CAUSE NO. 471-02574-2022

COMMISSION FOR LAWYER DISCIPLINE, *Petitioner*,	§	IN THE DISTRICT COURT
v.	§	
WARREN KENNETH PAXTON, JR. 202006564; 202006566; 202101148; 202101678; 202104762, *Respondent*.	§	OF COLLIN COUNTY, TEXAS 471ST JUDICIAL DISTRICT

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

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

Right after, the Attorney General's political opponents launched a coordinated attack against him through the Texas State Bar, subverting its limited commission to protect clients and other administrative responsibilities, in service of signaling its ideological opposition to the lawsuit. The Bar assembled an investigatory panel comprised of six unelected lawyers and activists from Travis County—despite the Commission's more recent acknowledgement that this matter properly belongs in Collin County. As a group, this panel donated thousands of dollars to federal, state, and local candidates and causes opposed to Attorney General Paxton. What's more, members of the panel voted consistently in Democratic primaries for over a decade. Several have maintained highly partisan social media accounts hostile to Paxton. Then, the panel passed responsibility for Paxton's political prosecution to the Commission for Lawyer Discipline—the

petitioner in this case. Reflective of their political agenda, the Commission filed this suit just a few weeks before Attorney General Paxton's primary runoff election—a year and a half after the events giving rise to this dispute occurred.

The United States Fifth Circuit Court of Appeals has previously criticized the State Bar for its political and ideological activism in violation of its core functions. *See, e.g.*, *McDonald v. Longley,* 4 F.4th 229 (5th Cir. 2021). And in this case specifically, the Commission's actions have been strongly condemned by both the Governor and Lieutenant Governor.[1] Now the Commission seeks to enlist this Court in the further pursuit of its partisan and political agenda. This Court should resist that invitation. Instead, the Court should dismiss the Commission's claims.

First, the Commission's suit against the Attorney General violates the separation-of-powers doctrine. The decision to file *Texas v. Pennsylvania* is committed entirely to the Attorney General's discretion. No quasi-judicial body like the Commission can police the decisions of a duly elected, statewide constitutional officer of the executive branch. Second, the Commission's suit is barred by sovereign immunity—despite its novel attempt to evade the sovereign immunity bar by suing Warren Kenneth Paxton, Jr., in his *personal* capacity—because the Commission's claims jeopardize the effective legal representation of the State of Texas and its interests.

There is nothing dishonest, fraudulent, or deceitful about what the Attorney General did or filed. The Commission disagrees with the positions the Attorney General took on behalf of the State of Texas. That is its prerogative. But that political disagreement cannot justify the

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

Commission's disregard of the Texas Constitution and its own Rules of Disciplinary Procedure, nor the inherent limits of its role as an unelected, bureaucratic, regulatory body.

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

STATEMENT OF THE CASE

The State Bar of Texas is an administrative agency that serves the Supreme Court of Texas and the judicial branch of the Texas government.[2] Among its other duties, the State Bar monitors continuing legal education compliance, reviews attorney advertisements, provides resources to its members, and fields grievances. But this bureaucracy has the potential to be weaponized against attorneys who have not violated any rule of professional conduct but rather champion unpopular causes or politically disfavored views. Here, the attorney targeted by the Bar is the duly elected Attorney General of Texas, who has been targeted not for any breach of an ethical duty, but for his decision to exercise his constitutional authority to file a case in the United States Supreme Court on behalf of the State of Texas.

Attorney General Ken Paxton filed *Texas v. Pennsylvania*, an original proceeding before the Supreme Court of the United States, on December 7, 2020. Seventeen States, through their attorneys general, joined Texas's pleadings in some capacity—including six states that sought to intervene and join Texas's claims[3]—and in total, forty-four States were before the Court in some capacity in connection with Texas's motion for leave to file a bill of complaint. In the end, the Court dismissed the motion on standing grounds—an almost-daily occurrence in courthouses

[2] "Our Mission," State Bar of Texas, https://www.texasbar.com/Content/NavigationMenu/AboutUs/OurMission/default.htm (last visited June 27, 2022).
[3] Exhibit 7 (Motion to Intervene).

across the country, often in some of the most hard-fought and sophisticated cases. *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020).[4] However, that decision was not unanimous—Justices Alito and Thomas voted to permit Texas to proceed with its case.

Because of this preliminary, but dispositive, ruling—made only four days after Texas's initial filing in the case—there was no opportunity to file additional pleadings or to develop the factual record or legal theories. More significant still is that the Supreme Court, though it has the full power to do so, did not issue sanctions as to any lawyer, much less as to Attorney General Paxton or the State of Texas's lawyers. No party to the case or their lawyers, moreover, sought sanctions against Texas, Respondent, or any other party. These facts render the Bar's disciplinary action here all the more shocking; the Bar seeks to *sanction* the Attorney General for bringing a case that seventeen other States supported and that two Supreme Court Justices voted to hear.

[4] As many judges of all political predilections have noted, standing doctrine is complex and frequently inconsistent and variable, particularly in the context of the Supreme Court's original jurisdiction and a state's sovereign interest. *See*, *e.g.*, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2218-21, 2223-24 (2021) (Thomas, J., dissenting) (criticizing the majority's standing holding regarding "'concrete' and 'real'—though 'intangible'—harms"); *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1115 (11th Cir. 2021) (Newsom, J., concurring) (expressing his "doubt that current standing doctrine—and especially its injury-in-fact requirement—is properly grounded in the Constitution's text and history, coherent in theory, or workable in practice"); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 422-23 (2013) (Breyer, J., Ginsburg, J., Sotomayor, J., and Kagan, J., dissenting) (criticizing the majority's standing holding regarding future harm, noting that "[t]his Court has often found the occurrence of similar future events sufficiently certain to support standing" and "dissent[ing] from the Court's contrary conclusion"); *South Carolina v. North Carolina,* 558 U.S. 256, 269–89 (2010) (Roberts, C.J., Thomas, J., Ginsburg, J., and Sotomayor, J. concurring in judgment in part and dissenting in part) (describing the majority holding on the Court's original jurisdiction as "literally unprecedented" and "difficult to understand"); *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 601 (1982) (describing state standing in asserting an injury that is a quasi-sovereign interest, "which is a judicial construct that does not lend itself to a simple or exact definition"); *Flast v. Cohen*, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting) (describing the majority's holding on constitutional standing as "a word game played by secret rules"). But the more important point is that nothing about the Court's ruling on standing negates the strong constitutional, legal, and factual underpinnings of Texas's pleadings.

Attorney General Paxton stands by his decision to file *Texas v. Pennsylvania*. Although the case was dismissed on standing grounds, the underlying substantive issues were—and remain—important, unresolved legal questions that Attorney General Paxton raised in good faith. Indeed, no fewer than *four* Supreme Court Justices have subsequently acknowledged the significance of the principal issue presented by Texas: whether the Electors Clause bars non-legislative actors from overriding the rules for federal elections established by state legislatures. *See* U.S. Const., art. II, § 1, cl. 2. This is, according to those Justices, an exceptionally important question of law for which "serious arguments on the merits" exist and that is unsettled, recurring, and which the Court should soon resolve. *Moore v. Harper*, 142 S. Ct. 1089, 1089 (March 7, 2022) (Kavanaugh, J., concurring in the denial of application for stay); *id.* at 1089-92 (Alito, J., Gorsuch, J., and Thomas, J., dissenting from the denial of application for stay) (citing additional cases, including several from the 2020 election cycle). These developments since *Texas v. Pennsylvania* make this disciplinary proceeding all the more shocking: *multiple* Supreme Court justices have expressed interest in taking up the merits of the very issue Attorney General Paxton sought to litigate in *Texas v. Pennsylvania*.

Admittedly, *Texas v. Pennsylvania* was a high-profile, controversial case. But this is hardly unusual for litigation involving the State. As Texas's chief legal officer, Attorney General Paxton must routinely confront some of the most difficult decisions any lawyer can face: whether, and how, to exercise the power of the sovereign State of Texas to bring a lawsuit in the name of the State of Texas and on behalf of nearly 29 million Texans. This tremendous responsibility is vested solely in the Attorney General—a constitutional officer within the executive branch of government—not the courts, and not the State Bar of Texas, an agency of the judiciary. If Texans

disapprove of the how the Attorney General exercises his authority, the remedy is to vote him out of office. The Bar has no veto over how the Attorney General exercises his constitutional authority.

The Commission's gambit threatens to install a quasi-judicial committee in a supervisory role over one of Texas's five elected executive branch officials in the exercise of his core, constitutionally assigned functions: "represent[ing] the State in civil litigation." *Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001). This is an area over which the Attorney General enjoys broad discretion: "in the matter of bringing suits the Attorney General must exercise judgment and discretion, *which will not be controlled by other authorities*." *Charles Scribner's Sons v. Marrs*, 262 S.W. 722, 727 (Tex. 1924) (emphasis added). And for over a century, the Texas Supreme Court has recognized that in this arena the judicial branch cannot intercede: "[s]ince it is the duty of the attorney general to institute suits" and since performing that duty "requires an investigation of the case and a determination" that suit is warranted, "the courts cannot control his judgment in the matter and determine his action." *Lewright v. Bell*, 63 S.W. 623, 623–24 (Tex. 1901).

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

Relatedly, the Commission's action is also barred by sovereign immunity. *See Paxton v. Waller Cnty.*, 620 S.W.3d 843, 848 (Tex. App.—Amarillo 2021, pet. denied). "Sovereign

immunity is 'inherent' in Texas statehood and 'developed without any legislative or constitutional enactment.'" *Univ. of Incarnate Word v. Redus*, 602 S.W.3d 398, 404 (Tex. 2020) (quoting *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 429, 431 (Tex. 2016)). Of particular significance for this case, sovereign immunity "preserves separation-of-powers principles," "protects the public treasury," and "prevent[s] potential disruptions of key government services that could occur when government funds are unexpectedly and substantially diverted by litigation." *Id.* The substance of the claims and the relief sought make the Attorney General in his *official capacity* the real party in interest. Consequently, lacking any waiver of sovereign immunity, the Commission's suit is jurisdictionally barred.

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

BACKGROUND

A. The Attorney Disciplinary Process Generally

"The attorney disciplinary process begins when the [Chief Disciplinary Counsel or] CDC receives a written statement, from whatever source, alleging professional misconduct by a lawyer." *Comm'n for Lawyer Discipline v. Stern*, 355 S.W.3d 129, 134 (Tex. App.—Houston [1st Dist.]

2011, pet. denied). "Until the CDC determines whether the statement actually alleges professional misconduct, it is classified as a grievance." *Id.* (citing Tex. R. Disc. P. 1.06(R)). Within thirty days of receipt, the CDC must determine "whether it constitutes an Inquiry, a Complaint, or a Discretionary Referral." Tex. R. Disc. P. 2.10. If the grievance constitutes a complaint—meaning that the written materials on their face or upon preliminary investigation allege professional misconduct—the respondent is provided with a copy of the complaint and afforded an opportunity to respond to the allegations in writing. Tex. R. Disc. P. 1.06(G); *id.* 2.10.B. After the respondent provides a written response, the CDC investigates the complaint to determine whether there is just cause to proceed. *Id.* 2.12.

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

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

the district court, the Commission for Lawyer Discipline may file suit. Tex. R. Disc. P. 3.01. The petition must contain the following:

> A. Notice that the action is brought by the Commission for Lawyer Discipline, a committee of the State Bar.
>
> B. The name of the Respondent and the fact that he or she is an attorney licensed to practice law in the State of Texas.
>
> C. A request for assignment of an active district judge to preside in the case.
>
> D. Allegations necessary to establish proper venue.
>
> E. A description of the acts and conduct that gave rise to the alleged Professional Misconduct in detail sufficient to give fair notice to Respondent of the claims made, which factual allegations may be grouped in one or more counts based upon one or more Complaints.
>
> F. A listing of the specific rules of the Texas Disciplinary Rules of Professional Conduct allegedly violated by the acts or conduct, or other grounds for seeking Sanctions.
>
> G. A demand for judgment that the Respondent be disciplined as warranted by the facts and for any other appropriate relief.
>
> H. Any other matter that is required or may be permitted by law or by these rules.

Tex. R. Disc. P. 3.01.

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

B. The *Texas v. Pennsylvania* Lawsuit

On December 7, 2020, the State of Texas invoked the original jurisdiction of the United States Supreme Court and filed a lawsuit against the Commonwealth of Pennsylvania and the

States of Georgia, Michigan, and Wisconsin (Defendant States).[5] Counsel listed on the initial pleadings for the State of Texas were Ken Paxton, Attorney General of Texas (counsel of record), Brent Webster, First Assistant Attorney General of Texas, and Lawrence Joseph, Special Counsel to the Attorney General of Texas.

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

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

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

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

- Non-legislative actors in the Defendant States "usurped their legislatures' authority and unconstitutionally revised their states' election statutes . . . through executive fiat or friendly lawsuits," in violation of the Electors Clause, which provides that only the legislatures of the States may specify the rules for appointing presidential electors. *See* U.S. CONST., Art. II, § 1, cl. 2.

- Those purported non-legislative changes created different voting standards within the Defendant States and violated the one-person, one-vote principle, in violation of the Equal Protection Clause. *See* U.S. CONST., Amend. XIV, § 1.

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

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

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

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

Pennsylvania." *Id.* at 20.[7]

Georgia. At the time of filing, available information suggested that Georgia's 16 electoral votes went to Biden by 12,670 votes: 2,472,098 to 2,458,121—a margin of approximately 0.26%. Texas alleged that the Georgia Secretary of State unilaterally, without legislative approval, changed a statutory requirement prohibiting the opening of absentee ballots before Election Day. *Id.* at 20–21. It also alleged that the Secretary of State settled an election lawsuit in a way that altered and violated statutory requirements concerning the rejection of incomplete absentee ballots, resulting in a rejection rate of 0.37% (4,786 absentee ballots out of 1,305,659 cast), versus the 2016 rejection rate of 6.42%. *Id.* at 21–23. Texas alleged that this non-legislative alteration was outcome-determinative. *Id.* at 23.[8]

Michigan. At the time of filing, available information suggested that Michigan's 16 electoral votes went to Biden by 146,007 votes: 2,796,702 to 2,650,695—a margin of approximately 2.7%. Texas alleged that the Michigan Secretary of State violated Michigan statutes by sending absentee ballots to every voter in Michigan, contrary to statutes allowing clerks (not the Secretary of State) to supply absentee ballots only to those voters who requested one.[9] *Id.* at 24–25. It also alleged that the Secretary of State allowed absentee ballots to be requested online without signature verification as expressly required by Michigan statutes. *Id.* at 25–26. Texas further alleged that

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

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

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

both of these actions unilaterally abrogated Michigan election statutes without legislative approval, resulting in 3.2 million absentee votes cast—in contrast to 2016, when voters requested only 587,618 absentee ballots. *Id.* at 26. Texas also alleged that local officials in Wayne County (which Biden won by 322,925 votes) violated statutory requirements regarding access to vote counting and canvassing by poll watchers and inspectors. *Id.* at 26–29.[10]

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

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

Texas argued that it had standing on behalf of its citizens because, first, "'the right of

[10] Texas detailed Electors Clause violations committed by Michigan at ¶¶ 79-93 of the Bill of Complaint (Exhibit 8), and at pages 14-17 of its Reply in Support of Motion for Leave to File Bill of Complaint (Exhibit 11).

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

suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Bush v. Gore*, 531 U.S. 98, 105 (2000) (*quoting Reynolds v. Sims*, 377 U. S. 533, 555 (1964)) (*Bush II*). "In other words, [Texas] is acting to protect the interests of its respective citizens in the fair and constitutional conduct of elections used to appoint presidential electors." Bill of Complaint (Exhibit 8) at 8–9. Second, Texas also claimed standing to assert the rights of its citizens "to demand that all other States abide by the constitutionally set rules in appointing presidential electors to the electoral college." *Id*. at 12. Third, Texas also claimed standing "[b]ecause individual citizens may arguably suffer only a generalized grievance from Electors Clause violations, States have standing where their citizen voters would not." *Id.* at 13. Fourth, Texas claimed "States can assert *parens patriae* standing for their citizens who are presidential electors." *Id*. at 14.

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

Second, as Texas alleged in its proposed Bill of Complaint:

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

Bill of Complaint (Exhibit 8) at 13 (citation omitted).

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

Several states filed *amicus* briefs.[12] Missouri, joined by sixteen other states (all of which

[12] *See also Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of U.S. Representative Mike Johnson and 125 Other Members of the U.S. House of Representatives in Support of Plaintiff's Motion for Leave to File a Bill of Complaint and Motion for Preliminary Injunction* (Exhibit 23).

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

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

On December 11, 2020, the Supreme Court issued the following order:

> The State of Texas's motion for leave to file a bill of complaint is denied for lack of standing under Article III of the Constitution. Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections. All other pending motions are dismissed as moot. **Statement of Justice Alito, with whom Justice Thomas joins:** In my view, we do not have discretion to deny the filing of a bill of complaint in a case that falls within our original

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

[14] Exhibit 7.

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

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

> jurisdiction. I would therefore grant the motion to file the bill of complaint but would not grant other relief, and I express no view on any other issue.

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

C. The CDC's Pre-Litigation Conduct

This lawsuit stems from five grievances filed regarding the Attorney General between December 2020 and July 2021. *See* Pet. at 2. The Office of CDC initially dismissed the first four complaints, having correctly "determined that the information alleged did not demonstrate Professional Misconduct." This decision was unsurprising. Indeed, the State Bar correctly dismissed approximately 90 such complaints. Only months later, as partisanship hardened and a political narrative took hold, did the Board of Disciplinary Appeals (BODA) reclassify the grievances as complaints and call for a response from the Attorney General. The fifth grievance was filed by Gershon Gary Ratner in late July 2021, after BODA's intervention, and by then the political climate had already changed to the point that it was allowed to proceed.[17]

COMPLAINANT	GRIEVANCE FILED[18]	GRIEVANCE DISMISSED[19]	GRIEVANCE RECLASSIFIED[20]
Kevin Moran	Dec. 11, 2020	Jan. 8, 2021	June 3, 2021
David W. Wellington Chew	Dec. 11, 2020	Jan. 8, 2021	June 3, 2021
Neil Kay Cohen	Feb. 12, 2021	March 3, 2021	June 3, 2021

[17] The letter classifying the grievance as a Complaint is attached as Exhibit 17-1.
[18] Pet. at 2.
[19] The letter announcing the dismissal of Moran's grievance is attached as Exhibit 17-2. The letter announcing the dismissal of Chew's grievance is attached as Exhibit 17-4. The letter announcing the dismissal of Cohen's grievance is attached as Exhibit 17-6. The letter announcing the dismissal of VanHettinga's grievance is attached as Exhibit 17-8.
[20] The letter announcing the reclassification of Moran's grievance as a complaint and requesting a written response is attached as Exhibit 17-3. The letter announcing the reclassification of Chew's grievance as a complaint and requesting a written response is attached as Exhibit 17-5. The letter announcing the reclassification of Cohen's grievance as a complaint and requesting a written response is attached as Exhibit 17-7. The letter announcing the reclassification of VanHettinga's grievance as a complaint and requesting a written response is attached as Exhibit 17-9.

COMPLAINANT	GRIEVANCE FILED[18]	GRIEVANCE DISMISSED[19]	GRIEVANCE RECLASSIFIED[20]
Brynne VanHettinga	March 11, 2021	March 25, 2021	June 15, 2021

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

The CDC next ignored its own rules regarding venue. Over the Attorney General's objection, the CDC scheduled an investigatory hearing before a panel drawn from Travis County, Texas.[21] Under the Texas Rules of Disciplinary Procedure, "[p]roceedings of an Investigatory Panel shall be conducted by a Panel for the county where the alleged Professional Misconduct occurred, in whole or in part. *If the acts or omissions complained of occurred wholly outside the State of*

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

Texas, proceedings shall be conducted by a Panel for the county of Respondent's residence . . . ." Tex. R. Disc. P. 2.11(A) (emphasis added). As the Attorney General's objection and motion to transfer venue explained, the professional misconduct alleged occurred wholly outside the State of Texas, in Washington D.C., and the Attorney General resides in Collin County. It is for that same reason, in fact, that *this case* is filed in Collin County. Yet the CDC denied the Attorney General's objection and motion to transfer venue.[22] A Travis County panel presided over the investigatory hearing and issued the just cause determination that precipitated this suit.[23]

Lastly, the Commission charges the violation of only one Rule of Professional Conduct, 8.04(a)(3), in its Petition. *See* Pet. at 4. Yet when BODA reversed the dismissals of the first four Complaints against Attorney General Paxton and directed the CDC to investigate them as Inquiries, it did not mention Rule 8.04 at all. Rather, it raised only Rules 3.01 and 3.03 as a basis for further investigation by the CDC. [24] Although the Commission is bound by the rules that were remanded to it by BODA, it continued to ignore them and its own appellate body's instructions, the better to accomplish its political goals.

The State Bar never offered a sufficient explanation for any of these significant irregularities, if it ever offered one at all. *See, e.g.*, Exhibit 4 (transcript of the investigatory hearing). And the State Bar proceeded with these investigations and charges without ever grappling with the Attorney General's well-founded objections that were outlined in correspondence. *See* Exhibits 1, 3, 5-6. The irregular conduct of the Commission belies any suggestion that these proceedings

[22] Exhibit 3.
[23] Exhibit 18.
[24] Exhibits 19–22.

against the Attorney General have been brought in good faith. These charges are, rather, a mere pretext for pursuing a political objective.

D. Petitioner's Original Disciplinary Petition

The Commission alleges that the Respondent Attorney General of Texas Ken Paxton violated only a single rule: Rule 8.04(a)(3) of the Texas Disciplinary Rules of Professional Conduct. As the Commission explains, Rule 8.04(a)(3) is "a gap filling provision" that is "a broader rule designed to prohibit dishonest or deceitful conduct not otherwise captured by the other rules."[25] Here, the Commission tries to fill the gap by contending that the Attorney General "engage[d] in conduct involving dishonesty, fraud, deceit, or misrepresentation." Pet. at 3–4. In support, the Petition makes vague allegations regarding Texas's Pleadings in the Supreme Court. Pet. at 2–3.

Texas's Motion to File Bill of Complaint alone is 92 pages.[26] The Commission's Petition cites four allegedly dishonest representations that purportedly occurred within those 92 pages:

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

Pet. at 3. The Commission does not cite or describe these purported misrepresentations with any degree of specificity. But more importantly, the Commission is demonstrably wrong that the proposed Bill of Complaint contained any misrepresentations at all.

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

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

First, the Commission contends that the Attorney General "made representations in his pleadings that . . . an outcome determinative number of votes were tied to unregistered voters." *See* Pet. at 3. But while the Motion refers to votes not tied to registered voters in Wayne County, Michigan, Texas' Motion (which describes additional defects in the Michigan election) nowhere asserts that the unregistered Wayne County votes alone would have changed the outcome of the election. *See* Exhibit 8 at 30. Nothing else in the Pleadings supports the Commission's allegation, and the Petition does not offer any further clarification.

Second, the Commission's contention regarding the Attorney General's purported misrepresentation regarding Dominion voting machines is wholly divorced from the actual allegations brought by Texas and grossly exaggerates the prominence of any discussion of Dominion. *See* Pet. at 3. In the State's 92-page Motion, the allegations regarding Dominion are merely part of a list "describ[ing] . . . a number of currently pending lawsuits in [other] States or in public view." Bill of Complaint (Exhibit 8) at 4. And the term "Dominion" appears only twice in Texas' Motion, both in this single paragraph:

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

Id. at 5. This information is described in the public domain and was contemporaneously reported by sources such as the Associated Press.[27]

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

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

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

The Commission's other allegations against Respondent fare no better. For example, the Commission contends that it was a misrepresentation for the Attorney General to have pleaded

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technology-voting-michigan-6beeef230376e75252d6eaa91db3f88f (last visited June 27, 2022).

"that the State of Texas had 'uncovered substantial evidence. . . that raises serious doubts as to the integrity of the election process in Defendant States[.]'" Pet. at 3. But the State's evidence was detailed in its Pleadings, both from publicly available and widely reported sources and in several sworn affidavits that were submitted to the Supreme Court, and it cannot be disputed that many Americans had doubts as to the integrity of the 2020 election. The Commission may disagree with that conclusion, and it may not be persuaded by Texas's evidence, but it was not a misrepresentation to say that the evidence existed. The Commission is also wrong, therefore, when it says that Texas's allegations were not supported by admissible evidence, and it arrogates to itself a core judicial function when it airily dismisses Texas's evidence as not "credible." Pet. at 3. The Commission seeks to invade the purview of the judge or jury as fact-finder. Additionally, the Commission contends that the Attorney General "misrepresented that the State of Texas . . . had standing to bring these claims before the United States Supreme Court." Pet. at 3. But this is a legal argument advanced by Texas in a complex area of law, not a factual misrepresentation. Failing to prevail on a hotly contested legal question—at the pleadings stage, no less—is hardly tantamount to "professional misconduct." Nor is litigating unsettled, novel, and recurring questions of law. Were the Commissioner's application of Rule 8.04(a)(3) correct, any unsuccessful litigant would be subject to disciplinary action for "misrepresenting" its legal theories when the judge or jury rejects them. That is not, and cannot be, the law.

GENERAL DENIAL

As authorized by Rule 92 of the Texas Rules of Civil Procedure, the Attorney General denies each and every, all and singular, of the allegations of Petitioner's Original Disciplinary

Petition, and demands strict proof thereof, as required by Texas law and the Texas Rules of Disciplinary Procedure.

DEFENSES

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

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

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

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

4. The Attorney General asserts sovereign immunity from suit and liability.

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

6. The Attorney General asserts that his actions were protected by the Texas Constitution. Tex. Const. art. I, §§ 8, 27.

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

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

PLEA TO THE JURISDICTION

A. Standard of Review

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

B. Arguments & Authorities

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

"[s]overeign immunity from suit defeats a trial court's subject matter jurisdiction." *Miranda*, 133 S.W.3d at 224 (Tex. 2004); *EBS Sols., Inc. v. Hegar*, 601 S.W.3d 744, 749 (Tex. 2020).

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

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

The Texas Constitution, like the U.S. Constitution, divides the powers of government into legislative, executive, and judicial departments, "and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." Tex. Const. art. II, § 1. "The separation of powers doctrine prohibits one branch of state government from exercising power inherently belonging to another branch of state government." *Hotze v. City of Houston*, 339 S.W.3d 809, 818 (Tex. App.—Austin 2011, no pet.). The "doctrine means that a 'public officer or body may not exercise or

otherwise interfere with a power constitutionally assigned to another public officer or body, nor may either surrender its own constitutionally assigned power, referring in all cases to the 'mass' of its powers or any 'core' paramount power.'"[28] *Univ. of Tex. Health Sci. Ctr. at San Antonio v. Mata & Bordini, Inc.*, 2 S.W.3d 312, 316 (Tex. App.—San Antonio 1999, pet. denied). The doctrine "was designed, as were other checks and balances, to prevent excesses." *Coates v. Windham*, 613 S.W.2d 572, 576 (Tex. App.—Austin 1981, no writ).

"The Separation of Powers Clause is violated (1) when one branch of government assumes power more properly attached to another branch or (2) when one branch unduly interferes with another branch so that the other cannot effectively exercise its constitutionally assigned powers." *In re D.W.*, 249 S.W.3d 625, (Tex. App.—Fort Worth 2008, pet. denied); *see also Black v. Dallas Cnty. Bail Bond Bd.*, 882 S.W.2d 434, 438 (Tex. App.—Dallas 1994, no writ) (same); *Tex. Dep't of Family & Protec. Servs. v. Dickensheets*, 274 S.W.3d 150, 156 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (same). "To determine whether a separation of powers violation involving 'undue interference' has occurred, [courts] engage in a two-part inquiry." *Tex. Comm'n on Env'l Quality v. Abbott*, 311 S.W.3d 663, 672 (Tex. App.—Austin 2010, pet. denied). Courts first look to the scope of the powers constitutionally assigned to the first governmental actor and then to the impact on those powers imposed by the second. *See id.* When one branch attempts to impinge on another's exercise of "core powers," it is less the degree of interference, but "the fact of the attempted interference at all" that raises a separation-of-powers problem. *Ex parte Lo*, 424 S.W.3d 10, 29 (Tex. Crim. App. 2013).

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

The Commission's attempt to superintend the Attorney General's exercise of discretion in representing the State in civil litigation presents a profound threat to the separation of powers. As already discussed, the State Bar is an unelected, democratically unaccountable, arm of the Texas Judiciary and the Attorney General is a member of the Executive Department. *See* Tex. Gov't Code § 81.011(a); *Perry*, 67 S.W.3d at 92. Under the Texas Constitution, the Attorney General—not the Judiciary—is vested with authority to bring suits on behalf of the State of Texas. *See* Tex. Const. art. IV, § 22; *Brady v. Brooks*, 89 S.W. 1052, 1055 (Tex. 1905); *El Paso Elec. Co. v. Tex. Dep't of Ins.*, 937 S.W.2d 432, 438 (Tex. 1996). And, in exercising that authority, the "Attorney General, as the State's chief legal officer, has broad discretionary power in carrying out his responsibility to represent the State," *Perry*, 67 S.W.3d at 92 (citing *Terrazas v. Ramirez*, 829 S.W.2d 712, 722 (Tex. 1991)), and that "judgment and discretion . . . will not be controlled by other authorities.'" *Bullock*, 583 S.W.2d at 894 (quoting *Charles Scribner's Sons*, 262 S.W. at 727). *Lewright* provides an instructive application of these principles. There, the Texas Supreme Court rejected a petition for a writ of mandamus to the Attorney General of Texas, commanding him to institute a suit in the name of the state. *Lewright*, 63 S.W. at 623–24. Even though the statute at issue imposed a duty on the Attorney General to institute a suit, the Court recognized that this "imperative" required an exercise of discretion, namely a finding "not only that there is reasonable ground to believe that the statute has been violated, but also that the evidence necessary to a successful prosecution of the suit can be procured." *Id.* at 624. Accordingly, the Court held that "the courts cannot control his judgment in the matter and determine his action." *Id.*

The Commission invites this Court to travel where Supreme Court precedent instructs it not to go. The Commission alleges that the Attorney General's "representations were dishonest"

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

And here, the Attorney General determined that there were reasonable grounds to believe that a violation of federal law had occurred and that the State had evidence necessary to initiate a lawsuit. *See* Pet. at 2–3. No less than the Texas Supreme Court in *Lewright*, this Court cannot attempt to "control [the Attorney General's] judgment in the matter" by sanctioning him for his determination that sufficient grounds existed to file a motion for leave to file a bill of complaint in the United States Supreme Court. To impose such sanction on the Attorney General—indeed, to further subject the Attorney General to the burden, cost, and indignity of this proceeding—would unduly interfere with the executive branch's effectual exercise of its constitutionally assigned powers. More specifically, this action unduly interferes with the Attorney General's constitutional prerogative to represent the State in civil matters and thus violates the Separation of Powers Clause.

"The very balance of state governmental power imposed by the framers of the Texas Constitution depends on each branch, and particularly the judiciary, operating within its jurisdictional bounds." *State v. Morales*, 869 S.W.2d 941, 949 (Tex. 1994). Here, the Texas Constitution protects the Attorney General's discretion and, in so doing, deprives this Court of jurisdiction. Lest the argument be misunderstood, this is far from asserting that the Attorney General's discretion is wholly unbounded: "[i]n the checks and balances of our political system, the [Attorney General's] powers are not unfettered." *Morath v. Texas Taxpayer & Student Fairness Coalition*, 490 S.W.3d 826, 887 (Tex. 2016) (Guzman, J., concurring). The first check on the Attorney General is the People of Texas, to whom he is ultimately accountable. *See* Tex. Const. art. IV, §§ 1–2 (requiring the Attorney General to be among those officers of the Executive Department to be elected by the qualified voters of the State). The second check on the Attorney General is the State Legislature, which can impeach the Attorney General, and thereby remove him from office or even disqualify him from holding any office of honor, trust, or profit under this State. Tex. Const. art. XV, §§ 1–4. And, at least in this context, a third check on the Attorney General is the Supreme Court of the United States itself, which could have exercised its own authority to impose sanctions had it seen fit to do so. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43–46 (1991). That the Court evidently did not even consider sanctions against Texas—indeed, that the parties to the original proceeding did not even request them—only underscores the extraordinary nature of this case and the Commission's conduct.

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

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

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

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

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

sought that ultimately determine whether the sovereign is a real party in interest and its immunity thereby implicated." *GTECH Corp. v. Steele*, 549 S.W.3d 768, 785 (Tex. App.—Austin 2018, aff'd sub nom. *Nettles v. GTECH Corp.*, 606 S.W.3d 726 (Tex. 2020)).

Texas courts have repeatedly found that claims arising from a government officer's performance of official duties are official capacity claims covered by sovereign immunity. In *City of Richardson v. Cannon*, the plaintiff claimed three police officers unlawfully detained and arrested him. No. 05-18-00181-CV, 2018 WL 6845240, at *1 (Tex. App.—Dallas Nov. 16, 2018, no pet.). The Fifth Court of Appeals noted that the plaintiff's "pleadings are based upon actions involving the individual defendants' duties as public servants. In other words, the individual defendants were able to detain, arrest, and charge [the plaintiff] only because of their positions as police officers." *Id.* at *4. The Court held that the plaintiff "alleg[ed] claims against the individual defendants only in their official capacities" as a result. *Id.*

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

In *Perez v. Physician Assistant Bd.,* the plaintiff sued the Texas Physician Assistant Board's presiding officer (Bentley) to challenge an order revoking his physician license. No. 03-16-00732-

CV, 2017 WL 5078003, at *1 (Tex. App.—Austin Oct. 31, 2017, pet. denied). Although the plaintiff "purported to sue Bentley in her official and individual capacities," the Third Court of Appeals held that "the substance of [the plaintiff's] claims were limited to claims against Bentley in her official capacity." *Id.* at *4. In reaching this conclusion, the court examined the "factual allegations asserted against Bentley" and found that the plaintiff "did not allege any act by [Bentley] that was performed outside of her role as an officer of the Board." *Id.*

In *Crampton v. Farris*, the plaintiff sued a Texas Commission for Lawyer Discipline prosecutor (Farris) in her individual capacity over her role in a disciplinary proceeding regarding the plaintiff. 596 S.W.3d 267, 270–72 (Tex. App.—Houston [1st Dist.] 2019, no pet.). The First Court of Appeals found that the plaintiff had actually asserted official capacity claims, explaining that the plaintiff "failed to plead any actions undertaken by Farris outside the general scope of Farris's duties with the Commission." *Id.* at 276. The court also noted that "Farris was only in a position to act as she did by virtue of her role as the Commission's prosecutor." *Id.* at 275.

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

Finally, in *Ross v. Linebarger, Goggan, Blair & Sampson, L.L.P.*, the plaintiff sued a law firm and its employees (collectively, "Linebarger") for acts they took as agents of local governmental entities to collect delinquent taxes owed by the plaintiff. 333 S.W.3d at 738–40. The plaintiff sued

the Linebarger defendants in their "official—if any—and individual capacities" for breach of contract and negligent misrepresentation, among other things. *Id.* at 740. The First Court of Appeals found that the plaintiff's claims all related to Linebarger's "actions taken in the process of collecting taxes on behalf of the taxing entities." *Id.* at 743. Thus, the court found that "the true nature of [the plaintiff]'s claims is that of claims against Linebarger in its official capacity as an agent of the taxing entities." *Id.* at 743.

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

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

Applying this line of authority to the facts of this case, both the substance of the claims and the nature of the relief sought by the Commission make the Attorney General in his *official* capacity the real party in interest. Regarding the substance of the claims, the Commission's grievance arises from the Attorney General's decision to file the *Texas v. Pennsylvania* proceeding. Not only did the Attorney General file this proceeding in his official capacity, it is an act that could *only* be taken by the Attorney General and *only* in his official capacity. *See* Tex. Gov't Code § 402.021 ("The attorney general *shall* prosecute and defend *all actions* in which the state is interested before the supreme court.") (emphasis added). The Commission's claims therefore strike at the Attorney General acting in his official capacity as they arise from the performance of his official duties. Such claims necessarily implicate the State's sovereign immunity.

Regarding the relief sought, it too makes the State the real party in interest. Relief that would "control state action" implicates sovereign immunity, "even in a suit that purports to name

no defendant, governmental or otherwise." *GTECH Corp.*, 549 S.W.3d at 785. A suit that "seeks to restrain the State or its officials in the exercise of discretionary statutory or constitutional authority" is a suit that seeks to control state action. *Creedmoor-Maha Water Supply Corp. v. Tex. Comm'n on Env'l. Quality*, 307 S.W.3d 505, 514 (Tex. App.—Austin 2010, no pet.); *see also Univ. of Tex. of Permian Basin v. Banzhoff*, No. 11-17-00325-CV, 2019 WL 2307732, at *4 (Tex. App.—Eastland May 31, 2019, no pet.) ("If the plaintiff alleges only facts demonstrating acts within the officer's legal authority and discretion, the claim seeks to control state action and is barred by governmental immunity.").

The Commission's claims arise from the Attorney General's exercise of his statutory and constitutional authority to file a lawsuit in the State's name that he believed to be in the State's best interests. The Commission's attempt to sanction the Attorney General for this act serves as a clear warning shot to the Attorney General and his employees: do not file lawsuits the Commission dislikes, or you risk sanction. *Cf. In the Matter of Joseph Wm. Bailey State Bar Card No. 01529200*, 2013 WL 8507063, at *23 (explaining that one of the purposes of sanctions is to "deter future misconduct"). As shown above, the Commission's attempt to control state action in this manner directly implicates the State's sovereign immunity.

The Commission's allegations relate to the Attorney General's performance of his official duties, and the relief that they seek is tantamount to a judicial veto over the exercise of executive discretion that would effectually deprive the State of a chief legal officer. Accordingly, the Commission's Original Disciplinary Petition is brought against the Attorney General in his official capacity and is thus barred by sovereign immunity.[29]

[29] This conclusion is not disturbed by the identity of the petitioner as "an administrative agency of the judicial department of government." *See* Tex. Gov't Code § 81.011(a). The Texas Supreme Court has held

PRAYER

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

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that a political subdivision retains its governmental immunity even when the plaintiff is the State of Texas. *Chambers-Liberty Ctys. Navigation Dist. v. State*, 575 S.W.3d 339, 345–48 (Tex. 2019). The same result is certainly applicable here, when the respondent is one of the seven executive officers expressly identified in the Texas Constitution. *See* Tex. Const. art. IV, § 1.

Date: June 27, 2022.

Respectfully submitted.

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CERTIFICATE OF SERVICE

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

/s/ Christopher D. Hilton
CHRISTOPHER D. HILTON