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 REPLY BRIEF ON THE MERITS

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Reply To Respondents' Statement Regarding Oral Argument

Petitioner Dianne Hensley respectfully requests oral argument, and believes that oral argument would be helpful to the resolution of the issues presented.

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PETITIONER'S REPLY BRIEF ON THE MERITS

To The Honorable Supreme Court Of Texas:

The respondents reiterate the jurisdictional objections and preclusion defenses that they raised in the lower courts, and they contest Judge Hensley's interpretation of the Texas Religious Freedom Restoration Act. None of the respondents' arguments have merit.

I. The Respondents' Jurisdictional Objections Are Meritless

The respondents raise numerous jurisdictional objections to Judge Hensley's claims, but each of these arguments has been soundly refuted.

A. Judge Hensley's Decision Not To Appeal To The Special Court Of Review Does Not Deprive The State Judiciary Of Jurisdiction Because Judge Hensley Is Not Asking The State Judiciary To Vacate The Commission's Sanction Or Have It Declared Void

The respondents repeat their claim that section 33.034 of the Texas Government Code provides the "exclusive mechanism" for review of the Commission's sanction. *See* Respondents' Br. at 53. This argument gets the respondents nowhere because Judge Hensley is *not* seeking to undo or modify the "public warning" that she received, and that sanction will remain in effect regardless of whether the state judiciary awards the relief that Judge Hensley is demanding in this litigation. *See* Petitioner's Br. at 14–15. Indeed, Judge Hensley has expressly disclaimed any intent to collaterally attack or in any way disturb the public warning that the Commission issued on November 12, 2019. *See id.* at 14–15; CR 240 ("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 respondents have no answer to this. Their brief repeatedly and falsely asserts that Judge Hensley is attempting to change the outcome of her disciplinary hearing, even though Judge Hensley has explicitly disavowed any relief that would alter or undo the sanction that the Commission imposed. *See* Respondents' Br. at 1 ("Petitioner's suit is a collateral attack on a final, unappealable Public Warning disciplinary order issued by the Commission"); *id.* at 22 ("Petitioner's claims fly in the face of established law that prohibits

collateral attacks on Commission decisions and those of other state agencies."); *id.* at 29 ("Petitioner . . . is necessarily claiming issuing the Public Warning is void"). Judge Hensley is *not* asking the state judiciary to change the *outcome* of the Commission's proceeding, and she acknowledges that the Commission's "public warning" will remain no matter what happens in this litigation. Judge Hensley is asking only for relief that she *could not have obtained* from the Special Court of Review: compensatory damages, costs and attorneys' fees, and declaratory and injunctive relief that will prevent the Commission from instituting future disciplinary proceedings over her refusal to officiate at same-sex weddings.

How can Judge Hensley be jurisdictionally barred from seeking relief in state court that was *unavailable* in an appeal to the Special Court of Review? The respondents do not attempt to answer this question, and they do not deny that the Special Court of Review could not have awarded the compensatory damages, costs and attorneys' fees, and declaratory and injunctive relief that Judge Hensley is seeking in these state-court proceedings. To accept the respondents' argument would mean that Judge Hensley could never obtain (or even request) the compensatory damages, costs and attorneys' fees, and declaratory and injunctive relief that Texas RFRA promises to those who suffer violations of their right to religious freedom.

Finally, the respondents insist that *Hagstette v. State Commission on Judicial Conduct*, 2020 WL 7349502 (Tex. App.—Houston [1st Dist.], no pet.),[1] bars Judge Hensley's lawsuit even though Judge Hensley (unlike the magistrate judges in *Hagstette*) is *not* suing to have the Commission's sanction declared void. *See* Respondents' Br. at 29 ("Nothing in *Hagstette*'s language limits the scope of the ruling to collateral attacks specifically requesting that prior orders be voided."). Yet the respondents agree with Judge Hensley that the plaintiffs in *Hagstette* were asking the state judiciary to declare "void" the public admonitions issued by the State Commission on Judicial Conduct. *See Hagstette*, 2020 WL 7349502, at *3 ("[T]he Magistrate Judges sought a judicial declaration that their public admonitions were void."); Respondents' Br. at 29 ("[T]he Court of Appeals in *Hagstette* made clear what the magistrate judges actually sought: '[T]he Magistrate Judges argue that the trial court had jurisdiction to declare the Commissions actions void because the Commission and its officials acted beyond their statutory authority.'" (quoting *Hagstette*, 2020 WL 7349502, at *1).

1. *See* Petitioner's Br. at 23 ("*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" (emphasis in original).

The respondents claim that Judge Hensley is "necessarily claiming" that "issuing the Public Warning is void"—even though Judge Hensley has specifically renounced any request to "void" the Commission's sanction[2]—because she brought an *ultra vires* claim against the individual commissioners, which (in the respondents' view) necessarily implies that the public warning that the commissioners issued on November 12, 2019 was "illegal, unauthorized, and thus void." Respondents' Br. at 30. The respondents are mistaken. An *ultra vires* claim allows a court to award only prospective relief to restrain an ongoing violation of state law; it does not authorize retrospective relief to remedy or undo a past unlawful act of a state official. *See 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."); *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 75–76 (Tex. 2015) ("[S]overeign immunity is inapplicable when a suit challenges the constitutionality of a statute and seeks only equitable relief."). So Judge Hensley cannot use her *ultra vires* claims to "void" a past action taken by the individual commissioners. And even if she could, Judge Hensley has explicit-

2. CR 240 ("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."); *see also* Petitioner's Br. at 14–15.

ly disclaimed and renounced any attempt to obtain a remedy of that sort.[3] Finally, even if the respondents' argument were correct, it would only preclude Judge Hensley's *ultra vires* claims against the individual commissioners, and would not have any effect on the remaining claims that Judge Hensley has brought against the commissioners and the Commission itself. CR 609–614 (listing claims in second amended petition).

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

The respondents continue to insist that Judge Hensley's notice of February 17, 2019, failed to state "the manner in which the exercise of governmental authority burdens" her refusal to perform same-sex weddings. *See* Respondents' Br. at 40 (quoting Tex. Civ. Prac. & Rem. Code § 110.006(a)(3) (requiring notice of "the manner in which the exercise of governmental authority burdens the act or refusal to act.")). It is hard to understand how the respondents can say this when the notice said:

> *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 657–668 (emphasis added). That clearly and unequivocally describes the "manner" in which the respondents have "burdened" Judge Hensley's "refusal to act," *i.e.*, her refusal to perform same-sex weddings. They have

3. *See* note 2, *supra*.

"burdened" that "refusal to act" by: (1) subjecting Judge Hensley to investigation; and (2) threatening Judge Hensley with penalties. The notice could not possibly have been clearer on this point.

The respondents also observe that Judge Hensley did not "change her practices" regarding weddings until August of 2019—nearly seven months after she mailed her notice letter on February 17, 2019. *See* Respondents' Br. at 54. But that has no relevance to whether the notice complies with the requirements of section 110.006(a), which looks to the content of the notice rather than the behavior of the plaintiff. The respondents are also claiming that Judge Hensley could not have been "burdened" by the Commission's investigation because she was still performing marriages for opposite-sex couples at the time she mailed her notice on February 17, 2019, and no actual "burden" existed until she quit performing weddings entirely in August of 2019. *See* Respondents' Br. at 63. That is sophistry. Judge Hensley suffered a "substantial burden" on her religious freedom from the *threat* of disciplinary action, and that "substantial burden" existed regardless of whether or when she changed her practices in response to the Commission's threats. A person who is undeterred by the prospect of disciplinary action can still challenge the *threatened* discipline as a "substantial burden" on his or her religious freedom. *See Goldman v. Weinberger*, 475 U.S. 503, 505 (1986).

Finally, the respondents are wrong to say that Judge Hensley's notice "implied" that she had been "required to suspend her opposite-sex wedding

ceremonies" at the time she mailed her notice on February 17, 2019. *See* Respondents' Br. at 40; *id.* at 63. Judge Hensley wrote:

> 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 657–668 (emphasis added). The respondents appear to take issue with the use of the present progressive verb tense in the italicized language, and they insist that Judge Hensley could not possibly have suffered a "substantial burden" until she capitulated to the Commission's threats and quit doing marriages entirely in August of 2019. But a "substantial burden" is imposed whenever the government forces someone to *choose* between punishment and acting in accordance with their religious beliefs. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 691 (2014) ("If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price—as much as $1.3 million per day, or about $475 million per year, in the case of one of the companies. If these consequences do not amount to a substantial burden, it is hard to see what would."); *id.* 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)); *id.* at 720. And it was the imposition of this choice that

"substantially burdened" Judge Hensley's religious freedom when she mailed her notice to the Commission on February 17, 2019.

C. None Of The Respondents Have Immunity From Judge Hensley's Claims

The respondents reiterate their arguments for sovereign immunity and statutory immunity under section 33.006 of the Texas Government Code. Neither of these immunities can shield the respondents from Judge Hensley's claims.

1. Sovereign Immunity Is No Defense

Texas Religious Freedom Restoration Act waives the respondents' sovereign immunity for claims asserted under the Texas Religious Freedom Restoration Act. *See* Tex. Civ. Prac. & Rem. Code § 110.008(a). The respondents acknowledge the statutory waiver but attempt to escape it by claiming that Judge Hensley failed to provide the notice required by section 110.006(a). *See* Respondents' Br. at 39–40. The respondents' attacks on the adequacy of Judge Hensley's notice are meritless for the reasons we have already provided. *See* Petitioner's Br. at 24–32; *see also supra* at 6–9. Unless the Court finds that Judge Hensley's notice of February 17, 2019, failed to comply with the requirements of section 110.006(a), there is no way to avoid the statutory waiver of sovereign immunity.

The Uniform Declaratory Judgment Act also waives the Commission's sovereign immunity because Judge Hensley is challenging the constitutionality of Canon 4A(1). CR 613 (¶ 70); Petitioner's Br. at 18–20. The respondents

try to get around the Uniform Declaratory Judgment Act by claiming that it "may not be used to circumvent" the appellate mechanism in section 34.034 of the Texas Government Code. *See* Respondents' Br. at 65. But that just reiterates the respondents' meritless claim that Judge Hensley is collaterally attacking the Commission's "public warning" of November 12, 2019. Judge Hensley has made abundantly clear that she is *not* seeking to disturb the Commission's sanction in any manner. And Judge Hensley could not have obtained the relief that she is seeking in this lawsuit from the Special Court of Review. The respondents get nowhere by (once again) trying to characterize the claims for declaratory relief as an attempt to circumvent or undermine the Special Court of Review.

Finally, Judge Hensley's claims fall within the *ultra vires* exception to sovereign immunity, because she is seeking prospective relief against a state officer who is accused of violating state law. The respondents claim that Judge Hensley is suing over matters "within the discretion of the Commissioners." Respondents' Br. at 55. But the commissioners have no "discretion" to violate the Texas Religious Freedom Restoration Act, 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 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)). Of course, the respondents believe that they were acting in a manner consistent with the Texas Religious Freedom Restoration Act,[4] but that goes to the merits rather than immunity.

The respondents observe that *ultra vires* claims may not be used to challenge an "an incorrect or wrong result" when made within the official's "delegated authority." Respondents' Br. at 66 n.186 (quoting *Creedmoor-Maha W.S.C. v. Texas Commission on Environmental Quality*, 307 S.W.3d 505, 517–18 (Tex. App.—Austin 2010, no pet.) (internal quotation marks omitted)); *see also id.* at 66 n.186 (collecting authorities). But the commissioners have *no* "delegated authority" to act in violation of a statute, and none of the cases that the respondents cite involved an alleged violation of a plaintiff's *statutory* rights. On the respondents' view, it is hard to imagine how there could ever be an *ultra vires* lawsuit, because a respondent would always be able to characterize its statutory or constitutional violations as an "incorrect or wrong result." But alleged statutory violations will *always* be the proper subject of an *ultra vires* lawsuit, because no government official will ever have "discretion" or "delegated authority" to violate a statutory command.

4. *See* Respondents' Br. at 19–21 (citing *In re Neely*, 390 P.3d 728, 753 (Wyo. 2017)); *id.* at 57.

2. Statutory Immunity Under Section 33.006 Is No Defense

The respondents do not address any of Judge Hensley's arguments against the application of statutory immunity under section 33.006. *See* Petitioner's Br. at 32–34. They also do not contest Judge Hensley's arguments that the Religious Freedom Restoration Act trumps any claim for statutory immunity under section 33.006. *See id.* at 33–34.

Section 33.006 cannot be raised in a plea to the jurisdiction because it confers only an immunity from liability and not an immunity from suit. *See* Petitioner's Br. at 32–33. The respondents do not deny this, and they ignore this point in their brief. So there is no basis to sustain the respondents' plea to the jurisdiction by invoking statutory immunity under section 33.006.

But section 33.006 can still be invoked to defeat a motion for summary judgment, regardless of whether it confers immunity from liability or immunity from suit. So Judge Hensley must rebut this immunity defense to prevail on her motion for summary judgment; she cannot brush it aside merely by observing that section 33.006 confers only an immunity from liability.

And Judge Hensley has done so by presenting three arguments against statutory immunity. First, the text of section 33.006(b) confers immunity only for "an act or omission committed by the person *within the scope of the person's official duties*." Tex. Gov't Code § 33.006(b) (emphasis added). A commissioner who violates the Texas Religious Freedom Restoration Act is *not* acting "within the scope of the person's official duties"—and the immunity

conferred by section 33.006(b) melts away for the same reason that sovereign and official immunity disappear. An officer who acts in violation of a statute is no longer acting within his "official duties" and is stripped of the "official" status that triggers immunity under section 33.006(b) and sovereign-immunity doctrines. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009) ("[T]he rule that *ultra vires* suits are not 'suit[s] against the State within the rule of immunity of the State from suit' derives from the premise that the 'acts of officials which are not lawfully authorized are not acts of the State'" (quoting *Cobb v. Harrington*, 144 Tex. 360, 366, 190 S.W.2d 709, 712 (Tex. 1945)); *Ex parte Young*, 209 U.S. 123, 159–60 (1908) ("If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."); *see also* Petitioner's Br. at 33–34.

Second, the respondents' interpretation of "official duties" would render the statute unconstitutional because it would immunize the Commission and its members from *any* type of lawsuit or judicial scrutiny when they violate statutory or constitutional rights protected by state law. CR 494. The appeal offered by section 34.034 of the Texas Government Code provides only for vacatur of an unlawful sanction; it offers no protection from Commissioners who threaten to launch *future* investigations of judges in response to statuto-

rily or constitutionally protected conduct. The respondents' interpretation of section 33.006 would empower the Commission to violate constitutional rights at whim and disable the judiciary from enjoining those constitutional violations. Constitutional rights cannot exist if immunity doctrines shield government officials who violate the constitution from any type of judicial relief.

Third, the Religious Freedom Restoration Act trumps any immunity that might otherwise be conferred by section 33.006. Section 110.002(c) of the Texas Civil Practice and Remedies Code says:

> 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.

Tex. Civ. Prac. & Rem. Code § 110.002(c). That means the remedies provided in Chapter 110 *must* be available, notwithstanding any other statute that purports to confer immunity, unless the immunity-conferring statute expressly exempts itself from the requirements of Texas RFRA. *See* Petitioner's Br. at 33–34. On top of that, section 110.008(a) says:

> 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) (emphasis added). This expressly allows a plaintiff to sue a "government entity for damages," *regardless* of any other statute that might purport to confer immunity, and to the extent there

is any conflict between section 110.008(a) and section 33.006 the former must prevail. *See id.*

The respondents do not address *any* of this. They have therefore waived any possible argument that section 33.006(a) can defeat Judge Hensley's motion for summary judgment, both in this Court and in any future proceeding. *See Griggs v. Capitol Machine Works, Inc.*, 701 S.W.2d 238, 238 (Tex. 1985).

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

The respondents claim that Judge Hensley's claims are unripe and that she is seeking an "advisory opinion." Respondents' Br. at 47–48. This is premised on the respondents' assertion that there is "no current or threatened investigation" of Judge Hensley. *Id.* at 48; see also id. at 56 (same). But that is because Judge Hensley stopped performing weddings in response to the Commission's actions. The controversy is ripe because Judge Hensley *wants* to resume officiating at marriages, but she cannot do so unless she agrees to perform same-sex weddings or subjects herself to additional discipline from the Commission. Self-censorship in response to threatened punishment from the government does not make a controversy unripe. *See Speech First Inc. v. Fenves*, 979 F.3d 319, 331 (5th Cir. 2020). And the entire point of pre-enforcement challenges is to allow a plaintiff to obtain a declaration of his rights *before* subjecting himself to government investigation and punishment. *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."); *see also Doe v. Bolton*, 410 U.S. 179, 188–89 (1973).

II. The Respondents' Res Judicata And Collateral Estoppel Defenses Are Meritless

The respondents re-assert their arguments for res judicata and collateral estoppel, but Judge Hensley has conclusively refuted these arguments in her opening brief. *See* Petitioner's Br. at 36–46. Nothing in the respondents' brief moves the needle on any of these preclusion arguments.

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

The Commission's disciplinary proceedings do not even qualify for issue or claim preclusion because the Commission is not a court, and an agency proceeding cannot trigger res judicata or collateral estoppel unless it falls within the three-part test that the Supreme Court established in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966). The respondents cannot invoke preclusion doctrines unless they first establish that:

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.

Id. at 422. And because res judicata and collateral estoppel are affirmative defenses, the burden of pleading and proving these elements rests entirely with the respondents. *See Loya Insurance Company v. Avalos*, 610 S.W.3d 878, 882 n.3 (2020).

1. The Commission Was Not Acting In A Judicial Capacity

The respondents insist that the Commission was "acting in a judicial capacity" when it sanctioned Judge Hensley, and it cites the Fifth Circuit's ruling in *Scott v. Flowers*, 910 F.2d 201 (5th Cir. 1990), to support its argument. *See* Respondents' Br. at 68 & n.190. But *Scott* was not applying the *Utah Construction & Mining* test, and it was not considering whether the Commission's disciplinary proceedings should trigger res judicata in state or federal court. It was applying the *Rooker–Feldman* doctrine, and its statement that the Commission's reprimand of another judge was "a judicial act" has no bearing on whether the Commission was "acting in a judicial capacity" for purposes of res judicata. In all events, rulings from the Fifth Circuit are not binding on the state judiciary and may be followed only to the extent that this court, in its independent judgment, finds them persuasive. *See Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) ("Texas courts may certainly draw upon the precedents of the Fifth Circuit, or any other federal or state court, . . . [but] they are *obligated* to follow only higher Texas courts and the United States Supreme Court"). The state courts should not follow the Fifth Circuit's characterization of Commission proceedings for the reasons in Judge Hensley's opening brief: (1) The Commission was not resolving a dispute between adverse parties; and (2) 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). *See* Petitioner's Br. at 38–39.

The respondents make no argument for how an inquisition that lacks adverse parties can qualify as a "judicial" proceeding, other than to cite the Fifth Circuit's ruling in *Scott*. *See* Respondents' Br. at 68 & n.190. The respondents correctly observe that the Commission's disciplinary actions are subject to *de novo* review on issues of law and fact, *see id.* at 68, but that undercuts their attempt to characterize the Commission as "judicial" because a true judicial tribunal receives deferential appellate review with regard to its findings of fact.

There is a more serious problem with the respondents' "judicial capacity" argument. Article 5, section 1 of the Texas Constitution vests "the judicial power of this State" exclusively in "courts":

> The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other *courts* as may be provided by law.

Tex. Const. art. 5, § 1 (emphasis added). Yet section 33.002(a-1) of the Texas Government Code specifically declares that the Commission "does not have the power or authority of a court in this state." Tex. Gov't Code § 33.002(a-1). So the idea that a non-court such as the Commission can act in a "judicial capacity" is incompatible with article 5, section 1 of the Texas Constitution.

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). Judge Hensley argued that the Commission's conclusions of law cannot receive preclusive effect under *Utah Construction & Mining*. *See* Petitioner's Br. at 39–40. The respondents have no answer to this argument.

B. Res Judicata Does Not Bar Judge Hensley's Claims Because She Could Not Have Asserted Her 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); Petitioner's Br. at 41–43. And the respondents do not deny that Judge Hensley could not have sought or obtained relief on her claims for compensatory damages and declaratory and injunctive relief before the Commission.

But the respondents say that Judge Hensley was able to present her defense under the Texas Religious Freedom Restoration Act, and that the Commission tacitly rejected that defense when it sanctioned her. *See* Respondents' Br. at 69. That is an argument for collateral estoppel, not res judi-

cata. The *claims for relief* that Judge Hensley is now asserting could not have been made before the Commission or the Special Court of Review, and that is all that Judge Hensley needs to avoid a res judicata defense. If the respondents want to contend that the Commission *ruled* on the meaning of the Texas Religious Freedom Restoration Act in a manner that binds Judge Hensley in future proceedings, then it is arguing for collateral estoppel and not res judicata.

C. Collateral Estoppel Does Not Bar Judge Hensley's Claims Because The Commission Ignored And Did Not Rule On Her Texas RFRA Defense

The respondents claim that the Commission "actually decided" Judge Hensley's Texas RFRA defense by implication—even though the Commission refused to acknowledge her defense and said nothing about it in its order. *See* Respondents' Br. at 31–33; *id.* at 52 & n.152; id. at 52 & n.157; *id.* at 61–62; *id.* at 69. The respondents' stance is untenable. Under Texas law, "a prior adjudication of an issue will be given estoppel effect only if it was adequately deliberated and firm." *Mower v. Boyer*, 811 S.W.2d 560 (Tex. 1991). And this Court has established three factors to consider when deciding whether to apply collateral estoppel:

> (1) whether the parties were fully heard,
> (2) *that the court supported its decision with a reasoned opinion*, and
> (3) that the decision was subject to appeal or was in fact reviewed on appeal.

Id. at 562 (emphasis added); *see also Cole v. G.O. Associates, Ltd.*, 847 S.W.2d 429, 431 (Tex. App.—Fort Worth 1993, writ denied) (same three-factor test);

Montana v. United States, 440 U.S. 147, 164 n.11 (1979) ("Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation."). In *Cockrell v. Republic Mortgage Insurance Co.*, 817 S.W.2d 106 (Tex. App.—Dallas 1991, no writ), for example, the Court recited the three-part test from *Mower* and refused to apply collateral estoppel because (among other reasons) "the trial court did not give a reasoned opinion." *Id.* at 115.

The Commission's apparent rejection of Judge Hensley's Texas RFRA defense does not qualify for collateral estoppel under the three-part test of *Mower*. The most glaring problem is that there was no "reasoned opinion" supporting the Commission's rejection of the Texas RFRA arguments; indeed, Judge Hensley's Texas RFRA defense was not even acknowledged in the Commission's order. On top of that, one cannot say that the "*parties* were fully heard" because there was no adverse presentation between "parties" before the Commission.

The respondents try to get around all of this by citing *Allen v. Allen*, 717 S.W.2d 311 (Tex. 1986),[5] but that case had nothing to do with collateral estoppel or issue preclusion. *Allen* concerned only whether an issue had been resolved in the trial court for purposes of determining appellate jurisdiction:

> Pat complains that the court of appeals had no jurisdiction on appeal because the trial court's failure to adjudicate his alternative grounds of recovery renders the order intrinsically interloc-

5. *See* Respondents' Br. at 31–33; *id.* at 52 & n.152; id. at 52 & n.157; *id.* at 61–62; *id.* at 69.

> utory . . . . The absence of any reference to pleaded alternative grounds of recovery does not render an order intrinsically interlocutory. 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.

Id. at 312. *Allen* is of course correct to hold that a trial court's judgment is presumed to "dispose" of all pleaded issues—but that does *not* mean that a trial court's tacit or presumed disposition of issues is precluded from re-litigation under the doctrine of collateral estoppel. The issue to decide is not whether the Commission "disposed of" Judge Hensley's RFRA defense, but whether the Commission "actually decided" the issues in a manner that triggers collateral estoppel. To make that determination, a court must apply the three-part test established in *Mower*; it cannot assume that every issue "disposed of" is precluded from re-litigation under the *Mower* test.

III. The Respondents' Limitations Argument Overlooks The Tolling Provision Of Section 110.007(b)

The respondents correctly observe that the Texas Religious Freedom Restoration Act establishes a one-year statute of limitations,[6] but they are wrong to claim that the limitations period prevents Judge Hensley from recovering damages for harms or substantial burdens that were inflicted "more than one year before she filed this suit." Respondents' Br. at 57; *see also id.* at 38 (claiming that Judge Hensley "cannot assert any claim under RFRA as to any alleged act or omission by the Commission or its members before De-

6. *See* Tex. Civ. Prac. & Rem. Code § 110.007(a).

cember 17, 2018."). Section 110.007(b) of the Texas Civil Practice and Remedies Code tolls the statute of limitations for 75 days after 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."). Judge Hensley mailed her notice on February 17, 2019, and she filed her lawsuit on December 17, 2019. The mailing of notice adds 75 days to the limitations period, so Judge Hensley may seek relief for any "substantial burdens" on her religious freedom that occurred on or after October 3, 2018. *See* Petitioner's Br. at 30 n.10.

IV. Judge Hensley Has Established A Violation Of The Texas Religious Freedom Restoration Act

The respondents suggest that Judge Hensley's interpretation of the Texas Religious Freedom Restoration Act conflicts with section 106.001(a) of the Texas Civil Practice and Remedies Code,[7] which says:

> An officer or employee of the state or of a political subdivision of the state who is acting or purporting to act in an official capacity may not, because of a person's race, religion, color, sex, or national origin:
>
> (1) refuse to issue to the person a license, permit, or certificate; [or] . . .
>
> (5) refuse to grant a benefit to the person;

7. Respondents' Br. at 57.

Tex. Civ. Prac. & Rem. Code § 106.001(a); *see also Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (interpretating federal prohibitions on "sex" discrimination to encompass discrimination against homosexuals). But it is far from clear that the Supreme Court of Texas will adopt *Bostock*'s controversial interpretation of "sex" discrimination or extend it to state anti-discrimination statutes. And even if this were to happen, the Texas Religious Freedom Restoration Act trumps the anti-discrimination rules in section 106.001(a) to the extent there is any conflict between the two. *See* Tex. Civ. Prac. & Rem. Code § 110.002(c) ("This chapter applies to each law of this state unless the law is expressly made exempt from the application of this chapter by reference to this chapter."). Finally, it is hard to see how Judge Hensley's behavior violates section 106.001(a) even if one assumed that *Bostock* carries over to state anti-discrimination laws. A wedding officiant does not "issue" licenses, permits, or certificates; that is done by the county clerk. *See* Tex. Family Code § 2.001(a) ("A man and a woman desiring to enter into a ceremonial marriage must obtain a marriage license from the county clerk of any county of this state."). And Judge Hensley is not "refusing" to "grant a benefit" by recusing herself from same-sex weddings and referring same-sex couples to other wedding officiants. Those couples still obtain the "benefit" of a low-cost wedding officiated by a justice of the peace; they simply obtain that "benefit" from a different judicial officer.

V. There Are No Disputed Issues Of Material Fact

The respondents contend that issues of material fact remain, but there are no factual disagreements between the parties. The parties' dispute concerns only whether the uncontested facts establish a violation of the Texas Religious Freedom Restoration Act.

A. It is undisputed that the Commission disciplined Judge Hensley in response to her decision to recuse herself from officiating at same-sex weddings, and it is undisputed that the Commission issued a "public warning" that threatens Judge Hensley with further discipline if she persists in the behavior that led to the disciplinary proceedings. The content of the Commission's public warning appears in Exhibit 10 to Judge Hensley's motion for summary judgment, and the authenticity of that document is undisputed. CR 594–596. The Court needs only to decide whether this uncontested evidence establishes a "substantial burden" on Judge Hensley's religious freedom, and whether that burden represents the least restrictive means of furthering a compelling governmental interest.

B. The respondents argue that the Commission's disciplinary actions (and threatened disciplinary actions) against Judge Hensley furthered two "compelling governmental interests." The first is "the importance of assuring that litigants may have confidence in the integrity of the judiciary and the rule of law." Respondents' Br. at 58; *see also id.* at 4–5; *id.* at 19–21; *id.* at 70. And the second is that "judges not engage in conduct that would create in

reasonable minds a perception that the judge's ability to carry out judicial responsibilities impartially is impaired." *Id.* at 58–59. This is not an issue of "material fact," but a pure question of law, and the Court must decide on summary judgment whether these asserted interests are "compelling" and whether the Commission's discipline of Judge Hensley actually furthers those interests.

The Commission's discipline of Judge Hensley does not further either of these asserted governmental interests. A judge who politely and respectfully recuses herself from officiating at same-sex weddings has not done anything to undermine "confidence in the integrity of the judiciary and the rule of law."[8] Nor does such conduct "create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities impartially is impaired." It merely expresses disapproval of homosexual behavior, and disapproval of a person's *behavior* does not evince bias toward that individual as a *person* when they appear as a litigant in court. *See* Petitioner's Br. at 51–53 (denying that there can be any "compelling governmental interest" in preventing judges or justices of the peace from publicly, but politely and respectfully, expressing a religious belief that opposes homosexual behavior). Disapproval of homosexual conduct may not be as fashionable as it once was, but it is a view held by millions of Americans and the majority of Christian reli-

8. The Wyoming Supreme Court was wrong to hold otherwise in *In re Neely*, 390 P.3d 728 (Wyo. 2017), and this Court should explicitly repudiate that decision and its reasoning.

gious denominations (as well as many traditional Jewish and Muslim believers). And the respondents make no effort to explain why expressing disapproval of homosexuality on account of one's religious beliefs is incompatible with the judicial role.

More importantly, there cannot be a "compelling" governmental interest in prohibiting Judge Hensley from recusing herself from same-sex weddings when the Texas legislature has specifically addressed the issue of discrimination by wedding officiants in section 2.205(a) of the Texas Family Code, which allows wedding officiants to discriminate on account of sex or sexual orientation:

> (a) A person authorized to conduct a marriage ceremony by this subchapter is prohibited from discriminating on the basis of race, religion, or national origin against an applicant who is otherwise competent to be married.
>
> (b) On a finding by the State Commission on Judicial Conduct that a person has intentionally violated Subsection (a), the commission may recommend to the supreme court that the person be removed from office.

Tex. Family Code § 2.205. So while the legislature decided to prohibit wedding officiants from discriminating on account of "race, religion, or national origin," it has pointedly refused to extend this statutory anti-discrimination rule to sex or sexual orientation. There cannot possibly be a "compelling governmental interest" in prohibiting judges from recusing themselves from officiating at same-sex weddings when the legislature has specifically addressed the topic and declined to extend its anti-discrimination rule to same-

sex couples. *See Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993) ("[A] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." (citations and internal quotation marks omitted)); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2392 (2020) (Alito, J., concurring).

Finally, same-sex marriage remains illegal under the law of Texas, as both the Texas Constitution and the Texas Family Code continue to define marriage exclusively as the union of one man and one woman. *See* Tex. Const. art. 1, § 32; Tex. Family Code § 6.204(b). Texas has not amended or repealed its marriage laws in response to *Obergefell v. Hodges*, 576 U.S. 644 (2015), and the Supreme Court has no power to formally amend or revoke a state statute or constitutional provision—even after opining that the state law violates the Supreme Court's interpretation of the Constitution. *See Pidgeon v. Turner*, 538 S.W.3d 73, 88 n.21 (Tex. 2017) ("[N]either the Supreme Court in *Obergefell* nor the Fifth Circuit in *De Leon* 'struck down' any Texas law. When a court declares a law unconstitutional, the law remains in place unless and until the body that enacted it repeals it"). The federal judicial power extends only to the resolution of cases and controversies between named litigants, and Judge Hensley is not a party to *Obergefell* or *De Leon v. Perry*, 975 F. Supp. 2d 632 (2014). Nor is Judge Hensley subject to any injunction or court decree that requires her to disregard the state's marriage laws.

There is no "compelling" governmental interest in forcing Judge Hensley to officiate or celebrate a marriage that remains unlawful under the Texas Constitution. The state might have a compelling interest in restraining its officials from behaving in ways that could expose the state and its fisc to lawsuits, but Judge Hensley's behavior does not violate the holding of *Obergefell*, which merely requires states to "license" and "recognize" same-sex marriages on the same terms as opposite-sex marriages. *See Obergefell*, 576 U.S. at 656. Judge Hensley is not withholding a marriage license or state recognition by politely recusing herself from same-sex weddings and referring couples to other wedding officiants who are willing to perform those ceremonies.

C. The respondents complain that Judge Hensley's evidence of "substantial burden" is "conclusory,"[9] and they insist that she must identify specific instances in which she declined to conduct a wedding in response to the Commission's threats. *See* Respondents' Br. at 59. But Judge Hensley explains that she "stopped performing weddings entirely in 2019 in response to the Commission's investigation and disciplinary actions." *See* Hensley Decl. at ¶ 35 (CR 535). And in all events, the "substantial burden" is established by the undisputed fact that the Commission forced Judge Hensley to *choose* between further disciplinary action or abandoning the performance of weddings across the board. *See Hobby Lobby*, 573 U.S. at 691, 710, 720. The respondents remain stuck on the idea that a "substantial burden" cannot exist unless

9. Respondents' Br. at 59.

and until Judge Hensley stops performing weddings in response to the Commission's threats, when it is the threats themselves that impose the "substantial burden" on Judge Hensley's religious freedom. *See id.* at 691.

D. The respondents also complain that Judge Hensley's proof of damages is "stated in conclusory fashion,"[10] but they are simply wrong to call this evidence "conclusory." Judge Hensley carefully explained how the Commission's actions against her has cost her over $10,000 in lost income since August of 2019:

> I stopped performing weddings entirely in 2019 in response to the Commission's investigation and disciplinary actions. I was performing approximately 100 weddings per year before I stopped in 2019. I charged $100 per wedding, although I waived this fee for military couples. The Commission's threatened disciplinary actions have cost me well over $10,000 in lost income since 2019.

Hensley Decl. at ¶ 35 (CR 535). Judge Hensley's sworn declaration describes the fee that she typically charged ($100 per wedding) and the approximate number of weddings performed per year (100). Multiplying those numbers produces a $10,000 loss per year, and it has been well over a year since Judge Hensley stopped performing weddings in August of 2019. That is more than enough to prove that Judge Hensley lost at least $10,000 in income on account of the Commission's actions, and there is nothing "conclusory" about this declaration testimony.

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10. *See* Respondents' Br. at 59.

E. The respondents complain that Judge Hensley has not included evidence of attorneys' fees in her motion for summary judgment,[11] but evidence of attorneys' fees is submitted *after* a party has prevailed on final judgment. A litigant does not "waive" their claim to attorneys' fees by failing to prematurely introduce evidence of those fees on a motion for summary judgment.

F. Judge Hensley did not "fail to mitigate"[12] her damages by declining to appeal under section 34.034 of the Texas Government Code. *See* Respondents' Br. at 60. Even if Judge Hensley had appealed to the Special Court of Review and won, that would not have precluded the Commission from continuing to launch investigations and threaten Judge Hensley with discipline because there is no declaratory or injunctive relief available from the Special Court of Review. All that Judge Hensley could have hoped to obtain was a vacatur of the "public warning" issued on November 12, 2019; she could not have obtained a remedy that would have reined in the Commission and protected her religious freedom going forward.

11. *See* Respondents' Br. at 60.
12. *See* Respondents' Br. at 60.

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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