No. 10-0566

IN THE SUPREME COURT OF TEXAS

IN RE THE HONORABLE SHARON KELLER,

Relator

Original Proceeding from
Inquiry Concerning Hon. Sharon Keller, Judge No. 96,
Before the State Commission on Judicial Conduct

RESPONSE TO PETITION FOR MANDAMUS

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TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Cases **Page(s)**

Cases (Continued) **Page(s)**

Cases (Continued) **Page(s)**

Constitutional Provisions

Statutes

Rule

STATEMENT OF THE CASE

This petition for mandamus challenges an order of public warning issued by the State Commission on Judicial Conduct to the Hon. Sharon Keller, Presiding Judge of the Texas Court of Criminal Appeals. Judge Keller seeks mandamus relief from the order, in lieu of a trial *de novo* before a statutory special court of review available to her under Section 33.034 of the Texas Government Code.

STATEMENT OF JURISDICTION

Under this Court's precedents, this Court does not have jurisdiction to issue a writ of mandamus against the State Commission on Judicial Conduct, and thus has no jurisdiction over this proceeding.

"This Court may entertain original mandamus proceedings only when jurisdiction is conferred by the Constitution or by statute." *In re Nolo Press/Folk Law, Inc*., 991 S.W.2d 768, 775 (Tex. 1999) (holding no jurisdiction to issue mandamus against the Unauthorized Practice of Law Committee or its members). This Court has no "inherent power" to issue writs of mandamus. "[T]he Court's inherent powers, such as the power to regulate the bar, are *administrative* powers, not *jurisdictional* powers." *Id.* at 776 (quoting *Chenault v. Phillips*, 914 S.W.2d 140, 142 (Tex. 1996) (per curiam) (emphasis in original)). "The Court's administrative powers imply no mandamus jurisdiction." *Id.*

No provision of the Texas Constitution authorizes this Court to issue a writ of mandamus in a proceeding before the Commission. The Constitution "empowers this Court to issue writs of mandamus 'as may be necessary to enforce its jurisdiction.'" *Id.* at 775 (quoting TEX. CONST. art. V, § 3). This Court has "repeatedly construed this provision as authorizing the Court to issue writs only when a lower court's action threatens to impair our appellate jurisdiction or nullify the effect of our judgments." *Id.* The order challenged here does not implicate this Court's appellate jurisdiction or any judgment of this Court.

No statute authorizes this Court to issue a writ of mandamus in a proceeding before the Commission. TEX. GOVT. CODE § 22.002(a) authorizes this Court to issue

writs of mandamus against "any officer of state government except the governor." This Court construes this phrase "to refer, not to every State official at every level, but only to chief administrative officers – the heads of State departments and agencies who are charged with the general administration of State affairs." *In re Nolo Press/Folk Law, Inc*., 991 S.W.2d at 776 n. 46. This statute does not authorize mandamus against a board or a commission, or the individual members of those bodies. *See City of Arlington v. Nadig*, 960 S.W.2d 641, 642 (Tex. 1997) (per curiam) ("We have previously held that members of state boards are not state officers for purposes of this Court's exclusive mandamus jurisdiction."); *Superior Oil Co. v. Sadler*, 458 S.W.2d 55, 55-56 (Tex. 1970) (per curiam) ("[T]he writ may not be issued against state boards and commissions"); *Chemical Bank & Trust Co. v. Falkner*, 369 S.W.2d 427, 430-31 (Tex. 1963) ("Article 1733 [the predecessor to Section 22.002] extends only to a certain limited class of officers" consisting of the "heads of departments of the state government"); *Betts v. Johnson*, 96 Tex. 360, 73 S.W. 4,5 (1903) ("It seems that, if it had been the purpose to empower this court to issue the writ as well against a board of officers as against a single officer, the language would have been, 'any officer or board of officers of the state government.'"). The Commission and its members are not an "officer of state government" for purposes of TEX. GOV'T CODE § 22.002, and this Court has no statutory jurisdiction to issue a writ of mandamus.[1]

[1] Judge Keller asserts that the Commission "admitted" its members are State officers for purposes of mandamus jurisdiction. (Petition at x) That is untrue. The email message cited by Judge Keller refers to the "holdover" provision of TEX. CONST. art. XVI, § 17, not the mandamus statute. The scope of state officials covered by the two provisions are not the same. Unlike the "limited class of officers" to which

In addition, Judge Keller's challenges to the qualifications of three of the members of the Commission may be brought only in a *quo warranto* proceeding. Accordingly, this Court has no jurisdiction to review those challenges in this mandamus proceeding.

Section 22.002 applies (*see Chemical Bank*, 369 S.W.2d at 430-31), Article XVI, § 17 of the Constitution applies more broadly to "[a]ll officers within this State." *See, e.g., Delamora v. State*, 128 S.W.3d 344, 356 (Tex. App.—Austin 2004, pet. ref'd) (hold-over provision applies to county sheriff); *Crawford v. State*, 153 S.W.3d 497, 504-05 (Tex. App.—Amarillo 2004, no pet.) (hold-over provision applies to constable); *Pyote ISD v. Estes*, 390 S.W.2d 3, 7 (Tex. App.—El Paso 1965, writ ref'd n.r.e.) (per curiam) (hold-over provision applies to school district trustees); *Keen v. Featherston*, 69 S.W. 983, 983-84 (Tex. Civ. App. 1902, writ ref'd) (hold-over provision applies to county surveyor).

ISSUES PRESENTED

1. Does this Court have jurisdiction to issue a writ of mandamus to the Commission?

2. Did the Commission have the authority to issue a public warning?

3. May the qualifications of the members of the Commission be challenged only in a *quo warranto* proceeding. If not, are the members of the Commission challenged by Judge Keller qualified to serve?

4. Do Judge Keller's complaints (if true) render the Commission's order void? If not, is Judge Keller's right to a trial *de novo* an adequate remedy at law?

STATEMENT OF FACTS

The essential facts underlying the Commission's order come principally from Judge Keller's own testimony, and are largely ignored in her "Statement of Facts":

> Judge Keller knew that her Court's Execution-Day Procedures required that "[a]ll communications regarding [that day's] scheduled execution shall first be referred to the assigned judge" (3 RR 156)[2];
>
> She knew that September 25, 2007, was an execution date and that the execution was scheduled for 6:00 p.m. that day (3 RR 174);
>
> She knew that the United Supreme Court had granted certiorari that very morning in a case known as *Baze* that would address whether the protocol for lethal injection was unconstitutional (3 RR 173; Examiner's Ex. 4);
>
> She knew that a motion was expected to be filed that day on behalf of the person scheduled to be executed that day, and that the motion was expected to be based on the Supreme Court's action of that morning in the *Baze* case (3 RR 176; Examiner's Ex. 6);
>
> She knew that the 4:45 p.m. telephone call she received related to a communication concerning that day's scheduled execution (3 RR 178, 181, 186);
>
> She knew that the caller wanted to file something but was not ready to file by 5:00 p.m. (3 RR 180-82; 4 RR 14, 28);
>
> She knew that the caller had requested to file after 5:00 p.m. (Marty: 4 RR 112, 146);
>
> She knew the assigned judge for that day's scheduled execution remained available after hours, as required under the Execution-Day Procedures (3 RR 157);
>
> She knew that she was not the assigned judge (3 RR 174, 178);
>
> She knew that the matter was important, since it involved a life-or-death decision and "could not be undone" (3 RR 179);
>
> She twice said "no"; she said, "We close at 5:00 p.m.; and she said there's no reason the clerk's office should stay open for these people who can't file on time

[2] References to testimony ("RR," *i.e.*, Reporter's Record) can be found in volume 2 of Petitioner's Record In Support Of Petition For Mandamus.

(3 RR 184-85, 188; 4 RR 14; Marty: 4 RR 84-87, 137).

The assigned judge (whose identity was not known to the public, 3 RR 171), knew that a filing was expected and waited after hours – surprised that nothing was filed (2 RR 76).

Instead of referring the communication to the assigned judge, as was required under her Court's Execution-Day Procedures, Judge Keller addressed and disposed of the communication.

Judge Keller adamantly testified that, presented with the same circumstances again, she would do nothing different today (4 RR 28-29).

Judge Keller neither mentions, nor objects to the sufficiency of evidence concerning, any of these essential facts. None of these facts contradicts any finding by the Special Master. Judge Keller complains that evidence was insufficient as to *other* findings (*see* Petition at 4-6); but she has overlooked the abundant factual support for each:

1. **Finding 43**. Marty testified that he did not know whether or not the Execution-Day Procedures required all communications regarding the scheduled execution to be first referred to the assigned judge. 4 RR 88 ("You don't know what you don't know"). He had believed that only "substantive" communications, rather than "all communications," were subject to the Procedures. *Id*. Judge Keller admitted that she did not know in September 2007 whether Marty did, or did not, know the applicable requirements under the Execution-day Procedures. 3 RR 159(24)-160(6); 3 RR 160(18-23); 4 RR 4(23-25); 4 RR 5(10)-6(1); 4 RR 8(3-5).

2. **Finding 40**. The Special Master made findings that there were no "serious" or "major" computer problems. Order at 13. But he found that TDS "may have had an internal problem emailing the files from one person to another in the

Houston office." *Id.* The Commission's finding does not conflict with the Special Master's order; and abundant evidence supports the finding. *See* Examiner's Exhibit 24 (Internet America customer service attention to the account at 3:37 p.m.); 3 RR 133-34 (Lagarda); 3 RR 50-51 (David Dow).

3. **Findings 95, 96 and 117**. Judge Keller herself testified that Rule 9.2(a) gives a person with a legal interest in a proceeding the right to be heard by the clerk or a judge as to the acceptance of a filing after hours. 3 RR 193.

SUMMARY OF THE ARGUMENT

This Court should deny the petition for mandamus because this Court does not have the jurisdiction to grant the relief Judge Keller seeks; because the Commission acted lawfully in following this Court's own rule regarding the imposition of a public warning after the conclusion of formal proceedings; and because Judge Keller has an adequate remedy at law through a trial *de novo* before a special court of review.

As held in *In re Nolo Press/Folk Law, Inc*., 991 S.W.2d 768 (Tex. 1999), this Court's mandamus jurisdiction does not extend to bodies such as the Commission or its individual members. Judge Keller's specific complaints about the qualifications of certain Commissioners may be brought only in a *quo warranto* proceeding.

In imposing a public warning after a formal proceeding, the Commission followed the rule this Court adopted on the procedure for formal proceedings. RULES FOR REMOVAL OR RETIREMENT OF JUDGES, Rule 10(m). This Court's rule and the Commission's order are consistent with the Constitution's text, which authorizes the

Commission to impose a public warning "[a]fter such investigation as it deems necessary." TEX. CONST. art. V, § 1-a(8).

The proper avenue for Judge Keller to challenge the Commission's order is through a trial *de novo* before a court of special review. She can challenge the public warning on the grounds she raises here and seek reconsideration of the factfindings about which she complains, before a tribunal that will not consist of any of the Commissioners whose qualifications she challenges. Her adequate remedy at law before the court of special review thus provides an independent basis for denying the petition for mandamus.

ARGUMENT

I. The Commission's Order of Public Warning Was Authorized by the Constitution and this Court's Rules Interpreting the Constitution.

The Texas Constitution provides that a judge "may be disciplined or censured, in lieu of removal from office," and gives the Commission the specific authority to issue a public warning "after such investigation as it deems necessary." TEX. CONST. art. V, § 1-a(6), (8). Rule 10(m) of this Court's Rules for the Removal or Retirement of Judges states that "after hearing, upon considering the record and report of the special master, . . . the commission may publicly order a . . . warning." These provisions refute Judge Keller's argument that the Commission's order is "void" because the Commission had "no power" to issue a public warning. (Petition at 7)

Judge Keller's argument is based on the false premise that the Commission's decision to initiate "formal proceedings" eliminates a public warning as a possible action by the Commission. A plain reading of the Constitution's text and this Court's rules

implementing this provision confirms that a public warning may be imposed with or without formal proceedings.

"When interpreting our state Constitution, we rely heavily on its literal text and are to give effect to its plain language." *Republican Party of Texas v. Dietz*, 940 S.W.2d 86, 89 (Tex. 1997) (citation omitted). The Texas Constitution provides that a judge engaging in misconduct or incompetence may be removed from office or "may be disciplined or censured, in lieu of removal from office, as provided by this section." TEX. CONST. art. V, § 1-a(6).

The Constitution vests the Commission with the authority to impose a wide range of specific disciplinary actions against a judge – from requiring additional training to a recommendation of removal from office. For most of these actions, the Constitution leaves to the discretion of the Commission the extent and nature of the investigation necessary: "*After such investigation as it deems necessary,* the Commission may in its discretion issue a private or public admonition, warning, reprimand, or requirement that the person obtain additional training or education." TEX. CONST. art. V, § 1-a(8) (emphasis added). For the most severe disciplinary actions (*i.e.*, public censure, removal, or retirement), the Constitution mandates certain additional specified procedures: a finding of "good cause" following the initiation of "formal proceedings," and either a "formal hearing" before the Commission or an evidentiary hearing before a special master. *See id.* ("If, after formal hearing, or after considering the record and report of a Master, the Commission finds good cause therefore, it shall issue an order of public censure or it shall recommend to a review tribunal the removal or retirement, as the case

may be, of the [judge].").

Initiating the additional procedural protections required for censure, removal, or retirement does not foreclose the other disciplinary actions available to the Commission. In other words, under the Constitution, the initiation of formal proceedings makes possible censure, removal, or retirement, but does not preclude admonition, warning, reprimand, or the requirement that the person obtain additional training or education. In those circumstances where the Commission determines that an allegation of misconduct or incompetence requires further examination through a formal proceeding, but, after that more thorough examination, concludes that censure, removal, or retirement are not justified, the Commission retains the ability to impose appropriate disciplinary relief, including a public warning.

By promulgating Rule 10(m), this Court endorsed this common-sense reading of the constitutional provision:

> If, after hearing, upon considering the record and report of the special master, the commission finds good cause therefore, . . . it shall recommend to the review tribunal the removal, or retirement, as the case may be; or in the alternative, the commission may dismiss the case or publicly order a censure, reprimand, warning or admonition.

RULES FOR REMOVAL OR RETIREMENT OF JUDGES, Rule 10(m). In issuing a warning in this case, the Commission followed this Court's rule, and this Court's rule is consistent with the constitutional text. Nothing in the text of the Constitution says that a public warning is unavailable after the initiation of formal proceedings. To the contrary, the Constitution says that a public warning may be imposed "after such investigation as [the Commission] deems necessary." TEX. CONST. art. V, § 1-a(8). Nothing in the text of the

Constitution says that a failure to find "good cause" for public censure, removal, or retirement after a formal hearing prevents the Commission from issuing a warning. Indeed, it would be anomalous to allow the Commission to issue a warning to a judge without a formal hearing, but then, after a formal hearing to fully consider the evidence against the judge, prohibit the Commission from issuing a warning.

The Commission may issue a public warning "after such investigation as it deems necessary." TEX. CONST. art. V, § 1-a(8). The Commission here deemed a formal hearing necessary, and after such a process found that Judge Keller engaged in willful or persistent conduct clearly inconsistent with her duties of office and that cast public discredit on the judiciary or the administration of justice. For these violations of the judicial canons, the Commission issued Judge Keller a warning "in lieu of removal from office." *Id.* § 1-a(6). The decision of the Commission to initiate formal proceedings does not take away the Commission's authority to issue a lesser sanction. The Commission's order in this case was authorized by the Constitution, and Judge Keller's challenge to its constitutionality must fail.

II. Judge Keller's Complaints About Individual Findings of Fact Are Not Cognizable in Mandamus.

"It is well established Texas law that an appellate court may not deal with disputed matters of fact in an original mandamus proceeding." *Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 714 (Tex. 1990). Judge Keller attempts to circumvent this well-established principle by complaining in her mandamus petition that there was insufficient evidence to support the Commission's findings. (Petition at 4-6) She cites

examples of the findings and complains that they do not defer to the Special Master's findings, and that they are unsupported by the evidence. As stated, a review of the Commission's factual finding is inappropriate for mandamus. Moreover, Judge Keller's very examples show that she is mistaken. The Commission's findings were supported by the evidence. *See* pages 2-3, *supra*.

In addition to these general principles, Judge Keller has (but has not yet exercised) the right to a trial *de novo* before a special tribunal to reconsider all factual findings about which she complains. TEX. GOV'T CODE § 33.034. Judge Keller's mandamus petition should be denied.[3]

III. Judge Keller's Argument Regarding the Commission's Vote Consists Entirely of Impermissible Speculation.

Judge Keller asks this Court to assume that only six members voted against her, and based on that speculation, to declare the Commission's decision void. No evidence supports Judge Keller's inference that the decision was less than the unanimous act of all the Commissioners who participated in the hearing. The order was issued by the Commission, was signed by its Chair, and gives no suggestion of even a single dissenting vote.

Judge Keller's attempt to substitute speculation for proof falls far short of the exacting standards traditionally applied in mandamus proceedings. "The burden is upon

[3] The record amply supports the Commission's findings, as reflected by record citations in the Examiner's Objections and Responses to Special Master's Findings of Fact (Appendix 1). Judge Keller also complains of two legal rulings, (i) as to the proper standard of proof (Petition at 4 n.5) and (ii) as to the permissibility of amendments in a Rule 10 proceeding (Petition at 5; inaptly citing an order as to amendments during the course of an appeal from a Rule 9 proceeding). Petitioner did not include in her record excerpts the materials that supported those two legal rulings. They are submitted as Appendices 2 and 3.

the [mandamus] petitioner to negate by affirmative allegation and prove every fact or condition which would have authorized the public official to take action sought to be enforced upon him." *Mattox v. Grimes County Com'rs Court*, 305 S.W.3d 375, 380 (Tex. App.—Houston [14 Dist.] 2010, pet. denied); *see also Gabert v. Olcott*, 23 S.W. 985, 987 (Tex. 1893) ("The presumption is that public officers do as the law and their duty require them."); *Bexar County v. Hatley*, 136 Tex. 354, 150 S.W.2d 980, 988 (Tex. 1941) ("Certainly it would be unfair to assume against the members of the court, who are presumed to have acted lawfully in the discharge of their duties, that they intended to act unlawfully.").

IV. No Commissioner Was Disqualified from Service.

A. The Qualifications of the Commission's Members May Be Challenged Only by *Quo Warranto*, Not Mandamus.

Judge Keller's attacks on the residency requirements of certain Commission members and the term of office of another are not cognizable in mandamus. Instead, *quo warranto* is the "exclusive remedy" to challenge the qualifications of these public officeholders. *Williams v. Castleman*, 112 Tex. 193, 247 S.W. 263, 270 (1922). "The recognized procedure for determining whether an elected judge or other public official has done any act that by law works a forfeiture of his office is through a *quo warranto* proceeding brought in the name of the State of Texas by the Attorney General or the district or county attorney of the proper district or county." *Rosell v. Central West Motor Stages, Inc.*, 89 S.W.3d 643, 651 (Tex. App.—Dallas 2002, pet. denied). "The principle is of great public importance. Public officers should be free to perform their duties

without having their authority questioned incidentally in litigation between other parties. They should not be called on to defend their authority unless a proper legal officer of the State has determined that the question raised is serious and deserves judicial consideration." *Lewis v. Drake*, 641 S.W.2d 392, 395 (Tex. App.—Dallas 1982, no writ).

The only case relied on by Judge Keller – *In re Union Pac. Resources Co.*, 969 S.W.2d 427 (Tex. 1998) – deals with the constitutional disqualification of a judge to sit *in a particular case* because of a conflict of interest, not the judge's general qualifications to hold office. Under the Texas Constitution, "No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case." TEX. CONST. art. V, § 11. Any order in a case entered by a judge disqualified from that case under this constitutional provision is void and subject to mandamus. *In re Union Pac. Resources Co.*, 969 S.W.2d at 428.

But the rule regarding a judge's disqualification to sit in a case because she or he has a constitutional conflict of interest does not extend to the judge's right to hold office. *Rosell*, 89 S.W.3d at 651 (discussing and contrasting *In re Union Pac. Resources Co*.). Instead, a party challenging a judge's qualifications to hold office "must bring a direct action through a *quo warranto* proceeding." *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 854 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.). Further, a judge's failure to meet the qualifications in office is not grounds for attacking his or her prior orders: "While he is in possession of the office under color of title, discharging its ordinary functions, a judge's official acts are conclusive as to all persons interested and

cannot be attacked in a collateral proceeding, even though the person acting as judge lacks the necessary qualifications and is incapable of legally holding the office." *Ex parte Lefors*, 171 Tex. Crim. 229, 347 S.W.2d 254, 354-55 (1961). Similarly, *quo warranto* is the proper vehicle for challenging whether a former judge has improperly continued to serve in office after expiration of his or her assignment. *Wilson v. State*, 977 S.W.2d 379, 380-81 (Tex. Crim. App. 1998); *see also id*. at 381 (Keller, J, concurring) (authority of the judge may not be challenged for the first time on appeal).[4]

B. Each Commissioner Is Qualified.

Judge Keller argues that the Commission was unconstitutionally composed because (i) more than one commissioner lives in the same appellate court district, and (ii) another commissioner's term on the Commission had expired. Judge Keller's arguments misread the governing constitutional requirements.

The Commission's members are drawn from eight classes of membership: class (i) to (viii). TEX. CONST. art. V, § 1-a(2). For five of those eight classes, the Constitution specifies that none of the members in *those* five classes may reside in the same court of appeals' district:

> provided that no person shall be or remain a member of the Commission, who does not maintain physical residence within this state, or who shall have ceased to retain the qualifications above specified for that person's respective class of membership, and provided that a Commissioner of *class (i), (ii), (iii), (vii), or (viii)* may not reside or hold a judgeship in the same

[4] Judge Keller raised the disqualification point informally, asking for a response from Commission staff so that she could decide whether to file any formal motion to disqualify. (Petitioner's Appendix H, pages 1-2.) Judge Keller's counsel received a prompt response, attaching two Attorney General letters that contradicted Judge Keller's viewpoint. (Petitioner's Appendix I.) Judge Keller then chose not to file any motion to disqualify. Having subsequently received an unwelcome Order, she now has changed her strategy.

court of appeals district as another member of the Commission.

TEX. CONST. art. V, § 1-a(2) (emphasis added). Classes (iv)-(vi) are not included within the above limitation on residency. Members of those three classes are therefore not barred from "resid[ing] … in the same court of appeals district as another member."

Judge Keller attempts to rewrite this provision to state that *no member* may be from the same court of appeals district as any other. Building on that false premise, Judge Keller argues that the following three Commission members live in the Austin Court of Appeals' district, and therefore violate Section 1-a(2)'s restriction:

Member	**Class**	**Within the 5 restricted classes?**
Hon. Jan Patterson	(i) Court of Appeals Justice	Yes
Comr. Patti H. Johnson	(iv) Public member	No
Comr. Karry K. Matson	(iv) Public member	No

Commissioners Johnson and Matson are not in "class (i), (ii), (iii), (vii), or (viii)." Those two public members of the Commission are therefore not prevented from residing in the same district as Justice Patterson.

Judge Keller also complains that the Hon. Michael R. Fields and Commissioner Tom Cunningham reside in the same district because they are both from Houston. Houston, of course, has *two* court of appeals districts, composed of the same counties. TEX. GOVT. CODE § 22.201(b) & (o). Nothing in the Constitution prevents appointment

of a commissioner from each of the two overlapping Houston court of appeals' districts. Judge Keller cites no authority to suggest otherwise.

Finally, Judge Keller complains that Judge Field's regular term on the Commission ended November 19, 2009. But under the "holdover" provision of the Texas Constitution, "[a]ll officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified." TEX. CONST. art. XVI, § 17. The constitutional authorization for officers to "hold over after the expiration of their terms until their successors are elected or appointed" prevents the public inconvenience that would result from vacancies in office. TEX. CONST. art. XVI, § 17 "Interpretative Commentary." Judge Fields is still the sitting judge of Harris County Criminal Court at Law No. 14 and thus has not "ceased to retain the qualifications above specified for his respective class of membership" under Section 1-a(2)'s class (vii). No successor has been appointed to take his place on the Commission. He therefore continues to lawfully perform his duties as a Commissioner, regardless of whether his term has expired.

V. The Commission's Order Is Not "Void," and Judge Keller Has an Adequate Remedy at Law Through a Trial *De Novo*.

"The requirement that persons seeking mandamus relief establish the lack of an adequate appellate remedy is a 'fundamental tenet' of mandamus practice." *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (quoting *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680, 684 (Tex. 1989)). Judge Keller seeks to avoid this "fundamental tenet" by asserting that all of her various complaints render the Commission's order "void." None of her arguments, however, fall within the narrow scope of reasons that an order

may be "void." Further, she has an adequate remedy at law available to her through a trial *de novo* before a special court of review. Her mandamus petition must therefore be denied.

"[T]he mere fact that an action by a court . . . is contrary to a statute, constitutional provision or rule of civil or appellate procedure makes it [not void but] 'voidable' or erroneous." *In re Masonite Corp.*, 997 S.W.2d 194, 198 (Tex. 1999) (quoting *Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex. 1990)). "A judgment is void only when it is apparent that the court rendering the judgment had no jurisdiction of the parties, no jurisdiction of the subject matter, no jurisdiction to enter the judgment, or no capacity to act as a court." *Mapco, Inc.*, 795 S.W.2d at 703.

Even if all of the errors alleged by Judge Keller are true (and they are not), the Commission's order in this case cannot be "void." The Commission has jurisdiction over Judge Keller; jurisdiction over allegations of judicial misconduct; subject matter jurisdiction to impose discipline on a judge; and the capacity to act as a Commission. Although constitutional disqualification of an individual trial judge for a conflict of interest may render his or her orders void, *In re Union Pac. Resources Co.*, 969 S.W.2d at 428, that rule does not extend to multi-member bodies such as the Commission, where disqualification of some members will not render the court's judgment "void." *Tesco Am., Inc. v. Strong Indus.*, 221 S.W.3d 550, 555-57 (Tex. 2006).[5]

[5] As argued earlier, moreover, even if Judge Keller's challenges to the qualifications of certain Commissioners to hold office had merit, the actions taken by those Commissioner would still be effective. *See* pages 10-11, supra; *Ex parte Lefors*, 171 Tex. Crim. 229, 347 S.W.2d 254, 354-55 (1961) (" While he is in possession of the office under color of title, discharging its ordinary functions, a judge's official acts

Judge Keller is thus not entitled to mandamus without establishing that she has "no adequate remedy at law." She cannot meet this requirement, because she has available a trial *de novo* by a special court of review. TEX. GOV'T CODE § 33.034(e)(2). In *Grimm v. Garner*, 589 S.W.2d 955 (Tex. 1979), this Court held that the availability of a trial *de novo* makes mandamus inappropriate. *Grimm* specifically held that the trial *de novo* on appeal from justice court to county court is an adequate remedy precluding mandamus relief. That holding applies directly to Judge Keller's right of appeal, because the statute states that the special court's review "of a sanction is by trial de novo as that term is used in the appeal of cases from justice to county court." TEX. GOV'T CODE § 33.034(e)(2). As with the relator in *Grimm*, Judge Keller has an adequate remedy at law through a trial *de novo*. Her petition for mandamus must therefore be denied.[6]

PRAYER

Respondents pray that this Court deny the Petition for Review and pray for such other and further relief to which they may show themselves to be justly entitled.

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are conclusive as to all persons interested and cannot be attacked in a collateral proceeding, even though the person acting as judge lacks the necessary qualifications and is incapable of legally holding the office.").

[6] Judge Keller also complains that the Order violates the Constitution because it "did not include a finding of good cause that Relator should be either removed from office or censured." (Petition at 10) That, of course, is because the Commission did not censure or remove her from office. The Constitution does not require that the Commission make any explicit finding of "good cause" for a warning.

Respectfully submitted,

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By: /s/ John J. McKetta, III
John J. McKetta, III

CERTIFICATION

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, on this day personally appeared John J. McKetta, III, who being by me first duly sworn, stated on his oath the following:

"My name is John J. McKetta, III. I am over twenty-one years of age, am of sound mind, and am competent to make this affidavit and to testify to the facts stated herein. I certify that I have reviewed the RESPONSE TO PETITION FOR MANDAMUS and conclude that every factual statement therein is supported by competent evidence included in the Appendix or Record submitted by Petitioner or with this response."

/s/John J. McKetta, III

SUBSCRIBED AND SWORN TO BEFORE ME on August 6, 2010, to certify which witness my hand and official seal.

Notary Public in and for the State of Texas

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, on this day personally appeared John J. McKetta, III, who being by me first duly sworn, stated on his oath the following:

"My name is John J. McKetta, III. I am over twenty-one years of age, am of sound mind, and competent to make this affidavit. Unless otherwise stated, all facts set forth in this Verification are true and based on my personal knowledge.

"I am Special Counsel to the State Commission on Judicial Conduct. True and correct copies of (i) Examiner's Objections And Responses To Special Master's Findings Of Fact, (ii) Examiner's Response To Motion For Application Of Proper Evidentiary Standard, and (iii) Response In Opposition to Judge Keller's Motion To Strike And Motion To Show Authority are included in the Appendix in Support of RESPONSE TO PETITION FOR MANDAMUS, which is material to Examiners' response."

/s/John J. McKetta, III

SUBSCRIBED AND SWORN TO BEFORE ME on August 6, 2010, to certify which witness my hand and official seal.

Notary Public in and for the State of Texas

CERTIFICATE OF SERVICE

On August 6, 2010, a true and correct copy of the foregoing response was served by certified mail, return-receipt delivery, on counsel of record at the following addresses:

Charles L. Babcock
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COUNSEL FOR RELATOR

/s/John J. McKetta, III