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SUPREME COURT OF TEXAS
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No. 22-1145
In the Supreme Court of Texas

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

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

BRIEF OF*AMICI CURIAE*
THE THOMAS MORE SOCIETY and TEXAS VALUES
IN SUPPORT OF PETITIONER

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Table of Contents

Index of Authorities

Cases:

Constitutional Provisions:

Statutes and Rules:

Other Authorities:

Statement of Interest of Amici Curiae

Amicus curiae, the Thomas More Society, is a 501(c)(3) organization dedicated to the promotion and protection of traditional families, and to the protection of all citizens' constitutional rights to free exercise of religion and free expression of religious belief. It is also a practicing law firm with a network of lawyers licensed, among other places, in Texas, Illinois, and Minnesota (three jurisdictions where the free exercise and free expression issues at stake in the provisions of the country's Codes of Judicial Conduct have now been litigated). It therefore also has an interest seeing that, to the extent those lawyers are able to effectuate it, all jurisdictions uniformly respect the constitutional rights of judges subject to those Codes, and that procedural means to protect those rights of free exercise and free expression are available.[1]

Amicus curiae Texas Values is a statewide Judeo-Christian non-profit law and policy organization that promotes research, education, and legislative advocacy to encourage, strengthen, and protect Texas families. Texas Values has over 100,000 supporters in all 254 counties in the State of Texas. Texas Values provides its supporters with legal and legislative representation and support on

[1] No counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the amici curiae or their counsel, has made a monetary contribution to this brief's preparation or submission.

issues of faith, family, and freedom and is the leading organization in Texas on issues affecting constitutionally-protected religious freedom, free speech, marriage and parental rights.

Introduction

The Texas Code of Judicial Conduct, a code of behavior promulgated by this Court, is, like all positive law in this state, subject to the constraints and mandates of the federal and state constitutions, and subject in its application to the constraints of other positive law enacted by legislation or by other rules decisions of this Court. The district and appellate courts below did not give sufficient attention and analysis to those uncontestable propositions. This case is properly before this Court, within its jurisdiction, and the decisions of the district and appellate courts should be reversed.

Summary of the Argument

Texas judges are entitled to know with precision the meaning and breadth of the provisions of the Code of Judicial Conduct. And to have that precision, they must have recourse to this Court, the authority which promulgates the Code, to allow it to adjudicate with finality the meaning of any provision of the Code that might limit their behavior. The need is all the more acute when the behavior affected is of such importance that it has received explicit protection in the Texas

Constitution's Bill of Rights and Texas statutory law (like the Religious Freedom Restoration Act).

The holdings of the district court and the Third Court of Appeals here regarding the procedural effect of Commission disciplinary proceedings – that the Commission itself and the legislatively created "special" tribunal of Government Code §33.034 are the *sole* authorities that may interpret provisions of the Code that result in "warnings," "admonitions," and "censures" to judges – is contrary to the common law of judgments, and contrary to the holdings of every court to have confronted the issue. All those courts hold that a sanctioned judge must have some recourse to a common law court–and, ultimately, the highest common law court of the jurisdiction – to pass on the meaning of the Code provision upon which a sanction is based. *People ex rel. Harrod v. Illinois Courts Commission,* 69 Ill.2d 445, 372 N.E.2d 53 (1977); *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (7th Cir. 1993); *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

That access may come, these courts hold, either via a declaratory judgment suit challenging the relevant Code provision and its continuing effects *after* the sanction is meted out to the judge, as Judge Hensley has chosen here (*White* and *Buckley*), or via a direct approach to a state supreme court by petition for extraordinary writ (*Harrod*). In no event can the judicial disciplinary apparatus be

the final authority. Texas will be a singular outlier on this issue if the Third Court of Appeals decision stands.

Because of the importance of the matter here, and because the facts of the case have been fully developed in the proceedings before the Commission and the district court below, this Court also need not remand the matter, but may, and ought to, reach and decide the substantive question this case poses: Does the Texas Religious Freedom Restoration Act permit a judge's decision to decline personal approval of same-sex unions by presiding at such civil marriage ceremonies, because her religious beliefs forbid it, to be deemed judicial misconduct subject to sanction? Not only Judge Hensley's personal situation is impacted by the answer, but also that of every other judicial officer whose personal religious beliefs and practices command similar restraint.

Argument

I. The declaratory judgment suit Judge Hensley filed is not "collateral" review of the "warning" decision of the Judicial Conduct Commission, and such "warnings" never can have *res judicata* effect because they did not come from a "court." All courts considering these questions have so held, and Texas will be a singular outlier unless this Court reverses the Third Court of Appeal, and also corrects the First Court of Appeal in *Hagstette v. State Comm'n on Judicial Conduct.*

Thirty years ago, Professor James Paulsen (who is still teaching civil procedure and jurisprudence at South Texas College of Law), gave a critical, public review of

the provisions of Government Code §33.034 and cast thorough doubt whether the entity it created was worthy of the epithet "court" at all. The review entity for serious judicial sanctions – removals, involuntary retirements, and suspension – that the Constitution creates is not similarly referred to as "court" but simply as a review "tribunal." Tex. Const. Art. 5, §1-a(9). Only the entities constituted under Article 5, section 1 earn the epithet "court" in the Constitution. While some of the quirks and flaws Professor Paulsen cataloged are ameliorated by the Procedural Rules for the State Commission on Judicial Conduct that this Court promulgated, Professor Paulsen's most substantial fear about the § 33.034 "special" tribunal is made palpable by the current position taken by the State Commission on Judicial Conduct, and the Third Court of Appeals in this case. Professor Paulsen noted:

> Notwithstanding the language of the rule [regarding publication of decisions, Tex. Proc. R. 9(e) for State Comm'n on Jud. Conduct], let us hope that in the course of reviewing a judicial sanction a special court never "establishes, alters or modifies" any rules of ethics [and so makes its decision worthy of publication], much less publishes the results. Most of us would think of this as a task for the Texas Supreme Court [alone].

James Paulsen, "Who Was that Masked Court? An Introduction to Texas' New Special Court of Review," 56 Tx. Bar. J. 1133 (1993).

Yet, the inclusion of the no-appeal provision in §33.034(i), coupled with the unsupported claim of the Commission here that approach to its "special" tribunal is

exclusive and mandatory, and demanding of preclusive effect barring further challenge, Prof. Paulsen's grave concerns have been realized.[2]

The law across the country from courts confronting similar concerns, however, is uniformly to the contrary, and should be to the contrary in Texas, too.

1. This is an independent action, not a "collateral" review of the Commission's "warning" to Judge Hensley. An independent action is the acknowledged avenue to seek judicial review of otherwise unreviewable judicial commission actions.

In *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (7th Cir. 1993) (affirming jurisdiction over a declaratory judgment claim brought by a judge *after* his discipline was meted out, and holding a provision of the Code of Judicial Conduct unconstitutional) and 801 F. Supp. 83 (N.D. Ill. 1992) (affirming jurisdiction over action, holding Code provision constitutional as applied), the federal district and circuit courts in Chicago analyzed and rejected every jurisdictional challenge that the Commission brings here (and *Rooker-Feldman*, too) in an analogous case. The Seventh Circuit's decision bears particularly on the Texas Commission's incorrect claim here that Judge Hensley's declaratory

[2] Ironically, Prof. Paulsen also noted that "[j]udging from the date of the statute and press comments at the time, the special court statute may be a reaction to complaints by two Texas Supreme Court justices publicly censured by the Commission on Judicial Conduct that they were denied any effective judicial review of the charges." Paulsen, *ibid.*

judgment action is congruent with, and thus merely collateral to, the original sanctions proceedings.

Notably, Judge Hensley has already in her reply made the most obvious correction to that argument: her case includes a claim for damages under the Religious Freedom Restoration Act, Civ. Pract. and Remedies Code §110.005, which could not have been part of the disciplinary procedures.

In *Buckley*, the plaintiff was an Illinois appellate court justice who ran unsuccessfully for a seat on the Illinois Supreme Court and was found, post-election, to have violated the "pledge or promise" prohibition of the Illinois Code of Judicial Conduct. He received no punishment from the Commission, only a finding of a violation and a warning. 997 F.2d at 226. Before running again in the next election cycle, he sued the Illinois Commission seeking a declaratory judgment that the Code's "pledge" prohibition violated the First Amendment. One of the Commission's jurisdictional defenses was that the issues of the declaratory judgment suit were congruent with the original disciplinary matter, and the suit was thus an impermissible collateral attack on the final findings of the Commission. The Seventh Circuit disagreed:

> It is true that if … Buckley were seeking not only to clear away the rule so that he could run in future judicial elections unimpeded by it but also to obtain relief against the discipline imposed upon him, he would be in effect appealing from the Illinois Courts Commission's judgment (though that

> would be only a part of what he was doing), which *Rooker-Feldman* forbids him to do. But he is not asking us to expunge the disciplinary finding or do anything else to correct or revise the Commission's judgment. He is not, in short, asking for any relief of the kind an appellant seeks— relief directed against a judgment… So we have jurisdiction, and come to the merits.

996 F.2d at 227.

That same procedural choice for testing the constitutionality of provisions of the Code of Judicial Conduct – conform behavior to warnings issued by a judicial conduct commission, but then test the warning by suit for declaratory judgment in a common law court — was endorsed in the most seminal decision regarding the Code, *Republican Party of Minnesota v. White,* 536 U.S. 765 (2002).

One of the plaintiffs in *White*, Gregory Wersal, was a Minneapolis lawyer running for a seat on the Minnesota Supreme Court and, like Justice Buckley before him in Illinois, circulated campaign literature that generated a charge to the judicial disciplinary authorities. Unlike the Illinois authorities (and perhaps because they were chastened by the decision in *Buckley*), however, the Minnesota authorities made no finding of violation. Wersal withdrew from the election, but like Justice Buckley, he ran again, taking the precaution this time of asking the disciplinary authorities for an advisory opinion that the Code provision generating the prior charge was unconstitutional and couldn't be enforced.

But they "responded equivocally" and:

> Shortly thereafter, Wersal filed this lawsuit in Federal District Court against respondents, seeking, *inter alia*, a declaration that the announce clause violates the First Amendment and an injunction against its enforcement. Wersal alleged that he was forced to refrain from announcing his views on disputed issues during the 1998 campaign, to the point where he declined response to questions put to him by the press and public, out of concern that he might run afoul of the [Code].

536 U.S. at 769-770.

Because the disciplinary authorities in *White* made no formal findings, and only equivocated to the request for a formal advisory opinion, there could be no question regarding preclusion or a *Rooker-Feldman* jurisdictional bar, and nothing in *White's* analyses supports the jurisdictional objections to declaratory judgment review that the Commission posits here. And, the equivocation of the Minnesota authorities had functionally the same effect as the "warnings" issued to Justice Buckley and to Judge Hensley here. Neither Justice Buckley nor Justice Hensley were removed from office or prohibited from seeking other judicial office, just as Mr. Wersal was allowed to campaign for judicial office again. But in all three scenarios ostensibly unreviewable positions of their disciplinary overseers constrained all of their *future* behavior in office or campaign. And that, as the Seventh Circuit held, puts to rest the jurisdictional objection to declaratory judgment review of the disciplinary authorities' position.

Judge Hensley, like Justice Buckley, is not asking this Court to expunge the disciplinary finding or do anything else to correct or revise the Commission's decision. She is not, in short, asking for any relief of the kind an appellant seeks—relief directed against a judgment. She, like any other citizen could, is pursuing a declaratory judgment under the Texas Religious Freedom Restoration Act. So this Court has jurisdiction, and should decide the case on the merits.

2. The Commission's and the §33.034 "special" tribunal's decisions imposing "warnings" (or any sanctions less than removal, suspension, or formal censure) never have preclusive, *res judicata* effect precisely *because* those decisions have been removed from the full adjudicative process of the Texas Constitution.

In *People ex rel. Harrod v. Illinois Courts Commission,* 69 Ill. 2d 445, 372 N.E.2d 53 (1977), the Illinois Supreme Court was presented a procedural landscape even more unfriendly to full review of judicial disciplinary action than that created by §33.034. *No* provision of the constitutional sections creating Illinois's judicial disciplinary apparatus – an "inquiry board" to investigate alleged misconduct, and a courts commission to review its findings and sanctions[3] --

[3] Illinois Constitution of 1970, Article 6, §15. Section 15(f) says that Commission decisions "shall be final." This contrasts with the equivalent provisions of the Texas Constitution which explicitly give this Court final review authority for all judicial disciplinary suspensions, involuntary retirements, and removals from office. Texas Constitution, Article 5, §1-a(6). The provisions of §1-a(8) that create the lesser-sanctions of "private or public admonition, warning, reprimand, or requirement that the [judicial officer] obtain additional training or education" do not explicitly provide an avenue of review to this court – and also do not explicitly provide for "finality" of Commission decisions as the Illinois Constitution does.

explicitly allow any judicial review or supervision of the Courts Commission at all. That, the Courts Commission told the Illinois Supreme Court, deprived the Court of *any* jurisdiction to review its decision in *any* case imposing judicial discipline of *any* kind. *Harrod*, 372 N.E.2d at 58-59.

The Illinois Supreme Court emphatically disagreed. It reasoned that "[t]he Commission also derives its authority from the Constitution, but it is not a coequal branch of government, nor is it a court within the meaning of the judicial article." *Id.,* at 59. That means, the Court held:

> [T]he judicial power in this State is vested solely in the courts. This power includes, among other things, the authority to judicially interpret and construe constitutional provisions and statutes when necessary… Inasmuch as the Commission is not a part of the tripartite court system in this State, it possesses no power to interpret statutory ambiguities or to compel judges to conform their conduct to any such interpretation. This limitation is particularly dictated inasmuch as this court is without the authority to review the correctness of the Commission's orders. To interpret the Constitution as granting the Commission such power would do violence to the intended constitutional scheme of government in this State. To grant the Commission such authority would interfere with an independent judicial system and would place trial judges in an untenable position. If, as here, the statutory interpretation of the Commission differed from that of the appellate courts, trial judges who followed, as mandated, the guidance of the courts of review, would be subject to sanction by the Commission. The framers of the constitution sought to promote certainty and uniformity in the interpretation and declaration of the law. To that end they committed the exercise of these judicial functions to the judicial department [alone].

372 N.E.2d at 65-66 [citations omitted]. The Court therefore granted Judge Harrod's petition for writ of mandamus, and issued a writ to the Commission to

expunge the discipline it had meted out (Judge Harrod had already served a suspension). *Id.* at 66.

That reasoning applies squarely to the constitutional judicial disciplinary apparatus in Texas, too. The Texas Constitution, Article 5, section 3, just like the judicial article of the Illinois Constitution, commands that this Court "shall exercise the judicial power of the state except as otherwise provided in this Constitution. Its jurisdiction shall be coextensive with the limits of the State and its determinations shall be final except in criminal law matters. Its appellate jurisdiction shall be final and shall extend to all cases." *Ibid.* There is no reservation of "finality" to decisions of that disciplinary apparatus, unlike in the Illinois Constitution, and so that reasoning applies even more squarely and emphatically in Texas than it did in Illinois.

Furthermore, a subsidiary conclusion of the Illinois Supreme Court's reasoning in *Harrod* puts to rest one of the incorrect claims that the Commission presses here. As discussed *supra*, in *Harrod*, the Illinois Supreme Court held that the Illinois disciplinary commission is not "a court within the meaning of the judicial article… particularly … inasmuch as this court is without the authority to review the correctness of the Commission's orders." 372 N.E.2d at 59.

So also in the Texas scheme, to the extent that this Court may be without authority to review lesser-sanction decisions of the Texas Commission and the "special" tribunal created by §33.034 (like the "warning" issued to Judge Hensley) they, too, are not courts, and their decisions cannot be given the preclusive effect of judicial processes and decisions. It is a blackletter proposition of the common law of judgments that preclusion may not apply against a party in a subsequent proceeding if she "could not, as a matter of law, have obtained review" of the decision in the prior action. Restatement (Second) Judgments §28(1). Thus, if the "special" tribunal created by Government Code §33.034 is the "exclusive and mandatory" avenue for review of lesser-sanction decisions, as the Commission claims, then the provision of §33.034(i) prohibiting access to this Court means, per force, that lesser-sanction decisions are not judicial decisions with preclusive effect.

The district court in *Buckley, supra,* was presented with precisely this preclusion argument by the Illinois Courts Commission and summarily disposed of it by noting simply that because of the absence of meaningful review "[t]he Illinois Supreme Court has concluded that the [Commission] is not a court" citing *People ex rel. Harrod*). *Buckley,* 801 F. Supp. at 102. Accordingly, its decision had no preclusive effect under the Illinois common law of judgments. In fact, so weak was the argument for preclusion that on appeal the Seventh Circuit failed even to

address it, choosing instead to find it had been procedurally defaulted. 997 F.2d at 227.

The premise that opportunity for meaningful judicial review by a common law court of appeal is necessary if decisions of judicial conduct commissions are to be treated as preclusive under the formal law of judgment is also embedded in the model laws of the American Bar Association. ABA Model Rule 25 for Judicial Disciplinary Enforcement explicitly provides that final decisions construing Code of Judicial Conduct must come from the "Highest Court" of the jurisdiction.

The fact that §33.034 gives *some* opportunity for review of lesser-sanction Commission decisions in the "special" tribunal, moreover, does not overcome this impediment to preclusion, for another blackletter proposition is that preclusion is not available when there are "differences in the quality or extensiveness of the procedures followed in the two courts." Restatement (Second) Judgments, §28(3); *see also Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 107 (Iowa 2011) (relying on Restatement §28 as articulation of Iowa law). As Prof. Paulsen recognized early in the life of the §33.034 "special" tribunal, it simply has no incentive to give the analytical rigor to lesser-sanction decisions that this Court gives to suspension, removal, or involuntary retirement decisions.

Another well-established provision principle of the law of judgments is that preclusion is inappropriate if there "is a clear and convincing need for a new

determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action." Restatement (Second) Judgments, §28(5)(a). If lesser-sanction decisions of the Commission are never subject to review in this Court but are nevertheless given preclusive effect, the Commission and the §33.034 "special" tribunal may make their own construction of any provision of the Code the unassailable, final construction of that provision by the simple expedient of imposing *only* lesser sanctions of admonition or warning. Not only will the subjects of the disciplinary inquiries be prevented from *any* review, but all judges of the state who are aware of the warning will be chilled in their behavior in similar circumstances. This Court will have lost control over the meaning of the Code – its own creature – and the Commission and special tribunal will have usurped control over the meaning of selected provisions of the Code, and control over behavior of all judicial officers of the state.

That is the unavoidable effect of the jurisdictional arguments that the Commission advances here, that the Third Court of Appeals accepted, and that the First Court of Appeals seems to have implicitly accepted in *Hagstette v. Commission on Judicial Conduct*, No. 01-19-00208-CV, 2020 WL 7349502 (Tex. App. Ct. for First Dist., Dec. 15, 2020). The Third Court of Appeals should be reversed outright as to that holding, and a clear holding announced by this Court

that lesser-sanction decisions of the Commission and §33.034 special tribunals have no preclusive effect on subsequent litigation between the Commission and the judges subject to those ongoing sanctions.

II. Whether Canon 4(A) of the Code of Judicial Conduct must comply with the guarantees of Free Exercise of Religion in the federal and state constitutions and Texas Religious Freedom Restoration Act is a pure question of law that should be answered without remand, lest Judge Hensley and all other judges of the State continue to be chilled in their religious speech and behavior.

The disciplinary authorities' equivocation in *White* about the constitutionality of the "pledge" Code provision at issue (536 U.S. at 69), the finding of a violation but a refusal to impose a reviewable sanction in *Buckley* (997 F.2d at 226), and the imposition of the lesser-sanction of "warning" under Canon 4(A) on Judge Hensley here are of a piece, and significantly so. It was an undeniable effect, maybe even an intended purpose, in each instance to send a message that the constitutionally questionable provisions of the Code remained in disciplinary authorities' quiver and could be deployed again not only against the warned judges themselves, but against *any* judge who behaved similarly.

Such temporizing by state discipline authorities, and more emphatically the effect of that temporizing in delaying or preventing judicial review of Commission decisions analyzing a Code provision's constitutionality, is antithetical to the text and remedial structure of most civil rights legislation generally, and of the

Religious Freedom Restoration Act specifically. The explicit inclusion of the equitable remedies of declaratory judgment and injunctive relief [Civil Practice and Remedies Code §110.005] evinces that Texas's RFRA, like its state siblings across the country, is intended to create remedies for religious discrimination by state actors operating prospectively and applying universally to *all* of their interactions with the citizens subject to their authority, not merely to a single aggrieved plaintiff. That is the very purpose of declaratory relief. *See* Uniform Commission's Prefatory Note to the Uniform Declaratory Judgment Act ("In truth, the Declaratory Judgments Act is nothing more than a bill to make it possible for a citizen to ascertain what are his rights and what are the rights of others before taking steps which might involve him [and others] in costly litigation"); *and see generally*, DiSarro, *A Farewell to Harms: Against Presuming Irreparable Injury in Constitutional Litigation,* 35 Harv. J. Law & Pub. Pol. 743 (2012) (arguing against the need for presumption or proof of injury in constitutional rights litigation because Congress has authorized declaratory relief as a prospective remedy already, and injury need not be proven for declaratory relief).

When the constitutionality of a provision of positive law — a statute, or rule — presents only a question of law, public interest is that the question should be settled by the court of last resort as soon as possible. For example, both *White* and

Buckley granted declaratory judgments that the Code's "announce" and "pledge" provisions violated the First Amendment.

That is also what the United States Supreme Court said most recently in *303 Creative v. Elenis*, __ U.S. __, 143 S. Ct. 2298 (2023), holding that the Free Exercise clause of the First Amendment prohibited Colorado authorities from applying their state public accommodations statute to require a commercial website developer from creating websites celebrating same-sex unions because such affirmations were prohibited by her religious beliefs, and ordering the Tenth Circuit to enter an injunction against such application. The Court's judgment there depended wholly on a record of stipulated facts. *Id*. at 2309.

Prayer

Amicus respectfully urges this Court to hold that both the trial court and the Third Court of Appeals, as well as this Court, have jurisdiction over this matter; that Texas RFRA, and the Free Exercise guarantees of the state and federal constitutions, protect Judge Hensley's decision not to preside at same-sex civil union ceremonies. The Court should also note that anything in the First Court of Appeals' decision in *Hagstette* inconsistent with that judgment is overruled. It should remand the case only for determination of damages, if any, that Judge Hensley is entitled to recover under Texas RFRA.

Certificate of Service

The undersigned certifies that on October 18, 2023, he served electronic copies of this brief on the following counsel for the parties at the following addresses:

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