

No. 22-1145

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In the Supreme Court of Texas

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DIANNE HENSLEY,  
*Petitioner,*

v.

STATE COMMISSION ON JUDICIAL CONDUCT, *ET AL.*,  
*Respondents.*

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

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**Brief *Amicus Curiae* of  
Public Advocate of the United States,  
America's Future, LONANG Institute,  
U.S. Constitutional Rights Legal Defense Fund, and  
Conservative Legal Defense and Education Fund  
in Support of Petitioner and Reversal**

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## INTEREST OF THE *AMICI*<sup>1</sup>

Public Advocate of the United States, America's Future, LONANG Institute, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

### STATEMENT OF FACTS

Petitioner Dianne Hensley serves as a justice of the peace in McLennan County, Texas and is a Bible-believing Christian. As a justice of the peace, she is authorized, but is not required, to perform wedding ceremonies which solemnize marriages. After the U.S. Supreme Court issued its decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), Judge Hensley initially stopped performing marriages entirely. Later, to serve the needs of the community, she resumed performing marriages, but recused herself from conducting same-sex ceremonies while establishing a convenient system to refer those persons to others authorized

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<sup>1</sup> It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

to perform marriages at the same price. No complaints were filed against Judge Hensley, but the Respondent Commission learned of Judge Hensley's practice from a news article, and, *sua sponte*, decided to investigate. On November 12, 2019, the Commission issued a Public Warning to Judge Hensley, putting her judgeship in jeopardy if she were to continue her recusal/referral approach to conducting weddings based on a violation of 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(1) of the Texas Code of Judicial Conduct. [CR 596.]

Judge Hensley became concerned that if she continued her recusal/referral approach to weddings, the Commission would attempt to further discipline her and remove her from office. As a result, following the approach of many of her fellow jurists, Judge Hensley stopped conducting all weddings.

After giving appropriate notice, Judge Hensley filed suit against the Commission and its members for declaratory relief and compensatory damages under the Texas Religious Freedom Restoration Act and the Texas Constitution's Bill of Rights. Judge Hensley sought prospective relief in order to allow her to

resume her recusal/referral system without putting her service in office in jeopardy based on her exercise of her sincerely held religious beliefs. *See* Petitioner’s Brief on the Merits at 28-30. Beyond these facts, for purposes of this brief, the *Amici* incorporate by reference, and substantially adopt, the Statement of Facts provided by Judge Hensley in her Brief on the Merits. Additional facts relied upon by the *Amici* are provided throughout the brief.

### **SUMMARY OF THE ARGUMENT**

This Court has jurisdiction over all judges on the State of Texas and is responsible for setting policy for the judiciary. The State Commission on Judicial Conduct has formulated and applied a public policy hostile to all religious judges in this State who desire to perform weddings of opposite-sex couples while recusing from performing weddings for same-sex couples based on deeply held Bible-based or other religious beliefs that performing a same-sex wedding would be forbidden for them. As a result of the unconstitutional religious test imposed by the Commission, all judges with traditional Bible-based beliefs against their participation in same-sex weddings are branded as bigots by the Commission. This false label of bigotry would apply to many judges and judicial candidates of Muslim or Orthodox Jewish beliefs in addition to Bible-based Christian beliefs. This Court must reverse the Commission and the lower courts who allowed this

hostility to stand, and set forth a public policy for this State which protects the religious liberty and dignity of all judges.

## ARGUMENT

### **I. THE COMMISSION’S PROCEEDING AGAINST JUDGE HENSLEY IS GROUNDED IN A POLICY OF HOSTILITY TO ALL TRADITIONAL RELIGIOUS JUDGES AND JUDICIAL CANDIDATES IN TEXAS.**

Judge Hensley recused herself from performing same-sex weddings because of her Bible-based Christian religious beliefs that marriage is an institution designed for one man and one woman,<sup>2</sup> and that her participation in such a ceremony would involve her in sinful behavior.<sup>3</sup> She established a referral system to meet the needs of same-sex couples, even ensuring that they would be charged the same price. Technically, the Commission is not moving against Judge Hensley for her failure to perform same-sex marriages, because she could simply follow the pattern of other jurists who refused to perform any marriage. The reality is that the Commission is proceeding against Judge Hensley based on its inference from her approach to conducting marriages, grounded in her sincerely-held religious views,

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<sup>2</sup> See *Matthew 19:4-6* (NASB) (“And He answered and said, ‘Have you not read that He who created them from the beginning MADE THEM MALE AND FEMALE, and said, ‘FOR THIS REASON A MAN SHALL LEAVE HIS FATHER AND MOTHER AND BE JOINED TO HIS WIFE, AND THE TWO SHALL BECOME ONE FLESH’? So they are no longer two, but one flesh....” (Quoting *Genesis 2:24*)

<sup>3</sup>See *Romans 1:32* (NASB) (“although they know the ordinance of God, that those who practice such things are worthy of death, they not only do the same, but also give hearty approval to those who practice them”).

that she is a hateful, bigoted person who would be incapable of ruling impartially on matters before her.

The truth is that Judge Hensley's recusal/referral approach to this complicated, contested social issue in no way demonstrates prejudice, but rather, it is the Commission's actions against her which demonstrate a shocking level of bigotry against not only Bible-believing Christians, but also those of other faith traditions who oppose same-sex marriage, including, *inter alia*, many Orthodox Jews and Muslims. Logically, it must be the Commission's view that only an atheist, an agnostic, a person associated with a church that has abandoned its historic traditional teachings, or a person whose faith in no way influences his behavior, are qualified to serve as a Judge in Texas.

Applying the standard set by the Supreme Court Justice who provided the swing vote against traditional marriage, the only bigotry to be found in this case is that committed by the Commission. When the U.S. Supreme Court decided the momentous decision in *Obergefell* by a 5-to-4 vote, Justice Kennedy, writing for the Court, assured Americans that the Court's decision presented no threat to individuals who held religious beliefs against same-sex marriage. Justice Kennedy gave assurances that no American embracing traditional marriage would be impaired from holding and acting on that belief. Justice Kennedy explained:

it must be emphasized that religions, and **those who adhere to religious doctrines, may continue to advocate with utmost, sincere**



**conviction that, by divine precepts**, same-sex marriage should not be condoned. [*Obergefell* at 679 (emphasis added).]

Justice Kennedy then went out of his way to assure those who opposed same-sex marriage that the Court's decision would not limit their rights and that those who opposed same-sex marriage would have the same judicial protection as those who supported it:

**The First Amendment ensures that religious organizations and persons are given proper protection** as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. [*Id.* at 679-80 (emphasis added).]

In moving against Judge Hensley, the Commission has violated the principles and promises articulated by the High Court. The Commission displays contempt for people of faith as it seeks to punish Judge Hensley for exercising the rights of religious Americans which Justice Kennedy promised the courts would protect.

Judge Hensley's lack of animus toward anyone is revealed by how carefully she handled the heavily disputed *Obergefell* decision. Before *Obergefell*, under a provision in the Texas Constitution that is still on the books, marriage is defined as a union between a man and a woman,<sup>4</sup> Judge Hensley chose to perform weddings,

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<sup>4</sup> Article I, § 32 of the Bill of Rights in the Texas Constitution Bill of Rights, providing marriage is between a man and a woman has never been repealed. Thus, if the Supreme Court were to reverse its position on marriage, as it recently did on abortion in *Dobbs v. Jackson*

all of which were in accordance with that provision. After *Obergefell* was decided, Judge Hensley scheduled no further weddings from June 26, 2015 to August 1, 2016. However, because no other judges or justices of the peace were performing any weddings in McLennan County, Judge Hensley thought it better to resume conducting opposite-sex weddings in accordance with her religious convictions. She felt that the people of McLennan County needed access to a low-cost wedding ceremony. While Judge Hensley performed the vast majority of traditional marriage ceremonies which were between opposite-sex couples, she created a referral system to assist same-sex couples in having access to equally low-cost marriage ceremonies. Judge Hensley made arrangements with a minister at a wedding chapel a mere three blocks from her office whereby the minister agreed to lower her normal fees of \$125 per wedding to \$100 per wedding for those referred by Judge Hensley. Later, Hensley went further and found a justice of the peace in

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*Women's Health Organization*, 142 S.Ct. 2228 (2022), Texas law on marriage would be back into effect. A judicial determination as to the constitutionality of a law does not remove the law from the statute books. Law professor and constitution scholar Gerald Gunther explained that “a law held unconstitutional in an American court is by no means a nullity....” G. Gunther, *Constitutional Law* at 28 (12<sup>th</sup> ed. 1991). In 1923, the U.S. Supreme Court ruled the District of Columbia minimum wage law to be unconstitutional (*Adkins v. Children's Hospital*, 261 U.S. 525 (1923)) only to reverse itself 13 years later (*West Coast Hotel v. Parrish*, 300 U.S. 379 (1937)). The Attorney General advised the President of the United States that Congress need not reenact the D.C. minimum wage law, because the 1923 ruling simply suspended enforcement, explaining: “The decisions are practically in accord in holding that the **courts have no power to repeal or abolish a statute**, and that notwithstanding a decision holding it unconstitutional a statute continues to remain on the statute books.” 39 *Ops. Atty. Gen.* 22 (1937) (emphasis added).

McLennan County who would take her referrals to conduct same-sex weddings.

*See* Petitioner’s Brief on the Merits at 3-4.

Thus, Judge’s Hensley’s recusal/referral wedding system served all the people of McLennan County — and without complaint. These are not the actions of bigotry, but of understanding and accommodation — courtesies that the Commission has refused to extend to Judge Hensley. What the U.S. Supreme Court has declared to be a protected religious belief, the Commission now assails as bigotry.

It is useful to pause to consider the vast changes in the manner in which homosexual conduct has been addressed in the State of Texas over the past two decades. For almost all of recorded history, marriage has been between a man and a woman. Until 20 years ago, Texas criminalized same-sex sodomy under a law that was rarely enforced, except against those who flagrantly violated the public policy inherent in that ancient crime. That Texas criminal law could no longer be enforced due to the 5-to-4 decision of the U.S. Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003). Due to changes in the membership of the Court, *Lawrence* overturned the 5-to-4 decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986) issued only 17 years earlier. Then, after *Lawrence*, it only took a dozen years for the Supreme Court to move from decriminalizing same-sex sodomy to protecting same-sex marriage in *Obergefell*. Now, the Texas State Commission on

Judicial Conduct is asking this Court to ratify another major shift in public policy — not one based in tolerance, but in coercion. The Commission seeks to remove perceived discrimination against homosexuals in favor of a policy that drips with hostility against judges who maintain their traditional Bible-based Christian beliefs against same-sex marriage.

This Court, which is ultimately responsible for setting policy for all judges in this state, must reject such hostility to Bible-based beliefs, which are held not only by traditional Christians, but reflect the moral convictions of many Muslims and Orthodox Jews as well.

## **II. THE COMMISSION’S HOSTILITY TO BIBLE-BASED RELIGIOUS BELIEFS VIOLATES THE NO RELIGIOUS TEST PROVISION OF THE TEXAS CONSTITUTION.**

The Texas Constitution absolutely prohibits the use of religious tests to hold office:

No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being. [Texas Constitution, Art. 1, § 4.]

The Constitution of the United States similarly provides: “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” U.S. Constitution, Article VI.

*Vernon's Annotated Texas Constitution Art 1., § 4* has an “Interpretive Commentary” (2018) providing historical background for Article VI:

Historically, office holding often depended upon a declaration of a belief in a certain religious faith, but by the time of the formation of the United States Constitution religious freedom had been gathering strength, and in Article VI, Clause 3, it had been laid down that “No religious test shall ever be required as a qualification of any office or public trust under the United States.” This prohibition was a reaction against such laws as the famous English Test Act of 1673, 25 Car. II, c. 2, which was enacted “for preventing dangers which may happen from Popish recusants,” and which caused grave injustice.

**By this wording, a religious test demanding the avowal or repudiation of certain religious beliefs may not be required** as qualification for office under the United States. [Emphasis added.]

That annotation then discusses the history of the parallel provision in the Texas Constitution.

The earlier Texas State Constitutions followed this language almost verbatim, but in the Constitution of 1876 the following clauses were added: “nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being.” **Eligibility may not, then, be made to depend on religious views.** [*Miller v. El Paso County, Civ.App.*, 146 S.W.2d 1027 (1940), *reversed on other grounds* 136 Tex. 370, 150 S.W.2d 1000 (1941) (emphasis added).]

The State Commission has required Judge Hensley to either forsake her Bible-based Christian beliefs about same-sex marriage or forsake her ability to preside over and earn fees for marriage ceremonies of opposite-sex marriage, which compromise nearly all marriages in McLennan County. This Hobson’s choice imposed upon Judge Hensley by the State Commission establishes a

religious test which threatens her judicial office if she again begins to preside over opposite-sex marriage in accordance with her Bible-based Christian beliefs.

The federal judicial recusal statute addressing judicial impartiality is instructive; 28 U.S.C. § 455(a) (“Disqualification of justice, judge, or magistrate judge”) provides:

- (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his **impartiality** might reasonably be questioned. [Emphasis added.]

This statute, similar to Canon 4A(1), has been interpreted in several cases as applied to religious beliefs of judges. A 1995 opinion by Judge John T. Noonan of the Ninth Circuit addressing a motion that he recuse from an abortion case is instructive:

The plaintiffs in this petition for rehearing renew their motion that I recuse myself because my “fervently-held religious beliefs would compromise [my] ability to apply the law.” This contention stands in conflict with the principle embedded in Article VI.

It is a matter of public knowledge that the Catholic Church, of which I am a member, holds that the deliberate termination of a normal pregnancy is a sin, that is, an offense against God and against neighbor. Orthodox Judaism also holds that in most instances abortion is a grave offense against God. The Church of Jesus Christ of Latter–Day Saints proscribes abortion as normally sinful. These are only three of many religious bodies whose teaching on the usual incompatibility of abortion with the requirements of religious morality would imply that the plaintiffs’ business is disfavored by their adherents.... If religious beliefs are the criterion of judicial capacity in abortion-related cases, many persons with religious convictions must be disqualified from hearing them.... Either religious belief disqualifies or it does not. Under Article VI it does not....

**The plaintiffs seek to qualify the office of federal judge with a proviso: no judge with religious beliefs** condemning abortion may function in abortion cases. **The sphere of action of these judges is limited and reduced. The proviso effectively imposes a religious test on the federal judiciary.** The plaintiffs' motion of recusal is denied. [*Feminist Women's Health Ctr. v. Codispoti*, 69 F.3d 399, 400–01 (9th Cir. 1995) (emphasis added).]

Judge Noonan's rationale applies with equal force to the Commission's attack on Judge Hensley's ability to preside over opposite-sex marriages and her ability to be "impartial" in her judicial duties. Her Bible-based beliefs on same-sex marriage are not bigotry and do not render her incapable of being impartial to all people who come before her as she exercises her judicial duties.

The Tenth Circuit addressed a similar issue in *In re McCarthey*, 368 F.3d 1266, 1270 (10th Cir. 2004):

**Religious freedom is one of the Constitution's most closely guarded values.** *Torcaso v. Watkins*, 367 U.S. 488, 491–92 (1961). The First Amendment prohibits congressional action respecting an establishment of religion, or prohibiting its free exercise. Article VI, clause 3, provides that all governmental officers be bound by an oath to support the Constitution, and that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Should we require federal judges to disclose the firmness of their beliefs in religious doctrine, it is a very fine line before we enter the "business of evaluating the relative merits of differing religious claims." *United States v. Lee*, 455 U.S. 252, 263 n. 2 (1982) (Stevens, J., concurring); *see also Feminist Women's Health Ctr. v. Codispoti*, 69 F.3d 399, 400 (9th Cir.1995). [*McCarthey* at 1270 (emphasis added).]

In *Perry v. Brown*, 671 F.3d 1052, 1095–96 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 570 U.S. 693 (2013), the Ninth Circuit ruled that Chief Judge Vaughn Walker was not in violation of 28 U.S.C. § 455 (a), even though he was in a relationship with another man for 10 years and did not disclose it until after his decision in favor of same-sex marriage. The Ninth Circuit explained that: “Nor could it possibly be ‘reasonable to presume,’ for the purposes of § 455(a), ‘that a judge is incapable of making an impartial decision about the constitutionality of a law, solely because, as a citizen, the judge could be affected by the proceeding.’” *Id.* at 1096.

It is clear that the Commission’s interpretation of the language in Canon 4A(1), that “the judge’s capacity to act impartially as a judge,” is at odds with how the issue has been treated in other jurisdictions, is fundamentally flawed, and should be rejected by this Court.

### **III. ALLOWING THE COMMISSION TO PROCEED AGAINST JUDGE HENSLEY WILL CAUSE EVEN MORE JUDGES TO DECLINE TO PERFORM ANY WEDDINGS.**

In Texas, it is the County Clerk who issues marriage licenses. Sec. 2.202 of the Texas Family Code specifies who may conduct marriage ceremonies:

(a) The following persons are authorized to conduct a marriage ceremony: (1) a licensed or ordained Christian minister or priest; (2) a Jewish rabbi; (3) a person who is an officer of a religious organization and who is authorized by the organization to conduct a marriage ceremony; and (4) a current, former, or retired federal judge or state judge.



Thus, while state judges are *authorized* to conduct marriages, they are not *mandated* to do so.

During a period after the *Obergefell* decision, Judge Hensley chose not to conduct marriages of any type. That decision ensured that she would not be assailed for declining to marry same-sex couples. In demonstration of the truism that “No Good Deed Goes Unpunished,” it was only when she attempted to serve her community by offering a low-cost marriage service to the overwhelming percentage of opposite-sex couples that she was targeted. Her careful plan to provide equivalent services at an equal cost from a minister and a different justice of the peace was disregarded by the Commission in its effort to compel obedience to its interpretation of a Supreme Court decision that it passionately embraces.

From Judge Hensley’s experience, it becomes clear that the judges who did not want to conduct same-sex marriages followed a better strategy to protect themselves — by refusing to perform any marriages whatsoever. For if judges are to be assailed by the Commission for attempting to better serve their community, jeopardizing their positions, then the message will be received by judges across the State of Texas. As a result, no state judges who have a religious or moral objection to same-sex marriage will perform any marriages whatsoever. Those who embrace a radical view of homosexual rights would, no doubt, find this a small price to pay for rooting out of public office those with a different moral compass. What makes

the Commission's effort shocking is that has chosen to find bigotry where none exists. The Commission appears to be in the control of persons driven to advance a partisan political objective. This Court should not allow any agency of state government to be weaponized against those who embrace traditional morality.

### **PRAYER**

The *amici* pray that this Court would grant all that the Petitioner seeks, to reverse and vacate the decision of the Court of Appeals and grant the summary judgment, including the declaratory and prospective relief requested by the Petitioner. It is incumbent on this Court to reject the hostility toward judges with Bible-based beliefs revealed by the Commission on Judicial Conduct and follow the rule adopted elsewhere that such judges can be trusted to uphold their duty of impartiality to all parties that come before them.

Respectfully Submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this document contains 3,805 words, excluding the portions described in Texas Rule of Appellate Procedure 9.4(i)(1), according to Microsoft Word for Mac version 16.49.

Dated: October 18, 2023

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