No. 08-22-00217-CV

IN THE COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

COMMISSION FOR LAWYER DISCIPLINE
Appellant

v.

BRENT EDWARD WEBSTER
Appellee

Appeal from the 368th Judicial District Court of Williamson County, Texas
Honorable John W. Youngblood, Sitting by Assignment

BRIEF OF AMICI CURIAE TEXAS LAWYERS AND LAWYERS DEFENDING AMERICAN DEMOCRACY IN SUPPORT OF APPELLANT COMMISSION FOR LAWYER DISCIPLINE

James C. Harrington
Texas Bar No. 09048500
5304 Hallmark Drive
Austin, TX 78723
jim.harrington.austin@gmail.com

Counsel for Amici Curiae

INTRODUCTION

Interest of *Amici*

Amici curiae are senior members of the Texas Bar, including highly respected leaders in the fields of ethics and professionalism, and a representative of Lawyers Defending American Democracy, a 501(c)(3), non-partisan organization whose purpose is to further the rule of law and help protect American democracy. A full list of *Amici curiae* and their credentials appears at the conclusion of this brief. The professional misconduct in this matter was reported pursuant to Texas Disciplinary Rules of Professional Conduct (TDRPC) Rule 8.03(a).

Amici are interested in this disciplinary proceeding because of the seriousness of the ethics charges against Appellee Brent Edward Webster (Webster) and because certain of the *Amici* were the complainant and co-complainants on one of the ethics complaints that led to the disciplinary petition against Warren Kenneth Paxton, Jr. The District Court of Collin County has denied Attorney General Paxton's plea to the jurisdiction. On February 10, 2023, Attorney General Paxton filed Respondent's Notice of Accelerated Interlocutory Appeal and Automatic Stay with the Fifth Court of Appeals. A copy of *Amici's* State Bar complaint against Attorney General Paxton is attached as the Appendix.

Two former Texas State Bar Presidents previously testified about the harms to the legal profession and to future law students if the ethics rules are not enforced

against executive-branch lawyers. Since the allegations of professional misconduct by Webster and the defenses of separation of powers and sovereign immunity are essentially the same in this disciplinary proceeding as in the proceeding against Mr. Paxton, *Amici* have a strong interest in this proceeding. *Amici* filed an *amicus* brief in the District Court in this case.

Amici support the position of Appellant Commission for Lawyer Discipline (Commission).

Amici also respectfully wish to bring to this Court's attention further arguments against Webster's separation of powers and sovereign immunity defenses which *Amici* believe may be of interest to the Court.

If Webster's position in this appeal were successful, the net result would be to invalidate, as to an entire class of lawyers, the Legislature's longstanding statute that all Texas-licensed attorneys are subject to the jurisdiction of the Commission. The Legislature has explicitly mandated that: "[e]ach attorney admitted to practice in this state … is subject to the disciplinary … jurisdiction of … the Commission for Lawyer Discipline, a committee of the state bar[]", Tex. Gov't Code §81.071. Webster is indisputably an attorney admitted in Texas.

For this Court to accept Webster's separation of powers argument, it would need to hold §81.071 unconstitutional as applied to Webster. Similarly, it would need to hold §81.071 illegal as applied to Webster under the doctrine of sovereign

immunity. *See* T*ooke* v. *City of Mexia*, 197 S.W. 3d 325, 331-32 (Tex. 2006) (sovereign immunity is a "common-law rule" that is ancient and "firmly established [.]")

In the related context of considering a "substantive due course challenge [] to [an] economic regulation statute []", the Texas Supreme Court held that: "statutes are presumed to be constitutional. To overcome that presumption, the proponent of an as-applied challenge … must demonstrate that either (1) the statute's purpose could not arguably be rationally related to a legitimate governmental interest; or (2) when considered as a whole, the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the government interest." *Ashish Patel* v. *Tex. Dep't of Licensing and Regulations*, No. 12-0657, 469 S.W. 3d 69, 87 (Tex. 2015).

Webster's brief does not acknowledge that accepting his separation of powers and sovereign immunity arguments would require this Court to declare Tex. Gov't Code, §81.071 and §81.072(d) unconstitutional [or illegal, respectively,] as applied. Moreover, Webster has offered nothing to overcome the statutory presumption of constitutionality, let alone satisfy the "high burden to show unconstitutionality [.]" *Patel*, 469 S.W. 3d at 87. There would be no legal basis for this Court to declare

§81.071 unconstitutional or illegal as applied to Webster or any other lawyers in the executive branch.[1]

SUMMARY OF THE ARGUMENT

Webster's separation of powers argument is essentially that because the Attorney General has "broad discretion" to conduct the State's civil litigation, to apply the State's law that subjects all Texas-licensed attorneys to the Commission's jurisdiction "unduly interferes" with exercise of that "discretion" by attorneys in his office. But "broad discretion" does not mean unlimited discretion. Indeed, the Texas Supreme Court has determined that, although the Attorney General has "broad discretion," he still must comply with "statutes", *Perry* v. *Del Rio*, 67 S.W. 3d 85, 92 (Tex. 2001), and that "disciplinary rules should be treated like statutes." *O'Quinn* v. *State Bar of Texas*, 763 S.W. 2d 397, 399 (Tex. 1988).

Nor does being subject to disciplinary proceedings for alleged professional misconduct committed while working for the executive branch "unduly interfere" with the Attorney General's powers to represent the State in civil litigation. Webster's argument seems to be that attorneys in his office must be able to engage in professional misconduct in order to "*'effectively* exercise [the Attorney General's]

[1] In *Osborne* v. *Paxton*, 2016 WL 3240211, n. 7 (Tex. App. – Austin 2016), the court noted that Mr. Paxton is "require[ed] to pay dues to maintain his law license [.]" The court thereby implicitly recognized that Mr. Paxton is bound by §81.071, the same statute that subjects all Texas-admitted attorneys to the "disciplinary … jurisdiction of the supreme court and the Commission [.]"

constitutionally assigned powers.'" (emphasis in original) (citations omitted). *See* Appellee's Br. at 32. To the contrary, "unethical conduct" by Texas-licensed attorneys is so important that judges are directed to report it to the Commission for disciplinary enforcement. *Brewer* v. *Lennox Hearth Products, LLC,* 601 S.W. 3d 704, 723, n. 76 (Tex. 2020). The Commission's disciplinary enforcement does not "unduly interfere" with the Attorney General's exercise of his powers.

The unspoken premise of Webster's sovereign immunity argument is that disciplinary proceedings for alleged professional misconduct are a kind of proceeding to which sovereign immunity applies. This premise is invalid. The purposes of the common law sovereign immunity doctrine are to prevent interference with the allocation of government funds and avoid having the judiciary "interfer[e] with the responsibilities of the other branches." *Nettles* v. *Gtech Corporation,* 606 S.W. 3d 726, 737-38 (Tex. 2020). By contrast, the Commission's proceedings discipline Texas-licensed attorneys solely by imposing professional sanctions on them personally for their professional misconduct. The Commission's proceedings do not result in any money judgments against the government nor "interfere" with the executive branch conducting the State's civil litigation. Disciplinary proceedings are outside the purposes of sovereign immunity.

Webster concedes that there are two kinds of legal proceedings against executive-branch attorneys for professional misconduct that are not subject to

sovereign immunity: court-initiated sanctions for misconduct before the courts and criminal charges for misconduct as government attorneys. The Commission's disciplinary proceedings are closely analogous to both. It is understandable that neither is protected by sovereign immunity because both, like the Commission's disciplinary proceedings, are outside sovereign immunity's purposes. Webster's concession of the inapplicability of sovereign immunity to these two kinds of proceedings undermines his claim that sovereign immunity applies to disciplinary proceedings.

Webster's separation of powers and sovereign immunity arguments seek to exempt all Texas-licensed executive-branch attorneys from potential discipline for professional misconduct in disregard of Tex. Gov't Code, §81.071 and §81.072(d). This would cause immense harm to the public's respect for lawyers and to the legal profession. It would, moreover, violate a fundamental American principle: "No person is above the law." Webster's arguments are legally unsupportable and should be rejected.

ARGUMENT

I. Commission's Disciplinary Proceeding Against Webster Does Not "Unduly Interfere" with Attorney General's Core Powers

A. The Attorney General's "broad discretion" is not unlimited; he has no constitutional "discretion" to engage in professional misconduct

Webster's central argument in support of the application of separation of powers is essentially that, because the Attorney General has "broad discretion" to conduct the State's civil litigation, it "unduly interferes" with "his core powers" to subject his office's attorneys to the Commission's disciplinary proceeding. Brief of Appellee (Appellee's Br.) at 20-21. Webster's argument builds from the principle that the Attorney General's discretion includes deciding "whether to institute suit," what "legal arguments" to make and what "facts and evidence" to present. *Id*. From that uncontroversial premise, however, Webster implicitly leaps to the conclusion that the Attorney General is constitutionally authorized to make discretionary decisions that include misrepresentations to courts and other types of professional misconduct without being subject to the Commission's discipline. This follows, according to Webster, because being free to engage in such unethical behavior is a necessary part of performing his core powers of representing the State in civil litigation. This unlimited "discretion" apparently holds for Webster and other attorneys in his office, regardless of how unethical their conduct may be.

The breathtaking argument that "broad discretion" means unlimited discretion is definitionally and legally unsupportable. The Texas Supreme Court gives terms their "common, ordinary meaning [.]" (citation omitted) *See Anadarko Petroleum Corp.* v. *Houston Cas. Co.*, 573 S.W. 3d 187, 192 (Tex. 2019). It is commonly understood that "broad" does not mean infinite or unlimited and that "broad

discretion" does not mean unlimited or absolute discretion. To the contrary, "broad discretion" denotes that while one's discretion is wide, it is not absolute or unlimited; it has boundaries.

The Texas Supreme Court has expressly rejected the notion that the Attorney General's "broad discretion" is unlimited. While "recogniz[ing] that the Attorney General, as the State's chief legal officer, has *broad discretionary power* in carrying out his responsibility to represent the State [,] the *Attorney General can only act within the limits of the Texas Constitution and statutes*, and courts cannot enlarge the Attorney General's powers." *Perry* v. *Del Rio*, 67 S.W. 3d 85, 92 (Tex. 2001) (Emphasis added). Since the Court has held that "*our disciplinary rules should be treated like statutes* [,]" *O'Quinn* v. *State Bar of Texas*, 763 S.W. 2d 397, 399 (Tex. 1988) (emphasis added), the Attorney General likewise "can only act within the limits of the Texas [disciplinary rules.]"

Thus, the Texas Supreme Court has already implicitly rejected the argument that the Attorney General's "broad discretion" as an executive-branch official to represent the State in civil litigation immunizes him, as well as his assistants, from the Commission's power and responsibility to enforce the disciplinary rules against alleged violators. The Court has also effectively undermined Webster's claim of immunity from the Commission by recently recognizing that "referral of [a] matter to the Commission for Lawyer Discipline is one method available to courts to help

ensure ethical lapses are disciplined, when warranted, according to the processes, procedures, and standards of review *applicable to all attorneys*." (Emphasis added) *Brewer* v. *Lennox Hearth Products, LLC*, 601 S.W. 3d 704, 723 n. 76 (Tex. 2020).

More generally, the Court has recognized that while lawyers have "discretion" to decide how to conduct litigation, their exercise of discretion is not unlimited; they must not violate the ethics rules. "Lawyers are under a professional obligation to act with commitment and dedication to their clients' interests, but they are neither duty-bound nor permitted to press for every possible advantage under the imprimatur of zealous advocacy. The discretion to determine the trial tactics and litigation strategies to employ, while considerable, is cabined by ethical standards memorialized in sundry rules and statutes [.]" *Brewer*, 601 S.W. 3d at 707. These decisions by the Court are fatal to Webster's effort to redefine broad discretion into unlimited discretion.

B. Commission's disciplinary proceeding for alleged professional misconduct does not "unduly interfere" with Attorney General's conduct of State's civil litigation

Aside from Webster's contention that the Attorney General's "broad discretion" exempts him from disciplinary proceedings, Appellee's Br. at 33-35**,** his argument that such proceedings "unduly interfere" with the office's conduct of the State's civil litigation is essentially only his conclusory assertion that such proceedings "encroach [] on the Attorney General's core powers." Appellee's Br. at

36. Tellingly, Webster fails to provide any evidence or authority as to how or why it would "unduly interfere" with the ability of lawyers in the Attorney General's office to effectively represent the State in civil proceedings if they are equally subject to disciplinary proceedings for alleged professional misconduct as all other Texas-licensed attorneys. *See* Appellant's Br. at 32-36.

Absent any other explanation, what Webster is saying is that it is essential for the Attorney General and his assistants to be able to engage in professional misconduct to be able to "'*effectively* exercise [the Attorney General's] constitutionally assigned powers.'" *Id*. at 32 (emphasis in original). This is absurd.

Indeed, in *Brewer*, the Texas Supreme Court stated that: "[i]f a judge has knowledge of unethical conduct, *the judge* can, and indeed *must, refer the matter [to the Commission] for disciplinary proceedings."* 601 S.W. 3d at 723, n. 76 (emphasis added). Since adherence to ethical standards is so important, it seems inconceivable that the Commission's pursuit of discipline for alleged misconduct could be regarded as "unduly interfering" with that lawyer's conduct of civil litigation – including those lawyers in the Attorney General's office.

The factors that do enable lawyers to effectively represent clients in civil litigation include knowledge, skills, experience, hard work and compliance with ethical requirements. Making misrepresentations to courts or engaging in any other

professional misconduct is *not* a requirement for effectively representing any client; it is anathema. Webster's separation of powers argument is invalid.

II. The Commission's Disciplinary Proceedings for Professional Misconduct against Executive-branch Attorneys Are Not a Type of Proceeding Subject to Sovereign Immunity

A. Disciplinary proceedings for professional misconduct of government lawyers are outside the purposes of sovereign immunity

The fundamental premise of Webster's sovereign immunity defense is that sovereign immunity applies to the Commission's disciplinary proceedings against government attorneys for professional misconduct. See Appellee's Br. at 22 – 31, This premise is unfounded. Disciplinary proceedings against Texas-licensed attorneys for professional misconduct they have allegedly committed while working for the Texas government are not a type of proceeding that is a "suit" against the "State", *Nettles* v. *Gtech Corporation*, 606 S.W. 3d 726, 731 (Tex. 2020), within the meaning of the sovereign immunity doctrine. See Appellant's Br. at 24-26.

As the Commission notes, "Webster provides no authority in support of his argument that an attorney disciplinary proceeding against any executive-branch attorney is, in fact, a suit *against the sovereign*, of the type meant to be shielded by sovereign immunity, as there is no such authority." (Emphasis in original) Reply Brief of Appellant Commission for Lawyer Discipline (Appellant's Reply Br.) at 18.

Whether sovereign immunity is applicable to a particular kind of legal proceeding or case is to be determined by whether it would serve the purposes of the sovereign immunity doctrine to apply it. *See Nettles*, 606 S.W. 3d at 737.

The principal purpose of sovereign immunity is to protect the government from lawsuits that could require it to pay money judgments unless the government has agreed to be liable for such lawsuits. "[S]overeign immunity was 'designed to guard against the 'unforeseen expenditures' associated with the government's defending lawsuits and paying judgments 'that could hamper government functions' by diverting funds from their allocated purposes.'" *Nettles*, 606 S.W. 3d at 737 (citations omitted); accord, *City of El Paso* v. *Heinrich*, 284 S.W. 3d 366, 376 (Tex. 2009) (citation omitted) ("[T]he modern justification for [sovereign] immunity [is] protecting the public fisc." (citation omitted)). Thus, the sovereign immunity doctrine applies to traditional civil lawsuits seeking to control the government's expenditure of money, such as for torts, e.g., *Lopez* v. *City of El Paso*, 621 S.W. 3d 762 (Tex. App. – El Paso, 2020) or breaches of contract, *Hay Street Bridge Restoration Group* v. *City of San Antonio*, 570 S.W. 3d 697 (Tex. 2019).

Sovereign immunity's secondary purpose is to avoid having the judiciary disrupt other branches from carrying out their functions. "'[T]he immunity doctrine represents the separateness of the branches of government, (citations omitted) by

preventing the judiciary from interfering with the responsibilities of the other branches." (citations omitted). *Nettles*, 606 S.W. 3d at 738.

By contrast, disciplinary proceedings against government lawyers for violating professional ethics are not within the purposes of sovereign immunity. These proceedings cannot result in any money judgment against the government. Disciplinary proceedings are solely against an individual attorney. Moreover, the remedy is never a money judgment, but solely a professional sanction against the individual attorney, including, most seriously, disbarment. Nor, as discussed above in Section I.B., does discipline of government lawyers for professional misconduct interfere with government carrying out its functions, including the conduct of civil litigation.

B. Webster's concessions that sovereign immunity does not apply to two types of (closely analogous) legal proceedings against government attorneys confirm that sovereign immunity does not apply to disciplinary proceedings

1. Concession that sovereign immunity is inapplicable to court-initiated sanctions against government attorneys

Webster concedes that sovereign immunity does not apply to two types of proceedings against government attorneys based on their alleged misconduct while working for the government. First, Webster concedes that "sovereign immunity would not provide protection against sanctions issued by a court to reprimand an [executive-branch] attorney for conduct that occurs before the court." Appellee's Br.

at 30. See *Brewer*, 601 S.W. 3d at 718 (courts' have authority to sanction attorneys' misconduct on their own initiative based on "rules, …statutes [and] inherent powers [.]") *See* Appellant's Reply Br. at 15-17.

In explaining why sovereign immunity does not apply to court-initiated sanctions against government lawyers, Webster makes a striking statement. He says: "[a]fter all, sovereign immunity is an immunity 'from suit and from liability.' (citations omitted) But sanctions meted out by a court against attorneys for conduct before the court are in no sense a 'suit' [,]" and they do not "constitute" the imposition of "liability." Appellee's Br. at 30. *Amici* fully agree.

Stated differently, judicial proceedings imposing sanctions directly on government attorneys for their litigation misconduct are not subject to sovereign immunity for a simple reason - they are not within the purposes of sovereign immunity. The direct imposition by courts of sanctions for professional misconduct by government attorneys neither threatens the public fisc nor interferes with government's carrying out its responsibilities.

In light of the purposes of sovereign immunity, there is no difference between disciplinary proceedings initiated and adjudicated by a court and those initiated by the Commission, an arm of the judiciary, and then adjudicated by a court. In neither case are professional misconduct proceedings within the protections of sovereign immunity.

2. Concession that sovereign immunity is inapplicable to "criminal charges" against government attorneys

Webster also concedes that: "[n]or would sovereign immunity ordinarily provide a defense against criminal charges brought against an executive-branch lawyer." Appellee's Br. at 29**.** *See* Appellant's Reply Br. at 15, 17-18.

In support of this point, Webster states: "[c]riminal charges are pursued by the State to enforce its own laws…. It would make little sense for a sovereign-immunity defense to be available to argue that the State has been improperly made a defendant when it is the State itself who is the prosecutor*." Id.* at 30.

Again, *Amici fully* agree. Indeed, the same principle illustrates the inappropriateness of applying the doctrine of sovereign immunity to the Commission's prosecutions for professional misconduct. The Commission is an arm of the State Bar, implementing ethics rules issued by the Texas Supreme Court, and is itself a creation of the State Legislature.[2] Whenever the Commission files a disciplinary petition against a Texas-licensed attorney for professional misconduct it is, in Webster's words, "the State itself who is the prosecutor."

[2] The Legislature (not the judiciary) established the State Bar in 1939 as the mandatory licensing and disciplinary entity for lawyers. It was the Legislature with approval by the executive department (Governor) that established the Commission for Lawyer Discipline as an independent entity housed within the State Bar. *See* Tex. Gov't Code §81.087. Pursuant to Texas agency sunset requirements, the State Bar and duties of the Commission were last amended by the Legislature in 2017 in Senate Bill 302 that was signed into law by the current governor.

But, more broadly, it is not just the incongruity of treating a criminal prosecution *by* the State as also being *against* the State that makes sovereign immunity inapplicable to criminal prosecutions of government attorneys. It is the fact that such a disciplinary proceeding, by its nature, falls outside the purposes and scope of sovereign immunity. Where a lawyer is sanctioned for crimes committed as a representative of the government, there is neither a threat to the public fisc nor interference with government's functioning. That is because criminal proceedings are, by their very nature, not the kinds of civil suits for liability to which the purposes of sovereign immunity apply.

Significantly, prosecutions for professional misconduct of government attorneys are analogous to criminal prosecutions of such attorneys in other respects as well, besides both being "prosecuted" by the State. Specifically, disciplinary proceedings are for "misconduct," the "violation" of legal prohibitions contained in statutes or legally binding rules. *See State Bar of Texas* v. *Kilpatrick*, 874 S.W. 2d 656, 657-59 (Tex. 1994). *Id.* And, if the disciplinary respondent is found to have committed the alleged violations, the respondent is determined to be "guilty."

In short, Webster concedes that executive-branch attorneys are not protected by sovereign immunity and are subject to sanction for their professional misconduct by courts on the courts' own initiative and in criminal proceedings. Both types of proceedings against Texas-licensed attorneys working for the government are

closely analogous to the Commission's prosecution of disciplinary proceedings against Webster and other executive-branch attorneys. Webster's concession that sovereign immunity does not apply to these legal proceedings eviscerates his sovereign immunity defense. [3]

CONCLUSION

It is indisputable that Texas law subjects every attorney licensed to practice law in Texas "to the disciplinary jurisdiction of the supreme court and the Commission for Lawyer Discipline," §81.071, and that Webster is so licensed.

[3] As the Commission has noted, Appellant's Reply Br. at 7, although all that is pending at this stage is the appeal of the grant of the plea to the jurisdiction, Webster has argued extensively that the Commission's allegations of misrepresentations are unfounded. See Appellee's Br. at 36-43. While *Amici* agree it is premature to rebut Webster's assertions about the merits of the Commission's misrepresentation allegations, *Amici* believe it is important to correct what they believe is a severely misleading and prejudicial argument.

Specifically, Webster argues, in effect, that he should not be held responsible for having made factual representations to a court that may have been unsupported by evidence because, when he and his fellow attorneys had made the representations, they had not yet had time to conduct discovery to develop further evidence to support their allegations. See Appellee's Br. at 41-42.

In fact, Webster and his colleagues, based on the evidence they already had, sought a temporary restraining order to prevent the four defendant States "from voting in the electoral college [.]" *Texas* v. *Pennsylvania*, S.Ct. (12/7/20). Motion for Preliminary Injunction and Temporary Restraining Order or, Alternatively, for Stay and Administrative Stay, at 35. They told the U.S. Supreme Court that "[t]his case presents a pure and straightforward question of law that requires neither finding additional facts nor briefing beyond the threshold issues presented here." Brief in Support of Motion for Leave to File Bill of Complaint (Brief in Support) (12/7/20), at 35.

Further, they stated, "this case is a prime candidate for summary disposition because the material facts … are not in serious dispute." (citation omitted). Brief in Support, at 34, and requested the Court, if Texas's emergency relief were denied, to schedule briefing on the merits by all parties, as well as oral argument, if any, for between December 8–11, 2020. Motion for Expedited Consideration of the Motion for Leave to File a Bill of Complaint and for Expedition of Any Plenary Consideration of the Matter on the Pleading If Plaintiffs' Forthcoming Motion for Interim Relief Is Not Granted (12/7/20), at 13-14. The time schedule that Webster requested would have made it impossible for Texas to have conducted discovery in any case.

Webster's invalid separation of powers and sovereign immunity defenses effectively seek to nullify that law as to Webster - immunizing him against potential discipline for serious alleged professional misconduct.

If Webster's view were sustained, the result would be to exempt a large and publicly influential category of attorneys from the Legislature's statutory mandate that *all* Texas-licensed lawyers are subject to the Commission's jurisdiction. It would be an invitation for executive-branch attorneys to abuse their power by engaging in unethical conduct. It would unjustifiably put Webster above the law - violating one of the most fundamental principles of American law and democracy: "No person is above the law."[4]

Dated: February 15, 2023

Respectfully submitted,

/s/ Randall Chapman
Past Chair, Supreme Court of Texas Grievance Oversight Committee
Past Chair, Texas Bar College
State Bar Number: 04129800

/s/ Beryl P. Crowley
Former Executive Director, Texas Center for Legal Ethics
Former Member, State Bar of Texas Board of Directors
Founding Member and Chair - Professionalism Committee
State Bar of Texas State Bar Number: 16998500

[4] That the logic of Webster's separation of powers and sovereign defenses would not only put himself above the law, but likewise put seven hundred Attorney General's office attorneys and untold numbers of other executive-branch attorneys above the law, dramatizes how untenable his defenses are.

/s/ Judy Doran
Former Texas Assistant Attorney General
Former Staff Attorney, Texas Parks and Wildlife Commission
State Bar Number: 05997700

/s/ David Escamilla
Former Travis County Attorney - Retired
Past President, Texas District and County Attorneys Association
Appointed Member, Judicial Committee on Information Technology
State Bar Number: 06662300

/s/Allan Van Fleet
Former Member, Standing Committee on Texas Disciplinary Rules of Professional Conduct
Former Commissioner, Texas Permanent Judicial Commission on Children, Youth, and Families
Former Director, State Bar of Texas
State Bar Number: 20494700

/s/ Maria Luisa (Lulu) Flores
Past President, Mexican American Bar Association of Texas
Member Travis County Women Lawyers Association
Past Chair, State Bar of Texas Hispanic Issues Section
State Bar Number: 07164750

/s/ James C. Harrington
Retired Founder, Texas Civil Rights Project
Former Adjunct Professor, University of Texas School of Law
Former Adjunct Professor, St. Mary's University Law School State Bar Number: 09040500

/s/ John R. Jones
Founding Chair, Texas Access to Justice Commission
Past Director, Texas Young Lawyers Association
Past Director, El Paso Bar Association
State Bar Number: 10919500

/s/ Mario Lewis
Former General Counsel, International Boundary and Water Commission
Former General Counsel, Legal Services Corporation
Senior Attorney, Army Audit Agency
State Bar Number: 12300200

/s/ Milam Markovic
Professor of Law and Co-Convener of the Program in Law and Social Sciences,
Texas A&M University School of Law
State Bar Number 24109418

/s/ W. Frank Newton
Past President, State Bar of Texas
Former Dean, Texas Tech School of Law
Former Professor, Baylor University School of Law
State Bar Number: 00000072

/s/ Richard Pena
Past President and Director, State Bar of Texas,
American Bar Association, Board of Governors
Past President, Austin Bar Association
State Bar Number: 0000073

/s/ Larry Sauer
Former Chair, State Bar Section on Individual Rights and Responsibilities
State Bar Number: 17674000

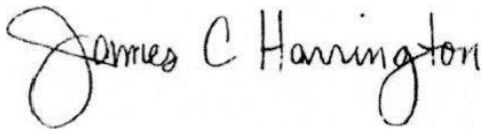
/s/ Robert Sohns
American Bar Association, Section on Litigation Leadership
Board of Directors, Houston Volunteer Lawyers
Former Adjunct Faculty, University of Houston Law School and Texas Southern University School of Law
State Bar Number: 18824500

/s/ Jordan Steiker
University of Texas School of Law, Judge Robert M. Parker Endowed Chair in Law
University of Texas School of Law, Co-Director, Capital Punishment Center
State Bar Number: 19126495

/s/ William O. Whitehurst
Past President, State Bar of Texas
Past President, Texas Trial Lawyers Association
State Bar Number: 00000061

[The organizations referenced above for Texas Bar Member signers have not endorsed this brief. They are listed for purposes of signer identity only.]

Organizational Signer:
/s/ Gershon (Gary) Ratner
Co-Founder, Lawyers Defending American Democracy
Former Associate General Counsel for Litigation, U.S. Department of Housing and Urban Development
On behalf of Lawyers Defending American Democracy



James C. Harrington
Texas Bar No. 09048500
5304 Hallmark Drive
Austin, TX 78723
jim.harrington.austin@gmail.com

Counsel for Amici Curiae

APPENDIX

July 21, 2022 Complaint to State Bar

Seana Willing, Chief Disciplinary
Counsel State Bar of Texas
1414 Colorado, Ste. 200
Austin, TX 78701
swilling@texasbar.com
July 21, 2021

Re: Professional Responsibility Investigation of Warren Kenneth Paxton Jr.

Dear Ms. Willing:

This is a complaint under the Texas Disciplinary Rules of Professional Conduct (TDRPC or Rules) against Texas Attorney General Warren Kenneth Paxton Jr. for having brought a Supreme Court action seeking to overturn the 2020 presidential election results that was frivolous and otherwise violated the Rules, and for having further violated the Rules after that suit was summarily dismissed.

The lawsuit that Mr. Paxton asked the Supreme Court to entertain was against Pennsylvania, Georgia, Michigan and Wisconsin. Former Vice President Joseph Biden had won the popular vote in the November election over then-President Donald Trump in all four of these States, and their electoral votes provided the critical margin of victory. Mr. Paxton's lawsuit urged the Court to enjoin these four States from using the results of their presidential elections to appoint electors and, instead, to have the States' legislatures appoint new electors to replace any electors the States had already appointed or to appoint no electors at all.

All four States' legislatures were controlled by members of the Republican Party. If given the power to appoint their own electors, the State legislatures predictably would have appointed electors who would cast their ballots for candidate Trump in the Electoral College. Alternatively, if the legislatures had appointed no electors, Mr. Trump would have won in the Electoral College, because there would have been no electors voting for Mr. Biden from those four states. In either case, granting the relief Mr. Paxton sought would have overturned the results of the presidential election, converting the loser, Mr. Trump, into the winner.

Mr. Paxton was a strong supporter of Mr. Trump. Although the lawsuit was initially prepared by lawyers supporting the Trump Campaign, https://www.nytimes.com/2021/01/31/us/trump-election-lie.html, Texas's First Assistant Attorney General testified to the Texas State Senate

Committee on Finance that Mr. Paxton and Executive staff in the Attorney General's Office worked on the case. See Texas Senate Audio/Video Archives February 2021, 2/10/21, Senate Committee on Finance (Part I), at 2 hr. 56 min. – 2 hr. 58 min. The lawsuit was filed as part of President Trump's continuing attempt to overturn his election loss. It is noteworthy that Louisiana's Attorney General "declined" to file the action, and Mr. Paxton's top Supreme Court litigator – Texas's Solicitor General – would not sign the complaint. https://www.nytimes.com/2021/01/31/us/trump-election-lie.html. Mr. Paxton was the lawsuit's lead counsel of record.

Mr. Paxton's motion for leave to file the suit was filed on December 7, 2020. This was more than a month after the November 3 election and only seven days before electors in the Electoral College were required to cast their votes. The Supreme Court summarily dismissed the Texas motion for lack of standing just four days later, on December 11. Dismissed as moot were also motions by President Trump and seventeen other States to intervene in the case in support of the complaint Mr. Paxton had filed.

Texas's Rules provide that a lawyer is "an officer of the legal system and a public citizen having special responsibility for the quality of justice." TDRPC Preamble § 1. "Lawyers, as guardians of the law, play a vital role in the preservation of society" and have an obligation "to maintain the highest standards of ethical conduct." Id. Moreover, the Rules prohibit pleading to a court frivolous claims of law or fact and making false, dishonest, deceptive or misleading statements. Mr. Paxton's Supreme Court Complaint violated these prohibitions.

After the Court dismissed his suit, Mr. Paxton continued to commit ethical violations in support of Mr. Trump's campaign to overturn the election results. His misconduct included violating his attorney's oath to support the Constitution by urging the crowd standing behind the White House on January 6 to march on the Capitol to pressure Congress to change what it was meeting to do, i.e., carrying out its constitutional and statutory duty to properly count Electoral College votes and declare the rightful winner.

We, as members of the bar, bring this matter to the attention of the Office of the Chief Disciplinary Counsel, State Bar of Texas, out of deep concern about violations of the Texas rules of ethics by the State's highest-ranking legal officer. Such conduct cannot be accepted from any person licensed to practice law in the United States, much less a sitting State Attorney General.

Mr. Paxton's post-dismissal, unethical conduct was serious in its own right. Demonstrating a pattern of ethical misconduct, it made his prior conduct in the Supreme Court lawsuit even more egregious.

Given the gravity of Mr. Paxton's violations, we believe that he should be suspended or permanently disbarred from the practice of law. We urge the Chief Disciplinary Counsel to investigate promptly the allegations in this disciplinary complaint – along with the allegations against Mr. Paxton in multiple other complaints - and, if validated, initiate the necessary proceedings to suspend or disbar him.

Complaining Parties

Signers of this complaint are highly respected leaders in the field of ethics and professionalism. We include four former Presidents of the State Bar of Texas, members of the State Bar Board of Directors, scholars in professionalism and in the training of Texas lawyers, former grievance panel members, a former member of the Standing Committee on the Texas Disciplinary Rules of Professional Conduct, and the former chair of the Supreme Court Grievance Oversight Committee. This complaint is filed pursuant to TDRPC 8.03(a) because we have "knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects[.]"

We are joined as a co-signer by Lawyers Defending American Democracy ("LDAD"). LDAD is a non-profit, non-partisan organization whose purpose is to foster adherence to the rule of law and help protect American democracy.

I. Mr. Paxton's Conduct

A. *Texas* v. Pennsylvania, Georgia, Michigan and Wisconsin – U.S. Supreme Court – Dec. 7-11, 2020

1. Standing to Sue

The gravamen of Mr. Paxton's claim was that the four State defendants, by extensively violating their own ballot security laws, had violated the Constitution's Electors Clause, Art. II, Sect. 1, Cl. 2, and thereby injured plaintiff Texas. Bill of Complaint (Comp.) p. 3, Motion for Preliminary Injunction and Temporary Restraining Order or, Alternatively, for Stay and Administrative Stay (Motion for P.I.) pp. 3-5, 26-29.

Mr. Paxton alleged that the State of Texas had standing to sue the four defendants because they had injured two different Texas interests: the interest of the State itself "in who is elected as *Vice President* and thus … can [break Senate ties]", (emphasis in original), Brief in Support of Motion to File Bill of Complaint (Brief), p. 13; and its interest as *parens patriae*, to protect the interest of its appointed 2020 presidential electors in being able to vote in the Electoral College. Brief, pp. 14-15.

Mr. Paxton, however, cited no precedents that support his assertion that a State has standing to challenge how another State administers its own election law, because there are none. Moreover, there are overwhelming constitutional and legal reasons why the claim of such standing was indefensible. Even conservative legal scholars agreed that Texas had no standing.

The Supreme Court summarily and categorically rejected Mr. Paxton's lawsuit for lack of standing to sue:

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. (Emphasis added) ORDER IN PENDING CASE, 155. ORIG., TEXAS V. PENNSYLVANIA, ET AL., FRIDAY, DECEMBER 11, 2020

There are at least three critical reasons why Mr. Paxton's assertion of standing had no basis in law and, indeed, was fundamentally inconsistent with the American constitutional and legal scheme for presidential elections.

First, the Constitution's Electors Clause itself, Art. II, Sect. 1, Cl. 2, on which Mr. Paxton heavily relied, makes clear that one State has no interest in another State's method of choosing electors. The Clause provides:

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 [.] (Emphasis added).

Thus, under the express terms of the Electors Clause itself, each State has the unilateral right, acting through its legislature, to determine the rules under which it will select its own presidential electors. Under the Electors Clause, there is no authority for any State to be involved with, let alone to interfere with, how another State selects its electors. To allow Texas to

challenge the methods by which Pennsylvania and the other States selected their electors would contradict the very right and duty conferred by the Electors Clause on each State to decide by itself how to appoint its own electors.

Second, under the Constitution's fundamental structural principle of federalism, including the Tenth Amendment, as the Complaint acknowledges, Comp., p. 10, every State is "sovereign" unto itself. That is, every State alone has the constitutional authority, power and responsibility to make and execute all laws for the people within the State, subject to the supremacy of the Constitution and laws of the United States. To allow any State the authority to challenge and interfere with another State's selection of its own presidential electors would flout the latter State's sovereignty. As law professor and election law expert Edward B. Foley of Ohio State University noted, granting Texas standing to challenge other States' selection of electors "would be an unprecedented intrusion into state sovereignty."

Finally, to allow Texas standing would cause chaos in the entire constitutional and federal statutory process for electors to meet and certify the voters' choice, count the electoral ballots, and inaugurate a new President. As Harvard Law School Professor Laurence Tribe stated: "This is truly ridiculous…. If the 50 sister States could sue one another to overturn each other's election results, there'd be a mind-blowing cascade of … intra-family Electoral College mega-suits. Endless!"

Mr. Paxton's specious arguments would result in election chaos. The time required for interstate litigation would predictably make it impossible in future presidential elections to satisfy the statutorily mandated timeframes for the meeting of electors, 3 U.S.C. Sect. 7, and congressional counting of electoral votes and declaration of a winner, 3 U.S.C. Sect. 15. Moreover, his theory of standing would put at extreme risk compliance with the constitutionally mandated beginning of the newly elected President's term on January 20. Twentieth Amend, Sect. 1. As the Attorney General of Texas, Mr. Paxton knows better.

2. Complaint's Assertion that Biden's Probability of Winning Election Was Less Than 1 in a Quadrillion

The Paxton Complaint contends that the probability of former Vice President Biden winning the election in each of the four Defendant States was so low that it "raise[d] serious questions as to the integrity of this election." Comp., p. 6.

a. Pre- versus Post-3 a.m. Claim

i. Misrepresentation of Expert's Conclusion

Specifically, the Complaint asserted that: "[t]he probability of former Vice President Biden's winning the popular vote in [each of] the four Defendant States – Georgia, Michigan, Pennsylvania, and Wisconsin - … given President Trump's early lead in those States as of 3 a.m. on November 4, 2020, is less than one in a quadrillion, or 1 in 1,000,000,000,000,000." Comp., p. 6.

This stunning, unfounded assertion severely misrepresented the actual finding that Mr. Paxton's expert had made. While Mr. Paxton claimed that the one in a quadrillion ratio described the probability that Biden would "win [] the popular vote", the (unsworn) declaration of the expert on whom Mr. Paxton relied – Dr. Charles J. Cicchetti - said no such thing. Rather, Dr. Cicchetti's "one in a quadrillion" conclusion applied to a much narrower and politically less impactful matter: the probability that Mr. Biden would have won if the votes counted after 3 a.m. had been "randomly drawn from the same population" as the votes counted before 3 a.m. Declaration of Charles J. Cicchetti (Cicchetti Decl.), Dec. 6, 2020, p. 5a.

In Georgia, about 95% of the ballots had been counted before 3 a.m. Of those, 51.09% were for Trump and 48.91% for Biden. The final reported votes were reversed: 50.14% for Biden and 49.86% for Trump. For Biden to have reversed Trump's early lead and won Georgia by "less than 14,000 votes," as the final tally showed, Dr. Cicchetti declared that Biden would have had to have won 71.6% of the votes counted after 3 a.m. Cicchetti Decl., p. 4a. Dr. Cicchetti's actual conclusion was that: "[*t]here is a one in many more than quadrillions of chances that these two tabulation periods [pre- and post-3 a.m.] are randomly drawn from the same population."* (Emphasis added) Cicchetti Decl., p. 5a; accord, p. 4a.

Thus, Dr. Cicchetti's "one in a quadrillion" conclusion did <u>not</u> refer to the likelihood of Biden's winning the election, but rather to the totally separate question of the likelihood that the pre- and post-3 a.m. votes came from the same voter population. Dr. Cicchetti's basic conclusion here was essentially just confirming common sense: there is virtually no chance that the proportion of votes for Biden would have vastly increased from 49% pre-3 a.m. to 72% post-3 a.m. if the later votes had come randomly from the same population of voters as the earlier votes.

But Mr. Paxton was not satisfied with this pedestrian, non-politically advantageous conclusion. Instead, he misrepresented what the expert had

actually concluded by falsely and deceptively asserting that the "one in a quadrillion" probability applied to Biden's likelihood of winning the popular vote.

ii. Expert's Key Factual Assumption Unfounded

Further, Dr. Cicchetti's pre/post 3 a.m. conclusion itself had no basis in fact because the assumption it rested on - that the "two tabulation periods were similar and randomly drawn from the same population [of voters]", Decl., p. 2a - was factually unfounded. There were no facts in the record to support it. There is absolutely no basis for making probability projections based on vote counts at one time of the day as compared to another time of the day unless there is evidence that the composition of the groups of voters at the two different times is substantially similar. If a jar is filled with red and blue marbles, a handful of marbles from the top is no predictor of the number of red and blue marbles, respectively, in other portions of the jar unless all marbles in the jar had been distributed in the same proportions.

For weeks before the election, information was widely published that Trump supporters were likely to vote heavily in person and Biden supporters heavily by mail-in ballots. Since in-person ballots are typically counted earlier in the process and mail-in ballots later, the media and the public widely understood that the early and later results would not be the same. That is exactly what happened. https://www.nytimes.com/2021/01/31/us/trump-election-lie.html

Dr. Cicchetti even admitted that he was "aware of anecdotal statements from election night that some Democratic strongholds were yet to be tabulated," Decl., p. 5a. Strikingly, Dr. Cicchetti conceded that if "the yet-to-be counted ballots were likely absentee mail-in ballots []" or that post-3 a.m. votes were "from Democratic strongholds … [e]ither could cause the later ballots to be non-randomly different from the nearly 95% of ballots counted by 3 a.m. EST [.]" Decl., p. 5a.

That is, in the very Cicchetti Declaration that Mr. Paxton submitted to the Supreme Court as the basis for plaintiff's probability claims, Mr. Paxton's expert conceded, in effect, that his assumptions were groundless. If the assumption that the pre- and post-3 a.m. ballots came from the same population was not correct, the basis for his entire pre/post 3 a.m. probability analysis was invalid. Because the critical assumption underlying Dr. Cicchetti's whole pre/post 3 a.m. probability analysis was unfounded, Mr. Paxton knew he had no basis in fact for arguing this probability analysis to the Supreme Court.

b. Hillary Clinton 2016 – Joseph Biden 2020 Election Comparison

Mr. Paxton also asserted that a comparison of votes in the 2016 Clinton-Trump election with votes in the Biden-Trump 2020 election showed that there was "[t]he same less than one in a quadrillion statistical improbability of Mr. Biden winning the popular vote in [each of] the four Defendant States [.]" Comp., p. 7. Dr. Cicchetti explained an assumption on which he based his Clinton-Biden conclusion as to Georgia: "the increase of Biden over Clinton is statistically incredible if the outcomes were based on similar populations of voters supporting the two Democratic candidates." Decl., p. 4a

In addition to assuming that the Democratic candidate voter populations were similar in the 2016 and 2020 Georgia presidential elections, Dr. Cicchetti made another critical assumption: "other things being the same" between the Clinton-Trump 2016 election and the Biden-Trump 2020 election, Decl., p. 3a, That is, Dr. Cicchetti's entire conclusion that Biden's increase over Clinton in Georgia was "statistically incredible" was premised on his assumption that all factors affecting voters' decisions were the same in the two different elections.

The premise on which Dr. Cicchetti's Clinton-Biden probability estimate was based – "all things being equal" between the two elections – was preposterous. The 2016 and 2020 presidential elections involved two fundamentally different Democratic candidates, Hillary Clinton and Joe Biden, with very different personalities and backgrounds, a different political environment, different policy issues, and different voter demographics. These elections were held four tumultuous years apart, further demonstrating that there was nearly nothing "equal" about the two presidential races.

Mr. Paxton failed to provide any evidence to support this seminal assumption underlying plaintiff's Clinton-Biden probability estimate. Moreover, the assumption was categorically false. As Harvard professor and election data expert Stephen Ansolabehere stated, the Biden-Clinton probability estimate is "comical." "The analysis omitted a number of obvious, relevant facts, he said: '[that] the context of the elections are different, that a Covid pandemic is going on, that people reach different conclusions about the administration, that Biden and Clinton are different candidates.'" Mr. Paxton's Clinton-Biden probability claim was unfounded and unsupportable.

3. Relief Sought by Mr. Paxton

a. Preliminary injunction to prevent four States' electors from voting in electoral college and enable legislatures to replace them with electors for losing presidential candidate

Beyond Mr. Paxton's unfounded claims that Texas had standing to sue and that Mr. Biden had a "one in a quadrillion" chance of winning, Mr. Paxton's most egregiously unfounded claim was for relief. Mr. Paxton sought one of the most draconian forms of relief imaginable in our democracy: the disenfranchisement of sovereign States and their millions of qualified voters, preventing them from having their votes counted in the Electoral College and enabling State legislatures controlled by the losing candidate's party to select their own replacement electors. Comp., pp. 39-40; Motion for P.I., pp. 34-35; Reply in Support of Motion for Preliminary Injunction and Temporary Restraining Order, Or, Alternatively, for Stay and Administrative Stay (Reply for P.I.), p. 12.

The purpose of Mr. Paxton's requested relief was nothing less than overturning our presidential electoral process. He was seeking to replace the winning candidate - selected through the votes of 159 million American citizens - with the losing candidate, notwithstanding that virtually all States, whether led by Republicans or Democrats, had certified the validity of their results.

Mr. Paxton nominally distinguished between seeking a preliminary injunction to prevent defendant States from voting in the Electoral College and a summary decision on the merits vacating defendants' "elector certifications" and remanding to the four State legislatures the authority to appoint their own electors:

This court should first --- temporarily restrain the Defendant States from voting in the electoral college … and then issue a preliminary injunction or a stay against their doing so until the conclusion of this case on the merits. Alternatively, the Court should reach the merits, vacate the Defendant States' elector certifications … and remand to the Defendant States' legislatures pursuant to 3 U.S.C. Sect. 2 to appoint electors. Motion for P.I., p. 35; accord, Reply for P.I., p. 12.

More specifically, Mr. Paxton asserted that: "[t]he issues presented here are neither fact-bound nor complex " and that "[t]his case presents a pure and straightforward question of law that requires neither finding additional facts nor briefing beyond the threshold issues presented here." Brief, pp. 34-35. Mr. Paxton asserted that the case was a "prime candidate for summary disposition," *Id*., p. 34. Indeed, the schedule he urged the Court to adopt

for deciding the "merits", if it "neither grants the requested interim relief nor summarily resolved this matter [,]" provided for oral argument only four days after filing and no discovery or trial. Motion for Expedited Consideration of the Motion for Leave to File a Bill of Complaint and for Expedition of Any Plenary Consideration of the Matter on the Pleadings If Plaintiff's Forthcoming Motion for Interim Relief Is Not Granted, pp. 12-13.

But, contrary to Mr. Paxton's assertion that the case involved a "pure…question of law," State defendants disputed various of plaintiff's allegations of material fact. For example, Michigan disputed plaintiff's "claims [Comp., pp, 27-28] that large numbers of unaccounted for ballots showed up at the TCF Center, and that Republican challengers were wrongly denied access or had challenges improperly rejected[.]" State of Michigan's Brief in Opposition to Motions for Leave to File Bill of Complaint and for Injunctive Relief (Michigan Brief), p. 16.

Georgia contested the Complaint's claim, p. 23, that rejection of absentee ballots in the State was "seventeen times lower" in 2020 than in 2016 by noting that "rejection rates for *signatures* of absentee ballots remained largely the same [,]" (emphasis in original) and that the lower overall rejection rate was largely due to elimination by the State legislature of certain absentee voter restrictions. Georgia's Opposition to Texas's Motion for Leave to File Bill of Complaint and Its Motion for Preliminary Relief (Georgia's Opposition), p. 4.

Accordingly, all Mr. Paxton's requests for mandatory relief were procedurally in the nature of motions for preliminary injunction and will be so treated here. "'The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must have a likelihood of success on the merits rather than actual success." *Winter* v. *NRDC*, 555 U.S. 7, 32 (2008), (quoting *Amoco Production Co*. v. *Gambell*, 480 U.S. 531, 546, n. 12 (1987).

b. Applicable legal standards for judging plaintiff's requested relief

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter,* 555 U.S. at 24. "'In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id*., (quoting *Weinberger* v. *Romero-Barcello,* 456 U.S. 305, 312 (1982). Where one State is seeking an injunction against another State, the plaintiff State has a "much greater" burden than "in an ordinary suit between private parties… [T]he threatened invasion of rights must be of serious magnitude and it must be established

by clear and convincing evidence." *New York* v. *New Jersey*, 256 U.S. 296, 309 (1921)

The Supreme Court has described the four traditional factors applicable to preliminary injunctions as follows: "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that the injunction is in the public interest." *Winter*, 555 U.S. at 20.

While likelihood of success on the merits and irreparable injury are usually the "most critical" factors, *Nken* v. *Holder*, 556 U.S. 418, 434 (2009), where a proposed preliminary injunction is against a government defendant and would cause serious harm to the public interest, the relative importance of the factors is reversed – the balance of the equities between the parties and the public interest are given greater weight. "[E]ven if plaintiffs have shown irreparable injury from the Navy's training exercises, any such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors. A proper consideration of these factors alone requires denial of the requested injunctive relief. For the same reason, we do not address the lower courts' holding that plaintiffs have also established a likelihood of success on the merits." *Winter*, 555 U.S. at 23-24.

Indeed, where the balance of equities strongly favored a government defendant and the public interest was seriously threatened by a preliminary injunction, the Court held it was an "abuse of discretion" for the District Court to have issued an injunction, *id.,* at 33, (even assuming that plaintiff had shown irreparable injury and a likelihood of success. *Id*., at 22.)

c. Texas's likelihood of success on merits

While Mr. Paxton's complaint alleged three federal claims – the Constitution's Electors Clause, Art. II, Sect., 1, Cl. 2, the 1th Amendment Equal Protection Clause, and the 14th Amendment Due Process Clause, Comp. pp. 3, 36-39, Mr. Paxton's motion for preliminary injunction relied solely on the Electors Clause claim as the basis for arguing that Texas had a likelihood of success on the merits. Motion for P.I., pp. 3-5, 26-29.

Texas's claim analytically rested on four arguments, all of which Mr. Paxton was required to establish to state a valid claim for relief: 1) each State defendant had extensively violated its own State's ballot integrity laws, Comp., pp. 1-3, 13-36, Brief, pp. 3-29; 2) the alleged State law violations contravened the Electors Clause, Motion for P.I., p. 26; 3) the violations of the Electors Clause applied to so many votes that they made it impossible to

tell who had legitimately won the election, Comp., pp. 2, 8, 14, 20, 24; and 4) 3 U.S.C. Sect. 2 authorized each defendant State's legislature "to appoint a new set of presidential electors … or to appoint no presidential electors at all." Comp., p. 40, paragraph E.

Texas did not establish a likelihood of success as to any of these components of its claim for relief, let alone all of them. Most egregiously, its claim that 3 U.S.C. Sect. 2 authorized State legislatures to replace electors chosen in a completed election because of a post-election legal dispute is completely unfounded.

i. Alleged violations of State laws

State defendants vigorously disputed Texas's allegations that their executive and judicial officials' actions had violated State laws. Compare, e.g., Comp., pp. 30-32 with Response to Motion for Leave to File Bill of Complaint and to Motion for Preliminary Injunction and Temporary Restraining Order [Wisconsin], (Wisconsin's Response), pp. 29-30 (drop boxes); Comp., pp. 26-27 with Michigan Brief, pp. 13-15 (signature verification). Moreover, even before Mr. Paxton filed this suit, many of the same claims that Texas made here had already been rejected by State and federal courts. See Opposition to Motion for Leave to File Bill of Complaint and Motion for Preliminary Injunction, Temporary Restraining Order, or Stay [Pennsylvania] (Pennsylvania's Opposition) pp. 3-5; Georgia's Opposition, pp. 6-7; and Michigan Brief, pp. 5-7. 10-12.

Further, it is each defendant State's election officials, its attorneys, and its State court judges – not the lawyers supporting the Trump Campaign and the Texas Attorney General's Office – who are the experts in understanding how their own election systems operate and interpreting their own State's election laws. Each of the above factors undercuts Mr. Paxton's claim that Texas had a likelihood of success in showing that defendants' actions extensively violated State election law.

ii. Alleged violations of Electors Clause

Mr. Paxton's argument under the Electors Clause is essentially that the Clause gives State legislatures plenary authority to determine their own State's rules for presidential elections and, because State and local election officials and State court judges in defendant States had allegedly engaged in systemic violations of their States's ballot integrity laws, they violated the Electors Clause. See Comp., pp. 3, 10; Brief, pp. 24-29.

Because Texas's Electors Clause claim depended on having first shown that defendants' conduct violated State election law, it had no more likelihood of success on the merits than its arguments that defendants had extensively violated State law. As indicated above, Texas did not make such a showing.

As to the Electors Clause claim itself, Mr. Paxton cited no Supreme Court or other judicial precedent holding that systemic violation of State election law constitutes a violation of the federal Constitution's Electors Clause. Instead, he relied on Chief Justice Rehnquist's concurrence in *Bush* v. *Gore*, 531 U.S. 98, 113 (2000): "A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question."

Thus, even if the Court were to have adopted the reasoning in Chief Justice Rehnquist's concurrence, for Mr. Paxton to have shown an Electors Clause violation, it would have been necessary to show not only that each State had violated its own election laws, but also that the violations constituted a "significant departure from the legislative scheme for appointing Presidential electors [.]"

Moreover, though not acknowledged by Mr. Paxton, under the concurrence, Texas's burden of showing that defendants had violated the Electors Clause would have been much heavier. The Court would have been required to give deference to the very State election officials and judges whose conduct plaintiff was challenging as illegal. The Rehnquist concurrence stated that: "[w]ith respect to a Presidential election, *the court must be* both mindful of the legislature's role under Article II and *deferential to those bodies expressly empowered by the legislature to carry out its constitutional mandate."* (Emphasis added) *Id*., at 114.

The same need for deference to State election officials cited by Chief Justice Rehnquist is applicable here. State defendants pointed out that their election officials had authority delegated to them by their respective legislatures to interpret and apply State election laws and that their official determinations under those laws were entitled to judicial deference. See Wisconsin's Response, pp. 23-26; Georgia's Opposition, pp. 1, 3; and Michigan's Brief, p. 30. The very deference to State election officials' actions that Chief Justice Rehnquist said the Electors Clause required undermined Mr. Paxton's claim that Texas had a likelihood of success on its essential Electors Clause claim.

iii. Alleged impossibility of "knowing who legitimately won the 2020 election"

Mr. Paxton contended that the States' alleged violations of their ballot integrity laws unconstitutionally and "proximately caused the appointment of

presidential electors for former Vice President Biden []", Comp., p. 14, and "preclude knowing who legitimately won the 2020 election [.]" Motion for Leave to File Bill of Complaint (Motion to File Complaint), p. 2.The reason Mr. Paxton urged the Court to issue an injunction preventing defendants' electors from voting in the electoral college and to enable legislatures to replace defendant States' electors was "[t]o safeguard public legitimacy… and restore public trust in the presidential elections[.]" Comp., p. 2.

Mr. Paxton's contention that defendants' violations of their respective States' ballot integrity laws were so extensive that they precluded knowing whether Mr. Biden legitimately won depended on plaintiff's having shown a likelihood of success in its predicate arguments: that the defendants had extensively violated their own laws and, if the Court adopted the Rehnquist concurrence, that these violations contravened the Electors Clause under the concurrence's standards. As described above, Texas did not show a likelihood of success on these foundational arguments. Accordingly, it did not show a likelihood of success on its claim that it was not possible to know whether Mr. Biden had legitimately won.

iv. Alleged authority of State legislatures under 3 U.S.C. Sect. 2

The key relief Texas sought was to enjoin State defendants' appointed electors from voting in the Electoral College, Comp., p. 40, paragraph F, and to direct each defendant's legislature "to appoint a new set of presidential electors … or to appoint no presidential electors at all." Comp. p. 40, paragraph E. Mr. Paxton alleged that defendant State legislatures had the statutory authority to appoint replacement electors "pursuant to 3 U.S.C. Sect. 2." *Id*., paragraph E.

Mr. Paxton's sole arguments for his far-reaching claim as to the scope of Section 2 were a partial quotation from Section 2 and a conclusory assertion that plaintiff's characterization of the broad reach of Section 2 is what Congress intended. Mr. Paxton stated: "With all unlawful votes discounted, the election result is an open question this Court must answer. Under 3 U.S.C. Sect. 2, the State legislatures may answer the question [.]" Brief, p. 25. "*When a State fails to conduct a valid election – for any reason* – 'the electors may be appointed on a subsequent day in such manner as the *legislature of such State may direct*.' 3 U.S.C. Sect. 2. (Emphasis added)" Brief, p. 5.

Mr. Paxton ignored Section 2's language, purpose and legislative history. In fact, Section 2 provides in its entirety: "Whenever any State has held an election for the purpose of choosing electors, and has failed to make a

choice on the day prescribed by law, the electors may be appointed on a subsequent day in such manner as the legislature of such State may direct." (What was codified in 1948 as 3 U.S.C. Sect 2, 62 Stat. 672, was originally enacted as part of the Act of January 23, 1845, Chapt. 1, 5 Stat. 721 (1845), "An Act to establish a uniform time for holding elections for electors of President and Vice President.")

Contrary to Mr. Paxton's assertion, Section 2 says nothing whatsoever about its being applicable "when a State fails to conduct a valid election," let alone when it "fails to conduct a valid election - for any reason." The critical statutory language that does define the scope of the legislature's appointment authority under Section 2 is what comes before the clause plaintiff quoted. Section 2 applies only when a State "has failed to make a choice on the day prescribed by law [.]"

Here, not only had each State defendant "held an election… on the day prescribed by law", but, in the words of Section 2, it had made a "choice" between the two candidates on that day. Each defendant State had completed its election process, counted, and sometimes recounted the votes, and determined who had won. Moreover, although the losing candidate's campaign had brought multiple, post-election lawsuits that attacked the voters' "choice," State and federal courts had rejected those suits, Republican and Democratic State leaders had defended the legitimacy of their States's elections, and Georgia, Michigan and Pennsylvania had certified their State' election results. Because each defendant State had made a "choice" between the two candidates on election day, Section 2 was plainly inapplicable.

The notion that a post-election dispute over the validity of the "choice" that was made on election day means that no "choice" was made on election day defies fact and logic and is indefensible. Mr. Paxton reads Section 2 as if Congress had written that it applied not only whenever a State has "failed to make a choice [of electors] on [election day]," but also whenever "the choice made by a State on election day may later be determined not to have been consistent with State law."

But Section 2 says no such thing. Section 2's language on its face shows that it only applies when the voters did not complete choosing between the candidates on "the day prescribed by law.". It says nothing about authorizing State legislatures to appoint electors when there is a post-election dispute about who won. By omitting the key language from his quotation of Section 2 and mischaracterizing what the statutory language actually says, Mr. Paxton was deceptive and dishonest with the Court.

The legislative history reveals specifically what Congress intended by a "fail[ure] to make a choice on the day prescribed by law [.]" What has been codified as 3 U.S.C. Sect. 2 was initially inserted as a proviso to a bill to require a uniform nationwide date for presidential elections. Cong. Globe, 28th Cong., 2d Sess., Dec. 11, 1844, p. 21, Cong Record ID: CG-1844-1211. It was added to address the problem raised by Representative John Parker Hale that in those States where "a majority of all the votes cast were required to elect the electors of President and Vice President of the United States… it might so happen that no choice might be made on election day, because no candidate might receive a majority of the votes." *Id.,* Dec. 9, 1844, p. 14, Cong. Record ID: CG – 1844-1209. Thus, Section 2's purpose was narrow: to enable any State that had a majority-win legal requirement to determine other means for selecting electors if no candidate had won a majority of the votes cast on election day.

The Supreme Court has reached this very conclusion in determining Congress's purpose in enacting the parallel statutory provision applying to "failure to elect [Congressmen] at the time prescribed by law," 2 U.S.C. Sect. 8. Based on the legislative history of 2 U.S.C. Sect. 8, the Court found that Congress's purpose there was only to allow States to hold a post-election run-off where State law required a majority vote to be elected and "no candidate receives a majority vote on federal election day [.]" *Foster* v. *Love*, 522 U.S. 67, 71 n.3 (1997).

Given the absence of any precedent interpreting 3 U.S.C. Sect. 2, the parallel applicability of 2 U.S.C. Sect. 8 to congressional elections and the virtually identical statutory purpose shown by their respective legislative histories, *Foster* confirms that Mr. Paxton's claim that 3 U.S.C. Sect. 2 applies "whenever a State fails to conduct a valid election – for any reason" was wholly unfounded.

Mr. Paxton never suggested that any of the four defendant States required a presidential candidate to win a majority to be elected nor that failure to meet such a requirement was its basis for invoking the legislatures' authority to appoint electors under Section 2. 3 U.S.C. Sect. 2 has no applicability whatsoever to this case. Mr. Paxton's position that 3 U.S.C. Sect. 2 authorizes State legislatures to replace State-appointed electors even though the elections were completed on election day had no basis in law.

d. Texas's likelihood of irreparable injury

Texas's claim of irreparable injury was essentially that Pennsylvania, Georgia, Michigan and Wisconsin had violated the interest of Texas and its citizens in having the 2020 presidential election conducted constitutionally.

Motion for P.I., p. 32. Specifically, Texas stated that it had an "interest in ensuring that the selection of a President – any President – is legitimate [,]" Comp., p. 1, and that defendants' alleged violations of State ballot security protection laws and the Electors Clause "preclude knowing who legitimately won the 2020 election." Motion to File Complaint, p. 2. It was purportedly to protect this interest that Mr. Paxton asked the Court to preliminarily enjoin the defendant States from having their electors vote in the Electoral College and remand to the defendants' legislatures, authorizing them to appoint new electors to replace the electors appointed pursuant to the certified election results or to appoint no electors. Comp., p. 40, paragraph E.

Thus, Mr. Paxton's claim that Texas would be "likely to suffer irreparable harm in the absence of preliminary relief," *Winter,* 555 U.S. at 20, depended on the premises that: 1) the election had extensively violated State election laws; 2) those State law violations violated the Electors Clause; and 3) on the facts of this case, 3 U.S.C. Sect. 2 gave State legislatures the authority to appoint replacement electors.

As indicated above, Mr. Paxton did not demonstrate a likelihood that each State defendant had engaged in such extensive violations of State election laws that it was impossible to know who legitimately had won. Nor did he show that State defendants' conduct violated the Electors Clause, especially in light of the Rehnquist concurrence's requirement that the Court give deference to the actions of State election officials. And Mr. Paxton utterly failed to show that 3 U.S.C. Sect. 2 had any applicability where, as here, defendant States had completed their elections on election day and had already chosen the winner. Mr. Paxton's claim that 3 U.S.C. Sect. 2 applied to this situation was contrary to Section 2's language, purpose and legislative history. Mr. Paxton's claim under 3 U.S.C. Sect. 2 was without any basis in law or fact.

In short, Texas failed to show a likelihood of suffering irreparable injury.

e. Irreparable injury to defendants and balance of equities

In contrast to Mr. Paxton's failure to show that Texas would likely suffer irreparable injury if the injunction had been denied, the relief Mr. Paxton sought would have caused defendants Pennsylvania, Georgia, Michigan and Wisconsin to have suffered two certain, immense and irreparable injuries.

First, the injunction Mr. Paxton sought would have nullified the defendants' *parens patriae* interest in protecting their citizens' constitutional right to have their votes counted. His injunction would have effectively disenfranchised more than 20 million qualified citizens in these four States

who had voted in the 2020 presidential election by prohibiting their votes from being counted in the Electoral College – where their votes mattered most - and, instead, turning over the selection of electors to State legislatures controlled by the losing candidate's party.

The Court has recognized that "the Constitution of the United States protects the right of all qualified citizens to vote … in federal …. elections." *Reynolds* v. *Sims*, 377 U.S. 533, 554 (1964). Indeed, "'the political franchise of voting [is] a fundamental political right, because [it is] preservative of all other rights'". *Id*., at 512 (quoting *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886).

Moreover, the constitutional right to vote includes not only the right to cast a ballot but also the right to have the ballot counted in determining which candidate wins an election. "'Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a State to cast their ballots *and have them counted* [.]'" (Emphasis added) *Reynolds*, 377 U.S. at 555 (quoting *United States* v. *Classic*, 313 U.S. 299, 315 (1941).

"The right to vote freely for the candidate of one's choice is of the essence of democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds*, 377 U.S. at 556. It is hard to imagine any State suffering a greater irreparable injury than having its millions of qualified citizens' votes for President excluded from being counted in the Electoral College, where they would be decisive in determining who would be the next President of the United States.

Second, defendant States have a vitally important direct interest in having their federal statutory right to a "safe harbor" in selecting their electors to the Electoral College be protected. 3 U.S.C. Sect. 5 guarantees that where any State timely, and in accordance with State law, makes a final determination of which electors to appoint to the Electoral College, "*such determination … shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution [.]"* (Emphasis added)

Defendants Michigan, Pennsylvania and Georgia satisfied the "safe harbor" requirements. See Michigan Brief, p.5, Pennsylvania's Opposition, p. 3, and Georgia's Opposition, pp. 1, 27. Mr. Paxton's arguments would have required the Supreme Court to flout this vital statutory protection intended to prevent interference with a complying State's authority to select its own electors and thereby determine which presidential candidate would receive its electoral votes.

Weighing Texas's unlikelihood of suffering irreparable injury if the injunction had been denied against the certain and immense injury to Pennsylvania, Georgia, Michigan, Wisconsin and their millions of qualified voters if the injunction had been granted, the balance of equities was strongly in favor of the defendants.

f. Public Interest

The Supreme Court has recognized that there is a "public interest in orderly elections", *Benisek* v*. Lamone,* 585 U.S. __, 138 S. Ct. 1942, 1944 (2018) and in avoiding "a chaotic and disruptive effect upon the electoral process." *Fishman* v. *Schaffer*, 429 U.S. 1325, 1330 (1976). The Court has also emphasized that: "[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences of employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24. Moreover, underlying these public interests, qualified voters have a constitutional right to "have [their ballots] counted [.]*" Reynolds*, 377 U.S. at 555.

Enjoining the four defendant States from having their votes counted and reflected in the Electoral College would have violated the fundamental constitutional interest of their more than 20 million qualified voters to have their votes counted. Enjoining defendant States' legislatures to appoint their own electors for the Electoral College or none at all would have overridden the "safe harbor" law, 3 U.S.C. Sect. 5, under which States' timely determination of their own electors is "conclusive" and "shall govern in the counting of the electoral votes [.]"

To have enjoined defendant States' electors from voting in the Electoral College and enabled State legislatures controlled by the losing candidate's party to have reversed the State-certified determination of winners would have had a profoundly "chaotic and disruptive effect," not only on Pennsylvania, Georgia, Michigan and Wisconsin, but in the United States as a whole.

The long, intense and divisive presidential campaign had finally come to an end with a clear margin of victory for the winner a month before Attorney General Paxton filed suit. State and federal courts had repeatedly rejected the Trump Campaign's attacks on the election's legitimacy. Mr. Trump's own Department of Justice, after investigation, had determined that there was no basis for invalidating the election's results. The nation's top election cybersecurity experts had stated that "[t]he November 3rd election was the most secure in American history." All States had counted, and virtually all had certified, the results, notwithstanding coercive pressures on certain States to undermine them.

Summarily reversing the election results, as Mr. Paxton sought, would have caused unimaginable chaos and disruption to Americans' trust in the fairness of our democratic political system, to our respect for the rule of law, and to our social stability. As the Third Circuit held in the case in which the Trump Campaign sought to set aside 1.5 million mail-in ballots in Pennsylvania, *Donald J. Trump for President, Inc*. v. *Secretary Commonwealth of Pennsylvania,* No. 20-3371, __ F. 3d ___, ___ (Nov. 27, 2020): "tossing out millions of mail-in ballots would be drastic and unprecedented, disenfranchising a huge swath of the electorate [.]" *Id*. Slip Op. at 3. "[R]elief would not serve the public interest. Democracy depends on counting all lawful votes promptly and finally, not setting them aside without weighty proof. The public must have confidence that our Government honors and respects their votes." *Id*., at 20.

Mr. Paxton's efforts to overturn the 2020 presidential election results would have, as the Supreme Court recognized in *Reynolds,* struck the heart of our democracy. Given the drastic impact the injunction would have had - not only on the four defendant States, but on our entire nation - the public interest weighed overwhelmingly in favor of denying the injunction.

g. No basis for relief under Preliminary Injunction Standards

There is no basis, and indeed no precedent, for supporting the relief requested in Mr. Paxton's complaint. Even in *Winter*, where there was less direct and immediate threat to the public interest, the Court concluded that the public interest and balance of equities were so strongly in favor of defendants that it was not a "close question" that the motion for a preliminary injunction must be denied. The preliminary injunction was precluded based on those two factors alone, even assuming that plaintiff had satisfied the other two factors, irreparable injury and success on the merits. 555 U.S. at 26, 33 and n. 5. The Court held that the District Court's granting of the preliminary injunction was an "abuse of discretion." *Id*., at 33 and n. 65. Mr. Paxton's request for relief was even more unfounded than that in *Winter*.

Here there was no reason to assume that Texas had shown a likelihood of success on the merits and irreparable injury. For the reasons given above, it had not. Mr. Paxton's request for relief failed to satisfy any of the four requirements for a preliminary injunction. Beyond that, if the relief Mr. Paxton sought had been granted, the actual harm to the public interest in preserving American democracy would have been even greater than the potential risk to national security that the Court found required denying the injunction in *Winter*.

Nor would the devastating impact of Mr. Paxton's injunction have ceased in a short time. No, the injunction Mr. Paxton sought would have usurped the presidency for the next four years – a shocking judicial precedent casting doubt on whether truly democratic presidential elections would ever have been restored in America. Mr. Paxton had no basis for the relief he requested.

B. Post-Supreme Court Statements: Call to Thwart Lawful Congressional Certification of Electoral College Vote

Starting on January 3, 2021, Mr. Paxton began a series of tweets and retweets on his official Texas Attorney General Twitter account urging people to join him in Washington, D.C. on January 6 to demonstrate that the publicly announced 2020 presidential election results were wrong and must not be accepted, and to support Donald Trump.

Mr. Paxton's tweets and retweets included: a) January 3 – "Confirmed: Join me and @realDonaldTrump in Washington D.C. this Wednesday, January 6th. All Patriots need to be present to stand with President Trump. Register at Trumpmarch.com. #MarchForTrump #election 2020 #StopThe Steal #Trump #MAGA #Electoral College" [Tweet]; b) January 5 - "Someday they will say that on Jan. 6, 2021 'some people did a thing'…those people were Patriots and what they did was save a nation." [Retweet]; c) January 5 – "*He [VP Mike Pence] must just not accept them that's period we don't want it delayed we just don't want him to accept the votes as they are."* (Emphasis added) [Retweet]; and d) January 6 – "Americans are here in Washington to stand up and support the President. A lot of voters, as well as myself, believe something went wrong in this election. I'm here to support @realDonaldTrump #MarchtoSaveAmerica." [Tweet]; https://twitter.com/kenpaxtontx?lang=en

On the morning of January 6, 2021, Mr. Paxton was interviewed by Fox News on "*Fox & Friends*". The interview is described as "Texas Attorney General Ken Paxton joins 'Fox & Friends' ahead of Congress [sic] joint session to vote on certification[.]" Mr. Paxton was asked: "What can we expect" from the 11 a.m. rally at which Trump will speak and the 1 p.m. congressional session on certification of the Electoral College? Mr. Paxton explained that he thought that many people are coming because they feel "something went really wrong" in the election. Since the votes are to be certified today, "they feel like this may be their last chance [to] stand up and … do whatever they can do to [object.]" The interviewer then asked: "Is this more therapy or is there a legal challenge?" Mr. Paxton replied: "I

don't know. *The challenge is whether you have enough Representatives, whether Senate or House, to not certify parts* of the *election; that's really what's going on today."* (Emphasis added) https://video.foxnews.com

That is, Mr. Paxton's purpose in urging people to participate in the January 6 march and rally outside the Capitol was to pressure Vice President Pence and members of Congress not to certify the electoral votes of certain States Mr. Trump had lost, so Congress would choose Mr. Trump as the next President instead of carrying out its constitutional duty to certify the electors' votes cast for Mr. Biden.

At 1:00 p.m. on January 6, the House and Senate were meeting for the purpose of counting each State's electoral votes, as mandated by the Constitution's Art. II, Sect. 1, Cl. 2 and 3 U.S.C. Sect. 15. Under these provisions, Senators and Representatives had a constitutional and statutory duty to certify the electors who had been lawfully selected by their States. Because Congress did not reject the lawfulness of any State's selection of electors, the Senators and Representatives were constitutionally and statutorily obligated to count the votes of all States' electors. The Electors Clause itself mandates that the "President of the Senate shall … open all the certificates [of electors] and the votes shall then be counted[.]" Art. II, Sect. 1, Cl. 2; *See* 3 U.S.C. Sect. 15.

Later in the morning of January 6, Mr. Paxton gave a short speech at the White House Rally to the crowd about to march to the Capitol:

"'What we have in President Trump is a fighter. And I think that's why we're all here,' Paxton said. 'We will not quit fighting. We're Texans, we're Americans, and the fight will go on."
https://www.houstonchronicle.com/politics/texas/article/Paxton-Trump-DC-rally-election-2020-georgia-15850073.php

As evidenced by his tweets, retweets, Fox interview and speech, Mr. Paxton was calling for marchers to pressure Senators and Representatives not to certify certain States' lawfully designated electors. His purpose was to overturn the election's legitimate results.

But there was no constitutionally or statutorily valid basis for preventing the counting of any State's electoral votes. The members of Congress had a constitutional and statutory duty to count the votes of all States' electors to confirm that Mr. Biden had won the Electoral College. In clear disregard of the law, Mr. Paxton was urging the marchers to pressure the members to

violate their fundamental constitutional and statutory duty by abandoning their obligation to count all of the electoral votes.

II. Mr. Paxton's Conduct Violated the Texas Disciplinary Rules of Professional Conduct

A. Mr. Paxton's Conduct Violated TDRPC 3.01: Meritorious Claims and Contentions - Frivolousness

Rule 3.01 provides in pertinent part as follows:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.

Comment 2. A filing or assertion is frivolous … if the lawyer is unable to make a good faith argument that the action taken is consistent with existing law or that it may be supported by a good faith argument for an extension, modification or reversal of existing law.

1. Standing to Sue

The concept of standing to sue that Mr. Paxton urged the Supreme Court to adopt flew in the face of the Electors Clause and the bedrock constitutional principle of each State's sovereignty within our federal system. Beyond that, if such standing were allowed, the time it would take to adjudicate various States' challenges to other States' election results would cause chaos in the American legal and political system. Allowing such lawsuits would predictably have made it impossible to comply with the statutorily and constitutionally mandated dates for completing the process of selecting and inaugurating a duly elected President. The standing Mr. Paxton sought would have been a prescription for an autocratic President to perpetuate his power indefinitely against the will of the voters. See pp. 3-5, above.

Mr. Paxton's claim of standing was frivolous under Rule 3.01. It had no basis in existing law, nor did he provide any good faith basis for modifying or reversing existing law to adopt it. Moreover, Mr. Paxton's claim of standing would predictably have caused cataclysmic damage to American democracy and the rule of law. Mr. Paxton's claim of standing was indefensible.

2. Claims that Biden's Probability of Winning Was Less Than 1 in a Quadrillion

Mr. Paxton's assertions to the Court that statistical analysis showed that Mr. Biden's chances of legitimately winning the election were infinitesimal had no basis in fact. Mr. Paxton's claim that his expert's comparison of pre- and post-3 a.m. November 4th voting results showed that Mr. Biden's "probability of … winning … is less than 1 in 1,000,000,000,000,000" grossly misrepresented what his expert, Dr. Charles J. Cicchetti, had found. What Dr. Cicchetti had concluded was only that there would have been such a tiny likelihood of Mr. Biden's winning *if* the pre- and post-3 a.m. voters had been "randomly drawn from the same population." Mr. Paxton provided no evidence to support the key assumption that the early and later counted voters came from the "same population." That assumption was unfounded and contrary to fact.

Similarly, Mr. Paxton's assertion that a statistical comparison of the results of the 2016 Clinton-Trump election with the 2020 Biden-Trump election showed "[t[he same less than one in a quadrillion statistical improbability of Mr. Biden's winning" had no basis in fact. This conclusion was based on Dr. Cicchetti's having admittedly made two assumptions: that "similar populations of voters [had supported] the two Democratic candidates" and that "other things were the same" in the Biden and Clinton elections.

Mr. Paxton provided no evidence to support these assumptions, and certainly the latter had no basis in fact. Indeed, as Harvard University Professor and election data expert Stephen Ansolabelhere noted, to base a probability estimate on the assumption that the relevant factors were the same in the 2020 and 2016 presidential elections was "comical". See pp. 5-9, above.

There was no basis in fact for Mr. Paxton's assertions that the probability of Mr. Biden's winning the election was "less than 1 in a quadrillion". Because he did not have any reasonable basis for believing that such assertions were legitimate and supported by the facts, Mr. Paxton's probability assertions to the Supreme Court violated Rule 3.01.

3. Claim for Relief: Preliminary Injunction Against Counting State Defendants' Electors and For Appointing Replacement Electors

The principal relief Mr. Paxton sought – preventing sovereign States from casting their votes in the Electoral College and directing State legislatures to appoint replacement electors or have none at all - was designed to overturn the will of 159 million American citizens who voted in what experts described

as the most secure election in American history. Mr. Paxton offered no precedent for this profoundly anti-democratic relief because there was none.

The relief Mr. Paxton sought would have caused devastation to America's fundamental, constitutional system for presidential elections. It would have eviscerated the American people's trust in our democracy. It would have established a judicial precedent that could have prevented our ever returning to the norm of democratic presidential elections.

While a plaintiff must usually establish all four traditional factors to warrant a preliminary injunction, where a proposed injunction is against a government defendant and would cause serious harm, the balance of the equities and the public interest are given prime importance. *Winter*, 555 U.S. at 22-24, 33. Here, Texas did not meet *any* of the four requirements for a preliminary injunction, let alone all of them. See pp. 9-21, above. But, even if it had met the first two factors, the balance of equities was so strongly in defendants' favor and the public interest was so obviously undermined by overturning the election results that there was no legal or equitable basis for granting the relief.

Mr. Paxton's claim, to use the Supreme Court to overturn the results of the presidential election, was not consistent with existing law, nor was it supportable or "supported by a[ny] good faith argument for an extension, modification or reversal of existing law." Mr. Paxton's claim for relief was "frivolous" in violation of Rule 3.01.

B. Mr. Paxton's Conduct Violated Rule 3.03: Knowingly False Statements of Law or Material Fact to a Court

Rule 3.03 provides in pertinent part:

(a) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal. [The Rules' "Terminology" defines "Tribunal" as including "courts."

Comment 3. Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal.

1. Claim That Biden's Probability of Winning Less Than 1 in 1,000,000,000,000,000: Pre-Post 3 a.m. Comparison

Mr. Paxton's statement to the Court that: "[t]he probability of former Vice President Biden winning the popular vote in [each of] the four Defendant States = Georgia, Michigan, Pennsylvania and Wisconsin … given President

Trump's early lead in those States as of 3 a.m. on November 4, 2020, is less than one in a quadrillion, or 1 in 1,000,000,000,000,000", was a knowingly false statement of material fact. The expert whose analysis Mr. Paxton invoked never said unconditionally that there was a "less than a one in a quadrillion" chance that Mr. Biden would have won based on the pre- and post- 3 a.m. comparison. The expert only said that Biden's chances would have been so low *if* the pre-and post-3 a.m. votes had been "randomly drawn from the same population." See pp. 6-8, above.

But this assumption was unfounded and contrary to fact. It had been widely reported for weeks before the election that Trump voters were heavily going to vote in person and Biden voters heavily by mail. Since in-person votes are typically counted earlier and mail-in votes later, the pre-and-post 3 a.m. votes were categorically *not* "randomly drawn from the same population*."* As the lead attorney for the plaintiff, Mr. Paxton would have known that his key expert never asserted unconditionally that Mr. Biden's chance of winning was "less than 1 in 1,000,000,000,000,000," but that this estimate was based entirely on an assumption, an assumption that was unfounded and contrary to fact.

Mr. Paxton would have known that if he had truthfully stated to the Court what the expert had actually said, it would have undermined the estimate's validity because its underlying assumption was without factual basis. Instead, Mr. Paxton omitted the assumption and misrepresented what the expert had concluded, asserting unconditionally that Mr. Biden's chance of winning was "less than 1 in 1,000,000,000,000,000".

Mr. Paxton's statement was "material" to his case because he relied heavily on it to cast doubt on whether Mr. Biden had legitimately won the election. Casting that doubt was important to support plaintiff's alleged need for the injunctive relief he sought.

Mr. Paxton's knowingly false statement of material fact to the Court that, based on the pre/post 3 a.m. comparison, the probability that Mr. Biden would win the popular vote in the four defendant States was "less than one in a quadrillion" violated Rule 3.03(a)(3).

2. Claim 3 U.S.C. Sect. 2 Authorized State Legislatures to Replace State-Appointed Electors Even Though Election Had Been Completed on Election Day

Mr. Paxton's statement to the Court that "*when a State fails to conduct a valid election – for any reason* – 'the electors may be appointed on a subsequent day in such manner as the legislature of such State may direct' 3 U.S.C. Sect. 2 (Emphasis added)" was a knowingly false statement of law. 3 U.S.C. Sect. 2 applies only when a State has failed to complete its presidential election on election day, and then, only where a State law requires that to win, a presidential candidate must win a majority of votes, and no candidate won a majority on election day. See pp. 14-16, above.

In his above partial quotation of 3 U.S.C. Sect. 2, Mr. Paxton omitted the key statutory language that narrowed its applicability and made it inapplicable to situations like this one, in which the defendant States had completed their elections on election day. This self-serving omission of statutory language could not have been by accident: the relevant statutory words that were omitted appear immediately before the words Mr. Paxton quoted. The omission of the narrowing language can only have been knowing and intentional. As the lead attorney for Texas, Mr. Paxton would have known that this statement misrepresented what the statute said, but creating this misrepresentation was critical to his assertion that there was a legal basis for State legislatures to appoint replacement electors – a claim central to the relief he was seeking.

Mr. Paxton's statement that 3 U.S.C. Sect. 2 applies "when a State fails to conduct a valid election – for any reason" was knowingly false. By making this knowingly false statement of law to the Court, Mr. Paxton violated Rule 3.03(a)(1).

C. Mr. Paxton Violated Rule 8.04(a)(3): "Engag[ing] in Conduct Involving Dishonesty, Deceit or Misrepresentation"

Rule 8.04(a)(3) provides in pertinent part:

(a) A lawyer shall not:

(3) Engage in conduct involving dishonesty… deceit or misrepresentation.

Mr. Paxton violated Rule 8.04(a)(3)'s prohibition against dishonest, deceitful or misrepresentative conduct by his "knowingly … false statements" of law and material facts to the Supreme Court. See pp. 5-6, 14-16, above. We incorporate by reference the same reasons given on pages 25-27, above for violations of Rule 3.03 as the reasons for Mr. Paxton's having also violated Rule 8.04(a)(3).

D. Mr. Paxton Violated Rule 8.04(a)(12): Conduct Violating Other Texas Laws - Oath to Support the Constitution

When Mr. Paxton urged people to come to Washington, D.C. on January 6 to march on the Capitol to support then-President Trump's efforts to overturn the election, he was not just calling for an ordinary political demonstration. He was urging the marchers to pressure Representatives and Senators not to carry out their constitutional duty to count all States' electors' votes in the Electoral College. See pp. 21-23, above.

In doing so, Mr. Paxton was not supporting the Constitution: he was attacking it. Mr. Paxton was attacking one of the most fundamental pillars of American constitutional democracy: the impartial conduct of congressional certification of the Electoral College vote to select the next President of the United States of America.

Texas Law, Texas Government Code, Title 2, Chapter 82, Sect. 82.037(1), requires all lawyers licensed by the State of Texas, including Mr. Paxton, to take an oath to "support the constitution of the United States [.]" By urging the marchers to thwart Congress's carrying out its constitutionally and statutorily mandated process for certifying electors and selecting the presidential winner, Mr. Paxton violated the Texas law requiring him to "support the Constitution" and thereby violated Rule 8.04(a)(12).

By his conduct, Mr. Paxton was not honoring his sacred lawyer's oath to support the Constitution: he was defiling it. By urging the marchers to fight against America's critical constitutional process for the peaceful transfer of presidential power, Mr. Paxton was striking a dagger at the heart of American constitutional democracy.

Conclusion

Mr. Paxton has engaged in a pattern of serious violations of the Texas Disciplinary Rules of Professional Conduct. These include: making "frivolous" claims of law and fact to the Supreme Court in violation of Rule 3.01; making "knowingly … false statement[s] of material fact or law" to the Court in violation of Rule 3.03; "engag[ing] in conduct involving dishonesty… deceit or misrepresentation" in violation of Rule 8(a)(3); and violating his lawyer's oath to "support the Constitution" in violation of Texas law and Rule 8(a)(12).

By these actions, Attorney General Paxton, the highest law officer of the State of Texas, has brought dishonor to his fellow Texas lawyers and to the legal profession. After investigation, if the allegations in this complaint are validated, Mr. Paxton should be suspended from the practice of law or be permanently disbarred.

Respectfully submitted,

Texas Bar Members:

/s/ Randall Chapman
Past Chair, Supreme Court of Texas Grievance Oversight Committee Past Chair, Texas Bar College
State Bar Number: 04129800

/s/ John Delaney
Former Chairman, State Bar Grievance Committee 8A
Former Member Texas Committee on Model Rules of Professional Responsibility
State Bar Number: 05724500

/s/ Martha Dickie
Past President and Board Member, State Bar of Texas Past President, Austin Bar Association
Past President, Austin Chapter of ABOTA
State Bar Number: 00000081

/s/ Judy Doran
Former Texas Assistant Attorney General
Former Staff Attorney, Texas Parks and Wildlife Commission
State Bar Number: 05997700

/s/ David Escamilla
Former Travis County Attorney – Retired
Past President, Texas District and County Attorneys Association Appointed Member, Judicial Committee on Information Technology
State Bar Number: 06662300

/s/ Allan Van Fleet

Former Member, Standing Committee on Texas Disciplinary Rules of Professional Conduct
Former Commissioner, Texas Permanent Judicial Commission on Children, Youth, and Families
Former Director, State Bar of Texas
State Bar Number: 20494700

/s/ Maria Luisa (Lulu) Flores
Past President, Mexican American Bar Association of Texas Member Travis County Women Lawyers Association
Past Chair, State Bar of Texas Hispanic Issues Section
State Bar Number: 07164750

/s/ James C. Harrington
Retired Founder, Texas Civil Rights Project
Former Adjunct Professor, University of Texas School of Law Former Adjunct Professor, St. Mary's University Law School
State Bar Number 09048500

/s/ John R. Jones
Founding Chair, Texas Access to Justice Commission Past Director, Texas Young Lawyers Association Past Director, El Paso Bar Association
State Bar Number: 10919500

/s/ Mario Lewis
Former General Counsel, International Boundary and Water Commission Former General Counsel, Legal Services Corporation
Senior Attorney, Army Audit Agency
State Bar Number: 12300200

/s/ W. Frank Newton
Past President, State Bar of Texas Former Dean, Texas Tech School of Law
Former Professor, Baylor University School of Law
State Bar Number: 00000072

/s/ Richard Pena
Past President and Director, State Bar of Texas American Bar Association, Board of Governors

Past President Austin Bar Association State Bar Number: 0000073

/s/ Larry Sauer
Former Chair, State Bar Section on Individual Rights and Responsibilities
State Bar Number: 17674000

/s/ Robert Sohns
American Bar Association, Section on Litigation Leadership Board of Directors, Houston Volunteer Lawyers
Former Adjunct Faculty, University of Houston Law School and Texas Southern University School of Law
State Bar Number: 18824500

/s/ Jordan Steiker
University of Texas School of Law – Judge Robert M. Parker Chair in Law
University of Texas School of Law – Co-Director, Capital Punishment Center
State Bar Number: 19126495

/s/ William O. Whitehurst
Past President, State Bar of Texas
Past President, Texas Trial Lawyers Association
State Bar Number: 00000061

Organizational Signer:

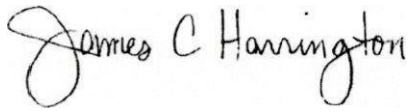
/s/ Gershon (Gary) Ratner
Co-Founder, Lawyers Defending American Democracy
Former Associate General Counsel for Litigation, U.S. Department of Housing and Urban Development
On behalf of Lawyers Defending American Democracy

We respectfully request that your confirmation of receipt and any other communications be sent to each signatory of the Complaint. Contact information for each Texas Bar Member signer is available at: www.TexasBar.com. Please notify Mr. Ratner at: gratner@rcn.com.

The organizations referenced for Texas Bar Member signers have not endorsed this Complaint. They are listed for purposes of signer identity only.

CERTIFICATE OF SERVICE

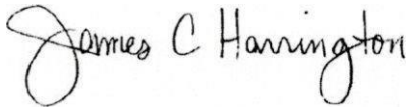
I certify that I served all parties to this appeal through the Court's electronic filing system, including Appellant's and Appellee's counsel on the 15th day of February 2023.



Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that the text of this amicus brief contains 4,132 words; and the attachment, 11,140 words.



Counsel for Amici Curiae