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

REPLY BRIEF ON THE MERITS FOR PETITIONER

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The Commission's response illustrates why this Court should grant review and dismiss this suit for lack of jurisdiction. The Commission nowhere disputes the First Assistant's assertion (at 44-45) that bar-disciplinary actions are designed to deter future misconduct. And it openly admits that the decision to file *Texas v. Pennsylvania*, No. 22O155, on behalf of the State was an "executive decision" (at 27) and "state action" (at 57). Because an arm of the judiciary cannot control the exercise of a core executive function, that concession is fatal. But, at the very least, that concession suggests that this Court should intervene to clarify the scope of the Commission's authority before the Commission exacts that punishment in this Court's name. This is for two separate reasons, each of which is of constitutional significance.

First, for more than a century, this Court has recognized that the Separation of Powers Clause safeguards the Attorney General's broad discretion to determine what lawsuits to bring on behalf of the State based on his assessment of the facts, evidence, and law. True, that Clause also protects a court's authority to control behavior that occurs in its own courtroom. Respondent's Br. 30, 64-65. But a court's historical power to police misconduct it *observes* to occur does not serve as precedent for permitting an administrative entity to police what it *perceives* as misconduct that occurred in another jurisdiction—but which neither the other court nor any litigants so perceived. The Commission cannot avoid that conclusion by asserting policy reasons for why it *should* be able to punish the First Assistant for participating in litigation it dislikes or justify that action by cherry picking six sentences out of ninety-two pages of pleadings and labeling them "misrepresentations."

Second, as even the Commission seems to concede (at 54-55, 57-58), sovereign immunity precludes it from sanctioning the First Assistant for an official-capacity act such as filing a lawsuit on behalf of the State in the U.S. Supreme Court. Again, that concession is fatal—notwithstanding the Commission's repeated insistence (at 23-24, 27, 33-34, 41-42, 57-58) that it merely seeks to punish putative "misrepresentations" in the case-initiating pleadings. After all, the Commission still cannot offer a facially valid theory for (1) how the decision to file a lawsuit can be logically or legally severed from the assessment of the facts, evidence, and law asserted *in* those pleadings, or (2) how presenting legal theories on open and unsettled questions of federal constitutional law violates the legal ethics rules. Because sovereign immunity will not permit a court to entertain this *suit* absent such a theory, it should be dismissed notwithstanding that the *relief* the Commission seeks runs against the First Assistant's personal law license.

The Court should take up this case now. If applied uniformly, the Commission's proposed interpretation of what it calls a "gap-filling" ethical rule would allow the State Bar to sanction any Texas-licensed lawyer for "misrepresentations" or "dishonest" conduct whenever a case is dismissed at the pleading stage, *see* Respondent's Br. 24-25, 47-49, apparently without regard to whether the pleadings were made in good faith, *cf. id.* at 22 (asserting that the First Assistant's "good faith" has "no bearing on the ultimate issue presented"). If instead the Commission seeks to apply an ethical standard that is good for one case only, that only underscores how the Bar is seeking to control executive action with which it disagrees, *not* exercise

this Court's power to regulate the practice of law. Either way, this appeal seeks far more than a "ruling of personal importance." *Id.* at 68.

ARGUMENT

I. The Commission's Disciplinary Action Against the First Assistant Violates the Separation of Powers Clause.

The Commission's lawsuit is barred by the Texas Constitution's Separation of Powers Clause, which forbids one branch of government to unduly interfere with the exercise of another's core powers. *See* Tex. Const. art. II, § 1; *In re Turner*, 627 S.W.3d 654, 660 (Tex. 2021) (per curiam) (orig. proceeding). Through this disciplinary action, the Commission—acting in the name, and using the authority, of this Court—aims to invade the Attorney General's exclusive, constitutional duty to represent the State of Texas in civil appellate litigation by sanctioning his top deputy. *See* Petitioner's Br. 21-33.

The Commission stridently resists (at 39-52) this conclusion by arguing that its lawsuit is a run-of-the-mill attorney-discipline case falling within the heartland of the Bar's mandate from this Court to punish "misrepresentations" to a tribunal. *See, e.g.*, CR.9-10. But as the First Assistant has explained (at 25-33), examining the Commission's petition reveals that the six alleged "misrepresentations" represent little more than disagreements with the Attorney General's assessment of the facts, evidence, and law at the time he initiated *Pennsylvania.* The Texas Constitution and more than a century of this Court's precedent, however, commit such judgments to the discretion of the duly elected Attorney General—not to an unelected administrative body housed in the judicial branch. *See* Petitioner's Br. 23-25.

In response, the Commission doubles-down (at 39-46) on its attempt to distinguish the act of filing a lawsuit from the allegations and legal theories that form its basis, as well as on its refrain that the First Assistant seeks an "exemption" from the ethical rules. It also tries to deflect from the First Assistant's argument that the allegations in the Commission's petition challenge the Attorney General's assessment of the facts, evidence, and law by erroneously characterizing (at 46-52) that argument as only concerning the "merits" of this dispute. Neither response saves its lawsuit.

A. The Commission's lawsuit unduly interferes with the Attorney General's exercise of core executive powers.

1. The Texas Constitution expressly confers the power to represent the State in civil appellate litigation on the Attorney General. Tex. Const. art. IV, § 22; *see also* Tex. Gov't Code § 402.021. And for well over a century this Court has recognized that this constitutional obligation is the "exclusive" province of the Attorney General into which other branches may not "interfere." *See Maud v. Terrell*, 200 S.W. 375, 376 (Tex. 1918) (orig. proceeding). Consequently, "the Attorney General, as the State's chief legal officer, has broad discretionary power in carrying out his responsibility to represent the State." *Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001) (citing *Terrazas v. Ramirez*, 829 S.W.2d 717, 722 (Tex. 1991) (orig. proceeding)). That discretion includes "the right to investigate the facts and exercise his judgment and discretion regarding the filing of a suit," *Agey v. Am. Liberty Pipeline Co.*, 172 S.W.2d 972, 974 (Tex. 1943), and to determine "that there is reasonable ground to believe that [a] statute has been violated," and "that the evidence necessary to a successful prosecution of the suit can be procured," *Lewright v. Bell*, 63 S.W. 623,

624 (Tex. 1901) (orig. proceeding). Indeed, "in the matter of bringing suits," his "exercise [of] judgment and discretion . . . will not be controlled by other authorities." *Charles Scribner's Sons v. Marrs*, 262 S.W. 722, 727 (Tex. 1924).

Under the pretense of policing misrepresentations to the U.S. Supreme Court, the Commission's lawsuit invades this prerogative. *See* Petitioner's Br. 25-33. The Commission's petition points to six statements, spread across ninety-two pages of allegations and briefing, that it considers to be "misrepresentations" that violate Texas Disciplinary Rule of Professional Conduct 8.04. CR.9-10. But the Commission's petition reflects mere disagreement with the legal theories pursued by the Attorney General—which turned on then-unsettled questions of federal constitutional law—and with his assessment of the facts and evidence contained in eleven declarations, affidavits, and verified pleadings accompanying Texas's U.S. Supreme Court filings. Petitioner's Br. 25-33. Such judgments fall squarely within the heartland of the Attorney General's discretion to exercise his constitutional function of representing the State in civil appellate litigation. *See Agey*, 172 S.W.2d at 974; *Charles Scribner's Sons*, 262 S.W. at 727; *Maud*, 200 S.W. at 376; *Lewright*, 63 S.W. at 624.

2. The Commission's brief offers (at 39-46, 60-61) four reasons why its lawsuit does not violate the Separation of Powers Clause, but none has merit. *First*, the Commission repeats (at 41) the refrain that its lawsuit "is not based on the Texas Attorney General's initial decision to file *Texas v. Penn* **at all**," but instead is concerned with "allegations" in the "pleadings" that the Commission insists were "dishonest, fraudulent, deceitful, and/or contained misrepresentations." Tellingly, however, the Commission still cannot explain how the act of filing a lawsuit—which it appears

to agree is an executive decision that it cannot second-guess—can be logically or legally decoupled from the contents of the documents that initiate that lawsuit. *See* Petitioner's Br. 35. Indeed, the Commission simply ignores the First Assistant's argument that because the decision to file is necessarily dictated by the facts and law that form the substance of the suit, the two issues *cannot* be untethered.

The Commission similarly overlooks the legal authorities that preclude such a distinction. The Bar's own rules recognize the overlap between the decision to file a lawsuit and the lawsuit's contents: In order to discharge his duty of candor to the tribunal, an attorney *must* make a reasonable inquiry into the facts and legal arguments in a pleading *before* filing a document or making an argument. *See* Tex. Disciplinary Rules Prof'l Conduct, Rs. 3.01, 3.03. So do the Federal and Texas Rules of Civil Procedure, which state that an attorney's signature on a pleading functions as a certification that a reasonable inquiry has been done into the factual and legal contentions therein. *See* Fed. R. Civ. P. 11(b); *see also* Tex. R. Civ. P. 13 (same). As does this Court's precedent, which defines 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.2d at 974; *Lewright*, 62 S.W. at 624. The Commission does not even try to grapple with these authorities.

Second, elsewhere in the brief, the Commission appears to suggest (at 60-61) these constitutional powers are irrelevant because it was the First Assistant's Texas-issued law license—not the constitutionally conferred authority of the Attorney General's public office—that allowed the First Assistant to file the *Pennsylvania*

pleadings in the U.S. Supreme Court. This ignores that a Texas-issued law license, without more, does not give a lawyer the authority to represent the State of Texas in the U.S. Supreme Court; instead, it is the authority flowing from the Attorney General's constitutionally created office that confers such authority. *See* Petitioner's Br. 42-43, 44-45.

Third, the Commission argues (at 42-43) that its disciplinary action does not interfere with the Attorney General's exercise of core executive functions because "an exemption" from the ethical rules that apply to all Texas-licensed attorneys is not necessary for the Attorney General to effectively exercise his constitutional authority to represent the State. But this argument is a non-sequitur, as the First Assistant has never argued for an "exemption" from the ethical rules.

As the First Assistant has repeatedly explained, he and other executive-branch attorneys remain bound by the ethical rules, and they may be enforced in several important ways. *See* Petitioner's Br. 35-36, 38-39, 48. To start, judges can sanction executive-branch lawyers for conduct occurring before their courts that violates the attorneys' ethical obligations. *See* Petitioner's Br. 38; *infra* at 9-11. The Separation of Powers Clause also would provide no barrier to the Commission instituting a disciplinary action in response to *ultra vires* or criminal conduct, which by its very nature does not fall within the discretionary constitutional authority of the Attorney General. *See* Petitioner's Br. 35-36, 38. Likewise, the First Assistant and other executive-branch lawyers are fully subject to discipline for any representation undertaken in their private capacities. *See id.* at 38. And should any of these judicially directed attempts at discipline prove inadequate, the Attorney General—and by extension,

the First Assistant—ultimately remains accountable to the electorate and to the Legislature. *See id.* at 39. None of that happened here because lawsuits do not violate the disciplinary rules just because they are dismissed in whole or in part for lack of standing.[1]

The Commission nevertheless appears to take offense (at 64) that it perceives the First Assistant to be saying that government attorneys' ethical obligations "are better safeguarded [in ways] other than through this Court's attorney disciplinary process." It is not clear what the Commission means by some of its rhetoric. The First Assistant has readily acknowledged that executive-branch attorneys, including the First Assistant and Attorney General, remain subject to the attorney-disciplinary process for *ultra vires* conduct, criminal actions, or sanctions imposed by a court for misconduct occurring in its courtroom. *See* Petitioner's Br. 35-36, 38-39, 48; *supra* at 7-8. But, as one of the Commission's own cases explains, "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). This is one of those proceedings because the State

[1] Indeed, if it were otherwise, the Commission would have little else to do with its time. A Westlaw search across cases in Texas and the federal courts for (plaintiff! /s lack! /s standing) returned over 10,000 hits, including a voting-rights case where one group of plaintiffs was represented by a former member of this Court, *Abbott v. Mexican Am. Legis. Caucus, Tex. House of Representatives*, 647 S.W.3d 681, 686 (Tex. 2022), who authored this Court's leading precedent on standing in voting-rights cases, *Andrade v. NAACP of Austin*, 345 S.W.3d 1 (Tex. 2011) (Jefferson, C.J.).

Bar is seeking to use the attorney-discipline process for an improper purpose: namely, to express its disagreement with how Attorney General's exercised his core executive powers by seeking to sanction his top deputy.

The Commission is also wrong to argue (at 63, 64) that the First Assistant's acknowledgement that a court can sanction executive-branch attorneys for ethical violations committed before that court undermines his reliance on the Separation of Powers Clause. A court's inherent *judicial* "power to discipline attorney behavior" taken in its presence is aimed at "aid[ing] the exercise of jurisdiction, facilitat[ing] the administration of justice, and preserv[ing] the independence and integrity of the judicial system." *Brewer v. Lennox Hearth Prods., LLC*, 601 S.W.3d 704, 718 (Tex. 2020) (quoting *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 399 (Tex. 1979)).[2] Because that inherent power is both "potent[]" and "shielded from direct democratic control[]," this Court has instructed that it be exercised "with restraint" and only in cases (unlike *Pennsylvania*) involving "bad faith," which the Court has defined to require "not just intentional conduct but intent to engage in conduct for an impermissible reason, willful noncompliance, or willful ignorance of the facts," and

[2] The Commission observes (at 64) that in *Brewer*, this Court listed the Texas Disciplinary Rules of Professional Conduct as an example of the "ethical standards" that define the metes and bounds of permissible litigation conduct. 601 S.W.3d at 707 n.2. True, but irrelevant. This Court relies on the adversarial system and principles of party presentation when determining whether to give precedential effect to its rulings. *Cf. Longoria v. Paxton*, 646 S.W.3d 532, 538 (Tex. 2022). Because *Brewer* did not present a separation-of-powers question, it provides no answer to the separation-of-powers issue presented here.

"includes 'conscious doing of a wrong for a dishonest, discriminatory, or malicious purpose.'" *Id.* at 718, 719.

By contrast, the power to regulate the practice of law is an "implied power[]," *Eichelberger*, 582 S.W.2d at 399, that is "administrative" in nature—"not jurisdictional"—and it flows from the Court's "obligation, as the head of the judicial department, to regulate judicial affairs." *The State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994); *see also In re State Bar of Tex.*, 113 S.W.3d 730, 732 (Tex. 2003) (describing this as an "inherent regulatory power[]"). By rule, the Bar has defined this power to be far broader in scope, and it contains no "bad faith" limitation, *see* Tex. Disciplinary Rules Prof'l Conduct R. 8.04(a). In this litigation, the Commission seeks to broaden that administrative rule even further—indeed, so much so that the Commission struggles to delineate its contours. *See infra* at 17-18.

The Court should decline the Commission's invitation (at 64-65) to equate the Bar's exercise of this Court's *administrative* power to regulate the legal profession with a court's inherent judicial power to sanction bad-faith conduct occurring in judicial proceedings. This Court has stated that sometimes respect for the separation of powers means that a court must interpret its own constitutional authority narrowly to avoid unnecessary conflict with the constitutional prerogatives of its co-equal branches of government. *In re Turner*, 627 S.W.3d at 660-61. Moreover, it has long been established that though a court has the power to punish any "disobedience to or disrespect of a court by acting in opposition to its authority," *Ex parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995), *how* it goes about doing varies because not all misconduct is created equal. *E.g.*, *In re Reece*, 341 S.W.3d 360, 364-65 (Tex. 2011)

(collecting cases regarding the distinction between direct and constructive contempt); *State Bar of Tex. v. Kilpatrick*, 874 S.W.2d 656, 659 (Tex. 1994) (per curiam) (discussing relevant factors for a court to consider before imposing sanctions).

Applying these principles, the Court should hold that executive-branch lawyers are subject (as First Assistant has repeatedly acknowledged) to the Court's inherent *judicial* power to sanction conduct occurring before the judiciary but *not* to the broader *administrative* power the Commission claims. After all, conduct that falls within the notion of bad faith as defined by this judicial power would not present a separation-of-powers problem because the Attorney General has no discretion to engage in "'conscious doing of a wrong for a dishonest, discriminatory, or malicious purpose.'" *Brewer*, 601 S.W.3d at 718. But the Commission pointedly does not allege that the First Assistant's conduct meets that standard. To the contrary, it insists that "whether Webster made the representations" at issue "'in good faith' [is] either not relevant to the subject matter jurisdiction inquiry or illustrate[s] contested factual matters" entitling the Commission to proceed to discovery. Respondent's Br. 22. To accept such a position would be to invite the Bar to use the disciplinary process itself as a punishment any time an executive-branch attorney files a lawsuit with which the Bar disagrees. As the First Assistant has already explained (at 23-25), that cannot be reconciled with a century of this Court's precedent.[3]

[3] Similar considerations foreclose the Commission's related argument (at 44, 66) that ruling for the First Assistant would create a separation-of-powers problem by requiring this Court to "surrender its own constitutionally assigned power" to regulate the legal profession. An agency acting under power delegated by the judiciary cannot surrender that which the judiciary never had, including the power to control

Fourth, the Commission repeatedly suggests (at 27, 34 n.8, 41) that the Separation of Powers Clause does not apply to the First Assistant because he lacked any authority "independent[]" of the Attorney General to make the "executive decision" to file the *Pennsylvania* lawsuit. Undoubtedly, the First Assistant's position is a limited appointment that "operates under the direct supervision of the Attorney General and [he] exercises no independent executive power." 7 Tex. Jur. 3d Attorney General § 4 (citing *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 931 (Tex. Crim. App. 1994) (orig. proceeding)). But the separation-of-powers doctrine turns on the *function* at issue, not whether the official who performs that function is elected, appointed, or hired. After all, the Secretary of State is appointed, Tex. Const. art. IV, § 2, yet she is delegated executive power directly by the Constitution, *e.g.*, *id.* § 14. And it is beyond dispute that sovereign immunity, which is a specialized application of the separation of powers, *Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117, 121 (Tex. 2015), applies to public officials with far less authority than the First Assistant, *e.g.*, *Tex. S. Univ. v. Villarreal*, 620 S.W.3d 899, 904 (Tex. 2021) (extending immunity to university faculty). If anything, this argument underscores *why* this case should be dismissed because it betrays what this disciplinary action really is: an effort to target the legal judgment of the Attorney General by disciplining his agent.

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the Attorney General's executive prerogative to choose what lawsuits to bring or claims to pursue on behalf of the State.

B. The Commission cannot avoid the limitations imposed by the Constitution through artful pleading.

The Commission's chief defense to the accusation that it has transgressed the Separation of Powers Clause remains that it does not aim to register policy disagreements with the Attorney General's decision to file *Pennsylvania* but instead seeks to punish the First Assistant for making six misrepresentations to the U.S. Supreme Court. CR.9. To survive a plea to the jurisdiction on such a theory, the burden was on the Commission to (at minimum) "plead facts that, if true, 'affirmatively demonstrate'" that the First Assistant made such misrepresentations with the necessary scienter, *Matzen v. McLane*, 659 S.W.3d 381, 388 (Tex. 2021)—that is, in bad faith, *supra* at 10-11. Absent such facts, repeated incantation of words like "misrepresentation" will not suffice to establish jurisdiction. *See, e.g.*, *Jim Olive Photography v. Univ. of Hous. Sys.*, 624 S.W.3d 764, 777 (Tex. 2021); *Klumb v. Hous. Mun. ERS*, 458 S.W.3d 1, 12 (Tex. 2015). *Contra* Response Br. 35-37 (suggesting the Commission need only recite the requirements listed in the Texas Rules of Disciplinary Procedure). Such facts are entirely missing from the petition, and the Commission's half-hearted efforts to defend those allegations are unavailing.

1. To this day, the Commission has never explained—either in this case or the parallel proceeding against the Attorney General—how the six statements it identifies in its petition constitute "misrepresentations" that it is entitled to police under the Rules of Professional Conduct. It can't because three of the statements it chose

to highlight[4] are legal theories, which are considered a "misrepresentation" or "dishonesty" toward the tribunal, Tex. Disciplinary Rules Prof'l Conduct R. 8.04(a)(3), only if a lawyer fails to "disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party," *id*. R. 3.03(a)(4); Petitioner's Br. 27. But the Commission has not made, and cannot make, such an allegation because the primary legal theory in question—known as the independent state legislature doctrine—was acknowledged to be an important, unsettled question of federal constitutional law, *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 denial of application for stay).

Under the Commission's own rules, such statements cannot be misrepresentations. Rule 3.01, for example, prohibits lawyers from asserting a "frivolous" legal argument. Tex. Disciplinary Rules Prof'l Conduct R. 3.01. But a legal argument is not frivolous—even if precedent is to the contrary—so long as the argument is "supported by a good faith argument for an extension, modification or reversal of existing law," *id.* R. 3.01, cmt. 2. The state and federal rules of civil procedure echo the same rule. Tex. R. Civ. P. 13; Fed. R. Civ. P. 11(b)(2). And the key restriction in the ethical rules regarding the presentation of legal arguments is "fail[ing] to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly

[4] *See* CR.9 ((a) "state actors 'unconstitutionally revised their state's election statutes;'" (b) Texas had Article III standing to bring *Pennsylvania*; and (c) "'illegal votes' had been cast that affected the outcome of the election"); *see also* Petitioner's Br. 26-27, 30, 31-33.

adverse to the position of the client and not disclosed by opposing counsel." Tex. Disciplinary Rules Prof'l Conduct R. 3.03(a)(4). The Commission has not, and cannot, levy such a charge here because the legal theories advanced by the Attorney General concerned issues that were at the time ones of first impression. Indeed, it would be difficult to do so even now, as ambiguities in the Court's holding and disagreements among its members suggest that the issue may need to be revisited in the future. *Compare Moore v. Harper*, 600 U.S. 1, 19-34 (2023) (majority op.), *with id.* at 40-65 (Thomas, J., dissenting).

Apart from these legal conclusions, on their face, two of the remaining "misrepresentations" represent the Attorney General's assessment of the facts and evidence contained in the eleven declarations, affidavits, and verified pleadings that supported Texas's filings. *See* Petitioner's Br. 27-30.[5] The Commission clearly disagrees with the Attorney General's view of the evidence, but it is the Attorney General's constitutional prerogative to "investigat[e] . . . the case, and . . . determine[]" that "the evidence necessary to a successful prosecution of the suit can be procured." *Lewright*, 63 S.W. at 624. Ultimately, determining how to weigh that evidence was a decision for the U.S. Supreme Court, not the Texas State Bar. *See* Petitioner's Br. 28.

[5] CR.9 ((a) "the State of Texas had 'uncovered substantial evidence . . . that raises serious doubts as to the integrity of the election process in Defendant States;'" and (b) "an outcome determinative number of votes were tied to unregistered voters" in a particular jurisdiction).

The Commission has never disputed that the event underlying the final alleged misrepresentation occurred—the allegation, made in the context of a section entitled "facts for which no independently verified reasonable explanation yet exists," 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. *See* Petitioner's Br. 31. Nor does it respond to the First Assistant's point that if the *Pennsylvania* complaint had used the term "reporting error" instead of "glitch," it would have entirely tracked the language that Michigan authorities used in describing that event. *Id.* But decisions about syntax are well within the permissible range of the Attorney General's broad "judgment and discretion regarding the filing of a suit." *Id.* (quoting *Agey*, 172 S.W.2d at 974).

2. The Commission offers three rejoinders to this analysis. Again, none has merit. *First*, the Commission contends (at 47) that the First Assistant's arguments about the contents of its petition improperly ask this Court to examine "the merits of the underlying attorney disciplinary action." But as the First Assistant has explained (at 33-34)—and the Commission nowhere refutes—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) (citing *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 223 (Tex. 2004)). And the Commission fails to engage with the First Assistant's explanation about *why* an assessment of the petition's allegations is especially critical here. *See* Petitioner's Br. 34. Such an inquiry "affirmatively negates," *State v. Lueck*, 290 S.W.3d 876, 878 (Tex. 2009), the Commission's primary defense of this disciplinary action: that its

lawsuit is a routine disciplinary matter that polices misrepresentations made by a lawyer to a tribunal, not an incursion into the Attorney General's exclusive constitutional domain of representing the State in civil litigation before the U.S. Supreme Court.

Second, the Commission suggests (at 47-49) that an attorney's pursuit of certain legal theories might run afoul of Rule 8.04 of the Disciplinary Rules of Professional Conduct even if that lawyer discloses adverse authority as required by Rule 3.03(a)(4). The Commission reasons that Rule 8.04(a)(3) is "broader in scope" than merely preventing "fraud on a court" and also sweeps within its ambit any conduct that "denote[s] a lack of honesty, probity, or integrity in principle and a lack of straightforwardness." Petitioner's Br. 47-48 (citations omitted). But the Commission never explains how the presentation of a legal theory that four U.S. Supreme Court Justices stated was an important, unsettled question of federal constitutional law for which serious arguments on the merits exist—and which the U.S. Supreme Court resolved by a divided vote last Term—could possibly be construed as conduct lacking "honesty, probity, integrity in principle," or "straightforwardness." *Supra* at 14-15. It likewise fails to articulate how the dismissal of a case on Article III standing grounds renders the standing allegations dishonest. *See* Petitioner's Br. 31-33.

The Commission thus appears (at 48-49) to suggest that there is some other unwritten prohibition on the presentation of legal arguments that can be mined from Rule 8.04(a)(3). But the Commission fails to articulate the content of this unarticulated proscription, or by what authority these unelected bureaucrats purport to impose it. After all, by statute, it is this Court that "promulgate[s] the rules governing

the state bar," Tex. Gov't Code § 81.024(a), through processes that were very carefully delineated by the Legislature and signed by the Governor, *id.* §§ 81.0871-.08794. The deliberation over such rules "must be open to the public," *id.* § 81.08791, subject to the approval of members of the state bar, *id.* § 81.08792, and be adopted *in its entirety* by a majority of this Court, *id.* at § 81.0879. By definition, an unwritten prescription whose only definition is the collective disapproval of the Bar's leadership of a highly controversial lawsuit has not done any of that. Under any circumstances, such an effort by an administrative agency to appropriate for itself the power to act outside the process prescribed by the Legislature is constitutionally problematic. *See PUC v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 315 (Tex. 2001) ("The basic rule is that a state administrative agency has only those powers that the Legislature . . . confers upon it" expressly or by necessarily implication). And it is constitutionally untenable when that agency in one Department of Government attempts to use that misappropriated authority to control the exercise of a core power of a *different* Department. *See* Petitioner's Br. 21-23.

Finally, the Commission again argues (at 49) that its petition does not contest the Attorney General's assessment of the facts and evidence, "only specific representations made in the *Texas v. Penn* pleadings." This non-response misses this point: Because of the nature of the statements, the Commission's charge that they were improper represents a thinly veiled challenge to the Attorney General's assessment of the evidence contained in the eleven declarations, affidavits, and verified pleadings accompanying Texas's filings. *Supra* at 15. Because, as this Court has recognized, the Constitution charges the Attorney General with making that

assessment, the Separation of Powers Clause forecloses the State Bar's effort to superintend upon that process, no matter how the Bar chooses to characterize its pleadings. The trial court was therefore correct to dismiss the Commission's petition.

II. Sovereign Immunity Alternatively Bars this Lawsuit.

Sovereign immunity independently bars this lawsuit. The Commission does not dispute that in the absence of "waiv[er] by the Legislature" or "*ultra vires*" conduct, the First Assistant, like other state officials, enjoys sovereign immunity "from both suit and liability" for actions taken in his "official capacit[y]." *Matzen*, 659 S.W.3d at 388. And the Commission expressly admits (at 57) that "the true test of whether sovereign immunity is implicated . . . rests on whether the relief" it seeks aims "to control 'state action.'" The Commission has never identified any *ultra vires* conduct or any statutory waiver of immunity, and it concedes (at 57) that the Attorney General's act of filing a lawsuit is "state action" that it has no authority to control. Because its disciplinary action against the First Assistant nevertheless attempts to do just that, sovereign immunity precludes this suit.

A. As the First Assistant has explained (at 44-45), this suit seeks to control state action. It centers on an action—filing a lawsuit on behalf of the State of Texas in the Supreme Court of the United States—that only Texas's Attorney General, or the First Assistant acting in his stead, is authorized to take (and only in his official capacity) under state law, see Tex. Gov't Code §§ 402.001(a), 402.021, or (at least arguably) under the Supreme Court's rules, *cf.* Sup. Ct. R. 17.3 (requiring service of original actions on the Attorney General of the State). And since the Commission has never argued that the First Assistant's sovereign immunity has been waived or

that filing the *Pennsylvania* pleadings constituted an *ultra vires* act, that immunity bars the Commission's lawsuit.

Moreover, as the First Assistant has explained (at 42-43, 44-45)—and the Commission nowhere disputes—"sanction[s] for attorney misconduct" are imposed to ensure "the avoidance of repetition, [and] the deterrent effect on others." *Kilpatrick*, 874 S.W.2d at 659. Here, the action that the Commission seeks to control is state action because its lawsuit seeks to influence how the Attorney General "investigate[s] the facts and exercise[s] his judgment and discretion regarding the filing of a suit" on behalf of the State, *Agey*, 172 S.W.2d at 974. The Commission's own brief underscores this fact, opining (at 55) that *Pennsylvania* "could have been filed without making the alleged dishonest misrepresentations." By seeking to sanction the First Assistant and the Attorney General for the "manner in which [they] engaged in" their constitutionally and statutorily assigned duties, *Crampton v. Farris*, 596 S.W.3d 267, 275 (Tex. App.—Houston [1st Dist.] 2019, no pet.), the Commission seeks to assert authority over the Attorney General's decision on whether to file—and even how to draft—high-profile and contentious complaints and motions. That is a textbook example of an attempt to "control state action," which implicates sovereign immunity. *Cf. Charles Scribner's Sons*, 262 S.W. at 727.

B. The Commission offers (at 52-53, 55-61) five responses, none of which supplies a route around the First Assistant's sovereign immunity. *First*, the Commission contends (at 52-53) that the canon of "constitutional avoidance" suggests that the trial court "implicitly" rejected the First Assistant's sovereign-immunity argument when it resolved the case on separation-of-powers grounds. "This characterization

of constitutional avoidance is not quite accurate" as the canon of constitutional avoidance "provides that, as a rule, courts decide constitutional questions only when the issue cannot be resolved on non-constitutional grounds." *In re Ginsberg*, 630 S.W.3d 1, 10 (Tex. Spec. Ct. Rev. 2018). Specifically, the canon of constitutional avoidance is a canon of statutory construction that requires a court to "interpret a statue in a manner that avoids constitutional infirmity." *Longoria*, 646 S.W.3d at 539. This appeal presents no question of statutory construction but instead two independent challenges to the trial court's subject matter jurisdiction. And as this Court recently explained, "[w]hen defendants challenge jurisdiction on multiple grounds, courts are . . . not duty-bound to address them all if any one of them warrants dismissal." *Rattray v. City of Brownsville*, 662 S.W.3d 860, 868 (Tex. 2023) (citing *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007)). That is, the trial court could stop when it decided the separation-of-powers doctrine precluded jurisdiction. *Id.* If this Court disagrees, it must resolve whether sovereign immunity precludes this suit regardless of what the trial court may have "implicitly" held.

Second, the Commission argues (at 56) that "what is at stake" in *the Commission's* suit "is the regulation of Webster's license to practice law in the State of Texas, which is personal to him and is not dependent on or subject to any position he may hold as a public employee." The Commission ignores that 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 rather than from the state treasury; yet sovereign immunity routinely protects against exactly that. *See* Petitioner's Br. 44 (citing *City of El Paso v. Heinrich*, 284 S.W.3d 366, 370-71 (Tex. 2009), and

City of Houston v. Williams, 216 S.W.3d 827, 828-29 (Tex. 2007) (per curiam)). Moreover, as the First Assistant has explained (at 42)—and as the Commission itself admits (at 57)—it is black-letter law that it is the "substance of the claims and relief sought" rather than the "form of the pleadings," *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), that dictates whether "the purpose of a proceeding against state officials is to control action of the State" and is therefore against the State, *Griffin v. Hawn*, 341 S.W.2d 151, 152 (Tex. 1960).

Second, the Commission returns (at 57-58, 59-60) to its proposed distinction between the act of filing a lawsuit and the allegations and assertions contained in the pleadings. Agreeing (at 57) that "*filing* the litigation in *Texas v.* [*Pennsylvania*]" may have constituted "state action," the Commission paradoxically argues that the First Assistant's "statements and representations made in the pleadings"—which the Commission insists were "dishonest"—are individual-capacity actions. The concession that the filing of the *Pennsylvania* lawsuit was "state action," *id.*, is fatal because, as the First Assistant has explained, the Commission's distinction between the filing of a lawsuit and the contents of the pleadings in that lawsuit is illusory. *See supra* at 5-6. Legal filings necessarily require an assessment of the facts, law, and evidence behind proposed legal claims, which are then memorialized in filings lodged with a court. Such tasks are thus indispensable parts of "represent[ing] the State in civil litigation," *Perry*, 67 S.W.3d at 92—a task constitutionally committed to the "broad discretion[]" of the Attorney General, *id.*

The Commission's distinction is particularly illogical within the context of sovereign immunity. Government lawyers do not toggle between official-capacity conduct and personal-capacity conduct while representing the State, much less while preparing a single pleading or motion. Even if they did, the Commission has not even attempted to provide a basis for the bench—let alone the bar—to ascertain when a government attorney occupies one role or the other. Nor has the Commission argued that the First Assistant acted *ultra vires* by acting inconsistently with or outside the scope of that discretion. *Hall v. McRaven*, 508 S.W.3d 232, 238 (Tex. 2017). Any attempt to raise that argument should now be deemed waived.

Third, rather than address the binding Texas authorities defining the scope of the Attorney General's official duties, the Commission points (at 58-59 & nn.16-17) to eight cases to support the proposition that *other jurisdictions* "have been critical, if not dismissive" of the argument that sovereign immunity may apply in the context of disciplinary proceedings against government lawyers. As an initial matter, "[a]lthough the decisions of other states construing their constitution are persuasive authority," this Court has repeatedly stated that its analysis turns "upon the language and prior construction of our own constitution." *Brown v. Meyer*, 787 S.W.2d 42, 45 (Tex. 1990); *see also City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148 (Tex. 1995) (same). Moreover, each of the Commission's cases is inapposite because none actually addresses sovereign immunity in the context of disciplinary proceedings.

For example, three of the Commission's cases involved courts exercising their inherent authority to sanction government attorneys for misconduct occurring *before* those courts, such as flouting court orders and violating discovery obligations.

See Chilcutt v. United States, 4 F.3d 1313, 1316-19 (5th Cir. 1993); *United States v. Shaffer Equip. Co.*, 158 F.R.D. 80, 87 (S.D. W. Va. 1994) (mem. op.); *Enriquez v. Estelle*, 837 F. Supp. 830, 831-33 (S.D. Tex. 1993). The First Assistant has repeatedly acknowledged that courts possess the inherent authority to sanction litigants for such misconduct committed before them. *See* Petitioner's Br. 38; *supra* at 7, 9-11. But as the First Assistant has explained no such sanctions were levied in *Pennsylvania. See* Petitioner's Br. 12-13, 38-39; *supra* at 8.

Four more of the Commission's cases involved freestanding disciplinary proceedings against government lawyers. *See In re Kline*, 311 P.3d 321 (Kan. 2013) (per curiam) (orig. proceeding); *Ramsey v. Bd. of Prof'l Resp.*, 771 S.W.2d 116 (Tenn. 1989); *Massameno*, 663 A.2d 317; *In re Lord*, 97 N.W.2d 287 (Minn. 1959) (per curiam) (orig. proceeding). But, as the Commission begrudgingly concedes (at 59), none presented a sovereign-immunity argument. The ordinary problems with inferring precedential weight into issues neither pressed nor passed upon are exacerbated in this case because in many jurisdictions, sovereign immunity must be *raised*, or it is waived. *See, e.g.*, *Walther v. FLIS Enters., Inc.*, 540 S.W.3d 264, 267-68 (Ark. 2018); *Sea Hawk Seafoods, Inc. v. State*, 215 P.3d 333, 336-41 (Alaska 2009); *Washington v. Whitaker*, 451 S.E.2d 894, 898 & n.7 (S.C. 1994).[6] Even if these courts could, in theory, have raised the issue *sua sponte*, their failure to do so represents at most an implicit jurisdictional holding of no precedential value. *See Steel Co. v. Citizens for a*

[6] That is not the rule in Texas. *See, e.g.*, *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 856-60 (Tex. 2002).

Better Env't, 523 U.S. 83, 91 (1998) ("We have often said that drive-by jurisdictional rulings . . . have no precedential effect."); *see also Gantt v. Gantt*, 208 S.W.3d 27, 30 n.4 (Tex. App.—Houston [14th Dist.] 2006) ("Thus, in deciding its jurisdiction, a court is not bound by a prior exercise of jurisdiction where it was not questioned, but was passed *sub silentio*.").

The Commission's final case involved an order holding that government lawyers were *entitled* to absolute immunity for their conduct in connection with the development of a post-trial litigation strategy—a holding that, if relevant at all, supports the First Assistant's argument that this case should have been dismissed. *See Dinsdale v. Commonwealth*, 675 N.E.2d 374, 378 (Mass. 1997).

Prayer

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

Respectfully submitted.

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