Supreme Court of Texas

No. 21-0772

Health and Human Services Commission,
Petitioner,

v.

Brenda Vazquez,
Respondent

On Petition for Review from the
Court of Appeals for the Third District of Texas

JUSTICE BOYD filed an opinion dissenting to the denial of the petition for review.

The court of appeals appears in this case to have granted a right to judicial review of an administrative agency's decision when no statutory or constitutional provision affords that right. The result, we are told, creates confusion and uncertainty affecting tens of thousands of agency decisions every year. I would grant review, not only to eliminate that uncertainty, but to fortify the borders that separate the political branches. Because the Court does not, I respectfully dissent.

The facts are deceptively simple. Brenda Vazquez asked the state registrar of vital statistics[1] for a copy of her Texas birth certificate. Generally, upon request, the state registrar must provide a certified copy of a registered birth certificate to any "properly qualified applicant." TEX. HEALTH & SAFETY CODE § 191.051(a). But the registrar may refuse to provide a copy of any birth certificate to which she has attached an "addendum" containing information that contradicts the facts contained in the original record. *Id.* §§ 191.033(a), .057(b). The state registrar refused Vazquez's request because the original record contained such an addendum.[2]

The registrar must timely notify the applicant of the reasons for her refusal, and the Department of State Health Services "shall give the applicant an opportunity for a hearing." *Id.* § 191.057(c). Vazquez requested and the Department provided a hearing before an administrative law judge authorized to resolve the dispute on behalf of the Health and Human Services Commission. After the hearing, the administrative law judge issued an order affirming the registrar's denial

[1] The director of the vital statistics unit of the Texas Department of State Health Services serves as the state registrar of vital statistics. TEX. HEALTH & SAFETY CODE §§ 191.001(3), .004(a).

[2] The addendum was based on an investigative report from U.S. Immigration and Customs Enforcement concluding that Vazquez had a Mexican birth certificate and that her Texas birth certificate was fraudulent. Additional information indicated that Vazquez lived in Mexico from 1980 to 2004 and that she previously swore to a Mexican court that she was born in Mexico.

of Vazquez's request and instructing that the addendum remain on her birth certificate.

Although the statute characterizes the agency's decision as "final," *id.* § 191.057(d), Vazquez filed this suit seeking judicial review under the Texas Administrative Procedure Act (the APA) and asserting claims for declaratory relief under the Uniform Declaratory Judgments Act (the UDJA).[3] The Commission filed a plea to the jurisdiction arguing, among other things, that sovereign immunity bars Vazquez's suit and the APA does not waive that immunity. The trial court granted the Commission's plea and dismissed Vazquez's claims with prejudice. The court of appeals reversed, holding that the legislature authorized this suit for judicial review of the administrative decision denying Vazquez a copy of her birth certificate. 2021 WL 3176031, at *7 (Tex. App.—Austin July 28, 2021).[4]

The court of appeals' decision implicates significant concerns that are both practical and—more importantly—constitutional. The Texas Constitution expressly prohibits each of our government's branches from exercising "any power properly attached to either of the others." TEX. CONST. art. II, § 1. Within its proper authority, the legislative

[3] Specifically, Vazquez sought declarations that she was born in Texas, that the addendum should be removed from her birth certificate, and that she is entitled to receive a certified copy of her birth certificate.

[4] The court of appeals also held (1) in light of the APA's waiver, sovereign immunity does not bar Vazquez's declaratory-judgment claims; (2) Vazquez has standing to bring her claims; and (3) Vazquez did not adequately plead any constitutional claims but should be given an opportunity to amend her pleadings to assert any such claims as ultra vires claims. 2021 WL 3176031, at *7–10.

branch may create various legal rights and may "for reasons of its own decide[] upon the method for the protection of the 'right' which it created." *Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297, 301 (1943). To that end, the legislature may create administrative agencies within the executive branch and delegate to them the power to resolve legal and factual disputes to protect those statutory rights. *Id.* at 303; *see also City of Amarillo v. Hancock*, 239 S.W.2d 788, 790 (Tex. 1951). Fundamentally, when the legislature creates a statutory right, "such right is to be governed by the terms of such statute." *Tex. Highway Comm'n v. El Paso Bldg. & Const. Trades Council*, 234 S.W.2d 857, 860 (Tex. 1950).

When the legislature empowers an administrative agency to resolve disputes over statutory rights, it may specifically authorize courts to review the agency's decision, may specifically deny such judicial review, or "may simply be silent upon the subject." *Hancock*, 239 S.W.2d at 790.[5] Our laws do not recognize an inherent right to judicial review of an administrative agency's decision. *Ferrell*, 248 S.W.3d at 157–58. As a result, Texas law permits judicial review of administrative decisions only when (1) a statute permits judicial review, (2) the administrative decision adversely affects a vested property right, or

[5] *See, e.g.*, *Hous. Mun. Emps. Pension Sys. v. Ferrell*, 248 S.W.3d 151, 157–59 (Tex. 2007) (holding statute that declared pension board's decisions to be "final and binding" expressly prohibited judicial review of those decisions); *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 599 (Tex. 2001) (holding statute "expressly precluded judicial review of the administrative judge's rulings" regarding contract claims against governmental agency); *Cont'l Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 398–401 (Tex. 2000) (holding statute did not grant right to judicial review of administrative agency's "final" decision on claim for medical benefits).

(3) the decision otherwise violates a constitutional right. *Little-Tex*, 39 S.W.3d at 599.[6]

Absent one of these grounds, the constitutional separation of powers prohibits courts from reviewing an agency's decision. That decision becomes the dispute's "last terminal point," and there should be "no dragging out of the controversy into other tribunals of law." *Switchmen's Union*, 320 U.S. at 305. Although courts must provide "the last refuge of the citizen against usurpation of power by public officials," they must harness their own powers by being "doubly careful that they themselves do not extend their jurisdiction beyond that granted by the Constitution or legislature." *Hancock*, 239 S.W.2d at 791.

Here, the court of appeals concluded that section 2001.171 of the APA creates a right to judicial review. That section authorizes judicial review and waives immunity against suits filed by a plaintiff who "has exhausted all administrative remedies available within a state agency and who is aggrieved by a final decision *in a contested case*." TEX. GOV'T CODE § 2001.171 (emphasis added); *see Mega Child Care*, 145 S.W.3d at 198. The Commission does not dispute that Vazquez exhausted her administrative remedies and was aggrieved by the administrative law judge's final decision, but it contends that the administrative law judge's decision was not made in a "contested case."

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[6] *See also Ferrell*, 248 S.W.3d at 158; *Tex. Dep't of Protective & Regul. Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 172 (Tex. 2004); *Cont'l Cas. Ins. Co.*, 19 S.W.3d at 397; *Firemen's & Policemen's Civ. Serv. Comm'n v. Kennedy*, 514 S.W.2d 237, 239 (Tex. 1974); *Stone v. Tex. Liquor Control Bd.*, 417 S.W.2d 385, 385–86 (Tex. 1967); *Hancock*, 239 S.W.2d at 790.

The APA defines "contested case" to mean "a proceeding . . . in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing." TEX. GOV'T CODE § 2001.003(1). We have described it as "an adversarial" or "trial-like proceeding." *Tex. Comm'n on Env't Quality v. City of Waco*, 413 S.W.3d 409, 410 (Tex. 2013); *Cont'l Cas. Ins. Co.*, 19 S.W.3d at 397. Relying on the statutory definition, the court of appeals concluded that Vazquez was aggrieved by a decision in a contested case because the administrative law judge conducted an "adjudicative hearing" to determine whether she had a right to receive a certified copy of her birth certificate. 2021 WL 3176031, at *5–6.

We have held, however, that "[a]lthough the APA defines 'contested case' and sets the procedural framework," it does not itself create a right to a contested case to resolve any particular dispute. *City of Waco*, 413 S.W.3d at 423. Instead, we must look to the agency's enabling act and to the rules the agency has adopted under that act's authority to determine whether a person has a right to a hearing on an agency decision and, if so, whether that right includes a contested case. *Id.*[7] If the relevant statutes and rules provide for a hearing but not for a

[7] *See also Pharmserv, Inc. v. Tex. Health & Hum. Servs. Comm'n*, No. 03-13-00526-CV, 2015 WL 1612006, at *5 (Tex. App.—Austin Apr. 9, 2015, no pet.) (mem. op.) (relying on *City of Waco* to explain that the APA "does not independently provide a right to a contested case hearing"; instead, "[t]he particular agency's enabling act determines whether rights are to be determined after an opportunity for adjudicative hearing, and agency rules may decide whether that opportunity may include a contested case hearing" (quoting *Tex. Logos, L.P. v. Tex. Dep't of Transp.*, 241 S.W.3d 105, 123 (Tex. App.—Austin 2007, no pet.))); *McAllen Hosps., L.P. v. Suehs*, 426 S.W.3d 304, 314 (Tex. App.—Amarillo 2014, no pet.) (similar); *Tex. Comptroller of Pub.*

contested case, the agency may resolve the dispute through "a less formal proceeding," and the courts lack jurisdiction to review the agency's decision. *Id.* at 424.

Here, the Health and Safety Code requires that the Department provide an applicant denied a certified copy of her birth certificate "an opportunity for a hearing," but it does not require a contested case or otherwise specify the nature of that hearing. TEX. HEALTH & SAFETY CODE § 191.057(c)(2). The Commission's rules provide for two separate types of administrative hearings: a "Formal Hearing" and a "Fair Hearing." The rules addressing Formal Hearing procedures expressly apply to and supplement statutory provisions—including those within the APA—that govern "contested cases." 25 TEX. ADMIN. CODE § 1.21. But the rules addressing Fair Hearing procedures expressly apply "when a statute or regulation does not specify that a contested case be heard under the APA." *Id.* § 1.51(b)(1); *see id.* § 1.51(b)(2)(H) (stating that the Fair Hearing procedures "apply to fair hearings for . . . any other program not required to be a contested case under the provisions of the APA").

Because the Health and Safety Code does not require a contested case when an applicant challenges the state registrar's refusal to

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Accts. v. Walker Elec. Co., LLC, No. 03-13-00285-CV, 2014 WL 6612431, at *4 (Tex. App.—Austin Nov. 21, 2014, no pet.) (mem. op.) ("If an agency is not required to conduct a contested case hearing before issuing a given order, then section 2001.171 does not create a right to judicial review of that order." (citing *McAllen Hosps.*, 426 S.W.3d at 314)); *Bacon v. Tex. Hist. Comm'n*, 411 S.W.3d 161, 180 (Tex. App.—Austin 2013, no pet.) ("[A]s for Bacon's view that [the Texas Historical Commission] has somehow invoked a right to a contested-case hearing that arises independently from the APA, the Texas Supreme Court has squarely rejected that notion in its recent *City of Waco* decision.").

provide a copy of a birth certificate, the Commission's rules governing Fair Hearings apply, rather than the rules governing Formal Hearings. Other Commission rules, which expressly address birth-certificate hearings, confirm this result. Rule 181.24 permits the applicant to request a "hearing . . . as provided in [rule] 181.21," and rule 181.21 requires the hearing to be conducted "in accordance with the department's hearing procedures, contained in [rules] 1.51–1.55." *Id.* §§ 181.21(c)(3), .24(d). Rules 1.51 through 1.55 set forth the provisions governing Fair Hearing procedures and expressly provide that such hearings "are not required to be conducted under" the APA's provisions but instead "shall" be conducted "in accordance with rules adopted by the Texas Board of Health." *Id.* § 1.51(a). We presume that these rules are valid, *see Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n*, 616 S.W.3d 558, 568 (Tex. 2021), and Vazquez has not established otherwise.

In summary, section 2001.171 of the APA provides the only basis on which we could conclude that the legislature provided for judicial review of a decision denying a certified copy of a birth certificate, but that section applies only to decisions made in a contested case. The Health and Safety Code does not require the Department to provide a contested case, and the Commission's applicable rules expressly do not provide one. Because the APA only provides for judicial review of decisions made in a contested case, it does not appear to provide for judicial review of the decision affirming the state registrar's refusal to provide Vazquez with a certified copy of her birth certificate.

Nevertheless, the court of appeals concluded that the administrative law judge made the decision regarding Vazquez's birth

certificate in a "contested case" because the administrative law judge received and considered sworn testimony and documentary evidence, made findings by a preponderance of the evidence, and reached legal conclusions based on those findings. 2021 WL 3176031, at *6. Contrary to our holding in *City of Waco*, the court held that courts deciding whether an administrative hearing was a contested case may "look *either* to the proceeding that the agency actually provided to the adverse party *or* to the relevant statutes and rules about the proceeding that the agency should have provided." 2021 WL 3176031, at *5 (emphases added). Thus, according to the court, "[a]n administrative proceeding can be a contested case when the agency afforded a procedure that meets the 'contested case' definition"—that is, when it provided an "adjudicative hearing," *see* TEX. GOV'T CODE § 2001.003(1)—"despite what the agency's related statutes or rules might otherwise say." 2021 WL 3176031, at *6 (citing *Heat Energy Advanced Tech. v. W. Dall. Coal. for Env't Just.*, 962 S.W.2d 288, 291 n.1 (Tex. App.—Austin 1998, pet. denied)).

The Commission contends that the court's decision not only conflicts with our decision in *City of Waco*, it also permits courts to invade clearly defined legislative power. As explained, the agency's enabling act and rules, and not the APA, determine whether a hearing constitutes a contested case. *See City of Waco*, 413 S.W.3d at 423. The legislature may require administrative agencies to adopt rules providing for a contested case and thereby permit (and waive their immunity against) a suit for judicial review under the APA. Or, as here, the legislature may instruct an agency to adopt rules providing for a

hearing without specifying whether it must be a contested case, thus authorizing the agency to decide whether to provide a contested case. If, as here, an agency adopts rules providing for a "less formal hearing" that is not a contested case, the agency cannot impliedly waive its immunity by its conduct in connection with that hearing. In deference to the legislature's authority to decide when to waive the state's immunity based on the balancing of policy choices, we have repeatedly refused to recognize a "waiver-by-conduct" exception. *See Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 414 (Tex. 2011); *City of Dallas v. Albert*, 354 S.W.3d 368, 377 (Tex. 2011); *Tex. Nat. Res. Conservation Comm'n v. IT–Davy*, 74 S.W.3d 849, 857 (Tex. 2002).

The Commission also complains that the court of appeals' decision opens the floodgates to judicial review of not only administrative decisions regarding the refusal to issue a copy of a birth certificate but all Fair Hearing decisions and others resulting from an administrative hearing that could arguably "look" like a "contested case." While the court of appeals noted that not every administrative hearing will amount to a "contested case," 2021 WL 3176031, at *7 n.4, courts will now be burdened with reviewing every Fair Hearing to determine if the procedures were "adjudicative" enough to amount to a "contested case." This expansion of judicial review is especially burdensome because Fair Hearing procedures explicitly apply not only to birth-certificate disputes, but to numerous types of agency procedures. *See* 25 TEX. ADMIN. CODE § 1.51(b)(2). And section 1.51 of the Texas Administrative Code includes a catch-all provision—"any other program hearing not required to be a contested case hearing under the provisions of the

APA"—to which Fair Hearings procedures apply. *Id.* Under the court of appeals' holding, every administrative decision could be reviewable as either a traditional "contested case" as defined by the APA or a hearing that is not a contested case but has features that are arguably adjudicative in nature. According to the Commission, the result not only creates confusion and imposes unintended demands on our judicial system, it waives sovereign immunity by mere implication.

I would grant the petition for review to resolve the uncertainty the court of appeals' decision creates and to uphold our constitution's separation of governmental powers. Because the Court does not, I respectfully dissent.

Jeffrey S. Boyd
Justice

OPINION FILED: December 30, 2022