

The second way in which the separation of powers doctrine may be violated occurs "when one branch unduly interferes with another branch so that the other branch cannot *effectively* exercise its constitutionally assigned powers." *Martinez v. State*, 503 S.W.3d 728, 733 (Tex.App. – El Paso 2016, pet. ref'd) (citing *Martinez v. State* 323 S.W.3d 493, 501 (Tex.Crim.App. 2010) (quoting *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex.Crim.App. 1990) (emphasis in original)); *see also*, *Tex. Comm'n on Envtl. Quality v. Abbott*, 311 S.W.3d 663, 672 (Tex.App. – Austin 2010, pet. denied). It is on this basis that Webster argued (and continues to argue) that the trial court lacked subject-matter jurisdiction over this disciplinary action, and it was on this basis that the trial court erred in granting Webster's Plea to the Jurisdiction.

Courts engage in a two-part inquiry to determine whether an "undue interference" separation of powers violation has occurred, looking first at the scope of constitutional powers being exercised by the first branch and then the impact of that exercise on the second branch's exercise of its constitutional powers. *See e.g.*, *Martinez*, 503 S.W. 3d at 734-736; *Abbott*, 311 S.W.3d at 672-675; *Armadillo Bail*

Bonds, 802 S.W.2d at 239-241. Here, the constitutional powers exercised by the judicial branch consist in the Commission's bringing the disciplinary action at issue against Webster, pursuant to the standards of ethical conduct set forth in the TDRPCs and the procedures prescribed in the TDRPs.

Again, as previously noted, the judiciary has the inherent, exclusive authority to regulate the practice of law, including through the attorney disciplinary process. TEX. CONST. ART. II, SEC. 1 & ART. V, SEC. 1 & 3; *see also*, *Eichelberger*, 582 S.W.2d at 397-399; *Gomez*, 891 S.W.2d at 245; *In re Nolo Press*, 991 S.W.2d at 769-770. This Court in *Gomez* referred to such authority as one of its "constitutionally imposed duties" and an "obligation" stating, "Because the admission and practice of Texas attorneys is inextricably intertwined with the administration of justice, the Court must have the power to regulate these activities in order to fulfill its constitutional role." *Gomez*, 891 S.W.2d at 245, citing JIM R. CARRIGAN, INHERENT POWERS OF THE COURTS 2 (1973). There is no doubt of the constitutional scope and import of the judicial branch's authority to regulate the practice of law by all Texas-licensed attorneys, including through the attorney disciplinary process, embodied here in the pending disciplinary action against Webster.

As to the second part of the inquiry, the court must look to the constitutional power exercised by the executive branch that Webster alleges is impeded by the

disciplinary action against him. *See e.g.*, *Martinez*, 503 S.W. 3d at 734-736; *Abbott*, 311 S.W.3d at 672-675; *Armadillo Bail Bonds*, 802 S.W.2d at 239-241. Webster argues that the court's exercise of subject-matter jurisdiction over the disciplinary action against him unduly interferes with the executive branch's "effectual exercise" of its "constitutional prerogative to represent the State in civil matters," thus violating the separation of powers doctrine. [App 3 (CR 53)]. More to the point, Webster contends that the disciplinary action against him constitutes an impermissible attempt by the judicial branch to "superintend" the Office of the Attorney General's discretionary determination about the "propriety of filing that lawsuit."[10] [Id.]. However, Webster's argument fails, both logically and legally, in at least two respects.

First, the pending disciplinary action against Webster is not based on the Texas Attorney General's initial decision to file *Texas v. Penn* **at all**, which in any case, is a decision Webster is unable to make himself. That is, the Commission's disciplinary action against Webster is expressly concerned only with the allegations that the *Texas v. Penn* pleadings, as filed in a court of law, were dishonest, fraudulent, deceitful, and/or contained misrepresentations, in violation of TEX. DISCIPLINARY R. PROF. CONDUCT 8.04(a)(3).[11] And, as noted above, a proper review

[10] Referring to *Texas v. Penn*.
[11] See, Sec. II(C), *supra*.

of the jurisdictional question at issue involves looking to the allegations in the pleadings, construing them liberally in the plaintiff's favor and considering the *pleader's* intent.

This **is not** an action based on the Attorney General's office's determination that *Texas v. Penn* should have been filed. Rather, it is a disciplinary action regarding whether representations made in the *Texas v. Penn* pleadings carrying out that determination were dishonest, fraudulent, or deceitful, "[w]here the appropriate interpretation of the Rules of Conduct and a factual determination whether [the attorney's] conduct met or violated the Rules is at issue." *Acevedo v. Comm'n for Lawyer Discipline*, 131 S.W.3d 99, 107 (Tex.App. – San Antonio 2004, pet. denied) (citing *Hawkins v. Comm'n for Lawyer Discipline*, 988 S.W.2d 927, 936 (Tex.App. – El Paso 1999, pet. denied), *cert. denied*, 529 U.S. 1022 (2000)).

Second, the disciplinary action against Webster does not unduly (or otherwise) interfere with the Attorney General's constitutional authority to represent the State in civil matters. The clear implication of Webster's argument in this respect is that once the Texas Attorney General has determined a suit should be filed, the initiation of an attorney disciplinary action that attempts to hold AG attorneys to the same standards of professional conduct as all other Texas-licensed attorneys is an unconstitutional assault on the Attorney General's executive authority. [App 3 (CR 53)]. That is, Webster's argument implies that requiring that he not engage in

conduct involving dishonesty, fraud, deceit, or misrepresentation before a court of law is an assault on the Attorney General's executive authority that could theoretically prevent the Attorney General from filing certain suits. But Webster offers **nothing** in support of the argument that these pending disciplinary actions against himself or Attorney General Paxton have had **any effect at all** on the Attorney General's choices to file any prospective suits.

And contrary to Webster's plea, and the trial court's ruling thereon, the Attorney General's *effective* exercise of his/her authority to bring suits on behalf of the State of Texas, and the judiciary's exercise of its constitutional obligation to regulate the practice of law, are **not** mutually exclusive nor do they conflict. An exemption from the professional standards of conduct imposed by the judiciary on the practice of law is not a necessary requirement for the Attorney General's *effective* exercise of its authority, and Webster pointed to no authority in the proceedings below standing for the proposition that such is the case.

This Court has said:

> In determining whether or not the exercise of a power by one branch of government is an unauthorized invasion of the realm or jurisdiction of another branch, we must consider the relationship of the various governmental departments as set forth and defined in the Texas Constitution, *for that which is permitted by the Constitution cannot be unconstitutional*.
>
> --*Government Services Ins. Underwriters*, 368 S.W.2d at 563 (emphasis added).

The judicial branch's inherent authority to regulate the practice of law is not only permitted by the Constitution but is obligatory upon the judiciary. *Gomez*, 891 S.W.2d at 245. Moreover, "[i]t has long been understood that the separation-of-powers principle means this: a public officer or body may not exercise or otherwise interfere with a power constitutionally assigned to another public officer or body, nor may either **surrender** its own constitutionally assigned power…" *Holmes v. Morales*, 906 S.W.2d at 573 (emphasis added) (citing *Government Servs. Ins. Underwriters*, 368 S.W.2d at 564-565 (Tex. 1963)), *rev'd in part on other grounds*, 924 S.W.2d 920 (Tex. 1996). While Webster (and any other attorney in the Attorney General's office) can still effectively assist the Texas Attorney General in exercising his authority to represent the State of Texas while being subject to the same attorney disciplinary standards and processes as all other Texas-licensed attorneys, the judiciary cannot meet its constitutional obligations in respect of regulating the practice of law by surrendering *its* constitutionally assigned power to do so.

In an attempt to bolster his argument that the attorney disciplinary proceeding against him unduly "interferes" with or improperly seeks to "control" the Attorney General's broad discretion to file suit on behalf of the State of Texas, Webster turns to recent caselaw analyzing the "political question" aspect of the separation of powers doctrine. Webster cites *Van Dorn Preston v. M1 Support Servs., L.P.*, for the proposition that, "[w]hen the Executive Branch acts within its constitutional

discretion, 'nothing can be more perfectly clear than that their acts are only politically examinable.'" [Pet. Br. 22, citing *Van Dorn Preston v. M1 Support Servs., L.P.*, 642 S.W.3d 452, 457 & n. 10 (Tex. 2022)]. In *Van Dorn*, the Texas Supreme Court recognized the potential application of the political question aspect of separation of powers in a tort suit between the families of servicemembers killed and/or injured in a helicopter maintained by a private contractor. But the above-referenced quote fails to capture an important aspect of *Van Dorn's* final analysis. This Court ultimately held that the judiciary's exercise of its jurisdiction to resolve the underlying dispute would not interfere with the executive's military prerogative, reversing the trial court's dismissal of the case on subject-matter jurisdiction grounds and remanding for further proceedings. *Id.* at 465-66. Likewise, here, the court's exercise of its jurisdiction to resolve the attorney disciplinary issue at hand does not unduly interfere with the executive.

Webster also suggests that another recent opinion of this Court, expressing the position that courts should not interfere with the executive's administration of the state government by mandamus, "[u]nless the law shows that an official's conduct (or lack of conduct) is unlawful," supports his argument that the judiciary's exercise of jurisdiction in this attorney disciplinary matter would constitute impermissible interference with the executive. [Pet. Br. 22, citing *In re Stetson Renewables Holdings, L.L.C.*, 658 S.W.3d 292, 297 (Tex. 2022) (orig. proceeding)].

Broadly speaking, *Stetson* concerned a statutory program that allowed considerable property-tax incentives to businesses making eligible investments within the boundaries of school districts that was also subject to a statutorily imposed deadline by which the Comptroller's office was required to evaluate such businesses' timely filed applications for participation in the program. *Id.* at 293-94.

And, while the Court determined that a judicial resolution of the deadline issue statutorily imposed on the Comptroller by mandamus would be unwarranted, it did so because the underlying issue was more properly susceptible of being addressed by the Legislature. *Id*. at 296-97. Importantly, the Court noted: "To be clear, no government official should ever feel free to disregard a statutory deadline or any other statutory command. Quite the opposite. All laws should be followed…" *Id.* The Court then described legislative alternatives that could potentially be used to resolve the deadline issue and further explained, "Such choices are the proper domain of the *legislature*." *Id.* (emphasis in original). Here, by contrast, the resolution of the underlying attorney disciplinary matter, whether Webster's conduct violated ethical standards imposed by the TDRPCs, is undoubtedly the proper domain of the *judiciary* – made so by its inherent, **constitutional** authority (indeed, obligation) to regulate the practice of law.

E. Much of Webster's separation of powers argument attacks the *merits* of the Commission's allegations rather than any jurisdictional issues and reveals basic misunderstandings of the disciplinary process.

Webster also attempts to argue that certain of the Commission's allegations regarding his misrepresentations in *Texas v. Penn* do not meet the requirements for professional misconduct under TDRPC 8.04(a)(3)[12], and either misapprehends or misstates those requirements in the process. [Pet. Br. 25-33]. Moreover, while Webster characterizes *this* argument as relating to his jurisdictional argument because the Commission's allegations in this respect touch on the Attorney General's "exclusive and capacious duty" to represent the State in civil litigation, it is clearly an argument directed at the merits of the underlying attorney disciplinary action. [Pet. Br. 26, citing *Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001)].

Contrary to Webster's assertion that a violation of TDRPC 8.04(a)(3), "addresses misrepresentations as a form of fraud on a court," that Rule is broader in scope: "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation." TEX. DISCIPLINARY R. PROF'L CONDUCT R. 8.04(a)(3). While the disciplinary rules define "fraud" as "conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information," they do not define the terms "dishonesty," "deceit," and "misrepresentation." TEX. DISCIPLINARY R. PROF'L CONDUCT, TERMINOLOGY. However, courts have concluded that, consistent with their ordinary meanings, the terms "dishonesty," "deceit," or "misrepresentation" denote "a lack of honesty,

[12] Webster mistakenly references this as "Texas Rule of Disciplinary Procedure 8.04(a)(3)".

probity, or integrity in principle" and a "lack of straightforwardness." *See e.g., Olsen v. Comm'n for Lawyer Discipline*, 347 S.W.3d 876, 882-83 (Tex.App. – Dallas 2011, pet. denied); *Rosas v. Comm'n for Lawyer Discipline*, 335 S.W.3d 311, 319 (Tex.App. – San Antonio 2010, no pet.); *Onwuteaka v. Comm'n for Lawyer Discipline*, No. 14-07-00544-CV, 2009 WL 620253, *7 (Tex.App. – Houston [14th Dist.] March 12, 2009, pet. denied) (mem. op.); *Brown v. Comm'n for Lawyer Discipline*, 980 S.W.2d 675, 680 (Tex.App. – San Antonio 1998, no pet.).

Webster also asserts that, to the extent the Commission's allegations concern legal arguments he made in *Texas v. Penn*, a 'legal argument' could **only** constitute dishonesty towards a tribunal, "if a lawyer fails to 'disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party." [Pet. Br. 27, citing TEX. DISCIPLINARY R. PROF'L CONDUCT R. 3.03(a)(4) & cmt. 3]. This is a misstatement as to both the content and character of the TDRPC 3.03 standard. A standard that suggests nothing about its relation to the TDRPC 8.04(a)(3) standard other than that a legal argument based on a knowingly false representation of law constitutes one form of "dishonesty" that might also thus be sanctionable per Rule 8.04(a)(3). Further, while the comments to the ethical rules are meant to "illustrate or explain applications of the rules, in order to provide guidance for interpreting the rules and for practicing in compliance with the spirit of

the rules," such illustrations are not meant to be exhaustive. TEX. DISCIPLINARY R. PROF'L CONDUCT, PREAMBLE: SCOPE, ¶ 10.

Webster further complains that the Commission's allegations against him constitute a "rejection of the Attorney General's 'investigation of the case, and…determination' that 'the evidence necessary to a successful prosecution of the suit c[ould] be procured.'" [Pet. Br. 28, citing *Lewright v. Bell*, 63 S.W. 623, 624 (Tex. 1901) (orig. proceeding)]. Though Webster again suggests (without foundation) that the *intent* of the attorney disciplinary action against him is to improperly control the Attorney General's decision to file *Texas v. Penn*, or to improperly control an Attorney General's decision(s) to file cases in the future (again, an argument rejected by the Court of Appeals), none of the Commission's allegations concern the Attorney General's determination(s) in that respect.[13] [App 4 (CR 9-12)]. The Commission's allegations expressly address only specific representations made in the *Texas v. Penn* pleadings and whether such representations constituted conduct involving dishonesty, fraud, deceit or misrepresentation. And the circumstance concerned in *Lewright*, involving an effort to compel a prior Texas Attorney General to file a suit from the outset via mandamus, is clearly distinguishable from the Commission's initiation of an attorney

[13] Indeed, *Texas v. Penn* concluded as a live dispute before the U.S. Supreme Court over two years prior to the Commission's filing of this disciplinary action.

disciplinary action long after the conduct complained of and case from which it arose occurred. Webster's attempt to fit that round peg into a square hole for the purposes of his jurisdictional arguments is misplaced.

Webster also misstates the basics of disciplinary jurisdiction as articulated by the Court in both the TDRPCs and TRDPs, apparently in an awkward attempt to suggest that TRDP 8.04(a)(3) could not have applied to his conduct, stating "But at the relevant time, that provision provided that '[a]ttorney conduct that occurs in another jurisdiction'…qualified as 'Professional Misconduct,' subject to the Bar's jurisdiction only if it 'results in the disciplining of an attorney in that other jurisdiction,' TEX. RULES DISCIPLINARY P.R. 1.06(CC)." [Pet. Br. 37]. First, TDRPC 8.05(a), regarding disciplinary jurisdiction states:

> A lawyer is subject to the disciplinary authority of this state, if admitted to practice in this state or if specially admitted by a court of this state for a particular proceeding. *In addition to being answerable for his or her conduct occurring in this state, any such lawyer also may be disciplined here for conduct occurring in another jurisdiction* **or** *resulting in lawyer discipline in another jurisdiction*, if it is professional misconduct under Rule 8.04.
>
> -- TEX. DISCIPLINARY R. PROF'L CONDUCT R. 8.05(a) (emphasis added)

That is, TDRPC 8.05(a) provides that Texas-licensed attorneys are subject to the Court's disciplinary system for conduct occurring in another jurisdiction that

violates TDRPC 8.04, whether it results in lawyer discipline in another jurisdiction or not.[14]

Second, Webster's suggestion that TRDP 1.06(CC)(2) somehow operates to exclude attorney conduct that occurs in another jurisdiction that does not result in discipline in that other jurisdiction from being "Professional Misconduct," also misses the mark. That particular subpart of the definition of Professional Misconduct is simply meant to recognize "reciprocal discipline" – addressed further in Part IX of the TRDPs. Webster ignores: (1) TRDP 1.06(CC)(1), which states that "Professional Misconduct includes…Acts or omissions by an attorney, individually or in concert with another person or persons, that violate one or more of the Texas

[14] Webster suggests that "the Bar engaged in rulemaking to authorize disciplinary actions whether or not the other jurisdiction saw fit to sanction that lawyer," during the pendency of this case. [Pet. Br. 37, fn. 3, citing *Proposed Rule Changes: Rule 8.05. Jurisdiction*, Comm. on Disciplinary rules & Referenda, 86 Tex. B.J. 192, 192-93 (Mar. 2023)]. Clearly, this ignores the plain language of the rule, which has **always** authorized disciplinary actions in such circumstances. In fact, a review of the history of the TDRPCs demonstrates that the jurisdictional language of TDRPC 8.05(a) has remained unchanged since it was first adopted in 1995.

As to Webster's implication that "the Bar" interjected itself into the rulemaking process while his case was pending, aimed at expanding disciplinary jurisdiction: (1) The proposed new TDRPC 8.05 he points to was part of a wider rulemaking proposal initiated by the Committee on Disciplinary Rules and Referenda, a Committee created by the Texas Legislature in 2017 (See TEX. GOV'T CODE §§81.0871 -.08794), and a majority of whose members are appointed by this Court; and (2) the proposed new TDRPC 8.05 is still making its way through the rulemaking process, which necessarily includes review and approval (or rejection) by this Court. The proposed new TDRPC 8.05 states: "A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction in the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct."

Disciplinary Rules of Professional Conduct" (without regard to where such acts or omissions took place); and (2) TRDP 1.05, which states "Nothing in these rules is to be construed, explicitly or implicitly, to amend or repeal in any way the Texas Disciplinary Rules of Professional Conduct." Webster's arguments in these regards are also without merit.

Finally, Webster's implication that a sanction issued (or not issued) against an attorney by the U.S. Supreme Court in a particular proceeding excludes this Court from exercising its authority to regulate that attorney's Texas law license pursuant to its ethical rules, is equally unfounded.

III. The Court of Appeals also properly determined that sovereign immunity does not deprive the court of subject matter jurisdiction over the Commission's pending disciplinary action against Webster.

> "The public expects and deserves the highest level of professional conduct from the government lawyers who represent their interests. Government attorneys are subject to professional rules that govern all attorneys, as well as constitutional, statutory, and regulatory requirements that protect the public's trust. Government attorneys are, like all lawyers, required to follow the rules of professional conduct of the states where they are licensed … and violations of them can result in penalties ranging from a confidential admonishment to disbarment."
>
> --National Association of Attorneys General, *Ethics* (visited Mar. 13, 2024) <https://www.naag.org/issues/ethics/

Webster asserts that the trial court: (1) did not reach the sovereign-immunity question; and (2) this Court *need* not reach that question (ostensibly because of his belief the separation of powers issue is dispositive), though he believes the

Commission's disciplinary action against him is "independently barred" by sovereign immunity. [Pet. Br. 39-40]. Webster is incorrect on all counts.

Webster's "sovereign-immunity" basis for arguing a lack of subject-matter jurisdiction was presented to the trial court by his plea to the jurisdiction, his reply in support of his plea to the jurisdiction, and the arguments of his counsel at the hearing on the plea to the jurisdiction. [CR 54-59 & 1839-1842; RR, *passim*]. The trial court considered that argument, along with Webster's separation of powers argument, and granted the plea to the jurisdiction only on the basis that "the separation of powers doctrine" deprived it of subject-matter jurisdiction, denying all other relief not expressly granted. [CR 1917]. Indeed, principles of constitutional avoidance suggest that if the trial court believed sovereign immunity constituted a valid ground on which Webster's plea to the jurisdiction could be granted, then it would have granted the plea on that basis, rather than reaching the separation of powers issue. *See ETC Mktg., Ltd. v. Harris Cty. Appraisal Dist.*, 528 S.W.3d 70, 74 (Tex. 2017) (citing *In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003)); see also, *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347-48 (1936) (Brandeis, J., concurring). Thus, the trial court's ruling, at least implicitly, denied Webster's jurisdictional argument as to sovereign immunity.

Webster also draws a false analogy between the immunity from suit afforded to the Commission (and others) in the context of the attorney disciplinary system by

TRDP 17.09, to his own situation in this attorney disciplinary matter. He asserts that, "The Commission itself has declared by rule, without any apparent statutory or constitutional authority," that itself and its attorneys are entitled to such immunity, even though "[t]he Commission surely cannot create [such immunity] by mere rule." [Pet. Br. 40, fn. 5]. Of course, the Commission did not create the TRDPs, or "declare" anything by rule. As explained above, the TRDPs (along with the TDRPCs) are promulgated by this Court pursuant to *its* constitutional "warrant" to regulate the practice of law. Moreover (and as discussed in further detail below), while sovereign immunity, as well as other types of immunity, often apply to protect government officials from suit and/or liability for monetary, declaratory and/or injunctive relief, Webster provides **no** authority for the proposition that any such immunity applies to protect government attorneys from attorney disciplinary proceedings brought pursuant to the Court's disciplinary system.

To the extent Webster asserts that sovereign immunity is an alternative, valid ground on which Webster's plea to the jurisdiction should be granted, the Commission respectfully disagrees.

A. Sovereign immunity is not implicated by this *attorney disciplinary action* against Webster merely because his conduct occurred while he was the First Assistant Attorney General.

While it is generally true that public officials sued in their *official* capacities, for monetary, injunctive and/or declaratory relief, or the like, are often protected by

some form of sovereign immunity, such immunity exists and is derived solely by virtue of the governmental unit they represent. *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 843-44 (Tex. 2007); *Paxton v. Waller County*, 620 S.W.3d 843 (Tex.App. – Amarillo 2021, pet. denied). Here, Webster conflates the fact that *Texas v. Penn* was filed under the color of the authority of the Texas Attorney General's Office with the fact that the Commission has pursued charges of attorney misconduct against *him* regarding alleged misrepresentations/dishonesty in connection with the pleadings he filed with the U.S. Supreme Court. From there he arrives at his misplaced conclusion that the Commission's disciplinary action in this regard is directed at the State of Texas itself in a way that implicates sovereign immunity. This despite his knowing the *Texas v. Penn* pleadings (which he testified before the Texas Senate Committee on Finance he participated in the preparation and filing of [App 5 (CR 694)]) could have been filed without making the alleged dishonest misrepresentations.

Notwithstanding Webster's faulty logic, the disciplinary action brought against Webster was not brought against him in his *official* capacity, certainly not in the sense meant when courts are determining the applicability, or lack thereof, of sovereign immunity. Rather, the Commission was required to bring this action against Webster in his individual/personal capacity, as a Texas licensed attorney, pursuant to the TDRPCs and TRDPs.

As previously discussed with respect to the separation of powers arguments, in such a proceeding the true issue is simply whether the respondent attorney's conduct met or violated the applicable ethical rules. See Sec. II(D)(2), *supra*; *Acevedo*, 131 S.W.3d at 107, citing *Hawkins*, 988 S.W.2d at 936, *cert denied,* 529 U.S. 1022, 120 S.Ct. 1426, 146 L.Ed.2d 317 (2000). And unlike a typical *suit* by a private party against a governmental actor, where what is at stake are money damages, or injunctive or declaratory relief, recoverable as against the governmental unit of which that actor is a part (or *susceptible* of being brought against that governmental unit itself), here, what is at stake is the regulation of Webster's license to practice law in the State of Texas, which is personal to him and **is not dependent on or subject to any position he may hold as a public employee**.

The authorities cited by Webster regarding sovereign immunity claims brought against public officials in their official capacities, or, in their individual capacities when in fact it was their official capacities implicated by such claims, are inapposite. Each of those authorities concerns matters in which litigants sued governmental units and/or public officials employed by such units for money damages and/or injunctive or declaratory relief arising from such government actors' improper use of governmental authority. In a very real sense, those litigants' claims were solely directed at the sovereign, or at an individual acting *solely* on behalf of the sovereign, as the claims themselves implicated only governmentally derived

powers. In such cases, courts have indeed consistently found that governmental actors are often protected from liability in their *individual* capacities by sovereign immunity, as the sovereign is, in fact, the real party in interest in such cases. See *Koseoglu*, 233 S.W.3d at 843-44; *Davis v. City of Aransas Pass*, No. 13-17-00455-CV, 2018 WL 4140633 (Tex.App. – Corpus Christi Aug. 29, 2018, no pet.); *Ross v. Linebarger, Goggan, Blair & Sampson, L.L.P.*, 333 S.W.3d 736 (Tex.App. – Houston [1st Dist.] 2010, no pet.); *Pickell v. Brooks*, 846 S.W.2d 421 (Tex.App. – Austin 1992, writ denied).[15]

But even in such cases, the true test of whether sovereign immunity is implicated at all rests on whether the relief sought seeks to control "state action." See *GTECH Corp. v. Steele*, 549 S.W.3d 768, 784-85 (Tex.App. – Austin 2018) *aff'd sub nom., Nettles v. GTECH Corp.*, 606 S.W.3d 726 (Tex. 2020). The action to be addressed in this disciplinary case is not the 'state action' of the Texas Attorney General or Webster as First Assistant Attorney General in *filing* the litigation in the *Texas v. Penn* case. Rather, it is Webster's conduct as an attorney in that litigation, specifically his alleged dishonest statements and representations made in the

[15] Though the Court has also long held that even in *some* circumstances involving, for example, claims for declaratory relief against government officials, sovereign immunity is not implicated at all. *See Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855-56 (Tex. 2002), citing *W.D. Haden Co. v. Dodgen*, 308 S.W.2d 838, 840 (Tex. 1958); see also, *Cobb v. Harrington*, 190 S.W.2d 709, 712 (Tex. 1945); *Griffin v. Hawn*, 341 S.W.2d 151, 152-53 (Tex. 1960).

pleadings underlying the *Texas v. Penn* case, and whether such actions met or violated the ethical obligations imposed by the TDRPCs, that are at issue.

There is a relative scarcity of caselaw analyzing arguments raised by state attorneys general or by government lawyers suggesting they are not subject to the judiciary's regulation of the legal profession based on sovereign immunity. In such cases, courts have been critical, if not dismissive, of these arguments, noting the conspicuous flaws with such reasoning.[16]

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[16] See *Chilcutt v. U.S.*, 4 F.3d 1313, 1327 (5th Cir. 1993) (holding that to restrict a court's power to fashion sanctions pursuant to the Federal Rules of Civil Procedure against a government attorney, when appropriate, would, "violate the separation of powers doctrine," as it, "[w]ould invite members of our sister branches to ignore acceptable standards of decorum in courts and flout court orders."); *U.S. v. Shaffer Equip. Co.*, 158 F.R.D. 80, 87 (S.D. W.Va. 1994) (citing *U.S. v. Associated Convalescent Enterprises, Inc.*, 766 F.2d 1342, 1346 (9th Cir. 1985) and *U.S. v. Horn*, 29 F.3d 754 (1st Cir. 1994)) (holding that a court's power to impose sanctions pursuant to its inherent authority and the Federal Rules of Civil Procedure applies to government attorneys who, "[l]ike all attorneys, have a duty to conform to the ethical guidelines of their profession." And further, that "Sovereign immunity is not a bar to personal sanctions on government attorneys for their ethical violations because these sanctions do not come from the public coffers."); *Massameno v. Statewide Grievance Committee*, 234 Conn. 539, 562-64 & 576-77 (Conn. 1995) (holding that prosecutors "maintain their positions as officers of the court like all other attorneys when they are performing their role as prosecutors…and that they must act within recognized principles of law and standards of justice," and as such were subject to the disciplinary jurisdiction of the judiciary – and further, rejecting prosecutors' "unconditional attack" on the judicial branch's authority to regulate their ethical conduct as "the separation of powers doctrine does not obliterate the obligation and authority of the judicial branch to investigate and discipline prosecutors." (internal citations omitted)); *Ramsey v. Board of Professional Responsibility*, 771 S.W.2d 116, 118 (Tenn. 1989) (holding that a district attorney was subject to the court's jurisdiction regarding attorney discipline as, "The office of District Attorney constitutes no shield or protection to an attorney who violates his oath as an attorney or the disciplinary rules of this Court."); *see also*, *Enriquez v. Estelle*, 837 F.Supp. 830, 832 (S.D. Tex. 1993) (sanctioning then Texas Attorney General Dan Morales $500 for conduct by an Assistant Attorney General the court found to be "dilatory, obstructionist, disobedient, and dishonest" stating, "'Equal justice under law' does not have an exception for attorneys general, elected or appointed, public or private. Government lawyers have no special license that exempts them from the strictures of the procedural rules, professional behavior, and individual responsibility.")

Further, in cases where a state's attorney general has been disciplined for violations of attorney disciplinary standards, neither the separation of powers doctrine nor sovereign immunity was found to be an impediment to the disciplinary process, if they were argued by the respondent attorney at all. *In re Lord*, 255 Minn. 370 (Minn. 1959) (Minnesota Attorney General not clothed with immunity from the disciplinary powers of the court when appearing as an attorney); *In re Kline*, 298 Kan. 96, 311 P.3d 321 (2013) (Former Kansas Attorney General suspended indefinitely from the practice of law in Kansas in connection with multiple violations of the Kansas Rules of Professional Conduct while serving as Kansas Attorney General and later as Johnson County District Attorney).[17]

Here, the misconduct alleged in the Commission's disciplinary petition refers to Webster's actions as an officer of the court and attorney in the *Texas v. Penn* case

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And *Cf., Dinsdale v. Commonwealth, et. al.*, 675 N.E. 2d 374 (1997) (noting the extension of absolute immunity to government attorneys in their conduct of criminal and civil litigation in some jurisdictions, and recognizing several historical and common law bases for this extension of such immunity, including the fact that, "[s]uch attorneys are **still subject to other checks** whereby an abuse of authority might be redressed, such as sanctions in the underlying case, contempt, or **bar disciplinary proceedings**," citing, *Fry v. Melaragno*, 939 F.2d 832, 838 (9th Cir. 1991) and *Barrett v. U.S.*, 798 F.2d 565, 572 (2nd Cir. 1986) (emphasis added)).

[17] Likewise, this Court has previously exercised its disciplinary jurisdiction over the law license of a Texas Attorney General by accepting Dan Morales' Resignation In Lieu of Discipline on December 15, 2003. At the time of his resignation, Morales was subject to Compulsory Discipline under Part VIII of the TRDPs following the entry of his guilty plea to an Intentional and Serious Crime in Case Number A-03-CR-085(1)-SS, styled *United States of America, Plaintiff v. Daniel C. Morales, Defendant,* in the United States District Court, Western District of Texas, Austin Division, related to conduct that occurred while he was serving as Texas Attorney General. *See* Order of the Supreme Court of Texas in Misc. Docket No. 03-9205, *In the Matter of Daniel C. Morales*, and associated pleadings. [CR 1250-1296].

filed before the United States Supreme Court; not the decision taken by the Texas Attorney General or his office to file such litigation. In this respect, Webster also argues that he was *only* in the position to act as he did in *Texas v. Penn* by virtue of his position as First Assistant Attorney General, thus the disciplinary action against him *must* "target" only his conduct in his official capacity. [Pet. Br. 42-45]. E.g., "A Texas-issued law license, without more, does not authorize an attorney to represent the State of Texas in an original action before the U.S. Supreme Court."[18] [Pet. Br. 44]. There, Webster misses the relevant point completely.

Of course, it is not true that Webster was *only* in the position to file the pleadings at issue in *Texas v. Penn* by virtue of his government office, and that very fact demonstrates the failure of such arguments. While it is true that the Office of the Texas Attorney General can typically represent the interests of the State of Texas in state and federal courts, it is **only** by virtue of Webster's admission to practice as a *Texas-licensed attorney* (and his corresponding admission to the Bar of the U.S. Supreme Court, or admission *pro hac vice* for the purposes of oral argument only) that he was able to file the *Texas v. Penn* pleadings in a representative capacity. U.S. SUP. CT. RULES 5, 6, 9, 28.8, and 34.1(f) (2019) (Revised 2023).[19] And it is *that*

[18] Citing U.S. SUP. CT. RULE 17.3, which says **nothing** about what attorney(s) may appear on behalf of a State in a representative capacity in the U.S. Supreme Court, but simply addresses *who must be served* in an original proceeding where a State is a party.

[19] The Supreme Court Rules in effect at the time of the filing of *Texas v. Penn* are attached hereto. [App 6].

conduct as a Texas-licensed attorney that is the subject of this disciplinary action brought pursuant to the Texas Rules of Disciplinary Procedure – which is indisputably subject to the disciplinary jurisdiction of this Court and not barred by sovereign immunity.

Webster provides no authority in support of his arguments that an attorney disciplinary proceeding against an executive branch attorney is, in fact, a suit *against the sovereign*, of the type meant to be shielded by sovereign immunity. He also provides no authority that executive branch attorneys are exempt from the ethical obligations imposed by this Court. And he provides no authority that a private litigant, the voting public, the Texas Attorney General, or some other state agency is empowered to issue disciplinary sanctions against his (or any other attorney's) Texas law license. As is set forth at length, above, such authority is delegated by this Court only to the Board of Disciplinary Appeals, an Evidentiary Panel of a District Grievance Committee, or a District Court Judge pursuant to the TRDPs. In short, there is no valid basis for the argument that sovereign immunity bars attorney disciplinary proceedings against Paxton, or any other executive branch or government attorney.

IV. Webster's concessions regarding the courts' inherent authority to discipline attorneys are fatal to his arguments.

In an attempt to reconcile both his separation of powers and immunity arguments with the foregoing authorities, Webster suggests that all appearances to

the contrary, such arguments do not lead to an impermissible exemption from the Court's attorney discipline system. And further, Webster argues that his and other executive branch attorneys' *ethical* obligations are actually already policed (or better or more appropriately policed in his view) in other ways. [Pet. Br. 38-39 & 45-46].

For instance, Webster argues that "the Separation of Powers Clause would have nothing to say about the Commission's enforcement of its rules," as against him, if he undertook some representation in a private capacity. [Pet. Br. 38]. That is, he returns to the refrain that the Commission should not have the power to impose "its rules" on him; of course, the Commission's pursuit of attorney disciplinary proceedings against **any** attorney in no way constitutes the imposition of "its rules" by the Commission. In an attorney disciplinary action, the Commission serves a role as the adverse party. TEX. RULES DISCIPLINARY P.R. 2.14 & 4.06(A). That role requires the Commission in an attorney disciplinary action (such as Webster's) taking place in a district court to: (i) present its allegations to a factfinder for a determination as to whether the Commission has proven such allegations, as to liability; and (ii) to present the matter to the court, for determination of the

appropriate sanction, when liability for professional misconduct on such allegations has been established.[20]

Further, Webster's immunity arguments also suggest that a determination that the disciplinary action against him is barred by sovereign immunity would not free executive branch lawyers from their ethical obligations, because they could still be potentially subject to *ultra vires* and/or criminal actions, and/or the courts' inherent authority to impose sanctions on attorneys on an *ad hoc* basis for violations of courtroom decorum. But those arguments concede that the courts have the inherent authority to discipline all attorneys for misconduct, including executive branch attorneys. That illuminates the flaws in Webster's arguments that the Commission's charges of violation(s) of *ethical* obligations against him (or, by extension, any AG attorney acting in his or her "official capacity") are appropriate only **outside** the attorney disciplinary process specifically created by the Texas Supreme Court (and aided by the Legislature through the State Bar Act) to address such violations in the context of his Texas-issued license to practice law.

[20] The factfinder as to liability in such cases can be the court, or either party has the right to trial by jury on the timely payment of the required fee and compliance with Tex. R. Civ. P. 216. TEX. RULES DISCIPLINARY P.R. 3.06. The trial court determines the appropriate sanction or sanctions to be imposed. TEX. RULES DISCIPLINARY P.R. 3.09 & 15.03; *see also, State v. O'Dowd*, 312 S.W.2d 217, 221 (Tex. 1958); *State Bar of Texas v. Kilpatrick*, 874 S.W.2d 656, 659 (Tex. 1994); *In re Caballero*, 441 S.W.3d at 570; *Washington v. Comm'n for Lawyer Discipline*, No. 03-15-00083-CV, 2017 WL 1046260, *10 (Tex.App. – Austin Mar. 17, 2017, pet. denied) (mem. op.).

But the TDRPCs do not create a basis for liability, beyond being "a just basis for a lawyer's self-assessment, or for sanctioning a lawyer *under the administration of a disciplinary authority*…" TEX. DISCIPLINARY R. PROF. CONDUCT, PREAMBLE: SCOPE, ¶15 (emphasis added). So, Webster's argument that the *ethical* obligations imposed on attorneys by the TDRPCs are **better** safeguarded other than through this Court's attorney disciplinary process fails on that point alone. Moreover, the Court has held that the "[d]iscretion to determine the trial tactics and litigation strategies to employ, while considerable, is cabined by ethical standards memorialized in sundry rules and statutes and is subject to the inherent authority of courts to preserve the integrity of our judicial system." *Brewer v. Lennox Hearth Products, L.L.C.*, 601 S.W.3d 704, 708, and fn. 2 (Tex. 2020) (citing as examples of such rules and statutes, amongst other things: TEX. CIV. PRAC. & REM. CODE CHS. 9 & 10; TEX. GOV'T CODE §21.002; TEX. R. CIV. P. 13, 18a(h), & 215; **and the TDRPCs**).

In the course of his arguments in these respects, Webster points out several cases that stand for the proposition that courts have inherent authority to sanction attorneys for "conduct before the court," a concept that no one disputes. This strawman fails in (at least) two respects. First, the inherent authority of the courts articulated in those cases ultimately arises from **the same** constitutional source as does the authority to hear attorney disciplinary matters. "Inherent authority emanates 'from the very fact that the court has been created and charged by the constitution

with certain duties and responsibilities." See *Brewer*, 601 S.W.3d at 718, citing *Eichelberger*, 582 S.W.2d at 398; *see also, Gomez*, 891 S.W.2d at 245; *In re State Bar of Texas*, 113 S.W.3d at 732. Second, the mere fact that any court has the inherent authority to sanction an attorney for misconduct before *that* court (again, a concept no one disputes) does not speak, at all, to **this** Court's authority to regulate that attorney's Texas law license or the attorney disciplinary process created by the Court to carry out that obligation. The two are not mutually exclusive, and indeed in many instances, might **both** be called upon to determine separate discipline against an attorney for the same misconduct.[21]

Certainly, as Webster argues, an attorney (even an executive branch attorney by his reckoning) might be subject to civil, or in some cases, even criminal liability when violating other *legal* obligations. For example, an executive branch attorney might be subject to *ultra vires* and/or criminal actions for conduct outside of their authority, or criminal conduct. But it does not follow that a court would not, by reason of the same conduct, **also** have subject matter jurisdiction over a potential attorney disciplinary proceeding against such an attorney, as provided in the TRDPs. Indeed, a felony conviction for a criminal offense, if it qualified as a "serious crime" under the TRDPs, would **require** compulsory discipline pursuant to Part VIII of the

[21] "Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the *extra-disciplinary* consequences of violating such a duty." TEX. DISCIPLINARY R. PROF. CONDUCT, PREAMBLE: SCOPE, ¶15 (emphasis added).

Rules (as it did in *Morales*, see fn. 17, *supra*). TEX. RULES DISCIPLINARY P.R. 8.01.[22] In these respects, *this* strawman also fails.

At bottom, Webster's arguments that he should be exempted from the same disciplinary standards/procedures as all other Texas-licensed attorneys would interfere with the inherent powers of the Texas Supreme Court.[23] If either the separation of powers doctrine or sovereign immunity were determined to deprive the courts of subject-matter jurisdiction in attorney disciplinary actions against executive branch attorneys, Texas-licensed attorneys employed by the Texas Attorney General would effectively be given a blanket exemption from having to comply with all provisions of the TDRPCs and TRDPs. This would improperly afford executive branch attorneys leverage over all other Texas-licensed attorneys who are required to comply with the Rules.

[22] In fact, Rule 8.01 provides that such an attorney would not only be subject to compulsory discipline for a qualifying conviction or probation, but the underlying facts could also be the basis for a separate, independent disciplinary action.

[23] The separation of powers doctrine requires that "any attempt by one department of government to interfere with the powers of another is null and void." *Meshell v. State*, 739 S.W.2d 246, 252 (Tex.Crim.App. 1987). Although one department has occasionally exercised a power that would otherwise seem to fit within the power of another department, courts have approved those actions only when authorized by an express provision of the constitution. *Id*.

"This separation of powers provision reflects a belief on the part of those who drafted and adopted our state constitution that one of the greatest threats to liberty is the accumulation of excessive power in a single branch of government." *Armadillo Bail Bonds*, 802 S.W.2d at 239. It has the incidental effect of "promoting effective government by assigning functions to the branches that are best suited to discharge them." *Id*.

CONCLUSION

> "Current and former Assistant Attorneys General have a duty to follow all rules related to the practice of law in the state of Texas."
>
> -- Office of the Texas Attorney General, News, Press Releases: *Attorney General's Office Issues Cease and Desist Letter to Former Agency Lawyer* (visited Mar. 13, 2024) <https://www.texasattorneygeneral.gov/news/releases/attorney-generals-office-issues-cease-and-desist-letter-former-agency-lawyer

In a cease-and-desist letter that accompanied the above-referenced press release, the Office of the Attorney General further warned a former assistant attorney general, "Although your employment with this agency ended with your retirement in 2011, your duties to comply with state law and the Texas Disciplinary Rules of Professional Conduct **applicable to all licensed attorneys in Texas** endure." See *Notice to Cease and Desist from Sharing Privileged or Confidential Information from State Records* (visited Mar. 13, 2024) <https://www.texasattorneygeneral.gov/files/epress/060316Owens.pdf (emphasis added).

That is, the Texas Attorney General's Office has previously recognized that **its** attorneys are subject to the disciplinary and disability jurisdiction of this Court, which necessarily includes the disciplinary system and process established by the Court through the TDRPCs and TRDPs, with the aid of the Legislature through its passage of relevant portions of the State Bar Act. But contrary to that recognition, Webster's participation in the attorney discipline process in this instance has

essentially been only to argue about why he should not be subject to the attorney disciplinary process.

To be clear, Webster now seeks a jurisdictional ruling of ***personal importance*** that would exempt him, and by extension all attorneys acting under the executive authority of the Attorney General, from compliance with and/or accountability to the applicable standards of professional conduct, or participation in the attorney discipline process, promulgated by this Court pursuant to its constitutional authority to regulate the practice of law.

But Webster offers no authority that he is absolved from complying with the ethical rules or exempt from the disciplinary and disability jurisdiction of this Court. Instead, he invites the Court to join his speculation as to the imagined *motivations* of this Court's appointees to the Commission and BODA, and the volunteer members of the investigative hearing panel of a District Grievance Committee, rather than allowing a factfinder to determine whether his conduct violated the Court's ethical standards for a Texas-licensed attorney. For all of the foregoing reasons, the Court should decline such invitation.

Finally, Webster's continual refrain that the attorney disciplinary proceeding against him "interferes" with and/or improperly attempts to "control" the Attorney General's broad discretion to determine what actions to file on behalf of the State of Texas is meritless. The attorney disciplinary proceeding brought by the Commission

after Webster's alleged improper conduct, is no more an "interference" with that conduct or attempt to control it than are other statutes and/or rules of procedure that prescribe similar bounds on an attorney's conduct, and with which Webster apparently has no quarrel. See Sec. IV, *supra*; *Brewer*, 601 S.W.3d at 708 and fn. 2; TEX. CIV. PRAC. & REM. CODE CHS. 9 & 10; TEX. R. CIV. P. 13, 18a(h), & 215. Further, Webster's arguments regarding the substance of the representations he made in the *Texas v. Penn* pleadings in an attempt to obtain extraordinary injunctive relief (which was rejected by the U.S. Supreme Court) are the true subject of the disciplinary action against him and go not to the jurisdictional question, but to the merits of that disciplinary action. Such determinations are clearly within the subject matter jurisdiction of the trial court in this attorney disciplinary proceeding.

PRAYER

WHEREFORE, premises, arguments, and authorities considered, the Commission prays that the Court deny Webster's Petition for Review.

RESPECTFULLY SUBMITTED,

SEANA WILLING
CHIEF DISCIPLINARY COUNSEL

ROYCE LEMOINE
DEPUTY COUNSEL FOR ADMINISTRATION

MICHAEL G. GRAHAM
APPELLATE COUNSEL

OFFICE OF THE CHIEF DISCIPLINARY COUNSEL
STATE BAR OF TEXAS
P.O. BOX 12487
AUSTIN, TEXAS 78711
michael.graham@texasbar.com
TELEPHONE: (512) 427-1350;
(877) 953-5535
FAX: (512) 427-4253

MICHAEL G. GRAHAM
STATE BAR CARD NO. 24113581
ATTORNEY FOR RESPONDENT

CERTIFICATE OF COMPLIANCE

Pursuant to the Texas Rules of Appellate Procedure, the foregoing brief on the merits contains approximately 13,298 words (total for all sections of response that are required to be counted), which is less than the total words permitted by the TRAPs. Counsel relies on the word count of the computer program used to prepare this brief.

MICHAEL G. GRAHAM
APPELLATE COUNSEL
STATE BAR OF TEXAS

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Brief of Respondent, the Commission for Lawyer Discipline, has been served on Petitioner, Brent Edward Webster, by and through his attorney of record, Ms. Lanora C. Pettit, Principal Deputy Solicitor General, Office of the Attorney General, by electronic service through this Court's electronic filing service provider on the 18th day of March, 2024.

MICHAEL G. GRAHAM
APPELLATE COUNSEL
STATE BAR OF TEXAS

No. 23-0694

In The Supreme Court of Texas

BRENT EDWARD WEBSTER,
PETITIONER

v.

COMMISSION FOR LAWYER DISCIPLINE,
RESPONDENT

On Petition for Review from the
Eighth Court of Appeals, El Paso
Case No. 08-22-00217-CV

APPENDIX TO BRIEF OF RESPONDENT COMMISSION FOR LAWYER DISCIPLINE

App 1: Trial Court's Order Granting Petitioner Brent Edward Webster's Plea to the Jurisdiction [CR 1917]

App 2: 8th Court of Appeals Opinion issued July 13, 2023

App 3: Webster's Answer, Defenses, and Plea to the Jurisdiction [CR 23-61][24]

App 4: Commission's Original Disciplinary Petition [CR 7 – 13]

[24] The voluminous materials attached to Respondent's pleading are not included in this Appendix but are included in the Clerk's Record filed in this matter (see CR 62-691).

App 5: Commission's Response to Webster's Answer, Defenses, and Plea to the Jurisdiction [CR 692-727][25]

App 6: U.S. SUP. CT. R. 5, 6, 9, 17.3, 28.8 & 34.1(f) (2019) (Revised 2023)

[25] The voluminous materials attached to the Commission's Response are not included in this Appendix but are included in the Clerk's Record filed in this matter (see CR 728-1673).

App 1

CAUSE NO. 22-0594-C368

COMMISSION FOR LAWYER DISCIPLINE, *Plaintiff,*	§	IN THE DISTRICT COURT
v.	§	OF WILLIAMSON COUNTY, TEXAS
BRENT EDWARD WEBSTER; 202101679, *Defendant.*	§	368TH JUDICIAL DISTRICT

ORDER GRANTING RESPONDENT BRENT EDWARD WEBSTER'S PLEA TO THE JURISDICTION

Before the Court is Respondent Brent Edward Webster's Plea to the Jurisdiction in this disciplinary matter brought by Petitioner, Commission for Lawyer Discipline. Upon consideration of the Plea, any relevant evidence, the responses, the replies, and the applicable law, the Court is of the opinion that Respondent's Plea is meritorious and should be granted, as the separation of powers doctrine deprives this Court of subject-matter jurisdiction.

It is therefore ORDERED that Respondent Brent Edward Webster's Plea to the Jurisdiction is hereby GRANTED, and that all of Petitioner's claims against the Respondent in this cause are hereby dismissed with prejudice. Any other relief sought in this matter not herein expressly granted is hereby DENIED.

IT IS SO ORDERED.

SIGNED on this the 13th day of September 2022.

John Youngblood
HONORABLE JUDGE JOHN YOUNGBLOOD

FILED
at 4:26 o'clock P M
SEP 13 2022
Lisa David
District Clerk, Williamson Co., TX.

App 2

676 S.W.3d 687
Court of Appeals of Texas, El Paso.

COMMISSION FOR LAWYER DISCIPLINE, Appellant,
v.
Brent Edward WEBSTER, Appellee.

No. 08-22-00217-CV
|
July 13, 2023

Synopsis

Background: Texas Commission For Lawyer Discipline brought disciplinary proceeding against attorney who was an assistant attorney general. The 368th District Court, Williamson County, John Youngblood, J., granted attorney's plea to the jurisdiction. Commission appealed.

Holdings: The Court of Appeals, Rodriguez, C.J., held that:

[1] Commission's allegations demonstrating the court's jurisdiction over disciplinary proceeding;

[2] separation of powers doctrine did not defeat court's subject-matter jurisdiction; and

[3] disciplinary proceeding against assistant attorney general was not subject to sovereign immunity.

Reversed and remanded.

Procedural Posture(s): On Appeal; Proceeding on Attorney Discipline.

West Headnotes (38)

[1] **Constitutional Law** Nature and scope in general

States Nature and scope of immunity in general

A separation of powers doctrine violation defeats a court's subject-matter jurisdiction, as does sovereign immunity.

[2] **Pleading** Plea to the Jurisdiction

A defendant may challenge the court's subject-matter jurisdiction through a plea to the jurisdiction.

[3] **Pleading** Scope of inquiry and matters considered in general

A plea to the jurisdiction can attack both the plaintiff's allegations in the pleadings as well as the existence of jurisdictional facts by attaching evidence to the plea.

[4] **Appeal and Error** Pleading

When a defendant does not challenge the existence of jurisdictional facts, the Court of Appeals reviews his plea to the jurisdiction as a matter of law.

[5] **Appeal and Error** Pleading and dismissal

In reviewing a plea to the jurisdiction, the appellate court liberally construes the pleadings in the plaintiff's favor.

[6] **Appeal and Error** Pleading

The appellate court reviews a trial court's ruling on a plea to the jurisdiction de novo.

[7] **Attorneys and Legal Services** Courts and judges in general

Texas Commission For Lawyer Discipline alleged facts demonstrating the court's jurisdiction over its disciplinary proceeding against attorney under the Texas Rules of Disciplinary Procedure; Commission's petition was filed in a district court in attorney's county of residence, it described the acts and conduct that gave rise to the alleged professional misconduct and listed the specific rules of the Texas Disciplinary Rules of Professional

Conduct allegedly violated by attorney. Tex. Gov't Code Ann. § 81.071.

[8] **Constitutional Law** Separation of Powers

The three branches of government do not operate with absolute independence; some degree of interdependence and reciprocity is subsumed within the separation of powers principle. Tex. Const. art. 2, § 1.

[9] **Constitutional Law** Separation of Powers

The proper interpretation of the separation of powers doctrine is dictated by its context. Tex. Const. art. 2, § 1.

[10] **Constitutional Law** Separation of Powers

While the separation of powers doctrine prohibits a transfer of a whole mass of powers from one department to another and a person of one branch from exercising a power historically or inherently belonging to another department, it cannot be interpreted to prevent cooperation or coordination between two or more branches of government, hindering altogether any effective governmental action. Tex. Const. art. 2, § 1.

[11] **Constitutional Law** Encroachment in general

Courts take a flexible approach in considering whether a separation of powers violation has occurred, accepting some degree of commingling the functions of the branches of government so long as the challenged act poses no danger of either aggrandizement or encroachment. Tex. Const. art. 2, § 1.

[12] **Constitutional Law** Encroachment in general

Constitutional Law Delegation in general

A separation of powers violation happens in one of two ways: the first is when one branch assumes, or is delegated, to whatever degree, power that is more properly attached to another branch; the second is when one branch unduly interferes with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers. Tex. Const. art. 2, § 1.

[13] **Constitutional Law** Encroachment in general

To determine whether an undue-interference separation of powers violation has occurred, courts examine the scope of constitutional powers held by the first governmental actor and then consider the impact of the first branch's conduct on the second branch's ability to exercise its own constitutionally derived powers. Tex. Const. art. 2, § 1.

[14] **Attorneys and Legal Services** Power to regulate and control in general

The judicial branch has the inherent power to regulate the practice of law in Texas for the benefit and protection of the justice system and the people as whole. Tex. Const. art. 2, § 1; Tex. Gov't Code Ann. § 81.072(a).

[15] **Attorneys and Legal Services** Power to regulate and control in general

The Supreme Court has the authority to regulate judicial affairs and direct the administration of justice in the judiciary. Tex. Const. art. 2, § 1; Tex. Gov't Code Ann. § 81.072(a).

[16] **Attorneys and Legal Services** Power to Admit and License

The Supreme Court has the obligation to regulate the admission and practice of Texas attorneys because these activities are inextricably intertwined with the administration of justice; indeed, the Court must have the power to regulate these activities in order to fulfill its constitutional role. Tex. Const. art. 2, § 1; Tex. Gov't Code Ann. § 81.072(a).

[17] **Attorney General** Deputies, assistants, and substitutes

The Attorney General may act through his assistants. Tex. Gov't Code Ann. § 402.001(a).

[18] **Attorney General** Representation of state in general

As the state's chief legal officer, the Attorney General has broad discretionary power in carrying out his responsibility to represent the state. Tex. Const. art. 4, §§ 1, 22; Tex. Gov't Code Ann. § 402.021.

[19] **Attorney General** Powers and Duties

The Attorney General can only act within the limits of the Texas Constitution and statutes, and courts cannot enlarge the Attorney General's powers. Tex. Const. art. 4, §§ 1, 22; Tex. Gov't Code Ann. § 402.021.

[20] **Attorney General** Powers and Duties

The Attorney General has broad discretionary power in representing the state's interests in civil litigation. Tex. Const. art. 4, §§ 1, 22; Tex. Gov't Code Ann. § 402.021.

[21] **Attorneys and Legal Services** Courts and judges in general

Constitutional Law Labor, employment, and public officials

The separation of powers doctrine did not defeat court's subject-matter jurisdiction over disciplinary proceeding against assistant attorney general; disciplinary proceeding brought by Texas Commission For Lawyer Discipline did not challenge attorney general's decision to initiate litigation or other executive functions of the Attorney General's office, but instead alleged that the pleadings filed in lawsuit against other states regarding their administration of presidential election contained dishonest and unfounded representations which violated the rules of professional responsibility applicable to all attorneys who practiced law in Texas. Tex. Const. art. 2, § 1; Tex. Const. art. 4, § 22; Tex. Gov't Code Ann. § 81.071.

[22] **Attorney General** Powers and Duties

Attorneys and Legal Services Conduct of district and prosecuting attorneys

The Attorney General's broad discretion to represent the state in civil litigation is not unlimited, as the Attorney General can only act within the limits of the Texas Constitution, statutes, and by adherence to the disciplinary rules. Tex. Const. art. 4, §§ 1, 22; Tex. Gov't Code Ann. § 402.021.

[23] **Attorneys and Legal Services** Canons, codes, or rules of conduct in general

Though the Texas Disciplinary Rules of Professional Conduct are not statutory, they should be treated like statutes. Tex. Gov't Code Ann. § 81.072(a).

[24] **Attorneys and Legal Services** Dues and assessments

The Attorney General must comply with the disciplinary rules and other aspects of the State Bar Act, including its membership dues requirement; the same limitation on the Attorney General applies to his assistants. Tex. Gov't Code Ann. § 81.001 et seq.

[25] **Attorneys and Legal Services** Courts and judges in general

Attorneys and Legal Services Administrative agencies, boards, and commissions

The mechanisms of professional discipline through a court's inherent sanction power and "external checks" through political and

legislative processes do not preclude the authority of the Texas Commission For Lawyer Discipline to administer the attorney-discipline system in the state; the processes are not mutually exclusive. Tex. Gov't Code Ann. § 81.072(a).

[26] **Appeal and Error** Organization and Jurisdiction of Lower Court

When an argument is jurisdictional, the Court of Appeals must consider it.

[27] **States** Necessity of waiver or consent

Absent an express waiver of sovereign immunity, the state and its agencies are generally immune from suit.

[28] **Public Employment** Sovereign immunity, and relation of official immunity thereto

States Actions against state agencies or officers as actions against state

Sovereign immunity bars suits against public officials sued in their official capacities because the state is effectively the real party in interest such that its agent enjoys the sovereign's immunity derivatively.

[29] **Public Employment** State, local, and other non-federal personnel in general

States Actions against state agencies or officers as actions against state

Regardless of whether a suit is brought explicitly against a public official in his official capacity, it is the substance of the claims and relief sought that ultimately determine whether the sovereign is a real party in interest and its immunity thereby implicated.

[30] **Public Employment** Privilege or immunity in general

States Presumptions and burden of proof

Sovereign immunity comes into play only if a public official has met an initial burden of establishing that the claims actually implicate that immunity.

[31] **Public Employment** Sovereign immunity, and relation of official immunity thereto

States Sovereign immunity, and relation of official immunity thereto

To determine whether a defendant is immune, courts consider the nature and purposes of sovereign immunity.

[32] **States** Nature and scope of immunity in general

The modern justification for sovereign immunity is to protect the public fisc.

[33] **States** Nature and scope of immunity in general

Like the separation of powers doctrine, sovereign immunity maintains equilibrium among the branches of government by honoring the allocation of responsibility for resolving disputes with the state.

[34] **Public Employment** In general; official immunity

States Nature and scope of immunity in general

States Official immunity

If a suit seeks relief that would control state action, sovereign immunity is implicated; in other words, government entities and officials are immunized from suits that seek to restrain their exercise of discretionary statutory or constitutional authority.

[35] **Attorneys and Legal Services** Privilege or immunity

States Particular Claims and Actions

Disciplinary proceeding brought by Texas Commission For Lawyer Discipline against assistant attorney general was not subject to sovereign immunity and thus did not deprive court of jurisdiction; Commission's petition targeted attorney's conduct personally, not in his official capacity, for alleged misrepresentations made in lawsuit against other states regarding their administration of presidential election, a judgment of professional misconduct against attorney would have no effect on the state, immunizing attorney from professional-misconduct proceedings would not protect the public from the costs and consequences of improvident government actions, and the disciplinary rules of professional conduct applied to all attorneys in the state and could be enforced only by the Commission. Tex. Gov't Code Ann. § 81.072(a).

[36] **Attorneys and Legal Services** Nature and Form in General

At issue in a disciplinary proceeding against an attorney is the appropriate interpretation of the Rules of Conduct and a factual determination of whether the attorney's conduct met or violated the Rules at issue. Tex. Gov't Code Ann. § 81.072(a).

[37] **Attorneys and Legal Services** Nature and purpose

Deterrence is a function of the disciplinary rules.

[38] **Attorneys and Legal Services** Purpose of proceedings in general

The purpose of an attorney disciplinary proceeding is to protect the public, maintain the integrity of the profession, and prevent reoccurrence.

***691** Appeal from the 368th Judicial District Court of Williamson County, Texas (TC# 22-0594-C368)

Attorneys and Law Firms

James C. Harrington, Austin, Civil - Amicus Curiae for Texas Lawyers and Lawyers Defending American Democracy.

Amanda Kates, Royce LeMoine, Austin, Michael Graham, for Appellant.

Christopher Hilton, Judd E. Stone II, for Appellee.

Before Rodriguez, C.J., Palafox, and Soto, JJ.

OPINION

YVONNE T. RODRIGUEZ, Chief Justice

In wake of the 2020 presidential election, the State of Texas attempted to sue several states for purported violations of the Electors Clause. 84 professional-misconduct grievances against the Texas-licensed attorneys on the pleadings followed. One such grievance was against First Assistant Attorney General, Brent Edward Webster. In this case arising from that complaint, the Commission for Lawyer Discipline (the Commission) appeals the trial court's grant of Webster's plea to the jurisdiction. We reverse. [1]

BACKGROUND

A. The attorney-discipline process in Texas

The Texas Supreme Court supervises the conduct of attorneys admitted to practice in Texas. TEX. GOV'T CODE ANN. § 81.072(a). To advance this power, the Texas Legislature enacted the State Bar Act, which, among other things, created the State Bar of Texas to aid the Texas Supreme Court in regulating the practice of law, including by overseeing attorney discipline. *See id.* §§ 81.001 *et seq.*

The Commission is a standing committee of the State Bar that administers the Texas attorney-discipline system. *Id.* § 81.076. The Commission also selects and oversees the Office of Chief Disciplinary Counsel (CDC), which represents the Commission in attorney-disciplinary litigation. *Id.* § 81.076(g). The CDC administers the State Bar's grievance procedure as outlined in the Texas Rules of Disciplinary Procedure. *Id.*

***692** Every attorney admitted to practice in Texas is subject to the Texas Disciplinary Rules of Professional Conduct and

Texas Rules of Disciplinary Procedure, both promulgated by the Texas Supreme Court. *Id.* §§ 81.072(b), (d); *see id.* § 81.071 ("Each attorney admitted to practice in this state ... is subject to the disciplinary and disability jurisdiction of the supreme court and the Commission for Lawyer Discipline, a committee of the state bar."). These rules define proper professional conduct and provide the mechanism by which grievances are processed, investigated, and prosecuted. Commission for Lawyer Discipline Annual Report, State Bar of Texas, Overview of the Attorney Discipline Process 13 (2022), https://www.texasbar.com/AM/Template.cfm?Section=Content_Folders&ContentID=57786&Template=/CM/ContentDisplay.cfm.

Anyone may file a grievance against a Texas attorney by filing a written form with the CDC, which initiates the attorney-disciplinary process. TEX. RULES DISCIPLINARY P. 1.06(R); *Comm'n for Lawyer Discipline v. Stern*, 355 S.W.3d 129, 134 (Tex. App.—Houston [1st Dist.] 2011, pet. denied). Upon receiving a grievance, the CDC must first classify it as either a complaint or an inquiry. TEX. RULES DISCIPLINARY P. 2.10. If the grievance alleges professional misconduct on its face, it is classified as a complaint and sent to the lawyer for a response. *Id.*; TEX. RULES DISCIPLINARY P. 106(G). If not—*i.e.*, if the grievance alleges conduct that, even if true, does not constitute professional conduct—it is classified as an inquiry and dismissed. TEX. RULES DISCIPLINARY P. 2.10. However, the person who filed the grievance may, within 30 days, appeal the CDC's classification decision to the Board of Disciplinary Appeals (BODA). *Id.* If BODA reverses the classification decision, the grievance is sent back to the CDC, where it is processed as a complaint. TEX. RULES DISCIPLINARY P. 7.08(C).

Once a grievance is classified as a complaint, the respondent attorney has 30 days from its receipt to respond to the allegations. TEX. RULES DISCIPLINARY P. 2.10. The CDC must then determine whether there is just cause to believe professional misconduct has occurred and, if so, proceed with the complaint within 60 days of the attorney's response deadline. TEX. RULES DISCIPLINARY P. 2.12. As part of its investigation, the CDC, with the Committee chair's approval, may convene an investigatory panel and issue subpoenas to determine whether just cause exists. *Id.*

If the CDC determines there is no just cause to proceed on a complaint, the case is presented to a summary disposition panel, which then makes an independent determination regarding just cause. TEX. RULES DISCIPLINARY P. 2.13. However, if the CDC (or the summary disposition panel) determines there is just cause, the CDC notifies the attorney of conduct it contends violates the disciplinary rules and the purported rule violations. TEX. RULES DISCIPLINARY P. 2.14(D). The attorney has 20 days to notify the CDC whether he elects to have his case heard before an evidentiary panel of the grievance committee or by a district court, with or without a jury. TEX. RULES DISCIPLINARY P. 2.15. If the attorney elects the district court option, the Commission must file its suit within 60 days of his election. TEX. RULES DISCIPLINARY P. 3.01. The Commission bears the burden to prove the allegations of professional misconduct by a preponderance of the evidence. TEX. RULES DISCIPLINARY P. 3.08.

B. Texas v. Pennsylvania

On December 7, 2020, the State of Texas attempted to invoke the original jurisdiction of the United States Supreme Court by suing the Commonwealth of Pennsylvania and the States of Georgia, Michigan, and Wisconsin. Counsel for Texas included ***693** Webster, Attorney General Ken Paxton (as counsel of record), and Lawrence Joseph, Special Counsel to the Attorney General of Texas. Specifically, the State of Texas filed:

- a Motion for Leave to File a Bill of Complaint, [2] attaching the Bill of Complaint and Brief in Support of Motion for Leave;
- a Motion for Expedited Consideration of the same;
- a Motion for Preliminary Injunction and Temporary Restraining Order or, Alternatively, for Stay and Administrative Stay;
- a Motion to Enlarge Word-Count Limit and Reply in Support of Motion for Leave to File Bill of Complaint; and
- a Reply in Support of Motion for Preliminary Injunction and Temporary Restraining Order or, Alternatively, for Stay and Administrative Stay.

First, Texas alleged that changes made by non-legislative actors to the defendant States' election procedures in light of the COVID-19 pandemic violated the Constitution's Electors Clause. U.S. CONST. art. II, § 1, cl. 2. Second, Texas claimed these alterations created different voting standards within the States, which violated the "one-person, one-vote"

principle enshrined in the Equal Protection Clause. U.S. CONST. amend. XIV, § 1. Finally, Texas alleged these alterations rendered election procedures fundamentally unfair in violation of the Due Process Clause. *Id.*

Texas argued it had standing to bring these claims because the defendant States purportedly injured two of Texas's interests: (1) its interest in who is elected as Vice President and thus can break Senate ties; and (2) its interest as *parens patriae* to protect the interest of its own electors. However, on December 11, 2020, the Supreme Court denied its motion for leave to file a bill of complaint for lack of standing, concluding "Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections" and dismissing all pending motions as moot. *Texas v. Pennsylvania*, —— U.S. ——, 141 S. Ct. 1230, 208 L.Ed.2d 487 (2020).

C. The grievance against Webster

After Texas filed *Texas v. Pennsylvania*, the CDC received 81 grievances against Paxton and three against Webster. All but four—three against Paxton and one against Webster—were ultimately dismissed. This case arises from the one remaining grievance against Webster.

The CDC received that grievance on March 11, 2021, from Brynne VanHettinga, an inactive Texas-licensed attorney. VanHettinga alleged the *Texas v. Pennsylvania* pleadings included, among other things, "manufactured 'evidence,' " "specious legal arguments," "unsupported factual assertions," "unfounded claims," and "conspiracy theories," and that Webster "violated [his] oath[ ] as [an] attorney[ ]" and a public servant. VanHettinga asserted Webster's conduct violated the Texas Disciplinary Rules of Professional Conduct, including Rule 3.01 (frivolous lawsuits and false statements), 3.03(a)(1) (false statement of material fact or law to a tribunal), 8.04(a)(3) (conduct involving dishonesty, fraud, deceit, or misrepresentation), and 4.01 cmt. 5 (knowingly assisting a client in the commission of a criminal or fraudulent act).

***694** The CDC initially classified VanHettinga's grievance as an inquiry and dismissed it as such. However, VanHettinga appealed the classification to BODA, which granted the appeal and reversed the initial classification, stating that the grievance alleged a possible violation of Rules 3.01 and 3.03. BODA thus returned VanHettinga's grievance to the CDC as a complaint for investigation and determination of just cause. The CDC notified Webster and requested his response. Webster responded,[3] outlining the circumstances leading up to and legal theories behind the lawsuit, challenging VanHettinga's allegations, and raising defenses, including the separation of powers doctrine. Webster also submitted a supplemental response after VanHettinga amended her initial grievance.

The CDC then set the complaints against Paxton and Webster for a joint hearing before an investigatory-hearing panel in Travis County. Webster filed a motion to dismiss or alternatively to transfer venue of the panel and a motion to recuse panel members; however, the grievance committee chair denied the motions. On January 5, 2022, the grievance committee held the investigatory hearing, at which it heard testimony from the complainants. Webster did not appear or provide testimony, but he was represented by counsel who examined VanHettinga and offered argument on his behalf. Two days later, the CDC informed Webster that "[b]ased on the evidence," the investigatory panel "believes there is credible evidence to support a finding of Professional Misconduct for a violation of Rule[ ] 8.04(a)(3)" and "recommends a sanction of Public Reprimand." The CDC offered Webster the opportunity to accept the recommended sanction but stated if he declined, the Commission would initiate a disciplinary action against him before either an evidentiary panel or trial court. Webster rejected the proposed sanction and elected to have his disciplinary action heard in district court.

On May 6, 2022, the CDC filed the Commission's Original Disciplinary Petition against Webster in Williamson County district court. It alleged Webster made the following six misrepresentations in the *Texas v. Pennsylvania* pleadings:

1. an outcome determinative number of votes were tied to unregistered voters;
2. votes were switched by a glitch with Dominion voting machines;
3. state actors "unconstitutionally revised their state's election statutes;"
4. "illegal votes" had been cast that affected the outcome of the election;
5. Texas had "uncovered substantial evidence ... that raises serious doubts as to the integrity of the election process in Defendant States;" and

6. Texas had standing to bring these claims before the United States Supreme Court.

The Commission claimed Webster's "representations were dishonest" and "were not supported by any charge, indictment, judicial finding, and/or credible or admissible evidence," and Webster "failed to disclose to the Court that some of his representations and allegations had already been adjudicated and/or dismissed in a court of law." As a result, the Commission contended the defendants "were required to expend time, money, and resources to respond to the misrepresentations and false statements contained in these pleadings and injunction requests even though they had previously certified their presidential electors based on the election results prior to the filing of [Webster's] pleadings." Accordingly, the Commission ***695** alleged Webster's actions amounted to a violation of Rule 8.04(a)(3): "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

Webster responded by filing his answer, defenses, and plea to the jurisdiction. His plea to the jurisdiction sought dismissal on two grounds: (1) as a violation of the separation of powers doctrine; and (2) sovereign immunity. The Commission filed a response, and the court held a hearing on the plea. The court granted Webster's plea, stating "the separation of powers doctrine deprives this court of subject-matter jurisdiction," and dismissing the Commission's claims with prejudice.[4] The Commission appealed.

STANDARD OF REVIEW

[1] **[2]** **[3]** **[4]** A separation of powers doctrine violation defeats a court's subject-matter jurisdiction, as does sovereign immunity. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004) (sovereign immunity); *Tex. Ass'n of Bus. v. Tex. Air Ctr. Bd.*, 852 S.W.2d 440, 443–44 (Tex. 1993) (separation of powers). A defendant may challenge the court's subject-matter jurisdiction through a plea to the jurisdiction. *Flores v. Tex. Dep't of Criminal Justice*, 634 S.W.3d 440, 450 (Tex. App.—El Paso 2021, no pet.) (citing *Miranda*, 133 S.W.3d at 225–26). The plea can attack both the plaintiff's allegations in the pleadings as well as the existence of jurisdictional facts by attaching evidence to the plea. *Id.* (citing *Miranda*, 133 S.W.3d at 226–27). Here, Webster did not challenge the existence of jurisdictional facts, so we review his plea as a matter of law. *Flores*, 634 S.W.3d at 450 (citing *City of El Paso v. Heinrich*, 284 S.W.3d 366, 378 (Tex. 2009)).

[5] **[6]** In reviewing a plea to the jurisdiction, we liberally construe the pleadings in the plaintiff's favor. *Heinrich*, 284 S.W.3d at 378 (citation omitted). We review a trial court's ruling on a plea to the jurisdiction de novo. *Miranda*, 133 S.W.3d at 226 (Tex. 2004).

ANALYSIS

A. The Commission's jurisdictional allegations

[7] Because Webster's plea to the jurisdiction challenges the pleadings, we must first determine whether the Commission alleged facts that affirmatively demonstrate the court's jurisdiction. *State v. Holland*, 221 S.W.3d 639, 642 (Tex. 2007). The Commission's petition states "[t]he cause of action and the relief sought in this case are within the jurisdictional requirements of this Honorable Court." It specifies the Commission is suing Webster under the State Bar Act, the Disciplinary Rules of Professional Conduct, and the Texas Rules of Disciplinary Procedure, and states Webster's "acts and omissions ... as hereinafter alleged, constitute professional misconduct." The petition then describes relevant factual background to *Texas v. Pennsylvania* before outlining the six alleged misrepresentations listed above the Commission contends violate Rule 8.04(a)(3). The petition also states venue is proper in Williamson County because that is Webster's county of residence.

Consistent with Webster's election, the Commission brought its suit in a district court in his county of residence. TEX. RULES DISCIPLINARY P. 2.15, 3.03. Its petition meets all requirements of a disciplinary petition filed in a district court, including "[a] description of the acts and conduct that gave rise to the alleged Professional Misconduct" and "[a] listing of the specific ***696** rules of the Texas Disciplinary Rules of Professional Conduct allegedly violated by the acts or conduct." *See* TEX. RULES DISCIPLINARY P. 3.01 (listing requirements of a disciplinary petition filed in district court). Construing the pleadings in the Commission's favor, we conclude the Commission has alleged facts demonstrating the court's jurisdiction over the case under the Texas Rules of Disciplinary Procedure. *See* TEX. GOV'T CODE ANN. § 81.071 ("Each attorney admitted to practice in this state ...

is subject to the disciplinary and disability jurisdiction of the supreme court and the Commission for Lawyer Discipline, a committee of the state bar.").

B. Separation of powers doctrine

Webster contends the Commission's disciplinary proceeding violates the separation of powers doctrine because the Commission—a statutorily created agent of the judicial branch—has invaded the exclusive power of the Attorney General—part of the executive branch—to represent the State in civil litigation. The question presented is whether the Commission's disciplinary proceeding against Webster unduly interferes with the Attorney General's exercise of its constitutionally assigned core powers.

Article II, section 1 of the Texas constitution outlines the separation of powers doctrine:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: those which are Legislative to one, those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

[8] **[9]** **[10]** **[11]** The three branches of government do not, however, "operate with absolute independence," and Texas courts "have instead 'long held that some degree of interdependence and reciprocity is subsumed within the separation of powers principle.' " *Martinez v. State*, 503 S.W.3d 728, 734 (Tex. App.—El Paso 2016, pet. ref'd) (quoting *Tex. Comm'n on Env't Quality v. Abbott*, 311 S.W.3d 663, 672 (Tex. App.—Austin 2010, pet. denied)). The "proper interpretation" of the separation of powers doctrine is therefore "dictated by its context." *Coates v. Windham*, 613 S.W.2d 572, 576 (Tex. App.—Austin 1981, no writ). While it "prohibits a transfer of a whole mass of powers from one department to another and ... a person of one branch from exercising a power historically or inherently belonging to another department," it cannot be interpreted to "prevent[ ] cooperation or coordination between two or more branches of government, hindering altogether any effective governmental action." *Id.* Courts take a "flexible approach" in considering whether a separation of powers violation has occurred, accepting some degree of "commingl[ing] the functions of the Branches" so long as the challenged act "pose[s] no danger of either aggrandizement or encroachment." *Martinez*, 503 S.W.3d at 734 (quoting *Abbott*, 311 S.W.3d at 671–72).

[12] A separation of powers violation happens in one of two ways. *Id.* The first is when one branch "assumes, or is delegated, to whatever degree, a power that is more 'properly attached' to another branch." *Abbott*, 311 S.W.3d at 672 (quoting *Jones v. State*, 803 S.W.2d 712, 715–16 (Tex. Crim. App. 1991) (en banc)). The second is "when one branch unduly interferes with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers." *Id.* ***697** (quoting *Jones*, 803 S.W.2d at 715–16). Only the second is at issue here.

[13] To determine whether an undue-interference separation of powers violation has occurred, courts examine the scope of constitutional powers held by the first governmental actor and then consider the impact of the first branch's conduct on the second branch's ability to exercise its own constitutionally derived powers. *Id.* (citing *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex. Crim. App. 1990)) (en banc). Here, we thus consider the scope of the Commission's constitutional powers as an agent of the judiciary established by the legislature and the impact, if any, of its disciplinary proceeding on the Attorney General office's ability to effectively exercise its constitutional powers as a part of the executive branch.

[14] **[15]** **[16]** The judicial branch has the "inherent power to regulate the practice of law in Texas for the benefit and protection of the justice system and the people as a whole." *In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768, 769 (Tex. 1999). This power is derived from Article II, Section I of the Texas Constitution, which grants the Supreme Court of Texas the authority to regulate judicial affairs and direct the administration of justice in the judiciary. *Id.* (citing *The State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994)). That includes the Court's "obligation" to regulate the admission and practice of Texas attorneys because these activities are "inextricably intertwined with

the administration of justice." *Gomez*, 891 S.W.2d at 245. Indeed, "the Court *must* have the power to regulate these activities in order to fulfill its constitutional role." *Id.* (emphasis added). The Legislature acknowledged the Court's "fundamental authority" to regulate the practice of law by enacting the State Bar Act to aid the Court in carrying out this inherent power. *Id.* (citing TEX. GOV'T CODE ANN. § 81.011(b)); *see* TEX. GOV'T CODE ANN. §§ 81.024(a) (clarifying the Court's supervisory role over the State Bar), .076 (outlining the Commission's duties and composition). The Commission's duties, described above, include administering the Texas attorney-discipline system pursuant to statutory and Court rules. TEX. GOV'T CODE ANN. § 81.076

[17] **[18]** **[19]** The Attorney General is a member of the executive department and has the constitutional authority to "represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party."[5] TEX. CONST. art. IV, § 22. His "primary duties are to render legal advice in opinions to various political agencies and to represent the State in civil litigation." *Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001) (citing TEX. CONST. art. IV, §§ 1, 22; TEX. GOV'T CODE ANN. § 402.021). As the State's chief legal officer, the Attorney General has "broad discretionary power in carrying out his responsibility to represent the State." *Id.* (citing *Terrazas v. Ramirez*, 829 S.W.2d 712, 722 (Tex. 1991) (orig. proceeding)). However, "the Attorney General can only act within the limits of the Texas Constitution and statutes, and courts cannot enlarge the Attorney General's powers." *Id.* (citing *Terrazas*, 829 S.W.2d at 735 (Cornyn, J., concurring)).

[20] Webster urges that the Commission's disciplinary proceeding unduly interferes with the Attorney General's exercise of its core powers, namely its exclusive control over representing the State in civil appellate litigation. He insists the disciplinary action is "a thinly veiled effort to ***698** second-guess" the Attorney General's decision to file *Texas v. Pennsylvania* (though he offers no evidence of this purported pretext). Because the Attorney General has "broad discretionary power" in representing the State's interests in civil litigation, Webster contends the Commission's disciplinary proceeding represents "a profound threat to the separation of powers."

[21] But nowhere in the Commission's disciplinary proceeding does it challenge the Attorney General's decision to *file* the suit. Instead, it points directly to the allegations within the *Texas v. Pennsylvania* pleadings it contends violate Rule 8.04(a)(3). Webster's conclusory argument otherwise is not supported by the pleadings, which we must construe liberally in the Commission's favor. *Heinrich*, 284 S.W.3d at 378 (citation omitted). The authorities Webster cites related to the Attorney General's decision to exercise his judgment in *bringing* a suit are thus inapplicable. *See, e.g.*, *Charles Scribner's Sons v. Marrs*, 114 Tex. 11, 262 S.W. 722, 727 (1924) (noting the Attorney General alone has the duty to exercise "judgment and discretion" in bringing suits on behalf of the State); *Lewright v. Bell*, 94 Tex. 556, 63 S.W. 623, 623–24 (1901) (concluding courts cannot compel Attorney General to initiate suit, as that decision involves his professional judgment and discretion).

[22] **[23]** **[24]** We are also not persuaded by Webster's argument that the Attorney General's "broad discretion" to represent the State in civil litigation renders the Commission's disciplinary proceeding undue interference with his exercise of core powers. This "broad discretion" is not unlimited, as "the Attorney General can only act within the limits of the Texas Constitution and statutes." *Perry*, 67 S.W.3d at 92. And though the Texas Disciplinary Rules of Professional Conduct are not statutory, they "should be treated like statutes." *O'Quinn v. State Bar of Tex.*, 763 S.W.2d 397, 399 (Tex. 1988). Thus, this "broad discretion" is plainly limited by adherence to the disciplinary rules. Indeed, the Attorney General must also comply with other aspects of the State Bar Act, including its membership dues requirement. *See Osborne v. Paxton*, No. 03-15-00374-CV, 2016 WL 3240211, at *3 n.7 (Tex. App.—Austin June 9, 2016, no pet.) (mem. op.) ("[R]equiring Paxton to pay dues to maintain his law license does not amount to the State Bar exercising authority over the office of the Attorney General."). The same limitation on the Attorney General applies to his assistants. *See Cofer*, 754 S.W.2d at 124. No amount of discretion in representing the State in civil litigation would permit an executive-branch attorney to bypass the Commission's disciplinary process if he engaged in alleged professional misconduct.

Finally, Webster devotes significant briefing to defending the veracity of his alleged misrepresentations. However, this discussion concerns the merits of the disciplinary action against him; it has no bearing on the jurisdictional question before us and would be inappropriate to address at this stage.

See Amarillo v. R.R. Comm'n of Tex., 511 S.W.3d 787, 796 (Tex. App.—El Paso 2016, no pet.) ("The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties.").

[25] Webster has not shown how the Commission's disciplinary proceeding unduly interferes with the executive function of the Attorney General's office. His argument appears to be that to effectively exercise the Attorney General's core powers, the Attorney General and his assistants must be exempt from the lawfully created process addressing attorney conduct that allegedly violates professional disciplinary rules. That cannot be. Though Webster insists he and other executive-branch attorneys are still subject to professional discipline through a court's inherent sanction ***699** power and "external checks" through political and legislative processes, those mechanisms do not preclude the Commission's authority to administer the attorney-discipline system in the state; the processes are not mutually exclusive. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT, Preamble: Scope ¶ 15 ("Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty."). Indeed, the Texas Supreme Court has endorsed the uncontroversial principle that "all attorneys" are subject to the professional disciplinary processes, procedures, and standards of review to "ensure ethical lapses are disciplined." *Brewer v. Lennox Hearth Products, LLC*, 601 S.W. 3d 704, 723 n.76 (Tex. 2020). Exempting an entire category of attorneys from the State's disciplinary rules would be contrary to precedent, both in Texas[6] and elsewhere.[7] *See* *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982) ("States traditionally have exercised extensive control over the professional conduct of attorneys. The ultimate objective of such control is the protection of the public, the purification of the bar and prevention of recurrence." (cleaned up)).

In sum, the Commission's proceeding "pose[s] no danger of either aggrandizement or encroachment" on the executive branch. *Martinez*, 503 S.W.3d at 734. Webster is not exempt from the judiciary's constitutional obligation to regulate the practice of Texas attorneys simply because he serves in the Attorney General's office.[8] The trial court's conclusion that the separation of powers doctrine defeated subject-matter jurisdiction was thus error, and the Commission's issue on appeal is sustained.

C. Sovereign immunity

[26] Webster also contends the Commission's suit is barred by sovereign immunity because he appeared on the *Texas v. Pennsylvania* filings in his official capacity so the State is the real party in interest.[9] The Commission responds that ***700** its disciplinary action is against Webster personally as a Texas-licensed attorney, not in his official capacity as First Assistant Attorney General, and in any event, a disciplinary proceeding against a Texas-licensed attorney is not a suit against the State subject to sovereign immunity. The Commission also argues sovereign immunity is not implicated because its proceeding targets Webster's license to practice law, and that is not an interest sovereign immunity protects, even among executive-branch attorneys.

[27] **[28]** **[29]** **[30]** Texas has long recognized the doctrine of sovereign immunity: that "no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent." *Hosner v. DeYoung*, 1 Tex. 764, 769 (1847). Absent an express waiver of sovereign immunity, the State and its agencies are generally immune from suit. *Paxton v. Waller Cnty.*, 620 S.W.3d 843, 847 (Tex. App.—Amarillo 2021, pet. denied) (citing *Tex. Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 388 (Tex. 2011)). Sovereign immunity likewise bars suits against public officials sued in their official capacities because the State is effectively the real party in interest such that its agent "enjoy[s] the sovereign's immunity 'derivatively.' " *GTECH Corp. v. Steele*, 549 S.W.3d 768, 784 (Tex. App.—Austin 2018), *aff'd sub nom.* *Nettles v. GTECH Corp.*, 606 S.W.3d 726 (Tex. 2020) (citing *Franka v. Velasquez*, 332 S.W.3d 367, 382–83 (Tex. 2011)). Regardless of whether a suit is brought explicitly against a public official in his official capacity, "it is the substance of the claims and relief sought that ultimately determine whether the sovereign is a real party in interest and its immunity thereby implicated." *Id.* at 785. But sovereign immunity comes into play only if Webster has met an initial burden of establishing that the Commission's claims actually implicate that immunity. *See id.* at 774.

[31] **[32]** **[33]** **[34]** To determine whether a defendant is immune, courts consider "the 'nature and purposes' of sovereign immunity." *Univ. of the Incarnate Word v. Redus*, 518 S.W.3d 905, 911 (Tex. 2017) (quoting *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 432 (Tex. 2016)). "[T]he stated reasons for immunity have

changed over time," evolving from "the English legal fiction that the King can do no wrong[.]" *Wasson Interests*, 489 S.W.3d at 431 (cleaned up). The "modern justification" for sovereign immunity is to "protect[ ] the public fisc." *Heinrich*, 284 S.W.3d at 375; *see also* *Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117, 123 (Tex. 2015) ("Sovereign immunity ... was designed to guard against the 'unforeseen expenditures' associated with the government's defending lawsuits and paying judgments that could hamper government functions by diverting funds from their allocated purposes." (internal quotations omitted)). Like the separation of powers doctrine, sovereign immunity also "maintains equilibrium among the branches of government by honoring 'the allocation of responsibility' for resolving disputes with the state." *Rosenberg Dev. Corp. v. Imperial Performing Arts, Inc.*, 571 S.W.3d 738, 740 (Tex. 2019) (quoting *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 416 (Tex. 1997) (Hecht, J., concurring)). Thus, if a suit "seeks relief that would control state action," sovereign immunity is implicated. *GTECH Corp.*, 549 S.W.3d at 786 (citing ***701** *Ex parte Springsteen*, 506 S.W.3d 789, 797 (Tex. App.—Austin 2016, pet. denied)). In other words, government entities and officials are immunized from suits that seek to restrain their "exercise of discretionary statutory or constitutional authority." *Creedmoor-Maha Water Supply Corp. v. Tex. Comm'n on Env't Quality*, 307 S.W.3d 505, 514 (Tex. App.—Austin 2010, no pet.).

[35] **[36]** The Commission's disciplinary proceeding against Webster is not subject to sovereign immunity for several reasons. First, the Commission's claims clarify the State is not the real party in interest. Even ignoring the form of the pleadings, the substance of the Commission's petition targets Webster personally, not in his official capacity. For example, the Commission seeks "a judgment of professional misconduct" against Webster, something that affects only his license to practice law in Texas and has no effect on the State. Though Webster contends he could have filed the pleadings in *Texas v. Pennsylvania* only as a member of the Attorney General's office, again, it is not the filing of that suit that the Commission's disciplinary proceeding targets but specific alleged misrepresentations in its pleadings. Contrary to Webster's assertion that the Commission's suit "arises from the decision of the Attorney General and First Assistant to file the *Texas v. Pennsylvania* lawsuit and from their assessment of the facts, evidence, and law," at issue in a disciplinary proceeding is "the appropriate interpretation of the Rules of Conduct and a factual determination of whether [Webster's] conduct met or violated the Rules at issue." *Hawkins v. Comm'n for Lawyer Discipline*, 988 S.W.2d 927, 936 (Tex. App.—El Paso 1999, pet. denied); *cf. Tirrez v. Comm'n for Lawyer Discipline*, No. 03-16-00318-CV, 2018 WL 454723, at *3 (Tex. App.—Austin Jan. 12, 2018, pet. denied) ("Disbarment, designed to protect the public, is a punishment or penalty imposed *on the lawyer*." (quoting *In re Ruffalo*, 390 U.S. 544, 550, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) (emphasis added))). Because the focus in this suit is squarely on Webster's alleged misconduct—not the State—it is not a suit subject to sovereign immunity.

Webster relatedly contends that "sanctions meted out by a court against attorneys for conduct before the court are in no sense a 'suit' " that would be subject to sovereign immunity because "they are a component of a court's exercise of its 'inherent powers that aid the exercise of their jurisdiction, facilitate the administration of justice, and preserve the independence and integrity of the judicial system.' " This logic supports the conclusion that professional misconduct proceedings are the same—*i.e.*, not the type of "suit" subject to claims of sovereign immunity—particularly given that the judiciary's "inherent powers" Webster mentions arise from the same constitutional source.

[37] Further, the Commission does not pursue relief that would "control state action." *GTECH Corp.*, 549 S.W.3d at 786 (citing *Ex parte Springsteen*, 506 S.W.3d at 797). In addition to seeking "a judgment of professional misconduct be entered against [Webster]," the Commission requests "an appropriate sanction" for the violation. In other words, the Commission seeks a penalty against Webster consistent with the guiding rules and principles of the Rules of Disciplinary Procedure. *See* TEX. RULES DISCIPLINARY P. 15.05(A) (discussing appropriate sanctions in cases involving dishonesty, fraud, deceit, or misrepresentation to a court or another, ranging from private reprimand to disbarment). Webster urges otherwise, contending that by threatening sanctions, "the State Bar's lawsuit against [Webster] aims to deter the Attorney General and his subordinates from instituting high-profile and contentious ***702** lawsuits of which the State Bar may disapprove." To be sure, deterrence is certainly a function of the disciplinary rules. *See* *State Bar of Tex. v. Kilpatrick*, 874 S.W.2d 656, 659 (Tex. 1994) ("In determining the appropriate sanction for attorney misconduct, a trial court must consider ... the deterrent effect on others[.]" (citing TEX.

RULES DISCIPLINARY P. 3.10 (1992))). However, it is not filing "high-profile and contentious lawsuits" the rules seek to deter but the alleged misconduct—here, "conduct involving dishonesty, fraud, deceit or misrepresentation." TEX. DISCIPLINARY RULES PROF'L CONDUCT 8(a)(3). In other words, the Commission's proceeding seeks not to "control state action" but to ensure Texas-licensed attorneys, including those serving in the executive department, adhere to the disciplinary rules of professional conduct applicable to "all attorneys." *See Brewer*, 601 S.W.3d at 723 n.76.

[38] Nor does this case fit within the modern justification for sovereign immunity: protecting the public from the "costs and consequences" of improvident government actions. *Rosenberg Dev. Corp.*, 571 S.W.3d at 741 (quoting *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006)). The purpose of an attorney disciplinary proceeding is to protect the public, maintain the integrity of the profession, and prevent reoccurrence. *Middlesex Cnty. Ethics Comm.*, 457 U.S. at 434, 102 S.Ct. 2515. Immunizing Webster from professional-misconduct proceedings in no way furthers the rationale for sovereign immunity, as no civil damages threaten the State.

Finally, Webster argues immunizing executive-branch attorneys from disciplinary proceedings is harmless because they are subject to checks on their ethical obligations in other ways: through an *ultra vires* suit, criminal actions, or a court's inherent authority to impose sanctions. However, the Disciplinary Rules of Professional Conduct contemplate and reject the same principle; the Rules may be enforced only through "the administration of a disciplinary authority." TEX. DISCIPLINARY RULES PROF'L CONDUCT, Preamble: Scope ¶ 15. That attorneys have ethical obligations that may be policed elsewhere is thus inapposite, as no other mechanism can regulate Webster's Texas-law license. Indeed, courts have offered the availability of a professional-discipline proceeding as a counterbalance measure to deter misconduct when civil suits must otherwise be dismissed due to qualified immunity or litigation privilege. *In re Discipline of Arabia*, 137 Nev. 568, 495 P.3d 1103, 1110 (2021) (collecting cases); *see also Imbler v. Pachtman*, 424 U.S. 409, 428–29, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) (emphasizing prosecutors are still subject to professional discipline even though they are immune from Section 1983 suits, thus "the public" is not "powerless to deter misconduct").

Because sovereign immunity is inapplicable to this proceeding, Webster's argument that it defeats subject-matter jurisdiction fails. [10]

*703 CONCLUSION

The Commission's jurisdictional allegations affirmatively demonstrate the trial court's jurisdiction. Because Webster is not exempt from jurisdiction by virtue of his position as First Assistant Attorney General, we reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

Soto, J., concurring without separate opinion

All Citations

676 S.W.3d 687

Footnotes

1 This case was transferred pursuant to the Texas Supreme Court's docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001. We follow the precedent of the Third Court of Appeals to the extent they might conflict with our own. *See* TEX. R. APP. P. 41.3.

2 The Supreme Court's procedural rules require that any party seeking to invoke the Court's Article III original jurisdiction must first file a motion for leave to file before its initial pleading. U.S. Sup. Ct. RR. 17.1, .3.

3 Given the similarities in complaints, Webster filed a joint response with Paxton.

4 The State of Texas also filed a petition in intervention, which the Commission moved to strike. The trial court did not rule on the State's motion before granting Webster's plea and dismissing the Commission's claims.

5 The Attorney General may act through his assistants. *Pub. Util. Comm'n of Tex. v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988). If he is "absent or unable to act," the First Assistant Attorney General (Webster's position) performs his duties that are prescribed by law. TEX. GOV'T CODE ANN. § 402.001(a).

6 *See, e.g.*, Order of the Supreme Court of Texas, *In re Daniel C. Morales*, Misc. Docket No. 03-9205 (Dec. 15, 2003) (accepting former Attorney General's resignation in lieu of discipline); *State ex rel. Eidson v. Edwards*, 793 S.W.2d 1, 7 (Tex. Crim. App. 1990) (en banc) ("[A] prosecutor who violates ethical rules is subject to the disciplining authority of the State Bar like any other attorney.").

7 *See, e.g., In re Kline*, 298 Kan. 96, 311 P.3d 321, 393, 399 (2013) (suspending former Kansas Attorney General from practicing law in state for professional misconduct); *Massameno v. Statewide Grievance Committee*, 234 Conn. 539, 663 A.2d 317, 337 (1995) (concluding that the separation of powers doctrine does not alter the obligation and right of judicial branch to investigate and discipline prosecutors for professional misconduct). Indeed, states have long carried out attorney-misconduct proceedings even in cases involving a high-ranking federal government official. *In re Jeffrey B. Clark*, No's. 22-MC-0096, 22-MC-0117, 23-MC-0007, 2023 WL 3884119, at *14 n.13 (D.D.C. June 8, 2023) (mem. op.) (collecting cases, including *Neal v. Clinton*, No. CIV 2000-5677, 2001 WL 34355768, at *3 (Ark. App. Jan. 19, 2001) (unpublished) and *In re Nixon*, 53 A.D.2d 178, 182, 385 N.Y.S.2d 305 (N.Y. App. Div. 1976)).

8 To the extent Webster attempts to argue the political-question aspect of the separation of powers doctrine renders this case nonjusticiable, that argument fails for the same reasons; the Commission's proceeding does not inappropriately encroach on the executive branch's constitutional authority over the representation of the State in civil litigation. *See Van Dorn Preston v. M1 Support Services, L.P.*, 642 S.W.3d 452, 455 (Tex. 2022) (citing *American K-9 Detection Servs. v. Freeman*, 556 S.W.3d 246 (Tex. 2018)).

9 The trial court did not explicitly rule on Webster's sovereign immunity issue, nor did the Commission raise it in its appellate brief. However, because Webster contends he is entitled to sovereign immunity and the argument is jurisdictional, we must consider it here. *See Dallas Metrocare Services v. Juarez*, 420 S.W.3d 39, 41 (Tex. 2013) (citing *Rusk State Hospital v. Black*, 392 S.W.3d 88, 94 (Tex. 2012)) ("[A]n appellate court must consider all of a defendant's immunity arguments, whether the governmental entity raised other jurisdictional arguments in the trial court or none at all.").

10 In a footnote, Webster argues that even if the Commission sued him in his individual capacity, he would still be immune from suit through official immunity because "filing a lawsuit on behalf of the State in appellate courts is a discretionary duty" that he did "within the scope of his official duties" and based on his "good-faith belief" in the "legal arguments and factual allegations at the time the lawsuit was filed." He points to no authority that would support exempting executive-branch attorneys from the attorney-disciplinary process on this basis nor does he address how official immunity applies to the Commission's claims against him—for alleged misrepresentations in court pleadings, not "filing a lawsuit." He also fails to explain how the purpose of official immunity would be served in a professional misconduct proceeding. *See Kassen v. Hatley*, 887 S.W.2d 4, 8 (Tex. 1994) (noting the purpose of official immunity is to insulate government function from "the harassment of litigation, not to protect erring officials" and to free public officials exercising their duties from "fear of damage suits"). Official immunity also does not bar the Commission's suit against Webster.

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CAUSE NO. 22-0594-C368

COMMISSION FOR LAWYER DISCIPLINE, *Plaintiff,*	§	IN THE DISTRICT COURT
v.	§	OF WILLIAMSON COUNTY, TEXAS
BRENT EDWARD WEBSTER; 20211679, *Defendant.*	§	368TH JUDICIAL DISTRICT

RESPONDENT'S ANSWER, DEFENSES, AND PLEA TO THE JURISDICTION

In December 2020, Attorney General Ken Paxton and his Assistant Attorneys General, on behalf of the State of Texas, filed with the U.S. Supreme Court a motion for leave to challenge the constitutionality of presidential election procedures in four states. Almost half the union and over 100 members of Congress joined Texas's lawsuit in some capacity. The Supreme Court eventually denied Texas's motion. *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020).

Right after, the Attorney General's political opponents launched a coordinated attack against him and his First Assistant Attorney General, Brent Webster, through the Texas State Bar . Webster was appointed to his post in October 2020 and he serves as Attorney General Paxton's second-in-command. The First Assistant's role is defined by statute: "If the attorney general is absent or unable to act, the attorney general's first office assistant shall perform the duties of the attorney general that are prescribed by law." Tex. Gov't Code § 402.001(a)

By pursuing this case against Attorney General Paxton and First Assistant Attorney General Webster, The State Bar is subverting its limited commission to protect clients and other administrative responsibilities, in service of signaling its ideological opposition to the lawsuit. The Bar assembled an investigatory panel comprised of six unelected lawyers and activists from Travis County—despite the Commission's more recent acknowledgement that this matter properly

belongs in Williamson County. As a group, the panel donated thousands of dollars to federal, state, and local candidates and causes opposed to Attorney General Paxton and his staff's work. What's more, members of the panel voted consistently in Democratic primaries for over a decade. Several have maintained highly partisan social media accounts hostile to Attorney General Paxton's office.

Then, the panel passed responsibility for Mr. Webster's political prosecution to the Commission for Lawyer Discipline. Reflective of their political agenda, the Commission filed this suit just a few weeks before Attorney General Paxton's primary runoff election—*a year and half after the events giving rise to this dispute occurred.* And it wasn't enough for the Commission to attack only the public officeholder, who is the subject of similar litigation in Collin County. Rather, in an effort to chill lawyers' willingness to serve under politicians whom the Bar opposes, they expanded their scope to strike at the official's top Assistant Attorney General, who "operates under the direct supervision of the Attorney General and exercises no independent executive power." Christina J. Hung, 7 Tex. Jur. 3d Att'y Gen. § 4 (3d ed. 2022) (citing *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 924 (Tex. Crim. App. 1994)).

The Bar's weaponized partisanship has already been the subject of high-profile legal fights. *See McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021). And in this case specifically, the Commission's actions have been strongly condemned by both the Governor and Lieutenant Governor.[1] Now the Commission seeks to enlist this Court in the further pursuit of its partisan and political agenda. This Court should resist that invitation. Instead, the Court should dismiss the

[1] "Governor Abbott Statement On State Bar's Threatened Intrusion Upon Executive Branch Authority," https://gov.texas.gov/news/post/governor-abbott-statement-on-state-bars-threatened-intrusion-upon-executive-branch-authority (Sept. 24, 2021); "Lt. Gov. Dan Patrick: Statement on the State Bar of Texas' Investigatory Panel," https://www.ltgov.texas.gov/2021/09/24/lt-gov-dan-patrick-statement-on-the-state-bar-of-texas-investigatory-panel/ (Sept. 24, 2021).

Commission's claims.

First, the Commission's suit against the Attorney General—and, by extension, his staff—violates the separation-of-powers doctrine. The decision to file *Texas v. Pennsylvania* is committed entirely to the Attorney General's discretion, which his First Assistant—the respondent in this case—has an obligation to carry out. No quasi-judicial body like the Commission can police the decisions of a duly elected, statewide constitutional officer of the executive branch, who acts through his appointees. Second, the Commission's suit is barred by sovereign immunity—despite its novel attempt to evade the sovereign immunity bar by suing Mr. Webster in his *personal* capacity—because the Commission's claims jeopardize the effective legal representation of the State of Texas and its interests.

There is nothing dishonest, fraudulent, or deceitful about what Attorney General Paxton or his First Assistant Webster did or filed here. The Commission disagrees with the position the Attorney General took on behalf of the State of Texas. That is its prerogative. But that political disagreement cannot justify the Commission's disregard of the Texas Constitution and its own Rules of Disciplinary Procedure, nor the inherent limits of its role as an unelected, bureaucratic, regulatory body.

In sum, the Court lacks jurisdiction over Mr. Webster in this case. The Commission's case should therefore be dismissed.

STATEMENT OF THE CASE

The State Bar of Texas is an administrative agency that serves the Supreme Court of Texas and the judicial branch of the Texas government.[2] The Bar monitors continuing legal education compliance, reviews attorney advertisements, provides resources to members, and fields grievances. But this bureaucracy has the potential to be weaponized—not just against attorneys who have violated any rules of professional conduct, but against those who champion political causes. Here, the attorney targeted by the Bar is the duly appointed First Assistant Attorney General of Texas. He has not been credibly accused of breaching any ethical duty or the like. Instead, he is being targeted for appearing as the First Assistant Attorney General in a case filed in the United States Supreme Court by the Attorney General of Texas on behalf of the State of Texas and pursuant to his constitutional authority.

The First Assistant's position is a crucial but limited appointment that is wholly subservient to the Attorney General. "If the attorney general is absent or unable to act, the attorney general's first office assistant shall perform the duties of the attorney general that are prescribed by law." Tex. Gov't Code § 402.001(a). The Texas Supreme Court has recognized that "while all of the constitutional and statutory authority is vested in *one* Attorney General, he need not be personally involved in every case and may properly delegate his duties to his assistants." *Public Utility Comm'n of Tex. v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988). "[A]n Assistant Attorney General is not of counsel in every case in which the Attorney General may be of counsel, but . . . the Attorney General is of counsel in every case in which an Assistant Attorney General, as such,

[2] "Our Mission," State Bar of Texas, https://www.texasbar.com/Content/NavigationMenu/AboutUs/OurMission/default.htm (last visited June 27, 2022).

is properly of counsel." *Langdeau v. Dick*, 356 S.W.2d 945, 959 (Tex. Civ App.—Austin 1962, writ ref'd n.r.e.). "An assistant attorney general is a public employee," "operat[ing] under the direct supervision of the Attorney General and exercises no independent executive power." *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 931 (Tex. Crim. 1994). Unless there is a recusal, both the Attorney General's and the First Assistant Attorney General's name is included in every signature block in every pleading filed in every case handled by the Office of the Attorney General, which numbers over 30,000 cases at any given time on the Attorney General's civil litigation docket, as well as many more criminal and child support cases.

Texas v. Pennsylvania was filed on December 7, 2020. Mr. Webster's name appeared on the filing in his capacity as First Assistant and the Attorney General himself was designated as counsel of record. Seventeen states, through their own attorneys general, joined Texas's pleadings in some capacity—including six states that sought to intervene so as to assert Texas's claims as their own.[3] In total, forty-four states—many in support, some opposed—were before the Supreme Court in some capacity in connection with Texas's motion. In the end, the Court dismissed the motion on standing grounds—an almost-daily occurrence in courthouses across the country, often in some of the most hard-fought and sophisticated cases. *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020).[4]

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[3] Exhibit 7 (Motion to Intervene).

[4] As many judges of all political predilections have noted, standing doctrine is complex and frequently inconsistent and variable, particularly in the context of the Supreme Court's original jurisdiction and a state's sovereign interest. *See, e.g.*, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2218-21, 2223-24 (2021) (Thomas, J., dissenting) (criticizing the majority's standing holding regarding "'concrete' and 'real'—though 'intangible'—harms"); *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1115 (11th Cir. 2021) (Newsom, J., concurring) (expressing his "doubt that current standing doctrine—and especially its injury-in-fact requirement—is properly grounded in the Constitution's text and history, coherent in theory, or workable in practice"); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 422-23 (2013) (Breyer, J., Ginsburg, J., Sotomayor, J., and Kagan, J., dissenting) (criticizing the majority's standing holding regarding future harm,

However, that decision was not unanimous—Justices Alito and Thomas voted to permit Texas to proceed with its case.

Because of this preliminary, though dispositive, ruling—made only four days after Texas's initial filing in the case—there was no opportunity to file additional pleadings or to develop the factual record or legal theories. More significant still is that the Supreme Court, though it has the full power to do so, did not issue sanctions on any lawyer, much less on Attorney General Paxton or the State of Texas's lawyers. Nor did any party to the case on either side or their lawyers seek sanctions against Texas, the Attorney General, the First Assistant, or any party or their lawyers. These facts render the Bar's disciplinary action here all the more troubling: the Bar seeks to *sanction* the First Assistant Attorney General for appearing as First Assistant in a case brought by Texas,that seventeen other States supported and that two Supreme Court justices voted to hear.

The First Assistant stands by his decision to appear and contribute to *Texas v. Pennsylvania*. Although the case was dismissed on standing grounds, the underlying substantive issues were—and remain—important, unresolved legal questions that the State raised in good faith. Indeed, no fewer than *four* Supreme Court justices have subsequently acknowledged the significance of the principal issue presented by Texas: whether the Electors Clause bars non-legislative actors from

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noting that "[t]his Court has often found the occurrence of similar future events sufficiently certain to support standing" and "dissent[ing] from the Court's contrary conclusion"); *South Carolina v. North Carolina,* 558 U.S. 256, 269-89 (2010) (Roberts, C.J., Thomas, J., Ginsburg, J., and Sotomayor, J. concurring in judgment in part and dissenting in part) (describing the majority holding on the Court's original jurisdiction as "literally unprecedented" and "difficult to understand"); *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 601 (1982) (describing state standing in asserting an injury that is a quasi-sovereign interest, "which is a judicial construct that does not lend itself to a simple or exact definition"); *Flast v. Cohen*, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting) (describing the majority's holding on constitutional standing as "a word game played by secret rules"). But the more important point is that nothing about the Court's ruling on standing negates the strong constitutional, legal, and factual underpinnings of Texas's pleadings.

overriding the rules for federal elections established by state legislatures. *See* U.S. Const., art. II, § 1, cl. 2. This is, according to those justices, an exceptionally important question of law for which "serious arguments on the merits" exist and that is unsettled, recurring, and which the Court should soon resolve. *Moore v. Harper*, 142 S. Ct. 1089, 1089 (March 7, 2022) (Kavanaugh, J., concurring in the denial of application for stay); *id.* at 1089-92 (Alito, J., Gorsuch, J., and Thomas, J., dissenting from the denial of application for stay) (citing additional cases, including several from the 2020 election cycle).

Admittedly, *Texas v. Pennsylvania* was a high-profile, controversial case. But this is hardly unusual for litigation involving the State. As Texas's chief legal officer, Attorney General Paxton must routinely confront some of the most difficult decisions any lawyer can face: whether and how to exercise the power of the sovereign State of Texas to bring a lawsuit in the name of the State of Texas and on behalf of nearly 29 million Texans. This tremendous responsibility is vested solely in the Attorney General—a constitutional officer within the executive branch of government—not the courts, and not the State Bar of Texas, an agency of the judiciary. If Texans disapprove of how the Attorney General exercises his authority, the remedy is to vote him out of office. The Bar has no veto over how the Attorney General exercises his constitutional authority—nor how he directs his top staff to implement that authority. And because the Attorney General properly and frequently acts through his staff, an attack on the First Assistant for discharging his duties is an attack on the Attorney General himself.

The Commission's gambit threatens to install a quasi-judicial committee in a supervisory role over one of Texas's five elected executive branch officials in the exercise of his core, constitutionally assigned functions: "represent[ing] the State in civil litigation." *Perry v. Del Rio*,

67 S.W.3d 85, 92 (Tex. 2001). This is an area over which the Attorney General enjoys broad discretion: "in the matter of bringing suits the Attorney General must exercise judgment and discretion, *which will not be controlled by other authorities.*" *Charles Scribner's Sons v. Marrs*, 262 S.W. 722, 727 (Tex. 1924) (emphasis added). And for over a century, the Texas Supreme Court has recognized that in this arena the judicial branch cannot intercede: "[s]ince it is the duty of the attorney general to institute suits," and since performing that duty "requires an investigation of the case and a determination" that suit is warranted, "the courts cannot control his judgment in the matter and determine his action." *Lewright v. Bell*, 63 S.W. 623, 623-24 (Tex. 1901). This is no less true for the First Assistant, who is by law the Attorney General's top aide.

By pursuing this disciplinary sanction against the First Assistant for fulfilling his obligation to the Attorney General, the Commission (an agent of the judicial branch of government) interferes with the effectual function of the Attorney General (the executive branch of government). This interference is prohibited by the Texas Constitution's Separation of Powers Clause. Tex. Const. art. II, § 1; *see also In re Turner*, 627 S.W.3d 654, 660 (Tex. 2021) (noting that "the interference by one branch of government with the effectual function of another raises concerns of separation of powers").

Relatedly, the Commission's action is also barred by sovereign immunity. *See Paxton v. Waller Cnty.*, 620 S.W.3d 843, 848 (Tex. App.—Amarillo 2021, pet. denied). "Sovereign immunity is 'inherent' in Texas statehood and 'developed without any legislative or constitutional enactment.'" *Univ. of Incarnate Word v. Redus*, 602 S.W.3d 398, 404 (Tex. 2020) (quoting *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 429, 431 (Tex. 2016)). Of particular significance for this case, sovereign immunity "preserves separation-of-powers principles,"

"protects the public treasury," and "prevent[s] potential disruptions of key government services that could occur when government funds are unexpectedly and substantially diverted by litigation." *Id.* The substance of the claims and the relief sought make the First Assistant Attorney General in his *official capacity* the real party in interest. Consequently, lacking any waiver of sovereign immunity, the Commission's suit is jurisdictionally barred.

The grievance process should not be abused to suppress disfavored views or retaliate against political expression. Unpopularity inevitably inheres in election-law contests, where our two-party system frequently presents zero-sum scenarios, and any substantial legal question is certain to provoke partisan ire. Whichever side a lawyer takes, he or she can anticipate resentment and rancorous attacks from the opposing side, often untethered to any actual harm to clients or to the judicial system that is the proper concern of the bar grievance process. Even more so, when an elected officer represents the sovereign interests of the State, any attempt by state bar functionaries to attack such elected officer is in fact an attack on the will of the People, effectively disenfranchising Texas voters by taking away their control over their Attorney General.

BACKGROUND

A. The Attorney Disciplinary Process Generally

"The attorney disciplinary process begins when the [Chief Disciplinary Counsel or] CDC receives a written statement, from whatever source, alleging professional misconduct by a lawyer." *Comm'n for Lawyer Discipline v. Stern*, 355 S.W.3d 129, 134 (Tex. App.—Houston [1st Dist.] 2011, pet. denied). "Until the CDC determines whether the statement actually alleges professional misconduct, it is classified as a grievance." *Id.* (citing Tex. R. Disc. P. 1.06(R)). Within thirty days of receipt, the CDC must determine "whether it constitutes an Inquiry, a Complaint, or a Discretionary Referral." Tex. R. Disc. P. 2.10. If the grievance constitutes a complaint—meaning

that the written materials on their face or upon preliminary investigation allege professional misconduct—the respondent is provided with a copy of the complaint and afforded an opportunity to respond to the allegations in writing. Tex. R. Disc. P. 1.06(G); *id.* 2.10.B. After the respondent provides a written response, the CDC investigates the complaint to determine whether there is just cause to proceed. *Id.* 2.12.

"If the CDC determines that just cause does not exist, then it forwards the complaint to a summary disposition panel, which then makes an independent determination on the existence of just cause." *Stern*, 355 S.W.3d at 134 (citing Tex. R. Disc. P. 2.13). "If either the CDC or the summary disposition panel decides that just cause exists, the CDC notifies the attorney of the attorney's acts or omissions that it contends violate the disciplinary rules, and the substance of those rules." *Id.* But the "fact that a Complaint was placed on the Summary Disposition Panel Docket and not dismissed is wholly inadmissible for any purpose in the instant or any subsequent Disciplinary Proceeding or Disciplinary Action." Tex. R. Disc. P. 2.13.

After the respondent receives written notice that either the CDC or the Summary Disposition Panel has decided that just cause exists, the respondent "may elect to have the complaint heard in a district court." *Stern*, 355 S.W.3d at 135 (citing Tex. R. Disc. P. 2.15). "Otherwise, the administrative proceeding continues before a specially appointed evidentiary panel." *Id.* (citing Tex. R. Disc. P. 2.17). If the respondent elects to have the complaint heard by the district court, the Commission for Lawyer Discipline may file suit. Tex. R. Disc. P. 3.01. The petition must contain the following:

> A. Notice that the action is brought by the Commission for Lawyer Discipline, a committee of the State Bar.
>
> B. The name of the Respondent and the fact that he or she is an attorney licensed to practice law in the State of Texas.

C. A request for assignment of an active district judge to preside in the case.

D. Allegations necessary to establish proper venue.

E. A description of the acts and conduct that gave rise to the alleged Professional Misconduct in detail sufficient to give fair notice to Respondent of the claims made, which factual allegations may be grouped in one or more counts based upon one or more Complaints.

F. A listing of the specific rules of the Texas Disciplinary Rules of Professional Conduct allegedly violated by the acts or conduct, or other grounds for seeking Sanctions.

G. A demand for judgment that the Respondent be disciplined as warranted by the facts and for any other appropriate relief.

H. Any other matter that is required or may be permitted by law or by these rules.

Tex. R. Disc. P. 3.01.

"At this point, the case proceeds like other civil cases, except where the Rules of Disciplinary Procedure vary from the Rules of Civil Procedure." *Stern*, 355 S.W.3d at 135; Tex. R. Disc. P. 3.08.B. "The burden of proof in a Disciplinary Action seeking Sanction is on the Commission." Tex. R. Disc. P. 3.08.D.

B. The *Texas v. Pennsylvania* Lawsuit

On December 7, 2020, the State of Texas invoked the original jurisdiction of the United States Supreme Court and filed a lawsuit against the Commonwealth of Pennsylvania and the States of Georgia, Michigan, and Wisconsin (Defendant States).[5] Counsel listed on the initial pleadings for the State of Texas were Ken Paxton, Attorney General of Texas (counsel of record),

[5] *See* 28 U.S.C. § 2851(a) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."); Supreme Court Rule 17(a), (c) ("This Rule applies only to an action invoking the Court's original jurisdiction . . . . The initial pleading shall be preceded by a motion for leave to file, and may be accompanied by a brief in support of the motion."); Supreme Court Rule 32(g) (identifying a motion filed under Rule 17 as a "Motion for Leave to File a Bill of Complaint and Brief in Support").

Brent Webster, First Assistant Attorney General of Texas, and Lawrence Joseph, Special Counsel to the Attorney General of Texas.

Specifically, Texas initially filed (1) a Motion for Leave to File a Bill of Complaint in that Court, with an attached Bill of Complaint and a Brief in Support of its Motion for Leave to File a Bill of Complaint;[6] (2) a Motion for Expedited Consideration with 151 pages of declarations attached as exhibits; (3) a Motion for Preliminary Injunction and Temporary Restraining Order or, Alternatively, for Stay and Administrative Stay; (4) a Motion to Enlarge Word-Count Limit and Reply in Support of Motion for Leave to File Bill of Complaint; and (5) a Reply in Support of Motion for Preliminary Injunction and Temporary Restraining Order or, Alternatively, for Stay and Administrative Stay (collectively referred to herein, together with two reply briefs, as "the Pleadings"). *See* Exhibits 8-12.

Conducting a hotly contested presidential election in the middle of a pandemic was an extraordinarily challenging event, and different jurisdictions approached those issues in different ways. But some of those approaches raised legitimate legal concerns. Texas alleged that "the 2020 election suffered from significant and unconstitutional irregularities in the Defendant States." Exhibit 8 at 3. In particular, it alleged:

- Non-legislative actors in the Defendant States "usurped their legislatures' authority and unconstitutionally revised their states' election statutes . . . through executive fiat or friendly lawsuits," in violation of the Electors Clause, which provides that only the legislatures of the States may specify the rules for appointing presidential electors. *See* U.S. CONST., Art. II, § 1, cl. 2.
- Those purported non-legislative changes created different voting standards within the Defendant States and violated the one-person, one-vote principle, in violation of the Equal Protection Clause. *See* U.S. CONST., Amend. XIV, § 1.

[6] The Motion for Leave to File Bill of Complaint and attached Bill of Complaint are attached here as Exhibit 8.

- They also constituted patent and fundamental unfairness and intentional failure to follow the law, in violation of the Due Process Clause. *See id.*

Motion for Leave to File a Bill of Complaint (Exhibit 8) at 1–2; Bill of Complaint (Exhibit 8) at 36–39.

Among Texas's specific allegations against the Defendant States were the following:

Pennsylvania. At the time of filing, available information suggested that Pennsylvania's 20 electoral votes went to Biden by 81,597 votes: 3,445,548 to 3,363,951—a margin of approximately 0.12%. Texas alleged that Pennsylvania's Secretary of State, without legislative approval, unilaterally abrogated several Pennsylvania statutes requiring signature verification for absentee or mail-in ballots when he settled a lawsuit. Bill of Complaint (Exhibit 8) at 14–15. It also alleged that the Pennsylvania Supreme Court extended statutory deadlines to receive mail-in ballots, purportedly under authority of a state constitutional provision that "[e]lections shall be free and equal." *Id.* at 15. Texas further alleged that the Pennsylvania Secretary of State authorized local election officials to examine absentee and mail-in ballots before 7:00 a.m. on Election Day, in violation of a statute expressly to the contrary, and in violation of a statute governing how such ballots must be canvassed. *Id.* at 16–17. Texas alleged that these non-legislative modifications "appear to have generated an outcome-determinative number of unlawful ballots that were cast in Pennsylvania." *Id.* at 20.[7]

Georgia. At the time of filing, available information suggested that Georgia's 16 electoral votes went to Biden by 12,670 votes: 2,472,098 to 2,458,121—a margin of approximately 0.26%. Texas alleged that the Georgia Secretary of State unilaterally, without legislative approval, changed

[7] Texas detailed Electors Clause violations committed by Pennsylvania at ¶¶ 43-53 of the Bill of Complaint (Exhibit 8), and at pages 9-14 of its Reply in Support of Motion for Leave to File Bill of Complaint (Exhibit 11).

a statutory requirement prohibiting the opening of absentee ballots before Election Day. *Id.* at 20-21. It also alleged that the Secretary of State settled an election lawsuit in a way that altered and violated statutory requirements concerning the rejection of incomplete absentee ballots, resulting in a rejection rate of 0.37% (4,786 absentee ballots out of 1,305,659 cast), versus the 2016 rejection rate of 6.42%. *Id.* at 21–23. Texas alleged that this non-legislative alteration was outcome-determinative. *Id.* at 23.[8]

Michigan. At the time of filing, available information suggested that Michigan's 16 electoral votes went to Biden by 146,007 votes: 2,796,702 to 2,650,695—a margin of approximately 2.7%. Texas alleged that the Michigan Secretary of State violated Michigan statutes by sending absentee ballots to every voter in Michigan, contrary to statutes allowing clerks (not the Secretary of State) to supply absentee ballots only to those voters who requested one.[9] *Id.* at 24–25. It also alleged that the Secretary of State allowed absentee ballots to be requested online without signature verification as expressly required by Michigan statutes. *Id.* at 25–26. Texas further alleged that both of these actions unilaterally abrogated Michigan election statutes without legislative approval, resulting in 3.2 million absentee votes cast—in contrast to 2016, when voters requested only 587,618 absentee ballots. *Id.* at 26. Texas also alleged that local officials in Wayne County (which Biden won by 322,925 votes) violated statutory requirements regarding access to vote counting and canvassing by poll watchers and inspectors. *Id.* at 26–29.[10]

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[8] Texas detailed Electors Clause violations committed by Georgia at ¶¶ 66-72 of the Bill of Complaint (Exhibit 8), and at pages 17-20 of its Reply in Support of Motion for Leave to File Bill of Complaint (Exhibit 11).

[9] In Texas, when a county clerk made a similar attempt to supply absentee ballot applications in a manner contrary to the Texas Election Code, the Attorney General obtained an injunction that was upheld by the Texas Supreme Court. *State v. Hollins*, 620 S.W.3d 400, 403 (Tex. Oct. 7, 2020) (per curiam).

[10] Texas detailed Electors Clause violations committed by Michigan at ¶¶ 79-93 of the Bill of Complaint

Wisconsin. At the time of filing, available information suggested that Wisconsin's 10 electoral votes went to Biden by 20,565 votes: 1,630,716 to 1,610,151—a margin of approximately 0.63%. Texas alleged that the Wisconsin Elections Commission and local officials violated statutes governing "alternate absentee ballot site[s]" by allowing absentee ballots to be placed in hundreds of unmanned drop boxes. *Id.* at 30-32. It also alleged that the Clerks of Dane County and Milwaukee County (which Biden collectively won by 364,298 votes) encouraged voters to falsely claim to be "indefinitely confined" due to COVID-19, which would allow them to exercise their vote in ways otherwise contrary to Wisconsin statutes. *Id.* at 32-34.[11]

Biden won the election by 306 electoral votes to 232, with Texas's 38 electoral votes going to Trump. Had Trump won the Defendant States' electoral votes, Trump would have won the election, 294 to 244. Accordingly, Texas's proposed Bill of Complaint alleged that the election irregularities in the Defendant States materially affected the outcome of the 2020 presidential election.

Texas argued that it had standing on behalf of its citizens because, first, "'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Bush v. Gore*, 531 U.S. 98, 105 (2000) (*quoting Reynolds v. Sims*, 377 U. S. 533, 555 (1964)) (*Bush II*). "In other words, [Texas] is acting to protect the interests of its respective citizens in the fair and constitutional conduct of elections used to appoint presidential electors." Bill of Complaint (Exhibit 8) at 9. Second, Texas

(Exhibit 8), and at pages 14-17 of its Reply in Support of Motion for Leave to File Bill of Complaint (Exhibit 11).

[11] Texas detailed Elector Clause violations committed by Wisconsin at ¶¶ 105-126 of the Bill of Complaint (Exhibit 8), and at pages 20-22 of its Reply in Support of Motion for Leave to File Bill of Complaint (Exhibit 11).

also claimed standing to assert the rights of its citizens "to demand that all other States abide by the constitutionally set rules in appointing presidential electors to the electoral college." Brief in Support (Exhibit 8) at 12. Third, Texas also claimed standing "[b]ecause individual citizens may arguably suffer only a generalized grievance from Electors Clause violations, States have standing where their citizen voters would not." *Id.* at 13. Fourth, Texas claimed "States can assert *parens patriae* standing for their citizens who are presidential electors." *Id.* at 14.

Texas also argued that it had standing on its own behalf, for two reasons. First, it "presses its own form of voting-rights injury as States. As with the one-person, one-vote principle for congressional redistricting, the equality of the States arises from the structure of the Constitution, not from the Equal Protection or Due Process Clauses." *Id.* at 12 (citation omitted). Indeed, the Constitution refers to the States' interest in the composition of the Senate (and the Vice President, by virtue of their tie-breaking vote), using terminology normally reserved for voters. *See* U.S. Const., art. V (prohibiting those constitutional amendments that would deprive a state "of its equal suffrage in the Senate" without its consent). In the Federalist papers, James Madison described this provision as "a palladium to the residuary sovereignty of the States, implied and secured by that principle of representation in one branch of the legislature; and was probably insisted on by the States particularly attached to that equality." The Federalist No. 43, at 8 (James Madison). Second, as Texas alleged in its proposed Bill of Complaint:

> Whereas the House represents the People proportionally, the Senate represents the States. While Americans likely care more about who is elected President, the States have a distinct interest in who is elected Vice President and thus who can cast the tiebreaking vote in the Senate. Through that interest, States suffer an Article III injury when another State violates federal law to affect the outcome of a presidential election. . . . Quite simply, it is vitally important to the States who becomes Vice President."

Brief in Support (Exhibit 8) at 13 (citation omitted).

Texas's filings were also supported by substantial evidence. In addition to dozens of citations to publicly available sources such as court filings, media reports, and government sources, Texas attached eleven declarations, affidavits, and verified pleadings in an appendix to support its contentions. *See* Exhibit 9. These voluminous filings far exceeded the minimum pleading standard in federal court. *See, e.g.*, Fed R. Civ. P. 8(a)(1) & (2), 8(d)(1) ("A pleading that states a claim for relief must contain . . . a short and plain statement of the grounds for the court's jurisdiction, . . . [and] a short and plain statement of the claim . . . . Each allegation must be simple, concise, and direct."); Fed. R. Civ. P. 11(b)(2) (noting that signing a pleading indicates that "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law"); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Several states filed *amicus* briefs.[12] Missouri, joined by sixteen other states (all of which Trump won),[13] submitted an *amicus* brief in support of Texas. Six of those states also filed a motion to intervene as parties on Texas's side.[14] The District of Columbia, joined by twenty states (all of which, except one, were won by Biden),[15] submitted an *amicus* brief in support of the Defendant

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[12] *See also Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of U.S. Representative Mike Johnson and 125 Other Members of the U.S. House of Representatives in Support of Plaintiff's Motion for Leave to File a Bill of Complaint and Motion for Preliminary Injunction* (Exhibit 20).

[13] Alabama, Arkansas, Florida, Indiana, Kansas, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and West Virginia. *Brief of State of Missouri and 16 Other States as Amici Curiae in Support of Plaintiff's Motion for Leave to File Bill of Complaint* (Exhibit 13) at 1. Biden won one of Nebraska's four electoral votes.

[14] Exhibit 7.

[15] California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts,

States.

Ohio (won by Trump) and Arizona (won by Biden) filed *amicus* briefs in support of neither party but agreeing with Texas that the case was important, that the Court's original jurisdiction should be deemed non-discretionary, and that by taking up the case the Court could give important guidance as to the proper application of the Electors Clause to the Defendant States' complained-of conduct and certainty to the Nation with respect to the election outcome.[16]

> On December 11, 2020, the Supreme Court issued the following order:
>
> > The State of Texas's motion for leave to file a bill of complaint is denied for lack of standing under Article III of the Constitution. Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections. All other pending motions are dismissed as moot. **Statement of Justice Alito, with whom Justice Thomas joins:** In my view, we do not have discretion to deny the filing of a bill of complaint in a case that falls within our original jurisdiction. I would therefore grant the motion to file the bill of complaint but would not grant other relief, and I express no view on any other issue.

Texas v. Pennsylvania, 141 S. Ct. 1230 (2020) (emphasis added) (citation omitted).

C. The CDC's Pre-Litigation Conduct

This lawsuit stems from a grievance filed regarding the First Assistant on March 11, 2021. *See* Pet. at 2. The complainant, Brynne VanHettinga, did not hold an active Texas law license, nor

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Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington. *Brief for the District of Columbia and the States and Territories of California, Colorado, Connecticut, Delaware, Guam, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, U.S. Virgin Islands, and Washington as Amici Curiae in Support of Defendants and in Opposition to Plaintiff's Motion for Leave to File a Bill of Complaint* (Exhibit 14) at 1. Trump won North Carolina and one of Maine's four electoral votes. North Carolina's Attorney General, who represented North Carolina in the District's *amicus* brief, is a Democrat. Steve Bullock (a Democrat), in his capacity as Governor of Montana, submitted an *amicus* brief supporting the Defendant States, while Montana itself, represented by its Republican attorney general, joined an *amicus* brief supporting Texas. *See* Exhibit 13.

[16] *Motion for Leave to File and Brief of Amicus Curiae Ohio in Support of Neither Party* (Ohio's Brief) (Exhibit 15); *Motion for Leave to File an Amicus Brief for the State of Arizona and Mark Brnovich, Arizona Attorney General* (Arizona's Brief) (Exhibit 16).

did she even live in Texas. *See* Exhibit 21 at 11. VanHettinga was never a client of the First Assistant's, and she described her connection to the litigation as "citizen concerned about fascism & illegal overthrow of democracy." *Id.* at 5. The Office of CDC initially, correctly dismissed the grievance because it did not present an allegation of Professional Misconduct. Only months later, as partisanship hardened and a political narrative took hold, did the Board of Disciplinary Appeals reclassify the grievance as a complaint and call for a response from the First Assistant Attorney General.[17] Notably, the Board of Disciplinary Appeals told the complainant that it found a possible violation of Rules 3.01 and 3.03 of the Texas Disciplinary Rules of Professional Conduct.[18] But, as discussed below, the just cause determination that precipitated this suit charges the First Assistant with violating only Rule 8.04(a)(3), not 3.01 or 3.03.

In allowing the grievances to be classified as a complaint, the CDC ignored the definition of "Professional Misconduct" contained in the Texas Rules of Disciplinary Procedure that is most directly applicable here. These rules specifically state that "[a]ttorney conduct that occurs in another jurisdiction, including before any federal court or federal agency," is "Professional Misconduct" where it (1) "results in the disciplining of an attorney in that other jurisdiction" and (2) qualifies as "Professional Misconduct under the Texas Disciplinary Rules of Professional Conduct." Tex. R. Disc. P. 1.06(CC)(2). While the Attorney General's Supreme Court filings do not qualify as Processional Misconduct under the Texas Disciplinary Rules—as discussed at length below—that addresses only the second requirement. It is undisputed that the *Texas v. Pennsylvania* filings did not "result[] in the disciplining of an attorney in that other jurisdiction." No sanctions

[17] The letter to the First Assistant announcing the reclassification of VanHettinga's grievance as a complaint and requesting a written response is attached as Exhibit 17.
[18] The letter to the complainant finding a possible violation is attached as Exhibit 19.

or other discipline were either sought in or levied by the Supreme Court. And therefore, the Bar's own rules make clear that these Supreme Court filings cannot qualify as Professional Misconduct—either for the Attorney General or for the First Assistant—under the directly applicable definition.

The CDC next ignored its own rules regarding venue. Over the First Assistant's objection, the CDC scheduled an investigatory hearing before a panel drawn from Travis County, Texas.[19] Under the Texas Rules of Disciplinary Procedure, "[p]roceedings of an Investigatory Panel shall be conducted by a Panel for the county where the alleged Professional Misconduct occurred, in whole or in part. *If the acts or omissions complained of occurred wholly outside the State of Texas, proceedings shall be conducted by a Panel for the county of Respondent's residence . . . .*" Tex. R. Disc. P. 2.11(A) (emphasis added). As the First Assistant's objection and motion to transfer venue explained, the professional misconduct alleged occurred wholly outside the State of Texas, in Washington D.C., and the First Assistant resides in Williamson County. It is for that same reason, in fact, that *this case* is filed in Williamson County. Yet the CDC denied the First Assistant's objection and motion to transfer venue.[20] A Travis County panel presided over the investigatory hearing and issued the just cause determination that precipitated this suit.[21]

Lastly, the Commission charges the violation of only one Rule of Professional Conduct, 8.04(a)(3), in its Petition. *See* Pet. at 4. Yet when BODA reversed the dismissal of the Complaint against the First Assistant and directed the CDC to investigate it as an Inquiry, it did not mention Rule 8.04 at all. Rather, it raised only Rules 3.01 and 3.03 as a basis for further investigation by the

[19] Motion to Dismiss and, in the Alternative, Motion to Transfer Venue, dated September 24, 2021, attached as Exhibit 2.
[20] Exhibit 3.
[21] Exhibit 18.

CDC.[22] Although the Commission is bound by the rules that were remanded to it by BODA, it continued to ignore them and its own appellate body's instructions, the better to accomplish its political goals.

The State Bar never offered a sufficient explanation for any of these significant irregularities, if it ever offered one at all. *See, e.g.*, Exhibit 4 (transcript of the investigatory hearing). And the State Bar proceeded with these investigations and charges without ever grappling with the First Assistant's well-founded objections that were outlined in correspondence. *See* Exhibits 1, 3. The irregular conduct of the Commission belies any suggestion that these proceedings against the First Assistant have been brought in good faith. These charges are, rather, a mere pretext for pursuing a political objective.

D. Petitioner's Original Disciplinary Petition

The Commission alleges that the First Assistant violated only a single rule: Rule 8.04(a)(3) of the Texas Disciplinary Rules of Professional Conduct. As the Commission explains, Rule 8.04(a)(3) is "a gap filling provision" that is "a broader rule designed to prohibit dishonest or deceitful conduct not otherwise captured by the other rules."[23] Here, the Commission tries to fill the gap by contending that the First Assistant "engage[d] in conduct involving dishonesty, fraud, deceit, or misrepresentation." Pet. at 3–4. In support, the Petition makes vague allegations regarding Texas's Pleadings in the Supreme Court. Pet. at 2–3.

[22] Exhibit 19.

[23] *See* Brief of Commission for Lawyer Discipline at pg. 51, No. 03-18-00725-CV, in Third Court of Appeals of Texas, Austin, filed on April 25, 2019, publicly accessible at https://tinyurl.com/AppelleeBr00725 (last accessed June 26, 2022).

Texas's Motion to File Bill of Complaint alone is 92 pages.[24] The Commission's Petition cites four allegedly dishonest representations that purportedly occurred within those 92 pages:

1) an outcome determinative number of votes were tied to unregistered voters;
2) votes were switched by a glitch with Dominion voting machines;
3) state actors unconstitutionally revised their state's election statutes; and
4) illegal votes had been cast that affected the outcome of the election.

Pet. at 3. The Commission does not cite or describe these purported misrepresentations with any degree of specificity, nor does it grapple with the fact that the First Assistant did not appear as counsel of record in this matter. But more importantly, the Commission is demonstrably wrong that the proposed Bill of Complaint contained any misrepresentations at all.

First, the Commission contends that the First Assistant "made representations in his pleadings that . . . an outcome determinative number of votes were tied to unregistered voters." *See* Pet. at 3. But while the Motion refers to votes not tied to registered voters in Wayne County, Michigan, Texas' Motion (which describes additional defects in the Michigan election) nowhere asserts that the unregistered Wayne County votes alone would have changed the outcome of the election. *See* Exhibit 8 at 88. Nothing else in the Pleadings supports the Commission's allegation, and the Petition does not offer any further clarification.

Second, the Commission's contention regarding the First Assistant's purported misrepresentation regarding Dominion voting machines is wholly divorced from the actual allegations brought by Texas and grossly exaggerates the prominence of any discussion of Dominion. *See* Pet. at 3. In the State's 92-page Motion, the allegations regarding Dominion are

[24] Motion for Leave to File Bill of Complaint, filed by State of Texas on December 7, 2020, publicly accessible at https://tinyurl.com/TexasMotion (last accessed June 27, 2022).

merely part of a list "describ[ing] . . . a number of currently pending lawsuits in [other] States or in public view." Bill of Complaint (Exhibit 8) at 4. And the term "Dominion" appears only twice in Texas' Motion, both in this single paragraph:

> On October 1, 2020, in Pennsylvania a laptop and several USB drives, used to program Pennsylvania's Dominion voting machines, were mysteriously stolen from a warehouse in Philadelphia. The laptop and the USB drives were the *only* items taken, and potentially could be used to alter vote tallies; In Michigan, which also employed the same Dominion voting system, on November 4, 2020, Michigan election officials have admitted that a purported "glitch" caused 6,000 votes for President Trump to be wrongly switched to Democrat Candidate Biden.

Id. at 5. This information is described in the public domain and was contemporaneously reported by sources such as the Associated Press.[25]

Third, the Commission takes issue with Texas's allegation that "state actors 'unconstitutionally revised their state's election statutes,'" Pet. at 3, but this is not a dishonest representation—it is a legal issue that *four* Supreme Court Justices have recently acknowledged as an important, recurring, and unsettled question of law that the Court should resolve. *See Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring in the denial of application for stay); *id.* at 1089-92 (Alito, J., Gorsuch, J., and Thomas, J., dissenting from the denial of application for stay). Whether non-legislative alterations to states' rules for running elections violates the Electors Clause was the central legal dispute of Texas's proposed Bill of Complaint, but it cannot credibly be disputed that such changes did in fact occur, as detailed above. How, then, are such statements sanctionable, dishonest representations? The Commission does not explain.

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[25] *See, e.g.*, Frank Bajak, *Laptop, USB drives stolen from Philly election-staging site*, ASSOCIATED PRESS, Oct. 1, 2020, https://apnews.com/article/voting-machines-voting-custodio-elections-philadelphia-f8a6453dc9e211ef20e9412d003511b1 (last visited April 26, 2022); *Officials: Clerk error behind county results favoring Biden*, ASSOCIATED PRESS, Nov. 7, 2020 https://apnews.com/article/joe-biden-donald-trump-technology-voting-michigan-6beeef230376e75252d6eaa91db3f88f (last visited June 27, 2022).

Fourth, the Commission points to the use of the phrase "illegal votes" that could have affected the outcome of the election, but that phrase appears once in Texas's Pleadings in a background discussion of *Bush II*: "Though *Bush II* did not involve an action between States, the concern that illegal votes can cancel out lawful votes does not stop at a State's boundary in the context of a Presidential election." Brief in Support of the Motion (Exhibit 8) at 4. Moreover, the Commission does not appear to understand the use of this term in this context. Under Texas's legal theory, a vote can be deemed "illegal" if it is cast, collected, or counted in violation of a state's election laws. As explained above, Texas had a good faith basis for this allegation based on publicly available information at the time of filing.

The Commission's other allegations against Respondent fare no better. For example, the Commission contends that it was a misrepresentation for the First Assistant to have pleaded "that the State of Texas had 'uncovered substantial evidence. . . that raises serious doubts as to the integrity of the election process in Defendant States[.]'" Pet. at 3. But the State's evidence was detailed in its Pleadings, both from publicly available and widely reported sources and in several sworn affidavits that were submitted to the Supreme Court, and it cannot be disputed that many Americans had doubts as to the integrity of the 2020 election. The Commission may disagree with that conclusion, and it may not be persuaded by Texas's evidence, but it was not a misrepresentation to say that the evidence existed. The Commission is also wrong, therefore, when it says that Texas's allegations were not supported by admissible evidence, and it arrogates to itself a core judicial function when it airily dismisses Texas's evidence as not "credible." Pet. at 3. The Commission seeks to invade the purview of the judge or jury as fact-finder. Additionally, the Commission contends that the First Assistant "misrepresented that the State of Texas . . . had

standing to bring these claims before the United States Supreme Court." Pet. at 3. But this is a legal argument advanced by Texas in a complex area of law, not a factual misrepresentation. Failing to prevail on a hotly contested legal question—at the pleadings stage, no less—is hardly tantamount to "professional misconduct." Nor is litigating unsettled, novel, and recurring questions of law. Were the Commissioner's application of Rule 8.04(a)(3) correct, any unsuccessful litigant would be subject to disciplinary action for "misrepresenting" its legal theories when the judge or jury rejects them. That is not, and cannot be, the law.

GENERAL DENIAL

As authorized by Rule 92 of the Texas Rules of Civil Procedure, the First Assistant Attorney General denies each and every, all and singular, of the allegations of Petitioner's Original Disciplinary Petition, and demands strict proof thereof, as required by Texas law and the Texas Rules of Disciplinary Procedure.

DEFENSES

Pleading further, and in addition to his General Denial, the First Assistant Attorney General asserts the following jurisdictional and other defenses—reserving the right to supplement or amend as permitted under the Texas Rules of Civil Procedure:

1. To the extent that the Commission's claims or filings occurred outside any applicable statutory periods or were not thoroughly exhausted through any required administrative process, the Commission's claims are barred.

2. To the extent the grievance committee of the State Bar did not comport with the requirements of the Texas Rules of Disciplinary Procedure, the proceeding is void.

3. The First Assistant asserts that at all times relevant to this cause of action, he was acting in his official capacity as the First Assistant Attorney General of the State of Texas.

4. The First Assistant asserts sovereign immunity from suit and liability.

5. The First Assistant asserts that this proceeding and the charges against him violate the constitutional principle of separation of powers.

6. The First Assistant asserts that his actions are protected by the Texas Constitution. Tex. Const. art. I, §§ 8, 27.

7. The First Assistant asserts that he carried out the effectual duties of his office in good faith and without malice.

8. The First Assistant asserts the right to raise additional defenses that become apparent through further factual development of this case.

PLEA TO THE JURISDICTION

A. Standard of Review

A plea to the jurisdiction challenges the court's authority to determine the subject matter of the controversy. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553–54 (Tex. 2000). "When a plea to the jurisdiction challenges the pleadings, [the court] determine[s] if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause." *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). "If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend." *Id.* at 227. While a plea to the jurisdiction typically challenges "whether the plaintiff has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the case," a plea can also "properly challenge the *existence* of those very jurisdictional facts." *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012) (emphasis in original). "In those situations, a trial court's review of a plea to the jurisdiction mirrors that of a traditional summary judgment motion." *Id.*

B. Arguments & Authorities

"Subject matter jurisdiction is essential to the authority of a court to decide a case." *Tex. Ass'n of Bus. v. Tex. Air Ctr. Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). "Subject matter jurisdiction requires that the party bringing the suit have standing, that there be a live controversy between the parties, and that the case be justiciable." *State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994). "One limit on courts' jurisdiction under both the state and federal constitutions is the separation of powers doctrine." *Tex. Ass'n of Bus.*, 852 S.W.2d at 444. When granting the relief sought would infringe, preempt, or usurp the inherent powers of another government authority, the Court lacks subject-matter jurisdiction. *See id.*; *Gomez*, 891 S.W.2d at 246. Likewise, "[s]overeign immunity from suit defeats a trial court's subject matter jurisdiction." *Miranda*, 133 S.W.3d at 224 (Tex. 2004); *EBS Sols., Inc. v. Hegar*, 601 S.W.3d 744, 749 (Tex. 2020).

1. The Separation-of-Powers Clause of the Texas Constitution deprives this Court of subject-matter jurisdiction.

"[L]imits on judicial power are as important as its reach." *American K-9 Detection Servs., LLC v. Freeman*, 556 S.W.3d 246, 252 (Tex. 2018). "'The province of the court,' Chief Justice Marshall wrote, 'is, solely, to decide on the rights of individuals, not to inquire how the executive or executive officers, perform duties in which they have a discretion.'" *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)). When allowing a case to proceed would violate the Texas Constitution's separation-of-powers principles, subject-matter jurisdiction is implicated. *See Van Dorn Preston v. M1 Support Servs., L.P.*, 642 S.W.3d 452, 457–59 (Tex. 2022) (discussing the Texas Constitution's separation-of-powers principles in the context of the political question doctrine). Here, the judicial intrusion imposed by the State Bar's disciplinary actions—including through its prosecution of this lawsuit—rises to the level of constitutional infirmity. *See id.* at 460.

The claim is not justiciable, and the separation-of-powers doctrine deprives this Court of subject-matter jurisdiction.

The Texas Constitution, like the U.S. Constitution, divides the powers of government into legislative, executive, and judicial departments, "and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." Tex. Const. art. II, § 1. "The separation of powers doctrine prohibits one branch of state government from exercising power inherently belonging to another branch of state government." *Hotze v. City of Houston*, 339 S.W.3d 809, 818 (Tex. App.—Austin 2011, no pet.). The "doctrine means that a 'public officer or body may not exercise or otherwise interfere with a power constitutionally assigned to another public officer or body, nor may either surrender its own constitutionally assigned power, referring in all cases to the 'mass' of its powers or any 'core' paramount power.'"[26] *Univ. of Tex. Health Sci. Ctr. at San Antonio v. Mata & Bordini, Inc.*, 2 S.W.3d 312, 316 (Tex. App.—San Antonio 1999, pet. denied). The doctrine "was designed, as were other checks and balances, to prevent excesses." *Coates v. Windham*, 613 S.W.2d 572, 576 (Tex. App.—Austin 1981, no writ).

"The Separation of Powers Clause is violated (1) when one branch of government assumes power more properly attached to another branch or (2) when one branch unduly interferes with another branch so that the other cannot effectively exercise its constitutionally assigned powers." *In re D.W.*, 249 S.W.3d 625, (Tex. App.—Fort Worth 2008, pet. denied); *see also Black v. Dallas Cnty. Bail Bond Bd.*, 882 S.W.2d 434, 438 (Tex. App.—Dallas 1994, no writ) (same); *Tex. Dep't*

[26] For example, "[s]ince only the Legislature can waive the right of the State to immunity from suit, neither the executive [n]or judicial branches of the State government may exercise such power." *Dep't of Pub. Safety of Tex. v. Great Sw. Warehouses, Inc.*, 352 S.W.2d 493, 495 (Tex. App.—Austin 1961, writ ref'd n.r.e.).

of Family & Protec. Servs. v. Dickensheets, 274 S.W.3d 150, 156 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (same). "To determine whether a separation of powers violation involving 'undue interference' has occurred, [courts] engage in a two-part inquiry." *Tex. Comm'n on Env'l Quality v. Abbott*, 311 S.W.3d 663, 672 (Tex. App.—Austin 2010, pet. denied). Courts first look to the scope of the powers constitutionally assigned to the first governmental actor and then to the impact on those powers imposed by the second. *See id.* When one branch attempts to impinge on another's exercise of "core powers," it is less the degree of interference, but "the fact of the attempted interference at all" that raises a separation-of-powers problem. *Ex parte Lo*, 424 S.W.3d 10, 29 (Tex. Crim. App. 2013).

The Commission's attempt to superintend the Attorney General's and First Assistant's exercise of discretion in representing the State in civil litigation presents a profound threat to the separation of powers. As already discussed, the State Bar is an unelected, democratically unaccountable, arm of the Texas Judiciary and the Attorney General is a member of the Executive Department who acts through his Assistants. *See* Tex. Gov't Code § 81.011(a); *Perry*, 67 S.W.3d at 92. Under the Texas Constitution, the Attorney General—not the Judiciary—is vested with authority to bring suits on behalf of the State of Texas. *See* Tex. Const. art. IV, § 22; *Brady v. Brooks*, 89 S.W. 1052, 1055 (Tex. 1905); *El Paso Elec. Co. v. Tex. Dep't of Ins.*, 937 S.W.2d 432, 438 (Tex. 1996). And, in exercising that authority, the "Attorney General, as the State's chief legal officer, has broad discretionary power in carrying out his responsibility to represent the State," *Perry*, 67 S.W.3d at 92 (citing *Terrazas v. Ramirez*, 829 S.W.2d 712, 722 (Tex. 1991)), and that "judgment and discretion . . . will not be controlled by other authorities.'" *Bullock*, 583 S.W.2d at 894 (quoting *Charles Scribner's Sons*, 262 S.W. at 727). *Lewright* provides an instructive

application of these principles. There, the Texas Supreme Court rejected a petition for a writ of mandamus to the Attorney General of Texas, commanding him to institute a suit in the name of the state. *Lewright*, 63 S.W. at 623-24. Even though the statute at issue imposed a duty on the Attorney General to institute a suit, the Court recognized that this "imperative" required an exercise of discretion, namely a finding "not only that there is reasonable ground to believe that the statute has been violated, but also that the evidence necessary to a successful prosecution of the suit can be procured." *Id.* at 624. Accordingly, the Court held that "the courts cannot control his judgment in the matter and determine his action." *Id.*

The Commission invites this Court to travel where Supreme Court precedent instructs it not to go. The Commission alleges that the First Assistant's "representations were dishonest" because the State's allegations "were not supported by any charge, indictment, judicial finding, and/or credible/admissible evidence." Pet. at 3. As an initial matter, it is hardly surprising that a *complaint* was unaccompanied by "evidence," which is typically developed at a later juncture in the case. Regardless, the Commission's request for a finding of "professional misconduct" on this basis challenges the Attorney General's assessment of the facts, evidence, and law at the time he initiated *Texas v. Pennsylvania* and asks this court to substitute its judgment for the Attorney General's and his First Assistant about the propriety of filing that lawsuit. But the Attorney General's "investigation of the case and a determination" that "the evidence necessary to a successful prosecution of the suit can be procured," *Lewright*, 63 S.W. at 624, falls within the core of his "discretionary power in carrying out his responsibility to represent the State." *Perry*, 67 S.W.3d at 92.

And here, the Attorney General determined that there were reasonable grounds to believe that a violation of federal law had occurred and that the State had evidence necessary to initiate a lawsuit. *See* Pet. at 2-3. Like the Texas Supreme Court in *Lewright*, this Court too cannot attempt to "control [the Attorney General's] judgment in the matter" by sanctioning him for his determination that sufficient grounds existed to file a motion for leave to file a bill of complaint in the United States Supreme Court. To impose such sanction on the First Assistant—indeed, to further subject the First Assistant to the burden, cost, and indignity of this proceeding—would unduly interfere with the executive branch's effectual exercise of its constitutionally assigned powers. More specifically, this action unduly interferes with the Attorney General's constitutional prerogative to represent the State in civil matters and thus violates the Separation of Powers Clause.

"The very balance of state governmental power imposed by the framers of the Texas Constitution depends on each branch, and particularly the judiciary, operating within its jurisdictional bounds." *State v. Morales,* 869 S.W.2d 941, 949 (Tex. 1994). Here, the Texas Constitution protects the Attorney General's discretion and, in so doing, deprives this Court of jurisdiction. Lest the argument be misunderstood, this is far from asserting that the Attorney General's discretion is wholly unbounded: "[i]n the checks and balances of our political system, the [Attorney General's] powers are not unfettered." *Morath v. Texas Taxpayer & Student Fairness Coalition*, 490 S.W.3d 826, 887 (Tex. 2016) (Guzman, J., concurring). The first check on the Attorney General is the People of Texas, to whom he is ultimately accountable. *See* Tex. Const. art. IV, §§ 1-2 (requiring the Attorney General to be among those officers of the Executive Department to be elected by the qualified voters of the State). The second check on the Attorney

General is the State Legislature, which can impeach the Attorney General, and thereby remove him from office or even disqualify him from holding any office of honor, trust, or profit under this State. Tex. Const. art. XV, §§ 1–4. And, at least in this context, a third check on the Attorney General is the Supreme Court of the United States itself, which could have exercised its own authority to impose sanctions had it seen fit to do so. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43–46 (1991). And these checks apply equally to the First Assistant, who is further subject to the control of the Attorney General in the discharge of his duties. That the Court evidently did not even consider sanctions against Texas—indeed, that the parties to the original proceeding did not even request them—only underscores the extraordinary nature of this case and the Commission's conduct.

Because the Commission's judicially derived authority does not afford it any supervisory power over the Attorney General—and, as applied to these facts, the First Assistant Attorney General—the Commission has unconstitutionally violated the separation-of-powers principle by subjecting him to this litigation.

2. The Commission's claims are barred by sovereign immunity from suit.

It is well established that public officials sued in their official capacities are protected by the same immunity as the governmental unit they represent. *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 843–44 (Tex. 2007). The Attorney General in his official capacity is entitled to sovereign immunity. *Paxton*, 620 S.W.3d at 848. Here, the State of Texas filed an original proceeding in the Supreme Court. Only the Attorney General of Texas, acting in his official capacity, could take that action on behalf of the State of Texas. *See* Tex. Gov't Code § 402.021. The Commission now asks this Court to sanction the First Assistant Attorney General for appearing as First Assistant on a filing on behalf of the State. But because the substance of the

claims and the relief sought make the First Assistant in his *official capacity*—and thereby the State—the real party in interest, sovereign immunity bars the Commission's suit.

a. Whether the sovereign is the real party in interest depends on the substance of the claims and the relief sought.

Sovereign immunity often turns on whether the government officer is sued in his official or individual capacity. *See, e.g.*, *Koseoglu*, 233 S.W.3d at 843-44. In determining this capacity, a court must review the pleadings to "ascertain the true nature of the [plaintiff's] claims," being careful to "not exalt form over substance." *Davis v. City of Aransas Pass*, No. 13-17-00455-CV, 2018 WL 4140633, at *3 (Tex. App.—Corpus Christi Aug. 29, 2018, no pet.); *see also Ross v. Linebarger, Goggan, Blair & Sampson, L.L.P.*, 333 S.W.3d 736, 743 (Tex. App.—Houston [1st Dist.] 2010, no pet.); *Pickell v. Brooks*, 846 S.W.2d 421, 424 n.5 (Tex. App.—Austin 1992, writ denied). "Importantly, although the form of the pleadings may be relevant in determining whether a particular suit implicates the sovereign's immunity, such as whether a suit is alleged explicitly against a government official in his 'official capacity,' it is the substance of the claims and relief sought that ultimately determine whether the sovereign is a real party in interest and its immunity thereby implicated." *GTECH Corp. v. Steele*, 549 S.W.3d 768, 785 (Tex. App.—Austin 2018, aff'd sub nom. *Nettles v. GTECH Corp.*, 606 S.W.3d 726 (Tex. 2020)).

Texas courts have repeatedly found that claims arising from a government officer's performance of official duties are official capacity claims covered by sovereign immunity. In *City of Richardson v. Cannon*, the plaintiff claimed three police officers unlawfully detained and arrested him. No. 05-18-00181-CV, 2018 WL 6845240, at *1 (Tex. App.—Dallas Nov. 16, 2018, no pet.). The Fifth Court of Appeals noted that the plaintiff's "pleadings are based upon actions involving the individual defendants' duties as public servants. In other words, the individual defendants were

able to detain, arrest, and charge [the plaintiff] only because of their positions as police officers." *Id.* at *4. The Court held that the plaintiff "alleg[ed] claims against the individual defendants only in their official capacities" as a result. *Id.*

In *Miller v. Diaz*, the Fifth Court of Appeals found it was the course of proceedings, not the plaintiff's statements, that controlled: "Although [the plaintiff] insists that he is also suing Judge Diaz in her individual, rather than official capacity, we look to 'the course of the proceedings' to determine the capacity in which the official has been sued." No. 05-21-00658-CV, 2022 WL 109363, at *6 (Tex. App.—Dallas Jan. 12, 2022, no pet.) (quoting *Terrell v. Sisk*, 111 S.W.3d 274, 281 (Tex. App.—Texarkana 2003, no pet.)). The Court reviewed the plaintiff's petition, found that he sued Judge Diaz for acts taken "in connection with the performance of her official duties as an Associate Judge," and held that there was "no basis for individual liability." *Id.*

In *Perez v. Physician Assistant Bd.,* the plaintiff sued the Texas Physician Assistant Board's presiding officer (Bentley) to challenge an order revoking his physician license. No. 03-16-00732-CV, 2017 WL 5078003, at *1 (Tex. App.—Austin Oct. 31, 2017, pet. denied). Although the plaintiff "purported to sue Bentley in her official and individual capacities," the Third Court of Appeals held that "the substance of [the plaintiff's] claims were limited to claims against Bentley in her official capacity." *Id.* at *4. In reaching this conclusion, the court examined the "factual allegations asserted against Bentley" and found that the plaintiff "did not allege any act by [Bentley] that was performed outside of her role as an officer of the Board." *Id.*

In *Crampton v. Farris*, the plaintiff sued a Texas Commission for Lawyer Discipline prosecutor (Farris) in her individual capacity over her role in a disciplinary proceeding regarding the plaintiff. 596 S.W.3d 267, 270-72 (Tex. App.—Houston [1st Dist.] 2019, no pet.). The First

Court of Appeals found that the plaintiff had actually asserted official capacity claims, explaining that the plaintiff "failed to plead any actions undertaken by Farris outside the general scope of Farris's duties with the Commission." *Id.* at 276. The court also noted that "Farris was only in a position to act as she did by virtue of her role as the Commission's prosecutor." *Id.* at 275.

In *Davis v. City of Aransas Pass*, the plaintiff sued various police officers, mainly claiming that they made defamatory statements about him during a murder investigation. 2018 WL 4140633, at *1. The plaintiff insisted that he sued these officers in their individual capacities. *Id.* at *3. The Thirteenth Court of Appeals disagreed: "Although [the plaintiff] names each appellee individually, his argument and underlying suit stem from allegedly defamatory statements made by appellees in their official capacities." *Id.* at *3.

Finally, in *Ross v. Linebarger, Goggan, Blair & Sampson, L.L.P.*, the plaintiff sued a law firm and its employees (collectively, "Linebarger") for acts they took as agents of local governmental entities to collect delinquent taxes owed by the plaintiff. 333 S.W.3d at 738–40. The plaintiff sued the Linebarger defendants in their "official—if any—and individual capacities" for breach of contract and negligent misrepresentation, among other things. *Id.* at 740. The First Court of Appeals found that the plaintiff's claims all related to Linebarger's "actions taken in the process of collecting taxes on behalf of the taxing entities." *Id.* at 743. Thus, the court found that "the true nature of [the plaintiff]'s claims is that of claims against Linebarger in its official capacity as an agent of the taxing entities." *Id.* at 743.

The Commission will doubtless contend that it has brought these charges against the First Assistant Attorney General in his individual capacity. But according to the great weight of authority, this begins, not ends, the inquiry.

b. The First Assistant Attorney General in his official capacity is the real party in interest and sovereign immunity bars this suit.

Applying this line of authority to the facts of this case, both the substance of the claims and the nature of the relief sought by the Commission make the First Assistant Attorney General in his *official* capacity the real party in interest. Regarding the substance of the claims, the Commission's grievance arises from the Attorney General's decision to file the *Texas v. Pennsylvania* proceeding and respondent's appearance in his capacity as First Assistant in that case. Not only did the Attorney General file this proceeding in his official capacity, it is an act that could *only* be taken by the Attorney General and *only* in his official capacity. *See* Tex. Gov't Code § 402.021 ("The attorney general *shall* prosecute and defend *all actions* in which the state is interested before the supreme court.") (emphasis added). And the First Assistant has no independent authority here: he "operates under the direct supervision of the Attorney General[,] and exercises no independent executive power." *State ex rel. Hill*, 887 S.W.2d at 931. The Commission's claims therefore strike at the First Assistant acting in his official capacity, as they arise from the performance of his official duties. Such claims necessarily implicate the State's sovereign immunity.

Regarding the relief sought, it too makes the State the real party in interest. Relief that would "control state action" implicates sovereign immunity, "even in a suit that purports to name no defendant, governmental or otherwise." *GTECH Corp.*, 549 S.W.3d at 785. A suit that "seeks to restrain the State or its officials in the exercise of discretionary statutory or constitutional authority" is a suit that seeks to control state action. *Creedmoor-Maha Water Supply Corp. v. Tex. Comm'n on Env'l. Quality*, 307 S.W.3d 505, 514 (Tex. App.—Austin 2010, no pet.); *see also Univ. of Tex. of Permian Basin v. Banzhoff*, No. 11-17-00325-CV, 2019 WL 2307732, at *4 (Tex. App.—Eastland May 31, 2019, no pet.) ("If the plaintiff alleges only facts demonstrating acts within the

officer's legal authority and discretion, the claim seeks to control state action and is barred by governmental immunity.").

The Commission's claims arise from the Attorney General's exercise of his statutory and constitutional authority to file a lawsuit in the State's name that he believed to be in the State's best interests. The Commission's attempt to sanction the First Assistant for his participation in this filing serves as a clear warning shot to the Attorney General and his employees: do not file lawsuits the Commission dislikes, or you risk sanction. *Cf. In the Matter of Joseph Wm. Bailey State Bar Card No. 01529200*, 2013 WL 8507063, at *23 (explaining that one of the purposes of sanctions is to "deter future misconduct"). Indeed, the Commission has demonstrated a willingness to not only go after the elected official, but also his subordinates—even subordinates who merely appeared on the signature block and never even signed the pleadings from which their purported culpability arises. As shown above, the Commission's attempt to control state action in this manner directly implicates the State's sovereign immunity.

The Commission's allegations relate to the First Assistant's performance of his official duties, and the relief that they seek is tantamount to a judicial veto over the exercise of executive discretion that would effectually deprive the State of a chief legal officer. Accordingly, the Commission's Original Disciplinary Petition is brought against the First Assistant in his official capacity and is thus barred by sovereign immunity.[27]

[27] This conclusion is not disturbed by the identity of the petitioner as "an administrative agency of the judicial department of government." *See* Tex. Gov't Code § 81.011(a). The Texas Supreme Court has held that a political subdivision retains its governmental immunity even when the plaintiff is the State of Texas. *Chambers-Liberty Ctys. Navigation Dist. v. State*, 575 S.W.3d 339, 345–48 (Tex. 2019). The same result is certainly applicable here, when the respondent is one of the seven executive officers expressly identified in the Texas Constitution. *See* Tex. Const. art. IV, § 1.

PRAYER

For all these reasons, the Court lacks subject-matter jurisdiction over these claims against the First Assistant. The First Assistant requests judgment of the Court that Petitioner the Commission take nothing by this suit and that the First Assistant recover all costs and be awarded such other and further relief to which he may be justly entitled.

Date: June 27, 2022.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General of Texas

GRANT DORFMAN
Deputy First Assistant Attorney General

/s/ Christopher D. Hilton
CHRISTOPHER D. HILTON
Chief, General Litigation Division
Texas Bar No. 24087727
JUDD E. STONE II
Solicitor General of Texas
Texas Bar No. 24076720
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
christopher.hilton@oag.texas.gov
judd.stone@oag.texas.gov

COUNSEL FOR THE FIRST ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served electronically through the electronic-filing manager in compliance with Texas Rule of Civil Procedure 21a on June 27, 2022, to all counsel of record.

/s/ Christopher D. Hilton
CHRISTOPHER D. HILTON

CAUSE NO. 22-0594-C368

COMMISSION FOR LAWYER DISCIPLINE, *Plaintiff,*	§	IN THE DISTRICT COURT
v.	§	OF WILLIAMSON COUNTY, TEXAS
BRENT EDWARD WEBSTER; 20211679, *Defendant.*	§	368TH JUDICIAL DISTRICT

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Williamson County, Texas
Michele Darlene Rodriguez

22-0594-C368

CAUSE NO. _____

COMMISSION FOR LAWYER DISCIPLINE	§	**IN THE DISTRICT COURT OF**
	§	
	§	
V.	§	**WILLIAMSON COUNTY, TEXAS**
	§Williamson County - 368th Judicial District Court	
BRENT EDWARD WEBSTER	§	
202101679	§	**_____ JUDICIAL DISTRICT**

ORIGINAL DISCIPLINARY PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the COMMISSION FOR LAWYER DISCIPLINE, Petitioner, and would respectfully show the following:

I.

DISCOVERY CONTROL PLAN

Pursuant to Rule 190.1 and 190.3, Texas Rules of Civil Procedure, Petitioner asserts discovery in this case is to be conducted under Discovery Control Plan Level 2-by Rule.

II.

PARTIES

The Petitioner is the COMMISSION FOR LAWYER DISCIPLINE, a standing committee of the State Bar of Texas.

Respondent, Brent Edward Webster, State Bar Number 24053545 (Respondent), is an attorney licensed to practice law in the State of Texas and is a member of the State Bar of Texas. Respondent's residence is in Williamson County, Texas, and he may be served with citation in Austin, Williamson County, Texas.

III.

JURISDICTION AND VENUE

The cause of action and the relief sought in this case are within the jurisdictional requirements of this Honorable Court.

Venue of this case is proper in Williamson County, Texas, pursuant to Texas Rules of Disciplinary Procedure Rule 3.03, because Williamson County is the county of the Respondent's residence. Petitioner requests an active judge whose district does not include Williamson County, Texas, be assigned to preside in this case.

IV.

PROFESSIONAL MISCONDUCT

Petitioner brings this disciplinary action pursuant to the State Bar Act, Tex. Govt. Code Ann. §81.001 *et seq.*, the Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure. The complaint, which initiated this proceeding, was filed by Brynne VanHettinga on March 11, 2021.

The acts and omissions of Respondent, as hereinafter alleged, constitute professional misconduct.

V.

FACTUAL BACKGROUND

On or about December 7, 2020, Respondent filed Case No. 220155, styled: *State of Texas v. Commonwealth of Pennsylvania, State of Georgia, State of Michigan, and State of Wisconsin* in the United States Supreme Court. Respondent's pleadings included requests for multiple injunctions against the Defendant States and a finding that the Defendant States violated federal election laws.

Specifically, these requests asked the United States Supreme Court to enjoin "Defendant States' use of the 2020 election results for the Office of President to appoint presidential electors to the Electoral College," and sought to prevent the Defendant States from "meeting for purposes

of the electoral college pursuant to 3 U.S.C. §5, 3 U.S.C. §7, or applicable law pending further order..."

Respondent's pleadings requesting this extraordinary relief misrepresented to the United States Supreme Court that an "outcome-determinative" number of votes in each Defendant State supported Respondent's pleadings and injunction requests. Respondent made representations in his pleadings that: 1) an outcome determinative number of votes were tied to unregistered voters; 2) votes were switched by a glitch with Dominion voting machines; 3) state actors "unconstitutionally revised their state's election statutes;" and 4) "illegal votes" had been cast that affected the outcome of the election.

Respondent's representations were dishonest. His allegations were not supported by any charge, indictment, judicial finding, and/or credible or admissible evidence, and failed to disclose to the Court that some of his representations and allegations had already been adjudicated and/or dismissed in a court of law.

In addition, Respondent misrepresented that the State of Texas had "uncovered substantial evidence... that raises serious doubts as to the integrity of the election process in Defendant States," and had standing to bring these claims before the United States Supreme Court.

As a result of Respondent's actions, Defendant States were required to expend time, money, and resources to respond to the misrepresentations and false statements contained in these pleadings and injunction requests even though they had previously certified their presidential electors based on the election results prior to the filing of Respondent's pleadings.

VI.

DISCIPLINARY RULES OF PROFESSIONAL CONDUCT VIOLATED

The facts alleged herein constitute a violation of the following Texas Disciplinary Rules of Professional Conduct:

8.04(a)(3) A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that a judgment of professional misconduct be entered against Respondent, and that this Honorable Court determine and impose an appropriate sanction, including an order that Respondent pay reasonable attorneys' fees, costs of court and all expenses associated with this proceeding. Petitioner further prays for such other and additional relief, general or specific, at law or in equity, to which it may show itself entitled.

Respectfully submitted,

Seana Willing
Chief Disciplinary Counsel

Royce Lemoine
Deputy Counsel for Administration/
Austin Regional Counsel
Office of the Chief Disciplinary Counsel
STATE BAR OF TEXAS
P.O. Box 12487, Capitol Station
Austin, Texas 78711-2487
Telephone: 512.427.1350
Facsimile: 512.427.4167
Email: rlemoine@texasbar.com

Amanda M. Kates
Assistant Disciplinary Counsel
State Bar Card No. 24075987
ATTORNEYS FOR PETITIONER

THIRD ADMINISTRATIVE JUDICIAL REGION

BILLY RAY STUBBLEFIELD, PRESIDING JUDGE

PHONE 512-943-3777
FAX 512-943-3767
E-MAIL presidingjudge3@wilco.org

405 MARTIN LUTHER KING, BOX 9
GEORGETOWN, TEXAS 78626

ADMINISTRATIVE ASSISTANT
BRENDA WILBURN

May 5th, 2022

Mr. Royce LeMoine
Deputy Counsel for Administration/Regional Counsel
State Bar of Texas
Office of the Chief Disciplinary Counsel

Brent Edward Webster
% Murtaza Sutarwalla
PO Box 12548
Austin, Texas 78711-2548

RE: Commission for Lawyer Discipline vs Brent Edward Webster
SBOT File No. 202101679

Dear Mr. LeMoine and Ms. Sutarwalla,

Pursuant to Rule 3.02 of the Texas Rules of Disciplinary Procedure, I hereby notify you that I have appointed the Honorable John W. Youngblood, 20th Judicial District Court, Milam County, to preside in the above-referenced disciplinary case.

A copy of this assignment order is enclosed. Unless otherwise directed, all future case papers should be filed in Williamson County.

Sincerely,

Billy Ray Stubblefield
Presiding Judge, Third Administrative Judicial Region

THIRD ADMINISTRATIVE JUDICIAL REGION

Assignment of a District Judge to Preside

In a State Bar Disciplinary Action

I hereby assign the Honorable John W. Youngblood, Judge of the 20th Judicial District Court, Milam Texas, to preside in the Disciplinary Action styled:

Commission for Lawyer Discipline vs. Brent Edward Webster

SBOT Case No. 202101679

The Chief Disciplinary Counsel shall promptly forward to the District Clerk of Williamson County, a copy of the Disciplinary Petition and this Order for filing, pursuant to Rule 3.03, Texas Rules of Disciplinary Procedure.

As Ordered by the Presiding Judge of the Third Administrative Judicial Region, on this 5th day of May, 2022.

Billy Ray Stubblefield, Presiding Judge
Third Administrative Judicial Region

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Shelly Hogue on behalf of Royce LeMoine
Bar No. 24026421
shogue@texasbar.com
Envelope ID: 64266977
Status as of 5/6/2022 1:30 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Amanda M.Kates		amanda.kates@texasbar.com	5/6/2022 12:44:52 PM	SENT
Royce Lemoine	24026421	royce.lemoine@texasbar.com	5/6/2022 12:44:52 PM	SENT
Murtaza Sutarwalla		Murtaza.Sutarwalla@oag.texas.gov	5/6/2022 12:44:52 PM	SENT

App 5

Filed: 7/21/2022 2:09 PM
Lisa David, District Clerk
Williamson County, Texas
Judy Tenneyuque

CAUSE NO. 22-0594-C368

COMMISSION FOR LAWYER DISCIPLINE	§	**IN THE DISTRICT COURT OF**
	§	
	§	
V.	§	**WILLIAMSON COUNTY, TEXAS**
	§	
BRENT EDWARD WEBSTER	§	
202101679	§	**368th JUDICIAL DISTRICT**

RESPONSE TO RESPONDENT'S ANSWER, DEFENSES, AND PLEA TO THE JURISDICTION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the COMMISSION FOR LAWYER DISCIPLINE (the "Commission"), Petitioner, in this disciplinary action and files this Response to Respondent's Answer, Defenses, and Plea to the Jurisdiction (hereinafter referred to as *Plea to the Jurisdiction*). In support thereof the Commission would respectfully show the Court the following:

I.
INTRODUCTION

This disciplinary action was filed against Respondent as a result of his unethical and dishonest conduct as a licensed Texas attorney while engaging in the practice of law[1]. Specifically, on or about December 7, 2020, Respondent appeared in and filed written pleadings in Case No. 22O155, styled: *State of Texas v. Commonwealth of Pennsylvania, State of Georgia, State of Michigan, and State of Wisconsin* (the *Pennsylvania Case*) before the United States Supreme Court. Respondent's pleadings contained numerous statements

[1] In Texas, the "practice of law" includes "the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court..." See TEX. GOV'T CODE §81.101(a).

that he knew, or should have known, were false, misleading, and not supported by any admissible or credible evidence. As a result of Respondent's unethical actions in the *Pennsylvania Case*, the Defendant States were required to expend government time, money, and resources responding to Respondent's dishonest attacks, deceptive pleadings, and false criminal accusations. In other words, there were costly and tangible consequences as a result of Respondent's misconduct.

Despite the contentions raised in his *Plea to the Jurisdiction*, this disciplinary action has not been brought for political or retaliatory purposes. Moreover, this action is not about Respondent's participation in the decision to file the *Pennsylvania Case* as the First Assistant Attorney General; the Commission takes no position on that decision. Rather, the Commission contends that the pleadings Respondent prepared and filed contained numerous statements that were false, dishonest, and deceitful in violation of Rule 8.04(a)(3) of the Texas Disciplinary Rules of Professional Conduct (TDRPC)[2]. It is Respondent's conduct while engaging in the practice of law before a tribunal that has generated this proceeding.

Contrary to Respondent's attempts to argue otherwise, all licensed attorneys, including attorneys elected to public office or serving as a public employee (by appointment or otherwise), stand on equal footing in terms of having to comply with the minimum ethical standards of their state's licensing and regulatory authority. These rules

[2] The terms "dishonesty," "deceit," or "misrepresentation" are not expressly defined by the TDRPC; however, as set forth in *Olsen v. Comm'n for Lawyer Discipline*, 347 S.W.3d 876, 882-83 (Tex. App. – Dallas 2011, pet. denied), "Courts have therefore given those terms their ordinary meanings, and have concluded that they generally mean a 'lack of honesty, probity, or integrity in principle,' and a 'lack of straightforwardness.'"

of professional conduct apply to any attorney engaged in the practice of law regardless of their position. No Texas attorney holding public office or serving as a public employee in Texas has been granted license to engage in the unethical practice of law while avoiding the consequences of his/her professional misconduct. Neither the Texas Legislature nor our Texas Supreme Court has made any exception that would allow the Texas Attorney General or any attorney from that office to file dishonest pleadings and false criminal accusations in a court of law without being subject to the disciplinary jurisdiction of the Texas Supreme Court and this Commission. TEX. GOV'T CODE §81.071.

It is not disputed that Respondent was engaged in the practice of law when he prepared and filed the *Pennsylvania Case*. On February 10, 2021, Respondent and Texas Attorney General, Ken Paxton, testified before the Texas Senate Committee on Finance, that the Attorney General, Respondent and the "Executive staff" in the Texas Attorney General's Office worked on the *Pennsylvania Case*. See https://tlcsenate.granicus.com/MediaPlayer.php?clip_id=15358, starting at 2:55:18. Respondent participated in the preparation and filing of all pleadings on behalf of the State of Texas, including Plaintiff's: 1) Motion for Leave to File Bill of Complaint, with attached, proposed Bill of Complaint; 2) Brief in Support of Motion for Leave to File Bill of Complaint; 3) Motion for Expedited Consideration of the Motion for Leave to File a Bill of Complaint and for Expedition of any Plenary Consideration of the Matter on the Pleadings if Plaintiffs' Forthcoming Motion for Interim Relief is Not Granted; 4) Motion for Preliminary Injunction and Temporary Restraining Order or, Alternatively, for Stay and Administrative Stay; 5) Motion to Enlarge Word-Count Limit and Reply in Support of

Motion for Leave to File Bill of Complaint; and 6) Reply in Support of Motion for Preliminary Injunction and Temporary Restraining Order or, Alternatively for Stay and Administrative Stay. *See* ***Exhibit 1, bates 2-324.***

In these pleadings, Respondent attacked "non-legislative actors" in the Defendant States and dishonestly set forth purported "facts" in an attempt to support his request for the United States Supreme Court to "delay the deadline for the appointment of presidential electors under 3 U.S.C. §§ 5, 7," and "extend the December 14, 2020, deadline for Defendant States' certification of presidential electors to allow these investigations to be completed." *See* ***Exhibit 1, bates 10.*** Respondent then requested the United States Supreme Court to enjoin the Defendant States from participating in the electoral college altogether, seeking relief in the form of a "temporary restraining order, preliminary injunction, stay, and administrative stay…" This request for unprecedented, extraordinary relief was based on Respondent's dishonest allegation that an "outcome-determinative" number of votes had been illegally cast, switched, or accepted in Defendant States. *See* ***Exhibit 1, bates 5, 28, and 103.*** At the time of filing, Respondent knew, or should have known, that this allegation was false and unsupported by any admissible or credible evidence.

In fact, most of Respondent's purported unsubstantiated "facts" and allegations that actors in Defendant States had committed crimes that caused an "outcome-determinative" number of illegal votes to be counted had been debunked and refuted before Respondent ever filed his pleadings on or about December 7, 2020. Moreover, to this day, no evidence exists to show that an "outcome determinative" number of votes were ever counted or that

anyone engaged in the false illegal acts that he alleged in his pleadings.[3] Therefore, the Commission contends that Respondent engaged in professional misconduct that was dishonest and deceitful in violation of TDRPC Rule 8.04(a)(3) when he asked the Court to enjoin the Defendant States from participating in the electoral college on the false assertion that an "outcome determinative" number of votes were illegally cast.[4]

On December 11, 2020, the United States Supreme Court summarily denied Respondent's motion for leave to file Respondent's *Bill of Complaint*, holding that the State of Texas lacked standing under Article III of the Constitution. Specifically, the Court stated that "Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections." *See* ***Exhibit 3, bates 413.*** In addition to the Court's Order, Justice Samuel Alito issued a statement (the *Statement*), joined by Justice Clarence Thomas, in which he expressed his belief that the Court did not have discretion to deny the *filing* of such pleadings, while also making it clear that he would "not grant other relief" and expressing "no view on any other issue." *Id.*

In drawing this Court's attention to the *Statement*, Respondent overstates the legal significance of Justice Alito's and Justice Thomas' position while clumsily attempting to use the *Statement* to bolster his claim that the legal arguments in his pleadings had a veneer of legitimacy. Respondent is simply wrong. First, while both justices expressed the belief

[3] In fact, to date, Respondent has failed to provide *any* such evidence; nor has *any* litigant, in *any* case, in *any* jurisdiction in the United States provided *any* such admissible evidence.

[4] As set forth in the Omnibus Order issued on or about July 11, 2017, in *In re: Matter of Disciplinary Complaint Against Omar W. Rosales, Esq.*, an attorney is subject to being disciplined for violating the TDRPC when he dishonestly alleges criminal behavior on the part of others in an attempt to obtain an extraordinary remedy (i.e., protective orders, restraining orders, injunctions, etc.). *See* ***Exhibit 2.***

that *leave to file* the Bill of Complaint should have been granted, both also explicitly stated they would not have granted "other relief, and [they] express no view on any other issues..." *See* ***Exhibit 3, bates 413.*** Second, nothing contained in the *Statement* would have justified Respondent's dishonesty before the Court in filing pleadings that misrepresented the facts and/or falsely accused individuals of criminal conduct. Despite Respondent's suggestion to the contrary, no one on the United States Supreme Court has ever publicly stated that they agreed with Respondent's false assertion that he had evidence that an "outcome-determinative" number of votes were cast illegally - the linchpin for Respondent's request for injunctive relief.

In fact, less than 3 months later, the United States Supreme Court denied requests for writs of certiorari related to decisions of the Supreme Court of Pennsylvania regarding various challenges to changes in that state's election rules for the 2020 presidential election. *See Republican Party of Pennsylvania v. DeGraffenreid, et. al.,* 141 S.Ct. 732 (Mem) (2021), *attached hereto as* ***Exhibit 4, bates 415-421.*** In *DeGraffenreid*, Justice Thomas noted in his dissent from the denial of certiorari that in one of the underlying cases arising from Pennsylvania (regarding the Pennsylvania Supreme Court's decision to change a receipt deadline for mail-in ballots), "[n]one of the parties contend that those ballots made an outcome-determinative difference in any relevant federal election," and further stated, "At first blush, it may seem reasonable to address this question when it next arises. After all, the 2020 election is now over, and the Pennsylvania Supreme Court's decision was not outcome determinative for any federal election." *See* ***Exhibit 4, bates 416-417,*** *DeGraffenreid,* at 734-735. Clearly, Respondent's purported "evidence," as

stated throughout his pleadings in the *Pennsylvania Case*, never existed. As such, Respondent's dishonest conduct in connection with his effort to obtain an injunction against the Defendant States, specifically by making false accusations that "actors" in the Defendant States committed criminal and unlawful acts which resulted in votes being illegally counted or switched, violates TDRPC Rule 8.04(a)(3).

Respondent also expresses his fear that the Commission's institution of a disciplinary proceeding against an attorney in his position amounts to "[a]n effort to chill lawyers' willingness to serve under politicians whom the Bar opposes," while also acknowledging that as First Assistant Attorney General he, personally, does not exercise **any** "independent executive power". *See Plea to the Jurisdiction page 2.* Respondent offers no factual allegations in support of his contention that the Bar "opposes" the Attorney General or Attorney General's Office in any particular matter at all. Instead, the "opposition" Respondent refers to in the context of this disciplinary proceeding seems to be the Commission's responsibility to administer the State's attorney disciplinary system, through the application of Texas Supreme Court-promulgated standards of professional conduct, in the same manner with respect to Executive-branch attorneys as it does with respect to all other Texas-licensed attorneys.

II.
RESPONDENT'S PLEA TO THE JURISDICTION

As mentioned above, Respondent and Attorney General, Ken Paxton, testified before the Texas Senate Committee on Finance that the Attorney General, Respondent and the "Executive staff" in the Texas Attorney General's Office worked on the *Pennsylvania*

Case, and filed all pleadings on behalf of the State of Texas as "Counsel of Record." However, Respondent now asserts in his *Plea to the Jurisdiction* that he unlike every other licensed attorney in the United States, is altogether exempt from having to comply with his state's rules of professional conduct, *even when participating as counsel before a court* - at least as long as he is only acting at the direction of the Attorney General. Respondent also claims that any enforcement of the TDRPC and Texas Rules of Disciplinary Procedure (TRDP) against him violates the separation of powers doctrine and is barred by the doctrine of sovereign immunity. In addition, and without factual or evidentiary support, Respondent asserts that the State Bar of Texas, the Chief Disciplinary Counsel's Office (CDC), and the Commission failed to follow their own rules and thereby committed "an unconstitutional usurpation of power..." Finally, Respondent contends that his dishonest conduct in the *Pennsylvania Case*, including but not limited to his misrepresentations of facts and evidence and his false accusations of criminal conduct, do not violate TDRPC Rule 8.04(a)(3). Respondent's arguments are wrong and his requests for relief should be denied.

A.
STANDARD OF REVIEW

When, as here, the factual allegations in a plaintiff's petition affirmatively demonstrate the court's jurisdiction, evidence is not necessary to resolve the plea in the non-movant's favor. *Texas Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-27 (Tex. 2004). Moreover, pleadings are to be construed liberally in favor of the plaintiff, while looking to its intent. *Id., citing Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 446* (Tex. 1993). Because Respondent, a licensed Texas attorney, is not exempt from

the Court's jurisdiction by virtue of his position as First Assistant Attorney General in the Office of the Texas Attorney General, this Court should deny Respondent's *Plea to the Jurisdiction.*

B.
ARGUMENTS & AUTHORITIES

1. LEGAL BASIS FOR JURISDICTION.

Regarding attorneys, their licensing, and the practice of law in the State of Texas generally, the Texas legislature has promulgated Chapters 81 and 82 of the Texas Government Code. Chapter 81 provides, among other things, that:

- BAR MEMBERSHIP REQUIRED. (a) The state bar is composed of those persons licensed to practice law in this state. Bar members are subject to this chapter and to the rules adopted by the supreme court; (b) Each person licensed to practice law in this state shall, not later than the 10th day after the person's admission to practice, enroll in the state bar by registering with the clerk of the supreme court. *Sec. 81.051.*
- DISCIPLINARY JURISDICTION. **Each attorney admitted to practice in this state** and each attorney specially admitted by a court of this state for a particular proceeding **is subject to the disciplinary and disability jurisdiction of the supreme court and the Commission for Lawyer Discipline, a committee of the state bar**. *Sec. 81.071.* (emphasis added).
- GENERAL DISCIPLINARY AND DISABILITY PROCEDURES. (a) In furtherance of the supreme court's powers to supervise the conduct of attorneys, the court shall establish disciplinary and disability procedures in addition to the procedures provided by this subchapter; (b) The supreme court shall establish minimum standards and procedures for the attorney disciplinary and disability system...(d) **Each attorney is subject to the Texas Rules of Disciplinary Procedure and the Texas Disciplinary Rules of Professional Conduct**. *Sec. 81.072* (emphasis added).

Texas courts have consistently held that all attorneys admitted to practice in the State of Texas are subject to the disciplinary jurisdiction of the Texas Supreme Court and to the disciplinary procedures and rules of professional conduct promulgated by the Court. *See Belt v. Comm'n for Lawyer Discipline*, 970 S.W.2d 571, 574 (Tex. App. – Dallas 1997,

no pet.); *Kaufman v. Comm'n for Lawyer Discipline*, 197 S.W.3d 867, 872 (Tex. App. – Corpus Christi-Edinburg 2006, pet. denied).

Further, all attorneys licensed to practice law in the State of Texas are subject to the following: "OATH OF ATTORNEY. (a) Each person admitted to practice law shall, before receiving a license, take an oath that the person will: (1) support the constitutions of the United States and this state; (2) **honestly** demean oneself in the practice of law; (3) discharge the attorney's duty to the attorney's client to the best of the attorney's ability; and (4) conduct oneself with integrity and civility in dealing and communicating with the court and all parties." TEX. GOV'T CODE §82.037(A) (emphasis added). Respondent was licensed to practice law in the State of Texas on May 4, 2006, and endorsed the aforementioned Oath on his law license. TEX. GOV'T CODE §82.037(B).

2. FACTUAL ALLEGATIONS SUPPORTING JURISDICTION.

This disciplinary action has been filed in full compliance with the Texas Rules of Disciplinary Procedure. By rule, allegations of professional misconduct may be heard by an Evidentiary Panel of a Grievance Committee or by a district court, at the election of the respondent attorney. TEX. RULES DISCIPLINARY P.R. 2.15. When a respondent elects to proceed in district court, the case "[p]roceeds like other civil cases, except where the Rules of Disciplinary Procedure vary from the Rules of Civil Procedure," including providing for an appeal from the district court's judgment "as in civil cases generally." *See Comm'n for Lawyer Discipline v. Stern*, 355 S.W.3d 129, 135 (Tex. App. – Houston [1st Dist.] 2011, pet. denied), citing TEX. RULES DISCIPLINARY P.R. 3.02, 3.03, 3.08B & 3.16. In this case, Respondent elected to proceed in district court pursuant to TRDP Rule 2.15. In its Original

Disciplinary Petition, the Commission alleged, in pertinent part:

- Respondent is an attorney licensed to practice law in the State of Texas and a member of the State Bar of Texas.
- Respondent appeared and filed pleadings in the *Pennsylvania Case* on behalf of the State of Texas before the United States Supreme Court.
- In those pleadings, Respondent sought, among other things, injunctive relief against multiple Defendant States related to alleged violations of federal elections laws.
- In those pleadings, Respondent made several representations that were dishonest as they were not supported by any charge, indictment, judicial finding, or credible or admissible evidence, including, but not limited to: (i) an outcome-determinative number of votes in the 2020 presidential election were tied to unregistered voters; (ii) votes were switched by a glitch with Dominion voting machines; (iii) state actors 'unconstitutionally revised their state's election statutes'; and (iv) 'illegal votes' had been cast that affected the outcome of the election.
- Respondent's representations in those respects constituted conduct involving dishonesty, deceit, or misrepresentation, in violation of Texas Disciplinary Rule of Professional Conduct 8.04(a)(3).

The Commission alleged facts in its Original Disciplinary Petition which, on their face or if construed liberally in favor of the Commission, affirmatively demonstrate the Court's jurisdiction to hear this disciplinary action under Rules 2.15 and 3.01 of the TRDP. *See Stern,* 355 S.W.3d at 134-35; *Kaufman,* 197 S.W.3d at 872, citing *Belt,* 970 S.W.2d at 574.

3. RESPONDENT'S ARGUMENTS

As referenced above, Respondent's arguments arise from his mistaken belief that as First Assistant Attorney General, *even when acting as counsel before a court*, he is not subject to the disciplinary authority that the Texas Supreme Court holds over all Texas-licensed lawyers regarding the practice of law. Respondent's arguments, including his misplaced belief that the Court's disciplinary jurisdiction should not apply to the Texas

Attorney General or attorneys practicing law as directed by the Attorney General, suggest that no attorney who is an elected officeholder in the Executive or Legislative branches, or **any** government attorney in those two branches, can be subject to the disciplinary jurisdiction of the Texas Supreme Court for professional misconduct committed while holding such position when acting as an attorney.

Without legal authority to support this contention, Respondent argues that expecting him to abide by the same rules of professional conduct as all other Texas-licensed lawyers even when, in representing the State of Texas in court, he is actively engaged in the practice of law, is tantamount to the Commission, "[u]nduly interfer[ing] with the Attorney General's constitutional prerogative to represent the State in civil matters..." *See Plea to the Jurisdiction page 31.* Because it is not only possible, but also hopefully commonplace for government lawyers to fulfill all of their duties and responsibilities within the Executive or Legislative branches of government while also behaving ethically in the practice of law on behalf of their government agency clients, Respondent's concern that these responsibilities pose, for him, an untenable conflict rings hollow.

a. SEPARATION OF POWERS

The State Bar Act gives the Supreme Court "administrative control over the State Bar and provides a statutory mechanism for promulgating regulations governing the practice of law." *State Bar of Texas v. Gomez,* 891 S.W.2d 243, 245 (Tex. 1994). Furthermore, the Court has inherent regulatory powers derived from Article II, Section I of the Texas Constitution, which dictates separation of powers and implies the Court's supervisory role in regulating legal practice. *See In re State Bar of Texas,* 113 S.W.3d 730,

732 (Tex. 2003) (orig. proceeding) citing *Eichelberger v. Eichelberger,* 582 S.W.2d 395, 398-99 (Tex. 1979). *See* ***Exhibit 5, bates 423-428.*** The Court's inherent powers, such as the power to regulate the practice of law, are not jurisdictional powers. *See Eichelberger*, 582 S.W.2d at 399. These powers are administrative powers, necessary to the preservation of the judiciary's independence and integrity.

In addition, two states have already tackled and rejected Respondent's argument as to whether the judicial branch of government can administratively regulate the license of an attorney who is an officer of the executive branch of government. In both instances it was determined that such regulation does not violate the Separation of Powers Doctrine. *See In re Lord*, 255 Minn. 370 (Minn. 1959) and *Massameno v. Statewide Grievance Committee*, 234 Conn. 539 (Conn. 1995). *See* ***Exhibits 6 and 7.*** In *In re Lord,* the Supreme Court of Minnesota held "the governor has no power to clothe the attorney general with immunity for disciplinary powers of the court when the attorney general appears in court as an attorney," and that such a finding would "reduce the court to a tool of the executive." *Lord,* 255 Minn. at 372.

The Commission recognizes that the Attorney General serves a unique role in Texas government. That unique role embraces both executive and judicial functions and arose when the position was originally created within the judicial branch (the same section of the Texas Constitution that created the positions of district attorney). *See* TEX. CONST. of 1845 art. 4, § 12.12. In a recent attempted prosecution in Case No. PD-1032-20 & PD-1033-20 styled, *Zena Collins Stephens v. The State of Texas*, the Attorney General's Office stated, "the Attorney General routinely and constitutionally exercises judicial power, as the

Attorney General frequently appears in a variety of courts on behalf of the State." *See* ***Exhibit 8, bates 478.*** In fact, the Attorney General's Office specifically argued in *Stephens* that, "[t]he duties imposed upon (the Attorney General) are both executive and judicial, that is, they are judicial in a sense, that he is to represent the state in some cases brought in the courts." *See* ***Exhibit 8, bates 489.***[5]

When Respondent participated in the preparation and filing of the pleadings in the *Pennsylvania Case*, he was keenly aware that he was exercising his judicial function. *As an attorney who took an Oath as part of his license and admission to practice law in Texas,* Respondent must have also been aware that he would be subject to the TDRPC and TRDP if he engaged in unethical conduct while practicing law as counsel for the State of Texas in the *Pennsylvania Case*. While the role of Texas Attorney General (and by extension, the Attorney General's Office) may be unique, Respondent's ethical responsibilities as an attorney while actively engaged in the practice of law in the *Pennsylvania Case* are no different than those of every other Texas-licensed attorney.

Respondent also suggests jurisdiction over the conduct of the Texas Attorney General or executive-branch attorneys in their practice of the law by the judicial branch, unlike for all other Texas-licensed attorneys, is unnecessary and unwarranted, as the Attorney General can be held accountable for his actions through the political process (i.e., the Attorney General, can, after all, be unelected), or via impeachment. Respondent offers that such checks "[a]pply equally to the First Assistant, who is further subject to the control

[5] According to the Attorney General's Brief, Respondent served as both trial and appellate counsel in *Stephens*.

of the Attorney General in the discharge of his duties." *See Plea to the Jurisdiction pages 31-32.* Of course, this is not accurate, as Respondent (who is not an elected official) can neither be unelected, nor be impeached. Finally, none of Respondent's analysis in this regard addresses the obvious – the existence of such checks (i.e., political checks on the executive power of an Attorney General, and the employment check on the professional conduct of an employee) does not in any way preclude the attorney disciplinary jurisdiction delegated to the Texas Supreme Court and the Commission.[6]

b. SOVEREIGN IMMUNITY

Respondent's arguments regarding sovereign immunity, rather purposefully it seems, miss the point entirely. It is generally true that public officials sued in their official capacities for damages, injunctive or declaratory relief, or the like, are often protected by some form of sovereign immunity, derived by virtue of the governmental unit they represent. *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 843-44 (Tex. 2007); *Paxton v. Waller County*, 620 S.W.3d 843 (Tex. App. – Amarillo 2021, pet. denied).

However, here, Respondent has not been sued in his official capacity at all. Rather,

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[6] Indeed, the Texas Court of Criminal Appeals has noted this very concept. In *State ex rel Eidson v. Edwards*, the Court, while deciding mandamus would lie to correct a trial court's improper disqualification of a district attorney and his entire office from prosecution of a matter, made this observation:

> "Contrary to the charge of our dissenting brother, we *are not* in any way saying that Texas prosecutors are immune from the Code of Professional Responsibility. We merely recognize that the current state of the law accords no authority for the trial courts to enforce these rules by disqualifying an entire prosecutorial office. *Unlike any private attorney*, the local prosecutor – be the district attorney, county attorney, or criminal district attorney – is an elected official whose office is constitutionally mandated and protected. Prosecutors are still subject to the Rules of Professional Responsibility, but they must police themselves at the trial court level because of their status as independent members of the judicial branch of government. Such a holding *is not* tantamount to making the fox guardian of the henhouse or letting the wolf keep watch on the flock, **because a prosecutor who violates ethical rules is subject to the disciplining authority of the State Bar like any other attorney.**" *State ex rel. Eidson v. Edwards*, 793 S.W.2d 1, 6-7 (Tex. Crim. App. 1990) (op. on reh'g) (italicized emphasis in original) (emboldened emphasis added).

the Commission has brought this disciplinary action against him personally, in his capacity as a Texas-licensed attorney, pursuant to TDRPC and TRDP. In this disciplinary action, the issues are, "[t]he appropriate interpretation of the Rules of Conduct and a factual determination of whether [Respondent's] conduct met or violated the Rules..." *Acevedo v. Commission for Lawyer Discipline*, 131 S.W.3d 99, 107 (Tex. App. – San Antonio 2004, pet. denied), citing *Hawkins v. Commission for Lawyer Discipline*, 988 S.W.2d 927, 936 (Tex. App. – El Paso 1999, pet. denied), *cert denied*, 529 U.S. 1022, 120 S.Ct. 1426, 146 L.Ed.2d 317 (2000). And the "stakes" are not money damages, or injunctive or declaratory relief, to be ordered against a governmental unit, but the regulation of Respondent's license to practice law in the State of Texas, something that is personal to him and not dependent on or subject to any position he may hold as a public employee.

The authorities cited by Respondent regarding the proper application of sovereign immunity to claims brought against public officials in their official capacities, or, in their individual capacities when in fact it was their official capacities implicated by such claims, are inapposite. Each of those authorities concerns matters in which litigants sued governmental units and/or public officials employed by such units for money damages and/or injunctive or declaratory relief. In a very real sense, those litigants' claims were solely directed at the sovereign, or at an individual acting *solely* on behalf of the sovereign. In such cases, courts have indeed consistently found that governmental actors are often protected from liability in their *individual* capacities by sovereign immunity, as the sovereign is, in fact, the real party in interest in such cases. (E.g., *Koseoglu*, 233 S.W.3d at 843-44; *Davis v. City of Aransas Pass*, No. 13-17-00455-CV, 2018 WL 4140633 (Tex.

App. – Corpus Christi Aug. 29, 2018, no pet.); *Ross v. Linebarger, Goggan, Blair & Sampson, L.L.P.*, 333 S.W.3d 736 (Tex. App. – Houston [1st Dist.] 2010, no pet.); *Pickell v. Brooks*, 846 S.W.2d 421 (Tex. App. – Austin 1992, writ denied).

But even in such cases, the true test of whether sovereign immunity is implicated at all rests on whether the relief sought seeks to control "state action". *See GTECH Corp. v. Steele*, 549, S.W.3d 768, 784-85 (Tex. App. – Austin 2018, aff'd sub nom), *Nettles v. GTECH Corp.*, 606 S.W.3d 726 (Tex. 2020). The action to be addressed in this disciplinary case is not the "state action" of the Texas Attorney General or Respondent as First Assistant Attorney General in *choosing to file* the litigation in the *Pennsylvania Case*. Rather, it is Respondent's actions as an attorney in the conduct of that litigation, specifically his dishonest statements and representations made in the pleadings underlying the *Pennsylvania Case*, and whether such actions met or violated the requirements of the TDRPC.

There is a relative paucity of caselaw analyzing arguments raised by state attorneys general or by government lawyers generally suggesting they are not subject to the judiciary's regulation of the legal profession based on sovereign immunity. In most cases, courts have been critical, if not dismissive, of these arguments, noting the obvious flaws of

such reasoning.[7]

Further, in cases where a state's attorney general has been disciplined for violations of attorney disciplinary standards, neither the separation of powers doctrine nor sovereign immunity was found to be an impediment to the disciplinary process, if they were argued by the respondent attorney at all. *Lord, supra*; *In re Kline*, 298 Kan. 96, 311 P.3d 321 (2013) (Former Kansas Attorney General suspended indefinitely from the practice of law in Kansas in connection with multiple violations of the Kansas Rules of Professional Conduct while serving as Kansas Attorney General and later as Johnson County District Attorney)[8].

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[7] See *Chilcutt v. U.S.*, 4 F.3d 1313, 1327 (5th Cir. 1993) (holding that to restrict a court's power to fashion sanctions pursuant to the Federal Rules of Civil Procedure against a government attorney, when appropriate, would, "violate the separation of powers doctrine," as it, "[w]ould invite members of our sister branches to ignore acceptable standards of decorum in courts and flout court orders."); *U.S. v. Shaffer Equip. Co.*, 158 F.R.D. 80, 87 (S.D. W.Va. 1994) (citing *U.S. v. Associated Convalescent Enterprises, Inc.*, 766 F.2d 1342, 1346 (9th Cir. 1985) and *U.S. v. Horn*, 29 F.3d 754 (1st Cir. 1994)) (holding that a court's power to impose sanctions pursuant to its inherent authority and the Federal Rules of Civil Procedure applies to government attorneys who, "[l]ike all attorneys, have a duty to conform to the ethical guidelines of their profession." And further, that "Sovereign immunity is not a bar to personal sanctions on government attorneys for their ethical violations because these sanctions do not come from the public coffers."); *Massameno*, 234 Conn. at 562-64 (holding that prosecutors "maintain their positions as officers of the court like all other attorneys when they are performing their role as prosecutors...and that they must act within recognized principles of law and standards of justice," and as such were subject to the disciplinary jurisdiction of the judiciary. (internal citations omitted)); *Ramsey v. Board of Professional Responsibility*, 771 S.W.2d 116, 118 (Tenn. 1989) (holding that a district attorney was subject to the court's jurisdiction regarding attorney discipline as, "The office of District Attorney constitutes no shield or protection to an attorney who violates his oath as an attorney or the disciplinary rules of this Court.")

And *Cf., Dinsdale v. Commonwealth, et. al.*, 675 N.E. 2d 374 (1997) (noting the extension of absolute immunity to government attorneys in their conduct of criminal and civil litigation in some jurisdictions, and recognizing several historical and common law bases for this extension of such immunity, including the fact that, "[s]uch attorneys are still subject to other checks whereby an abuse of authority might be redressed, such as sanctions in the underlying case, contempt, or **bar disciplinary proceedings**," citing, *Fry v. Melaragno*, 939 F.2d 832, 838 (9th Cir. 1991) and *Barrett v. U.S.*, 798 F.2d 565, 572 (2nd Cir. 1986) (emphasis added)).

[8] In Texas, the Supreme Court exercised disciplinary jurisdiction over the law license of the Texas Attorney General by accepting Dan Morales' Resignation In Lieu of Discipline on December 15, 2003. At the time of his resignation, Morales was subject to Compulsory Discipline under Part VIII of the Texas Rules of Disciplinary Procedure following the entry of his guilty plea to an Intentional and Serious Crime in Case Number A-03-CR-085(1)-SS, styled *United States of America, Plaintiff v. Daniel C. Morales, Defendant*, in the United States District Court, Western District of Texas, Austin Division, related to conduct that occurred while he was serving as Texas Attorney General. See Order of the Supreme Court of Texas in Misc. Docket No. 03-9205, *In the Matter of Daniel C. Morales*, and associated pleadings, attached hereto as **Exhibit 9, starting at bates 519.**

Here, the misconduct alleged in the Commission's disciplinary petition refers to Respondent's actions as an officer of the court and attorney in the *Pennsylvania Case* filed before the United States Supreme Court; not the decision taken by the Texas Attorney General or his office to file such litigation.

c. UNCONSTITUTIONAL USURPATION OF POWER

In the Texas attorney grievance and disciplinary process, all licensed attorneys are afforded the same due process under the TRDP as required by the Texas Legislature and our Texas Supreme Court. Respondent's attempts to politicize this proceeding with his inaccurate description of the procedural history of this case and the rules that have been applied in the disciplinary process, is troubling. As Respondent's own records attached to his *Plea to the Jurisdiction* clearly show, the Commission and the Chief Disciplinary Counsel's Office (CDC) have complied with the TRDP in all respects since the grievances that serve as the basis of this disciplinary action were filed.

By way of background, once a grievance is filed in Texas, the CDC must determine whether to classify the grievance as a "Complaint" (a writing that alleges conduct that, if true, constitutes professional misconduct) or an "Inquiry" (a writing that alleges conduct that, even if true, does not constitute professional misconduct). TEX. RULES DISCIPLINARY P.R. 2.10 (*emphasis added)*. If the CDC determines that the allegations do not constitute professional misconduct, the writing is dismissed as an Inquiry. TEX. RULES DISCIPLINARY P.R. 2.10. A complainant has the right to appeal the dismissal of a grievance as an Inquiry

to the Board of Disciplinary Appeals (BODA)[9]. TEX. RULES DISCIPLINARY P.R. 2.10A.

Grievances classified by the CDC as a Complaint or overturned on appeal by BODA for classification as a Complaint, are upgraded for investigation. In those instances, the respondent attorney must respond to the allegations of misconduct within thirty days of receiving notice of the allegations. TEX. RULES DISCIPLINARY P. R. 2.10 (*emphasis added).* Pursuant to TRDP 2.12, the CDC is mandated to investigate all Complaints.

Contrary to Respondent's contention, there is no rule that limits the scope of the CDC's investigation to only those rules that BODA identifies as "possible violations" when overturning a classification decision and returning the case to the CDC for investigation. *See* Respondent's *Plea to the Jurisdiction,* Exhibit 19-22; TEX. RULES DISCIPLINARY P.R. 2.10-2.12. Respondent's belief that BODA can limit the scope of an investigation is nonsensical since an investigation does not commence until a grievance is classified as a Complaint. TEX. RULES DISCIPLINARY P.R. 2.12.

After receiving the response from the respondent attorney, the CDC must make a Just Cause determination within sixty days or set the matter for an Investigatory Hearing. TEX. RULES DISCIPLINARY P.R. 2.12. An Investigatory Hearing is conducted by a panel of district grievance committee members, comprised of volunteers who live or work in the county where the alleged Professional Misconduct occurred, in whole or in part. TEX. RULES DISCIPLINARY P.R. 2.11. The chair of the Investigatory Panel conducts the hearing pursuant to TRDP 2.12F.

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[9] As Respondent correctly points out, the complaint underlying this disciplinary action was originally dismissed by the CDC as an "inquiry," that was later overturned on appeal by BODA. As a result, the CDC had no discretion to take any action other than to upgrade the case as a "Complaint" and conduct an investigation.

As shown by Respondent's own records attached to his *Plea to the Jurisdiction*, venue for the Investigatory Hearing in this disciplinary action was properly held to be in Travis County, Texas, which is where the allegations against him occurred in whole or in part. *See* TEX. GOV'T CODE §402.008. Respondent's Motion to Dismiss and, in the Alternative, Motion to Transfer Venue, dated September 24, 2021 (Exhibit 2 of *Plea to the Jurisdiction*), wherein he attempted to transfer venue based on a claim that the allegations against him did not occur, in part, in Travis County was properly denied. Despite this finding, Respondent continues to argue that the Investigatory Hearing should have taken place in Williamson County, where he resides. This erroneous claim ignores the simple fact that the venue rules are different for Investigatory Hearings, Evidentiary Hearings, and District Court proceedings. *See* Respondent's *Plea to the Jurisdiction page 20 and* TEX. RULES DISCIPLINARY P.R. 2.11 and 3.03. Further, Respondent's suggestion that he cannot be disciplined for "Professional Misconduct" related to pleadings he filed in a court of law outside the State of Texas makes no sense. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.05(A).[10]

When an Investigatory Hearing is held, the Just Cause determination is made by the grievance panel at the completion of the hearing. TEX. RULES DISCIPLINARY P.R. 2.12. The result of an Investigatory Hearing may be "a Sanction negotiated with the Respondent or in the CDC's dismissing the Complaint or finding Just Cause..." TEX. RULES

[10] The Texas Supreme Court rejected similar arguments in Cause No. 19-0668; styled *Matthew Louis Pepper v. Commission for Lawyer Discipline,* which affirmed an evidentiary panel's decision to sanction Pepper for violations related to pleadings filed in Louisiana when some of his clients lived in Texas and he filed the pleadings from his Texas office. *See* ***Exhibit 10.***

DISCIPLINARY P.R. 2.12G. The Investigatory Hearing gives the respondent a chance to present evidence and testimony that can assist the volunteer grievance panel members in making their recommendation.

As Respondent points out in his *Plea to the Jurisdiction,* the Complaint underlying this disciplinary action was presented to an Investigatory Panel on January 5, 2022, where Respondent did not personally appear and/or provide testimony. *See Plea to the Jurisdiction Exhibit 4.* Also, as set forth in Exhibit 18 of Respondent's *Plea to the Jurisdiction,* the Investigatory Panel found "credible evidence" to support a finding that Respondent violated Rule 8.04(a)(3) of the TDRPC, and the CDC attempted to negotiate a resolution with Respondent. TEX. RULES DISCIPLINARY P.R. 2.12.

Regarding the next steps in the process, in his *Plea to the Jurisdiction*, Respondent states that he elected to have these matters heard in district court, pursuant to TRDP 2.15. Respondent elected to have the disciplinary action heard in Williamson County, Texas, where venue was proper under TEX. RULES DISCIPLINARY P.R. 3.03. Following Respondent's election to have the matter heard before a district court in Williamson County, the Commission, as required by the TRDP, requested the assignment of a judge to preside over the proceedings, and then filed its Petition, along with the Order of Assignment, with the Williamson County District Clerk.[11] TEX. RULES DISCIPLINARY P.R. 3.01-3.03.

In his *Plea to the Jurisdiction,* Respondent falsely accuses the State Bar of Texas of

[11] Respondent's suggestion that the Commission had discretion to forego the filing of this disciplinary action if no resolution occurred after the Investigatory Hearing is groundless. *See Respondent's Plea to the Jurisdiction page 10 and* TEX. RULES DISCIPLINARY P.R. 2.15, 3.01 and 3.03.

following a "political agenda," by filing this disciplinary action "just a few weeks before Attorney General Paxton's primary runoff election..." *See Plea to the Jurisdiction page 2.* As is evident from the face of the pleading, the Disciplinary Petition was filed on May 25, 2022, not "just a few weeks before [Respondent's] primary runoff election..." as alleged. As noted above, the Commission cannot file the Disciplinary Petition until the Presiding Judge has appointed a judge to preside over the matter. TEX. RULES DISCIPLINARY P.R. 3.03. Clearly, Respondent has conjured up the specter of a "political agenda" on the part of the State Bar of Texas, the Commission, and the CDC in order to politicize an otherwise straightforward disciplinary proceeding.

d. PROFESSIONAL MISCONDUCT - RULE 8.04(a)(3)

In its Disciplinary Petition, the Commission alleges that Respondent's conduct in the *Pennsylvania Case* violated TDRPC Rule 8.04(a)(3).

Specifically, in the pleadings filed with the United States Supreme Court in the *Pennsylvania Case*, Respondent made numerous false, misleading, and dishonest statements. Those statements included accusations that Defendant State actors had committed, or permitted, multiple illegal or unconstitutional acts (i.e., illegal backdating, removal, acceptance, and harvesting of ballots), with no supporting evidence or indictment. *See* ***Exhibit 1, bates 24, 43, 89, 98, 102.*** Respondent also dishonestly set forth that an "outcome-determinative" number of illegal votes had been counted for current President Joe R. Biden and claimed in the pleadings that "Presently, evidence of material illegality in the 2020 general elections held in Defendant States grows daily," despite the existence of no such finding from a court of law or corroborating evidence. *See* ***Exhibit 1, bates 10.***

As mentioned above, even Justice Clarence Thomas disagreed that an "outcome-determinative" number of votes were at play in the 2020 federal election. *See* ***Exhibit 4.***

At the time the pleadings were filed, all Defendant States had certified their election results and conducted recounts pursuant to their own election laws. In fact, as early as December 1, 2020, former United States Attorney General, William Barr, explained that the Justice Department had uncovered no evidence of widespread voter fraud that could change the outcome of the 2020 election *(emphasis added)*. *See* Associated Press. "Disputing Trump, Barr Says No Widespread Election Fraud." U.S. News & World Report Online, December 1, 2020. https://www.usnews.com/news/us/articles/2020-12-01/barr-no-evidence-of-fraud-thatd-change-election-outcome?context=amp. Ignoring this information, Respondent made numerous statements in the pleadings that were false, dishonest, and deceitful in violation of Rule 8.04(a)(3) of the TDRPC, including the following:

> ***Claim #1:*** "The rampant lawlessness arising out of Defendant States' unconstitutional acts is described in a number of currently pending lawsuits in the Defendant States or in public view …" *See* ***Exhibit 1, bates 12.***
>
> ***Claim #2:*** "The number of votes not tied to a registered voter by itself exceeds Vice President Biden's margin of margin of 146,007 votes by more than 28,377 votes." *See* ***Exhibit 1, bates 36.***
>
> ***Claim #3:*** "Facts for which no independently verified reasonable explanation yet exists: … In Michigan, which also employed the same Dominion voting system, on November 4, 2020, Michigan election officials have admitted that a purported "glitch" caused 6,000 votes for President Trump to be wrongly switched to Democrat Candidate Biden." *See* ***Exhibit 1, bates 13.***
>
> ***Claim #4:*** "The number of absentee and mail-in ballots that have been handled unconstitutionally in Defendant States greatly exceeds the difference between the totals of the two candidates for President…" *See* ***Exhibit 1, bates 16.***

Claim #5: "The CSV file from the state (Pennsylvania) on November 4 depicts 3.1 million mail in ballots sent out but on November 2, the information was provided that only 2.7 million ballots had been sent out. ***This discrepancy of approximately 400,000 ballots from November 2 to November 4 has not been explained."*** *See* ***Exhibit 1, bates 27.***

Remarkably, Respondent made or referenced these statements, in part, to persuade the Supreme Court to enjoin Defendant States from participating in the electoral college based on his dishonest argument that an "outcome-determinative" number of votes were "constitutionally tainted," and/or "illegally" counted. *See* ***Exhibit 1, bates 5, 27, 28, 47-49, and 103.*** Respondent also attached eight affidavits/declarations to the Motion for Expedited Consideration of the Motion for Leave to File Bill of Complaint. *See* ***Exhibit 1, bates 123-130; 137-263.*** None of the affidavits were sworn to by residents from the State of Texas, and none set forth personal knowledge that an "outcome-determinative" number of votes had been illegally cast for President Joe R. Biden.[12] Likewise, Respondent's attempt to use the "Declaration" of Charles J. Cicchetti, Ph.D., which identifies him as a Managing Director at Berkeley Research Group, to support some of his claims was deceitful and dishonest, as set forth below.[13] *See* ***Exhibit 1, bates 113-122.***

As to Claim #1: "The rampant lawlessness arising out of Defendant States' unconstitutional acts is described in a number of currently pending lawsuits in the Defendant States or in public view…"

On or about December 7, 2020, when Respondent filed the pleadings with the

[12] In order of their inclusion in Respondent's Motion for Expedited Consideration, the affidavits/declarations are; (1) Affidavit of Monica Palmer, ***Exh. 1, bates 123-125***; (2) Affidavit of William C. Hartmann, ***Exh. 1, bates 126-130***; (3) Affidavit of Mellissa A. Carone, ***Exh. 1, bates 137-139***; (4) Affidavit of Jessy Jacob, ***Exh. 1, bates 146-148***; (5) Affidavit of Zachary Larsen, ***Exh. 1, bates 149-158***; (6) Affidavit of Andrew John Miller, ***Exh. 1, bates 159-160***; (7) Declaration of Gregory Stenstrom, ***Exh. 1, bates 164-186***; and (8) Affidavit of Ethan J. Pease, ***Exh. 1, bates 261-263***.

[13] This "Declaration" neither complied with the federal requirements regarding unsworn declarations in 28 U.S.C. §1746, nor offered **any** indicia of verification as to the identity of its supposed author.

United States Supreme Court, no court had found that an "unconstitutional act" had occurred in any of the Defendant States as alleged. Of the approximately sixty-two election cases filed, only one resulted in a court of law granting an injunction for petitioner. That case was *Donald J. Trump for President, Inc., and Republican National Committee v. Kathy Boockvar et. al.,* No. 602 M.D. 2020, in the Commonwealth Court of Pennsylvania, wherein Judge Mary Hannah Leavitt (on November 12, 2020), granted *Donald J. Trump for President, Inc.'s* request for an injunction and enjoined Boockvar from counting the ballots that had been segregated (pursuant to the Court's November 5, 2020 order) due to being postmarked after 8:00 p.m., election day. As to the remaining states, to date, there has been no finding of "unconstitutional acts" by an actor of a Defendant State related to any of Respondent's claims in Georgia, Wisconsin, or Michigan.

As to Claim #2: "The number of votes not tied to a registered voter by itself exceeds Vice President Biden's margin of margin of 146,007 votes by more than 28,377 votes."

In the *Bill of Complaint*, Respondent represented the "Wayne County Statement of Votes Report Lists in stating 174,384 absentee ballots out of 566,694 absentee ballots tabulated (about 30.8%) as counted without a registration number for precincts in the City of Detroit." *See* ***Exhibit 1, bates 36.*** However, none of the affidavits attached to Respondent's pleadings contained personal knowledge supporting Respondent's claim that "more than 173,000 ballots in the Wayne County, MI center…cannot be tied to a registered voter." *See* ***Exhibit 1, bates 12-13.*** While it appears Respondent relied on the purported "Declaration" of Charles Cicchetti to make this claim, Respondent was aware that Cicchetti stated in his "Declaration" that when he was "asked to analyze absentee ballots in Wayne

County, Michigan…[he] found that Detroit precincts do not provide information on voter registration," and "do not report balanced tabulations…" Cicchetti also stated in his "Declaration" that "These failures make it impossible to determine if the ballots tabulated are valid." *See* ***Exhibit 1, bates 115.***

More concerning is that Respondent (a licensed attorney for approximately 16 years) was aware, or should have been aware, of the pending litigation in *King et. al. v. Whitmer et. al.*, 2020 WL 7134198 (E.D. Mich. Dec 7, 2020), and that before he filed the pleadings on or about December 7, 2020, this specific claim was addressed and rejected by the court filing of Director of Michigan's Bureau of Elections, Jonathan Brater's declaration, on December 2, 2020, which was based on Brater's personal knowledge. Said declaration explained these "approximately 174,000 absentee voter ballots" were tabulated at the TCF Convention Center in Detroit and ultimately only 150 of those ballots were not verified with the name on their "poll book" before being counted. *See* ***Exhibit 11, bates 612-613.*** As a result, Respondent had no credible, admissible evidence to support his representation to the Court that an "outcome-determinative" number of votes were in play in Michigan. This is especially true since his claim that Michigan's Secretary of State Jocelyn Benson's "unconstitutional modification of Michigan's election rules resulted in the distribution of millions of absentee ballot applications without verifying voter signatures as required by MCL = 168.759(4) and 168.761(2)," had been rejected before the election by the Michigan Court of Appeals in September 2020.[14] *See* ***Exhibit 1, bates 34.***

[14] Before the election and before Respondent filed his pleadings, the Michigan Court of Appeals concluded in a published decision that it was within the Michigan Secretary of State's constitutional and statutory authority to mail

As to Claim #3, "Facts for which no independently verified reasonable explanation yet exists: ... In Michigan, which also employed the same Dominion voting system, on November 4, 2020, Michigan election officials have admitted that a purported 'glitch' caused 6,000 votes for President Trump to be wrongly switched to Democrat Candidate Biden."

Here, Respondent possessed no evidence to support his assertion that Michigan election officials admitted that a purported "glitch" with its Dominion voting machines caused 6,000 votes for President Trump to be wrongly switched to Democrat Candidate Biden. This allegation was widely publicized before Respondent filed the pleadings on or about December 7, 2020, and it was known that no votes were "switched", and that any tabulation error was a result of human error corrected that same day. *See* ***Exhibit 12, starting at bates 616.*** (entitled Report on The November 2020 Election in Michigan, dated June 23, 2021, providing a summary of the testimony that Antrim County Clerk Sheryl Guy gave on November 19, 2020, explaining this issue to the Senate and House Oversight Committees in November 2020). In fact, the Michigan Department of State put out a statement, on or about November 7, 2020, clarifying that the votes in question were part of the unofficial results in Antrim County Michigan and were "quickly identified and corrected." *See* ***Exhibit 13.*** The Department of State also explained that all program tabulators were updated and counted the votes correctly, but the issue was that it did not communicate properly with the "central election management system software," when the reports were combined. *See* ***Exhibit 13.*** The Department of State further stated that such

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the unsolicited applications to registered voters. See *Davis v. Secretary of State*, 333 Mich. App. 588, 963 N.W.2d 653, 660-61 (Sept. 16, 2020), *appeal denied by Davis v. Secretary of State*, 506 Mich. 1040 (2020). [Note: The Michigan Court of Appeals is Michigan's lone, intermediate appellate court, serving between Michigan trial courts and the Michigan Supreme Court.]

errors are easy to spot because every tabulator prints a paper total, which is how they found and corrected the error in the first place. This process was explained in Jonathan Brater's December 2, 2020, declaration as described above. *See* ***Exhibit 11, starting at bates 603.***

As to Claim #4: "The number of absentee and mail-in ballots that have been handled unconstitutionally in Defendant States greatly exceeds the difference between the totals of the two candidates for President…"

To date, no evidence exists to support this statement, and none existed at the time Respondent filed these false and dishonest allegations in the pleadings with the Court.

As to Claim #5: "The CSV file from the state (Pennsylvania) on November 4 depicts 3.1 million mail-in ballots sent out but on November 2, the information was provided that only 2.7 million ballots had been sent out. ***This discrepancy of approximately 400,000 ballots from November 2 to November 4 has not been explained."*** …

Respondent chose to recite this unsupported claim despite the fact that at the time he filed the pleadings, the Pennsylvania Department of State's "opendataPA" website showed that approximately 3.08 million mail-in or absentee ballots applications had been approved for the 2020 General Election. https://data.pa.gov/stories/s/2020-General-Election-Voting-Story/kptg-uury.[15] Additionally, Pennsylvania Secretary of State Kathy Boockvar had already released a press statement on or about October 30, 2020, stating "about 73 percent of the more than 3 million ballots mailed to Pennsylvania voters have been voted and returned to counties."[16] Further, in Case No 4:20-cv-02078, styled *Donald J. Trump for President Inc., et. al., v. Kathy Boockvar, et. al.*, in the United States District Court (Middle District of Pennsylvania), former President Trump conceded this point when

[15] https://data.pa.gov/Government-Efficiency-Citizen-Engagement/2020-Primary-Mail-Ballot-Counts-by-County/43wz-2ph2

[16] https://www.media.pa.gov/pages/state-details.aspx?newsid=425

he filed a Verified Complaint for Declaratory and Injunctive Relief setting forth that "(approximately 3.1 million absentee and mail-in ballots were approved and sent to electors for the General Election)." *See* ***Exhibit 14, starting at bates 675.*** As was the case throughout the pleadings, Respondent had no admissible, credible evidence supporting this claim filed with the Court.

The nature of Respondent's conduct in the *Pennsylvania Case* is similar to the conduct of other Texas attorneys who have been disciplined in the past for violations of Rule 8.04(a)(3). For example, in *In re: Matter of Disciplinary Complaint Against Omar W. Rosales, Esq,* Rosales was disciplined by the United States District Court for the Western District of Texas for violating Rule 8.04(a)(3), among other rules, for alleging without any credible evidence that opposing counsel had harassed and stalked him. Rosales made these false claims in an attempt to obtain a temporary restraining order from the court.[17] *See* ***Exhibit 2.*** Likewise, in *Favaloro v. Commission for Lawyer Discipline*, 13 S.W.3d 831 (Tex. App.—Dallas 2000, no pet.), Favaloro was disciplined for taking a position in the course of litigation that unreasonably increased the costs of the case; making a statement known to be false or with reckless disregard as to its truth or falsity regarding a judge; and engaging in conduct involving dishonesty, deceit, fraud, or misrepresentation in violation of Rules 3.02(a)(1), 8.02(a), and 8.04(a)(3). *See* ***Exhibit 15, starting at bates 762.*** In *Willie v. Commission for Lawyer Discipline*, No. 14-13-00872-CV, 2015 WL 1245965 (Tex.

[17] The Commission also filed a state disciplinary action against Rosales on April 27, 2018, ***See Cause No. D-1-GN-18-002039, styled Commission for Lawyer Discipline v. Omar Weaver Rosales 201705141.*** On March 10, 2021, the trial court granted the Commission's partial motion for summary judgment finding that Rosales violated, in part, Rule 8.04(a)(3) based on findings by another court in an Omnibus Order that Rosales "could not elucidate any credible threats or violations of law, or any stalking or harassing conduct" by opposing counsel to justify seeking a temporary restraining order. Rosales resigned in lieu of discipline on October 22, 2021.

App.—Houston [14th Dist.] March 17, 2015, pet. denied) (mem. op.), Willie argued for reversal on the appeal of an underlying criminal matter claiming the State failed to introduce the confessions and waivers. The State supplemented the appellate record with the confessions and waivers. Although the appellate court declined to impose sanctions against Willie, one justice dissented and reported the attorney's misconduct to the State Bar of Texas. A trial court found that Willie violated TDRPC Rules 3.01, 3.03(a)(1)(5), 8.04(a)(3) and 8.04(a)(4), which decision was affirmed by the Fourteenth Court of Appeals. *See* ***Exhibit 16, starting at bates 793.***

Respondent's suggestion that attorneys cannot not be disciplined for "Professional Misconduct," under TDRPC Rule 8.04(a)(3), for pleadings filed in a court of law outside the State of Texas contradicts Rule 8.05(a) of the TDRPC. Nor is there any requirement that an attorney be sanctioned by a court of law from another jurisdiction before facing a disciplinary action brought by the Commission. *See Willie at 13-15.*

III.
OBJECTION TO RESPONDENT'S EXHIBITS

To the extent the Court believes it must consider evidence to determine jurisdictional facts related to Respondent's *Plea to the Jurisdiction*, the Commission objects to Respondent's Exhibits 8-12 (consisting of Respondent's Supreme Court pleadings), and the materials attached to each such exhibit, including the "[e]leven declarations, affidavits, and verified pleadings" referenced in the Appendix to Respondent's Exhibit 9, insofar as Respondent seeks to offer them as "evidence" regarding the truth of his representations in the Supreme Court pleadings. The Commission objects

as to the authenticity of each of the "declarations" and "affidavits" included in such materials, and further objects to all such documents as inadmissible hearsay.

Notwithstanding the foregoing objections, the Commission maintains that the Court does not need to consider evidence to resolve Respondent's *Plea to the Jurisdiction*, as the Commission's petition affirmatively demonstrates the court's jurisdiction, as set forth above. Indeed, a fact determination as to whether Respondent's representations in the United States Supreme Court pleadings were violative of the Texas Disciplinary Rules of Professional Conduct, rather than being a jurisdictional issue, is exactly the sort of merits-based attorney disciplinary inquiry consigned to the Texas Supreme Court and the Commission, and by extension, this court.

IV.
CONCLUSION

As set forth above, Respondent made false, dishonest, and deceitful representations in the pleadings he filed with the United States Supreme Court in the *Pennsylvania Case.* This conduct violated Rule 8.04(a)(3) of the TDRPC, as well as the oath Respondent took when he became a licensed attorney in Texas. Respondent has presented no credible arguments or legal authority to support his request that he is entitled to the relief sought in his *Plea to the Jurisdiction.* As the Commission has demonstrated above, the Texas Supreme Court has the authority to regulate all attorneys licensed in Texas, including the attorneys in the employ of the Texas Attorney General. Absent a lawful exception to this Court's jurisdiction, Respondent, a Texas licensed attorney, remains subject to the TDRPC and TRDP while engaging in the practice of law.

As stated above, while the Texas Attorney General (and by extension, Respondent as First Assistant Attorney General, to the extent he participated in that actual decision) may have had the *right* to make the decision to file the *Pennsylvania Case*, it was unethical to prepare and file pleadings before the United States Supreme Court that contained misleading and deceitful "facts," false accusations of criminal conduct, and arguments unsupported by the law or any credible, admissible evidence. The Commission disagrees with Respondent's argument that, as an attorney who is also a public employee – appointed and/or employed by the executive head of a state agency – he should be held to lower (or, in fact, no) standards of ethical conduct in the practice of law. Instead, as an attorney who is also a public employee, Respondent holds a position of public trust and, at a minimum, should be held to at least the same disciplinary standards as all other Texas-licensed attorneys in the practice of law.

V.
PRAYER

Petitioner prays that this Court deny Respondent's *Plea to the Jurisdiction*, and for any and all such other relief to which this Court deems Petitioner entitled.

Respectfully submitted,

Seana Willing
Chief Disciplinary Counsel

Amanda M. Kates
Assistant Disciplinary Counsel
State Bar Card No. 24075987
OFFICE OF THE CHIEF DISCIPLINARY COUNSEL
STATE BAR OF TEXAS
P.O. Box 12487, Capitol Station

Austin, Texas 78711-2487
Telephone: 512.427.1350
Facsimile: 512.427.4167
Email: akates@texasbar.com

Amanda M. Kates
Assistant Disciplinary Counsel
State Bar Card No. 24075987

Royce Lemoine
Deputy Counsel for Administration –
Austin Regional Counsel
State Bar Card No. 24026421

Michael G. Graham
Appellate Counsel
State Bar Card No. 24113581

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served electronically through the electronic-filing manager in compliance with Texas Rules of Civil Procedure 21a on July 21, 2022, to all counsel of record.

Amanda M. Kates

CAUSE NO. 22-0594-C368

COMMISSION FOR LAWYER DISCIPLINE, *Petitioner,*	§	**IN THE DISTRICT COURT OF**
V.	§	**WILLIAMSON COUNTY, TEXAS**
BRENT EDWARD WEBSTER **202101679**	§	**368TH JUDICIAL DISTRICT**

BUSINESS-RECORD AFFIDAVIT FOR RESPONSE TO RESPONDENT'S ANSWER, DEFENSES, AND PLEA TO THE JURISDICTION

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, personally appeared Shelly Hogue, who, being by me duly sworn, deposed and said:

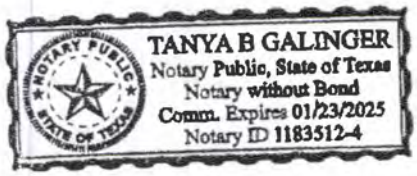
1. My name is Shelly Hogue. I am over 18 years of age, of sound mind, capable of making this affidavit, and am personally acquainted with the facts herein stated:

2. I am employed as an Executive Assistant with the Chief Disciplinary Counsels Office of the State Bar of Texas, and as such I am the custodian of the below-described records attached to this affidavit.

3. The records attached to this affidavit as **Exhibits 9** and **15**; consisting of pages 519-565 and 772-791 are kept by the Chief Disciplinary Counsel's Office in the regular course of business. It was in the regular course of business for an employee or representative of the Chief Disciplinary Counsels Office with knowledge of the act, event, condition, or opinion or diagnosis that was recorded, to make this record or to transmit the information to be included in this record. The record was made at or near the time of the act, event, condition, or opinion recorded, or reasonably soon thereafter. The records attached hereto are exact duplicates of the originals in our files.

Shelly Hogue

SWORN TO AND SUBSCRIBED BEFORE ME this 21st day of July 2022.



Notary Public, State of Texas

App 6

RULES

OF THE

Supreme Court of the United States

ADOPTED APRIL 18, 2019

EFFECTIVE JULY 1, 2019

SUPREME COURT OF THE UNITED STATES

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Part I. The Court

Rule 1. Clerk

1. The Clerk receives documents for filing with the Court and has authority to reject any submitted filing that does not comply with these Rules.

2. The Clerk maintains the Court's records and will not permit any of them to be removed from the Court building except as authorized by the Court. Any document filed with the Clerk and made a part of the Court's records may not thereafter be withdrawn from the official Court files. After the conclusion of proceedings in this Court, original records and documents transmitted to this Court by any other court will be returned to the court from which they were received.

3. Unless the Court or the Chief Justice orders otherwise, the Clerk's office is open from 9 a.m. to 5 p.m., Monday through Friday, except on federal legal holidays listed in 5 U. S. C. § 6103.

Rule 2. Library

1. The Court's library is available for use by appropriate personnel of this Court, members of the Bar of this Court, Members of Congress and their legal staffs, and attorneys for the United States and for federal departments and agencies.

2. The library's hours are governed by regulations made by the Librarian with the approval of the Chief Justice or the Court.

3. Library books may not be removed from the Court building, except by a Justice or a member of a Justice's staff.

Rule 3. Term

The Court holds a continuous annual Term commencing on the first Monday in October and ending on the day before the first Monday in October of the following year. See 28 U. S. C. § 2. At the end of each Term, all cases pending on the docket are continued to the next Term.

Rule 4. Sessions and Quorum

1. Open sessions of the Court are held beginning at 10 a.m. on the first Monday in October of each year, and thereafter as announced by the Court. Unless it orders otherwise, the Court sits to hear arguments from 10 a.m. until noon and from 1 p.m. until 3 p.m.

2. Six Members of the Court constitute a quorum. See 28 U. S. C. § 1. In the absence of a quorum on any day appointed for holding a session of the Court, the Justices attending—or if no Justice is present, the Clerk or a Deputy Clerk—may announce that the Court will not meet until there is a quorum.

3. When appropriate, the Court will direct the Clerk or the Marshal to announce recesses.

Part II. Attorneys and Counselors

Rule 5. Admission to the Bar

1. To qualify for admission to the Bar of this Court, an applicant must have been admitted to practice in the highest court of a State, Commonwealth, Territory or Possession, or the District of Columbia for a period of at least three years immediately before the date of application; must not have been the subject of any adverse disciplinary action pronounced or in effect during that 3-year period; and must appear to the Court to be of good moral and professional character.

2. Each applicant shall file with the Clerk (1) a certificate from the presiding judge, clerk, or other authorized official of that court evidencing the applicant's admission to practice there and the applicant's current good standing, and (2) a completely executed copy of the form approved by this Court and furnished by the Clerk containing (a) the applicant's personal statement, and (b) the statement of two sponsors endorsing the correctness of the applicant's statement, stating that the applicant possesses all the qualifications required for admission, and affirming that the applicant is of good

moral and professional character. Both sponsors must be members of the Bar of this Court who personally know, but are not related to, the applicant.

3. If the documents submitted demonstrate that the applicant possesses the necessary qualifications, and if the applicant has signed the oath or affirmation and paid the required fee, the Clerk will notify the applicant of acceptance by the Court as a member of the Bar and issue a certificate of admission. An applicant who so wishes may be admitted in open court on oral motion by a member of the Bar of this Court, provided that all other requirements for admission have been satisfied.

4. Each applicant shall sign the following oath or affirmation: I, ..., do solemnly swear (or affirm) that as an attorney and as a counselor of this Court, I will conduct myself uprightly and according to law, and that I will support the Constitution of the United States.

5. The fee for admission to the Bar and a certificate bearing the seal of the Court is $200, payable to the United States Supreme Court. The Marshal will deposit such fees in a separate fund to be disbursed by the Marshal at the direction of the Chief Justice for the costs of admissions, for the benefit of the Court and its Bar, and for related purposes.

6. The fee for a duplicate certificate of admission to the Bar bearing the seal of the Court is $15, and the fee for a certificate of good standing is $10, payable to the United States Supreme Court. The proceeds will be maintained by the Marshal as provided in paragraph 5 of this Rule.

Rule 6. Argument *Pro Hac Vice*

1. An attorney not admitted to practice in the highest court of a State, Commonwealth, Territory or Possession, or the District of Columbia for the requisite three years, but otherwise eligible for admission to practice in this Court under Rule 5.1, may be permitted to argue *pro hac vice.*

2. An attorney qualified to practice in the courts of a foreign state may be permitted to argue *pro hac vice.*

3. Oral argument *pro hac vice* is allowed only on motion of the counsel of record for the party on whose behalf leave is requested. The motion shall state concisely the qualifications of the attorney who is to argue *pro hac vice.* It shall be filed with the Clerk, in the form required by Rule 21, no later than the date on which the respondent's or appellee's brief on the merits is due to be filed, and it shall be accompanied by proof of service as required by Rule 29.

Rule 7. Prohibition Against Practice

No employee of this Court shall practice as an attorney or counselor in any court or before any agency of government while employed by the Court; nor shall any person after leaving such employment participate in any professional capacity in any case pending before this Court or in any case being considered for filing in this Court, until two years have elapsed after separation; nor shall a former employee ever participate in any professional capacity in any case that was pending in this Court during the employee's tenure.

Rule 8. Disbarment and Disciplinary Action

1. Whenever a member of the Bar of this Court has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this Court, the Court will enter an order suspending that member from practice before this Court and affording the member an opportunity to show cause, within 40 days, why a disbarment order should not be entered. Upon response, or if no response is timely filed, the Court will enter an appropriate order.

2. After reasonable notice and an opportunity to show cause why disciplinary action should not be taken, and after a hearing if material facts are in dispute, the Court may take any appropriate disciplinary action against any attorney who is admitted to practice before it for conduct unbecoming a member of the Bar or for failure to comply with these Rules or any Rule or order of the Court.

Rule 9. Appearance of Counsel

1. An attorney seeking to file a document in this Court in a representative capacity must first be admitted to practice before this Court as provided in Rule 5, except that admission to the Bar of this Court is not required for an attorney appointed under the Criminal Justice Act of 1964, see 18 U. S. C. § 3006A(d)(7), or under any other applicable federal statute. The attorney whose name, address, and telephone number appear on the cover of a document presented for filing is considered counsel of record. If the name of more than one attorney is shown on the cover of the document, the attorney who is counsel of record shall be clearly identified. See Rule 34.1(f).

2. An attorney representing a party who will not be filing a document shall enter a separate notice of appearance as counsel of record indicating the name of the party represented. A separate notice of appearance shall also be entered whenever an attorney is substituted as counsel of record in a particular case.

Part III. Jurisdiction on Writ of Certiorari

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual

course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Rule 11. Certiorari to a United States Court of Appeals Before Judgment

A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court. See 28 U. S. C. § 2101(e).

Rule 12. Review on Certiorari: How Sought; Parties

1. Except as provided in paragraph 2 of this Rule, the petitioner shall file 40 copies of a petition for a writ of certiorari, prepared as required by Rule 33.1, and shall pay the Rule 38(a) docket fee.

2. A petitioner proceeding *in forma pauperis* under Rule 39 shall file an original and 10 copies of a petition for a writ of certiorari prepared as required by Rule 33.2, together with an original and 10 copies of the motion for leave to proceed *in forma pauperis.* A copy of the motion shall precede and be attached to each copy of the petition. An in-

mate confined in an institution, if proceeding *in forma pauperis* and not represented by counsel, need file only an original petition and motion.

3. Whether prepared under Rule 33.1 or Rule 33.2, the petition shall comply in all respects with Rule 14 and shall be submitted with proof of service as required by Rule 29. The case then will be placed on the docket. It is the petitioner's duty to notify all respondents promptly, on a form supplied by the Clerk, of the date of filing, the date the case was placed on the docket, and the docket number of the case. The notice shall be served as required by Rule 29.

4. Parties interested jointly, severally, or otherwise in a judgment may petition separately for a writ of certiorari; or any two or more may join in a petition. A party not shown on the petition as joined therein at the time the petition is filed may not later join in that petition. When two or more judgments are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the judgments suffices. A petition for a writ of certiorari may not be joined with any other pleading, except that any motion for leave to proceed *in forma pauperis* shall be attached.

5. No more than 30 days after a case has been placed on the docket, a respondent seeking to file a conditional cross-petition (*i. e.*, a cross-petition that otherwise would be untimely) shall file, with proof of service as required by Rule 29, 40 copies of the cross-petition prepared as required by Rule 33.1, except that a cross-petitioner proceeding *in forma pauperis* under Rule 39 shall comply with Rule 12.2. The cross-petition shall comply in all respects with this Rule and Rule 14, except that material already reproduced in the appendix to the opening petition need not be reproduced again. A cross-petitioning respondent shall pay the Rule 38(a) docket fee or submit a motion for leave to proceed *in forma pauperis.* The cover of the cross-petition shall indicate clearly that it is a conditional cross-petition. The cross-petition then will be placed on the docket, subject to the

provisions of Rule 13.4. It is the cross-petitioner's duty to notify all cross-respondents promptly, on a form supplied by the Clerk, of the date of filing, the date the cross-petition was placed on the docket, and the docket number of the cross-petition. The notice shall be served as required by Rule 29. A cross-petition for a writ of certiorari may not be joined with any other pleading, except that any motion for leave to proceed *in forma pauperis* shall be attached. The time to file a conditional cross-petition will not be extended.

6. All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court, unless the petitioner notifies the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below have no interest in the outcome of the petition. A copy of such notice shall be served as required by Rule 29 on all parties to the proceeding below. A party noted as no longer interested may remain a party by notifying the Clerk promptly, with service on the other parties, of an intention to remain a party. All parties other than the petitioner are considered respondents, but any respondent who supports the position of a petitioner shall meet the petitioner's time schedule for filing documents, with the following exception: A response of a party aligned with petitioner below who supports granting the petition shall be filed within 30 days after the case is placed on the docket, and that time will not be extended. Counsel for such respondent shall ensure that counsel of record for all parties receive notice of its intention to file a brief in support within 20 days after the case is placed on the docket. A respondent not aligned with petitioner below who supports granting the petition, or a respondent aligned with petitioner below who takes the position that the petition should be denied, is not subject to the notice requirement and may file a response within the time otherwise provided by Rule 15.3. Parties who file no document will not qualify for any relief from this Court.

7. The clerk of the court having possession of the record shall keep it until notified by the Clerk of this Court to certify and transmit it. In any document filed with this Court, a party may cite or quote from the record, even if it has not been transmitted to this Court. When requested by the Clerk of this Court to certify and transmit the record, or any part of it, the clerk of the court having possession of the record shall number the documents to be certified and shall transmit therewith a numbered list specifically identifying each document transmitted. If the record, or stipulated portions, have been printed for the use of the court below, that printed record, plus the proceedings in the court below, may be certified as the record unless one of the parties or the Clerk of this Court requests otherwise. The record may consist of certified copies, but if the lower court is of the view that original documents of any kind should be seen by this Court, that court may provide by order for the transport, safekeeping, and return of such originals.

Rule 13. Review on Certiorari: Time for Petitioning

1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

2. The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time. See, *e. g.*, 28 U. S. C. § 2101(c).

3. The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for re-

hearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or *sua sponte* considers rehearing, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment.

4. A cross-petition for a writ of certiorari is timely when it is filed with the Clerk as provided in paragraphs 1, 3, and 5 of this Rule, or in Rule 12.5. However, a conditional cross-petition (which except for Rule 12.5 would be untimely) will not be granted unless another party's timely petition for a writ of certiorari is granted.

5. For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days. An application to extend the time to file shall set out the basis for jurisdiction in this Court, identify the judgment sought to be reviewed, include a copy of the opinion and any order respecting rehearing, and set out specific reasons why an extension of time is justified. The application must be filed with the Clerk at least 10 days before the date the petition is due, except in extraordinary circumstances. The application must clearly identify each party for whom an extension is being sought, as any extension that might be granted would apply solely to the party or parties named in the application. For the time and manner of presenting the application, see Rules 21, 22, 30, and 33.2. An application to extend the time to file a petition for a writ of certiorari is not favored.

Rule 14. Content of a Petition for a Writ of Certiorari

1. A petition for a writ of certiorari shall contain, in the order indicated:

(a) The questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail. The questions should be short and should not be argumentative or repetitive. If the petitioner

or respondent is under a death sentence that may be affected by the disposition of the petition, the notation "capital case" shall precede the questions presented. The questions shall be set out on the first page following the cover, and no other information may appear on that page. The statement of any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court.

(b) (i) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed (unless the caption of the case contains the names of all the parties);

(ii) a corporate disclosure statement as required by Rule 29.6; and

(iii) a list of all proceedings in state and federal trial and appellate courts, including proceedings in this Court, that are directly related to the case in this Court. For each such proceeding, the list should include the court in question, the docket number and case caption for the proceeding, and the date of entry of the judgment. For the purposes of this rule, a case is "directly related" if it arises from the same trial court case as the case in this Court (including the proceedings directly on review in this case), or if it challenges the same criminal conviction or sentence as is challenged in this Court, whether on direct appeal or through state or federal collateral proceedings.

(c) If the petition prepared under Rule 33.1 exceeds 1,500 words or exceeds five pages if prepared under Rule 33.2, a table of contents and a table of cited authorities. The table of contents shall include the items contained in the appendix.

(d) Citations of the official and unofficial reports of the opinions and orders entered in the case by courts or administrative agencies.

(e) A concise statement of the basis for jurisdiction in this Court, showing:

(i) the date the judgment or order sought to be reviewed was entered (and, if applicable, a statement that the petition is filed under this Court's Rule 11);

(ii) the date of any order respecting rehearing, and the date and terms of any order granting an extension of time to file the petition for a writ of certiorari;

(iii) express reliance on Rule 12.5, when a cross-petition for a writ of certiorari is filed under that Rule, and the date of docketing of the petition for a writ of certiorari in connection with which the cross-petition is filed;

(iv) the statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question; and

(v) if applicable, a statement that the notifications required by Rule 29.4(b) or (c) have been made.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, set out verbatim with appropriate citation. If the provisions involved are lengthy, their citation alone suffices at this point, and their pertinent text shall be set out in the appendix referred to in subparagraph 1(i).

(g) A concise statement of the case setting out the facts material to consideration of the questions presented, and also containing the following:

(i) If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e. g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the fed-

eral question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied on under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(i).

(ii) If review of a judgment of a United States court of appeals is sought, the basis for federal jurisdiction in the court of first instance.

(h) A direct and concise argument amplifying the reasons relied on for allowance of the writ. See Rule 10.

(i) An appendix containing, in the order indicated:

(i) the opinions, orders, findings of fact, and conclusions of law, whether written or orally given and transcribed, entered in conjunction with the judgment sought to be reviewed;

(ii) any other relevant opinions, orders, findings of fact, and conclusions of law entered in the case by courts or administrative agencies, and, if reference thereto is necessary to ascertain the grounds of the judgment, of those in companion cases (each document shall include the caption showing the name of the issuing court or agency, the title and number of the case, and the date of entry);

(iii) any order on rehearing, including the caption showing the name of the issuing court, the title and number of the case, and the date of entry;

(iv) the judgment sought to be reviewed if the date of its entry is different from the date of the opinion or order required in sub-subparagraph (i) of this subparagraph;

(v) material required by subparagraphs 1(f) or 1(g)(i); and

(vi) any other material the petitioner believes essential to understand the petition.

If the material required by this subparagraph is voluminous, it may be presented in a separate volume or volumes with appropriate covers.

2. All contentions in support of a petition for a writ of certiorari shall be set out in the body of the petition, as provided in subparagraph 1(h) of this Rule. No separate brief in support of a petition for a writ of certiorari may be filed, and the Clerk will not file any petition for a writ of certiorari to which any supporting brief is annexed or appended.

3. A petition for a writ of certiorari should be stated briefly and in plain terms and may not exceed the word or page limitations specified in Rule 33.

4. The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition.

5. If the Clerk determines that a petition submitted timely and in good faith is in a form that does not comply with this Rule or with Rule 33 or Rule 34, the Clerk will return it with a letter indicating the deficiency. A corrected petition submitted in accordance with Rule 29.2 no more than 60 days after the date of the Clerk's letter will be deemed timely.

Rule 15. Briefs in Opposition; Reply Briefs; Supplemental Briefs

1. A brief in opposition to a petition for a writ of certiorari may be filed by the respondent in any case, but is not mandatory except in a capital case, see Rule 14.1(a), or when ordered by the Court.

2. A brief in opposition should be stated briefly and in plain terms and may not exceed the word or page limitations specified in Rule 33. In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived mis-

statement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition. A brief in opposition should identify any directly related cases that were not identified in the petition under Rule 14.1(b)(iii), including for each such case the information called for by Rule 14.1(b)(iii).

3. Any brief in opposition shall be filed within 30 days after the case is placed on the docket, unless the time is extended by the Court or a Justice, or by the Clerk under Rule 30.4. Forty copies shall be filed, except that a respondent proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis*, a copy of which shall precede and be attached to each copy of the brief in opposition. If the petitioner is proceeding *in forma pauperis*, the respondent shall prepare its brief in opposition, if any, as required by Rule 33.2, and shall file an original and 10 copies of that brief. Whether prepared under Rule 33.1 or Rule 33.2, the brief in opposition shall comply with the requirements of Rule 24 governing a respondent's brief, except that no summary of the argument is required. A brief in opposition may not be joined with any other pleading, except that any motion for leave to proceed *in forma pauperis* shall be attached. The brief in opposition shall be served as required by Rule 29.

4. No motion by a respondent to dismiss a petition for a writ of certiorari may be filed. Any objections to the jurisdiction of the Court to grant a petition for a writ of certiorari shall be included in the brief in opposition.

5. The Clerk will distribute the petition to the Court for its consideration upon receiving an express waiver of the right to file a brief in opposition, or, if no waiver or brief in opposition is filed, upon the expiration of the time allowed for filing. If a brief in opposition is timely filed, the Clerk will distribute the petition, brief in opposition, and any reply

brief to the Court for its consideration no less than 14 days after the brief in opposition is filed, unless the petitioner expressly waives the 14-day waiting period.

6. Any petitioner may file a reply brief addressed to new points raised in the brief in opposition, but distribution and consideration by the Court under paragraph 5 of this Rule will not be deferred pending its receipt. Forty copies shall be filed, except that a petitioner proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The reply brief shall be served as required by Rule 29.

7. If a cross-petition for a writ of certiorari has been docketed, distribution of both petitions will be deferred until the cross-petition is due for distribution under this Rule.

8. Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing. A supplemental brief shall be restricted to new matter and shall follow, insofar as applicable, the form for a brief in opposition prescribed by this Rule. Forty copies shall be filed, except that a party proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The supplemental brief shall be served as required by Rule 29.

Rule 16. Disposition of a Petition for a Writ of Certiorari

1. After considering the documents distributed under Rule 15, the Court will enter an appropriate order. The order may be a summary disposition on the merits.

2. Whenever the Court grants a petition for a writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record and the court whose judgment is to be reviewed. The case then will be scheduled for briefing and oral argument. If the rec-

ord has not previously been filed in this Court, the Clerk will request the clerk of the court having possession of the record to certify and transmit it. A formal writ will not issue unless specially directed.

3. Whenever the Court denies a petition for a writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record and the court whose judgment was sought to be reviewed. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice.

Part IV. Other Jurisdiction

Rule 17. Procedure in an Original Action

1. This Rule applies only to an action invoking the Court's original jurisdiction under Article III of the Constitution of the United States. See also 28 U. S. C. § 1251 and U. S. Const., Amdt. 11. A petition for an extraordinary writ in aid of the Court's appellate jurisdiction shall be filed as provided in Rule 20.

2. The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In other respects, those Rules and the Federal Rules of Evidence may be taken as guides.

3. The initial pleading shall be preceded by a motion for leave to file, and may be accompanied by a brief in support of the motion. Forty copies of each document shall be filed, with proof of service. Service shall be as required by Rule 29, except that when an adverse party is a State, service shall be made on both the Governor and the Attorney General of that State.

4. The case will be placed on the docket when the motion for leave to file and the initial pleading are filed with the Clerk. The Rule 38(a) docket fee shall be paid at that time.

5. No more than 60 days after receiving the motion for leave to file and the initial pleading, an adverse party shall file 40 copies of any brief in opposition to the motion, with

proof of service as required by Rule 29. The Clerk will distribute the filed documents to the Court for its consideration upon receiving an express waiver of the right to file a brief in opposition, or, if no waiver or brief is filed, upon the expiration of the time allowed for filing. If a brief in opposition is timely filed, the Clerk will distribute the filed documents to the Court for its consideration no less than 10 days after the brief in opposition is filed. A reply brief may be filed, but consideration of the case will not be deferred pending its receipt. The Court thereafter may grant or deny the motion, set it for oral argument, direct that additional documents be filed, or require that other proceedings be conducted.

6. A summons issued out of this Court shall be served on the defendant 60 days before the return day specified therein. If the defendant does not respond by the return day, the plaintiff may proceed *ex parte*.

7. Process against a State issued out of this Court shall be served on both the Governor and the Attorney General of that State.

Rule 18. Appeal from a United States District Court

1. When a direct appeal from a decision of a United States district court is authorized by law, the appeal is commenced by filing a notice of appeal with the clerk of the district court within the time provided by law after entry of the judgment sought to be reviewed. The time to file may not be extended. The notice of appeal shall specify the parties taking the appeal, designate the judgment, or part thereof, appealed from and the date of its entry, and specify the statute or statutes under which the appeal is taken. A copy of the notice of appeal shall be served on all parties to the proceeding as required by Rule 29, and proof of service shall be filed in the district court together with the notice of appeal.

2. All parties to the proceeding in the district court are deemed parties entitled to file documents in this Court, but a party having no interest in the outcome of the appeal may so notify the Clerk of this Court and shall serve a copy of

the notice on all other parties. Parties interested jointly, severally, or otherwise in the judgment may appeal separately, or any two or more may join in an appeal. When two or more judgments involving identical or closely related questions are sought to be reviewed on appeal from the same court, a notice of appeal for each judgment shall be filed with the clerk of the district court, but a single jurisdictional statement covering all the judgments suffices. Parties who file no document will not qualify for any relief from this Court.

3. No more than 60 days after filing the notice of appeal in the district court, the appellant shall file 40 copies of a jurisdictional statement and shall pay the Rule 38 docket fee, except that an appellant proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis*, a copy of which shall precede and be attached to each copy of the jurisdictional statement. The jurisdictional statement shall follow, insofar as applicable, the form for a petition for a writ of certiorari prescribed by Rule 14, and shall be served as required by Rule 29. The case will then be placed on the docket. It is the appellant's duty to notify all appellees promptly, on a form supplied by the Clerk, of the date of filing, the date the case was placed on the docket, and the docket number of the case. The notice shall be served as required by Rule 29. The appendix shall include a copy of the notice of appeal showing the date it was filed in the district court. For good cause, a Justice may extend the time to file a jurisdictional statement for a period not exceeding 60 days. An application to extend the time to file a jurisdictional statement shall set out the basis for jurisdiction in this Court; identify the judgment sought to be reviewed; include a copy of the opinion, any order respecting rehearing, and the notice of appeal; and set out specific reasons why an extension of time is justified. For the time and manner of presenting the application, see Rules 21,

22, and 30. An application to extend the time to file a jurisdictional statement is not favored.

4. No more than 30 days after a case has been placed on the docket, an appellee seeking to file a conditional cross-appeal (*i. e.*, a cross-appeal that otherwise would be untimely) shall file, with proof of service as required by Rule 29, a jurisdictional statement that complies in all respects (including number of copies filed) with paragraph 3 of this Rule, except that material already reproduced in the appendix to the opening jurisdictional statement need not be reproduced again. A cross-appealing appellee shall pay the Rule 38 docket fee or submit a motion for leave to proceed *in forma pauperis.* The cover of the cross-appeal shall indicate clearly that it is a conditional cross-appeal. The cross-appeal then will be placed on the docket. It is the cross-appellant's duty to notify all cross-appellees promptly, on a form supplied by the Clerk, of the date of filing, the date the cross-appeal was placed on the docket, and the docket number of the cross-appeal. The notice shall be served as required by Rule 29. A cross-appeal may not be joined with any other pleading, except that any motion for leave to proceed *in forma pauperis* shall be attached. The time to file a cross-appeal will not be extended.

5. After a notice of appeal has been filed in the district court, but before the case is placed on this Court's docket, the parties may dismiss the appeal by stipulation filed in the district court, or the district court may dismiss the appeal on the appellant's motion, with notice to all parties. If a notice of appeal has been filed, but the case has not been placed on this Court's docket within the time prescribed for docketing, the district court may dismiss the appeal on the appellee's motion, with notice to all parties, and may make any just order with respect to costs. If the district court has denied the appellee's motion to dismiss the appeal, the appellee may move this Court to docket and dismiss the appeal by filing an original and 10 copies of a motion presented in conformity with Rules 21 and 33.2. The motion shall be accompanied by proof of service as required by Rule 29,

and by a certificate from the clerk of the district court, certifying that a notice of appeal was filed and that the appellee's motion to dismiss was denied. The appellant may not thereafter file a jurisdictional statement without special leave of the Court, and the Court may allow costs against the appellant.

6. Within 30 days after the case is placed on this Court's docket, the appellee may file a motion to dismiss, to affirm, or in the alternative to affirm or dismiss. Forty copies of the motion shall be filed, except that an appellee proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis*, a copy of which shall precede and be attached to each copy of the motion to dismiss, to affirm, or in the alternative to affirm or dismiss. The motion shall follow, insofar as applicable, the form for a brief in opposition prescribed by Rule 15, and shall comply in all respects with Rule 21.

7. The Clerk will distribute the jurisdictional statement to the Court for its consideration upon receiving an express waiver of the right to file a motion to dismiss or to affirm or, if no waiver or motion is filed, upon the expiration of the time allowed for filing. If a motion to dismiss or to affirm is timely filed, the Clerk will distribute the jurisdictional statement, motion, and any brief opposing the motion to the Court for its consideration no less than 14 days after the motion is filed, unless the appellant expressly waives the 14-day waiting period.

8. Any appellant may file a brief opposing a motion to dismiss or to affirm, but distribution and consideration by the Court under paragraph 7 of this Rule will not be deferred pending its receipt. Forty copies shall be filed, except that an appellant proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The brief shall be served as required by Rule 29.

9. If a cross-appeal has been docketed, distribution of both jurisdictional statements will be deferred until the cross-appeal is due for distribution under this Rule.

10. Any party may file a supplemental brief at any time while a jurisdictional statement is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing. A supplemental brief shall be restricted to new matter and shall follow, insofar as applicable, the form for a brief in opposition prescribed by Rule 15. Forty copies shall be filed, except that a party proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The supplemental brief shall be served as required by Rule 29.

11. The clerk of the district court shall retain possession of the record until notified by the Clerk of this Court to certify and transmit it. See Rule 12.7.

12. After considering the documents distributed under this Rule, the Court may dispose summarily of the appeal on the merits, note probable jurisdiction, or postpone consideration of jurisdiction until a hearing of the case on the merits. If not disposed of summarily, the case stands for briefing and oral argument on the merits. If consideration of jurisdiction is postponed, counsel, at the outset of their briefs and at oral argument, shall address the question of jurisdiction. If the record has not previously been filed in this Court, the Clerk of this Court will request the clerk of the court in possession of the record to certify and transmit it.

13. If the Clerk determines that a jurisdictional statement submitted timely and in good faith is in a form that does not comply with this Rule or with Rule 33 or Rule 34, the Clerk will return it with a letter indicating the deficiency. If a corrected jurisdictional statement is submitted in accordance with Rule 29.2 no more than 60 days after the date of the Clerk's letter it will be deemed timely.

Rule 19. Procedure on a Certified Question

1. A United States court of appeals may certify to this Court a question or proposition of law on which it seeks instruction for the proper decision of a case. The certificate shall contain a statement of the nature of the case and the facts on which the question or proposition of law arises. Only questions or propositions of law may be certified, and they shall be stated separately and with precision. The certificate shall be prepared as required by Rule 33.2 and shall be signed by the clerk of the court of appeals.

2. When a question is certified by a United States court of appeals, this Court, on its own motion or that of a party, may consider and decide the entire matter in controversy. See 28 U. S. C. § 1254(2).

3. When a question is certified, the Clerk will notify the parties and docket the case. Counsel shall then enter their appearances. After docketing, the Clerk will submit the certificate to the Court for a preliminary examination to determine whether the case should be briefed, set for argument, or dismissed. No brief may be filed until the preliminary examination of the certificate is completed.

4. If the Court orders the case briefed or set for argument, the parties will be notified and permitted to file briefs. The Clerk of this Court then will request the clerk of the court in possession of the record to certify and transmit it. Any portion of the record to which the parties wish to direct the Court's particular attention should be printed in a joint appendix, prepared in conformity with Rule 26 by the appellant or petitioner in the court of appeals, but the fact that any part of the record has not been printed does not prevent the parties or the Court from relying on it.

5. A brief on the merits in a case involving a certified question shall comply with Rules 24, 25, and 33.1, except that the brief for the party who is the appellant or petitioner below shall be filed within 45 days of the order requiring briefs or setting the case for argument.

Rule 20. Procedure on a Petition for an Extraordinary Writ

1. Issuance by the Court of an extraordinary writ authorized by 28 U. S. C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

2. A petition seeking a writ authorized by 28 U. S. C. § 1651(a), § 2241, or § 2254(a) shall be prepared in all respects as required by Rules 33 and 34. The petition shall be captioned "*In re* [name of petitioner]" and shall follow, insofar as applicable, the form of a petition for a writ of certiorari prescribed by Rule 14. All contentions in support of the petition shall be included in the petition. The case will be placed on the docket when 40 copies of the petition are filed with the Clerk and the docket fee is paid, except that a petitioner proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis*, a copy of which shall precede and be attached to each copy of the petition. The petition shall be served as required by Rule 29 (subject to subparagraph 4(b) of this Rule).

3. (a) A petition seeking a writ of prohibition, a writ of mandamus, or both in the alternative shall state the name and office or function of every person against whom relief is sought and shall set out with particularity why the relief sought is not available in any other court. A copy of the judgment with respect to which the writ is sought, including any related opinion, shall be appended to the petition together with any other document essential to understanding the petition.

(b) The petition shall be served on every party to the proceeding with respect to which relief is sought. Within 30

days after the petition is placed on the docket, a party shall file 40 copies of any brief or briefs in opposition thereto, which shall comply fully with Rule 15. If a party named as a respondent does not wish to respond to the petition, that party may so advise the Clerk and all other parties by letter. All persons served are deemed respondents for all purposes in the proceedings in this Court.

4. (a) A petition seeking a writ of habeas corpus shall comply with the requirements of 28 U. S. C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242, which requires a statement of the "reasons for not making application to the district court of the district in which the applicant is held." If the relief sought is from the judgment of a state court, the petition shall set out specifically how and where the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U. S. C. § 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. This writ is rarely granted.

(b) Habeas corpus proceedings, except in capital cases, are *ex parte,* unless the Court requires the respondent to show cause why the petition for a writ of habeas corpus should not be granted. A response, if ordered, or in a capital case, shall comply fully with Rule 15. Neither the denial of the petition, without more, nor an order of transfer to a district court under the authority of 28 U. S. C. § 2241(b), is an adjudication on the merits, and therefore does not preclude further application to another court for the relief sought.

5. The Clerk will distribute the documents to the Court for its consideration when a brief in opposition under subparagraph 3(b) of this Rule has been filed, when a response under subparagraph 4(b) has been ordered and filed, when the time to file has expired, or when the right to file has been expressly waived.

6. If the Court orders the case set for argument, the Clerk will notify the parties whether additional briefs are required, when they shall be filed, and, if the case involves a petition for a common-law writ of certiorari, that the parties shall prepare a joint appendix in accordance with Rule 26.

Part V. Motions and Applications

Rule 21. Motions to the Court

1. Every motion to the Court shall clearly state its purpose and the facts on which it is based and may present legal argument in support thereof. No separate brief may be filed. A motion should be concise and shall comply with any applicable page limits. Non-dispositive motions and applications in cases in which certiorari has been granted, probable jurisdiction noted, or consideration of jurisdiction postponed shall state the position on the disposition of the motion or application of the other party or parties to the case. Rule 22 governs an application addressed to a single Justice.

2. (a) A motion in any action within the Court's original jurisdiction shall comply with Rule 17.3.

(b) A motion to dismiss as moot (or a suggestion of mootness), a motion for leave to file a brief as *amicus curiae*, and any motion the granting of which would dispose of the entire case or would affect the final judgment to be entered (other than a motion to docket and dismiss under Rule 18.5 or a motion for voluntary dismissal under Rule 46) shall be prepared as required by Rule 33.1, and 40 copies shall be filed, except that a movant proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file a motion prepared as required by Rule 33.2, and shall file the number of copies required for a petition by such a person under Rule 12.2. The motion shall be served as required by Rule 29.

(c) Any other motion to the Court shall be prepared as required by Rule 33.2; the moving party shall file an original and 10 copies. The Court subsequently may order the mov-

ing party to prepare the motion as required by Rule 33.1; in that event, the party shall file 40 copies.

3. A motion to the Court shall be filed with the Clerk and shall be accompanied by proof of service as required by Rule 29. No motion may be presented in open Court, other than a motion for admission to the Bar, except when the proceeding to which it refers is being argued. Oral argument on a motion will not be permitted unless the Court so directs.

4. Any response to a motion shall be filed as promptly as possible considering the nature of the relief sought and any asserted need for emergency action, and, in any event, within 10 days of receipt, unless the Court or a Justice, or the Clerk under Rule 30.4, orders otherwise. A response to a motion prepared as required by Rule 33.1, except a response to a motion for leave to file an *amicus curiae* brief (see Rule 37.5), shall be prepared in the same manner if time permits. In an appropriate case, the Court may act on a motion without waiting for a response.

Rule 22. Applications to Individual Justices

1. An application addressed to an individual Justice shall be filed with the Clerk, who will transmit it promptly to the Justice concerned if an individual Justice has authority to grant the sought relief.

2. The original and two copies of any application addressed to an individual Justice shall be prepared as required by Rule 33.2, and shall be accompanied by proof of service as required by Rule 29.

3. An application shall be addressed to the Justice allotted to the Circuit from which the case arises. An application arising from the United States Court of Appeals for the Armed Forces shall be addressed to the Chief Justice. When the Circuit Justice is unavailable for any reason, the application addressed to that Justice will be distributed to the Justice then available who is next junior to the Circuit Justice; the turn of the Chief Justice follows that of the most junior Justice.

4. A Justice denying an application will note the denial thereon. Thereafter, unless action thereon is restricted by law to the Circuit Justice or is untimely under Rule 30.2, the party making an application, except in the case of an application for an extension of time, may renew it to any other Justice, subject to the provisions of this Rule. Except when the denial is without prejudice, a renewed application is not favored. Renewed application is made by a letter to the Clerk, designating the Justice to whom the application is to be directed, and accompanied by 10 copies of the original application and proof of service as required by Rule 29.

5. A Justice to whom an application for a stay or for bail is submitted may refer it to the Court for determination.

6. The Clerk will advise all parties concerned, by appropriately speedy means, of the disposition made of an application.

Rule 23. Stays

1. A stay may be granted by a Justice as permitted by law.

2. A party to a judgment sought to be reviewed may present to a Justice an application to stay the enforcement of that judgment. See 28 U. S. C. § 2101(f).

3. An application for a stay shall set out with particularity why the relief sought is not available from any other court or judge. Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof. An application for a stay shall identify the judgment sought to be reviewed and have appended thereto a copy of the order and opinion, if any, and a copy of the order, if any, of the court or judge below denying the relief sought, and shall set out specific reasons why a stay is justified. The form and content of an application for a stay are governed by Rules 22 and 33.2.

4. A judge, court, or Justice granting an application for a stay pending review by this Court may condition the stay on the filing of a supersedeas bond having an approved surety

or sureties. The bond will be conditioned on the satisfaction of the judgment in full, together with any costs, interest, and damages for delay that may be awarded. If a part of the judgment sought to be reviewed has already been satisfied, or is otherwise secured, the bond may be conditioned on the satisfaction of the part of the judgment not otherwise secured or satisfied, together with costs, interest, and damages.

Part VI. Briefs on the Merits and Oral Argument

Rule 24. Briefs on the Merits: In General

1. A brief on the merits for a petitioner or an appellant shall comply in all respects with Rules 33.1 and 34 and shall contain in the order here indicated:

(a) The questions presented for review under Rule 14.1(a). The questions shall be set out on the first page following the cover, and no other information may appear on that page. The phrasing of the questions presented need not be identical with that in the petition for a writ of certiorari or the jurisdictional statement, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.

(b) A list of all parties to the proceeding in the court whose judgment is under review (unless the caption of the case in this Court contains the names of all parties). Any amended corporate disclosure statement as required by Rule 29.6 shall be placed here.

(c) If the brief exceeds 1,500 words, a table of contents and a table of cited authorities.

(d) Citations of the official and unofficial reports of the opinions and orders entered in the case by courts and administrative agencies.

(e) A concise statement of the basis for jurisdiction in this Court, including the statutory provisions and time factors on which jurisdiction rests.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, set out verbatim with appropriate citation. If the provisions involved are lengthy, their citation alone suffices at this point, and their pertinent text, if not already set out in the petition for a writ of certiorari, jurisdictional statement, or an appendix to either document, shall be set out in an appendix to the brief.

(g) A concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix, *e. g.*, App. 12, or to the record, *e. g.*, Record 12.

(h) A summary of the argument, suitably paragraphed. The summary should be a clear and concise condensation of the argument made in the body of the brief; mere repetition of the headings under which the argument is arranged is not sufficient.

(i) The argument, exhibiting clearly the points of fact and of law presented and citing the authorities and statutes relied on.

(j) A conclusion specifying with particularity the relief the party seeks.

2. A brief on the merits for a respondent or an appellee shall conform to the foregoing requirements, except that items required by subparagraphs 1(a), (b), (d), (e), (f), and (g) of this Rule need not be included unless the respondent or appellee is dissatisfied with their presentation by the opposing party.

3. A brief on the merits may not exceed the word limitations specified in Rule 33.1(g). An appendix to a brief may include only relevant material, and counsel are cautioned not to include in an appendix arguments or citations that properly belong in the body of the brief.

4. A reply brief shall conform to those portions of this Rule applicable to the brief for a respondent or an appellee, but, if appropriately divided by topical headings, need not contain a summary of the argument.

5. A reference to the joint appendix or to the record set out in any brief shall indicate the appropriate page number.

If the reference is to an exhibit, the page numbers at which the exhibit appears, at which it was offered in evidence, and at which it was ruled on by the judge shall be indicated, *e. g.*, Pl. Exh. 14, Record 199, 2134.

6. A brief shall be concise, logically arranged with proper headings, and free of irrelevant, immaterial, or scandalous matter. The Court may disregard or strike a brief that does not comply with this paragraph.

Rule 25. Briefs on the Merits: Number of Copies and Time to File

1. The petitioner or appellant shall file 40 copies of the brief on the merits within 45 days of the order granting the writ of certiorari, noting probable jurisdiction, or postponing consideration of jurisdiction. Any respondent or appellee who supports the petitioner or appellant shall meet the petitioner's or appellant's time schedule for filing documents.

2. The respondent or appellee shall file 40 copies of the brief on the merits within 30 days after the brief for the petitioner or appellant is filed.

3. The petitioner or appellant shall file 40 copies of the reply brief, if any, within 30 days after the brief for the respondent or appellee is filed, but any reply brief must actually be received by the Clerk not later than 2 p.m. 10 days before the date of oral argument. Any respondent or appellee supporting the petitioner or appellant may file a reply brief.

4. If cross-petitions or cross-appeals have been consolidated for argument, the Clerk, upon request of the parties, may designate one of the parties to file an initial brief and reply brief as provided in paragraphs 1 and 3 of this Rule (as if the party were petitioner or appellant), and may designate the other party to file an initial brief as provided in paragraph 2 of this Rule and, to the extent appropriate, a supplemental brief following the submission of the reply brief. In such a case, the Clerk may establish the time for the submission of the briefs and alter the otherwise applicable word limits. Except as approved by the Court or a Jus-

tice, the total number of words permitted for the briefs of the parties cumulatively shall not exceed the maximum that would have been allowed in the absence of an order under this paragraph.

5. The time periods stated in paragraphs 1, 2, and 3 of this Rule may be extended as provided in Rule 30. An application to extend the time to file a brief on the merits is not favored. If a case is advanced for hearing, the time to file briefs on the merits may be abridged as circumstances require pursuant to an order of the Court on its own motion or that of a party.

6. A party wishing to present late authorities, newly enacted legislation, or other intervening matter that was not available in time to be included in a brief may file 40 copies of a supplemental brief, restricted to such new matter and otherwise presented in conformity with these Rules, up to the time the case is called for oral argument or by leave of the Court thereafter.

7. After a case has been argued or submitted, the Clerk will not file any brief, except that of a party filed by leave of the Court.

8. The Clerk will not file any brief that is not accompanied by proof of service as required by Rule 29.

Rule 26. Joint Appendix

1. Unless the Clerk has allowed the parties to use the deferred method described in paragraph 4 of this Rule, the petitioner or appellant, within 45 days after entry of the order granting the writ of certiorari, noting probable jurisdiction, or postponing consideration of jurisdiction, shall file 40 copies of a joint appendix, prepared as required by Rule 33.1. The joint appendix shall contain: (1) the relevant docket entries in all the courts below; (2) any relevant pleadings, jury instructions, findings, conclusions, or opinions; (3) the judgment, order, or decision under review; and (4) any other parts of the record that the parties particularly wish to bring to the Court's attention. Any of the foregoing items

already reproduced in a petition for a writ of certiorari, jurisdictional statement, brief in opposition to a petition for a writ of certiorari, motion to dismiss or affirm, or any appendix to the foregoing, that was prepared as required by Rule 33.1, need not be reproduced again in the joint appendix. The petitioner or appellant shall serve three copies of the joint appendix on each of the other parties to the proceeding as required by Rule 29.

2. The parties are encouraged to agree on the contents of the joint appendix. In the absence of agreement, the petitioner or appellant, within 10 days after entry of the order granting the writ of certiorari, noting probable jurisdiction, or postponing consideration of jurisdiction, shall serve on the respondent or appellee a designation of parts of the record to be included in the joint appendix. Within 10 days after receiving the designation, a respondent or appellee who considers the parts of the record so designated insufficient shall serve on the petitioner or appellant a designation of additional parts to be included in the joint appendix, and the petitioner or appellant shall include the parts so designated. If the Court has permitted the respondent or appellee to proceed *in forma pauperis*, the petitioner or appellant may seek by motion to be excused from printing portions of the record the petitioner or appellant considers unnecessary. In making these designations, counsel should include only those materials the Court should examine; unnecessary designations should be avoided. The record is on file with the Clerk and available to the Justices, and counsel may refer in briefs and in oral argument to relevant portions of the record not included in the joint appendix.

3. When the joint appendix is filed, the petitioner or appellant immediately shall file with the Clerk a statement of the cost of printing 50 copies and shall serve a copy of the statement on each of the other parties as required by Rule 29. Unless the parties agree otherwise, the cost of producing the joint appendix shall be paid initially by the petitioner or appellant; but a petitioner or appellant who considers that parts of the record designated by the respondent or appellee

are unnecessary for the determination of the issues presented may so advise the respondent or appellee, who then shall advance the cost of printing the additional parts, unless the Court or a Justice otherwise fixes the initial allocation of the costs. The cost of printing the joint appendix is taxed as a cost in the case, but if a party unnecessarily causes matter to be included in the joint appendix or prints excessive copies, the Court may impose these costs on that party.

4. (a) On the parties' request, the Clerk may allow preparation of the joint appendix to be deferred until after the briefs have been filed. In that event, the petitioner or appellant shall file the joint appendix no more than 14 days after receiving the brief for the respondent or appellee. The provisions of paragraphs 1, 2, and 3 of this Rule shall be followed, except that the designations referred to therein shall be made by each party when that party's brief is served. Deferral of the joint appendix is not favored.

(b) If the deferred method is used, the briefs on the merits may refer to the pages of the record. In that event, the joint appendix shall include in brackets on each page thereof the page number of the record where that material may be found. A party wishing to refer directly to the pages of the joint appendix may serve and file copies of its brief prepared as required by Rule 33.2 within the time provided by Rule 25, with appropriate references to the pages of the record. In that event, within 10 days after the joint appendix is filed, copies of the brief prepared as required by Rule 33.1 containing references to the pages of the joint appendix in place of, or in addition to, the initial references to the pages of the record, shall be served and filed. No other change may be made in the brief as initially served and filed, except that typographical errors may be corrected.

5. The joint appendix shall be prefaced by a table of contents showing the parts of the record that it contains, in the order in which the parts are set out, with references to the pages of the joint appendix at which each part begins. The relevant docket entries shall be set out after the table of contents, followed by the other parts of the record in chrono-

logical order. When testimony contained in the reporter's transcript of proceedings is set out in the joint appendix, the page of the transcript at which the testimony appears shall be indicated in brackets immediately before the statement that is set out. Omissions in the transcript or in any other document printed in the joint appendix shall be indicated by asterisks. Immaterial formal matters (*e. g.*, captions, subscriptions, acknowledgments) shall be omitted. A question and its answer may be contained in a single paragraph.

6. Two lines must appear at the bottom of the cover of the joint appendix: (1) The first line must indicate the date the petition for the writ of certiorari was filed or the date the appeal was docketed; (2) the second line must indicate the date certiorari was granted or the date jurisdiction of the appeal was noted or postponed.

7. Exhibits designated for inclusion in the joint appendix may be contained in a separate volume or volumes suitably indexed. The transcript of a proceeding before an administrative agency, board, commission, or officer used in an action in a district court or court of appeals is regarded as an exhibit for the purposes of this paragraph.

8. The Court, on its own motion or that of a party, may dispense with the requirement of a joint appendix and may permit a case to be heard on the original record (with such copies of the record, or relevant parts thereof, as the Court may require) or on the appendix used in the court below, if it conforms to the requirements of this Rule.

9. For good cause, the time limits specified in this Rule may be shortened or extended by the Court or a Justice, or by the Clerk under Rule 30.4.

Rule 27. Calendar

1. From time to time, the Clerk will prepare a calendar of cases ready for argument. A case ordinarily will not be called for argument less than two weeks after the brief on the merits for the respondent or appellee is due.

2. The Clerk will advise counsel when they are required to appear for oral argument and will publish a hearing list

in advance of each argument session for the convenience of counsel and the information of the public.

3. The Court, on its own motion or that of a party, may order that two or more cases involving the same or related questions be argued together as one case or on such other terms as the Court may prescribe.

Rule 28. Oral Argument

1. Oral argument should emphasize and clarify the written arguments in the briefs on the merits. Counsel should assume that all Justices have read the briefs before oral argument. Oral argument read from a prepared text is not favored.

2. The petitioner or appellant shall open and may conclude the argument. A cross-writ of certiorari or cross-appeal will be argued with the initial writ of certiorari or appeal as one case in the time allowed for that one case, and the Court will advise the parties who shall open and close.

3. Unless the Court directs otherwise, each side is allowed one-half hour for argument. Counsel is not required to use all the allotted time. Any request for additional time to argue shall be presented by motion under Rule 21 in time to be considered at a scheduled Conference prior to the date of oral argument and no later than 7 days after the respondent's or appellee's brief on the merits is filed, and shall set out specifically and concisely why the case cannot be presented within the half-hour limitation. Additional time is rarely accorded.

4. Only one attorney will be heard for each side, except by leave of the Court on motion filed in time to be considered at a scheduled Conference prior to the date of oral argument and no later than 7 days after the respondent's or appellee's brief on the merits is filed. Any request for divided argument shall be presented by motion under Rule 21 and shall set out specifically and concisely why more than one attorney should be allowed to argue. Divided argument is not favored.

5. Regardless of the number of counsel participating in oral argument, counsel making the opening argument shall present the case fairly and completely and not reserve points of substance for rebuttal.

6. Oral argument will not be allowed on behalf of any party for whom a brief has not been filed.

7. By leave of the Court, and subject to paragraph 4 of this Rule, counsel for an *amicus curiae* whose brief has been filed as provided in Rule 37 may argue orally on the side of a party, with the consent of that party. In the absence of consent, counsel for an *amicus curiae* may seek leave of the Court to argue orally by a motion setting out specifically and concisely why oral argument would provide assistance to the Court not otherwise available. Such a motion will be granted only in the most extraordinary circumstances.

8. Oral arguments may be presented only by members of the Bar of this Court. Attorneys who are not members of the Bar of this Court may make a motion to argue *pro hac vice* under the provisions of Rule 6.

Part VII. Practice and Procedure

Rule 29. Filing and Service of Documents; Special Notifications; Corporate Listing

1. Any document required or permitted to be presented to the Court or to a Justice shall be filed with the Clerk in paper form.

2. A document is timely filed if it is received by the Clerk in paper form within the time specified for filing; or if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on or before the last day for filing; or if it is delivered on or before the last day for filing to a third-party commercial carrier for delivery to the Clerk within 3 calendar days. If submitted by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's inter-

nal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U. S. C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid. If the postmark is missing or not legible, or if the third-party commercial carrier does not provide the date the document was received by the carrier, the Clerk will require the person who sent the document to submit a notarized statement or declaration in compliance with 28 U. S. C. § 1746 setting out the details of the filing and stating that the filing took place on a particular date within the permitted time.

3. Any document required by these Rules to be served may be served personally, by mail, or by third-party commercial carrier for delivery within 3 calendar days on each party to the proceeding at or before the time of filing. If the document has been prepared as required by Rule 33.1, three copies shall be served on each other party separately represented in the proceeding. If the document has been prepared as required by Rule 33.2, service of a single copy on each other separately represented party suffices. If personal service is made, it shall consist of delivery at the office of the counsel of record, either to counsel or to an employee therein. If service is by mail or third-party commercial carrier, it shall consist of depositing the document with the United States Postal Service, with no less than first-class postage prepaid, or delivery to the carrier for delivery within 3 calendar days, addressed to counsel of record at the proper address. When a party is not represented by counsel, service shall be made on the party, personally, by mail, or by commercial carrier. Ordinarily, service on a party must be by a manner at least as expeditious as the manner used to file the document with the Court. An electronic version of the document shall also be transmitted to all other parties at the time of filing or reasonably contemporaneous therewith, unless the party filing the document is proceeding *pro se* and *in forma pauperis* or the electronic service address of the party being served is unknown and not identifiable through reasonable efforts.

4. (a) If the United States or any federal department, office, agency, officer, or employee is a party to be served, service shall be made on the Solicitor General of the United States, Room 5616, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530-0001. When an agency of the United States that is a party is authorized by law to appear before this Court on its own behalf, or when an officer or employee of the United States is a party, the agency, officer, or employee shall be served in addition to the Solicitor General.

(b) In any proceeding in this Court in which the constitutionality of an Act of Congress is drawn into question, and neither the United States nor any federal department, office, agency, officer, or employee is a party, the initial document filed in this Court shall recite that 28 U. S. C. § 2403(a) may apply and shall be served on the Solicitor General of the United States, Room 5616, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530-0001. In such a proceeding from any court of the United States, as defined by 28 U. S. C. § 451, the initial document also shall state whether that court, pursuant to 28 U. S. C. § 2403(a), certified to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question. See Rule 14.1(e)(v).

(c) In any proceeding in this Court in which the constitutionality of any statute of a State is drawn into question, and neither the State nor any agency, officer, or employee thereof is a party, the initial document filed in this Court shall recite that 28 U. S. C. § 2403(b) may apply and shall be served on the Attorney General of that State. In such a proceeding from any court of the United States, as defined by 28 U. S. C. § 451, the initial document also shall state whether that court, pursuant to 28 U. S. C. § 2403(b), certified to the State Attorney General the fact that the constitutionality of a statute of that State was drawn into question. See Rule 14.1(e)(v).

5. Proof of service, when required by these Rules, shall accompany the document when it is presented to the Clerk

for filing and shall be separate from it. Proof of service shall contain, or be accompanied by, a statement that all parties required to be served have been served, together with a list of the names, addresses, and telephone numbers of counsel indicating the name of the party or parties each counsel represents. It is not necessary that service on each party required to be served be made in the same manner or evidenced by the same proof. Proof of service may consist of any one of the following:

(a) an acknowledgment of service, signed by counsel of record for the party served, and bearing the address and telephone number of such counsel;

(b) a certificate of service, reciting the facts and circumstances of service in compliance with the appropriate paragraph or paragraphs of this Rule, and signed by a member of the Bar of this Court representing the party on whose behalf service is made or by an attorney appointed to represent that party under the Criminal Justice Act of 1964, see 18 U. S. C. § 3006A(d)(7), or under any other applicable federal statute; or

(c) a notarized affidavit or declaration in compliance with 28 U. S. C. § 1746, reciting the facts and circumstances of service in accordance with the appropriate paragraph or paragraphs of this Rule, whenever service is made by any person not a member of the Bar of this Court and not an attorney appointed to represent a party under the Criminal Justice Act of 1964, see 18 U. S. C. § 3006A(d)(7), or under any other applicable federal statute.

6. Every document, except a joint appendix or *amicus curiae* brief, filed by or on behalf of a nongovernmental corporation shall contain a corporate disclosure statement identifying the parent corporations and listing any publicly held company that owns 10% or more of the corporation's stock. If there is no parent or publicly held company owning 10% or more of the corporation's stock, a notation to this effect shall be included in the document. If a statement has been included in a document filed earlier in the case, reference may be made to the earlier document (except when the ear-

lier statement appeared in a document prepared under Rule 33.2), and only amendments to the statement to make it current need be included in the document being filed. In addition, whenever there is a material change in the identity of the parent corporation or publicly held companies that own 10% or more of the corporation's stock, counsel shall promptly inform the Clerk by letter and include, within that letter, any amendment needed to make the statement current.

7. In addition to the filing requirements set forth in this Rule, all filers who are represented by counsel must submit documents to the Court's electronic filing system in conformity with the "Guidelines for the Submission of Documents to the Supreme Court's Electronic Filing System" issued by the Clerk.

Rule 30. Computation and Extension of Time

1. In the computation of any period of time prescribed or allowed by these Rules, by order of the Court, or by an applicable statute, the day of the act, event, or default from which the designated period begins to run is not included. The last day of the period shall be included, unless it is a Saturday, Sunday, federal legal holiday listed in 5 U. S. C. § 6103, or day on which the Court building is closed by order of the Court or the Chief Justice, in which event the period shall extend until the end of the next day that is not a Saturday, Sunday, federal legal holiday, or day on which the Court building is closed.

2. Whenever a Justice or the Clerk is empowered by law or these Rules to extend the time to file any document, an application or motion seeking an extension shall be filed within the period sought to be extended. An application to extend the time to file a petition for a writ of certiorari or to file a jurisdictional statement must be filed at least 10 days before the specified final filing date as computed under these Rules; if filed less than 10 days before the final filing

date, such application will not be granted except in the most extraordinary circumstances.

3. An application to extend the time to file a petition for a writ of certiorari, to file a jurisdictional statement, to file a reply brief on the merits, or to file a petition for rehearing of any judgment or decision of the Court on the merits shall be made to an individual Justice and presented and served on all other parties as provided by Rule 22. Once denied, such an application may not be renewed.

4. A motion to extend the time to file any document or paper other than those specified in paragraph 3 of this Rule may be presented in the form of a letter to the Clerk setting out specific reasons why an extension of time is justified. The letter shall be served on all other parties as required by Rule 29. The motion may be acted on by the Clerk in the first instance, and any party aggrieved by the Clerk's action may request that the motion be submitted to a Justice or to the Court. The Clerk will report action under this paragraph to the Court as instructed.

Rule 31. Translations

Whenever any record to be transmitted to this Court contains material written in a foreign language without a translation made under the authority of the lower court, or admitted to be correct, the clerk of the court transmitting the record shall advise the Clerk of this Court immediately so that this Court may order that a translation be supplied and, if necessary, printed as part of the joint appendix.

Rule 32. Models, Diagrams, Exhibits, and Lodgings

1. Models, diagrams, and exhibits of material forming part of the evidence taken in a case and brought to this Court for its inspection shall be placed in the custody of the Clerk at least two weeks before the case is to be heard or submitted.

2. All models, diagrams, exhibits, and other items placed in the custody of the Clerk shall be removed by the parties no more than 40 days after the case is decided. If this is

not done, the Clerk will notify counsel to remove the articles forthwith. If they are not removed within a reasonable time thereafter, the Clerk will destroy them or dispose of them in any other appropriate way.

3. Any party or *amicus curiae* desiring to lodge non-record material with the Clerk must set out in a letter, served on all parties, a description of the material proposed for lodging and the reasons why the non-record material may properly be considered by the Court. The material proposed for lodging may not be submitted until and unless requested by the Clerk.

Rule 33. Document Preparation: Booklet Format; 8½- by 11-Inch Paper Format

1. *Booklet Format:* (a) Except for a document expressly permitted by these Rules to be submitted on 8½- by 11-inch paper, see, *e. g.*, Rules 21, 22, and 39, every document filed with the Court shall be prepared in a 6⅛- by 9¼-inch booklet format using a standard typesetting process (*e. g.*, hot metal, photocomposition, or computer typesetting) to produce text printed in typographic (as opposed to typewriter) characters. The process used must produce a clear, black image on white paper. The text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(b) The text of every booklet-format document, including any appendix thereto, shall be typeset in a Century family (*e. g.*, Century Expanded, New Century Schoolbook, or Century Schoolbook) 12-point type with 2-point or more leading between lines. Quotations in excess of 50 words shall be indented. The typeface of footnotes shall be 10-point type with 2-point or more leading between lines. The text of the document must appear on both sides of the page.

(c) Every booklet-format document shall be produced on paper that is opaque, unglazed, and not less than 60 pounds in weight, and shall have margins of at least three-fourths of an inch on all sides. The text field, including footnotes, may not exceed 4⅛ by 7⅛ inches. The document shall be bound firmly in at least two places along the left margin (saddle

stitch or perfect binding preferred) so as to permit easy opening, and no part of the text should be obscured by the binding. Spiral, plastic, metal, or string bindings may not be used. Copies of patent documents, except opinions, may be duplicated in such size as is necessary in a separate appendix.

(d) Every booklet-format document shall comply with the word limits shown on the chart in subparagraph 1(g) of this Rule. The word limits do not include the questions presented, the list of parties and the corporate disclosure statement, the table of contents, the table of cited authorities, the listing of counsel at the end of the document, or any appendix. The word limits include footnotes. Verbatim quotations required under Rule 14.1(f) and Rule 24.1(f), if set out in the text of a brief rather than in the appendix, are also excluded. For good cause, the Court or a Justice may grant leave to file a document in excess of the word limits, but application for such leave is not favored. An application to exceed word limits shall comply with Rule 22 and must be received by the Clerk at least 15 days before the filing date of the document in question, except in the most extraordinary circumstances.

(e) Every booklet-format document shall have a suitable cover consisting of 65-pound weight paper in the color indicated on the chart in subparagraph 1(g) of this Rule. If a separate appendix to any document is filed, the color of its cover shall be the same as that of the cover of the document it supports. The Clerk will furnish a color chart upon request. Counsel shall ensure that there is adequate contrast between the printing and the color of the cover. A document filed by the United States, or by any other federal party represented by the Solicitor General, shall have a gray cover. A joint appendix, answer to a bill of complaint, motion for leave to intervene, and any other document not listed in subparagraph 1(g) of this Rule shall have a tan cover.

(f) Forty copies of a booklet-format document shall be filed, and one unbound copy of the document on 8½- by 11-inch paper shall also be submitted.

(g) Word limits and cover colors for booklet-format documents are as follows:

Type of Document	Word Limits	Color of Cover
(i) Petition for a Writ of Certiorari (Rule 14); Motion for Leave to File a Bill of Complaint and Brief in Support (Rule 17.3); Jurisdictional Statement (Rule 18.3); Petition for an Extraordinary Writ (Rule 20.2)	9,000	white
(ii) Brief in Opposition (Rule 15.3); Brief in Opposition to Motion for Leave to File an Original Action (Rule 17.5); Motion to Dismiss or Affirm (Rule 18.6); Brief in Opposition to Mandamus or Prohibition (Rule 20.3(b)); Response to a Petition for Habeas Corpus (Rule 20.4); Respondent's Brief in Support of Certiorari (Rule 12.6)	9,000	orange
(iii) Reply to Brief in Opposition (Rules 15.6 and 17.5); Brief Opposing a Motion to Dismiss or Affirm (Rule 18.8)	3,000	tan
(iv) Supplemental Brief (Rules 15.8, 17, 18.10, and 25.6)	3,000	tan
(v) Brief on the Merits for Petitioner or Appellant (Rule 24); Exceptions by Plaintiff to Report of Special Master (Rule 17)	13,000	light blue
(vi) Brief on the Merits for Respondent or Appellee (Rule 24.2); Brief on the Merits for Respondent or Appellee Supporting Petitioner or Appellant (Rule 12.6); Exceptions by Party Other Than Plaintiff to Report of Special Master (Rule 17)	13,000	light red
(vii) Reply Brief on the Merits (Rule 24.4)	6,000	yellow
(viii) Reply to Plaintiff's Exceptions to Report of Special Master (Rule 17)	13,000	orange
(ix) Reply to Exceptions by Party Other Than Plaintiff to Report of Special Master (Rule 17)	13,000	yellow
(x) Brief for an *Amicus Curiae* at the Petition Stage or pertaining to a Motion for Leave to file a Bill of Complaint (Rule 37.2)	6,000	cream
(xi) Brief for an *Amicus Curiae* Identified in Rule 37.4 in Support of the Plaintiff, Petitioner, or Appellant, or in Support of Neither Party, on the Merits or in an Original Action at the Exceptions Stage (Rule 37.3)	9,000	light green
(xii) Brief for any Other *Amicus Curiae* in Support of the Plaintiff, Petitioner, or Appellant, or in Support of Neither Party, on the Merits or in		

	an Original Action at the Exceptions Stage (Rule 37.3)	8,000	light green
(xiii)	Brief for an *Amicus Curiae* Identified in Rule 37.4 in Support of the Defendant, Respondent, or Appellee, on the Merits or in an Original Action at the Exceptions Stage (Rule 37.3)	9,000	dark green
(xiv)	Brief for any Other *Amicus Curiae* in Support of the Defendant, Respondent, or Appellee, on the Merits or in an Original Action at the Exceptions Stage (Rule 37.3)	8,000	dark green
(xv)	Petition for Rehearing (Rule 44)	3,000	tan

(h) A document prepared under Rule 33.1 must be accompanied by a certificate signed by the attorney, the unrepresented party, or the preparer of the document stating that the brief complies with the word limitations. The person preparing the certificate may rely on the word count of the word-processing system used to prepare the document. The word-processing system must be set to include footnotes in the word count. The certificate must state the number of words in the document. The certificate shall accompany the document when it is presented to the Clerk for filing and shall be separate from it. If the certificate is signed by a person other than a member of the Bar of this Court, the counsel of record, or the unrepresented party, it must contain a notarized affidavit or declaration in compliance with 28 U. S. C. § 1746.

2. *8½- by 11-Inch Paper Format:* (a) The text of every document, including any appendix thereto, expressly permitted by these Rules to be presented to the Court on 8½- by 11-inch paper shall appear double spaced, except for indented quotations, which shall be single spaced, on opaque, unglazed, white paper. The document shall be stapled or bound at the upper left-hand corner. Copies, if required, shall be produced on the same type of paper and shall be legible. The original of any such document (except a motion to dismiss or affirm under Rule 18.6) shall be signed by the party proceeding *pro se* or by counsel of record who must be a member of the Bar of this Court or an attorney appointed under the Criminal Justice Act of 1964, see 18 U. S. C.

§ 3006A(d)(7), or under any other applicable federal statute. Subparagraph 1(g) of this Rule does not apply to documents prepared under this paragraph.

(b) Page limits for documents presented on 8½- by 11-inch paper are: 40 pages for a petition for a writ of certiorari, jurisdictional statement, petition for an extraordinary writ, brief in opposition, or motion to dismiss or affirm; and 15 pages for a reply to a brief in opposition, brief opposing a motion to dismiss or affirm, supplemental brief, or petition for rehearing. The exclusions specified in subparagraph 1(d) of this Rule apply.

Rule 34. Document Preparation: General Requirements

Every document, whether prepared under Rule 33.1 or Rule 33.2, shall comply with the following provisions:

1. Each document shall bear on its cover, in the order indicated, from the top of the page:

(a) the docket number of the case or, if there is none, a space for one;

(b) the name of this Court;

(c) the caption of the case as appropriate in this Court;

(d) the nature of the proceeding and the name of the court from which the action is brought (*e. g.*, "On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit"; or, for a merits brief, "On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit");

(e) the title of the document (*e. g.*, "Petition for Writ of Certiorari," "Brief for Respondent," "Joint Appendix");

(f) the name of the attorney who is counsel of record for the party concerned (who must be a member of the Bar of this Court except as provided in Rule 9.1) and on whom service is to be made, with a notation directly thereunder identifying the attorney as counsel of record and setting out counsel's office address, e-mail address, and telephone number. Only one counsel of record may be noted on a single document, except that counsel of record for each party must be listed on the cover of a joint appendix. The names of other members of the Bar of this Court or of the bar of the

highest court of State acting as counsel, and, if desired, their addresses, may be added, but counsel of record shall be clearly identified. Names of persons other than attorneys admitted to a state bar may not be listed, unless the party is appearing *pro se*, in which case the party's name, address, and telephone number shall appear.

(g) The foregoing shall be displayed in an appropriate typographical manner and, except for identification of counsel, may not be set in type smaller than standard 11-point, if the document is prepared as required by Rule 33.1.

2. Every document (other than a joint appendix), that exceeds 1,500 words when prepared under Rule 33.1, or that exceeds five pages when prepared under Rule 33.2, shall contain a table of contents and a table of cited authorities (*i. e.*, cases alphabetically arranged, constitutional provisions, statutes, treatises, and other materials) with references to the pages in the document where such authorities are cited.

3. The body of every document shall bear at its close the name of counsel of record and such other counsel, identified on the cover of the document in conformity with subparagraph 1(f) of this Rule, as may be desired.

4. Every appendix to a document must be preceded by a table of contents that provides a description of each document in the appendix.

5. All references to a provision of federal statutory law should ordinarily be cited to the United States Code, if the provision has been codified therein. In the event the provision has not been classified to the United States Code, citation should be to the Statutes at Large. Additional or alternative citations should be provided only if there is a particular reason why those citations are relevant or necessary to the argument.

6. A case in which privacy protection was governed by Federal Rule of Appellate Procedure 25(a)(5), Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same Rule in this Court. In any other case, privacy protection is governed by Federal Rule of Civil Pro-

cedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case. If the Court schedules briefing and oral argument in a case that was governed by Federal Rule of Civil Procedure 5.2(c) or Federal Rule of Criminal Procedure 49.1(c), the parties shall submit electronic versions of all prior and subsequent filings with this Court in the case, subject to the redaction Rules set forth above.

Rule 35. Death, Substitution, and Revivor; Public Officers

1. If a party dies after the filing of a petition for a writ of certiorari to this Court, or after the filing of a notice of appeal, the authorized representative of the deceased party may appear and, on motion, be substituted as a party. If the representative does not voluntarily become a party, any other party may suggest the death on the record and, on motion, seek an order requiring the representative to become a party within a designated time. If the representative then fails to become a party, the party so moving, if a respondent or appellee, is entitled to have the petition for a writ of certiorari or the appeal dismissed, and if a petitioner or appellant, is entitled to proceed as in any other case of nonappearance by a respondent or appellee. If the substitution of a representative of the deceased is not made within six months after the death of the party, the case shall abate.

2. Whenever a case cannot be revived in the court whose judgment is sought to be reviewed, because the deceased party's authorized representative is not subject to that court's jurisdiction, proceedings will be conducted as this Court may direct.

3. When a public officer who is a party to a proceeding in this Court in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate and any successor in office is automatically substituted as a party. The parties shall notify the Clerk in writing of any such successions. Proceedings following the substitution shall be in the

name of the substituted party, but any misnomer not affecting substantial rights of the parties will be disregarded.

4. A public officer who is a party to a proceeding in this Court in an official capacity may be described as a party by the officer's official title rather than by name, but the Court may require the name to be added.

Rule 36. Custody of Prisoners in Habeas Corpus Proceedings

1. Pending review in this Court of a decision in a habeas corpus proceeding commenced before a court, Justice, or judge of the United States, the person having custody of the prisoner may not transfer custody to another person unless the transfer is authorized under this Rule.

2. Upon application by a custodian, the court, Justice, or judge who entered the decision under review may authorize transfer and the substitution of a successor custodian as a party.

3. (a) Pending review of a decision failing or refusing to release a prisoner, the prisoner may be detained in the custody from which release is sought or in other appropriate custody or may be enlarged on personal recognizance or bail, as may appear appropriate to the court, Justice, or judge who entered the decision, or to the court of appeals, this Court, or a judge or Justice of either court.

(b) Pending review of a decision ordering release, the prisoner shall be enlarged on personal recognizance or bail, unless the court, Justice, or judge who entered the decision, or the court of appeals, this Court, or a judge or Justice of either court, orders otherwise.

4. An initial order respecting the custody or enlargement of the prisoner, and any recognizance or surety taken, shall continue in effect pending review in the court of appeals and in this Court unless for reasons shown to the court of appeals, this Court, or a judge or Justice of either court, the order is modified or an independent order respecting custody, enlargement, or surety is entered.

Rule 37. Brief for an *Amicus Curiae*

1. An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored. An *amicus curiae* brief may be filed only by an attorney admitted to practice before this Court as provided in Rule 5.

2. (a) An *amicus curiae* brief submitted before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ may be filed if it reflects that written consent of all parties has been provided, or if the Court grants leave to file under subparagraph 2(b) of this Rule. An *amicus curiae* brief in support of a petitioner or appellant shall be filed within 30 days after the case is placed on the docket or a response is called for by the Court, whichever is later, and that time will not be extended. An *amicus curiae* brief in support of a motion of a plaintiff for leave to file a bill of complaint in an original action shall be filed within 60 days after the case is placed on the docket, and that time will not be extended. An *amicus curiae* brief in support of a respondent, an appellee, or a defendant shall be submitted within the time allowed for filing a brief in opposition or a motion to dismiss or affirm. An *amicus curiae* filing a brief under this subparagraph shall ensure that the counsel of record for all parties receive notice of its intention to file an *amicus curiae* brief at least 10 days prior to the due date for the *amicus curiae* brief, unless the *amicus curiae* brief is filed earlier than 10 days before the due date. Only one signatory to any *amicus curiae* brief filed jointly by more than one *amicus curiae* must timely notify the parties of its intent to file that brief. The *amicus curiae* brief shall indicate that counsel of record received timely notice of the intent to file the brief under this Rule and shall specify whether consent was granted, and its cover shall identify the party supported. Only one signatory to an *amicus curiae*

brief filed jointly by more than one *amicus curiae* must obtain consent of the parties to file that brief. A petitioner or respondent may submit to the Clerk a letter granting blanket consent to *amicus curiae* briefs, stating that the party consents to the filing of *amicus curiae* briefs in support of either or of neither party. The Clerk will note all notices of blanket consent on the docket.

(b) When a party to the case has withheld consent, a motion for leave to file an *amicus curiae* brief before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ may be presented to the Court. The motion, prepared as required by Rule 33.1 and as one document with the brief sought to be filed, shall be submitted within the time allowed for filing an *amicus curiae* brief, and shall indicate the party or parties who have withheld consent and state the nature of the movant's interest. Such a motion is not favored.

3. (a) An *amicus curiae* brief in a case before the Court for oral argument may be filed if it reflects that written consent of all parties has been provided, or if the Court grants leave to file under subparagraph 3(b) of this Rule. The brief shall be submitted within 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the time allowed for filing the petitioner's or appellant's brief. Motions to extend the time for filing an *amicus curiae* brief will not be entertained. The 10-day notice requirement of subparagraph 2(a) of this Rule does not apply to an *amicus curiae* brief in a case before the Court for oral argument. The *amicus curiae* brief shall specify whether consent was granted, and its cover shall identify the party supported or indicate whether it suggests affirmance or reversal. The Clerk will not file a reply brief for an *amicus curiae*, or a brief for an *amicus curiae* in support of, or in opposition to, a petition for rehearing. Only one signatory to an *amicus curiae* brief filed jointly by more than one *amicus curiae* must obtain consent of the parties to file that brief. A petitioner or respondent may submit to the Clerk

a letter granting blanket consent to *amicus curiae* briefs, stating that the party consents to the filing of *amicus curiae* briefs in support of either or of neither party. The Clerk will note all notices of blanket consent on the docket.

(b) When a party to a case before the Court for oral argument has withheld consent, a motion for leave to file an *amicus curiae* brief may be presented to the Court. The motion, prepared as required by Rule 33.1 and as one document with the brief sought to be filed, shall be submitted within the time allowed for filing an *amicus curiae* brief, and shall indicate the party or parties who have withheld consent and state the nature of the movant's interest.

4. No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer.

5. A brief or motion filed under this Rule shall be accompanied by proof of service as required by Rule 29, and shall comply with the applicable provisions of Rules 21, 24, and 33.1 (except that it suffices to set out in the brief the interest of the *amicus curiae*, the summary of the argument, the argument, and the conclusion). A motion for leave to file may not exceed 1,500 words. A party served with the motion may file an objection thereto, stating concisely the reasons for withholding consent; the objection shall be prepared as required by Rule 33.2.

6. Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the *amicus curiae*, its members, or its counsel, who made such

a monetary contribution. The disclosure shall be made in the first footnote on the first page of text.

Rule 38. Fees

Under 28 U. S. C. § 1911, the fees charged by the Clerk are:

(a) for docketing a case on a petition for a writ of certiorari or on appeal or for docketing any other proceeding, except a certified question or a motion to docket and dismiss an appeal under Rule 18.5, $300;

(b) for filing a petition for rehearing or a motion for leave to file a petition for rehearing, $200;

(c) for reproducing and certifying any record or paper, $1 per page; and for comparing with the original thereof any photographic reproduction of any record or paper, when furnished by the person requesting its certification, $.50 per page;

(d) for a certificate bearing the seal of the Court, $10; and

(e) for a check paid to the Court, Clerk, or Marshal that is returned for lack of funds, $35.

Rule 39. Proceedings *In Forma Pauperis*

1. A party seeking to proceed *in forma pauperis* shall file a motion for leave to do so, together with the party's notarized affidavit or declaration (in compliance with 28 U. S. C. § 1746) in the form prescribed by the Federal Rules of Appellate Procedure, Form 4. The motion shall state whether leave to proceed *in forma pauperis* was sought in any other court and, if so, whether leave was granted. If the court below appointed counsel for an indigent party, no affidavit or declaration is required, but the motion shall cite the provision of law under which counsel was appointed, or a copy of the order of appointment shall be appended to the motion.

2. If leave to proceed *in forma pauperis* is sought for the purpose of filing a document, the motion, and an affidavit or declaration if required, shall be filed together with that document and shall comply in every respect with Rule 21. As provided in that Rule, it suffices to file an original and 10 copies, unless the party is an inmate confined in an institu-

tion and is not represented by counsel, in which case the original, alone, suffices. A copy of the motion, and affidavit or declaration if required, shall precede and be attached to each copy of the accompanying document.

3. Except when these Rules expressly provide that a document shall be prepared as required by Rule 33.1, every document presented by a party proceeding under this Rule shall be prepared as required by Rule 33.2 (unless such preparation is impossible). Every document shall be legible. While making due allowance for any case presented under this Rule by a person appearing *pro se*, the Clerk will not file any document if it does not comply with the substance of these Rules or is jurisdictionally out of time.

4. When the documents required by paragraphs 1 and 2 of this Rule are presented to the Clerk, accompanied by proof of service as required by Rule 29, they will be placed on the docket without the payment of a docket fee or any other fee.

5. The respondent or appellee in a case filed *in forma pauperis* shall respond in the same manner and within the same time as in any other case of the same nature, except that the filing of an original and 10 copies of a response prepared as required by Rule 33.2, with proof of service as required by Rule 29, suffices. The respondent or appellee may challenge the grounds for the motion for leave to proceed *in forma pauperis* in a separate document or in the response itself.

6. Whenever the Court appoints counsel for an indigent party in a case set for oral argument, the briefs on the merits submitted by that counsel, unless otherwise requested, shall be prepared under the Clerk's supervision. The Clerk also will reimburse appointed counsel for any necessary travel expenses to Washington, D. C., and return in connection with the argument.

7. In a case in which certiorari has been granted, probable jurisdiction noted, or consideration of jurisdiction postponed, this Court may appoint counsel to represent a party financially unable to afford an attorney to the extent authorized by the Criminal Justice Act of 1964, 18 U. S. C. § 3006A, or by any other applicable federal statute.

8. If satisfied that a petition for a writ of certiorari, jurisdictional statement, or petition for an extraordinary writ is frivolous or malicious, the Court may deny leave to proceed *in forma pauperis.*

Rule 40. Veterans, Seamen, and Military Cases

1. A veteran suing under any provision of law exempting veterans from the payment of fees or court costs, may proceed without prepayment of fees or costs or furnishing security therefor and may file a motion for leave to proceed on papers prepared as required by Rule 33.2. The motion shall ask leave to proceed as a veteran and be accompanied by an affidavit or declaration setting out the moving party's veteran status. A copy of the motion shall precede and be attached to each copy of the petition for a writ of certiorari or other substantive document filed by the veteran.

2. A seaman suing under 28 U. S. C. § 1916 may proceed without prepayment of fees or costs or furnishing security therefor and may file a motion for leave to proceed on papers prepared as required by Rule 33.2. The motion shall ask leave to proceed as a seaman and be accompanied by an affidavit or declaration setting out the moving party's seaman status. A copy of the motion shall precede and be attached to each copy of the petition for a writ of certiorari or other substantive document filed by the seaman.

3. An accused person petitioning for a writ of certiorari to review a decision of the United States Court of Appeals for the Armed Forces under 28 U. S. C. § 1259 may proceed without prepayment of fees or costs or furnishing security therefor and without filing an affidavit of indigency, but is not entitled to proceed on papers prepared as required by Rule 33.2, except as authorized by the Court on separate motion under Rule 39.

Part VIII. Disposition of Cases

Rule 41. Opinions of the Court

Opinions of the Court will be released by the Clerk immediately upon their announcement from the bench, or as the

Court otherwise directs. Thereafter, the Clerk will cause the opinions to be issued in slip form, and the Reporter of Decisions will prepare them for publication in the preliminary prints and bound volumes of the United States Reports.

Rule 42. Interest and Damages

1. If a judgment for money in a civil case is affirmed, any interest allowed by law is payable from the date the judgment under review was entered. If a judgment is modified or reversed with a direction that a judgment for money be entered below, the courts below may award interest to the extent permitted by law. Interest in cases arising in a state court is allowed at the same rate that similar judgments bear interest in the courts of the State in which judgment is directed to be entered. Interest in cases arising in a court of the United States is allowed at the interest rate authorized by law.

2. When a petition for a writ of certiorari, an appeal, or an application for other relief is frivolous, the Court may award the respondent or appellee just damages, and single or double costs under Rule 43. Damages or costs may be awarded against the petitioner, appellant, or applicant, against the party's counsel, or against both party and counsel.

Rule 43. Costs

1. If the Court affirms a judgment, the petitioner or appellant shall pay costs unless the Court otherwise orders.

2. If the Court reverses or vacates a judgment, the respondent or appellee shall pay costs unless the Court otherwise orders.

3. The Clerk's fees and the cost of printing the joint appendix are the only taxable items in this Court. The cost of the transcript of the record from the court below is also a taxable item, but shall be taxable in that court as costs in the case. The expenses of printing briefs, motions, petitions, or jurisdictional statements are not taxable.

4. In a case involving a certified question, costs are equally divided unless the Court otherwise orders, except that if the Court decides the whole matter in controversy, as permitted by Rule 19.2, costs are allowed as provided in paragraphs 1 and 2 of this Rule.

5. To the extent permitted by 28 U. S. C. § 2412, costs under this Rule are allowed for or against the United States or an officer or agent thereof, unless expressly waived or unless the Court otherwise orders.

6. When costs are allowed in this Court, the Clerk will insert an itemization of the costs in the body of the mandate or judgment sent to the court below. The prevailing side may not submit a bill of costs.

7. In extraordinary circumstances the Court may adjudge double costs.

Rule 44. Rehearing

1. Any petition for the rehearing of any judgment or decision of the Court on the merits shall be filed within 25 days after entry of the judgment or decision, unless the Court or a Justice shortens or extends the time. The petitioner shall file 40 copies of the rehearing petition and shall pay the filing fee prescribed by Rule 38(b), except that a petitioner proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The petition shall state its grounds briefly and distinctly and shall be served as required by Rule 29. The petition shall be presented together with certification of counsel (or of a party unrepresented by counsel) that it is presented in good faith and not for delay; one copy of the certificate shall bear the signature of counsel (or of a party unrepresented by counsel). A copy of the certificate shall follow and be attached to each copy of the petition. A petition for rehearing is not subject to oral argument and will not be granted except by a majority of the Court, at the

instance of a Justice who concurred in the judgment or decision.

2. Any petition for the rehearing of an order denying a petition for a writ of certiorari or extraordinary writ shall be filed within 25 days after the date of the order of denial and shall comply with all the form and filing requirements of paragraph 1 of this Rule, including the payment of the filing fee if required, but its grounds shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. The time for filing a petition for the rehearing of an order denying a petition for a writ of certiorari or extraordinary writ will not be extended. The petition shall be presented together with certification of counsel (or of a party unrepresented by counsel) that it is restricted to the grounds specified in this paragraph and that it is presented in good faith and not for delay; one copy of the certificate shall bear the signature of counsel (or of a party unrepresented by counsel). The certificate shall be bound with each copy of the petition. The Clerk will not file a petition without a certificate. The petition is not subject to oral argument.

3. The Clerk will not file any response to a petition for rehearing unless the Court requests a response. In the absence of extraordinary circumstances, the Court will not grant a petition for rehearing without first requesting a response.

4. The Clerk will not file consecutive petitions and petitions that are out of time under this Rule.

5. The Clerk will not file any brief for an *amicus curiae* in support of, or in opposition to, a petition for rehearing.

6. If the Clerk determines that a petition for rehearing submitted timely and in good faith is in a form that does not comply with this Rule or with Rule 33 or Rule 34, the Clerk will return it with a letter indicating the deficiency. A corrected petition for rehearing submitted in accordance with Rule 29.2 no more than 15 days after the date of the Clerk's letter will be deemed timely.

Rule 45. Process; Mandates

1. All process of this Court issues in the name of the President of the United States.

2. In a case on review from a state court, the mandate issues 25 days after entry of the judgment, unless the Court or a Justice shortens or extends the time, or unless the parties stipulate that it issue sooner. The filing of a petition for rehearing stays the mandate until disposition of the petition, unless the Court orders otherwise. If the petition is denied, the mandate issues forthwith.

3. In a case on review from any court of the United States, as defined by 28 U. S. C. § 451, a formal mandate does not issue unless specially directed; instead, the Clerk of this Court will send the clerk of the lower court a copy of the opinion or order of this Court and a certified copy of the judgment. The certified copy of the judgment, prepared and signed by this Court's Clerk, will provide for costs if any are awarded. In all other respects, the provisions of paragraph 2 of this Rule apply.

Rule 46. Dismissing Cases

1. At any stage of the proceedings, whenever all parties file with the Clerk an agreement in writing that a case be dismissed, specifying the terms for payment of costs, and pay to the Clerk any fees then due, the Clerk, without further reference to the Court, will enter an order of dismissal.

2. (a) A petitioner or appellant may file a motion to dismiss the case, with proof of service as required by Rule 29, tendering to the Clerk any fees due and costs payable. No more than 15 days after service thereof, an adverse party may file an objection, limited to the amount of damages and costs in this Court alleged to be payable or to showing that the moving party does not represent all petitioners or appellants. The Clerk will not file any objection not so limited.

(b) When the objection asserts that the moving party does not represent all the petitioners or appellants, the party moving for dismissal may file a reply within 10 days, after

which time the matter will be submitted to the Court for its determination.

(c) If no objection is filed—or if upon objection going only to the amount of damages and costs in this Court, the party moving for dismissal tenders the additional damages and costs in full within 10 days of the demand therefor—the Clerk, without further reference to the Court, will enter an order of dismissal. If, after objection as to the amount of damages and costs in this Court, the moving party does not respond by a tender within 10 days, the Clerk will report the matter to the Court for its determination.

3. No mandate or other process will issue on a dismissal under this Rule without an order of the Court.

Part IX. Definitions and Effective Date

Rule 47. Reference to "State Court" and "State Law"

The term "state court," when used in these Rules, includes the District of Columbia Court of Appeals, the Supreme Court of the Commonwealth of Puerto Rico, the courts of the Northern Mariana Islands, the local courts of Guam, and the Supreme Court of the Virgin Islands. References in these Rules to the statutes of a State include the statutes of the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the Territory of Guam, and the Territory of the Virgin Islands.

Rule 48. Effective Date of Rules

1. These Rules, adopted April 18, 2019, will be effective July 1, 2019.

2. The Rules govern all proceedings after their effective date except that the amendments to Rules 25.3 and 33.1(g) will apply only to cases in which certiorari was granted, or a direct appeal or original action was set for argument, after the effective date.

INDEX TO RULES

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Lauren Baisdon on behalf of Michael Graham
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lbaisdon@texasbar.com
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Royce Lemoine	24026421	royce.lemoine@texasbar.com	3/18/2024 3:56:22 PM	SENT
Maria Williamson		maria.williamson@oag.texas.gov	3/18/2024 3:56:22 PM	SENT
Michael Graham	24113581	Michael.Graham@TEXASBAR.COM	3/18/2024 3:56:22 PM	SENT
Toni Shah		toni.shah@oag.texas.gov	3/18/2024 3:56:22 PM	SENT
Mike Scarcella		mike.scarcella@tr.com	3/18/2024 3:56:22 PM	SENT
Seana Beckerman Willing	787056	seana.willing@texasbar.com	3/18/2024 3:56:22 PM	SENT

Associated Case Party: Office of the Texas Attorney General

Name	BarNumber	Email	TimestampSubmitted	Status
Lanora Pettit	24115221	lanora.pettit@oag.texas.gov	3/18/2024 3:56:22 PM	SENT
William Cole	24124187	William.Cole@oag.texas.gov	3/18/2024 3:56:22 PM	SENT