3/23/01

SUPREME COURT OF LOUISIANA

No. 00-CC-1750

CHRISTA DUPLANTIS

VERSUS

LOUISIANA BOARD OF ETHICS

c/w

No. 00-CC-1956

BREAZEALE, SACHSE, & WILSON, L.L.P.

VERSUS

LOUISIANA BOARD OF ETHICS

ON WRITS OF CERTIORARI TO THE COURT OF APPEAL FIRST CIRCUIT, LOUISIANA BOARD OF ETHICS

CALOGERO, Chief Justice, dissenting

Today, the majority holds that (1) La. Rev. Stat. § 42:1142(A) is unconstitutional insofar as it grants the First Circuit Court of Appeal jurisdiction to review advisory opinions issued by the Board of Ethics and (2) the district court does not have subject matter jurisdiction over an action seeking declaratory relief regarding the propriety of an advisory opinion issued by the Board of Ethics. I respectfully disagree with both of these conclusions and, therefore, dissent.

The first issue raised in each of these cases, and the principle issue that prompted us to grant this writ, is whether the First Circuit Court of Appeal has jurisdiction to review advisory opinions of the Louisiana Board of Ethics. The majority finds that the Legislature is without the authority to grant the First Circuit this jurisdiction and, in doing so, declares that portion of § 42:1142(A) granting it the power to hear such cases unconstitutional.

In Transit Management of S.E. La. v. Commission on Ethics for Pub. Emp., 96-1982, p.2 (La. 12/2/97), 703 So. 2d 576, 577 [hereinafter TMSL], we addressed the question of whether an advisory opinion was a "preliminary, procedural, or intermediate action or ruling by an ethics body" within the meaning of § 42:1142(A) as it read at the time. As we determined in TMSL, unchanged by our clarification on rehearing, the holding of TMSL was that an advisory opinion was not a preliminary, procedural, or intermediate action by the Board of Ethics. See TMSL, 96-1982, p. 1 (La. 4/4/98), 710 So. 2d 792, 792 (on rehearing). Therefore, we found that there was no statutory authority for review of advisory opinions. Shortly thereafter, the Legislature revised § 42:1142(A) to give the First Circuit Court of Appeal supervisory jurisdiction over "any advisory opinion issued to any person or governmental entity by the [Board of Ethics]" as well as "any preliminary, procedural, or intermediate action or ruling by the [Board]." See 1999 La. Acts 252, § 1 (amending La. Rev. Stat. § 42:1142(A)). It is clear that the Legislature intended to change the TMSL result and clearly provide legislative authority for the First Circuit, and ultimately this court, because of our supervisory jurisdiction over the courts of appeal, to review advisory opinions of the Board of Ethics. Therefore, the first issue before this court, as the majority points out, is whether or not the Legislature has the authority under our 1974 constitution to grant that power to our courts. In TMSL this question was neither posed nor resolved.[1]

---

[1] The majority opinion states: "We held in TMSL, before the revision of La. R.S. 42:1142 to include advisory opinions, that "[t]here is no constitutional or legislative authority for judicial review of an advisory opinion rendered by the Commission." See ante at p. 8. This statement by the majority is, quite simply, taken out of context. The TMSL holding had nothing whatsoever to do with the interpretation of the word "Decisions" in Article X, Section 21 of the Louisiana Constitution; in fact, the constitution is not referenced at any point in either the original or rehearing opinions. As we clarified on rehearing, the actual holding of TMSL was simply that an advisory opinion was not a "preliminary, procedural or intermediate action or ruling" as contemplated by La. Rev. Stat. § 42:1142(A) as it read at the time. See TMSL, 96-1982 at 1, 710 So. 2d at 793 (on rehearing). Further, a read of our TMSL decision reflects the fact that we followed the well-settled rule that our courts will dispose of a case on statutory grounds before addressing a constitutional issue. See, e.g., Blanchard v. State, 96-

It is elementary that the Legislature possesses a plenary power to enact any legislation not prohibited by our state constitution. Board of Comm'rs of Orleans Levee Dist. v. Department of Natural Resources, 496 So. 2d 281, 286 (La. 1986) (on rehearing). As such, laws enacted by the Legislature are entitled to a presumption of constitutionality from our courts. See State v. Griffin, 495 So. 2d 1306, 1308 (La. 1986); City of Lake Charles v. Henning, 414 So. 2d 331, 333 (La. 1982). Accordingly, the party attacking a statute's constitutionality, the Board of Ethics in this case, has the burden of proving its constitutional flaw and any doubt must be resolved in favor of constitutionality. See City of Lake Charles v. Chaney, 468 So. 2d 1191, 1192 (La. 1985); State v. Gisclair, 363 So. 2d 696, 698 (La. 1978). Finally, as § 42:1142(A) explicitly confers jurisdiction on the First Circuit Court of Appeal to review advisory opinions of the Board of Ethics, "it is not enough [for the Board] to show that the constitutionality [of § 42:1142(A)] is fairly debatable, but, rather, it must be shown clearly and convincingly that it was the constitutional aim to deny the Legislature the power to enact the statute." Board of Directors of Louisiana Recovery Dist. v. Taxpayers, Property Owners, & Citizens of the State of Louisiana, 529 So. 2d 384, 388 (La. 1988) (emphasis added); accord Ancor v. Belden Concrete Products, Inc., 260 La. 372, 379, 256 So. 2d 122, 125 (1971). In my view, the Board has failed to meet this high burden in this case.

Title 42, section 1142(A) of the Louisiana Revised Statutes specifically grants the First Circuit authority to review the advisory opinions of the Board; therefore, the constitutional boundaries to the First Circuit's jurisdiction are integral to analysis of this issue. Article V, Section 10 of the Louisiana Constitution grants jurisdiction to the

---

0053, p. 2 (La. 5/21/96), 673 So. 2d 1000, 1002; Matherne v. Gray Ins. Co., 95-0975, p. 3 (La. 10/16/95), 661 So. 2d 432, 434. Contrary to the majority's statement, no part of the TMSL decision could be fairly read to conclude that the word "Decisions" in Article X, Section 21 of the Constitution does not include advisory opinions — the question presented in this case.

courts of appeal over three types of cases: civil cases, family and juvenile matters, and criminal cases triable by a jury (other than capital cases imposing a sentence of death) — "except as otherwise provided by this constitution." This latter phrase "is the authority of the legislature to grant additional jurisdiction to the courts of appeal" as directed by other portions of the constitution. *See* Lee Hargrave, The Judiciary Article of the Louisiana Constitution of 1974, 37 La. L. Rev. 767, 805 (1977). One such example is Article X, Section 12(A) of the constitution which provides that "the final decision of the [State Civil Service Commission] shall be subject to review on any question of law or fact upon appeal to the court of appeal wherein the commission is located." La. Const. art. X, § 12(A).[2] Thus, in order for the Legislature's expansion of the First Circuit's jurisdiction to cover the review of advisory opinions from the Board of Ethics to be constitutional, a separate constitutional provision must allow for it. Article X, Section 21 of the Louisiana Constitution is just such a provision.

Article X, Section 21 of the Louisiana Constitution creates the Board of Ethics and provides that: "Decisions of [the Board] shall be appealable, and the legislature shall provide the method of appeal." La. Const. art. X, § 21 (emphasis added).[3]

---

[2] Similarly, decisions of the City Civil Service Commission "shall be subject to review on any question of law or fact upon appeal to the court of appeal wherein the commission is located . . . ." La. Const. art. X, § 12(B). Additionally, Article X, Section 50 provides that "the decision of the [State Police Commission] shall be subject to review on any question of law or fact upon appeal to the court of appeal wherein the commission is located." La. Const. art. X, § 50; cf. La. Const. art. III, § 6 (granting the supreme court jurisdiction to reapportion the representative districts if the legislature fails to do so as required by the constitution).

Further, just as the Legislature can add to the jurisdiction of the courts of appeal when authorized by the constitution, it can withdraw that jurisdiction as well when so authorized. See La. Const. art. IV, § 21(E) (permitting the legislature to withdraw jurisdiction of the courts of appeal over actions of the Public Service Commission by providing for appeal directly from the district court to the supreme court).

[3] Article X, Section 21 provides in its entirety as follows:

> The legislature shall enact a code of ethics for all officials and employees of the state and its political subdivisions. The code shall be administered by one or more boards created by the legislature with qualifications, terms of office, duties, and powers provided by law. Decisions of a board shall be appealable, and the legislature shall

Therefore, the issue here is the intent and meaning of the word "decisions" (of the Board). Did the constitutional delegates, and correspondingly the people in adopting the constitution, mean to limit appealable decisions to adjudications following a full adversarial hearing — to justiciable controversies between adversaries — or was the word "decisions" intended to include other decisions or matters likely to be within the province of an ethics board that the Legislature, as authorized by the constitution, might choose to create? Based upon both the constitutional and statutory provisions regarding a Code of Ethics prevailing in 1973 before the adoption of the 1974 Constitution as well as the debates of the delegates at the 1973 Constitutional Convention, I would find that this provision was intended to do the latter.

Prior to 1964, Louisiana did not have a Code of Ethics covering state officials or employees. In 1964, a constitutional amendment was proposed to the voters to add what came to be Article XIX, Section 27 of the Louisiana Constitution of 1921. See La. Const. of 1921, art. XIX, § 27 (1964). Upon ratification of that constitutional amendment in November of 1964, the Legislature enacted the first Code of Ethics. See 1964 La. Acts 110 (enacting La. Rev. Stat. §§ 1101-48). This new and comprehensive code was to be administered by two separate administrative bodies with somewhat different duties: the Louisiana Commission on Governmental Ethics and the Louisiana Board of Ethics for State Elected Officials. See id.

The Louisiana Commission on Governmental Ethics ("Commission on Ethics") had jurisdiction to investigate alleged misconduct by any state employees other than elected officials. See La. Const. of 1921, art. XIX, § 27; La. Rev. Stat. § 42:1119 (vacated by 1979 La. Acts 443, § 1). Importantly, the Commission on Ethics did not

---

provide the method of appeal.

La. Const. art. X, § 21.

have the power to impose sanctions on any state employees. See La. Rev. Stat. § 42:1121 (vacated). Instead, the Commission on Ethics was permitted to hold hearings on charges and then report the findings to the head of the employee's department upon finding a violation; that department head would then have the authority to impose sanctions. See id. The constitution and the revised statutes were specific in granting a right of appeal to an employee only after an action adverse to him was taken by the department head, whether prompted by the Commission's findings or an independent investigation by the department head. See La. Const. of 1921, art. XIX, § 27(3)(C); La. Rev. Stat. § 42:1121(E) (vacated). Consequently, Louisiana courts lacked the authority to review any advisory decisions (such as opinions) of the Commission until after discipline had been imposed on the employee. See Louisiana Commission on Governmental Ethics v. Leake, 264 So. 2d 675, 677-78 (La. App. 1st Cir. 1972) (declining to review an advisory opinion from the Commission because "it is apparent from the legislative enactment that appeals lie only from a decision in which disciplinary action is taken against any employees and only after the decision becomes final").

The second agency in place in 1973, the Louisiana Board of Ethics for State Elected Officials ("Elected Official's Board of Ethics"), as the name suggests, had jurisdiction "to investigate all allegations of violations of the code of governmental ethics enacted by the legislature with respect to all elected state officials, including members of the legislature." La. Const. of 1921, art. XIX, § 27(4)(B). The Elected Official's Board of Ethics also had no power to impose penalties; instead, upon finding a violation of the ethics code, the Elected Official's Board of Ethics would forward a copy of the findings to a district attorney for possible prosecution. See La. Rev. Stat. § 42:1144(E)(6) (vacated). Thus, the role of the Elected Official's Board

of Ethics was purely advisory — it would investigate claims, hold hearings, and refer matters to a local district attorney. No finding by the Elected Official's Board of Ethics, standing alone, would have punitive consequences other than, possibly, adverse publicity.

Despite the fact that the Elected Official's Board of Ethics was a purely advisory body, constitutional authority existed for appellate review of its findings. Specifically, the Louisiana Constitution of 1921, as amended in 1964, provided that:

> The decision of the Board shall be subject to appeal which shall be granted to the Court of Appeals, First Circuit, if application to the Board is made within 30 days after the Board's decision become [sic] final.

La. Const. of 1921, art. XIX, § 27(4)(C).[4] Thus, even though the Board of Ethics served a purely advisory role, its "decision" was appealable and no authority, jurisprudential or otherwise, existed to refute that conclusion. The importance of this was made evident by the floor debates at the 1973 Constitutional Convention.

Throughout the debates at the Convention, it is clear from the discussion of the Delegates that the intent of this new constitutional article was primarily to shorten, and in the process simplify, the former lengthy provision.[5] It is also evident that the Convention intended to grant the Legislature considerable discretion in its ability to create the Board of Ethics, administer the Code of Ethics, and provide the procedural

---

[4] It is also important to note that the Louisiana Constitution of 1921, as amended, characterized the Elected Official's Board of Ethics's advisory action as a "decision." La. Const. of 1921, art. XIX, § 27(4)(C). Further, the language granting appeal of the Board's "decisions" in the former constitution is strikingly similar to the language in the present constitution. Compare La. Const. of 1921, art. XIX, § 27(4)(C) ("The decision of the Board shall be subject to appeal . . . .") with La. Const. art. X, § 21 (Decisions of a board shall be appealable . . . .").

[5] Article XIX, Section 27 of the Louisiana Constitution of 1921 consisted of four subsections, nine subsubsections, and three subsubsubsections whereas Article X, Section 21 of the Louisiana Constitution of 1974 consists of a total of three sentences. It is well established that one of the goals of the 1973 Constitutional Convention was to produce a shorter and simpler constitution for the state. See Mark T. Carleton, Fundamental Special Interests: The Constitution of 1974, in In Search of Fundamental Law: Louisiana's Constitutions, 1812-1974 141 (Warren M. Billings & Edward F. Haas eds. 1993).

mechanisms for its enforcement. Importantly, when the Code of Ethics provision in the Louisiana Constitution of 1974 was initially proposed, the general provision leaving extensive authority to the Legislature contained no mention of judicial review. During the floor debate at the Constitutional Convention, the Delegates were concerned that without a specific grant of authority for judicial review in the proposed article, the Legislature would be unable to "give the appellate courts jurisdiction of an appeal from a purely administrative body without some constitutional provision for that appeal." Official Transcript of the Constitutional Convention State of Louisiana 1973, 48th day, p. 16 (Sept. 15, 1973), reprinted in 7 Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts, p. 1276 (La. Const. Conv. Records Comm. 1977) [hereinafter Official Transcript]. Consequently, Delegate Harmon Drew introduced an amendment that rewrote the language of the proposed Article and added the following sentence: "The decisions of the board shall be appealable and the legislature shall provide the method of appeal." Official Transcript, supra, at 38. In explaining the purpose of this provision, Drew stated that it "will give a right of appeal to effect . . . to protect the individual affected." Id. at 39 (ellipsis in original).

Drew was later questioned about the exact application of this new provision regarding "decisions" being appealable and the following discussion took place:

> Mr. Jenkins: Harmon, isn't it true that the Boards of Ethics right now primarily are advisory in their nature. They can censure, they can criticize, publicize, but they can't actually do anything to anyone, can they?
>
> Mr. Drew: As I appreciate it, that's correct.
>
> Mr. Jenkins: Well, wouldn't your amendment as written change that concept because when you say that the decisions of the board will be appealable, aren't you saying in effect that they are going to be able to do something to someone, or at least that the legislature could allow them to do something to someone and that, thus, you are going to need a means for appealing those decisions; such as removal from office, such as fines, suspensions from offices, things like that?

> Mr. Drew: Not necessarily, Woody, because I think any action taken by the Board of Ethics that would be critical of a person should be subject to review.

Official Transcript, supra, at 40-41 (emphasis added). Shortly after this exchange, the amendment adding the language that "decisions of the board shall be appealable . . . ." was adopted and, on January 10, 1974, the Article was ratified by the Convention.

It appears from the above debates that the intent of the sentence "Decisions of the board shall be appealable" was to allow the Legislature to provide for appeal of any action of the Board that is adverse to the interests of a person (Delegate Drew's words were "critical of a person").

Prior to the Louisiana Constitution of 1974, the two Ethics Boards were primarily advisory. The Louisiana Commission on Governmental Ethics could only effect sanctions through department heads and the Elected Official's Board of Ethics could only refer its findings or opinion to a local district attorney. The agencies had no authority to sanction or penalize anyone for anything; nevertheless, the actions of these two agencies were appealable. See La. Const. of 1921, art. XIX, §§ 27(3)(C) & 27(4)(C). At the 1973 Constitutional Convention, Delegate Jenkins questioned Delegate Drew as to whether these agencies were advisory in nature and Drew responded that they were. Jenkins then expressed concern that an amendment mandating that "decisions shall be appealable" would effectively force the Legislature to grant the Board authority to render "decisions" — something that Jenkins understood to only include final adjudicatory actions such as removal, suspensions, or fines. Drew disagreed and clarified that the intent of the amendment was not to mandate such a grant of authority by the Legislature because, he perceived, all actions of the Board should be subject to review, whether adjudicatory or advisory. The import of Drew's statement is that, under the constitution, the Legislature would have

the ability to create a Board of Ethics both to administer the Code of Ethics and impose sanctions or critically affect a person's interests by something less than sanctions (as for instance, advisory opinions), but that in all events, appeal to the Court of Appeal would be permitted.[6]

Again, the Legislature's enactment is entitled to a presumption of constitutionality and the Board bears the burden to prove "clearly and convincingly that it was the constitutional aim to deny the Legislature the power to enact" Title 42, Section 1142(A) of the Revised Statutes. Board of Directors of Louisiana Recovery Dist. v. Taxpayers, Property Owners, & Citizens of the State of Louisiana, 529 So. 2d 384, 388 (La. 1988). In my opinion, the Board falls well short of meeting this burden. To the contrary, a review of this Legislative history reveals that the intent of the framers of the constitution was to permit the Legislature to provide judicial review of any action taken by the Board of Ethics that would adversely affect any person's interests. Thus, I would find that the grant of judicial review over advisory opinions by the Board of Ethics in La. Rev. Stat. § 42:1142(A) is not prohibited by the Louisiana Constitution.

The majority cites four reasons why advisory opinions cannot be reviewed pursuant to § 42:1142(A): (1) courts can only review justiciable controversies, (2) there is an absence of adverse parties, (3) there is no fully developed record with sworn testimony, and (4) the only purpose of the third sentence of article X, section 21 of the Louisiana Constitution was to allow direct review of the Board's actions at the court of appeal level. See ante at pp. 11-12. None of these reasons are persuasive.

First, the majority reasons that our courts are limited to the review of justiciable

[6] The majority takes the position that Drew's comments regarding appealability are only in reference to the investigatory and regulatory actions of the Board. See ante at p. 10, n.4. However, nothing in the discussion between Delegates Jenkins and Drew indicates that they were only concerned with these powers of the Board.

controversies and that the present cases do not so qualify. In doing so, the majority overrules a portion of Midboe v. Commission on Ethics for Public Emp., 94-2270 (La. 11/30/94), 646 So. 2d 351. In Midboe, an attorney licensed in Louisiana requested an advisory opinion from the Commission on Ethics regarding post-employment restrictions on the practice of law contained within the Code of Ethics. Following an adverse advisory opinion by the Commission, Midboe filed a Petition for Declaratory Relief seeking an order declaring the Code of Ethics unconstitutional as it applied to the regulation and practice of law. This court held that a sufficient justiciable controversy existed between Midboe and the Commission on Ethics to permit review by the court. See Midboe, 94-2270 at pp. 4-5, 646 So. 2d at 351. Specifically, the court reasoned that:

> Midboe, as a former state agency head within two years following termination of his public service, is faced with an immediate and genuine situation, the applicability of ethics code's rules to his present attorney employment opportunities. Midboe has a real interest in obtaining a declaratory judgment to clarify his employment options. If he proceeded without such a declaration, he might subject himself and his future employer to the [Board's] administrative sanctions. The [Board] has a statutorily mandated duty to administer and enforce the ethics code. Thus, there is a genuine controversy between the parties.

Midboe, 94-2270 at pp. 9-10, 646 So. 2d at 356 (citations omitted). The six justices reaching this conclusion in Midboe were correct.

Under the declaratory judgment articles of the Code of Civil Procedure, a court has the jurisdiction to declare rights, status, and other legal relations whether or not the person seeks other relief. See La. Code Civ. Pro. art. 1871. Further, the purpose of the articles is to settle and afford relief from uncertainty and insecurity with respect to those rights, status and other legal relations; thus, the articles should be liberally construed and administered to permit a court to act. See La. Code Civ. Pro. art. 1881. "A person is entitled to relief by declaratory judgment when his rights are uncertain or

disputed in an immediate and genuine situation and the declaratory judgment will remove the uncertainty or terminate the dispute." Louisiana Associated Gen. Contrs. v. State, 95-2105, p. 15 (La. 3/8/96), 669 So. 2d 1185, 1191 (quoting In re: P.V.W., 424 So. 2d 1015, 1020-21 (La. 1982)).

An individual seeking an advisory opinion from the Board of Ethics is not seeking an opinion regarding some future, abstract, or hypothetical situation. To the contrary, that individual is only prompted to request an advisory opinion in the face of an impending business transaction or employment opportunity. In fact, the Board will only consider a request for an advisory opinion from a person or entity "with a demonstrable objective interest in the Board's interpretation, construction, and application of any law within the Board's jurisdiction." See Rules for the Louisiana Board of Ethics §§ 101 & 601, available at http://www.ethics.state.la.us/general/rules.htm.

When confronted with an advisory opinion from the Board adverse to his interests, the individual has two options: (1) forego the employment opportunity, as Duplantis did in this case; or (2) ignore the advisory opinion and all but assure disciplinary action by the Board, see, e.g., Hill v. Commission on Ethics for Pub. Emp., 442 So. 2d 592 (La. App. 1st Cir. 1983). The exact purpose of the Code of Ethics is to protect against conflicts of interest "without creating unnecessary barriers to public service." La. Rev. Stat. § 42:1101. Refusing to allow an individual to ascertain the correctness of the Board's advice puts that person in the precarious position of honoring an opinion that he believes is truly incorrect (and thus, forego a business opportunity or public service[7]) or violate the opinion, risk fines of up to

[7] For example, in City of Baton Rouge v. Commission on Ethics for Pub. Emp., 94-2480 (La.App. 1 Cir. 5/5/95), 655 So. 2d 457, and Board of Trustees of the Emp. Retirement Sys. v. Commission on Ethics for Pub. Emp., 95-0062 (La.App. 1 Cir. 5/5/95), 655 So. 2d 1355, members of a Board of Trustees resigned from their positions because of an advisory opinion by the Board

$10,000, and hope to be vindicated from the sanction on appeal.[8] As former Justice Tate so eloquently stated: "To require private individuals to do business under the act at their peril in order to acquire standing is to defeat a major purpose of the declaratory judgment act." Louisiana Independent Auto Dealers Assoc. v. State, 295 So. 2d 796, 801 (La. 1974), quoted in, Midboe, 94-2270 at p. 10, 646 So. 2d at 356. Thus, I would conclude, as did six justices in Midboe, that the rendering of an advisory opinion by the Board of Ethics adverse to the requesting party's interest creates a sufficiently justiciable controversy to permit our courts to grant declaratory relief when appropriate. Assuming for the moment that Midboe was wrong when it concluded that a justiciable controversy exists in this situation and that it should be overruled in that respect, the First Circuit should still retain jurisdiction over these cases despite the lack of a justiciable controversy in the face of an express constitutional directive to do so.

The Louisiana Constitution vests the judicial power of the State in the supreme court, the courts of appeal, the district courts, and other courts established by the constitution. See La. Const. art. V, § 1. It is true that this court has frequently noted that the grant of judicial power implicitly restricts our courts to review only matters which are justiciable, i.e., actual and substantial disputes with adverse parties, not hypothetical, moot, or abstract questions of law. See Cat's Meow v. City of New

---

concluding that a violation of the Code of Ethics would occur absent such action.

[8] Justice Knoll cited this argument in her dissent from TMSL:

> An advisory opinion may have expensive compliance requirements for both public and private persons. The opinion may have a "chilling effect" on the actions of affected individuals, justifiably concerned about an impending formal action against them if they challenge the Commission's opinion by their conduct. Rather than place the expense and burden of humiliation of an ethics investigation on the individual, it is better to encourage the challenge of advisory opinions in the courts.

TMSL, 96-1982, p. 2 (La. 12/2/97), 703 So. 2d 576, 578-79 (Knoll, J., dissenting).

Orleans, 98-0601, p. 8 (La. 10/20/98), 720 So. 2d 1186, 1193; Perschall v. State, 96-0322, p. 15 (La. 7/1/97), 697 So. 2d 240, 251; Louisiana Associated Gen. Contractors, Inc. v. State, 95-2105, p. 9 (La. 3/8/96), 669 So. 2d 1185, 1193; St. Charles Parish Sch. Bd. v. GAF Corp., 512 So. 2d 1165, 1171 (La. 1987) (on rehearing); Stoddard v. City of New Orleans, 246 La. 417, 423, 165 So. 2d 9, 11 (1964). Consequently, as a general rule, the constitution prohibits the courts from reviewing or rendering advisory opinions. See Cat's Meow, 98-0601 at 8, 720 So. 2d at 1193; Jordan v. Louisiana Gaming Control Bd., 98-1122, p. 18 (La. 5/15/98), 712 So. 2d 74, 85; American Waste & Pollution Control Co. v. St. Martin Parish Police Jury, 627 So. 2d 158, 162 (La. 1993); Church Point Wholesale Beverage Co. v. Tarver, 614 So. 2d 697, 702 (La. 1993); Belsome v. Southern Stevedoring, Inc., 239 La. 413, 421, 118 So. 2d 458, 461 (1960). However, just as the constitution can generally require justiciable controversies, through the implicit rule found in the above cited cases, there is no reason that it cannot provide exceptions to it in situations such as the one found in article X, section 21 of the Louisiana constitution which provides the Legislature broad authority to grant the courts of appeal review of decisions of the Board of Ethics.

Second, the majority finds that while Duplantis and Breazeale, Sachse are "interested" parties in this litigation, the Board is an uninterested party indifferent to the ultimate resolution by this court. As such, the majority concludes that the issues of law cannot be fully debated so as to provide for a resolution of a true controversy. I would agree that, under the present statutory scheme, the Board is an uninterested party and further agree that it is strongly advisable for our courts to resolve conflicts only between "interested" parties. There is no doubt that this is a valid concern and our courts should seek to avoid this problem through the use of implicit rules such as justiciability whenever possible. Despite our concerns, however, the explicit directive

by the Legislature, authorized by the constitution, should supercede these concerns. The constitution is specific in providing that "the legislature shall provide the method of appeal" of the Board's decisions. La. Const. art. X, § 21. This is a broad grant of authority by the constitution and, under it, the majority should not second guess the Legislature's statutory scheme.

Third, the majority finds that the review of an advisory opinion would necessarily depend solely on facts as represented by the requesting party, not sworn testimony flushed out after a full hearing or trial on the merits. A review of the records in these cases supports those contentions in that there is no sworn testimony of any kind speaking to the facts providing the basis for these advisory opinions. Unfortunately, however, when the legislature implements its power under the constitution by directing our courts to review a specific matter, we lack the authority to find that such a mandate is inadvisable for lack of a record; instead, I would find that in light of the constitution's grant of authority to the Legislature in this case, this court should be bound to perform this review as the cases come before us.[9]

Finally, the majority finds that the only purpose of the third paragraph of Article X, section 21 was to permit review of the imposition of sanctions by the Board of Ethics directly with the First Circuit. For the reasons more fully articulated above, I must disagree. As the delegate who authored the sentence stated, the purpose of that sentence was to make "any action taken by the Board of Ethics that would be critical

[9] Of course, while the problem created by a lack of a record in these cases could be addressed by the Legislature in the form of a statutory provision or by this court in the form of procedural rules, the Board could also take action to cure this problem. Under La. Rev. Stat. § 42:1134, the Board has the authority to adopt rules and regulations for the carrying out of the duties and powers of the Board. In fact, under the authority granted by this provision, the Board has outlined several procedural requirements that must be satisfied before the Board will issue an advisory opinion. See Rules for the Board of Ethics §§ 601-10, available at http://www.ethics.state.la.us/general/rules.htm. Under that same authority, the Board would surely be permitted to circumscribe additional procedural rules to tighten the parameters under which it issues advisory opinions.

of a person . . . subject to review." Therefore, the majority ignores the intent of this provision altogether.[10]

This first holding by the majority disposes of the Breazeale, Saches matter as that case was brought directly to the First Circuit following the rendition of the advisory opinion by the Board of Ethics. The Duplantis case, however, originated as a declaratory judgment action in the district court and, consequently, the second issue presented for the court's review is whether the district court has subject matter jurisdiction over this claim. The majority finds that "a district court lacks subject matter jurisdiction to review the interpretation and application of provisions of the Ethics Code, absent a constitutional challenge to a provision of the Ethics Code." Ante p. 15. In reaching this conclusion, the majority relies on Jones v. Board of Ethics for Elected Officials, 96-2005 (La. 5/9/97), 694 So. 2d 171, 172, modified on rehearing, (La. 6/20/97), 696 So. 2d 549, and Midboe, 94-2270 (La. 11/30/94), 646 So. 2d 351, 355. The majority's reliance on these two decisions is misplaced.

The Jones decision was based solely on the analysis performed by this court in Midboe; therefore, I will address Midboe directly. As previously mentioned, Midboe filed suit in the district court seeking a declaratory judgment declaring portions of the Code of Ethics unconstitutional. The Midboe court did conclude that a person seeking a determination of the application or interpretation of the Code of Ethics was limited to bringing such a claim to the First Circuit due to the statutory and constitutional scheme in place at the time; however, the court's reasoning on this point has since been overruled. Specifically, the Midboe court reasoned:

---

[10] My opinion on this issue is driven solely by the fact that there is a specific constitutional authority for the review of advisory opinions of the Board of Ethics only. I fully agree with the long-standing general rule against the review of advisory opinions. It is only in this situation, where a specific constitutional provision grants the Legislature this power, would I find that we have the power to undertake such a review.

> "[An] advisory opinion by the Commission is a preliminary or intermediate action or ruling by an ethics body within the meaning of La. R.S. 42:1142." The Commission argues that, despite titling the petition as one for declaratory judgment, the real issue was review of the Commission's advisory opinion.
>
> Had Midboe's petition sought a determination of the ethics code's application or interpretation, the constitutional and statutory scheme outlined above provides for an initial determination utilizing the Commission's expertise and review by the court of appeal. However, Midboe's petition clearly sought a determination of the constitutionality of the statutory provisions of the ethics code. The determination whether a statute is unconstitutional is a purely judicial function. The judicial power of the state is constitutionally vested in the courts. The Commission is not a court but is an administrative agency in the executive branch of state government. An administrative agency does not have the authority to determine the constitutionality of statutes. Thus, the district court, and not the Commission, had jurisdiction to rule on the constitutionality of the statutes.

Midboe, 94-2270 at 6-7, 646 So. 2d at 355 (emphasis added) (citations omitted). Thus, the court concluded, in what could only be characterized as dicta, that the district court did not have subject matter jurisdiction over claims regarding the interpretation or application of the Code of Ethics. As made evident in the above quoted passage, however, the court's reasoning focused on the fact that the claimant would have an avenue of relief through the First Circuit Court of Appeal. Since Midboe first reached this conclusion, the reasoning supporting its conclusion has been overruled. In TMSL, we found that an individual seeking a review of an advisory opinion concerning the interpretation or application of the Code of Ethics could not seek relief through the First Circuit under the statutory scheme in place at the time and, today, the majority affirms this ruling. Therefore, the reasoning which initially supported Midboe's conclusion that the district court did not have subject matter jurisdiction over this type of claim is no longer good law and the majority's reliance on it is misplaced.

The majority's opinion today raises the following simple problem: Duplantis has

a right to declaratory relief under the Louisiana Code of Civil Procedure because of the adverse advisory opinion issued by the Board of Ethics; however, there is no court in the state with the power to grant it. Such a conclusion seems illogical. The better view would be that the district court has jurisdiction over the claim pursuant to its general jurisdiction over all civil matters. See La. Const. art. V, § 16(A). Therefore, in my opinion, Duplantis should be permitted to pursue her declaratory action in the district court.

In sum, I must disagree with both of the majority's conclusions today. First, any valid, independent reasons cited by the majority for disfavoring the review of advisory opinions by the Board of Ethics are superceded by the directive from the constitution to make such a review available where authorized by the Legislature.[11] Second, the district court possesses the subject matter jurisdiction to hear a claim for

---

[11] Notably, this state would not be alone in granting its courts the ability to act on matters not otherwise justiciable. As the United States Supreme Court so appropriately noted, the issue of whether or not a state court may render an advisory opinion is purely a matter of state law. See New York State Club Assoc. v. New York, 487 U.S. 1, 8 n.2 (1988). In fact, a survey of the constitutions and jurisprudence of our sister states reveals that twelve states permit their courts to render advisory opinions in certain situations.

Typically, the authority for such action by the courts is found directly within the constitution itself. See Colo. Const. art. VI, § 3; Fla. Const. art. IV, § 1 & art. V, § 3; Mass. Const., pt. 2, chap. III, art. II; Me. Const. art. VI, § 3; Mich. Const. art. III, § 8; N.H. Const., pt. 2, art. 74; R.I. Const. art. X, § 23; S.D. Const. art. V, § 5. In three states, however, the authority for such review is found within the statutes. See Ala. Code § 12-2-10; Del. Code tit. 10, § 141 & tit. 29, § 2102; Okla. Stat. tit. 22, § 1003. In these states, however, limits on the power of the courts to act under such authority exists because of the constitutional concerns. See, e.g., Opinions of Justices, 96 So. 487, 488-89 (Ala. 1923) (permitting the issuance of advisory opinions with several limiting conditions); Opinion of Justices, 413 A.2d 1245, 1247 (Del. 1980) (limiting such opinions to strictly constitutional questions); Okla. Stat. tit. 22, § 1003 (allowing for the Governor to request an advisory opinion only on the sufficiency of the proceedings in a capital case). Finally, North Carolina's Supreme Court will issue advisory opinions in limited situations solely within their own discretion when the court finds the issue presented significant enough to warrant such action. See Waddell v. Berry, 31 N.C. (9 Ired.) App. (1848); see also Margaret M. Bledsoe, Comment, The Advisory Opinion in North Carolina: 1947 to 1991, 70 N.C.L. Rev. 1853 (1992).

For a more detailed discussion of the use of advisory opinions in other states and countries, as well as a discussion of the procedures utilized by courts in tailoring their treatment of those opinions, see Pascal F. Calogero, Jr., Advisory Opinions: A Wise Change for Louisiana and Its Judiciary?, 38 Loy. L. Rev. 329 (1992).

declaratory relief seeking a ruling on the accuracy of an advisory opinion from the Board of Ethics.

For the foregoing reasons, I respectfully dissent.