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

BRIEF FOR PETITIONER

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

LANORA C. PETTIT
Principal Deputy Solicitor General
State Bar No. 24115221
Lanora.Pettit@oag.texas.gov

WILLIAM F. COLE
Deputy Solicitor General

Counsel for Petitioner

Identity of Parties and Counsel

Petitioner:
Brent Edward Webster

Appellate and Trial Counsel for Petitioner:
Ken Paxton
Brent Webster
Judd E. Stone II (now with Stone Hilton PLLC, Austin, TX)
Lanora C. Pettit (lead counsel)
William F. Cole
Ari Cuenin (now with Stone Hilton PLLC, Austin, TX)
Christopher D. Hilton (now with Stone Hilton PLLC, Austin, TX)
William Wassdorf
Amy S. Hilton
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700
Lanora.Pettit@oag.texas.gov

Respondent:
Commission for Lawyer Discipline

Appellate and Trial Counsel for Respondent:
Seana Willing
Royce LeMoine
Michael G. Graham (lead counsel)
State Bar of Texas
P.O. Box 12487
Austin, Texas 78711-2487
Tel: (512) 427-1350
Fax: (512) 427-4167
Michael.Graham@texasbar.com

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Statement of the Case

Nature of the Case:	The State Bar of Texas, through its Commission for Lawyer Discipline ("Commission"), seeks an order imposing sanctions and declaring that the First Assistant Attorney General of Texas, Brent Webster ("First Assistant"), engaged in professional misconduct when he filed an original action on behalf of the State of Texas in the Supreme Court of the United States at the direction of the Texas Attorney General, who served as counsel of record. CR.10.
Trial Court:	368th Judicial District Court, Williamson County Honorable John W. Youngblood, presiding by designation
Disposition in the Trial Court:	The trial court granted the First Assistant's plea to the jurisdiction and dismissed the Commission's petition, concluding that "the separation of powers doctrine deprive[d] th[e] Court of subject-matter jurisdiction." CR.1917.
Parties in the Court of Appeals:	The Commission for Lawyer Discipline was the appellant. First Assistant Brent Edward Webster was the appellee.
Disposition in the Court of Appeals:	The court of appeals reversed the trial court's order in a published opinion. *See Comm'n for Law. Discipline v. Webster*, 676 S.W.3d 687 (Tex. App.—El Paso 2023, pet. filed) (Rodriguez, C.J., joined by Palafox, J., and Soto, J.) ("*Webster*"). The court held that the separation-of-powers doctrine was not implicated because this lawsuit targets only misrepresentations in the First Assistant's pleadings and not the act of filing the lawsuit. *Id.* at 696-99. The court also held that sovereign immunity did not apply because this disciplinary action targets the First Assistant's law license and seeks no relief that would be paid out of the State's coffers. *Id.* at 699-702.

Statement of Jurisdiction

The Court has jurisdiction under Texas Government Code section 22.001(a).

Issues Presented

An inactive, out-of-state lawyer who lacks any connection to the underlying litigation insisted that the First Assistant Attorney General of Texas committed professional misconduct by filing a lawsuit on behalf of the State in another jurisdiction challenging perceived procedural irregularities in the 2020 presidential election in four States. That suit was dismissed but did not result in any reprimand or sanction from the relevant Court, and the Commission's own Chief Disciplinary Counsel also found that the relevant complaint did not allege any violations of the ethical rules. Nevertheless, the Commission now asks the Texas courts to discipline the First Assistant. The issues presented are:

1. Whether the Texas Constitution's Separation of Powers Clause, Tex. Const. art. II, § 1, precludes the State Bar, an administrative arm of the Texas judiciary, from expressing disagreement with the Texas Attorney General's assessment of the facts, law, and evidence alleged in a complaint brought in the U.S. Supreme Court by seeking to discipline the Attorney General's senior-most deputy.

2. Whether the State Bar's disciplinary action against the First Assistant is barred by sovereign immunity because it seeks to control State action by seeking to sanction him for official-capacity conduct taken on behalf of the State in another jurisdiction.

To the Honorable Supreme Court of Texas:

The State Bar has never disputed that the Texas Constitution assigns the Attorney General the exclusive right to represent the State in civil appellate litigation or that the decision to file *Texas v. Pennsylvania*, No. 22O155, falls within that broad discretion. And for more than a century, this Court has recognized this constitutional obligation necessarily carries with it broad discretion to assess facts, evidence, and legal theories to determine what lawsuits are in the State's interest. Nevertheless, for the first time in the State's history, the State Bar seeks to second guess that assessment by imposing discipline on the Attorney General' senior-most deputy—all in the name of policing putative misrepresentations allegedly made to the Supreme Court of the United States in the *Pennsylvania* pleadings. That unprecedented action is afflicted by at least two fatal jurisdictional defects.

First, as the trial court correctly held, "the separation of powers doctrine deprive[d] th[e] Court of subject-matter jurisdiction." CR.1917. Even the court of appeals appears to have acknowledged that the State Bar could not second guess the Attorney General's decision to bring *Pennsylvania*. But the court of appeals erred by drawing a false distinction between the decision to file that lawsuit, and the contents of the pleadings that initiated the lawsuit. A lawsuit has no existence apart from its pleadings. And the face of the Commission's petition reveals that what it calls misrepresentations are just allegations in a complaint—that is, the Attorney General's good-faith assessments of the law, facts, and evidence at the time *Pennsylvania* was filed. Policy arguments that the First Assistant seeks to "exempt" himself from the ethical rules—a proposition that ignores the myriad ways in which the First Assistant

remains accountable to courts, the Legislature, and the public—cannot afford the State Bar power that the Constitution reserves to the Attorney General.

Second, whatever the nature of the remedy that the Commission seeks, the Commission's lawsuit is independently barred by sovereign immunity. On its face, the Commission's suit aims to deter the Attorney General and his subordinates from instituting high-profile and contentious matters that the State Bar opposes—actions that those lawyers can only perform in their official capacities. True, the mechanism the Bar has chosen to effectuate that deterrence is to threaten individual lawyers' licenses. Nevertheless, sovereign immunity precludes the State Bar's attempt to use the threat of personal sanctions to influence the Attorney General's official decisions—regardless of whether the Commission justifies that attempt as based on purported "misrepresentations" or otherwise.

These errors warrant this Court's prompt attention and demand its correction. Without question, *Pennsylvania* was indisputably controversial. But it represents an exercise of the Attorney General's core executive prerogative to represent the State in civil matters before a court of last resort. It is not subject to second-guessing by an unelected administrative agency subject to the control of another branch of government. Beyond that, the court of appeals has endorsed the Bar's view that any time discovery fails to substantiate every allegation in a complaint, or a lawyer fails to prevail on any legal theory in a brief, that lawyer has made a sanctionable misrepresentation to the court. The Bar's own rules refute that notion. Tex. Disciplinary Rules Prof'l Conduct Rs. 3.01 & 3.03. For good reason: By definition, half of the lawyers in

any piece of litigation lose. No litigator would keep their license for long if this rule, apparently endorsed by the court of appeals, were uniformly enforced.

This Court should grant the petition, reverse the court of appeals' decision, and render judgment for the First Assistant.

Statement of Facts

The court of appeals correctly stated the nature of the case, except as provided below.

I. Statutory Background

A. The Attorney General and his subordinates

The Texas Attorney General is one of the five elected executive officers listed in Article IV of the Texas Constitution. Tex. Const. art. IV, § 1. Among other things, he is obligated to "represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party," to "give legal advice in writing to the Governor and other executive officers," and to "perform such other duties as may be required by law." *Id.* art. IV, § 22. Over the decades, the Legislature has passed numerous laws charging the Attorney General with additional duties. *See generally* 7 Tex. Jur. 3d Attorney General § 13 (2022). But at its core, the Attorney General's chief function remains "to represent the State in civil litigation." *Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001).

"[W]hile all of the constitutional and statutory authority is vested in *one* Attorney General," it is well-established that "he need not be personally involved in every case and may properly delegate his duties to his assistants." *PUC v. Cofer*, 754

S.W.2d 121, 124 (Tex. 1988). He must; no single person could fulfill these innumerable responsibilities. The Office of the Attorney General thus employs approximately 700 attorneys and thousands of additional staff across nearly 40 divisions to assist the Attorney General in the discharge of his constitutional and statutory duties. *See generally* Tex. Gov't Code § 402 *et seq.* As a result, an "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, is properly of counsel." *Langdeau v. Dick*, 356 S.W.2d 945, 959 (Tex. App.—Austin 1962, writ ref'd n.r.e.).

The First Assistant Attorney General is one such assistant position. The Legislature has prescribed that "[i]f 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). Unless there is a recusal, OAG policy provides that (like the Attorney General), the First Assistant is named in every signature block in every pleading filed in every case handled by the Office—a caseload that numbers over 30,000 at any given time on the Attorney General's civil litigation docket, which does not include the office's many criminal and child-support cases. CR.27. Nevertheless, the First Assistant's position is a limited appointment. Rather than stand for election, the First Assistant "operates under the direct supervision of the Attorney General and exercises no independent executive power." 7 Tex. Jur. 3d Attorney General § 4 (citing *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 924 (Tex. Crim. App. 1994) (orig. proceeding)).

B. The State Bar's role in overseeing attorney discipline

Like the First Assistant, neither the State Bar of Texas nor its leadership is elected by the people of Texas: it is an administrative agency that serves this Court and the judicial branch of the Texas government. Tex. Gov't Code § 81.011. The State Bar is tasked with aiding the judiciary in regulating the practice of law, including by providing professional services to members of the Bar, providing for legal education, encouraging the formation and activities of local bar associations, and—as relevant to this appeal—overseeing attorney discipline. *See id.* §§ 81.011(b), 81.012, 81.071. Several divisions or officers of the Bar are relevant to the attorney-discipline process.

First, the Commission for Lawyer Discipline is "a standing committee of the state bar" that is composed of twelve members, six of whom are attorneys appointed by the President of the State Bar; the others are public, non-attorney members appointed by this Court. *Id.* § 81.076(b); Tex. Rules Disciplinary P. R. 4.01. The Commission functions as the "client"—and typically as plaintiff—in connection with "lawyer disciplinary and disability proceedings." Tex. Rules Disciplinary P. R. 4.06(A).

Second, while the Commission performs the role of client, the role of attorney is played by the Chief Disciplinary Counsel ("CDC"), *see Off. of Chief Disciplinary Counsel*, State Bar of Texas, https://tinyurl.com/2s42tnpy (last visited Feb. 26, 2024). As "the 'Bar's law office,'" *id.*, the CDC is selected, Tex. Gov't Code § 81.076(g), and overseen by the Commission, Tex. Rules Disciplinary P. R. 4.06(B) (requiring periodic reports to the Board of Directors). By rule, the position is

typically occupied by the State Bar's General Counsel, Tex. Rules Disciplinary P. R. 5.01. The CDC "serve[s] as administrator of the state bar's grievance procedure as provided by the Texas Rules of Disciplinary Procedure," Tex. Gov't Code § 81.076(g), and is involved at all stages of the process—from intake, to initial classification of allegations of attorney misconduct to investigation of those allegations to representing the Commission in all proceedings in courts and administrative bodies. *See id.* §§ 81.073-.075; Tex. Rules Disciplinary P. R. 5.02(A)-(M). To carry out those tasks, the CDC employs 91 full-time staff members, including 34 lawyers, 11 investigators and 46 support-staff members. *See Office of Chief Disciplinary Counsel*, *supra*.

Third, two adjudicative bodies are relevant: grievance committees and the Board of Disciplinary Appeals ("BODA"). To start, the State is "geographically divided into disciplinary districts that are coextensive with the districts" of the Bar's Directors. Tex. Rules Disciplinary P. R. 2.01. Grievance committees are district-level bodies consisting of no fewer than nine members, two-thirds of whom are attorneys and one-third of whom are non-attorney public members. *Id.* R. 2.02. The State Bar Director that represents the relevant geographic district nominates members to each grievance committee. *Id.* R. 2.02. These committees act "through panels, as assigned by the Committee chairs, to conduct investigatory hearings, summary disposition dockets, and evidentiary hearings." *Id.* R. 2.07. BODA serves as the appellate body of the State Bar's attorney-discipline process, and consists of twelve members appointed by this Court. *Id.* R. 7.01.

C. The attorney-discipline process

The attorney-discipline process consists of three principal phrases: the intake and classification of grievances, the determination of just cause, and the prosecution of complaints (including any appeals).

1. "The attorney disciplinary process begins when the CDC receives a written statement, from whatever source, alleging professional misconduct by a lawyer." *Comm'n for Law. Discipline v. Stern*, 355 S.W.3d 129, 134 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (Bland, J.). "Until the CDC determines whether the statement actually alleges professional misconduct, it is classified as a grievance." *Id.* (citing Tex. Rules Disciplinary P. R. 1.06(R)). Within 30 days of receipt, the CDC must determine "whether it constitutes an Inquiry, a Complaint, or a Discretionary Referral." Tex. Rules Disciplinary P. R. 2.10; *see generally* Tex. Gov't Code § 81.073. Only the first two classifications are relevant to this case.

The CDC classifies a grievance as an Inquiry if, among other things, "the grievance alleges conduct that, even if true, does not constitute professional misconduct or disability cognizable under the Texas Disciplinary Rules of Professional Conduct." Tex. Gov't Code § 81.073(a)(2)(A)-(B). The CDC "shall" "dismiss" Inquiries. *Id.* § 81.074. But the complainant is entitled to appeal the CDC's decision to classify the grievance as an Inquiry to BODA, which may affirm or reverse that decision. *Id.* § 81.073(b); *see also* Tex. Rules Disciplinary P. R. 7.08(C).

The CDC will classify a grievance as a Complaint if "the grievance . . . alleges conduct that, if true, constitutes professional misconduct or disability cognizable under the Texas Disciplinary Rules of Professional Conduct." Tex. Gov't Code

§ 81.073(a)(1)(A). If a grievance is classified as a Complaint, the respondent is provided with a copy of the complaint and afforded an opportunity to respond to the allegations in writing. Tex. Rules Disciplinary P. R. 1.06(G); *id.* R. 2.10(B).

2. After the respondent provides a written response to a Complaint, the CDC investigates the Complaint to determine whether there is just cause to proceed. Tex. Gov't Code § 81.075(a). The CDC may request that the grievance committee convene an investigatory panel to assist in the determination of whether "just cause" exists to proceed. Tex. Rules Disciplinary P. R. 2.12. Such a panel may issue subpoenas compelling the production of documents, electronically stored information, tangible things, or the attendance of a witness. *Id.*

If the CDC determines that no just cause exists following this investigation, she shall "place the [C]omplaint on a dismissal docket." Tex. Gov't Code § 81.075(b)(1). A summary-disposition panel of the grievance committee will then review the Complaint, receive a presentation by the CDC, and make an independent determination whether to dismiss or proceed. *Id.* § 81.075(c)(1)-(2); Tex. Rules Disciplinary P. R. 2.13.

If either the CDC or the summary-disposition panel concludes that just cause exists, the CDC will provide written notice to the respondent of (1) the acts or omissions allegedly constituting professional misconduct and (2) the Texas Disciplinary Rules of Professional Conduct allegedly violated. Tex. Rules Disciplinary P. R. 2.14(D). Thereafter, the respondent may "request a trial in a district court." Tex. Gov't Code § 81.075(b)(2)(A); *see* Tex. Rules Disciplinary P. R. 2.15. Otherwise, the CDC will "place the complaint on a hearing docket," Tex. Gov't Code

§ 81.075(b)(2)(B), and an evidentiary panel of the grievance committee will convene to "conduct a hearing on each complaint placed on the hearing docket," *id.* § 81.075(d).

3. If the respondent elects to proceed before an evidentiary panel of the grievance committee, the panel will conduct an adversarial evidentiary hearing, with the CDC presenting the complainant's case and the respondent and his attorneys presenting his own. *Id.*; *see also* Tex. Rules Disciplinary P. R. 2.17. Following the hearing, the evidentiary panel may "dismiss the [C]omplaint" or "find that professional misconduct occurred and impose sanctions." Tex. Gov't Code § 81.075(e); *see also* Tex. Rules Disciplinary P. R. 2.17(P). In either circumstance, BODA may hear an appeal from the judgment of an evidentiary panel of the grievance committee. Tex. Gov't Code § 81.0751(a)(1); *see also* Tex. Rules Disciplinary P. R. 7.08(D).

If the respondent elects to have the Complaint heard by a trial court, the Commission must file suit within 60 days of that election. *Id.* R. 3.01. "At th[at] 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. Rules Disciplinary. P. R. 3.08(B). "The burden of proof in a Disciplinary Action seeking Sanction is on the Commission." *Id.* R. 3.08(D).

II. Factual Background

The disciplinary action at issue in this appeal 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. *See* CR.176-218. That action was dismissed for lack of standing at the pleading stage, but the Court imposed no disciplinary action of any kind.

A. In its bill of complaint in the U.S. Supreme Court—on which the First Assistant was listed as of counsel but not counsel of record—Texas alleged that "the 2020 election suffered from significant and unconstitutional irregularities in" the Commonwealth of Pennsylvania as well as the States of Georgia, Michigan, and Wisconsin ("Defendant States"). CR.173-74; *see also* CR.178-79, 189-213. As required by the rules of the U.S. Supreme Court, Texas sought leave to file this bill of complaint. *See* Sup. Ct. R. 17.3; *see also* CR.171-75. Texas also filed a motion for a preliminary injunction and a temporary restraining order or, alternatively, for a stay and administrative stay, CR.435-78, and a motion for expedited consideration of its pleadings, CR.264-281.

Texas's proposed complaint brought three federal constitutional claims. CR.213-16. *First*, Texas claimed that non-legislative actors in each of the four Defendant States had altered their States' election statutes in violation of the federal Constitution's Electors Clause, U.S. Const. art. II, § 1, cl. 2, which assigns the duty to appoint electors to vote for President and Vice President solely to the state legislature. CR.213-14. *Second*, Texas claimed that these alterations created different voting standards within the Defendant States in violation of the one-person, one-vote principle embodied in the Equal Protection Clause, U.S. Const., amend. XIV, § 1, as interpreted by *Bush v. Gore*, 531 U.S. 98 (2000). CR.214-15. *Third*, Texas claimed that these alterations rendered election procedures fundamentally unfair and unlawful under the Due Process Clause, U.S. Const., amend. XIV, § 1. CR.215-16.

At the time, these claims raised important and unresolved legal questions. Indeed, in 2022, no fewer than four U.S. Supreme Court Justices acknowledged the

significance of the principal issue presented by Texas: whether the Electors Clause bars non-legislative actors from overriding the rules for federal elections established by state legislatures. *See Moore v. Harper*, 142 S. Ct. 1089, 1089 (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). Although the Court ultimately rejected the theory—nearly three years after *Pennsylvania* was filed—its reasoning was neither pellucidly clear nor unanimous. *See generally Moore v. Harper*, 600 U.S. 1, 19-34 (2023); *see also id.* at 56-62 (Thomas, J., dissenting).

As required by federal law, Texas's proposed complaint also made several allegations in support of its standing to bring these claims under Article III of the federal Constitution, U.S. Const. art. III, § 2, cl. 1. CR.186-91, 239-42. The State claimed *parens patriae* standing to assert Texans' interests in preventing vote dilution and the interests of Texans who may serve as presidential electors. CR.185-86, 189-91, 241-42. The State also asserted its own form of vote-dilution injury with respect to its entitlement to equal suffrage in the Senate, including with respect to the identity of the Vice President. CR.190-91, 239-40. In support of these allegations and the associated motions, Texas cited dozens of publicly available sources such as court filings, media reports, and government sources and attached eleven declarations, affidavits, and verified pleadings, *see* CR.282-433—far more than typically expected under the federal courts' minimum pleading standards for filing a complaint. *See, e.g.*, Fed. R. Civ. P. 8(a)(1) & (2), 8(d)(1); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

B. Four days after it was filed, and without any opportunity to amend the pleadings or develop the factual record, the U.S. Supreme Court denied Texas leave to

file its bill of complaint "for lack of standing under Article III of the Constitution," concluding that "Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections." *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020). Like the later decision in *Moore* that ultimately rejected Texas's theory under the Electors Clause, that decision was not unanimous. Justices Alito and Thomas voted to permit Texas's case to proceed. *Id.*

Notwithstanding the short lifespan of the case, most States and nearly a quarter of the then-sitting members of the United States House of Representatives filed amicus briefs. Missouri, joined by sixteen other States, submitted an amicus brief in support of Texas. CR.548-77. Six of those States also sought to intervene as parties on Texas's side. CR.152-69. The District of Columbia, joined by twenty States, submitted an *amicus* brief in support of the Defendant States. CR.579-607. Ohio and Arizona filed amicus briefs in support of neither party but agreed 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. CR.609-20, 621-25.

Notwithstanding the quick, jurisdictional dismissal, the U.S. Supreme Court did not sanction *any* lawyer—not Attorney General Paxton, not any of the lawyers representing the many amici who filed in support of Texas, and certainly not First Assistant Webster. Nor did any party to the case seek sanctions against Texas, the

Attorney General, or the First Assistant. Dissatisfied with the mere dismissal of the case, the Texas State Bar decided to fill the gap.

III. Procedural History

A. The CDC's pre-litigation conduct

This lawsuit originated with a grievance filed against the First Assistant on March 11, 2021. CR.680-90. The complainant, Brynne VanHettinga, did not hold an active Texas law license, was not a Texas resident, and had never even met the First Assistant—much less been his client. CR.115-16, 682-83, 690. Instead, VanHettinga described herself as a "citizen concerned about fascism & illegal overthrow of democracy." CR.684. VanHettinga's grievance vaguely asserted that the *Pennsylvania* lawsuit "borrow[ed] heavily from [] manufactured 'evidence,'" peddled "conspiracy theories," and was based upon "legal sophistry." CR.689. It accused the Attorney General and First Assistant of "attempt[ing] to disenfranchise voters and subvert democracy" and of violating their "oaths as attorneys" and "oaths as public servants." CR.690. And it adjudged them guilty of "sedition." CR.690.

Initially, the CDC classified VanHettinga's partisan screed—as well as dozens like it filed against the Attorney General, CR.65—as an Inquiry and dismissed it. *See* CR.633. But months later, BODA reversed course, overruled the CDC, reclassified the grievance as a Complaint, and called for a response from the First Assistant. CR.627-28, 633. BODA informed VanHettinga and the First Assistant that it believed VanHettinga's grievance alleged a possible violation of Rules 3.01 and 3.03 of the Texas Disciplinary Rules of Professional Conduct. CR.633. On July 15, the First

Assistant provided a 21-page, single-spaced response refuting VanHettinga's allegations and raising the separation-of-powers issue. CR.64-85.

After VanHettinga's Complaint was returned for investigation to the CDC, the CDC scheduled an investigatory hearing before a panel drawn from the grievance committee encompassing Travis County. *See* CR.88-89. The First Assistant moved to transfer venue to Williamson County, CR.87-97, 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, Tex. Rules Disciplinary P. R. 2.11(A). The investigatory-hearing panel summarily denied that motion without explanation. CR.99.

On January 5, 2022, the investigatory panel convened a hearing in Travis County to assist the CDC with her determination of just cause. *See* CR.101-40. Two days later, the CDC informed the First Assistant that the investigatory-hearing panel "believes there is credible evidence to support a finding of Professional Misconduct for a violation of Rule[] 8.04(a)(3) of the Texas Disciplinary Rules of Professional Conduct," CR.631—"a gap filling provision," Brief of Appellee Commission for Lawyer Discipline, *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.) ("Brief of Appellee"), that was never identified in the BODA's decision to reclassify Van Hettinga's grievance and to which the First Assistant had no opportunity to respond, *cf.* CR.633.

The CDC then put the First Assistant to the choice: accept a "recommended sanction" of a public reprimand or proceed to a disciplinary action before either an evidentiary panel or a trial court. CR.631. Because nothing in VanHettinga's

grievance established a violation the rules of discipline, and because the Bar had already demonstrated that it would disregard its own procedural rules, the First Assistant rejected the proposed sanction and elected a trial in the district court.

B. Proceedings in the trial court

1. On May 6, 2022, the Commission filed an original disciplinary petition against the First Assistant in the 368th District Court of Williamson County. CR.7-10. The Commission alleged that, by appearing on the pleadings in *Pennsylvania*, the First Assistant violated Rule 8.04(a)(3) of the Texas Disciplinary Rules of Professional Conduct, CR.9-10, which provides that "[a] lawyer shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation," Tex. Disciplinary Rules Prof'l Conduct R. 8.04(a)(3).

To bridge the gaps in VanHettinga's grievance, the Commission alleged that the First Assistant made "misrepresent[ations]" or "dishonest" representations to the U.S. Supreme Court. CR.9. Specifically, the Commission identified six alleged misrepresentations made over the course of ninety-two pages of allegations and briefing before the U.S. Supreme Court: (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) "the State of 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." CR.9.

Notably, the Commission took several of these statements out of context and inaccurately summarized others. For example, the Commission alleged that the First Assistant "made representations in his pleadings that . . . an outcome determinative number of votes were tied to unregistered voters." CR.9. But while the bill of complaint referred to votes not tied to registered voters in Wayne County, Michigan, Texas's pleadings also described additional defects in the Michigan election and nowhere asserted that the unregistered Wayne County votes alone would have changed the outcome of the election. *See* CR.205. Likewise, the Commission contended that the First Assistant misrepresented that "votes were switched by a glitch with Dominion voting machines." CR.9. But the term "Dominion" appeared only twice in Texas's bill of complaint, both times as merely part of a list "describ[ing] . . . a number of currently pending lawsuits in [other] States or in public view." CR.181-82. Finally, the Commission pointed to the use of the phrase "illegal votes" that could have affected the outcome of the election. CR.9. But that phrase appeared once in Texas's brief in support of its motion for leave to file a bill of complaint, in a background discussion of the U.S. Supreme Court's decision in *Bush v. Gore*. CR.231.

Nevertheless, the Commission alleged that these six allegations or arguments constituted misrepresentations because they "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 [the] representations and allegations had already been adjudicated and/or dismissed in a court of law." CR.9.

2. On June 27, 2022, the First Assistant filed his answer, defenses, and a plea to the jurisdiction. CR.23-61. In that plea, the First Assistant argued that the trial

court lacked jurisdiction over the Commission's lawsuit because it was barred by both the Separation of Powers Clause, Tex. Const. art II, § 1, and by sovereign immunity, CR.49-59. The State of Texas—the First Assistant's only client in connection with *Pennsylvania*—also intervened to safeguard its interest in protecting the legal representation it receives from its constitutionally designated lawyer from interference by politically motivated, unelected administrators in the judicial branch. CR.1677-82. The Commission later moved to strike that motion to intervene. CR.1684-91.

On September 6, the trial court held a hearing on the plea to the jurisdiction, the State's motion to intervene, and the Commission's motion to strike. RR.4-72. On September 12, the trial court informed the parties that it would dismiss the Commission's suit against the First Assistant because the court lacked jurisdiction under the separation-of-powers doctrine. CR.1914. The court reasoned that, "[t]o find in the Commission's favor would stand for a limitation of the Attorney General's broad power to file lawsuits on the State's behalf, a right clearly supported by the Texas Constitution and recognized repeatedly by Texas Supreme Court precedent." CR.1914. The next day, the Court issued a formal order granting the First Assistant's plea on the ground that "the separation of powers doctrine deprive[d] th[e] Court of subject-matter jurisdiction." CR.1917. Denying all relief "not herein expressly granted," CR.1917, the trial court never reached the sovereign-immunity question.

C. Proceedings in the court of appeals.

The court of appeals reversed. Accepting wholesale the Commission's argument that it was not challenging the Attorney General's decision to *file Pennsylvania*,

but just the "allegations" contained within his pleadings, the court declared irrelevant more than a century of this Court's precedent describing the Attorney General's broad power to represent the State in civil litigation, and held that this lawsuit posed no separation-of-powers problem. *Webster*, 676 S.W.3d at 698. The court also held that sovereign immunity posed no barrier to this suit because "the State is not the real party in interest," given that the remedy sought would operate against the First Assistant's personal law license and "no civil damages threaten the State." *Id.* at 701-02.

The First Assistant timely petitioned this Court for review.

Summary of the Argument

I. The trial court got it entirely right: Exercising jurisdiction over this lawsuit would run afoul of the Texas Constitution's Separation of Powers Clause, Tex. Const. art. II, § 1, which forbids one branch of government to unduly interfere with another branch's exercise of its core powers. *See In re Turner*, 627 S.W.3d 654, 660 (Tex. 2021) (per curiam) (orig. proceeding). More than a century of this Court's precedent makes clear that the Constitution assigns the Attorney General "exclusive" control over representing the State in civil appellate litigation. *E.g.*, *Maud v. Terrell*, 200 S.W. 375, 376 (Tex. 1918) (orig. proceeding). And in discharging that duty, the Attorney General—and, by extension the First Assistant—has broad discretion over the selection of legal arguments, the assessment of the available facts and evidence, and the ultimate decision about whether to institute suit. *Perry*, 67 S.W.3d at 92; *Agey v. Am. Liberty Pipe Line Co.*, 172 S.W.2d 972, 974-75 (Tex. 1943); *Charles Scribner's Sons v. Marrs*, 262 S.W. 722, 727-28 (Tex. 1924) (orig.

proceeding); *Lewright v. Bell*, 63 S.W. 623, 623-24 (Tex. 1901) (orig. proceeding). Because the Commission is an agent of the judiciary, and its disciplinary action is a thinly veiled effort to second-guess the Attorney General's assessment of the law, facts, and evidence at the time he decided to file *Pennsylvania*, its actions run headlong into the separation-of-powers doctrine.

The court of appeals erred when it departed from this Court's well-established precedent based on its policy-driven view that the First Assistant should not be able to "exempt" himself from the Commission's rules against misrepresentations to a tribunal. Leaving aside that the U.S. Supreme Court is perfectly capable of punishing any misrepresentations it perceives in briefs it reviews, neither response is accurate. The six purported misrepresentations identified by the Commission amount to no more than a disagreement with the Attorney General's legal arguments, assessment of the evidence, and ultimate decision to file suit. And the First Assistant fully acknowledges that executive-branch lawyers remain accountable to courts, the Legislature, and ultimately the public for their actions in myriad other ways.

II. Sovereign immunity independently bars this lawsuit. It is well established that government officials like the First Assistant enjoy sovereign immunity for conduct undertaken in their official capacities. *Matzen v. McLane*, 659 S.W.3d 381, 388 (Tex. 2021). Whether this immunity is implicated turns not on the remedy sought but on whether the lawsuit attempts to "control action of the State." *Griffin v. Hawn*, 341 S.W.2d 151, 152 (Tex. 1960). The Commission seeks to sanction the First Assistant for conduct which could only have been undertaken in his official capacity by virtue of his position: filing a lawsuit in the U.S. Supreme Court on behalf of the

State of Texas. Though that sanction would formally run against the First Assistant's law license, it functions to deter the Attorney General and his subordinates from instituting high-profile and contentious matters that the State Bar would not support. Because this effort is directed at controlling the conduct of the State's chief legal officer and his top deputy in the exercise of core executive functions, it is an official-capacity action barred by sovereign immunity.

Standard of Review

This Court reviews a trial court's ruling on a plea to the jurisdiction de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). In reviewing that ruling, the Court considers the plaintiff's pleading and factual assertions, in addition to any evidence relevant to the jurisdictional issue. *City of Elsa v. Gonzalez*, 325 S.W.3d 622, 625-26 (Tex. 2010) (per curiam); *Bland ISD v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). "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." *Miranda*, 133 S.W.3d at 227.

"Sovereign immunity from suit defeats a trial court's subject matter jurisdiction and thus is properly asserted in a plea to the jurisdiction." *Id.* at 225-26. Another "limit on courts' jurisdiction under both the state and federal constitutions is the separation of powers doctrine." *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) (citing Tex. Const. art. II, § 1).

ARGUMENT

I. The Commission's Lawsuit is Barred by the Texas Constitution's Separation of Powers Clause.

The Texas Constitution, like the U.S. Constitution, divides the powers of government into legislative, executive, and judicial departments. *See* Tex. Const. arts. III, IV, V. But unlike the federal Constitution, the Texas Constitution expressly provides that "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." *Id.* art. II, § 1. This Clause represents a textual commitment to the "separation of powers doctrine," *In re Dean*, 393 S.W.3d 741, 747 (Tex. 2012) (orig. proceeding), under which the "governmental authority vested in one department of government cannot be exercised by another department unless expressly permitted by the constitution." *Tex. Ass'n of Bus.*, 852 S.W.2d at 444. Likewise, "the interference by one branch of government with the effectual function of another raises concerns of separation of powers." *In re Turner*, 627 S.W.3d at 660; *see also Coates v. Windham*, 613 S.W.2d 572, 575-76 (Tex. App.—Austin 1981, no writ).

The trial court was entirely correct that these principles preclude the Commission's lawsuit. The Attorney General is the chief legal officer of the State. He has broad and exclusive authority to make determinations about what civil cases the State will file and what arguments it will pursue, particularly in appellate courts. The Commission's lawsuit represents a thinly veiled attempt to superintend over the Attorney General's discharge of those core duties by means of a disciplinary action

against his top deputy. The court of appeals was wrong to allow the Bar to accomplish through artifice what it could never do through direct action.

A. Under the Texas Constitution, an administrative body of the judiciary can neither exercise nor unduly interfere with core executive functions.

As this Court recently explained, "[w]hen the Executive Branch acts within its constitutional discretion, 'nothing can be more perfectly clear that [its] acts are only politically examinable.'" *Van Dorn Preston v. M1 Support Servs., L.P.*, 642 S.W.3d 452, 457 & n.10 (Tex. 2022) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803)). Thus, "courts should not interfere in the executive's administration of the state government . . . unless the law shows that an official's conduct (or lack of conduct) is unlawful and not an exercise of discretion." *In re Stetson Renewables Holdings, LLC*, 658 S.W.3d 292, 297 (Tex. 2022) (orig. proceeding).

Although this Court has not had occasion to delineate a precise test for determining the outer scope of the Executive's discretion, other Texas courts have long recognized that "[a] separation of powers violation may occur in one of two ways." *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)); *see also Black v. Dall. Cnty. Bail Bond Bd.*, 882 S.W.2d 434, 438 (Tex. App.—Dallas 1994, no writ) (same); *DFPS v. Dickensheets*, 274 S.W.3d 150, 156 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (same). "First, it is violated when one branch of government assumes, or is delegated, *to whatever degree*, a power that is more 'properly attached' to another branch." *Martinez*, 503 S.W.3d at 733 (quoting *Armadillo Bail Bonds v. State*, 802

S.W.2d 237, 239 (Tex. Crim App. 1990)). "The second occurs 'when one branch unduly interferes with another branch so that the other branch cannot *effectively* exercise its constitutionally assigned powers.'" *Id.* (quoting *Martinez*, 323 S.W.3d at 501).

This case involves the second type of separation-of-powers violation: undue interference. That type of violation is assessed through "a two-part inquiry." *TCEQ v. Abbott*, 311 S.W.3d 663, 672 (Tex. App.—Austin 2010, pet. denied). The court begins by examining the scope of the powers constitutionally assigned to the first governmental actor. *See id.* The court then considers the "impact" of the first branch's conduct on the second branch's "exercise of those powers." *Id.* When one branch attempts to impinge on another's exercise of its "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) (per curiam).

B. The Constitution confers broad discretion on the Attorney General when exercising his duty to represent the State.

The Texas Constitution expressly instructs the Attorney General to "represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party." Tex. Const. art. IV, § 22. And the Legislature has required him to "prosecute and defend all actions in which the state is interested before the supreme court and courts of appeals." Tex. Gov't Code § 402.021. The First Assistant is the Attorney General's principal assistant, but he "exercises no independent executive power," and his authority is entirely derivative of the Attorney General's. *Pirtle*,

887 S.W.2d at 931; *see also Sierra Club v. City of San Antonio*, 115 F.3d 311, 314 (5th Cir. 1997) (noting that "other attorneys who may be permitted to assist the [Texas] Attorney General are subordinate to his authority").

This Court has long recognized that the constitutional obligation to represent the State in civil litigation in this Court and the courts of appeals is "exclusive" to the Attorney General. *Maud*, 200 S.W. at 376; *Garcia v. Laughlin*, 285 S.W.2d 191, 194 (Tex. 1955) (orig. proceeding); *cf. Hill v. Tex. Water Quality Bd.*, 568 S.W.2d 738, 741 (Tex. App.—Austin 1978, writ ref'd n.r.e.) ("either the Attorney General or a county or district attorney may represent the State in a particular situation, but these are the only choices[;] whichever official represents the State exercises *exclusive* authority" (emphasis added)). Consequently, other branches may not "interfere with the [Attorney General's] right to exercise" that core power. *Maud*, 200 S.W. at 376; *see also El Paso Elec. Co. v. TDI*, 937 S.W.2d 432, 438 (Tex. 1996); *Brady v. Brooks*, 89 S.W. 1052, 1055 (Tex. 1905) (orig. proceeding). "The legislature cannot by statute abrogate the Attorney General's constitutional grant of power." *State v. Thomas*, 766 S.W.2d 217, 219 (Tex. 1989) (orig. proceeding). And, as a creature of statute, neither can an administrative agency. *Cf. id.*

When discharging his duties, 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) (orig. proceeding)). "He has the right to investigate the facts and exercise his judgment and discretion regarding the filing of a suit." *Agey*, 172 S.W.2d at 974. And "in the matter of bringing suits," his "exercise [of] judgment and

discretion . . . will not be controlled by other authorities." *Charles Scribner's Sons*, 262 S.W. at 727.

Lewright illustrates the breadth of the Attorney General's exclusive discretion in this sphere. In that case, this Court denied a petition for a writ of mandamus directed at the Attorney General that would have commanded him to institute a suit in the name of the State. 63 S.W. at 623-24. Even though the relator pointed to a statute that imposed a duty on the Attorney General to institute a suit under the circumstances at issue, the Court nevertheless recognized that this statutory "imperative" required an exercise of discretion on the part of the Attorney General—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. But because mandamus is not available to compel a discretionary act, the Court held that "the courts cannot control [the Attorney General's] judgment in the matter and determine his action." *Id.*

C. The Commission's disciplinary action unduly interferes with the exercise of core executive powers.

Rather than heed this Court's century-old command, the State Bar now seeks to deter through sanctions that which it could not compel through court order. Specifically, the Commission aims to control the exercise of the Attorney General's core executive function of choosing what lawsuits to bring in the name of the State by seeking discipline against the First Assistant for what it characterizes as six "misrepresent[ations]" made in the *Pennsylvania* pleadings. CR.9. It reasons that the six offending statements amounted to dishonest representations because the State's

allegations "were not supported by any charge, indictment, judicial finding, and/or credible or admissible evidence." CR.9.

But Texas Rule of Disciplinary Procedure 8.04(a)(3), which is the rule alleged to be violated, addresses misrepresentations as a form of fraud on a court. Generally speaking, under a theory of fraud, a "representation, to be actionable, must be a representation of a material fact." *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983). "[A]n expression of an opinion cannot support an action for fraud" unless the speaker has knowledge of its falsity, *id.* (collecting cases)—which the Commission does not allege here. That is why the Rules of Professional Conduct separately forbid presenting knowingly false evidence, Tex. Disciplinary Rules Prof'l Conduct R. 3.03(a)(5), and presenting an argument that is not "supported by a good faith argument for an extension, modification or reversal of existing law," *id.* R. 3.01 cmt.2.

Even a cursory examination of the six alleged "misrepresentations" reveals that the Commission's label of "misrepresentations" is meant to conceal a challenge to the Attorney General's assessment of the facts, evidence, and law at the time he initiated *Pennsylvania*. Yet, those judgments lie in the heartland of the Attorney General's exclusive and capacious duty "to represent the State in civil litigation." *Perry*, 67 S.W. 3d at 92; *see supra* at 23-25. The Separation of Powers Clause squarely precludes the Commission's gambit.

1. To start, consider the Commission's allegation that the First Assistant misrepresented that "state actors 'unconstitutionally revised their state's election statutes'" and that Texas had Article III standing to bring *Pennsylvania*. CR.9. That is just a disagreement with two *legal* theories pursued by the Attorney General and the

First Assistant. Assuming that a legal argument can constitute a *representation* for the purpose of Rule 8.04, it is the *Attorney General*—not a quasi-judicial administrative body like the Commission—that has "the right to investigate the facts and exercise his judgment and discretion regarding the filing of a suit," including deciding what legal arguments the State will present to courts. *Agey*, 172 S.W.2d at 974; *see also Lewright*, 63 S.W. at 624 (explaining that the Attorney General has discretion to conclude "that there is reasonable ground to believe that [a] statute has been violated").

Moreover, a legal argument is only considered "a knowingly false representation of law"—and thus "dishonesty toward the tribunal"—if a lawyer fails to "disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." Tex. Disciplinary Rules Prof'l Conduct R. 3.03(a)(4) & cmt.3. The Commission has never contended that the First Assistant failed to disclose binding authority regarding these legal theories because until this past June, the legal question whether non-legislative actors may revise state election law was an important, unsettled issue for which *four* U.S. Supreme Court Justices stated substantial arguments on the merits exist. *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). Even then, more than one Justice agreed with Texas on its legal theory, underscoring that it was far from frivolous. *See Moore*, 600 U.S. at 40-65 (Thomas, J., dissenting).

2. Even more troublesome is the Commission's allegation that the First Assistant 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.'" CR.9. This fails for three reasons. *First*, it represents the Commission's 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." *Lewright*, 63 S.W. at 624. Again, that judgment is reserved for the Attorney General under the Texas Constitution and is not subject to "control[] by other authorities," like an administrative agency of the judiciary. *Charles Scribner's Sons*, 262 S.W. at 727; *Lewright*, 63 S.W. at 624.

Second, it entirely ignores the eleven declarations, affidavits, and verified pleadings supporting the State's motion for a preliminary injunction. CR.282-433. The Commission may not be persuaded by that evidence, but questions about how to weigh that evidence were for the U.S. Supreme Court—not the Texas State Bar—to decide. *See Brown v. The State Bar of Tex.*, 960 S.W.2d 671, 674 (Tex. App.—El Paso 1997, no pet.) (explaining that it is "the trial court's" role to "resol[ve] . . . conflicts in the evidence" and "pass on the weight or credibility of the witnesses' testimony"). The federal Constitution and Congress have vested original, exclusive jurisdiction to hear cases and controversies between two States in the U.S. Supreme Court—not an administrative agency in a single State. U.S. Const. art. III, § 2, cl. 1; 28 U.S.C. § 1251(a); *see Mississippi v. Louisiana*, 506 U.S. 73, 78 (1992) ("This follows from the plain meaning of 'exclusive,' and has been remarked upon by opinions in our original jurisdiction cases.") (citation omitted). Any other rule would grant the State Bar license to second-guess not just the Attorney General's "investigat[ion] [of] the facts and exercise [of] his judgment and discretion regarding the

filing of a suit," *Agey*, 172 S.W.2d at 974, but also the ability of the highest court in the federal system to weigh the documents placed in front of it.

Third, the Commission's apparent demand for "evidence" or "judicial finding[s]" misunderstands the character of the pleadings filed in the U.S. Supreme Court, which were in the nature of a complaint and an application for a preliminary injunction. *See generally* Sup. Ct. Rule 17. Indeed, because the U.S. Supreme Court ultimately dismissed the case four days after it was filed, there was no opportunity for the development of evidence through discovery or an evidentiary hearing before a special master. *See Texas v. New Mexico*, 574 U.S. 972, 972 (2014) (appointing a special master in an original-jurisdiction action to, among other things, "take such evidence as may be introduced and such as he may deem it necessary to call for"); *New Jersey v. New York*, 513 U.S. 924, 924 (1994) (same).

If the Commission's newfound "misrepresentations" standard were correct, it would mean that any lawyer who appears on a pleading must personally guarantee, at the risk of his law license, that evidence to support every allegation in a petition will be procured. That is entirely contrary to the Bar's own rules, which instruct that "[a] filing or contention" is "not frivolous . . . merely because the facts have not been substantiated fully or because the lawyer expects to develop vital evidence only by discovery." *See* Tex. Disciplinary Rules Prof'l Conduct, R. 3.01, cmt. 3. And application of the Bar's newfound standard in this case would grind the Office of the Attorney General to a halt, as the Attorney General is responsible for more than 30,000 civil cases at any given time. CR.27. No doubt other entities would fare no better.

3. Many of the same flaws doom the Commission's allegations that the First Assistant misrepresented that "an outcome determinative number of votes were tied to unregistered voters"; that "votes were switched by a glitch with Dominion voting machines"; and that "'illegal votes' had been cast that affected the outcome of the election." CR.9. These allegations are a barely concealed challenge to the Attorney General's assessment of the evidence and law before him at the time the pleadings were filed.

The first—that the number of votes affected by allegedly unconstitutional election procedures was "outcome determinative"—represents the Attorney General's characterization of the evidence contained in the eleven declarations, affidavits, verified pleadings, and other publicly available sources referenced in the pleadings. CR.282-433. Particularly at a preliminary stage of the case before there is any opportunity to develop evidence, such an assessment is one the Attorney General is entitled to make, *Lewright*, 63 S.W. at 624—even if, after discovery, the evidence to support the allegation cannot be procured. *Accord* Tex. Disciplinary Rules Prof'l Conduct, R. 3.01 & cmts. 2-4; *id.* R. 3.03(a)(1), (3), (5) & cmt.2.

The second—that "illegal votes" had been cast, CR.9—reflects the Attorney General's legal argument that the election procedures employed in the Defendant States did not comport with the federal Constitution's Electors Clause, U.S. Const. art. II, § 1, cl. 2. Far from a false representation of the law as defined by the State Bar's own rules, *see* Tex. Disciplinary Rules Prof'l Conduct R. 3.01 & cmt. 3, that represented an open question at the time, which the U.S. Supreme Court resolved just last Term. *Supra* at 11

Finally, the statement that "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," CR.182, was not a misrepresentation at all, *contra* CR.9. The Commission does not seriously dispute that there was a "reporting error" in Antrim County, Michigan's unofficial vote totals due to missteps by the county clerk in using the election management system software. Mich. Dep't of State, *False claims from Ronna McDaniel have no merit*, https://tinyurl.com/mrxh6yv4 (last visited Feb. 26, 2024). So, the Commission's claim that the description of this event in the *Pennsylvania* pleading amounts to a "misrepresentation" appears to be little more than a dispute over word choice. But decisions about syntax are surely within the ambit of the Attorney General's broad "judgment and discretion regarding the filing of a suit." *Agey*, 172 S.W.2d at 974—even if the Commission would have chosen different language.

4. Stripping out these improper efforts to second guess the Attorney General's legal judgment regarding whether to file *Pennsylvania*, the Commission is left to argue that, because the U.S. Supreme Court dismissed Texas's motion for leave to file a bill of complaint on standing grounds, the State's complaint was misleading. But as this Court is well aware, *see, e.g.*, *Abbott v. Mexican-Am. Legis. Caucus*, 647 S.W.3d 681, 690-98 (Tex. 2022) (*MALC*), the standing doctrine is highly fact-dependent and notoriously produces inconsistent results.[1]

[1] *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"); *Clapper v. Amnesty Int'l*

Moreover, the U.S. Supreme Court dismisses petitions for any number of reasons without suggesting that the lawyer who filed the document acted in derogation of his ethical obligations.[2] For good reason. Almost by definition, half the lawyers lose in every lawsuit. That is in part why the Federal Rules, like the Texas Rules, allow attorneys to bring claims that are dismissed so long as there is a "good faith argument for the extension, modification, or reversal of existing law." Tex. R. Civ. P. 13; *see also* Fed. R. Civ. P. 11(b)(2). At a minimum, making arguments on one side of a then-open question of constitutional law steers well clear of violating those rules and easily complies with the State Bar's disciplinary rules. *See* Tex. Disciplinary

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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, 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, 276-89 (2010) (Roberts, C.J., Thomas, J., Ginsburg, J., and Sotomayor, J., concurring in the judgment in part and dissenting in part) (describing the majority holding on the Court's original jurisdiction as "literally unprecedented" and "difficult to understand"); *see also Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1115 (11th Cir. 2021) (Newsom, J., concurring) (expressing "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").

[2] *Compare, e.g.*, *In re Grand Jury*, 143 S. Ct. 543 (2023) (per curiam) (dismissing writ of certiorari after oral argument suggested that the parties agreed on the relevant legal test); *Brooks v. Abbott*, 143 S. Ct. 441 (2022) (Mem.) (dismissing direct appeal where notice of appeal was untimely); *United States v. Texas*, 142 S. Ct. 522 (2021) (per curiam) (dismissing writ of certiorari after challenge to the United States' standing), *with, e.g.*, Orders List at 5-6, 598 U.S.__ (Feb. 27, 2023), https://www.supremecourt.gov/orders/courtorders/022723zor_6537.pdf (disbarring 6 lawyers for violating the Court's rules).

Rules Prof'l Conduct, R. 3.01 & cmt. 4 (observing that "the duties imposed on a lawyer by Rule 11 of the Federal Rules of Civil Procedure exceed those set out in this Rule."). But if asserting such arguments in the U.S. Supreme Court can now be grounds for disciplining a lawyer, very few lawyers would retain their licenses for long.

The impropriety of such a theory takes on constitutional significance here because it is an attempt by the judiciary to influence the types of arguments made by the Attorney General in the future. That is because whether taken separately or together, the alleged misrepresentations cannot overcome the fact that the Texas Constitution reserves to the Attorney General the choice whether to bring a given case in the U.S. Supreme Court based on a particular set of theories and evidence. *See Agey*, 172 S.W.2d at 974; *Lewright*, 63 S.W. at 624. The Commission is not empowered to second-guess those choices by hanging the Damoclean sword of disciplinary proceedings over any assistant attorney general who makes a legal argument that does not carry the day in court.

D. The court of appeals erred by deeming the Separation of Powers Doctrine inapplicable.

Rather than seriously engage with the First Assistant's separation-of-powers argument, the court of appeals offered four reasons for sidestepping them. None is meritorious.

First, the court of appeals refused to make any assessment of the allegations contained in the Commission's petition on the ground that doing so would veer into "the merits of the disciplinary action," which the Court deemed "inappropriate to

address" on a plea to the jurisdiction. *Webster*, 676 S.W.3d at 698. But consideration of the allegations in the Commission's petition is pivotal because these allegations affirmatively undermine the Commission's primary defense to the First Assistant's jurisdictional argument—that it is seeking merely to police "misrepresentations" made to the U.S. Supreme Court. As this Court has repeatedly recognized, under Texas law there are many instances "[w]here the facts underlying the merits and jurisdiction are intertwined." *City of Fort Worth v. Pridgen*, 653 S.W.3d 176, 182 (Tex. 2022); *see also, e.g.*, *MALC*, 647 S.W.3d at 699 & n.8; *Chambers-Liberty Cntys. Navigation Dist. v. State,* 575 S.W.3d 339, 345 (Tex. 2019); *Alamo Heights ISD v. Clark*, 544 S.W.3d 755, 770 (Tex. 2018). That is precisely the case here, where the face of the Commission's petition reveals jurisdictional defects.

Examination of the Commission's allegations here would not improperly adjudicate the merits of this controversy. In this appeal, the First Assistant does not seek an adjudication of whether the six alleged misrepresentations constitute violations of Rule 8.04(a)(3) of the Texas Rules of Disciplinary Conduct. Instead, the First Assistant asserts that an examination of the petition's allegations demonstrates that the Commission is *not* seeking to police misrepresentations but to second-guess the Attorney General's selection of legal arguments, investigation of facts, and assessment of evidence. *Supra* at 26-31. Because those powers fall squarely within the ambit of the Attorney General's core executive powers, *supra* at 23-25, the Commission's suit poses a grave separation-of-powers problem implicating the trial court's jurisdiction. Even if this inquiry overlaps with the merits, that does not excuse the court of appeals' refusal to engage with them. *Pridgen*, 653 S.W.3d at 182.

Second, the court of appeals first dismissed as irrelevant this Court's decisions defining the scope of the Attorney General's authority to represent the State in civil appellate litigation, *supra* at 23-25, on the ground that they concern only the Attorney General's "decision to exercise his judgment in *bringing* a suit," but not his authority to make "allegations within the . . . pleadings," *Webster*, 676 S.W.3d at 698. But legal filings have no existence beyond facts they allege or the legal theories they pursue, which are then memorialized in filings lodged with a court. *See Lewright*, 63 S.W. at 624. That is, the decision to file a lawsuit cannot logically be decoupled from the contents of the lawsuit because the decision to file is necessarily dictated by the facts and law that form the substance of the suit. Consistent with that reality—and with the Bar's own rules regarding an attorney's duties before bringing a suit, Tex. Disciplinary Rules Prof'l Conduct, Rs. 3.01 & 3.03—this Court has defined the scope of the Attorney General's constitutional duty to represent the State to include investigating and assessing facts and evidence as well as selecting legal arguments. *See, e.g.*, *Agey*, 172 S.W.3d at 974; *Lewright*, 63 S.W. at 624.

The court of appeals nevertheless concluded that permitting this lawsuit to go forward would be consistent with "precedent, both in Texas and elsewhere." *Webster*, 676 S.W.3d at 699. Not so. The closest Texas analogue that the court of appeals can cite is that of former Attorney General Daniel Morales, who resigned his law license rather than submit to discipline after he pleaded guilty to federal crimes. *Id.* at 699 n.6 (citing Order of the Supreme Court of Texas in Misc. Docket No. 03-9205, *In the Matter of Daniel C. Morales*). But that history proves nothing: Morales was disciplined after he had pleaded guilty to federal charges of mail fraud and filing a false

tax return—four years *after* he choose not to seek reelection to a position in the Executive Department of the Texas government. *See* CR.1250-96. In all events, the Separation of Powers Clause would have posed no barrier to such a disciplinary action against Attorney General Morales had he been in public office at the time, since the commission of crimes does not fall within the ambit of any of the Attorney General's constitutionally assigned functions; disciplining him for criminal activity thus cannot be said to "interfere[]" with the discharge of his constitutional duties. *In re Turner*, 627 S.W.3d at 660.

The court of appeals' limited out-of-state authority does not establish otherwise. *See Webster*, 676 S.W.3d at 699 n.7. To the contrary, one of its cases expressly acknowledges that "in a particular grievance proceeding, a prosecutor subject to investigation may be able to allege that, because of separation of powers principles, different substantive or procedural rules apply to him or her than to the average attorney." *Massameno v. Statewide Grievance Comm.*, 663 A.2d 317, 336 (Conn. 1995). And the other two cases did not involve any separation-of-powers question at all, so they are not instructive for resolution of the issue of Texas constitutional law presented before this Court. *See In re Klein*, 311 P.3d 321 (Kan. 2013) (per curiam); *In re Clark*, Nos. 22-mc-0096, 2023 WL 3884119, at *14 (D.D.C. June 8, 2023) (holding that "attorney regulation" is the exclusive province of States and the District of Columbia so removal of an attorney-discipline matter to federal court was improper).

Third, the court of appeals insisted that there is no-separation-of-powers problem here because whatever the extent of the Attorney General's constitutional authority, it is "limited by adherence to the [State Bar's] disciplinary rules" that it

likens to "statutes." *Webster*, 676 S.W.3d at 698. After all, the court reasoned, the Attorney General pays yearly "membership dues" to the Bar. *Id.* Leaving aside that no one has challenged whether the Bar can require the Attorney General to pay dues, this gets the issue precisely backwards: "The legislature cannot by statute abrogate the Attorney General's constitutional grant of power." *Thomas*, 766 S.W.2d at 219. As a creature of statute, neither can an administrative agency like the Commission. *Cf. id.* The court of appeals erred by trying to resolve a *constitutional* question by pointing to *administrative* rules.

To the extent that administrative rules are relevant to decide a constitutional question (and they are not), they only underscore why this case should have been dismissed. As the First Assistant has explained, *supra* at 14, the Commission abandoned the initial charges brought against the First Assistant under specific ethics rules in favor of "a gap filling" catchall provision "designed to prohibit dishonest or deceitful conduct *not otherwise captured by the other rules*." Brief of Appellee, 2019 WL 1901320 at *51 (emphasis added). But at the relevant time, that provision provided that "[a]ttorney conduct that occurs in another jurisdiction"—here the U.S. Supreme Court—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).[3]

[3] During the pendency of this case, the Bar engaged in rulemaking to authorize disciplinary actions whether or not the other jurisdiction saw fit to sanction that lawyer. *See Proposed Rule Changes: Rule 8.05. Jurisdiction*, Comm. on Disciplinary Rules & Referenda, 86 Tex. B.J. 192, 192-93 (Mar. 2023).

Fourth, the court of appeals retreated to bare appeals to policy: the First Assistant's argument, it insisted, "cannot be" accepted because doing so would effectively "[e]xempt[] an entire category of attorneys"—government lawyers—"from the judiciary's constitutional obligation to regulate the practice of Texas attorneys." *Webster*, 676 S.W.3d at 698-99. Not so. To start, if the First Assistant were to undertake a representation in his private capacity, the Separation of Powers Clause would have nothing to say about the Commission's enforcement of its rules as to that private representation. Though not common, OAG policy does not forbid attorneys representing family members or friends in private disputes that do not implicate the interests of the State.

Even for acts in his official capacity, the First Assistant has never disputed that a *court* can sanction executive-branch lawyers for conduct undertaken in their official capacities before *the court* that violates ethical rules. *See Brewer v. Lennox Hearth Prods., LLC*, 601 S.W.3d 704, 718 & n.41 (Tex. 2020) (quoting *In re Bennett*, 960 S.W.2d 35, 40 (Tex. 1997) (per curiam) (orig. proceeding)). Here, that other jurisdiction would have been the U.S. Supreme Court, which has stated that it has the "inherent power" to, among other things, "control admission to its bar and to discipline attorneys who appear before it." *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); *see also* Fed. R. Civ. P. 11. In such a circumstance, sovereign immunity also would likely not be at issue because it does not protect actions outside the scope of a state official's discretion. *Hous. Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 163-64 (Tex. 2016). Here, however, the U.S. Supreme Court did not

sanction the Attorney General—or any of the nearly 150 lawyers and legislators who joined filings in support of his position. *Supra* at 12-13.

Furthermore, the Attorney General—and, by extension, the First Assistant, who is a political appointee[4]—is subject to several external checks on his conduct apart from the judiciary. Chief among those is the electorate: as an elected officer of a constitutionally created state office, Tex. Const. art. IV, §§ 1, 2, the Attorney General is directly accountable to "the voters for his conduct" in office when he stands for election. *Colorado County v. Staff*, 510 S.W.3d 435, 445 (Tex. 2017). The Legislature also possesses mechanisms for expressing its disapproval of an elected officer's conduct. It can censure an elected officer; deduct from an officer's salary for neglect of duty, Tex. Const. art. XVI, § 10; hold hearings into an official's conduct, *see Ferguson v. Maddox*, 263 S.W. 888, 890 (Tex. 1924); and, as it deems necessary, impeach and remove an elected officer, Tex. Const. art. XV, § 2. These external checks merely do not include allowing an administrative body created by the judiciary in one jurisdiction to attempt to exercise control over the exercise of a core executive power in a *different* jurisdiction.

II. The Commission's Lawsuit is Barred by Sovereign Immunity.

Although the trial court did not, and this Court need not, reach the issue, the Commission's lawsuit is independently barred by sovereign immunity. Only the Attorney General of Texas acting in his official capacity—or the First Assistant acting

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[4] Because he *is* a political appointee, the First Assistant is further subject to the control of the Attorney General in the discharge of his duties. *Pirtle*, 887 S.W.2d at 931.

in his stead, Tex. Gov't Code § 402.001(a)—may file a lawsuit in the U.S. Supreme Court on behalf of the State of Texas under state law, *see id.* § 402.021, or (at least arguably) under the U.S. Supreme Court's rules, *cf.* Sup. Ct. R. 17.3 (requiring service of original actions on the Attorney General of the State). The First Assistant, like other state officials, is immune "from both suit and liability" for actions taken in his "official capacit[y]." *Matzen*, 659 S.W.3d at 388.[5] This Court has repeatedly stated "that it is the Legislature's sole province to waive or abrogate sovereign immunity;" "other governmental entities" may not "waive immunity by conduct." *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 857 (Tex. 2002). As the Commission has never argued that the Legislature waived the First Assistant's sovereign immunity—or that its suit could fit within the *ultra vires* exception—this is fatal.

A. The First Assistant is entitled to sovereign immunity for acts taken in his official capacity.

It is well established that, absent "waive[r] by the Legislature" or "*ultra vires* acts" by the official, "sovereign immunity continues to protect state officials from both suit and liability in their official capacities." *Matzen*, 659 S.W.3d at 388; *see also Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 843 (Tex. 2007) ("an official sued in his official capacity would assert sovereign immunity"). That is why Texas courts,

[5] The Commission itself has declared by rule, without any apparent statutory or constitutional authority, that its attorneys are "absolute[ly] and unqualified[ly]" "immune from suit for any conduct in the course of their official duties." Tex. Rules Disciplinary P. R. 17.09.

including this one, have repeatedly held that claims arising from a government officer's performance of official duties are official-capacity claims barred by sovereign immunity. *See, e.g.*, *Tex. S. Univ. v. Villarreal*, 620 S.W.3d 899, 904 (Tex. 2021) ("As part of a state educational institution, the School and its employees acting in their official capacities have sovereign immunity from suit."); *Crampton v. Farris*, 596 S.W.3d 267, 275-76 (Tex. App.—Houston [1st Dist.] 2019, no pet.); *Miller v. Diaz*, No. 05-21-00658-CV, 2022 WL 109363, at *6 (Tex. App.—Dallas Jan. 12, 2022, no pet.) (mem. op.).

To determine whether the complained-of conduct is individual-capacity or official-capacity conduct, courts look to "[t]he course of proceedings" to ascertain "the nature of the liability sought to be imposed." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 377 (Tex. 2009) (alteration in original). To accomplish that task, Texas courts look to the "pleadings, evidence, and arguments," to determine "the 'real substance' of the plaintiff's claims." *Tex. Parks & Wildlife Dep't v. Sawyer Tr.*, 354 S.W.3d 384, 389 (Tex. 2011) (quoting *Dall. Cnty. Mental Health & Mental Retardation v Bossley*, 968 S.W.2d 339, 343 (Tex. 1998)); *see also Lopez v. City of El Paso*, 621 S.W.3d 762, 767 (Tex. App.—El Paso 2020, no. pet.) (explaining that the court "look[s] to the substance of pleadings, not to their characterization or form," in ascertaining "the real substance of [plaintiff's] claims" for sovereign-immunity purposes); *Perez v. Physician Assistant Bd.*, No. 03-16-00732-CV, 2017 WL 5078003, at *4 (Tex. App.—Austin Oct. 31, 2017, pet. denied) (mem. op.) ("review[ing]" the plaintiff's pleadings to determine the "substance of [the plaintiff's] claims"). If "the purpose of a proceeding against state officials is to control action of the State or

subject it to liability, the suit is against the State and cannot be maintained without the consent of the Legislature." *Griffin*, 341 S.W.2d at 152; *see also Creedmoor-Maha Water Supply Corp. v. TCEQ*, 307 S.W.3d 505, 514 (Tex. App.—Austin 2010, no pet.) (explaining that a "suit" that "seeks to control state action" "implicates sovereign immunity").

Though "the form of the pleadings may be relevant in determining . . . 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). "To hold otherwise" would be to ignore the principle that "[i]f the claim is" against "the sovereign, it cannot be material whether the 'official nature of the claim is asserted in the plaintiffs' petition or in the defendants' answer." *State v. Lain*, 349 S.W.2d 579, 582 (Tex. 1961).

In this case, a review of the Commission's petition leaves little doubt that the "real substance," *Sawyer Tr.*, 354 S.W.3d at 389, of the Commission's claim is against the First Assistant in his official capacity. The Commission's petition arises from the decision of the Attorney General and First Assistant to file the *Pennsylvania* lawsuit and from their assessment of the facts, evidence, and law. *See* CR.8-10; *supra* at 23-25. Not only did the Attorney General and First Assistant file this proceeding in their official capacities as "Attorney General of Texas" and "First Assistant Attorney General of Texas," CR.176, 218, but it is also an act that could only be taken by the Attorney General or First Assistant and only in their official capacities, *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 and court of appeals."); *see also id.* § 402.001; *Pirtle*, 887 S.W.2d at 931.

In other words, "[n]one of the alleged actions were taken outside of [their] role[s]" as the constitutionally and statutorily designated lawyers for the State in these circumstances. *Crampton*, 596 S.W.3d at 275. And they were "only in a position to act as [they] did by virtue of [that] role." *Id.*; *see Falls Cnty. Appraisal Dist. v. Burns*, No. 10-21-00119-CV, 2022 WL 866687, at *7 (Tex. App.—Waco Mar. 23, 2022, pet. pending) (mem. op.) ("All the [plaintiffs'] allegations relate to acts that McKinley and Hand could only take in their capacity as chief appraisers."). So, the Commission's "pleadings essentially challenge the manner in which [the First Assistant and Attorney General] engaged in" their constitutionally and statutorily assigned "duties." *Crampton*, 595 S.W.3d at 275. Because the Commission's claim therefore targets the conduct of the First Assistant while acting in his official capacity and arises from the performance of his official duties, it necessarily implicates—and is barred by—sovereign immunity.

B. The court of appeals erred in rejecting the First Assistant's sovereign-immunity argument.

Again, the court of appeals articulated four reasons for why it believed that sovereign immunity poses no barrier to the Commission's lawsuit against the First Assistant. And again, each is contrary to this Court's precedent.

First, the court looked to the remedy the Commission's petition seeks, namely "'a judgment of professional misconduct'" and "an appropriate sanction" against

the First Assistant. *Webster*, 676 S.W.3d at 701-02 (quoting CR.10). The court concluded that, because the Commission's suit targets the First Assistant's "license to practice law in Texas" it has "no effect on the State" and would not "threaten" the public fisc. *Webster*, 676 S.W.3d at 701-02. The same could be said if the State Bar had sought monetary damages from the First Assistant and asserted it would come from his personal bank account. Yet sovereign immunity routinely protects against exactly that. *Heinrich*, 284 S.W.3d at 370-71; *City of Houston v. Williams*, 216 S.W.3d 827, 828-29 (Tex. 2007) (per curiam).

Moreover, the court of appeals erred by unduly fixating on the "form of the pleadings," *GTECH*, 549 S.W.3d at 785, rather than on the "real substance" of the Commission's claim, *Sawyer Tr.*, 354 S.W.3d at 389. While the form of relief may be relevant, it "is not dispositive" of the sovereign-immunity inquiry. *Creedmoor-Maha*, 307 S.W.3d at 515. After all, the Commission's "claims would equally implicate sovereign immunity if the effect of the remedy sought was to control state action." *Id.*; *see also IT-Davy*, 74 S.W.3d at 855-56. Instead, as this Court has long held, "[w]here the purpose of a proceeding against [a] state official[] is to control action of the State or subject it to liability the suit is against the state and cannot be maintained without the consent of the Legislature." *Griffin*, 341 S.W.2d at 152.

Controlling state action is precisely what the Commission's lawsuit against the First Assistant attempts. 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. Sup. Ct. R. 17.3. Indeed, were it otherwise, more than a hundred thousand lawyers could lay claim to that privilege. *See* State Bar of Tex. Dep't of

Rsch. & Analysis, State Bar of Tex. Membership: Att'y Stat. Profile (2023-24), http://tinyurl.com/4z3tjpa5 (last visited Feb. 26, 2024) (showing 113,771 active members of the Texas Bar as of December 31, 2023). As a result, the act at issue is an official one. And, as this Court has recognized, "sanction[s] for attorney misconduct" are motivated in part by "the avoidance of repetition, [and] the deterrent effect on others." *State Bar of Tex. v. Kilpatrick*, 874 S.W.2d 656, 659 (Tex. 1994) (per curiam). That is, through the threat of sanctions, the State Bar's lawsuit against the First Assistant aims to deter the Attorney General and his subordinates from instituting high-profile and contentious lawsuits of which the State Bar may disapprove. *See Kilpatrick*, 874 S.W.2d at 659. In that way, the State Bar's lawsuit endeavors to "control" the manner by which the Attorney General and his First Assistant exercise core executive powers conferred by the Constitution and statute. *See supra* at 23-25.

Second, the court of appeals insisted that this suit would *not* "control state action" by policing the types of lawsuits that the Attorney General files but instead would deter him and his subordinates from making misrepresentations to courts. *Webster*, 676 S.W.3d at 701-02. Assuming that such deterrence is necessary given the numerous other ways that the Attorney General and his staff can be held accountable, *but see* s*upra* at 39; Tex. Const. art. IV, § 22, it is irreconcilable with the court of appeals' decision to uncritically accept the Commission's "misrepresentations" label and concomitant refusal to even examine the petition's actual allegations. As discussed above, *supra* at 26-31, what the Commission labels "misrepresentations" are in fact the Attorney General's assessment of the facts and evidence listed in a

complaint, and thus well within the Attorney General's constitutional discretion. To disregard those pleadings based on labels is to distort beyond all recognition the sovereign-immunity inquiry, which requires courts to examine the "jurisdictional facts" even in cases, like this one, where the "jurisdictional challenge implicates the merits of the plaintiffs' cause of action." *Miranda*, 133 S.W.3d at 227.

Third, the court of appeals also reasoned that because the First Assistant has admitted that a court can sanction a lawyer who engaged in misconduct before that court, sovereign immunity can stand as no barrier to this free-standing lawsuit. *Webster*, 676 S.W.3d at 701. That is a non-sequitur. This Court has long recognized certain "inherent" powers that a court may exercise "by virtue of their origin in the common law and the mandate of" the Constitution's separation of powers. *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398 (Tex. 1979). These include "aid[ing] in the exercise of [the court's] jurisdiction, in the administration of justice, and in the preservation of its independence and integrity." *Id.* That is a distinct inquiry from whether an arm of judiciary may seek to impose sanctions through separately constituted administrative proceedings.

Put another way, the "judicial power of this State," Tex. Const. art. V, § 1, is not monolithic but instead composed of different powers, each with its own purpose and its own constitutional limitations. The power to sanction attorneys appearing before the court for misconduct is a judicial power possessed by all courts, which safeguards the judiciary's authority to "impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *Brewer*, 601 S.W.3d at 718. By contrast, "the power to regulate the practice of law," *In re State Bar of Tex.*, 113

S.W.3d 730, 732 (Tex. 2003) (orig. proceeding), is an "administrative power[]" that is the peculiar province of this Court, *State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994). It flows from the Court's "obligation, as the head of the judicial department, to regulate judicial affairs." *Id.* As the Court has explained, "[b]ecause 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." *Id.* The Commission fails to grapple with the different purposes and loci of these two inherent powers, and it can offer no reason why the two should be equated for sovereign-immunity purposes.

Moreover, the Commission's efforts to conflate court-ordered sanctions with Bar disciplinary proceedings ignore the context in which the issues will arise. In the closely related area of contempt, there is a well-established distinction between "direct contempt," which "occurs within the presence of the court," and "constructive, or indirect, contempt" which "occurs outside the presence of the court." *Ex parte Werblud*, 536 S.W.2d 542, 546 (Tex. 1976) (citing *inter alia Ex parte Ratliff*, 117 Tex. 325, 3 S.W.2d 406 (1928)). "This distinction has more significance than merely identifying the physical location of the contemptuous act," the Court has explained, because even absent sovereign immunity "more procedural safeguards have been afforded to constructive contemnors than to direct contemnors." *Id.* (collecting authorities). As relevant here, when a court imposes sanctions for conduct before that court, that court by definition has jurisdiction over the matter at issue. Even then, commentators have identified sovereign-immunity concerns with contempt sanctions issued against state entities. *See generally* Daniel Riess, *Federal Sovereign*

Immunity & Compensatory Contempt, 80 Tex. L. Rev. 1487 (2002). Those concerns are only amplified for a disciplinary action, which constitutes a "suit"—that is, "the prosecution of some demand in a court of justice," *Ex parte Towles*, 48 Tex. 413, 433 (1877) (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 407 (1821)), which requires a route around the Attorney General's sovereign immunity like any other. *See Matzen*, 659 S.W.3d at 387.

Fourth, and finally, the court of appeals again retreated to a bare policy judgment that it is not enough that a government lawyer committing misconduct could be subject "an *ultra vires* suit, criminal actions, or a court's inherent authority to impose sanctions," because "no other mechanism" besides a Commission-led disciplinary action "can regulate Webster's Texas law license." *Webster*, 676 S.W.3d at 702. But the "policy decision" about the scope of sovereign immunity "belongs largely to the legislature," *Nazari v. State*, 561 S.W.3d 495, 500 (Tex. 2018), which is "better suited to balance the conflicting policy issues associated with waiving immunity," *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003). The fact that the Legislature has not seen fit to waive sovereign immunity for attorney-disciplinary actions against state officials for official-capacity conduct can supply no warrant for a *court* to step into the breach to do so.

Prayer

The Court should grant the petition, reverse the court of appeals' decision, and render judgment on behalf of the First Assistant.

Respectfully submitted.

Ken Paxton
Attorney General of Texas

Brent Webster
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

/s/ Lanora C. Pettit
Lanora C. Pettit
Principal Deputy Solicitor General
State Bar No. 24115221
Lanora.Pettit@oag.texas.gov

William F. Cole
Deputy Solicitor General

Counsel for Petitioner

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Bar No. 24115221
maria.williamson@oag.texas.gov
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Royce Lemoine	24026421	royce.lemoine@texasbar.com	2/26/2024 5:14:08 PM	SENT
Maria Williamson		maria.williamson@oag.texas.gov	2/26/2024 5:14:08 PM	SENT
Michael Graham	24113581	Michael.Graham@TEXASBAR.COM	2/26/2024 5:14:08 PM	SENT
Toni Shah		toni.shah@oag.texas.gov	2/26/2024 5:14:08 PM	SENT
Mike Scarcella		mike.scarcella@tr.com	2/26/2024 5:14:08 PM	SENT

Associated Case Party: Office of the Texas Attorney General

Name	BarNumber	Email	TimestampSubmitted	Status
Lanora Pettit	24115221	lanora.pettit@oag.texas.gov	2/26/2024 5:14:08 PM	SENT
William Cole	24124187	William.Cole@oag.texas.gov	2/26/2024 5:14:08 PM	SENT