Response of Attorney General Ken Paxton and First Assistant Attorney General Brent Webster To Complaints from Kevin Moran, David Chew, Neil Cohen, and Brynne VanHettinga

> JUSTICE THOMAS, dissenting from the denial of certiorari.
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> The Constitution gives to each state legislature authority to determine the "Manner" of federal elections. Art. I, §4, cl. 1; Art. II, §1, cl. 2. *Yet both before and after the 2020 election, nonlegislative officials in various States took it upon themselves to set the rules instead.* As a result, we received an unusually high number of petitions and emergency applications contesting those changes. The petitions here present a clear example. The Pennsylvania Legislature established an unambiguous deadline for receiving mail-in ballots: 8 p.m. on election day. Dissatisfied, the Pennsylvania Supreme Court extended that deadline by three days. The court also ordered officials to count ballots received by the new deadline even if there was no evidence—such as a postmark—that the ballots were mailed by election day. That decision to rewrite the rules seems to have affected too few ballots to change the outcome of any federal election. But that may not be the case in the future. These cases provide us with an ideal opportunity to address just what authority nonlegislative officials have to set election rules, and to do so well before the next election cycle. The refusal to do so is inexplicable.

Republican Party of Pennsylvania v. Degraffenreid, 141 S. Ct. 732–33 (2021) (Thomas, J., dissenting from the denial of certiorari) (emphasis added).

I. Bar Complaints Should Not Be a Popularity Contest

The passage quoted above, from Justice Thomas's dissent from the denial of certiorari in a Pennsylvania election contest just a few months ago—with which Justices Alito and Gorsuch agreed in a separate dissent, *see id.* at 738— in just one paragraph affirms both the legal and factual validity of the bill of complaint that Texas sought leave to file against Pennsylvania in December 2020.

We rightly celebrate historical lawyers like John Adams and Clarence Darrow—and even fictitious figures such as Atticus Finch—because they stood for and demanded the rule of law regardless of whether their client or their cause was popular. Unpopularity inheres in election law contests—where our two-party system frequently presents zero-sum scenarios and any substantial legal question is likely to provoke partisan ire. Whichever side a lawyer takes, he or she can anticipate resentment and rancorous attacks from the opposing side.

Such was undeniably the case with *Texas v. Pennsylvania, et al.* In the end, seventeen (17) States, through their attorneys general, joined Texas's pleadings in some capacity. *See 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 (the "Missouri Brief").*[1] Twenty (20) other States, plus the District of Columbia and

[1] All citations to items in the Supreme Court case file may be found at the following web address: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22o155.html.

the territories of Guam and the U.S. Virgin Islands, filed as *amici* in opposition and in support of the four (4) defendant States. *See Motion for Leave to File and Brief as* Amici Curiae *in Support of Defendants and in Opposition to Plaintiff's Motion for Leave to File a Bill of Complaint.* Arizona and Ohio, too, filed *amicus* briefs supporting neither side. Nonetheless, Arizona urged the Court that "election integrity is of paramount importance" and that, should the Court take up the case, "it is equally important that the Court act quickly to give the Nation certainty." *Motion for Leave to File an Amicus Brief for the State of Arizona and Mark Brnovich, Arizona Attorney General,* at 1-2. For Ohio's part, it emphasized "the need for a Supreme Court ruling, at the earliest available opportunity, on the proper application of the [Electors] Clause to cases in which state courts or state executive officers alter election rules in presidential elections." *Motion for Leave to File and Brief of Amicus Curiae Ohio in Support of Neither Party,* at 1. Fully forty-four (44) of the States were before the United States Supreme Court in some capacity in connection with this application to proceed in its original jurisdiction.

In the end, the Court ruled, and dismissed the motion on standing grounds—an almost-daily occurrence in courthouses across the country, often in some of the most hard-fought and sophisticated cases. *See infra* at pp. 7–10. Standing doctrine is, of course, complex and, some would say, not infrequently inconsistent and variable. *See, e.g., TransUnion LLC v. Ramirez*, No. 20-297, 2021 WL 2599472, at *19, *20, *23 (U.S. June 25, 2021) (Thomas, J., dissenting). But that ruling does not invalidate the strong Constitutional and legal underpinnings of the Pleadings, and the solid evidentiary support—part of it (the Pennsylvania part) affirmed in Justice Thomas's comments excerpted at the top of this response.

Partisan rancor about the case nonetheless persisted even after the Court pronounced its ruling. The State Bar Disciplinary Counsel has advised that a total of eighty-four (84) Grievances were brought against Attorney General Paxton and First Assistant Brent Webster (81 against the former and 3 against the latter) for filing pleadings in *Texas v. Pennsylvania.* All of them were reviewed and dismissed by the Office of Chief Disciplinary Counsel, including the four (4) (hereafter, "the Complaints") responded to herein.

What is special about these four Complaints—or these four Complainants—that necessitates a response? Certainly it is not their specificity or the clarity of legal analysis. It is not even clear from the substance of their complaints that the complainants have read what Respondents filed. And, as discussed *infra,* despite the Complaints' conclusory and unsupported assertions, there is nothing frivolous, fraudulent, or un-candid about Texas's filings. They are well-grounded and defensible—albeit unsuccessful—court filings.

As important as that point is—or should be, in the typical Bar disciplinary investigation response—it is the smaller issue here. The larger issue is, rather, the role of the State Bar in its oversight of the legal profession. Will it continue to defend even lawyers who support unpopular or controversial causes, or clients? Will it impartially apply and enforce the Disciplinary Rules in a politically neutral manner? Or will it, instead, depart from the rule of law and yield to the partisan clamor of non-client non-parties whose only apparent interest is to prolong the political fight after the court case has concluded?

This is, indeed, a matter of some moment. Disciplinary decisions must not be resolved pursuant to a popularity contest. The Bar should adhere, instead, to the best traditions of Texas and American justice, and for the reasons stated herein dismiss these Complaints. Attorney

General Ken Paxton and First Assistant Attorney General Brent Webster did not violate the Texas Disciplinary Rules of Professional Conduct.

II. TEXAS'S FILINGS WERE NOT FRIVOLOUS, AND ATTORNEY GENERAL PAXTON AND FIRST ASSISTANT WEBSTER DID NOT VIOLATE THE DISCIPLINARY RULES

A. Background: This Was an Important and Hotly Contested Case.

On December 7, 2020, the State of Texas invoked the original jurisdiction of the United States Supreme Court[2] and filed a lawsuit against the Commonwealth of Pennsylvania and the States of Georgia, Michigan, and Wisconsin (Defendant States). Counsel for the State of Texas were Ken Paxton, Attorney General of Texas (counsel of record), Brent Webster, First Assistant Attorney 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, (2) a Motion for Expedited Consideration with 151 pages of declarations attached as exhibits, and (3) a 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"). No. 22O155, Original.[3]

Texas alleged that "the 2020 election suffered from significant and unconstitutional irregularities in the Defendant States." Motion for Leave to File a Bill of Complaint at 1. In particular, it alleged:

- Non-legislative actors in the Defendant States "usurped their legislatures' authority and unconstitutionally revised their states' election statutes … through executive fiat or friendly lawsuits," in violation of the Electors Clause,[4] which provides that only the legislatures of the States are permitted to determine the rules for appointing presidential electors.
- Those purported amendments created different voting standards within the Defendant States and violated the one-person, one-vote principle, in violation of the Equal Protection Clause.[5]

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[2] *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").

[3] https://www.supremecourt.gov/docket/docketfiles/html/public/22o155.html (Docket Sheet).

[4] U.S. CONST., Art. II, § 1, cl. 2.

[5] U.S. CONST., Amend. IV, § 1.

- They also constituted patent and fundamental unfairness and intentional failure to follow the law, in violation of the Due Process Clause.[6]

Id. at 1–2; Bill of Complaint at 36–39.

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

Pennsylvania. At the time of filing, 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 by settling a lawsuit. Bill of Complaint at 14–15. It also alleged that the Pennsylvania Supreme Court extended statutory deadlines to receive mail-in ballots, supposedly acting under a state constitutional provision that "Elections shall be free and equal." *Id.* at 15. It also 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 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, 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 a lawsuit in a way that violated statutory requirements concerning the rejection of incomplete absentee ballots, which resulted in a rejection rate of 0.37% (4,786 absentee ballots out of 1,305,659 cast), versus the rejection rate in 2016 of 6.42%. *Id.* at 21–23. Texas alleged that this was outcome-determinative. *Id.* at 23.[8]

Michigan. At the time of filing, 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 alleged that both of these actions unilaterally

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[6] *Id.*

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

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

[9] *Cf. State v. Hollins*, 620 S.W.3d 400, 403 (Tex. Oct. 7, 2020) (per curiam) (enjoining the Harris County Clerk's plan to send absentee ballots to every voter in Harris County because the plan was unauthorized by the Election Code) ("The question before us is not whether voting by mail is good policy or not, but what policy the Legislature has enacted. It is purely a question of law.").

abrogated Michigan election statutes without legislative approval and resulted in 3.2 million absentee votes cast, in contrast to 2016, when only 587,618 absentee ballots had been requested by voters. *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, 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 unstaffed 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," which would allow them to exercise their vote in ways contrary to Wisconsin statutes. *Id.* at 32–34.[11]

Biden won the election by 306 electoral votes to 232. Had Trump won the Defendant States' electoral votes, Trump would have won the election, 294 to 244. Thus, the election irregularities alleged by Texas presented a facial case of materiality to the outcome of the 2020 presidential election.

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

> 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

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

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

election…. Quite simply, it is vitally important to the States who becomes Vice President."

Id. at 13 (citation omitted).

On December 9, Trump filed a motion to intervene,[12] in which he agreed with Texas's Electors Clause argument. Whatever else may be said of Texas's standing arguments, Trump certainly had standing as a presidential candidate. And if Trump had standing, then the Supreme Court should have considered Texas's case: "Only one of the petitioners needs to have standing to permit us to consider the petition for review." *Massachusetts v. E.P.A.*, 549 U.S. at 518. But the Supreme Court never ruled on Trump's motion to intervene.

As noted above, several states filed *amicus* briefs. Missouri, joined by sixteen (16) other states (all of which Trump won),[13] submitted an *amicus* brief in support of Texas. Six of those states also filed a motion to intervene as parties on Texas's side.[14] The District of Columbia, joined by twenty (20) 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, as also noted above, 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

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[12] *Motion of Donald J. Trump, President of the United States, to Intervene in his Personal Capacity, as Candidate for Re-Election, Proposed Bill of Complaint in Intervention, and Brief in Support of Motion to Intervene.*

[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 at 1.* Biden won one of Nebraska's four electoral votes.

[14] *Motion of States of Missouri, Arkansas, Louisiana, Mississippi, South Carolina, and Utah to Intervene and Proposed Bill of Complaint in Intervention.*

[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 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 (*supra* n.13).

could give important guidance as to the proper application of the Electors Clause to the Defendant States' complained-of conduct and certainty to the Nation with respect to the election outcome.[16]

On December 11, 2020, the Supreme Court issued the following order: "The State of Texas's motion for leave to file a bill of complaint is denied for lack of standing under Article III of the Constitution. Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections. All other pending motions are dismissed as moot. Statement of Justice Alito, with whom Justice Thomas joins: In my view, we do not have discretion to deny the filing of a bill of complaint in a case that falls within our original jurisdiction. I would therefore grant the motion to file the bill of complaint but would not grant other relief, and I express no view on any other issue." *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (citation omitted). The Supreme Court has denied a state leave to file a bill of complaint against another state six times since 2016.[17]

The Office of Chief Disciplinary Counsel (CDC) received Grievances concerning Texas's lawsuit from Kevin Moran, David Chew, Neil Cohen, and Brynne VanHettinga, in addition to eighty (80) other similar Grievances filed against either Attorney General Paxton or First Assistant Brent Webster. The CDC determined that all eighty-four (84) of these grievances were Inquiries and dismissed them. After appeals, the Board of Disciplinary Appeals (BODA) classified four (4) of the above-referenced Grievances as Complaints and the CDC served Respondents with them on or about June 15 and 16, 2021.

B. The Law Governing Federal Court Intervention Into Elections Is Complex and Unresolved.

Legal scholars recognize that the legal issues raised by the Office of Attorney General in *Texas v. Pennsylvania* are complex and unresolved:

> [T]he legal structure [of federal court oversight of elections] is counterintuitive and hardly simple. The unique legal architecture of American democracy—a product of the original Constitutional design and subsequent legal additions built upon that original structure—envisions a complex interlacing of federal and state interests in matters of voting, elections and political participation…. Defining the boundary line, then, between issues left to be resolved as a matter of state law and issues that instead implicate distinct, federal constitutional interests, requires working out the

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

[17] New Hampshire v. Massachusetts, 154 ORIG, 2021 WL 2637831, at *1 (U.S. June 28, 2021); Montana v. Washington, 152 ORIG, 2021 WL 2637830, at *1 (U.S. June 28, 2021); Texas v. California, 141 S. Ct. 1469 (2021); Arizona v. California, 140 S. Ct. 684, 206 L. Ed. 2d 175 (2020); Missouri v. California, 139 S. Ct. 859 (2019); New Mexico v. Colorado, 137 S. Ct. 2319 (2017); Nebraska v. Colorado, 577 U.S. 1211, 136 S. Ct. 1034, 194 L. Ed. 2d 545 (2016).

intricate relationship between federal and state law that has long structured the American democratic system—even for national offices.[18]

Texas's lawsuit navigates these "counterintuitive and hardly simple" areas. Texas made many arguments, some of which were literally without precedent, but all of which were "supported by a good faith argument for an extension, modification or reversal of existing law." Therefore, they did not violate the Rules. *See* Rule 3.01 cmt. 2. *See also* FED. R. CIV. P. 13 (Notes of Advisory Committee on Rules—1993 Amendment) ("Arguments for extensions, modifications, or reversals of existing law or for creation of new law do not violate subdivision (b)(2) provided they are 'nonfrivolous.' This establishes an objective standard …").

Lawyers who make novel arguments that ultimately fail to persuade judges do not automatically violate the Rules, especially when the arguments are made in the partisan, highly-charged, and complex area of election law. Should the Bar opt to police such arguments, it is not inconceivable that dismissed election lawsuits could routinely be followed up by litigation before the State Bar, its hearings panels, the Board of Disciplinary Appeals, and the courts of this state.

For instance, since 1961, state law has provided that the candidates of the party that won the last Gubernatorial election shall appear first on the ballot. *Miller v. Hughs*, 471 F. Supp. 3d 768, 773 (W.D. Tex. 2020). For the 2020 election, when Republican party candidates appeared first on the ballot, plaintiffs aligned with the Democratic party alleged that the law violated the First and Fourteenth Amendments by imposing an undue burden on the right to vote and treated similarly-situated political parties differently in violation the Equal Protection Clause. *Id.* These arguments were unprecedented, and one could certainly think of them as "a stretch"—all the moreso, perhaps, if one were not a Democrat. Judge Yeakel dismissed the case for lack of standing and justiciability. *Id.* at 776–79.

If someone—anyone—complains to the CDC that the *Miller v. Hughs* lawsuit was frivolous, or brought merely for political gain, must the plaintiffs' lawyers be investigated for unprofessional conduct? Does that apply to all election litigation, which is frequently partisan? Can the CDC and BODA put partisan feelings aside and judge such cases in a non-partisan manner? Respondents would argue that an investigation into the attorneys in the *Miller v. Hughs* lawsuit (or a disciplinary complaint filed against them) would be an improper one – notwithstanding the fact that the plaintiffs in such case are Democrats.

The better result is to presume that arguments in election litigation, even arguably partisan ones, are "supported by a good faith argument for an extension, modification or reversal of existing law," barring clear proof to the contrary. *See, e.g.,* TEX. R. CIV. P. 13 ("Courts shall presume that pleadings, motions, and other papers are filed in good faith."). No such proof is present in this case. The CDC should dismiss the Complaints.

C. The Law of State Standing Is Also Complex and Unresolved.

Texas's assertion that it had standing in *Texas v. Pennsylvania* could not have been frivolous. There are no Supreme Court cases contrary to its position that it had standing, and its argument was, at the very least, "supported by a good faith argument for an extension,

[18] Samuel Issacharoff, Pamela S. Karlan, Richard H. Pildes, & Nathaniel Persily, The Law of Democracy: Legal Structure of the Political Process (5th ed. 2016) at 1113–14.

modification or reversal of existing law." Justices Thomas and Alito, moreover, disagreed with the majority and, in dissent, opined that the Court should have granted the motion for leave and accepted Texas's bill of complaint. Respondents respectfully submit that a motion for leave to file a bill of complaint that garners the assent of two Supreme Court Justices should not be deemed "frivolous."

Legal scholars recognize that standing is a "doctrine of almost indescribable complexity"; and yet, even so, there are "special problems posed by the standing of States."[19] State standing is one of the "specialized standing doctrines" to which it is "difficult to apply standing precedents."[20]

In 2007, the Supreme Court recognized that States have an easier time establishing standing than other litigants. "It is of considerable relevance [to the standing inquiry] that the party seeking review here is a sovereign State." *Massachusetts v. E.P.A.*, 549 U.S. 497, 518 (2007). "States are not normal litigants for the purposes of invoking federal jurisdiction." *Id.* States are "entitled to special solicitude in our standing analysis." *Id.* at 520. Professors Hickman and Pierce have explained, "In *Massachusetts v. EPA*, the Court held that states have a special, preferred status in standing disputes. The majority repeatedly refers to the significance of the state as the petitioner and explicitly distinguishes the (apparently) less legally-significant potential interests of private parties. The position is unprecedented. The Court had never even hinted at the existence of such a special status for states before *Massachusetts v. EPA*."[21] It is fair to say that, since 2007, the legal system is still working out the contours and doctrines of state standing.

Meanwhile, the very foundations of basic standing doctrine itself are being questioned almost to this very day. "I write separately to explain why, following several pretty unsatisfying encounters with it, I've come to 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." *Sierra v. City of Hallandale Beach, Florida*, 996 F.3d 1110, 1115 (11th Cir. 2021) (Newsom, J., concurring) (quoted with approval in *TransUnion LLC v. Ramirez*, No. 20-297, 2021 WL 2599472, at *19, *20, *23 (U.S. June 25, 2021) (Thomas, J., dissenting)). "Despite nearly universal consensus about standing doctrine's elements and sub-elements, applying the rules has proven far more difficult than reciting them." *Id.* at 1116. "[O]ur Article III standing jurisprudence has jumped the tracks." *Id.* at 1117. *See also California v. Texas*, 141 S. Ct. 2104, 2126 (2021) (Alito, J., dissenting) (noting the Court's inconsistent application of State standing doctrine and criticizing the majority's "fundamental distortion of our standing jurisprudence.").

In light of these unsettled doctrines, Attorney General Paxton and First Assistant Webster could not have violated the Rules by asserting that Texas had standing to bring the suit. "[T]he law is not always clear and never is static. Accordingly, in determining the proper scope of

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[19] Steven Gow Calabresi & Gary Larson, The U.S. Constitution: Creation, Reconstruction, the Progressives, and the Modern Era (2020) at 580.

[20] Martin H. Redish, Suzanna Sherry, & James E. Pfander, Federal Courts (8th ed. 2018) at 31.

[21] Kristen E. Hickman & Richard J. Pierce, Federal Administrative Law: Cases and Materials (3d. ed. 2019) at 1135.

advocacy, account must be taken of the law's ambiguities and potential for change." Rule 3.01 cmt. 1. That is especially the case here.

D. Texas's Primary Argument—That the Defendant States Violated the Electors Clause—Was Not Frivolous.

Texas's primary allegation was that, by allowing election law to be changed by non-legislative actors, the Defendant States violated the Electors Clause, which reads, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."[22]

That allegation is supported by a leading election law treatise, which recognizes that the Supreme Court's first, unanimous opinion in *Bush v. Gore*, 531 U.S. 70 (2000) (*Bush I*) "suggests that the constitutional delegation of authority in Art. II, § 1 of the Constitution is an exclusive grant of authority to the state legislature to create the procedures for the state's presidential electors. The opinion further raises the possibility that no other state law (including the state constitution) may intercede absent an express authorization from the legislature."[23] The treatise also teaches: "Note that Art. II textually commits the manner of choosing presidential electors to the State legislatures."[24] Likewise, the majority in the second, divided opinion in *Bush v. Gore* (*Bush II*) stated that "the state legislature's power to select the manner for appointing electors is plenary." 531 U.S. 98, 114 (2000). "Plenary" means "Full; complete; entire <plenary authority>."[25] For over one hundred years, the Supreme Court has recognized that the Electors Clause "leaves it to the legislature exclusively to define the method" of appointment of electors. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). "[T]he practical construction of the [Electors Clause] has conceded plenary power to the state legislatures in the matter of the appointment of electors." *Id.* at 35.

Ohio's Brief in support of neither party makes a strong case that Texas's position was not only non-frivolous, but desperately needed resolution. Ohio "urge[d] the Court to decide, at the earliest available opportunity, whether state courts and state executive actors violate the Electors Clause when they change the rules by which presidential elections are run." Ohio's Brief at 1.

> In States around the country, judges and executive officials changed the rules that would govern the election immediately preceding or during the election. If there is anything more American than representative government, it is a firm conviction that the rules ought not be changed after the game has begun. Because this Court has never held that the Electors Clause forbids state courts and state executive officers from meddling with state legislatures' work, state courts and state executive officers retained leeway to change the rules in the final stretch of election season. It is not unreasonable to wonder—and many millions of Americans do—whether those hastily implemented changes exposed the election systems to

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[22] U.S. CONST., Art. II, § 1, Cl. 2.

[23] Issacharoff, et al., *supra* n. 18 at 1143–44.

[24] *Id.* at 1137.

[25] PLENARY, Black's Law Dictionary (11th ed. 2019).

> vulnerabilities. Nor is it unreasonable to object on fairness grounds—as many millions of Americans do—to changing the voting rules when the election is impending and the changes' impact on the results can be predicted. These concerns undermine public confidence in the integrity of the electoral process. That confidence is necessary if there is to be citizen participation in the democratic process, which is itself necessary for the success of the American project.

Id. at 5 (internal quotations and citation omitted). Ohio also argued, "It may prove difficult at this late date to fashion a remedy that does not create equal or greater harms. But there will be an election in 2024, another four years after that, and so on. If only to prevent the doubts that have tainted this election from arising again in some future election, the Court should decide, as soon as possible, the extent of the power that the Electors Clause confers on state legislatures and withholds from other actors." *Id.* at 6.

Thus, neither Attorney General Paxton nor First Assistant Webster violated the Rules by asserting that non-legislative actors in the Defendant States unconstitutionally changed their states' election laws in violation of the Electors Clause. Again, "[T]he law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change." Rule 3.01 cmt. 1. Again, that is especially the case here.

E. Texas's Argument that the Defendant States Violated the Equal Protection Clause and Due Process Clause Was Not Frivolous.

In the divided *Bush v. Gore* opinion (*Bush II*), seven Justices agreed that the Florida Supreme Court's rules for recounting ballots violated the Equal Protection Clause and Due Process Clause. "Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy." 531 U.S. at 111 (per curiam opinion); *see also id.* at 110 (per curiam opinion) ("[T]he recount cannot be conducted in compliance with the requirements of equal protection and due process."); *id.* at 134 (Souter, J., dissenting (joined by Breyer, J.)) ("Petitioners have raised an equal protection claim (or, alternatively, a due process claim) in the charge that unjustifiably disparate standards are applied in different electoral jurisdictions to otherwise identical facts…. I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters' fundamental rights. The differences appear wholly arbitrary.") (citation omitted).

Thus, neither Attorney General Paxton nor First Assistant Webster violated the Rules by asserting that the Defendant States violated the Equal Protection Clause and the Due Process Clause by changing election rules or by applying inconsistent or arbitrary standards. The Supreme Court clearly recognizes that cause of action.

F. No Court Opinion Establishes that Texas's Claims Are Frivolous.

A recurring theme in the Complaints is that many of Texas's claims had already been decided in the Defendant States' favor by other courts before Texas filed the lawsuit, or that courts have demonstrated Texas's claims to be frivolous since that time. But none of the judicial opinions cited are by the United States Supreme Court, none addressed State standing, and none of them addressed the specific facts and arguments raised in Texas's pleadings. Any subsequently-occurring cases or rulings, moreover, can have no bearing on the factual or legal validity of Texas's

arguments at the time it made them. Therefore, none of those judicial decisions show that Attorney General Paxton and First Assistant Webster violated the Rules. As of this date, no ruling has been made on the merits of Texas's original jurisdiction claims raised in the Pleadings.

G. The Pleadings Do Not Contain Incorrect Factual Allegations. But Even If They Did, that Alone Does Not Establish a Rules Violation.

This case sounded in the Court's original jurisdiction under Article III, § 2, cl. 2 of the U.S. Constitution. Accordingly, Texas's Pleadings were effectively an original complaint; technically, in fact, a motion for leave requesting leave to file an original complaint (with preliminary injunctive relief also requested). This was, Respondents submit, a well-grounded motion for leave and proposed complaint, for the reasons previously stated herein. The main thrust of Texas's argument was that the complained-of actions in these four Defendant States "constitute non-legislative changes to State election law by executive-branch State election officials, or by judicial officials . . . in violation of the Electors Clause." Motion for Leave to File Bill of Complaint at 37, ¶132. Texas presented abundant evidence of these non-legislative departures from the Constitutional design. *See supra* at 4-5 (summarizing the Pleadings' State-specific allegations against the Defendant States). Far more than was necessary to meet the relatively minimal applicable legal standard, which requires only that "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . (3) *the factual contentions have evidentiary support* or, if specifically so identified, *will likely have evidentiary support after a reasonable opportunity for further investigation or discovery* . . .. FED. R. CIV. P. 11(b)(3) (emphasis added).

But if there was any deficiency in the Pleadings, or an inclusion of matters that were allegedly "immaterial, impertinent, or scandalous," the prescribed remedy for same is typically a preliminary motion under FED. R. CIV. P. 12(b)(6) (motion to dismiss for failure to state a claim upon which relief can be granted), 12(e) (motion for a more definite statement), or 12(f) (motion to strike).[26] None was made in this case.[27] And, even had such a motion been made, and granted, it is common practice under such circumstances to allow an original complaint to be amended and the case to go forward, assuming the deficiency is one that may be cured. As with other original jurisdiction cases, had this matter moved forward, the parties would have been afforded discovery and motion practice under the Federal Rules of Civil Procedure, to flesh out and test the allegations contained in Texas's complaint.

Neither Attorney General Paxton nor First Assistant Webster alleged knowingly false facts at what was an initial pleading stage, so they did not violate the Rules. "A filing or contention is frivolous if it contains knowingly false statements of fact. It is not frivolous, however, merely because the facts have not been first substantiated fully or because the lawyer expects to develop vital evidence only by discovery. Neither is it frivolous even though the lawyer believes that the

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[26] The Federal Rules of Civil Procedure generally apply to pleadings and motions filed in original proceedings before the U.S. Supreme Court. S. Ct. Rule 17.2.

[27] It also bears noting that none of the twenty-four (24) States nor the three (3) territories that filed briefs in opposition to the positions of Texas and the seventeen (17) other States sought sanctions from the Supreme Court.

client's position ultimately may not prevail." Rule 3.01 cmt. 3. Thus, even if some facts alleged in a pleading may not ultimately be substantiated, as is frequently or even typically the case, lawyers do not violate the Rules merely by alleging these facts.

The Federal Rules of Civil Procedure are to much the same effect, and the commentary thereon is instructive:

> The rule [FED. R. CIV. P. 13] is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. *The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted.* Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer;[28] whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.
>
> The rule does not require a party or an attorney to disclose privileged communications or work product in order to show that the signing of the pleading, motion, or other paper is substantially justified.

FED. R. CIV. P. 13 (Notes of Advisory Committee on Rules—1983 Amendment) (emphasis added).

H. Importantly, the Complainants Are Not Clients of Attorney General Paxton or First Assistant Webster.

The four complainants are not clients of Attorney General Paxton or First Assistant Webster. This is an important distinction under the statute governing this proceeding. First, the Government Code specifically prohibits the Bar from requiring Attorney General Paxton or First Assistant Webster to explain their privileged decisions in this matter: "The state bar or a court may not require an attorney against whom a disciplinary action has been brought to disclose information protected by the attorney-client privilege *if the client did not initiate the grievance that is the subject of the action."* Tex. Gov't Code § 81.072 (emphasis added). Accordingly, absent a violation of the Disciplinary Rules that clearly appears from the face of the Pleadings—which has not been shown—the Complaints should be dismissed again.

Secondly, and related to the partisanship concerns alluded to above, the State Bar should neither encourage nor countenance what could be referred to as "disciplinary tourism." *Cf.*

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[28] The Rule makes context critical when it comes to determining what constitutes a reasonable inquiry under the circumstances. As Texas told the Court at the time, this was "a massive effort in minimal time . . .." Reply in Support of Motion for Preliminary Injunction at 9. "Texas had less than four weeks to detect violations, find witnesses willing to testify—notwithstanding threats—and develop evidence and build a case." *Id.* As Justice Thomas has written, such pressures are inherent: "postelection litigation is truncated by firm timelines. That is especially true for Presidential elections . . .. Five to six weeks for judicial testing is difficult enough for straightforward cases. For factually complex cases, compressing discovery, testimony, and appeals into this timeline is virtually impossible." *Degraffenreid*, 141 S. Ct. at 735 (Thomas, J., dissenting).

complaints relating to the alleged practice of "lawsuit tourism."[29] Put simply, the four complainants who filed the Complaints are not the Respondents' aggrieved clients. They have not filed true "Grievances," and they are not in any real sense victims of the Respondents' alleged violations of the Disciplinary Rules. Other than being members of the Texas State Bar, in fact, they do not stand in any different stead from members of the public generally. It could be said, ironically enough, that they lack standing to file a grievance in this matter. But nothing prevents them from writing a letter to the editor or an editorial, publishing a blog post, or hosting a podcast outlining their concerns in whatever level of detail they see fit.

State Bar disciplinary procedures should instead be reserved for policing the legal profession and should not be abused to harass or intimidate attorneys with whose causes or clients one happens to disagree. *See, e.g.,* Texas Disciplinary Rules of Professional Conduct, Preamble, cmt. 4 ("A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others."). As the Preamble to the Disciplinary Rules provides: "the purpose of these rules can be abused when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule." *Id.* at Preamble, cmt. 15. How much truer that rings, Respondents submit, for a non-client non-party whose only relationship to the case was as a member of the public and a supporter of the other side in a hotly-disputed election contest.

III. The Complainants Have Not Raised Specific Violations and Respondents Should Not Have to Bear the Burden of Proof

In the following section, Respondents attempt as best they can to address the Complainants' allegations. But in so doing, Respondents are hampered by the fact that none of the Complaints cite any alleged Rules violations with specificity. In requiring a response to these conclusory and amorphous Complaints, Respondents respectfully submit that the Board has flipped the burden of proof in this proceeding and required Respondents to try to prove a negative: that they did *not* violate any Disciplinary Rules. This they can do, and have done herein. But it imposes an excessive and improper allocation of resources for Respondents to be required to anticipate, articulate, and then rebut any conceivable concern that may be raised by the general, non-specific, and inchoate assertions in these Complaints.

A. David W. Wellington Chew (Case No. 202006566) (against AG Ken Paxton)

Asked in the State Bar Grievance Form: "If you are not a party to this suit, what is your connection with it?" Senior Chief Justice Chew replied: "Citizen." *See* Grievance Form in Case No. 202006566, at p. 5. But there is and should be no "taxpayer standing" in State Bar grievance processes.

Chief Justice Chew's complaint boils down to three conclusory sentences, to wit:

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[29] *See, e.g.,* *https://theblogforbusinesslaw.com/has-the-u-s-supreme-court-put-an-end-to-lawsuit-tourism-once-and-for-all-or-3-strikes-and-your-out-of-this-jurisdiction/*; and *https://protecttheprotest.org/2020/02/10/bills-to-end-virginia-lawsuit-tourism/*.

> This attorney is [sic] his capacity as Attorney General of Texas has violated his duty and obligations as a Texas attorney, in particular, he has violated TDPRs:
>
> Sec. 3.01: he has filed a [sic] utterly frivolous lawsuit; Sec. 8.02, he has made numerous false statements in the petition filed; and, Sec. 3.09, he has violated his responsibilities as a prosecutor. He has brought shame and disrespect to the the [sic] State of Texas and the legal community of Texas.

Id. at p. 6.

First, and as noted above, to demand a response to such vague, non-specific, and conclusory allegations effectively shifts the burden of proof to Respondents to prove a negative: that they did not initiate a frivolous lawsuit. That is a violation of both due process and the Disciplinary Rules of Procedure. The essence of due process is the requirement that a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it. *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (internal quotation marks omitted).

But to address what little substance there may be of Justice Chew's complaint, he specifies violations of three (3) Disciplinary Rules: Rule 3.01, by filing a frivolous lawsuit; Rule 8.02, by making "numerous false statements in the petition filed"; and Rule 3.09, by violating "his responsibilities as a prosecutor." *Id.* at p. 6.

Respondents did not violate Rule 3.01 because the lawsuit is not frivolous, as explained above.

Rule 8.02 concerns statements about the qualifications of a judge and legal obligations of lawyers who are candidates for office, and does not apply to this case.

Rule 3.09 concerns the responsibilities of criminal prosecutors, and likewise does not apply to this case.

Justice Chew's complaint should be dismissed.

B. Kevin Moran (Case No. 202006564) (against AG Ken Paxton)

Mr. Moran includes a mashup of newspaper clippings and public commentary by opposing parties, politicians, and commentators to support his allegations – and importantly, no evidence or cognizable legal argument. Mr. Moran's grievance is more typical of the other Complaints than is Justice Chew's. But it is almost equally devoid of specificity. Asked to "[e]xplain in detail why you think this attorney has done something improper or has failed to do something which should have been done," Mr. Moran stated the following:

> Texas Attorney General Ken Paxton has filed a frivolous lawsuit vs. four swing states in the 2020 national election. Paxton knows, and knew when he filed the lawsuit, that it was totally unconstitutional. Still, he spent my tax dollars on the filing, wasting the state's money and his staff time and incurring the disdain of legal experts across the nation. Paxton has purposely perverted the functions of his Texas

> office. He has misrepresented me and damaged me by wasting Texas state tax dollars and other resources on this lawsuit.

Moran Grievance Form in Case No. 202006564 ("Moran Grievance"), at p. 6.

Mr. Moran further alleged that Attorney General Paxton "was hired to represent" him, that Paxton is paid with Moran's taxes, and that Moran is "a constituent and employer" of Paxton. Moran Grievance, at 4, 5. Of course, Paxton and Moran do not in fact have an attorney-client relationship and, importantly, Paxton was not "hired" but was elected to serve as the State of Texas's Attorney General, with the express constitutional and statutory authority to "prosecute and defend all actions in which the state is interested before the supreme court and courts of appeals." TEX. GOV'T CODE §402.021. *See also* TEXAS CONST., Art. IV, § 22 ("The Attorney General shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party …"). Again, Respondents respectfully submit, taxpayer standing is not a sound basis for the filing of Bar complaints. In fact, by statute, the Attorney only represents the interests of the State of Texas, and is prohibited from providing legal advice other than to those state actors permitted by the Texas Constitution or the Government Code. *See* Gov't Code 402.045. He does not represent any citizen individually, nor is any citizen his client.

In his eight page "Supporting Documentation," faxed to the State Bar a few days after he filed his Grievance Form, Moran mostly quoted party opponents' briefs or public comments, or statements about the case made by politicians and other commentators, including the following:

- the Pennsylvania Attorney General's response brief;
- public comments by the Wisconsin Attorney General and the Attorney General for the District of Columbia;
- Statements of Senator Chris Murphy (D-CT), Congressman Jamie Raskin (D-MD), and Congressman Adam Schiff (D-CA);
- Michael Abramowitz, the non-lawyer President of Freedom House and former Washington Post White House correspondent; and
- Marc Elias, DNC legal adviser.

See generally Moran Supporting Documentation, at 2–6.

In the only portion of his grievance to cite the Rules, Mr. Moran excerpted certain Rules and conclusorily alleged that Paxton (1) violated paragraph 4 of the Preamble to the Texas Disciplinary Rules of Professional Conduct by filing the Pleadings "to harass or intimidate others," and that the lawsuit failed to "demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials"; and (2) violated Rule 3.01 when he "filed the lawsuit, knew that it had no merit and would be correctly called 'frivolous'—or worse—when filed, [then] he nonetheless filed the lawsuit. Then, he failed to withdraw the lawsuit when dozens of legal and constitutional experts across the nation publicly said that it was frivolous on its face." Moran Supporting Documentation at 7–8.

First, Paragraph 4 of the Preamble is not a Rule; and in any event, as explained above, Attorney General Paxton did not file the lawsuit "to harass or intimidate others." We stand by our conviction that the Pleadings do in fact "demonstrate respect for the legal system and for those

who serve it, including judges, other lawyers and public officials." A plain and fair reading of the Pleadings reveals just that. Nothing in this or any of the other Complaints shows otherwise.

Second, Attorney General Paxton did not violate Rule 3.01. As demonstrated above, the Pleadings are not frivolous, and there is no factual basis for Mr. Moran's unsupported speculation that General Paxton himself believed otherwise.

Mr. Moran's Complaint should be dismissed.[30]

C. Neil Kay Cohen (Case No. 202101148) (against AG Ken Paxton)

Like the prior two complaints, Mr. Cohen also lists his connection to the case as "citizen of Texas. Disgusted by his [Paxton's] behavior." Cohen Grievance Form at p. 5. His attached complaint is very long (at 51 pages) and difficult to follow. But the gist of it seems to be that Attorney General Paxton "committed grave violations of the Texas Disciplinary Rules of Professional Conduct (the Rules) in filing a baseless lawsuit." Cohen Grievance Form Attachment ("Cohen Attachment") at 10. Mr. Cohen derides the Pleadings as "beyond frivolous," likens them—on multiple occasions—to something "straight out of Alice in Wonderland," and twice quotes liberal commentator Linda Greenhouse saying about the case: "It's as if someone filed a case asking the court to exercise its original jurisdiction and declare the moon to be made of green cheese." *Id.* at pp. 2, 17. Respondents submit these comments are merely hyperbolic.

Like Mr. Moran's Complaint, Mr. Cohen also liberally cuts-and-pastes extensive quotes from political and media commentators—some attributed, others not—and intersperses throughout long excerpts from the briefs of the Defendant States and of those *amici* aligned with them. *See especially id.* at pp. 23, 31-42. He even relies upon a Politifact rating of an expert affidavit submitted with Texas's appendix. *Id.* at pp. 25, 48.

Mr. Cohen also includes arguments and quoted passages from pleadings, briefs, and judicial decisions in other 2020 election contest cases that were not filed in the Supreme Court and did not sound in that Court's original jurisdiction or in any way involve questions of State standing doctrine. But his efforts to re-litigate the underlying facts of these cases—and of Texas's lawsuit—are moot: the Court never reached the merits and, accordingly, Texas was never given an opportunity to conduct discovery in an attempt to prove up its Bill of Complaint.

In the last few pages of his complaint, Mr. Cohen cites several Disciplinary Rules. Rule 1.06(b)(2) addresses loyalty to a client, and Mr. Cohen says General Paxton violated it because "press coverage suggested that the suit was for Paxton's personal benefit" (*id.* at p. 45), and then goes on to cite politicians, commentators, and unnamed sources in editorials and news articles musing about General Paxton's motivations. *Id.* at pp. 45-48. This is not evidence but sheer

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[30] According to press reports, Mr. Moran is the President of the Galveston Island Democrats and a friend of former Galveston Mayor Joe Jaworski, who has formally declared his candidacy for the Democratic Party nomination for Texas Attorney General in the upcoming 2022 election cycle. *See, e.g.,* https://thehill.com/homenews/state-watch/557601-texas-bar-association-investigating-states-attorney-general-report; https://www.kcbd.com/2021/06/09/ap-exclusive-state-bar-investigating-texas-attorney-general/. While a partisan such as Mr. Moran is free to file a bar complaint, his motivation and bias in doing so should be considered by the State Bar, just like the Bar does in other highly emotional and contested cases.

speculation; and, furthermore, it fails to explain what motives drove 17 other States and State Attorneys General to side with Texas (not to mention the supportive arguments urged by Arizona and Ohio in their *amicus* briefs).

Mr. Cohen also accuses General Paxton of violating Rule 3.03 and its requirement of candor toward the tribunal, claiming—again, without any evidence of his subjective state of mind—that General Paxton knowingly presented false or fraudulent facts to the Court. Cohen's reliance upon *Politifact* and opponents' briefing is, again, beside the point: Texas never obtained discovery to prove its case and its facts were never put to the test by summary judgment or trial. But, as noted above, *infra* at p. 3–5, the main gist of its case was based on evidence well-established in the public record: non-legislative actors in these four (4) States unquestionably enacted changes to the election rules in violation of the Electors Clause of the U.S. Constitution. Respondents did not knowingly present false information to the Court, and did not violate Rule 3.03.

Mr. Cohen also alleges a violation of Rule 8.04, accusing General Paxton of having "committed fraud upon the Supreme Court by bringing the suit in the name of the State of Texas while acting as a straw man for Trump . . .. One result of the fraud is that the Supreme Court had to deliberate whether the suit qualified for original jurisdiction whereas a suit brought in Trump's name could have been immediately dismissed." *Id.* at p. 50. This is nonsense. Two Supreme Court Justices—Thomas and Alito—agreed with Texas and dissented from the majority's refusal to accept the case in its original jurisdiction. And, as previously noted, 17 other States and States' Attorneys General agreed with Texas—and both Arizona and Ohio noted in their *amicus* briefs their belief that jurisdiction was mandatory in this matter. There was no deceit here.

Lastly, Mr. Cohen spends considerable time arguing about events that transpired after the Court ruled and the lawsuit had concluded. None of this relates to any court filing or legal work, and Respondents decline to address it. Respondents hope, as well, that the State Bar is mindful of the disturbing precedent that would be set by holding attorneys accountable for the out-of-court actions of unrelated third parties taken several weeks after the Supreme Court ruled.

Mr. Cohen's Complaint should be dismissed.

D. Brynne VanHettinga (Case No. 202101679) (against Brent Webster, only)

Dr. VanHettinga is an inactive member of the Texas Bar, who appears to no longer practice as an attorney.[31] Her grievance solely names Brent Webster as the attorney about whom she is complaining. In response to the question about her connection to the case, VanHettinga responded that she is a "Citizen concerned about fascism & illegal overthrow of democracy." VanHettinga Grievance at 5.

Dr. VanHettinga alleges that First Assistant Webster violated Rule 3.01 by filing a frivolous lawsuit, and violated Rule 3.03 by knowingly making a false statement of material fact or law to a tribunal. VanHettinga Grievance, attached materials at 1. She similarly complains that First Assistant Webster violated Rule 8.04(a)(3) by "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation," *Id.* at 2, but in either instance she fails to state with any specificity what it is in the Pleadings that she contends to be dishonest, fraudulent, deceitful or

[31] *See* https://thegreatjobsdeception.com/about-the-author/.

misrepresentative. As explained at length above, First Assistant Webster did not violate Rule 3.01 or 3.03 because the lawsuit was not frivolous and did not contain knowingly false statements.[32]

Like the above-referenced Complaints, Dr. VanHettinga also fails to specify what she finds frivolous or factually unsupported in the Pleadings. Interestingly, she quotes TEX. R. CIV. P. 13 to the effect that an attorney's signature constitutes a representation that the pleading, etc., is not fictitious, groundless, or brought in bad faith or for an improper purpose, subject to contempt or other sanctions as punishment. *Id.* at 1-2. But she neglects to quote another important part of the rule: "Courts *shall presume that pleadings, motions, and other papers are filed in good faith.* No sanctions under this rule may be imposed *except for good cause, the particulars of which must be stated* in the sanction order." TEX. R. CIV. P. 13 (emphasis added).

Similarly, the applicable federal counterpart to this rule provides that an attorney's signature certifies "that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . (3) the factual contentions have evidentiary support or, if specifically so identified, *will likely have evidentiary support after a reasonable opportunity for further investigation or discovery* . . .. FED. R. CIV. P. 11(b)(3) (emphasis added). As previously noted, the Court did not take the case, so no discovery ensued, and the merits of Texas's factual allegations were not tested in court. As noted above, the main gist of those factual allegations was not disputed. And while the Complaints have asserted that some of the cited evidence was controversial or even hotly-disputed, none have attempted to show that it lacked all evidentiary support at the pleadings stage, or that it assuredly would have failed to do so "after a reasonable opportunity for further investigation or discovery" in this original jurisdiction proceeding.[33]

As previously noted, the lawsuit was not frivolous, its factual allegations were well-supported, and filing the Pleadings was not an act of "dishonesty, fraud, deceit or misrepresentation."

Dr. VanHettinga's Complaint against First Assistant Webster should be dismissed.

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[32] Dr. VanHettinga's complaint also refers to "Texas Disciplinary Rule of Conduct 4.01.5" – apparently intending Comment 5 to Rule 4.01, which she correctly quotes as saying "[a] lawyer should never knowingly assist a client in the commission of a criminal act or a fraudulent act." *Id.* at 4. But here, too, she does not specify what crime or fraud was being committed, or what evidence supports an inference that Mr. Webster subjectively knew his "client" was committing it.

[33] Dr. Van Hettinga also quotes extensively from written decisions by two judges: one from Nevada (Judge James Russell) and one from Pennsylvania (Judge Matthew Brann). *Id.* at 3-4. Of course, Nevada's election was not at issue in the *Texas v. Pennsylvania* case, and Judge Brann's case—like other contemporaneous election contests referred to in the Complaints generally—involved different parties, different legal theories, mostly different facts, did not address original jurisdiction or State standing, and was decided based on a very different procedural posture. This fact VanHettinga grudgingly acknowledges, noting that despite some overlap in evidence, "*State of Texas v. Commonwealth of Pennsylvania et al,* involves different parties and raises somewhat different issues than these prior cases . . .." *Id.* at 3.

IV. The State Bar's Review of This Matter Violates the Separation of Powers Clause

Under Texas law and the Texas Constitution, Attorney General Ken Paxton and First Assistant Brent Webster have the authority to file cases on behalf of the State of Texas that invoke the original jurisdiction of the United States Supreme Court.[34] When they do so, they are cloaked in the power of the State. For the State Bar to investigate, let alone reprimand, those decisions is tantamount to ceding to the State Bar the Attorney General's statutory and constitutional power. With full respect for the State Bar and its core functions, this is an unconstitutional usurpation of power that far exceeds its remit.

Therefore, the statute allowing the State Bar's Chief Disciplinary Counsel (CDC), a part of the Judicial Branch, to investigate grievances, find professional misconduct, and impose sanctions is unconstitutional as applied[35] to this investigation of the legally authorized decisions of the Office of Attorney General because it violates the Separation of Powers Clause.[36] "The Texas Separation of Powers provision is violated: (1) when one branch of government assumes or is delegated a power 'more properly attached' to another branch, or (2) when one branch unduly interferes with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers." *Ex parte Perry*, 483 S.W.3d 884, 894–95 (Tex. Crim. App. 2016).

This investigation violates the Separation of Powers Clause of the Texas Constitution because the Attorney General cannot effectively exercise his constitutionally assigned powers if the judicial branch requires him to justify such exercise in the guise of regulating the professional conduct of the attorneys who work for him. As applied to this investigation of the four Complaints, the statutes allowing this investigation are just as unconstitutional as a hypothetical statute purporting to allow the Attorney General to investigate court decisions or votes by legislators that the Attorney General believes violates Rules adopted by the Attorney General. And it is just as unconstitutional as would be a hypothetical criminal investigation of a lawyer-governor's veto, or a hypothetical State Bar investigation of a lawyer-legislator's decision to leave the State and collect pay from the State's coffers during a legislative session, in the guise of merely investigating the lawyer-governor's professional conduct.

The regulation of the professional conduct of attorneys does not extend to the regulation of the decisions of the Attorney General, his Office, or any other agency that happens to be led by a licensed attorney, or any public official who may happen to be a licensed attorney. The

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[34] *See* TEX. GOV'T CODE §402.021. *See also* TEXAS CONST., Art. IV, § 22 ("The Attorney General shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party"); TEX. GOV'T CODE § 402.001(a) ("If the attorney general is absent or unable to act, the attorney general's first office assistant shall perform the duties of the attorney general that are prescribed by law.").

[35] In an as-applied challenge, "the plaintiff argues that a statute, even though generally constitutional, operates unconstitutionally as to him or her because of the plaintiff's particular circumstances." *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 518 n.16 (Tex. 1995).

[36] TEX. GOV'T CODE § 81.075.

Complaints, notably, all concern the decisions of the Attorney General and the conduct of attorneys acting under his authority and supervision. They do not allege violation of the Rules by individual attorneys independent of the Attorney General's exercise of his constitutional and statutory authority.

Additionally, whether the Attorney General should have brought this suit is self-evidently a political question, not an ethical one.[37] "To protect the separation of powers essential to the structure and function of American governments, the political question doctrine teaches that the Judicial Branch will abstain from matters committed by constitution and law to the Executive and Legislative Branches." *Am. K-9 Detection Services, LLC v. Freeman*, 556 S.W.3d 246, 249 (Tex. 2018). The Texas Supreme Court has thus applied the United States Supreme Court's political question jurisprudence in identifying issues beyond the scope of Texas courts' power to adjudicate. Specifically, the Court has examined whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Id.* at 252–53.

This holding should extend to investigations by the judicial branch of the Attorney General's decision to file this lawsuit because that decision is committed by constitution and law to that executive branch office. The Bar does not and cannot regulate politics, and should not allow itself to be weaponized for use in political disputes. It must stay out of this textbook political dispute.

Allowing this investigation to continue would effectively impair the Attorney General's independent constitutional and statutory authority, impermissibly transferring a core Executive responsibility to the Bar, which would thereby sit in judgment of the Attorney General's motives behind each lawsuit—even though those motives are privileged in this investigation and can only be separated out from the inherent political considerations with great difficulty. The separation of powers does not tolerate such a transfer.

V. Conclusion

Attorney General Paxton and First Assistant Webster did not violate the Texas Disciplinary Rules of Professional Conduct. The lawsuit in *Texas v. Pennsylvania* was not frivolous and addressed important yet unresolved issues. Filing the lawsuit was an exercise of the legitimate constitutional and statutory authority of the Attorney General. The Office of Chief Disciplinary Counsel may not investigate such exercises of authority under the guise of investigating allegations of Disciplinary Rules violations. Finally, the political question doctrine also applies and bars this investigation. Whether the lawsuit should have been filed is ultimately not an ethical question, but is inseparable from its political context. The Bar cannot regulate politics, and should not try to do so. For these reasons, the undersigned request that the Complaints be dismissed, and that no further action be taken by the State Bar against Attorney General Paxton and First Assistant Webster related to their involvement in the *Texas v. Pennsylvania* lawsuit, whether with respect to previous or future filed grievances against them.

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[37] And one, it bears repeating, in which at least seventeen (17) other State Attorneys General concurred.

Dated: July 15, 2021.

Respectfully submitted,

/s/ *Grant Dorfman*

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