CASE NO. D-1-GN-21-001017

JO ANN HOLMGREN and PREFERRED LEGAL SERVICES, INC.,	§	**IN THE DISTRICT COURT**
PLAINTIFFS	§	
	§	**345th JUDICIAL DISTRICT**
v.	§	
JUDICIAL BRANCH CERTIFICATION COMMISSION, et al.,	§	
DEFENDANTS	§	**TRAVIS COUNTY, TEXAS**

PETITIONERS' RESPONSE TO PLEA TO THE JURISDICTION

COME NOW Petitioners Jo Ann Holmgren and Preferred Legal Services, Inc. ("Petitioners") and respond to Respondents' Plea to the Jurisdiction (the "Plea"). In support of the foregoing, Petitioners would respectfully show the Court as follows:

Summary of the Response

Petitioners, a Certified Shorthand Reporter and a licensed Shorthand Reporting Firm, brought this action seeking to compel the JBCC to properly discharge its statutorily-imposed duties to police the court reporting profession after it dismissed Petitioner's complaint against StoryCloud for want of jurisdiction and refused to act in the face of clear violations of Chapter 154 of the Texas Government Code. In challenging this Court's jurisdiction, the JBCC advances three (3) arguments. First, it claims that sovereign immunity bars this suit. Second, it claims that Petitioners lack standing. Finally, the JBCC claims that Petitioners are improperly seeking to control state action. Each of the JBCC's arguments fail as a matter of law and the Plea to the Jurisdiction should be denied.

Last December, the 1st Court of Appeals, sitting for the Austin Court of Appeals, reiterated the well-established precedent that sovereign immunity does not apply in mandamus proceedings. *See St. Jude Healthcare, Ltd. v. Tex. HHS Comm'n*, No. 01-20-00076-CV, 2021 Tex. App. LEXIS 9865, at *18-20 (Tex. App.—Houston [1st Dist.] Dec. 14, 2021, no pet.). Second, as the initiating complainants against StoryCloud, Petitioners have standing to maintain this action. As far back as 1968, the Texas Supreme Court held that attorneys had independent standing to police the profession. *See Touchy v. Hous. Legal Found*., 432 S.W.2d 690, 694 (Tex. 1968). Finally, the JBCC's third argument is merits based and not properly raised in a plea to the jurisdiction. *See Anding v. City of Austin*, No. 03-18-00307-CV, 2020 Tex. App. LEXIS 3578, 2020 WL 2048255 (Tex. App.—Austin Apr. 29, 2020, no pet.) (mem. op.).

Background Facts

StoryCloud, Inc. ("StoryCloud") was licensed by the JBCC as a Court Reporting Firm bearing the designation CRF-11576. StoryCloud advertises itself as being a digital court reporting service.[1] Rather than using a Certified Shorthand Reporter, StoryCloud sends an unlicensed notary public to act as the deposition officer.[2] This unlicensed notary operates electronic recording equipment which records the deposition locally and to the cloud.[3] StoryCloud then uses artificial intelligence to produce a transcript.[4] Although it offers transcripts that are certified by a Certified Shorthand Reporter, StoryCloud's advertising is directed at its artificial intelligence products.[5] Petitioners understand that Farmers and certain other insurance companies are conducting depositions of plaintiffs using StoryCloud's transcript on demand service.[6] StoryCloud apparently

[1] *See* Declaration of Dennis Holmgren (the "Holmgren Declaration"), which is attached hereto and incorporated herein by reference, Ex. B, p. 6; Ex. B to the Second Amended Petition.
[2] Holmgren Declaration, Ex. B. p. 7; Ex. B to the Second Amended Petition.
[3] Holmgren Declaration, Ex. B. p. 7-12; Ex. B to the Second Amended Petition.
[4] Holmgren Declaration, Ex. B. p. 7-12; Ex. B to the Second Amended Petition.
[5] Holmgren Declaration, Ex. B. p. 7-12; Ex. B to the Second Amended Petition.
[6] Holmgren Declaration, Ex. B. p. 7-12; Ex. B to the Second Amended Petition.

understands that it is not operating in the traditional court reporting regulatory structure because it has developed a standard stipulation for the Parties to execute to bypass the Rules and Government Code in an effort to allow its work product to be used at trial.[7] StoryCloud has alleged that it surrendered its registration as a Court Reporting Firm.

Tex. Gov't Code §154.101(f) provides that "all depositions conducted in this state must be recorded by a Certified Shorthand Reporter." Tex. Gov't Code § 151.101(b) provides that a "person may not engage in shorthand reporting in this state unless the person is certified as a shorthand reporter by the Supreme Court under this section or an apprentice court reporter or provisional court reporter…" Tex. Gov't. Code §151.101(c) provides that "A certification issued under this section must be for one or more of the following methods of shorthand reporting: (1) written shorthand; (2) machine shorthand; (3) oral stenography; or (4) any other method of shorthand reporting authorized by the Supreme Court." Tex. Gov't Code §154.101(e) provides that "[a] person may not assume or use the title or designation 'court recorder,' 'court reporter,' or 'shorthand reporter,' or any abbreviation, title, designation, words, letters, sign, card, or device ***tending to indicate that the person is a court reporter*** or shorthand reporter, unless the person is certified as a shorthand reporter or provisional court reporter by the Supreme Court." As a Certified Court Reporting Firm, StoryCloud must ensure that it is employing Certified Shorthand Reporters to transcribe depositions and that such persons are acting in accordance with Chapter 154 of the Government Code and the rules promulgated by the JBCC. *See* Tex. Gov't Code §154.111(4) and (7).

Tex. Gov't Code §154.111 mandates that the JBCC investigate and enforce Chapter 154 against license Court Reporting Firms. It specifically states that "the commission ***shall*** reprimand,

[7] Holmgren Declaration, Ex. B. p. 20; Ex. B to the Second Amended Petition.

assess a reasonable fine against, or suspend, revoke, or refuse to renew the registration of a shorthand reporting firm or affiliate office" if such firm violates Chapter 154. To the extent that StoryCloud is unlicensed, Texas Gov't Code §154.101(g) provides that "[t]he commission may enforce this section by seeking an injunction or by filing a complaint against a person who is not certified by the supreme court." In addition to civil administrative penalties, violations of Gov't Code §154.101 are criminal violations, constituting Class A misdemeanors. *See* Gov't Code §154.113.

On or about March 4, 2020, Petitioners filed a highly detailed complaint against StoryCloud to the JBCC pursuant to Tex. Gov't Code §154.111.[8] The Complaint detailed numerous violations of Section 154.111 by StoryCloud, including subsections (3), (4), (5), (7), and (11).[9] In fact, StoryCloud's own website advertises services that clearly violate Section 154.111. The Complaint was assigned Cause Number 0247.[10]

In accordance with JBCC Rule 5.8, "[u]pon receipt of a properly executed Complaint, Commission staff must send a copy of the Complaint and any attachments to the respondent and direct the respondent to submit a written answer to the Complaint, under penalty of perjury, within 20 days after receipt of the notice."[11] Therefore, StoryCloud's response should have been due at the end of March or early April of 2020.

However, after the Complaint was filed, Petitioners were provided with no update or information. On April 13, 2020, the undersigned requested a status update from the JBCC and was told that "[t]he complaint is still in the review process."[12] On May 22, 2020, the undersigned

[8] Holmgren Declaration, Ex. B; Ex. B to the Second Amended Petition.
[9] Holmgren Declaration, Ex. B. p. 7-12; Ex. B to the Second Amended Petition
[10] Holmgren Declaration, Ex. B. p. 7-12; Ex. B to the Second Amended Petition
[11] Holmgren Declaration, Ex. M.
[12] Holmgren Declaration, Ex. C; Ex. C to the Second Amended Petition

requested a further update. Again, Petitioners were told that "[t]he complaint is still in the review process."[13] On July 2, 2020, the undersigned requested another status update. The JBCC indicated that it was "still processing complaints in [the order] in which they are received.[14]

Shortly before Petitioners filed the Complaint, Lorrie Schnoor, the past president of the Texas Court Reporter's Association, filed a complaint against a non-licensed videographer, Trey Perez, which was assigned Cause Number 0238.[15] Mrs. Schnoor's complaint was immediately assigned a final hearing date to occur in April of 2020.[16] The hearing on the Perez complaint was delayed due to covid. Later, the Perez complaint was set for a final hearing to occur in September of 2020, which was later moved to December of 2020.[17] Meanwhile, Petitioners heard nothing regarding their Complaint.[18]

Frustrated with the lack of movement on the Complaint, on October 7, 2020, the undersigned sent a formal letter to the JBCC threatening to file a petition for writ of mandamus against the JBCC unless progress was made on the Complaint.[19] It appears that the threat of mandamus spurred action at the JBCC. On November 3, 2020, JBCC staff reached out to the undersigned to schedule an interview regarding the complaint. The same day, staff reconsidered and determined that an interview was not necessary due to the "nature of this complaint and the legal allegations."[20] The Complaint was finally scheduled to go before the Complaint Review Committee on December 4, 2020, and Petitioners requested to appear at it.[21] This was later moved

[13] Holmgren Declaration, Ex. D; Ex. D to the Second Amended Petition
[14] Holmgren Declaration, Ex. E; Ex. E to the Second Amended Petition
[15] Second Amended Petition, ¶22
[16] Second Amended Petition, ¶22
[17] Second Amended Petition, ¶22
[18] Second Amended Petition, ¶22
[19] Holmgren Declaration, Ex. F; Ex. F to the Second Amended Petition
[20] Holmgren Declaration, Ex. G; Ex. G to the Second Amended Petition
[21] Second Amended Petition, ¶23

to December 18, 2020.[22]

On December 4, 2020, the JBCC sent Petitioners a letter administratively dismissing the Complaint for lack of jurisdiction.[23] Petitioners timely requested a rehearing and a rehearing was granted.[24] On December 17, 2020, the JBCC acknowledged the request for reconsideration and set the matter for JBCC meeting that was scheduled for February 5, 2021.[25] The matter came before the JBCC at its February 5, 2021 meeting and the JBCC administratively dismissed the Complaint for want of jurisdiction, and denied the request for reconsideration. The formal order was entered on February 11, 2021. This appeal and petition for mandamus followed.

Arguments and Authorities

It is well settled that "[w]hether a court has subject matter jurisdiction is a question of law." *Tex. Dep't of Parks & Wildlife v. Miranda,* 133 S.W.3d 217, 226 (Tex. 2004) (*citing Tex. Natural Res. Conservation Comm'n v. IT–Davy,* 74 S.W.3d 849, 855 (Tex.2002). "Whether a pleader has alleged facts that affirmatively demonstrate a trial court's subject matter jurisdiction is a question of law reviewed *de novo.*" *Id.* (emphasis in original).

In considering a plea to the jurisdiction, the Texas Supreme Court has held that "[w]hen a plea to the jurisdiction challenges the pleadings, we determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause." *Id.* (*citing Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446, 36 Tex. Sup. Ct. J. 607 (Tex. 1993)). "We construe the pleadings liberally in favor of the plaintiffs and look to the pleaders' intent. If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency

[22] Holmgren Declaration, Ex. H; Ex. H to the Second Amended Petition
[23] Holmgren Declaration, Ex. I; Ex. I to the Second Amended Petition
[24] Holmgren Declaration, Ex. J; Ex. J to the Second Amended Petition
[25] Holmgren Declaration, Ex. K; Ex. K to the Second Amended Petition

and the plaintiffs should be afforded the opportunity to amend." *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-27 (Tex. 2004). The Court is further required to "indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Id.* at 228.

The Texas Supreme Court has held that "if a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, as the trial court is required to do. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004). "When reviewing a plea to the jurisdiction in which the pleading requirement has been met and evidence has been submitted to support the plea that implicates the merits of the case, we take as true all evidence favorable to the nonmovant." *Id.* at 228 (*citing Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911, 40 Tex. Sup. Ct. J. 438 (Tex. 1997).

a. The Commission's plea fails because a mandamus proceeding does not implicate sovereign immunity.

Under well-established Texas law, "[g]enerally, the district court has exclusive original jurisdiction over mandamus proceedings except when the Constitution or a statute confers original jurisdiction on another tribunal." *In re Nolo Press/Folk Law*, 991 S.W.2d 768, 775 (Tex. 1999). "The authority of district courts to issues writs of mandamus against municipalities has been regularly upheld." *City of Waco v. Bittle*, 167 S.W.3d 20, 27 (Tex. App.—Waco 2005, pet den.) (*citing Anderson v. City of Seven Points*, 806 S.W.2d 791, 793, 34 Tex. Sup. Ct. J. 356 (Tex. 1991); Guthery v. Taylor, 112 S.W.3d 715, 720 (Tex. App.--Houston [14th Dist.] 2003, no pet.); *8 City of Corpus Christi v. Unitarian Church of Corpus Christi*, 436 S.W.2d 923, 927 (Tex. Civ. App.--Corpus Christi 1968, writ ref'd n.r.e.); TEX. CONST. art. V, § 8 (describing extent of district court's jurisdiction); TEX. GOV'T CODE ANN. § 24.011 (Vernon 2004) (describing district court's jurisdiction to issue writs)).

More importantly, the Texas Supreme Court has held that "it is clear that suits to require state officials to comply with statutory or constitutional provisions are not prohibited by sovereign immunity." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). In December of 2021, the First Court of Appeals, sitting for the Austin Court of Appeals, decided *St. Jude Healthcare, Ltd. v. Tex. HHS Comm'n,* No. 01-20-00076-CV, 2021 Tex. App. LEXIS 9865 (Tex. App.—Houston [1st Dist.] Dec. 14, 2021, no pet.). In *St. Jude*, the plaintiff sought mandamus against the Texas Health and Human Services Commission ("HHCS") regarding a licensure issue. Just as the JBCC has done here, HHSC file a plea to the jurisdiction and challenged St. Jude's petition on sovereign immunity grounds. Quoting *Heinrich,* the Court held that a mandamus proceeding was not barred by sovereign immunity. *Id.* at 18. As a result, the JBCC's sovereign immunity argument fails as a matter of law.

b. As aggrieved parties, Petitioners have standing to maintain this proceeding.

The general test for standing in Texas requires that there "(a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought." *Tex. Ass'n of Bus. v. Tex. Air Control Bd*., 852 S.W.2d 440, 446 (Tex. 1993) (*quoting Board of Water Engineers v. City of San Antonio*, 155 Tex. 111, 114, 283 S.W.2d 722, 724 (1955). "Ordinarily, any person having an interest in the subject matter of the petition is entitled to institute mandamus proceedings, but an officious intermeddler may not seek mandamus in a matter with which he or she is not concerned." *In re BancorpSouth Bank*, No. 05-14-00294-CV, 2014 Tex. App. LEXIS 4052, at *4 (Tex. App.—Dallas Apr. 14, 2014, orig. proceeding) (*quoting* 55 C.J.S. Mandamus § 48). "Mandamus is a proper remedy for a trial court's action against a non-party who has no right of appeal, but has standing in the mandamus proceeding." *Id.* (citations omitted).

Standing is a broad construct in the case of administrative proceedings and the standards for establishing standing have been relaxed over the years. However, back in 1968 (when the

concept of standing was far narrower), the Texas Supreme Court held that a group of attorneys had standing to maintain a suit to enjoin the unauthorized practice of law. *See Touchy v. Hous. Legal Found*., 432 S.W.2d 690, 694 (Tex. 1968) ("We hold that, due to the special interest attorneys have in their profession, they have standing to maintain a suit to enjoin action which allegedly damages their profession." (*citing Stewart Abstract Co. v. Judicial Comm'n*, 131 S.W.2d 686 (Tex. Civ. App. -- 1939, no writ); *Woods v. Kiersky*, 14 S.W.2d 825, 828 (Tex. Comm'n App. -- 1929, jdgmt. adopted)). If attorneys have standing to police the profession directly by seeking injunctive relief on their own, most certainly a Certified Shorthand Reporter has standing to force the JBCC to discharge its statutory duties. Petitioners meet this test as Mrs. Holmgren has been a Certified Shorthand Reporter since the 1980s and Preferred Legal Services, Inc. has been a Shorthand Reporting Firm since the 1990s.

Given the manner in which they are regulated, Certified Shorthand Reporters, like attorneys, have a special interest in maintaining their profession. While other professions are regulated by the executive branch, Certified Shorthand Reporters are regulated by the JBCC, a subdivision of the Administrative Office of the Courts, which is a subdivision of the judiciary. As a subdivision of the judiciary, the JBCC operates outside of the normal quasi-judicial process of the State Office of Administrative Hearings. Therefore, the same concerns giving attorneys standing to police the profession apply to Certified Shorthand Reporters, who (like attorneys) are officers of the Court, and Court Reporting Firms. As such, Certified Shorthand Reporters have standing de jure according to *Touchy*.

Turing to the specifics of Petitioners' grievance, Tex. Gov't. Code §153.0001(a) provides that "[t]o file a complaint with the commission against a regulated person or another person alleged to have unlawfully engaged in conduct regulated under this subchapter" a person must comply

with the requirements set forth therein. Petitioners complied with each of §153.001(a)'s requirements. This is expressly a private right vested in the public because Gov't Code §153.0001(c) provides that "[t]his section does not preclude the commission, an advisory board of the commission, or a court of this state from filing a complaint." Gov't. Code §154.111(a) provides that, after it receives a complaint and affords a respondent their due process rights, "the commission ***shall*** reprimand, assess a reasonable fine against, or suspend, revoke, or refuse to renew the registration of a shorthand reporting firm or affiliate office" for certain violations enumerated therein. (emphasis added).

On March 4, 2020, Petitioners filed a conforming complaint with the JBCC.[26] Therein, Petitioners satisfied each of the requirements of §153.0001(a). Petitioners even provided evidentiary support for numerous acts or omissions listed in Gov't Code §154.111(a), including, subsections (1), (3), (4), and (7).[27] In that regard, Petitioners are not "officious intermeddler(s)." Rather, they availed themselves of a statutorily-prescribed procedure to bring a complaint against someone (StoryCloud) who was violating Chapter 154. At that point, Petitioners had a legally protectable interest in ensuring that the JBCC performed its duties as an agency of the State vested with regulatory, investigative, and enforcement powers. Therefore, the first prong of standing was met.

Because StoryCloud was a licensee at the time of the JBCC complaint, Gov't. Code 154.111(a) required the JBCC to take action. Instead of acting, the JBCC made a legal determination that it had no jurisdiction and took no action whatsoever. This injury is directly traceable to the conduct at issue in the petition, satisfying the second prong. Finally, if mandamus is granted, the JBCC will be required to do its job. Bear in mind, Petitioners do not seek to compel

[26] Holmgren Declaration, Ex. B; Ex. B to the Second Amended Petition
[27] Holmgren Declaration, Ex. B; Ex. B to the Second Amended Petition

an outcome. Rather they seek the Court's assistance in forcing the JBCC to discharge its statutorily imposed duties, something it entirely failed to do in this regard. Mandamus, if issued, will compel the JBCC to at least complete the process. Therefore, the third element of standing is met. As a result, the plea to the jurisdiction fails and should be denied.

c. Subsection D of the Plea is an improper request for consideration on the merits; however, in any event mandamus is proper and warranted.

Other State agencies have made the same arguments regarding the "ministerial act" limitation of mandamus in the context of a plea to the jurisdiction. The Austin Court of Appeals has held that whether an act is ministerial or not is a merits-based question and not a question of jurisdiction. In *Enriquez v. Wainwright*, No. 03-18-00189-CV, 2018 Tex. App. LEXIS 10241, 2018 WL 6565017 (Tex. App.—Austin Dec. 13, 2018, no pet.) (mem. op.), an inmate filed a petition for writ of mandamus seeking to compel prison officials to perform what he argued were ministerial acts. 2018 Tex. App. LEXIS 10241, at *1. The prison officials filed a plea to the jurisdiction arguing the trial court lacked jurisdiction over the petition because the acts the inmate sought to compel were discretionary, and not ministerial. 2018 Tex. App. LEXIS 10241, at *2. The trial court granted the plea. *Id.* The court of appeals held the trial court had jurisdiction over the mandamus petition, without regard to the merits. 2018 Tex. App. LEXIS 10241, [WL] at *3 ("A plea to the jurisdiction should not be used to address whether a petitioner is entitled to mandamus relief. The trial court had jurisdiction over Enriquez's request for mandamus relief, without regard to its merits.").

In *Anding v. City of Austin*, No. 03-18-00307-CV, 2020 Tex. App. LEXIS 3578, 2020 WL 2048255 (Tex. App.—Austin Apr. 29, 2020, no pet.) (mem. op.), the Andings sought mandamus relief against a municipal court judge related to his review of an administrative hearing over certain ordinance violations. 2020 Tex. App. LEXIS 3578, [WL] at *1. The judge asserted a plea to the

jurisdiction arguing the trial court lacked jurisdiction over the Andings' petition for writ of mandamus because they had an adequate remedy at law, and they were not seeking to compel a ministerial act. 2020 Tex. App. LEXIS 3578, [WL] at *6. The trial court sustained the plea and dismissed the Andings' petition for writ of mandamus. *Id*. On appeal, the court concluded the trial court had jurisdiction over the Andings' petition because they were seeking to compel a public official—the municipal court judge—to perform a ministerial act. *Id*. Whether the act the Andings sought to compel the judge to perform was truly ministerial went to the merits of the claim:

> [The municipal court judge] argued and the district court apparently agreed that mandamus was not available because the Andings had an adequate remedy by appeal and because the relief sought was not the performance of a ministerial act. Such a ruling would not, however, operate to deprive the district court of subject-matter jurisdiction over the Andings' claim. Instead, such a conclusion would dictate the denial of the requested mandamus relief, a decision that could then be appealed as in any other civil suit.

Id. The court reversed the trial court's order granting the plea to the jurisdiction and remanded the case for the trial court to consider the merits of the mandamus claim. 2020 Tex. App. LEXIS 3578, [WL] at *7. For the same reasons, the Plea should be denied.

Turning briefly to the merits-based arguments, the JBCC simply misstates the law. Mandamus is not limited to "ministerial acts" and applies in the administrative context. *See St. Jude*, 2021 Tex. App. LEXIS 9865, at *18-20. As far back as 1937, the Texas Supreme Court has held that " a mandamus will lie to correct a gross abuse of discretion upon the part of boards or officers entrusted with such discretion, when such abuse is so clearly shown as to establish the fact that in performing the act complained of the officers acted wholly through fraud, caprice, or by a purely arbitrary decision, and without reason." *San Antonio v. Zogheib*, 129 Tex. 141, 149, 101 S.W.2d 539, 543 (1937). More recently, that test has been distilled as follows: An agency's decision is arbitrary or results from an abuse of discretion if the agency: (1) failed to consider a

factor the legislature directs it to consider; (2) considers an irrelevant factor; or (3) weighs only relevant factors that the legislature directs it to consider but still reaches a completely unreasonable result. *City of El Paso v. Pub. Util. Comm'n*, 883 S.W.2d 179, 184 (Tex. 1994) (*citing Gerst v. Nixon*, 411 S.W.2d 350, 360 n. 8 (Tex. 1966)).

"It is a general principle of administrative law that an administrative agency has no inherent power. An agency's jurisdiction and the nature and extent of its powers must be found within the constitutional and statutory provisions applicable to the agency." *Blount v. Metro. Life Ins. Co.*, 677 S.W.2d 565, 574 (Tex. App.—Austin 1984, no pet.) Further, "if an agency indeed has no jurisdiction over [**4] the subject matter, any order made in that matter is void." *Id.* (*citing Security State Bank v. State*, 169 S.W.2d 554 (Tex. Civ. App. 1943, writ ref'd w.o.m.); *Key Western Life Ins. Co. v. State Board of Ins*., 163 Tex. 11, 350 S.W.2d 839 (1961). It is axiomatic that "[t]he existence of subject-matter jurisdiction is a question of law that can be challenged. . .." *Klumb v. Hous. Mun. Emples. Pension Sys*., 458 S.W.3d 1, 8 (Tex. 2015) (*citing Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000)).

In the context of mandamus, the Texas Supreme Court has held that misinterpretations of the law are ultra vires acts:

> Although mandamus will not issue to control an officer's legitimate exercise of discretion, it may issue to enforce the performance of a nondiscretionary or ministerial act. *Cobra Oil & Gas Corp. v. Sadler*, 447 S.W.2d 887, 896 (Tex. 1969) (orig. proceeding). In this regard, a public officer has no discretion or authority to misinterpret the law. *See, e.g., Jessen Assocs., Inc. v. Bullock*, 531 S.W.2d 593, 602 (Tex. 1975) (original proceeding to compel the comptroller to issue a warrant for payment of architects' services); *Gordon v. Lake*, 163 Tex. 392, 356 S.W.2d 138, 141 (Tex. 1962) (original proceeding to compel secretary of state to file a corporate charter); *Tarrant Cnty. Water Control & Improvement Dist. No. 1 v. Pollard*, 118 Tex. 138, 12 S.W.2d 137, 139 (Tex. 1929) (original proceeding to compel attorney general to approve bonds and certify them to comptroller for registration). Similarly, when an alleged mistake of

> law involves an issue of statutory construction, ***our review is de novo***. *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008).

In re Smith, 333 S.W.3d 582, 585 (Tex. 2011) (emphasis added). Further, "[m]andamus is an appropriate remedy by which to compel the exercise of discretion when a lower court refuses to exercise the discretion with which it is vested." *Cessna Aircraft Co. v. Kirk,* 702 S.W.2d 321, 323 (Tex. App.—Eastland 1986, orig. proceeding). Finally, mandamus is proper to "correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law." *Id.*

Tex. Gov't. Code §154.111(a) commands the JBCC to take enforcement action against firms that, among other things, violate Chapter 154. Gov't. Code 154.100 commands the JBCC to take enforcement action against individual licensees that, among other things, violate Chapter 154. The word "shall" in the statute is mandatory. *See* Gov't Code §311.016(2). Gov't. Code §154.101(g) grants the JBCC the discretion to enforce Chapter 154 against non-licensees. At the time that the StoryCloud complaint was filed, StoryCloud was a licensee. Therefore, enforcement action was mandatory. Even if StoryCloud had not been licensed, the JBCC has twice recently refused to enforce Chapter 154 against digital reporters citing a lack of jurisdiction. This, alone, demonstrates that the JBCC is abusing its discretion by choosing not to exercise it.

The JBCC cites *Logos* and Tex. Gov't Code §153.001 for the proposition that its enforcement mandates are discretionary. *Logos* is not a mandamus case and involved a competitor seeking to invalidate an award of a state-contract so that it can get the contract instead. This case is different. Petitioners do not seek to compel a specific result, but to compel compliance with a process. Gov't Code §153.001 is simply an enabling statute giving the JBCC the right to

investigate. It must be read in conjunction with the mandatory enforcement duties in §154.110 and 154.111, which are mandatory.

Chapter 154 clearly vests jurisdiction with the JBCC to take enforcement action. It's determination to the contrary is simply a "misinterpretation of the law." While the JBCC attempts to conflate its determination that it lacked jurisdiction with an argument that StoryCloud did not violate Chapter 154, the JBCC cannot have it both ways. If it lacked jurisdiction to act, any act would have been void. Therefore, legally no action was taken by the JBCC. The JBCC cannot simultaneously claim that it lacked jurisdiction to act and that it discharged its statutory duties. It is an either-or proposition. In determining that it lacked jurisdiction to consider the complaint, the JBCC committed an error of law that is reviewable *de novo* by this Court on mandamus. As such, the Plea should be denied.

d. The JBCC has cited no authority for the proposition that the Court does not have jurisdiction over the administrative appeal portion of the Petition.

The JBCC has cited no authority for the proposition that the Administrative Procedures Act does not apply to the JBCC. It fits the definition of "State Agency" under Gov't Code 2001.003(7). Therefore, the appellate procedures of Gov't Code §2001.171 apply.

Conclusion

It is well-established that mandamus proceedings are not subject to sovereign immunity. The JBCC's plea simply ignores this binding precedent. Under *Touchy* and the more recent cases regarding standing, it is clear that Petitioners have standing to seek mandamus relief as complainants in Chapter 153's enforcement process. Finally, the JBCC's arguments regarding the underlying claims are merits based arguments that are outside the procedural scope of a dilatory plea. Regardless, Petitioners have demonstrated that mandamus relief is not only available, but warranted.

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that: (i) the Court deny the Plea to the Jurisdiction, (ii) if inclined to grant the Plea to the Jurisdiction, that the Court afford Petitioners leave to amend, and (iii) that the Court grant Petitioners such further and additional relief to which they may be justly entitled.

Respectfully submitted,

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ATTORNEY FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2022, a true and correct copy of the above and foregoing was served on all counsel of record in accordance with the Texas Rules of Civil Procedure.

By: /s/ Dennis Holmgren
Dennis M. Holmgren