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SUPREME COURT OF TEXAS
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No. 22-1145

In the Supreme Court of Texas

Dianne Hensley,
***Petitioner*,**

v.

State Commission on Judicial Conduct, et al.,
Respondents.

On Petition for Review from the
Third Court of Appeals, Austin, Texas
No. 03-21-00305-cv

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STATEMENT AS TO ORAL ARGUMENT.

Petitioner has not requested oral argument. Should this Court grant Petitioner oral argument, Respondents also request oral argument.

ABBREVIATIONS

"***Merits B.***" followed by the page number are references to Petitioner's brief.

"**Petitioner**" or "**Hensley**" refers to Petitioner Dianne Hensley.

"**Commissioners**" refers to Respondents David C. Hall, in his official capacity as Chair of the State Commission on Judicial Conduct; Ronald E. Bunch, in his official capacity as Vice-Chair of the State Commission on Judicial Conduct; Tramer J. Woytek, in his official capacity as Secretary of the State Commission on Judicial Conduct; David M. Patronella, in his official capacity as Member of the State Commission on Judicial Conduct; Darrick L. McGill, in his official capacity as Member of the State Commission on Judicial Conduct; Sujeeth B. Dralcsharam, in his official capacity as Member of the State Commission on Judicial Conduct; Ruben G. Reyes, in his official capacity as Member of the State Commission on Judicial Conduct; Lee Gabriel, in her official capacity as Member of the State Commission on Judicial Conduct; Valerie Ertz, in her official capacity as Member of the State Commission on Judicial Conduct; Frederick C. Tate, in his official capacity as Member of the State Commission on Judicial Conduct; Steve Fischer, in his official capacity as Member of the State Commission on Judicial Conduct; Janis Holt, in her official capacity as Member of the State Commission on Judicial Conduct; M. Patrick Maguire, in his official capacity as Member of the State Commission on Judicial Conduct.

"**Commission**" refers to Respondent The State Commission on Judicial Conduct.

"**Respondents**" refers to Commissioners and Commission, collectively.

"**Append.**" refers to the Appendix.

"**CR.**" refers to the Clerk's Record.

"**Findings**" refers to the Trial Court's Findings of Fact and Conclusions of Law.

"**Petition**" refers to Petitioner's Petition for Review.

"**Public Warning**" refers to the Commission's November 19, 2019 Public Warning issued to Petitioner.

"**RR**" refers to the Reporter's Record.

"**Supp. CR.**" refers to the Supplemental Clerk's Record.

"**T.R.A.P.**" refers to the Texas Rules of Appellate Procedure.

"**T.R.C.P.**" refers to the Texas Rules of Civil Procedure.

"**RFRA**" references the Texas Religious Freedom Restoration Act; Texas Civil Practices and Remedies Code § 110.001, *et seq*.

"**TCPRC**" references the Texas Civil Practice and Remedies Code.

APPENDIX

1. Public Warning issued to Dianne Hensley, November 12, 2019, ("***Public Warning***"), CR. 619-620.

2. Judicial Canon 4A(1).

3. Trial Court Findings of Fact and Conclusions of Law ("Findings"), August 26, 2021, Supp. CR. 3-44.

4. Order Granting Defendants' Plea to the Jurisdiction and, In the Alternative, Plea in Estoppel, ("***Trial Court Order of Dismissal***"), June 25, 2021, CR. 762¬764.

5. Plaintiffs' Second Amended Petition, CR. 598-616.

6. Exhibit 1, Plaintiff's Second Amended Petition, Handout Delivered by Court Staff to Same Sex Couples Seeking the Wedding Ceremony Services of Petitioner. CR 622.

7. Petitioner's Counsel's letter dated February 17, 2019, ¶ 10 CR. 656.

STATEMENT OF THE CASE

Type of Proceeding: Suit for Declaratory Judgment and damages.

Nature of the Case: Claims asserted by Petitioner pursuant to TCPRC § 110.001, *et seq*., the Texas Religious Freedom Restoration Act.

Disposition: Dismissed by the trial court for lack of jurisdiction.

ISSUES PRESENTED

I. Did the district court err by granting the defendants' plea to the jurisdiction?

II. Did the district court err by granting, in the alternative, the defendants' plea in estoppel?

III. Did the district court err by refusing to grant Judge Petitioner's motion for summary judgment?

TO THE HONORABLE TEXAS SUPREME COURT:

Respondents (the State Commission on Judicial Conduct and its Commissioners or former Commissioners) (collectively referred to as the Commission) file this their Respondents' Brief. Respondents respectfully show this Texas Supreme Court as follows in support:

I. PRELIMINARY STATEMENT.

Petitioner requests this Court reverse the Court of Appeals decision affirming the trial court's dismissal of Petitioner's suit, also asking that this Court render summary judgment in her favor. However, Petitioner's suit is a collateral attack on a final, unappealable Public Warning disciplinary order issued by the Commission on November 19, 2019. The Public Warning is final because Petitioner knowingly waived the statutory appellate process to challenge that Public Warning and instead filed this suit. Petitioner acknowledges the Warning itself will not be affected by the outcome of this litigation. For such reasons, the trial court dismissed lack of jurisdiction and the Third District Court of Appeals affirmed.

Respondents respectfully contend this Court must affirm, lest the law of Texas be turned on its ear. Petitioner procedurally asks this Court to validate her decision to ignore the mandatory statutory appeals process for the Public Warning set by the Texas Government Code § 33.034. She instead filed an entirely new suit for declaratory judgment, raising issues which were or could have been raised in the

process culminating in the Warning. As alarming, Petitioner asks this Court to subvert the ethical obligations of Texas judges to conduct themselves as visibly impartial.

The Public Warning was based on Petitioner's admitted, voluntary, and repeated biased and discriminatory public statements as a Justice of the Peace about gay/lesbian Texans. She openly refused to conduct marriage ceremonies for same sex couples, while offering to conduct them for heterosexual couples.

Critical to this Court's analysis is that Petitioner's legal power to marry is provided by statute as an incident to her public office as a Justice of the Peace. The legal foundation for the Public Warning is that Petitioner's conduct breached her ethical obligations pursuant to Canon 4A(1), of the Code of Judicial Conduct to conduct herself in such a way that her words and actions do not "cast reasonable doubt on [her] capacity to act impartially as a judge."[1]

No one has disputed that she would be within her rights to refuse to perform a same-sex wedding if relying on ordination or licensing by her own church, rather than on the authority granted to her as a judge by Texas law to perform weddings. Petitioner has not been directed by the Commission as to what church she can or cannot attend, nor has the Commission ordered Petitioner may not state her moral

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[1] TX ST CJC Canon 4(A)(1), Append. 2.

views provided she does not "cast reasonable doubt on [her] capacity to act impartially as a judge." TX ST CJC Canon 4(A)(1), Append. 2.

Because Petitioner voluntarily refused to appeal from the Public Warning as provided by law, she is bound by the legal ramification of that Public Warning and cannot collaterally attack it. Petitioner nevertheless seeks to re-try the legal and factual determinations underlying the Warning by seeking a declaratory judgments that either (1) directly contradict the Public Warning, or (2) raise issues so far outside the Warning that they simply are not ripe.

While the findings in the Public Warning recited what is stated above,[2] Petitioner has repeatedly misstated the basis for the Public Warning as "her refusal to officiate same-sex marriages."[3] That was not the basis for the Public Warning. Instead, it was her public statements and actions that identified her willingness to officiate only opposite-sex marriages, and public statements explaining why she had

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[2] *See* Public Warning, CR. 619-620 at ¶ 2, Append. 1, ("2. On June 24, 2017, the Waco Tribune newspaper published an article on their website entitled *No Courthouse Weddings in Waco for Same-sex Couples, 2 Years After Supreme Court Ruling* which reported that Justice of the Peace Dianne Hensley 'would only do a wedding between a man and a woman.'").

[3] Merits Br. at 15, 25-30, 33, 39, and 48.

made the decision to use her judicially granted authority in this clearly partial way that "cast reasonable doubt on [her] capacity to act impartially as a judge."[4]

This Court should be guided by a decision of the Wyoming Supreme Court that affirmed sanctions imposed on a judge for conduct remarkably similar to Petitioner's. That Wyoming judge made public statements about her refusal to conduct same sex marriage ceremonies while stating she agreed to conduct heterosexual marriage ceremonies. The Wyoming Judicial Conduct Commission concluded the judge's statements and conduct failed to maintain "the public's faith in an independent and impartial judiciary that conducts its judicial functions according to the rule of law, independent of outside influences, including religion, and without regard to whether a law is popular or unpopular."[5] The Wyoming Supreme Court rejected the judge's defenses based on her constitutional rights to free exercise of religion and freedom of speech, concluding the sanction did not violate her rights because, among other reasons, the State "has a compelling

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[4] TX ST CJC Canon 4(A)(1), Append. 2.

[5] *In re Neely*, 390 P.3d 728, 753 (Wyo. 2017) (reducing sanction from removal from office to censure).

government interest in maintaining the integrity of the judiciary, in this case by enforcing Wyoming Rules of Judicial Conduct . . . ."[6]

Texas shares this interest. The rights of Texans to an impartial judiciary outweigh any right Petitioner may claim to publicly exercise her judicial powers in a partial manner.

II. SUMMARY OF THE CASE.

The State Commission on Judicial Conduct investigates and address allegations of judicial misconduct. TEX. CONST. ART. V, § 1-a; TEX. GOV'T CODE §§ 33.021, 33.0211, 33.022. Its jurisdiction extends to all sitting Texas judges, even non-attorney Justices of the Peace such as Hensley.

The Commission issued its Public Warning on November 12, 2019.[7] Petitioner had a statutory right to appeal under Section 33.034 of the Government Code if she disputed the validity or other aspects of the Warning. Petitioner deliberately waived that right.

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[6] *Id.* at 736 ("The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions. As Justice Frankfurter once put it for the Court, 'justice must satisfy the appearance of justice.'" (quoting *Williams-Yulee v. Florida Bar*, 575 U.S. 443, 445 (2015))).

[7] Public Warning, CR. 619-620, Append. 1.

The finality of the Public Warning (and so its immunity from collateral attack) is consistent with Petitioner's statement that "the district court was wrong to suggest that Judge Hensley is seeking to undo or collaterally attack either the 'public warning' that the Commission issued on November 12, 2019, or the tentative public warning that she received on January 25, 2019. Supp. CR. 21 ("[Judge Hensley] purports to seek relief based on what was only a draft tentative action, rather than based upon the Commission's final resolution issued after her evidence and arguments at the August 8, 2019 evidentiary hearing.")."[8]

Instead of appealing this final order, Petitioner filed this suit against the Commission, reasserting claims she unsuccessfully litigated in the disciplinary proceeding, plus claims she could have asserted in the prior proceeding but did not.

The trial court below considered and heard arguments on Petitioner's motion for summary judgment as well as Respondents' Plea to the Jurisdiction and, in the alternative, Plea in Estoppel. In its order of June 25, 2021, the trial court found dismissal of Petitioner's suit was required by:

- Petitioner's failure to exercise her exclusive statutory remedy for issues pertinent to her disciplinary proceeding;

[8] Merits B. at 30.

- failure to comply with jurisdictional statutory notice requirements pertinent to her RFRA claims;
- sovereign immunity;
- statutory immunity under Section 33.006 of the Texas Government Code;
- lack of ripeness and Plaintiff's request for impermissible advisory opinions; and
- res judicata.[9]

The trial court further found that, if the Court had jurisdiction and the case were not barred by res judicata, Petitioner remained bound by the findings and conclusions of, and all issues resolved by, the November 12, 2019, Public Warning, due to collateral estoppel and other preclusive doctrines. Subsequently, the trial court signed findings of fact and conclusions of law dated August 26, 2021.[10] Petitioner timely appealed. The Third District Court of Appeals affirmed the trial court's dismissal of Petitioner's suit.[11]

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[9] Trial Court Order of Dismissal, June 25, 2021, CR. 762-764, Append. 4.

[10] Findings, Supp. CR. 3-44, Append. 3.

[11] *Hensley v. State Comm'n on Judicial Conduct*, No. 03-21-00305-CV, 2022 WL 16640801, at *7 (Tex. App.—Austin Nov. 3, 2022, pet. filed).

III. FACTUAL BACKGROUND

A detailed factual background is set forth in Paragraphs 1-23 of the trial court's Findings.[12] However, a summary of those events and facts is below.

A. The Commission

The Commission is an independent agency within the judicial branch, created over 50 years ago by amendment to article V, § 1-a of the Texas Constitution. The Constitution establishes the Commission as a thirteen-member body, all unpaid, comprised of six judges appointed by the Texas Supreme Court; two attorneys, who are not judges, appointed by the State Bar of Texas, and five citizen members, who are neither attorneys nor judges, appointed by the Governor. All are subject to advice and consent of the Senate. *See* TEX. CONST. ART. V, § 1-a(2), (4).[13]

The Commission operates pursuant to the provisions of that constitutional provision, Chapter 33 of the Texas Government Code, and the Procedural Rules for Removal or Retirement of Judges ("**PRRRJ**") promulgated by the Texas Supreme Court. *See* TEX. CONST. ART. V, § 1-a(2), (11), (14). The Commission's is to "protect the public, promote public confidence in the integrity, independence, competence,

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[12] Findings, Supp. CR. 3-44, Append. 3.

[13] *Id.*

and impartiality of the judiciary, and encourage judges to maintain high standards of conduct both on and off the bench."[14]

The Commission accomplishes this by investigating and addressing allegations of judicial misconduct. *E.g.*, TEX. CONST. ART. V, § 1-a; TEX. GOV'T CODE §§ 33.021, 33.0211, 33.022. Its jurisdiction extends to all sitting Texas judges. *See* TEX. CONST. ART. V, § 1-a(6)(A), (C).[15]

If the Commission issues a sanction, Section 33.034 of the Government Code and PRRRJ Rule 9 furnish the exclusive opportunity for an appeal. Within 30 days, the judge may make written request to the Chief Justice of the Supreme Court for appointment of a Special Court of Review. Within 10 days afterwards, the Chief Justice appoints three court of appeal justices. Within 15 days later, the Commission files its charging instrument with the Special Court of Review. Within 30 days afterwards, the Special Court of Review conducts a hearing. The hearing is *de novo*, as that term is used in the appeal of cases from justice to county court (TEX. GOV'T CODE § 33.034(e)(2)); and the hearing is governed by the rules of law, evidence, and

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[14] *Id.*

[15] *Id.*

procedure (including discovery (TEX. GOV'T CODE § 33.027)) applicable to non-jury civil trials.[16]

B. The Commission Member Respondents.

The individual Respondents are, or were when sued, Commissioners of the Commission. Each has been sued solely in his or her official capacity.

C. Interaction Between The Commission and Petitioner.

Based on a Waco news article,[17] which included an interview of Petitioner about her wedding service practices, the Commission conducted an investigation. It received written responses from Petitioner to several questions[18] and it conducted an evidentiary hearing attended by Petitioner and three of her counsel. In her written responses and at the hearing, they asserted defenses including a claim under RFRA.[19]

Following the hearing, the Commission issued a November 12, 2019 Public Warning which included findings regarding her newspaper interview, her admission of performing opposite-sex weddings while declining to perform same-sex wedding

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[16] *Id.* at ¶5(e), Supp. CR. 6, Append. 3.

[17] *Id.* at ¶ 7, Supp. CR. 7, Append 3.

[18] *Id.* at ¶ 8, Supp. CR. 7, Append 3.

[19] *Id.* at ¶¶ 11-13, Supp. CR. 9, Append. 3.

ceremonies, her use of court personnel to communicate refusal of services to same-sex couples, and her testimony that she would recuse herself from cases in which a party doubted her impartiality on the basis of her public refusal to perform same-sex weddings.[20] Petitioner had the right to file an appeal to challenge any aspect of the Public Warning and obtain de novo review. Petitioner could have re-urged her RFRA defense in that appeal. *See* TCPRC § 110.004.[21] She admits she chose not to appeal.[22]

Instead, Petitioner filed this lawsuit in McLennan County. Venue was transferred to Travis County.[23] Failing to appeal had predictable consequences. The trial court dismissed for lack of jurisdiction and applied res judicata to her claims.[24]

In this lawsuit, Petitioner seeks:

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[20] Public Warning, CR. 619-620, Append 1.

[21] *See also* Findings at ¶ 24(b)-(f), Supp. CR. 14-15, Append. 3.

[22] *Id.* at ¶ 18, Supp. CR. 12-14, Append. 3.

[23] *Id.* at ¶ 21, Supp. CR. 14., Append. 3

[24] *Id.* at ¶¶ 52, 57-61, Supp. CR. 32, 36-41, Append. 3. The trial court alternatively concluded that Petitioner is bound by collateral estoppel and cannot re-litigate her claims. *Id.* at ¶¶ 62-68, Supp. CR. 42-44, Append. 3.

a) RFRA damages and injunctive relief based on the Commission's investigation and the Public Warning "and by [its] threatening to impose further discipline if she persists in recusing[25] herself from officiating at same-sex weddings."[26]

b) Declaratory judgment "that a judge does not violate Canon 4A merely by expressing disapproval of homosexual behavior or same-sex marriage."[27]

c) Declaratory judgment "that a judge does not violate Canon 4A by belonging to or supporting a church or charitable organization that opposes homosexual behavior or same-sex marriage."[28]

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[25] Petitioner repeatedly uses forms of the word "recuse" to describe her refusal to officiate same-sex weddings while being willing to officiate opposite-sex weddings. Recusal involves self-removal from judging a live controversy due to the presence (or appearance) of facts which might disqualify the judge. Weddings are not adversarial cases, and a disagreement with certain types of weddings is not a fact which could disqualify Petitioner from officiating a wedding. The word is not apt, and "refusal" is better. But it is apt in one way: recusal tends to imply bias or lack of impartiality, which is precisely what Petitioner's conduct reveals in this case. *See* RECUSE, Black's Law Dictionary (11th ed. 2019).

[26] *Id.* at ¶¶ 18(a), 19, Supp. CR. 13-14, Append. 3.

[27] *Id.* at ¶ 18(b), Supp CR. 13, Append. 3.

[28] *Id.* at ¶ 18(c), Supp CR. 13, Append. 3.

d) Declaratory judgment "that the Commission's interpretation of Canon 4A violates article I, section 8, of the Texas Constitution."[29]

e) Declaratory judgment "that the officiating of weddings is not a judicial 'duty' under Canon 38(6)."[30]

f) Declaratory judgment "that her decision to recuse herself from officiating at same-sex weddings and her intention to continue recusing herself is not a 'willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice."[31]

Petitioner also sought that relief against the Commissioners under a theory of ultra vires conduct.[32]

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[29] *Id.* at ¶ 18(d), Supp CR. 13, Append. 3.

[30] *Id.* at ¶ 18(e), Supp CR. 13, Append. 3.

[31] *Id.* at ¶ 18(f), Supp CR. 13 Append. 3.

[32] *Id.* at ¶ 18(g), Supp CR. 13-14, Append. 3.

IV. STANDARD OF REVIEW.

A. De Novo Review.

Subject-matter jurisdiction is required for a court to decide a case.[33] It is never presumed and cannot be waived.[34] A plea to the jurisdiction is a dilatory plea, asserted to defeat a claim for lack of subject-matter jurisdiction without regard to the merits.[35] A trial court's ruling on a plea to the jurisdiction is a question of law reviewed de novo.[36]

B. Factual Allegations Bind the Appellate Court's Review.

A plea to the jurisdiction may challenge either the pleadings or the existence of jurisdictional facts.[37] When, as in this case, a plea to the jurisdiction challenges

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[33] *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443-44 (Tex. 1993).

[34] *Id*.

[35] *Town of Fairview v. Lawler*, 252 S.W.3d 853, 855-56 (Tex. App.—Dallas 2008, no pet.) (citing *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000)).

[36] *City of Dallas v. Redbird Dev. Corp.,* 143 S.W.3d 375, 380 (Tex. App.—Dallas 2004, no pet.) (citing *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998)); *Univ. of Tex. at Dallas v. Addante*, No. 05-20-00376-CV, 2021 WL 4772931, at *8-10 (Tex. App.—Dallas Sept. 8, 2021), reconsideration en banc denied, 650 S.W.3d 874 (Tex. App.—Dallas 2022, no pet.).

[37] *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-27 (Tex. 2004) ("[W]hether a district court has subject matter jurisdiction is a question for the court, not a jury, to decide, even if the determination requires making factual findings,

the existence of jurisdictional facts, an appellate court considers relevant evidence submitted by the parties, when necessary, to resolve the jurisdictional issues raised.[38] The appellate court is not bound by the plaintiff's factual allegations.[39] This standard mirrors the TRCP Rule 166a summary judgment standard. The burden is on plaintiff to allege facts affirmatively demonstrating jurisdiction.[40]

C. Burden on Movant to Present Evidence.

The movant on the plea to the jurisdiction has the burden to assert evidence in support of its contention.[41] If movant meets that burden, plaintiff must raise a material fact issue regarding jurisdiction to survive the plea.[42] In appellate review, pleadings are construed liberally in favor of the plaintiff, looking to the plaintiff's

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unless the jurisdictional issue is inextricably bound to the merits of the case." (quoting *Cameron v. Children's Hosp. Med. Ctr.,* 131 F.3d 1167, 1170 (6th Cir. 1997))).

[38] *Id*. at 227 (citing *Bland Indep. Sch. Dist*, 34 S.W.3d at 555).

[39] *City of Dallas v. Hughes*, 344 S.W.3d 549, 553 (Tex. App.—Dallas 2011, no pet.).

[40] *Miranda*, 133 S.W.3d at 228 (referring to TCRP 166a); *Addante*, 2021 WL 4772931, at *8-10.

[41] *City of Dallas v. Heard*, 252 S.W.3d 98, 102 (Tex. App.—Dallas 2008, pet. denied) (citing *Miranda*, 133 S.W.3d at 228).

[42] *Id*.

intent.[43] "In doing so, however, [an appellate court] cannot disregard evidence necessary to show context, and [the court] cannot disregard evidence and inferences unfavorable to the plaintiff if reasonable jurors could not."[44]

D. Findings of Fact and Conclusions of Law.

In an appeal from a bench trial, the findings of fact "have the same force and dignity as a jury's verdict upon questions."[45] The findings of fact are reviewable for legal and factual sufficiency of the evidence to support them by the same standards that are applied in reviewing evidence supporting a jury's answer.[46] Unchallenged findings of fact are binding on an appellate court unless the contrary is established as a "matter of law" or there is "no evidence" to support the finding.[47] A review of unchallenged findings is confined to whether the evidence is legally sufficient to

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[43] *Id*.

[44] *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 771 (Tex. 2018).

[45] *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991).

[46] *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996); *Anderson*, 806 S.W.2d at 794.

[47] *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986).

support them.[48] Generally, attacks on the sufficiency of the evidence supporting findings of fact "must be directed at specific findings of fact, rather than at the judgment as a whole."[49]

A reviewing court may review conclusions of law to determine their correctness based upon the facts.[50] An appellate court will uphold a conclusion of law if the judgment can be supported on any legal theory supported by the evidence.[51] Conclusions of law are reviewed de novo,[52] and will not be reversed unless they are erroneous as a matter of law.[53]

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[48] *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983) ("no evidence" legal-sufficiency standard applies when an adverse finding is challenged by an appellant who did not have the burden of proof for the finding).

[49] *De Arrellano v. State Farm Fire & Cas. Co.,* 191 S.W.3d 852, 855 (Tex. App.--Houston [14th Dist.] 2006, no pet.) (citing *Zagorski v. Zagorski*, 116 S.W.3d 309, 319 (Tex. App.--Houston [14th Dist.] 2003, pet. denied)).

[50] *Citizens Nat'l Bank v. City of Rhome*, 201 S.W.3d 254, 256 (Tex. App.-Fort Worth 2006, no pet.).

[51] *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002); *Tex. Dep't. of Public Safety v. Stockton*, 53 S.W.3d 421, 423 (Tex. App.-San Antonio 2001, pet. denied).

[52] *State v. Heal*, 917 S.W.2d 6, 9 (Tex. 1996).

[53] *Stockton*, 53 S.W.3d at 423.

V. APPLICATION OF LAW TO FACTS.

A. Introduction.

Petitioner does not, before this Court, challenge any of the trial court's findings of fact.[54] Petitioner also does not raise any challenge to the sufficiency of the evidence.[55] Thus, the trial court's findings of fact are binding.[56]

B. Ramifications of Petitioner's Collateral Attack.

Reinstatement of Petitioner's suit would imperil Texas law in a least three ways. First, Petitioner's demand for a carve out to the obligation of impartiality is unsupported by law. It would give license to any judge to make biased and discriminatory extra-judicial statements coupled with blatantly partial conduct as long as that judge claims, as does Petitioner, she acted from a "sincerely held" belief. Judicial impartiality is not negotiable nor subject to exception. Judges are held to high standards.

This is for good reason. The Preamble to the Texas Code of Judicial Conduct states in part, "[t]he role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code of Judicial Conduct are the

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[54] *See generally* Merits B.

[55] *Id.*

[56] *McGalliard*, 722 S.W.2d at 696.

precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system."[57] It is not subject to debate that "the cornerstone of the American judicial system is the right to a fair and impartial process."[58] "Any judicial officer incapable of presiding in such a manner violates the due process rights of the party who suffers the resulting effects" of that bias.[59]

Even assuming for the sake of argument that Petitioner's claims could be addressed by this Court, her claimed rights do not override the compelling governmental interest of the state of Texas to maintain the integrity of the judiciary.[60] The decision of the Wyoming Supreme Court in the 2017 *In re Neely* case was guided by the same compelling government interest, and it affirmed sanctions imposed on a Wyoming judge who's conduct was similar to Petitioner's.[61]

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[57] *See* TX ST CJC, Preamble.

[58] *Bigby v. Dretke,* 402 F.3d 551, 558 (5th Cir. 2005) (citing *Bracy v. Gramley*, 520 U.S. 899 (1997)).

[59] *Id.*

[60] *Williams-Yulee*, 575 U.S. at 445.

[61] *In re Neely*, 390 P.3d at 753.

In *Neely*, a Wyoming judge made public statements announcing she would not conduct same-sex marriage ceremonies, but would conduct marriage ceremonies for heterosexual couples.[62] The Wyoming Commission on Judicial Conduct and Ethics imposed the sanction of removal because the judge's admitted conduct failed to maintain "the public's faith in an independent and impartial judiciary that conducts its judicial functions according to the rule of law, independent of outside influences, including religion, and without regard to whether a law is popular or unpopular."[63]

That judge claimed the sanction was barred because it violated her constitutional rights of freedom of speech and freedom of religion. In a prelude to its decision, the Court noted pointedly that "This case is [ ] not about imposing a religious test on judges. Rather, it is about maintaining the public's faith in the judiciary.[64]

The Court observed that if the judge's arguments were accepted, the judge would be improperly allowed the unfettered latitude "to apply the law in accordance

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[62] *Id.* at 734.

[63] *Id.* at 732. The Wyoming Supreme Court did reduce the sanction from removal from office to censure.

[64] *Id.*

with [her] individual views on what 'divine law' required, to the exclusion of any other right under the Wyoming Constitution."[65] Accordingly, that Court determined the sanction imposed on the judge did not violate her constitutional rights because Wyoming "has a compelling government interest in maintaining the integrity of the judiciary, in this case by enforcing Wyoming Rules of Judicial Conduct . . . ."[66]

Texas shares this compelling government interest in maintaining the integrity of the judiciary. To reject that interest would be to reject the public's expectation of judicial impartiality.

Second, reinstatement of Petitioner's suit collaterally attacking the Public Warning would signal to any judge that receives a sanction from the Commission that the state's statutory appellate process, through Texas Government Code § 33.034, is a nullity and may be ignored without consequence. Further, Petitioner's suit would become a model for how to artfully plead an avoidance of the statutory process by claiming one is not collaterally attacking a sanction or seeking a judgment voiding the order. This would undermine the stability of judgments and the rule of *res judicata*.

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[65] *Id.* at 744.

[66] *Id.* at 736.

Finally, Petitioner's claims fly in the face of established law that prohibits collateral attacks on Commission decisions and those of other state agencies. The 2020 decision of the First District Court of Appeals in *Hagstette v. State Comm'n on Judicial Conduct*, No. 01-19-00208-CV, 2020 WL 7349502 (Tex. App.—Houston [1st Dist.] Dec. 15, 2020, no pet.) is directly on point. It confirmed Texas courts have no jurisdiction to consider a collateral attack like that brought by Petitioner where a judge seeks review of a disciplinary ruling after waiving the de novo statutory review process of Section 33.006 of the Government Code. The First Court of Appeals decision in *Hagstette* confirms the trial court below properly dismissed the suit and the court of appeals correctly affirmed.

C. Petitioner Collaterally Attacks the Public Warning.

Petitioner filed her Petition for Review as a part of her active, public opposition to *Obergefell v. Hodges,* 576 U.S. 644 (2015).[67] However, this case is not about *Obergefell*. Rather, it is about whether Petitioner is exempt from the rules that bind others. This case is about whether Petitioner can be treated uniquely among judges by being exempted from the exclusive statutory appeal process. Also, it is about whether Petitioner is exempt from res judicata, estoppel, statutory RFRA

[67] Petition at 2.

notice requirements, and standing. Finally, this case addresses whether Petitioner is exempt from the high duty of all judges to maintain the appearance of impartiality.

Petitioner is not exempt from the rules that bind judges and litigants. The "Public Warning" was issued because of Petitioner's intemperate public display of bias in a newspaper interview and by directions to her government-paid staff to turn away same sex couples who sought Petitioner's wedding ceremony services. The sanction was not issued, as Petitioner claims, because of her personal views, because of where she goes to church, or even for her disapproval of gay people. The sanction addressed her failure to maintain the appearance of impartiality, in part by actually acting partially. [68]

Now, after voluntarily waiving[69] her right to a de novo statutory review of the "Public Warning," Petitioner hopes this suit will yield a better result regarding her alleged RFRA rights, *plus* what she could not get after a de novo statutory re-trial by a Court of Special Review: final review by the Texas Supreme Court.[70]

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[68] *See generally* Public Warning, Append. 1.

[69] Petition at 6.

[70] *See* TEX. GOV'T CODE § 33.034 (i) ("The court's decision under this section is not appealable.")

As the trial court and the court of appeals found, Texas courts have no jurisdiction over Petitioner's new lawsuit and her purported RFRA claims because she did not pursue the statutory remedy of review by de novo trial. Had Petitioner pursued the de novo review, she could have fully litigated the RFRA rights asserted unsuccessfully at the Commission.[71] In dismissing Petitioner's suit, the trial court[72] and the court of appeals[73] placed significant reliance upon the recent holding of the First Court of Appeals in *Hagstette*.[74]

D. Petitioner's Suit is Completely Barred Due to Her Failure to Use the Statutory Appeal Process.

Petitioner's failure to utilize the exclusive statutory review bars her attack in this case. The focus of her attempt to avoid dismissal is that she says she "disclaims" any "collateral attack" on the Public Warning. She claims her suit is about preventing the Commission from initiating *future* disciplinary proceedings against her over the

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[71] Findings at ⁋⁋ 1, 2, Supp. CR 3-4, App. 3.

[72] *Id.* at ⁋ 25, Supp. CR 3-4, App. 3.

[73] *Hensley v. State Comm'n on Judicial Conduct*, No. 03-21-00305-CV, 2022 WL 16640801, at *7 (Tex. App.—Austin Nov. 3, 2022, pet. filed)

[74] *See id.* at * 4 (citing *Hagstette,* 2020 WL 7349502, at *4); *see also id.* at * 7 (Goodwin, J., concurring) (citing *Hagstette*).

same conduct for which she has already been sanctioned.[75] However, using artful rhetoric to assert there's no collateral attack does not make it so.[76]

Petitioner's claim that she does not seek revocation or voiding of the Public Warning would be irrelevant even if it was true (it is not—as explained below, Petitioner claims the Commission acted *ultra vires*, which would make its actions, including the Public Warning, void if true). The collateral attack rule is how *res judicata* is enforced. *Engelman Irrigation Dist. v. Shields Bros., Inc.*, 514 S.W.3d 746, 750 (Tex. 2017) ("The reason for not allowing collateral attack on a final judgment is that such an attack would run squarely against principles of res judicata…"). *Res judicata* extends to bar all questions, causes of action, and defenses that were raised *or might have been raised* in the prior litigation and which touch the same transaction or occurrence. *See Barr v. Resolution Tr. Corp. ex rel. Sunbelt Fed. Sav.*, 837 S.W.2d 627, 630 (Tex. 1992); *Tex. Water Rights Comm'n v. Crow Iron Works*, 582 S.W.2d 768, 771-72 (Tex. 1979) (res judicata applies to "causes of action or defenses which arise out of the same subject matter and which might have been

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[75] Merits B. at 12-13, 15, 29, 30, and 47.

[76] *See In re Breviloba, LLC*, 650 S.W.3d 508, 512 (Tex. 2022) ("We are guided by the 'nature' and 'gravamen' of a claim, not how the claim is artfully pleaded or recast.") .

litigated" in the original action); *Russell v. Moeling*, 526 S.W.2d 533, 536 (Tex. 1975) (noting res judicata applies to "all issues connected with a cause of action or defense which, with the use of diligence, might have been tried…" in the prior proceeding); *McGuire v. Commercial Union Ins. Co. of New York*, 431 S.W.2d 347, 352 (Tex. 1968) (noting extension of res judicata to questions of law and fact decided by the prior court). Thus, in *Browning v. Prostok*, even though the plaintiff did *not* seek to revoke a court's prior order (a bankruptcy confirmation order), his attempt to relitigate a question the court had decided in entering that order "necessarily challenge[d] the integrity" of that order. 165 S.W.3d 336, 346-47 (Tex. 2005). This Court determined the claim was barred. *Id.* at 347, 351.[77] Whether Petitioner's suit is a collateral attack does not turn on the formal relief Petitioner seeks.

Her pleadings make clear that she is seeking to collaterally attack the Public Warning.[78] For instance, ¶¶ 67-75 of Petitioner's Second Amended Petition,[79] says

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[77] It is not contested, but *res judicata* and the collateral attack rule apply with equal force to court rulings and agency final orders. *Pub. Util. Comm'n of Tex. v. Allcomm Long Distance, Inc.*, 902 S.W.2d 662, 666 (Tex. App.—Austin 1995, writ denied) ("[g]enerally, an agency's final order, like the final judgment of a court of law, is immune from collateral attack"); *see also Igal v. Brightstar Info. Tech. Group, Inc.*, 250 S.W.3d 78, 92 (Tex. 2008), *superseded by statute* TEX. LAB. CODE § 61.051(c).

[78] Plaintiff's Second Amended Petition, CR. 598, Append. 5.

[79] CR. 612-615, Append 5.

she "seeks a declaratory judgment" that the "the Commission's interpretation of Canon 4A(1)" violates article I, section 8 of the Texas Constitution."[80] By attacking "the Commission's interpretation of Canon 4A(1)" she is directly asking this court to second guess a question the Commission actually ruled on. Second, in her opening brief she unmistakably attacks the Commission's "interpretation of Canon 4A(1)" so she can get a different ruling from the Public Warning and then resume the conduct for which she was sanctioned, i.e., the conduct that "had cast doubt on her impartiality."[81] Moreover, Petitioner seeks *damages* that would be predicated on a court finding that the Commission's investigation and public warning were constitutionally and statutorily impermissible.[82]

None of Petitioner's claims escapes this problem. For Petitioner to prevail, this Court must find at least one of three things: that the Commission's construction of the Canons must be wrong, that the Canons themselves are unconstitutional (facially or as applied), or that the Commission's application of the Canons violated

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[80] Plaintiff's Second Amended Petition at ¶ 70, CR. 613, Append. 5.

[81] Merits B. at 19, 55.

[82] Findings at ¶ 18(a)-(g), 19, Supp. CR. 13-14, Append. 3.

RFRA. All three of these questions were or could have been litigated before the Commission. Relitigation of any of them is therefore barred.

Petitioner cannot cure this by claiming that she is seeking review of different conduct, because that is just an unabashed request for an advisory opinion. She admits that she is not under threat, but claims that this is only "because Judge Hensley has stopped performing weddings in response to the Commission's threats."[83] Petitioner thus claims that the threat posed by the Public Warning creates a controversy, but that is only true *if* Petitioner's contemplated conduct is precisely what she has been warned not to do. If it is, then Petitioner is asking this Court to relitigate exactly the questions the Commission answered and Petitioner did not appeal. If it is not, then Petitioner is under no threat and has no standing.[84]

Petitioner attempts to distinguish *Hagstette*, but the distinction fails. According to Petitioner, *Hagstette* addressed only claims by the magistrate judges to set aside and declare void their public admonitions, and thus she escapes its force because she has not requested such a ruling.[85]

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[83] Merits B. at 34-35.

[84] *See infra*, § V.G.

[85] Merits B. at 22-24.

Nothing in *Hagstette*'s language limits the scope of the ruling to collateral attacks specifically requesting that prior orders be voided. And the Court of Appeals in *Hagstette* made clear what the magistrate judges actually sought: "[T]he Magistrate Judges argue that the trial court had jurisdiction to declare the Commission's actions void because the Commission and its officials acted beyond their statutory authority."[86] That is, the Magistrate Judges argued "they are challenging whether 'the Commission had the authority to act in the first place—not the 'correctness' of the Commission's decision.'"[87]

Petitioner makes the very same claim. That is, when Petitioner claims in this case the Commissioners actions were *ultra vires*[88] she is necessarily claiming issuing the Public Warning is void because "[t]o state an ultra vires claim, the plaintiff must allege and prove that the named officials acted without legal authority or failed to perform a ministerial act."[89]As graphically demonstrated above, even though

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[86] *Hagstette*, 2020 WL 7349502, at *1.

[87] *Id*. at *6.

[88] Merits B. at 18; *See also* Plaintiff's Second Amended Petition at ¶ 17, CR. 602., Append. 5.

[89] *Honors Academy, Inc. v. Texas Education Agency*, 555 S.W.3d 54, 68 (Tex. 2018) (citing *Hall v. McRaven*, 508 S.W.3d 232, 238 (Tex. 2017)).

Petitioner carefully maneuvers to avoid using the term "void," the nature and gravamen of Petitioner's claim is that the Commissions actions were illegal, unauthorized, and thus void.

Further, the trial court made clear *Hagstette* shows Petitioner's broadly stated declaratory judgment claims are barred, because, as *Hagstette* held, since an appeal by trial de novo was waived, another "avenue," that is, declaratory judgment,[90] cannot be pursued.[91]

Every claim that Petitioner alleged in this case could have been raised in the statutory de novo appeal that she waived. Neither the trial court, nor this Court, has jurisdiction to substitute this suit for the exclusive judicial review designated by the Legislature.

E. Petitioner's Barred RFRA Claim Is the Centerpiece of Her Suit.

For the reasons in Section V.D., *supra*, Petitioner's RFRA claim is barred by res judicata. While Petitioner may complain that she (supposedly) could not have sought RFRA damages in a de novo appeal of the Commission's decision, even if that was true nothing would have precluded her from raising RFRA as a defense

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[90] *Hagstette*, 2020 WL 7349502, at *4.

[91] *Id*.; *see also* Findings at ¶ 25(a), Supp. CR. 16, Append. 5 (citing *Hagstette* 2020 WL 7349502 at *5).

again in that de novo review, nor does Petitioner cite any authority for the proposition that a legal question like the application of RFRA is *not* barred by *res judicata* after a failure to appeal if that defense can also support an affirmative claim in another proceeding.

Petitioner also failed to perfect any RFRA claim because the notice letter[92] she sent to the Commission in numerous ways did not satisfy RFRA requirements. Finally, the trial court found the Commission raised in its pleadings that Petitioner failed to strictly comply with the RFRA notice requirements, but Petitioner never attempted to give additional notice or otherwise cure the defective notice.[93] Each of those reasons, and others, will be addressed in turn below.

1. Petitioner previously litigated and lost her contention the Commission violated the RFRA.

Petitioner's Opening Brief mistakenly and repeatedly contends the Commission, in issuing its final appealable Public Warning, failed to address (and did not reject) her RFRA defense.[94] However, the controlling case law, *Allen v.*

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[92] Petitioner's Counsel's letter dated February 17, 2019, CR 656-68, Append. 7; *See also* Findings at ¶ 34(a), (b), Supp. CR. 20-21, Append. 5.

[93] Findings at ¶ 20, Supp. CR. 14, Append. 3.

[94] Merits B. at 43-46.

Allen, rejects that position.[95] Petitioner did not address *Allen* in her Petition, in her Reply to Respondents' Response, nor her opening merits brief in this Court.

The trial court directly cited *Allen* in ¶ 65 of the Findings of Fact and Conclusions of Law.[96] While Petitioner does not address *Allen*, she dismisses the trial court's reliance on *Allen* (without referring to *Allen*) as follows: "The district court claims that the Commission 'decided' the Texas RFRA issue *sub silentio* and treated the sanction as an implied rejection of Judge Hensley's Texas RFRA arguments. Supp. CR. 42–43 (¶¶ 64–65). The district court's stance is untenable."[97] The failure to address the merits of *Allen* is telling.

Allen is not an isolated or aberrant Supreme Court decision. It is an accurate statement of the effect of a final and appealable order.[98] "The rule is that where a

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[95] 717 S.W.2d 311, 312 (Tex. 1986) ("All pleaded issues are presumed to be disposed of, expressly or impliedly, by the trial court's judgment absent a contrary showing in the record. … That judgment will ordinarily be construed as settling all issues by implication.").

[96] Findings ¶¶ 64–65, Supp. CR. 42–43, Append. 3.

[97] Merits B. at 46 (citing Findings at ¶¶ 64–65, Supp. CR. 42–43, Append. 3).

[98] *See Vance v. Wilson*, 382 S.W.2d 107, 108-09 (Tex. 1964) (Norvell, J). ("The general rule in Texas is that all issues presented by the pleadings are disposed of by the judgment unless the contrary appears from the face thereof. '(A) judgment which grants part of the relief but omits reference to other relief put in issue by the

claim is not expressly disposed of by the judgment although raised by the pleading, the judgment will be construed as denying relief upon such claim, and the judgment will be considered as being final and appealable."[99]

The trial court found, and Petitioner has not challenged, that she had a "full and fair" opportunity to litigate before the Commission any defenses or other issues she wished – including actual litigation of asserted rights under the Texas Religious Freedom Restoration Act."[100] Precisely because she fully raised and argued RFRA as a defense before the Commission,[101] the Public Warning – which Petitioner acknowledges was a final appealable order[102] – is presumed to have overruled Petitioner's claims RFRA was violated.

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pleadings will ordinarily be construed to settle all issues by implication.'" (citation omitted))

[99] *Davies v. Thomson*, 49 S.W. 215 (Tex. 1899); *Trammell v. Rosen*, 157 S.W. 1161 (Tex. 1913); *see also Chem-Gas Engineers, Inc. v. Texas Asphalt & Refining Co*., 395 S.W.2d 690, 691 (Tex. Civ. App. – Waco 1965, writ ref'd n.r.e.) (citing *Vance*, 382 S.W.2d at 108-09).

[100] Findings at ¶ 17, Supp. CR. 12, Append. 3.

[101] *Id.* at ¶ 12, Supp. CR. 9, Append. 3.

[102] Merits B. at 14 ("Judge Hensley … declined to seek 'review of the commission's decision' under section 33.034.").

If the Commission were in error to have overruled that defense, then Petitioner's remedy – and sole remedy – was to exercise her right of statutory appeal.[103] Likewise, if the Commission denied Petitioner's due process or otherwise violated her constitutional rights,[104] her remedy – and sole remedy – was to exercise that statutory appeal. The Commission was not in error; and its procedures allowing Petitioner notice, opportunity for an evidentiary hearing, opportunity for representation by counsel, and opportunity for a prompt and efficient statutory appeal, did not deny due process.[105] Petitioner is entitled to no more.

2. Petitioner failed to comply strictly with jurisdictional statutory notice.

(a) The Insufficient Notice

It is undisputed that Petitioner gave no notice under RFRA following the August 8, 2019 hearing or the issuance of the November 12, 2019 Public Warning.

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[103] *See* Findings at ¶ 5(e), Supp. CR. 6, Append. 3 (describing the *de novo* statutory right of appeal).

[104] Merits B. at 46 (promulgating "[t]he Commission simply ignored Judge Hensley's Texas RFRA argument; it did not 'actually decide' any element of her Texas RFRA defense. And the defendants cannot 'conclusively prov[e]' that the Commission 'actually decided' the Texas RFRA issues based on this evidence[,]" while citing *Centre Equities*, 106 S.W.3d at 152 ("A movant bringing a motion for summary judgment based on collateral estoppel bears the burden of conclusively proving these elements.")).

[105] Findings at ¶ 17(a)-(b), Supp. CR. 12. Append. 3.

Her only effort to give statutorily required notice was back on February 17, 2019. Her purported notice letter said in material part:

> Judge Hensley's refusal to perform same-sex weddings is substantially motivated by her Christian faith and her belief in the Bible as the inerrant word of God. The Bible repeatedly and explicitly condemns homosexual behavior. *See*, *e.g.*, Romans 1:26-28; 1 Timothy 1:8-11; 1 Corinthians 6:9-11; Leviticus 18:22; Leviticus 20:13. The Bible also warns Christians not to lend their approval to those who practice homosexual behavior. *See*, *e.g.*, Romans 1:32. Because of these clear and unambiguous Biblical passages, Judge Hensley will not perform same-sex weddings. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(2).
>
> The Commission's investigation of Judge Hensley and its threatened penalties are imposing substantial burdens on Judge Hensley for her refusal to perform same-sex weddings in violation of her Christian faith. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(2)-(3).[106]

(b) The Trial Court's Findings

These findings of the trial court with respect to that notice are not questioned by Petitioner and are binding:

> The notice gave no greater specificity as to the 'investigation' or the 'threatened discipline' nor any specificity as to 'the manner' in which they allegedly 'impos[ed] substantial burdens' on Judge Hensley's free exercise of religion. The language of the letter implied, though it did not state, that the investigation and the

[106] Petitioner's Counsel's letter dated February 17, 2019, CR. 656-68, Append. 7; Findings at ¶10(a), (d), Supp. CR. 8-9, Append. 3.

> January 25, 2019 unsigned tentative public warning had caused Judge Hensley to cease conducting any weddings; but it later became clear that Judge Hensley continued conducting opposite-sex weddings throughout 2018 and continuing into 2019 until August 26, 2019.
>
> …
>
> Neither Judge Hensley nor her counsel sent any subsequent [RFRA] notice. In particular, Judge Hensley never gave notice complaining of any conduct by the Commission at any time after February 17, 2019, including any complaint about the August 8, 2019 hearing nor any complaint about the November 12, 2019 Public Warning or its findings or its sanction.[107]

Petitioner sent no notice after February 17, 2019. She therefore, did not complain about the August 8, 2019 hearing that led to the rendition of the November 19, 2019 Public Warning or provide any notice regarding any RFRA claim regarding same.

(c) The Applicable Law

A jurisdictional prerequisite to Petitioner's claims under RFRA is strict compliance, not mere substantial compliance, with its statutory notice requirement.[108]

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[107] Findings at ¶ 10(b)-(c), Supp. CR. 8-9, Append. 3.

[108] *Morgan v. Plano I.S.D.,* 724 F.3d 579, 585-586 (5th Cir. 2013) (finding "strict compliance," rather than "substantial compliance," is required).

TCPRC Section 110.006(a) provides:

> A person may not bring an action to assert a claim under this chapter unless, 60 days before bringing the action, the person gives written notice to the government agency by certified mail, return receipt requested:
>
> (1) that the person's free exercise of religion is substantially burdened by an exercise of the government agency's governmental authority;
>
> (2) of the particular act or refusal to act that is burdened; and
>
> (3) of the manner in which the exercise of governmental authority burdens the act or refusal to act.[109]

Section 110.006(c), (d) and (e) make clear why great detail is required in any notice under Section 110.006(a)(1), (2) and (3).[110] It is to allow the government agency to attempt, if it wishes, to provide a "narrowly tailored" remedy as to the specific alleged burden; and no suit may be brought for the specific matters identified in the statutory notice if the agency has cured those matters with a remedy.[111]

The February 17, 2019 notice was inadequate to comply with strict statutory prerequisites for any of the three time periods discussed below: (i) any time after

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[109] TCPRC § 110.006(a).

[110] TCPRC § 110.006(c), (d), and (e).

[111] *Id.*

February 17, 2019; (ii) any time before December 17, 2018, and (iii) the time between December 17, 2018 and February 17, 2019.

(i) Any issues after February 17, 2019. As to any alleged act or omission by the Commission or its members after February 17, 2019, Petitioner never gave notice purporting to comply with Section 110.006(a). Thus, Petitioner has not complied with the strict statutory notice requirements to allow any complaint about (i) the August 8, 2019 hearing or (ii) the November 12, 2019 Public Warning. (The November 12, 2019 Public Warning reflected changes made by the Commission from the Commission's January 25, 2019 unsigned tentative public warning.)

(ii) Any issue before December 17, 2018. Petitioner also cannot assert any claim under RFRA as to any alleged act or omission by the Commission or its members before December 17, 2018. This is because RFRA has a one-year statute of limitations. (See Section 110.007 of the Texas Civil Practice & Remedies Code.) This suit was filed December 17, 2019, and therefore Petitioner cannot seek relief under the RFRA based upon any act or occurrence prior to December 17, 2018.

This means that Petitioner cannot seek relief under RFRA based upon any claim concerning the commencement of the investigation, which she identifies as May 22, 2018; and she cannot seek relief based upon any alleged burden that she was called upon to respond to specific inquiries – namely, anything related to her June 20, 2018 written responses to the Commission.

(iii) The time between December 17, 2018 and February 17, 2019. As to any alleged act or omission by the Commission or its members during the two months occurring between December 17, 2018, and February 19, 2019, the February 19, 2019 purported notice letter vaguely identified the Commission's "threatened penalties." This is apparently a reference to the Commission's January 25, 2019 unsigned tentative public warning. (If not, it is too vague to comply with the statutory requirements of specificity). However, the Commission's January 25, 2019 unsigned tentative public warning never became effective. It remained confidential until Petitioner chose to attach it to her pleadings in this lawsuit. Indeed, the ultimate decision by the Commission in the November 12, 2019 Public Warning, following the evidentiary hearing, included very different textual provisions from the unsigned, "tentative Public Warning," in that it omitted two potential findings of violations that appeared in the January 25, 2019 unsigned tentative public warning. [112] The ultimate decision – the November 12, 2019 Public Warning – was never the subject of any purported statutory notice.

Petitioner's failure to strictly comply with the statutory requirements of Section 110.006 has two consequences: (i) she has failed to fulfill a jurisdictional prerequisite to the bringing of any lawsuit under RFRA; and (ii) she has failed to

[112] Petitioner admits this difference. Merits B. at 7.

assert any basis for a limited waiver of sovereign immunity, as discussed below.[113] *See, e.g.*, TEX. GOV'T CODE § 311.034 ("Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity."). The trial court's dismissal of her RFRA was well founded.

TCPRC § 110.006(a)(3) requires that the notice include a statement "of the manner in which the exercise of governmental authority burdens the act or refusal to act."[114] The notice letter did not do so and the trial court so found.[115] The notice letter merely implied that Petitioner had been required to suspend her opposite-sex wedding ceremonies due to the "investigation" and "threatened penalties." However, importantly, Petitioner acknowledged that she continued to perform opposite-sex weddings throughout 2018 and continuing into 2019 until August 26, 2019.[116] Thus, it is totally unclear – and unspecified by the purported February 2019 notice letter – the manner in which Judge Hensley was burdened by the Commission's activities prior to February 17, 2019. This failure to comply with Section 110.006(A)(3) is

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[113] *See also* Findings at ¶ 35(a)-(b), Supp. CR. 22, Append. 3.

[114] TCRPC § 110.006(a)(3).

[115] Findings at ¶ 10(b), Supp. CR. 8, Append. 3.

[116] Rule 11 Agreement, filed April 16, 2021; CR. 681-684.

fatal. Absent strict compliance with the notice requirements, no jurisdiction exists for bringing this suit and, in addition, no basis exists for any waiver of Respondents' immunity.[117]

Even if, hypothetically, the February 17, 2019 notice were not statutorily deficient, it is inadequate to support claims for any conduct by the Respondents that occurred after February 17, 2019. Petitioner's evidence shows that she continued to schedule opposite-sex weddings until after the August 8, 2019 hearing, and continued to perform them until August 26, 2019 – after the Commission's evidentiary hearing on August 8, 2019.[118] Thus, the first time that the evidence shows that there could have been any arguable burden on her "act or refusal to act" was after the August 8, 2019 hearing. Judge Hensley never gave any notice on or after that date. Accordingly, the Courts of Texas have no jurisdiction to entertain any claims under RFRA.

F. Immunity

Respondents enjoy the sovereign immunity generally applicable to State agencies and State commissioners sued in their official capacities. Additionally,

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[117] TEX. GOV'T CODE § 311.034; *Prairie View A&M University v. Chatha*, 381 S.W.3d 500, 513-14 (Tex. 2012).

[118] Rule 11 Agreement, filed April 16, 2021; CR. 681-684.

unlike most State agencies and State commissioners, Respondents also enjoy a special immunity under Section 33.006 of the Texas Government Code, which provides that the Commissioners are "not liable for an act or omission committed by the person within the scope of the person's official duties," and "[t]he immunity from liability provided by this section is absolute and unqualified and extends to any action at law or in equity."[119]

Petitioner attempts to avoid sovereign immunity and this "absolute and unqualified" statutory immunity by three strategies: (i) limited waiver of immunity in RFRA, (ii) the Uniform Declaratory Judgment Act, and (iii) her ultra vires allegations. None is successful. The trial court's dismissal was correct due to lack of jurisdiction because of Respondents' immunity.

1. RFRA

Section 110.008(a) of the Texas Civil Practice & Remedies Code gives a limited waiver of *sovereign* immunity for suits brought under RFRA. (By contrast, it does not purport to waive any other species of immunity, such as the special statutory immunity for the Respondents under Section 33.006 of the Texas Government Code.)

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[119] TEX. GOV'T CODE § 33.006(b)-(c).

Section 110.008(a) is expressly limited by the condition that the claimant comply with the strict statutory notice requirements of Section 110.006: "***Subject to Section 110.006 [notice]***, sovereign immunity to suit and from liability is waived …" (Section 110.008(a), Emphasis added.)

Petitioner cannot assert the limited waiver under Section 110.008(a) because of her failure to strictly comply with the notice requirements of Section 110.006, discussed above.[120]

2. Uniform Declaratory Judgment Act

This Court has held that the Uniform Declaratory Judgment Act does not waive sovereign immunity in cases (such as this lawsuit) that do not involve a challenge to the validity of a statute.[121] Petitioner does not allege the invalidity of any statute, nor even of any Canon of the Texas Code of Judicial Conduct. Instead, she challenges Respondents' *application* (or as she claims, "the Commission's

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[120] *See* Findings at ¶¶ 41, 42, Supp. CR. 25-26, Append. ("We have repeatedly affirmed that any purported statutory waiver of sovereign immunity should be strictly construed in favor of retention of immunity"; a claimant may bring suit against the government "only after a claimant strictly satisfies the procedural requirements" 3 (quoting *Prairie View Chatha*, 381 S.W.3d at 513-14)).

[121] *Texas Dept. of Transportation v. Sefzik*, 355 S.W.3d 618, 622 (Tex. 2011); *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009).

interpretation")[122] of Canon 4A(1) – for which there is no waiver of immunity under the Uniform Declaratory Judgment Act.[123]

Again, Petitioner catches herself coming and going. She repeatedly contends she is not asserting the Public Warning pursuant to Canon 4A(1) is "void" or unconstitutional.[124] However, on the other hand she tells this Court, for purposes of arguing that sovereign immunity is waived, she is actually challenging Canon 4A(1).[125] She cannot have it both ways. Either way, there is no waiver of sovereign immunity.

3. Ultra vires allegations

Petitioner has not pleaded Respondents (i) failed to perform a ministerial act or (ii) undertook conduct outside their statutory authority. All Petitioner alleged was

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[122] *See*, *e.g.*, Plaintiff's Second Amended Petition at ¶¶ 69-71, CR. 613-14, Append. 5.

[123] *See* Findings at ¶¶ 43, 44, Supp. CR. 25-26, Append. 3.

[124] *See* Merits B. at 18. ("Judge Hensley's petition seeks 'a declaration that the Commission's interpretation of Canon 4A violates article I, section 8 of the Texas Constitution.' This constitutional challenge falls within the UDJA's waiver of immunity because it challenges the *validity* of the canon as interpreted by the Commission.") (internal citations omitted).

[125] *See* Merits B. at 11 ("[T]he Uniform Declaratory Judgment Act (UDJA) waives sovereign immunity with respect to her claim that challenges the constitutionality of Canon 4A(1).").

the Commission "initiated an inquiry" as to her conduct, held a hearing, and issued a disciplinary sanction (November 2019 Public Warning).[126] The Commission performed its duties precisely as authorized by the Texas Constitution and statutes.[127] Therefore, ultra vires is inapplicable.[128] Even if the Commission or its individual members erred in exercising this discretion, any alleged error does not constitute an ultra vires act.[129]

None of Petitioner's allegations suggest that the Commissioners failed to discharge their duty. In fact, she does not contest the trial court's findings that she was "afforded due process before the Commission," the Commission followed "the requirements of the Texas Government Code and the Supreme Court's PRRJ Rules,"

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[126] Plaintiff's Second Amended Petition at ¶¶ 41, 42, 53, CR. 606, 608, Append. 5; *See* TEX. CONST. ART. V, § 1-a (8); TEX. GOV'T CODE § 33.002.

[127] *See* Findings at ¶¶ 47-51, Supp. CR. 27-32, Append. 3.

[128] *Hagstette*, discussed earlier, is dispositive on this issue. 2020 WL 7349502, at *7.

[129] See *Honors Academy*, 555 S.W.3d at 68 ("'Ultra vires claims depend on the scope of the state official's authority,' … it is not an ultra vires act for an official to make an erroneous decision within the authority granted.") (citations omitted); *MHCB (USA) Leasing & Fin. Corp. v. Galveston Cent. App. Dist. Review Bd.,* 249 S.W.3d 68, 81 (Tex. App.— Houston [1st Dist.] 2007, pet. denied) ("[J]ust because an agency determination is wrongly decided does not render that decision outside the agency's authority … an incorrect agency determination rendered pursuant to the agency's authority is not a determination made outside that authority.").

and she had a "full and fair opportunity to litigate ... any defenses... including her actual litigation of her asserted rights under [RFRA]."[130] If Petitioner believed they got it wrong, her recourse was to file an efficient, quick, and inexpensive statutory de novo appeal – not this separate lawsuit.

Once again, Petitioner asserts a position that is absolutely in opposition to her admissions before the trial court. On one hand, she asserts an ultra vires theory. However, on the other, she expressly concedes the Public Warning is a binding order (and thus a valid finding of a violation of Canon 4A(1)). Specifically, when contesting the transfer of venue in this lawsuit, Petitioner told the McLennan County District Court that she "is *not* seeking vacatur or reversal of the Commission's sanction."[131] If the Public Warning – or the disciplinary proceeding or the investigation preceding the Public Warning – were ultra vires, her remedy was to appeal it. She is bound by her statement to the trial court. There is no ultra vires claim.

Because none of Petitioner's three efforts to bypass immunity is effective, the trial court did not err when it dismissed Petitioner's suit for lack of jurisdiction based

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[130] Findings at ¶ 17(a), Supp. CR. 12, Append. 3.

[131] Plaintiff's Response to First Amended Motion to Transfer, at page 4, filed March 20, 2020, CR. 234.

both upon (i) sovereign immunity and also (ii) the special "absolute and unqualified" statutory immunity of Section 33.006.

G. Ripeness; Advisory Opinion

While Petitioner claims she is not seeking to vacate or reverse any determinations concerning Public Warning, she asks this Court for advice by declaratory judgment as to how she might change her "future" conduct in order to comply with the Texas Code of Judicial Conduct.[132] Besides the lack of jurisdiction and immunity hurdles discussed above she also is asking for improper advisory opinions and no controversy is ripe for adjudication.[133]

Courts have no jurisdiction to issue advisory opinions. "Litigants may not employ declaratory-judgment actions to obtain impermissible advisory opinions seeking to interpret statutes or agency rules."[134]

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[132] *See, e.g.,* Plaintiff's Second Amended Petition at ¶ 63, CR 614, Append 5 ("[Petitioner] seeks a declaratory judgment that her decision to recuse herself from officiating at same-sex weddings and her intention to continue recusing herself is not a 'willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice.'").

[133] Findings at ¶¶ 55, 56, Supp. CR. 33-36, Append. 3.

[134] *VanderWerff v. Tex. Bd. of Chiropractic Examiners*, No. 03-12-00711-CV, 2014 WL 7466814, at *2 (Tex. App.—Austin Dec. 18, 2014, no pet.); *Alamo Express, Inc. v. Union City Transfer*, 309 S.W.2d 815, 827 (Tex. 1958).

Further, courts have no jurisdiction when, as in this case, no controversy has become ripe. There is no current or threatened investigation of Petitioner.[135] She does not contend there is. She represents she ceased much, or perhaps all, of the conduct that the Commission found violated Canon 4A(1).[136] She does not allege what she would do differently. Even if she did, in the absence of any imminent or threatened enforcement proceeding, the controversy "is not ripe, and therefore [the Court does] not have jurisdiction."[137]

H. Alternatively: Res Judicata

Petitioner is foreclosed from relitigating claims under RFRA.[138] Petitioner virtually conceded the applicability of res judicata when she told the McLennan

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[135] Declaration of Jacqueline Habersham at ¶ 11, CR. 700; Findings at ¶ 56, Supp. CR. 33-36, Append. 3.

[136] Plaintiff's Response to Defendants' Proposed Findings of Fact, March 22, 2021 at ¶ 22, CR. 467 ("Judge Henley has ceased performing weddings entirely . . .").

[137] *CPS Energy v. Public Utility Commission*, 537 S.W.3d 157, 199-200 (Tex. App. – Austin 2017), rev'd in part on other grounds, 593 S.W.3d 291 (Tex. 2019). *See also* Findings at ¶¶ 52 – 56, Supp. CR. 32-36, Append. 3.

[138] *See Friends of Canyon Lake, Inc, v. Guadalupe-Blanco River Authority*, 96 S.W.3d 519, 532 (Tex. App. – Austin 2002, pet. denied) (discussing "the well established principle that an agency's final order, like the final judgment of a court of law, is immune from collateral attack").

County District Court in this very lawsuit and as she says in her opening brief,[139] that she "is not seeking vacatur or reversal of the Commission's sanction."[140]

Another unsurprising consequence of Petitioner's decision not to pursue a statutory de novo appeal of the Public Warning is it became a final, no-longer-appealable, binding order. Res judicata and collateral estoppel both apply to the un-appealed Public Warning.[141]

Accordingly, Petitioner cannot ask any Court to change the conclusion that her conduct violated Canon 4A(1), or the appropriateness of a sanction for the conduct. Likewise, she cannot ask any court to give RFRA relief. She invoked unsuccessfully in her defense of the disciplinary proceeding.[142]

Again, she is fighting the solid legal rule that final judgments may not be collaterally attacked in a subsequent lawsuit unless they are void.[143]

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[139] Merits B. at 15, 30, and 42.

[140] *Id.*; *see also* Plaintiff's Response to First Amended Motion to Transfer, filed March 20, 2020, at 4, CR. 240; Findings at ¶¶ 57 – 61, Supp. CR. 36-41, Append. 3.

[141] Findings at ¶ 58, Supp. CR. 36, Append. 3.

[142] *Id*. at ¶ 58(b), Supp. CR. 36, Append. 3.

[143] *Browning*, 165 S.W.3d at 345-46, 347-48 (refusing to allow "an impermissible collateral attack" on a bankruptcy confirmation order, even though the relief

This principle applies also to disciplinary proceedings and other agency decisions.[144] The *Perez*,[145] *VanderWerff*,[146] and *Oji*[147] cases make it very clear, one cannot fail to exhaust all appeals of a disciplinary sanction, and then file a separate suit to collaterally attack that final sanction.

Further, Petitioner does not allege that the Public Warning is void. Instead, she admits (i) that "the 'public warning' that the Commission imposed will remain in place regardless of whether Judge Hensley obtains the damages and declaratory

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requested by the party was not to void the order, but simply to relitigate a valuation question underlying it).

[144] *See Friends of Canyon Lake*, 96 S.W.3d at 532 (discussing "the well established principle that an agency's final order, like the final judgment of a court of law, is immune from collateral attack").

[145] *Perez v. Physician Assistant Bd.*, No. 03-16-00732-CV, 2017 WL 5078003, at *3 (Tex. App.—Austin Oct. 31, 2017, pet. denied) (physician assistant's separate suit barred as collateral attack where available statutory review of adverse disciplinary decision was foregone and order was not shown to be void).

[146] *VanderWerff*, 2014 WL 7466814, at *3 (chiropractor's separate suit barred as "an attempt to obtain a different judgment with respect to the same controversy" where chiropractor had failed to timely appeal unfavorable agency ruling).

[147] *Oji v. The State Bar Of Tex.*, No. 14-01-00434-CV, 2001 WL 1387183, at *3 (Tex. App.—Houston [14th Dist.] Nov. 8, 2001, pet. denied) ("Oji had a proper remedy by appeal and failed to exercise it;" his new "declaratory judgment suit constitutes an impermissible collateral attack" on the disciplinary order disbarring Oji).

relief that she seeks" and (ii) that "[t]he defendants' claim that Judge Hensley is attempting to 'collaterally attack a judicial disciplinary order' is false, and there is nothing in Judge Hensley's petition that asks this Court to revoke or set aside the 'public warning' that the Commission imposed."[148] Res judicata, or "claim preclusion," forecloses Petitioner from seeking to re-litigate any issue that was, or that could have been, raised during her defense of that proceeding.[149]

I. Alternatively: Collateral Estoppel

Even if this Court did have jurisdiction, and even if res judicata did not foreclose this lawsuit in its entirety, collateral estoppel would prevent Petitioner from re-litigating issues that were decided against her in the disciplinary proceeding.[150] The trial court found that Petitioner's RFRA contentions were fully

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[148] Merits B. at 15; Plaintiff's Response to First Amended Motion to Transfer, filed March 20, 2020, at 4, CR. 240; Findings at ¶ 59(b), (c), Supp. CR. 39, Append. 3.

[149] Findings at ¶¶ 61, 62 Supp. CR. 40-42, Append. 3.

[150] *Texas Dept. of Public Safety v. Petta*, 44 S.W.3d 575, 579 (Tex. 2001) ("Collateral estoppel applies when an issue decided in the first action is actually litigated, essential to the prior judgment, and identical to an issue in a pending action.").

presented to the Commission.[151] The issuance of the Public Warning is deemed a rejection of all defenses she presented.[152]

Those findings are not contested by Petitioner and are binding upon her. Indeed, having argued before the Waco court that she "is not seeking vacatur or reversal of the Commission's sanction," she cannot ask this Court to declare that the Commission got it wrong.[153] Thus, she cannot now deny (i) that her conduct prior to November 12, 2019 violated Canon 4A(1), (ii) that a Public Warning was warranted for such conduct, or (iii) that the discipline did not violate any rights she may have under RFRA.

VI. RESPONSE TO PETITIONER'S CLAIM SHE IS ENTITLED TO SUMMARY JUDGMENT.

A. Lack of Jurisdiction

This Court has no jurisdiction for each of the independent reasons set forth above and below.[154] The Supreme Court has cautioned against a district court's

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[151] Findings at ¶¶ 12-13, 17 Supp. CR. 9, 12, Append. 3.

[152] *See Allen*, 717 S.W.2d at 312; s*ee also Vance*, 382 S.W.2d at 108-09.

[153] Plaintiff's Response to First Amended Motion to Transfer, filed March 20, 2020, at 4, CR. 240; Findings at ¶¶ 57-61 Supp. CR. 36-40, Append. 3.

[154] The arguments and authorities set forth above in this Brief are incorporated on this response to Petitioner's claim she is entitled to summary judgment.

reaching the merits of a controversy before determining whether it does, or does not, have jurisdiction.[155]

1. Exclusive mechanism for review.[156]

Section 33.034 of the Texas Government Code ("Review of Commission Decision") and Rule 9(a) of the PRRRJ ("Review of Commission Decision") gave Petitioner an absolute right, which she waived, to obtain de novo review of the final and appealable Public Warning. The Public Warning overruled Petitioner's RFRA contentions.[157] If Petitioner believed that her conduct was protected by RFRA, the statutory de novo review allowed her to re-urge her defense, de novo, that her conduct was statutorily protected.[158] Petitioner's waiver of her right to appeal also precluded any judicial proceeding to address claims pertinent to her disciplinary proceeding. This Court has no jurisdiction for (i) a collateral attack of the Public Warning and/or (ii) any re-litigation of the factual findings within the Public Warning and/or (iii) any re-litigation of the arguments under RFRA and/or (iv) any

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[155] *See State Bar of Texas v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994).

[156] *See supra*, Section V.C.

[157] *See Allen*, 717 S.W.2d at 312.

[158] *See* TCPRC § 110.004.

factual or legal issue that Petitioner could have litigated in the disciplinary proceeding, but chose not to and/or (v) any issue pertinent to the disciplinary proceeding.

2. Failure to comply strictly with jurisdictional statutory notice requirement[159]

Petitioner's claims under RFRA require prior notice under TCPRC § 110.006(a). Her sole effort to comply with Section 110.006(a) was in February 2019.[160] That notice failed to state "the manner in which the exercise of governmental authority burdens the act or refusal to act," as required under Section 110.006(a)(3).[161] Petitioner has admitted in this lawsuit that she did not change her practices concerning weddings until after an evidentiary hearing on August 8, 2019.[162] Her February 2019 notice letter is insufficient regarding any claim based upon any occurrence prior to its date, due to its failure to comply with the specificity requirements of Section 110.006(a); and it is insufficient as to any claim based upon

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[159] *See supra*, Section V E.2.

[160] Petitioner's Counsel's letter dated February 17, 2019, CR 656-668, Append. 7; *See also* Findings at ¶ 34(a), (b), Supp. CR. 20-21, Append. 5.

[161] *See* Declaration of Jacqueline Habersham at ¶ ¶ 11, 12, CR. 700-01.

[162] Appellant's Reply Brief in Support of Plaintiff's Motion for Summary Judgment, filed May 20, 2021, § V, ¶ (D), CR. 756¬757.

any occurrence after February 2019 (such as the evidentiary hearing before the Commission or the Commission's issuance of the November 12, 2019 Public Warning).

3. Immunity[163]

Each Respondent enjoys both sovereign immunity and statutory immunity under Section 33.006 of the Texas Government Code. No waiver exists under RFRA because of Petitioner's failure to comply with the jurisdictional statutory notice requirement and RFRA does not purport to grant any waiver of Section 33.006 immunity in any event. No waiver exists under the Uniform Declaratory Judgment Act because (i) it is inapplicable for waiver of the type of claims asserted here and (ii) it cannot be used redundantly to litigate issues that Petitioner should have litigated by the exclusive de novo review mechanism. No waiver exists under Petitioner's ultra vires claims because she complains of matters within the discretion of the Commissioners, who performed their statutory and constitutional duties and authority to investigate, make determinations from the evidentiary record before them, and issue sanctions.

Such discretionary decisions – even if erroneous – are reviewable only by the mechanism of de novo review and not by a new lawsuit or an ultra vires claim.

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[163] *See supra*, Section V.F.

4. Ripeness; Impermissible advisory opinions[164]

To the extent Petitioner is asking this Court to give her advice by declaratory judgment how she might change her conduct in order to comply with the Texas Code of Judicial Conduct, or how her future conduct (if different from her prior conduct) might avoid judicial discipline, she seeks an improper advisory opinion. Second, there is no ripe controversy. No current or threatened investigation exists. Her claims concerning her potential future conduct – for declaratory relief, including her claim that the Commissioners acted ultra vires – are not ripe and must therefore be dismissed for lack of jurisdiction.

B. Res judicata and collateral estoppel[165]

Petitioner cannot ask any court to change the findings, the conclusion that her conduct violated Canon 4A(1), or the appropriateness of a sanction. In particular, she cannot ask any court to give relief under RFRA, which she invoked unsuccessfully in the disciplinary proceeding. Even if this suit were permitted to proceed despite its lack of jurisdiction and despite the res judicata bar, Petitioner is bound by collateral estoppel and cannot relitigate any factual or legal issue decided

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[164] *See supra*, Section V.G.

[165] *See supra*, Sections V.C, V.H, and V.I.

by the Public Warning – including the finding that her conduct violated Canon 4A(1) and warranted a public warning.

C. Limitations[166]

Petitioner is barred from complaining under RFRA concerning any act or omission that occurred more than one year before she filed this suit.

D. Failure of condition precedent.

Petitioner failed to comply with the condition precedent of sufficient statutory notice under Section 110.006 of RFRA.

E. Interpretation of RFRA.

Another barrier to summary judgment is Petitioner's disparate treatment of same-sex couples based on religious principles. That conduct implicates or violates Section 106.001 of the Texas Civil Practice & Remedies Code that forbids employees of the State or of political subdivisions of the State, while acting in their official capacity, from refusing a license or permit or refuse to grant a benefit to a person, because of religion or because of sex. RFRA cannot apply to judges whose conduct is permitted solely by virtue of their role as a State actor and whose conduct is forbidden by Section 106.001. This was not a matter of Hensley refusing to perform same-sex weddings at her home church, instead in her role as a judge.

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[166] *See supra*, Section V.F.

F. Issues of material fact

The Public Warning addressed Petitioner's conduct, as it was observable by potential litigants and based upon all the facts and circumstances shown by the evidentiary record. The Commission made no findings under Canon 2A, which requires a judge to follow the law. Rather, its findings were only under Canon 4A, which constrains a judge's conduct. Petitioner cannot show that her wedding-related practices, based on her religious beliefs, were – standing alone – the basis for her discipline. Even though Petitioner makes that argument, the Public Warning does not say that.

The record shows the basis for the Private Warning include her public newspaper interview, her practice of communicating with gay couples through Court personnel, and her testimony concerning recusing herself in cases where a party doubted her impartiality on the basis of her public refusal to perform same-sex weddings. The Public Warning was issued because she purported to "recuse" herself from conducting marriage ceremonies for same sex couples. Her position is, once again, artfully crafted and erroneous rhetoric.

The Public Warning was issued in furtherance of a compelling governmental interest, namely, the importance of assuring that litigants may have confidence in the integrity of the judiciary and the rule of law, and that judges not engage in conduct that would create in reasonable minds a perception that the judge's ability

to carry out judicial responsibilities impartially is impaired.[167] The Public Warning appropriately determined that the application of Canon 4A and the sanction issued was proper and was the least restrictive means of furthering the compelling governmental interest.[168]

Petitioner's purported evidence on "substantial burden" is conclusory. Nothing in the trial court record identifies any instance when she was asked to conduct a wedding, but declined to do so because of any alleged substantial burden. Respondents have objected and continue to object to the conclusory nature of § 35 of Petitioner's declaration and also object that she has furnished no testimonial or documentary evidence of any request for a wedding that she declined to perform that might support a summary under Evidence Rule 1006 ("Summaries to Prove Content").[169]

Petitioner's alleged damages are also stated in conclusory fashion, without any evidence whatsoever of specific opportunities that she chose to avoid.

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[167] *See Caperton v. Massey Coal Co*., 556 U.S. 866, 888-89 (2009); *In re Neely*, 390 P.3d at 736); Declaration of Jacqueline Habersham at ¶ 13, CR. 701-702.

[168] *Id*.

[169] Defendants' Response to Plaintiff's Motion for Summary Judgment, filed April 26, 2021 § V, ¶(C), CR. 692-93.

Respondents have objected and continue to object to the conclusory nature of § 35 of Petitioner's declaration and also that she has not furnished underlying documents that might support a summary under Evidence Rule 1006 ("Summaries to Prove Content").[170] Nor has Petitioner furnished evidence of reasonable attorneys' fees. That claim has been waived.

If she has suffered any cognizable injury or incurred any recoverable damages, Petitioner failed to mitigate including by her failure to utilize the available prompt and efficient statutory right of de novo appeal. If Petitioner were correct that the Public Warning violated her rights under RFRA, such an appeal would have reversed the Commission's action and removed any impact of the Public Warning that Petitioner claims.

G. Summary Judgement Evidence–Petitioner has Litigated, and Lost, Her Contention the Commission Violated RFRA.

Respondents rely upon the admissions by Petitioner in her pleadings, in her Declaration, in her Response to Defendants' Proposed Findings of Fact and Conclusions of Law, in her Stipulation, and also upon the Declaration of Jacqueline Habersham cited in this response.

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[170] *Id.* at ¶ D, CR. 693.

Petitioner's arguments misapply the fundamental principles of the conclusiveness of judgments. She mistakenly and repeatedly contends that the Commission, in issuing its final appealable Public Warning, failed to address (and did not reject) her RFRA defense.[171] Petitioner's error relates to her refusal to acknowledge, cite or rebut the controlling case law, *Allen*.[172] The trial court's Findings of Fact and Conclusion of Law cites *Allen*[173] but Petitioner's opening brief is (i) totally silent about it and (ii) cites no case law whatsoever for Petitioner's

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[171] Plaintiff's Response to Defendants' Proposed Findings of Fact, filed March 22, 2021 at ¶ 14(d), CR. 466 ("The public warning entirely ignores Judge Hensley's RFRA defense and does not purport to consider or reject her RFPA arguments."); *id*. at ¶ 17, CR. 466 ("The Commission ignored and refused to address Judge Hensley's Texas RFRA defense even though it was explicitly raised and preserved at the hearing. That is not 'due process of law.'"); Plaintiff's Brief in Opposition filed March 22, 2021 at 29, CR. 470, 504-05 ("Yet one will search the Commission's findings and conclusions in vain for anything that even acknowledges Judge Hensley's RFRA defense—and there is nothing in the Commission's findings and conclusion that purports to decide or rule upon the RFRA issue."); *Id*. at 31, CR. 506 ("The Commission simply ignored Judge Hensley's RFRA argument; it did not 'actually decide' any element or component of her RFRA defense."); Merits B. at 39.

[172] *See Allen*, 717 S.W.2d at 312.

[173] Findings at ¶ 65, Supp. CR. 42-43, Append. 3.

apparent belief that a final appealable judgment does not dispose of all issues before the tribunal.[174]

Because Petitioner raised RFRA as a defense before the Commission, the Public Warning is presumed to have overruled Petitioner's contention that the discipline would violate her rights under RFRA. Petitioner's remedy – and sole remedy – was to exercise her right of statutory appeal.

H. This Court has no jurisdiction to address Petitioner's RFRA contentions.

Petitioner is asking this Court to act contrary to the law and reach a different outcome than she obtained in the Commission's proceeding concerning her alleged rights under RFRA. Only the statutory, Special Court of Review had jurisdiction to grant her such relief.[175]

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[174] *See generally* Merits B.

[175] *Hagstette*, 2020 WL 7349502, at *5 ("the district court lacked subject-matter jurisdiction"); *Patel v. Tex. Dep't of Licensing and Reg*., 469 S.W.3d 69, 79 (Tex. 2015) ("Under the redundant remedies doctrine, courts will not entertain an action brought under the UDJA when the same claim could be pursued through different channels.").

I. Petitioner failed to comply strictly with jurisdictional statutory notice.

It is undisputed that Petitioner gave no notice under RFRA following the August 8, 2019 hearing or the issuance of the November 12, 2019 Public Warning. Her only effort to give statutorily required notice was in February 2019.[176]

Section 110.006(a)(3) requires that the notice include a statement "of the manner in which the exercise of governmental authority burdens the act or refusal to act." The notice letter did not do so. The notice letter implied that Petitioner had been required to suspend her opposite-sex wedding ceremonies due to the "investigation" and "threatened penalties." Petitioner has now acknowledged that she continued to perform opposite-sex weddings throughout 2018 and continuing into 2019 until August 26, 2019.[177] Thus, February 2019 notice letter does not specify the manner in which Petitioner was burdened by the Commission's activities prior to February 2019.

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[176] Findings at ¶ 33, Supp. CR. 20, Append. 3; Petitioner's Counsel's letter dated February 17, 2019, CR 656-68, Append. 7.

[177] Rule 11 Agreement, filed April 16, 2021, CR. 681-684.

This failure to comply with Section 110.006(A)(3) is fatal. Absent strict compliance with the notice requirements, no jurisdiction exists for bringing this suit and, in addition, no basis exists for any waiver of Respondents' immunity.[178]

Even if, hypothetically, the February 2019 notice were not statutorily deficient, it is inadequate to support claims for any conduct by the Respondents that occurred after February 2019. Petitioner's evidence shows that she continued to schedule opposite-sex weddings until after the August 8, 2019 hearing, and continued to perform them until August 26, 2019 – after the Commission's evidentiary hearing on August 8, 2019.[179] Thus, the first time that the evidence shows that there was any arguable burden on her "act or refusal to act" was after the August 8, 2019 hearing. Petitioner never gave any notice on or after that date; and thus, this Court has no jurisdiction to entertain any claims under RFRA

J. Respondents are immune from suit.

Because no compliant statutory notice was given, as discussed above, Respondents' sovereign immunity has not been waived by RFRA. Nor is immunity

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[178] TEX. GOV'T CODE § 311.034 ("Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.").

[179] *See supra*, § V.E.

waived in this case by the Uniform Declaratory Judgment Act or by Petitioner's ultra vires allegations. None of her attempts to find a waiver of immunity is successful.

K. Uniform Declaratory Judgment Act.

Petitioner cannot use the Uniform Declaratory Judgment Act to obtain waiver of sovereign immunity, because she uses it in an impermissible effort to re-litigate her RFRA contentions. The Uniform Declaratory Judgment Act may not be used to circumvent the de novo appellate review right of 34.034 of the Texas Government Code.[180]

L. Ultra vires allegations.

Petitioner claims that an adjudicatory decision – if erroneous as to interpretation or application of a statute – can be redressed by an ultra vires claim in a new lawsuit, rather than by utilizing available judicial review.[181] The only case she cites for this unusual proposition is her characterization of dictum is *Honors*

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[180] *Alamo Express*, 309 S.W.2d at 827 (holding that "an action for declaratory judgment does not lie" in suit that asserts a "direct attack upon the [agency's] order by appeal"); *Aaron Rents, Inc. v. Travis Cent. Appraisal Dist*., 212 S.W.3d 665, 669 (Tex. App.—Austin 2006, no pet.) (en banc) ("When a statute provides an avenue for attacking an agency order, a declaratory judgment action will not lie to provide redundant remedies."); *Hagstette*, 2020 WL 7349502, at *4-5.

[181] Merits B. at 21.

Academy.[182] That case found that the Commissioner of Education could not be sued under an ultra vires theory – even if "the Commissioner's decision to revoke [a] charter was arbitrary, capricious or clearly erroneous."[183] As with all of her claims raised in the law suit, any redress would need to have been by the statutory appellate process, not by a new ultra vires lawsuit.[184] The Court held that the Commissioner's exercise of authority given him by the Legislature – even if erroneous – is not ultra vires.[185] The holding in *Honors Academy, Inc.* is consistent with a long line of other cases.[186]

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[182] 555 S.W.3d at 68.

[183] *Id*. at 77-78.

[184] *Id*. at 78.

[185] *Id*. at 77.

[186] *E.g., Zurich American Ins. Co. v. Diaz*, 566 S.W.3d 297, 305 (Tex. App.-Houston [14th Dist.] 2018, pet. denied) ("[T]he ultra vires exception simply 'does not extend to allegations that an [official] reached an incorrect result when exercising its delegated authority.'"); *MHCB,* 249 S.W.3d at 81 ("[J]ust because an agency determination is wrongly decided does not render that decision outside the agency's authority ... : an incorrect agency determination rendered pursuant to the agency's authority is not a determination made outside that authority."); *Creedmoor-Maha W.S.C. v. Texas Comm'n on Env. Quality*, 307 S.W.3d 505, 517¬18 (Tex. App.-Austin 2010, no pet.) ("These are allegations that [the agency] reached an incorrect or wrong result when exercising its delegated authority, not facts that would demonstrate [the agency] exceeded that authority."); *Reagan Nat'l Advert. of Austin,*

M. Res judicata and collateral estoppel also bar this lawsuit and these claims.

Initially, Petitioner erroneously claims that issue and claim preclusion only apply to court proceedings, and not to agency decisions.[187] Petitioner herself admits that several Texas Supreme Court decisions applied res judicata in administrative contexts.[188]

She says that the Commission's proceedings cannot qualify under the test in *United States v. Utah Construction & Mining Co.,* 384 U.S. 394 (1966). In particular, she claims that the Commission was not "acting in a judicial capacity"; that it did

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Inc. v. Bass, No. 03-16-00320-CV, 2017 WL 4348181, at *4 (Tex. App.—Austin Sept. 27, 2017, no pet.) ("Errors or mistakes by state officials are insufficient, on their own, to establish an ultra vires act"); *City of Austin v. Utility Assocs., Inc*., 517 S.W.3d 300, 310 (Tex. App.-Austin 2017, pet. denied) (" [C]omplaints that the body merely 'got it wrong' while acting within this authority, which are shielded. 'Indeed,' as the Texas Supreme Court recently observed, 'an ultra vires doctrine that requires nothing more than an identifiable mistake would ... swallow immunity.'" (citing *McRaven*, 508 S.W.3d 232, 242-43 (Tex. 2017))); *Hagstette*, 2020 WL 7349502, at *7 ("Even if the Commission or its individual members erred in exercising this discretion, we cannot say that such an error constitutes an ultra vires act.").

[187] Merits B. at 36-37.

[188] *Id.* at 37.

not "resolve[] disputed issues of fact properly before it"; and that she did not have "an adequate opportunity to litigate."[189] Petitioner is mistaken on each count.

The Commission was acting in a judicial capacity.[190] The Commission investigated Petitioner's conduct; it declared and enforced Judicial Canon obligations based on facts "and under laws supposed already to exist." Then, Petitioner waived the right to proceed immediately to a special court of review for a fully de novo trial of law and fact.[191]

Petitioner's argument – that she should not be barred by the prior adjudication – really boils down to her contention that there was no opportunity to litigate because, in her view, there was no counterparty to her position. She portrays the

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[189] *Id.* at 38.

[190] *See Scott v. Flowers*, 910 F.2d 201, 208 (5th Cir. 1990) (a proceeding is judicial when it "investigate[s], declare[s], and enforce[s] liabilities ... on present or past facts and under laws supposed already to exist"; "We have little difficulty in concluding that the Commission's reprimand of [Judge] Scott was a judicial act."). *Scott v. Flowers* dealt with a disciplinary proceeding filed prior to the adoption of Section 33.034 – the Legislature's exclusive design for an appeal from disciplinary decisions by the Commission. For that reason, a federal lawsuit to challenge the Commission's decision was permitted, since Scott "did not bypass [any] channels of state court review" directed by the Legislature. 910 F.2d at 208.

[191] *See*, *e.g.*, *In re Ginsberg*, 630 S.W.3d 1, 4 (Tex. 2018) (noting that the disciplined judge's appeal was by trial de novo to the special court of review).

Commission as having presented "an inquisition, not an adjudication."[192] The same characterization could have been made by the unhappy loser in the *Scott* case or in virtually any agency enforcement action.

Petitioner argues that res judicata should not apply because her claims for affirmative relief (*e.g.,* for money damages or injunction) could not have been litigated in the disciplinary proceeding. Yet, her contentions under RFRA were litigated. She presented her evidence and arguments both in her written submissions and in her counsel's arguments at the evidentiary hearing. She is bound by her loss at the Commission, which she refused to appeal. Had she won, she could argue that she needed a new lawsuit to assert claims for affirmative relief based on her successful contest. Having lost, she is foreclosed from asking a different forum for an entirely different result.

Petitioner claims collateral estoppel should not apply because, the Commission did not "actually decide" her RFRA contentions.[193] But it did. The final appealable Public Warning is presumed to have resolved all matters before the Commission. *Allen* makes that clear.

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[192] Merits B. at 39.

[193] Merits B. at 36, 43, 44, and 46,

VII. CONCLUSION AND PRAYER

The United States Supreme Court declared the Code of Judicial Conduct serves the "vital state interest" in safeguarding "public confidence in the fairness and integrity of the nation's elected judges."[194] Further, that Court observed that the public's perception of judicial integrity is "a state interest of the highest order."[195]

Finally, that Court cited the critical importance of the public trusts of the judiciary when it said, "[t]he judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions. As Justice Frankfurter once put it for the Court, 'justice must satisfy the appearance of justice.'"[196] The *In re Neely* decision of the Wyoming Supreme Court faithfully follows the path set by the United States Supreme Court. It is respectfully requested this Court reach the same conclusion.

The relief Petitioner seeks would subvert the "compelling government interest in maintaining the integrity of the judiciary." Judges cannot be free to decide "the

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[194] *Williams-Yulee*, 575 U.S. at 445.

[195] *Id.*

[196] *Id.*

law in accordance with their individual views. . . ." [197] Nor can a judge make overt extra-judicial comments and actions that demonstrate bias and prejudice.

Petitioner's points on appeal must be decided against her. For the reasons shown, no jurisdiction supports her lawsuit. Respondents specifically request the trial court's order of dismissal be affirmed.

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[197] *In re Neely*, 390 P.3d at 744.

CERTIFICATE OF COMPLIANCE

I certify that this document was produced on a computer using Microsoft Word and contains 14,686 words, as determined by the computer software's word count function, excluding the sections of the document listed in the Texas Rule of Appellate Procedure 9.4.

/s/ Douglas S. Lang
Douglas S. Lang

CERTIFICATE OF SERVICE

This certifies that on the 1st day of May, 2023, the undersigned served this Respondents' Brief on the following:

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Service was accomplished by filing Respondents' Brief electronically through the Court's e-filing system.

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No. 22-1145

In the Supreme Court of Texas

Dianne Hensley,
Petitioner,
v.
State Commission on Judicial Conduct, et al.,
Respondents.

On Petition for Review from the
Third Court of Appeals, Austin, Texas
No. 03-21-00305-cv

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Appendix 1

BEFORE THE STATE COMMISSION ON JUDICIAL CONDUCT

CJC NO. 17-1572

PUBLIC WARNING

HONORABLE DIANNE HENSLEY
JUSTICE OF THE PEACE, PRECINCT 1, PLACE 1
WACO, MCLENNAN COUNTY, TEXAS

During its meeting on October 9-11, 2019, the State Commission on Judicial Conduct concluded a review of allegations against the Honorable Dianne Hensley, Justice of the Peace, Precinct 1, Place 1, Waco, McLennan County, Texas. Judge Hensley was advised by letter of the Commission's concerns and provided written responses. Judge Hensley appeared with counsel before the Commission on August 8, 2019, and gave testimony. After considering the evidence before it, the Commission enters the following findings and conclusions:

FINDINGS OF FACT

1. At all times relevant hereto, the Honorable Dianne Hensley was Justice of the Peace for Precinct 1, Place 1, in Waco, McLennan County, Texas.

2. On June 24, 2017, the Waco Tribune newspaper published an article on their website entitled *No Courthouse Weddings in Waco for Same-sex Couples, 2 Years After Supreme Court Ruling* which reported that Justice of the Peace Dianne Hensley "would only do a wedding between a man and a woman."

3. From August 1, 2016, to the present, Judge Hensley has performed opposite-sex weddings for couples, but has declined to perform same-sex wedding ceremonies.

4. Beginning on about August 1, 2016, Judge Hensley and her court staff began giving all same-sex couples wishing to be married by Judge Hensley a document which stated "I'm sorry, but Judge Hensley has a sincerely held religious belief as a Christian, and will not be able to perform any same sex weddings." The document contained a list of local persons who would officiate a same-sex wedding.

5. Judge Hensley told the Waco-Tribune, the public and the Commission that her conscience and religion prohibited her from officiating same-sex weddings.

6. At her appearance before the Commission, Judge Hensley testified that she would recuse herself from a case in which a party doubted her impartiality on the basis that she publicly refuses to perform same-sex weddings.

RELEVANT STANDARD

Canon 4A(1) of the Texas Code of Judicial Conduct states "A judge shall conduct all of the judge's extra-judicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially as a judge...."

CONCLUSION

Based upon the record before it and the factual findings recited above, the Texas State Commission on Judicial Conduct has determined that the Honorable Judge Dianne Hensley, Justice of the Peace for Precinct 1, Place 1 in Waco, McLennan County, Texas, should be publicly warned for casting doubt on her capacity to act impartially to persons appearing before her as a judge due to the person's sexual orientation in violation of Canon 4A(1) of the Texas Code of Judicial Conduct.

The Commission has taken this action pursuant to the authority conferred it in Article V, §1-a of the Texas Constitution in a continuing effort to promote confidence in and high standards for the judiciary.

Issued this the 12th day of November, 2019.

David Hall
Chairman, State Commission on Judicial Conduct

Appendix 2

A judge shall not approve compensation of appointees beyond the fair value of services rendered.

(5) A judge shall not fail to comply with Rule 12 of the Rules of Judicial Administration, knowing that the failure to comply is in violation of the rule.

D. Disciplinary Responsibilities.

(1) A judge who receives information clearly establishing that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the State Commission on Judicial Conduct or take other appropriate action.

(2) A judge who receives information clearly establishing that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Office of the General Counsel of the State Bar of Texas or take other appropriate action.

COMMENT

It is not a violation of Canon 3B(8) for a judge presiding in a statutory specialty court, as defined in Texas Government Code section 121.001, to initiate, permit, or consider any ex parte communications in a matter pending in that court.

Canon 4: Conducting the Judge's Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Obligations

A. Extra-Judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge; or

(2) interfere with the proper performance of judicial duties.

B. Activities to Improve the Law. A judge may:

(1) speak, write, lecture, teach and participate in extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code; and,

(2) serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A judge may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He or she may make recommendations to public and private fund-granting agencies on projects and

Appendix 3

Cause No. D-1-GN-20-003926

Dianne Hensley, on behalf of herself and others similarly situated, Plaintiff, v. **State Commission on Judicial Conduct**, et al., Defendants.	IN THE DISTRICT COURT TRAVIS COUNTY, TEXAS 459th JUDICIAL DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On May 26, 2021, this case came before the Court on Defendants' Plea to the Jurisdiction and, in the Alternative, Plea in Estoppel, via Zoom pursuant to the emergency orders in effect due to the COVID-19 pandemic. Plaintiff and Defendants appeared through their respective attorneys of record and announced ready. The record was duly reported by Michelle Williamson, the Official Court Reporter for the 345th Judicial District Court of Travis County, Texas. On June 25, 2021, the Court signed the Order Granting Defendants' Plea to the Jurisdiction and, in the Alternative, Plea in Estoppel.

On July 14, 2021, Defendants filed their Request for Findings of Fact and Conclusions of Law pursuant to Tex. R. Civ. P. 296.

Pursuant to Tex. R. Civ. P. 297, the Court makes the following findings of fact based upon the credible, admissible evidence, and conclusions of law. To the extent that any finding of fact made by this Court should properly be considered a conclusion of law and to the extent that any conclusion of law made by this Court should properly be considered

a finding of fact, it is the express intent of the Court that any statement identified herein as a finding of fact also be deemed a conclusion of law and any statement identified herein as a conclusion of law shall also be deemed a finding of fact.

Overview

1. The State Commission on Judicial Conduct issued a Public Warning to Judge Hensley on November 12, 2019.

2. Judge Hensley had a statutory right to appeal if she disagreed with the findings and/or the sanction in the Public Warning or its appropriateness or validity. The statute provided an efficient, prompt *de novo* review before a special court of three justices of Texas courts of appeals.

3. Though represented by three able counsel in the disciplinary proceeding, Judge Hensley elected not to appeal.

Parties

4. Plaintiff Judge Dianne Hensley is a justice of the peace in Waco.

5. Defendant State Commission on Judicial Conduct is an independent agency within the judicial branch, created over 50 years ago by amendment to article V, section 1-a of the Texas Constitution.

a. The Constitution establishes the Commission as a thirteen-member body, all unpaid, comprised of six judges appointed by the Texas Supreme Court; two attorneys, who are not judges, appointed by the State Bar of Texas, and five citizen members, who are neither attorneys nor judges, appointed by the Governor. All are subject to advice and consent of the Senate. *See* Tex. Const. art. V, § 1-a(2), (4).

b. The Commission operates pursuant to the provisions of that constitutional provision, of Chapter 33 of the Texas Government Code adopted by the Legislature pursuant to the constitutional requirements, and of the Procedural Rules for Removal or Retirement of Judges ("PRRRJ") promulgated by the Texas Supreme Court pursuant to the constitutional requirements. *See* Tex. Const. art. V, § 1-a(2), (11), (14).

c. The Commission's mission is to "protect the public, promote public confidence in the integrity, independence, competence, and impartiality of the judiciary, and encourage judges to maintain high standards of conduct both on and off the bench." *See* http://www.scjc.texas.gov/about/mission-statement/.

d. The Commission accomplishes this mission by investigating and addressing allegations of judicial misconduct. *E.g.,* Tex. Const. art. V, § 1-a; Tex. Gov't Code §§

33.021, 33.0211, 33.022. Its jurisdiction extends to all sitting Texas judges. *See* Tex. Const. art. V, § 1-a(6)(A), (C). Section 33.022 of the Government Code and PRRRJ Rules 3 and 4 direct the circumstances of a preliminary investigation and of a full investigation, including requirements of notice to the judge who is the subject of the investigation and provision to request the judge's response to the matters investigated. Rule 6 authorizes appearances before the Commission, including requirements of notice, the right to counsel on behalf of the respondent judge, opportunity for sworn testimony by the judge, and provisions of confidentiality.

e. If the Commission issues a sanction, Section 33.034 of the Government Code and PRRRJ Rule 9 furnish the simple, expedited, and efficient opportunity for an appeal by a judge who wishes to contest the sanction. The judge is given 30 days to make written request to the Chief Justice of the Supreme Court for appointment of a Special Court of Review. Within 10 days afterwards, the Chief Justice appoints three courts of appeal justices. Within 15 days after the appointment, the Commission files its charging instrument with the Special Court of Review. Within 30 days afterwards, the Special Court of Review conducts a hearing. The hearing is *de novo*, as that term is used in the appeal of cases from justice to county court (§33.034(e)(2)); and the hearing is governed by the rules of law, evidence, and procedure (including discovery (§33.027)) applicable to non-jury civil trials.

6. Defendants David C. Hall, Ronald E. Bunch, David M. Petronella, Darrick L. McGill, Sujeeth B. Draksharam, Ruben G. Reyes, Valerie Ertz, Frederick C. Tate, Steve Fischer, Janis Holt, M. Patrick Maguire and David Schenck are, or were when sued, Commissioners of the

State Commission on Judicial Conduct. Each has been sued solely in his or her official capacity.

The investigation and disciplinary proceedings

7. Judge Hensley's conduct came to the Commission's attention from a Waco newspaper article, which included an interview with Judge Hensley.

8. On May 22, 2018, the Commission sent Judge Hensley a letter of inquiry and asked Judge Hensley to respond to specific written questions. She did so. Her June 20, 2018 responses included contentions that her conduct was protected by the Texas Religious Freedom Restoration Act.

9. On January 25, 2019, the Commission wrote Judge Hensley identifying two alleged violations of the Texas Code of Judicial Conduct and an alleged violation of the Texas Constitution's restrictions on judicial conduct and furnishing the text of an unsigned tentative Public Warning.

a. The unsigned January 25, 2019 tentative Public Warning identified (i) an alleged violation of Canon 3B(6) (prohibiting bias and prejudice in the performance of judicial duties), an alleged violation of Canon 4A(1) (prohibiting conduct in extra-judicial activities that would cast reasonable doubt on the judge's capacity to act impartially), and an alleged violation of Article V, Section 1-a(6)(A) of the Texas Constitution (prohibiting "willful or persistent conduct that is clearly inconsistent with the proper performance of [the judge's] duties or casts public discredit upon the judiciary or administration of justice").

b. Judge Hensley was given the opportunity to accept the tentative Public Warning or to appear for a hearing.

c. Judge Hensley elected to appear for a hearing.

d. The unsigned tentative Public Warning never became effective.

e. It remained confidential by statute. It never became public prior to the conclusion of the disciplinary proceeding; but Judge Hensley chose to attach it to her pleading in this lawsuit.

10. On February 17, 2019, Judge Hensley purported to give statutory notice under the Texas Religious Freedom Restoration Act.

a. Her February 17, 2019 notice complained of "the Commission's investigation," which she says began May 22, 2018, and of the Commission's "threatened penalties," apparently referring to the Commission's January 25, 2019 confidential transmission of an unsigned tentative public warning.

b. The notice gave no greater specificity as to the "investigation" or the "threatened discipline" nor any specificity as to "the manner" in which they allegedly "impos[ed] substantial burdens" on Judge Hensley's free exercise of religion. The language of the letter implied, though it did not state, that the investigation and the January 25, 2019 unsigned tentative public warning had caused Judge Hensley to cease conducting any weddings; but it later became clear that Judge Hensley continued conducting opposite-sex weddings throughout 2018 and continuing into 2019 until August 26, 2019.

c. (The November 12, 2019 Public Warning differed from the January 25, 2019 unsigned tentative public warning, as detailed in ¶ 14.e. below.)

d. Neither Judge Hensley nor her counsel sent any subsequent notice. In particular, Judge Hensley never gave notice complaining of any conduct by the Commission at any time after February 17, 2019, including any complaint about the August 8, 2019 hearing nor any complaint about the November 12, 2019 Public Warning or its findings or its sanction.

11. On August 8, 2019, Judge Hensley appeared before the Commission. At the hearing, she was represented by her current trial attorney, Jonathan Mitchell, and two other attorneys. She gave her sworn testimony and responded under oath to questions by the Commission. Both Judge Hensley and her counsel were also given opportunity to make any arguments they wished.

12. At the hearing, Judge Hensley and her counsel's presentation included contentions that her conduct was protected by the Texas Religious Freedom Restoration Act. The Texas Religious Freedom Restoration Act expressly gives Judge Hensley the right to assert such defenses in the disciplinary hearing. Tex. Civ. Prac. & Rem. Code §110.004 ("Defense": "A person whose free exercise of religion has been substantially burdened in violation of Section 110.003 may assert that violation as a defense in a judicial or administrative proceeding without regard to whether the proceeding is brought in the name of the state or by any other person.").

13. Judge Hensley and her counsel also contested (i) whether any violation of Canon 3B(6) or of Canon 4A(1) or of the alleged constitutional violation had occurred; and (ii) whether Judge Hensley was protected under Article 1, Section 8 of the Texas Constitution from any discipline.

14. The Commission issued the Public Warning on November 12, 2019.

a. The November 12, 2019 Public Warning made findings about Judge Hensley's conduct, referring to (i) the newspaper article, which included an interview with her; (ii) her performing opposite-sex weddings while declining to perform same-sex wedding ceremonies; (iii) Judge Hensley's use of court personnel to communicate with same-sex couples; and (iv) her testimony that she would recuse herself from cases in which a party doubted her impartiality on the basis of her public refusal to perform same-sex weddings.

b. The November 12, 2019 Public Warning further made the finding that, "[b]ased upon the record before it and the factual findings recited above," Judge Hensley's conduct had "cast[] doubt on her capacity to act impartially to persons appearing before her as a judge due to the person's sexual orientation in violation of Canon 4A(1) of the Texas Code of Judicial Conduct."

c. Canon 4A(1) provides: "A judge shall conduct all of the judge's extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge …."

d. The November 12, 2019 Public Warning made no express mention of the Texas Religious Freedom Restoration Act. It granted no relief based on Judge Hensley's defenses based upon the Texas Religious Freedom Restoration Act, which she had asserted both in her written submissions and at the August 8, 2019 hearing.

e. The text of the November 12, 2019 Public Warning (which was issued after the August 8, 2019 evidentiary hearing) was different from the text of the January 25,

2019 tentative Public Warning (which was drafted prior to the August 8, 2019 evidentiary hearing).

i. It identified only one violation of the Texas Code of Judicial Conduct (Canon 4A(1)), rather than the two violations identified in the tentative document; and it included no findings of any violation of the Texas Constitution's restrictions on judicial conduct, unlike the January 25, 2019 tentative unsigned document.

ii. Though similar in some respects to the findings in the unsigned January 25, 2019 tentative Public Warning, the findings in the November 12, 2019 Public Warning were different.

iii. Unlike the unsigned January 25, 2019 tentative Public Warning, the November 12, 2019 Public Warning made no finding of any violation of Canon 3B(6).

f. The November 12, 2019 Public Warning made no findings under Canon 2A. (Canon 2A requires that "[a] judge shall comply with the law.") That is, the Public Warning found a violation that Judge Hensley's extrajudicial conduct had cast doubt on her impartiality – but not any finding that her refusal to conduct same-sex weddings was, or was not, lawful.

g. The Public Warning made no reference to where Judge Hensley attended religious services or to charitable organizations she supported.

15. The November 12, 2019 Public Warning was sent to Judge Hensley's counsel on November 14, 2019. Judge Hensley was permitted 30 days to file an appeal. She elected not to do so.

16. By December 14, 2019, the Public Warning had become final and unappealable.

a. Indeed, Judge Hensley has expressly represented in this lawsuit (i) that she "is not seeking vacatur or reversal of the Commission's sanction – and the 'public warning' that the Commission imposed will remain in place regardless of whether Judge Hensley obtains the damages and declaratory relief that she seeks" and (ii) that "[t]he defendants' claim that Judge Hensley is attempting to 'collaterally attack a judicial disciplinary order' is false, and there is nothing in Judge Hensley's petition that asks this Court to revoke or set aside the 'public warning' that the Commission imposed." (Plaintiff's Response to First Amended Motion to Transfer, at page 4, filed March 20, 2020.)

17. Judge Hensley was afforded full due process before the Commission during 2018-19.

a. The Commission followed the requirements of the Texas Government Code and of the Supreme Court's PRRRJ rules, including notice, right to counsel, and opportunity to present evidence.

b. Judge Hensley had full and fair opportunity to litigate before the Commission any defenses or other issues she wished – including her actual litigation of her asserted rights under the Texas Religious Freedom Restoration Act.

Claims and proceedings in this lawsuit

18. Instead of filing an appeal, Judge Hensley filed this lawsuit in McLennan County on December 17, 2019. In this lawsuit, she makes the following claims:

a. That Defendants violated her rights under the Texas Religious Freedom Restoration Act by their investigation and their issuance of the November 12, 2019

Public Warning "and by threatening to impose further discipline if she persists in recusing herself from officiating at same-sex weddings." (Second Amended Pet., ¶¶ 58-66.)

b. That the Court should grant a declaratory judgment "that a judge does not violate Canon 4A merely by expressing disapproval of homosexual behavior or same-sex marriage." (Second Amended Pet., ¶ 68.)

c. That the Court should grant a declaratory judgment "that a judge does not violate Canon 4A by belonging to or supporting a church or charitable organization that opposes homosexual behavior or same-sex marriage." (Second Amended Pet., ¶ 69.)

d. That the Court should grant a declaratory judgment "that the Commission's interpretation of Canon 4A violates article I, section 8, of the Texas Constitution." (Second Amended Pet., ¶70.)

e. That the Court should grant a declaratory judgment "that the officiating of weddings is not a judicial 'duty' under Canon 3B(6)." (Second Amended Pet., ¶ 72.)

f. That the Court should grant a declaratory judgment "that her decision to recuse herself from officiating at same-sex weddings and her intention to continue recusing herself is not a 'willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice.'" (Second Amended Pet., ¶ 73.)

g. Judge Hensley seeks the relief described in items b through f, above, under the Declaratory Judgment Act, under the Texas Religious Freedom Restoration Act, and,

against the Defendant Commissioners, under a theory of *ultra vires* conduct. (Second Amended Pet., ¶¶ 67, 74.).

19. Judge Hensley amended her petition on March 22, 2021, to also seek injunctive relief corresponding to her prayers for declaratory relief.

20. In its March 2, 2020 amended pleading in this lawsuit, the Commission raised Judge Hensley's failure to comply strictly with the statutory notice requirement. (Defendants' First Amended Motion to Transfer, Pleas to Jurisdiction and, Subject thereto, First Amended Answer, Plea of Res Judicata and Collateral Estoppel, and Defenses, at pages 6-8, 11, 24, 27.) Judge Hensley never took any steps to attempt to cure her failure.

21. Following a contested hearing, venue was transferred to Travis County.

22. Judge Hensley purports to have ceased much, or perhaps all, of the conduct that was found to violate Canon 4A(1). (Second Amended Petition, ¶ 63 ("she ceased officiating weddings").)

23. Following issuance of the November 12, 2019 Public Warning, the Commission has not initiated any new investigation of Judge Hensley, nor any new disciplinary proceeding; nor has it threatened her that any is planned or imminent.

Conclusions of law: Lack of jurisdiction due to failure to utilize the exclusive statutory appeal

24. Section 33.034 of the Texas Government Code ("Review of Commission Decision") and Rule 9(a) of the PRRRJ ("Review of Commission Decision") gave Judge Hensley an absolute right, if she wished, to obtain *de novo* review of the November 12, 2019 Public Warning.

a. All she needed to do was to make a written request to the Chief Justice of the Texas Supreme Court by December 14, 2019 – the 30th day after the transmittal of the Public Warning to her. Section 33.034(b); PRRRJ Rule 9(a).

b. If she had chosen to appeal, a special court of review consisting of three court of appeals justices would have been appointed within 10 days and would have expeditiously conducted its proceedings. Section 33.034(c).

c. Within 15 days after appointment of the Special Court of Review, the Commission would have filed and served a charging document. Section 33.034(d); PRRRJ Rule 9(b).

d. Within 30 days after filing of the charging document, the Special Court of Review would have conducted its hearing or would have allowed continuances, not exceeding 60 days in total. Section 33.034(h); PRRRJ Rule 9(c).

e. The review would have been "by trial *de novo* as that term is used in the appeal of cases from justice to county court" – that is, review would not have been limited by the prior evidentiary record or by any principles of deferential review, and Judge Hensley could have introduced new evidence, if she wished, or could have argued any nuances she might wish to emphasize in the evidence or any legal points, to rebut the charges that her particular conduct had cast doubt on her ability to act impartially. Section 33.034(e)(2) and (f); PRRRJ Rule 9(d).

f. Moreover, if Judge Hensley believed that her conduct was protected by the Texas Religious Freedom Restoration Act, the statutory *de novo* review allowed her to re-urge her defense that her conduct was statutorily protected. (*See* Section 110.004 of the Texas Civil Practice & Remedies Code.)

25. This Court has no jurisdiction for (i) a collateral attack of the Public Warning and/or (ii) any re-litigation of the factual findings within the Public Warning and/or (iii) any re-litigation of the arguments under the Texas Religious Freedom Restoration Act which Judge Hensley previously urged in the proceeding before the Commission leading to the issuance of the Public Warning and/or (iv) any factual or legal issue that Judge Hensley could have litigated in the disciplinary proceeding but chose not to and/or (v) any issue pertinent to the disciplinary proceeding concerning Judge Hensley.

a. This is the holding in *Hagstette v. State Commission on Judicial Conduct*, 2020 WL 7349502, slip op. at *5 (Tex. App. – Houston [1st Dist.], Dec. 15, 2020, no pet.) ("Given these statutory provisions permitting the Magistrate Judges to raise their claim through some avenue other than the UDJA, we determine that the district court lacked subject-matter jurisdiction over the Magistrate Judges' suit seeking a declaration that the Commission's public admonitions were void.").

b. This is because the Legislature chose to designate a single review process for such orders. A court may not seek redundantly to use the Uniform Declaratory Judgment Act to supplant the statutory mechanism designed by the Legislature. *E.g., Alamo Express, Inc. v. Union City Transfer*, 309 S.W.2d 815, 827 (Tex. 1958) (holding that "an action for declaratory judgment does not lie" in suit that asserts "a direct attack upon the [agency's] order by appeal"); *Patel v. Tex. Dep't of Licensing and Reg.*, 469 S.W.3d 69, 79 (Tex. 2015) ("Under the redundant remedies doctrine, courts will not entertain an action brought under the UDJA when the same claim could be pursued through different channels."); *Aaron Rents, Inc. v. Travis Cent. Appraisal Dist.*, 212 S.W.3d 665, 669 (Tex. App.—Austin 2006, no pet.) (en banc)

("When a statute provides an avenue for attacking an agency order, a declaratory judgment action will not lie to provide redundant remedies."); *Zurich American Insurance Co. v. Diaz*, 566 S.W.3d 297, 304 (Tex. App. – Houston [14th Dist.] 2018, pet. denied) ("When a claimant has invoked a statutory means of attacking an agency order, a trial court lacks jurisdiction over an additional purported claim under the UDJA that would merely determine the same issues and provide substantially the same relief as the available statutory remedies invoked.").

c. Further, the Court has no jurisdiction to impinge upon the comprehensive system for addressing judicial conduct directed by the Constitution and by the Supreme Court rules and statutes adopted pursuant to the Constitution's comprehensive system. *See Goldberg v. Commission* for *Lawyer Discipline*, 265 S.W.3d 568, 576 (Tex. App. – Houston [1st Dist.] 2008, pet. denied) ("When a litigant seeks in a lower court a remedy that would impinge on the supreme court's 'exclusive authority to regulate the practice of law,' the case does not present a justiciable controversy, and the lower court lacks subject-matter jurisdiction over it."; quoting *State Bar of Texas v. Gomez*, 891 S.W.2d 243, 246 (Tex. 1994)); *accord*, *Board of Disciplinary Appeals v. McFall*, 888 S.W.2d 471 (Tex. 1994).

26. Judge Hensley waived her right to any judicial review of the Public Warning and any of its findings or conclusions.

27. Section 110.004 of the Texas Civil Practice & Remedies Code expressly allows a claimant to assert her Texas Religious Freedom Restoration Act statutory rights as a defense in an administrative proceeding. Judge Hensley had the opportunity to litigate those claims

before the Commission, where she did so and failed, and also before the statutory special court of appeals, which she declined to invoke.

28. When she waived her right to appeal, Judge Hensley also waived her right to any judicial review of her claims under the Texas Religious Freedom Restoration Act.

29. Judge Hensley's waiver of her right to appeal also was a waiver of any right to any judicial proceeding to address any issue pertinent to her disciplinary proceeding.

Conclusions of law: Lack of jurisdiction due to failure to comply strictly with the statutory notice requirement

30. Judge Hensley purports to seek relief under the Texas Religious Freedom Restoration Act, found in Chapter 110 of the Texas Civil Practice & Remedies Code. Any claims under that Act require prior notice under Tex. Civ. Prac. & Rem. Code §110.006:

> (a) A person may not bring an action to assert a claim under this chapter unless, 60 days before bringing the action, the person gives written notice to the government agency by certified mail, return receipt requested:
>
> (1) that the person's free exercise of religion is substantially burdened by an exercise of the government agency's governmental authority;
>
> (2) of the particular act or refusal to act that is burdened; and
>
> (3) of the manner in which the exercise of governmental authority burdens the act or refusal to act.

31. The notice requirements are very specific.

a. The notice cannot be a general statement.

b. It must specify that the claimant's free exercise of religion is substantially burdened "by an exercise of the government agency's governmental authority" and the notice must identify a "particular act or refusal to act" and "the manner in which the exercise of governmental authority burdens the act or refusal to act."

c. No lawsuit may be filed before 60 days following a compliant notice.

d. The notice provision is intended to allow the agency, if it wishes, to "remedy the substantial burden on the person's free exercise of religion." Section 110.006(c).

e. Even if a governmental act substantially burdens a person's religious freedom, no violation of the Act exists "if the government agency demonstrates that the [burden] (1) is in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that interest." Section 110.003(b).

32. The statutory notice is jurisdictional.

a. "Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity." Tex. Gov't Code §311.034; *accord*, *City of Madisonville v. Sims*, 2020 WL 1898540, slip op. at *1 (Tex. Apr. 17, 2020) ("When a party sues a governmental body but fails to comply with a statutory prerequisite to suit, the governmental entity's response is 'properly asserted in a plea to the jurisdiction.'").

b. Strict compliance is required. *Prairie View A&M University v. Chatha*, 381 S.W.3d 500, 513-14 (Tex. 2012) ("We have repeatedly affirmed that any purported statutory waiver of sovereign immunity should be strictly construed in favor of retention of immunity"; a claimant may bring suit against the government "only after a claimant strictly satisfies the procedural requirements"); *Morgan v. Plano I.S.D.*, 724 F.3d 579, 585-86 (5th Cir. 2013) (where the claimant's pre-suit notice was by U.S. mail, fax and email – rather than by certified mail, return receipt requested, as required by Section 110.006 – the court was required to dismiss the Texas Religious Freedom

Restoration Act claims for lack of jurisdiction; "Texas lawmakers required strict compliance, not substantial compliance.").

c. Because strict compliance is jurisdictional, the case must be dismissed, rather than abated. *See City of Madisonville v. Sims, supra*, 2020 WL 1898540, slip op. at *2 ("When a statutory prerequisite to suit is not met …, the suit may be properly dismissed for lack of jurisdiction"); *Prairie View A&M University v. Chatha, supra*, 381 S.W.3d at 510 (because of non-compliance with a statutory prerequisite, "the University's plea [to the jurisdiction] should have been granted and the case dismissed").

33. Through her counsel, Judge Hensley sent notice letters to various of the Defendants on February 17, 2019. Neither Judge Hensley nor her counsel sent any subsequent notice. In particular, Judge Hensley never gave notice complaining of any act or omission by the Commission at any time after February 17, 2019, including any complaint about the August 8, 2019 hearing nor any complaint about the November 12, 2019 Public Warning or its findings or its sanction.

34. Judge Hensley's February 17, 2019 notice was not compliant.

a. It clearly is non-compliant to support any claim concerning any governmental action occurring after February 17, 2019.

b. It is not compliant as to any governmental action occurring on or prior to February 17, 2019, because she failed to strictly comply with the requirement to furnish specificity as to the governmental actions of which she complained and as to how she alleged that the Commission's exercise of governmental authority burdened

her rights. In particular, the letter does not give any explanation or description of the *manner* in which the investigation or threatened discipline allegedly burdened Judge Hensley's act or refusal to act. *See* Tex. Civ. Prac. & Rem. Code, § 110.006(a)(3). The letter's implication – that Judge Hensley had ceased conducting weddings based on the Commission's investigation or its January 2019 unsigned tentative public warning – is not accurate, since Judge Hensley continued to conduct opposite-sex weddings through August 26, 2019. No other "manner" in which Judge Hensley was burdened is explained or described in the February 2019 letter. Thus, it is totally unclear – and unspecified by the purported February 2019 notice letter – the *manner* in which Judge Hensley was burdened by the Commission's activities prior to February 2019. This failure to comply with Section 110.006(A)(3) is fatal.

c. Judge Hensley cannot support any claim based upon the January 25, 2019 unsigned tentative public warning because (i) it never had any legal effect, in light of her election to attend a hearing in lieu of accepting the tentative sanctions, (ii) it was confidential during the pendency of the disciplinary proceeding, even though she chose to publicize it as an attachment to her pleadings, and (iii) the only discipline imposed on Judge Hensley was the November 12, 2019 Public Warning, which made different findings than the unsigned tentative public warning and which was never challenged by any subsequent statutory appeal. That is, she purports to seek relief based on what was only a draft tentative action, rather than based upon the Commission's final resolution issued after her evidence and arguments at the August 8, 2019 evidentiary hearing.

d. As to any governmental actions that occurred before December 17, 2018, the February 17, 2019 notice is ineffective even if it had otherwise been compliant as to the required specificity. This is because the Texas Religious Freedom Restoration Act has a one-year statute of limitations. (*See* Section 110.007(a) of the Texas Civil Practice & Remedies Code, "One Year Limitations Period": "A person must bring an action to assert a claim for damages under this chapter not later than one year from the date the person knew or should have known of the substantial burden on the person's free exercise of religion.") This suit was filed December 17, 2019, and therefore cannot seek relief under the Texas Religious Freedom Restoration Act based upon any act or occurrence prior to December 17, 2018.

i. Thus, Judge Hensley cannot seek relief based on any claim concerning the commencement of the investigation, which she identifies as May 22, 2018.

ii. She cannot seek relief based upon anything related to the May 22, 2018 request that she answer written questions, nor related to her June 20, 2018 written responses.

35. Two consequences follow from Judge Hensley's non-compliance.

a. First, this Court has no jurisdiction to entertain her Texas Religious Freedom Restoration Act claims.

b. Second, as discussed below at ¶¶ 41-42, Judge Hensley cannot use the Texas Religious Freedom Restoration Act to attempt to assert any waiver of immunity under its provisions.

36. Accordingly, Judge Hensley's Texas Religious Freedom Restoration Act claims must be dismissed due to the failure of a statutory jurisdictional prerequisite. Moreover, Defendants are not constrained by the limited waiver of immunity under Tex. Civ. Prac. & Rem. Code §110.008; and they may assert sovereign immunity as well as the other bases for immunity that the law makes available to them.

Conclusions of law: Immunity

37. Unless waived, sovereign immunity protects State agencies (such as the Defendant Commission) and officials sued in their official capacities (such as the Defendant Commissioners) from suits. *E.g., Texas A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 843-44 (Tex. 2007) ("But an official sued in his official capacity would assert sovereign immunity [rather than official immunity, which is applicable when the official is sued for damages in an individual capacity]"; "When a state official files a plea to the jurisdiction, the official is invoking the sovereign immunity from suit held by the government itself. It is fundamental that a suit against a state official is merely 'another way of pleading an action against the entity of which [the official] is an agent.'"); *Texas Dept. of Transp. v. Sefzik*, 355 S.W.3d 618, 620-21 (Tex. 2011) ("sovereign immunity bars UDJA actions against the state and its political subdivisions absent a legislative waiver"); *City of El Paso v. Heinrich*, 284 S.W.3d 366, 370-74 (Tex. 2009) (each Commissioner is protected by sovereign immunity because the suit is in reality a suit against the State, unless the so-called "*ultra vires*" exception applies); *Bailey v. Smith*, 581 S.W.3d 374, 387 (Tex. App. – Austin 2019, pet. denied) ("Sovereign immunity from suit generally extends to state officials acting in their official capacities because 'a suit against a government official acting in an official capacity is

"merely another way of pleading an action against the entity of which the official is an agent." ' ").

38. Courts lack jurisdiction to hear claims that are barred by sovereign immunity. *E.g., Texas Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004). Indeed, immunity could be asserted for the first time on appeal. *Rusk State Hospital v. Black*, 392 S.W.3d 88, 95 (Tex. 2012).

39. In addition to their protection by sovereign immunity, and unlike most State agencies and State commissioners, Defendants also enjoy a special statutory immunity under Section 33.006 of the Texas Government Code, which provides that the Commission and its members are "not liable for an act or omission committed by the person within the scope of the person's official duties," and "[t]he immunity from liability provided by this section is absolute and unqualified and extends to any action at law or in equity." Section 33.006(b)-(c).

40. Judge Hensley attempts to avoid the immunity enjoyed by these Defendants in three ways: (i) by the limited waiver of immunity in the Texas Religious Freedom Restoration Act, (ii) by the Uniform Declaratory Judgment Act, and (iii) by her *ultra vires* allegations. None of these three attempts has merit.

41. **First** (alleged waiver by the **Texas Religious Freedom Restoration Act**): Section 110.008(a) of the Texas Civil Practice & Remedies Code waives *sovereign* immunity, but only if a claimant has complied with the notice requirements of Section 110.006.

a. Section 110.008(a) provides: "Subject to Section 110.006, *sovereign* immunity to suit and from liability is waived and abolished to the extent of liability created by Section 110.005…." (Emphasis added.)

42. Although the Texas Religious Freedom Restoration Act contains a waiver of *sovereign* immunity in many circumstances, that waiver does not apply to this suit against these Defendants for two reasons: (i) Section 110.008(a) does not purport to create any waiver as to the special statutory immunity granted these Defendants by Section 33.006 of the Texas Government Code, and (ii) as discussed in ¶¶ 30-36 above, Judge Hensley failed to comply strictly with the notice requirements that might have triggered the limited waiver in Section 110.008. *See Prairie View A&M University v. Chatha*, 381 S.W.3d 500, 513-14 (Tex. 2012) ("We have repeatedly affirmed that any purported statutory waiver of sovereign immunity should be strictly construed in favor of retention of immunity"; a claimant may bring suit against the government "only after a claimant strictly satisfies the procedural requirements").

a. Even if the limited waiver under the Texas Religious Freedom Restoration Act had any applicability in this lawsuit, a waiver under that Act would not have any applicability to those claims asserted by Judge Hensley under the Uniform Declaratory Judgment Act or under her "*ultra vires*" theory, in ¶¶ 67-75 of her Second Amended Petition.

43. **Second** (alleged waiver of immunity by the **Uniform Declaratory Judgment Act**): The Uniform Declaratory Judgment Act does not waive sovereign immunity in cases (such as this lawsuit) that do not involve challenge of the validity of a statute. *Texas Dept. of*

Transportation v. Sefzik, 355 S.W.3d 618, 622 (Tex. 2011); *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (Tex. 2009). Judge Hensley does not allege invalidity of any statute, nor even of any Canon of the Texas Code of Judicial Conduct. Instead, she challenges Defendants' *application* of Canon 4A(1) – for which there is no waiver of immunity under the Uniform Declaratory Judgment Act.

44. Additionally, as discussed in ¶¶ 24-29 above, the Uniform Declaratory Judgment Act is unavailable to Judge Hensley to litigate any issue that is pertinent to her disciplinary proceeding, which should have been litigated – if at all – in the statutory review which was available to her (but waived by her) pursuant to Section 33.034 of the Texas Government Code and PRRRJ Rule 9. *Hagstette v. State Commission on Judicial Conduct*, 2020 WL 7349502, slip op. at *5 (Tex. App. – Houston [1st Dist.], Dec. 15, 2020, no pet.). The Uniform Declaratory Judgment Act may not be used to circumvent the appellate mechanism furnished by the Legislature in Section 34.034 of the Texas Government Code. *Alamo Express, Inc. v. Union City Transf*er, 309 S.W.2d 815, 827 (Tex. 1958) (holding that "an action for declaratory judgment does not lie" in suit that asserts "a direct attack upon the [agency's] order by appeal"); *Aaron Rents, Inc. v. Travis Cent. Appraisal Dist.*, 212 S.W.3d 665, 669 (Tex. App.—Austin 2006, no pet.) (en banc) ("When a statute provides an avenue for attacking an agency order, a declaratory judgment action will not lie to provide redundant remedies.")

45. **Third** (the ***ultra vires*** allegations): Judge Hensley attempts to invoke the *ultra* vires doctrine by alleging that the Defendant Commissioners acted without legal or statutory authority. (Second Amended Petition, ¶ 75.) She is mistaken.

46. The *ultra vires* exception does not apply in this case.

a. "To fall within this *ultra vires* exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer [1] acted without legal authority or [2] failed to perform a purely ministerial act." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009); *accord, Patel v. Texas Dept. of Licensing & Reg*., 469 S.W.3d 69, 76 (Tex. 2015) ("But, to fall within this 'ultra vires exception,' a suit must allege that a state official acted without legal authority or failed to perform a purely ministerial act, rather than attack the officer's exercise of discretion."). The suit "must *not* complain of a government officer's exercise of discretion." *Patel v. Texas Dept. of Licensing & Reg*., *supra*, 469 S.W.3d at 76 (emphasis added).

b. Instead, to invoke the *ultra vires* exception, the claim must be "brought against a state official for nondiscretionary acts unauthorized by law." *Texas* Dept*. of Transp. v. Sefzik, supra*, 355 S.W.3d at 621.

47. Judge Hensley's pleadings defeat her claim. Her allegations and the evidence demonstrate that the Defendant Commissioners clearly acted within their constitutional and statutory authority, and in the exercise of their discretion rather than in derogation of any ministerial duties, when they investigated, deliberated, applied the law to the facts before them, and reached a collaborative decision based on that evidentiary record.

a. Investigating, deliberating and deciding were acts clearly within the Defendant Commissioners' authority – not outside it. Article V, Section 1-a of the Texas Constitution directs the Commission to investigate, make determinations and issue sanctions:

(7) The Commission shall keep itself informed as fully as may be of circumstances relating to the misconduct or disability of [judges], receive complaints or reports, formal or informal, from any source in this behalf and make such preliminary investigations as it may determine. …

(8) After such investigation as it deems necessary, the Commission may in its discretion issue a private or public admonition, warning, reprimand, or requirement that the person obtain additional training or education …

b. In Section 33.022 of the Texas Government Code, the Legislature expressly gives the Commission responsibilities for investigations and proceedings:

(a) The commission may conduct a preliminary investigation of the circumstances surrounding an allegation or appearance of misconduct or disability of a judge to determine if the allegation or appearance is unfounded or frivolous.
…

(c) If, after conducting a preliminary investigation under this section, the commission does not determine that an allegation or appearance of misconduct or disability is unfounded or frivolous, the commission:

(1) shall:

(A) conduct a full investigation of the circumstances surrounding the allegation or appearance of misconduct or disability; and

(B) notify the judge in writing of:

(i) the commencement of the investigation; and

(ii) the nature of the allegation or appearance of misconduct or disability being investigated; and

(2) may:

(A) order the judge to:

(i) submit a written response to the allegation or appearance of misconduct or disability; or

(ii) appear informally before the commission;

(B) order the deposition of any person; or

(C) request the complainant to appear informally before the commission.

c. The Supreme Court further directed that the Commission had the power "upon receipt of a verified statement, upon its own motion, or otherwise, make such preliminary investigation as is appropriate to the circumstances relating to an allegation or appearance of misconduct or disability of any judge to determine that such allegation or appearance is neither unfounded nor frivolous." Procedural Rules for Removal or Retirement of Judges, Rule 3.

48. Thus, the conduct that the Commission and Commissioners performed in connection with Judge Hensley's disciplinary proceeding and the issuance of the November 12, 2019 Public Warning were non-ministerial and were directly within the legal authority given by the Constitution, the Legislature and the Supreme Court. Judge Hensley's *ultra vires* allegations are therefore defeated by her own pleading and by the evidence.

49. The Commissioners clearly had the authority, and the duty, to evaluate the record in the disciplinary proceeding concerning Judge Hensley and reach a decision.

a. If they were mistaken (which the Defendants have denied in their pleadings), that error in performing their duty does not take the Defendants out of their authority -- any more than when a judge is determined on review to have erred. If the Commissioners were mistaken when they deliberated upon the record before them, then the statutory special court of review is Judge Hensley's remedy -- not a suit accusing them of having acted outside their authority.

b. A commissioner -- just as a judge -- is not acting outside the authority of his or her office in making a decision -- even if the decision is later reversed or modified by a reviewing court. "[T]he *ultra vires* exception simply 'does not extend to allegations that an [official] reached an incorrect result when exercising its delegated authority.'" *Zurich American Ins. Co. v. Diaz*, 566 S.W.3d 297, 305 (Tex. App.-Houston [14th Dist.] 2018, pet. denied); *Honors Academy, Inc. v. Tex. Educ. Agency*, 555 S.W.3d 54, 68, 77-78 (Tex. 2018) ("'*Ultra vires* claims depend on the scope of the state official's authority,' not the quality of the official's decisions. … Thus, it is not an *ultra vires* act for an official to make an erroneous decision within the authority granted."; the Commissioner of Education could *not* be sued under an *ultra vires* theory – even if "the Commissioner's decision to revoke a charter was arbitrary, capricious or clearly erroneous") (internal citations omitted); *MHCB (USA) Leasing & Fin. Corp. v. Galveston Cent. App. Dist. Review Bd.*, 249 S.W.3d 68, 81 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) ("[J]ust because an agency determination is wrongly decided does not render that decision outside the agency's authority ...: an incorrect agency determination rendered pursuant to the agency's authority is not a determination made outside that authority."); *Creedmoor-Maha W.S.C. v. Texas Comm'n on Env. Quality*, 307 S.W.3d 505, 517-18 (Tex. App.-Austin 2010, no pet.) ("These are allegations that TCEQ reached an incorrect or wrong result when exercising its delegated authority, not facts that would demonstrate that TCEQ exceeded that authority"); *Reagan Nat'l Adv. of Austin, Inc., v. Bass*, 2017 WL 4348181, slip op. at *4 (Tex. App.-Austin Sept. 27, 2017, no pet.) ("Errors or mistakes by state officials are insufficient, on their own, to establish an ultra vires act"); *City of Austin v. Utility*

Assocs., Inc., 517 S.W.3d 300, 310 (Tex. App.-Austin 2017, pet. denied) ("Where, as here, a governmental body has been delegated authority to make some sort of decision or determination, immunity jurisprudence has long emphasized a critical distinction between alleged acts of that body that are truly ultra vires of its decision-maker authority, and are therefore not shielded by immunity, and complaints that the body merely 'got it wrong' while acting within this authority, which are shielded. 'Indeed,' as the Texas Supreme Court recently observed, 'an ultra vires doctrine that requires nothing more than an identifiable mistake would ... swallow immunity.'" [citing *Hall v. McRaven*, 508 S.W.3d 232, 242-43 (Tex. 2017)]); *Hagstette v. State Commission on Judicial Conduct*, 2020 WL 7349502, slip op. at *7 (Tex. App. – Houston [1st Dist.], Dec. 15, 2020, no pet.) ("Even if the Commission or its individual members erred in exercising this discretion, we cannot say that such an error constitutes an ultra vires act.").

50. Further, Judge Hensley's judicial admission in this lawsuit, during her unsuccessful effort to maintain venue in McLennan County, contradicts her claim of *ultra vires* when she stated (i) that she "is not seeking vacatur or reversal of the Commission's sanction – and the 'public warning' that the Commission imposed will remain in place regardless of whether Judge Hensley obtains the damages and declaratory relief that she seeks" and (ii) that "[t]he defendants' claim that Judge Hensley is attempting to 'collaterally attack a judicial disciplinary order' is false, and there is nothing in Judge Hensley's petition that asks this Court to revoke or set aside the 'public warning' that the Commission imposed." (Plaintiff's Response to First Amended Motion to Transfer, at page 4, filed March 20, 2020.)

51. Because each of Judge Hensley's foregoing three efforts to establish a waiver of immunity are unmeritorious, Judge Hensley's claims must be dismissed, based on Defendants' immunity.

Conclusions of law: Ripeness; Impermissible Advisory Opinions

52. As discussed at ¶¶ 30-36 above, no jurisdiction exists to support Judge Hensley's claims under the Texas Religious Freedom Restoration Act. Further, as to any determinations concerning the propriety of the conduct Judge Hensley engaged in prior to the Commission's November 12, 2019 Public Warning, the sanction order – which Judge Hensley claims she is not seeking to vacate or reverse – is binding upon her and dispositive. This is the consequence of *res judicata*, discussed at ¶¶ 57-61 below, and of Judge Hensley's judicial admission that she is not collaterally attacking the November 12, 2019 Public Warning. Judge Hensley is foreclosed from asking any court to re-litigate issues concerning her prior conduct; and if she were to choose to engage in identical conduct in the future, she is foreclosed from denying that the same conduct would again be a violation of Canon 4A(1). This is the consequence of collateral estoppel, discussed at ¶¶ 62-68 below.

53. To the extent Judge Hensley is asking this Court to give her advice as to how she might change her conduct in order to comply with the Texas Code of Judicial Conduct, or how her future conduct (if different from her prior conduct) might avoid judicial discipline, she faces two additional problems in addition to the lack of jurisdiction and immunity hurdles discussed at ¶¶ 24-51 above.

a. First, she is asking for improper advisory opinions.

b. Second, no controversy is ripe for adjudication.

c. Both of these problems prevent this Court from entertaining her request for the Court's views.

d. Her claims concerning her potential future conduct – for declaratory relief, including her claim that the Commissioners acted *ultra vires* – are not ripe and must therefore be dismissed for lack of jurisdiction.

54. Judge Hensley's request for declarations as to the legal effect of events that have not yet occurred calls for impermissible speculation as to whether or how the Commission may adjudicate the particular facts of future proceedings -- whether involving Judge Hensley or involving others. Those claims do not present a ripe controversy.

55. Courts have no jurisdiction to issue advisory opinions. "[L]itigants may not employ declaratory-judgment actions to obtain impermissible advisory opinions seeking to interpret statutes or agency rules." *VanderWerff v. Texas Bd. of Chiropractic Exam'rs*, 2014 WL 7466814, slip op. at *2 (Tex. App.—Austin Dec. 18, 2014, no pet.); *Alamo Express, Inc. v. Union City Transfer*, 309 S.W.2d 815, 827 (Tex. 1958) ("What the common carriers are seeking by their request for a declaratory judgment is an advisory opinion by the Court. It is well settled that courts will not give advisory opinions.").

56. And of course, courts have no jurisdiction when no controversy has yet become ripe.

a. Here there is no current or threatened investigation of Judge Hensley. She does not contend that there is one.

b. She portrays that she has ceased much, or perhaps all, of the conduct that was previously determined to violate Canon 4A(1). (Second Amended Petition ¶ 63.)

c. She does not allege what she wishes to do differently; and even if she did, in the absence of any imminent or threatened enforcement proceeding, the controversy "is not ripe, and therefore [the Court] do[es] not have jurisdiction." *CPS Energy v. Public Utility Commission,* 537 S.W.3d 157, 199-200 (Tex. App. – Austin 2017) (with reference to certain 2011 amendments: "In similar situations involving what is essentially a pre-enforcement suit, courts have concluded that the controversy is ripe for review only if an enforcement action is not merely remote, conjectural, or hypothetical, but imminent or sufficiently likely."), *rev'd in part on other grounds*, 593 S.W.3d 291 (Tex. 2019); *Atmos Energy Corp. v. Abbott*, 127 S.W.3d 852, 856 (Tex. App. - Austin 2004, no pet.) (When a plaintiff files "a 'pre-enforcement' suit seeking a declaration of its rights prior to an agency 'pre-enforcement' suit seeking a declaration of its rights prior to an agency enforcement action, we have concluded the controversy is ripe for review only if 'an enforcement action is imminent or sufficiently likely.'"); *Zimmerman v. City of Austin*, 620 S.W.3d 473, 486-87 (Tex.App. – El Paso 2021, motion granted to extend time for petitioning for review) ("A case is not ripe for review when the resolution depends on contingent or hypothetical facts, or upon events that have not come to pass, or in fact may never come to pass.").

d. Because ripeness principles relate to the Court's jurisdiction, the determination of ripeness must be made as of the date Judge Hensley filed her suit – December 17, 2019. *See Robinson v. Parker*, 353 S.W.3d 753, 755 (Tex. 2011) ("In evaluating ripeness, we consider 'whether, at the time a lawsuit is filed, the facts are sufficiently developed so that an injury has occurred or is likely to occur, rather than being contingent or remote.'").

e. Here, Judge Hensley's petition gives no evidence, but only an invitation for speculation, as to many contingencies: how will she act in the future?; will a grievance be asserted by anyone concerning her conduct in the future?; will the Commission take any action in response, and, if so, what action?

f. Determinations concerning propriety of judicial conduct are typically fact-specific, based upon the details, nuances, and particular facts of a particular case. *E.g., Hagstette v. State Commission on Judicial Conduct*, 2020 WL 7349502, slip op. at *3 (Tex. App. – Houston [1st Dist.], Dec. 15, 2020, no pet.) ("weighing the facts and circumstances of [the] case"); PRRRJ Rule 4 ("full inquiry into the facts and circumstances" concerning a judge's conduct).

g. Even the Attorney General's opinion relied upon by Judge Hensley and attached to her amended petition (Opinion KP-0025) emphasizes on four occasions that the strength of a claim concerning a refusal to conduct same-sex weddings "depends on the particular facts of each case"; and the Opinion says that "such a factually specific inquiry is beyond the scope of what this opinion can answer." Yet Judge Hensley asks this Court to bypass any particularized fact-specific inquiry and declare a categorical rule.

h. It is not the role of a court to give advisory opinions or to entertain a litigant's speculation about facts that have not yet occurred.

i. In particular, Judge Hensley's following causes of action are not ripe: (i) her claim that Canon 4A is not violated by mere disapproval of homosexual behavior or same-sex marriage (Second Amended Petition ¶ 68), since the Commission has not instituted or threatened to institute any proceeding against her based on any such

alleged violation; (ii) her claim that Canon 4A is not violated by membership in a church or charitable organization that opposes homosexual behavior or same-sex marriage (Second Amended Petition. ¶ 69), since the Commission has not instituted or threatened to institute any proceeding against her based on any such alleged violation; (iii) her claim that officiating weddings is not an official duty under Canon 3B(6) (Second Amended Petition ¶ 72), since the Commission found no such violation in its November 12, 2019 Public Warning and has not subsequently instituted or threatened to institute any proceeding against her based on any such alleged violation; and (iv) her claim that her conduct has not been willful or persistent (Second Amended Petition ¶ 73), since the Commission found no such violation in its November 12, 2019 Public Warning and has not subsequently instituted or threatened to institute any proceeding against her based on any such alleged violation.

Conclusions of law: Res judicata

57. Another consequence of Judge Hensley's decision not to invoke the available statutory *de novo* judicial review to challenge the Public Warning is this: the Public Warning became a final, no-longer-appealable, binding order.

58. *Res judicata* and collateral estoppel both apply to the un-appealed Public Warning.

a. Accordingly, Judge Hensley cannot ask this Court (or any other court) to change the findings, the conclusion that her conduct violated Canon 4A(1), or the appropriateness of a sanction for the conduct that was the subject of her disciplinary proceeding.

b. In particular, she cannot ask this Court (or any other court) to give relief under the Texas Religious Freedom Restoration Act, which she invoked unsuccessfully in her defense of the disciplinary proceeding.

59. Final judgments from a court may not be collaterally attacked in a subsequent lawsuit unless they are void. *Browning v. Prostok*, 165 S.W.3d 336, 345-46, 347-48 (Tex. 2005) (refusing to allow "an impermissible collateral attack" on a bankruptcy confirmation order; "Collateral attacks on final judgments are generally disfavored because it is the policy of the law to give finality to the judgments of the courts"; "Only a void judgment may be collaterally attacked… [that is,] when it is apparent that the court rendering judgment 'had no jurisdiction of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act'"; this is so even if there were intrinsic fraud, such as "fraudulent instruments, perjured testimony, or any matter which was actually presented to and considered by the trial court in rendering judgment"). Judge Hensley relies on *Mower v. Boyer*, 811 S.W.2d 560, 562 (Tex. 1991) to argue that a trial court's order cannot have estoppel effect – either for *res judicata* or for collateral estoppel – unless it included a reasoned opinion. She is mistaken. That case made those comments solely as to *non-final*, interlocutory partial summary judgment order (unlike the Commission's final November 12, 2019 Public Warning). *Mower v. Boyer* expressly granted *res judicata* effect to a *final* order by a different trial court (the probate court), without any requirement of a reasoned opinion. 811 S.W.2d at 563. It would be erroneous to portray *Mower v. Boyer* as requiring that a *final* order include a reasoned opinion before it can be given estoppel effect. *Calabrian Corp. v. Alliance Specialty Chemicals, Inc.*, 418 S.W.3d 154, 158 n.3 (Tex.App. – Houston [14th Dist.] 2003, no pet.) ("Accordingly, it would be improper to apply [the *Mower v. Boyer* factors

including any reasoned-opinion requirement], which are designed to determine whether an adjudication that is *not* accompanied by a final judgment is nevertheless firm enough to be given issue-preclusive effect."; emphasis is original).

a. This principle applies also to disciplinary proceedings and other agency decisions. *E.g., Friends of Canyon Lake v. Guadalupe-Blanco River Authority*, 96 S.W.3d 519, 532 (Tex. App. – Austin 2002, pet. denied) (discussing "the well established principle that an agency's final order, like the final judgment of a court of law, is immune from collateral attack"); *Perez v. Physician Assistant Board*, 2017 WL 5078003, slip op. at *3 (Tex. App. – Austin 2017, pet. denied) (discipline of a licensed physician assistant; the physician assistant did not exercise available statutory review of the adverse disciplinary proceeding, but instead filed a suit seeking damages and injunctive relief against the Board and its presiding officer; the court of appeals rejected his collateral attack because the underlying agency order was not shown to be void; "Collateral attacks on an agency order may be maintained successfully on one ground alone -- that the order is void."); *Chisholm Trail SUD Stakeholders Group v. Chisholm Trail Special Utility District*, 2020 WL 1281254, slip op. at *3 (Tex. App. – Austin Mar. 18, 2020, pet. denied) (where the PUC's final order was no longer subject to appeal, and a statutory district's corresponding order was also final and unappealable, an unhappy party could not collaterally attack the agency's order unless the order were void); *Chocolate Bayou Water Co. & Sand Supply v. Texas Nat. Res. Conservation Comm'n*, 124 S.W.3d 844, 853 (Tex. App. – Austin 2003, pet. denied) ("Collateral attacks upon an agency order may be maintained successfully on one ground alone - that the order is void. … An agency order may be

void in the requisite sense on either of two grounds: 1) the order shows on its face that the agency exceeded its authority, or 2) a complainant shows that the order was procured by extrinsic fraud."); *VanderWerff v. Texas Board of Chiropractic Examiners*, 2014 WL 7466814, slip op. at *3 (Tex. App. – Austin Dec. 18, 2014, no pet.) (a chiropractor failed to timely appeal from an unfavorable agency ruling and instead filed a new lawsuit seeking injunctive relief against future discipline and declaratory relief concerning constitutional challenges to the agency's interpretation of statutes and regulations; the new lawsuit is "an attempt to obtain a different judgment with respect to the same controversy"); *Oji v. State Bar of Texas*, 2001 WL 1387183, slip op. at *3 (Tex. App. – Houston [14th Dist.] 2001, pet. denied) ("Oji had a proper remedy by appeal and failed to exercise it"; his new "declaratory judgment suit constitutes an impermissible collateral attack" on the disciplinary order disbarring Oji).

b. Judge Hensley does not allege that the Public Warning is void.

c. Instead, she candidly admits (i) that "the 'public warning' that the Commission imposed will remain in place regardless of whether Judge Hensley obtains the damages and declaratory relief that she seeks" and (ii) that "[t]he defendants' claim that Judge Hensley is attempting to 'collaterally attack a judicial disciplinary order' is false, and there is nothing in Judge Hensley's petition that asks this Court to revoke or set aside the 'public warning' that the Commission imposed."

d. Judge Hensley would shoulder the burden of proof if she wished to claim that the Public Warning was void. *See Stewart v. USA Custom Paint & Body Shop, Inc.*, 870

S.W.2d 18, 20 (Tex. 1994) (placing the burden on the party attacking the prior judgment; "In a collateral attack, the judgment under attack is presumed valid.").

e. Because there is no claim, and certainly no evidence, that the November 12, 2019 Public Warning was void, *res judicata* [or "claim preclusion"] forecloses Judge Hensley from seeking to re-litigate any issue that was, or that could have been, raised during her defense of that proceeding.

60. "Res judicata bars the relitigation of claims that have been finally adjudicated or that could have been litigated in the prior action." *Engelman Irrigation Dist. v. Shields Bros., Inc.*, 514 S.W.3d 746, 750 (Tex. 2017); *accord*, *Barr v. Resolution Trust Co.*, 837 S.W.2d 627, 628, 631 (Tex. 1992) ("Res judicata, or claims preclusion, prevents the relitigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have been litigated in a prior suit."; "We reaffirm the 'transactional' approach to res judicata. A subsequent suit will be barred if it arises out of the same subject matter of a previous suit and which[,] through the exercise of diligence, could have been litigated in a prior suit.").

61. Judge Hensley chose to litigate most, though not all, of her current claims in the disciplinary proceeding. All relate to the same subject matter. Through the exercise of diligence, Judge Hensley could have litigated each of those issues in the disciplinary proceeding or, if she had wished, in a statutory *de novo* appeal. *Res judicata* bars this action. *Barr v. Resolution Trust Co.*, *supra*.

a. The Commission was acting in a judicial capacity. *See Scott v. Flowers,* 910 F.2d 201, 208 (5th Cir. 1990) (a proceeding is judicial when it "investigate[s],

declare[s], and enforce[s] liabilities ... on present or past facts and under laws supposed already to exist"; "We have little difficulty in concluding that the Commission's reprimand of [Judge] Scott was a judicial act.")). The Commission investigated Judge Hensley's conduct; it declared and enforced Judicial Canon obligations based on facts "and under laws supposed already to exist."

b. The Commission resolved disputed issues of fact before it, reviewing the particular evidentiary record before it and setting forth findings within the Public Warning.

c. Judge Hensley had an adequate opportunity to litigate. She had notice of the issues. She was offered an evidentiary hearing. She was represented by multiple counsel of her choosing, including her current trial lawyer. She points to no instance when she wished to offer evidence or argument but was denied the opportunity to do so. She was given a written final appealable order.

Conclusions of law: Collateral estoppel

62. Alternatively, even if this suit were permitted to proceed despite its lack of jurisdiction and despite its being barred by *res judicata*, Judge Hensley is bound by collateral estoppel and cannot re-litigate any factual or legal issue that was determined by the November 12, 2019 Public Warning – including the finding that her conduct violated Canon 4A(1) and warranted a public warning.

63. "Collateral estoppel applies when an issue decided in the first action is actually litigated, essential to the prior judgment, and identical to an issue in a pending action. … It applies when the party against whom it is asserted had a full and fair opportunity to litigate the issue in the prior suit." *Texas Dept. of Public Safety v. Petta*, 44 S.W.3d 575, 579 (Tex. 2001).

64. Judge Hensley actually litigated whether her conduct as protected by the Texas Religious Freedom Restoration Act. She raised the issue by written responses to questions in June 2018; by her attorney's demand letters in February 2019; by her testimony in August 2019; and by her attorney's arguments at the August 2019 hearing. Under the statute, it was her right to do make such arguments. Tex. Civ. Prac. & Rem. Code § 110.004 ("Defense": "A person whose free exercise of religion has been substantially burdened in violation of Section 110.003 may assert that violation as a defense in a judicial or administrative proceeding …"). She also litigated unsuccessfully whether her conduct was protected by Article I, Section 8 of the Texas Constitution.

65. The Commission declined to grant any relief in response to her arguments. The issuance of the Public Warning is deemed a rejection of all defenses. *See Allen v. Allen*, 717

S.W.2d 311, 312 (Tex. 1986) ("All pleaded issues are presumed to be disposed of, expressly or impliedly, by the trial court's judgment, absent a contrary showing in the record."; "That judgment will ordinarily be construed as settling all issues by implication."); *Vance v. Wilson*, 382 S.W.2d 107, 108-09 (Tex. 1964) (Norvell, J) ("The general rule in Texas is that all issues presented by the pleadings are disposed of by the judgment unless the contrary appears from the face thereof. '(A) judgment which grants part of the relief but omits reference to other relief put in issue by the pleadings will ordinarily be construed to settle all issues by implication.' 4 McDonald, Texas Civil Practice, 1340, s 17.10."; "The rule is that where a claim is not expressly disposed of by the judgment although raised by the pleading, the judgment will be construed as denying relief upon such claim, and the judgment will be considered as being final and appealable. *Davies v. Thomson*, 92 Tex. 391, 49 S.W. 215 (1899); *Trammell v. Rosen*, 106 Tex. 132, 157 S.W. 1161 (1913).")

66. Because Judge Hensley elected not to appeal, the Public Warning is a final determination that cannot be collaterally attacked. Collateral estoppel [or "issue preclusion"] forecloses Judge Hensley from seeking to re-litigate or challenge any of the findings or conclusions within the Public Warning.

67. The Commission's November 12, 2019 Public Warning established that the conduct Judge Hensley had engaged in prior to November 2019 was a violation of Canon 4A(1). Collateral estoppel prevents her from arguing – in this lawsuit or in any future lawsuit or disciplinary proceeding -- that recurrence of the same conduct would *not* be a violation of Canon 4A(1).

68. Accordingly, Judge Hensley cannot claim in this lawsuit (or in any other) that the Public Warning was inaccurate or erroneous or unconstitutional or in violation of any of Judge Hensley's rights when it determined, from the evidentiary record before it, that the particular facts of her conduct were in violation of Canon 4A(1).

SIGNED this 26th day of August, 2021.

Jan Soifer

Jan Soifer, Judge Presiding

Appendix 4

Cause No. D-1-GN-20-003926

Dianne Hensley, on behalf of herself and others similarly situated, Plaintiff, v. **State Commission on Judicial Conduct**, et al., Defendants.	IN THE DISTRICT COURT TRAVIS COUNTY, TEXAS 459th JUDICIAL DISTRICT

ORDER GRANTING DEFENDANTS' PLEA TO THE JURISDICTION AND, IN THE ALTERNATIVE, PLEA IN ESTOPPEL

On May 26, 2021, the Court heard Defendants' Plea to the Jurisdiction and, in the Alternative, Plea in Estoppel. All parties appeared by their respective counsel of record and announced ready. Having considered Defendants' alternative pleas, Plaintiff's opposition, Defendants' reply, the admissible evidence introduced at the hearing, the parties' arguments, and the legal authorities urged by the parties, the Court FINDS that dismissal is required for each of the following reasons: Plaintiff's failure to exercise her exclusive statutory remedy concerning issues pertinent to her disciplinary proceeding; Plaintiff's failure to comply strictly with jurisdictional statutory notice requirements pertinent to her claims under the Texas Religious Freedom Restoration Act; sovereign immunity; statutory immunity under Section

33.006 of the Texas Government Code; lack of ripeness and Plaintiff's request for impermissible advisory opinions; and *res judicata*.

The Court further FINDS that, if the Court had jurisdiction and if the case were not barred by *res judicata*, Plaintiff is bound by the findings and conclusions of, and all issues concluded by, the November 12, 2019, Public Warning at issue due to collateral estoppel.

Accordingly, it is ORDERED that this cause be, and it hereby is, DISMISSED. IT IS FURTHER ORDERED that all costs are taxed against Plaintiff Dianne Hensley.

SIGNED on June 25, 2021.

Jan Soifer, Judge Presiding

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Associated Case Party: STATE COMMISSION ON JUDICIAL CONDUCT

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Appendix 5

Cause No. D-1-GN-20-003926

Dianne Hensley, Plaintiff, v. **State Commission on Judicial Conduct**; **David C. Hall**, in his official capacity as Chair of the State Commission on Judicial Conduct; **Janis Holt**, in his official capacity as Secretary of the State Commission on Judicial Conduct; **David M. Patronella**, **Darrick L. McGill**, **Sujeeth B. Draksharam**, **Ronald E. Bunch**, **Valerie Ertz**, **Frederick C. Tate**, **M. Patrick Maguire**, **David Schenck**, and **Clifton Roberson**, each in their official capacities as Members of the State Commission on Judicial Conduct, Defendants	IN THE DISTRICT COURT TRAVIS COUNTY, TEXAS 459th JUDICIAL DISTRICT

PLAINTIFF'S SECOND AMENDED PETITION

Plaintiff Dianne Hensley serves as a justice of the peace in Waco, having served her community in this position since January 1, 2015. As a justice of the peace, Judge Hensley is authorized by Texas law to officiate at marriage ceremonies. *See* Texas Family Code § 2.202(a). Prior to June 2015, Judge Hensley officiated eighty (80) weddings. Between June 26, 2015, and August 1, 2016, Judge Hensley—along with the majority of justices of the peace and other public officials authorized to officiate marriages in McLennan County—officiated no weddings.

Judge Hensley's conscience is informed by the teachings of her Chrisitan faith. To remain faithful to her firmly held religious beliefs, she cannot officiate a same-sex marriage ceremony. These same religious convictions compel Judge Hensley to treat

all people, regardless of sexual preference or orientation, with dignity, respect, and kindness. Her Christian belief in the dignity of the individual led Judge Hensley to consider how to accommodate those seeking a local wedding officiant. Not wishing to bind the conscience of others, Judge Hensley sought to provide the public with reasonable alternatives.

At her own expense, Judge Hensley invested extensive time and resources to compile a referral list of alternative, local, and low-cost wedding officiants in Waco that she provides to people for whom she is unable to officiate due to time constraints or her religious convictions. One such officiant operates a walk-in wedding chapel located just a short walk (three blocks) from Judge Hensley's courtroom. Those who mention that the referral to this walk-in wedding officiant came from Judge Hensley receive a discounted rate to comport with Judge Hensley's rate.

Judge Hensley's referral solution has provided a means by which many more couples—including same-sex couples—are able to marry than by the predominant practice of many public officials, who have simply ceased officiating weddings altogether. Judge Hensley has officiated wedding ceremonies for 328 couples since August 2016—and dozens more have taken advantage of the referral system instituted by Judge Hensley.

No one complained about Judge Hensley's referral system. Nonetheless, the State Commission on Judicial Conduct launched a lengthy investigation of Judge Hensley's activities in May 2018. On November 12, 2019, the Commission issued a "Public Warning," sanctioning Judge Hensley for operating the referral system developed to accommodate her religious convictions and serve her community. *See* Exhibit 1. Without a single public complaint, the Commission punished Judge Hensley's attempt to reconcile her religious beliefs with the needs of her community.

The Commission's public punishment of Judge Hensley—as well as its threat to impose further discipline if Judge Hensley persists in recusing herself from officiating

at same-sex weddings—violates Judge Hensley's rights under the Texas Religious Freedom Restoration Act. By investigating and punishing Judge Hensley for acting in accordance with the commands of her Christian faith, the Commission and its members have substantially burdened the free exercise of her religion, with no compelling justification. Judge Hensley sues to recover damages, costs, and attorneys' fees as authorized by the Texas Religious Freedom Restoration Act. *See* Tex. Civ. Prac. & Rem. Code § 110.005(a).

Judge Hensley also intends to continue recusing herself from officiating at same-sex weddings—her conscience demands it—despite the Commission's warning. She therefore seeks a declaratory judgment that her referral system complies with Texas law, and an injunction that prevents the Commission from imposing any further discipline on justices of the peace who recuse themselves from officiating at same-sex marriage ceremonies.

DISCOVERY CONTROL PLAN

1. The plaintiff intends to conduct discovery under Level 3 of the rules set forth in Rule 190 of the Texas Rules of Civil Procedure.

PARTIES

2. Plaintiff Dianne Hensley resides in McLennan County.

3. Defendant State Commission on Judicial Conduct is an independent Texas state agency. It may be served at its offices at 300 West 15th Street, Austin, Texas 78701.

4. Defendant David C. Hall is chair of the State Commission on Judicial Conduct. He may be served at the Commission's offices at 300 West 15th Street, Austin, Texas 78701. Chairman Hall is sued in his official capacity.

5. Defendant Janis Holt is secretary of the State Commission on Judicial Conduct. She may be served at the Commission's offices at 300 West 15th Street, Austin, Texas 78701. Secretary Holt is sued in her official capacity.

6. Defendant David M. Patronella is a member of the State Commission on Judicial Conduct. He may be served at the Commission's offices at 300 West 15th Street, Austin, Texas 78701. Commissioner Patronella is sued in his official capacity.

7. Defendant Darrick L. McGill is a member of the State Commission on Judicial Conduct. He may be served at the Commission's offices at 300 West 15th Street, Austin, Texas 78701. Commissioner McGill is sued in his official capacity.

8. Defendant Sujeeth B. Draksharam is a member of the State Commission on Judicial Conduct. He may be served at the Commission's offices at 300 West 15th Street, Austin, Texas 78701. Commissioner Draksharam is sued in his official capacity.

9. Defendant Ronald E. Bunch is a member of the State Commission on Judicial Conduct. He may be served at the Commission's offices at 300 West 15th Street, Austin, Texas 78701. Commissioner Bunch is sued in his official capacity.

10. Defendant Valerie Ertz is a member of the State Commission on Judicial Conduct. She may be served at the Commission's offices at 300 West 15th Street, Austin, Texas 78701. Commissioner Ertz is sued in her official capacity.

11. Defendant Frederick C. Tate is a member of the State Commission on Judicial Conduct. He may be served at the Commission's offices at 300 West 15th Street, Austin, Texas 78701. Commissioner Tate is sued in his official capacity.

12. Defendant M. Patrick Maguire is a member of the State Commission on Judicial Conduct. He may be served at the Commission's offices at 300 West 15th Street, Austin, Texas 78701. Commissioner Maguire is sued in his official capacity.

13. Defendant David Schenck is a member of the State Commission on Judicial Conduct. He may be served at the Commission's offices at 300 West 15th Street, Austin, Texas 78701. Commissioner Schenck is sued in his official capacity.

14. Defendant Clifton Roberson is a member of the State Commission on Judicial Conduct. He may be served at the Commission's offices at 300 West 15th Street, Austin, Texas 78701. Commissioner Roberson is sued in his official capacity.

JURISDICTION AND VENUE

15. The Court has subject-matter jurisdiction under the Texas Constitution, Article V, § 8, as the amount in controversy exceeds the minimum jurisdictional limits of the court exclusive of interest. Judge Hensley seeks relief that can be granted by courts of law or equity.

16. The Court has jurisdiction over Judge Hensley's requests for damages and declaratory and injunctive relief under the Texas Religious Freedom Restoration Act because the statute waives sovereign immunity and specifically authorizes lawsuits for money damages against state agencies. *See* Tex. Civ. Prac. & Rem. Code § 110.008(a) ("Subject to Section 110.006, sovereign immunity to suit and from liability is waived and abolished to the extent of liability created by Section 110.005, and a claimant may sue a government agency for damages allowed by that section."). The waiver of immunity in the Texas Religious Freedom Restoration Act prevails over any other grant of immunity that may appear in Texas statutes or judicial decisions. *See* Tex. Civ. Prac. & Rem. Code § 110.002(c) ("This chapter applies to each law of this state unless the law is expressly made exempt from the application of this chapter by reference to this chapter.").

17. The Court has jurisdiction over Judge Hensley's request for declaratory and injunctive relief against the individual members of the Commission because they are acting *ultra vires* by pursuing disciplinary proceedings against judges and justices of the peace who recuse themselves from officiating at same-sex weddings. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 368–69 (Tex. 2009).

18. Plaintiff Dianne Hensley has standing because she is suffering injury on account of the defendants' actions.

19. The Court has personal jurisdiction over each of the defendants.

20. Venue is proper because a substantial portion of the events giving rise to the claims occurred in Travis County, Texas. *See* Tex. Civ. Prac. & Rem. Code §§ 15.002, 15.003, 15.005, 15.035.

21. Judge Hensley brings her claims for relief exclusively under state law. She is not asserting any federal cause of action, and she is not relying on federal law to support her claims for relief.

FACTS

22. Plaintiff Dianne Hensley serves as a Justice of the Peace in McLennan County, Texas. She has held this office since January 1, 2015.

23. As a Justice of the Peace, Judge Hensley is authorized but not required to officiate at weddings. *See* Tex. Family Code § 2.202(a).

24. The law of Texas prohibits wedding officiants "from discriminating on the basis of race, religion, or national origin against an applicant who is otherwise competent to be married." Tex. Family Code § 2.205(a). Judge Hensley obeys section 2.205(a) and has never discriminated against any person or couple seeking to be married on any of these grounds.

25. Before the Supreme Court's ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), Judge Hensley officiated approximately 80 weddings as a Justice of the Peace.

26. After the Supreme Court's ruling in *Obergefell*, Judge Hensley officiated four additional weddings that had been previously scheduled before the Court's ruling, and then her office did not book any more weddings between June 26, 2015, and August 1, 2016.

27. Judge Hensley is a Christian, and her religious faith forbids her to officiate at any same-sex marriage ceremony.

28. In addition, the Constitution and laws of Texas continue to define marriage as the union of one man and one woman. *See* Tex. Const. art. I, § 32 ("(a) Marriage in this state shall consist only of the union of one man and one woman. (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage."); Tex. Family Code § 6.204(b) ("A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state."). Texas has not amended its Constitution or its marriage laws in response to the Supreme Court's opinion in *Obergefell*.

29. For these reasons, Judge Hensley initially quit officiating weddings entirely following the *Obergefell* decision.

30. In August of 2016, Judge Hensley decided that there was a need in her community for low-cost wedding officiants because no judges or justices of the peace in Waco were officiating any weddings in the aftermath of *Obergefell*.

31. Rather than categorically refusing to officiate weddings, and wanting to provide a reasonable accommodation for everyone, regardless of sexual preference or orientation, Judge Hensley decided that she would resume officiating weddings between one man and one woman, as she had done before *Obergefell*. Judge Hensley also decided to recuse herself from officiating same-sex weddings and politely refer same-sex couples to other officiants in McLennan County who are willing to perform their ceremonies.

32. Judge Hensley and her staff researched and compiled a list of every officiant they could find for same-sex weddings in McLennan County and its surrounding counties. One of these officiants, Ms. Shelli Misher, is an ordained minister who operates a walk-in wedding chapel three blocks away and on the same street as the courthouse where Judge Hensley's offices are located.

33. Ms. Misher has agreed to accept referrals from Judge Hensley's office of any same-sex couple seeking to be married. *See* Exhibit 10.

34. Although Ms. Misher charges $125 for her services, which is $25 more than the $100 that Judge Hensley charges for a justice-of-the-peace wedding, Ms. Misher has generously agreed to provide a $25 discount to any couple that Judge Hensley refers to her, so that no extra costs are imposed on couples that Judge Hensley refers to her business.

35. The website for Ms. Misher's chapel can be found at https://www.wacoweddingsandevents.com (last visited on March 22, 2021).

36. Judge Hensley has also made arrangements with Judge David Pareya, a fellow justice of the peace in McLennan County, who has agreed to accept referrals of any same-sex couple who is seeking a justice-of-the-peace wedding. Judge Pareya's offices are located in West, Texas, about 20 miles from Judge Hensley's offices in Waco.

37. All three of Judge Hensley's clerks are licensed to officiate weddings.

38. If a same-sex couple asks Judge Hensley's office about whether she will officiate weddings, Judge Hensley's staff is instructed to provide them with a document that says:

> I'm sorry, but Judge Hensley has a sincerely held religious belief as a Christian, and will not be able to perform any same sex weddings.
>
> We can refer you to Judge Pareya (254-826-3341), who is performing weddings. Also, it is our understanding that Central Texas Metropolitan Community Church and the Unitarian Universalist Fellowship of Waco perform the ceremonies, as well as independent officiants in Temple and Killeen (www.thumbtack.com/tx/waco/wedding-officiants/)

They are also instructed to hand them a business card for Ms. Misher's wedding chapel, which is three blocks down the street. A copy of that document is attached as Exhibit 2 to this petition.

39. Judge Hensley's referral system benefits both same-sex and opposite-sex couples when compared to her earlier practice of refusing to officiate weddings for anyone. It benefits same-sex couples by providing them with referrals to every known officiant in McLennan County that is willing to officiate same-sex weddings. And it benefits opposite-sex couples by allowing them to obtain a justice-of-the-peace wedding, because no other judges or justices of the peace in Waco are willing to officiate any weddings after *Obergefell*.

40. No same-sex couple has ever complained to the State Commission on Judicial Conduct about Judge Hensley's referral system, nor has anyone complained to her.

THE COMMISSION'S PROCEEDINGS

41. On May 22, 2018, the State Commission on Judicial Conduct (the Commission) initiated an inquiry into Judge Hensley's referral system after learning of it in a newspaper article published in the Waco Tribune. The Commission sent Judge Hensley a letter of inquiry and demanded that she respond to written interrogatories about her referral system within 30 days.

42. Judge Hensley submitted her written responses to these interrogatories on June 20, 2018. *See* Exhibit 3.

43. Judge Hensley explained to the Commission that her Christian faith prohibits her from officiating at same-sex weddings, and for that reason she initially quit officiating weddings entirely after *Obergefell*. *See id*.

44. Judge Hensley also explained that her decision to stop officiating weddings created inconveniences for couples seeking to be married in Waco, because no other justices of the peace or judges in Waco would perform *any* weddings in the aftermath of *Obergefell*. The only justice of the peace in McLennan County willing to officiate

weddings of any sort post-*Obergefell* was Judge Pareya, whose offices are located in West, Texas—20 miles away from Waco. As Judge Hensley explained:

> Following *Obergefell*, only one of the six Justices of the Peace in McLennan County continued performing weddings and he wasn't available all the time. As far as I am aware, none of the other judges in the county were performing weddings either. Perhaps because my office is located in the Courthouse across the street from the County Clerk's office where marriage licenses are issued, we received many phone calls and office visits in the next year from couples looking for someone to marry them. Many people calling or coming by the office were very frustrated and some literally in tears because they were unaffiliated with or didn't desire a church wedding and they couldn't find anyone to officiate.

Id.

45. Judge Hensley explained to the Commission that she "became convicted that it was wrong to inconvenience ninety-nine percent of the population because I was unable to accommodate less than one percent." *Id.* She therefore began officiating weddings again on August 1, 2016, with the referral system described in paragraphs 31–39.

46. On January 25, 2019, the Commission issued Judge Hensley a "Tentative Public Warning." *See* Exhibit 4.

47. The Tentative Public Warning accused Judge Hensley of violating Canon 3B(6), of the Texas Code of Judicial Conduct, which states: "A judge shall not, in the performance of judicial duties, by words or conduct manifest a bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status . . . ." *Id.*

48. The Tentative Public Warning also accused Judge Hensley of violating Canon 4A of the Texas Code of Judicial Conduct, which states: "A judge shall conduct all of the judge's extra-judicial activities so that they do not: (1) cast reasonable

doubt on the judge's capacity to act impartially as a judge; or (2) interfere with the proper performance of judicial duties." *Id.*

49. Finally, the Tentative Public Warning accused Judge Hensley of violating Article V, Section 1-a(6)A of the Texas Constitution, which allows a judge to be sanctioned for "willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice." *Id.*

50. The Commission's Tentative Public Warning allowed Judge Hensley to choose between accepting the Commission's tentative sanction or appearing before the Commission. Judge Hensley chose to appear before the Commission, and a hearing was held on August 8, 2019.

51. At the hearing, Judge Hensley argued that the Texas Religious Freedom Restoration Act protected her right to recuse herself from officiating same-sex weddings in accordance with the commands of her faith, and to refer same-sex couples to other officiants willing to officiate such marriages.

52. Judge Hensley also argued that the Commission lacked authority to sanction her under Canon 3B(6) because officiating weddings is not a "judicial duty" within the meaning of the Canon, as the law of Texas authorizes but does not require judges or justices of the peace to officiate at weddings. *See* Texas Family Code § 2.202(a).

53. On November 12, 2019, after hearing Judge Hensley's testimony, the Commission issued its final sanction and issued a "Public Warning" to Judge Hensley. *See* Exhibit 1.

54. Unlike the Commission's Tentative Public Warning of January 25, 2019, the Commission's Public Warning of November 12, 2019, did not accuse Judge Hensley of violating Canon 3B(6) of the Texas Code of Judicial Conduct, nor did it accuse Judge Hensley of violating Article V, Section 1-a(6)A of the Texas Constitution. Instead, the Commission declared only that Judge Hensley had violated Canon 4A(1)

of the Texas Code of Judicial Conduct, which states: "A judge shall conduct all of the judge's extra-judicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially as a judge . . . ." The Commission declared that Judge Hensley:

> should be publicly warned for casting doubt on her capacity to act impartially to persons appearing before her as a judge due to the person's sexual orientation in violation of Canon 4A(l) of the Texas Code of Judicial Conduct.

See Exhibit 1.

55. The Commission's Public Warning of November 12, 2019, did not acknowledge or address the Texas Religious Freedom Restoration Act, and it did not respond to the arguments that Judge Hensley had made in reliance on that statute.

CLAIMS FOR RELIEF

56. Judge Hensley sues the Commission and its members under three separate causes of action: (1) the cause of action established in the Texas Religious Freedom Restoration Act, *see* Tex. Civ. Prac. & Rem. Code § 110.005; (2) the Texas Declaratory Judgment Act, *see* Tex. Civ. Prac. & Rem. Code §§ 37.003; and (3) an *ultra vires* cause of action against the individual commissioners, *see City of El Paso v. Heinrich*, 284 S.W.3d 366, 368–69 (Tex. 2009).

1. Violation of the Texas Religious Freedom Restoration Act

57. The Commission violated the Texas Religious Freedom Restoration Act by investigating and punishing Judge Hensley for recusing herself from officiating at same-sex weddings, in accordance with the commands of her Christian faith.

58. The Commission's investigation and punishment of Judge Hensley for acting in accordance with the commands of her Christian faith is a substantial burden on Judge Hensley's free exercise of religion. *See* Tex. Civ. Prac. & Rem. Code § 110.003(a) ("[A] government agency may not substantially burden a person's free exercise of religion."). The Commission's threat to impose further discipline on Judge

Hensley if she persists in recusing herself from officiating at same-sex weddings is also a substantial burden on Judge Hensley's free exercise of religion.

59. The Commission's investigation and punishment of Judge Hensley—and its threat to impose further discipline on Judge Hensley if she persists in recusing herself from officiating at same-sex weddings—does not further a "compelling governmental interest" of any sort. *See* Tex. Civ. Prac. & Rem. Code § 110.003(b)(1). If Judge Hensley is forbidden to recuse herself from officiating at same-sex weddings, then she will stop officiating weddings entirely, as she did in the immediate aftermath of *Obergefell*. That outcome does nothing to alleviate inconveniences that Judge Hensley's referral system might impose on same-sex couples. Indeed, the Commission's actions have the perverse effect of imposing even greater inconveniences on same-sex and opposite-sex couples seeking low-cost weddings. Same-sex couples will no longer have the benefit of Judge Hensley's referral system, and opposite-sex couples will have one fewer option from an already short (and shrinking) list of low-cost weddings officiants in Waco.

60. There is no compelling governmental interest in preventing judges or justices of the peace from openly expressing a religious belief that opposes homosexual behavior. The Commission claimed that Judge Hensley's actions "cast reasonable doubt on [her] capacity to act impartially as a judge," presumably because she had publicly stated her inability to officiate at same-sex marriage ceremonies on account of her Christian faith. But disapproval of an individual's *behavior* does not evince bias toward that individual as a *person* when they appear in court. Every judge in the state of Texas disapproves of at least some forms of sexual behavior. Most judges disapprove of adultery, a substantial number (though probably not a majority) disapprove of pre-marital sex, and nearly every judge disapproves of polygamy, prostitution, pederasty, and pedophilia. A judge who publicly proclaims his opposition to these behaviors—either on religious or non-religious grounds—has not compromised his impartiality toward

litigants who engage in those behaviors. It is absurd to equate a judge's publicly stated opposition to an individual's behavior as casting doubt on the judge's impartiality toward litigants who engage in that conduct. Otherwise no judge who publicly opposes murder or rape could be regarded as impartial when an accused murderer or rapist appears in his court.

61. In addition, there are thousands of judges and justices of the peace in Texas who publicly demonstrate that they hold religious beliefs against homosexual behavior and same-sex marriage by openly belonging to churches that condemn homosexual conduct—including the Roman Catholic Church, the Southern Baptist Convention, the United Methodist Church, and the Church of Jesus Christ Latter-Day Saints. Many of those judges and justices of the peace financially support those churches as well as charities that hold similar religious beliefs. There is no compelling governmental interest in suppressing judicial affiliation with organizations that oppose homosexual behavior for religious reasons—on the ground that this somehow casts reasonable doubt on the judge's "impartiality" toward homosexual litigants.

62. The Texas Religious Freedom Act authorizes Judge Hensley to sue for declaratory relief, injunctive relief, compensatory damages up to $10,000, and costs and attorneys' fees. *See* Tex. Civ. Prac. & Rem. Code § 110.005.

63. Judge Hensley is entitled to recover compensatory damages against the Commission for the costs she incurred responding to the Commission's investigation and for the income that she lost when she ceased officiating weddings in response to the Commission's investigation and sanctions. *See* Tex. Civ. Prac. & Rem. Code § 110.005(a)(3), (b), (d).

64. Judge Hensley is entitled to a declaratory judgment that the Commission and its members violated her rights under the Texas Religious Freedom Act by investigating and sanctioning her for recusing herself from officiating at same-sex weddings, and by threatening to impose further discipline if she persists in recusing herself

from officiating at same-sex weddings. *See* Tex. Civ. Prac. & Rem. Code § 110.005(a)(1). She is also entitled to an injunction that will prevent the Commission and its members from investigating or sanctioning judges or justices of the peace who recuse themselves from officiating at same-sex weddings on account of their sincere religious beliefs.

65. Judge Hensley is entitled to reasonable attorneys' fees, courts costs, and other reasonable expenses incurred in bringing this action. *See* Tex. Civ. Prac. & Rem. Code § 110.005(a)(4).

66. Judge Hensley provided the notice required by section 110.006 of the Texas Civil Practice and Remedies Code more than 60 days before bringing suit. *See* Exhibits 5–9.

2. Texas Declaratory Judgment Act

67. Judge Hensley also brings suit under the Texas Declaratory Judgment Act, and she seeks declaratory relief that protects her right to recuse herself from officiating at same-sex wedding ceremonies.

68. The Commission sanctioned Judge Hensley for violating Canon 4A of the Texas Code of Judicial Conduct, which states: "A judge shall conduct all of the judge's extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; or (2) interfere with the proper performance of judicial duties." But a judge who merely expresses disapproval of homosexual *behavior* has not cast doubt on his or her impartiality as a judge. Every judge disapproves of at least some forms of sexual behavior, and no one thinks that a judge who publicly announces his disapproval of adultery—or who publicly disapproves of pre-marital sex—has compromised his impartiality toward litigants who engage in those behaviors. It may not be as fashionable to publicly disapprove homosexual behavior as it once was, but that is not a reason to question the impartiality of a judge

who openly expresses a religious belief that marriage should exist only between one man and one woman. Judge Hensley seeks a declaratory judgment that a judge does not violate Canon 4A merely by expressing disapproval of homosexual behavior or same-sex marriage.

69. The Commission's interpretation of Canon 4A calls into question whether a judge may openly affiliate with churches and charitable institutions that oppose homosexual behavior and same-sex marriage. Many judges publicly belong to churches that condemn homosexual conduct and oppose same-sex marriage—including the Roman Catholic Church, the Southern Baptist Convention, the United Methodist Church, and the Church of Jesus Christ Latter-Day Saints—and many judges give generously to Christian charities that hold similar views. Many activists, however, equate financial support for organizations of this sort as a manifestation of "anti-LGBT bias." *See* Associated Press, *Chick-Fil-A Halts Donations to 3 Groups Against Gay Marriage* (Nov. 18, 2019). Judge Hensley seeks a declaratory judgment that a judge does not violate Canon 4A by belonging to or supporting a church or charitable organization that opposes homosexual behavior or same-sex marriage.

70. Judge Hensley also seeks a declaration that the Commission's interpretation of Canon 4A violates article I, section 8 of the Texas Constitution. *See* Tex. Const. art. I § 8 ("Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press."); *Davenport v. Garcia*, 834 S.W.2d 4, 10 (Tex. 1992) ("[A]rticle one, section eight of the Texas Constitution provides greater rights of free expression than its federal equivalent."). Judicial canons of "impartiality" may not be used to prevent judges from expressing their opposition to homosexual behavior, any more than they may be used to prevent judges from expressing opposition to pre-marital sex, adultery, polygamy, prostitution, pederasty, or pedophilia.

71. At the very least, the Commission's interpretation of Canon 4A raises serious constitutional questions under article I, section 8, and it should be rejected for that reason alone. *See Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 169 (Tex. 2004) ("[W]e are obligated to avoid constitutional problems if possible.").

72. The Commission's Tentative Public Warning of January 25, 2019, accused Judge Hensley of violating Canon 3B(6) of the Texas Code of Judicial Conduct, which states: "A judge shall not, in the performance of judicial duties, by words or conduct manifest a bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status . . . ." *Id.* Judge Hensley seeks a declaratory judgment that the officiating of weddings is not a judicial "duty" under Canon 3B(6) because judges are not required to officiate at weddings; they merely have the option of doing so. The Commission therefore lacks authority to discipline Judge Hensley under Canon 3B(6) for recusing herself from same-sex weddings.

73. The Commission's Tentative Public Warning of January 25, 2019, also accused Judge Hensley of violating article V, section 1-a(6)A of the Texas Constitution, which allows a judge to be sanctioned for "willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice." Judge Hensley seeks a declaratory judgment that her decision to recuse herself from officiating at same-sex weddings and her intention to continue recusing herself is not a "willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice."

3. *Ultra Vires* Claims

74. Judge Hensley seeks the same declaratory relief described in paragraphs 67–73 against each of the Commissioners in their official capacity.

75. Judge Hensley is also seeking an injunction that will prevent the Commissioners from investigating or sanctioning judges or justices of the peace who recuse themselves from officiating at same-sex weddings on account of their sincere religious beliefs. Judge Hensley asserts these claims for declaratory and injunctive relief under the *ultra vires* doctrine recognized in *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009).

DEMAND FOR JUDGMENT

76. Judge Hensley respectfully asks that the Court:

a. award the declaratory and injunctive relief described in paragraph 64 and paragraphs 68–74;

b. award damages to Judge Hensley in the amount of $10,000;

c. award costs and attorneys' fees; and

d. award other relief that the Court may deem just, proper, or equitable.

Respectfully submitted.

/s/ Jonathan F. Mitchell

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Dated: March 22, 2021

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I certify that on March 22, 2021, I served this document through the electronic-filing manager upon:

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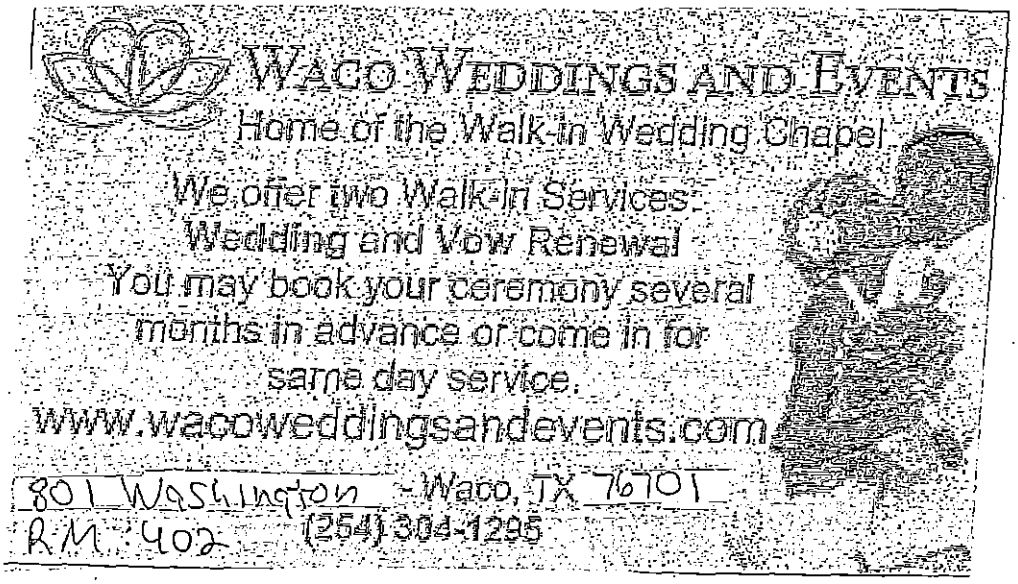
Counsel for Defendants

/s/ Jonathan F. Mitchell
Jonathan F. Mitchell
Counsel for Plaintiff

Appendix 6

"I'm sorry, but Judge Hensley has a sincerely held religious belief as a Christian, and will not be able to perform any same sex weddings."

We can refer you to Judge Pareya (254-826-3341), who is performing weddings. Also, it is our understanding that Central Texas Metropolitan Community Church and the Unitarian Universalist Fellowship of Waco perform the ceremonies, as well as independent officiants in Temple and Killeen (www.thumbtack.com/tx/waco/wedding-officiants/)



Appendix 7

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February 17, 2019

The Honorable Catherine N. Wylie
Chair, State Commission on Judicial Conduct
300 West 15th Street, # 415
Austin, Texas 78701

Re: Notice of substantial burden on the free exercise of religion

Dear Commissioner Wylie:

I represent Justice of the Peace Dianne Hensley. I write to inform you that the Commission's investigation of Judge Hensley, and its threatened discipline of Judge Hensley for refusing to perform same-sex weddings, substantially burdens her free exercise of religion. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(1).

The Texas Religious Freedom Restoration Act protects a "refusal to act that is substantially motivated by sincere religious belief." Tex. Civ. Prac. & Rem. Code §§ 110.001(1). Judge Hensley's refusal to perform same-sex weddings is substantially motivated by her Christian faith and her belief in the Bible as the inerrant word of God. The Bible repeatedly and explicitly condemns homosexual behavior. *See, e.g.*, Romans 1:26–28; 1 Timothy 1:8–11; 1 Corinthians 6:9–11; Leviticus 18:22; Leviticus 20:13. The Bible also warns Christians not to lend their approval to those who practice homosexual behavior. *See, e.g.*, Romans 1:32. Because of these clear and unambiguous Biblical passages, Judge Hensley will not perform same-sex weddings. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(2).

The Commission's investigation of Judge Hensley and its threatened penalties are imposing substantial burdens on Judge Hensley for her refusal to perform same-sex weddings in violation of her Christian faith. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(2)–(3).

Sincerely,

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February 17, 2019

The Honorable David C. Hall
Vice Chair, State Commission on Judicial Conduct
300 West 15th Street, # 415
Austin, Texas 78701

Re: Notice of substantial burden on the free exercise of religion

Dear Commissioner Hall:

I represent Justice of the Peace Dianne Hensley. I write to inform you that the Commission's investigation of Judge Hensley, and its threatened discipline of Judge Hensley for refusing to perform same-sex weddings, substantially burdens her free exercise of religion. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(1).

The Texas Religious Freedom Restoration Act protects a "refusal to act that is substantially motivated by sincere religious belief." Tex. Civ. Prac. & Rem. Code §§ 110.001(1). Judge Hensley's refusal to perform same-sex weddings is substantially motivated by her Christian faith and her belief in the Bible as the inerrant word of God. The Bible repeatedly and explicitly condemns homosexual behavior. *See, e.g.*, Romans 1:26–28; 1 Timothy 1:8–11; 1 Corinthians 6:9–11; Leviticus 18:22; Leviticus 20:13. The Bible also warns Christians not to lend their approval to those who practice homosexual behavior. *See, e.g.*, Romans 1:32. Because of these clear and unambiguous Biblical passages, Judge Hensley will not perform same-sex weddings. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(2).

The Commission's investigation of Judge Hensley and its threatened penalties are imposing substantial burdens on Judge Hensley for her refusal to perform same-sex weddings in violation of her Christian faith. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(2)–(3).

Sincerely,

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February 17, 2019

The Honorable Ronald E. Bunch
Secretary, State Commission on Judicial Conduct
300 West 15th Street, # 415
Austin, Texas 78701

Re: Notice of substantial burden on the free exercise of religion

Dear Commissioner Bunch:

I represent Justice of the Peace Dianne Hensley. I write to inform you that the Commission's investigation of Judge Hensley, and its threatened discipline of Judge Hensley for refusing to perform same-sex weddings, substantially burdens her free exercise of religion. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(1).

The Texas Religious Freedom Restoration Act protects a "refusal to act that is substantially motivated by sincere religious belief." Tex. Civ. Prac. & Rem. Code §§ 110.001(1). Judge Hensley's refusal to perform same-sex weddings is substantially motivated by her Christian faith and her belief in the Bible as the inerrant word of God. The Bible repeatedly and explicitly condemns homosexual behavior. *See, e.g.*, Romans 1:26–28; 1 Timothy 1:8–11; 1 Corinthians 6:9–11; Leviticus 18:22; Leviticus 20:13. The Bible also warns Christians not to lend their approval to those who practice homosexual behavior. *See, e.g.*, Romans 1:32. Because of these clear and unambiguous Biblical passages, Judge Hensley will not perform same-sex weddings. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(2).

The Commission's investigation of Judge Hensley and its threatened penalties are imposing substantial burdens on Judge Hensley for her refusal to perform same-sex weddings in violation of her Christian faith. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(2)–(3).

Sincerely,

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February 17, 2019

The Honorable Maricela Alvarado
Member, State Commission on Judicial Conduct
300 West 15th Street, # 415
Austin, Texas 78701

Re: Notice of substantial burden on the free exercise of religion

Dear Commissioner Alvarado:

I represent Justice of the Peace Dianne Hensley. I write to inform you that the Commission's investigation of Judge Hensley, and its threatened discipline of Judge Hensley for refusing to perform same-sex weddings, substantially burdens her free exercise of religion. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(1).

The Texas Religious Freedom Restoration Act protects a "refusal to act that is substantially motivated by sincere religious belief." Tex. Civ. Prac. & Rem. Code §§ 110.001(1). Judge Hensley's refusal to perform same-sex weddings is substantially motivated by her Christian faith and her belief in the Bible as the inerrant word of God. The Bible repeatedly and explicitly condemns homosexual behavior. *See, e.g.*, Romans 1:26–28; 1 Timothy 1:8–11; 1 Corinthians 6:9–11; Leviticus 18:22; Leviticus 20:13. The Bible also warns Christians not to lend their approval to those who practice homosexual behavior. *See, e.g.*, Romans 1:32. Because of these clear and unambiguous Biblical passages, Judge Hensley will not perform same-sex weddings. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(2).

The Commission's investigation of Judge Hensley and its threatened penalties are imposing substantial burdens on Judge Hensley for her refusal to perform same-sex weddings in violation of her Christian faith. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(2)–(3).

Sincerely,

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February 17, 2019

The Honorable Demetrius K. Bivins
Member, State Commission on Judicial Conduct
300 West 15th Street, # 415
Austin, Texas 78701

Re: Notice of substantial burden on the free exercise of religion

Dear Commissioner Bivins:

I represent Justice of the Peace Dianne Hensley. I write to inform you that the Commission's investigation of Judge Hensley, and its threatened discipline of Judge Hensley for refusing to perform same-sex weddings, substantially burdens her free exercise of religion. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(1).

The Texas Religious Freedom Restoration Act protects a "refusal to act that is substantially motivated by sincere religious belief." Tex. Civ. Prac. & Rem. Code §§ 110.001(1). Judge Hensley's refusal to perform same-sex weddings is substantially motivated by her Christian faith and her belief in the Bible as the inerrant word of God. The Bible repeatedly and explicitly condemns homosexual behavior. *See, e.g.*, Romans 1:26–28; 1 Timothy 1:8–11; 1 Corinthians 6:9–11; Leviticus 18:22; Leviticus 20:13. The Bible also warns Christians not to lend their approval to those who practice homosexual behavior. *See, e.g.*, Romans 1:32. Because of these clear and unambiguous Biblical passages, Judge Hensley will not perform same-sex weddings. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(2).

The Commission's investigation of Judge Hensley and its threatened penalties are imposing substantial burdens on Judge Hensley for her refusal to perform same-sex weddings in violation of her Christian faith. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(2)–(3).

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February 17, 2019

The Honorable Sujeeth B. Draksharam
Member, State Commission on Judicial Conduct
300 West 15th Street, # 415
Austin, Texas 78701

Re: Notice of substantial burden on the free exercise of religion

Dear Commissioner Draksharam:

I represent Justice of the Peace Dianne Hensley. I write to inform you that the Commission's investigation of Judge Hensley, and its threatened discipline of Judge Hensley for refusing to perform same-sex weddings, substantially burdens her free exercise of religion. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(1).

The Texas Religious Freedom Restoration Act protects a "refusal to act that is substantially motivated by sincere religious belief." Tex. Civ. Prac. & Rem. Code §§ 110.001(1). Judge Hensley's refusal to perform same-sex weddings is substantially motivated by her Christian faith and her belief in the Bible as the inerrant word of God. The Bible repeatedly and explicitly condemns homosexual behavior. *See, e.g.*, Romans 1:26–28; 1 Timothy 1:8–11; 1 Corinthians 6:9–11; Leviticus 18:22; Leviticus 20:13. The Bible also warns Christians not to lend their approval to those who practice homosexual behavior. *See, e.g.*, Romans 1:32. Because of these clear and unambiguous Biblical passages, Judge Hensley will not perform same-sex weddings. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(2).

The Commission's investigation of Judge Hensley and its threatened penalties are imposing substantial burdens on Judge Hensley for her refusal to perform same-sex weddings in violation of her Christian faith. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(2)–(3).

Sincerely,

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February 17, 2019

The Honorable Lee Gabriel
Member, State Commission on Judicial Conduct
300 West 15th Street, # 415
Austin, Texas 78701

Re: Notice of substantial burden on the free exercise of religion

Dear Commissioner Gabriel:

I represent Justice of the Peace Dianne Hensley. I write to inform you that the Commission's investigation of Judge Hensley, and its threatened discipline of Judge Hensley for refusing to perform same-sex weddings, substantially burdens her free exercise of religion. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(1).

The Texas Religious Freedom Restoration Act protects a "refusal to act that is substantially motivated by sincere religious belief." Tex. Civ. Prac. & Rem. Code §§ 110.001(1). Judge Hensley's refusal to perform same-sex weddings is substantially motivated by her Christian faith and her belief in the Bible as the inerrant word of God. The Bible repeatedly and explicitly condemns homosexual behavior. *See, e.g.*, Romans 1:26–28; 1 Timothy 1:8–11; 1 Corinthians 6:9–11; Leviticus 18:22; Leviticus 20:13. The Bible also warns Christians not to lend their approval to those who practice homosexual behavior. *See, e.g.*, Romans 1:32. Because of these clear and unambiguous Biblical passages, Judge Hensley will not perform same-sex weddings. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(2).

The Commission's investigation of Judge Hensley and its threatened penalties are imposing substantial burdens on Judge Hensley for her refusal to perform same-sex weddings in violation of her Christian faith. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(2)–(3).

Sincerely,

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February 17, 2019

The Honorable Darrick L. McGill
Member, State Commission on Judicial Conduct
300 West 15th Street, # 415
Austin, Texas 78701

Re: Notice of substantial burden on the free exercise of religion

Dear Commissioner McGill:

I represent Justice of the Peace Dianne Hensley. I write to inform you that the Commission's investigation of Judge Hensley, and its threatened discipline of Judge Hensley for refusing to perform same-sex weddings, substantially burdens her free exercise of religion. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(1).

The Texas Religious Freedom Restoration Act protects a "refusal to act that is substantially motivated by sincere religious belief." Tex. Civ. Prac. & Rem. Code §§ 110.001(1). Judge Hensley's refusal to perform same-sex weddings is substantially motivated by her Christian faith and her belief in the Bible as the inerrant word of God. The Bible repeatedly and explicitly condemns homosexual behavior. *See, e.g.*, Romans 1:26–28; 1 Timothy 1:8–11; 1 Corinthians 6:9–11; Leviticus 18:22; Leviticus 20:13. The Bible also warns Christians not to lend their approval to those who practice homosexual behavior. *See, e.g.*, Romans 1:32. Because of these clear and unambiguous Biblical passages, Judge Hensley will not perform same-sex weddings. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(2).

The Commission's investigation of Judge Hensley and its threatened penalties are imposing substantial burdens on Judge Hensley for her refusal to perform same-sex weddings in violation of her Christian faith. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(2)–(3).

Sincerely,

Jonathan F. Mitchell

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(512) 686-3940 TEL
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jonathan@mitchell.law

February 17, 2019

The Honorable David M. Patronella
Member, State Commission on Judicial Conduct
300 West 15th Street, # 415
Austin, Texas 78701

Re: Notice of substantial burden on the free exercise of religion

Dear Commissioner Patronella:

I represent Justice of the Peace Dianne Hensley. I write to inform you that the Commission's investigation of Judge Hensley, and its threatened discipline of Judge Hensley for refusing to perform same-sex weddings, substantially burdens her free exercise of religion. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(1).

The Texas Religious Freedom Restoration Act protects a "refusal to act that is substantially motivated by sincere religious belief." Tex. Civ. Prac. & Rem. Code §§ 110.001(1). Judge Hensley's refusal to perform same-sex weddings is substantially motivated by her Christian faith and her belief in the Bible as the inerrant word of God. The Bible repeatedly and explicitly condemns homosexual behavior. *See, e.g.*, Romans 1:26–28; 1 Timothy 1:8–11; 1 Corinthians 6:9–11; Leviticus 18:22; Leviticus 20:13. The Bible also warns Christians not to lend their approval to those who practice homosexual behavior. *See, e.g.*, Romans 1:32. Because of these clear and unambiguous Biblical passages, Judge Hensley will not perform same-sex weddings. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(2).

The Commission's investigation of Judge Hensley and its threatened penalties are imposing substantial burdens on Judge Hensley for her refusal to perform same-sex weddings in violation of her Christian faith. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(2)–(3).

Sincerely,

Jonathan F. Mitchell

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February 17, 2019

The Honorable Ruben G. Reyes
Member, State Commission on Judicial Conduct
300 West 15th Street, # 415
Austin, Texas 78701

Re: Notice of substantial burden on the free exercise of religion

Dear Commissioner Reyes:

I represent Justice of the Peace Dianne Hensley. I write to inform you that the Commission's investigation of Judge Hensley, and its threatened discipline of Judge Hensley for refusing to perform same-sex weddings, substantially burdens her free exercise of religion. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(1).

The Texas Religious Freedom Restoration Act protects a "refusal to act that is substantially motivated by sincere religious belief." Tex. Civ. Prac. & Rem. Code §§ 110.001(1). Judge Hensley's refusal to perform same-sex weddings is substantially motivated by her Christian faith and her belief in the Bible as the inerrant word of God. The Bible repeatedly and explicitly condemns homosexual behavior. *See, e.g.*, Romans 1:26–28; 1 Timothy 1:8–11; 1 Corinthians 6:9–11; Leviticus 18:22; Leviticus 20:13. The Bible also warns Christians not to lend their approval to those who practice homosexual behavior. *See, e.g.*, Romans 1:32. Because of these clear and unambiguous Biblical passages, Judge Hensley will not perform same-sex weddings. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(2).

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Sincerely,

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February 17, 2019

The Honorable David M. Russell
Member, State Commission on Judicial Conduct
300 West 15th Street, # 415
Austin, Texas 78701

Re: Notice of substantial burden on the free exercise of religion

Dear Commissioner Russell:

I represent Justice of the Peace Dianne Hensley. I write to inform you that the Commission's investigation of Judge Hensley, and its threatened discipline of Judge Hensley for refusing to perform same-sex weddings, substantially burdens her free exercise of religion. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(1).

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Sincerely,

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February 17, 2019

The Honorable Amy Suhl
Member, State Commission on Judicial Conduct
300 West 15th Street, # 415
Austin, Texas 78701

Re: Notice of substantial burden on the free exercise of religion

Dear Commissioner Suhl:

I represent Justice of the Peace Dianne Hensley. I write to inform you that the Commission's investigation of Judge Hensley, and its threatened discipline of Judge Hensley for refusing to perform same-sex weddings, substantially burdens her free exercise of religion. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(1).

The Texas Religious Freedom Restoration Act protects a "refusal to act that is substantially motivated by sincere religious belief." Tex. Civ. Prac. & Rem. Code §§ 110.001(1). Judge Hensley's refusal to perform same-sex weddings is substantially motivated by her Christian faith and her belief in the Bible as the inerrant word of God. The Bible repeatedly and explicitly condemns homosexual behavior. *See, e.g.*, Romans 1:26–28; 1 Timothy 1:8–11; 1 Corinthians 6:9–11; Leviticus 18:22; Leviticus 20:13. The Bible also warns Christians not to lend their approval to those who practice homosexual behavior. *See, e.g.*, Romans 1:32. Because of these clear and unambiguous Biblical passages, Judge Hensley will not perform same-sex weddings. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(2).

The Commission's investigation of Judge Hensley and its threatened penalties are imposing substantial burdens on Judge Hensley for her refusal to perform same-sex weddings in violation of her Christian faith. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(2)–(3).

Sincerely,

Jonathan F. Mitchell

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February 17, 2019

The Honorable Tramer J. Woytek
Member, State Commission on Judicial Conduct
300 West 15th Street, # 415
Austin, Texas 78701

Re: Notice of substantial burden on the free exercise of religion

Dear Commissioner Woytek:

I represent Justice of the Peace Dianne Hensley. I write to inform you that the Commission's investigation of Judge Hensley, and its threatened discipline of Judge Hensley for refusing to perform same-sex weddings, substantially burdens her free exercise of religion. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(1).

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The Commission's investigation of Judge Hensley and its threatened penalties are imposing substantial burdens on Judge Hensley for her refusal to perform same-sex weddings in violation of her Christian faith. *See* Tex. Civ. Prac. & Rem. Code § 110.006(a)(2)–(3).

Sincerely,

Jonathan F. Mitchell

JONATHAN F. MITCHELL
Mitchell Law PLLC

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Filing Code Description: Brief on the Merits (all briefs)
Filing Description: Brief of Respondents
Status as of 5/4/2023 7:05 AM CST

Associated Case Party: State Commission on Judicial Conduct

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Associated Case Party: Dianne Hensley

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