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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

RESPONSE TO PETITION FOR REVIEW

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Table Of Contents

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes and Constitutional Provisions

Rules

Appendix

1. Respondent adopts the Appendices submitted by Petitioner and those Appendices will be cited as "App. __." Tex. R. App. P 53.3(f).

2. Plaintiff's Second Amended Petition, Respondent Appendix (Res. App.) 1.

List Of Abbreviations

1. Petition for Review-"Petition."

2. *Hensley v. State Commission on Judicial Conduct*, No. 03-21-00305-CV, 2022 WL 16640801 (Tex. App.—Austin, Nov. 3, 2022, pet h.)-"COA at _____."

3. Plaintiff's Second Amended Petition-."Second Amended Pet., ¶¶ _____."

4. Texas Code of Judicial Conduct. (V. T. C. A., Govt. Code T. 2, Subt. G App. B, Jud. Conduct, T. 2, Subt. G, Refs & Annos, TX ST CJC T. 2, Subt. G.)-"Code."

5. The Texas Religious Freedom Restoration Act, Tex. Civ. Prac. & Rem. Code § 110.001, *et. seq.*-"TRFRA."
6. Texas Uniform Declaratory Judgment Act, Tex. Civ. Prac. & Rem. Code § 37.002- "UDJA."
7. Trial Court's Findings of Fact and Conclusions of Law-"Findings _____."

Statement Of The Issues

Respondent is dissatisfied with Petitioner's Statement of the Issues because it constitutes argument. As such that Statement of Issues does not comply with Tex.R.App.P. 53.2(f). Rather, the issues should be identified only as follows:

1. Did the court of appeals err in dismissing Petitioner's Texas RFRA claims as an "impermissible collateral attack on the commission's order"?

2. Did the court of appeals err in holding that Petitioner's claims are barred by sovereign immunity?

3. Is Petitioner entitled to summary judgment on her claims against the Commission and its members?

To The Honorable Supreme Court Of Texas:

I. Argument.

A. Introduction.

Respondents are aware that the Texas Rules of Appellate Procedure do not require a response to be voluntarily filed with this Court at this time. Tex. R. App. P. 53.3. Nonetheless, Respondents file this Response, given their alarm about the unorthodox and unprecedented demands Petitioner, a Texas Justice of the Peace, makes of this Court.

Were the Petition for Review granted, this Court would be considering Petitioner's demands to vest jurisdiction in a Texas trial court over a declaratory judgment suit brought by Petitioner to hold unconstitutional and "void" a final, not appealed, judicial sanction issued by the State Commission on Judicial Conduct (Commission). The case of *Hagstette v. State Commission on Judicial Conduct*, 2020 WL 7349502 (Tex. App.-Houston [1st Dist.] 2020, no pet.) confirmed Texas courts have no jurisdiction to consider such a case where a disciplined judge seeks review of that discipline after waiving the de novo statutory review process for judicial discipline. The First Court of Appeals decision in *Hagstette* demonstrates the trial court and the court of appeals correctly dismissed Petitioner's suit. This Court should not grant the Petition for Review.

B. Petitioner Collaterally Attacks A "Final" "Public Warning."

Petitioner filed her Petition for Review as a part of her active, public opposition, since August 2016, to the United States Supreme Court's decision in *Obergefell v. Hodges,* 576 U.S. 644 (2015).[1] However, this case is not about *Obergefell*. Rather, it is about Petitioner's spurious attack on a final order of the Commission, the "Public Warning," rendered after a full hearing, that held her public, overt, actions against same-sex marriage "cast[] doubt on her capacity to act impartially" as a Texas judge in violation of Canon 4A(1) of the Texas Code of Judicial Conduct.[2] (Code). Petitioner defended herself, unsuccessfully, at the hearing by claiming any sanction would violate her rights under the Texas Religious Freedom Restoration Act (TRFRA). Specifically, 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. Contrary to Petitioner's allegations, the sanction was not at all issued because of her claimed personal views. The sanction addressed her failure to maintain the appearance of impartiality. [3]

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[1] Petition at 2-9.

[2] V. T. C. A., Govt. Code T. 2, Subt. G App. B, Jud. Conduct, T. 2, Subt. G, Refs & Annos, TX ST CJC T. 2, Subt. G.

[3] *See* "Public Warning," App. 67. "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.'

Now, after voluntarily waiving[4] her right to a de novo statutory review[5] of the "Public Warning," Petitioner filed a civil suit with hopes of getting not only a better result regarding her alleged TRFRA rights, but also getting what she could not get after a de novo statutory re-trial by a Court of Special Review; that is, a final review by the Texas Supreme Court.[6]

As the trial court and the court of appeals concluded, Texas courts have no jurisdiction over Petitioner's new lawsuit and her purported TRFRA claims because she did not pursue the remedy of review by de novo trial provided by statute.[7] Had Petitioner pursued the de novo review, she could have fully litigated the TRFRA rights asserted unsuccessfully at the Commission.[8] In dismissing Petitioner's suit, the trial court[9] and the court of appeals[10] placed significant reliance upon the recent holding of the First Court of Appeals in *Hagstette*.[11] Remarkably, the Petition does

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3. Beginning on August 1, 2016, Judge Hensley has performed opposite-sex weddings for couples, but started to decline 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 listed local private officiants who did do such weddings."

[4] Petition at 6.
[5] *See* Tex. Gov't Code § 33.034(a) "A judge who receives from the commission a sanction or censure . . . is entitled to a review of the commission's decision as provided by this section. . . . (i) The court's decision under this section is not appealable."
[6] *See* Tex. Gov't Code § 33.034 (i) "The court's decision under this section is not appealable."
[7] *See* n. 5, *supra.*
[8] Findings ¶ 1, 2, App. 3.
[9] Findings ¶ 25, App. 3.
[10] COA at 9, App. 46.
[11] *See Hagstette v. State Commission on Judicial Conduct*, 2020 WL 7349502 (Tex. App.-Houston [1st Dist.] 2020, no pet.).

not even mention the *Hagstette* case. Petitioner's silence regarding *Hagstette* is telling.

C. *Hagstette* Is Dispositive of This Case.

The *Hagstette* court declared Texas courts had no jurisdiction over a declaratory judgment suit brought by three judges who sought a ruling the Commission's sanction against them is "void" because "the Commission and its members acted beyond their statutory authority."[12] The dismissal was based on the sanctioned judges' filing a suit for declaratory judgment instead of pursuing their right of review by de novo trial.[13]

That is precisely the situation presented in this case. Petitioner failed to pursue her statutory right to a trial de novo. Instead, she filed her suit where she demands holdings that would declare the Commission's application of the law and the "Public Warning" unconstitutional and void. Her pleadings bear out that, contrary to her claims in the Petition, she has mounted an unlawful collateral attack on the "Public Warning." The heart of her pleaded claims are as follows:

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

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[12] *Id.* at *3.

[13] *Id*. at *5, "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."

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.)." Findings 18 a, App. 3.

b. "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.)" Findings 18 d, App. 3. The essence of Petitioner's claims is to declare the Commission's decision void. [14]

Even assuming, *arguendo*, that Texas Courts have jurisdiction of Petitioner's claims, res judicata and collateral estoppel bar those claims. The trial court below specifically found Petitioner' TRFRA rights could not be raised again in the suit because she "actually litigated" unsuccessfully her TRFRA defense at the Commission.[15] That "actual litigation" described by the trial court included responding to the Commission's written questions, her attorney's correspondence with the Commission, her testimony at the hearing, and her attorney's arguments to the Commission.[16] The court of appeals agreed with the trial court that Petitioner's suit was barred because it is an impermissible collateral attack on the "Public Warning."[17] Petitioner simply ignores the law and especially the rule in *Hagstette.*

[14] *See In re Henry*, 154 S.W.3d 594, 596 (Tex. 2005) ("A commitment order that violates the Texas Constitution is beyond the court's power and is void.").
[15] Findings ⁋ 63-64, App. 3.
[16] Findings ⁋ 11, App. 3.
[17] COA at 11, App. 46..

Petitioner's suit also lacks merit since she seeks to evade the statutory structure for review of Commission discipline in an attempt to wend her way to this Court. Had she pursued a trial de novo by a Special Court of Review, that court's review would have been final.[18] This Court could never have seen this case.

Incredibly, Petitioner admits she filed suit to avoid the statutory de novo review process, but she cloaks that admission with an explanation she now seeks *affirmative* relief in the trial court.[19] However, Petitioner has merely followed the same path as the unsuccessful plaintiffs in *Hagstette*. Petitioner cannot camouflage her claim to bootstrap a theory of jurisdiction. Petitioner asks this Court, as she did before the trial court and the court of appeals, to turn a blind eye to the printed words of her pleadings.

II. Petitioner's Caustic and Exaggerated Rhetoric Shows The Petition Is "Untenable."[20]

Petitioner makes several outlandish statements that cannot be ignored. She opens by characterizing the "Public Warning" as an intentional attack on her religious faith: "[t]he . . . Commission . . . sanctioned Judge Dianne Hensley for *recusing* herself from officiating same-sex weddings on account of her Christian faith." Petition at 1 (Emphasis added).

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[18] *See* Tex. Gov't Code § 33.034 (i) "The court's decision under this section is not appealable."
[19] Petition at 14.
[20] Petition at 11, 13, and 16. (Petitioner contends incorrectly the court of appeals decision is "untenable.").

Directly contrary to Petitioner's exaggerated depiction, the Commission was prompted to investigate when Petitioner created a public spectacle by openly and conspicuously declaring in a newspaper interview that she refused to perform marriage ceremonies for same-sex couples while continuing to perform those ceremonies for opposite-sex couples.[21] She compounded that public display by directing her government-salaried court staff to turn away same sex couples seeking Petitioner's wedding services by telling them she would not perform same-sex weddings.[22]

The Commission could not simply look the other way when Petitioner's self-publicized actions flew directly in the face of the law.[23] Petitioner's hyperbolic language cannot absolve her of her sworn obligations to "preserve, protect, and defend the Constitution and laws of the United States and of this State."[24]

Another overreaching and incorrect contention is Petitioner's characterization of her "refusal" to perform wedding ceremonies for same-sex couples as a "recusal." Wedding ceremonies are not trials. "Recusal" is grounded in Constitutional Due

[21] *See* n. 3, *supra.,* "Public Warning," App. 67.
[22] *Id.*
[23] *See* Article V, Section 1-a(7) of the Texas Constitution (requiring Commission to stay informed of circumstances involving judicial misconduct or disability, investigate complaints from all sources, and conduct preliminary inquiries).
[24] *See* Texas Oath of Office, Texas Const. Art. 16, § 1 (official promising to faithfully execute official duties and to "preserve, protect, and defend" federal and state Constitutions and laws.).

Process.[25] Under our precedents, objective standards require recusal when "the probability of actual bias on the part of the judge is too high to be constitutionally tolerable."[26] Petitioner, a government official, made an economic decision to perform those ceremonies for a fee, yet, she issued loud public notice that she turns away people the law protects.

Petitioner concludes with a caustic and calumnious claim that by doing their duties, Texas judges and the Commission are not only biased, but have ruled by design to attack Petitioner. Petition at 19. Her references to "abortifacient contraception" and judges she accuses of being sympathizers reflect this case is intended to emphasize ideological goals over consistent application of the law. Petition at 19.

III. Petitioner Attacks The Foundational Obligation of Impartiality.

Petitioner's suit is a transparent attempt to carve away at judicial impartiality. Were Petitioner's arguments accepted, a judge could adhere to the obligation of impartiality or not on a whim. Where does the demand for exceptions from the responsibility to demonstrate impartiality stop? Could a judge announce publicly

[25] *See Caperton v. A.T. Massey Coal Co., Inc.,* 556 U.S. 868, 883, 129 S.Ct. 2252, 2263, 173 L.Ed.2d 1208 (2009) ("The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional "potential for bias.").

[26] *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975).

with impunity she will marry same-race couples, but not mixed-race couples?[27] Exceptions can devour a rule.[28]

A judge's impartiality is not an elective option, rather "[o]ne of the most fundamental components of a fair trial...."[29] Petitioner's blatant actions put the constitutional assurance of a fair trial in jeopardy for any person appearing in her court, regardless of whether they are proponents of same-sex marriage.

Texas is not alone in its concern about judges making improper comments to the media. The Second Circuit Court of Appeals addressed a similar situation in which a judge injudiciously chose to speak to the media, ruling that:

> [a] judge's statements to the media may nevertheless undermine the judge's appearance of impartiality with respect to a pending proceeding, even if the judge refrains from specifically identifying that proceeding in his remarks to the media..[30]

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[27] *See Loving v. Virginia*, 388 U.S. 1 (1967), "This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. For reasons which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand consistently with the Fourteenth Amendment." (Footnotes omitted).

[28] *Ker v. State of Cal.,* 374 U.S. 23, 61 (1968). (Justice Brennan observed, "The recognition of exceptions to great principles always creates, of course, the hazard that the exceptions will devour the rule.").

[29] *See Rymer v. Lewis,* 206 S.W.3d 732, 736 (Tex. App.-Dallas 2006, no pet.) (Public policy demands that a trial judge act with absolute impartiality.) *See* also, *CNA v. Scheffey*, 828 S.W.2d 785, 792 (Tex. App.-Texarkana 1992, writ denied).

[30] *See Ligon v. City of New York*, 736 F.3d 118, 126 (2nd Cir. 2013), Vacated in part on other grounds, 743 F.3d 362 (2d Cir. 2014). The Second Circuit Court of Appeals construed 28 U.S.C.A. § 455 that directs recusal ("**(a)** Any justice, judge, or magistrate judge of the United States *shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned*."). (Emphasis added). § 455 contains language virtually identical to that found in Tex. R. Civ. P. 18b(b), "*Grounds for Recusal*. A judge must recuse in *any proceeding* in which:(1) the judge's *impartiality might reasonably be questioned*;(2) the judge has a personal bias or prejudice concerning the subject matter or a party . . . ." (Emphasis added).

Also, the Seventh Circuit Court of Appeals issued a "public admonition" to a judge for language in his scholarly article that did not "promote public confidence in the integrity and impartiality of the judiciary."[31] The court found portions of the article appeared to be "criticisms of recent policy positions taken by one political party" and other portions could "reasonably be understood by the public as an attack on the integrity of the Chief Justice . . . ."[32] That court concluded, "these portions of the article do not promote public confidence in the integrity and impartiality of the judiciary."[33]

Simply stated, a judge's public expression of bias that reflects on her ability to serve as an impartial judicial officer cannot be condoned.

IV. Petition's Claims For Prospective Relief Are Unripe and Barred by Res Judicata and Collateral Estoppel.

Throughout the Petition,[34] Petitioner claims, at some point in the future, she will go right back to pursuing the conduct for which she was sanctioned. Not only do Petitioner's pleadings in the trial court show her design is to relitigate the "Public Warning," but her Petition boldly asks this Court to allow her to obtain a declaration

[31] *Resolution of Judicial Misconduct Complaints about District Judge Lynn Adelman,* 965 F.3d 603, 610 (7th Cir. 2020).
[32] *Id.*
[33] *Id*.
[34] Petition at vii, 6, 12, and 15.

the final decision in the "Public Warning" does not prohibit future, identical intemperate actions.

Below are some of Petitioner's contentions demonstrating obvious efforts to relitigate, for alleged prospective activities, decisions already made in deciding the "Public Warning."

A. First Set of Contentions.

1. "Judge Hensley is merely seeking declaratory and injunctive relief that will prevent the Commission from initiating *future* disciplinary proceedings . . . ." Petition at 14. (Emphasis original).

2. Petitioner is complaining about the Commission's issuance of the "Public Warning" when she claims that "[t]the Commission *is acting* without any regard for the religious convictions of those who oppose homosexuality and same-sex marriage . . . ." Petition at 10.

3. An additional anomaly is Petitioner's unfounded characterization of the Commission's action in issuing the Public Warning as one that did not consider her alleged rights under TRFRA.[35] In any case, she could have pursued a de novo trial on that issue.

[35] "The Commission did not even acknowledge Judge Hensley's Texas RFRA arguments when imposing its sanctions, even though Judge Hensley repeatedly invoked the statute as a defense in her disciplinary proceedings. App. 68–74." Petition at 11.

The Commission's response to the above is not complex. The plain language of the pleadings belies her claim she is not seeking review of the "Public Warning." The trial court recognized this in Petitioner's second amended petition. Petitioner claims she is entitled to TRFRA relief because of the Commission's "investigation and their issuance" of the Public Warning and "threatening" further discipline if she persisted in the conduct.[36] She contends the warning violated her alleged rights. Then, she asks the court "grant a declaratory judgment" that the Commission's reading of Canon 4A violates the Texas Constitution.[37]

B. Second Set of Contentions.

Petitioner's next set of contentions focus upon her claim for "compensatory damages," and declaratory judgment as to a "right to belong to a church or support religious organizations that oppose homosexuality and same-sex marriage." Petitioner asserts those claims are new, within the jurisdiction of the court, not barred by lack of jurisdiction because the Special Court of Review has no power to grant them.[38]

Petitioner's contentions ignore the facts. First, Texas courts have no jurisdiction over her alleged TRFRA claims. That was her own fault since she did not send the requisite notice to assert TRFRA claims in the Commission

[36] Second Amended Pet., ¶¶ 58-66., Resp. App. 1; Findings 18 a, App. 3. (Emphasis added).
[37] Second Amended Pet., ¶70, Resp. App. 1; Findings 18 d, App. 3.
[38] Petition at viii, and 14.

proceeding.[39] The court of appeals affirmed the trial court's judgment[40] that concludes there was no jurisdiction to address Petitioner's TRFRA claims because her alleged statutory notice was defective.[41]

Second, as the trial court concluded, had Petitioner followed the rules, TRFRA could have been raised de novo before the Special Court of Review.[42]

Third, the court of appeals correctly observed that TRFRA relief is available to one who "successfully" asserts a TRFRA claim or defense.[43] As the court of appeals concluded, her TRFRA defense of the "Public Warning" failed.

It is critical to note the weakness of Petitioner's positions are virtually admitted because Petitioner has not attempted to attack the trial court's conclusions her claims were barred by res judicata and collateral estoppel. Petitioner failed to even address the controlling authorities cited by the court of appeals that show she impermissibly pursues a collateral attack.[44]

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[39] Findings ¶ 10 a-d, App. 3.
[40] COA Judgment, App. 45, "This is an appeal from the order signed by the trial court on June 25, 2021. Having reviewed the record and the parties' arguments, the Court holds that there was no reversible error in the order. Therefore, the Court affirms the trial court's order."
[41] *See* n. 21, *supra.*
[42] *See* Findings 24 f, App. 3, "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." (citing TRCP § 110.004).
[43] *See* Tex. Civ. Prac. & Rem. Code § 110.005(a)(2). COA at 11, App. 46.
[44] *See* COA at 11, App. 46.

V. Sovereign Immunity, the UDJA, and Ultra Vires.

Another of Petitioner's unsupportable claims is that the courts below erred by determining sovereign immunity barred the Uniform Declaratory Judgment Act (UDJA) and Ultra Vires claims. Petition at 16-18.

First, Petitioner's alleged claim is barred whenin she seeks a declaratory judgment and injunction to stop any future or prospective investigation and sanctioning. Petitioner's conduct has already been found, as a matter of law, by a final, unappealed order, to violate Canon 4A(1).

Second, Petitioner's claims are legally insufficient as to the prayer for injunctive relief to prohibit the Commission from addressing her future actions. She claims the Commission is "threatening to impose further discipline if she persists in recusing herself from officiating at same-sex weddings." Petition at 10, 16. That allegation is absolutely untrue and pure speculation.

As the court of appeals concluded, it is undisputed the Commission has not initiated any new investigation or discipline of Hensley, nor communicated any is imminent.[45] That court properly concluded she therefore failed to demonstrate TRFRA waives immunity as to claims potential future discipline burdens her religious exercise rights.[46]

[45] COA at 11-12, App. 46.
[46] *Id*.

Petitioner continues her argument saying her exercise of religion is burdened by that (long final) "Public Warning" because "by its very nature [it] threatens the person being warned with additional consequences if they persist . . . ." Petition at 15-16. Petitioner's musing is unfounded speculation.

That speculation is not actionable. The law is clear injunctive relief is unavailable when claimed injury is merely speculative and based on fear and apprehension of injury.[47] One cannot show probable and imminent injury by evidence of merely "possible" or "feared" harm.

Third, Petitioner asks this Court to review whether her TRFRA claims fall within "the UDJA's [claimed] waiver of sovereign immunity, given that Judge Hensley is challenging the constitutionality of Canon 4A(1)." Petition at 17. The trial court dismissed this claim for lack of jurisdiction, stating at least four grounds, including sovereign immunity.

As the first dismissal basis, the trial court held Section 110.008(a) of the Texas Civil Practice & Remedies Code waives sovereign immunity "only" if the claimant complies with section 110.006 notice requirements.[48]

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[47] *Fuentes v. Union de Pasteurizadores de Juarez Sociedad Anonima de Capital Variable,* 527 S.W.3d 492, 501 (Tex. App.—El Paso 2017, no pet.).
[48] Findings ¶ 30-36, App. 3.

As a second reason, the trial court found that Petitioner failed to comply with the TRFRA notice requirements, which meant no claim could be asserted.[49]

A third basis was that merely pleading a claim for declaratory judgment was inadequate to invoke a waiver of sovereign immunity. The trial court correctly ruled the UDJA does not waive sovereign immunity where the validity of a statute was not at issue, nor Cannon 4A(1). Petitioner challenged only the *application* of the Canon.[50]

The fourth trial court basis for denying UDJA relief was Petitioner's unsuccessful assertion of TRFRA as a defense. Petitioner missed her chance to assert TRFRA issues via the de novo trial procedure. The trial court and the court of appeals made clear in referencing *Hagstette* it is impermissible to use the UDJA to circumvent the Tex. Gov't Code 34.034 Special Court of Review mechanism.[51]

The court of appeals added another basis for dismissal of the ultra vires allegations. That is there is no legal substance in Petitioner's's contention the ultra vires doctrine applied because Respondents "acted without legal or statutory authority.[52] Petitioner is sorely mistaken. The court of appeals concluded: "the Officials carried out their duty to determine whether Hensley's conduct violated

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[49] Findings 41, App. 3.
[50] Findings 43, App. 3 (citing *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); *See* also, COA at 14-15, App. 46.
[51] Findings 44, App. 3; See also, COA at 9, App. 46.
[52] Second Amended Petition, ¶ 75, Res. App. 1.

Canon 4A and whether punishing that conduct with a Public Reprimand would substantially burden her free exercise of religion. Their discretion in making those determinations was otherwise unconstrained."[53] The legal authority relied on by the Commission is duly promulgated by the Texas Constitution, Texas statutes, and the rules promulgated by this Court.[54]

VI. Petitioner Is Not Entitled To Summary Judgment.

Petitioner's claims were dismissed based upon considered findings of fact and conclusions of law. There is no basis for this Court to render summary judgement in Petitioner's favor. As stated above, Petitioner's claims are barred because the courts of Texas have no jurisdiction over her alleged TRFRA claims.

VII. Conclusion: This Case Is Not Appropriate For Review.

Petitioner embellishes again when she claims her alleged TRFRA issues are exceptionally important and should be reviewed by this Court. Petition at 18. Simply because Petitioner says this case is all about TRFRA does not make it so.

The issues in this case are solely about whether Petitioner can collaterally attack the long final "Public Warning." That sanction is final and binding. Nevertheless, she asks this Court to render a decision the "Public Warning" is void

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[53] COA at 17, App. 46, (citing *Hall v. McRaven,* 508 S.W.3d 232, 242 (Tex. 2017)).
[54] *See* V. T. C. A., Govt. Code T. 2, Subt. G App. B, Jud. Conduct, T. 2, Subt. G, Refs & Annos, TX ST CJC T. 2, Subt. G., Article V, Section 1–a of the Texas Constitution; PROCEDURAL RULES FOR THE REMOVAL OR RETIREMENT OF JUDGES (Adopted and Promulgated Pursuant to Article V, Section 1-a(11), Texas Constitution); *See* also COA at 17,18, App. 46.

and thereby allow her to continue without repercussions her public action that violate Canon 4A(1). However, were this Court to grant such sweeping relief, the Commission would be stripped of its authority to even consider the propriety of any of her future public actions violating impartiality obligations.

Further, were this Court to grant the requested relief, it would nullify the statutory de novo review process intended as the sole remedy for judges to contest a Commission sanction. Sanctioned judges could ignore the mandatory de novo review process and bring suit in trial courts to attack Commission actions. Judges could attempt to artfully skirt jurisdictional problems by dressing up attacks as new affirmative claims.

The First Court of Appeals in *Hagstette* and the Third Court of Appeals in this case saw the danger of allowing such attacks. Both courts rendered correct decisions when they concluded a judge's waiver of an appeal of a Commission sanction by the statutorily provided de novo review bars a judge's new suit attacking the sanction. That straight forward rule applies here and now. Accordingly, the Commission and other Respondents respectfully requests that this Petition for Review be denied.

Respectfully submitted,

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/s/ Douglas S. Lang
Counsel for Respondents

Dated: January 17, 2023

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

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

Appendix to Response to Petition for Review

1. Plaintiff's Second Amended Petition, Respondent Appendix (Res. App.) 1.

Plaintiff's Second Amended Petition, Respondent Appendix

(Res. App.) 1

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 her 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

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CERTIFICATE OF SERVICE

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

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Status as of 1/18/2023 7:27 AM CST

Associated Case Party: Willow Creek Golf Club, Inc.

Name	BarNumber	Email	TimestampSubmitted	Status
Dylan Russell		russell@hooverslovacek.com	1/17/2023 5:30:08 PM	SENT
Joseph O. Slovacek	18512300	slovacek@hooverslovacek.com	1/17/2023 5:30:08 PM	SENT

Associated Case Party: Willow Creek Management Inc.

Name	BarNumber	Email	TimestampSubmitted	Status
David W. Elrod	6591900	delrod@shackelford.law	1/17/2023 5:30:08 PM	SENT
Melissa Nicholson	24037181	msternfels@shackelford.law	1/17/2023 5:30:08 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Douglas S.Lang		dlang@thompsoncoburn.com	1/17/2023 5:30:08 PM	SENT
Roxanna Lock		rlock@thompsoncoburn.com	1/17/2023 5:30:08 PM	SENT
Laurie DeBardeleben		ldebardeleben@thompsoncoburn.com	1/17/2023 5:30:08 PM	SENT
Roland Johnson	84	rolandjohnson@hfblaw.com	1/17/2023 5:30:08 PM	SENT
Jonathan Mitchell	24075463	jonathan@mitchell.law	1/17/2023 5:30:08 PM	SENT
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Justin Butterfield	24062642	jbutterfield@firstliberty.org	1/17/2023 5:30:08 PM	SENT
David Schleicher		david@gov.law	1/17/2023 5:30:08 PM	SENT
Ross Reyes		rgreyes@littler.com	1/17/2023 5:30:08 PM	SENT
Hiram Stanley Sasser	24039157	hsasser@firstliberty.org	1/17/2023 5:30:08 PM	SENT