

05-23-00128-CV

In The Court Of Appeals  
Fifth District Of Texas  
Dallas, Texas

WARREN KENNETH PAXTON, JR.,  
Appellant

v.

COMMISSION FOR LAWYER DISCIPLINE,  
Appellee

Appealed from the 471st Judicial District Court  
of Collin County, Texas  
Honorable Casey Blair, Sitting by Assignment

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

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## 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 Appellant Warren Kenneth Paxton, Jr. 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 him.

For simplicity and consistency, *Amici* adopt the convention of Appellee Commission for Lawyer Discipline of referring to Appellant Paxton as “Paxton” and to Appellee as “Commission.” A copy of *Amici's* Complaint against Attorney General Paxton is attached as the Appendix.

Two former Texas State Bar Presidents previously testified in the Investigatory Hearing about the harms to the legal profession and to future law students if the ethics rules were not enforced against executive-branch lawyers.

*Amici* support the position of Appellant Commission for Lawyer Discipline. *Amici* also respectfully wish to bring to this Court's attention further arguments against Paxton's separation of powers and sovereign immunity defenses.

### **SUMMARY OF THE ARGUMENT**

Appellant Paxton is undisputedly a Texas-licensed attorney. Longstanding Texas statutes, Tex. Gov't Code §81.071 and §81.072(d), mandate that each Texas-licensed attorney is subject to Texas's ethics rules and the Commission's jurisdiction to administer them. By arguing that the constitutional separation of powers and the common law sovereign immunity doctrine prevent the Commission from bringing this disciplinary proceeding against him, Paxton is effectively asking this Court to nullify the application of these statutes to him, i.e., to declare these statutes unconstitutional or illegal as applied to him.

Paxton cannot meet the heavy burden required to overcome the presumption of constitutionality and to show that the statutes are unconstitutional as applied. Essentially, he has to show that it would be irrational or oppressive to apply the statutes to him, in light of the important governmental interests that the statutes serve, *see Ashish Patel v. Tex. Dep't of Licensing and Regulations*, 469 S.W.3d 69, 87 (Tex. 2015), and, presumably, meet a similarly heavy burden to declare a statute illegal under the common law.

Paxton's plea to the jurisdiction should be dismissed on this ground alone.

Paxton’s separation of powers argument is essentially that, because the Attorney General has “broad discretion” to conduct the State’s civil litigation, the application of 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. Paxton’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] constitutionally assigned powers.” (emphasis in original) (citations omitted). See Brief for Appellant (Appellant’s Br.) at 35; Reply Brief for Appellant (Reply Br.) at 46. 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 Paxton's sovereign immunity argument is that disciplinary proceedings for alleged professional misconduct, including making factual misrepresentations to a court, 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.

Paxton 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. Paxton's concession of the inapplicability of sovereign immunity to these two kinds of proceedings undermines his claim that sovereign immunity applies to disciplinary proceedings.

Paxton'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." Paxton's arguments are legally unsupportable and should be rejected.

## **ARGUMENT**

### **I. To Accept Paxton's Defenses Would Require Holding Texas Statutes Unconstitutional or Illegal As Applied**

As a threshold matter, for this Court to accept Paxton's separation of powers or sovereign immunity defenses would require it to declare two longstanding Texas statutes either unconstitutional or illegal, respectively, as applied to Paxton and hundreds of executive-branch lawyers.

This follows because State law mandates that “[e]ach attorney admitted to practice in this State ... is subject to the disciplinary ... jurisdiction of the supreme court and the Commission on Lawyer Discipline,” Tex. Gov’t Code §81.071 and “[e]ach [such] attorney is subject to the Texas Rules of Disciplinary Procedure and the Texas Disciplinary Rules of Professional Conduct.” Tex. Gov’t Code §81.072 (d). That is, each Texas-licensed attorney is subject to the Texas Supreme Court’s rules of professional conduct and its procedural rules for the Commission to seek sanctions for alleged violation of the conduct rules.

Since Paxton is undisputedly a Texas-licensed attorney, both statutes on their face plainly apply to him, as well as to the hundreds of other Texas-licensed attorneys in the Attorney General’s office and elsewhere in the executive branch of state government. What Paxton is seeking by his plea to the jurisdiction is to prevent the Commission from prosecuting allegations that he has committed professional misconduct and to prevent a judge and jury from determining whether those allegations are valid.

In short, what Paxton is seeking is to nullify the applicability of both statutes as to him, as well as to many other executive branch attorneys.

In the related context of considering a “substantive due course challenge [] to [an] economic regulation statute [],” the Texas Supreme Court has 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*, 469 S.W.3d at 87.

That is a heavy burden. Since the impact of invalidating a legislative statute would be the same whether it would be based on unconstitutionality under separation of powers or violation of common law sovereign immunity, presumably the Court would apply a similar test to invalidating statutes under the common law. *See Tooke v. City of Mexia*, 197 S.W.3d 325, 331 (Tex. 2006) (sovereign immunity is a common law doctrine).

Paxton has not even acknowledged that to sustain his plea to the jurisdiction he would have to meet the heavy burden of showing that it would be irrational or oppressive to apply §81.071 and §81.072(d) to him in light of the important governmental interests they serve of protecting the integrity of the administration of justice and the legal profession. Paxton cannot meet that burden. That, by itself, would require denying Paxton's plea.

## **II. The Separation of Powers Defense Is Invalid**



**A. The Attorney General’s “broad discretion” to conduct State’s civil litigation does not include discretion to commit professional misconduct**

Paxton’s 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 authority. Brief of Appellant (Appellant’s Br.) at 38; Reply Brief for Appellant (Reply Br.) at 2, 14-20. Paxton’s argument builds from the principle that the Attorney General’s discretion includes “investigation and assessment of facts and evidence and his selection of legal arguments.” (citations omitted) Reply Br. at 17.

From that uncontroversial premise, however, Paxton 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 Paxton, 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 Paxton 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; rather, 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*, S.W.3d at 92 (emphasis added). Since the Court has held that “*our disciplinary rules should be treated like statutes [.]*” *O’Quinn*, 763 S.W.2d at 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 Paxton’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*, 601 S.W.3d at 723 n.76.

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.<sup>1</sup> These

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<sup>1</sup> *Lewright v. Bell*, 63 S.W. 623 (Tex. 1902) (orig. proceeding), Appellant’s Br. at 38, 41, 43; Reply Br. at 16, 17, 21, does not help Paxton. *Lewright* stands for the non-controversial principle that mandamus does not lie for a court to order an Attorney General to make litigation decisions, such as whether to file a suit, over which he has legitimate discretion.

But *Lewright* was not a professional disciplinary proceeding, such as this one, against a Texas-licensed lawyer serving as Attorney General in which the State alleges that the lawyer has made dishonest misrepresentations to a court in violation of Texas’s ethics rules. Nor did *Lewright* ever consider, let alone decide, whether an Attorney General has constitutional discretion to commit professional misconduct as part of conducting litigation.

decisions by the Court are fatal to Paxton’s effort to redefine broad discretion into unlimited discretion.

Indeed, Paxton himself has conceded the critical principle: even though the Attorney General has “broad discretion” under separation of powers, that discretion does not authorize the Attorney General to engage in unlawful or criminal conduct. “[T]he Separation of Powers Clause would provide no barrier to the Commission instituting a disciplinary action in response to *ultra vires* or criminal conduct, which by its very definition does not fall within the discretionary authority of the Attorney General.” (emphasis added) Reply Br. at 9. Yet, Paxton has given no reason and cited no authority for why an Attorney General has greater constitutional discretion to violate the State’s ethics laws than to violate its criminal laws or act *ultra vires*. There is none.

This concession is devastating to Paxton’s claim that the Separation of Powers Clause gives him unlimited discretion to conduct the State’s litigation any way he chooses, exempt from potential sanctions for professional misconduct applicable to all Texas-licensed attorneys. An attorney serving as Attorney General has no discretion to commit professional misconduct.

**B. Applying to the Attorney General the same disciplinary standards and procedures applicable to all other Texas-licensed attorneys does not “unduly interfere” with his conduct of litigation**

In addition to Paxton's contention that the Attorney General's "broad discretion" exempts him from disciplinary proceedings, Appellant's Br. at 36-38; Reply Br. at 14-20, he argues that such proceedings "unduly interfere" with the office's conduct of the State's civil litigation by "encroach[ing] on the Attorney General's core and exclusive powers." Appellant's Br. at 38.

Tellingly, Paxton 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* Appellee's Br. at 50-51.

Absent any other explanation, what Paxton 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.'" Appellant's Br. at 35 (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 to fair administration of justice.

Paxton’s separation of powers argument is invalid.

### **III. State Disciplinary Proceedings Against Government Attorneys for Professional Misconduct Are Not a Type of Proceeding to Which Sovereign Immunity Applies**

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

The fundamental, implicit premise of Paxton’s sovereign immunity defense is that the sovereign immunity doctrine applies to the Commission’s disciplinary proceedings for sanctions against government attorneys for professional misconduct. *See* Appellant’s Br. at 22 – 26.

If the sovereign immunity doctrine does not apply to the type of proceeding at issue, the court never reaches the question of whether the challenged actions were done in the respondent’s “official capacity” or “individual capacity.” *See Cobb v. Harrington*, 144 Tex. 360, 366 (Tex. 1945) (by implication).

But this premise is unfounded here. As the Commission notes, “Paxton 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.” (Emphasis in original) Brief of Appellee Commission for Lawyer Discipline (Appellee’s Br.) at 43. The applicability of the common law doctrine of sovereign immunity, *Tooke*, 197 S.W.3d at 331, is determined by whether it would serve the purposes of the sovereign immunity doctrine to apply it. *See Nettles*, 606 S.W.3d at 737.

Under Texas law, the doctrine of sovereign immunity has two purposes; neither applies here. The logic of Paxton’s argument is that it is the secondary purpose that applies: disciplinary proceedings purportedly interfere with his carrying out his functions as Attorney General.

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.’” *Id.* (citations omitted); accord, *City of El Paso v. Heinrich*, 284 S.W.3d 366, 376 (Tex. 2009) (“[T]he modern

justification for [sovereign] immunity [is] protecting the public fisc.”). (citations 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.<sup>2</sup>

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<sup>2</sup> Paxton’s assertion of “official immunity,” Appellant’s Br. at 31-32, Reply Brief at 9, n.3, is invalid for the same fundamental reasons as his assertions of “sovereign immunity.” Disciplinary proceedings against government lawyers for professional misconduct are not within the purposes of “official immunity.”



Nor, as discussed above in Section II.B, does the discipline of government lawyers for professional misconduct interfere with government carrying out its functions, including the conduct of civil litigation.

**B. Paxton’s concessions eviscerate his claim that sovereign immunity applies to State Bar disciplinary proceedings**

**1. Paxton’s concession that sovereign immunity does not apply to court-initiated sanctions against government attorneys for professional misconduct**

Paxton admits 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, Paxton concedes that “it is undisputed that a *court* can sanction executive-branch lawyers for conduct undertaken in their official capacities before the *court* that violates ethical rules.” Appellant’s Br. at 48 (citations omitted); accord at 29-30. *See Brewer*, 601 S.W.3d at 718, n.41 (quoting *In re Bennett*, 960 S.W.2d 35, 40 (Tex. 1997) (per curiam) (orig. proceeding))” (courts’ have authority to sanction attorneys’ misconduct on their own initiative based on “rules, ...statutes [and] inherent powers [.]”) *See* Appellee’s Br. at 39-40.

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To the contrary, “[t]he purpose of the doctrine of official immunity is to protect public officers from civil liability for conduct that would otherwise be actionable.” *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653-54 (Tex. 1994). That is, official immunity’s purpose is to protect government officials from personal financial liability in traditional civil lawsuits, such as for negligence, as in *Chambers*. Official immunity has no applicability to professional disciplinary proceedings where the sole remedy is professional sanction against an attorney for violating the State’s ethics code.

In explaining why sovereign immunity does not apply to court-initiated sanctions against government lawyers, Paxton makes a striking statement: “[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,” Appellant’s Br. at 29; and they do not “constitute” the imposition of “liability.” *Id.* at 29-30 (by implication) *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.

The same is true of Commission-initiated disciplinary proceedings against government attorneys for professional misconduct. Disciplinary proceedings neither threaten the public fisc nor interfere with the government performing its responsibilities.

In light of the purposes of sovereign immunity, it makes no difference whether a court directly imposes sanctions on a government attorney for professional misconduct or a court imposes sanctions after a disciplinary proceeding initiated by

the Commission, another part of the judicial branch. In neither case do the reasons for the sovereign immunity doctrine apply.<sup>3</sup>

## **2. Paxton’s concession that sovereign immunity does not apply to “criminal charges” against government attorneys**

Paxton also concedes that: “[n]or would sovereign immunity ordinarily provide a defense against criminal charges brought against an executive-branch lawyer.” Appellant’s Br. at 29. *See* Appellee’s Br. at 40-41.

In support of this point, Paxton states: “[c]riminal charges are pursued by the State to enforce its own laws (citations omitted) .... 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.” Appellant’s Br. at 29.

Again, *Amici* fully agree. In fact, the same principle illustrates the inappropriateness of applying the doctrine of sovereign immunity to the

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<sup>3</sup> Paxton argues that because courts have “inherent powers” (citation omitted) to impose sanctions on government lawyers for professional misconduct in cases before them, the only court with the power to impose sanctions on him for his conduct in *Texas v. Pennsylvania* was the U.S. Supreme Court. *See* Appellant’s Br. at 30.

While the Supreme Court itself had sanctions authority over Paxton in *Texas v. Pennsylvania*, that neither logically nor legally precluded Texas courts from also having authority to sanction him as a Texas-licensed attorney for professional misconduct outside the state. Indeed, TDRPC 8.05(a) specifies that: “[i]n addition to being answerable for his or her conduct occurring in this state, any [lawyer admitted to practice in this state] ... may be disciplined in this state for conduct occurring in another jurisdiction ... if it is professional misconduct under Rule 8.04.”

Moreover, while courts have authority to sanction lawyers for misconduct before them, the Texas Supreme Court has made it clear that the body chiefly responsible for disciplining Texas lawyers’ unethical conduct is the Commission. *Brewer*, 601 S.W.3d at 723, n.76 (emphasis added).

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.<sup>4</sup> Whenever the Commission files a disciplinary petition against a Texas-licensed attorney for professional misconduct it is, in Paxton's words, "the State itself who is the prosecutor."

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 a criminal proceeding against a government attorney is punitive in nature, to punish the attorney for a crime the attorney committed personally; it is not to hold the government liable.

Similarly, a professional disciplinary proceeding against a government lawyer is not to hold the government liable, but to sanction the lawyer personally for what the lawyer did. Where a lawyer is sanctioned for crimes committed while representing the government, there is neither a threat to the public fisc nor interference with government's functioning. That is because criminal proceedings,

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<sup>4</sup> 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.

like disciplinary proceedings, are, by their very nature, not the kinds of civil suits for liability to which the purposes of sovereign immunity apply.<sup>5</sup>

Paxton “acknowledges that sovereign immunity would not provide a defense to ... criminal actions, or sanctions imposed by a court for misconduct occurring in its courtroom.” Paxton’s concession that sovereign immunity does not apply to court-initiated sanctions against government attorneys for professional misconduct or to them for crimes they commit eviscerates his claim that sovereign immunity applies to parallel disciplinary proceedings against such attorneys for violating Texas Disciplinary Rule of Professional Conduct 8.03(a).<sup>6</sup>

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<sup>5</sup> Significantly, the nomenclature of the Commission’s disciplinary proceedings for professional misconduct is also the same as for criminal prosecutions in multiple respects. Both disciplinary proceedings and criminal proceedings are “prosecuted” by the “State.” Both proceedings are punitive in nature, to sanction individuals 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). The respondent is entitled to a “jury” and the jury renders a “verdict.” *State v. O’Dowd*, 312 S.W.2d 217, 221 (Tex. 1958). And, if the disciplinary respondent is found to have committed the alleged violations, the respondent is determined to be “guilty” of professional misconduct. *Kilpatrick*, at 659.

<sup>6</sup> As the Commission has noted, Appellee’s Br. at 29-30, 51-52, although this proceeding is not yet at the merits stage, Paxton has argued extensively that the Commission’s allegations of misrepresentations are unfounded. *See Appellant’s Br.* at 39-48. Since Paxton has raised the merits, *Amici* believe it is important to inform the Court about what they believe is a severely misleading and prejudicial argument Paxton has made about the evidentiary basis for allegations he made in *Texas v. Pennsylvania*.

Specifically, Paxton 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 Appellant’s Br.* at 44-46.

In fact, Paxton and his colleagues, sought a temporary restraining order to prevent the four defendant States “from voting in the electoral college.” *Texas v. Pennsylvania*). Motion for Preliminary Injunction and Temporary Restraining Order or, Alternatively, for Stay and Administrative Stay, at 35, based on the evidence they already had when they filed the Complaint and motion for injunctive relief on December 7, 2020, and they sought “*summary disposition*

In short, as related to the purposes and scope of the sovereign immunity doctrine, there is no relevant difference between court-initiated sanctions and criminal proceedings, and Commission-initiated disciplinary proceedings. None of the three types of proceedings is a traditional civil lawsuit, such as tort or contract, to which the sovereign immunity doctrine typically applies. None requires payment from the public fisc nor interferes with government carrying out its responsibilities.

Instead, all three types of proceedings are brought by State officials against government attorneys solely to sanction them for their alleged misconduct while serving as government lawyers and, if successful, result only in personal sanctions against the lawyers. Commission disciplinary proceedings against government lawyers do not implicate the purposes of the sovereign immunity doctrine.

Thus, the whole premise of Paxton’s sovereign immunity defense – that the sovereign immunity doctrine applies to the Commission’s disciplinary proceedings – is meritless. Professional disciplinary proceedings are not the type of proceeding to which sovereign immunity applies.

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because the material facts ... are not in serious dispute.” (citation omitted) (emphasis added), Brief in Support of Motion for Leave to File Bill of Complaint, at 34-35.

Further, Paxton 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 – within only 4 days after he had filed the Complaint. 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 requested by Paxton would have made it impossible for Texas to have conducted “discovery” in any case.

Accordingly, Paxton’s sovereign immunity defense should be dismissed outright on the ground that the doctrine does not apply to disciplinary proceedings for a lawyer’s professional misconduct. As a corollary, the Court would never need to reach the question of whether, if the doctrine applied to such proceedings, the Commission’s petition was brought against Paxton in his “individual capacity” or “official capacity.”<sup>7</sup>

## CONCLUSION

It is indisputable that Texas law subjects every attorney licensed to practice law in Texas to Texas’s “Rules of Professional Conduct” and the Commission’s disciplinary jurisdiction” and that Paxton is so licensed. Paxton’s invalid separation of powers and sovereign immunity defenses effectively seek to nullify those laws as to Paxton, as well as to executive branch lawyers generally. To accept Paxton’s separation of powers and sovereign immunity defenses would require holding the two statutes unconstitutional or illegal as applied, a heavy burden Paxton has not met and cannot meet.

If Paxton’s view were sustained, the result would be not only to immunize him against potential discipline for serious alleged professional misconduct, but also to exempt a large and publicly influential category of attorneys from the

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<sup>7</sup> If the Court were to reach that question, *Amici* support the Commission’s position as to why this proceeding is against Paxton in his “individual capacity,” rather than in his “official capacity,” within the meaning of the sovereign immunity doctrine.

Legislature's statutory mandate that *all* Texas-licensed lawyers are subject to the Commission's jurisdiction. Such a ruling would undermine public respect for the administration of justice, lawyers, and the legal profession. It would be an invitation for executive-branch attorneys to abuse their power by engaging in unethical conduct. Moreover, it would unjustifiably put Paxton and hundreds of other executive branch attorneys above the law - violating one of the most fundamental principles of American law and democracy: "No person is above the law."<sup>8</sup>

Dated: May \_\_, 2023

Respectfully submitted,

/s/ Randall Chapman

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Former Travis County Attorney - Retired

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<sup>8</sup> That the logic of Paxton'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.



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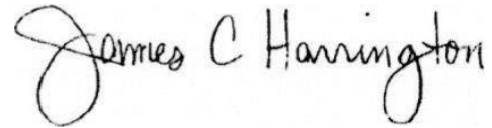
/s/ William O. Whitehurst  
Past President, State Bar of Texas  
Past President, Texas Trial Lawyers Association  
State Bar Number: 00000061

[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

A handwritten signature in black ink that reads "James C. Harrington". The signature is written in a cursive style with a large, looping initial "J".

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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 not 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 unsupported.

## **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 14th 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’ 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, 28<sup>th</sup> 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 6<sup>th</sup>. All Patriots need to be present to stand with President Trump. Register at [Trumpmarch.com](http://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 4<sup>th</sup> 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 Ansolabehere 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: 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  
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/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  
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/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  
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Former Professor, Baylor University School of Law  
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Former Adjunct Faculty, University of Houston Law School and Texas Southern  
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/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

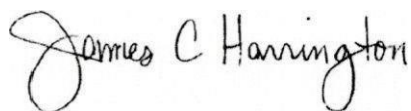
**We respectfully request that your confirmation of receipt and any other  
communications be sent to each signatory of the Complaint. Contact  
information for each Texas Bar Member signer is available at:**

**[www.TexasBar.com](http://www.TexasBar.com). Please notify Mr. Ratner at: [gratner@rcn.com](mailto: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

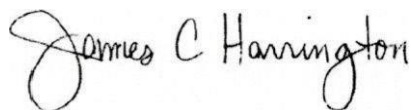
I certify that I served all parties to this appeal through the Court's electronic filing system, including Appellant's and Appellee's counsel on the 15<sup>th</sup> day of February 2023.

A handwritten signature in black ink that reads "James C. Harrington". The signature is written in a cursive style with a large initial "J".

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.

A handwritten signature in black ink that reads "James C. Harrington". The signature is written in a cursive style with a large initial "J".

Counsel for Amici Curiae