No. 23-0694

IN THE SUPREME COURT OF TEXAS

BRENT EDWARD WEBSTER,

Petitioner

v.

COMMISSION FOR LAWYER DISCIPLINE,

Respondent

On Petition for Review from the

Eighth Court of Appeals, El Paso

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

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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.

Amici are interested in this disciplinary proceeding because of the seriousness of the ethics charges against Petitioner Brent Edward Webster and because certain of the Amici were the complainant and co-complainants on one of the ethics complaints that led to the disciplinary petition against Warren Kenneth Paxton, Jr. involving the same conduct at issue here. Mr. Paxton's plea to the jurisdiction was denied by the District Court of Collin County and the Court of Appeals dismissed his interlocutory appeal. *Paxton* v. *Commission for Lawyer Discipline*, No. 05-23-00128-CV (Tex. App. – Dallas, Apr. 18, 2024, pet. pending) (mem. op.).

Two former Texas State Bar Presidents previously testified about the harm to the legal profession and to future law students if the ethics rules are not enforced against executive-branch lawyers. Amici are concerned that if this Court were to accept Mr. Webster's separation of powers and/or sovereign immunity arguments,

it would create a two-tier system of justice in Texas – one for government lawyers and one for all others. Since the allegations of professional misconduct by Mr. Webster and the separation of powers and sovereign immunity arguments are essentially the same in this disciplinary proceeding as in the proceeding against Mr. Paxton, *Amici* have a strong interest in this proceeding. Amici filed an amicus brief in the District Court and in the Court of Appeals in this case.

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

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

Summary

Mr. Webster's separation of powers argument is self-contradictory and misconceived. His central theme is that the Attorney General has "broad discretion" to conduct the State's civil litigation, including to assess the evidence, facts and law, and that judicial branch discipline of his misrepresentations to a court "unduly interferes" with his core power. Brief for Petitioner (Pet.Br.) at 23-33.

Yet, Mr. Webster concedes that separation of powers is no bar to judicial branch disciplinary proceedings against an Attorney General for three types of

misconduct – criminal conduct (Pet.Br. at 36), *ultra vires* acts (Reply Brief on the Merits for Petitioner (Reply Br.) at 7), and misconduct before a court (Pet.Br. at 38) – because the Attorney General has no legal authority to engage in such misconduct. He concedes, for example, that "the Separation of Powers Clause would have posed no barrier to … a disciplinary proceeding against Attorney General Morales … since the commission of crimes does not fall within the ambit of any of the Attorney General's constitutionally assigned functions; disciplining him for criminal activity thus cannot be said to 'interfere'[] with the discharge of his constitutional duties." (citation omitted). Pet.Br. at 36.

That is, even under Mr. Webster's approach, the test for whether disciplinary proceedings against an Attorney General violate separation of powers does not turn on the scope of the Attorney General's general powers, but on whether he has the authority to engage in the type of misconduct alleged against him. Here, the Attorney General and his Assistant Attorneys General, including Mr. Webster, have no more legal authority to violate this Court's disciplinary rules than they do to commit crimes, *ultra vires* acts or misconduct before a court.

It follows that separation of powers is no bar to the judicial branch's bringing disciplinary proceedings against Mr. Webster as a Texas-licensed attorney, just as it does against any other Texas-licensed attorney for breaching the disciplinary rules. Indeed, Mr. Webster's attempt to escape disciplinary

proceedings for himself and hundreds of other lawyers in the Attorney General's office intrudes on this Court's own fundamental constitutional and statutory powers to regulate the legal profession, including the power to discipline "each" Texas-licensed lawyer for rules' violations. *See* Brief of Respondent Commission for Lawyer Discipline (Resp.Br.) at 30-32. The separation of powers doctrine cuts against Mr. Webster.

In addition, Mr. Webster has not shown that subjecting the Attorney General's office lawyers to disciplinary proceedings would prevent them from "effectively" conducting the State's civil litigation, as would be required to show "undue interference". Mr. Webster has failed to provide any evidence that the Attorney General's office lawyers cannot represent their clients "effectively" *unless* they may violate the disciplinary rules and be exempted from disciplinary proceedings to sanction such violations. It is nonsensical that some government lawyers somehow could have such a unique need, one that distinguishes them from the other more than 100,000 Texas-licensed lawyers.

Finally, since Tex. Gov't Code Sect. 81.071 explicitly subjects "each" Texas-licensed lawyer to the "disciplinary jurisdiction" of the Commission, to hold that disciplinary proceedings against Attorney General's office lawyers are barred by separation of powers would require holding this statute unconstitutional as applied. Mr. Webster cannot overcome the "strong presumption in favor of

[constitutional[] validity" and meet the "high bar for declaring any [statute] in violation of the Constitution." *Patel* v. *Texas Department of Licensing and Regulation*, 469 S.W.3d 69, 91 (Tex. 2015).

Mr. Webster's sovereign immunity argument is likewise misconceived. His premise – that disciplinary proceedings for professional misconduct are subject to sovereign immunity and therefore that the only question is whether he acted in his "official capacity" or "individual capacity," Pet.Br. at 40-43 – is flatly wrong.

This Court, as a matter of common law, has identified at least two standards for determining whether particular types of official conduct are subject to sovereign immunity: (1) whether the conduct is within the official's "authority," *See Matzen* v. *McLane*, 659 S.W.3d 381, 388 (Tex. 2021) (because *ultra vires* acts are not within an official's authority, they are not subject to sovereign immunity) and (2) whether providing immunity would "further the purposes" of sovereign immunity. *See Nettles* v. *Gtech Corporation*, 606 S.W.3d 726, 738 (Tex. 2020).

Here, as with *ultra vires* acts, the Attorney General has no constitutional or statutory "authority" to violate the disciplinary rules; indeed, Mr. Webster concedes that he is subject to the rules. Reply Br. at 7. For this reason alone, violation of disciplinary rules falls outside of sovereign immunity, just as Mr. Webster concedes that *ultra vires* acts do. *Id*.

Nor would subjecting disciplinary proceedings for professional misconduct to sovereign immunity "further the purposes" of sovereign immunity: "protecting the public fisc," *City of El Paso* v. *Heinrich*, 284 S.W.3d 366, 376 (Tex. 2009) (citation omitted) and "preventing the judiciary from interfering with the responsibilities of the other branches." *Nettles*, 606 S.W.3d at 738. Disciplinary proceedings do not involve money judgments against the State, but solely professional sanctions against individual attorneys. Nor do disciplinary proceedings interfere with the State's civil litigation. The responsibilities of the executive branch do not include conducting civil litigation in violation of the judicial branch's ethics rules.

The Commission's interpretation of Rule 8.04(a)(3) would not, as Mr. Webster claims, subject Texas lawyers to discipline because they failed ultimately to prove every allegation in a complaint (see Pet.Br. at 29); it would do so only if they failed to have "credible or admissible evidence" to support representations to courts at the time they made the representations and made "dishonest" "misrepresentations" to a court. The pleadings before the United States Supreme Court that contained the statements found by the Commission to be misrepresentations asserted that there was no need for additional factual inquiries and the case was a "prime candidate for summary disposition [.]" *Texas* v.

Pennsylvania, 592 U.S. ___ (2020), Brief in Support of Motion for Leave to File Bill of Complaint. at 35.

Argument

I. Disciplinary Proceedings against Mr. Webster Are Not Barred by Separation of Powers

A. There Is No Separation of Powers Bar Under the "Undue Interference" Test Because Mr. Webster Has No "Constitutionally Assigned Powers" to Violate the Disciplinary Rules

1. An Attorney General's Violation of Disciplinary Rules Is Analogous to His Committing Three Other Categories of Misconduct for Which Mr. Webster Concedes Separation of Powers Is No Bar to Commission Disciplinary Proceedings

Mr. Webster's argument that separation of powers prohibits judicial branch proceedings against an Attorney General for alleged disciplinary violations[1] is fatally flawed. Mr. Webster concedes that separation of powers is no bar to disciplinary proceedings against an Attorney General for three different types of misconduct an Attorney General can commit: criminal conduct, misconduct before a court and *ultra vires* acts.

[1] What Mr. Webster is apparently challenging in this appeal is not whether an Attorney General is subject to the disciplinary rules *per se*, but whether the judicial branch may use the Commission for Lawyer Discipline to bring disciplinary proceedings against him or his Assistant Attorneys General for alleged violation of those rules. *See* Pet.Br. at xiv, 8. "As the First Assistant has repeatedly explained, he and other executive branch attorneys remain bound by the ethical rules [.]" Reply Br. at 7.

Mr. Webster acknowledges that the reason that separation of powers is no bar to sanctioning these three types of misconduct is that the Attorney General has no constitutional power or discretion to engage in them, i.e., no "constitutionally assigned powers". For the same reason, separation of powers is no bar to disciplinary proceedings against an Attorney General for the misconduct of violating this Court's disciplinary rules: the Attorney General has no "constitutionally assigned powers" to violate the disciplinary rules.

Specifically, Mr. Webster states as to each type of misconduct:

Criminal Conduct

"[T]he Separation of Powers Clause would have posed no barrier to … a disciplinary proceeding against Attorney General Morales had he been in office at that time, since the commission of crimes does not fall within the ambit of any of the Attorney General's constitutionally assigned functions; disciplining him for criminal activity thus cannot be said to 'interfere[]' with the discharge of his constitutional duties. *In re Turner*, 627 S.W.3d at 660." Pet.Br. at 36. Thus, Mr. Webster concedes that, since the Attorney General has no constitutional power to commit crimes, disciplining him for such misconduct does not "unduly interfere [with his] effectively exercis[ing his] constitutionally assigned powers."

Misconduct Before A Court

"Even for acts in his official capacity, the First Assistant has never disputed that a *court* can sanction executive-branch lawyers for conduct undertaken in their official capacities before *the court* that violates ethical rules. (emphasis in original) *See Brewer* v. *Lennox Hearth Prods*., LLC, 601 S.W.3d 704, 718 & n. 41 (Tex. 2020) (quoting *In re Bennett*, 960 S.W.2d 35, 40 (Tex. 1997) (per curiam) (orig, proceeding))." Pet.Br. at 38. Indeed, one of the specific sets of rules *Brewer* cites whose violation courts are entitled to sanction is the Texas Disciplinary Rules of Professional Conduct (TDRPC) that Mr. Webster is alleged to have violated in this case. 601 S.W.3d at 707 n.2.[2]

Ultra Vires Acts

"The Separation of Powers Clause also would provide no barrier to the Commission instituting a disciplinary action in response to *ultra vires* or criminal conduct which by its very nature does not fall within the discretionary constitutional authority of the Attorney General." Reply Br. at 7. As this Court noted in *Patel* v. *Texas Department of Licensing and Regulation*, 469 S.W.3d 69,

[2] In addition, Mr. Webster admits that separation of powers is no bar to courts disciplining the Attorney General for a sub-category of misconduct before them: "bad faith." Reply Br. at 11. Webster acknowledges that the reason that there is no separation of powers bar is that the Attorney General has no "discretion," i.e., no legal power, to engage in "bad faith" conduct. "[C]onduct that falls within the notion of bad faith as defined by this judicial power would not present a separation-of-powers problem because the Attorney General has no discretion to engage in 'conscious doing of a wrong for a dishonest, discriminatory, or malicious purpose'. *Brewer*, 601 S.W.3d at 718." *Id.*

76 (Tex. 2015): "the premise underlying the ultra vires exception is that the State is not responsible for unlawful acts of officials."

These concessions are critical for two separate reasons. First, they dramatically illustrate that even Mr. Webster agrees that separation of powers does *not* prevent the judicial branch from seeking to discipline an Attorney General for three major types of misconduct he may commit while in office: crimes, misconduct before a court and *ultra vires* acts.[3]

Second, as Mr. Webster and the Commission agree, the test for determining the separation of powers question is whether "' one branch unduly interferes with another branch so that the other branch cannot *effectively* exercise its constitutionally assigned powers[,]'" (referred to hereafter as the "undue interference" test) (Emphasis in original) Pet.Br. at 23, quoting *Martinez* v. *State*, 503 S.W.3d 728, 733 (Tex. App. – El Paso 2016, pet. ref'd), quoting *Martinez* v. *State*, 323 S. W. 3d 493, 501 (Tex. Crim App. 2010); Brief of Respondent Commission for Lawyer Discipline (Resp.Br.) at 37, 39. Mr. Webster's concessions illustrate that under the "undue interference" test, the relevant conduct for which the Attorney General must have "constitutionally assigned power" is not

[3] "The First Assistant has readily acknowledged that executive-branch attorneys, including the First Assistant and the Attorney General, are subject to the attorney-disciplinary process for *ultra vires* conduct, criminal actions, or sanctions imposed by a court for misconduct occurring in its courtroom." Reply Br. at 8.

his general constitutional power to perform his official duties, but the specific authority to perform the particular type of conduct for which the State seeks to sanction him: misconduct before a court, criminal conduct or an *ultra vires* act.

Mr. Webster premises his whole claim that separation of powers bars this disciplinary proceeding on the Attorney General's having "broad discretion" to conduct the State's civil litigation (*see* Pet.Br. at 23-25), including the power to "assess[] … facts, evidence and law." *Id*. at 26; *and see* generally *id*. at 23-33. But under the "undue interference" test that is *not* the relevant question.

The key question, instead, is whether the Attorney General has the "constitutionally assigned power," or "discretion," to commit the particular type of misconduct for which the judicial branch is seeking to discipline him; if not, separation of powers is no bar to discipline. Thus, the germane question here is not, as Mr. Webster would have it, whether the Attorney General has the general "constitutionally assigned power" to conduct the State's civil litigation or to assess evidence, facts and law, Pet.Br. at 23-33, but whether he has such power to do so in a way that violates the disciplinary rules.

His concessions that there is no separation of powers bar to the judicial branch sanctioning an Attorney General for various types of misconduct *because* the Attorney General does not have constitutional power to engage in such misconduct destroy the entire premise of Mr. Webster's argument. The answer to

the question of whether the Attorney General has the "constitutionally assigned power" to violate the disciplinary rules, including Rule 8.04(a)(3), is a resounding "no".

Mr. Webster has not pointed to any constitutional or statutory provision that authorizes him to violate the disciplinary rules, or TDRPC Rule 8.04(a)(3) in particular, and, as noted above, Mr. Webster concedes that he is subject to those rules. (*See* fn 1). Just as the Attorney General has no "constitutionally assigned powers" to commit criminal conduct, misconduct before a court, or *ultra vires* acts, he likewise has no "constitutionally assigned powers" to violate Texas's disciplinary rules.

It follows that, under the "undue interference" test, the judicial branch's disciplinary proceedings against Mr. Webster for alleged "dishonest" "misrepresentations" in violation of Rule 8.04(a)(3) do not "unduly interfere[]" with the Attorney General's "constitutionally assigned powers." Accordingly, separation of powers is no bar to the judicial branch's proceeding against Mr. Webster.

Even if the "undue interference" test for separation of powers could be satisfied by showing that a disciplinary proceeding would "interfere" with the Attorney General's general power to conduct the State's civil litigation, including assessing evidence, facts and law, Mr. Webster would still not satisfy the test

because he has not shown that subjecting Attorney General's office lawyers to such proceedings – like all other Texas-licensed lawyers – would prevent them from "effectively" exercising their general powers. Pet.Br. at 23. To make such a showing, Mr. Webster would have to demonstrate that he and his fellow Assistants must be free to violate the disciplinary rules and be exempt from the Commission's disciplinary proceedings to be able to "effectively" conduct the State's litigation. This is absurd. Making misrepresentations to courts or engaging in any other professional misconduct is not a requirement for effectively representing the State of Texas or any client: indeed, it is anathema.

B. Mr. Webster's Separation of Powers Claim Intrudes on This Court's Constitutional Powers

The separation of powers doctrine, far from supporting Mr. Webster's claim, cuts decisively against it. The situation here is analogous to that in *Perry* v. *Del Rio*, 67 S.W.3d 86 (Tex. 2001), and *Terrazas* v. *Ramirez*, 829 S.W.2d 712 (Tex. 1992), as to the limits of the Attorney General's authority in relation to that of other branches. In *Perry*, this Court recognized that, while the Attorney General had authority to propose settlements and settle redistricting cases, he did not have any power "to effectuate a valid congressional reapportionment plan[.]" 67 S.W.3d at 93, citing *Terrazas*, 829 S.W.2d at 720.

Where the Attorney General seeks to exercise powers otherwise belonging to another branch, he must have express constitutional or statutory authority to do

so. "As a member of the executive branch, the Attorney General may not perform legislative functions unless expressly authorized to do so. *See* Tex. Const. art. II, Sect. 1; *Garcia*, 285 S.W.2d at 194-95; *Terrazas*, 829 S.W.2d at 733 (Cornyn, J., concurring)" *Perry*, 67 S.W.3d at 93.

Perry found that neither the Texas Constitution nor any statute "expressly authorizes the Attorney General's position here [] (citations omitted)" "[a]nd the State defendants provide us with no other authority giving the Attorney General the legislature's power to resolve the congressional districting controversy." *Perry*, 67 S.W.3d at 93. Accordingly, *Perry* rejected the "argument that the trial court violated our separation-of-powers doctrine when it did not defer to, or adopt, the redistricting plan the Attorney General proposed [.]" *Id*. at 92-93.

Similarly, in this case, the constitutional and statutory power to regulate the practice of law, including the power to discipline all Texas-licensed attorneys for violating the ethics rules, belongs exclusively to the judicial branch, specifically to this Court and its statutory agent, the Commission. *See* Resp.Br. at 30-32. By claiming that it violates separation of powers for a judicial branch entity to seek to discipline a Texas-licensed lawyer for alleged rules violations, Mr. Webster is, in effect, asserting that the executive branch has the authority to nullify this Court's constitutional and statutory disciplinary power as to hundreds of lawyers in the Attorney General's office.

Under *Perry*, for the Attorney General to establish that he has the power to nullify disciplinary proceedings, he would have to show that he has constitutional or statutory authority that "explicitly authorizes" him to override or bypass the judicial branch's disciplinary power as to the Attorney General's office's lawyers.

Mr. Webster, however, has wholly failed to show that the Attorney General has any such explicit constitutional or statutory power. He has none. As in *Perry*, the Attorney General's separation of powers argument should be rejected.[4]

C. Accepting Mr. Webster's Separation of Powers Claim Would Require Declaring the Statute Subjecting Each Texas-Licensed Attorney to the Commission's Disciplinary Jurisdiction Unconstitutional As Applied

Mr. Webster is not only asserting that separation of powers prevents the judicial branch from seeking to discipline him; he is also implicitly asking this Court to declare Tex. Gov't Code Sect. 81.071 unconstitutional as applied. Since Section 81.071 explicitly states that "[e]ach attorney admitted to practice in this state … is subject to the disciplinary … jurisdiction of the … Commission for Lawyer Discipline [,]" and Mr. Webster is admitted to practice in Texas, to find

[4] Indeed, as in *Perry*, "it is the Attorney General's position … that violates the separation-of-powers doctrine." 67 S.W.3d at 92-93. Mr. Webster's separation of powers argument would deprive this Court of its constitutional and statutory power to discipline an entire class of Texas-licensed lawyers for violating the ethics rules. Since the Attorney General has no explicit constitutional or statutory authority for such power, as in *Perry*, the Attorney General's position itself violates separation of powers. The Attorney General has no more authority to preempt the judiciary's power to regulate the legal profession and discipline lawyers for professional misconduct than he had authority to "perform legislative functions," *id*. at 93, in *Perry.*

that separation of powers precludes such discipline would, in effect, require this Court to hold that Section 81.071 is unconstitutional as applied to him. Because Mr. Webster's separation of powers argument applies directly to the Attorney General and thereby to all Assistants Attorney General, a holding of unconstitutionality as to Mr. Webster would also constitute a holding of unconstitutionality as applied to the Attorney General and the more than 700 lawyers in his Office.

In considering a statute's constitutionality, there is a "strong presumption" that the statute is valid. *Vinson* v. *Burgess*, 773 S.W.2d 263, 266 (Tex. 1989). As this Court noted in *Patel*, a leading case on unconstitutionality as applied: "[c]ourts must extend great deference to legislative enactments, apply a strong presumption in favor of their validity, and maintain a high bar for declaring any of them in violation of the Constitution" 469 S.W.3d at 91. Those principles would apply in this case as well.

II. State Bar Proceedings Against Texas-Licensed Lawyers for Alleged Professional Misconduct Are Not a Type of Proceeding to Which "Sovereign Immunity" Applies

The fundamental premise of Mr. Webster's sovereign immunity argument is that the sovereign immunity doctrine applies to State Bar disciplinary proceedings for alleged professional misconduct, so that the only issue is whether the petition is against Mr. Webster in his "official" or "individual" capacity. Pet.Br. at 39-48. But

that premise is incorrect. Just as an Attorney General's misconduct in committing *ultra vires* acts, professional misconduct before a court, or criminal conduct is not subject to sovereign immunity, the alleged professional misconduct of a Texas-licensed lawyer serving as Attorney General is likewise not the type of conduct to which the sovereign immunity doctrine applies.

As this Court has recognized, "'sovereign immunity is a common-law creation,' and the 'responsibility to define the boundaries of the doctrine' remains with the judiciary. *Engelman*, 514 S.W.3d at 753." *Nazari* v. *State*, 561 S.W.3d 495, 501 (Tex. 2018). For those types of conduct by state officials that the judiciary determines are outside the "boundaries," the courts never reach the question of whether the State has "waived" immunity, because the judiciary has determined that sovereign immunity does not apply to such conduct in the first place. The "issue here, then, is not whether the state waived its immunity against [certain] counterclaims …, but whether the scope of the state's immunity encompasses those counterclaims to begin with. *See Albert*, 354 S.W.3d at 375." *Nazari*, 561 S.W.3d at 502.

A. Violating Disciplinary Rules Is Similar to Committing Ultra Vires Acts Which Webster Concedes Are Not Subject to Sovereign Immunity

One type of governmental conduct for which this Court has held that sovereign immunity does not apply is *ultra vires* claims. "' Even if a government entity's immunity has not been waived by the legislature, a claim may proceed

against a government official in his official capacity if the plaintiff successfully alleges that the official is engaging in *ultra vires* conduct. *Chambers-Liberty Cntys. Navigation Dist*. v.. *State*, 575 S.W.3d 339, 344 (Tex. 2019)." *Matzen* v. *McLane*, 659 S.W.3d 381, 388 (Tex. 2021). Mr. Webster concedes that sovereign immunity does not apply to "ultra vires acts" by State officials. Pet.Br. at 40.

The rationale for excluding *ultra vires* acts from sovereign immunity is essentially that officials acting *ultra vires* are acting outside their legal authority. The basic justification for this *ultra vires* exception to sovereign immunity is that *ultra vires* acts – or those acts without authority – should not be considered acts of the state at all. Consequently, '*ultra vires* suits do not attempt to exert control over the state – they attempt to reassert the control of the state over one of its agents.' *Hall* v. *McRaven*, 508 S.W.3d 232, 238 (Tex. 2017) (citation omitted and quoting *Heinrich*, 284 S.W.3d at 372)." *Matzen*, 659 S.W.3d at 388.

Matzen's rationale for excluding from sovereign immunity *ultra vires* acts by government officials generally applies to acts by Texas-licensed lawyers in the Attorney General's office who violate Texas's disciplinary rules: such lawyers have no "authority" to violate the rules. Here, Mr. Webster had authority to make statements in pleadings to the Supreme Court as part of the Attorney General's authority to conduct the State's civil litigation. But he had no authority to make dishonest misrepresentations to the Court in violation of Rule 8.04(a)(3). To make

such misrepresentations was not only unauthorized but conflicts with the statutes subjecting all Texas-licensed lawyers to the rules and to the Commission's disciplinary jurisdiction to enforce them against alleged violators.

As in *Matzen*, the Commission's proceeding against Mr. Webster for alleged misrepresentations in violation of Rule 8.04(a)(3) does not seek to "control … the State," but "to reassert the control of the State over one of its agents[]" who is alleged to have violated the disciplinary rules.

For sovereign immunity purposes, violation of the disciplinary rules is closely parallel to an *ultra vires* act: in both situations, the government official is "without authority" to commit the misconduct. Violation of this Court's disciplinary rules likewise "should not be considered acts of the state at all." *Matzen*, 659 S.W.3d at 388. It follows that disciplinary proceedings against Texas-licensed Attorney General's office lawyers, including Mr. Webster, alleged to have violated the disciplinary rules, lie outside the scope of sovereign immunity.[5]

[5] In addition to conceding that sovereign immunity does not apply to *ultra vires* acts, Pet.Br. at 40, Mr. Webster concedes that "sovereign immunity would likely not be an issue [in court sanctions of an Attorney General for misconduct before courts] because [sovereign immunity] does not protect actions outside the scope of a state official's discretion.' *Hous. Belt & Terminal Ry. Co.* v. *City of Houston*, 487 S.W.3d 154, 163-64 (Tex. 2016)." Pet.Br. at 38. Similarly, Mr. Webster concedes in the separation of powers context that "the commission of crimes does not fall within the ambit of any of the Attorney General's constitutionally assigned functions []," Pet.Br. at 36. And, in the Court of Appeals below, Mr. Webster conceded that "[n]or would sovereign immunity ordinarily provide a defense against criminal charges brought against an executive-branch lawyer." Brief for Appellee at 29, *Comm'n for Law. Discipline v. Webster*, 676 S.W.3d 687 (Tex. App.- El Paso 2023, pet. filed).

B. Granting Sovereign Immunity to Disciplinary Proceedings for Professional Misconduct Would Not "Further the Purposes" of Sovereign Immunity

Beyond *Matzen's* standard for excluding *ultra vires* acts from sovereign immunity because they are "without authority," the Court also considers whether application of sovereign immunity to a particular type of conduct would serve the "purposes" of the sovereign immunity doctrine. *Nettles* v. *Gtech Corporation,* 606 S.W.3d 726, 738 (Tex. 2020) (denying a claim for "derivative sovereign immunity from suit [because it] would not further the purposes of immunity."); accord, *Brown & Gay Eng'g, Inc*. v. *Olivares*, 461 S.W.3d 117, 119, 123 (Tex. 2015).

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.'" N*ettles,* 606 S.W.3d at 737 (citations omitted).

As previously noted, "the modern justification for [sovereign] immunity [is] protecting the public fisc." *Heinrich,* 284 S.W.3d at 376 (citation omitted). Thus, the sovereign immunity doctrine applies to traditional civil lawsuits seeking to control the government's expenditure of money, such as for torts, e.g., *Lopez* v.

City of El Paso, 621 S.W.3d 762, 766-67 (Tex. App. – El Paso, 2020) or breaches of contract, *Hays Street Bridge Restoration Group* v. *City of San Antonio*, 570 S.W.3d 697, 706-08 (Tex. 2019).

Sovereign immunity's secondary purpose is to avoid having the judiciary disrupt other branches in carrying out their functions. "'[T]he immunity doctrine represents the separateness of the branches of government, (citations omitted) by preventing the judiciary from interfering with the responsibilities of the other branches." (citations omitted) *Nettles*, 606 S.W.3d at 738.

By contrast, disciplinary proceedings against government lawyers for violating professional ethics are not within the "purposes" of sovereign immunity. These proceedings cannot result in any money judgment against the government. Disciplinary proceedings are solely against an individual attorney. Moreover, the remedy is never a money judgment, but solely a professional sanction against the individual attorney, including, most seriously, disbarment.

Nor, as discussed above at pages 3-4, 10-11, does discipline of government lawyers for professional misconduct interfere with the executive branch's "responsibilities," including the conduct of litigation. To the contrary, the "responsibility" of the Attorney General's office lawyers is to conduct litigation in a way that complies with the disciplinary rules. Thus, disciplinary proceedings against Texas-licensed lawyers in the Attorney General's office, including Mr.

Webster, for alleged violation of the disciplinary rules satisfy both the outside of "purposes" and "without authority" standards for excluding such proceedings from sovereign immunity.

In addition to *ultra vires* acts, two other types of Attorney General misconduct that would not be subject to sovereign immunity under the "without authority" and "outside the purposes" standards are criminal conduct and misconduct before a court.

First, the Attorney General and his Assistants have no "authority," *See Matzen*, 659 S.W.3d at 388, to commit criminal conduct or misconduct before a court. See pp. 10-11, *supra*.

Second, proceeding against Attorney General's office lawyers for any of these three types of misconduct does not threaten the "public fisc," *See Lopez*, 621 S.W.3d at 766-67, or "interfere with the responsibilities of the [executive] branch[.]" *See Nettles*, 606 S.W.3d at 738 and pp. 11-12, *supra*.

Accordingly, preventing the judicial branch from proceeding against such attorneys for engaging in any of these three types of misconduct would not "serve the purposes" of sovereign immunity. *See Brown & Gay Engineering*, 461 S.W.3d at 117, 119 ("extending sovereign immunity does not serve the purposes underlying the doctrine, and we therefore decline to do so.")

Further, violation of the disciplinary rules by lawyers in the Attorney General's office is a closely parallel type of misconduct to their professional misconduct before a court, *ultra vires* acts and criminal conduct. Mr. Webster's concessions that Attorney General lawyers' *ultra vires* acts are not subject to sovereign immunity and that their misconduct before a court and criminal actions also generally would not be subject to immunity reinforces the conclusion that judicial branch sanction of these three types of misconduct is not subject to sovereign immunity.[6]

Thus, Attorney General lawyers' violations of the Texas Disciplinary Rules of Professional Conduct, including Rule 8.04(a)(3), satisfy the "without authority" and "outside the purposes" standards for excluding certain types of conduct from sovereign immunity. Further, as Mr. Webster largely concedes, three other types of Attorney General misconduct – professional misconduct before a court, *ultra vires* acts and criminal conduct - are not subject to sovereign immunity. There is no rational basis for treating violations of the disciplinary rules differently based on where a lawyer works.

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[6] Mr. Webster has already conceded in the separation-of-powers context that there is no bar to disciplinary proceedings for these three types of misconduct. "The First Assistant has readily acknowledged that executive-branch attorneys, including the First Assistant and Attorney General, remain subject to the attorney-disciplinary process for *ultra vires* conduct, criminal actions, or sanctions imposed by a court for misconduct occurring in its courtroom." Reply Br. at 8.

For these reasons, the Court should hold that disciplinary proceedings for professional misconduct of Texas-licensed lawyers in the Attorney General's office are not a type of proceeding to which sovereign immunity applies and reject Webster's claim to the contrary.

III. Rule 8.04(a)(3) and First Amendment

A. Rule 8.04(a)(3)

Mr. Webster's argument that the Commission's interpretation of TDRPC 8.04(a)(3) would subject every lawyer to potential disbarment if the ultimate "evidence [in a case failed] to support every allegation in a petition," Pet.Br. at 29, is misconceived and invalid.

The Commission is not basing its allegations that Mr. Webster violated Rule 8.04(a)(3) on a mere claim that the evidence in *Texas* v. *Pennsylvania* ultimately failed to support factual statements he had made in the complaint. Rather, the Commission is alleging that at the time Mr. Webster made statements to the Supreme Court, he lacked any "credible or admissible evidence" to support them and that these statements were "dishonest" and were "misrepresentations" to the Court. Resp.Br. at 36.[7]

[7] Similarly, the West Amicus arguments that the Commission's interpretation of Rule 8.04(a)(3) would subject Texas lawyers to potential sanctions whenever the ultimate evidence did not "perfectly align with their pleadings," Amicus Curiae Brief of West Webb Albritton & Gentry, P.C. in Support of Petitioner (West Amicus) at 15, and that the Commission's interpretation would "deter[] attorneys from pursuing valid legal claims for fear of retrospective disciplinary actions by the bar based on the outcomes of their cases," West Amicus at 17, are unsupportable.

Mr. Webster's further argument that the Commission's allegations that he misrepresented facts to the Court should not be taken seriously because the case was dismissed so quickly that he had "no opportunity for the development of evidence through discovery or an evidentiary hearing before a special master []" (citation omitted), Pet.Br. at 29, is grossly misleading and indefensible.

In fact, Mr. Webster and his colleagues were never seeking any discovery or the appointment of a special master because they were asking the Court for immediate injunctive relief to prevent the four defendant States "from voting in the electoral college [.]" *Texas* v. *Pennsylvania*, 592 U.S. ___ (2020) (12/7/20), Motion for Preliminary Injunction and Temporary Restraining Order or, Alternatively, for Stay and Administrative Stay, at 35.

Mr. Webster and his colleagues filed all their pleadings on the same day, December 7, 2020. On that date they, in effect, disavowed that they had any need to gather further evidence. They told the U.S. Supreme Court that **"[t]his case presents a pure and straightforward question of law that requires neither finding additional facts nor briefing beyond the threshold issues presented here."** (Emphasis added) Brief in Support of Motion for Leave to File Bill of

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What would subject attorneys to potential sanctions would not be lack of alignment between facts pled and the ultimate evidence. It would be, as alleged about Mr. Webster, failing to have any "credible or admissible evidence," Resp. Br. at 36, to support factual representations to a court at the time the attorney makes the representations and having those representations be "dishonest" and "misrepresentations." *See id.*

Complaint (Brief in Support) (12/7/20), at 35. Further, they stated, "this case is a prime candidate for summary disposition because the material facts are not in serious dispute." (citation omitted). Brief in Support at 34.

Moreover, Mr. Webster and his colleagues requested that, if Texas's emergency relief were denied, the Court schedule briefing on the merits by all parties, as well as oral argument, if any, for between December 8-11, 2020, i.e., within only **four days** after they had filed their pleadings. 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. Even if Mr. Webster had intended to ask the Court for discovery or a special master, the lightning time schedule that Mr. Webster requested would have made it impossible for Texas to conduct discovery or utilize a special master in any case.

B. First Amendment

The West Amicus contention that sanctioning Mr. Webster under Rule 8.04(a)(3) would violate Webster's First Amendment rights, at 20-22, is based on two false premises and is unfounded. First, West Amicus treats Mr. Webster as if he had the full First Amendment free speech rights of an ordinary citizen.

However, the United States Supreme Court has made it clear "that lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary

citizen would not be." *Gentile* v. *State Bar of Nevada*, 501 U.S. 1030, 1071 (1991). As *Gentile* explains: "[i]n the United States, the courts have historically regulated admission to the practice of law before them, and exercised the authority to discipline and ultimately to disbar lawyers whose conduct departed from prescribed standards." *Id*. at 1066.

Second, West Amicus' premise is that because Mr. Webster had authority as First Assistant to make representations to the Supreme Court in his "official capacity," therefore his alleged misrepresentations were also in his official capacity for purposes of discipline. This premise is wrong. West Amicus has improperly assumed that, legally, Mr. Webster wears only one hat for First Amendment and disciplinary purposes. To the contrary, Mr. Webster wears two different hats: one as First Assistant and one as a Texas-licensed lawyer.

While Mr. Webster had authority to submit statements to the Supreme Court in his "official capacity" as First Assistant, he had no authority in that capacity or in his capacity as a Texas-licensed lawyer to make dishonest misrepresentations in violation of the disciplinary rules to the Court. In his capacity as a Texas-licensed lawyer, Mr. Webster was prohibited from violating Texas Disciplinary Rules of Professional Conduct 8.04(a)(3): "[a] lawyer shall not … engage in conduct involving dishonesty, fraud, deceit, or misrepresentation [,]" and is subject to discipline under the Texas Rules of Disciplinary Procedure if he did. *See* Resp.Br.

at 32-33. Thus, Mr. Webster has no more free speech rights to make dishonest misrepresentations to a court than any other Texas-licensed lawyer.

Conclusion

For the reasons described above, both Mr. Webster's separation of powers and sovereign immunity claims are baseless.

Prayer

The Court should affirm the judgment of the Court of Appeals and remand to the District Court for a jury trial.

Dated: August 27, 2024.

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/ 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
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/s/ James C. Harrington
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/s/ Mario Lewis
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Past President, State Bar of Texas
Past President, Texas Trial Lawyers Association
State Bar Number: 00000061

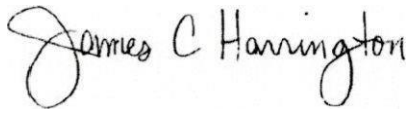
Organizational Signer:

/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

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

CERTIFICATE OF SERVICE

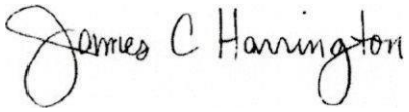
I certify that I served all parties to this appeal through the Court's electronic filing system, including Petitioner and Petitioner's counsel on the 27th day of August 2024.



Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that the text of this amicus brief contains 5.664 words.



Counsel for Amici Curiae