No. 21-1145

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

PETITIONER'S BRIEF ON THE MERITS

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Statement Of The Case

Nature of the Case:	Plaintiff Dianne Hensley has sued the State Commission on Judicial Conduct and its members for violating her rights under the Texas Religious Freedom Restoration Act after the Commission sanctioned Judge Hensley for refusing to officiate at same-sex marriages on account of her Christian faith.
Trial Court:	The Honorable Jan Soifer, 459th Judicial District Court, Travis County, Texas
Trial Court Disposition:	The district court granted the defendants' plea to the jurisdiction and plea in estoppel.
Parties in the Court of Appeals:	Appellant: Dianne Hensley Appellees: State Commission on Judicial Conduct, David C. Hall, Gary L. Steel, Janis Holt, Frederick C. Tate, David C. Hall, Sujeeth B. Draksharam, Ronald E. Bunch, Valerie Ertz, M. Patrick Maguire, Clifton Roberson, Lucy M. Hebron, David Schenck, Kathy P. Ward, Wayne Money
Court of Appeals:	Third Court of Appeals at Austin, Texas (Goodwin, Baker, and Smith, JJ.)
Court of Appeals Disposition:	The court of appeals affirmed the trial court's ruling. *See Hensley v. State Commission on Judicial Conduct*, No. 03-21-00305-CV, 2022 WL 16640801 (Tex. App.—Austin, Nov. 3, 2022, pet h.) (App. 45–66). No motions for rehearing or en banc reconsideration are pending.

Statement Of Jurisdiction

This Court has jurisdiction under section 22.001(a) of the Texas Government Code because the appeal presents a question of law that is important to the jurisprudence of the state.

Statement Of Issues

1. The State Commission on Judicial Conduct sanctioned Judge Dianne Hensley for recusing herself from officiating same-sex weddings on account of her Christian faith. Section 33.034 of the Texas Government Code allowed (but did not require) Judge Hensley to appeal the Commission's public warning to a special court of review. *See* Tex. Gov't Code § 33.034(a) ("A judge who receives from the commission a sanction. . . is entitled to a review of the commission's decision as provided by this section."). Judge Hensley, however, declined to seek "review of the commission's decision" under section 33.034 because the special court of review is powerless to award damages under the Texas Religious Freedom Restoration Act, nor can it award the prospective declaratory and injunctive relief that Judge Hensley needs to ensure that she can continue performing weddings in a manner consistent with her religious beliefs. Instead, Judge Hensley sued the Commission and its members for declaratory and injunctive relief and compensatory damages under the Texas Religious Freedom Restoration Act (Texas RFRA).

   The court of appeals held that Judge Hensley could not sue the Commission or its members under Texas RFRA because she declined to appeal the disciplinary sanction under section 33.034, and it dismissed Hensley's claims under Texas RFRA as an "impermissible collateral attack on the Commission's order." The issue presented is:

   > Did the court of appeals err in dismissing Judge Hensley's Texas RFRA claims as an "impermissible collateral attack on the commission's order"?

2. The Texas Religious Freedom Restoration Act clearly and unambiguously waives sovereign immunity. *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 court of appeals nonetheless held that Judge Hensley's Texas RFRA claims against the Commission and its members were barred by sovereign immunity. The Commission also refused to allow Judge Hensley's claims challenging the constitutionality of Canon 4A(1) to proceed under the UDJA's waiver of sovereign immunity, and it refused to allow her claims for prospective relief against

the individual commissioners to proceed under the *ultra vires* exception to sovereign immunity. The issue presented is:

> Did the court of appeals err in holding that Judge Hensley's claims are barred by sovereign immunity?

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

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PETITIONER'S BRIEF ON THE MERITS

To The Honorable Supreme Court Of Texas:

The State Commission on Judicial Conduct sanctioned Judge Dianne Hensley for recusing herself from officiating same-sex weddings on account of her Christian faith. App. 67–69. Judge Hensley is now suing the Commission and its members under the Texas Religious Freedom Restoration Act for substantially burdening her exercise of religion. The district court and the court of appeals rejected her claims for specious and contrived jurisdictional reasons. *See Hensley v. State Commission on Judicial Conduct*, No. 03-21-00305-CV, 2022 WL 16640801 (Tex. App.—Austin, Nov. 3, 2022, pet h.)

(App. 45–66). Judge Hensley respectfully asks this Court to grant the petition for review and reverse the court of appeals' decision.

Statement Of Facts[1]

Dianne Hensley serves as a justice of the peace in McLennan County. CR 530 (¶ 3). She has held this office since January 1, 2015. CR 530 (¶ 3). As a justice of the peace, Judge Hensley is authorized but not required to officiate at weddings. *See* Tex. Family Code § 2.202(a).

Before the Supreme Court's ruling in *Obergefell v. Hodges*, 576 U.S. 644 (2015), Judge Hensley officiated approximately 80 weddings. CR 530 (¶ 5). After *Obergefell*, Judge Hensley officiated four additional weddings that had been previously scheduled, and her office did not book any more weddings between June 26, 2015, and August 1, 2016. CR 530 (¶ 6).

Judge Hensley is a Christian, and her Christian faith forbids her to officiate at any same-sex marriage ceremony. CR 530 (¶ 7); CR 535 (¶ 37). For these reasons, Judge Hensley quit officiating weddings entirely following the *Obergefell* decision. CR 531 (¶ 8).

In August of 2016, Judge Hensley decided that there was a need for low-cost wedding officiants in Waco, because no judges or justices of the peace were officiating any weddings in the aftermath of *Obergefell*. CR 531 (¶¶ 9–10). Judge Hensley therefore decided that she would resume officiating weddings between one man and one woman. CR 531–532 (¶¶ 11–20). Judge

1. The court of appeals' opinion correctly states the facts and nature of this case. *See Hensley*, 2022 WL 16640801, *1–*3 (App. 46–53).

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 those ceremonies. CR 531–532 (¶¶ 12–18).

Judge Hensley and her staff made a list of every officiant they could find for same-sex weddings in McLennan County and its surrounding counties. CR 531 (¶ 13). One of these officiants, 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. CR 531 (¶ 13). Ms. Misher has agreed to accept referrals from Judge Hensley of any same-sex couple seeking to be married. CR 531 (¶ 14); CR 537–538 (affidavit of Shelli Misher).

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, so that no extra costs are imposed on couples that Judge Hensley refers to her business. CR 531 (¶ 15).

Judge Hensley 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 seeking a justice-of-the-peace wedding. CR 532 (¶ 17). Judge Pareya's offices are in West, Texas, about 20 miles from Judge Hensley's offices in Waco. CR 532 (¶ 17).

If a same-sex couple asks Judge Hensley's office about her availability to officiate weddings, Judge Hensley instructed her staff to provide 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)

CR 532 (¶ 21). They are also instructed to provide a business card for Ms. Misher's chapel, which is three blocks down the street. CR 533 (¶ 21).

Judge Hensley's referral system benefitted both same-sex and opposite-sex couples when compared to her earlier practice of refusing to officiate any weddings. It benefitted same-sex couples by providing them with referrals to willing officiants in McLennan County. CR 532 (¶¶ 18–20). And it benefitted 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 in the wake of *Obergefell*. CR 531 (¶ 10). No same-sex couple has complained to the State Commission on Judicial Conduct about Judge Hensley's referral system, nor has anyone ever complained about it to Judge Hensley or her staff. CR 533 (¶ 22).

On May 22, 2018, the State Commission on Judicial Conduct (the Commission) launched an inquiry into Judge Hensley's referral system after learning of it in a newspaper article. CR 533 (¶ 23). The Commission sent a letter of inquiry and demanded that Judge Hensley respond to written interrogatories within 30 days. CR 533 (¶ 23). Judge Hensley responded to these interrogatories on June 20, 2018. CR 533 (¶ 24); CR 540–561. Judge Hensley explained that her Christian faith precludes her from officiating at same-sex weddings, and for that reason she initially stopped officiating weddings entirely after *Obergefell*. CR 541. Judge Hensley also explained that this 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 post-*Obergefell*. CR 541–542. The only justice of the peace officiating weddings in McLennan County after *Obergefell* was Judge Pareya, and his offices are in in West, Texas—20 miles 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.

CR 541. Judge Hensley also explained that she thought it "wrong to inconvenience ninety-nine percent of the population because I was unable to accommodate less than one percent." CR 542. She therefore began officiating opposite-sex marriages again on August 1, 2016, while politely referring same-sex couples to willing officiants in McLennan County. CR 542.

On January 25, 2019, the Commission issued Judge Hensley a "Tentative Public Warning." CR 534 (¶ 28); CR 565–567. The tentative 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 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 . . . .

CR 566–567. The tentative 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.

CR 566–567. Finally, the tentative 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." CR 566–567.

The Commission's tentative public warning required Judge Hensley to choose between accepting the tentative sanction or appearing before the Commission. CR 563–564. Judge Hensley chose to appear before the Commission, which held a hearing on August 8, 2019. CR 534 (¶ 31). At the hearing, Judge Hensley argued that her recusal-and-referral system was protected by the Texas Religious Freedom Restoration Act. CR 534 (¶ 32). Judge Hensley also argued that the Commission lacked authority to sanction her under Canon 3B(6) because officiating weddings is not a "judicial duty," as judges and justices of the peace are allowed but not required to officiate at weddings. CR 534 (¶ 33); *see also* Texas Family Code § 2.202(a).

On November 12, 2019, after hearing Judge Hensley's testimony, the Commission issued its final sanction, which it described as a "Public Warning." CR 535 (¶ 34); CR 595–596. Unlike the tentative warning of January 25, 2019, the Commission's final sanction did not accuse Judge Hensley of violating either Canon 3B(6) of the Texas Code of Judicial Conduct or Article V, Section 1-a(6)A of the Texas Constitution. CR 595–596. Instead, the Commission declared that Judge Hensley had violated only 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 . . . .

CR 596. 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.

CR 596. The public warning of November 12, 2019, did not acknowledge or address the Texas Religious Freedom Restoration Act, and it did not respond to any of the arguments that Judge Hensley made in reliance on that statute. CR 595–596.

Judge Hensley stopped performing weddings entirely in response to the Commission's investigation and disciplinary actions. CR 535 (¶ 35). Judge Hensley had been performing approximately 100 weddings per year before she stopped. *See id.* The Commission's threatened disciplinary actions have cost Judge Hensley well over $10,000 in lost income. *See id.*

Section 33.034 of the Texas Government Code allowed (but did not require) Judge Hensley to appeal the Commission's public warning to a special court of review. *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."). Judge Hensley, however, declined to seek "review of the commission's decision" under section 33.034 because the special court of review cannot award compensatory damages under Texas RFRA. CR 535 (¶ 36). Nor can it award the prospective declaratory and injunctive relief that Judge Hensley needs to ensure that she can continue performing weddings in a manner consistent with her religious beliefs. *See id.*

Instead, Judge Hensley sued the Commission and its members for declaratory relief and compensatory damages under the Texas Religious Freedom Restoration Act. On February 19, 2019, Judge Hensley provided the pre-suit notice required by section 110.006 of the Texas Practice & Civil Remedies Code. CR 569–592. On December 17, 2019, Judge Hensley filed her original petition. CR 12–32.

Judge Hensley initially filed suit in McLennan County. CR 12–32. But the district judge transferred the case to Travis County. CR 5–6. After the transfer, the defendants filed a plea to the jurisdiction and, in the alternative, a plea in estoppel. CR 373–398. Judge Hensley moved for summary judgment. CR 510–596. A hearing for all three motions was held on May 26, 2021. CR 730 (¶ 4); CR 762; CR 769.

On June 25, 2021, the district court dismissed the case for the following reasons: (1) "Plaintiff's failure to exercise her exclusive statutory remedy concerning issues pertinent to her disciplinary proceeding"; (2) "Plaintiff's failure to comply strictly with jurisdictional statutory notice requirements pertinent to her claims under the Texas Religious Freedom Restoration Act"; (3) "sovereign immunity"; (4) "statutory immunity under Section 33.006 of the Texas Government Code"; (5) "lack of ripeness and Plaintiff's request for impermissible advisory opinions"; and (6) "*res judicata*." CR 762–763.

Then the district court added:

> 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.

CR 763. On July 14, 2021, the defendants requested findings of fact and conclusions of law,[2] and the district court issued findings and conclusions on August 26, 2021. Supp. CR 3–44.

Judge Hensley appealed,[3] and the court of appeals affirmed. *See Hensley*, 2022 WL 16640801 (App. 45–66). It held that the district court "correctly dismissed" Hensley's claims for damages and declaratory relief under Texas RFRA as an "impermissible collateral attack on the Commission's order." *Id.* at *5 (App. 56). The court of appeals also held that "injunctive relief is not available to Hensley under the TRFRA" because:

> [I]njunctive relief is not available to Hensley under the TRFRA. The statute provides that a person who *successfully* asserts a claim or defense under the TRFRA is entitled to injunctive relief to prevent the threatened or continued violation. *See* Tex. Civ. Prac. & Rem. Code § 110.005(a)(2). In this case, the trial court properly dismissed Hensley's claims brought under the TRFRA and, consequently, she has not successfully asserted a claim under that statute that would entitle her to injunctive relief.

Id. (App. 56).

Then the court of appeals held that the district court "properly dismissed" Hensley's claims as barred by sovereign immunity—even though

2. CR 775–829.

3. CR 765; CR 831.

Texas RFRA explicitly waives sovereign immunity. *Compare id.* (App. 56) *with* 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 court of appeals also rejected Hensley's argument that the Uniform Declaratory Judgment Act (UDJA) waives sovereign immunity with respect to her claim that challenges the constitutionality of Canon 4A(1). *Id.* at *5–*6 (App. 57–60). Hensley had argued that *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015), allows litigants to sue government entities under the UDJA when challenging the constitutionality of agency rules such as Canon 4A(1). *See id.* at 75–77. But the court of appeals denied that *Patel* interpreted the UDJA to waive immunity "for challenges to agency regulations." *Hensley*, 2022 WL 16640801, at *6 (App. 59). Instead, it observed that the plaintiffs in *Patel* had "challenged the constitutionality of a statute, along with rules promulgated pursuant to that statute." *Id.* (App. 59). Hensley, by contrast, "does not purport to challenge any statute; she challenges only the validity of Canon 4A." *Id.* (App. 59).

Finally, the court of appeals rejected Hensley's *ultra vires* claims by denying that the commissioners had "exercised their discretion in conflict with the constraints of the law authorizing them to act." *Hensley*, 2022 WL 16640801, at *7 (App. 62). In reaching this conclusion, the court of appeals did not consider or address Hensley's claim that the commissioners had vio-

lated the constraints of Texas RFRA. *See id.* at *7 n.5 (App. 63 n.7). Instead, the court of appeals held that there were *no* legal constraints on the commissioners' authority to determine whether Hensley had violated Canon 4A or whether a public reprimand would "substantially burden" her religious freedom:

> [T]he Officials carried out their duty to determine whether Hensley's conduct violated 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.

Id. at *7 (App. 62); *see also id.* ("'When the ultimate and unrestrained objective of an official's duty is to interpret collateral law, a misinterpretation is not overstepping such authority; it is a compliant action even if ultimately erroneous. . . . [I]t is not an ultra vires act for an official or agency to make an erroneous decision while staying within its authority.'" (citation omitted)).

Judge Goodwin concurred only in the judgment. *See Hensley*, 2022 WL 16640801, at *7–*8 (App. 64–65).

Summary Of Argument

The court of appeals erred when it dismissed Judge Hensley's Texas RFRA claims as an "impermissible collateral attack on the Commission's order." *Hensley*, 2022 WL 16640801, *5 (App. 56). Judge Hensley has made clear throughout this litigation that she is not asking the district court to review, vacate, or in any way alter the sanction that the Commission imposed. *See infra* at 14–15. Instead, Judge Hensley is seeking declaratory and injunc-

tive relief that will stop the Commission from initiating *future* disciplinary proceedings against her, as well as damages for the income she lost when she stopped performing weddings. The special court of review could not have provided any of that relief, so Judge Hensley cannot be faulted for not pursuing that relief from the special court of review. And the disciplinary sanction issued by the Commission will remain in effect no matter how the courts resolve Judge Hensley's claims in this litigation.

The court of appeals was equally off-base in dismissing Judge Hensley's claims on sovereign-immunity grounds. Texas RFRA explicitly waives the defendants' sovereign immunity,[4] and even apart from Texas RFRA the Uniform Declaratory Judgment Act waives the Commission's sovereign immunity to the extent Judge Hensley is challenging the validity of Canon 4A. What's more, Judge Hensley's claims for prospective relief against the individual commissioners do not even implicate sovereign immunity because she has brought *ultra vires* claims against them. CR 602 (¶ 17); CR 609 (¶ 56); CR 614–615 (¶¶ 74–75); *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 76 (Tex. 2015) ("[U]nlawful acts of officials are not acts of the State.").

The court of appeals did not reach or resolve the district court's remaining reasons for dismissing Judge Hensley's claims. But the Court should rule on those issues now rather than remanding them to the court of appeals,

4. *See* Tex. Civ. Prac. & Rem. Code § 110.008(a).

which has shown that it cannot be trusted to enforce the protections of Texas RFRA after defying the statute's clear and explicit waiver of sovereign immunity. The Court should also render judgment for Judge Hensley because the relevant facts are undisputed, and Judge Hensley is entitled to judgment as a matter of law on her claims against the Commission and its members.

Argument

I. The Court Of Appeals Erred By Dismissing Judge Hensley's Texas RFRA Claims As An "Impermissible Collateral Attack On The Commission's Order"

Section 33.034 of the Texas Government Code allowed (but did not require) Judge Hensley to appeal the Commission's public warning to a special court of review. *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."). Judge Hensley, however, declined to seek "review of the commission's decision" under section 33.034. CR 535. The court of appeals held that this decision precludes the state judiciary from considering Judge Hensley's claims for damages and declaratory relief under Texas RFRA. *See Hensley*, 2022 WL 16640801, at *5 (App. 56); *see also id.* at *7–*8 (App. 64–65) (Goodwin, J., concurring in the judgment). The court of appeals' holding is wrong and should be reversed.

Judge Hensley is *not* asking the state judiciary to review, vacate, or reverse the "public warning" that she received from the Commission. CR 598–616 (second amended petition). And Judge Hensley has expressly disclaimed

any intent to collaterally attack or in any way disturb the Commission's public warning, both in the district court and in the court of appeals:

> Judge Hensley is *not* seeking vacatur or reversal of the Commission's sanction—and the "public warning" that the Commission issued will remain in place regardless of whether Judge Hensley obtains the damages and declaratory relief that she seeks. The 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. Judge Hensley is merely asking for a judicial declaration of her right to recuse herself from officiating at same-sex weddings . . . . She is also seeking damages for lost income . . . .

CR 240; CR 477; *see also* Br. of Appellant, *Hensley v. State Comm'n on Judicial Conduct*, No. 03-21-00305-CV, at 13, available at https://bit.ly/3uUr8oU (same).

Judge Hensley is merely seeking declaratory and injunctive relief that will prevent the Commission from initiating *future* disciplinary proceedings over her refusal to officiate same-sex marriages, as well as damages for lost income when she stopped performing weddings in response to the Commission's actions. *See* CR 612–615. The "public warning" that the Commission issued on November 12, 2019, will remain on the books no matter what happens in this lawsuit, and it will not be disturbed by the relief that Judge Hensley is seeking. Judge Hensley is not asking the state judiciary to "review" or do anything to the Commission's sanction, and she is not inviting this Court to exercise *any* prerogative that belongs to the special court of review.

More importantly, the special court of review had *no* power to award Judge Hensley compensatory damages under Texas RFRA. *See* Tex. Gov't Code § 33.034(a) (empowering the court of special review only to "review . . . the commission's decision"). The special court of review was equally powerless to issue a declaratory judgment regarding Judge Hensley's right to belong to a church or support religious organizations that oppose homosexuality and same-sex marriage. *See id.* All that the special court of review can do is affirm, modify, or reverse the *sanction* that the Commission imposed; it has no authority to grant the relief that Judge Hensley is demanding under Texas RFRA and the UDJA. It is absurd to contend that Judge Hensley should have sought this relief from the special court of review when Judge Hensley *could not have obtained* that relief from the special court of review.

Judge Hensley made all of this clear in her appellate-court briefing. *See* Br. of Appellant, *Hensley v. State Comm'n on Judicial Conduct*, No. 03-21-00305-CV, at 13–14, available at https://bit.ly/3uUr8oU. Yet the court of appeals ignored all of this and falsely claimed the Judge Hensley was pursuing an "impermissible collateral attack on the Commission's order."

II. The Court Of Appeals Erred In Holding That Judge Hensley's Claims Are Barred By Sovereign Immunity

The court of appeals' holding that Judge Hensley's claims are barred by sovereign immunity is equally indefensible. *See Hensley*, 2022 WL 16640801, at *5 (App. 56–57). Judge Hensley has no fewer than three ways around sov-

ereign immunity: (1) The explicit waiver of sovereign immunity in Texas RFRA; (2) The waiver of sovereign immunity in the Uniform Declaratory Judgment Act (UDJA), which allows Judge Hensley to challenge the validity of Canon 4A by suing the Commission; and (3) The *ultra vires* exception to sovereign immunity, which allows Judge Hensley to seek prospective relief against the individual commissioners.

A. The Texas Religious Freedom Restoration Act Waives Each Of The Defendants' Sovereign Immunity

Section 110.008(a) explicitly waives the defendants' sovereign immunity for claims asserted under Texas RFRA:

> 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.

Tex. Civ. Prac. & Rem. Code § 110.008(a). The court of appeals, however, insisted that Hensley's claims for prospective relief under Texas RFRA were barred by sovereign immunity—despite the clear and unambiguous waiver of sovereign immunity in section 110.008(a):

> Because the evidence establishes that the Commission has in fact *not* threatened further disciplinary action against Hensley, she has failed to carry her burden of demonstrating that the TRFRA waives the Commission's immunity for her claim that threats of further discipline by the Commission have burdened her free exercise of religion.

Hensley, 2022 WL 16640801, at *5 (App. 57).

The court of appeals' claim that the Commission has "not threatened further disciplinary action against Hensley" is absurd. The Commission issued a "Public Warning" to Judge Hensley, and a warning by its very nature threatens the person being warned with additional consequences if they persist in their ways. The court of appeals noted that the Commission has not initiated any "new" investigations or disciplinary proceedings involving Judge Hensley. *See id.* But that is because Judge Hensley stopped performing weddings entirely in response to the Commission's investigation and sanctions—not because the Commission is willing to allow Judge Hensley to resume her practice of recusing herself from same-sex marriage ceremonies. CR 611. The Commission is threatening Judge Hensley with discipline *if* she resumes performing marriages for opposite-sex couples, and that threat allows Judge Hensley to sue for declaratory and injunctive relief under Texas RFRA. *See Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.").

B. The Uniform Declaratory Judgment Act Waives The Commission's Sovereign Immunity And Allows Judge Hensley To Challenge The Validity Of Canon 4A

The Uniform Declaratory Judgment Act also waives the Commission's sovereign immunity because Judge Hensley is challenging the constitutionality of Canon 4A(1). Judge Hensley's petition seeks "a declaration that the

Commission's interpretation of Canon 4A violates article I, section 8 of the Texas Constitution." CR 613 (¶ 70). This constitutional challenge falls within the UDJA's waiver of immunity because it challenges the *validity* of the canon as interpreted by the Commission. *See Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 552 (Tex. 2019) ("[T]he UDJA . . . provid[es] only a limited waiver for challenges to the validity of an ordinance or statute.").

The court of appeals acknowledged that *Patel* allows litigants to sue governmental entities when challenging the validity of agency rules, but it insisted that *Patel* allows such challenges only when the litigant is simultaneously challenging the underlying statute that authorized the disputed agency rules. *See Hensley*, 2022 WL 16640801, at *6 (App. 59). *Patel* says nothing of the sort, and section 2001.038 of the Texas Administrative Procedure Act is incompatible with the notion that agency rules cannot be challenged by suing the relevant state agency in a declaratory-judgment action:

> (a) The validity or applicability of a rule, including an emergency rule adopted under Section 2001.034, *may be determined in an action for declaratory judgment* if it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff.
>
> (b) The action may be brought only in a Travis County district court.
>
> (c) The state agency must be made a party to the action.

Tex. Gov't Code § 2001.038. Section 2001.038 of the APA authorizes the very declaratory-judgment claim that Judge Hensley is asserting in this litiga-

tion, which was brought in Travis County district court, and it waives the Commission's immunity in any lawsuit seeking such declaratory relief. So the Commission's sovereign immunity has been waived coming or going, and Judge Hensley may sue the Commission for declaratory relief by invoking the waivers of sovereign immunity in either the UDJA or section 2001.038 of the APA.

C. Judge Hensley's *Ultra Vires* Claims Against The Individual Commissioners Do Not Implicate Sovereign Immunity

Judge Hensley does not need a waiver of sovereign immunity for her claims for prospective relief against the individual commissioners, because sovereign immunity is simply inapplicable when a litigant seeks prospective relief against a state officer who is accused of acting in violation of state law. *See Patel*, 469 S.W.3d at 76 ("[U]nlawful acts of officials are not acts of the State."). This is the "*ultra vires*" exception to sovereign immunity—and Judge Hensley explicitly invoked the *ultra vires* doctrine to support her claims against the individual commissioners. *See* CR 602 (¶ 17); CR 609 (¶ 56); CR 614–615 (¶¶ 74–75).

The court of appeals held that Hensley was suing over matters within the commissioners' "discretion,"[5] but the commissioners have no "discretion" to violate Texas RFRA, and claims that a state official is acting in violation of a statute are quintessential *ultra vires* lawsuits. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009) ("[S]uits to require state officials *to comply*

5. *See Hensley*, 2022 WL 16640801, at *7 (App. 60–63).

with statutory or constitutional provisions are not prohibited by sovereign immunity" (emphasis added)); *Federal Sign v. Texas Southern University*, 951 S.W.2d 401, 404 (Tex. 1997) ("A private litigant does not need legislative permission to sue the State for a state official's *violations of state law*." (emphasis added)); *Honors Academy, Inc. v. Texas Education Agency*, 555 S.W.3d 54, 68 (Tex. 2018) ("The fact that the official has some limited discretion to act under the applicable law *does not preclude* an ultra vires claim if the claimant alleges that the official exceeded the bounds of that authority, *or the conduct conflicts with the law itself*." (emphasis added)). Hensley's claims for prospective relief against the individual commissioners must be allowed to proceed under the *ultra vires* doctrine, and they cannot be dismissed or disregarded on sovereign-immunity grounds.

III. The District Court's Remaining Reasons For Granting The Plea To The Jurisdiction Should Be Rejected Without Remanding To The Court Of Appeals

Because the court of appeals' holdings on the sovereign-immunity issues were sufficient to dispose of Judge Hensley's claims, the court of appeals did not review or weigh in on the district court's remaining reasons for granting the defendants' plea to the jurisdiction. Rather than remanding these remaining jurisdictional issues to the court of appeals, the Court should decide them now. The court of appeals has shown that it cannot be trusted to follow the law when statutory protections for religious freedom interfere with the LGBTQ agenda, as it went so far as to hold that Judge Hensley's claims were

barred by sovereign immunity despite an explicit waiver of sovereign immunity in Texas RFRA. A remand to the court of appeals will produce yet another decision that twists the law and further delays the long-overdue ruling on the merits of Judge Hensley's religious-freedom claims.

A. The District Court Erred In Holding That Judge Hensley's Decision Not To Appeal The Commission's Sanction To The Special Court Of Review Deprives The Courts Of Jurisdiction To Consider Her Texas RFRA Claims

Section 33.034 of the Texas Government Code allowed Judge Hensley to appeal the Commission's public warning to a special court of review,[6] but Judge Hensley declined to appeal and instead sued the Commission and its members under Texas RFRA. CR 535 (¶ 36). The district court held that this decision deprives the state judiciary of jurisdiction over her claims. CR 762; Supp. CR 16 (citing *Hagstette v. State Commission on Judicial Conduct*, 2020 WL 7349502 (Tex. App. — Houston [1st Dist.], no pet.)).[7]

The district court's holding was mistaken for two reasons. First, Judge Hensley is *not* asking the state judiciary to rescind or do anything to the "public warning" that she received,[8] and there is no conceivable jurisdictional obstacle that can arise when Judge Hensley expressly disclaims any

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6. *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.").
7. The court of appeals did not review this jurisdictional holding because it dismissed Judge Hensley's claims on other grounds.
8. *See supra* at 14–15.

collateral attack on the Commission's sanction. The district court cited *Hagstette*, 2020 WL 7349502, but that case is inapposite. The judges in *Hagstette* received a public admonition from the Commission, but they spurned their right to appeal under section 33.034 and filed a lawsuit *to have to their public admonitions declared void*. *See id.* at *3 ("[T]he Magistrate Judges sought a judicial declaration that their public admonitions were void."). The *Hagstette* court properly held that it lacked jurisdiction over these claims, because one cannot sue to set aside an agency ruling after spurning an opportunity to appeal. *See id.* at *5 ("'[A]n action for declaratory judgment does not lie' in suit that asserts 'a direct attack upon the [agency's] order by appeal'" (quoting *Alamo Express, Inc. v. Union City Transfer*, 309 S.W.2d 815, 827 (Tex. 1958))); *id.* ("'When a statute provides an avenue for attacking an agency order, a declaratory judgment action will not lie to provide redundant remedies.'" (quoting *Aaron Rents, Inc. v. Travis Central Appraisal District*, 212 S.W.3d 665, 669 (Tex. App.—Austin 2006, no pet.) (en banc)). *Hagstette* does *not* hold that judges are forbidden to sue the Commission if they decline to appeal under section 33.034; it holds only that judges may not sue *to have their sanctions declared void* after neglecting their appellate remedies:

> [W]e 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*.

Id. at *5 (emphasis added).

Second, the district court was wrong to assert that Judge Hensley "could have litigated" her claims by appealing the Commission's decision under section 33.034. Supp. CR 16. The special court of review has *no* power to award Judge Hensley compensatory damages or declaratory or injunctive relief; it can only affirm, modify, or reverse the *sanction* that the Commission imposed. *See* Tex. Gov't Code § 33.034(a) (empowering the court of special review only to "review . . . the commission's decision"); *see also supra* at 16. The district court cannot lack "jurisdiction" to award relief that Judge Hensley could not have obtained from the special court of review.

B. Judge Hensley Complied With The Notice Requirements Of The Texas Religious Freedom Restoration Act

The district court's second reason for granting the plea to the jurisdiction was that Judge Hensley had (supposedly) failed to comply with the notice requirements of Texas RFRA. CR 762; Supp. CR 18–23. Justice Goodwin's concurrence in the court of appeals made a similar claim, although the majority opinion did not. *See Hensley*, 2022 WL 16640801, at *8 (Goodwin, J., concurring in the judgment) (App. 65). These contentions are meritless.

Section 110.006(a) of the Texas Civil Practice and Remedies Code 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.

Tex. Civ. Prac. & Rem. Code § 110.006(a). Judge Hensley complied with this statute to the letter. On February 17, 2019, her attorney sent a written notice to each of the Commissioners by certified mail, return receipt requested, which read as follows:

> 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).

CR 656–668; CR 653–654. The notice was mailed more than 60 days before Judge Hensley filed suit on December 17, 2019. CR 653 (¶ 4).

The notice states 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." CR 656. That is all that is needed to satisfy subsection (a)(1), which merely requires notice "that the person's free exercise of religion is substantially burdened by an exercise of the government agency's governmental authority," without requiring further descriptions of the governmental action or the person's exercise of religion.

The notice also describes "the particular act or refusal to act that is burdened" in conformity with subsection (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.*

CR 656 (emphasis added). Finally, the notice satisfies subsection (a)(3) by describing the "manner" in which the Commission has "burdened" Judge Hensley's religious freedom. It says that "[t]he Commission's investigation of Judge Hensley and its threatened penalties" are imposing the substantial burdens described in Texas RFRA. CR 656. What more was Judge Hensley's notice supposed to say?

The district court did not contend that Judge Hensley's notice failed to satisfy subsections (a)(1) or (a)(2). But it took issue with Judge Hensley's description of "the manner in which the exercise of governmental authority burdens" her refusal to officiate at same-sex weddings under section 110.006(a)(3), and it claimed that Judge Hensley had failed to "furnish specificity as to the governmental actions of which she complained and as to how she alleged that the Commission's exercise of government authority burdened her rights." Supp. CR 20–21.[9]

The district court's claim is untenable, and the court was flatly wrong to say that section 110.006(a)(3) requires a person to describe the exercise of government authority with "specificity." Supp. CR 20 (¶34(b)). There is *nothing* in section 110.006—or any other provision of the Texas Religious Freedom Restoration Act—that requires "specificity" in the required notice, and there is no case imposing such a requirement. A notice needs only to provide information that the potential defendant needs to "cure" the burden on religious freedom before the plaintiff sues. *See* Tex. Civ. Prac. & Rem.

9. Justice Goodwin's concurrence, by contrast, does not even deign to explain how the letters from Judge Hensley's attorney, which were cited and quoted in Judge Hensley's appellate brief, failed to satisfy the notice requirements of section 110.006(a). *See Hensley*, 2022 WL 16640801, at *8 (Goodwin, J., concurring in the judgment) (App. 65) (asserting, without any explanation, that Judge Hensley "did not comply with [Texas RFRA's] notice provisions"); *see also* Br. of Appellant, *Hensley v. State Comm'n on Judicial Conduct*, No. 03-21-00305-CV, at 17, available at https://bit.ly/3uUr8oU (quoting the letters from Judge Hensley's attorney).

Code § 110.006(c)–(d); *see also* Tex. Civ. Prac. & Rem. Code § 110.006(e) ("A person with respect to whom a substantial burden on the person's free exercise of religion has been cured by a remedy implemented under this section may not bring an action under Section 110.005."). Judge Hensley's notice was more than sufficient to give the Commission an opportunity to "cure" the burdens and avoid suit under sections 110.006(c)–(e). Anyone who reads the notice will understand that the Commission could have avoided a lawsuit and removed the burdens on Judge Hensley's religious freedom by: (1) terminating its investigation; and (2) promising never to discipline Judge Hensley over her refusal to perform same-sex weddings. The Commission chose to plow ahead regardless and invite litigation.

The district court also held that Judge Hensley cannot seek relief in response to anything that occurred after she mailed her notice on February 17, 2019. Supp. CR 20 (¶ 34(a)). The district court appears to believe that a new notice must be sent (and a new lawsuit filed) for every discrete act or incident that burdened Judge Hensley's religious freedom after February 17, 2019, and that a new notice must be sent (and a new lawsuit filed) for every increment of lost income that Judge Hensley sustained after mailing her initial notice to the Commission. *See id.* The district court's stance is untenable. The Texas Religious Freedom Restoration Act explicitly allows plaintiffs to seek *prospective* relief—such as declaratory judgments and injunctions—which serve only to protect a litigant from anticipated *future* harm. If the district court were right to assert that post-notice events can never provide a basis for

relief under Texas RFRA, then no injunction or declaratory judgment could ever be issued in a Texas RFRA lawsuit. Judge Hensley is seeking declaratory and injunctive relief to prevent the Commission from investigating or penalizing her in the future, and a litigant cannot obtain prospective relief by waiting for the expected harm to occur, providing notice to the defendant, and then waiting an additional 60 days before filing suit. Judge Hensley's notice of February 17, 2019, authorizes her to seek relief for any past, present, or future "investigation" or "threatened penalties" arising out of her refusal to perform same-sex weddings.

The district court also denied that Judge Hensley can seek relief for events that occurred before December 17, 2018, because (in the district court's view) those events fall outside the one-year statute of limitations. CR 22 (¶ 34(d)) (citing Tex. Civ. Prac. & Rem. Code § 110.007). But a limitations defense goes to the *merits*, and it cannot be considered on a plea to the jurisdiction. *See City of New Braunfels v. Allen*, 132 S.W.3d 157, 160 (Tex. App.—Austin 2004, no pet.) ("[A] statute of limitations provision . . . is not grounds for a plea to the jurisdiction."); *Bland Independent School District v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000) ("A plea to the jurisdiction is a dilatory plea, the purpose of which is to defeat a cause of action without regard to whether the claims asserted have merit."). The statute of limitations also has no bearing on whether Judge Hensley complied with section 110.006(a). Section 110.006 allows a plaintiff to sue 60 days after providing the required notice—*regardless* of whether the plaintiff's claims are time-barred. The defendants

may still present their limitations argument in a motion for summary judgment, but that has nothing to do with jurisdiction or Judge Hensley's compliance with section 110.006.[10]

Finally, 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."). Judge Hensley is seeking only: (1) prospective relief to prevent the Commission from launching future investigations or imposing future sanctions over her refusal to perform same-sex weddings; and (2) $10,000 in damages for lost income when she stopped officiating weddings in response to the Commission's threats. Judge Hensley is *not* asking for vacatur or reversal of the past sanctions that the Commission imposed, so the dates on which the Commission issued the

10. Section 110.007(b) tolls the statute of limitations for 75 days after the notice is mailed. *See* Tex. Civ. Prac. & Rem. Code § 110.007(b) ("Mailing notice under Section 110.006 tolls the limitations period established under this section until the 75th day after the date on which the notice was mailed."). So Judge Hensley may seek relief under Texas RFRA for any "substantial burden" on her religious freedom that occurred on or after October 3, 2018—not December 17, 2018, as the district court claimed.

"tentative" and "final" public warnings have no relevance to the district court's jurisdiction or the validity of Judge Hensley's notice.

There is one last problem with the district court's jurisdictional analysis surrounding Judge Hensley's pre-suit notice. It is clear that Judge Hensley must comply with section 110.006 before a court can assert jurisdiction over the Texas RFRA claims brought against the Commission itself. *See* Tex. Gov't Code § 311.034; *Morgan v. Plano Independent School District*, 724 F.3d 579, 586, 588 (5th Cir. 2013). But the Court's jurisdiction over the Texas RFRA claims against the individual commissioners does not in any way turn on Judge Hensley's compliance with section 110.006. The jurisdictional significance of section 110.006 comes from section 311.034 of the Texas Government Code, which says:

> 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 (emphasis added). But claims brought against the *commissioners* do not implicate section 311.034, and they do implicate sovereign immunity either. *See Patel*, 469 S.W.3d at 76 ("[U]nlawful acts of officials are not acts of the State."); *Texas Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 393 (Tex. 2011) ("[S]uits for declaratory or injunctive relief against a state official to compel compliance with statutory or constitutional provisions are not suits against the State."). Sovereign immunity is simply inapplicable to *ultra vires* lawsuits against officers, so the district court had

jurisdiction to consider those claims regardless of whether Judge Hensley has complied with section 110.006 or any other "statutory prerequisite" to suit.

C. None Of The Individual Commissioners Have Immunity Under Section 33.006 Of The Texas Government Code

In addition to holding that Judge Hensley's claims were barred by sovereign immunity, the district court went on to hold that the individual commissioners were additionally entitled to immunity under section 33.006 of the Texas Government Code. Supp. CR 24 (¶ 39).

Section 33.006 of the Texas Government Code provides:

> (a) This section applies to:
> (1) the commission;
> (2) a member of the commission; . . .
>
> (b) A person to which this section applies is not liable for an act or omission committed by the person within the scope of the person's official duties.
>
> (c) The immunity from liability provided by this section is absolute and unqualified and extends to any action at law or in equity.

Tex. Gov't Code § 33.006. But section 33.006 confers only an immunity from *liability*, not an immunity from suit. *See* Tex. Gov't Code § 33.006(c) ("The *immunity from liability* provided by this section is absolute and unqualified . . . .") (emphasis added); Tex. Gov't Code § 33.006(b) ("A person to which this section applies *is not liable for* an act or omission committed by the person within the scope of the person's official duties.") (emphasis added); *In re Rose*, 144 S.W.3d 661, 672 n.8 (Tex. Rev. Trib. 2004) (describing section

33.006 as an "absolute quasi-judicial *immunity from liability*") (emphasis added); *Smith v. State Comm'n on Jud. Conduct*, No. 03-04-00376-CV, 2005 WL 3331887, at *4 (Tex. App.—Austin 2005) ("Section 33.006 provides 'absolute and unqualified' *immunity from liability* for acts by the commission, its members and employees, or its executive director committed within the scope of official duties.") (emphasis added); *see also Tarrant County v. Bonner*, 574 S.W.3d 893, 900 (Tex. 2019) (explaining the difference between "immunity from liability" and "immunity from suit"); *Texas Dep't of Transportation v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999) (same). As such, the defendants cannot assert section 33.006 in a plea to the jurisdiction. *See Wichita Falls State Hospital v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2003) ("Unlike immunity from suit, immunity from liability does not affect a court's jurisdiction to hear a case and cannot be raised in a plea to the jurisdiction.").

Even if section 33.006 could be raised in a plea to the jurisdiction, the immunity conferred by section 33.006 is inapplicable. Judge Hensley is alleging that the Commission (and the individual commissioners) are violating Texas RFRA and the state constitution by threatening sanctions over her refusal to perform same-sex weddings,[11] and acts that violate a statute or the state constitution are *not* "within the scope" of the defendants' "official duties." *See* Tex. Gov't Code § 33.006(b) ("A person to which this section applies is not liable for an act or omission committed by the person *within the*

11. CR 609–615 (¶¶ 57–75).

scope of the person's official duties.") (emphasis added). Statutes and constitutional provisions define the boundaries of the Commission's "official duties," and lawsuits that accuse the Commission and its members of transgressing those boundaries do not implicate section 33.006.

D. Judge Hensley's Claims Are Ripe And She Is Not Seeking An Advisory Opinion

The district court's fourth reason for granting the plea to the jurisdiction was that Judge Hensley's claims are "unripe" and that she is seeking an "advisory opinion." Supp. CR 32–36. But Judge Hensley's claim for compensatory damages[12] is indisputably ripe—and a plaintiff who is demanding damages is not seeking an "advisory opinion." The district court made no attempt to explain how a claim for *damages* can be "unripe" or an advisory-opinion request. The district court suggested that Judge Hensley's claims for damages will be barred by issue preclusion and claim preclusion,[13] but that has nothing to do with ripeness or advisory opinions and cannot be considered on a plea to the jurisdiction.

The notion that Judge Hensley's claims for *prospective* relief are unripe or seek advisory opinions is equally meritless. The Commission has issued a public *warning* to Judge Hensley—and a warning (by definition) means that the Commission will sanction Judge Hensley *again* unless she performs same-sex weddings on the same terms as opposite-sex weddings. Judge

12. CR 611 (¶¶ 62–63); CR 615 (¶ 76(b)).
13. Supp. CR 32 (¶ 52).

Hensley has already capitulated to the Commission's threats and stopped performing weddings in response to the Commission's actions. And all of this is costing Judge Hensley income—and will continue costing her income absent relief from this Court. This undeniably imposes "injury" and establishes a "real controversy between the parties." *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001) ("[U]nder Texas law, standing limits subject matter jurisdiction to cases involving a distinct injury to the plaintiff and 'a real controversy between the parties, which . . . will be actually determined by the judicial declaration sought.'" (quoting *Texas Workers' Compensation Comm'n v. Garcia*, 893 S.W.2d 504, 517–18 (Tex. 1995)).

The district court observed that "there is no current or threatened investigation of Judge Hensley." Supp. CR 33 (¶ 56(a)). But that is because Judge Hensley has stopped performing weddings in response to the Commission's threats. That does not eliminate the existence of a controversy. A litigant who self-censors or modifies its behavior in response to threats from the government will always have standing to seek pre-enforcement declaratory or injunctive relief. *See Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). That is especially true when the Commission has *specifically warned* Judge Hensley that she will be disciplined again if she persists in recusing herself from same-sex weddings. Judge Hensley is not required to flout the Commission's warning and expose herself to further disciplinary sanctions as a condition of seeking declaratory relief. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007) ("[W]here threatened action by

government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat").

IV. The District Court Erred In Granting The Plea In Estoppel

The court of appeals did not review the district court's decision to grant the defendants' plea in estoppel because it dismissed Judge Hensley's claims on jurisdictional grounds. *See Hensley*, 2022 WL 16640801, at *7 (App. 63). But this Court should hold that the district court erred in granting the plea in estoppel for three independent reasons. First, the doctrines of issue and claim preclusion do not apply to disciplinary sanctions imposed by the Commission. Second, the defense of res judicata is unavailable because Judge Hensley could not have raised her claims for compensatory damages or declaratory or injunctive relief before the Commission or the special court of review. Third, there is no conceivable collateral-estoppel defense because the Commission never ruled on Judge Hensley's Texas RFRA claim.

A. The Doctrines Of Issue And Claim Preclusion Do Not Apply To Disciplinary Sanctions Imposed By The Commission

The doctrines of issue and claim preclusion apply when issues have been litigated in a previous *court* proceeding. *See Citizens Insurance Co. of America v. Daccach*, 217 S.W.3d 430, 449 (Tex. 2007) ("For res judicata to apply, there must be . . . a prior final judgment on the merits by a *court* of competent jurisdiction") (emphasis added). But the Commission on Judicial Conduct is not a court; it is an agency. *See* Tex. Gov't Code § 33.002(a-1) ("The com-

mission is an agency of the judicial branch of state government and administers judicial discipline."). And the statute establishing the Commission says:

> The commission does not have the power or authority of a court in this state.

Id. By depriving the Commission of the "powers" and "authority" of a court, section 32.002(a-1) precludes its decisions from having res judicata or collateral estoppel effect in future court proceedings.

This Court has recognized that issue and claim preclusion can apply to *some* agency proceedings. *See Coalition of Cities for Affordable Utility Rates v. Public Utility Commission of Texas*, 798 S.W.2d 560, 563 (Tex. 1990) ("Texas has made limited use of *res judicata* in an administrative context."); *Igal v. Brightstar Information Technology Group, Inc.*, 250 S.W.3d 78, 86–87 (Tex. 2008) ("We have, however, held that . . . the administrative orders of *certain* administrative agencies bar the same claims being relitigated in the court system.") (emphasis added). And in determining whether res judicata or collateral estoppel attaches to an agency decision, the courts of this state apply the test enunciated in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966):

> Occasionally courts have used language to the effect that res judicata principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.

Id. at 421–22 (footnotes omitted); *see also Igal*, 250 S.W.3d at 86–87 (endorsing *Utah Construction & Mining*); *Bryant v. L. H. Moore Canning Co.*, 509 S.W.2d 432, 434 (Tex. Civ. App.—Corpus Christi 1974, no writ) ("Texas courts have followed the rationale of [*Utah Construction & Mining*]"). Under this test, an agency decision will have preclusive effect when:

1. The agency "is acting in a judicial capacity";
2. The agency "resolved disputed issues of fact properly before it"; and
3. The parties "had an adequate opportunity to litigate" the disputed issues before the agency.

Utah Construction & Mining, 384 U.S. at 422. The defendants must show that *all three* criteria are satisfied before they can assert issue or claim preclusion. *See Centre Equities, Inc. v. Tingley*, 106 S.W.3d 143, 152 (Tex. App.—Austin 2003, no pet.) ("A movant bringing a motion for summary judgment based on collateral estoppel bears the burden of conclusively proving these elements."). Yet the defendants cannot establish any of them.

1. The Commission Was Not Acting In A Judicial Capacity

Neither res judicata nor collateral estoppel can apply unless the Commission was "acting in a judicial capacity." *See Utah Construction & Mining*, 384 U.S. at 422; *see also McMillan v. Texas Natural Resources Conservation Commission*, 983 S.W.2d 359, 363 (Tex. App.—Austin 1998, pet. denied) ("[T]he doctrine [of res judicata] may apply by analogy to final decisions made by administrative agencies *in their adjudication of contested cases*, as opposed to their other decisions and actions.") (emphasis added). The Commission was

not "acting in a judicial capacity" when it sanctioned Judge Hensley because it was not resolving a contested case between adverse parties. This was an inquisition, not an adjudication, and the Commission initiated the investigation of Judge Hensley and haled her before the agency. There was no opposing litigant, and the Commission was not purporting to referee a dispute between two opposing parties.

In addition, the statute establishing the Commission unequivocally states that the Commission "does not have the power or authority of a court in this state." Tex. Gov't Code § 33.002(a-1). It is hard to fathom how an entity can act "in a judicial capacity" when the law explicitly denies it the "powers" and "authorities" of a court. And it is even harder to understand how the Commission can claim that it acts "in a judicial capacity" without defying the statute that provides for its existence.

2. Issue and Claim Preclusion Can Extend Only To The Commission's Factual Findings And Not Its Legal Conclusions

Utah Construction & Mining holds that preclusion doctrines will apply "[w]hen an administrative agency is acting in a judicial capacity *and resolved disputed issues of fact* properly before it." *Utah Construction & Mining*, 384 U.S. at 422 (emphasis added). Nothing in *Utah Construction & Mining* suggests that an agency's *conclusions of law* should receive preclusive effect in a subsequent court proceeding. Whether Texas RFRA protects Judge Hensley from disciplinary action over her refusal to perform same-sex weddings is a

question of law, not an issue of fact, and the Commission's resolution (or purported resolution) of *that* issue does not trigger issue or claim preclusion under *Utah Construction & Mining*.

3. There Were No Opposing "Parties" To "Litigate" The Texas RFRA Issues Before The Commission

Utah Construction & Mining also requires that "the parties have had an adequate opportunity to litigate" the disputed issue before the agency. *See Utah Construction & Mining*, 384 U.S. at 422. The Commission cannot satisfy this criterion because there was no opposing party to "litigate" the Texas RFRA issues alongside Judge Hensley. This was an inquisitorial proceeding rather than an adversarial one, and there was never an opposing party who challenged Judge Hensley's Texas RFRA argument or provided an argument for Judge Hensley to respond to. So the Texas RFRA issues were not "litigated" by adverse "parties"; they were merely presented to the Commission by Judge Hensley.

* * *

The district court did not address *Utah Construction & Mining*, and it simply assumed that every agency proceeding triggers issue and claim preclusion even though that is assuredly not the law. Supp. CR 38 (¶ 59(a)). The district court also cited cases that disallow collateral attacks on agency orders, *id.*, but none of that is relevant because Judge Hensley is *not* collaterally attacking the public warning and is *not* seeking to vacate or set aside the sanction. *See supra* at 14–15. The district court needed to explain how the Com-

mission's sanction qualifies for preclusion under *Utah Construction & Mining*, and it made no attempt to do so.

B. Res Judicata Is No Defense Because Judge Hensley Could Not Have Asserted Claims For Compensatory Damages Or Declaratory Or Injunctive Relief Before The Commission Or The Special Court Of Review

The doctrine of res judicata applies only when a litigant *could* have raised its claims in an earlier proceeding. *See Compania Financiara Libano, S.A. v. Simmons*, 53 S.W.3d 365, 367 (Tex. 2001) (res judicata inapplicable to claims that "could not have been brought in the prior suit"); *Getty Oil Co. v. Insurance Co. of North America*, 845 S.W.2d 794, 801 (Tex. 1992) ("Since Getty could not have asserted its present claims against INA or Youell in the [previous] suit, it is not now precluded by res judicata from bringing these claims."). Judge Hensley could not have asserted *any* of her claims for compensatory damages and declaratory and injunctive relief before the Commission because the Commission has no authority to award that relief. Neither does the special court of review, whose powers extend only to *reviewing* the Commission's disciplinary actions. *See* Tex. Gov't Code § 33.001(a)(11); Tex. Gov't Code § 33.034. The *only* way Judge Hensley can obtain the remedies described in section 110.005 is to sue the Commission (and the commissioners) in court.

Judge Hensley could have asserted Texas RFRA as a *defense* against the Commission's disciplinary actions—and she did assert that defense before the Commission. *See* Tex. Civ. Prac. & Rem. Code § 110.004 ("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"); Supp. CR 9 (¶ 12). And Judge Hensley could have asserted a Texas RFRA defense before the special court of review. But Judge Hensley could not have asserted *an affirmative claim for relief* under Texas RFRA—and she could not have obtained *any* remedy described in section 110.005 from the Commission or the special court of review. The only "relief" that Judge Hensley could have obtained in those proceedings was a vacatur of the Commission's "public warning"—and Judge Hensley is not seeking that relief in this litigation. *See supra* at 14–15. So there is no "claim" that Judge Hensley is asserting in this lawsuit that could have been presented to the Commission or the special court of review.

The district court did not assert that the Commission or the special court of review could have awarded Judge Hensley damages, or any of the declaratory or injunctive relief described in section 110.005. And for good reason: The Commission cannot award damages or injunctive relief against itself, and it has no authority to render declaratory judgments. The special court of review is equally powerless to award this relief; it can only *review* the Commission's disciplinary actions. *See* Tex. Gov't Code § 33.001(a)(11); Tex. Gov't Code § 33.034. So the district court's res judicata argument, if accepted by this Court, would leave Judge Hensley unable to obtain any of the remedies in section 100.005, even though the statute says Judge Hensley is "entitled to recover" *all* of that relief if the defendants have violated Texas RFRA.

See Tex. Civ. Prac. & Rem. Code § 110.005(a) ("Any person . . . who successfully asserts a claim or defense under this chapter is *entitled to recover*: (1) declaratory relief under Chapter 37; (2) injunctive relief to prevent the threatened violation or continued violation; (3) compensatory damages for pecuniary and nonpecuniary losses; and (4) reasonable attorney's fees, court costs, and other reasonable expenses incurred in bringing the action.") (emphasis added). The district court would allow Judge Hensley to assert Texas RFRA only as a defense before the Commission and the special court of review—where Texas RFRA can be used only to stop the Commission from imposing a disciplinary sanction—and then insist that Judge Hensley is forever barred from obtaining the affirmative relief required by section 100.005. This stance is incompatible with the statutory language. And it is incompatible with res judicata, which applies only when a litigant *could* have raised its claims for damages and declaratory and injunctive relief in a previous court proceeding. *See Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996) ("Res judicata precludes relitigation of claims that have been finally adjudicated, or that arise out of the same subject matter *and that could have been litigated in the prior action.*") (emphasis added).

C. Collateral Estoppel Is No Defense Because The Commission Ignored And Did Not Rule On Judge Hensley's Texas RFRA Defense

Issue preclusion (or collateral estoppel) applies only when an issue was "actually decided" in an earlier proceeding. *See Witherspoon v. United States*,

838 F.2d 803, 806 (5th Cir. 1988) ("[C]ollateral estoppel bars the plaintiffs from relitigating against the United States, or against any other defendant, issues that were actually decided in the earlier action"); *Texas Employers' Insurance Ass'n v. Jackson*, 862 F.2d 491, 500 (5th Cir. 1988) ("Collateral estoppel, or 'issue preclusion,' requires, among other things, that the allegedly precluded issue have been 'actually litigated and determined' in the prior action.") (citation omitted); *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 521 (Tex. 1998) ("If a cause of action in the second lawsuit involves an element *already decided* in the first lawsuit, that cause of action is barred.") (emphasis added). And the defendants must show that the Commission "actually decided" the elements of Judge Hensley's Texas RFRA claim. *See 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.").

Yet one will search the Commission's findings and conclusions in vain for anything that even acknowledges Judge Hensley's Texas RFRA defense—and there is *nothing* in the Commission's findings and conclusion that purports to decide the Texas RFRA issue. CR 619–620. The Commission made six "findings of fact," all of which are accurate and uncontested in this litigation. CR 619–620. The remainder of the document says:

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.

CR 620. There is no mention of Texas RFRA, no recognition that Texas RFRA trumps Canon 4A(1),[14] no ruling on whether the sanction "substantially burdens" Judge Hensley's exercise of religion,[15] and no ruling on whether the sanction represents the "least restrictive means" of furthering a "compelling governmental interest."[16] The Commission *ignored* Judge Hensley's Texas RFRA argument and ruled that her putative violation of Canon 4A(1) was enough to justify the "public warning."

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14. *See* Tex. Civ. Prac. & Rem. Code § 110.002(a) ("This chapter applies to any ordinance, rule, order, decision, practice, or other exercise of governmental authority."); 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.").
15. *See* Tex. Civ. Prac. & Rem. Code § 110.003(a).
16. *See* Tex. Civ. Prac. & Rem. Code § 110.003(b).

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. The "relevant standard" portion of the Commission's ruling mentions and recites *only* Canon 4A(1), without acknowledging that Texas RFRA governs the Commission's interpretations and enforcement of the canon. CR 620. And the "conclusion" section says only that Judge Hensley has violated Canon 4A(1) by "casting doubt on her capacity to act impartially to persons appearing before her as a judge." *Id.* A conclusion that Judge Hensley has violated Canon 4A(1) does *not* entail a rejection of Judge Hensley's Texas RFRA argument, because a judge who violates Canon 4A(1) is *still* protected by Texas RFRA if enforcing the canon would "substantially burden" the free exercise of religion and fail to advance a "compelling governmental interest." *See* Tex. Civ. Prac. & Rem. Code § 110.003(a)–(b). The 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. *See 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.").

V. Judge Hensley Is Entitled To Summary Judgment

Neither the district court nor the court of appeals ruled on Judge Hensley's motion for summary judgment after they granted the plea to the jurisdiction. CR 762–763. But Judge Hensley is entitled to summary judgment, as there are no disputed issues of material fact and Judge Hensley is entitled to judgment as a matter of law. The Court should remand with instructions to enter judgment for Judge Hensley.

A. Judge Hensley Is Entitled To Summary Judgment On Her Texas RFRA Claims

The defendants violated Texas RFRA by investigating and punishing Judge Hensley for recusing herself from officiating at same-sex weddings. And the defendants continue to violate Texas RFRA by threatening Judge Hensley with future discipline if she persists in operating the recusal-and-referral system that she had established in the wake of *Obergefell*.

1. The Defendants Are Substantially Burdening Judge Hensley's Free Exercise of Religion

The Texas Religious Freedom Restoration Act prohibits a government agency from substantially burdening a person's free exercise of religion, unless that burden represents the least restrictive means of advancing a compelling governmental interest. *See* Tex. Civ. Prac. & Rem. Code § 110.003(a) ("[A] government agency may not substantially burden a person's free exercise of religion."). The "free exercise of religion" is defined to include "an

act or refusal to act that is substantially motivated by sincere religious belief." Tex. Civ. Prac. & Rem. Code § 110.001(1).

Judge Hensley's unwillingness to perform same-sex weddings is motivated by her Christian faith and her belief in the Bible as the inerrant Word of God. CR 535 (¶ 37). Judge Hensley sincerely believes that officiating a same-sex marriage ceremony would make her complicit in behavior that is condemned by the Bible and millennia of Christian teaching. CR 535 (¶ 37).

Judge Hensley's *belief* that officiating a same-sex marriage ceremony would make her complicit in conduct that violates her religious beliefs establishes a "sincere religious belief" under Texas RFRA. The Supreme Court's rulings in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), and *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020), hold that courts *must* accept a religious objector's complicity-based objections to contraceptive coverage—no matter how implausible those objections may seem to an opposing party or a federal judge. A court's *only* task is to determine whether a complicity-based objection is sincere:

> [I]n these cases, the Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and *it is not for us to say that their religious beliefs are mistaken or insubstantial*. Instead, our "narrow function . . . in this context is to determine" whether the line drawn reflects "an honest conviction," and there is no dispute that it does.

Hobby Lobby, 573 U.S. at 725 (emphasis added) (citation omitted); *id.* at 724 ("[C]ourts have no business addressing . . . whether the religious belief as-

serted in a RFRA case is reasonable." (parentheses omitted)).[17] The Court emphatically reaffirmed this stance in *Little Sisters*, declaring that courts "*must* accept the sincerely held complicity-based objections of religious entities" no matter how "attenuated" the complicity may seem:

> [I]n *Hobby Lobby*, . . . we made it abundantly clear that, under RFRA, the Departments must accept the sincerely held complicity-based objections of religious entities. That is, they could not "tell the plaintiffs that their beliefs are flawed" because, in the Departments' view, "the connection between what the objecting parties must do . . . and the end that they find to be morally wrong . . . is simply too attenuated."

Little Sisters, 140 S. Ct. at 2383 (quoting *Hobby Lobby*, 573 U.S. at 723–24).

Judge Hensley sincerely believes that officiating at a same-sex marriage ceremony would make her complicit in conduct forbidden by the Bible. CR 535 (¶ 37). That sincerely held religious belief, combined with governmental pressure to violate that belief (which may be as little as a five-dollar fine),[18] is all that is needed to establish a "substantial burden" under *Hobby Lobby* and *Little Sisters*. The defendants have told Judge Hensley that she must either: (a) officiate at same-sex marriage ceremonies in violation of her Christian

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17. *See also* Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake*, 82 U. Chi. L. Rev. 1897, 1900 (2015) ("[T]he mere fact that Hobby Lobby *believed* that it would be complicit, no matter how idiosyncratic its belief, sufficed to qualify it for an exemption." (emphasis in original)).
18. *See Wisconsin v. Yoder*, 406 U.S. 205, 208 (1972) ("[R]espondents were charged, tried, and convicted of violating the compulsory-attendance law in Green County Court and were fined the sum of $5 each").

faith; or (b) stop performing weddings entirely and forfeit thousands of dollars in annual income. The Supreme Court has long recognized that the imposition of such a choice "substantially burdens" the free exercise of religion. As the Court explained in *Sherbert v. Verner*, 374 U.S. 398 (1963):

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Id. at 404; *see also Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 717–18 (1981) ("Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."); *Hobby Lobby*, 573 U.S. at 710 ("[A] law that 'operates so as to make the practice of . . . religious beliefs more expensive' in the context of business activities imposes a burden on the exercise of religion." (quoting *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961)).

2. The Commission's Punishment Of Judge Hensley And Its Threats To Impose Further Discipline Do Not Further A "Compelling Governmental Interest"

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—do not further a "compelling governmental interest." *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 the inconveniences that Judge Hensley's referral system might impose on same-sex couples. Indeed, the Commission's actions have the perverse effect of imposing greater inconveniences on same-sex and opposite-sex couples seeking low-cost weddings. Same-sex couples no longer have the benefit of Judge Hensley's referral system, and opposite-sex couples have one fewer option from an already short (and shrinking) list of low-cost weddings officiants in Waco. CR 532 (¶¶ 18–20).

There is also no "compelling governmental interest" in preventing judges or justices of the peace from politely and respectfully expressing religious beliefs that oppose 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.

There are also thousands of judges and justices of the peace in Texas who publicly belong to churches that refuse to recognize same-sex marriages—including the Roman Catholic Church, the Southern Baptist Convention, 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 same-sex marriage for religious reasons, on the ground that this somehow casts reasonable doubt on the judge's "impartiality" toward homosexual litigants. No different result should obtain when Judge Hensley expresses religious

opposition to same-sex marriage by politely and respectfully recusing herself from officiating at same-sex weddings.

3. Judge Hensley Is Entitled To $10,000 In Damages, Along With Declaratory And Injunctive Relief And Costs And Attorneys' Fees

Section 110.005 of the Texas Civil Practice and Remedies Code says that a person who successfully asserts a claim or defense under Texas RFRA is "entitled to recover":

> (1) declaratory relief under Chapter 37;
>
> (2) injunctive relief to prevent the threatened violation or continued violation;
>
> (3) compensatory damages for pecuniary and nonpecuniary losses; and
>
> (4) reasonable attorney's fees, court costs, and other reasonable expenses incurred in bringing the action.

Tex. Civ. Prac. & Rem. Code § 110.005(a). Compensatory damages are capped at $10,000,[19] and the undisputed facts show that Judge Hensley has lost at least $10,000 in income on account of the defendants' Texas RFRA violations. CR 535 (¶ 35). Judge Hensley is also entitled to declaratory and injunctive relief that will prevent the Commission and its members from investigating or sanctioning her for recusing herself from officiating at same-sex weddings.

19. Tex. Civ. Prac. & Rem. Code § 110.005(b).

B. Judge Hensley Is Entitled To Summary Judgment On Her Remaining Claims

Judge Hensley is also entitled to a declaratory judgment that her referral-and-recusal does not violate the code of judicial conduct or the state constitution.[20] The Commission purported to sanction 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 premarital sex—has compromised his impartiality toward litigants who engage in those behaviors. It may not be as fashionable to publicly disapprove same-sex marriage 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 is entitled to a declaratory judgment that a judge does not violate Canon 4A by politely and respectfully expressing religious opposition to homosexual behavior or same-sex marriage.

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20. *See* Tex. Civ. Prac. & Rem. Code § 110.005(a) (authorizing "declaratory relief under Chapter 37").

Judge Hensley is also entitled to 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 or same-sex marriage, any more than they may be used to prevent judges from expressing opposition to pre-marital sex or adultery. 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.").

The Court should also declare that Judge Hensley's referral-and-recusal system is consistent with 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 . . . ." The Commission's Tentative Public Warning of January 25, 2019, accused Judge Hensley of vio-

lating Canon 3B(6), but 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 (or any other judge) under Canon 3B(6) for recusing herself from same-sex weddings.

Finally, 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." The Court should declare that Judge Hensley's decision to recuse herself from officiating at same-sex weddings and her desire to continue her recusal-and-referral system 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."

Conclusion

The petition for review should be granted, and the judgment of the court of appeals should be reversed. The case should be remanded to the district court with instructions to enter judgment for Judge Hensley.

Respectfully submitted.

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Dated: April 10, 2023

No. 21-1145

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

APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

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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

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

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED NOVEMBER 3, 2022

NO. 03-21-00305-CV

Dianne Hensley, Appellant

v.

State Commission on Judicial Conduct; David Schenck, in his official capacity as Chair of the State Commission on Judicial Conduct; Janis Hold, in her official capacity as Vice-Chair of the State Commission on Judicial Conduct; Frederick C. Tate, in his official capacity as Secretary of the State Commission on Judicial Conduct; and David C. Hall, David M. Petronella, Sujeeth B. Draksharam, Ronald E. Bunch, Valerie Ertz, M. Patrick Maguire, Clifton Roberson, Lucy M. Hebron, Gary L. Steel, and Katy P. Ward, in their official capacities as Members of the State Commission on Judicial Conduct, Appellees

APPEAL FROM THE 459TH DISTRICT COURT OF TRAVIS COUNTY
BEFORE JUSTICES GOODWIN, BAKER, AND SMITH
AFFIRMED -- OPINION BY JUSTICE BAKER
CONCURRING OPINION BY JUSTICE GOODWIN

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. Appellant shall pay all costs relating to this appeal, both in this Court and in the court below.

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-21-00305-CV

Dianne Hensley, Appellant

v.

State Commission on Judicial Conduct; David Schenck, in his official capacity as Chair of the State Commission on Judicial Conduct; Janis Hold, in her official capacity as Vice-Chair of the State Commission on Judicial Conduct; Frederick C. Tate, in his official capacity as Secretary of the State Commission on Judicial Conduct; and David C. Hall, David M. Petronella, Sujeeth B. Draksharam, Ronald E. Bunch, Valerie Ertz, M. Patrick Maguire, Clifton Roberson, Lucy M. Hebron, Gary L. Steel, and Katy P. Ward, in their official capacities as Members of the State Commission on Judicial Conduct, Appellees[1]

FROM THE 459TH DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-20-003926, THE HONORABLE JAN SOIFER, JUDGE PRESIDING

MEMORANDUM OPINION

Dianne Hensley appeals from the trial court's order dismissing her suit against the State Commission on Judicial Conduct (the Commission) and David Schenck, in his official capacity as Chair of the State Commission on Judicial Conduct; Janis Hold, in her official capacity as Vice-Chair of the State Commission on Judicial Conduct; Frederick C. Tate, in his official capacity as Secretary of the State Commission on Judicial Conduct; and David C. Hall, David M. Petronella, Sujeeth B. Draksharam, Ronald E. Bunch, Valerie Ertz, M. Patrick Maguire, Clifton Roberson, Lucy M. Hebron, Gary L. Steel, and Katy P. Ward, in their official

[1] Pursuant to Rule 7.2 of the Texas Rules of Appellate Procedure, the current officers and members of the State Commission on Judicial Conduct have been automatically substituted for its former officers and members.

capacities as Members of the State Commission on Judicial Conduct (collectively "the Officials"). Hensley brought claims against the Commission and the Officials alleging that they violated the Texas Religious Freedom Restoration Act, *see* Tex. Civ. Prac. & Rem. Code § 110.005 (the TRFRA), and acted ultra vires regarding the Commission's disciplinary action against her. Hensley also sought declaratory relief under the Texas Uniform Declaratory Judgments Act. *See id.* §§ 37.001-.011 (the UDJA). On the Commission's and the Officials' plea to the jurisdiction and, in the alternative, plea in estoppel, the trial court dismissed Hensley's claims, concluding that (1) Hensley failed to exercise her exclusive statutory remedy for issues related to the disciplinary proceeding; (2) Hensley failed to comply with jurisdictional statutory notice requirements governing her claims under the TRFRA; (3) sovereign immunity barred her claims; (4) her claims were barred by statutory immunity under Texas Government Code section 33.006, *see* Tex. Gov't Code § 33.006; (5) her claims were not ripe; (6) her claims sought impermissible advisory opinions; and (6) her claims were barred by the doctrine of res judicata. We will affirm.

BACKGROUND

Hensley is a justice of the peace in Waco, Texas. After a Waco newspaper published an article about Hensley, which included an interview with her, the Commission sent Hensley a letter of inquiry asking her to respond to written questions. The Commission's questions inquired into Hensley's policy, from the time she assumed the bench until the date of the inquiry, regarding performing wedding ceremonies for same-sex couples. The Commission also asked Hensley to confirm whether the Waco newspaper article, which was titled "No courthouse weddings in Waco for same-sex couples, 2 years after Supreme Court ruling" and

included quotes attributed to Hensley regarding the issue of performing same-sex marriages, accurately and fairly represented her statements to the media on that issue. The Commission also asked Hensley to discuss whether, in her opinion, refusing requests to perform same-sex marriages but continuing to perform marriage ceremonies for heterosexual couples violated Canons 2(A), 3B(5), or 3B(6) of the Texas Code of Judicial Conduct. In her June 20, 2018 response, Hensley included contentions that her conduct was protected by the TRFRA.

In January 2019, the Commission wrote Hensley and identified two alleged violations of the Texas Code of Judicial Conduct and one alleged violation of the Texas Constitution's restrictions on judicial conduct. An attached unsigned "tentative Public Warning" identified (1) an alleged violation of Canon 3B(6), which prohibits bias and prejudice in the performance of judicial duties; (2) an alleged violation of Canon 4A(1), which prohibits conduct in extra-judicial activities that would cast reasonable doubt on the judge's capacity to act impartially; and (3) an alleged violation of Article V, Section 1-a(6)(A) of the Texas Constitution, which prohibits "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." The Commission gave Hensley the option of either accepting the tentative Public Warning or appearing before the Commission for a hearing. Hensley elected to appear for a hearing, and the tentative Public Warning never became effective and remained confidential by statute.[2]

At an August 2019 hearing before the Commission, Hensley appeared and was represented by three attorneys. Hensley testified under oath to the Commission's questions.

[2] The tentative Public Warning was not made public before the conclusion of the Commission's disciplinary proceedings and only became public when Hensley attached a copy of it as an exhibit to her pleadings in the underlying trial court proceedings.

Hensley argued that her conduct was protected by the TRFRA and disputed that her conduct constituted a violation of the Texas Constitution or of Canons 3B(6) or 4A(1). She also asserted that she was protected from discipline by Article 1, Section 8 of the Texas Constitution. *See* Tex. Const. art 1, § 8 (providing that "[e]very person shall be at liberty to speak, write or publish his opinions on any subject" and that "no law shall ever be passed curtailing the liberty of speech or of the press"). After the hearing, the Commission issued a Public Warning on November 12, 2019. The Public Warning included the following 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.

Based on the record before it and these findings, the Commission determined that 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(1) of the Texas Code of Judicial Conduct."

The Public Warning was sent to Hensley's counsel on November 14, 2019, after which Hensley had 30 days to file an appeal. *See* Tex. Gov't Code § 33.034(a) (judge who receives sanction or censure by Commission entitled to review of Commission's decision); (b) (judge must file written request for appointment of special court of review with chief justice of supreme court not later than 30th day after date on which Commission issues its decision); (e) (providing for review by trial de novo as that term is used in appeal of cases from justice to county court). Hensley did not file an appeal. Instead, she filed the underlying suit in December 2019.[3]

In her petition, Hensley asserted that the Commission violated her rights under the TRFRA by punishing her for "recusing herself from officiating at same-sex weddings, in accordance with the commands of her Christian faith." Hensley asserted that "the Commission's investigation and punishment" of her for "acting in accordance with the commands of her Christian faith" substantially burdened her free exercise of religion. Hensley also asserted that "the Commission's threat to impose further discipline on Judge Hensley if she persists in recusing herself from officiating at same-sex weddings" also substantially burdens her free exercise of religion. Hensley alleged that "the Commission's investigation and punishment" of her and "its threat to impose further discipline" on her "if she persists in recusing herself from officiating at same-sex weddings" further no compelling governmental interest. Hensley asserted that the Commission's determination that her actions violated Canon 4A(1) because they

[3] The underlying suit was originally filed in McLennan County but, after a contested hearing, venue was transferred to Travis County District Court.

cast reasonable doubt on her capacity to act impartially as a judge was erroneous because, she contends, "disapproval of an individual's *behavior* does not evince bias toward that individual as a *person* when they appear in court." Hensley described the Commission's determination as "absurd" because, according to her, the Commission "equate[d] 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." She asserted that under this reasoning, "no judge who publicly opposes murder or rape could be regarded as impartial when an accused murderer or rapist appears in his court." Hensley alleged that, pursuant to the TRFRA, she was entitled to declaratory and injunctive relief, compensatory damages, and attorneys' fees. *See* Tex. Civ. Prac. & Rem. Code § 110.005 (person who successfully asserts claim or defense under TRFRA entitled to declaratory relief under UDJA, injunctive relief, compensatory damages, and reasonable attorneys' fees).

Hensley sought additional declaratory relief under the UDJA. Specifically, Hensley sought declarations that (1) a judge does not violate Canon 4A by merely expressing disapproval of homosexual behavior or same-sex marriage or by belonging to or supporting a church or charitable organization that opposes homosexual behavior or same-sex marriage (Declaration 1); (2) the officiating of weddings is not a "judicial duty" under Canon 3B(6) (Declaration 2); (3) Hensley's decision to recuse herself from officiating at same-sex weddings does not constitute "willful or persistent conduct clearly inconsistent with the proper performance of [a judge's] duties or casts public discredit upon the judiciary or administration of justice" such that it violates article V, section 1-a(6)(A) of the Texas Constitution (Declaration 3); and (4) the Commission's interpretation of Canon 4A violates article I, section 8 of the Texas

Constitution (Declaration 4). Hensley also sought this declaratory relief against the Officials based on her assertion that they had acted ultra vires.

The Commission and the Officials filed a plea to the jurisdiction and, in the alternative, a plea in estoppel. They argued that Hensley's claims should be dismissed for lack of jurisdiction because she failed to utilize the exclusive statutory review process provided by the Legislature to challenge the Commission's determination to issue the Public Warning. They also asserted that sovereign immunity bars Hensley's claims brought under the TRFRA because she failed to comply with the TRFRA's statutory notice requirements. The Commission and the Officials argued further that sovereign immunity bars Hensley's UDJA claims and that she failed to plead any ultra vires conduct by the Officials. They also maintained that, to the extent Hensley seeks declarations about her potential future conduct, the court lacks jurisdiction because those issues are not ripe for adjudication and Hensley is seeking impermissible advisory opinions. In the alternative, the Commission and the Officials asserted that Hensley's claims should be dismissed because they are barred by the doctrines of res judicata and collateral estoppel.

After an evidentiary hearing, the trial court granted the plea to the jurisdiction, concluding that the court lacked jurisdiction over Hensley's claims concerning issues pertinent to her disciplinary proceeding because she failed to exercise her exclusive statutory remedy. The trial court concluded that it lacked jurisdiction over Hensley's claims under the TRFRA because she failed to strictly comply with jurisdictional statutory notice requirements. The trial court also concluded that Hensley's claims were barred by sovereign immunity and statutory immunity under section 33.006 of the Texas Government Code, were not ripe for adjudication and sought

impermissible advisory opinions, and were barred by the doctrine of res judicata. Hensley then perfected this appeal.

DISCUSSION

Standard of Review

A plea to the jurisdiction is a procedural mechanism "through which a party may challenge a trial court's authority to decide the subject matter" of a claim. *Texas Dep't of State Health Servs. v. Balquinta*, 429 S.W.3d 726, 737 (Tex. App.—Austin 2014, pet. dism'd). Because whether a court has subject-matter jurisdiction is a question of law, we review de novo a trial court's ruling on a plea to the jurisdiction. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225 (Tex. 2004).

A plea to the jurisdiction may challenge whether the plaintiff has alleged facts that affirmatively demonstrate a court's jurisdiction to hear the case, the existence of those jurisdictional facts, or both. *Texas Dep't of Transp. v. Lara*, 625 S.W.3d 46, 52 (Tex. 2021). When the jurisdictional plea challenges the pleadings, we determine whether the plaintiff's pleadings allege facts affirmatively demonstrating subject-matter jurisdiction. *Miranda*, 133 S.W.3d at 226. In making this assessment, we construe the plaintiff's pleadings liberally, taking all assertions as true, and look to the pleader's intent. *Texas Dep't of Crim. Justice v. Rangel*, 595 S.W.3d 198, 205 (Tex. 2020). Allegations found in pleadings may affirmatively demonstrate or negate the court's jurisdiction. *City of Waco v. Kirwan*, 298 S.W.3d 618, 622 (Tex. 2009). If the pleadings affirmatively negate the existence of jurisdiction, the plea may be granted without affording the plaintiff an opportunity to replead. *Miranda*, 133 S.W.3d at 226.

When the plea challenges the existence of jurisdictional facts, we must move beyond the pleadings and consider evidence when necessary to resolve the jurisdictional issues. *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 770 (Tex. 2018); *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554-55 (Tex. 2000). When those challenged jurisdictional facts also implicate the merits of the plaintiff's claim, as in this case, the plaintiff's burden mirrors that of a traditional motion for summary judgment. *Lara*, 625 S.W.3d at 46 (quoting *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 634 (Tex. 2012)). Consequently, we review the relevant evidence in the light most favorable to the plaintiff to determine whether a genuine issue of material fact exists. *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019) (citing *Miranda*, 133 S.W.3d at 226). If the evidence creates a fact issue regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder. *Miranda*, 133 S.W.3d at 227-28. But if the relevant evidence is undisputed or does not raise a fact question on jurisdiction, we rule on the plea as a matter of law. *See id.* at 228.

The State Commission on Judicial Conduct is a constitutionally created agency composed of judges, attorneys, and citizens from the State of Texas. *See* Tex. Const. art. V, § 1-a(2); Tex. Gov't Code § 33.002(a-1) ("The commission is an agency of the judicial branch of state government and administers judicial discipline."). As a state agency, the Commission is entitled to sovereign immunity. *See Miranda*, 133 S.W.3d at 224; *Hagstette v. State Comm'n on Jud. Conduct*, No. 01-19-00208-CV, 2020 WL 7349502, at *4 (Tex. App.—Houston [1st Dist.] Dec. 15, 2020, no pet.) (mem. op.); *see also* Tex. Gov't Code § 33.006 (providing that commission and its members are immune from liability for acts or omissions committed by person within scope of person's official duties). When a governmental entity challenges

jurisdiction on immunity grounds, the plaintiff's burden of affirmatively demonstrating jurisdiction includes establishing a waiver of immunity. *Swanson*, 590 S.W.3d at 550.

TRFRA Claims

We first consider whether the trial court erred by dismissing Hensley's TRFRA claims that relate to the Commission's investigation and determination, after conducting a hearing, to issue a Public Reprimand. Hensley's claims reduce to two complaints. First, she contends that the Commission's investigating and issuing a Public Reprimand were improper because they violated her rights under the TRFRA. Second, she takes issue with the Commission's determination that her conduct did in fact violate Canon 4A. Both these complaints challenge an agency's determination after a hearing. With regard to Hensley's complaint that the Commission's investigation and decision to issue a Public Warning violated her rights under the TRFRA, we note that Hensley could have, and did, raise this as a defense to the Commission's action. *See* Tex. Civ. Prac. & Rem. Code § 110.004 ("A person whose free exercise of religion has been substantially burdened in violation of Section 110.003 or 110.0031 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 another person."). By issuing the Public Warning in the face of this asserted defense, the Commission implicitly found that its investigation and subsequent Public Warning did not substantially burden Hensley's free exercise of religion. Similarly, regarding whether her conduct violated Canon 4A, the Commission determined that it did. Rather than pursue an appeal of the Commission's determination—the avenue established by the Legislature to obtain review of Commission decisions and set forth in Texas Government Code section 33.034—Hensley filed a proceeding

in district court asserting the same argument she presented to the Commission and requesting that the district court declare that the Commission was incorrect in its determinations that (1) Hensley's conduct violated the Code of Judicial Conduct and (2) that its investigation and public reprimand did not substantially burden her free exercise of religion so as to violate the TRFRA. The trial court correctly dismissed this impermissible collateral attack on the Commission's order. *See 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."); *see also Browning v. Prostok*, 165 S.W.3d 336, 346 (Tex. 2005) ("A collateral attack is an attempt to avoid the binding force of a judgment in a proceeding not instituted for the purpose of correcting, modifying, or vacating the judgment, but in order to obtain some specific relief which the judgment stands as a bar against.").

Also pursuant to the TRFRA, Hensley sought injunctive relief "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." This injunctive relief is not available to Hensley under the TRFRA. The statute provides that a person who *successfully* asserts a claim or defense under the TRFRA is entitled to injunctive relief to prevent the threatened or continued violation. *See* Tex. Civ. Prac. & Rem. Code § 110.005(a)(2). In this case, the trial court properly dismissed Hensley's claims brought under the TRFRA and, consequently, she has not successfully asserted a claim under that statute that would entitle her to injunctive relief.

The trial court also properly dismissed Hensley's claims for relief under the TRFRA that were based on her allegations that the Commission violated her right to religious

freedom by "threatening to impose further discipline if she persists in recusing herself from officiating at same-sex weddings." The undisputed evidence, presented at the evidentiary hearing through the testimony of the Commission's Executive Director, was that, since issuing the Public Warning, the Commission has not initiated any new investigation of Hensley, has not initiated any new disciplinary proceeding involving Hensley, and has not communicated to Hensley any threat that any new investigation or disciplinary proceeding is planned or imminent. Because the evidence establishes that the Commission has in fact *not* threatened further disciplinary action against Hensley, she has failed to carry her burden of demonstrating that the TRFRA waives the Commission's immunity for her claim that threats of further discipline by the Commission have burdened her free exercise of religion. *See id.* §§ 111.005 (person who successfully asserts claim under TRFRA entitled to declaratory and injunctive relief), .008(a) (providing that sovereign immunity to suit is waived to extent of liability created by section 110.005).

UDJA Claims

In addition to the declarations she requested pursuant to the TRFRA, Hensley also sought Declarations 1, 2, 3, and 4 under the UDJA. The trial court dismissed these claims for lack of jurisdiction on several grounds, including that they were barred by sovereign immunity. Because it is dispositive, we first consider whether the trial court correctly concluded that Hensley's UDJA claims were barred by sovereign immunity. The UDJA provides that "[a] person . . . whose rights, status, or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and may obtain a declaration of rights, status, or other legal relations thereunder." *Id.* § 37.004(a). The

Texas Supreme Court has explained that "the UDJA does not enlarge the trial court's jurisdiction but is 'merely a procedural device for deciding cases already within a court's jurisdiction.'" *Texas Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621-22 (Tex. 2011) (per curiam) (quoting *Texas Parks & Wildlife Dep't v. Sawyer Tr.*, 354 S.W.3d 384, 388 (Tex. 2011)). Accordingly, the UDJA "is not a general waiver of sovereign immunity." *Sawyer Tr.*, 354 S.W.3d at 388. Instead, the UDJA only "waives sovereign immunity in particular cases." *Sefzik*, 355 S.W.3d at 622. "For example, the state may be a proper party to a declaratory judgment action that challenges the validity of a statute." *Id.* However, "the UDJA does not waive the state's sovereign immunity when the plaintiff seeks a declaration of his or her rights under a statute or other law." *Id*. at 621. On appeal, Hensley does not challenge the trial court's dismissal of her request for Declarations 1, 2, or 3. Instead, she asserts only that the UDJA waives sovereign immunity for her request for Declaration 4 that "the Commission's interpretation of Canon 4A violates article 1, section 8 of the Texas Constitution." Hensley maintains that this constitutes a challenge to the validity of Canon 4A for which the UDJA provides a waiver of immunity. *See Town of Shady Shores*, 590 S.W.3d at 552 (holding that UDJA provides "only limited waiver for challenges to the validity of an ordinance or statute"). Hensley asserts that, although Canon 4A is not a statute, supreme court precedent in *Patel v. Texas Department of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015), supports the conclusion that the UDJA waives sovereign immunity for a claim challenging a Canon of the Code of Judicial Conduct. Hensley asserts that "*Patel* holds that the UDJA allows litigants to sue government entities when challenging the validity of *agency regulations*, even though agency rules are not mentioned in section 37.006(b)" and that "there is no basis for excluding claims that challenge the validity of a judicial canon from the UDJA's waiver of immunity."

In *Patel*, in the context of evaluating whether the plaintiffs had alleged an ultra vires claim, the court held that "because the [plaintiffs] challenge the validity of the cosmetology statutes and regulations, rather than complaining that officials illegally acted or failed to act, the ultra vires exception does not apply." *Id.* at 77. We do not believe that this constitutes a holding that the UDJA waives immunity for challenges to agency regulations. In fact, challenges to agency rules and regulations are properly brought as a rule challenge under Texas Government Code section 2001.038, and courts routinely dismiss challenges to agency rules brought under the UDJA instead of under section 2001.038. *See* Tex. Gov't Code § 2001.038 (validity or applicability of rule may be determined in action for declaratory judgment under Administrative Procedure Act); *see also Patel*, 469 S.W.3d at 78 (stating that "[u]nder the redundant remedies doctrine, courts will not entertain an action brought under the UDJA when the same claim could be pursued through different channels" and that focus of doctrine is "whether the Legislature created a statutory waiver of sovereign immunity that permits the parties to raise their claims through some avenue other than the UDJA"); *id*. at 79 ("When a plaintiff files a proceeding that only challenges the validity of an administrative rule, the parties are bound by the APA and may not seek relief under the UDJA because such relief would be redundant."). In *Patel*, the supreme court concluded that the trial court had jurisdiction over the plaintiffs' claims under the UDJA because they challenged the constitutionality of a statute, along with rules promulgated pursuant to that statute. *Id.* at 80. Here, Hensley's UDJA claim does not purport to challenge any statute; she challenges only the validity of Canon 4A. Moreover, even if *Patel* could be read to stand for the proposition that the UDJA waives immunity for a challenge to an agency regulation, as an intermediate appellate court we will not expand any such waiver to include challenges to Canons of the Texas Code of Judicial Conduct. *See Anderson v. Archer*, 490 S.W.3d 175, 177 (Tex.

App.—Austin 2016) (declining to recognize cause of action for tortious interference with inheritance and observing that "[w]e must, in short, follow the existing law rather than change it, and we have adhered to that basic limiting principle in a variety of contexts"), *aff'd*, *Archer v. Anderson*, 556 S.W.3d 228, 229 (Tex. 2018) (holding that there is no cause of action in Texas for intentional interference with inheritance); *Texas Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P.*, 287 S.W.3d 390, 394-95, 398 (Tex. App.—Austin 2009) (declining to recognize proposed judicial expansion of common-law or constitutional privacy exceptions to mandatory disclosure under Public Information Act), *rev'd on other grounds*, 343 S.W.3d 112, 120 (Tex. 2011) (Texas Supreme Court ultimately adopting proposed expansion).[4]

Because sovereign immunity bars Hensley's claims for declaratory relief under the UDJA, the trial court properly dismissed them.

Ultra Vires Claims

Sovereign immunity does not bar claims alleging that state officials acted ultra vires, or without legal authority, in carrying out their duties. *See Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 158 n.1 (Tex. 2016) ("[W]hen a governmental officer is sued for allegedly *ultra vires* acts, governmental immunity does not apply from the outset."). An ultra vires action requires a plaintiff to "allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). The Texas Supreme Court clarified what it means for an

[4] We also note that, rather than challenging the validity of Canon 4A, Hensley is actually challenging the Commission's actions under its own interpretation of the Canon. The UDJA does not provide a waiver for challenges to an agency's interpretation of rules it is charged with enforcing or applying. Complaints that the Commission misinterpreted or misapplied the Canons are properly brought through the available appeal process that Hensley declined to pursue.

official to act "without legal authority." *See Houston Belt & Terminal Ry. Co.*, 487 S.W.3d at 158. The court said that "a government officer with some discretion to interpret and apply a law may nonetheless act 'without legal authority,' and thus *ultra vires*, if he exceeds the bounds of his granted authority or if his acts conflict with the law itself." *Id.* "[U]ltra vires suits do not attempt to exert control over the state—they attempt to reassert the control of the state." *Heinrich*, 284 S.W.3d at 372. To reassert such control, an ultra vires suit must lie against the "allegedly responsible government actor in his official capacity." *Patel*, 469 S.W.3d at 76. Therefore, an ultra vires claim against the Officials must complain of conduct taken pursuant to their authority: their duty to determine whether Hensley's conduct contravened judicial canons and whether that conduct was, as she asserted, nevertheless protected by the TRFRA.

An ultra vires claim against the Officials in the present case, therefore, must be based on the assertion that the Officials acted without legal authority when they rejected her defense under the TRFRA that publicly reprimanding her for her conduct would substantially burden her free exercise of religion. *See* Tex. Gov't Code § 110.004 (person whose free exercise of religion has been substantially burdened in violation of Section 110.003 or 110.031 may assert that violation as defense in administrative proceeding). The dispositive issue, then, is whether the Commission's alleged mistake of law constituted an ultra vires act. The Texas Supreme Court has explained that, when considering whether a legal mistake is an ultra vires act, "it is the mistake's impact on the official's authority that carries dispositive weight." *Hall v. McRaven*, 508 S.W.3d 232, 241 (Tex. 2017). The court explained that an official's mistake in interpreting his enabling authority *can* give rise to an ultra vires claim because it results in a misinterpretation of the bounds of his own authority. *Id.* at 241-42. In *Hall*, the court concluded that the official's alleged misinterpretation of federal privacy law, a law "*collateral* to [the official's] authority,"

did not give rise to an ultra vires claim because that federal privacy law did not "suppl[y] the parameters of [his] authority." *Id.* at 242. The court held that "[i]n order to act without legal authority in carrying out a duty to interpret and apply the law, [an official] must have exercised discretion "without reference to or in conflict with the constraints of the law *authorizing [him] to act*." *Id.* (emphasis added).

Informed by the court's explanation in *Hall*, Hensley must have alleged, and ultimately prove, that the Officials exercised their discretion in conflict with the constraints of the law authorizing them to act. Without that showing, Hensley "would simply have no basis for 'reassert[ing] control of the state.'" *Id.* (quoting *Heinrich*, 284 S.W.3d at 372). Here, the Officials carried out their duty to determine whether Hensley's conduct violated 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. *Cf. Houston Belt & Terminal Ry. Co.*, 487 S.W.3d at 159 (official's neglecting what he was required to consider in making permeability determination rendered it—right or wrong—ultra vires). As the supreme court explained in *Hall*:

> When the ultimate and unrestrained objective of an official's duty is to interpret collateral law, a misinterpretation is not overstepping such authority; it is a compliant action even if ultimately erroneous. Our intermediate courts of appeals have repeatedly stated that it is not an *ultra vires* act for an official or agency to make an erroneous decision while staying within its authority. Indeed, an *ultra vires* doctrine that requires nothing more than an identifiable mistake would not be a narrow exception to immunity: it would swallow immunity. [] As important as a mistake may be, sovereign immunity comes with a price; it often allows the "improvident actions" of the government to go unredressed. Only when these improvident actions are *unauthorized* does an official shed the cloak of the sovereign and act *ultra vires*.

Hall, 508 S.W.3d at 242 (citations omitted).

The Officials—whether right or wrong—were not acting without legal authority in making their determinations regarding Hensley's conduct.[5] Moreover, the Commissioner's determinations did not constitute violations of "a purely ministerial duty." *See id.* at 243 ("Perhaps it goes without saying, but if an official's duty is discretionary, it is not also nondiscretionary."). Because Hensley failed to meet either of the bases for establishing an ultra vires claim against the Officials, the trial court properly dismissed her ultra vires claims for lack of jurisdiction.

CONCLUSION

Because the trial court lacked jurisdiction to consider Hensley's claims under the TRFRA and the UDJA, and because Hensley failed to establish ultra vires claims against the Officials, the court did not err in granting the plea to the jurisdiction and dismissing the case. Accordingly, we affirm the trial court's judgment.

Thomas J. Baker, Justice

Before Justices Goodwin, Baker, and Smith
Concurring Opinion by Justice Goodwin

Affirmed

Filed: November 3, 2022

[5] We need not, and do not, express any opinion on the correctness of the Commission's determinations.

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-21-00305-CV

Dianne Hensley, Appellant

v.

State Commission on Judicial Conduct; David Schenck, in his official capacity as Chair of the State Commission on Judicial Conduct; Janis Hold, in her official capacity as Vice-Chair of the State Commission on Judicial Conduct; Frederick C. Tate, in his official capacity as Secretary of the State Commission on Judicial Conduct; and David C. Hall, David M. Petronella, Sujeeth B. Draksharam, Ronald E. Bunch, Valerie Ertz, M. Patrick Maguire, Clifton Roberson, Lucy M. Hebron, Gary L. Steel, and Katy P. Ward, in their official capacities as Members of the State Commission on Judicial Conduct, Appellees

FROM THE 459TH DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-20-003926, THE HONORABLE JAN SOIFER, JUDGE PRESIDING

CONCURRING OPINION

Because I agree with the Court's disposition but not its analysis, I concur in the judgment only.

To the extent that Dianne Hensley seeks to challenge the Commission's investigation and subsequent disciplinary action, she could have sought de novo review of the Commission's decision by a special court of review but chose not to do so. *See* Tex. Gov't Code § 33.034 (providing review of Commission's decision). Thus, she may not complain in this case about the Commission's disciplinary action and is foreclosed from separately litigating her asserted defense to that action that her conduct was protected under the Texas Religious Freedom Restoration Act (TRFRA). *See* Tex. Civ. Prac. & Rem. Code § 110.004; *Hagstette v. State*

Comm'n on Judicial Conduct, No. 01-19-00208-CV, 2020 Tex. App. LEXIS 9838, at *14 (Tex. App.—Houston [1st Dist.] Dec. 15, 2020, no pet.) (mem. op.); *see also Patel v. Texas Dep't of Licensing & Reg.*, 469 S.W.3d 69, 79 (Tex. 2015) ("[C]ourts will not entertain an action brought under the UDJA when the same claim could be pursued through different channels."). Although the Court reaches this conclusion, it then unnecessarily and, in my view improperly, discusses and describes the Commission's investigation and actions. *See Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000) (stating that under article II, section 1 of Texas Constitution, "courts have no jurisdiction to issue advisory opinions").

Further, I would decide Hensley's TRFRA claims on the ground that she did not comply with its notice provisions. *See* Tex. Civ. Prac. & Rem. Code § 110.006 (addressing notice requirements). I do not agree with the Court's analysis or its ultimate determinations about those claims or the evidence surrounding those claims, particularly the Court making an implicit finding by the Commission that its investigation and disciplinary action did not substantially violate Hensley's free exercise of religion and that this implied finding foreclosed any future claims. The TRFRA's express statutory language waives sovereign immunity and allows a plaintiff to seek compensatory damages and "injunctive relief to prevent [a] threatened violation" when a governmental entity is violating or has threatened to violate the plaintiff's right to religious freedom. *See id.* §§ 110.005 (addressing available remedies), .008 (addressing waiver of sovereign immunity to suit and from liability to extent liability is created by section 110.005).

For these reasons, I concur in the judgment only.

Melissa Goodwin, Justice

Before Justices Goodwin, Baker, and Smith

Filed: November 3, 2022

State Commission on Judicial Conduct

November 14, 2019

VIA CERTIFIED AND REGULAR MAIL

Johnathan F. Mitchell
111 Congress Avenue, Suite 400
Austin, Texas 78701

Re: CJC No. 17-1572

Dear Mr. Mitchell:

During its regularly scheduled meeting on October 9-11, 2019, the State Commission on Judicial Conduct concluded its review of the complaint filed against your client in the above-referenced matter. Following the judge's appearance, and after considering the evidence before it, the Commission voted to issue the judge a **Public Warning.** Enclosed is a copy of the Sanction specifying the Commission's Findings and Conclusions.

Sanctions issued by the Commission are remedial in nature. They serve to promote the high ethical standards of the Texas judiciary and are issued with the intent of assisting all judges with their continued judicial service. In that service, we wish you well.

Sincerely,

Jacqueline R. Habersham

Jacqueline R. Habersham
Interim Executive Director

JH/jm
Enclosures

P O Box 12265
Austin TX 78711-2265

www.scjc.state.tx.us

(512) 463-5533
Toll-free (877) 228-5750

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

State Commission on Judicial Conduct

January 25, 2019

PERSONAL AND CONFIDENTIAL

VIA USPS REGULAR MAIL

Honorable Dianne Hensley
Justice of the Peace, Pct. 1, Pl. 1
McLennan County
501 Washington Ave
Suite 104B
Waco, TX 76701

Re: CJC No. 17-1572

Dear Judge Hensley:

During its meeting on August 8-9, 2018, the State Commission on Judicial Conduct (the Commission) considered the above-referenced complaint filed against you. After considering your written responses, the Commission voted to issue you a **Tentative Public Warning.** A copy of the proposed sanction is enclosed for your review.

At this time, the Commission's decision is tentative. If you would like to accept the **Public Warning** in lieu of an appearance before the Commission, please notify us in writing no later than **5:00 p.m. on February 25, 2019.** You may also fax the notification to us at (512) 463-0511 or send it via email to eric.vinson@scjc.texas.gov. If you choose not to accept this sanction, your appearance will take place before the Commission during a regularly scheduled meeting at the Commission's offices located in the William P. Clements, Jr. Building, 300 W. 15th Street, Suite 415, Austin, Texas. In the event you choose to appear, you will be informed in writing of the specific day and time of the hearing.

In the event you choose to appear, be advised that following an informal hearing, the Commission may reaffirm its decision to issue the proposed **Public Warning** or take any other action authorized by Article 5, §1-a(8) of the Texas Constitution. Alternatively, the Commission may vote to dismiss the complaint altogether.

P O Box 12265
Austin TX 78711-2265

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(512) 463-5
Toll-free (877) 228-5

Please be further advised that should you fail to respond or fail to appear before the Commission at the designated time and place, the proposed **Public Warning** will become final.

Sincerely,

Eric Vinson
Executive Director

EV/ju
Enclosures

TENTATIVE

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 December 5-7, 2018, 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. After considering the evidence before it, the Commission entered 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 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 "[o]nly one Waco-based justice of the peace [Judge Hensley] has been doing any civil weddings since the high court decided Obergefell v. Hodges…and she said she will only do a wedding between a man and a woman." According to the article, Judge Hensley "initially chose not to do weddings at all after the Supreme Court decision…[b]ut [she] changed her mind in September [2016], and has done about 70 opposite-sex weddings since then, mostly at the courthouse during business hours."

3. Judge Hensley was quoted in the article as saying that as a "Bible-believing" Christian, her conscience prohibits her from doing same-sex weddings, and she thinks she is entitled to a "religious exemption." The judge acknowledged that on a couple of occasions, her office has told

same-sex couples that she was not available and gave them a list of locals who would officiate a same-sex wedding, including Precinct 3 Justice of the Peace David Pareya, who is located in West (approximately twenty miles north of Waco).

4. Judge Hensley explained that so long as Judge Pareya performs civil weddings in McLennan County, same-sex couples have "reasonable accommodations" that preserve their constitutional right to marry. She asserted that "people have the right to an accommodation for their religious faith," and therefore she is "entitled to an accommodation just as much as anyone else."

5. In her response to the letter of inquiry, Judge Hensley stated "I am a Christian and espouse to millennia old Christian doctrine, dedicating my life and actions to serving Jesus Christ and faithfully adhering to the Bible. This includes my faith's millennia old doctrine relating to marriage and human sexuality. Due to these deeply held Christian beliefs, I am unable to officiate a same-sex wedding. For this reason, I initially quit performing weddings following the *Obergefell* decision."

6. The judge explained that she resumed officiating opposite-sex weddings on August 1, 2016[1] because she "became convicted [sic] that it was wrong to inconvenience ninety-nine percent of the population because I was unable to accommodate less than one percent." Judge Hensley asserted that she has "no desire to be unkind or disrespectful" to those individuals seeking to have a same-sex marriage, and that her office has "researched and compiled a reference sheet containing every officiant we could find for same-sex weddings in McLennan and surrounding counties."

7. Judge Hensley stated that she relied on Governor Abbott's June 26, 2015, letter to "all state agency heads," Attorney General Opinion KP-0025, and the June 28, 2015, Public Statement from Lt. Governor Dan Patrick for her position that she can openly refuse to perform same-sex marriages while still marrying heterosexual couples.

Relevant Standards and Authorities

1. Texas Family Code Section 2.202(a)(4) authorizes judges to perform a "marriage ceremony."

2. Canon 3B(6) of the Texas Code of Judicial Conduct states, in pertinent part, that "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...."

3. Canon 4A 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: (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."

4. Article V, Section 1-a(6)A of the Texas Constitution provides, in pertinent part, that a judge can 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."

5. On June 26, 2015, the U.S. Supreme Court ruled that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

[1] Judge Hensley stated that she has performed 328 opposite-sex marriages since August 1, 2016.

CONCLUSIONS

At the outset, the Commission notes that this case is not strictly about same-sex marriage, nor does it involve the reasonableness of religious beliefs. The Commission has no interest in imposing a "religious test" on judges, and does not do so in this case. Rather, this case is about the Commission performing its constitutional duty to maintain the public's faith in an independent, unbiased judiciary that conducts its judicial functions impartially, without reference to whether a particular law is popular or unpopular. The Commission recognizes that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." *Obergefell v. Hodges*, 135 S.Ct. at 2602.[2]

The Commission concludes that a judge who exercises her authority to conduct a marriage ceremony under Section 2.202(a)(4) of the Texas Family Code is performing a "judicial duty" for the purpose of Canon 3B(6). Accordingly, based on the facts of this case, the Canons of Judicial Conduct and the provisions of the Texas Constitution cited above, the Commission concludes that Judge Hensley's refusal to perform same-sex marriages while still performing opposite-sex weddings, along with her public comments reflecting this disparate treatment of same-sex couples in the context of marriage manifest a bias or prejudice based on sexual orientation in violation of Canons 3B(6) and 4A. The Commission also finds that Judge Hensley's conduct described above represents willful or persistent conduct that is clearly inconsistent with the proper performance of her duties and casts public discredit upon the judiciary and administration of justice.

For these reasons, the Commission concludes that Judge Hensley's conduct, as described above, constituted a willful violation of Canons 3B(6) and 4A of the Texas Code of Judicial Conduct and Article V, Section 1-a(6)A of the Texas Constitution.

****

In condemnation of the conduct described above that violated Canons 3B(6) and 4A of the Texas Code of Judicial Conduct and Article V, Section 1-a(6)A of the Texas Constitution, recited above, it is the Commission's decision to issue a **PUBLIC WARNING** to the Honorable Dianne Hensley, Justice of the Peace for Precinct 1, Place 1, in Waco, McLennan County, Texas.

Pursuant to the authority contained in Article V, §1-a(8) of the Texas Constitution, it is ordered that the actions described above be made the subject of a **PUBLIC WARNING** by the Commission.

The Commission has taken this action in a continuing effort to protect the public confidence in the judicial system and to assist the state's judiciary in its efforts to embody the principles and values set forth in the Texas Constitution and the Texas Code of Judicial Conduct.

Issued this the ___ day of _____, 2018.

_____

Honorable Douglas S. Lang, Chair
State Commission on Judicial Conduct

[2] The Commission is unconcerned with Judge Hensley's personal views on the issue of same-sex marriage. Like any citizen, Judge Hensley is free to hold whatever religious beliefs she chooses.

CIVIL PRACTICE AND REMEDIES CODE

TITLE 5. GOVERNMENTAL LIABILITY

CHAPTER 110. RELIGIOUS FREEDOM

Sec. 110.001. DEFINITIONS. (a) In this chapter:

(1) "Free exercise of religion" means an act or refusal to act that is substantially motivated by sincere religious belief. In determining whether an act or refusal to act is substantially motivated by sincere religious belief under this chapter, it is not necessary to determine that the act or refusal to act is motivated by a central part or central requirement of the person's sincere religious belief.

(2) "Government agency" means:

(A) this state or a municipality or other political subdivision of this state; and

(B) any agency of this state or a municipality or other political subdivision of this state, including a department, bureau, board, commission, office, agency, council, or public institution of higher education.

(b) In determining whether an interest is a compelling governmental interest under Section 110.003, a court shall give weight to the interpretation of compelling interest in federal case law relating to the free exercise of religion clause of the First Amendment of the United States Constitution.

Added by Acts 1999, 76th Leg., ch. 399, Sec. 1, eff. Aug. 30, 1999.

Sec. 110.002. APPLICATION. (a) This chapter applies to any ordinance, rule, order, decision, practice, or other exercise of governmental authority.

(b) This chapter applies to an act of a government agency, in the exercise of governmental authority, granting or refusing to grant a government benefit to an individual.

(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.

Added by Acts 1999, 76th Leg., ch. 399, Sec. 1, eff. Aug. 30, 1999.

Sec. 110.003. RELIGIOUS FREEDOM PROTECTED. (a) Subject to Subsection (b), a government agency may not substantially burden a person's free exercise of religion.

(b) Subsection (a) does not apply if the government agency demonstrates that the application of the burden to the person:

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that interest.

(c) A government agency that makes the demonstration required by Subsection (b) is not required to separately prove that the remedy and penalty provisions of the law, ordinance, rule, order, decision, practice, or other exercise of governmental authority that imposes the substantial burden are the least restrictive means to ensure compliance or to punish the failure to comply.

Added by Acts 1999, 76th Leg., ch. 399, Sec. 1, eff. Aug. 30, 1999.

Sec. 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.

Added by Acts 1999, 76th Leg., ch. 399, Sec. 1, eff. Aug. 30, 1999.

Sec. 110.005. REMEDIES. (a) Any person, other than a government agency, who successfully asserts a claim or defense under this chapter is entitled to recover:

(1) declaratory relief under Chapter 37;

(2) injunctive relief to prevent the threatened violation or continued violation;

(3) compensatory damages for pecuniary and nonpecuniary losses; and

(4) reasonable attorney's fees, court costs, and other reasonable expenses incurred in bringing the action.

(b) Compensatory damages awarded under Subsection (a)(3) may not

exceed $10,000 for each entire, distinct controversy, without regard to the number of members or other persons within a religious group who claim injury as a result of the government agency's exercise of governmental authority. A claimant is not entitled to recover exemplary damages under this chapter.

(c) An action under this section must be brought in district court.

(d) A person may not bring an action for damages or declaratory or injunctive relief against an individual, other than an action brought against an individual acting in the individual's official capacity as an officer of a government agency.

(e) This chapter does not affect the application of Section 498.0045 or 501.008, Government Code, or Chapter 14 of this code.

Added by Acts 1999, 76th Leg., ch. 399, Sec. 1, eff. Aug. 30, 1999.

Sec. 110.006. NOTICE; RIGHT TO ACCOMMODATE. (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.

(b) Notwithstanding Subsection (a), a claimant may, within the 60-day period established by Subsection (a), bring an action for declaratory or injunctive relief and associated attorney's fees, court costs, and other reasonable expenses, if:

(1) the exercise of governmental authority that threatens to substantially burden the person's free exercise of religion is imminent; and

(2) the person was not informed and did not otherwise have knowledge of the exercise of the governmental authority in time to reasonably provide the notice.

(c) A government agency that receives a notice under Subsection (a) may remedy the substantial burden on the person's free exercise of

religion.

(d) A remedy implemented by a government agency under this section:

(1) may be designed to reasonably remove the substantial burden on the person's free exercise of religion;

(2) need not be implemented in a manner that results in an exercise of governmental authority that is the least restrictive means of furthering the governmental interest, notwithstanding any other provision of this chapter; and

(3) must be narrowly tailored to remove the particular burden for which the remedy is implemented.

(e) A person with respect to whom a substantial burden on the person's free exercise of religion has been cured by a remedy implemented under this section may not bring an action under Section 110.005.

(f) A person who complies with an inmate grievance system as required under Section 501.008, Government Code, is not required to provide a separate written notice under Subsection (a). In conjunction with the inmate grievance system, the government agency may remedy a substantial burden on the person's free exercise of religion in the manner described by, and subject to, Subsections (c), (d), and (e).

(g) In dealing with a claim that a person's free exercise of religion has been substantially burdened in violation of this chapter, an inmate grievance system, including an inmate grievance system required under Section 501.008, Government Code, must provide to the person making the claim a statement of the government agency's rationale for imposing the burden, if any exists, in connection with any adverse determination made in connection with the claim.

Added by Acts 1999, 76th Leg., ch. 399, Sec. 1, eff. Aug. 30, 1999.

Sec. 110.007. ONE-YEAR LIMITATIONS PERIOD. (a) A person must bring an action to assert a claim for damages under this chapter not later than one year after the date the person knew or should have known of the substantial burden on the person's free exercise of religion.

(b) Mailing notice under Section 110.006 tolls the limitations period established under this section until the 75th day after the date on which the notice was mailed.

Added by Acts 1999, 76th Leg., ch. 399, Sec. 1, eff. Aug. 30, 1999.

Sec. 110.008. SOVEREIGN IMMUNITY WAIVED. (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.

(b) Notwithstanding Subsection (a), this chapter does not waive or abolish sovereign immunity to suit and from liability under the Eleventh Amendment to the United States Constitution.

Added by Acts 1999, 76th Leg., ch. 399, Sec. 1, eff. Aug. 30, 1999.

Sec. 110.009. EFFECT ON RIGHTS. (a) This chapter does not authorize a government agency to burden a person's free exercise of religion.

(b) The protection of religious freedom afforded by this chapter is in addition to the protections provided under federal law and the constitutions of this state and the United States. This chapter may not be construed to affect or interpret Section 4, 5, 6, or 7, Article I, Texas Constitution.

Added by Acts 1999, 76th Leg., ch. 399, Sec. 1, eff. Aug. 30, 1999.

Sec. 110.010. APPLICATION TO CERTAIN CASES. Notwithstanding any other provision of this chapter, a municipality has no less authority to adopt or apply laws and regulations concerning zoning, land use planning, traffic management, urban nuisance, or historic preservation than the authority of the municipality that existed under the law as interpreted by the federal courts before April 17, 1990. This chapter does not affect the authority of a municipality to adopt or apply laws and regulations as that authority has been interpreted by any court in cases that do not involve the free exercise of religion.

Added by Acts 1999, 76th Leg., ch. 399, Sec. 1, eff. Aug. 30, 1999.

Sec. 110.011. CIVIL RIGHTS. (a) Except as provided in Subsection (b), this chapter does not establish or eliminate a defense to a civil action or criminal prosecution under a federal or state civil rights law.

(b) This chapter is fully applicable to claims regarding the

employment, education, or volunteering of those who perform duties, such as spreading or teaching faith, performing devotional services, or internal governance, for a religious organization. For the purposes of this subsection, an organization is a religious organization if:

(1) the organization's primary purpose and function are religious, it is a religious school organized primarily for religious and educational purposes, or it is a religious charity organized primarily for religious and charitable purposes; and

(2) it does not engage in activities that would disqualify it from tax exempt status under Section 501(c)(3), Internal Revenue Code of 1986, as it existed on August 30, 1999.

Added by Acts 1999, 76th Leg., ch. 399, Sec. 1, eff. Aug. 30, 1999.

Sec. 110.012. GRANT TO RELIGIOUS ORGANIZATION NOT AFFECTED. Notwithstanding Section 110.002(b), this chapter does not affect the grant or denial of an appropriation or other grant of money or benefits to a religious organization, nor does it affect the grant or denial of a tax exemption to a religious organization.

Added by Acts 1999, 76th Leg., ch. 399, Sec. 1, eff. Aug. 30, 1999.

TEXAS CODE OF JUDICIAL CONDUCT

(As amended by the Supreme Court of Texas through May 28, 2021)

Preamble

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The 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 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. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

Canon 1: Upholding the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary is preserved. The provisions of this Code are to be construed and applied to further that objective.

Canon 2: Avoiding Impropriety and the Appearance of Impropriety in All of the Judge's Activities

A. A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

C. A judge shall not knowingly hold membership in any organization that practices discrimination prohibited by law.

COMMENT

Consistent with section 253.1612 of the Texas Election Code, the Code of Judicial Conduct does not prohibit a joint campaign activity conducted by two or more judicial candidates.

Canon 3: Performing the Duties of Judicial Office Impartially and Diligently

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. Judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply:

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate.

(2) A judge should be faithful to the law and shall maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice.

(6) A judge shall not, in the performance of judicial duties, by words or conduct manifest 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, and shall not knowingly permit staff, court officials and others subject to the judge's direction and control to do so.

(7) A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status against parties, witnesses, counsel or others. This requirement does not preclude legitimate advocacy when any of these factors is an issue in the proceeding.

(8) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit:

(a) communications concerning uncontested administrative or uncontested procedural matters;

(b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;

(c) obtaining the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond;

(d) consulting with other judges or with court personnel;

(e) considering an *ex parte* communication expressly authorized by law.

(9) A judge should dispose of all judicial matters promptly, efficiently and fairly.

(10) A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case. This prohibition applies to any candidate for judicial office, with respect to judicial proceedings pending or impending in the court on which the candidate would serve if elected. A judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge or judicial candidate is a litigant in a personal capacity.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity. The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court's judgment, a written opinion or in accordance with Supreme Court guidelines for a court approved history project.

C. Administrative Responsibilities.

(1) A judge should diligently and promptly discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge should require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges should take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism.

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

programs concerning the law, the legal system and the administration of justice.

C. Civic or Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the profit of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly or frequently engaged in adversary proceedings in any court.

(2) A judge shall not solicit funds for any educational, religious, charitable, fraternal or civic organization, but may be listed as an officer, director, delegate, or trustee of such an organization, and may be a speaker or a guest of honor at an organization's fund raising events.

(3) A judge should not give investment advice to such an organization, but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

D. Financial Activities.

(1) A judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of the judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves. This limitation does not prohibit either a judge or candidate from soliciting funds for appropriate campaign or officeholder expenses as permitted by state law.

(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity including the operation of a business. A judge shall not be an officer, director or manager of a publicly owned business. For purposes of this Canon, a "publicly owned business" is a business having more than ten owners who are not related to the judge by consanguinity or affinity within the third degree of relationship.

(3) A judge should manage any investments and other economic interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge should divest himself or herself of investments and other economic interests that might require frequent disqualification. A judge shall be informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to be informed about the personal economic interests of any family member residing in the judge's household.

(4) Neither a judge nor a family member residing in the judge's household shall accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to the judge; books and other

resource materials supplied by publishers on a complimentary basis for official use; or an invitation to the judge and spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a judge or a family member residing in the judge's household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a gift from a friend for a special occasion such as a wedding, engagement, anniversary, or birthday, if the gift is fairly commensurate with the occasion and the relationship; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a family member residing in the judge's household may accept any other gift, bequest, favor, or loan only if the donor is not a party or person whose interests have come or are likely to come before the judge;

(d) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties.

E. Fiduciary Activities.

(1) A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

(2) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

F. Service as Arbitrator or Mediator. An active full-time judge shall not act as an arbitrator or mediator for compensation outside the judicial system, but a judge may encourage settlement in the performance of official duties.

G. Practice of Law. A judge shall not practice law except as permitted by statute or this Code. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

H. Extra-Judicial Appointments. Except as otherwise provided by constitution and statute, a judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however,

may represent his or her country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

COMMENT TO 2000 CHANGE

This change is to clarify that a judge may serve on the Texas Board of Criminal Justice.

I. Compensation, Reimbursement and Reporting.

(1) Compensation and Reimbursement. A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(b) Expense reimbursement shall be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's family. Any payment in excess of such an amount is compensation.

(2) Public Reports. A judge shall file financial and other reports as required by law.

Canon 5: Refraining from Inappropriate Political Activity

(1) A judge or judicial candidate shall not:

(i) make pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge;

(ii) knowingly or recklessly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent; or

(iii) make a statement that would violate Canon 3B(10).

(2) A judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party. A judge or judicial candidate may attend political events and express his or her views on political matters in accord with this Canon and Canon 3B(10).

(3) A judge shall resign from judicial office upon becoming a candidate in a contested election for a non-judicial office either in a primary or in a general or in a special election. A judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention or while being a candidate for election to any judicial office.

(4) A judge or judicial candidate subject to the Judicial Campaign Fairness Act, Tex. Elec. Code §253.151, *et seq.* (the "Act"), shall not knowingly commit an act for which he or she knows the Act imposes a penalty. Contributions returned in accordance with Sections 253.155(e), 253.157(b) or 253.160(b) of the Act are not a violation of this paragraph.

COMMENT

A statement made during a campaign for judicial office, whether or not prohibited by this Canon, may cause a judge's impartiality to be reasonably questioned in the context of a particular case and may result in recusal.

Consistent with section 253.1612 of the Texas Election Code, the Code of Judicial Conduct does not prohibit a joint campaign activity conducted by two or more judicial candidates.

Canon 6: Compliance with the Code of Judicial Conduct

A. The following persons shall comply with all provisions of this Code:

(1) An active, full-time justice or judge of one of the following courts:

(a) the Supreme Court,

(b) the Court of Criminal Appeals,

(c) courts of appeals,

(d) district courts,

(e) criminal district courts, and

(f) statutory county courts.

(2) A full-time commissioner, master, magistrate, or referee of a court listed in (1) above.

B. A County Judge who performs judicial functions shall comply with all provisions of this Code except the judge is not required to comply:

(1) when engaged in duties which relate to the judge's role in the administration of the county;

(2) with Canons 4D(2), 4D(3), or 4H;

(3) with Canon 4G, except practicing law in the court on which he or she serves or in any court subject to the appellate jurisdiction of the county court, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.

(4) with Canon 5(3).

C. Justices of the Peace and Municipal Court Judges.

(1) A justice of the peace or municipal court judge shall comply with all provisions of this Code, except the judge is not required to comply:

(a) with Canon 3B(8) pertaining to *ex parte* communications; in lieu thereof a justice of the peace or municipal court judge shall comply with 6C(2) below;

(b) with Canons 4D(2), 4D(3), 4E, or 4H;

(c) with Canon 4F, unless the court on which the judge serves may have jurisdiction of the matter or parties involved in the arbitration or mediation; or

(d) if an attorney, with Canon 4G, except practicing law in the court on which he or she serves, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.

(e) with Canons 5(3).

(2) A justice of the peace or a municipal court judge, except as authorized by law, shall not directly or indirectly initiate, permit, nor consider *ex parte* or other communications concerning the merits of a pending judicial proceeding. This subsection does not prohibit communications concerning:

(a) uncontested administrative matters,
(b) uncontested procedural matters,

(c) magistrate duties and functions,

(d) determining where jurisdiction of an impending claim or dispute may lie,

(e) determining whether a claim or dispute might more appropriately be resolved in some other judicial or non-judicial forum,

(f) mitigating circumstances following a plea of nolo contendere or guilty for a fine-only offense, or

(g) any other matters where *ex parte* communications are contemplated or authorized by law.

D. A Part-time commissioner, master, magistrate, or referee of a court listed in Canon 6A(1) above:

(1) shall comply with all provisions of this Code, except he or she is not required to comply with Canons 4D(2), 4E, 4F, 4G or 4H, and

(2) should not practice law in the court which he or she serves or in any court subject to the appellate jurisdiction of the court which he or she serves, or act as a lawyer in a proceeding in

which he or she has served as a commissioner, master, magistrate, or referee, or in any other proceeding related thereto.

E. A Judge Pro Tempore, while acting as such:

(1) shall comply with all provisions of this Code applicable to the court on which he or she is serving, except he or she is not required to comply with Canons 4D(2), 4D(3), 4E, 4F, 4G or 4H, and

(2) after serving as a judge pro tempore, should not act as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto.

F. Any Senior Judge, or a former appellate or district judge, or a retired or former statutory county court judge who has consented to be subject to assignment as a judicial officer:

(1) shall comply with all the provisions of this Code except he or she is not required to comply with Canon 4D(2), 4E, 4F, 4G, or 4H, but

(2) should refrain from judicial service during the period of an extra-judicial appointment permitted by Canon 4H.

G. Candidates for Judicial Office.

(1) Any person seeking elective judicial office listed in Canon 6A(1) shall be subject to the same standards of Canon 5 that are required of members of the judiciary.

(2) Any judge who violates this Code shall be subject to sanctions by the State Commission on Judicial Conduct.

(3) Any lawyer who is a candidate seeking judicial office who violates Canon 5 or other relevant provisions of this Code is subject to disciplinary action by the State Bar of Texas.

(4) The conduct of any other candidate for elective judicial office, not subject to paragraphs (2) and (3) of this section, who violates Canon 5 or other relevant provisions of the Code is subject to review by the Secretary of State, the Attorney General, or the local District Attorney for appropriate action.

H. Attorneys.

Any lawyer who contributes to the violation of Canons 3B(7), 3B(10), 4D(4), 5, or 6C(2), or other relevant provisions of this Code, is subject to disciplinary action by the State Bar of Texas.

Canon 7: Effective Date of Compliance

A person to whom this Code becomes applicable should arrange his or her affairs as soon as reasonably possible to comply with it.

Canon 8: Construction and Terminology of the Code

A. Construction.

The Code of Judicial Conduct is intended to establish basic standards for ethical conduct of judges. It consists of specific rules set forth in Sections under broad captions called Canons.

The Sections are rules of reason, which should be applied consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through the State Commission on Judicial Conduct. It is not designed or intended as a basis for civil liability or criminal prosecution. Furthermore, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.

It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.

B. Terminology.

(1) "Shall" or "shall not" denotes binding obligations the violation of which can result in disciplinary action.

(2) "Should" or "should not" relates to aspirational goals and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined.

(3) "May" denotes permissible discretion or, depending on the context, refers to action that is not covered by specific proscriptions.

(4) "De minimis" denotes an insignificant interest that could not raise reasonable question as to a judge's impartiality.

(5) "Economic interest" denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that:

(i) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(ii) service by a judge as an officer, director, advisor or other active participant, in an educational, religious, charitable, fraternal, or civic organization or service by a judge's spouse, parent or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest; and

(iv) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities.

(6) "Fiduciary" includes such relationships as executor, administrator, trustee, and guardian.
(7) "Knowingly," "knowledge," "known" or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(8) "Law" denotes court rules as well as statutes, constitutional provisions and decisional law.

(9) "Member of the judge's (or the candidate's) family" denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the candidate maintains a close familial relationship.

(10) "Family member residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides at the judge's household.

(11) "Require." The rules prescribing that a judge "require" certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control.

(12) "Third degree of relationship." The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece.

(13) "Retired Judge" means a person who receives from the Texas Judicial Retirement System, Plan One or Plan Two, an annuity based on service that was credited to the system. (Secs. 831.001 and 836.001, V.T.C.A. Government Code [Ch. 179, Sec. 1, 71st Legislature (1989)]

(14) "Senior Judge" means a retired appellate or district judge who has consented to be subject to assignment pursuant to Section 75.001, Government Code. [Ch. 359, 69th Legislature, Reg. Session (1985)]

(15) "Statutory County Court Judge" means the judge of a county court created by the legislature under Article V, Section 1, of the Texas Constitution, including county courts at law, statutory probate courts, county criminal courts, county criminal courts of appeals, and county civil courts at law. (Sec. 21.009, V.T.C.A. Government Code [Ch. 2, Sec. 16.01(18), 71st Legislature (1989)])

(16) "County Judge" means the judge of the county court created in each county by Article V, Section 15, of the Texas Constitution. (Sec. 21.009, V.T.C.A. Government Code [Ch. 2, Sec. 16.01(18), 71st Legislature (1989)])

(17) "Part-time" means service on a continuing or periodic basis, but with permission by law to devote time to some other profession or occupation and for which the compensation for that reason is less than that for full-time service.

(18) "Judge Pro Tempore" means a person who is appointed to act temporarily as a judge.

CIVIL PRACTICE AND REMEDIES CODE

TITLE 2. TRIAL, JUDGMENT, AND APPEAL

SUBTITLE C. JUDGMENTS

CHAPTER 37. DECLARATORY JUDGMENTS

Sec. 37.001. DEFINITION. In this chapter, "person" means an individual, partnership, joint-stock company, unincorporated association or society, or municipal or other corporation of any character.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 37.002. SHORT TITLE, CONSTRUCTION, INTERPRETATION. (a) This chapter may be cited as the Uniform Declaratory Judgments Act.

(b) This chapter is remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered.

(c) This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 37.003. POWER OF COURTS TO RENDER JUDGMENT; FORM AND EFFECT. (a) A court of record within its jurisdiction has power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. An action or proceeding is not open to objection on the ground that a declaratory judgment or decree is prayed for.

(b) The declaration may be either affirmative or negative in form and effect, and the declaration has the force and effect of a final judgment or decree.

(c) The enumerations in Sections 37.004 and 37.005 do not limit or restrict the exercise of the general powers conferred in this section in any proceeding in which declaratory relief is sought and a judgment or

decree will terminate the controversy or remove an uncertainty.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 37.004. SUBJECT MATTER OF RELIEF. (a) A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

(b) A contract may be construed either before or after there has been a breach.

(c) Notwithstanding Section 22.001, Property Code, a person described by Subsection (a) may obtain a determination under this chapter when the sole issue concerning title to real property is the determination of the proper boundary line between adjoining properties.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.
Amended by:

Acts 2007, 80th Leg., R.S., Ch. 305 (H.B. 1787), Sec. 1, eff. June 15, 2007.

Sec. 37.005. DECLARATIONS RELATING TO TRUST OR ESTATE. A person interested as or through an executor or administrator, including an independent executor or administrator, a trustee, guardian, other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust or of the estate of a decedent, an infant, mentally incapacitated person, or insolvent may have a declaration of rights or legal relations in respect to the trust or estate:

(1) to ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others;

(2) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity;

(3) to determine any question arising in the administration of the trust or estate, including questions of construction of wills and other writings; or

(4) to determine rights or legal relations of an independent executor or independent administrator regarding fiduciary fees and the settling of accounts.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 167, Sec. 3.08(a), eff. Sept. 1, 1987; Acts 1999, 76th Leg., ch. 855, Sec. 10, eff. Sept. 1, 1999.

Sec. 37.0055. DECLARATIONS RELATING TO LIABILITY FOR SALES AND USE TAXES OF ANOTHER STATE. (a) In this section, "state" includes any political subdivision of that state.

(b) A district court has original jurisdiction of a proceeding seeking a declaratory judgment that involves:

(1) a party seeking declaratory relief that is a business that is:

(A) organized under the laws of this state or is otherwise owned by a resident of this state; or

(B) a retailer registered with the comptroller under Section 151.106, Tax Code; and

(2) a responding party that:

(A) is an official of another state; and

(B) asserts a claim that the party seeking declaratory relief is required to collect sales or use taxes for that state based on conduct of the business that occurs in whole or in part within this state.

(c) A business described by Subsection (b)(1) is entitled to declaratory relief on the issue of whether the requirement of another state that the business collect and remit sales or use taxes to that state constitutes an undue burden on interstate commerce under Section 8, Article I, United States Constitution.

(d) In determining whether to grant declaratory relief to a business under this section, a court shall consider:

(1) the factual circumstances of the business's operations that give rise to the demand by the other state; and

(2) the decisions of other courts interpreting Section 8, Article I, United States Constitution.

Added by Acts 2007, 80th Leg., R.S., Ch. 699 (H.B. 2010), Sec. 1, eff.

September 1, 2007.

Sec. 37.006. PARTIES. (a) When declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties. A declaration does not prejudice the rights of a person not a party to the proceeding.

(b) In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party and is entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state must also be served with a copy of the proceeding and is entitled to be heard.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 37.007. JURY TRIAL. If a proceeding under this chapter involves the determination of an issue of fact, the issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 37.008. COURT REFUSAL TO RENDER. The court may refuse to render or enter a declaratory judgment or decree if the judgment or decree would not terminate the uncertainty or controversy giving rise to the proceeding.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 37.009. COSTS. In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 37.010. REVIEW. All orders, judgments, and decrees under this chapter may be reviewed as other orders, judgments, and decrees.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Sec. 37.011. SUPPLEMENTAL RELIEF. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application must be by petition to a court having jurisdiction to grant the relief. If the application is deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree to show cause why further relief should not be granted forthwith.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985.

Texas Constitution article I, section 8

FREEDOM OF SPEECH AND PRESS; LIBEL. 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. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

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